

HB

100

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES

DIVISION OF FAMILY AND YOUTH SERVICES

P.O. BOX 110630  
JUNEAU, ALASKA 99801-0630  
PHONE: (907) 465-3170

Date: February 25, 1993

Honorable Con Bunde, Representative  
Alaska State Legislature

Subject: Statistical Request HB 100

Dear Representative Bunde,

Your staff requested additional information from DFYS concerning the number of juveniles that would be affected under HB 100. Please find attached the information for FY 1991 FY 1992 and the first six months of FY 1993.

Sincerely yours,

*for* *Deborah R. Wing*  
Deborah R. Wing  
Director

cc. Representative Brian Porter, Chairman  
House Judiciary Committee

DHSS Youth Offender Statistics

Category (e) (1)

FY 1991 - 1 of the 2 cases referred were formally charged with murder 1st, murder 2nd or attempted or solicited murder. One case was waived into adult court.

FY 1992 - 9 of the 10 cases referred were formally charged with murder 1st, murder 2nd or attempted or solicited murder. Six cases were waived into adult court.

FY 1993 - (7/1/92-12/31/92) 0 of the 1 cases referred were formally charged with murder 1st, murder 2nd or attempted or solicited murder. No cases were waived into adult court.

Total referrals 13, with 10 formally charged and adjudicated or convicted in adult court.

Category (e) (2)

FY 1991 - 4 of the 6 cases referred were formally charged with an unclassified or class A felony and had a previous adjudication anywhere for a felony. One case was waived into adult court.

FY 1992 - 2 of the 6 cases referred were formally charged with an unclassified or class A felony and had a previous adjudication anywhere for a felony. One case was waived into adult court.

FY 1993 - (7/1/92-12/31/92) 2 of the 3 cases referred were formally charged with an unclassified or class A felony and had a previous adjudication anywhere for a felony. One case was waived into adult court.

Total referrals 15, with 8 formally charged and adjudicated or convicted in adult court.

Category (e) (3)

FY 1991 - There were 0 cases referred in this category.

FY 1992 - There were 0 cases were referred in this category.

FY 1993 - (7/1/92-12/31/92) There were 0 cases referred in this category.

8-LS0498K  
Chenoweth  
2/22/93

CS FOR HOUSE BILL NO. 100( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
EIGHTEENTH LEGISLATURE - FIRST SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVES BUNDE, Green

A BILL

FOR AN ACT ENTITLED

1 "An Act providing that juveniles 16 years and older who commit unclassified or  
2 class A felonies shall be charged, prosecuted, and sentenced in the same manner  
3 as adults."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 \* Section 1. AS 47.10.010 is amended by adding new subsections to read:

6 (e) The procedure prescribed in AS 47.10.020 - 47.10.090 and the Alaska  
7 Delinquency Rules does not apply when a minor is 16 years of age and older and is  
8 charged with an unclassified felony or a class A felony.

9 (f) If a minor is charged with an offense specified in (e) of this section, the  
10 procedure prescribed in AS 47.10.020 - 47.10.090 and the Alaska Delinquency Rules  
11 does not apply with regard to a charge that is properly joined to the offense described  
12 in (e) of this section.

13 (g) A minor accused of an offense specified in (e) or (f) of this section shall  
14 be charged, prosecuted, and sentenced in the superior court in the same manner as an

1  
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adult.

(h) Nothing in (e) - (g) of this section limits the right of a party to an action under this chapter to seek closure of a case under AS 47.10.060(a) and prosecution of the minor as an adult.

\* Sec. 2. APPLICABILITY. This Act applies to offenses committed after the effective date of this Act.

# 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 99801-2108

### MEMORANDUM

February 10, 1993

**SUBJECT:** Do the amendments made by House Bill 100, relating to the disposition of certain criminal offenses committed by minors, change a rule of court, Delinquency Rule 20, so that the proposed changes required acknowledge the change in court rule and adoption by a two-thirds vote?

**TO:** Representative Con Bunde  
ATTN: Jenny Murray

**FROM:** Jack Chenoweth  
Legislative Counsel

Under article IV, section 15, of the Alaska Constitution:

**RULE-MAKING POWER.** The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

Additionally, our current bill drafting rules require that court rule changes be identified in the bill title, and that the measure contain some provision under which a proposed court procedural rule change is identified in order to present the opportunity for a two-thirds vote. See Manual of Legislative Drafting, pp. 12, 13; 37.<sup>1/</sup>

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<sup>1/</sup> The drafting manual provision follows from and must be read in tandem with the applicable Uniform Legislative Rule, Rule 39(e), by which:

(e) If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases, the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the full membership of each house. If the section effecting a change in the court rule fails to receive the required two-thirds vote, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which

(continued...)

In its consideration of the handling of bill material affecting court rules, the drafting manual notes an important distinction applicable to court rule drafting and sets out the obligation of the responsible drafting attorney:

The basic problem for a drafter is two-fold. First, the drafter must determine if a provision of the draft would have the effect of amending a rule of court. Secondly, if a rule is affected, the drafter must then determine whether the change is

(1) a matter of substance (subject to legislative change with no special requirements);

(2) a matter of practice or procedure (subject to legislative change with a two-thirds vote and a special notation in the title and body of the bill); or

(3) a matter of judicial administration (not subject to legislative change).

Matters of substance include limitation of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction.

Rules of practice and procedure are usually considered to include such matters as forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder of causes, parties, pre-trial practice and discovery, calendars, the conduct of the trial, stay of proceedings, the procedures by which a judgment is enforced, post-trial proceedings such as motions for new trial, the assessment of costs, the time of appeal, venue, evidence, and procedures involved in special proceedings such as adoption and probate.

Rules of administration of courts include the traditional areas of court internal administration protected by the doctrine of separation of powers and those rules enacted for the administration of a unified court system.

Manual of Legislative Drafting, pp. 37, 38.

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1/ (...continued)

changes a court rule shall also be noted in the title of the bill. The section or sections relating to the effective dates must be approved by an affirmative vote of two-thirds of the full membership of each house. If a section setting out an effective date fails to receive the required two-thirds vote in either house, the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which sets out an effective date shall also be noted in the title of the bill.

Thus, not all changes affecting matter set out in court rules that are the subject of pending legislation trigger the formalities of adoption required by article IV, section 15 and Uniform Rule 39(e). The legislature is free to change a matter of substance without the necessity of meeting those requirements.

In conjunction with House Bill 100, of which you are principal sponsor, someone has contended that, because the proposed changes impact Delinquency Rule 20, the bill must be redrafted to meet the requirements of Uniform Rule 39(e) and may only be adopted with a 2/3 vote.

For the reasons set out below, I think not.

Delinquency Rule 20, which cross-references AS 47.10.060, one of the sections being amended by this measure, contains five subsections. Four of the five are not affected by the bill --

-- subsection (b) of the court rule, setting out permission to file a waiver petition, does not appear to be changed by the proposed amendments made by the measure;

-- subsection (c) of the rule, addressing the hearing on the waiver petition, is unchanged by the measure;

-- subsection (d) of the rule, speaking to the content and effect of any waiver order entered by the court, is unaffected by the measure; and

-- subsection (e) of the rule, authorizing the holding of a minor waived for trial as an adult, is unaltered by the measure.

The contention, then, must be that the changes proposed by House Bill 100 affected Delinquency Rule 20(a). Rule 20(a) provides:

**Persons Subject to Trial as Adults.** A person may not be tried as an adult for a delinquent act committed while the person was under the age of 18 unless the court has waived juvenile jurisdiction.

But isn't this court rule no more than a restatement of the substantive state law? Note that AS 47.10.010(a) already sets out the jurisdiction of the trial courts as it relates to juveniles or minors:

(a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the court finds the minor  
(1) to be a delinquent minor as a result of violating a

criminal law of the state or a municipality of the state; . . .

In the same provision, the legislature has arguably reserved to itself ("except as otherwise provided in this chapter") the opportunity to change by law the statement of the court's juvenile jurisdiction. The waiver provisions themselves, set out in AS 47.10.060 and addressing, as they do, the question of whether a juvenile shall be subject to the delinquency provisions or the juvenile procedures, are both procedural and substantive. The procedural elements of the existing waiver statute, as applied to juveniles, are not changed. What is changed is the manner of the court's handling of juveniles, that is, of the rights that juveniles enjoy, and that alteration in the form of proceeding is, in my view, a substantive change that is arguably either a restatement of the scope of the trial court's juvenile jurisdiction or a further limitation on the presumption that the juvenile who commits a serious offense, or who is caught up in a series of serious offenses, does not enjoy the benefit of the presumption given all other juveniles as to the treatment he or she will receive by the courts. Both involve substantive law; neither affects the requirements of article IV, section 15. <sup>2/</sup>

I suggest further that Delinquency Rule 20(a) adds nothing to the existing legislative enactments. Read together, AS 47.10.010(a)(1) and AS 47.10.060 reach the same end as the one sentence statement of Rule 20(a). The court rule may be more succinct--

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<sup>2/</sup> The Alaska Supreme Court, in Ware v. Anchorage, 439 P.2d 793 (Alaska 1968), offers this terse distinction:

The authorities generally agree that substantive law creates, defines, and regulates rights, while procedural law prescribes the method of enforcing the rights.

493 P.2d 793, at 794 (footnote omitted). See also Main v. State, 668 P.2d 868 (Alaska App. 1983), at 872.

As regards juvenile jurisdiction, the rights of a juvenile that are defined and regulated by AS 47.10--and that are altered as to certain juveniles by the changes proposed by HB 100--include those identified by the court in a note appended to its opinion in P.H. v. State, 405 P.2d 837 (Alaska 1972):

The list of substantial statutory benefits flowing from disposition through children's court proceedings includes the following: no criminal conviction or the attendant employment prejudice and loss of civil rights [AS 47.10.080(g)]; minimal publicity concerning an adjudication [AS 47.10.090]; a maximum period of commitment which cannot exceed the child's twentieth birthday [AS 47.10.080(c)(1)]; and perhaps conceptually most important, a benevolent attitude [AS 47.10.280--now AS 47.05.060] dictating specialized rehabilitative treatment [AS 47.10.150 - 260].

504 P.2d 837, at 842 (note 12).

indeed, more artful in its expression--but the court's jurisdiction over juveniles is actually defined by the statutes, not the rule. The court rule may be procedural, but it flows from the legislature's determination of the divided jurisdiction and where the line of that division shall be drawn. <sup>3/</sup>

Finally, any hesitancy on my part to treat this as a substantive matter evaporated when I reviewed an early Alaska Supreme Court case in which the court itself seemed to reach the conclusion that the matter of how a child ought to be handled should be treated as jurisdictional. The case was P.H. v. State, 504 P.2d 837 (Alaska 1972). A threshold question examined in the court's decision involved whether jurisdiction of the children's court--the court itself spoke of "jurisdiction"--was dependent on the age of the child at the time of the alleged delinquent acts or at the time the proceedings were commenced under AS 47.10. It concluded:

We hold that from the moment a child commits an offense he is exempt from criminal prosecution until the children's court properly waives its jurisdiction.

504 P.2d 837, at 842 (emphasis added). Thus the courts, like the legislature, have come to view AS 47.10.010 and the companion waiver provisions, AS 47.10.060(a), as fundamentally jurisdictional. And matters of jurisdiction, the legislative drafting manual concludes, are substantive, not subject to the court rule change constitutional requirements.

\*

This is my assessment of whether reference to a court rule change is required by House Bill 100. If you disagree with my contention--if you are of the view that Delinquency Rule 20(a) is more than substantive and does, in fact, add a dimension that should be considered as falling within the rule change requirement--then of

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<sup>3/</sup> The test is laid down in Nolan v. Sea Airmotive, Inc., 627 P.2d 1035 (Alaska 1981):

For the court to invalidate a statute as "procedural" requires us to find, first, that the statute indeed conflicts with a rule promulgated by the court, Matanuska Maid, Inc. v. State, 620 P.2d 180, 188 (Alaska 1980), second, that the main subject of the statute is not substantive with only an incidental effect on procedure, Winegardner v. Greater Anchorage Area Borough, 534 P.2d 541, 547 (Alaska 1975), Channel Flying, Inc. v. Bernhard, 451 P.2d 570, 576 (Alaska 1969), and finally, that the legislature has not changed the rule with the stated intention of doing so, Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963).

Representative Con Bunde  
February 10, 1993  
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course the necessary court rule change provisions should be added to the title and body of the bill, and you should direct me to do so. My own reading was to the contrary, and because of that I have not included any reference to court rule changes to the drafts of the bill that were provided to you. Additionally, it is not generally of advantage to the legislature to treat a substantive change as a court rule change simply because this creates the need of a two-thirds vote, which can be difficult to obtain.

JBC:pl:gc  
93-076.plm

REPRESENTATIVE CON BUNDE  
CO-CHAIR HEALTH, EDUCATION  
& SOCIAL SERVICES

# Alaska State Legislature



## House of Representatives

DURING SESSION:  
STATE CAPITOL  
JUNEAU, ALASKA 99801-1182  
CAPITOL ROOM 112  
OFFICE (907) 465-4843

### MEMORANDUM

To: Representative Brian Porter  
Chair, House Judiciary Committee

From: Representative Con Bunde

Date: February 8, 1993

Re: House Bill 100- Prosecuting Juvenile Felons

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House Bill 100 has successfully passed through the House Health, Education and Social Services Committee. I respectfully request that HB 100 be scheduled for a hearing at your earliest convenience.

The bill provides that juvenile murderers and serious habitual juvenile offenders, rather than the state, have the burden of proving to the that the juvenile can be rehabilitated by staying in the juvenile system.

Although the bill will essentially apply only to a small number of juveniles (six minors would have been affected by the bill in 1990), by targeting the offenders who pose the greatest risk to society, the bill makes an important improvement in the juvenile justice system.

If you have any questions regarding HB 100 please do not hesitate to contact my office at x4843. Thank you in advance for your assistance and early scheduling of this legislation.

REQUEST FOR SCHEDULING

# Alaska State Legislature



DURING SESSION:  
STATE CAPITOL  
JUNEAU, ALASKA 99801-1182  
CAPITOL ROOM 112  
OFFICE (907) 465-4843

## House of Representatives

### Sponsor Statement

#### House Bill 100

#### Relating to Criminal Charges Brought Against Minors

The current juvenile justice system does not deal effectively with violent or chronic juvenile offenders. House Bill 100 reforms the juvenile justice system allowing for the very small number of serious or habitual juvenile offenders to be treated as adults. In doing so, the legislation balances the needs of society to be protected from dangerous offenders against the importance of treating the vast majority of minors within the juvenile justice system.

Under current law, people under 18 are treated as juveniles. With only one exception, no matter what crime is committed or how many felony convictions the person has, a person under 18 who is convicted of a crime is released from all state supervision at age 20. The person must be released even if it is clear that the person continues to present a serious threat to the public safety. The only exception is where the state can prove that the minor is not amenable to treatment as a juvenile.

Until late 1989, in deciding whether a minor was amenable to treatment, the courts relied heavily on the testimony of expert psychiatrists and psychologists. However, in *R.H. V. State*, 777 P. 2d 204 (Alaska App. 1989), the court ruled that requiring minors to be examined by psychiatrists and psychologists to determine amenability to treatment is unconstitutional. Today courts are increasingly being asked to decide whether a minor is or is not amenable to treatment without the benefit of expert testimony.

The level of potential dangerousness presented by teenagers who commit murders, or who commit other serious felonies and have a record of committing felony offenses, is extremely high. In these cases, the courts must have access to the greatest possible amount of information about the minor before making a decision to treat the minor as a juvenile or as an adult. The only way it is constitutionally possible for the courts to gain access to this type of information is to switch the burden of proving amenability to treatment from the state to the minor.

House Bill 100 requires a very limited number of minors to prove that they are amenable to treatment as a juvenile before they can be kept within the juvenile justice system. Under HB 100, the burden of proof is shifted only when the minor is 15 years of age or older and (1) is charged with murder or attempted or solicited murder; (2) is charged with an unclassified (e.g. forcible rape) or class A felony (e.g. first degree assault) and has previously been adjudicated as a delinquent for a prior felony offense; or (3) has previously been prosecuted as an adult.

Sponsor Statement

# 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 1, 1993

**SUBJECT:** House Bill 100, criminal charges against minor--sectional analysis

**TO:** Representative Con Bunde

**FROM:** Jack Chenoweth  
Legislative Counsel

The measure provides for automatic treatment of certain juveniles 15 years of age and older as adults for purposes of disposition of certain criminal offenses.

Section 1 of the bill provides that a minor under 18, but at least 15, must be tried as an adult if the minor is charged with 1) murder or attempted or solicited murder; 2) an unclassified or class A felony, and the minor has been previously adjudicated delinquent for felonious conduct; or 3) any felony, if the minor has been previously adjudicated delinquent twice for felonious conduct, or has been previously tried and convicted as an adult on a felony charge. The minor must also be tried as an adult on all related charges (e.g., a charge of burglary for breaking into a house to commit a rape).

Under the other changes made by section 1, the minor may petition the court to be tried under juvenile procedures, notwithstanding the charges against him or her. The minor bears the burden of persuading the court that juvenile proceedings would be appropriate, unless the minor contends that he or she cannot be properly tried as an adult (for instance, that he or she has not previously been adjudicated delinquent for felonious conduct). In that case the state bears the burden of proving that the minor has been previously adjudicated delinquent as the state alleges.

Finally, section 1 provides that current law, allowing the state to seek prosecution as an adult of any minor for any offense, remains in effect. (Under current law, the state must show that the minor is not likely to be amenable to treatment before reaching age 20.)

Section 2, adding a new subsection to AS 47.10.060, introduces the opportunity for a minor to present the evidence of a professional that the minor is amenable to

Sectional Analysis

Representative Con Bunde

February 1, 1993

Page 2

treatment before reaching the age of 20, the threshold requirement to consideration of whether the minor shall be treated as a juvenile or tried as an adult.

Section 3 provides that a minor who is charged as an adult under section 1, but who is convicted only of a lesser offense that would not have given rise to an adult charge under that section, shall have his or her case disposed of under juvenile proceedings. However, the state may petition the court to sentence the minor as an adult, in which case the state must show that the minor would not be amenable to treatment before age 20.

Section 4 provides that the bill, if enacted, would apply only to offenses committed after the effective date of the enactment.

JBG:pl

93-053.plm

February 5, 1993

Rep. Con Bunde  
State Capital Building  
Juneau, AK

Dear Rep. Bunde:

Thank you for introducing HB100 into the House this session. It will be instrumental in helping to expedite the prosecution of violent juvenile criminals in our justice system. Presently, because of unrealistic burdens put on both the police and prosecution, waiving violent juvenile offenders from juvenile status to adult court can take years. In the mean time, the violent offenders are housed in youth facilities, such as McGlaughlin Youth Center, along side youths whose crimes are non-violent and are excellent chances at rehabilitation. The management at the youth centers then has to deal with "inmates" whose violence has elevated them to hero status among the other juveniles. Obviously, this has a detrimental effect on the youth center as a whole.

The reason that I am both familiar and concerned about the juvenile justice system is that my family was victimized by a violent juvenile. In October of 1989, several members of my family, including myself and my father, found my murdered brother's body shoved in a closet in his suburban Anchorage home. He had been shot three times at close range, the last shot coming at point blank range to the head. The only thing missing from the home was a sports car. The next day, a sixteen year old man was arrested driving Duane's car. He was taken to the police station, and the police, under the advisement of the District Attorney, asked if he wanted his parents called. He declined to have his parents notified, was read his rights in accordance with Miranda, and proceeding to tell in horrifying detail how he had gone to Duane's home for the explicit reason of stealing the car. He had brought with him a stolen .357 magnum. Before the young man left Duane's home he had fired three rounds into Duane, grabbed a 7-up out of the refrigerator and taken the car. He returned to the house twice after the shooting, once to show off the body to a friend, and once to take some beer. The juvenile confessed to all of this on videotape, and then took the police to Service High School, where he had hidden the murder weapon in the woods.

It seemed to everyone involved that this case would come to a relatively speedy conclusion. The DA went as far as to assign the case to an assistant DA that had never tried a murder case before, because this one seemed so easy. In the first actual series of hearings held on the case, Judge Peter Michalski ruled that the juvenile could not be rehabilitated by his twentieth birthday, and should therefore stand trial in an adult court. Because of the fact that the State had

Letters of Support

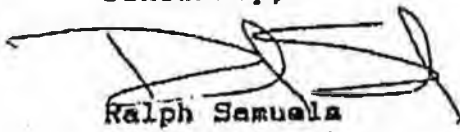
the burden of proof in the waiver proceeding, the juvenile did not have to offer any information whatsoever. It did not come out that the defense had examined the juvenile with their own psychiatrist and had chosen not to make their findings known to the court. It did not come out that the offenders own counselors advised that he not be released. It did not come out that three months prior to the murder, the juvenile had gone through a psychological treatment program at Charter North Hospital. The reason that none of these things came out is because the juvenile did not have to show that he could be rehabilitated, he merely had to hope that the Judge would think he was a nice young man. Even without all of the truth being told at the hearing, Michalaki ruled that the youth be waived to adult court, mostly on the evidence of the videotaped confession.

In the summer of 1991, the appellate court overturned the decision of Michalaki, because, they say, the parents should have been called before the police questioned the suspect. This ruling was made despite the fact that the police CALLED THE DA'S OFFICE PRIOR TO THE QUESTIONING TO BE SURE OF PROCEDURES. The appellate court ruled that the case should go back to Superior Court for another waiver hearing, this time without the confession or any of its "fruits" (i.e. the murder weapon as well as other evidence). By now, two years had passed since the confession.

In late 1991, the Supreme Court agreed to hear the case of the parental notification issue, and in February 1992, held oral arguments on the case. As of February, 1993, they have still not made a ruling on the case. The juvenile is approaching the age of twenty, at which time he is supposed to either be released, if he is a juvenile, or triad, if he is an adult.

My family has been forced to listen to the court while they worry about dotted i's and crossed t's for almost four years now, and do not have much hope that this issue will be resolved before its fifth year. All of this for a murderer that was caught and confessed within one day after we found the body. If there had been legislation forcing the sixteen year old to be responsible for his actions, or at least have to prove that he is worthy of another chance, in place at the time of my brothers murder, my family would not have to sit back, month after month, year after year, and wait for justice to take place. It is time that we made violent people of any age responsible to their victims and to society. It only seems fair to give the victims of crimes at least as many rights as the criminals themselves.

Sincerely,



Ralph Samuela  
8220 Frank St.  
Anchorage, AK 99518-

Paula Lindstam  
4431 Riverton Avenue  
Anchorage, AK 99518-3857

Representative Con Bunde  
State Capitol  
Juneau, AK 99801-1182

January 25, 1993

Dear Representative Bunde,

You may remember me. Early in the campaign you stopped at my house to chat. I'm probably one of the few women with a baby on their hip who had a prepared list of questions for you. The questions included abortion, juvenile crime, Native alcoholism, and subsistence.

A particular issue which concerns me is the way crimes committed by juveniles are handled by the State of Alaska. Juveniles who commit violent crimes should not be treated any differently than adults. Juveniles who repeatedly commit misdemeanor crimes should be treated the same as adult offenders.

Someone has sold us a bill of goods which says that juveniles can be "treated" for their social deviancy. There is little evidence that it works. McLaughlin Youth Center keeps no records on which of their charges, when released, go on to commit crimes as adults. Since the records of juvenile offenders are sealed it is impossible to know. It is lamentable that we assume our system is working, but we do not know for sure. Indications are that it does not.

Why does Paula Lindstam care so much about this issue? My brother, Duane Samuels, was murdered October 4, 1989. He woke up one morning and answered his doorbell to find sixteen-year-old Jonathan Norton standing on his doorstep with a .357 in hand. End of story (maybe I should say beginning of story). The case has been in court over three years! Three years! The issue? Whether Norton can be prosecuted. How ridiculous!

Last month in unrelated incidences our church's van and two cars belonging to members of our congregation were stolen. I belong to a very small church. The police suspect juveniles of the thefts. Not much effort is going into apprehension. Cost is the major factor, but there is another

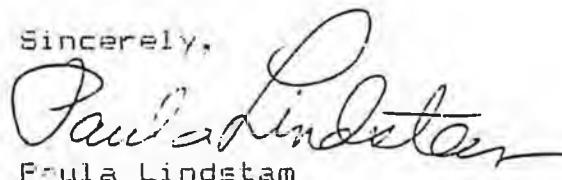
consideration. Why should the police go to any trouble apprehending a juvenile? So they can be "treated" at McLaughlin?

I was approached a few days ago by a friend whose husband is serving a 10+ year sentence for assault. My friend had read a letter to the editor which I wrote on this subject. She feels quite strongly that had her husband not gotten the kid glove treatment as a juvenile he would not have gone on to commit more serious crimes.

My letter to the editor was published January 18 in the Anchorage Daily News. Several people have approached me about supporting a bill on this issue. My brother, Ralph Samuels, was recently interviewed on television regarding our case. Paul Jenkins has written two editorials in The Voice of the Times within the past two months about juvenile crime. We need a bill. Last year's juvenile crime bill died in the House Finance Committee. Please sponsor a juvenile crime package addressing the aforementioned issues. There is a lot of momentum building now, but your help and support is needed.

Thank you for your time.

Sincerely,

A handwritten signature in cursive script that reads "Paula Lindstam". The signature is written in dark ink and is positioned above the printed name.

Paula Lindstam

## Johnny needs discipline

I've always been perplexed by the media, lawmakers and bureaucrats harping about escalating youth crime and violence. It makes for good headlines. But why sensationalize a problem that we are little prepared to correct?

Many elected officials consider themselves to be motivated, committed and forward thinking. These dynamos need to tell us why our 16-year-old murderers have their records wiped clean at 18, leaving an unsuspecting public at risk. I would like to know why lawmakers ignored HB101 last year that would have made it more expeditious to get a teen murderer into adult court where he belongs.

Juvenile law is embodied in Title 47. Its premise is that teen delinquents aren't cognizant of their actions. They don't commit crime, but "crime-like" acts. They can't be punished, only "rehabilitated." *Climax* times, youth violence results from dysfunctional upbringing. Yet 48 percent don't respond to "rehabilitation," re-offend and are returned to McLaughlin. Could it be that you can't "psycho-instruct" a kid to develop self-esteem?

Maybe Johnny needs to know that regardless of his background, he is to pay consequences for his "crime-like" behavior. We would be doing him a favor. But our legislators failed to consider passage of SB366, for a juvenile boot camp that would expose these kids to discipline, compassion and a sense of accomplishment. This bill was favored by 87 percent polled in the bill sponsor's district.

So what will the Juneau gang do this time around? Health care and budget cuts will be priorities. But if all we get again is lip service to juvenile waivers, boot camp,

Anch. Daily News 2/4/93

parental responsibility, and other Title 47 revisions, then other legislation will be inconsequential to a society interested most in one's personal "rights" to do whatever they please at anyone's expense but their own.

— Jay D. Page, chair  
Anchorage Chamber  
Crime Prevention Committee

Newspaper - Letters

## THE VOICE OF THE TIMES

# Some kids need more punishment than slap on hand

By PAUL JENKINS

Remember Alex Felker? He was the guy clubbed and beaten by five punks as he walked along Spenard Road just before Christmas. Guess what? Three of those same little darlings went on an even more violent spree just days later. This time, the bunch had a gun. This time they hurt someone else.

In the most recent episode, it's alleged they — and a few new buddies — rolled a drunk, tried to carjack a pizza delivery guy, stole a woman's car at gunpoint, shot at a cab driver and attacked and seriously injured a 15-year-old boy waiting in a car for his parents to come out of the Fred Meyer store on Northern Lights.

What else they were up to that night is anybody's guess. But what they did during those two nights could have happened to any of us unfortunate to be in the wrong place at the wrong time.

All these thugs are between 15 and 17 years old. At least two of them are known to juvenile authorities for past property crimes. They have fallen into the category of being the usual suspects when things like this happen. And you wonder why cops get a little cranky.

If there is a recent case that graphically shows why kids involved in violent crimes should automatically be charged and treated as adults, here it is.

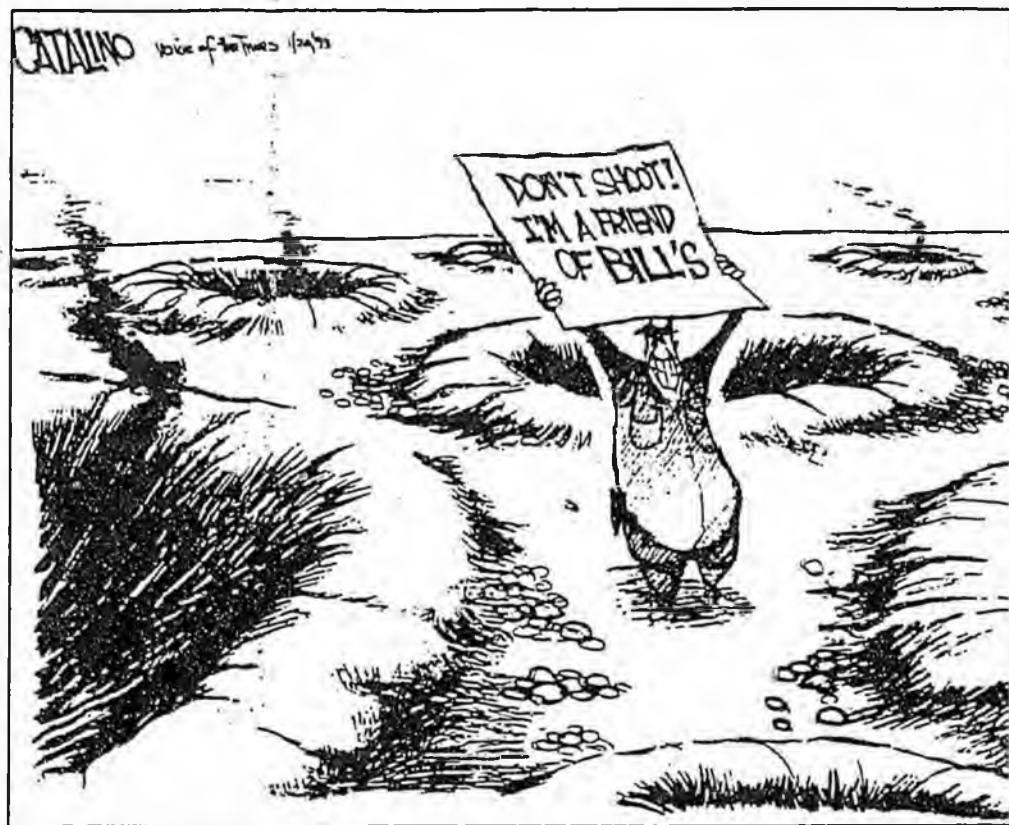
If the three clowns involved in beating Mr. Felker — and who were involved in the crime spree a few days later — had been charged as adults to begin with, they likely would not have been on the street to be involved in the second round of fun. And the knowledge that the law was coming down hard on them may have kept their buddies off the street as well.



Jenkins

As it is now, they have the protection of the juvenile justice system. We don't know who they are. For all we know, they're living next door. We likely won't know what happens to them. But in comparison to what they would have gotten in adult court, they'll just get their little hands slapped. All of this, of course, is designed to let the little dears grow up and become responsible adults without the onus of a criminal record.

That's great. Those same protections saved my butt when I was a punk kid and



went over the line. But then, my friends and I didn't try to shoot anybody or club them or hit them in the head with hockey sticks. We were stupid and insensitive, but we weren't violent.

And teen-agers have not changed. Kids, good kids who will grow up to be good citizens, do crazy, non-violent things. Get them together and the lowest-common-denominator thing goes to work. They become hormones with ears. But, hopefully, it passes. They should be allowed to grow up, get into college, get jobs and proceed with their lives when their brains actually begin to function.

But violent kids can grow up to be violent adults. If they have a career track leading to more and more violence, we should be trying to derail them now, before some poor soul has to deal with them in the middle of the night.

I think when you're 15, 16, 17 years old you should have a vague notion that hurting someone else is wrong, and when you step over the line, you should pay. About 99.5 percent of the kids know that. It's time to deal with those who haven't gotten the word.

This bunch has been lucky twice. They didn't kill anybody, despite their being armed and shooting a gun. Nobody killed them, despite this being a city where any

number of people could, and would love to, shoot back. That kind of luck is not going to hold forever.

It's well past time for a slap on the hand for these kids and others like them who haven't gotten the word that such behavior is wrong.

The Alaska Peace Officers Association is drafting legislation that would be a big step in the right direction.

Among other things, it would:

- Prosecute 16- and 17-year-olds as adults when they are charged with committing a felonious violent crime against a person.

- Retain confidentiality for juveniles charged with misdemeanors for the first crime only. One freebie for dummies like me. After that, it's tell-all and show-all.

- Change the law to make judges consider juvenile records as aggravating circumstances when sentencing a person as an adult.

- Ensure that juvenile court-ordered restitution continues after an offender's 19th birthday. Now, when junior hits 19, such orders cannot be enforced.

It's a start. It's a darned good start.

One thing is certain. Something needs to be done — soon. The system as it stands now is just not working.

Paul Jenkins is an editor of *The Anchorage Times*.

# Alaska State Legislature

Legislative Research Agency



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Juneau, Alaska 99801-2196

Phone: (907) 465-3991  
Fax: (907) 463-3351

February 8, 1993

## MEMORANDUM

TO: Representative Con Bunde

FROM: Maureen Weeks *MW*  
Legislative Analyst

RE: **Juvenile Waivers under House Bill 100**  
Research Request 93.125

You asked how many Alaska juveniles charged with offenses committed in 1990 and 1991 would have been tried in adult court (waived to adult court) if House Bill 100 had been law at the time.

## BACKGROUND

Any Alaskan under 18 has a right to be heard in juvenile court, where proceedings are secret, rather than in adult court, where they are public. This right to "juvenile jurisdiction" must be waived before a minor can be tried in adult court.

In Alaska, waiver takes place through a formal court process under AS 47.10.060. A minor can be tried in adult court if the judge finds a preponderance of evidence that the minor cannot be rehabilitated before the age of 20. When determining if a youth is "amenable to treatment," the court must consider the seriousness of the offense, the history of the youth's delinquency, the cause of the delinquent behavior and facilities for treatment.<sup>1</sup>

Under current law, no juvenile offender in Alaska is automatically tried in adult court (waived to adult court). Under proposed House Bill 100, juveniles would be presumed waived to adult court if:

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<sup>1</sup>"DFYS Juvenile Waiver," March 1989, Division of Family and Youth Services, Alaska Department of Health and Social Services, Juneau, p. 1.

- they were charged with murder (first degree, second degree, attempted or solicited);
- they were charged with an unclassified or class A felony *and* had previously been adjudicated delinquent; or
- they were charged with a felony of any degree *and* had previously been convicted as an adult for another felony.<sup>2</sup>

We use the words "presumed waived" because under the bill, the juvenile has the right to attempt to prove to a judge that he or she would be amenable to treatment before turning 20, or that the allegations were not true. It shifts the burden of proof from the prosecution to the defense.

#### **JUVENILES WHO WOULD HAVE BEEN WAIVED: 1990 AND 1991**

A total of 20 juveniles would have been tried in adult court in 1990 and 1991, if they were unable to prove to a judge that they should remain in juvenile court. These 20 cases include:

- six first-degree murder charges;
- one second-degree murder charge;
- three first-degree sexual assault charges;
- two first-degree sexual abuse charges;
- three arson charges;
- three robbery charges;
- one first-degree assault charge; and
- one first-degree escape charge.

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<sup>2</sup>An adjudication as a delinquent is a finding by a court that the minor has committed acts that would be crimes if they had been committed by an adult. It is tantamount to a conviction.

Representative Bunde  
February 8, 1993  
Page 3

The attached chart lists the juveniles presumed waived under HB 100.

#### **A NOTE OF CAUTION ABOUT THIS DATA**

The Department of Health and Social Services provided us with a database for the years 1990 and 1991. We worked from this database and the Youth Corrections administrator later checked the database by hand to make certain that it included all prior adjudications. That search showed that it did not. For this reason, it is possible that we have missed some juveniles who would have been presumed waived.

I hope this information is useful. If you have any questions, or want additional information, please contact this agency.

Attachment

**JUVENILE FELONY OFFENDERS PRESUMED WAIVED TO ADULT COURT IN 1990 AND 1991  
UNDER HOUSE BILL 100 OF THE 18TH ALASKA LEGISLATURE**

Identification		Offense for Which the Minor is Presumed Waived			Prior Adjudication as a Delinquent		
Date of Birth - Sex	Age at Referral	Referral Charge	Class of Offense	Date Referred	Date of Prior Adjudication	Charge Adjudicated	Class of Adjudicated Offense
<b>1990</b>							
08/13/73 - Male	17	Murder 1	Unclassified	12/06/90			
06/05/73 - Male	16	Murder 1	Unclassified	05/24/90			
01/24/74 - Male	16	Murder 2	Unclassified	03/17/90			
04/12/74 - Male	15	Sexual Assault 1	Unclassified	03/16/90	02/21/90	Burglary 1	"B" Felony
06/04/72 - Male	17	Robbery 1	"A" Felony	05/24/89	05/11/90	Criminal Mischief 2	"C" Felony
06/08/73 - Male	16	Arson	"A" Felony	02/10/90	01/09/90	Burglary 2	"C" Felony
<b>1991</b>							
12/21/73 - Male	17	Murder 1	Unclassified	09/20/91			
02/03/74 - Male	17	Murder 1	Unclassified	04/18/91			
10/24/76 - Male	15	Murder 1	Unclassified	12/10/91 & 12/13/91			
06/15/74 - Male	17	Murder 1	Unclassified	12/13/91			
06/05/74 - Male	16	Sexual Assault 1	Unclassified	01/08/91	06/05/90	Theft 2 (02/05/90) Burglary 1 (04/22/90)	"C" Felony "B" Felony
11/18/75 - Male	15	Sexual Assault 1	Unclassified	02/02/91	07/26/90	Burglary 1	"B" Felony
11/15/73 - Male	17	Sexual Abuse 1	Unclassified	08/30/91	07/25/91	Robbery 1	"A" Felony
01/19/74 - Male	17	Sexual Abuse 1	Unclassified	04/23/91	12/04/89	Sexual Assault 1	Unclassified
10/13/75 - Male	15	Arson 1	"A" Felony	08/02/91	11/02/89	Theft 2	"C" Felony
03/06/74 - Male	17	Escape 1	"A" Felony	10/13/91	02/13/91 10/12/89	Escape 2 Burglary 2	"B" Felony "C" Felony
10/03/74 - Male	17	Robbery 1	"A" Felony	04/23/91	03/05/90	Criminal Mischief 2	"C" Felony
05/20/73 - Male	17	Arson 1	"A" Felony	03/07/91	10/26/90	Arson 1	"A" Felony
06/19/74 - Male	17	Assault 1	"A" Felony	10/28/91	09/21/89	Burglary 1	"B" Felony
08/17/76 - Male	15	Robbery 1	"A" Felony	11/29/91	10/08/91	Burglary 1	"B" Felony

Note: Under CSHB 100, a juvenile offender aged 15 through 17 would be waived to adult court if charged with the following offenses:

- \* first-degree murder, second-degree murder or attempted or solicited murder;
- \* an unclassified felony or a class A felony and the juvenile had previously been adjudicated delinquent for a felony offense; and
- \* a felony of any degree and the juvenile previously had been convicted of a felony.

The juvenile would have the right to attempt to prove that he or she would be amenable to treatment before age 20.

Data provided by the Department of Health and Social Services.

Prepared by the Legislative Research Agency, February 1993 (93.125).



FISCAL NOTE SUMMARY--HB 100, Charges Against Minors

Agency	Amount
Dept. of Public Safety	-0-
Office of Public Advocacy	52.2
Public Defender Agency	89.3
Dept. of Health & Soc. Ser.	-0-

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO: HB 100

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: " An act relating to criminal charges  
brought against minors " BRU: Alaska State Troopers  
 Component: Detachments  
 Sponsor: Representative Bunde  
 Requestor: Representative Bunde 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						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>REVENUE FUND SOURCE:</b>	-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						
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

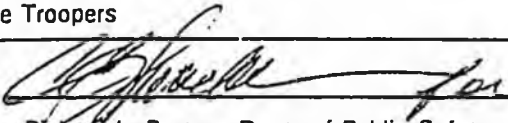
**POSITIONS:**

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.)**

No significant fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Francis C. Allan Phone: 269-5691  
 Division: Alaska State Troopers Date: 02/05/93  
 Approved by Commissioner:  Date: 2/5/93  
 Agency: Richard L. Burton, Dept. of Public Safety

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*⊕ Fiscal Note - Public Safety*

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

Revision Date: \_\_\_\_\_  
Title: "An Act relating to criminal charges brought against minors."  
Sponsor: Representative Bunde  
Requestor: House HESS

Department Affected: Administration  
BRU: Office of Public Advocacy  
Component: Office of Public Advocacy  
COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	4.0	4.1	4.2	4.3	4.4	4.5
CONTRACTUAL	48.2	49.6	51.1	52.6	54.2	55.8
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	52.2	53.7	55.3	56.9	58.6	60.3

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	52.2	53.7	55.3	56.9	58.6	60.3
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	52.2	53.7	55.3	56.9	58.6	60.3

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 (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary.)  
See Attached Analysis

Prepared by: Brant McGee, Public Advocate  
Division: Office of Public Advocacy

Phone: 274-1684  
Date: \_\_\_\_\_

Approved by Commissioner: Nancy Bear Usera  
Agency: Administration

Date: 2/8/93

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## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 100

Passage of HB100 will cause fundamental changes in the way that many juvenile cases are now processed through the justice system. In several important classes of cases the bill would create a presumption that the juvenile is not amenable to treatment and should therefore be waived into adult court. This section of the law will generate many more waiver hearings at which it will be necessary for both the state and the defense to call experts in psychology and psychiatry to provide evidence to the court regarding amenability to treatment.

During calendar 1992 OPA provided representation to approximately 20 juveniles who were subject to current waiver proceedings. It is anticipated that passage of HB100 would generate at least 10 more cases statewide that would involve both waiver proceedings and subsequent proceedings in adult court. Average contractor costs for these cases during calendar 1992 in Anchorage was \$3,820.00. Expert costs are estimated at \$1.0 per case. The contractual costs reflected on the attached fiscal note are therefore \$48.2 for FY94.

The automatic waiver provisions of HB100 are also triggered whenever a juvenile charged with a Class A or Unclassified felony has been previously adjudicated on a felony. This provision is likely to generate many more contested adjudications in juvenile court because any admission to a felony would create the necessary predicate for an automatic waiver if the juvenile was later charged with a serious felony. There is little doubt that HB100 will generate more contested adjudications, but because we are unable to provide any estimate of the cost of such a trend it is not included in the fiscal note.

It should also be noted that one recent waiver case, not yet completed, has already cost this agency \$8,755.00.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

Revision Date: \_\_\_\_\_

Department Affected: Administration

Title: "An Act relating to criminal charges brought against minors."

BRU: Public Defender Agency

Sponsor: Representative Bunde

Component: Public Defender Agency

Requestor: \_\_\_\_\_

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	62.3	64.2	66.1	68.1	70.1	72.2
TRAVEL	6.0	6.2	6.4	6.4	.8	7.0
CONTRACTUAL	15.0	15.5	16.0	16.5	17.0	17.5
SUPPLIES	2.0	0	0	0	0	0
EQUIPMENT	4.0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	89.3	85.9	88.5	91.2	93.7	96.7

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	89.3	85.9	88.5	91.2	93.7	96.7
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	89.3	85.9	88.5	91.2	93.7	96.7

POSITIONS:

FULL-TIME	2.0	2.0	2.0	2.0	2.0	2.0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)  
See Attached

Prepared by: John Salemi, Public Defender  
Division: Public Defender Agency

Phone: 279-7541  
Date: \_\_\_\_\_

Approved by Commissioner: Nancy Bear Usery  
Agency: Administration

Date: 2/18/93

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## FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

ANALYSIS: (continued)

### Fiscal Impact

It is the Public Defender's position that there will be a distinct fiscal impact on this agency if HB 100 passes into law. In prior years when similar legislative proposals were being promoted the Department of Law had suggested that ten (10) or less children would be affected statewide by this type of legislation. The Public Defender Agency is very skeptical of those estimates. The changes proposed provide for automatic waiver of juveniles 15 years of age and older accused of murder, attempted murder and/or solicited murder. This bill also provides for waiver for any 15-year old or above charged with an unclassified or class A felony under certain circumstances. Those circumstances involve the prior criminal/juvenile history of the child in that where a minor has previously been adjudicated as a delinquent in this or another jurisdiction for felony level conduct the case will go to adult court. The Public Defender Agency estimates suggest that there will be at least ten cases in Anchorage which will trigger waiver into adult court under this new proposal. Other areas of the state will generate additional cases.

Other juvenile cases will also be affected by this law in that it will be very important for lawyers representing minors accused of delinquent acts to advise them of the effect of admitting felony level conduct. The minor will be advised that a serious subsequent charge following admission to felony level conduct in a petition of delinquency will result in likely waiver into adult court concomitant with the serious penalties which are available and regularly imposed. The result will be that many more original petitions against minors will be contested in juvenile court. Under the current system most kids 'fess up' and little court wrangling occurs as a guilt or innocence. The court and the parties can then focus on therapy and rehabilitation. The new system will undermine this focus and will create a labor intensive adjudicative stage for both prosecution and defense.

In FY 92 the Public Defender Agency processed 17,094 cases with only 54 staff attorneys spread out over 12 office locations. Of these 17,000+ case, 500 were juvenile delinquency matters. Because juvenile proceedings in the past have been less adversarial than adult court case proceedings, resources were not focused in that arena. If this bill becomes law more resources will be required. Currently in the Anchorage office, for example, one lawyer handles all juvenile matters. In FY 92 she processed 226 cases. (It should be noted that national caseload standards indicate that an attorney handling juvenile delinquency matters should not handle more than 200 cases per year.) This proposal will intensify the litigation in all juvenile cases wherein felony conduct is alleged, will increase the number of waiver cases and will generally change the character of the juvenile justice system, not necessarily for the good.

Given the above the Public Defender Agency will require an additional one-half time attorney with felony level experience as well as a half-time paralegal. This team will work both in Anchorage and Fairbanks to handle waiver petitions and to give support to the general juvenile caseloads at those locations. Some Bush travel may also be required in that juvenile cases are filed all over the state. One final note with respect to fiscal impact--resources for special kinds of cases cannot be evaluated in a vacuum. In the last five years the Alaska Public Defender Agency has experienced a 45 percent increase in its overall caseload. Much of the increase is due to beefed up criminal prosecution efforts on the part of the state. Additionally, Child in Need of Aid cases are skyrocketing, which directly affects the ability of family law lawyers, especially in Anchorage, to devote time to juvenile cases. Given these circumstances, the fiscal note herein is seen as a very modest reaction to the effects of HB 100.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

ANALYSIS: (continued)

Budget Analysis

100	Personal Services	
	1/2 Attorney III (Anchorage)	36.5
	1/2 Paralegal Assistant II (Anchorage)	6.0
200	Travel:	
	Professional and Experts	15.0
300	Contractual:	
	Expert Witnesses, office space	15.0
400	Supplies:	2.0
500	Equipment (one-time):	<u>4.0</u>
	TOTAL	89.3

Position Title Attorney III		No. of Positions 1	Range / Step 22/A	Barg. Unit PX
Time Status PPT	Staff Months 6.0	Location Anchorage		Election District 7
TYPE OF EXPENDITURE		AMOUNT		
Salary	26,652.0	Justification Considering the fiscal impact on the Public Defender Agency, it appears that 1/2 attorney with felony level experience will be required as well as the commitment of a half-time paralegal. This attorney and half-time paralegal will likely be sited in the Anchorage office but will be called on to handle waiver petitions in Anchorage, Fairbanks, and certain bush areas.		
Benefits	9,897.0			
Premium Pay				
Other				
Total Personal Services	36,549.0			
Travel	3,000.0			
Contractual	15,000.0			
Commodities	1,000.0			
Equipment	2,000.0			
Other				
Total Cost	57,549.0			
FUNDING SOURCE FOR TOTAL COST				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	57,549.0		
I-A Receipts	1007			
CIP Receipts	1061			
Other				

9/LEG93/03626.kp

## Request For New Position

AGENCY ADMINISTRATION  
 BRU Public Defender Agency  
 COMPONENT Public Defender Agency

FY 94

Page 4 of 5  
 Revised Date: \_\_\_\_\_

Position Title Paralegal Assistant II		No. of Positions 1	Range / Step 16/A	Barg. Unit GGU
Time Status PPT	Staff Months 6.0	Location Anchorage		Election District 7
TYPE OF EXPENDITURE		AMOUNT		
Salary	18,222.0	<b>Justification</b> Considering the fiscal impact on the Public Defender, it appears that 1/2 attorney with felony level experience will be required as well as the commitment of a half-time paralegal. This attorney and half-time paralegal will likely be sited in the Anchorage office but will be called on to handle walver petitions in Anchorage, Fairbanks, and certain bush areas.		
Benefits	7,534.0			
Premium Pay				
Other				
<b>Total Personal Services</b>	<b>25,756.0</b>			
Travel	3,000.0			
Contractual	0.0			
Commodities	1,000.0			
Equipment	2,000.0			
Other				
<b>Total Cost</b>	<b>31,756.0</b>			
FUNDING SOURCE FOR TOTAL COST				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	31,756.0		
I-A Receipts	1007			
CIP Receipts	1061			
Other				

9/LEC93/03626.kp

# Request For New Position

AGENCY ADMINISTRATION

BRU Public Defender Agency

COMPONENT Public Defender Agency

FY 94

Page 5 of 5  
Revised Date: \_\_\_\_\_

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: "An act relating to criminal charges brought against minors." BRU: Youth Facilities Services  
 Component: MYC,FYF,NYF,JYC & BYF  
 Sponsor: Representative C. Bunde  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 0264,0265,0266,0267 & 0268

**Expenditures/Revenues:** (Thousands of Dollars)

	FY94	FY95	FY96	FY97	FY98	FY99
OPERATING						
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**FUNDING:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: 0.0

ANALYSIS: (Attach a separate page if necessary)

See attached for Fiscal Note Analysis

Prepared by: Deborah R. Wing, Director  
 Division: Department of Health & Social Services

Phone: 465-3191  
 Date: 02/05/93

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

Date: 2/8/93

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Fiscal Note  
HB 100

ANALYSIS:

This bill would require the charging, prosecuting, and sentencing in adult court juveniles age 15 and older who are alleged to have committed the following crimes:

- murder, attempted murder, or solicited murder;
- an unclassified or A felony and the youth has been previously adjudicated as a delinquent for a felony offense;
- or for a felony of any degree if the minor has been previously convicted as an adult for a felony offense.

Although the bill states that such minors will be charged, prosecuted and sentenced in adult court for the crimes mentioned above, it is unclear where such a minor will be "housed" during each stage of the process. The Department of Health & Social Services assumes that youth convicted and sentenced under the adult system would be incarcerated in adult facilities.

Based on this assumption, there would be no additional costs to the Department resulting from this bill.

FISCAL NOTE SUMMARY--HB 100, Charges Against Minors

Agency	Amount
Alaska Court System	?
Dept. of Corrections	-0-
Dept. of Law	-0-
Dept. of Public Safety	-0-
Office of Public Advocacy	52.2
Public Defender Agency	89.3
Dept. of Health & Soc. Ser.	-0-

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

Revision Date: 2-5-93 Dept. Affected: Department of Corrections  
 Title: "An Act relating to criminal charges brought against minors." BRU: Institutions  
 Component: Institutions  
 Sponsor: Rep. Bunde  
 Requestor: Rep. Bunde COMPONENT SERIAL NO. 1860

**Expenditures/Revenues:**

(Thousands of Dollars)

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

<b>CAPITAL</b>						
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<b>REVENUE FUND SOURCE:</b>						
-----------------------------	--	--	--	--	--	--

**FUNDING:**

(Thousands of Dollars)

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

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

**ANALYSIS:** (Attach a separate page if necessary)

The fiscal impact of this legislation is minimal since the Department of Corrections already receives a number of adjudicated delinquents.

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

Phone: 465-3376  
 Date: 2-5-93  
 Date: 2-5-93

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Mail Stop 3101

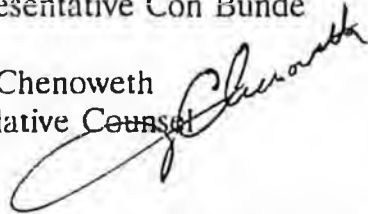
130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

February 10, 1993

**SUBJECT:** House Bill 100, criminal charges against minor--sectional analysis

**TO:** Representative Con Bunde

**FROM:** Jack Chenoweth  
Legislative Counsel 

The measure provides for automatic treatment of certain juveniles 15 years of age and older as adults for purposes of disposition of certain criminal offenses.

Section 1 of the bill provides that a minor under 18, but at least 15, must be tried as an adult if the minor is charged with 1) murder or attempted or solicited murder; 2) an unclassified or class A felony, and the minor has been previously adjudicated delinquent for felonious conduct; or 3) any felony, if the minor has been previously adjudicated delinquent for felonious conduct, or has been previously tried and convicted as an adult on a felony charge. The minor must also be tried as an adult on all related charges (e.g., a charge of burglary for breaking into a house to commit a rape).

Under the other changes made by section 1, the minor may petition the court to be tried under juvenile procedures, notwithstanding the charges against him or her. The minor bears the burden of persuading the court that juvenile proceedings would be appropriate, unless the minor contends that he or she cannot be properly tried as an adult (for instance, that he or she has not previously been adjudicated delinquent for felonious conduct). In that case the state bears the burden of proving that the minor has been previously adjudicated delinquent as the state alleges.

Finally, section 1 provides that current law, allowing the state to seek prosecution as an adult of any minor for any offense, remains in effect. (Under current law, the state must show that the minor is not likely to be amenable to treatment before reaching age 20.)

Section 2, adding a new subsection to AS 47.10.060, introduces the opportunity for a minor to present the evidence of a professional that the minor is amenable to

treatment before reaching the age of 20, the threshold requirement to consideration of whether the minor shall be treated as a juvenile or tried as an adult.

Section 3 provides that a minor who is charged as an adult under section 1, but who is convicted only of a lesser offense that would not have given rise to an adult charge under that section, shall have his or her case disposed of under juvenile proceedings. However, the state may petition the court to sentence the minor as an adult, in which case the state must show that the minor would not be amenable to treatment before age 20.

Section 4 provides that the bill, if enacted, would apply only to offenses committed after the effective date of the enactment.

JBG:pl  
93-077.plm



House of Representatives

SPONSOR STATEMENT

HB 100

"AN ACT RELATING TO CRIMINAL CHARGES BROUGHT AGAINST MINORS"

The juvenile justice system does not deal effectively with violent or chronic juvenile offenders. The most significant problem with keeping offenders in the juvenile system whose traits and behavior are more like those of adult criminals is the threat these offenders pose to the rehabilitation of other juveniles and to the public safety. HB 100 resolves this problem, and does so in a way that balances the needs of society to be protected from dangerous offenders against the importance of keeping the vast majority of minors in the juvenile justice system.

HB 100 requires the most dangerous classes of juvenile offenders to prove that they are amenable to treatment before they can be kept within the juvenile justice system. Under HB 100, the burden of proof is satisfied only when the minor is 15 years of age or older and (1) is charged with murder or attempted or solicited murder; (2) is charged with an unclassified ( e.g. forcible rape) or class A felony ( e.g. first degree assault) and has previously been adjudicated as a delinquent for a prior felony offense; or (3) has previously been prosecuted as an adult.

Under present law, offenders who clearly meet the standard for waiver, who clearly will be prosecuted as adults, and who clearly face decades of incarceration, are housed in youth correctional facilities during the period of months or years while a waive decision is pending. Presence of these offenders in youth facilities is detrimental to the rehabilitation of those minors who are effectively being treated with the juvenile system. Under HB 100, these offenders would be placed in adult correctional facilities immediately upon arrest. As a result, the ability to successfully treat other minors will be enhanced.

Under current law, with only one exception, no matter what crime is committed or how many felony convictions the person has, a person under 18 who is convicted of a crime is released from all state supervision at age 20.

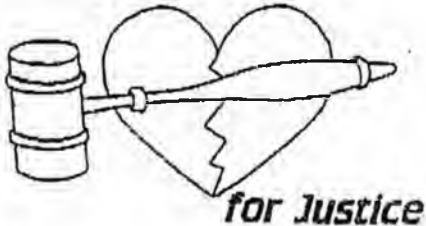
HB 100  
Sponsor Statement

The person must be released even if it is clear that the person continues to present a serious threat to the public safety. This is a definite threat to public safety. Particularly in light of the rising violent crime rate, laws that allow the knowing release of violent offenders into the community, as is the case with Alaska's existing juvenile delinquency laws, must be changed.

Under present law, a dangerous minor can be supervised beyond age 20 only if the minor is waived into adult court. And, waiver is permissible only if the state proves that the minor cannot be rehabilitated before juvenile jurisdiction ends. The typical basis for waiver was describe in a March 1989 DFYS report: "In most cases, the decision to waive depends on the belief of psychologist and psychiatrists that a youth cannot be rehabilitated before juvenile jurisdiction expires. If these 'expert' witnesses do not provide overwhelming testimony that the youth is not amenable to treatment, then the statutory framework presumes the the juvenile with be tried in juvenile court. The court can give little or no consideration to community interests requiring restraint or discipline."

In 1989, the Court of Appeals ruled that requiring minors to be examined by psychiatrists and psychologists to determine amenability to treatment is unconstitutional, *R.H. v. State*, 777 P.2d 204 (Alaska App. 1989). Since then, courts have been forced to decide whether a minor is or is not amenable to treatment without the benefit of expert psychiatric or psychological testimony. Because the level of potential dangerousness of minors who commit first degree murders or with a record of committing felony offenses is so high, it is critically important that courts have access to this type of information before deciding whether the minor should be treated as an adult or a juvenile. The only way it is constitutionally possible for the courts to get this information is to switch the burden of proving amenability to treatment from the state to the minor.

**Note on Constitutionality:** HB 101 is a valid exercise of legislative power under the Alaska Constitution. The Alaska Court of Appeals in *W.M.F. v State*, 723 P.2d 1298, 1300 ( Alaska App. 1986) specifically held that "a juvenile offender has no constitutional right to be tried in a juvenile court. Rather it is a right granted by the state legislature, and the legislature may restrict or qualify the right as it desires."

**VICTIMS**

February 5, 1993

Representative Con Bunde  
Alaska State Legislature  
P.O. Box V  
Juneau, Alaska 99811

Dear Representative Bunde,

This letter is in support of HB 100, "An Act - relating to criminal charges brought against minors."

As a co-founder of Victims for Justice in Anchorage, I have seen, personally and professionally, how violent and brutal crimes by minors can be. We need HB 100 to pass to show minors that they will not be tried in the juvenile court system when they commit a serious felony or murder. In the past, juveniles have been segregated in the adult prisons rather than utilizing juvenile detention centers, as in the Winona Fletcher case. She was housed in Cook Inlet prior to trial.

I urge you and the House of Representatives to pass HB 100.

Sincerely,

A handwritten signature in cursive script that reads "Sharon Nahorney". The signature is fluid and somewhat stylized, with the first letters of the first and last names being capitalized and prominent.

Sharon Nahorney

# THE VOICE OF THE TIMES

## Some kids need more punishment than slap on hand

By PAUL JENKINS

Remember Alex Felker? He was the guy clubbed and beaten by five punks as he walked along Spenard Road just before Christmas. Guess what? Three of those same little darlings went on an even more violent spree just days later. This time, the bunch had a gun. This time they hurt someone else.

In the most recent episode, it's alleged they — and a few new buddies — rolled a drunk, tried to carjack a pizza delivery guy, stole a woman's car at gunpoint, shot at a cab driver and attacked and seriously injured a 15-year-old boy waiting in a car for his parents to come out of the Fred Meyer store on Northern Lights.

What else they were up to that night is anybody's guess. But what they did during those two nights could have happened to any of us unfortunate to be in the wrong place at the wrong time.

All these thugs are between 15 and 17 years old. At least two of them are known to juvenile authorities for past property crimes. They have fallen into the category of being the usual suspects when things like this happen. And you wonder why cops get a little cranky.

If there is a recent case that radically shows why this involved in violent crimes should automatically be charged and treated as adults here in Alaska.

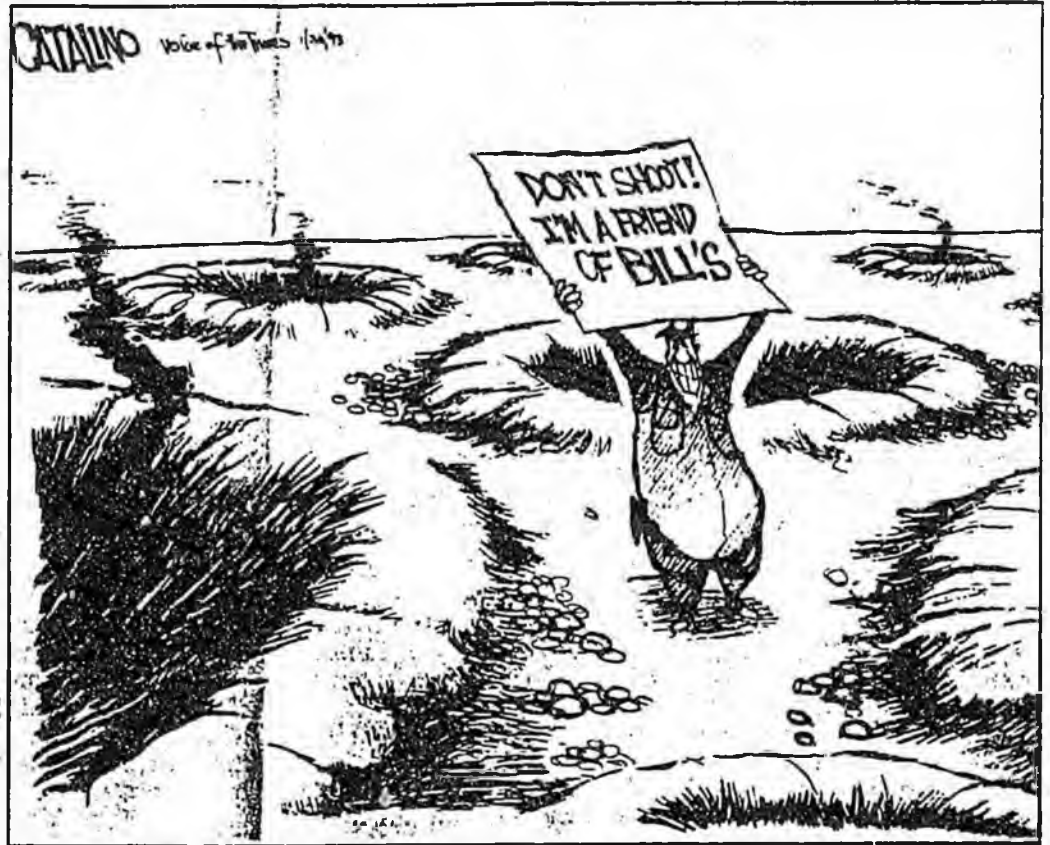
If the three clowns involved in beating Mr. Felker — and who were involved in the crime spree a few days later — had been charged as adults to begin with, they likely would not have been on the street to be involved in the second round of fun. And the knowledge that the law was coming down hard on them may have kept their buddies off the street as well.



Jenkins

As it is now, they have the protection of the juvenile justice system. We don't know who they are. For all we know, they're living next door. We likely won't know what happens to them. But in comparison to what they would have gotten in adult court, they'll just get their little hands slapped. All of this, of course, is designed to let the little dears grow up and become responsible adults without the onus of a criminal record.

That's great. Those same protections



went over the line. But then, my friends and I didn't try to shoot anybody or club them or hit them in the head with hockey sticks. We were stupid and insensitive, but we weren't violent.

And teen-agers have not changed. Kids, good kids who will grow up to be good citizens, do crazy, non-violent things. Get them together and the lowest-common-denominator thing goes to work. They become hormones with ears. But, hopefully, it passes. They should be allowed to grow up, get into college, get jobs and proceed with their lives when their brains actually begin to function.

But violent kids can grow up to be violent adults. If they have a career track leading to more and more violence, we should be trying to derail them now, before some poor soul has to deal with them in the middle of the night.

I think when you're 15, 16, 17 years old you should have a vague notion that hurting someone else is wrong, and when you step over the line, you should pay. About 99.5 percent of the kids know that. It's time to deal with those who haven't gotten the word.

This bunch has been lucky twice. They didn't kill anybody, despite their being armed and shooting a gun. Nobody killed

number of people could, and would love to, shoot back. That kind of luck is not going to hold forever.

It's well past time for a slap on the hand for these kids and others like them who haven't gotten the word that such behavior is wrong.

The Alaska Police Officers Association is waiting legislation that would be a big step in the right direction.

Among other things, it would:

-Prosecute 16- and 17-year-olds as adults when they are charged with committing a felonious violent crime against a person.

-Retain confidentiality for juveniles charged with misdemeanors for the first crime only. One freebie for dummies like me. After that, it's tell-all and show-all.

-Change the law to make judges consider juvenile records as aggravating circumstances when sentencing a person as an adult.

-Ensure that juvenile court-ordered restitution continues after an offender's 19th birthday. Now, when junior hits 19, such orders cannot be enforced.

It's a start. It's a darned good start.

One thing is certain. Something needs to be done — soon: The system as it stands now is just not working.

Paul Jenkins is an editor of The Anchorage Times.

**FY 1991**

Age at Referral	Referral Charge	Class of Offense	Date of Referral	Prior Adjudicated Charge	Class of Offense	Date of Referral
17	Murder 1st	Unclass.	April 1991			
17	Murder 1st	Unclass.	Dec 1990			
16	Robbery 1st	A-Felony	April 1991	Crim Mischief 2nd	C-Felony	Jan 1990
17	Arson 1st	A-Felony	March 1991	Arson 1st	A-Felony	Sept 1990
16	Sexual Assault 1st	Unclass.	Jan 1991	Burglary 1st	B-Felony	April 1990
16	Sexual Assault 1st	Unclass.	Oct 1990	Burglary 2nd	C-Felony	Oct 1990
15	Sexual Assault 1st	Unclass.	Feb 1991	Burglary 1st	B-Felony	June 1990
17	Sexual Abuse 1st	Unclass.	July 1990	Robbery 1st	A-Felony	April 1991

Of the above for FY 1991, 3 were petitioned for waiver and 2 were actually waived to adult court.

**FY 1992**

Age at Referral	Referral Charge	Class of Offense	Date of Referral	Prior Adjudicated Charge	Class of Offense	Date of Referral
17	Murder 1st	Unclass.	Feb 1992			
17	Murder 1st	Unclass.	Sept 1991			
15	Murder 1st	Unclass.	April 1992			
15	Murder 1st	Unclass.	Dec 1991			
15	Murder 1st	Unclass.	May 1992			
17	Murder 1st	Unclass.	Dec 1991			
17	Murder 1st	Unclass.	Jan 1992			
17	Murder 1st	Unclass.	Jan 1992			
18	Murder 2nd	Unclass.	Sept 1991			
18	Sexual Abuse 1st	Unclass.	Aug 1991	Assault 1st	A-Felony	Aug 1989
17	Escape 1st	A-Felony	Oct 1991	Escape 2nd	B-Felony	Nov 1990
16	Assault 1st	A-Felony	Jan 1992	Assault 2nd	B-Felony	Nov 1991
17	Assault 1st	A-Felony	Oct 1991	Burglary 1st	B-Felony	Sept 1989
17	Sexual Abuse 1st	Unclass.	Aug 1991	Robbery 1st	A-Felony	April 1991
15	Escape 1st	A-Felony	Oct 1991	Burglary 2nd	C-Felony	Oct 1991

Of the above for FY 1992, 6 were petitioned for waiver and all were actually waived to adult court.

### In favor of youth waiver bill

Our society is becoming much more violent and it starts with our youth. The juveniles who were committing violent acts in the past are only turning around to commit even greater offenses today. It is time to realize that our youth cannot be reformed until they understand that there are consequences for their actions. We cannot just slap repeat offenders on the hand and place them back on the streets.

Prosecuting certain youth repeat offenders of felonious crimes as adults and stating to the public who they are is a step in the right direction. It is time to start punishing those with violent tendencies by expressing your support for the youth waiver bill.

— John Bruce

ADN 2/14/93

### Support youth waiver bill

Laws put into place 30 years ago to protect youths from ruining their lives when committing minor crimes are out of date. Today's youths are much more sophisticated, commit more violent crimes and commit them more frequently.

The 16- and 17-year-old repeat violent criminals need to know that there are consequences for their actions. Our police are frustrated, and the victims can't find out the name of criminal involved. The burden of proof needs to be shifted to the youth to prove that he should be tried as a youth. If

he cannot make that proof, 16- and 17-year-olds should be tried as adults for certain crimes.

Call your legislator and ask for support for the youth waiver bill.

— Marty Miller

ADN - 2/12/93

## BOYKO &amp; FLANSBURG

LAW OFFICES

745 W. 4th AVENUE - SUITE 500 - ANCHORAGE, ALASKA 99501  
(907) 279-1000 • FAX (907) 279-8944EDGAR PAUL BOYKO, JD, ILM  
RONALD D. FLANSBURG, MBA, JD  
ROBERT L. BRECKBERG, JD  
JAMES L. HOPPER, JD  
KEENAN POWELL, JDFAIRBANKS AFFILIATE OFFICE  
MERDES & MERDES, P.C.  
455 3RD. AVENUE, SUITE 225  
FAIRBANKS, ALASKA 99701  
(907) 452-3741

February 16, 1993

VIA FAXHon. Con Bunde  
House of Representatives  
Capitol Building, Room 112  
Juneau, AK 99811Re: HB 79, SSHB 86 & HB 100

Dear Representative Bunde:

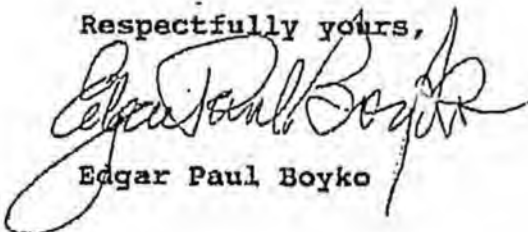
Previous to your appearance on my radio program, I had an opportunity to review the proposed legislation you are sponsoring in an effort to strengthen the criminal laws pertaining to juvenile offenders, particularly in the area of property related offense, such as malicious mischief. You are also seeking to change the current legal presumptions which place the burden upon the State to show that a juvenile, who has committed a serious felony offense, should appropriately be treated as an adult.

As you know, I have taught subjects relating to the administration of criminal justice at the college and graduate levels and I have spent many years in the practice of criminal law, the major portion of which was in the area of criminal defense.

Drawing on that background, allow me to suggest that your proposed changes in the law are not only desirable, but are long overdue. The age level at which persons commit serious crimes has been steadily lowered over the years. Youngsters of the ages 14, 15 or 16, who 40 or 50 years ago could have properly been considered as inexperienced and unsophisticated, today show a frightening level of exposure to experiences involving drugs, sexual promiscuity and anti-social behavior. Some of the most shocking reported crimes are being committed by teenagers. Under the present system these offenders are encouraged to believe that nothing will happen to them and when they are incarcerated, they are prematurely returned to society to become hardened adult criminals.

While your proposed bills do not yet fully address these problems, they make a worthwhile start in the right direction. Please feel free to use this endorsement when these matters come up for hearing in the legislature.

Respectfully yours,

A handwritten signature in cursive script that reads "Edgar Paul Boyko". The signature is written in dark ink and is positioned above the printed name.

Edgar Paul Boyko

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

Revision Date: February 16, 1993

Department Affected: Administration

Title: "An Act relating to criminal charges brought against minors."

BRU: Public Defender Agency

Component: Public Defender Agency

Sponsor: Representative Bunde

Requestor: \_\_\_\_\_

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	62.3	64.2	66.1	68.1	70.1	72.2
TRAVEL	6.0	6.2	6.4	6.4	6.8	7.0
CONTRACTUAL	15.0	15.5	16.0	16.5	17.0	17.5
SUPPLIES	2.0	0	0	0	0	0
EQUIPMENT	4.0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
<b>TOTAL OPERATING</b>	<b>89.3</b>	<b>85.9</b>	<b>88.5</b>	<b>91.2</b>	<b>93.7</b>	<b>96.7</b>

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	89.3	85.9	88.5	91.2	93.7	96.7
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
<b>TOTAL</b>	<b>89.3</b>	<b>85.9</b>	<b>88.5</b>	<b>91.2</b>	<b>93.7</b>	<b>96.7</b>

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	2.0	2.0	2.0	2.0	2.0	2.0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: \_\_\_\_\_

ANALYSIS: (Attach a separate page if necessary.)  
See Attached

Prepared by: John Salemi, Public Defender

Phone: 279-7541

Division: Public Defender Agency

Date: \_\_\_\_\_

Approved by Commissioner: Nancy Bear Usara *NBE*

Date: 2/16/93

Agency: Administration

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## FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

ANALYSIS: (continued)

### Fiscal Impact

It is the Public Defender's position that there will be a distinct fiscal impact on this agency if HB 100 passes into law. In prior years when similar legislative proposals were being promoted the Department of Law had suggested that ten (10) or less children would be affected statewide by this type of legislation. The Public Defender Agency is very skeptical of those estimates. The changes proposed provide for automatic waiver of juveniles 15 years of age and older accused of murder, attempted murder and/or solicited murder. This bill also provides for waiver for any 15-year old or above charged with an unclassified or class A felony under certain circumstances. Those circumstances involve the prior criminal/juvenile history of the child in that where a minor has previously been adjudicated as a delinquent in this or another jurisdiction for felony level conduct the case will go to adult court. The Public Defender Agency estimates suggest that there will be at least ten cases in Anchorage which will trigger waiver into adult court under this new proposal. Other areas of the state will generate additional cases.

Other juvenile cases will also be affected by this law in that it will be very important for lawyers representing minors accused of delinquent acts to advise them of the effect of admitting felony level conduct. The minor will be advised that a serious subsequent charge following admission to felony level conduct in a petition of delinquency will result in likely waiver into adult court concomitant with the serious penalties which are available and regularly imposed. The result will be that many more original petitions against minors will be contested in juvenile court. Under the current system most kids 'fess up' and little court wrangling occurs as a guilt or innocence. The court and the parties can then focus on therapy and rehabilitation. The new system will undermine this focus and will create a labor intensive adjudicative stage for both prosecution and defense.

In FY 92 the Public Defender Agency processed 17,094 cases with only 54 staff attorneys spread out over 12 office locations. Of these 17,000+ cases, 500 were juvenile delinquency matters. Because juvenile proceedings in the past have been less adversarial than adult court case proceedings, resources were not focused in that arena. If this bill becomes law more resources will be required. Currently in the Anchorage office, for example, one lawyer handles all juvenile matters. In FY 92 she processed 226 cases. (It should be noted that national caseload standards indicate that an attorney handling juvenile delinquency matters should not handle more than 200 cases per year.) This proposal will intensify the litigation in all juvenile cases wherein felony conduct is alleged, will increase the number of waiver cases and will generally change the character of the juvenile justice system, not necessarily for the good.

Given the above the Public Defender Agency will require an additional one-half time attorney with felony level experience as well as a half-time paralegal. This team will work both in Anchorage and Fairbanks to handle waiver petitions and to give support to the general juvenile caseloads at those locations. Some Bush travel may also be required in that juvenile cases are filed all over the state. One final note with respect to fiscal impact--resources for special kinds of cases cannot be evaluated in a vacuum. In the last five years the Alaska Public Defender Agency has experienced a 45 percent increase in its overall caseload. Much of the increase is due to beefed up criminal prosecution efforts on the part of the state. Additionally, Child in Need of Aid cases are skyrocketing, which directly affects the ability of family law lawyers, especially in Anchorage, to devote time to juvenile cases. Given these circumstances, the fiscal note herein is seen as a very modest reaction to the effects of HB 100.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 100

ANALYSIS: (continued)

Budget Analysis

100	Personal Services	
	1/2 Attorney III (Anchorage)	36.5
	1/2 Paralegal Assistant II (Anchorage)	6.0
200	Travel:	
	Professional and Experts	15.0
300	Contractual:	
	Expert Witnesses, office space	15.0
400	Supplies:	2.0
500	Equipment (one-time):	<u>4.0</u>
	TOTAL	89.3

Position Title Attorney III		No. of Positions 1	Range / Step 22/A	Barg. Unit PX
Time Status PPT	Staff Months 6.0	Location Anchorage		Election District 7
<b>TYPE OF EXPENDITURE</b>		<b>AMOUNT</b>		<b>Justification</b> Considering the fiscal impact on the Public Defender Agency, it appears that 1/2 attorney with felony level experience will be required as well as the commitment of a half-time paralegal. This attorney and half-time paralegal will likely be sited in the Anchorage office but will be called on to handle waiver petitions in Anchorage, Fairbanks, and certain bush areas.
Salary	26,652.0			
Benefits	9,897.0			
Premium Pay				
Other				
<b>Total Personal Services</b>	<b>36,549.0</b>	<b>36,549.0</b>		
Travel		3,000.0		
Contractual		15,000.0		
Commodities		1,000.0		
Equipment		2,000.0		
Other				
<b>Total Cost</b>		<b>57,549.0</b>		
<b>FUNDING SOURCE FOR TOTAL COST</b>				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	57,549.0		
I-A Receipts	1007			
CIP Receipts	1061			
Other				

9/LEG93/03626.kp

# Request For New Position

AGENCY ADMINISTRATION

BRU Public Defender Agency

COMPONENT Public Defender Agency

FY 94

Page 4 of 5  
Revised Date: \_\_\_\_\_

Position Title Paralegal Assistant II		No. of Positions 1	Range / Step 16/A	Barg. Unit GGU
Time Status PPT	Staff Months 6.0	Location Anchorage		Election District 7
TYPE OF EXPENDITURE		AMOUNT		
Salary	18,222.0	Justification Considering the fiscal impact on the Public Defender, it appears that 1/2 attorney with felony level experience will be required as well as the commitment of a half-time paralegal. This attorney and half-time paralegal will likely be sited in the Anchorage office but will be called on to handle waiver petitions in Anchorage, Fairbanks, and certain bush areas.		
Benefits	7,534.0			
Premium Pay				
Other				
Total Personal Services	25,756.0			
Travel	3,000.0			
Contractual	0.0			
Commodities	1,000.0			
Equipment	2,000.0			
Other				
Total Cost	31,756.0			
FUNDING SOURCE FOR TOTAL COST				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	31,756.0		
I-A Receipts	1007			
CIP Receipts	1061			
Other				

9/LEG93/03626.kp

# Request For New Position

AGENCY ADMINISTRATION

BRU Public Defender Agency

COMPONENT Public Defender Agency

FY 94

Page 5 of 5

Revised Date: \_\_\_\_\_

HB

109

(7)

Date Referred: February 17, 1993

FURTHER REFERRALS:

Finance

Date of Committee Action: 3-17-93

The JUDICIARY 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 CSHB109 (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 <sup>(27)</sup> HESS, \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note LAW, Corrections, Public Safety  zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Pete Foy</i>	<input checked="" type="checkbox"/>	<i>Same word used</i>		<input checked="" type="checkbox"/>	
<i>Neil Phillips</i>	<input checked="" type="checkbox"/>				
<i>Philip D. Jones</i>	<input checked="" type="checkbox"/>				
<i>Brian D. Porter</i>	<input checked="" type="checkbox"/>				
<i>Summit James</i>	<input checked="" type="checkbox"/>				

*Brian D. Porter*  
CHAIRMAN'S SIGNATURE

Rep. Brian Porter, Chairman

# House Judiciary Committee

Date: March 17, 1993

Place: Capitol Room 120

HB 86 Sanctions for Property-Related Offenses

Subject of Meeting: HB 109 Blood Tests/Sex Offenders  
HB 127 Presumptive Terms/Firearms Offenders

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/Which Bill?
Margaret Knuth	Law - Crim	Box 110300	99811		4089	(Y) N	HB 86 / HB 127
Randall Hines	HSS	Box 110630	99811		3187	(Y) N	HB 86
Elmer Lindstrom	DHSS	Box 110630 419 645	99811		3030	(Y) N	HB 109
Cindy Smith	Network on Domestic Violence	Sex Assault	99801		63650	(Y) N	HB 109
Jack Phelps	Rep. Kott	Room 409			3777	Y N	HB 109 / 127
Joanne Lopez	CDUSA	P.O. Box 111200	99811			Y N	If questions
Lee Ann Lucas	DPS				4322	Y N	If questions
Uma Murphy	ASJ	5700 Tudor Ave			269-5641	Y N	" "
Sandy Peron		PO Box 87175 Wenatchee		573610	892920	(Y) N	
						Y N	
						Y N	
						Y N	

**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 *JL*  
Legislative Counsel

1993 FEB 17 10 37

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.<sup>1/</sup> 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.<sup>2/</sup> 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.<sup>3/</sup> 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.

---

<sup>1/</sup> Criminal contempt is punishable as provided for in civil contempt proceedings. AS 12.80.010.

<sup>2/</sup> 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.

<sup>3/</sup> 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

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A I D S

# HIV Testing of Rapists Raises New Ethical Questions

BY VICTORIA BROWN WORTH



hen Susan was raped last summer in Washington, D.C., AIDS was the last thing on her mind. She had

been badly beaten, and her leg had been broken, when she was pushed from her attacker's car. Additional trauma for her was that she knew her attacker—he had been her date for the evening. For Susan (not her real name), the emotional trauma of the rape by a man she knew as a friend weighed more heavily than any of her physical



Rep. Lynn Martin

Injuries. Sexually transmitted diseases (STDs) and even pregnancy never entered her thoughts.

That is, not until her attorney visited her at the hospital, Susan says, and told her the man who raped her wanted to plea bargain: He would voluntarily take an HIV test in exchange for a reduced charge.

Susan began to worry. Did this mean she had been exposed to HIV, the suspected AIDS virus? After consulting with her attorney, her family, a rape-crisis counselor, and a few close friends, Susan agreed to the plea bargain. She wanted to know her rapist's HIV status because her own status could not be accurately tested until at least six months after the assault. Her attacker

had his charge reduced from felonious sexual assault to misdemeanor statutory rape and a simple assault charge. He received a year's probation in exchange for taking the HIV test and revealing the results to Susan. His results were negative in the first of two tests.

The threat of AIDS has changed the stakes in rape cases across the nation. Weiss's story is not an isolated tale but is the beginning of a nationwide trend that has civil libertarians, AIDS activists, and women's rights advocates at odds. And many involved believe that at the core of the conflict is AIDS hysteria.

#### THE COMPREHENSIVE CRIME ACT

In late September, Rep. Lynn Martin (R-



Robert Bray

Ill.) introduced an amendment to the Comprehensive Crime Act of 1990. The amendment stipulates that all states must establish laws allowing rape victims to request HIV test results from convicted rapists. The amendment passed the House of Representatives with a vote of 409-3. The act, with Martin's amendment intact, passed both chambers of Congress in late October.

Martin's press secretary, David Fox, explains, "Representative Martin felt it was unconscionable that so few states had provisions to protect rape victims. She felt that it was essential that there be consistency and uniformity throughout the United States" in releasing information on the HIV

status of rapists to victims.

According to the State AIDS Policy Center of the Intergovernmental Health Policy Project, a program at George Washington University in Washington, D.C., which maintains a data base of AIDS laws throughout the nation, 16 states already allow rape victims to have access to the HIV test results of their rapists. An six of those states permit victims to request that rapists take HIV tests and reveal the results. Currently Illinois, Oregon, Washington, Indiana, Georgia, South Carolina, Texas and Colorado enforce mandatory HIV testing of convicted rapists. In New York, a bill mandating testing of convicted rapists was defeated this fall, and a similar bill is pending in the Pennsylvania legis-



Sally Goldfarb

lature. Representatives of the American Civil Liberties Union (ACLU), Lambda Legal Defense and Education Fund (LLDEF), the National Gay and Lesbian Task Force (NGLTF), and other civil liberties advocates believe the trend toward HIV plea bargaining will be a detriment to both rape victims and prisoners alike. The added fallout of the amendment, note gay rights advocates, is that mandatory testing is now sanctioned and legally enforceable for yet another group.

Scott Burria, executive director of the ACLU in Philadelphia, points out that the average time between the arrest of a rapist and conviction is two to five years. Testing a rapist upon conviction, as the Mar-

## "Any forced testing drives the disease further underground."

amendment requires, offers the victim information much too late to be pertinent, Burris says.

Robert Bray, public information director at NGLTF, contends that the Martin amendment is a "calculated political move in an election year." He says that such legislation makes the general population believe that some attention is being paid to AIDS, when in fact, legislation does nothing for anyone in that area. Neither the victim nor the public is being aided by such a law. "It ignores the realities of the epidemic," says Bray. "We aren't, for example, allocating funds for rape victims to receive AZT treatment if they want it or for the government to pay for any kind of counseling or other services the victim might need or want. And such legislation has the added effect of stigmatization, which drives the disease further underground. Any kind of forced testing does that. But the way this legislation is phrased, who could oppose it?"

One congressional aide states that his

perpetrators in reported rapes are charged and of those, only 5% are convicted.

In addition to Susan's case, similar cases have been tried in New York, Pennsylvania, California, Oregon, Washington, and the District of Columbia, and there are other cases pending in Illinois and Colorado. What concerns many legal scholars and feminists is the possibility that in rape cases, HIV plea bargains will significantly diminish actual sentencing for the crime.

The National Organization for Women Legal Defense and Education Fund, which presented testimony at the Senate hearings convened in June on crimes against women, says requests for HIV testing will increase in rape cases because of the combined psychological and emotional traumas related to rape and the fact that HIV is sexually transmitted. Sally Goldfarb, staff attorney for the fund, intoned in an interview in the *New York Times*, "AIDS has turned the horror of rape - which is a brutal and damaging crime under any circumstances - into a crime that

evaluate every few weeks. It's a real legal quandary for everyone because you want to provide for the rape victim."

"But when you look at it? So often, times, the test has to be the availability of treatment. Does mandatory testing of rapists avail the victim of treatment she would otherwise not receive? The answer, unfortunately, is no. If testing a perpetrator would genuinely assist in either helping a woman make an informed choice or as a her of treatment, then we would have to weigh the issue more. But there is no cure for AIDS, there is no treatment available to use as a morning after pill for AIDS. The damage done through mandatory testing laws is bad, very bad. Any opportunity for mandatory testing of a group of people for AIDS encourages additional testing scenarios."

Bray states NGLTF's policy succinctly: "We're opposed to all mandatory testing unless it can have a proven benefit to the public health, which to date it has not."



Tom Stoddard

representative voted for the amendment for just that reason. "Who's going to be seen in an election year voting for rapists against rape victims? That's just not good politics," the aide says.

### IMPACT ON RAPE CONVICTIONS

According to Department of Justice statistics, rape is at an all-time high, occurring once every six minutes. The department also notes that rape is among the most underreported crimes in the nation with only one in three rapes reported. Arguing that government figures are conservative, rape-crisis counselors often assert that only one in 50 rapes is ever reported. The justice department also states that only 40% of



Roberta L. Hacker

is potentially fatal."

Other experts in the field suggest that rapists will more easily escape punishment under such legislation. One Philadelphia attorney notes, "This is a legal windfall for defense attorneys. Defendants can conceivably get off just by waiving their own rights to confidentiality. But they are also throwing away confidentiality for the nation."

And that is the issue plaguing gay rights advocates. Tom Stoddard, executive director of LLDEF, agrees that HIV plea bargaining pits the rights of women and the rights of prisoners and people with AIDS against each other. "This is an issue I've anguished over and that LLDEF has to re-



Chezia Carraway

says. "Mandatory testing of prisoners convicted of rape would have no effect whatsoever on the public health. The focus of attention should rather be on caring and supporting the victim. If anyone should be tested, it is the victim, so that she is most able to make decisions for herself on what modes of treatment she might want to access."

### THE RIGHTS OF RAPE VICTIMS

But the issue is not so straightforward for those working in the area of rape crisis. According to Roberta L. Hacker, executive director of Women in Transition, a Philadelphia-based service organization for women victims of domestic abuse and other

## The low level of HIV transmission in rape adds to the controversy.

violence, the issue of mandatory testing for HIV in rape cases is complex. "My knee-jerk reaction is test these perpetrators right away," Hacker says. "But then I am truly alarmed by the implications of mandatory testing of everyone that this precedent would set. A rape victim should be allowed to access whatever information would facilitate her recovery. When sexual violation includes the possible passing on of a fatal disease, then steps need to be taken legally to prosecute on that level."

"Perhaps a more viable approach would be the inclusion of HIV testing in the data collection at the time of the trauma and ensuing trial," Hacker continues. "Alleged rapists are routinely given blood tests and semen tests as part of the gathering of data. Why can't the HIV information be collected as well? Then testing would become part of the prosecution procedure rather than an after-the-fact violation of confidentiality. The bartering of HIV status for reduced sentencing or other plea bargaining is reprehensible and once again trades on AIDS hysteria at the expense of the victim of a sexual assault."

But what do rape victims themselves want? Susan was willing to plea-bargain her case, she says, "because I felt so violated. I felt that I had to know everything I possibly could about this guy so that I could cope, so that I could put my life back together. As soon as the issue of AIDS was raised, I felt hysterical—absolutely terrified. I just had to know."

The right to know is compelling for many women, who, like Susan, argue that they have been victimized and violated and so should have all possible information on their attacker so as best to approach their own recovery and healing process.

Chezia Carraway, coordinator of the New York City Task Force on Sexual Assault, believes that most women who have been raped want the information. A participant in the New York Governor's Task Force on Sexual Assault, Carraway conducted a national study of service providers and rape victims. "Overwhelmingly, the victims requested information on the HIV status of the rapist," Carraway reports. "So speaking as an advocate for survivors who have been

forced and violated, I believe that upon conviction of the rapist, victims should have access to that information."

But Carraway also notes that a disproportionate number of men of color are convicted in rape cases. She argues that because of racism in the legal system, "HIV testing becomes a punitive measure. There is the right of the victim to know, and then there are the rights of the prisoners. This is a complex issue that has innumerable aspects."

Carraway believes that mandatory testing in rape cases brings up a host of related issues that are not being addressed. "When we talk about HIV and women, we are still talking about a relatively unknown quantity," she argues. "There is a failure to diagnose women and a failure to test AZT on women. What are the prospects for a rape survivor with AIDS? There isn't even any attention paid to the special needs of lesbian rape victims."

"Also women tend to know their rapists more often than not," Carraway adds. "But the legislators who are making these laws are thinking that a rapist is some anonymous guy out there, a stranger. That's not the most likely case. If a woman is raped once by someone, the likelihood of single-incident transmission is low. But in cases such as incest, [the probability of transmission of HIV] is much higher because the rapes occur regularly over time. The same might be true in marital rapes."

Carraway points out that testing only convicted rapists does not effectively address the issue of HIV transmission through rape—both because so few rapists are convicted and because rapes such as those that occur through incest or marriage or even a long-term dating relationship are least likely to get convictions (if there are even arrests) but most likely to cause transmission.

Her theory is bolstered by a study released in the medical journal *Reviews of Infectious Diseases*. In the July-August 1990 issue, a study explores the relationship between STDs and rape. The article indicates that only 12% of victims of reported rapes contract STDs other than HIV from the attack. According to the Centers for Disease

Control (CDC), the transmission rate for HIV versus other STDs such as syphilis, gonorrhea, and chlamydia is about 50%. Extrapolation of this information would put HIV transmission at about 6% for all rapes, since the correlation between the amount of HIV in the U.S. population and the amount of syphilis is about equal, according to the CDC.

### UPHOLDING CONFIDENTIALITY

The low level of HIV transmission in rape fuels the fire of civil libertarians arguing against mandatory testing of rapists. Burris has been involved in several mandatory testing cases. He notes that the issue is volatile because "there is simply no compelling legal reason to damage the laws of confidentiality where there is absolutely no proven benefit to the victim. We're talking about only a psychological benefit for the victim in knowing the rapist's sero status," he asserts.

Burris says the ACLU has opposed such mandatory HIV testing of prisoners in the past and would also oppose testing of rapists. As for the lowering of sentences in exchange for HIV results, he says, "Using test results as a bargaining chip in rape sentencing is an ugly side effect of the whole HIV and confidentiality issue. This is a tragic dilemma and a horrible situation for the victim. But nothing should be different based on HIV status. And if it is allowed to be used as a chip, if these cases come up repeatedly, and they will, you're going to find a general weakening of confidentiality all around," he contends. "There's simply not a whole lot of argument for the release of confidentiality. It's irresponsible. The benefit to the victim or to the public is just not great enough."

But victims clearly feel there is more at stake for them than just the public good or the rights of prisoners. "This is the most personal crime there is," says Hacker. "And as much as we in the advocacy movement may be able to look at the larger picture, women who have been raped are looking at a much more defined picture—their own lives. And none of us is in a position to judge what best will serve their individual needs in recovery and healing." ▼

# Portion debate, there may be no middle ground

Gay-rights proponents hope that more heterosexuals will support their rights as they become more visible in public life. Whites came to accept civil rights for blacks after being confronted with the issue in the 1950s and 1960s. But the more comparable debate may be the one over abortion. Like homosexuali-

ty, abortion is seen as a constitutional right by some and morally wrong by others. Polls suggest that many Americans are willing to tolerate homosexuality in some situations, but are uncomfortable with encouraging it. "For the ordinary human being, when you have a different color of skin, they know you're not of my

tribe," Colorado Gov. Roy Romer said. "But when you have a different sexual practice, that is even a more radical chasm than for race to bridge over. I think it will be more difficult in the long term." Conflicts will be unavoidable. Gay and lesbian advocates intend to push for a federal civil rights bill bar-

ring discrimination against homosexuals, legalization of gay marriages and laws including the partners of gay and lesbian workers to receive spousal benefits. "We're not going to go away," said William Wayborn, executive director of the Gay and Lesbian Victory Fund, which makes cam-

aign contributions to openly gay and lesbian political candidates. "If anyone thinks we're going to go away, they're in for the ride of their lives." Gary Bauer, head of the conservative Family Research Council, predicts the tension over gay rights will Please see Back Page. DEBATE

## FRIDAY



### SNOW SHOWERS

High 25, low 5 to 10  
Details, Page A-7  
Weatherline, 278-7000

### SECTIONS

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METRO	Section B	CLASSIFIED	Section F
BUSINESS	Section C	CLASSIFIED	Section G
SPORTS	Section D	WEEKEND	Section H

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Bragg col	D 1	Nightwatch	H 11	Stocks	C 3
Bridge	E 9	Obituaries	B 1	Television	E 4
Comics	E 5				
Datebook	E 7				
Hear Abby	L 5				
Ocean col	B 1				
Photoscope	F 7				

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# Beating, rape net 1-year sentence

By LIZ RUSKIN  
Daily News reporter

Troy Woodworth was worried that his girlfriend would get in trouble if she stayed out late drinking at downtown bars, so he decided one night last month to teach her a lesson.

He took her home, beat her with his fists and then anally raped her.

Woodworth, 32, told police he intended the beating and rape "to show her what it's like for it to happen to her out on the street with somebody she don't know."

Woodworth, for reasons police couldn't explain, was charged with misdemeanor assault, not rape. He pleaded guilty and was sentenced Thursday to 360 days in jail.

His court-appointed attorney, Stuart Ross, told Dis-



PAUL SOUDERS / Associated Press

Troy Woodworth, right, talks with lawyer Stuart Ross after the sentencing.

Please see Back Page. ASSAULT

for jobs and taxes and has watched its tax base crumble over past the two years as oil-support companies left. Chevron closed its refinery and production from existing fields declined.

that it would further develop some previous Inlet fields had made it seem "a little like Christmas in January."

But just how good the news for the Peninsula is depends in good part on the

information, that would be good, but not great news. If however, the companies found the oil by testing new ideas about the location of the Inlet's riches, that might start a stampede of oil com-

panies doing is correct. More tests are done. Arco and Phillips' 1991 discovery at the Sunfish well was the first in the Cook Inlet in more than 25 years.

In addition, the proposal calls for a "partial moratorium on proceeding with procedures to remove people from the service while it is further studied by the Chiefs of Staff and further studied in the hearings."

However, in a nod to the Pentagon, the compromise would also allow a commander to temporarily transfer a homosexual.

Clinton had been expected to make an announcement Thursday or the next day, but it was postponed to a second straight day.

Whatever their sexual orientation, Clinton said Thursday. "Americans who are willing to conform to requirements of conduct in the military service, in my judg-

## ASSAULT: Man gets year for attack on girlfriend

Continued from Page A-1

district Court Judge John Lohff that Woodworth was only trying to help his girlfriend overcome her drinking problem.

"He loved her extremely much. . . . Whatever happened that day, I think he did it out of love," Ross said. He likened the situation to a parent who physically punishes a child.

"It's not illegal as long as it's reasonable," Ross said.

Assistant Municipal Prosecutor Carmen Clark-Weeks said Woodworth had a "Neanderthal mentality." He believed, she said, that the woman was his property and that he had the right to brutalize her to get her to behave the way he wanted her to.

The woman, who was not identified at the sentencing hearing, lived with Woodworth in a van. On Dec. 27, after she had been out drinking, Woodworth found her at the home of another man. He took her back to the van and assaulted her for an hour or two, the prosecutor said.

After the assault, she went to the emergency room at Alaska Native Medical Center. A doctor there called the police.

The victim refused to cooperate with the investigation, but Woodworth repeatedly confessed to the crime in a tape-recorded interview with police. Clark-Weeks read from the transcript at the sentencing hearing, noting that he blamed her for provoking him.

"I beat her. I assaulted her. I sexually used her," he told police. "If this is what I've got to do to get this woman out of my life and get her to stop doing this to me, then this is what I'm going to do. I'll go to jail. Screw it."

He told police he had assaulted her every second or third time that she went out drinking. He was convicted for assaulting her early last year, for which he was fined \$200 and ordered to perform community-service work.

Anchorage Police Lt. Bill Gifford, supervisor of the department's sexual assault unit, said Thursday he

didn't know why Woodworth was never charged with rape for the Dec. 27 assault. He said the case was never referred to the district attorney's office, which prosecutes rape and other serious crimes. Instead, police presented the case to the municipal prosecutors' office, which only has the power to prosecute misdemeanors.

Gifford said he believes a police officer may have informally discussed the case with someone at the district attorney's office and reached the conclusion that a rape case couldn't be brought because of the victim's refusal to cooperate. When that happens, "we're in a situation where it's almost impossible to get a conviction," he said.

Susan Wibkor, the prosecutor in charge of the sexual crimes unit at the district attorney's office, said her office has no record of the case.

Jim Wolf, head of the municipal prosecutor's office, said just because a victim refuses to help investigators does not mean the case

against her assailant has to be dropped.

"We deal with that problem on domestic violence cases" all the time," Wolf said.

They can be successfully prosecuted if there is enough other evidence that an assault occurred, Wolf said. In Woodworth's case, prosecutors had photographs of the woman's injuries, as well as his confession.

After Judge Lohff imposed the 360-day sentence and a \$1,000 fine, defense attorney Ross argued that the sentence was too stiff.

"I really don't think it's going to accomplish what you want it to accomplish," Ross said. He urged the judge to suspend part of the jail time as an incentive to keep Woodworth on the straight and narrow after his release.

Lohff declined to change his sentence, saying he wished he had the authority to impose a longer sentence.

Had Woodworth been convicted of rape, he would have faced a jail term of eight years.

## DEBATE: No

Continued from Page A-1

be "the defining issue of the '90s."

"The battleground is the whole attempt to elevate homosexuality as being socially and morally equivalent to the heterosexual family," said Bauer, who served as President Ronald Reagan's domestic policy adviser.

"It's part of what a lot of people see as cultural decay. . . . It's a sense that culture is out of control, and somewhere people have to take a stand."

Romer has felt the emotional intensity of the issue in Colorado. Over his opposition, Colorado voters last November approved a measure barring civil rights protections for gays and lesbians. But, if anything, he says passions are higher now in Colorado with efforts under way to repeal the amendment.

## CHINA: It's the time of year to show up for work and do nothing

Continued from Page A-1

Cabinet, has finally bowed to reality. In a recent circular, it acknowledged that

Kong are famous for their intense work ethic.

When people here manage to escape the grip of communism, they work ferociously

cakes.

Overstaffing also means many people slack off with official approval. At a Beijing television factory,

or more people. Gas-meter readers usually come in pairs. Newspaper articles often have double or triple bylines on straightforward



# AIDS PROJECT

## QUESTIONS AND ANSWERS ABOUT HIV AND RAPE

### CAN HIV BE TRANSMITTED DURING A RAPE OR SEXUAL ASSAULT?

HIV can be transmitted through the exchange of blood or other bodily fluids, including semen. As it is possible for HIV to be transmitted during consensual sexual intercourse (vaginal, anal, or to a lesser extent, oral), it also is possible for HIV to be transmitted during a rape or a sexual assault that involves the exchange of bodily fluids. Note, however, that although the virus occasionally has been found in tears and saliva, no cases of AIDS have been traced to a transmission involving these fluids. If the virus has been transmitted, that means you are infected with the HIV virus.

### WHAT IS THE LIKELIHOOD THAT HIV WILL BE TRANSMITTED DURING A RAPE?

The epidemiology branch of the AIDS Program at the Centers for Disease Control has estimated that the likelihood of male to female transmission of HIV is of the order of less than or equal to 0.2% per episode if the male is HIV infected. It is thought that the rate of transmission in the context of a rape may be somewhat higher; because of the involuntary nature of a rape, the woman's vaginal tract may suffer trauma, thereby creating small tears that would facilitate transmission of the virus and other microorganisms. Medical researchers stress that the estimated figure of 0.2% may change as additional data are collected.

### IF I AM INFECTED WITH HIV, DOES THAT MEAN I HAVE AIDS?

No. There are many stages between first being infected with HIV and developing full-blown AIDS. The vast majority of people infected with HIV will experience no symptoms of infection, or minor symptoms, for many years. After an average period of five to seven years, although perhaps significantly longer for others, people infected with HIV will begin to develop increasingly severe symptoms of infection, including the opportunistic infections that are the hallmark of an AIDS diagnosis. Current medical consensus refers to this full range of symptomatology as "HIV disease."

**IS THERE A CURE FOR HIV INFECTION OR FOR AIDS?**

At this point there is not. However, there is one drug, called AZT, that is available to help slow down the progress of the virus. There are two additional anti-virals that are expected to be approved for use in the very near future. Equally important, medical researchers have developed prophylactic drugs to help prevent or delay the development of opportunistic infections in a person infected with HIV; in addition, treatments now exist to help deal with such infections when they develop.

**HOW DO I KNOW WHETHER I HAVE BEEN INFECTED WITH HIV?**

There is a series of tests available that can determine whether you have developed antibodies to the HIV virus. It is widely acknowledged today that the presence of the antibodies indicates that the person who was tested is infected with the HIV virus. (This is not true, however, for a newborn, who may test positive for antibodies which he or she has received from his or her mother, but who may not be infected with the virus.) HIV antibodies tend to start appearing approximately four to six weeks after exposure, but may appear earlier.

**WHEN SHOULD I TAKE A TEST FOR HIV ANTIBODIES?**

You first should be tested immediately after you have been exposed. This is suggested for two reasons. First, the sooner you know about your HIV status, the earlier you can begin to take an active role in treatment to help keep up your health. Second, it will be useful to know whether the source of infection came from the sexual assault or rape or whether you were infected prior to the incident. As noted above, HIV antibodies tend to start appearing approximately four to six weeks after exposure, but may appear earlier; therefore, it is prudent to get a baseline test as soon after the incident as possible.

**WHEN WILL I KNOW WHETHER I HAVE BECOME INFECTED AS A RESULT OF THE SEXUAL ASSAULT OR RAPE? WILL THERE BE A TIME WHEN CAN I CONSIDER MYSELF TO BE HEALTHY?**

You should be tested approximately every three months following the incident for six months to a year. The majority of people develop antibodies within three months of having been exposed to the virus; ninety percent develop antibodies within six months of exposure. The vast majority of the remaining ten percent will develop antibodies within a year of exposure; beyond the one year point, some will still "sero-convert," but it is very rare to test negative and to be infected beyond one year.

**IF I THINK I HAVE BEEN EXPOSED TO HIV, ARE THERE ANY MEDICAL INTERVENTIONS AVAILABLE TO HELP PREVENT MY BEING INFECTED WITH THE VIRUS?**

Some medical experts suggest that the anti-viral drug, AZT, be administered to the patient within 48 hours of exposure and be continued for a period of approximately six weeks (although doctors may vary the duration of treatment by a couple of weeks). Although administering AZT immediately after exposure has not been proven to prevent infection, this often is the general course of treatment made available to health care workers who are exposed to the virus in an occupational setting. Animal studies examining whether AZT is effective in this setting are inconclusive; human studies are incomplete. Nevertheless, AZT has not yet been discounted as a viable prophylactic and is the only form of medical intervention available that may work.

**ARE THERE ANY SIDE EFFECTS TO TAKING AZT AS A PROPHYLACTIC FOR APPROXIMATELY SIX WEEKS?**

In otherwise healthy people who are not already seropositive, doctors have found that taking AZT is not likely to result in the types of toxic side effects sometimes found in those who already are infected with HIV and are taking AZT to slow the progression of infection. Generally, toxic side effects have been found to be dose and duration related and reversible following discontinuation of treatment with the drug. A non-infected person taking a six week course of AZT may experience some insomnia, fatigue, and flu-like symptoms. Again, these effects would end upon discontinuation of treatment with the drug. The research on long term effects are not yet known. Some researchers have found that when given very high doses of AZT (well beyond the doses prescribed for humans), female mice may develop vaginal carcinomas. In addition, only very limited research has been performed on the effect of AZT on the male or female reproductive systems; as such, its mutagenic and teratogenic effects, if any, are not known. One might expect that these more long term side effects would not be found in persons who take AZT for the relatively short period of time suggested for those who have been exposed to the virus as the result of sexual assault or rape.

**I UNDERSTAND THAT AZT LOSES ITS EFFECTIVENESS IN PEOPLE WHO ARE SEROPOSITIVE AFTER 12 TO 18 MONTHS; IF I AM EXPOSED, TAKE AZT, BUT STILL BECOME INFECTED, WILL I BE ABLE TO TAKE ADVANTAGE OF AZT AS A FORM OF TREATMENT LATER IN MY ILLNESS?**

AZT loses its effectiveness when resistant strains of the virus develop in a person already infected with the virus. Such activity is not expected in a person who recently has been exposed to the virus; therefore, it is unlikely that use of AZT as a prophylactic immediately after exposure will affect a person's ability to use AZT later in the course of

illness, if it becomes necessary.

**CAN I TRANSMIT THE VIRUS BEFORE I KNOW WHETHER I AM INFECTED?**

If you are infected with the virus, you are capable of transmitting it; this is so even if your HIV antibody test comes back negative. Therefore, to protect your partner from infection, it is important, if you engage in sexual relations, that you use safer sex techniques throughout this period; in fact, unless you know for certain that neither you nor your partner are HIV-infected, you never should engage in unsafe sex. If you use intravenous drugs, you should avoid sharing works; if you do share works, always clean them with bleach and water following each use.

**WHAT ELSE CAN I DO DURING THIS WAITING PERIOD?**

The most important thing you can do is to take care of yourself. You may wish to seek counseling. It is important to seek support from your family, friends, and medical professionals. Also, this would be a good time to accomplish the elusive goals of eating better, getting more sleep, and relaxing more.

## OTHER NEWS ...

### Federal Year 2000 Plan

In keeping with objectives first enumerated by former U.S. Surgeon General C. Everett Koop, the U.S. Department of Health and Human Services is drafting national health goals for the Year 2000. Among those goals is the reduction of the rate of rape and attempted rape of women age 12 years and older to "no more than 107 per 100,000 women." (The rate was 119.7 per 100,000 in 1986.) The proposed method of reduction is the initiation of sexual assault awareness programs for adolescents and evaluation of these programs. Preventive education for adult women is not being considered as equally necessary to rape reduction. Nor are services to sexual assault victims included in the federal objectives, as are services to victims of domestic violence. [For further information, contact Gary Hogelin, Office of Surveillance, Communicable Disease Center, U.S. Department of Health and Human Services, Atlanta, GA. Telephone: (404) 639-2752.]

[EDITOR'S NOTE: The term "rape" is used herein because the term is employed by the published material cited.]

### AIDS and Sexual Assault

The Department of Genitourinary Medicine of St. Mary's Hospital in London has reported the first known case of AIDS resulting from sexual assault. The seroconversion to human immunodeficiency virus (HIV) occurred during the three months following the assault in a woman who had no other identifiable risk factors for HIV infection (e.g., blood transfusions, intravenous drug use, sexual contact with other men in the previous nine months, etc.).

The sexual assault victim in this case had been forced to have vaginal and anal intercourse by a man known to her, who subsequently told her he had tested seropositive for HIV. Repeated testing of the woman for the HIV antibody also produced a positive result which doctors attributed to the sexual assault. Three other women tested positive at the same hospital following a rape. None had had blood transfusions or used intravenous drugs. However, one woman had a sexual partner from Central Africa, and serum taken at the time of the rape was not stored, so HIV infection could not be definitely attributed to the assault.

St. Mary's Hospital recommends that all adult victims of sexual assault be offered HIV testing, reassured that the risk of infection is low, and offered counseling.

In England, an assailant may be asked to supply samples and agree to be tested for sexually transmitted diseases. A refusal may be noted in court.

[Source: S. Murphy, V. Kitchen, J.R.W. Harris, and S.M. Forster. *Rape and subsequent seroconversion to HIV*. British Journal of Medicine.]

### Child Sexual Abuse in Indian Territory

Federal officials have approved a \$10.8 million payout to settle four consolidated lawsuits against the United States over the molestation of 58 Hopi children by a non-Indian teacher with the Bureau of Indian Affairs.

Between the end of 1988 and early this year, the Federal Bureau of Investigation investigated 130 reports of child sexual abuse in Indian territory.

### Reported Rape in the United States on the Rise

According to the FBI, both reported forcible rape and aggravated assault showed a 10% increase in the first six months of 1990. Robbery rose 9% and murder, 8%. Data released on October 21, 1990 showed a decline in all property crimes, with the exception of motor vehicle theft. Geographically, the semiannual Crime Index total was up 3% in the Northeast and 1% in the Midwest, while both the South and West registered a 1% decline.

### Sex Education in Schools

A recent report by the Sex Information and Education Council of the United States indicates more public schools are offering sex education to combat AIDS and teen pregnancy. But, school programs often sidestep sensitive issues such as acquaintance rape, interpersonal relationships, and sex roles. The 36 page report noted that little or no sex education is offered in the early grades.

### News from the National Association of Crime Victim Compensation Boards

In 1990, the Mississippi, Georgia, and Vermont legislatures took action to establish and fund crime victim compensation programs in those states, bringing to 47 the number of states with compensation programs. Mississippi's program will begin paying claims July 1, 1991. South Dakota and Maine remain the only states without crime victim compensation legislation.

In other actions, the Connecticut legislature increased the maximum emergency award from \$500 to \$1,000. (At least 15 states now have maximums of \$1,000 or more.) And, Wisconsin's legislature acted to extend coverage to on-duty police and fire fighters, including counseling for families of those killed in the line of duty.

As of October 1, 1990 states' crime victim compensation programs receiving federal VC/CA funds were required to develop rules to guide them in making awards which avoid the unjust enrichment of offenders. In cases of child abuse and child sexual abuse, the National Association of Crime Victim Boards has recommended that third party payment be used whenever possible, and that states consider establishing trust agreements to guarantee that the award be

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO: CS HB109 (HES)

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  
 Sponsor: Representative Kott Component: Detachments  
 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						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>REVENUE FUND SOURCE:</b>	-0-	-0-	-0-	-0-	-0-	-0-

**FUNDING: (Thousands of Dollars)**

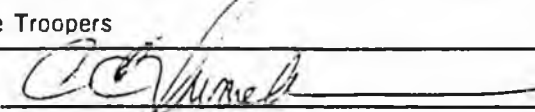
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

**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: 269.5.91  
 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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3/15/93

BRIEFING PAPER  
FOR

CS HOUSE BILL NO. 109 (HES)

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.

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 HB 109 (HES)

Revision Date: \_\_\_\_\_ 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 NO. #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						
<b>TOTAL OPERATING</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**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						
<b>TOTAL</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>

**POSITIONS:**

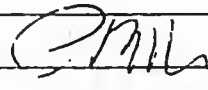
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: None

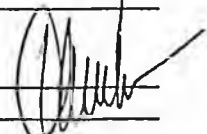
**ANALYSIS:** (Attach a separate page if necessary)

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: 3/16/93

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

Date: 3/16/93

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Revision Date: \_\_\_\_\_

BILL NO. CS HB 109 (HES)

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, .30

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. CS HB109 (HES)

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: Blood tests for persons charged with sex BRU: State Health Services  
offenses Component: Nursing  
 Sponsor: Kott  
 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						
<b>TOTAL OPERATING</b>	<b>45.5</b>	<b>45.5</b>	<b>45.5</b>	<b>45.5</b>	<b>45.5</b>	<b>45.5</b>

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

**FUNDING:**

(Thousands of Dollars)

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						
<b>TOTAL</b>	<b>45.5</b>	<b>45.5</b>	<b>45.5</b>	<b>45.5</b>	<b>45.5</b>	<b>45.5</b>

**POSITIONS:**

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 *P.N.*  
 Division: Division of Public Health

Phone: (907) 465-3090  
 Date: 3/16/93

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

Date: 3/16/93

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Revision Date: \_\_\_\_\_

BILL NO. CS HB109 (HES)

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.

Alaska State Legislature  
House of Representatives

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DURING SESSION:  
STATE CAPITOL  
JUNEAU, AK 99811  
PHONE (907) 465-3777

Representative Pete Kott

MEMORANDUM

DATE: February 22, 1993  
TO: Representative Porter  
Chair, House Judiciary Committee  
FROM: Rep. Pete Kott *Pete*  
RE: Request for hearing  
~~HB 109~~, Blood Tests for Sex Crime Perpetrators

Please schedule HB 109 for a hearing before the House Judiciary 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:

Sectional analysis of the HESS committee substitute  
New sponsor statement  
Letter from Dr. Peter Nakamura  
Chart showing increase in reported rapes in Alaska

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



Alaska State Legislature  
House of Representatives

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Representative Pete Kott  
SPONSOR STATEMENT

HB 109 — HIV Testing for Sex Offenders

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

It is true that the accused has certain rights that also must be protected by the state. The defendant's right to privacy and to due process is an important part of Alaska's judicial process. HB 109 includes several provisions designed to protect the defendant's rights while balancing those rights against the alleged victim's right to know if he or she has been exposed to infection. The following factors should be noted with respect to this concern:

- 1) The test is not automatically required, the victim must petition the court to request the test;
- 2) The court must find probable cause that there was a transfer of bodily fluids;
- 3) The release of information obtained as a result of the test is strictly controlled in that
  - a) only the defendant, the victim, and officials of the defendant's place of incarceration are to receive the test results, except that the Department of Health & Social Services may receive statistical information;
  - b) unauthorized disclosure of test results is strictly prohibited and is defined as a class A misdemeanor; and
  - c) the time period during which the alleged victim may request the test is narrowly defined.

HB 109 also provides that the state must make available to both the victim and the alleged perpetrator counseling relating to HIV and AIDS which is medically appropriate for those persons.

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. Furthermore, the Federal Crime Control Act of 1990 provided that states which do not have a law such as that proposed by HB 109 shall lose part of their law enforcement assistance grants. The loss to Alaska if we fail to pass such a law this year will be 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 find appropriate relief.



Sponsor Statement

**CSHB 109  
SECTIONAL ANALYSIS**

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

Section 1.

Adds new sections to AS 18.15 as follows:

AS 18.15.300

(a) makes a defendant (including a minor) charged with a sexual offense under AS 11.41.410 - 11.41.440 that includes sexual penetration as an element of the crime subject to an order of the court requiring testing for HIV and other communicable diseases.

(b) allows the alleged victim, or the prosecuting attorney on behalf of the alleged victim, to petition the court for an order requiring the defendant to be tested.

(c) requires the court to make a probable cause determination 1) that a crime has taken place under the specified statutes, and 2) that sexual penetration took place. Allows the court to conduct a hearing to receive evidence to make the determinations required under this subsection.

(d) requires the court to order the test if the court finds probable cause that a crime was committed and that sexual penetration took place.

(e) designates the authorized recipients of test results obtained under an order authorized by subsection (c) of this act. Authorized recipients are the defendant, the victim (or the victim's parents or guardian) and the officer in charge and the chief medical officer of the facility in which the defendant is incarcerated.

(f) places time constraints on when the order authorized under (c) of this act

may be filed. The test may not be ordered sooner than seven days after the arrest nor more than 90 days after the defendant has been convicted and sentenced. Additionally, a test may not be ordered after a finding favorable to the defendant.

(g) provides definitions for "disposition favorable to defendant," and "sexual penetration."

#### AS 18.15.310

(a) requires that blood drawn for a test under this act be drawn by licensed medical personnel according to AS 08.64.

(b) requires that testing on blood drawn under provisions of this act be conducted by a licensed medical laboratory and according to accepted medical standards.

(c) requires that positive test results be transmitted to the Department of Health & Social Services.

(d) requires test results to be sent to the designated recipients and requires a disclaimer to be attached to test results.

(e) requires the court to order persons who receive the test results to maintain the confidentiality of personal identifying data related to the tests. Provides certain exceptions to this confidentiality: (1) the defendant, and (2) the victim for such disclosures as are necessary to provide for the victim's own health and the health of the victim's spouse, family and household.

(f) prohibits the test results from being used as evidence in a criminal or juvenile proceeding.

(g) provides civil immunity for persons performing the duties authorized by this act.

(h) if the test results are positive, requires the Department of Health & Social Services to provide free counseling and testing to the victim and counseling to the defendant upon request. Also requires the department to provide referral for the victim to appropriate health care facilities and support services.

(i) defines "AIDS," "counseling," and "HIV." Counseling is defined as providing medically appropriate information including information on the diseases, their treatment and the medical and social implications of the diagnosis and the tests.

#### AS 18.15.320

(a) requires the Department of Health & Social Services to pay for tests ordered under this act.

(b) requires a defendant who is convicted of an offense for which a test was ordered under this act to reimburse the department for the cost of the test. Allows the court to order the Department of Corrections to garnish wages earned in correctional industries to pay for the test.

#### AS 18.15.330

provides that intentional unauthorized disclosure of information restricted by this act constitutes a class A misdemeanor.

#### Section 2.

Provides that the act takes effect immediately according to AS 01.10.070(c).

**HB 109**  
**SECTIONAL ANALYSIS**

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

Section 1.

Adds new sections to AS 18.15 as follows:

AS 18.15.300

(a) makes a defendant (including a minor) charged with a sexual offense under AS 11.41.410 - 11.41.440 subject to an order of the court requiring testing for HIV and other communicable diseases.

(b) allows the alleged victim, or the prosecuting attorney on behalf of the alleged victim, to petition the court for an order requiring the defendant to be tested.

(c) requires the court to conduct a hearing on a petition filed under subsection (b), and requires the court to order the test if the court finds probable cause that a transfer of bodily fluids took place between the defendant and the alleged victim.

(d) designates the authorized recipients of test results obtained under an order authorized by subsection (c) of this act. Authorized recipients are the defendant, the victim (or the victim's parents or guardian) and the officer in charge and the chief medical officer of the facility in which the defendant is incarcerated.

(e) places time constraints on when the order authorized under (c) of this act may be filed. The test may not be ordered sooner than seven days after the arrest nor more than 90 days after the defendant has been convicted and sentenced. Additionally, a test may not be ordered after a finding favorable to the defendant.

*Sectional Analysis*

AS 18.15.310

(a) requires that blood drawn for a test under this act be drawn by licensed medical personnel according to AS 08.64.

(b) requires that testing on blood drawn under provisions of this act be conducted by a licensed medical laboratory and according to accepted medical standards.

(c) requires that positive test results be transmitted to the Department of Health & Social Services.

(d) requires test results to be sent to the designated recipients and requires a disclaimer to be attached to test results.

(e) requires the court to order persons who receive the test results to maintain the confidentiality of personal identifying data related to the tests. Provides certain exceptions to this confidentiality: (1) the defendant, and (2) the victim for such disclosures as are necessary to provide for the victim's own health and the health of the victim's spouse, family and household.

(f) prohibits the test results from being used as evidence in a criminal or juvenile proceeding.

(g) provides civil immunity for persons performing the duties authorized by this act.

(h), if the test results are positive, requires the Department of Health & Social Services to provide counseling and testing to the victim; and counseling to the defendant upon request. Further provides that the Department's duty to provide counseling is satisfied if the Department delivers to the victim and the defendant a brochure containing the relevant information, and refers the defendant and victim to the Department for further information.

(i) defines "AIDS" and "counseling." Counseling is defined as providing medically appropriate information including information on the diseases, their treatment and the medical and social implications of the diagnosis and the tests.

AS 18.15.320

(a) requires the Department of Health & Social Services to pay for a test ordered under this act.

(b) requires a defendant who is convicted of an offense for which a test was ordered under this act to reimburse the Department for the cost of the test. Allows the court to order the Department of Corrections to garnish wages earned in correctional industries to pay for the test.

AS 18.15.330

provides that intentional unauthorized disclosure of information restricted by this act constitutes a class A misdemeanor.

AS 18.15.350

provides definitions of terms essential to the act.

Section 2.

Provides that the act takes effect immediately according to AS 01.10.070(c).

Sponsor Amendments to  
CS for HB 109(HES)

Offered in House Judiciary  
March 17, 1993

**Amendment 1:**

*p. 1, l. 7, after "indictment," add "presentment,"*

*p. 1, l. 12, after "indictment," add "presentment,"*

*p. 1, l. 14, after "indictment," add "presentment,"*

**Explanation:**

Article I, section 8 of the Alaska constitution provides that a grand jury may file charges by presentment or indictment. The difference between the two is that presentment is brought from the grand jury's own knowledge or observation without a bill of indictment being laid before it by the government prosecutor. Though presentment is rarely used in Alaska, it is provided for in our constitution. It therefore seems advisable to include it in the bill presently before us.

**Amendment 2:**

*p. 2, l. 1, after "guardian" delete comma and add "of an alleged victim who is a minor or incompetent,"*

**Explanation:**

When the bill was amended in HESS, an agreement was reached between the sponsor and the Department of Law to reword this part of the bill. Part of that agreement included adding this provision for the parent or guardian being able to request the test. The intent of that addition was to cover those situations in which a minor or incompetent person was the victim. As the bill now reads, however, it would seem to allow the parent of an emancipated adult to file a petition. The suggested amendment more accurately reflects the sponsor's intent, and brings the language of proposed AS 18.15.300(b) into line with AS 18.15.300(e) [see p. 2, l. 16 & 17].

**Amendment 3:**

*p. 2, l. 8, after "may rely" add "exclusively"*

**Explanation:**

This amendment is brought at the request of the Department of Law. They would like the language of the bill to indicate clearly that if the court deems probable cause to be adequately demonstrated at the grand jury proceedings or in a preliminary hearing, the court may proceed without an additional hearing.

**Amendment 4:**

*p. 3, l. 31, after "immediate family," delete "or"*

*p. 4, l. 1, delete the period and add ", or a person in a dating, courtship, or engagement relationship with the victim."*

**Explanation:**

This amendment is brought at the request of the Network on Domestic Violence and Sexual Assault. The existing language of the bill may work well for a victim who is a married woman or one living with a family. But what if the victim lives alone, or is not married, but engaged? This change borrows language from the domestic violence statutes, and closes these potential gaps.

Changes to HB 109 reflected in  
the blank Committee Substitute  
presented to the Committee on  
February 16, 1993

*Line numbers refer to the original bill.*

- p.1, l.7 adds "indictment, or information" to include the various forms of initiating a felony prosecution.
- p.1, l.8&9 uses more specific language denoting the acts for which the bill allows a petition to be initiated.
- This change is to ensure that the statute as amended by HB 109 conforms to Federal guidelines set forth in the Crime Control Act of 1990.*
- p.2, l.1-6 requires the court to find probable cause that a crime has been committed under the statutes cited in (a); and that probable cause exists that the crime included sexual penetration as defined in AS 11.81.900(b)(54).
- adds a new subsection (d) which requires the court to order a blood test on a defendant if probable cause is found as required in (c).
- This change is to ensure that the statute as amended by this bill conforms to the Federal guidelines set forth in the Crime Control Act of 1990.*
- p.2, l.7 renumbers this subsection (e); and substitutes "provided" for "sent."
- p.2, l.16 renumbers this subsection (f).
- p.2, l.22 adds a new subsection (g) providing a definition of "disposition favorable to defendant." In the original version, this was found on p.5, l.3.
- p.2, l.24 adds "registered physician assistant" to the list of those authorized to draw blood for the purposes of this section.
- This change was requested by the Department of Corrections.*
- p.3, l.4 substitutes "provided" for "sent."
- p.3, l.30 deletes the sentence which begins, "If the department delivers a brochure . . ." Adds a sentence which provides for "referral to appropriate health care facilities and support services at the request of the victim."
- p.4, l.5&6 substitutes "HIV symptomatic disease" for "AIDS-related complex."
- p.4, l.7 adds a subsection containing the definition of "HIV." In the original version, this was found on p.5, l.9.

Bill No. HB 109  
Bill No.\*\*\*AST

Date: February 12, 1993

Contact: Joanne F. Lopez  
Executive Director  
CDVSA

**DRAFT**

**Title:** An Act relating to  
blood test 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 supports the concept in HB 109 to test at the time of the arrest and strongly recommends that the testing be conducted once probable cause for a violation in AS 11.41.410 - 11.41.440 has been established. If testing is postponed until after conviction, it take as long as two years to obtain this crucial information.

The Council recommends that the victim not be put through a legal procedure in order to force the blood test of the offender. To do so would re-victimization the victim which is unacceptable. Prosecutors would likely not force the blood testing issue if this were the case in order to save the victim this additional distress since the victim will be needed for testimony in the actual assault litigation.

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

**POSITION PAPER - Council on Domestic Violence & Sexual Assault**

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.

Since there is a stigma involved with this condition, the Council suggests to consider protecting the confidentiality of HIV positive individuals, and suggests the court be required to order all parties to keep the information confidential.

---

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

*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. Tyndall*  
*Barbara B. Tyndall*  
*Chair*

# STATE OF ALASKA

## DEPT. OF HEALTH AND SOCIAL SERVICES

DIVISION OF PUBLIC HEALTH  
SECTION OF EPIDEMIOLOGY

3601 "C" STREET, SUITE 576  
P.O. BOX 240249  
ANCHORAGE, ALASKA 99524-0249

WALTER J. HICKEL, GOVERNOR

INFECTIOUS DISEASES  
AIDS/STD  
TUBERCULOSIS  
IMMUNIZATION  
CHRONIC DISEASES  
DIABETES  
INJURY CONTROL

561-4406

February 8, 1993

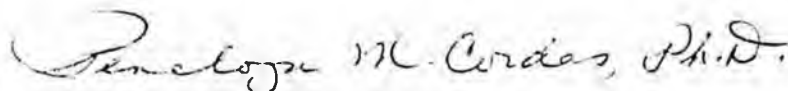
Representative Brian Porter  
State Capitol, Room 118  
Juneau, AK 99801-1182

Dear Representative Porter:

Per your request, enclosed are materials related to HB 109 on the issue of mandatory HIV testing of persons charged with sexual offenses.

If our office can be of further assistance, please call.

Sincerely,



Penelope M. Cordes, Ph.D.  
AIDS/STD Program

Enclosure

# STATE OF ALASKA

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WALTER J. HICKEL, GOVERNOR

INFECTIOUS DISEASES  
AIDS/STD  
TUBERCULOSIS  
IMMUNIZATION  
CHRONIC DISEASES  
DIABETES  
INJURY CONTROL

561-4406

### TECHNICAL ISSUES CONCERNING HOUSE BILL NO. 109

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

#### Summary

HB 109 provides for court ordered serologic testing for HIV and other communicable diseases of: (a) defendants charged with sexual assault; and (b) minors for whom a petition is filed alleging sexual assault.

HB 109 provides for notification of the results of such tests to:

(a) the defendant or minor; (b) the alleged victim, designee, or parent/guardian of a minor; and (c) the officer in charge and chief medical officer of the facility in which the defendant or minor is incarcerated or detained.

#### Discussion

The implied purpose of HB 109 is to obtain information related to an alleged sexual assault perpetrator's infectious disease status, especially HIV infection, and convey this information to alleged victims so that they may take measures to preserve their health and be spared groundless fear. The intended benefits to the victim cannot be achieved through mandatory serologic testing of the alleged perpetrator as proposed by HB 109.

**Testing of the perpetrator will not give the victim information about her/his own health status and will not preclude the need for the victim to receive counseling and testing for sexually transmitted disease including HIV for the following reasons:**

- If the suspect tests negative for HIV antibodies, it is not conclusive proof that the suspect is free of HIV infection. A person who is recently infected may not develop detectable HIV antibodies (seroconvert) for up to 6 months. Seroconversion for Hepatitis B ranges from two weeks to 6-9 months. Serologic testing for syphilis may also result in a false negative, i.e., the person is infected but it is not detected by the blood test.

- If the suspect tests positive for HIV antibodies, this does not give any information on the HIV status of the victim. The risk of transmission of HIV through sexual assault is not known. There has been one documented case of HIV transmission following a rape. There are anecdotal reports of victims of rape who are HIV positive, but the source of their HIV infection is not known. The theoretical risk of transmission of HIV from one episode of heterosexual intercourse is estimated to range from 1 in 100 to 1 in 1,000. While HIV can be transmitted in a single exposure, studies have shown that persons have remained uninfected despite multiple exposures over a prolonged period of time. Similarly, if the suspect tests positive for syphilis or Hepatitis B, this does not mean that the victim has been infected. Transmission depends on the stage of the illness in the source person and factors specific to the person exposed.

Thus, individualized counseling services for the victim regarding risks, safer sex, testing, and referrals for emotional support and medical care must be provided in order for the victim to know her/his own status, to make decisions about health care, and to cope with the trauma of assault. Reliance on perpetrator testing exaggerates the benefits of testing the source person and detracts attention from the counseling and medical needs of the victim.

Regardless of knowledge of the alleged perpetrator's HIV status, the victim should be counseled about baseline HIV testing to establish for the victim her/his HIV status before the assault, and retesting at intervals up to 6 month post-exposure to cover the "window period", i.e., the time from infection to seroconversion.

There is presently no cure for HIV disease nor treatment during the acute and early asymptomatic stages. Prophylactic use of AZT following a significant exposure to HIV in a health care setting is experimental and has not been proven effective in humans. Prophylaxis must begin within 24 hours of exposure. With currently available technology, reliable HIV test results on an alleged perpetrator would not be available within this time frame to assist a victim in making a decision about initiating prophylaxis.

Section 18.15.310(c) states that "copies of test results that indicate exposure to or infection by HIV or other communicable diseases shall also be transmitted to the department". This section needs clarification. To which department does this refer and what is the justification? HIV is not a reportable disease in Alaska. Disclosure of test results should be strictly limited to as few specifically designated persons as possible. The greater the number of persons with access to confidential information, the greater the possibility of breach of confidentiality and liability.

HB 109 goes beyond requirements of the federal Crime Control Act of 1990 which requires that states enact legislation for court ordered HIV testing of persons convicted of a sexual assault, or else lose 10% of their federal funding for public safety. Mandating HIV testing on persons charged with a sexual offense means performing an invasive medical procedure (phlebotomy), without consent, on a person whose guilt has yet to be determined. Challenges to the constitutionality of mandatory testing of either charged or convicted sexual offenders, and the attendant legal costs, should be anticipated.

The Section of Epidemiology has, in the past, opposed legislation similar to H.B. 109. These types of bills: provide no benefit in disease prevention nor dependable relief of fear and anxiety for victims of sexual assault; potentially infringe upon constitutionally protected rights to privacy; and deflect resources away from more appropriate medical and emotional supports for victims of sexual assault.

#### Problems with the language of certain sections of HB 109

Section 18.15.300(c): Delete reference to saliva and "other bodily fluids". Sexual transmission can occur through infected blood, semen, and vaginal secretions. Saliva and other external bodily fluids including sweat, vomitus, tears, urine, feces, and nasal secretions do not transmit HIV.

Section 18.15.300(e)(1): It is not clear what the reason is for this stipulation. There is no medical justification for a 7 day delay in testing.

Universally change "communicable" to "sexually transmitted disease" since the bill is for detection of diseases transmitted through a sexual assault.

Section 18.15.310(e): delete "immediate family, or persons occupying the same household as the victim." This phrase implies erroneously that these persons are at risk of acquiring HIV infection from the victim. HIV is not transmitted by non-sexual, family and household contact.

Section 18.15.310(h): The delivery of a brochure on HIV and AIDS to a person just informed of an HIV positive test result is an absolutely inappropriate way to discharge the professional and moral responsibility to counsel a patient receiving a positive HIV test result and it would violate the policy on HIV post-test counseling and the standard of practice as established by the A.A.A. and other professional bodies.

Section 18.15.310(h)(i1): delete "or AIDS related complex". HIV symptomatic disease is the term currently used to refer to the stage of the illness formerly referred to as AIDS related complex.

Vol 7 #5 Mar 19, 1992

ously underestimated." The study was conducted in Kigali, Rwanda. WHO's clinical definition of AIDS requires an HIV-positive patient to have at least two major and one minor symptom of the disease over the last year. Dr. Christina P. Lindan, a UCSF researcher and lead author of the study, published in the Feb. 16 issue of the *Annals of Internal Medicine*, said that based on the study, the true number of HIV-related deaths — among both males and females — in the central African country may be two to three times the 2,056 deaths officially reported by Rwanda in 1990. □

### Criminal Transmission

## Testing Sex Offenders for HIV Can Create Dilemma, Group Says

State legislators are faced with a dilemma when considering the issue of HIV testing of offenders in sexual assault cases, according to a report from the National Conference of State Legislatures.

"Legislators may want to consult with legal counsel, rape victim assistance groups, other relevant community organizations, and public health personnel when considering appropriate responses," said a report of the organization.

"Testing Sex Offenders for HIV," made public March 6, 1991

The legal and practical considerations of testing must be confronted, while remembering that other options to legislation also exist, NCSL said. The group noted that as of last May, 23 states had approved laws concerning HIV testing of sexual offenders, and that some 70 bills were being considered in 26 states during the 1991 legislative sessions.

In the United States, an average of some 155,000 women annually have reported being raped, NCSL said. While they suffer physical and emotional trauma, the group said, "when the fear of being infected with [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."

A 1990 federal law, NCSL said, pressures states to require HIV testing of convicted sex offenders at the victim's request or lose 10 percent of their victim's assistance funding [although the stipulation does not go into effect until fiscal 1995].

### A Task of Balancing

"The states have the task of balancing the rights of victims and defendants," the report said.

Among practical considerations of HIV testing, NCSL said, is the risk of transmission of HIV from a single assault — "at most a 1-in-500 chance . . . from a single male-to-female exposure if the male is infected." Other practical considerations, the group said, are the cost and reliability of HIV tests and the usefulness of testing.

"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," NCSL said, adding that the victim also might request AZT treatment, which may delay the progression from HIV infection to AIDS.

But, NCSL said, time is also an issue and that "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."

### Legal Considerations

Regarding legal considerations, NCSL said that "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."

An HIV test is a "search" under federal law and requires a balancing test between the government's need to conduct the search and the invasion which the search entails, NCSL said.

Privacy is another legal consideration, NCSL said, adding that "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."

Among "other options," the group said, are "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."

Copies of the report are available for \$5, plus \$3 for shipping and handling, from the NCSL Book Order Department, 1560 Broadway, Suite 700, Denver, Colo. 80202; (303) 830-2200. □

EXHIBIT 5

**MANDATORY/AUTHORIZED HIV TESTING FOLLOWING CERTAIN OFFENSES**

FOR SEX OFFENSES FOLLOWING ARREST	FOR SEX OFFENSES FOLLOWING CONVICTION	FOR SEX OFFENSES FOLLOWING A GUILTY PLEA	FOR SEX OFFENSES NOT SPECIFIED	FOR DRUG OFFENSES
Arkansas Florida Nevada Ohio Oklahoma South Dakota Tennessee	California Colorado Florida Illinois Indiana Kansas Maine Michigan Texas	Georgia Maryland	Idaho Iowa Louisiana Minnesota Wyoming	Idaho Illinois Indiana

**MANDATORY/AUTHORIZED HIV TESTING FOR INSTITUTIONALIZED POPULATION**

FOR MENTAL INSTITUTIONS	FOR PRISONS		
Missouri Texas Wisconsin	Alabama Arizona Colorado Connecticut Delaware Florida Georgia Idaho	Illinois Iowa Kentucky Maryland Michigan Missouri Montana Nevada	North Dakota Ohio Rhode Island South Carolina Texas Utah Wyoming

**HIV TESTING WITHOUT CONSENT**

FOLLOWING A SIGNIFICANT EXPOSURE IN A HEALTH CARE SETTING	FOLLOWING A SIGNIFICANT EXPOSURE IF BLOOD SAMPLE PREVIOUS AVAILABLE	IN A MEDICAL EMERGENCY OR WHEN MEDICALLY INDICATED
Arkansas Colorado Delaware Florida Hawaii Idaho Iowa Illinois Maine Michigan	Missouri Nebraska New Mexico Ohio Oregon Texas Washington West Virginia Wisconsin	Connecticut Louisiana Montana Pennsylvania Rhode Island Wyoming
		Arkansas Connecticut Delaware Hawaii Idaho Iowa Kentucky Montana
		New Hampshire New Mexico North Carolina Ohio Pennsylvania Rhode Island West Virginia

Source: AIDS Policy Center, Intergovernmental Health Policy project

HIV testing. Historically, such tests have been voluntary and in most states, written informed consent prior to testing is required. There have always been exceptions, however — most notably in the areas of blood and organ donations, as well as in medical emergencies. As policy in this area has evolved, non-voluntary HIV testing, particularly among institutionalized populations, has increased.

Non-voluntary HIV testing can be classified in two ways. First, there are some state laws that

mandate/require/authorize testing based on an individual's specific behavior. Second, there are laws that provide for testing without consent under certain conditions.

**WHICH STATES REQUIRE HIV TESTS FOR INJECTION DRUG USERS ?(EXHIBIT 5)**

Mandatory HIV testing of people convicted of drug offenders is specially prohibited in California. By way of contrast, Idaho and Indiana mandate testing for anyone convicted of drug-related charges; and Illinois

mandates it for all inmates who have a history of injection drug use, before they can be released from prison; and Indiana requires anyone convicted of a drug offense take an HIV test.

**WHICH STATES REQUIRE HIV TESTS FOR SEX OFFENDERS? (EXHIBIT 5)**

Another group that has been targeted for mandatory HIV testing is sex offenders. Often, laws are different for prostitutes and

See From Our Files page 8

## From Our Files (from pg. 7)

for other sex offenders. Also, a distinction is frequently made between people who have been arrested — as opposed to convicted — of a sexual offense.

Twelve states mandate HIV testing for individuals convicted of any sexual offense (CA, CO, IL, IN, MI, ND, OR, RI, SC, VA, WA, WV). Florida distinguishes between prostitution and other sexual offenses: testing is mandatory for prostitutes who have been convicted, but for sex offenses where there has been a transfer of body fluids, it is mandatory when a person is charged with such an offense. In Tennessee, testing is mandatory for a person arrested for prostitution; in Nevada and Ohio, it is mandatory upon arrest for any sexual offense. HIV testing is also mandated for sexual offenses in Iowa and Minnesota, and in Georgia and Maryland, if the person pleads guilty to the offense.

Several states authorize HIV testing after an arrest for a sexual offense (Arkansas, Michigan, Oklahoma, and South Dakota) or upon conviction (Kansas, Maine, Michigan, and Texas). In Louisiana and Wyoming HIV testing is authorized for sex offenses, no distinction is made between arrest and conviction.

Mandatory testing for prisoners is required in 23 states. In some cases, simply being

incarcerated is sufficient to authorize or mandate HIV testing. In others, testing is mandated in specific circumstances, or when a physician or prison official believes it to be necessary. Three states (Missouri, Texas and Wisconsin) mandate testing for individuals in mental institutions, while in Oregon and West Virginia, the courts can act on a patient's petition and mandate testing for a health care worker in cases where there has been a significant exposure to body fluids.

### WHICH STATES HAVE HIV TESTING WITHOUT CONSENT FOLLOWING A SIGNIFICANT EXPOSURE? (EXHIBIT 5)

States that allow HIV testing without consent under certain circumstances have tended to target their laws on notification and exposure in the workplace — particularly in medical settings.

For example: In cases where health care workers or emergency personnel have been significantly exposed to a patient's blood, HIV testing without consent is authorized in 15 states (AR, CO, DE, FL, HA, ID, IA, IL, MI, MO, NE, NM, TX, WV, WI). If there is already a sample of the potential source patient's blood available for testing, testing without consent may proceed following a significant exposure in six states (CT, LA, MT, PA, RI, WY). And if, following a significant exposure, the potential source patient refuses consent for HIV testing, the

court can require HIV testing in four states (ME, OH, OR, WA).

HIV testing without consent is also allowed in several states in medical emergencies, if the test is needed for diagnostic or treatment purposes, or if there is a threat to public health. If consent cannot be obtained because the patient is unable or unwilling, and if no agent of the patient is available to provide consent, testing will be done without consent in 16 states (AR, CT, DE, HA, ID, IA, KY, MI, MT, NH, NM, NC, OH, PA, RI, WV).

Consent for testing is implied when a patient has entered into medical treatment if: a physician determines a test is needed because the patient is at high risk for HIV and there is medical need (Alabama); HIV status is needed for further medical treatment (Arkansas); in the physician's judgment the test is medically needed (Illinois); or the test is necessary for diagnosis or treatment (Indiana). West Virginia allow testing without consent if a physician has cause to believe the test would be positive and knowledge of the patient's HIV status is medically necessary. And in Louisiana, consent is not required when in the medical opinion of the physician requesting it would be contraindicated, or in cases involving a child's medical treatment.

— Kate Cauley

## INTERGOVERNMENTAL HEALTH POLICY PROJECT

Intergovernmental AIDS Reports is published six times a year by the AIDS Policy Center at the George Washington University Intergovernmental Health Policy Project. Its objective is to report on significant and exemplary AIDS-related program and policy initiatives occurring within state, county and municipal governments nationwide, and to review legislative and policy developments at the federal level which have an impact on the states. Important policy research findings, as well as interviews with state and local policymakers, will also be featured.

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## Mandatory HIV testing for sex offenders Helping or further harming rape victims?

The possibility that a rapist infected with HIV will transmit the deadly virus to his victims has emerged as one of the most frightening aspects of the AIDS epidemic. As the Presidential Commission on the HIV Epidemic noted in its 1988 report, it has "added a new and disturbing specter" to the problems faced by sexual assault victims. Indeed, several studies have documented that women are both aware of and concerned about the risks of contracting AIDS or the virus that causes it as a result of being raped.

Last November, in an effort to address the concerns of rape victims who may be exposed to HIV, Congress passed the Martin Amendment to the Comprehensive Crime Control Act of 1990. Sponsored by former Rep. Lynn Martin, (R-IL), the amendment stipulates that states will lose 10 percent of their victim assistance funds if they do not mandate HIV testing for a convicted sex offender at the rape victim's request. It also requires that test results be disclosed to the victim and the convicted defendant. According to Martin, the amendment is important to ensure that rape victims do not have to live in fear that a rapist may have exposed them to HIV infection.

Even before the federal amendment was passed, nearly half the states had laws on the books mandating or allowing HIV testing for convicted sex offenders (or in some cases, individuals charged or arrested for a sexual offense) and providing for the subsequent disclosure of test results to the victim. As of May 6, more than 70 sex offender-rape victim related bills had been proposed in 26 states. (See Box, Sex Offenders).

### RAPE AND HIV TRANSMISSION

The risk of contracting HIV from a rapist depends on several factors, the most obvious of which is whether the assailant is himself infected with HIV. According to studies reported in the *Journal of Interpersonal Violence* and the *Journal of Emergency Nursing* in 1990, other factors include the number of assailants, the size of the inoculum per exposure and the number of exposures, the virulence of the viral strain, the kind of assault (vaginal, anal or oral) and the victim's susceptibility to infection.

Statistics documenting heterosexual transmission of the virus serve as a basis from which to hypothesize the rate of HIV transmission from rape. Several studies calculate the per contact infectivity for male-to-female HIV transmission at less than or equal to 0.2 percent. If, as the Centers for Disease Control has said, local trauma that dissolves mucosal barriers to infection may increase a woman's risk of infection, the potential for a rapist with HIV to infect his victim is estimated to be greater than 0.2 percent.

### TO TEST OR NOT: DEBATING MANDATORY HIV TESTING FOR SEX OFFENDERS

At first glance, the proposal to have convicted sex offenders undergo mandatory HIV testing and disclose the test results to the victim seems understandable and just. The issue is, however, complex and controversial, even among victims' rights organizations and women's groups advocating for rape victim-focused policies.

### Arguments Supporting Mandatory Testing

Advocates of mandatory testing assert that the right of rape victims to know a convicted, and in some cases charged, offender's HIV status supersedes the offender's right to privacy. Florida's 1990 sex offender testing law — one of the nation's most stringent — declares, for example, that victims of sexual offenses are entitled to know at the earliest possible opportunity whether the person charged with the crime has tested positive for HIV. According to Pat Gleason, general counsel in the Florida Attorney General's Office, a key supporter of the law, "The Attorney General felt that it was inequitable that rape victims would not be able to get access to a convicted or charged offender's test results."

In the view of Mary Ann Largen, executive director of the National Network for Victims of Sexual Assault (NNVSA), mandatory testing accomplishes two goals: (1) it prevents convicted offenders from abusing the criminal justice system by bargaining for a lighter sentence if they volunteer to be tested; and (2) it provides a woman who has contracted HIV infection from a rape with

evidence, should she wish to bring a civil suit against a convicted rapist. Largen acknowledges that mandatory HIV testing for convicted rapists does not preclude the need for victims to be tested for the virus as well.

Other supporters of mandatory testing for sex offenders contend — as does a 1991 Georgia law — that testing and disclosing test results are important to a victim's "psychological and physical well-being." Finally, some proponents posit simply that if an offender's blood is already available to be tested for evidence of other STDs, it might as well be tested for HIV so that the victim can act, if need be, to protect her own health.

### Arguments Against Mandatory Testing

Critics of mandatory testing say that by focusing on the offender, these laws divert attention from the psychological, medical and financial needs of rape victims. In their view, victims' interests would be better served through victim-focused services such as free anonymous HIV testing, counseling and early intervention.

Opponents counter many of the arguments made by mandatory testing supporters. They argue, for example, that mandatory testing for sex offenders does not provide victims with timely and reliable information about the risks of infection. Because of the potential for false test results and the delay in antibody formation (anywhere from three to six months), the American Public Health Association (APHA) says that relying on an offender's HIV test results may not be the appropriate standard of care for rape victims. Rather, the APHA recommends that victims be encouraged to seek HIV testing and counseling as soon as medically indicated, so that they may benefit from appropriate medical attention if they have become infected. Despite the lack of data regarding the efficacy of using AZT prophylactically, some medical experts recommend administering the AIDS drug within 48 hours of potential exposure. Thus, time is critical for a victim who chooses to take AZT after being raped.

Opponents also argue that mandatory testing is a misdirected and unrealistic ap-

proach to addressing the needs of rape victims. Susan Mooney of the National Coalition Against Sexual Assault (NCASA) notes that only one in ten rapes is reported to the criminal justice system and only 5 percent of rapes result in conviction. Laws that mandate HIV testing of rapists as a means of protecting the rights of victims, she contends, do not address the medical or psychological needs of the majority of individuals who are raped but do not report the assault to law enforcement authorities.

Marian Rosenberg, a former cooperating attorney at Lambda Legal Defense and Education Fund Inc., argues that mandatory testing misleads victims and in fact, provides no useful information to help them assess their needs for medical attention or civil restitution. Moreover, she notes, because the waiting period for convictions can range from six months to three years, rape victims who are eager to know their assailant's HIV test results are more likely to agree to requests to plea bargain for reduced charges or sentences in order to receive more timely test results.

Noting that empowerment is integral to psychological recovery from rape, rape crisis counselors assert that empowerment is best facilitated by restoring the victim's control over decisions about her life including if, when and how (anonymously or confidentially) she will be tested for HIV — not by making her psychological recovery contingent on the test results of her offender.

Finally, countering assertions that HIV testing should be treated like STD testing, Elizabeth Cooper, staff attorney of the American Civil Liberties Union (ACLU) AIDS Project, said that HIV is unique and distinguishable from other STDs in two important ways: (1) unlike STDs such as gonorrhea, chlamydia and syphilis, which are treatable, HIV is still incurable, and (2) HIV infection and AIDS are highly stigmatized diseases that can trigger discrimination on the basis of actual or perceived status.

## RESPONDING TO RAPE AND HIV INFECTION: STATE LAWS FROM 1986 TO 1991

At least 24 states have moved to regulate HIV testing for alleged or convicted rapists and to disclose test results to rape victims. In the main, the laws mandate or

allow alleged or convicted offenders to be tested if: (1) the crime involves transmission of body fluids from one person to another; (2) a court determines that the offender may have significantly exposed the victim to HIV infection; or (3) the victim requests that the convicted sex offender be tested for HIV infection.

## Testing Alleged and Convicted Sex Offenders

Presently, ten states (CA, FL, IL, IN, ND, OR, SC, TN, VA and WV) mandate HIV testing for convicted sex offenders, and four others (KS, MI, TX and WA) allow a court to order testing.

Mandating HIV testing for people who have been arrested but not yet tried and

## 1991 HIV/AIDS bills for sex offenders

Mandatory HIV testing for convicted, and in some cases charged, sex offenders, continues to be the major focus of state AIDS legislation. As of May 10, 70 sex offender testing bills had been introduced in 26 states, making it the most visible AIDS issue of the 1991 sessions. The bills can be categorized as follows:

### MANDATORY TESTING FOR CONVICTED SEX OFFENDERS

o Legislation introduced in AL, CT, DE, IA, MD, MA, MS, NH, NJ, PA, SD, TX, VT and WI would mandate HIV testing for convicted rapists. All of the bills allow a rape victim to be notified of a convicted offender's HIV test results.

### TESTING INDIVIDUALS ARRESTED FOR SEXUAL OFFENSES

o Bills in AR, DE, GA, HI, MD, MT, NJ, NY, OK, SC and WA would mandate or allow HIV testing for individuals arrested for sexual offenses. Maryland's bill requires that the defendant's blood sample to be destroyed if he is not convicted of rape. Four states (IL, MD, SC and SD) allow rape victims to request that a charged or arrested defendant be tested for HIV infection and allow the test results to be disclosed to the victim. Bills in New York and Oklahoma allow for the notification of a rape victim of the test results if she requests it.

o Legislation in Delaware and New Jersey would allow individuals arrested for sexual offenses to be tested for HIV voluntarily. For defendants who object to testing in Delaware, a judge would decide whether the test is to be performed.

o An Indiana bill would mandate HIV testing for individuals arrested for rape if the victim becomes pregnant as a result of the rape.

### HIV COUNSELING FOR RAPE VICTIMS

o Bills in five states (AL, AR, GA, PA and SC) mandate providing rape victims with "appropriate" counseling upon disclosure of a tested individual's test results.

o A Maryland measure requires institutions or physicians treating rape victims to inform them of anonymous HIV testing sites and counseling centers. A New Jersey bill requires the Commissioner of Health to develop a testing program for rape victims and a counseling program for victims who test positive for HIV infection.

### PAYING FOR HIV TESTING AND COUNSELING FOR RAPE VICTIMS

o A bill in New York amends existing law to include exposure to HIV within the definition of "out-of-pocket loss" for compensating rape victims for the costs of testing, counseling and prophylactic treatment prescribed by a physician. Legislation introduced in South Dakota pays for voluntary HIV testing for rape victims if the rape has been reported to the state.

### CRIMINAL RECORDS AND PROCEEDINGS

o Bills in Iowa and New Jersey provide that a convicted rapist's positive test results will become part of his criminal history record. Iowa's bill would allow this information to be considered in sentencing. A bill in Georgia would allow the court ordering the arrested individual's HIV test to make the report a part of the criminal record and consider it in granting bail and imposing a sentence, though the report would be confidential. A South Dakota bill would prohibit a defendant's test results from being used to establish his guilt or innocence of the crime. And a Vermont bill would allow the fact that a defendant has been voluntarily tested for HIV to be admissible in sentencing if he has been convicted of the offense.

convicted of a crime raises serious legal and constitutional questions. According to the ACLU's Cooper, the constitutional questions include violations of the presumption of innocence until proven guilty; rights to unwarranted search and seizure; and rights to privacy. As an alternative to mandatory testing, the APHA has proposed that HIV testing should be offered to individuals arrested for sex offenses since their behaviors may place them at high risk for HIV/AIDS.

Despite concerns about constitutionality, four states (CO, FL, NV and OH) — mandate HIV testing for individuals charged or arrested for a sexual offense under specified circumstances, and six others (AR, GA, ID, MI, TX and VA) allow such testing. Individuals arrested in Arizona must consent to testing and release of test results before HIV testing may be performed.

### **Regulating the Use of Confidentially Disclosed Information**

Under most state laws, confidentiality provisions prohibit HIV test results from being disclosed to anyone other than the offender himself, the rape victim (or her parents or legal guardian if she is a minor) and designated authorities such as local health or corrections officials. Five states further regulate the use of confidential information. California's law, for example, allows victims to disclose test results as deemed necessary — such as in a civil proceeding — but prohibits the results from being used in criminal proceedings. Four other states — FL, GA, OH and TX — prohibit the fact that the test was performed or the results to be disclosed in criminal proceedings.

### **HIV/STD Counseling and Testing for Rape Victims**

Nine states (AR, CA, FL, GA, IL, IN, KS, MI and MN) mandate HIV counseling for rape victims upon disclosure of the offender's HIV test results. This means that rape victims must wait until the offender, assuming that he is charged or arrested, is convicted and tested before the victims would receive counseling.

Only California has legislated counseling for rape victims unrelated to the disclosure of an offender's HIV test results. Under the law, county health officers must establish counseling programs for sexual offense victims who choose to be tested for HIV

infection. California and Minnesota also require that rape victims be notified about the risks of HIV exposure. California's Health Department has been directed to develop a brochure about exposure to HIV infection for rape victims, while Minnesota's law requires hospitals to provide written notice about STDs to anyone receiving medical services who reports or shows evidence of a sexual assault.

No states provide HIV testing for a rape victim or reimburse a victim for the costs of testing except Missouri, where the Health Department pays for testing if the convicted sex offender tests positive for HIV.

### **ANALYZING SEX OFFENDER TESTING LEGISLATION**

The frequency with which states have passed and continue to introduce sex offender testing legislation suggests that this legislation may be more of an emotional response to a very sensitive and complex issue, rather than a rational or carefully researched response. According to Lisa McGiffert, Legislative Coordinator of the Texas Senate Committee on Health and Human Services, Texas' 1987 law — the first to allow a rape victim to request that an accused offender be tested for HIV infection — was the result of a specific incident brought to a Senator's attention in which a rape victim in Fort Worth, Texas was prohibited from requesting that an alleged rapist be tested for HIV infection. The bill, which was discussed on the House floor was added as an amendment to the state's Penal Code but was never the subject of a legislative hearing or staff analysis.

In formulating Arizona's 1990 victim's rights and sex offender testing law, Jan Kenney, former co-chair of Arizona's Governor's Task Force on AIDS, cautions that it was important to have thoroughly researched the ramifications for rape victims of testing sex offenders for HIV before presenting the issue to the legislature. Kenney notes that involving state policymakers and community groups such as victims' rights organizations in ongoing debates and discussion on HIV infection and rape was one of the most positive aspects of Arizona's legislative process.

Most policymakers and victims' rights groups agree that laws and policies must

directly address the needs of rape victims but part company over how those needs may best be met. For example, the Center for Women Policy Studies (CWPS) recommends that state and federal laws and policies should develop free, voluntary and anonymous HIV testing and counseling programs and services for rape victims. According to Kathleen Stoll, Director National Resource Center on Women and AIDS, "What good is it for a rape victim to know that a rapist is HIV positive if she cannot afford to pay for her own HIV testing, counseling or medical care?"

However, Largen of the NNVA responds, "I'm not sure that requiring states to pay for a victim's HIV testing is an alternative that might help a rape victim; rather, it may be more harmful in the long run [in terms of a victim's right to privacy]." Largen believes that promulgating proper guidelines for training rape crisis counselors may be a more effective way of addressing the needs of rape victims. Although devoted to the same goal — providing for the best interest of rape victims — Stoll's and Largen's arguments exemplify the complexity of this issue.

Because the issue of rape and HIV infection is complex, states may wish to consider establishing commissions or task forces to develop the most effective way to address the medical, psychological, and financial needs of victims who may contract HIV infection as a result of a sexual assault. A well-balanced approach would, consistent with the 1988 Presidential Commission on the HIV Epidemic's recommendation, consider "both the emotional impact of an assault and the possible exposure to HIV." It would also "balance the rights of the victims to be treated with fairness and dignity with the due process rights of the perpetrators."

The Commission warned, "the victims of sexual assault deserve consideration and must be given attention and support so that they will not be forgotten in the tragedy surrounding the HIV epidemic." Focusing solely on the test results of charged or convicted sex offenders without concomitant focus on rape victim-focused services might in fact succeed in making rape victims the forgotten individuals in the HIV/AIDS epidemic.

by Lisa Bowleg

percent of the cases and IV drug use among heterosexuals, 11 percent. People who had practiced both homosexual risk behaviors and used IV drugs made up 1 percent of cases.

Looking at hospital practices, the survey revealed that 28 Illinois responding hospitals had adopted confidentiality policies for HIV/AIDS patients, 20 had developed specialized treatment policies for PWAs and 26 had policies that dealt specifically with HIV/AIDS infected employees. Twenty-seven of the 34 responding hospitals offered some type of AIDS or HIV-related community education, 25 offered individual counseling and support services and five offered group counseling and support.

### DIVISIONWIDE VARIATIONS

Across Division 4, Indiana hospitals reported treating the smallest number of patients: 99. Wisconsin and Michigan reported treating 107 and 188 respectively. Of the 114 responding hospitals throughout the

division, the average number of PWAs treated per hospital was 14, with Wisconsin representing the low end of the range at six patients per hospital. Hospitals in Michigan reported the highest average days per patient per year (25.5 days) where Indiana reported the lowest (9.2 days). Average length of stay was highest in Michigan (16.1 days), and Ohio claimed lowest average length of stay (12.0 days). Michigan and Wisconsin led Division 4 in terms of hospitals that had developed AIDS specific policies for PWAs. In Indiana, 90 percent of the responding hospitals had developed HIV/AIDS policies for infected employees (See Table 1, pg. 10).

Persons engaged in homosexual risk behavior represented the largest number of infected patients at reporting hospitals in Division 4, although the range — from 50 percent in Indiana to 74 percent in Illinois — was quite broad. Many of Indiana's PWAs (38 percent) were IV drug users, compared

to only 12 percent in Illinois and 15 percent across the division. Throughout Division 4, 3.6 percent of PWAs treated at responding hospitals were either children of or sexual partners of individuals in other risk group categories.

Of the PWAs treated in Ohio and Michigan, 74 percent were white, compared to Michigan and Illinois where half of the PWAs were white. In Michigan, 41 percent of patients were black, compared to 32 percent nationally and 29 percent overall in the North Central Division. Throughout the division, 95 percent of the PWAs were male, with the exception of Michigan, where 13 percent were female (See Table 2, pg. 10).

Intergovernmental AIDS Reports will continue to present NPHHI highlights from the 1988 U.S. Hospital AIDS Survey, focusing on the scope of the epidemic in different Census Divisions and states.

## 1991 legislative initiatives address broad range of issues

Five months into the 1991 legislative sessions, HIV/AIDS-related bills have been introduced in 45 of the 46 states meeting this year. In addition, eight states have revised or amended existing AIDS and HIV-related laws.

The more than 400 bills introduced to date cover a broad range of areas including: testing of sex offenders (26 states); discrimination protections (19); AIDS education and prevention (18); worker notification and exposure (18); victims' access to HIV test results (17); confidentiality (16); HIV reporting requirements (15); criminal penalties for knowingly exposing another person to the virus (14); testing of health care workers (9); exceptions to informed consent (7); testing of prisoners (7); pediatric AIDS (7); testing of blood and organ donations (7); partner notification (6); patient care (5); testing of marriage license applicants (5); AIDS drug reimbursement (4); women and AIDS (4); testing of hospital patients (3); classification of HIV infection (3); and testing of food handlers (2). Single bills introduced address the areas of isolating HIV-infected psychiatric patients, testing newborns, testing immigrants and the availability and distribution of condoms.

### HIGHLIGHTS

Although most of legislation introduced addresses familiar issues, frequently revising or amending already existing law, a number of bills represent significant changes in the public health policy of a state; and some of the bills represent subjects which continue to enjoy legislative introduction but which have not seen passage into law over several legislative sessions.

In Colorado, for instance, where the law now requires HIV reporting with names and identifiers, except at the state's one anonymous test site, pending legislation would exempt individuals involved in research protocols from reporting requirements. The bill would exempt physicians from reporting information on patients involved in medical research studies of HIV treatment or vaccine effectiveness when the study is "an approved research protocol."

A Missouri measure would require the state to establish 12 anonymous test sites. Under current state law, most HIV testing requires reporting with names and identifiers, though there is some opportunity for anonymous testing. The bill would expand the opportunity for anonymous testing and reporting without names or identifiers.

Over the last few years, a number of states have imposed criminal penalties for knowing exposure or transmission of HIV. In 16 states (AL, AK, CO, GA, ID, IL, KY, LI, MD, MI, MO, NV, OH, OK, SC and TX), an HIV-infected person who, through sexual or needle sharing behavior, exposes another person to the virus without mentioning the risk can be found guilty of an infraction, misdemeanor or felony.

A bill pending in Illinois would amend the state's Criminal Code to make the offense of criminal or aggravated sexual assault or sexual abuse first degree murder, if the victim subsequently dies of AIDS. Additionally, a Wisconsin bill provides that anyone who intentionally transmits the virus to another person could be subject to life imprisonment if the victim dies as a result of HIV infection.

Mississippi's legislature is again debating a bill requiring food handlers to certify they are free from HIV infection. Although there have been no documented cases of HIV transmission through food handlers and although the legislature has defeated similar bills every year since 1988, the 1991 bill calls for food handlers to be certified every six months by the State Department of

ment, ruled in a unanimous decision. "That section authorizes court ordered disclosure of confidential HIV-related information only in specific circumstances not present here."

In addition, the court said, there could be no available corrective action should HIV test results be disclosed, and "no appeal would lie from such an order since it would be neither an order issued as part of the criminal proceeding nor an order issued in a separate civil proceeding."

The case involved "John Doe," the defendant in a criminal action in Monroe County, N.Y., County Court, who was charged with rape and sodomy. During the proceedings, the district attorney's office sought an order from Judge John J. Connell directing Doe to provide a blood sample to be tested for HIV and that the results be provided to the woman who was the complainant in the criminal action and to her husband.

The information was to be used by the woman "only . . . in an effort to relieve and recover from her emotional trauma."

Connell orally granted the motion, which had been made under provisions of the state Public Health Law, but before an order was issued directing the test, Doe filed the appeal.

Agreeing with Doe's contention that Connell had exceeded his authorized powers, the appeals court noted that "while County Court unquestionably has jurisdiction over the pending criminal action," Public Health Law "did not confer jurisdiction on County Court. Indeed, the People cite no statutory authority that grants jurisdiction to County Court either to compel a defendant in a criminal action to submit to a blood test for the purpose of determining his HIV status or to direct disclosure of the results of that test where, as here, the test results sought were not for any use in any aspect of the criminal action."

Evan Wolfson, a staff attorney at Lambda Legal Defense and Education Fund in New York, said the decision, although drawn narrowly on New York criminal and public health statutes, would seem to have broader implications in other states. "Largely, this issue has come up in the context of legislation [rather than judicial decisions]," he said. (*Doe v. Connell*, NY Sup Ct App Div 4th Dept, No. 557, 4/24/92)

■ In a similar ruling also involving a court decision on HIV-related information, the U.S. District Court for Southern New York held April 22 that the plaintiff in a civil lawsuit may see medical files of the man he says infected him with HIV during a seven-year homosexual relationship.

"Plaintiff has demonstrated a compelling need for discovery of HIV-related information," said Judge Robert P. Patterson Jr. "Information relating to the defendant's alleged infection with HIV is central to plaintiff's claim. To prove that defendant knew or should have known that he was infected with the virus when he allegedly exposed plaintiff to it, plaintiff must have access to records indicating when defendant became infected and when he became aware of that fact. Without this information, plaintiff's claim may fail for lack of proof."

Patterson stipulated that because of "the possible abuse in suits of this nature, plaintiff Francisco Martinez Jr. must show good faith by first providing the court and defense

### *Mandatory Testing*

## **N.Y. Appeals Court Says Lower Panel Has No Authority to Order HIV Tests**

New York state laws do not give county judges the authority to compel a defendant in a criminal action to be tested for HIV antibodies when the results were not to be used as evidence in that action, a state appeals panel ruled April 24.

"Public Health Law §2785 (2) does not authorize court ordered testing to determine the HIV status of a person," the state Supreme Court, Appellate Division, Fourth Depart-

counsel a medical report and supporting affidavit demonstrating that he is infected with HIV. The medical files of the defendant, Alan P. Brazen, will be accessible only to the parties in the suit, their attorneys, expert witnesses, and the court, Patterson said.

The decision was immediately criticized by an attorney for Lambda Legal Defense and Education Fund in New York, who said it strains the confidentiality protections set up by state Public Health Law allowing disclosure of HIV medical records only when a "compelling need" is shown.

The case, said staff attorney Michael T. Isbell, "reflects a troubling trend, not only in the courts but among policy-makers, and that is 'who gave what to whom,' rather than dealing with the disease itself. This is the latest exasperating example of that mindset."

Even though Patterson held that Martinez must demonstrate his seropositivity to secure Brazen's medical records, Isbell said, "This doesn't persuade me very much [that Brazen was necessarily the source of Martinez's infection]. There's between 1 million and 2 million HIV-infected persons in the U.S., and studies have shown that most people have multiple sexual partners. That, plus the fact of the long incubation period of HIV, doesn't go very far in identifying the source of infection."

Martinez has charged that he and the defendant had a homosexual relationship from the summer of 1984 through April 1991. He said that Brazen told him in January 1991 that he was HIV positive after telling him repeatedly during their relationship that he was not infected.

Martinez is seeking \$135 million in compensatory and punitive damages on claims of fraud, battery, intentional infliction of emotional distress, and negligence.

Patterson said that the tight restrictions he has imposed on availability of Brazen's medical records were "due to the unfortunate societal stigma associated with HIV and AIDS," and that "substantial embarrassment and discrimination may result from disclosure of the identity of persons infected with the virus." Nevertheless, both plaintiff and defendant were identified by name in the ruling. (*Martinez v. Brazen*, DC SNY, No. 91 Civ 7769 (RPP), 4/22/92)□

in ?

**More Harm than Help:  
The Ramifications for Rape Survivors of  
Mandatory HIV Testing of Rapists**

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### About the Center

The Center for Women Policy Studies (CWPS) was established in 1972 as the first independent national policy institute focused specifically on issues affecting the social, legal, and economic status of women. The Center's policy research, development, and advocacy programs concentrate on educational equity, work and family issues, reproductive rights and health, violence against women, and AIDS -- recognizing that all issues affecting women are interrelated.

Underlying all of the Center's work is the premise that sex and race bias throughout society must be addressed simultaneously; policies and programs for "women in general" or "minorities in general" are not enough. The Center's programs look at the impact of combined race-plus-sex bias on women of color, women from diverse socioeconomic backgrounds, women with disabilities, and women of different ages.

The Center's current programs include: the Educational Equity Policy Studies Program, the National Resource Center on Women and AIDS, the Law and Pregnancy Project, the Violence Against Women Program, the Brain Trust on Economic Opportunity for Low Income Women, and a Washington policy internship program for women of color. The Center receives support from foundations, corporations, and individuals.

The National Resource Center on Women and AIDS was established in 1987 as a program of the Center for Women Policy Studies, to fill the vacuum in public policy discussion of AIDS and women and to address the critical policy issues for women,

particularly women of color and low income women, in the AIDS crisis from women's diverse perspectives. The Resource Center serves as a centralized resource for researchers, policymakers, advocates, and caregivers. During its first three years, the Resource Center published the first annual *Guide to Resources on Women and AIDS*; produced a landmark video, *Fighting for Our Lives: Women Confronting AIDS* and an Action Kit to accompany it; and developed the first federal legislative proposals to address the need for HIV/AIDS research, prevention and outreach programs targeted specifically to women.

During 1991 and 1992, the Resource Center's focus is on the creation of a National Collaboration for AIDS Policy for Women that brings together the expertise of scientists, ethicists, policy analysts, service providers, and advocates for women in a process that will build consensus in support of women and AIDS legislative and administrative initiatives. This policy paper is the first in a series that will be developed by the National Collaboration with funding from the Ford Foundation and the George Gund Foundation.

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## Preface

Since its founding in 1972, the Center for Women Policy Studies has conducted research, developed policy options, and provided technical assistance to policymakers and advocates alike on issues of violence against women. During the 1970s, for example, the Center was instrumental in defining rape as a federal policy issue and contributed to development of the Rape Prevention and Control Act. With support from the federal government over several years, the Center also established a national Resource Center on Family Violence and published the journal, *Response to the Victimization of Women and Children*, which continues to be edited by CWPS co-founder Jane Roberts Chapman and published by Guilford Press. The Center's most recent policy paper addressing violence against women was published in June of 1991; *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues* provides statistics on rape and other forms of violence against women and defines violence against women in the context of widely accepted definitions of bias-motivated hate crimes.

With this policy paper, we bring together our long history of work on issues of violence against women with the Center's current policy development efforts focused on women's needs in the continuing AIDS crisis. Unfortunately, the issue of mandatory HIV testing of charged or convicted rapists has been sensationalized in recent years and the Congressional debate on this issue has been virtually nonexistent, while the vote on the

amendment to the Comprehensive Crime Control Act of 1990 requiring testing of convicted rapists was falsely characterized as a vote either "for women" or "for rapists."

The Center for Women Policy Studies is in a unique position to bring some clarity to this complex and clouded issue. As advocates both for women survivors of rape and for sound and humane AIDS policies, we have carefully examined this issue and have come to the conclusion that mandatory HIV testing of rapists is bad policy for women. Our analysis of this difficult issue is based on our primary interest -- meeting the needs of the rape survivor. Indeed, the lack of needed health care and emotional support services for all survivors of rape is not addressed by a mandatory testing policy. The need for self-empowerment for women is not served by a policy that encourages manipulation and disempowerment of survivors through misperception and misinformation about HIV transmission and testing. And finally, this policy sets a dangerous precedent for legislative expansion of mandatory HIV testing and punishment of women who are sex workers or pregnant.

Confronting these difficult issues will be a continuing struggle for advocates of woman-sensitive policies at both the federal and state level. We hope that this policy paper will help legislators formulate and implement sound public policy that will truly meet rape survivors' and all women's needs.

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Executive Director

July, 1991

**More Harm than Help:  
The Ramifications for Rape Survivors of  
Mandatory HIV Testing of Rapists**

**Introduction**

Surviving a rape is an emotionally, psychologically and physically traumatic experience that now is compounded by the possibility that a rape survivor may contract HIV infection from an infected rapist.<sup>1</sup> According to a study reported in the *Journal of Interpersonal Violence*, fears about contracting HIV as a result of rape appear to exacerbate the psychological trauma associated with sexual assault (Baker, Burgess, Brickman, and Davis, 1990). This finding underscores the survivor's need to have access to anonymous HIV testing and to effective rape and HIV counseling that includes accurate and reliable information about a rape survivor's risk of contracting HIV infection as a result of rape. Yet AIDS laws and policies have virtually ignored the real psychological, medical and financial needs of rape survivors.

Since 1980, according to Federal Bureau of Investigation statistics, rape has increased more than any other violent crime but only an estimated 10 percent of rapes and sexual assaults are reported to the police, making rape the most underreported crime in the United States (Congressional Caucus on Women's Issues, 1990; Harlow, 1991; Koss, et al., 1990). Fewer than 40 percent of reported rapes result in charges against perpetrators, and

only 3 percent of these cases result in conviction (Congressional Caucus on Women's Issues, 1990).

Laws designed to help rape survivors cannot be limited to the few rape cases where there is an arrest and certainly not to the even smaller number of cases that actually end in a conviction. Rather, laws must recognize that the majority of rape survivors do not enter the criminal justice system at all; any purported attempt to meet their needs must reach them through the system of rape crisis centers and other support systems that they are much more likely to encounter.

#### Rape and HIV Transmission

A rape survivor's risk of contracting HIV from a rapist depends on several factors, the most obvious of which is whether the assailant is infected with HIV. Other factors associated with a survivor's risk of acquiring HIV infection include the number of assailants, the size of the inoculum per exposure, the virulence of the viral strain, the number of exposures, the kind of assault (vaginal, anal or oral), and the survivor's susceptibility to infection<sup>2</sup> (Burgess, Jacobsen, Thompson, Baker, and Grant, 1990; Jenny, Hooton, Bowers, et al., 1990). Although survivors' fears about contracting HIV have been documented, (Burgess, Jacobsen, Thompson, Baker, and Grant, 1990; Jenny, Hooton, Bowers, et al., 1990; Presidential Commission on the HIV Epidemic, 1988) the actual potential for HIV transmission through rape has received virtually no public health attention.

The lack of research and data on HIV transmission through rape is indicative of the status of women's health concerns within AIDS policy research. In its 1988 report to the President, the Presidential Commission on the HIV Epidemic stated that "victims of sexual assault deserve consideration and must be given attention and support so that they will not be forgotten in the tragedy surrounding the AIDS epidemic" (Presidential Commission on the HIV Epidemic, 1988). Three years after the Commission's report and more than ten years into the epidemic, the lack of research and data on the risks of acquiring HIV as a result of rape indicates that, indeed, rape survivors have been forgotten in the AIDS epidemic.

Anecdotes about rape survivors who have contracted HIV subsequent to a sexual assault are reported, but this risk remains unestablished. According to a study reported in the *New England Journal of Medicine*, because of the difficulty in ascertaining whether infections were present before a rape or acquired during it, the risk of acquiring a sexually transmitted disease (STD) as a result of rape is unknown (Jenny, Hooton, Bowers, et al., 1990). This rationale does not explain the absence of adequate research on the potential for HIV transmission through sexual violence (rape, incest, child molestation, and sexual assault) in light of the abundance of research identifying the risks of contracting HIV infection through consensual sexual behavior (Baker, Burgess, Brickman, et al., 1990; Burgess, Jacobsen, Thompson, et al., 1990).

Instead, in cases of sexual violence, research seems to assume that a rape survivor may already be infected with HIV, thus emphasizing the survivor's sexual history while de-emphasizing the crime of rape. Yet, research has been conducted to estimate the transmission rate of other STDs, such as gonorrhea, through rape. Similar research could be conducted on HIV transmission from rape.

In the absence of hard evidence from research, policymakers must rely upon extrapolations and hypotheses about the risks of contracting HIV from rape. Presently, the available statistics on HIV transmission in consensual sexual behavior are the only source of information; the rate of HIV transmission from rape must be extrapolated from these data. Several studies calculate the per contact infectivity for male-to-female HIV transmission as less than or equal to 0.2 percent (Peterman, Stoneburner, Allen, Jaffe, and Curran, 1988; Padian, Wiley, and Winkelstein, 1987; Hearst and Hulley, 1988). Because local trauma which dissolves mucosal barriers to infection is expected to increase a woman's risk of HIV infection (Centers for Disease Control, 1989), the risk of contracting HIV from rape is estimated to be greater than 0.2 percent (American Civil Liberties Union AIDS Project, 1991). Even so, HIV is not as efficiently transmitted as other STDs (Alexander, 1990; Holmberg, Horsburgh, Jr., Ward, and Jaffe, 1989).

Victoria Brownworth (1990), a medical reporter, extrapolated the risk of contracting HIV infection as a result of rape by a

person with unknown HIV status as 6 percent, using CDC's estimation that the transmission rate for HIV versus other STDs (syphilis, gonorrhea, and chlamydia, for example) is 50 percent and then dividing that figure by 12 percent, the percentage by which a recent study (Schwarcz and Whittington, 1990) indicated that survivors of reported rapes contracted STDs other than HIV from the attack. Brownworth bases her deduction on CDC's claim that the amount of HIV in the U.S. population and the amount of syphilis are equal (Brownworth, 1990). Brownworth's contention is clearly more speculative than scientific but the fact that this figure is widely quoted reveals the need for research and conclusive data on the potential of contracting HIV infection as a result of rape.

#### The Mandatory Testing Debate

Mandatory HIV testing is one of the most controversial and hotly debated AIDS policy issues. Policymakers and public health officials agree that voluntary anonymous HIV testing is critical to public health efforts to reduce the transmission of HIV infection, but since the advent of the HIV antibody test in 1985, they have debated the medical, political, psychological, and ethical ramifications of mandating HIV testing for individuals who may be deemed to engage in high risk behaviors. Proponents of mandatory testing contend that it is essential as a way to identify infected individuals, provide them with access to early intervention services, reduce the stigma of HIV testing, and

ultimately prevent further transmission of HIV (Americans for a Sound AIDS Policy, 1988). Opponents of mandatory testing, on the other hand, assert that mandatory testing is unethical and unjustified in the absence of therapeutic treatment (Levine and Bayer, 1989); does not change behavior more effectively than voluntary education, counseling and testing (Working Group on HIV Testing of Pregnant Women and Newborns, 1990); infringes upon individual liberties and rights to privacy, may be a pretext for discrimination, and is not the least restrictive measure to protect the public health (Hunter, 1987); and is inflexible for responding to new developments in therapy and treatment (Institute of Medicine, 1991).

These compelling arguments also apply to convicted or charged rapists. But it also is essential that policies that will be truly helpful to survivors of rape are developed. The Center for Women Policy Studies (CWPS), with a long tradition of leadership in research and policy analysis on violence against women, suggests that laws mandating HIV testing of charged or convicted rapists dangerously misdirect the policy focus away from the psychological and medical needs of rape survivors.

**Reviving the Mandatory Testing Debate:**  
**HIV Testing of Convicted Rapists**

The passage of former Representative Lynn Martin's (R-IL) amendment to the Comprehensive Crime Control Act of 1990 (P.L. 101-647) revived the mandatory HIV testing debate at the federal and state level. This time, however, the debate focused on

mandating HIV testing for convicted rapists who may have exposed a rape survivor to HIV infection. The Martin Amendment stipulates that a state will lose ten percent of its federal victim assistance funds if it does not establish laws that mandate HIV testing for a convicted rapist upon a rape survivor's request. The amendment also requires test results to be disclosed to the survivor and to the convicted defendant. In Martin's opinion, the amendment was important to ensure that rape survivors did not have to live in fear that a rapist may have exposed them to HIV infection (Martin, 1990).

Martin's concerns about survivors' fears are well-founded but her solution is dangerously misguided. Sexual assault survivors are aware of the risk of contracting HIV infection and many request to be tested for HIV (Presidential Commission on the HIV Epidemic, 1988; Jenny, Hooton, Bowers, et al., 1990). Although most policymakers and survivors' rights organizations agree on the need for laws and policies that address the psychological and medical needs of rape survivors, they disagree about how these needs can best be met. Mandatory HIV testing for charged or convicted rapists and disclosure of test results to survivors is the prevailing legislative trend at both the state and federal levels. Yet, the lack of legislative history and debate on mandatory HIV testing for rapists and its ramifications for rape survivors suggests that this legislation is based more on emotion than on logic or thoughtful planning to meet women's needs. These responses are reminiscent of much of the AIDS

hysteria of earlier years when the public and some public health officials suggested quarantine and isolation for people infected with HIV and AIDS as a valid public health measure.

#### Arguments for Mandatory HIV Testing of Convicted Rapists

Advocates for mandatory testing of convicted rapists assert that a rape survivor's right to know a convicted offender's HIV status supersedes the offender's rights to privacy. According to Mary Ann Largen, Executive Director of the National Network for Victims of Sexual Assault (NNVSA), mandatory HIV testing of convicted rapists also accomplishes two important goals: it prevents convicted offenders from abusing the criminal justice system by plea bargaining for lighter sentences if they volunteer to be tested; and it provides a rape survivor who has contracted HIV infection from a rape with evidence should she wish to bring a civil suit against a convicted rapist. Largen acknowledges that mandatory testing for convicted rapists will not preclude the need for rape survivors to be tested for HIV infection (Largen, 1991).

Other proponents justify involuntary HIV testing of alleged rapists because blood is already available for evidentiary reasons or for STD testing, so it might as well be tested for HIV infection and the test results disclosed to a rape survivor. However, HIV testing is unique and distinguishable from STD testing in two important ways: unlike STDs (gonorrhea, chlamydia, and syphilis) which are curable, HIV disease cannot be cured or

rendered noncommunicable; and HIV infection and AIDS still are highly stigmatized diseases, subjecting people to discrimination on the basis of actual or perceived HIV or AIDS status. In the prison system, the discrimination is severe. As one inmate described it, "if the guys in the general population suspect that someone has AIDS, first they throw water into that person's cell when he is not there. If that doesn't work, they burn out the cell" (Kurtz, 1988).

Further, if HIV transmission becomes an issue in a criminal proceeding or a civil suit for damages, defendants may be able to submit evidence of the survivor's sexual or drug history, to try to establish a doubt that the rape was the source of infection by showing that the rape survivor had engaged in high risk behaviors and had been previously exposed. Pauline Bart, co-author of *Stopping Rape: Successful Survival Strategies*, believes that a woman who claims to have contracted HIV infection from a rapist "will open the door to examining her entire sexual history [because] the defense would attempt to prove she could have gotten it from somebody else" (Salholz, 1990). Examining the survivor's sexual history may succeed only in further victimizing the survivor, prolonging her anguish, and delaying her psychological recovery.

#### Arguments Against Mandatory HIV Testing of Convicted Rapists

Instead of concentrating on testing convicted rapists, the concerns and interests of rape survivors would be better served

through funding of survivor-focused services such as free anonymous HIV testing, counseling, and early intervention. There is no doubt that part of the appeal of mandatory HIV testing of convicted rapists for policymakers is that it appears to "help" survivors of rape without the expenditure of funds. We do not doubt the sincerity of their desire to help survivors, but we challenge policymakers to carefully examine the needs of all rape survivors and make these needs a budget priority.

Mandatory HIV testing of convicted rapists is a misguided approach, for at least five reasons: (1) it does not provide survivors with timely and reliable information about their risks of contracting HIV infection; (2) it is a misdirected and unrealistic approach to addressing the real needs of rape survivors; (3) it perpetuates the dangerous misperception that information about a rapist's HIV status is critical to a rape survivor's health; (4) it does not facilitate a rape survivor's psychological recovery; and (5) it sets a dangerous precedent for extending mandatory testing to others, such as pregnant women and sex workers. These five issues are discussed in more detail below.

(1) Mandatory HIV Testing of Convicted Rapists Does Not Provide Survivors With Timely and Reliable Information About Their Risks of Contracting HIV Infection

Although detectable HIV antibodies usually develop within three months after infection, the CDC notes that antibody tests

cannot rule out HIV infection from a recent exposure, and recommends that HIV testing for a specific exposure be repeated three and six months after the exposure (CDC, 1989). Because of the potential for false test results and delays in antibody formation, the American Public Health Association (APHA) believes that relying on an offender's HIV test results is not the appropriate standard of care for rape survivors (APHA, 1989). The APHA recommends that a rape survivor be encouraged to seek her own HIV testing and counseling as soon as she is psychologically ready so she can make her own decisions about medical attention based on an accurate understanding of her own test results.

Despite the lack of conclusive data regarding the efficacy of using AZT prophylactically to prevent HIV infection, some medical experts recommend administration of AZT within 48 hours of potential exposure to HIV infection (ACLU, 1991). Thus, time is crucial to a rape survivor who chooses to take AZT subsequent to rape. She has no time to wait for a perpetrator to be arrested, charged, convicted (on average, the time period from arrest to conviction is six months to three years), tested and re-tested three to six months later.

While delays in conviction may prompt proponents of mandatory testing to suggest testing for arrested or charged rapists, this too would be an absolutely worthless mandate for the vast majority of rape and sexual assault survivors, who do not report the crime, or, if they do, do not see the perpetrator

arrested or charged. In those comparatively few cases where there is an arrest, it is extremely doubtful that the alleged rapist's test results would be available in a timely manner for a decision on AZT prophylactic treatment. Most important, even if the test results were available in less than 48 hours, and even if the test were negative, the survivor would have no guarantee that she has not been exposed to the virus. If she is seriously considering using AZT prophylactically, it would be wrong for her to change her mind simply based on the alleged rapist's test results, as he may not have developed antibodies to his own recent infection.<sup>3</sup>

The most obvious problem with the rationale which justifies mandatory testing by pointing to the survivor's need to decide about using AZT prophylactically is that it wrongly assumes that all survivors will have access to this very expensive drug if they do want it. A policy that helps survivors also would fund programs providing comprehensive health care services to survivors, including coverage for AZT.

(2) Mandatory HIV Testing of Convicted Rapists is a Misdirected and Unrealistic Approach to Addressing the Needs of Rape Survivors

Since it is estimated that only one in 10 rapes are reported to the police, fewer than 40 percent of reported rapes result in charges, and only three percent of rapes result in conviction ( $10\% \times 40\% \times 3\% = 0.1\%$ ), laws that mandate HIV testing of

convicted rapists as a means of protecting the rights of survivors ignore the reality of rape and offer no help to the majority of survivors. These laws also presume that most rapists are strangers, when in fact more than half of rapes are committed by an assailant that the rape survivor knows (Harlow, 1991) and one who may repeatedly rape her. Published studies on heterosexual HIV transmission suggest that while each exposure to HIV is associated with a small probability of infection, multiple exposures appear to increase the probability of HIV transmission (Padian, Marquis, Francis, Anderson, Rutherford, O'Malley, and Winkelstein, 1987).

Thus, mandating HIV testing for convicted rapists fails to respond to women who have been victimized through child molestation, incest, marital, and long-term acquaintance rape. Although these are more likely to be repeated and increase a survivor's risk of HIV infection, they are less likely to result in reporting, arrest, or conviction. In order to benefit the majority of rape and sexual assault survivors, rape crisis centers and service providers need sufficient funds to provide free, voluntary, anonymous HIV testing and counseling, and follow-up treatment, to any rape survivor in need of their services regardless of the prosecution status of the rape. With recent media attention to this issue, it is critical that policymakers seize the opportunity to draft real solutions. Passing a law that requires HIV testing of rapists may be an appealing, inexpensive, and emotionally satisfying response to a

complex problem. But real solutions for women require a focus on meeting the still unfunded needs of rape and sexual assault survivors in the AIDS epidemic.

(3) Mandatory HIV Testing of Convicted Rapists Perpetuates Misinformation that Knowledge of a Rapist's HIV Status is Critical

Although proponents of mandatory testing contend that it deters plea bargaining, legal advocates argue that mandatory testing actually encourages it (Rosenberg, 1990). In other words, because the waiting period for rape convictions is so long, rape survivors who are eager to know a perpetrator's HIV test results are more likely to agree to a defendant's request to plea bargain for reduced charges or sentences. The existence of the law may even give added credibility to the claim that the convicted rapist's test results are valuable to the survivor. In a recent New York rape case a man who pleaded guilty to raping an undergraduate in her dorm at knife point was promised a reduced sentence in exchange for agreeing to be tested for HIV infection and to allow his test results to be disclosed to the rape survivor (Salholz, 1990). A more direct and simple solution to the problem of plea bargaining is legislation which amends state criminal procedural law and prohibits the entry of a plea bargain conditioned upon an agreement to submit to testing for HIV.<sup>4</sup>

Supporters of mandatory testing also claim that knowing that a convicted rapist is HIV infected provides a rape survivor who

may have contracted HIV from rape with valuable evidence should she wish to bring a civil suit against a convicted rapist. However, because conviction may be delayed from six months to three years, knowing a convicted rapist's HIV status does not prove that the assailant was HIV positive at the time of the rape and did not contract HIV infection during the period before arrest or between arrest and conviction. Again, the survivor herself should be tested as soon as possible after the rape; if she tests negative and later tests positive, this may help her establish that the exposure to infection did not occur prior to the rape. Further, this type of civil suit for damages is very difficult to win; it could involve a very painful public examination of the survivor's sexual history before and after the rape, as rape shield laws would not apply. At issue would be every sexual encounter or other behavior that could have been the source of HIV infection to the rape survivor.

#### (4) Mandatory Testing of Convicted Rapists Does Not Facilitate a Rape Survivor's Psychological Recovery

An important, but often overlooked, survivor's right is the right to know the truth about all aspects of her risk of HIV infection. Research indicates that survivors are aware of the potential of contracting HIV from rape and many request to be tested (Baker, Burgess, Brickman, et al., 1990; Burgess, Jacobsen, Thompson, et al., 1990; Presidential Commission on the HIV Epidemic, 1988). Laws and policies that focus on the rapist

and his test results, but fail to provide the survivor with honest and accurate information about her risk of contracting HIV infection, the need for her to be tested for HIV infection, and the delays and improbability of conviction are deceitful and further victimize and disempower the survivor. This is especially important, as psychologists and rape crisis counselors note that empowerment is integral to psychological recovery from rape (Mooney, 1990). Restoring a survivor's control over her own life is key; and this includes the power to make decisions about all aspects of her life including if, when, and how (anonymously or confidentially), she will be tested for HIV (Mooney, 1990). Focusing on testing rapists perpetuates the notion that a rapist's HIV test results will be accurate and that knowing his serostatus will alleviate a survivor's anxiety. It is critical that the survivor understand that she must be tested herself regardless of the results of the rapist's HIV test, to safely determine her own serostatus.

The potential for a rape survivor to contract HIV infection from a rapist poses an ethical dilemma for many health care providers (Burgess, Jacobsen, Thompson, et al., 1990). Traditionally, they have understood their duty not to inflict further harm on a traumatized survivor as preventing them from informing her of a potential risk for HIV infection (Burgess, Jacobsen, Thompson, et al., 1990). Counseling by health care providers who are knowledgeable about survivor trauma and care and trained in counseling for HIV testing and results may

alleviate much of this dilemma (Minden, 1989).

(5) Mandatory Testing of Convicted Rapists Sets A Dangerous  
Precedent for Extending Mandatory Testing to Others --  
Particularly Pregnant Women and Sex Workers

Women, under HIV/AIDS laws and policies, are viewed primarily as vectors of heterosexual or perinatal transmission. Thus, instead of addressing the unique prevention, health care, social service and legal needs of women, laws and policies focus on women's potential to transmit HIV infection to others and seek to control women accordingly. The readiness and frequency with which state legislatures have introduced and enacted legislation mandating HIV testing for convicted rapists under the guise of protecting the rights of rape survivors sets a dangerous precedent for the extension of mandatory testing to pregnant women to protect the "rights" of fetuses and to women convicted of prostitution to protect their male customers. In all three scenarios, there is an assumption that it is appropriate to set aside the rights of a possibly infected person (the rapist, the prostitute or the pregnant woman) in favor of the rights of a possibly to-be-infected person (the survivor, the customer, or the fetus). The precedent of mandatory HIV testing to protect "innocent victims" of rape can easily be expanded to include testing of pregnant women and prostitutes as the vectors of transmission to other so-called "innocent victims."

## PREGNANT WOMEN

CDC already recommends "routine" HIV testing and counseling for all pregnant women at risk [sic]<sup>5</sup> for HIV to "allow" HIV infected women to avoid pregnancy and subsequent intrauterine perinatal transmission (CDC, 1987). The odds of an HIV positive woman bearing an HIV positive infant are estimated by the CDC to be less than 1 in 3.<sup>6</sup> CDC's recommendation ~~assumes~~ that all pregnant women who are HIV infected will determine that these odds are an unacceptable risk; thus women are denied their right to make their own reproductive choices. By choosing to focus only on the infants, two-thirds of whom will not actually be infected with HIV, CDC's recommendation succeeds in ignoring HIV infected women who are in need of their own medical care and social services.

CDC's recommendation to test "at risk" [sic] pregnant women also has the effect of discriminating against women who are African American and Latina who, because they are disproportionately affected by HIV/AIDS, are likely to be targeted for HIV testing based solely on race and ethnicity, rather than on high risk behavior. In its 1991 report, the Institute of Medicine's Committee on HIV Screening of Pregnant Women and Newborns offers a sound alternative to CDC's recommendation. The Committee proposes voluntary HIV screening, with informed consent, for all pregnant women in jurisdictions with a high prevalence of HIV infection among women of childbearing age and believes that the potential for discrimination and stigmatization can be reduced by

selecting large jurisdictions, such as states or counties, to target for voluntary testing (Institute of Medicine, 1991).

#### WOMEN CONVICTED OF PROSTITUTION

At least 25 states have already enacted HIV-related laws regulating prostitutes -- even though they may engage in activities that involve no direct sexual contact capable of transmitting HIV infection -- making this one of the most frequently legislated HIV/AIDS policy issues. Despite evidence that the risk of a prostitute transmitting HIV infection to a client is low (National Research Council, 1990; Seidlin, Krasinski, Bebenroth, Itri, Paolino, and Valentine, 1988; Cohen, Alexander, and Wofsy, 1989), public health officials continue to implicate prostitutes as vectors of heterosexual transmission. Even CDC officials acknowledge that the risk for women is greater; since more men are infected with HIV, and since male to female transmission is more efficient (CDC, 1989), the chances are greater for women that a random heterosexual male partner of a woman will be HIV infected (CDC, 1989). Yet CDC's acknowledgement that women are at a greater risk for heterosexual transmission compared to men is inconsistent with their condemnation of women sex workers. Instead, CDC could focus prevention messages and punitive policies on prostitutes' male customers, who are willingly spreading HIV to their paid partners. Indeed, these laws reinforce a double standard of morality, under which men patronize prostitutes with relative

impunity while women who engage in prostitution risk arrest, conviction, incarceration and forced HIV testing. These laws ignore the real needs of women who are sex workers because it is their most lucrative (or only) alternative to earn money to feed their families, or because treatment for an addiction, that may have started as a response to multiple levels of oppression and disadvantage, is unavailable.

Proponents of mandatory testing of rapists may not see that these policies are part of a dangerous pattern of mandatory testing policies that blame women for HIV transmission; they may not carefully examine any precedents for expanded mandatory testing in light of that reality. Although proponents may envision a law that singles out men convicted of crimes of sexual violence against women, this is unrealistic. Instead, most of these laws do not distinguish between a male client's consent to engage in sexual relations with a prostitute and the violence of rape; both are included in the general category of sex-related crimes. Thus, both the prostitute and the rapist are guilty of "sex crimes" and must be tested for HIV.

The next step legislators will consider is to enhance the penalty or provide for a separate crime for willful or deliberate transmission of HIV.<sup>7</sup> It is clear that prostitutes and pregnant women will be targeted by this next wave of laws. In reality, such laws only divert resources from effective HIV/AIDS prevention efforts. Prostitutes at risk may avoid being tested to protect themselves from prosecution for knowingly exposing a

client to HIV infection; pregnant women may avoid prenatal care and early testing to avoid both prosecution and the loss of their children to foster care for alleged "abuse" (Weissman, 1991).

### The Role of the Media in the Debate

Through its many stories about HIV and rape, the print and broadcast media have played an important role in raising the awareness of the public and policymakers about rape and the threat of HIV infection. To garner support for her amendment, for example, Representative Martin circulated a *Newweek* article entitled "A Frightening Aftermath: Concern About AIDS Adds to the Trauma of Rape" (Salholz, 1990) to members of Congress. However, the media has also played an active role in manipulating and attempting to simplify the issue of testing rapists for HIV as one in which opponents to testing are viewed as pro-rapist and supporters of testing are viewed as pro-woman. Framing the issue in this manner denies the complexity of the issue and the real needs of rape survivors; it also plays on the cynical manipulation of survivors' feelings of anger, frustration and fear. In fact, some survivors' and women's rights organizations committed to the best interests of survivors also oppose mandatory testing of charged or convicted rapists.<sup>8</sup> For example, the National Coalition Against Sexual Assault (NCASA) formally voted to oppose all forms of mandatory HIV testing. NCASA also voted to stress the importance of the availability of free,

anonymous or confidential HIV testing and counseling for survivors (Mooney, 1990).

### Constitutional Issues

Experts in criminal law are confident that testing prior to conviction is unconstitutional because it violates an arrested individual's constitutional rights to a presumption of innocence, to a constitutional protection from unwarranted search and seizure, and to privacy and confidentiality (Cooper, 1991). A person who has not been convicted of a crime retains the presumption of innocence and constitutional protections which exceed those of convicted persons. Thus, forcing arrested persons to be tested against their will would violate the constitutional rights to informational privacy and the Fourth Amendment; if such information then were used at a criminal trial, the testing might also violate the Fifth Amendment. It is also futile because the rape survivor will still need to be tested for HIV infection.

Testing of convicted rapists, on the other hand, is potentially constitutional because, once an individual is convicted of a crime, he loses depth and breadth of constitutional protections and thus may be tested (as in the case of prisoners) in the interest of maintaining security. But, although the convicted rapist loses a certain degree of constitutional protection because of his conviction, convicted persons do retain constitutional rights; thus, testing convicted

persons does raise constitutional issues concerning the right to privacy and the Fourth Amendment right to be free of unreasonable searches. HIV testing of prisoners has been upheld against constitutional challenge where the state's interest in such testing was for prison security. However, testing convicted rapists to disclose test results to a survivor does not raise the issue of security; rather, it requires a balancing of the interests of the state (which the state extends to the interests of the rape survivor) against the rapist's fundamental right to privacy.

This equation will not automatically lead to mandatory HIV testing, because testing the offender will not preclude the need for the rape survivor to be tested for HIV infection. It is arguable that the survivor's emotional need to know an offender's HIV status is a worthwhile and legitimate state interest. This argument is the most compelling part of the case for mandatory HIV testing of rapists. However, there are more medically sound and appropriate ways for the state to meet this very real need; a survivor's own testing and counseling will allow her to feel absolutely sure of her own HIV status. Limited funds should be spent on needed services for rape survivors rather than on litigation to defend laws with a minimal impact on survivors.

#### State Legislative Responses to Rape and Potential HIV Transmission

As of June, 1991 laws in at least 23 states regulate HIV testing for charged or convicted rapists. Consistent with the

justification for the Martin Amendment to the Comprehensive Crime Control Act of 1990, state legislators and policymakers contend that rape survivors have a right to know a convicted -- and in some cases, charged -- offender's HIV test results; these legislators view mandatory testing laws as integral to protecting the rights of rape survivors. However, the inadequacy of the policy is evident; beyond notifying the survivor of the offender's HIV status, these provisions do little to address the medical, psychological or financial needs of survivors.

The readiness with which state legislatures have enacted and continue to introduce mandatory HIV testing legislation suggests that legislators and policymakers are responding to the issue of rape and potential HIV transmission emotionally, rather than rationally. They may want to "help" women and to express their outrage at the pervasiveness of sexual violence against women; but, though this intention to help survivors may be sincere, when no funding for even basic access to HIV testing and counseling is included in a mandatory testing legislative initiative, it is doubtful that the commitment to helping survivors is serious enough to involve expenditures of funds.

In 1991 Texas became the first state to allow a rape survivor to request that an accused sex offender be tested for HIV infection. According to Lisa McGiffert, Legislative Coordinator of the Texas Senate Committee on Health and Human Services, this law was the result of a specific incident in which a rape survivor in Fort Worth, Texas was prohibited from

requesting that an alleged rapist be tested for HIV infection (McGiffert, 1991). The bill was discussed on the House floor and was added as an amendment to the state's Penal Code, but was never formally heard or analyzed in writing.

Florida's 1990 law mandating HIV testing for both charged and convicted sex offenders upon a survivor's request is the most stringent in the nation. The law's legislative intent states:

The Legislature finds that a victim of sexual offense is entitled to know at the earliest possible opportunity whether the person charged with the offense has tested positive for human immunodeficiency virus (HIV) infection. The Legislature finds that to deny victims access to HIV test results causes unnecessary mental anguish in persons who have already suffered trauma. The Legislature further finds that since medical science now recognizes that early diagnosis is a critical factor in the treatment of HIV infection, both the victim and the person charged with the offense benefit from prompt disclosure of test results. The Legislature finds that HIV test results can be disclosed to the victim of a sexual offense while confidentiality is protected in other respects (Florida, H.B. 1115, Chapter 90-210, 1990).

This statement reveals the flaws in reasoning discussed above. First, it does not matter if or when the alleged rapist is tested, the rape survivor still must be tested herself to be diagnosed and receive early treatment. Second, misleading a rape survivor into thinking that the alleged rapist's test result is critical to determining her own health status, when it is not, only exacerbates her mental anguish. Finally, in addition to the necessity for testing survivors for HIV, some medical experts recommend that survivors take a prophylactic dose of AZT

within 48 hours after the exposure (ACLU, 1991). Thus, testing an offender under the guise of facilitating early diagnosis and treatment for a survivor is both deceptive and futile. Yet, the Florida Legislature's flawed rationale is typical of the basis on which other states have enacted mandatory testing laws for convicted and/or alleged rapists.

#### HIV/STD COUNSELING FOR RAPE SURVIVORS NOT ADDRESSED

States claim that mandatory testing laws for convicted (and in some cases accused or charged rapists) are necessary to protect the rights of rape survivors who may have been exposed to HIV infection by the rape. Despite justifications that mandating testing for offenders is necessary to help rape survivors, state laws and policies actually do little for women who are raped. For example, of the 19 states that mandate HIV testing of offenders and disclose an offender's test results to a rape survivor, only ten states (Arkansas, California, Florida, Georgia, Illinois, Indiana, Kansas, Michigan, Minnesota and Oklahoma) mandate HIV counseling for rape survivors upon disclosure of the offender's HIV test results.

California is presently the only state to legislate HIV counseling for rape survivors that is unrelated to disclosure of an offender's HIV test results. Under California's law, county health officers must establish counseling programs for sexual offense survivors who choose to be tested for HIV infection. In 1988, the California legislature directed the Department of

Health to develop a brochure about exposure to HIV infection for rape survivors that is a potential model for other states.

Minnesota does not provide for counseling but does require rape survivors to be notified about the risks of HIV exposure. Minnesota's 1990 survivor notification law requires hospitals to give written notice about all STDs to anyone receiving medical services in the hospital who reports or evidences a sexual assault. The law provides that when appropriate, the notice must be given to the parent or guardian of the survivor. The notice, which must be developed by the Commissioners of Public Safety and Corrections in consultation with sexual assault survivor advocates and health care professionals, must inform the survivor of: (1) the risk of contracting STDs as a result of sexual assault; (2) the symptoms of STDs; (3) recommendations for periodic STD testing where appropriate; (4) locations where testing is done and the extent of the confidentiality provided; and (5) other medically relevant information. Again, this written notice may be a model for other states.

Again, it is estimated that only 1 in 10 rapes are reported, and fewer than 40 percent of reported rapes result in charges against perpetrators. Thus, state laws that link assistance to survivors of rape to testing of a charged rapist fail to address the needs of the vast majority of rape survivors. Although state HIV/AIDS laws acknowledge the potential for a rape survivor to contract HIV infection from an infected rapist, these laws ignore the direct and immediate needs of the few women who do

successfully pursue prosecution. It is futile for a rape survivor to know that an HIV infected rapist may have exposed her to HIV infection if she cannot afford her own HIV counseling, testing, and treatment. Presently, no states pay for a rape survivor's HIV testing or counseling. Missouri's Department of Health will pay the costs of HIV testing for survivors if the convicted sex offender tests positive for HIV infection.

This law epitomizes the misdirected focus of state laws; rather than directly addressing the woman's medical, psychological, and financial needs, the law makes her needs consequent to and dependent upon the status of the man who has raped her. In legislators' rush to help relieve the "unnecessary mental anguish" of rape survivors, they have overlooked the mental anguish of the rape survivor who is HIV positive and has no access to health care. It will not reduce her anguish, fear and pain to know she is at risk of developing AIDS and is unable to afford treatment. Follow-up health care services for rape survivors which go beyond the emergency room examination must be funded.

#### 1991 Bills for Testing of Rapists

Mandatory HIV testing of convicted, and in some instances charged, rapists continues to dominate state legislatures in 1991. As of March 28, 1991, 27 states had introduced rapist testing bills, making it the most common HIV/AIDS legislative issue of the 1991 state legislative sessions. As with existing

laws, an examination of these bills reveals a hasty and misdirected focus on the relatively few rapists who are arrested and charged, rather than on rape survivors whose interest this legislation purports to protect. In most cases, these bills are variations on the basic federal requirement for mandatory testing of convicted rapists created by the Martin amendment.

For example, the legislative intent of Alaska's proposed law mandating testing for charged rapists notes that the purpose of the legislation is "to require that information that may be vital to victims ... be obtained and disclosed in an appropriate manner in order that precautions can be taken to preserve their health and the health of others or in order for these persons to be relieved from groundless fear of infection" (Alaska, House Bill Number 24, Introduced March 8, 1991). Yet the legislation does not provide or pay for a survivor's HIV testing or counseling.

Bills introduced in 16 states (Alaska, Arkansas, Delaware, Florida, Georgia, Hawaii, Iowa, Maryland, Montana, New Jersey, New York, Oklahoma, South Carolina, South Dakota, Washington, and Wisconsin) would mandate HIV testing for arrested sex offenders upon a court's finding that transmission of bodily fluids may have occurred or upon the request of a rape survivor. States are attempting to circumvent the constitutional problems raised by legislation mandating testing prior to conviction in several ways. Legislation in Delaware would allow individuals arrested for rapes to be tested for HIV "voluntarily." However, if defendants object to HIV testing a judge would decide whether or

not HIV testing will be performed. The judge would weigh the state's interest (the survivor's emotional need to know an alleged rapist's HIV status) against the alleged rapist's right to privacy.

It is not clear how judges would approach this balancing. It is possible that the survivor's sexual history and drug use history would be part of the evidence the judge would require to make his/her decision. Further, sexist stereotypes of "good" and "bad" women may enter the judge's decisionmaking as he/she decides whether the rape survivor is otherwise at risk for HIV; thus, not all rape survivors would be the beneficiaries of these laws. Indeed, one clue to how judges might approach the balancing of interests is found in Indiana's proposed legislation. Indiana would mandate HIV testing for individuals arrested for rape only if the rape survivor is pregnant as a result of the rape. In addition to viewing women primarily as incubators, this bill demonstrates that fetuses in Indiana garner more concern than women who have been raped. Again, women are viewed simply as vectors of HIV transmission to so-called "innocent victims."

#### HIV COUNSELING FOR RAPE SURVIVORS

Only six states (Alaska, Arkansas, Georgia, Kansas, Montana and South Carolina) propose a requirement that rape survivors receive HIV counseling upon disclosure of a tested rapist's test results. None of these states, however, define appropriate

counseling or pay for it. Kansas's health department will pay only for a survivor's counseling if the convicted rapist tests positive for HIV infection. Similarly, Montana's bill would arrange for post-test counseling only if the convicted person tests positive for HIV. Maryland's bill would require institutions or physicians treating rape survivors to inform them of anonymous HIV testing sites and HIV counseling centers. New Jersey's bill would require the Commissioner of Health to develop a testing program for rape survivors and a counseling program for survivors who test positive for HIV infection.

Looking at the Maryland bill, it seems to explicitly recognize the need for the survivor herself to be tested for HIV. Yet the bill still requires that the alleged rapist be tested prior to conviction, suggesting that the unspoken motivation may have more to do with punishing the alleged rapist than meeting the needs of the rape survivor. This would appear to violate the principle that an accused person is innocent until proven guilty. It is not hard to imagine that this punitive philosophy can be extended to arrested prostitutes and even pregnant women, who have not been arrested. It is critical that we do not allow HIV positive status to equal "guilty of criminal behavior."

#### PAYING FOR A RAPE SURVIVOR'S HIV TESTING AND COUNSELING

Only New York's 1991 bill would offer unconditional payment for a survivor's HIV testing and counseling. By making payment contingent on whether a rapist tests positive or whether the rape

has been reported to the state, states reveal their indifference to the medical and psychological interests of rape survivors. For example, although New Hampshire's bill would pay the costs of HIV testing for a convicted rapist if he is indigent, the bill does not provide for payment for the HIV testing and counseling costs of indigent rape survivors.

New York's bill would amend existing law to include exposure to HIV within the definition of "out-of-pocket loss" for compensating rape survivors for the costs of testing, counseling, and prophylactic treatment prescribed by a physician. South Dakota's legislation would pay for voluntary HIV testing for rape survivors only if the alleged rape is reported to the state. While it is important that states pay for voluntary HIV testing for rape survivors, payment must not be contingent upon the survivor's entering the criminal justice system.

#### CRIMINAL RECORDS AND PROCEEDINGS

While Florida's bill would not allow a charged individual's test results to be admissible in a criminal proceeding, Iowa's and New Jersey's bills provide that a convicted rapist's positive test results become part of his criminal record. Iowa's legislation would allow this information to be considered in sentencing. In these proposed bills, it is obvious that HIV positive status is equated to "guilty of criminal behavior" and thus warrants additional punishment. Vermont's bill would allow the fact that a defendant is voluntarily tested for HIV infection

to be admissible in mitigation of sentence if the person is convicted of the offense. Vermont's bill is unique in actively encouraging plea bargaining but is not unusual in demonstrating how mandating HIV testing for rapists has the potential to harm rape survivors more than it helps them.

#### Recommendations for Survivor-Based Federal and State Policies

Laws that mandate HIV testing for alleged or convicted rapists under the guise of a survivor's right to know an offender's HIV status are unlikely to meet survivors' needs and will certainly lead to mandatory HIV testing of others -- particularly pregnant women. The Martin Amendment and state laws that mandate HIV testing for rapists should be repealed and replaced with laws that provide rape survivors with free voluntary HIV counseling, testing, and treatment. Such legislation should include the following provisions:

- (1) Funding to provide free anonymous HIV testing and counseling to all rape survivors by trained staff of rape crisis centers and similar facilities. Funding also should be provided for training of rape crisis center staff and for preparation of appropriate written materials. Because of the potential for discrimination, testing must be performed anonymously to protect the survivor's privacy. Appropriate counseling would include, but not be limited to, the following: (a) accurate information to help a survivor

assess her risk of HIV infection; (b) information about prophylactic treatment; (c) education about applicable HIV confidentiality and discrimination laws; and (d) accurate information about the value of the rapist's test results for the survivor's health care decisions and choices. This information will help the survivor make an informed decision about plea bargaining and will empower her to fight for her rights and refuse to allow the accused rapist to bargain for a lesser charge or sentence in exchange for his test results.

- (2) Funding to provide rape survivors with prophylactic AZT treatment when they lack insurance or when insurance will not cover this treatment. These costs may include a six week term of AZT if the survivor and her physician determine that this treatment is medically appropriate.
  
- (3) Funding to develop model programs for the long-term care of survivors who initially test positive and negative for HIV. Counseling and health care intervention should be provided throughout the various stages of HIV infection for survivors who convert to HIV infection. Rape survivors should have access to clinical drug trials and to support services, such as child care and transportation, that may be needed so that they actually can participate.

- (4) Provisions for free HIV counseling and testing services specifically targeted to low income women, women with disabilities, and women whose primary language is other than English.
  
- (5) Financing training for: (a) rape crisis center and other counselors about HIV infection and the availability of appropriate public and private programs that provide counseling, treatment and support; (b) assistant U.S. attorneys and judges regarding the negligible value of test results of the alleged rapists and the societal value of bringing rapists to justice; and (c) physicians, social workers, psychologists, psychiatrists, law enforcement officials and all other individuals who may come into contact with rape survivors.

#### Conclusion

Although there may be a time when progress in medical technology and treatment for HIV infection may justify mandatory HIV testing for convicted rapists, that time has not yet come. As we have shown in this paper, laws that focus on alleged or convicted rapists rather than on rape survivors do not address the medical, legal, psychological, and financial needs of women who are raped.

## Notes

1. The authors acknowledge that men rape lesbians as well as heterosexual women, and that the consequences of rape itself and the encounter with the criminal justice system may be particularly devastating for lesbians. Men also assault other men and our discussion of survivors' needs is relevant to all survivors.

2. Factors which affect the risk of HIV transmission to the survivor include the survivor's general health status, any existing genital ulcers, and the violence of the attack and the injuries it causes.

3. There has been very little evidence that AZT prophylaxis can prevent seroconversion in individuals exposed to HIV. There is a high incidence of severe reactions to and side effects from AZT use. The drug is toxic and is not universally tolerated by individuals who do choose to use it.

4. In the Senate of the State of New York, Senate Bill 3681 introduced on March 5, 1991 by Senators Saland, Hannon, Holland, Levy, Padavan, Skelos and Tully, takes this approach.

5. In the context of AIDS, the terms "at risk" and "high risk" stigmatize sexual orientation, ethnicity, economic class or culture. "High risk behaviors" is the preferred terminology because it describes behavior, such as intravenous drug use, that increases the chance of HIV transmission.

6. All newborns of HIV infected women carry passively acquired maternal antibodies which may persist up to 15 months of age, but only approximately 30 percent of these infants are actually infected with HIV. See Committee on Prenatal and Newborns Screening for HIV Infection, "HIV Screening of Pregnant Women and Newborns," (1991): 26.

7. Senator Bob Dole (R-KA) introduced in the United States Senate, S.B. 472, the "Women's Equal Opportunity Act of 1991", on February 21, 1991. This bill mandates HIV testing of alleged rapists at the request of the survivor and provides for enhanced sentences if the rapist "knew or had reason to know that he was infected with the human immunodeficiency virus, except where the offender did not engage or attempt to engage in conduct creating a risk of transmission of the virus to the victim."

8. For example, the National Coalition Against Sexual Assault (NCASA) formally voted to oppose all forms of mandatory HIV testing. NCASA also voted to stress the importance of the availability of free, anonymous or confidential HIV testing and counseling for survivors (Mooney, 1990).

The following organizations expressed their opposition to mandatory HIV testing of convicted rapists in a letter sent to members of the United States Congress on October 16, 1990: Center

for Women Policy Studies, American Civil Liberties Union, B'nai B'rith Women, National Organization for Women, National Women's Health Network, National Women's Political Caucus, Older Women's League, and Sex Information and Education Council of the United States.

The following organizations expressed their opposition to mandatory HIV testing of alleged rapists in a letter sent to the members of the United States Senate on June 18, 1991: Center for Women Policy Studies, B'nai B'rith Women, NOW Legal Defense and Education Fund, National Women's Health Network, National Women's Law Center, Older Women's League, National Association of Commissions on Women, Sex Information and Education Council of the United States, National Association of Protection and Advocacy Systems, National Association of Social Workers, National Association of State Alcohol and Drug Abuse Directors.

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Working Group on HIV Testing of Pregnant Women and Newborns. (1990). HIV infection, pregnant women and newborns. Journal of the American Medical Association, 264, 2416-2420.

## MANDATORY TESTING OF RAPE DEFENDANTS

The ACLU opposes involuntary testing and disclosure of HIV information in all cases, including those involving an alleged rape. The violation of the privacy rights and interests of the person from whom the information is sought is not outweighed by a benefit to the rape victim. The results of an HIV test are, on close examination, virtually irrelevant to the person who has to decide whether or not to seek immediate treatment to prevent infection after exposure.

In cases of rape, the person arrested or even indicted may not, in fact, be the rapist. In such a case, testing the defendant not only violates his entitlement to the presumption of innocence as well as his privacy rights, but also misleads the victim. Consider the possibility that the defendant may test negative and not be the rapist after all. The real rapist may have been infected and the victim exposed. An innocent defendant's negative test will lure the victim into believing she is safe when she should seek further information or treatment.

Even assuming for the sake of argument that the person indicted is the rapist, there remains the very real possibility of a false negative, which, of course, also exists in cases of occupational injury. Given that possibility, the rape victim or the injured worker cannot rely on a negative test in making a decision about immediate treatment. Under the circumstances, it is of little, if any, value to know for certain that the person tested positive.

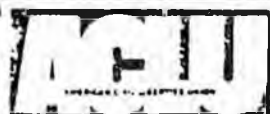
When the rights of victims and defendants conflict, there must be a careful and sensitive balancing of the constitutional concerns involved in a particular situation. However, there is no conflict in this situation. There is no need to balance here. The victim's health is not advanced by trampling a defendant's rights.

A variety of provisions to mitigate the harm to the person involuntarily tested have been suggested but do not achieve the goal. For example, giving the person tested the option not to learn the results is cruel. It is, at best, more difficult and may be impossible to resist learning the known than to keep the information unknown in the first place. Moreover, imagine the situation of someone who elects not to be informed of the results only to have them revealed in the press. Because the press can neither be liable for publishing the truth nor compelled to reveal confidential sources, there may be no way to punish or inhibit public disclosure of this kind.

In sum, we believe measures providing for involuntary testing of people accused of rape are both dangerous and unnecessary.

*Note - This Statement is being revised slightly.  
We will be issuing a revised Statement on  
the issue shortly*

*- Feb. 12, 1991*



# AIDS PROJECT

## QUESTIONS AND ANSWERS ABOUT HIV AND RAPE

### **1. Can the HIV virus be transmitted during a rape or sexual assault?**

HIV can be transmitted through the exchange of blood or other bodily fluids, including semen. As it is possible for HIV to be transmitted during consensual sexual intercourse (vaginal, anal, or to a lesser extent, oral), it also is possible for HIV to be transmitted during a rape or a sexual assault that involves the exchange of bodily fluids. Note, however, that although the virus occasionally has been found in tears and saliva, no cases of AIDS have been traced to a transmission involving these fluids. If the virus has been transmitted, that means you are infected with the HIV virus.

### **2. What is the likelihood that HIV will be transmitted during a rape?**

The epidemiology branch of the AIDS Program at the Centers for Disease Control has estimated that the likelihood of male to female transmission of HIV is of the order of less than or equal to 0.2% per episode if the male is HIV infected. It is thought that the rate of transmission in the context of a rape may be somewhat higher; because of the involuntary nature of a rape, the woman's vaginal tract may suffer trauma, thereby creating small tears that would facilitate transmission of the virus and other microorganisms. Medical researchers stress that the estimated figure of 0.2% may change as additional data are collected.

### **3. If I am infected with HIV, does that mean I have AIDS?**

No. There are many stages between first being infected with HIV and developing full-blown AIDS. The vast majority of people infected with HIV will experience no symptoms of infection, or minor symptoms, for many years. After an average period of five to seven years, although perhaps significantly longer for others, people infected with HIV will begin to develop increasingly severe symptoms of infection, including the opportunistic infections that are the hallmark of an AIDS diagnosis. Current medical consensus refers to this full range of symptomatology as "HIV disease."

**4. Is there a cure for HIV Infection or for AIDS?**

At this point there is not. However, there is one drug, called AZT, that is available to help slow down the progress of the virus. There are two additional anti-virals that are expected to be approved for use in the very near future. Equally important, medical researchers have developed prophylactic drugs to help prevent or delay the development of opportunistic infections in a person infected with HIV; in addition, treatments now exist to help deal with such infections when they develop.

**5. How do I know whether I have been infected with HIV?**

There is a series of tests available that can determine whether you have developed antibodies to the HIV virus. It is widely acknowledged today that the presence of the antibodies indicates that the person who was tested is infected with the HIV virus. (This is not true, however, for a newborn, who may test positive for antibodies which he or she has received from his or her mother, but who may not be infected with the virus.) HIV antibodies tend to start appearing approximately four to six weeks after exposure, but may appear earlier.

**6. When should I take a test for HIV antibodies?**

You first should be tested immediately after you have been exposed. This is suggested for two reasons. First, the sooner you know about your HIV status, the earlier you can begin to take an active role in treatment to help keep up your health. Second, it will be useful to know whether the source of infection came from the sexual assault or rape or whether you were infected prior to the incident. As noted above, HIV antibodies tend to start appearing approximately four to six weeks after exposure, but may appear earlier; therefore, it is prudent to get a baseline test as soon after the incident as possible.

**7. When will I know whether I have become infected as a result of the sexual assault or rape? Will there be a time when can I consider myself to be healthy?**

You should be tested approximately every three months following the incident for six months to a year. The majority of people develop antibodies within three months of having been exposed to the virus; ninety percent develop antibodies within six months of exposure. The vast majority of the remaining ten percent will develop antibodies within

a year of exposure; beyond the one year point, some will still "sero-convert," but it is very rare to test negative and to be infected beyond one year.

**8. If I think I have been exposed to HIV, are there any medical interventions available to help prevent my being infected with the virus?**

Some medical experts suggest that the anti-viral drug, AZT, be administered to the patient within 48 hours of exposure and be continued for a period of approximately six weeks (although doctors may vary the duration of treatment by a couple of weeks). Although administering AZT immediately after exposure has not been proven to prevent infection, this often is the general course of treatment made available to health care workers who are exposed to the virus in an occupational setting. Animal studies examining whether AZT is effective in this setting are inconclusive; human studies are incomplete. Nevertheless, AZT has not yet been discounted as a viable prophylactic and is the only form of medical intervention available that may work.

**9. Are there any side effects to taking AZT as a prophylactic for approximately six weeks?**

In otherwise healthy people who are not already seropositive, doctors have found that taking AZT is not likely to result in the types of toxic side effects sometimes found in those who already are infected with HIV and are taking AZT to slow the progression of infection. Generally, toxic side effects have been found to be dose and duration related and reversible following discontinuation of treatment with the drug. A non-infected person taking a six week course of AZT may experience some insomnia, fatigue, and flu-like symptoms. Again, these effects would end upon discontinuation of treatment with the drug. The research on long term effects are not yet known. Some researchers have found that when given very high doses of AZT (well beyond the doses prescribed for humans), female mice may develop vaginal carcinomas. In addition, only very limited research has been performed on the effect of AZT on the male or female reproductive systems; as such, its mutagenic and teratogenic effects, if any, are not known. One might expect that these more long term side effects would not be found in persons who take AZT for the relatively short period of time suggested for those who have been exposed to the virus as the result of sexual assault or rape.

**10. I understand that AZT loses its effectiveness in people who are seropositive after 12 to 18 months; if I am exposed, take AZT, but still become infected, will I be able to take advantage of AZT as a form of treatment later in my**

## **illness?**

AZT loses its effectiveness when resistant strains of the virus develop in a person already infected with the virus. Such activity is not expected in a person who recently has been exposed to the virus; therefore, it is unlikely that use of AZT as a prophylactic immediately after exposure will affect a person's ability to use AZT later in the course of illness, if it becomes necessary.

### **11. Can I transmit the virus before I know whether I am infected?**

If you are infected with the virus, you are capable of transmitting it; this is so even if your HIV antibody test comes back negative. Therefore, to protect your partner from infection, it is important, if you engage in sexual relations, that you use safer sex techniques throughout this period; in fact, unless you know for certain that neither you nor your partner are HIV-infected, you never should engage in unsafe sex. If you use intravenous drugs, you should avoid sharing works; if you do share works, always clean them with bleach and water following each use.

### **12. What else can I do during this waiting period?**

The most important thing you can do is to take care of yourself. You may wish to seek counseling. It is important to seek support from your family, friends, and medical professionals. Also, this would be a good time to accomplish the elusive goals of eating better, getting more sleep, and relaxing more.

FIRST IN THE FIGHT  
AGAINST AIDS



October 15, 1990

Judith I. Avner, Chairperson  
Governor's Task Force on Rape and Sexual Assault  
New York State Division of Women  
Executive Chamber, State Capitol  
Albany, New York 12224

Dear Ms. Avner:

The recent report of the Governor's Task Force on Rape and Sexual Abuse has recommended that procedures be implemented that would allow for the court-ordered HIV testing of persons suspected of rape or other sexually abusive crimes. Few issues in AIDS are as difficult as the possibility of transmission occurring through rape. The emotional and physical repercussions of the rape itself, coupled with the possibility of HIV infection, are devastating to the victim. However, GMHC believes that the mandatory HIV testing of suspects is inappropriate public health policy and urges that the Task Force recommendation be changed.

To determine if mandatory testing is appropriate in this instance, it is necessary to balance the effects that forced testing would have on both the suspect and public health policy against the benefits that the testing would provide to the victim. If a positive or negative test result could provide significant information about whether the victim has actually been infected and if there were steps that the victim could take to prevent seroconversion after exposure, then there would be no question that the interests of the victim would outweigh the privacy interests of the suspect and that the public health would be best served by requiring testing, with appropriate confidentiality protection for the suspect. However, given current limitations on medical knowledge, neither of those conditions are satisfied through this recommendation.

**I. Forced HIV Testing of Suspects Will Not Preclude the Need for Victims to be Tested Themselves**

If a suspect tests positive, it will be essential for the victim to also undergo HIV testing to learn if she or he has become infected. If the suspect tests negative, it is possible that the suspect is still infected, but has not yet developed antibodies for HIV. Even with a negative test result, the victim would still be at risk. Therefore, no matter what test result is received, the victim must be tested in order to obtain definitive knowledge of his or her HIV status.

Although it may appear as if knowing a suspect's HIV status can

offer a psychological comfort to the victim, such comfort is actually artificial and can be dangerous. A negative HIV-antibody test is not conclusive proof that a suspect is actually not infected because it takes time to develop antibodies. Therefore, revealing a suspect's status provides a false sense of security, which may deter a victim from testing.

Proper counseling services for the victim regarding the need to test, safer sex and needle-sharing practices and referrals for emotional and medical support must be provided. Testing should also be provided on a voluntary basis, along with appropriate counseling, to suspects. After counseling, the suspect may elect to disclose his or her test results to the victim, although, as noted, that information would have little actual value.

## **II. HIV Testing of Rape Suspects Does Not Provide Information that Will Help a Victim Make Informed Judgements About Medical Treatment**

There has been some speculation that a person exposed to HIV may begin prophylaxis with AZT in order to prevent infection. However, this hypothesis has not been adequately tested, and there is, as yet, no evidence to support it. Preliminary reports show that the protocol is ineffective<sup>1</sup>. According to the conditions of the protocol, it is believed that it is necessary to begin treatment within 24 hours of exposure at the latest, in order for the AZT to prevent seroconversion<sup>2</sup>. Therefore, an individual who is interested in trying AZT as prophylaxis would not have time to wait for test results. In any case, there is little or no evidence of adverse side-effects from AZT in persons with healthy immune systems, so there is no reason why an individual who wishes to try immediate AZT therapy could not safely do so.

## **III. Mandatory HIV Testing Would Intrude on the Privacy Rights of Suspects**

The privacy interests of the suspect should not be undervalued. A bloodtest for HIV is an intrusive process, often with serious emotional, social and legal consequences, that should not be forced upon someone without consent. Serious questions about the constitutionality of the Task Force's recommendation must be raised. Can such an intrusion be considered constitutionally sound, especially as to a suspect who has not been found guilty of any crime? We regard forced testing in this instance to be in violation of the Fourth

---

<sup>1</sup>Lange, J.M.A., et al., Failure of Zidovudine Prophylaxis After Accidental Exposure to HIV-1, N Engl J Med 1990; 321:1375-7.

<sup>2</sup>Centers for Disease Control. Public health service statement on management of occupational exposure to HIV, including considerations regarding zidovudine post-exposure use. MMWR 1990; 39(sppl RR1).

Amendment. Furthermore, we do not believe that the confidentiality of the suspect can be adequately protected. There is a possibility that the suspect's HIV status will become a factor that improperly influences the trial. What will the effect of testing the suspect be on his or her family life, mental and physical health, and in his or her job? Is it fair to subject the suspect to the possibility of discrimination without any proof of wrongdoing on his or her part, and in the absence of meaningful benefit to the victim? We think not.

Public health experts, including the National Academy of Sciences and the President's Commission on HIV, agree that HIV testing is most effective when it is performed on a voluntary basis. The New York State Legislature enacted legislation that reflects this policy. New York requires that HIV testing be voluntary, confidential and coupled with appropriate counseling. Programs which promote mandatory testing only serve to re-enforce the stigma that HIV testing is punishment and that being HIV positive is something to be ashamed of. This only undermines the effectiveness of testing and prevention programs overall.

It must be made very clear that in taking this position, we are in no way devaluing the devastating position in which a victim has been placed. However, we cannot let the fact that the issue is emotionally charged replace a rational analysis of appropriate policy. If testing the suspect could provide meaningful information about the victim's HIV status, and if there was a consequent intervention that might prevent seroconversion, then the testing could be justified under appropriate circumstances. Unfortunately, those conditions are not met. Sound public health policy dictates that HIV testing be voluntary, non-coercive and only one part of a broader attempt to educate people about AIDS and HIV transmission.

Therefore, we strongly urge that the recommendation allowing for mandatory HIV testing of rape suspects be eliminated. Instead, we call for effective counseling and referral programs for victims and offering testing on a voluntary basis to suspects.

Thank you for your attention in this matter and please feel free to call me to discuss this issue in greater detail.

Sincerely,

David A. Hansell, Esq.  
Deputy Executive  
Director for Policy

cc: Governor Mario Cuomo  
Hon. David Axelrod  
Hon. Richard Gottfried  
Nicholas Rango, M.D.

# Victims' group assails bill mandating testing

10/7/91 AT  
TIMES STAFF

Alaskan AIDS Assistance Association, an Anchorage agency which has served more than 200 clients in the past two years, strongly opposes the proposed Alaska House Bill 24 to mandate testing of suspected rapists.

Rebecca Rogers, executive director, said, "This bill does not take into account the nature of the HIV and AIDS testing process.

"A rapist could test negative up to six months after the attack and still be contagious. If a rape goes on during that time, testing won't necessarily inform the victim of the infection.

"In fact, if the victim is tested within the first three months, she could know her situation sooner than if the rapist is immediately tested," Rogers said. The director said 95 percent of HIV infections show up in the first three months after an encounter, and the remaining 5 percent in the next three months.

Four-A has never had a rape victim seek its help, she added. "The only rape we know of that transmitted HIV occurred in prison Outside," she said.

Alaska has 104 diagnosed cases of AIDS, Rogers said, and

## A rapist could test negative and still be contagious.

384 known cases of HIV, as of December, 1990. New statistics are due soon.

"The HIV cases reflect only those who have gone through state lab facilities," Rogers said. "We don't know the number that have used doctors' offices or private labs and tested HIV positive, but we are sure the figure is a lot higher."

Rogers said she considers Alaska's figures for both HIV and AIDS to be "low prevalence."

Maureen Dursi, president of Four-A's board of directors, said her organization "definitely is not in favor of this piece of legislation" on grounds of invasion of privacy, application to a charged rather than a convicted defendant, and because "there is no good purpose to the testing."

"Why don't we test everyone convicted for hepatitis B?" Dursi asked. "That's far more likely to be transmitted during a rape than HIV or AIDS."

# AIDS-test bill draws opposition

By BRIAN S. AKRE  
The Associated Press

JUNEAU — Advocates of AIDS victims are lining up against a bill that would make testing for the deadly disease mandatory for convicted sex offenders.

The bill would allow an offender's victims, as well as police, firefighters, ambulance workers and jailers who have physical contact with the offender, to seek court permission to gain the test results.

Fairbanks Republican Rep. Bert Sharp, prime sponsor of House Bill 24, said the measure would help protect victims of sexual assault from further trauma.

"Studies indicate that fear of exposure to the AIDS virus is more pronounced when intimate contact is involuntary," Sharp told the House Health, Education and Social Services Commit-

tee. "To subject a victim to the added stress of 'not knowing' is inequitable and cruel justice."

But at a committee hearing this week, advocates of AIDS victims said the bill would further traumatize victims of sexual assault.

The so-called HIV test, if positive, shows only that a person has been exposed to the AIDS virus. It does not mean the person has acquired immune deficiency syndrome.

Mark Tumeo, co-founder of the Interior AIDS Association in Fairbanks, also noted the test only indicates if the person has the virus at the time of the test.

"A test four months after an assault, the minimum time for sexual assault conviction after an arrest, will not indicate whether the person was positive at the time the sexual assault occurred,"

Tumeo said. "It says absolutely nothing about the status of the victim."

Tumeo said the test is "the type of potential state-sanctioned violation of personal rights" that AIDS victims fear.

Sharp said the courts have upheld such testing laws in other states, determining that the government's interest in protecting the public outweighs the criminal's privacy rights.

"When it threatens the lives of innocent victims, it is in the public interest that government step in and take action," he said.

Mandatory testing of criminals would further stigmatize all who test positive for the virus by associating them with deviant behavior, Tumeo said.

"The fact is that a person who commits rape is less likely to be a carrier than

anyone who has sex with prostitutes or is promiscuous," he said.

Bonnie McCorquodale of Fairbanks said sexual assault victims should be encouraged to get AIDS tests immediately after an assault, and testing the offender is no substitute.

"The motive is a good one. Unfortunately, the bill will not provide any additional protection for victims of sexual assault," she said.

Cindy Smith of Juneau, director of the Network on Domestic Violence and Sexual Assault, said her group has taken no position on the bill. But she suggested it be amended to require counseling for victims when the test results are released.

HESS Committee Co-chairwoman Rep. Georgiana Lincoln, R-Rampart, assigned the bill to a subcommittee for further study.

# 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.

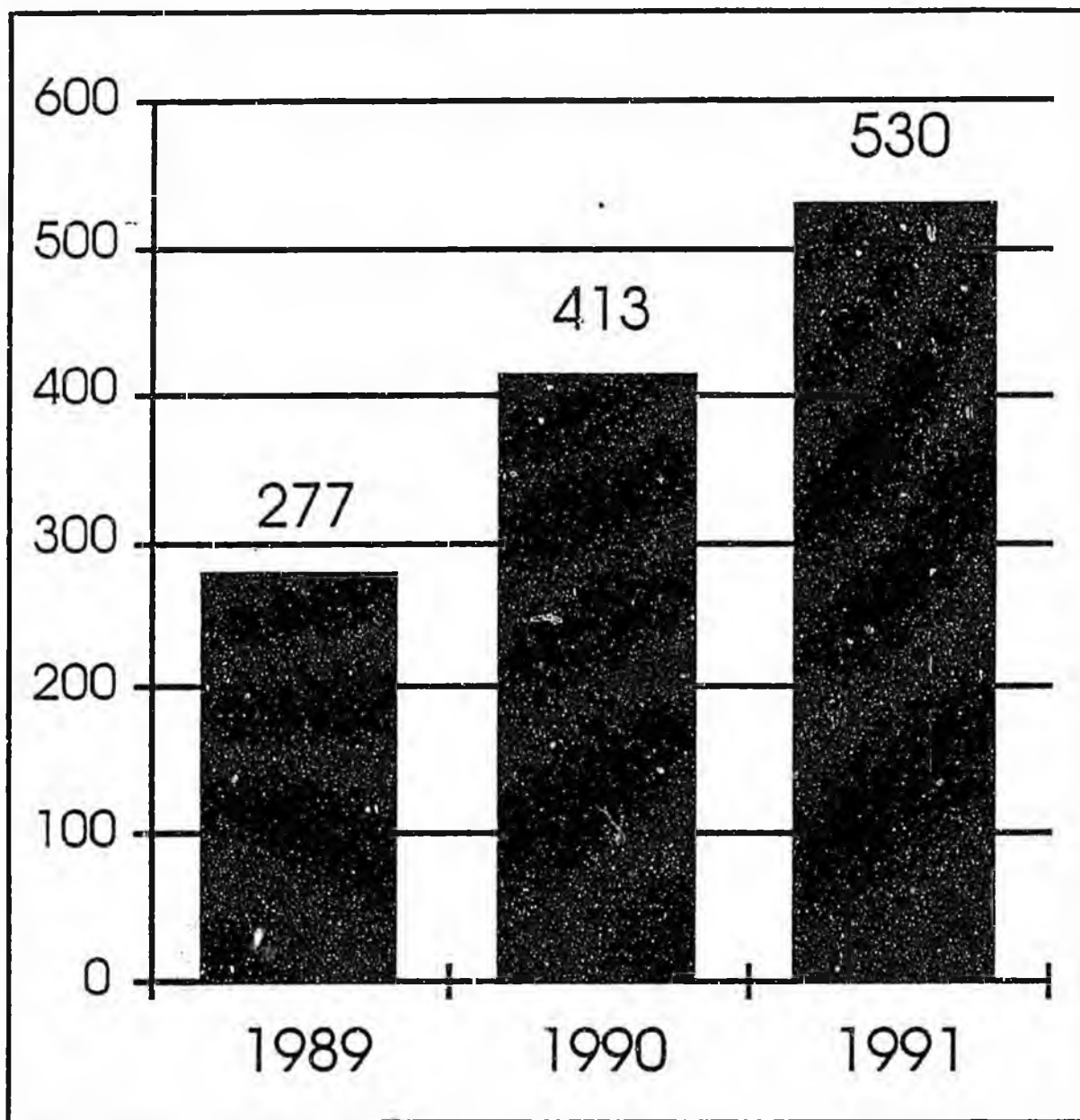
Thank you for giving me the opportunity to correct any misinformation that may have been provided earlier.

Sincerely,



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

## Reported Rapes in Alaska 1989 through 1991



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

# STATE OF ALASKA

## DEPARTMENT OF LAW

### CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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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.”<sup>1</sup> 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.<sup>2</sup>

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

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

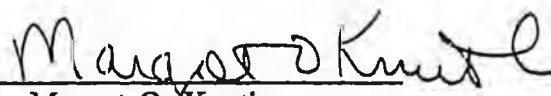
<sup>2</sup> We note that there is nothing in this bill that would prevent a prosecuting attorney from obtaining an independent order for the provision of a blood sample under Criminal Rule 16.

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  
Commissioner  
Department of Health and Social Services

Lloyd Rupp  
Commissioner  
Department of Corrections

HB 109  
Rep. Kott  
2/8/93

## 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

*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 (c)

AS 18.15.310 (b)    i

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 (d)

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) - AS 18.15.310 (i)

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

Dept. of Health + Social Services

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

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

AS 18.15.320

AS 18.15.310 (h)

**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").

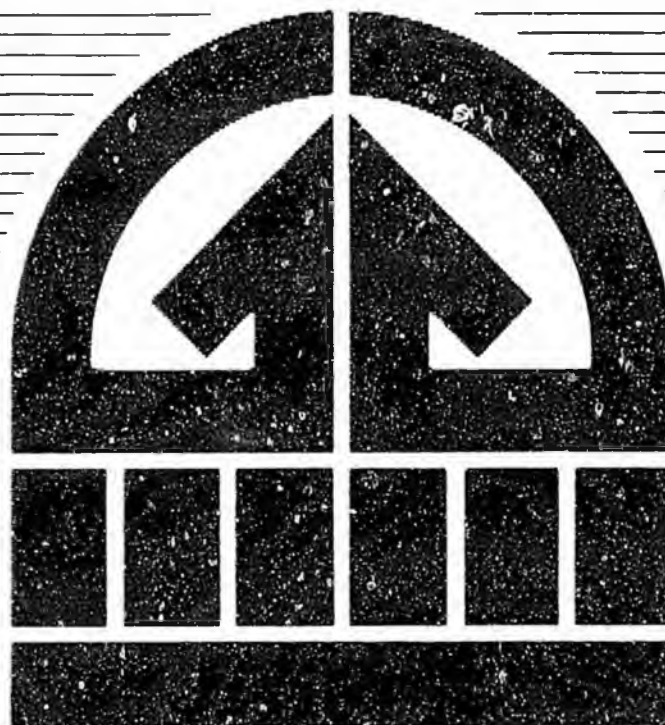
Yes     No

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

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

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## 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

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 3.6 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, WI) 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)			✓	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> <li>• Dept. of Health Services</li> </ul>	Class 3 misdemeanor (Fine ≤ \$5,000)	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> </ul>	
Arkansas 1989, Act 614 (HB 1496)		✓				<ul style="list-style-type: none"> <li>• Victim</li> </ul>		<ul style="list-style-type: none"> <li>• Victim</li> </ul>	
California 1989, Chap. 1360 (SB 2643) [Penal Code 1524.1] 1988, Chap. 1597 (SB 1007) 1988, Chap. 1582 (AB 3255)	✓	✓ (1)		✓	✓	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> <li>• Those victim "deems necessary"</li> </ul>	\$1,000 - \$10,000	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> </ul>	
Colorado 1988, Act 18-3-415 (SB 8)	✓			✓ (2)		<ul style="list-style-type: none"> <li>• Victim (1)</li> <li>• Court</li> </ul>			
Florida 1990, Chap. 90-210 (HB 1115)	✓ (5)	✓ (1)		✓	✓	<ul style="list-style-type: none"> <li>• Victim (1)</li> <li>• Accused</li> <li>• Dept. of Health &amp; Rehab.</li> </ul>		<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> </ul>	General Revenue Fund
Georgia 1988, Act 1440 (HB 1281) 1991, Act 411 (HB 554)		✓ ✓ (1) ✓ (15)			✓ (3) ✓	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Court</li> <li>• Penal Facility</li> <li>• Dept. of Human Res.</li> </ul>		<ul style="list-style-type: none"> <li>• Victim</li> </ul>	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

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:
<b>Idaho</b> 1988, Chap. 45 (HB 432)  1990, Chap. 310 (HB 638)	✓			✓		• Victim (1) • Public health authorities (5) • Court • Victim (5)			State (4)
<b>Illinois</b> 1987, P.A. 85-935 (HB 2044)	✓				✓	• Judge			
<b>Indiana</b> 1988, P. Law 88-123 (SB 9)	✓				✓	• Victim • Accused • Probation Officer • Board of Health		• Victim • Accused	
<b>Kansas</b> 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)
<b>Michigan</b> 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	
<b>Minnesota</b> 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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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:
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 (HE 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)

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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:
Texas 1987, Chap. 55 (SB 66-XX)		✓ (1)		✓ (17)		<ul style="list-style-type: none"> <li>• Victim</li> <li>• Local Health Authority</li> </ul>			
Virginia 1990, Chap. 957 (HB 815)		✓ (15) ✓	✓	✓	✓	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> <li>• Department of Health</li> </ul>		• 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                                    | (5) By court order   | (8) All prisoners                                      | (12) If defendant does not consent and after victim has been tested |
| (2) After preliminary hearing  | (6) And 6 months later if first test HIV negative (in some cases 3-6 months later) | (9) For victim if defendant tests HIV positive         | (13) After conviction if HIV positive                               |
| (3) Within 45 days of guilty verdict, guilty plea or no contest plea | (7) Restitution by convicted offender (court costs)                                | (10) Treatment of accused required                     | (14) Within 15 days   |
| (4) Only to extent of funding and appropriations                     |  | (11) If indigent, then municipality or county or state | (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

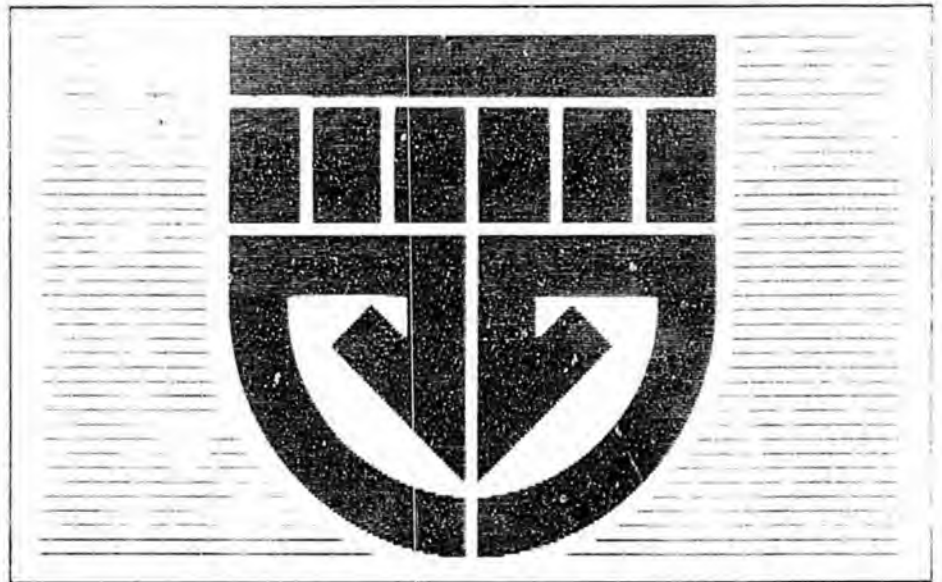
It is important for legislators to understand the distinction between the terms "HIV" and "AIDS" when they formulate policies. There is an immense difference between being infected with HIV and being diagnosed as having AIDS.

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  
LEGISLATIVE  
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# HOUSE COMMITTEE REPORT

(9)

Date Referred: January 29, 1993

FURTHER REFERRALS:

Judiciary  
Finance

Date of Committee Action: 2-16-93

The HEALTH, EDUCATION AND SOCIAL SERVICES 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:

bc replaced with CS HB 109 (HESS)  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 H+SS

fiscal note(s) \_\_\_\_\_

zero fiscal note Corrections, Law

zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO PASS</u>	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				

*[Signature]*  
CHAIRMAN'S SIGNATURE

# 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

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. CSHB 109 (HES)

Revision Date: February 23, 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						
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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.)

Please see the attached analysis.

*Richard I. Peques*

Prepared by: Richard I. Peques, Director  
 Division: Administrative Services Division  
 Approved by Commissioner: Charles E. Cole, Attorney General  
 Agency: Department of Law

Phone: 465-3672  
 Date: February 23, 1993  
 Date: February 23, 1993

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. CS 109 (HES)

ANALYSIS (Continued):

The committee substitute for HB 109, CSHB 109 (HES), changes the standard for hearing petitions of victims to request an order requiring that blood samples be taken from a defendant, to require (1) that a court find that probable cause exists to believe that a crime for which a test may be ordered has been committed, and (2) that a court find that probable cause exists to believe that sexual penetration took place between the defendant or a minor and the alleged victim. The bill further provides that in making these determinations, the court may rely on the evidence presented at a grand jury proceeding or preliminary hearing. We believe that these changes will eliminate virtually all "mini-hearings" and associated discovery efforts that we predicted in our fiscal note comments dated February 3, 1993. Consequently, there should not be a fiscal impact for the Department of Law.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

No. 2  
Bill Version: CSHB 109 (HES)  
(H) Publish Date: 2/17/93

Revision Date: February 3, 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						
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REVENUE						
FUND SOURCE:						

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.)

Please see the attached analysis.

*Richard I. Peques*

Prepared by: Richard I. Peques, Director  
Division: Administrative Services Division

Phone: 465-3672  
Date: February 3, 1993

Approved by Commissioner: Charles E. Cole, Attorney General  
At: Department of Law

Date: February 3, 1993

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FISCAL NOTE

CS HB 109 (HES)  
No. 2

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

ANALYSIS (Continued):

This bill amends AS 18.15 to provide that a defendant charged with a violation of the state's sexual assault laws, including a minor subject to a juvenile proceeding for committing the same violations, is subject to an order of a court to require testing for HIV and other communicable diseases. The bill would permit the alleged victim, or the prosecuting attorney at the request of an alleged victim, to petition the court for an order to require the testing. A court would then have to promptly conduct a hearing on the petition. If the court finds that 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, the court shall then order the tests.

The Department of Law handles about 200 sexual assault cases a year where criminal charges are filed, and where the assault includes conduct that would fall within the requirements of this bill. The department also handles a somewhat smaller number of sexual assaults involving minors in juvenile proceedings that would be subject to this bill.

We cannot predict how many sexual assault victims will request the department to petition on their behalf for a court hearing to require HIV and other communicable disease testing. If the number is large there could be a significant expense for the department. This is because our prosecutors would have to conduct a mini-trial and present evidence for each petition sufficient enough to convince a court that 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.

Defendants would be expected to resist prosecutors' efforts to show probable cause because of the effect that the hearing might have on their eventual defense at trial. In many cases, prosecutors would be required to prematurely reveal their evidence substantially earlier than normally required by court rule, in order to show probable cause. This could result in an additional level of defense discovery, giving the defense first crack at the state's case and witnesses.

However, because we cannot predict the number of times petitions will be requested, sufficient to warrant fiscal impact funding at any given location, fiscal note funds have not been requested.

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. CSHB 109 HESS

Revision Date: 2/18/93 Dept. Affected: Health and Social Services  
 Title: Blood Tests for persons charged with sex offenses BRU: State Health Services  
 Component: Laboratories  
 Sponsor: Kott  
 Requestor: House HESS COMPONENT SERIAL NO. #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						
<b>TOTAL OPERATING</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**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						
06 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>

**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: 2/18/93

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

Date: 2/18/93

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Revision Date: \_\_\_\_\_

BILL NO. CSHB 109 HESS

NALYSIS (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 West 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

No. 3

STATE OF ALASKA  
19<sup>th</sup> LEGISLATIVE SESSION

Bill Version: CSHB 109 (HES)  
(H) Publish Date: 2/17/93

Revision Date: \_\_\_\_\_ Dept. Affected: Corrections  
 Title: "An Act relating to blood tests  
for persons charged with sex offenses " BRU: Statewide Programs  
 Sponsor: \_\_\_\_\_ Component: Inmate Health Care  
 Requestor: \_\_\_\_\_ 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						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

CAPITAL

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REVENUE FUND SOURCE:

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FUNDING: (Thousands of Dollars)

1001 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						
<b>Estimate of current year (FY93) impact: 0</b>	<b>-0-</b>					

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Dana LaTour Phone: 465-3376  
 Division: Commissioner's Office Date: 2-11-93  
 Approved by Commissioner: Lloyd G. Rupp Date: 2-11-93  
 Agency: Department of Corrections

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## FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 109

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: Blood Tests for persons charged with sex offenses BRU: State Health Services  
 Sponsor: Kott Component: Laboratories  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. #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						
<b>TOTAL OPERATING</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>

CAPITAL						
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REVENUE FUND SOURCE						
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**FUNDING:**

(Thousands of Dollars)

FUNDING	FY94	FY95	FY96	FY97	FY98	FY99
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/M.HTIA						
Other						
<b>TOTAL</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>

**POSITIONS:**

POSITION TYPE	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)

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: 2/8/93

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

Date: 2/9/93

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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 West 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. HB 109

Revision Date: \_\_\_\_\_ Dept. Affected: Corrections  
 Title: "An Act relating to blood tests  
for persons charged with sex offenses." BRU: Statewide Programs  
 Component: Inmate Health Care  
 Sponsor: \_\_\_\_\_  
 Requestor: \_\_\_\_\_ 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						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

<b>CAPITAL</b>						
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<b>REVENUE FUND SOURCE:</b>						
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**FUNDING:** (Thousands of Dollars)

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

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

**ANALYSIS:** (Attach a separate page if necessary)

Prepared by: Dana LaTour  
 Division: Commissioner's Office  
 Approved by Commissioner: Lloyd G. Rupp  
 Agency: Department of Corrections

Phone: 465-3376  
 Date: 2-11-93  
 Date: 2-11-93

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FISCAL NOTE

BILL NO. HB 109

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Revision Date: February 3, 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						
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REVENUE						
FUND SOURCE:						

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.)

Please see the attached analysis.

*Richard I. Peques*

Prepared by: Richard I. Peques, Director  
Division: Administrative Services Division

Phone: 465-3672  
Date: February 3, 1993

Approved by Commissioner: Charles E. Cole, Attorney General  
Agency: Department of Law

Date: February 3, 1993

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*Fiscal Note - Dept of Law*

## FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 109

### ANALYSIS (Continued):

This bill amends AS 18.15 to provide that a defendant charged with a violation of the state's sexual assault laws, including a minor subject to a juvenile proceeding for committing the same violations, is subject to an order of a court to require testing for HIV and other communicable diseases. The bill would permit the alleged victim, or the prosecuting attorney at the request of an alleged victim, to petition the court for an order to require the testing. A court would then have to promptly conduct a hearing on the petition. If the court finds that 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, the court shall then order the tests.

The Department of Law handles about 200 sexual assault cases a year where criminal charges are filed, and where the assault includes conduct that would fall within the requirements of this bill. The department also handles a somewhat smaller number of sexual assaults involving minors in juvenile proceedings that would be subject to this bill.

We cannot predict how many sexual assault victims will request the department to petition on their behalf for a court hearing to require HIV and other communicable disease testing. If the number is large there could be a significant expense for the department. This is because our prosecutors would have to conduct a mini-trial and present evidence for each petition sufficient enough to convince a court that 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.

Defendants would be expected to resist prosecutors' efforts to show probable cause because of the effect that the hearing might have on their eventual defense at trial. In many cases, prosecutors would be required to prematurely reveal their evidence substantially earlier than normally required by court rule, in order to show probable cause. This could result in an additional level of defense discovery, giving the defense first crack at the state's case and witnesses.

However, because we cannot predict the number of times petitions will be requested, sufficient to warrant fiscal impact funding at any given location, fiscal note funds have not been requested.

FISCAL NOTE

No. 1

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Bill Version: CSHB 109 (HES)  
(H) Publish Date: 2/17/93

Division Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
: Blood Tests for persons charged with sex BRU: State Health Services  
offenses \_\_\_\_\_ Component: Laboratories  
Sponsor: Kott  
Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. #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						
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REVENUE FUND SOURCE						
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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/MTA						
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 *PN*  
Division: Division of Public Health

Phone: (907) 465-3090  
Date: 2/8/93

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

Date: 2/9/93

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Revision Date: \_\_\_\_\_

CS HB 109 (HES)  
No. 1.

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 West 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	\$27,330