

HB

109

Alaska State Legislature
House of Representatives

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& SOCIAL SERVICES
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DURING SESSION:
STATE CAPITOL
JUNEAU, AK 99811
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Representative Pete Kott

SPONSOR STATEMENT

HB 109 – Blood Tests for Sex Crime Perpetrators

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

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

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

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

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



SPONSOR STATEMENT

**CSHB 109(JUD)
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 sexually transmitted diseases.

(b) allows an alleged victim, the parent or guardian of a victim who is a minor or incompetent, or the prosecuting attorney on behalf of an 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 rely exclusively on evidence presented at a grand jury proceeding or preliminary hearing 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 (d) of this section. 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 (d) of this section 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 for HIV and other sexually transmitted diseases 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) allows 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, immediate family and household, or a person in a dating, courtship, or engagement relationship with the victim.

(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.

Section 2.

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

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

(907) 465-3867 or 465-2450
AX (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-LS0462K)

TO: Representative Cynthia Toohey
Attn: Lynne Smith

FROM: Jerry Luckhaupt *JL*
Legislative Counsel

FEB 17 1993

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

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

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

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

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

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

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

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

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

Representative Cynthia Toohey

February 17, 1993

Page 3

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

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

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

GPL:mi
93-026.mai

Enclosure

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO: CSHB 109 (JUD)

Revision Date: 3/31/93 Dept. Affected: Public Safety
 Title: "An act relating to blood tests for persons charged with sex offenses." BRU: Alaska State Troopers
 Component: Detachments
 Sponsor: Representative Kott
 Requestor: House Finance COMPONENT SERIAL NO. 799

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

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

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

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact is anticipated.

Prepared By: Francis C. Allan Phone: 269-5691
 Division: Alaska State Troopers Date: 3/31/93
 Approved by Commissioner: *Richard T. Burton* Date: 3/31/93
 Agency: Richard T. Burton, Dept. of Public Safety

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CSHB 109 (JUD)

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

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

EXPENDITURES/REVENUES:

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

CAPITAL						
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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.)

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

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division

Phone: 465-3672
Date: March 24, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law

Date: March 24, 1993

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

No. 5
Bill Version: CSHB 109 (JUD)
(H) Publish Date: 3/19/93

Envision Date: February 23, 1993
...relating to blood tests for persons charged with sex offenses.
 Sponsor: Representative Kort
 Requestor: Representative Kort

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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ENDING:						
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
 Dept: Department of Law

Phone: 465-3672
 Date: February 23, 1993
 Date: February 23, 1993

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FISCAL NOTE

CS HB 109 (sub)

NO. 5

pg. 2 of 2

STATE OF ALASKA
1993 LEGISLATIVE SESSION

ANALYSIS (Continued):

The committee substitute for HB 109, CS HB 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

BILL NO. CS HB 109 (JUD)

Revision Date: 3/23/93 Dept. Affected: Health and Social Services
 Title: Blood Tests for persons charged with sex offenses BRU: State Health Services
 Component: Laboratories
 Sponsor: Kott
 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						
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/MHTIA						
Other						
TOTAL	27.9	27.9	27.9	27.9	27.9	27.9

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary)

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

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

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

Phone: (907) 465-3090
 Date: _____

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

Date: 3/23/93

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ANALYSIS (cont.):

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

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. CS HB109 (JUD)

Revision Date: 3/23/93 Dept. Affected: Health and Social Services
 Title: Blood tests for persons charged with sex BRU: State Health Services
 Offices: _____ 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						
TOTAL OPERATING	45.5	45.5	45.5	45.5	45.5	45.5

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	45.5	45.5	45.5	45.5	45.5	45.5
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	45.5	45.5	45.5	45.5	45.5	45.5

POSITIONS:

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

Joe

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

Phone: (907) 465-3090
 Date: _____

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

Date: 3/23/93

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ANALYSIS (cont.):

This fiscal note assumes:

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

FISCAL NOTE

No. 6

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill Version: CSHB 109 (JUD)

(H) Publish Date: 3/19/93

Effective Date: 2-22-93

Dept. Affected: Corrections

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

SRU: Statewide Programs

Sponsor: Rep. Kott

Component: Inmate Health Care

Requestor: House HESS Committee

COMPONENT SERIAL NO. 705

Expenditures/Revenues:

(Thousands of Dollars)

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

CAPITAL						
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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						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

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

ANALYSIS:

(Attach a separate page if necessary)

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

Prepared by: Dana LaTour, Special Assistant *D. LaTour*

Phone: 465-3376

Division: Office of the Commissioner

Date: 2-22-93

Approved by Commissioner: Lloyd G. Rupp *L. Rupp*

Date: 2-22-93

Agency: Department of Corrections

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SENATE COMMITTEE REPORT

DATE: 4/12/93

FURTHER: FINANCE

DATE TURNED INTO OFFICE: 4/28/93

JUDICIARY Committee considered CS FOR HOUSE BILL NO. 109(JUD)

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

and recommends:

- replace with _____ CS _____ (_____)
- or adopt previous _____ CS _____ (_____)
- attaches amendment(s)

- same title
- new title
- technical title change (HB only)

- adopts _____ Letter of Intent
- further referral to the _____

- do pass
- do not pass
- no recommendation

individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal
Corrections	2-27-93	✓	
Law	2-23-93	✓	
HESS	3-16-93		✓
HESS	3-23-93		✓

Appropriation No Fiscal Note

DO PASS:

Rick Heford

OTHER RECOMMENDATIONS:

Com. to RSC

Suzanne R. Little No Rec

Adrian L. Taylor Do Pass

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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

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

March 10, 1993

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

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

Dear Representative Kott:

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

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

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

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

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

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

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

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

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

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

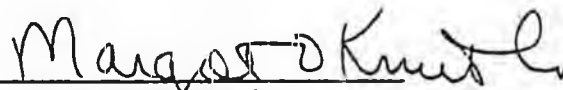
² We note that there is nothing in this bill that would prevent a prosecuting attorney from obtaining an independent order for the provision of a blood sample under Criminal Rule 16.

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

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

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
Margot O. Knuth
Assistant Attorney General

cc: Charles Cole
Attorney General

Deborah Behr
Department of Law

Kris Lethin
Legislative Liaison

Richard Burton, Commissioner
Department of Public Safety

Dr. Ted Mala
Commissioner
Department of Health and Social Services

Lloyd Rupp
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STATE OF ALASKA

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DEPARTMENT OF HEALTH AND SOCIAL SERVICES

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DIVISION OF PUBLIC HEALTH

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 latter 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

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.

Bill No. CSHB. 109(JUD)

Date: March 31, 1993

Contact: Joanne F. Lopez
Executive Director
465-4356

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

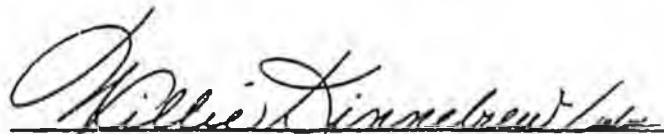
A total of 530 rapes were reported in 1991. Rapes account for 15.5% of all violent crimes. There are concerns for victims who may become infected with human immunodeficiency virus (HIV). Cases have been reported.

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

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

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

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



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

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

WOMEN'S COMMISSION APPROVAL