

4487

2013-2014 Regular Sessions

I N S E N A T E

April 3, 2013

Introduced by Sen. NOZZOLIO -- (at request of the Division of Criminal Justice Services) -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the criminal procedure law, in relation to the testing of certain criminal defendants for human immunodeficiency virus

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Section 210.16 of the criminal procedure law, as added by
2 chapter 571 of the laws of 2007, is amended to read as follows:
3 S 210.16 Requirement of HIV related testing in certain cases.
4 1. (a) In a case where an indictment or a superior court information
5 has been filed with a superior court which charges the defendant with a
6 felony offense enumerated in any section of article one hundred thirty
7 of the penal law where an act of "sexual intercourse", "oral sexual
8 conduct" or "anal sexual conduct," as those terms are defined in section
9 130.00 of the penal law, is required as an essential element for the
10 commission thereof, the court shall, upon a request of the victim, with-
11 in [six months of the date of the crimes charged,] FORTY-EIGHT HOURS
12 order that the defendant submit to human immunodeficiency virus (HIV)
13 related testing. [Testing of a defendant shall be ordered when the
14 result would provide medical benefit to the victim or a psychological
15 benefit to the victim. Medical benefit shall be found when the following
16 elements are satisfied: (i) a decision is pending about beginning,
17 continuing, or discontinuing a medical intervention for the victim; and
18 (ii) the result of an HIV test of the accused could affect that deci-
19 sion, and could provide relevant information beyond that which would be
20 provided by an HIV test of the victim. If testing the defendant would
21 provide medical benefit to the victim or a psychological benefit to the
22 victim, then the] THE testing is to be conducted by a state, county, or
23 local public health officer designated by the order. ANY FEE ASSESSED
24 FOR CONDUCTING THE TEST SHALL BE PAID FOR BY THE COUNTY. Test results,

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [] is old law to be omitted.

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1 which shall not be disclosed to the court, shall be communicated to the
2 defendant and the victim named in the order AS SOON AS PRACTICABLE in
3 accordance with the provisions of section twenty-seven hundred eighty-
4 five-a of the public health law.

5 (b) For the purposes of this section, the terms "victim" and "appli-
6 cant" mean the person with whom the defendant is charged to have engaged
7 in an act of "sexual intercourse", "oral sexual conduct" or "anal sexual
8 conduct", as those terms are defined in section 130.00 of the penal law,
9 where such conduct with such victim was the basis for charging the
10 defendant with an offense specified in paragraph (a) of this subdivi-
11 sion.

12 2. Any request made by the victim pursuant to this section must be in
13 writing[, filed with the court within six months of the date of the
14 crimes charged,] and provided by the court to the defendant or his or
15 her counsel. The request [must] MAY be filed with the court prior to or
16 within forty-eight hours after the indictment or superior court informa-
17 tion has been filed with the superior court; provided however that, for
18 good cause shown, the court may permit such request to be filed at a
19 later stage of the action [within six months of the date of the crimes
20 charged]. IF THE REQUEST IS FILED PRIOR TO THE FILING OF AN INDICTMENT
21 OR SUPERIOR COURT INFORMATION, THE COURT SHALL NOT ACT ON THE REQUEST
22 UNTIL SUCH INDICTMENT OR SUPERIOR COURT INFORMATION IS FILED.

23 3. At any stage in the action [within six months of the date of the
24 crimes charged,] prior to the final disposition of the indictment or
25 superior court information and while the defendant is charged with an
26 offense specified in paragraph (a) of subdivision one of this section,
27 the victim may request that the defendant submit to a follow-up HIV
28 related test AS MAY BE MEDICALLY APPROPRIATE. Such request must be in
29 writing, filed with the court and provided by the court to the defendant
30 or his or her counsel. Upon a finding that the follow-up HIV related
31 test is medically appropriate the court must order that the defendant
32 submit to such test. [The court shall not make such finding of medical
33 appropriateness unless the follow-up HIV related test is to be adminis-
34 tered a sufficient time after the charged offense to be consistent with
35 guidelines that may be issued by the commissioner of health. There shall
36 be no more than one follow-up HIV related test absent a showing of
37 extraordinary circumstances.]

38 4. Any requests, related papers and orders made or filed pursuant to
39 this section, together with any papers or proceedings related thereto,
40 shall be sealed by the court and not made available for any purpose,
41 except as may be necessary for the conduct of judicial proceedings
42 directly related to the provisions of this section. All proceedings on
43 such requests shall be held in camera.

44 5. The application for an order to compel a defendant to undergo an
45 HIV related test may be made by the victim but, if the victim is an
46 infant or incompetent person, the application may also be made by a
47 representative as defined in section twelve hundred one of the civil
48 practice law and rules. The application must state that: (a) the appli-
49 cant was the victim of the offense enumerated in paragraph (a) of subdivi-
50 sion one of this section of which the defendant is charged; and (b)
51 the applicant has been offered pre-HIV test counseling and post-HIV test
52 counseling by a public health officer in accordance with article twen-
53 ty-seven-F of the public health law and has been advised, in accordance
54 with any guidelines that may be issued by the commissioner of health, of
55 (i) the limitations on the information to be obtained through an HIV
56 test on the proposed subject; (ii) current scientific assessments of the

1 risk of transmission of HIV from the exposure he or she may have experi-
2 enced; and (iii) the need for the applicant to undergo HIV related test-
3 ing to definitively determine his or her HIV status.

4 6. The court shall conduct a hearing only if necessary to determine if
5 the applicant is the victim of the offense of which the defendant is
6 charged or to determine whether a follow-up test is medically appropri-
7 ate. The court ordered test must be performed within forty-eight hours
8 of the date on which the court ordered the test, provided, however, that
9 whenever the defendant is not tested within the period prescribed by the
10 court, the court must again order that the defendant undergo an HIV
11 related test. The defendant shall be advised of information as to HIV
12 testing and medical treatment in accordance with any guidelines that may
13 be issued by the commissioner of health.

14 7. (a) Test results shall be disclosed AS SOON AS PRACTICABLE subject
15 to the following limitations, which shall be specified in any order
16 issued pursuant to this section:

17 (i) disclosure of confidential HIV related information shall be limit-
18 ed to that information which is necessary to fulfill the purpose for
19 which the order is granted; and

20 (ii) disclosure of confidential HIV related information shall be made
21 to the defendant upon his or her request, and disclosure to a person
22 other than the defendant shall be limited to the person making the
23 application; redisclosure shall be permitted only to the victim, the
24 victim's immediate family, guardian, physicians, attorneys, medical or
25 mental health providers and to his or her past and future contacts to
26 whom there was or is a reasonable risk of HIV transmission and shall not
27 be permitted to any other person or the court.

28 (b) Unless inconsistent with this section, the court's order shall
29 direct compliance with and conform to the provisions of article twenty-
30 seven-F of the public health law. Such order shall include measures to
31 protect against disclosure to others of the identity and HIV status of
32 the applicant and of the person tested and may include such other meas-
33 ures as the court deems necessary to protect confidential information.

34 8. Any failure to comply with the provisions of this section or
35 section twenty-seven hundred eighty-five-a of the public health law
36 shall not impair or affect the validity of any proceeding upon the
37 indictment or superior court information.

38 9. No information obtained as a result of a consent, hearing or court
39 order for testing issued pursuant to this section nor any information
40 derived therefrom may be used as evidence in any criminal or civil
41 proceeding against the defendant which relates to events that were the
42 basis for charging the defendant with an offense enumerated in paragraph
43 (a) of subdivision one of this section, provided however that nothing in
44 this section shall prevent prosecution of a witness testifying in any
45 court hearing held pursuant to this section for perjury pursuant to
46 article two hundred ten of the penal law.

47 S 2. This act shall take effect immediately and shall permit court-
48 ordered testing of persons against whom an indictment or superior court
49 information has been filed on or after such effective date.