§ 210.16 Requirement of HIV related testing in certain cases.

1. (a) In a case where an indictment or a superior court information has been filed with a superior court which charges the defendant with a felony offense enumerated in any section of article one hundred thirty of the penal law where an act of "vaginal sexual contact", "oral sexual contact" or "anal sexual contact," as those terms are defined in section 130.00 of the penal law, is required as an essential element for the commission thereof, the court shall, upon a request of the victim within six months of the date of the crimes charged, order that the defendant submit to human immunodeficiency virus (HIV) related testing. Testing of a defendant shall be ordered when the result would provide medical benefit to the victim or a psychological benefit to the victim. Medical benefit shall be found when the following elements are satisfied: (i) a decision is pending about beginning, continuing, or discontinuing a medical intervention for the victim; and (ii) the result of an HIV test of the accused could affect that decision, and could provide relevant information beyond that which would be provided by an HIV test of the victim. If testing the defendant would provide medical benefit to the victim or a psychological benefit to the victim, then the testing is to be conducted by a state, county, or local public health officer designated by the order. Test results, which shall not be disclosed to the court, shall be communicated to the defendant and the victim named in the order in accordance with the provisions of section twenty-seven hundred eighty-five-a of the public health law.

(b) For the purposes of this section, the terms "victim" and "applicant" mean the person with whom the defendant is charged to have engaged in an act of "vaginal sexual contact", "oral sexual contact" or "anal sexual contact", as those terms are defined in section 130.00 of the penal law, where such conduct with such victim was the basis for charging the defendant with an offense specified in paragraph (a) of this subdivision.

2. Any request made by the victim pursuant to this section must be in writing, filed with the court within six months of the date of the crimes charged, and provided by the court to the defendant or his or her counsel. The request must be filed with the court prior to or within

forty-eight hours after the indictment or superior court information has been filed with the superior court; provided however that, for good cause shown, the court may permit such request to be filed at a later stage of the action within six months of the date of the crimes charged.

3. At any stage in the action within six months of the date of the crimes charged, prior to the final disposition of the indictment or superior court information and while the defendant is charged with an offense specified in paragraph (a) of subdivision one of this section, the victim may request that the defendant submit to a follow-up HIV related test. Such request must be in writing, filed with the court and provided by the court to the defendant or his or her counsel. Upon a finding that the follow-up HIV related test is medically appropriate the court must order that the defendant submit to such test. The court shall not make such finding of medical appropriateness unless the follow-up HIV related test is to be administered a sufficient time after the charged offense to be consistent with guidelines that may be issued by the commissioner of health. There shall be no more than one follow-up HIV related test absent a showing of extraordinary circumstances.

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

5. The application for an order to compel a defendant to undergo an HIV related test may be made by the victim but, if the victim is an infant or incompetent person, the application may also be made by a representative as defined in section twelve hundred one of the civil practice law and rules. The application must state that: (a) the applicant was the victim of the offense enumerated in paragraph (a) of subdivision one of this section of which the defendant is charged; and (b) the applicant has been offered pre-HIV test counseling and post-HIV test counseling by a public health officer in accordance with article twenty-seven-F of the public health law and has been advised, in

accordance with any guidelines that may be issued by the commissioner of health, of (i) the limitations on the information to be obtained through an HIV test on the proposed subject; (ii) current scientific assessments of the risk of transmission of HIV from the exposure he or she may have experienced; and (iii) the need for the applicant to undergo HIV related testing to definitively determine his or her HIV status.

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

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

(i) disclosure of confidential HIV related information shall be limited to that information which is necessary to fulfill the purpose for which the order is granted; and

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

(b) Unless inconsistent with this section, the court's order shall direct compliance with and conform to the provisions of article twenty-seven-F of the public health law. Such order shall include measures to protect against disclosure to others of the identity and HIV status of the applicant and of the person tested and may include such

other measures as the court deems necessary to protect confidential information.

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

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