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HOUSE BILL 112

**49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009**

INTRODUCED BY

John A. Heaton

AN ACT

RELATING TO HEALTH; REQUIRING A DISTRICT ATTORNEY TO PETITION FOR A HUMAN IMMUNODEFICIENCY VIRUS TEST ON A PERSON CHARGED WITH OR CONVICTED OF CERTAIN SEX OFFENSES UPON THE REQUEST OF THE VICTIM; PROVIDING THAT THE TEST BE PERFORMED WITHIN FORTY-EIGHT HOURS FROM THE DATE OF THE COURT ORDER.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 24-2B-5.1 NMSA 1978 (being Laws 1993, Chapter 107, Section 3) is amended to read:

"24-2B-5.1. INFORMED CONSENT NOT REQUIRED--TESTING OF PERSONS CONVICTED OF CERTAIN CRIMINAL OFFENSES--RESPONSIBILITY TO ADMINISTER AND PAY FOR TEST.--

A. A test designed to identify the human immunodeficiency virus or its antigen or antibody may be performed, without [his] the offender's consent, on an offender

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1 convicted pursuant to state law of any criminal offense:

2 (1) involving contact between the penis and  
3 vulva;

4 (2) involving contact between the penis and  
5 anus;

6 (3) involving contact between the mouth and  
7 penis;

8 (4) involving contact between the mouth and  
9 vulva;

10 (5) involving contact between the mouth and  
11 anus; or

12 (6) when the court determines from the facts  
13 of the case that there was a transmission or likelihood of  
14 transmission of blood, semen or vaginal secretions from the  
15 offender to the victim.

16 B. [~~When~~] If consent to perform a test on an  
17 offender cannot be obtained pursuant to the provisions of  
18 Section 24-2B-2 or 24-2B-3 NMSA 1978, the district attorney or  
19 other prosecutorial authority shall, upon the request of the  
20 victim of a criminal offense described in Subsection A of this  
21 section, [may] petition the court to order that a test be  
22 performed on the offender [The petition and all proceedings in  
23 connection therewith shall be under seal. When] not later than  
24 forty-eight hours from the date of the court order. If the  
25 victim of the criminal offense is a minor or incompetent, the

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1 parent or legal guardian of the victim may request the district  
2 attorney or other prosecutorial authority to petition the court  
3 to order that a test be performed on the offender. [~~The court~~  
4 ~~shall order and the test shall be administered to the offender~~  
5 ~~within ten days after the petition is filed by the victim, his~~  
6 ~~parent or guardian.~~] The petition and all proceedings in  
7 connection with the petition shall be under seal. The results  
8 of the test shall be disclosed as soon as practicable and only  
9 to the offender and to the victim or the victim's parent or  
10 legal guardian. [~~When~~] If the offender has a positive test  
11 result, both the offender and victim shall be provided with  
12 counseling, as described in Section 24-2B-4 NMSA 1978.

13 C. [~~When~~] If the offender is sentenced to  
14 imprisonment in a state corrections facility, the court's order  
15 shall direct the department of health to be responsible for the  
16 administration of and payment for the test and the lawful  
17 distribution of the test results.

18 D. [~~When~~] If the offender is convicted of a  
19 misdemeanor or petty misdemeanor offense or is convicted of a  
20 felony offense that is suspended or deferred, the court's order  
21 shall direct the department of health to be responsible for the  
22 administration of and payment for the test and the lawful  
23 distribution of the test results.

24 E. [~~When~~] If the offender is a minor adjudicated as  
25 a delinquent child pursuant to the provisions of the Children's

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1 Code and the court transfers legal custody of the minor to the  
2 children, youth and families department, the court's order  
3 shall direct the children, youth and families department to be  
4 responsible for the administration of and payment for the test  
5 and the lawful distribution of the test results.

6 F. ~~[When]~~ If the offender is a minor adjudicated as  
7 a delinquent child pursuant to the provisions of the Children's  
8 Code and the court does not transfer legal custody of the minor  
9 to the children, youth and families department, the court's  
10 order shall direct the department of health to be responsible  
11 for the administration of and payment for the test and the  
12 lawful distribution of the test results."

13 Section 2. Section 24-2B-5.2 NMSA 1978 (being Laws 1996,  
14 Chapter 80, Section 8) is amended to read:

15 "24-2B-5.2. INFORMED CONSENT NOT REQUIRED--TESTING OF  
16 PERSONS FORMALLY CHARGED FOR ALLEGEDLY COMMITTING CERTAIN  
17 CRIMINAL OFFENSES--RESPONSIBILITY TO ADMINISTER AND PAY FOR  
18 TEST.--

19 A. A test designed to identify the human  
20 immunodeficiency virus or its antigen or antibody may be  
21 performed, without ~~[his]~~ the person's consent, on a person upon  
22 the filing of a complaint, information or an indictment  
23 alleging that the person committed a state criminal offense:

24 (1) involving contact between the penis and  
25 ~~[the]~~ vulva;

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1 (2) involving contact between the penis and  
2 anus;

3 (3) involving contact between the mouth and  
4 penis;

5 (4) involving contact between the mouth and  
6 vulva; or

7 (5) involving contact between the mouth and  
8 anus.

9 B. If consent to perform a test on an alleged  
10 offender cannot be obtained pursuant to the provisions of  
11 Section 24-2B-2 or 24-2B-3 NMSA 1978, the district attorney or  
12 other prosecutorial authority shall, upon the request of the  
13 victim of the alleged criminal offense described in Subsection  
14 A of this section, [may] petition the court [through the  
15 prosecuting office or personally] to order that a test be  
16 performed on the alleged offender not later than forty-eight  
17 hours from the date of the court order; provided that the same  
18 test is first performed on the victim of the alleged criminal  
19 offense. [The test may be performed on the alleged offender  
20 regardless of the result of the test performed on the victim of  
21 the alleged offense.] If the victim of the alleged criminal  
22 offense is a minor or incompetent, the parent or legal guardian  
23 of the victim of the alleged criminal offense may request the  
24 district attorney or other prosecutorial authority to petition  
25 the court to order that a test be performed on the alleged

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1 offender. The test may be performed on the alleged offender  
2 regardless of the result of the test performed on the victim of  
3 the alleged offense.

4 C. The court may issue an order based on a finding  
5 of good cause after a hearing at which both the victim of the  
6 alleged criminal offense and the alleged offender have the  
7 right to be present. During the hearing, only affidavits,  
8 counter affidavits and medical reports regarding the facts that  
9 support or rebut the issuance of an order shall be admissible.  
10 The hearing shall be conducted within seventy-two hours after  
11 the ~~[victim of the alleged criminal offense]~~ district attorney  
12 or other prosecutorial authority petitions the court for the  
13 order. The petition and all proceedings in connection  
14 therewith shall be under seal. ~~[The court shall issue the~~  
15 ~~order and the test shall be administered to the alleged~~  
16 ~~offender within ten days after the petition is filed by the~~  
17 ~~victim of the alleged offense, his parent or guardian.]~~

18 D. The results of the test shall be disclosed as  
19 soon as practicable and only to the alleged offender and to the  
20 victim of the alleged criminal offense or the victim's parent  
21 or legal guardian. When the victim of the alleged criminal  
22 offense or the alleged offender has a positive test result,  
23 both the alleged offender and the victim of the alleged  
24 criminal offense shall be provided with counseling, as  
25 described in Section 24-2B-4 NMSA 1978.

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1 E. The court's order shall direct the department of  
2 health to be responsible for the administration of and payment  
3 for the test and the lawful distribution of the test results.

4 F. A prosecuting attorney may not use in a criminal  
5 proceeding arising out of the alleged criminal offense the fact  
6 that a test was administered to the alleged offender or the  
7 results of the test.

8 G. The provisions of this section shall not affect  
9 the rights and remedies available to the victim of the alleged  
10 criminal offense and alleged offender in any civil action.

11 H. The administration of a test to an alleged  
12 offender pursuant to the provisions of this section shall not  
13 preclude the subsequent administration of [~~another test~~]  
14 follow-up tests pursuant to the provisions of Section 24-2B-5.1  
15 NMSA 1978."