

# Legal Brief

## HIV Testing

This Legal Brief was drafted for general informational purposes only. It is not meant to be a comprehensive guide, nor should it be construed as legal advice. The information in this brief is current as of April 1, 2013; readers should consult the most recent versions of referenced statutes, regulations, and cases to ensure there have been no material changes.

### Summary

*In certain criminal or juvenile delinquency cases involving a possible exchange of blood, semen, or other bodily fluids, the victim or any involved law enforcement officer may request the entry of a court order requiring the issuance of a search warrant to draw blood from the defendant or alleged juvenile delinquent to be tested for blood-borne pathogens, including hepatitis B and HIV.*

*Upon the issuance of a search warrant, the South Dakota Department of Health is required to conduct the testing and report the results to a licensed physician designated by the victim or law enforcement officer with whom the blood, semen, or other bodily fluids were or may have been exchanged.*

*The victim or law enforcement officer may also request to be tested as well. Any other person who may have had sexual relations or otherwise exchanged bodily fluids with the person being tested may also petition the court to be provided with the test results.*

*Emergency medical service personnel who provide medical services to the alleged defendant or juvenile delinquent may also request to be tested, but they must first make the request to the alleged defendant or juvenile delinquent or to the relative or estate of a deceased defendant or alleged juvenile delinquent.*

*The results of such testing are to be kept confidential, except that the Department of Health is required to report the results of the test of the defendant or juvenile and to the victim, law enforcement officer, or emergency medical service provider.*

### Discussion

Any person convicted of prostitution or solicitation of prostitution may be required, with or without that person's consent, to undergo a standard diagnostic test for human immunodeficiency virus (HIV) under the testing protocol of the South Dakota Department of Health.

In addition, a victim or a law enforcement officer may make a written request to the state's attorney that the defendant or the alleged juvenile delinquent be tested for blood-borne pathogen infection by the Department of Health and that a search warrant be issued for the purpose of taking a blood sample from the defendant or the juvenile for testing for such infection. The written request shall state that the victim or law enforcement officer believes there was an exchange of

blood, semen, or other bodily fluids from the defendant or the juvenile to the victim or law enforcement officer and shall state the factual basis for believing there was such an exchange.

The court shall hold a hearing at which both the victim or law enforcement officer and the defendant or the alleged juvenile delinquent may be present. If the court finds probable cause to believe that the defendant or the juvenile committed the offense and that there was an exchange of blood, semen, or other bodily fluids from the defendant or the juvenile to the victim or from the defendant or the juvenile to the law enforcement officer, the court may order a search warrant for the purpose of taking a blood sample from the defendant or the juvenile for testing for blood-borne pathogen infection.

If the court orders a search warrant, the Department of Health shall initiate the test for blood-borne pathogen infection within forty-eight (48) hours after the department receives the blood sample.

Emergency medical service personnel who provided treatment to the defendant or alleged juvenile delinquent may also request to be tested, but they must first ask for permission from the defendant or alleged juvenile delinquent.

With or without a request from the victim or affected law enforcement officer, after conviction, but prior to sentencing, the court shall order the convicted person to submit to an HIV test and shall issue a warrant to collect a blood sample from that person. A health professional licensed or certified to do so shall take the blood samples required for testing and forward them to the Department of Health. It is not clear from the statutes whether this requirement applies to all convictions or just to those convicted of prostitution or solicitation of prostitution.

The Department of Health shall initiate the test for HIV within forty-eight (48) hours after the department receives the blood sample. If the screening test required by this section indicates the presence of antibodies to HIV, the court shall order the person to undergo a confirmatory test.

A health professional licensed or certified to do so shall take the blood samples required for testing for blood-borne pathogen infection and forward them to the Department of Health for testing. The testing shall take place under a test protocol determined by the Department of Health. A licensed physician, designated by the victim or the law enforcement officer to receive the results of the test, shall notify the victim or the law enforcement officer of the results of the victim's or law enforcement officer's test, and shall notify the victim or the law enforcement officer and the defendant or the juvenile of the results of the defendant's or the juvenile's test within forty-eight (48) hours after receipt.

All persons involved in carrying out the testing and notice provisions of South Dakota law must act in a manner that will protect the confidentiality of the victim, any affected law enforcement officer, and the defendant or alleged juvenile delinquent, including the sealing of relevant court records.

Any person who may have had sexual relations with or otherwise exchanged bodily fluids with the tested person may also petition the court to receive the results of the HIV test. The petition shall state that the petitioner believes there was an exchange of blood, semen, or other bodily fluids with the tested person and shall state the factual basis for believing there was such an exchange. The court must hold a hearing at which both the petitioner and the tested person may be present. If the court finds probable cause that there was an exchange of blood, semen, or other bodily fluids, the court may issue an order releasing the test results to the petitioner.

The final test results shall be provided to the person tested along with precautionary, medical care, and counseling information.

## Legal Brief

A victim may request that the Department of Health provide counseling, testing for infection by blood-borne pathogens, and referral for appropriate health care and support services to the victim through its public health services. If the Department makes such a referral, it is not responsible to pay for or otherwise provide health care or support services to the victim. If appropriate, given the circumstances, the physician should refer the victim to the local victim advocate services of the state or federal court system, as applicable and available.

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