

HONORING A VICTIM'S RIGHT TO HAVE DEFENDANT TESTED FOR HIV AND OTHER COMMUNICABLE DISEASES (ORS 135.139)

Oregon Department of Justice Crime Victims' Services Division

How to Comply with Multiple Agency Requirements and Get a
Speedy Result for Crime Victims

November 2015

A Product of the Attorney General's Task Force on Victims' Rights Enforcement



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How to Comply with Multiple Agency Requirements and Get a Speedy Result for Crime Victims

The justice system is best served by full implementation of all of crime victims' rights as embodied in Oregon Constitution and statute. Therefore, it is in the best interest of all to create a comprehensive approach to ensuring that ORS 135.139 be applied consistently and efficiently throughout the State of Oregon.

Select Express Provisions of Law

ORS 135.139(1) provides:

“When a person has been charged with a crime in which it appears from the nature of the charge that the transmission of body fluid from one person to another may have been involved, the district attorney, upon the request of the victim or the parent or guardian of a minor or incapacitated victim, shall seek the consent of the person charged to submit to a test for HIV and any other communicable disease. In the absence of such consent or failure to submit to the test, the district attorney may petition the court for an order requiring the person charged to submit to a test for HIV and any other communicable disease.”

Thus, under ORS 135.139(1), a victim's right to obtain an order compelling testing attaches upon the charging of a crime involving “the transmission of a body fluid from one person to another”. After charging and prior to conviction, and upon the request of a victim, a district attorney may seek consent of the defendant to submit to testing. If the defendant does not consent, “the district attorney may petition with the court for an order” and “the court shall order the testing if the court determines there is probable cause to believe that” “the person charged committed the crime” and that the victim “has received substantial exposure.” ORS 135.139(2)(b).

After a conviction is obtained, ORS 135.139(3) provides that, “the court shall seek the consent of the convicted person to submit to a test for HIV and other communicable diseases. In the absence of such consent or failure to submit to the test, the court shall order the convicted person to submit to the test if the victim of the crime, or a parent or guardian of the victims, request the court to make such order”.

***Please note for information on a juvenile court's authority to order HIV testing involving **youth offenders** who have been found within the jurisdiction of the juvenile court refer to **ORS 419C.475**

Frequently Asked Questions

Below we highlight a few questions that arose during the writing of this paper.

- **Who has access to the test results?** When a test is ordered under ORS 135.139(4) subsection (2) or (3) of this section, the victims of the crime or a parent or guardian of the victim if they are a minor, shall designate an attending physician to receive such information on behalf of the victim. ORS 135.139(4). The result of any test ordered under this law is not a public record and shall be available only to the

victim, the parent or guardian of a minor or incapacitated victim, the attending physician who is licensed to practice medicine, the Department of Human Services (DHS) and the person tested. ORS 135.137(4). The results of tests or reports, or information therein, obtained shall be confidential and shall not be divulged to any person not authorized by this section to receive the information. Any violation of this provision is a Class C misdemeanor. ORS 135.139(11). Any notices of test results should refer to those statutory requirements.

- **Is a second test always necessary?** Scientific literature¹ indicates advances in the technology of HIV testing have significantly shortened the window periods for the tests; therefore, the need for a second test at six months may not be necessary in many cases.
- **Who is responsible for payment of the testing?** The Crime Victims Compensation Program (CVCP) will pay for the testing of the defendant.
- **How is communicable disease defined?** While communicable disease is not directly defined in the statute common communicable diseases are identified in the community standards. One may argue the need for a specific test and identify it in the request or court order. Hepatitis C would be an example.
- **What if an offender refuses to undergo testing?** This is a very rare occurrence; however, should the need arise there are mechanisms in place to insure compliance with a valid court order.

Where Do We Go From Here?

Successfully crafting and incorporating a new process into current procedures takes time and resources to accomplish. This document offers guidance while leaving it to the individual agency to use in the way that best works for the agency. Included:

- suggested language for Petition and Order for testing
- sample consent form
- current Contact Information for District Attorney Victim Assistance Programs
- endorsement to use these solutions statewide

The guidance and sample documents supplied here will allow agencies to follow the law, respond with speed and consistency and minimize the potential for re-victimization and exposure to violating the rights of a crime victim. We encourage you to share this information with others who may benefit.

***Each agency must adhere to any statutory requirements or court mandates that apply to them.

Guidance and Sample Forms

DDA – During the law enforcement investigation process, under appropriate circumstances consent can be sought. When this right is requested by a victim or guardian, the DDA will seek the consent of the person charged through their defense counsel. In many cases the charged person will consent thereby speeding up the process of testing and ultimately the availability of results to the victim. If one cannot obtain voluntary consent the DDA may use the attached sample petition and order. The signed order should be sent to the appropriate holding facility immediately so that testing can commence. When possible, the cost of testing and any

¹ <http://www.bcmj.org/bc-centre-disease-control/don%E2%80%99t-wait-test-hiv>

counseling for the victim, should the test prove positive, should be ordered as restitution to the appropriate party.

Sample Petition & Order included at end of document.

Sample Consent Form included at end of document.

Judges – Availability of testing should be a part of the standard information provided by judges to any victims at the time of appearance when there may have been transmission of body fluids. A Judge may refer the victim to the District Attorney Victim Assistance Program or Victims’ Rights Attorney for a full discussion of this right. HIV/Communicable Disease testing needs to be a routine condition of probation in appropriate cases and should continue to be included in uniform criminal judgments.

Holding Facilities/Supervising Agency – If the facility/supervising agency wishes to bill Crime Victims Compensation for the testing send the invoice along with a copy of the written consent or court order to 1162 Court Street Salem OR 9733. If the facility/supervising agency has no means to perform the testing the defendant may be taken to a local clinic.

PLEASE NOTE: If the facility/supervising agency requires assistance to determine the designated physician/medical recipient of the test results they may contact the District Attorney’s Office Victim Assistance Program for assistance. See the link below for contact information.

<http://www.doj.state.or.us/victims/pages/assistance.aspx>

Medical Personnel – Follow the standards, policies and procedures set by county or state facility, which generally include a blood draw to test for diseases identified in the community standards or other specific test identified in the request or court order.

ORS 135.139(9) – (10) provide that medical personnel must do the draw, and that no person doing the draw in a “reasonable manner according to generally accepted medical practices “ shall be civilly or criminally liable for doing so.

Advocates – If the person charged is not available to undergo testing, the victim may wish to apply for crime victim’s compensation to cover the cost of undergoing testing him/herself. All of the standard application rules apply.

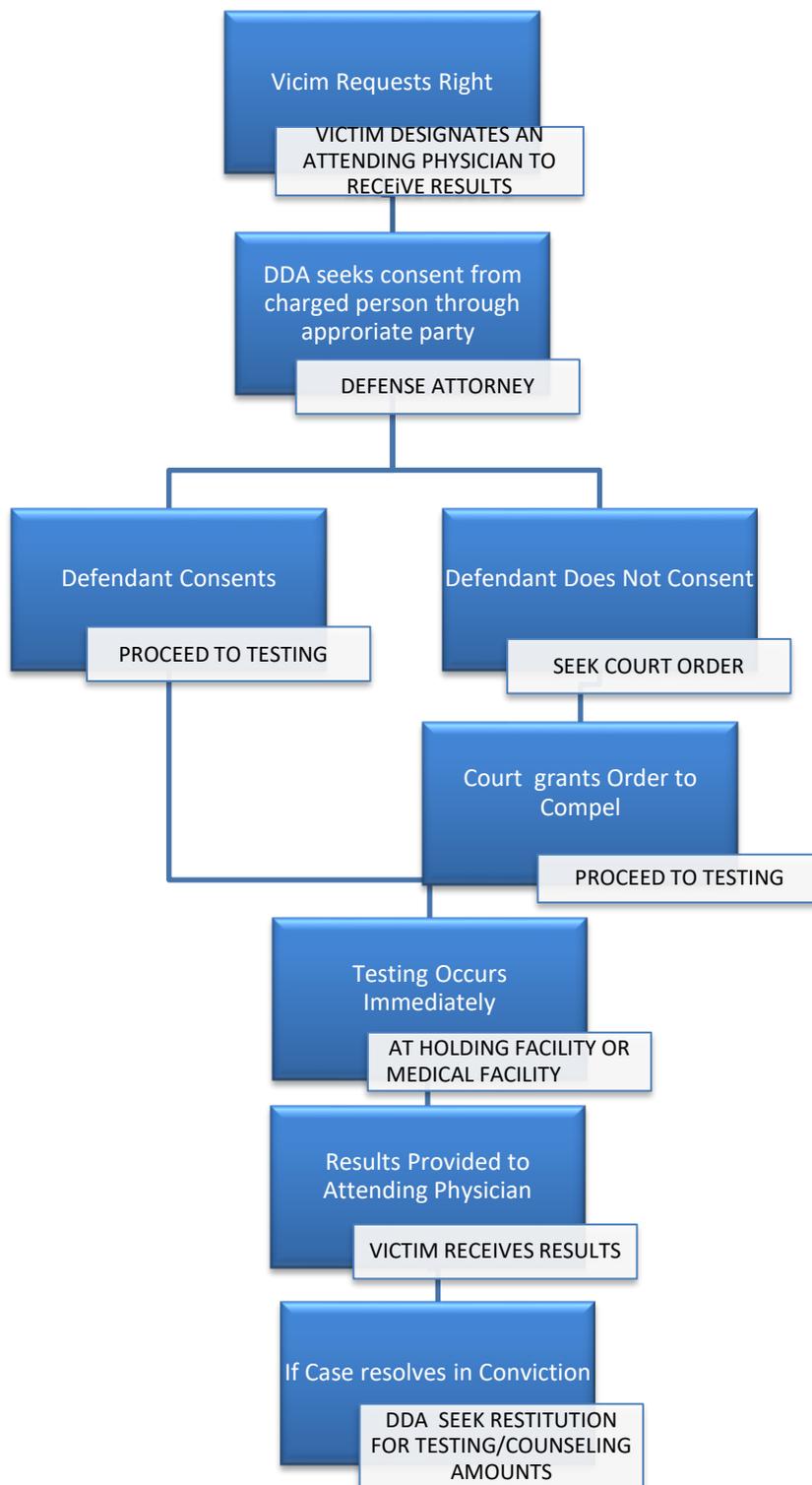
If the victim does not have a physician or does not wish to name their physician as recipient of test results, advocates can provide information about local community clinics or other appropriate community resources that can fulfill this function.

For the purpose of delivering test results, provide victim designated attending physician information to appropriate agency upon request.

Training

In order to provide the best services to victims and to manage cases most effectively, it is incumbent upon agencies to ensure personnel are regularly and appropriately trained in Crime Victims’ Rights.

Flowchart



Please Note: Consent/Order for testing can be obtained after conviction as part of sentencing.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF XXXXXX

STATE OF OREGON,) NO: _____
Plaintiff,)
) MOTION FOR HIV / COMMUNICABLE DISEASE
) TESTING PURSUANT TO ORS 135.139
_____)
Defendant.)

Notwithstanding the provisions of ORS 433.045 the State of Oregon, by and through XXXXXXXXXXXX, Deputy District Attorney, files this petition under subsection (1) of ORS 135.139(2)(B) requesting immediate testing for HIV and other communicable diseases. The testing process will include any additional testing requested if the first test results in a negative reaction as allowed by ORS 135.139(5). Additionally, the state moves this court to order the results of the defendant's testing to be forwarded to the victims' designated physician/medical agency, known to the District Attorney.

DATED this ____ day of _____, 20 ____.

Deputy District Attorney

Print Name

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF XXXXXX

STATE OF OREGON,) NO: _____
Plaintiff,)
) ORDER FOR HIV / COMMUNICABLE DISEASE
) TESTING PURSUANT TO ORS 135.139
_____))
Defendant.)

THIS MATTER coming before the Court on this ____ day of _____, 20__ on the above-entitled case, and the Court having considered the issue of the transmission of bodily fluids pursuant to ORS 135.139 and the Court now being fully advised in the premises;

THE COURT DETERMINES:

- There is probable cause to believe that person charged committed the crime Defendant has been found guilty
- There is probable cause to believe that the victim received a substantial exposure as defined by rule of the Oregon Health Authority.

IT IS HEREBY ORDERED:

- Defendant shall be tested immediately upon receipt of this order and, if required in six months, to submit to said testing.
- Jail, Community Corrections, Oregon Department of Corrections or other holding facility shall provide the appropriate medical provider to draw blood for said testing.
- The results of the testing shall be forwarded to the victims' designated physician/medical agency, known to the District Attorney.

IT IS FURTHER ORDERED:

- Said testing is a condition of sentencing and Defendant shall provide proof of compliance with the above procedure to appropriate prison authority, supervising probation, parole or post-prison supervision officer within __ days of this order.

DATED this ____ day of _____, 20_____.

Circuit Court Judge

Print Name

(YOUR LAW ENFORCEMENT HEADING)

CONSENT TO SEARCH

I, _____, understand the police do not have a court order.
(print name)

I understand that I have the right to refuse the collection of blood for the purpose of determining the presence of HIV or other communicable diseases. Should I give consent to this collection, I have the right to stop the collection at any time unless a court order is obtained.

I am voluntarily authorizing medical personnel to collect blood samples for the purpose of testing for HIV or other communicable diseases and forwarding the results to the victims' designated physician/medical agency, known to the District Attorney.

I have read the above and understand the contents. I have not been threatened or coerced and no promises have been made to cause me to consent to this collection.

Signed: _____

Date: _____ Time: _____

Witness 1: _____ Date: _____ Time: _____

Witness 2: _____ Date: _____ Time: _____

Served by 1: _____ Date: _____ Time: _____

Agency: _____ Case Number: _____