



1997 SENATE BILL 81

February 19, 1997 - Introduced by Senators BUETTNER, DRZEWIECKI, COWLES, DARLING, SCHULTZ, ROSENZWEIG, FARROW, A. LASEE, WELCH, HUELSMAN, FITZGERALD and ZIEN, cosponsored by Representatives GREEN, OTTE, DUFF, DOBYNS, LAZICH, BRANDEMUEHL, GOETSCH, KEDZIE, GUNDERSON, LADWIG, WARD, F. LASEE, ZIEGELBAUER, HOVEN, UNDERHEIM, HANDRICK, OWENS, GROTHMAN, SERATTI, MUSSER, ALBERS, AINSWORTH, OLSEN, WASSERMAN and KELSO. Referred to Committee on Judiciary, Campaign Finance Reform and Consumer Affairs.

1 **AN ACT to amend** 938.296 (2) (b), 938.296 (4) (intro.), 968.38 (2) (a), 968.38 (3)
2 (c) and 968.38 (4) (intro.); and **to create** 938.296 (3) (c) and (d), 968.38 (3) (d)
3 and 971.13 (4) of the statutes; **relating to:** testing for the presence of the
4 human immunodeficiency virus and sexually transmitted diseases in criminal
5 defendants and juveniles alleged to be delinquent or in need of protection or
6 services who are found not competent to proceed or not guilty by reason of
7 mental disease or defect.

Analysis by the Legislative Reference Bureau

Under current law, a person may be required to undergo testing to detect the presence of human immunodeficiency virus (HIV) and sexually transmitted diseases if the person is: 1) an adult charged with or convicted of certain sex offenses (specifically, sexual assault of an adult, sexual assault of a child, sexual assault of a student by a school instructional staff person, repeated acts of sexual assault of the same child, sexual exploitation of a child or incest with a child); or 2) a child alleged to be delinquent or in need of protection or services because he or she is alleged to have committed certain sex offenses (specifically, sexual assault of an adult, sexual assault of a child, repeated acts of sexual assault of the same child, sexual exploitation of a child or incest with a child).

Under current law, a district attorney must apply for an order requiring the person to undergo testing if: 1) the victim or, if the victim is a minor, the victim's

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parent or guardian requests the district attorney to apply to a court for an order requiring the testing; and 2) the district attorney has probable cause to believe that the person has significantly exposed the victim to the transmission of HIV or a sexually transmitted disease, except that such probable cause is not required if the person has been convicted or adjudicated delinquent or found in need of protection or services. The district attorney must apply for the order while the criminal or juvenile proceeding is pending against the person or after the person is convicted or adjudicated delinquent or found in need of protection or services. The court must hold a hearing to determine whether there is probable cause to believe that the person has significantly exposed the victim to the transmission of HIV or a sexually transmitted disease. The results of any required tests must be disclosed to: the person tested; the victim or, if the victim is a minor, to the victim's parent or guardian; the health care professional who provides care to the victim, if requested by the victim or the victim's parent or guardian; and the health care provider of the person tested, if the person tested is a child and disclosure is requested by the child's parent or guardian.

Current law does not provide for the testing of a person after he or she has been found not guilty or not responsible by reason of mental disease or defect. In addition, current law does not provide for the testing of a person if the criminal or juvenile proceeding against the person has been suspended because he or she has been found not competent to proceed. A person is not competent to proceed if he or she lacks substantial mental capacity to understand the proceedings or assist in his or her own defense, and he or she may not be tried, convicted or sentenced, or found delinquent or in need of protection or services, so long as the incapacity endures. Thus, in a case under current law involving a person who is found not competent to proceed, if a district attorney did not apply for an order requiring testing before the person was found incompetent to proceed, the person could not be required to undergo testing unless the person regained competency and the criminal or juvenile proceeding resumed.

This bill allows a court to order a person to undergo tests for the presence of HIV and sexually transmitted diseases if the person has been found not guilty or not responsible by reason of mental disease or defect of any of the sex offenses covered under current law. Under the bill, the district attorney must apply for an order requiring testing of a person found not guilty or not responsible by reason of mental disease or defect if the district attorney is requested to do so by the victim or, if the victim is a minor, the victim's parent or guardian. The district attorney may apply for the order at any time after the person is found not guilty or not responsible by reason of mental disease or defect. If a person has been found not guilty or not responsible by reason of mental disease or defect, a district attorney does not need probable cause to believe that the person has significantly exposed the victim to the transmission of HIV or a sexually transmitted disease in order to apply for an order for testing but, as under current law, a court must hold a hearing to determine whether there is probable cause to believe that the person found not guilty or not responsible by reason of mental disease or defect has significantly exposed the victim to the transmission of HIV or a sexually transmitted disease.

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In addition, the bill allows a court to order a person to undergo tests for the presence of HIV and sexually transmitted diseases if the person has been charged with, or alleged to be delinquent or in need of protection or services for committing, any of the sex offenses covered under current law and has been found not competent to proceed. Under the bill, the district attorney must apply for an order requiring testing of a person found not competent to proceed if requested to do so by the victim or, if the victim is a minor, the victim's parent or guardian. The district attorney also must have probable cause to believe that the person has significantly exposed the victim to the transmission of HIV or a sexually transmitted disease. The district attorney may apply for the order at any time after the person is found not competent to proceed and the court must hold a hearing to determine whether there is probable cause to believe that the person has significantly exposed the victim to the transmission of HIV or a sexually transmitted disease, unless that probable cause determination cannot be made fairly without the personal participation of the person.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 938.296 (2) (b) of the statutes is amended to read:
- 2 938.296 (2) (b) The district attorney or corporation counsel has probable cause
- 3 to believe that the juvenile has significantly exposed the victim or alleged victim. If
- 4 the juvenile is adjudicated delinquent ~~or~~, is found to be in need of protection or
- 5 services or is found not responsible by reason of mental disease or defect under s.
- 6 938.30 (5), this paragraph does not apply.
- 7 **SECTION 2.** 938.296 (3) (c) and (d) of the statutes are created to read:
- 8 938.296 (3) (c) At any time after the juvenile is found not responsible by reason
- 9 of mental disease or defect under s. 938.30 (5).
- 10 (d) If the court has determined that the juvenile is not competent to proceed
- 11 under s. 938.30 (5) and has suspended proceedings on the petition, at any time after
- 12 the determination that the juvenile is not competent to proceed.
- 13 **SECTION 3.** 938.296 (4) (intro.) of the statutes is amended to read:

SENATE BILL 81**SECTION 3**

1 938.296 (4) (intro.) On receipt of an application for an order under sub. (2), the
2 court shall set a time for a hearing on the application. If the juvenile has been found
3 not competent to proceed under s. 938.30 (5), the court may hold a hearing under this
4 subsection only if the court first determines that the probable cause finding can be
5 fairly made without the personal participation of the juvenile. If, after hearing, the
6 court finds probable cause to believe that the juvenile has significantly exposed the
7 victim or alleged victim, the court shall order the juvenile to submit to a test or a
8 series of tests administered by a health care professional to detect the presence of
9 HIV, antigen or nonantigenic products of HIV, an antibody to HIV or a sexually
10 transmitted disease. The court shall require the health care professional who
11 performs the test or series of tests to refrain, notwithstanding s. 252.15 (4) (c), from
12 making the test results part of the juvenile's permanent medical record and to
13 disclose the results of the test to any of the following:

14 **SECTION 4.** 968.38 (2) (a) of the statutes is amended to read:

15 968.38 (2) (a) The district attorney has probable cause to believe that the
16 defendant has significantly exposed the alleged victim or victim. If the defendant is
17 convicted or found not guilty by reason of mental disease or defect, this paragraph
18 does not apply.

19 **SECTION 5.** 968.38 (3) (c) of the statutes is amended to read:

20 968.38 (3) (c) At any time after the defendant is convicted or is found not guilty
21 by reason of mental disease or defect.

22 **SECTION 6.** 968.38 (3) (d) of the statutes is created to read:

23 968.38 (3) (d) If the court has determined that the defendant is not competent
24 to proceed under s. 971.14 (4) and suspended the criminal proceedings, at any time
25 after the determination that the defendant is not competent to proceed.

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1 **SECTION 7.** 968.38 (4) (intro.) of the statutes is amended to read:

2 968.38 (4) (intro.) The court shall set a time for a hearing on the matter under
3 sub. (2) during the preliminary examination, if sub. (3) (a) applies; after the
4 defendant is bound over for trial and before a verdict is rendered, if sub. (3) (b)
5 applies; ~~or after conviction or a finding of not guilty by reason of mental disease or~~
6 defect, if sub. (3) (c) applies; or, subject to s. 971.13 (4), after the determination that
7 the defendant is not competent, if sub. (3) (d) applies. The court shall give the district
8 attorney and the defendant notice of the hearing at least 72 hours prior to the
9 hearing. The defendant may have counsel at the hearing, and counsel may examine
10 and cross-examine witnesses. If the court finds probable cause to believe that the
11 defendant has significantly exposed the victim or alleged victim, the court shall order
12 the defendant to submit to a test or a series of tests administered by a health care
13 professional to detect the presence of HIV, antigen or nonantigenic products of HIV,
14 an antibody to HIV or a sexually transmitted disease. The court shall require the
15 health care professional who performs the test to disclose the test results to the
16 defendant. The court shall require the health care professional who performs the
17 test to refrain, notwithstanding s. 252.15 (4) (c), from making the test results part
18 of the defendant's permanent medical record and to disclose the results of the test
19 to any of the following:

20 **SECTION 8.** 971.13 (4) of the statutes is created to read:

21 971.13 (4) The fact that a defendant is not competent to proceed does not
22 preclude a hearing under s. 968.38 (4) unless the probable cause finding required
23 under s. 968.38 (4) cannot be fairly made without the personal participation of the
24 defendant.

25 **SECTION 9. Initial applicability.**

