**MEMORANDUM IN SUPPORT OF MOTION TO ORDER BLOOD TESTING OF DEFENDANT FOR HIV**

##### Government of the Virgin Islands

**In the District Court of the Virgin Islands**

**Division of St. Croix**

The virus generally known as AIDS (Acquired Immune Deficiency Syndrome) is spread from person to person by transfer of body fluids including sexual fluids. A person’s exposure to AIDS may be detected by analysis of the blood of an infected person by trained medical/scientific experts. However, exposure to the virus may not be detectable for several months or years after the incident or exposure. *People v. Thomas*, 529 N.Y.S.2d 429 (1988). A retrovirus commonly known as HIV is the causative agent of AIDS. There is a time lapse, often of several years, between exposure to HIV and the onset of symptoms generally identified with the disease. AIDS is incurable and fatal. Because of the risk of transmission, an HIV carrier cannot procreate without endangering the lives of both the offspring and the other parent. *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990), *citing Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 444 (N.D. Ill. 1988).

Since the disease was first identified in the early 1980s, AIDS has engendered such prejudice and apprehension that its diagnosis typically signifies a social death as concrete as the physical one which follows. *Cain*, 734 F. Supp. 679. The inability of the complaining witness, who fears she may have been involuntarily exposed to the virus, to ascertain whether she is at risk is also a formidable and unnecessary condition, especially when medical science provides such a simple and non-intrusive remedy.

In the case at bar, evidence presented at the preliminary hearing on November 8, 1990 established probable cause to believe that the defendant engaged in acts of sexual intercourse and oral sodomy with the complaining witness and did thereby potentially expose her to his body and sexual fluids. The complaining witness is desirous of knowing whether or not she may have been exposed to the AIDS virus as a result of (allegedly) being forcibly raped and sodomized by the defendant. She has been tested with negative results but knows that the virus has an unpredictably period of latency, leaving her feeling vulnerable. A request that the defendant voluntarily submit to this test was presented to his counsel along with assurances that the results would not in any way be used against him. Counsel refused that request.

In *Thomas*, the court ordered a criminal defendant to submit to an AIDS antibody blood test against his will, and further ordered that the results be disclosed to both the defendant and the victim. The court reasoned that “the victim has a right to know whether she may have been exposed to the AIDS virus by reason of having been exposed to the body and sexual fluids of the defendant.” 529 N.Y.S.2d at 431. The court held “that it has inherent discretionary power to order the defendant to submit to such a blood test simply because it is the intelligent, humane, logical, and proper course of action under the circumstances. The mental anguish suffered by the victim knowing that she was forcibly raped and sodomized… is real and continuing, and the intrusion upon defendant of a routine drawing of a blood sample is very minimal and commonplace.” *Thomas*, 529 N.Y.S.2d at 431.

Factually, *Thomas* is distinguishable from the instant case because it involved a defendant who had already pled guilty to attempted rape in the first degree. However, in *People v. Durham*, 553 N.Y.S.2d 944 (1990), the court extended the ruling in *Thomas* to a pre-conviction case.

In *Haywood County v. Hudson*, 740 S.W.2d 718 (Tenn. 1987), a county judge ordered that a sample of defendant’s blood be drawn for the purpose of testing to determine whether he was infected with the AIDS virus. This was based upon a defendant stating to a detective that he suffered from AIDS, and the concern was for the safety of jail personnel and inmates. Defendant appealed, alleging the blood testing was contrary to his religious beliefs. The Tennessee Supreme Court held that the sheriff and public health officials were authorized to carry out the blood test over defendant’s objections.

Thirteen states have passed laws authorizing the taking of blood from persons accused, and not yet convicted of sexual crimes for purposes of testing for AIDS. *See* Ark. Code Ann. § 16-82-101; Cal. Penal Code § 1524.1; Col. Rev. Stat. § 18-3-415; Fla. Stat. Ann. § 960.003; GA. CODE ANN. § 17-10-15; Idaho code § 39-601; Nev. Rev. Stat. § 441A.320; N.C. Gen. Stat. § 15A-534.3; Ohio Rev. Code Ann. §§ 2907.27 & 3701.243; Okla. Stat. tit. 63, §§ 1-524, 1-525; S.D. Codified Laws Ann. § 23A-35B-3; Tx. Crim. Proc. Code Ann. § 21.31; Va. Code Ann. § 18.2-62.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

UNITED STATES ATTORNEY

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Assistant U.S. Attorney