SB

91

Alaska State Legislature

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Sponsor Statement

Senate Bill 91

Senate Bill 91 was introduced with the goal of putting Alaska in a pro-active position when it comes to dealing with individuals who knowingly place others at risk of HIV infection. SB 91 is intended to be preventative as well as punitive and is intended to render a criminal rather than moral judgement.

As of December 31, 1994, 272 Alaskans have been confirmed to have AIDS. That's since tracking began in 1982. Of these cases, 152 are known to have died.

The Epidemiology section of the Division of Public Health reports that as of December 31, 1994, 540 Alaskans have tested positive for HIV infection. That number represents only those who were voluntarily tested through the State Section of Laboratories.

The statistics show that HIV/AIDS affects both male and female, across all age groups and without respect to race or residence. The sad fact is that the rate of infection in Alaska is growing.

If someone intentionally sets out to kill another person by infecting them with the AIDS virus, they can be charged under state law with attempted first degree murder. But what do we do with the person who does not "intend" to kill, but still places others in jeopardy? In 1990, the Attorney General's office reviewed that question and suggested that...quote..."it may be possible to prosecute the person for reckless endangerment", end quote. That is a class A misdemeanor prohibiting reckless conduct which creates a "substantial risk of serious physical injury".

Most people would equate becoming infected with HIV as something more than a "serious injury".

Twenty six other states have seen fit to adopt specific laws dealing with criminal penalties for knowingly transmitting or exposing another to HIV infection. It would only be prudent for Alaska to have such a statute on the books.

SB 91 is brief and to the point. It creates the crime of criminal transmission of HIV and covers actions and conduct known to transmit the disease.

The bill also provides an affirmative defense when the person exposed knows beforehand that the action could result in infection. It was amended in the Senate HES Committee to add a provision excluding perinatal transmission of the virus and to assure that the an individual is not prosecuted for an involuntary act.

SB 91 is not intended to punish those who have contracted HIV. It is intended to protect others who may be unknowingly exposed to the virus by what should be a criminal act of irresponsibility.

MEMORANDUM

NOV 16 1990
DEPT. OF LAW
JUNEAU ANNEX

State of Alaska
Department of Law

TO: Elizabeth L. Shaw
Assistant Attorney General
Department of Law - Civil Div.

DATE: November 16, 1990

FILE NO.:

TEL. NO.: 465-3428

SUBJECT: Criminal liability for having unprotected sex while infected with HIV or AIDS

FROM: Dean J. Guaneli
Assistant Attorney General
Criminal Division, Central Office

At the request of Chief Prosecutor Laurie Otto, I briefly reviewed the question of possible criminal liability for someone who intends to spread the HIV virus by having unprotected sex with another person, or by donating blood. In short, I believe we can certify that prosecution under state law is possible for both intentional or reckless conduct.

If someone intends to kill another person by infecting them with the AIDS virus, it could prosecuted as attempted first degree murder.[1] This holds even if infection is, as a factual matter, unlikely or impossible, since impossibility is not a defense as long as the actor believes that death will occur. AS 11.31.100(b); see also Gargan v. State, 436 P.2d 968 (Alaska 1968) (factual impossibility which was not apparent to the actor should not, as a matter of policy, insulate him from conviction for attempting commission of the offense). This view is shared by Barry Stern, Professor of Law at Western New England Law School, who was one of the principal drafters of the revised criminal code. It would also be possible to charge an attempted assault, if the person only intended serious injury, rather than death.[2]

The more interesting problem, and the one more likely to occur, is when a person is aware of the infection and has, or attempts to have, unprotected sex with a partner who is unaware. The mental state would probably not be "intentional" (since the

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[1] The Alaska Court of Appeals has held there is no such crime as attempted second degree murder, Huitt v. State, 678 P.2d 415 (Alaska App. 1984), and based on that opinion, there are no such crimes as attempted manslaughter or negligent homicide.

[2] The U.S. Supreme Court recently denied review of an opinion from a military court (attached) where the person was convicted of attempted aggravated assault (by means likely to cause death or bodily harm) by trying to have unprotected sex knowing he was infected by HIV. United States v. Johnson, 30 M.J. 53 (U.S. Ct. of Mil. Appeals, April 12, 1990), cert. den. 48 CrL 3037 (Oct. 15, 1990).

actor no doubt would not intend to pass the infection), nor would it be "knowing" (because the person may not believe infection was a substantial probability). However, the person is consciously disregarding a risk of infection, and most juries would find such a risk to be substantial and unjustifiable. Thus the mental state would be "reckless" under AS 11.81.900(a)(3), and it may be possible to prosecute the person for reckless endangerment, a class A misdemeanor (AS 11.41.250), that prohibits recklessly engaging in conduct which creates a substantial risk of serious physical injury.

Please let me know if a more detailed review of the law is necessary.

KNOWING EXPOSURE/TRANSMISSION
5/25/93

CRIMINAL PENALTIES FOR KNOWINGLY TRANSMITTING/EXPOSING ANOTHER TO HIV INFECTION

Alabama, HB 338, Act 87-574 (87) - misdemeanor - "risks transmitting or conducts himself in a manner likely to transmit the disease)

Arkansas, HB 1496, Act 614 (89) - felony - "sexual intercourse" (without 1st informing others)

California, SB 1002, Chapter 1154 (88) - felony, blood donation

Colorado, HB 1255 (90) - class 5 felony for knowingly performing, offering or agreeing to perform certain sexual acts with persons other than their spouses in exchange for money or any other thing of value. Persons who are knowingly infected with HIV who patronize prostitutes are guilty of a class 6 felony

Delaware, HB 637, Chapter 335 (88) - felony, blood donation

Florida, HB 1313, Chapter 86-220 (86) - misdemeanor "sexual intercourse"; (88) - misdemeanor (if person has been informed of modes of transmission); HB 1519 (88) - felony of the third degree, blood/body fluids donation;

Georgia, HB 1261, Act 1440 (88) - felony (after obtaining knowledge of infection) knowing intercourse, donation, sharing syringes

Idaho, HB 653, Chapter 70 (86) - prohibits knowing or willful exposure; HB 433 (88) - felony (provides affirmative defense if sexual activity occurred between consenting adults); - felony, knowing transmission or transmit with the intent of infection

Illinois, HB 1671 (89) - class 2 felony for criminal transmission = intimate contact; blood, semen, tissue or organ donation; sell, exchange, etc. non-sterile IV drug paraphernalia. Provides an affirmative defense if the person exposed knew that the infected persons was infected with HIV, knew that the action could results in HIV infected and consented to the action with that knowledge.

Indiana, SB 9, Public Law 86-123 (88) - Class C felony, blood donation

Kansas, HB 2841 (92) - Class A misdemeanor for individuals with a life threatening communicable disease to knowingly engage in sexual intercourse or sodomy, sell or donate blood, semen, tissue or other body fluids, or share hypodermic needles with intent to expose another to the disease.

Kentucky, HB 50 (88) - Class C felony, blood donation (also any health facility, physician or health care worker who knowingly transfuses untested blood when there is not an emergency situation is guilty of Class C felony

HB 425 (90) - felony for donating organs, skin or other human tissues; class A misdemeanor for persons who commits prostitution; class D felony for committing prostitution or who procures another to commit prostitution by engaging in sexual activity in a manner likely to transmit HIV infection.

Source: AIDS Policy Center, Intergovernmental Health Policy Project, The George Washington University, June 1993.

ADDITTIONAL INFORMATION
PENALTIES IN OTHER
STATES

FROM:NCSL DENVER 1995 4:41PM #724 P.02

KNOWING EXPOSURE/TRANSMISSION
PAGE 2

SB 244 (92) - Makes it a felony for any person to commit, offer, or agree to commit prostitution by engaging in sexual activity when he or she knew or had been informed that he or she could possible transmit the virus through sexual activity.

Louisiana, HB 1728, Act 663 (87) - fine of not more than $5,000, imprisonment with or without hard labor for not more than 10 years "sexual contact" without knowing consent of other person

Maryland, SB 719, Chapter 789 (89) - misdemeanor (may not knowingly transfer or attempt to transfer)

Michigan, HB 5026, Public Act 460 (88) - felony, sexual penetration (if they do not inform other person of the presence of disease)

Mississippi, HB 515, chapter 557 (88) - knowingly and willfully violating health department orders

Missouri, HB 1151 and 1044 (88) - Class D felony, donation of blood, organ, sperm, tissue; sexual contact

Nevada, AB 550, Chapter 762 (87) - Provides that any person who practices prostitution after testing positive for HIV is guilty of a felony and will be imprisoned in the state prison for not less than 1 year, not more than 20 years and/or fined up to $10,000. An owner of a house of prostitution who continues to employ HIV+ prostitutes is liable for any damages caused by HIV exposure as a result of the employment; SB 73 (89) - subject to confinement by court order as well as other penalties (which are not specified)

Ohio, HB 571 (88) - felony of the 3rd. degree, sell or donate blood plasma, blood product

Oklahoma, HB 1798 (88) - felony (with intent to infect); HB 1012 (91) - felony punishable by a maximum of 5 years of imprisonment for knowingly engaging with intent to infect in conduct reasonably likely to result in transfer of blood or bodily fluids into the bloodstream or through the skin or other membranes of a person except during in utero transmission.

South Carolina, HB 2807, Ramification 547 (88) -sale, donation, exchange of blood products; "exposing another person to HIV without first informing"; SB 1165 (90) - felony (upon conviction must be fined not more than $5,000 or imprisoned for nor more than 10 years) for engaging with or without consent in sexual intercourse (vaginal, anal or oral) without first informing in prostitution, selling or donating blood or other body fluids or sharing needles

Tennessee, HB 461, Chapter 281 (91) - class C felony for committing prostitution when a persons knows that he or she is HIV+

Texas, SB 959 (89) - felony for "engaging in conduct likely to transfer"

Utah, HB 24 (92) - Mandates HIV testing for persons convicted of prostitution or patronizing or sexually soliciting a prostitute. Provides enhanced penalties (3rd. degree felony) if these individuals test positive for HIV, know their test results and have received written personal notice of their positive test results from a law enforcement agency.

Virginia, HB 1974 (89) - class 6 felony, donating or selling blood, body fluids, organs or tissues

Washington, SB 6221, Chapter 206 (88) - assault in the second degree for a person who has exposed or transmitted HIV to another person with intent to inflict bodily harm

TOTAL = 28 STATES

FROM:NCSL DENVER TO: 907 463 3351 FEB 14, 1995 4:42PM #724 P.03

Man pleads guilty to HIV transmission

By Jennifer Liberto
Daily Staff Writer

The Chicago man charged with criminal transmission of HIV after an alleged sexual assault at Elder Hall last October pleaded guilty at a hearing at Circuit Court in Skokie yesterday.

Anthony M. Carr of the 5200 block of South Federal Street in Chicago was sentenced to 48 months probation on the condition that he serve it in a hospital, said prosecutor Cathy Crawley of the State's Attorney Office. Carr now has full-blown AIDS.

"I'm not really bitter about his light sentence because he's dying," the victim said. "At this point there is nothing else I can do."

The victim's attorney told him Carr has only six to eight months to live.

Carr was arrested on the morning of Oct. 4 after a fight broke out at Elder Hall, 2400 Sheridan Road, according to University Police reports. Carr had engaged in "intimate contact" with a Northwestern junior, police said.

Carr could have served seven years in prison for criminal transmission of HIV, which is a Class 2 felony in Illinois.

At the hearing, the public defender asked for a conference to discuss the sentence Carr would receive if he were to plead guilty, Crawley said. Carr chose to accept the relatively light sentence. There was no plea-bargaining.

The victim, who has dropped out of NU, was present at the hearing, Crawley said. He waived his right to give a "victim of violent crime impact" statement before Carr was sentenced. The statement, in which victims tell how crimes have affected their lives, is given after the sentencing so it will not influence the severity of a judge's sentence.

"No matter what I would have said, the judge had already made his decision," the victim said. "It would have only caused more pain and embarrassment."

The victim continues to test negative for HIV, and his last test is later this week. He has not yet showed any signs of AIDS, which can often takes years to fully develop.

"I get so nervous when I get a sore throat or a cough," he said. "So far, it has always turned out to be a cold."

Illinois is one of 27 states with a law against knowingly transmitting HIV. The law went into effect in September 1989.

Carr may be the first person in Illinois to be sentenced by this new law, said Allan Robinson, a Northwestern criminal law professor.

"It's a pretty tough case to sentence," Robinson said. "Nobody's thrilled to sentence someone who is dying already."

Robinson said the sentence had probably been discussed for some time, since the defendant did not bargain for a reduced probation sentence and changed his plea from innocent to guilty so quickly.

The victim said he wants to return to school, but he may not be able to until next fall because of financial problems and a death in the family.

"I'm a little nervous to come back," the victim said. "I really hope no one looks at me differently, but if they do, then they're not my real friends."

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TALE OF REVENGE STIRS AIDS FUROR

Woman Claims She's Trying to Infect Men, Prompting a Surge of Concern

Special to The New York Times

DALLAS, Sept. 29 — In a chilling radio interview on Sept. 4, a woman who said she had AIDS told how she was trying to spread the virus out of revenge on the man who had infected her.

Whether the woman, who calls herself C. J. but has kept her identity secret, is telling the truth is a subject of debate. But her assertion has sent a shock wave through this city.

Attendance has swelled at AIDS education seminars, talk shows are inundated with concerned callers and health clinics are seeing a surge in requests for AIDS virus testing.

The furor began with a letter, published in the September issue of Ebony magazine, from someone who wrote that since contracting the AIDS virus she had become compulsively promiscuous, frequently picking up men in nightclubs. "I feel if I have to die of a horrible disease I won't go alone," the letter said. It was signed, "C. J., Dallas, Texas." Ebony's managing editor, Hans J. Massaquoi, said that although the letter was not verified it was printed as a warning to readers.

A Previous Letter

Willis Johnson, a talk show host at radio station KKDA here, said the letter quickly provoked a storm of calls to his program. He issued a plea to the writer to call him, and on Aug. 31, he said, a female caller identified herself off the air as C. J. and agreed to the Sept. 4 on-air interview.

But Mr. Johnson said in an interview on Thursday that he was certain it was not his first contact with the woman.

"I got the exact same letter that was in Ebony about two years ago," said Mr. Johnson, who is 37 years old and has been with KKDA for 15 years.

Shortly after he received the first letter, he said, a black, "very beautiful, light-skinned woman, about 5-foot-5 and 120 pounds," approached him at a nightclub and introduced herself as C. J. "She was obviously eaten up with anger," Mr. Johnson said. "I never told anyone about the incident, but when she called Aug. 31, she reminded me of that earlier meeting. So I know it is the same woman."

Speaking quietly in the radio interview, the woman told of frequenting nightclubs in Dallas and nearby Fort Worth, of meeting men, some of them married, and having unprotected sex with them in "revenge."

The woman, who said the initials C. J. are not her own, said she felt no remorse. "I blame it on men, period," she said, adding, "I'm doing it to all the men because it was a man that gave it to me."

During the interview, Mr. Johnson repeatedly urged the woman to seek counseling. She continues to call him, he said Thursday. Once she told him she contracted the AIDS virus from a white bisexual man, he said. He said he arranged for her to talk with a minister, but "I don't think we have made a lot of headway with her."

Some people who call Mr. Johnson argue that C. J.'s story is a hoax.

Charles O'Neal, publisher of The Dallas Examiner, a weekly newspaper whose readership is largely black, said that though no one can be sure whether it is a hoax he believes that the story has stirred intense public discussion among blacks about heterosexual AIDS transmission. "I am certain there is some communitywide consternation that C. J. is one of a number of people who are out there wreaking havoc with this disease," he said.

Health officials said the number of heterosexual men seeking information about AIDS has greatly increased in recent weeks in Dallas County.

"In the past, people seemed to be a lot more judgmental about people who get this disease," said Phillip Mathews, director of minority services at the AIDS Interfaith Network. "Now they are showing serious concern because it could hit very close to home. C. J. could be a blessing, in a sad sort of way."

At R. J.'s on the Lake, a fashionable disco on Dallas's northwest side, the manager, Jerry Sanders, said business was as brisk as ever but "people's attitudes about high-risk behavior have changed enormously, thanks to C. J."

Drop in Promiscuity

Many of those at the bar agreed. "If what this woman says is true, we are talking about a form of genocide," said Levi Peterson 3d, a 32-year-old accountant. "It is serial killing. But true or not, promiscuity has de-elevated, believe me."

Coincidentally, the Dallas City Council voted Wednesday to allot $118,650 for AIDS education and assistance programs. Although the Council budgeted $167,000 for similar programs in the 1991 fiscal year, its new budget originally provided no AIDS money; some was added after pressure from advocates for people with AIDS. Dallas ranks 12th nationally in cities with AIDS, with 3,200 cases recorded as of Sept. 1.

Under Texas law, knowingly trying to transmit the AIDS virus is a third-degree felony, punishable by up to 10 years in prison and a $5,000 fine. A spokesman for the Dallas Police Department, Edward Spencer, said the department is aware of C. J.'s claims but is not investigating them because no one has filed a complaint.

Mark Peckmezian for The New York Times

In an on-the-air interview last month, a woman told Willis Johnson, a Dallas radio personality, that she has AIDS and is methodically trying to spread the virus out of revenge on the man who infected her.

A hoax, perhaps, but it has started healthy debates.

Many Sense Politi

By ROBERT REINHOLD
Special to The New York Times

LOS ANGELES, Sept. 30 — In vetoing a bill intended to protect homosexuals against job discrimination, Gov. Pete Wilson said Sunday that he was trying to protect California businesses from added costs, rather than playing electoral politics.

But the consensus today among both Republicans and Democrats in California was that the veto by Mr. Wilson, a moderate Republican who has sought the gay vote in the past, was indeed a political act. Many people here believe the Governor sought to protect himself and the man he appointed to succeed him in the United States Senate, John Seymour, against the wrath of his own party's conservative wing.

The veto dealt a sharp blow to the gay rights movement, whose leaders angrily vowed today to work for the defeat of both Governor Wilson and Senator Seymour. There were noisy demonstrations by homosexuals Sunday night in West Hollywood and San Francisco. There also were protests this afternoon at the Ronald Reagan State Building in downtown Los Angeles, where the state police reported at least two arrests.

The bill would have made California the fifth state, and by far the largest, to add sexual orientation to laws barring job discrimination on the basis of race, national origin, creed and other categories. The states that already have this provision are Connecticut, Hawaii, Massachusetts and Wisconsin.

Emotional Political Issue

The bill had presented Mr. Wilson with what was probably the most emotional political problem he has faced since taking office last January. He has been fighting a rebellion by his own party over his agreement to raise state taxes by $7 billion this summer. The gay rights bill stirred even deeper emotions, prompting 11,000 telephone calls and letters to the Governor's office, his aides said, with the overwhelming majority against the bill. Similarly, at the Republicans' state convention in Anaheim recently, party delegates voted overwhelmingly against the bill.

"It is no secret the Governor has serious problems with a large element of the Republican base," said Steven A. Merksamer, a Sacramento lawyer who is a leading Republican strategist. "Had he signed this bill those problems would have gotten worse. It was both a good policy and political decision."

Several political experts said the decision to veto the bill was motivated by two factors. Most immediately, Senator Seymour faces a tough primary challenge in June from Representative William E. Dannemeyer of Orange County, an outspoken opponent of gay rights. The Senator was further endangered by a gathering move by the Traditional Values Coalition, led by the Rev. Louis P. Sheldon of Anaheim, to put a measure on the same ballot to

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Jet June 10, 1991 Page 18

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CRIME

AIDS Victim On Mission To 'Take All The Women ...He Can' Before Dying

Police say William Lucas Barker of Oakland is on a deadly mission. They say he has tested positive for the AIDS virus and threatened to "take all the women with him that he can" before he dies. Barker, who denies the accusation, is in jail charged with four counts of assault with a deadly weapon stemming from repeated sexual encounters even though he knew he was infected.

But authorities fear the 25-year-old, who was paroled in March following convictions on charges of second-degree burglary and robbery, may go free and resume his grim task if the only woman who has agreed to testify against him backs down, for fear of being identified by the media. The 22-year-old Oakland woman "is indicating that she is reticent to appear (if) her name or picture are going to appear in the press," police officer Lt. Craig Stewart, said.

The charges against Barker stem from four encounters of consensual sex with the woman. He could be charged with a fifth count for allegedly throwing blood from a self-inflicted wound at a cellmate, police said.

Police believe Barker has had sexual relations with several women since he allegedly boasted while in prison that he would "take all the women with him that he can" before he dies from the deadly virus. "I never said that," Barker said in a jail interview published in the Oakland Tribune. "I love women dearly. There's no way I would come out and do anything to harm them."

He also said he has been tested for the human immunodeficiency virus which causes AIDS, more than once and the results have been inconclusive. Police say he was diagnosed with the virus while in custody.

Barker was arrested April 9 after a parole officer received a tip that Barker was deliberately trying to infect women with AIDS, Stewart said. Police found Barker and the woman in a motel room. She became hysterical when officers told her Barker had AIDS, Stewart said.

Citizen Arrest: A resident of the Mount Pleasant neighborhood of Washington, D.C. asks for help from police after area residents tied him to a sapling tree during a recent outbreak of violence that erupted after a police officer shot a Hispanic youth. Officers untied the man and let him go free.

Sent To Your ... Legislative ...

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File 703:USA Today 1989-1995/Mar 09
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AIDS-TRANSMISSION CONVICTION REAFFIRMED
USA Today (US) - TUESDAY October 16, 1990
By: Tony Mauro
Edition: FINAL Section: NEWS Page: 07A
Word Count: 395

MEMO:
NOTES: Accompanies: SUPREME COURT

TEXT:
A brief homosexual encounter in Tacoma, Washington nearly three years ago left a trail of AIDS-related controversy that ended at the Supreme Court Monday.

The result, gay rights advocates fear, may be a rise in criminal laws to punish those suffering from AIDS.

On Monday the court refused to hear the case of Nathaniel Johnson, an Air Force sergeant who learned in 1987 that he was HIV-positive - an AIDS indicator - and received counseling at Lackland Air Force Base in Texas. He then returned to duty at McChord Air Force Base in Washington.

According to trial records, it was there that Johnson met a 17-year-old boy and returned to his apartment, where they had drinks and sex.

When the boy later reported the incident, Johnson was court-martialed not only on sodomy charges but - because he was HIV-positive - on an aggravated assault charge.

Because he had unprotected sex while knowing he might be carrying a potentially fatal virus, the government claimed, in essence, that he should be in the same category as someone swinging an ax at another.

The government said Johnson knew "he was likely to transmit HIV" if he engaged in sex without a condom.

Johnson was convicted and sentenced to 10 years. He appealed, claiming the law and Air Force policy were vague.

The high court's action affirms his conviction.

Cases like Johnson's are increasingly common, legal experts say. In recent years, AIDS patients have been prosecuted for biting, spitting, or donating blood.

More than a dozen states have enacted laws specifically to make "intentional" AIDS transmission a criminal act.

"What would otherwise be no crime at all becomes a serious crime," says Paul DiDonato, legal director of San Francisco-based National Gay Rights Advocates.

Only if it could be proved that someone went out with a clear intent to infect someone else, says William Rubenstein of the American Civil Liberties Union, could criminal laws possibly come into play.

"AIDS is a health problem, best handled by the public health community," says Rubenstein. "Handling it as a crime is not very effective."

FOCUS

A mainstay of U.S. justice is that every citizen has the right to his or her day in court - and can take that issue "all the way to the Supreme Court." Here's a look at one journey to the high court.

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HIGH COURT UPHOLDS LAW BANNING INTENTIONAL SPREAD OF AIDS VIRUS
Chicago Tribune (CT) - FRIDAY, January 21, 1994
By:  Jan Crawford, Tribune Legal Affairs Writer.
Edition:  NORTH SPORTS FINAL   Section: CHICAGOLAND   Page: 2
Word Count:  386

TEXT:
    A state law prohibiting people with the AIDS virus from engaging in any
behavior that could spread the disease is not unconstitutional, the
Illinois Supreme Court ruled Thursday.

       With the decision, prosecutors now are free to bring criminal
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charges against people suspected of spreading HIV.

Opponents had argued that the law was so broad and vaguely written that a woman with the virus could be arrested for breastfeeding her baby. But the court, in a terse, three-page unanimous opinion, dismissed those and other arguments with little discussion. Further, it said it was unconcerned that opponents were able to conjure up possible ways the law might open up innocent conduct to possible prosecution.

"Vagueness, like beauty, may be in the eye of the beholder," wrote Justice James Heiple.

"We, however, read the statute as being sufficiently clear and explicit so that a person of ordinary intelligence need not have to guess at its meaning or application."

The decision reversed the opinions of two Downstate Illinois trial judges, who found the law unconstitutional in separate criminal cases.

In one of the cases, a woman was charged with knowingly spreading the virus when she had sex without telling her partner. In the second case, a man was charged with raping a woman when he knew he was infected with the virus.

Those charges now will be reinstated, said Gerry Arnold, a staff attorney in the state appellate prosecutor's office who defended the law last November in arguments before the court.

"The court did not seem to have any trouble deciding the issue," Arnold said. "We're obviously grateful the court reached the decision it did."

Only a few people have been charged under the law since it was passed in 1989.

Under the law, the state can bring felony charges against anyone who, knowing he or she has HIV, nevertheless engages in activities that could transmit AIDS, such as intimate contact, donating blood or sharing dirty needles. Those convicted face 3 to 7 years in prison.

The key issue in the court challenge was whether the phrase "intimate contact" provided enough notice for people to know what is prohibited.

The American Civil Liberties Union, which helped challenge the law on the defendants' behalf, argued it was unconstitutionally vague because it didn't clearly state what kind of activity it prohibited.

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HIGH COURT UPHOLDS LAW BANNING INTENTIONAL SPREAD OF AIDS VIRUS
Chicago Tribune (CT) - FRIDAY, January 21, 1994
By:  Jan Crawford, Tribune Legal Affairs Writer.
Edition:  NORTH SPORTS FINAL   Section: CHICAGOLAND   Page: 2
Word Count:  386

TEXT:
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A state law prohibiting people with the AIDS virus from engaging in any behavior that could spread the disease is not unconstitutional, the Illinois Supreme Court ruled Thursday.

With the decision, prosecutors now are free to bring criminal charges against people suspected of spreading HIV.

Opponents had argued that the law was so broad and vaguely written that a woman with the virus could be arrested for breastfeeding her baby. But the court, in a terse, three-page unanimous opinion, dismissed those and other arguments with little discussion. Further, it said it was unconcerned that opponents were able to conjure up possible ways the law might open up innocent conduct to possible prosecution.

"Vagueness, like beauty, may be in the eye of the beholder," wrote Justice James Heiple.

"We, however, read the statute as being sufficiently clear and explicit so that a person of ordinary intelligence need not have to guess at its meaning or application."

The decision reversed the opinions of two Downstate Illinois trial judges, who found the law unconstitutional in separate criminal cases.

In one of the cases, a woman was charged with knowingly spreading the virus when she had sex without telling her partner. In the second case, a man was charged with raping a woman when he knew he was infected with the virus.

Those charges now will be reinstated, said Gerry Arnold, a staff attorney in the state appellate prosecutor's office who defended the law last November in arguments before the court.

"The court did not seem to have any trouble deciding the issue," Arnold said. "We're obviously grateful the court reached the decision it did."

Only a few people have been charged under the law since it was passed in 1989.

Under the law, the state can bring felony charges against anyone who, knowing he or she has HIV, nevertheless engages in activities that could transmit AIDS, such as intimate contact, donating blood or sharing dirty needles. Those convicted face 3 to 7 years in prison.

The key issue in the court challenge was whether the phrase "intimate contact" provided enough notice for people to know what is prohibited.

The American Civil Liberties Union, which helped challenge the law on the defendants' behalf, argued it was unconstitutionally vague because it didn't clearly state what kind of activity it prohibited.

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Edgar defends clemency choice for re-arrested AIDS sufferer
Chicago Tribune (CT) - FRIDAY February 7, 1992
By:  Rick Pearson, Chicago Tribune
Edition:  NORTH SPORTS FINAL   Section: CHICAGOLAND   Page: 2
Word Count:  288

TEXT:
    SPRINGFIELD - Gov. Jim Edgar said Thursday he still believes he made
the right decision in granting clemency last October to an AIDS-infected
Rockford woman, despite her arrest this week on charges of criminal
transmission of the deadly virus and prostitution.

    Tracy Eichman, 34, was arrested by Rockford police on Tuesday after
offering to perform sexual acts for a police officer for $20, authorities
said. She was being held in the Winnebago County Jail on $25,000 bond,
sheriff's officials said.

    She faces one to three years in prison if convicted on the new charges,
officials said.
    In February 1991, Eichman was sentenced to 3 years in prison after
being convicted of criminal transmission of the AIDS-causing HIV virus.

    Edgar initially rejected requests that he approve clemency for Eichman,
even as her health deteriorated.

    But as Eichman's condition grew worse, and in the belief that she would
soon die, the governor agreed to grant pleas for clemency from her family
and from members of the First Evangelical Free Church of Rockford.

    Edgar said that despite Eichman's arrest, he thought the procedures his
administration used in granting clemency were correct.

    "Why she made a miraculous recovery is beyond me," Edgar said. "I don't
claim to be a medical expert. The medical experts we had to deal with
indicated to us that she was bedridden and near death.

    "I thought from a humane point of view that it was the right thing to
do and I still do think I made the right decision," he said. "I suspect in
the future that we'll probably put some provisions in the clemency so in
case the person does improve, that we know that they are not going to be a
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threat to society."

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Georgia

OPINIONS OF THE ATTORNEY GENERAL

Authority of Georgia Crime Information Center to maintain records. — The Georgia Crime Information Center is authorized to maintain records of reported crime and, in some instances, to record information identifying persons charged with the commission of crime; however, the center is not authorized to maintain records identifying persons charged with disorderly conduct except when the charge is directly connected with or directly related to certain statutory offenses including interference with custody. 1976 Op. Att'y Gen. No. 76-33.

RESEARCH REFERENCES

C.J.S. — 1 C.J.S., Abduction, § 1 et seq., 51 C.J.S., Kidnapping, § 4.

ALR. — Violation of state court order by one other than party as contempt, 7 ALR4th 893.

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 ALR4th 823.

Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 ALR4th 7.

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ARTICLE 4

RECKLESS CONDUCT

Cross references. — Reckless driving, § 40-6-390.

16-5-60. Reckless conduct causing harm to or endangering the bodily safety of another; conduct by HIV infected persons.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) A person who causes bodily harm to or endangers the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation is guilty of a misdemeanor.

(c) A person who is an HIV infected person who, after obtaining knowledge of being infected with HIV:

(1) Knowingly engages in sexual intercourse or performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person and the HIV infected person does not disclose to the other person the fact of that infected person's being an HIV infected person prior to that intercourse or sexual act;

(2) Knowingly allows another person to use a hypodermic needle, syringe, or both for the introduction of drugs or any other substance

GEORGIA STATUTE

into or for the withdrawal of body fluids from the other person's body and the needle or syringe so used had been previously used by the HIV infected person for the introduction of drugs or any other substance into or for the withdrawal of body fluids from the HIV infected person's body and where that infected person does not disclose to the other person the fact of that infected person's being an HIV infected person prior to such use;

(3) Offers or consents to perform with another person an act of sexual intercourse for money without disclosing to that other person the fact of that infected person's being an HIV infected person prior to offering or consenting to perform that act of sexual intercourse;

(4) Solicits another person to perform or submit to an act of sodomy for money without disclosing to that other person the fact of that infected person's being an HIV infected person prior to soliciting that act of sodomy; or

(5) Donates blood, blood products, other body fluids, or any body organ or body part without previously disclosing the fact of that infected person's being an HIV infected person to the person drawing the blood or blood products or the person or entity collecting or storing the other body fluids, body organ, or body part,

is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than ten years. (Code 1933, § 26-2910, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1988, p. 1799, § 3.)

Editor's notes. — Ga. L. 1988, p. 1799, § 1, provides: "The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the fight against AIDS is education. Through public education and counseling our citizens can learn how the disease is transmitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection."

Law reviews. — For survey article on criminal law and procedure, see 34 Mercer L. Rev. 89 (1982). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

Illinois

400. Excessive sentence and punishment

Five-year sentences on each of four counts of aggravated criminal sexual abuse was not excessive; sentences were midrange for offense, defendant had previous criminal record and was on parole at time of offense and victim had sustained psychological harm. People v. Edwards, App. 2 Dist.1990, 142 Ill.Dec. 8, 195 Ill.App.3d 454, 552 N.E.2d 358.

VIII. REVIEW

Subdivision Index

451. In general, review

Appropriate standard of review of challenge to conviction for sex offense is whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond reasonable doubt. People v. Haun, App. 5 Dist. 1991, 163 Ill.Dec. 710, 221 Ill.App.3d 164, 581 N.E.2d 864, disagreed with 165 Ill.Dec. 739, 585 N.E.2d 135.

Standard of review for determining sufficiency of evidence to support sex offense convictions was the traditional test applicable in other criminal cases, of whether evidence viewed in light most favorable to State would support rational trier of fact's determination that essential elements of crime had been proven beyond reasonable doubt, rather than heightened requirement that evidence against defendants be clear and convincing or substantially corroborated, and accordingly, the issue to be resolved was whether State's evidence was so unsatisfactory or improbable that there remained reasonable doubt of defendants' guilt. People v. Allen, App. 1 Dist.1991, 162 Ill.Dec. 872, 220 Ill.App.3d 772, 580 N.E.2d 1291.

452. Preservation of grounds for review

Defendant in child sexual abuse case waived issue whether circuit court erred in allowing pediatric nurse to testify that, in her opinion, victim was being truthful in describing assault, where defendant did not object to testimony either at trial or in written posttrial motion, and specifically questioned witness about her statement at length. People v. Davis, App. 5 Dist.1991, 153 Ill.Dec. 82, 208 Ill.App.3d 33, 566 N.E.2d 932.

Issue of whether examining clinical psychologist's opinion of credibility of minor who was allegedly victim of sexual abuse should not have been admitted was waived, where defendant did not object to court's questioning of psychologist at trial or raise the matter in posttrial motion. People v. Hickox, App. 2 Dist.1990, 143 Ill.Dec. 180, 197 Ill.App.3d 205, 553 N.E.2d 1166, appeal denied 149 Ill.Dec. 330, 133 Ill.2d 565, 561 N.E.2d 700.

453. Plain error, review

Any error in considering examining clinical psychologist's opinion of credibility of minor who was allegedly victim of sexual abuse by her father was not of such magnitude as to require plain error review. People v. Hickox, App. 2 Dist.1990, 143 Ill.Dec. 180, 197 Ill. App.3d 205, 553 N.E.2d 1166, appeal denied 149 Ill.Dec. 330, 133 Ill.2d 565, 561 N.E.2d 700.

5/12–16.1. § 12–16.1. Repealed by P.A. 85–1433, § 6, eff. Jan. 11, 1989

Historical and Statutory Notes

The repealed section made it a crime to permit the sexual abuse of children. See, now, 720 ILCS 150/5.1.

5/12–16.2. Criminal transmission of HIV

§ 12–16.2. Criminal Transmission of HIV. (a) A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV:

(1) engages in intimate contact with another;

(2) transfers, donates, or provides his or her blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or other administration to another; or

(3) dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia.

(b) For purposes of this Section:

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BODILY HARM

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AIDS investigation informatio

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Words and Phrases (Perm.Ed

5/12–17. Defenses

§ 12–17. Defenses.

(a) It shall be a defense
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(b) It shall be a defense
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"HIV" means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.

"Intimate contact with another" means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.

"Intravenous or intramuscular drug paraphernalia" means any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.

(c) Nothing in this Section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV.

(d) It shall be an affirmative defense that the person exposed knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.

(e) A person who commits criminal transmission of HIV commits a Class 2 felony.

Laws 1961, p. 1983, § 12-16.2, added by P.A. 86-897, § 1, eff. Sept. 11, 1989.
Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 12-16.2.

Cross References

AIDS investigation information, confidentiality, see 410 ILCS 325/3.5.

Law Review Commentaries

Are AIDS-transmission laws encouraging abortion? Michael L. Closen and Scott H. Isaacman, 76 ABA J. 76 (1990).

Criminal sanctions for transmission of AIDS—Analysis of new Illinois legislation. Jeffrey Deutschman, 4 CBA Rec. 32 (1990).

Neonatal HIV testing: Governmental inspection of the baby factory. Scott H. Isaacman, 24 J. Marshall L.Rev. 571 (1991).

Proposal to repeal the Illinois HIV transmission statute. Michael L. Closen and Jeffrey S. Deutschman, 78 Ill.B.J. 592 (1990).

Library References

Words and Phrases (Perm.Ed.)

5/12-17. Defenses

§ 12-17. Defenses.

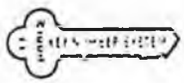
(a) It shall be a defense to any offense under Section 12-13 through 12-16 of this Code where force or threat of force is an element of the offense that the victim consented. "Consent" means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent.

(b) It shall be a defense under subsection (b) and subsection (c) of Section 12-15 and subsection (d) of Section 12-16 of this Code that the accused reasonably believed the person to be 17 years of age or over.

Laws 1961, p. 1983, § 12-17, added by P.A. 83-1067, § 1, eff. July 1, 1984. Amended by P.A. 83-1117, § 1, eff. July 1, 1984; P.A. 85-651, § 1, eff. Jan. 1, 1988; P.A. 87-438, § 1, eff. Jan. 1, 1992; P.A. 87-457, § 1, eff. Jan. 1, 1992; P.A. 87-895, Art. 2, § 2-19, eff. Aug. 14, 1992.
Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 12-17.

[illegible] this cause to the circuit court of [illegible] County to allow defendant to file a new motion to withdraw his guilty plea and for a hearing on that motion in full compliance with Rule 604(d). If, upon completion of the proceedings on remand, defendant's motion to withdraw his guilty plea is denied, this court will address, at defendant's request, the correctness of that decision and the remaining issues raised herein. See *People v. Gorosh* (1990), 129 Ill.2d 189, 195, 131 Ill.Dec. 329, 544 N.E.2d 784.

Circuit court reversed in part; cause remanded with directions.



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155 Ill.2d 569

190 Ill.Dec. 629

PEOPLE, State of Illinois, Respondent,

v.

Johnny GILSON, Petitioner.

No. 76090.

Supreme Court of Illinois.

April 6, 1994.

Prior Report: 246 Ill.App.3d 564, 616 N.E.2d 647.

Petition for leave to appeal allowed.

In the exercise of this Court's supervisory authority, this cause is *REMANDED* to the Appellate Court, Third District. The appellate court is ordered to reconsider its judgment in case Nos. 3-92-0901, 3-92-0902 and 3-92-0903 in light of *People v. Janes* (1994), 158 Ill.2d 27, 196 Ill.Dec. 625, 630 N.E.2d 790.

2

155 Ill.2d 22

190 Ill.Dec. 624

The PEOPLE of the State of Illinois, Appellant,

v.

Caretha RUSSELL, Appellee.

The PEOPLE of the State of Illinois, Appellant,

v.

Timothy LUNSFORD, Appellee.

Nos. 73721, 74443.

Supreme Court of Illinois.

Jan. 20, 1994.

Defendants were charged, in separate prosecutions, with knowingly transmitting human immunodeficiency virus (HIV) to another person through intimate contact. The Circuit Court, St. Clair County, James Donovan, J., and the Circuit Court, Coles County, Ashton C. Waller, Jr., J., declared criminal statute prohibiting knowing transmission of HIV to another through intimate contact unconstitutional. State appealed and cases were consolidated. The Supreme Court, Heiple, J., held that: (1) statute did not violate state and federal constitutional protections for free speech; (2) statute did not violate state and federal constitutional protections for free association; and (3) statute was not unconstitutionally vague.

Reversed and remanded.

1. Constitutional Law ⇨90.1(1)
Health and Environment ⇨21

Criminal statute prohibiting knowing transmission of human immunodeficiency virus (HIV) to another through intimate contact was not unconstitutionally overbroad or vague with respect to protected speech; neither statute nor two cases in which it was applied, which involved defendant charged with engaging in consensual sexual intercourse knowing that she was infected without telling her partner, and defendant charged with raping woman knowing that he was infected, had any connection with free

...S.H.A. 720 ILCS 5/12-16.2; S.H.A. ...st. Art. I, § 2; U.S.C.A. Const.Amend. I.

2. Constitutional Law ⇐91
Health and Environment ⇐21

Criminal statute prohibiting knowing transmission of human immunodeficiency virus (HIV) to another through intimate contact did not violate defendants' federal or state constitutional rights of free association; statute did not implicate any alleged right of intimate association as one defendant was charged with engaging in consensual sexual intercourse knowing that she was infected without telling her partner and other defendant was charged with raping woman knowing that he was infected. S.H.A. 720 ILCS 5/12-16.2; S.H.A. Const. Art. I, § 5; U.S.C.A. Const.Amend. I.

3. Health and Environment ⇐21

Criminal statute prohibiting knowing transmission of human immunodeficiency virus (HIV) to another through intimate contact was not unconstitutionally vague; statute was sufficiently clear and explicit and provided sufficiently definite standards for law enforcement and triers of fact, and that statute might open innocent conduct of others to prosecution was matter of pure speculation given specific conduct of two defendants, one of whom was charged with engaging in consensual sexual intercourse knowing that she was infected without telling her partner and one of whom was charged with raping woman knowing that he was infected. S.H.A. 720 ILCS 5/12-16.2; S.H.A. Const. Art. 1, § 2; U.S.C.A. Const.Amend. 14.

Roland W. Burris, Atty. Gen., Springfield, Robert Haida, State's Atty., Belleville, and C. Steve Ferguson, State's Atty., Charleston (Norbert J. Goetten, Stephen E. Norris and Gerry R. Arnold, Office of the State's Attys. Appellate Prosecutor, Mt. Vernon, of counsel), for the People.

Carrie J. Hightman, Stuart I. Graff and Judith M. Feller, of Schiff, Hardin & Waite, and John R. Hammell, Harvey Grossman, Colleen K. Connell, Mathew S. Nosanchuk and Pilar Penn, Chicago, for appellee in No. 73721.

James D. Holzhauer, Timothy S. Bishop and Jesse A. Witten, of Mayer, Brown & Platt, Chicago, for amici curiae American Public Health Ass'n et al.

Susan J. Curry, and Mark E. Wojcik, Chicago, for amicus curiae AIDS Legal Council of Chicago.

Gregg W. Boneili, of Mattoon, and Michael L. Closen, Chicago, for appellee in No. 74443.

Justice HEIPLE delivered the opinion of the court:

In 1989, the Illinois General Assembly made it a crime for a knowing carrier of the HIV virus to transmit this virus to another person through intimate contact. The stated offense is designated as a Class 2 felony which, though subject to probation, carries a possible sentence of imprisonment from three to seven years. (Ill.Rev.Stat.1989, ch. 38, par. 12-16.2(a)(1) (now 720 ILCS 5/12-16.2(a)(1) (West 1992)).) We take judicial notice of the fact that the HIV virus is a precursor to AIDS, a progressive and inevitably fatal disease syndrome. We further take judicial notice of the fact that intimate sexual contact whereby blood or semen of an infected person is transferred to an uninfected person is a primary method of spreading the infection.

The statute is now before us for consideration because two Illinois trial judges in separate criminal proceedings have declared the statute to be unconstitutional, ostensibly on the basis of vagueness. For purposes of appeal, these cases are here consolidated. We reverse and remand.

Neither of the court orders below indicates whether the statute is violative of either the State or Federal Constitutions. No article, section or clause of either constitution is alluded to. It could be the Constitution of the United States. It could be that of Illinois. It could be both. We are left to surmise which constitution or which portion thereof the trial judges may have had in mind.

From the defendants/appellees' briefs, however, we are informed that both the Federal and State Constitutions are allegedly

violated by the statute for reasons of free speech and association (U.S. Const., amend. I; Ill. Const.1970, art. I, §§ 4, 5); and that the statute is so vague as to deny the defendants due process of law. (U.S. Const., amend. V; Ill. Const.1970, art. I, § 2). These arguments are without merit.

In one of the cases before us, the criminal complaint charges that the defendant Carena Russell knew that she was infected with the HIV virus when she engaged in consensual sexual intercourse with Daren Smith without telling Smith of her infection. In the other case, defendant Timothy Lunsford is charged with raping a woman at a time when he knew he was infected with the HIV virus.

[1] Neither the statute nor the cases before us have even the slightest connection with free speech. Consequently, pursuant to constitutional interpretations of the United States Supreme Court, defendants' overbreadth argument and their argument of facial vagueness are inapplicable. *Bates v. State Bar* (1977), 433 U.S. 350, 380, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810, 833; *Smith v. Goguen* (1974), 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605; *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 611–17, 93 S.Ct. 2908, 2915–18, 37 L.Ed.2d 830, 839–43; *Grayned v. City of Rockford* (1972), 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222; *People v. Garrison* (1980), 82 Ill.2d 444, 45 Ill.Dec. 132, 412 N.E.2d 483.

[2, 3] Additionally, the defendants' cases do not infringe on any supposed right of intimate association as claimed. In fact, we know of no such right. The facts are that in the first of the two cases, the victim did not know that his sexual partner had HIV. In the second of the two cases, the HIV transmission charge is appendant to a charge of forcible rape. It is preposterous to argue that the statute constitutes a violation of either of the defendants' supposed right to intimate association in these situations. Finally, the vagueness argument is in error both facially and factually. Reference to the specific language of the statute makes this clear.

The subject statute provides in pertinent part:

"Criminal Transmission of HIV. (a) A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV:

1. engages in intimate contact with another;

* * *

(c) For purposes of this section:

* * *

'Intimate contact with another' means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV." 720 ILCS 5/12–16.2 (West 1992).

Vagueness, like beauty, may be in the eye of the beholder. We, however, read the statute as being sufficiently clear and explicit so that a person of ordinary intelligence need not have to guess at its meaning or application. Also, it provides sufficiently definite standards for law enforcement officers and triers of fact so that its application need not depend merely on their private conceptions. *Smith v. Goguen* (1974), 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605; *Grayned v. City of Rockford* (1972), 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222; *Interstate Circuit, Inc. v. City of Dallas* (1968), 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225.

That the statute might open the innocent conduct of others to possible prosecution is a matter of pure speculation and conjecture which is not before us in these consolidated cases. We are here concerned only with the specific conduct of these defendants and the application of the statute to them. *People v. Garrison* (1980), 82 Ill.2d 444, 453–57, 45 Ill.Dec. 132, 412 N.E.2d 483.

For the foregoing reasons, we hold that the statute in question is not violative of either the Illinois or the United States Constitution. Accordingly, we reverse the judgments of the courts below and remand these causes for further proceedings.

Reversed and remanded.

242 Ill.App.3d 568

182 Ill.Dec. 754

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Randall Lee DEMPSEY, Defendant-Appellant.

No. 5-91-0033.

Appellate Court of Illinois, Fifth District.

March 19, 1993.

Defendant was convicted in the Circuit Court, Williamson County, Snyder Howell, J., of aggravated criminal sexual assault and criminal transmission of human immunodeficiency virus (HIV), and he appealed. The Appellate Court, Welch, J., held that: (1) victim's testimony was admissible even though no pretrial competency hearing had been held; (2) victim's recantation of accusation after incident but prior to trial did not render evidence insufficient to support conviction; and (3) statute making knowing transmission of HIV criminal was not unconstitutionally vague as applied to defendant.

Affirmed in part; vacated in part; remanded with directions.

1. Criminal Law ⇐1170½(1)

If child witness is properly found competent to testify after motion to strike testimony, there can be no prejudice to defendant as result of failure to hold pretrial competency hearing; any error in failing to hold pretrial competency hearing is harmless. Ill.Rev.Stat.1989, ch. 38, ¶¶ 106A-5, 115-14(b)(2).

2. Criminal Law ⇐1153(2)
Witnesses ⇐79(1)

Question of witness competency is to be determined by trial judge, and reviewing court may not disturb the determination unless it is clear that trial judge abused discretion or misapprehended legal principles.

3. Criminal Law ⇐1157(2)

Although decisions as to competency of witness are reviewable, competency determinations will be overturned only if it appears that trial judge has abused his discretion.

4. Witnesses ⇐10(1)

Child witness may be deemed competent even if child does not give perfect answers to questions asked during competency determination or at trial; imperfect response to questions does not invalidate finding of competency if totality of responses indicate competence.

5. Witnesses ⇐10(1)

Fact that nine-year-old male victim of sexual abuse testified that he did not know difference between the truth and a lie did not automatically make witness incompetent where victim testified that he knew he would "go to the devil" if he told a lie and that he would be spanked if he lied to his mother.

6. Witnesses ⇐79(1)

Trial court may determine witness' competency to testify by observing demeanor and ability to testify during trial.

7. Sodomy ⇐6

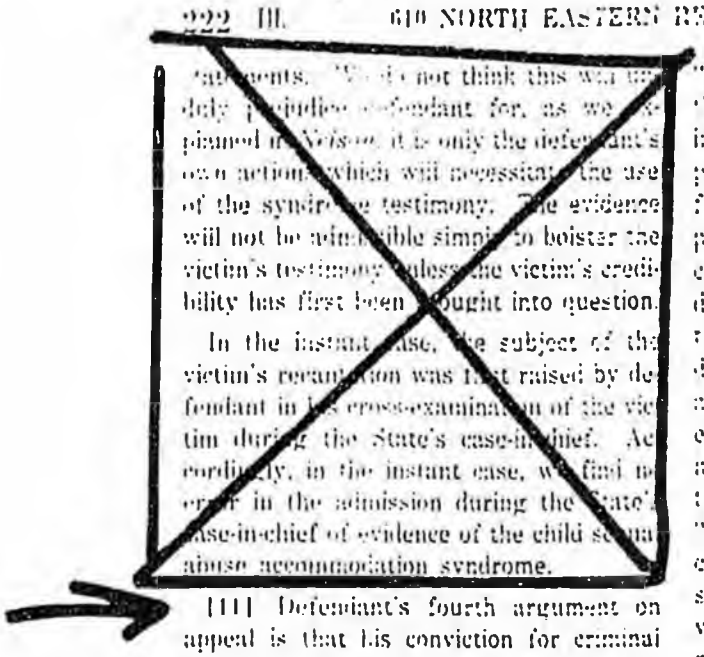
Fact that nine-year-old male victim of sexual assault had repeatedly denied that assault occurred did not make victim's testimony at trial that assault did occur unworthy of belief; jury had been fully advised as to circumstances under which victim made accusations and circumstances under which he recanted them.

8. Criminal Law ⇐942(2)

Evidence of recantation is inherently unreliable and insufficient to warrant new trial other than in extraordinary and unusual cases.

9. Criminal Law ⇐474.4(4)

Expert testimony concerning child sexual abuse accommodation syndrome was admissible in light of sufficient foundation established by testimony that it was form of posttraumatic stress syndrome and was accepted theory in psychological community. Ill.Rev.Stat.1989, ch. 38, ¶ 115-7.2.



arguments. We do not think this was unduly prejudicial to defendant for, as we explained in *Nelson*, it is only the defendant's own actions which will necessitate the use of the syndrome testimony. The evidence will not be admissible simply to bolster the victim's testimony unless the victim's credibility has first been brought into question.

In the instant case, the subject of the victim's reexamination was first raised by defendant in his cross-examination of the victim during the State's case-in-chief. Accordingly, in the instant case, we find no error in the admission during the State's case-in-chief of evidence of the child sexual abuse accommodation syndrome.

[11] Defendant's fourth argument on appeal is that his conviction for criminal transmission of HIV must be vacated because the statute upon which it is based, section 12-16.2(a)(1) of the Criminal Code of 1961 (Ill.Rev.Stat.1989, ch. 38, par. 12-16.2(a)(1)), is unconstitutionally vague and therefore invalid. Section 12-16.2 provides in pertinent part as follows:

> Criminal Transmission of HIV. (a) A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV:
>
> (1) engages in intimate contact with another:
>
> * * * * * *
>
> (b) For purposes of this Section:
>
> 'HIV' means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.
>
> 'Intimate contact with another' means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.
>
> * * * * * *
>
> (e) Nothing in this Section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV. Ill.Rev.Stat.1989, ch. 38, par. 12-16.2.

Defendant argues that the statute is unconstitutionally vague because the term "bodily fluid" is insufficiently defined and that, because the use of the word "could" in the definition of intimate contact encompasses such a broad range of conduct, it fails to clearly indicate what behavior is prohibited. As a result, the term "intimate contact with another" is not adequately defined and is vague. Defendant argues that because the term "bodily fluid" is not defined, the jury could conclude that saliva and tears could transmit the virus, when experts in the field assert that these are not bodily fluids capable of transmitting the virus. Furthermore, because the word "could" encompasses such a broad range of conduct, a jury could conclude that some sexual act short of penetrative oral, anal or vaginal intercourse could transmit the virus when experts assert that only these penetrative sexual acts could transmit the virus. Defendant further argues that one must speculate whether biting or spitting on another while knowingly infected with HIV constitutes criminal transmission of HIV because the statute does not define what bodily fluids are possible transmitters of the virus. Defendant argues that these uncertainties in the statute render it unconstitutionally vague in that it fails to give adequate notice to as to what acts are prohibited and allows arbitrary and discriminatory application.

Defendant's argument must fail because, not only does he lack standing to raise the constitutionality of the statute as applied to other acts and actors, the statute is not vague and unconstitutional as applied to him. It is well settled that vagueness challenges to statutes which do not involve first amendment freedoms must be examined in light of the facts of the case at hand. (*People v. Jihan* (1989), 127 Ill.2d 379, 385, 130 Ill.Dec. 422, 425, 537 N.E.2d 751, 754.) Thus, to prevail in a vagueness challenge to a statute that does not implicate first amendment concerns, a party must demonstrate that the statute is vague as applied to the conduct for which the party is being prosecuted. (*Jihan*, 127 Ill.2d at 385, 130 Ill.Dec. at 425, 537 N.E.2d at 754.) The party must show that the statute did not provide clear notice that the

party's conduct was prohibited. *Jihan*, 127 Ill.2d at 385, 130 Ill.Dec. at 425, 537 N.E.2d at 754.) The right to challenge a statute as being vague on its face where the statute clearly applies to the conduct of the party making the challenge does not exist unless first amendment concerns are involved. *Jihan*, 127 Ill.2d at 386, 130 Ill. Dec. at 425, 537 N.E.2d at 754.

[12] In the instant case, defendant does not argue, nor could he successfully argue, that any first amendment rights are implicated. Thus, defendant must demonstrate that the statute is vague not as applied to someone else, or some act other than that which he committed, but as applied to him and the act he committed. Thus, the issue before us is whether the statute clearly proscribed the conduct engaged in by defendant in this case.

A statute need only be sufficiently certain to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by law. (*People v. Lowe* (1990), 202 Ill.App.3d 648, 653, 148 Ill.Dec. 136, 139, 560 N.E.2d 438, 441.) A person should not be subjected to a penalty for certain conduct unless the words of the statute clearly describe the conduct prohibited. (*People v. Taylor* (1990), 138 Ill.2d 204, 211, 149 Ill.Dec. 297, 300, 561 N.E.2d 667, 670.) However, a defendant may be prosecuted under a statute without violating his right of due process if his conduct falls squarely within the statute's proscriptions, even though the statute may be vague as applied to other conduct. (*Taylor*, 138 Ill.2d at 211, 149 Ill.Dec. at 300, 561 N.E.2d at 670.) The fact that there may be borderline cases wherein a degree of uncertainty exists as to the applicability of a statute does not render the statute unconstitutional as to conduct about which no uncertainty exists. *People v. Witzkowski* (1972), 53 Ill.2d 216, 219, 290 N.E.2d 236, 239.

In the instant case, defendant placed his penis in the mouth of the victim and ejaculated semen. Defendant acknowledges that semen is a bodily fluid well known as a transmitter of HIV. Oral sexual intercourse is a penetrative sexual contact which is recognized as allowing transmission of the virus. Thus, defendant clearly exposed the body of another to his bodily fluid in a manner that could result in the transmission of HIV. A penal statute need only convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. (*Taylor*, 138 Ill.2d at 217, 149 Ill. Dec. at 303, 561 N.E.2d at 673.) Defendant's conduct clearly fell within the proscription of the statute. Section 12-16.-2(a)(1) is not unconstitutionally vague as applied to defendant in this case, and defendant has no standing to raise the constitutionality of the statute as it may be applied to other individuals and other acts.

Defendant's next argument on appeal is that the testimony of defendant's physician, Dr. Hyde, was improperly admitted in that the physician-patient privilege barred his testimony and no exception to that privilege applied. The State sought to introduce Dr. Hyde's testimony to establish that defendant had knowledge that he was infected with HIV, an essential element of the offense of criminal transmission of HIV. The court allowed Dr. Hyde to testify over defendant's objection, finding that there was a compelling need for the testimony. Defendant argues that the trial court improperly allowed Dr. Hyde to testify over defendant's assertion of the physician-patient privilege.

The physician-patient privilege is established by statute as follows:

"No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient * * *." (Ill.Rev.Stat.1989, ch. 110, par. 8-802.)

The statute sets forth several exceptions to the privilege, among them the following: "(4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, * * *, (7) in actions, civil or crim-

State of Alaska Epidemiology

Bulletin

Department of Health and Social Services
Karen Perdue, Commissioner

Division of Public Health
Peter M. Nakamura, MD, MPH, Director

Section of Epidemiology
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Bulletin No. 3 January 31, 1995

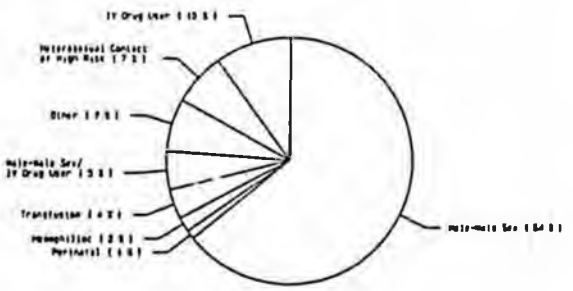
AIDS - ALASKA

Through December 31, 1994, 272 Alaskans have been confirmed to have AIDS. Of these, 152 are known to have died. Of the 272 AIDS cases, 241 are in males and 31 in females. Data below employ the 1993 Expanded Case Definition for AIDS. All cases are shown as diagnosed in the year the person first met the revised case definition. Residence at time of diagnosis is shown by census area.

Year of Diagnosis, N = 272

Year	Cases	Known Deaths
1982	1	1
1983	2	2
1984	4	3
1985	13	12
1986	16	14
1987	17	17
1988	19	18
1989	19	16
1990	18	13
1991	33	24
1992	38	20
1993	42	9
1994	50	3
Total	272	152

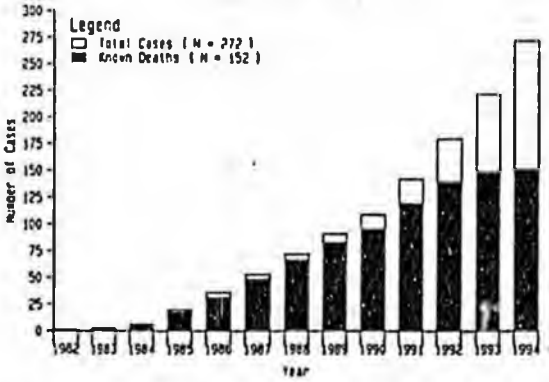
Risk Category,[1] N = 272



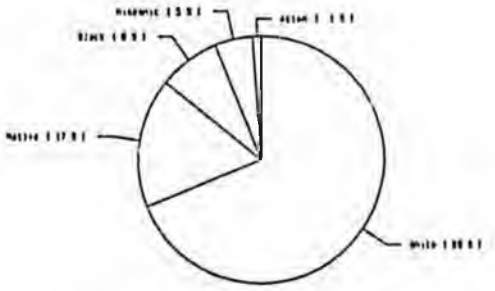
Age in Years at Diagnosis, N = 272

Age Group	Cases	Known Deaths
00-04	3	2
05-09	0	0
10-14	1	1
15-19	1	1
20-24	19	9
25-29	45	25
30-34	66	35
35-39	57	28
40-44	34	22
45-49	23	14
50-54	11	6
55-59	4	2
60-64	3	2
65+	4	4
Total	272	152

Cumulative Cases
Based on Date of Diagnosis



Race of Cases, N = 272



[1]The category "other" is defined nationally to include heterosexual contact with person(s) of unknown risk, occupationally exposed health care workers, and persons for whom risk factor has not been determined.

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Bulletin No. 4 February 1, 1995

HIV INFECTION - ALASKA

There are three main sources of data on the prevalence of HIV infection in Alaska. Data from two of these sources, HIV antibody testing conducted through the State Section of Laboratories and Department of Defense data on civilian applicants for military service in Alaska, are shown below. Data from the third source, the Alaska Survey in Childbearing Women, will be reported in a separate Epidemiology Bulletin late in 1995. HIV infection without AIDS is not currently reportable in Alaska. The data below do not include HIV tests sent by providers to laboratories other than State or Department of Defense laboratories.

State Section of Laboratories

1982

Through December 31, 1994, 540 (0.7%) of 75,826 individuals voluntarily tested through the Section of Laboratories, Division of Public Health, are positive for HIV infection.

HIV Testing by Race/Ethnicity

Race/Ethnicity	No. Tested	Positive (%)
White	48726	359 (0.7%)
Alaska Native	17338	80 (0.5%)
Black	4302	53 (1.2%)
Hispanic	1719	34 (2.0%)
Other	1833	9 (0.5%)
Not Specified	1908	5 (0.3%)
Total	75826	540 (0.7%)

HIV Testing by Sex

Sex	No. Tested	Positive (%)
Male	35584	473 (1.3%)
Female	38863	63 (0.2%)
Not Specified	379	4
Total	75826	540 (0.7%)

HIV Testing by Age

Age	No. Tested	Positive (%)
0-9	550	2 (0.4%)
10-19	8531	22 (0.3%)
20-29	28087	227 (0.8%)
30-39	24263	205 (0.8%)
40-49	10308	72 (0.7%)
50+	3968	12 (0.3%)
Not Specified	19	0
Total	75826	540 (0.7%)

HIV Testing by Risk

Risk Category	Positive/Number tested (% Positive) Non-Native		Native		Total*	
Homosexual/Bisexual Male	245/1685	(14.5%)	25/299	(8.7%)	271/1954	(13.8%)
IV Drug User	33/2291	(1.4%)	0/513	(0.0%)	34/2946	(1.2%)
Heterosexual Contact of Person with/or at risk of AIDS	8/2418	(0.3%)	5/458	(1.1%)	13/2918	(0.4%)
Hemophiliac	7/21	(33.3%)	0/3	(0.0%)	7/24	(29.2%)
Transfusion with Blood/ Blood Products	8/1102	(0.7%)	4/329	(1.2%)	12/1478	(0.8%)
All Others	154/48943	(0.3%)	48/15746	(0.3%)	203/66479	(0.3%)
Total	[illegible]	(0.8%)	85/17334	(0.5%)	540/75826	(0.7%)

*Total includes unknown race

Department of Defense

Since October 1985, all persons applying for active duty or reserve military service, the service academies, and the Reserve Officer Training Corps (ROTC) have been screened for HIV infection as part of their entrance evaluation. The Department of Defense shares the resulting statistical data with states for HIV surveillance purposes. Of 12,919 individuals (10,833 males and 2,086 females) screened in Alaska from October 1985 through September 1994, 3 (0.02%) have tested positive for HIV infection. Characteristics of those with HIV infection follow.

Sex .....
Males 3
Females..... 0
.....
Age .....
20-24 years 1
30+ years..... 2

Race/ethnicity
White.....1
Black.....1
Unspecified 1

Total number tested 12,919
Total number HIV positive 3

Charlotte Observer file photo

LaGena Lookabill Greene, shown in a January 1995 photo, is now dying of AIDS. She was the fiancee of race car driver Tim Richmond, who died of the disease in August 1989 and left behind a haunting legacy of dying women.

Lady Killer

Tim Richmond was a good-looking, hard-driving racing star. When he died of AIDS in 1989, he was mourned as a tragic figure. More tragic still is the line of women following him to the grave.

By KEN RODRIGUEZ
Miami Herald

Beyond the grave of Tim Richmond lies a trail of pretty women following him to the ground.

Fresh flowers grace the tombstone of one former lover. A second ex-girlfriend, still fighting for her life, has picked out her casket. At least two former paramours are in seclusion on the East Coast, awaiting the inevitable. Others — friends suspect a dozen or more — have passed on quietly, hoping to take this secret with them: Richmond, the late auto racing star, infected them with the virus that causes AIDS.

Panic seized women across the country when media reports leaked the cause of Richmond's death in August 1989. LaGena Lookabill Greene, Richmond's former fiancee now dying of AIDS in Charlotte, N.C., received more than two dozen calls.

"From those calls alone — only counting the ones from Charlotte — I could have started a support group of women exposed to HIV from Tim," said Greene, 35. "There would be about 30 in that support group. They told me they were exposed, that they had had sex with Tim and they were worried."

Richmond's infectious-disease specialist, Dr. David Dodson, can only guess when his late patient might have become infected.

"Perhaps in the late '70s," Dodson said.

Please see Page C-2, RICHMOND

RICHMOND: Women follow dead race car driver to the grave

Florida State. LaGena dated Danny for a while, broke up, then returned to Charlotte. Once home, she resumed her relationship with Richmond, a former football star himself at now-closed Miami Military Academy.

Tim's father, Al, does not believe that his late son infected LaGena Greene. "I don't think there is anything to it," said Al, who lost his wife, Evelyn, to cancer after Tim's death. "I don't remember her."

LaGena says she and Al spoke on the phone many times. "LaGena," she recalled Al telling her, "Tim says you're the keeper. The first time he said that, I asked what he meant. He said, 'You're the one Tim wants to marry.' "

Jackie Lookabill, Greene's mother, also remembers Al Richmond. "On Sept. 10, 1988, I brought my daughter to Charlotte Municipal Airport," Jackie said. "And Evelyn and Al Richmond brought Tim. We chatted inside the lobby. Tim and LaGena were on the way to Maryland for Tim to have a press conference with USA Today."

After the news conference, Richmond asked Greene to fly with him to New York for dinner, hinting he wanted to discuss something special.

Richmond rented a hotel suite, saying he wanted to freshen up. Moments after they arrived, a bellman delivered pink roses. Outside the window, Central Park in resplendent autumn colors. Inside the room, a man promising to be a devoted husband and father.

Richmond proposed, LaGena accepted. They consummated their relationship.

"I believed that by giving myself to Tim physically, our union marked the beginning of a lifetime of mutual commitment," she said. "We never made love again. Now I see that day as the end of my life as I had known it."

'WHY NOW?'

The odds of a woman contracting HIV from a single sexual encounter with an infected man are limited. But the chances increase when the man is in the late stages of the disease.

Richmond, by his own doctor's estimate, may have been carrying the virus for eight years when he had sex with LaGena. Jemsek, her infectious-disease specialist, says he believes his patient's account.

"Because of the timing of her sexual encounter and the subsequent development of medical problems, it all makes perfect sense," Jemsek said.

A former friend of Richmond, who did not want to be identified, confirms that LaGena was with Richmond that day in the hotel suite. The woman told The Miami Herald she called Richmond's room and LaGena answered.

After leaving New York, LaGena and Richmond remained in touch by telephone. "Tim wanted to spend Thanksgiving with me in Los Angeles," she said. "We made plans, he didn't show up, and he didn't call for the next two years and four months."

A sports agent called LaGena, wanting to know about whispers that Richmond had AIDS. A vicious rumor, she said. No way it could be true.

"After hanging up with the sports agent, my mind began to swirl with memories of Tim's proposal," she said. "I pictured Tim's face and his eyes, which were filled with tears saying, 'Why now? Why are you saying yes now? Why not earlier?' I became concerned that I needed to get tested, even though AIDS was known as a gay man's disease. The test came back negative. But I had only been exposed 11 weeks earlier. What doctors know now that they didn't know then is there can be a window of three to six months in which a person can be infected with HIV and test negative."

Nine months after the test, a sports writer called. He said Richmond was in the hospital and wondered if LaGena could confirm that Richmond had AIDS.

"I only said what a great race driver he was and I could not confirm any rumor," she said. "But I went and got tested again. This time, I was positive."

LaGena suffered privately for eight years until Jemsek, her doctor, persuaded her to speak at a Charlotte AIDS seminar. The only other woman to publicly say an American sports hero infected her is Waymer Moore. She sued Magic Johnson for $2.2 million, claiming he had infected her with HIV in 1990. The case has been settled out of court.

After a failed suicide attempt, LaGena went to church with Danny Greene. At the altar, she repented for the sin of premarital sex and rededicated her life to Jesus Christ.

Two years later, Danny proposed, knowing he and LaGena would never have children. They were married on Valentine's Day 1990.

ARE THERE OTHERS?

LaGena wanted an apology from Richmond after learning she had been infected. In March 1989, Richmond began calling. "But it wasn't to apologize and it wasn't to admit he had AIDS," she said. "He denied for the next four months that he had AIDS."

The Richmond family also denied the illness.

"Then, in what turned out to be our last conversation, I realized that Tim lacked the capacity to be truthful," LaGena said. "So, I told him, 'I know you gave me this disease and that you knew that you had AIDS when you asked me to marry you. But I forgive you.' He thanked me."

A few days later, he died in West Palm Beach at age 34.

LaGena now speaks at churches, high schools and colleges across the country, telling her story and crusading for abstinence. She does not neglect to drop a word or two about hero worship.

"The line is crossed when people begin to equate athletic ability with good character," LaGena said. "Those are two different things."

Jackie Lookabill knows.

"LaGena lived in secrecy for so long and we were so pained and here's this sports figure, who gets all this adulation," Jackie said. "Here is this man who has taken my child's life, and he is put so far above . . . while my child has a death sentence.

". . . How can a human being do this to someone, knowingly infect another person? And I say knowingly. I have no doubt."

Sometimes LaGena Lookabill Greene wonders how many others like her are out there.

Dawn Freeman, Tommy Morrison's fiancee? She has tested negative for HIV.

LaGena did, too. The first time.

□ Miami Herald researcher Elisabeth Donovan contributed to this report.