

HB

199

mand this cause to the circuit court of Cumberland 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. Garrett* (1990), 139 Ill.2d 189, 195, 151 Ill.Dec. 329, 564 N.E.2d 784.

Circuit court reversed in part; cause remanded with directions.



155 Ill.2d 509

196 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. Jones* (1994), 158 Ill.2d 27, 196 Ill.Dec. 625, 630 N.E.2d 790.



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158 Ill.2d 22

196 Ill.Dec. 629

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 Deo van, 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 violate state and federal constitutional protections for free speech; (2) statute violate state and federal constitutional protections for free association; and (3) was not unconstitutionally vague.

Reversed and remanded. *ri*

I. Constitutional Law § 90.10 Health and Environment; § 2

Criminal statute prohibiting transmission of human immunodeficiency virus (HIV) to another through intimate contact was not unconstitutionally vague with respect to protected speech. Other statute, *People v. Jones*, applied, which involved defendant with engaging in consensual sexual course knowing that she was infected, telling her partner, and defendant with raping woman knowing infected, had any connection.

PEOPLE v. RUSSELL

Ill. 795

Cite as 630 N.E.2d 794 (Ill. 1994)

speech. S.H.A. 720 ILCS 5/12-16.2; S.H.A. Const. Art. 1, § 4; U.S.C.A. Const.Amend. 1.

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. 1, § 5; U.S.C.A. Const.Amend. 1.

1 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.

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. Bonelli, of Mattoon, and Michael L. Closen, Chicago, for appellee in No. 7443.

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

Roland W. Burris, Atty. Gen., Springfield, Haida, State's Atty., Belleville, and C. Ferguson, State's Atty., Charleston Robert J. Goetten, Stephen E. Norris and R. Arnold, Office of the State's Attys. State Prosecutor, Mt. Vernon, of counsel for the People. Marie J. Hightman, Stuart I. Graff and M. Feller, of Schiff, Hardin & Waite, John R. Hammell, Harvey Grossman, K. Connell, Mathew S. Nosanchuk and Penn, Chicago, for appellee in No.

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 Caretha 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 person commits criminal transmission of HIV when he or she, knowing that she is infected with HIV:

(1) engages in intimate contact with another:

(b) For purposes of this Section:

'Intimate contact with another' means the exposure of the body of one person bodily fluid of another person in a manner that could result in the transmission of HIV." 720 ILCS 5/12-16.2 (West 19

Vagueness, like beauty, may be in the eye of the beholder. We, however, read the statute as being sufficiently clear and explicit 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 v. City of Dallas* (1968), 390 U.S. 696, 88 S.Ct. 1298, 20 L.Ed.2d 225.

That the statute might open the door to the 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. *Garrison* (1980), 82 Ill.2d 444, 45 Ill.Dec. 132, 412 N.E.2d 483.

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

Reversed and remanded.





Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

3/7

State Capitol
Juneau, AK 99801-1182

Representative Scott Ogan

House District 27

MEMORANDUM

To: House State Affairs Committee

From: Representative Scott Ogan *SO*

Date: February 28, 1995

Re: Request for Hearing on HB 199, "An Act creating the crime of criminal transmission of HIV."

Attn: Representative James, Chair

Please schedule the above referenced Bill for a hearing at your earliest convenience. Thank you for your attention to this matter.

Alaska State Legislature

Resources, Vice Chair
State Affairs, Vice Chair
House Special Committee on Oil & Gas, Vice Chair
House Special Committee on Fisheries



State Capitol
Room 409
Juneau, Alaska 99801-1182

Representative Scott Ogan *SO*
House District 27

Sponsor statement HB 199
Criminal transmission of HIV

This bill is simple. A person who knowingly has HIV and commits an act that is known to transmit HIV to others, is guilty of a class A felony.

Acts that will be illegal will include sexual contact, deliberately exposing someone to bodily fluids, donating organs or blood, and using nonsterile devices and needles.

The reality of this issue is that if a person is unknowingly exposed to this virus, it is likely to be a death sentence. People infected with HIV have a grave responsibility to the people they interact. There are many people with high risk behaviors infected with HIV. These people continue to engage in this behavior which is sentencing unknowing victims to death. Reckless disregard for another person's life is a crime in any other case. To deliberately infect someone with HIV should be a crime in Alaska. To know one's self is infected, and continue to engage in high risk behaviors should be legally considered a deliberate act of attempted murder.

This law would provide some recourse for people involuntarily exposed to HIV, as well as provide some protection to unsuspecting people with high risk behaviors. The largest single group of people acquiring this disease is young people. Often they are impulsive and reckless. Once the word gets around that HIV transmission is a crime, this reckless behavior should dramatically decline.



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

To: House Committees of Referral for HB 199

From: Representative Scott Ogan *SO*

Re: Sectional Analysis of HB 199

Date: March 3, 1995

The following is a sectional analysis of HB 199, "An Act creating the crime of criminal transmission of HIV."

Section 1. (This is a single section bill)

Section one creates a new "Article 6" to AS 11.41, Crimes Against the Person. This Article contains a single new crime, Criminal Transmission of HIV.

Criminal Transmission of HIV will penalize behaviors by persons who know they are infected with HIV that create a risk of transmission of HIV, whether or not transmission actually occurs. This includes high-risk sexual activities, transfer of potentially infected syringes, and other actions that would expose infected body fluid or tissue to another.

The bill contains a number of exceptions, including a limited spousal exception, an exception for receiving medical treatment, and an exception where the exposed individual already was infected with HIV.

Criminal transmission of HIV would be a Class A felony.

Facts about HB 199: Criminal Transmission of HIV 50

I. What are the elements of the offense?

- (1) A person who is infected with HIV,
- (2) and knows that he or she is infected
- (3) does one of the following:
 - (a) engages in the type of sexual relations that can transmit HIV;
 - (b) exposes someone else's body to the infected person's body fluids;
 - (c) transfers or donates blood, organs, semen, or any other infected tissue or body fluid; or
 - (d) transfers non-sterile (used) needles to someone.

II. Does the non-infected party have to catch the virus in order to successfully prosecute the offender?

No. The bill would penalize intentional behavior likely to transfer the virus, whether or not the virus is actually transmitted to someone by the conduct.

III. Why does Alaska need this law?

The answer is simple; during the 4 year period from December 31, 1990 to December 31, 1994, the number of living people carrying the HIV virus in this state has increased by 9 times. Statistics on the spread of this fatal disease do not show any downward trend, but continue to grow rapidly. (Source: *State of Alaska Epidemiology Bulletin*, no. 3, Jan. 31, 1995.)

III. Will this bill create a disincentive to testing?

No. A person can't avoid prosecution simply by refusing to have an HIV test. The bill states that prosecutors and juries should look at all of the surrounding circumstances and evidence concerning whether the person knew he or she was infected, rather than focussing solely on the results of one test. Of course, no one could be convicted unless the defendant's knowledge of his or her infection were proven beyond a reasonable doubt.

IV. The Exceptions:

- (1) If you expose someone who was already infected with HIV, you're not guilty of the crime.

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(2) Sexual relations with your spouse are not unlawful, as long as your spouse understands the risk before consenting, and reasonable prophylactic measures are used to minimize the danger that this disease will take your spouse's life. The requirement that prophylactic measures be used is not intended to be an intrusion into the bedroom; it is simply a recognition of the well-settled principle of law that a person cannot exonerate a killer by "consenting" to his or her own murder.

(3) Obviously, if you receive medical treatment you may be exposing your body fluids to the health care providers. This is not unlawful as long as the exposure really does consist of the medical treatment itself, as opposed to a malicious attempt to infect a health care worker. Also, the law will require that you tell your health care providers you are infected if you are able to tell them.

V. **The Penalty:**

Criminal Transmission of HIV is a Class A Felony. A Class A felony is punishable by a maximum sentence of 20 years, and a presumptive sentence of 5 years. This is comparable to other Crimes against the Person, or Attempted Crimes against the Person, of similar magnitude. For example:

- (a) Both Murder and Attempted Murder in the first degree are unclassified felonies.
- (b) Attempted Murder in the second degree is a class A felony.
- (c) Manslaughter is a class A felony.
- (d) Attempted Kidnapping is a class A felony.
- (e) Attempted Sexual Assault in the first degree is a class A felony.

The Washington Post

SPORTS

Olympic Diving Star

Louganis Says He Has AIDS

He Was HIV Positive in '88 Games

By Athelia Knight
Washington Post Staff Writer

Olympic gold medalist Greg Louganis has AIDS and knew he was HIV positive during the 1988 Olympics in Seoul, where he won two gold medals, according to a transcript of an ABC interview released last night.

In an interview with ABC's Barbara Walters, Louganis talked of his fears after injuring himself during a preliminary dive in the springboard competition in Seoul. Louganis hit his head on the board and fell into the water, bleeding. After receiving five stitches, he came back to win two gold medals and became the first male diver to gain double gold medals in consecutive Olympic Games.

Although transmission of the AIDS virus outside of sexual contact, needle sharing or blood transfusion is extremely rare, Louganis said he

worried about the safety of other divers. But in the interview, to be aired Friday on ABC's "20/20," Louganis said he didn't report his condition to the doctor who treated him—without wearing protective gloves—or to the U.S. Olympic Committee. He said he "didn't tell anyone" because he "was encouraged not to" by his coach, Ron O'Brien and a "small team of people."

Louganis, 35, publicly acknowledged at last summer's Gay Games in New York that he is a homosexual. His autobiography, "Breaking the Surface," is expected to be released by Random House on Monday. Other athletes who have announced they have the AIDS virus include former Los Angeles Lakers star Magic Johnson, the late tennis great Arthur Ashe and Washington Redskins tight end Jerry Smith, who died in 1986.

See LOUGANIS, D3, Col. 1



ASSOCIATED PRESS

Greg Louganis won four Olympic gold medals, two of them in 1988 Summer Games in Seoul, where he suffered five-stitch cut to his head when he hit board.

Diving Star Has AIDS

LOUGANIS, From D1

Louganis's revelations shocked the Olympic Committee.

"The United States Olympic Committee is saddened by the news that Greg Louganis is battling this deadly illness, and our prayers are with him in the fight," said USOC President LeRoy T. Walker.

Walker said Louganis, who retired after the '88 Games and became an actor, "has been one of the greatest competitors in Olympic history. . . . It is our hope that his struggles and his courage will both inspire youth and alert them to the dangers and precautions related to HIV and AIDS."

Wendy Williams, a teammate of Louganis's at the 1988 Olympics who trained with him at a swim club in Mission Viejo, Calif., said in a telephone interview from Hawaii, "Louganis was the best diver there ever was. He was a private man and shy, but gentle and kind."

Williams remembered when she was a young diver fearful of diving from a platform.

"He sat with me for two hours, talking about fear," Williams said. "He was so nice and thoughtful. I eventually did the dive."

"I'll never forget his last dive in Seoul. It was all on the line and he did a perfect dive. When he came out of the water, he was crying—he knew he had won."

During the "20/20" interview, Louganis talked of his unhappy childhood, including an abusive stepfather, teen-age depression, three suicide attempts, and dyslexia, which was not diagnosed until college. And he spoke of his sexuality. According to the transcript, six months before the 1988 Olympics, Louganis learned that a former companion was dying of AIDS. Louganis was tested by his personal physician, who told him that he was HIV positive.

Louganis began taking the drug AZT immediately, and continued taking it during the Olympics in Seoul.

Louganis said in the interview with Walters that, on a preliminary dive in the three-meter springboard competition, that "on my reverse two-and-a-half pike, I knew as soon as I was coming off the board that I was gonna be close . . . so I came out wide so that the board would go by and I wouldn't hit. I started coming out of the dive and then I heard this big hollow thud, and then I found myself in the water. I just held my head in hopes to—I didn't know if I was cut or not. But I just wanted to hold the blood in, or just not anybody touch it."

Walters: You hit your head, and there may have been blood in the water. Why were you terrified?

Louganis: Because Ron O'Brien [his coach] and myself were [two of] the few people . . . that knew that I was HIV positive. . . . Dealing with HIV was really difficult for me because I felt like, God, the U.S. Olympic Committee needs to know this. . . . U.S. Diving needs to know it, because what if I get sick at the Olympic Games, and am unable to compete? I didn't anticipate hitting my head on the board. I didn't anticipate, you know, blood. That's something that I didn't think about at the time."

According to the ABC transcript, O'Brien said he didn't have those fears. "Because there's very little chance," O'Brien said. "If [it] were in a sport like boxing or wrestling, football, where there's a lot of contact, personal contact, I would have been very concerned. But our sport is such that you don't ever come close to anybody."

O'Brien could not be reached for comment.

Louganis told Walters that he didn't tell



BY JOEL RICHARDSON—THE WASHINGTON POST

USOC President LeRoy T. Walker said diver Greg Louganis "has been one of the greatest competitors in Olympic history."

OLYMPIC MEDALS

- 1976: Montreal—silver medal, platform.
- 1984: Los Angeles—gold medal, platform; gold medal, springboard.
- 1988: Seoul—gold medal, platform; gold medal, springboard.

the doctor who stitched up the cut without wearing protective gloves.

"I was so stunned," he said in the interview. "I mean, what was going on in my mind at the time was, what's my responsibility, do I say something . . . this has been an incredibly guarded secret. You could throw the entire competition into a state of alarm."

Louganis said he hugged O'Brien after he won the last medal and cried. "I said that nobody will ever know what we've just been through," Louganis told Walters.

- HIV Laws in
Other States -

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 814 (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 88-220 (88) - 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 (88) - 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 1871 (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 result in HIV infected and consented to the action with that knowledge.

Indiana, SB 9, Public Law 88-123 (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.

202-872-1445

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 possibly 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 (87) - misdemeanor (may not knowingly transfer or attempt to transfer)

Michigan, HB 5026, Public Act 190 (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 not 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 481, Chapter 261 (91) - class C felony for committing prostitution when a person knows that he or she is HIV+

Texas, SB 59 (89) - felony for "engaging in conduct likely to transfer"

Utah, HB 24 (93) - 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 B 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 = 26 STATES

ALASKA CIVIL LIBERTIES UNION

An Affiliate of the American Civil Liberties Union
P. O. Box 201844 Anchorage, AK 99520-1844
Phone: 1-907-258-0044 Fax: 1-907-258-0288

March 13, 1995

The Honorable Jeannette James
Chair -- House State Affairs Committee
Alaska House of Representatives
State Capitol Building, Room 102
Juneau, AK 99801-1182

Re: House Bill 199/SB 91

Dear Representative James:

I am writing to you on behalf of the Board of Directors and members of the Alaska Civil Liberties Union (AkCLU) to express serious concerns regarding House Bill 199 and SB 91, both of which relate to "an act creating the crime of criminal transmission of HIV."

The emergence of the Acquired Immune Deficiency Syndrome (AIDS) as a major threat to public health has serious implications for civil liberties such as control over one's body, freedom of association and the right of privacy of one's medical records. The outbreak of HIV/AIDS has caused great public fear and concern. It is especially important at such times that a public health policy which is rational, effective and has the minimal intrusion possible on civil liberties be implemented. This bill accomplishes none of those goals.

These proposed bills are so fraught with problems that the best approach would be to abandon them altogether. Among the problems are: these bills would actually discourage responsible testing and preventative measures designed to prevent the control and spread of HIV/AIDS; it would be impossible to prosecute these cases even with grave invasions of personal privacy; the bills discriminate on the basis of marital status; and the bills are unnecessary. Each of these concerns will be addressed individually.

1. Transmission of AIDS may already be prosecuted under existing criminal statutes.

The first point that needs to be made is that the bills are absolutely unnecessary. Existing criminal statutes can already be used to prosecute the knowing transmission of HIV/AIDS. According to Assistant Attorney General Dean Guanelli a person with known HIV

infection could be prosecuted under existing statutes for: (a) attempted first degree murder, if s/he intended to kill another through infecting them with HIV; (b) attempted assault, if s/he intended serious injury, not death; or (c) reckless endangerment, if s/he engaged in behavior that could transmit the virus, but where transmission of the virus was not intentional or knowing. Of course, SB 91 and HB 199 would create new classes of felonies, Class B and Class A felonies respectively, which is unnecessary given the laws which already exist.

2. These bills discourage Alaskans from becoming informed of their HIV/AIDS status.

These bills are likely to discourage people from becoming informed of their HIV/AIDS status. There is a strong public health incentive to encourage people to participate in voluntary testing programs in order to be informed of their HIV/AIDS status and therefore, hopefully, to practice behaviors which reduce the risk of transmission of AIDS. By making it a crime to "knowingly" engage in behavior which is likely to transmit HIV/AIDS, the legislature is encouraging people to remain ignorant about their HIV/AIDS status. Ironically, this bill will have the paradoxical effect of discouraging people from being informed of their status, which is the exact opposite result from what the legislature is trying to accomplish.

3. It will be difficult, if not impossible, to prosecute these cases.

It will be nearly, if not completely, impossible for the state to establish that someone knowingly engaged in intimate contact which could result in transmission of HIV/AIDS. To establish that the person acted with knowledge, the state would be required to obtain confidential medical records from the defendant, or would be required to investigate intimate details of that person's life to determine whether "the totality of the evidence concerning the existence of the knowledge" [see Section 11.41.600(3)(c) of HB 199] regarding that person's life indicated that s/he knew of the likelihood of his or her status. To prove that a person "knew" about his or her status, without actual test results to establish this fact, would require the prosecution to investigate very intimate details about a person's life including his or her sexual life, possible drug usage, and medical history, areas which are constitutionally protected.

4. These bills violate rights to privacy and equal protection.

The entire statute is likely to violate constitutional rights

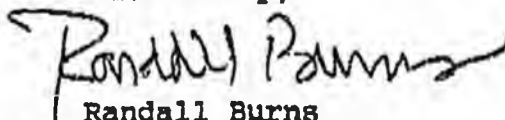
of privacy articulated by the United States Supreme Court in a series of decisions including Griswold v. State of Connecticut, 381 U.S. 479 (1965) Eisenstadt v. Baird, 405 U.S. 438 (1972) and Roe v. Wade, 410 U.S. 113 (1973). These cases have been interpreted to give individuals a right of privacy in decisions such as birth control, sexual conduct and abortion. This line of cases would likely apply to criminal transmission of AIDS because of the degree of state intrusiveness necessary to prosecute these cases.

It is further problematic to allow an affirmative defense to married couples [see Section 11.41.600(b)(1) of HB 199] and not to unmarried couples. Besides the privacy concerns addressed above, this section will also pose an equal protection problem. The case of Eisenstadt v. Baird (1972), specifically forbade on equal protection grounds discrimination based on marital status. Allowing an affirmative defense to married couples, but not to unmarried couples, will pose equal protection problems if this bill becomes law.

Also, we are concerned for proposed Sections 11.56.160(2) of SB 91 and 11.41.600(a)(3) of HB 199, which could be interpreted to apply to the perinatal transmission of HIV from an infected pregnant woman to a fetus or to the newborn during delivery or after birth through breast feeding. These bills should clearly exclude perinatal transmission or it will discourage pregnant women from getting tested and also discourage prenatal and obstretical care.

In short, the AkCLU is very much opposed to these bills and believes they are unconstitutional, misguided and wrong. While the concern for the spread of AIDS is a valid legislative concern, the time, money, and effort involved in passing these bills into law would be much better spent on a broad-based public education campaign informing Alaskans about the risks of HIV/AIDS. For those persons who do knowingly chose to engage in dangerous and risky behavior, current criminal statutes permit prosecution of these cases.

Sincerely,



Randall Burns
Executive Director

RCK:RPB

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 199

Revision Date: _____ Dept. Affected: Corrections
 Title: An Act creating the crime of criminal transmiss BRU: Statewide programs
 of HIV _____ Component inmate health
 Sponsor: Rep. Ogan
 Requester: Rep. Ogan COMPONENT SERIAL NO. 705

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/M/HTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: \$ _____

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The crime defined in this bill would carry a presumptive five year sentence. The Department of Corrections has no data to determine the number of people who may be convicted under this bill. It is believed that the number would be very small; perhaps zero in many years. However, in addition to the \$39.0 annual cost of maintaining an inmate in a prison facility, the exposure to medical cost liability must be considered.

In FY 95 alone nearly \$600.0 has been spent on one HIV/AIDS inmate. Every day an HIV positive inmate is in a prison facility, we risk adding huge medical costs to our inmate health care costs. DOC could be faced with an indeterminate number of million dollar per year inmates.

Prepared by: Jerry Shriner
 Division: _____
 Approved by Commissioner: *Walter H. Pugh*
 Agency: Department of Corrections

Phone: 465-5582
 Date: 3/3/95
 Date: 3/3/95

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 199

Revision Date: _____ Dept. Affected: Department of Law
 Title: "An Act creating the crime of criminal transmission of HIV." BRU: Prosecution
 of HIV." Component: All
 Sponsor: Representative Ogan
 Requester: House State Affairs COMPONENT SERIAL NO. 0085-0090

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY95) cost: \$ 0.0

POSITIONS

FULL-TIME	*****	*****	*****	*****	*****	*****
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill would make it a class A felony for a person, knowing that he or she is infected with the human immunodeficiency virus (HIV), to knowingly expose others to HIV infection through intimate sexual contact, infectious body fluids (including blood, tissue, semen or organs) in any manner that could result in transmission of HIV to a person who is unaware that the person causing the exposure is infected with HIV.

At the current time, 660 Alaskans are known to be infected with HIV, including 120 full-blown cases of AIDS. This number includes only those tested through state health laboratories. About four percent of those known to be infected with HIV are under the age of 20. Because many at high risk test anonymously or out of state, the actual number of persons residing in the state who have tested positive for HIV is undoubtedly higher than state records indicate. The current rate of growth for HIV in Alaska is about eight percent per year.

Prepared by: Richard I. Leagues, Director Phone: 465-3672
 Division: Administrative Services Division Date: 3/6/95
 Approved by Commissioner: Bruce M. Botelho, Attorney General Date: 3/6/95
 Agency: Department of Law

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 199

ANALYSIS CONTINUATION:

Of the known HIV cases in Alaska, the vast majority resulted from consensual sexual contact. Obtaining a conviction under this circumstance (simply securing sufficient evidence to warrant a prosecution) would be difficult, if not impossible. Consequently, the number of convictions resulting from exposure to HIV through intimate sexual contact may be relatively small. In a rare case where a person infected with HIV deliberately sets about to infect another, it might be possible to obtain a conviction. However, such a case is already chargeable under the state's existing criminal laws.

Although the bill is intended to deter persons who have tested positive from engaging in conduct that may spread HIV, we are concerned that it will have the unintended, but certain effect of deterring persons at the highest risk from seeking HIV testing and counseling, thus increasing the risk of spreading HIV.

Under these circumstances, estimating the number of prosecutions that would occur if the bill is enacted would be highly speculative, making it nearly impossible to determine a fiscal impact.

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 199

Revision Date: _____
 Title: "An Act creating the crime of criminal transmission of HIV"

 Sponsor: Rep. Ogan
 Requestor: (H) STA

Department Affected: Administration
 BRU: Public Defender Agency
 Component: Public Defender Agency

 COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
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FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 95) cost: \$ -0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)
 No measurable impact on the Public Defender Agency is anticipated.

Prepared by: John Salemi, Director
 Division: Public Defender Agency

Phone: 264-4400
 Date: _____

Approved by Commissioner: Mark Boye
 Agency: Department of Administration

Date: 3/3/95

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