

**SB**

**91**

Dr. Nakamura  
Amendments:  
→ mothers to fetus → Yes Taylor  
→ condom amendment → No Taylor

9-LS0739A

SENATE BILL NO. 91

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY SENATORS TAYLOR, Halford

Introduced: 2/20/95  
Referred: HES. JUD

A BILL

FOR AN ACT ENTITLED

1 "An Act creating the crime of criminal transmission of human immunodeficiency  
2 virus (HIV)."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. AS 11.66 is amended by adding a new section to read:

5 ARTICLE 1A. HEALTH OFFENSES.

6 Sec. 11.66.160. CRIMINAL TRANSMISSION OF HIV. (a) A person

7 commits the crime of criminal transmission of human immunodeficiency virus (HIV)  
8 if the person, knowing that the person is infected with HIV,

9 (1) engages in intimate contact with another person;  
10 (2) transfers, donates, or provides the person's blood, tissue, semen,  
11 organs, or other potentially infectious body fluids for transfusion, transplantation,  
12 insemination, or other administration to another; or

13 (3) dispenses, delivers, exchanges, sells, or in any manner transfers to  
14 another person any nonsterile intravenous or intramuscular drug paraphernalia.

Taylor  
Yes

"voluntarily"

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(b) In a prosecution under this section,

(1) it is an affirmative defense that the person exposed by the intimate contact, the transfusion, transplantation, insemination, or other administration or the transfer, knew that the defendant was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge;

(2) it is not necessary to show that the victim has been actually infected with HIV for the defendant to be convicted.

(c) In this section,

(1) "HIV" means the human immunodeficiency virus or another identified causative agent of acquired immunodeficiency syndrome;

(2) "intimate contact" means sexual penetration or any contact in which the body of one person is exposed to a body fluid of another person in a manner that could result in the transmission of HIV;

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

(d) Criminal transmission of HIV is a class B felony.

\* Sec. 2. This Act applies to all offenses committed on or after the effective date of this Act.

9-LS0739C  
Luckhaupt  
3/9/95

CS FOR SENATE BILL NO. 91( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:  
Referred:

Sponsor(s): SENATORS TAYLOR, Halford

A BILL

FOR AN ACT ENTITLED

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5 ARTICLE 1A. HEALTH OFFENSES.

6 Sec. 11.66.160. CRIMINAL TRANSMISSION OF HIV. (a) A person  
7 commits the crime of criminal transmission of human immunodeficiency virus (HIV)  
8 if the person, knowing that the person is infected with HIV,

9 (1) voluntarily engages in intimate contact with another person:

10 (2) transfers, donates, or provides the person's blood, tissue, semen,  
11 organs, or other potentially infectious body fluids for transfusion, transplantation,  
12 insemination, or other administration to another, excluding perinatal transmission; or

13 (3) dispenses, delivers, exchanges, sells, or in any manner transfers to  
14 another person any nonsterile intravenous or intramuscular drug paraphernalia.

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(2) it is not necessary to show that the victim has been actually infected with HIV for the defendant to be convicted.

(c) In this section,

(1) "HIV" means the human immunodeficiency virus or another identified causative agent of acquired immunodeficiency syndrome;

(2) "intimate contact" means sexual penetration or any contact in which the body of one person is exposed to a body fluid of another person in a manner that could result in the transmission of HIV;

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

(d) Criminal transmission of HIV is a class B felony.

• Sec. 2. This Act applies to all offenses committed on or after the effective date of this Act.

7 March, 1995

The Honorable Lyda Green, Chair  
Senate Health, Education and Social Services Committee  
Alaska State Capitol  
Juneau, Alaska 99801-1182



Dear Senator Green:

I am writing on behalf of the Board of Directors of the Interior AIDS Association to express our strong opposition to Senate Bill 91 (SB-91). This bill, if passed, will not prevent the spread of HIV-infection, but will in fact promote the spread by further marginalizing individuals who are infected, stopping highly effective needle exchange programs which have demonstrated ability to reduce HIV transmission, and causing individuals to not get tested, thereby reducing the chance these individuals will receive medical attention or take appropriate precautions to prevent further transmission.

**BOARD OF DIRECTORS**

Mark A. Tumeo, PHD  
Chair

Misha Strielvert  
Secretary

Sulis Mays  
Treasurer

Landra Epperson

Eric Klason

Susan McInnis

Bob Miller

Burt Schilling

The bill appears to be based on the misconception that HIV is spread by a select few individuals in a malicious and intentional manner - this is completely false. There are already laws which punish individuals convicted of rape and/or assault who knowingly try to spread HIV. However, SB 91 intrudes in private lives, and places responsibility for the acts and decisions of others on one group of people. As those of us who have been fighting this disease for over a decade know, we ALL share the responsibility for protecting OURSELVES. To place that responsibility on others, and then blame them when your own actions result in transmission of HIV, is to promote irresponsible behavior and further spread of this disease.

More importantly, SB-91 is blatantly unconstitutional, violates privacy, sets up the State as "bedroom police", punishes a small group of people based on their medical status, and violates State and Federal law prohibiting discrimination based on disability.

One does not have to look far to see how unethical, unenforceable and unrealistic this law is. Will HIV-positive women be tried for passing the virus to a fetus? Will a person in a divorce proceeding be able to bring felony charges against an estranged spouse as "pay-back"? The result of this legislation would be endless litigation and increased suffering for those already dealing with HIV and AIDS.

**STAFF**

Bonnie McCurquidale  
Executive Director

Theresa M. Clarkin  
Ed. & Office Coordinator

We urge you to stop this bill in Committee. It is bad policy for the State of Alaska and will not protect one individual. It will be costly to the State, cause suffering and pain to many individuals already fighting for their life, and in the end, serve to spread HIV farther and faster.

Sincerely,

Mark A. Tumeo, Ph.D.  
Chair, Interior AIDS Association

*Nakanuma opposes*

SENATE BILL NO. 91

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

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7 commits the crime of criminal transmission of human immunodeficiency virus (HIV)  
8 if the person, knowing that the person is infected with HIV,

9 (1) <sup>voluntarily</sup> engages in intimate contact with another person;

10 (2) transfers, donates, or provides the person's blood, tissue, semen,  
11 organs, or other potentially infectious body fluids for transfusion, transplantation,  
12 insemination, or other administration to another, or

13 (3) dispenses, delivers, exchanges, sells, or in any manner transfers to  
14 another person any nonsterile intravenous or intramuscular drug paraphernalia.

*with reasonable (10,000) to 10,000*  
*excluding perinatal transmission*

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(1) "HIV" means the human immunodeficiency virus or another identified causative agent of acquired immunodeficiency syndrome;

(2) "intimate contact" means sexual penetration or any contact in which the body of one person is exposed to a body fluid of another person in a manner that could result in the transmission of HIV;

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

(d) Criminal transmission of HIV is a class B felony.

• Sec. 2. This Act applies to all offenses committed on or after the effective date of this Act.

language  
let's  
be precise  
too broad

# ALASKA

## CIVIL LIBERTIES UNION

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*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 7, 1995

The Honorable Lyda Green  
Chair -- Senate Health, Education  
and Social Services Committee  
Alaska State Senate  
State Capitol Building, Room 423  
Juneau, AK 99801-1182

Re: House Bill 199/SB 91

Dear Senator Green:

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 Senate Bill 91, "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 presents the minimal intrusion possible into 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: 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

Page Two -- Representative Jeannette James -- March 7, 1995

infection could be prosecuted under existing statutes for: (a) attempted first degree murder, if s/he intended to kill another person by 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, 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)] 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

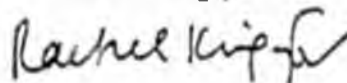
Page Three -- Representative Jeannette James -- March 7, 1995

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~~ Sec. 11.41.600 (b)(1)] 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.

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

## MEMORANDUM

NOV 16 1990

State of Alaska

Department of Law

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

DATE: November 16, 1990

FILE NO:

465-3428

TEL NO:

SUBJECT:

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

FROM: Dean J. Guanello  
 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 be prosecuted as attempted first degree murder.<sup>1</sup> 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.<sup>2</sup>

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

<sup>1</sup> The Alaska Court of Appeals has held there is no such crime as attempted second degree murder, Huitt v. State, 670 P.2d 415 (Alaska App. 1984), and based on that opinion, there are no such crimes as attempted manslaughter or negligent homicide.

<sup>2</sup> 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, 10 M.J. 53 (U.S. Ct. of Mil. Appeals, April 12, 1990), cert. den. 48 Crf. 3037 (Oct. 15, 1990).

Elizabeth L. Shaw  
Criminal liability for

November 16, 1990  
Page 2

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.

# FISCAL NOTE

STATE OF ALASKA  
1995 LEGISLATIVE SESSION

BILL NO. SB 91

Revision Date: \_\_\_\_\_  
 Title: "An Act creating the crime of criminal transmission of human immunodeficiency virus (HIV)."  
 Sponsor: Sen. Taylor  
 Requestor: (S) HES

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						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

<b>CAPITAL EXPENDITURES</b>	0	0	0	0	0	0
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<b>CHANGE IN REVENUES ( )</b>	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						
<b>TOTAL</b>	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 Boyer  
 Agency: Department of Administration

Date: 3/1/95

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# FISCAL NOTE

STATE OF ALASKA  
1995 LEGISLATIVE SESSION

BILL NO. SB 91

Revision Date: \_\_\_\_\_ Dept. Affected: Department of Law  
 Title: "An Act creating the crime of criminal transmission of human immunodeficiency virus (HIV)." BRU: Prosecution  
 Sponsor: Senator Taylor Component: All  
 Requester: Senate HESS 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						
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CHANGE IN REVENUES ( )						
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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 B 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 contact, potentially 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. Peques, 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. SB 91

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.

# Alaska State Legislature

Chairman  
Judiciary Committee

Vice Chairman  
Transportation Committee

Member  
Resources Committee  
Western Legislative Forestry Task Force



State Capitol  
Juneau, Alaska 99801-4182  
907 465 3873  
245 907 465 3922

332 Front Street  
Ketchikan, Alaska 99901  
907 225 8088  
245 907 225 0713

**Senator Robin L. Taylor**

## Sponsor Statement

### Senate Bill 91

Before the Senate HES Committee  
March 8, 1995

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.

Sponsor Statement - SB 91

Page Two

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.

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.

# Alaska State Legislature

Legislative Research Agency



130 Seward Street, Suite 218  
Juneau, Alaska 99801-2196

Phone: (907) 465-3991  
Fax: (907) 463-3351

March 7, 1995

## MEMORANDUM

TO: Senator Robin Taylor

FROM: Paula d. Scavera *PS*  
Legislative Analyst

RE: Testing for HIV/AIDS in Illinois

You requested that this office research whether the number of tests for HIV/AIDS has decreased in Illinois since 1989, when House Bill 1871 (Criminal Transmission of HIV) became law.

According to the Illinois Public Health Department, Epidemiology Studies and Health Systems Development Office, the number of HIV/AIDS tests has been on the increase and not decreased.

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 1486, Act 814 (88) - felony - "sexual intercourse" (without 1st informing others)

California, SB 1002, Chapter 1164 (88) - felony, blood donation

Colorado, HB 1255 (90) - class B 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 B felony

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

Florida, HB 1313, Chapter 86-220 (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 1281, 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 transmitt 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 infection 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 tissue; class A misdemeanor for persons who commit prostitution; class D felony for committing prostitution or who procure 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.

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 1726, 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 490 (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 1131 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 1788 (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 281 (91) - class C felony for committing prostitution when a person knows that he or she is HIV+

Texas, SB 869 (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 (88) - class a 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

Illinois

720 ILCS 5/12-16

Note 400

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

- In general 451
- Plain error 453
- Preservation of grounds for review 452

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

CRIMINAL CODE OF 1961

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 issue 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

"HIV" means the causative agent of AIDS. "Intimate contact" means contact between a person and another person to a bodily fluid transmission of HIV.

"Intravenous or intramuscular" means injecting a substance into a vein or muscle.

(c) Nothing in this Section prohibits transmission of HIV with HIV has occurred.

(d) It shall be an affirmative defense if the infected person was infected with HIV, and

(e) A person who commits a felony.

Laws 1961, p. 1983, § 12-16.1. Formerly Ill.Rev.Stat.1991, ch. 120, § 12-16.1.

AIDS investigation information

Are AIDS-transmission investigations required? Michael L. Cloven Isaacman, 76 ABA J. 76 (1990). Criminal sanctions for HIV/AIDS—Analysis of new Illinois law. Jeffrey Deutschman, 4 CBA 1 (1991).

Words and Phrases Defined

5/12-17. Defenses

§ 12-17. Defenses

(a) It shall be a defense of this Code where force was used by the victim consented. "Coercion" means sexual penetration or sexual contact without the victim's consent or submission, or the threat of force by the aggressor at the address of the victim at the time of the offense.

(b) It shall be a defense of this Code where force was used by the victim reasonably believed the person using force was a peace officer. Laws 1961, p. 1983, § 12-17.1. Formerly Ill.Rev.Stat.1991, ch. 120, § 12-17.1.

by P.A. 83-1117, § 1, eff. July 1, 1992; P.A. 87-1117, § 1, eff. Aug. 14, 1992. Formerly Ill.Rev.Stat.1991, ch. 120, § 12-17.1.

Sent To You By Legislative Research Agency

**CODE OF 1961**

State's evidence probative that there is no possibility of defendants' testimony. 1 Dist.1991, 162 Ill. App.3d 772, 580 N.E.2d 566.

... for review of abuse case waived error in allowing testimony, in her opinion, describing assault, subject to testimony posttrial motion. witness about her testimony. v. Davis, App. 3 Ill.App.3d 33, 566.

... clinical psychology of minor who was abused should not be questioned, where defendant's questioning of the matter in People v. Hickox, App. 2 Ill.App.3d 203, 197 Ill. App.3d 203, 149 Ill. Dec. 2d 700.

... examining clinical edibility of minor of sexual abuse by People v. Hickox, Dec. 180, 197 Ill. App.3d 203, 149 Ill. Dec. 2d 700.

Jan. 11, 1989

... commits criminal offense if infected with

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**BODILY HARM**

**720 ILCS 5/12-17**

"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. Issacman, 76 ABA J. 76 (1990). Neonatal HIV testing: Governmental inspection of the baby factory. Scott H. Isaacman, 24 J. Marshall L.Rev. 371 (1991). Criminal sanctions for transmission of AIDS—Analysis of new Illinois legislation. Jeffrey Deutschman, 4 CBA Rec. 32 (1990). Proposal to repeal the Illinois HIV transmission statute. Michael L. Closen and Jeffrey S. Deutschman, 78 Ill.B.J. 392 (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.

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, 594 N.E.2d 784.

*Circuit Court reversed in part; cause remanded with directions.*



1

153 Ill.2d 364

196 Ill.Dec. 629

PEOPLE, State of Illinois, Respondent,

v.

Johnny GILSON, Petitioner.

No. 76090.

Supreme Court of Illinois.

April 5, 1994.

Prior Report: 216 Ill.App.3d 564, 616 N.E.2d 617.

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. 1-92-4901, 1-92-4902 and 1-92-4903 in light of *People v. James* (1994), 153 Ill.2d 27, 196 Ill.Dec. 625, 630 N.E.2d 790.



2

153 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. 75721, 74445.

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, Anton C. Waller, Jr., J., declared criminal statutes 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 921

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

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SELL, Appellee.  
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Appellant.  
v.  
FORD, Appellee.  
21, 7443.  
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PEOPLE v. RUSSELL

Cite as 610 N.E.2d 794 (Ill. 1994)

speech. S.H.A. 720 ILCS 5/12-16.2; S.H.A. Const. Art. I, 4 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. I, 4 3; 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. I, 4 2; U.S.C.A. Const.Amend. 14.

Roland W. Burris, Atty. Gen., Springfield, Robert Hadda, 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 Atty., Appellate Prosecutor, Mt. Vernon, of counsel), for the People.

Carrie J. Hightman, Stuart I. Graff and Judith M. Feiler, of Schiff, Hardin & Waite, and John R. Hammell, Harvey Grossman, Colleen K. Conneil, Mathew S. Nosanchuk and Pilar Penn, Chicago, for appellee in No. 7443.

James D. Holzhauser, 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. 8, 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

JUN 11 1994

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. 2091, 2707, 53 L.Ed.2d 310, 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. 401, 611-17, 93 S.Ct. 2908, 2915-19, 37 L.Ed.2d 330, 339-43; *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 463.

[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 factually 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;

(b) 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 463.

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. 784

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 inadmissible; (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.

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. 1993, ch. 38, § 106A-15-14(b)(2).

3. 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 principle.

3. Criminal Law §1153(2)

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

Sodomy §6

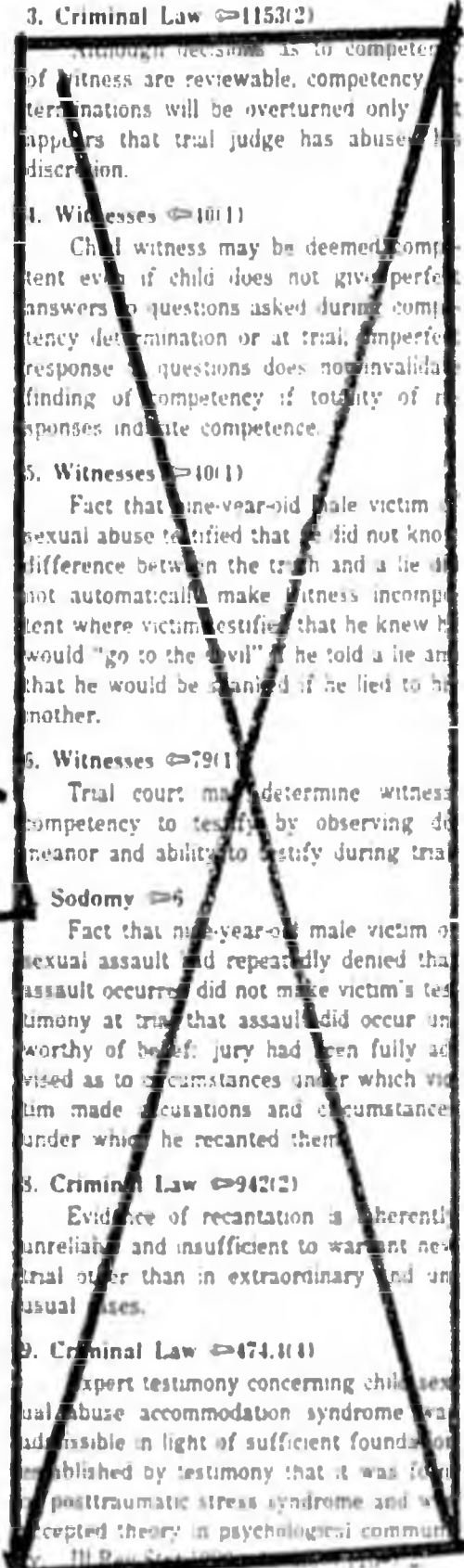
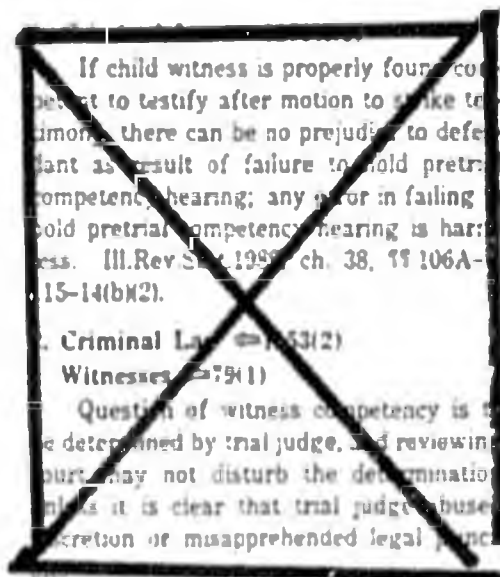
Fact that nine-year-old male victim of sexual assault had repeatedly denied that assault occurred did not make victim's testimony at trial that assault did occur unworthy of belief; jury had been fully advised as to circumstances under which victim made accusations and circumstances under which he recanted 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 §474.1(1)

Expert testimony concerning child sexual abuse accommodation syndrome was admissible in light of sufficient foundation established by testimony that it was based on posttraumatic stress syndrome and was accepted theory in psychological community.



1993 RULING ON ILLINOIS STATUTE

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(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.

(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. 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

efficiently defined and of the word "could" intimate contact encompass a range of conduct, it state what behavior is it, the term "intimate" is not adequately Defendant argues "bodily fluid" is not conclude that saliva omit the virus, when assert that these are able of transmitting re, because the word such a broad range of conclude that some penetrative oral, anal or fluid transmit the vi assert that only these ts could transmit the ther argues that one ter biting or spitting owingly infected with nial transmission of tate does not define possible transmitters ant argues that these tute render it uncon- that it fails to give as to what acts are a arbitrary and dis- n.

ent must fail because, standing to raise the tate as applied to, the statute is not tional as applied to that vagueness chal- which do not involve doms must be exam- facts of the case at an (1989), 127 Ill.2d 422, 425, 537 N.E.2d prevail in a vagueness that does not impli- t concerns, a party t the statute is vague nduct for which the ecuted. *Jihan*, 127 ec. at 425, 537 N.E.2d must show that the clear notice that the

Cite as 610 N.E.2d 208 (Ill.App. 5 Dist. 1993)

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 548, 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 prescription 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 engage him or her professionally to serve the patient . . ." (Ill. Rev. Stat. 1985, ch. 110, par. 8-80.)

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



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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

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			HIV Testing by Sex		
Race/Ethnicity	No. Tested	Positive (%)	Sex	No. Tested	Positive (%)
White	48726	759 (1.6)	Male	36500	473 (1.3)
Alaska Native	17330	60 (0.3)	Female	3006	63 (2.1)
Black	4002	53 (1.3)	Not Specified	379	0
Hispanic	1719	34 (2.0)	Total	75826	540 (0.7)
Other	1833	9 (0.5)			
Not Specified	1900	5 (0.3)			
Total	75826	540 (0.7)			

HIV Testing by Age			HIV Testing by Risk						
Age	No. Tested	Positive (%)	Risk Category	No. Tested	Positive (%)	Total*			
0-9	550	2 (0.4)	heterosexual/heterosexual male	245/1685	114 (5)	25/789	10 (1)	211/1974	10 (0.5)
10-19	6631	22 (0.3)	by drug user	31/2791	11 (0.4)	8/513	10 (0.1)	34/2794	11 (0.4)
20-29	20007	227 (1.1)	heterosexual contact of person with/for at risk of AIDS	8/2418	13 (0.5)	5/458	11 (0.2)	13/2418	10 (0.4)
30-39	24263	205 (0.8)	homosexual	7/21	113 (5)	0/3	10 (0)	7/21	129 (6)
40-49	10300	72 (0.7)	transmission with blood/blood products	0/1167	10 (0.9)	4/379	11 (3)	12/1176	10 (0.8)
50+	3760	12 (0.3)	all others	12/1979	10 (0.5)	11/1124	10 (0.9)	23/1963	10 (0.5)
Not Specified	19	0	Total	45756/200	10 (0)	10/1130	10 (0.9)	50/75826	10 (0.1)
Total	75826	540 (0.7)							

\*Total includes women only

### 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 .....	Race/ethnicity .....
Males .....	White .....
Females .....	Black .....
.....	Unspecified .....
Age .....	Total number tested .....
20-24 years .....	Total number HIV positive .....
30+ years .....	



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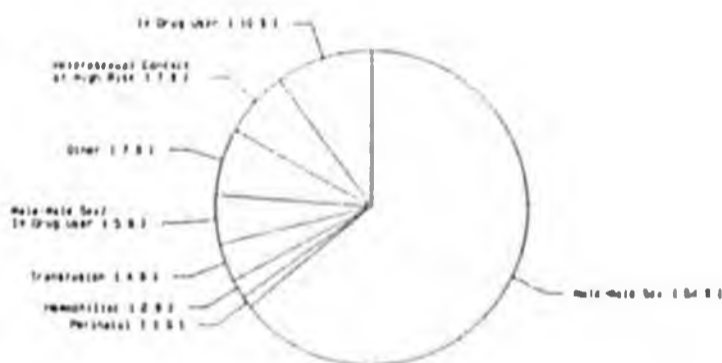
## AIDS - ALASKA

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	18
1990	18	13
1991	33	24
1992	38	20
1993	42	9
1994	50	3
Total	272	152

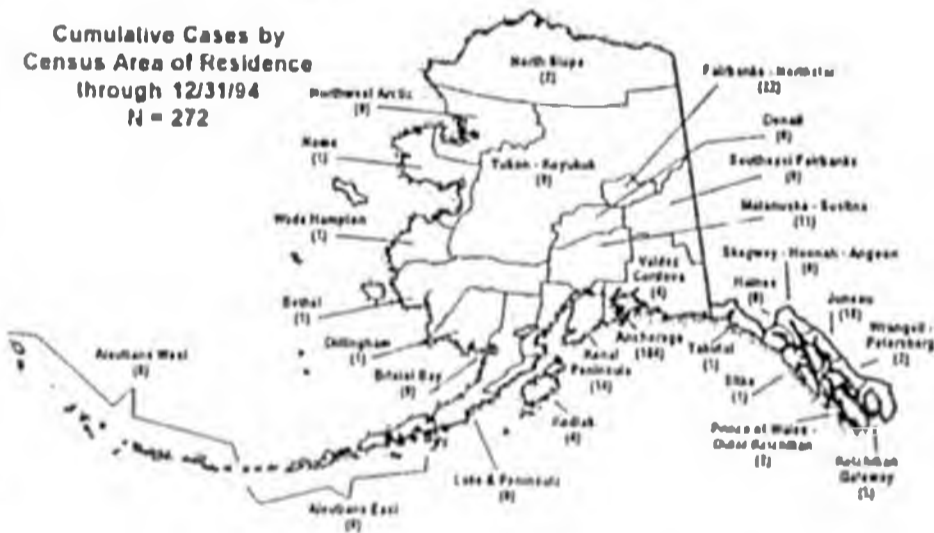
Risk Category, N = 272



Age in Years at Diagnosis, N = 272

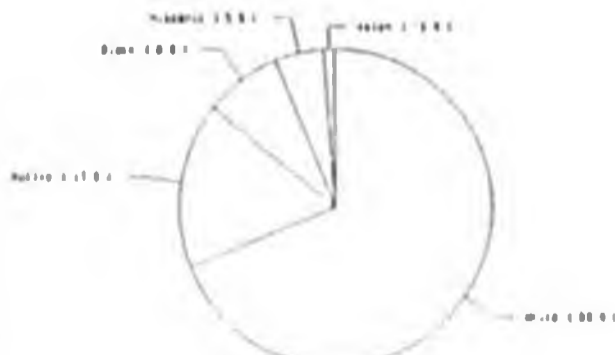
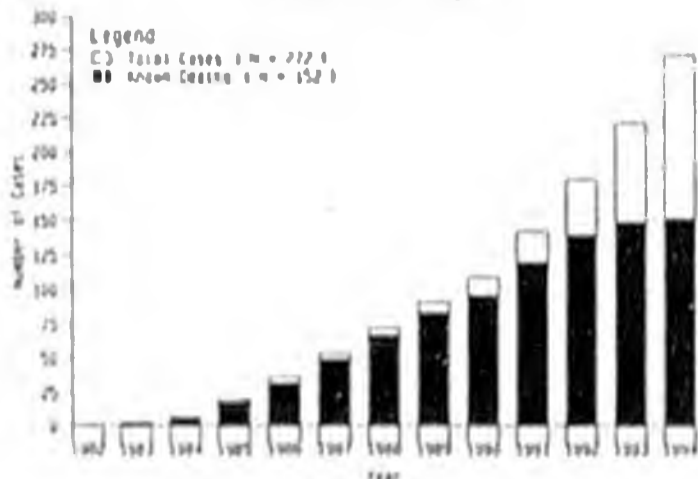
Age Group	Cases	Known Deaths
00-04	3	2
05-09	0	0
10-14	1	1
15-19	1	1
20-24	19	9
25-29	46	25
30-34	66	36
35-39	57	28
40-44	34	22
45-49	23	14
50-54	11	8
55-59	4	2
60-64	3	2
65+	0	0
Total	272	152

Cumulative Cases by  
Census Area of Residence  
through 12/31/94  
N = 272



Cumulative Cases  
based on Date of Diagnosis

Race of Cases, N = 272



\*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.