Georgia State University Law Review

Volume 3
Issue 2 *Spring/Summer 1987*

Article 2

3-1-1987

PENAL INSTITUTIONS Prisoners and Detainees: Provide for AIDS Testing

C. Willingham

PENAL INSTITUTIONS

Prisoners and Detainees: Provide for AIDS Testing

CODE SECTION:	O.C.G.A. § 42-1-6 (new)
BILL NUMBER:	HB 92
ACT NUMBER:	782
SUMMARY:	The Act authorizes the Department of Corrections to determine whether any inmate who injures or contacts correctional personnel has a communicable disease.
EFFECTIVE DATE:	April 17, 1987

History

In the 1986 session, the Georgia General Assembly considered two Acquired Immune Deficiency Syndrome (AIDS) related bills. AIDS testing prior to issuance of a marriage license failed;[1] a bill adding AIDS to the list of venereal diseases passed.[2]

In the 1987 session, HB 92 passed, but two AIDS related bills failed. HB 831 would have required virus antibody blood testing of present and prospective food service employees. The final unpassed version of HB 107, a conference committee report, would have required the AIDS antibody test of any person having blood tested for any purpose, whether performed in a physician's office, hospital, dispensary, clinic, blood bank, or penal institution. Consent to any medical treatment or testing would have been "deemed to authorize the disclosure"[3] of test results to attending physicians, other health care providers, the Department of Human Resources (DHR), the person being tested, or one designated in writing by the person tested, if disclosure was necessary for patient treatment or the public safety.

HB 107 also would have authorized DHR personnel or county boards of health, on behalf of the public safety, to "require any afflicted person to submit to examination [and] testing . . . ."[4] Any person refusing to be tested could be forced by superior court order to submit. The application for court order would have required specification of reasons "for believing the afflicted person is reasonably likely to be afflicted with a sexually transmissible disease and the afflicted person's inclusion in any known

1. HB 1190, 1986 Ga. Gen. Assem.
2. O.C.G.A. § 31-21-3(a)(4) (Supp. 1987).
3. HB 107 (CCS) § 2, 1987 Ga. Gen. Assem.
4. *Id.* § 3.

high-risk group for such disease may be among the reasons, but not the sole reason for such belief."[5]

Although the final version of unenacted HB 107 did protect against disclosing information about sexual or other contacts contained in the application for a court order, it required the contact turned informant to produce an affidavit specifying the nature of any sexual contact and whether the informant was afflicted.[6] The conference committee report deleted the language of an earlier Senate substitute amendment which would have permitted appeals of final decisions of the DHR. The Senate amendment would have allowed jury trial de novo.[7] The conference committee version left intact the right to counsel on appeal.[8]

The conference committee report was substantially the same as a House floor substitute of original HB 107. The much shorter original bill did not explicitly mention AIDS, but instead proposed two new sections to the consent to medical treatment provisions of Title 31, Chapter 9 of the Code. This bill would have equated consent to treatment with consent to testing only if the nature and purpose of the testing were explained to the patient. Testing would not have been permitted if consent were refused or revoked. Valid patient consent would have been "deemed to constitute an implied consent to, and therefore a waiver of any privilege regarding, the disclosure of information obtained as a result of that treatment, care, testing, or examination" when disclosure was to health care providers.[9]

The conference committee substitute reached the floor during the final hour of the 1987 session. The vote to pass was barred by a rule that a bill issued by a House/Senate conference committee must be in chamber at least one hour before formal consideration. A request to suspend the rule was defeated 25 to 21.[10] The sponsor of the original version of HB 107 intends to reintroduce her version in 1988; she predicts that broad amendments, similar to those proposed this year, will be submitted at the beginning of the session.[11]

HB 92

HB 92 amends the general provisions of Chapter 1, Title 42 of the Code

---

5. *Id.*

6. *Id.* (the affidavit would have been reviewed in camera by the court with a copy supplied to the person who was to be compelled to submit).

7. HB 107 (SCSFA), 1987 Ga. Gen. Assem.

8. *Id.*

9. HB 107, as introduced, 1987 Ga. Gen. Assem. (introduced by Representative Eleanor Richardson, House District No. 52).

10. *Mandatory Testing Fails in Last Hour GA Senate Battle*, Etcetera, Mar. 20, 1986, at 8.

11. Telephone interview with Representative Eleanor Richardson, House District No. 52 (July 23, 1987) [hereinafter Richardson Interview].

which governs penal institutions. The amendment authorizes communicable disease testing of any inmate or one "in the process of being taken into custody" who injures or contacts a "law enforcement officer, correctional officer, fireman, emergency medical technician, or other person in such a manner as to present a possible threat of transmission of a communicable disease."[12] The sponsor intends that AIDS be included within the definition of a communicable disease.[13]

When contacted by an inmate or an arrestee, correctional officials may take "all reasonable steps," including, but not limited to, "medical examination and collection of medical specimens" to determine whether the inmate or individual in custody has a communicable disease.[14] If the individual refuses to cooperate, officials may request from superior court an order authorizing "the use of any degree of force reasonably necessary to complete such procedures."[15] A Senate committee substitute, which ultimately was enacted, added a sentence after the authorization to seek court approval of the use of force: "Upon a showing of probable cause that the injury presents a threat of transmission of communicable disease, the court shall issue an order authorizing the petitioner to use reasonable measures to perform any medical procedures reasonably necessary to ascertain whether a communicable disease has been transmitted."[16]

The amendment also added a standard for conclusively establishing probable cause: "evidence of the injury or contact" combined with a doctor's statement that "the nature of the injury or contact is such as to present a threat of transmission of a communicable disease if the inmate has such a disease."[17] Failure to establish the conclusive standard does not preclude use of "any other grounds sufficient to show probable cause."[18]

Representative Couch introduced the bill after visiting prisons and in response to incidents reported to her as a member of the Public Safety Committee. Guards warned her not to walk through death row because inmates throw urine and feces at visiting officials.[19] Also, guards reported frequent injuries and cuts caused by inmates' homemade weapons. An officer frisking a suspect was stuck by a hypodermic needle hidden in the suspect's boot. Another officer was exposed to a needle, while searching a woman's purse, which Couch reports was intentionally placed so that it would stab him. It has also been postulated that a suspect might break a window in a police car and then cut both herself and the officer. Couch

12. O.C.G.A. § 42-1-6 (Supp. 1987).
13. Telephone interview with Representative Barbara Couch, House District No. 40 (Apr. 27, 1987) [hereinafter Couch Interview].
14. O.C.G.A. § 42-1-6 (Supp. 1987).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Couch Interview, *supra* note 13.

explained that the danger of transmission may occur in other situations. For example, an officer may be forced to give mouth-to-mouth resuscitation to an accident victim or administer first aid to someone who has been injured.[20]

The Florida legislature passed a law similar to HB 92 in 1986. The Control of Sexually Transmissible Disease Act[21] contains a subsection which authorizes the Florida Department of Health and Rehabilitative Services to "enter any state, county, or municipal detention facility to interview, examine, and treat any prisoner for a sexually transmissible disease",[22] which is defined to include AIDS.[23] The detention facility is required to cooperate by providing space for "examination and treatment of all prisoners suffering from or suspected of having a sexually transmissible disease."[24]

Georgia's law is different in that there is no provision for treatment of the afflicted person and the Georgia Department of Corrections is responsible for the examination—not the Department of Human Resources.[25] Another crucial difference is that Georgia's law covers detainees, whereas Florida's law applies only to convicted prisoners.[26]

The Penal Code of California, similar to Florida and unlike Georgia, provides for the treatment of inmates afflicted with AIDS. The Director of Corrections may contract with "public or private agencies located either within or outside of the state for the housing, care, and treatment of inmates afflicted with acquired immune deficiency syndrome (AIDS) or AIDS related complex (ARC)."[27]

Two years ago the New York Division of Parole adopted an early release program for inmates diagnosed with an opportunistic disease associated with AIDS. The program does not apply to inmates who have only been exposed to the virus.[28] It is administrative, not statutory. The rationale of New York's policy is that "[i]t does no good to force inmates with confirmed cases of AIDS to spend their remaining days alive languishing in prison."[29] AIDS is the leading cause of death among New York prison inmates.[30]

The Georgia law, while making no provision for AIDS treatment, also

---

20. *Id.*
21. FLA. STAT. ANN. § 384 (West Supp. 1987).
22. FLA. STAT. ANN. § 384.32 (West Supp. 1987).
23. FLA. STAT. ANN. § 384.23 (West Supp. 1987).
24. FLA. STAT. ANN. § 384.32 (West Supp. 1987).
25. O.C.G.A. § 42-1-6 (Supp. 1987).
26. *Compare* FLA. STAT. ANN. § 384.32 (West Supp. 1987) *with* O.C.G.A. § 42-1-6 (Supp. 1987).
27. CAL. PENAL CODE § 2692 (West 1986).
28. Sullivan, *New York State Paroles 50 Men Sick with AIDS*, N. Y. Times, Mar. 7, 1987, at 1A, col. 2.
29. *Id.*
30. *Id.*

does not provide for confidentiality of test results. Under the New York provision, prison officials are required to be sensitive to the conflict between the inmates' right to privacy and the threat to public health posed by their release. One factor in considering release is whether the inmate may be dangerous to the community by having sexual contact without disclosing his condition.[31]

The policy of the New Jersey Department of Corrections, also non-statutory, permits the transfer of non-acute AIDS cases from an overcrowded medical facility to isolation. "The policy is based on other inmates saying that harm would come to any inmates with AIDS who came back into the general prison population."[32]

In addition to statutory and administratively sanctioned policies, various courts have considered AIDS and the prison inmate. The United States District Court for the Eastern District of Pennsylvania has granted leave to proceed *in forma pauperis* to William Fenton, who alleged that the detectives who arrested him accused him of having AIDS and then included that accusation in their report of his arrest. As a result, Fenton claims that guards and inmates at the Philadelphia Detention Center beat and then isolated him in the prison hospital for six days. The court ruled that the "beatings plaintiff suffered while at the Detention Center may state a claim for punishment without due process . . . in that plaintiff seems to say that [the detectives] released this information knowing that this would place plaintiff's safety in jeopardy."[33]

The United States District Court for the Southern District of New York has ruled that the segregation of inmates with AIDS and the resultant denial of social, recreational, and rehabilitative activities does not deprive them of rights guaranteed by the first, eighth, or fourteenth amendments to the Constitution. Most relevant to the potential issues raised by HB 92 and addressed by the New York court, is the first amendment right to privacy. In denying relief, the court stated that first amendment rights "are limited by '[t]he fact of [a prisoner's] confinement and the needs of the penal institution . . . .' "[34] The court also rejected an equal protection claim holding that AIDS diagnosis does not create a suspect classification, and segregation is rationally related to the legitimate objective of protecting "both the AIDS victims and other prisoners from the tensions and harms that could result from the fears of other inmates."[35] The court acknowledged that "[t]he existence of such

31. *Id. Accord*, People v. Gray, N.Y.L.J., June 26, 1986, at 1, col. 3 (Queens, N.Y. Sup. Ct.) ("changed circumstances" warranted bail reduction or dismissal of charges).

32. *New Jersey Isolates Convicts with Aids*, AIDS Policy & Law (BNA) 4 (Apr. 23 1986).

33. Fenton v. City of Philadelphia, No. 86-3529 (E.D. Pa. Sept. 22, 1986).

34. Cordero v. Coughlin, 607 F. Supp. 9, 11 (D.C.N.Y. 1984) (quoting Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119, 125 (1977)).

35. *Id.* at 10.

fears, whether realistic or not, has not been contradicted."[36] This rationale can be equally applied to the safety of prison employees and law enforcement personnel, the groups which HB 92 attempts to protect.

The United States District Court for the Northern District of Oklahoma rejected similar constitutional claims of an inmate examined and isolated upon prison entry because test results indicated exposure to the AIDS virus. The inmate showed no symptoms of AIDS. The court cited Justice Rehnquist's earlier opinion that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights"[37] in support of its holding that prison administrators may exercise broad discretionary authority.[38] The district court ruled that "[p]rison regulations which are alleged to violate prisoners' first amendment rights [here, freedom of religion] must be analyzed in terms of the legitimate policies and goals of the institution involved."[39] The legitimate goals cited by the district court were preventing a possible spread of AIDS and protecting the plaintiff from assault by other inmates.[40]

A jury in Minnesota found an inmate, who bit two prison guards after testing positive for AIDS virus, guilty of assault with a deadly weapon — his teeth and saliva. The jury rendered the guilty verdict despite the testimony of the prosecution's medical expert who acknowledged on cross-examination that there is no proof that AIDS is transmitted through saliva or the human bite. The jury also disregarded the defense attorney's closing remark: "If you're not convinced that AIDS or hepatitis can be transmitted by a bite, you are duty-bound to find James Moore not guilty."[41]

The experience of other states with laws and court decisions pertaining to AIDS and the prison inmate foreshadowed the enactment of HB 92. The conflict between safety of law enforcement personnel and the civil rights of those accused or convicted of a crime is usually resolved in favor of the employees' safety. HB 92 reflects that trend. The Act, however, makes no corresponding concession to treatment of the prison inmate with AIDS. It is also more expansive in scope than any other domestic statute because it can compel AIDS testing of an arrestee whose civil rights are usually respected more than those of an individual who has been convicted.[42]

The blood testing for the AIDS antibody among the general population

---

36. *Id.*

37. Powell v. Dept. of Corrections, 647 F. Supp. 968, 970 (N.D. Okla. 1986) (quoting Hewitt v. Helms, 459 U.S. 460, 467 (1983) (quoting Price v. Johnson, 334 U.S. 266, 285 (1948)).

38. *Id.* at 971.

39. *Id.*

40. *Id.*

41. *Deadly Weapon in AIDS Verdict is Inmate's Teeth*, N.Y. Times, June 25, 1987, at 11A, col. 6.

42. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979).

whenever blood is taken for any medical purpose, as provided by unenacted HB 107, constitutes an even greater invasion than the Act. The prospect for introduction of this legislation in the 1988 session appears likely.[43] Also likely is a challenge to the constitutionality of the law, if passed. The resultant clash of interests between the concern for public safety and individual civil liberties will likely cause heated debate.

C. Willingham

43. Richardson Interview, *supra* note 11.