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PENAL INSTITUTIONS Correctional Institutions of State and Counties: Amend Article 3 of Chapter 5 of Title 42 of the Official Code of Georgia Annotated, Relating to Conditions of Detention Generally, so as to Provide That Certain Incarcerated Persons Shall Be Tested for HIV Before Release; Provide for Notice and Counseling; Require the Department of Corrections to Seek Funding for Such HIV Testing Program; Provide for a Definition; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes.

Kevin Bradberry

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PENAL INSTITUTIONS

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CODE SECTION:	O.C.G.A. § 42-5-52.2 (new)
BILL NUMBER:	SB 64
ACT NUMBER:	104
GEORGIA LAWS:	2009 Ga. Laws 104
SUMMARY:	The Act requires the Department of Corrections to administer an HIV test to prison inmates within thirty days before their release from prison if they were incarcerated for at least one year. Inmates must be notified of the results of the HIV test in writing, and information pertaining to positive test results must be provided to the Department of Human Resources, as required by Georgia law. Before an HIV-positive inmate is released from prison, he must be given educational and medical information on his condition. Additionally, HIV-positive inmates must receive instruction on HIV prevention before their release. The Department of Corrections is obligated to seek grants and other revenue sources to fund the testing program. Finally, the Department of Corrections must provide the education

and counseling required of the Act in the most efficient manner possible.

EFFECTIVE DATE: July 1, 2009

History

Incarceration is strongly associated with human immunodeficiency virus (HIV) infection.¹ Studies have demonstrated the prevalence of HIV infection is three to five times higher among incarcerated populations than for the general United States population.² To ensure the safety of prison inmates and those who come into contact with them, the Georgia Department of Corrections (GDC) has mandated HIV screening of all inmates upon entry into prison since 1988.³ Additionally, the GDC offers voluntary HIV testing to inmates upon request or if medically indicated.⁴ The GDC also offered voluntary HIV testing to prison inmates as part of their routine annual physical examinations between July of 2003 and June of 2005.⁵ Until recently, however, the magnitude of HIV transmission *within* Georgia state prisons was unknown.

In 2003, a male prisoner who had previously tested negative for HIV upon entry into the prison system was diagnosed with Acquired Immune Deficiency Syndrome (AIDS) and died.⁶ A second incident occurred in 2004, resulting in an AIDS diagnosis for a prisoner who had previously tested HIV-negative upon entry into prison.⁷ This

1. Maria R. Khan et al., *Incarceration and Risky Sexual Partnerships in a Southern U.S. City*, 85 J. URB. HEALTH 100, 100 (2007).

2. Centers for Disease Control and Prevention, *HIV Transmission Among Male Inmates in a State Prison System-Georgia, 1992-2005*, 55 MORBIDITY & MORTALITY WKLY. REP. 421, 421 (2006) (noting the incidence of HIV infection among incarcerated populations is 2.0% while the incidence of HIV infection for the general U.S. population is approximately 0.43%). Other studies suggest the prevalence may even be higher. See Khan et al., *supra* note 1, at 101 (citing research that states prison inmates are five times more likely to be HIV-positive than those in the general population).

3. See 1988 Ga. Laws 1799, § 9, at 1825 (codified at O.C.G.A. § 42-5-52.1 (1997)).

4. Centers for Disease Control and Prevention, *supra* note 2.

5. *Id.*

6. Krishna Jafa & Patrick Sullivan, *HIV in the Georgia State Prison System*, 22 FOCUS: A GUIDE TO AIDS RESEARCH AND COUNSELING 1, 1 (Apr. 2007), available at http://128.218.135.42:8080/searchblox/servlet/FileServlet?url=%2FUsers%2Fswesigle%2FDesktop%2F FOCUS_PDF%2F2007%2FFOCUS0407.pdf&col=5.

7. *Id.*

prisoner also died a short time after his diagnosis.⁸ Following the deaths, the GDC reviewed the HIV testing data that was routinely collected from prisoners between July of 1988 and February of 2005.⁹ During the review, the GDC identified eighty-eight male inmates who were known to have tested negative for HIV upon entry into prison but subsequently tested positive for HIV during incarceration.¹⁰

In October 2004, the GDC and the Georgia Department of Human Resources asked the Centers for Disease Control and Prevention (CDC) to conduct an investigation of HIV transmission patterns among prisoners in GDC facilities and to make HIV prevention recommendations for the inmate population.¹¹ The study took place between 2004 and 2006.¹² The study not only identified certain characteristics and behaviors that place an inmate at increased risk for HIV transmission while incarcerated, but also indicated there was a need for HIV prevention and counseling programs targeted toward the prison population.¹³ The CDC currently recommends that “HIV screening be provided upon entry into prison and before release and that voluntary testing be offered periodically during incarceration.”¹⁴ Despite the CDC’s recommendations, an article published in January, 2008 noted that HIV testing upon entry into prison was required in only twenty states, and testing before release was mandated by just three states.¹⁵

Recent research also demonstrates that African American women are disproportionately affected by HIV.¹⁶ Although African American women comprise only twelve percent of the nation’s female

8. *Id.*

9. *Id.*; see also Centers for Disease Control and Prevention, *supra* note 2, at 421.

10. Centers for Disease Control and Prevention, *supra* note 2, at 422.

11. *Id.* at 421.

12. Jafa & Sullivan, *supra* note 6, at 1 (explaining the CDC conducted a “case study to determine inmate factors associated with HIV seroconversion in Georgia state prisons”).

13. Centers for Disease Control and Prevention, *supra* note 2, at 421, 425. The investigation identified several characteristics or behaviors associated with HIV seroconversion in prison, including male-male sex in prison and tattooing in prison. *Id.*

14. *Id.* at 423.

15. Nina Harawa & Adaora Adimora, *Incarceration, African Americans and HIV: Advancing a Research Agenda*, 100 J. NAT. MED. ASS’N 57, 59 (2008).

16. Michelle A. Rose et al., *An HIV/AIDS Crisis Among African American Women: A Summary for Prevention and Care in the 21st Century*, 17 J. WOMEN’S HEALTH 321, 321 (2008).

population, they account for sixty-six percent of new HIV infections among women.¹⁷ Such statistics are alarming, and have led some to believe that there is an HIV/AIDS crisis among African Americans.¹⁸

The rampant increase in HIV infection among African American women over the last several years led some to speculate there was a link between incarceration and HIV infection in the African American community.¹⁹ Subsequent studies have confirmed HIV infection is common among the partners of former inmates and those with a history of incarceration.²⁰ Other studies report that “[a]n infection acquired or maintained during incarceration is likely to be infused into a community upon release from prison.”²¹ Such research only emphasizes the importance of accurately knowing the state of one’s HIV status before release from prison, so an inmate can make informed decisions about not only their own health, but also about his or her behaviors that may put others in the community at risk.²²

Although Georgia law required all inmates to submit to an HIV test within thirty days of their commitment, there was no testing requirement related to inmates’ release from incarceration.²³ In January of 2008, Senators Kasim Reed (D-35th), Gloria Butler (D-55th), Valencia Seay (D-34th), Nan Orrock (D-36th), Horacena Tate (D-38th), and Regina Thomas (D-2d) introduced SB 386.²⁴ The bill sought to require HIV and hepatitis testing of inmates before release from prison.²⁵ The Senate State Institutions and Property Committee

17. *Id.* Additionally, HIV infection is now the leading cause of death among African American women aged twenty-four to thirty-four years of age, and the HIV infection rate for African American women is twenty times greater than the rate for white women. *Id.*; accord Centers for Disease Control and Prevention, *HIV Transmission Among Black Women—North Carolina, 2004*, 54 MORBIDITY & MORTALITY WKLY. REP. 89, 89 (2005) (noting that in 2003, the HIV infection rate for African American women in North Carolina was fourteen times higher than that for white women).

18. See generally Rose et al., *supra* note 16.

19. See, e.g., Margaret Newkirk & David Knox, *Prison’s Hidden Cost: Inmates Can Take Home AIDS Risk*, AKRON BEACON J., Mar. 17, 2002, available at <http://www.prisonpolicy.org/scans/AkronBeaconJournal03172002.shtml>.

20. Khan et al., *supra* note 1, at 101.

21. James C. Thomas et al., *Incarceration and Sexually Transmitted Infections: A Neighborhood Perspective*, 85 J. URB. HEALTH 90, 97 (2007).

22. See generally *id.* at 110–11.

23. 1988 Ga. Laws 1799, § 9, at 1825 (codified at O.C.G.A. § 42-5-52.1(b) (1997)).

24. See SB 386, as introduced, 2008 Ga. Gen. Assem.

25. *Id.*

offered a substitute for the bill, which removed the testing requirement for hepatitis, and favorably reported on the bill on March 5, 2008.²⁶ SB 386 was read a second time before the Senate on March 6, 2008.²⁷ However, the bill did not proceed any further in the Georgia General Assembly.²⁸

SB 64 was introduced in 2009 in the wake of SB 386's failure the previous year. The bill's purpose was to offer greater protection to the public by stopping the spread of HIV following the release of HIV-positive inmates from prison.²⁹ The bill aimed to accomplish this goal by mandating HIV testing for inmates before their discharge from prison, ensuring inmates were properly notified of their HIV status before returning to the general population, and providing counseling to those inmates who test positive for HIV.³⁰

Bill Tracking of SB 64

Consideration and Passage by the Senate

Senators Kasim Reed (D-35th), Gloria Butler (D-55th), Horacena Tate (D-38th), Renee Unterman (R-45th), Freddie Sims (D-12th), and Valencia Seay (D-34th), respectively, sponsored SB 64.³¹ The Senate read the bill for the first time on January 29, 2009.³² President of the Senate, Lieutenant Governor Casey Cagle, assigned the bill to the Senate Committee on State Institutions and Property.³³

The bill, as originally introduced, would have added a new Code section requiring that all individuals “in the custody of a penal institution for one year or longer” who had not previously tested

26. SB 386 (SCS), 2008 Ga. Gen. Assem.

27. State of Georgia Final Composite Status Sheet, SB 386, Apr. 4, 2008.

28. *Id.*

29. See Video Recording of Senate Proceedings IP, Mar. 10, 2009 at 0 hr., 0 min., 50 sec. (remarks by Sen. Kasim Reed (D-35th)), <http://www.gpb.org/lawmakers-tv/video-archive> [hereinafter Senate Floor Video] (explaining that a desire to protect Georgia citizens, particularly African-American women, from HIV infection was the primary purpose in introducing the legislation).

30. See SB 64, as introduced, 2009 Ga. Gen. Assem.

31. *Id.*

32. State of Georgia Final Composite Status Sheet, SB 64, Apr. 3, 2009.

33. See Video Recording of Senate Proceedings, Jan. 29, 2009 at 0 hr., 1 min., 10 sec. (remarks by Lt. Gov. Casey Cagle), <http://www.gpb.org/lawmakers-tv/video-archive>.

positive for HIV “submit to an HIV test between 60 and 120 days before [their] expected date of discharge from the facility.”³⁴ The bill required that each inmate be notified in writing of the test results before his or her release from prison.³⁵ Additionally, the bill provided for HIV counseling for those inmates testing positive.³⁶ The bill specified that any inmate who tested positive for HIV, whether the positive result came from the test required upon exit from prison or anytime before, must “be given counseling” related to living with HIV “after release from incarceration.”³⁷ The Department of Corrections was charged with determining the specifics of the required counseling.³⁸ Finally, the bill expressly stated that “[t]he provisions of this Code section shall not be construed to limit the provision for HIV testing in Code section 42-9-42.1.”³⁹ Code section 42-9-42.1 authorizes parole boards to require inmates applying for parole to submit to HIV testing.⁴⁰ The provision demonstrates that the bill was careful to ensure that parole and pardon boards would still be vested with this power.

The Senate Committee on State Institutions and Property (SI&P) offered a substitute for SB 64, adding language to the bill that made HIV testing of inmates before release from prison contingent on financial resources.⁴¹ The addition stated the testing was “[s]ubject to appropriations by the General Assembly or other funding made available to the department [of corrections] for such purposes.”⁴² This change was made in light of budgetary concerns expressed by representatives from the Department of Corrections at the Senate Committee meeting.⁴³ The total cost of implementing the program

34. SB 64, as introduced, p. 1, ln. 12–13, 2009 Ga. Gen. Assem.

35. *Id.* at ln. 14–15.

36. *Id.* at ln. 17.

37. *Id.*

38. *Id.* at ln. 18–19.

39. *Id.* at ln. 20–21.

40. 1988 Ga. Laws 1799, § 10, at 1826 (codified at O.C.G.A. § 42-9-42.1(b) (1997)).

41. SB 64 (SCS), 2009 Ga. Gen. Assem.

42. SB 64 (SCS), p. 1, ln. 11–12, 2009 Ga. Gen. Assem.

43. See Video Recording of House State Institutions and Property Committee Hearing, Mar. 18, 2009 at 0 hr., 20 min., 23 sec. (remarks by Sen. Kasim Reed (D-35th)), http://www.legis.ga.gov/legis/2009_10/house/Committees/stateInstitutions/sipArchives.htm [hereinafter House Committee Video of Mar. 18, 2009] (explaining the changes implemented by the Senate Committee).

was estimated at \$250,000 annually, and the GDC was concerned that it would be unable to comply with mandatory testing under its current budget.⁴⁴ The Senate Committee on State Institutions and Property favorably reported the Senate Committee substitute on March 3, 2009.⁴⁵ The following day, SB 64 was read for a second time before the Senate.⁴⁶ Senate Bill 64 was then read for the third time on March 10, 2009.⁴⁷ On that same day, the Senate passed SB 64 by a vote of 41 to 7.⁴⁸ On April 3, 2009, after the House passed the bill by substitute by a vote of 163 to 4, the Senate passed the bill, agreeing to the substitute passed by the House, by a vote of 46 in favor and 3 in opposition.⁴⁹

Consideration and Passage by the House

On March 12, 2009, the House first read Senate Bill 64.⁵⁰ The bill was read for the second time on March 17, 2009, and Speaker of the House Glenn Richardson (R-19th) assigned it to the House Committee on State Institutions and Property (SI&P).⁵¹ The House Committee discussed the bill for the first time on March 18, 2009.⁵² Senator Kasim Reed (D-35th) described the bill to the House Committee, explaining the purpose of the bill was twofold: (1) to protect the innocent citizens of Georgia by ensuring that released prisoners are aware of their HIV status before they return to their communities and (2) to save the state of Georgia money by preventing future HIV infections in individuals who are likely to require public healthcare assistance for their treatment.⁵³ Senator Reed also explained that a compromise was reached in the Senate Committee, which made the testing contingent on appropriations from the General Assembly, because the GDC was concerned about

44. *Id.*

45. State of Georgia Final Composite Status Sheet, SB 64, Apr. 3, 2009.

46. *Id.*

47. *Id.*

48. Georgia Senate Voting Record, SB 64 (Mar. 10, 2009).

49. Georgia Senate Voting Record, SB 64 (Apr. 3, 2009).

50. State of Georgia Final Composite Status Sheet, SB 64, Apr. 3, 2009.

51. *Id.*

52. See House Committee Video of Mar. 18, 2009, *supra* note 43, at 0 hr., 17 min., 45 sec.

53. *Id.* at 0 hr., 18 min., 15 sec.

reductions made to its budget. Questions were then fielded from the Committee members.⁵⁴

Representative Calvin Hill (R-21st) expressed concern that the bill may open the State up to liability from prisoners who acquire HIV while in the custody of the GDC.⁵⁵ Mark Guzzy, Acting General Counsel for the GDC, diffused Representative Hill's concerns and opined that SB 64 would not expose the GDC "to any extensive liability."⁵⁶ Several Committee members noted the important objectives of SB 64, and were worried about the Senate Committee substitute, which had the effect of no longer mandating the HIV tests upon departure from prison.⁵⁷ Furthermore, Representative Debbie Buckner (D-130th) felt that the objectives of the bill could be met if provisions were added that required local public health departments to assist with the counseling component of the testing program.⁵⁸ Alan Adams, Director of the Office of Health Services for the GDC, also fielded several questions from Committee members. Mr. Adams explained that although a relationship between the GDC and local public health departments was not currently in place, the GDC would welcome such a relationship in the future.⁵⁹ Additionally, Mr. Adams stated that the budget reductions imposed on the GDC, including a \$4 million cut to the Office of Health Services budget, would make it difficult for his department to implement the testing and counseling required of SB 64 without appropriate funding.⁶⁰ Having asked questions of and received background information about SB 64 from Senator Reed and representatives from the GDC, Chairman Terry Barnard (R-166th) suggested that the Committee adjourn, giving the members an opportunity to prepare proposed improvements to SB 64 for presentation at the next House Committee meeting.⁶¹

54. *Id.*

55. *Id.* at 0 hr., 21 min., 08 sec. (remarks by Rep. Calvin Hill (R-21st)).

56. *Id.* at 0 hr., 22 min., 16 sec.

57. *See, e.g., id.* at 0 hr., 25 min., 20 sec. (remarks by Rep. Barbara Massey Reece (D-11th)) (stating her disapproval of language that made implementation of the bill "subject to appropriations").

58. *See* House Committee Video of Mar. 18, 2009, *supra* note 43, at 0 hr., 28 min., 10 sec. (remarks by Rep. Debbie Buckner (D-130th)).

59. *Id.* at 0 hr., 43 min., 15 sec. (remarks by Alan Adams, Director of the Office of Health Services, Georgia Department of Corrections).

60. *Id.* at 0 hr., 36 min., 36 sec.

61. *Id.* at 0 hr., 45 min., 1 sec. (remarks by Rep. Terry Barnard (R-166th)).

The House SI&P Committee discussed SB 64 for a second time on March 23, 2009.⁶² Once again, Senator Reed and Alan Adams from the GDC were present to answer questions on the bill and its possible consequences if passed.⁶³ Additionally, Yivette Daniels from the Georgia Department of Human Resources was also present.⁶⁴ Ms. Daniels suggested that there may be alternatives to state funding that could be used to help offset the cost of the testing program for the GDC.⁶⁵ Specifically, Ms. Daniels stated that there may be funds from the federal stimulus package allocated to Georgia by the Department of Health and Human Services that could be used to implement the program.⁶⁶

Representative Sean Jerguson (R-22nd) offered a substitute for SB 64 that would have required inmates to bear the cost of the HIV testing.⁶⁷ However, Representative Buckner opposed a substitute that would have placed the burden of funding the tests on inmates, stating it was “unfair” because unconfined citizens are entitled to free HIV tests at community health departments.⁶⁸ Representative Barnard also offered a substitute for SB 64, which the Committee elected to expand upon.⁶⁹

The House Committee’s substitute bill made several substantial changes to SB 64. First, the committee added a subsection at the beginning of the bill that provided a definition for HIV, consistent with Code section 31-22-9.1.⁷⁰ Second, the committee’s substitute bill removed the language “[s]ubject to appropriations by the General

62. See Video Recording of House State Institutions and Property Committee Hearing, Mar. 23, 2009 at 0 hr., 24 min., 57 sec., http://www.legis.ga.gov/legis/2009_10/house/Committees/stateInstitutions/sipArchives.htm [hereinafter House Committee Video of Mar. 23, 2009].

63. *Id.*

64. *Id.* at 0 hr., 33 min., 40 sec. (remarks by Rep. Terry Barnard) (stating he had invited Ms. Daniels to the hearing to explain some of the alternative funding options that may be available for the HIV testing program).

65. See *Lawmakers 2009* (GPTV broadcast, Mar. 23, 2009) (remarks by Yivette Daniels, Georgia Department of Human Resources) (on file with the Georgia State University Law Review).

66. *Id.*

67. See House Committee Video of Mar. 23, 2009, *supra* note 62, at 0 hr., 49 min., 50 sec.

68. *Id.* at 0 hr., 54 min., 08 sec. (remarks by Rep. Debbie Buckner (D-130th)) (explaining her disapproval of any substitute which transferred the cost of the testing to the inmates).

69. *Id.* at 1 hr., 27 min., 14 sec. (remarks by Rep. Terry Barnard).

70. SB 64 (HCS), p. 1, ln. 12–13, 2009 Ga. Gen. Assem.

Assembly or other funding made available to the department for such purposes,” and inserted language requiring the GDC to implement an HIV testing program.⁷¹ Third, the substitute altered the timeframe in which the HIV test must take place from between 60 and 120 days before release to anytime “within 30 days before . . . [the] expected date of release.”⁷² Fourth, the substitute bill added language reemphasizing that under existing Georgia law, the GDC is required to notify the Department of Human Resources when any individual tests positive for HIV.⁷³ While this obligation already exists under Code sections 24-9-47 and 31-22-9.2, Representative Buckner indicated that including the language would further ensure the requirement was met.⁷⁴ Fifth, the committee added specific language outlining the information and counseling that HIV-positive inmates must receive.⁷⁵ In addition to contact information for community resources, HIV-positive inmates must be provided “instruction relating to living with HIV, the prevention of the spread of such virus, and the legal consequences of infecting unknowing partners.”⁷⁶ Sixth, the Committee added subsection (d), which directed the GDC to seek alternative sources of revenue to fund the program, such as federal and state grants, and authorized the GDC to accept gifts to help fund the program.⁷⁷ Finally, the substitute compelled the GDC to “consolidate” HIV-positive inmates such that education, counseling and treatment is provided in the most “efficient[.]” manner possible.⁷⁸ The Committee unanimously approved the substitute with a do pass recommendation.⁷⁹

71. *Id.* at p. 1, ln. 14–15.

72. *Id.* at p. 1, ln. 16–17.

73. *Id.* at p. 1, ln. 20–22.

74. See House Committee Video of Mar. 23, 2009, *supra* note 62, at 1 hr., 1 min., 17 sec. (remarks by Rep. Debbie Buckner) (explaining the requirement was added “in an abundance of caution” to ensure the Department of Corrections complied with its current statutory obligations).

75. SB 64 (HCS), 2009 Ga. Gen. Assem.

76. *Id.* at p. 2, ln. 26–27.

77. *Id.* at p. 2, ln. 28–31.

78. *Id.* at p. 2, ln. 32–33.

79. See House Committee Video of Mar. 23, 2009, *supra* note 62, at 1 hr., 48 min., 45 sec. (remarks by Rep. Terry Barnard).

The House Committee on State Institutions and Property favorably reported the House Committee substitute on March 25, 2009.⁸⁰ On April 1, 2009, the bill was postponed on the House floor until a later date.⁸¹ The bill was read a third time in the House on April 3, 2009.⁸² On that same day, the House passed the House Committee substitute for SB 64 by a vote of 163 to 4.⁸³

The Act

The Act amends Chapter 5 of Title 12 by adding new Code section, 42-5-52.2, requiring all state inmates be tested for HIV before release from prison, and that those inmates testing positive be provided counseling and instruction on living with HIV and the legal consequences of exposing others to the virus.⁸⁴

Subsection (a) of the Act supplies a definition for HIV. The subsection states that “‘HIV’ means HIV as defined by Code section 31-22-9.1.”⁸⁵ Code section 31-22-9.1(10) explains that HIV means “any type of Human Immunodeficiency Virus” and includes all “identified causative agent[s] of AIDS.”⁸⁶ Subsection (a) ensures the definition of HIV used in the Act remains consistent with prior statutory law in Georgia.

Subsection (b) of the Act requires the Georgia Department of Corrections to implement the HIV testing program.⁸⁷ To fall within the statute, an inmate must satisfy two criteria: (1) incarceration in the penal system for one year or longer, and (2) no previous HIV tests indicating that the inmate is positive.⁸⁸ Any state inmate meeting these criteria must submit to an HIV test “within 30 days before his or her expected date of release from the custody of the department.”⁸⁹ By mandating the testing of all “state inmates” who meet the criteria,

80. State of Georgia Final Composite Status Sheet, SB 64, Apr. 3, 2009.

81. *Id.*

82. *Id.*

83. Georgia House of Representatives Voting Record, SB 64 (Apr. 3, 2009).

84. O.C.G.A. § 42-5-52.2 (Supp. 2009).

85. *Id.* § 42-5-52.2(a).

86. O.C.G.A. § 31-22-9.1(10) (2006).

87. *Id.* § 42-5-52.2(b).

88. *Id.*

89. *Id.*

the Act ensures that state prisoners who are held in private prisons or county correctional facilities also fall within the statute.⁹⁰

Subsection (c) of the Act addresses the notification and counseling that each inmate testing positive for HIV must receive.⁹¹ Every inmate who is tested, whether or not he tests positive, will be notified of the test results in writing before his discharge from prison.⁹² This provision ensures that an inmate is aware of his HIV status before returning to the general population.⁹³ Several Code sections already in effect when the Act was passed specify the manner in which HIV-positive test results can be disclosed to third parties.⁹⁴ Two Code sections, 24-9-47 and 31-22-9.2, address the release of HIV-positive results to the Georgia Department of Human Resources.⁹⁵ Subsection (c) acknowledges these Code sections and gives the GDC permission to reveal HIV-positive results to the Department of Human Resources, consistent with Georgia law.⁹⁶ Representative Buckner (D-130th) wanted this particular provision added to subsection (c) to ensure the GDC complies with the reporting obligations specified in other Georgia statutes.⁹⁷ Additionally, subsection (c) mandates that before any HIV-positive inmate is released, the GDC must provide the inmate “in writing contact information regarding medical, educational, and counseling services available through the Department of Human Resources.”⁹⁸ This stipulation ensures that HIV-positive inmates receive information on the resources available to them before they are discharged.⁹⁹ Furthermore, this subsection also requires that HIV-positive inmates receive “instruction relating to living with HIV, the prevention of the spread of such virus, and the

90. See House Committee Video of Mar. 23, 2009, *supra* note 62, at 1 hr., 48 min., 19 sec. (remarks by Rep. Terry Barnard) (explaining legislative counsel informed him the insertion of the word “state” covers inmates in state prisons, private prisons, and county correctional facilities).

91. O.C.G.A. § 42-5-52.2(c) (Supp. 2009).

92. *Id.*

93. *Id.*

94. See, e.g., O.C.G.A. § 24-9-47 (Supp. 2008) and O.C.G.A. § 31-22-9.2 (2006).

95. O.C.G.A. § 24-9-47 (Supp. 2008) and O.C.G.A. § 31-22-9.2 (2006).

96. O.C.G.A. § 42-5-52.2(c) (Supp. 2009).

97. See House Committee Video of Mar. 23, 2009, *supra* note 62, at 1 hr., 1 min., 17 sec. (remarks by Rep. Debbie Buckner).

98. O.C.G.A. § 42-5-52.2(c) (Supp. 2009).

99. *Id.*

legal consequences of infecting unknowing partners.”¹⁰⁰ The Act does not require this instruction be given before the inmate’s release. Instead, the instruction will take place after the inmate is discharged and will be administered by local public health departments in partnership with the Department of Human Resources.¹⁰¹ Representative Terry Barnard (R-166th) explained that this provision “leaves counseling where . . . counseling is done, and that is with [the department of human] resources with the counseling nurses, and not necessarily with the department [of corrections].”¹⁰² This highlights the importance of the reporting requirements, noted earlier, because the Department of Human Resources must be notified by the GDC of HIV-positive inmates to ensure they receive the required counseling after their release.

Subsection (d) of the Act addresses funding for the testing program.¹⁰³ The subsection orders the GDC to “seek state and federal grants or other possible sources of revenue” to fund the HIV testing program.¹⁰⁴ Additionally, the subsection authorizes the GDC to accept gifts to fund the program.¹⁰⁵ The total estimated cost of the program is \$250,000 per year.¹⁰⁶ Approximately \$64,000 of the total cost is for the HIV tests themselves, which cost \$4 each.¹⁰⁷ The remaining costs are for the provision of the required counseling and instruction.¹⁰⁸ The GDC expressed concern about implementing the program without funding, because the General Assembly did not provide appropriations for the program.¹⁰⁹ Representative Barnard explained that this subsection may allow the program to be paid for

100. *Id.*

101. *See* House Committee Video of Mar. 23, 2009, *supra* note 62, at 1 hr., 4 min., 29 sec. (remarks by Rep. Terry Barnard) (explaining the various responsibilities of the Department of Corrections and the Department of Human Resources).

102. *Id.*

103. O.C.G.A. § 42-5-52.2(d) (Supp. 2009).

104. *Id.*

105. *Id.*

106. *See* House Committee Video of Mar. 23, 2009, *supra* note 62, at 0 hr., 27 min., 31 sec. (remarks by Sen. Kasim Reed) (detailing the expected costs of implementing the program).

107. *Id.*

108. *Id.*

109. *Id.* at 0 hr., 36 min., 36 sec. (remarks by Alan Adams, Director of the Office of Health Services, Department of Corrections).

entirely with grants or gifts, rather than “at the expense of [the] taxpayers.”¹¹⁰

Subsection (e) of the Act compels the GDC to “consolidate inmates who have tested positive for HIV in a manner that most efficiently provides education, counseling, and treatment for such persons.”¹¹¹ This provision does not mean that HIV inmates must be housed separately or isolated.¹¹² Rather, according to Representative Barnard, it was added to ensure that counseling is provided efficiently and cost-effectively for inmates remaining in prison who are HIV-positive.¹¹³

Finally, subsection (f) of the Act expressly states the Act should “not be construed to limit the provision for HIV testing in Code section 42-9-42.1.”¹¹⁴ Code section 42-9-42.1 authorizes parole boards to require prisoners to submit to HIV tests as part of the process of determining whether to grant parole.¹¹⁵ Additionally, the author of the Act, Senator Kasim Reed (D-35th) stated his intent was that “none of the laws and none of the rules that currently govern the operation of the department of corrections [] be impacted in any way by [the Act].”¹¹⁶ Thus, although the Act does specifically state that it does not limit Code section 42-9-42.1, it was the legislature’s intent that the Act not limit or affect any other current Code sections.¹¹⁷

Analysis

The Act manifests an attempt to protect the citizens of Georgia from the spread of HIV by ensuring that prison inmates are tested for HIV and made aware of their status before being released into the general population, where they have the opportunity to spread the

110. *Id.* at 1 hr., 4 min., 29 sec. (remarks by Rep. Terry Barnard).

111. O.C.G.A. § 42-5-52.2(e) (Supp. 2009).

112. *See* House Committee Video of Mar. 23, 2009, *supra* note 62, at 1 hr., 4 min., 29 sec. (remarks by Rep. Terry Barnard) (articulating the intent behind the addition of language requiring the “consolidation” of inmates).

113. *Id.*

114. O.C.G.A. § 42-5-52.2(f) (Supp. 2009).

115. 1988 Ga. Laws 1799, § 10, at 1826 (codified at O.C.G.A. § 42-9-42.1(b) (1997)).

116. *See* House Committee Video of Mar. 23, 2009, *supra* note 62, at 0 hr., 28 min., 50 sec. (remarks by Sen. Kasim Reed).

117. *Id.*

disease.¹¹⁸ The Act seeks to ensure that those who come into contact with former inmates are shielded from HIV transmission, and relies on the actions of the former inmates to ensure that this objective is met.¹¹⁹ Additionally, the Act serves as a “preventative savings measure” for Georgia.¹²⁰ By preventing prospective HIV infections, the Act will save the State from having to pay for costly HIV treatments in the future.¹²¹ There are both behavioral and financial concerns that may prevent the Act from achieving its ultimate purpose, however.

Potential Behavioral Challenges

The General Assembly’s intent in passing the Act was to protect the welfare of the citizens of Georgia.¹²² Most inmates who are released from prison return to the communities they lived in before their incarceration.¹²³ Many return to spouses, significant others, and friends.¹²⁴ Shortly after release, inmates are “highly likely to engage in unprotected sex with partners they had before going to prison, to have sex with new partners or prostitutes and use intravenous drugs.”¹²⁵ These activities can lead to the transmission of HIV, and inmates who are unaware of their HIV status will also be unaware

118. See Video Recording of House Proceedings, Apr. 3, 2009 at 1 hr., 3 min., 0 sec. (remarks by Rep. Earl Ehrhart (R-36th)), <http://www.gpb.org/lawmakers-tv/video-archive> [hereinafter House Floor Video] (explaining the legislative intent behind the Act).

119. See Senate Floor Video, *supra* note 29, at 0 hr., 2 min., 45 sec. (remarks by Sen. John Douglas (R-17th)) (stating there is no way to force HIV-positive inmates to reveal their status to partners).

120. See *Lawmakers 2009* (GPTV broadcast, Mar. 3, 2009) (remarks by Sen. Kasim Reed (D-35th)) (stating the Act saves the state money by preventing future HIV infections) (on file with the Georgia State University Law Review).

121. See House Committee Video of Mar. 18, 2009, *supra* note 43, at 0 hr., 29 min., 50 sec. (remarks by Sen. Kasim Reed) (explaining that former inmates often infect innocent citizens who rely on state-funded healthcare, costing the State a substantial amount).

122. See House Committee Video of Mar. 23, 2009, *supra* note 62, at 0 hr., 25 min., 24 sec. (remarks by Sen. Kasim Reed).

123. *Id.*

124. Thomas et al., *supra* note 21, at 96 (noting offenders often resume sexual relationships they had before incarceration).

125. Janell Ross, *Lawmaker Wants All Inmates to Be Tested for HIV: Bill Aims to Reduce Risk As Ex-cons Rejoin Society*, TENNESSEAN, Apr. 5, 2009, available at <http://www.tennessean.com/article/20090405/NEWS07/904050385> (citing research by Jacques Bailargeon, a researcher at the University of Texas Medical Branch-Galveston).

they may transmit the virus.¹²⁶ The Act seeks to notify inmates of their status before their release, allowing them to make informed decisions regarding their behavior in the community they return to.¹²⁷ As Senator Kasim Reed (D-35th) explained, “[t]he data suggests that when people know their status, they change their behavior.”¹²⁸

There is evidence to support the contention that knowledge of one’s HIV status influences his behavior. An analysis conducted by the Centers for Disease Control and Prevention found that people altered their behavior substantially after becoming aware they were HIV-positive.¹²⁹ In fact, “the prevalence of high-risk sexual behavior is between 53–68% lower in HIV-positive individuals aware of their status than in HIV-positive individuals unaware of their status.”¹³⁰ Thus, the CDC encourages increased emphasis on HIV testing, particularly in at-risk populations, such as the prison population, to reduce exposure to uninfected individuals from those unaware they are infected.¹³¹ The Act implements some of the increased testing recommended by the CDC for the prevention of the spread of HIV.¹³²

To achieve its primary purpose, however, the Act depends on inmates who are HIV-positive to make responsible choices about their behavior once they are released from prison.¹³³ The results of the inmates who test positive remains confidential and are not released to the public.¹³⁴ Thus, innocent citizens in Georgia do not have knowledge of individuals who are HIV-positive and cannot take

126. *Id.*

127. See House Floor Video, *supra* note 118, at 1 hr., 3 min., 0 sec. (remarks by Rep. Earl Ehrhart).

128. The Kaiser Network, *Georgia Senate Passes Bill Requiring HIV Testing Among Prison Inmates Before Release*, http://www.kaisernetwork.org/Daily_Reports/rep_index.cfm?DR_ID=57433 (last visited Mar. 23, 2009).

129. Gary Marks et al., *Meta-Analysis of High-Risk Sexual Behavior in Persons Aware and Unaware They Are Infected with HIV in the United States*, 39 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 446, 448 (2005).

130. Aidsmap, *Untested HIV-Positive Individuals More Than Twice As Likely to Engage in High-Risk Sex Than Those Aware of Their HIV-Positive Status*, <http://www.aidsmap.com/en/news/0851DE0F-30AE-4E3F-A32D-466275B8DE41.asp> (last visited Apr. 15, 2009).

131. See Marks et al., *supra* note 129, at 446.

132. See Centers for Disease Control and Prevention, *supra* note 2, at 423 (reviewing the CDC’s recommended testing schedule for prison inmates).

133. See generally House Committee Video of Mar. 23, 2009, *supra* note 62, at 0 hr., 42 min., 55 sec. (discussing the bill’s reliance on former inmates’ ability to make reasonable decisions).

134. See House Floor Video, *supra* note 118, at 1 hr., 4 min., 46 sec. (remarks by Rep. Joe Heckstall (D-62d)).

steps to protect themselves during encounters with such individuals.¹³⁵ As stated by Representative Billy Horne (R-71st), “at the end of the day, we have to rely on the inmate to do the right thing.”¹³⁶ It is certainly possible that even with knowledge of their HIV status, some inmates will elect to participate in risky behaviors, and could transmit the virus to unsuspecting Georgians.¹³⁷ Senator John Douglas (R-17th), an opponent of the Act, expressed this sentiment, stating there was nothing the legislature could do “to force” HIV-positive former inmates “to tell their partners that they have HIV.”¹³⁸

Moreover, some research suggests that even those inmates who are aware of their HIV-positive status after release do not take all possible steps to minimize the potential for transmission. Former prisoners often delay HIV treatment after they are released from jail, placing both themselves and the community at risk.¹³⁹ A recent study showed that only five percent of released inmates filled a prescription for drugs needed for their HIV treatment in the first ten days after their release.¹⁴⁰ Only thirty percent filled a prescription within their first two months of freedom.¹⁴¹ Although these numbers are likely caused by a lack of health insurance coverage for recently released inmates,¹⁴² failure to seek necessary treatment can “leave a person with HIV more infectious and give rise to drug-resistant strains of HIV,” both of which increase risk to the public.¹⁴³ This particular study demonstrates that even those who are aware of their HIV-

135. See generally House Committee Video of Mar. 23, 2009, *supra* note 62, at 0 hr., 42 min., 55 sec. (remarks by Rep. Billy Horne (R-71st)).

136. *Id.*

137. *Id.*

138. Posting of Carl Zornes to GBP News Blog, Senate Passes Bill Requiring HIV Testing in Prisons, <http://gpbnews.blogspot.com/2009/03/senate-passes-bill-requiring-hiv.html> (Mar. 10, 2009) (quoting Sen. John Douglas). Senator Douglas also opposed the Act because of its overall cost. He stated, “If administrators think that prisoners need AIDS testing, the prisoners themselves can pay for it.” See Telephone Interview with Sen. John Douglas (Apr. 13, 2009).

139. See McGill Global AIDS Coalition, *AIDS Infected Prison Inmates Fail to Get Treatment Post Release*, Feb. 25, 2009, <http://treatthepeople.com/article/aids-infected-prison-inmates-fail-to-get-treatment-post-release/>.

140. *Id.*

141. *Id.*

142. *Id.*

143. Ross, *supra* note 125.

positive status may lack the desire or resources to make behavioral choices that protect the public, thus thwarting the Act's ultimate objective of protecting the public.

Potential Financial Obstacles

A second goal of the Act is to save Georgia taxpayers money in the future. By preventing the spread of HIV, particularly to citizens who rely on the State for their healthcare, the Act will benefit Georgia financially.¹⁴⁴ As stated by Senator Reed (D-35th), if a “felon is released from prison and then infects another Georgian who is an innocent bystander, . . . often those individuals do not have traditional insurance and end up being cared for through the safety net systems set up by our State, and those costs are passed on to Georgians.”¹⁴⁵ Given the substantial costs associated with HIV treatment,¹⁴⁶ the \$250,000 per annum to fund the program certainly seems reasonable.¹⁴⁷ The Act, however, mandates the HIV testing program without supplying funding or appropriations to the Department of Corrections for its implementation. Though the Act does authorize the GDC to accept gifts to fund the program, and even orders the GDC to seek grants for funding purposes,¹⁴⁸ there is no guarantee such efforts will be successful. Unfortunately, the General Assembly's failure to fund the program may prevent it from fully serving its purpose.

144. See House Floor Video, *supra* note 118, at 1 hr., 3 min., 0 sec. (remarks by Rep. Earl Ehrhart); House Committee Video of Mar. 18, 2009, *supra* note 43, at 0 hr., 18 min., 15 sec. (remarks by Sen. Kasim Reed). See generally Mandy Locke, *More N.C. Prisoners to Be Tested for HIV*, NEWS & OBSERVER, Sept. 25, 2008, http://www.newsobserver.com/news/crime_safety/story/1231474.html (explaining that taxpayers have a reason to be concerned about prisoners in the community after their release).

145. See House Committee Video of Mar. 18, 2009, *supra* note 43, at 0 hr., 29 min., 50 sec. (remarks by Sen. Kasim Reed) (explaining he drafted the Act because two constituents in his district were infected by a former inmate).

146. See generally Ross, *supra* note 125 (noting the typical monthly cost of medication for an HIV patient is between \$1000 and \$3000).

147. See House Committee Video of Mar. 18, 2009, *supra* note 43, at 0 hr., 38 min., 1 sec. (remarks by Rep. Al Williams (D-165th)) (explaining that failing to address this issue would be “penny wise and dollar foolish”).

148. O.C.G.A. § 42-5-52.2(d) (Supp. 2009).

The Department of Corrections noted that its budget was decreased substantially as a result of the State's projected shortfall.¹⁴⁹ Treatment for prisoners who have previously tested positive for HIV/AIDS already consumes a disproportionate portion of the GDC's prescription drug budget.¹⁵⁰ Mandating the testing program without providing appropriations to fund it will likely cause difficulties for the Department of Corrections. Although the GDC stated that it would find a way to implement the program even if funding was not provided,¹⁵¹ the lack of adequate financial resources may mean that certain aspects of the program will be scaled back, such as counseling. The most expensive portion of the program is the counseling required for those inmates testing positive.¹⁵² Arguably, however, this is also the most important aspect of the program, because it includes instruction on living with the virus and preventing its transmission.¹⁵³ It remains to be seen whether the Department of Corrections can fully and effectively implement the program on the limited resources it has been provided.

SB 64 enjoyed strong bipartisan consensus in both the Senate and House, enabling the Act to pass by a wide margin in both bodies.¹⁵⁴ It is clear that members from both the House and Senate agree the Act addresses an important issue in Georgia, and serves the interests of the State by protecting citizens from the spread of HIV. To be effective, however, the Act must depend on the actions of inmates after they are released from prison, and faces additional challenges due to the difficult financial situation the State is currently experiencing.

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149. See House Committee Video of Mar. 18, 2009, *supra* note 43, at 0 hr., 36 min., 36 sec. (remarks by Alan Adams, Director of the Office of Health Services, Department of Corrections).

150. *Id.* at 0 hr. 35 min., 17 sec. (remarks by Alan Adams, Director of the Office of Health Services, Department of Corrections).

151. *Id.* at 0 hr., 40 min., 52 sec. (remarks by Alan Adams, Director of the Office of Health Services, Department of Corrections).

152. See House Committee Video of Mar. 23, 2009, *supra* note 62, at 0 hr., 27 min., 31 sec. (remarks by Sen. Kasim Reed).

153. O.C.G.A. § 42-5-52.2(c) (Supp. 2009).

154. See House Floor Video, *supra* note 118, at 1 hr., 3 min., 0 sec. (remarks by Rep. Earl Ehrhart).