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## Criminal Procedure; Prisoner testing-AIDS

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## **Criminal Procedure; pen registers**

NEV. REV. STAT. § 179.— (new).

AB 912 (Committee on Judiciary); 1989 STAT. Ch. 538

Chapter 538 permits state district courts to authorize the use of a pen register or a trap and trace device.<sup>1</sup> Any public utility that relies upon a court order for a pen register, will not be criminally or civilly liable.<sup>2</sup>

*KRI*

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1. 1989 Nev. Stat. ch. 538, sec. 1, at 1134 (enacting NEV. REV. STAT. § 179.—). An application for a pen register or a trap and trace device must be accompanied by a district attorney or attorney general's affidavit. *Id.* The affidavit must be pursuant to Title 18 United States Code Sections 3121-3127, setting the standards for the use of pen registers and trap and trace devices. *Id.* See *Smith v. Maryland*, 442 U.S. 735, 746 (1979) (holding that a search warrant is not needed to install a pen register).

2. 1989 Nev. Stat. ch. 538, sec. 1, at 1134 (enacting NEV. REV. STAT. § 179.—).

## **Criminal Procedure; Prisoner testing—AIDS**

NEV. REV. STAT. § 209.— (new); §§ 209.433, 209.443, 209.446, 441.070, 441.210 (amended).

AB 186 (Gaston); 1989 STAT. Ch. 174

Existing law requires all offenders<sup>1</sup> to submit to a test for exposure to the human immunodeficiency virus (HIV) upon release from prison.<sup>2</sup> Chapter 174 creates an education program within the prison system regarding the nature of HIV<sup>3</sup> and creates a more comprehen-

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1. See NEV. REV. STAT. § 209.081 (1987) (definition of offender).

2. See 1987 Nev. Stat. ch. 622, sec. 2, at 1474 (enacting NEV. REV. STAT. § 209.511 1). See generally C. EVERETT KOOP, M.D., Sc.D., SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, (U.S. Department of Health and Human Services Oct. 22, 1986) (the human immunodeficiency virus is commonly referred to as acquired immune deficiency syndrome (AIDS)).

3. See 1989 Nev. Stat. ch. 174, sec. 1, at 385 (enacting NEV. REV. STAT. § 209.—) (inmates and prison staff are to receive education and counseling on HIV). The curriculum requirements and instructor certification must be provided by the Health Division of the Department of Human Resources. *Id.*

sive regulatory program designed to minimize the spread of HIV within the prison population.<sup>4</sup> Under Chapter 174, all offenders committed to the Department of Prisons must be tested for exposure to HIV at entrance to a prison or other correctional institution.<sup>5</sup> Subsequent HIV tests are required of prisoners involved in any incident<sup>6</sup> which poses a risk of transmitting the virus.<sup>7</sup> Offenders testing positive for HIV may be segregated from other prisoners if they engage in activities which increase the risk of transmitting the AIDS virus.<sup>8</sup>

## COMMENT

Mandatory HIV screening of all prisoners and subsequent segregation of those testing positive raises two constitutional issues. First, since the HIV screening process involves a bodily intrusion,<sup>9</sup> a prisoner's right to privacy may be violated.<sup>10</sup> In the absence of probable cause,<sup>11</sup> such a search is permissible only if there is an important government interest that outweighs the individual's privacy expectations.<sup>12</sup> In enacting Chapter 174, the legislature seeks to protect

4. *Id.*

5. *See id.* (prisoners must be tested if committed for evaluation or imprisonment).

6. *See id.* (incident means an activity that poses a risk of exposure to the human immunodeficiency virus as specified by regulations of the State Board of Health).

7. *Id.*

8. *See id.* (test means supplemental test, approved by the Board of Health, to confirm positive preliminary test). Infected offenders may be separated from other inmates if they commit battery or engage in homosexual acts, sexual intercourse, or the intravenous injection of controlled substances. *Id.*

9. *See generally* NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS, 73, 113-14 (1986) (discussion of the major HIV antibody tests; procedures and reliability). HIV antibody tests require a blood sample to be taken. *Id.*

10. *See* U.S. CONST. amend. IV (individuals right to be free from unreasonable governmental searches and seizures). *See also* *Schmerber v. California*, 384 U.S. 757, 767-68 (1966) (a compelled intrusion into the body for blood to be analyzed for alcohol content is a Fourth Amendment search); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (Fourth Amendment guarantees the privacy and dignity of persons against arbitrary and invasive acts by officers of the government); *Geary v. State*, 91 Nev. 784, 789, 544 P.2d 417, 421 (1975) (subject to a few well defined exceptions, warrantless invasions of personal privacy are per se unreasonable under the Fourth Amendment); *Owens v. City of North Las Vegas*, 85 Nev. 105, 108, 450 P.2d 784, 787 (1969) (warrantless administrative searches are intrusions upon privacy rights protected under the Fourth Amendment).

11. *See Illinois v. Gates*, 462 U.S. 213, 236-37 (1983) (probable cause means a substantial basis for believing that a search will uncover evidence of wrongdoing).

12. *See National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1397 (1989) (court upheld compulsory urinalysis to detect the presence of illegal drug use by federal customs service employees). In *Von Raab*, the Court held that the government's interest in safeguarding United States borders and public safety outweighed the privacy expectations of employees seeking promotion to sensitive positions. *Id.* at 1396. *Cf. Skinner v. Railway Labor Executive's Ass'n*, 109 S. Ct. 1402, 1412 (1989) (court upheld federal regulations requiring the collection

the prison population from the spread of AIDS.<sup>13</sup> Hence, in order for Chapter 174 to be upheld, a court must find that the state's interest in restricting the spread of AIDS among prisoners is an important government interest<sup>14</sup> and that it outweighs the individual prisoner's expectation of privacy. Given a prisoner's reduced expectation of privacy while incarcerated,<sup>15</sup> and the state's interest in reducing the spread of AIDS, Chapter 174 should withstand an attack based on an invasion of privacy theory.

The second constitutional issue raised is whether the segregation of infected prisoners violates their equal protection rights.<sup>16</sup> In *Cordero v. Coughlin*<sup>17</sup> a federal court upheld the segregation of AIDS infected prisoners on the ground that the segregation of prisoners infected with AIDS was a reasonable means to achieve a legitimate state purpose in light of the lesser protection afforded an inmate.<sup>18</sup> For a court to uphold Chapter 174, it must find that segregation of HIV carriers in the prison population serves a legitimate state purpose. Since the state has a strong interest in restricting the spread of disease,<sup>19</sup> and segregation of HIV carriers serves to protect uninfected prisoners and prison staff from the threat of AIDS, it should be similarly upheld.

*JEC.*

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and subsequent analysis of bodily fluids to detect illegal drug use by private railway employees). A warrantless search of bodily fluids may be permissible where the privacy interests invaded are minimal and where an important governmental interest would be jeopardized by a requirement of individualized suspicion. *Id.* Probable cause is not required for administrative searches designed to detect conditions posing a serious risk to the health and welfare of society. *Donovan v. Dewey*, 452 U.S. 594, 602 (1981). (the Court determined that requiring a warrant would impede the government's enforcement of the Mine Safety and Health Act).

13. See 1989 Nev. Stat. ch. 174, at 384 (preamble).

14. See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1904) (states have a substantial interest in preventing the spread of disease).

15. See *Wolfe v. McDonnell*, 418 U.S. 539, 555 (1974) (a prisoner's rights are substantially diminished, but not wholly stripped of constitutional protections).

16. See U.S. CONST. amend. XIV (source of due process and equal protection rights). See also *Lee v. Washington*, 390 U.S. 333 (1967) (equal protection rights survive incarceration).

17. 607 F. Supp. 9 (D.C.N.Y. 1984). Due process requires that similarly situated people be treated equally under the law. *Id.* at 10. Since AIDS infected prisoners may not be similarly situated to non-infected prisoners, the equal protection rights afforded by the Fourteenth Amendment may not apply. *Id.* However, even if the equal protection clause does apply, a move to less comfortable conditions for non-punitive reasons is within the normal contemplation of a prison term. *Hewitt v. Helms*, 459 U.S. 460, 468 (1982).

18. *Cordero*, 607 F. Supp. at 9. See *McLaughlin v. Florida*, 379 U.S. 184, 190 (1964) (equal protection requirements are met if all members of the class are treated equally and if their classification is not arbitrary). See also *Powell v. Department of Corrections*, 647 F. Supp. 968, 970 (N.D. Okl. 1986) (prisoner testing positive for HIV was not denied equal protection when segregated from other non-infected prisoners since classification was based on HIV status).

19. *Supra* note 14 and accompanying text.