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Health and Welfare

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Health and Safety Code §§ 199.95, 199.96, 199.97, 199.98, 199.99 (new).
1988 CAL. STAT. Prop. 96.
*(Effective November 9, 1988)**

Proposition 96 creates two exceptions to the existing requirement[1] that the state obtain a person's written consent before testing the person for the presence of acquired immune deficiency syndrome (AIDS) antibodies.[2] These exceptions establish the framework for providing precautionary information to peace officers, firefighters, emergency medical personnel, and custodial personnel, as well as to victims and defendants of certain sex crimes who might have been exposed to the AIDS virus.[3] Under Proposition 96, an eligible party[4]

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* Proposition 96 applies retrospectively to all pending complaints and petitions irrespective of when the underlying actions took place, with maximum application to the information subject to disclosure obtained prior to the effective date of this proposition. 1988 Cal. Stat. prop. 96, sec. 2, at ——.

1. CAL. HEALTH & SAFETY CODE § 199.22(a) (requires a person's written consent before testing them for AIDS). *See id.* § 199.27 (consent requirements for AIDS tests when the subject is incompetent).

2. *Id.* §§ 199.96 (defendants accused of certain sexual crimes may be subjected to nonconsensual testing), 199.97 (persons who interfere with peace officers, firefighters, or emergency medical personnel may be subjected to nonconsensual testing). *See id.* § 199.97 (definition of interference).

3. *Id.* § 199.95. Proposition 96 furnishes the information so that adequate precautions can be taken or groundless fears may be relieved in response to the threat to public safety posed by AIDS and AIDS-related conditions. *Id. See id.* § 199.46 (definition of AIDS).

4. *Id.* §§ 199.96 (allows alleged victims or the prosecuting attorney of certain sexual crimes to petition), 199.97 (allows peace officers, firefighters, emergency medical personnel, or their employing agency to petition). A victim listed in the criminal complaint or juvenile petition must file a written request for a court to order a blood test of any criminal defendant or minor charged with any violation of Penal Code sections 261 (rape), 261.5 (unlawful sexual intercourse with a female under age 18), 262 (spousal rape), 266b (abduction to live in an illicit relation), 266c (inducement by fear to engage in sexual intercourse, to penetration by a foreign object, substance, instrument, or device, to oral copulation, or to sodomy), 286 (unlawful sodomy), 288 (lewd or lascivious acts with a child under age 14), or 288a (unlawful oral copulation). *Id.* § 199.96.

may petition the court to order a criminal defendant or minor to submit to a nonconsensual AIDS test.[5] The petition must allege that a person charged in a criminal complaint or juvenile petition either interfered[6] with the petitioner's official duties, or is charged with an enumerated sexual crime.[7] The court must order the test if, after conducting a hearing, it finds probable cause that a bodily fluid was transferred.[8]

Upon approving the petition, the court must order the defendant's blood specimens to be sent to a licensed medical laboratory for testing.[9] The laboratory must use medically accepted tests for indications of exposure or infection by AIDS or AIDS-related conditions.[10] Copies of the test results must be sent with a disclaimer[11] to the following: (1) The defendant or minor; (2) each victim who requests the results; and (3) the chief medical officer and officer in charge of the facility if the tested person is incarcerated or detained.[12]

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5. *Id.* §§ 199.96, 199.97 (the court must promptly conduct a hearing upon receipt of the petition).

6. Interference by biting, scratching, spitting, or transferring blood, saliva, or other body fluids on or through their skin or membranes. *Id.* § 199.97.

7. *Id.*

8. *Id.* §§ 199.96, 199.97. Proposition 96 mandates a showing of probable cause that the possibility of a transfer of blood, semen, saliva, or other bodily fluid took place between the defendant and the person requesting the test. *Id.* Since the court issues an order to compel testing, refusing to take the test is apparently only punishable by contempt. *See* In re McKinney, 70 Cal. 2d 8, 10-11, 447 P.2d 972, 974, 73 Cal. Rptr. 580, 582 (1968) (courts have the inherent power to punish for contempt). *See also* Kreling v. Superior Court, 18 Cal. 2d 884, 887, 118 P.2d 470, 472 (1941) (habeas corpus is the appropriate remedy to halt the enforcement of an invalid judgment of contempt); McLaughlin v. Superior Court 128 Cal. App. 2d 62, 65, 274 P.2d 745, 747 (1954) (a person cannot be in contempt unless there is a valid enforceable order at the time the alleged acts of contempt were committed). *See generally* CAL. PENAL CODE § 166(4) (willful disobedience of a lawfully issued court order is a misdemeanor); CAL. CODE CIV. PROC. §§ 1209(a)(5) (disobedience of an order of the court is contempt), 1211 (summary punishment for contempt), 1218 (determination of guilt by the court and punishment of fines or imprisonment), 1219 (imprisonment to compel performance).

9. CAL. HEALTH & SAFETY CODE § 199.98(b).

10. *Id.* (also requiring tests for communicable diseases when the court determines that the tests are economically and readily available). Blood samples are to be taken by only a licensed vocational nurse, medical technician, phlebotomist, physician, or registered nurse. *Id.* § 199.98(a). Proposition 96 does not specifically require confirmatory tests. *See id.* § 199.98. Proposition 96 does require two samples to be taken. *Id.* §§ 199.96, 199.97.

11. The disclaimer must state: "The tests were conducted in a medically approved manner but tests cannot determine exposure to or infection by AIDS or other communicable diseases with absolute accuracy. Persons receiving this test result should continue to monitor their own health and should consult a physician as appropriate." *Id.* § 199.98(d).

12. *Id.* §§ 199.96, 199.97. The court must order all persons receiving results pursuant to these sections to maintain the confidentiality of the personal identifying data except when disclosure is necessary for medical or psychological care. *Id.* § 199.98(e). Copies of the test results must be sent to the parents or guardian of the tested minor. *Id.* § 199.98(d). If the test results indicate exposure or infection by AIDS, AIDS-related conditions, or communicable

Medical personnel who provide service to detention facilities[13] and receive information[14] that an inmate or minor has had AIDS or communicable disease exposure or infection must report the information to the officer in charge of the detention facility.[15]

COMMENT

Proposition 96 permits the state to obtain and release data on individuals without their consent. Proposition 96 may, therefore, be susceptible to challenge based upon either the California right to privacy or the Fourth Amendment of the United States Constitution. Such challenges will require the courts to balance the constitutional rights of the individuals against the state interest in obtaining and releasing the information.

The California constitution, unlike the federal constitution,[16] provides an express right to privacy.[17] Proposition 96 contravenes this

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diseases, copies of the results must be sent to the State Department of Health Services. *Id.* § 199.98(c). Persons who test, transmit test results, or disclose information pursuant to these provisions are immune from civil liability. *Id.* § 199.98(g). In case of a conflict with existing case law or statutes, Proposition 96 is intended to supersede the confidentiality and consent criteria, including those in Health and Safety Code sections 199.20 (no person can be compelled to identify any person who is the subject of an AIDS test), 199.30 (personally identifying AIDS research records are not to be disclosed), 199.42 (penalties and confidentiality requirements for personally identifying AIDS-related health records developed or acquired by the state or public health agency). *Id.* § 199.95. *But see* Woods v. White, 689 F. Supp. 874 (W.D.Wis. 1988) (a prisoner with AIDS has a 14th amendment constitutional right to privacy in the disclosure of his medical records).

13. Medical personnel receiving payments or under contract to provide medical services to any state, municipal, or county government or agency providing service to state prisons, the Medical Facility, any Youth Authority institution, county jail, city jail, hospital jail ward, juvenile hall, juvenile detention facility, or any other facility that detains minors or adults. CAL. HEALTH & SAFETY CODE § 199.99(a).

14. Except when communicated or obtained by a scientific research study with written approval expressly waiving disclosure by the officer in charge, information includes: (1) A laboratory test indicating exposure to the AIDS virus, AIDS-related conditions, or communicable disease; (2) any statements made by the minor or inmate to the medical personnel indicating exposure or infection; or (3) the results of any medical examination or test indicating infection or exposure. *Id.* § 199.99(b). The officer in charge must notify the personnel that may have had contact with the inmate or minor, or contact with their bodily fluids, of the contents of the information so protective measures can be taken for the caring of the inmate or minor and the safety of other inmates and personnel. *Id.* § 199.99(c). The officer in charge and all other personnel receiving information must keep the identifying data confidential except when disclosure is necessary to obtain medical or psychological help. *Id.* § 199.99(d). Willful disclosure of identifying data to any person without the written consent of the patient, except to a peace officer or federal, state, or local health agency employee or when authorized, is a misdemeanor. *Id.* § 199.99(e).

15. *Id.* § 199.99(a).

16. The Supreme Court has recognized protection of certain fundamental rights to personal

right.[18] The state may, however, justify an impairment of the right to privacy upon the showing of a compelling state interest.[19] Furthermore, the state must show that the impairment is necessary to achieve the compelling state interest.[20] The Proposition's future will therefore depend on whether the courts find that the state has a compelling interest in obtaining the information and whether impairment of the individual's right to privacy is necessary to further that interest.

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privacy under the fourteenth amendment concept of personal liberty relating to activities in cases such as: Roe v. Wade, 410 U.S. 113, 152-153 (1973) (a woman's right to choose whether to carry her pregnancy to term); Eisenstadt v. Baird, 405 U.S. 438, 453-454 (1972) (right to use contraception for an unmarried person); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (personal intimacies of the home); Loving v. Virginia, 388 U.S. 1, 12 (1967) (interracial marriage); Griswold v. Connecticut, 381 U.S. 479, 485-486 (1965) (right to use contraception); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation); Pierce v. Society Sisters, 268 U.S. 510, 535 (1925) (child rearing and education). *See* Whalen v. Roe, 429 U.S. 589, 599 (1976) (recognizing two kinds of privacy interests, the individual interest in avoiding disclosure of personal information, and the interest of freedom of choice for certain kinds of fundamental matters, in evaluating the safeguarding of privacy interests in the assimilation of private medical information in a state computer bank about prescription controlled substance users). *See also* J.P. v. DeSanti, 653 F.2d 1080, 1089-1090 (6th Cir. 1981) (in an action by juveniles to prevent the collection and dissemination of their social histories by probation authorities, the court refused to recognize anything more than a general constitutional right to have the disclosure of private information measured against the need for disclosure). *See generally* Glover v. Eastern Nebraska Community Office of Retardation, 686 F. Supp. 243 (D.Neb. 1988) (mandatory AIDS testing of employees without an overriding public policy concern is unconstitutional); Doe v. Roe, 139 Misc. 2d 209, ____, 526 N.Y.S.2d 718, 722 (1988) (a compelling state need must be shown for a mandatory AIDS test when mental health is endangered).

17. CAL. CONST. art. I, sec. 1 (among the inalienable rights of all people is the right of "pursuing and obtaining safety, happiness, and privacy").

18. *See* White v. Davis, 13 Cal. 3d 757, 774-775, 533 P.2d 222, 233-234, 120 Cal. Rptr. 94, 105-106 (1975) (the primary purpose of the right to privacy clause is to protect individuals from the accelerating encroachment on personal freedom by society's increased surveillance and data collection).

19. *See* Division of Medical Quality v. Gherardini, 93 Cal. App. 3d 669, 679-681, 156 Cal. Rptr. 55, 61-63 (1979) (patient-physician records sought by the medical board fell under the privacy protection of the California constitution and a compelling state interest must be shown to justify the incursion into the medical information of the individual, as well as adequate safeguards for the individual's constitutional privacy rights). *See also* City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 130, 610 P.2d 436, 439, 164 Cal. Rptr. 539, 542 (1980) (applying the compelling state interest test to a residential zoning ordinance restricting the number of unrelated people living together). In deciding whether to permit an intrusion, the courts must balance the state interest in discovering the information against an individual's right to privacy. *Id.*

20. Wood v. Superior Court, 166 Cal. App. 3d 1138, 1147, 212 Cal. Rptr. 811, 820 (1985). Balancing the power of the Board of Medical Quality Assurance to subpoena records of all of physicians' patients without their consent with the privacy interests of those patients and limiting the power to only relevant and material records to the investigation. *Id.* An alternative means of securing the compelling state interest to minimize or avoid the competing interests of the state and the individual's constitutional protection must be implemented if possible. *Id.* The state must use the least intrusive means to achieve the satisfaction of the compelling interest. *Id.*

The Proposition states that its purpose is to enact a precautionary measure with respect to specific threats to public safety posed by AIDS.[21] In an effort to counter one of these threats, Proposition 96 purports to allow peace officers, health care workers, firefighters, and custodial personnel to perform their duties without the fear of being unable to determine whether they have been exposed to the AIDS virus.[22] Such information is also intended to relieve victims of sexual crimes from a "groundless fear of infection."[23] The state almost certainly will assert that, given the deadly nature of AIDS, it has a compelling interest in discovering this type of information.

Although the state interest may be compelling, Proposition 96's nonconsensual testing provisions must be necessary to further that interest. This warrants an examination of the test procedures. Proposition 96 provides that the blood will be extracted by medical personnel and tested in a medically approved manner, indicating a somewhat routine diagnostic procedure for determining exposure to disease in present day society. The proposition, however, fails to designate who decides what test is to be used, which test is to be used, how accurate the test must be, or who is to make the disclosures to the various parties after the test is made on an accused or minor.[24]

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21. CAL. HEALTH & SAFETY CODE § 199.95.
22. *Id.*
23. *Id.*
24. *Id.* § 199.98(b). Proposition 96 merely requires the blood to be tested by a licensed medical laboratory for medically accepted indications of AIDS exposure and infection, plus any other communicable diseases readily and economically available as determined by the court and does not require confirmatory tests or designate who pays for the testing. *Id.* § 199.98(a)-(g). The 1988 legislature enacted various AIDS testing statutes. *See* 1988 Cal. Stat. ch. 1088, sec. 1, at ____ (enacting CAL. HEALTH & SAFETY CODE § 26, and CAL. PENAL CODE § 1524.1) (allowing the testing of a criminal defendant upon a showing of probable cause that a fluid capable of transmitting the AIDS virus was transferred, requiring counseling about the testing procedures and results, providing for confirmatory tests, and delegating the establishment of testing procedures to the local health officer based on federal standards); *id.* 1119 sec. 2, at . (enacting CAL. HEALTH & SAFETY CODE § 199.221, and CAL. WELFARE & INSTITUTIONS CODE § 1768.9) (allowing testing of inmates or wards of the California Youth Authority for AIDS if the person evidences symptoms of AIDS or AIDS-related complex by state licensed AIDS testing laboratories, requiring pretest counseling, and providing for confirmatory testing); *id.* 1279 sec. 1, at ____ (enacting CAL. INS. CODE §§ 799, 799.01, 799.02, 799.03, 799.04, 799.05, 799.06, 799.07, 799.08, 799.09) (setting AIDS testing standards for insurance companies to avoid unfair distinctions between individuals when underwriting life and disability insurance and requiring a positive enzyme-linked immunosorbent assay serologic test (ELISA), followed by a reactive Western Blot Assay test on the same specimen of blood before denying the insurance application); *id.* 1579 sec. 2, chs. 1-6, at ____ (enacting CAL. HEALTH & SAFETY CODE § 199.222, and CAL. PENAL CODE §§ 7500, 7501, 7502, 7503, 7504, 7510, 7511, 7512, 7512.5, 7513, 7514, 7515, 7516, 7516.5, 7516.8, 7517, 7518, 7519, 7520, 7521, 7522, 7523, 7530, 7531, 7540, 7550, 7551, 7552, 7553) (allowing law enforcement employees to request testing of inmates, detainees, probationers, or parolees for AIDS upon some reasonable

The more accurate tests for the direct causative agent of AIDS are generally not practicable for routine use.[25] These factors increase the potential for a false positive test result to be disclosed.[26] Such a disclosure may be mentally devastating for both the accused and the victim despite any accompanying disclaimer. Because of this lack of safeguards to prevent inaccurate or unnecessary disclosures, Proposition 96's test procedures may not sufficiently further the state interest, and, therefore, may fail to justify an impairment of the individual's right to privacy.[27]

In addition to the potential challenges under the California constitution's right to privacy, Proposition 96 may violate the fourth

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suspicion of the presence of the virus, requiring counseling about precautionary measures and providing for confirmatory tests); *id.* 1597 secs. 2-5, at ____ (enacting CAL. PENAL CODE §§ 647(f), 1202.1, 1202.6, 12022.85) (requiring AIDS testing upon conviction of certain sex offenses or upon conviction of prostitution, providing a sentence enhancement for knowingly committing certain sex crimes when infected with AIDS, requiring counseling programs to be implemented, and delegating the establishment of testing procedures to the county probation officer in consultation with the local health officer). *See generally Review of Selected 1988 California Legislation*, 20 PAC. L.J. 536, 560, 653, 661, 682 (1989) (providing an analysis of chapters 1088, 1119, 1279, 1579, 1597).

25. Banks & McFadden, *Rush to Judgment: HIV Test Reliability and Screening*, 23 TULSA L.J. 1, 5 (1987). There are two types of tests to screen for infectious diseases: (1) a direct test for the etiological (causative) agent, which are generally commercially unavailable, too expensive, or too complex to be practicable for routine use; and (2) an indirect test, such as those in use today, which infers the presence of disease and is consequently less accurate. *Id.*

26. *See* Doe v. Roe, 139 Misc. 2d 209, ____, 526 N.Y.S.2d 718, 721 (1988) (there is an incubation period from six weeks to six months or more before the antibody reaction shows). The tests are not diagnostic but rather, are intended to protect the blood supply; therefore, accuracy rates of commercial laboratories vary widely and some have up to 20% false-positive rates on pretested samples. *Id.* 139 Misc. 2d at ____, 526 N.Y.S.2d at 721; Clifford and Iuculano, *Aids and Insurance: The Rationale for AIDS-Related Testing*, 100 HARV. L. REV. 1806, 1812 (1987) (a series of tests called the ELISA-ELISA-Western blot has been found to have 99.9% accuracy). *See generally* Banks and McFadden, *supra* note 25 (discussing the reliability of present testing methods and the high false-positive rate to protect the blood supply); Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739, 746-747 (1986) (AIDS blood tests only indicate that the person carries the antibodies to the AIDS virus, the tests do not directly reveal the presence of the AIDS virus, and therefore, the presence of HIV antibodies should only be considered presumptive evidence of current infection or infectiousness); Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986) (analysis of federal first, fifth, and fourteenth amendment constraints on legislation enacted that affects AIDS carriers and high risk groups in response to the fear of AIDS); *Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS)*, 14 HOFSTRA L. REV. 1 (1985) (giving a broad overview of medical, employment, public health, criminal, legislative, constitutional, and world issues concerning AIDS).

27. Division of Medical Quality v. Gherardini, 93 Cal. App. 3d 669, 679-681, 156 Cal. Rptr. 55, 61-63 (1979) (requiring a compelling state interest and adequate safeguards for the individual's privacy rights). *See generally* Rasmussen v. South Fla. Serv., Inc., 500 So.2d 533 (Florida 1987) (the right to privacy under the Florida state constitution would not permit discovery of the names and addresses of 51 blood donors after an auto accident victim donee contracted AIDS because of the potential significant harm to unsuspecting donors, and the low probative value of the discovery, outweighed the donee's need for the information).

amendment protection against unreasonable search and seizure.[28] This constitutional safeguard, however, does not forbid states from making minor intrusions into an individual's body under stringently limited conditions.[29] Under existing law, a court must find probable cause[30] to believe an intrusion will reveal material evidence of a crime before it may order an intrusion.[31] Moreover, a court must balance

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28. U.S. CONST. amend. IV (". . .the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

29. *See e.g.*, Schmerber v. California, 384 U.S. 757, 772 (1966). The decision to invade a person's body in search of evidence of guilt must be informed, detached, and deliberate. *Id.* at 770. *See also* Plowman v. United States Dep't of the Army, 698 F. Supp. 627 (E.D. Va. 1988) (nonconsensual AIDS tests on civilian employee's blood already extracted for extensive diagnostic tests upon admission to an army hospital was justified by the medical necessity of informing medical personnel of the patient's HIV status outweighing the individual's privacy interests); Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50, 52-53 (D.D.C. 1987) (the court refused to enjoin HIV testing as part of an established series of extensive diagnostic blood tests for Foreign Service employees finding a rational relationship between the legitimate purpose of finding out the individual's fitness for duty and the addition of the test). *Compare* National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987) (mandatory urine testing, not based on individualized suspicion as a requirement for promotion into certain customs agent positions, is not an unreasonable search), *cert. granted*, 108 S. Ct. 1072 (1988) *with* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988) (post-accident testing of railway workers absent a particularized suspicion that the test will reveal evidence of current drug or alcohol impairment is an unreasonable search), *cert. granted*, 108 S. Ct. 2033 (1988). *See generally* Policeman's Benevolent Ass'n of N.J., Local 318 v. Township of Wash., 850 F.2d 133 (3rd Cir. 1988) (mandatory random drug testing programs were administrative search exceptions to the warrant requirement of the fourth amendment and because of the pervasive regulation of the police department, police officers had a reduced expectation of privacy); Amalgamated Transit Union, Division 1279 v. Cambria County Transit Auth., 691 F. Supp. 898 (W.D. Pa. 1988) (the uniform nondiscriminatory application of mandatory drug and alcohol testing during annual physicals of bus drivers and mechanics not based on reasonable suspicion, when blood and urine samples were already required, satisfied the fourth amendment's privacy and arbitrary governmental intrusion requirements); Poole v. Stephens, 688 F. Supp. 149 (D.N.J. 1988) (random drug testing of prison guard recruits did not violate the fourth amendment due to the reduced expectation of privacy because of the recruits knowledge of the demands of the occupation); Amalgamated Transit Union 1277 v. Sunline Transit Agency, 663 F. Supp. 1560 (C.D. Cal. 1987) (a public employer may require mandatory alcohol and drug testing of employees without a search warrant or showing of probable cause in jobs directly related to mass public transportation, but must have a reasonable suspicion of drug or alcohol abuse); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986) (administrative search exception applied to employees of heavily regulated horse racing industry for the power of the State Racing Steward to mandate drug and alcohol testing of employees), *cert. denied*, 479 U.S. 986 (1986); American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) (mandatory periodic drug testing of civilian police officers holding critical jobs by the Defense Department was an unreasonable search and seizure).

30. *See* Illinois v. Gates, 462 U.S. 213, 236-37 (1983) (to encourage the use of the warrant procedure the magistrate must find a substantial basis that a search would uncover evidence of wrongdoing).

31. *See* People v. Scott, 21 Cal. 3d 284, 293, 578 P.2d 123, 127, 145 Cal. Rptr. 876, 880 (1978). When a warrant authorizing a bodily intrusion is sought, the court must, after finding probable cause that the intrusion will reveal evidence of a crime, balance the necessity and

an individual's fourth amendment right against the state interest in having the information before issuing a search warrant authorizing a bloodtest to be performed on an accused.[32]

By requiring a judicial determination of whether to order the testing of the accused's blood for AIDS, Proposition 96 attempts to obviate the need to obtain a search warrant.[33] Nevertheless, there are several obstacles the Proposition must overcome. First, Proposition 96 does not make the transfer of a bodily fluid while interfering with the duties of peace officers, firefighters, or emergency medical personnel a separate crime or aggravation of a crime.[34] Second, Proposition 96 does not require the state to show probable cause that the accused has AIDS, had AIDS or an AIDS-related condition at the time of the interference or fluid transfer, or that the fluid transferred is capable of transmitting the AIDS virus.[35] Moreover,

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reliability of the method of intrusion, the seriousness of the underlying criminal offense, the strength of law enforcement suspicions that important evidence will be found, and the possibility of recovery by less intrusive means against the severity of the intrusion. *Id.* A greater showing of necessity by society is required as the intensity, length, more unsafe, or unusual the intrusion to the individual becomes. *Id.*

32. *Scott*, 21 Cal. 3d at 293, 578 P.2d at 127, 145 Cal. Rptr. at 880 (after a finding of probable cause, the court must balance the accused's right to privacy against society's interest in having the information). *See* Winston v. Lee, 470 U.S. 753, 758-763 (1985) (also applying the "probable cause plus" balancing test to surgical removal of a bullet when the health of the accused was endangered); *Schmerber*, 384 U.S. at 766-72 (requiring an inquiry into the facts and circumstances surrounding the warrantless and involuntary blood testing of a suspected drunken driver, and weighing the individual's interests in privacy against society's interests in performing the procedure).

33. *See* CAL. HEALTH & SAFETY CODE §§ 199.96, 199.97 (providing judicial finding that probable cause exists to believe that blood, saliva, semen, or other bodily fluid has been transferred from the accused to the victim). *But see Scott*, 21 Cal. 3d at 293, 578 P.2d at 127, 145 Cal. Rptr. at 880 (strong showings of need must be shown for bodily penetrations with or without a warrant). *See generally* CAL. PENAL CODE § 1525 (issuance, probable cause, supporting affidavits, contents of application for search warrants).

34. The Proposition only requires a showing of probable cause that a possible transfer of a body fluid was transferred. CAL. HEALTH & SAFETY CODE §§ 199.96, 199.97. *See Schmerber*, 384 U.S. at 769-770 (searches of the body must be based on clear indications that desired evidence of a crime will be found). *See also* Robinson v. California, 370 U.S. 660, 667 (1962) (the Eighth Amendment forbids criminal punishment for the status of being ill and invalidated a statute deeming addiction to narcotics a crime). *See generally* Doe v. Roe, 139 Misc. 2d 209, 526 N.Y.S.2d 718 (1988) (reviewing mandatory AIDS testing, reliability of tests, and findings in the context of child custody).

35. *See* Chalk v. United States Dist. Court, 840 F.2d 701, 706 (9th Cir. 1988) (HIV is transmitted by intimate sexual contact with an infected person, invasive exposure to contaminated blood or certain other body fluids, or perinatal exposure); Sullivan & Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 158 (1988) (biting and spitting have not been proven to be able to transmit the AIDS virus); Comment, *Protecting Children with AIDS Against Arbitrary Exclusion from School*, 74 CALIF. L. REV. 1373 (1986) (there is a broad consensus that AIDS cannot be transmitted by casual contact). *See also* Illinois v. Gates 462 U.S. 213, 236-237 (1983) (the probable cause requirement means a substantial basis that a search would uncover evidence of wrongdoing); Jarrett v. Faulkner,

because transmission of AIDS is not itself a crime, the courts may determine that the blood test constitutes an unreasonable government intrusion. Due to the questionable accuracy of AIDS tests[36] and the manner in which the AIDS virus can be transmitted,[37] the state interest in performing the blood test may not be found to be sufficient to impair the accused's fourth amendment right to be secure in his person from such unreasonable governmental intrusions.[38]

In determining whether Proposition 96 violates the California or federal constitutions, the courts must, where reasonable, construe the language of the proposition to be constitutional.[39] Proposition 96 is often vague and seemingly ambiguous, and therefore may provide the court some flexibility in interpretation.[40] For example, the language of the proposition requiring "medically approved" testing and taking of two blood samples could be interpreted as necessitating confirmatory tests.[41] Further, the statute is silent as to who is to

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662 F. Supp. 928 (S.D. Ind. 1987) (an action brought by inmates to order the Department of Corrections to screen all inmates for AIDS and to segregate all homosexual prisoners was dismissed for the failure to show that the risk of contracting AIDS was great enough to plaintiffs to implicate their constitutional rights and therefore necessitate the testing and segregation). *But see* Powell v. Department of Corrections, 647 F. Supp. 968 (N.D. Okla. 1986) (suit brought by inmate diagnosed as having AIDS challenging his segregation from the general population dismissed because of the legitimate purpose to prevent the spread of the deadly disease and to protect the plaintiff from assault by other prisoners).

36. *See* Banks & McFadden, *supra* note 25, at 5 (discussing the reliability of present testing methods and the high false-positive rate to protect the blood supply). *See also* Clifford & Iuculano, *supra* note 26, at 1812 (a series of tests called the ELISA-ELISA-Western blot has been found to have 99.9% accuracy); Merritt, *supra* note 26, at 746-747 (AIDS blood tests only indicate that the person carries the antibodies to the AIDS virus, the tests do not directly reveal the presence of the AIDS virus, and therefore, the presence of HIV antibodies should only be considered presumptive evidence of current infection or infectiousness). *See generally* Doe v. Roe, 139 Misc. 2d 209, ——, 526 N.Y.S.2d 718, 721 (1988) (accuracy rates of commercial laboratories vary widely and some have up to 20% false-positive rates on pretested samples).

37. *See* CAL. HEALTH & SAFETY CODE § 199.46(h) (the AIDS virus is transmitted primarily through sexual contact, sharing of hypodermic needles, contaminated blood transfusions, and during pregnancy to the fetus).

38. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). *See* Winston v. Lee, 470 U.S. 753, 758-63 (1985) (a compelling need must be shown for the bodily intrusion where the health of the person may be endangered); Schmerber v. California, 384 U.S. 757, 767 ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State"); Doe v. Roe, 139 Misc. 2d 209, ——, 526 N.Y.S.2d 718, 722 (1988) (a compelling state need must be shown for a mandatory AIDS test when mental health is endangered). *See also* CAL. PENAL CODE § 1096 (a defendant in a criminal action is innocent until proven otherwise).

39. People v. Davis, 68 Cal.2d 481, 483, 439 P.2d 651, 652, 67 Cal. Rptr. 547, 548 (1968) (setting forth premises of statutory construction).

40. *See supra* note 24 and accompanying text (discussing the ambiguities and comparing other AIDS testing statutes).

41. *See* CAL. HEALTH & SAFETY CODE §§ 199.98(b) (requiring medically accepted tests), 199.96 (requiring two samples of blood to be taken), 199.97 (requiring two samples of blood to be taken).

decide which tests are to be administered and who is to make the disclosures of the results;[42] therefore, a court interpreting this language may conclude that the court which orders the test has the responsibility of safeguarding the tested party's rights.[43] The ordering court would then be required to determine at the petition hearing whether, in the totality of the circumstances, the test is justified. That court would then be required to determine what type of test is to be administered and to whom the necessary disclosures are to be made. This active role of the court would ensure some safeguarding of the tested party's fourth and fourteenth amendment rights.

In summary, without proper safeguards, Proposition 96 may violate the California and federal constitutions. The courts will have to weigh a defendant's rights against the state interest in obtaining nonconsensual information on AIDS. The state interest in containing the AIDS virus must necessitate such testing and disclosure procedures. In addition, a court applying the rules of statutory construction may interpret the vagueness in the statute as permitting an active role by a court, thus ensuring a minimally intrusive procedure. Under such an interpretation, Proposition 96 may provide the proper safeguards. The proportion of the spread of the AIDS virus and the public uproar for measures to contain the deadly disease may warrant such an intrusion of an individual's rights.

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42. *See id.* §§ 199.96 (requiring two specimens to be provided for testing), 199.97 (requiring two specimens to be provided for testing), 199.98(b) (requiring medically approved tests to be conducted on the blood specimens), 199.98(c) (requiring copies of positive test results to be sent to the State Department of Health Services), 199.98(d) (requiring copies of the test results to be sent to a minor's parents or guardian), 199.98(e) (allowing disclosures necessary for medical or psychological care or advice). Proposition 96 is more specific about the disclosure process in the custodial safety section. *See also* §§ 199.99(a) (allowing custodial personnel to disclose information about an inmates exposure to AIDS to the officer in charge of the facility), 199.99(c) (allowing the officer in charge of the facility to disclose to custodial personnel information about an inmates exposure), 199.99(d) (allowing disclosures necessary for medical or psychological care or advice), 199.99(e) (providing a misdemeanor sanction for willful disclosures of personal identifying information to any person who is not a peace officer or an employee of a federal, state, or local health agency except as authorized by a court order with the patient's consent).

43. *See* Kash Enterprises v. City of Los Angeles, 19 Cal. 3d 294, 305, 562 P.2d 1302, 1309, 138 Cal. Rptr. 53, 60 (1977) (legislation should be construed to preserve its constitutionality when reasonably possible).