

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Health Care Committee

BILL: SB 796

INTRODUCER: Senator Wilson

SUBJECT: HIV Infection/Testing of Inmates

DATE: March 3, 2006

REVISED: 03/08/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cannon</u>	<u>CJ</u>	<b>Favorable</b>
2.	<u>Munroe</u>	<u>Wilson</u>	<u>HE</u>	<b>Fav/2 amendments</b>
3.	<u></u>	<u></u>	<u>CA</u>	
4.	<u></u>	<u></u>	<u>JU</u>	
5.	<u></u>	<u></u>	<u>HA</u>	
6.	<u></u>	<u></u>	<u></u>	

## Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

### I. Summary:

This bill allows county and municipal governments, by majority vote, to adopt a program that requires HIV testing on prisoners. The bill further requires local detention facilities to notify the Department of Health and the county health department when an HIV positive prisoner is released and to provide certain transitional assistance to that prisoner. Conforming language adds HIV testing under these circumstances to the list of tests for which informed consent is not required.

The bill provides absolute sovereign immunity for death or injury arising from actions carried out by the state, its agencies, or subdivisions, and their employees in compliance with the provisions of the bill.

This bill substantially amends sections 951.27 and 381.004, Florida Statutes.

### II. Present Situation:

#### HIV/AIDS

AIDS is the acronym for acquired immune deficiency syndrome. It is a fatal disease caused by a virus, a tiny organism similar to the organisms that cause colds and flu. The virus that causes

AIDS is the human immunodeficiency virus, or HIV. HIV infection causes people to get AIDS by damaging their immune systems. The immune system is what defends the body against the many different organisms that can enter the body and cause sickness. Without the ability to resist disease, people with AIDS fall ill easily, get sick often, and have great difficulty recovering. People do not die from HIV infection directly. Rather, they die from the “opportunistic” infections and diseases they get because their immune system is not working properly.

### **HIV/AIDS In Florida**

Since testing and reporting began in 1981, through 2004, a cumulative total of 96,849 AIDS cases have been reported in Florida. This places Florida third in the nation for reported AIDS cases. In 2004 alone, 5,816 AIDS cases were reported here. Of the cumulative total, males account for 76 percent of the cases and females account for 24 percent.<sup>1</sup> The number of newly infected HIV cases dropped by 3 percent in 2004. During 2004, AIDS cases rose higher in Broward County (1,010) and Miami-Dade County (1,349) relative to the other areas in the state. Officials at the Florida Department of Health note that the increase in AIDS cases may be attributed in part to the large volume of publicly funded HIV testing that has occurred over the past three years.

Since HIV testing and reporting began in 1997 through 2004, a cumulative total of 33,489 HIV cases have been reported in Florida. In 2004 alone, 6,341 HIV cases were reported. Males accounted for 64 percent of the cumulative total while females accounted for 36 percent.<sup>2</sup>

A racial breakdown of these figures indicates that, while blacks account for 14 percent of the state population, blacks represent 48 percent of the total AIDS cases and 54 percent of the HIV cases.<sup>3</sup> While whites make up approximately 69 percent of the state population, they represent 36 percent of the AIDS cases and 28 percent of the HIV cases.<sup>4</sup> Hispanics account for 17 percent of the adult population and comprise the remaining 16 percent of the AIDS cases and 17 percent of the HIV cases.<sup>5</sup> The Haitian population is recorded as part of the black population for statistical purposes. The Haitian population accounted for 6,984 AIDS cases in the cumulative total and 2,170 cases in the 2004 total.<sup>6</sup>

### **HIV Testing in Florida Prisons**

The rate of HIV/AIDS is more prevalent in prisons and detention facilities than in the general population. The Department of Corrections reports that, of the total inmate population of 86,474 inmates, 3,396 or 3.5 percent have tested positive for the HIV virus. Of the inmates who have tested positive for HIV, 645 have been diagnosed with AIDS. This is often attributed to the fact that the inmates engage in high risk activities more frequently than the general population. Researchers say high incarceration rates increase risk behaviors associated with HIV by skewing

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<sup>1</sup> Florida Department of Health, Bureau of HIV/AIDS, data as of December 31, 2004.

<sup>2</sup> *Id.*

<sup>3</sup> Florida Department of Health, Bureau of HIV/AIDS – HIV/AIDS and Blacks, 2004.

<sup>4</sup> Florida Department of Health, Bureau of HIV/AIDS, data as of December 31, 2004.

<sup>5</sup> Florida Department of Health, Bureau of HIV/AIDS, HIV/AIDS Among Hispanics, Florida, 2004.

<sup>6</sup> Florida Department of Health, Bureau of HIV/AIDS – HIV/AIDS in Florida’s Haitian Population – 2004.

the ratio of women to men, worsening economic conditions and increasing the social capital of men who are not imprisoned.<sup>7</sup>

Beginning in July 2002, the Department of Corrections was required to test all inmates for HIV at least 60 days prior to their release. If the inmate is found to be HIV positive, the department is required to:

- Notify the Department of Health and the county health department in the county where the inmate intends to live;
- Provide counseling and transition assistance related to HIV; and
- Provide a 30-day supply of HIV/AIDS related medicine.<sup>8</sup>

Section 951.27, F.S., requires county and municipal detention facilities to have a written procedure concerning the testing for infectious diseases, including HIV. The procedure must be consistent with guidelines established by the Centers for Disease Control and Prevention and recommendations of the Correctional Medical Authority.

According to the Department of Health, 11 county health departments receive funding through the department's Bureau of HIV/AIDS to implement HIV counseling, testing, and referral services to the local county detention facilities. The programs focus on testing inmates early in their jail terms and then linking them with appropriate services upon their release. Other detention facilities provide voluntary testing programs through their county health department or community-based organizations, but do not receive funding from the bureau.

### **HIV Testing and Informed Consent**

Section 381.004(3), F.S., requires any person who orders an HIV test to obtain the informed consent of the person upon whom the test is being performed, with some exceptions. Under s. 381.004(3)(h), F.S., informed consent is not required:

- When testing for sexually transmissible diseases is required by state or federal law, or by rule, including HIV testing of persons convicted of prostitution or of procuring another to commit prostitution, HIV testing of inmates prior to their release from prison, testing for HIV by a medical examiner, and testing of pregnant women;
- For those exceptions provided for blood, plasma, organs, skin, semen, or other human tissue in state law;
- For the performance of an HIV-related test by licensed medical personnel in bona fide medical emergencies when the test results are necessary for medical diagnostic purposes to provide appropriate emergency care or treatment to the person being tested and the patient is unable to consent;
- For the performance of an HIV-related test by licensed medical personnel for medical diagnosis of acute illness where, in the opinion of the attending physician, obtaining informed consent would be detrimental to the patient, as supported by documentation in

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<sup>7</sup> "Links Between Prison and AIDS Affecting Blacks Inside and Out" Lynette Clemetson The New York Times August 6, 2004.

<sup>8</sup> Section 945.355, F.S.

- the medical record, and the test results are necessary for medical diagnostic purposes to provide appropriate care or treatment to the person being tested;
- When HIV testing is performed as part of an autopsy for which consent was obtained;
  - For the performance of an HIV test upon a defendant pursuant to the victim's request in a prosecution for any type of sexual battery where a blood sample is taken from the defendant voluntarily, pursuant to court order for any purpose, or pursuant to Florida law, and the results of any HIV test performed shall be disclosed solely to the victim and the defendant;
  - When an HIV test is mandated by court order;
  - For epidemiological research, for research consistent with institutional review boards created by federal law, or for the performance of an HIV-related test for the purpose of research, if the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher;
  - When human tissue is collected lawfully without the consent of the donor for corneal removal or enucleation of the eyes as authorized by law;
  - For the performance of an HIV test upon an individual who comes into contact with medical personnel in such a way that a significant exposure has occurred during the course of employment or within the scope of practice and where a blood sample is available that was taken from that individual voluntarily by medical personnel for other purposes;
  - For the performance of an HIV test upon an individual who comes into contact with medical personnel in such a way that a significant exposure has occurred during the course of employment or within the scope of practice of the medical personnel while the medical personnel provides emergency medical treatment to the individual; or who comes into contact with nonmedical personnel in such a way that a significant exposure has occurred while the nonmedical personnel provides emergency medical assistance during a medical emergency;
  - For the performance of an HIV test by the medical examiner or attending physician upon an individual who expired or could not be resuscitated while receiving emergency medical assistance or care and who was the source of a significant exposure to medical or nonmedical personnel providing such assistance or care;
  - For the performance of an HIV-related test medically indicated by licensed medical personnel for medical diagnosis of a hospitalized infant as necessary to provide appropriate care and treatment of the infant when, after a reasonable attempt, a parent cannot be contacted to provide consent;
  - For the performance of HIV testing conducted to monitor the clinical progress of a patient previously diagnosed to be HIV positive; or
  - For the performance of repeated HIV testing conducted to monitor possible conversion from a significant exposure.

Informed consent for HIV testing must be preceded by an explanation of the right to confidential treatment of information identifying the subject of the test and the results of the test as provided by law. Information must also be provided on the fact that a positive HIV test result will be reported to the county health department with sufficient information to identify the test subject and on the availability and location of sites at which anonymous testing is performed. Consent

need not be in writing if there is documentation in the medical record that the test has been explained and the consent has been obtained.

The person ordering the test or that person's designee must ensure that all reasonable efforts are made to notify the test subject of his or her test result. Notification of a person with a positive test result must include information on the availability of appropriate medical and support services, on the importance of notifying partners who may have been exposed, and on preventing transmission of HIV. Notification of a person with a negative test result must include, as appropriate, information on preventing the transmission of HIV. When testing occurs in a hospital emergency department, detention facility, or other facility and the test subject has been released before being notified of positive test results. Informing the county health department for that department to notify the test subject fulfills this responsibility.

### III. Effect of Proposed Changes:

**Section 1.** Amends s. 951.27, F.S., to authorize a local city or county government, by majority vote of the governing body, to institute a program to test the local jail inmates for HIV. Each inmate must be tested at least 30 days before release unless the facility knows that the inmate is HIV positive or unless within 120 days before the release date, the inmate has been tested and does not request retesting. A test on the inmate is not required if an inmate is released due to an emergency or unless a court order and the facility receives less than 30 days' notice of the release or the inmate is transferred to the Department of Corrections for incarceration.

The bill imposes several requirements on the detention facility before an HIV positive inmate is released. The facility must notify both the county health department of the county where the inmate plans to reside as well the Department of Health, of the inmate's release date and HIV status. The facility must also provide transitional assistance to the inmate that includes education on preventing HIV transmission and on the importance of receiving medical care and treatment. The assistance must also include an individualized written discharge plan that includes records of all lab and diagnostic test results, medication and treatment information, and referrals to and contacts with the county health department and local primary medical care services for the treatment of HIV infection that are available in the area where the inmate intends to reside.

The bill provides that, notwithstanding any statute providing for a waiver of sovereign immunity, the state, its agencies, or subdivisions, and their employees are not liable to any person for negligently causing any death or injuries that arise from the blood testing of inmates in compliance with s. 951.27, F.S.<sup>9</sup>

The requirements of this section, as amended in the bill, parallel the existing s. 945.355, F.S., which requires the Department of Corrections to test inmates prior to their release. One significant difference, however, is that the department must provide the HIV positive inmate

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<sup>9</sup> Article X, s. 13, of the State Constitution, authorized the Florida Legislature in 1868 to waive sovereign immunity by stating that, "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The doctrine of sovereign immunity prohibits lawsuits in state court against a state government, and its agencies and subdivisions without the government's consent. Section 768.28, F.S., provides that sovereign immunity for tort liability is waived for the state, and its agencies and subdivisions, but imposes a \$100,000 limit on the government's liability to a single person and for claims arising out of a single incident, the limit is \$200,000.

with a 30 day supply of HIV/AIDS-related medications that the inmate is taking at the time of release.

**Section 2.** Amends s. 381.004, F.S., relating to the confidentiality of HIV test results, to add HIV testing of inmates before their release from a local detention facility pursuant to s. 951.27, F.S., as an exception to the informed consent requirements for HIV tests.

**Section 3.** Provides an effective date of July 1, 2006.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

##### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, Subsection 19(f) of the Florida Constitution.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

Early detection and treatment of HIV-infected inmates can yield substantial health benefits for these inmates, including a reduction in the number of opportunistic infections and their attendant treatment costs, and potentially delaying the onset of AIDS and death.

##### **C. Government Sector Impact:**

Local detention facilities may conduct voluntary HIV counseling, testing, education, and social services under current law. Detention facilities that do not routinely test prisoners for HIV before their release but who opt to voluntarily do so under the requirements of the bill will incur costs.<sup>10</sup> The fiscal impact could be significant depending on the

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<sup>10</sup> Under current s. 951.27, F.S., local detention facilities must have a written procedure, which establishes conditions under which an inmate will be tested for infectious disease, including HIV under specified circumstances involving criminal transmission.

facilities' populations. The impact of meeting the transitional assistance requirements is unknown but could be significant.

When the Department of Health supplies detention facilities with testing kits, they use the rapid test kits. Those tests generally take from 20 – 40 minutes to get results. The kit costs approximately \$12 and if the test result is negative, no further action is required. If the result is reactive then a confirmatory test is required which requires an additional expenditure of approximately \$30. According to the Department of Health, 98 percent of tests are negative.

#### **VI. Technical Deficiencies:**

On page 2, line 15; the bill should refer to each “sentenced inmate.”

The proposed paragraph 951.27(2)(b), F.S., imposes several requirements on local detention facilities before an HIV positive inmate is released. It is unclear whether such requirements only apply to detention facilities that have opted for the voluntary HIV testing program provided in paragraph 951.27(2)(a), F.S., of the bill. If so, then the following amendment is recommended. On page 2, line 26, delete that line and insert “(b) Each county or municipal detention facility that elects to participate in the testing program authorized in paragraph (a) must comply with the requirements of this paragraph. If the county or municipal detention facility”.

#### **VII. Related Issues:**

The bill requires local detention facilities to perform HIV testing on each inmate who is to be released from the facility unless the facility knows that the inmate is HIV positive or unless the inmate has been tested for HIV and does not request retesting, or the inmate is released due to an emergency or a court order and the facility receives less than 30 days' notice of the release date, or if the inmate is transferred to the custody of the Department of Corrections. The bill, in effect, would require facilities whose local governing body have authorized HIV testing of jail inmates to do so on a mandatory basis. The bill requires such detention facilities to perform HIV testing on each inmate who is to be released from the facility with specified exceptions.





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## VIII. Summary of Amendments:

**Barcode 860106 by Health Care:**

The amendment narrows the requirements for mandatory HIV testing by local detention facilities to sentenced inmates.

**Barcode 170384 by Health Care:**

The amendment clarifies that requirements for HIV testing of inmates and transitional assistance to HIV positive inmates apply only to detention facilities that have elected to operate a mandatory HIV testing program under the bill.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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