

2006–2007 NATIONAL HEALTH LAW MOOT COURT COMPETITION*

Transcript of Record

Docket No. 06-1765

SUPREME COURT OF THE UNITED STATES

October Term, 2006

**State of New Amsterdam,
Petitioner,**

v.

**Roger Richards,
Respondent.**

SPONSORS:

Southern Illinois University School of Law
*Southern Illinois University School of Medicine,
Department of Medical Humanities*
American College of Legal Medicine
American College of Legal Medicine Foundation

*This problem was prepared by Professor Edward P. Richards, Harvey A. Peltier Professor of Law and Director of the Program in Law, Sciences and Public Health at Louisiana State University, Paul M. Hebert School of Law in Baton Rouge, Louisiana.

**IN THE DISTRICT COURT OF YORK COUNTY
STATE OF NEW AMSTERDAM**

State of New Amsterdam, Plaintiff)	
)	
v.)	Crim. No. 05-CR-84
)	
Roger Richards, Defendant)	
)	

OPINION AND ORDER

Weed, District Judge

Defendant Roger Richards moves to suppress the admission of the results of a test for sexually transmitted infections (STIs) as evidence in a criminal prosecution against him for violating New Amsterdam Code § 77-101-10 “Criminal exposure of another to HIV (human immunodeficiency virus).” Defendant Richards also moves to dismiss the charges on the ground that N.A.C. § 77-101-10(a) is unconstitutional under the United States Constitution.

This case presents two issues of first impression: 1) may the State use evidence gathered in a mandatory test ordered for public health purposes as evidence in a criminal prosecution without violating the Defendant’s Fourth and Fourteenth Amendment rights of bodily integrity and freedom from unreasonable searches and seizures; and 2) may the State criminalize intimate contact between consenting adults without violating an individual’s Fourteenth Amendment rights to privacy?

This Court concludes that the State violated Defendant’s constitutional rights when it ordered him tested for STIs without his permission, thus the test cannot be admitted in his subsequent criminal trial. This court also finds that New Amsterdam Code § 77-101-10(a) “Criminal exposure of another to HIV (human immunodeficiency virus)” is unconstitutional in that it interferes with the Defendant’s constitutionally protected right of privacy in intimate sexual relations.

Factual Background

In early 2004, the State of New Amsterdam, shocked by new data showing an increasing rate of HIV transmission in the state, especially among minority women, decided to end special treatment for HIV infection and apply traditional communicable disease control measures to HIV transmission. The new laws and administrative regulations require reporting of all positive HIV tests by name and social security number and empowers the Health

Department to investigate the intimate contacts of persons infected with HIV. N.A.C. § 18-202-100(a) (2004). Persons who have had intimate contact with persons with HIV, or who have engaged in other risky behavior, such as sharing intravenous drugs, are offered testing for HIV and STIs, and can be ordered to submit to the testing if they refuse. *Id.* § 18-202-100(b). This testing is ordered by the health officer in the jurisdiction who is empowered by the legislation to ask the sheriff to transport the person who refuses testing to a designated hospital where the specimens for testing will be obtained, by force if necessary. *Id.* The Health Department provides an internal administrative review of refusals of testing, which includes allowing the individual to be heard. *Id.* § 18-202-100(d). The person subject to testing may seek judicial review of the order to be tested, but there is no appointed counsel.

When the Health Department identifies an individual who has been exposed to HIV, the individual is asked to submit to STI testing. If the individual refuses testing, the Health Department may order specimens to be taken for involuntary testing. The individual is educated about the methods by which HIV is spread and how to protect him/herself from HIV infection. The individual is also asked to identify his/her sexual contacts. If the individual refuses to cooperate with the disease control investigation, the Health Department on occasion has requested a court order to force cooperation.

If the screening test for HIV is positive, a blood sample is drawn for a confirmatory test. If the confirmatory test is positive, the Health Department interviews and tests the named contacts, and offers HIV management and treatment options to the infected person. If the tests for syphilis or gonorrhea are positive, the individual is evaluated and treated as appropriate.

The purpose of this testing is to determine the prevalence and spread of HIV in the community, and to facilitate public health interventions to reduce the spread of HIV and the treatment of other STIs. If a person infected with HIV is determined to be engaged in unsafe practices after being notified that he/she is infected with HIV, the Health Department may issue administrative orders to the person requiring him/her to refrain from exposing others to HIV, and may seek a court order to enforce these orders. N.A.C. § 18-202-100(c) (2004).

Recognizing that public health efforts may not always be adequate to limit the spread of HIV, in 2004 the New Amsterdam legislature also revised the criminal law governing the transmission of HIV. This new law was based on a Tennessee statute, Tenn. Code. Ann. § 39-13-109, which defines the conduct that might expose another to HIV and provides for criminal sanctions for engaging in this behavior after individuals learn they have been infected with HIV.

By its plain language, the Tennessee statute is aimed at fraud in obtaining consent for intimate contact, in that it only applies if the partner is not warned about the defendant's HIV status. Thus HIV infected individuals may engage in unsafe conduct as long as their partner knows about the risk of HIV

transmission and accepts it by participating in the unsafe activity. In contrast, the purpose of the New Amsterdam legislation is to limit the spread of HIV. To achieve this objective, the affirmative defense provided by the Tennessee statute was removed. Under New Amsterdam Code § 77-101-10, there is no consent defense. Thus individuals are subject to prosecution if they are found to be engaging in unsafe practices after being notified that they are infected with HIV, even if their partner knew about the HIV infection and knowingly consented to the unsafe conduct.

Roger Richards was identified as a sexual contact of an HIV infected man. Pursuant to standard Health Department protocol, he was contacted by Sara Jones, a disease control investigator. He was asked to submit to STI testing and to identify his sexual contacts. Mr. Richards refused testing and refused to identify any sexual contacts. Ms. Jones referred the matter to the health officer, who issued an administrative order directing that Mr. Richards be tested. Mr. Richards requested and was granted administrative review by the Health Department, where he argued that involuntary STI testing is an unconstitutional invasion of privacy. The departmental review found that testing was justified and issued an order to the sheriff who took Mr. Richards to the designated hospital, where Mr. Richards allowed the samples to be withdrawn while continuing to voice his objections. This testing was done on June 20, 2005. Four days later, he was notified that he was HIV positive and that he was also positive for gonorrhea. Mr. Richards continued to refuse to name his sexual contacts, but accepted counseling for HIV prevention and treatment for gonorrhea.

Concerned that Mr. Richards would not identify his contacts, the Health Department conducted a search of its files for any information on Mr. Richards, including any individuals who had named him as a sexual contact in the past. On July 1, 2005, through cross-checking contact investigation records and tests ordered based on those investigations, the Department determined that Mr. Richards had been tested in the past using a false name. He was conclusively linked to a test done on January 13, 2005. At this testing, Mr. Richards (under his false name) was found to be positive for HIV, but negative for syphilis and gonorrhea. He had been notified of these results on January 18, 2005, and counseled about how to prevent the spread of HIV and the importance of engaging in safe sexual practices only. Since Mr. Richards was not linked to the false name until after he was tested under the court order, the results did not affect the decision to order the testing of Mr. Richards on June 20, 2005.

Based on Mr. Richards being found to have become infected with gonorrhea subsequent to being notified that he was positive for HIV, and his refusal to cooperate with the Health Department investigation of his sexual contacts, the Department was concerned about his continuing to expose other individuals to HIV. The Department contacted Sherie Garson, the local district attorney, to inquire about getting a court order requiring Mr. Richards to cooperate with the investigation of his contacts. D.A. Garson inquired as

to the significance of the positive test for gonorrhea after an earlier negative test. The Department indicated that because gonorrhea is spread through the same types of intimate contact as HIV, the change to a positive test after being informed of his HIV status is evidence that Mr. Richards was engaged in unsafe intimate contact as proscribed by § 77-101-10(a).

Rather than pursue the failure to cooperate charge, on her own initiative on August 2, 2005, the district attorney filed criminal charges against Mr. Richards for engaging in conduct which puts others at risk of HIV infection in violation of N.A.C. § 77-101-10(a).¹ Defendant's motion to suppress the testing results and to dismiss the criminal charges were filed on August 6, 2005.²

Analysis

Defendant Richards makes two motions. First, he moves to suppress the admission of the results of the involuntary June 20th STI test as an unconstitutional invasion of privacy and bodily integrity under the Fourteenth Amendment to the United States Constitution. Relatedly, he argues that even if the test was constitutionally administered, it was not conducted with a proper criminal probable cause warrant and thus is inadmissible in this proceeding under the Fourth Amendment to the United States Constitution. Second, Defendant also moves to dismiss the criminal charges altogether, arguing that § 77-101-10(a) is an unconstitutional invasion of his Fourteenth Amendment rights to privacy in consenting, private adult sexual relationships. The Court, having heard all parties' arguments and having considered the briefs filed in the case, finds both motions to have merit.

Subjecting the Defendant to Involuntary STI Testing and Using the Results in a Criminal Proceeding Against Him

Under the Fourth Amendment, as applied to states through the Due Process Clause of the Fourteenth Amendment, *see Wolf v. Colorado*, 338 U.S. 25 (1949), Mr. Richards has a fundamental right to privacy and bodily integrity that is infringed by involuntary medical testing. While conceding that it is not directly applicable to his case, because he allegedly knew his HIV status, Mr. Richards also argues that an individual should have the right to refuse the diagnosis of an illness, just as he has the right to refuse the treatment of an illness. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990). Mr. Richards further argues that in *Ferguson v. City of Charleston*, 532 U.S.

¹ Both the January 13th and June 20th test results would come into evidence as medical business records and their admission is not contested by Mr. Richards. The June 20th test results provide evidence of unsafe intimate contact, which meets the prima facie requirements of § 77-101-10(a). While Mr. Richards may attack the inference that subsequent infection with gonorrhea must necessarily involve unsafe intimate contact, that question is not before the court at this time.

² (Assume for purposes of this problem that there are no procedural questions about the initial blood testing order or whether Mr. Richards has preserved all issues for appeal. Only the constitutionality of the testing and use of its results, and the criminal statute itself, are at issue.)

67 (2001), the United States Supreme Court found that unconsented testing allegedly obtained for public health purposes, but also then used to threaten criminal prosecution, is not a valid exercise of the police power.

This right of bodily integrity and privacy must be balanced against the State's right to protect the public's health. The State has broad power to protect the public health, including the right to require individuals to submit to mandatory vaccinations, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and treatment for communicable diseases such as tuberculosis which threaten others, *In re Halko*, 54 Cal. Rptr. 661 (Cal. Ct. App. 1966). The State also has the power to order involuntary medical testing in criminal investigations with either a proper probable cause warrant or in exigent circumstances. *Schmerber v. California*, 384 U.S. 757 (1966). The State's power to require testing has been extended to ordering involuntary HIV testing. See *Syring v. Tucker*, 498 N.W.2d 370 (Wis. 1993) (approving an order requiring the defendant to undergo HIV testing after she bit the plaintiff and declared "I have AIDS").

These cases can be distinguished from Mr. Richards's situation. Mr. Richards was not tested pursuant to a probable cause warrant based on specific information that he was engaging in criminal behavior. The State argues that he was tested for a valid public health purpose: to reduce the spread of HIV and related STIs. The State further argues that the testing was conducted with proper administrative process, which does not require a probable cause warrant. The State asserts that even if the test results might also be used in a criminal proceeding, this does not require the State to use criminal due process to order the testing. See *New York v. Burger*, 482 U.S. 691 (1987). As such, the State contends, testing was a valid exercise of its police power. Forcing Mr. Richards to submit to the testing was more efficient than quarantining him for the duration of the infection, which is the traditional response when individuals refuse testing for communicable diseases.

The Court finds the State's arguments unpersuasive. Unlike tuberculosis and vaccine preventable diseases such as measles and smallpox, HIV is not spread to others through casual contact. It only poses a threat to persons who are in intimate contact with defendant. Such contact assumes improper conduct, perhaps even illegal conduct, by Mr. Richards. If there is evidence of such conduct, the State can order testing based on a proper probable cause warrant, but it cannot use administrative process to deprive Mr. Richards of his Fourth Amendment rights against unreasonable searches. While quarantine may be inefficient, it is an alternative to involuntary testing if the State can show that there is reason to believe that Mr. Richards poses a threat to others.

The State notes that at the time the June 20th test was performed, the Health Department had no information to indicate that Mr. Richards already knew he was HIV positive. Therefore, the Department did not know that STI testing might provide evidence of criminal conduct. The Health Department's intent was to determine if Mr. Richards was infected with HIV so that he

could be counseled about how to prevent its spread, and so his sexual contacts could be warned that they had been exposed to HIV. He would also be referred for medical evaluation and treatment of his HIV infection. If Mr. Richards were found to be infected with syphilis or gonorrhea, he would be treated and rendered non-infectious.

Once again, this Court finds the State's argument unpersuasive. The Health Department brought Mr. Richards to the attention of the district attorney, and provided the district attorney the information about his previous HIV testing and the results of the June 20th test indicating that he might be engaging in unsafe behavior. Whatever the Health Department's intent when ordering the testing of Mr. Richards, the result was criminal prosecution. This undermines any public health rationale for the STI testing.

Finally, the Court rejects the use of *New York v. Burger* as an analogous case because it depended on the defendant's implied consent to the search as part of the permitting process to operate a heavily regulated business. *See Burger*, 482 U.S. at 701 (finding warrantless search reasonable in context of a "closely regulated" industry where owners and operators have reduced expectations of privacy). There is no similar context in this case.

This Court rules that the police power to order mandatory testing for sexually transmitted diseases which do not pose a risk to the public through casual contact violates Mr. Richards's Fourteenth Amendment rights to privacy and bodily integrity. The police power does not extend to situations where the individual does not pose a threat to others unless engaging in illegal or knowingly improper behavior. If the State has evidence of such behavior, it may take actions to prevent Mr. Richards from infecting others. Even if the testing itself does not violate Mr. Richards's Fourteenth Amendment rights to privacy and bodily integrity, we further hold that the June 20th test cannot be used as evidence in a criminal trial because it was not done pursuant to a proper probable cause warrant as required by the Fourth Amendment.

Criminalizing Engaging in Intimate Sexual Contact with Known Risk of Transmitting HIV

Mr. Richards next attacks the State's novel statute criminalizing unsafe sexual practices between persons, at least one of whom is HIV infected.³ Unlike other state statutes on this point, the New Amsterdam statute does not allow the knowing consent of the uninfected partner as a defense. The State argues that the statute's objective is to prevent the transmission of HIV, unlike other States' laws which focus on fraud in the sexual consent rather than disease transmission. The State further argues that this is consistent with

³ Although the results of the June 20th test have been suppressed, the State may have other evidence on which to base its prosecution of the Defendant. For that reason, this Court will address the constitutional challenge Defendant mounts to § 77-101-10's criminalization of exposure of another to HIV through intimate sexual contact between consenting adults.

criminal law in general, which seeks to prevent violent or harmful contact without regard to whether the parties consent to the contact.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the United States Supreme Court recognized a Fourteenth Amendment interest in sexual privacy independent of both marital and reproductive rights. This “right to liberty under the Due Process Clause gives [individuals] the full right to engage in their conduct without intervention of the government.” *Lawrence*, 539 U.S. at 578. The State argues it had a legitimate reason to justify its actions, namely its public health concerns. However, *Lawrence*, by specifically overruling the Court’s prior decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), also implicitly overrules *Bowers*’s reference to public health justifications for laws criminalizing sexual conduct between consenting adults. See *Lawrence*, 539 U.S. at 577-78. The State is unable to advance a legitimate reason to justify its law criminalizing otherwise consensual, private adult sexual conduct, and therefore § 77-101-10 violates the Defendant’s rights under the Fourteenth Amendment.

This Court recognizes the broad powers of the State to protect against the spread of communicable diseases, and the power of the legislature to use criminal laws as well as civil process to protect the citizens of the State. We find, however, that this statute is an impermissible interference with Mr. Richards’s sexual privacy.

Conclusion

This Court holds that the health department did not have a compelling reason to test Mr. Richards for HIV and other STIs over his objection, thus this testing unconstitutionally infringed Mr. Richards’s bodily integrity and right to autonomy under the Fourteenth Amendment to the United States Constitution. This alone makes the test results inadmissible in the criminal proceeding against Mr. Richards. Had there been a valid public health purpose in testing Mr. Richards, unless this testing was done pursuant to a criminal due process search warrant issued by a judge and based on probable cause to believe that Mr. Richards committed a crime as required by the Fourth Amendment, this testing could not be admitted in a criminal proceeding. This Court further holds that New Amsterdam Code § 77-101-10(a) violates Mr. Richards’s rights to privacy under the Fourteenth Amendment by criminalizing consenting, private adult sexual conduct. Therefore, the State may not consistent with the United States Constitution prosecute Mr. Richards and the charges are hereby dismissed.

IT IS SO ORDERED

Date: August 22, 2005.

/S/ Yolande Weed

Honorable Yolande Weed

Entered: September 2, 2005

Supreme Court of New Amsterdam

Case No. 06-0923

State of New Amsterdam,
Appellant

v.

Roger Richards,
Appellee

Runkle, Chief Justice, wrote the Opinion of the Court, joined by Dautrive, Gonzales, Olsen, Stern. Boyd, Associate Justice, dissented and filed an opinion in which Gold, James and Olmos joined.

Runkle, Chief Justice. This is an appeal from the District Court for the County of York, which held:

- 1) Involuntary HIV and STI testing is an unconstitutional interference with sexual privacy and individual autonomy under the Fourteenth Amendment to the United States Constitution and evidence obtained in administrative proceedings without a criminal due process warrant is not admissible in subsequent criminal proceedings under the Fourth Amendment; and
- 2) New Amsterdam Code § 77-101-10, which criminalizes exposing another to HIV, is an unconstitutional intrusion into defendant's right to privacy in intimate sexual relations under the Fourteenth Amendment.

This Court hears this direct appeal from the Superior Court under New Amsterdam Code § 02-200-40(a) (1998). This section allows New Amsterdam's Supreme Court to hear directly any case of first impression that involves novel issues of state or federal constitutional law for which the lower courts need direction to ensure uniform application of the law. Further, New Amsterdam Code § 02-200-42 permits the State in a criminal action to appeal any "order or judgment the substantive effect of which results in dismissing a charge; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence."

For the reasons discussed below, we uphold the district court's ruling.

Facts

The facts of this case are set out in the lower court's opinion and will be briefly reviewed here. The New Amsterdam Health Department identified Mr. Richards when he was named as a sexual contact to an HIV infected person. The Health Department asked Mr. Richards to submit to HIV and related STI testing, and Mr. Richards refused. Unknown to the Department at the time, Mr. Richards already knew he was HIV positive and refused the new testing from a well founded fear of prosecution under New Amsterdam Code § 77-101-10(a) if he were found positive for an STI that could be used as evidence of unsafe intimate contact. The Health Department issued an administrative order for testing and Mr. Richards was tested pursuant to that order on June 20, 2005. Mr. Richards also refused to identify his intimate contacts. When the Health Department found that Mr. Richards had previously tested positive for HIV on January 13, 2005, it asked the district attorney to request a court order forcing Mr. Richards to cooperate with the investigation. Rather than seeking a court order requiring Mr. Richards to cooperate with the Health Department investigation of his contacts, the district attorney brought criminal charges against Mr. Richards for exposing another person to HIV. Among the evidence relied upon was the June 20th STI test.

Analysis

1. Involuntary STI Testing and Use of Test Results in Criminal Proceeding

The June 20th testing poses two inter-related issues. As an issue of first impression, may the State order involuntary testing for a communicable disease which is not spread by casual contact, in the absence of other factors such as an arrest for prostitution or sexual assault? Second, can testing performed under administrative authority, without a criminal due process warrant, be admitted in a criminal trial? The first question raises issues of Fourteenth Amendment rights to privacy and bodily integrity and the second Fourth Amendment issues regarding unreasonable searches and seizures.

This Court recognizes the importance of bodily integrity and right of an individual to control their person. *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92, 93 (1914). This case is further complicated by the nature of the test results—a diagnosis of an incurable, ultimately fatal disease. This Court agrees with the district court's holding that mandatory testing is not appropriate for diseases which are not spread by casual contact, but are only spread by the affirmative action of the infected person. Until there is evidence that the infected person is putting others at risk, such testing is an unconstitutional invasion of privacy and autonomy.

Even if such testing were constitutional under different facts than in this case, such as if there was evidence that Mr. Richards was endangering

others, testing under an administrative order cannot be used as a subterfuge to deny Mr. Richards his Fourth Amendment protection against unreasonable searches. Since there is a well founded risk of criminal prosecution, such testing cannot be done without a warrant that meets Fourth Amendment standards for criminal prosecution, even if the State's purpose of the testing is clearly public health prevention and not criminal prosecution. As demonstrated in this case, the intent of the Health Department does not bind the district attorney.

2. Constitutionality of § 77-101-10(a)

The district court additionally concluded that the State could not consistent with the Fourteenth Amendment prosecute Mr. Richards for engaging in sexual relations knowing that he was HIV positive. It should be noted that nowhere in the record is there any evidence Mr. Richards actually infected a sexual partner with HIV or any other STI. The State was prosecuting him solely for having engaged in sexual relations as an HIV positive man, a fact known to Mr. Richards having received a positive drug test on January 13, 2005.

New Amsterdam Code § 77-101-10 is based on Tenn. Code. Ann. § 39-13-109, which was upheld in *State v. Bonds*, 189 S.W.3d 249 (Tenn. Ct. App. 2005) on September 22, 2005, after the district court ruling in this case. *Bonds* is important to understanding § 77-101-10(a) because our legislature looked explicitly to the Tennessee statute and legislative intent. However, the underlying purposes of the statutes are fundamentally different, and this goes to the heart of our problems with the New Amsterdam statute.

The purpose of the Tennessee statute, and all the similar statutes we have been able to find, is to criminalize fraud in intimate relationships. It criminalizes having an intimate relationship with a partner and failing to tell that partner about the risk of HIV transmission posed by the infected person's HIV status. It is an affirmative defense if the defendant can prove that the partner was aware of the risk of HIV infection and accepted it, with or without taking appropriate precautions to prevent the spread of the disease. In contrast, the New Amsterdam version eliminates the affirmative defense of consent. This changes the purpose of the statute to preventing the spread of HIV, rather than preventing fraud in intimate relationships. While this is an important objective, it is fraught with constitutional perils.

We believe that existing United States Supreme Court precedent without question protects the reproductive choices of heterosexual couples, especially married couples, and that these choices include accepting the risk of HIV transmission. More fundamentally, we believe that *Lawrence v. Texas*, 539 U.S. 558 (2003), establishes a general right of sexual privacy. Through the Court's overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), it could be argued that sexual privacy was elevated to a fundamental right. See generally Matthew Coles, *Lawrence v. Texas & The Refinement of Substantive Due*

Process, 16 Stan. L. & Pol’y Rev. 23 (2005). We don’t believe it necessary to decide whether it is a fundamental right, because we agree with the district court that the State has not articulated a legitimate reason to justify its adoption of a statute criminalizing sexual intimacy where one partner is HIV positive, without an exception for consent. By preventing persons with HIV to freely engage in the sexual activities of their choice, as long as both partners are competent, consenting adults, the State impermissibly interferes with the protected right of sexual privacy.

Alternatively, we think § 77-101-10(a) raises serious equal protection concerns if we were not to strike it on privacy grounds. *Lawrence* was decided on substantive due process grounds, the Supreme Court declining to address a lurking equal protection issue. *Lawrence*, 539 U.S. at 575. While § 77-101-10(a) as written is neutral as to the sexual preferences of the parties, this Court believes that United States Supreme Court precedent implies that the statute must exclude sexual relations with the aim of reproduction, which, by necessity, also acts as an exclusion for heterosexual couples. *See Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). The statute thus acts to single out and criminalize private homosexual activity. This would deny Mr. Richards the equal protection of the law, providing an additional ground for declaring § 77-101-10(a) unconstitutional. We don’t find it necessary to reach this issue only because of our decision on the privacy claim.

Conclusion

The district court properly suppressed the results of the June 20th blood test as obtained in violation of the Appellee’s Fourth and Fourteenth Amendment rights. The district court also properly dismissed the criminal charges pending against the Appellee under § 77-101-10(a) because the statute itself is unconstitutional under the Fourteenth Amendment.

IT IS SO ORDERED

Supreme Court of New Amsterdam

Mary Runkle, Chief Judge
Fred Gonzales, Associate Justice
Murry Olsen, Associate Justice
Jane Dautrive, Associate Justice
Sam Stern, Associate Justice

DATED: 15 June 2006

Supreme Court of New Amsterdam

Case No. 06-0923

State of New Amsterdam,
Appellant

v.

Roger Richards,
Appellee

Dissenting Opinion

We respectfully dissent from both conclusions reached by the majority opinion. We find that there is a rational relationship between mandatory STI testing and the control of HIV infection, that test results obtained as part of a proper public health inquiry may be admitted in evidence in a criminal proceeding that arises from the same facts that are subject to public health regulation, and we believe that New Amsterdam Code § 77-101-10 is a constitutional exercise of the State's powers to use the criminal law to punish behavior that harms society.

1. Involuntary HIV Testing

The question of first impression for this Court is whether the State of New Amsterdam may order involuntary testing for disease control purposes rather than giving the potentially infected person the option of remaining in quarantine rather than being tested, and whether such an order prevents the results of the tests to be used in subsequent criminal proceedings. We would find that it may order such testing and may use the results in criminal proceedings.

States have broad powers to protect the public health. At times in the past, these powers have included closing off major cities to prevent the spread of disease, *Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana*, 186 U.S. 380 (1902), the destruction of property, *Surocco v. Geary*, 3 Cal. 69 (Cal. 1853), and infringements of personal liberty, including mandatory vaccination, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). Subsequent to *Jacobson*, all state courts have upheld laws that allow the isolation and quarantine of persons who are potentially infected with tuberculosis until they can prove, through medical testing, that they are not infectious and thus pose no risk to the public. *See In re Halko*,

54 Cal. Rptr. 661 (Cal. Ct. App. 1966). There is also a line of cases that involved the jailing of prostitutes until they submit to gonorrhea testing. *See Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973). Involuntary testing is also well known in the criminal law context, including involuntary testing for HIV. In civil law, involuntary testing is routinely ordered in paternity determinations. *See Matter of M.A.H.*, 855 P.2d 1066, 1993 OK 92 (Okla. 1993).

The absence of cases reviewing the legality of involuntary testing for communicable diseases outside of testing incident to arrest tells us less about the state of the law than about the nature of public health practice. Public health authorities traditionally used their powers of isolation and quarantine to force compliance with testing orders: few, if any, individuals chose to resist testing when it was their key to freedom from quarantine. While the State arguably could employ the same strategy today, using quarantine to enforce testing orders is inefficient, wasting both State resources and putting the quarantined person at greater risk than that posed by testing because quarantine will often be carried out in correctional facilities for lack of other venues. Modern medical testing, such as used in this case, is minimally invasive and can be carried out quickly.

Mr. Richards argues that involuntary testing for STIs violates his right of privacy and right of bodily integrity. When done by the Health Department for disease control purposes, he argues and the majority agrees, such testing does not meet criminal law standards because it is not based on a criminal due process warrant, issued based on specific probable cause that a crime has been committed and that Mr. Richards was the perpetrator. The State correctly responds that since the test was ordered for an administrative purpose—communicable disease control—it need only meet the standards for administrative searches. *See See v. City of Seattle*, 387 U.S. 541 (1967).

We would find that testing for STIs is minimally invasive and is rationally related to the state's interest in preventing the spread of STIs. *See People v. Adams*, 597 N.E.2d 574 (Ill. 1992). Requiring the State to keep a person suspected of an STI infection in indefinite quarantine as an alternative to testing would be a poor use of State resources. More fundamentally, since quarantine is almost never justified in STI control, forcing the State to use quarantine on the mere suspicion of STI infection provides more constitutional problems than does mandatory testing.

The majority accepts the argument that even if such testing might be allowed in a pure administrative proceeding, New Amsterdam is using the Health Department STI testing as a thinly veiled subterfuge to collect evidence for criminal prosecutions without affording proper Fourth Amendment protections. We agree with the State's argument that *New York v. Burger*, 482 U.S. 691 (1987), is instructive on this issue, and believe that evidence gathered through proper administrative process for legitimate administrative purposes

is properly in the hands of the State and can be used for related criminal prosecutions. The test is not whether there is any chance that the evidence will be used in a criminal proceeding, but whether the administrative justification for conducting the search is legitimate and the evidence collected is that which is justified by the regulatory process. Thus *Burger* allowed the use of evidence of criminal conduct collected by an administrative search because the subject of the administrative search—evidence of stolen automobile parts—was the same as the evidence for the criminal prosecution. *See Burger*, 482 U.S. at 712-14, 716.

We would therefore find that Mr. Richards's STI status was legitimate public health information, gathered with a proper administrative process. Its subsequent use in a criminal proceeding against Mr. Richards does not render its collection by public health authorities unconstitutional. *Cf. State v. Stark*, 832 P.2d 109 (Wash. Ct. App. 1992) (concluding that a prosecutor may file criminal charges based on HIV test results provided by local health officer who was seeking only civil enforcement).

2. Criminal Exposure of Another to HIV

The gravamen of the majority opinion is that an individual has a constitutional right to consent to be infected with a deadly, incurable infectious disease, for the purpose of sexual convenience. This case does not involve the right to reproduction, nor do we believe that every law governing sexual privacy need meet the test of reproductive freedom. Rather, only those that actually implicate the right to reproduction need meet that test. This law does not prevent Mr. Richards from having sexual relations with any willing person. This law does require Mr. Richards to refrain from recklessly endangering the life of his partners, a requirement that can be easily met by commonsense precautions as he was counseled by the Health Department.

We question whether *Lawrence* requires any sort of heightened scrutiny of claims such as Mr. Richards, but even if it does recognize a right of sexual privacy that extends to all couples, we think the State has met its burden to show a legitimate interest in this case. *Lawrence* does not bar all regulation of private sexual activity. We doubt even that the majority would find that *Lawrence* would bar a law against sadomasochist practices that could lead to death, even if this was desired by both partners. In this case, infection with HIV not only harms the individual, a valid concern of the criminal law, but also harms society through depleting the limited resources available to treat HIV. This is a compelling rationale that outweighs the unlimited right to engage in sexual practices without regard to their consequences.

We are reluctant to interfere with the legislature's determination that protecting the public against the spread of HIV justifies limited restrictions on sexual privacy outside the marital relationship, where there is no issue of reproductive rights. We believe that the State has not just a legitimate but

a compelling interest in controlling the spread of HIV. Since this law does not bar but merely imposes commonsense restrictions on sexual activity, we would defer to the legislature and find this law constitutional.⁴

Conclusion

For the foregoing reasons, we hereby DISSENT.

Donald James, Associate Justice
Jorge Olmos, Associate Justice
Susan Boyd, Associate Justice
Alexander Gold, Associate Justice

⁴ The majority opinion suggests that there is an alternative equal protection basis for striking down § 77-101-10(a). We disagree with the majority's reading of the statute as creating an equal protection problem, but because the Respondent did not clearly raise that issue in the court below, we do not believe it necessary to address the issue.

Docket No. 06-1765

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2006**

**State of New Amsterdam,
Petitioner,**

v.

**Roger Richards,
Respondent**

ORDER GRANTING CERTIORARI

Upon the Petition for Certiorari the Court hereby **GRANTS** the petition as to the following issues:

1. Whether a state may under the Fourth and Fourteenth Amendments to the United States Constitution involuntarily test an individual for sexually transmitted infections and use the results in a subsequent criminal prosecution; and
2. Whether New Amsterdam Code § 77-101-10(a) violates the Fourteenth Amendment to the United States Constitution by making intimate contact between two individuals, one of whom knows he is infected with HIV, a criminal offense.

IT IS SO ORDERED

Date: July 20, 2006

New Amsterdam Code**Title 77.** Criminal Offenses**Chapter 101.** Offenses Against Person (Refs & Annos)**Part 1.** Assaultive Offenses**§ 77-101-10. Criminal exposure of another to HIV (human immunodeficiency virus)**

- (a) A person commits the offense of criminal exposure of another to human immunodeficiency virus (HIV) when, knowing that such person is infected with HIV, such person knowingly:
 - (1) Engages in intimate contact with another;
 - (2) Transfers, donates, or provides blood, tissue, semen, organs, or other potentially infectious body fluids or parts for transfusion, transplantation, insemination, or other administration to another in any manner that presents a significant risk of HIV transmission; or
 - (3) Dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia.
- (b) As used in this section:
 - (1) “HIV” means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome;
 - (2) “Intimate contact with another” means the exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV transmission; and
 - (3) “Intravenous or intramuscular drug paraphernalia” means any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.
- (c) Nothing in this section shall be construed to require the actual transmission of HIV in order for a person to have committed the offense of criminal exposure of another to HIV.
- (d) Criminal exposure of another to HIV is a Class C felony.

Effective date: September 1, 2004