



**TESTIMONY SUBMITTED BY  
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AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA  
TO  
HOUSE JUDICIARY COMMITTEE  
HOUSE BILL 265  
STATE CAPITOL, HARRISBURG  
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Good morning, Chairman Caltagirone and members of the committee. Thank you for the opportunity to submit testimony on House Bill 265, legislation to allow the forced HIV testing of suspects in criminal cases. Founded in 1920, the American Civil Liberties Union is one of the nation's oldest civil rights organizations, and ACLU activity in Pennsylvania dates to the 1930s. Approximately half a million Americans are members of the ACLU, and I am here today on behalf of the 16,000 members of the ACLU of Pennsylvania.

When considering the issues at hand, it's healthy to take the time to remember that all of us here today, regardless of where we stand on HB 265, share the common goals of stopping the spread of HIV and helping sexual assault survivors. The question we are left with is, how do we make that happen? What policies can the commonwealth implement and what policies has the commonwealth already implemented to ensure that HIV is not spread as a result of sexual assault and that survivors are aided in their recovery?

House Bill 265 is not the answer. HB 265 requires a court to order that an HIV test be performed on a suspect in sexual assault cases, upon the request of the district attorney, in consultation with the survivor. The court must issue the order within 48 hours of the defendant being held for court. This legislation is symbolic and would not aid sexual assault survivors. In fact, it may even harm survivors in that it gives

them a false sense of security and implies that a survivor can wait until after an arrest to address healthcare issues related to the assault.

When a person has potentially been exposed to HIV, whether it is a result of a sexual assault, in the healthcare industry, or in other situations, the person must make immediate decisions about her care. She has approximately a three day window to begin taking post-exposure drugs. The Centers for Disease Control and Prevention (CDC) recommends that a person should begin taking nonoccupational postexposure prophylaxis (nPEP), a drug treatment that can stop HIV transmission, within 72 hours after possible exposure. In fact, 72 hours is the maximum recommended time frame for starting the drugs. Ideally, a person begins the regimen within 2-36 hours of the possible exposure.

A defendant in a criminal case typically has his first preliminary hearing within 7 to 10 days of arrest. Often, the defendant is not held for court at this first hearing, as prosecutors often ask for a continuance in order to pull together the evidence to prove probable cause and, thus, to continue to hold the defendant for a trial. Even if the defendant is held for court at the first hearing, the survivor is now well beyond the window when she must begin using the post-exposure drug regimen.

There are two other problems with HB 265 that render it useless for survivors. The first is the possibility that the police arrested the wrong person. According to the Innocence Project, primary suspects have been pursued and only cleared through DNA testing prior to conviction in tens of thousands of cases in the last 20 years.<sup>1</sup> 245 people have been exonerated through DNA testing after conviction, and many of

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<sup>1</sup> The Innocence Project. *Facts on post-conviction DNA exonerations*. Retrieved December 8, 2009, from <http://www.innocenceproject.org/Content/351.php>.

these cases, including cases in Pennsylvania, have involved sexual assault. Forcing an HIV test on the wrong person will not help a survivor of sexual assault.

Second, a person who has recently contracted HIV will test negative for it- a “false negative”- for at least six weeks and possibly for as long as six months. Research indicates that the person’s viral load- the amount of HIV in the bloodstream- during this period is very high and that possibly as much as 50 percent of HIV transmission occurs during this period after initial infection. In other words, at the same time that a person is susceptible to passing on HIV, he is also testing negative for it. Thus, even if a suspect is arrested and tested, those test results may provide misleading information to the survivor of sexual assault – with potentially life-threatening consequences if she delays nPEP in reliance on a falsely-negative test.

Pennsylvania law already ensures that sexual assault survivors receive the assistance they need. Act 148 of 1990, the Confidentiality of HIV-Related Information Act, provides sexual assault survivors with access to HIV testing, pre- and post-test counseling, and the nPEP drug regimen, if necessary.

Healthcare professionals recognize that a sexual assault survivor cannot put her own care on hold to wait for a suspect to be arrested and tested. The CDC recommends that healthcare providers discuss with sexual assault survivors the limitations and benefits of the nPEP drug regimen and offer a 3-7 day supply, if necessary. If a survivor thinks it is possible she contracted HIV from a perpetrator, the CDC also recommends testing for survivors at the initial examination and after six weeks, 3 months, and 6 months.<sup>2</sup> The World Health Organization also recommends that sexual

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<sup>2</sup> National Sexual Violence Resource Center. (2008) *Sexual Violence and HIV: A Technical Assistance Guide for Victim Service Providers*. Available at

assault victims initiate the nPEP regimen as soon as possible after an assault.  
Pennsylvania law should follow these respected recommendations.

The ACLU of Pennsylvania opposes mandatory HIV testing. The best care occurs and privacy rights are respected when a person agrees to be tested through written informed consent with pre- and post-test counseling. HIV is a disease that requires lifelong care. A patient with HIV needs to have a trusting relationship with his or her healthcare provider. That trust is lost when a patient is forced to take an HIV test.

Mandatory HIV testing in sexual assault cases also comes with significant privacy concerns. As discussed previously, the commonwealth- on behalf of a sexual assault survivor- has little medical interest or need to force a suspect to take an HIV test. In addition, the results of the test cannot and should not be used as criminal evidence. Thus, HB 265 presents 4<sup>th</sup> Amendment, search-and-seizure problems.

While the ACLU of Pennsylvania opposes HB 265, medically-accurate policies are already in place to ensure that sexual assault survivors receive the care they need.  
Chairman Caltagirone, thank you for the opportunity to testify today.