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## **Brock v. State: The AIDS Virus as a Deadly Weapon, 24 J. Marshall L. Rev. 677 (1991)**

Timothy P. Martin

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## CASENOTE

### *BROCK v. STATE*\*: THE AIDS VIRUS AS A DEADLY WEAPON

Equipped with ineffective criminal statutes<sup>1</sup>, states are powerless to prosecute the growing number of cases involving attempted transmission of the AIDS virus.<sup>2</sup> Alabama is one such state which has few criminal statutory alternatives for the felony prosecution of defendants who intentionally attempt to transmit this deadly dis-

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\* 555 So. 2d 285 (Ala. Crim. App. 1989).

1. See Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L. J. 1017, 1038-57 (1989) (discussing the inadequacy of applying general criminal law theory in cases involving alleged transmission of AIDS virus).

2. The outbreak of Acquired Immune Deficiency Syndrome ("AIDS") has generated major challenges to our systems of government and law. Leonard, *The Legal Challenge of AIDS*, 12 NOVA L. J. 961, 961 (1988). The medical community first reported AIDS in 1981 in a report issued by the Centers for Disease Control ("CDC"). M. CLOSEN, D. HERMAN, P. HORNE, S. ISAACMAN, R. JARVIS, A. LEONARD, R. RIVERA, M. SCHERZER, G. SCHULTZ & M. WOJCIK, AIDS: CASES AND MATERIALS 47-48 (1989) [hereinafter M. CLOSEN]. For a discussion on the various theories regarding the transmission of AIDS, see M. CLOSEN, *infra* notes 62-66.

AIDS is spreading rapidly. Currently, the CDC estimates that the AIDS virus infects over one million persons in the United States alone. Centers for Disease Control, *Human Immunodeficiency Virus Infection in the United States*, 36 MORBIDITY AND MORTALITY WEEKLY REP. S-6 & S-40 (Supp. 6-40) (1987). Medical researchers have separated the AIDS virus into three progressive stages of infection. Stauter, *United States v. Moore: AIDS and the Criminal Law, The Witch Hunt Begins*, 22 AKRON L. REV. 503, 507 (1989). The three stages include:

1) HIV-Antibody Positive — Condition where persons are noted to have the HIV antibody in their blood but have no symptoms associated with AIDS. *Id.* Having the HIV antibody does not mean that a person is contagious. *Id.* In fact, most HIV antibody positive persons are not contagious. *Id.*

2) AIDS-Related Complex ("ARC") — Condition where persons have the HIV antibody in their blood and have some other illness; symptoms may include high sweats, fatigue, chronic diarrhea, swollen lymph glands, weight loss, or fever. *Id.* Persons in the ARC stage are contagious. *Id.*

3) AIDS — As defined by the CDC, AIDS is present when there is: a) an antibody to HIV in a person's blood; b) a disease process which demonstrates a defect in a person's cellular immunity system; and c) evidence of Kaposi's Sarcoma (type of cancer) or a serious opportunistic infection. *Id.* This final stage of HIV infection is nearly always fatal. Sinkfield & Houser, *AIDS and the Criminal Justice System*, 10 J. LEGAL MED. 103, 104 (1989). Diagnosis of the final stage is based on the existence of one or more opportunistic infections characteristic of the disease, together with the absence of any underlying causes of reduced resistance to such infections. *Id.*

ease.<sup>3</sup> The Alabama Criminal Code states that a person commits the crime of assault in the first degree if, with intent to cause serious injury to any person, he "causes serious physical injury to another person by means of a deadly weapon or dangerous instrument."<sup>4</sup> In *Brock v. State*,<sup>5</sup> the Alabama Criminal Court of Appeals decided that an AIDS infected defendant was not criminally responsible for assault in the first degree for attempting to transmit the AIDS virus through a bite.<sup>6</sup> In reversing the trial court's conviction, the court of appeals held that the evidence failed to establish that teeth are deadly weapons or dangerous instruments,<sup>7</sup> and that the requisite serious physical injury did not occur.<sup>8</sup> The court also held that the prosecution's evidence of intent to

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3. The Code of Alabama does not contain a specific section prohibiting the intentional transmission of contagious diseases. Thus, on a case-by-case basis the State must choose between a charge of attempted murder, first degree assault, or second degree assault to obtain a felony conviction. ALA. CODE § 13A-6-2-22 (1975 & Supp. 1990).

4. *Id.* § 13A-6-20. Under the Code of Alabama, a person commits assault in the first degree if:

With intent to cause serious physical injury to another person, the defendant causes serious physical injury to another person by means of a deadly weapon or dangerous instrument; or, with intent to disfigure another person seriously or permanently, or to destroy, amputate, or disable permanently a member or organ of his body, he causes such an injury to another person; or, under circumstances manifesting extreme indifference to the value of human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person.

*Id.*

5. 555 So. 2d 285 (Ala. Crim. App. 1989).

6. *Id.* at 288. This was a case of first impression for the Alabama courts. *Id.* at 286. Few courts have confronted cases involving the attempted criminal transmission of the AIDS virus, and each has arrived at a substantially different conclusion. See, e.g., *United States v. Kazenbach*, 824 F. 2d 649 (8th Cir. 1987) (AIDS-infected defendant convicted of assault for biting, scratching, spitting and punching correctional officers); *United States v. Moore*, 669 F. Supp. 289 (D. Minn. 1987) *aff'd*, 846 F.2d 1163 (8th Cir. 1988) (AIDS-infected inmate convicted of assault with a deadly weapon or dangerous instrument for biting two correctional officers); *Cooper v. State*, 539 So. 2d 508 (Fla. Dist. Ct. App. 1989) (AIDS-infected defendant convicted of sexual battery for assault on child); *State v. Sherhouse*, 536 So. 2d 1194 (Fla. Dist. Ct. App. 1989) (AIDS-infected prostitute acquitted of attempted murder for alleged transmission of AIDS virus through sexual intercourse); *State v. Haines*, 545 N.E.2d 834 (Ind. Ct. App. 1989) (AIDS-infected defendant convicted of attempted murder for biting, spitting, scratching, and throwing blood at police officers and paramedics).

7. *Brock*, 555 So. 2d at 287. A deadly weapon is defined as "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious physical injury." ALA. CODE § 13A-1-2 (ii) (1975 & Supp. 1990). A dangerous instrument is defined as "[a]ny instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is highly capable of causing death or serious physical injury." *Id.* § 13A-1-2 (12).

8. *Brock*, 555 So. 2d at 288. A serious physical injury is defined as "[p]hysical injury [impairment of physical condition or substantial pain] which creates a substantial risk of death, or which causes serious and protracted disfig-

transmit AIDS was insufficient.<sup>9</sup>

Adam Brock, the defendant, was a prisoner confined to the AIDS unit of the Limestone Correctional Facility.<sup>10</sup> On January 14, 1988, Officer Jim Gates and Officer Penelope Bell were assigned to the AIDS unit to conduct a contraband "shakedown."<sup>11</sup> During the shakedown, Officer Gates seized two ink pens as prohibited contraband from the defendant.<sup>12</sup> After Officer Gates seized the pens, the defendant started shouting and became very belligerent.<sup>13</sup> A struggle began when Officer Gates attempted to place the defendant in handcuffs.<sup>14</sup> During the struggle, the defendant bit Officer Gates on the arm, breaking the skin.<sup>15</sup> The prison's health care unit treated the injury, and at this time Officer Gates received antibiotics.<sup>16</sup> After the injury, three blood tests were administered to Of-

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urement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." ALA. CODE § 13A-1-2 (a) (1975 & Supp. 1990).

9. *Brock*, 555 So. 2d at 288. *But see* *Hollis v. State*, 417 So. 2d 617 (Ala. Crim. App. 1982), where the court held that the criminal intent required for an assault conviction may be inferred from the circumstances attending the offense. *Id.* at 619.

10. *Brock*, 555 So. 2d at 286. The AIDS unit is the only one of its type in the State of Alabama and houses all but one of the AIDS inmates that the Department of Corrections supervises. Brief for Appellant at 3, *Brock v. State*, 555 So. 2d 285 (1989) (No. CV-88-15).

11. *Brock*, 555 So. 2d at 286. A shakedown is part of a search for contraband which prison officers routinely conduct. *Id.* Each month the prison officers conduct an institutional shakedown, where they shake down the whole camp. Brief for Appellee at 11, *Brock v. State*, 555 So. 2d 285 (1989) (No. CV-88-15). Under the rules of the institution, all items in the possession of the inmates which were not issued or purchased in the prison store or canteen are considered contraband and are seized. *Id.*

12. Brief for Appellant at 8, *Brock v. State*, 555 So. 2d 285 (1989) (No. CV-88-15). At the time of the shakedown, all non-clear barrel ink pens were considered contraband. *Id.* The defendant had stored the pens in a metal box in his cell. *Id.* The Department of Corrections issues such boxes to prisoners for them to store their belongings. *Id.*

13. Brief for Appellee at 12, *Brock v. State*, 555 So. 2d 285 (1989) (No. CV-88-15).

14. *Id.* Officer Gates seized the defendant's upper right arm, while Officer Bell caught his left arm. *Id.* at 13. When the defendant jerked back out of the officers' reach, Officer Gates caught him by the shoulders and pushed his face down on the bunk. *Id.*

15. *Id.* Officer Gates's right arm slipped off the defendant's head. *Id.* The defendant then turned his head and bit Officer Gates on the arm. *Id.*

Officer Gates later testified under cross examination that the defendant never screamed at him or said he was going to kill the officer. Brief for Appellant at 9, *Brock v. State*, 555 So. 2d 285 (1989) (No. CV-88-15). Nor did the defendant state that he was going to bite the officer or infect him with AIDS. *Id.*

The defendant testified that he bit the officer because the policeman's hand had slipped in front of the defendant and he was struggling to get away from the officer. *Id.* at 12. The defendant further testified that he bit the officer in self-defense, to keep the officer from breaking his neck on the side of the bunk. *Id.*

16. Brief for Appellee at 13, *Brock v. State*, 555 So. 2d 285 (1989) (No. CV-88-15). After securing the defendant in handcuffs, Officer Gates reported to the

ficer Gates to detect the presence of the AIDS virus.<sup>17</sup> All three tests were negative.<sup>18</sup> The defendant's act of biting Officer Gates formed the basis of Count I of the indictment for attempted murder.<sup>19</sup> At trial, the jury found the defendant guilty of first degree assault,<sup>20</sup> a lesser included offense of attempted murder.<sup>21</sup> The trial

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health care unit. *Id.* There, a doctor cleaned the bite with bleach and alcohol. *Id.* A nurse gave Officer Gates a tetanus shot and administered antibiotics. *Id.*

17. *Brock*, 555 So. 2d at 286. In 1985, marketing of a serologic test emerged for detecting antibodies that the body's immune system develops in response to the AIDS infection. R. JARVIS, M. CLOSEN, D. HERMAN & A. LEONARD, AIDS LAW IN A NUTSHELL 17 (1990). The procedure for an HIV test is to draw a sample of the patient's blood, label it, and send it to a laboratory for a screening test, known as the enzyme-linked immunoabsorbent assay ("ELISA"). *Id.* Blood that initially tests positive for HIV antibodies is subject to a second test, called the Western blot. *Id.* The Western blot test is a far more accurate tool for determining HIV antibody status, but its high cost rules out using it as an initial screening device. *Id.* at 18. "When properly administered and interpreted, the Western blot test reportedly is nearly 99% accurate." *Id.*

However, a window period exists between when someone becomes HIV-infected and when the body's immune system develops an antibody reaction strong enough to prompt an HIV-positive test result. *Id.* The window period ordinarily spans from six weeks to six months after exposure to the HIV virus. *Id.* Therefore, if a person undergoes testing during the window period, the test will not discover the presence of HIV antibodies, even though he or she actually may be contagious. *Id.*

18. *Brock*, 555 So. 2d at 286.

19. *Id.*

20. *Id.* See *supra* note 4 for a definition of first degree assault.

21. *Id.* The Code of Alabama defines attempt as follows:

(a) A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense.

(b) It is no defense under this section that the offense charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such offense could have been committed had the attendant circumstances been as the defendant believed them to be.

(c) A person is not liable under this section if, under circumstances manifesting a voluntary and complete renunciation of this criminal intent, he avoided the commission of the offense attempted by abandoning his criminal effort and, if mere abandonment is insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof. The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.

ALA. CODE § 13A-4-2 (1975 & Supp 1990).

The Code of Alabama defines murder, in pertinent part, as follows:

(a) A person commits the crime of murder if:

(1) With intent to cause the death of another person, he causes the death of that person or of another person; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the

judge entered judgment accordingly.<sup>22</sup>

The Alabama Criminal Court of Appeals reversed the trial court's judgment and remanded the case.<sup>23</sup> The remand order set aside the defendant's conviction for first degree assault, and instructed the trial court to enter judgment for third degree assault.<sup>24</sup> Thus, the court ordered that the defendant be sentenced accordingly.<sup>25</sup>

In arriving at its conclusion, the *Brock* court considered the issue of whether an HIV/AIDS-infected defendant may be criminally responsible for assault in the first degree<sup>26</sup> for the attempted transmission of the AIDS virus through a bite.<sup>27</sup> The court held that the State failed to prove the elements of assault in the first degree.<sup>28</sup> The court so held for the following three reasons. First, the state failed to establish that teeth are a deadly weapon or a dangerous instrument.<sup>29</sup> Second, because there was no evidence that the AIDS virus had been transmitted to the victim, the state failed to establish that a serious physical injury occurred.<sup>30</sup> Third, the court held that the State failed to prove the required intent element of first degree assault and, therefore, the court could not sustain the conviction.<sup>31</sup>

The court began its analysis by assessing whether the defendant's use of his mouth and teeth to bite the prison guard constituted the use of a deadly weapon or dangerous instrument, because of the AIDS virus.<sup>32</sup> The court cited the Annotated Law Reports ("A.L.R.") rule regarding the inclusion of body parts as deadly weapons.<sup>33</sup> This rule states that although teeth may be used to cause death or serious injury, the main line of authority does not

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course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, cause the death of any person.

*Id.* § 13A-6-2.

22. *Brock*, 555 So. 2d at 286.

23. *Id.* at 289.

24. *Id.* at 288. Assault in the third degree is a class A misdemeanor. ALA. CODE § 13A-6-22(b) (1975 & Supp. 1990). According to the Alabama Criminal Code, a person commits third degree assault if, with intent to cause physical injury to another person, he causes physical injury to any person. § 13A-6-22(a)(1)-(2).

25. *Brock*, 555 So. 2d at 288.

26. See *supra* note 4 for a definition of "assault in the first degree."

27. *Brock*, 555 So. 2d at 286.

28. *Id.* at 288.

29. *Id.* at 287. See *supra* note 7 for the definitions of "deadly weapon" and "dangerous instrument" under the Code of Alabama.

30. *Brock*, 555 So. 2d at 288. See *supra* note 8 for a definition of "serious physical injury" under the Code of Alabama.

31. *Brock*, 555 So. 2d at 288.

32. *Id.* at 287.

33. *Brock*, 555 So. 2d at 287.

classify teeth as deadly weapons.<sup>34</sup> The court then recognized two Alabama cases where each court followed the minority rule and held that fists may constitute deadly weapons or dangerous instruments, depending on the circumstances and manner of use.<sup>35</sup> However, the *Brock* court refused to follow this trend and include teeth as deadly weapons, because the State failed to prove the defendant used his mouth and teeth under circumstances highly capable of causing death or serious physical injury.<sup>36</sup>

Next, the court addressed whether a serious physical injury occurred within the meaning of the Alabama first degree assault statute. The court held that Officer Gates did not suffer a serious physical injury as a result of the defendant's bite.<sup>37</sup> In reaching this conclusion, the court referred to medical authority which stated that the role of saliva in the transmission of the AIDS virus is unclear.<sup>38</sup> The court refused to take judicial notice of the alleged fact

34. The A.L.R. position on the inclusion of body parts as deadly weapons is cited at Annotation, *Parts of the Human Body as Dangerous Weapons*, 8 A.L.R. 1269 (1981), and has become recognized as the majority rule. This position states:

The inclusion of human body parts, such as fists and teeth, within the class of deadly weapons provokes several conceptual problems. Most obviously, unlike other kinds of weapons, fists and teeth are not external instrumentalities. However, like many other criminal instrumentalities, they may be used to cause death or serious physical injury. This quality has led some courts to classify their use, under some circumstances, as use of a deadly weapon, although the main line of authority, discussed *infra* is to the effect that in no circumstances are fists or teeth dangerous weapons within the meaning of applicable statutes.

*Id.* at 1269.

35. *Brock*, 555 So. 2d at 287. See *Hollis v. State*, 417 So. 2d 617, 619 (Ala. Crim. App. 1982) (defendant's use of fists in physical assault constituted deadly weapons); *Stewart v. State*, 405 So. 2d 402, 405 (Ala. Crim. App. 1981) (fists were used in manner highly capable of causing death; therefore, they were deadly weapons).

Alabama courts are split on the use of body parts as deadly weapons. See, e.g., *Davis v. State*, 470 So. 2d 1340 (Ala. Crim. App. 1985) (feet not classified as deadly weapons, although their use in particular situations may make them deadly weapons); *Baker v. State*, 441 So. 2d 1061 (Ala. Crim. App. 1983) (hands or fists may be considered deadly weapons for sentencing purposes); *Helton v. State*, 372 So. 2d 390 (Ala. Crim. App. 1979) (feet classified as deadly weapons); *Cozart v. State*, 171 So. 2d 77 (Ala. Crim. App. 1964) (defendant's use of fists did not constitute deadly weapons).

36. *Brock*, 555 S. 2d at 288.

37. *Id.* See *supra* note 8 for a definition of "serious physical injury" under the Code of Alabama.

38. *Id.* "Although biting is of 'particular concern,' 'evidence for the role of saliva in the transmission of the virus is unclear.'" *Id.* (quoting UNITED STATES DEP'T OF HEALTH AND HUMAN SERV., GUIDELINES FOR PREVENTION OF TRANSMISSION OF HUMAN IMMUNODEFICIENCY VIRUS AND HEPATITIS B VIRUS TO HEALTH CARE AND PUBLIC SAFETY WORKERS 9, 15 (Feb. 1989)). See *infra* note 58 and accompanying text for a thorough medical account regarding the role of saliva in the transmission of AIDS.

that the AID's virus is transmitted through saliva.<sup>39</sup> The court noted that the State presented absolutely no evidence as to the nature of AIDS or the manner in which it can be transmitted.<sup>40</sup> Additionally, the *Brock* court noted that there was no evidence that the prison guard contracted the AIDS virus, or that he suffered any other serious physical injury within the meaning of the Alabama Criminal Code.<sup>41</sup> Therefore, the court refused to recognize the defendant's biting had the capacity to result in serious physical injury.<sup>42</sup>

To reach this holding, the *Brock* court distinguished *United States v. Moore*,<sup>43</sup> where the United States District Court of Appeals for the Eighth Circuit reached a different result on the issue of teeth as deadly weapons.<sup>44</sup> In *Moore*, a medical expert testified that a human bite could cause a serious infection.<sup>45</sup> From this testi-

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39. *Brock*, 555 So. 2d at 288. The *Brock* court relied on *Clark v. State*, 57 So. 2d 384, 387 (1952), which held that judicial notice will not be taken of matters which are not of common knowledge. The court also relied on *Nolan v. State*, 45 So. 2d 786 (1950), *cert. denied*, 45 So. 2d 792, which held that "[i]n order that a matter may properly be the subject of judicial notice it must be 'known'—that is, well established and authoritatively settled." *Id.* The *Nolan* court further held that "uncertainty or difference of belief" regarding the material at issue "will operate to preclude judicial notice thereof." *Id.*

40. *Brock*, 555 So. 2d at 288. *Id.* In dicta, the court recognized that although AIDS theoretically may be transmitted through a human bite, there was no such established evidence produced at trial. *Id.*

41. *Id.* The court pointed out that the evidence showed Officer Gates underwent three blood tests to detect the presence of AIDS, and all three tests were negative. *Id.* at 286.

42. *Id.* at 288.

43. 846 F.2d 1163, 1166 (8th Cir. 1988).

44. *Id.* In *Moore*, the court of appeals upheld a conviction for assault with a deadly weapon based upon an AIDS-infected inmate who intentionally bit two prison guards during a struggle. *Id.* at 1168. The holding in *Moore* was not based on an AIDS infection analysis; rather, the holding was based upon the general possibility that an ordinary human bite could cause serious infection. *Id.* The *Moore* Court rejected the argument that the only way Moore's mouth and teeth could be deemed dangerous weapons was if it could be established that AIDS was transmitted through the biting. *Id.* at 1167. The court in *Moore* determined that even if Moore had *not* been inflicted with AIDS, there was sufficient evidence to allow the jury to find that Moore's mouth and teeth were used as a deadly and dangerous weapon. *Id.* The court held in this manner because expert witnesses established that "30 to 50" different varieties of germs can be transmitted through a human bite. *Id.* Further, there was expert testimony that human bites are one of the most dangerous types of bites. *Id.* at 1166.

The *Moore* decision is widely criticized. See Stauter, *supra* note 1, at 517 (criticizing the decision in *Moore* because the court based its conclusion on the remote possibility that a human bite could cause serious physical injury, contrary to established medical evidence); Comment, *Deadly and Dangerous Weapons and AIDS: The Moore Analysis Is Likely to Be Dangerous*, 74 IOWA L. REV. 951, 955 (1989) (criticizing the *Moore* court's analysis of teeth as deadly weapons and dangerous instruments).

45. *Moore*, 846 F.2d at 1165. The doctor testified that a human bite could be dangerous. *Id.* He testified that there are probably 30 to 50 varieties of germs in the human mouth which, acting in concert, could cause serious infection. *Id.*



mony, the *Moore* court held medical evidence established that the potential for serious infection through a human bite constituted a form of serious bodily harm.<sup>46</sup> The *Moore* court then concluded that since a human bite has the capacity to inflict serious bodily harm,<sup>47</sup> the human mouth and teeth are deadly and dangerous weapons, even if the harm actually inflicted is not severe.<sup>48</sup> The *Brock* court determined that it could not recognize the type of serious physical injury defined in *Moore* because the State presented absolutely no evidence of the capacity of a human bite to cause serious injury.<sup>49</sup> The *Brock* court also noted that in *Moore*, the court found that the possibility of AIDS transmission through a human bite is too remote to support a holding that the mouth and teeth are deadly weapons or dangerous instruments.<sup>50</sup>

Finally, the court determined that the State failed to meet its burden of proving that Brock intended to transmit the AIDS virus.<sup>51</sup> The court reached this holding because the State did not present evidence establishing the defendant's subjective intent at the time of the assault.<sup>52</sup> However, the State did produce evidence that prison hospital employees warned the defendant that he tested positive for AIDS, that he was infectious to other people, and that he should not engage in sexual activity or share oral hygiene utensils.<sup>53</sup> Notwithstanding this evidence, the court held that the State's evidence was insufficient to prove that the defendant was aware, or had been informed, that AIDS could be transmitted through a human bite.<sup>54</sup> Therefore, the court held that Brock did

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46. *Id.* at 1166.

47. *Id.* In *Moore*, the court focused on the potential capacity of the mouth and teeth to cause serious bodily harm, as opposed to the actual harm inflicted on the victim. *Id.* at 1165.

48. *Id.* at 1166.

49. *Brock*, 555 So. 2d at 288.

50. *Id.* In *Moore*, the medical evidence established only a remote or theoretical possibility that the AIDS virus could be transmitted through a human bite. *Moore*, 846 F.2d at 1168. The doctor testified that the medical profession knew of no proven instances in which a human bite has resulted in transmission of the AIDS virus to the bitten person. *Id.* However, he also testified that the AIDS virus has appeared in minute amounts in saliva, but medical research has never shown AIDS to have spread through contact with saliva. *Id.*

51. *Brock*, 555 So. 2d at 289. See also Robinson, *AIDS and the Criminal Law: Traditional Approaches and a New Statutory Proposal*, 14 HOFSTRA L. REV. 91 (1975) (discussing various difficulties with establishing intent in cases involving criminal transmission of AIDS).

52. *Brock*, 555 So. 2d at 288.

53. *Id.* at 287. The registered nurse at the correctional facility testified that the defendant received standard orientation on his health care. *Id.* The orientation included warnings that the defendant had AIDS and that he was infectious to other people, and instructions not to engage in sexual activity or share oral hygiene utensils. *Id.*

54. *Id.* at 288.

not commit assault in the first degree,<sup>55</sup> and accordingly reversed the trial court's decision.<sup>56</sup>

The Alabama Criminal Court of Appeals' decision to reverse the defendant's conviction for first degree assault was correct in two respects. First, the *Brock* court properly held that the defendant's mouth and teeth were not used as deadly weapons and that the State failed to establish that any serious physical injury occurred. Second, the court correctly held that the defendant did not have the requisite intent to transmit the AIDS virus to the prison guard. However, the court's holding was lacking in one respect. The court should have held that under no circumstances can teeth or a human mouth be classified as deadly weapons within the meaning of the State's applicable criminal statutes.

The *Brock* court correctly held that the defendant's use of his mouth and teeth to bite the prison guard did not meet the requirements of the use of a deadly weapon or dangerous instrument. This conclusion was proper for two reasons. First, under the Alabama statute, a deadly weapon or a dangerous instrument is an object that is highly capable of causing death or serious physical injury.<sup>57</sup> Scientific evidence shows the absence of any likelihood that a human bite would endanger life or cause serious physical injury through transmission of the AIDS virus.<sup>58</sup> Studies of people who have been exposed to small amounts of AIDS-infected saliva show no documented cases of transmission from a human bite.<sup>59</sup> Moreover, other

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55. *Id.*

56. *Id.* at 286.

57. See *supra* note 7 for the definitions of deadly weapons and dangerous instruments under Alabama law.

58. Gostin, *supra* note 1, at 1050. In an informational brochure mailed to all American households, former U.S. Surgeon General C. Everett Koop stated that the AIDS virus is transmitted only by an exchange of infected blood, semen or vaginal fluids. Centers for Disease Control, *Understanding AIDS*, 37 MORBIDITY & MORTALITY WEEKLY REP. 3 (May 1988). The Surgeon General plainly stated that AIDS is not transmitted from saliva. *Id.*

Legal journals have widely recognized the fact that AIDS is not transmitted from the saliva of an infected person, even as a result of a bite. See, e.g., Sinkfield & Houser, *supra* note 2, at 105. Sinkfield and Houser stated that medical evidence overwhelmingly suggests that AIDS is not transmitted by casual contact and although the virus may be detected in saliva, epidemiological evidence suggests that the virus is rarely, if ever, transmitted through such means. *Id.* Additionally, the authors recognized that there have been no documented cases involving the transmission of HIV through saliva. *Id.*; see also Jarvis, *AIDS: A Brief Overview*, 12 NOVA L. J. 973, 976 (1988) ("transmission of AIDS, except by sexual or transfused blood, is zero or near zero"); Cloosen, Connor, Kaufman & Wojcik, *AIDS: Testing Democracy - Irrational Responses to the Public Health Crisis and the Need for Privacy in Serologic Testing*, 19 J. MARSHALL L. REV. 835, 864-65 (1986) (AIDS virus is spread by sexual contact, contaminated blood or organs, and from mother to unborn fetus; all evidence indicates that the AIDS virus is not spread by tears, sweat, sneezing or saliva).

59. Gostin, *supra* note 1, at 1050; see also Earl & Kavanaugh, *Meeting the AIDS Epidemic in the Courtroom: Practical Suggestions in Litigating Your*

studies have found that saliva may actually block transmission.<sup>60</sup>

Second, case law supports the *Brock* court's holding that the human mouth and teeth are not deadly weapons or dangerous instruments. In *United State v. Moore*,<sup>61</sup> the United States Court of Appeals for the Eighth Circuit determined that transmission of AIDS through a bite is too remote to support a finding that the mouth and teeth are deadly weapons.<sup>62</sup> Similarly, Alabama courts have stressed that in order to take judicial notice of a matter, it must be known, that is, well established and authoritatively settled.<sup>63</sup> As the previously mentioned studies have demonstrated, the *Brock* court could not take judicial notice of the human mouth and teeth as deadly weapons or dangerous instruments because scientific studies show the opposite to be true.<sup>64</sup> Therefore, the *Brock* court properly rejected the State's evidence of a theoretical possibility of serious physical injury as sufficient to prove a high capability of such injury.

The *Brock* court's decision was correct in a second respect. The court held that the State failed to prove that the defendant had the actual intent to transmit the AIDS virus when he bit the prison guard. In cases involving assault in the first degree, Alabama courts have held that the criminal intent necessary to constitute the offense may be inferred from the circumstances surrounding the event.<sup>65</sup> However, in the context of criminal transmission of AIDS, "intentional" transmission is difficult to prove.<sup>66</sup> In addition, in Alabama, assault in the first degree is a specific intent crime.<sup>67</sup> In the AIDS context, that means that the defendant must know he has

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*First AIDS Case*, 12 NOVA L. J. 1203, 1206 (1988) (no known cases of AIDS transmitted through tears or saliva).

60. Gostin, *supra* note 1, at 1023. ("both whole saliva and saliva filtrates contain components that inactivate the AIDS virus in vitro.") (citing Fultz, *Components of Saliva Inactivate Human Immunodeficiency Virus*, 2 LANCET 1215 (1986)).

61. 846 F.2d 1163 (8th Cir. 1988).

62. *Id.* at 1167-68. In *Moore*, the only evidence on the transmissibility of the AIDS virus was the testimony of a single physician. This physician stated that there was only a remote or theoretical possibility that the virus could be transmitted through biting. *Id.* This statement led the *Moore* Court to conclude that the possibility of AIDS transmission is too remote to support a finding that the human mouth and teeth are deadly weapons; however, the court held that the human mouth and teeth can be deadly and dangerous weapons if used in any manner that could have transmitted any disease. *Id.* at 1167.

63. *Nolan v. State*, 45 So. 2d 786, 788 (Ala. Crim. App. 1950).

64. See *supra* notes 58-60 and accompanying text for a discussion on the absence of any likelihood that the AIDS virus is transmitted by biting.

65. See, e.g., *Hollis v. State*, 417 So. 2d 617, 619 (Ala. Crim. App. 1982) (intent element of first degree assault could be inferred from circumstances of defendant's actions in beating his mother with his fists).

66. Schultz, *AIDS: Public Health and the Criminal Law*, ST. LOUIS U. PUB L. REV. 65, 86 (1988).

67. See *supra* note 4 for a definition of assault in the first degree.

tested positive for AIDS and that the particular act would almost certainly transmit the AIDS virus.<sup>68</sup>

The State's evidence presented at the *Brock* trial established that the defendant was aware that he had the AIDS virus and that the disease was contagious.<sup>69</sup> To find specific intent, the court also would have needed conclusive evidence establishing that the defendant understood that biting was an almost certain method of transmitting AIDS.<sup>70</sup> However, the State failed to present evidence establishing the defendant's knowledge of the modes of transmission.<sup>71</sup> Because of the insufficient evidence, the court correctly held that while the defendant was fully aware of his contagious condition, he was not aware that biting would almost certainly transmit the AIDS virus.<sup>72</sup>

Conversely, other courts have held that the defendant had the requisite intent to transmit the AIDS virus.<sup>73</sup> For example, in *State v. Haines*,<sup>74</sup> the Indiana Court of Appeals reversed the trial court's judgment and reinstated the jury's verdict convicting an AIDS-infected defendant for attempted murder.<sup>75</sup> In *Haines*, the State established the defendant's intent by his verbal statements accompanying his actions of spitting, biting, scratching and throwing blood at police officers and emergency medical technicians.<sup>76</sup> In addition, medical evidence established a high capability of transmission by the defendant's actions in splattering his blood upon the vic-

68. Gostin, *supra* note 1, at 1043. Knowledge of HIV infection is difficult to prove because many individuals are tested anonymously or are not tested at all. *Id.*

69. See *supra* note 53 and accompanying text for information concerning the extent of the defendant's knowledge about the AIDS virus.

70. Gostin, *supra* note 1, at 1043.

71. *Brock*, 555 So. 2d at 288.

72. *Id.* at 287.

73. See, e.g., *United States v. Moore*, 669 F Supp 289 (D. Minn. 1987) (defendant's statements, after assaulting two correctional officers, that he wanted to kill them and hoped bites were bad enough that they would get the disease that he had, established intent element), *aff'd*, 846 F.2d 1163 (8th Cir. 1988); *State v. Kazenbach*, 824 F.2d 69 (8th Cir. 1987) (defendant's actions of biting, scratching and spitting on three correctional officers established intent element); *Cooper v. State*, 539 So. 2d 508 (Fla. Dist. Ct. App. 1989) (intent element established because defendant knew or should have known that he had the AIDS virus and that sexual battery of his victim created a strong likelihood that victim would be exposed to AIDS); *State v. Haines*, 545 N.E.2d 834 (Ind. Ct. App. 1989) (defendant's verbal statements that he wanted to give AIDS virus to attending police officers and paramedics established intent element).

74. *State v. Haines*, 545 N.E.2d 834 (Ind. Ct. App. 1989).

75. *Id.*

76. *Id.* at 835. The defendant said he was going to "show everyone what it was like to have the AIDS disease." *Id.* And, when the police officers and paramedics arrived at the defendant's home, he stated that he "was going to give it to them," and began spraying his blood at them. *Id.*

tims.<sup>77</sup> Transmission through blood is much more likely than transmission by spitting, biting or scratching.<sup>78</sup>

In contrast, the *Brock* court did not have any medical evidence establishing the possibility of transmission through biting.<sup>79</sup> Additionally, there was no proof presented showing that the defendant intended to transmit the AIDS virus by biting the prison guard during the scuffle.<sup>80</sup> Therefore, the court properly held that the defendant did not have the requisite intent to transmit the AIDS virus.

Despite the correctness of the *Brock* court's holding that the defendant did not act with intent to transmit the AIDS virus and did not use his mouth and teeth in a manner that rendered them deadly weapons or dangerous instruments, the court left open the question of whether teeth can be classified as deadly weapons within the meaning of the statute. The court should have gone further and authoritatively excluded teeth from the class of deadly weapons. The court's holding only stated that the evidence presented failed to prove that teeth are deadly weapons or dangerous instruments.<sup>81</sup> Due to this holding, lower courts must continuously interpret potentially ambiguous medical evidence when deciding cases involving teeth as deadly weapons.<sup>82</sup>

The *Brock* court should have adopted the A.L.R. position that in no circumstances can teeth be classified as deadly weapons within the meaning of any applicable statute.<sup>83</sup> Without the presence of the AIDS virus, medical evidence establishes that a human bite is incapable of causing infection resulting in death or serious physical injury.<sup>84</sup> Moreover, even with the presence of the AIDS virus, medical authority establishes that the chance of transmission

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77. *Id.* at 837. Medical evidence that the State presented established a substantial risk of infection when blood is splattered into the eyes or other mucus membranes. *Id.*

78. See *supra* notes 58-61 for a discussion regarding the modes of transmission of the AIDS virus.

79. *Brock*, 555 So. 2d at 288.

80. *Id.*

81. *Id.* at 287.

82. Although the main line of medical evidence regarding the transmission of AIDS or other diseases holds that biting is not capable of causing serious physical injury, some courts have relied on inaccurate medical testimony in cases involving teeth as deadly weapons. See, e.g., *United States v. Moore*, 846 F.2d 1163, 1168 (court heard testimony from physician who stated that a bite, without the presence of AIDS, "could" cause serious physical injury).

83. See *supra* note 34 for the A.L.R. rule on the inclusion of body parts as deadly weapons.

84. AMA, *ENCYCLOPEDIA OF MEDICINE* 175 (1989). Human bites rarely cause serious tissue damage or blood loss. *Id.* However, infection from viruses and bacteria in the mouth is likely, particularly if the bite is deep. *Id.*

through a bite is remote, possibly non-existent.<sup>85</sup> Based on this medical evidence, other courts have concluded that teeth should never be considered a dangerous or deadly weapon.<sup>86</sup> Therefore, the *Brock* court should have followed suit and held that teeth can never be classified as deadly weapons within the meaning of the Alabama statute, regardless of whether the biter has the AIDS virus.

Furthermore, the decision in *Brock* establishes difficult guidelines for Alabama courts to follow in deciding cases of assault in the first degree for attempted criminal transmission of the AIDS virus. First, if a body part is involved, the trial court must interpret potentially ambiguous medical evidence to establish whether the body part is a means highly capable of transmitting the AIDS virus.<sup>87</sup> Second, the court must also make four separate findings to establish the defendant's specific intent to transmit AIDS<sup>88</sup>: 1) that the defendant carried the AIDS virus<sup>89</sup>; 2) that the defendant was aware of the infection<sup>90</sup>; 3) that the defendant believed it to be transmissible by a particular mode; and 4) by using that mode, the defendant intended to inflict another person with the disease.<sup>91</sup> Finally, the court needs conclusive evidence of a serious physical injury<sup>92</sup> inflicted on the victim, with or without the presence of the AIDS virus.<sup>93</sup>

Under current Alabama statutes, it is difficult to effectively prosecute cases involving the attempted criminal transmission of the AIDS virus.<sup>94</sup> Nevertheless, the Presidential Commission on the Human Immunodeficiency Virus Epidemic stated that "extending criminal liability to those who knowingly engage in behav-

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85. See *supra* notes 58-60 and accompanying text for a discussion on the remote possibility of AIDS transmission through a bite.

86. See, e.g., *Commonwealth v. Davis*, 406 N.E. 2d 417 (Mass. App. Ct. 1980) (in a case not involving the transmission of AIDS, the court held that the defendant's use of his teeth to bite off another's ear was not the use of a dangerous or deadly weapon, and concluded that teeth should never be classified as a deadly weapon); *Glover v. Eastern Neb. Com. Office of Retardation*, 867 F.2d 461 (8th Cir. 1989) (medical evidence established risk of AIDS transmission as a result of a human bite is extraordinarily low, approaching zero); *United States v. Moore*, 846 F.2d 1163 (8th Cir. 1988) (possibility of AIDS transmission by biting, sweating or sneezing is too remote for legal recognition).

87. See *supra* note 7 for the definitions of deadly weapon and dangerous instrument.

88. See generally Gostin, *supra* note 1, at 1042-43 (discussing conduct that manifests intent to kill in the AIDS transmission context).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Brock*, 555 So. 2d at 288.

93. *Id.*

94. See generally Robinson, *supra* note 51 (discussing criminal offenses related to AIDS).

ior which is likely to transmit AIDS is consistent with society's obligation to prevent harm to others and the criminal laws' concern with punishing those whose behavior results in harmful acts."<sup>95</sup> To implement its policy, the Commission does not recommend use of traditional criminal law, but instead recommends adoption of AIDS-specific criminal statutes.<sup>96</sup>

Currently, eight states have adopted specific statutes to deal with the attempted criminal transmission of the AIDS virus.<sup>97</sup> None of these statutes require the State to show specific intent or the actual transmission of the disease.<sup>98</sup> Given current estimates projecting a rapid rise in the number of people with AIDS in the United States over the next few years,<sup>99</sup> Alabama courts will likely be presented with criminal cases involving the transmission of AIDS at an increasing rate. Without an AIDS-specific statute, Alabama courts have no effective means to prosecute these types of cases.

In conclusion, the *Brock* court properly reversed the trial court's judgment finding the defendant guilty of assault in the first degree. The court correctly held that the State presented insufficient evidence to establish that teeth are deadly weapons, because no medical evidence supported the potential transmission of AIDS through a human bite. For the same reason, the court properly determined that no serious physical injury occurred. Finally, the court correctly held that absent any conclusive evidence of specific intent, the defendant did not have the intent to transmit the AIDS

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95. UNITED STATES GOV'T PRINTING OFFICE, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130-31 (June 1988). "HIV infected individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions." *Id.* at 130. "Establishing criminal penalties for failure to comply with clearly set standards of conduct can also deter HIV-infected individuals from engaging in high-risk behaviors." *Id.*

96. *Id.* The commission does not recommend applying traditional criminal law to HIV transmission because of the various difficulties associated with using current criminal codes. *Id.* Specifically, the report notes the problem of using murder or attempted murder statutes because of the difficulties of proving the intent and causation elements. *Id.* Also, the report notes that simple assault penalties may prove too lenient for cases where the attempted transmission was intentional. *Id.*

97. The seven states which have adopted AIDS-specific statutes are: California, 39 CAL. CRIM. CODE § 1621-26 (West 1988); Florida, FLA. STAT. § 382.25 (1988); Georgia, GA. CODE ANN. § 26-2910 (1987); Idaho, IDAHO CODE § 191.677 (1988); Ohio, OHIO REV. CODE ANN. § 32.1-289.2 (Anderson 1987); Oklahoma, OKLA. STAT. ANN. tit. 21, § 1192 (West 1988); and Virginia, VA. CODE ANN. § 8-5501 (1988).

98. See Gostin, *supra* note 1, at 1041 (discussing the general statutory requirements of AIDS-specific statutes).

99. Currently, it is estimated that about one million persons in the United States are infected with HIV. Centers for Disease Control, *Estimates on HIV Prevalence and Projected AIDS Cases: Summary of Workshop, October 31-November 1, 1989*, 39 MORBIDITY AND MORTALITY WEEKLY REP. 110, 110 (1990).

virus to the officer. However, the court should have extended its holding by unequivocally excluding teeth as deadly weapons, thereby leaving the lower courts with a definitive ruling for future AIDS cases involving the transmission of AIDS via biting.

*Timothy P. Martin*



