

Maryland

Analysis

People living with HIV (PLHIV) may face misdemeanor penalties for engaging in various activities.

It is a misdemeanor punishable by up to three years in prison and a \$2,500 fine for PLHIV to knowingly transfer or attempt to transfer HIV to another person.¹ Any type of HIV exposure, including consensual sex, blood and tissue donation, breastfeeding, and/or needle sharing, may be subject to prosecution. On its face, neither disclosure nor the use of condoms or other protection would operate as an affirmative defense to prosecution under this law. Moreover, few cases clarify the scope of this HIV exposure statute.

One 2008 case suggests that PLHIV may face prosecution even without exposing others to any risk of HIV transmission. In that case, a 44-year-old PLHIV was sentenced to 18 years' imprisonment; ten years of his sentence stemmed from a charge of knowingly attempting to transfer HIV to another person, for allegedly biting a police officer during an arrest.² The officer did not test positive for HIV, and, according to the CDC, there exists only a "negligible" risk of HIV transmission from a bite.³ Yet Maryland's statute and its application ignore these scientific findings, leading to prosecutions for behavior that poses at most a remote possibility of transmitting HIV.

In September 2012, a 36-year-old man living with HIV was charged with knowingly attempting to transmit HIV for, among other things, having sex with a 13-year-old boy.⁴ The man pled guilty to having sexual contact with the boy in a deal allowing him to avoid going to trial on the HIV transmission charge.⁵

¹ MD. CODE. ANN., HEALTH-GEN. § 18-601.1 (2016).

² Amber Parcher, *HIV positive suspect who bit officer gets 18 years*, GAZETTE.NET, June 4, 2008, available at http://www.gazette.net/stories/060408/burtnew215303_32365.shtml. See also Maryland Judiciary Case Information, District Court for Montgomery County, available at <http://casesearch.courts.state.md.us/casesearch/> (search name "Lindsay, Robert Wayne"; search type "Criminal"; search County "Montgomery").

³ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Risk Behaviors, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (Dec. 4, 2015) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Oct. 20, 2016).

⁴ Jessica Anderson, *Edgemere man faces rarely used HIV transmission charges*, BALTIMORE SUN, Sept. 9, 2012, available at http://articles.baltimoresun.com/2012-09-09/news/bs-md-co-hiv-criminal-transmission-20120909_1_hiv-virus-hiv-criminalization-hiv-prevention.

⁵ Jessica Anderson, *Man admits sexual contact with teen; HIV charge dropped*, BALTIMORE SUN, Feb. 13, 2013, available at http://articles.baltimoresun.com/2013-02-13/news/bs-md-co-hiv-transmission-20130213_1_hiv-criminalization-hiv-charge-criminal-charges.

HIV exposure cases have been prosecuted under general criminal laws, including attempted murder and reckless endangerment.

Prosecutions for HIV exposure in Maryland typically arise under general criminal laws rather than the “knowing transfer of HIV” statute. General criminal law charges occur regardless of whether a PLHIV exposed another to a significant risk of HIV infection. In Maryland, reckless endangerment, which has been used in multiple prosecutions, is defined as recklessly engaging in “conduct that creates a substantial risk of death or serious physical injury to another.”⁶

In 2009, a 29-year-old man living with HIV was charged with 12 counts of reckless endangerment, 12 counts of knowingly attempting to transfer HIV, and one count of theft for, among other things, allegedly having consensual sex with a woman without disclosing his HIV status.⁷ He pled guilty to one charge of reckless endangerment and was sentenced to 18 months’ imprisonment and two years of supervised probation.⁸ He was previously charged under Maryland’s HIV exposure law in 2005 after he engaged in consensual unprotected sex with a different woman without disclosing his HIV status.⁹ He pled guilty to reckless endangerment in that case and was sentenced to five years’ imprisonment, with all but one year suspended, and three years probation.¹⁰

Other notable prosecutions include:

- In March 2015, a PLHIV pled guilty to two counts of reckless endangerment after having unprotected sex with two women.¹¹ He reportedly had an undetectable viral load.¹²
- In July 2010, a 44-year-old PLHIV was sentenced to five years in prison for a conviction of assault in the second degree after spitting on a police officer.¹³ Because the defendant had no teeth and often spat unintentionally, it is not clear whether the man intended to spit on the police officer.¹⁴ Moreover, saliva is not a viable route of HIV transmission.¹⁵

⁶ MD. CODE ANN., CRIM. LAW § 3-204 (2016).

⁷ Patricia M. Murret, *Man sentenced for exposing woman he met online to HIV*, GAZETTE.NET, Mar. 10, 2010, available at http://www.gazette.net/stories/03102010/damanew224501_32560.php. See also Maryland Judiciary Case Information, District Court for Montgomery County, available at <http://casesearch.courts.state.md.us/casesearch/> (search name “Perrera, Thomas James”; search type “Criminal”; search County “Montgomery”; Case Nos. 113320C, 112743C).

⁸ *Id.*

⁹ Murret, *supra*, note 7.

¹⁰ *Id.* See also Maryland Judiciary Case Information, District Court for Montgomery County, available at <http://casesearch.courts.state.md.us/casesearch/> (search name “Perrera, Thomas James”; search type “Criminal”; search County “Montgomery”; Case No. 105317C).

¹¹ Debra Alfarone, *Man with HIV admits to knowingly having unprotected sex*, WUSA 9 NEWS, March 10, 2015, available at <http://www.wusa9.com/news/man-with-hiv-admits-to-knowingly-having-unprotected-sex/203526761>.

¹² *Id.*

¹³ Don Aines, *Man with HIV who spit on police officer sentenced to five years*, HERALD-MAIL (Hagerstown, MD), July 26, 2010, available at http://articles.herald-mail.com/2010-07-26/news/25198925_1_hagerstown-police-department-police-officer-hagerstown-man.

¹⁴ *Id.*

¹⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Dec. 21, 2016) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Oct. 27, 2016) (“No. HIV isn’t spread through saliva, and there is no risk of transmission from scratching because no body fluids are transferred between people.”).

- In 1999, a 20-year-old PLHIV was charged with assault in the first degree for biting a security guard in the arm during a struggle.¹⁶ Assault in the first degree, a felony carrying a maximum penalty of 25 years' imprisonment, prohibits intentionally causing or attempting to cause serious physical injury to another.¹⁷

At least one court ruling in Maryland has found that attempted murder cannot be used to prosecute HIV exposure without the specific intent to murder via HIV transmission.

In *Smallwood v. State* a man living with HIV appealed his convictions of assault with intent to murder and three counts of attempted second-degree murder, amounting to a sentence of 30 years in prison.¹⁸ The convictions stemmed from his raping and robbing three women at gunpoint, for which he had pled guilty to attempted first-degree rape and robbery.¹⁹ He argued that sexually assaulting the women with knowledge of his HIV status was not sufficient to find intent to kill.²⁰ The prosecution countered that a PLHIV engaging in unprotected sex while knowing their HIV status is equivalent to their firing a loaded firearm at an individual, an act from which a jury could infer the intent to kill.²¹

The Maryland Court of Appeals determined the State did not provide evidence that the defendant intended to kill the victims—only that he intended to rob and rape them.²² The court reasoned that, since death by AIDS from a single exposure to HIV was not sufficiently probable to show such intent, the state must provide additional evidence – such as statements suggesting a person wished to spread HIV or actions solely explicable as an attempt to spread HIV, such as splashing blood.²³

People with other STIs or other communicable diseases may face misdemeanor penalties for engaging in various activities.

Maryland's health code prohibits a number of activities for any person "who has an infectious disease that endangers public health," such as willfully being in a public place "without taking proper precautions against exposing other individuals to the disease," or transferring to another person "any article that has been exposed to the disease without thoroughly disinfecting the article."²⁴ Penalty for conviction under these provisions can be up to one year of imprisonment and a \$500 fine.²⁵

The scope of application for this statute is unclear because the term "infectious disease that endangers public health" is defined neither by the Public Health Code nor any public health regulation. Instead, the Maryland Code of Regulations merely defines "infectious" as "capable of being transmitted in a manner

¹⁶ Nancy A. Youssef, *HIV positive man bit security guard in fight, police say*, BALTIMORE SUN, June 20, 1999, available at http://articles.baltimoresun.com/1999-06-20/news/9906220446_1_glaspie-winer-frederick-county.

¹⁷ MD. CODE ANN. CRIM. LAW § 3-202(b) (2016).

¹⁸ *Smallwood v. State*, 680 A.2d 512 (Md. 1996).

¹⁹ *Id.* at 513-14.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 516.

²³ *Id.* at 516-18.

²⁴ MD. CODE ANN., HEALTH-GEN. § 18-601(a) (2016).

²⁵ § 18-601(b) (2016).

that can cause a disease or abnormal condition in an individual,²⁶ and lists reportable diseases and conditions to include HIV/AIDS, chancroid, chlamydia, hepatitis, and syphilis.²⁷ However, the second provision, regarding articles exposed to the disease, may be conceivably applied to shared syringes, sex toys, or other shared objects. At the time of publication, the authors have not identified any cases providing clarification of the issue.

An analogous third-party statute using the same term, “infectious disease that endangers public health,” may provide some guidance. The statute prohibits (1) willfully or knowingly taking a person with an infectious disease that endangers public health to the home of another person, (2) carelessly exposing an individual to a person with an infectious disease that endangers public health, or (3) permitting a child with an infectious disease that endangers public health to be in a public place while in charge of the child.²⁸

Case law suggests HIV may fall within the scope of “infectious disease that endangers public health.” In *Lemon v. Stewart*, plaintiffs allegedly exposed to HIV after caring for a patient living with HIV appealed the dismissal of their complaint against the patient’s physician, among others, for failing to disclose his HIV status to them.²⁹ The Maryland Court of Special Appeals affirmed the dismissal, holding the defendants owed no duty to the people who brought suit.³⁰ However, there was no inquiry as to whether HIV fell within the “infectious disease that endangers public health” classification.³¹ Rather, the court held the defendants owed no duty of HIV status disclosure to anyone besides the patient; the particular parties in the case, rather than HIV itself, were at issue.³²

Other STIs and communicable diseases might also fit that classification of “infectious disease that endangers public health.” Moreover, while the authors have found no reported cases under MD. CODE ANN., HEALTH-GEN. § 18-601 at time of publication, there may nevertheless be unreported prosecutions and charges dropped as part of plea bargains, as well as the possibility of future prosecutions.

The Department of Health and Mental Hygiene may be required to aid in the prosecution of PLHIV or those with other STIs or communicable diseases.

Although medical files related to a person’s HIV status are to be kept confidential, a health officer may be required to consult with the State’s attorney about prosecutions related to disease exposure.³³ It is unclear if health officers must simply comply with requests for assistance or if they must affirmatively seek out the State’s attorney in specific situations.

²⁶ MD. CODE REGS. 10.06.01.02(B)(14) (2016).

²⁷ MD. CODE REGS. 10.06.01.03(C) (2016).

²⁸ MD. CODE ANN., HEALTH-GEN. § 18-602(a) (2016).

²⁹ *Lemon v. Stewart*, 111 Md. App. 511, 514-15 (Md. Ct. Spec. App. 1996).

³⁰ *Id.* at 525-26.

³¹ *Id.* at 521-24.

³² *Id.*

³³ MD. CODE REGS. 10.18.04.02(C)(3)(d) (2016). See also MD. CODE ANN., HEALTH-GEN. §§ 18-207(a)(4)(iii), (b)(4) (2016) (“The [HIV/AIDS case] report and any proceedings, records or files relating to the reports required under this section are not discoverable and are not admissible in evidence in any *civil* action.”) (Emphasis added, noting the possibility of use of records in criminal actions.).

Important note: *While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.*

Maryland Code Annotated

Note: Provisions imposing punitive restrictions or listing criminal sentences are denoted with ** and are generally listed first. Thereafter, provisions within a particular title are listed numerically.

CODE OF HEALTH-GENERAL

MD. CODE ANN., HEALTH-GEN. § 18-601.1 (2016) **

Exposure of other individuals – By individual with human immunodeficiency virus

(a) Prohibited act. -- An individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual.

(b) Penalty. -- A person who violates the provisions of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$ 2,500 or imprisonment not exceeding 3 years or both.

MD. CODE ANN., HEALTH-GEN. § 18-601 (2016) **

Exposure of other individuals – By infected individual generally

(a) Prohibited act. -- An individual who has an infectious disease that endangers public health may not willfully:

(1) Be in a public place without taking proper precautions against exposing other individuals to the disease; or

(2) Transfer to another individual any article that has been exposed to the disease without thoroughly disinfecting the article.

(b) Penalty. -- A person who violates any provision of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$ 500 or imprisonment not exceeding 1 year or both.

MD. CODE ANN., HEALTH-GEN. § 18-207 (2016)

Human immunodeficiency virus; case report; confidentiality

(a) Definitions. –

(4) “Report” means:

(iii) An HIV/AIDS case report.

(b) Case report. –

(4) The report and any proceedings, records, or files relating to the reports required under this section are not discoverable and are not admissible in evidence in any civil action.

Code of Maryland Regulations

TITLE 10, DEPARTMENT OF HEALTH AND MENTAL HYGIENE

MD. CODE REGS. 10.06.01.02 (2016)

Definitions

(A) The definitions of terms used in the Control of Communicable Diseases Manual are accepted as official and applicable to the control of diseases within this State under this chapter.

(B) Terms Defined

(14) “Infectious” means capable of being transmitted in a manner that can cause a disease or abnormal condition in an individual.

MD. CODE REGS. 10.18.04.02 (2016)

Provisions to Limit Spread of Infection

(C) A health officer shall:

(3) Take the least restrictive action necessary to induce appropriate behavior changes to reduce the risk of transmission of HIV, including:

(d) Consulting with the State’s attorney about action, if appropriate, under Health-General Article, §18-601, 18-601.1, or 18-602, Annotated Code of Maryland.