

South Dakota

Analysis

Engaging in sexual intercourse without disclosing HIV status can result in imprisonment.

It is a Class 3 felony, punishable by up to 15 years' imprisonment and a \$30,000 fine, if a person living with HIV (PLHIV) knows their HIV status and “intentionally exposes another to infection by engaging in sexual intercourse or other intimate physical contact with another person.”¹ Persons convicted under the exposure statute must also register as sex offenders.²

Although the statute requires intent to expose another person to HIV, neither the intent to transmit HIV³ nor actual transmission is required.⁴ The prosecutions described below also suggest that failing to disclose one's status, without more, suffice for a finding of “intent” to expose. “Sexual intercourse” is not defined, and “intimate physical contact” is defined as “bodily contact which exposes a person to the body fluid of the infected person in any manner that presents a significant risk of HIV *transmission*.”⁵ At the time of publication, the authors are unaware of any case law to help determine how the courts may interpret conduct posing a “significant risk of HIV transmission.”

It is an affirmative defense if the person exposed to HIV (1) was aware of the defendant's HIV status, (2) knew that the sexual contact could result in HIV infection, and (3) consented to HIV exposure with knowledge of these risks.⁶ However, a sexual partner's consent to HIV exposure may be difficult to prove, as whether or not disclosure occurred is often open to interpretation and usually depends on the words of one person against another.

In 2002 a PLHIV served four months in jail and was required to perform 200 hours of community service after pleading guilty to intentional exposure to HIV for having unprotected sex with several

¹ S.D. CODIFIED LAWS §§ 22-18-31(1), 22-6-1(6) (2018).

² S.D. CODIFIED LAWS §§ 22-24B-1(20)(defining intentional HIV exposure as a sex crime), 22-24B-2 (requiring sex offender registration for any person convicted of a sex crime) (2018).

³ See S.D. CODIFIED LAWS § 22-1-2(1)(b) (2018) (“[I]ntentionally’ . . . import[s] a specific design to cause a certain result or, if the material part of a charge is the violation of a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, a specific design to engage in conduct of that nature.”). The statute indicates that intent to engage in sexual intercourse or other physical contact while living with HIV fulfills the intent requirement.

⁴ S.D. CODIFIED LAWS § 22-18-34 (2018).

⁵ S.D. CODIFIED LAWS § 22-18-32(2) (2018) (emphasis added). Elsewhere in the criminal code, “sexual penetration” is defined as, “an act . . . of sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the body or of any object into the genital or anal openings of another person's body.” S.D. CODIFIED LAWS § 22-22-2 (2018). Thus, since “sexual intercourse” is considered distinct from all of those acts, it presumably only refers to penile-vaginal penetration and non-penetrative anilingus.

⁶ S.D. CODIFIED LAWS § 22-18-33 (2018).

classmates without disclosing his HIV status.⁷ He later received four years in prison for failing to return to jail on schedule.⁸

Other cases further illustrate prosecutions under the HIV exposure law:

- In February 2014, a 19-year-old PLHIV pled guilty to intentional exposure to HIV after having unprotected sex without disclosing his HIV status and was sentenced to eight years' imprisonment.⁹
- In November 2006, a 33-year-old PLHIV received a suspended prison sentence in a plea deal after being charged with five counts of intentional exposure to HIV.¹⁰
- In May 2002, two PLHIV were charged with multiple counts under the exposure statute.¹¹ One of the men pled guilty to one count and received a sentence of 18 months' probation while the other received a 45-day suspended jail sentence with five years' probation.¹²

Consecutive, as opposed to concurrent, sentencing is allowed at the discretion of a sentencing court in South Dakota.¹³ Thus, if a PLHIV is found guilty of exposing multiple partners to the virus, they may receive a sentence of 15 years *per offense*.

It is a felony for PLHIV to provide blood, tissue, semen, organs, body parts, or body fluids for use by another.

It is a Class 3 felony, punishable by up to 15 years' imprisonment and a \$30,000 fine for a PLHIV who knows their HIV status to, "intentionally [expose] another to infection by transferring, donating, or providing blood, tissue, semen, organs, or other potentially infectious bodily fluids or parts for transfusion, transplantation, insemination, or other administration to another in any manner that presents a significant risk of HIV transmission."¹⁴ Neither the intent to transmit HIV nor actual transmission is required.¹⁵ It is an affirmative defense if the individual exposed to HIV (1) was aware of

⁷ Jo Napolitano, *South Dakota: Jail Term for H.I.V. Exposure*, N.Y. TIMES, Aug. 30, 2002, at A-15, available at <http://www.nytimes.com/2002/08/30/us/national-briefing-plains-south-dakota-jail-term-for-hiv-exposure.html>; John W. Fountain, *After Arrest, Campus Queues for H.I.V. Tests*, N.Y. TIMES, May 1, 2002, at A-16, available at <http://www.nytimes.com/2002/05/01/us/after-arrest-campus-queues-for-hiv-tests.html>. See also Leslie E. Wolf, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 863-65 (2004) (citing John-John Williams,

2 *S. Dakotans Sentenced for Spreading HIV*, ARGUS LEADER (Sioux Falls, SD), Mar. 26, 2003, at 1B).

⁸ Wolf, *supra* note 7, at 864.

⁹ Associated Press, *Ex-SDSU Student Sentenced to 8 years in HIV Exposure Case*, RAPID CITY JOURNAL, Feb. 26, 2014, available at [http://rapidcityjournal.com/news/local/ex-sdsu-student-sentenced-to-years-in-hiv-exposure-case/article_155f6534-
ea75-526f-9315-7716acd7133b.html](http://rapidcityjournal.com/news/local/ex-sdsu-student-sentenced-to-years-in-hiv-exposure-case/article_155f6534-
ea75-526f-9315-7716acd7133b.html).

¹⁰ *Woman with HIV Sentenced*, RAPID CITY J. (Rapid City, SD), Nov. 4, 2004, available at http://www.rapidcityjournal.com/news/local/article_59a9d4d6-bfc3-511b-98b9-106b8fb035b8.html.

¹¹ *Men charged with spreading HIV*, CNN.COM/LAWCENTER, May 2, 2002, available at <http://edition.cnn.com/2002/LAW/05/02/hiv.arrests/>.

¹² Advocate.com editors, *South Dakota man receives probation for HIV exposure*, April 15, 2003, available at <https://www.advocate.com/health/health-news/2003/04/15/south-dakota-man-receives-probation-hiv-exposure-8344>.

¹³ S.D. CODIFIED LAWS § 22-6-6.1 (2018).

¹⁴ S.D. CODIFIED LAWS §§ 22-18-31(2), 22-6-1(6) (2018).

¹⁵ S.D. CODIFIED LAWS § 22-18-34 (2018).

the defendant's HIV status, (2) knew that HIV infection could result from the exposure in question, and (3) consented to exposure with knowledge of these risks.¹⁶

Sharing non-sterile needles or syringes by PLHIV can result in imprisonment.

It is a Class 3 felony, punishable by up to 15 years' imprisonment and a \$30,000 fine, for a PLHIV who knows their HIV status to, "intentionally [expose] another person to infection by dispensing, delivering, exchanging, selling, or in any other way transferring to another person any nonsterile intravenous or intramuscular drug paraphernalia that has been contaminated by himself or herself."¹⁷ South Dakota defines "intravenous or intramuscular drug paraphernalia" as "any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body."¹⁸

Neither the intent to transmit HIV nor actual transmission is required.¹⁹ It is an affirmative defense if the individual exposed to HIV (1) was aware of the defendant's HIV status, (2) knew that HIV infection could result from sharing drug paraphernalia, and (3) consented to exposure with knowledge of these risks.²⁰ However, as noted above, an individual's consent to HIV exposure may be difficult to prove without documentation. Sterilizing the items before transfer may also help avoid prosecution, but it may be similarly difficult to prove that a needle or syringe was sterile at the time of transfer to another without witnesses or documentation.

Exposing another person to blood or semen can result in imprisonment for PLHIV.

It is a Class 3 felony, punishable by up to 15 years' imprisonment and a \$30,000 fine, for a PLHIV who knows their HIV status to, "intentionally [expose] another person to infection by throwing, smearing, or otherwise causing blood or semen, to come in contact with another for the purpose of exposing that person to HIV infection."²¹ Neither the intent to transmit HIV nor actual transmission is required.²²

Persons living with venereal diseases may be subject to a number of criminal or civil penalties.

It is a Class 1 misdemeanor, punishable by imprisonment of one year and a fine of \$1,000 for anyone living with "syphilis, gonorrhea or chancroid" to "[expose] another person to infection."²³

People living with chancroid, gonorrhea, hepatitis, HIV, and syphilis,²⁴ may also be subject to mandatory testing, treatment, isolation, and quarantine.²⁵ The department may use restrictive public health measures only if other measures, including efforts to obtain the voluntary cooperation of the

¹⁶ S.D. CODIFIED LAWS § 22-18-33 (2018).

¹⁷ S.D. CODIFIED LAWS §§ 22-18-31(3), 22-6-1(6) (2018).

¹⁸ S.D. CODIFIED LAWS § 22-18-32(3) (2018).

¹⁹ S.D. CODIFIED LAWS § 22-18-34 (2018).

²⁰ S.D. CODIFIED LAWS § 22-18-33 (2018).

²¹ S.D. CODIFIED LAWS §§ 22-18-31(4), 22-6-1(6) (2018).

²² S.D. CODIFIED LAWS § 22-18-34 (2018).

²³ S.D. CODIFIED LAWS §§ 34-23-1, 22-6-2(1) (2018).

²⁴ S.D. CODIFIED LAWS § 34-23-13 (2018); S.D. ADMIN. R. 44:20:01:02, 44:20:01:04 (2018).

²⁵ S.D. CODIFIED LAWS §§ 34-23-4, 34-23-13 (2018).

person who may be subject to restriction, have failed.²⁶ However, it is unclear what other procedural protections may be in place for such cases.

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.

²⁶ S.D. ADMIN. R. 44:20:03:04 (2018).

South Dakota Codified Laws

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.

TITLE 22. CRIMES

S.D. CODIFIED LAWS § 22-18-31 (2018) **

Criminal exposure to HIV – Penalty.

Any person who, knowing himself or herself to be infected with HIV, intentionally exposes another person to infection by:

- (1) Engaging in sexual intercourse or other intimate physical contact with another person;
- (2) Transferring, donating, or providing 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) Dispensing, delivering, exchanging, selling, or in any other way transferring to another person any nonsterile intravenous or intramuscular drug paraphernalia that has been contaminated by himself or herself; or
- (4) Throwing, smearing, or otherwise causing blood or semen, to come in contact with another for the purpose of exposing that person to HIV infection; is guilty of criminal exposure to HIV.

Criminal exposure to HIV is a Class 3 felony.

S.D. CODIFIED LAWS § 22-18-32 (2018)

Criminal exposure to HIV – Definitions.

- (2) “Intimate physical contact” means bodily contact which exposes a person to the body fluid of the infected person in any manner that presents a significant risk of HIV transmission.
- (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.

S.D. CODIFIED LAWS § 22-18-33 (2018)

Criminal exposure to HIV – Defense.

It is an affirmative defense to prosecution if it is proven by a preponderance of the evidence that the person exposed to HIV knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and gave advance consent to the action with that knowledge.

S.D. CODIFIED LAWS § 22-18-34 (2018)

Criminal exposure to HIV – Actual transmission not required.

Nothing in §§ 22-18-31 TO 22-18-34, inclusive, may be construed to require the actual transmission of HIV in order for a person to have committed the offense of criminal exposure to HIV.

S.D. CODIFIED LAWS § 22-24B-1 (2018)

“Sex crime” defined

For the purposes of §§ 22-24B-2 to 22-24B-14, inclusive, a sex crime is any of the following crimes regardless of the date of the commission of the offense or the date of the conviction:

(20) Intentional exposure to HIV infection as set forth in subdivision (1) of § 22-18-31.

S.D. CODIFIED LAWS § 22-24B-2 (2018) **

Registration of convicted sex offenders--Violation as felony--Discharge

Any person who has been convicted for commission of a sex crime, as defined in § 22-24B-1, shall register as a sex offender. The term, convicted, includes a verdict or plea of guilty, a plea of nolo contendere, and a suspended imposition of sentence which has not been discharged pursuant to § 23A-27-14 prior to July 1, 1995.

Any juvenile fourteen years or older shall register as a sex offender if that juvenile has been adjudicated of rape as defined in subdivision 22-24B-1(1), or of an out-of-state or federal offense that is comparable to the elements of these crimes of rape or any crime committed in another state if the state also requires a juvenile adjudicated of that crime to register as a sex offender in that state. The term, adjudicated, includes a court’s finding of delinquency, an admission, and a suspended adjudication of delinquency which has not been discharged pursuant to § 26-8C-4 prior to July 1, 2009.

The sex offender shall register within three business days of coming into any county to reside, temporarily domicile, attend school, attend postsecondary education classes, or work. Registration shall be with the chief of police of the municipality in which the sex offender resides, temporarily domiciles, attends school, attends postsecondary education classes, or works, or, if no chief of police exists, then with the sheriff of the county. If the sex offender is not otherwise registered in the state, the sex offender shall register within three business days of coming into any county when the sex offender applies for or receives a South Dakota driver license, registers a motor vehicle, establishes a postal address, or registers to vote. A violation of this section is a Class 6 felony. Any person whose sentence is discharged under § 23A-27-14 after July 1, 1995, shall forward a certified copy of such formal discharge by certified mail to the Division of Criminal Investigation and to local law enforcement where the person is then registered under this section. Upon receipt of such notice, the person shall be removed from the sex offender registry open to public inspection and shall be relieved of further registration requirements under this section. Any juvenile whose suspended adjudication is discharged under § 26-8C-4 after July 1, 2009, shall forward a certified copy of the formal discharge by certified mail to the Division of Criminal Investigation and to local law enforcement where the juvenile is then registered under this section. Upon receipt of the notice, the juvenile shall be removed from the sex offender registry open to public inspection and shall be relieved of further registration requirements under this section.

S.D. CODIFIED LAWS § 22-6-1 (2018) **

Felonies – Classification – Penalties.

Except as otherwise provided by law, felonies are divided into the following nine classes which are distinguished from each other by the following maximum penalties which are authorized upon conviction:

(6) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of thirty thousand dollars may be imposed;

S.D. CODIFIED LAWS § 22-6-2 (2018) **

Misdemeanors – Classification – Penalties.

Misdemeanors are divided into two classes which are distinguished from each other by the following maximum penalties which are authorized upon conviction:

- (1) Class 1 misdemeanor: one year imprisonment in a county jail or two thousand dollars fine, or both;
- (2) Class 2 misdemeanor: thirty days imprisonment in a county jail or five hundred dollars fine, or both.

TITLE 34. PUBLIC HEALTH AND SAFETY

S.D. CODIFIED LAWS § 34-23-1 (2018)

Designation of venereal disease – Person infected exposing another person to infection – Penalty.

Syphilis, gonorrhea, and chancroid are designated to be venereal diseases and are contagious, infectious, communicable, and dangerous to the public health. Any person infected with a venereal disease under this section who intentionally exposes another person to infection of that venereal disease is guilty of a Class 1 misdemeanor.

S.D. CODIFIED LAWS § 34-23-4 (2018)

Requirement to report for and continue treatment until cure – Isolation and quarantine.

State, county, and municipal health officers or their authorized deputies within their respective jurisdiction are hereby directed and empowered to require persons infected with venereal disease to report for treatment to a reputable physician and continue treatment until cured or to submit to treatment provided at public expense until cured, and also, when in their judgment it is necessary to protect the public health, to isolate or quarantine persons infected with venereal disease.

S.D. CODIFIED LAWS § 34-23-5 (2018)

Person convicted of being a prostitute or inmate of a disorderly house.

Any person convicted of being a prostitute or inmate of a disorderly house who may be found to be infected with venereal disease in a stage which, in the opinion of the health officer, is or is apt to become communicable, shall be quarantined or isolated so long as such person is so infected.

S.D. CODIFIED LAWS § 34-23-6 (2018)

Persons imprisoned or confined in state, county, or city prison.

All persons who shall be imprisoned or confined in any state, county, or city prison in the state shall be examined for and, if infected, treated for venereal diseases by the health authorities or their deputies.

S.D. CODIFIED LAWS § 34-23-13 (2018)

Rules and regulations.

The state department of health is hereby empowered and directed to make, in compliance with chapter 1-26, such rules and regulations as shall in its judgment be necessary for the carrying out of the provisions of this chapter, including rules and regulations provided for the control and treatment of persons isolated or quarantined under the provisions of this chapter and such other rules and regulations not in conflict with the provisions of this chapter concerning the control of venereal diseases and concerning the care, treatment, and quarantine of persons infected therewith, as it may from time to time deem advisable.

All such rules and regulations so made shall be of force and binding upon all county and municipal health officers and other persons affected by this chapter.

S.D. CODIFIED LAWS § 34-23-14 (2018) **

Violations of chapter provision, rules and regulations made pursuant to authority therein – Penalty.

Any person who violates any of the provisions of this chapter or any lawful rule or regulation made by the Department of Health pursuant to the authority therein granted, or who shall fail or refuse to obey any lawful order issued by any state, county, or municipal health officer pursuant to the authority granted in this chapter, shall be guilty of a Class 1 misdemeanor.

South Dakota Administrative Code

TITLE 44. HEALTH AND PUBLIC SAFETY

S.D. ADMIN. R. 44:20:01:02 (2018)

Category II reportable diseases and conditions

The department declares the communicable diseases and related conditions listed in §§ 44:20:01:03 and 44:20:01:04 to be dangerous to public health.

S.D. ADMIN. R. 44:20:01:04 (2018)

Category II reportable diseases and conditions

Category II reportable diseases and conditions include:

- (5) Chancroid;
- (17) Gonorrhea;
- (21) Hepatitis, acute, viral types including A, B, C;
- (23) Hepatitis B and C, chronic;
- (24) Human immunodeficiency virus (HIV) infection;
- (43) Syphilis

S.D. ADMIN. R. 44:20:03:03 (2018)

Health threat to others defined

For purposes of this article, a "health threat to others" or a "threat to the public health" exists if a case or carrier demonstrates an inability or unwillingness to refrain from conduct that places others at risk of exposure to a reportable disease, condition, or infectious agent. It may include one or more of the following:

- (1) Behavior by a case or carrier that has been demonstrated epidemiologically to transmit a disease, condition, or infectious agent to others or that evidences a careless disregard for the transmission of the disease, condition, or infectious agent to others;
- (2) A substantial likelihood that a case or carrier will transmit a disease, condition, or infectious agent to others as evidenced by a case's or carrier's past behavior or by statements of a case or carrier that are credible indicators of a case's or carrier's intention; or
- (3) Affirmative misrepresentation by a person of the person's status as a case or carrier prior to engaging in a behavior that has been demonstrated epidemiologically to transmit the disease, condition, or infectious agent.

S.D. ADMIN. R. 44:20:03:04 (2018)

Application of public health measures to persons

The department may instruct a case or carrier of a reportable disease or condition regarding public health measures for preventing the spread of the disease or condition and of the necessity for treatment until cured, non-infectious, or free from the infection. If the department knows or has reason to believe, because of medical or epidemiological information, that a person has a reportable disease or condition and is a health threat to others, it may issue a public health notice directing the person to take one or more of the following actions:

- (1) To be examined or tested to determine whether the person has the disease in an infectious stage;
- (2) To report to a physician, health care worker, or authorized department representative for counseling on the disease and for information on how to avoid infecting others;
- (3) To receive treatment until cured or non-infectious and to follow measures for preventing reinfection;
- (4) To cease from specified conduct which endangers the health of others; or
- (5) To cooperate with the department in implementation of recommended public health measures.

The department may use restrictive public health measures only if other measures to protect the public health have failed, including efforts to obtain the voluntary cooperation of the person who may be the subject of such measures. The department shall apply public health measures as necessary to achieve the desired purpose of protecting the public health, using the least intrusive measures first.

S.D. ADMIN. R. 44:20:03:06 (2018)

Imminent health threat to others – Petition to circuit court

If the department has determined by medical or epidemiological information that a person has a reportable disease or condition and is an imminent health threat to others, the department may petition the circuit court for a temporary restraining order pursuant to SDCL chapter 15-6 to enforce public health measures.