



State of New Jersey

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
PO BOX 085

TRENTON, NJ 08625-0085
TELEPHONE: (609) 984-6500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANDREW J. BRUCK
Acting Attorney General

LYNDSAY RUOTOLO
Director

TO: Director, Division of Criminal Justice
Executive Director, Office of Public Integrity & Accountability
Insurance Fraud Prosecutor
All County Prosecutors

FROM: Andrew J. Bruck, Acting Attorney General

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SUBJECT: Guidance Regarding N.J.S.A. 2C:34-5(b) in Light of Advancements in Treatment for HIV/AIDS

Advancements in medical treatment over the past several decades have transformed HIV/AIDS from a devastating epidemic to a manageable, chronic disease—and require us to rethink how we enforce N.J.S.A. 2C:34-5(b), which criminalizes certain sexual activity by those living with HIV.

In 1997, New Jersey enacted N.J.S.A. 2C:34-5(b), which made it a third-degree crime for an individual living with HIV to engage in an “act of sexual penetration” without the informed consent of their partner. At the time, doctors and researchers were still struggling to find effective medical treatments for the disease and an infection was thought to be a death sentence.

Since then, the Centers for Disease Control and Prevention (CDC) has adopted treatment guidelines recommending a regimen of antiretroviral therapy (ART) for all adults and adolescents living with HIV. These ART treatments have proven remarkably successful. According to the CDC, individuals who adhere to their treatment plans can now reduce their viral loads to such a low level that the virus is undetectable in testing—and virtually impossible to transmit through sex.¹

But even as the risk of infection and mortality has decreased, the stigma associated with the virus has remained high. People living with HIV still face discrimination, and this stigma discourages people from learning their HIV status and, when appropriate, disclosing it to medical providers and sexual partners.² A number of professional organizations, including the American

¹ Centers for Disease Control and Prevention, “HIV Treatment,” available at: <https://www.cdc.gov/hiv/basics/livingwithhiv/treatment.html>.

² The White House, National HIV/AIDS Strategy for the United States, July 2010, at ix.



Medical Association and the American Psychological Association, have criticized laws that criminalize sexual activity by those living with HIV, on the grounds that they further stigmatize the disease.³ For the same reason, in 2014, the U.S. Department of Justice’s Civil Rights Division published a best practices guide encouraging states to repeal or significantly reform such laws.⁴

Of course, N.J.S.A. 2C:34-5(b) remains on the books, and it is the responsibility of the Legislature—not prosecutors—to decide whether and how the law should be modified. And while relatively few individuals are charged with violating N.J.S.A. 2C:34-5(b), it is helpful to provide statewide guidance to ensure that its enforcement does not undermine current public-health strategies.

As always, prosecutors retain significant discretion in deciding whether and under what circumstances to charge individuals with certain criminal offenses.⁵ In deciding whether to charge a violation of N.J.S.A. 2C:34-5(b), prosecutors should consider the following factors:

- Whether the individual forced or coerced their partner to engage in sexual activity;
- Whether the individual engaged in sexual activity *for the purpose* of transmitting HIV to their partner;⁶ and/or
- Whether the individual was adhering to a medically appropriate HIV treatment plan at the time of the sexual activity.

It is virtually impossible to imagine a scenario where it would be appropriate for a prosecutor to charge an individual with N.J.S.A. 2C:34-5(b) when that person’s HIV viral load was undetectable at the time of the sexual activity and no aggravating factors existed. Prosecutors who are considering criminal charges in such circumstances must consult with the Director of the Division of Criminal Justice before proceeding.

³ AMA Adopts New Public Health Policies to Improve Health of Nation, June 13, 2019, <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-public-health-policies-improve-health-nation-3>; HIV Criminalization: APA Opposes Public Policies that Penalize Individuals that Unintentionally Transmit HIV, Sept. 2017, <https://www.apa.org/advocacy/health-disparities/hiv-criminalization>.

⁴ U.S. Department of Justice, Civil Rights Division, Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors (July 15, 2014), <https://www.hivlawandpolicy.org/sites/default/files/DOJ-HIV-Criminal-Law-Best-Practices-Guide.pdf>.

⁵ See, e.g., Memorandum from Attorney General Grewal to Director, Division of Criminal Justice, et al., Guidance Regarding Municipal Prosecutors’ Discretion in Prosecuting Marijuana and Other Criminal Offenses, August 29, 2018, https://nj.gov/oag/newsreleases18/2018-0829_AG-Memorandum.pdf. Nothing in this Guidance shall be construed in any way to create any substantive right that may be enforced by any third party.

⁶ In cases of purposeful HIV transmission, not only N.J.S.A. 2C:34-5(b) but other charges—such as aggravated assault or attempted homicide—may be appropriate. Data suggests, however, that such transmissions are very rare. National HIV/AIDS Strategy, *supra* note 2, at 36.