



**ENDING & DEFENDING AGAINST HIV CRIMINALIZATION
A MANUAL FOR ADVOCATES:**

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STATE AND FEDERAL LAWS AND PROSECUTIONS

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With additional laws and cases through December 2014

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MISSION STATEMENT

The Center for HIV Law and Policy is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV.

We support and increase the advocacy power and HIV expertise of attorneys, community members and service providers, and advance policy initiatives that are grounded in and uphold social justice, science, and the public health.

We do this by providing high-quality legal and policy materials through an accessible web-based resource bank; cultivating interdisciplinary support networks of experts, activists, and professionals; and coordinating a strategic leadership hub to track and advance advocacy on critical HIV legal, health, and human rights issues.

To learn more about our organization and access the Resource Bank, visit our website at www.hivlawandpolicy.org.

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FOREWORD TO VOLUME I

This volume represents the first installment of a multi-volume resource for responding to the phenomenon of HIV criminalization. Future volumes and editions will include resources such as check lists for attorneys and other advocates, sample affidavits and other documents for cases that go to court, and additional analysis of the history and purpose of criminal and civil law punishments targeting people affected by HIV.

Because statutory law and common law trends develop and can change over time, we anticipate future editions of this volume to reflect such changes. However, while we made every attempt to include relevant cases as they existed at the time of publication, it is important to keep in mind that it is possible that we are significantly under-reporting the occurrence of HIV-related arrests and prosecutions in the United States. States do not share the same systems for tracking arrests across all counties and areas of the state, and many arrests are unlikely to appear in news reports or databases readily available to the general public or researchers.



A NEW STRATEGY TO END CIVIL AND CRIMINAL PUNISHMENT AND DISCRIMINATION ON THE BASIS OF HIV INFECTION

From the beginning of the HIV/AIDS epidemic, stigma and fear have fueled mistreatment of people living with HIV. One of the more troubling and persistent issues for people with HIV has been the prospect of criminal prosecution for acts of consensual sex and for conduct, such as spitting or biting, that poses no significant risk of HIV transmission. The Positive Justice Project is CHLP's response to this issue: a truly community-driven, multidisciplinary collaboration to end government reliance on an individual's positive HIV test result as proof of intent to harm, and the basis for irrationally severe treatment in the criminal justice system.

The use of criminal law as a way to stop or slow HIV transmission invariably is ineffective. The reasons why individuals take risks with their health, and how they assess risk, are many and complex. Arresting and prosecuting people with HIV for consensual sexual relationships or no-risk conduct, such as spitting, does nothing to take these reasons into account, or to assess risks based on the specific circumstances of the case at hand, such as viral load or even basic issues of intent or mutual responsibility.

We believe that success in reducing and ending reliance on criminal laws to single out and stigmatize people with HIV; in educating court, prosecutors, and media; and in lessening stigma and discrimination, begins with a focus on the very real and serious public health ramifications of HIV criminalization. This in no way involves abandonment of civil liberties principles, but rather broadens the focus of advocacy to the public health consequences of ignoring individual rights.

A multi-pronged and collaborative plan is needed to address HIV criminalization, including a focused cross-disciplinary conversation about reconsidering the way we conceptualize and talk about HIV and transmission risk. Goals of our Positive Justice Project campaign include:

- Broader public understanding of the stigmatizing impact and negative public health consequences of criminalization and other forms of discrimination against people with HIV that occur under the guise of addressing HIV transmission.
- Community consensus on the appropriate use of criminal and civil law in the context of the HIV epidemic.
- Clear statements from lead government officials on the causes and relative risks of HIV transmission and the dangers of a criminal enforcement response to HIV exposure and the epidemic.
- A broader, more effective community-level response to the ongoing problem of HIV-related arrests and prosecutions.
- Reduction and eventual elimination of the inappropriate use of criminal and civil punishments against people with HIV.

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INTRODUCTION

This volume sets out the specific laws and illustrative cases in each state and U.S. territory on the treatment of people with HIV in the criminal justice system. Also included is a summary of military prosecutions of individuals with HIV, and the treatment of HIV as an aggravating factor under federal sentencing guidelines.

First, this volume and the individual state analyses it contains were carefully researched and current as of the date of publication. The law is fluid, however, and users should always check for the subsequent legal or legislative developments. The statutes and cases collected here are fairly comprehensive and will provide the reader with a good sense of how individuals living with HIV have fared under the criminal laws and enforcement policies in their states. The cases were identified through searches of press archives, internet searches, and case and news reports on Westlaw. In our search on Westlaw, we used successive search terms in various databases with HIV and either criminal charges and/or modes of transmission, such as “HIV,” “assault,” “spit,” etc., to identify court decisions and media reports. Although we have attempted to include all reported cases from either news media sources or official judicial opinions, not all cases of HIV exposure are reported in the media and many prosecutions do not result in published judicial opinions. As a result, the cases represented here are assumed not to constitute an exhaustive representation of all HIV-related prosecutions in the U.S. The cases presented are likely only a sampling of a much more widespread but generally undocumented use of criminal laws against people with HIV.

Second, this volume attempts to collect only those laws and state cases that explicitly, or by clear implication, have or can be used to prosecute people for conduct on the basis of HIV status. In some states, this has included general criminal laws that are not HIV-specific, including offenses such as:

- Reckless endangerment;¹
- Assault;²
- Terroristic threats;³ and
- Homicide and attempted homicide.⁴

¹ Typically, *reckless endangerment* is defined as recklessly engaging in conduct which places or may place another person in danger of death or serious bodily injury. Model Penal Code § 211.2 (2014). *Recklessness* is defined as a conscious disregard of a substantial and unjustifiable risk. § 2.02(2)(c) (2014). Consent is not a defense to reckless endangerment because, under the Model Penal Code, consent can only be a defense when the threatened harm is “not serious.” § 2.11(2)(a) (2014).

² Typically, *simple assault* is defined as an attempt to cause, or purposely, knowingly, or recklessly causing bodily injury to another. Model Penal Code § 211.1(1) (2014). The crime also includes negligently causing bodily injury to another with a deadly weapon. The crime becomes an *aggravated assault* if the actor causes or attempts to cause “serious” bodily injury, or if he or she knowingly or purposely causes or attempts to cause bodily injury with a deadly weapon. § 211.1(2).

³ Typically, a *terroristic threat* is a communication, either directly or indirectly, of a threat to commit any crime of violence with intent to terrorize another or otherwise cause terror with reckless disregard of the risk of causing such terror. Model Penal Code § 211.3 (2014); *See Commonwealth v. Walker*, 836 A.2d 999 (Pa. Super. Ct. 2003) (affirming conviction on basis that defendant’s statements were intended to cause terror from fear of HIV infection, likelihood of actual HIV infection resulting from threatened conduct is immaterial).

⁴ Typically, *homicide* can either be *murder* (a homicide committed purposely, knowingly, or with extreme recklessness), Model Penal Code § 210.2 (2014), *manslaughter* (a reckless homicide), § 210.3 (2014), or *negligent homicide* (a homicide committed negligently), § 210.4 (2014). *See also* § 2.02 (general requirements of culpability: definitions of “purposely,” “knowingly,” “recklessly,” and “negligently”). Homicide offenses relating to HIV transmission are rarely prosecuted except as attempted offenses, because it is unusual for transmission of HIV to result in death. Homicide prosecutions

Although these general criminal laws could, theoretically, be used against people living with HIV in all states, we only include case reports about them where they in fact have been applied to cases involving HIV.

This volume does not include analysis of the many state laws that mandate HIV testing of suspects arrested and/or convicted of sex offenses, some with negative consequences for those who test positive. We also do not address the very real, increasing problem of confidentiality violations, in which public health, health care, and other service providers share the HIV status of individuals in their care with law enforcement officials, sometimes after counseling them to avoid sexual contact without prior partner notification, in the belief that these individuals pose a risk to others and that health and service providers have a legal or ethical “duty to warn.”

Many states have “communicable” or “contagious disease” control statutes that criminalize STI exposure, which may or may not include HIV.⁵ Most of these statutes were enacted prior to the discovery of HIV and have typically not been enforced against any person with an STI, including HIV. The penalties under these laws tend to be limited to misdemeanors. Due to the antiquated nature and limited use of these statutes, such communicable disease laws were not highlighted in this manual except in cases where HIV is noted within the scope of the statute. For states that have an HIV-specific criminal statute in addition to a communicable disease control statute (i.e.: California, Tennessee, etc.), the latter is analyzed only when relevant.

The state-by-state section references does not include an exhaustive analysis of all instances of sentencing determinations that, even without HIV-specific sentencing statutes, were or could be influenced by a defendant’s HIV status, or a victim’s allegation that the impact of a crime included fear of exposure to HIV. Such cases typically concern rape survivors who, after learning of a defendant’s HIV positive status, or other infection with an STI, may have begun to take preventative medication, or feared possible infection with HIV, or have become alienated from family members. These factors can be material to a sentencing court’s consideration of the “impact of the crime upon the victim . . . including a description of the nature and extent of any physical, psychological, or financial harm.” In these cases, courts and juries might treat the “physical and emotional trauma” as constituting a level of harm beyond that of a “typical” rape victim.⁶

An additional area of law that is not addressed here in depth, but is of potential concern to people with HIV and their advocates, is the option of civil commitment available to government officials seeking to isolate individuals with HIV, or to continue to confine persons with HIV whose conviction can be characterized as a sex crime. Two types of these laws are of concern to people

are also unusual because of the requirement of proof of causation and proof of intent to transmit HIV, particularly in sexual contact cases. *State v. Schmidt*, 771 So. 2d 131 (La. Ct. App. 2000) (affirming conviction and sentence of 50 years at hard labor in attempted homicide prosecution based on defendant’s having intentionally injected victim with HIV), *prior opinion*, 699 So. 2d 448 (La. Ct. App. 1997) (pre-trial writ opinion ruling on admissibility of DNA evidence).

⁵ See, e.g. CAL. HEALTH & SAFETY CODE § 120600 (West 2014); LA. REV. STAT. ANN. § 40:1062 (2014); MONT. CODE ANN. § 50-18-112 (2013); N.Y. PUB. HEALTH LAW § 2307 (McKinney 2014); S.C. CODE ANN. § 44-29-60 (2014); TENN. CODE ANN. § 68-10-107 (2014); VT. STAT. ANN. tit. 18 § 1106 (2014); W. VA. CODE § 16-4-20 (2014); see also, The Center for HIV Law and Policy, *Chart: State-by-State Criminal Laws Used to Prosecute People with HIV* (2013), available at <http://hivlawandpolicy.org/resources/chart-state-state-criminal-laws-used-prosecute-people-hiv-center-hiv-law-and-policy-2012>.

⁶ See, e.g., *Torrence v. Commonwealth*, 269 S.W.3d 842, 845-46 (Ky. 2008); *State v. Scott*, 180 P.3d 774 (Utah Ct. App. 2008).

with HIV and their advocates. The first are general civil commitment laws, available to health and law enforcement officials in every state, that allow for the involuntary commitment, typically to a mental health or medical facility, of individuals determined to be a danger to the public or to themselves. Under this type of law, an individual who comes to the attention of a public health officer who believes the individual is behaving in a way that threatens disease transmission can be subjected to a petition and court order confining the individual for a period of time until the supposed risk of harm no longer exists. The second type of law authorizes the confinement of individuals determined to be sexually violent predators, i.e., persons who have been convicted of or charged with a sexually violent offense and who suffer from a condition affecting emotional or volitional capacity such that they pose a menace to the health and safety of others.

The United State Supreme Court has upheld the use of involuntary civil commitment or confinement of individuals, although the use of this measure has certain requirements to remain within the bounds of the federal Constitution.⁷ Such measures have been used against persons with HIV in recent cases suggesting that a defendant's history of unprotected sexual contact (as admitted by a defendant or evidenced by his contracting a sexually transmitted infection such as gonorrhea or syphilis) without disclosure of his HIV infection is adequate to meet the statutory dangerousness standard for confinement.⁸ A more recent, and perhaps more pernicious trend, is the indefinite detention of persons with HIV under sexually violent predator confinement statutes. Such statutes were upheld by the Supreme Court in *Kansas v. Hendricks*⁹ and have been applied to persons with HIV based on sexual activity posing no risk of HIV transmission.¹⁰

In virtually every state and case situation, state and local prosecutors possess significant discretion in determining whether and how to prosecute individuals arrested or reported for HIV exposure. It is important to keep in mind that particular jurisdictions with significant numbers of prosecutions may be as reflective of a prosecutor's mindset or ambitions as it is a product of a particular state law. However, it is difficult to include assessment of this factor in a publication of this kind. Obviously, we cannot report on cases that prosecutors have declined to prosecute, and, to our knowledge, no prosecutor has developed public guidelines for use in determining whether prosecution is appropriate or not (some prosecutors might, as some cases suggest, select only cases in which there are multiple partners involved in sexual activities that present at least an actual risk of transmission, where the defendant has been explicitly warned that his behavior if continued will result in prosecution, where actual transmission of HIV seems to have taken place, or where a defendant has evidenced an intent to transmit HIV – cases that from a law enforcement point of view present more egregious circumstances and greater ease of conviction).

Similarly, as we point out in our analysis, the overly broad statutes that criminalize conduct that presents little or no risk of HIV transmission might be narrowed in their application by appropriate prosecutorial discretion. But even if a prosecutor declines to prosecute a specific case, being the

⁷ See *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979). For a discussion of civil detention of individuals with HIV who pose a risk of transmission, see Ronald Bayer & Amy Fairchild-Carrino, *AIDS and the Limits of Control: Public Health Orders, Quarantine, and Recalcitrant Behavior*, 83 Am. J. Pub. Health 1471 (1993) (finding very limited use of civil detention measures and advocating instead for education, counseling, voluntary testing and partner notification, drug abuse treatment, and needle exchange programs to prevent HIV transmission).

⁸ *In re Renz*, No. A08-898, 2008 WL 4706962 (Minn. Ct. App. Oct. 28, 2008).

⁹ 521 U.S. 346 (1997).

¹⁰ *In re Coffel*, 117 S.W.3d 116 (Mo. Ct. App. 2003) (reversing civil confinement order after three years of confinement as a sexually violent predator based on underlying criminal offense posing no risk of HIV transmission).

subject of a law enforcement investigation of HIV exposure can have significant negative impact on the life of someone with HIV. The statutes we analyze thus present a significant risk of harm to persons with HIV who in fact may not have engaged in behavior that is a prosecutable offense.

Our analysis is not able to capture fully whether defendants with HIV are given fair trials or whether, because of the social stigma that attaches to their status as HIV positive in what are often emotionally charged allegations of betrayal within deeply intimate relationships, their own truthful testimony is discounted, or their defense counsel are less than zealous and well-informed about the underlying medical and scientific issues.¹¹

Defendants in such cases also may not have adequate access to expert scientific witnesses. Indeed, some convictions of persons with HIV appear to be the result of so-called expert testimony that is nothing more than “junk science,” sometimes unfortunately relied upon by judges or juries even in those cases where the defense seeks to challenge and discredit it. Nevertheless, given many of the “facts” as found by judges or juries in these cases, there is certainly support for the view that the testimony of defendants with HIV is often discounted, particularly in cases where conflicting testimony comes from law enforcement personnel who are likely to be viewed sympathetically by the fact-finder and whose social standing is superior to that of the defendant,¹² such as those testifying that they were spit upon or bitten by an HIV positive defendant in their custody, or for the “morally innocent” sexual partners whose trust has allegedly been betrayed by the nondisclosure of HIV status by a sexual partner.¹³

In our summaries of cases, which include both reports of cases in published judicial opinions as well as in news media sources, we include as many relevant facts about the defendant and the case as possible, but without making any judgment about how one might interpret those facts.¹⁴ For example, in many cases, information about the HIV status of the defendant’s sexual contact or contacts is included. As we explain, proof of transmission to a sexual partner is generally not an element in most cases. Often, however, while it is either implied or explicitly stated that the defendant is the source of a sexual partner’s HIV infection, there is often little if any information about how the defendant, as opposed to another sexual partner, has been established as the source of that infection.

Finally, under many HIV-specific statutes, particularly those imposing enhanced penalties for prostitution offenses, cases can be prosecuted under attempt or solicitation theories, and no evidence of a completed offense is necessary for conviction. Under these often overly broad statutes, as we note, no sexual contact or other activity posing a risk of HIV transmission is

¹¹ See, e.g., *State v. Bird*, 692 N.E.2d 1013 (Ohio 1998) (affirming conviction based on defendant’s no contest plea which was deemed an admission of factual issue as to whether saliva can be a deadly weapon because of risk of HIV transmission).

¹² See, e.g., *People v. Hall*, 124 Cal. Rptr. 2d 806 (Cal. Ct. App. 2002) (affirming HIV testing order on theory that sweat on defendant’s hands might pose a risk of HIV transmission to prosecutor who defendant assaulted during his criminal trial).

¹³ See, e.g., *Ginn v. State*, 667 S.E.2d 712 (Ga. Ct. App. 2008) (affirming conviction in case that resulted from the defendant’s former sexual partner applying for an arrest warrant with magistrate court and giving a statement to sheriff’s department against the defendant for failing to inform him of her HIV status, although her HIV status was published on the front page of a local newspaper before she commenced the sexual relationship).

¹⁴ In regard to news media reports, we caution the reader that the actual facts may differ significantly from those as reported, given the potential for sensationalized reporting on such cases. Nevertheless, we include these news reports because in many cases there is no other published source of information about the case.

necessary, and often court opinions offer scant information about the actual risk of HIV transmission that would have resulted from the offense, had it been completed.

STATE BY STATE GUIDE

Alabama Statute(s) that Allow for Criminal Prosecution Based on HIV Status:**ALA. CODE § 22-11A-21**

Penalties for treating or preparing medicine without a license; penalty for person afflicted with sexually transmitted disease to transmit such disease to another person.

(c) Any person afflicted with a sexually transmitted disease who shall knowingly transmit, or assume the risk of transmitting, or do any act which will probably or likely transmit such disease to another person shall be guilty of a Class C misdemeanor.

ALA. ADMIN. CODE r. 420-4-1-.03***Enumeration.***

(3) Sexually Transmitted Diseases. The State Committee of Public Health, acting for the State Board of Health, shall designate in accordance with the Alabama Administrative Procedure Act, by majority vote, those notifiable diseases which shall be designated as sexually transmitted. Such sexually transmitted notifiable diseases shall be included within those designated in Rule 420-4-1-.03(1) and shall be reported as provided in Rule 420-4-1-.03(2). Syphilis and HIV infection are specifically designated as those sexually transmitted diseases referred to in the Code of Ala. 1975, § 22-11A-17(a).

ALA. CODE § 13A-5-7

Class C misdemeanors are punishable by up to three months imprisonment.

ALA. CODE § 13A-5-12

Class C misdemeanors are subject to a fine up to \$500.

Alabama has prosecuted incidents of HIV exposure under general criminal laws.

Under Alabama's communicable disease exposure statute, HIV positive persons may be imprisoned for up to three months or fined up to \$500 if they "knowingly" transmit the virus, assume the risk of transmitting, or perform any act which will probably or likely transmit such disease to another

person.¹⁵ Neither the intent to transmit HIV nor actual transmission is required for prosecution.

Though HIV is classified as a sexually transmitted disease for the purpose of Alabama’s statute, there has never been a prosecution for HIV exposure under this law. Many states have similar communicable disease control statutes,¹⁶ but their applicability to HIV is doubtful as many were enacted prior to the HIV epidemic and there have been no prosecutions for HIV exposure under these laws. In the absence of specific HIV exposure laws, states have prosecuted incidents of HIV exposure under general criminal laws, including assault and reckless endangerment.

In *Brock v. State*, an HIV positive inmate who was in the AIDS unit of an Alabama prison¹⁷ was charged with attempted murder and two counts of assault when he allegedly became belligerent and bit a police officer.¹⁸ The police officer did not test positive for HIV.¹⁹ At trial, the jury acquitted Brock of the attempted murder charge but convicted him of first-degree assault, a crime which requires that the defendant both intend to cause and actually cause “serious physical injury” with a “deadly weapon or dangerous instrument.”²⁰ The prosecution argued that because the defendant was HIV positive, his mouth and teeth were “highly capable of causing death or serious physical injury” and should be considered dangerous weapons or instruments for the purposes of the assault charges.²¹

On appeal, Alabama’s Court of Criminal Appeals set aside the first-degree assault conviction and reduced the conviction to assault in the third degree.²² The court held that the state failed to establish the essential elements of a case of first-degree assault against Brock.²³ The court stated that no evidence was provided that Brock’s mouth and teeth were “deadly weapon[s]” as defined by Alabama law.²⁴ Moreover, the state did not prove that Brock intended to cause serious physical harm to the prison guard.²⁵ The court further noted that the state provided no evidence that AIDS can be

¹⁵ ALA. CODE §§ 22-11A-21(c) (2014), 13A-5-7 (2014), 13A-5-12 (2014); ALA. ADMIN. CODE r. 420-4-1-.03 (2014). Under Alabama law, “[a] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature of that the circumstance exists.” ALA. CODE § 13A-2-2(2) (2014).

¹⁶ Several states have criminal exposure statutes for “sexually transmitted diseases,” “infectious venereal diseases,” etc. See e.g. CAL. HEALTH & SAFETY CODE § 120600 (West 2014); LA. REV. STAT. ANN. § 40:1062 (2014); MONT. CODE ANN. § 50-18-112 (2013); N.Y. PUB. HEALTH LAW § 2307 (McKinney 2014); S.C. CODE ANN. § 44-29-60 (2013); TENN. CODE ANN. § 68-10-107 (2014); VT. STAT. ANN. tit. 18, § 1106 (2014); W. VA. CODE § 16-4-20 (2014). There have been no prosecutions for HIV exposure under any of these statutes. Prosecutions for HIV exposure, if any, have arisen out of the general criminal laws or HIV-specific exposure statutes of these states.

¹⁷ It should be noted that the Alabama Department of Corrections’ (“ADOC”) policy of categorically segregating HIV positive prisoners from the general prison population was challenged through a class action suit in 2012. *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1276 (M.D. Ala. 2012). The court found that the policy violated the Americans with Disabilities Act. *Id.* at 1306-07. Among other things, the subsequent settlement agreement ended the ADOC’s practice of segregating HIV positive inmates within facilities. *Henderson v. Thomas*, Civ. A. 2:11cv224-MHT, 2013 WL 5493197, at *2 (M.D. Ala. Sept. 30, 2013).

¹⁸ 555 So. 2d 285, 286 (Ala. Crim. App. 1989).

¹⁹ *Id.*

²⁰ *Id.* at 286-87; ALA. CODE § 13A-6-20 (2014).

²¹ *Brock*, 555 So. 2d at 287-88.

²² *Id.* at 288.

²³ *Id.*

²⁴ *Id.* at 287.

²⁵ *Id.* at 288.

transmitted through a human bite, and that the court did not believe it to be an established scientific fact that AIDS could be transmitted in such a manner.²⁶

The CDC has concluded that there exists only a “negligible” risk that HIV could be transmitted through a bite.²⁷ The CDC has also maintained that saliva alone has never been shown to transmit HIV.²⁸ Despite these findings, there have still been prosecutions, and upheld convictions, for HIV exposure for biting or spitting.²⁹

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, it should not be used as a substitute for legal advice.

²⁶ *Id.*

²⁷ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

²⁸ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

²⁹ See Texas section.

Alaska Statute(s) that Allow for Criminal Prosecution Based on HIV Status:**ALASKA STAT. § 12.55.155*****Sentence Enhancement for HIV Exposure***

(c) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125:

(33) the offense was a felony specified in AS 11.41.410--11.41.455, the defendant had been previously diagnosed as having or having tested positive for HIV or AIDS, and the offense either (A) involved penetration, or (B) exposed the victim to a risk or a fear that the offense could result in the transmission of HIV or AIDS; in this paragraph, “HIV” and “AIDS” have the meanings given in AS 18.15.310.

ALASKA STAT. § 11.41.410 - 11.41.455

ALASKA STAT. § 11.41.410 Sexual assault, first degree
Unclassified felony

ALASKA STAT. § 11.41.420 Sexual assault, second degree
Class B felony

ALASKA STAT. § 11.41.425 Sexual assault, third degree
Class C felony

ALASKA STAT. § 11.41.427 Sexual assault, fourth degree
Class A misdemeanor

ALASKA STAT. § 11.41.434 Sexual abuse of a minor, first degree
Unclassified felony

ALASKA STAT. § 11.41.436 Sexual abuse of a minor, second degree
Class B felony

ALASKA STAT. § 11.41.438 Sexual abuse of a minor, third degree
Class C felony

ALASKA STAT. § 11.41.440 Sexual abuse of a minor, fourth degree
Class A misdemeanor

ALASKA STAT. § 11.41.450 Incest
Class C felony

ALASKA STAT. § 11.41.452 Online enticement of a minor
Class B felony unless the defendant at the time of the offense was required to register as a sex offender or child kidnapper, in which case class A felony

ALASKA STAT. § 11.41.455 Unlawful exploitation of a minor
Class B felony, unless the defendant has previously been convicted of this or a similar

HIV positive status may lead to higher prison sentences for felony sexual offenses.

Alaska has no statute explicitly criminalizing HIV transmission or exposure, but enhanced sentencing may be applied based on a defendant's HIV status if she/he is found guilty of one of several specified sex offenses.³⁰ If an HIV positive person is found guilty of a sexually-based assault, she/he may receive an enhanced term of imprisonment if (1) the offense involved penetration or (2) the defendant exposed the victim to a risk or fear that HIV transmission could result.³¹ Neither the intent to transmit HIV nor actual transmission is required.

Alaska defines "sexual penetration" as "genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body"³² An enhanced sentence can be imposed regardless of the defendant's viral load, whether protection, such as a condom, was used, or if the crime involved penetration with a body part or object that cannot transmit HIV.

In 1996, the HIV positive status of a defendant was considered an "aggravating factor," leading the court to sentence him to ten years for sexual abuse of a minor.³³ On appeal, the court affirmed the finding of the defendant's HIV status as an aggravating factor because the defendant knew he had HIV at the time of the sexual conduct with the minor, did not disclose his status, and did not take any measures to protect her from HIV.³⁴ The court found that although the minor provided a condom that was used for the second sexual encounter, and that she had thus far tested negative for HIV, it was "reasonable to infer that [the minor] [would] be very fearful for some time to come that she may have contracted [HIV]"³⁵ The court determined that such considerations supported an enhanced sentence.³⁶

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³⁰ ALASKA STAT. § 12.55.155 (2014).

³¹ § 12.55.155(c)(33).

³² § 11.81.900(60)(A) (2014).

³³ *Wans v. State*, No. A-6188, 1996 WL 671355 at *2 (Alaska Ct. App. 1996).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Arizona Statute(s) that Allow for Criminal Prosecution Based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in Arizona. However, in some states, HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Arizona.

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, it should not be used as a substitute for legal advice.

Arkansas Statute(s) that Allow for Criminal Prosecution Based on HIV Status:**ARK. CODE ANN. § 5-14-123*****Knowingly transmitting AIDS, HIV***

(a) A person with acquired immunodeficiency syndrome or who tests positive for the presence of human immunodeficiency virus antigen or antibodies is infectious to another person through the exchange of a body fluid during sexual intercourse and through the parenteral transfer of blood or a blood product and under these circumstances is a danger to the public.

(b) A person commits the offense of exposing another person to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus and exposes another person to human immunodeficiency virus infection through the parenteral transfer of blood or a blood product or engages in sexual penetration with another person without first having informed the other person of the presence of human immunodeficiency virus.

(c) (1) As used in this section, “sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into a genital or anal opening of another person’s body.

(2) However, emission of semen is not required.

(d) Exposing another person to human immunodeficiency virus is a Class A felony.

ARK. CODE ANN. § 20-15-903***Obligation to advise medical personnel***

(a) Prior to receiving any health care services of a physician or dentist, any person who is found to have human immunodeficiency virus (HIV) infection shall advise the physician or dentist that the person has human immunodeficiency virus (HIV) infection.

(b) Any person failing or refusing to comply with the provisions of subsection (a) of this section shall be guilty of a Class A misdemeanor and punished accordingly.

ARK. CODE ANN. § 5-4-401***Felonies, incarceration***

(a) A defendant convicted of a felony shall receive a determinate sentence according to the following limitations:

(2) For a Class A felony, the sentence shall be not less than six (6) years nor more than thirty (30) years;

(b) A defendant convicted of a misdemeanor may be sentenced according to the following limitations:

(1) For a Class A misdemeanor, the sentence shall not exceed one (1) year;

ARK. CODE ANN. § 5-4-201***Imposition of Fines***

(a) A defendant convicted of a felony may be sentenced to pay a fine:

(1) Not exceeding fifteen thousand dollars (\$15,000) if the conviction is of a Class A felony or Class B felony;

(b) A defendant convicted of a misdemeanor may be sentenced to pay a fine:

(1) Not exceeding two thousand five hundred dollars (\$2,500) if the conviction is of a Class A misdemeanor;

To avoid the risk of arrest and prosecution, HIV status must be disclosed to partners before engaging in sexual activities.

People living with HIV in Arkansas should be aware that penalties for engaging in a broad range of sexual activities, without being able to prove that one first notified partners of one's HIV status, can result in criminal penalties. If a person in Arkansas is aware that she/he is HIV positive, she/he must disclose this to a sexual partner before engaging in penile-vaginal sex, anal sex, oral sex, or the insertion of any body part of an HIV positive person, or any object, into the genital or anal openings of another person.³⁷ Though the statute's title emphasizes "knowingly transmitting AIDS/HIV," neither the intent to transmit HIV, actual transmission of HIV, or the ejaculation of semen is required for prosecution.³⁸

The only affirmative defense to prosecution is the disclosure of one's HIV status. However, it is difficult to prove whether HIV status was disclosed in the course of private sexual activities because the evidence in these matters is often, if not always, limited to "he said, she said" testimony by the parties or third-party witnesses. In *Weaver v. State*, for example, an HIV positive man was sentenced to thirty-years imprisonment

³⁷ ARK. CODE ANN. § 5-14-123 (2014).

³⁸ *Id.*

for allegedly having sex without disclosing his status.³⁹ The defendant maintained at trial that he had disclosed his status to his partner.⁴⁰ To rebut the defendant's testimony, the prosecution called a health official to testify that the defendant said he would infect everyone he could if he was HIV positive.⁴¹ On appeal, the court found that the rebuttal testimony was sufficient as it went to the intent of the defendant not to disclose his HIV positive status, and therefore it refuted the defendant's assertion that he had told the complainant that he was HIV positive.⁴²

Prosecutions of HIV exposure cases raise serious issues as to the confidentiality of medical records and patient history. In criminalization matters, states often authorize the disclosure of otherwise confidential HIV information. Disclosure of this information does not require the defendant's authorization even though it is her/his confidential medical information that is being disseminated to third parties. In a second trial to prosecute the defendant from *Weaver* on two additional counts of exposing another to HIV, the state obtained the defendant's medical records from the county health department by issuing an investigative subpoena, which did not require court approval.⁴³ The defendant was convicted and sentenced to thirty years for each count, to be served concurrently with his prior conviction.⁴⁴ On appeal, the defendant argued that the medical records were obtained in violation of the state's rule of criminal procedure, rules of evidence, as well as the state and federal constitutions.⁴⁵ The Arkansas Court of Appeals found that the prosecutor's use of the investigative subpoena was proper because prosecutors are statutorily allowed to subpoena medical records without court approval if it is for the investigation of a crime.⁴⁶

Arkansas also allows court-ordered involuntary HIV testing for complainant notification.⁴⁷ All criminal defendants in Arkansas charged with sexual assault, incest, or prostitution may be required to submit to an HIV test and, upon conviction, and at the victim's request, will be required to take an HIV test.⁴⁸ At least thirty-two states have passed similar statutes permitting involuntary HIV testing of certain suspects, defendants, or convicts.⁴⁹

³⁹ 939 S.W.2d 316, 317 (Ark. Ct. App. 1997).

⁴⁰ *Id.* at 318.

⁴¹ *Id.*

⁴² *Id.* at 319.

⁴³ *Weaver v. State*, 990 S.W.2d 572, 573-74 (Ark. Ct. App. 1999).

⁴⁴ *Id.* at 573.

⁴⁵ *Id.*

⁴⁶ *Id.* at 574-75, (citing ARK. CODE ANN. § 20-15-904 (2014), which states "(a) A person with Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of Human Immunodeficiency Virus (HIV) antigen or antibodies is infectious to others through the exchange of body fluids during sexual intercourse and through the parenteral transfer of blood or blood products and under these circumstances is a danger to the public. (b) A physician whose patient is determined to have Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of Human Immunodeficiency Virus (HIV) antigen or antibodies shall immediately make a report to the Arkansas Department of Health in such manner and form as the department shall direct. (c) All information and reports in connection with persons suffering from or suspected to be suffering from the diseases specified in this section shall be regarded as confidential by any and every person, body, or committee whose duty it is or may be to obtain, make, transmit, and receive such information and reports. *However, any prosecuting attorney of this state may subpoena such information as may be necessary to enforce the provisions of this section and 5-14-123 and 16-82-101, provided that any information acquired pursuant to such subpoena shall not be disclosed except to the courts to enforce the provisions of this section.*").

⁴⁷ ARK. CODE ANN. § 16-82-101 (2014).

⁴⁸ *Id.*

⁴⁹ ALA. CODE § 22-11A-17 (2014); ARIZ. REV. STAT. ANN. § 13-1415 (2014); CAL. PENAL CODE §§ 1202.1 (West 2014), 1202.6 (West 2014); CAL. HEALTH & SAFETY CODE §§ 121050 (West 2014), 121055 (West 2014); COLO. REV. STAT. ANN. §§ 18-3-415 (2014), 18-7-205.5 (2014); CONN. GEN. STAT. §§ 54-102a (2014), §54-102b (2014); FLA. STAT. §§ 775.0877 (2014), 796.08 (2014); GA. CODE ANN. § 17-10-15 (2014); 730 ILL. COMP. STAT. ANN. § 5/5-5-3 (2014); IND. CODE § 35-38-1-10.5 (2014); KY. REV. STAT. ANN. § 510.320 (West 2014); LA. REV. STAT. ANN. § 15:535 (2014); LA. CODE CRIM. PROC. ANN. art. 499 (2013);

Sentences for violating Arkansas’s HIV exposure statute are severe. The minimum sentence for a Class A felony is six years, but sentences and fines of up to thirty years and \$15,000 are possible.⁵⁰ Sex offender registration may also be required by a sentencing court,⁵¹ which often leads to community ostracism and serious problems finding employment. The following cases serve as illustrations of possible penalties for violating Arkansas’ criminal exposure statute:

- In March 2010, an HIV positive man was sentenced to twenty years imprisonment after engaging in unprotected sex with a woman without first disclosing his status.⁵²
- In May 2009, a 17-year-old high school student was arrested for failing to inform his teenage sexual partner of his HIV positive status before engaging in unprotected sex.⁵³ He was charged as an adult and sentenced to fifteen years in jail after pleading guilty to five counts of exposing another person to HIV.⁵⁴
- In July 2009, a 29-year-old man was arrested for allegedly raping a boy and exposing him to HIV.⁵⁵
- In May 2008, a 33-year-old HIV positive man was sentenced to twelve years in prison for failing to disclose his HIV status to his girlfriend and another woman prior to engaging in sexual conduct.⁵⁶ The man also had to register as a sex offender.⁵⁷ Neither of the women tested positive for HIV.⁵⁸

Exposing another to HIV positive blood is criminally punishable.

Because the law punishes “parenteral” exposure—i.e., exposure through a break in the skin or through a mucus membrane—prosecutions are possible if any amount of HIV positive blood makes contact with another individual’s non-intact skin, eyes, nose, mouth, or other area involving a mucus membrane.⁵⁹ In May 2010, a 41-year-old HIV positive man was charged with criminal exposure to HIV after allegedly

ME. REV. STAT. ANN. tit. 5, §§ 19203-A (2014), 19203-F (2014); MICH. COMP. LAWS. § 333.5129 (2014); MISS. CODE ANN. §§ 99-19-201 (2014), 99-19-203 (2014), 43-21-623 (2014); MO. REV. STAT. § 191.663 (2014); MONT. CODE ANN. § 46-18-256 (2013); NEB. REV. STAT. § 29-2290 (2014); NEV. REV. STAT. §§ 201.356 (2014), 441A.320 (2014); N.H. REV. STAT. ANN. § 632-A:10-b (2014); N.J. REV. STAT. §§ 2A:4A-43.1 (2014), 2C:43-2.2 (2014); N.M. STAT. ANN. §24-2B-5.1 (2014); N.Y. CODE CRIM. PROC. § 390.15 (McKinney 2014); N.Y. FAM. CT. ACT § 347.1 (McKinney 2014); N.D. CENT. CODE § 23-07-07.5 (2013); OHIO REV. CODE ANN. § 2907.27 (West 2014); OKLA. STAT. tit. 63, § 1-524 (West 2014); OR. REV. STAT. § 135.139 (2014); 35 PA. CONS. STAT. § 7608 (West 2014); TENN. CODE ANN. §§ 39-13-521 (2014), 68-10-116 (2014); TEX. CODE CRIM. PROC. ANN. art. 21.31 (West 2013); VA. CODE ANN. §§ 18.2-62 (2014), 18.2-346.1 (2014); W. VA. CODE § 16-3C-2 (2014); WIS. STAT. §§ 252.15 (2014), 968.38 (2014).

⁵⁰ ARK. CODE ANN. §§ 5-4-401(a)(2) (2014), 5-4-201(a)(1) (2014).

⁵¹ § 12-12-903(12)(A)(i)(p) (2014).

⁵² Wanda Freeman, *HIV positive Man Gets 20-year Term*, TIMES REC. ONLINE, Mar. 11, 2010.

⁵³ US: *Arkansas High School Student Arrested for HIV Exposure*, HIV JUSTICE NETWORK, June 2, 2009, available at <http://www.hivjustice.net/news/us-arkansas-high-school-student-arrested-for-hiv-exposure/>.

⁵⁴ *Arkansas Man Gets 15 Years in Prison for HIV Felony*, POZ, Dec. 31, 2009, available at http://www.poz.com/articles/arkansas_christopher_gray_1_17803.shtml.

⁵⁵ US: *Arkansas man accused of HIV exposure, under-age rape*, HIV JUSTICE NETWORK, July 17, 2009, available at http://criminalhivtransmission.blogspot.fr/2009_07_01_archive.html.

⁵⁶ Ron Wood, *Man Gets Prison Term for Exposing Woman to HIV*, MORNING NEWS, May 2, 2008, available at <http://criminalhivtransmission.blogspot.com/2008/05/33-year-old-arkansas-man-who-pleaded.html>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ ARK. CODE ANN. § 5-14-123.

spitting blood at a police officer.⁶⁰

HIV status must be disclosed before receiving medical treatment.

All people in Arkansas who are aware that they are HIV positive must inform doctors or dentists of their HIV status before receiving treatment.⁶¹ Failure to meet this requirement is punishable by up to one year in prison, a \$2,500 fine, or both.⁶²

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, it should not be used as a substitute for legal advice.

⁶⁰ Gavin Lesnick, *HIV positive man spits blood at police officer, report says*, ARKANSASONLINE.COM, May 12, 2010, available at <http://www.arkansasonline.com/news/2010/may/12/HIV-positive-man-spits-blood-officer-report-says/?latest>.

⁶¹ ARK. CODE ANN. § 20-15-903 (2014).

⁶² §§ 5-4-401, 5-4-201(a)(1), 20-15-903,

California Statute(s) that Allow for Criminal Prosecution Based on HIV Status:**CAL. HEALTH & SAFETY CODE § 120291*****Unprotected sexual activity by one who knows self to be infected by HIV; offense; evidence of knowledge; charging document***

(a) Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years. Evidence that the person had knowledge of his or her HIV positive status, without additional evidence, shall not be sufficient to prove specific intent.

(b) As used in this section, the following definitions shall apply:

(1) "Sexual activity" means insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner.

(2) "Unprotected sexual activity" means sexual activity without the use of a condom.

(c)(1) When alleging a violation of subdivision (a), the prosecuting attorney or grand jury shall substitute a pseudonym for the true name of the victim involved. The actual name and other identifying characteristics of the victim shall be revealed to the court only in camera, and the court shall seal that information from further revelation, except to defense counsel as part of discovery.

(2) All court decisions, orders, petitions, and other documents, including motions and papers filed by the parties, shall be worded so as to protect the name or other identifying characteristics of the victim from public revelation.

(3) Unless the victim requests otherwise, a court in which a violation of this section is filed shall, at the first opportunity, issue an order that the parties, their counsel and other agents, court staff, and all other persons subject to the jurisdiction of the court shall make no public revelation of the name or any other identifying characteristics of the victim.

(4) As used in this subdivision, "identifying characteristics" includes, but is not limited to, name or any part thereof, address or any part thereof, city or unincorporated area of residence, age, marital status, relationship to defendant, and race or ethnic background.

CAL. HEALTH AND SAFETY CODE § 120290***Willful exposure of self or others to disease; offense***

Except as provided in Section 120291 or in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself or herself to another person, and any person who willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor.

CAL. PENAL CODE § 12022.85***Violation of sexual offense with knowledge that one has AIDS or HIV; enhancement of sentence; proof of knowledge; test results***

(a) Any person who violates one or more of the offenses listed in subdivision (b) with knowledge that he or she has acquired immune deficiency syndrome (AIDS) or with the knowledge that he or she carries antibodies of the human immunodeficiency virus at the time of the commission of those offenses shall receive a three-year enhancement for each violation in addition to the sentence provided under those sections.

(b) Subdivision (a) applies to the following crimes:

- (1) Rape in violation of Section 261.
- (2) Unlawful intercourse with a person under 18 years of age in violation of Section 261.5.
- (3) Rape of a spouse in violation of Section 262.
- (4) Sodomy in violation of Section 286.
- (5) Oral copulation in violation of Section 288a.

(c) For purposes of proving the knowledge requirement of this section, the prosecuting attorney may use test results received under subdivision (c) of Section 1202.1 or subdivision (g) of Section 1202.6.

CAL. HEALTH AND SAFETY CODE § 1621.5***Donation of blood, etc., by person knowing he or she has AIDS or has tested reactive to etiologic agent AIDS or its antibodies; felony; exempt persons; disclosure of test results in criminal investigation***

(a) It is a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, four, or six years, for any person to donate blood, body organs or other tissue, semen to any medical center or semen bank that receives semen for purposes of artificial insemination, or breast milk to any medical center or breast milk bank that receives breast milk for purposes of distribution, whether he or she is a paid or a volunteer donor, who knows that he or she has acquired immunodeficiency syndrome (AIDS), as diagnosed by a physician and surgeon, or who knows that he or she has tested reactive to HIV. This section shall not apply to any person who is mentally incompetent or who self-defers his or her blood at a blood bank or plasma center pursuant to subdivision (b) of Section 1603.3 or who donates his or her blood for purposes of an autologous donation.

(b) In a criminal investigation for a violation of this section, no person shall disclose the results of a blood test to detect the etiologic agent of AIDS or antibodies to that agent to any officer, employee, or agent of a state or local agency or department unless the test results are disclosed as otherwise required by law pursuant to any one of the following:

- (1) A search warrant issued pursuant to Section 1524 of the Penal Code.
- (2) A judicial subpoena or subpoena duces tecum issued and served in compliance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of the Code of Civil Procedure.
- (3) An order of a court.

(c) For purposes of this section, "blood" means "human whole blood" and "human whole blood derivatives," as defined for purposes of this chapter and includes "blood components," as defined in subdivision (k) of Section 1603.1.

CAL. PENAL CODE § 647f***Prostitution; accusatory pleading; previous sex offense conviction; blood test AIDS positive; felony***

In any accusatory pleading charging a violation of subdivision (b) of Section 647, if the defendant has been previously convicted one or more times of a violation of that ...

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... subdivision or of any other offense listed in subdivision (d) of Section 1202.1, and in connection with one or more of those convictions a blood test was administered pursuant to Section 1202.1 or 1202.6 with positive test results, of which the defendant was informed, the previous conviction and positive blood test results, of which the defendant was informed, shall be charged in the accusatory pleading. If the previous conviction and informed test results are found to be true by the trier of fact or are admitted by the defendant, the defendant is guilty of a felony.

CAL. PENAL CODE § 1202.1

Conviction of sex offense; AIDS testing

(d)(1) In every case in which a person is convicted of a sexual offense listed in subdivision (e) or adjudged by the court to be a person described by Section 601 or 602 of the Welfare and Institutions Code as provided in Section 725 of the Welfare and Institutions Code by reason of the commission of a sexual offense listed in subdivision (e), the prosecutor or the prosecutor's victim-witness assistance bureau shall advise the victim of his or her right to receive the results of the blood or oral mucosal transudate saliva test performed pursuant to subdivision (a). The prosecutor or the prosecutor's victim-witness assistance bureau shall refer the victim to the local health officer for counseling to assist him or her in understanding the extent to which the particular circumstances of the crime may or may not have placed the victim at risk of transmission of the human immunodeficiency virus (HIV) from the accused, to ensure that the victim understands the limitations and benefits of current tests for HIV, and to assist the victim in determining whether he or she should make the request.

(2) Notwithstanding any other law, upon the victim's request, the local health officer shall be responsible for disclosing test results to the victim who requested the test and the person who was tested. However, as specified in subdivision (g), positive test results shall not be disclosed to the victim or the person who was tested without offering or providing professional counseling appropriate to the circumstances as follows:

- (A) To help the victim understand the extent to which the particular circumstances of the crime may or may not have put the victim at risk of transmission of HIV from the perpetrator.
- (B) To ensure that the victim understands both the benefits and limitations of the current tests for HIV.
- (C) To obtain referrals to appropriate health care and support services.

(e) For purposes of this section, "sexual offense" includes any of the following:

- (1) Rape in violation of Section 261 or 264.1.

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- (2) Unlawful intercourse with a person under 18 years of age in violation of Section 261.5 or 266c.
- (3) Rape of a spouse in violation of Section 262 or 264.1.
- (4) Sodomy in violation of Section 266c or 286.
- (5) Oral copulation in violation of Section 266c or 288a.
- (6)(A) Any of the following offenses if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim:
 - (i) Sexual penetration in violation of Section 264.1, 266c, or 289.
 - (ii) Aggravated sexual assault of a child in violation of Section 269.
 - (iii) Lewd or lascivious conduct with a child in violation of Section 288.
 - (iv) Continuous sexual abuse of a child in violation of Section 288.5.
 - (v) The attempt to commit any offense described in clauses (i) to (iv), inclusive.
- (B) For purposes of this paragraph, the court shall note its finding on the court docket and minute order if one is prepared.

CAL. PENAL CODE § 647

Disorderly conduct

Except as provided in subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

- (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.

CAL. PENAL CODE § 18

Punishment of felony not otherwise prescribed; alternate sentence to county jail

- (a) Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170.
- (b) Every offense which is prescribed by any law of the state to be a felony punishable by imprisonment or by a fine, but without an alternate sentence to the county jail for a period not exceeding one year, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

HIV positive persons may be prosecuted for engaging in unprotected sexual intercourse with the specific intent to transmit HIV.

Under California’s felony exposure statute, imprisonment for three, five, or eight years may follow if an HIV positive person (1) engages in unprotected penile-vaginal sex or unprotected anal sex, (2) with knowledge of her/his positive status, (3) without disclosing his/her HIV status to sexual partners, *and* (4) with the specific intent to transmit HIV.⁶³ Actual transmission of HIV is not required.

Proof of disclosure of one’s status and/or condom use, or use of other protection, are affirmative defenses to prosecution. Importantly, an HIV positive person will only be prosecuted if there is proof that the person *specifically intended* to transmit HIV to a partner. Knowledge of one’s HIV status alone is insufficient for prosecution.⁶⁴ In other jurisdictions intent has been shown through statements a defendant made about wanting to infect others with HIV.⁶⁵

In September 2010, a 41-year-old man pleaded guilty to having unprotected sexual activity while knowing he was HIV positive and acting with the intent to infect his sexual partner.⁶⁶ At the time of this publication, this is the only case the authors are aware of where an HIV positive individual was charged or convicted under California’s statute.

When intent cannot be proven, HIV positive persons may be prosecuted for exposure of another to a communicable disease.

Under California law, notwithstanding the HIV criminalization statute, any person who is infected with a communicable disease and willfully exposes herself/himself to another person is guilty of a misdemeanor, punishable by up to six months.⁶⁷

In July 2012, a 56-year-old HIV positive man was found guilty of willfully exposing another to HIV after he “admitted during trial that he knew he had AIDS and yet had unprotected sex with the victim,” with whom he was having an affair.⁶⁸ He was sentenced to six months imprisonment.⁶⁹

Similarly, in August 2014, a 29 year old man was charged with willful exposure after a former partner alleged transmission and non-disclosure.⁷⁰ If convicted, he could face up to six months in jail and a \$1,000 fine. At the time of this publication, this case had not been formally prosecuted.

⁶³ CAL. HEALTH & SAFETY CODE § 120291 (West 2014).

⁶⁴ *Id.*

⁶⁵ See *State v. Stark*, 832 P.2d 109, 110 (Wash. Ct. App. 1992) (finding that the HIV positive defendant’s statement, “I don’t care. If I’m going to die, everybody’s going to die,” when talking about his sexual activity, was sufficient to show intent to inflict bodily injury on his sexual partners through exposure to HIV.); *Commonwealth v. Walker*, 836 A.2d 999, 1002 (Pa. Super. Ct. 1999) (finding an HIV positive man guilty of communicating terrorist threats when he scratched a parole officer on the hand and said, “I have open cuts on my hands. Life is short. I am taking you with me.” The court found that the statement was sufficient to show intent to terrorize another.).

⁶⁶ Tomoya Shimura, *Gang member pleads guilty to spreading HIV*, HIGHDESERT.COM, Sept. 7, 2010, available at <http://www.highdesert.com/articles/spreading-21626-vvdailynews-gang-victorville.html>.

⁶⁷ CAL. HEALTH & SAFETY CODE § 120290 (West 2014); CAL PENAL CODE § 19 (West 2014).

⁶⁸ Katie Lucia, *Man gets 6 months for spreading HIV*, DESERT DISPATCH, July 26, 2012, available at <http://www.desertdispatch.com/news/spreading-13329-barstow-gets.html>.

⁶⁹ *Id.*

HIV positive individuals may receive enhanced sentences or aggravated assault charges for sex crimes.

California imposes sentence enhancements for sex offenders who are HIV positive.⁷¹ Specifically, if a person living with HIV/AIDS knows her/his status and commits a sex offense, or multiple sex offenses, an additional three years in prison are required for each offense.⁷²

Neither the intent to transmit HIV nor actual transmission is required.

The sentencing law may be applied regardless of the defendant's viral load, whether condoms or other protection were used, or whether HIV could have been transmitted during the acts in question.

Although cases arising under sentence enhancement laws are rare in California, in 1998 a man received a sentence enhancement of nine additional years in prison for having unprotected sex with a minor while being HIV positive.⁷³ On a challenge to the sentencing enhancement statute, the California Court of Appeal declined to label the application of the statute as “cruel and unusual punishment” in violation of the Eighth Amendment to the U.S. Constitution, as it did not punish the HIV-positive status itself, but rather punished conduct.⁷⁴

Sexual assault charges may also be elevated to aggravated assault charges if the HIV positive defendant fails to use protection. In *Roman v. Superior Court*, an HIV positive man anally raped a minor without using a condom.⁷⁵ The court found the non-use of a condom to be sufficient evidence that the defendant engaged in conduct “likely to produce great bodily harm or death,” elevating his charge to aggravated assault from sexual assault.⁷⁶ No actual finding of HIV transmission was required.⁷⁷

Heightened penalties may result from activities as a sex worker or soliciting sex while HIV positive.⁷⁸

⁷⁰ Matt Rascon & Christina London, *Man Accused of Spreading HIV Must Stay off Grindr*, NBCSANDIEGO.COM, Sept. 3, 2014, available at <http://www.nbcsandiego.com/news/local/Man-Accused-of-Spreading-HIV-to-Stay-Off-Grindr-273643351.html>.

⁷¹ CAL. PENAL CODE § 12022.85 (West 2014).

⁷² *Id.*

⁷³ *Guevara v. Superior Court*, 73 Cal. Rptr. 2d 421 (Cal. Ct. App. 1998).

⁷⁴ *Id.* at 424-25; (distinguishing *Robinson v. California*, 370 U.S. 660 (1962), where a “narcotics addiction” statute was invalidated, because unlike *Robinson*, the statute at issue in *Guevara* “does not criminalize the *status* of being HIV positive because it applies only where a knowingly HIV positive individual commits specified criminal *conduct*.” (emphasis not added)).

⁷⁵ 5 Cal. Rptr. 3d 807 (Cal. Ct. App. 2003).

⁷⁶ *Id.* at 813.

⁷⁷ *Id.* at 812.

⁷⁸ Prior to California's statutes on HIV exposure and HIV-specific statute enhancements, there were a few cases where persons who knew they were HIV positive and solicited or engaged in prostitution faced penalties under general criminal laws. In 1987, an HIV positive sex worker was charged with attempted murder and her pimp was charged with pimping and willfully exposing another to a contagious disease. However, the charges were later dropped when a witness refused to testify. *Main News: The State*, LOS ANGELES TIMES, July 24, 1987, at 2.

California prostitution laws provide for additional penalties when an HIV positive individual is found guilty of either engaging in or soliciting prostitution. Under § 647f of the California Penal Code, if an individual is (1) found guilty of either soliciting or engaging in prostitution, (2) has previously been convicted of a sex offense, and (3) tested positive for HIV following a previous sex offense conviction, she/he is guilty of a felony and may be imprisoned for up to three years.⁷⁹

This sentencing law punishes a defendant for being HIV positive regardless of whether she/he intended to transmit HIV, transmitted the virus, or engaged in activities likely or possible to do so. To commit a felony under this statute, no actual sexual activity is required. A conviction for prostitution is possible as long as a defendant does some act proving intent and agreement to engage in prostitution.⁸⁰

In 2007, an HIV positive sex worker was charged with exposing others to HIV and felony prostitution.⁸¹ She had previously been convicted for prostitution and had tested positive for HIV.⁸² The defendant had condoms in her possession and had not yet engaged in sex with an undercover officer.⁸³ At trial, the court acquitted Hall of the exposure charge, finding that there was not a specific intent to transmit HIV.⁸⁴ On appeal, the court upheld the felony prostitution charge.⁸⁵

Individuals with HIV must not donate blood, organs and other tissues, semen, or breast milk, to others.⁸⁶

A person may face two, four, or six years imprisonment if she/he is aware of her/his HIV positive status and donates blood, body organs or tissues, semen, or breast milk.⁸⁷ Neither the intent to transmit HIV nor actual transmission is required. An individual will not be prosecuted under the following circumstances:

- She/he is mentally incompetent;
- Blood is donated and official procedures for “self-deferring” their blood (indicating that blood should only be used for science purposes, and not for transfusion);
- Donate blood for autologous use (use in another part of the donor’s own body).⁸⁸

HIV positive persons have also been convicted under general criminal charges.⁸⁹

⁷⁹ CAL. PENAL CODE § 647f (West 2014); CAL. PENAL CODE § 18 (West 2014); *See also* above discussion of California sentencing laws for a list of sex offenses covered under this statute.

⁸⁰ CAL. PENAL CODE § 647(b) (West 2014).

⁸¹ *People v. Hall*, No. B190199, 2007 WL 2121912, at *1 (Cal. Ct. App. July 25, 2007).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at *4.

⁸⁵ *Id.* at *5.

⁸⁶ Prior to California’s HIV-specific statute on blood and organ donations, an HIV positive homeless man was acquitted on charges of attempting to poison a pharmaceutical product after selling his blood. Terry Pristin, *Jury Frees AIDS Victim Who Sold Infected Blood*, LOS ANGELES TIMES, Mar. 3, 1998, available at http://articles.latimes.com/1988-03-03/local/me-136_1_blood-bank.

⁸⁷ CAL. HEALTH & SAFETY CODE § 1621.5 (West 2014).

⁸⁸ *Id.*

In *Beauford v. People*, the California Court of Appeal confirmed a conviction for, amongst other charges, making criminal threats.⁹⁰ While resisting arrest, the defendant spit at the officers and made comments including, “I’ll make your life miserable because I’m infected with HIV.”⁹¹ A criminal threat under California law is a threat that is intended to and does cause fear in the person threatened.⁹² The State must prove that (1) the defendant threatened to kill or inflict great bodily injury on another person, (2) intended the threat to be understood as such, (3) communicated the serious intention that the threat would be carried out, (4) the threat caused the person to be in fear and (5) such fear was reasonable.⁹³ The court held that the language and actions of the defendant could reasonably be found to be criminal threats by a jury.⁹⁴

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, it should not be used as a substitute for legal advice.

⁸⁹ In a 1987 case, the defendant successfully sued the San Diego Police Department for taking and testing his blood for HIV without consent or a warrant after he bit the officers. *Barlow v. Superior Court (People)*, 236 Cal.Rptr. 134 (Cal. Ct. App. 1987). He was originally charged with two counts of battery against a police officer and one count of obstructing a police officer. *Barlow v. Ground*, 943 F.2d 1132, 1134 (9th Cir. 1991). After it was discovered he was HIV positive, “the municipal court granted an order authorizing the [blood] tests to support charges the defendant bit the officers with intent to kill them and to inflict great bodily injury on them.” *Barlow*, 236 Cal.Rptr., at 135. A jury later acquitted him of all criminal charges. *Barlow*, 943 F.2d, at 1134.

⁹⁰ No. B196860, 2008 WL 5091389, at *1 (Cal. Ct. App. Dec. 4, 2008).

⁹¹ *Id.*

⁹² CAL. PENAL CODE § 422 (West 2014).

⁹³ *Id.*

⁹⁴ *Beauford*, 2008 WL 5091389, at *3-4.

Colorado Statute(s) that Allow for Criminal Prosecution based on HIV Status:**COLO. REV. STAT. § 18-3-415.5*****Acquired immune deficiency syndrome testing for persons charged with certain sexual offenses - mandatory sentencing***

(1) For purposes of this section, "sexual offense" is limited to a sexual offense that consists of sexual penetration, as defined in section 18-3-401 (6), involving sexual intercourse or anal intercourse.

(2) Any adult or juvenile who is bound over for trial subsequent to a preliminary hearing or after having waived the right to a preliminary hearing on a charge of committing a sexual offense shall be ordered by the court to submit to a diagnostic test for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, said diagnostic test to be ordered in conjunction with the diagnostic test ordered pursuant to section 18-3-415. The results of said diagnostic test shall be reported to the district attorney. The district attorney shall keep the results of such diagnostic test strictly confidential, except for purposes of pleading and proving the mandatory sentencing provisions specified in subsection (5) of this section.

(5) (b) If the court determines that the person tested pursuant to subsection (2) of this section had notice of his or her HIV infection prior to the date the offense was committed, the judge shall sentence said person to a mandatory term of incarceration of at least three times the upper limit of the presumptive range for the level of offense committed, up to the remainder of the person's natural life, as provided in section 18-1.3-1004.

"Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anilingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration, however slight, is sufficient to complete the crime. COLO. REV. STAT. § 18-3-401(6).

COLO. REV. STAT. § 18-7-201.7***Prostitution with knowledge of being infected with acquired immune deficiency syndrome***

(1) Any person who performs or offers or agrees to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse, as such terms are defined in section 18-7-201(2), with any person not his spouse, in exchange for money or any other thing of value, and if such person has been tested for acquired immune deficiency syndrome pursuant to section 18-7-201.5 or 18-7-205.5 or otherwise, . . .

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and the results of such test indicate the presence of the human immunodeficiency virus (HIV) which causes acquired immune deficiency syndrome, such person commits prostitution with knowledge of being infected with acquired immune deficiency syndrome.

(2) Prostitution with knowledge of being infected with acquired immune deficiency syndrome is a class 5 felony.

COLO. REV. STAT. § 18-7-205.7

Patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome

(1) Any person who performs any of the acts described in section 18-7-205(1), with any person not his spouse, and if such person has been tested for acquired immune deficiency syndrome pursuant to section 18-7-201.5 or 18-7-205.5 or otherwise, and the results of such test indicate the presence of the human immunodeficiency virus (HIV) which causes acquired immune deficiency syndrome, such person commits patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome.

(2) Patronizing a prostitute with knowledge of being infected with acquired immune deficiency syndrome is a class 6 felony.

COLO. REV. STAT. § 18-1.3-401

Felonies classified – presumptive penalties

Class 5 felony sentence: minimum one-year imprisonment, maximum three years imprisonment.

Class 6 felony sentence: minimum one-year imprisonment, maximum eighteen months imprisonment.

The prison sentences of HIV positive persons convicted of sex offenses may be severely increased due to HIV status.

Individuals living with HIV in Colorado should be aware that they may receive prison sentences dramatically above those of HIV negative persons if they are convicted of a sex offense, including rape and sexual assault, regardless of whether their alleged conduct exposed others to a significant risk of HIV transmission or if they had the intent to expose others to HIV. Specifically, if an HIV positive person is convicted of a sexual offense involving penetration and is aware that she/he is HIV positive, a sentencing judge is required to impose a sentence of at least three times the upper

limit of the normal sentencing range, which could extend to the remainder of a person's natural life.⁹⁵ "Sexual penetration" is defined as penile-vaginal sex, oral sex, oral stimulation of the anus, or anal sex.⁹⁶ Even under the most lenient application of this statute, penalties for sexual assault would be elevated from six to eighteen years.⁹⁷

The use of protection during a sexual offense is not a defense, no ejaculation or emission of bodily fluid is required, and any degree of penetration, however slight, is sufficient to support the imposition of an increased sentence.⁹⁸ The actual likelihood of HIV transmission during a sexual assault is not a consideration. Neither the intent to transmit HIV nor actual transmission is required.

HIV exposure cases have been prosecuted under general criminal laws in Colorado.

Incidents of HIV exposure in Colorado have been prosecuted under a variety of general criminal laws, including reckless endangerment statutes, regardless of the actual likelihood of transmission. In a 1999 case, an HIV positive man was charged with attempted manslaughter when, knowing his HIV status, he did not use a condom during anal sex with a twelve-year-old boy.⁹⁹ The man was convicted of two counts of sexual assault and reckless endangerment, the latter of which being a lesser included offense for an attempted manslaughter charge because he failed to use a condom during the sexual encounter even though he knew he was HIV positive.¹⁰⁰ In Colorado, reckless endangerment is defined as exposing another to a "substantial risk of serious bodily injury."¹⁰¹ There is no requirement of proof of purpose or intent to transmit HIV, nor does it matter if HIV is actually transmitted, so long as there was a "risk" of transmission.

Felony menacing charges may also apply if an HIV positive person knowingly, by threat or physical action, places or attempts to place another person in fear of "imminent serious bodily injury."¹⁰² Menacing is a class 5 felony if it is committed by a deadly weapon or by representing that the person is armed with a deadly weapon.¹⁰³ In *People v. Shawn*, the Colorado Court of Appeals held that because HIV is capable of causing significant injury, a person's HIV-positive status could constitute a deadly weapon for the purposes of the menacing statute.¹⁰⁴ In that case, an HIV positive man was convicted of menacing when he allegedly scratched and pinched a store manager, broke his skin, and shouted "I'm HIV positive, let go of me, let go of me."¹⁰⁵ Despite the fact that the store manager testified that he was not in imminent fear of serious bodily injury, the court concluded that the defendant's statements were intended to cause such fear and, as such, were menacing.¹⁰⁶ The court also determined that HIV was a deadly weapon, because a deadly weapon does not have to be *likely* to cause serious bodily injury, only *capable* of doing so.¹⁰⁷ The court determined that "the dangers of

⁹⁵ COLO. REV. STAT. § 18-3-415.5(5)(b) (2014).

⁹⁶ § 18-3-401 (2014).

⁹⁷ § 18-1.3-401(1)(a)(V)(A) (2014).

⁹⁸ *Id.*

⁹⁹ *People v. Dembry*, 91 P.3d 431, 433 (Colo. Ct. App. 2003).

¹⁰⁰ *Id.*

¹⁰¹ COLO. REV. STAT. § 18-3-208 (2014).

¹⁰² § 18-3-206(1) (2014).

¹⁰³ *Id.*

¹⁰⁴ 107 P.3d 1033, 1036 (Colo. App. 2004).

¹⁰⁵ *Id.* at 1035.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1036.

HIV are widely known,” and the man’s HIV status was “used” as a weapon when he broke the store manager’s skin, giving himself “ready access to means of transmitting HIV.”¹⁰⁸

In *People v. Perez*,¹⁰⁹ an HIV positive man was convicted of attempted extreme indifference murder¹⁰⁹ and two counts of sexual abuse when he allegedly made his stepdaughter engage in masturbation, oral sex, and penile-vaginal sex while knowing that he was HIV positive.¹¹⁰ On appeal, the defendant argued that he did not act with the “universal malice” necessary for the attempted extreme indifference murder conviction.¹¹¹ The crime of extreme indifference murder (now known as murder in the first degree) requires that, with “an attitude of universal malice manifesting in extreme indifference to the value of human life,” the defendant “knowingly engages in conduct which creates a great risk of death to a person . . . and thereby causes the death of another.”¹¹² “Universal malice” is defined as the “depravity of the human heart which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim,” and is aimed at conduct that places the lives of many people in danger without focusing on any one person’s life in particular.¹¹³ On appeal, the Colorado Court of Appeals found that there was not sufficient evidence to show that there was any universal malice because the defendant knew the victim and his conduct was directed towards her alone, as opposed to other unknown victims.¹¹⁴ On this basis, the attempted extreme indifference murder conviction was overturned.¹¹⁵

Other cases of HIV exposure being prosecuted under general criminal laws in Colorado include:

- In 2009, an HIV positive man pled guilty to felony child abuse and was sentenced to fifteen years imprisonment after he failed to tell his pregnant fiancée that he was HIV positive.¹¹⁶ His fiancée and son tested positive for HIV after doctors were puzzled why the four-month-old baby had caught pneumonia.¹¹⁷
- In June 2010, an HIV positive man was charged with attempted second-degree assault with a “deadly weapon” after he allegedly spat on a technician while being fitted for an electronic monitoring bracelet.¹¹⁸ His charge was later reduced to misdemeanor harassment.¹¹⁹

It is a felony to solicit a prostitute while HIV positive.

¹⁰⁸ *Id.* at 1037.

¹⁰⁹ The crime has since been renamed “murder in the first degree.” COLO. REV. STAT. § 18-3-102 (2014).

¹¹⁰ 972 P.2d 1072, 1073 (Colo. App. 1998).

¹¹¹ *Id.* at 1073-74.

¹¹² COLO. REV. STAT. § 18-3-102(1)(d).

¹¹³ *Perez*, 107 P.3d at 1074, (citing *Longinotti v. People*, 102 P. 165, 168 (Colo. 1909)).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Jessica Zartler, *HIV Positive Man Charged with Child Abuse*, NBC11NEWS.COM, Jan. 6, 2009, available at <http://www.nbc11news.com/home/headlines/37152584.html>.

¹¹⁷ *Id.*

¹¹⁸ Joseph Boven, *Denver HIV-positive Man Charged With Using Spit as a Deadly Weapon*, COLORADO INDEPENDENT, June 9, 2010, available at <http://coloradoindependent.com/55114/denver-hiv-positive-man-charged-with-using-spit-as-deadly-weapon>.

¹¹⁹ *Id.*

It is a class 6 felony, punishable by up to eighteen months in prison and/or a \$1,000 fine, for an HIV positive person, knowing her/his status, to patronize a prostitute.¹²⁰ “Patronizing” a prostitute is defined as (1) “engag[ing] in an act of sexual intercourse or of deviate sexual conduct” with a prostitute, or (2) “enter[ing] or remain[ing] in a place of prostitution with intent to engage” in such acts.¹²¹

Although the meaning of “deviate sexual conduct” is not defined, Colorado defines “sexual intercourse” for the purposes of prostitution as penile-vaginal sex, oral sex, masturbation, and anal sex in exchange for money or things of value.¹²²

It is a felony to engage in prostitution while HIV positive.

It is a class 5 felony punishable by up to three years in prison and/or a \$1,000 fine for a person who is aware of her/his HIV positive status to perform, offer to perform, or agree to perform any act of penile-vaginal sex, oral sex, masturbation, or anal sex in exchange for money or any other thing of value.¹²³

In July 2007, an HIV positive sex worker in Denver was arrested and “charged with prostitution with knowledge of being HIV infected.”¹²⁴ He received an eighteen-month prison sentence after pleading guilty to attempted prostitution.¹²⁵ Following another arrest in November 2009, he was once again charged for prostitution with knowledge of being HIV positive.¹²⁶ He was arrested again in January 2012 during a prostitution sting.¹²⁷ Because this would be his third felony in less than ten years, causing him to fall under the small habitual criminal provision, he could face up to nine years in prison if convicted.¹²⁸

The solicitation and prostitution statutes punish individuals for being HIV positive, regardless of whether or not they exposed another to a significant risk of HIV transmission. Because intent to engage in prostitution is punishable, an HIV positive person may be imprisoned regardless of whether there was any sexual conduct that could have resulted in HIV transmission, or if one’s HIV status would have been disclosed to the sexual partner. Neither the intent to transmit HIV nor actual HIV transmission is required, and using condoms or other protection is not a defense.

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¹²⁰ COLO. REV. STAT. § 18-7-205.7 (2014); § 18-1.3-401(1)(a)(V)(A).

¹²¹ § 18-7-205(1) (2014).

¹²² § 18-7-201(1) (2014).

¹²³ § 18-7-201.7(1) (2014).

¹²⁴ *HIV positive Man Charged with Prostitution*, ABC 7 News, THE DENVER CHANNEL, Nov. 10, 2009, available at <http://www.thedenverchannel.com/news/21577633/detail.html>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Police: Sting Busts HIV-Positive Prostitute*, ABC 7 News, THE DENVER CHANNEL, Jan. 26, 2012, available at <http://www.thedenverchannel.com/news/police-sting-busts-hiv-positive-prostitute>.

¹²⁸ *Id.*

Connecticut Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in Connecticut. However, in some states, HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Connecticut.

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Delaware Statute(s) that Allow for Criminal Prosecution based on HIV Status:**DEL. CODE ANN. tit. 16, § 2801*****Establishment of registry; testing of donors; penalties***

(b) All donors of semen for purposes of artificial insemination, or donors of corneas, bones, organs or other human tissue for the purpose of injecting, transfusing or transplanting any of them in the human body, shall be tested for evidence of exposure to human immunodeficiency virus (HIV) and any other identified causative agent of Acquired Immunodeficiency Syndrome (AIDS) at the time of or after the donation, but prior to the semen, corneas, bones, organs or other human tissue being made available for such use. However, when in the opinion of the attending physician the life of a recipient of a bone, organ or other human tissue donation would be jeopardized by delays caused by testing for evidence for exposure to HIV and any other causative agent of AIDS, testing shall not be required prior to the life-saving measures.

(c) No person may intentionally, knowingly, recklessly or negligently use the semen, corneas, bones, organs or other human tissue of a donor unless the requirements of subsection (b) of this section have been met. No person may knowingly, recklessly or intentionally use the semen, corneas, bones, organs or other human tissue of a donor who has tested positive for exposure to HIV or any other identified causative agent of AIDS. Violation of this subsection shall be a class E felony.

DEL. CODE ANN. tit. 11, § 4205***Sentence for felonies***

(a) A sentence of incarceration for a felony shall be a definite sentence.

(b) The term of incarceration which the court may impose for a felony is fixed as follows:

(5) For a class E felony up to 5 years to be served at Level V.

There is no explicit statute criminalizing HIV exposure except for donations.

There are no statutes explicitly criminalizing HIV transmission or exposure in Delaware other than in the context of organ, tissue, or semen donations. Under Delaware public health laws, it is a felony to fail to test for HIV or to knowingly, recklessly, or intentionally use the semen, corneas, bones, organs, or other human tissues donations of a person who has tested positive for HIV.¹²⁹ Violation

¹²⁹ DEL. CODE ANN. tit. 16, § 2801(b)-(c) (2014); DEL CODE ANN. tit. 11, § 4205 (2014).

of this statute is punishable by up to five years in prison.¹³⁰ Sperm and tissue banks must follow state regulations for the testing and disposal of tissue donations found to be positive for HIV.¹³¹

Though there are no statutes explicitly criminalizing HIV transmission or exposure in Delaware, in some states, HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Delaware.

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¹³⁰ DEL. CODE ANN. tit. 11, § 4205.

¹³¹ See DEL. CODE ANN. tit. 16, § 2801.

District of Columbia Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in the District of Columbia. However, in some states, HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in the District of Columbia.

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, it should not be used as a substitute for legal advice.

Florida Statute(s) that Allow for Criminal Prosecution based on HIV Status:**FLA. STAT. ANN. § 775.0877*****Criminal transmission of HIV; procedures; penalties***

(1) In any case in which a person has been convicted of or has pled nolo contendere or guilty to, regardless of whether adjudication is withheld, any of the following offenses, or the attempt thereof, which offense or attempted offense involves the transmission of body fluids from one person to another:

- (a) Section 794.011, relating to sexual battery;
- (b) Section 826.04, relating to incest;
- (c) Section 800.04, relating to lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age;
- (d) Sections 784.011, 784.07(2)(a), and 784.08(2)(d), relating to assault;
- (e) Sections 784.021, 784.07(2)(c), and 784.08(2)(b), relating to aggravated assault;
- (f) Sections 784.03, 784.07(2)(b), and 784.08(2)(c), relating to battery;
- (g) Sections 784.045, 784.07(2)(d), and 784.08(2)(a), relating to aggravated battery;
- (h) Section 827.03(2)(c), relating to child abuse;
- (i) Section 827.03(2)(a), relating to aggravated child abuse;
- (j) Section 825.102(1), relating to abuse of an elderly person or disabled adult;
- (k) Section 825.102(2), relating to aggravated abuse of an elderly person or disabled adult;
- (l) Section 827.071, relating to sexual performance by person less than 18 years of age;
- (m) Sections 796.03, 796.07, and 796.08, relating to prostitution; or
- (n) Section 381.0041(11)(b), relating to donation of blood, plasma, organs, skin, or other human tissue, the court shall order the offender to undergo HIV testing, to be performed under the direction of the Department of Health in accordance with s. 381.004, unless the offender has undergone HIV testing voluntarily or pursuant to procedures established in s. 381.004(2)(h)6. or s. 951.27, or any other applicable law or rule providing for HIV testing of criminal offenders or inmates, subsequent to her or his arrest for an offense enumerated in paragraphs (a)-(n) for which she or he was convicted or to which she or he pled nolo contendere or guilty. The results of an HIV test performed on an offender pursuant to this subsection are not admissible in any criminal proceeding arising out of the alleged offense.

(2) The results of the HIV test must be disclosed under the direction of the Department of Health, to the offender who has been convicted of or pled nolo contendere or guilty to an offense specified in subsection (1), the public health agency of the county in which the conviction occurred and, if different, the county of residence of the offender, and, upon request pursuant to s. 960.003, to the victim or the victim's legal guardian, or the parent or legal guardian of the victim if the victim is a minor.

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(3) An offender who has undergone HIV testing pursuant to subsection (1), and to whom positive test results have been disclosed pursuant to subsection (2), who commits a second or subsequent offense enumerated in paragraphs (1)(a)-(n), commits criminal transmission of HIV, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime enumerated in paragraphs (1)(a)-(n).

(4) An offender may challenge the positive results of an HIV test performed pursuant to this section and may introduce results of a backup test performed at her or his own expense.

(5) Nothing in this section requires that an HIV infection have occurred in order for an offender to have committed criminal transmission of HIV.

(6) For an alleged violation of any offense enumerated in paragraphs (1)(a)-(n) for which the consent of the victim may be raised as a defense in a criminal prosecution, it is an affirmative defense to a charge of violating this section that the person exposed knew that the offender was infected with HIV, knew that the action being taken could result in transmission of the HIV infection, and consented to the action voluntarily with that knowledge.

FLA. STAT. ANN. § 775.082(3)

Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison

(3) A person who has been convicted of any other designated felony may be punished as follows:

- (b) For a felony of the first degree, by a term of imprisonment not exceeding 30 years or, when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment.
- (d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

FLA. STAT. ANN. § 775.083

Fines

(1) A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine in addition to any punishment described in s. 775.082; when specifically authorized by statute, he or she may be sentenced to pay a fine in lieu of any punishment described in s. 775.082. A person who has been convicted of a noncriminal violation may be sentenced to pay a fine. Fines for designated crimes and for noncriminal violations shall not exceed:

- (b) \$10,000, when the conviction is of a felony of the first or second degree.
- (c) \$5,000, when the conviction of a felony is of the third degree.

FLA. STAT. ANN. § 384.24***Unlawful acts***

(1) It is unlawful for any person who has chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, nongonococcal urethritis (NGU), pelvic inflammatory disease (PID)/acute salpingitis, or syphilis, when such person knows he or she is infected with one or more of these diseases and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.

(2) It is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.

FLA. STAT. ANN. §384.34(5)***Penalties***

Any person who violates s. 384.24(2) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Any person who commits multiple violations of s. 384.24(2) commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. ANN. §381.0041(11)(b)***Donation and transfer of human tissue; testing requirements***

Any person who has human immunodeficiency virus infection, who knows he or she is infected with human immunodeficiency virus, and who has been informed that he or she may communicate this disease by donating blood, plasma, organs, skin, or other human tissue who donates blood, plasma, organs, skin, or other human tissue is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. ANN. § 796.08(5)***Screening for HIV and sexually transmissible diseases; providing penalties***

A person who (a) Commits or offers to commit prostitution; or (b) Procures another for prostitution by engaging in sexual activity in a manner likely to transmit the human immunodeficiency virus, and who, prior to the commission of such crime, had tested positive for human immunodeficiency virus and knew or had been informed that he or she had tested positive for human immunodeficiency virus and could possibly communicate such disease to another person through sexual activity commits criminal transmission of HIV, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime of prostitution or procurement of prostitution.

HIV positive persons may face felony charges for failing to disclose their status to sexual partners.

In Florida, one may be prosecuted for failing to disclose one's HIV status to sexual partners. It is a third-degree felony, punishable by up to five years in prison and/or a \$5,000 fine, if an HIV positive person (1) knows that she/he is HIV positive, (2) has been informed that HIV may be transmitted during sexual intercourse,¹³² and (3) has sexual intercourse with any other person without disclosing her/his HIV status.¹³³ It is a first-degree felony punishable by up to thirty years imprisonment if there is a failure to disclose one's HIV status on multiple occasions.¹³⁴

Florida's statute penalizes conduct where HIV positive persons know their status and engage in sexual conduct, currently limited to penile-vaginal sex, which may expose others to HIV. It is an affirmative defense if a sexual partner knows of her/his sexual partner's HIV status and consents to engage in sexual conduct with that knowledge.¹³⁵ It is not a defense to prosecution if protection, such as a condom, was used during sex. Neither the intent to transmit HIV nor actual transmission is required for prosecution.

The following cases illustrate prosecutions under this statute:

- In August 2013, an HIV positive man was arrested for allegedly failing to disclose his status to a sexual partner, who later tested positive for the virus.¹³⁶
- In April 2013, a 46-year-old HIV positive man was charged with criminal transmission of HIV, among other things, after kidnapping and raping a 10-year-old boy.¹³⁷
- In January 2013, two HIV positive men were arrested after allegedly engaging in unprotected sex with a 16-year-old boy they met on Grindr without disclosing their status.¹³⁸
- In December 2012, a 35-year-old HIV positive man was arrested after allegedly failing to disclose his status to sexual partners.¹³⁹
- In September 2012, a 30-year-old HIV positive man was charged with attempted second-degree murder and criminal transmission of HIV, among other things, for allegedly having sex with a 15-year-old boy.¹⁴⁰ The boy later tested positive for HIV.¹⁴¹

¹³² Florida law defines "sexual intercourse" as the "penetration of the female sex organ by the male sex organ, however slight, emission of semen is not required. § 826.04 (statute on incest). Florida's district courts of appeals are currently split on whether the term "sexual intercourse" applies to sexual intercourse between the same sex. *Compare State v. Debaum*, 2013 Fla. App. LEXIS 17238 (Fla. 3rd Dist. Ct. App., Oct. 30, 2013) (holding that the legislative intent to deal with sexually-transmitted HIV could not plausibly construed to only apply to vaginal intercourse), and *State v. D.C.*, 114 So.3d 440 (5th Dist. Ct. App., May 31, 2013) (claiming that the legislative intent to deal with sexually transmitted HIV intended to broadly criminalize both heterosexual and homosexual sex), with *L.A.P. v. State*, 62 So.3d 693 (Fla. 2nd Dist. Ct. App., May 31, 2013) (finding that sexual intercourse as used in the statute meant exclusively sexual intercourse between a man and a woman involving penile insertion in a vagina). There is no statutory indication that oral sex is considered "sexual intercourse."

¹³³ FLA. STAT. §§ 775.082, 775.083 (2014), 384.24(2) (2014).

¹³⁴ §§ 384.34(5) (2014), 775.082.

¹³⁵ § 384.24(2).

¹³⁶ *Fort Myers man arrested, accused of knowingly spreading HIV*, WINK NEWS, Aug. 17, 2013, available at <http://www.winknews.com/Local-Florida/2013-08-17/Fort-Myers-man-arrested-for-infecting-partners-with-HIV#.Upu8-mRDsqQ>.

¹³⁷ Brian Hamacher, *HIV-Positive Man Raped 10-Year-Old Boy: BSO*, NBC 6 NEWS SOUTH FLORIDA, Apr. 4, 2013, available at <http://www.nbcmiami.com/news/HIV-Positive-Man-Raped-10-Year-Old-Boy-BSO-201269651.html>.

¹³⁸ Tonya Alanez, *Pines men accused of sex with boy, not revealing HIV status*, SUN SENTINEL, Jan. 17, 2013, available at http://articles.sun-sentinel.com/2013-01-17/news/fl-men-accused-of-hiv-crime-20130117_1_hiv-status-catherine-hanssens-grindr.

¹³⁹ *Man charged with criminal transmission of HIV*, ACTIONNEWSJAX.COM, Jan. 2, 2012, available at http://www.actionnewsjax.com/content/topstories/story/Man-charged-with-criminal-transmission-of-HIV/fmfGT3_moES_A8dnXmp8JQ.csp.

- In May 2011, an HIV positive man was charged with criminal transmission of HIV after he attempted to bite a deputy while being arrested for shoplifting.¹⁴²
- In March 2011, a 47-year-old HIV positive man was charged with failing to disclose his status to a sexual partner, among other things, for allegedly raping a 13-year-old boy he met through Craigslist.¹⁴³
- In July 2010, a 39-year-old HIV positive man was arrested after he allegedly had unprotected sex with a woman without disclosing his HIV status.¹⁴⁴ The man's partner later tested positive for HIV.¹⁴⁵
- In February 2010, a 45-year-old HIV positive man was charged with the first-degree felony of unlawful acts related to HIV exposure after allegedly failing to tell his sexual partner that he was HIV positive during their long-term, romantic, sexual relationship.¹⁴⁶
- In August 2009, a 39-year-old HIV positive woman was arrested after she allegedly had unprotected sex with a man and lied about her HIV status.¹⁴⁷
- In May 2009, an HIV positive woman was arrested for failing to disclose her status to multiple sexual partners.¹⁴⁸ She was charged separately for every sexual encounter.¹⁴⁹
- In 2008, a 27-year-old HIV positive woman was sentenced to five years imprisonment after biting a police officer during an arrest for a charge that was later dropped.¹⁵⁰ She was diagnosed with cancer four months into her sentence, and following a public campaign she was granted a conditional release by the Florida Parole Commission, allowing her to die at home.¹⁵¹

Donation of blood, organs, or other human tissues to others is a third-degree felony.

HIV positive persons in Florida should be aware that they may receive up to five years in prison and/or a \$5,000 fine if they know their HIV positive status and donate blood, plasma, organs, skin, or human

¹⁴⁰ Carli Teproff and Steve Rothaus, *Man, 30, charged with attempted murder after boy, 15, contracts HIV after sex*, MIAMI HERALD, Sept. 7, 2012, available at <http://www.miamiherald.com/2012/09/07/2989939/man-30-charged-with-attempted.html>.

¹⁴¹ *Id.*

¹⁴² Marcos Restrepo, *South Florida Man charged with criminal transmission of HIV*, THE FLORIDA INDEPENDENT, June 1, 2011, available at <http://floridaindependent.com/32164/criminal-transmission-hiv-aids>; Marcos Restrepo, *More details emerge about South Florida criminal HIV transmission case*, THE FLORIDA INDEPENDENT, June 3, 2011, available at <http://floridaindependent.com/32611/hiv-criminal-transmission-broward>.

¹⁴³ Rene Stutzman, *Judge orders Craigslist sex offender held on \$150,000 bail*, ORLANDO SENTINEL, Mar. 14, 2011, available at http://articles.orlandosentinel.com/2011-03-14/news/os-craigslist-sex-offender-20110314_1_casselberry-boy-craigslist-arrest-report.

¹⁴⁴ *Jacksonville Man Arrested for Criminal Transmission of HIV*, FIRSTCOASTNEWS.COM, July 5, 2010, available at <http://www.firstcoastnews.com/news/local/story.aspx?storyid=158235>.

¹⁴⁵ *Id.*

¹⁴⁶ Katie Thomas, *Equestrian Charged with H.I.V.-Related Offenses*, N.Y TIMES, Apr. 12, 2010, available at http://www.nytimes.com/2010/04/12/sports/12hiv.html?pagewanted=all&_r=0.

¹⁴⁷ *HIV positive woman arrested*, OCALA STARBANNER, Aug. 14, 2009, available at <http://www.ocala.com/article/20090814/ARTICLES/908149971>.

¹⁴⁸ *US: Florida Woman Accused of HIV Exposure*, HIV JUSTICE NETWORK, May 9, 2009, available at <http://www.hivjustice.net/case/us-florida-woman-accused-of-hiv-exposure/>.

¹⁴⁹ *Id.*

¹⁵⁰ *HIV-Positive Woman Released from Prison Dies at Home*, CBS MIAMI, Feb. 1, 2011, available at <http://miami.cbslocal.com/2011/02/01/hiv-positive-woman-released-from-prison-dies-at-home/>.

¹⁵¹ *Id.*

tissues.¹⁵² It is a defense if the HIV positive person has not been informed that HIV can be transmitted through human blood, plasma, organ, and tissue donations.¹⁵³ Neither the intent to transmit HIV nor actual transmission of the virus is required.

Engaging in prostitution with knowledge of one's HIV positive status is a felony.

Up to five years imprisonment and/or a \$5,000 fine can be imposed upon conviction if an individual (1) has tested positive for HIV, (2) been informed that HIV can be transmitted through sexual activity, and (3) commits prostitution, offers to commit prostitution, or procures another for prostitution by engaging in sexual activity in a manner likely to transmit HIV.¹⁵⁴

Neither the intent to transmit HIV, actual transmission, nor engaging in activities known to transmit HIV are required for prosecution.

Florida defines “prostitution” as the “giving or receiving of the body for sexual activity for hire”¹⁵⁵ Much of what Florida defines as “sexual activity” does not transmit HIV, including: anal or vaginal penetration of another by *any* object other than the sexual organ of another, and the handling or fondling of another for the purpose of masturbation.¹⁵⁶ Under this statute, sex workers can face penalties for conduct that has absolutely no risk of exposing another to HIV. In HIV exposure cases involving prostitution, disclosure of HIV status is not a defense, whether condoms or other protection was used is not a consideration, and ejaculation or the exchange of bodily fluids known to transmit HIV is not required for prosecution.

Though there is an HIV-specific statute for sex workers, many of the reported cases of prosecutions of HIV positive sex workers have fallen under the criminal transmission of HIV statute. The only prosecutions of sex workers on record that have not fallen under the criminal transmission statute occurred prior to many of Florida's HIV-specific laws being enacted. For example, in 1988, an HIV positive male sex worker was sentenced to five years imprisonment based on his HIV status.¹⁵⁷

Other prosecutions of HIV positive sex workers in Florida include:

- In August 2009, a 32-year-old HIV positive sex worker was arrested under Florida's criminal exposure prostitution statute after she offered to perform a sexual act on an undercover officer for \$20.¹⁵⁸
- In June 2013, a 19-year-old HIV positive sex worker was arrested after she offered to perform a sex act on an undercover police officer.¹⁵⁹ She was charged with offering to commit prostitution and criminal transmission of HIV.¹⁶⁰

¹⁵² FLA. STAT. §§ 381.0041(11)(b) (2014), 775.082, 775.083.

¹⁵³ § 381.0041(11)(b) (stating “[a]ny person who has human immunodeficiency virus infection, who knows he or she is infected with human immunodeficiency virus, and who has been informed that he or she may communicate this disease by donating blood, plasma, organs, skin, or other human tissue (emphasis added)).

¹⁵⁴ §§ 775.082, 775.083, 796.08(5) (2014).

¹⁵⁵ § 796.07 (2014).

¹⁵⁶ § 796.07.

¹⁵⁷ Mark Journey, *AIDS Carrier in Jail for Soliciting*, ST. PETERSBURG TIMES, Aug. 15, 1990, at 1B.

¹⁵⁸ *HIV-Positive Florida Woman Arrested on Prostitution Charges for Third Time*, POZ, Aug. 24, 2009, available at http://www.poz.com/articles/prostitution_charge_hiv_florida_1_17141.shtml.

¹⁵⁹ *Police: Nebraska Avenue prostitute didn't disclose HIV*, TAMPA BAY TIMES, June 30, 2013, available at <http://www.tampabay.com/news/publicsafety/crime/police-nebraska-avenue-prostitute-didnt-disclose-hiv/2129361>.

¹⁶⁰ *Id.*

- In May 2012, a 41-year-old HIV positive woman was charged with felony prostitution and criminal transmission of HIV.¹⁶¹
- In February 2012, a 36-year-old HIV positive woman was arrested during an undercover prostitution sting.¹⁶² She was charged with failing to disclose her HIV positive status to her sexual partners.¹⁶³

Prosecution under this statute is also possible if an HIV positive individual “procures” another for prostitution by engaging in sexual activity in a “manner likely to transmit” HIV.¹⁶⁴ At least one case in Florida suggests that “procurement” goes beyond mere solicitation and that it instead requires the inducement of another to provide sexual services to a third party (i.e., a pimp).¹⁶⁵ The meaning of “likely to transmit HIV” is not defined. If “likely” is construed to mean more probable than not, few if any sexual activities would be likely to transmit HIV.¹⁶⁶

Prosecution for HIV exposure in Florida has occurred under general criminal laws.

At least one Florida case has found that HIV can be considered a deadly weapon for prosecution under general criminal laws. In August 2009, a 35-year-old HIV positive man in Florida was charged with attempted murder when he allegedly yelled that he had HIV and threatened to kill a police officer before biting him in the shin and leaving a permanent bruise.¹⁶⁷ He was later convicted of aggravated battery on a law enforcement officer and sentenced to fifteen years in prison.¹⁶⁸ The officer did not test positive for HIV.¹⁶⁹ The crime of aggravated battery requires that a person intentionally and knowingly cause great bodily harm or use a deadly weapon.¹⁷⁰ Many HIV positive persons convicted of aggravated assault or aggravated battery have been convicted based on their HIV status, with courts finding that their teeth or bodily fluids (including saliva) used in the assault constitute “deadly weapons.”

During the trial, the Florida prosecutor told the jury that the police officer had to avoid intimate “contact with his wife or children for fear he could severely affect them,” for eight months before he was cleared by doctors as being HIV negative.¹⁷¹ This statement ignores the fact that the CDC has concluded that there exists only a negligible risk of HIV infection from a bite.¹⁷² The scientific and factual misrepresentations

¹⁶¹ *Manatee Sheriff: Prostitute transmitted HIV*, HERALD-TRIBUNE, May 27, 2012, available at <http://www.heraldtribune.com/article/20120527/BREAKING/120529620/2071/NEWS?Title=Manatee-Sheriff-Prostitute-transmitted-HIV>.

¹⁶² Rochelle Ritchie, *Michelle Weissman busted in prostitution sting, tells deputies she's HIV positive, police say*, WPTV.COM, Feb. 8, 2012, available at http://www.wptv.com/dpp/news/region_c_palm_beach_county/lake_worth/michelle-weissman-of-lake-worth-busted-in-prostitution-sting-tells-deputies-shes-hiv-positive#ixzz1mOEu3Rwg.

¹⁶³ *Id.*

¹⁶⁴ FLA. STAT. § 796.08(5).

¹⁶⁵ See generally *Register v. State*, 715 So.2d 274 (Fla. Dist. Ct. App. 1998) (comparing the meanings of “solicitation” and “procurement” under a statute criminalizing procurement of a minor for prostitution).

¹⁶⁶ Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED. & ETHICS 327, 330 (2004).

¹⁶⁷ *Miami Man Gets 15 Years in Prison for Biting Cop*, HIV JUSTICE NETWORK, Aug. 17, 2009, available at <http://www.hivjustice.net/news/us-miami-man-gets-15-years-in-prison-for-biting-cop/>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ FLA. STAT. § 784.045 (2014).

¹⁷¹ *Miami Man Gets 15 Years in Prison for Biting Cop*, HIV JUSTICE NETWORK, Aug. 17, 2009, available at <http://www.hivjustice.net/news/us-miami-man-gets-15-years-in-prison-for-biting-cop/>.

¹⁷² CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

created by criminal HIV exposure laws and the prosecutions of HIV positive persons only increase the risk that HIV positive individuals may be prosecuted for conduct that cannot transmit HIV.

HIV positive persons may face additional felony penalties for committing or attempting to commit an identified crime(s) after a previous conviction for a similar offense.

An HIV positive person who commits one of the crimes enumerated by statute after a previous conviction for a statutorily enumerated offense can face additional felony charges. Under Florida law, an individual must be tested for HIV if she/he is convicted of, pleads guilty to, or pleads no contest to an offense or attempted offense involving the transmission of bodily fluids (i.e. the sex-based or assault/battery offenses noted in the statute).¹⁷³ If an individual tests positive for HIV, knows of her/his HIV status, and commits another such offense involving the transmission of bodily fluids, she/he is guilty of an additional felony, punishable by up to five years in prison and/or a \$5,000 fine.¹⁷⁴ Although this statute is labeled a “criminal transmission” law, actual transmission of HIV is not required.¹⁷⁵

Felonies that may trigger additional penalties under this statute include:

- Sexual battery
- Incest
- Lewd, lascivious, or indecent assault upon any person less than 16 years of age
- Assault or aggravated assault
- Battery or aggravated battery
- Child abuse or aggravated child abuse
- Abuse or aggravated abuse of any elderly person or disabled adult
- Sexual performance by a person less than 18 years of age
- Prostitution
- Donation of blood, plasma, organs, skin, or other human tissue¹⁷⁶

It is an affirmative defense to prosecution under this statute if the person exposed knew that the offender was infected with HIV, knew that the action being taken could result in transmission of the HIV infection, and voluntarily consented to the action.¹⁷⁷

Although the statute enumerates several underlying offenses, the authors are only aware of this law applying in prosecutions of sex workers, despite the fact that there is a separate HIV-specific prostitution statute. Such prosecutions include:

- In 2007, a female sex worker was charged with criminal transmission of HIV for offering oral sex to an undercover officer.¹⁷⁸

¹⁷³ FLA. STAT. § 775.0877 (2014).

¹⁷⁴ §§ 775.0877(3), 775.082, 775.083.

¹⁷⁵ § 775.0877(5).

¹⁷⁶ §§ 775.0877(1)(a)-(n).

¹⁷⁷ §775.0877(6).

¹⁷⁸ Michael Scarcella, *Woman charged with exposing men to HIV*, HERALD-TRIBUNE, Oct. 10, 2007, available at <http://www.heraldtribune.com/article/20071010/NEWS/710100460>.

- A woman was charged with prostitution, resisting arrest, and criminal “transmission” of HIV after negotiating the price of a sex act with an undercover officer.¹⁷⁹ Prosecutors had also considered charging her with attempted murder, even though she told the officer after her arrest that she had HIV and also had condoms in her purse.

Florida courts have also imposed sentencing enhancements based on HIV status.

Early in the epidemic, Florida courts imposed sentence enhancements based on a person’s HIV positive status. The cases noted here are from the late 1980s and mid-1990s, and there are no recent cases, to the authors’ knowledge, demonstrating that Florida courts continue to apply sentence enhancements based on HIV status. The following cases are included as a comprehensive review of Florida’s approach to HIV criminalization, but are not necessarily reflective of current trends in criminal sentencing in Florida.

In *Morrison v. State*, the HIV positive defendant was convicted of aggravated battery and was sentenced to ten years imprisonment and ten years of parole.¹⁸⁰ The trial court justified its departure from the sentencing guidelines because in the course of the robbery the defendant bit a 90-year-old man to the bone who later tested positive for HIV.¹⁸¹ Confirming the lower court’s sentencing, the court of appeals held that the departure was justified due to the nature of the crime and that HIV could give rise to AIDS, a “fatal disease.”¹⁸²

One Florida case has held that an HIV positive defendant’s sentence could be enhanced even if there was no proof that the defendant knew he was HIV positive at the time of the crime. In *Cooper v. State*, the defendant was convicted of aggravated battery, solicitation and sexual battery and sentenced to thirty years imprisonment, reflecting an upward departure from the sentencing guidelines.¹⁸³ Four days prior to trial, the defendant received test results that showed he had tested positive for HIV.¹⁸⁴ Though the jury never received this information, the sentencing judge found that the defendant’s total disregard of the likelihood that the complainant would be exposed to HIV through the sexual contact supported an enhanced sentence.¹⁸⁵ On appeal, the court agreed with the sentencing, holding that “[b]ecause of his lifestyle, [the defendant] knew or should have known that he had been exposed to the AIDS virus and that by sexual battery upon his victim there was a strong likelihood that the victim would be exposed to AIDS.”¹⁸⁶ By “lifestyle” the court was referring to the fact that the defendant had been an “admitted homosexual for years.”¹⁸⁷ There was no evidence presented that showed the defendant knew of his HIV status at the time of the assault and, in fact, had only tested positive immediately before trial.¹⁸⁸ This opinion rests on the assumption that gay men should know that they have been exposed to HIV even though they have not tested positive.

In *Brooks v. State*, a judge sentenced a sex worker convicted of theft to a sentence above the state sentencing guidelines because she had AIDS, despite the fact that the crime had nothing to do with her

¹⁷⁹ Sue Carlton, *HIV-Positive Woman Free of Attempted Murder Charge*, ST. PETERSBURG TIMES, June 18, 1996, at 4B.

¹⁸⁰ 673 So.2d 953, 954 (Fla. Dist. Ct. App. 1996).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ 539 So. 2d 508, 509, 510 (Fla. Dist. Ct. App. 1989).

¹⁸⁴ *Id.* at 510.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 511.

¹⁸⁷ *Id.* at 512.

¹⁸⁸ *See generally id.*

HIV status.¹⁸⁹ On appeal, the sentence was reversed because the court found that her HIV status was in no way relevant to the crime.¹⁹⁰

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, it should not be used as a substitute for legal advice.

¹⁸⁹ 519 So.2d 1156, 1156 (Fla. Dist. Ct. App. 1988).

¹⁹⁰ *Id.*

Georgia Statute(s) that Allow for Criminal Prosecution based on HIV Status:**GA. CODE ANN. § 16-5-60(c)-(d)*****Reckless conduct; HIV infected persons***

(c) A person who is an HIV infected person who, after obtaining knowledge of being infected with HIV:

- (1) Knowingly engages in sexual intercourse or performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person and the HIV infected person does not disclose to the other person the fact of that infected person's being an HIV infected person prior to that intercourse or sexual act;
- (2) Knowingly allows another person to use a hypodermic needle, syringe, or both for the introduction of drugs or any other substance into or for the withdrawal of body fluids from the other person's body and the needle or syringe so used had been previously used by the HIV infected person for the introduction of drugs or any other substance into or for the withdrawal of body fluids from the HIV infected person's body and where that infected person does not disclose to the other person the fact of that infected person's being an HIV infected person prior to such use;
- (3) Offers or consents to perform with another person an act of sexual intercourse for money without disclosing to that other person the fact of that infected person's being an HIV infected person prior to offering or consenting to perform that act of sexual intercourse;
- (4) Solicits another person to perform or submit to an act of sodomy for money without disclosing to that other person the fact of that infected person's being an HIV infected person prior to soliciting that act of sodomy; or
- (5) Donates blood, blood products, other body fluids, or any body organ or body part without previously disclosing the fact of that infected person's being an HIV infected person to the person drawing the blood or blood products or the person or entity collecting or storing the other body fluids, body organ, or body part,

is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than ten years.

Continued on the following page...

(d) A person who is an HIV infected person or hepatitis infected person and who, after obtaining knowledge of being infected with HIV or hepatitis, commits an assault with the intent to transmit HIV or hepatitis, using his or her body fluids (blood, semen, or vaginal secretions), saliva, urine, or feces upon:

(1) A peace officer while the peace officer is engaged in the performance of his or her official duties or on account of the peace officer's performance of his or her official duties; or

(2) A correctional officer while the correctional officer is engaged in the performance of his or her official duties or on account of the correctional officer's performance of his or her official duties

is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than five nor more than 20 years.

GA. CODE ANN. § 31-22-9.1

Definition of AIDS and HIV related terms

(a) As used in this Code section, the term:

(3) "AIDS transmitting crime" means any of the following offenses specified in Title 16:

(A) Rape;

(B) Sodomy;

(C) Aggravated sodomy;

(D) Child molestation;

(E) Aggravated child molestation;

(F) Prostitution;

(G) Solicitation of sodomy;

(H) Incest;

(I) Statutory rape; or

(J) Any offense involving a violation of Article 2 of Chapter 13 of Title 16, regarding controlled substances, if that offense involves heroin, cocaine, derivatives of either, or any other controlled substance in Schedule I, II, III, IV, or V and that other substance is commonly intravenously injected, as determined by the regulations of the department.

(11) "HIV infected person" means a person who has been determined to be infected with HIV, whether or not that person has AIDS, or who has been clinically diagnosed as having AIDS.

(14) "Knowledge of being infected with HIV" means actual knowledge of:

(A) A confirmed positive HIV test; or

(B) A clinical diagnosis of AIDS.

HIV positive status must be disclosed to sexual partners to avoid criminal penalties.

Georgia’s HIV exposure statute targets HIV positive persons who fail to disclose their HIV status prior to engaging in anal, oral, and penile-vaginal sex with another person.¹⁹¹ A violation of this statute results in felony penalties of up to ten years imprisonment.¹⁹² Neither the intent to transmit HIV nor the actual transmission of HIV is required.

Disclosure of one’s HIV status is the only affirmative defense to prosecution. A defendant’s viral load is not a consideration, and it is no defense if protection, such as a condom, was used during sexual activities. It is a violation of the statute even if an HIV positive person fails to disclose her/his status and performs oral sex on an HIV negative person despite the fact that there is at best a remote risk of HIV exposure from such activity.¹⁹³

Though disclosure is a defense to prosecution, there are difficulties in proving whether disclosure actually occurred in these situations and such evidence normally depends on the words of one person against another. In a 2008 case, an HIV positive woman was convicted for reckless conduct when she allegedly engaged in unprotected sexual intercourse without disclosing her HIV status.¹⁹⁴ Two witnesses testified that the defendant’s sexual partner was aware of her HIV positive status, and the defendant herself testified that her sexual partner knew her HIV positive status because it had been published on the front page of a local newspaper.¹⁹⁵ Despite this, the defendant was found guilty and sentenced to eight years imprisonment and two years probation.¹⁹⁶

In a January 2009 case, a 38-year-old HIV positive man was sentenced to two years imprisonment and eight years probation after pleading guilty to reckless conduct for having sex with a woman without telling her his status.¹⁹⁷ The first day they met and had sex, the man and his partner—who later tested negative for HIV—went to the defendant’s home at a housing center for people who are HIV positive.¹⁹⁸ Nonetheless, the fact that the defendant was staying at a home solely for people living with HIV was not enough to be considered disclosure for the purposes of the reckless conduct statute.

In November 2010, an HIV positive man was convicted of rape and reckless conduct for sexually assaulting a woman at a psychiatric hospital.¹⁹⁹ He was sentenced to life imprisonment plus ten years.²⁰⁰ In July 2012, the Court of Appeals of Georgia vacated the man’s conviction and “remanded the case to the trial court for consideration of whether [the defendant] was prejudiced by his

¹⁹¹ GA. CODE ANN. § 16-5-60(c) (2014).

¹⁹² *Id.*

¹⁹³ See CTR. FOR DISEASE CONTROL & PREVENTION, *Oral Sex and HIV Risk*, (May 21, 2014) available at <http://www.cdc.gov/hiv/risk/behavior/oralsex.html> (last visited Dec. 3, 2014) (stating that “[r]eceiving fellatio, giving or receiving cunnilingus, and giving or receiving anilingus carry little to no risk.”).

¹⁹⁴ *Ginn v. State*, 667 S.E.2d 712, 713-14 (Ga. Ct. App. 2008).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 713.

¹⁹⁷ Amy Leigh Womack, *HIV-positive man sentenced for not disclosing his status to sexual partner*, THE TELEGRAPH, Jan. 13, 2009, available at <http://www.macon.com/2009/01/13/584845/hiv-positive-man-sentenced-for.html>.

¹⁹⁸ *Id.*

¹⁹⁹ Andria Simmons, *Gwinnett jury sentences HIV-positive rapist to life plus 10 years*, ATLANTA J. CONST., Nov. 18, 2010, available at <http://www.ajc.com/news/news/local/gwinnett-jury-sentences-hiv-positive-rapist-to-life/nQm9j/>.

²⁰⁰ *Id.*

counsel's” “failure to investigate adequately the possibility that [the defendant] was suffering from a delusional compulsion at the time of his offense.”²⁰¹ On remand, the trial court reinstated the defendant's conviction.²⁰² The defendant appealed, but the Court of Appeals affirmed the order reinstating his conviction.²⁰³

Engaging in prostitution without disclosing HIV status is a felony.

Georgia's reckless conduct statute imposes criminal penalties on HIV positive persons who do not disclose their status before engaging in solicitation or acts of prostitution.²⁰⁴ A maximum sentence of ten years imprisonment can be imposed if an HIV positive person is aware of her/his HIV status and fails to disclose it before (1) offering or consenting to engage in sexual intercourse for money, or (2) soliciting another to submit to or perform oral or anal sex for money.²⁰⁵ Neither the intent to transmit HIV nor actual transmission is required. A conviction for prostitution is normally a misdemeanor,²⁰⁶ but it is prosecuted as a felony if the defendant is HIV positive.

This statute penalizes an individual for being HIV positive, regardless of whether she/he exposed another person to a significant risk of HIV transmission. It is not a defense if protection was used during alleged acts of prostitution because *offering* or *soliciting* to engage in sexual intercourse is sufficient for prosecution, and actual sexual conduct is not required.²⁰⁷

HIV positive status must be disclosed before sharing needles.

Georgia imposes criminal penalties on HIV positive persons for sharing needles or syringes.²⁰⁸ Up to ten years imprisonment may follow if an HIV positive individual is (1) aware of her/his HIV status, (2) uses a needle or syringe for the injection of drugs or withdrawal of bodily fluids, and (3) shares that needle with another without disclosing her/his HIV status.²⁰⁹ It is a complete defense if HIV status is disclosed before needle-sharing. Neither the intent to transmit HIV nor actual transmission is required.

HIV positive status must be disclosed before donating blood or body tissues.

It is a felony punishable by up to ten years imprisonment if an HIV positive individual is aware of her/his HIV status and fails to disclose her/his status before donating blood, blood products (i.e., plasma, platelets), other bodily fluids, or any other body organ or body part.²¹⁰ Neither the intent to transmit HIV nor actual transmission is required.

Assaulting a peace or correctional officer using bodily fluids with intent to transmit HIV is a felony.

²⁰¹ *Hatfield v. State*, 743 S.E.2d 560, 561-62 (Ga. Ct. App. 2013).

²⁰² *Id.*

²⁰³ *Id.* at 563.

²⁰⁴ GA. CODE ANN. § 16-5-60(c)(3)-(4).

²⁰⁵ *Id.*

²⁰⁶ §§ 16-6-9 (2014), 16-6-13(a) (2014).

²⁰⁷ § 16-5-60(c)(3)-(4).

²⁰⁸ § 16-5-60(c)(2).

²⁰⁹ *Id.*

²¹⁰ § 16-5-60(c)(5).

Georgia’s reckless conduct/endangerment statute includes a provision that is tailored to cases involving peace officers and correctional officers.²¹¹ It is a felony, punishable by five to twenty years in prison, for an individual who is aware that she/he is HIV positive to commit an assault against a peace or correctional officer engaged in her/his duties with the intent to transmit HIV using her/his blood, semen, vaginal secretions, saliva, urine, or feces.²¹² This statute punishes conduct that poses only a remote possibility of HIV exposure and, though intent is considered an element of the prosecution, many of the bodily fluids listed cannot transmit HIV.

In *Burk v. State*, an HIV positive man who allegedly threatened to transmit HIV to a corrections officer was originally charged with aggravated assault with intent to murder after he struck the officer, grabbed his arm, and attempted to bite him.²¹³ The inmate was later convicted of reckless conduct, what was then referred to as “reckless endangerment,” an offense which required that the defendant consciously disregarded a substantial risk of harming or endangering the safety of another person.²¹⁴ Despite the fact that the CDC has stated that there exists only a “negligible” possibility that HIV could be transmitted through a bite,²¹⁵ the Court of Appeals of Georgia found Burk’s alleged attempt to bite the officer sufficient to uphold his conviction for reckless conduct.²¹⁶ Contrary to the CDC’s position, a physician testified at trial that HIV transmission from a human bite was “very strongly probable” and that he “did not see why” HIV could not be transmitted through saliva.²¹⁷ Based off of this testimony, the court affirmed the defendant’s conviction, stating that “the evidence authorized the jury to find that by attempting to bite [the officer], knowing that he was HIV-infected and had AIDS, Burk consciously disregarded a substantial and unjustifiable risk that his act would harm [the officer] or endanger his safety.”²¹⁸ The court further stated that “[t]he fact that Burk did not engage in any act proscribed by [Georgia Code] § 16-5-60(c) does not insulate him from criminal liability under subsection (b) for attempting to transmit the AIDS virus through saliva.”²¹⁹

The conviction in *Burk* reflects the issues associated with “expert” testimony on HIV transmission and exposure. When expert testimony fails to provide scientifically supported facts on HIV, HIV positive individuals can be convicted for conduct that presents at best a remote possibility of HIV exposure or transmission.

HIV positive persons have also been prosecuted under aggravated assault charges.

In *Scroggins v. State*, the defendant, while struggling with a police officer, sucked extra saliva into his mouth and then bit the officer.²²⁰ When the defendant was treated at the hospital he told a nurse he

²¹¹ § 16-5-60(d).

²¹² *Id.*

²¹³ 478 S.E.2d 416, 416-17 (Ga. Ct. App. 1996).

²¹⁴ *Id.* at 417.

²¹⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

²¹⁶ *Burk*, 478 S.E.2d at 417.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ 401 S.E.2d 13, 15 (Ga. Ct. App. 1990) overruled on other grounds *Dunagan v. State*, 502 S.E.2d 726 (Ga. 1998).

was HIV positive and laughed when the officer who was bit asked the defendant about his status.²²¹ He was convicted of aggravated assault with intent to murder.²²² On appeal, the Court of Appeals of Georgia found that the impossibility of transmitting HIV via a bite and/or saliva was not a defense as long as Scroggins believed HIV could be transmitted in such a manner.²²³ The court ruled that a wanton and reckless state of mind could be the equivalent of a specific intent to kill for the purposes of the charges, and that Scroggins biting the officer while knowing that he was HIV positive was sufficient evidence to establish a wanton and reckless disregard for whether HIV was transmitted.²²⁴

A person commits aggravated assault when there is intent to murder, rape, or rob someone using a deadly weapon that does or is likely to result in serious bodily injury.²²⁵ Despite the fact that the CDC has maintained that there exists only a “negligible” possibility that HIV could be transmitted through a bite, Georgia’s application of its aggravated assault statute ignores this fact and continues to prosecute HIV positive persons for acts that, at best, have only a remote possibility of transmitting HIV.²²⁶ The CDC has also concluded that spitting alone has never been shown to transmit HIV.²²⁷

Other prosecutions under Georgia’s HIV criminal statute include:

- In November 2013, a 52-year-old HIV positive man was charged with reckless conduct after allegedly failing to disclose his status to a sexual partner.²²⁸
- In October 2013, a 23-year-old HIV positive man was charged with statutory rape and reckless conduct after allegedly infecting a teenage girl with the virus.²²⁹
- In June 2013, a 29-year-old HIV positive man was arrested and charged with criminal exposure to HIV after spitting on a hospital worker.²³⁰
- In March 2013, a 21-year-old HIV positive man was arrested and charged with reckless conduct by an HIV-infected person after he allegedly failed to disclose his status to sexual partners.²³¹ At least one partner claimed to have contracted the virus from him.²³²

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 16-20.

²²⁴ *Id.* at 19.

²²⁵ GA. CODE. § 16-5-21 (2014).

²²⁶ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

²²⁷ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

²²⁸ Evan Bleier, *HIV-positive Georgia man arrested for having unprotected sex*, UPI.COM, Nov. 15, 2013, available at http://www.upi.com/Odd_News/Blog/2013/11/15/HIV-positive-Georgia-man-arrested-for-having-unprotected-sex/3521384541636/; Joe Johnson, *HIV-infected Athens man arrested for having unprotected sex*, ATHENS BANNER-HERALD, Dec. 5, 2013, available at <http://onlineathens.com/local-news/2013-11-13/hiv-infected-athens-man-arrested-having-unprotected-sex>.

²²⁹ *Police: Savannah man with HIV knowingly infected teenage girl*, SAVANNAHNOW.COM, Oct. 21, 2013, available at <http://savannahnow.com/crime/2013-10-21/police-savannah-man-knowingly-infected-teenage-girl-hiv#.Ury1q2RDsqQ>.

²³⁰ *Man With HIV Arrested After he Spits on Hospital Worker*, THECHATANOOGAN.COM, June 28, 2013, available at <http://www.chattanooga.com/2013/6/28/254206/Man-With-HIV-Arrested-After-He-Spits.aspx>.

- In July 2012, an HIV positive man was arrested for reckless conduct after he allegedly failed to disclose his status to two sexual partners.²³³ One partner later tested positive for HIV.²³⁴
- In February 2012, an HIV positive man was sentenced to ten years imprisonment for reckless conduct after failing to disclose his status to multiple sexual partners.²³⁵
- In August 2011, an HIV positive man was charged with reckless conduct after allegedly failing to disclose his status to his girlfriend.²³⁶
- In April 2011, a 32-year-old HIV positive man was charged with contributing to the delinquency of a minor, aggravated child molestation, and reckless conduct after allegedly having sex with his 15-year-old student.²³⁷
- In November 2010, a 26-year-old HIV positive man was charged with assault by an HIV-infected person after he bit a police officer while resisting fingerprinting.²³⁸
- In August 2009, a 42-year-old HIV positive man was charged with aggravated assault after he bit an Atlanta police officer, allegedly shouting “I have full-blown AIDS” and stating that his bite would infect the officer with HIV.²³⁹ He later received eighteen months for aggravated assault.²⁴⁰
- In a July 2008 case, a 43-year-old, HIV positive woman was charged with aggravated assault when she spat in the face of another person.²⁴¹ The woman pleaded guilty and was sentenced to three years in jail.²⁴²

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

²³¹ Amanda Castro, *Baldwin Co. Deputies Arrest Man for Spreading HIV Without Telling Sexual Partners*, 41NBC.COM, Mar. 12, 2013, available at <http://w.41nbc.com/news/local-news/21023-baldwin-sheriff-s-office-man-charged-with-reckless-conduct-by-hiv-infected-person>.

²³² *Id.*

²³³ Tammy Joyner and Sheila Poole, *Man faces charges of exposing two women to HIV*, THE ATLANTA JOURNAL-CONSTITUTION, Sept. 3, 2012, available at <http://www.ajc.com/news/news/crime-law/man-faces-charges-of-exposing-two-women-to-hiv/nR2pz/>.

²³⁴ *Id.*

²³⁵ Erica Byfield, *Man knowingly spreads HIV*, WSBTV.COM, Feb. 29, 2012, available at <http://www.wsbtv.com/news/news/local/man-convicted-knowingly-spreading-hiv/nK8Pc/>.

²³⁶ Alaya Boykin, *Douglas County man charged with infecting girlfriend with HIV*, THE ATLANTA JOURNAL-CONSTITUTION, Aug. 4, 2011, available at <http://www.ajc.com/news/news/local/douglas-county-man-charged-with-infecting-girlfrie/nQKLL/>.

²³⁷ Edecio Martinez, *Band Teacher With HIV Allegedly Had Sex with 15-Year-Old Student*, CBSNEWS.COM, Apr. 14, 2011, available at <http://www.cbsnews.com/news/band-teacher-with-hiv-allegedly-had-sex-with-15-year-old-student/>.

²³⁸ *HIV positive man bites police officer*, WRCBTV.COM, Nov. 20, 2010, available at <http://www.wrcbtv.com/Global/story.asp?S=13542076>.

²³⁹ *US: Georgia Judge Branded 'Too Lenient' After 18 Month Sentence for Cop Biter*, HIV JUSTICE NETWORK, Sept. 6, 2009, available at <http://www.hivjustice.net/news/us-georgia-judge-branded-too-lenient-after-18-month-sentence-for-cop-biter/>.

²⁴⁰ *Id.*

²⁴¹ Alan Riquelmy, *HIV positive woman gets 3 years for spitting*, LEDGER-ENQUIRER, July 22, 2008, available at <http://www.ledger-enquirer.com/2008/07/22/378521/hiv-positive-woman-gets-3-years.html>.

²⁴² *Id.*

information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

Hawaii Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV exposure or transmission in Hawaii. However, in some states, HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Hawaii.

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, it should not be used as a substitute for legal advice.

Idaho Statute(s) that Allow for Criminal Prosecution based on HIV Status:

IDAHO CODE ANN. § 39-608

Transfer of body fluid which may contain the HIV virus--Punishment--Definitions--Defenses

(1) Any person who exposes another in any manner with the intent to infect or, knowing that he or she is or has been afflicted with acquired immunodeficiency syndrome (AIDS), AIDS related complexes (ARC), or other manifestations of human immunodeficiency virus (HIV) infection, transfers or attempts to transfer any of his or her body fluid, body tissue or organs to another person is guilty of a felony and shall be punished by imprisonment in the state prison for a period not to exceed fifteen (15) years, by fine not in excess of five thousand dollars (\$ 5,000), or by both such imprisonment and fine.

(2) Definitions. As used in this section:

- (a) "Body fluid" means semen (irrespective of the presence of spermatozoa), blood, saliva, vaginal secretion, breast milk, and urine.
- (b) "Transfer" means engaging in sexual activity by genital-genital contact, oral-genital contact, anal-genital contact; or permitting the use of a hypodermic syringe, needle, or similar device without sterilization; or giving, whether or not for value, blood, semen, body tissue, or organs to a person, blood bank, hospital, or other medical care facility for purposes of transfer to another person.

(3) Defenses:

- (a) Consent. It is an affirmative defense that the sexual activity took place between consenting adults after full disclosure by the accused of the risk of such activity.
- (b) Medical advice. It is an affirmative defense that the transfer of body fluid, body tissue, or organs occurred after advice from a licensed physician that the accused was noninfectious.

IDAHO CODE ANN. § 39-601

Venereal diseases enumerated

Syphilis, gonorrhea, human immunodeficiency virus (HIV), chlamydia and hepatitis B virus (HBV), hereinafter designated as venereal diseases, are hereby declared to be contagious, infectious, communicable and dangerous to public health; and it shall be unlawful for anyone infected with these diseases or any of them to knowingly expose another person to the infection of such diseases.

To avoid the risk of prosecution, HIV status must be disclosed to sexual partners.

Individuals living with HIV in Idaho should be aware that it is against the law to engage in sexual intercourse without disclosing one's HIV status. It is a felony, punishable by up to fifteen years in prison and/or a \$5,000 fine, for an HIV positive person to act with the intent to transfer or attempt to transfer bodily fluids through any genital-to-genital, mouth-to-genital, or genital-anal contact.²⁴³ Though intent to transfer HIV is an element of the crime, simply knowing one's HIV status and failing to disclose that status is enough for prosecution. Actual transmission is not required.

It is an affirmative defense if the HIV positive individual can prove that (1) the sex was consensual and (2) her/his partner was informed "of the risk of such activity."²⁴⁴ Informing a partner only of one's HIV positive status, without disclosing the risk of transmission, is not a sufficient defense on the face of this statute. Neither the use of condoms nor other protection is a defense.

Whether or not disclosure actually occurred is often open to interpretation and always depends on the words of one person against another. In *State v. Thomas*, an HIV positive man was convicted under Idaho's statute and sentenced to fifteen years in prison for failing to disclose his HIV status before engaging in anal and oral sex, without ejaculating, with a trans woman.²⁴⁵ At trial, the defendant questioned his accuser's credibility regarding her denial that he had disclosed his HIV-positive status, suggesting that she had a history of drug use, psychological problems, a reputation "untruthful and dramatic" behavior, and that she had several drinks before having sex with him that would have affected her memory of the evening's events.²⁴⁶ Friends of the complainant, however, testified that they were in her apartment, could hear her sexual encounter, and when they told her the defendant was HIV positive she was very upset and alluded to the fact that she had no knowledge of his HIV status.²⁴⁷ The Idaho Court of Appeals concluded that it was up to the jury to determine which testimony was the most credible, and that there was "substantial and complete evidence presented to support the jury's verdict finding [the defendant] guilty"²⁴⁸

In 2009, after serving fifteen years in prison, the defendant in *State v. Thomas* pleaded guilty to two more charges of exposing women to HIV.²⁴⁹ A judge chastised the defendant for giving his sexual partners "a potential death sentence" and sentenced him to thirty years in prison with ten years fixed.²⁵⁰ The woman in this case did not test positive for HIV, but this is irrelevant to prosecution because transmission of HIV is not an element of the crime.²⁵¹ The defendant later tried to withdraw

²⁴³ IDAHO CODE ANN. § 39-608(1) (2014).

²⁴⁴ § 39-608(3)(a).

²⁴⁵ *State v. Thomas*, 983 P.2d 245, 246-47 (Idaho Ct. App. 1999).

²⁴⁶ *Id.* at 247.

²⁴⁷ *Id.* at 248.

²⁴⁸ *Id.*

²⁴⁹ Taylor Craig Newbold, *Full Disclosure: Idaho's HIV Disclosure Laws Causing Their Own Issues*, BOISE WEEKLY, Jan. 23, 2013, available at <http://www.boiseweekly.com/boise/full-disclosure-idahos-hiv-disclosure-laws-causing-their-own-issues/Content?oid=2803038&storyPage=2>.

²⁵⁰ *Id.*

²⁵¹ *Id.*

his guilty plea, but his motion was denied by the district court, and this denial was subsequently affirmed by the Court of Appeals of Idaho.²⁵²

HIV positive persons prosecuted under Idaho's felony HIV transfer law may have a defense if they can prove that a licensed physician informed them that they were "noninfectious" (could not transmit HIV to others).²⁵³ This could occur if a person's viral load was undetectable.

Prosecutions of HIV positive individuals under Idaho's transfer of bodily fluids statute include:

- In December 2013, a 40-year-old HIV-positive man was charged with transfer of bodily fluids which may contain HIV for allegedly failing to disclose his status to a sexual partner.²⁵⁴
- In September 2013, a 52-year-old man was charged with transfer of bodily fluids which may contain HIV after allegedly failing to disclose his HIV status to multiple sexual partners.²⁵⁵ Though the man argued that his original HIV test had been a false positive, and in fact subsequent tests for HIV were all negative, the prosecution stated that this was irrelevant, as the man believed at the time of the sexual encounters that he was HIV-positive.²⁵⁶ The man made an Alford plea, under which he maintained his innocence but acknowledged a jury would likely find him guilty.²⁵⁷ Under the terms of his plea, the man faces five to fifteen years in prison.²⁵⁸
- In February 2013, a 38-year-old HIV-positive man was charged with transfer of body fluids which may contain HIV after allegedly failing to disclose his status to a partner with whom he had unprotected sex.²⁵⁹
- In May 2012, a 37-year-old HIV-positive man was charged with knowingly exposing another to HIV after he allegedly failed to disclose his status to two sexual partners.²⁶⁰
- In 2010, a 31-year-old HIV-positive man was charged with knowingly transferring bodily fluids with HIV for failing to disclose his status to sexual partners he had met on the Internet.²⁶¹ The man told detectives that he failed to tell his sexual partners, with whom he had had unprotected sex, that he was HIV-positive after he had been booked on an

²⁵² *State v. Thomas*, 297 P.3d 268, 271 (Idaho Ct. App. 2013).

²⁵³ IDAHO CODE ANN. § 39-608(3)(b).

²⁵⁴ George Prentice, *Police Blotter: HIV-Related Charges and Vandalizing Small Business*, BOISE WEEKLY, Dec. 13, 2013, available at <http://www.boiseweekly.com/CityDesk/archives/2013/12/13/police-blotter-hiv-related-charges-and-vandalizing-small-business>.

²⁵⁵ John Funk, *Man charged with transmitting HIV gets 15 years for probation violation*, IDAHO PRESS-TRIBUNE, Sept. 11, 2013, available at http://www.idahopress.com/members/man-charged-with-transmitng-hiv-gets-years-for-probatonviolaton/artcle_cc57d346-1a9a-11e3-99fa-001a4bcf887a.html.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *SW Idaho man facing HIV body fluids charge*, 10TV.COM, Feb. 9, 2013, available at <http://www.10tv.com/content/stories/apexchange/2013/02/09/id--hiv-unprotected-sex.html>.

²⁶⁰ *Idaho man charged with knowingly exposing others to HIV*, NWCN.COM, May 28, 2012, available at <http://www.nwcn.com/story/news/2014/07/30/12918220/>.

²⁶¹ *Boise man charged with transferring HIV*, IDAHO PRESS-TRIBUNE, Sept. 14, 2010, available at http://www.idahopress.com/news/article_bbfc76ac-c032-11df-9d38-001cc4c002e0.html.

unrelated misdemeanor probation violation.²⁶² He later pleaded guilty and was sentenced to fifteen years in prison.²⁶³

HIV positive individuals have also been prosecuted under Idaho’s statute for engaging in acts that are not known to transmit HIV. In *State v. Mubita*, an HIV positive man was convicted of eleven counts of transferring bodily fluids and sentenced to forty-four years in prison with a possibility of parole after four years for crimes including performing oral sex on his female partner and ejaculating on her thigh.²⁶⁴ On appeal, defense counsel argued that it was factually impossible to violate Idaho’s felony exposure law, intended to criminalize “knowingly expos[ing] another person to AIDS,” because an HIV positive individual performing oral sex or ejaculating on intact skin has little or no risk of transmitting HIV.²⁶⁵ The Idaho Court of Appeals found that the defendant had nonetheless violated the law because, when looking to the plain language of the statute, it “unambiguously dictate[d] that one can ‘transfer’ one’s body fluid via ‘oral-genital contact,’ and the statute expressly defines ‘body fluid’ to include saliva.”²⁶⁶ The Idaho statute’s definition of “body fluids” includes saliva and urine in addition to blood, semen, vaginal secretions, and breast milk, despite scientific evidence that HIV is not transmitted through saliva or urine.²⁶⁷

Idaho’s definition of bodily fluids disregards scientific facts surrounding the risks of HIV transmission, only adding to public confusion concerning how the disease is transmitted and worsening the stigma faced by people living with HIV. It ignores the fact that the CDC has long maintained that saliva and urine have not been found to transmit HIV.²⁶⁸ Further, while breast milk is included in this statute’s list of “bodily fluids,” breastfeeding, which can transfer HIV, is not included in a list of activities that “transfer” bodily fluids.²⁶⁹

Sharing needles/syringes is a felony.

Idaho’s HIV statute specifically targets intravenous drug users and others who share their needles and syringes. To avoid prosecution, HIV positive individuals should not share needles, syringes, and similar drug paraphernalia capable of transferring fluids through the skin. It is a felony, punishable by up to fifteen years in prison and/or a \$5,000 fine, for an individual who is aware that she/he is HIV positive to “transfer” bodily fluids by allowing others to use their hypodermic syringes, needles, or similar devices without sterilization.²⁷⁰

²⁶² *Id.*

²⁶³ *Boise man with HIV sentenced for unprotected sex*, IDAHO PRESS-TRIBUNE, Mar. 25, 2011, available at http://www.idahopress.com/news/state/boise-man-with-hiv-sentenced-for-unprotected-sex/article_fa614fac-1593-5f83-b83f-5b1068ba6be4.html.

²⁶⁴ 188 P.3d 867, 871-73, 883 (Idaho 2008).

²⁶⁵ *Id.* at 881-82.

²⁶⁶ *Id.* at 883.

²⁶⁷ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).; CTR. FOR DISEASE CONTROL & PREVENTION, *How is HIV passed from one person to another?*, (Sept. 23, 2014), available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014) (noting that HIV can only be transmitted through certain fluids: blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, and breast milk).

²⁶⁸ *Id.*

²⁶⁹ IDAHO CODE ANN. § 39-608(2)(a)-(b); Christina M. Schriver, *State Approaches to Criminalizing the Exposure of HIV*, 21 N.ILL.U.L. Rev. 319, 331 (2001).

²⁷⁰ IDAHO CODE ANN. § 39-608(2)(b).

Neither the intent to transmit HIV nor actual transmission is required for conviction. Unlike those charged under the sexual activity provision of the law, disclosure of HIV status is not a defense for individuals charged with sharing a syringe.²⁷¹ An HIV positive person sharing needles or syringes only has a defense to prosecution if she/he can prove that a licensed physician advised them that they were “noninfectious” (not capable of infecting others with HIV).²⁷²

HIV status must be disclosed before donating blood, semen, body tissues, or organs.

It is a felony, punishable by up to fifteen years in prison and/or a \$5,000 fine, for an individual who is aware that she/he is HIV positive to “transfer” bodily fluids to another by giving blood, semen, organs, or body tissues to any person, blood bank, hospital, or medical facility for the purposes of transfer to another person.²⁷³ Neither the intent to transmit HIV nor actual transmission is required. However, an HIV positive person donating blood, semen, organs, or body tissues does have a defense if she/he can prove that the donation(s) occurred after a licensed physician advised that she/he was “noninfectious” (not capable of infecting others with HIV).²⁷⁴

In 2005, a 22-year-old HIV positive man was charged with attempting to sell his blood to a blood bank.²⁷⁵ The man faced up to fifteen years imprisonment and a \$5,000 if convicted, but the outcome of this case is unknown.²⁷⁶

Prosecution may result from exposing another to HIV, but the meaning of “exposing” is not defined.

Idaho has a generalized, catch-all HIV exposure statute, Idaho Code Ann. § 39–601, in addition to the felony statute criminalizing such activities as needle-sharing and unprotected sexual intercourse (as discussed above). This is a communicable disease control statute and such statutes are rarely used in prosecutions.

In Idaho it is a misdemeanor for an HIV positive person to knowingly expose another to HIV infection.²⁷⁷ The penalties for violating this law are not specified, although penalties for exposing others to syphilis, gonorrhea, or chancroid may include up to six months in prison and/or up to a \$300 fine.²⁷⁸ Unlike Idaho’s felony exposure statute, discussed above, disclosure is not a defense. Neither the intent to transmit HIV nor actual transmission is required.

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, it should not be used as substitute for legal advice.

²⁷¹ § 39-608(3)(a).

²⁷² § 39-608(3)(b).

²⁷³ § 39-608(2)(b).

²⁷⁴ § 39-608(3)(b).

²⁷⁵ Faye Hoffman, *Man Jailed for Attempting to Sell HIV-Infected Blood*, KMVT.COM, Oct. 4, 2005, available at <http://www.kmvt.com/news/regional/1879472.html>.

²⁷⁶ *Id.*

²⁷⁷ § 39-601 (2014).

²⁷⁸ § 39-607.

Illinois Statute(s) that Allow for Criminal Prosecution based on HIV Status:**720 ILL. COMP. STAT. § 5/12-5.01*****Criminal transmission of HIV***

(a) A person commits criminal transmission of HIV when he or she, with the specific intent to commit the offense:

- (1) engages in sexual activity with another without the use of a condom knowing that he or she is infected with HIV;
- (2) transfers, donates, or provides his or her blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or other administration to another knowing that he or she is infected with HIV; or
- (3) dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia knowing that he or she is infected with HIV.

(b) For purposes of this Section: “HIV” means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.

“Sexual activity” means the insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner.

“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.

(c) Nothing in this Section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV.

(d) It shall be an affirmative defense that the person exposed knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.

(d-5) A court, upon a finding of reasonable suspicion that an individual has committed the crime of criminal transmission of HIV, shall order the production of records of a person accused of the offense of criminal transmission of HIV or the attendance of a person with relevant knowledge thereof so long as the return of the records or attendance of the person pursuant to the subpoena is submitted initially to the court for an in camera inspection

Continued on the following page...

...Only upon a finding by the court that the records or proffered testimony are relevant to the pending offense, the information produced pursuant to the court's order shall be disclosed to the prosecuting entity and admissible if otherwise permitted by law.

(e) A person who commits criminal transmission of HIV commits a Class 2 felony.

720 ILL. COMP. STAT. § 5/8-4

Attempt

(a) Elements of the offense.

A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

(c) Sentence.

(1)(E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony;

(4) the sentence for attempt to commit a Class 2 felony is the sentence for a Class 3 felony.

730 ILL. COMP. STAT. § 5/5-4.5-35

Class 2 Felonies; Sentence

For a Class 2 felony:

(a) TERM. The sentence of imprisonment shall be a determinate sentence of not less than 3 years and not more than 7 years. The sentence of imprisonment for an extended term Class 2 felony, as provided in Section 5-8-2 (730 ILCS 5/5-8-2), shall be a term not less than 7 years and not more than 14 years.

(d) PROBATION; CONDITIONAL DISCHARGE. Except as provided in Section 5-5-3 or 5-6-2 (730 ILCS 5/5-5-3 or 5/5-6-2), the period of probation or conditional discharge shall not exceed 4 years. The court shall specify the conditions of probation or conditional discharge as set forth in Section 5-6-3 (730 ILCS 5/5-6-3).

(e) FINE. Fines may be imposed as provided in Section 5-4.5-50(b) (730 ILCS 5/5-4.5-50(b)).

730 ILL. COMP. STAT. § 5/5-4.5-50***Sentence Provisions; All Felonies***

(b) FELONY FINES. An offender may be sentenced to pay a fine not to exceed, for each offense, \$25,000 or the amount specified in the offense, whichever is greater, or if the offender is a corporation, \$50,000 or the amount specified in the offense, whichever is greater. A fine may be imposed in addition to a sentence of conditional discharge, probation, periodic imprisonment, or imprisonment. See Article 9 of Chapter V (730 ILCS 5/Ch. V, Art. 9 [(730 ILCS 5/5-9-1 et seq.)]) for imposition of additional amounts and determination of amounts and payment.

HIV positive persons may be prosecuted for engaging in unprotected sexual intercourse with the specific intent to transmit HIV.

HIV positive persons may face prosecution for engaging in unprotected sexual intercourse without first disclosing their HIV status.²⁷⁹ The specific intent to transmit HIV is required for prosecution, but actual transmission is not.²⁸⁰

It is a Class 2 felony punishable by three to seven years in prison and a \$25,000 fine, for a person who is aware that she/he is HIV positive to engage in “sexual contact” with another.²⁸¹ The definition of “sexual contact” is limited to vaginal and anal intercourse.²⁸² It is an affirmative defense to prosecution if the charged individual can prove that her/his sexual partner 1) knew that she/he was HIV positive, 2) knew that the relevant action could result in HIV transmission, and 3) consented to the relevant action with that knowledge.²⁸³ The use of a condom is also a defense.²⁸⁴

While disclosure and condom use constitute defenses to prosecution, proving that either one occurred during private, sexual encounters is exceedingly difficult without witnesses or documentation. Whether disclosure occurred or a condom was used will almost always depend entirely on the word of one person against another.

Prosecutions under the Illinois HIV exposure statute include:

²⁷⁹ 720 ILL. COMP. STAT. 5/12-5.01(a)(1) (2014).

²⁸⁰ *Id.*

²⁸¹ 720 ILL. COMP. STAT. 5/12-5.01(a)(1), (e); 730 ILL. COMP. STAT. 5/5-4.5-35(a) (2014), 5/5-4.5-50(b) (2014).

²⁸² 5/12-5.01(b).

²⁸³ *Id.*

²⁸⁴ 5/12-5.01(a)(1) (stating that a person commits criminal transmission of HIV when, with the specific intent to commit the offense, she/he “engages in sexual activity with another *without the use of a condom . . .*” (emphasis added)).

- In May 2013, a 35-year-old HIV positive man was charged with criminal sexual assault, criminal sexual abuse, and sexual transmission for allegedly sexual abusing several high school students in 2011.²⁸⁵
- Also in May 2013, a 48-year-old HIV positive man was charged with criminal assault after he allegedly sexually assaulted a male teenager after the teen refused to have sex for money.²⁸⁶ The man's bail was set at \$5 million.²⁸⁷
- In March 2013, a 38-year-old HIV positive police officer was charged with criminal transmission of HIV after a sexual partner claimed he failed to disclose his HIV status before they had unprotected sex.²⁸⁸

Numerous other individuals were prosecuted under the previous Illinois HIV criminal exposure law, discussed in greater detail below.

People living with HIV may also be prosecuted for *attempting* to transmit HIV. In Illinois, it is a Class 3 felony, punishable by two to five years in prison²⁸⁹ and a \$25,000 fine,²⁹⁰ to attempt to criminally transmit HIV.²⁹¹

HIV positive persons are prohibited from donating or providing blood, tissue, semen, organs, or bodily fluids.

People living with HIV also are subject to prosecution and imprisonment if they donate blood, bodily fluids such as semen, and human tissue.²⁹² It is a Class 2 felony, punishable by three to seven years in prison and a \$25,000 fine, for an HIV-positive person to donate, transfer, or provide blood, tissue, semen, organs, or “other potentially infectious bodily fluids” for transfusion, transplant, insemination, or administration to another.²⁹³

The meaning of “potentially infectious bodily fluids” is undefined in the statute. Taken literally, any bodily fluid containing any amount of HIV virus could “potentially” infect another if the odds of HIV transmission are greater than zero. While the specific intent to transmit HIV is required for prosecution, actual transmission is not.²⁹⁴

Individuals prosecuted under this statute have a defense if they can prove that the individual exposed to a blood, fluid, organ, or tissue donation (1) was aware that her/his donor was HIV

²⁸⁵ Carolyn P. Smith, *Police: Cahokia High boys exposed to HIV by school worker*, BND.COM, May 13, 2013, available at <http://www.bnd.com/2013/05/13/2615515/police-cahokia-high-boys-got-hiv.html>.

²⁸⁶ Geoff Ziezulewicz, *\$5M bail for HIV positive man charged with sexual assault*, CHI. TRIB., May 5, 2013, available at http://articles.chicagotribune.com/2013-05-05/news/chi-5m-bail-for-hiv-positive-man-charged-with-sexual-assault-20130505_1_miller-hiv-positive-man-bathroom.

²⁸⁷ *Id.*

²⁸⁸ Becky Schlikerman, *Cicero police detective charged with felony for allegedly transmitting HIV*, SUNTIMES.COM, Mar. 14, 2013, available at <http://www.suntimes.com/18855033-761/cicero-police-detective-charged-with-felony-for-allegedly-transmitting-hiv.html>.

²⁸⁹ 730 ILL. COMP. STAT. 5/5-4.5-40(a) (2014).

²⁹⁰ 5/5-4.5-40(e); 5/5-4.5-50(b).

²⁹¹ 720 ILL. COMP. STAT. 5/12-5.01(e); 5/8-4(e)(4) (2014).

²⁹² 5/12-5.01(a)(3).

²⁹³ 720 ILL. COMP. STAT. 5/12-5.01(a)(2); 730 ILL. COMP. STAT. 5/5-4.5-35, 5/5-4.5-50.

²⁹⁴ 5/12-5.01(a)(2).

positive, (2) knew that accepting a donation could result in HIV infection, and (3) consented to HIV exposure knowing of this risk.²⁹⁵

Individuals with HIV may also be prosecuted for attempting to donate blood, semen, organs or other human tissues, and bodily fluids. Such offenses are Class 3 felonies, punishable by two to five years in prison and a \$25,000 fine.²⁹⁶ A verbal offer to donate blood, fluids, organs, or other tissues may be sufficient for prosecution.

HIV positive persons can be prosecuted and jailed for sharing dirty syringes with others.

Criminal liability, including imprisonment, may result from sharing or exchanging non-sterile needles and other drug paraphernalia. It is a Class 2 felony, punishable by three to seven years in prison and a \$25,000 fine, for an HIV positive person aware of her/his HIV status to dispense, deliver, exchange, sell, or transfer in any other way to another person any non-sterile “intravenous or intramuscular paraphernalia.”²⁹⁷ This includes syringes, or “any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.”²⁹⁸

HIV positive persons in Illinois are prohibited from selling, sharing, or exchanging, or otherwise transferring to any other person unsterilized needles or any other unsterilized items used to inject substances into the human body. The specific intent to transmit HIV is required for prosecution, but actual transmission is not.²⁹⁹

Under the previous Illinois HIV criminal law, HIV positive persons could be imprisoned for exposing others to their “bodily fluids.”

The Illinois HIV criminal law was heavily changed in 2012.³⁰⁰ Under the previous statute, HIV positive persons faced prosecution for engaging in “intimate contact,” which was defined as the exposure of the body of one person to the bodily fluid of another person in a manner that could result in the transmission of HIV.³⁰¹ Because the definition of “bodily fluids” under the previous HIV exposure law was not limited to fluids known to transmit HIV, actions that posed at best only a theoretical risk of HIV transmission, such as biting, spitting, and scratching, were subject to prosecution.³⁰²

Unlike the new law, the specific intent to transmit HIV was not required for prosecution under the

²⁹⁵ 5/12-5.01(d).

²⁹⁶ 720 ILL. COMP. STAT. 5/8-4(e)(4), 5/12-5.01(e); 730 ILL. COMP. STAT. 5/5-4.5-40(a), (e), 5/5-4.5-50(b).

²⁹⁷ 720 ILL. COMP. STAT. ANN. 5/12-5.01(a)(3); 730 ILL. COMP. STAT. 5/5-4.5-35, 5/5-4.5-50(b).

²⁹⁸ 5/12-5.01(b).

²⁹⁹ 5/12-5.01(a)(3).

³⁰⁰ Ramon Gardenhire, *How Illinois’ HIV Criminalization Law has Changed*, AIDS FOUNDATION OF CHICAGO, Jul. 27, 2012, available at <http://aidschicago.org/illinois-news/522-how-illinois-hiv-criminalization-law-has-changed>.

³⁰¹ 720 ILL. COMP. STAT. 5/12-16.2 (amended 2012, current version at 720 ILL. COMP. STAT. 5/12-5.01).

³⁰² See CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014) (stating that there exists only a “negligible” risk that HIV can be transmitted through a bite); CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014) (stating that HIV cannot be spread through saliva or from being scratched by an HIV positive individual).

previous Illinois statute. Further, the old law did not allow for condom use as a defense, in spite of the fact that such use has been demonstrated to be highly effective in preventing HIV transmission.³⁰³ The only affirmative defense to prosecution was if there had been disclosure, knowledge that the action could result in HIV transmission, and consent to the action.³⁰⁴

There were numerous prosecutions under the previous HIV exposure law. These included charges brought for non-disclosure, activities that posed little or no risk of HIV transmission, and attempt to transmit HIV.

The following cases only are small sampling of a vast number of prosecutions under the previous statute:

- In November 2011, a 36-year-old HIV positive man was charged with criminal transmission of HIV after allegedly biting a police officer's thumb and breaking the skin.³⁰⁵
- In October 2011, a 26-year-old HIV positive man was charged with criminal transmission of HIV after having unprotected sex with multiple partners.³⁰⁶
- In 2010, a 42-year-old HIV positive man pleaded guilty to criminal transmission of HIV after he failed to disclose his HIV status before engaging in unprotected sex with a 19-year-old woman.³⁰⁷ The man was sentenced to six years in prison.³⁰⁸
- In December 2004, a 33-year-old HIV positive man was charged with criminal transmission of HIV for having sex with his girlfriend without disclosing his HIV status.³⁰⁹ The man's HIV status was discovered in a letter from hospital officials during a police search related to another investigation.³¹⁰
- In February 2003, a 47-year-old HIV positive woman pleaded guilty to attempted criminal transmission of HIV after leaving a bar with a man to go to his home to engage in "intimate contact."³¹¹ She was sentenced to the six months in county jail for time she had already served since her arrest the previous September, plus two years probation.³¹²
- In May 1999, a 30-year-old HIV positive sex worker was charged with criminal transmission of HIV after she was discovered having sex with a man in exchange for

³⁰³ CTR. FOR DISEASE CONTROL & PREVENTION, *Condoms and STDs*, available at <http://www.cdc.gov/condomeffectiveness/latex.htm> (last visited Mar. 18, 2014).

³⁰⁴ 720 ILL. COMP. STAT. 5/12-16.2(3)(d) (amended 2012, current version at 720 ILL. COMP. STAT. ANN. 5/12-5.01).

³⁰⁵ Jim Jaworski, *Man accused of biting cop, charged with transmission of HIV*, TRIBLOCAL.COM, Nov. 23, 2011, available at <http://www.triblocal.com/oak-park-river-forest/2011/11/23/man-accused-of-biting-cop-charged-with-transmitting-hiv/>.

³⁰⁶ Kevin Held, *Patrick Wayne Gregory accused of knowingly passing on HIV*, KSDK.COM, Oct. 13, 2011, available at <http://www.ksdk.com/news/article/281200/3/Police-Man-knowingly-passed-HIV-onto-others>.

³⁰⁷ Dave Fopay, *Man pleads guilty in Coles County Court for knowingly spreading HIV*, HERALD-REVIEW.COM, Feb. 16, 2010, available at http://www.herald-review.com/news/local/article_77a9af98-13b8-5a12-aa55-88997f84b5b3.html.

³⁰⁸ *Id.*

³⁰⁹ Krystyna Slivinski, *Elgin Man Charged with HIV Exposure*, CHI. TRIB., Dec. 16, 2004, at 2-NW.

³¹⁰ *Id.*

³¹¹ Art Barnum, *Woman Pleads Guilty in HIV Case*, CHI. TRIB., Feb. 4, 2003, available at http://articles.chicagotribune.com/2003-02-04/news/0302040089_1_hiv-lesser-crime-guilty.

³¹² *Id.*

money.³¹³ A condom wrapper was found at the scene of the woman's arrest.³¹⁴ It is not known whether the man later tested positive for HIV.³¹⁵

- In March 1993, a 35-year-old HIV positive woman was charged with criminal transmission of HIV when she allegedly refused to leave a hospital after treatment, biting a security guard and spitting at others in the process.³¹⁶ Her bite did not break the guard's skin.³¹⁷
- In February 1993, a 37-year-old HIV positive man was charged with criminal transmission of HIV and attempted murder when he allegedly attacked a nurse and stuck her with a needle filled with his blood.³¹⁸ This charge was later elevated to attempted murder.³¹⁹ The nurse did not contract HIV, and the man died before trial.³²⁰
- In February 1992, an HIV positive man pleaded guilty to three charges, including criminal transmission of HIV, after sexually assaulting a woman.³²¹ He was later sentenced to 15 years imprisonment.³²² This case represents one of Illinois' earliest prosecutions for HIV exposure.

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, it should not be used as a substitute for legal advice.

³¹³ Mark Shuman, *Prostitution Suspect faces HIV Charge*, CHI. TRIB., May 6, 1999, available at http://articles.chicagotribune.com/1999-05-06/news/9905060289_1_hiv-and-prostitution-criminal-transmission-arrest-tuesday-night.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ Jerry Crimmins, *Police: Woman with HIV Bit Security Guard*, CHI. TRIB., Mar. 30, 1993, available at http://articles.chicagotribune.com/1993-03-30/news/9303300181_1_hiv-tainted-blood-aurora-charged.at.2-D.

³¹⁷ *Id.*

³¹⁸ Christian Hawes, *Man with AIDS Held in Attack*, CHI. TRIB., Feb. 28, 1993, at 3-L; Teresa Jimenez, *HIV Transmission Law Faces a Test*, CHI. TRIB., Feb. 13, 1996, at 1-L.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Man Pleads Guilty to HIV Transmission*, CHI. TRIB., Feb. 25, 1992, available at http://articles.chicagotribune.com/1992-02-25/news/9201180183_1_hiv-transmission-hiv-virus-criminal-transmission.

³²² *Man Sentenced for Spreading HIV*, CHI. TRIB., May 2, 1992, available at http://articles.chicagotribune.com/1992-05-02/news/9202080980_1_hiv-virus-virus-that-causes-aids-criminal-transmission.

Indiana Statute(s) that Allow for Criminal Prosecution based on HIV Status:**IND. CODE § 16-41-7-1*****Carriers' duty to warn persons at risk***

(a) This section applies to the following dangerous communicable diseases:

- (1) Acquired immune deficiency syndrome (AIDS).
- (2) Human immunodeficiency virus (HIV).
- (3) Hepatitis B.

(b) As used in this section, "high risk activity" means sexual or needle sharing contact that has been demonstrated epidemiologically to transmit a dangerous communicable disease described in subsection (a).

(c) As used in this section, "person at risk" means:

- (1) past and present sexual or needle sharing partners who may have engaged in high risk activity; or
- (2) sexual or needle sharing partners before engaging in high risk activity; with the carrier of a dangerous communicable disease described in subsection (a).

(d) Carriers who know of their status as a carrier of a dangerous communicable disease described in subsection (a) have a duty to warn or cause to be warned by a third party a person at risk of the following:

- (1) The carrier's disease status.
- (2) The need to seek health care such as counseling and testing.

IND. CODE § 35-42-2-1(b), (e), (g)***Battery***

(b) Except as provided in subsections (c) through (j), a person who knowingly or intentionally:

- (1) touches another person in a rude, insolent, or angry manner; or
 - (2) in a rude, insolent, or angry manner places any bodily fluid or waste on another person;
- commits battery, a class C misdemeanor

(e) The offense described in subsection (b)(2) is a Level 6 felony if the person knew or recklessly failed to know that the bodily fluid or waste placed on another person was infected with hepatitis, tuberculosis, or human immunodeficiency virus.

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- (g) The offense described in subsection (b)(2) is a Level 5 felony if:
- (1) the person knew or recklessly failed to know that the bodily fluid or waste placed on another person was infected with hepatitis, tuberculosis, or human immunodeficiency virus; and
 - (2) the person placed the bodily fluid or waste on a public safety official.

IND. CODE § 35-45-16-2(a)-(f)

Malicious mischief

- (a) As used in this section, “body fluid” means:
- (1) blood;
 - (2) saliva;
 - (3) sputum
 - (4) semen;
 - (5) vaginal secretions;
 - (6) human milk;
 - (7) urine;
 - (8) sweat;
 - (9) tears;
 - (10) any other liquid produced by the body; or
 - (11) any aerosol generated form of liquids listed in this subsection.
- (c) a person who recklessly, knowingly, or intentionally places human:
- (1) body fluid; or
 - (2) fecal waste;
- in a location with the intent that another person will involuntarily touch the bodily fluid or fecal waste commits malicious mischief, a class B misdemeanor.
- (d) An offense described in subsection (c) is a:
- (1) Level 6 felony if the person knew or recklessly failed to know that the body fluid or fecal waste was infected with:
 - (A) infectious hepatitis;
 - (B) HIV; or
 - (C) tuberculosis;
 - (2) Level 4 felony if:
 - (A) the person knew or recklessly failed to know that the body fluid or fecal waste was infected with HIV; and
 - (B) the offense results in the transmission of HIV to the other person.
- (e) A person who recklessly, knowingly, or intentionally places human:
- (1) body fluid; or
 - (2) fecal waste;
- in a location with the intent that another person will ingest the body fluid or fecal waste commits malicious mischief with food, a Class A misdemeanor.

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- (f) An offense described in subsection (e) is:
- (1) a Level 6 felony if the person knew or recklessly failed to know that the blood, body fluid, or fecal waste was infected with:
 - (A) infectious hepatitis;
 - (B) HIV; or
 - (C) tuberculosis;
 - (3) a Level 4 felony if:
 - (A) the person knew or recklessly failed to know that the body fluid or fecal waste was infected with HIV; and
 - (B) the offense results in the transmission of HIV to the other person.

IND. CODE § 16-41-14-17

Donation, sale, or transfer of HIV infected semen; penalties

- (a) This section does not apply to a person who transfers for research purposes semen that contains antibodies for the human immunodeficiency virus (HIV).
- (b) A person who, for the purpose of artificial insemination, recklessly, knowingly, or intentionally donates, sells, or transfers semen that contains antibodies for the human immunodeficiency virus (HIV) commits transferring contaminated semen, a Level 5 felony. The offense is a Level 4 felony if the offense results in the transmission of the virus to another person.

IND. CODE § 35-42-21-1(b)-(c)

Donation, sale or transfer of blood or semen containing the human immunodeficiency virus (HIV)

- (b) A person who recklessly, knowingly, or intentionally donates, sells, or transfers blood, or semen for artificial insemination (as defined in IC 16-41-14-2) that contains the human immunodeficiency virus (HIV) commits transferring contaminated body fluids, a Level 5 felony.
- (c) However, the offense under subsection (b) is a Level 3 felony if it results in the transmission of the human immunodeficiency virus (HIV) to any person other than the defendant.

IND. CODE § 35-45-21-3

Violation of IC 16-41-7; penalty

- (a) A person who recklessly violates or fails to comply with IC 16-41-7 commits a Class B misdemeanor.
- (b) A person who knowingly or intentionally violates or fails to comply with IC 16-41-7-1 commits a Level 6 felony.
- (c) Each day a violation described in this section continues constitutes a separate offense.

IND. CODE. § 35-50-2-5***Class B/Level 3 felony***

(a) A person who commits a Class B felony (for a crime committed before July 1, 2014) shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

(b) A person who commits a Level 3 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between three (3) and sixteen (16) years, with the advisory sentence being ten (9) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

IND. CODE. § 35-50-2-5.5***Level 4 felony; penalty***

A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two (2) and twelve (12) years, with the advisory sentence being six (6) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

IND. CODE. § 35-50-2-6***Class C/Level 5 felony***

(a) A person who commits a Class C felony (for a crime committed before July 1, 2014) shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

(b) A person who commits a Level 5 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

IND. CODE. § 35-50-2-7***Class D/Level 6 felony***

(a) A person who commits a Class D felony (for a crime committed before July 1, 2014) shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 ½) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

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(b) A person who commits a Level 6 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between six (6) months and two and one-half (2 ½) years, with the advisory sentence being one (1) year. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

IND. CODE. 35-50-3-2

Class A misdemeanor

A person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year; in addition, he may be fined not more than five thousand dollars (\$5,000).

IND. CODE. 35-50-3-3

Class B misdemeanor

A person who commits a Class B misdemeanor shall be imprisoned for a fixed term of not more than one hundred eighty (180) days; in addition, he may be fined not more than one thousand dollars (\$1,000).

HIV positive persons can face felony charges for failing to disclose their HIV status to their sexual and needle-sharing partners.

Indiana’s “duty to warn” statute requires that HIV positive persons disclose their status to past, present, and future sexual or needle-sharing partners that have or will engage in activities that have been “demonstrated epidemiologically to transmit” HIV.³²³ While the statute gives no definition for what acts are “demonstrated epidemiologically to transmit” HIV, case law suggests activities include engaging in oral and penile-vaginal sex.³²⁴ It is a Level 6 felony for a person to knowingly or intentionally fail to disclose her/his HIV status in violation of this law, punishable by up to two and one-half years imprisonment and up to a \$10,000 fine.^{325, 326}

Neither the intent to transmit nor the transmission of HIV is required.

Though disclosing HIV status is the only affirmative defense to prosecution, and while Indiana’s failure to warn statute does not explicitly mention the use of protection, condom use may potentially be a successful defense. Condoms, when used consistently and correctly, are highly effective in

³²³ IND. CODE. § 16-41-7-1(b)-(c) (2014).

³²⁴ *Johnson v. State*, 785 N.E.2d 1134 (Ind. Ct. App. 2003).

³²⁵ IND. CODE. §§ 35-45-21-3 (2014), 35-50-2-7 (2014).

³²⁶ It should be noted that Indiana overhauled its criminal code, effective July 1, 2014. Prior to this date, a knowing and intentional violation of Indiana Code § 16-41-7-1 was a Class D felony punishable by up to three years imprisonment and up to a \$10,000 fine.

preventing the transmission of HIV in sexual contact “demonstrated epidemiologically to transmit” the virus.³²⁷ However, because cases that have been prosecuted under the failure to warn statute have typically involved HIV positive persons who engaged in unprotected sex with their partners, it is still unclear whether Indiana courts will accept condom use as a defense.³²⁸ Nonetheless, though there is limited case law on whether condom use provides a successful defense the application of the statute appears to be limited to cases where no condom or other form of protection was used.

Other cases and prosecutions of HIV positive persons for failure to warn their partners include:

- In March 2011, a 20-year-old HIV positive woman was charged with two counts of failure to warn after having unprotected sex with a man without disclosing her status.³²⁹ It was her third arrest for the same charge.³³⁰
- In March 2011, a 33-year-old HIV positive man was charged with six counts of child molestation and one count of failure to warn for allegedly molesting an 8-year-old boy.³³¹
- In June 2010, a 19-year-old HIV positive woman was charged with failing to disclose her status to her sexual partner, a 22-year-old man that she had met on the social networking site MySpace.³³² The two engaged in unprotected sex on numerous occasions.³³³
- In March 2010, a 47-year-old HIV positive man was charged with fifteen felony counts of failing to warn sexual partners of his HIV status.³³⁴ At the time, the man already faced up to six years in prison for pleading guilty to two counts of failing to warn in February.³³⁵ In April 2012, the man was sentenced to seven and a half years imprisonment after pleading guilty to additional charges for failing to warn five sexual partners of his HIV status.³³⁶ This followed a three-year sentence that the man was given for his previous charges.³³⁷
- In July 2008, an HIV positive man convicted of two counts of failing to disclose his HIV status to his sexual partners was sentenced to three years of probation and a suspended

³²⁷ CTR. FOR DISEASE CONTROL & PREVENTION, *Male Latex Condoms and Sexually Transmitted Diseases*, (Mar. 25, 2013) <http://www.cdc.gov/condomeffectiveness/latex.htm> (last visited June 29, 2014).

³²⁸ See Sophia Voravong, *Teen Charged in Suspected HIV Lie*, JOURNAL & COURIER, June 10, 2010 (page unavailable); Ruth Ann Krause, *Gary Slaying Suspect has HIV, Cops Say*, MERRILLVILLE POST TRIBUNAL, Nov. 5, 1999, at 4; *AIDS Victim Charged for Having Unprotected Sex*, FORT-WAYNE SENTINEL, Sept. 11, 1998, at 5A.

³²⁹ *Woman Accused of Not Telling Partner About HIV*, THE INDYCHANNEL.COM, Mar. 30, 2011, available at <http://www.theindychannel.com/news/woman-accused-of-not-telling-partner-about-hiv>.

³³⁰ *Id.*

³³¹ *Police: Man With HIV Molests 8-Year-Old-Boy*, THE INDYCHANNEL.COM, Mar. 12, 2011, available at <http://www.theindychannel.com/news/police-man-with-hiv-molests-8-year-old-boy>.

³³² Sophia Voravong, *Teen Charged in Suspected HIV Lie*, JOURNAL & COURIER, June 15, 2010, available at <http://www.jconline.com/article/20100616/NEWS03/6160330/Teen-charged-in-suspected-HIV-lie>.

³³³ *Id.*

³³⁴ *Charges Mount in HIV-warning Case*, FORT WAYNE JOURNAL GAZETTE, Mar. 17, 2010, available at <http://www.journalgazette.net/apps/pbcs.dll/article?AID=/JG/20100317/LOCAL/303179934>.

³³⁵ *Id.*

³³⁶ *Indiana man sentenced for not disclosing HIV status*, WLKY.COM, Apr. 16, 2012, available at <http://www.wlky.com/news/local-news/indiana-news/Indiana-man-sentenced-for-not-disclosing-HIV-status/10919288#!7xzzN>.

³³⁷ *Id.*

one-and-a-half-year prison sentence.³³⁸

- In 1998, a 27-year-old woman was charged with failing to warn her sexual partner, with whom she had engaged in unprotected sex, that she was HIV positive.³³⁹
- In 1999, an HIV positive man was charged with failing to tell his girlfriend that he was HIV positive.³⁴⁰ They had been having unprotected sex for four months.³⁴¹
- In October 2007, a 47-year-old HIV positive man was charged with failing to warn his sexual partner that he was HIV positive.³⁴²

It is a felony for HIV positive persons to expose others to any bodily fluid, including those not known to transmit HIV.

In Indiana, there are multiple statutes that make it a felony to expose others to blood, semen, saliva, feces, sweat, tears, and urine, among other things, that are “infected with HIV.”³⁴³ These laws apply to a wide range of acts and bodily fluids cannot transmit HIV, including spitting saliva or throwing urine and feces.

Under Indiana’s battery statute,³⁴⁴ it is a Level 6 felony, punishable by up to two and one-half years imprisonment and up to a \$10,000 fine, if an individual knowingly or intentionally in a rude, insolent, or angry manner places any bodily fluid or waste on another person and the individual knew or recklessly failed to know that the bodily fluid or waste placed on that person was infected with HIV.³⁴⁵ If the individual places the bodily fluid or waste on a public safety official it is a Level 5 felony, punishable by up to six years imprisonment and up to a \$10,000 fine.³⁴⁶

³³⁸ Rebecca Green, *Probation Given to Man Who “Hid” HIV*, FORT WAYNE JOURNAL GAZETTE, July 8, 2004, at 2.

³³⁹ *AIDS Victim Charged for Having Unprotected Sex*.

³⁴⁰ Krause, *Gary Slaying Suspect has HIV, Cops Say*, at 4.

³⁴¹ *Id.*

³⁴² *Sex Partner Alleges No HIV Warning*, FORT WAYNE JOURNAL GAZETTE, Oct. 26, 2007, at 2C.

³⁴³ IND. CODE §§ 16-41-14-17 (2014), 35-42-21-1 (2014), 35-45-16-2 (2014).

³⁴⁴ It should be noted that until the large-scale revision of Indiana’s criminal code, effective July 1, 2014, the state had a “battery by body waste statute,” under which it was a Class C felony, punishable by up to eight years imprisonment and up to a \$10,000 fine, if a person intentionally or knowingly in a rude, insolent, or angry manner placed blood, bodily fluid (including saliva), or waste contaminated with HIV on a law enforcement officer, corrections officer, firefighter, or first responder. IND. CODE §§ 35-50-2-6(a) (2014), 35-42-2-6(e)(1), repealed by P.L.158-2013, SEC.429, eff. July 1, 2014; *Newman v. State*, 677 N.E.2d 590 (Ind. Ct. App. 1997) (affirming the defendant’s conviction of a Class D felony under the battery by body waste statute. The court noted that evidence the defendant “intentionally swung her head around causing saliva to land on [police] officers” was in itself sufficient to support the conviction.). It was a Class A felony if the exposure results in transmission. IND. CODE § 35-42-2-6(e)(3)(B). The same statute applied when a person intentionally caused another person, who was not a law enforcement officer or first responder, to come in contact with bodily fluids “infected with HIV,” but the penalties were less severe. § 35-42-2-6(f). To be prosecuted under the statute, it was only necessary that the bodily fluid make some sort of contact with another’s skin or clothing. *Thomas v. State*, 749 N.E.2d 1231 (Ind. Ct. App. 2001) (holding that Indiana’s battery by body waste statute was not ambiguous. The court affirmed the defendant’s conviction, finding that the statute did not require that the fluid—in this case, the defendant’s saliva—come into contact with the law enforcement officer’s skin or pose a risk of disease transmission. Rather, it was sufficient that his saliva had merely landed on the officer. The court noted that it was “plausible the legislature intended to penalize the offensive and disgusting nature of such [contact] . . .”).

³⁴⁵ IND. CODE §§ 35-42-2-1(e) (2014), § 35-50-2-7(b) (2014).

³⁴⁶ §§ 35-42-2-1(g), 35-50-2-6(b).

Pursuant to Indiana’s malicious mischief statute, it is a misdemeanor to recklessly, knowingly, or intentionally place bodily fluids (including blood, saliva, semen, urine, sweat, tears, and feces) with the intent that another person might unintentionally touch or eat them.³⁴⁷ However, if the individual knew or recklessly failed to know that the body fluid or fecal waste was infected with HIV it is a Level 6 felony, punishable by up to two and one-half years imprisonment and up to a \$10,000 fine.³⁴⁸ If HIV transmission occurs as a result, it is a Level 4 felony, punishable by up to twelve years imprisonment and up to a \$10,000 fine.³⁴⁹

The battery and malicious mischief statutes provide increased penalties if the bodily fluids in question contain traces of HIV despite the fact that HIV transmission may be impossible under the circumstances. These statutes fail to recognize that urine, feces, and saliva do not transmit HIV, and throwing, spitting, or placing these fluids on another person has never been shown to result in HIV transmission.³⁵⁰ There have been prosecutions under these statutes involving HIV positive defendants exposing others to saliva or fecal waste.³⁵¹ The following cases highlight prosecutions under Indiana’s battery by body waste statute, repealed during the overhaul of the state’s criminal code, effective July 1, 2014.

In *Nash v. State*, the Indiana Court of Appeals upheld the conviction and sentence of an HIV positive defendant to six years imprisonment under the state’s now repealed battery by body waste statute for throwing his urine and feces on a nurse in his detention facility.³⁵² The urine and feces landed on the nurse’s shoes and box that she was carrying.³⁵³ Despite the fact that this act posed no risk of HIV transmission, the state charged him with violating the battery by body waste statute, at the time a Class C felony,³⁵⁴ for exposing the nurse to bodily fluid “infected with HIV.”³⁵⁵ In these cases, though there is no risk of HIV transmission, HIV positive persons face increased penalties solely due to their HIV status. This remains true under Indiana’s current battery statute, which after the July 1, 2014 revision now contains HIV-specific provisions carried over from the repealed battery by body waste statute.

There is only one case on record that challenged the battery by body waste statute. In *Newman v. State*, an HIV positive sex worker was charged with a Class C felony for purposefully placing her “HIV-infected” body fluids on law enforcement officers who were trying to arrest her.³⁵⁶ The defendant “swung her head back and forth in an attempt to spray the officers with her tears, saliva,

³⁴⁷ § 35-45-16-2(a), (c), (e).

³⁴⁸ §§ 35-45-16-2(d)(3), (f)(3), 35-50-2-7.

³⁴⁹ §§ 35-45-16-2(d)(3), (f)(3), 35-50-2-5.5 (2014).

³⁵⁰ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, How is HIV passed from one person to another?* (June 18, 2014), available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited July 2, 2014) (stating that “[o]nly certain fluids—blood, semen (*cum*), pre-seminal fluid (*pre-cum*), rectal fluids, vaginal fluids, and breast milk—from an HIV-infected person can transmit HIV.”).

³⁵¹ See *Newman*, 677 N.E.2d at 591-92; *HIV-positive man Charged With Spitting on Officer*, FORT WAYNE SENTINEL, June 11, 2002, at 4A.

³⁵² 881 N.E.2d 1060, 1061-62 (Ind. Ct. App. 2008).

³⁵³ *Id.* at 1062.

³⁵⁴ Before the most recent revision of Indiana’s criminal code, a Class C felony was punishable by up to eight years imprisonment and up to a \$10,000 fine. IND. CODE § 35-50-2-6(a).

³⁵⁵ *Nash*, 881 N.E.2d at 1062.

³⁵⁶ *Newman*, 677 N.E.2d at 593.

and nasal secretions.”³⁵⁷ The trial judge refused to enter the conviction as a Class C felony and instead convicted the defendant of the lesser included Class D felony offense, based on the reasoning that “it’s medically impossible to transfer HIV and AIDS through spitting.”³⁵⁸ On appeal, the court affirmed the defendant’s sentence and conviction to three years for battery by body waste.³⁵⁹ If she had been convicted under the original charges she could have been sentenced up to eight years imprisonment.³⁶⁰

In a 2002 case, a 37-year-old HIV positive homeless man was charged with battery by body waste after he allegedly spat on a confinement officer.³⁶¹ He was in custody for car-jacking, resisting arrest, and battery.³⁶² Prior to the spitting incident, he had been charged under the same statute for throwing a cup of urine on another officer.³⁶³

It is a felony for HIV positive persons to donate or sell their semen, blood, or plasma.

It is a Level 5 felony, punishable by up to six years imprisonment and up to a \$10,000 fine,³⁶⁴ fine for a person to recklessly, knowingly, or intentionally donate, sell, or transfer blood or semen for artificial insemination that contains HIV.³⁶⁵ The law does not apply to people who donate semen or blood for research purposes or notify the blood center that the blood or blood component must be discarded and not used for any purpose.³⁶⁶

If the act results in transmission of HIV, however, the level of the offense is not entirely clear. Under Indiana Code § 35-45-21-1, described above, if the act results in transmission it is a Level 3 felony,³⁶⁷ punishable by up to twenty years imprisonment and up to a \$10,000 fine.³⁶⁸ Yet under § 16-41-14-17, which also criminalizes the reckless, knowing, or intentional donation, sale, or transfer of semen containing HIV for the purpose of artificial insemination, it is a Level 4 felony if the act results in transmission.³⁶⁹ A Level 4 felony is punishable by up to twelve years imprisonment and up to a \$10,000 fine.³⁷⁰ It appears that during the major revision of Indiana’s criminal code—which in fact added § 35-45-21-1 as a new statute, effective July 1, 2014—an oversight occurred which resulted in this contradiction. Indeed, before the revision both § 16-41-14-17 and § 35-42-1-7, which was replaced by § 35-45-21-1 and contained almost identical wording, provided the same punishments for both the initial act and for if transmission of HIV resulted (a Class C felony and a Class A felony, respectively).³⁷¹ It remains to be seen how the conflicting offense levels in the two

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 591-92.

³⁶⁰ IND. CODE § 35-50-2-6(a).

³⁶¹ *HIV-positive Man Charged With Spitting on Officer*, FORT WAYNE SENTINEL, June 11, 2002, at 4A.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ IND. CODE § 35-50-2-6(b).

³⁶⁵ § 35-45-21-1(b) (2014).

³⁶⁶ § 35-45-21-1(d).

³⁶⁷ § 35-45-21-1(c).

³⁶⁸ § 35-50-2-5(a) (2014).

³⁶⁹ § 16-41-14-17(b) (2014).

³⁷⁰ § 35-50-2-5.5.

³⁷¹ See IND. P.L.158-2013, SEC.429, eff. July 1, 2014, at 1288, 1402-03, available at http://iga.in.gov/static-documents/8/4/0/7/8407e19c/acts_2013.pdf

current statutes will play out in criminal prosecutions.

There have been numerous cases of individuals being prosecuted under Indiana's transfer and donating contaminated fluids statutes:

- In March 2010, a 39-year-old HIV positive woman pleaded not guilty to donating tainted plasma in December 2008.³⁷² While doctors informed her that she was HIV positive in 2005, she allegedly signed a document saying she was not HIV positive when she donated the plasma.³⁷³
- In 2004, a HIV positive man pleaded guilty and was sentenced to four years imprisonment for selling his plasma.³⁷⁴
- A 20-year-old, HIV positive homeless woman was sentenced to two years of probation for selling her plasma.³⁷⁵ She received \$20 for her donation and testified that she was going to use the money to feed herself and her baby.³⁷⁶
- A 46-year-old HIV positive man was sentenced to two years imprisonment for selling his blood at a blood plasma donation site.³⁷⁷
- In 2003 five HIV positive persons were charged with multiple counts of transferring contaminated fluids for selling their plasma.³⁷⁸

HIV positive individuals have also been charged under general criminal laws.³⁷⁹

In *State v. Haines*, the HIV positive defendant attempted suicide by slashing his wrists and was later found unconscious by police and emergency medical technicians.³⁸⁰ When the police and emergency team arrived and Haines awoke, he began yelling at them not to come closer or else he would infect them with HIV.³⁸¹ He began to scratch, bite, spit at, and throw blood at the officers.³⁸² At trial, the

³⁷² *Prosecutor: Woman Donated Plasma Tainted with HIV*, THEINDYCHANNEL.COM, Mar. 9, 2010, available at <http://www.theindychannel.com/news/prosecutor-woman-donated-plasma-tainted-with-hiv#>.

³⁷³ *Id.*

³⁷⁴ *Man Sentenced in Sale of HIV-tainted Plasma*, INDIANAPOLIS STAR, June 26, 2004, at B2.

³⁷⁵ *Woman Given Probation for Selling Tainted Plasma*, INDIANAPOLIS STAR, Nov. 6, 2003, at B1.

³⁷⁶ *Id.*

³⁷⁷ *Sale of Tainted Blood Nets HIV-positive Man 2 Years*, MERRILLVILLE POST TRIBUNE, April 21, 2007, (A5).

³⁷⁸ *Five with HIV Accused of Selling Plasma*, INDIANAPOLIS STAR, July 18, 2003, at A1; Shannon Dininny, *Indiana prosecutor charges five with donating HIV-positive plasma*, NAPAVALLEYREGISTER.COM, July 25, 2003, available at http://napavalleyregister.com/news/indiana-prosecutor-charges-five-with-donating-hiv-positive-plasma/article_a1cee207-09f2-5155-a242-3274b0732dc0.html.

³⁷⁹ In *White v. State*, 647 N.E.2d 684, 689 (Ind. Ct. App. 1995), the court found that HIV could not be considered an aggravating factor during the sentencing of a crime where the record contained no evidence that the defendant was HIV-positive, knew he was HIV-positive, or had received risk counseling.

³⁸⁰ 545 N.E.2d 834, 835 (Ind. Ct. App. 1989). It should be noted that Indiana's battery by body waste statute was adopted after this case.

³⁸¹ *Id.*

³⁸² *Id.*

jury convicted Haines of three counts of attempted murder.³⁸³ Subsequently, however, the trial court vacated these counts and entered judgment of conviction on three counts of battery as a Class D felony instead, finding that the state failed to produce, among other things, medical evidence that a person with AIDS could “kill another by transmitting bodily fluids as alleged in this case.”³⁸⁴

On appeal, the court reinstated the attempted murder conviction, finding that the defendant was HIV positive, knew of his status, and intended to infect others with HIV by spitting, biting, scratching, and throwing blood.³⁸⁵ The court likened the defendant’s actions to “biological warfare . . . akin to a sinking ship firing on his rescuers”³⁸⁶ and found that, even if the conduct in question could not result in HIV infection, the law simply required that the defendant *believe* that his conduct could result in HIV transmission.³⁸⁷

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.

³⁸³ *Id.* at 836.

³⁸⁴ *Id.* at 836, 837.

³⁸⁵ *Id.* at 838.

³⁸⁶ *Id.* at 838.

³⁸⁷ *Id.* at 838-39.

Iowa Statute(s) that Allow for Criminal Prosecution based on HIV Status:**IOWA CODE § 709D.2*****Definitions***

As used in this chapter, unless the context otherwise requires:

1. “Contagious or infectious disease” means hepatitis in any form, meningococcal disease, AIDS or HIV as defined in section 141A.1, or tuberculosis.
2. “Exposes” means engaging in conduct that poses a substantial risk of transmission.
3. “Practical means to prevent transmission” means substantial good faith compliance with a treatment regimen prescribed by the person’s health care provider, if applicable, and with behavioral recommendations of the person’s health care provider or public health officials, which may include but are not limited to the use of a medically indicated respiratory mask or a prophylactic device, to measurably limit the risk of transmission of the contagious or infectious disease.

IOWA CODE § 709D.3***Criminal transmission of a contagious or infectious disease***

1. A person commits a class “B” felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease with the intent that the uninfected person contract the contagious or infectious disease, and the conduct results in the uninfected person becoming infected with the contagious or infectious disease.
2. A person commits a class “D” felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease with the intent that the uninfected person contract the contagious or infectious disease, but the conduct does not result in the uninfected person becoming infected with the contagious or infectious disease.
3. A person commits a class “D” felony when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease acting with a reckless disregard as to whether the uninfected person contracts the contagious or infectious disease, and the conduct results in the uninfected person becoming infected with the contagious or infectious disease.

Continued on the following page...

4. A person commits a serious misdemeanor when the person knows the person is infected with a contagious or infectious disease and exposes an uninfected person to the contagious or infectious disease acting with a reckless disregard as to whether the uninfected person contracts the contagious or infectious disease, but the conduct does not result in the uninfected person becoming infected with the contagious or infectious disease.

5. The act of becoming pregnant while infected with a contagious or infectious disease, continuing a pregnancy while infected with a contagious or infectious disease, or declining treatment for a contagious or infectious disease during pregnancy shall not constitute a crime under this chapter.

6. Evidence that a person knows the person is infected with a contagious or infectious disease and has engaged in conduct that exposes others to the contagious or infectious disease, regardless of the frequency of the conduct, is insufficient on its own to prove the intent to transmit the contagious or infectious disease.

7. A person does not act with the intent required pursuant to subsection 1 or 2, or with the reckless disregard required pursuant to subsection 3 or 4, if the person takes practical means to prevent transmission, or if the person informs the uninfected person that the person has a contagious or infectious disease and offers to take practical means to prevent transmission but that offer is rejected by the uninfected person subsequently exposed to the infectious or contagious disease.

8. It is an affirmative defense to a charge under this section if the person exposed to the contagious or infectious disease knew that the infected person was infected with the contagious or infectious disease at the time of the exposure and consented to exposure with that knowledge.

IOWA CODE § 709.4

Additional remedies

This chapter shall not be construed to preclude the use of any other civil or criminal remedy available relating to the transmission of a contagious or infectious disease.

IOWA CODE § 902.9***Maximum sentence for felons***

1. The maximum sentence for any person convicted of a felony shall be that prescribed by statute or, if not prescribed by statute, if other than a class “A” felony shall be determined as follows:

- b. A class “B” felon shall be confined for no more than twenty-five years.
- c. An habitual offender shall be confined for no more than fifteen years.
- e. A class “D” felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars.

IOWA CODE § 903.1***Maximum sentence for misdemeanants***

1. If a person eighteen years of age or older is convicted of a simple or serious misdemeanor and a specific penalty is not provided for or if a person under eighteen years of age has been waived to adult court pursuant to section 232.45 on a felony charge and is subsequently convicted of a simple, serious, or aggravated misdemeanor, the court shall determine the sentence, and shall fix the period of confinement or the amount of fine, which fine shall not be suspended by the court, within the following limits:

- b. For a serious misdemeanor, there shall be a fine of at least three hundred fifteen dollars but not to exceed one thousand eight hundred seventy-five dollars. In addition, the court may also order imprisonment not to exceed one year.

Intentional or reckless exposure to HIV may result in prosecution.

The intentional or reckless exposure of another to HIV, hepatitis, meningococcal disease, and tuberculosis, may result in prosecution and imprisonment under Iowa’s criminal transmission of a contagious or infectious disease statute.³⁸⁸ Under this statute there are several levels of crime and punishment, based on the defendant’s intent and whether the virus was actually transmitted.

If an HIV positive person exposes another to HIV with the intent to transmit the virus and the act results in transmission it is a class B felony, punishable by up to twenty-five years imprisonment.³⁸⁹ If an HIV positive person exposes another to HIV with the intent to transmit the virus and the act

³⁸⁸ IOWA CODE § 709D.3 (2014).

³⁸⁹ §§ 709D.3(1), 902.9(1)(b) (2014).

does not result in transmission it is a class D felony, punishable by up to five years imprisonment and a \$7,500 fine.³⁹⁰

If an HIV positive person exposes another to HIV acting with a reckless disregard as to whether transmission occurs and the act results in transmission it is a class D felony, punishable by up to five years imprisonment and a \$7,500 fine.³⁹¹ If an HIV positive person exposes another to HIV acting with a reckless disregard as to whether transmission occurs and the act does not result in transmission it is a serious misdemeanor, punishable by up to one year imprisonment and a \$1,875 fine.³⁹²

HIV positive women who become pregnant, choose to continue a pregnancy, or decline treatment for HIV while pregnant are not subject to prosecution under this law.³⁹³ Evidence that an HIV positive individual was aware of her/his status and engaged in conduct that exposed another, regardless of how often this conduct occurred, is insufficient on its own to prove the individual had the intent to transmit HIV within the meaning of the statute.³⁹⁴ Further, if an HIV positive individual takes practical means to prevent transmission or discloses her/his status to a partner and offers to take such practical means, then she/he has not acted with the intent required for prosecution.³⁹⁵ It is an affirmative defense if the exposed individual knew of the other's HIV positive status and consented to the exposure.³⁹⁶

It should be noted that Iowa's HIV criminal transmission law was recently revised, effective May 30, 2014. Before the revision, it was a class B felony, punishable by up to 25 years in prison, for a person who knew she/he was HIV positive to engage in intimate contact with another.³⁹⁷ "Intimate contact" was defined as the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.³⁹⁸ The use of condoms or other protection during sexual activity was not a defense to prosecution without prior disclosure of one's HIV status. Unlike the current law, neither the intent to transmit HIV nor actual transmission was required for prosecution. Defendants convicted under the law were also required to register as sex offenders.³⁹⁹ Under the 2014 revision, those who were previously required to register as sex offenders pursuant to the prior law will have their records expunged and their names removed from the registry.⁴⁰⁰

The following cases and prosecutions discuss defendants charged under Iowa's previous HIV criminal law. At the time of this publication, the authors are not aware of a criminal prosecution under Iowa's revised HIV exposure law.

³⁹⁰ §§ 709D.3(2), 902.9(1)(e).

³⁹¹ §§ 709D.3(3), 902.9(1)(e).

³⁹² §§ 709D.3(4), 903.1(1)(b) (2014).

³⁹³ § 709D.3(5).

³⁹⁴ § 709D.3(6).

³⁹⁵ § 709D.3(7).

³⁹⁶ § 709D.3(8).

³⁹⁷ §§ 709C.1(1)(a), (3), repealed by Acts 2014 (85 G.A.) S.F. 2297, § 9, eff. May 30, 2014, § 902.9(1)(b).

³⁹⁸ § 709C.1(2)(b), repealed by Acts 2014 (85 G.A.) S.F. 2297, § 9, eff. May 30, 2014.

³⁹⁹ § 692A.102(1)(c)(23), subsection deleted by Acts 2014 (85 G.A.) S.F. 2297, § 9, eff. May 30, 2014.

⁴⁰⁰ Miranda Leitsinger, *Iowa Scraps Harsh HIV Criminalization Law in Historic Vote*, NBC NEWS, May 1, 2014, available at <http://www.nbcnews.com/news/us-news/iowa-scraps-harsh-hiv-criminalization-law-historic-vote-n94946>.

In *State v. Keene*, an HIV positive man was charged with criminal transmission of HIV after engaging in unprotected sexual intercourse with a female partner without first disclosing his HIV status.⁴⁰¹ After pleading guilty, the defendant received a twenty-five year suspended prison sentence and was placed on probation.⁴⁰² The defendant argued on appeal that Iowa’s criminal transmission laws were unconstitutionally vague as applied to his case.⁴⁰³ The statutory language defining intimate contact (“the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus”⁴⁰⁴) was at issue; specifically, the defendant argued that the term “could result” was not defined in the statute.⁴⁰⁵ The Supreme Court of Iowa disagreed, holding that prosecution under Iowa’s criminal transmission statute was lawful as long as HIV transmission was *possible*.⁴⁰⁶ The court stated that “any reasonably intelligent person is aware it is possible to transmit HIV during sexual intercourse, especially when it is unprotected.”⁴⁰⁷ It cited several cases in which states with HIV criminal transmission statutes analogous to Iowa’s statute rejected similar constitutional challenges.⁴⁰⁸

The court also clarified the types of intimate contact that may result in prosecution, taking “judicial notice of the fact that HIV may be transmitted through contact with an infected individual’s blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus.”⁴⁰⁹

Following *Keene*, the Supreme Court of Iowa held in *State v. Stevens* that an HIV positive individual may be prosecuted under Iowa’s criminal transmission statute if she/he engages in oral sex.⁴¹⁰ In *Stevens*, a 33-year-old HIV positive man was sentenced to twenty-five years in prison after he engaged in oral sex with a 15-year-old boy and ejaculated in the boy’s mouth.⁴¹¹ The defendant also received a 10-year sentence for sexual abuse of a child.⁴¹² Notably, the court in *Stevens* looked to the reasoning in *Keene* and concluded that the latter case should be read as taking judicial notice of the fact that “sexual intercourse may be committed through oral sex.”⁴¹³ The court further stated that “oral sex is a well-recognized means of transmission of the HIV.”⁴¹⁴

Even though Iowa’s definition of intimate contact required exposure to bodily fluids, conviction under the state’s previous HIV criminal transmission statute could occur without proof of ejaculation. In *Keene*, the Supreme Court of Iowa determined that the question of whether the defendant ejaculated during intercourse was irrelevant so long as the defendant exposed another to

⁴⁰¹ 629 N.W.2d 360, 362 (Iowa 2001).

⁴⁰² *Id.* at 363.

⁴⁰³ *Id.*

⁴⁰⁴ IOWA CODE § 709C.1(2)(b), repealed by Acts 2014 (85 G.A.) S.F. 2297, § 9, eff. May 30, 2014.

⁴⁰⁵ *Keene*, 629 N.W.2d at 365.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 366.

⁴⁰⁹ *Id.* at 365.

⁴¹⁰ 719 N.W.2d 547, 552 (Iowa 2006).

⁴¹¹ *Id.* at 548-49.

⁴¹² *Id.* at 549.

⁴¹³ *Id.* at 551.

⁴¹⁴ *Id.*

his bodily fluids.⁴¹⁵ In *State v. Musser*, an HIV positive man was convicted under the HIV criminal transmission statute and sentenced to twenty-five years in prison after allegedly engaging in unprotected sexual intercourse several times with a female partner without disclosing his status.⁴¹⁶ The defendant argued on appeal that he did not expose the woman to bodily fluids because 1) he used a condom and 2) his partner could not say whether he ejaculated.⁴¹⁷ The Supreme Court of Iowa affirmed the defendant's conviction, citing testimony by the county public health director that HIV transmission was possible during sexual intercourse without ejaculation.⁴¹⁸

In 2009, a 34-year-old HIV positive man was charged with criminal transmission of HIV after failing to disclose his status to a one-time male sexual partner, with whom he used a condom.⁴¹⁹ After pleading guilty, the defendant was sentenced to 25 years in prison and lifetime registration as a sex offender.⁴²⁰ As a sex offender, the defendant was barred from being around minors without their parents' supervision, and was subject to GPS ankle bracelet monitoring, curfews, psychological and polygraph tests, and random, unannounced searches of his computer to ensure he was not accessing social media websites or pornography.⁴²¹ The defendant's sentence was later reduced to five years of probation, but his sex offender registration requirements remained intact.⁴²²

The defendant's conviction was vacated by the Supreme Court of Iowa on June 13, 2014, shortly after the revision of the state's HIV criminal law went into effect.⁴²³ The court remanded the case back to the district court with instructions to enter judgment finding trial counsel was ineffective and to set aside the defendant's sentence.⁴²⁴ The court specifically noted that it was "unable to take judicial notice that an infected individual can transmit HIV when an infected person engages in protected anal sex with another person or unprotected oral sex, regardless of the infected person's viral load."⁴²⁵ Nonetheless, the court ordered that the prosecution be allowed the opportunity to establish a sufficient factual basis for the defendant's original guilty plea.⁴²⁶ This allows for the possibility that the defendant can be convicted all over again in the upcoming district court case.

⁴¹⁵ *Keene*, 629 N.W.2d at 366.

⁴¹⁶ 721 N.W.2d 758, 759-60 (Iowa 2006).

⁴¹⁷ *Id.* at 761 (noting that the defendant's "testimony that he always wore a condom was directly controverted by [his partner's] testimony that he did not use condoms.").

⁴¹⁸ *Id.* at 759, 760.

⁴¹⁹ Arthur Breur, *Nick Rhoades 25-Year Sentence Cut Short, But He's Hardly a Free Man*, ACCESSLINE IOWA, Sept. 14, 2009, available at http://accesslineiowa.com/index.php?option=com_content&view=article&id=151:nick-rhoades-25-year-sentence-cut-short-but-hes-hardly-a-free-man&catid=92:editorials&Itemid=59; US: *Gay Man in Iowa Gets 25 Years for One-Time Non-Disclosure to a Single Complainant*, HIV JUSTICE NETWORK, May 3, 2009, available at <http://www.hivjustice.net/news/us-gay-man-in-iowa-gets-25-years-for-one-time-non-disclosure-to-a-single-complainant/>.

⁴²⁰ *Id.*

⁴²¹ HIV IS NOT A CRIME (Sean Strub 2011), available at <http://www.youtube.com/watch?v=iB-6bLjbjc>.

⁴²² Breur, *Nick Rhoades 25-Year Sentence Cut Short, But He's Hardly a Free Man*.

⁴²³ *Rhoades v. State*, 848 N.W.2d 22 (Iowa 2014).

⁴²⁴ *Id.* at 33.

⁴²⁵ *Id.* at 32.

⁴²⁶ *Id.* at 33.

In 2007, a 46-year-old HIV positive woman pleaded guilty to criminal transmission of HIV and received a suspended sentence of twenty-five years with four years' probation.⁴²⁷ She was required to register as a sex offender for ten years and was forbidden from having sex while on probation.⁴²⁸ In December 2009, a 38-year-old HIV positive man was arrested for failing to disclose his status to a sexual partner.⁴²⁹ While he did not transmit the virus to his partner, he still faces up to twenty-five years in prison and lifetime registration as a sex offender if convicted.⁴³⁰

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.

⁴²⁷ US: *Iowa Woman Receives Probation After Pleading Guilty to Criminal HIV Transmission*, HIV JUSTICE NETWORK, Nov. 27, 2007, available at <http://www.hivjustice.net/case/us-iowa-woman-receives-probation-after-pleading-guilty-to-criminal-hiv-transmission/>.

⁴²⁸ *Id.*

⁴²⁹ Jeff Reinitz, *Waterloo man arrested for transmission of HIV*, WCF COURIER, Dec. 16, 2009, available at <http://wcfcourier.com/news/local/747c123c-ea73-11de-8816-001cc4c002e0.html>.

⁴³⁰ Lindsey Moon, *Critics address flaws in Iowa's HIV criminalization law*, THE DAILY IOWAN, Feb. 9, 2012, available at <http://www.dailyiowan.com/2012/02/09/Metro/26931.html>.

Kansas Statute(s) that Allow for Criminal Prosecution based on HIV Status:**KAN. STAT. ANN. § 21-5424*****Exposing another to a life threatening communicable disease***

(a) It is unlawful for an individual, who knows oneself to be infected with a life threatening communicable disease, to:

(1) Engage in sexual intercourse or sodomy with another individual with the intent to expose that individual to that life threatening communicable disease;

(2) sell or donate one's own blood, blood products, semen, tissue, organs or other body fluids with the intent to expose the recipient to a life threatening communicable disease; or

(3) share with another individual a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from, the other individual's body with the intent to expose another person to a life threatening communicable disease.

(b) Violation of this section is a severity level 7, person felony.

(c) As used in this section:

(1) "Sexual intercourse" shall not include penetration by any object other than the male sex organ; and

(2) "sodomy" shall not include the penetration of the anal opening by any object other than the male sex organ.

KANSAS SENTENCING GUIDELINES

Kansas Sentencing Guidelines provide recommendations based upon the severity of the crime and the past criminal history of the convicted defendant. A conviction for a severity level 7 person felony without any prior criminal history would result in a sentence between 22-26 months.

Engaging in penile-vaginal sex or anal sex with the specific intent to transmit HIV is a felony.

It is a severity level 7, person felony punishable by up to twenty-six months in prison for a person who knows that she/he is infected with a "life threatening communicable disease" to (1) engage in

sexual intercourse or sodomy (2) with the intent to expose another to the disease.⁴³¹ Although “life threatening communicable disease” is not defined, HIV appears to be included, as at least one HIV positive person in Kansas has been charged for HIV exposure under this statute.⁴³²

Under the Kansas exposure law, “sexual intercourse” only includes penetration by the penis.⁴³³ Because even the slightest insertion of the penis into the vagina can be considered “penetration,” ejaculation or the emission of bodily fluids are not required for prosecution.⁴³⁴ Under the terms of the exposure statute, “sodomy” is limited to anal penetration by the penis.⁴³⁵ Oral sex is not prosecuted under this statute.

In the 2009 case *State v. Richardson*, an HIV positive man appealed his conviction of two counts of exposing another to a life-threatening disease.⁴³⁶ He was convicted after having sex with two women at a time when his viral load measured as undetectable.⁴³⁷ On appeal, the defendant argued that Kansas’ communicable disease exposure law was unconstitutionally vague because it fails to give adequate notice as to what constitutes a “life threatening” disease, “exposure” to HIV, and what viral load would be sufficient to trigger a criminal exposure.⁴³⁸ The Supreme Court of Kansas rejected these arguments, stating that the law does not criminalize communicable disease exposure *per se*, but rather sexual intercourse or sodomy with the *intent* to expose another to a communicable disease.⁴³⁹ The court added, “One need not ruminate on exactly how the act must be performed to meet the legal definition of ‘expose’ or even know that a transmittal of the disease is possible.”⁴⁴⁰

Importantly, the *Richardson* court also ruled that Kansas’ communicable disease exposure statute required that a defendant have the *specific intent* to expose sexual partners to HIV.⁴⁴¹ It was not sufficient if a defendant had the *general intent* to engage in sexual intercourse while HIV positive.⁴⁴² In doing so, the court rejected the prosecution’s argument that Kansas’ communicable disease exposure law criminalized *any* act of sexual intercourse or sodomy by an HIV positive person, even if a condom was used.⁴⁴³ The prosecution went so far as to suggest that complete abstinence from sex is the only way to avoid exposing others to a risk of HIV transmission.⁴⁴⁴ The Kansas Supreme Court disagreed, reversing the man’s conviction after finding that the prosecution failed to prove that his specific intent was to expose his sexual partners to HIV.⁴⁴⁵

⁴³¹ KAN. STAT. ANN. § 21-5424 (2014); KAN. SENTENCING GUIDELINES, Sentencing Range – Nondrug Offenses, available at <http://sentencing.ks.gov/docs/default-source/2013-forms/sentencing-range---nondrug-offenses.pdf?sfvrsn=0>.

⁴³² See *State v. Richardson*, 209 P.3d 696 (Kan. 2009) (reversing the conviction of an HIV positive man to two counts of exposing another to a life-threatening communicable disease for having sexual intercourse with two different partners).

⁴³³ KAN. STAT. ANN. § 21-5424.

⁴³⁴ See, e.g., § 21-5501 (stating that “[a]ny penetration, however slight, is sufficient to constitute sexual intercourse.”).

⁴³⁵ § 21-5424.

⁴³⁶ 209 P.3d 696 (Kan. 2009).

⁴³⁷ *Id.* at 699.

⁴³⁸ *Id.* at 701-02.

⁴³⁹ *Id.* at 702-03.

⁴⁴⁰ *Id.* at 703.

⁴⁴¹ *Id.* at 701.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 705.

In *Richardson*, the court suggested that “prime examples of proven circumstances that could support an inference” of specific intent included whether the HIV positive individual disclosed her/his HIV status, used a condom, or specifically denied having HIV or other sexually transmitted diseases.⁴⁴⁶

Though the Kansas Supreme Court reversed the convictions in *Richardson*, only two months later the defendant was convicted for an identical charge stemming from a separate incident.⁴⁴⁷ Despite the Kansas Supreme Court’s prior ruling, during instructions the trial jury was given a definition of general intent, rather than specific intent.⁴⁴⁸ The trial court further “instructed the jury that it could consider evidence of [the defendant’s] prior crimes and bad acts for the purpose of showing [the defendant’s] . . . intent”⁴⁴⁹ Such evidence has no relation to the examples given by the Kansas Supreme Court regarding what circumstances could support an inference of specific intent for an exposure charge. Despite this, and other issues, the Kansas Court of Appeals upheld the defendant’s conviction.⁴⁵⁰ The court also upheld the defendant’s 32-month sentence, refusing to give credit for time served for his other reversed conviction.⁴⁵¹

HIV positive persons are prohibited from donating blood, blood products, semen, human tissue, organs, or body fluids.

In Kansas, it is a severity level 7, person felony, punishable by up to twenty-six months in prison, for a person who knows that she/he is infected with a “life threatening communicable disease” to (1) sell or donate blood, blood products (plasma, platelets, etc.), semen, tissue, organs, or other body fluids (2) with the intent to expose the recipient to the disease.⁴⁵²

HIV positive persons are prohibited from sharing needles or syringes.

In Kansas, it is also a severity level 7, person felony, punishable by up to twenty-six months in prison for a person who knows that she/he is infected with a “life threatening communicable disease” to share a hypodermic needle and/or syringe with another for (1) the introduction of drugs or any other substance, or (2) the withdrawal of body fluids from that person’s body with the intent to expose the recipient to the disease.⁴⁵³

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⁴⁴⁶ *Id.* at 704.

⁴⁴⁷ *State v. Richardson*, 2012 WL 603214, at *2 (Kan. App. Feb. 10, 2012).

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at *4.

⁴⁵⁰ *Id.* at *8.

⁴⁵¹ *Id.*

⁴⁵² KAN. STAT. ANN. § 21-5424; KAN. SENTENCING GUIDELINES, Sentencing Range – Nondrug Offenses.

⁴⁵³ KAN. STAT. ANN. § 21-5424, KAN. SENTENCING GUIDELINES, Sentencing Range – Nondrug Offenses.

Kentucky Statute(s) that Allow for Criminal Prosecution based on HIV Status:**KY. REV. STAT. ANN. § 311.990(24)(b)*****Penalties***

Any person who has human immunodeficiency virus infection, who knows he is infected with human immunodeficiency virus, and who has been informed that he may communicate the infection by donating organs, skin, or other human tissue who donates organs, skin, or other human tissue shall be guilty of a Class D felony.

KY. REV. STAT. ANN. § 529.090***Person convicted required to submit to screening for HIV infection; prostitution or procuring prostitution with knowledge of sexually transmitted disease or HIV***

(1) Any person convicted of prostitution or procuring another to commit prostitution under the provisions of KRS 529.020 shall be required to undergo screening for human immunodeficiency virus infection under direction of the Cabinet for Health and Family Services and, if infected, shall submit to treatment and counseling as a condition of release from probation, community control, or incarceration. Notwithstanding the provisions of KRS 214.420, the results of any test conducted pursuant to this subsection shall be made available by the Cabinet for Health and Family Services to medical personnel, appropriate state agencies, or courts of appropriate jurisdiction to enforce the provisions of this chapter.

(2) Any person who commits prostitution and who, prior to the commission of the crime, had tested positive for a sexually transmitted disease and knew or had been informed that he had tested positive for a sexually transmitted disease pursuant to KRS 214.410 and that he could possibly communicate such disease to another person through sexual activity is guilty of a Class A misdemeanor. A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime of prostitution.

Continued on the following page...

(3) Any person who commits, offers, or agrees to commit prostitution by engaging in sexual activity in a manner likely to transmit the human immunodeficiency virus and who, prior to the commission of the crime, had tested positive for human immunodeficiency virus and knew or had been informed that he had tested positive for human immunodeficiency virus and that he could possibly communicate the disease to another person through sexual activity is guilty of a Class D felony. A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime of prostitution.

(4) Any person convicted of procuring another to commit prostitution in a manner likely to transmit the human immunodeficiency virus and who, prior to the commission of the crime, had tested positive for human immunodeficiency virus and knew or had been informed that he had tested positive for human immunodeficiency virus and that he could possibly communicate the disease to another person through sexual activity is guilty of a Class D felony.

KY. REV. STAT. ANN. § 532.060(2)(d)

Sentence of imprisonment for felony; postincarceration supervision

(2) Unless otherwise provided by law, the authorized maximum terms of imprisonment for felonies are:

- (d) For a Class D felony, not less than one (1) year nor more than five (5) years.

KY. REV. STAT. ANN. § 534.030(1)

Fines for felonies

Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any felony shall, in addition to any other punishment imposed upon her/him, be sentenced to pay a fine in an amount not less than one thousand dollars (\$1,000) and not greater than ten thousand dollars (\$10,000) or double his gain from commission of the offense, whichever is the greater.

HIV positive persons are prohibited from donating organs, skin, or other human tissues.

It is a Class D felony, punishable by one to five years in prison and a \$1,000 - \$10,000 fine for a person who (1) knows that she/he is HIV positive and (2) has been informed that she/he may

transmit HIV through organ, skin, or tissue donations to provide any such donations.⁴⁵⁴ Neither the intent to transmit HIV nor actual transmission is required for conviction, and prosecution is possible regardless of whether an HIV positive donor is paid.

Engaging in prostitution or solicitation while HIV positive is a felony.

It is a Class D felony, punishable by one to five years in prison and a \$1,000 - \$10,000 fine, if an HIV person (1) knows or has been informed that she/he has tested positive for HIV, (2) is aware or has been informed that HIV can be transmitted through sexual activities, and (3) commits, offers, or agrees to commit prostitution by engaging in sexual activity “in a manner likely to transmit HIV.”⁴⁵⁵ Neither the intent to transmit HIV nor actual transmission is required for conviction. Neither disclosing HIV status to sexual partners nor the use of protection are defenses to prosecution.

Kentucky’s prostitution laws penalize individuals for being HIV positive, regardless of whether they engage or plan to engage in activities that expose others to a significant risk, or even any risk at all, of HIV infection. Under Kentucky law, “prostitution” is defined as “engaging, agreeing to engage, or offering to engage” in “sexual conduct” in return for a fee.⁴⁵⁶ “Sexual conduct” is defined as “sexual intercourse or any act of sexual gratification involving the sex organs.”⁴⁵⁷

It is also a Class D felony, punishable by one to five years in prison and a \$1,000 - \$10,000 fine, if an HIV positive person (1) knows or has been informed that she/has tested positive for HIV, (2) is aware or has been informed that HIV can be transmitted through sexual activities, and (3) procures another to commit prostitution.⁴⁵⁸ Procurement laws often punish “pimping” as opposed to solicitation of prostitution, but this provision is presumably a solicitation law targeting HIV positive persons who seek out or hire sex workers.

In August 2010, an HIV positive woman was charged under this prostitution statute.⁴⁵⁹ She had previously been arrested more than half a dozen times for prostitution related offenses.⁴⁶⁰

HIV positive individuals have been prosecuted under Kentucky’s general criminal laws.

Kentucky has used general criminal laws to prosecute HIV positive individuals for transmitting HIV, failing to disclose HIV status to sexual partners, and otherwise exposing others to HIV infection. These prosecutions often disregard whether HIV positive defendants actually exposed others to a significant risk of HIV infection or if there was even a scientific possibility that HIV could be transmitted.

⁴⁵⁴ KY. REV. STAT. ANN. §§ 311.990(24)(b) (West 2014), 532.060(2)(d) (West 2014), 534.030(1) (West 2014).

⁴⁵⁵ §§ 529.090(3) (West 2014), § 532.060(2)(d), § 534.030(1).

⁴⁵⁶ § 529.020(1) (West 2014).

⁴⁵⁷ § 529.010(9) (West 2014).

⁴⁵⁸ §§ 529.090(4), § 532.060(2)(d), § 534.030(1).

⁴⁵⁹ *Woman police say is an HIV infected prostitute indicted on felony charges*, WHAS11.COM, Aug. 6, 2010, available at <http://www.whas11.com/news/Woman-Police-Say-is-HIV-Infected-Prostitute-Indicted-on-Felony-Charges-100155024.html>.

⁴⁶⁰ *Id.*

Kentucky’s “wanton endangerment” law is one example of a general criminal law that has been used to prosecute HIV positive persons for alleged HIV exposure. In Kentucky, the crime of first-degree wanton endangerment, punishable by one to five years in prison and a \$1,000 - \$10,000 fine, requires that, “under circumstances manifesting extreme indifference to the value of human life,” an individual wantonly engage in “conduct which creates a substantial danger of death or serious physical injury to another person.”⁴⁶¹

In *Hancock v. Commonwealth*, Kentucky’s first case determining whether HIV exposure could be prosecuted under the state’s wanton endangerment law, an HIV positive man was charged for having a two-year sexual relationship with a woman, allegedly without disclosing his HIV positive status.⁴⁶² Although the man testified that his partner knew he was HIV positive, he later pleaded guilty to second-degree wanton endangerment.⁴⁶³ He received a 120-day suspended sentence plus one year of probation.⁴⁶⁴

On appeal, the Court of Appeals of Kentucky rejected the argument that Kentucky’s wanton endangerment statute could not apply to HIV exposure, finding the charge valid on its face “in light of the deadly nature of HIV.”⁴⁶⁵ The court also found that the defendant’s contention that his partner knew of his HIV positive status had no bearing on the issue of whether the charges should have been dismissed.⁴⁶⁶ According to the court, this was an issue of fact that the defendant needed to raise before the jury as a defense to prosecution.⁴⁶⁷

Neither the intent to transmit HIV nor actual transmission is required for prosecution for wanton endangerment. Because the defendant in *Hancock* pleaded guilty, the court never turned to a discussion regarding how the use of condoms or other protection during sexual intercourse or evidence of a defendant’s low viral load would factor into a prosecution for wanton endangerment, although it certainly could be argued that those factors reduce the risk of transmission to below that of the statutory “substantial danger” standard.

In another case from 2008, a 29-year-old HIV positive woman was charged with attempted murder when she allegedly bit a store clerk on the chest during a robbery, and then shouted that she had AIDS.⁴⁶⁸ She later pleaded guilty to robbery and wanton endangerment and was sentenced to twelve years imprisonment.⁴⁶⁹ The store clerk tested negative for HIV.⁴⁷⁰ Two years of her prison sentence arose from the wanton endangerment charge, based solely on her HIV positive status, despite the

⁴⁶¹ §§ 508.060(1) (West 2014), § 532.060(2)(d), § 534.030(1).

⁴⁶² 998 S.W.2d 486, 497 (Ky. Ct. App. 1998).

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 498.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *HIV positive Robber Receives 12 Year Prison Sentence*, WKYT.COM, Apr. 8, 2008, available at <http://www.wkyt.com/home/headlines/17382524.html>; Greg Kocher, *Accused Robber, Biter has HIV*, LEXINGTON HERALD-LEADER, Sept. 13, 2007, at D1.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

fact the CDC has concluded that there exists only a “negligible” risk that HIV could be transmitted through a bite.⁴⁷¹

Other prosecutions of HIV positive individuals under general criminal laws include:

- In February 2013, a 22-year-old HIV positive man was charged with attempted murder for throwing urine on a police officer.⁴⁷²
- In December 2008, a 47-year-old HIV positive man was charged with wanton endangerment, among other things, for allegedly sexually abusing a 15-year-old.⁴⁷³

Another Kentucky case considered HIV positive status as a factor during sentencing for sexual assault.⁴⁷⁴ In *Torrence v. Commonwealth*, an HIV positive man convicted of first-degree rape and sodomy argued that it would violate his due process rights to introduce evidence of his HIV status during the sentencing phase of his trial.⁴⁷⁵ At trial, the assault complainant testified that she learned of the defendant’s HIV positive status following the rape, took medication to prevent infection, and suffered emotional damage due to her fears of HIV infection and belief that her family was treating her differently.⁴⁷⁶ The Supreme Court of Kentucky found no error in admitting this evidence during sentencing, as it directly related to physical and psychological harm the victim suffered and the impact of a crime on a victim may be validly considered during sentencing.⁴⁷⁷ The court also noted that the defendant’s HIV positive status magnified his victim’s suffering beyond that of a “typical” rape victim.⁴⁷⁸

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⁴⁷¹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

⁴⁷² *HIV positive inmate talks about attempted murder charge after throwing urine*, WAVE3.COM, Dec. 2, 2013, available at <http://www.wave3.com/story/21080171/exclusive-hiv-positive-man-talks-about-attempted-mu>.

⁴⁷³ *Ky. Pastor Charged with Sex Abuse Says He Has HIV*, NEWSCHANNEL5.COM, Jan. 6, 2009, available at <http://www.newschannel5.com/story/9626558/ky-pastor-charged-with-sex-abuse-says-he-has-hiv>.

⁴⁷⁴ *Torrence v. Com.*, 269 S.W.3d 842 (Ky. 2008).

⁴⁷⁵ *Id.* at 843.

⁴⁷⁶ *Id.* at 845-46.

⁴⁷⁷ *Id.* at 846.

⁴⁷⁸ *Id.*

Louisiana Statute(s)⁴⁷⁹ that Allow for Criminal Prosecution based on HIV Status:

LA. REV. STAT. ANN. § 14:43.5

Intentional exposure to AIDS virus

A. No person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through sexual contact without the knowing and lawful consent of the victim.

B. No person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through any means or contact without the knowing and lawful consent of the victim.

C. No person shall intentionally expose a police officer to any AIDS virus through any means or contact without the knowing and lawful consent of the police officer when the offender has reasonable grounds to believe the victim is a police officer acting in the performance of his duty.

D. For purposes of this Section, the following words have the following meanings:

(1) “Means or contact” is defined as spitting, biting, stabbing with an AIDS contaminated object, or throwing of blood or other bodily substances.

(2) “Police officer” includes a commissioned police officer, sheriff, deputy sheriff, marshal, deputy marshal, correctional officer, constable, wildlife enforcement agent, and probation and parole officer.

E. (1) Whoever commits the crime of intentional exposure to AIDS virus shall be fined not more than five thousand dollars, imprisoned with or without hard labor for not more than ten years, or both.

(2) Whoever commits the crime of intentional exposure to AIDS virus against a police officer shall be fined not more than six thousand dollars, imprisoned with or without hard labor for not more than eleven years, or both.

⁴⁷⁹ Under the public health laws of Louisiana, “[i]t is unlawful for any person to inoculate or infect another person in any manner with a venereal disease or to do any act which will expose another to inoculation or infection with a venereal disease.” LA. REV. STAT. ANN. § 40:1062 (2014); *See also* LA. REV. STAT. ANN. § 40:1068 (2014); *Meany v. Meany*, 639 So.2d 229 (La. 1994) (imposing a civil duty on those infected with a venereal disease to either abstain from sex or warn sexual partners). A venereal disease is defined as “syphilis, gonorrhea, chancroid, or any other infectious disease primarily transmitted from one person to another by means of a sexual act.” LA. REV. STAT. ANN. § 40:1061 (2014). However, because this law was enacted in 1918, long before the discovery of HIV, and because Louisiana has enacted a separate criminal statute concerning HIV exposure, it is unlikely that this statute will be used to penalize HIV exposure.

Any number of consensual sexual activities may result in prosecution and imprisonment.

It is an unlawful act, punishable by up to ten years in prison and/or a \$5,000 fine, to expose another to HIV/AIDS through sexual contact.⁴⁸⁰ Sex offender registration may also be required.⁴⁸¹ Despite the language in the statute, Louisiana courts have found that neither the intent to transmit HIV⁴⁸² nor actual transmission is required.⁴⁸³

It is a defense if exposure to HIV was with “knowing and lawful consent.”⁴⁸⁴ This means that an HIV positive person will not likely be prosecuted for engaging in consensual sexual intercourse with a partner fully aware of her/his HIV status, as long as that partner is above the age of consent in Louisiana.⁴⁸⁵

However, disclosure of HIV status may be difficult to prove as most evidence is based on the testimony of the parties where it is one person’s word against the other’s. In *State v. Gamberella*, an HIV positive man was convicted of HIV exposure despite his testimony that he disclosed his HIV positive status to his girlfriend and wore condoms during sex.⁴⁸⁶ The man’s girlfriend, the complainant, testified that after she became pregnant by the defendant after a condom failed, they engaged in unprotected sexual intercourse on multiple occasions.⁴⁸⁷ She testified that she didn’t know his HIV positive status during the entire relationship.⁴⁸⁸ The defendant was convicted and sentenced to ten years in prison at hard labor.⁴⁸⁹

On appeal, the defendant in *Gamberella* argued that the law failed to define such terms as “expose” and “sexual contact,” and therefore could prohibit activities posing no risk of HIV transmission, including kissing.⁴⁹⁰ The Court of Appeal of Louisiana rejected these arguments, holding that the statute described prohibited conduct with sufficient particularity.⁴⁹¹ The court reasoned that the term “sexual contact” unambiguously refers to “numerous forms of behavior involving use of the sexual organs of one or more of the participants or involving other forms of physical contact for the purpose of satisfying or gratifying the ‘sexual desires’ of one of the participants.”⁴⁹² The preceding phrase, in and of itself, is ambiguous and provides absolutely no clarity as to what types of sexual conduct can be prosecuted under the statute. Under the court’s definition, acts that don’t involve an

⁴⁸⁰ LA. REV. STAT. ANN. §§ 14:43.5(A), (E)(1) (2014).

⁴⁸¹ § 15:541(24)(a) (2014).

⁴⁸² See, e.g., *State v. Roberts*, 844 So. 2d 263, 272 (La. Ct. App. 2003) (“La. R.S. 14:43.5 does not require the State to prove that a defendant acted with the specific intent to expose the victim to [HIV] . . . it requires the State to prove that the defendant intentionally committed an act proscribed by the statute which exposed the victim to [HIV].”)

⁴⁸³ See, e.g., *State v. Gamberella*, 633 So. 2d 595, 602 (La. Ct. App. 1993) (“By use of the word ‘expose’ rather than the word ‘transmit,’ the legislature obviously intended that the element of the offense be the risk of infection, rather than actual transmission of the virus.”); accord *Roberts*, 844 So. 2d at 272.

⁴⁸⁴ LA. REV. STAT. ANN. § 14:43.5(A).

⁴⁸⁵ See, e.g., LA. REV. STAT. ANN. § 14:80 (2014) (defining “juvenile” as an individual under the age of seventeen for the purpose of “carnal knowledge” laws).

⁴⁸⁶ *Gamberella*, 633 So. 2d at 598-99.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at 599.

⁴⁸⁹ *Id.* at 598.

⁴⁹⁰ *Id.* at 602-03.

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 603 (citing Cheney C. Joseph, Jr., *Developments in the Law 1986-1987: A Faculty Symposium*, 48 LA. L. REV. 257, 282 (1987)).

exchange of bodily fluids or penetration could be prosecuted. The court's findings also don't provide insight into whether or not the use of condoms or other form of protection would be a defense to prosecution.

Other cases that have been prosecuted under the statute include:

- In *State v. Roberts*, an HIV positive man received ten years in prison at hard labor for exposing his rape victim to HIV.⁴⁹³ Although a dispute existed as to whether bodily fluids were exchanged, an appeals court found that the defendant's conviction could be sustained on evidence that he anally and vaginally raped his victim.⁴⁹⁴
- In *State v. Serrano*, an HIV positive man was sentenced to one year in prison at hard labor after he engaged in unprotected sex with his girlfriend without disclosing his HIV status.⁴⁹⁵
- In *State v. Turner*, an HIV positive woman received two concurrent five-year prison sentences after she pleaded guilty to engaging in "some sort of sexual contact" with two men.⁴⁹⁶ A sentencing court equated the woman's activities to "pointing a gun to [the victims'] head[s] and pulling the trigger."⁴⁹⁷
- In 1999, an HIV positive woman received four years probation and registered as a sex offender after engaging in unprotected sex with at least two men.⁴⁹⁸
- In 2002, an HIV positive man was arrested after he allegedly engaged in unprotected sex with a woman without disclosing his HIV status.⁴⁹⁹
- In 2009, an HIV positive man was charged with attempted intentional exposure to AIDS after allegedly failing to disclose his HIV status to an undercover police officer during a prostitution bust.⁵⁰⁰
- In 2010, an HIV positive woman was charged with intentional exposure of the AIDS virus after engaging in unprotected sex with a man without disclosing her HIV status.⁵⁰¹
- In 2013, an HIV positive man was charged with intentional exposure of the AIDS virus and false imprisonment after spitting on a police officer.⁵⁰²

⁴⁹³ *Roberts*, 844 So.2d at 264.

⁴⁹⁴ *Id.* at 270.

⁴⁹⁵ 715 So. 2d 602, 602-03 (La. Ct. App. 1998).

⁴⁹⁶ 927 So. 2d 438, 439 (La. Ct. App. 2005).

⁴⁹⁷ *Id.* at 441.

⁴⁹⁸ Joe Darby, *Woman Pleads Guilty in HIV Exposure Case*, TIMES-PICAYUNE (New Orleans), Jan. 26, 1999, at B2.

⁴⁹⁹ *Metairie Man Arrested on HIV Charge*, TIMES-PICAYUNE (New Orleans), May 25, 2002, at 4-Metro.

⁵⁰⁰ Matthew Pleasant, *Houma Man Accused of Attempted HIV Exposure*, DAILY COMET, June 21, 2009, available at <http://www.dailycomet.com/article/20090621/ARTICLES/906209915/1026?Title=Houma-man-accused-of-attempted-HIV-exposure>.

⁵⁰¹ Michelle Hunter, *Metairie Woman Booked with Intentionally Exposing Man to AIDS Virus*, TIMES-PICAYUNE (New Orleans), Feb. 10, 2010, available at http://www.nola.com/crime/index.ssf/2010/02/metairie_woman_booked_with_int.html.

⁵⁰² Gerron Jordan, *Lake Charles man accused of intentional AIDS exposure*, KPLC, June, 19, 2013, available at <http://www.kplctv.com/story/22303105/lake-charles-man-accused-of-intentional-aids-exposure-by-spitting>

Spitting, biting, and other exposures to bodily fluids can result in criminal liability.

Louisiana criminalizes several forms of HIV exposure beyond sexual contact that pose no risk of HIV infection, including biting and spitting.⁵⁰³ It is an unlawful act, punishable by up to ten years in prison (with or without hard labor) and/or a \$5,000 fine, to expose a person to any AIDS virus through *any* means or contact without the knowing and lawful consent of the person exposed.⁵⁰⁴

If an HIV positive person (1) exposes a police officer to HIV through “any means or contact,” and (2) has reasonable grounds to believe that the person exposed is a police officer acting in performance of his duty, HIV exposure is punishable by up to eleven years in prison (with or without hard labor) and/or a \$6,000 fine.⁵⁰⁵ This sentence enhancement also applies to correctional officers, parole officers, probation officers, sheriffs, deputy sheriffs, marshals, deputy marshals, constables, and wildlife enforcement agents.⁵⁰⁶

Neither the intent to transmit HIV nor actual transmission is required.⁵⁰⁷

Under the terms of this statute, “means or contact” is defined as spitting, biting, stabbing another with an AIDS-contaminated object (e.g., a used needle), or throwing blood or other “bodily substances.”⁵⁰⁸ Although throwing blood or other “bodily substances” is listed as a criminal offense under the terms of this statute, “bodily substances” is not defined.⁵⁰⁹ This statute thus presents the risk that exposure to saliva, urine, sweat, or other “bodily substances” posing no risk of HIV infection may result in criminal prosecution.

In *State v. Roberts*, for example, an HIV positive defendant was convicted of intentionally exposing a rape victim to HIV after he raped and bit her.⁵¹⁰ On appeal, the defendant argued that the state failed to prove that (1) biting a person could expose that person to HIV, (2) the teeth of an HIV positive man could be “AIDS-contaminated” objects, (3) that his mouth contained saliva, and (4) that his bite broke his victim’s skin.⁵¹¹ The Court of Appeal of Louisiana rejected these arguments because the statute specifically noted biting to be an offense under the statute.⁵¹² The court did not consider that the Center for Disease Control (CDC) has long maintained that there exists only a remote possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including severe trauma, extensive tissue damage, and the presence of blood.⁵¹³

⁵⁰³ LA. REV. STAT. ANN. § 14:43.5(D)(1).

⁵⁰⁴ § 14:43.5(B), (E)(1).

⁵⁰⁵ § 14:43.5(C).

⁵⁰⁶ § 14:43.5(D)(2).

⁵⁰⁷ See, e.g., *Roberts*, 844 So. 2d at 272; *Gamberella*, 633 So. 2d at 602.

⁵⁰⁸ LA. REV. STAT. ANN. § 14:43.5(D)(1).

⁵⁰⁹ § 14:43.5(D)(1).

⁵¹⁰ *Roberts*, 844 So. 2d at 265-69.

⁵¹¹ *Id.* at 270-71.

⁵¹² *Id.* at 271.

⁵¹³ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

The CDC has also concluded that spitting alone has never been shown to transmit HIV.⁵¹⁴ Louisiana's statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

Attempted murder prosecutions have been used for intentional exposure to HIV.⁵¹⁵

Individuals with HIV in Louisiana may be prosecuted for HIV exposure under general criminal laws, including attempted murder. In the past, these prosecutions have arisen from the rare and extreme cases where HIV positive persons attempt to purposefully infect others with the virus. In *State v. Caine*,⁵¹⁶ an HIV positive man was convicted of attempted second-degree murder after he allegedly stuck a store clerk with a syringe full of clear liquid and said "I'll give you AIDS."⁵¹⁷ The syringe was never recovered, and it is not known whether the clear liquid was contaminated with HIV.⁵¹⁸ However, because the defendant was HIV positive, pulled a needle out of his pocket, and had "track marks" on his arm suggesting a history of drug use, the Court of Appeal of Louisiana found it likely that the needle was infected with HIV, and affirmed the defendant's sentence of fifty years in prison at hard labor.⁵¹⁹

HIV positive status can result in an enhanced sentence upon conviction.

HIV positive status can be a factor in enhanced sentences for sexual assault. Sentencing courts sometimes see HIV positive status as a relevant consideration when measuring the impact of a crime on the victim (See, e.g., Kentucky, Utah, Texas).

In *State v. Richmond*,⁵²⁰ the Court of Appeal of Louisiana rejected an argument from an HIV positive sex worker that a ten-year sentence for conviction of a crime against nature by soliciting unnatural oral copulation for compensation was excessive.⁵²¹ Although the court noted that a ten-year sentence was harsh, the trial judge, who is afforded wide discretion on sentencing, supported the sentence by stating that the woman committed prostitution with knowledge of her HIV positive status and should, therefore, be punished to the full extent of the law for the danger that she posed to others "who are not ill right now, who can be protected."⁵²² The trial court compared the woman's actions

⁵¹⁴ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

⁵¹⁵ See *State v. Schmidt*, 771 So. 2d 131 (La. Ct. App. 2000), *writ denied*, 798 So. 2d 105 (La. 2001), *cert. denied*, 535 U.S. 905 (2002) (affirming the conviction of a Louisiana doctor to fifty years in prison at hard labor for injecting his ex-lover with HIV and Hepatitis C. The doctor extracted tainted blood from two patients and transferred it to the woman, who believed she was getting an injection of a vitamin supplement. This case was not based on the doctor's HIV status and as such as not reflective of prosecutions against HIV positive persons.); see also *State v. Schmidt*, 699 So. 2d 448 (La. Ct. App. 1997), *writ denied*, 706 So. 2d 451 (La. 1997) (denying writ application concerning two pre-trial evidentiary rulings regarding admissibility of DNA evidence); *Schmidt v. Hubert*, No. 05-2168, 2008 WL 4491467 (W.D. La. Oct. 6, 2008) (denying habeas corpus petition challenging conviction).

⁵¹⁶ 652 So. 2d 611 (La. Ct. App. 1995), *writ denied*, 661 So. 2d 1358 (La. 1995).

⁵¹⁷ *Id.* at 613.

⁵¹⁸ *Id.* at 616.

⁵¹⁹ *Id.*

⁵²⁰ 708 So. 2d 1272 (La. Ct. App. 1998).

⁵²¹ *Id.* at 1273.

⁵²² *Id.* at 1275.

to imposing a death sentence for others “because of what [she carries] around inside [her] body.”⁵²³ The Louisiana Court of Appeal affirmed the defendant’s sentence of ten years in prison based in part on her prior record as a third felony offender.⁵²⁴ Despite the fact that the defendant did not engage in oral sex, and even if she had there was only a remote chance of exposing another to HIV in such a manner, she was sentenced to the full extent of the law, in large part based on her HIV status.⁵²⁵

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.

⁵²³ *Id.*

⁵²⁴ *Id.* at 1276.

⁵²⁵ *Id.* at 1273-76.

Maine Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in Maine. However, in some states, HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in the Maine.

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Maryland Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MD. CODE ANN., HEALTH-GEN. § 18-601.1*****Knowingly transfer of HIV prohibited***

In general

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

Fines and penalties

(b) 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.

HIV positive persons may face misdemeanor penalties for engaging in various activities.

In Maryland, it is a misdemeanor punishable by a sentence of up to three years in prison and/or a \$2,500 fine for an HIV positive person to knowingly transfer or attempt to transfer HIV to another.⁵²⁶ This law targets HIV positive persons who are (1) aware of their HIV status and (2) knowingly engage in activities posing a risk of HIV infection. Any number of HIV exposures, including consensual sexual intercourse, 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 be an affirmative defense to prosecution under this law. The statute potentially targets a wide range of activities without defined limitations to what conduct may or may not face potential prosecution.

Few cases in Maryland clarify the scope of this HIV exposure statute. One prosecution suggests that individuals with HIV may face prosecution regardless of whether they expose others to an actual risk of HIV transmission. In May 2008, a 44-year-old HIV positive man was charged with knowingly attempting to transfer HIV after he bit a police officer during an arrest.⁵²⁷ He was later sentenced to eighteen years in prison after pleading guilty to drug and assault charges.⁵²⁸ Ten years of this sentence stemmed from the HIV transfer charge.⁵²⁹ Though the officer did not test positive for HIV, such evidence is not relevant to prosecution.⁵³⁰ The CDC has concluded that there exists only

⁵²⁶ MD. CODE ANN., HEALTH-GEN. § 18-601.1 (West 2014).

⁵²⁷ Amber Parcher, *HIV positive suspect who bit officer gets 18 years*, GAZETTE.NET, June 4, 2008, available at http://www.gazette.net/stories/060408/burnew215303_32365.shtml.

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Id.*

a “negligible” risk that HIV could be transmitted through a bite.⁵³¹ Maryland’s statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

In March 2010, a 29-year-old HIV positive man was charged with seven counts of reckless endangerment and seven counts of knowingly attempting to transfer HIV after he had consensual sex with a woman he met online and did not disclose his HIV status.⁵³² He was later sentenced to eighteen months in prison and two years supervised probation.⁵³³ The same man was previously charged under Maryland’s HIV exposure law in 2005 after he engaged in consensual but unprotected intercourse with a different woman without disclosing his HIV status.⁵³⁴ He pleaded guilty to reckless endangerment in that case and was sentenced to five years imprisonment with all but one year suspended.⁵³⁵

In September 2012, a 36-year-old HIV positive man was charged with knowingly attempting to transmit HIV, among other things, for having sex with a 13-year-old boy he met through the dating app Grindr.⁵³⁶ The man later pleaded guilty to having sexual contact with the boy, in a deal which allowed him to avoid going to trial on the HIV transmission charge.⁵³⁷

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

Prosecutions for HIV exposure in Maryland have typically arisen under general criminal laws rather than the “knowing transfer of HIV” statute. General criminal law charges occur regardless of whether the HIV positive person 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.”⁵³⁸

In 1999, a 20-year-old HIV positive man was charged with first-degree assault for biting a security guard in the arm during a struggle.⁵³⁹ In August 2011, an HIV positive man was charged with

⁵³¹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

⁵³² 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.

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ *Id.*

⁵³⁶ 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.

⁵³⁷ 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-tranmission-20130213_1_hiv-criminalization-hiv-charge-criminal-charges.

⁵³⁸ MD. CODE ANN., CRIM. LAW § 3-204 (West 2014).

⁵³⁹ 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.

aggravated assault for allegedly having unprotected sex with his girlfriend without disclosing his HIV-status.⁵⁴⁰

In July 2010, a 44-year-old HIV positive defendant was sentenced to five years in prison for second-degree assault after he was convicted of spitting on a police officer.⁵⁴¹ It should be noted that the jury was unaware that the man was HIV positive; this fact was revealed by the judge during sentencing.⁵⁴² Because the defendant had no teeth and often spat unintentionally, it is not clear whether the man intended to spit on the police officer.⁵⁴³ The CDC has long maintained that spitting alone has never been shown to transmit HIV.⁵⁴⁴ Therefore the defendant in this case failed to engage in conduct creating a substantial risk of death or serious injury that would warrant his conviction and five-year sentence.

At least two cases in Maryland have ruled that an attempted murder charge cannot be used in cases of HIV exposure unless there is a specific intent to murder through the transmission of HIV. In 1996, a 47-year-old HIV positive man was convicted of assault with intent to murder and sentenced to ninety years in prison after he sexually assaulted his 9-year-old stepgrandson.⁵⁴⁵ The man's sentence was later reduced to sixty years after the Maryland Court of Special Appeals ruled that his awareness of his HIV positive status was not proof of intent to murder.⁵⁴⁶ The boy twice tested negative for HIV, but this information is not relevant in a prosecution unless it would go to show the intent of the defendant.⁵⁴⁷

The Court of Appeals of Maryland came to a similar conclusion in *Smallwood v. State*.⁵⁴⁸ In *Smallwood*, an HIV positive man pleaded guilty to attempted first-degree rape and robbery with a deadly weapon for raping and robbing three women at gunpoint.⁵⁴⁹ In addition to his guilty plea, the man was also convicted of assault with intent to murder, reckless endangerment, and three counts of attempted second-degree murder.⁵⁵⁰ In addition to other sentences, the man received thirty years in prison for assault with intent to murder based on his raping the women while knowing of his HIV status.⁵⁵¹ On appeal, the defendant argued that sexually assaulting the women with knowledge of his HIV positive status was not sufficient to find an intent to kill.⁵⁵² The prosecution countered that

⁵⁴⁰ Adam Bednar, *Crime: Man Charged with Assault for Not Disclosing HIV Status Before Sex*, NORTH BALTIMORE PATCH, Aug. 24, 2011, available at <http://northbaltimore.patch.com/groups/police-and-fire/p/crime-man-charged-with-assault-for-not-disclosing-hiv75f2c5b15f>.

⁵⁴¹ Don Aines, *Man with HIV ho spit on police officer sentenced to five years*, HERALD-MAIL (Hagerstown, MD), July 26, 2010, available at http://www.herald-mail.com/?cmd=displaystory&story_id=249796&format=html&autoreload=true.

⁵⁴² *Id.*

⁵⁴³ *Id.*

⁵⁴⁴ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

⁵⁴⁵ Amy L. Miller, *Man who raped stepgrandson given 90 years*, BALTIMORE SUN, Feb. 2, 1996, available at http://articles.baltimoresun.com/1996-02-02/news/1996033007_1_abuse-beck-sentence-for-child.

⁵⁴⁶ *HIV-Positive Man Convicted of Child Abuse Given Reduced Sentence*, DAILY REC. (Baltimore), July 31, 1997, at 7.

⁵⁴⁷ *Id.*

⁵⁴⁸ 680 A.2d 512 (Md. 1996).

⁵⁴⁹ *Id.* at 513.

⁵⁵⁰ *Id.* at 513-14.

⁵⁵¹ *Id.* at 514.

⁵⁵² *Id.*

engaging in unprotected sexual intercourse while HIV positive is equivalent to firing a loaded firearm at an individual, an act from which a jury could infer the intent to kill.⁵⁵³

The court determined that the State had only provided evidence that the defendant intended to rob and rape the victims – not that he intended to kill them.⁵⁵⁴ The court reasoned that death by AIDS from a single exposure to HIV was not sufficiently probable to show that the defendant intended to kill his victims.⁵⁵⁵ The court also distinguished the defendant’s case from cases in other states where intent to kill was clearly shown by evidence such as: (1) statements suggesting that a person wished to spread HIV or (2) actions solely explainable as an attempt to spread HIV, such as splashing blood.⁵⁵⁶

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⁵⁵³ *Id.*

⁵⁵⁴ *Id.* at 516.

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.* at 516-18.

Massachusetts Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Though there is no explicit statutes regarding HIV exposure prosecution under general criminal laws have occurred.⁵⁵⁷

There are no statutes explicitly criminalizing HIV transmission or exposure in Massachusetts. However, HIV positive individuals have been prosecuted under general criminal laws in Massachusetts.

In *Commonwealth v. Smith*, an HIV positive man appealed the denial of his motion to withdraw his guilty plea to an indictment charging him with assault with intent to commit murder.⁵⁵⁸ The charges stemmed from an incident in which the defendant allegedly bit a corrections officer on the arm and screamed: “I’m HIV positive. I hope I kill you . . .” and “You’re all gonna die . . . I have AIDS.”⁵⁵⁹ Another officer testified before the grand jury that a doctor from the department of health told him that HIV transmission from a human bite is possible if an attacker’s gums are bloody and the bite breaks the skin.⁵⁶⁰ Despite the fact that the CDC has concluded that there exists only a “negligible” risk of HIV transmission from a bite,⁵⁶¹ the grand jury indicted the defendant, who later pleaded guilty.⁵⁶² Conviction for assault with intent to commit murder can result in imprisonment of up to ten years.⁵⁶³

Smith demonstrates that HIV positive status can be the basis for a serious criminal charge in Massachusetts, regardless of whether the complainant was exposed to any risk of HIV infection. In a 1996 case, a 38-year-old man in Massachusetts was charged with assault with a “deadly weapon” after he allegedly told two police officers he had AIDS and spat at them.⁵⁶⁴ The police officers stated, “We felt that he had a contagious disease, and that by him spitting at us, that he was attempting to infect us.”⁵⁶⁵ The CDC has long maintained that spitting alone has never been shown to transmit HIV.⁵⁶⁶

⁵⁵⁷ MASS. GEN. LAWS ch. 265, § 22b(f) (2014) mandates a fifteen-year-to-life sentence for a defendant who has forced sexual intercourse with a child under 16-years-old in a manner in which the child could contract an STD or STI when the defendant “knew or should have known” that she/he was a carrier for an STI or STD. There is no case on record that this statute has been applied to HIV positive persons.

⁵⁵⁸ 790 N.E.2d 708, 709 (Mass. App. Ct. 2003).

⁵⁵⁹ *Id.* at 712.

⁵⁶⁰ *Id.*

⁵⁶¹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

⁵⁶² *Smith*, 790 N.E.2d at 709.

⁵⁶³ MASS. GEN. LAWS ANN. ch. 265, § 15 (2014).

⁵⁶⁴ Associated Press, *AIDS Spitting Case Hits Courts*, AEGIS.COM, Dec. 12, 1996, available at <http://www.aegis.org/DisplayContent/print.aspx?SectionID=961>.

⁵⁶⁵ *Id.*

⁵⁶⁶ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

Murder charges may also be possible in cases where an HIV positive person intentionally infected others with HIV and those infected later die of AIDS. In *Commonwealth v. Casanova*, the Supreme Judicial Court of Massachusetts affirmed a denial of the defendant's motion to dismiss where the defendant shot a man who became paralyzed and died of breathing problems six years later.⁵⁶⁷ While Massachusetts abolished the "year and a day" rule in 1980, dictating that murder charges may only result if victims die within a year and a day of an alleged attack, the defendant argued that the court should replace the rule with some other time limit to protect the rights to due process and a speedy trial.⁵⁶⁸ The court disagreed, stating that medical science had advanced enough to make arbitrary time limits unnecessary in cases where the link between an assault and a victim's death can be proven.⁵⁶⁹ In support of this ruling, the court compared the facts to a situation in which a slow-acting poison is used or a person purposefully infects another with HIV.⁵⁷⁰

Other prosecutions under Massachusetts' general criminal laws include:

- In April 2012, a 19-year-old HIV positive teenager was charged with assault and battery with a dangerous weapon, among other things, for failing to disclose his HIV status to multiple sexual partners.⁵⁷¹ At least one partner later tested positive for HIV.⁵⁷²
- In August 2012, a 30-year-old HIV positive man was arrested for allegedly threatening a 17-year-old girl with a syringe he claimed was filled with HIV-infected blood, then stealing her car.⁵⁷³ The man was charged with attempted murder, armed carjacking, and assault with a dangerous weapon.⁵⁷⁴

Of course, in situations of HIV infection there are often problems establishing whether the defendant is indeed the source of transmission. The first person to test positive can often be deemed the culprit even though she/he may have been infected by someone else, including the complainant. Even if it was the accused party who was infected first, it could have been a third party who infected the complainant. Prosecutors have been using "phylogenetic testing," which focuses on establishing a genetic connection between the HIV viruses of the two parties.⁵⁷⁵ But such evidence only indicates similarities in the viruses and does not prove who infected whom, or the source of the virus.⁵⁷⁶ Such

⁵⁶⁷ 708 N.E.2d 86, 87 (Mass. 1999).

⁵⁶⁸ *Id.* at 87-88.

⁵⁶⁹ *Id.* at 90.

⁵⁷⁰ *Id.* (stating that "[a]lthough it will undoubtedly be difficult in many cases for the prosecution to prove causation where death is remote in time from the allegedly precipitating injury, in cases where this link can be proved, such as where a slow-acting poison is used or where a person purposely infects another with a virus such as HIV, prosecution should not be barred by some arbitrary time limit.")

⁵⁷¹ Marisa Donelan, *Fitchburg man with HIV allegedly showed false medical records*, SENTINEL & ENTERPRISE, Apr. 13 2012, available at http://www.sentinelandenterprise.com/ci_20388210/fitchburg-man-hiv-allegedly-showed-false-medical-records?source=rss_viewed.

⁵⁷² *Id.*

⁵⁷³ *Massachusetts police arrest homeless man accused of threatening teen with HIV syringe*, FOX NEWS, Aug. 16, 2012, available at <http://www.foxnews.com/us/2012/08/16/massachusetts-police-arrest-homeless-man-accused-threatening-teen-with-hiv/>.

⁵⁷⁴ *Id.*

⁵⁷⁵ Ralf Jurgens et al., *10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, Open Society Institute (2008), available at http://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf, at 18.

⁵⁷⁶ *Id.*

technology is also not well understood by law enforcement, attorneys, judges, or people living with HIV and fails to provide sufficient evidence for prosecution.⁵⁷⁷

HIV positive status may also lead to increased prison sentences in sexual assault cases. In *Commonwealth v. Boone*, an HIV positive man was convicted of rape of a child and sentenced to five years in prison when for anally raping his 14-year-old cousin.⁵⁷⁸ The boy later revealed the events to a doctor after discovering that he was HIV positive.⁵⁷⁹ On appeal, the defendant argued that at sentencing the judge improperly considered the fact that the defendant knew his HIV positive status when he raped the boy.⁵⁸⁰ The Appeals Court of Massachusetts rejected this argument, agreeing with the sentencing judge that although it could not be proven that the defendant transmitted HIV to his cousin, the fact that he committed a sexual assault with knowledge of his HIV positive status was a valid consideration during sentencing.⁵⁸¹

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.

⁵⁷⁷ *Id.*

⁵⁷⁸ No. 02-P-536, 2003 WL 22087552, at *1 (Mass. App. Ct. Sept. 9, 2003).

⁵⁷⁹ *Id.* at *1.

⁵⁸⁰ *Id.* at *3.

⁵⁸¹ *Id.*

Michigan Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MICH. COMP. LAWS ANN. § 333.5210*****Knowledge of AIDS or HIV infection; sexual penetration as a felony***

(1) A person who knows that he or she has or has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex, or who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony.

(2) As used in this section, "sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

MICH. COMP. LAWS ANN. § 333.11101***Donation or sale of blood or blood products; knowledge of positive HIV test***

An individual shall not donate or sell his or her blood or blood products to a blood bank or storage facility or to an agency or organization that collects blood or blood products for a blood bank or storage facility knowing that he or she has tested positive for the presence of HIV or an antibody to HIV. A blood bank or other health facility to which blood or blood products is donated in violation of this section immediately shall notify the local health department of the violation. The local health facility will immediately proceed under part 52.

Engaging in sexual intercourse without disclosing HIV status can lead to felony charges.

In Michigan, it is a felony punishable by up to four years in prison if a person is aware that she/he is HIV positive and engages in "sexual penetration" with a person uninformed of her/his HIV status.^{582, 583} Neither the intent to transmit HIV nor actual transmission is required.

⁵⁸² MICH. COMP. LAWS ANN. § 777.13k (2014) (categorizing sexual penetration with an uninformed partner as a class F, person felony). For information on minimum sentences, consult sentencing instructions at § 777.21. *See also* § 777.22 (outlining offense variables as they apply to different offense categories); §§ 777.31-49a (2014) (providing a point system for each offense variable); § 777.67 (2014) (providing minimum sentences for class F felonies); *But see* H.B. 6328, 95th Leg., 2010 Reg. Sess. (Mich. 2010) (proposing to require definite terms of imprisonment and repeal portions of Michigan's sentencing guidelines, the bill is still under review); *see also* MICHIGAN SENTENCING GUIDELINES MANUAL (2013), available at <http://courts.mi.gov/education/mji/Publications/Documents/sg-manual.pdf>.

Michigan defines “sexual penetration” as penile-vaginal sex, oral sex, anal sex, and *any* other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.⁵⁸⁴ The emission of semen is not required.⁵⁸⁵ The use of condoms or other protection during sexual penetration is not a defense.

The only defense to prosecution is if HIV positive persons disclose their HIV status to sexual partners before engaging in sexual penetration. However, the disclosure of HIV status during private, sexual activities may be difficult to prove without witnesses or documentation, and evidence often rests on the testimonies of the parties where it is one person’s word against the other. In *People v. Flynn*, a former lover of an HIV positive man testified that she engaged in unprotected sexual intercourse with him and he failed to inform her of his HIV positive status.⁵⁸⁶ The man testified that he informed the complainant of his HIV status before they engaged in sexual intercourse and that he wore a condom.⁵⁸⁷ He further argued that the testimony of a second woman with whom he had sexual intercourse was inadmissible under the Michigan Rules of Evidence.⁵⁸⁸ The court of appeals upheld the trial court’s ruling that the second woman’s testimony was admissible as “it was relevant to show that [the] defendant intentionally failed to disclose his HIV status as part of a scheme, plan, or system of doing an act.”⁵⁸⁹ In these situations, there are inherent problems when the only evidence available is the testimony of the parties.

Despite its potential to criminalize safe sexual practices, Michigan’s uninformed partner law has survived legal challenges that it is unconstitutionally overbroad.⁵⁹⁰ In *People v. Jensen*, a mentally-impaired, HIV positive woman received three concurrent prison terms of two years and eight months to four years after she engaged in unprotected sex with a man on three occasions.⁵⁹¹ On appeal, the defendant argued that the statute failed to differentiate between consensual and nonconsensual intercourse, and would seem to require that rape victims inform their attackers of their HIV status.⁵⁹²

The Court of Appeals of Michigan rejected this argument, finding that the defendant did not have standing to challenge the statute on such grounds because her case did not involve forced sexual intercourse.⁵⁹³ The court found that the defendant’s act of engaging in unprotected, consensual sex without disclosing her HIV status was clearly encompassed by the language of the statute.⁵⁹⁴ The

⁵⁸³ MICH. COMP. LAWS ANN. § 333.5210(1) (2014); *See also Doe v. Johnson*, 817 F.Supp. 1382, 1393 (W.D. Mich. 1993) (finding that a woman’s claims for negligent or fraudulent transmission of HIV could be maintained if defendant knew (1) that he was HIV positive, (2) that he was suffering from HIV-related symptoms, or (3) that a prior sex partner was HIV positive).

⁵⁸⁴ MICH. COMP. LAWS ANN. § 333.5210(2).

⁵⁸⁵ *Id.*

⁵⁸⁶ No. 199753, 1998 WL 1989782, at *1 (Mich. Ct. App. Sept. 25, 1998).

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* (explaining defendant’s assertion that the testimony of the second woman constituted evidence of bad acts and that such evidence is inadmissible under Mich. R. Evid. 404(b)).

⁵⁸⁹ *Id.*

⁵⁹⁰ *See, e.g., People v. Jensen*, 586 N.W.2d 748, 759 (Mich. Ct. App. 1998); *Flynn*, No. 199753, 1998 WL 1989782, at *4.

⁵⁹¹ 564 N.W.2d 192, 194 (Mich. Ct. App. 1997), *vacated in part, appeal denied in part by* 575 N.W.2d 552 (Mich. 1998), *remanded to* 586 N.W.2d 748 (Mich. Ct. App. 1998).

⁵⁹² *Jensen*, 586 N.W.2d at 751.

⁵⁹³ *Id.* at 752.

⁵⁹⁴ *Id.* at 751.

court further rejected the defendant's argument that Michigan's uninformed partner law is unconstitutional due its lack of a clear intent requirement.⁵⁹⁵

Looking to the reasoning of the Michigan legislature, the court held that the statute required only a general intent to engage in sexual penetration while failing to disclose HIV status.⁵⁹⁶ An HIV positive person who fails to disclose her/his status could be considered grossly negligent because non-disclosure could only achieve the "further dissemination of a lethal, incurable disease in order to gratify the sexual or other physical pleasures of the already infected individual."⁵⁹⁷

The Michigan Court of Appeals rejected another constitutional challenge to the state's HIV disclosure laws in *People v. Flynn*, discussed above.⁵⁹⁸ The defendant argued that Michigan's uninformed partner law was unconstitutionally overbroad, because the law's definition of "sexual penetration" included activities that could not spread the virus.⁵⁹⁹ The court found that the defendant had no basis for challenging the scope of the law because the defendant had engaged in unprotected sexual intercourse, which was "clearly encompassed" by the statute's language.⁶⁰⁰ The defendant was sentenced to two concurrent terms of thirty-two to forty-eight months in prison.⁶⁰¹

Several other HIV positive individuals in Michigan have been prosecuted for engaging in sexual intercourse without disclosing their status to partners:

- In August 2012, a 25-year-old man was charged with sexual penetration with an uninformed partner after he allegedly failed to tell his sexual partner that he was HIV positive.⁶⁰²
- In August 2012, a 32-year-old man was arrested for allegedly lying to his partner about his HIV positive status.⁶⁰³
- In September 2012, a 53-year-old man was charged with two counts of sexual penetration with an uninformed partner for allegedly sexually assaulting two 15 year-olds.⁶⁰⁴ He had

⁵⁹⁵ *Id.* at 752-56.

⁵⁹⁶ *Id.* at 755.

⁵⁹⁷ *Id.* at 754.

⁵⁹⁸ *Flynn*, No. 199753, 1998 WL 1989782, at *4.

⁵⁹⁹ *Id.* at *3.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* at *1.

⁶⁰² Mark Ranzenberger, *Clare-Area Man Accused of Failing to Inform Partner of HIV*, THE MORNING SUN, Aug. 27, 2012, available at <http://www.themorningsun.com/article/20120827/NEWS01/120829779/clare-%C2%AD%E2%80%90area-%C2%AD%E2%80%90man-%C2%AD%E2%80%90accused-%C2%AD%E2%80%90of-%C2%AD%E2%80%90failing-%C2%AD%E2%80%90to-%C2%AD%E2%80%90inform-%C2%AD%E2%80%90partner-%C2%AD%E2%80%90of-%C2%AD%E2%80%90hiv>.

⁶⁰³ *HIV-Infected Man Lied to Sex Partner*, WOODTV, Aug. 17, 2012, available at <http://www.woodtv.com/news/local/kent-county/hiv-infected-man-lied-to-sex-partner>.

⁶⁰⁴ John Counts, *HIV-Positive Ypsilanti Man Charged With Sexually Assaulting Two More Victims*, THE ANN ARBOR NEWS, Sept. 22, 2012, available at <http://www.annarbor.com/news/crime/hiv-positive-ypsilanti-man-charged-with-sexually-assaulting-two-more-victims/>.

been charged previously in August 2012 with “several counts of criminal sexual conduct charges including one charge of exposing the 14-year-old male victim to HIV.”⁶⁰⁵

- In December 2011, an HIV positive man was arrested after telling police that he “had set out to intentionally infect as many people as he could.”⁶⁰⁶
- In November 2010, a man was charged with two felony counts of sexual penetration of an uninformed partner for allegedly having sex with two women without disclosing his HIV status.⁶⁰⁷
- In *People v. Selemogo*, an HIV positive man received 108 to 240 months in prison for criminal sexual contact and a concurrent nine-month sentence for sexual penetration with an uninformed partner after he sexually assaulted a woman in her sleep.⁶⁰⁸
- In *People v. Clayton*, an HIV positive man received forty-eight months to fifteen years in prison after he allegedly engaged in unprotected anal and oral sex with a man without informing the man of his HIV status.⁶⁰⁹
- In September 2008, an HIV positiveman was charged with four counts of engaging in sexual penetration with an uninformed partner when he allegedly had sex with two women without disclosing his HIV status.⁶¹⁰
- In December 2008, a 36-year-old woman pleaded guilty for failing to inform several sexual partners that she was HIV positive.⁶¹¹ She was sentenced to sixty-eight days in prison for time already served and five years probation.⁶¹² The woman was arrested again after allegedly violating her probation for engaging in sex work and associating with a known felon.⁶¹³
- In November 2009, a 21-year-old man was arrested after allegedly engaging in unprotected

⁶⁰⁵ *Id.*

⁶⁰⁶ M. Alex Johnson, *Michigan Man May Have Intentionally Infected Hundreds with HIV*, NBC NEWS, Dec. 30, 2011, available at http://usnews.nbcnews.com/_news/2011/12/30/9833291-michigan-man-may-have-intentionally-infected-hundreds-with-hiv.

⁶⁰⁷ Lisa LaPlante, *HIV-Positive Man Charged With Having Sex, Not Telling Partners of Status*, WSBT.COM, Nov. 15, 2010.

⁶⁰⁸ No. 273410, 2008 WL 902287, at *1 (Mich. Ct. App. Apr. 3, 2008).

⁶⁰⁹ No. 230328, 2002 WL 31058331, at *1 (Mich. Ct. App. Sept. 13, 2002), *sentencing modified after new sentencing hearing* in No. 245260, 2004 WL 895857 (Mich. Ct. App. Apr. 27, 2004) (affirming the new sentence of forty-eight months to fifteen years in prison).

⁶¹⁰ *Montcalm County Man Faces Charge of Not Disclosing HIV Infection to Sex Partners*, MLIVE.COM, Sept. 5, 2008, available at http://www.mlive.com/news/grand-rapids/index.ssf/2008/09/montcalm_county_man_faces_char.html.

⁶¹¹ Rex Hall Jr., *Kalamazoo Woman with HIV is the Second Person to Face Charges Within a Month*, KALAMAZOO GAZETTE (Michigan), Oct. 8, 2008, available at

http://www.mlive.com/news/kalamazoo/index.ssf/2008/10/kalamazoo_woman_with_hiv_is_th.html; See also Rex

Hall Jr., *Woman Spared More Jail Time in HIV Case*, MLIVE.COM, Dec. 10, 2008, available at

http://www.mlive.com/news/kalamazoo/index.ssf/2008/12/woman_spared_more_jail_time_in.html.

⁶¹² Hall, *Woman Spared More Jail Time in HIV Case*.

⁶¹³ Lynn Turner, *Kalamazoo Man with HIV Who Had Sex with Unwitting Partners Gets Jail*, KALAMAZOO GAZETTE (Michigan), Feb. 3, 2009, available at

http://www.mlive.com/news/kalamazoo/index.ssf/2009/02/kalamazoo_man_with_hiv_who_had.html.

sex with a teenage girl without informing her that he was HIV positive.⁶¹⁴ After entering a guilty plea he was sentenced to nine-months imprisonment with credit for 152 days, three years of probation, and a \$1,250 fine.⁶¹⁵

- In July 2009, an HIV positive woman employed at a sex club was arrested for engaging in sexual penetration without disclosing her HIV status.⁶¹⁶ She was sentenced to sixteen months to twenty years for failing to disclose her HIV status and for drug offenses.⁶¹⁷
- In February 2009, a 25-year-old man was sentenced to two months in prison after he failed to disclose his HIV status to several sexual partners.⁶¹⁸
- In March 2010, a 54-year-old HIV positive woman was arrested and charged under Michigan's uninformed partner law after she allegedly engaged in sexual intercourse without disclosing her HIV status to her partner.⁶¹⁹

HIV positive blood has been considered a “harmful biological substance” under Michigan bioterrorism laws.

HIV positive blood is considered a “harmful biological substance” under the Michigan's bioterrorism laws,⁶²⁰ and exposing others to HIV positive blood may increase prison sentences for assault or may be prosecuted as a crime of its own.

Enhanced sentences for blood exposure are possible regardless of whether HIV infection was possible under the circumstances. In *People v. Odom*, an HIV positive inmate was convicted of three counts of assault when he allegedly punched and spat on corrections officers during an altercation.⁶²¹ Because he was bleeding from the mouth during the assault,⁶²² and because his saliva containing

⁶¹⁴ Kelly Dame, *Man Charged in AIDS Case Sentenced*, MIDLAND DAILY NEWS, Nov. 18, 2009, available at http://www.ourmidland.com/police_and_courts/article_e2dc9201-86cc-51ae-beab-b61226b1f642.html.

⁶¹⁵ *Id.*

⁶¹⁶ *US: Michigan Strip Club Employee Pleads 'No Contest' to HIV Non-Disclosure (Updated)*, CRIMINALHIVTRANSMISSIONBLOGSPOT.COM, July 14, 2009, available at

<http://criminalhivtransmission.blogspot.com/2009/07/us-michigan-strip-club-employee-pleads.html>.

⁶¹⁷ *Id.*

⁶¹⁸ Turner, *Kalamazoo Man with HIV Who Had Sex with Unwitting Partners Gets Jail*.

⁶¹⁹ Mark Ranzenberger, *Rosebush Woman Faces Prison on HIV Charge*, MORNING SUN (Mount Pleasant, MI), May 1, 2012, available at <http://www.themorningsun.com/article/20100310/NEWS/303109978/rosebush-woman-faces-prison-on-hiv-charge>.

⁶²⁰ See generally *People v. Odom*, 740 N.W.2d 557, 562 (Mich. Ct. App. 2007) (stating that “HIV-infected blood is a ‘harmful biological substance,’ as defined by [Mich. Comp. Laws Ann. § 750.200h], because it is a substance produced by a human organism that contains a virus that can spread or cause disease in humans.”); see also MICH. COMP. LAWS ANN. § 750.200h(g) (2004) (defining “harmful biological substance” as “a bacteria, virus, or other microorganism or toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.”).

⁶²¹ 740 N.W.2d at 560.

⁶²² *Id.* at 561.

blood was deemed a “harmful biological substance” under state bioterrorism laws,⁶²³ the spitting incident led to an increased sentence of five to fifteen years.⁶²⁴

The defendant’s appeal was the first opportunity for the Michigan Court of Appeals to determine whether the blood of an individual with HIV could be considered a “harmful biological substance” under state sentencing guidelines.⁶²⁵ Relying on a statement from the Centers for Disease Control (“CDC”) website that HIV can be transmitted via blood, the Court of Appeals concluded that HIV positive blood is a “harmful biological substance,” as it can “spread or cause disease in humans, animals, or plants.”⁶²⁶ The man’s elevated sentencing was therefore upheld.⁶²⁷

Odom failed to address how state sentencing laws could apply to HIV positive individuals who act in self-defense during an altercation, or who have no knowledge or intention of exposing another to HIV. The ruling leaves open the possibility that HIV positive persons will be prosecuted for unintentional blood exposures that occur when they are attacked by others or are victims of prison guard misconduct. The defendant in *Odom* denied that he initiated the altercation or that he spit at the officers.⁶²⁸ Although the defendant did have a bloody mouth after his altercation with prison guards, the court did not discuss how he received his injuries.⁶²⁹

In 2010, another HIV positive man was charged under Michigan’s bioterrorism law for allegedly biting his neighbor during an altercation.⁶³⁰ In *People v. Allen*,⁶³¹ the defendant was charged under bioterrorism laws due to the “[possession of] a harmful biological substance, i.e. HIV infected blood, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person”⁶³² There was no evidence that the defendant was bleeding from the mouth at the time of the bite, that he intended to transmit HIV, or that he exposed his neighbor to anything but saliva.⁶³³

This initial charge disregarded the fact that the CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite.⁶³⁴ The CDC has also concluded that

⁶²³ *Id.* at 561-62.

⁶²⁴ *Id.* at 560, 562; see also MICH. COMP. LAWS ANN. § 777.31(1)(b) (2014) (imposing twenty additional sentencing points for exposures to harmful biological substances).

⁶²⁵ *Odom*, 740 N.W.2d at 561.

⁶²⁶ *Id.* at 561-62.

⁶²⁷ *Id.* at 562.

⁶²⁸ *Id.* at 561.

⁶²⁹ *Id.* at 560-67.

⁶³⁰ *People v. Allen*, No. 2009-4960 (Macomb County Ct. Mich. Cir. Ct. June 2, 2010, available at <http://www.hivlawandpolicy.org/resources/view/517>).

⁶³² *Id.* at *6; see also MICH. COMP. LAWS ANN. § 750.200i(1)(a) (2014) (making it illegal to possess a harmful biological substance).

⁶³³ *Allen*, No. 2009-4960 at *6.

⁶³⁴ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

spitting alone cannot transmit HIV, and that there is no documented case of transmission from an HIV-infected person spitting on another person.⁶³⁵

The Macomb County Circuit Court dismissed the bioterrorism charge as unfounded.⁶³⁶ Relying on a statement from the CDC, the court acknowledged that contact with saliva, tears, or sweat has never been shown to result in HIV transmission.⁶³⁷ However, the court also cited *Odom* and confirmed that HIV-infected blood is a “harmful biological substance” under state bioterrorism laws.⁶³⁸ Thus, while *Allen* did nothing to remove the risk that an HIV positive individual can be arrested and charged as a “bioterrorist” under Michigan state law, it did help illuminate the fallacies of prosecuting HIV positive persons for spitting and biting.

HIV positive status can be considered a factor in sentencing.

Under Michigan state law, a sentencing court may go beyond sentencing guidelines and impose a minimum sentence above what is recommended if there is a substantial and compelling reason to do so.⁶³⁹ In the past, this provision of state sentencing guidelines has led to increased sentences where sexual assault victims are exposed to or infected with STIs, such as HPV.⁶⁴⁰ In *People v. Holder*, the Michigan Court of Appeals affirmed the eighty to 120 month sentence of the HIV positive defendant’s conviction for sexual penetration of an uninformed partner.⁶⁴¹ The court stated that because the defendant did not tell his partner about his HIV status, which resulted in transmission of the virus without her knowledge, he risked both the “potential exposure . . . to other people through the innocent transmission by the victim” and infection to his partner’s then unborn child.⁶⁴² The court found that these facts were sufficient to uphold a sentence of twice the standard range.⁶⁴³

Donating blood or blood products while HIV positive is a criminal offense.

The Michigan Public Health Code prohibits individuals who are aware that they have tested positive for HIV from donating or selling blood or blood products (plasma, platelets, etc.).⁶⁴⁴ Neither the intent to transmit HIV nor actual transmission is required. Disclosure of HIV status before blood sales or donations is not a defense on the face of the statute. If an individual violates this law,

⁶³⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

⁶³⁶ *Allen*, No. 2009-4960 at *7.

⁶³⁷ *Id.* at *5.

⁶³⁸ *Id.* at *4-5.

⁶³⁹ MICH. COMP. LAWS ANN. § 769.34(3) (2014), *limited on constitutional grounds by People v. Conley*, 715 N.W.2d 377 (Mich. Ct. App. 2006).

⁶⁴⁰ *See, e.g., People v. Grissom*, No. 251427, 2004 WL 2625034, at *2 (Mich. Ct. App. Nov. 18, 2004) (citing the trial court, which stated that “[f]urther, although points were scored for bodily injury requiring treatment, the guidelines do not take into account the extent of injury to this victim of the transmission of disease. In this case, the victim contracted Human Papilloma Virus (HPV), a disease that potentially may cause cervical cancer in the future.”); *People v. Castro-Isaquirre*, No. 242134, 2004 WL 737489, at *2 (Mich. Ct. App. Apr. 6, 2004) (stating “[h]ere, the trial court based its departure on the fact that defendant, who has a sexually transmitted disease, exposed the victim, her mother, and her sister to the disease.”).

⁶⁴¹ 2003 WL 22138282, at *1 (Mich. Ct. App. 2003).

⁶⁴² *Id.* at 3.

⁶⁴³ *Id.* at 4.

⁶⁴⁴ MICH. COMP. LAWS ANN. § 333.11101 (2014).

her/his local health department will be notified immediately, and she/he she may be declared a health threat to others.⁶⁴⁵ The health department may send the individual an official warning, requiring that she/he participate in mandatory education programs, or take legal action if the HIV positive person continues to expose others to HIV.⁶⁴⁶

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⁶⁴⁵ *Id.*; *See also* § 333.5201(1)(b) (2014) (defining a “health threat to others” as “an individual who is a carrier [that] has demonstrated an inability or unwillingness to conduct himself or herself in such a manner as to not place others at risk of exposure to a serious communicable disease or infection.”).

⁶⁴⁶ MICH. COMP. LAWS ANN. § 333.5203 (2014)(outlining the procedure for issuing a health department warning notice); *see also* § 333.5205 (2014) (outlining court proceedings that may result from refusing to comply with health department warnings).

Minnesota Statute(s) that Allow for Criminal Prosecution based on HIV Status:

MINN. STAT. § 609.2241

Knowing transfer of communicable disease

Subdivision 1. Definitions. As used in this section, the following terms have the meanings given:

- (a) “Communicable disease” means a disease or condition that causes serious illness, serious disability, or death; the infectious agent of which may pass or be carried from the body of one person to the body of another through direct transmission.
- (b) “Direct transmission” means predominately sexual or blood-borne transmission.
- (c) “A person who knowingly harbors an infectious agent” refers to a person who receives from a physician or other health professional:
 - (1) advice that the person harbors an infectious agent for a communicable disease;
 - (2) educational information about behavior which might transmit the infectious agent; and
 - (3) instruction of practical means of preventing such transmission.
- (d) “Transfer” means to engage in behavior that has been demonstrated epidemiologically to be a mode of direct transmission of an infectious agent which causes the communicable disease.
- (e) “Sexual penetration” means any of the acts listed in section 609.341, subdivision 12, when the acts described are committed without the use of a latex or other effective barrier.

Subd. 2. Crime. It is a crime, which may be prosecuted under section 609.17, 609.185, 609.19, 609.221, 609.222, 609.223, 609.2231, or 609.224, for a person who knowingly harbors an infectious agent to transfer, if the crime involved:

- (1) sexual penetration with another person without having first informed the other person that the person has a communicable disease;
- (2) transfer of blood, sperm, organs, or tissue, except as deemed necessary for medical research or if disclosed on donor screening forms; or
- (3) sharing of nonsterile syringes or needles for the purpose of injecting drugs.

Continued on the following page...

Subd. 3. Affirmative defense. It is an affirmative defense to prosecution, if it is proven by a preponderance of the evidence, that:

- (1) the person who knowingly harbors an infectious agent for a communicable disease took practical means to prevent transmission as advised by a physician or other health professional; or
- (2) the person who knowingly harbors an infectious agent for a communicable disease is a health care provider who was following professionally accepted infection control procedures.

Nothing in this section shall be construed to be a defense to a criminal prosecution that does not allege a violation of subdivision 2.

MINN. STAT. § 609.341

Definitions

Subd. 12. Sexual penetration. “Sexual penetration” means any of the following acts committed without the complainant’s consent, except in those cases where consent is not a defense, whether or not emission of semen occurs:

- (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or
- (2) any intrusion however slight into the genital or anal openings:
 - (i) of the complainant’s body by any part of the actor’s body or any object used by the actor for this purpose;
 - (ii) of the complainant’s body by any part of the body of the complainant, by any part of the body of another person, or by any object used by the complainant or another person for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired; or
 - (iii) of the body of the actor or another person by any part of the body of the complainant or by any object used by the complainant for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired.

HIV status must be disclosed to sexual partners and condoms or other protection must be used during sexual activities.

In Minnesota, HIV positive persons must disclose their HIV status to sexual partners. It is a criminal offense for any individual who knowingly “harbors” the infectious agent for a communicable disease (i.e., HIV) to engage in sexual penetration with another person without first

informing that person that she/he carries that infectious agent.⁶⁴⁷ This offense may be charged as assault (of the first, second, third, fourth, and fifth degrees), attempted assault, murder (first or second degree), or attempted murder.⁶⁴⁸ Potential prison sentences depend on the offense charged. However, if an HIV positive person violates the statute on multiple occasions, consecutive sentencing is possible.⁶⁴⁹

Neither the intent to transmit HIV nor actual transmission is required for prosecution.⁶⁵⁰

Under the statute, a “communicable disease” is defined as “a disease or condition that causes serious illness, serious disability or death; the infectious agent of which [(i.e., HIV)] may pass or be carried from the body of one person to the body of another through direct transmission.”⁶⁵¹ “Direct transmission” is defined as “predominately sexual or blood-borne transmission.”⁶⁵² The term “transfer” means “to engage in behavior that has been demonstrated epidemiologically to be a mode of direct transmission of an infectious agent which causes the communicable disease.”⁶⁵³ Thus by the wording of the statute, prosecution for violation of law is limited to activities that are known to transmit HIV.⁶⁵⁴

An individual “knowingly” harbors an infectious agent when she/he (1) is advised by a physician or health professional that she/he harbors an infectious agent, (2) receives educational materials about how the infectious agent is transmitted, and (3) is instructed on how to prevent transmission of the infectious agent.⁶⁵⁵

It is a defense to prosecution under this statute if condoms, dental dams, or other latex barriers are used during sexual intercourse.⁶⁵⁶ It is also a defense if HIV status is disclosed to sexual partners.⁶⁵⁷ However, it should be noted that the disclosure of HIV status or the use of condoms or other protection during private, sexual activities may be difficult to prove without witnesses or documentation. Finally, an HIV positive individual may have a defense to prosecution if she/he can

⁶⁴⁷ MINN. STAT. § 609.2241(2)(1) (2014).

⁶⁴⁸ §§ 609.17, 609.185-19 (2014), 609.221-2231 (2014), 609.224-2241(2) (2014).

⁶⁴⁹ Appendix to Minnesota Sentencing Guidelines at MINN. STAT. ch. 244 App. VI.

⁶⁵⁰ See MINN. STAT. § 609.2241.(1)(d).

⁶⁵⁰ See MINN. STAT. § 609.2241.(1)(d).

⁶⁵¹ § 609.2241(1)(a).

⁶⁵² § 609.2241(1)(b).

⁶⁵³ § 609.2241(1)(d).

⁶⁵⁴ *Id.*; It is important to note that Minnesota’s communicable disease statute defines “sexual penetration” as those acts listed in MINN. STAT. §609.341(12) (2014). Under that section, the term “sexual penetration” includes multiple activities that pose no risk of HIV transmission. This definition is cited by many other statutes (i.e., sexual assault and aggravated sexual assault statutes) and is overly broad for the purposes of the communicable disease statute. It was perhaps a legislative oversight to include the entire definition of “sexual penetration” in the statute, as the law specifically notes that only behavior known to transmit an infectious agent may be prosecuted and the use of latex barrier protection is an affirmative defense. This suggests both that it was not the intent of the legislature to prosecute sexual activities that are not known to transmit an infectious agent and that the entire definition of “sexual penetration” is not applicable to Minnesota’s communicable disease statute.

⁶⁵⁵ See § 609.2241(1)(c).

⁶⁵⁶ § 609.2241(1)(e).

⁶⁵⁷ § 609.2241(2)(1).

prove that she/he took practical means to prevent HIV transmission as advised by a doctor or health care professional.⁶⁵⁸

Prosecutions under Minnesota's communicable disease statute include:

- In March 2010, a 28-year-old, HIV positive man was charged with third-degree assault after he engaged in sexual intercourse with two men without disclosing his HIV status.⁶⁵⁹ At least one of the men tested positive for HIV, but such information is not relevant to prosecution.⁶⁶⁰
- In October 2009, an HIV positive man pleaded guilty to intentionally inflicting or attempting to inflict bodily harm on another (misdemeanor assault in the fifth-degree) and was sentenced to ninety days in jail after he had unprotected sex with a woman without disclosing his HIV status.⁶⁶¹

HIV positive persons are prohibited from donating their blood, organs, semen, or body tissues.

Minnesota's communicable disease statute also prohibits HIV positive persons from transferring their blood, semen, organs, or body tissues to others.⁶⁶² The intent to transmit HIV nor actual transmission is required for prosecution.

It is not a violation of the statute if (1) the transfer of blood, semen, organ, or tissue was deemed necessary for medical research, or (2) the HIV positive individual disclosed his/her status on donation forms before transferring the bodily fluids or tissues.⁶⁶³

In *State v. Rick*, the Supreme Court of Minnesota affirmed that this subsection does not apply to sexual conduct.⁶⁶⁴ In 2009, Rick was charged with attempted first-degree assault in violation of MINN. STAT. 609.2241, subdivision 2, for engaging in unprotected consensual sexual activity with a partner on multiple occasions.⁶⁶⁵ The State argued that Rick had either violated subdivision 2(1) by engaging in "sexual penetration" without disclosing his status, or that he had violated subdivision 2(2) by transferring sperm to his partner during the relevant sexual conduct.⁶⁶⁶

At trial, the jury found Rick not guilty of violating subdivision 2(1), but guilty of violating subdivision 2(2).⁶⁶⁷ The court of appeals reversed Rick's conviction, finding that subdivision 2(2)

⁶⁵⁸ § 609.2241(3).

⁶⁵⁹ Vince Tuss, *HIV-positive man charged with assault*, STAR TRIB. (Minneapolis), Mar. 25, 2010, available at <http://www.startribune.com/local/minneapolis/89022527.html>.

⁶⁶⁰ *Id.*

⁶⁶¹ *Minnesota Man Receives 90 Days in Jail for Allegedly Exposing Woman to HIV*, POZ, Oct. 28, 2009, available at http://www.poz.com/articles/duluth_hiv_exposure_1_17491.shtml.

⁶⁶² MINN. STAT. § 609.2241(2)(2).

⁶⁶³ *Id.*

⁶⁶⁴ *State v. Rick*, 835 N.W.2d 478, 487 (Minn. 2013).

⁶⁶⁵ *Id.* at 481.

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

only applied to medical procedures.⁶⁶⁸ The State appealed this reversal, arguing that subdivision 2(2) “criminalizes sexual conduct that involves the transfer of sperm.”⁶⁶⁹

In making its determination, the Supreme Court of Minnesota looked to the relevant legislative history of the communicable disease statute and noted that the exemptions provided in subdivision 2(2) pertain solely to “situations involving ‘medical research’ or ‘donor screening forms.’”⁶⁷⁰ In light of the foregoing, the court held that “subdivision 2(2) applies only to the donation or exchange for value of ‘blood, sperm, organs, or tissue, except as deemed necessary for medical research or if disclosed on donor screening forms.’”⁶⁷¹

Sharing needles or syringes may lead to criminal penalties.

It is unlawful for an HIV positive individual who is aware of her/his status to share non-sterile needles or syringes for the purpose of injecting drugs.⁶⁷² Neither the intent to transmit HIV nor actual transmission is required for prosecution.

Although disclosing one’s HIV status to sexual partners may prevent prosecution, on the face of the statute it is not a defense if HIV status is disclosed before sharing needles with another.⁶⁷³

Prosecution for HIV exposure may thus result even if an HIV positive person shares a needle with another individual fully aware of her/his HIV status and understands the risk to HIV exposure.

HIV positive status results in enhanced prison sentences for sex offenses.

Under Minnesota’s sentencing guidelines, a defendant may receive a higher sentence than what is recommended if aggravating circumstances make her/his conduct more serious than the conduct normally involved in the commission of the offense.⁶⁷⁴ A defendant’s exposure of sexual assault victims to sexually transmitted infections or HIV has been used as a justification for elevated prison sentences.⁶⁷⁵

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.* at 481-82.

⁶⁷⁰ *Id.* at 482-485.

⁶⁷¹ *Id.* at 486.

⁶⁷² § 609.2241(2)(3).

⁶⁷³ *Id.*

⁶⁷⁴ MINN. STAT. § 244.10 (2014).

⁶⁷⁵ See *Kilcoyne v. State*, 344 N.W.2d 394, 397 (Minn. 1984) (finding defendant’s transmission of trichomonas vaginalis to sexual assault victim was one of several aggravating factors justifying an elevated sentence); *State v. Vance*, 392 N.W.2d 679, 684-85 (Minn. Ct. App. 1986) (finding that the trial court appropriately considered both the victim’s young age and the defendant’s transmission of public lice and venereal warts as factors justifying an elevated sentence); *State v. Taylor*, No. C3-88-74, 1988 WL 75555, at *2 (Minn. Ct. App. June 26, 1988) (affirming an elevated sentence based partly on defendant’s transmission of gardnerella to victim); *State v. Banks*, No. C1-94-1491, 1995 WL 118922, at *2 (Minn. Ct. App. Mar. 21, 1995) (finding the defendant’s transmission of venereal disease to sexual assault victim was one of several aggravating factors justifying an elevated sentence).

HIV positive criminal defendants may receive enhanced sentences regardless of whether they transmit HIV to sexual assault victims.⁶⁷⁶ In *Perkins v. State*, a man with AIDS received the statutory maximum of thirty years in prison for a sexual assault, three times higher than the sentence recommended by guidelines.⁶⁷⁷ At the time of trial, it was not made public whether or not the woman involved was infected with HIV, but such facts were not necessary for the enhanced sentencing.⁶⁷⁸ The trial judge remarked that he could not “fathom on the face of this earth if there was a more devastating offense to a victim than being sexually assaulted by a person with AIDS The victim of this offense will not know for several months whether or not she contracted the HIV virus.”⁶⁷⁹

Note on civil commitment: Under the civil commitment laws of Minnesota, an individual found to be “sexually dangerous,” having a “sexual psychopathic personality,” or “mentally ill and dangerous” can be indefinitely confined by the state to protect the public safety.⁶⁸⁰ New York State has attempted to use a similar law to impose further punishments for HIV exposure.⁶⁸¹ In 2008, a civil commitment proceeding was initiated against an HIV positive man in *In re Civil Commitment of Renz*.⁶⁸² Renz appealed his commitment for being “mentally ill and dangerous,” arguing that though he was mentally ill he was not dangerous and his commitment should only be for his mental illness.⁶⁸³ To be classified as “mentally ill and dangerous,” an individual must be mentally ill, present a “clear danger to the safety of others” because she/he has “engaged in an overt act causing or attempting to cause serious physical harm to another,” and there must be a “substantial likelihood that the person will engage in acts capable of inflicting serious harm on another.”⁶⁸⁴ Renz contended that there was no clear and convincing evidence that he engaged in any act causing or attempting to cause physical harm to another.⁶⁸⁵

The court found that because he knew his HIV positive status and engaged in unprotected sexual activity, Renz had committed “an overt act causing or attempting to cause physical harm to another.”⁶⁸⁶ While there was no evidence of a specific sexual partner or instance of unprotected sexual conduct, the court relied on medical testimony reasoning that Renz must have engaged in unprotected sex because he had contracted gonorrhea and syphilis.⁶⁸⁷ The court also noted that though earlier case law held that “the risk posed by [an HIV positive individual] who intended to have intercourse with others without advising them of his HIV status should [be] addressed by the Health Threat Procedures Act, rather than civil commitment,” an individual’s HIV status would not

⁶⁷⁶ See *State v. Sebasky*, 547 N.W.2d 93, 100-101 (Minn. Ct. App. 1996) (affirming a triple departure from the recommended sentence for criminal sexual conduct where defendant knew he was HIV positive while sexually abusing two boys).

⁶⁷⁷ *Perkins v. State*, 559 N.W.2d 678, 683-85 (Minn. 1997).

⁶⁷⁸ *Perkins*, 559 N.W.2d at 682, 684.

⁶⁷⁹ *Id.* at 684.

⁶⁸⁰ MINN. STAT. §§ 253B.18 (2014), 253D.07 (2014).

⁶⁸¹ See New York section.

⁶⁸² *In re Civil Commitment of Renz*, No. A08-898, 2008 WL 4706962 (Minn. Ct. App. 2008).

⁶⁸³ *Id.* at *1. It should be noted that there are stark differences between civil commitment for being “mentally ill” and civil commitment for being “mentally ill and dangerous.” This includes the place and duration of commitment as well as the procedures for being discharged. MINN. STAT. §§ 253B.09, 253B.18 (2014).

⁶⁸⁴ MINN. STAT. § 253B.02(17) (2014).

⁶⁸⁵ *Renz*, 2008 WL 4706962, at *2.

⁶⁸⁶ *Id.* at *3.

⁶⁸⁷ *Id.*

preclude civil commitment if other requirements of the law were met.⁶⁸⁸ Here, the court found that due to Renz’s sexual history, he met the requirements for commitment as mentally ill and dangerous.⁶⁸⁹

Note on coercion: Under Minnesota victims’ rights laws, any individual coerced into sex work by another person may pursue a civil action against that person.⁶⁹⁰ Evidence of “coercion” may include “exploiting HIV status, particularly where the defendant’s previous coercion led to the HIV exposure.”⁶⁹¹

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⁶⁸⁸ *Id.* at *4 (citing *In re Stilinovich*, 479 N.W.2d 731, 735-36 (Minn. Ct. App. 1992) (finding the use of Minnesota’s “psychopathic personality” statute inappropriate for civil commitment where HIV positive defendant failed to show concern for the risk of HIV transmission through sexual intercourse)). It should be noted that *In re Stilinovich* pre-dates Minnesota’s communicable disease and “sexually dangerous person” statutes.

⁶⁸⁹ *Id.* at *5.

⁶⁹⁰ MINN. STAT. § 611A.81 (2014).

⁶⁹¹ § 611A.80(2)(22) (2014).

Mississippi Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MISS. CODE ANN. § 97-27-14*****Endangerment by bodily substance***

(1) It shall be unlawful for any person to knowingly expose another person to human immunodeficiency virus (HIV), hepatitis B or hepatitis C. Prior knowledge and willing consent to the exposure is a defense to a charge brought under this paragraph. A violation of this subsection shall be a felony.

(2)(a) A person commits the crime of endangerment by bodily substance if the person attempts to cause or knowingly causes a corrections employee, a visitor to a correctional facility or another prisoner or offender to come into contact with blood, seminal fluid, urine, feces or saliva.

(b) As used in this subsection, the following definitions shall apply unless the context clearly requires otherwise:

(i) “Corrections employee” means a person who is an employee or contracted employee of a subcontractor of a department or agency responsible for operating a jail, prison, correctional facility or a person who is assigned to work in a jail, prison or correctional facility.

(ii) “Offender” means a person who is in the custody of the Department of Corrections.

(iii) “Prisoner” means a person confined in a county or city jail.

(c) A violation of this subsection is a misdemeanor unless the person violating this section knows that he is infected with human immunodeficiency virus (HIV), hepatitis B or hepatitis C, in which case it is a felony.

(3) Any person convicted of a felony violation of this section shall be imprisoned for not less than three (3) years nor more than ten (10) years and a fine of not more than Ten Thousand Dollars (\$ 10,000.00), or both.

(4) Any person guilty of a misdemeanor violation of this section shall be punished by imprisonment in the county jail for up to one (1) year and may be fined One Thousand Dollars (\$ 1,000.00), or both.

(5) The provisions of this section shall be in addition to any other provisions of law for which the actions described in this section may be prosecuted.

MISS. CODE ANN. § 41-23-2

Violating lawful order, life-threatening communicable diseases

Any person who shall knowingly and willfully violate the lawful order of the county, district or state health officer where that person is afflicted with a life-threatening communicable disease or the causative agent thereof shall be guilty of a felony and, upon conviction, shall be punished by a fine not exceeding Five Thousand Dollars (\$ 5,000.00) or by imprisonment in the penitentiary for not more than five (5) years, or by both.

A broad range of HIV exposures may result in imprisonment.

In Mississippi, it is a felony punishable by up to ten years in prison and/or a \$10,000 fine if an HIV positive person knowingly exposes another to HIV.⁶⁹²

Neither the intent to transmit HIV nor actual transmission is required for conviction.

It is a defense to prosecution if the complainant (1) was aware of the defendant's HIV status and (2) willingly consented to HIV exposure.⁶⁹³ Yet while disclosure is a complete defense in Mississippi, proving disclosure of HIV status during private, sexual encounters is difficult without witnesses or documentation. Whether or not disclosure actually occurred is often open to interpretation and always depends on the words of one person against another.

Prosecutions under Mississippi's exposure statute include:

- In February 2014, a 51-year-old HIV positive man was charged with exposing another to HIV, among other things, after spitting in the face of a police officer during an arrest.⁶⁹⁴ While an article from the Clarion Ledger detailing this arrest explains the "circumstances" under which saliva can transmit HIV, it should be noted that the CDC has concluded, "HIV cannot be spread through saliva, and there is no documented case of transmission from an HIV-infected person spitting on another person."⁶⁹⁵
- In July 2013, a 29-year-old HIV positive man was charged with knowingly exposing a minor

⁶⁹² MISS. CODE ANN. § 97-27-14(1), (3) (2014).

⁶⁹³ *Id.*

⁶⁹⁴ *Gulfport man charged with exposing officer to HIV*, WLOX.COM, Feb. 6, 2014, available at <http://www.wlox.com/story/24656007/gulfport-man-charged-with-exposing-officer-to-hiv>; *HIV positive man accused of exposing Gulfport officer during arrest*, CLARION LEDGER, Feb. 6, 2014, available at <http://www.clarionledger.com/article/20140206/NEWS01/140206019/HIV-positive-man-accused-exposing-Gulfport-officer-during-arrest>.

⁶⁹⁵ *HIV positive man accused of exposing Gulfport officer during arrest*, CLARION LEDGER; CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

to HIV after having sexual relations with a 15-year-old girl.⁶⁹⁶ The man had been released from prison three months earlier, where he had served a three-year sentence for similar charges.⁶⁹⁷

- In October 2008, a 28-year-old woman pleaded guilty to knowingly exposing her husband to HIV after she failed to tell him that she was HIV positive.⁶⁹⁸ The woman had allegedly known she was HIV positive since 1997, but never told her husband, whom she married in 2003.⁶⁹⁹ Under the terms of her plea agreement, she received a ten-year prison sentence, with nine years suspended and one year to be served under house arrest.⁷⁰⁰ Neither the woman's ex-husband nor her five-year-old son tested positive for HIV, though such facts play no role in a prosecution.⁷⁰¹

Exposing prisoners, prison guards, or prison visitors to bodily fluids is prohibited.

Mississippi's HIV statute specifically targets HIV positive inmates who throw or otherwise expose others to their bodily fluids during confrontations.⁷⁰² It is a misdemeanor punishable by up to one year in jail and/or a \$1,000 fine⁷⁰³ if a person attempts to cause or knowingly causes a corrections employee, visitor to a correctional facility, or fellow prisoner or offender to come into contact with her/his blood, seminal fluid, urine, feces, or saliva.⁷⁰⁴ A violation of this law becomes a felony, punishable by up to ten years in prison and/or a \$10,000 fine,⁷⁰⁵ if the charged individual knew that she/he was HIV positive.⁷⁰⁶

This "bodily substance" statute may cover a large class of persons beyond prisoners and prison guards. Under the terms of this statute, "offenders" include anyone in the custody of the department of corrections and "prisoners" include anyone confined in a city or county jail.⁷⁰⁷ "Corrections employees" include any employee of an agency or department responsible for operating a jail, prison, or correctional facility, or anyone working in these facilities.⁷⁰⁸ Exposing visitors to these facilities is also criminalized.⁷⁰⁹

Neither the intent to transmit HIV nor actual transmission is required.

⁶⁹⁶ JB Clark, *Tupelo man charged with exposing HIV again*, DJOURNAL.COM, July 13, 2013, available at <http://djournal.com/news/tupelo-man-charged-with-exposing-hiv-again/>.

⁶⁹⁷ *Id.*

⁶⁹⁸ Nicklaus Lovelady, *Wife gets house arrest in HIV case*, CLARION LEDGER, Oct. 6, 2008, available at <http://www.clarionledger.com/apps/pbcs.dll/article?AID=/20081007/NEWS/810070362/1001/NEWS&enck=1>.

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.*

⁷⁰¹ *Id.*

⁷⁰² MISS. CODE ANN. § 97-27-14(2) (2014).

⁷⁰³ § 97-27-14(4).

⁷⁰⁴ § 97-27-14(2).

⁷⁰⁵ § 97-27-14(3).

⁷⁰⁶ § 97-27-14(2)(c).

⁷⁰⁷ § 97-27-14(2)(b)(ii)-(iii).

⁷⁰⁸ § 97-27-14(2)(b)(i).

⁷⁰⁹ § 97-27-14(2)(a).

This statute imposes additional fines and prison sentences for offenders who are HIV positive, regardless of whether they expose others to a risk of HIV infection. An HIV positive offender will serve up to ten times more prison time than an HIV negative offender, even if the “bodily substance” in question is urine, feces, or saliva, which pose only theoretical risks of HIV infection.

Furthermore, because attempting to expose others to bodily substances is punishable, it is not a defense that these substances did not come into contact with another or that HIV transmission was impossible under the circumstances.

Violating a quarantine order of the health department is a felony.

Imprisonment may result from violating directions from the state health department. HIV positive persons may be mandated by the health department to disclose their HIV status to sexual partners and avoid intravenous drug use.

Under the public health and quarantine laws of Mississippi, the state department of health is authorized to “investigate and control the causes of epidemic, infectious and other disease affecting the public health.”⁷¹⁰ Part of this authority includes the power to “establish, maintain and enforce isolation and quarantine,” and “to exercise such physical control over property and individuals as the department may find necessary for the protection of the public health.”⁷¹¹ It is a felony, punishable by up to five years in prison and/or a \$5,000 fine, for an individual afflicted with a “life-threatening communicable disease” to willfully violate an order of the state health department issued under this authority.⁷¹²

Individuals living with HIV in Mississippi should be aware that this public health law has been used to prosecute at least one HIV positive person for failing to disclose his HIV status to sexual partners.⁷¹³ In 1992, the health department of Mississippi issued a quarantine order against an HIV positive man.⁷¹⁴ The order stated that due to his HIV positive status, the man “posed a risk of harm to the public health.”⁷¹⁵ The order further required the man to (1) disclose his HIV status to sexual partners and (2) abstain from engaging in activities involving the mixture of his blood with the blood of another (i.e., intravenous drug use).⁷¹⁶ The following year, the man was arrested for violating the quarantine order after he failed to tell a sexual partner that he was HIV positive.⁷¹⁷ The man was convicted and sentenced to five years in prison.⁷¹⁸

The only impetus for the man’s quarantine order was a positive test for HIV.⁷¹⁹ Under the terms of the order, using protection during sexual intercourse was not a defense.⁷²⁰

⁷¹⁰ § 41-23-5 (2014).

⁷¹¹ § 41-23-5.

⁷¹² § 41-23-2 (2014).

⁷¹³ *Carter v. State*, 803 So. 2d 1191 (Miss. Ct. App. 1999).

⁷¹⁴ *Id.* at 1192-93.

⁷¹⁵ *Id.* at 1193.

⁷¹⁶ *Id.*

⁷¹⁷ *Id.*

⁷¹⁸ *Id.*

⁷¹⁹ *Id.* at 1192-93.

⁷²⁰ *Id.* at 1192-93.

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Missouri Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MO. REV. STAT. § 191.677*****Prohibited acts, criminal penalties***

1. It shall be unlawful for any individual knowingly infected with HIV to:
 - (1) Be or attempt to be a blood, blood products, organ, sperm or tissue donor except as deemed necessary for medical research;
 - (2) Act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV, in one of the following manners:
 - (a) Through contact with blood, semen or vaginal secretions in the course of oral, anal or vaginal sexual intercourse; or
 - (b) By the sharing of needles; or
 - (c) By biting another person or purposely acting in any other manner which causes the HIV-infected person's semen, vaginal secretions, or blood to come into contact with the mucous membranes or nonintact skin of another person.

Evidence that a person has acted recklessly in creating a risk of infecting another individual with HIV shall include, but is not limited to, the following:

- a. The HIV-infected person knew of such infection before engaging in sexual activity with another person, sharing needles with another person, biting another person, or purposely causing his or her semen, vaginal secretions, or blood to come into contact with the mucous membranes or nonintact skin of another person, and such other person is unaware of the HIV-infected person's condition or does not consent to contact with blood, semen or vaginal fluid in the course of such activities;
 - b. The HIV-infected person has subsequently been infected with and tested positive to primary and secondary syphilis, or gonorrhea, or chlamydia; or
 - c. Another person provides evidence of sexual contact with the HIV-infected person after a diagnosis of an HIV status.
2. Violation of the provisions of subdivision (1) or (2) of subsection 1 of this section is a class B felony unless the victim contracts HIV from the contact in which case it is a class A felony.
 3. The department of health and senior services or local law enforcement agency, victim or others may file a complaint with the prosecuting attorney or circuit attorney of a court of competent jurisdiction alleging that a person has violated a provision of subsection 1 of this section. The department of health and senior services shall assist the prosecutor or circuit attorney in preparing such case, and upon request, turn over to peace officers, police officers, the prosecuting attorney or circuit attorney, or ...

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the attorney general records concerning that person's HIV-infected status, testing information, counseling received, and the identity and available contact information for individuals with whom that person had sexual intercourse or deviate sexual intercourse and those individuals' test results.

4. The use of condoms is not a defense to a violation of paragraph (a) of subdivision (2) of subsection 1 of this section.

MO. REV. STAT. § 565.085

Crime of endangering a corrections employee—definitions—penalty

1. An offender or prisoner commits the crime of endangering a corrections employee, a visitor to a correctional facility, or another offender or prisoner if he or she attempts to cause or knowingly causes such person to come into contact with blood, seminal fluid, urine, feces, or saliva.

2. For the purposes of this section, the following terms mean:

- (1) "Corrections employee", a person who is an employee, or contracted employee of a subcontractor, of a department or agency responsible for operating a jail, prison, correctional facility, or sexual offender treatment center or a person who is assigned to work in a jail, prison, correctional facility, or sexual offender treatment center;
- (2) "Offender", a person in the custody of the department of corrections;
- (3) "Prisoner", a person confined in a county or city jail.

3. Endangering a corrections employee, a visitor to a correctional facility, or another offender or prisoner is a class D felony unless the substance is unidentified in which case it is a class A misdemeanor. If an offender or prisoner is knowingly infected with the human immunodeficiency virus (HIV), hepatitis B or hepatitis C and exposes another person HIV or hepatitis B or hepatitis C by committing the crime of endangering a corrections employee, a visitor to a correctional facility, or another offender or prisoner, it is a class C felony.

MO. REV. STAT. § 567.020

Prostitution

1. A person commits the crime of prostitution if the person performs an act of prostitution.

2. Prostitution is a class B misdemeanor unless the person knew prior to performing the act of prostitution that he or she was infected with HIV in which case prostitution is a class B felony. The use of condoms is not a defense to this crime.

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3. As used in this section, “HIV” means the human immunodeficiency virus that causes acquired immunodeficiency syndrome.

4. The judge may order a drug and alcohol abuse treatment program for any person found guilty of prostitution, either after trial or upon a plea of guilty, before sentencing. For the class B misdemeanor offense, upon the successful completion of such program by the defendant, the court may at its discretion allow the defendant to withdraw the plea of guilty or reverse the verdict and enter a judgment of not guilty. For the class B felony offense, the court shall not allow the defendant to withdraw the plea of guilty or reverse the verdict and enter a judgment of not guilty. The judge, however, has discretion to take into consideration successful completion of a drug or alcohol treatment program in determining the defendant's sentence.

MO. REV. STAT. § 558.011

Sentence of imprisonment, terms—conditional release

1. The authorized terms of imprisonment, including both prison and conditional release terms, are:

- (1) For a class A felony, a term of years not less than ten years and not to exceed thirty years, or life imprisonment;
- (2) For a class B felony, a term of years not less than five years and not to exceed fifteen years;
- (3) For a class C felony, a term of years not to exceed seven years;
- (6) For a class B misdemeanor, a term not to exceed six months;

It is a felony to fail to disclose one’s HIV status to sexual partners, and condom use is not a defense.

Missouri’s HIV-exposure statute makes it a felony punishable by up to fifteen years in prison, or as many as thirty years if HIV is transmitted, for an HIV positive person who knows her/his status to recklessly expose someone, without disclosing his/her status, through contact with blood, semen, or vaginal secretions during oral, anal, or vaginal sex.⁷²¹ Other proscribed contact includes contact of certain fluids with mucus membranes, biting, and the sharing of needles.⁷²²

The only affirmative defense under this statute is if one has disclosed her/his HIV status to sexual partners prior to engaging in sexual conduct.⁷²³ Disclosure of HIV status can be difficult to prove in court, as the only evidence available is often the word of one party against that of another.

⁷²¹ MO. REV. STAT. §§ 191.677, 558.011 (2014).

⁷²² § 191.677.

⁷²³ *State v. Wilson*, 256 S.W.3d 58, 64 (Mo. 2008) (stating that “[t]he statute is unambiguous that one who knows he is HIV positive is reckless [and subject to prosecution] if he has sexual intercourse with another without making that other person aware of his HIV status . . . the statute does not contemplate that withdrawal [prior to ejaculation] is in itself a complete defense.”).

In *State v. Yonts*, the Missouri Court of Appeals upheld a conviction for reckless exposure of another to HIV despite evidence that the parties continued their ongoing sexual relationship even after the defendant disclosed his HIV positive status.⁷²⁴ The defendant was sentenced to one-year imprisonment for exposing his girlfriend, the complainant, to HIV.⁷²⁵ Though the defendant testified that he disclosed his HIV status prior to any sexual conduct, the complainant testified it was not until ten months into their relationship that the defendant told her he was HIV positive.⁷²⁶ According from the complainant, after the defendant's disclosure she continued to have unprotected sex with him because the defendant told her that the medication he was taking would prevent HIV transmission – which may have been the case if he had a low viral load.⁷²⁷ The complainant did not test positive for HIV, but this was irrelevant to the prosecution.⁷²⁸

It is difficult to comprehend that a jury could find the defendant's actions “reckless” when the complainant also engaged in unprotected sex with full knowledge of the defendant's status. This case serves as a stark example of the difficulty in defending oneself against accusations of HIV exposure and proving disclosure to sexual partners under criminal HIV transmission statutes.

In *State v. Wilson*, the HIV positive defendant was convicted of, amongst other charges, reckless exposure to HIV.⁷²⁹ On appeal, the defendant argued he could not be convicted under the statute because he ejaculated outside the body and therefore did not recklessly expose the complainant's mucus membrane to HIV.⁷³⁰ The Missouri Supreme Court concluded that “[w]hile the evidence regarding withdrawal would have been relevant to the jury's determination of recklessness, the statute does not contemplate that withdrawal is in itself a complete defense.”⁷³¹

The Missouri statute has been unsuccessfully challenged for being unconstitutionally vague.⁷³² In *State v. Mahan*, the Missouri Supreme Court consolidated the appeals of two men who were convicted for failing to inform their sexual partners that they were HIV positive.⁷³³ One of the men, Sykes, was sentenced to two consecutive five-year terms of imprisonment for having sex with two women and failing to disclose his HIV status.⁷³⁴ The other man, Mahan, was sentenced to five years imprisonment for failing to tell his sexual partner that he was HIV positive.⁷³⁵

The appellants argued that the statute was overly broad and criminalized behavior such as an HIV positive mother giving birth to her child.⁷³⁶ The court held that the appellants lacked standing on this matter because their behavior fell directly within the language of the statute and, as such, they could

⁷²⁴ 84 S.W.3d 516, 517 (Mo. Ct. App. 2002)

⁷²⁵ *Id.*

⁷²⁶ *Id.* at 518.

⁷²⁷ *Id.*

⁷²⁸ *Id.*

⁷²⁹ *Wilson*, 256 S.W.3d at 59.

⁷³⁰ *Id.* at 64.

⁷³¹ *Id.* (noting that the State had also provided evidence that HIV can be transmitted by sexual fluids even if the actor withdraws prior to ejaculation).

⁷³² *State v. Mahan*, 971 S.W.2d 307, 309 (Mo. 1998).

⁷³³ *Id.*

⁷³⁴ *Id.* at 310, 311.

⁷³⁵ *Id.* at 311.

⁷³⁶ *Id.*

not challenge hypothetical scenarios that were not reflective of their behavior.⁷³⁷ The appeal by Mahan also argued that the statute was overly vague, as the phrase “grave and unjustifiable risk” did not provide enough notice as to what acts can be prohibited under the statute.⁷³⁸ Mahan reasoned that because the risk of transmitting HIV was not quantitatively known to scientists, a person of “ordinary intelligence” would have no way of knowing when one’s conduct would rise to a “grave and unjustifiable risk.”^{739, 740} The court found because Mahan was counseled that HIV could be transmitted through unprotected sex, including anal sex, and he continued to have anal sex without disclosing his HIV status, the statute was not vague as applied to him, and he had full notice that his actions could result in the transmission of HIV.⁷⁴¹ The court upheld both of the convictions.⁷⁴²

One notable aspect of Missouri’s law is that an HIV positive defendant’s subsequent infection with syphilis, gonorrhea, or chlamydia may be used as evidence—to show that the defendant acted recklessly in creating a risk of infecting another with HIV—presumably because a positive test result for an STI can show that the HIV positive defendant was engaging in unprotected sex.⁷⁴³ This statute allows the state to more easily prosecute HIV positive persons charged with failing to tell a sexual partner about their HIV status because, as opposed to relying on facts and witness testimony, prosecutors can rely on the defendant’s medical records to prove that she/he was “recklessly” having unprotected sex and placing others at risk.⁷⁴⁴ This segment of the statute all but eliminates the need for complainant testimony and other evidence to prove whether or not the defendant engaged in undisclosed, “reckless” sex. This unjustly prosecutes persons based on their medical history as opposed to the facts of a case.⁷⁴⁵

The Missouri statute also provides that evidence provided by a complainant of sexual contact with the HIV positive defendant after the complainant’s own positive HIV test may be used to show that the defendant acted recklessly in creating a risk of infecting another individual with HIV.⁷⁴⁶ Under the statute the prosecution would have to prove a sexual relationship existed between the complainant and HIV positive defendant and that the HIV positive defendant knew of her/his HIV positive status at the time of the sexual activity.⁷⁴⁷ This statute enables prosecutions of persons where the defendant can face up to thirty years imprisonment for transmitting HIV without direct evidence as to the actual source of the complainant’s infection.⁷⁴⁸

⁷³⁷ *Id.*

⁷³⁸ *Id.* at 312.

⁷³⁹ *Id.* at 312.

⁷⁴⁰ It is important to note that there have been many scientific studies since *State v. Mahan* concluding that HIV has a very low rate of transmission even in the most aggravating of circumstances.

⁷⁴¹ *Mahan*, 971 S.W.2d at 312.

⁷⁴² *Id.* at 309.

⁷⁴³ MO. REV. STAT. § 191.677.

⁷⁴⁴ *See id.*

⁷⁴⁵ The Centers for Disease Control and Prevention (CDC) have found that persons who are infected with syphilis are two to five times more likely to acquire HIV when exposed to the virus because the sores, ulcers, or breaks in skin or mucus membrane caused by syphilis break down the barriers against infection. *CDC Fact Sheet: Syphilis*, Ctr. for Disease Control and Prevention, Dec. 2007, available at <http://www.cdc.gov/std/syphilis/stdfact-syphilis.htm>. The CDC has also found that people with gonorrhea can more easily contract and transmit HIV. *CDC Fact Sheet: Gonorrhea*, Ctr. for Disease Control and Prevention, Dec 2007, available at <http://www.cdc.gov/std/chlamydia/stdfact-chlamydia.htm>.

⁷⁴⁶ MO. REV. STAT. § 191.677.

⁷⁴⁷ *Id.*

⁷⁴⁸ MO. REV. STAT. §§ 191.677, 558.011.

Other cases and prosecutions for exposing persons to HIV in Missouri include:

- In June 2012, a 48-year-old HIV positive man and his HIV positive girlfriend were found guilty of knowingly exposing another person to HIV when they engaged in sexual activities with another couple without disclosing their HIV status.⁷⁴⁹
- In February 2012, an HIV positive man was charged with recklessly risking the infection of another person with HIV when he bit a police officer.⁷⁵⁰ According to the probable cause statement, the bite left marks but did not break the skin.⁷⁵¹
- In January 2012, a 26-year-old HIV positive man was charged with four counts of reckless risk of infecting another person with HIV for engaging in vaginal sexual intercourse with his girlfriend without disclosing his HIV status.⁷⁵²
- In 2011, the St. Louis Metropolitan Police Department began investigating an HIV positive man after he was charged under the Illinois HIV criminal law.⁷⁵³ The St. Louis Circuit Attorney's Office later issued warrants against the man for three counts of knowingly infecting another with HIV.⁷⁵⁴
- In March 2011, an HIV positive man was charged with recklessly and knowingly risking infection of another with HIV after biting a police officer during an arrest.⁷⁵⁵
- In March 2011, a 36-year-old HIV positive man was charged with criminal transmission of HIV for engaging in intimate contact with a woman.⁷⁵⁶
- In March 2011, an HIV positive man was charged with eight counts of exposing another person to HIV after police, when responding to a domestic disturbance, discovered he had not disclosed his HIV status to his live-in girlfriend.⁷⁵⁷
- In January 2011, a “man was sentenced to [ten] years in prison after pleading guilty to

⁷⁴⁹ Jennifer Mann, *2 Guilty of Risking Transmission of HIV at St. Louis Mardi Gras Party*, ST. LOUIS POST-DISPATCH, June 12, 2012, available at http://www.stltoday.com/news/local/crime-and-courts/guilty-of-risking-transmission-of-hiv-at-st-louis-mardi/article_33d9d61d-057e-582d-b319-894164df2710.html.

⁷⁵⁰ Tyler Francke, *Man Accused of Biting Officer*, BRANSON TRI-LAKES NEWS, Feb. 7, 2012, available at http://bransontrilakesnews.com/news_free/article_7015e792-51d0-11e1-b3a4-0019bb2963f4.html.

⁷⁵¹ *Id.*

⁷⁵² Kevin Held, *Jermaine Johnson Charged with Spreading HIV*, KSDK.COM, Jan. 24, 2012, available at <http://www.ksdk.com/news/article/299200/3/Local-man-charged-with-spreading-HIV-to-girlfriend>.

⁷⁵³ Kevin Held, *Patrick Wayne Gregory Accused of Knowingly Passing on HIV*, KSDK.COM, Oct. 13, 2011, available at <http://www.ksdk.com/news/article/281200/3/Police-Man-knowingly-passed-HIV-onto-others>.

⁷⁵⁴ *Id.*

⁷⁵⁵ *Man with HIV Charged with Biting O'Fallon Police Officer*, KMOV.COM, Mar. 10, 2011, available at <http://www.kmov.com/news/local/Man-with-HIV-charged-with-biting-OFallon-Missouri-police-officer-117739179.html>.

⁷⁵⁶ *Man Charged with Criminal Transmission of HIV*, KSDK.COM, Mar. 3, 2011, available at <http://www.ksdk.com/news/article/247286/3/Man-charged-with-criminal-transmission-of-HIV>.

⁷⁵⁷ Des Peres, *Area Crime Reports*, WEBSTER-KIRKWOOD TIMES, Mar. 4, 2011, available at <http://www.websterkirkwoodtimes.com/Articles-i-2011-03-04-173882.114137-Area-Crime-Reports.html#ixzz1Fe6WSUtC>.

knowingly infecting a woman with HIV.”⁷⁵⁸

- In 2010, a 37-year-old HIV positive man was charged with two counts of assault for allegedly threatening and spitting on police officers.⁷⁵⁹
- In September 2009, a 40-year-old man was charged with six counts of recklessly risking the infection of another with HIV after transmitting the virus to a sexual partner.⁷⁶⁰
- In 2008, a 43-year-old man was charged with recklessly risking another person with HIV infection for having a sexual relationship with a woman without disclosing his status.⁷⁶¹
- In 2000, an HIV negative man was convicted of attempted murder and sentenced to life imprisonment for infecting his son with HIV positive blood.⁷⁶²
- In 2004, a man pleaded guilty and was sentenced to fifteen years imprisonment for five counts of the class B felony and eight counts of the class D felony of recklessly exposing his sexual partners to HIV without disclosing his HIV status.⁷⁶³
- An HIV positive man was convicted of two counts of exposing his sexual partners to HIV and was sentenced to ten years imprisonment in addition to being convicted as a sex offender.⁷⁶⁴
- A man was convicted of knowingly exposing his ex-girlfriend to HIV because he failed to tell her that he was HIV positive.⁷⁶⁵
- In 2000, an HIV positive man was convicted of recklessly exposing his former girlfriend to HIV without her knowledge and consent and was sentenced to five years imprisonment.⁷⁶⁶ His sentence was later suspended and he was placed on five years probation and fined \$5,000.⁷⁶⁷
- A 43-year-old man was arrested for failing to disclose his HIV status to his sexual partners.⁷⁶⁸
- In 2009, a 40-year-old HIV positive man was charged with exposing his sexual partner to

⁷⁵⁸ *SW Missouri Man Pleads Guilty to Infecting Woman with HIV*, ST. LOUIS POST-DISPATCH, Jan. 18, 2011, available at http://www.stltoday.com/news/local/crime-and-courts/article_ebe29ba2-2307-11e0-988e-0017a4a78c22.html.

⁷⁵⁹ Kathryn Wall, *Man Claiming He Has HIV Charged in Assault on Officers*, NEWS-LEADER.COM, Nov. 2, 2010, available at <http://www.news-leader.com/article/20101102/NEWS01/11020343/Man-claiming-he-has-HIV-charged-in-assault-on-officers>.

⁷⁶⁰ Patrick M. O’Connell, *Northwoods Man Charged in HIV Case*, ST. LOUIS POST-DISPATCH, Sept. 24, 2009, available at http://www.stltoday.com/news/local/crime-and-courts/article_939b9889-f8fb-5cfd-9004-430cca57ebfd.html.

⁷⁶¹ Jasmine Huda, *St. Charles Man Accused of Exposing Men & Women to HIV*, KSDK.COM, Feb. 12, 2008, available at <http://www.ksdk.com/news/story.aspx?storyid=140165>.

⁷⁶² *State v. Stewart*, 18 S.W.3d 75, 81 (Mo. Ct. App. 2000).

⁷⁶³ *Spicer v. State*, 300 S.W.3d 249, 249 (Mo. Ct. App. 2009).

⁷⁶⁴ *State v. Newlon*, 216 S.W.3d 180, 182-83 (Mo. Ct. App. 2007).

⁷⁶⁵ *State v. White*, 247 S.W.3d 557, 560 (Mo. Ct. App. 2007).

⁷⁶⁶ *State v. Moss*, 83 S.W.3d 604, 604 (Mo. Ct. App. 2002).

⁷⁶⁷ *Id.*

⁷⁶⁸ *Man Charged for Knowingly Spreading HIV*, KSPR NEWS, Feb. 12, 2008, available at <http://www.kspr.com/news/local/15553847.html>.

HIV after allegedly failing to disclose his HIV status.⁷⁶⁹

Sexually violent predator statutes have been applied to persons in Missouri based solely on their HIV positive status.

In the Missouri Court of Appeals case, *In re Coffel*, an HIV positive woman's status was a factor in her three-year civil confinement as a sexually violent predator.⁷⁷⁰ Missouri defines a sexually violent predator as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who [...] has pled guilty or been found guilty [...] of a sexually violent offense."⁷⁷¹

Coffel pleaded guilty to two counts of sodomy based on an incident that took place when she was 18-years-old.⁷⁷² On a dare, Coffel had placed the penises of an 11-year-old and 13-year-old boy briefly in her mouth.⁷⁷³ When the boys discovered she was HIV positive they reported the incident to their mother.⁷⁷⁴ After pleading guilty she was sentenced to five years imprisonment and though a pre-sentencing report said she was not a sexual predator, her end-of-confinement evaluation determined that due to her lack of remorse or concern about the possibility of infecting others with HIV, she was more likely than not to re-offend and should be considered a sexually violent predator.⁷⁷⁵ The Missouri Court of Appeals noted that this report was prepared by an individual who was not qualified to diagnose or testify in the state.⁷⁷⁶

At trial, a multidisciplinary team as well as a psychologist determined that Coffel was not a sexual predator.⁷⁷⁷ In particular, the psychologist noted that the end-of-confinement report was based in large part on the erroneous assumption that Coffel's saliva could have transmitted HIV during the acts of sodomy.⁷⁷⁸ The trial court, despite this evidence, ordered her to be confined "until such time as her mental abnormality has so changed that she is safe to be at large."⁷⁷⁹

On appeal, the Missouri Court of Appeals focused on whether the state had met its burden in proving that Coffel was more likely than not to commit another sexually violent crime, as required by the sexually violent predator statute.⁷⁸⁰ The court found that only two out of ten of the State's witnesses addressed whether Coffel was likely to commit the crime again, and that the expert testimonies did not base their opinions on psychological theories but rather on private, subjective, untested, unsupported analysis.⁷⁸¹ Based on this evidence, the court ordered Coffel's release because the state failed to meet its burden.⁷⁸² This case highlights the extent to which a person's HIV status can be erroneously applied in civil confinement and sexually violent predator status.

⁷⁶⁹ *Missouri Man with HIV Charged with Reckless Sexual Contact*, KANSAS CITY STAR (MO), Sept. 23, 2009.

⁷⁷⁰ *In re Coffel*, 117 S.W.3d 116, 118 (Mo. Ct. App. 2003).

⁷⁷¹ MO. REV. STAT. § 632.480(5) (2010).

⁷⁷² *In re Coffel*, 117 S.W.3d at 118.

⁷⁷³ *Id.* at 117-18.

⁷⁷⁴ *Id.* at 118.

⁷⁷⁵ *Id.*

⁷⁷⁶ *Id.*

⁷⁷⁷ *Id.* at 118-19.

⁷⁷⁸ *Id.* at 120.

⁷⁷⁹ *Id.* at 127.

⁷⁸⁰ *Id.*

⁷⁸¹ *Id.* at 127-29.

⁷⁸² *Id.* at 129.

Acts known not to transmit HIV, such as spitting,⁷⁸³ are punishable by felony penalties of five to fifteen years' imprisonment.

Under Missouri's exposure statute, it is a felony to bite, or by acting purposefully in any other manner to expose someone to the semen, vaginal secretions, or blood of an HIV positive person.⁷⁸⁴ The CDC has concluded that there exists only a "remote" possibility that HIV could be transmitted through a bite.⁷⁸⁵ The CDC has also concluded that spitting alone has never been shown to transmit HIV.⁷⁸⁶ Missouri's statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

In 2010, an HIV positive man was charged with exposure to HIV for spitting at a police officer.⁷⁸⁷

In a case from 2004, an HIV positive man was arrested for knowingly exposing another to HIV after he bit a police officer.⁷⁸⁸ Though the man had been intoxicated, as his blood alcohol level was twice the legal limit, and probably had no intention of transmitting HIV, the prosecutor noted that "the law doesn't distinguish between whether he intended to give the officer HIV or not. The mere fact that he bit him constitutes reckless exposure, and he can be charged and convicted for that."⁷⁸⁹

It is a felony to expose prison guards, prison visitors, and other prisoners to HIV through bodily fluids.

In Missouri, it is a class D felony, punishable by up to four years in prison,⁷⁹⁰ for an HIV negative person in confinement to attempt to cause or knowingly cause a correctional employee, visitor to a correctional facility, or fellow prisoner to come into contact with her/his blood, semen, urine, feces, or saliva.⁷⁹¹ A violation of this statute becomes a class C felony, punishable by up to seven years in prison if the incarcerated person is infected with HIV, hepatitis B, or hepatitis C.⁷⁹² Areas of confinement covered by this statute include prisons, jails, sex offender treatment centers, and any

⁷⁸³ In most cases involving spitting, individuals have been charged under the specific HIV criminalization statute. However, in November 2010 a man who claimed he had HIV was charged with two counts of assault for allegedly threatening and spitting on police officers. Kathryn Wall, *Man Claiming He Has HIV Charged in Assault on Officers*, NEWS-LEADER.COM, Nov. 2, 2010, available at <http://www.news-leader.com/article/20101102/NEWS01/11020343/Man-claiming-he-has-HIV-charged-in-assault-on-officers>.

⁷⁸⁴ MO. REV. STAT. § 191.677(1).

⁷⁸⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

⁷⁸⁶ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

⁷⁸⁷ *Seymour Man Charged with Recklessly Exposing Someone to HIV*, KSPR NEWS, June 1, 2010, available at http://articles.kspr.com/2010-06-01/police-officer_24123569.

⁷⁸⁸ *Man Accused of HIV Exposure*, KANSAS CITY STAR (MO), June 11, 2004, at B4.

⁷⁸⁹ *Id.*

⁷⁹⁰ MO. REV. STAT. § 558.011.

⁷⁹¹ § 565.085 (stating that a "corrections employee" is a person "who is an employee . . . of a department or agency responsible for operating a jail, prison, correctional facility, or sexual offender treatment center or a person who is assigned to work in [such locations].").

⁷⁹² §§ 558.011, 565.085(3).

other correctional facilities.⁷⁹³ Neither the intent to transmit HIV nor actual transmission is required for prosecution.

This “endangerment” statute imposes specific penalties for offenders who are HIV positive, even if they expose others to fluids that cannot transmit HIV or *attempt* to expose others to the bodily fluids listed. It is not a defense if HIV transmission was impossible under the circumstances. This statute is not based on scientific evidence, but rather fear, stigma, and perpetual ignorance about HIV transmission.

Under this statute, there is also a risk of prosecution if a prisoner begins to bleed during a fight, and a complainant claims that he was intentionally exposed to the blood. The facts surrounding sporadic fights are hard to determine, and because juries often consider the testimony of HIV positive criminal defendants less credible than HIV negative complainants regarding HIV exposure, this statute has the potential of imposing additional prison sentences for HIV positive inmates who accidentally and unintentionally expose others to their blood due to an injury sustained during a fight.

HIV positive persons face potential criminal penalties if they donate blood, organs, semen, or tissue unless such donation is for medical research.

It is a class B felony, carrying a sentence of five to fifteen years, for an HIV positive person to donate any blood, blood products, organs, sperm or tissue, unless the donation is for medical research.⁷⁹⁴

It is a felony for an HIV positive person to share needles and not disclose her/his HIV status.

If HIV positive persons fail to disclose their HIV status to fellow needle sharers, it is a class B felony punishable by five to fifteen years in prison.⁷⁹⁵ However, if the complainant later tests positive for HIV, the HIV positive defendant can be convicted of a class A felony with the possibility of ten to thirty years’ imprisonment.⁷⁹⁶

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.

⁷⁹³ § 565.085.

⁷⁹⁴ §§ 191.677(1)(1), 558.011.

⁷⁹⁵ §§ 191.677(1)(2)(b), 558.011.

⁷⁹⁶ §§ 191.677(2), 558.011.

Montana Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MONT. CODE. ANN. § 50-18-112*****Infected person not to expose another to sexually transmitted disease***

A person infected with a sexually transmitted disease may not knowingly expose another person to infection.

MONT. CODE. ANN. § 50-18-101***Sexually transmitted diseases defined***

Human immunodeficiency virus (HIV), syphilis, gonorrhea, chancroid, chlamydia genital infections, lymphogranuloma venereum, and granuloma inguinale are sexually transmitted diseases. Sexually transmitted diseases are contagious, infectious, communicable, and dangerous to public health.

MONT. CODE. ANN. § 50-18-113***Violation a misdemeanor***

A person who violates provisions of this chapter or rules adopted by the department of public health and human services concerning a sexually transmitted disease or who fails or refuses to obey any lawful order issued by a state or local health officer is guilty of a misdemeanor.

Exposing another to an STI, including HIV, is punishable via a communicable disease control statute.

It is a misdemeanor, punishable by up to six months in county jail and/or a \$500 fine, for a person with a sexually transmitted disease to “knowingly” expose another to that disease.⁷⁹⁷ HIV is considered an STD for the purposes of this exposure law.⁷⁹⁸ At the time of publication the authors are not aware of any recorded prosecution of HIV exposure under this statute.

However, there has been at least one prosecution of HIV exposure under general criminal laws in Montana. In November 2012, a 52-year-old HIV positive man was charged with felony

⁷⁹⁷ MONT. CODE ANN. §§ 46-18-212, 50-18-112 (2013), 50-18-113 (2013).

⁷⁹⁸ § 50-18-101 (2013).

endangerment for allegedly failing to disclose his status to a partner with whom he had a three-year sexual relationship.⁷⁹⁹ The partner later tested positive for HIV.⁸⁰⁰

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.

⁷⁹⁹ Greg Tuttle, *Joliet man charged with felony for HIV infection*, BILLINGS GAZETTE, Nov. 2, 2012, available at http://billingsgazette.com/news/state-and-regional/montana/joliet-man-charged-with-felony-for-hiv-infection/article_ddfd0ad4-b336-5e56-9b94-b9f904a80152.html; Greg Tuttle, *Joliet man denies felony charge for HIV infection*, BILLINGS GAZETTE, Dec. 5, 2012, available at http://billingsgazette.com/news/local/crime-and-courts/man-denies-felony-charge-for-hiv-infection/article_3d9d1455-a205-5501-b85c-ce31036a7e94.html.

⁸⁰⁰ *Id.*

Nebraska Statute(s) that Allow for Criminal Prosecution based on HIV Status:

NEB. REV. STAT. § 28-934***Assault with a bodily fluid against a public safety officer; penalty; order to collect evidence***

- (1) Any person who knowingly and intentionally strikes any public safety officer with any bodily fluid is guilty of assault with a bodily fluid against a public safety officer.
- (2) Except as provided in subsection (3) of this section, assault with a bodily fluid against a public safety officer is a Class I misdemeanor.
- (3) Assault with a bodily fluid against a public safety officer is a Class IIIA felony if the person committing the offense strikes with a bodily fluid the eyes, mouth, or skin of a public safety officer and knew the source of the bodily fluid was infected with the human immunodeficiency virus, hepatitis B, or hepatitis C at the time the offense was committed.
- (4) Upon a showing of probable cause by affidavit to a judge of this state that an offense as defined in subsection (1) of this section has been committed and that identifies the probable source of the bodily fluid or bodily fluids used to commit the offense, the judge shall grant an order or issue a search warrant authorizing the collection of any evidence, including any bodily fluid or medical records or the performance of any medical or scientific testing or analysis, that may assist with the determination of whether or not the person committing the offense or the person from whom the person committing the offense obtained the bodily fluid or bodily fluids is infected with the human immunodeficiency virus, hepatitis B, or hepatitis C.
- (5) As used in this section:
- (a) Bodily fluid means any naturally produced secretion or waste product generated by the human body and shall include, but not be limited to, any quantity of human blood, urine, saliva, mucus, vomitus, seminal fluid, or feces; and
- (b) Public safety officer includes any of the following persons who are engaged in the performance of their official duties at the time of the offense: A peace officer; a probation officer; a firefighter; an out-of-hospital emergency care provider as defined in subsection 28-929.01; an employee of a county, city, or village jail; an employee of the Department of Correctional Services; an employee of the...

Continued on the following page

... secure youth confinement facility operated by the Department of Correctional Services, if the person committing the offense is committed to such facility; an employee of the Youth Rehabilitation and Treatment Center-Geneva or the Youth Rehabilitation and Treatment Center-Kearney; or an employee of the Department of Health and Human Services if the person committing the offense is committed as a dangerous sex offender under the Sex Offender Commitment Act.

At the time of this publication, the authors are not aware of any prosecution against an HIV positive individual for violation of Nebraska's assault with a bodily fluid against a public safety officer statute. The authors are similarly unaware of any prosecution of an HIV positive individual for HIV transmission or exposure under Nebraska's general criminal laws.

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, it should not be used as a substitute for legal advice.

Nevada Statute(s) that Allow for Criminal Prosecution based on HIV Status:**NEV. REV. STAT. § 201.205*****Intentional transmission of HIV: penalty; affirmative defense***

1. A person who, after testing positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and receiving actual notice of that fact, intentionally, knowingly or willfully engages in conduct in a manner that is intended or likely to transmit the disease to another person is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment.

2. It is an affirmative defense to an offense charged pursuant to subsection 1 that the person who was subject to exposure to the human immunodeficiency virus as a result of the prohibited conduct:

- (a) Knew the defendant was infected with the human immunodeficiency virus;
- (b) Knew the conduct could result in exposure to the human immunodeficiency virus; and
- (c) Consented to engage in the conduct with that knowledge.

NEV. REV. STAT. § 201.358***Engaging in prostitution or solicitation for prostitution after testing positive for exposure to human immunodeficiency virus: Penalty; definition***

1. A person who:

- (a) Violates NRS 201.354; or
- (b) Works as a prostitute in a licensed house of prostitution, after testing positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and receiving notice of that fact is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment.

2. As used in this section, “notice” means:

- (a) Actual notice; or
- (b) Notice received pursuant to NRS 201.356.

NEV. REV. STAT. § 441A.300***Confinement of a person whose conduct may spread acquired immunodeficiency syndrome***

A person who is diagnosed as having acquired immunodeficiency syndrome who fails to comply with a written order of a health authority, or who engages in behavior through which the disease may be spread to others, is, in addition to any other penalty imposed pursuant to this chapter, subject to confinement by order of a court of competent jurisdiction.

NEV. REV. STAT. § 441A.180***Contagious person to prevent exposure to others; warning by health authority; penalty***

1. A person who has a communicable disease in an infectious state shall not conduct himself or herself in any manner likely to expose others to the disease or engage in any occupation in which it is likely that the disease will be transmitted to others.
2. A health authority who has reason to believe that a person is in violation of subsection 1 shall issue a warning to that person, in writing, informing the person of the behavior which constitutes the violation and of the precautions that the person must take to avoid exposing others to the disease. The warning must be served upon the person by delivering a copy to him or her.
3. A person who violates the provisions of subsection 1 after service upon him or her of a warning from a health authority is guilty of a misdemeanor.

HIV positive persons are prohibited from engaging in conduct known to transmit HIV.

In Nevada, it is a class B felony, punishable by two to ten years in prison and/or a fine of up to \$10,000, for a person who knows she/he is HIV positive to intentionally engage in conduct that is intended or likely to transmit the disease to another person.⁸⁰¹

Though the statute is entitled “intentional transmission” of HIV, neither the intent to expose another to HIV nor actual transmission is required. A person must only engage in conduct “likely to transmit HIV,” regardless of any specific intent to expose another person to HIV.⁸⁰² Conduct “likely to transmit” HIV is not defined under the statute.

Under the statute, it is an affirmative defense if the individual subject to possible HIV exposure

⁸⁰¹ NEV. REV. STAT. § 201.205(1) (2014).

⁸⁰² *Id.*

1) knew the defendant was HIV positive, 2) knew that the conduct in which they engaged could lead to HIV exposure, and 3) voluntarily engaged in the conduct.⁸⁰³ This most likely applies to sexual activities and needle sharing, though the statute does not explicitly define such conduct.

At a minimum, disclosure must occur prior to engaging in any acts known to transmit HIV. It may be difficult to prove whether one's HIV status was disclosed in the course of private sexual activities, because whether or not disclosure actually occurred is often open to interpretation and always depends on the words of one person against another. Condom use without disclosure is not a defense to prosecution.

In June 2010, in what appears to be a case of first impression under the statute,⁸⁰⁴ two men were charged with felony intentional transmission of HIV for engaging in sex with an HIV negative man whom they had met on Adam4Adam, a male dating website.⁸⁰⁵ Though one of the defendants had an undetectable viral load, his HIV status was nonetheless prominently displayed on his dating profile, and he maintained that the claimant was fully aware of his HIV status.⁸⁰⁶ In exchange for a guilty plea, the felony charges were reduced to gross misdemeanor charges for intentional transmission of HIV, carrying a maximum sentence of one year in county jail.⁸⁰⁷

Engaging in acts of prostitution while HIV positive can result in felony charges.

In Nevada, the only state that has legalized prostitution, it is a misdemeanor for anyone to engage in prostitution except in a licensed "house of prostitution."⁸⁰⁸ As prostitution is regulated, sex workers must be tested monthly for HIV and STIs and are required to wear latex condoms.⁸⁰⁹ In Nevada, it is a class B felony, punishable by two to ten years in prison and/or a fine of up to \$10,000, for an HIV positive sex worker to engage in licensed or unlicensed sex work after receiving notice of his/her HIV positive status.⁸¹⁰

In *Glegola v. State*, the Nevada Supreme Court affirmed a sex worker's conviction and fifteen-year sentence⁸¹¹ for solicitation while being HIV positive.⁸¹² At trial, the defendant testified with the support of several witnesses that she did not actually intend to perform any sexual acts, but rather intended to take the money and leave, and did not engage in any activities that could transmit

⁸⁰³ § 201.205(2).

⁸⁰⁴ Prior to this incident, at least one case held that a person's HIV status is relevant to determining whether there was consent during sexual intercourse. In *Shelton v. State*, the Supreme Court of Nevada upheld the district court's ruling that the defendant's HIV status was relevant for determining whether the complainant in the case had agreed to engage in unprotected oral sex. 2009 WL 1490929, at *1 (Nev. 2009). The defendant was convicted of first-degree kidnapping, sexual assault of a minor under 16 years of age, battery with the intent to commit sexual assault of a minor under 16 years of age, and the use of a minor in the production of pornography.

⁸⁰⁵ Interview with defendant and his attorney, names have been omitted to protect the identities of the parties (Nov. 11, 2010).

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.*

⁸⁰⁸ NEV. REV. STAT. § 244.345 (2014).

⁸⁰⁹ NEV. ADMIN. CODE § 441A.800-815 (2014).

⁸¹⁰ NEV. REV. STAT. § 201.358 (2014).

⁸¹¹ At the time, a conviction of this offense was punishable from one to twenty years imprisonment. 871 P.2d 950, 953 (Nev. 1994).

⁸¹² 871 P.2d 950 (Nev. 1994).

HIV.⁸¹³ Indeed, no sexual act was committed, and she was taken into custody after offering sexual services in exchange for money to an undercover officer.⁸¹⁴ Based on this, the defendant argued that she could not be charged under the relevant statute.⁸¹⁵ Nonetheless, the court concluded that “a jury could reasonably infer from the evidence presented that [the defendant] committed the crime of solicitation for prostitution after notice of testing positive for HIV.”⁸¹⁶

The defendant also argued that her fifteen-year sentence was cruel and unusual punishment and disproportionate to the crime for which she was convicted.⁸¹⁷ The state, in turn, argued that both the conviction and sentence were appropriate because “the harm threatened by the act of solicitation of prostitution while HIV positive is great; because the ‘legislature did not intend for the unsuspecting client to be fatally infected before criminals like [the defendant] are treated as felons; and because her crime should be treated differently [as] it is much more serious and obviously much more deadly than an ordinary crime of mere solicitation defined as a misdemeanor.”⁸¹⁸ Noting that the district court has wide discretion in imposing a particular prison term, the court affirmed the defendant’s fifteen-year sentence.

Such severe sentences may create an incentive for unlicensed prostitutes, who are not mandated by the state to do monthly HIV testing, to avoid being tested for HIV. If unlicensed prostitutes continue to work without knowledge of their HIV status, they at worst face a misdemeanor conviction for being unlicensed, which carries a sentence of no more than six months.⁸¹⁹ However, if they continue to work knowing their HIV positive status, they can face felony penalties of up to ten years imprisonment.

Nevada also imposes penalties on HIV positive persons for failing to comply with health authorities.

An HIV positive person who ignores or fails to comply with orders from health authorities and engages in behavior known to transmit HIV may be subject to confinement and criminal penalties.⁸²⁰ At the time of this publication, the authors are not aware of any person being subject to prosecution or penalties under this statute.

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⁸¹³ *Id.* at 952.

⁸¹⁴ *Id.* at 951.

⁸¹⁵ *Id.* at 952.

⁸¹⁶ *Id.* at 952-53.

⁸¹⁷ *Id.* at 953.

⁸¹⁸ *Id.*

⁸¹⁹ NEV. REV. STAT. §§ 201.354(2) (2014), 193.150(1) (2014).

⁸²⁰ § 441A.300 (2014).

New Hampshire Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure but prosecutions have arisen under general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in New Hampshire. However, there has been at least one prosecution for HIV exposure under the state's general criminal laws.

In the 2002 case *State v. CJ*, the New Hampshire Superior Court evaluated whether a defendant could be charged under the state's assault and reckless conduct statutes for failing to disclose his HIV positive status to a sexual partner.⁸²¹ In this case, the defendant had engaged in unprotected sexual intercourse with a female partner on multiple occasions, and only disclosed his status after the relationship had ended and she was pregnant.⁸²² On these facts, the defendant was charged with second-degree assault for "recklessly causing serious psychological injuries" to his partner and four counts of reckless conduct for four other occasions that they engaged in unprotected sex.⁸²³ The defendant moved to dismiss the charges, arguing that because New Hampshire had no law specifically criminalizing exposure to the HIV, then the legislature must not have intended to criminalize acts known to transmit HIV.⁸²⁴

The Court held that the seminal fluids and sexual organs of an HIV positive person are objectively capable of causing serious bodily injury and/or death, and as such should be considered a "deadly weapon" for the purposes of the state's assault and reckless conduct statutes when the relevant activities involve unprotected sex.⁸²⁵ The Court thus found that the conduct the defendant allegedly engaged in was capable of inflicting bodily harm or death due to the nature of HIV and how the virus is transmitted.⁸²⁶ Based on this, the court denied the defendant's motion to dismiss and ordered the case be sent to a jury for trial.⁸²⁷

In 2008, a 24-year-old man of unknown HIV status was ordered to pay over \$500 for an HIV test and write a letter of apology to a police officer after spitting in the officer's eye during an arrest.⁸²⁸ Though not an arrest or subsequent charges targeting an HIV positive individual, this case is demonstrative of the vast misconceptions still surrounding HIV transmission. As the CDC has long held, HIV cannot be transmitted through saliva.⁸²⁹

⁸²¹ No. 01-S-726, 2002 WL 31059244, at *1 (N.H. Super. Ct. May 23, 2002).

⁸²² *Id.*

⁸²³ *Id.*

⁸²⁴ *Id.*

⁸²⁵ *Id.* at *5.

⁸²⁶ *Id.*

⁸²⁷ *Id.*

⁸²⁸ *New Hampshire Man Forced to Pay for Cop's HIV Test After Spitting*, HIV JUSTICE NETWORK, Aug. 18, 2008, available at <http://www.hivjustice.net/case/us-new-hampshire-man-forced-to-pay-for-cops-hiv-test-after-spitting/>.

⁸²⁹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

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New Jersey Statute(s) that Allow for Criminal Prosecution based on HIV Status:

N.J. STAT. ANN. § 2C: 34-5

Diseased person committing an act of sexual penetration

a. A person is guilty of a crime of the fourth degree who, knowing that he or she is infected with a venereal disease such as chancroid, gonorrhea, syphilis, herpes virus, or any of the varieties or stages of such diseases, commits an act of sexual penetration without the informed consent of the other person.

b. A person is guilty of a crime of the third degree who, knowing that he or she is infected with human immune deficiency virus (HIV) or any other related virus identified as a probable causative agent of acquired immune deficiency syndrome (AIDS), commits an act of sexual penetration without the informed consent of the other person.

N.J. STAT. ANN. § 2C:43-6

Sentence for imprisonment of a crime: ordinary terms; mandatory terms

a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows:

(3) In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between three years and five years;

N.J. STAT. ANN. § 2C:43-3

Fines and restitution

A person who has been convicted of an offense may be sentenced to pay a fine, to make restitution, or both, such fine not to exceed:

b. (1) \$ 15,000.00 when the conviction is of a crime of the third degree;

An HIV positive person must disclose her/his status to sexual partners.

In New Jersey, HIV positive individuals may face prosecution for engaging in sexual activity without first disclosing their status.⁸³⁰ It is a crime of the third degree, punishable by up to five years in prison and up to a \$15,000 fine, for an HIV positive individual to engage in an “act of sexual

⁸³⁰ N.J. STAT. ANN. § 2C: 34-5 (2014).

penetration” without the informed consent of the other party.⁸³¹ Neither the intent to transmit HIV nor actual transmission of HIV is necessary for conviction.

In October 2011, a 46-year-old HIV positive man was charged under New Jersey’s diseased persons statute for engaging in sexual intercourse with two women without disclosing his HIV status.⁸³² It is unknown whether either woman contracted HIV, but this is irrelevant to prosecution.

In March 2010, a twenty-year-old HIV positive man was charged under New Jersey’s diseased persons statute for having sexual relations with two women without disclosing his HIV status.⁸³³ It is not known whether either woman tested positive for HIV.⁸³⁴

In *State v. E.W.*, the Superior Court of New Jersey Appellate Division upheld the conviction and sentencing of the HIV positive defendant to six years imprisonment for one count of second-degree sexual assault and five-years imprisonment, to be served concurrently, for one count of third-degree sexual penetration by a diseased person.⁸³⁵ The defendant, who was on treatment, was charged for engaging in consensual sex with his housemate without first disclosing his HIV status.⁸³⁶

HIV positive persons have been prosecuted under general criminal laws, including attempted murder, in HIV exposure cases.

In *State v. Smith*, the New Jersey Superior Court Appellate Division upheld the conviction and twenty-five-year sentence of an HIV positive inmate who was found guilty of attempted murder, aggravated assault, and terrorist threats for biting a corrections officer.⁸³⁷ The correctional officer did not test positive for HIV, but this was irrelevant to the prosecution.⁸³⁸ Though the court acknowledged that there was only a theoretical possibility that HIV could be transmitted through biting or saliva, it upheld the defendant’s conviction because the defendant subjectively believed he could cause the death of the corrections officer and intended to do so.⁸³⁹

The defendant offered evidence at trial and on appeal that he knew that HIV could not be transmitted through biting because he had been counseled on the matter by various health professionals and, therefore, his threats were only made to take “advantage of the ignorance and fear of his jailors.”⁸⁴⁰ Nonetheless, the court found that the jury could “reasonably have rejected [the] defendant’s claim that he ‘knew’ biting or spitting could not spread HIV, especially in view of the

⁸³¹ §§ 2C: 34-5, 2C: 43-3 (2014), 2C: 43-6 (2014).

⁸³² Alicia Cruz, *Ex-N.J. police captain Charles Martina charged with criminal transmission of HIV*, NEW JERSEY NEWS ROOM, Oct. 13, 2011, available at <http://www.newjerseynewsroom.com/state/ex-nj-police-captain-charles-martina-charged-with-criminal-transmission-of-hiv>.

⁸³³ Michael Buck, *HIV-positive Man Charged with Second Sex Crime in Hunterdon County*, LEHIGH VALLEY LIVE, Mar. 10, 2010, available at http://www.lehighvalleylive.com/hunterdon-county/express-times/index.ssf/2010/03/hiv-positive_man_charged_with.html.

⁸³⁴ *Id.*

⁸³⁵ 2012 WL 1948654, at *1 (N.J. Super. Ct. App. Div. May 31, 2012).

⁸³⁶ *Id.*

⁸³⁷ 621 A.2d 487, 492 (N.J. Super. Ct. App. Div. 1993). This case was tried prior to New Jersey’s diseased person’s statute amended in 1997 to include HIV.

⁸³⁸ *Id.* at 497.

⁸³⁹ *Id.* at 493.

⁸⁴⁰ *Id.* at 511-14.

conflict in the record between that claim and his conduct in jail over several months.”⁸⁴¹

In 1994, a 17-year-old woman was charged as an adult on charges of attempted murder and aggravated assault for biting a juvenile detention officer, with a possible sentence of twenty-five years imprisonment.⁸⁴² At the time of the indictment, it was not confirmed whether the woman had tested positive for HIV, only that “she believ[ed]” she had HIV.⁸⁴³

In another case, the New Jersey Superior Court Law Division found that a hypodermic needle purportedly infected with HIV is a deadly weapon.⁸⁴⁴ Under New Jersey law, a deadly weapon is defined as an object “which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury.”⁸⁴⁵

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⁸⁴¹ *Id.* at 514.

⁸⁴² Joseph F. Sullivan, *Girl Who Thinks She has AIDS to Stand Trial for Biting of Guard*, N.Y. TIMES, Aug. 31, 1994, available at <http://www.nytimes.com/1994/08/31/nyregion/girl-who-thinks-she-has-aids-to-stand-trial-in-biting-of-guard.html>. This case also occurred prior to New Jersey amending its diseased person’s statute.

⁸⁴³ *Id.*

⁸⁴⁴ *State v. Ainis*, 721 A.2d 329, 331-34 (N.J. Super. Ct. Law Div. 1998).

⁸⁴⁵ *Id.* at 331.

New Mexico Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in New Mexico. However, in some states, HIV positive individuals have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault.

At the time of this publication, the only criminal prosecution that the authors are aware of is that of an HIV positive woman who was charged with battery for licking the cheek and mouth of a police officer.⁸⁴⁶ The news article did not make clear whether the battery charge was based off of the woman's HIV status.⁸⁴⁷

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, it should not be used as a substitute for legal advice.

⁸⁴⁶ *Woman Charged for Licking Officer*, ALBUQUERQUE JOURNAL, Aug. 17 1998, at B8.

⁸⁴⁷ *Id.*

New York Statute(s) that Allow for Criminal Prosecution based on HIV Status:**NY PUB. HEALTH LAW § 2307*****Venereal disease; person knowing himself to be infected***

Any person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor.

NY PUB. HEALTH LAW § 2100***Communicable diseases; local boards of health and health officers; powers and duties***

1. Every local board of health and every health officer shall guard against the introduction of such communicable diseases as are designated in the sanitary code, by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases.
2. Every local board of health and every health officer may:
 - (a) provide for care and isolation of cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health and,
 - (b) subject to the provisions of the sanitary code, prohibit and prevent all intercourse and communication with or use of infected premises, places and things, and require, and if necessary, provide the means for the thorough purification and cleansing of the same before general intercourse with the same or use thereof shall be allowed.

10 NYCRR § 23.1***List of sexually transmissible diseases***

The following are groups of sexually transmissible diseases (STDs) and shall constitute the definition of sexually transmissible diseases for the purposes of this Part:

Group A

Treatment facilities referred to in section 23.2 of this Part must provide diagnosis and treatment free of charge as provided in section 23.2(c) of this Part for the following STDs: Chlamydia trachomatis infection, Gonorrhea Syphilis, Non-gonococcal Urethritis (NGU), Non-gonococcal (mucopurulent) Cervicitis, Trichomoniasis, Lymphogranuloma Venereum, Chancroid, Granuloma Inguinale

Continued on the following page

Group B

Treatment facilities referred to in section 23.2 of this Part must provide diagnosis free of charge and must provide treatment as provided in section 23.2(d) of this Part for the following STDs: Ano-genital warts, Human Papilloma Virus (HPV), Genital Herpes Simplex

Group C

Treatment facilities referred to in section 23.2 of this Part must provide diagnosis free of charge and must provide treatment as provided in section 23.2(e) of this Part for the following STD: Pelvic Inflammatory Disease (PID), Gonococcal/Non-gonococcal

Group D

Treatment facilities referred to in section 23.2 of this Part must provide diagnosis free of charge and must provide treatment as provided in section 23.2(f) of this Part for the following STDs: Yeast (Candida) Vaginitis, Bacterial Vaginosis, Pediculosis Pubis, Scabies

New York law is not defined on whether there are criminal penalties for HIV exposure.

In New York, a person who is aware that she/he is living with an infectious venereal disease may be guilty of a misdemeanor if she/he has sexual intercourse with another person. HIV is not identified as an infectious venereal disease under this statute, but there is nothing preventing its inclusion. Neither the intent to transmit nor actual transmission of HIV is necessary for a conviction. The statute provides no indication of whether disclosure of one's status, consent prior to engaging in sexual activity, or using protection would be a defense under the statute.

There are no reports of prosecutions of persons with HIV under this statute.

HIV positive persons have been prosecuted under general criminal laws.

In 1997, Nushawn Williams pleaded guilty to two counts of statutory rape and two counts of reckless endangerment and was sentenced to twelve years imprisonment.⁸⁴⁸ The Williams case was heavily covered in the media after local health and law enforcement officials publicized his HIV positive status, ostensibly “to try to stop further spread of the virus by his infected sex partners.”⁸⁴⁹ Just days before Williams' sentence was nearing completion in April 2010, New York Attorney General Andrew Cuomo sought to keep Williams in indefinite civil confinement under the Sex Offender Management Treatment Act of 2007, a law “intended to keep the most dangerous sex offenders out of communities after prison.”⁸⁵⁰ Under this law, a sex offender may be confined

⁸⁴⁸ Danny Hakim, *Man Who Spread H.I.V. May Be Held*, N.Y. TIMES, Apr. 13, 2010, available at http://www.nytimes.com/2010/04/14/nyregion/14nushawn.html?_r=0.

⁸⁴⁹ *Id.*; Associated Press, *State Can Try to Detain Man Who Spread H.I.V.*, N.Y. TIMES, July 19, 2010, available at <http://www.nytimes.com/2010/07/20/nyregion/20nushawn.html?ref=nushawnjwilliams>.

⁸⁵⁰ *Id.*

“indefinitely if [the state] proves that the person has a mental abnormality and is likely to commit more [sexual] crimes.”⁸⁵¹

In June 2013, a civil jury determined that Williams has such a mental abnormality, making him “unable to control his sexual impulses and thus mak[ing] him potentially dangerous.”⁸⁵² At trial, Williams’ attorney presented evidence from the Office of Medical and Scientific Justice, a nonprofit group based in California, which had examined Williams’ blood under an electron microscope and concluded that he was not in fact HIV positive in the first place.⁸⁵³ However, the state attorneys dismissed the electron microscope analysis as junk science, and the jurors were unconvinced by the defense’s argument and experts.⁸⁵⁴ Now, the State Supreme Court Justice who presided over the trial “will determine whether the state moves Williams to a secure treatment facility or puts him under strict and intensive supervision and treatment.”⁸⁵⁵

In *People v. Hawkkrigg*, the county court denied the defendant’s motion to dismiss the indictment of charges of third-degree sodomy, first-degree reckless endangerment, and endangering the welfare of a child because it found that there was sufficient evidence to show that defendant engaged in the acts knowing both that he had AIDS and that such conduct could transmit HIV.⁸⁵⁶ The court found that this evidence was sufficient to support a reckless endangerment charge because reckless endangerment only requires proof that the defendant consciously disregarded a substantial and unjustifiable risk that her/his conduct would result in the transmission of HIV. In another case, a 20-year-old HIV positive man was charged with five counts of reckless endangerment for having unprotected sex with multiple women without disclosing his status.⁸⁵⁷ He pleaded guilty and was sentenced to one year imprisonment.⁸⁵⁸

In the past, New York courts have found that HIV can be considered a “deadly weapon.” However due to a recent landmark ruling, discussed below, this may no longer be the case going forward. In 2007, an HIV positive man was found guilty of aggravated assault and sentenced to ten years in prison for biting a police officer.⁸⁵⁹ In that case, the court found that the saliva of an HIV positive

⁸⁵¹ *State Can Try to Detain Man Who Spread H.I.V.*

⁸⁵² Jay Tokasz, *Jury rules Nushawn Williams has condition making him likely to commit more sex crimes*, THE BUFFALO NEWS, June 38, 2013, available at http://www.buffalonews.com/20130628/jury_rules_nushawn_williams_has_condition_making_him_likely_to_commit_more_sex_crimes.html.

⁸⁵³ *Id.*

⁸⁵⁴ *Id.*; Eric Tichy, *Juror Speaks out About Nushawn Williams’ Case*, THE POST-JOURNAL, July 2, 2013, available at <http://www.post-journal.com/page/content.detail/id/624586/Juror-Speaks-Out-About-Nushawn-Williams--Case.html?nav=5192> (quoting a juror as saying “[it] was strongly proved, in my opinion, that [Williams] was HIV positive and has AIDS . . . It was proved by the doctors who showed us what his viral loads look liked.” In regard to the electron microscope testing, the juror stated, “We were told that [the Office of Medical and Scientific Justice] just kept testing the blood until they got the negative result. The state had [Dr. Gregory Hendricks] on the stand to discuss how he got the results, and we felt there was some issues there.”).

⁸⁵⁵ *Id.*

⁸⁵⁶ 525 N.Y.S.2d 752, 753, 754 (Co. Ct. 1988).

⁸⁵⁷ Kyla Igoe, *Buffalo Man Sentenced for Exposing Women to HIV*, WKBW.COM, Aug. 24, 2011, available at <http://www.wkbw.com/news/local/Buffalo-Man-Sentenced-for-Exposing-Women-to-HIV-128349878.html>.

⁸⁵⁸ *Id.*

⁸⁵⁹ Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae Supporting Defendant-Appellant, *X v. People*, at *4-5 (N.Y. App. Div. 2010) (The identifying information has been redacted to protect the identity of the defendant. The brief can be found at <http://www.hivlawandpolicy.org/resources/view/526>).

person could be considered a “deadly weapon” for the purposes of aggravated assault, despite the fact that there is no scientific evidence to support such a claim.⁸⁶⁰ In another case the court held that a hypodermic needle, which the defendant claimed contained the AIDS virus and pressed against the complaining witness’ arm, constituted a “dangerous instrument” under New York law due to the manner in which the defendant threatened to use it.⁸⁶¹

In *People v. Plunkett*, the highest court in New York shifted away from the holdings in these previous cases.⁸⁶² Plunkett, an HIV positive man, was convicted of aggravated assault upon a police officer after he bit the officer’s hand during an arrest.⁸⁶³ A conviction for this offense requires that the defendant used a deadly weapon or dangerous instrument.⁸⁶⁴ The trial court found that because the “defendant’s saliva was ‘infected with the AIDS virus,’ . . . [it] was a substance ‘readily capable of causing death or other serious physical injury’ and, as such, qualified as a dangerous instrument for purposes of the aggravated assault statute.”⁸⁶⁵ However, on appeal, the court dismissed the indictment of aggravated assault upon a police officer.⁸⁶⁶ The court found that an individual’s body part could not be deemed an “instrument” under the statute, and thus “body parts, even if otherwise corresponding to the terms ‘substance,’ ‘article,’ or ‘instrument,’ categorically could not qualify as ‘dangerous instruments’ within the meaning of Penal Law § 10.00(13).”⁸⁶⁷ The Court said that its opinion does nothing to prevent punishment of an individual based on the harm actually inflicted.

At least one New York court has allowed access to medical records to determine a defendant’s HIV status for criminal charges.⁸⁶⁸ In an attempted assault and reckless endangerment case, the court granted the state’s motion to have access to the defendant’s medical records to prove she was HIV positive, finding that “[w]ithout such proof, the People would be unable to prove the defendant’s state of mind (that she acted with depraved indifference to human life) or to prove a grave risk of death to the victim.”⁸⁶⁹ For this reason, the court found that there was a “compelling need”⁸⁷⁰ to disclose the defendant’s confidential HIV information.⁸⁷¹ While it did not discuss access to medical records showing HIV status for the prosecution of criminal charges, the court in a separate case found that the “admission into evidence of medical records showing [the defendant’s] HIV positive status” did not violate his due process rights under the United States Constitution.⁸⁷²

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, it should not be used as a substitute for legal advice.

⁸⁶⁰ *Id.* at *5.

⁸⁶¹ *People v. Nelson*, 627 N.Y.S.2d 412, 413 (N.Y. App. Div. 1995).

⁸⁶² *People v. Plunkett*, 971 N.E.2d 363 (N.Y. 2012).

⁸⁶³ *Id.* at 364.

⁸⁶⁴ *Id.*

⁸⁶⁵ *Id.* at 365.

⁸⁶⁶ *Id.* at 368.

⁸⁶⁷ *Id.*

⁸⁶⁸ *Application of Gribetz*, 605 N.Y.S.2d 834, 836 (Co. Ct. 1994).

⁸⁶⁹ *Id.*

⁸⁷⁰ *Id.*

⁸⁷¹ *Id.*

⁸⁷² *Carmona v. Connolly*, 2011 WL 2748694, at *2 (S.D.N.Y. July 13, 2011).

North Carolina Statute(s) that Allow for Criminal Prosecution based on HIV Status:**10A N.C. ADMIN. CODE 41A.0202*****Control measures-HIV***

The following are the control measures for the Acquired Immune Deficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV) infection:

- (1) Infected persons shall:
 - (a) refrain from sexual intercourse unless condoms are used; exercise caution when using condoms due to possible condom failure;
 - (b) not share needles or syringes, or any other drug-related equipment, paraphernalia, or works that may be contaminated with blood through previous use;
 - (c) not donate or sell blood, plasma, platelets, other blood products, semen, ova, tissues, organs, or breast milk;
 - (d) have a skin test for tuberculosis;
 - (e) notify future sexual intercourse partners of the infection;
 - (f) if the time of initial infection is known, notify persons who have been sexual intercourse and needle partners since the date of infection; and,
 - (g) if the date of initial infection is unknown, notify persons who have been sexual intercourse and needle partners for the previous year.
- (2) The attending physician shall:
 - (a) give the control measures in Item (1) of this Rule to infected patients, in accordance with 10A NCAC 41A .0210;
 - (b) If the attending physician knows the identity of the spouse of an HIV-infected patient and has not, with the consent of the infected patient, notified and counseled the spouse, the physician shall list the spouse on a form provided by the Division of Public Health and shall mail the form to the Division. The Division shall undertake to counsel the spouse. The attending physician's responsibility to notify exposed and potentially exposed persons is satisfied by fulfilling the requirements of Sub-Items (2)(a) and (b) of this Rule;
 - (c) advise infected persons concerning clean-up of blood and other body fluids;
 - (d) advise infected persons concerning the risk of perinatal transmission and transmission by breastfeeding.

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(3) The attending physician of a child who is infected with HIV and who may pose a significant risk of transmission in the school or day care setting because of open, oozing wounds or because of behavioral abnormalities such as biting shall notify the local health director. The local health director shall consult with the attending physician and investigate the following circumstances:

(a) If the child is in school or scheduled for admission and the local health director determines that there may be a significant risk of transmission, the local health director shall consult with an interdisciplinary committee, which shall include school personnel, a medical expert, and the child's parent or guardian to assist in the investigation and determination of risk. The local health director shall notify the superintendent or private school director of the need to appoint such an interdisciplinary committee.

(i) If the superintendent or private school director establishes such a committee within three days of notification, the local health director shall consult with this committee.

(ii) If the superintendent or private school director does not establish such a committee within three days of notification, the local health director shall establish such a committee.

(b) If the child is in school or scheduled for admission and the local health director determines, after consultation with the committee, that a significant risk of transmission exists, the local health director shall:

(i) notify the parents;

(ii) notify the committee;

(iii) assist the committee in determining whether an adjustment can be made to the student's school program to eliminate significant risks of transmission;

(iv) determine if an alternative educational setting is necessary to protect the public health;

(v) instruct the superintendent or private school director concerning protective measures to be implemented in the alternative educational setting developed by school personnel; and

(vi) consult with the superintendent or private school director to determine which school personnel directly involved with the child need to be notified of the HIV infection in order to prevent transmission and ensure that these persons are instructed regarding the necessity for protecting confidentiality.

(c) If the child is in day care and the local health director determines that there is a significant risk of transmission, the local health director shall notify the...

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...parents that the child must be placed in an alternate child care setting that eliminates the significant risk of transmission.

(4) When health care workers or other persons have a needlestick or nonsexual non-intact skin or mucous membrane exposure to blood or body fluids that, if the source were infected with HIV, would pose a significant risk of HIV transmission, the following shall apply:

(a) When the source person is known:

(i) The attending physician or occupational health care provider responsible for the exposed person, if other than the attending physician of the person whose blood or body fluids is the source of the exposure, shall notify the attending physician of the source that an exposure has occurred. The attending physician of the source person shall discuss the exposure with the source and, unless the source is already known to be infected, shall test the source for HIV infection without consent unless it reasonably appears that the test cannot be performed without endangering the safety of the source person or the person administering the test. If the source person cannot be tested, an existing specimen, if one exists, shall be tested. The attending physician of the exposed person shall be notified of the infection status of the source.

(ii) The attending physician of the exposed person shall inform the exposed person about the infection status of the source, offer testing for HIV infection as soon as possible after exposure and at reasonable intervals up to one year to determine whether transmission occurred, and, if the source person was HIV infected, give the exposed person the control measures listed in Sub-Items (1)(a) through (c) of this Rule. The attending physician of the exposed person shall instruct the exposed person regarding the necessity for protecting confidentiality.

(b) When the source person is unknown, the attending physician of the exposed persons shall inform the exposed person of the risk of transmission and offer testing for HIV infection as soon as possible after exposure and at reasonable intervals up to one year to determine whether transmission occurred.

(c) A health care facility may release the name of the attending physician of a source person upon request of the attending physician of an exposed person.

(5) The attending physician shall notify the local health director when the physician, in good faith, has reasonable cause to suspect a patient infected with HIV is not following or cannot follow control measures and is thereby causing a significant risk of transmission. Any other person may notify the local health director when the person, in good faith, has reasonable cause to suspect a person infected with HIV is not following control measures and is thereby causing a significant risk of transmission.

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(6) When the local health director is notified pursuant to Item (5) of this Rule, of a person who is mentally ill or mentally retarded, the local health director shall confer with the attending mental health physician or mental health authority and the physician, if any, who notified the local health director to develop a plan to prevent transmission.

(7) The Division of Public Health shall notify the Director of Health Services of the North Carolina Department of Correction and the prison facility administrator when any person confined in a state prison is determined to be infected with HIV. If the prison facility administrator, in consultation with the Director of Health Services, determines that a confined HIV infected person is not following or cannot follow prescribed control measures, thereby presenting a significant risk of HIV transmission, the administrator and the Director shall develop and implement jointly a plan to prevent transmission, including making recommendations to the unit housing classification committee.

(8) The local health director shall ensure that the health plan for local jails include education of jail staff and prisoners about HIV, how it is transmitted, and how to avoid acquiring or transmitting this infection.

(9) Local health departments shall provide counseling and testing for HIV infection at no charge to the patient. Third party payors may be billed for HIV counseling and testing when such services are provided and the patient provides written consent.

(10) HIV pre-test counseling is not required. Post-test counseling for persons infected with HIV is required, must be individualized, and shall include referrals for medical and psychosocial services and control measures.

(11) A local health department or the Department may release information regarding an infected person pursuant to G.S. 130A-143(3) only when the local health department or the Department has provided direct medical care to the infected person and refers the person to or consults with the health care provider to whom the information is released.

(12) Notwithstanding Rule .0201(d) of this Section, a local or state health director may require, as a part of an isolation order issued in accordance with G.S. 130A-145, compliance with a plan to assist the individual to comply with control measures. The plan shall be designed to meet the specific needs of the individual and may include one or more of the following available and appropriate services:

- (a) substance abuse counseling and treatment;
- (b) mental health counseling and treatment; and

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(c) education and counseling sessions about HIV, HIV transmission, and behavior change required to prevent transmission.

(13) The Division of Public Health shall conduct a partner notification program to assist in the notification and counseling of partners of HIV infected persons.

(14) Every pregnant woman shall be offered HIV testing by her attending physician at her first prenatal visit and in the third trimester. The attending physician shall test the pregnant woman for HIV infection, unless the pregnant woman refuses to provide informed consent pursuant to G.S. 130A-148(h). If there is no record at labor and delivery of an HIV test result during the current pregnancy for the pregnant woman, the attending physician shall inform the pregnant woman that an HIV test will be performed, explain the reasons for testing, and the woman shall be tested for HIV without consent using a rapid HIV test unless it reasonably appears that the test cannot be performed without endangering the safety of the pregnant woman or the person administering the test. If the pregnant woman cannot be tested, an existing specimen, if one exists that was collected within the last 24 hours, shall be tested using a rapid HIV test. The attending physician must provide the woman with the test results as soon as possible. However, labor and delivery providers who do not currently have the capacity to perform rapid HIV testing are not required to use a rapid HIV test until January 1, 2009.

(15) If an infant is delivered by a woman with no record of the result of an HIV test conducted during the pregnancy and if the woman was not tested for HIV during labor and delivery, the fact that the mother has not been tested creates a reasonable suspicion pursuant to G.S. 130A-148(h) that the newborn has HIV infection and the infant shall be tested for HIV. An infant born in the previous 12 hours shall be tested using a rapid HIV test. However, providers who do not currently have the capacity to perform rapid HIV testing shall not be required to use a rapid HIV test until January 1, 2009.

(16) Testing for HIV may be offered as part of routine laboratory testing panels using a general consent which is obtained from the patient for treatment and routine laboratory testing, so long as the patient is notified that they are being tested for HIV and given the opportunity to refuse.

N.C. GEN. STAT. § 130A-144

Investigation and control measures

(a) The local health director shall investigate, as required by the Commission, cases of communicable diseases and communicable conditions reported to the local health director pursuant to this Article.

(b) Physicians, persons in charge of medical facilities or laboratories, and other persons shall, upon request and proper identification, permit a local health director or the State Health Director to examine, review, and obtain a copy of medical or other records in their possession or under their control which the State Health Director or a local health director determines pertain to the (i) diagnosis, treatment, or prevention of a communicable disease or communicable condition for a person infected, exposed, or reasonably suspected of being infected or exposed to such a disease or condition, or (ii) the investigation of a known or reasonably suspected outbreak of a communicable disease or communicable condition.

(c) A physician or a person in charge of a medical facility or laboratory who permits examination, review or copying of medical records pursuant to subsection (b) shall be immune from any civil or criminal liability that otherwise might be incurred or imposed as a result of complying with a request made pursuant to subsection (b).

(d) The attending physician shall give control measures prescribed by the Commission to a patient with a communicable disease or communicable condition and to patients reasonably suspected of being infected or exposed to such a disease or condition. The physician shall also give control measures to other individuals as required by rules adopted by the Commission.

(e) The local health director shall ensure that control measures prescribed by the Commission have been given to prevent the spread of all reportable communicable diseases or communicable conditions and any other communicable disease or communicable condition that represents a significant threat to the public health. The local health department shall provide, at no cost to the patient, the examination and treatment for tuberculosis disease and infection and for sexually transmitted diseases designated by the Commission.

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(f) All persons shall comply with control measures, including submission to examinations and tests, prescribed by the Commission subject to the limitations of G.S. 130A-148.

(g) The Commission shall adopt rules that prescribe control measures for communicable diseases and conditions subject to the limitations of G.S. 130A-148. Temporary rules prescribing control measures for communicable diseases and conditions shall be adopted pursuant to G.S. 150B-13.

(h) Anyone who assists in an inquiry or investigation conducted by the State Health Director for the purpose of evaluating the risk of transmission of HIV or Hepatitis B from an infected health care worker to patients, or who serves on an expert panel established by the State Health Director for that purpose, shall be immune from civil liability that otherwise might be incurred or imposed for any acts or omissions which result from such assistance or service, provided that the person acts in good faith and the acts or omissions do not amount to gross negligence, willful or wanton misconduct, or intentional wrongdoing. This qualified immunity does not apply to acts or omissions which occur with respect to the operation of a motor vehicle. Nothing in this subsection provides immunity from liability for a violation of G.S. 130A-143.

N.C. GEN. STAT. § 130A-25

Misdemeanor

(a) Except as otherwise provided, a person who violates a provision of this Chapter or the rules adopted by the Commission or a local board of health shall be guilty of a misdemeanor.

(b) A person convicted under this section for violation of G.S. 130A-144(f) or G.S. 130A-145 shall not be sentenced under Article 81B of Chapter 15A of the General Statutes but shall instead be sentenced to a term of imprisonment of no more than two years and shall serve any prison sentence in McCain Hospital, Section of Prisons of the Division of Adult Correction, McCain, North Carolina; the North Carolina Correctional Center for Women, Section of Prisons of the Division of Adult Correction, Raleigh, North Carolina; or any other confinement facility designated for this purpose by the Secretary of Public Safety after consultation with the State Health Director. The Secretary of Public Safety shall consult with the State Health Director concerning the medical management of these persons.

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(c) Notwithstanding G.S. 148-4.1, G.S. 148-13, or any other contrary provision of law, a person imprisoned for violation of G.S. 130A-144(f) or G.S. 130A-145 shall not be released prior to the completion of the person's term of imprisonment unless and until a determination has been made by the District Court that release of the person would not create a danger to the public health. This determination shall be made only after the medical consultant of the confinement facility and the State Health Director, in consultation with the local health director of the person's county of residence, have made recommendations to the Court.

HIV exposure is prohibited under the health code and can result in incarceration.

Although there is no specific HIV-related criminal transmission statute in North Carolina, HIV is considered a communicable disease requiring compliance with health regulations and control measures governing the spread of such a disease.⁸⁷³ A maximum of two years imprisonment may occur from violating these regulations, and individuals will not be released before the end of their sentence unless they are no longer considered a public danger by local authorities.⁸⁷⁴

Condoms or other protection must be used during sexual intercourse, and HIV status must be disclosed.

HIV positive persons must notify all sexual partners that they have tested positive for HIV.⁸⁷⁵ If the date of infection is known, sexual or needle partners from that date forward must be notified of the individual's HIV status.⁸⁷⁶ Otherwise, all such partners from the year prior to testing positive for HIV must be notified.⁸⁷⁷

The North Carolina regulation does not provide guidance on what activities are considered "sexual intercourse," and whether oral sex or anal sex is included in the definition. Nonetheless, any acts of sexual intercourse require, under the statute, the use of condoms and disclosure.

In November 2011, a 27-year-old HIV positive man was charged with a public health violation for failing to tell a sexual partner of his HIV status.⁸⁷⁸ In August 2008, a 23-year-old HIV positive man was sentenced to thirty months of probation for having unprotected sex with numerous partners.⁸⁷⁹ He was later sentenced to six months of house arrest for further acts of unprotected sex.⁸⁸⁰

⁸⁷³ N.C. GEN. STAT. § 130A-144(f) (2014).

⁸⁷⁴ § 130A-25(b)-(c) (2010).

⁸⁷⁵ 10A N.C. ADMIN. CODE 41A.0202 (2014).

⁸⁷⁶ *Id.*

⁸⁷⁷ *Id.*

⁸⁷⁸ *Police: Man didn't tell partner he has HIV*, ABC11, Nov. 4, 2011, available at <http://abclocal.go.com/wtvd/story?section=news/local&id=8419702>.

⁸⁷⁹ *Club DJ on house arrest for violating probation*, WRAL.COM, Oct. 21, 2008, available at http://www.wral.com/news/news_briefs/story/3781930/.

⁸⁸⁰ *Id.*

HIV positive persons are prohibited from donating blood, organs, human tissue, semen, or breast milk.

Under North Carolina’s Administrative Code, persons who are HIV positive must not donate or sell blood, plasma, platelets, any other blood products, semen, ova, tissues, organs, or breast milk.⁸⁸¹

Sharing needles while being HIV positive can result in criminal penalties.

North Carolina’s Administrative Code prohibits individuals who are HIV positive from sharing needles, syringes, or any other drug paraphernalia that may be contaminated with blood.⁸⁸²

HIV positive persons are also subject to general criminal laws in North Carolina.

In many states, including North Carolina, HIV exposure is often prosecuted under general criminal laws such as assault or reckless endangerment. In 2009, a 45-year-old HIV positive man was charged with assault inflicting serious bodily injury and assault with a deadly weapon after he cut a police officer’s thumb, head-butted him, and bit his ear during an altercation.⁸⁸³ This is in spite of the fact that the CDC has concluded that there exists only a negligible risk of HIV infection from a bite.⁸⁸⁴

At least two courts have found that HIV is can be considered a “deadly weapon” for purposes of sexual assault cases. In 2005, a man was convicted of, among other charges, sexual assault with a deadly weapon inflicting serious injury and violation of control measures for having sex with an underage boy.⁸⁸⁵ The boy later tested positive for HIV, but transmission is irrelevant for prosecution.⁸⁸⁶ In *State v. Monk*, the North Carolina Court of Appeals determined that charges of assault with deadly weapon and attempted murder, which arose from fact that defendant was HIV positive when he sexually assaulted the minor victim, were properly joined for trial with charges of first-degree statutory rape and taking indecent liberties with minor.⁸⁸⁷

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, it should not be used as a substitute for legal advice.

⁸⁸¹ 10A N.C. ADMIN. CODE 41A.0202.

⁸⁸² *Id.*

⁸⁸³ *Man used his HIV as weapon, police say*, NEWSOBSERVER.COM, June 22, 2009, available at <http://www.newsobserver.com/2009/06/22/81920/man-used-his-hiv-as-weapon-police.html>.

⁸⁸⁴ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

⁸⁸⁵ *State v. Murphy*, 612 S.E.2d 694, at *1 (N.C. Ct. App. 2005). The control measure charges were dismissed due to the statute of limitations. *Id.* at *6-7.

⁸⁸⁶ *Id.*

⁸⁸⁷ 511 S.E.2d 332, 336 (N.C. Ct. App. 1999).

North Dakota Statute(s) that Allow for Criminal Prosecution based on HIV Status:

N.D. CENT. CODE § 12.1-20-17

***Transfer of body fluid that may contain the human immunodeficiency virus--
Definitions--Defenses--Penalty***

1. As used in this section, unless the context otherwise requires:
 - a. "Body fluid" means semen, irrespective of the presence of spermatozoa; blood; or vaginal secretion.
 - b. "Transfer" means to engage in sexual activity by genital-genital contact, oral-genital contact, or anal-genital contact, or to permit the reuse of a hypodermic syringe, needle, or similar device without sterilization.

2. A person who, knowing that that person is or has been afflicted with acquired immune deficiency syndrome, afflicted with acquired immune deficiency syndrome related complexes, or infected with the human immunodeficiency virus, willfully transfers any of that person's body fluid to another person is guilty of a class A felony.

3. It is an affirmative defense to a prosecution under this section that if the transfer was by sexual activity, the sexual activity took place between consenting adults after full disclosure of the risk of such activity and with the use of an appropriate prophylactic device.

N.D. CENT. CODE §12.1-32-01

Classification of offenses--Penalties

Offenses are divided into seven classes, which are denominated and subject to maximum penalties, as follows:

2. Class A felony, for which a maximum penalty of twenty years' imprisonment, a fine of ten thousand dollars, or both, may be imposed.

HIV status must be disclosed before sexual activity and condoms or other protections must be used.

In North Dakota, a person who is aware that she/he is HIV positive may be criminally liable and face penalties of up to twenty years in prison and a \$10,000 fine if she/he engages in sexual activity, including penile-vaginal sex, anal sex, and oral sex, with another person without disclosing her/his status.⁸⁸⁸ It is an affirmative defense if the HIV positive person disclosed her/his status and used

⁸⁸⁸ N.D. CENT. CODE §§ 12.1-20-17(2) (2013), 12.1-32-01 (2013).

condoms or other protection during the sexual activity.⁸⁸⁹

Neither the intent to transmit nor actual transmission of HIV is necessary for a conviction under this statute. There has been at least one prosecution in North Dakota for exposure to HIV. In *State v. Bethke*, the defendant was charged with several offenses, including one count of transfer of a bodily fluid containing HIV.⁸⁹⁰ The published appellate opinion stated that the trial court found him not guilty on this count, but it contains no other information regarding this charge.⁸⁹¹

HIV positive persons may not share needles.

In North Dakota, a person who is aware that she/he is HIV positive may be criminally liable if she/he transfers blood or bodily fluids to another person by allowing them to use a needle or syringe previously used by the HIV positive person without first sterilizing it.⁸⁹² Neither the intent to transmit nor actual transmission of HIV is necessary for a conviction.

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, it should not be used as a substitute for legal advice.

⁸⁸⁹ § 12.1-20-17(2).

⁸⁹⁰ 763 N.W.2d 492, 496 (North Dakota 2009).

⁸⁹¹ *Id.*

⁸⁹² §§ 12.1-20-17(2), 12.1-32-01.

Ohio Statute(s) that Allow for Criminal Prosecution based on HIV Status:**OHIO REV. CODE ANN. § 2903.11*****Felonious assault***

(A) No person shall knowingly do either of the following:

- (1) Cause serious physical harm to another or to another's unborn;
- (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

- (1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;
- (2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;
- (3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

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(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

- (1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.
- (2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.
- (3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.
- (4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.
- (5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.
- (6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

OHIO REV. CODE ANN. § 2907.24

Soliciting; solicitation after positive HIV test

(A) No person shall solicit another to engage with such other person in sexual activity for hire.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall engage in conduct in violation of division (A) of this section.

(C)(1) Whoever violates division (A) of this section is guilty of soliciting, a misdemeanor of the third degree.

(2) Whoever violates division (B) of this section is guilty of engaging in solicitation after a positive HIV test. If the offender commits the violation prior to July 1, 1996, engaging in solicitation after a positive HIV test is a felony of the second degree. If the offender commits the violation on or after July 1, 1996, engaging in solicitation after a positive HIV test is a felony of the third degree.

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(D) If a person is convicted of or pleads guilty to a violation of any provision of this section, an attempt to commit a violation of any provision of this section, or a violation of or an attempt to commit a violation of a municipal ordinance that is substantially equivalent to any provision of this section and if the person, in committing or attempting to commit the violation, was in, was on, or used a motor vehicle, the court, in addition to or independent of all other penalties imposed for the violation, may impose upon the offender a class six suspension of the person's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of section 4510.02 of the Revised Code. In lieu of imposing upon the offender the class six suspension, the court instead may require the offender to perform community service for a number of hours determined by the court.

OHIO REV. CODE ANN. § 2907.241

Loitering to engage in solicitation; loitering to engage in solicitation after positive HIV test

(A) No person, with purpose to solicit another to engage in sexual activity for hire and while in or near a public place, shall do any of the following:

- (1) Beckon to, stop, or attempt to stop another;
- (2) Engage or attempt to engage another in conversation;
- (3) Stop or attempt to stop the operator of a vehicle or approach a stationary vehicle;
- (4) If the offender is the operator of or a passenger in a vehicle, stop, attempt to stop, beckon to, attempt to beckon to, or entice another to approach or enter the vehicle of which the offender is the operator or in which the offender is the passenger;
- (5) Interfere with the free passage of another.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall engage in conduct in violation of division (A) of this section.

(C) As used in this section:

- (1) "Vehicle" has the same meaning as in section 4501.01 of the Revised Code.
- (2) "Public place" means any of the following:
 - (a) A street, road, highway, thoroughfare, bikeway, walkway, sidewalk, bridge, alley, alleyway, plaza, park, driveway, parking lot, or transportation facility;
 - (b) A doorway or entrance way to a building that fronts on a place described in division (C)(2)(a) of this section;
 - (c) A place not described in division (C)(2)(a) or (b) of this section that is open to the public.

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(D)(1) Whoever violates division (A) of this section is guilty of loitering to engage in solicitation, a misdemeanor of the third degree.

(2) Whoever violates division (B) of this section is guilty of loitering to engage in solicitation after a positive HIV test. If the offender commits the violation prior to July 1, 1996, loitering to engage in solicitation after a positive HIV test is a felony of the fourth degree. If the offender commits the violation on or after July 1, 1996, loitering to engage in solicitation after a positive HIV test is a felony of the fifth degree.

OHIO REV. CODE ANN. § 2907.25

Prostitution; prostitution after positive HIV test

(A) No person shall engage in sexual activity for hire.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall engage in sexual activity for hire.

(C)(1) Whoever violates division (A) of this section is guilty of prostitution, a misdemeanor of the third degree.

(2) Whoever violates division (B) of this section is guilty of engaging in prostitution after a positive HIV test. If the offender commits the violation prior to July 1, 1996, engaging in prostitution after a positive HIV test is a felony of the second degree. If the offender commits the violation on or after July 1, 1996, engaging in prostitution after a positive HIV test is a felony of the third degree.

OHIO REV. CODE ANN. § 2921.38

Harassment by inmate

(A) No person who is confined in a detention facility, with intent to harass, annoy, threaten, or alarm another person, shall cause or attempt to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner.

(B) No person, with intent to harass, annoy, threaten, or alarm a law enforcement officer, shall cause or attempt to cause the law enforcement officer to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the law enforcement officer, by expelling the bodily substance upon the law enforcement officer, or in any other manner.

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(C) No person, with knowledge that the person is a carrier of the virus that causes acquired immunodeficiency syndrome, is a carrier of a hepatitis virus, or is infected with tuberculosis and with intent to harass, annoy, threaten, or alarm another person, shall cause or attempt to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner.

(D) Whoever violates this section is guilty of harassment with a bodily substance. A violation of division (A) or (B) of this section is a felony of the fifth degree. A violation of division (C) of this section is a felony of the third degree.

(E)(1) The court, on request of the prosecutor, or the law enforcement authority responsible for the investigation of the violation, shall cause a person who allegedly has committed a violation of this section to submit to one or more appropriate tests to determine if the person is a carrier of the virus that causes acquired immunodeficiency syndrome, is a carrier of a hepatitis virus, or is infected with tuberculosis.

(2) The court shall charge the offender with the costs of the test or tests ordered under division (E)(1) of this section unless the court determines that the accused is unable to pay, in which case the costs shall be charged to the entity that operates the detention facility in which the alleged offense occurred.

(F) This section does not apply to a person who is hospitalized, institutionalized, or confined in a facility operated by the department of mental health or the department of developmental disabilities.

OHIO REV. CODE ANN. § 2927.13

Sale or donation of blood by AIDS carrier

(A) No person, with knowledge that the person is a carrier of a virus that causes acquired immune deficiency syndrome, shall sell or donate the person's blood, plasma, or a product of the person's blood, if the person knows or should know the blood, plasma, or product of the person's blood is being accepted for the purpose of transfusion to another individual.

(B) Whoever violates this section is guilty of selling or donating contaminated blood, a felony of the fourth degree.

OHIO REV. CODE ANN. § 2929.14***Prison terms***

(A) Except as provided in division (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), (B)(6), (B)(7), (B)(8), (E), (G), (H), or (J) of this section or in division (D)(6) of section 2919.25 of the Revised Code and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

- (1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years.
- (2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.
- (3)(a) For a felony of the third degree that is a violation of section 2903.06, 2903.08, 2907.03, 2907.04, or 2907.05 of the Revised Code or that is a violation of section 2911.02 or 2911.12 of the Revised Code if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.
- (b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.
- (4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.
- (5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

HIV positive persons can be prosecuted for failing to disclose their HIV status to sexual partners.

Ohio's felonious assault statute specifically criminalizes failing to disclose one's HIV positive status to sexual partners. Under this statute, it is also a felony punishable by up to eight years imprisonment for engaging in sexual conduct with a person who cannot appreciate one's HIV status or engaging in such conduct with someone under the age of eighteen.⁸⁹³

⁸⁹³ OHIO REV. CODE ANN. § 2903.11(B) (West 2014), § 2929.14(A)(2) (West 2014).

“Sexual conduct” includes penile-vaginal sex, anal sex, oral sex, and, without consent, the insertion, however slight, of any part of the body or any instrument that carries the bodily fluids of an HIV positive person into another person’s vagina or anus.⁸⁹⁴

The only affirmative defense to prosecution is the disclosure of one’s HIV status to sexual partners prior to engaging in any of the above-mentioned conduct. The disclosure must be made prior to the first initial act of such conduct and using condoms or other forms of protection is not a defense.

Neither the intent to transmit HIV nor HIV transmission is required for prosecution.

Ohio’s felonious assault statute has survived constitutional challenges. In *State v. Gonzalez*,⁸⁹⁵ the defendant was convicted of two counts of felonious assault for failing to tell his sexual partner that he was HIV positive.⁸⁹⁵ He was sentenced to sixteen years imprisonment and was required to register as a sex offender.⁸⁹⁶ The complainant later tested positive for HIV.⁸⁹⁷ At trial, there were numerous discrepancies in the parties’ testimony, including whether or not Gonzalez told the complainant that he was HIV positive prior to their sexual relationship.⁸⁹⁸ Gonzalez testified that the complainant asked him before they began their sexual relationship whether the rumors about him being HIV positive were true and he confirmed that he had tested positive for HIV and insisted that they use condoms every time they had sex.⁸⁹⁹ The complainant, however, testified that when she confronted Gonzalez he denied his HIV status and that they had only used a condom once.⁹⁰⁰ In addition to the testimony of the defendant and complainant, the defendant had an ex-girlfriend testify that he had disclosed his HIV status to her and always insisted on using condoms.⁹⁰¹

On appeal, Gonzalez argued, among other issues, that the statute was unconstitutionally vague.⁹⁰² He asserted that the statute did not provide enough information on what constitutes “disclosure,” whether such disclosure had to be made prior to each sexual contact with the same person, or whether disclosure needed to be in writing.⁹⁰³ For a law “[t]o survive a void-for-vagueness challenge, the statute must be written so that a person of common intelligence can determine what conduct is prohibited, and the statute must provide sufficient standards to prevent arbitrary and discriminatory enforcement.”⁹⁰⁴ The court rejected the defendant’s void for vagueness argument because the ordinary meaning of “disclose” is used in every day speech and therefore cannot be vague.⁹⁰⁵ The court reasoned that if an HIV positive person disclosed her/his status once to a sexual partner then this would negate guilt for any subsequent contact the person had with that partner.⁹⁰⁶ Verbal

⁸⁹⁴ § 2903.11(E)(4).

⁸⁹⁵ 796 N.E.2d 12, 17 (Ohio Ct. App. 2003).

⁸⁹⁶ *Id.* at 17, 18.

⁸⁹⁷ *Id.* at 19.

⁸⁹⁸ *Id.*

⁸⁹⁹ *Id.*

⁹⁰⁰ *Id.*

⁹⁰¹ *Id.* at 19-20.

⁹⁰² *Id.* at 21.

⁹⁰³ *Id.* at 21-22.

⁹⁰⁴ *Id.* at 21.

⁹⁰⁵ *Id.*

⁹⁰⁶ *Id.* at 22.

disclosure was also held to be sufficient as the court reasoned it was disingenuous to suggest that written, signed, and notarized disclosure would be necessary to avoid prosecution.⁹⁰⁷

The court also held that though there was a violation of the state's HIV confidentiality statutes when the prosecution failed to obtain court authorization for Gonzalez's HIV status, this was deemed "harmless error" because of the other evidence of the defendant's HIV status.⁹⁰⁸

As *State v. Gonzalez* demonstrates, it is very difficult to prove disclosure in court. In many of these cases, there is no proof that an HIV positive person disclosed her/his status and the only evidence available is the testimony of the defendant, complainant, or other witnesses.

Below are other examples of prosecutions of HIV positive individuals under Ohio's felonious assault statute:⁹⁰⁹

- In 2013, a 48-year-old woman was convicted of two counts of felonious assault and sentenced to eight years in prison for failing to tell two sexual partners that she was HIV positive.⁹¹⁰
- In 2012, an HIV positive man was sentenced to three years in prison for failing to disclose his status to a sexual partner.⁹¹¹
- In 2012, a 29-year-old former professional wrestler was sentenced to thirty-two years in prison for having sex with women without disclosing his HIV positive status.⁹¹²
- In 2012, an HIV positive man pleaded guilty to three charges of felonious assault and was sentenced to five years in prison for infecting three women with HIV.⁹¹³
- In September 2011, an HIV positive woman was charged with felonious assault, among other things, for spitting on patrons at a bar.⁹¹⁴
- In 2011, a 32-year-old man was charged with two counts of felonious assault for allegedly having sexual relations with a 15-year-old boy.⁹¹⁵ The boy later tested positive for HIV.⁹¹⁶

⁹⁰⁷ *Id.*

⁹⁰⁸ *Id.* at 18.

⁹⁰⁹ Ohio's felonious assault statute also applies to persons who "knowingly cause physical harm to another." OHIO REV. CODE ANN. § 2903.11(A)(1). A woman was convicted of attempted felonious assault for biting a hospital employee who was trying to restrain her. *State v. Reif-Hill*, 1998 WL 787389, at *1-2 (Ohio Ct. App. 1998). Prior to the assault she had told the hospital staff that she had AIDS though she did not. *Id.* at *1. On appeal the court vacated the conviction and ordered the release of the defendant because the prosecution failed to prove that the defendant knowingly caused or attempted to cause serious physical harm to the victim by biting him with the intent to pass on HIV. *Id.* at *4.

⁹¹⁰ *HIV Positive Woman Gets 8 Years Prison for Having Sex With Men*, LIMA.OHIO.COM, Aug. 23, 2013, available at http://www.limaohio.com/news/local_news/article_2dfe1c74-8a9d-11e2-91a6-001a4bcf6878.html.

⁹¹¹ John W. Goodwin, Jr., *HIV-Positive Man Sentenced to Three Years for Assault*, VINDY.COM, May 18, 2012, available at <http://www.vindy.com/news/2012/may/18/hiv-positive-man-sentenced-to-three-year/>.

⁹¹² *Ohio Wrestler Gets 32 Years in HIV Assault Case*, FOX NEWS, Jan 23, 2012, available at <http://www.foxnews.com/us/2012/01/23/ohio-wrestler-gets-32-years-in-hiv-assault-case/>.

⁹¹³ Michael Sangiacomo, *HIV Positive Man Sentenced for Infecting 3 Women*, THE PLAIN DEALER, Jan. 10, 2012, available at http://blog.cleveland.com/metro/2012/01/hiv_positive_man_sentenced_for.html.

⁹¹⁴ *HIV Positive Woman Behind Bars After Spitting on Several Bar Patrons*, 19 ACTION NEWS, Sept. 2, 2011, available at <http://www.19actionnews.com/story/15383123/hiv-positive-woman-spits-on?clienttype=printable>.

- In May 2011, an HIV positive woman was arrested on a felony prostitution charge.⁹¹⁷
- In October 2010, a man was charged with felonious assault for allegedly failing to tell his wife that he was HIV positive.⁹¹⁸ After the man was admitted to the hospital with pneumonia his doctor allegedly threatened to tell the man's wife about his HIV status if the man did not disclose his status.⁹¹⁹
- In 2010, a 51-year-old HIV positive man pleaded guilty to felonious assault and was sentenced to five years imprisonment for failing to tell his wife that he was HIV positive.⁹²⁰ The man did not tell her of his status any time during their fourteen year relationship, and she did not seek treatment for HIV infection until after it had turned into AIDS.⁹²¹ He was originally charged with attempted murder in addition to felonious assault.⁹²²
- An HIV positive man pleaded guilty for failing to disclose his HIV status to his sexual partner.⁹²³ He was originally sentenced to ten years imprisonment for felonious assault and for possessing cocaine.⁹²⁴
- In 2009, an HIV positive man was sentenced to seven years imprisonment for failing to disclose his HIV status to his alleged rape victim.⁹²⁵ The man appealed his conviction, arguing that he did not know his HIV status and could therefore not be convicted under the statute.⁹²⁶ The court reasoned that because the defendant had discussed his HIV positive status with detectives, there was sufficient evidence to show that he knew his HIV status despite the fact that there was no medical record that the defendant had tested positive for HIV.⁹²⁷
- In 2006, an HIV positive man was convicted of nine counts of felonious assault for exposing his sexual partner, who was under the age of eighteen and not his wife, to

⁹¹⁵ Kelli Wynn, *Boy, 15, Infected by Man with HIV*, DAYTON DAILY NEWS, June 16, 2011, available at <http://www.daytondailynews.com/news/news/crime-law/boy-15-infected-by-man-with-hiv/nMsDs/>.

⁹¹⁶ *Id.*

⁹¹⁷ *Id.*

⁹¹⁸ Tom Giamboni, *Husband Allegedly Kept HIV a Secret*, MORNING JOURNAL, Oct. 2, 2010, available at <http://www.morningjournalnews.com/page/content.detail/id/526618/Husband-allegedly-kept-HIV-a-secret.html?nav=5006>.

⁹¹⁹ *Id.*

⁹²⁰ Gabriel Baird, *Man Who Gave Wife AIDS Gets Five Years in Prison*, THE PLAIN DEALER, Mar. 8 2010, available at http://blog.cleveland.com/metro/2010/03/man_who_gave_wife_aids_gets_5.html.

⁹²¹ *Id.*

⁹²² Gabriel Baird, *Woman Hopes Tale Can Warn Others After Her Husband Conceals Illness, Gives Her AIDS*, THE PLAIN DEALER, Feb. 28, 2010, available at http://blog.cleveland.com/metro/2010/02/oman_hopes_she_can_warn_others.html.

⁹²³ *State v. Jones*, No. 23156, 2009 WL 4811329, at *1 (Ohio Ct. App. Dec. 11, 2009).

⁹²⁴ *Id.* at *3 (vacating and remanding due to the state's failure to meet its plea negotiations of recommending the defendant to a term of imprisonment of two to four years.).

⁹²⁵ *State v. Russell*, No. 09AP-226, 2009 WL 3090190, at *1 (Ohio Ct. App. Sept. 29, 2009).

⁹²⁶ *Id.* at *4.

⁹²⁷ *Id.*

HIV.⁹²⁸ He was sentenced to forty years imprisonment and forced to register as a sex offender.⁹²⁹

- An HIV positive man was sentenced to four years imprisonment for abduction and six years imprisonment for felonious assault for failing to tell his sexual partner that he was HIV positive.⁹³⁰ The trial court ordered that the sentences be served consecutively.⁹³¹ On appeal, the court found that the trial court's determination of consecutive sentencing was proper because the defendant could have transmitted HIV to the complainant and because it was unclear how many other people the defendant may have exposed to HIV through unprotected sex.⁹³²
- An HIV positive man was sentenced to four years in jail under felonious assault charges for failing to tell his sexual partner that he was HIV positive.⁹³³
- An HIV positive man pleaded guilty to two counts of felonious assault and was sentenced to twelve years imprisonment for failing to tell his sexual partners about his HIV status.⁹³⁴
- In 2008, an HIV positive man was charged with felonious assault for failing to disclose his HIV status to his sexual partner.⁹³⁵

After being released from prison for felonious assault charges, HIV positive persons may be subject to invasive parole and community control standards. In 2006, an HIV positive man was sentenced to two years imprisonment for failing to tell his sexual partner that he was HIV positive.⁹³⁶ A year later he was released and put on community control for five years.⁹³⁷ As part of his community control, the defendant could “[h]ave no sexual contact with any individual without prior approval of the court as to such said individual.”⁹³⁸ During his community control, the defendant engaged in two sexual relationships, one with a man and one with a woman, both of whom knew of his HIV status, but only the woman had received court approval.⁹³⁹ In the trial regarding whether the defendant had violated his community control sanctions by engaging in sexual relationship with the man without court approval the trial court found the defendant guilty and sentence him to two years imprisonment.⁹⁴⁰

⁹²⁸ *State v. Christian*, No. 07 JE 9, 2007 WL 4696853, at *1 (Ohio Ct. App. Dec. 28, 2007).

⁹²⁹ *Id.* at *2, *7 (stating that “felonious assault . . . when committed with a sexual motivation is a sexually oriented offense . . . An offender having sexual conduct with a person under 18 years of age who is not their spouse when the offender knows he is HIV positive is felonious assault that has a sexual motivation,” and that “[a]n offender can be designated a sexual predator if the offender is sentenced for a sexually oriented offense . . .”)

⁹³⁰ *State v. Geiger*, No. 22073, 2004 WL 3017314, at *1 (Ohio Ct. App. Dec. 22, 2004).

⁹³¹ *Id.*

⁹³² *Id.* at *3.

⁹³³ *State v. Roberts*, 805 N.E.2d 594, 596 (Ohio Ct. App. 2004).

⁹³⁴ Tracey Read, *Man Gets 6 More Years in HIV Case*, THE NEWS-HERALD, Sept. 6, 2008, available at <http://www.news-herald.com/general-news/20080906/man-gets-6-more-years-in-hiv-case>.

⁹³⁵ Dana Wilson, *Man Who Hid HIV Status Charged With Assault*, THE COLUMBUS DISPATCH, June 30, 2008, available at http://www.dispatch.com/content/stories/local/2008/07/01/ayala_hiv.html.

⁹³⁶ *State v. Eversole*, 912 N.E. 2d 643, 645 (Ohio Ct. App. 2009).

⁹³⁷ *Id.*

⁹³⁸ *Id.* at 645.

⁹³⁹ *Id.*

⁹⁴⁰ *Id.*

On appeal, the defendant argued that he did not violate the court's orders because (1) he and the man never had sex; (2) even if they had a sexual relationship the man knew about the defendant's HIV status; and (3) it was an unconstitutional invasion of his right to privacy to require court approval for potential sex partners.⁹⁴¹ The Ohio Court of Appeals was "concerned" about the breadth of the community control requiring court approval for sexual partners but found that the defendant failed to timely appeal the right to privacy issue and would therefore not address it.⁹⁴² The court overruled the defendant's other issues on appeal, finding that the trial court was correct in monitoring the defendant's activities to "protect the public from the blatant disregard [the defendant] demonstrated when he failed to disclose his condition to the initial victim of his offense."⁹⁴³ The court held that the defendant was in violation for failing to get court approval of his sexual relationship with the man despite the fact that the man had full knowledge of defendant's HIV status.⁹⁴⁴

HIV positive persons can face criminal penalties for prostitution and solicitation of prostitution.

It is a third-degree felony for HIV positive persons to solicit (advertising the illegal sale of sex for hire) or encourage another to solicit prostitution.⁹⁴⁵ It is a felony in the fifth degree for an HIV positive person to "loiter to engage in prostitution."⁹⁴⁶ For HIV negative persons the charge is a misdemeanor in the third degree.⁹⁴⁷

A person "loiters to engage in prostitution" when she/he tries to stop another person, engages or attempts to engage another in conversation, stops or attempts to stop the operator of a car, or approaches a stationary car with the intent to engage in sexual activity for hire while in or near a public place.⁹⁴⁸ A person can also be charged with loitering to engage in prostitution if she/he is the driver or passenger in a car and tries to do any of the aforementioned activities or tries to entice another person to approach or enter the vehicle with the purpose of engaging in sexual activity for hire.⁹⁴⁹

Under this statute it does not matter whether any sexual act was performed, if there was any possibility of transmitting HIV, or if there was an intent to transmit HIV. The mere discussion of engaging in sexual conduct for money is sufficient for prosecution. In *State v. McPherson*, the appellant was found guilty of solicitation of prostitution while HIV positive and was sentenced to three years imprisonment and forced to register as a sex offender.⁹⁵⁰ McPherson was charged when he approached an undercover officer, who knew that McPherson was HIV positive and had been

⁹⁴¹ *Id.* at 646.

⁹⁴² *Id.*

⁹⁴³ *Id.* at 647.

⁹⁴⁴ *Id.* at 647-48.

⁹⁴⁵ OHIO REV. CODE ANN. §§ 2907.24 (West 2014), 2907.25 (West 2014).

⁹⁴⁶ § 2907.241(B) (West 2014).

⁹⁴⁷ § 2907.241(D)(1).

⁹⁴⁸ § 2907.241(A)(1)-(3).

⁹⁴⁹ § 2907.241(A)(4).

⁹⁵⁰ 758 N.E.2d 1198, 1199 (Ohio Ct. App. 2001).

previously arrested for solicitation.⁹⁵¹ The two engaged in conversation and when McPherson agreed to perform a sexual act for \$10 he was arrested.⁹⁵²

On appeal, the Ohio Court of Appeals addressed whether there was sufficient evidence to convict McPherson of solicitation, if McPherson knew of his HIV positive status, and whether the trial court correctly forced him to register as a sex offender.⁹⁵³ The court found that because the defendant initiated the conversation with the undercover officer and was the first person to discuss sex and money there was enough evidence to successfully prosecute him for solicitation despite the fact that no sexual act or exchange of money had occurred.⁹⁵⁴ On the question of whether the defendant knew his HIV positive status, the court concluded that the medical records noting the defendant's status and the police department's vice squad's knowledge of the defendant's status were sufficient to prove that McPherson knew he was HIV positive.⁹⁵⁵ The court reversed the finding that the defendant had to register as a "sex offender" because solicitation is not considered a sexually oriented offense.⁹⁵⁶

Other examples of prosecutions for solicitation and prostitution after an HIV positive test include:

- An HIV positive woman was convicted of two counts of soliciting another to engage in sexual activity for hire after a positive HIV test.⁹⁵⁷ She was sentenced to four years imprisonment, each charge to be served concurrently.⁹⁵⁸
- In 2000, an HIV positive man was convicted of solicitation while being HIV positive and was sentenced to two years imprisonment.⁹⁵⁹
- A 25-year-old HIV positive man was arrested for solicitation and prostitution while knowing he was HIV positive.⁹⁶⁰
- In 2010, an HIV positive woman was indicted for solicitation after testing positive for HIV.⁹⁶¹ She was subsequently charged twice for prostitution.⁹⁶²
- In 2003, a woman was sentenced to two years imprisonment after pleading guilty to solicitation with the knowledge that she had HIV.⁹⁶³

⁹⁵¹ *Id.* at 1200.

⁹⁵² *Id.*

⁹⁵³ *Id.* at 1199.

⁹⁵⁴ *Id.* at 1200.

⁹⁵⁵ *Id.* at 1200-01.

⁹⁵⁶ *Id.* at 1201-02.

⁹⁵⁷ *State v. West*, No. 22966, 2009 WL 4268554, at *1 (Ohio Ct. App. Nov. 25, 2009).

⁹⁵⁸ *Id.*

⁹⁵⁹ *State v. Jones*, No. 19978, 2004 WL 690419, at *1 (Ohio Ct. App. Apr. 2, 2004).

⁹⁶⁰ Lucas Sullivan, *HIV-Positive Prostitute Picked up by Undercover Cop*, DAYTON DAILY NEWS (Ohio), Sept. 11, 2009, available at <http://mo.daytondailynews.com/blogs/content/shared-gen/blogs/dayton/daytoncrime/entries/2009/09/>.

⁹⁶¹ John Fuddy, *Woman Faces Multiple Counts of Soliciting With HIV*, THE COLUMBUS DISPATCH, July 31, 2010, available at <http://www.dispatch.com/content/stories/local/2010/07/31/woman-faces-multiple-counts-of-soliciting-with-hiv.html>.

⁹⁶² *Id.*

HIV positive persons face penalties for exposing others to any bodily fluid.

Under Ohio's harassment by inmate statute HIV positive persons can face third-degree felony charges for exposing any other person to their urine, feces, saliva, blood, or any other bodily substance with the intent to annoy, threaten, alarm, or harass.⁹⁶⁴ Though the statute is named "harassment by inmate," a person does not have to be imprisoned or in confinement to be prosecuted under this statute.

HIV positive persons face increased sentences despite the fact that many of the bodily substances at issue present no risk of transmitting HIV. Urine, feces, and saliva are not known transmitters of HIV,⁹⁶⁵ but HIV positive persons can nonetheless face three years imprisonment for exposing others to these fluids.⁹⁶⁶ HIV negative persons, alternatively, face a maximum of one year imprisonment for violating the same statute.⁹⁶⁷ Many of the cases under this statute arise from people spitting at or throwing urine at law enforcement officials.

In *State v. Thompson*, the HIV positive defendant was a prisoner at the Southern Ohio Correctional Facility ("SOCF") and threw a cup full of feces at a nurse.⁹⁶⁸ The feces hit her in the face, hair, arms, chest and leg.⁹⁶⁹ The defendant was brought before the Rules Infraction Board at SOCF and was sentenced to fifteen days in disciplinary control.⁹⁷⁰ He was also indicted on two counts of harassment by an inmate.⁹⁷¹ The defendant moved to dismiss on the grounds of double jeopardy, and the trial court overruled the motion.⁹⁷² The defendant later pleaded no contest to one count and was sentenced to an additional nine months imprisonment.⁹⁷³

The defendant appealed his conviction, contending that the disciplinary proceedings at the SOCF were criminal in nature, and that his subsequent conviction for harassment by an inmate violated the double jeopardy provisions of the U.S. Constitution.⁹⁷⁴ The appellate court sustained the defendant's conviction, finding that the legislature intended that the administrative sanctions imposed upon an inmate by prison authorities be civil in nature and that the subsequent criminal action did not violate the Double Jeopardy Clause.⁹⁷⁵ If one is imprisoned and convicted under the harassment by inmate statute she/he may face penalties implemented by the prison system as well as additional sentences from the courts.

⁹⁶³ John Fuddy, *Prostitute's HIV Status Overlooked in Charges*, THE COLUMBUS DISPATCH, September 13, 2010, available at http://www.dispatch.com/live/content/local_news/stories/2010/09/12/prostitutes-hiv-status-overlooked-in-charges.html?sid=101.

⁹⁶⁴ OHIO REV. CODE ANN. § 2921.38(C) (West 2014).

⁹⁶⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

⁹⁶⁶ § 2921.38(D); § 2929.14(A)(3)(b).

⁹⁶⁷ § 2921.38(D); § 2929.14(A)(5).

⁹⁶⁸ 726 N.E.2d 530, 531 (Ohio Ct. App. 1999).

⁹⁶⁹ *Id.*

⁹⁷⁰ *Id.*

⁹⁷¹ *Id.*

⁹⁷² *Id.*

⁹⁷³ *Id.*

⁹⁷⁴ *Id.* at 532.

⁹⁷⁵ *Id.* at 532-35.

In *State v. Lewis*, an HIV positive man was found guilty of nine counts of third-degree felony harassment by an inmate, one count of intimidation by a public servant, and was sentenced to twenty years imprisonment.⁹⁷⁶ The appellant denied he was HIV positive and though the state produced medical records stating that the appellant had been diagnosed in 1996, those medical records had not been given to the appellant during the discovery phase of the trial.⁹⁷⁷ The appellant argued at trial that he needed to obtain exculpatory lab tests proving that he was HIV negative and asked for a continuance, which was denied, to prepare this defense.⁹⁷⁸ On appeal, the Ohio Court of Appeals found that the trial court abused its discretion by admitting the medical records on the first day of the trial before the defendant had time to prepare a defense and rebut the prosecution's assertion that he was HIV positive.⁹⁷⁹ The conviction was reversed and the case remanded.⁹⁸⁰

Other prosecutions and cases under the harassment by inmate statute include:

- In 2010, a 41-year-old, HIV positive man was charged with harassment by an inmate, among other charges, for spitting in the eye of an officer after trying to break into a convenience store.⁹⁸¹
- A 48-year-old, HIV positive man was charged with two counts of harassment by an inmate for spitting at a police officer.⁹⁸²

HIV positive persons are prohibited from donating or selling blood or plasma.

It is a felony, punishable by up to eighteen months imprisonment, for an HIV positive person to donate or sell her/his blood, plasma, or any other blood product.⁹⁸³

HIV positive persons have been incarcerated for using saliva as a “deadly weapon.”

Ohio's felonious attempt statute, in addition to prosecuting persons for failing to disclose their HIV status to sexual partners, has also been used to prosecute HIV positive persons for using their saliva or other bodily fluid as a “deadly weapon.”⁹⁸⁴ Under the felonious assault statute, “no person shall knowingly . . . [c]ause or attempt to cause physical harm to another or another's unborn by means of a deadly weapon”⁹⁸⁵ In multiple cases, Ohio courts have determined that any spit of an HIV positive person containing a mixture of blood and saliva is a “deadly weapon.”

⁹⁷⁶ No. 07CA3137, 2008 WL 787722, at *1-2 (Ohio Ct. App. Mar. 21, 2008).

⁹⁷⁷ *Id.* at *2.

⁹⁷⁸ *Id.*

⁹⁷⁹ *Id.* at *3.

⁹⁸⁰ *Id.* at *4.

⁹⁸¹ *Akron Police Say Man Spit on Officer, Store Break-In Suspect Says He's HIV Positive*, AKRON BEACON JOURNAL, Feb. 17, 2010 at B10.

⁹⁸² *Police: Man with AIDS Spits on Officer*, NEWS 5 WLWT.COM, Aug. 12, 2009, available at <http://www.wlwt.com/news/20368401/detail.html?taf=cin>.

⁹⁸³ OHIO REV. CODE ANN. § 2927.13 (West 2013); § 2929.14(A)(4).

⁹⁸⁴ *State v. Bird*, 692 N.E.2d 1013, 1014 (Ohio 1998) (stating that the HIV positive defendant pleaded no contest to felonious assault charges for spitting in the eye of a police officer and was sentenced to three to fifteen years imprisonment).

⁹⁸⁵ OHIO REV. CODE ANN. § 2903.11(A)(2).

In *State v. Price*, the appellant, an HIV positive hemophiliac, spat at and bit a police officer.⁹⁸⁶ He was indicted on one count of felonious assault, one count of attempted felonious assault, and one count of assault on a peace officer.⁹⁸⁷ He was sentenced to six years imprisonment because the court found that his spit and saliva constituted a deadly weapon.⁹⁸⁸

On appeal, the appellant argued that his spit and saliva should not be considered a deadly weapon.⁹⁸⁹ A “deadly weapon” is defined as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.”⁹⁹⁰ During the trial the defendant’s treating physicians testified that though there is only a remote risk of transmitting HIV via saliva, because the defendant is a hemophiliac his saliva would have blood in it a majority of the time, and as such there would be a potentially high concentration of the HIV virus.⁹⁹¹ Based on this testimony, the Ohio Court of Appeals determined that because the appellant was HIV positive and a hemophiliac, his saliva was a deadly weapon.⁹⁹² The court reasoned that the appellant was correctly convicted under the felonious assault statute because he knew about his illness, knew that “his saliva was a deadly weapon,” and still assaulted the officer.⁹⁹³

In a similar case, the HIV positive defendant spit in the eye of a police officer and was found guilty of attempted felonious assault on a peace officer.⁹⁹⁴ He was sentenced to four years imprisonment.⁹⁹⁵ At trial there was evidence to suggest that the spit may have contained blood.⁹⁹⁶ The medical examiner testified that there was a small risk of getting HIV from spitting when the saliva contains blood, but that saliva alone is not “a significant risk factor in transmitting HIV.”⁹⁹⁷ On appeal, the defendant argued that he could not be convicted under the statute because the risk of spitting in the officer’s eye was negligible.⁹⁹⁸

In order to convict defendant of attempted felonious assault, the prosecution was required to prove that appellant knowingly “[c]ause[d] or attempt[ed] to cause physical harm to another . . . by means of a deadly weapon or dangerous ordnance,” and that the defendant engaged in “conduct that, if successful, would constitute or result in the offense.”⁹⁹⁹ The court determined that even if it was factually or legally impossible under the circumstances for the appellant transmit HIV to the officer, it is no defense if the act could have been completed had the circumstances been as the appellant believed.¹⁰⁰⁰ The court upheld the conviction, finding that the appellant intended to harm the officer and that because his saliva was mixed with blood it could be considered a deadly weapon.¹⁰⁰¹

⁹⁸⁶ 834 N.E. 2d 847, 848 (Ohio Ct. App. 2005).

⁹⁸⁷ *Id.*

⁹⁸⁸ *Id.* at 848-49.

⁹⁸⁹ *Id.* at 848.

⁹⁹⁰ OHIO REV. CODE ANN. § 2923.11(A) (West 2014).

⁹⁹¹ *Price*, 834 N.E.2d at 849.

⁹⁹² *Id.*

⁹⁹³ *Id.*

⁹⁹⁴ *State v. Branch*, No. L-05-1269, 2006 WL 2045911, at *1 (Ohio Ct. App. July 21, 2006).

⁹⁹⁵ *Id.*

⁹⁹⁶ *Id.*

⁹⁹⁷ *Id.* (quoting the testimony of Dr. Varsha Moudgal).

⁹⁹⁸ *Id.* at *2.

⁹⁹⁹ OHIO REV. CODE ANN. §§ 2903.11(A)(2), 2923.02(A) (West 2014)

¹⁰⁰⁰ *Branch*, 2006 WL 2045911, at *3-4.

¹⁰⁰¹ *Id.* at 4.

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Oklahoma Statute(s) that Allow for Criminal Prosecution based on HIV Status:

OKLA. STAT. tit. 21, § 1192.1

Knowingly engaging in conduct reasonably likely to transfer HIV virus

A. It shall be unlawful for any person knowing that he or she has Acquired Immune Deficiency Syndrome (AIDS) or is a carrier of the human immunodeficiency virus (HIV) and with intent to infect another, to engage in conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the skin or other membranes of another person, except during in utero transmission of blood or bodily fluids, and:

1. The other person did not consent to the transfer of blood, bodily fluids containing blood, semen, or vaginal secretions; or
2. The other person consented to the transfer but at the time of giving consent had not been informed by the person that the person transferring such blood or fluids had AIDS or was a carrier of HIV.

B. Any person convicted of violating the provisions of this section shall be guilty of a felony, punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years.

OKLA. STAT. tit. 21, § 1031

Punishment for violations--Fines--Knowingly engaging in prostitution while infected with HIV--Violations within certain distance from school or church

A. Except as provided in subsection B or C of this section, any person violating any of the provisions of Section 1028, 1029 or 1030 of this title shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment in the county jail for not less than thirty (30) days nor more than one (1) year or by fines as follows: a fine of not more than Two Thousand Five Hundred Dollars (\$2,500.00) upon the first conviction for violation of any of such provisions, a fine of not more than Five Thousand Dollars (\$5,000.00) upon the second conviction for violation of any of such provisions, and a fine of not more than Seven Thousand Five Hundred Dollars (\$7,500.00) upon the third or subsequent convictions for violation of any of such provisions, or by both such imprisonment and fine. In addition, the court may require a term of community service of not less than forty (40) nor more than eighty (80) hours. The court in which any such conviction is had shall notify the county superintendent of public health of such conviction.

Continued on the following page...

B. Any person who engages in an act of prostitution with knowledge that they are infected with the human immunodeficiency virus shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years.

C. Any person who engages in an act of child prostitution, as defined in Section 1030 of this title, shall, upon conviction, be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for not more than ten (10) years and by fines as follows: a fine of not more than Five Thousand Dollars (\$5,000.00) upon the first conviction, a fine of not more than Ten Thousand Dollars (\$10,000.00) upon the second conviction, and a fine of not more than Fifteen Thousand Dollars (\$15,000.00) upon the third or subsequent convictions.

D. Any person violating any of the provisions of Section 1028, 1029 or 1030 of this title within one thousand (1,000) feet of a school or church shall be guilty of a felony and, upon conviction, shall be punished by imprisonment in the custody of the Department of Corrections for not more than five (5) years or by fines as follows: a fine of not more than Two Thousand Five Hundred Dollars (\$2,500.00) upon the first conviction for violation of any of such provisions, a fine of not more than Five Thousand Dollars (\$5,000.00) upon the second conviction for violation of any of such provisions, and a fine of not more than Seven Thousand Five Hundred Dollars (\$7,500.00) upon the third or subsequent convictions for violation of any of such provisions, or by both such imprisonment and fine. In addition, the court may require a term of community service of not less than forty (40) nor more than eighty (80) hours. The court in which any such conviction is had shall notify the county superintendent of public health of such conviction.

HIV positive persons can face felony charges for failing to disclose their HIV status to their sexual partners.

It is punishable by up to five years in prison for HIV positive persons to engage in conduct that carries a “reasonable likelihood” of transmitting HIV, with the intent to infect another.¹⁰⁰² It is a defense to prosecution if the other party had been informed of the defendant’s HIV positive status and agreed to engage in the relevant conduct.¹⁰⁰³ The transmission of HIV is not required for prosecution.

Although Oklahoma’s HIV exposure statute requires intent to transmit HIV, prosecutions under this law have resulted in convictions even when there was no indication that the defendant acted

¹⁰⁰² OKLA. STAT. tit. 21, § 1192.1 (2014).

¹⁰⁰³ § 1192.1(A)(2)

with intent to transmit HIV, but rather only failed to inform her/his sexual partner about her/his HIV status:

- In July 2014, a 36-year-old HIV positive man was charged with engaging in conduct likely to transfer HIV for engaging in unprotected sex with two women without disclosing his status.¹⁰⁰⁴
- In January 2014, a 31-year-old HIV positive man was charged with knowingly exposing another to HIV.¹⁰⁰⁵
- In March 2012, a 23-year-old HIV positive man was charged with, among other things, assault and battery with a deadly weapon and knowingly transferring HIV to his wife and former sexual partners.¹⁰⁰⁶
- In 2009, a 40-year-old HIV positive man was arrested and charged with exposure to HIV for failing to tell a man his status before engaging in oral sex.¹⁰⁰⁷
- In December 2009, a 64-year-old HIV positive man was charged with engaging in conduct reasonably likely to transmit HIV for allegedly failing to disclose his status to a sexual partner.¹⁰⁰⁸
- In June 2004, a 20-year-old HIV positive woman was charged under Oklahoma's exposure statute after she allegedly failed to inform her partner of her status.¹⁰⁰⁹
- In March 2003, a 41-year-old HIV positive man was charged with engaging in conduct likely to transfer HIV for failing to disclose his HIV status to his sexual partner.¹⁰¹⁰

The common element in all of these cases was the defendant's apparent failure to disclose her/his HIV status to a sexual partner.

Though disclosure is an affirmative defense to prosecution under this statute, it is important to note that even when a person does disclose her/his HIV status it can be difficult to prove such disclosure in court. In these matters, relying on party testimony has inherent problems. For example, an HIV positive man was charged with knowingly spreading HIV to his girlfriend, who alleged that she did not know the man's status over the period of their relationship.¹⁰¹¹ It was not until six months after

¹⁰⁰⁴ Christine VanTimmeren, *Police: HIV positive man arrested, accused of spreading virus to partners*, FOX25, July 31, 2014, available at <http://www.okcfox.com/story/26164512/police-hiv-positive-man-arrested-accused-of-spreading-virus-to-partners>.

¹⁰⁰⁵ *HIV Suspect Arrested in Muskogee County*, SWTIMES, Jan. 17, 2014, available at <http://swtimes.com/news/hiv-suspect-arrested-muskogee-county>.

¹⁰⁰⁶ *Grady County Man Accused of Spreading HIV Held Without Bond*, NEWS9.COM, Mar. 20, 2012, available at <http://www.news9.com/story/17204303/grady-county-man-accused-of-spreading-hiv-held-without-bond?clienttype=printable>.

¹⁰⁰⁷ *Oklahoma City man arrested on suspicion of 'transmitting AIDS'*, NEWSOK, Aug. 27, 2009, available at http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100?custom_click=rss.

¹⁰⁰⁸ *Oklahoma City man arrested on HIV complaint*, NEWSOK, Dec. 15, 2009, available at <http://newsok.com/oklahoma-city-man-arrested-on-hiv-complaint/article/3425108>.

¹⁰⁰⁹ *Enid woman will be arraigned next week on felony charge that she exposed a former love to HIV*, AP ALERT, June 8, 2004.

¹⁰¹⁰ *Man Faces HIV Charge*, OKLAHOMAN, Mar. 26, 2003, at 2.

¹⁰¹¹ *Authorities Drop Charges Against HIV-Positive Man*, TULSA WORLD, Oct. 1, 1992, at C12.

the initial charges were brought that detectives determined, due to the witness testimony, that the woman had in fact been aware of the man's HIV status before starting their sexual relationship.¹⁰¹²

The Oklahoma statute does not carve out a specific defense based on the use of a condom or other protection during penile-vaginal, anal, or oral sex, nor has the use of a condom or low viral load been relied upon as a defense in any reported case decisions in Oklahoma.

HIV positive persons have been prosecuted under Oklahoma's criminal HIV exposure law for spitting and biting.

Oklahoma's HIV exposure statute creates criminal liability for "conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the skin or other membranes of another person."¹⁰¹³ HIV positive individuals have been charged with HIV exposure for conduct, such as biting and spitting, that has only theoretical or remote risks of transmission of HIV and that contravene the actual requirements of the statute:

- In July 2014, a 40-year-old HIV positive man was charged with aggravated assault, battery, and knowingly transmitting HIV after biting a health care worker.¹⁰¹⁴
- In May 2010, a man claiming to be HIV positive was booked on four felony complaints of spreading an infectious disease and knowingly engaging to transfer HIV after slinging his head to throw blood at emergency medical workers.¹⁰¹⁵ He was also alleged to have spit at the workers during his rescue.¹⁰¹⁶
- In October 2008, a 50-year-old HIV positive woman was arrested and charged with engaging in conduct likely to transfer HIV after biting a security guard.¹⁰¹⁷

In both of the above cases, the risk of HIV transmission is remote at best. The CDC has concluded that there exists only a "negligible" possibility that HIV could be transmitted through a bite.¹⁰¹⁸ The CDC has also concluded that spitting alone has never been shown to transmit HIV.¹⁰¹⁹ The application of Oklahoma's statute in the aforementioned cases ignores these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

¹⁰¹² *Id.*

¹⁰¹³ OKLA. STAT. tit. 21, § 1192.1.

¹⁰¹⁴ *HIV Patient Arrested after Biting Medical Technician*, LAW FIRM OF OKLAHOMA, July 29, 2014, available at <http://www.lawfirmofoklahoma.com/blog/hiv-patient-arrested-after-biting-medical-technician>.

¹⁰¹⁵ Shannon Muchmore, *Man Who Says He Has HIV Allegedly Spits on Emergency Workers*, NEWSOK, May 23, 2010, available at <http://newsok.com/man-who-says-he-has-hiv-spits-on-emergency-workers/article/3463349>; *Man Arrested for Trying to Spread HIV*, FOX23, May 24, 2010, available at <http://www.fox23.com/news/news/breaking-news/man-arrested-for-trying-to-spread-hiv/ndmZ4/>.

¹⁰¹⁶ *Id.*

¹⁰¹⁷ Jay Marks, *HIV-positive Woman Faces Felony for Bite*, NEWSOK, Oct. 8, 2008, available at <http://newsok.com/hiv-positive-woman-faces-felony-for-bite/article/3308838>.

¹⁰¹⁸ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

¹⁰¹⁹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

Engaging in sex work while HIV positive can lead to enhanced penalties of up to five years in jail.

Upon conviction for prostitution, sex workers face up to five years in prison if they know they are HIV positive.¹⁰²⁰ This specifically targets HIV positive persons regardless of whether they intended to transmit HIV, actually transmitted the virus, or engaged in activities likely or possible to do so. On the face of this statute, no actual sexual activity is required to face felony prosecution.

HIV positive persons have also been convicted under general criminal laws.

Though Oklahoma enacted its HIV exposure statute in 1997, there has been at least one case of HIV exposure since that time that has been prosecuted under general criminal laws. In 2000, a 41-year-old HIV positive man pleaded guilty to fifty-six counts of sexual abuse and one count of attempted murder after he engaged in sexual intercourse with two female minors.¹⁰²¹ Each count represented a month that he engaged in sexual conduct with one or both of the minors.¹⁰²² The attempted murder charge arose from allegations that he knew he was HIV positive and repeatedly engaged in unprotected sex with one of the minors, who later became pregnant and both she and her baby tested positive for HIV.¹⁰²³ The other minor tested negative for HIV.¹⁰²⁴ The defendant was sentenced to four consecutive life sentences and fifty-three concurrent life sentences.¹⁰²⁵

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¹⁰²⁰ OKLA. STAT. tit. 21, § 1031(B) (2014).

¹⁰²¹ Bill Braun, *Tulsa Man Imprisoned for Life on Sex Counts*, TULSA WORLD, May 24, 2000, at A13

¹⁰²² *Id.*

¹⁰²³ *Id.*

¹⁰²⁴ *Id.*

¹⁰²⁵ *Id.*

Oregon Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure but prosecutions have arisen under general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in Oregon. Nonetheless, Oregon has prosecuted HIV positive persons for exposing others to HIV under general criminal laws, including attempted murder, assault, and reckless endangerment. Failing to disclose HIV status to sexual partners may result in prosecution and conviction.

In *State v. Hinkhouse*, an HIV positive defendant was convicted of ten counts each of attempted murder and attempted assault when he failed to disclose his HIV status to numerous sexual partners, including a 3-year-old girl that he sexually abused.¹⁰²⁶ The defendant had refused to use a condom with several sexual partners and denied being HIV positive, despite being warned by his parole officer not to have unprotected sex.¹⁰²⁷ According to the testimony of one sexual partner, the defendant said that if he ever became HIV positive, he would spread the virus to others.¹⁰²⁸ At least one of the defendant's partners was infected with HIV, though this fact was irrelevant to prosecution.¹⁰²⁹ At trial, the defendant was sentenced to seventy years in prison.¹⁰³⁰

On appeal, the defendant argued that he did not intend to kill his sexual partners, only to gratify himself sexually.¹⁰³¹ The Court of Appeals of Oregon disagreed, finding, among other things that the defendant's refusal to wear condoms, failure to disclose his HIV status, and awareness of the risks of unprotected sex were all sufficient to prove intent to cause harm or death.¹⁰³² The further reasoned that Hinkhouse's unsafe sexual practices were not merely for his own sexual gratification because he did use condoms and disclose his HIV status with the one woman that he planned to marry.¹⁰³³ Before his attempted murder conviction, the defendant also served eleven months in prison for recklessly endangering two women by engaging in unprotected sex and sexually abusing a 15-year-old girl.¹⁰³⁴

¹⁰²⁶ 912 P.2d 921, 922 (Or. Ct. App. 1996), *adhered to as modified*, 915 P.2d 489 (Or. Ct. App. 1996); *HIV-Positive Man Guilty of Attempted Murder*, THE SEATTLE TIMES, Mar. 16, 1994, available at <http://community.seattletimes.nwsources.com/archive/?date=19940316&slug=1900486>.

¹⁰²⁷ *Hinkhouse*, 912 P.2d at 922-23.

¹⁰²⁸ *Id.* at 924.

¹⁰²⁹ *Id.* at 922.

¹⁰³⁰ Josh Meyer, *Non-Unanimous Jury Idea Appeals to Some Reformers*, L.A. TIMES, Sept. 28, 1994, available at http://articles.latimes.com/1994-09-28/news/mn-44047_1_unanimous-jury.

¹⁰³¹ *Hinkhouse*, 912 P.2d at 922, 925.

¹⁰³² *Id.* at 925.

¹⁰³³ *Id.*

¹⁰³⁴ *Man Who Tested Positive for AIDS Virus Accused of Molesting Child*, AP NEWS ARCHIVE, Oct. 1, 1993, available at <http://www.apnewsarchive.com/1993/Man-Who-Tested-Positive-for-AIDS-Virus-Accused-of-Molesting-Child/id-556574b6a50663d66f6b2fbf35ae21>.

In 1993, another HIV positive man in Oregon was convicted of assault and reckless endangerment when two of his sexual partners tested positive for HIV.¹⁰³⁵ He was sentenced to three years in prison, registered as a sex offender, and was forbidden from going into bars, contacting victims, contacting girls without written permission, and having unprotected sex with an HIV negative person.¹⁰³⁶ He later received seven years in prison for exposing a Canadian woman to HIV in 1996.¹⁰³⁷ It is not known whether the man used condoms during sex or disclosed his status.¹⁰³⁸

Individuals living with HIV in Oregon should be aware that they risk criminal liability if they fail to disclose their HIV status to sexual partners or engage in unprotected sex. The two cases above concern the rare and extreme instances where HIV positive individuals repeatedly failed to disclose their HIV status and refused to use condoms or other protection. In *Hinkhouse*, the defendant's long history of failing to tell his partners about his HIV status and refusal to wear condoms certainly went to the court's determination of specific intent, but the facts of the case could have been more appropriately applied to a charge of reckless endangerment.

Other prosecutions of HIV positive persons under Oregon's general criminal laws include:

- In 2013, a 37-year-old HIV positive man was charged with sexual abuse, sodomy, unlawful sexual penetration, and recklessly endangering another person for engaging in sexual activity with a young child.¹⁰³⁹ At the time of this writing, the man faces up to twenty-five years in prison if convicted.¹⁰⁴⁰
- In July 2012, a 21-year-old HIV positive man was charged with attempted first-degree assault, attempted second-degree assault, and two counts of reckless endangerment for engaging in unprotected sexual relations with a female partner without disclosing his HIV status.¹⁰⁴¹
- In June 2009, a 21-year-old HIV positive man pleaded guilty to second-degree attempted assault and third-degree assault after having unprotected sex with a female partner without disclosing his status.¹⁰⁴² He was later sentenced to two years in prison with three years post-prison supervision.¹⁰⁴³ He was further ordered to undergo sex offender evaluation.¹⁰⁴⁴

HIV positive status may also be a factor in sentencing. In *State v. Guayante*, an HIV positive defendant was convicted on one count of sexual abuse and two counts each of attempted rape and sodomy of a 13-year-old girl.¹⁰⁴⁵ On appeal, the defendant argued that it would be disproportionately

¹⁰³⁵ Anne Saker, *More Jail for Fugitive Sex Offender*, OREGONIAN, Dec. 8, 2005, at B01.

¹⁰³⁶ *Id.*

¹⁰³⁷ *Id.*

¹⁰³⁸ *Id.*

¹⁰³⁹ Lynne Terry, *HIV-positive Portland man, 37, arrested, may have infected young child*, THE OREGONIAN, Apr. 3, 2013, available at http://www.oregonlive.com/portland/index.ssf/2013/04/_portland_man_37_f.html.

¹⁰⁴⁰ *Id.*

¹⁰⁴¹ Scott Graves, *Man with HIV facing charges of assault and endangering*, CURRY COASTAL PILOT, July 25, 2012, available at <http://www.currypilot.com/News/Local-News/Man-with-HIV-facing-charges-of-assault-and-endangering>.

¹⁰⁴² Karen Pate, *Man sentenced after sexual partner contracts HIV*, THE OREGONIAN, July 17, 2009, available at http://www.oregonlive.com/washingtoncounty/index.ssf/2009/07/man_sentenced_after_sexual_par.html.

¹⁰⁴³ *Id.*

¹⁰⁴⁴ *Id.*

¹⁰⁴⁵ 783 P.2d 1030, 1031 (Or. Ct. App. 1989).

harsh to use his HIV positive status as an “aggravating factor” during sentencing.¹⁰⁴⁶ The Court of Appeals of Oregon disagreed, stating that it was valid to consider as an aggravating factor the defendant’s willingness to expose his victim to HIV when imposing maximum, consecutive sentences for sexual assault.¹⁰⁴⁷ This case illustrates that neither the intent to transmit HIV nor actual HIV transmission is required for aggravated factor sentencing.

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¹⁰⁴⁶ *Id.*

¹⁰⁴⁷ *Id.* at 1032.

Pennsylvania Statute(s) that Allow for Criminal Prosecution based on HIV Status:

18 PA. CONS. STAT. ANN. § 2703

Assault by prisoner

(a) *Offense defined.*--A person who is confined in or committed to any local or county detention facility, jail or prison or any State penal or correctional institution or other State penal or correctional facility located in this Commonwealth is guilty of a felony of the second degree if he, while so confined or committed or while undergoing transportation to or from such an institution or facility in or to which he was confined or committed intentionally or knowingly, commits an assault upon another with a deadly weapon or instrument, or by any means or force likely to produce serious bodily injury. A person is guilty of this offense if he intentionally or knowingly causes another to come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material when, at the time of the offense, the person knew, had reason to know, should have known or believed such fluid or material to have been obtained from an individual, including the person charged under this section, infected by a communicable disease, including, but not limited to, human immunodeficiency virus (HIV) or hepatitis B.

(b) *Consecutive sentences.*--The court shall order that any sentence imposed for a violation of subsection (a), or any sentence imposed for a violation of section 2702(a) (relating to aggravated assault) where the victim is a detention facility or correctional facility employee, be served consecutively with the person's current sentence.

18 PA. CONS. STAT. ANN. § 2704

Assault by life prisoner

Every person who has been sentenced to death or life imprisonment in any penal institution located in this Commonwealth, and whose sentence has not been commuted, who commits an aggravated assault with a deadly weapon or instrument upon another, or by any means of force likely to produce serious bodily injury, is guilty of a crime, the penalty for which shall be the same as the penalty for murder of the second degree. A person is guilty of this offense if he intentionally or knowingly causes another to come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material when, at the time of the offense, the person knew, had reason to know, should have known or believed such fluid or material to have been obtained from an individual, including the person charged under this section, infected by a communicable disease, including, but not limited to, human immunodeficiency virus (HIV) or hepatitis B.

18 PA. CONS. STAT. ANN. § 5902

Prostitution and related offenses

(a) *Prostitution.*--A person is guilty of prostitution if he or she:

- (1) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or
- (2) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

(a.1) *Grading of offenses under subsection (a).*--An offense under subsection (a) constitutes a:

- (1) Misdemeanor of the third degree when the offense is a first or second offense.
- (2) Misdemeanor of the second degree when the offense is a third offense.
- (3) Misdemeanor of the first degree when the offense is a fourth or subsequent offense.
- (4) Felony of the third degree if the person who committed the offense knew that he or she was human immunodeficiency virus (HIV) positive or manifesting acquired immune deficiency syndrome (AIDS).

(b) *Promoting prostitution.*--A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in subsection (c) of this section. The following acts shall, without limitation of the foregoing, constitute promoting prostitution:

- (1) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business;
- (2) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate;
- (3) encouraging, inducing, or otherwise intentionally causing another to become or remain a prostitute;
- (4) soliciting a person to patronize a prostitute;
- (5) procuring a prostitute for a patron;
- (6) transporting a person into or within this Commonwealth with intent to promote the engaging in prostitution by that person, or procuring or paying for transportation with that intent;
- (7) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or
- (8) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.

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(b.1) *Promoting prostitution of minor.*--A person who knowingly promotes prostitution of a minor commits a felony of the third degree. The following acts shall, without limitation of the foregoing, constitute promoting prostitution of a minor:

- (1) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business in which a victim is a minor;
- (2) procuring an inmate who is a minor for a house of prostitution or a place in a house of prostitution where a minor would be an inmate;
- (3) encouraging, inducing, or otherwise intentionally causing a minor to become or remain a prostitute;
- (4) soliciting a minor to patronize a prostitute;
- (5) procuring a prostitute who is a minor for a patron;
- (6) transporting a minor into or within this Commonwealth with intent to promote the engaging in prostitution by that minor, or procuring or paying for transportation with that intent;
- (7) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution of a minor or the promotion of prostitution of a minor, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities or other legally available means; or
- (8) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this subsection.

(c) *Grading of offenses under subsection (b).*--

- (1) An offense under subsection (b) constitutes a felony of the third degree if:
 - (i) the offense falls within paragraphs (b)(1), (b)(2) or (b)(3);
 - (ii) the actor compels another to engage in or promote prostitution;
 - (iii) (Deleted by amendment.)
 - (iv) the actor promotes prostitution of his spouse, child, ward or any person for whose care, protection or support he is responsible; or
 - (v) the person knowingly promoted prostitution of another who was HIV positive or infected with the AIDS virus.
- (2) Otherwise the offense is a misdemeanor of the second degree.

(d) *Living off prostitutes.*--A person, other than the prostitute or the prostitute's minor child or other legal dependent incapable of self-support, who is knowingly supported in whole or substantial part by the proceeds of prostitution is promoting prostitution in violation of subsection (b) of this section.

(e) *Patronizing prostitutes.*--A person commits the offense of patronizing prostitutes if that person hires a prostitute or any other person to engage in sexual activity with him or her or if that person enters or remains in a house of prostitution for the purpose of engaging in sexual activity.

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(e.1) *Grading of offenses under subsection (e).*--An offense under subsection (e) constitutes a:

- (1) Misdemeanor of the third degree when the offense is a first or second offense.
- (2) Misdemeanor of the second degree when the offense is a third offense.
- (3) Misdemeanor of the first degree when the offense is a fourth or subsequent offense.
- (4) Felony of the third degree if the person who committed the offense knew that he or she was human immunodeficiency virus (HIV) positive or manifesting acquired immune deficiency syndrome (AIDS).

(e.2) *Publication of sentencing order.*--A court imposing a sentence for a second or subsequent offense committed under subsection (e) shall publish the sentencing order in a newspaper of general circulation in the judicial district in which the court sits, and the court costs imposed on the person sentenced shall include the cost of publishing the sentencing order.

(f) *Definitions.*--As used in this section the following words and phrases shall have the meanings given to them in this subsection:

“House of prostitution.” Any place where prostitution or promotion of prostitution is regularly carried on by one person under the control, management or supervision of another.

“Inmate.” A person who engages in prostitution in or through the agency of a house of prostitution.

“Minor.” An individual under 18 years of age.

“Public place.” Any place to which the public or any substantial group thereof has access.

“Sexual activity.” Includes homosexual and other deviate sexual relations.

18 PA. CONS. STAT. ANN. § 1103

Sentence of imprisonment for felony

Except as provided in 42 Pa.C.S. § 9714 (relating to sentences for second and subsequent offenses), a person who has been convicted of a felony may be sentenced to imprisonment as follows:

- (2) In the case of a felony of the second degree, for a term which shall be fixed by the court at not more than ten years.
- (3) In the case of a felony of the third degree, for a term which shall be fixed by the court at not more than seven years.

18 PA. CONS. STAT. ANN. § 1101

Fines

A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

- (1) \$50,000, when the conviction is of murder or attempted murder.
- (2) \$25,000, when the conviction is of a felony of the first or second degree.
- (3) \$15,000, when the conviction is of a felony of the third degree.
- (4) \$10,000, when the conviction is of a misdemeanor of the first degree.
- (5) \$5,000, when the conviction is of a misdemeanor of the second degree.
- (6) \$2,500, when the conviction is of a misdemeanor of the third degree.
- (7) \$300, when the conviction is of a summary offense for which no higher fine is established.

HIV positive persons have been convicted under Pennsylvania’s general criminal laws for various types of conduct, including failing to disclose their HIV status to sexual partners.

Although Pennsylvania does not have a specific criminal HIV-exposure law to address non-incarcerated persons and those who are not sex workers, numerous persons have been prosecuted for HIV exposure under general criminal laws, including murder, attempted murder, and reckless endangerment.

In Pennsylvania, HIV positive persons have been prosecuted for failing to disclose their HIV status to their sexual partners. In the 2006 case, *Commonwealth v. Cordoba*, a man was charged with reckless endangerment for having unprotected, consensual oral sex and failing to disclose to his partner that he was HIV positive.¹⁰⁴⁸ The trial court ruled that because consent is not a defense to reckless endangerment, to prosecute an HIV positive individual for engaging in consensual sex would lead to absurd results, including prosecution even if the person did disclose her/his status.¹⁰⁴⁹

¹⁰⁴⁸ *Com. v. Cordoba*, 67 Pa. D. & C.4th 353, 356, 361 (Pa. Com. Pl. 2004), *overruled by Com. v. Cordoba*, 902 A.2d 1280 (Pa. Super. 2006).

¹⁰⁴⁹ *Id.* at 358 (finding that “under the Commonwealth’s theory, even if an HIV positive individual informs his or her partner of this status prior to engaging in unprotected sexual activity, the statute would still be violated. A person carrying an infectious disease would commit a crime every time he/she had consensual sex. This is an absurd result, as individuals in this Commonwealth are free to make such intimate decisions outside the glare of state scrutiny. Lastly, allowing an HIV positive individual to be prosecuted under this statute for allegedly having consensual sexual contact with another adult would open the floodgates to jilted lovers and angry spouses to file charges after a relationship has soured.”). On appeal, the Superior Court did not address this issue because it was outside of the scope of the case and was not at issue because the defendant never disclosed his status. *Com. v. Cordoba*, 902 A.2d 1280, 1286 (Pa. Super. 2006).

On appeal the Superior Court of Pennsylvania reversed the trial court’s findings.¹⁰⁵⁰ Though there was never any transfer of blood or semen that could result in HIV transmission (the defendant only ejaculated on the face and chest of the complainant, however, HIV has been found in pre-seminal fluids),¹⁰⁵¹ the court found that the sex was not consensual and amounted to reckless endangerment because the defendant failed to disclose his HIV status to the complainant.¹⁰⁵² Reckless endangerment under Pennsylvania law is defined as “conduct which places or may place another person in danger of death or serious bodily injury.”¹⁰⁵³ Even though most exposure to the blood or semen of an HIV positive person will not result in transmission, the court determined that the prosecution need only establish that the defendant’s conduct placed “*or may have placed*” another in danger of serious bodily injury or death.¹⁰⁵⁴

To establish a *prima facie* case for reckless endangerment, the court found that there only needs to be a possibility of the risk of harm, regardless of the likelihood of that harm actually occurring.¹⁰⁵⁵ According to the court, the defendant’s act of engaging in oral sex without informing his partner of his HIV status constituted a “gross deviation from the standard of conduct that a reasonable person would observe.”¹⁰⁵⁶

The statute does not explicitly provide for a defense based on use of condoms (or other protection) or a low viral load even though both significantly reduce the risk of HIV transmission to near zero.

Though disclosing one’s HIV status is a defense to this type of prosecution, disclosure of HIV status is difficult to prove in court without witnesses or documentation, and juries often consider the testimony of HIV positive defendants less credible than the testimony of HIV negative persons claiming that they were exposed to HIV without consent.

In addition to reckless endangerment, HIV positive individuals have also been charged with murder and attempted murder for failing to disclose their HIV positive status to their sexual partners:

- In 1999, a 30-year-old man was charged with murder, attempted homicide and aggravated assault for failing to tell five female sex partners that he had HIV.¹⁰⁵⁷ Each of the women later tested positive for HIV.¹⁰⁵⁸ The man died in 2000 before the case could go to trial.¹⁰⁵⁹
- In 1992, a 50-year-old man with AIDS was arrested after he allegedly paid several hundred

¹⁰⁵⁰ *Cordoba*, 902 A.2d at 1283.

¹⁰⁵¹ *Id.*

¹⁰⁵² *Id.* at 1286.

¹⁰⁵³ *Id.* (citing 18 PA. CONS. STAT. § 2705 (2014)).

¹⁰⁵⁴ *Id.* at 1289 (emphasis not added).

¹⁰⁵⁵ *Id.* at 1288-89.

¹⁰⁵⁶ *Id.* at 1289.

¹⁰⁵⁷ Jeff Gelman, *AIDS-Related Death Leads to 3rd-degree Murder Charge*, MORNING CALL (Allentown, PA), Nov. 20, 1999, available at http://articles.mcall.com/1999-11-20/news/3275553_1_aids-virus-martin-third-degree-murder; Debbie Garlicki, *Man who allegedly infected women with AIDS virus dies*, MORNING CALL (Allentown, PA), Dec. 1, 2000, available at http://articles.mcall.com/2000-12-01/news/3330315_1_aids-virus-infected-murder-charge.

¹⁰⁵⁸ *Id.*

¹⁰⁵⁹ Garlicki, *Man who allegedly infected women with AIDS virus dies*.

Philadelphia boys for their sexual favors, underwear, and feces.¹⁰⁶⁰ The man’s bail was increased to \$20 million, though it was later reduced.¹⁰⁶¹ He died before the trial.¹⁰⁶²

- In *Commonwealth v. Bey*, the court affirmed the ten to twenty year sentence for a single count of a deviate sexual intercourse due in part to the defendant’s HIV positive status.¹⁰⁶³ The court reversed the trial court’s determination that the defendant was a sexual predator.¹⁰⁶⁴

In *Commonwealth v. Walker*, an HIV positive man was found guilty of communicating terrorist threats when he scratched a parole officer on the hand and said, “I have open cuts on my hands. Life is short. I am taking you with me.”¹⁰⁶⁵ The officer knew Walker was HIV positive.¹⁰⁶⁶ On appeal, Walker argued that the evidence against him was insufficient and that he didn’t have the requisite intent to terrorize the officer.¹⁰⁶⁷ To be convicted of making terroristic threats one must communicate a threat to terrorize another or act with reckless disregard of the risk of causing terror.¹⁰⁶⁸ The court affirmed the conviction, finding that the jury could have inferred that Walker’s statements intended to cause terror from fear of HIV infection.¹⁰⁶⁹ The court held that the likelihood of HIV infection from scratching was immaterial to the case as long as the threats were made with the intent to cause such fear.¹⁰⁷⁰

Other prosecutions of HIV positive persons under Pennsylvania’s general criminal laws have included convictions for acts that are not known to transmit HIV:

- In May 2012, a 19-year-old HIV positive man was charged with aggravated assault, among other things, after he spit in the face of a police officer while being taken into custody.¹⁰⁷¹
- In October 2009, a 34-year-old HIV and Hepatitis C-positive woman was charged with aggravated assault after she spat in the face of another inmate.¹⁰⁷² She was later sentenced

¹⁰⁶⁰ Michael DeCourcy Hinds, *Man Who Has Aids May Have Infected Hundreds of Boys*, MORNING CALL (Allentown, PA), Mar. 28, 1992, available at http://articles.mcall.com/1992-03-28/news/2834787_1_uncle-ed-virus-that-causes-aids-sexual-contact.

¹⁰⁶¹ Barnaby C. Wittels & Stephen Robert LaCheen, *The Persecution of Ed Savitz*, THE PHILA. INQUIRER, May 12, 1993, available at http://articles.philly.com/1993-05-12/news/25963730_1_ed-savitz-young-boys-case; see also Lynne M. Abraham, *Ed Savitz was No Victim, No Icon of Virtue*, THE PHILA. INQUIRER, June 1, 1993, available at http://articles.philly.com/1993-05-12/news/25963730_1_ed-savitz-young-boys-case; *What Has Savitz Case Taught Us?*, PHILA. DAILY NEWS, Mar. 30, 1993, available at http://articles.philly.com/1993-03-30/news/25949076_1_ed-savitz-aids-crisis-hiv-virus.

¹⁰⁶² *Id.*

¹⁰⁶³ *Id.*

¹⁰⁶⁴ 841 A.2d 562, 567 (Pa. Super Ct. 2004).

¹⁰⁶⁵ *Id.*

¹⁰⁶⁶ 836 A.2d 999, 1000, 1001 (Pa. Super. Ct. 2003).

¹⁰⁶⁷ *Id.*

¹⁰⁶⁸ *Id.*

¹⁰⁶⁹ *Id.* (citing 18 PA. CONN. STAT. § 2706(a) (2014)).

¹⁰⁷⁰ *Id.* at 1002.

¹⁰⁷¹ *Id.*

¹⁰⁷² *Easton man infected with HIV spits in police officer’s face, records say*, LEHIGHVALLEYLIVE.COM, May 21, 2012, available at http://www.lehighvalleylive.com/easton/index.ssf/2012/05/easton_man_infected_with_hiv_s.html.

¹⁰⁷³ Michael Rudolf, *HIV-Positive Prisoner Sentenced for Spitting at Inmate*, CITIZENSVOICE.COM, Oct. 15, 2009, available at <http://citizensvoice.com/news/hiv-positive-prisoner-sentenced-for-spitting-at-inmate-1.335692>; Josh Mrozinski, *Inmate*

to twenty-one months to ten years imprisonment.¹⁰⁷³

- A 39-year-old, HIV positive man was convicted of aggravated assault, among other things, and was sentenced to thirteen years and six months to twenty-seven years in prison in 1999 for biting a security guard who was arresting him for shoplifting.¹⁰⁷⁴ The guarded tested negative for HIV.¹⁰⁷⁵
- In 1997, a 32-year-old HIV positive woman was arrested and charged with attempted murder, among other things, after she allegedly stabbed a CVS employee with a syringe, telling the employee that he was going to die and shouting that she had AIDS.¹⁰⁷⁶
- In *Commonwealth v. Brown*, an HIV and Hepatitis B-positive defendant was convicted of aggravated assault for throwing fecal matter on a guard's face.¹⁰⁷⁷

Many of these convictions are based on the stigma and fear surrounding HIV and not on the science of how HIV is transmitted.

HIV positive persons who are incarcerated face increased penalties for exposing others to their bodily fluids, including saliva.

The Pennsylvania HIV exposure statute for incarcerated persons is overly broad and criminalizes conduct that does not in fact transmit HIV. Under the statute, if a person in confinement intentionally causes another person to “come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material” and “the person knew, had reason to know, or should have known or believed that such fluid or material was infected by a communicable disease, including, but not limited to, HIV”¹⁰⁷⁸ that person can face an additional sentence of up to ten years in prison.¹⁰⁷⁹ The CDC has long maintained that there is no risk of transmission from saliva, urine, or feces unless there is contamination with infected blood.

Charged for Assault for Spiting, WCEXAMINER.COM (Wyoming County, Pa.), Jan. 14, 2009, available at <http://wce Examiner.com/?p=8454>.

¹⁰⁷³ Rudolf, *HIV positive Prisoner Sentenced for Spitting at Inmate*.

¹⁰⁷⁴ Debbie Garlicki, *City Man with HIV Virus Gets Prison Time for Biting * Eric Rivera Perez is Sentenced for Assault on Walmart Security Officer*, MORNING CALL (Allentown, PA), Feb. 4, 1999, available at http://articles.mcall.com/1999-02-04/news/3240187_1_infected-human-immunodeficiency-virus-police-officer; Laura Whitehorn, *America's Most Unwanted*, POZ, Aug. 2000, available at http://www.poz.com/articles/204_10206.shtml.

¹⁰⁷⁵ *Id.*

¹⁰⁷⁶ Thomas J. Gibbons Jr., *Syringe-attack Case is Suspect's Second Both Involved Claims of HIV-tainted Needles and the Stabbing of Clerks who Accused her of Shoplifting*, THE PHILA. INQUIRER, Jan. 17, 1997, available at http://articles.philly.com/1997-01-17/news/25558859_1_shoplifting-police-custody-aids-virus.

¹⁰⁷⁷ 605 A.2d 429, 430-31 (Pa. Super. Ct. 1992).

¹⁰⁷⁸ The statute was rewritten in 1998 to include “HIV” after the 1992 conviction of an HIV and Hepatitis B-positive inmate for throwing urine and feces at a prison guard. See *Brown*, 605 A.2d at 430-31. The defendant was convicted of aggravated assault, assault by prisoner, simple assault, and recklessly endangering another person and sentenced to ten to twenty years in prison to run consecutively with the sentence he was already serving. *Id.* at 431. Based on the fact that the defendant knew he had both HIV and Hepatitis B and had received counseling regarding the transmission of HIV through bodily fluids, the court found that “there was sufficient evidence for the factfinder to conclude that [the defendant] intended to inflict serious bodily injury” when he threw fecal matter at the guard, and thus “the evidence was sufficient to support [the defendant's] conviction for aggravated assault.” *Id.*

¹⁰⁷⁹ 18 PA. CONS. STAT. §§ 2703 (2014), 1103 (2014).

If the incarcerated person is already serving a life sentence or is on death row and violates the statute then that person will be prosecuted for second-degree murder.¹⁰⁸⁰

It is a felony for people who are HIV positive to engage in or solicit prostitution.

A person is guilty of prostitution while HIV positive if she/he is part of a house of prostitution, engages in sexual activity as a business, or loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.¹⁰⁸¹

Sexual activity for the purposes of the statute is broadly defined to include “homosexual and other deviate sexual relations.”¹⁰⁸² The lack of a clear definition of “sexual acts” in the statute has led the Pennsylvania courts to attempt to define what types of sexual acts are punishable under the prostitution statute.¹⁰⁸³ Many of the acts that the courts have found to be criminally liable “sexual acts” pose no risk of transmitting HIV, including acts that do not involve penetration of the body¹⁰⁸⁴ or the transfer of blood or semen, such as massaging another person’s genitals¹⁰⁸⁵ and giving a hand job.¹⁰⁸⁶ This broad definition of “sexual acts” poses the risk of severe penalties for HIV positive sex workers who engage in conduct that does not transmit HIV.

Neither disclosure of one’s HIV status, the use of condoms or other protection, nor the sex worker’s viral load are considered a defense to prosecution. This creates a situation where HIV positive individuals are prosecuted and suffer increased penalties due to their HIV-status alone, without consideration for the actual risk their activities pose of transmitting HIV.

The punishment for HIV positive sex workers is significantly harsher than the punishment for sex workers who do not test positive for HIV. Prostitution is normally punished under varying degrees of misdemeanors that range from a few months to a few years imprisonment, based on the number of prior convictions.¹⁰⁸⁷ However, if a sex worker is HIV positive she/he is subject to third-degree felony charges, punishable by up to seven years in prison.¹⁰⁸⁸

Examples of prosecutions under this statute include:

- In March 2011, an HIV positive man was sentenced to six to twelve months in prison with two years probation for engaging in prostitution.¹⁰⁸⁹

¹⁰⁸⁰ 18 PA. CONS. STAT. § 2704 (2014).

¹⁰⁸¹ § 5902(a) (2014).

¹⁰⁸² § 5902(f).

¹⁰⁸³ See *Com. v. Bleigh*, 586 A.2d 450, 452 (Pa. Super. Ct. 1991) (stating that “[s]ince the term ‘sexual activity’ is neither specifically nor exhaustively defined in the prostitution statute, we must construe the term according to its common and approved usage.”).

¹⁰⁸⁴ *Com. v. Lundberg*, 37 Pa. D. & C.3d 4, 5-10. (Pa. Ct. Com. Pl. 1985).

¹⁰⁸⁵ *Com. v. Cohen*, 538 A.2d 582, 583 (Pa. Super. Ct. 1988).

¹⁰⁸⁶ *Id.*

¹⁰⁸⁷ 18 PA. CONS. STAT. § 5902(a.1). Prostitution charges that are non-HIV specific are normally prosecuted as either first, second, or third degree misdemeanors that range in maximum sentences from one to five years imprisonment. 18 PA. CONS. STAT. § 1104 (2014).

¹⁰⁸⁸ §§ 5902(a.2), 1103.

¹⁰⁸⁹ *Com. v. Garvin*, 50 A.3d 694, 695 (Pa. Super. Ct. 2012)

- In January 2009, a 26-year-old sex worker pleaded guilty to reckless endangerment and engaging in prostitution while HIV positive.¹⁰⁹⁰ She received three years probation.
- In 1996, an HIV positive sex worker was charged with engaging in prostitution while being HIV positive.¹⁰⁹¹ Another HIV positive sex worker was convicted of the same offense in 1998, and sentenced to seven years imprisonment.¹⁰⁹²

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.

¹⁰⁹⁰ Laurie Mason, *HIV positive Prostitute Sentenced*, BUCKS COUNTY COURIER TIMES (Philadelphia, PA), Jan. 16, 2009, at 1.

¹⁰⁹¹ David Kinney, *Authorities Crack Down on HIV positive Prostitutes*, THE PHILA. INQUIRER, Aug. 17, 1996, at B03.

¹⁰⁹² April Adamson, *Obscure Law Used on Reckless Hookers*, PHILA. DAILY NEWS, June 16, 1998, at 8.

Rhode Island Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

Rhode Island does have a general sexually transmitted disease (STD) exposure statute, but it does not target HIV exposure. It is an offense punishable by up three months imprisonment or a \$100 fine for an individual with an STD to knowingly expose another to infection.¹⁰⁹³ However, this law was enacted long before HIV was discovered and was thus not originally intended to address HIV. There has never been an arrest or prosecution for HIV exposure under this or any other statute in Rhode Island.

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.

¹⁰⁹³ R.I. GEN. LAWS § 23-11-1 (2014) (imposing penalties for knowing exposure to sexually transmitted diseases including, but not be limited to, syphilis, gonorrhea, chancroid, granuloma inguinale and lymphogranuloma venereum).

South Carolina Statute(s) that Allow for Criminal Prosecution based on HIV Status:**S.C. Code Ann. § 44-29-145*****Penalty for exposing others to Human Immunodeficiency Virus***

It is unlawful for a person who knows that he is infected with Human Immunodeficiency Virus (HIV) to:

- (1) knowingly engage in sexual intercourse, vaginal, anal, or oral, with another person without first informing that person of his HIV infection;
- (2) knowingly commit an act of prostitution with another person;
- (3) knowingly sell or donate blood, blood products, semen, tissue, organs, or other body fluids;
- (4) forcibly engage in sexual intercourse, vaginal, anal, or oral, without the consent of the other person, including one's legal spouse; or
- (5) knowingly share with another person a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from the other person's body without first informing that person that the needle, syringe, or both, has been used by someone infected with HIV.

A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than ten years.

S.C. Code Ann. § 44-29-60***Sexually transmitted diseases declared dangerous to public health; infection of another with sexually transmitted disease***

Sexually transmitted diseases which are included in the annual Department of Health and Environmental Control List of Reportable Diseases are declared to be contagious, infectious, communicable, and dangerous to the public health. Sexually transmitted diseases include all venereal diseases. It is unlawful for anyone infected with these diseases to knowingly expose another to infection.

S.C. Code Ann. § 44-29-140***Penalties pertaining to venereal disease***

Any person who violates any of the provisions of Sections 44-29-60 to 44-29-140, other than Section 44-29-120, or any regulation made by the Department of Health and Environmental Control pursuant to the authority granted by law, or fails or refuses to obey any lawful order issued by any state, county, or municipal health officer, pursuant to Sections 44-29-60 to 44-29-140, or any other law or the regulations prescribed by law, is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or be imprisoned for not more than thirty days.

HIV positive persons face criminal penalties for engaging in sexual activity without disclosing their HIV status.¹⁰⁹⁴

It is felony, punishable by a fine of no more than \$5,000 and/or imprisonment for up to ten years, for a person who is aware that she/he is HIV positive to knowingly engage in penile-vaginal, anal, or oral sex with another person without first informing that person of her/his HIV status.¹⁰⁹⁵ Neither actual transmission nor the intent to transmit HIV is necessary for prosecution.

On its face, the statute does not recognize the use of protection, such as condoms, or low viral load as defenses to prosecution. Under the wording of the statute, even if HIV positive persons protect their sexual partners by using a condom, they must also disclose their status to avoid prosecution.

In South Carolina there have been numerous prosecutions of HIV positive individuals for allegedly failing to disclose their HIV status prior to engaging in consensual sex:

- In January 2011, a 30-year-old HIV positive man was charged with first-degree harassment and exposing others to HIV after a sexual partner found his HIV medications and reported him to the police.¹⁰⁹⁶
- In November 2009, an HIV positive man was sentenced to six years in prison and four years of probation for knowingly exposing his wife to HIV.¹⁰⁹⁷ She did not contract HIV.¹⁰⁹⁸
- In September 2009, a 35-year-old HIV positive man was charged with exposing another to

¹⁰⁹⁴ Though there is a separate misdemeanor penalty for exposing people to venereal diseases, including HIV, S.C. CODE ANN. §§ 44-29-60 (2014), 44-29-140 (2014), this statute is not in practical effect for HIV exposure prosecutions because there is an HIV-specific statute for HIV exposure, S.C. CODE ANN. § 44-29-145 (2014). There do not appear to be any HIV cases prosecuted under the venereal disease statute.

¹⁰⁹⁵ S.C. CODE ANN. § 44-29-145 (2014).

¹⁰⁹⁶ *Man exposed others to HIV, police say*, THE AUGUSTA CHRON., Jan. 21, 2011, available at <http://chronicle.augusta.com/news/crime-courts/2011-01-21/man-exposed-others-hiv-police-say>; *Report: Aiken Man May Have Knowingly Exposed Women to HIV*, WSPA.COM, Jan. 23, 2011, available at <http://www.wspa.com/story/21469270/report-aiken-man-may-have-knowingly-exposed-women-to-hiv>.

¹⁰⁹⁷ Stephanie Toone, *Former Aiken County teacher found guilty of exposing others to HIV*, THE AUGUSTA CHRON., Nov. 13, 2009, available at http://chronicle.augusta.com/stories/latest/lat_703284.shtml.

¹⁰⁹⁸ *Id.*

HIV after he failed to disclose his HIV status to a sexual partner with whom he engaged in consensual, unprotected sex.¹⁰⁹⁹

- In March 2008, a 39-year-old HIV positive man was sentenced to four years imprisonment after pleading guilty to exposing his then girlfriend to HIV.¹¹⁰⁰ According to investigators, the man neither told the woman he was HIV positive nor insisted on using condoms.¹¹⁰¹ The woman discovered that she was HIV positive during a pre-natal checkup, though the fact that the virus was transmitted was irrelevant to the charges.¹¹⁰²
- In April 2007, an HIV positive man was charged with exposing another to HIV after failing to disclose his HIV status and engaging in unprotected, consensual sex with a female partner.¹¹⁰³

Though disclosure is an affirmative defense to prosecution in South Carolina, whether or not disclosure actually occurred is often open to interpretation and always depends on the word of one person against another.

Other prosecutions under South Carolina's HIV exposure statute include:

- In October 2009, a 24-year-old HIV positive man was charged with exposing another to HIV.¹¹⁰⁴
- In August 2009, a 30-year-old HIV positive man was charged with criminal sexual conduct with a minor, lewd act on a minor, and exposing another to HIV after he allegedly engaged in sex acts with a 14-year-old boy.¹¹⁰⁵

General criminal laws have been used to prosecute HIV positive persons for alleged HIV exposure.

In July 2009, a 41-year-old HIV positive man was charged with assault and intent to kill after biting his neighbor.¹¹⁰⁶ While the police had originally planned to charge the man with assault and battery, the charge was raised to assault and battery with intent to kill after it was discovered that the defendant was HIV positive.¹¹⁰⁷ This was in spite of the fact that the CDC has concluded that there

¹⁰⁹⁹ *Deputies: Man illegally exposes victim to HIV virus*, WMBFNEWS.COM, Sept. 11, 2009, available at <http://www.wmbfnews.com/Global/story.asp?S=11115609>.

¹¹⁰⁰ *US; South Carolina Man Charged with HIV Exposure*, HIV JUSTICE NETWORK, Mar. 25, 2008, available at <http://www.hivjustice.net/case/us-south-carolina-man-charged-with-hiv-exposure/>.

¹¹⁰¹ *Id.*

¹¹⁰² *Id.*

¹¹⁰³ *Athens police say man may have deliberately spread HIV*, THE AUGUSTA CHRON., Apr. 17, 2010, available at <http://chronicle.augusta.com/news/crime-courts/2010-04-17/athens-police-say-man-may-have-deliberately-spread-hiv>.

¹¹⁰⁴ *Man arrested after exposing person to HIV virus*, WMBFNEWS.COM, Oct. 27, 2009, available at <http://www.wmbfnews.com/story/11393554/man-arrested-after-exposing-person-to-hiv-virus>.

¹¹⁰⁵ *Deputies: Sex offender arrested, exposed teen to HIV*, WMBFNEWS.COM, Aug. 20, 2009, available at <http://www.wmbfnews.com/story/10964992/deputies-sex-offender-arrested-exposed-teen-to-hiv>.

¹¹⁰⁶ *Charges Upgraded Against HIV Positive Man After Fight*, WSOC-TV.COM, July 23, 2009, available at <http://www.wsoc-tv.com/news/20147162/detail.html>.

¹¹⁰⁷ *Id.*

exists only a “negligible” risk that HIV could be transmitted through a bite.¹¹⁰⁸ The CDC has also maintained that saliva alone has never been shown to transmit HIV.¹¹⁰⁹

HIV positive persons can be fined and imprisoned if convicted of prostitution.

If a person is aware that she/he is HIV positive and commits an act of prostitution, she/he faces penalties of up to ten years in prison and/or up to a \$5,000 fine.¹¹¹⁰ In contrast, the penalty for an HIV negative person who commits her/his first prostitution offense is limited to no more than thirty days in prison and/or up to a \$200 fine.¹¹¹¹ By merely being HIV positive, sex workers are subject to penalties over ten times greater than those imposed on their HIV negative counterparts.

In addition to disproportionate penalties for HIV positive sex workers, South Carolina’s HIV exposure statute potentially targets activities that pose no risk of HIV transmission. Prostitution is defined as “engaging or offering to engage in sexual activity with or for another in exchange for anything of value.”¹¹¹² Under this definition, the mere offer of a sexual act, which poses no risk of transmission, could result in imprisonment under the HIV exposure statute. Further, even if the offered act was completed there is no consideration about whether the act itself posed a risk of HIV exposure or transmission (i.e.: an HIV positive sex worker performing oral sex carries little to no risk of HIV transmission).¹¹¹³

Under South Carolina’s HIV exposure statute, prosecutions are limited to penile-vaginal sex, anal sex, and oral sex.¹¹¹⁴ But because the statute also prohibits engaging in prostitution, it necessarily also prohibits “sexual activity” as defined for the purposes of a prostitution charge.¹¹¹⁵ This poses a particularly serious problem, because “sexual activity” is broadly defined in this context, and many of the listed acts pose no risk of transmitting HIV.

For prostitution prosecutions, “sexual activity” includes, but is not limited to, acts of masturbation; touching a person’s clothed, or unclothed, genitals or breasts; and other acts such as using sex toys.¹¹¹⁶ These activities pose no risk of HIV transmission, but HIV positive sex workers may face felony charges for engaging in them. It is not a defense if condoms or other protection were used during sexual activity or if HIV status was disclosed.

HIV positive persons can face criminal penalties for donating blood, organs, human tissue, semen, or other body fluids.

¹¹⁰⁸ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

¹¹⁰⁹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

¹¹¹⁰ S.C. CODE ANN. § 44-29-145.

¹¹¹¹ § 16-15-110 (2014).

¹¹¹² § 16-15-375(4) (2014).

¹¹¹³ CTR. FOR DISEASE CONTROL & PREVENTION, *Oral Sex and HIV Risk*, (Jan. 22, 2014), available at <http://www.cdc.gov/hiv/risk/behavior/oralsex.html> (last visited Apr. 11, 2014).

¹¹¹⁴ S.C. CODE ANN. § 44-29-145.

¹¹¹⁵ *Id.*

¹¹¹⁶ § 16-15-375(5).

It is a felony, punishable by a fine of no more than \$5,000 and/or imprisonment for up to ten years, for a person who is aware that she/he is HIV positive to knowingly donate or sell blood, semen, tissue, organs or other bodily fluids.¹¹¹⁷ Neither the intent to transmit HIV nor actual transmission is required for liability.

HIV positive persons can be prosecuted and jailed for sharing dirty syringes with others.

It is felony, punishable by up to ten years imprisonment and/or a maximum fine of \$5,000 for a person who is aware that she/he is HIV positive to knowingly share equipment used for injecting drugs with another without disclosing her/his HIV status.¹¹¹⁸

HIV positive persons in South Carolina should not share, or exchange, or otherwise transfer to any other person unsterilized needles used to inject substances into the human body. Simply giving someone a dirty syringe is sufficient for a conviction; neither the intent to transmit HIV nor actual transmission is required.

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.

¹¹¹⁷ § 44-29-145.

¹¹¹⁸ *Id.*

South Dakota Statute(s) that Allow for Criminal Prosecution based on HIV Status:

S.D. CODIFIED LAWS § 22-18-31

Intentional exposure to HIV infection a felony

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.

“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. S.D. CODIFIED LAWS § 22-18-32(2).

“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 § 22-18-32(3).

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 § 22-18-33.

The actual transmission of HIV is not required. S.D. CODIFIED LAWS § 22-18-34.

S.D. CODIFIED LAWS § 22-24B-1***Sex crimes 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***Registration of convicted sex offenders--Time limit--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 . . .

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... 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

Felony classes and penalties--Restitution--Habitual criminal sentences

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;

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

In South Dakota, failing to disclose one's HIV status to sexual partners may result in imprisonment. It is a Class 3 felony, punishable by up to fifteen years in prison and a \$30,000 fine, if an individual aware that she/he is HIV positive intentionally exposes another to HIV infection through sexual intercourse or "other intimate physical contact."¹¹¹⁹ Sex offender registration is mandatory.¹¹²⁰ "Intent" requires a specific design to expose another to HIV or the intent to engage in the prohibited activities under the statute.¹¹²¹

Neither the intent to transmit HIV nor actual transmission is required.¹¹²²

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.¹¹²³ 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

¹¹¹⁹ S.D. CODIFIED LAWS §§ 22-6-1(6) (2014), 22-18-31(1) (2014).

¹¹²⁰ §§ 22-24B-1(20) (2014) (defining intentional HIV exposure as a sex crime), 22-24B-2 (2014) (requiring sex offender registration for any person convicted of a sex crime).

¹¹²¹ § 22-1-2(1)(b) (2014).

¹¹²² § 22-18-34 (2014).

¹¹²³ § 22-18-33 (2014).

always depends on the words of one person against another.

In South Dakota's first prosecution for HIV exposure, an HIV positive college student was sentenced to a suspended five-year prison term, with four months in jail, and 200 hours of community service after pleading guilty to intentional exposure to HIV for having unprotected sex with several classmates without disclosing his HIV status.¹¹²⁴ Under the terms of his guilty plea, the man was also ordered to abstain from unprotected sex unless he notified partners that he was HIV positive.¹¹²⁵ He later received four years in prison for failing to return to jail on schedule.¹¹²⁶

The following cases serve as further examples of prosecutions that have resulted under South Dakota's HIV exposure law:

- In February 2014, a 19-year-old HIV positive man plead guilty to intentional exposure to HIV after failing to disclose his status and engaging unprotected consensual sex with another college student.¹¹²⁷ He was sentenced to eight years imprisonment, with four years suspended.¹¹²⁸
- In November 2006, a 33-year-old HIV positive woman received a suspended prison sentence after pleading guilty to five counts of intentional exposure to HIV.¹¹²⁹ Her plea was later changed to one count.¹¹³⁰ None of the woman's sexual partners were infected, but this was irrelevant to prosecution.¹¹³¹
- In August 2005, a 26-year-old HIV positive man was arrested and charged with several counts of intentional exposure to HIV after he allegedly lied about his HIV status to multiple sexual partners.¹¹³²
- In March 2003, a 30-year-old HIV positive woman was sentenced to three months imprisonment and five years probation for intentionally exposing a sexual partner to HIV.¹¹³³ She was also ordered to abstain from unprotected sex and submit to lie detector

¹¹²⁴ 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 John-John Williams, *2 S. Dakotans Sentenced for Spreading HIV*, ARGUS LEADER (Sioux Falls, SD), Mar. 26, 2003, at 1B; 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).

¹¹²⁵ Napolitano, *South Dakota: Jail Term for H.I.V. Exposure*.

¹¹²⁶ Wolf, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, at 864.

¹¹²⁷ Ryan Trowbridge, *Former Student Charged With Exposing Others to HIV*, WGGG.COM, Nov. 9, 2013, available at <http://www.wggg.com/2013/11/09/former-student-charged-with-exposing-others-to-hiv/>; 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.

¹¹²⁸ Jeff Rusack, *Man Sentenced to Prison in HIV Exposure Case*, KDLT.COM, Feb. 25, 2014, available at http://www.kdlt.com/index.php?option=com_content&task=view&id=33886&Itemid=57.

¹¹²⁹ *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.

¹¹³⁰ *Id.*

¹¹³¹ *Id.*

¹¹³² Denise Tucker, *Inmate May Have Spread HIV*, ARGUS LEADER (Sioux Falls, SD), Aug. 6, 2005, at 1B.

¹¹³³ Williams, *2 S. Dakotans Sentenced for Spreading HIV*.

tests when requested.¹¹³⁴

- In May 2002, two HIV positive partners who were also roommates were charged with exposing several sexual partners to HIV.¹¹³⁵ In March 2003 one of the men pleaded guilty to one count and received a forty-five day suspended jail sentence with five years probation.¹¹³⁶ The outcome of the other man's case is unknown.

Consecutive, as opposed to concurrent, sentencing is allowed at the discretion of a sentencing court in South Dakota.¹¹³⁷ Thus, if an HIV positive person is found guilty of exposing multiple partners to the virus, it is possible for her/him to receive a sentence of fifteen years *per* offense.

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

In South Dakota, imprisonment may also result from donating bodily fluids or tissues. It is a Class 3 felony, punishable by up to fifteen years in prison and a \$30,000 fine,¹¹³⁸ if an individual aware that she/he is HIV positive intentionally exposes another to infection by transferring, donating, or providing blood, tissue, semen, organs, or other “potentially infectious bodily fluids” for use by another.¹¹³⁹ Specifically, fluids or tissues may not be provided for “transfusion, transplantation, insemination, or other administration to another in any manner that presents a significant risk of HIV transmission.”¹¹⁴⁰

Neither the intent to transmit HIV nor actual transmission is required.¹¹⁴¹

It is an affirmative defense if the individual exposed to HIV (1) was aware of the defendant's HIV positive status, (2) knew that HIV infection could result from the exposure in question, and (3) consented to exposure with knowledge of these risks.¹¹⁴²

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

South Dakota's “intentional exposure” law explicitly prohibits HIV positive individuals from sharing used needles and syringes. It is a Class 3 felony, punishable by up to fifteen years in prison and possibly a \$30,000 fine, for an individual aware that she/he is HIV positive to intentionally expose another to infection by dispensing, delivering, exchanging, selling, or in any other way transferring to another any non-sterile “intravenous or intramuscular drug paraphernalia” that she/he has

¹¹³⁴ *Id.*

¹¹³⁵ Rhonda Smith, *S.D. gay couple faces prison for exposing others to HIV*, WASH. BLADE, May 24, 2002, available at <http://www.aegis.org/NEWS/wb/2002/WB020512.html>; *Men charged with spreading HIV*, CNN.COM, May 2, 2002, available at <http://edition.cnn.com/2002/LAW/05/02/hiv.arrests/>.

¹¹³⁶ John-John Williams, *Dakota man sentenced for HIV exposure*, ADVOCATE.COM, Mar. 29, 2003, available at <http://vowser.advocate.com/health/health-news/2003/03/29/south-dakota-man-sentenced-hiv-exposure-8183>.

¹¹³⁷ S.D. CODIFIED LAWS § 22-6-6.1(2014).

¹¹³⁸ § 22-6-1(6).

¹¹³⁹ § 22-18-31(2).

¹¹⁴⁰ § 22-18-31(2).

¹¹⁴¹ § 22-18-34.

¹¹⁴² § 22-18-33.

contaminated.¹¹⁴³

Neither the intent to transmit HIV nor actual transmission is required.¹¹⁴⁴

South Dakota law 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.¹¹⁴⁵ To avoid prosecution, HIV positive individuals should not share needles, syringes, or any other devices used to inject drugs into the body. Presumably, if these items are sterilized before transfer to another, prosecution may be avoided. However, it may be difficult to prove that a needle or syringe was sterile at the time of transfer to another without witnesses or documentation.

It is an affirmative defense if the individual exposed to HIV (1) was aware of the defendant’s HIV positive status, (2) knew that HIV infection could result from sharing drug paraphernalia, and (3) consented to exposure with knowledge of these risks.¹¹⁴⁶ However, an individual’s consent to HIV exposure may be difficult to prove without documentation.

Exposing the body of another person to blood or semen can result in imprisonment.

In South Dakota, it is a Class 3 felony, punishable by up to fifteen years in prison and a \$30,000 fine, if an individual aware that she/he is HIV positive intentionally exposes a person to HIV infection by throwing, smearing, or otherwise causing blood or semen to come in contact that person.¹¹⁴⁷

Neither the intent to transmit HIV nor actual transmission is required.¹¹⁴⁸

An individual will only be prosecuted under this provision of South Dakota’s HIV exposure laws if she/he acted with the purpose of exposing another to HIV infection. This reduces the risk that HIV positive persons will be prosecuted for accidentally exposing others to their bodily fluids. However, it is important to note that cases concerning the intent or purpose to spread HIV sometimes hinge upon uncorroborated testimony from prison guards, police, or assault victims claiming they were attacked by HIV positive persons attempting to infect them.¹¹⁴⁹

At the time of this writing, the authors are unaware of any individual in South Dakota who has been prosecuted for throwing or “smearing” blood or semen on another.

¹¹⁴³ §§ 22-6-1(6), 22-18-31(3).

¹¹⁴⁴ § 22-18-34.

¹¹⁴⁵ § 22-18-32(3) (2014).

¹¹⁴⁶ § 22-18-33.

¹¹⁴⁷ §§ 22-6-1(6), 22-18-31(4).

¹¹⁴⁸ § 22-18-34.

¹¹⁴⁹ See *US: Georgia Judge Branded ‘Too Lenient’ After 18 Month Sentence for Cop Biter*, HIV JUSTICE NETWORK, Sept. 6, 2009, available at <http://www.hivjustice.net/news/us-georgia-judge-branded-too-lenient-after-18-month-sentence-for-cop-biter/> (reporting on a 2008 Georgia case in which an officer bitten by an HIV positive man during a confrontation claimed that the man screamed “I have full-blown AIDS ... You’re going to die.” While the prosecuting attorney recommended a sentence of 15 years, the judge sentenced the man to 18 months imprisonment. After being labeled “too lenient”, the judge defended the reduced sentence, noting that the police report made no mention of any such statement by the defendant, which called into question whether it had in fact been said at all.); see also Idaho, Michigan, Massachusetts.

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Tennessee Statute(s) that Allow for Criminal Prosecution based on HIV Status:**TENN. CODE ANN. § 39-13-109*****Criminal exposure of another to HIV (human immunodeficiency virus), hepatitis B virus (HBV), or to hepatitis C virus (HCV)***

(a) A person commits the offense of criminal exposure of another to human immunodeficiency virus (HIV), to hepatitis B virus (HBV), or to hepatitis C virus (HCV) when, knowing that the person is infected with HIV, with HBV, or with HCV, the person knowingly:

- (1) Engages in intimate contact with another;
- (2) Transfers, donates, or provides 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, HBV or HCV transmission; or
- (3) Dispenses, delivers, exchanges, sells, or in any other way transfers to another any nonsterile intravenous or intramuscular drug paraphernalia.

(b) As used in this section:

- (1) "HIV" means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome;
- (2) "Intimate contact with another" means the exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV, HBV or HCV transmission; and
- (3) "Intravenous or intramuscular drug paraphernalia" means any equipment, product, or material of any kind that is peculiar to and marketed for use in injecting a substance into the human body.

(c) (1) It is an affirmative defense to prosecution under this section, which must be 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.

(2) It is an affirmative defense to prosecution under this section, which must be proven by a preponderance of the evidence, that the person exposed to HBV knew that the infected person was infected with HBV, knew that the action could result in infection with HBV, and gave advance consent to the action with that knowledge.

(3) It is an affirmative defense to prosecution under this section, which must be proven by a preponderance of the evidence, that the person exposed to HCV knew that the infected person was infected with HCV, knew that the action could result in infection with HCV, and gave advance consent to the action with that knowledge.

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(d) (1) Nothing in this section shall be construed to require the actual transmission of HIV in order for a person to have committed the offense of criminal exposure of another to HIV.

(2) Nothing in this section shall be construed to require the actual transmission of HBV in order for a person to have committed the offense of criminal exposure to HBV.

(3) Nothing in this section shall be construed to require the actual transmission of HCV in order for a person to have committed the offense of criminal exposure to HCV.

(e) (1) Criminal exposure of another to HIV is a Class C felony.

(2) Criminal exposure of another to HBV or HCV is a Class A misdemeanor, punishable by a fine of not more than one thousand dollars (\$1,000), restitution to the victim or victims, or both a fine and restitution. The clerk shall transmit all money collected from a fine imposed for a violation of this section to the criminal injuries compensation fund created pursuant to § 40-24-107. In addition, a victim of criminal exposure HBV or HCV may maintain an action for the expenses and the actual loss of service resulting from such exposure.

TENN. CODE ANN. § 39-13-516

Aggravated prostitution

(a) A person commits aggravated prostitution when, knowing that such person is infected with HIV, the person engages in sexual activity as a business or is an inmate in a house of prostitution or loiters in a public place for the purpose of being hired to engage in sexual activity.

(b) For the purposes of this section, "HIV" means the human immunodeficiency virus or any other identified causative agent of acquired immunodeficiency syndrome.

(c) Nothing in this section shall be construed to require that an infection with HIV has occurred in order for a person to have committed aggravated prostitution.

(d) Aggravated prostitution is a Class C felony.

TENN. CODE ANN. § 68-10-107

Exposure of another person

It is a violation of this chapter for any person infected with a STD to expose another person to such infection.

TENN. CODE ANN. § 68-10-101(4)***Definitions***

"Sexually transmitted disease" (STD) means any disease that is transmitted primarily through sexual practices and is identified in rules and regulations of the department.

TENN. CODE ANN. § 39-13-108***HIV (human immunodeficiency virus); willful transmission; quarantine***

(a) The department of health, acting pursuant to § 68-10-109, shall promulgate rules regarding transmission of human immunodeficiency virus (HIV). The rules shall include specific procedures for quarantine or isolation, as may be necessary, of any person who clearly and convincingly demonstrates willful and knowing disregard for the health and safety of others, and who poses a direct threat of significant risk to the health and safety of the public regarding transmission of HIV.

(b) The department is authorized to quarantine or isolate a person within a secure facility, after exercising other appropriate measures, if the person continues to pose a direct threat of significant risk to the health and safety of the public. Any person so quarantined or isolated within a secure facility, who intentionally escapes from the facility, commits a Class E felony.

TENN. CODE ANN. § 40-35-114(21)***Enhancement factors***

If appropriate for the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence:

(21) If the defendant is convicted of the offenses of aggravated rape pursuant to § 39-13-502, rape pursuant to § 39-13-503, rape of a child pursuant to § 39-13-522 or statutory rape pursuant to § 39-13-506, the defendant knew or should have known that, at the time of the offense, the defendant was HIV positive.

TENN. CODE ANN. § 40-35-111***Authorized sentences; prison terms or fines; reports***

(a) A sentence for a felony is a determinate sentence.

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- (b) The authorized terms of imprisonment and fines for felonies are:
- (3) Class C felony, not less than three (3) years nor more than fifteen (15) years. In addition, the jury may assess a fine not to exceed ten thousand dollars (\$10,000), unless otherwise provided by statute;
 - (5) Class E felony, not less than one (1) year nor more than six (6) years. In addition, the jury may assess a fine not to exceed three thousand (\$3,000) dollars, unless otherwise provided by statute.
- (c) (1) A sentence to pay a fine, when imposed on a corporation for an offense defined in title 39 or for any offense defined in any other title for which no special corporate fine is specified, is a sentence to pay an amount, not to exceed:
- (C) Two hundred fifty thousand dollars (\$250,000) for a Class C felony;
 - (D) One hundred twenty-five thousand dollars (\$125,000) for a Class D felony;
- (e) The authorized terms of imprisonment and fines for misdemeanors are:
- (1) Class A misdemeanor, not greater than eleven (11) months, twenty-nine (29) days or a fine not to exceed two thousand five hundred dollars (\$2,500), or both, unless otherwise provided by statute;
 - (3) Class C misdemeanor, not greater than thirty (30) days or a fine not to exceed fifty dollars (\$50.00), or both, unless otherwise provided by statute.

HIV positive persons may face criminal penalties for engaging in sexual activities without disclosing their HIV status.

In Tennessee, it is against the law for a person who is aware that she/he is HIV positive to engage in “intimate contact” with another without first disclosing her/his HIV status.¹¹⁵⁰ Intimate contact is defined as any contact between the body of one person and the bodily fluids of another person in a manner that presents a significant risk of HIV transmission.¹¹⁵¹ Because the statute is silent on condom use, “[i]t is not clear if an individual who engages solely in condom-protected sex could be charged with violating [the law].”¹¹⁵² Actual transmission of HIV is not necessary for a conviction.¹¹⁵³

Violating this statute is a Class C felony, punishable by three to fifteen years imprisonment as well as a possible \$10,000 fine.¹¹⁵⁴ If an HIV positive person is convicted under this statute she/he will also have to register as a violent sex offender for a minimum of 10 years.¹¹⁵⁵ If HIV positive persons disclose their HIV status to sexual partners prior to engaging in activities that present a significant

¹¹⁵⁰ TENN. CODE ANN. § 39-13-109(a)(1) (2014).

¹¹⁵¹ § 39-13-109(b)(2).

¹¹⁵² Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in Nashville, Tennessee Prosecutorial Region 2000-2010*, AIDS and Behavior, at 2 (Jan. 22, 2013).

¹¹⁵³ *Id.*

¹¹⁵⁴ § 40-35-111(b)(3) (2014).

¹¹⁵⁵ § 40-39-202(30) (2014).

risk of HIV transmission is an affirmative defense.¹¹⁵⁶ Proving disclosure can be challenging because there are rarely documents or other incontrovertible proof of disclosure and these cases often result in the defendant and complainant’s versions of the story pitted against one another.

In *State v. Smith*, there was a discrepancy between the defendant’s and complainant’s evidence regarding whether or not the defendant had disclosed his HIV status.¹¹⁵⁷ The defendant, who was charged with criminal exposure to HIV, among other charges, testified that he told the complainant that he had HIV and assumed that the complainant had used a condom before they engaged in anal sex.¹¹⁵⁸ The defendant maintained that he discovered later that the complainant had not used the condom.¹¹⁵⁹ The complainant testified otherwise, noting that though the sex was consensual, the defendant never disclosed his HIV status and the complainant only found out the information from a friend afterwards.¹¹⁶⁰

Tennessee’s criminal exposure statute requires that there be “exposure” of bodily fluids between an HIV positive person and another that presents a significant risk of transmission, but the scope of such exposure is not defined in the statute.¹¹⁶¹ In *State v. Bonds*, the Tennessee Court of Appeals defined “exposure” to encompass acts that presented a risk of transmission but declined to require an exchange of bodily fluids.¹¹⁶² The HIV positive defendant in that case was sentenced to six years for criminal exposure of HIV and an additional twenty-five years for aggravated rape.¹¹⁶³ On appeal, the defendant argued that under the terms of the HIV exposure statute he never “exposed” the complainant to HIV because there was no proof that there had been any exchange of bodily fluids during the commission of the crime.¹¹⁶⁴

The court determined that actual exposure to body fluids was not required, but rather “the Tennessee legislature’s use of the word ‘exposure’ in the statute . . . require[s] only evidence that a defendant subjected a victim to risk of contact with bodily fluids in a manner that would present a significant risk of HIV transmission.”¹¹⁶⁵ Because the defendant knew of his HIV status and anally raped the victim, the court found that this presented a significant risk of HIV transmission punishable under the HIV exposure statute.¹¹⁶⁶ After reviewing previous cases of HIV exposure in Tennessee, the court in *Bonds* found successful prosecutions hinged on the fact that the sex was unprotected and undisclosed, increasing the possible “risk” of transmitting HIV – as opposed to if a condom or other protection had been used.¹¹⁶⁷

The prosecutions of HIV exposure involving “intimate contact” in Tennessee appear to be limited to cases where the HIV positive defendant did not disclose her/his HIV status and a condom or

¹¹⁵⁶ § 39-13-109(c)(1).

¹¹⁵⁷ *State v. Smith*, No. M2007-00932-CCA-R10-CO, 2008 WL 544603, at *1-2 (Tenn. Crim. App. May 5, 2008).

¹¹⁵⁸ *Id.* at *1.

¹¹⁵⁹ *Id.*

¹¹⁶⁰ *Id.* at *2.

¹¹⁶¹ TENN. CODE ANN. § 39-13-109(a)(2).

¹¹⁶² *State v. Bonds*, 189 S.W.3d 249, 258 (Tenn. Crim. App. 2005).

¹¹⁶³ *Id.* at 251.

¹¹⁶⁴ *Id.* at 257.

¹¹⁶⁵ *Id.* at 258.

¹¹⁶⁶ *Id.* at 258-59.

¹¹⁶⁷ *Id.* at 259.

other protection was not used during sexual intercourse. Other prosecutions of criminal exposure to HIV involving intimate contact include:

- In September 2013, a man was arrested for criminal exposure to HIV after his mistress, with whom he had been having unprotected sex, found out that he was HIV positive from his wife.¹¹⁶⁸
- In April 2013, the Tennessee Court of Criminal Appeals affirmed the conviction of a defendant for eleven counts of especially aggravated sexual exploitation of a minor, seven counts of criminal exposure of another to HIV, and six counts of aggravated statutory rape.¹¹⁶⁹ The court further affirmed the trial court's total effective sentence of 174 years.¹¹⁷⁰ All charges arose from a single one-hour incident.¹¹⁷¹
- In October 2010, an HIV positive man was charged with four counts of criminal exposure of HIV after allegedly having sex with at least two women.¹¹⁷²
- A 24-year-old HIV positive defendant was sentenced to fourteen years for HIV exposure and an additional six years for statutory rape for having unprotected sex with a 14-year-old.¹¹⁷³ The defendant never told the minor that he was HIV positive.¹¹⁷⁴
- An HIV positive defendant pleaded guilty to twenty-two counts of criminal exposure to HIV and was sentenced to twenty-six years and six months imprisonment.¹¹⁷⁵ The defendant engaged in unprotected sex with multiple men without disclosing her HIV status.¹¹⁷⁶ Though the defendant maintained that she told her partners about her HIV status, the complainants testified otherwise.¹¹⁷⁷ The men maintained that the defendant purposefully denied her HIV status and they did not use condoms.¹¹⁷⁸ After ten years imprisonment the defendant was released and is currently on parole for twelve years.¹¹⁷⁹

¹¹⁶⁸ Beth Burger, *Red Bank, Tenn., man accused of exposing woman to HIV*, TIMES FREE PRESS, Sept. 18, 2013, available at <http://www.timesfreepress.com/news/2013/sep/18/red-bank-man-accused-of-exposing-woman-to-hiv/?news>.

¹¹⁶⁹ *State v. Hogg*, No. M2012-00303-CCA-R3-CD, 2013 WL 1619392, at *1 (Tenn. Crim. App. Apr. 16, 2013), *appeal granted* (Aug. 13, 2013).

¹¹⁷⁰ *Id.*

¹¹⁷¹ *Id.*

¹¹⁷² Claire Galofaro, "Flipper" Sensabaugh indicted on charges of criminal exposure to HIV, TRICITIES.COM, Oct. 29, 2010, available at <http://www2.tricities.com/business/2010/oct/29/flipper-sensabaugh-indicted-charges-criminal-expos-ar-614364/>.

¹¹⁷³ *State v. Harvey*, No. W2001-01164-CCA-R3-CD, 2002 WL 1162346, at *1 (Tenn. Crim. App. May 31, 2002).

¹¹⁷⁴ *Id.* at *2.

¹¹⁷⁵ *State v. Wisner*, No. M1999-02500-CCA-R3-CD, 2000 WL 1612363, at *2 (Tenn. Crim. App. Oct. 30, 2000).

¹¹⁷⁶ *Id.* at *2-4.

¹¹⁷⁷ *Id.*

¹¹⁷⁸ *Id.*

¹¹⁷⁹ *Woman who spread HIV leaves prison*, TIMES GAZETTE, Dec. 31, 2008, available at <http://www.t-g.com/story/1489830.html>.

- A 31-year-old HIV positive defendant pleaded guilty to criminal exposure to HIV and was sentenced to five concurrent four-year sentences.¹¹⁸⁰ The defendant engaged in five consensual, unprotected sexual encounters with the same female and did not disclose his status.¹¹⁸¹
- In October 1999, an HIV positive defendant pleaded guilty to nine counts of criminal exposure to HIV and three counts of statutory rape.¹¹⁸² He was sentenced to seventeen years imprisonment.¹¹⁸³ The defendant failed to disclose his HIV status, and when asked by his sexual partners he denied that he had HIV.¹¹⁸⁴ At least two of the women that he was intimate with tested positive for HIV, but that did not matter for the purposes of the charges or prosecution.¹¹⁸⁵
- In June 1999, a man was charged with statutory rape and criminal exposure to HIV.¹¹⁸⁶

Though most of the prosecutions for HIV exposure in Tennessee involve unprotected sexual activity without disclosure of HIV status, there have been multiple cases of arrests and prosecutions for criminal exposure to HIV that presented only a remote risk of transmission of HIV:

- In June 2013, a man was arrested for criminal exposure to HIV when he spit on a hospital worker who was trying to restrain him.¹¹⁸⁷ He was in the hospital for treatment of seizures.¹¹⁸⁸
- In November 2010, a man was charged with aggravated assault and criminal exposure of another to HIV for allegedly spitting on a detention officer.¹¹⁸⁹
- A 34-year-old HIV positive man was indicted on charges of criminal exposure to HIV for allegedly spitting on a police officer.¹¹⁹⁰
- From January 1, 2000 to December 31, 2010, “[e]ven of the twenty-seven arrests for HIV exposure (41%) [in the Nashville prosecutorial region] involved scratching, spitting (some with saliva, some with saliva mixed with blood), biting, or flinging or splattering blood.”¹¹⁹¹

¹¹⁸⁰ *State v. Bennett*, No. 03C01-9810-CR-00346, 1999 WL 544653, at *1 (Tenn. Crim. App. July 28, 1999).

¹¹⁸¹ *Id.*

¹¹⁸² *State v. Jones*, No. E1999-01296-CCA-R3-CD, 2001 WL 30198, at *1 (Tenn. Crim. App. Jan. 12, 2001).

¹¹⁸³ *Id.*

¹¹⁸⁴ *Id.*

¹¹⁸⁵ *Id.*

¹¹⁸⁶ *Man Allegedly Shot Girlfriend in front of Son*, DAILY NEWS JOURNAL, June 28, 1999, at X.

¹¹⁸⁷ *Man With HIV Arrested After He Spits On Hospital Worker*, THE CHATTANOOGAN, June 28, 2013, available at <http://www.chattanooga.com/2013/6/28/254206/Man-With-HIV-Arrested-After-He-Spits.aspx>.

¹¹⁸⁸ *Id.*

¹¹⁸⁹ *Inmate charged with exposing jailer to HIV*, WKRN.COM, Nov. 8, 2010, available at <http://www.wkrn.com/Global/story.asp?S=13466403>.

¹¹⁹⁰ *HIV Case Accused of Spitting At Cop*, MEMPHIS COMMERCIAL APPEAL, July 22, 1998, at B2.

¹¹⁹¹ Galletly, at 3.

In 2012, the Court of Criminal Appeals of Tennessee reversed a conviction of criminal exposure to HIV and modified the sentence to one of attempt to expose one to HIV.¹¹⁹² The court found that in order for the State to establish that spitting saliva into an officer's face posed a significant risk of transmission, the State must provide expert medical testimony on whether the defendant's actions posed a significant risk of HIV transmission because a layperson does not have the necessary medical knowledge to make this determination.¹¹⁹³

HIV positive persons who engage in prostitution face enhanced criminal penalties.

It is a Class C felony, punishable by three to fifteen years in prison for an HIV positive person who knows her/his status to engage in acts of prostitution.¹¹⁹⁴ Conviction under this statute also results in the defendant having to register as a violent sex offender for a minimum of 10 years.¹¹⁹⁵ Actual transmission of HIV is not required for conviction.¹¹⁹⁶ A conviction for prostitution in a case not involving HIV is a Class B misdemeanor punishable by no more than a six month sentence and/or a \$500 fine, but an HIV positive defendant faces a thirty times greater penalty for the same offense.¹¹⁹⁷ There are approximately thirty-nine women in Tennessee who have been convicted of aggravated prostitution.¹¹⁹⁸

Under the statute, it is not required that an act that could transmit HIV occur for conviction. It is not a consideration whether condoms or other protection were used, or if the HIV positive defendant had a low viral load. Tennessee law does not require actual physical contact for a conviction of aggravated prosecution.¹¹⁹⁹

One's HIV status may also be considered an aggravating factor in sentencing.

Tennessee's sentencing enhancement notes that if a defendant knew her/his HIV status during the commission of an aggravated rape, sexual battery, rape of a child, or statutory rape, the sentencing court may consider the defendant's HIV status in sentencing.¹²⁰⁰ In order to sustain a sentence enhancement under this provision, the defendant must have known or should have known her/his HIV status during the commission of the assault.¹²⁰¹ In *State v. Banks*, the Tennessee Court of Criminal Appeals vacated a trial court's imposing consecutive sentencing for a defendant convicted of aggravated kidnapping and rape because there was no trial court finding to show that the defendant knew his HIV status during the offense.¹²⁰² The defendant was originally sentenced to two twenty-three year consecutive sentences, for a total of forty-six years imprisonment.¹²⁰³

¹¹⁹² *State v. Ingram*, No. W2011-02595-CCA-R3-CD, 2012 WL 5355694, at *1 (Tenn. Crim. App. Oct. 31, 2012).

¹¹⁹³ *Id.* at *5.

¹¹⁹⁴ TENN. CODE ANN. § 39-13-516 (2014); § 40-35-111(b)(3).

¹¹⁹⁵ § 40-39-202(30).

¹¹⁹⁶ Galletly, at 2.

¹¹⁹⁷ § 39-13-513(b)(1) (2014); § 40-35-111(e)(2).

¹¹⁹⁸ J.J. Stambaugh, *HIV-positive Knoxville woman a walking felony*, knoxnews.com, June 30, 2009, available at <http://www.knoxnews.com/news/2009/jun/30/hiv-positive-knoxville-woman-a-walking-felony/>.

¹¹⁹⁹ Galletly, at 2.

¹²⁰⁰ TENN. CODE ANN. § 40-35-114(21) (2014).

¹²⁰¹ *Id.*

¹²⁰² No. M2009-00421-CCA-R3-CD, 2010 WL 1486897, at *6 (Tenn. Crim. App. April 14, 2010).

¹²⁰³ *Id.* at *1.

Donating blood, organs, tissue, semen, or other body fluids is prohibited.

HIV positive persons must not donate or sell blood or any other body parts meant for transfer to another person.¹²⁰⁴ Actual transmission of HIV is not necessary for a conviction and a violation of this statute could result in up to fifteen years imprisonment.¹²⁰⁵

HIV positive persons may be criminally prosecuted for sharing needles.

A person who is aware that she/he is HIV positive may be criminally liable for providing another person with any non-sterile equipment used for injecting drugs that has been used by an HIV positive person.¹²⁰⁶ Actual transmission of HIV is not necessary for a conviction.¹²⁰⁷

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, it should not be used as a substitute for legal advice.

¹²⁰⁴ TENN. CODE ANN. § 39-13-109(a)(2).

¹²⁰⁵ § 40-35-111(b)(3).

¹²⁰⁶ § 39-13-109(a)(3).

¹²⁰⁷ Galletly, at 2.

Texas Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure but prosecutions have arisen under general criminal laws.

Despite the fact that Texas does not have a criminal statute for HIV exposure or transmission,¹²⁰⁸ HIV positive persons have been prosecuted for HIV exposure under general criminal laws, including attempted murder and aggravated assault.¹²⁰⁹

Texas's aggravated assault statute makes it a felony on the second degree to cause serious bodily injury to another or use or exhibit a deadly weapon in the commission of an assault.¹²¹⁰ A felony of the second degree carries a punishment of two to twenty years in jail and a possible fine of \$10,000.¹²¹¹ If an aggravated assault is committed against a person the actor knows is a security officer it is a felony of the first degree punishable by five to ninety-nine years in prison and a possible fine of \$10,000.¹²¹² The Court of Appeals of Texas has found that the seminal fluid of an HIV positive man is a deadly weapon for the purposes of conviction under the aggravated assault statute,¹²¹³ and numerous prosecutions in Texas have led to the incarceration of individuals whose alleged criminal conduct presented no known risk of transmitting HIV.¹²¹⁴

¹²⁰⁸ Prior to 1994, Texas had an HIV transmission statute that made it a third degree felony punishable by up to ten years in prison and a \$10,000 fine for an HIV positive person to intentionally, and without consent, transfer bodily fluids to another. TEX. PENAL CODE ANN. § 22.012 (1987). Texas deleted this statute from its code in 1994, but a handful of cases were charged under the statute prior to its repeal. In 1993, an HIV positive man was charged with exposing a sexual partner to HIV. TJ Milling, *Woman Claims Lover Hid His HIV*, HOUSTON CHRONICLE, Aug. 17, 1993, at A 13. In 1992, an AIDS activist was charged with exposure to AIDS and HIV for scratching a police officer when he was being dragged from the Houston City Council Chambers. The charges were later dropped. *Id.* Another AIDS activist was charged after he bit a man on the hand and fingers. R.A. Dyer, *Ex-AIDS Activist Charged, Biting brings up rarely used law*, HOUSTON CHRONICLE, June 11, 1992, at A31.

¹²⁰⁹ See *Parker v. State*, 2010 WL 2784428 (Tex. App. 2010) (affirming the conviction and sentencing of an HIV positive defendant to life imprisonment for aggravated assault with a minor who tested positive for HIV); *Weeks v. State*, 834 S.W.2d 559 (Tex. App. 1992) (affirming the conviction for attempted murder of an HIV positive defendant for spitting at a prison guard. The defendant was sentenced to life in prison); *Najera v. State*, 955 S.W.2d 698 (Tex. App. 1997) (affirming the conviction of an HIV positive defendant for aggravated sexual assault. The aggravating element was that defendant's penis and bodily fluids together were considered a deadly weapon); *Lopez v. State*, 288 S.W.3d 148 (Tex. App. 2009) (remanding the case for a new trial. The HIV positive defendant had previously been convicted of two counts of aggravated sexual assault); *Hoffman v. State*, 2005 WL 1583552 (Tex. App. 2005) (affirming an eighteen-year sentence for HIV positive defendant convicted of aggravated sexual assault of a child where the aggravating factor was that his penis and bodily fluids were considered a deadly weapon); *Sierra v. State*, 2007 WL 2265170 (Tex. App. 2007) (affirming the conviction of an HIV positive defendant for three counts of aggravated sexual assault of a minor. The defendant was sentenced to life imprisonment and ordered to pay a fine of \$10,000 per count); *Suarez v. State*, 2004 WL 1660938 (Tex. App. 2004) (affirming the conviction of an HIV positive defendant for aggravated sexual assault of a child. The defendant was sentenced to fifteen years imprisonment).

¹²¹⁰ TEX. PENAL CODE ANN. § 22.02(a) (2013).

¹²¹¹ § 12.33 (2013).

¹²¹² §§ 22.02(b)(2)(D), 12.32 (2013).

¹²¹³ *Matbonican v. State*, 194 S.W.3d 59, 67-71 (Tex. App. 2006).

¹²¹⁴ *Degrate v. State*, No. 05-04-00218-CR, 2005 WL 165182 (Tex. Ct. App. Jan. 26, 2005) (affirming the conviction of an HIV positive defendant for aggravated assault of a public servant with a deadly weapon after he bit a Detention Service

In *Mathonican v. State*, the Court of Appeals of Texas found that the seminal fluid of an HIV positive man can be considered a deadly weapon in aggravated assault and aggravated sexual assault cases.¹²¹⁵ Similar to assault cases, sexual assault can be enhanced to aggravated sexual assault if the assailant uses or exhibits a deadly weapon in the commission of the crime.¹²¹⁶ The HIV positive defendant in *Mathonican* was sentenced to ninety-seven years imprisonment for sexually assaulting another individual.¹²¹⁷ The trial court held that the defendant's seminal fluid was a deadly weapon because he was HIV positive.¹²¹⁸ The defendant appealed his case, asserting that the deadly weapon finding was erroneous because HIV status should not be considered a deadly weapon.¹²¹⁹

The court found that seminal fluid may be a deadly weapon “if the man producing it is HIV positive and engages in unprotected sexual contact.”¹²²⁰ The court reasoned that a deadly weapon is anything that can be used to cause death or serious injury, and that the “seminal fluid from an HIV positive man is capable of causing death or serious bodily injury to another person when the HIV positive man engages in unprotected sexual contact.”¹²²¹ Even if the defendant did not ejaculate or otherwise expose the complainant to HIV, the court determined that the single fact that the defendant's seminal fluid “as used or as intended to be used” was capable of causing death or serious bodily injury supported the deadly weapon finding.¹²²² This reasoning suggests that if an HIV positive person engages in any unprotected sexual activity, regardless of the person's viral load and whether the sexual activity poses any possibility of transmission, criminal liability could follow.

More recently, the aggravated sexual assault conviction of an 18-year-old male living with HIV for having unprotected sexual relations with a child (a 15-year-old male, Jared Graham, a pseudonym) was affirmed by the Texas Court of Appeals. *Riley v. State*, No. 10-11-00439-CR, 2014 Tex. App. LEXIS 2830 (Tex. App. 2014). In *Riley*, Graham placed an ad on the website “craigslist” to find other males with whom to have sex. *Id.* at *3. The defendant responded to the ad and the two met twice. *Id.* at **3-5. Graham testified at trial that at the first meeting Riley: “first tried to put his penis” in Graham's anus without wearing a condom, and “then performed oral sex on Graham without using any protection,” with only Graham ejaculating. *Id.* at *4. Graham testified that at the second meeting “Riley performed anal sex on Graham without a condom while he masturbated Graham to ejaculation. Riley withdrew his penis and ejaculated.” *Id.* at *5. Graham admitted that Riley did not force him to participate in these acts. *Id.* at **4-5. When Riley's home was searched a medication was found for HIV and Riley's medical records and other witnesses confirmed that he was HIV positive. *Id.* at *7.

Officer in the leg. The deadly weapon in question was the defendant's mouth); Emily Tsao, *Man Claiming HIV Accused of Biting Guard*, DALLAS MORNING NEWS, May 31, 2008, at 2B.

¹²¹⁵ *Mathonican*, 194 S.W.3d at 67-71.

¹²¹⁶ The aggravated sexual assault statute makes it a first degree felony if “a person commits an offense . . . if the person . . . uses . . . a deadly weapon in the course of the same criminal episode.” TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(iv) (2014).

¹²¹⁷ *Mathonican*, 194 S.W.3d at 61.

¹²¹⁸ *Id.* at 67-71.

¹²¹⁹ *Id.* at 67.

¹²²⁰ *Id.* at 69 (citing *Najera v. State*, 955 S.W.2d 698, 701 (Tex. App. 1997) (finding that evidence of unprotected sex by an HIV positive man, even if there was no evidence of ejaculation by defendant, is sufficient for a finding that penis and seminal fluids are deadly weapons).

¹²²¹ *Id.*

¹²²² *Id.* at 71.

Riley was convicted on two counts of aggravated sexual assault of a child (younger than 17) with a deadly weapon (the bodily fluids of the HIV positive defendant) and sentenced to an imprisonment term of 70 years and a \$5,000 fine. The reasoning in this case follows *Mathonican*: that if a man living with HIV anally penetrates a partner without ejaculation and performs oral sex on a partner causing his partner to ejaculate, regardless of his viral load and whether the sexual activity poses any possibility of transmission, he may be convicted of aggravated sexual assault with a deadly weapon.¹²²³

Other prosecutions for HIV exposure under general criminal laws include:

- In August 2013, a 36-year-old HIV positive man was convicted of aggravated assault with a deadly weapon causing serious bodily injury after he transmitted HIV to four women.¹²²⁴ He was sentenced to 120 years in prison.¹²²⁵
- In December 2012, a 42-year-old HIV positive man pleaded guilty to aggravated assault causing serious bodily injury for having unprotected sex with the woman he was dating.¹²²⁶ He was sentenced to 15 years imprisonment.¹²²⁷
- In March 2010, an HIV positive man was charged with aggravated sexual assault of a child.¹²²⁸ Prosecutors cited HIV as a deadly weapon, and the man's HIV positive status was used to "upgrade the sexual assault of a child charge to an aggravated offense, making it a first-degree felony."¹²²⁹
- In November 2009, a 26-year-old HIV positive man was charged with aggravated sexual assault with a deadly weapon after having unprotected sex with a 16-year-old boy.¹²³⁰

Despite the scientific evidence on HIV transmission, numerous prosecutions have occurred for activities that pose no risk of transmission to others. In 1992, the Texas Court of Appeals upheld the attempted murder conviction of an HIV positive man for spitting on a prison guard.¹²³¹ For a conviction of attempted murder, "[t]he State was required to prove[, among other things,] that [Weeks'] intent, when he spit on the officer, was to cause the officer's death"¹²³² The court

¹²²³ *But see People v. Plunkett*, 19 N.Y.3d 363, 971 N.E.2d 363 (N.Y. 2012) (New York Court of Appeals holds that under New York law assault with saliva of a man living with HIV does not constitute a "dangerous instrument.")

¹²²⁴ Tyler White, *Midland man receives 120 years for transmitting HIV virus to four women*, MIDLAND REPORTER-TELEGRAM, Aug. 29, 2013, available at http://www.mrt.com/top_stories/article_ed04bbfe-1103-11e3-aaeb-0019bb2963f4.html?mode=story.

¹²²⁵ *Id.*

¹²²⁶ Robert Wilonsky, *Judge sentences Fort Worth man to 15 years in prison for knowingly infecting woman with HIV*, DALLAS MORNING NEWS, Dec. 31, 2012, available at <http://crimeblog.dallasnews.com/2012/12/judge-sentences-fort-worth-man-to-15-years-in-prison-for-knowingly-infecting-woman-with-hiv.html/>.

¹²²⁷ *Id.*

¹²²⁸ Brian Rogers, *In 1st for Harris Co., HIV deemed deadly weapon*, HOUSTON CHRONICLE, Mar. 21, 2010, available at <http://www.chron.com/news/houston-texas/article/In-1st-for-Harris-Co-HIV-deemed-deadly-weapon-1714831.php>.

¹²²⁹ *Id.*

¹²³⁰ John Cuoco, *Charges filed after HIV used as deadly weapon*, KXXV.COM, Nov. 3, 2009, available at <http://www.kxxv.com/Global/story.asp?S=11436836>.

¹²³¹ *Weeks*, 834 S.W.2d at 560-61.

¹²³² *Id.* at 561.

noted that Weeks “believed he could kill the [officer] by spitting his HIV infected saliva on him.”¹²³³ Further, the court found that, while the “evidence was highly controverted, there was sufficient evidence on the record, when considered in the light most favourable to the [guilty] verdict, that [Weeks] could have transmitted HIV by spitting.”¹²³⁴ For these reasons, the court upheld the attempted murder conviction and sentencing to life imprisonment.¹²³⁵

Seventeen years later the Court of Appeals of Texas was presented with an opportunity to revisit whether the saliva of an individual affected with HIV could be considered a “deadly weapon.”¹²³⁶ In 2006, an HIV positive man, Campbell, was convicted of harassing a public servant under Tex. Penal Code Ann. §22.11(a)(2)¹²³⁷ when he allegedly became confrontational and spat on a police officer’s eyes and mouth during an arrest.¹²³⁸ While the officer did not test positive for HIV, Campbell’s saliva was considered a possible means of transmitting HIV.¹²³⁹ Due to this, the jury also found that he used a “deadly weapon” during the offense.¹²⁴⁰ Campbell was later sentenced to thirty-five years in prison.¹²⁴¹ In both *Weeks* and *Campbell* the court based its ruling on the testimony of medical experts that there exists a theoretical possibility of HIV transmission through saliva.¹²⁴²

These convictions were affirmed despite the fact that no officers involved in the altercations were infected with HIV and, most importantly, saliva has never been documented to transmit HIV. The CDC has concluded that there exists only a “negligible” possibility that HIV could be transmitted through a bite.¹²⁴³ The CDC has also concluded that “HIV cannot be spread through saliva, and there is no documented case of transmission from an HIV-infected person spitting on another person.”¹²⁴⁴ The Court of Appeals of Texas has set a poor precedent that HIV positive individuals may be prosecuted for conduct that bears no risk or only a remote risk of HIV transmission and may be convicted for crimes solely on the basis of HIV status.¹²⁴⁵

Other cases in Texas where HIV positive persons have been prosecuted for conduct that poses no risk of HIV transmission include:

¹²³³ *Id.* at 562.

¹²³⁴ *Id.* at 565.

¹²³⁵ *Id.* at 560 (noting that the jury “assessed punishment at confinement for life” “[a]fter finding that [Campbell] had two prior felony convictions”).

¹²³⁶ See generally *Campbell v. State*, No. 05-08-00736-CR, 2009 Tex. App. LEXIS 5369 (Tex. Ct. App. July 14, 2009).

¹²³⁷ Under Texas Penal Code §22.11(a) (2014) “[a] person commits an offense if, with the intent to assault, harass, or alarm, the person: (1) while imprisoned or confined in a correctional or detention facility, causes another person to contact the . . . saliva . . . of the actor, any other person . . . or (2) causes another person the actor knows to be a public servant to contact the . . . saliva . . . of the actor, any other person . . . while the public servant is lawfully discharging an official duty . . .” “An offense under this section is a felony of the third degree.” Tex. Penal Code §22.11(b)(2014).

¹²³⁸ *Id.* at **2-3.

¹²³⁹ *Id.* at *3, **7-8.

¹²⁴⁰ *Id.* at *1, *8.

¹²⁴¹ *Ex parte Willie Bernard Campbell*, 2012 Tex. Crim. App. Unpub. LEXIS 131 (Tex. Ct. App. February 29, 2012).

¹²⁴² *Campbell*, 2009 Tex. App. 5369 at **7-8; *Weeks*, 832 S.W.2d at 562-64.

¹²⁴³ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source*, by *Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

¹²⁴⁴ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

¹²⁴⁵ But see fn. 1223 above.

- In May 2013, a 25-year-old HIV positive man was charged with aggravated assault after spitting on two police officers.¹²⁴⁶
- An HIV positive woman spit in the face of a prison guard and was convicted of attempted capital murder and sentenced to twenty-five years imprisonment.¹²⁴⁷
- A 26-year-old HIV positive man was charged with aggravated assault after he bit a security guard during a struggle in May 2008.¹²⁴⁸ Because of his HIV positive status, the jury considered his saliva a “deadly weapon.”¹²⁴⁹
- In 2005, an HIV positive man’s twenty-five year sentence for biting a police officer was upheld by the Court of Appeals of Texas.¹²⁵⁰ A nurse who testified at the trial said that HIV could be transmitted via the saliva in a bite and the court affirmed the conviction based in part on the nurse’s testimony.¹²⁵¹

HIV positive persons who fail to disclose their HIV status to their sexual partners may be prosecuted for aggravated assault.

Because an HIV positive individual’s saliva and other bodily fluids can be considered a deadly weapon in Texas, HIV positive individuals may face aggravated assault charges for failing to disclose their HIV status to sexual partners.

In May 2009, an HIV positive man was sentenced to five concurrent forty-five-year sentences and one twenty-five year sentence for aggravated assault with a deadly weapon for exposing and infecting multiple women with HIV.¹²⁵² Because he allegedly did not disclose his HIV status to his partners and did not use condoms during sex, the prosecutors charged him with aggravated assault.¹²⁵³ The man maintained that he himself may have even been infected by one of the complainants.¹²⁵⁴ He will be eligible for parole after twenty-two years.¹²⁵⁵ On appeal, the Court of Appeals of Texas affirmed his conviction and sentencing.¹²⁵⁶

¹²⁴⁶ Matt Peterson, *Police say HIV positive man refused to be masked, spit on officers trying to book him for public intoxication*, DALLAS MORNING NEWS, May 29, 2013, available at <http://crimeblog.dallasnews.com/2013/05/police-say-HIV-positive-man-refused-to-be-masked-spit-on-officers-trying-to-book-him-for-public-intoxication.html/>.

¹²⁴⁷ Brenda Rodriguez, *Sisterhood forms in Prison AIDS Center*, SAN ANTONIO EXPRESS NEWS, Sept. 15, 1997, at 8A.

¹²⁴⁸ Emily Tsao, *Man Claiming HIV Accused of Biting Guard*, DALLAS MORNING NEWS, May 31, 2008, at 2B; Ben Briscoe, *Saliva again considered deadly weapon in Oak Lawn assault case*, PEGASUSNEWS.COM, June 6, 2008, available at <http://www.pegasusnews.com/news/2008/jun/06/saliva-again-considered-deadly-weapon-oak-lawn-ass/>.

¹²⁴⁹ *Id.*

¹²⁵⁰ *Degrate*, 2005 WL 165182 at *1.

¹²⁵¹ *Id.* at *1, *2.

¹²⁵² Diane Jennings, *Collin County jury sentences man to 45 years for assault by spreading HIV*, WFAA.COM, Aug. 15, 2009, available at <http://www.wfaa.com/news/local/64543457.html>.

¹²⁵³ *Id.*

¹²⁵⁴ Diane Jennings, *HIV-positive Frisco man blames victims, lawyers for conviction*, WFAA.COM, Aug. 15, 2009, available at <http://www.wfaa.com/news/local/64502807.html>.

¹²⁵⁵ Jennings, *Collin County jury sentences man to 45 years for assault by spreading HIV*.

¹²⁵⁶ *Padien v. State*, No. 05-09-00796-CR, 2010 WL 5395656, at *1 (Tex. Ct. App. Dec. 30, 2010).

In July 2010, an HIV positive man pleaded guilty to aggravated sexual assault and other aggravated assault charges for failing to disclose his HIV status to his sexual partners.¹²⁵⁷ The court found that the man’s penis and seminal fluids constituted a deadly weapon.¹²⁵⁸

In October 2010, a 32-year-old HIV positive Iraq war veteran was sentenced to three life sentences without parole for super-aggravated assault of a child and continuous sexual abuse of a child.¹²⁵⁹ A super-aggravated assault conviction requires that the jury find that the defendant used a deadly weapon while molesting a child younger than 14.¹²⁶⁰ In this case, the deadly weapon was considered to be the defendant’s bodily fluids.¹²⁶¹ The man’s conviction and sentencing was upheld by the Court of Appeals of Texas.¹²⁶²

In *Henry v. State*, the Court of Appeals of Texas affirmed the conviction and sentencing of an HIV positive man to seventy-five years imprisonment for aggravated assault of a child, enhanced by two prior felony convictions.¹²⁶³ There was testimony at trial by a family nurse practitioner at the jail who had “extensive” HIV training.¹²⁶⁴ She testified that there was a “high risk of HIV transmission during unprotected sex.”¹²⁶⁵ Such broad generalizations are questionable and should not be applied to individual defendants without at least considering the viral load of a defendant and her/his medical treatment. Otherwise, “it is difficult to see how a qualified witness could reliably testify as to the risk posed by the defendant’s sexual activity.”¹²⁶⁶

HIV status is a consideration in sentencing even if there was no exposure to HIV.

HIV status can be considered admissible evidence at the punishment stage of a conviction if it is determined that HIV status is relevant to the offense. This consideration of HIV status most often involves cases of aggravated assault and aggravated sexual assault. The Court of Appeals of Texas has found that “whether the accused is infected with AIDS or HIV is a ‘viable concern’ at the punishment stage of an aggravated sexual assault trial” and that testimony and evidence of the defendant’s HIV status should therefore be admitted to consider the “potential long term effect of the injury” to the complainant.¹²⁶⁷

Though the courts have established that information concerning a defendant’s life and characteristics may not be relevant to an issue of ultimate fact in the case, such considerations are

¹²⁵⁷ Jennifer Emily, *HIV carrier who endangered women pleads guilty in midst of trial*, THE DALLAS MORNING NEWS, July 16, 2010, available at

<http://www.dallasnews.com/sharedcontent/dws/news/localnews/crime/stories/071510dnmetaidstrial.1418cf0c0.html>.

¹²⁵⁸ *Id.*

¹²⁵⁹ Craig Kapitan, *Molester with HIV gets life without parole – times three*, MYSANANTONIO.COM, Oct. 7, 2010, available at http://www.mysanantonio.com/news/local_news/molester_with_hiv_gets_life_without_parole__times_three_104532769.html?c=y&page=1#storytop.

¹²⁶⁰ *Id.*

¹²⁶¹ *Id.*

¹²⁶² *Delgado v. State*, No. 04-10-00797-CR, 2012 WL 2581251, at *1 (Tex. Ct. App. July 5, 2012).

¹²⁶³ No. 08-05-00364-CR, 2007 WL 2405798, at *1 (Tex. Ct. App. Aug. 23, 2007).

¹²⁶⁴ *Id.* at *4.

¹²⁶⁵ *Id.*

¹²⁶⁶ AIDS AND THE LAW 7-26, David W. Webber ed., Aspen Publishers 4th ed. Supp. 2010 (1987).

¹²⁶⁷ *Suarez v. State*, No. 14-03-00441-CR, 2004 WL 1660938, at *6 (Tex. Ct. App. July 27, 2004) (citing *Hunter v. State*, 799 S.W.2d 356, 360 (Tex. Ct. App. 1990)).

appropriate when determining a sentence.¹²⁶⁸ In *Martinez v. State*, the defendant was sentenced to life in prison and a \$10,000 fine for aggravated sexual assault against a child.¹²⁶⁹ The defendant appealed his sentence, arguing that it was largely based on his HIV status.¹²⁷⁰ The court, upholding the conviction and the sentence, found that HIV status can be considered as victim impact evidence at sentencing.¹²⁷¹ The court stated that victim impact evidence reflects the “defendant’s personal responsibility and moral guilt and thus is relevant to punishment issues.”¹²⁷²

Taking into account HIV status in the penalty phase has led to increased sentences for many individuals in Texas, including those who did not expose others to HIV during the commission of the crime.

In *Atkins v. State*, an HIV positive man was convicted of attempted sexual performance of a child and was sentenced to life in prison.¹²⁷³ The defendant invited a minor to his apartment where the defendant then sat on the bed, began undressing and fondling himself, and made suggestive overt comments referring to sex.¹²⁷⁴ The minor left the apartment and called for help before any physical or sexual contact took place.¹²⁷⁵ During the trial, the state presented evidence that the defendant was HIV positive even though there was no contact that could remotely result in the transmission of HIV.¹²⁷⁶

The defendant argued on appeal that his HIV positive status had no probative value and should not have been considered for his sentencing.¹²⁷⁷ The court found that even though no sexual or physical contact occurred between the defendant and the minor, the defendant’s HIV status could be considered as relevant evidence of the offense and used in assessing punishment because the defendant often had unprotected sex with men.¹²⁷⁸ This behavior, the court held, reflected the defendant’s “willingness to expose others to the virus and his reckless disregard for the lives of others” and, as such, was pertinent to his sentencing.¹²⁷⁹

In *Lewis v. State*, an HIV positive man was sentenced to consecutive life sentences for aggravated sexual assault and indecency with a child.¹²⁸⁰ The man inserted his finger into the child’s vagina and masturbated while doing so.¹²⁸¹ In the appeal of his sentence, the defendant argued that his HIV

¹²⁶⁸ *Sellers v. State*, No. 05-94-00033-CR, 1996 WL 223537, at *1 (Tex. Ct. App. Apr. 29, 1996) (citing *Murphy v. State*, 777 S.W.2d 44, 63 (Tex. Crim. App. 1988)).

¹²⁶⁹ No. 05-03-01243-CR, 2004 WL 2378359, at *1 (Tex. Ct. App. Oct. 25, 2004).

¹²⁷⁰ *Id.* at *3.

¹²⁷¹ *Id.* at *4.

¹²⁷² *Id.*

¹²⁷³ No. 05-07-00586-CR, 2008 WL 2815087, at *1 (Tex. Ct. App. July 23, 2008) (noting that the punishment was enhanced by two prior felony convictions).

¹²⁷⁴ *Id.*

¹²⁷⁵ *Id.*

¹²⁷⁶ *Id.* at *8.

¹²⁷⁷ *Id.*

¹²⁷⁸ *Id.*

¹²⁷⁹ *Id.*

¹²⁸⁰ No. 07-08-00290-CR, 2010 WL 2400085, at *1 (Tex. Ct. App. June 16, 2010) (noting that the punishment was enhanced by two prior felony convictions).

¹²⁸¹ *Id.*

status should not have been considered because at no time did he expose the child to HIV.¹²⁸² The defendant also asserted that the state did not produce any medical testimony regarding the defendant's HIV status, the nature of HIV, or how the acts in question could have exposed the minor to a risk of transmission.¹²⁸³ The court disagreed, finding that the defendant's HIV positive status was properly used during the trial and sentencing because the defendant had volunteered his HIV status to the police.¹²⁸⁴ The court held that "the jury may consider, as a circumstance of the offense, that appellant's recognized HIV positive status placed the victim of his sexual assault at risk of infection, whether or not the evidence shows any actual transmission of body fluids in a manner likely to infect."¹²⁸⁵

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¹²⁸² *Id.* at *3.

¹²⁸³ *Id.* at *3.

¹²⁸⁴ *Id.* at *4.

¹²⁸⁵ *Id.*

Utah Statute(s) that Allow for Criminal Prosecution based on HIV Status:**UTAH CODE ANN. § 76-10-1309*****Enhanced penalties--HIV positive offender***

A person who is convicted of prostitution under Section 76-10-1302, patronizing a prostitute under Section 76-10-1303, or sexual solicitation under Section 76-10-1313 is guilty of a third degree felony if at the time of the offense the person is an HIV positive individual, and the person:

- (1) has actual knowledge of the fact; or
- (2) has previously been convicted under Section 76-10-1302, 76-10-1303, or 76-10-1313.

UTAH CODE ANN. § 76-5-102.6***Propelling substance or object at a correctional or peace officer--Penalties***

(1) Any prisoner or person detained pursuant to Section 77-7-15 who throws or otherwise propels any substance or object at a peace or correctional officer is guilty of a class A misdemeanor, except as provided under Subsection (2).

(2) A violation of Subsection (1) is a third-degree felony if:

- (a) The object or substance is:
 - (i) blood, urine, or fecal material; or
 - (iv) the prisoner's or detained person's saliva, and the prisoner or detained person knows he or she is infected with HIV, hepatitis B, or hepatitis C; and
- (b) The object or substance comes into contact with any portion of the officer's face, including the eyes or mouth, or comes into contact with any open wound on the officer's body.

(3) If an offense committed under this section amounts to an offense subject to a greater penalty under another provision of state law than under this section, this section does not prohibit prosecution and sentencing for the more serious offense.

UTAH CODE ANN. § 76-3-203(3)***Felony conviction--Indeterminate term of imprisonment***

In the case of a felony of the third degree, unless the statute provides otherwise, for a term not to exceed five years.

UTAH CODE ANN. § 76-3-301(1)(b)***Fines of persons***

- (1) A person convicted of an offense may be sentenced to pay a fine, not exceeding:
 (b) \$5,000 for a felony conviction of the third degree.

HIV positive persons convicted of sex offenses, particularly prostitution, may receive increased sentences.

Utah is one of many states with a “sentence enhancement” statute that may increase penalties for HIV positive offenders, regardless of whether they expose others to a significant risk of HIV infection.¹²⁸⁶ In Utah, if an individual pleads guilty or no contest to, or is convicted of any of the following offenses, she/he is required to take an HIV test:¹²⁸⁷

- Prostitution¹²⁸⁸
- Patronizing a prostitute¹²⁸⁹
- Sexual solicitation¹²⁹⁰

If a defendant tests positive and receives notice of the positive test result it is a third-degree felony, punishable by up to five years in prison and a \$5,000 fine if that HIV positive defendant is subsequently convicted of one of the aforementioned offenses.¹²⁹¹ In contrast, a violation of Utah’s prostitution laws for those who are not HIV positive is a class B misdemeanor punishable by at most six months in prison and a \$1,000 fine (or one year and a \$2,500 fine for repeat prostitution and “sexual solicitation” offenses).¹²⁹² HIV positive persons, on the basis of their status alone, may face a prison sentence four years longer than that of HIV negative persons.

In September 2010, an HIV positive sex worker was sentenced to five years imprisonment after

¹²⁸⁶ UTAH CODE ANN. § 76-10-1309 (West 2014).

¹²⁸⁷ § 76-10-1311 (West 2014).

¹²⁸⁸ §§ 76-10-1311, 76-10-1302 (West 2014).

¹²⁸⁹ §§ 76-10-1311, 76-10-1303 (West 2014).

¹²⁹⁰ §§ 76-10-1311, 76-10-1313 (West 2014).

¹²⁹¹ §§ 76-3-203(3) (West 2014), 76-3-301(1)(b) (West 2014), 76-10-1309, 76-10-1312 (West 2014) (outlining test result notification standards).

¹²⁹² §§ 76-3-204, 76-3-301, 76-10-1302(2), 76-10-1313(2).

pleading guilty to one count of third-degree felony sexual solicitation.¹²⁹³ The woman had tested positive for HIV in 2007 after her fourth prostitution conviction.¹²⁹⁴ She had also been imprisoned in 2008 and 2009 for prostitution.¹²⁹⁵

In June 2013, an HIV positive man was charged with second-degree felony aggravated exploitation of prostitution and sexual solicitation for offering to pay a teenage boy for sex.¹²⁹⁶ The sexual solicitation charge was elevated to a third-degree felony due to the man's HIV positive status.¹²⁹⁷

This “penalty enhancement” law increases penalties for HIV positive defendants regardless of whether infection was even possible under the circumstances. In Utah, a person is guilty of prostitution when 1) she/he engages in any sexual activity with another person for a fee; 2) she/he is an inmate of a house of prostitution; or 3) she/he loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.¹²⁹⁸ “Sexual activity” is defined as “acts of masturbation, sexual intercourse, or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.”¹²⁹⁹ Under this broad definition, felony-level prison sentences may be imposed in circumstances where HIV could not have been transmitted through the relevant activity.

The use of condoms or other protection is not a defense, despite the fact that they can significantly reduce risks of HIV transmission. Disclosure of HIV positive status is not a defense on the face of the statute nor is a defendant's viral load taken into consideration, even though a low viral load can significantly reduce transmission risks.

Further, under this statute sexual activity itself is not even required for prosecution. As noted above, “loitering” in a public place for the purpose of being hired for prostitution also results enhanced penalties.¹³⁰⁰ The act of offering or agreeing to commit any sexual activity for a fee, or entering a house of prostitution for the purpose of having sex for a fee, will also incur enhanced penalties for HIV positive offenders.¹³⁰¹ Thus acts which carry no risk of HIV transmission can result in enhanced penalties. Moreover, there is no consideration given to whether the act, if it had been completed, would carry a risk of HIV exposure or transmission.

Finally, merely being an “inmate of a house of prostitution” also triggers enhanced sentencing.¹³⁰² Presumably, this means that any sex worker in a commercial sex establishment may face up to five years in prison,¹³⁰³ regardless of whether they engaged in sexual activities posing any risk of HIV infection.

¹²⁹³ Stephen Hunt, *HIV-positive prostitute sent to prison*, THE SALT LAKE TRIB., Sept. 17, 2010, available at <http://www.sltrib.com/sltrib/home/50306321-76/-prison-patwardhan.html.csp>.

¹²⁹⁴ *Id.*

¹²⁹⁵ *Id.*

¹²⁹⁶ Erin Alberty, *Price police say HIV-positive man solicited sex from teen*, THE SALT LAKE TRIB., June 7, 2013, available at <http://www.sltrib.com/sltrib/news/56428611-78/mead-barnes-police-sex.html.csp>.

¹²⁹⁷ *Id.*

¹²⁹⁸ UTAH CODE ANN. § 76-10-1302(1).

¹²⁹⁹ § 76-10-1301(4) (West 2014).

¹³⁰⁰ § 76-10-1302(1)(c).

¹³⁰¹ § 76-10-1303.

¹³⁰² § 76-10-1302(1)(b).

¹³⁰³ § 76-10-1301(1).

HIV status may be taken into consideration during sentencing.

Transmission of HIV may be a factor in sentencing decisions. In *State v. Scott*, a man with chlamydia pleaded guilty to three counts of sodomy on a child for sexually abusing a six-year-old girl.¹³⁰⁴ He was subsequently sentenced to three ten years to life prison terms.¹³⁰⁵ On appeal, the defendant argued that the trial court should not have considered his victim's infection with chlamydia as an "aggravating factor" when deciding whether to impose concurrent sentences or consecutive sentences, because it was not certain that the defendant was the source of the victim's infection.¹³⁰⁶ The Court of Appeals of Utah disagreed, as evidence suggested that the defendant had chlamydia, and the transmission of a sexually transmitted infection (STI) to a sexual abuse victim was a valid aggravating factor.¹³⁰⁷ The reasoning in *Scott* suggests that the transmission of HIV may also be taken into consideration for sentencing purposes and result in consecutive sentences for conviction of multiple charges of a sex offense.

Assaulting a police or correctional officer with bodily fluids can result in increased prison sentences.

Utah has an HIV exposure statute specifically addressing situations where HIV positive inmates throw or otherwise expose others to their bodily fluids during confrontations.¹³⁰⁸ In Utah, it is a class A misdemeanor, punishable by one year in prison and a \$2,500 fine, if any prisoner or person throws or otherwise propels any substance or object at a police or correctional officer.¹³⁰⁹

However, it is a third-degree felony, punishable by up to five years in prison and a \$5,000 fine, if the object or substance is (1) blood, urine, or feces, or (2) the saliva of a person who knows she/he is infected with HIV, hepatitis B, or hepatitis C, and any of these substances come into contact with an officer's face, eyes, mouth, or an open wound on the officer's body.¹³¹⁰ Neither the intent to transmit HIV nor actual transmission is required.

The CDC has concluded that there exists only a "negligible" risk that HIV could be transmitted through a bite.¹³¹¹ The CDC has also concluded that spitting alone has never been shown to transmit HIV.¹³¹² Utah's statute ignores these scientific findings, leading to potential prosecutions for behavior that has at best a remote possibility of transmitting HIV.

Important note: While we have made an effort to ensure that this information is current, the law is

¹³⁰⁴ *State v. Scott*, 180 P.3d 774, 775-76 (Utah Ct. App. 2008).

¹³⁰⁵ *Id.* at 776.

¹³⁰⁶ *Id.* at 777-78.

¹³⁰⁷ *Id.*

¹³⁰⁸ UTAH CODE ANN. § 76-5-102.6 (West 2014).

¹³⁰⁹ §§ 76-3-204(1), 76-3-301(c), 76-5-102.6.

¹³¹⁰ §§ 76-3-203(3), 76-3-301(b), 76-5-102.6.

¹³¹¹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission Risk, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (July 1, 2014) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited Dec. 3, 2014).

¹³¹² CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Sept. 23, 2014) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 3, 2014).

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, it should not be used as a substitute for legal advice.

Vermont Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure but at least one prosecution has arisen under general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in Vermont. However, at least one person has been prosecuted for HIV exposure under general criminal laws. In July 2009, a 31-year-old HIV positive man was charged with aggravated assault for spitting in the face of a police officer.¹³¹³

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.

¹³¹³ Brent Curtis, *AIDS Patient Faces Felony for Spitting at City Officer*, RUTLANDHERALD.COM, July 30, 2009, available at <http://www.vermonttoday.com/apps/pbcs.dll/article?AID=/RH/20090730/NEWS01/907300377>.

Virginia Statute(s) that Allow for Criminal Prosecution based on HIV Status:**VA. CODE ANN. § 18.2-67.4:1*****Infected sexual battery; penalty***

A. Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with the intent to transmit the infection to another person is guilty of a Class 6 felony.

B. Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with another person without having previously disclosed the existence of his infection to the other person is guilty of a Class 1 misdemeanor.

C. "HIV" means the human immunodeficiency virus or any other related virus that causes acquired immunodeficiency syndrome (AIDS).

Nothing in this section shall prevent the prosecution of any other crime against persons under Chapter 4 (§ 18.2-30 et seq.) of this title. Any person charged with a violation of this section alleging he is infected with HIV shall be subject to the testing provisions of § 18.2-62.

VA. CODE ANN. § 32.1-289.2***Donation or sale of blood, body fluids, organs and tissues by persons infected with human immunodeficiency virus***

Any person who donates or sells, who attempts to donate or sell, or who consents to the donation or sale of blood, other body fluids, organs and tissues, knowing that the donor is, or was, infected with human immunodeficiency virus, and who has been instructed that such blood, body fluids, organs or tissues may transmit the infection, shall be guilty, upon conviction, of a Class 6 felony.

This section shall not be construed to prohibit the donation of infected blood, other body fluids, organs and tissues for use in medical or scientific research.

VA. CODE ANN. § 18.2-10(f)***Punishment for conviction of felony; penalty***

The authorized punishments for conviction of a felony are:

(f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.

VA. CODE ANN. § 18.2-11(a)***Punishment for conviction of misdemeanor***

The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanor, confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.

Virginia criminalizes a broad range of sexual activities for people living with HIV.

Virginia criminalizes oral sex, anal sex, and vaginal sex for people living with HIV.¹³¹⁴ If an individual knows she/he has HIV and engages in these activities with the intent to transmit HIV, she/he is guilty of a felony that can result in up to five years of prison and a fine of up to \$2,500.¹³¹⁵ Even if the individual has no intent to transmit HIV, an individual who knows she/he has HIV is guilty of a misdemeanor if she/he engages in oral sex, anal sex, or vaginal sex without disclosing her/his HIV-status to her/his partner.¹³¹⁶

This statute may disproportionately punish an individual for being HIV positive, regardless of whether the alleged conduct involved a risk of transmission. There is no exception for condom use and no consideration of the defendant's viral load, both of which might significantly reduce the risk of transmission. There is also no exception or consideration under the statute for situations in which both partners are HIV positive.

An individual living with HIV must disclose her/his HIV status to a partner before engaging in certain sexual activities.

The misdemeanor section of Virginia's HIV statute requires the prosecution to demonstrate that the

¹³¹⁴ VA. CODE ANN. § 18.2-67.4:1 (2014).

¹³¹⁵ §§ 18.2-10 (2014), 18.2-67.4:1.

¹³¹⁶ § 18.2-67.4:1.

individual did not disclose her/his HIV status.¹³¹⁷ Under the felony section there is no requirement of disclosure, but the prosecution must prove that the defendant intended to transmit HIV.¹³¹⁸ Which section applies in a given case is thus dependent on the defendant's state of mind, i.e., whether the intent to transfer element exists. Such intent could be difficult to prove under the felony section. Hypothetically, an individual could disclose her/his HIV positive status to a partner but still be prosecuted under the felony provision if there were elements to suggest that the individual intended to transmit HIV.

Prosecutions of HIV positive persons under Virginia's HIV statute include:

- In July 2012, a 56-year-old HIV positive man was charged with infected sexual battery for failing to disclose his HIV-status prior to engaging in unprotected sexual intercourse with his then-fiancée.¹³¹⁹
- In December 2011, a 52-year-old HIV positive man pleaded guilty to carnal knowledge of a minor and engaging in sexual intercourse without disclosing his HIV-status for having sex with a 14-year-old girl.¹³²⁰ The second charge was reduced from a felony to a misdemeanor because there was no evidence the defendant intended to transmit HIV to the girl.¹³²¹ The man was sentenced to seven years in prison for the two charges.¹³²²
- In October 2010, an HIV positive man was charged with felony infected sexual battery for allegedly trying to infect two women with HIV.¹³²³
- In June 2010, a 45-year-old HIV positive woman pleaded guilty to misdemeanor prostitution before standing trial for an additional infected sexual battery charge.¹³²⁴ She was convicted of the lesser misdemeanor offense after the judge found that she did not intend to transmit HIV.¹³²⁵
- In October 2009, a 37-year-old HIV positive Petty Officer in the navy pleaded guilty to two counts of aggravated assault and disobeying an order for having consensual unprotected sex with two women, both of whom knew his HIV-status.¹³²⁶ The man was

¹³¹⁷ *Id.*

¹³¹⁸ *Id.*

¹³¹⁹ Catie Beck, *Man charged with not telling sexual partner about STD*, WTVR.COM, July 30, 2012, available at <http://wtvr.com/2012/07/30/man-charged-with-not-telling-sexual-partner-about-std/>; Marcus Schmidt, *Man charged with not telling his fiancé about HIV infection*, PROGRESS-INDEX.COM, Aug. 4, 2012, available at <http://progress-index.com/news/man-charged-with-not-telling-his-fianc%C3%A9-about-hiv-infection-1.1354319>.

¹³²⁰ Scott Wise, *Harvin pleads guilty to HIV-positive sex with a minor*, WTVR.COM, Dec. 15, 2011, available at <http://wtvr.com/2011/12/15/harvin-pleads-guilty-to--sex-with-a-minor/>; Mark Bowes, *HIV-infected man given 7 years for sex with teen*, TIMES DISPATCH, Jan. 29, 2013, available at http://www.timesdispatch.com/news/hiv-infected-man-given-years-for-sex-with-teen/article_5628bc75-51c7-582b-bc8d-91874b443585.html?mode=jqm.

¹³²¹ Bowes, *HIV-infected man given 7 years for sex with teen*.

¹³²² *Id.*

¹³²³ *Man Accused of Infecting Women with HIV*, WTVR.COM CLIP SYNDICATE, Oct. 15, 2010, available at http://www.clipsyndicate.com/video/play/1757927/man_accused_of_infecting_women_with_hiv.

¹³²⁴ Jen McCaffery, *Va. Beach woman guilty of not disclosing HIV*, PILOTONLINE.COM, June 10, 2010, available at <http://hamptonroads.com/2010/06/va-beach-woman-guilty-not-disclosing-hiv>.

¹³²⁵ *Id.*

¹³²⁶ Kate Wilttrout, *HIV-positive sailor punished for having unprotected sex*, PILOTONLINE.COM, Oct. 7, 2009, available at <http://hamptonroads.com/2009/10/hivpositive-sailor-punished-having-unprotected-sex>.

later sentenced to three months' confinement and a bad-conduct discharge.¹³²⁷ Neither the informed consent of either woman, nor the fact that neither contracted HIV, nor the fact that the man had a nearly undetectable viral load were taken into account.¹³²⁸

- In 2008, a 42-year-old HIV positive man pleaded guilty to two counts of infected sexual battery and assault and battery for engaging in unprotected sex with his girlfriend without disclosing his HIV status.¹³²⁹ Though he eventually disclosed his status and the two continued their relationship, including engaging in protected sexual intercourse, the defendant was later arrested following a domestic altercation.¹³³⁰ The two charges of infected sexual battery were reduced from felonies to misdemeanors because the prosecution did not wish to attempt to prove the required intent element.¹³³¹

Virginia criminalizes the donation or sale of blood, bodily fluids, tissue, and organs of an HIV positive person.

Involvement in the sale of blood, bodily fluids, tissue, and organs of a person with HIV is prohibited if the person knows the donor is or was HIV positive and that the materials may transmit HIV.¹³³²

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, it should not be used as a substitute for legal advice.

¹³²⁷ *Id.*

¹³²⁸ *Id.*

¹³²⁹ Keith Epps, *Keeping HIV secret lands man in jail*, FREDRICKSBURG.COM, Mar. 27, 2008, available at <http://fredericksburg.com/News/FLS/2008/032008/03272008/366616>.

¹³³⁰ *Id.*

¹³³¹ *Id.*

¹³³² VA. CODE ANN. § 32.1-289.2 (2014).

Washington Statute(s) that Allow for Criminal Prosecution based on HIV Status:**WASH. REV. CODE § 9A.36.011*****Assault in the first degree***

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

- (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
- (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
- (c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

WASH. REV. CODE § 9.94A.507***Sentencing of sex offenders***

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

- (a) Is convicted of:
 - (i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;
 - (ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or
 - (iii) An attempt to commit any crime listed in this subsection (1)(a); or
- (b) Has a prior conviction for an offense listed in *RCW 9.94A.030(31)(b), and is convicted of any sex offense other than failure to register.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

WASH. REV. CODE § 9A.20.021***Maximum sentences for crimes committed July 1, 1984, and after***

(1) Felony. Unless a different maximum sentence for a classified felony is specially established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine.

WASH. REV. CODE § 9.94A.550***Fines***

Unless otherwise provided by a statute of this state, on all sentences under this chapter the court may impose fines according to the following ranges:

Class A felonies \$0--50,000

In Washington, any person may be imprisoned if she/he engages in activity with the “intent” to expose another to HIV.

Washington’s HIV assault provision makes it a class A felony to expose another to HIV with the intent to inflict bodily harm.¹³³³ The statute fails to define what activity “administers” or “exposes” others to HIV. This may allow prosecutors to interpret the statute to include activities in which there is little to no risk of HIV transmission, such as spitting, biting, oral sex, sexual activity with the use of a condom, or performing or submitting to medical procedures. It also fails to account explicitly for an individual’s viral load, and as such an individual may be prosecuted under the statute even if her/his low viral load makes transmission extremely unlikely.

The Court of Appeals has rejected challenges to this statute on the basis that it violates the equal protection clauses of the United States and Washington constitutions, the privileges and immunities clause of the Washington constitution, and that it is unconstitutionally vague.¹³³⁴ In *State v. Stark*, the Court of Appeals rejected an argument that the statute was unconstitutionally vague, stating that “[a]ny reasonably intelligent person would understand from reading the statute that the term

¹³³³ WASH. REV. CODE § 9A.36.011 (2014).

¹³³⁴ See *State v. Whitfield*, 134 P.3d 1203, 1211-13 (Wash. Ct. App. 2006) (finding that the statute was not unconstitutionally vague); *State v. Stark*, 832 P.2d 109, 115 (Wash. Ct. App. 1992) (finding that the statute did not violate the equal protection clauses of the United States and Washington constitutions).

[expose] refers to engaging in conduct that can cause another person to become infected with the virus.”¹³³⁵

The Court of Appeals in both *Stark* and *State v. Whitfield* provide limited guidance on whether sexual activity with a condom constitutes exposure under Washington’s criminalization statute. In *Stark*, the court specifically cited the fact that the defendant “engaged in unprotected sexual intercourse” in determining that his conduct “necessarily exposed his sexual partners to [HIV]”¹³³⁶ However, in *Whitfield* the Court of Appeals interpreted exposure to include oral, anal, and vaginal sex without a condom.¹³³⁷

In Washington, disclosure of HIV status and using condoms or other protection may provide a defense that there was no intent to inflict harm through exposure or transmission of HIV. The Court of Appeals in both *Whitfield* and *Stark* inferred criminal intent because the defendants did not disclose their HIV status to their sexual partners and failed to use condoms.

For prosecution under this statute, the State must also show intent to inflict great bodily harm through exposure to HIV.¹³³⁸ Despite the fact that the statute requires intent to inflict great bodily harm, some courts have interpreted that knowing one’s HIV positive status and failing to take precautions limiting exposure is enough to constitute an intent to harm or expose another to HIV.¹³³⁹ In *Whitfield*, the Court of Appeals determined that there was sufficient evidence of intent to harm because there was evidence that the defendant knew he had HIV, that it was *possible* to transmit HIV through oral and vaginal sex with women, and he engaged in such conduct without the use of a condom or other types of protection.¹³⁴⁰ Similarly, in *Stark*, the Court of Appeals found sufficient evidence of intent based on the fact that the defendant knew he was HIV positive, had been counseled on how HIV was transmitted and how to prevent transmission during sex, denied or failed to disclose that he had HIV or STIs to his sexual partners, and insisted on not using a condom or other type of protection.¹³⁴¹ In both cases the defendants made statements indicating a desire to infect other individuals, and this evidence also led to the courts’ determination of intent.¹³⁴² Likewise, in *State v. Ferguson*, the Supreme Court of Washington upheld the defendant’s conviction under the state’s HIV criminal statute where the lower courts had found intent to inflict great bodily harm because the defendant not only knew his status and that he could transmit HIV to sexual

¹³³⁵ *Stark*, 832 P.2d at 115-16 (affirming the conviction of an HIV positive defendant for three counts of second-degree assault for engaging in unprotected oral and vaginal sex with three women. *Id.* at 111, 112. The defendant was convicted under a second-degree assault statute, but the statutes were subsequently amended such that the language relating to HIV was removed from the second-degree assault statute and added to the first-degree assault statute. While the defendant was originally sentenced to 163 months imprisonment, the court remanded for resentencing on count one due to the fact that the defendant was given more than 100 months over the standard range for that offense. *Id.* at 112, 117.).

¹³³⁶ *Stark*, 832 P.2d at 114.

¹³³⁷ *Whitfield*, 134 P.3d at 1207, 1214 (affirming conviction for 17 counts of first-degree assault, among other things, and sentence of 2,137 months (roughly 178 years) imprisonment for HIV positive man who engaged in anal, oral, and vaginal sex with seventeen women, usually without a condom, with transmission occurring in five of the 17 cases. *Id.* at 1207-08.).

¹³³⁸ WASH. REV. CODE § 9A.36.011.

¹³³⁹ See *Whitfield*, 134 P.3d at 1213-14; *Stark*, 832 P.2d at 114-15.

¹³⁴⁰ *Whitfield*, 134 P.3d at 1213-14.

¹³⁴¹ *Stark*, 832 P.2d at 114-15.

¹³⁴² *Whitfield*, 134 P.3d at 1214; *Stark*, 832 P.2d at 114.

partners, but also made comments to acquaintances indicating that he did not care if his partners were infected and that he wanted to infect his partners.¹³⁴³

However, recently there has been a prosecutorial trend in Washington where if someone is HIV positive and engages in sexual activities, that may be enough to arrest her/him for assault. The following cases had absolutely no evidence to suggest that the defendant intended to expose or transmit HIV to others, but only engaged in sexual activities allegedly without disclosing her/his status:

- In October 2010, a 19-year-old perinatally infected man was charged with first-degree assault for having unprotected sex with two women, one of whom being his long-term minor girlfriend, allegedly without disclosing his status.¹³⁴⁴ He pleaded guilty to second-degree assault, among other things, and was sentenced to 31 months in prison.¹³⁴⁵
- Also in October 2010, a 23-year-old, HIV positive man was sentenced to 87 months imprisonment after pleading guilty to attempted first-degree assault with a sexual motivation for allegedly not disclosing his status to a male sexual partner.¹³⁴⁶

Disclosure of one's HIV status may be a defense to prosecution.

Washington's statute does not explicitly provide an exception for disclosure or consent but, as noted above, there is supporting case law that disclosure may be considered as a possible, though not absolute, defense against intent to transmit HIV. Before the previously mentioned case *State v. Ferguson* reached the state's highest court, the Washington Court of Appeals left open the question of whether consent to sex with knowledge of the defendant's HIV positive status could constitute a defense.¹³⁴⁷ In *Ferguson*, the defendant's partner knew the defendant was HIV positive before consenting to sex, but did not know that the defendant removed his condom during sex.¹³⁴⁸ The court refused to determine whether consent could be a defense to the statute, but stated that even if it were, it could not be used in this case because the defendant's sexual partner did not consent to sex without a condom.¹³⁴⁹ The court further stated that again, even if consent were a defense, the partner must have "knowledge of all relevant facts," including whether the defendant is using a condom.¹³⁵⁰

Upon conviction of multiple offenses, sentences for each offense can be imposed consecutively, resulting in lengthy incarceration.

¹³⁴³ 15 P.3d 1271, 1272-74 (Wash. 2001) (Like *Stark*, the defendant was convicted under a second degree assault statute, but the statutes were subsequently amended such that the language relating to HIV was removed from the second degree assault statute and added to the first degree assault statute.).

¹³⁴⁴ *HIV-Infected Man Faces Assault Counts; Authorities Looking for Possible Victims*, KHQ6.COM, Oct. 13, 2010, available at <http://www.khq.com/story/13317728/hiv-infected-man-faces-assault-counts-authorities-looking-for-possible-victims>.

¹³⁴⁵ *Man w/ HIV gets 31 months for assault*, THE SPOKESMAN-REVIEW, May 20, 2011, available at <http://www.spokesman.com/blogs/sirens/tags/edward-casto/>.

¹³⁴⁶ *HIV-Positive man sentenced for assault*, THE SPOKESMAN-REVIEW, Oct. 12, 2010, available at <http://www.spokesman.com/stories/2010/oct/12/hiv-positive-man-sentenced-assault/>.

¹³⁴⁷ See No. 21329-0-II, 1999 WL 1004992, at *6-*7.

¹³⁴⁸ *Id.* at *6.

¹³⁴⁹ *Id.* at *6-7.

¹³⁵⁰ *Id.* at *6-*7, n. 32.

In Washington, class A felonies, such as first-degree assault, carry a maximum penalty of life in prison and a \$50,000 fine.¹³⁵¹ Prison sentences for “serious violent offenses,” which include first-degree assault, must run consecutively, meaning that sentences for every offense must be served one after the other.¹³⁵² In *Whitfield*, although the trial court interpreted multiple incidents of sexual activity with one partner as a single offense, the activity with each of seventeen partners resulted in a conviction of seventeen class A felony counts and thus seventeen consecutive sentences, resulting in a 178-year sentence.¹³⁵³ The Court of Appeals rejected the defendant’s argument that this amounted to cruel and unusual punishment.¹³⁵⁴

HIV status may be a factor in sentencing.

In *Matter of Farmer*, the Washington Supreme Court upheld a 90-month sentence for a defendant convicted of sexual exploitation of a minor and patronizing a juvenile prostitute.¹³⁵⁵ ¹³⁵⁶ This lengthy sentence was due to the trial court’s findings that the defendant knew or believed he was HIV positive at the time of the crime in question, that he knew or should have known he might transmit the virus to the two minors concerned, and that this constituted deliberate, cruel, and malicious conduct that justified an exceptional sentence.¹³⁵⁷

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¹³⁵¹ WASH. REV. CODE § 9A.20.021 (2014).

¹³⁵² §§ 9.94A.589 (2013), 9.94A.030 (2014).

¹³⁵³ *Whitfield*, 134 P.3d at 1209.

¹³⁵⁴ *Id.* at 1216-17.

¹³⁵⁵ 835 P.2d 219, 220-21 (Wash. 1992) (per curiam).

¹³⁵⁶ Farmer was one of the first people in the state to under-go a court ordered blood test to determine if he was HIV positive. Such testing was later ruled unconstitutional by the Washington Supreme Court. Debra Carlton Harrell, *Steven Farmer, Central Figure in Case on HIV Testing, Dies*, SEATTLE POST INTELLIGENCER, Sept. 30, 1995, at B2.

¹³⁵⁷ *Id.* at 220. Although the supreme court specified that the defendant knew or believed he had AIDS, previous opinions were amended to state that the court was relying on the fact that he knew or believed he “was HIV-positive.” See *State v. Farmer*, 812 P.2d 858, 858 (Wash. 1991).

West Virginia Statute(s) that Allow for Criminal Prosecution based on HIV Status:**W. VA. CODE ANN. § 16-4-20*****Communication of disease; certificate***

It shall be unlawful for any person suffering with an infectious venereal disease to perform any act which exposes another person to infection with said disease, or knowingly to infect or expose another person to infection with such disease; and no physician, health officer or other person shall give any certificate showing a person to be free from a venereal disease, but such certificate shall simply state the results of tests and examinations that may have been made, and what tests were made to arrive at the results stated.

W. VA. CODE ANN. § 16-4-1***Diseases designated as sexually transmitted***

Sexually transmitted diseases, as designated by the secretary of the department of health and human resources in rules proposed for legislative approval in accordance with the provisions of article three [§§ 29A-3-1 et seq.], chapter twenty-nine-a of this code, are hereby declared to be infectious, contagious, communicable and dangerous to the public health. If a conflict exists between a provision of this article and a provision of article three-c [§§ 16-3C-1 et seq.] of this chapter, the provision of article three-c prevails.

W. VA. CODE ANN. § 16-4-16***Hearing on warrant; detention***

When a party is brought in for a hearing upon arrest under the warrant provided in the preceding section [§ 16-4-15], the health officer shall at once proceed to ascertain the facts in the case, and to this end he may summon witnesses, and administer oaths to such witnesses touching their testimony, and may commit for contempt for failure to answer proper questions, and may, if proper, discharge the party from further custody; but if from the testimony it appears that the party so apprehended is properly classifiable under any subdivision of section four [§ 16-4-4] of this article, touching persons reasonably suspected of being infected with a venereal disease, then such party shall not be released from custody until proof has been made showing the party is already under treatment from a reputable physician, or other person, or until an examination...

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... has been made to ascertain whether in fact said party is so infected, and results of all tests and examinations are known, and shall make all orders touching the care, custody, and examination of the party as are reasonably necessary in the premises, and if it is found that said party is infected, then he may make any other orders that may be necessary touching the treatment of such party, and if said party is suffering with one or more venereal diseases in an infectious stage, said party shall not be released from custody until the diseases are past such infectious stage, and said party may be detained or quarantined in any place or institution provided for the purpose, or in the patient's own home if the health officer thinks best; and if no other place is available for such purposes, then such party shall be detained in the city or county jail, as the case may be. And it shall be the duty of every city and every county in the State to take this contingency in hand when they are making up their estimates for taxation and levy purposes and to provide therefor.

W. VA. CODE ANN. § 16-4-26

Offenses generally; penalties; jurisdiction of justices; complaints

Any person violating any provision of this article, where no other punishment is provided, shall be punished by a fine of not less than ten nor more than one hundred dollars, and may in addition thereto, at the discretion of the judge or justice trying the case, be imprisoned in jail for a period of not to exceed thirty days.

West Virginia has a communicable disease statute that may criminalize HIV exposure.

West Virginia's Public Health Code imposes penalties of up to \$100 and 30 days in jail for knowingly exposing others to venereal diseases.¹³⁵⁸ "Venereal disease" is not defined, but HIV is considered "potentially sexually transmittable."¹³⁵⁹ There have been no prosecutions under this statute and at the time of this publication the authors are not aware of a criminal prosecution of an individual on the basis of HIV status in West Virginia.

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¹³⁵⁸ W. VA. CODE § 16-4-26 (2014).

¹³⁵⁹ § 64-7-19 (2014).

Wisconsin Statute(s) that Allow for Criminal Prosecution based on HIV Status:**Wis. Stat. § 973.017*****Bifurcated sentences; use of guidelines; consideration of aggravating and mitigating factors***

(4) Aggravating factors; serious sex crimes committed while infected with certain diseases

(a) In this subsection:

1. “HIV” means any strain of human immunodeficiency virus, which causes acquired immunodeficiency syndrome.

1m. “HIV test” has the meaning given in s. 252.01 (2m)

2. “Serious sex crime” means a violation of s. 940.225 (1) or (2), 948.02 (1) or (2), 948.025, 948.085.

3. “Sexually transmitted disease” means syphilis, gonorrhea, hepatitis B, hepatitis C, or chlamydia.

4. “Significantly exposed” means sustaining a contact that carries a potential for transmission of a sexually transmitted disease or HIV by one or more of the following:

a. Transmission, into a body orifice or onto mucous membrane, of blood; semen; vaginal secretions; cerebrospinal, synovial, pleural, peritoneal, pericardial, or amniotic fluid; or other body fluid that is visibly contaminated with blood.

b. Exchange, during the accidental or intentional infliction of a penetrating wound, including a needle puncture, of blood; semen; vaginal secretions; cerebrospinal, synovial, pleural, peritoneal, pericardial, or amniotic fluid; or other body fluid that is visibly contaminated with blood.

c. Exchange, into an eye, an open wound, an oozing lesion, or other place where a significant breakdown in the epidermal barrier has occurred, of blood; semen; vaginal secretions; cerebrospinal, synovial, pleural, peritoneal, pericardial, or amniotic fluid; or other body fluid that is visibly contaminated with blood.

(b) When making a sentencing decision concerning a person convicted of a serious sex crime, the court shall consider as an aggravating factor the fact that the serious sex crime was committed under all of the following circumstances:

1. At the time that he or she committed the serious sex crime, the person convicted of committing the serious sex crime had a sexually transmitted disease or acquired immunodeficiency syndrome or had had a positive HIV test.

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2. At the time that he or she committed the serious sex crime, the person convicted of committing the serious sex crime knew that he or she had a sexually transmitted disease or acquired immunodeficiency syndrome or that he or she had had a positive HIV test.
3. The victim of the serious sex crime was significantly exposed to HIV or to the sexually transmitted disease, whichever is applicable, by the acts constituting the serious sex crime.

HIV positive status may lead to higher prison sentences for sex offenses.

While Wisconsin has no statute explicitly criminalizing HIV transmission or exposure, the state allows HIV positive status at the time of certain sex offenses to serve as an “aggravating factor” which may lead to additional prison time.¹³⁶⁰

HIV status may be considered an aggravating factor in sentencing for the following offenses: first or second-degree sexual assault;¹³⁶¹ first or second-degree sexual assault of a child;¹³⁶² repeated acts of sexual assault of the same child;¹³⁶³ or sexual assault of a child placed in substitute care.¹³⁶⁴

In order for an individual’s HIV positive status to serve as an aggravating factor in sentencing: 1) the individual must have had HIV or have tested positive for HIV, 2) the individual must have known of her/his HIV positive status or her/his positive test result, and 3) the crime must have “significantly exposed” the victim to HIV.¹³⁶⁵ The statute defines “significantly exposed” as “sustaining a contact that carries a potential for transmission of a sexually transmitted disease or HIV” by one or more of the following:¹³⁶⁶

- Transmission, into a body orifice or onto mucous membrane, of blood; semen; vaginal secretions; cerebrospinal,¹³⁶⁷ synovial,¹³⁶⁸ pleural,¹³⁶⁹ peritoneal,¹³⁷⁰ pericardial,¹³⁷¹ or amniotic fluid;¹³⁷² or other body fluid that is visibly contaminated with blood.
- Exchange, during the accidental or intentional infliction of a penetrating wound, including a needle puncture, of blood; semen; vaginal secretions; cerebrospinal, synovial, pleural, peritoneal, pericardial, or amniotic fluid; or other body fluid that is visibly contaminated with blood.

¹³⁶⁰ WIS. STAT. § 973.017(4) (2014)

¹³⁶¹ §§ 940.225(1), (2) (2014), 973.017(4)(a)(2).

¹³⁶² §§ 948.02(1), (2) (2014), 973.017(4)(a)(2).

¹³⁶³ §§ 948.025 (2014), 973.017(4)(a)(2).

¹³⁶⁴ §§ 948.085 (2014), 973.017(4)(a)(2).

¹³⁶⁵ § 973.017(4)(b).

¹³⁶⁶ § 973.017(4)(a)(4).

¹³⁶⁷ Cerebrospinal fluid is a bodily fluid that surrounds the brain and spinal cord.

¹³⁶⁸ Synovial fluid is bodily fluid that surrounds the joints.

¹³⁶⁹ Pleural fluid is a bodily fluid that surrounds the lungs.

¹³⁷⁰ Peritoneal fluid is a bodily fluid that surrounds organs in the abdominal cavity.

¹³⁷¹ Pericardial fluid is a bodily fluid that surrounds the heart.

¹³⁷² Amniotic fluid is a bodily fluid that surrounds a fetus in the womb.

Neither the intent to transmit HIV nor actual transmission is required for HIV status to serve as an aggravating factor.

Aggravating factors may increase prison sentences by several years and even decades, depending on the specific offense and other factors considered in sentencing.¹³⁷³

Mere risk of contracting HIV may lead to an increased sentence, even if the defendant is HIV negative.

At least one Wisconsin court has considered an HIV negative defendant's risk of contracting and transmitting HIV in sentencing. In *State v. Holloway*, the trial court sentenced a woman convicted of prostitution to the maximum term, in part because of the "high HIV risk, both to herself and others, presented by [her] extensive prostitution record," even though the woman was HIV negative.¹³⁷⁴

Arrests and prosecutions for HIV exposure have also come under general criminal laws.

In August 2012, a 36-year-old HIV positive man pleaded no contest to three charges of second-degree reckless endangerment for having sex with two underage girls.¹³⁷⁵ He was later sentenced to 15 years imprisonment with 10 years extended supervision upon release.¹³⁷⁶

In 2008, an 18-year-old was charged with second-degree reckless endangerment, a felony punishable by up to 10 years imprisonment, for allegedly having unprotected sex with a fellow teenager and not disclosing his HIV status.¹³⁷⁷ The defendant denied that he and the woman ever had sex.¹³⁷⁸

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¹³⁷³ See, e.g., WIS. SENTENCING COMM'N, SENTENCING WORKSHEET FOR FIRST DEGREE ASSAULT (showing a mitigated level offense sentencing range of probation to 20 years in prison, an intermediate level offense sentencing range of five to 30 years, and an aggravated level offense sentencing range of 10 to 40 years).

¹³⁷⁴ 551 N.W.2d 841, 843-44 (Wis. Ct. App. 1996).

¹³⁷⁵ Raymond Neupert, *HIV-positive Rothschild man gets 15 years for having sex with underage girls*, WSAU.COM, Sept. 11, 2012, available at <http://wsau.com/news/articles/2012/sep/11/hiv-positive-rothschild-man-gets-15-years-for-having-sex-with-underage-girls/>.

¹³⁷⁶ *Id.*

¹³⁷⁷ Crocker Stephenson, *Teen charged with not disclosing HIV*, JOURNAL SENTINEL, Apr. 23, 2008, available at <http://www.jsonline.com/news/milwaukee/29583909.html>.

¹³⁷⁸ *Id.*

Wyoming Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in Wyoming. However, in some states, HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Wyoming.

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UNITED STATES TERRITORIES

American Samoa Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute.

There are no statutes explicitly criminalizing HIV transmission or exposure in American Samoa. However, in other jurisdictions HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in American Samoa.

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Guam Statute(s) that Allow for Criminal Prosecution based on HIV Status:**GUAM CODE ANN. tit. 9, § 28.10*****Prostitution Defined; Punishment Established; Definitions***

(a) A person who engages in, or agrees to engage in, or offers to engage in, sexual penetration or sexual contact or in any sexual conduct or act with another person in return for a fee or in consideration of a pecuniary benefit commits the crime of prostitution. It is the intent of this section that guilt attach to both the payor and the recipient of the fee or pecuniary benefit that is the consideration for the act of prostitution, except that a police officer engaged in the performance of his or her official duties in the performance of an investigation of offenses committed under this chapter shall not be charged under this section.

(b) (1) A person convicted of prostitution shall be guilty of a misdemeanor; or

(2) A person convicted of a third offense of prostitution within three (3) years of the first two (2) offenses shall be guilty of a felony of the third degree; or

(3) A person convicted of prostitution who is determined to have known that he or she was infected with either HIV or AIDS at the time of the commission of the act shall be guilty of a felony of the first degree.

(c) As used in this section, the terms sexual penetration and sexual contact have the meanings provided by § 25.10 of this title.

GUAM CODE ANN. tit. 9, § 25.10***Definitions***

(a) As used in this Chapter:

(8) Sexual Contact includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification;

(9) Sexual Penetration means sexual intercourse, cunnilingus, fellatio, anal intercourse or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required

GUAM CODE ANN. tit. 9, § 80.30***Duration of Imprisonment***

Except as otherwise provided by law, a person who has been convicted of a felony may be sentenced to imprisonment as follows:

(a) In the case of a felony of the first degree, the court shall impose a sentence of not less than five (5) years and not more than twenty (20) years.

GUAM CODE ANN. tit. 9, § 80.50***Fines & Restitution as Sentence Allowed: Limited***

A person who has been convicted of an offense may be sentenced to pay a fine or to make restitution not exceeding:

(a) Ten Thousand Dollars (\$10,000.00) when the conviction is of a felony of the first or second degree.

Engaging in prostitution while HIV positive may result in imprisonment for up to twenty years.

Guam is one of many jurisdictions with a “penalty enhancement” provision specifically targeting HIV positive individuals who engage in prostitution.¹³⁷⁹ Such provisions frequently authorize increased prison sentences for HIV positive individuals, regardless of whether they expose others to a significant risk of HIV transmission.

In Guam, engaging in, offering to engage in, or agreeing to engage in any sexual conduct in return for a fee is a misdemeanor punishable by up to one year imprisonment and up to a \$1,000 fine.¹³⁸⁰ However, if an individual convicted of prostitution is aware of her/his HIV positive status, prostitution is a first-degree felony punishable by five to twenty years imprisonment and up to a \$10,000 fine.¹³⁸¹ Thus, HIV positive individuals convicted of prostitution may receive prison sentences up to twenty times higher than those of HIV negative individuals.

This prostitution law is intended to punish both HIV positive sex workers and HIV positive persons who seek out the services of a sex worker.¹³⁸²

¹³⁷⁹ See generally GUAM CODE ANN. tit. 9, § 28.10 (2014).

¹³⁸⁰ GUAM CODE ANN. tit. 9, §§ 28.10(b)(1), 80.34(a) (2014), 80.50(c) (2014).

¹³⁸¹ §§ 28.10(b)(3), 80.30(a) (2014), 80.50(a).

¹³⁸² § 28.10(a) (stating “[i]t is the intent of this section that guilt attach to *both the payor and the recipient of the fee* or pecuniary benefit that is the consideration for the act of prostitution, except that a police officer engaged in the performance of his or her official duties in the performance of an investigation of offenses committed under this chapter shall not be charged under this section.” (emphasis added)).

Neither the intent to transmit HIV nor actual transmission is required. The use of condoms or other protection during sexual intercourse is not a defense, and neither is the disclosure of HIV status to sexual partners. This statute thus fails to provide HIV positive sex workers with any incentive to use condoms, because the increased sentence applies whether they do so or not.

Guam's prostitution law is a penalty enhancement statute that may severely increase the prison sentences of HIV positive persons, regardless of whether they expose others to any actual risk of HIV transmission. Guam's definition of "sexual contact" includes sexual activities that do not present any risk of HIV transmission, including:

- The intentional touching of the victim's or actor's intimate parts;
- The intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.¹³⁸³

Under this definition, even contact between the hands of a sex worker and the clothes covering the penis of an HIV positive man could result in penalty enhancement. Exchanging money for sexual penetration or any sexual conduct triggers elevated sentencing for any party who is HIV positive, regardless of whether the act, if completed, would have posed any risk of HIV exposure or transmission (i.e., a hand job).¹³⁸⁴ Applying penalty enhancement provisions to this broad definition of prostitution may lead to felony-level penalties for HIV positive persons engaging in sexual contact that cannot transmit HIV.

Note: Under Guam's public health laws, it is unlawful for any person with a "communicable disease" to "willfully expose himself" in any public place, street or highway.¹³⁸⁵ Although Guam defines both HIV and AIDS as communicable diseases,¹³⁸⁶ this exposure statute was intended to address contagious disease outbreaks, and is seemingly inapplicable to HIV exposure or transmission.

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¹³⁸³ § 28.10(c) (citing GUAM CODE ANN. tit. 9, § 25.10(a)(8) (2014)).

¹³⁸⁴ *Id.*

¹³⁸⁵ GUAM CODE ANN. tit. 10, § 3320 (2014).

¹³⁸⁶ § 3301(a).

Northern Mariana Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in the Northern Mariana Islands. However, in other jurisdictions HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in the Northern Mariana Islands.

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Puerto Rico Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No criminal statutes explicitly addressing HIV exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in the Puerto Rico. However, in other jurisdictions HIV positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Puerto Rico.

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.

U.S. Virgin Islands Statute(s) that Allow for Criminal Prosecution based on HIV Status:**V.I. CODE ANN. tit. 14, § 888*****Exposure by another of HIV***

(a) Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity or by sharing hypodermic needles/syringes when the infected person knows at the time of the unprotected sex/sharing of needles that he is infected with HIV, has not disclosed his HIV positive status, and acts with the specific intent to infect the other person with HIV, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(b) Any person who exposes another to the human immunodeficiency virus by donating, selling, or attempting to donate or sell blood, semen, tissues, organs, or other bodily fluids for the use of another, except as determined necessary for medical research or testing, and when the infected person knows at the time that he is infected with HIV, has not disclosed his HIV positive status, and acts with the specific intent to infect another person with HIV, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(c) Evidence that the person had knowledge of his HIV positive status, without additional evidence, shall not be sufficient to prove specific intent.

(d) Transmission of the Human Immunodeficiency Virus does not have to occur for a person to be convicted of a violation of this section.

(e) As used in this section, the following definitions shall apply:

- (1) "Sexual activity" means insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner.
- (2) "Unprotected sexual activity" means sexual activity without the use of a condom.

Engaging in unprotected sexual intercourse with the specific intent to transmit HIV is prohibited.

In the U.S. Virgin Islands, HIV positive individuals may be prosecuted for engaging in unprotected sexual intercourse, but only under very specific circumstances. It is an offense punishable by up to ten years imprisonment and up to a \$10,000 fine if an HIV positive person (1) knows that she/he is

HIV positive, (2) has not disclosed her/his HIV status to a sexual partner, and (3) engages in unprotected sexual activity with the specific intent to infect her/his partner with HIV.¹³⁸⁷ However, evidence that an HIV positive person knew of her/his HIV status and engaged in unprotected sex is not sufficient by itself to prove the specific intent to infect.¹³⁸⁸ While it is not clear what evidence would be sufficient to prove intent to infect, presumably testimony regarding statements from an HIV positive person that she/he wished to spread HIV could suffice.

Actual transmission of HIV is not required for conviction.¹³⁸⁹

This HIV exposure law is explicitly limited to situations where HIV positive persons expose others to activities known to transmit HIV and where there is proof of actual intent to transmit HIV.

If a condom is used during sexual intercourse, then there is no violation of the statute.¹³⁹⁰ In addition, the law's definition of "sexual activity" includes only: "Insertive vaginal or anal intercourse on the part of an infected male; receptive consensual vaginal intercourse on the part of an infected woman with a male; or receptive consensual anal intercourse on the part of an infected man or woman with a male."¹³⁹¹

Under the terms of this HIV exposure law, it is a complete defense to prosecution if HIV status is disclosed to sexual partners before engaging in consensual sexual activity.¹³⁹² However, individuals living with HIV should be aware that disclosure of HIV status may be difficult to prove without witnesses or some form of incontrovertible evidence.

At the time of publication, the authors are not aware of any criminal prosecutions of individuals on the basis of their HIV positive status in the U.S. Virgin Islands.

Sharing needles or syringes with the specific intent to infect another person with HIV is prohibited.

In the U.S. Virgin Islands it is an offense punishable by up to ten years imprisonment and up to a \$10,000 fine if an HIV positive person (1) knows that she/he is HIV positive, (2) has not disclosed her/his HIV status, and (3) shares a hypodermic needle or syringe with the specific intent to infect another with HIV.¹³⁹³

Transmission of HIV is not required for prosecution.¹³⁹⁴

It is a complete defense to prosecution if HIV-status is disclosed to those sharing needles/syringes with an HIV positive person.¹³⁹⁵ However, individuals living with HIV should be aware that disclosure of HIV status may be difficult to prove without witnesses or documentation.

¹³⁸⁷ V.I. CODE ANN. tit. 14, § 888(a) (2014).

¹³⁸⁸ § 888(c).

¹³⁸⁹ § 888(d).

¹³⁹⁰ § 888(a), (e)(2).

¹³⁹¹ § 888(e)(1).

¹³⁹² § 888(a).

¹³⁹³ *Id.*

¹³⁹⁴ § 888(d).

This needle-sharing law is a rare example of a statute explicitly limiting prosecution to the unusual situation where an HIV positive person intentionally attempts to infect others. To be convicted of HIV exposure through sharing a needle under this statute, the state must prove that the HIV positive defendant had the specific intent to infect by sharing the needle or syringe.¹³⁹⁶ Evidence that an HIV positive person knew of her/his HIV status and shared a contaminated needle is not sufficient by itself to fulfill this specific intent requirement.¹³⁹⁷

Donating or selling blood, semen, human tissues, organs, or bodily fluids with the specific intent to infect another person is prohibited.

The U.S. Virgin Islands' HIV exposure law also prohibits HIV positive individuals from donating or selling blood, organs, and other human tissues or bodily fluids.¹³⁹⁸ Specifically, it is an offense punishable by up to ten years imprisonment and up to a \$10,000 fine if an HIV positive person (1) knows that she/he is HIV positive, (2) has not disclosed her/his HIV status, and (3) donates, sells, or attempts to donate or sell blood, semen, tissues, organs, or bodily fluids for the use of another, except as necessary for medical research or testing.¹³⁹⁹

Transmission of HIV is not required for prosecution.¹⁴⁰⁰

It is a complete defense to prosecution if HIV-status is disclosed before donation of blood, tissues, and bodily fluids.¹⁴⁰¹

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¹³⁹⁵ § 888(a).

¹³⁹⁶ § 888(c).

¹³⁹⁷ *Id.*

¹³⁹⁸ § 888(b).

¹³⁹⁹ *Id.*

¹⁴⁰⁰ § 888(d).

¹⁴⁰¹ § 888(a).

**FEDERAL LAW
INCLUDING U.S. MILITARY LAW**

Federal Criminal Statute(s)

18 U.S.C. § 1122***Protection against the human immunodeficiency virus***

(a) In general.--Whoever, after testing positive for the Human Immunodeficiency Virus (HIV) and receiving actual notice of that fact, knowingly donates or sells, or knowingly attempts to donate or sell, blood, semen, tissues, organs, or other bodily fluids for use by another, except as determined necessary for medical research or testing or in accordance with all applicable guidelines and regulations made by the Secretary of Health and Human Services under section 377E of the Public Health Service Act, shall be fined or imprisoned in accordance with subsection (c).

(b) Transmission not required.--Transmission of the Human Immunodeficiency Virus does not have to occur for a person to be convicted of a violation of this section.

(c) Penalty.--Any person convicted of violating the provisions of subsection (a) shall be subject to a fine under this title of not less than \$ 10,000, imprisoned for not less than 1 year nor more than 10 years, or both.

Federal law explicitly addresses HIV transmission as a criminal offense in only one area: donation or sale of blood or other potentially infectious fluids or human tissues.¹⁴⁰² Federal law provides that for conviction, the person must receive “actual notice” of testing HIV positive, although there is no requirement that the person be informed that HIV can be transmitted by blood, other body fluids, or human tissue.¹⁴⁰³ There is an exception for donations or sales that are necessary for medical research or testing.¹⁴⁰⁴

Actual transmission of HIV is not required for conviction.¹⁴⁰⁵

Because of widespread use of testing to screen HIV in donated blood (and widespread testing of donors of semen or other human body fluids or tissue), there is very little likelihood that a donor who knows of his/her HIV status will be undetected in attempting to donate or sell blood.

Although this law was originally enacted by Congress in 1994, there are no reported cases involving prosecutions under it. Many states have similar statutes, and prosecutions of individuals have been reported under those laws.

¹⁴⁰² 18 U.S.C. § 1122(a) (2014).

¹⁴⁰³ *Id.*

¹⁴⁰⁴ *Id.*

¹⁴⁰⁵ 18 U.S.C. § 1122(b).

Enhanced federal sentences for defendants with HIV.

Unlike many states, Congress has not enacted a law imposing enhanced sentences for defendants in criminal cases involving conduct posing a risk of HIV transmission. The U.S. Sentencing Commission considered issuing a guideline for enhanced sentences in cases of intentional exposure to HIV through sexual contact, and declined to do so given the rarity of such cases in the federal courts.¹⁴⁰⁶ Instead, the Commission concluded that the federal guidelines' "general departure" provision,¹⁴⁰⁷ which allows for an upward departure from the guideline range for aggravating circumstances, is the appropriate way to handle cases involving HIV. As a result of recent U.S. Supreme Court decisions,¹⁴⁰⁸ the federal sentencing guidelines are now largely advisory, and federal judges can determine sentences based on concerns other than those set forth in the guidelines.

Very few federal cases have involved upward departure sentences for sex offenses committed by HIV positive defendants. For example, in *United States v. Blas*, the Court of Appeals for the Eleventh Circuit affirmed an "extreme conduct" upward sentence departure based on the HIV positive defendant's numerous sexual acts with a 15-year-old girl.¹⁴⁰⁹ The defendant had not disclosed his HIV infection, although the record indicated that the defendant used a condom at least some of the time.¹⁴¹⁰ The court found that as a result of the sexual contact, the complainant feared that she was infected with HIV, suffered other psychological trauma, and repeatedly sought HIV testing.¹⁴¹¹ In another federal case, *United States v. Burnett*, the court's use of the defendant's HIV status to impose an upward departure was much more problematic.¹⁴¹² In that case, there was no risk of HIV transmission presented by the underlying offense, public lewdness when soliciting an undercover federal officer for sex, and the court's opinion fails to determine the risk of HIV transmission involved in the sexual activity that was solicited from the undercover agent.¹⁴¹³

In at least one case, a federal judge has imposed a sentence far beyond the federal sentencing guidelines based solely on HIV status. In 2009, a federal judge in Maine determined a pregnant woman's sentence based solely off of her HIV status.¹⁴¹⁴ The woman was charged with possession and use of false immigration documents, a crime for which the federal sentencing guidelines recommend 0-6 months incarceration.¹⁴¹⁵ The woman had been incarcerated for almost 4 months at the time of her sentencing, and both the defense and prosecution recommended that the judge enter

¹⁴⁰⁶ U.S. SENTENCING COMM'N, REPORT TO CONGRESS: ADEQUACY OF PENALTIES FOR THE INTENTIONAL EXPOSURE OF OTHERS THROUGH SEXUAL ACTIVITY TO THE HUMAN IMMUNODEFICIENCY VIRUS 4 (1995) (concluding that HIV transmission issues are rare in federal sentences, based on a review of 235 criminal cases sentenced in fiscal year 1993 in which HIV was mentioned in only four cases, and in only one of those cases, which was not a sexual offense case, was intentional transmission of HIV an issue).

¹⁴⁰⁷ U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 5K2.0 (2013).

¹⁴⁰⁸ See, e.g., *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¹⁴⁰⁹ 360 F.3d 1268, 1273 (11th Cir. 2004).

¹⁴¹⁰ *Id.* at 1271.

¹⁴¹¹ *Id.* at 1271-72.

¹⁴¹² 545 F. Supp. 2d 1207 (N.D. Ala. 2008).

¹⁴¹³ *Id.*

¹⁴¹⁴ See Brief for National Advocates for Pregnant Women, Center for HIV Law and Policy, Verrill Dana, LLP on behalf of Medical, Public Health and HIV Experts and Advocates as Amici Curiae Supporting Respondents, *United States v. "Mrs. T"*, (No. 09-19-B-W), available at <http://www.hivlawandpolicy.org/resources/view/412>.

¹⁴¹⁵ *Id.* at 1.

a sentence of “time served.”¹⁴¹⁶ However, the judge sentenced her to a total of 7.9 months because, he argued, the interests of the “unborn child” necessitated that the woman remain in prison past her due date so that he could ensure she received treatment to prevent HIV transmission to the child she was carrying.¹⁴¹⁷

Prosecution of HIV positive Federal Inmates for Risk of HIV Transmission to Correctional Officers.

Although there are many convictions of HIV positive persons, increased penalties for posing an alleged risk of HIV transmission, and matters in state courts for altercations (often involving biting or spitting) with law enforcement personnel, very few such federal cases have been reported. The reported cases tend to involve substantial prison sentences for conduct posing a limited risk of HIV transmission. One such case, *United States v. Moore*, involved an assault prosecution of a federal inmate for severely biting two federal corrections officers.¹⁴¹⁸ The Court of Appeals for the Eighth Circuit concluded that HIV is not transmitted by exposure to saliva, and thus it rejected the argument that the risk of HIV transmission from a human bite is such that an HIV positive inmate’s teeth and mouth can be used as a deadly and dangerous weapon under the federal assault statute.¹⁴¹⁹ But in another inmate biting case, *United States v. Sturgis*, the Court of Appeals for the Fourth Circuit concluded to the contrary on the question of whether saliva could transmit HIV.¹⁴²⁰ Based on the expert testimony in the record before it, the court concluded that the inmate’s HIV infection was a basis for finding that the inmate’s teeth were used as a deadly weapon.¹⁴²¹ The conclusion in *Sturgis* that HIV is transmitted by saliva exposure from a human bite was followed in *United States v. Studnicka*, which resulted in a ten year prison term for an HIV affected federal inmate’s biting of a correctional officer.¹⁴²²

Prosecution of HIV-Related Offenses in the U.S. Military.

Members of the U.S. Armed Forces have been prosecuted and convicted for offenses involving sexual transmission or risk of transmission of HIV. Although applicants with HIV are barred from enlisting in the armed forces, military service members are tested for HIV, and those who test positive are retained in the service as long as they are able to meet fitness for duty standards. All prosecutions of service members for HIV-related offenses are pursuant to the Uniform Code of Military Justice, which does not include any provision explicitly addressing HIV transmission. Instead, service members with HIV have been prosecuted under general criminal assault provisions, similar to the criminal assault prosecutions of civilians with HIV under state law. Military service members have also been prosecuted under two provisions unique to the military: failing to follow

¹⁴¹⁶ *Id.*

¹⁴¹⁷ *Id.* at 1-2.

¹⁴¹⁸ 846 F.2d 1163 (8th Cir. 1988).

¹⁴¹⁹ *Id.* at 1167-68 (finding that although the court rejected the argument that the inmate’s HIV infection caused his mouth and teeth to be a deadly and dangerous weapon, the court instead held that because of the risk of disease transmission and infection in general, rather than solely for HIV, the deadly and dangerous weapon standard nevertheless applied, and the inmate received a five year sentence to run consecutively with his current sentence).

¹⁴²⁰ 48 F.3d 784 (4th Cir. 1995) (affirming sentence of fourteen years based on the underlying offense, as well as a finding that the inmate committed perjury at trial concerning his knowledge of when he tested HIV positive).

¹⁴²¹ *Id.* at 788-89.

¹⁴²² 450 F. Supp. 2d 680 (E.D. Tex. 2006).

safe-sex orders and for conduct prejudicial to good order. All military cases appear to involve sexual contact, and thus there is an absence of reported biting, spitting, or similar assault cases of the sort prosecuted in the civilian state courts.

Military service members living with HIV been convicted of aggravated assault in cases in which HIV status is disclosed and their sexual partner consents, as well as in cases in which condoms are used.

Numerous military service members with HIV have been prosecuted under the aggravated assault provision contained in Article 128 of the Uniform Code of Military Justice (UCMJ).¹⁴²³ Article 128 defines aggravated assault as an assault undertaken with a means likely to produce death or grievous bodily harm, or an assault undertaken with the intent to inflict grievous bodily harm.¹⁴²⁴ Assault in this context has been defined as any contact, even that consented to by the service member's partner. Article 128 includes both attempted as well as completed assaults, and thus an HIV positive service member's attempt to have unprotected, consensual anal intercourse, which was abandoned before achieving penetration, has been held to be an aggravated assault.¹⁴²⁵ Military courts have held that there is no requirement that the defendant have a specific intent to infect a sexual partner, but instead only a general intent to engage in unprotected sex.¹⁴²⁶ Because a partner in an assault cannot, as a matter of law, consent to the assault, disclosure of HIV status is not a defense. Thus, even in cases in which a service member has disclosed his HIV status to his sexual partner, and the partner has given an informed consent to the sexual contact, the service member has been convicted of aggravated assault.¹⁴²⁷

The military courts have stretched the meaning of the "likely to produce" death or grievous bodily harm element in the aggravated assault definition to encompass circumstances that present nothing more than a highly remote possibility of harm. First, in *United States v. Johnson*, the Court of Military Appeals decided that "likely" need only be "more than merely a fanciful, speculative, or remote possibility," and it therefore held that unprotected anal intercourse "would have been likely to transmit a disease which can ultimately result in death."¹⁴²⁸ Next, in *United States v. Joseph*, the Court of Military Appeals further diluted the meaning of "likely."¹⁴²⁹ In that case, the service member had sexual intercourse with a woman on one occasion without having disclosed his HIV infection.¹⁴³⁰ At trial, it was undisputed that the service member used a condom, although his partner testified that

¹⁴²³ 10 U.S.C. § 928 (2014).

¹⁴²⁴ *Id.*

¹⁴²⁵ *United States v. Johnson*, 30 M.J. 53, 56 (C.M.A.) (affirming conviction and sentence of confinement for six years, total forfeitures, reduction in rank, and dishonorable discharge), *cert. denied*, 498 U.S. 919 (1990).

¹⁴²⁶ *United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994) (holding that an HIV positive service member who had unprotected sex with five women without disclosing his HIV status, but without evidence that he intended to infect her with HIV, was guilty of aggravated assault), *cert. denied*, 513 U.S. 1178 (1995).

¹⁴²⁷ See *United States v. Bygrave*, 46 M.J. 491 (C.A.A.F. 1997) (affirming conviction on ground that informed consent to sexual intercourse with HIV positive service member was not a defense).

¹⁴²⁸ *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A. 1990), *aff'g* 27 M.J. 798, 801 (A.C.M.R. 1988), *cert. denied*, 498 U.S. 919 (1990). In *Johnson*, there was no act of sexual intercourse because the case was prosecuted as an attempted assault. The court's ruling requiring "more than remote" likelihood of HIV transmission was thus a determination regarding the likelihood of transmission resulting from one instance of unprotected anal intercourse.

¹⁴²⁹ 37 M.J. 392 (C.M.A. 1993).

¹⁴³⁰ *Id.* at 393-94.

the condom broke during sex.¹⁴³¹ A medical expert testified that the risk of HIV transmission as a result of one act of sexual intercourse was small, and that using a condom, although not 100 percent effective in preventing HIV transmission, would be extremely effective in reducing the risk.¹⁴³² Although this evidence clearly indicated that transmission of HIV was not likely from the one act of sexual intercourse, the court reframed the issue, concluding that “the question is not the statistical probability of HIV invading the victim’s body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victim’s body.”¹⁴³³ The court thus abandoned any requirement that the risk of HIV transmission must be likely, with the result that under *Joseph*, conviction under the Article 128 aggravated assault provision is possible for sexual contact posing any theoretical risk of transmission, including sexual contact using condoms or other protection.¹⁴³⁴

Along this same line, in *United States v. Goldsmith*,¹⁴³⁵ the Air Force Court of Criminal Appeals held that unprotected sex, even if the probability of transmission was only 1 in 1,000 in each instance of sexual intercourse, is an aggravated assault. Consistent with a zero risk approach, in *United States v. Perez*,¹⁴³⁶ the court held that evidence of risk of transmission was insufficient to support conviction for aggravated assault because there was no evidence that the defendant, who had had a vasectomy, could transmit HIV.

At the same time, however, the Court of Appeals for the Armed Forces has started to show receptiveness to evidence that a low viral load reduces the risk of HIV transmission below the level necessary to prove an aggravated assault. In *United States v. Dacus*, the court applied *Joseph* and affirmed, based on the defendant’s guilty plea, aggravated assault convictions for sexual intercourse involving inconsistent condom use.¹⁴³⁷ At sentencing, however, undisputed expert testimony established that the defendant’s viral load was extremely low, and although he posed a risk of HIV transmission from sexual intercourse, such transmission was “very, very unlikely.”¹⁴³⁸ A concurring opinion noted that had the defendant chosen to litigate the issue, then the evidence would not satisfy the statutory aggravated assault standard.¹⁴³⁹ The court used that same reasoning in *United States v. Upham* when it reversed an aggravated assault conviction based on evidence that the risk of HIV transmission was too remote because of the defendant’s low viral load.¹⁴⁴⁰ Even if the use of

¹⁴³¹ *Id.* at 394.

¹⁴³² *Id.*

¹⁴³³ *Id.* at 397. The court’s ruling may reflect the fact that Joseph’s sexual partner subsequently tested positive for HIV. For a similar ruling, see *United States v. Stewart*, 29 M.J. 92 (C.M.A. 1989) (holding that unprotected sexual intercourse with a woman on numerous occasions, apparently resulting in the woman’s infection with HIV, was aggravated assault in view of the probability that death would result from HIV infection).

¹⁴³⁴ The implication in *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993) that any risk of HIV transmission whatsoever is adequate to support an aggravated assault charge conflicts with the military’s own HIV prevention approach, which uses “safe-sex” orders to compel service members to reduce, but not entirely eliminate, the risk of transmission. Apparently no service member has been prosecuted for an aggravated assault based on behavior (i.e. disclosure of HIV status, use of condoms) that conforms to a safe-sex order.

¹⁴³⁵ No. ACM 31172, 1995 WL 730266 (A.F. Ct. Crim. App. Nov. 20, 1995).

¹⁴³⁶ 33 M.J. 1050 (A.C.M.R. 1991).

¹⁴³⁷ 66 M.J. 235 (C.A.A.F. 2008).

¹⁴³⁸ *Id.* at 237.

¹⁴³⁹ *Id.* at 240-41.

¹⁴⁴⁰ 66 M.J. 83 (C.A.A.F. 2008), *aff’d* 64 M.J. 547 (C.G. Ct. Crim. App. 2006). The court did, however, affirm a conviction for a lesser offense, assault consummated by a battery.

aggravated assault charges in military cases is limited by these decisions in the future, military prosecutors can bring charges under the UCMJ for violation of safe-sex orders, as discussed below.

Military service members with HIV have been convicted of disobeying a “safe-sex order” in cases in which HIV status is not disclosed or in which condoms are not used.

Upon testing positive, HIV affected military service members are counseled regarding the risk of HIV transmission, and are routinely issued orders from their commanding officers that they both disclose their HIV infection to their sexual partners, avoid sexual activities posing a significant risk of HIV transmission, and use condoms or other protection to reduce the risk of transmission. Violations of safe-sex orders are prosecuted under Article 90 of the UCMJ,¹⁴⁴¹ which provides for court-martial of service members who willfully disobey a lawful order. Obtaining the consent of a sexual partner, after disclosure of HIV status, to sexual intercourse without a condom or other protection would be irrelevant to whether a safe-sex order was violated. Military service members with HIV have been convicted under Article 90 for using condoms but failing to disclose HIV status,¹⁴⁴² and for failing to use condoms or other protection coupled with failing to disclose.¹⁴⁴³ Service members have been convicted of violating safe-sex orders for their sexual relations with their spouses.¹⁴⁴⁴ An article 90 failure to obey a lawful order charge can be combined with the aggravated assault charge discussed above.¹⁴⁴⁵

In September 2010, an airman in Kansas was charged with aggravated assault, adultery, indecent acts for having sexual relations in public, obstruction of justice, and violating a squadron commander’s orders for allegedly engaging in unprotected and undisclosed sex with various partners.¹⁴⁴⁶ The squadron commander’s order included that the airman not engage in any sex without disclosing his HIV status and to always use condoms.¹⁴⁴⁷ The airman was later convicted on all counts except obstruction of justice.¹⁴⁴⁸ The U.S. Air Force Court of Criminal Appeals affirmed his sentence to a

¹⁴⁴¹ 10 U.S.C. § 890(2) (2014).

¹⁴⁴² *United States v. Negron*, 28 M.J. 775, 776–79 (A.C.M.R.) (upholding conviction for violation of safe-sex order by service member who used condom during heterosexual intercourse but did not inform partner of his HIV infection), *aff’d*, 29 M.J. 324 (C.M.A. 1989).

¹⁴⁴³ *United States v. Stevens*, No. NMCCA 201300116, 2013 WL 5844657 (N-M. Ct. Crim. App. Oct. 31, 2013), *review denied*, (C.A.A.F. Mar. 11, 2014) (affirming conviction for unprotected consensual heterosexual sex without informing partner of HIV infection);

United States v. Dumford, 30 M.J. 137 (C.M.A.), *cert. denied*, 498 U.S. 854 (1990) (affirming conviction for unprotected consensual heterosexual sex without informing partner of HIV infection); *United States v. Barrows*, 48 M.J. 784, 785 (Army Ct. Crim. App. 1998) (affirming conviction for unprotected consensual heterosexual sex without informing partner of HIV infection); *United States v. Sargeant*, 29 M.J. 812, 814–17 (A.C.M.R. 1989) (affirming conviction for unprotected consensual heterosexual sex without informing partner of HIV infection).

¹⁴⁴⁴ *United States v. Pritchard*, 45 M.J. 126 (C.A.A.F. 1996), *cert. denied*, 520 U.S. 1253 (1997). Prosecutions involving spousal sexual contact, or others involving regulation of service members’ consensual sexual contact, particularly with civilians, could violate constitutional privacy rights, *see Lawrence v. Texas*, 539 U.S. 558 (2003), although no military case has directly addressed this issue.

¹⁴⁴⁵ *See United States v. Sorey*, NMCCA 9901186, 2004 WL 49093 (N-M. Ct. Crim. App. Jan. 8, 2004).

¹⁴⁴⁶ *Kansas airman with HIV charged with assault for sex*, ASSOCIATED PRESS, Sept. 24, 2010 *available at* <http://technews.tmcnet.com/topics/associated-press/articles/104087-kan-airman-with-hiv-charged-with-assault-sex.htm>.

¹⁴⁴⁷ *Id.*

¹⁴⁴⁸ *United States v. Gutierrez*, No. ACM 37913, 2014 WL 842651, at *1 (A.F. Ct. Crim. App. Feb. 25, 2014), *review granted*, (C.A.A.F. July 31, 2014).

dishonorable discharge, confinement for eight years, total forfeiture of pay and allowances, and reduction in rank.¹⁴⁴⁹

If convicted on all charges the airman could face at least fifty-three years imprisonment, a dishonorable discharge, forfeiture of pay, and a reduction of rank.¹⁴⁵⁰

Some safe-sex orders have been overly broad in prohibiting service members from engaging in behaviors that pose no risk of HIV transmission, but have nevertheless been upheld as lawful orders in subsequent prosecutions. In *United States v. Womack*, the service member was issued an order requiring him to take affirmative steps “during any sexual activity to protect your sexual partner from coming in contact with your blood, semen, urine, feces, or saliva.”¹⁴⁵¹ The defendant service member was accused of having oral-genital contact with another man, and his subsequent conviction for willful disobedience of the order was upheld on the basis that the service member’s saliva came in contact with his partner during sexual activity.¹⁴⁵² At trial, two military doctors testified that “it was possible but not very likely that one could transmit the virus through his saliva incident to an act of fellatio.”¹⁴⁵³

Military service members with HIV have been convicted of “conduct prejudicial to good order” for engaging in sexual activities posing a risk of HIV transmission.

Military service members with HIV have been convicted under the “general article,” Article 134 of the UCMJ.¹⁴⁵⁴ This catch-all provision criminalizes all conduct “to the prejudice of good order and discipline in the armed forces” and “all conduct of a nature to bring discredit upon the armed forces.”¹⁴⁵⁵ Despite the absence of any reference in this provision to behaviors posing a risk of HIV transmission, or any reference to what behaviors involve a sufficient risk to constitute a violation, the Court of Military Appeals upheld its application to HIV positive service members on the basis that the safe-sex counseling they have received provides sufficient notice regarding conduct prohibited by Article 134.¹⁴⁵⁶ As is the case with aggravated assault charges under the UCMJ, disclosure of HIV status and consent of the service member’s sexual partner is not a defense to an Article 134 prosecution.¹⁴⁵⁷

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, it should not be used as a substitute for legal advice.

¹⁴⁴⁹ *Id.*

¹⁴⁵⁰ *Id.*

¹⁴⁵¹ 29 M.J. 88, 89 (C.M.A. 1989). The order also required disclosure of HIV status to all health care professionals.

¹⁴⁵² *Id.* at 90-91.

¹⁴⁵³ 29 M.J. 88, 89.

¹⁴⁵⁴ 10 U.S.C. § 934 (2014).

¹⁴⁵⁵ *Id.*

¹⁴⁵⁶ *United States v. Woods*, 28 M.J. 318, 319-20 (C.M.A. 1989).

¹⁴⁵⁷ *United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990) (affirming Article 134 conviction and sentence of bad-conduct discharge, forfeiture of \$400 pay per month for three months, and restriction to the limits of his base for service member who disclosed HIV status and used condoms approximately 25 percent of the time with female sex partner).

Illustrations and Resources of Laws, Prosecutions, and Arrests based on HIV status in the United States

The following section provides illustrations of laws, prosecutions, and arrests in the United States, in addition to a fact sheet on the issues surrounding HIV criminalization.

The first chart in the series is an illustrative list of arrests and prosecutions in the United States for HIV exposure between 2008 – 2014. Not all cases of HIV exposure are reported in media and many prosecutions do not result in published judicial opinions; however, the authors have attempted to include a variety of reported cases. As a result, the cases represented in this chart do not constitute an exhaustive representation of all HIV-related prosecutions in the U.S., but are likely only a sampling of a much more widespread, but generally undocumented, use of criminal laws against people living with HIV.

The last resource is a fact sheet that provides a summary on the issues surrounding HIV criminalization in the United States. This fact sheet is intended to be used by advocates as informative talking points on HIV criminalization.



Prosecutions and Arrests for HIV Exposure in the United States, 2008–2014

(List is illustrative, not exhaustive)

Total Number of Cases:	213
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DATE	STATE	TYPE OF EXPOSURE	LAW	DESCRIPTION & OUTCOME
November 2014	MS	Sex	Endangerment by Bodily Substance	A 26 year old man was sentenced to ten years imprisonment and five years probation after being convicted of two counts of endangerment by bodily substance. He was charged after two former sexual partners tested positive for HIV, while he was under a quarantine issued by the local Health Department. http://www.msnewsnow.com/story/27431417/south-ms-man-to-serve-10-years-for-exposing-2-people-to-hiv
October 2014	IL	Sex	Criminal Transmission of HIV	A 25 year old man is charged with Criminal Transmission of HIV after a former sexual partner alleged that he failed to disclose his status before several sexual encounters. http://www.chicagotribune.com/news/local/breaking/chi-man-charged-with-failing-to-reveal-he-had-hiv-to-partner-20141025-story.html
October 2014	VA	Sex	Infected Sexual Battery	A 28 year old man is charged with several counts of infected sexual battery after failing to disclose his status to a sexual partner he met in a bar. http://www.gazette.net/article/20141010/NEWS/141019805/1022/va-man-charged-with-knowingly-trying-to-give-hiv-to-silver-spring&template=gazette
October 2014	TN	Sex	Aggravated Prostitution	A 23 year old woman is charged with aggravated prostitution after offering to charge the officer for sex. Once arrested, the officer looked up her information and discovered the that she was HIV positive and notified of her status. http://www.wkrn.com/story/26744773/hiv-positive-woman-allegedly-solicits-officer
October 2014	MO	Sex	Prostitution	A 25 year old woman faces up to 15 years in prison after failing to disclose her status before agreeing to have sex with an undercover officer for money. http://fox2now.com/2014/10/06/prostitute-charged-with-not-disclosing-hiv-status-again/
September	WA	Sex	Control and	An HIV positive man is currently under court supervised HIV treatment and

2014			Treatment of Sexually Transmitted Diseases	counseling after failing to comply with previous Public Health department orders. If he fails to undergo treatment and follow the court order, public health official may ask to the court to have him hospitalized involuntarily until any treatment is completed. http://www.seattlepi.com/default/article/Seattle-area-HIV-positive-man-who-won-t-stop-5745044.php
September 2014	IL	Spit	Criminal Transmission of HIV	A 24 year old man was charged with criminal transmission of HIV after he allegedly spit on his boyfriend during an argument. http://www.news-gazette.com/news/local/2014-09-02/boyfriend-spat-leads-hiv-charge.html
August 2014	CA	Sex	Willful exposure of self to another person	A 29 year old man was charged with willful exposure (misdemeanor statute) after a former partner became HIV positive. http://www.10news.com/news/investigations/man-accused-of-infecting-another-person-with-hiv-charged-with-misdemeanor-08262014
August 2014	OH	Sex	Solicitation	A 69 year old man was charged with solicitation after approaching an undercover ranger in a park. His charge was elevated to a felony when he disclosed his HIV positive status to law enforcement. http://www.cleveland.com/court-justice/index.ssf/2014/08/judge_questions_the_constituti.html
August 2014	LA	Spit	Intentional Exposure to AIDS virus	A 48 year old man was charged with intentional exposure to AIDS virus after spitting on a cop while being arrested for driving under the influence. http://www.wafb.com/story/26014503/man-charged-with-intentional-exposure-to-aids-after-arrest-for-dwi
August 2014	FL	Sex	Criminal Transmission of HIV	A 52 year old man was charged with criminal transmission of HIV after a former sexual partner alleged that he did not disclose his state during sexual encounters, but he did use a condom. http://articles.orlandosentinel.com/2014-08-06/news/os-hiv-sex-arrest-orange-county-inmate-20140806_1_hiv-positive-man-state-prison-orange-county-jail
August 2014	OH	Sex	Solicitation and Possessing Criminal Tools	A 50 year old man was charged with soliciting as a third-degree felony and possessing criminal tools as a fifth degree felony after seeking sex online with an undercover officer. Both charges were elevated due to his HIV positive status. http://www.thegatewaynews.com/news%20local/2014/08/06/police-arrest-hiv-positive-streetsboro-man-for-solicitation
July 2014	FL	Sex	Criminal Transmission of HIV	A florida man was charged with criminal transmission of HIV after a former partner alleged she was infected with HIV during their relationship. http://www.palmbeachpost.com/news/news/crime-law/riviera-police-charge-man-with-not-telling-woman-h/nggmb/
July 2014	TN	Sex	Criminal Exposure to HIV	A 34 year old man was charged with criminal exposure to HIV after allegedly failing to disclose his HIV positive status before a sexual encounter. http://www.jacksonsun.com/article/20140702/NEWS01/140702014/Man-accused-criminal-exposure-HIV
July 2014	AR	Sex	Attempting to Knowingly Expose a	A 35 year old man was charged with attempting to knowingly expose a person to HIV after allegedly agreeing to engage in a sex act with an undercover police officer.

			Person to HIV	http://swtimes.com/news/fort-smith-man-suspected-exposing-person-hiv
July 2014	SC	Sex	Exposing Another to HIV Virus	A 23 year old transgender woman was charged with exposing another to HIV virus after being arrested for a sex work related charge. http://manninglive.com/2014/07/03/lake-city-man-charged-exposing-others-hiv-prostitution/
July 2014	MO	Sex	Prostitution while HIV Positive	A 20 year old woman was charged with prostitution while HIV positive after being arrested in an undercover prostitution sting. http://www.semissourian.com/story/2098085.html
June 2014	CO	Sex	Prostitution with knowledge of AIDS	A 24 year old man was charged with prostitution with knowledge of AIDS after offering oral sex to an undercover police officer. http://blogs.westword.com/latestword/2014/06/joshua_harker_prostitution_hiv_aids.php
June 2014	TX	Sex	Aggravated sexual assault of a child with a deadly weapon, Aggravated sexual assault with serious bodily injury, and sexual assault of a child	A 31 year old man plead guilty to aggravated sexual assault of a child with a deadly weapon, Aggravated sexual assault with serious bodily injury, and sexual assault of a child after having a sexual relationship with a 15 year old girl. He was ordered to serve his sentence consecutively which could result in a 95 year sentence. http://www.dallasnews.com/news/crime/headlines/20140617-dallas-prosecutors-man-knowingly-transmitted-hiv-to-15-year-old.ece
June 2014	LA	Sex	Intentional Exposure to AIDS virus	A 37 year old man was charged with Intentional Exposure to AIDS virus after allegedly having a sexual relationship with a student. His bail was set at \$1 million when authorities learned of his HIV positive status. http://www.cbsnews.com/news/cops-la-teacher-had-sex-with-student-exposed-him-to-hiv/
June 2014	TN	Spitting	Criminal Exposure to HIV	A 35 year old woman was charged with assault and criminal exposure to HIV after rubbing a saliva-soaked rag in the face of another person. http://www.newschannel5.com/story/25668217/police-woman-tried-to-infect-aunt-with-hiv-during-assault
April 2014	FL	Sex	Criminal Transmission of HIV	A 47 year old man was charged with criminal transmission of HIV after a former partner discovering his HIV medications. http://www.naplesnews.com/news/2014/apr/29/man-accused-transmitting-hiv-two-women/
April 2014	IL	Sex	Criminal Transmission of HIV	A 31 year old man was charged with criminal transmission of HIV after failing to disclose his status to an ex-girlfriend. http://www.suntimes.com/news/crime/27034416-418/chicago-man-charged-with-giving-girlfriend-hiv.html#.U1poVuZdVhM
April 2014	FL	Spitting	Criminal Transmission of HIV	A 53 year old woman was charged with criminal transmission of HIV after spitting on a police officer while being arrested for obstructing traffic. http://miami.cbslocal.com/2014/04/18/police-trespassing-turns-to-transmitting-disease/
April 2014	LA	Syringe	Intentional Exposure to the AIDS Virus	A 27 year old man was charged with four counts of intentional exposure to the AIDS virus and several other drug offenses after sharing needles with two individuals to

				inject heroin. A detective was also pricked by a syringe while taking him into custody. http://www.nola.com/crime/index.ssf/2014/04/kenner_man_accused_of_exposing.html
February 2014	MS	Spitting	Exposure to HIV	A 51 year old man was charged with exposure to HIV after spitting on a police officer during an arrest. http://www.clarionledger.com/apps/pbcs.dll/article?AID=/201402061536/NEWS01/140206019&nclick_check=1
January 2014	FL	Sex	Unlawful Acts and Sexual Assault with a minor	A 58 year old man was charged with unlawful acts and other offenses for failing to disclose his status and exchanging sex for drugs with a minor. http://articles.sun-sentinel.com/2014-01-27/news/fl-palm-sex-assault-drugs-20140127_1_deputies-16-year-old-girl-black-tar-heroin
January 2014	FL	Sex	Criminal transmission of HIV	A 38 year old man was charged with two counts of criminal transmission of HIV, after a former partner alleged he did not disclose his HIV status until after unprotected sex. http://www.palmbeachpost.com/news/news/greenacres-police-officer-arrested-city-police-spo/nc2PP/
January 2014	AL	Sex	Intentional Exposure to HIV virus, aggravated incest and drug possession	A 40 year old man was charged with intentional exposure to HIV virus, among other things, after former sexual partners alleged he did not disclose his HIV status before engaging in unprotected sex. http://www.wbng.com/news/local/Career-Criminal-Targets-Women-241532531.html
January 2014	MI	Sex	Sexual Penetration with Uninformed partner	A 38 year old man was sentenced to two and eight years in Michigan Department of Corrections after being convicted for two counts of sexual penetration with uninformed partners. His sentence was doubled because he was convicted as a third-time habitual offender. http://www.mlive.com/news/muskegon/index.ssf/2014/01/hiv-positive_muskegon_man_sent.html
January 2014	PA	Sex	Aggravated Assault, sexual assault, simple assault and reckless endangerment	A 25 year old woman was arrested for aggravated assault, sexual assault, simple assault and reckless endangerment after a former sexual partner alleged she lied about her health status and engaged in unprotected sex. http://www.pennlive.com/midstate/index.ssf/2014/01/woman_arrested_for_lying_about.html
January 2014	GA	Sex	Reckless Conduct	A 52 year old man was arrested for reckless conduct after a former sexual partner alleged that he did not disclose his HIV status after several sexual encounters. http://onlineathens.com/local-news/2014-01-01/athens-man-hiv-claims-alleged-victim-wanted-have-unprotected-sex
December 2013	OH	Sex	Loitering to engage in solicitation after positive HIV test	A 54 year old woman was arrested for Loitering to engage in solicitation after positive HIV test, after offering sex for money to an undercover cop. http://www.whio.com/news/news/crime-law/vicki-west-hiv-positive-prostitute-arrested-again/nLJ3/
December 2013	ID	Sex	Transferring of Body Fluids containing	A 40 year old man was charged with transferring of body fluids containing the HIV virus after a former sexual partner alleged he did not disclose his status.

			the HIV Virus	http://www.boiseweekly.com/CityDesk/archives/2013/12/13/police-blotter-hiv-related-charges-and-vandalizing-small-business
November 2013	SD	Sex	Intentional Exposure to HIV Infection	A 19 year old male student was charged with intentional exposure to HIV Infection after failing to use a condom during consensual sex with another student. http://www.argusleader.com/article/20131109/NEWS/311090020/Ex-student-accused-spreading-HIV?nclick_check=1
October 2013	GA	Sex	Reckless Conduct	A 36 year old woman was sentenced to 10 years, 2 years to serve in prison and 8 years probation, for failing to disclose her status to her former husband. http://www.gainesvilletimes.com/section/6/article/90052/
October 2013	GA	Sex	Reckless Conduct	A 29 year old man was charged with reckless conduct and other charges after he was accused of masturbating and having oral sex with a teen boy. http://abcnews.go.com/US/wireStory/indictment-ga-teacher-hiv-molested-teen-boy-20534274
October 2013	MO	Sex	Reckless Exposure to HIV	A 21 year old man was charged with reckless exposure to HIV after a former partner alleged transmission after unprotected sex. http://www.stltoday.com/news/local/crime-and-courts/lindenwood-u-student-charged-with-exposing-another-student-to-hiv/article_24ec8c31-be8d-5517-be8e-9a9c4edcd184.html
September 2013	TN	Sex	Criminal exposure of another to HIV	A 32 year old man was charged with criminal exposure to HIV after his wife contacted his mistress and told her that he tested positive for HIV. http://timesfreepress.com/news/2013/sep/18/red-bank-man-accused-of-exposing-woman-to-hiv/
September 2013	OH	Sex	Felonious assault	A 21 year old man was charged with felonious assault after having unprotected sex and failing to disclose his status to his ex-girlfriend of a week and a half. http://www.10tv.com/content/stories/2013/09/17/Marion_HIV_Assault_Charges.html
September 2013	ID	Sex	Transfer of body fluids which may contain the HIV virus	A 52 year old man was sentenced to 15 years in prison for violating probation for an HIV exposure charge. He was originally charged for failing to disclose his diagnosis from a false positive test. http://www.idahopress.com/members/man-charged-with-transmitting-hiv-gets-years-for-probation-violation/article_cc57d346-1a9a-11e3-99fa-001a4bcf887a.html
August 2013	CO	Sex	Prostitution with knowledge of AIDS	A 63 year old man was charged with prostitution with knowledge of AIDS after being arrested in a police sting. http://blogs.westword.com/latestword/2013/08/william_head_prostitution_aids.php
August 2013	TX	Sex	Aggravated assault resulting in serious bodily harm.	A 36-year-old man was sentenced to 120 years for aggravated assault with a deadly weapon causing serious bodily harm after a former girlfriend alleged he intentionally infected her with HIV. http://www.mywesttexas.com/top_stories/article_ed04bbfe-1103-11e3-aaeb-0019bb2963f4.html
August 2013	MO	Sex	Prohibited Acts	A 36 year old man faces the criminal charge of Prohibited Acts (reckless exposure) after a former sexual partner tested positive for HIV. http://www.ledger-enquirer.com/2013/08/28/2658547/dexter-man-with-hiv-

				charged-with.html
August 2013	FL	Sex	Unlawful Acts	A 28 year old man was charged with unlawful acts relating to HIV exposure after a former sexual partner alleged transmission. http://www.winknews.com/Local-Florida/2013-08-17/Fort-Myers-man-arrested-for-infecting-partners-with-HIV#.UhlNemRgbbp
July 2013	TN	Sex	Criminal Exposure to HIV	A 46 year old man was charged with criminal exposure to HIV after a former girlfriend tested positive for HIV and alleged that he did not disclose his status. http://www.wmctv.com/story/23570873/minister-charged-for-spreading-hiv
July 2013	OK	Sex	Assault with a deadly weapon	A 24 year old man was sentenced to 15 years and mandatory sex offender registration after pleading guilty to assault with a deadly weapon and rape charges. http://paulsvalleydailydemocrat.com/communitynews/x541280100/HIV-plea-hits-close-to-home
June 2013	GA	Spitting	Criminal Exposure of HIV	A 29 year old man was charged with criminal exposure of HIV after he allegedly spit on a hospital worker. http://www.chattanooga.com/2013/6/28/254206/Man-With-HIV-Arrested-After-He-Spits.aspx
June 2013	FL	Sex	Criminal Transmission of HIV, Prostitutions	A 19 year old woman was charged with criminal transmission of HIV and prostitution after she allegedly offered to perform a sexual act on an undercover police officer. http://www.tampabay.com/news/publicsafety/crime/police-nebraska-avenue-prostitute-didnt-disclose-hiv/2129361
June 2013	CA	Sex	Willful exposure of self or other to disease	A 42 year old man was sentenced to 30 days in jail for one count of willful exposure after exposing two people to syphilis. http://www.sbsun.com/breakingnews/ci_23431194/l-porn-actors-conviction-working-syphilis-is-rare
May 2013	UT	Sex	Second Degree Aggravated Exploitation of Prostitution, Third Degree Sexual Solicitation	A 58 year old man was charged with second-degree aggravated exploitation of prostitution and third-degree sexual solicitation after allegedly offering to pay a teenage boy for sex. His charge for sexual solicitation was elevated to a third-degree felony because of his HIV status. http://www.sltrib.com/sltrib/news/56428611-78/mead-barnes-sex-police.html.csp
May 2013	TX	Spitting	Aggravated Assault	A 25 year old man was charged with aggravated assault after spitting on a police officer. http://crimeblog.dallasnews.com/2013/05/police-say-hiv-positive-man-refused-to-be-masked-spit-on-officers-trying-to-book-him-for-public-intoxication.html/
May 2013	LA	Spitting	Intentional exposure of AIDS virus, false imprisonment	A 34 year old man was charged with intentional exposure of the AIDS virus and false imprisonment after spitting on a police officer. http://www.kplctv.com/story/22303105/lake-charles-man-accused-of-intentional-aids-exposure-by-spitting
May 2013	IL	Sex	Criminal Sexual Assault, criminal sexual abuse, sexual transmission of HIV	A 35 year old man was charged with criminal sexual assault, criminal sexual abuse, and sexual transmission of HIV for allegedly sexually abusing several high school students in 2011. http://www.bnd.com/2013/05/13/2615515/police-cahokia-high-boys-got-hiv.html

May 2013	IL	Sex	Criminal Sexual Assault	A 48 year old man was charged with criminal sexual assault after he allegedly sexually assaulted male teenager after the teen refused to have sex for money. His bail was set at \$5 million . http://www.chicagotribune.com/news/local/breaking/chi-5m-bail-for-hiv-positive-man-charged-with-sexual-assault-20130505,0,736916.story
April 2013	FL	Sex	Criminal Transmission of HIV; Sexual Assault; Lewd or Lascivious Molestation ; Sexual Battery; Kidnapping	A 46 year old man was charged with criminal transmission of HIV and several other sex crimes after allegedly taking a child from a party, locking him in a room, where rape and other acts occurred. http://www.nbcmiami.com/news/local/HIV-Positive-Man-Raped-10-Year-Old-Boy-BSO-201269651.html
March 2013	OH	Sex	Felonious Assault	A 48 year old woman was convicted of two counts of felonious assault for failing to disclose her HIV status prior to having sex with two men. She was sentenced to 8 years in prison. http://www.limaohio.com/news/local_news/article_2dfe1c74-8a9d-11e2-91a6-001a4bcf6878.html
March 2013	GA	Sex	Reckless Conduct	A 21 year old male was charged with one count of reckless conduct by an HIV infected person after a former partner alleged she contracted HIV from him. http://www.41nbc.com/news/local-news/21023-baldwin-sheriff-s-office-man-charged-with-reckless-conduct-by-hiv-infected-person
March 2013	IL	Sex	Criminal Transmission of HIV	A 38 year old police officer was charged with criminal transmission of HIV after a sexual partner alleged he disclosed his HIV status after they had unprotected sex. http://abclocal.go.com/wls/story?section=news/local&id=9028711
January 2013	FL	Sex	Attempted Murder, Sexual Assault	A 40 year old man and a 32 year year old man were charged with attempted murder for allegedly engaging in unprotected sex with a 16 year old boy. http://articles.sun-sentinel.com/2013-01-17/news/fl-men-accused-of-hiv-crime-20130117_1_hiv-status-catherine-hanssens-grindr
January 2013	IA	Spitting, biting	Criminal Transmission of HIV	A 40 year old woman was charged with criminal transmission of HIV and other charges after spitting on several police officers and biting one while they attempted to restrain her in response to an emergency call. http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=2013301130041&gcheck=1
December 2012	TX	Sex	Aggravated Assault causing serious bodily harm	A 42 year old man plead guilty to aggravated assault causing serious bodily harm after failing to disclose his status to several partners. He was sentenced to 15 years. http://crimeblog.dallasnews.com/2012/12/judge-sentences-fort-worth-man-to-15-years-in-prison-for-knowingly-infecting-woman-with-hiv.html/
December 2012	FL	Sex	Criminal Transmission of HIV; Sexual Intercourse without Disclosure of HIV	A 35 year old man was arrested for failing to disclose his HIV status and criminal transmission of HIV. Transmission is alleged by at least two individuals. http://www.actionnewsjax.com/content/topstories/story/Man-charged-with-criminal-transmission-of-HIV/fmfgT3_moES_A8dnXMp8JQ.csp

November 2012	MT	Sex	Criminal Endangerment	A 52 year old man was charged with criminal endangerment after a former partner alleged that he failed to disclose his medical condition during their three-year sexual relationship. http://billingsgazette.com/news/local/crime-and-courts/man-charged-with-felony-for-hiv-infection/article_dfd0ad4-b336-5e56-9b94-b9f904a80152.html
September 2012	MD	Sex	Transfer Hiv To Another; Sex Offense Second Degree; Sexual Solicitation Of A Minor	A 36 year old man was charged with several offenses, which together can carry over a 30 year sentence, after having sex with a 13 year old boy. http://www.baltimoresun.com/news/maryland/crime/bs-md-co-hiv-criminal-transmission-20120909,0,7534341.story?page=1
September 2012	FL	Sex	Attempted second-degree murder ; Criminal transmission of the AIDS virus	A 30 year old man was charged with attempted murder in second-degree and criminal transmission of the AIDS virus after having unprotected sex with a 15 year old boy. http://www.miamiherald.com/2012/09/07/2989939/man-30-charged-with-attempted.html
August 2012	MI	Sex	CSC (criminal sexual conduct) 2nd degree; CSC assault w/intent sexual penetration; AIDS sexual penetration with uninformed partner; CSC 4th degree victim between 13 and 16; CSC 4th degree victim between 13 and 16	A 53 year old man was charged with sexual penetration with an uninformed partner when there's risk of AIDS after he allegedly sexually assaulted a 14-year-old boy. http://www.annarbor.com/news/crime/police-ypsilanti-man-charged-in-sexual-assault-is-hiv-positive/#.UEYsKiSR1g
August 2012	GA	Sex	Reckless Conduct	A 41 year old man was charged with Reckless Conduct, after two women accused him of exposing them to HIV after consensual sex . http://www.wsbtv.com/news/news/crime-law/man-faces-charges-of-exposing-two-women-to-hiv/nR2pz/
August 2012	MI	Sex	Sex with an uninformed partner	A 25 year old man was charged with the felony for failing to inform a sexual partner that he was HIV positive. He was arrested after a former sexual partner contacted authorities when she feared she might have contracted HIV. http://www.themorningsun.com/article/20120827/NEWS01/120829779/clare-area-man-accused-of-failing-to-inform-partner-of-hiv
August 2012	PA	Spitting	Aggravated Assault, Assault by a prisoner	A 19 year old man was charged with aggravated assault and assault by a prisoner after he allegedly spat blood at a police officer following an arrest for public drunkenness, disorderly conduct and underage drinking. http://www.lehighvalleylive.com/easton/index.ssf/2012/08/hiv-

				postive man who spit at ea.html
August 2012	MI	Sex	Sexual penetration with uninformed partner	A 32 year old man was charged with sexual penetration with uninformed partner, which is a four-year felony. The victim alleges after meeting on a website and having consensual sex, he assured the victim he was HIV negative. http://www.woodtv.com/dpp/news/local/kent_county/hiv-infected-man-lied-to-sex-partner
July 2012	CA	Sex	Cal. Health and Safety Code § 120290: "Any person afflicted with any contagious, infectious, or communicable disease who willfully exposes him/herself to another person is guilty of a misdemeanor."	A Barstow Superior Court jury found a 56 year old guilty under the California Health code and given the maximum sentence, after he admitted during trial he knew he had AIDS and yet had unprotected sex with a former lover. http://www.desertdispatch.com/news/spreading-13329-barstow-gets.html
July 2012	TN	Sex	Assault, Criminal exposure of another to HIV, child rape, statutory rape	A 22-year-old woman is charged with assault on an officer with bodily injury, criminal exposure to HIV, rape of a child and statutory rape after the mother of two boys, ages 11 and 16, woke up and saw Morris with one of her children before Morris fled the residence. http://www.tennessean.com/article/20120720/NEWS03/120720011/Police-North-Nashville-woman-exposed-child-teen-HIV?odyssey=mod newswell text FRONTPAGE p&nckick_check=1
July 2012	TN	Sex	Assault, Criminal exposure of another to HIV	A 34-year-old man was charged with two counts of the felony, Assault, Criminal exposure of another to HIV after a woman accused him of having sex with her and not disclosing his HIV status. http://www.newschannel5.com/story/19017872/man-accused-of-exposing-woman-to-hiv
June 2012	MO	Sex	Reckless risk of infecting another person with HIV	A 48-year-old man and his 42-year-old girlfriend were found guilty of knowingly exposing another person to HIV after the man allegedly had sexual contact with a woman during a Mardi Gras party, and the girlfriend, who knew his HIV positive status, encouraged the contact and did not disclose his status. As of June 2012 they await sentencing, but face up to 15 years each. http://www.stltoday.com/news/local/crime-and-courts/guilty-of-risking-transmission-of-hiv-at-st-louis-mardi/article_33d9d61d-057e-582d-b319-894164df2710.html
June 2012	FL	Sex	Prostitution with knowledge of HIV-positive status	A 19-year-old woman was charged with solicitation and prostitution with knowledge of HIV-positive status, a third degree felony (unless a repeat offense) that can result in up to five years in prison.
May 2012	FL	Sex	Unlawful Acts Relating to HIV Exposure	A 49-year-old man was charged with Unlawful Acts Relating to HIV Exposure for engaging in consensual sexual intercourse without disclosing his HIV positive status.
May 2012	IA	Sex	Criminal Transmission	A 37-year-old man who has been charged with third-degree sexual abuse for sexually

			of HIV	assaulting a 15-year-old boy now faces an additional charge of criminal transmission of HIV. http://easterniowanewsnow.com/2012/05/30/cr-man-faces-additional-charge-for-hiv-transmission-in-sexual-abuse-case/
May 2012	FL	Sex	Prostitution with knowledge of HIV-positive status	A 41-year-old woman in Bradenton, FL who was already in jail charged with felony prostitution was additionally charged with prostitution with knowledge of HIV-positive status, a third degree felony (unless a repeat offense) that can result in up to five years in prison. http://www.heraldtribune.com/article/20120527/BREAKING/120529620?tc=ar
May 2012	OH	Sex	Felonious assault	A 23-year-old perinatally infected man was sentenced to 3 years in prison after pleading guilty to felonious assault for not disclosing his HIV status prior to sex. This was despite a pre-sentence investigation prepared by the parole authority, which recommended him serving no jail time, only probation. http://www.vindy.com/news/2012/may/18/hiv-positive-man-sentenced-to-three-year/
April 2012	MA	Sex	Assault and Battery with a deadly weapon	A 19-year-old has been charged with assault and battery with a deadly weapon (HIV) and one count of statutory rape of a child. It is also alleged that he showed false medical records (showing HIV negative status) to at least one partner, but it is not clear if there will be additional charges. http://www.sentinelandenterprise.com/ci_20388210/fitchburg-man-hiv-allegedly-showed-false-medical-records?source=rss_viewed#ixzz1sDpczu1X
March 2012	OK	Sex	Knowingly engaging in conduct likely to transfer the HIV virus	A 23-year-old man has been charged with rape for allegedly having sex with a 14-year old, in addition to several unrelated charges of knowingly engaging in conduct likely to transfer the HIV virus. http://www.news9.com/story/17204303/grady-county-man-accused-of-spreading-hiv-held-without-bond?clienttype=printable
February 2012	GA	Sex	Reckless Conduct	A man was sentenced to 10 years for reckless conduct after a former partner alleged transmission. http://www.wsbtv.com/news/news/local/man-convicted-knowingly-spreading-hiv/nK8Pc/
February 2012	FL	Sex	Unlawful Acts Relating to HIV Exposure	A 36-year-old woman admitted to being a sex worker and having sex with multiple men while she knew she was HIV positive after an undercover sex sting. http://www.wptv.com/dpp/news/region_c_palm_beach_county/lake_worth/michelle-weissman-of-lake-worth-busted-in-prostitution-sting-tells-deputies-shes-hiv-positive#ixzz1mOEu3Rwg
February 2012	MO	Bite	Reckless risk of infecting another person with HIV	A 29-year-old man has been charged with recklessly risking the infection of another person with HIV for allegedly biting a police officer during an incident last June. http://bransontrilakesnews.com/news_free/article_7015e792-51d0-11e1-b3a4-0019bb2963f4.html
January 2012	MO	Sex	Reckless risk of infecting another person with HIV	A 26-year-old man has been charged with four counts of reckless endangerment after allegedly having sex with his girlfriend without telling her he was HIV-positive. http://www.ksdk.com/news/article/299200/3/Local-man-charged-with-spreading-HIV-to-girlfriend
January 2012	IA	Sex	Criminal Transmission of HIV	A 50-year-old man reached a plea deal after being charged with criminal transmission of HIV in September 2010 for allegedly not disclosing his status to a sexual partner. Prosecutors are planning not to go to trial if the man signs a contract where he will pledge not to spread HIV and will reveal names of past sexual partners so they can be notified of the potential exposure. http://www.wqad.com/news/wqad-h-i-v-infect-trial-sex-criminal-10612,0,2448033.story
December	MI	Sex	AIDS-Sexual	A 51-year old man in Grand Rapids allegedly admitted to attempting to infect hundreds of

2011			Penetration of an Uninformed Partner	people with HIV through unprotected sexual activity and needle-sharing. The investigation, including into the man's mental health, is ongoing. M. Alex Johnson, <i>Michigan man may have intentionally infected hundreds with HIV</i> , msnbc.com, Dec. 30, 2011 http://usnews.msnbc.msn.com/_news/2011/12/30/9833291-michigan-man-may-have-intentionally-infected-hundreds-with-hiv
December 2011	VA	Sex	Infected Sexual Battery	A 52-year-old man pleaded guilty to having carnal knowledge of a minor, a felony, and to a misdemeanor count of having sex with a person without disclosing he was infected with the human immunodeficiency virus. The second charge was reduced from a felony to a misdemeanor because there was no evidence that he intended to infect her, but still carries a sentence of up to 12 months in jail. In March 2012, he was sentenced to 7 years for the two charges. http://www2.timesdispatch.com/news/2012/mar/16/tdmet02-career-criminal-with-hiv-gets-seven-years--ar-1769766/
November 2011	IL	Biting	Criminal Transmission of HIV	A 36-year-old man is being charged with transmission of HIV, after Oak Park police said he bit a police officer's thumb and broke the skin. http://triblocal.com/oak-park-river-forest/2011/11/23/man-accused-of-biting-cop-charged-with-transmitting-hiv/
November 2011	NC	Sex	Violation of state public health laws	A 27 year-old man was arrested and charged in Raleigh with violation of state public health laws for not disclosing his HIV status before sex. http://abclocal.go.com/wtvd/video?id=8419703&syndicate=syndicate&section
October 2011	NJ	Sex	Diseased person Committing an act of sexual penetration	A 46 year old man was charged with two counts of a "diseased person committing an act of sexual penetration" after a former girlfriend took a recorded conversation with his doctor regarding his HIV status to the local prosecutor. http://www.newjerseynewsroom.com/state/ex-nj-police-captain-charles-martina-charged-with-criminal-transmission-of-hiv
October 2011	ID	Sex	Transferring body fluids containing HIV	A 50-year-old man was arrested on charges of transferring body fluids containing HIV for having sex with women without disclosing his status. If convicted he faces 15 years in prison and/or a \$5000 fine.
October 2011	IL and MO	Sex	Criminal transmission of HIV (IL) and knowingly transmitting HIV (MO)	A man was charged with one count of criminal transmission of HIV in Illinois, and three counts of knowingly transmitting HIV in Missouri, for allegedly failing to tell his female sexual partners that he was HIV positive. It is unclear whether there was any transmission involved. http://www.ksdk.com/news/article/281200/3/Police-Man-knowingly-passed-HIV-onto-others
September 2011	OH	Spitting	Felonious Assault	A woman was charged with felonious assault for allegedly spitting on people and telling them that she had HIV. Saliva cannot transmit HIV but Ohio courts have held that if blood is mixed with saliva then an HIV positive person can be convicted of felonious assault. [<i>HIV-positive woman behind bars after spitting on several bar patron</i> , Sept. 2, 2011, http://www.woio.com/story/15383123/hiv-positive-woman-spits-on]
August 2011	MD	Sex	Aggravated Assault	A man was charged with assault for allegedly failing to tell his girlfriend that he was HIV positive prior to them having sex. [Adam Bednar, <i>Man Charged with Assault for Not Disclosing HIV Status Before Sex</i> , North Baltimore Batch, Aug. 24, 2011, http://northbaltimore.patch.com/articles/crime-man-charged-with-assault-for-not-disclosing-hiv-status-before-sex]
August 2011	TN	Sex	Criminal Exposure to HIV	A 39-year-old man was charged with criminal exposure to HIV for failing to tell his live-in girlfriend that he was HIV positive. [<i>Man Charged with Exposing Girlfriend to HIV</i> , wreg.com, Aug. 17, 2011, http://www.wreg.com/news/wreg-man-charged-with-exposing-girlfriend-to-hiv-20110817,0,7741295.story]
August 2011	FL	Sex	Unlawful Acts Relating to HIV Exposure	A man was indicted on 20 counts of criminal exposure to HIV for allegedly failing to tell his female sexual partner that he was HIV positive. [Man charged with exposing woman to HIV, Jackson Sun, Aug. 11, 2011, http://www.jacksonsun.com/article/20110811/NEWS01/108110319]
August 2011	FL	Sex	Unlawful Acts Relating to HIV Exposure	A man was arrested for allegedly failing to inform his male sexual partner of his HIV status. Charges were later dropped because, for the purposes of Florida's HIV exposure statute, sexual intercourse under state law is defined as being between a man and a woman. The 2nd Circuit Court of Appeals held in a July 2011 decision that the narrow definition of "sexual intercourse"

				precludes using the statute in cases of same-sex consensual relationships. [<i>Charges dropped against HIV positive man accused of endangering others</i> , cfnews13.com, August 19, 2011, http://www.cfnews13.com/article/news/2011/august/297505/Charges-dropped-against-HIVpositive-man-accused-of-endangering-others]; <i>Man Charged With not telling Partner he was HIV Positive</i> , Tampa Bay Online, Aug. 5, 2011, http://www2.tbo.com/news/breaking-news/2011/aug/05/man-charged-with-not-telling-partner-he-was-hiv-po-ar-248600/]
August 2011	GA	Sex	Reckless Conduct	A man was arrested for allegedly failing to tell his girlfriend of his HIV positive status. The complainant has tested positive for HIV. [Alaya Boykin, <i>Douglas County Man Charged with Infecting Girlfriend with HIV</i> , The Atlanta Journal-Constitution, Aug. 4, 2011, http://www.ajc.com/news/douglas-county-man-charged-1075552.html#.Tjr-ZLQeal4.email]
July 2011	NY	Spitting	Reckless Endangerment	A writ of habeas corpus was denied in the case of a man of was convicted of reckless endangerment after spitting at police officers saying that he had AIDS. Spit cannot transmit HIV. The ruling mainly focused on Carmona's argument that it was a violation of his due process rights to have his medical records entered into evidence at trial. The court held that Carmona did not provide evidence that admission of his medical records violated his constitutional rights. [<i>Carmona v. Connelly</i> , 2011 WL 2748694 (S.D.N.Y. July 13, 2011)]
July 2011	TN	Sex	Criminal Exposure to HIV	A man was arrested for allegedly failing to tell his wife, who has since tested positive for HIV, that he was HIV positive. [Beth Burger, <i>More HIV Victims Speak Out</i> , TimesFreePress.com, July 30, 2011, http://timesfreepress.com/news/2011/jul/30/more-hiv-victims-speak-out/]
July 2011	TN	Sex	Criminal Exposure to HIV	An arrest was made in the case of a man who allegedly failed to tell his sexual partner, whom he met online, that he was HIV positive. [<i>Man Surrenders to CPD After Allegations of Criminal Exposure to HIV</i> , Eagle94.com, July 25, 2011, http://www.eagle943.com/pages/10418760.php?contentType=4&contentId=8598475 ; <i>Clarksville Woman in HIV Exposure Case Warns Others</i> , The Leaf Chronicle, June 22, 2011, http://www.theleafchronicle.com/article/20110623/NEWS01/106230315/Clarksville-woman-HIV-exposure-case-warns-others?odyssey=tab topnews text FRONTPAGE]
June 2011	OH	Biting	Felonious Assault	An HIV positive woman has been charged with felonious assault for allegedly biting a police officer. [<i>HIV Positive Woman Accused of Biting Police Officer</i> , WLWT.Com, June 24, 2011, http://www.wlwt.com/r/28344700/detail.html]
June 2011	OH	Sex	Felonious Assault	A 32-year-old man was charged with felonious assault for allegedly not disclosing his HIV status to a young man he met on an online dating service. The young man has since tested positive for HIV. [Kelli Wynn, <i>Boy, 15, infected by man with HIV</i> , Dayton Daily News, June 15, 2011, http://www.daytondailynews.com/news/crime/boy-15boy-15-infected-by-man-with-hiv-1185800.html]
May 2011	FL	Biting	Criminal Transmission of HIV	A 30-year-old man was charged with criminal transmission, among other charges, for allegedly trying to bite a police officer while resisting arrest for shoplifting. The charges were dropped when it was discovered that the man did not in fact have HIV. [Marcos Restrepo, <i>Public Defender: Broward detainee charged with criminal transmission of HIV does not have the virus</i> , Florida Independent, June 10, 2011, http://floridaindependent.com/33508/public-defender-broward-detainee-charged-with-criminal-transmission-of-hiv-does-not-have-the-virus ; Marcos Restrepo, <i>More Details Emerge about South Florida criminal HIV transmission case</i> , Florida Independent, June 3, 2011, http://floridaindependent.com/32611/hiv-criminal-transmission-broward;Danielle Alvarez, BSO Accuses man with HIV of trying to bite Deputy , May 31, 2011, SunSentinel.com, http://www.sun-sentinel.com/news/broward/west-park/fl-home-depot-hiv-20110531,0,4512874.story]
May 2011	OH	Sex	Felony Prostitution	A 32-year-old HIV positive sex worker was charged with felony prostitution. Most prostitution charges are misdemeanors but being HIV positive increases the penalties to felony level offenses. Prior to this incident, she was arrested and sentenced to one year in prison for felony prostitution in January 2010. [Doug Page, <i>Convicted HIV-positive prostitute arrested again</i> , Dayton Daily News, May 19, 2011, http://www.daytondailynews.com/news/crime/convicted-hiv-positive-prostitute-arrested-again--1164324.html]
April 2011	OK	Biting	Assault and Battery	An HIV positive man bit a police officer during an arrest and was charged with felony assault and battery, in addition to other charges. [Jordan Gummer, <i>HIV-Positive Inmate Accused of Biting Jailer</i> , Times Record Online, April 29, 2011, http://www.swtimes.com/news/article_976c2328-7266-11e0-9ec0-001cc4c03286.html]
April 2011	OH	Sex	Felonious Assault	After being indicted in April, a 29-year-old former wrestler was convicted Nov. 23, 2011 of 14 felonious assault counts for allegedly not telling his sexual partners that he was HIV positive. In

				January 2012, he was sentenced to 32 years in prison. [http://www.foxnews.com/us/2012/01/23/ohio-wrestler-gets-32-years-in-hiv-assault-case/, http://www.suntimes.com/news/nation/9035383-418/ex-pro-wrestler-andre-davis-convicted-in-hiv-case.html]
April 2011	NY	Sex	First Degree Reckless Endangerment	A 20-year-old man was arrested for felony reckless endangerment for allegedly failing to tell his girlfriend that he was HIV positive. The man pleaded guilty to five counts of misdemeanor reckless endangerment and was sentenced to one year imprisonment. [<i>Buffalo Man admits exposing five to HIV; faces 1 year imprisonment</i> , Buffalo News, July 9, 2011, http://www.buffalonews.com/city/article482521.ece; <i>Man charged for not telling of HIV infection</i> , Wall Street Journal, April 21, 2011, http://online.wsj.com/article/APc4540a75baea4c3da2586727a82d0c86.html]
April 2011	IL	Sex	Criminal Transmission of HIV	A man was charged with criminal transmission of HIV for not telling his sexual partner about his HIV condition. The man was arrested after police searched his car and found his medications for HIV and asked the man if he was HIV positive and had disclosed such information to his sexual partner, who was also in the car. [<i>Man convicted on AIDS case arrested on sex charge</i> , The Herald News, April 21, 2011, http://heraldnews.suntimes.com/news/4941274-418/man-convicted-on-aids-case-arrested-on-sex-charge.html]
April 2011	IA	Sex	Criminal Transmission of HIV	A 44-year-old HIV positive man turned himself into police on a warrant charging criminal transmission of HIV. He is accused of engaging in "intimate contact with another person" while being HIV positive. [<i>Police Reports</i> , thonline.com, April 19, 2011, http://www.thonline.com/article.cfm?id=318509]
April 2011	WI	Sex	HIV as an aggravated factor in serious sex acts	A 35-year-old HIV positive man was charged with sexual assault of a child. Wisconsin does not have an HIV specific criminal law but in making sentencing decisions, a judge may consider a person's HIV status as an aggravating factor. [<i>Man with HIV Charged with Sexual Assault of a Child</i> , WAUSAUDAILYHERALD.com, April 19, 2010, http://wsau.com/news/articles/2011/apr/19/charges-filed-against-hiv-spreader/]
April 2011	GA	Sex	Reckless Conduct	An HIV positive man was charged with reckless conduct, among other charges, for allegedly having sex with one of his students. [<i>Band teacher with HIV allegedly had sex with 15-year-old student</i> , CBSnews.com, April 14, 2011, http://www.cbsnews.com/8301-504083_162-20053944-504083.html]
March 2011	IN	Sex	Failure to Warn	A 20-year-old perinatally infected HIV-positive woman was arrested for allegedly failing to disclose her status to her sexual partner. [<i>Woman Accused of Not Telling Partner About HIV</i> , TheIndyChannel.com, March 30, 2011, http://www.theindychannel.com/news/27362307/detail.html]
March 2011	PA	Spitting, Biting	Terroristic Threats	An HIV positive man pleaded guilty to two counts of assault and one count of making terroristic threats for spitting and biting at police officers. He said that that he hoped the officers would get HIV. There is a very low chance of HIV being transmitted by blood spatter because HIV cannot live outside of the body for very long and HIV cannot be transmitted via saliva or biting. The man was eventually sentenced to six months to a year in jail and will have three months of probation. [<i>Eaton Police AIDS Assault: Man who said he had AIDS gets prison for assault on police</i> , The Morning Call, May 13, 2011, http://articles.mcall.com/2011-05-13/news/mc-easton-police-aids-assault-20110513_1_easton-man-codes-officer-count-of-terroristic-threats; Todd Heywood, <i>HIV-positive PA man pleads guilty of terroristic threats</i> , Michigan Messenger, March 29, 2011, http://michiganmessenger.com/47741/hiv-positive-pa-man-pleads-guilty-of-terroristic-threats]
March 2011	ID	Sex	Transfer of Bodily Fluids Which May Contain HIV	A man was sentenced to 15 years imprisonment for not disclosing his HIV status and having unprotected sex with multiple partners. It is not known if any of the partners tested positive for HIV. The man pleaded guilty in Dec. 2010 and will be eligible for parole after two years. [<i>Boise man with HIV sentenced for unprotected sex</i> , KIVITV.com, March 25, 2011, http://www.kivity.com/Global/story.asp?S=14323844; <i>Boise man charged with transferring HIV</i>
March 2011	IN	Sex	Failure to Warn	A man was sentenced to two years imprisonment for HIV non-disclosure after not telling his female sexual partner he had HIV. [<i>Man sentenced in HIV-related case</i> , Journal and Courier, March 26, 2011, http://www.jconline.com/article/20110326/NEWS03/103260327/Man-sentenced-HIV-related-case?odyssey=mod newswell text FRONTPAGE s]
March 2011	OH	Sex	Felonious Assault	A HIV+ man was charged with three counts of felonious assault for allegedly not disclosing his HIV status to his sexual partners. In January 2012 he was sentenced to 5 years in prison. [<i>Sarah Webber, Vermillion man charged for spreading HIV</i> , Sandusky Register, March 17, 2011,

				http://www.sanduskyregister.com/news/2011/mar/17/aidschargessw031711xml ; Michael Sangiacomo, <i>HIV positive man sentenced for infecting 3 women</i> , The Plain Dealer, Jan. 10, 2012, http://blog.cleveland.com/metro/2012/01/hiv_positive_man_sentenced_for.html
March 2011	FL	Sex	Unlawful Acts Related to HIV Exposure	An HIV+ man was charge with unlawful acts related to HIV exposure, among other charges, for allegedly raping a 13-year -old boy. [<i>Police: Man with HIV raped boy, 13</i> , wesh.com, March 14, 2011, http://www.wesh.com/r/27185799/detail.html]
March 2011	IN	Sex	Failure to warn persons at risk	A 33-year-old HIV positive man was charged with six counts failing to warn, along with other charges, for allegedly molesting a boy. [<i>Police: Man with HIV Molests 8-year-old boy</i> , indychannel.com, March 11, 2011, http://www.theindychannel.com/news/27168892/detail.html]
March 2011	MO	Bite	Reckless Exposure to HIV	An HIV positive man was charged with reckless exposure to HIV, assault on an officer, and resisting arrest for allegedly biting a police officer. [<i>Man with HIV charged with biting O'Fallon police officer</i> , kmov.com, kmov.com, March 10, 2011 http://www.kmov.com/news/local/Man-with-HIV-charged-with-biting-O'Fallon-Missouri-police-officer-117739179.html]
March 2011	IN	Sex	Failure to Warn	A man pleaded guilty to failing to warn his sexual partner that he was HIV positive. Failure to warn is a class D felony in Indiana, punishable by six months to three years imprisonment. [Sophia Voravong, <i>Suspect admits to sex without disclosing that he had a STD</i> , jconline.com, March 5, 2011, http://www.jconline.com/article/20110305/NEWS03/103050328/Suspect-admits-to-sex-without-disclosing-he-had-STD]
March 2011	TN	Sex	Criminal Exposure to HIV	A 28-year-old HIV-positive man was arrested for allegedly having sex without disclosing his status. [<i>Man charged with exposing 14 year old boy to HIV</i> , wmctv.com, March 2, 2011, http://www.wmctv.com/Global/story.asp?S=14176472]
March 2011	MO	Sex	Reckless Exposure to HIV	A 36-year-old man was charged with reckless exposure to HIV for allegedly engaging in sex with his girlfriend without disclosing his HIV status. [Kristin Gosling, <i>Man charged with criminal transmission of HIV</i> , ksdk.com, March 3, 2011, http://www.ksdk.com/news/article/247286/3/Man-charged-with-criminal-transmission-of-HIV]
March 2011	MO	Sex	Reckless Exposure to HIV	In response to a domestic violence call, police arrested a man for criminal transmission of HIV after discovering that the man allegedly never told his girlfriend about his condition. He was charged with eight counts of reckless exposure to HIV. [Area Crime Reports, Webster-Kirkwood Times, March, 4, 2011, http://www.websterkirkwoodtimes.com/Articles-i-2011-03-04-173882.114137-Area-Crime-Reports.html#ixzz1Fe6WSUtC]
Feb. 2011	CO	Sex	Prostitution with the knowledge of being HIV positive	A woman was arrested for the felony charge, prostitution with the knowledge of being HIV positive, in addition to two misdemeanors for allegedly soliciting an undercover cop. If convicted of the HIV-specific charge she could up to face three years imprisonment. [<i>Denver Woman Accused of Knowingly Spreading HIV</i> , Fox News, Feb. 2, 2011, http://www.foxnews.com/us/2011/02/02/denver-prostitute-arrested-knowingly-spreading-hiv-virus/]
Jan. 2011	SC	Sex	First-degree harassment and Exposing others to HIV	A 30-year-old man was arrested for allegedly exposing others to HIV. [<i>Man Exposed Others to HIV, Police Say</i> , Augusta Chronicle, January 21, 2011, http://chronicle.augusta.com/news/crime-courts/2011-01-21/man-exposed-others-hiv-police-say]
Jan. 2011	KS but Military Prosecution	Sex	Aggravated assault plus violating a squadron commander's orders, adultery, indecent acts for having sexual relations in front of others, and obstruction of justice.	A US airman was sentenced to eight years imprisonment and will be dishonorably discharged after serving his time for having unprotected sex with multiple sexual partners without disclosing his HIV status. The man was found guilty on seven of eight counts of aggravated assault and violating squadron commander's orders to notify sexual partners about his HIV status and to use condoms. He was also convicted of indecent acts for having sex in front of others and adultery. None of the man's sexual partners tested positive for HIV. Upon his dishonorable discharge the man will lose his medical benefits. [<i>Kan. Airman with HIV charged with assault for sex</i> , Associated Press, Sept. 24, 2010, available at http://technews.tmcnet.com/topics/associated-press/articles/104087-kan-airman-with-hiv-charged-with-assault-sex.htm ; <i>Airman gets 8 years imprisonment in HIV exposure case</i> , AP, January 20, 2011.].
Jan. 2011	TN	Sex	Criminal Exposure of Another to HIV	A man was arrested for allegedly not telling his sexual partner that he was HIV positive. If convicted, the man could face up to three to fifteen years imprisonment. [<i>Man charged with criminal exposure to HIV</i> , Jacksonsun.com, January 20, 2011, http://www.jacksonsun.com/article/20110120/NEWS01/110119038/-

				1/newsfront2/Man+charged+with+criminal+exposure+to+HIV]
Jan. 2011	MO	Sex	Reckless Exposure to HIV	A man pleaded guilty to recklessly exposing his former girlfriend to HIV and was sentenced to ten years imprisonment. Probation was denied. The former girlfriend alleges that she did not know the defendant was HIV positive until they had broken up. She has since tested positive for HIV. [SW Missouri man pleads guilty to infecting woman with HIV, January 18, 2011, http://www.stltoday.com/news/local/crime-and-courts/article_ebe29ba2-2307-11e0-988e-0017a4a78c22.html
Jan. 2011	MO	Sex	Reckless Exposure to HIV	A man was charged with six counts of reckless exposure to HIV for failing to tell his sexual partner about his HIV status. He was convicted of four of the counts and sentenced to 30 years imprisonment. The partner has since tested positive. [Patrick M. O'Connell, <i>Northwoods man charged in HIV case</i> , stltoday.com, http://www.stltoday.com/news/local/crime-and-courts/article_939b9889-f8fb-5cfd-9004-430cca57ebfd.html , January 14, 2011; <i>Northwoods man sentenced in HIV case</i> , stltoday.com, , January 14, 2011, http://www.stltoday.com/news/local/crime-and-courts/article_f8017690-1fe4-11e0-936e-0017a4a78c22.html]
Dec. 2010	TN	Sex	Criminal Exposure to HIV	A man was arrested for criminal exposure to HIV and aggravated statutory rape for allegedly having sex with a 16-year-old boy. Charges were dropped in February due to a lack of probably cause. [<i>Man Accused of Statutory Rape, Exposing 16-year-old boy to HIV in Memphis</i> , abc24.com, Dec. 21, 2010, http://www.abc24.com/news/local/story/Man-Accused-of-Statutory-Rape-Exposing-16-Year/iJJUEIQX_004lgc7dUOW4Q.csp]
Dec. 2010	CO	Spitting	Aggravated Assault	A man, who claimed he was HIV positive, spit on an officer's cheek and was to be charged with second degree assault. It was later determined that the man was HIV negative. Though HIV cannot be transmitted via saliva, the Boulder police department told reporters that spitting is an "extremely serious" matter for police and all officers after being spit on receive a medical check at a hospital. [Heath Urie, <i>Boulder Police: Man said he was HIV positive before spitting on officer</i> , Daily Camera, , Dec. 21, 2010, http://www.dailycamera.com/ci_16904190?source=most_viewed]
Dec. 2010	VA	Sex	Infected Sexual Battery	A HIV-positive man pleaded guilty to carnal knowledge of a child and pleaded no contest to infected sexual battery for engaging in sex with an underage girl. The girl has since tested positive for HIV. In January 2011, he was sentenced to 50 years imprisonment. [Carrie J. Sidener, <i>Amherst man found guilty in teen sex case</i> , New Era Progress, Dec. 17, 2010, http://www2.neweraprogress.com/news/amherst-news/2010/dec/17/amherst-man-found-guilty-teen-sex-case-ar-723677/ ; Scott Marshall, <i>Man sentenced to 50 years for sex with Teen</i> , neweraprogress.com, January 12, 2011, http://www2.neweraprogress.com/news/amherst-news/2011/jan/12/man-hiv-sentenced-50-years-child-sex-charges-ar-770448]
Nov. 2010	GA	Bite	Assault by an HIV infected person on an officer	A 26-year-old HIV positive man was charged with assault by an HIV infected person on an officer for allegedly biting the officer when he refused to get his fingerprints taken. The police officer's skin was not broken. [<i>HIV Positive man bites police officer</i> , WRCBtv.com, Nov. 20, 2010, http://www.wrcbvtv.com/Global/story.asp?S=13542076]
Nov. 2010	MI	Sex	Sexual Penetration of an Uninformed Partner	A man from Grand Rapids was charged with two felony counts of sexual penetration of an uninformed partner, punishable by up to four year imprisonment for each count, for allegedly having sex with two women without disclosing his HIV status. He was eventually sentenced to time already served – 181 days. [<i>GR Man sentenced for HIV sex charge</i> , wood8tv, May 10, 2011, available at http://www.woodtv.com/dpp/news/local/grand_rapids/GR-man-sentenced-for-HIV-sex-charge;_Instead_of_Jail_Time,_it_is_marriage_for_a_man_accused_of_not_informing_his_partner_he_has_AIDS , mlive.com, May 11, 2011, available at http://www.mlive.com/news/grand-rapids/index.ssf/2011/05/instead_of_jail_time_it_is_mar.html ; Lisa LaPlante, <i>HIV Positive Man charged with having sex, not telling partners of status</i> , wsbt.com, Nov, 15, 2010, http://www.wsbt.com/news/fox17-hivpositive-man-charged-with-h-111510,0,7741407.story ; Nate Reens, <i>Grand Rapids Man jailed for allegedly failing to tell his sex partners he is HIV positive</i> , The Grand Rapids Press, Nov. 15, 2010, http://www.mlive.com/news/grand-rapids/index.ssf/2010/11/grand_rapids_man_jailed_for_al.html]
Nov. 2010	GA	Sex	Reckless Conduct, HIV Infected Persons	An HIV positive man was sentenced to life imprisonment plus ten years for rape and reckless conduct for allegedly raping a woman. Under the reckless conduct charge it is a felony for HIV positive persons to have sexual intercourse without first disclosing their HIV status. [Andria Simmons, <i>HIV positive man to stand trial on rape charge</i> , Atlanta Journal Constitution, Nov. 12,

				2010, http://www.ajc.com/news/gwinnett/hiv-positive-man-to-738690.html ; <i>HIV Positive Man Gets Life Sentence for Rape</i> , Examiner.com, http://www.examiner.com/crime-in-atlanta/hiv-positive-man-get-s-life-sentence-for-rape]
Nov. 2010	NV	Sex	Intentional Transmission of HIV	Two HIV positive men were charged with intentional transmission of HIV after meeting another man through a male dating website. One of the defendant's, who has an undetectable viral load, dating profile noted that he was HIV positive and he and his co-defendant maintain that the complainant knew of their HIV positive status. Though the Nevada statute is called "intentional transmission of HIV", neither the intent to transmit nor actual transmission of HIV is required for prosecution. Conviction under the statute carries a maximum ten years imprisonment. [Interview with defendant and his attorney, names have been omitted to protect the identities of the parties (November 11, 2010)].
Nov. 2010	TN	Spitting	Aggravated assault and Criminal Exposure of Another to HIV	A man allegedly spit at a detention officer's face while he was in custody and was charged with aggravated assault and criminal exposure of another to HIV. The family of the man said that the guard used pepper spray to subdue the man, prompting the spitting and, moreover, that the man is not even HIV positive and as of July 2009 had not tested positive for HIV. [<i>Inmate charged with exposing jailer to HIV</i> , WKRN.com, Nov. 8, 2010, http://www.wkrn.com/Global/story.asp?S=13466403 ; Chris Graham, <i>Family Disputes HIV Charge</i> , The Daily Herald, Nov. 10, 2010]
Nov. 2010	MO	Spitting	Assault	A man who claims he has HIV was charged with two counts of assault for allegedly threatening and spitting on police officers. [Kathryn Wall, <i>Man claiming he has HIV charged in assault on officers</i> , News-Leader.com, Nov. 2, 2010, http://www.news-leader.com/article/20101102/NEWS01/11020343/Man-claiming-he-has-HIV-charged-in-assault-on-officers]
Oct. 2010	TN	Sex	Criminal Exposure of Another to HIV	A man was charged with five counts of criminal exposure of HIV after allegedly failing to tell three of his sexual partners that he had HIV. Two of the counts were eventually dismissed. One of the women tested positive for HIV. The man pleaded guilty to three counts of criminal exposure to HIV and was sentenced to six years of probation. [Claire Galofaro, <i>Bristol man sentenced to six years probation for knowingly exposing women to HIV</i> , TriCities.com, May 23, 2011, http://www2.tricity.com/news/2011/may/23/bristol-man-sentenced-six-years-probation-knowingl-ar-1059542/ ; Kacie Breeding, <i>Bristol Man Sentenced for Exposing Women to HIV</i> , Timesnews.net, May 23, 2011, http://www.timesnews.net/article.php?id=9032324 ; Kacie Breeding, <i>Case of Bristol man accused of exposing women to HIV postponed</i> , Timesnews.net, Jan. 28, 2011, http://www.timesnews.net/article.php?id=9029413 ; Claire Galofaro, <i>"Flipper" Sensabaugh indicted on charges of criminal exposure to HIV</i> , TriCities.com, Oct. 29, 2010, http://www2.tricity.com/business/2010/oct/29/flipper-sensabaugh-indicted-charges-criminal-expos-ar-614364/]
Oct. 2010	VA	Sex	Infected Sexual Battery	A man was charged with a class 6 felony for allegedly knowingly exposing women to HIV. [<i>Man accused of infecting women with HIV</i> , WTVR.com, Oct. 15, 2010, available at http://www.wtvr.com/news/wtvr-man-infecting-women-with-hiv-101410,0,2366386.story]
Oct. 2010	WA	Sex	First Degree Assault	A 19-year-old male college student was charged with first degree assault for having sex with girlfriend without allegedly disclosing his HIV status. [<i>HIV-Infected Man Faces Assault Counts</i> , KHQQ6.com, Oct. 13, 2010] The search warrant issued for the young man's medical records were quashed and the HIV related charges were dismissed.
Oct. 2010	WA	Sex	First Degree Assault	A 23-year-old HIV positive man was sentenced to 87 months imprisonment after pleading guilty to first degree assault charges. The man engaged in anonymous, unprotected, and undisclosed sex with a man that he met on manhunt.com. [<i>HIV positive man sentenced for assault</i> , The Spokesman Review, Oct. 12, 2010, available at http://www.spokesman.com/stories/2010/oct/12/hiv-positive-man-sentenced-assault/]
Oct. 2010	OH	Sex	Felonious Assault	A man was charged with felonious assault for allegedly failing to tell his wife that he was HIV positive. When the man was admitted to the hospital with pneumonia his doctor allegedly threatened to tell the man's wife about his HIV status if the man didn't. In January 2012 he was sentenced to three years after pleading guilty. (http://www.wkbn.com/content/news/local/story/Man-Gets-Jail-Time-for-Withholding-HIV-Status-From/bSo40XWbvUKpUyslg4lBig.cspX) [Tom Giambroni, <i>Husband Allegedly kept HIV a secret</i> , Morning Journal, Oct. 2, 2010, available at http://www.morningjournalnews.com/page/content.detail/id/526618/Husband-allegedly-kept-HIV-a-secret.html?nav=5006]

Oct. 2010	TX	Sex	Super aggravated assault (HIV as a deadly weapon)	A 32-year-old HIV positive Iraq war veteran was sentenced to three life sentences without parole for super aggravated assault of a child and continuous sexual abuse of a child. A super aggravated assault conviction requires that the jury find that the defendant used a deadly weapon, in this case HIV, during the assault. [Craig Kapitan, <i>HIV Molester Handed three life sentences</i> , Express News, Oct. 7, 2010, available at http://www.mysanantonio.com/news/local_news/molester_with_hiv_gets_life_without_parole_times_three_104532769.html?c=y&page=1#storytop]
Sept. 2010	CA	Sex	Unprotected sexual activity with the intent to expose another to HIV	A 41-year-old HIV positive man pleaded guilty to intentionally exposing his sexual partner to HIV. [Tomoya Shimura, <i>Gang Member Pleads Guilty to Spreading HIV</i> , Highdesert.com, Sept. 7, 2010, available at http://www.highdesert.com/articles/spreading-21626-vdailypress-gang-victorville.html]
Sept. 2010	UT	Sex	Enhanced penalties for HIV positive offenders	An HIV-positive sex worker was sentenced to five years imprisonment after pleading guilty to one count of third degree felony solicitation. The woman had tested positive for HIV in 2007 after her fourth prostitution conviction. She had also been imprisoned in 2008 and 2009 for prostitution. [Stephen Hunt, <i>HIV Positive Prostitute Sent to Prison</i> , Salt Lake Tribune, Sept. 17, 2010, http://archive.slttrib.com/article.php?id=11176194&itype=storyID]
July 2010	MD	Spitting	Second Degree Assault	A 44-year-old HIV positive man was sentenced to five years in prison for spitting on a police officer. Because the defendant had no teeth and often spat unintentionally it is not clear whether the man intended to spit on the police officer. [Don Aines, <i>Man with HIV who Spit on Police Officer Sentenced to Five Years</i> , Herald-Mail (Hagerstown, MD), July 26, 2010, http://www.herald-mail.com/?cmd=displaystory&story_id=249796&format=html&autoreload=true.]
June 2010	IN	Sex	"Duty to Warn Statute" Class D felony	A 19-year-old woman was charged with failing to disclose her HIV status to her 22-year-old sexual partner. In Sept. 2010 she pleaded guilty and was originally sentenced to 222 days imprisonment but eventually had the prison time negated. As part of her probation, she must complete sex offender counseling, avoid internet use, and not possess any pornography. [<i>No prison for teen's lie about HIV, sex</i> , JOnline.com, Oct. 13, 2010, http://www.wthr.com/global/story.asp?s=12655922]
May 2010	OK	Spitting	Spreading Infectious Disease and Knowingly Engaging to Transfer HIV	A man claiming to be HIV positive was booked on four felony complaints after moving his head to throw blood at emergency medical workers. He is also alleged to have spit blood at the workers during his rescue and treatment for injuries from a fire. [Shannon Muchmore, <i>Man Who Says He Has HIV Allegedly Spits on Emergency Workers</i> , Tulsa World, May 23, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20100523_298_0_Amanwh547994]
May 2010	AR	Spitting	Aggravated assault and exposing another to HIV.	A 41-year old, HIV+ man was arrested after spitting blood at a police officer. He is currently facing charges of aggravated assault and exposing another to HIV. [Gavin Lesnick, <i>HIV-positive Man Spits Blood at Police Officer, report says</i> , ArkansasOnline.com, May 12, 2010, http://www.arkansasonline.com/news/2010/may/12/hiv-positive-man-spits-blood-officer-report-says/?latest]
May 2010	MI	Biting	Bioterrorism	A HIV+ man was charged with bioterrorism for biting his neighbor during an argument. The man eventually pleaded guilty to an assault charge and was given probation by the judge. [<i>HIV-positive man tied to bioterrorism charge gets probation</i> , Free Press, Christina Hall, Dec. 8, 2010, http://www.freep.com/article/20101208/NEWS04/101208026/1320/HIV-positive-man-sentenced-in-biting]
Mar. 2010	TX	Sex	Aggravated Sexual Assault of a child.	A 49-year-old HIV+ man, who was aware of his HIV status, was charged with having unprotected sex with a minor. The charge became "aggravated" because of his HIV status, making it a felony. [Houston Chronicle 3/22/10, http://www.chron.com/news/houston-texas/article/In-1st-for-Harris-Co-HIV-deemed-deadly-weapon-1714831.php]
Mar. 2010	MN	Sex	Assault	A 28-year-old HIV+ man was charged with assault after failing to tell his partners his HIV status prior to having unprotected consensual sex. One partner tested positive for HIV. [Star Tribune 3/24/10]
Mar. 2010	AR	Sex	Knowingly Exposing Another to HIV	A 33-year-old HIV+ man was arrested for having unprotected sex with a woman, knowing he had HIV, and failing to inform her of his illness. Woman has now tested positive for HIV. Pled not guilty; sentenced to 20 years in prison. [Times Record Online 3/11/10, http://www.swtimes.com/news/article_65cead58-2a9f-51f9-b9be-3fd6c779af14.html]
Mar. 2010	MI	Sex	Failing to Disclose HIV Status to Sexual Partner	A 54-year-old HIV+ woman allegedly failed to tell her sexual partner that she had HIV. She was sentenced to 11 months in prison. [The Michigan Messenger 3/11/10]

				http://michiganmessenger.com/35670/isabella-county-woman-charged-with-failing-to-disclose-her-hiv-positive-status-to-sex-partner
Mar. 2010	MD	Sex	Knowingly Exposing Others to HIV	A 29-year-old HIV+ man was sentenced to 18 months in prison after he knowingly exposed an 18-year-old woman to the HIV virus. [Gazette.net 3/10/10]
Mar. 2010	NJ	Sex	Third Degree Diseased Person Charge (HIV Specific)	A 20-year-old HIV+ man charged with having "high risk sexual behavior" with a female without her informed consent. [LehighValleyLive.com 3/10/10]
Mar. 2010	OH	Sex	Loitering to Engage in Sexual Activity Being HIV Positive and Soliciting with Previous Conviction Being HIV Positive	A 38-year-old HIV+ woman was charged with attempted solicitation. [Chicago Tribune 3/10/10]
Mar. 2010	IN	Donating Plasma	Donating Plasma when Knowing HIV+ Status	A 39-year-old HIV+ woman plead not guilty to donating plasma in 2008, though she had been diagnosed with HIV since 2005. [Chicago Tribune 3/9/09]
Feb. 2010	FL	Sex	Failing to Disclose HIV Status to Sexual Partner	A 45-year-old HIV+ man pleaded not guilty to a first degree felony charge for allegedly failing to tell his sexual partner that he was HIV positive. [POZ 2/24/10]
Feb. 2010	IN	Sex	Failure of Carriers Duty to Warn	A 47-year-old HIV+ man had sexual relations with several woman without telling them he was HIV+. He plead guilty to two counts, and was sentenced to 18 months on Dec. 12, 2011. He was sentenced for another 14 counts in April 2012 and received 7 ½ years in jail. [http://www.abc57.com/video/Indiana-man-behind-bars-for-infecting-partners-with-HIV-135545753.html]
Dec. 2009	IA	Sex	Criminal Transmission of HIV (transmission need not occur)	A 38-year-old HIV+ man was charged with a felony after he allegedly failed to tell his sexual partner is HIV status. [http://wcfcourier.com/news/local/747c123c-001cc4c002e0.html 12/23/09]
Nov. 2009	MI	Sex	AIDS-sexual penetration with an Uninformed Partner	A 21-year-old HIV+ man had consensual sexual relations; pled guilty and sentenced to 9 months in jail. [Midland Daily News 11/18/2009]
Nov. 2009	SC	Sex	Knowingly Exposing Another to HIV	A man was sentenced for knowingly exposing his wife to HIV; sentenced to 6 years in prison. Wife did not contract HIV. [The Augusta Chronicle 9/14/09]
Nov. 2009	TX	Sex	Aggravated sexual assault with deadly weapon	A 26-year-old man was charged with aggravated sexual assault with deadly weapon (HIV being the deadly weapon) after allegedly having unprotected sex with a 16-year-old. [http://www.kxxv.com/Global/story.asp?S=11436836] He pleaded guilty in June 2010, and received a 15 year prison sentence in August 2010. [http://www.kxxv.com/global/story.asp?s=12977817]
Oct. 2009	SC	Sex	Knowingly Exposing Another to HIV	A 24-year-old HIV positive man exposed another to HIV. [WMFBNews.com 10/27/09]
Oct. 2009	PA	Spitting	Aggravated Assault (HIV and prisoner specific)	A HIV and Hepatitis C positive woman was charged after she spit in the face of another inmate; sentenced to 21 months to 10 years in prison. [citizensvoice.com 10/15/09] [Wyoming County Press Examiner 9/9/09]
Oct. 2009	VA	Sex	Aggravated Assault (HIV Specific). Court Martial (Military)	Two women, including ex-wife, chose to have consensual, unprotected sex with a Military Officer, knowing that he had HIV. The man was sentenced to 3 months in confinement and a bad conduct discharge after pleading guilty to two counts of aggravated assault and disobeying an order. The order was for him to have sex only with the use of protection. Neither woman contracted HIV. [Virginian Pilot 10/7/09]
Sept. 2009	IL	Sex	Criminal Transmission of HIV	A 42-year-old HIV+ man had sex with a 19-year-old woman with allegedly failing to inform the woman that he was HIV+. Unknown if the woman has tested positive for HIV. Criminal statute applies even if the sex partner is not subsequently infected with HIV. [Journal Gazette Times Courier 9/21/09] Pled Guilty; sentenced to 6 years in prison. [Herald Review 2/6/10]
Sept. 2009	ID	Sex	Knowingly Exposing Another to HIV	A 44-year-old HIV+ man pleaded guilty to two felony charges of exposing women to HIV. Sentenced to 30 years in prison with the possibility of parole after 20 years. At least one woman was not infected with HIV. [Idahostatesman.com 9/17/09]
Sept. 2009	OH	Sex	Loitering to Engage in Prostitution with the Knowledge that He/She Has Tested Positive for HIV	A 25-year-old HIV+ man was arrested for prostitution. It was later discovered that the man knew he was HIV positive. [Dayton Daily News 9/11/09]

Sept. 2009	SC	Sex	Knowingly Engaging in Sexual Intercourse without Disclosing HIV Status	A 35-year-old HIV+ man had sexual relations with a woman without telling her that he was HIV positive. [WMBFNews.com 9/11/09].
Sept. 2009	TN	Spitting	Criminal Exposure to HIV	A HIV+ man spit blood at a police officer while being arrested for burglary. [Chicago Tribune 9/4/09] [myeyewitnessnews.com 9/3/09]
Aug. 2009	GA	Biting	Aggravated Assault	A 42-year-old, HIV+ man was sentenced to 18 months for aggravated assault after he bit an Atlanta police officer. He allegedly shouted "I have full-blown AIDS" and bragged that he had infected the officer. The police officer did not test positive for HIV. [Stephanie Ramage, <i>Too Lenient?</i> , SundayPaper.com, Aug., 30, 2009, http://www.sundaypaper.com/DesktopModules/DnnForge%20%20NewsArticles/Print.aspx?tabid=98&tabmoduleid=940&articleid=4452&moduleid=922&PortalID=0]
Aug. 2009	FL	Biting	Aggravated battery on a law enforcement officer (not HIV-specific) [Originally charged with attempted murder]	35-year-old HIV+ man bit a police officer and drew blood while trying to avoid being arrested; officer tested negative; sentenced to 15 years. [Miami Herald 8/26/09]
Aug. 2009	FL	Sex	Committing Prostitution while HIV Positive (3 rd Degree Felony with possibility of maximum of 5 years in prison)	A 32-year-old woman was arrested for working as a sex worker while she knew she was HIV positive. [Palm Beach Post 8/21/09]
Aug. 2009	FL	Sex	Failing to Inform a Sexual Partner of One's Known HIV Status	A 39-year-old HIV+ woman was arrested for having unprotected sex with a man without disclosing her HIV status. [http://www.ocala.com/article/20090814/ARTICLES/9081499718/14/09]
Aug. 2009	MN	Sex	Knowing transfer of communicable disease	39-year-old HIV+ man had sex with girlfriend w/o disclosing his HIV status; girlfriend tested negative; ex-wife tested positive[Duluth News Tribune 8/11/09]; pled guilty; sentenced to 90 days in jail. [POZ Magazine 10/29/09]
July 2009	AR	Sex	Knowing exposure to HIV	A 29- year-old man was arrested for raping a child and knowingly exposing the child to HIV. http://www.fox16.com/news/local/story/Man-charged-with-knowingly-exposing-child-to-HIV/Bn1fSMFQ5UCN9yFeHO1H0Q.csp
July 2009	SC	Biting	Assault and Intent to Kill	A 41-year-old HIV positive man was charged with assault and intent to kill after biting his neighbor. An original charge of simple assault was upgraded after it was discovered that the assailant was HIV positive. This case is pending. [Greg Suskin, <i>Charges Upgraded Against HIV Positive Man After Fight</i> , wsocvtv.com, July 29, 2009, http://www.wsocvtv.com/news/20147162/detail.html]
July 2009	WA	Sex	Assault (HIV-specific)	An HIV+ man had unprotected sex with other men w/o disclosing his HIV status; pending. [The Spokesman-Review 7/15/09]
July 2009	OR	Sex	Assault and attempted assault (not HIV-specific)	21-year-old HIV+ man had unprotected sex with woman w/o disclosing his HIV status; pled guilty; woman tested positive for HIV; sentenced to 2 yrs in prison, 3 yrs post-prison supervision, sex offender evaluation [The Oregonian 7/17/09]
July 2009	VT	Spitting	Aggravated assault against a police officer	31-year-old HIV+ man spat on police officer while being restrained for treatment after police responded to possible drug overdose; pending [Times Argus 7/30/09]
June 2009	KS	Sex	Exposing another to a life-threatening communicable disease	Kansas Supreme Court reversed convictions for exposing another to a life-threatening communicable disease, finding that the prosecution failed to prove that defendant intended to expose the complainants to HIV. [State v. Richardson, 209 P.3d 696 (Kan. 2009)]
June 2009	NC	Biting	Assault inflicting serious bodily injury & assault with a deadly weapon	A 45-year-old HIV+ man cut a police officer's thumb and bit the police officer's ear during an altercation; pending [<i>Man Used His HIV as weapon, police say</i> , News and Observer, June 21, 2009, http://www.newsobserver.com/2009/06/22/81920/man-used-his-hiv-as-weapon-police.html#storylink=misearch]
June 2009	NY	Spitting	Aggravated assault on a police officer by means of a dangerous weapon (saliva)	HIV+ man allegedly bit police officer while being subdued for erratic behavior after learning HIV diagnosis; took 10-year plea deal & reserved right to appeal; HIV-related conviction vacated on appeal in 2012 after serving 5 years [Information from defendant and defense counsel] http://www.lambdalegal.org/news/ny_20120607_high-court-rejects
June 2009	OH	Spitting	Harassment by inmate (HIV-specific; not limited	HIV+ man spat on police officer and EMT while being subdued for erratic behavior after suicide attempt; attorney challenged validity of statute; pled no contest; sentenced to 60 days house

			to inmates)	arrest in Sept. 2009 [Information from defense counsel]
May 2009	AR	Sex	Knowingly transmitting AIDS, HIV	17-year-old HIV+ teenage boy had sex with teenage girl w/o disclosing his HIV status; being tried as an adult; sentenced to 180 months, currently serving http://www.nwaonline.com/news/2009/dec/22/man-18-pleads-guilty-exposing-five-girls--20091222/
May 2009	OH	Sex	Felonious assault (HIV-specific)	HIV+ man had sex with woman without disclosing his HIV status; appeal pending; attorney challenged constitutionality of statute [Information from defense counsel]
May 2009	TX	Sex	Aggravated assault (not HIV-specific). Assault with a deadly weapon.	53-year-old HIV+ man had sex with multiple women w/o disclosing HIV status; at least 6 women tested positive for HIV [Dallas Morning News 5/28/09]; sentenced to 5 45-yr and 1 25-yr prison terms [Dallas Morning News 5/30/09] http://abcnews.go.com/2020/story?id=7696939&page=1
May 2009	FL	Sex	Unlawful acts (HIV-specific)	HIV+ woman had sex with multiple men w/o disclosing her HIV status; records sealed http://www.tcpalm.com/news/2009/feb/28/hiv-positive-kissimmee-woman-arrested-after-sex-me/?print=1; http://www.theledger.com/article/20090517/reporter/905185010?p=2&tc=pg
May 2009	IA	Sex	Criminal transmission of HIV (transmission need not occur)	HIV+ man had sex one time with man he met online; was under influence of drugs during sex; condom was used for anal but not oral sex; other man not HIV+ after testing; received 25-year sentence & must register as sex offender [wfcourier.com 5/2/09]; later released on 5 yrs probation after reconsideration hearing on Sept. 11, 2009 [accesslineiowa.com 9/14/09]; the HIV+ man is now listed as a sex offender.
April 2009	TN	Sex	Aggravated prostitution	A 28-year old HIV+ woman was arrested for the third time for prostitution while HIV positive. She is registered as a sex offender, which also bars her from drug treatment programs. She served 2 ½ years for this offence. http://www.knoxnews.com/news/2009/jun/30/hiv-positive-knoxville-woman-a-walking-felony/
April 2009	MI	Sex	Sexual penetration w/ knowledge of AIDS or HIV infection	An HIV+ woman employed at a dance club had sex w/ multiple partners w/o disclosing her HIV status; sentenced to 16 mos. to 20 yrs; HIV-related charges later dropped, served time for drug charges http://www.nilesstar.com/2009/09/21/escape-reality-dancer-star-gets-up-to-20-years/
Jan. 2009	GA	Sex	Reckless conduct by HIV infected persons	38-year-old HIV+ man had sex with a woman w/o disclosing his HIV status; woman agreed to unprotected sex with man who lived in housing program for people with HIV; woman tested negative; pleaded guilty; sentenced to 2 yrs in prison and 8 yrs probation [macon.com 1/13/09] http://www.macon.com/2009/01/13/584845/hiv-positive-man-sentenced-for.html
Dec. 2008	MI	Sex	Failing to Disclose HIV Status to Sexual Partners	A 36-year-old HIV+ woman pleaded guilty to failing to inform her sexual partners of her HIV status. She was sentenced to time already served, 68 days. [mlive.com 12/10/08] http://www.mlive.com/news/kalamazoo/index.ssf/2008/12/hivpositive_woman_gets_jail_pr.html
Dec. 2008	CO	Sex	Child abuse resulting in serious injury (not HIV-specific)	33-year-old HIV+ man had sex with pregnant fiancée w/o disclosing his HIV status; both mother and baby tested positive for HIV [GJSentinel.com 12/23/08]; sentenced to 15 yrs in July 2009 [GJSentinel.com 7/18/09] http://www.kjct8.com/news/GJ-Man-Accused-Of-Infecting-Fiance-Son-With-HIV-/163152/441930/-/mh8pogz/-/index.html
Dec. 2008	NE	Sex	Manufacturing child pornography (not HIV-specific)	48-year-old HIV+ man had consensual sex with 17-year-old boy w/o disclosing his HIV status; videotaped sexual encounter; boy tested positive for HIV; sentenced to 20 years (cut to 10 per state sentencing guidelines) [Omaha World Herald 12/22/08]
Oct. 2008	OK	Biting	Knowingly Engaging to Transfer HIV	A 50-year old, HIV positive woman was arrested in October 2008 after biting a security guard and attempting to spread the virus; convicted, released 12/10/2010 [Jay Marks, <i>HIV-positive Woman Faces Felony for Bite</i> , NewsOk, Oct. 8, 2008, http://newsok.com/hiv-positive-woman-faces-felony-for-bite/article/3308838] http://www.tulsaworld.com/news/article.aspx?subjectid=12&articleid=20081008_12_OKLA158171&allcom=1
Oct. 2008	MS	Sex	Endangerment by bodily substance (HIV-specific)	HIV+ African-American woman had sex with white husband over many years w/o disclosing her HIV status; husband alerted police when woman tried to get custody of son in divorce proceeding; husband and son both tested negative; pled guilty; 10-year sentence w/ 9 suspended; one year house arrest [Clarion Ledger 5/16/08, 10/7/08]
Oct. 2008	KY	Sex	Rape; Sodomy	The Kentucky Supreme Court held that a defendant's HIV status may be considered during the sentencing portion of a trial. [Torrence v. Commonwealth, 269 S.W.3d 842 (Ky. 2008)]
Sept. 2008	GA	Sex	Reckless Conduct	A woman was sentenced to 8 years imprisonment for failing to disclose her HIV status to her

				sexual partners. She argued that her sexual partner must have known of her HIV status because it had been published on the front page of the local newspaper; currently serving 8 year sentence-- release expected 11/2013 [Ginn v. State, 667 S.E.2d 712 (Ga. Ct. App. 2008)] http://caselaw.findlaw.com/ga-court-of-appeals/1295814.html
Sept. 2008	MI	Sex	Sexual penetration w/ knowledge of AIDS or HIV infection	A 32-year-old HIV+ man had sex with two women w/o first disclosing his HIV status; HIV status of women unknown. [mlive.com 9/5/08] He was sentenced to 2 months in jail. [mlive.com 2/3/09] http://www.mlive.com/news/kalamazoo/index.ssf/2009/02/kalamazoo_man_with_hiv_who_had.html
Aug. 2008	NC	Sex	Charges Related to Controlling the Spread of HIV	A 23-year-old, HIV+ man was sentenced to 30 months of probation for having unprotected sex with numerous partners. He was later sentenced to six months of house arrest for further acts of unprotected sex. [Gay DJ put on house arrest for second HIV violation, Wral.com, Oct. 21, 2008, http://www.wral.com/news/news_briefs/story/3781930/]
Aug. 2008	FL	Biting	Criminal Transmission of HIV	A 25-year-old woman was sentenced to 5 years in prison for battery on a law enforcement officer, and resisting arrest with violence, with increased penalties because a Florida law makes it a third degree felony for HIV positive defendants to transfer body fluids during a violent act. Due to PTSD she reacted violently while being arrested. She was diagnosed with cancer four months into her sentence, and after a prolonged public campaign was released in January 2011 to die at home. http://www.miamiherald.com/2011/01/06/2002703/dying-broward-inmate-granted-conditional.html]
Aug. 2008	NH	Spitting	Simple assault	24-year-old man of unknown HIV status spat in police officer's face; sentenced to 2-5 yrs in prison; required to pay for officer's HIV test and apologize to officer [The Citizen of Laconia 8/11/08]
July 2008	GA	Spitting	Aggravated assault (not HIV-specific)	43-year-old HIV+ woman spat in face of other person; allegedly yelled, "I hope you get AIDS"; sentenced to 3 yrs [Ledger-Enquirer 7/22/08] http://www.ledger-enquirer.com/2008/07/22/378521/hiv-positive-woman-gets-3-years.html
June 2008	MD	Biting	Knowingly transfer or attempt to transfer HIV	44-year-old HIV+ man bit police officer while being arrested on warrant; officer tested negative for HIV; sentenced to 18 years [gazette.net 6/4/08]
June 2008	ID	Sex	Transferring body fluids containing HIV	An HIV+ man was convicted of transferring body fluids containing HIV after he performed oral sex on complainant. The court refused to take into consideration evidence of the scientific unlikelihood of HIV transmission through male-to-female oral sex; currently serving 4 years on each of 11 counts (sentenced to 44 years total) http://caselaw.findlaw.com/id-supreme-court/1024756.html [State v. Mubita, 188 P.3d 867 (Idaho 2008)]
May 2008	TX	Spitting	Harassing a public servant (not HIV-specific) with deadly weapon (saliva)	42-year-old HIV+ homeless man spat on police officer during arrest for public intoxication; sentenced to 35 years (25-year minimum under habitual offender law); must serve at least half because of deadly weapon finding; waived right to appeal [NY Times 5/16/08] http://www.nytimes.com/2008/05/16/us/16spit.html , information from defense counsel]; Unpublished decision on appeal of deadly weapon finding (denied), 2009 WL 2025344 (Tex. App. 2009)
May 2008	TX	Biting	Aggravated robbery (not HIV-specific)	26-year-old HIV+ man bit security guard after being stopped for shoplifting; outcome unknown [nbc5i.com 5/31/08]
May 2008	AR	Sex	Knowingly transmitting AIDS (text of statute refers to exposure)	33-year-old HIV+ man had sex with girlfriend and another woman w/o disclosing his HIV status; both women tested negative for HIV; sentenced to 12 years and must register as sex offender [The Morning News 5/1/08] reposted at http://criminalhivtransmission.blogspot.com/2008/05/33-year-old-arkansas-man-who-pleaded.html
April 2008	KY	Biting	Wanton endangerment (not HIV-specific)	HIV+ woman bit store clerk while robbing store; clerk tested negative for HIV; sentenced to 12 years total, 2 of which was for wanton endangerment [HIV-Positive Robber Receives 12 year prison sentence, wkytv.com, April 8, 2008, available at http://www.wkyt.com/home/headlines/17382524.html]
Mar. 2008	SC	Sex	Exposing others to HIV	39-year-old HIV+ man had sex with girlfriend w/o disclosing his HIV status; girlfriend tested positive for HIV during prenatal visit; pled guilty; sentenced to 4 years; released 9/23/2008 [goupstate.com 3/21/08] http://www.goupstate.com/article/20080321/NEWS/803210376

Feb. 2008	MO	Sex	Prohibited acts (HIV-specific)	43-year-old HIV+ man had sex with a woman w/o disclosing his HIV status; outcome unknown http://www.ksdk.com/news/story.aspx?storyid=140165
Jan. 2008	KS	Sex	Exposing another to a life threatening communicable disease (not HIV-specific)	HIV+ man had sex with two women w/o disclosing his HIV status; defendant thought he posed no risk b/c infection was "under control" w/ meds; both women tested negative for HIV; sentenced to 32 months for each of two counts; received parole in June 2011 [Emporia Gazette 1/17/08]; conviction reversed by Kansas Supreme Court on 6/19/09 on specific intent issue, <i>State v. Richardson</i> , 209 P.3d 696 (Kan. 2009) http://www.emporiagazette.com/news/2008/jan/17/robert_richardson_sentenced_hivexposure_case/

HIV CRIMINALIZATION FACT SHEET

MOST STATES HAVE TARGETED HIV POSITIVE INDIVIDUALS FOR CRIMINAL LIABILITY BASED ON THEIR HIV STATUS

- Thirty-two (32) states and two (2) U.S. territories explicitly criminalize HIV exposure through sex, shared needles or, in some states, exposure to “bodily fluids” that can include saliva. At least thirty-five (35) states have singled out people who have tested positive for HIV for criminal prosecution or enhanced sentences, either under HIV-specific criminal laws or under general criminal laws governing crimes such as assault, attempted murder or reckless endangerment.
- Proof of intent to transmit HIV, or actual transmission, typically are not elements of these prosecutions.
- Spitting and biting, which pose no significant risk of HIV transmission, have resulted in criminal convictions and severe sentences despite the absence of HIV transmission in these cases.
- Disclosure is often the only affirmative defense to prosecution, but typically is difficult to prove. Condom use is rarely a defense.
- The common factor in all of these cases is that the criminal defendant knew her/his HIV status.
- Also common to these cases is severe ignorance of the routes and actual risk of HIV transmission in varying circumstances, and grossly exaggerated characterizations of the risk of harm defendants pose.

CRIMINALIZATION HAS NO EFFECT ON BEHAVIOR & UNDERMINES PUBLIC HEALTH GOALS

- Studies show that the criminalization of HIV exposure has no effect on risk behavior.
- HIV criminalization can discourage individuals from seeking testing and treatment because a positive test result subjects a person to criminal liability for otherwise non-criminal conduct.
- Health care providers frequently are forced to disclose HIV-related medical records, including documentation of private communications, as part of a criminal investigation or trial, interfering with the physician-patient relationship and delivery of health services and generating mistrust among patients.
- In some states, health officials actually participate in creation of evidence that can be used against individuals with HIV, by requiring them to sign forms acknowledging criminal liability if they engage in certain otherwise-legal conduct.
- Sex between two consenting adults is a shared decision; the responsibility for protection against disease should not be borne by one partner. Placing exclusive responsibility on the person living with HIV undermines public health messages that everyone should take responsibility for individual sexual health.
- Criminalization further stigmatizes an already marginalized population, and reinforces ignorance and unfounded beliefs about the routes and actual risks of HIV transmission.

HIV PROSECUTIONS DISCRIMINATE AGAINST HIV POSITIVE PERSONS

- Charges for HIV exposure often are accompanied by sensationalist media coverage, which often includes disclosure of the HIV positive person’s identity, disclosing the person’s HIV status not only to the individual’s community but also, with the internet, to the world.
- Sentences for people convicted of HIV exposure are typically very harsh and grossly disproportionate to any actual or potential harm, perpetuating the misconception that people with HIV are toxic, highly infectious and dangerous.
- HIV positive persons increasingly are forced to register as sex offenders after conviction, leading to a host of life-long problems with future employment, living conditions, and the right to privacy.

- HIV exposure laws are applied unfairly and selectively, targeting those who are socially and economically marginalized, such as sex workers, while those with other STIs or infectious diseases are not targeted.