

Idaho

Analysis

People living with HIV (PLHIV) can face felony charges for failure to disclose HIV status to sexual partners.

In Idaho it is against the law for PLHIV to engage in sex without first disclosing their HIV status to their partners. It is a felony, punishable by up to 15 years in prison and/or a \$5,000 fine, for a PLHIV to expose another person in “any manner with the intent to infect.”¹ Where intent to transmit disease is present, exposure by any means is sufficient for prosecution. As drafted, the statute may criminalize conduct that poses no risk of HIV transmission, such as a PLHIV spitting at another individual, so long as there is intent to transmit disease.²

It is also a felony for a PLHIV who is aware of their HIV status to transfer or attempt to transfer any body fluid, body tissue, or organs to another person.³ “Body fluid” includes semen, blood, saliva, vaginal secretion, breast milk, and urine.⁴ “Transfer” is also defined broadly as including genital-genital contact, oral-genital contact and anal-genital contact.⁵ The statute criminalizes exposure to bodily fluids that are known not to transmit HIV (saliva, urine) as well as activities that involve “little to no risk” of HIV transmission, such as oral sex.⁶

Actual transmission is not required for prosecution, under either the exposure with intent to transmit or the transfer of body fluids with non-disclosure of HIV status statutes. It is an affirmative defense if the defendant can prove that the sexual activity was consensual and their partner was informed “of the risk of such activity.”⁷ Disclosing one’s HIV status to a partner without also informing them of the risk presented by the activity is not a sufficient defense on the face of the statute. The use of condoms or other protection is not a defense. PLHIV prosecuted under the statute also have an affirmative defense if it can be demonstrated that a licensed physician informed the defendant that they were

¹ IDAHO CODE ANN. § 39-608(1) (2016).

² CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from being spit on or scratched by an HIV-infected person?*, (Nov. 10, 2016) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 11, 2016) (stating that HIV cannot be spread through saliva or from being scratched by a PLHIV)

³ IDAHO CODE ANN. § 39-608(1) (2016).

⁴ IDAHO CODE ANN. § 39-608(2)(a) (2016).

⁵ IDAHO CODE ANN. § 39-608(2)(b) (2016).

⁶ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can I get HIV from Oral Sex?*, (Nov. 10, 2016) available at <http://www.cdc.gov/hiv/basics/transmission.html> (last visited Dec. 11, 2016) (stating that “there’s little to no risk of getting or transmitting HIV through oral sex.”)

⁷ IDAHO CODE ANN § 39-608(3)(a) (2016).

“noninfectious” prior to the transfer of body fluids, tissues, or organs.⁸ This defense may be applicable for a defendant who is counseled by a physician that they are virally suppressed prior to sexual activity.

Whether or not disclosure of HIV status actually occurred is challenging for a defendant to prove—typically the only available evidence is the conflicting testimony of the defendant and the complainant. In *State v. Thomas*, a PLHIV appealed his conviction and 15 year sentence for not disclosing his HIV status before engaging in oral and anal sex, though he did not ejaculate.⁹ At trial, the defendant had questioned his accuser’s credibility, presenting evidence of her drug use, psychological problems, reputation for “untruthful and dramatic” behavior, and alcohol consumption prior to sex with him that could have undermined her recall of the evening’s events.¹⁰ Friends of the complainant, however, testified that they could hear the sexual encounter, saw the defendant leave the residence, and that the complainant was very upset when they informed her of defendant’s HIV status.¹¹ 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 competent evidence presented to support the jury’s verdict finding [the defendant] guilty”¹²

In 2009, over a decade after his 1996 conviction, the defendant in *State v. Thomas* pled guilty to two more counts of criminal transfer of body fluids.¹³ The deputy prosecuting attorney chastised the defendant for potentially giving his sexual partners a “death sentence”¹⁴ and Thomas received 30 years in prison with ten years fixed.¹⁵ The complainant in the case did not test positive for HIV, though whether transmission of HIV occurred is irrelevant under the statute.¹⁶ The defendant later tried to withdraw 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.¹⁷

Prosecutions of PLHIV under Idaho’s transfer of bodily fluids statute include:

- In December 2013, a 40-year-old PLHIV was charged with transfer of bodily fluids which may contain HIV for allegedly failing to disclose his status to a sexual partner.¹⁸
- 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.¹⁹

⁸ IDAHO CODE ANN. § 39-608(3)(b) (2016).

⁹ *State v. Thomas*, 983 P.2d 245, 246-47 (Idaho Ct. App. 1999).

¹⁰ *Id.* at 247.

¹¹ *Id.* at 248.

¹² *Id.*

¹³ 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>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *State v. Thomas*, 297 P.3d 268, 271 (Idaho Ct. App. 2013).

¹⁸ 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>.

¹⁹ 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.

Though the defendant 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 defendant in fact believed at the time of the sexual encounters that he had HIV and was required to disclose this information.²⁰ The defendant made an Alford plea, under which he maintained his innocence but acknowledged that a jury would likely find him guilty.²¹ Under the terms of his plea, the man received five to 15 years in prison for the transmission charge and associated violation of his probation.²²

- In May 2012, a 37-year-old PLHIV was charged with knowingly exposing another to HIV after he allegedly failed to disclose his status to two sexual partners.²³
- In September 2010, a 31-year-old PLHIV was charged with knowingly transferring bodily fluids and failing to disclose his status to sexual partners he met through the Internet.²⁴ He later pled guilty and was sentenced to 15 years in prison.²⁵

PLHIV have also been prosecuted under Idaho's statute for engaging in acts that are not known to transmit HIV. In *State v. Mubita*, a man living with HIV appealed his conviction for 11 counts of transferring bodily fluids which may contain HIV and resulting 44-year sentence.²⁶ His crimes included performing oral sex on his female partner and ejaculating on her thigh.²⁷ On appeal, defendant argued that it was factually impossible to violate the purpose of Idaho's HIV criminal exposure statute by engaging in oral sex, since the Idaho legislature intended to criminalize "behavior which may result in the spread of HIV or AIDS"²⁸ and a PLHIV performing oral sex poses little or no risk of transmitting HIV.²⁹ The Supreme Court of Idaho 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 define[d] 'body fluid' to include saliva."³⁰

Idaho's definition of bodily fluids, which includes saliva and urine, disregards scientific fact surrounding the risks of HIV transmission, only adding to public confusion concerning how the disease is transmitted

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Meridian man charged with exposing others to HIV*, IDAHO PRESS-TRIBUNE May 28, 2012, available at http://www.idahopress.com/news/state/meridian-man-charged-with-exposing-others-to-hiv/article_cee48871-7eef-5de5-b196-bf6bc8997696.html.

²⁴ *Boise man charged with transferring HIV*, IDAHO PRESS-TRIBUNE, Sept. 14, 2010, available at http://www.idahopress.com/news/article_bbf676ac-c032-11df-9d38-001cc4c002e0.html.

²⁵ *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.

²⁶ 188 P.3d 867, 871 (Idaho 2008).

²⁷ *Id.* at 882-83.

²⁸ *Id.* at 881-82.

²⁹ *Id.*

³⁰ *Id.* at 883 (Note that the established rule of statutory construction relied upon in *Mubita* was subsequently overruled in *Verska v. St. Alphonsus Reg'l Med. Ctr.* In that case, the Court clarified that its role is not to determine whether an "unambiguous statute [is] palpably absurd" in its assessment of a statute's meaning. 151 Idaho 889, 895-96 (Idaho 2011) In *Mubita*, the Court merely confirmed that oral sex was unambiguously included in the statute without reaching the question of whether that was a "palpably absurd" result. 188 P.3d 867, 882-83 (Idaho 2008).

and worsening the stigma faced by people living with HIV.³¹ It ignores the fact that the CDC has long maintained that saliva and urine do not transmit HIV.³² 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 constitute "transfer" of bodily fluids.³³

Sharing needles/syringes is a felony for PLHIV.

Idaho's HIV statute specifically targets intravenous drug users and others who share their needles and syringes. It is a felony, punishable by up to 15 years in prison and/or a \$5,000 fine, for a PLHIV who knows their HIV status to "transfer" bodily fluids by allowing others to use their hypodermic syringes, needles, or similar devices without sterilization.³⁴

Neither the intent to transmit HIV nor actual transmission is required for prosecution. Unlike those charged for transfer of bodily fluids that occurs via sexual activity under the law, disclosure of HIV status is not a defense for individuals charged with sharing a syringe.³⁵ A PLHIV sharing unsterilized needles or syringes only has a defense to prosecution if they can prove that a licensed physician advised them that they were "noninfectious."³⁶

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

It is a felony, punishable by up to 15 years in prison and/or a \$5,000 fine, for a PLHIV who knows their HIV status to give blood, semen, organs, or body tissues to any person, blood bank, hospital, or medical facility for the purposes of transfer to another person.³⁷ Neither the intent to transmit HIV nor actual transmission is required. However, a PLHIV donating blood, semen, organs, or body tissues does have an affirmative defense if they can prove that the donation(s) occurred after a licensed physician advised that they were "noninfectious."³⁸

A person with venereal disease, including HIV, can be prosecuted for exposing another to the risk of transmission.

Under Idaho's public health code it is a unlawful for a person with a venereal disease to knowingly expose another person to that disease.³⁹ The code defines venereal disease to include syphilis, gonorrhea, HIV, chlamydia, and hepatitis B.⁴⁰ However, the statute only references exposing another to syphilis, gonorrhea or chancroid as a misdemeanor offense ; if found guilty an individual can face up to

³¹ 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. 11, 2016) (noting that HIV can only be transmitted through certain fluids: blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, and breast milk).

³² *Id.*

³³ IDAHO CODE ANN. §§ 39-608(2)(a), 39-608(2)(b) (2016).

³⁴ IDAHO CODE ANN. §§ 39-608(1), 39-608(2)(b) (2016).

³⁵ IDAHO CODE ANN. § 39-608(3)(a) (2016).

³⁶ IDAHO CODE ANN § 39-608(3)(b) (2016).

³⁷ IDAHO CODE ANN § 39-608(2)(b) (2016).

³⁸ IDAHO CODE ANN § 39-608(3)(b) (2016).

³⁹ IDAHO CODE ANN §§ 39-601, 39-607 (2016).

⁴⁰ IDAHO CODE ANN § 39-601(2016).

six months' imprisonment and/or a fine of up to \$300.⁴¹ Unlike Idaho's felony exposure statute, disclosure is not a defense to prosecution; and neither the intent to transmit disease nor actual transmission is required.

Although hepatitis B and chlamydia are both defined as a venereal disease, the Idaho code is otherwise silent about the penalty for a person with hepatitis B who knowingly exposes another to the disease..⁴²

Persons with venereal disease also may be subject to restrictive measures, including mandatory examination, treatment, isolation and quarantine.

A public health official may require that a person "known or suspected to be infected with venereal disease" undergo mandatory examination or treatment if "in their judgment it is necessary to protect the public health."⁴³ Mandatory treatment may continue until a person is "cured,"⁴⁴ which makes it unclear how the statute would apply to a person with HIV or any other condition that cannot be eliminated or rendered completely non-infectious.

Health officials also have the power to impose isolation or quarantine on an individual with venereal disease if deemed "necessary to protect the public health."⁴⁵ The statute does not enumerate any procedural safeguards for a person subject to these kinds of measures and the authors are not aware of any Idaho case law that demonstrates the limits of public health authority to control venereal disease.

Public health officials, in fulfilling their duty "to investigate sources of infection of venereal diseases," are also instructed to "cooperate with the proper officials whose duty it is to enforce laws directed against prostitution, and otherwise to use every proper means for the repression of prostitution."⁴⁶

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.*

⁴¹ IDAHO CODE ANN § 39-607(2016).

⁴² *Id.*

⁴³ IDAHO CODE ANN § 39-603 (2016).

⁴⁴ *Id.*

⁴⁵ *Id.* See also IDAHO CODE ANN § 39-605 (2016).

⁴⁶ IDAHO CODE ANN § 39-603 (2016).

Idaho Code Annotated

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

GENERAL LAWS, TITLE 39, HEALTH AND SAFETY

IDAHO CODE ANN. § 39-608 (2016) **

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 (2016) **

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.

IDAHO CODE ANN. § 39-603 (2016)

Examination, treatment, and quarantine—Repression of prostitution

State, county and municipal health officers, or their authorized deputies, within their respective jurisdiction, are hereby directed and empowered, when in their judgment it is necessary to protect the

public health, to make examinations, or have examinations made by competent physician, of persons reasonably suspected of being infected with venereal disease, and to require persons infected with venereal disease to report for treatment to a reputable physician and continue treatment until cured, or to submit to treatment provided at public expense until cured, and also, when in their judgment it is necessary to protect the public health, to isolate or quarantine persons affected with venereal disease. It shall be the duty of all local and state health officers to investigate sources of infection of venereal diseases, to cooperate with the proper officials whose duty it is to enforce laws directed against prostitution, and otherwise to use every proper means for the repression of prostitution.

IDAHO CODE ANN. § 39-605 (2016)

Rules for carrying out law

The state board of health and welfare is hereby empowered and directed to make such rules as shall, in its judgment, be necessary for the carrying out of the provisions of this chapter, including rules providing for the control and treatment of persons isolated or quarantined under the provisions of section 39-603, Idaho Code, and such other rules, not in conflict with provisions of this chapter, concerning the control of venereal diseases, and concerning the care, treatment and quarantine of persons infected therewith, as it may from time to time deem advisable. All such rules so made shall be of force and binding upon all county and municipal health officers and other persons affected by this chapter, and shall have the force and effect of law. Such rules may be amended from time to time by the state board of health and welfare. All rules must be entered on the minutes of the state board of health and welfare and copies shall be furnished to all county and municipal health officers and to anyone else who may apply for same. Such rules shall be adopted and become effective in accordance with the provisions of chapter 52, title 67, Idaho Code.

IDAHO CODE ANN. § 39-607 (2016) **

Penalties for violations

Any person who shall violate any lawful rule or regulation made by the state board of health and welfare, pursuant to the authority herein granted, or who shall fail or refuse to obey any lawful order issued by any public health authority, pursuant to the authority granted in this chapter, or any person who, knowing that he or she is infected with syphilis, gonorrhoea or chancroid, exposes another person to the infection of such disease, shall be deemed guilty of a misdemeanor, and shall be punished, on conviction thereof, by a fine of not more than three hundred dollars (\$300) or by imprisonment in the county jail for not more than six (6) months; or by both such fine and imprisonment..