

# Massachusetts

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## Analysis

### **Sexually transmitted diseases (STDs), including HIV, can be the basis for enhanced criminal sentences.**

If a person, “has sexual intercourse or unnatural sexual intercourse with a child under 16 . . . in a manner in which the victim could contract a sexually transmitted disease or infection of which the defendant knew or should have known,” they were infected, they may be sentenced to imprisonment for life or any term not less than 15 years.<sup>1</sup> “Sexual intercourse” is defined as the, “traditional common law notion of rape, the penetration of female sex organ by male sex organ, with or without emission,”<sup>2</sup> while “unnatural sexual intercourse” is defined as, “oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person’s body or other object into the genital or anal opening of another person’s body.”<sup>3</sup>

Notably, no transmission is explicitly required, and no ejaculation is required in the case of penile-vaginal sexual assault. Thus, prosecutions will likely depend on the courts’ interpretation of, “a manner in which the victim could contract a sexually transmitted disease or infection.” It is also unclear how the courts may determine whether any particular defendant, “should have known” they had an STD. At the time of publication, the authors have not found any cases illustrating how this statute may be implemented.

### **There are no explicit criminal statutes regarding HIV, but people living with HIV have been prosecuted under general criminal laws.**

In *Commonwealth v. Smith*, a man living with HIV appealed the denial of his motion to withdraw his guilty plea to an indictment charging him with assault with intent to commit murder.<sup>4</sup> 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.”<sup>5</sup> Another officer testified before the grand jury that a doctor from the department of health told him that

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<sup>1</sup> MASS. GEN. LAWS ch. 265, § 22B(f) (2016). There is no case on record in which this statute has been applied to a person living with HIV (PLHIV).

<sup>2</sup> See *Commonwealth v. Gallant*, 369 N.E.2d 707, 712 (Mass. 1977).

<sup>3</sup> *Id.*

<sup>4</sup> *Commonwealth v. Smith*, 790 N.E.2d 708, 709 (Mass. App. Ct. 2003).

<sup>5</sup> *Id.* at 712.

HIV transmission from a human bite is possible if an attacker's gums are bloody and the bite breaks the skin.<sup>6</sup>

*Smith* demonstrates that HIV 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. Despite the fact that the CDC has concluded there exists only a “negligible” risk of HIV transmission from a bite,<sup>7</sup> the grand jury indicted the defendant, who later pled guilty.<sup>8</sup> Conviction for assault with intent to commit murder can result in imprisonment of up to ten years.<sup>9</sup>

Other prosecutions under Massachusetts' general criminal laws include:

- In April 2012, a 19-year-old HIV man living with HIV was charged with assault and battery with a dangerous weapon, among other things, for failing to disclose his HIV status to multiple sexual partners.<sup>10</sup> At least one partner later tested positive for HIV.<sup>11</sup>
- In August 2012, a 30-year-old 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 and almost running her over.<sup>12</sup> The man was charged with attempted murder, armed carjacking, and assault with a dangerous weapon.<sup>13</sup>

### **Prisoners with venereal disease may be subject to additional restrictions.**

If a prisoner is found to have venereal disease at the conclusion of their confinement and the attending physician of the institution concludes that “his release would be dangerous to public health,” the prisoner may be placed under medical treatment in the facility where they have been incarcerated.<sup>14</sup> The prisoner may be released upon a finding by the attending physician that “symptoms have disappeared and [their] release will not endanger the public health.” Notice of a prisoner's release is also made to the department of public welfare.

**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.*

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<sup>6</sup> *Id.*

<sup>7</sup> CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Risk Behaviors, Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (Dec. 4, 2015) available at <http://www.cdc.gov/hiv/policies/law/risk.html> (last visited August 12, 2016).

<sup>8</sup> *Smith*, 790 N.E.2d at 709.

<sup>9</sup> MASS. GEN. LAWS ANN. ch. 265, § 15 (2016).

<sup>10</sup> 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](http://www.sentinelandenterprise.com/ci_20388210/fitchburg-man-hiv-allegedly-showed-false-medical-records?source=rss_viewed).

<sup>11</sup> *Id.*

<sup>12</sup> *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/>.

<sup>13</sup> *Id.*

<sup>14</sup> MASS. GEN. LAWS ch. 111, § 121 (2016).

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## Annotated Laws of Massachusetts

*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.*

### CHAPTER 265, CRIMES AGAINST THE PERSON

#### **MASS. GEN. LAWS CH. 265, § 22B (2016) \*\***

*Rape of Child -- Aggravating Factors.*

Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such child to submit by force and against his will or compels such child to submit by threat of bodily injury and:

(f) the sexual intercourse or unnatural sexual intercourse was committed in a manner in which the victim could contract a sexually transmitted disease or infection of which the defendant knew or should have known he was a carrier, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years. The sentence imposed on such person shall not be reduced to less than 15 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 15 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

### CHAPTER 111, PUBLIC HEALTH

#### **MASS. GEN. LAWS CH. 111, § 6 (2016)**

*Diseases Deemed Dangerous to Public Health.*

The department shall have the power to define, and shall from time to time define, what diseases shall be deemed to be dangerous to the public health, and shall make such rules and regulations consistent with law for the control and prevention of such diseases as it deems advisable for the protection of the public health. The department shall also have the power to define, and shall from time to time so define, what diseases shall be included within the term venereal diseases in the provisions of the laws relative to public health.

#### **MASS. GEN. LAWS CH. 111, § 119 (2016)**

*Venereal Diseases -- Records Not Public.*

Hospital, dispensary, laboratory and morbidity reports and records pertaining to venereal diseases, as defined under section six, shall not be public records, and the contents thereof shall not be divulged by any person having charge of or access to the same, except upon proper judicial order or to a person whose official duties, in the opinion of the commissioner, entitle him to receive information contained therein. Violations of this section shall for the first offence be punished by a fine of not more than fifty dollars, and for a subsequent offence by a fine of not more than one hundred dollars.

**MASS. GEN. LAWS CH. 111, § 121 (2016)**

*Venereal Diseases and Tuberculosis -- Infected Inmates -- Isolation and Treatment.*

An inmate of a public charitable institution or a prisoner in a penal institution who is afflicted with a venereal disease, as defined under section six or pulmonary tuberculosis shall be forthwith placed under medical treatment, and if, in the opinion of the attending physician, it is necessary, he shall be isolated until danger of contagion is passed or the physician determines his isolation unnecessary. If at the expiration of a prisoner's sentence he is afflicted with a venereal disease, as defined under section six or pulmonary tuberculosis in its contagious or infectious stages, or if, in the opinion of the attending physician of the institution or of such physician as the authorities thereof may consult, his release would be dangerous to public health, he shall be placed under medical treatment in the institution where he has been confined. Thereupon the authorities of such institution shall notify the department of public welfare of his condition and said department shall provide for his hospitalization and medical care at an institution until, in the opinion of the attending physician of the institution wherein he is being treated, the symptoms have disappeared and his release will not endanger the public health. Notice of a prisoner's release hereunder to the department of public welfare shall be made to the department of public health. The expense of his support, not exceeding three dollars and fifty cents a week, shall be paid by the town where he resides, after notice of the expiration of his sentence and of his condition to such town, or, if he is a state charge, by the commonwealth after like notice to the department of public welfare.