

New York

Analysis

People living with a venereal disease may be criminally liable for having sex.

Persons who are aware they are living with an “infectious venereal disease” may be guilty of a misdemeanor if they have sex with another person.¹ Neither the intent to transmit nor actual transmission of the venereal disease is necessary for prosecution. The statute provides no indication of whether disclosure of one’s health status, consent prior to engaging in sexual activity, or using protection would be a defense under the statute. Persons convicted under this statute may face up to one year in prison and a \$1,000 fine.²

Although the statute does not define “infectious venereal disease,” the public health code defines “communicable disease” as “infectious, contagious or communicable disease” and provides the commissioner of health of New York the authority to promulgate a list of sexually transmitted diseases (STDs).³

In 2017, the New York State Department of Health classified HIV as a sexually transmitted infection.⁴ Previously, HIV was classified as a “serious infectious disease.”⁵ The law now requires STD clinics operated by local health departments to provide diagnosis and treatment, including prevention services, to persons diagnosed or at risk for HIV. Further, the amendment allows minor to consent to pre-exposure prophylaxis (PrEP) and post-exposure prophylaxis (PEP) without parental consent.

The New York Department of Health (NYSDOH) has gone on record in a public response to state that the NYSDOH construes the law as inapplicable to individuals where (1) the individual does not know their positive status and (2) the individual disclosed their positive status to their partner prior to engaging

¹ NY PUB. HEALTH LAW § 2307 (2016).

² N.Y. PENAL LAW §§ 55.10(2)(b); 55.05(2)(a); 70.15(1); 80.05(1) (2015)

³ NY PUB. HEALTH LAW §§ 2, 2311, (2016); N.Y. COMP. R. & REGS. 10 § 23.1 (2016) (listed STDs include chlamydia trachomatis infection, gonorrhea, syphilis, non-gonococcal urethritis, non-gonococcal (mucopurulent) cervicitis, trichomoniasis, lymphogranuloma venereum, chancroid, granuloma inguinale, human papilloma virus (HPV), genital herpes simplex, pelvic inflammatory disease (PID) gonococcal/non-gonococcal, yeast (candida) vaginitis, bacterial vaginosis, pediculosis pubis, scabies).

⁴ N.Y. COMP. R. & REGS. 10 § 23.1 (2017).

⁵ Id..

in sex.⁶ The NYSDOH went further and stated that the Department “interprets the law as only applying to individuals who knowingly expose another individual to an acute, bacterial venereal disease such as syphilis or gonorrhea.”⁷ This definition of disease does not encompass HIV. However, the response from the NYSDOH does not have binding legal authority. However, the Supreme Court has ruled that courts should defer to guidance from public health authorities.⁸

People living with HIV (PLHIV) have been prosecuted under general criminal laws and may be subject to indefinite civil commitment.

In 1997, Nushawn Williams pled guilty to two counts of statutory rape and two counts of reckless endangerment⁹ and was sentenced to 12 years imprisonment.¹⁰ The Williams case received extensive media attention after local health and law enforcement officials publicized his HIV status, ostensibly “to try to stop further spread of the virus by his infected sex partners.”¹¹ In 2010, days before Williams’ sentence neared completion, the State moved to keep Williams in indefinite civil confinement under the Sex Offender Management Treatment Act of 2007.¹² Known as “article 10,” the law is reserved for extreme cases to confine the most dangerous sex offenders who “have mental abnormalities that predispose them to engage in repeated sex offenses.”¹³

The Supreme Court of New York, Appellate Division, Fourth department has upheld Williams’ civil confinement over multiple challenges, including the use of HIV status as a factor in the determination that he has a mental abnormality that predisposes him to engage in repeated sex offenses.¹⁴ Rather, the Court accepted the State’s argument that such a determination was based solely on “diagnoses of antisocial personality disorder, psychopathy, sexual preoccupation, and polysubstance abuse, together with [his] failure to complete sex offender treatment, his poor prison disciplinary record, his pattern of sexual misconduct, . . . and his stated intention to commit further sex offenses.”¹⁵ However, the record is questionable in regard to both the quality of evidence to support such diagnoses and conclusions, and the extent to which HIV was indeed a factor in making a determination of Williams’ civil commitment.¹⁶

⁶ N.Y. STATE DEP’T OF HEALTH, EXPANSION OF MINOR CONSENT FOR HIV Treatment ACCESS AND PREVENTION (2017), https://regs.health.ny.gov/sites/default/files/pdf/recently_adopted_regulations/Expansion%20of%20Minor%20Consent%20for%20HIV%20Treatment%20%20Access%20and%20Prevention.pdf.

⁷ *Id.*

⁸ See *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (“In assessing the reasonableness of petitioner’s actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority.”)

⁹ The reckless endangerment counts entailed engaging in unprotected sexual intercourse while having knowledge of his HIV status.

¹⁰ 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>. See also *State v. Williams*, 31 N.Y.S.3d 362, 364 (N.Y. App. Div. 2016).

¹¹ *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>.

¹² *Id.*

¹³ N.Y. MENTAL HYG. LAW § 10.01 (2015).

¹⁴ *Williams supra* note 10.

¹⁵ *Id.* at 365.

¹⁶ On December 15, 2016, the New York Court of Appeals denied the motion for leave to appeal.

Although PLHIV have previously been convicted of reckless endangerment,¹⁷ in 2015 the New York Court of Appeals affirmed the reduction of a first-degree reckless endangerment prosecution to a second-degree reckless endangerment charge for a man who had anal sex without disclosing his HIV status.¹⁸ Although the defendant's sex partner tested positive for HIV, the Supreme Court reduced the criminal charge to a Class A misdemeanor, which carries a maximum penalty of one year's imprisonment and a fine of up to \$1,000,¹⁹ because, based on expert testimony "about advances in medical treatment, neither HIV nor AIDS poses a grave risk of death,"²⁰ and because there was insufficient evidence to hold that the defendant acted with the requisite "depraved mental state."²¹ After the Appellate Division affirmed both grounds for the dismissal, the Court of Appeals affirmed the latter, reasoning that when only one person is endangered, the defendant must exhibit "wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target of the perpetrator's inexcusable acts,"²² and that the defendant's conduct, though "reckless, selfish and reprehensible," did not meet that level of depraved indifference.²³ The court declined to decide whether "HIV infection creates a grave and unjustifiable risk of death in light of the medical advances in treatment."²⁴ However, the shift in the "depraved indifference" analysis may signal the Court's willingness to more thoroughly examine issues of transmission risk and intent to harm.

The bodily fluids of a PLHIV may not be considered a "deadly weapon."

In *People v. Plunkett*, the Court of Appeals of New York shifted away from previous cases holding that bodily fluids of PLHIV may be considered a deadly weapon.²⁵ Plunkett, a PLHIV, was convicted of aggravated assault upon a police officer after he bit the officer's hand during an arrest.²⁶ A conviction for this offense requires that the defendant used a deadly weapon or dangerous instrument.²⁷ 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."²⁸ However, on appeal, the court dismissed the indictment of aggravated assault upon a police officer because 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

¹⁷ See, e.g., *People v. Hawkrigg*, 525 N.Y.S.2d 752 (Co. Ct. 1988) (defendant's reckless endangerment conviction affirmed because HIV status sufficient to show conscious disregard of a substantial and unjustifiable risk that their conduct would result in transmission); see also *Williams supra* note 10.

¹⁸ *People v. Williams*, 3 N.Y.S.3d 305 (N.Y. 2015).

¹⁹ N.Y. PENAL LAW §§ 120.20; 70.15(1); 80.05(1) (2015). Reckless endangerment in the first degree is a Class D felony, punishable by up to seven years' imprisonment and a fine of up to \$5,000. N.Y. PENAL LAW §§ 120.25; 70.00(2)(d); 80.00(1)(a) (2015).

²⁰ *Williams, supra* note 18 at 307.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 308.

²⁵ *People v. Plunkett*, 971 N.E.2d 363 (N.Y. 2012).

²⁶ *Id.* at 364.

²⁷ *Id.*

²⁸ *Id.* at 365.

‘dangerous instruments’ within the meaning of Penal Law § 10.00(13).”²⁹ The Court stated that its opinion did not function to prevent punishment of an individual based on the harm actually inflicted.³⁰

Medical records may be used in the prosecution of PLHIV or persons with other STDs.

Medical records must generally be kept confidential, but they may be used to prosecute persons with STDs, under the State’s venereal disease exposure statute,³¹ or PLHIV under a general criminal law.³²

In *In re Gribetz*, an attempted assault and reckless endangerment case, the court granted the state’s motion to access the defendant’s medical records to prove her HIV status, 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.”³³ Thus the court found a “compelling need”³⁴ to disclose the defendant’s confidential HIV information.³⁵

Local boards of health may require isolation of persons to limit the spread of communicable diseases.

Local boards of health may, “provide for care and isolation of cases of communicable disease,”³⁶ including chancroid, chlamydia, gonococcal infection, hepatitis, and syphilis.³⁷ Persons subject to medical orders have the rights to notice, to legal counsel, to cross-examine witnesses against them, and to produce evidence and witnesses on their behalf.³⁸

Violating public health laws may result in criminal and civil penalties.

Violating any of the public health laws discussed above carries a civil penalty up to \$2,000, in addition to any other penalties described, for every such violation.³⁹ The penalty may be increased to \$5,000 for subsequent violations within a year, or \$10,000 if the violation directly results in serious physical harm to any person.⁴⁰

²⁹ *Id.* at 368.

³⁰ *Id.*

³¹ NY PUB. HEALTH LAW § 2306 (2016).

³² NY PUB. HEALTH LAW § 2785 (2016). Under this statute, HIV-related information may also be used in civil proceedings. A court order is required for access in both contexts.

³³ *Application of Gribetz*, 605 N.Y.S.2d 834, 836 (Co. Ct. 1994). See also *Carmona v. Connolly*, 07 Civ. 11300, at *23 (S.D.N.Y. Jan. 21, 2011) (finding admission into evidence of medical records showing defendant’s HIV status does not violate his due process rights under the United States Constitution).

³⁴ *Gribetz*, *supra* note 33.

³⁵ *Id.*

³⁶ NY PUB. HEALTH LAW § 2100 (2016); N.Y. COMP. R. & REGS. 10 §§ 2.1, 2.27, 2.29 (2016).

³⁷ N.Y. COMP. R. & REGS. 10 § 2.1 (2016). *In re Smith*, 40 N.E. 497 (N.Y. 1895) (prohibiting quarantine unless a person is infected with a contagious disease or has been exposed to it).

³⁸ N.Y. PUB. HEALTH LAW § 12-A (2016).

³⁹ N.Y. PUB. HEALTH LAW § 12; 12-b (“A person who willfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor. . .”) (2016).

⁴⁰ *Id.*

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.

New York Public Health Law

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.

N.Y. PUB. HEALTH LAW § 2307 (2016) **

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.

N.Y. PUB. HEALTH LAW § 2 (2016)

Definitions

(l) Communicable disease. The term “communicable disease” means infectious, contagious or communicable disease.

(n) Sexually transmissible disease. The term "sexually transmissible disease" shall mean a disease that appears on the list of diseases promulgated by the commissioner pursuant to section twenty-three hundred eleven of this chapter.

N.Y. Pub. Health Law § 12 (2016) **

Violations of health laws or regulations; penalties and injunctions

1. [Expires April 1, 2020]

(a) Except as provided in paragraphs (b) and (c) of this subdivision, any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto for which a civil penalty is not otherwise expressly prescribed by law, shall be liable to the people of the state for a civil penalty of not to exceed two thousand dollars for every such violation.

(b) The penalty provided for in paragraph (a) of this subdivision may be increased to an amount not to exceed five thousand dollars for a subsequent violation if the persons committed the same violation, with respect to the same or any other person or persons, within 12 months of the initial violation for which a penalty was assessed pursuant to paragraph (a) of this subdivision and said violations were a serious threat to the health and safety of an individual or individuals.

(c) The penalty provided for in paragraph (a) of this subdivision may be increased to an amount not to exceed ten thousand dollars if the violation directly results in serious physical harm to any patient or patients.

N.Y. Pub. Health Law § 12-a (2016)

Formal hearings; notice and procedure

1. The commissioner, or any person designated by him for this purpose, may issue subpoenas and administer oaths in connection with any hearing or investigation under or pursuant to this chapter, and it shall be the duty of the commissioner and any persons designated by him for such purpose to issue subpoenas at the request of and upon behalf of the respondent.

2. The commissioner and those designated by him shall not be bound by the laws of evidence in the conduct of hearing proceedings, but the determination shall be founded upon sufficient legal evidence to sustain it.
3. Notice of hearing shall be served at least fifteen days prior to the date of the hearing, provided that, whenever because of danger to the public health it appears prejudicial to the interests of the people of the state to delay action for fifteen days, the commissioner may serve the respondent with an order requiring certain action or the cessation of certain activities immediately or within a specified period of less than fifteen days and the commissioner shall provide an opportunity to be heard within fifteen days after the date the order is served.
4. Service of notice of hearing or order shall be made by personal service or by registered or certified mail. Where service, whether by personal service or by registered or certified mail, is made upon an infant, incompetent, partnership, corporation, governmental subdivision, board or commission, it shall be made upon the person or persons designated to receive personal service by article three of the civil practice law and rules.
5. The attorney-general may prefer charges, attend hearings, present the facts, and take any and all proceedings in connection therewith.
6. At a hearing, the respondent may appear personally, shall have the right of counsel, and may cross-examine witnesses against him and produce evidence and witnesses in his behalf.
7. Following a hearing, the commissioner may make appropriate determinations and issue an order in accordance therewith.
8. The commissioner may adopt, amend and repeal administrative rules and regulations governing the procedures to be followed with respect to hearings, such rules to be consistent with the policy and purpose of this chapter and the effective and fair enforcement of its provisions.
9. The provisions of this section shall be applicable to all hearings held pursuant to this chapter, except where other provisions of this chapter applicable thereto are inconsistent therewith, in which event such other provisions shall apply.

N.Y. Pub. Health Law § 12-b (2016)

Willful violation of health laws

1. A person who willfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor; except, however, that where such order or regulation applies to a tenant with respect to his own dwelling unit or to an owner occupied one or two family dwelling, such person is guilty of an offense for the first violation punishable by a fine not to exceed fifty dollars and for a second or subsequent violation is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars or by imprisonment not to exceed six months or by both such fine and imprisonment.
2. [Expires April 1, 2020] A person who willfully violates any provision of this chapter, or any regulation lawfully made or established by any public officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding ten thousand dollars or by both. Effective on and after April first, two thousand eight the comptroller is hereby authorized and

directed to deposit amounts collected in excess of two thousand dollars per violation to the patient safety center account to be used for purposes of the patient safety center created by title two of article twenty-nine-D of this chapter.

NY Pub. Health Law § 2100 (2016)

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,

N.Y. Pub. Health Law § 2306 (2016)

Sexually transmitted diseases; reports and information, confidential

All reports or information secured by a board of health or health officer under the provisions of this article shall be confidential except in so far as is necessary to carry out the purposes of this article. Such report or information may be disclosed by court order in a criminal proceeding in which it is otherwise admissible or in a proceeding pursuant to article ten of the family court act in which it is otherwise admissible, to the prosecution and to the defense, or in a proceeding pursuant to article ten of the family court act in which it is otherwise admissible, to the petitioner, respondent and attorney for the child, provided that the subject of the report or information has waived the confidentiality provided for by this section *except insofar as is necessary to carry out the purposes of this article. Information may be disclosed to third party reimbursers or their agents to the extent necessary to reimburse health care providers for health services; provided that, when necessary, an otherwise appropriate authorization for such disclosure has been secured by the provider.* A person waives the confidentiality provided for by this section if such person voluntarily discloses or consents to disclosure of such report or information or a portion thereof. If such person lacks the capacity to consent to such a waiver, his or her parent, guardian or attorney may so consent. An order directing disclosure pursuant to this section shall specify that no report or information shall be disclosed pursuant to such order which identifies or relates to any person other than the subject of the report or information. *Reports and information may be used in the aggregate in programs approved by the commissioner for the improvement of the quality of medical care provided to persons with sexually transmitted diseases; or with patient identifiers when used within the state or local health department by public health disease programs to assess co-morbidity or completeness of reporting and to direct program needs, in which case patient identifiers shall not be disclosed outside the state or local health department except as otherwise provided for in this section.*

N.Y. PUB. HEALTH LAW § 2311 (2016)

Sexually transmitted disease list

The commissioner shall promulgate a list of sexually transmitted diseases, such as gonorrhea and syphilis, for the purposes of this article. The commissioner, in determining the diseases to be included in such list, shall consider those conditions principally transmitted by sexual conduct, *other section of*

this chapter addressing communicable diseases and the impact of particular diseases on individual morbidity and the health of newborns.

N.Y. PUB. HEALTH LAW § 2785 (2016)

Court authorization for disclosure of confidential HIV related information

1. Notwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information, except a court of record of competent jurisdiction in accordance with the provisions of this section.
2. A court may grant an order for disclosure of confidential HIV related information upon an application showing: (a) a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding; (b) a clear and imminent danger to an individual whose life or health may unknowingly be at significant risk as a result of contact with the individual to whom the information pertains; (c) upon application of a state, county or local health officer, a clear and imminent danger to the public health; or (d) that the applicant is lawfully entitled to the disclosure and the disclosure is consistent with the provisions of this article.

New York Penal Law

N.Y. PENAL LAW § 55.05 (2015)

Classifications of felonies and misdemeanors

2. Misdemeanors. Misdemeanors are classified, for the purposes of sentence, into three categories as follows:
 - (a) Class A misdemeanors;
 - (b) Class B misdemeanors; and
 - (c) Unclassified misdemeanors.

N.Y. PENAL LAW § 55.10 (2015)

Designation of offenses

2. Misdemeanors

- (b) Any offense defined outside this chapter which is declared by law to be a misdemeanor without specification of the classification thereof or of the sentence therefor shall be deemed a class A misdemeanor.

N.Y. PENAL LAW § 70.15 (2015) **

Sentences of imprisonment for misdemeanors and violation

1. Class A misdemeanor. A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed one year; provided, however, that a sentence of imprisonment imposed upon a conviction of criminal possession of a weapon in the fourth degree as defined in subdivision one of section 265.01 must be

for a period of no less than one year when the conviction was the result of a plea of guilty entered in satisfaction of an indictment or any count thereof charging the defendant with the class D violent felony offense of criminal possession of a weapon in the third degree as defined in subdivision four of section 265.02, except that the court may impose any other sentence authorized by law upon a person who has not been previously convicted in the five years immediately preceding the commission of the offense for a felony or a class A misdemeanor defined in this chapter, if the court having regard to the nature and circumstances of the crime and to the history and character of the defendant, finds on the record that such sentence would be unduly harsh and that the alternative sentence would be consistent with public safety and does not deprecate the seriousness of the crime.

N.Y. PENAL LAW § 80.05 (2015) **

Fines for misdemeanors and violation

1. Class A misdemeanor. A sentence to pay a fine for a class A misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding one thousand dollars, provided, however, that a sentence imposed for a violation of section 215.80 of this chapter may include a fine in an amount equivalent to double the value of the property unlawfully disposed of in the commission of the crime.

Compilation of Codes, Rules & Regulations of the State of New York

TITLE 10. DEPARTMENT OF HEALTH

N.Y. COMP. R. & REGS. 10 § 2.1 (2016)

Communicable diseases designated: cases, suspected cases and certain carriers to be reported to the State Department of Health

(a) When used in the Public Health Law and in this Chapter, the term infectious, contagious or communicable disease, shall be held to include the following diseases and any other disease which the commissioner, in the reasonable exercise of his or her medical judgment, determines to be communicable, rapidly emergent or a significant threat to public health, provided that the disease which is added to this list solely by the commissioner's authority shall remain on the list only if confirmed by the Public Health Council at its next scheduled meeting:

Chancroid

Chlamydia trachomatis infection

Gonococcal infection

Hepatitis (A; B; C)

Syphilis, specify stage

N.Y. COMP. R. & REGS. 10 § 2.27 (2016)

Physician to isolate person with highly communicable disease and give instructions regarding prevention of spread of the disease

It shall be the duty of the attending physician immediately upon discovering a case of highly communicable disease (as defined in section 2.1 of this Part) to cause the patient to be isolated, pending official action by the health officer. Such physician shall also advise other members of the household regarding precautions to be taken to prevent further spread of the disease and shall inform them as to appropriate specific preventive measures. He shall in addition furnish the patient's attendant with such detailed instructions regarding the disinfection and disposal of infective secretions and excretions as may be prescribed by the State Commissioner of Health.

N.Y. COMP. R. & REGS. 10 § 2.29 (2016)

Other highly communicable diseases

Whenever a case of a highly communicable disease (as defined in section 2.1 of this Part) comes to the attention of the city, county or district health officer he shall isolate such patients as in his judgment he deems necessary.