

Washington

Analysis

A person may be prosecuted if they engage in activity that exposes or transmits HIV to another person with the intent to cause bodily harm.

Washington's criminal assault provision makes it a Class A felony to administer, transmit or expose another person to HIV with the intent to inflict great bodily harm,¹ punishable by up to life imprisonment and/or a fine of up to \$50,000.² Transmission is not required and the statute fails to define what kinds of activities constitute "administering" or "exposing." This may allow prosecutors to interpret the law to include activities that pose little to no risk of HIV transmission, such as spitting, biting, oral sex, sexual activity with the use of a condom, and performing or submitting to medical procedures.³ The law also fails to account explicitly for a defendant's viral load, making prosecution possible even when a person's low viral load makes transmission extremely unlikely.

Washington's HIV criminal statute has survived multiple legal challenges, including 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.⁴ In *State v. Stark*, the Court of Appeals rejected the argument that the statute was unconstitutionally vague, stating that "[a]ny reasonably intelligent person would understand from reading the statute that the term [expose] refers to engaging in conduct that can cause another person to become infected with the virus."⁵

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

¹ WASH. REV. CODE § 9A.36.011(1)(b) (2016).

² WASH. REV. CODE § 9A.20.021(1)(a) (2016).

³ See 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. 12, 2016); 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. 12, 2016) (stating that "there's little to no risk of getting or transmitting HIV through oral sex.").

⁴ 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).

⁵ *Stark*, 832 P.2d at 115-16 (affirming the conviction of a PLHIV for three counts of second-degree assault for engaging in unprotected oral and vaginal sex with three women. *Id.* at 111-12. The defendant was convicted under the second-degree assault statute, but the assault statutes were subsequently amended so that language relating to HIV was removed from the second-degree assault statute and added to the first-degree assault statute in 1997, where it remains. 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.).

determining that his conduct “*necessarily* exposed his sexual partners to [HIV]”⁶ However, in *Whitfield*, the Court of Appeals interpreted exposure to include oral, anal, and vaginal sex without a condom.⁷ In that affirmation, the Court of Appeals also did not revisit the trial court’s assertion that it is irrelevant whether “the [complainant] was already infected with the virus from another source.”⁸

The statute requires the State to show a defendant’s intent to inflict great bodily harm through exposure to HIV.⁹ Nevertheless, courts have held that knowing one’s HIV status and failing to disclose one’s status or take precautions to prevent transmission constitute intent to inflict harm.¹⁰ In *Whitfield*, the Court of Appeals determined that there was sufficient evidence of intent to harm because the defendant knew he had HIV, understood that it was possible to transmit HIV through oral and vaginal sex, and engaged these activities without disclosure of his status or the use of a condom or other protection.¹¹ Similarly, in *Stark*, the Court of Appeals found sufficient evidence of intent based on the fact that the defendant knew his HIV status, had been counseled on transmission of HIV and how to prevent transmission during sex, did not disclose his HIV status to his sexual partners, and insisted on not using a condom or other type of protection.¹² In both of these cases, the defendants made statements indicating a desire to infect other individuals, and this evidence also contributed to the courts’ finding of intent.¹³ 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 knew his status, understood that he could transmit HIV to sexual partners, and also made comments to acquaintances indicating that he did not care if his partners were infected and that he wanted to infect his partners.¹⁴

The case law suggests that disclosure of HIV status and using condoms or other protection may provide a defense that there was no intent to inflict harm through exposure to HIV. Prosecutions in Washington have demonstrated that a person living with HIV (PLHIV) merely having sex without disclosure of status will suffice to establish the required intent to inflict harm for prosecution under the first degree assault statute.

In October 2010, a PLHIV was charged with first-degree assault for having unprotected sex with two women and allegedly failing to disclose his status or use protection.¹⁵ He pled guilty to second-degree assault, among other things, and was sentenced to 31 months in prison.¹⁶

⁶ *Id.* at 114 (emphasis added).

⁷ *Whitfield*, 134 P.3d at 1207, 1214 (affirming defendant’s conviction for 17 counts of first-degree assault, among other crimes, and sentence of 2,137 months’ (roughly 178 years) imprisonment after he engaged in anal, oral, and vaginal sex with 17 women, usually without a condom, with transmission occurring in five of the 17 cases. *Id.* at 1207-08.).

⁸ *Id.* at 886.

⁹ WASH. REV. CODE § 9A.36.011(1) (2016).

¹⁰ See *Whitfield*, 134 P.3d at 1213-14; *Stark*, 832 P.2d at 114-15.

¹¹ *Whitfield*, 134 P.3d at 1213-14.

¹² *Stark*, 832 P.2d at 114-15.

¹³ *Whitfield*, 134 P.3d at 1214; *Stark*, 832 P.2d at 114.

¹⁴ 15 P.3d 1271, 1272-74 (Wash. 2001) (As in *Stark*, the defendant was convicted under the second degree assault statute, which formerly contained HIV-specific provisions that were later moved to the first degree assault statute in 1997.)

¹⁵ *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>.

¹⁶ *Man w/ HIV gets 31 months for assault*, SPOKESMAN-REVIEW, May 20, 2011, available at <http://www.spokesman.com/blogs/sirens/2011/may/20/man-w-hiv-gets-31-months-assault/>.

Also in October 2010, a 23-year-old PLHIV 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.¹⁷

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 case law supporting the proposition that disclosure may be considered as a possible, though not absolute, defense to prosecution. Before *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 a defendant's HIV status could constitute a defense.¹⁸ In *Ferguson*, the defendant's partner knew the defendant's HIV status before consenting to sex, but did not know that the defendant removed his condom during sex. The court refused to determine whether consent could operate as a defense to the statute, but stated that even if possible in some instances, the defense was not available in the case at hand because the defendant's sexual partner did not consent to sex without a condom.¹⁹ The court further reiterated that even if consent were a defense, the partner must have "knowledge of all relevant facts," including whether the defendant is using a condom.²⁰

Upon conviction of multiple offenses, sentences for each offense can be imposed consecutively, resulting in lengthy incarceration.

In Washington, Class A felonies, such as first-degree assault, are punished with a maximum penalty of life in prison and a \$50,000 fine.²¹ 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.²² In *Whitfield*, although the trial court interpreted multiple incidents of sexual activity with one partner as a single offense, the activity with each of 17 partners resulted in a conviction of 17 Class A felony counts and 17 consecutive sentences, totaling 178 years.²³ The Court of Appeals rejected the defendant's argument that this amounted to cruel and unusual punishment.²⁴

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.²⁵ This lengthy sentence was due to the trial court's findings that the defendant knew or believed he had HIV at the time of the crime in question, that he knew or should have known he might transmit the virus to the two minors

¹⁷ *HIV-Positive man sentenced for assault*, SPOKESMAN-REVIEW, Oct. 12, 2010, available at <http://www.spokesman.com/stories/2010/oct/12/hiv-positive-man-sentenced-assault/>.

¹⁸ 1999 Wash App. LEXIS 1905, *20-21 (Wash Ct. App. 1999) ("[Defendant] claims that he has the right to argue a defense of consent. We disagree, without determining whether consent can sometimes be a defense to assault with the AIDS virus.")

¹⁹ *Id.*

²⁰ *Id.* at *21-22.

²¹ WASH. REV. CODE § 9A.20.021(1)(a) (2016).

²² WASH. REV. CODE §§ 9.94A.589(1)(b)(2016).

²³ *Whitfield*, 134 P.3d at 1209.

²⁴ *Id.* at 1216-17.

²⁵ 835 P.2d 219, 220-21 (Wash. 1992) (per curiam).

concerned, and that this constituted “deliberate, cruel, and malicious conduct” that justified an exceptional sentence.²⁶

Persons with an STI can be punished for failure to disclose the presence of disease prior to sexual contact.

Washington defines STIs as including “chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, nongonococcal urethritis (NGU), trachomitis, genital human papilloma virus infection, syphilis, acquired immunodeficiency syndrome (AIDS), and human immunodeficiency virus (HIV).”²⁷ It is illegal for persons aware they are infected with an STI other than HIV and who have been counseled that they may transmit the disease to others through sexual intercourse, to engage in sexual intercourse with another person without first informing that person of the STI.²⁸ HIV is explicitly excluded from this provision, perhaps to ensure that any prosecution involving HIV occur under Washington’s first degree assault statute.

A violation of § 70.24.140 is a gross misdemeanor²⁹ and can be punished with up to 364 days in jail and a fine of up to \$5,000.³⁰ As drafted, the statute does not address the role of risk reduction measures such as using a condom and whether such measures could operate as defense. Intent to transmit disease or actual disease transmission is not required for prosecution.

Persons with an STI, including HIV, can be subject to mandatory examination, testing, counseling or medical treatment.

Public health officials may order a person with an STI to submit to a medical examination, testing, or treatment.³¹ Officials may also issue an order that a person with an STI cease and desist from specified conduct that “endangers the health of others” if the person has been ordered to undergo counseling but continues to engage in behaviors that threaten others.³² A public health order may only be issued when such measures to obtain the voluntary cooperation of an individual have failed.³³

Conduct that “endangers public health” is defined in Washington’s administrative code, and includes: 1) anal, oral, or vaginal intercourse for all sexually transmitted diseases, including HIV and Hepatitis B;³⁴ 2) with respect to HIV and Hepatitis B, in addition to anal, oral, or vaginal intercourse, the sharing of injection equipment, or the donation or sale of blood, blood products, body tissues or semen;³⁵ 3) any of these activities which result in the introduction of blood, semen and/or vaginal fluids to mucous membranes, the eye, open cuts or lesions, or other interruption of the epidermis.³⁶

²⁶ *Id.* at 220.

²⁷ WASH. REV. CODE § 70.24.017(13) (2016).

²⁸ WASH. REV. CODE § 70.24.140 (2016).

²⁹ WASH. REV. CODE § 70.24.080 (2016).

³⁰ WASH. REV. CODE § 9A.20.021(2)(2016).

³¹ WASH. REV. CODE § 70.24.024(3)(a) (2016).

³² WASH. REV. CODE § 70.24.024(3)(b) (2016).

³³ WASH. REV. CODE § 70.24.024(2) (2016).

³⁴ WASH. ADMIN. CODE § 246-100-203(1)(b)(i) (2016).

³⁵ WASH. ADMIN. CODE § 246-100-203(1)(b)(ii) (2016).

³⁶ WASH. ADMIN. CODE § 246-100-203(1)(b)(iii) (2016).

A written order to cease and desist may not exceed three months.³⁷ Any order issued, whether for examination or to cease and desist particular conduct, must state the grounds and provisions of the order.³⁸ A person who chooses to contest such an order is entitled to a judicial hearing on its enforceability in a superior court, which is held within 72 hours of the person receiving notice of the order.³⁹ They have a right to appear at the hearing or to have an attorney appear on their behalf at public expense if necessary.⁴⁰ At the hearing, public health officials bear the burden of proof to show by clear and convincing evidence that the required grounds for the order exist and that the terms imposed are the least restrictive necessary to protect public health.⁴¹ Hearings conducted to review the issuance of public health orders are closed and confidential unless the subject of the order requests otherwise.⁴²

A person who violates a lawful order issued by a public health official may be charged with a gross misdemeanor⁴³ and punished with up to 364 days in jail and a \$5000 fine.⁴⁴

In September 2014, public health officials sought a court order requiring a PLHIV to submit to treatment and counseling sessions.⁴⁵ The man had already been served with two cease and desist orders, both of which he failed to comply.⁴⁶ King County public health officials had reportedly last sought such a court order against a PLHIV in 1993.⁴⁷

PLHIV may be subject to detention.

When a public health official “knows or has reason to believe, because of medical information, that a person has a sexually transmitted disease and that the person continues to engage in behaviors that present an imminent danger to the public health,” the official may bring an action in superior court to detain the individual.⁴⁸

Behaviors that present an imminent danger to public health are defined as the following when performed by a person with laboratory-confirmed HIV infection who has received HIV post-test counseling and who did not inform the persons with whom the activities occurred of their HIV status: 1) anal or vaginal intercourse without a latex condom; 2) shared use of blood-contaminated injection equipment; and 3) donating or selling HIV-infected blood, blood products, or semen.⁴⁹ In seeking a court order for detention of a PLHIV, a health official must have exhausted less restrictive alternatives, e.g., a cease and desist order, have enlisted court enforcement of order to cease and desist, and have

³⁷ WASH. ADMIN. CODE § 246-100-203(1)(f) (2016).

³⁸ WASH. REV. CODE § 70.24.024(4)(a) 2016).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² WASH. REV. CODE § 70.24.024(5) (2016).

⁴³ WASH. REV. CODE § 70.24.080 (2016).

⁴⁴ WASH. REV. CODE § 9A.20.021 (2016).

⁴⁵ Levi Pulkkinen, *Seattle-area HIV-positive man who won't stop infecting others could face jail*, SEATTLE PI, Sept. 9, 2014, available at <http://www.seattlepi.com/default/article/Seattle-area-HIV-positive-man-who-won-t-stop-5745044.php>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ WASH. REV. CODE § 70.24.034(1) (2016).

⁴⁹ WASH. ADMIN. CODE §246-100-203(2)(a) (2016).

evidence to “reasonably believe” a person is engaging in behaviors that present an imminent danger to public health.⁵⁰

A person subject to a detention order may be taken into custody for up to 72 hours.⁵¹ As with a cease and desist order, it must be in writing and state the grounds and terms of the order, including the evidence relied upon to establish proof of infection and dangerous behavior.⁵² If the person refuses to comply or contests the order, they are entitled to a closed and confidential hearing within 48 hours after receipt of the order.⁵³ The person subject to the order is entitled to appear at the hearing or have an attorney appear on their behalf.⁵⁴ If the order includes detention for a period of 14 days or more, the person is entitled to a trial by jury upon request.⁵⁵

Public health officials bear the burden of proof to demonstrate by clear and convincing evidence that the grounds for the issuance of the order exist.⁵⁶ Any order for detention issued by the superior court must impose terms and conditions no more restrictive than necessary to protect the public health.⁵⁷ A person who violates a lawful order issued by a public health official may be charged with a gross misdemeanor⁵⁸ and punished with up to 364 days in jail and a \$5000 fine.⁵⁹

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.

⁵⁰ WASH. ADMIN. CODE §246-100-203(2)(b) (2016).

⁵¹ WASH. REV. CODE § 70.24.034(2) (2016).

⁵² *Id.*

⁵³ WASH. REV. CODE §§ 70.24.034(3), 70.24.034(5) (2016).

⁵⁴ WASH. REV. CODE § 70.24.034(3) (2016).

⁵⁵ *Id.*

⁵⁶ WASH. REV. CODE § 70.24.034(4) (2016).

⁵⁷ WASH. REV. CODE § 70.24.034(6) (2016).

⁵⁸ WASH. REV. CODE § 70.24.080 (2016).

⁵⁹ WASH. REV. CODE § 9A.20.021 (2016).

Washington Revised Code

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.

TITLE 9, CRIMES AND PUNISHMENTS

WASH. REV. CODE § 9A.36.011 (2016) **

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 § 9A.20.021 (2016) **

Maximum sentences for crimes committed July 1, 1984 and after

(1) Felony. Unless a different maximum sentence for a classified felony is specifically 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.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

WASH. REV. CODE § 9.94A.50 (2016)

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

(6)

(a) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.95.420 through 9.95.435.

(b) An offender released by the board under RCW 9.95.420 is subject to the supervision of the department until the expiration of the maximum term of the sentence. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

WASH. REV. CODE § 9.94A.550 (2016) **

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

TITLE 70, PUBLIC HEALTH AND SAFETY

WASH. REV. CODE § 70.05.120 (2016) **

Violations--Remedies--Penalties

(4) Any person violating any of the provisions of chapters 70.05, 70.24, and 70.46 RCW or violating or refusing or neglecting to obey any of the rules, regulations or orders made for the prevention, suppression and control of dangerous contagious and infectious diseases by the local board of health or local health officer or administrative officer or state board of health, or who shall leave any isolation hospital or quarantined house or place without the consent of the proper health officer or who evades or breaks quarantine or conceals a case of contagious or infectious disease or assists in evading or breaking any quarantine or concealing any case of contagious or infectious disease, is guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars nor more than one hundred dollars or to imprisonment in the county jail not to exceed ninety days or to both fine and imprisonment.

WASH. REV. CODE § 70.24.017 (2016)

Definitions

(13) "Sexually transmitted disease" means a bacterial, viral, fungal, or parasitic disease, determined by the board by rule to be sexually transmitted, to be a threat to the public health and welfare, and to be a disease for which a legitimate public interest will be served by providing for regulation and treatment. The board shall designate chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, nongonococcal urethritis (NGU), trachomitis, genital human papilloma virus infection, syphilis, acquired immunodeficiency syndrome (AIDS), and human immunodeficiency virus (HIV) infection as sexually transmitted diseases, and shall consider the recommendations and classifications of the centers for disease control and other nationally recognized medical authorities in designating other diseases as sexually transmitted.

WASH. REV. CODE § 70.24.024 (2016)

Orders for examination and counseling--Restrictive Measure--Investigation--Issuance of Order--Confidential notice and hearing--Exception

(1) Subject to the provisions of this chapter, the state and local public health officers or their authorized representatives may examine and counsel or cause to be examined and counseled persons reasonably believed to be infected with or to have been exposed to a sexually transmitted disease.

(2) Orders or restrictive measures directed to persons with a sexually transmitted disease shall be used as the last resort when other measures to protect the public health have failed, including reasonable efforts, which shall be documented, to obtain the voluntary cooperation of the person who may be subject to such an order. The orders and measures shall be applied serially with the least intrusive measures used first. The burden of proof shall be on the state or local public health officer to show that specified grounds exist for the issuance of the orders or restrictive measures and that the terms and conditions imposed are no more restrictive than necessary to protect the public health.

(3) When the state or local public health officer within his or her respective jurisdiction knows or has reason to believe, because of direct medical knowledge or reliable testimony of others in a position to have direct knowledge of a person's behavior, that a person has a sexually transmitted disease and is engaging in specified conduct, as determined by the board by rule based upon generally accepted

standards of medical and public health science, that endangers the public health, he or she shall conduct an investigation in accordance with procedures prescribed by the board to evaluate the specific facts alleged, if any, and the reliability and credibility of the person or persons providing such information and, if satisfied that the allegations are true, he or she may issue an order according to the following priority to:

(a) Order a person to submit to a medical examination or testing, seek counseling, or obtain medical treatment for curable diseases, or any combination of these, within a period of time determined by the public health officer, not to exceed fourteen days.

(b) Order a person to immediately cease and desist from specified conduct which endangers the health of others by imposing such restrictions upon the person as are necessary to prevent the specified conduct that endangers the health of others only if the public health officer has determined that clear and convincing evidence exists to believe that such person has been ordered to report for counseling as provided in (a) of this subsection and continues to demonstrate behavior which endangers the health of others. Any restriction shall be in writing, setting forth the name of the person to be restricted and the initial period of time, not to exceed three months, during which the order shall remain effective, the terms of the restrictions, and such other conditions as may be necessary to protect the public health. Restrictions shall be imposed in the least-restrictive manner necessary to protect the public health.

(4)

(a) Upon the issuance of any order by the state or local public health officer or an authorized representative pursuant to subsection (3) of this section or RCW 70.24.340(4), such public health officer shall give written notice promptly, personally, and confidentially to the person who is the subject of the order stating the grounds and provisions of the order, including the factual bases therefor, the evidence relied upon for proof of infection and dangerous behavior, and the likelihood of repetition of such behaviors in the absence of such an order, and notifying the person who is the subject of the order that, if he or she contests the order, he or she may appear at a judicial hearing on the enforceability of the order, to be held in superior court. He or she may have an attorney appear on his or her behalf in the hearing at public expense, if necessary. The hearing shall be held within seventy-two hours of receipt of the notice, unless the person subject to the order agrees to comply. If the person contests the order, no invasive medical procedures shall be carried out prior to a hearing being held pursuant to this subsection. If the person does not contest the order within seventy-two hours of receiving it, and the person does not comply with the order within the time period specified for compliance with the order, the state or local public health officer may request a warrant be issued by the superior court to insure appearance at the hearing. The hearing shall be within seventy-two hours of the expiration date of the time specified for compliance with the original order. The burden of proof shall be on the public health officer to show by clear and convincing evidence that the specified grounds exist for the issuance of the order and for the need for compliance and that the terms and conditions imposed therein are no more restrictive than necessary to protect the public health. Upon conclusion of the hearing, the court shall issue appropriate orders affirming, modifying, or dismissing the order.

(b) If the superior court dismisses the order of the public health officer, the fact that the order was issued shall be expunged from the records of the department or local department of health.

(5) Any hearing conducted pursuant to this section shall be closed and confidential unless a public hearing is requested by the person who is the subject of the order, in which case the hearing will be conducted in open court. Unless in open hearing, any transcripts or records relating thereto shall also be confidential and may be sealed by the order of the court.

WASH. REV. CODE § 70.24.034 (2016)

Detention--Grounds-- Order--Hearing

(1) When the procedures of RCW 70.24.024 have been exhausted and the state or local public health officer, within his or her respective jurisdiction, knows or has reason to believe, because of medical information, that a person has a sexually transmitted disease and that the person continues to engage in behaviors that present an imminent danger to the public health as defined by the board by rule based upon generally accepted standards of medical and public health science, the public health officer may bring an action in superior court to detain the person in a facility designated by the board for a period of time necessary to accomplish a program of counseling and education, excluding any coercive techniques or procedures, designed to get the person to adopt nondangerous behavior. In no case may the period exceed ninety days under each order. The board shall establish, by rule, standards for counseling and education under this subsection. The public health officer shall request the prosecuting attorney to file such action in superior court. During that period, reasonable efforts will be made in a noncoercive manner to get the person to adopt nondangerous behavior.

(2) If an action is filed as outlined in subsection (1) of this section, the superior court, upon the petition of the prosecuting attorney, shall issue other appropriate court orders including, but not limited to, an order to take the person into custody immediately, for a period not to exceed seventy-two hours, and place him or her in a facility designated or approved by the board. The person who is the subject of the order shall be given written notice of the order promptly, personally, and confidentially, stating the grounds and provisions of the order, including the factual bases therefor, the evidence relied upon for proof of infection and dangerous behavior, and the likelihood of repetition of such behaviors in the absence of such an order, and notifying the person that if he or she refuses to comply with the order he or she may appear at a hearing to review the order and that he or she may have an attorney appear on his or her behalf in the hearing at public expense, if necessary. If the person contests testing or treatment, no invasive medical procedures shall be carried out prior to a hearing being held pursuant to subsection (3) of this section.

(3) The hearing shall be conducted no later than forty-eight hours after the receipt of the order. The person who is subject to the order has a right to be present at the hearing and may have an attorney appear on his or her behalf in the hearing, at public expense if necessary. If the order being contested includes detention for a period of fourteen days or longer, the person shall also have the right to a trial by jury upon request. Upon conclusion of the hearing or trial by jury, the court shall issue appropriate orders.

The court may continue the hearing upon the request of the person who is subject to the order for good cause shown for no more than five additional judicial days. If a trial by jury is requested, the court, upon motion, may continue the hearing for no more than ten additional judicial days. During the pendency of the continuance, the court may order that the person contesting the order remain in detention or may place terms and conditions upon the person which the court deems appropriate to protect public health.

(4) The burden of proof shall be on the state or local public health officer to show by clear and convincing evidence that grounds exist for the issuance of any court order pursuant to subsection (2) or (3) of this section. If the superior court dismisses the order, the fact that the order was issued shall be expunged from the records of the state or local department of health.

(5) Any hearing conducted by the superior court pursuant to subsection (2) or (3) of this section shall be closed and confidential unless a public hearing is requested by the person who is the subject of the order, in which case the hearing will be conducted in open court. Unless in open hearing, any transcripts or records relating thereto shall also be confidential and may be sealed by order of the court.

(6) Any order entered by the superior court pursuant to subsection (1) or (2) of this section shall impose terms and conditions no more restrictive than necessary to protect the public health

WASH. REV. CODE § 70.24.080 (2016) **

Penalty

Any person who shall violate any of the provisions of this chapter or any lawful rule adopted by the board pursuant to the authority herein granted, or who shall fail or refuse to obey any lawful order issued by any state, county or municipal public health officer, pursuant to the authority granted in this chapter, shall be deemed guilty of a gross misdemeanor punishable as provided under RCW 9A.20.021.

WASH. REV. CODE § 70.24.140 (2016) **

Certain infected persons--Sexual intercourse unlawful without notification

It is unlawful for any person who has a sexually transmitted disease, except HIV infection, when such person knows he or she is infected with such a disease and when such person has been informed that he or she may communicate the 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 transmitted disease.

Washington Administrative Code

TITLE 246, HEALTH, DEPARTMENT OF COMMUNICABLE DISEASES

WASH. ADMIN. CODE § 246-100-011 (2016)

Definitions

(28) "Sexually transmitted disease (STD)" means a bacterial, viral, fungal, or parasitic disease or condition which is usually transmitted through sexual contact, including:

- (a) Acute pelvic inflammatory disease;
- (b) Chancroid;
- (c) Chlamydia trachomatis infection;
- (d) Genital and neonatal herpes simplex;

- (e) Genital human papilloma virus infection;
- (f) Gonorrhea;
- (g) Granuloma inguinale;
- (h) Hepatitis B infection;
- (i) Human immunodeficiency virus infection (HIV) and acquired immunodeficiency syndrome (AIDS);
- (j) Lymphogranuloma venereum;
- (k) Nongonococcal urethritis (NGU); and
- (l) Syphilis.

WASH. ADMIN. CODE §246-100-203 (2016)

Special diseases--Sexually transmitted diseases--Health officer orders

(1) A state or local health officer within his or her jurisdiction may, in accordance with RCW 70.24.024, issue orders for medical examination, testing, and/or counseling, as well as orders to cease and desist specific activities, when he or she knows or has reason to believe that a person has a sexually transmitted disease and is engaging in conduct endangering the public health.

(a) For purposes of this section, "reason to believe" means a health officer's belief that is based on:

- (i) Laboratory test results confirming or suggestive of a STD; or
- (ii) A health care provider's direct observation of clinical signs confirming an individual has or is likely to have a STD; or
- (iii) Information obtained directly from an individual infected with a STD about the identity of his or her sexual or needle-sharing contacts when:
 - (A) Contact with the infected individual occurred during a period when the disease may have been infectious; and
 - (B) The contact was sufficient to transmit the disease; and
 - (C) The infected individual is, in the health officer's judgment, credible and believable.

(b) "Conduct endangering the public health" for the purposes of RCW 70.24.024 and this section, means:

- (i) Anal, oral, or vaginal intercourse for all sexually transmitted diseases;
- (ii) For HIV and Hepatitis B:
 - (A) Anal, oral, or vaginal intercourse; and/or

(B) Sharing of injection equipment; and/or

(C) Donating or selling blood, blood products, body tissues, or semen; and

(iii) Activities described in (b)(i) and (ii) of this subsection resulting in introduction of blood, semen, and/or vaginal fluids to:

(A) Mucous membranes;

(B) Eyes;

(C) Open cuts, wounds, lesions; or

(D) Interruption of epidermis.

(c) State and local health officers and their authorized representatives shall have authority to issue written orders for medical examination, testing, and/or counseling under chapter 70.24 RCW, only after:

(i) All other efforts to protect public health have failed, including reasonable efforts to obtain the voluntary cooperation of the person to be affected by the order; and

(ii) They have sufficient evidence to "reasonably believe" the individual to be affected by the order:

(A) Has a sexually transmitted disease; and

(B) Is engaging in "conduct endangering public health"; and

(iii) They have investigated and confirmed the existence of "conduct endangering the public health" by:

(A) Interviewing sources to assess their credibility and accuracy; and

(B) Interviewing the person to be affected by the order; and

(iv) They have incorporated all information required in RCW 70.24.024 in a written order.

(d) State and local health officers and their authorized representatives shall have authority to issue written orders for treatment under RCW 70.24.022 only after laboratory test results or direct observation of clinical signs or assessment of clinical data by a physician confirm the individual has, or is likely to have, a sexually transmitted disease.

(e) State and local health officers and their authorized representatives shall have authority to issue written orders to cease and desist from specified activities under RCW 70.24.024 only after:

(i) They have determined the person to be affected by the order is engaging in "conduct endangering public health"; and

(ii) Laboratory test results, or direct observation of clinical signs or assessment of clinical data by a physician, confirm the individual has, or is likely to have, a sexually transmitted disease; and

- (iii) They have exhausted procedures described in subsection (8)(a) of this section; and
- (iv) They have enlisted, if appropriate, court enforcement of the orders described in (c) and (d) of this subsection.

(f) Written orders to cease and desist from specified activities shall be for an initial period of time not to exceed three months, and may be renewed by the health officer for periods of time not to exceed three months provided all requirements of RCW 70.24.024 regarding notification, confidentiality, right to a judicial hearing, and right to counsel are met again at the time of renewal.

(2) A state or local health officer within his or her jurisdiction may, in accordance with RCW 70.24.034, bring action in superior court to detain a person in a designated or approved facility when he or she knows or has reason to believe that person has a sexually transmitted disease and continues to engage in behaviors that present an imminent danger to the public health.

(a) "Behaviors that present an imminent danger to public health" or "BPID" for the purposes of detention in accordance with RCW 70.24.034 and this section means the following activities, under conditions specified below, performed by an individual with a laboratory-confirmed HIV infection:

- (i) Anal or vaginal intercourse without a latex condom; or
- (ii) Shared use of blood-contaminated injection equipment;
- (iii) Donating or selling HIV-infected blood, blood products, or semen; and
- (iv) Activities described in (a)(i) and (ii) of this subsection constitute BPID only if:

(A) The infected individual received post-test counseling as described in WAC 246-100-209 prior to repeating activities; and

(B) The infected individual did not inform the persons with whom the activities occurred of his or her infectious status.

(b) State and local health officers and their authorized representatives shall have authority to seek court orders for detainment under RCW 70.24.034 only for persons infected with HIV and only after:

- (i) Exhausting procedures described in subsection (1) of this section; and
- (ii) Enlisting, if appropriate, court enforcement of orders to cease and desist; and
- (iii) Having sufficient evidence to "reasonably believe" the person is engaging in BPID.

(c) A local health officer may notify the state health officer if he or she determines:

- (i) The criteria for BPID are met by an individual; and
- (ii) Such individual fails to comply with a cease and desist order affirmed or issued by a court.

(d) A local or state health officer may request the prosecuting attorney to file an action in superior court to detain an individual specified in this subsection. The requesting local or state health officer or authorized representative shall:

(i) Notify the department prior to recommending the detainment setting where the individualized counseling and education plan may be carried out consistent with subsection (9)(d), (e), and (f) of this section;

(ii) Make a recommendation to the court for placement of such individual consistent with (e), (f), and (g) of this subsection; and

(iii) Provide to the court an individualized plan for education and counseling consistent with (f) of this subsection.