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Criminalization of AIDS Transmission & Exposure at the State & Federal Level

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Research Guides

Criminalization of AIDS Transmission & Exposure at the State & Federal Level

Guide Information

Last Updated:	Jan 24, 2012
Guide URL:	http://libguides.law.gsu.edu/hiv-aidscriminalization
Description:	A Libguide created by Brett Williams for Nancy Johnson's Advanced Legal Research Class.
Tags:	advanced_legal_research, criminal_law
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Overview

From the very beginning of the AIDS epidemic, there were calls to use the power of the law to help in stopping the spread of AIDS. From the failure of the blood industry to screen potential donors for the virus early in the epidemic to the inflammatory horror story of “Patient Zero,” the fear of future spread led to cries for a number of remedies: from criminalization of behavior risking HIV exposure to immediate quarantine of HIV-positive individuals. In response, President Reagan established the Presidential Commission on the Human Immunodeficiency Virus Epidemic in 1987. The following year, the Commission published a report encouraging state legislatures to begin using criminal law in combatting the AIDS epidemic. The report encouraged states to initiate the creation of HIV-specific statutes:

“Because of the problems in applying traditional criminal law to HIV transmission, however, states should review their criminal codes to determine the possible need to adopt a criminal statute specific to HIV infection. . . . An HIV-specific statute . . . would provide clear notice of socially acceptable standards of behavior specific to the HIV epidemic and tailor punishment to the specific crime of HIV transmission.”

Soon after, state legislatures began to respond to this call by enacting criminal HIV-specific statutes. In 1990, Congress added power and persuasion to the call for criminalization by passing the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, which conditioned federal funding to states for HIV/AIDS prevention upon the adequacy of the state’s laws governing criminal prosecution for intentional transfer of HIV. Over the next three years, half of the states had initiated HIV-specific criminal legislation. This legacy remains as twenty-one states maintain statutes criminalizing behavior that may risk the transfer of HIV or AIDS. Other states responded to the demands of the Ryan White Act by demonstrating the ability of their current criminal laws to punish behavior risking exposure to HIV. Thus, the use of the criminal law to combat the spread of HIV can be boiled down into three distinct categories: (1) HIV-specific exposure and transmission laws; (2) Public health statutes prohibiting conduct which may lead to exposure of others to sexually transmitted diseases and/or communicable diseases; or (3) General criminal laws covering attempted murder and assault.

The motivations behind the use of criminal law to combat the spread of HIV parallel the general arguments found in the criminal law context. Proponents believed that traditional theories of criminal law, retribution and utilitarianism, would properly aid in stemming the epidemic. Retributive principles would help reduce risky behavior because “if specific behaviors are prohibited, HIV-positive individuals will refrain from engaging in those activities.” Utilitarianism would help reduce transmission by imprisoning the HIV-positive individual “to eliminate the threat posed by the individual, to deter similar future behavior by others, and hopefully to reform the imprisoned individual.”

Most of the criminalization statutes and prosecutions revolve around the behaviors which are known to be the most risky for HIV transmission, such as sexual intercourse, intravenous needle sharing or use, and donation of blood or semen. However, many states go beyond the criminalization of just these known risky behaviors and prohibit behaviors such as “biting another person” and “spitting, biting, [and] stabbing with an AIDS contaminated object.” Other states appear to take a more generalized approach, placing a blanket ban on any behavior which may result in intentional exposure of HIV to other persons. Therefore, these general laws encompass both scientifically proven risky behavior, such as unprotected sexual intercourse, and lesser risky behaviors, such as biting or spitting.

About The Author

Brett Ashton Williams is a law student at Georgia State University's College of Law and will graduate in May of 2012. As a student, Ms. Williams served as a Graduate Research Assistant for Professor Leslie Wolf, a health law professor specializing in human subjects research issues and the interplay between HIV/AIDS and the law. Ms. Williams wrote this web research guide for Professor Johnson's Advanced Legal Research class in the Fall of 2011.

Please email Professor Johnson at njohnson@gsu.edu for more information about this bibliography.

Scope

This research guide is an introduction to the interplay between HIV/AIDS and criminal law. Specifically, this guide focuses on the criminal statutes and cases which cover behavior considered to lead to the transmission of HIV by HIV-positive individuals at the state and federal level throughout the United States. This guide will not discuss tort liability for the transmission of HIV or many of the other pertinent law topics influenced by HIV-positive individuals, such as insurance or healthcare guidelines.

It is important to note that as the medical community gained (and gains) further understanding and scientific evidence of HIV and how it is precisely trnasmitted, the way courts have applied these statutes and general criminal laws against HIV-positive defendants has continued to change. For this reason, the cases and secondary sources have been presented in chronological order to give the reader an understanding of the change-over-time that is occurring in this area of law. The statutes and cases chosen serve as useful resources with which to analogize or distinguish a researcher's current facts or case. This guide also provides various secondary resources as well as several starting points for computerized research in this area of law ranging from general information, to legal research, to interest group websites.

Disclaimer

The annotations provided here do not constitute legal advice. This guide is designed to be a starting point for research and is not comprehensive. Further, this guide has not been updated since November 2011. Do not rely on the author's interpretations of the cases or statutes provided. If you have questions on how to proceed with your research, please talk to the reference librarians.

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Primary Sources

Alabama

Statutes

ALA. CODE § 22-11A-21(c)

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

Under ALA. ADMIN. CODE r. 420-4-1-.03, HIV is included among STDs.

Cases

At the time this guide was published, there has not been any prosecution in Alabama against HIV-positive individuals under the above law. However, HIV-positive defendants have been prosecuted under general criminal laws.

Brock v. State, 555 So. 2d 285 (Ala. Crim. App. 1989)

An HIV-positive inmate being held in the AIDS unit of an Alabama prison was charged with attempted murder and two counts of assault when he allegedly became belligerent and bit a police officer. The police officer never tested positive for HIV. At trial, the jury convicted the defendant of first-degree assault, which required that the defendant both intend to cause and actually cause "serious physical injury" with a "deadly weapon or dangerous instrument." On appeal, the court dismissed the first degree assault conviction and downgraded the defendant's conviction to assault in the third degree. The court held that no evidence had been presented that the defendant's mouth and teeth were "deadly weapons" as defined and required by the Alabama statute. The court also relied upon the fact that the prosecution had offered no scientific evidence that HIV could be transmitted through a human bite in their findings.

Alaska

Statutes

ALASKA STAT. § 12.55.155(C)(33)

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

Cases

Wans v. State, No. A-6188, 1996 WL 671355 at * 1 (Alaska Ct. App. 1996)

In Wans, the defendant's HIV-positive status was considered an "aggravating factor" and he was sentenced to ten years for sexual abuse of a minor. On appeal, the court affirmed the lower court's sentencing because the defendant knew he was HIV-positive at the time he had sexual contact with the minor, did not disclose his HIV-positive status to the minor, and took no steps to protect her from transmission of HIV. Though the minor had tested negative for HIV, the court stil found that these considerations supported an enhanced sentence for the defendant.

Arizona

Currently, Arizona has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. There also have not been any prosecutions under general criminal laws, such as attempted murder or assault, for behavior considered to transfer HIV in Arizona.

Arkansas

Statutes

ARK. CODE ANN. § 5-14-123

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

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

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

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

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

ARK. CODE ANN. § 20-15-903

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

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

Cases

State v. Weaver, 939 S.W.2d 316 (Ark. Ct. App. 1997)

In Weaver, the defendant was convicted of exposing another human to HIV and was sentenced to thirty years in prison. On appeal, the defendant argued that the trial court erred in allowing: (1) the prosecution to present evidence that the victim was currently HIV-positive, (2) in denying the defendant the opportunity to cross-examine the victim about other sexual partners, and (3) in allowing the prosecution to present rebuttal testimony after the defendant testified that he had disclosed his HIV-positive status to the victim prior to any sexual intercourse. The court of appeals held that the trial court did not err in any of these areas, finding that the defendant failed to properly object to the presentation of the victim's HIV-positive status and therefore could not bring the argument on appeal. The court also found that the trial court did not err in denying the defendant the opportunity to cross-examine the victim about her other sexual partners because the defendant did not have any evidence that any of these partners were HIV-positive. Finally, the court held that allowing the State Health Department worker who tested the defendant for HIV to testify that the defendant "had stated to him that if he was truly positive, he would give HIV to everyone he could" was proper rebuttal evidence and not error.

See also Weaver v. State, 990 S.W.2d 572 (Ark. Ct. App. 1999).

California

Statutes

CAL. HEALTH & SAFETY CODE § 120291

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

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

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

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

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

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

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

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

CAL. HEALTH & SAFETY CODE § 120290

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

CAL. PENAL CODE § 12022.85

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

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

(1)Rape in violation of Section 261.

(2)Unlawful intercourse with a person under 18 years of age in violation of Section 261.5.

(3)Rape of a spouse in violation of Section 262.

(4)Sodomy in violation of Section 286.

(5)Oral copulation in violation of Section 288a.

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

CAL. HEALTH & SAFETY CODE § 1621.5

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

CAL. PENAL CODE § 647f - Penalty enhancements concerning prostitution

In any accusatory pleading charging a violation of subdivision (b) of Section 647, if the defendant has been previously convicted one or more times of a violation of that subdivision or of any other offense listed in subdivision (d) of Section 1202.1, and in connection with one or more of those convictions a blood test was administered pursuant to Section 1202.1 or 1202.6 with positive test results, of which the defendant was informed, the previous conviction and positive blood test results, of which the defendant was informed, shall be charged in the accusatory pleading. If the previous conviction and informed test results are found to be true by the trier of fact or are admitted by the defendant, the defendant is guilty of a felony.

Cases

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

In Guevara, the HIV-positive defendant was charged with aggravated assault for engaging in unprotected consensual intercourse with a minor female without disclosing his HIV-positive status to the female. The magistrate court found that the prosecution presented enough evidence to satisfy assault "by means of force likely to produce great bodily injury" and imposed the three year sentence enhancement detailed in California Penal Code § 12022.85(b)(2). On appeal, the defendant argued that California's sentencing enhancement statute violated the Eight Amendment's prohibition against cruel and unusual punishment because the enhancement was based on his status as an HIV-positive individual. The Court of Appeals disagreed, finding that the statute did not punish an offender's status, but rather the offender's conduct.

Roman v. Superior Court, 5 Cal. Rptr. 3d 807 (Cal. Ct. App. 2003)

In Roman, an HIV-positive defendant anally raped a "dependent adult" without using a condom and the court found that to be sufficient evidence that the defendant engaged in conduct “likely to produce great bodily harm or death,” elevating his charge to aggravated assault from sexual assault. No actual finding of HIV transmission was required.

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

In Hall, an HIV-positive defendant was charged with felony prostitution and exposing others to HIV after being picked up by an undercover officer. The defendant was aware of her HIV-positive status and had condoms in her purse. On appeal, the court upheld the felony prostitution conviction but dismissed the exposure to HIV charge finding that the defendant did not have specific intent to expose or transmit HIV.

Beuford v. People, No. B196860, 2008 WL 5091389 (Cal. Ct. App. Dec. 4, 2008)

In Beuford, the HIV-positive defendant was charged and convicted of making criminal threats to police officers while resisting arrest. The defendant spat at the officers and stated, "I'll make your life miserable because I'm infected with HIV." A criminal threat is a threat that is intended to and does cause fear in the person threatened that the defendant intended to kill or inflict bodily harm on the person. On appeal, the court found that a reasonable jury could find that the actions and threats made by the defendant constituted criminal threats.

Colorado

Statutes

COLO. REV. STAT. § 18-3-415.5 - Sentence enhancement

If it is proven beyond a reasonable doubt that a person had notice of his or her HIV infection prior to the date that he or she committed a sexual offense, the judge shall sentence the person to a mandatory term of incarceration of at least three times the upper limit of the presumptive range for the level of offense committed, up to the remainder of the person's life. ("Sexual offense" refers to sexual offenses consisting of sexual penetration as defined in Colo. Rev. Stat. § 18-3-401(6).)

COLO. REV. STAT. § 18-7-201.7 - Prostitution with the knowledge of being HIV positive

Any person who, in exchange for money or any other thing of value, performs or offers or agrees to perform, with any person not his/her spouse, any act of sexual intercourse, oral sex, masturbation or anal intercourse and does so with knowledge of having tested positive for HIV, is guilty of a class 5 felony.

COLO. REV. STAT. § 18-7-205.7 - Patronizing a prostitute

Any person with knowledge of being infected with HIV who patronizes a prostitute is guilty of a class 6 felony. ("Patronizing a prostitute" is defined in Colo. Rev. Stat. § 18-7-205).

Cases

People v. Perez, 972 P.2d 1072 (Colo. App. 1998)

In Perez, an HIV-positive man in Colorado was convicted of attempted extreme indifference murder and two counts of sexual abuse when he allegedly made his step-daughter engage in masturbation, oral sex, and penile-vaginal sex while knowing that he was HIV-positive. On appeal, the defendant argued that he did not act with the "universal malice" necessary for the attempted murder conviction. "Universal malice" is defined as the "depravity of the human heart which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim" and is aimed at conduct that places the lives of many people in danger without focusing on any one person's life in particular. On appeal the Colorado Court of Appeals found that there was not sufficient evidence to show that there was any universal malice because the defendant knew the victim and his conduct was directed towards her and her alone as opposed to other unknown victims. On this basis, the attempted murder conviction was overturned.

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

In Dembry, the HIV-positive defendant was charged and convicted of sexual assault on a minor and reckless endangerment, a lesser included offense of attempted manslaughter, based on the defendant's unprotected sexual contact while knowing he was HIV-positive. According to Colorado law, reckless endangerment is defined as exposing another to a "substantial risk of serious bodily injury" and a conscious disregard of a substantial and unjustifiable risk. The court of appeals affirmed the convictions, finding that the attempted manslaughter charge was properly consolidated with the other charges against the defendant.

People v. Shawn, 107 P.3d 1033 (Colo. App. 2004)

In Shawn, the Colorado Court of Appeals held that a person's HIV positive status could be a deadly weapon for the purposes of the menacing statute because HIV is capable of causing significant injury. In Shawn, an HIV-positive man was convicted of menacing when he allegedly scratched and pinched a store manager, broke his skin, and shouted "I'm HIV positive, let go of me, let go of me." Despite the fact that the store manager was not placed in fear of serious bodily injury, the court concluded that the defendant's statements were intended to cause such fear and as such were menacing. The court also determined that HIV was a deadly weapon because a deadly weapon does not have to be likely to cause serious bodily injury, only capable of doing so. The court determined that "the dangers of HIV are widely known" and the man's HIV status was "used" as a weapon when he broke the store manager's skin, giving himself "ready access to means of transmitting HIV."

Connecticut

Currently, Connecticut has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. There also have not been any prosecutions under general criminal laws, such as attempted murder or assault, for behavior considered to transfer HIV in Connecticut.

Delaware

Statutes

DEL. CODE ANN. tit. 16 § 2801(c) - Donating

No person may intentionally, knowingly, recklessly or negligently use the semen, corneas, bones, organs or other human tissue of a donor unless they have been tested for HIV or required as a life-saving measure. No person may knowingly, recklessly or intentionally use the semen, corneas, bones, organs or other human tissue of a donor who has tested positive for exposure to HIV or any other identified causative agent of AIDS.

Cases

There have not been any prosecutions under the above health statute or under general criminal laws, such as assault or attempted murder, of HIV-positive individuals in Delaware.

Florida

Statutes

FLA. STAT. ANN. § 384.24(2) - Unlawful acts relating to HIV exposure

It is unlawful for any person who has HIV, with knowledge of such infection and having been informed that he or she may communicate it to others through sexual intercourse, to have sexual intercourse with any other person, unless the other person has been informed of the presence of HIV and has consented to the sexual intercourse. A violation of this statute is a third degree felony. It is a first degree felony if there were multiple violations of this statute. FLA. STAT. ANN. §384.34(5).

FLA. STAT. ANN. § 381.0041(11)(B) - Donation or transfer of human tissue

Any person who knows he or she has HIV and has been informed that by donating blood, organs or human tissues he or she may communicate HIV to another person and with this knowledge donates blood, organs, plasma, skin or human tissue is guilty of a felony of the third degree.

FLA. STAT. ANN. § 796.08(5) - Prostition with knowledge of HIV-positive status

A person who commits prostitution, offers to commit prostitution or (by engaging in sexual activity likely to transmit HIV) procures another for prostitution, and who had previously tested positive for HIV and knew or had been informed of the test result and of the possibility of transmission to others through sexual activity is guilty of a third degree felony.

FLA. STAT. ANN. § 775.0877 - Repeated sex offense

A person who pleads guilty or nolo contendere to, or is convicted of, committing or attempting to commit one of the crimes that is listed in subsection (1) of this statute [pertaining to sex offenses] and involves the transmission of bodily fluids from one person to another, who subsequently tested positive for HIV and was informed of that test result, and who then again commits one of the crimes listed in subsection (1) is guilty of criminal transmission of HIV, a felony of the third degree. The offenses listed in subsection (1) include, among others, sexual assault, incest, child abuse, indecent assault upon a minor child, sexual performance by a minor, and donation of contaminated blood.

Cases

Brooks v. State, 519 So.2d 1156 (Fla. Dist. Ct. App. 1988)

In Brooks, a judge sentenced a sex worked convicted of theft to a sentence above the state sentencing guidelines because she had AIDS, despite the fact that the crime had nothing to do with her HIV status. On appeal, the sentence was reversed because her HIV status was in no way relevant to the crime.

State v. Sherouse, 536 So.2d 1194 (Fl. Dist. Ct. App. 1989)

Prior to the enactment of any HIV-specific statutes in Florida, an HIV-positive defendant was charged with two counts of attempted manslaughter for agreeing to have sex with two men for money. The trial court dismissed the charges and the Court of Appeals affirmed, finding that there was no evidence demonstrating the defendant's specific intent to kill, a required element of attempted manslaughter.

Cooper v. State, 539 So. 2d 508 (Fla. Dist. Ct. App. 1989)

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

Morrison v. State, 673 So.2d 953 (Fla. Dist. Ct. App. 1996)

In Morrison, the HIV-positive defendant was convicted of aggravated battery and was sentenced to ten years imprisonment and ten years of parole. The trial court justified its departure from the sentencing guidelines because in the course of the robbery the defendant bit a 90-year-old man to the bone who later tested positive for HIV. Confirming the lower court's sentencing, the Court of Appeals held that the departure was justified due to the nature of the crime and that HIV could give rise to AIDS.

Georgia

Statutes

O.C.G.A. § 16-5-60(c) - Reckless conduct; HIV-infected individuals

Any person who knows that he or she is HIV infected is guilty of a felony if he or she, without first disclosing his or her HIV status, (1) knowingly has sexual intercourse or performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person; (2) knowingly shares a hypodermic needle or syringe with another person; (3) offers or consents to perform an act of sexual intercourse for money; (4) solicits another to perform or submit to an act of sodomy for money; or (5) donates blood, blood products, other body fluids, or any body organ or body part.

O.C.G.A. § 16-5-60(d)

A person who knows he or she is HIV infected who commits an assault with the intent to transmit HIV, using his or her body fluids (blood, semen, or vaginal secretions), saliva, urine, or feces upon a peace or correctional officer while the officer is engaged in the performance of his or her official duties or on account of the officer's performance of his or her official duties is guilty of a felony.

Cases

Scroggins v. State, 401 S.E.2d 13 (Ga. Ct. App. 1990)

In Scroggins, the defendant was engaged in an altercation with another man when the police arrived. Finding the defendant "out of control," a police officer straddled the defendant to place handcuffs on him, at which point the defendant bit the office in the arm. The defendant was indicted and convicted of aggravated assault with intent to murder and aggravated assault in a manner likely to result in serious bodily injury. The Court of Appeals upheld the convictions, rejecting the defendant's argument that the evidence must prove that HIV may be transmitted through a human bite. Expert testimony at trial "did not testify that it was impossible to transmit the HIV virus via human saliva, but only that there were no such 'documented cases' although there were two 'reports' of it."Concluding that the jury "knew as much as medical science knew at the date of trial . . . with hardly anything ruled out as 'impossible' . . . except that *the disease itself is deadly*," the court further concluded that "the jury was well within the evidence to consider the human bite of a person infected with the AIDS virus to be 'deadly.'"

Burk v. State, 478 S.E.2d 416 (Ga. Ct. App. 1996)

In Burk,an HIV-positive man who allegedly threatened to transmit HIV to a corrections officer was originally charged with aggravated assault with intent to murder after he struck the officer, grabbed his arm, and attempted to bite him. The inmate was later convicted of reckless conduct (what was then referred to as "reckless endangerment"), an offense which required that he disregard a substantial risk of harming or endangering the safety of the officer. Contrary to the CDC's position that there is only a remote possibility that HIV may be transmitted through human bite, a physician testified at trial that HIV transmission from a human bite was "very strongly probable" and that he "did not see why" HIV could

not be transmitted through saliva. Based off of this testimony the court affirmed the defendant's conviction, finding that the defendant, knowing his HIV status and purposefully biting the officer amounted to reckless conduct despite the fact that biting was not conduct proscribed under O.C.G.A. § 16-5-60.

Ginn v. State, 667 S.E.2d 712 (Ga. Ct. App. 2008)

In Ginn, an HIV-positive defendant was sentenced to eight years imprisonment and two years probation for reckless conduct when she allegedly engaged in unprotected sexual intercourse without disclosing her HIV status. She was convicted despite the fact that two witnesses testified that the woman's sexual partner was aware of her HIV positive status and the defendant testified that her sexual partner knew her HIV-positive status because it had been published on the front page of a local newspaper. On appeal, the court affirmed the convictions, finding that a reasonable jury could find, despite the conflicting testimony, that the defendant had not disclosed her HIV status.

Hawaii

Currently, Hawaii has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. There also have not been any prosecutions under general criminal laws, such as attempted murder or assault, for behavior considered to transfer HIV in Hawaii.

Idaho

Statutes

IDAHO CODE ANN. § 39-608 - Transfer of bodily fluids which may contain HIV

Any person who exposes another in any manner with the intent to infect or, knowing that he or she has HIV, transfers or attempts to transfer any of his or her body fluid, tissue or organs to another person is guilty of a felony. It is an affirmative defense that the sexual activity took place between consenting adults after full disclosure by the accused of the risk of HIV transmission. It is also an affirmative defense that the transfer of body fluid, tissue or organs occurred after advice from a licensed physician that the accused was noninfectious. ("Body fluid" means semen, blood, saliva, vaginal secretion, breast milk, and urine. "Transfer" means engaging in sexual activity by genital-genital contact, oral-genital contact, anal-genital contact; or permitting the use of an unsterilized hypodermic syringe, needle, or similar device; or giving blood, semen, body tissue, or organs for purposes of transfer to another person.)

IDAHO CODE ANN. § 39-601

It is unlawful for anyone infected with HIV to knowingly expose another person to HIV infection.

Cases

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

In Thomas, the HIV-positive defendant was convicted under Idaho's statue for exposing a woman to HIV through oral and anal sex. The defendant claimed that he disclosed his HIV status to the woman before engaging in any sexual activity. Friends of the victim stated they informed the woman of the defendant's HIV status the day after the encounter and she was extremely upset and suprised. The Court of Appeals held that this testimony was sufficient to support that jury's guilty verdict and affirmed the conviction.

Illinois

Statutes

720 ILL. COMP. STAT. § 5/12-16.2 - Criminal transmission of HIV

A person who knows that he or she is infected with HIV commits criminal transmission of HIV if he or she (1) engages in contact with another person involving the exposure of the body of one person to a bodily fluid of another in a manner that could result in HIV transmission; (2) transfers, donates or provides his or her blood, tissue, semen, organs or other potentially infectious body fluids for administration (e.g., transfusion) to another person, or (3) in any way transfers to another any nonsterile IV or intramuscular drug paraphernalia. The actual transmission of HIV is not a required element of this crime. It is an affirmative defense that the person exposed knew the infected person was infected with HIV, knew the action could result in infection, and consented with that knowledge.

Cases

People v. Dempsey, 610 N.E.2d 208 (Ill. App. Ct. 1993)

In Dempsey, an HIV-positive defendant was covicted of aggravated criminal sexual assault and criminal transmission of HIV when he allegedly ejaculated into the mouth of a minor. On appeal, the defendant challenged the Illinois statute as being "unconstitutionally vague" as it prohibits conduct that "could result in the transmission of HIV" and is therefore overly broad. Thr Court of Appeals rejected this challenge, finding that the defendant's conduct fell squarely within the language of the Illinois statute as semen was a well known "transmitter of HIV" and oral sex was a known route of HIV transmission. Because his conduct was clearly targeted by the statute, the court held that the defendant had fair notice that his conduct would be considered criminal.

People v. Russell, 630 N.E.2d 794 (Ill. 1994)

In Russell, the Illinois Supreme Court evaluated the constitutionality of Illinois's HIV transmission statute. The appeal centered around two prosecutions: one concerning an HIV-positive woman charged with criminal transmission of HIV after engaging in consensual sexual intercourse with her partner allegedly without disclosing her HIV status and the other concerning an HIV-positive defendant charged with the same offense after he raped a woman with the knowledge that he was HIV-positive. In both trials, the trial judges found the statute to be unconstitutionally vague. The Illinois Supreme Court reversed, holding that the statute was constitutional. Following the Court of Appeal's reasoning in Dempsey, the Supreme Court applied the statute to the specific conduct of the two defendants and found that the statute covered the conduct, giving fair notice to each defendant. Though many hypothetical situations in which the statute could be applied were presented, the court found these arguments without merit, stating, "That the statute might open the innocent conduct of others to possible prosecution is a matter of pure speculation and conjecture which is not before us in these consolidated cases. We are here concerned only with the specific conduct of these defendants and the application of the statute to them."

Indiana

Statutes

IND. CODE ANN. §§ 16-41-7-1, 35-42-1-9 - Carriers' duty to warn persons at risk/Failure of carriers of dangerous communicable diseases to warn persons at risk

People who know of their HIV status have a duty to warn or cause to be warned by a third party person at risk of the following: the carrier's disease status and the need to seek health care, such as counseling and testing. This statute applies to past and present needle sharing and sexual activity that has been epidemiologically demonstrated to transmit HIV. A person who recklessly violates or fails to comply with this law commits a class B misdemeanor. A person who knowingly or intentionally violated state statute commits a class D felony.

IND. CODE § 35-42-2-6(E) - Battery by body waste (on a law enforcement officer)

A person who knowingly or intentionally in a rude, insolent, or angry manner places (or coerces another to place) blood or another body fluid or waste on a law enforcement or corrections officer, firefighter, or first responder (identified as such and engaged in performance of official duties) commits a class D Felony. If the person knew or recklessly failed to know that the blood, bodily fluid or waste was infected with HIV, it is a class C felony. If the person knew or recklessly failed to know that the blood, bodily fluid or waste was infected with HIV and the offense results in transmission of HIV, it is a class A felony.

IND. CODE § 35-42-2-6(F) - Battery by body waste (on another person, non-law enforcement officer)

A person who knowingly or intentionally in a rude, insolent, or angry manner places human blood, semen, urine or fecal waste on another person commits a class A misdemeanor. If the person knew or recklessly failed to know that the blood, semen, urine or fecal waste was infected with HIV, it is a class D felony. If the person knew or recklessly failed to know that the blood, semen, urine or fecal waste was infected with HIV and the offense results in transmission of HIV, it is a class B felony.

IND. CODE § 35-45-16-2(A) & (B) - Malicious mischief (touching)

A person who recklessly, knowingly, or intentionally places human blood, semen, urine or fecal waste in a location with the intent that another person will involuntarily touch it commits malicious mischief, a class B misdemeanor. If the person knew or recklessly failed to know that the blood, urine, or waste was infected with HIV, it is a class D felony. If the person knew or recklessly failed to know that the waste was infected with HIV and the offense results in the transmission of HIV to the other person, it is a class B felony.

IND. CODE § 35-45-16-2(D) - Malicious mischief (ingesting)

A person who recklessly, knowingly, or intentionally places human blood, body fluid, or fecal waste in a location with the intent that another person will ingest it commits malicious mischief with food, a class A misdemeanor. If the person knew or recklessly failed to know that the blood, fluid or waste was infected with HIV, it is a class D felony. If the person knew or recklessly failed to know that the blood, fluid or waste was infected with HIV and the offense results in the transmission of HIV to the other person, it is a class B felony.

IND. CODE § 16-41-14-17 - Donation, sale, or transfer of HIV infected semen

A person who, for the purpose of artificial insemination, recklessly, knowingly, or intentionally donates, sells, or transfers semen that contains HIV antibodies commits a Class C felony. The offense is a Class A felony if the offense results in the transmission of the virus to another person. (This does not apply to a person who transfers for research purposes semen that contains HIV antibodies.)

IND. CODE § 35-42-1-7 - Transferring contaminated bodily fluids

A person who recklessly, knowingly, or intentionally donates, sells or transfers blood, a blood component, or semen for artificial insemination that contains HIV commits a class C felony, but if it results in the transmission of HIV it is a class A felony. (Does not apply to person who, for reasons of privacy, donates blood to a blood center after the person has notified the blood center that the blood must be disposed of or who transfers HIVpositive body fluids for research purposes.)

Cases

State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989)

Prior to the enactment of Indiana's battery by body waste statute, in Haines, the HIV-positive defendant was charged and convicted of attempted murder after spitting, biting, scratching, and throwing blood on police officers and emergency personnel who arrived at his home in response to a call about the defendant's suicide attempt. The defendant had slit his wrists and warned the officers not to approach or else he would infect them with HIV. Though the trial court judge vacated the conviction because the state did not prove that HIV could be transmitted by the defendants conduct, the Court of Appeals reinstated that attempted murder convictions, finding that the defendant's actions were akin to "biological warfare" and that even if the conduct in question could not result in HIV infection, the defendant still believed that his conduct could result in transmission which was enough to uphold the attempted murder conviction.

Newman v. State, 677 N.E.2d 590 (Ind. Ct. App. 1997)

In Newman, an HIV-positive sex worker was charged under the class C felony of purposefully placing her "HIV-infected" body fluids on law enforcement officers who were trying to arrest her. The defendant "swung her head back and forth in an attempt to spray the officers with her tears, saliva, and nasal secretions." The trial judge refused to enter the conviction as a class C felony and instead convicted her under the lesser included class D felony offense reasoning that "it's medically impossible to transfer HIV and AIDS through spitting." The Court of Appeals affirmed the defendant's conviction for battery by body waste.

Nash v. State, 881 N.E.2d 1060 (Ind. Ct. App. 2008)

In Nash, the HIV-positive defendant was sentenced to six years imprisonment under the battery by body waste statute for throwing his urine and feces on a nurse in his detention facility. The urine and feces landed on the nurse's shoes and box that she was carrying. Despite the fact that there was no risk of HIV transmission the court sentenced him under the more severe class C felony charge for exposing the nurse to bodily fluid "infected with HIV." The Court of Appeals affirmed the conviction, finding that the purpose of the statute was to deter persons from intentionally exposing those working at the state's correctional facilities from bodily waste.

Iowa

Statutes

IOWA CODE § 709C.1 - Class B Felony: Criminal transmission of HIV

A person commits criminal transmission of HIV if the person, knowing of his or her HIV-positive status:
1. Engages in intimate contact with another person;
2. Transfers, donates, or provides the person's blood, tissue, semen, organs, or other potentially infectious bodily fluids for transfusion, transplantation, insemination, or other administration to another person; or
3. Dispenses, delivers, exchanges, sells, or in any other way transfers to another person any nonsterile intravenous or intramuscular drug paraphernalia previously used by the person infected with HIV.

"Intimate contact" is the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV. Actual transmission of HIV is not a necessary element of this crime. It is an affirmative defense that the person exposed to HIV (1) knew of the other person's HIV-positive status, (2) knew that the action of exposure could result in transmission of HIV, and (3) consented to exposure with that knowledge.

Cases

State v. Keene, 629 N.W.2d 360, 362 (Iowa 2001)

In Keene, an HIV-positive man was charged with criminal transmission of HIV after engaging in unprotected sexual intercourse with a female partner without disclosing his HIV status. After pleading guilty, the defendant in Keene received a twenty-five year prison sentence. Following his guilty plea, the defendant argued on appeal that Iowa's criminal transmission laws were unconstitutionally vague as applied to his case. Specifically, he argued that the language "could result in the transmission of HIV" failed to give him fair notice of what conduct was prohibited under Iowa's HIV exposure laws. The Supreme Court of Iowa disagreed, holding that conviction under Iowa's criminal transmission law was lawful as long as HIV transmission was possible and "any reasonably intelligent person is aware it is possible to transmit HIV during sexual intercourse, especially when it is unprotected." The Supreme Court of Iowa also clarified the types of "intimate contact" that may result in prosecution, recognizing that "HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing [HIV]." Though the defendant argued that he had not ejaculated during intercourse, and therefore did not expose the woman to HIV, the Supreme Court of Iowa determined that the question of whether the defendant ejaculated during intercourse was irrelevant as long as he exposed another to his bodily fluids.

State v. Musser, 721 N.W.2d 758 (Iowa 2006)

In Musser, an HIV-positive man engaged in unprotected, undisclosed sex three times with a female partner and was convicted and sentenced to twenty-five years in prison. On appeal, the defendant argued that he did not expose the woman to bodily fluids because he did not ejaculate. A state health director testified at trial that HIV transmission was possible during sexual intercourse without ejaculation and the defendant's conviction was affirmed.

State v. Musser, 721 N.W.2d 734 (Iowa 2006)

In a different appeal, the same defendant from the case above challenged Iowa's criminal transmission law as unconstitutionally vague. The court rejected this challenge and found, as applied to the defendant's case, the law gave clear warning, and the court took judicial notice, that HIV could be transmitted through sexual intercourse and such activities fell under the purview of the statute. The court found that requiring an HIV positive person to disclose her/his HIV status was the most narrowly tailored means of achieving the goal of the statute, to limit the spread of HIV, and that such a requirement did not infringe on First Amendment rights. The court also rejected the defendant's claim that Iowa's criminal transmission law is vague on its face. Musser argued that the statute, as written, would limit his freedom of association because its broad language could limit conduct such as kissing or "sweating on another while playing a game of basketball." The court rejected this argument because such activities are not known to transmit HIV and the statute only addressed conduct that could result in HIV transmission.

Kansas

Statutes

KAN. CRIM. CODE ANN. § 21-3435 - Exposing another to a life threatening communicable disease

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

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

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

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

(b) As used in this section, the term "sexual intercourse" shall not include penetration by any object other than the male sex organ; the term "sodomy" shall not include the penetration of the anal opening by any object other than the male sex organ.

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

Cases

State v. Richardson, 209 P.3d 696 (Kan. 2009)

In Richardson, an HIV-positive defendant appealed his conviction of two counts of exposing another to a life-threatening disease. He was convicted after having sex with two women at a time when his viral load measured as undetectable. At trial and on appeal, the defendant argued that Kansas' communicable disease exposure law fails to give adequate notice as to what constitutes a "life threatening" disease, "exposure" to HIV, and what viral load would be sufficient for a criminal exposure to HIV. The Supreme Court of Kansas rejected these arguments, stating that the law does not criminalize communicable disease exposure per se, but rather sexual intercourse or sodomy with the intent to expose another to a communicable disease. It added that "one need not ruminate on exactly how the act must be performed to meet the legal definition of 'expose' or even know that a transmittal of the disease is possible."

Importantly, the Richardson court also ruled that Kansas' communicable disease exposure statute required that a defendant have the specific intent to expose sexual partners to HIV. It was not sufficient if a defendant had the general intent to engage in sexual intercourse while HIV positive. In doing so, the court rejected the prosecution's argument that Kansas' communicable disease exposure law criminalized any act of sexual intercourse or sodomy by an HIV-positive person, even if a condom was used. The prosecution went as far as to suggest that complete abstinence from sex is the only way to avoid exposing others to a risk of HIV. The Kansas Supreme Court disagreed and vacated the defendant's conviction after the state failed to prove that his specific intent was to expose his sexual partners to HIV. The court found that the elements of specific intent could include an analysis of whether the HIV positive person disclosed her/his HIV status, used a condom during sexual acts, or specifically denied having HIV or sexually transmitted diseases.

Kentucky

Statutes

KY. REV. STAT. ANN. § 311.990(24)(B) - Donation of human organs, skin, and other tissues

Any person infected with HIV knowing that he or she is infected and having been informed of the possibility of communicating the infection by donating human organs, skin or other human tissues who donates organs, skin or other human tissue is guilty of a class D felony.

KY. REV. STAT. ANN. §§ 529.090(3)-(4) - Prostitution with knowledge of HIV-positive status

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

Cases

Hancock v. Commonwealth, 998 S.W.2d 486, 497 (Ky. Ct. App. 1998)

In Hancock, an HIV-positive man had a two-year sexual relationship with a woman without allegedly disclosing his HIV-positive status. Although the man testified that his partner knew he was HIV positive, he later pleaded guilty to second-degree wanton endangerment. He received a 120-day suspended sentence plus one year of probation. On appeal of the initial indictment, the Court of Appeals of Kentucky rejected the argument that Kentucky's wanton endangerment statute could not apply to HIV exposure, finding the charge valid on its face "in light of the deadly nature of HIV." 287 The court also found that the defendant's contention that his partner knew of his HIV-positive status had no bearing on the issue of whether his charges should have been dismissed. That was an issue of fact the man would have to raise before the jury as a defense to prosecution.

Torrence v. Commonwealth,269 S.W.3d 842 (Ky. 2008)

In Torrence, an HIV-positive man found guilty of first-degree rape and sodomy argued that it would violate his due process rights to introduce evidence of his HIV status during the sentencing phase of his trial. At trial, the assault complainant testified that she learned of the defendant's HIV-positive status following the rape, took medication to prevent infection, and suffered emotional damage due to her fears of HIV infection and alleged feelings of alienation from her family. The Supreme Court of Kentucky found no error in admitting this evidence during sentencing, as it directly related to physical and psychological harm the victim suffered, and the impact of a crime on a victim is consideration during sentencing. The court also noted that the defendant's HIV-positive status magnified his victim's suffering beyond that of a "typical" rape victim.

Louisiana

Statutes

LA. REV. STAT. ANN. § 14:43.5 - Intentional exposure to AIDS virus

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

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

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

"Means or contact" is defined as spitting, biting, stabbing with an AIDS contaminated object, or throwing of blood or other bodily substances.

"Police officer" includes a commissioned police officer, sheriff, deputy sheriff, marshal, deputy marshal, correctional officer, constable, wildlife enforcement agent, and probation and parole officer.

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

Cases

State v. Gamberella, 633 So. 2d 595 (La. Ct. App. 1993)

In Gamberella, an HIV-positive man was convicted of HIV exposure despite his testimony that he disclosed his HIV positive status to his girlfriend and wore condoms during sex. The man's girlfriend, the complainant, testified that after she became pregnant by the defendant after a condom failed they engaged in unprotected sexual intercourse on multiple

occasions. She testified that she didn't know his HIVpositive status during the entire relationship. The defendant was convicted and sentenced to ten years in prison at hard labor. On appeal, the defendant argued that the law failed to define such terms as "expose" and "sexual contact," and therefore could prohibit activities posing no risk of HIV transmission, including kissing. The Court of Appeal of Louisiana rejected these arguments, holding that the statute described prohibited conduct with sufficient particularity. The court reasoned that the term "sexual contact" "unambiguously" refers to: "numerous forms of behavior involving use of the sexual organs of one or more of the participants or involving other forms of physical contact for the purpose of satisfying or gratifying the 'sexual desires' of one of the participants."

See also State v. Serrano, 715 So. 2d 602 (La. Ct. App. 1998) (sentencing an HIV-positive man to one year in prison at hard labor after he engaged in unprotected sex with his girlfriend without disclosing his HIV status); ***State vs. Turner***, 927 So. 2d 438 (La. Ct. App. 2005) (sentencing an HIV-positive woman to two concurrent five-year prison sentences after she pleaded guilty to engaging in "some sort of sexual contact" with two men and equating the woman's activities to "pointing a gun to [the victims'] head[s] and pulling the trigger").

State v. Caine, 652 So. 2d 611 (La. Ct. App. 1995)

In Caines, an HIV-positive man was convicted of attempted second-degree murder after he allegedly stuck a store clerk with a syringe full of clear liquid and said "I'll give you AIDS." The syringe was never recovered, and it is not known whether the clear liquid was contaminated with HIV. However, because the defendant was HIV-positive, pulled a needle out of his pocket, and had "track marks" on his arm suggesting a history of drug use, the Court of Appeal of Louisiana found it likely that the needle was infected with HIV, and affirmed the defendant's sentence of fifty years in prison at hard labor.

State v. Richmond, 708 So. 2d 1272 (La. Ct. App. 1998)

In Richmond, the Court of Appeal of Louisiana rejected an argument from an HIV-positive sex worker that a ten-year sentence for conviction of a crime against nature by soliciting unnatural oral copulation for compensation was excessive. Although the court noted that a ten-year sentence was harsh, the trial judge, who is afforded wide discretion on sentencing, supported the sentence by stating that the woman committed prostitution with knowledge of her HIV-positive status and should therefore be punished to the full extent of the law for the danger that she posed to others "who are not ill right now, who can be protected." The trial court compared the woman's actions to imposing a death sentence for others "because of what [she carries] around inside [her] body." The Louisiana Court of Appeal affirmed the defendant's sentence of ten years in prison based on her prior record as a third felony offender.

State v. Roberts, 844 So. 2d 263 (La. Ct. App. 2003)

In Roberts, an HIV-positive defendant was convicted of intentionally exposing a rape victim to HIV after he raped and bit her. On appeal, the defendant argued that the state failed prove that (1) biting a person could expose that person to HIV, (2) the teeth of an HIVpositive man could be "AIDS-contaminated" objects, (3) that his mouth contained saliva, and (4) that his bite broke his victim's skin. The Court of Appeal of Louisiana rejected these arguments because the statute specifically noted biting to be an offense under the statute.

Maine

Currently, Maine has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. There also have not been any prosecutions under general criminal laws, such as attempted murder or assault, for behavior considered to transfer HIV in Maine.

Maryland

Statutes

MD. CODE ANN., HEALTH-GEN. § 18-601.1 - Misdemeanor: knowing transfer of HIV

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

(b) A person who violates the provisions of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $2,500 or imprisonment not exceeding 3 years or both.

Cases

Smallwood v. State, 680 A.2d 512 (Md. 1996)

In Smallwood, an HIV-positive man was convicted of assault with intent to murder, reckless endangerment, and attempted murder after pleading guilty to attempted first-degree rape and robbery with a deadly weapon, when he raped and robbed three women at gunpoint. In addition to other sentences, the man received thirty years in prison for assault with intent to murder base on his raping the women while knowing of his HIV status. On appeal, the defendant argued that sexually assaulting the women with knowledge of his HIV-positive status was not sufficient to find an intent to kill. The court determined that the State had only provided evidence that Smallwood intended to rob and rape the victims – not that he intended to kill them. The court reasoned that death by AIDS from a single exposure to HIV was not sufficiently probable to show that the defendant intended to kill his victims. The court also distinguished the defendant's case from cases in other states where intent to kill was clearly evident by evidence such as (1) statements suggesting that a person wished to spread HIV or (2) actions solely explainable as an attempt to spread HIV, such as splashing blood.

Massachusetts

Statutes

Currently, Massachusetts has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. However, there have been prosecutions against HIV-positive individuals under general criminal laws in Massachusetts.

Cases

Commonwealth v. Smith, 790 N.E.2d 708 (Mass. App. Ct. 2003)

In Smith, an HIV-positive man was indicted on charges for assault with intent to commit murder after he 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." Another officer testified before the grand jury that a doctor told him that HIV transmission from a human bite is possible if an attacker's gums are bloody. Despite the fact that the chances of HIV transmission from a human bite are at best remote, a grand jury indicted the defendant and he later pleaded guilty. The defendant later filed a motion to withdraw his guilty plea based on ineffective assistance of counsel, claiming his counsel erred in advising the defendant to stipulate to his HIV-positive status. The Court of Appeals affirmed the denial of this motion, finding that "defense counsel justifiably concluded that the Commonwealth would have been able to have the defendant's blood tested for the HIV virus because the evidence would have been relevant to the investigation before the grand jury" and did not err in advising the defendant to admit his HIV-positive status.

Commonwealth v. Boone, No. 02-P-536, 2003 WL 22087552, at *1 (Mass. App. Ct. Sept. 9, 2003)

In Boone, an HIV-positive positive man was convicted of rape of a child and sentenced to five years in prison when he anally raped his 14-year old cousin. The boy later revealed the events to a doctor after discovering that he was HIV positive. On appeal, the defendant argued that at sentencing the judge improperly considered the fact that the defendant knew his HIV positive status when he raped the boy. The Appeals Court of Massachusetts rejected this argument, agreeing with the sentencing judge that although it could not be proven that the defendant transmitted HIV to his cousin, the fact that he committed a sexual assault with knowledge of his HIV-positive status was a valid consideration during sentencing.

Michigan

Statutes

MICH. COMP. LAWS ANN. § 333.5210 - Class F, Person Felony: Sexual penetration with uninformed partner

(1) A person who knows that he/she has been diagnosed as having AIDS or AIDS-related complex (ARC), or who knows that he/she is infected with HIV, and who engages in sexual penetration with another person without having first informed the other person that he/she has AIDS/ARC/HIV, is guilty of a felony.

(2) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body. Emission of semen is not required.

MICH. COMP. LAWS ANN. § 333.11101 - Violation: donation or sale of blood or blood products

An individual shall not donate or sell his/her blood or blood products to a blood bank or storage facility or to an agency or organization that collects blood or blood products for a blood bank or storage facility knowing that he or she has tested positive for the presence of HIV or an antibody to HIV. A blood bank or other health facility to which blood or blood products is donated in violation of this section immediately shall notify the local health department of the violation.

Cases

People v. Jensen, 564 N.W.2d 192 (Mich. Ct. App 1997), ***vacated in part, appeal denied in part by*** 575 N.W.2d 552 (Mich. 1998)

In Jensen, a mentallyimpaired, HIV-positive woman received three concurrent prison terms of two years and eight months to four years after she engaged in unprotected sex with a man on three occasions. On appeal, she argued that the statute failed to differentiate between consensual and nonconsensual intercourse, and would seem to require that rape victims inform their attackers of their HIV status. The Court of Appeals of Michigan rejected this argument, finding that the defendant did not have standing to challenge the statute on such grounds because her case did not involve forced sexual intercourse. The court found that the defendant's actions of engaging in unprotected, consensual sex without disclosing her HIV status was clearly prohibited by law and rejected the defendant's argument that Michigan's uninformed partner law is unconstitutional due its lack of a clear intent requirement.

People v. Flynn, No. 199753, 1998 WL 1989782, at *1 (Mich. Ct. App. Sept. 25, 1998)

In Flynn, an HIV-positive man was convicted of failing to tell his sexual partners, with whom he engaged in unprotected sex, that he was HIV-positive. On appeal, he argued that Michigan's uninformed partner law was unconstitutionally overbroad, because the law's definition of "sexual penetration" included activities that could not spread the virus. The court found that the defendant had no basis for challenging the scope of the law because the defendant had engaged in unprotected sexual intercourse, which was "clearly encompassed" by the statute's language. The defendant was sentenced to two concurrent terms of thirty-two to forty-eight months in prison.

See also People v. Selemogo, No. 273410, 2008 WL 902287, at *1 (Mich. Ct. App. Apr. 3, 2008) (sentencing an HIV-positive man to 108 to 240 months in prison for criminal sexual contact and nine months in prison for sexual penetration with an uninformed partner after he sexually assaulted a woman in her sleep)*;* ***People v. Clayton,*** No. 230328, 2002 WL 31058331, at *1 (Mich. Ct. App. Sept. 13, 2002) (sentencing an HIV-positive man to fifty-eight months to fifteen years in prison after he allegedly engaged in unprotected anal and oral sex with a man without informing the man of his HIV status).

People v. Odom, 740 N.W.2d 557 (Mich. Ct. App. 2007)

In Odom, an HIV-positive inmate was convicted on three counts of assault when he allegedly punched and spat on correctional officers during an altercation. Because he was bleeding from the mouth during the assault, and because his saliva containing blood was deemed a "harmful biological substance" under state bioterrorism laws, the spitting incident led to an increased sentence of five to fifteen years. The defendant's appeal was the first opportunity for the Michigan Court of Appeals to determine whether the blood of an individual with HIV could be considered a "harmful biological substance" under state sentencing guidelines. Relying on a statement from the CDC website that HIV can be transmitted via blood, the Court of Appeals concluded that HIV-positive blood is a "harmful biological substance" as it can "spread or cause disease in humans, animals, or plants." The defendant's elevated sentencing was therefore upheld.

People v. Allen, No. 2009-4960 (Macomb County Ct. Mich. Cir. Ct. June 2, 2010)

In Allen,the HIV-positive defendant was charged under bioterrorism laws due to the "possession" of a harmful biological substance (i.e., HIV) with the intent to frighten, terrorize, intimidate, threaten, harass, injure or kill another. There was no evidence that the man was bleeding from the mouth at the time of the bite, that he intended to transmit HIV, or that he exposed his neighbor to anything but saliva. The Macomb County Circuit Court dismissed the bioterrorism charge as unfounded. Relying on a statement from the CDC, the court acknowledged that saliva, tears, or sweat has never been shown to result in HIV transmission. However, the court also cited Odom and confirmed that HIV-infected blood is a "harmful biological substance" under state bioterrorism laws.

Minnesota

Statutes

MINN. ST. § 609.2241 - Knowing transfer of communicable disease

It is a crime for a person who knowingly harbors an “infectious agent” to transfer it to another person through:

1. Sexual penetration with another person without having first informed the other person that the person has a communicable disease;
2. Transfer of blood, sperm, organs, or tissue; or
3. Sharing of nonsterile syringes or needles for the purpose of injecting drugs.

This crime may be under Minnesota laws concerning: attempt; murder in the first and second degrees; and assault in the first, second, third, fourth, and fifth degrees.

It is an affirmative defense that:
1. The person who knowingly harbors an infectious agent for a communicable disease took practical means to prevent transmission as advised by a physician or other health professional; or
2. The person who knowingly harbors an infectious agent for a communicable disease is a health care provider who was following professionally accepted infection control procedures.

Cases

Perkins v. State, 559 N.W.2d 678 (Minn. 1997)

In Perkins, the HIV-positive defendant charged with first degree sexual assault, which carried a recommended maximum sentence of 105 to 111 months in prison. After pleading guilty to the assault, the trial judge sentenced the defendant to thirty years in prison and a $12,000 fine, citing the fact that the defendant knew he was HIV-positive as a severe aggravating factor. Specifically, the judge stated, "I cannot fathom on the face of this earth if there was a more devastating offense to a victim than being sexually assaulted by a person with AIDS -- I can't imagine what it would be. The victim of this offense will not know for several months whether or not she contracted the HIV virus. She might not know for years. If she does become HIV positive, it's a death sentence. The victim here will not know if she becomes pregnant, whether the child would be HIV positive or not. The victim reports that she has suffered a great deal because of this type of uncertainty." On appeal, the Court of Appeals and the Minnesota Supreme Court affirmed the sentencing decision, finding that the defendant understood the difference between an agreement as to a sentence and a recommendation as to a sentence, and, therefore, his guilty plea was accurate, voluntary, and intelligent.

Mississippi

Statutes

MISS. CODE ANN. § 97-27-14 - Exposure to HIV, hepatitis B or hepatitis C

(1) It shall be a felony for any person to knowingly expose another person to HIV, hepatitis B or hepatitis C. Prior knowledge and willing consent to the exposure is a defense to a charge brought under this statute.

(2) A person commits the crime of endangerment by bodily substance if the person attempts to cause or knowingly causes a corrections employee, a visitor to a correctional facility or another prisoner or offender to come into contact with blood, seminal fluid, urine, feces or saliva. A violation of this subsection is a misdemeanor unless the person violating this section knows that he is infected with HIV, hepatitis B or hepatitis C, in which case it is a felony.

(3) Any person convicted of a felony violation of this section shall be imprisoned for not less than three years nor more than ten years and/or a fine of not more than $10,000.

MISS. CODE ANN. § 41-23-2 - Violating the lawful order of a health officer

Any person who shall knowingly and willfully violate the lawful order of the county, district or state health officer where that person is afflicted with a life-threatening communicable disease or the causative agent thereof shall be guilty of a felony and, upon conviction, shall be punished by a fine not exceeding $5,000 or by imprisonment in the penitentiary for not more than five years, or by both.

Cases

Carter v. State, 803 So. 2d 1191 (Miss. Ct. App. 1999)

In Carter, the health department of Mississippi issued a quarantine order against an HIV-positive man and labeled him a potential danger to the public health after he tested positive for HIV. The man was ordered to (1) disclose his HIV status to sexual partners and (2) abstain from engaging in activities involving the mixture of his blood with the blood of another (i.e., intravenous drug use). The man was sentenced to five years in prison after being convicted of failing to tell a sexual partner that he was infected with HIV.

Missouri

Statutes

MO. REV. STAT. § 191.677 - Reckless Exposure to HIV

It is unlawful for a person knowingly infected with HIV to:
(1) Be or attempt to donate blood, blood products, organs, sperm or tissue donor except as deemed necessary for medical research.
(2) Act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person, in any of the following manners:
a. Through contact with blood, semen or vaginal secretions during oral,

anal or vaginal sex; or
b. By sharing needles; or
c. By biting another person or purposely doing anything else which causes the HIV infected person's semen, vaginal secretions, or blood to come into contact with the mucous membranes or non-intact skin of another person.

Examples that a person has acted reckless include:
• The HIV-infected person knew of such infection before engaging in sexual activities, sharing needles, biting, or purposefully causing his or her semen, vaginal secretions or blood to come into contact with the mucus membrane or non-intact skin of another person, and the [person exposed] was unaware of the HIV-infected person's condition or did not consent to contact with blood, semen or vaginal fluid in the course of such activities;
• The HIV-infected person has subsequently been infected with and tested positive to primary and secondary syphilis, or gonorrhoea, or chlamydia; or
• Another person provides evidence of sexual contact with the HIV-infected person after a diagnosis of an HIV status.

The use of a condom is not a defense.

A violation of these provisions is a class B felony, unless the victim contracts HIV from the contact, in which case it is a class A felony.

MO. REV. STAT. § 565.085 - Exposure to HIV in prison facilities

An offender or prisoner commits the crime of endangering a corrections employee, a visitor to a correctional facility, or another offender or prisoner if he or she attempts to cause or knowingly causes such person to come into contact with blood, seminal fluid, urine, feces, or saliva.
It is a Class C felony if the offender has HIV, hepatitis B, or hepatitis C, or exposes another to the HIV, hepatitis B, or hepatitis C.

MO. REV. STAT. § 567.020 - Prostitution while HIV positive

Performing an act of prostitution, which is normally a class B misdemeanor, becomes a class B felony if the prostitute knew prior to performing the act of prostitution that he or she was infected with HIV. The use of a condom is not a defense.

Cases

State v. Mahan, 971 S.W.2d 307 (Mo. 1998)

In Mahan, the Missouri Supreme Court heard the appeals of two men who were convicted under the Missouri statute for failing to inform their sexual partners that they were HIV positive. One of the men, Sykes, was sentenced to ten years imprisonment for having sex with two women, including his live-in girlfriend, and failing to disclose his HIV status. The other man, Mahan, was sentenced to five years imprisonment for failing to tell his sexual partner that he was HIV-positive. The appellants argued that the statute was overly broad and criminalized behavior such as an HIV-positive mother giving birth to her child. The court held that the appellants lacked standing on this matter because their behavior directly fell within the language of the statute and as such they could not challenge hypothetical scenarios that were not reflective of their behavior. The appeal by one of the defendants, Mahan, also argued that the statute was overly vague as the phrase "grave and unjustifiable risk" did not provide enough notice as to what acts can be prohibited under the statute. Specifically, Mahan reasoned that because the risk of transmitting HIV was not quantitatively known to scientists, a person would have no way of knowing when one's conduct would rise to a "grave and unjustifiable risk." The court found because Mahan was counseled that HIV could be transmitted through unprotected sex, including anal sex, and he continued to have anal sex without disclosing his HIV status, the statute was not vague as applied to him and he had full notice that his actions could result in the transmission of HIV. The court upheld both of the convictions.

State v. Yonts, 84 S.W.3d 516 (Mo. Ct. App. 2002)

In Yonts, the HIV-positive defendant was sentenced to one year imprisonment for exposing his girlfriend, the complainant, to HIV. Though the defendant testified that he disclosed his HIV status prior to any sexual conduct, the complainant testified it wasn't until a year into their relationship that the defendant told her he was HIV-positive. After the disclosure she continued to have unprotected sex with him because she thought that the medication the defendant was taking would prevent HIV transmission – which may have been the case if he had a low viral load. The trial court found that even if one does eventually disclose her/his HIV status to her/his sexual partner, and the parties continue to be sexually intimate after such disclosure, the HIV-positive person can still face prosecution unless the disclosure was done prior to the first sexual encounter.

In re Coffel, 117 S.W.3d 116 (Mo. Ct. App. 2003)

In In re Coffel, the HIV-positive defendant pleaded guilty to two counts of sodomy based on an incident that took place when she was 18-years-old. In 1994, she, on a dare, placed the penises of an 11-year-old and 13-year-old boy briefly in her mouth. When the boys discovered she was HIV-positive they reported the incident. After pleading guilty she was sentenced to five years imprisonment and though a pre-sentencing report said she was not a sexual predator, her end-of-confinement evaluation determined that due to her lack of remorse or concern about the possibility of infecting others with HIV she was more likely than not to re-offend and should be considered a sexually violent predator. At trial, a multidisciplinary team as well as a psychologist determined that Coffel was not a sexual predator. In particular the psychologist noted that the end-of-confinement report was based in large part on the erroneous assumption that Coffel's saliva could have transmitted HIV during the acts of sodomy and that she intended to transmit HIV. The trial court, despite this evidence, ordered her to be confined indefinitely.

On appeal, the Missouri Court of Appeals focused on whether the state had met its burden in proving that Coffel was more likely than not to commit another sexually violent crime, as required by the sexually violent predator statute. The court found that only two out of ten of the State's witnesses addressed whether Coffel was likely to commit the crime again and that the expert testimonies did not base their opinions on psychological theories but rather on private, subjective, untested, unsupported analysis. Based on this evidence, the court ordered Coffel's release because the state failed to meet its burden.

State v. Wilson, 256 S.W.3d 58, 64 (Mo. 2008)

In Wilson, the HIV-positive defendant was convicted of, amongst other charges, reckless exposure to HIV. On appeal, the defendant argued he could not be convicted under the statute because he ejaculated outside the body and therefore did not recklessly expose the complainant to HIV. The Missouri Supreme Court concluded that "while withdrawal would have been relevant to the jury's determination of recklessness, the statute does not contemplate that withdrawal is in itself a complete defense." The jury could have concluded that ejaculating outside of the body negated the element of recklessness, and thus could have acquitted but the jury concluded that unprotected contact was reckless because it posed some possibility of transmission.

Montana

Statutes

MONT. CODE. ANN. §§ 50-18-112, 50-80-113 - Violation of a Misdemeanor

A person infected with an STD may not knowingly expose another person to infection. HIV is considered an STD for the purposes of this statute.

Cases

There have been no reported prosecutions under this statute or under general criminal laws against HIV-positive individuals in Montana at the time this guide was published.

Nebraska

Currently, Nebraska has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. There also have not been any prosecutions under general criminal laws, such as attempted murder or assault, for behavior considered to transfer HIV in Nebraska.

Nevada

Statutes

NEV. REV. STAT. § 201.205 - Intentional transmission of HIV: penalty and affirmative defense

A person who, after testing positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and receiving actual notice of that fact, intentionally, knowingly or willfully engages in conduct in a manner that is intended or likely to transmit the disease to another person is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than $10,000, or by both fine and imprisonment. It is an affirmative defense to an offense charged is that the person who was subject to exposure to the human immunodeficiency virus as a result of the prohibited conduct: knew the defendant was infected with the human immunodeficiency virus; knew the conduct could result in exposure to the human immunodeficiency virus; and consented to engage in the conduct with that knowledge.

NEV. REV. STAT. § 201.358 - Engaging in prostitution or solicitation for prostitution after testing positive for exposure to human immunodeficiency virus

A person who works as a prostitute in a licensed house of prostitution after testing positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and receiving notice of that fact is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than $10,000, or by both fine and imprisonment.

NEV. REV. STAT. § 441A.300 - Confinement of a Person Whose Conduct May Spread Acquired Immunodeficiency Syndrome

A person who is diagnosed as having acquired immunodeficiency syndrome who fails to comply with a written order of a health authority, or who engages in behavior through which the disease may be spread to others, is, in addition to any other penalty imposed pursuant to this chapter, subject to confinement by order of a court of competent jurisdiction.

NEV. REV. STAT. § 441A.180 - Contagious person to prevent exposure to others; warning by health authority; penalty

A person who has a communicable disease in an infectious state shall not conduct himself or herself in any manner likely to expose others to the disease or engage in any occupation in which it is likely that the disease will be transmitted to others. A person who violates this provision after service upon him or her of a warning from a health authority is guilty of a misdemeanor.

Cases

Glegola v. State, 871 P.2d 950 (Nev. 1994)

In Glegola, the Nevada Supreme Court affirmed a sex worker's conviction and fifteen year sentence for solicitation while being HIV positive, even though she testified that she did not actually intend to perform any sexual acts and did not engage in any activities that could transmit HIV. The defendant testified that her only intent was to steal the undercover agent's money, without engaging in any sexual activities and she should therefore not be prosecuted under the statute. No sexual act was committed and she was taken into custody after offering sexual services. She produced multiple witnesses to testify to such facts on her behalf. The defendant also argued that her fifteen-year sentence was cruel and unusual punishment and disproportionate to the crime for which she was convicted. The court found that both the conviction and sentencing were appropriate because the "harm threatened by the act of solicitation of prostitution while HIV positive is great."

New Hampshire

Statutes

Currently, New Hampshire has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. However, there have been prosecutions against HIV-positive individuals under general criminal laws in New Hampshire.

Cases

State v. C.J., No. 01-S-726, 2002 WL 31059244, at *1 (N.H. Super. Ct. May 23, 2002)

In C.J., the New Hampshire Superior Court held that exposure to HIV could be prosecuted under the state's assault and reckless conduct statutes. The defendant was an HIV

positive man who did not disclose his HIV status to his girlfriend before they engaged in unprotected sexual activities and only disclosed his status after the relationship had ended and she was pregnant. On these facts, the defendant was charged with second degree assault for recklessly causing serious psychological injuries to his former girlfriend and with four counts of reckless conduct for four other occasions that they engaged in unprotected sex. The defendant moved to dismiss the charges, arguing that because New Hampshire had no law specifically criminalizing exposure the HIV, then the legislature must not have intended to criminalize acts known to transmit HIV. The Court held that the seminal fluid and sexual organs of an HIV positive person are objectively capable of causing serious bodily injury and/or death and as such should be considered a "deadly weapon" for the purposes of the state's assault and reckless conduct statutes when the activities involve unprotected sex. The Court found that the conduct the defendant allegedly engaged in was capable of inflicting bodily harm or death due to the nature of HIV and how it is transmitted. The defendant's motion to dismiss was denied and the case was ordered to be sent to a jury for trial.

New Jersey

Statutes

N.J. STAT. ANN. § 2C: 34-5 - Diseased person committing act of sexual penetration

A person is guilty of a crime of the third degree if, knowing that he or she is infected with HIV, he or she commits an act of sexual penetration without the informed consent of the other person.

Cases

State v. Ainis, 721 A.2d 329 (N.J. Super. Ct. Law Div. 1998)

In Ainis, the defendant was charged and convicted of robbery while threatening the store clerk with a hypodermic needle that the defendant alleged would give the victim AIDS. The use of the needle heightened the defendant's robbery into a violent crime. On appeal, the court found that the weilding of the needle combined with the defendant's threats was sufficient to raise the status of the needle to that of a deadly weapon and affirmed the convictions.

State v. Smith, 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993)

In Smith, the HIV-positive defendant was an inmate of the county jail while awaiting trial on robbery charges. Officers were forced to handcuff the defendant, who continued struggling and shouted, "If I get my mouth on you I'm going to bite you, I'm going to give you AIDS!" The defendant was charged and convicted of attempted murder, aggravated assault, and terroristic threats. At trial, both the state and the defendant presented expert medical testimony to answer the question of whether or not HIV can be transmitted through a human bite. The expert witness for the state testified "that the defendant was capable of transmitting HIV through his saliva" and discussed three anecdotal cases in which an individual had been infected with HIV through a bite. The expert witness for the defendant criticized the reports relied upon by the state's witness as unreliable and testified "that there was 'a very low probability of being infected following a bite wound of an adult as an isolated incident.'"

On appeal, the defendant argued that the jury could only find him guilty of attempted murder if it was proven as medically possible for his bite to transmit HIV. The Superior Court rejected this argument by stating, "We cannot and need not decide if a bite can transmit HIV. . . . We conclude that the attempted murder verdict was supported by proof . . . that the defendant *subjectively believed* that his conduct could succeed in causing the officer's death, regardless of whether his belief was objectively valid." The defendant also attempted to argue, to counter the evidence that he intended harm upon his jailers, by claiming that, "in view of his certain knowledge that neither [biting nor spitting] could spread AIDS, his only true motive was to take 'advantage of the ignorance and fear of his jailors.'" The court rejected this argument as well, leaving the adjudication of the credibility of the defendant to the jury. The combination of the defendant's knowledge of his HIV-positive status, his statements containing threats of HIV transmission, and the uncertainty of the route of transmission was enough to show the defendant's intent to commit murder.

New Mexico

Currently, New Mexico has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. There also have not been any prosecutions under general criminal laws, such as attempted murder or assault, for behavior considered to transfer HIV in New Mexico.

New York

Statutes

NY PUB. HEALTH LAW § 2307

Provides that someone who knows that she/he is infected with an "infectious venereal disease" and has sexual intercourse with another is guilty of a misdemeanor. But there is no indication in New York statutes that HIV infection is considered a "venereal disease."

Cases

People v. Hawkrigg, 525 N.Y.S.2d 752 (Suffolk County Ct. 1988)

In Hawkrigg, the county court denied the defendant's motion to dismiss the indictment of charges for third-degree sodomy, reckless endangerment, and endangering the welfare of a child because there was sufficient evidence to show that defendant engaged in the acts knowing that he had AIDS and that such conduct could transmit HIV. The court found that this evidence was sufficient to support a reckless endangerment charge because reckless endangerment only requires proof that the defendant consciously disregarded a substantial and unjustifiable risk that his or her conduct would result in the transmission of HIV.

People v. Nelson, 627 N.Y.S.2d 412 (N.Y. App. Div. 1995)

In Nelson, the defendant entered a restaurant and threatened the employees with a hypodermic needle, claiming that the needly contained the AIDS virus. The defendant was charged and convicted of robbery in the first degree and criminal possession of a weapon in the fourth degree. On appeal, the court held that a hypodermic needle which the defendant claimed contained the AIDS virus constituted a "dangerous instrument" under New York law.

North Carolina

Statutes

10A N.C. ADMIN. CODE 41A.0202 - Control measures – HIV

Infected persons shall:
a. refrain from sexual intercourse unless condoms are used; exercise caution when using condoms due to possible condom failure;
b. not share needles or syringes, or any other drug-related equipment,
paraphernalia, or works that may be contaminated with blood through
previous use;
c. not donate or sell blood, plasma, platelets, other blood products, semen, ova, tissues, organs, or breast milk;
d. have a skin test for tuberculosis;
e. notify future sexual intercourse partners of the infection;
f. if the time of initial infection is known, notify persons who have been sexual intercourse and needle partners since the date of infection; and,
g. if the date of initial infection is unknown, notify persons who have been
sexual intercourse and needle partners for the previous year.

Cases

State v. Monk, 511 S.E.2d 332 (N.C. Ct. App. 1999)

In Monk, the North Carolina Court of Appeals determined that charges of assault with deadly weapon and attempted murder, which arose from fact that defendant was HIVpositive when he sexually assaulted the minor victim, were properly joined with charges of firstdegree statutory rape and taking indecent liberties with minor. Though the defendant argued that allowing presentation of evidence concerning his HIV-positive status was improperly prejudicial, the court found that the defendant's HIV status was relevant evidence and properly admitted to the jury.

North Dakota

Statutes

N.D. CENT. CODE § 12.1-20-17 - Transfer of body fluid that may contain the human immunodeficiency virus

A person who, knowing that he or she has HIV, willfully transfers any of his or her body fluid to another person is guilty of a class A felony. It is an affirmative defense that, if the transfer was by sexual activity, the activity took place between consenting adults after full disclosure of the risk of the activity and with the use of an appropriate prophylactic device.

“Body fluid” means semen, blood, or vaginal secretion. “Transfer” means to engage in sexual activity by genital-genital contact, oral-genital contact, or anal-genital contact, or to permit the reuse of a hypodermic syringe, needle, or similar device without sterilization.

Cases

There have been no reported prosecutions under this statute or under general criminal laws against HIV-positive individuals in North Dakota at the time this guide was published.

Ohio

Statutes

OHIO REV. CODE ANN. § 2903.11 - Felonious assault

No person, with knowledge that the person has tested positive for HIV, shall knowingly do any of the following: (1) Engage in sexual conduct with another person without disclosing his or her HIV-positive status to the other person prior to engaging in the sexual conduct, (2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender is HIV-positive, or (3) Engage in sexual conduct with a person under 18 who is not the spouse of the offender. Violation of this provision is a felony of the second degree. (“Sexual conduct” is defined in OHIO. REV. CODE ANN. § 2903.11(E)(4)).

OHIO REV. CODE ANN. §§ 2907.24 - Solicitation after positive HIV test

No person, with knowledge that the person has tested positive for HIV, shall engage in, or solicit another person to engage in, sexual activity for hire. Violation of this statute is a felony of the third degree.

OHIO REV. CODE ANN. §2907.241 - Loitering to engage in solicitation after positive HIV test

No person who is HIV positive, with the purpose to solicit another to engage in sexual activity for hire and while in or near a public place, shall do any of the following: beckon, stop, or attempt to stop another; engage or attempt to engage another in conversation; stop or attempt to stop the operator of a vehicle or approach a stationary vehicle; or if the offender is the operator of or a passenger in a vehicle, stop, attempt to stop, beckon to, attempt to beckon to, or entice another to approach or enter the vehicle of which the offender is the operator or in which the offender is the passenger. Violation of this statute is a fifth degree felony.

OHIO REV. CODE ANN. §§ 2907.25 - Prostitution after positive HIV test

No person, with knowledge that the person has tested positive for HIV, shall engage in sexual activity for hire. Violation of this statute is a felony of the third degree.

OHIO REV. CODE ANN. §2921.38 - Harassment by inmate

No person, with knowledge that the person is HIV-positive and with intent to harass, annoy, threaten, or alarm another person, shall cause or attempt to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling it upon the other person, or in any other manner. Violation of this statute is a third degree felony.

OHIO REV. CODE ANN. §2927.13 - Sale or donation of blood by AIDS carrier

No person, with knowledge that she/he is HIV-positive, shall sell or donate her/his blood, plasma, or a product of her/his blood, if he or she knows or should know the blood, plasma, or product of her/his blood is being accepted for the purpose of transfusion to another individual. Violation of this statute is a felony in the fourth degree.

Cases

State v. Reif-Hill, 1998 WL 787389 (Ohio Ct. App. 1998)

In Reif-Hill, the defendant was convicted of attempted felonious assault for biting a hospital employee who was trying to restrain her. Prior to the assault she had told the hospital staff that she had AIDS though she did not. On appeal the court vacated the conviction and ordered the release of the defendant because the prosecution failed to prove that the defendant knowingly caused or attempted to cause serious physical harm to the victim by biting him with the intent to pass on HIV. Because the defendant did not have HIV and the victim did not contract HIV the conviction was vacated.

State v. Thompson, 726 N.E.2d 530 (Ohio Ct. App. 1999)

In Thompson, the HIV-positive defendant was a prisoner at the Southern Ohio Correctional Facility and threw a cup of feces at a nurse employed by SOCF. The defendant was brought before the Rules Infraction Board at SOCF was sentenced to fifteen days in disciplinary control. He was also indicted on two counts of harassment by an inmate. The defendant moved to dismiss on the grounds of double jeopardy, and the trial court overruled the motion. The defendant later pleaded no contest to one count and was sentenced to an additional nine months imprisonment. The defendant appealed his conviction, contending that the disciplinary proceedings at the SOCF were criminal in nature, and that his subsequent conviction for harassment by an inmate violated the double jeopardy provisions of the U.S. Constitution. The appellate court sustained the defendant's conviction, finding that the legislature intended that the administrative sanctions imposed upon an inmate by prison authorities to be civil in nature and that the subsequent criminal action did not violate the Double Jeopardy Clause.

State v. McPherson, 758 N.E.2d 1198 (Ohio Ct. App. 2001)

In McPherson, the HIV-positive defendant was charged and convicted of soliciting with knowledge that he was HIV-positive in violation of Ohio R.C. § 2907.24. The defendant was charged when he approached an undercover officer, who knew that the McPherson was HIV-positive and had been previously arrested for solicitation. The two engaged in conversation and when McPherson agreed to perform a sexual act for $10 he was arrested. On appeal, the Ohio Court of Appeals addressed whether there was sufficient evidence to convict McPherson of solicitation, if McPherson knew of his HIV positive status, and whether the trial court correctly forced him to register as a sex offender. The court found that because the defendant initiated the conversation with the undercover officer and was the first person to discuss sex and money there was enough evidence to successfully prosecute him for solicitation despite the fact that no sexual act or exchange of money had occurred. On the question of whether the defendant knew his HIV positive status, the court concluded that the medical records noting the defendant's status and the police department's vice squad's knowledge of the defendant's status was sufficient to prove that McPherson knew he was HIV positive. The court reversed the finding that the defendant had to register as a "sex offender" because solicitation is not considered a sexually oriented offense.

See also State v. Jones, No. 19978, 2004 WL 690419 (Ohio Ct. App. Apr. 2, 2004) (sentencing HIV-positive defendant to two years imprisonment for solicitation while HIV-positive); ***State v. West,*** No. 22966, 2009 WL 4268554 (Ohio. Ct. App. Nov. 25, 2009) (sentencing HIV-positive woman to two concurrent four year terms for solicitation after a positive HIV test).

State v. Gonzalez, 796 N.E.2d 12 (Ohio Ct. App. 2003)

In Gonzalez, the defendant was convicted of two counts of felonious assault for failing to tell his sexual partner that he was HIV-positive. He was sentenced to sixteen years imprisonment and was required to register as a sex offender.542 The complainant later tested positive for HIV. At trial, there were numerous discrepancies in the parties' testimony, including whether or not Gonzalez told the complainant that he was HIV-positive prior to their sexual relationship. Gonzalez testified that the complainant asked him before they began their sexual relationship whether the rumors about him being HIVpositive were true and he confirmed that he had tested positive for HIV and insisted that they use condoms every time they had sex. The complainant, however, testified that when she confronted Gonzalez he denied his HIV status and claimed that they only used a condom once. In addition to the testimony of the defendant and complainant, the defendant had an ex-girlfriend testify that he had disclosed his HIV status to her and always insisted on using condoms. On appeal, Gonzalez argued, among other issues, that the statute was unconstitutionally vague. He asserted that the statute did not provide enough information on what constitutes "disclosure," whether such disclosure had to be made prior to each sexual contact with the same person, or whether disclosure needed to be in writing. To survive a void for vagueness challenge the statute must be written so that a person of common intelligence can determine what conduct is prohibited and the statute must provide sufficient standards to prevent arbitrary and discriminatory enforcement. The court rejected the defendant's void for vagueness argument because the ordinary meaning of "disclose" is used in every day speech and therefore cannot be vague. The court reasoned that if an HIV-positive person disclosed her/his status once to a sexual partner then this would negate guilt for any subsequent contact the person had with that partner.

State v. Russell, No. 09AP-226, 2009 WL 3090190 (Ohio Ct. App. Sept. 29, 2009)

In Russell, an HIV-positive man was sentenced to seven years imprisonment for failing to disclose his HIV status to his sexual partner. The man appealed his conviction arguing that he did not know his HIV status and could therefore not be convicted under the statute. The court reasoned that because the defendant had discussed his HIV positive statute with detectives there was sufficient evidence to show that he knew his HIV status despite the fact that there was no medical record that the defendant had tested positive for HIV.

State v. Eversole, 912 N.E. 2d 643 (Ohio Ct. App. 2009)

In Eversole, the HIV-positive defendant was sentenced to two years imprisonment for failing to tell his sexual partner that he was HIV-positive. Upon his release, the defendant was placed on community control (a type of probation) for five years. As part of his comuunity control, the defendant was required to have "no sexual conduct with any individual without prior approval by the court." During this time period, the defendant engaged in two different sexual relationships, one with a man and one with a woman. In both of these relationships, the defendant disclosed his HIV-positive status before engaging in any sexual contact. However, only the defendant only received court approval to engage in sexual contact with the woman. The defendant was charged and convicted of violating his community control provisions by engaging in a sexual relationship with the man without receiving court approval and sentenced to two years imprisonment.

On appeal, the defendant argued that he did not violate the court's orders because (1) he and the man never had sex; (2) even if they had a sexual relationship the man knew about the defendant's HIV status; and (3) that it was an unconstitutional invasion of his right to privacy to require court approval for potential sex partners. Though the Ohio Court of Appeals was "concerned" about the breadth of the community control measures requiring the defendant to receive court approval before engaging in sexual conduct, the court concluded that the defendant had not timely appealed the right to privacy issue and would not address it. The court overruled the defendant's other issues on appeal, finding that the trial court was correct in monitoring the defendant's activities to "protect the public from the blatant disregard [the defendant] demonstrated when he failed to disclose his condition to the initial victim of his offense." The court affirmed that the defendant was in violation of the controls, even though he had disclosed his HIV-positive status to all of his

sexual partners.

Oklahoma

Statutes

OKLA. STAT. TIT. 21, § 1192.1 - Knowingly engaging in conduct likely to transfer HIV virus

It shall be unlawful for any person knowing that he or she has Acquired Immune Deficiency Syndrome (AIDS) or is a carrier of the human immunodeficiency virus (HIV) and with intent to infect another, to engage in conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the skin or other membranes of another person, except during in utero transmission of blood or bodily fluids, and:

1. The other person did not consent to the transfer of blood, bodily fluids containing blood, semen, or vaginal secretions; or
2. The other person consented to the transfer but at the time of giving consent had not been informed by the person that the person transferring such blood or fluids had or was a carrier of HIV.

Any person convicted of violating the provisions of this section shall be guilty of a felony, punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years.

OKLA. STAT. TIT. 21, § 1031 - Knowingly engaging in prostitution while infected with HIV

Any person who engages in an act of prostitution with knowledge that they are infected with the human immunodeficiency virus shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years.

OKLA. STAT. TIT. 63, § 1-519 - Exposure to venereal disease

It is a felony for any person, after becoming infected with a venereal disease and before being pronounced cured by a physician in writing, to marry any other person or to expose any other person by the act of copulation or sexual intercourse to such venereal disease or to liability to contract the venereal disease. ("Venereal disease" is defined to include diseases which may be transmitted from one person to another through or by means of sexual intercourse and found and declared by medical science or accredited schools of medicine to be infectious or contagious, § 1-517.)

Cases

Though there have been many prosecutions against HIV-positive defendants under the above laws or general criminal laws reported in the news in Oklahoma, there have not been any reported cases or opinions concerning such prosecutions in Oklahoma at the time this guide was published.

Oregon

Statutes

Currently, Oregon has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. However, there have been prosecutions against HIV-positive individuals under general criminal laws in Oregon.

Cases

State v. Guayante,783 P.2d 1030, 1031 (Or. Ct. App. 1989)

In Guayante, an HIV-positive defendant was convicted on several counts of sexual abuse of a 13-year old girl. On appeal, he argued that it would be disproportionately harsh to use his HIV-positive status as an "aggravating factor" during sentencing. The Court of Appeals of Oregon disagreed stating the defendant's willingness to expose his victim to HIV infection was a valid aggravating factor to consider when imposing maximum, consecutive sentences for sexual assault.

State v. Hinkhouse, 912 P.2d 921 (Or. Ct. App. 1996)

In Hinkhouse, an HIV-positive defendant was convicted of ten counts of attempted murder and ten counts of attempted assault when he failed to disclose his HIV status to numerous sexual partners, including a 3-year old girl that he sexually abused. The defendant had refused to use a condom with several sexual partners and denied being HIV-positive, despite being warned by his parole officer not to have unprotected sex. According to the testimony of one sexual partner, the defendant said that if he ever became HIV-positive, he would spread the virus to others. At least one of the defendant's partners was infected with HIV though this fact was irrelevant to prosecution. He was sentenced to seventy years in prison. On appeal, the defendant argued that he did not intend to kill his sexual partners, only to gratify himself sexually. The Court of Appeals of Oregon disagreed, finding that the defendant's refusal to wear condoms, failure to disclose his HIV status, and awareness of the risks of unprotected sex were all sufficient to prove intent to cause harm or death. The court also found that Hinkhouse's unsafe sexual practice was not only for his own sexual gratification because he did use condoms with the one woman that he planned to marry.

Pennsylvania

Statutes

18 PA. CONS. STAT. ANN. § 2703 - Assault by prisoner

A person confined in any jail, prison, or correctional or penal institution is guilty of a felony of the second degree if he/she, while confined (or while being transported to or from such a facility), intentionally or knowingly causes another to come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material when, at the time of the offense, the person knew, had reason to know, or should have known or believed that such fluid or material was infected by a communicable

disease, including, but not limited to, HIV or hepatitis B. The court shall order that any sentence imposed for a violation of this section and subsection §2702(a) (related to aggravated assault), where the victim is a detention facility or correctional facility employee, be served consecutively with the person's current sentence.

Violation of this statute shall be a second degree felony.

18 PA. CONS. STAT. ANN. §2704 - Assault by life prisoner

Every person sentenced to death or life imprisonment who intentionally or knowingly causes another to come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material when, at the time of the offense, the person knew, had reason to know, or should have known or believed that the fluid or material was infected with HIV, is guilty of a crime, the penalty for which shall be the same penalty for murder of the second degree.

18 PA. CONS. STAT. ANN. § 5902 - Prostitution while HIV-positive

It is a felony of the third degree for a person to commit prostitution knowing he or she is HIV-positive; to knowingly promote prostitution of one who is HIV-positive; or, if the person knows him or herself to be HIV-positive, to patronize a prostitute.

Cases

Commonwealth v. Brown, 605 A.2d 429 (Pa. Super. Ct. 1992)

In Brown, an HIV-positive defendant was convicted of aggravated assault, assault by prisoner, simple assault, and reckless endangerment and sentenced to ten to twenty years in prison to run consecutively with the sentence he was already serving for throwing urine and feces at a prison guard. The court found that because the defendant knew he had both HIV and Hepatitis B and threw the fecal matter at a guard, that was sufficient to produce "serious bodily injury" and sustain a conviction for Assault by Prisoner. 18 PA. CONS. STAT. ANN. § 2703 was subsequently amended in 1998 to include "HIV" after the conclusion of this case.

Commonwealth v. Walker, 836 A.2d 999 (Pa. Super. Ct. 2003)

In Walker, an HIV-positive defendant was found guilty of communicating terrorist threats when he scratched a parole officer on the hand and said, "I have open cuts on my hands. Life is short. I am taking you with me." The officer knew Walker was HIV positive. On appeal, Walker argued that the evidence against him was insufficient and that he didn't have the requisite intent to terrorize the officer. To be convicted of making terroristic threats one must communicate a threat to terrorize another or act with reckless disregard of the risk of causing terror. The court affirmed the conviction finding that the jury could have inferred that Walker's statements intended to cause terror from fear of HIV infection. The court held that the likelihood of HIV infection from scratching was immaterial to the case as long as the threats were made with the intent to cause such fear.

Commonwealth v. Cordoba, 902 A.2d 1280 (Pa. Super. 2006)

In Cordoba, an HIV-positive defendant was charged with reckless endangerment for having unprotected, consensual oral sex and failing to disclose to his partner that he was HIV-positive. The trial court ruled that because consent is not a defense to reckless endangerment, to prosecute an HIV-positive individual for engaging in consensual sex would lead to absurd results, including prosecution even if the person did disclose her/his status. On appeal the Superior Court of Pennsylvania reversed the trial court's findings. Though there was never any transfer of blood or semen that could result in HIV transmission, the court found that the sex was not consensual and amounted to reckless endangerment because the defendant failed to disclose his HIV status to the complainant. Reckless endangerment under Pennsylvania law is defined as "conduct which places or may place another person in danger of death or serious bodily injury." Even though most exposure to the blood or semen of an HIV positive person will not result in transmission, the court determined that the prosecution need only establish that the defendant's conduct placed "or may have placed" another in danger of serious bodily injury or death. According to the court, the defendant's actions constituted a "gross deviation from the standard of conduct that a reasonable person would observe" by engaging in oral sex without informing the complainant of his HIV status.

Rhode Island

Statutes

R.I. GEN. LAWS 1956 § 23-11-1 - Communicable disease exposure

It shall be unlawful for anyone knowingly, while in the infectious condition with a sexually transmitted disease, to expose another person to infection.

Cases

However, this law was enacted long before HIV was discovered and thus not originally intended to address HIV. There has never been an arrest or prosecution for HIV exposure under this or any other statute in Rhode Island.

South Carolina

Statutes

S.C. CODE ANN. § 44-29-145 - Penalty for exposing others to HIV

It is unlawful for a person who knows he or she is infected with HIV to: (1) knowingly engage in sexual intercourse (vaginal, anal, or oral) with another person without first informing that person of his HIV infection; (2) knowingly commit an act of prostitution with another person; (3) knowingly sell or donate blood, blood products, semen, tissue, organs, or other body fluids; (4) forcibly engage in sexual intercourse (vaginal, anal, or oral) without the consent of the other person, including one's legal spouse; or (5) knowingly share with another person a hypodermic needle/syringe without first informing that person that the needle or syringe has been used by someone infected with HIV.

Any person convicted under this statute is guilty of a felony, resulting in imprisonment up to ten years and/or a maximum fine of $5,000.

S.C. CODE ANN. §§ 44-29-60, 44-29-140 - Penalties Pertaining to Venereal Disease

It is unlawful for anyone infected with an STD included in the annual SC Department of Health and Environmental Control List of Reportable Diseases to knowingly expose another to infection. ("HIV" was included in the DHEC list for 2009.)

Any person in violation of this statute has committed a misdemeanor. Persons will be subject to a fine of not more than $200 and imprisoned for not more than thirty days.

Cases

Though there have been many prosecutions against HIV-positive defendants under the above laws or general criminal laws reported in the news in South Carolina, there have not been any reported cases or opinions concerning such prosecutions in South Carolina at the time this guide was published.

South Dakota

Statutes

S.D. CODIFIED LAWS § 22-18-31 - Class 3 Felony: Intentional exposure to HIV infection

Any person who, knowing himself or herself to be infected with HIV, intentionally exposes another person to infection through any of the following means is guilty of criminal exposure to HIV (Class 3 felony):
(1) Engaging in sexual intercourse or other intimate physical contact with another person;
(2) Transferring, donating, or providing blood, tissue, semen, organs, or other potentially infectious body fluids or parts for transfusion, transplantation, insemination, or other administration to another in any manner that presents a significant risk of HIV transmission; or
(3) Dispensing, delivering, exchanging, selling, or in any other way transferring to another person any nonsterile intravenous or intramuscular drug paraphernalia that has been contaminated by himself or herself; or
(4) Throwing, smearing, or otherwise causing blood/semen to come in contact with another for the purpose of exposing that person to HIV infection.

"Intimate physical contact" means bodily contact which exposes a person to the body fluid of the infected person in any manner that presents a significant risk of HIV transmission. S.D. CODIFIED LAWS § 22-18-32(2).

"Intravenous or intramuscular drug paraphernalia" means any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body. S.D. CODIFIED LAWS § 22-18-32(3).

It is an affirmative defense to prosecution if it is proven by a preponderance of the evidence that the person exposed to HIV knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and gave advance consent to the action with that knowledge. S.D. CODIFIED LAWS § 22-18-33.

The actual transmission of HIV is not required. S.D. CODIFIED LAWS § 22-18-34.

Cases

Though there have been many prosecutions against HIV-positive defendants under the above laws or general criminal laws reported in the news in South Dakota, there have not been any reported cases or opinions concerning such prosecutions in South Dakota at the time this guide was published.

Tennessee

Statutes

TENN. CODE ANN. § 39-13-109 - Criminal Exposure of another to HIV

It is unlawful for a person, knowing that he or she is infected with HIV, to knowingly:
(1) engage in intimate contact with another;
(2) transfer, donate or provide any potentially infectious body fluid or part for administration to another person in any manner that presents a significant risk of HIV transmission; or
(3) transfer in any way to another any nonsterile intravenous or intramuscular drug paraphernalia.

"Intimate contact with another" means the exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV transmission. It is an affirmative defense, if proven by a preponderance of the evidence, that the person exposed to HIV knew the infected person was infected with HIV, knew the action could result in infection with HIV, and gave advance consent to the action with that knowledge. The actual transmission of HIV is not a required element of this offense.
Violation of this statute is a class C felony punishable by three to fifteen years imprisonment and a possible fine of up to $10,000. TENN. CODE. ANN. § 40-35-111.

TENN. CODE ANN. § 39-13-516 - Aggravated Prostitution

A person commits aggravated prostitution when, knowing that such person is infected with HIV, the person engages in sexual activity as a business or in a house of prostitution or loiters in a public place for the purpose of being hired to engage in sexual activity. Actual transmission of HIV is not a required for prosecution. Violation of this statute is a class C felony punishable by three to fifteen years imprisonment and a possible fine of up to $10,000. TENN. CODE. ANN. § 40-35-111.

TENN. CODE ANN. § 39-13-108 - HIV; Willful Transmission; Quarantine

The department of health, acting pursuant to § 68-10-109, shall promulgate rules regarding transmission of human immunodeficiency virus (HIV). The rules shall include specific procedures for quarantine or isolation, as may be necessary, of any person who clearly and convincingly demonstrates willful and knowing disregard for the health and safety of others, and who poses a direct threat of significant risk to the health and safety of the public regarding transmission of HIV. The department is authorized to quarantine or isolate a person within a secure facility, after exercising other appropriate measures, if the person continues to pose a direct threat of significant risk to the health and safety of the public. Any person so quarantined or isolated within a secure facility, who intentionally escapes from the facility, commits a Class E felony.

TENN. CODE ANN. § 40-35-114(21) - Enhancement Factors

If the defendant is convicted of the offenses of aggravated rape pursuant to § 39-13-502, rape pursuant to § 39-13-503, rape of a child pursuant to § 39-13-522, or statutory rape pursuant to § 39-13-506, the defendant knew or should have known that, at the

time of the offense, the defendant was HIV positive, the court shall considered this as an advisory factor in determining whether to enhance the defendant's sentence.

Cases

State v. Bonds, 189 S.W.3d 249 (Tenn. Crim. App. 2005)

In Bonds, the HIV-positive defendant was sentenced to six years for criminal exposure of HIV and an additional twenty-five years for aggravated rape. On appeal, the defendant argued that under the terms of the HIV exposure statute he never "exposed" the complainant to HIV because there was no proof that there had been any exchange of bodily fluids during the commission of the crime. The court determined that actual exposure to body fluids was not required but rather "the prosecution need only show that the defendant subjected the victim to the risk of contact with the [d]efendant's bodily fluids[...] in a manner that would present a significant risk of HIVtransmission." Because the defendant knew of his HIV status and anally raped the victim, the court found that this presented a significant risk of HIV transmission punishable under the HIV exposure statute. After reviewing previous cases of HIV exposure in Tennessee, the court found successful prosecutions hinged on the fact that the sex was unprotected and undisclosed, increasing the possible "risk" of transmitting HIV - as opposed to if a condom or other protection had been used.

State v. Smith,No. M2007-00932-CCA-R10-CO, 2008 WL 544603, at *1 (Tenn. Crim. App. May 5, 2008)

In Smith, the HIV-positive defendant was charged, among other charges, with criminal exposure to HIV. At a trial court hearing, there was a discrepancy between the defendant's and complainant's evidence regarding whether or not the defendant had disclosed his HIV status. The defendant testified that he told the complainant that he had HIV and assumed that the complainant had used a condom before they engaged in anal sex. The defendant maintained that he discovered later that the complainant had not used the condom. The complainant testified otherwise, noting that though the sex was consensual, the defendant never disclosed his HIV status and the complainant only found out the information from a friend afterwards. The defendant applied for pretrial diversion as a first offender, but the prosecutor denied pretrial diversion due to the charges against defendant and the Tennessee Court of Criminal Appeals affirmed.

For more HIV exposure prosecutions based on sexual intercourse, see ***Jones v. Carlton***, No. E2008-01737-CCA-R3-HC, 2008 WL 5204434, at *1 (Tenn. Crim. App. Dec. 11, 2008); ***State v. Harvey***, No. W2001-01164-CCA-R3-CD, 2002 WL 1162346, at *1 (Tenn. Crim. App. May 31, 2002); ***State v. Wiser***, No. M1999-02500-CCA-R3-CD, 2000 WL 1612363, at *2 (Tenn. Crim. App. Oct. 30, 2000); ***State v. Bennett***, No. 03C01-9810-CR-00346, 1999 WL 544653, at *1 (Tenn. Crim. App. July 28, 1999).

State v. Banks 2010 WL 1486897 (Tenn. Crim. App. 2010)

In Banks, the HIV-positive defendant was convicted of aggravated kidnapping and rape and originally sentenced to two twenty-three year consecutive sentences, for a total of forty-six years imprisonment. Though the victim of the rape later tested positive for HIV, the Tennessee Court of Criminal Appeals vacated the trial court's imposition of consecutive sentencing for the defendant because there was no trial court finding to show that the defendant knew his HIV status during the offense.

Texas

Statutes

Currently, Texas has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. However, there have been prosecutions against HIV-positive individuals under general criminal laws in Texas.

Cases

Weeks v. State, 834 S.W.2d 559 (Tex. Ct. App. 1992)

In Weeks, the HIV-positive defendant was charged and convicted of attempted murder after spitting on the face and mouth of a prison guard. The defendant also "told everybody that he had AIDS and that he was going to take as many with him as he could." On appeal, the defendant argued that the state failed to prove that his conduct of spitting on a prison guard was reasonably capable of harming him because there was no evidence that there was any HIV in his saliva or that transmission of the disease by spitting was reasonably likely. After reviewing the testimony of the five medical experts who testified at trial, the Texas Court of Appeals found that a reasonable jury could conclude that HIV could possibly be transmitted through spitting and that the defendant intended to infect the guard with HIV when he spat on the guard's face.

See also Campbell v. State, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. Ct. App. July 14, 2009) (affirming an HIV-positive defendant's conviction for harassing a public servant and using a deadly weapon during the offense when he stated he was HIV-positive and spat on the officer's face, despite expert testimony at trial that there is only a hypothetical possibility that such contact may transmit HIV).

Degrate v. State, 2005 WL 165182, *1 (Tex. App. 2005)

In Degrate, the HIV-positive defendant was convicted of aggravated assault and sentenced to twenty-five years imprisonment after biting a correctional officer on the leg. The Texas Court of Appeals affirmed the conviction, finding that the defendant's mouth constituted a deadly weapon, basing its decision solely upon the sole medical expert testimony of HIV transmission through human bite by the county jail's intake nurse's statement that the defendant's "bite could transmit the virus to the person bitten."

Mathonican v. State, 194 S.W.3d 59 (Tex. App. 2006)

In Mathonican, the HIV-positive defendant was sentenced to ninety-seven years imprisonment for sexually assaulting another individual. The original indictment held that the defendant's seminal fluid was a deadly weapon because he was HIV positive. The defendant appealed his case, asserting both that the deadly weapon finding was erroneous because HIV status should not be considered a deadly weapon and that the trial court erred in submitting his case to a disjunctive jury. Though the Texas Court of Appeals found that the trial court did err in submitting the defendant's case to a disjunctive jury and remanded the case for new trial, the court also held that HIV status can be considered a deadly weapon in aggravated assault and aggravated sexual assault cases.The court found that seminal fluid may be a deadly weapon "if the man producing it is HIV-positive and engages in unprotected sexual contact." The court reasoned that a deadly weapon is anything that can be used to cause death or serious injury and that the seminal fluid from an HIV-positive man can cause such death or serious injury to another if that man engages in unprotected sex. Even if the defendant did not ejaculate or otherwise expose the complainant to HIV, the court determined that the single fact that the defendant's seminal fluid "as used or as intended to be used" supported the deadly weapon finding. Because of this finding, the court stated that in a new trial, the prosecution could again seek a deadly weapon finding.

Henry v. State, No. 08-05-00364-CR, 2007 WL 2405798, at *1 (Tex. Ct. App. Aug. 23, 2007)

In Henry, the Texas Court of Appeals affirmed the seventy-five year sentence of an HIV-positive defendant for conviction for aggravated assault of a child, enhanced by two prior felony convictions. There was testimony at trial by a family nurse practitioner at the jail who had "extensive" HIV training. She testified that there was a "high risk of HIV transmission during unprotected sex."

Atkins v. State, No. 05-07-00586-CR, 2008 WL 2815087, at *1 (Tex. Ct. App. July 23, 2008)

In Atkins, an HIV-positive defendant was convicted of attempted sexual performance of a child and, because of two prior felony convictions, was sentenced to life in imprison. The defendant in the case invited a minor to his hotel room where the defendant then sat on the bed, began undressing and fondling himself, and made suggestive overt comments referring to sex. The minor left the room and called for help before any physical or sexual contact took place. During the trial, the state presented evidence that the defendant was HIV positive even though there was no contact that could remotely result in the transmission of HIV. The defendant argued on appeal that his HIV positive status had no probative value and should not have been considered for his sentencing. The court found that even though no sexual or physical contact occurred between the defendant and the minor, the defendant's HIV status could be considered as relevant evidence of the offense and used in assessing punishment because the defendant often had unprotected sex with men. This behavior, the court held, reflected the defendant's "willingness to expose others to the virus and his reckless disregard for the lives of others" and as such was pertinent to his sentencing.

See also Lewis v. State, No. 07-08-00290-CR, 2010 WL 2400085, at *3 (Tex. Ct. App. June 16, 2010) (affirming the presentation of evidence to the jury concerning the defendant's HIV-positive status despite no contact between the defendant's genatalia and the child's body because "the jury may consider, as a circumstance of the offense, that the appellant's recognized HIV-positive status placed the victim of his sexual assault at risk of infection, whether or not the evidence shows any actual transmission of body fluids in a manner likely to infect").

Utah

Statutes

UTAH CODE ANN. § 76-10-1309 - Enhanced penalties: HIV-positive offenders

A person who is convicted of prostitution under Section 76-10-1302, patronizing a prostitute under Section 76-10-1303, or sexual solicitation under Section 76-10-1313 is guilty of a third degree felony if at the time of the offense the person is an HIV positive individual, and the person:
(1) has actual knowledge of the fact; or
(2) has previously been convicted under Section 76-10-1302, 76-10-1303, or 76-10-1313.

UTAH CODE ANN. § 76-5-102.6 - Propelling substance or object at a correctional or peace officer

(1) Any prisoner or person detained pursuant to Section 77-7-15 who throws or otherwise propels any substance or object at a peace or correctional officer is guilty of a class A misdemeanor, except as provided under Subsection (2).
(2) A violation of Subsection (1) is a third degree felony if:
(a) The object or substance is:
(i) blood, urine, or fecal material; or
(ii) the prisoner's or detained person's saliva, and the prisoner or detained person knows he or she is infected with HIV, hepatitis B, or hepatitis C; and
(b) The object or substance comes into contact with any portion of the officer's face, including the eyes or mouth, or comes into contact with any open wound on the officer's body.

Cases

Though there have been many prosecutions against HIV-positive defendants under the above laws or general criminal laws reported in the news in Utah, there have not been any reported cases or opinions concerning such prosecutions in Utah at the time this guide was published.

Vermont

Currently, Vermont has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. There also have not been any prosecutions under general criminal laws, such as attempted murder or assault, for behavior considered to transfer HIV in Vermont.

Virginia

Statutes

VA. CODE ANN. § 18.2-67.4:1(A) - Infected sexual battery; penalty

Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with the intent to transmit the infection to another person is guilty of a Class 6 felony.

VA. CODE ANN. § 18.2-67.4:1(B) - Infected sexual battery; penalty

Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with another person without having previously disclosed the existence of his infection to the other person is guilty of a Class 1 misdemeanor.

VA. CODE ANN. § 32.1-289.2 - Donation or sale of blood, body fluids, organs and tissues by persons infected with human immunodeficiency virus

Any person who donates or sells, who attempts to donate or sell, or who consents to the donation or sale of blood, other body fluids, organs and tissues, knowing that the donor is, or was, infected with human immunodeficiency virus, and who has been instructed that such blood, body fluids, organs or tissues may transmit the infection, shall be guilty, upon conviction, of a Class 6 felony. This section shall not be construed to prohibit the donation of infected blood, other body fluids, organs and tissues for use in medical or scientific research.

Cases

Though there have been a few prosecutions against HIV-positive individuals under the above laws reported in the news in Virginia, there have not been any reported cases or opinions in Virginia at the time this guide was published.

Washington

Statutes

WASH. REV. CODE ANN. § 9A.36.011 - First Degree Assault

(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.

Cases

In re Farmer, 835 P.2d 219, 220 (Wash. 1992)

In Farmer, the Washington Supreme Court imposed a sentence of almost eight years for a HIV-positive defendant because of his HIV-positive status upon his conviction of sexual exploitation of a minor and patronizing a juvenile prostitute. The court held that the defendant's knowledge or belief that he was HIV-positive and might transmit the virus to the two minors constituted deliberate, cruel, and malicious conduct that justified the ninety-month sentence.

State v. Stark, 832 P.2d 109 (Wash. Ct. App. 1992)

In Stark, the HIV-positive defendant was convicted under a second degree assault statute for engaging in unprotected oral and vaginal sex with three women and sentenced to 163 months in prison. The statutes were subsequently amended such that the language relating to HIV was removed from the second degree assault statute and added to the first degree assault statute. On appeal, the Court of Appeals rejected an argument that the statute was unconstitutionally vague, and stated that "expose" refers to "conduct that can cause another person to become infected with the virus," an interpretation that provides no real guidance on defining such conduct. The Court specifically cited the fact that the defendant "engaged in unprotected sexual intercourse" in determining that his conduct constituted exposure. The Court of Appeals also determined that there was sufficient evidence of intent to harm because there was evidence that the defendant knew he had HIV and that it was possible to transmit HIV through oral and vaginal sex with women, and the defendant engaged in such conduct without the use of a condom or other types of protection.

But see State v. Ferguson, 15 P.3d 1271 (Wash. 2001) (reversing a trial court holding of deliberate cruelty as an aggravating factor for first degree assault based on the defendant's statements that he would give HIV to as many women as he could).

State v. Whitfield, 134 P.3d 1203 (Wash. Ct. App. 2006)

In Whitfield, the HIV-positive defendant was charged and convicted of 17 counts of first degree assault with sexual motivation, two counts of witness tampering, and three counts of no-contact order violations. The defendant was sentenced to 178 years in prison. The defendant contracted HIV in 1992 while in prison and engaged in sexual contact with "thousands" of women after his release without disclosing his HIV status. At least 5 of the 17 victims included in the charges subsequently tested positive for HIV after engaging in sexual intercourse with the defendant. Despite being counseled and subsequently sent a cease and desist order from the local Health Department, the defendant continued to engaged in unprotected sexual activity, leading to his arrest. On appeal, the defendant argued that the statute violated the Equal Protection Clause of the Fourteenth Amendment because the statute treats HIV-infected persons differently than non-HIV-infected persons. The Washington Court of Appeals disagreed, finding that "[a] non-infected individual who injected HIV-infected blood into another person with the intent to inflict great bodily harm would be just as guilty of this offense as an HIV-infected person who exposed another person to the virus through the act of unprotected sexual intercourse with the intent to inflict great bodily harm" and thus, the statute applied "equally to HIV-infected persons and non-HIV-infected persons."The court also dismissed the defendant's argument that the statute violated the Privileges and Immunities Clause of the Washington State Constitution because it gave individuals infected with other sexually transmitted diseases privileges over those infected with HIV. The court held that because the defendant "fail[ed] to show if any of these other diseases will result in great bodily harm equivalent to that caused by HIV," the statute did not violate the Privileges and Immunities Clause.

West Virginia

Statutes

W. VA. CODE ANN. §§ 16-4-20,16-4-26 - Communication of disease

It shall be unlawful for any person suffering from an infectious venereal disease to perform any act which exposes another person to infection with said disease, or knowingly to infect or expose another person to infection with said disease. ("Venereal disease" is not defined, but HIV is identified as "potentially sexually transmittable." See W. VA. CODE §§ 16-4-1, 64-7-17). Violation of this statute is punishable by $100 and thirty days in jail.

Cases

There have been no prosecutions under this statute and at the time of this publication the authors are not aware of a criminal prosecution of an individual on the basis of HIV status in West Virginia.

Wisconsin

Statutes

WIS. STAT. § 973.017(4) - Aggravating Factors; Serious sex crimes committed while infected with certain diseases

When making a sentencing decision concerning a person convicted of a serious sex crime, the court shall consider as an aggravating factor the fact that the serious sex crime was committed under all of the following circumstances:

(1) At the time that he or she committed the serious sex crime, the person convicted of committing the serious sex crime had a sexually transmitted disease or acquired immunodeficiency syndrome or had had a positive HIV test;
(2) At the time that he or she committed the serious sex crime, the person convicted of committing the serious sex crime knew that he or she had a sexually transmitted disease or acquired immunodeficiency syndrome or that he or she had had a positive HIV test;
(3) The victim of the serious sex crime was significantly exposed to HIV or to the sexually transmitted disease, whichever is applicable, by the acts constituting the serious sex crime.

Cases

State v. Holloway, 551 N.W.2d 841 (Wis. Ct. App. 1996)

In Holloway, an HIV-negative defendant was sentenced to the maximum term for prostitution charges. Though the woman was HIV-negative, the court took into account that her multiple convictions for prostitution and high volume drug use made her a "high HIV risk, both to herself and others" and justified the enhanced sentencing.

Wyoming

Currently, Wyoming has not enacted any specific statutes targeted at criminalizing behavior which may transmit HIV. There also have not been any prosecutions under general criminal laws, such as attempted murder or assault, for behavior considered to transfer HIV in Wyoming.

Federal Law

Statutes

18 U.S.C. § 1122 - Donating or selling blood or other potentially infectious fluids or human tissues

After testing positive for HIV and receiving actual notice of that fact, HIV-positive individuals are prohibited from knowingly donating or selling, or knowingly attempting to donate or sell, blood, semen, tissues, organs, or other bodily fluids for use by another, except as determined necessary for medical research or testing. Transmission of HIV is not required for conviction.

Penalties - Fine of not less than $10,000, imprisonment for not less than 1 year nor more than 10 years, or both.

Cases

Though there have not been any federal prosecutions under the above statute, there have been prosecutions against HIV-positive individuals under general criminal laws at the federal level.

United States v. Moore, 846 F,2d 1163 (1988)

An Eight Circuit case, Moore stands out as the first case to label the use of mouth and teeth by an HIV-positive individual as the use of a "deadly and dangerous weapon." In Moore, the defendant was an inmate at the Federal Medical Center in Rochester, Minnesota. While there the defendant tested positive for HIV and was given counseling by a doctor at the Center. Moore was told "the disease could be transmitted by the way of blood or semen" and "to avoid unprotected intercourse and not to share needles, razor blades, or toothbrushes." A few months later, the defendant engaged in a confrontation with correctional officers and bit two of the officers attempting to restrain him. There was no evidence of blood within Moore's mouth at the time of the bites and neither bite broke the skin of the officer bitten. Moore was indicted and convicted for two counts of assault with a deadly and dangerous weapon upon federal correctional officers. At trial, the doctor who had counseled Moore testified that "the medical profession knew of no 'well-proven instances in which a human bite has resulted in transmission of the [HIV] virus to the bitten person.'" The doctor testified that "theoretically 'one cannot exclude the possibility' of transmission through biting." The doctor also testified that, apart from HIV, "a human bite can be dangerous," even "more dangerous than a dog bite."

On appeal, the defendant argued that the state had to prove that a human bite was a way of transmitting HIV in order for the jury to find that his mouth had been used as a deadly and dangerous weapon. The Eight Circuit rejected this argument, relying instead upon the belief that "it is not necessary that the object, as used by a defendant, actually cause great bodily harm, as long as it has the capacity to inflict such harm in the way it was used." Rejecting "Moore's massive emphasis on the AIDS aspect of the case," the court leaned upon the testimony of the doctor that a human bite itself can cause infection and therefore serious bodily harm. This testimony alone "contained sufficient evidence to allow the jury to find that Moore's mouth and teeth were used as a deadly and dangerous weapon." Though the Eight Circuit attempted to distinguish its decision from the lack of scientific evidence showing the transmissibility of HIV through a human bite, by allowing the jury to hear evidence as to the defendant's HIV-positive status and not requiring the state to prove the transmissibility of AIDS through a bite, the court left the decision to the irrational and unfounded fears of the jury and left open a wide door through which these types of convictions could be made.

For more federal cases based on biting prosecutions, see ***United States v. Sturgis,*** 48 F.3d 784 (4th Cir. 1995) (affirming sentence of fourteen years based on the underlying offense as well as a finding that the inmate committed perjury at trial concerning his knowledge of when he tested HIV positive) ***and United States v. Studnicka,*** 450 F. Supp. 2d 680 (E.D. Tex. 2006) (affirming a ten year prison term for an HIV-positive federal inmate's biting of a correctional officer).

United States v. Blas, 360 F.3d 1268 (11th Cir. 2004)

In Blas, the HIV-positive defendant engaged in numerous sexual acts with a 15-year-old girl and was convicted of attempting to persuade and coerce an individual under the age of eighteen to engage in a sexual act, pursuant to 18 U.S.C. § 2422(b), and traveling in interstate commerce for the purpose of engaging in a sexual act with an individual under the age of 18 years. During sentencing, the district court applied an upward departure to the defendant's sentence, finding "that Blas's behavior constituted an 'unusually heinous, cruel, and degrading act toward a minor,' thus meriting the upward departure." The Court of Appeals for the Eleventh Circuit affirmed an "extreme conduct" upward sentence departure. The defendant had not disclosed his HIV infection, although the record indicated that the defendant used a condom at least some of the time. The court found that as a result of the sexual contact, the complainant feared that she was infected with HIV, suffered other psychological trauma, and repeatedly sought HIV testing.

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Secondary Sources

Books

The following books each contain sections concerning the criminalization of HIV. While the first book on the list gives a more general overview of these laws and their affect upon those living with HIV, the second book is written as a helpful guide for those living with HIV. The book also contains an appendix of national, state, and local resources available to help guide the reader toward legal help for specific issues. Each of these books will help the researcher gain a general knowledge of HIV criminalization.

- HIV, AIDS, and the Law: A Guide to Our Rights and Challenges by Mark S. Senak
  ISBN: 0306452685
  Publication Date: 1996
  https://gil.gsu.edu/cgi-bin/Pwebrecon.cgi?BBID=49472
- HIV Law: A Survival Guide to the Legal System for People Living with HIV by Paul Hampton Crockett
  ISBN: 060980023X
  Publication Date: 1997
  https://gil.gsu.edu/cgi-bin/Pwebrecon.cgi?BBID=56762
- Legal Responses to HIV and AIDS by James Chalmers
  ISBN: 184113726X
  Publication Date: 2008
  https://gil.gsu.edu/cgi-bin/Pwebrecon.cgi?BBID=1947251

American Law Reports

Alan Stephens, ***Transmission or Risk of Transmission of Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS) as Basis for Prosecution or Sentencing in Criminal or Military Discipline Case***, 13 A.L.R. 5th 628 (2011)

- This ALR gives a basic overview of many of the cases in which HIV-positive defendants have been charged with transmission or exposure of HIV, aggravated assault or attempted murder due to their HIV status, sentencing enhancements for other crimes due to the additional presence of HIV, and with using a deadly weapon for bodily injury. This ALR also focuses on the testing requirements used by courts in these situations to compel defendants to undergo HIV testing in order to confirm that they are indeed HIV-positive in criminal prosecutions. Finally, the ALR gives an in depth discussion concerning HIV prosecutions within the military itself. This overview explains the nature of court-martial proceedings involving the transmission of HIV and the imposition of “safe-sex orders” on HIV-positive servicemen.

Robin Miller, ***Validity, and Propriety Under Circumstances, of Court-Ordered HIV Testing***, 87 A.L.R.5th 631 (2010)

- This ALR analyzes the constitutionality and validity of court-ordered HIV testing in both criminal and civil settings. Because this type of court-ordered testing occurs most commonly in the criminal setting, the ALR focuses on the specific offenses which trigger these orders. The ALR also examines specific statutes which give the court authority to compel an HIV-positive defendant to undergo an HIV test. Further, the ALR tests the constitutionality of such orders by looking at issues such as unreasonable search and seizure, equal protection, ex post facto law, freedom of religion, right to privacy, and substantive due process. This ALR is extremely useful for those dealing with HIV criminalization because compelled HIV testing does commonly occur in these types of prosecutions and it is vital that HIV-positive defendants and their counsel understand the rights that they have in dealing with court-ordered testing.

Internet Sources

Lexis One

- LexisOne provides free and fee-based resources and is less extensive than its LexisNexis counterpart. Although cases are accessible on LexisOne, they are limited to those that have been decided in the past ten years (for most jurisdictions). However, the complete history of the United States Supreme Court is provided. In addition, a researcher can access forms, news, blogs, and podcasts on this site. Lawyers who want to access LexisNexis content from this site can pay by the day, week, or month. The website address is www.law.lexisnexis.com/webcenters/lexisone/.

Casemaker

- Casemaker is a legal research service for Sate Bar Associations and their members. The Georgia Bar Association is one of the twenty-eight state bar associations who currently subscribe to Casemaker. Casemaker’s library includes links to state caselaw, statutes, state and federal court rules, administrative codes, and Attorney General opinions. The website address is www.ga.bar.org/casemaker.

Loislaw

- Loislaw is a fee-based legal research site that provides access to primary law, public records, treatises, and legal forms. Although it is less expensive than Westlaw and LexisNexis, offering an all-inclusive flat rate, it is not as comprehensive as Westlaw or LexisNexis. The website address is www.loislaw.com.

Findlaw

- Findlaw is a free legal database that caters to non-lawyers who are interested in learning about specific areas of the law. Findlaw for Legal Professionals provides access to case law, statutory law, and articles. For information on criminal HIV transmission or exposure laws, enter "criminal HIV transmission or exposure" in the search box on the home page. This will take you to the "Learn about the Law" tab, and it lists several links to further information such as brief summaries of HIV transmission or exposure laws in different states. This resource is only somewhat helpful because it only discusses a limited number of statutes, and it only briefly analyzes them. Further, the site does not pull up any cases. This website would be a good starting point for a researcher looking for laws in this area. The website address is www.findlaw.com.

Google

- Google is company whose web search engine is its most popular service. It is the dominant search engine in the United This basic search engine has spread to specific services as well, including an image search engine, the Google News search site, Google Maps, and more. Google's "advanced search" allows the researcher to type in various phrases such as "criminal HIV transmission or exposure", and it will pull up most cited advocacy group websites and most recent HIV prosecutions that are in the news.

Law Reviews, Periodicals, & Articles

Mona Markus, ***A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws***, 23 Nova L. Rev. 847 (1999)

- This Law Review Article examines and advocates the general use of criminal law to combat the spread of HIV, specifically supporting the enactment of HIV specific laws to target certain behavior known to transmit HIV. Written earlier on in the AIDS epidemic, the article takes on the accustomed tone of disgust and anger for addressing behavior considered to transfer HIV. The author begins the article by discussing Nushawn Williams, the most notorious HIV-positive defendant of the 1990's. Eventually prosecuted and convicted for spreading HIV for numerous women, Nushawn Williams's notoriety in the media caused fear and anguish concerning the spread of HIV throughout the United States. Relying on this angst, the author in the article examines the ways in which laws already put into place could be used to combat the spread of HIV. The author does so in three steps: (1) First, the author examines prosecution under general criminal laws against such behavior; (2) Second, the author examines the application of public health crimes to deter HIV-positive individuals from spreading the virus; and (3) Third, the author addresses the use of public health regulation to control the spread of HIV. After discussing the pros and cons of each of these approaches, the author addresses HIV specific transmission/exposure laws themselves, breaking down the elements of these laws and analyzing the advantages and disadvantages of enacting such laws. The author concludes that the enactment of such laws would best stem the spread of HIV by specifically describing what conduct should be avoided by HIV-positive individuals and deterring them from engaging in the conduct. Notably, the author includes an appendix which spells out what the author believes to be an ideal format for the HIV transmission/exposure law.

- This article is vitally important for those researching criminal HIV transmission/exposure laws, whether for academic or litigation purposes. Because the understanding of how HIV is transmitted and the general acceptance of HIV has changed over the years, this article helps explain *why* such laws were considered necessary to stem the spread of HIV and the motivation behind the enactment of the laws. As any area of law, the attitudes behind the laws governing HIV transmission have changed over time. This article gives a greater understanding of the full picture behind the criminalization of HIV transmission and exposure.

See also Amy L. McGuire, ***AIDS as a Weapon: Criminal Prosecution of HIV Exposure***, 36 Hous. L. Rev. 1787 (1999) (paralleling the above article in structure and advocating the enactment of HIV specific criminal laws for transmission or exposure because current general criminal laws were too broad to be truly effective); Rebecca Ruby, ***Apprehending the Weapon Within: The Case for Criminalizing the Intentional Transmission of HIV***, 36 Am. Crim. L. Rev. 313 (1999) (advocating the use of general criminal laws—such as murder, reckless endangerment, assault, and manslaughter—to deter HIV-positive individuals from intentionally engaging in behavior which may spread HIV).

Christina M. Shriver, ***State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications***, 21 N. Ill. U. L. Rev. 319 (2001)

- This Law Review article examines the HIV specific criminal laws in each state which had an active statute at the time of the article's publication. Specifically, the article discussed and analyzed the sixteen states which had enacted criminal transmission statutes relating to sexual activity. Through this analysis, the author points out the vagueness and broadness of many of the laws, triggering constitutional implications. The author points out the similarities and differences between the varying approaches states have taken in their statutory schemes. The author then proposes an alternative statutory scheme to fix the constitutional imperfections found in many of the states' statutes and to make such statutes only applicable to behavior that has been medically proven to transmit HIV.

- This article is helpful to the researcher because it closely examines and analyzes numerous state's approaches in applying criminal law to high risk HIV behavior. The article details the flaws, and the successes, of each state's approach, making the article especially useful to a legislator or judge who is looking for a way to improve a state statute in this area. Additionally, the article suggests statutory language that may be enacted for a clearer and more constitutionally sound criminal HIV transmission or exposure law.

Zita Lazzarini et al., ***Evaluating the Impact of Criminal Laws on HIV Risk Behavior,*** 30 J.L. Med. & Ethics 239 (2002)

- While many articles discussing HIV transmission and exposure laws focus on the theoretical and constitutional aspects of such laws, this Periodical article focuses on the actual impact of such laws on the risk behavior of HIV-positive individuals. In Part I of the article, the authors describe the different types of criminal provisions enacted and used in the United States to prosecute HIV-positive individuals. In Part II, the authors report their research over prosecutions of HIV-positive individuals reported in legal decisions and the press. Finally, in Part III, the authors analyze the implications of their findings on the risk behavior of HIV-positive individuals. In this section, the article conveys that the number of individuals being prosecuted for HIV-exposure crimes is generally low and that there seemed to be no evidence of systematic enforcement of HIV exposure laws. The most prominent characteristic the authors found in their research was that most of the individuals who were charged with HIV-related crimes were engaged in behavior that was already criminal without regard to their HIV status (such as rape, child molestation, prostitution, etc.). The authors conclude that, taken broadly, the data does not support the view that HIV-specific statutes create clear rules for behavior. Further, the authors conclude that HIV transmission and exposure laws create somewhat of a paradox in preventing the spread of AIDS. The article describes this paradox as "The behavior most widely accepted as wrong — deliberately using HIV as a tool to harm or terrorize another — is too rare to influence the epidemic, whereas the behavior most responsible for spreading the virus — voluntary sex and needle-sharing — is difficult and controversial to prohibit." While not completely disavowing the use of criminal law in stemming the spread of HIV, the article does give weight to the argument that criminal law may not be the most effective tool in doing so.

- This article is useful to the researcher as it attempts to take a scientific look at the effect of criminal law on the choices and behaviors of HIV-positive individuals. For those researching such issues, this article may serve as support for those who call for the repudiation of HIV specific criminal laws.

For follow-up information, data and conclusions on the above study, see Scott Burris et al., ***Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial***, 39 Ariz. St. L.J. 467 (2007) (summarizing data to conclude that "[t]he criminalization of HIV has been a strange, pointless exercise in the long fight to control HIV. It has done no good; if it has done even a little harm the price has been too high. Until the day comes when the stigma of HIV, unconventional sexuality and drug use are gone, the best course for criminal law is to follow the old Hippocratic maxim, 'first, do no harm.'").

Richard Vezina & Leslie E. Wolf, ***Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?***, 25 Whittier L. Rev. 821 (2004)

- This Law Review Article examines the interplay between criminal law and public health policies in dealing with the AIDS epidemic. The article focuses on the inherent tension between the criminal approach towards HIV prevention and the public health prevention. The authors explain that criminal law attempts to deter transmission or exposure by

punishing those engaging in such conduct with the expectation that the threat of incarceration will act as a deterrent. The criminal approach is directly juxtaposed with the public health prevention approach, which the authors explain relies on voluntary cooperation with HIV-positive individuals and in contacting the sexual partners of individuals who have tested positive for HIV and may have been infected as well. These two approaches come into stark conflict, as opponents of HIV criminalization argue that criminal exposure laws deter high risk individuals from seeking out HIV testing, as knowledge of an HIV-positive status tends to be an element of such prosecutions. After discussing the background of HIV transmission and the use of general criminal laws and HIV specific laws, the authors explain how the power of public health and the use of prevention policies, instead of criminal laws, may truly aid in preventing the spread of HIV. The authors go on to suggest ways in which the current HIV specific statutes could be improved and brought into balance with public health prevention policies.

- This article is unique in that, unlike many of the articles discussing the issue, the authors attempt to take an objective look at the use of criminal law to stop the spread of HIV. The authors not only look at the current laws (both criminal and public health), but also analyze many different cases and prosecutions of HIV-positive individuals under general criminal laws and HIV transmission/exposure laws to determine the actual effect of such laws. This more objective approach helps the researcher understand that a multifaceted approach may be the best way in which the spread of AIDS can be stopped.

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Interest Groups and Associations

Government Support and Education

Office of National AIDS Policy - The White House

The Office of National AIDS Policy (ONAP) is part of the White House Domestic Policy Council and is tasked with coordinating the continuing efforts of the government to reduce the number of HIV infections across the United States. The Office emphasizes prevention through wide-ranging education initiatives and helps to coordinate the care and treatment of citizens with HIV/AIDS. In July of 2010, the ONAP published its "National HIV/AIDS Strategy for the United States." This publication calls for a re-evaluation of the criminal laws enacted in each state to combat the spread of AIDS. The publication specifically targets laws which criminalize behavior that has a nearly impossible chance of transmission (such as biting or spitting) and laws concerning consensual sexual activity between adults.

AIDS.gov

Created and managed by the United States Department of Health and Human Services, AIDS.gov seeks to educate citizens and promote three simple objectives:

1. Expand visibility of timely and relevant Federal HIV policies, programs, and resources to the American public.
2. Increase use of new media tools by government, minority, and other community partners to extend the reach of HIV programs to communities at greatest risk.
3. Increase knowledge about HIV and access to HIV services for people most at-risk for, or living with, HIV.

Though there is not a simple link leading searchers to a criminal law discussion on the website, if the searcher types "criminal" in the upper right-hand corner of the main page of the website, the site takes the searcher to a list of links to documents concerning HIV criminalization promulgated by the government and various advocacy groups.

Centers for Disease Control and Prevention

As a part of its overall public health mission, CDC provides leadership in helping control the HIV/AIDS epidemic by working with community, state, national, and international partners in surveillance, research, and prevention and evaluation activities. These activities are critically important because CDC estimates that about 1.1 million Americans are living with HIV, and that 21% of these persons do not know they are infected.

In addition, the number of people living with AIDS is increasing, as effective new drug therapies keep HIV-infected persons healthy longer and dramatically reduce the death rate. CDC's programs work to improve treatment, care, and support for persons living with HIV/AIDS and to build capacity and infrastructure to address the HIV/AIDS epidemic in the United States and around the world.

The key page on this site for those investigating, litigating, or advocating around the issue of HIV criminalization is the page titled "HIV Transmission, Questions and Answers." This page contains information about all types of behavior in which HIV can be transmitted. Because so many state laws criminalizing HIV "transmission" are vague and imprecise, arguments can be made against some prosecutions due to the fact that the behavior involved does not actually transmit HIV. The CDC spells out clearly which behaviors are risky and which behaviors have almost no chance of transmitting HIV.

UNAIDS

Mission: UNAIDS, the Joint United Nations Programme on HIV/AIDS, is an innovative partnership that leads and inspires the world in achieving universal access to HIV prevention, treatment, care and support. UNAIDS fulfills its mission by:

- Uniting the efforts of the United Nations system, civil society, national governments, the private sector, global institutions and people living with and most affected by HIV;
- Speaking out in solidarity with the people most affected by HIV in defense of human dignity, human rights and gender equality;
- Mobilizing political, technical, scientific and financial resources and holding ourselves and others accountable for results;
- Empowering agents of change with strategic information and evidence to influence and ensure that resources are targeted where they deliver the greatest impact and bring about a prevention revolution; and
- Supporting inclusive country leadership for sustainable responses that are integral to and integrated with national health and development efforts.

Interest and Advocacy Groups

American Civil Liberties Union - ACLU AIDS Project

The ACLU AIDS Project uses impact litigation, public education and advocacy at the state and federal level to fight discrimination against people with HIV/AIDS. The overall goal

of the Project is to work to create a world in which discrimination based on HIV status has ended, people with HIV have control over their medical information and care, and where the government's HIV policy promotes public health and respect and compassion for people living with HIV and AIDS. The ACLU actively seeks out litigation involving HIV-positive individuals, including criminal prosecutions. Often, the ACLU will submit Amicus Curiae briefs in these types of litigation in an attempt to protect individuals living with HIV from human rights or civil rights violations. The ACLU calls for the repeal of HIV specific laws in the states and continuously works to show that these laws violate the rights of HIV-positive individuals.

AIDS United

AIDS United is dedicated to the development and implementation of sound public health policy in response to the HIV/AIDS epidemic. We work to advance federal policies that improve the quality of life and ensure access to treatment and care for all those living with HIV/AIDS. AIDS United promotes scientific and evidence based HIV prevention policy to reduce the spread of new infections. While this group focuses mainly on the public health aspect of the AIDS epidemic, and does not touch on the criminal aspect, it is important for any researcher dealing with HIV criminalization to fully understand the health aspects of HIV transmission. Because many argue that public health, and not criminal law, should govern the spread of HIV, it is important for litigators in this area to be able to argue soundly for this approach.

Lambda Legal

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. This group not only maintains an informational website to aid those researching issues concerning the LGBT and HIV-positive communities, but also engages in advocacy through submitting Amicus Curiae briefs in litigation across the nation affecting these communities and by lobbying for equal treatment with state and national legislatures. Key features concerning HIV criminalization on the website include:

1. On the main page, in the upper right-hand corner, a searcher can click on "Find Your State" and enter the state in which they live to find all the laws in that state affecting the LGBT and HIV-positive individuals in the state. After choosing the state, the site takes the searcher to a page which gives a breakdown of all the state laws as well as recent press releases and cases.
2. On the main page, along the top tool bar, a searcher can click on "Legal Work" and then "Cases" to see the cases in which Lambda Legal is currently involved in litigation.

The Center for HIV Law and Policy

The Center for HIV Law and Policy is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV. Like Lambda Legal, the CHLP maintains an informational website covering every topic in the law that is affected by individuals living with HIV, including, but not limited to: advanced directives and wills, confidentiality and disclosure, criminal law, employment, family law issues, health care and insurance issues, human rights, immigration, legal assistance, and prevention and sexual health.

Blogs

AIDSmap

This website contains a wealth of resources and information for those seeking to know more about HIV/AIDS. The site does contain information about criminal laws governing HIV risk behavior. On the main page, the searcher should click "Topics" on the top tool bar, then underneath "Social and Legal Issues" choose "HIV and criminal law." This will take the searcher to a page containing not only resources, features, and news, but also a function called "In Your Own Words." This function allows readers of the site to post, anonymously or not, about the topic of HIV and criminal law. This function is extremely interesting as many individuals post about their own experiences in disclosing their HIV status before engaging in sexual intercourse or what happened to them if they did not disclose their status.

The Body - The Complete HIV/AIDS Resource

This site contains multiple different types of resources from fact sheets with the criminal laws affecting HIV-positive individuals in each state to interviews with HIV-positive individuals on topics such as dating or taking HIV medication. The site also has an extensive list of blogs, all written by individuals living with HIV, from which to choose. An interesting feature of the site, these bloggers come from a wide variety of backgrounds and experiences, helping shed light onto the living situations and day-to-day issues individuals living with HIV are faced with.

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