Ending and Defending Against HIV Criminalization

A MANUAL FOR ADVOCATES

VOLUME 1

State and Federal Laws and Prosecutions

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MISSION STATEMENT

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.

We support and increase the advocacy power and HIV expertise of attorneys, community members and service providers, and advance policy initiatives that are grounded in and uphold social justice, science, and the public health.

We do this by providing high-quality legal and policy materials through an accessible web-based resource bank; cultivating interdisciplinary support networks of experts, activists, and professionals; and coordinating a strategic leadership hub to track and advance advocacy on critical HIV legal, health, and human rights issues.

To learn more about our organization and access the Resource Bank, visit our website at [www.hivlawandpolicy.org](http://www.hivlawandpolicy.org).

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FOREWORD TO VOLUME I

This volume represents the first installment of a multi-volume resource for responding to the phenomenon of HIV criminalization. Future volumes and editions will include resources such as check lists for attorneys and other advocates, sample affidavits and other documents for cases that go to court, and additional analysis of the history and purpose of criminal and civil law punishments targeting people affected by HIV.

Because statutory law and common law trends develop and can change over time, we anticipate future editions of this volume to reflect such changes. However, while we made every attempt to include relevant cases as they existed at the time of publication, it is important to keep in mind that it is possible that we are significantly under-reporting the occurrence of HIV-related arrests and prosecutions in the United States. States do not share the same systems for tracking arrests across all counties and areas of the state, and many arrests are unlikely to appear in news reports or databases readily available to the general public or researchers.
A NEW STRATEGY TO END CIVIL AND CRIMINAL PUNISHMENT AND DISCRIMINATION ON THE BASIS OF HIV INFECTION

From the beginning of the HIV/AIDS epidemic, stigma and fear have fueled mistreatment of people living with HIV. One of the more troubling and persistent issues for people with HIV has been the prospect of criminal prosecution for acts of consensual sex and for conduct, such as spitting or biting, that poses no significant risk of HIV transmission. The Positive Justice Project is CHLP's response to this issue: a truly community-driven, multidisciplinary collaboration to end government reliance on an individual's positive HIV test result as proof of intent to harm, and the basis for irrationally severe treatment in the criminal justice system.

The use of criminal law as a way to stop or slow HIV transmission invariably is ineffective. The reasons why individuals take risks with their health, and how they assess risk, are many and complex. Arresting and prosecuting people with HIV for consensual sexual relationships or no-risk conduct, such as spitting, does nothing to take these reasons into account, or to assess risks based on the specific circumstances of the case at hand, such as viral load or even basic issues of intent or mutual responsibility.

We believe that success in reducing and ending reliance on criminal laws to single out and stigmatize people with HIV; educating court, prosecutors, and media; and in lessening stigma and discrimination, begins with a focus on the very real and serious public health ramifications of HIV criminalization. This in no way involves abandonment of civil liberties principles, but rather broadens the focus of advocacy to the public health consequences of ignoring individual rights.

A multi-pronged and collaborative plan is needed to address HIV criminalization, including a focused cross-disciplinary conversation about reconsidering the way we conceptualize and talk about HIV and transmission risk. Goals of our Positive Justice Project campaign include:

• Broader public understanding of the stigmatizing impact and negative public health consequences of criminalization and other forms of discrimination against people with HIV that occur under the guise of addressing HIV transmission.
• Community consensus on the appropriate use of criminal and civil law in the context of the HIV epidemic.
• Clear statements from lead government officials on the causes and relative risks of HIV transmission and the dangers of a criminal enforcement response to HIV exposure and the epidemic.
• A broader, more effective community-level response to the ongoing problem of HIV-related arrests and prosecutions.
• Reduction and eventual elimination of the inappropriate use of criminal and civil punishments against people with HIV.
TABLE OF CONTENTS

Introduction ........................................................................................................................................1

State by State Analysis

Alabama .............................................................................................................................................7
Alaska ...............................................................................................................................................9
Arizona ..........................................................................................................................................10
Arkansas ......................................................................................................................................11
California ....................................................................................................................................15
Colorado ......................................................................................................................................20
Connecticut ................................................................................................................................25
Delaware ......................................................................................................................................26
District of Columbia .....................................................................................................................27
Florida .........................................................................................................................................28
Georgia ......................................................................................................................................35
Hawaii .........................................................................................................................................40
Idaho ..........................................................................................................................................41
Illinois .........................................................................................................................................45
Indiana .........................................................................................................................................52
Iowa ..............................................................................................................................................59
Kansas .......................................................................................................................................64
Kentucky ....................................................................................................................................67
Louisiana .....................................................................................................................................71
Maine ..........................................................................................................................................76
Maryland .....................................................................................................................................77
Massachusetts ..............................................................................................................................80
Michigan ......................................................................................................................................82
Minnesota .....................................................................................................................................89
Mississippi ..................................................................................................................................95
Missouri ......................................................................................................................................98
Montana .....................................................................................................................................106
Nebraska .....................................................................................................................................107
Nevada .......................................................................................................................................108
New Hampshire ........................................................................................................................112
New Jersey ................................................................................................................................113
New Mexico ...............................................................................................................................115
New York ..................................................................................................................................116
North Carolina ..........................................................................................................................118
North Dakota ............................................................................................................................121
Ohio ............................................................................................................................................123
Oklahoma ..................................................................................................................................133
Oregon .....................................................................................................................................137
Pennsylvania ..............................................................................................................................139
Rhode Island ..............................................................................................................................145
South Carolina ............................................................................................................................146
South Dakota .............................................................................................................................150
United States Territories Analysis
- American Samoa ......................................................... 184
- Guam ............................................................................ 185
- Northern Mariana Islands.............................................. 188
- Puerto Rico .................................................................... 189
- U.S. Virgin Islands .......................................................... 190

Federal Law, including U.S. Military .............................................................. 193

Illustrations and Resources of Prosecutions and Arrests for HIV Exposure .......... 201
- Chart: Arrests and Prosecutions for HIV Exposure in the United States
  (Arranged by alphabetical order based on jurisdiction)................................. 202
- Chart: Arrests and Prosecutions for HIV Exposure in the United States
  (Arranged by aggregate number of arrests and prosecutions)....................... 204
- Chart: Prosecution for HIV Exposure in the United States, 2008-2010 ............. 206
- Positive Justice Project: HIV Criminalization Fact Sheet ............................. 214
INTRODUCTION

This volume sets out the specific laws and illustrative cases in each state and U.S. territory on the treatment of people with HIV in the criminal justice system. Also included is a summary of military prosecutions of individuals with HIV, and the treatment of HIV as an aggravating factor under federal sentencing guidelines.

First, this volume and the individual state analyses it contains were carefully researched and current as of the date of publication. The law is fluid, however, and users always should check for the subsequent legal or legislative developments. The statutes and cases collected here are fairly comprehensive and will provide the reader with a good sense of how individuals living with HIV have fared under the criminal laws and enforcement policies in their states. The cases were identified through searches of press archives, internet searches, and case and news reports on Westlaw. In our search on Westlaw, we used successive search terms in various databases with HIV and either criminal charges and/or modes of transmission, such as “HIV”, “assault”, “spit”, etc., to identify court decisions and media reports. Although we have attempted to include all reported cases from either news media sources or official judicial opinions, not all cases of HIV exposure are reported in the media and many prosecutions do not result in published judicial opinions. As a result, the cases represented here are assumed not to constitute an exhaustive representation of all HIV-related prosecutions in the U.S. The cases presented are likely only a sampling of a much more widespread but generally undocumented use of criminal laws against people with HIV.

Second, this volume attempts to collect only those laws and state cases that explicitly, or by clear implication, have or can be used to prosecute people for conduct on the basis of HIV status. In some states, this has included general criminal laws that are not HIV-specific, including offenses such as:

• Reckless endangerment;¹
• Assault;²
• Terroristic threats;³ and
• Homicide and attempted homicide.⁴

¹ Typically, reckless endangerment is defined as recklessly engaging in conduct which places or may place another person in danger of death or serious bodily injury. Model Penal Code § 211.2 (1985). Recklessness is defined as a conscious disregard of a substantial and unjustifiable risk. § 2.02(2)(c). Consent is not a defense to reckless endangerment because, under the Model Penal Code, consent can only be a defense when the threatened harm is “not serious.” § 2.11(2)(a).

²Typically, simple assault is defined as an attempt to cause, or purposely, knowingly, or recklessly causing bodily injury to another. Model Penal Code § 211.1(1) (1985). The crime also includes negligently causing bodily injury to another with a deadly weapon. The crime becomes an aggravated assault if the actor causes or attempts to cause “serious” bodily injury, or if he or she knowingly or purposely causes or attempts to cause bodily injury with a deadly weapon. § 211.1(2).

³ Typically, terroristic threat is a communication, either directly or indirectly, of a threat to commit any crime of violence with intent to terrorize another or otherwise cause terror with reckless disregard of the risk of causing such terror. See Commonwealth v. Walker, 836 A.2d 999 (Pa. Super. Ct. 2003) (affirming conviction on basis that defendant’s statements were intended to cause terror from fear of HIV infection, likelihood of actual HIV infection resulting from threatened conduct is immaterial).

⁴ Typically, homicide can either be murder (a homicide committed purposely, knowingly, or with extreme recklessness), Model Penal Code § 210.2 (1985), manslaughter (a reckless homicide), § 210.3, or negligent homicide (a homicide committed negligently), § 210.4. See also § 2.02 (general requirements of culpability: definitions of “purposely,” “knowingly,” “recklessly,” “negligently”). Homicide offenses relating to HIV transmission are rarely prosecuted, except as attempted offenses, because it is unusual for transmission of HIV to result in death. Homicide prosecutions are also unusual because of the requirement of proof of causation and proof of intent to transmit HIV, particularly in sexual contact.
Although these general criminal laws could, theoretically, be used against people living with HIV in all states, we only include case reports about them where they in fact have been applied to cases involving HIV.

This volume does not include analysis of the many state laws that mandate HIV testing of suspects arrested and/or convicted of sex offenses, some with negative consequences for those who test positive. We also do not address the very real, increasing problem of confidentiality violations, in which public health, health care, and other service providers share the HIV status of individuals in their care with law enforcement officials, sometimes after counseling them to avoid sexual contact without prior partner notification, in the belief that these individuals pose a risk to others and that health and service providers have a legal or ethical “duty to warn.”

Many states have “communicable” or “contagious disease” control statutes that criminalize STI exposure, which may or may not include HIV. Most of these statutes were enacted prior to the discovery of HIV and have typically not been enforced against any person with an STI or HIV. The penalties under these statutes tend to be limited to misdemeanors and there is no record of a case of HIV exposure ever being prosecuted under such statutes. Due to the antiquated nature and limited use of these statutes, such communicable disease statutes were not highlighted in this manual except in cases where HIV is noted within the scope of the statute. For states that have an HIV-specific criminal statute in addition to a communicable disease control statute (i.e.: California, Tennessee, etc.), the latter was not highlighted or analyzed.

The state-by-state section references but does not include a exhaustive analysis of all instances of sentencing determinations that, even without HIV-specific sentencing statutes, were or could be influenced by a defendant’s HIV status, or a victim’s allegation that the impact of a crime included fear of exposure to HIV. Such cases typically concern rape survivors who, after learning of a defendant’s HIV-positive status, or other infection with an STI, may have begun to take preventative medication, or feared possible infection with HIV, or have become alienated from family members. These factors can be material to a sentencing court’s consideration of the "impact of the crime upon the victim ... including a description of the nature and extent of any physical, psychological, or financial harm." In these cases, courts and juries might treat the “physical and emotional trauma” as constituting a level of harm beyond that of a "typical" rape victim.

An additional area of law that is not addressed here in depth, but is of potential concern to people with HIV and their advocates, is the option of civil commitment available to government officials seeking to isolate individuals with HIV, or to continue to confine persons with HIV whose conviction can be characterized as a sex crime. There are two types of these laws of concern to
people with HIV and their advocates. The first are general civil commitment laws, available to health and law enforcement officials in every state, that allow for the involuntary commitment, typically to a mental health or medical facility, of individuals determined to be a danger to the public or to themselves. Under this type of law, an individual who comes to the attention of a public health officer who believes the individual is behaving in a way that threatens disease transmission can be subjected to a petition and court order confining the individual for a period of time until the supposed risk of harm no longer exists. The other type of law authorizes the confinement of individuals determined to be sexually violent predators, i.e. persons who have been convicted of or charged with a sexually violent offense and who suffer from a condition affecting emotional or volitional capacity such that they pose a menace to the health and safety of others.

The United States Supreme Court has upheld the use of involuntary civil commitment or confinement of individuals, although the use of this measure has certain requirements to remain within the bounds of the federal Constitution. Such measures have been used against persons with HIV in recent cases suggesting that a defendant's history of unprotected sexual contact (as admitted by a defendant or evidenced by his contracting a sexually transmitted infection such as gonorrhea or syphilis) without disclosure of his HIV infection is adequate to meet the statutory dangerousness standard for confinement. A more recent, and perhaps more pernicious trend, is the indefinite detention of persons with HIV under sexually violent predator confinement statutes. Such statutes were upheld by the Supreme Court in Kansas v. Hendricks and have been applied to persons with HIV based on sexual activity posing no risk of HIV transmission.

In virtually every state and case situation, state and local prosecutors possess significant discretion in determining whether and how to prosecute individuals arrested or reported for HIV exposure. It is important to keep in mind that particular jurisdictions with significant numbers of prosecutions may be as reflective of a prosecutor's mindset or ambitions as it is a product of a particular state law. However, it is difficult to include assessment of this factor in a publication of this kind. Obviously, we cannot report on cases that prosecutors have declined to prosecute, and, to our knowledge, no prosecutor has developed public guidelines for use in determining whether prosecution is appropriate or not (some prosecutors might, as some cases suggest, select only cases in which there are multiple partners involved in sexual activities that present at least an actual risk of transmission, where the defendant has been explicitly warned that his behavior if continued will result in prosecution, where actual transmission of HIV seems to have taken place, or where a defendant has evidenced an intent to transmit HIV – cases that from a law enforcement point of view present more egregious circumstances and greater ease of conviction).

Similarly, the overly broad statutes that criminalize, as we point out in our analysis, conduct that presents little or no risk of HIV transmission, might be narrowed in their application by appropriate prosecutorial discretion. But even if a prosecutor declines to prosecute a specific case, being the

10 In re Coffel, 117 S.W.3d 116 (Mo. Ct. App. 2003) (reversing civil confinement order after three years of confinement as a sexually violent predator based on underlying criminal offense posing no risk of HIV transmission).
subject of a law enforcement investigation of HIV exposure can have significant negative impact on the life of someone with HIV. The statutes we analyze thus present a significant risk of harm to persons with HIV who in fact may not have engaged in behavior that is a prosecutable offense.

Our analysis is not able to capture fully whether defendants with HIV are given fair trials or whether, because of the social stigma that attaches to their status as HIV positive in what are often emotionally charged allegations of betrayal within deeply intimate relationships, their own truthful testimony is discounted, or their defense counsel are less than zealous and well-informed about the underlying medical and scientific issues.11

Defendants in such cases also may not have adequate access to expert scientific witnesses. Indeed, some convictions of persons with HIV appear to be result of so-called expert testimony that is nothing more than “junk science” that unfortunately is relied upon by judges or juries, even in those cases where the defense seeks to challenge and discredit it. Nevertheless, given many of the “facts” as found by judges or juries in these cases, there is certainly support for the view that the testimony of defendants with HIV is often discounted, particularly in cases where conflicting testimony is from law enforcement personnel who are likely to be viewed sympathetically by the fact-finder and whose social standing is superior to that of the defendant,12 such as those testifying that they were spit upon or bitten by an HIV-positive defendant in their custody, or for the “morally innocent” sexual partners whose trust has allegedly been betrayed by the nondisclosure of HIV status by a sexual partner.13

In our summaries of cases, which include both reports of cases in published judicial opinions as well as in news media sources, we include as many relevant facts about the defendant and the case as possible, but without making any judgment about how one might interpret those facts.14 For example, in many cases, information about the HIV status of the defendant’s sexual contact or contacts is included. As we explain, proof of transmission to a sexual partner, is generally not an element in most cases. Often, however, while it is either implied or explicitly stated that the defendant is the source of a sexual partner’s HIV infection, there is often little if any information about how the defendant, as opposed to another sexual partner, has been established as the source of that infection.

Finally, under many HIV-specific statutes, particularly those imposing enhanced penalties for prostitution offenses, cases can be prosecuted under attempt or solicitation theories, and no evidence of a completed offense is necessary for conviction. Under these often overly broad statutes, as we note, no sexual contact or other activity posing a risk of HIV transmission is

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11 See, e.g., State v. Bird, 692 N.E.2d 1013 (Ohio 1998) (affirming conviction based on defendant’s no contest plea which was deemed an admission of factual issue as to whether saliva can be a deadly weapon because of risk of HIV transmission).

12 See, e.g., People v. Hall, 124 Cal. Rptr. 2d 806 (Cal. Ct. App. 2002) (affirming HIV testing order on theory that sweat on defendant’s hands might pose a risk of HIV transmission to prosecutor who defendant assaulted during his criminal trial).

13 See, e.g., Ginn v. State, 667 S.E.2d 712 (Ga. Ct. App. 2008) (affirming conviction in case that resulted from the defendant’s former sexual partner applying for an arrest warrant with magistrate court and giving a statement to sheriff’s department against the defendant for failing to inform him of her HIV status, although her HIV status was published on the front page of a local newspaper before she commenced the sexual relationship).

14 In regard to news media reports, we caution the reader that the actual facts may differ significantly from those as reported, given the potential for sensationalized reporting on such cases. Nevertheless, we include these news reports because in many cases there is no other published source of information about the case.
necessary, and often court opinions offer scant information about the actual risk of HIV transmission that would have resulted from the offense, had it been completed.
STATE BY STATE GUIDE
Alabama Statute(s) that Allow for Criminal Prosecution Based on HIV Status:

**ALA. CODE § 22-11A-21(c)**

*Penalties for person afflicted with sexually transmitted disease to transmit such disease to another person*

Any person afflicted with an STD who knowingly transmits, assumes the risk of transmitting, or does any act which will probably or likely transmit such disease to another person is guilty of a class C misdemeanor.

HIV included among STDs, *see ALA. ADMIN. CODE r. 420-4-1-.03(2008)*

Class C misdemeanors are punishable by up to three months in jail.

Alabama has prosecuted incidents of HIV exposure under general criminal laws.

Under Alabama’s communicable disease exposure statute, HIV-positive persons may be imprisoned for up to three months or fined up to $500 if they “knowingly” transmit the virus to another. 15 Neither the intent to transmit HIV nor actual transmission is required.

Though HIV/AIDS is classified as a sexually transmitted disease for the purpose of Alabama’s statute there has never been a prosecution for HIV exposure under this law. Many states16 have similar communicable disease control statutes but their applicability to HIV is doubtful as many were enacted prior to the HIV epidemic and there have been no prosecutions for HIV exposure under such statutes. In the absence of specific HIV exposure laws, states have prosecuted incidents of HIV exposure under general criminal laws including assault and reckless endangerment.

In *Brock v. State*,17 an HIV-positive inmate who was 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 did not test positive for HIV. At trial, the jury acquitted Brock of the attempted murder charge but convicted him of first-degree assault, a crime which required that the defendant both intend to cause and actually cause “serious physical injury” with “deadly weapon or dangerous instrument.”18 The prosecution argued that because the defendant was HIV-

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15 ALA. ADMIN. CODE r. 420-4-1-.03(2008). Alabama law defines a person as acting “knowingly” “when he is aware that his conduct is of that nature of that the circumstance existed.” ALA. CODE § 13A-2-2(1975).

16 Other state statutes that have criminal exposure statutes for “sexually transmitted diseases,” “infectious venereal diseases,” etc. *see e.g. CAL. HEALTH & SAFETY CODE § 120600 (West 2010); LA. REV. STAT. ANN. § 40:1062 (2008); MONT. CODE ANN. § 50-18-112 (1989); N.Y. PUB. HEALTH LAW § 2307 (McKinney 2001); S.C. CODE ANN. § 44-29-60 (2009); TENN. CODE ANN. § 68-10-107 (2010); VT. STAT. ANN. TIT. 18 § 1106 (1973); W. VA. CODE § 16-4-20 (2010). There has never been a prosecution for HIV exposure under any of these statutes. Prosecutions for HIV exposure, if any, have arisen out of the general criminal law or HIV-specific exposure statutes of these states.


positive his mouth and teeth were “highly capable of causing death or serious physical injury” and should be considered dangerous weapons or instruments for the purposes of the assault charges.

On appeal, Alabama’s Court of Criminal Appeals dismissed the first degree assault conviction and downgraded his conviction to assault in the third degree. The court held that the state failed to establish the essential elements of a case of first degree assault against Brock. The court stated that no evidence was provided that Brock's mouth and teeth were "deadly weapon[s]" as defined by Alabama statute. Moreover, the state did not prove that Brock intended to cause serious physical harm to the prison guard. The court noted that the state provided no evidence that AIDS can be transmitted through a human bite and that the court did not believe it to be an established scientific fact that AIDS could be transmitted in such a manner.

The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.” The CDC has also maintained that saliva alone has never been shown to transmit HIV. Despite these findings there have still been prosecutions for HIV exposure for biting or spitting. (See Texas).

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

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Alaska Statute(s) that Allow for Criminal Prosecution Based on HIV Status:

**ALASKA STAT. § 12.55.155(C)(33)**

**Sentence Enhancement for HIV Exposure**

The sentencing court may impose a sentence above the presumptive range if the offense was a felony sexual offense specified in ALASKA STAT. §§ 11.41.410-11.41.455 and the following factors are proven in accordance with this section: the defendant had been previously diagnosed as having or having tested positive for HIV, 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.

HIV-positive status may lead to higher prison sentences for felony sexual offenses.

Alaska has no statute explicitly criminalizing HIV transmission or exposure but enhanced sentencing may be applicable based on a defendant’s HIV status if she/he is found guilty of one of the specified sex offenses. If an HIV-positive person is found guilty of a sexually-based assault, she/he may receive an enhanced term of imprisonment if (1) the offense involved penetration or (2) the defendant exposed the victim to a risk or a fear that HIV transmission could result. Neither the intent to transmit HIV nor actual transmission is required.

Alaska defines “sexual penetration” to include all intrusions “however slight, of an object or any part of a person's body into the genital or anal opening of another person's body.” An enhanced sentence can be imposed regardless of the defendant’s viral load; whether protection, such as a condom, was used; or if the crime involved penetration with a body part or object that cannot transmit HIV.

In 1996, a man’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 had HIV at the time of the sexual conduct with the minor, didn’t disclose his status, and didn’t take any measures to protect her from HIV. The court found that even though the minor provided a condom that was used for the second sexual encounter and the minor had thus far tested negative for HIV, it was “safe to infer that [the minor] will be very fearful for some time to come” that she may test positive for HIV. The court determined that such considerations supported an enhanced sentence.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. Please note that at the time of publication, ALASKA STAT. § 12.55.155 was undergoing amendments and revisions and as such sentencing enhancement provisions may have changed since the date of publication.

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Arizona Statute(s) that Allow for Criminal Prosecution Based on HIV Status:

No specific statute on record.

There are no explicit statutes regarding HIV or STI exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in Arizona. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault.

At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person’s HIV status in Arizona.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.
Arkansas Statute(s) that Allow for Criminal Prosecution Based on HIV Status:

**ARK. CODE ANN. § 5-14-123**

*Knowingly “Transmitting” AIDS, HIV*

It is a class A felony for a person who knows that he or she has tested positive for HIV to expose another to HIV (1) through the parenteral transfer of blood or blood products or (2) by engaging in 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, without first having informed the other person of the presence of HIV. The emission of semen is not required.

**ARK. CODE ANN. § 20-15-903**

*Receiving Health Care*

A person who is HIV-positive must, prior to receiving any health care services of a physician or dentist, advise such physician or dentist that the person has HIV. Failure to do so is a class A misdemeanor.

**AR. CODE. ANN. § 5-4-401**

*Sentence*

For a class A felony the sentence shall not be less than six years but not more than thirty years.

For a class A misdemeanor the sentence shall not exceed one year.

**AR. CODE. ANN. § 5-4-201.**

*Fines – Limitation on Amount*

A defendant convicted of a felony may be ordered to pay a fine not exceeding $15,000 if the conviction is of a class A or class B felony.

A defendant convicted of a misdemeanor may be sentenced to pay a fine (1) Not exceeding two thousand five hundred dollars ($2,500) if the conviction is of a Class A misdemeanor.
To avoid the risk of arrest and prosecution, HIV status must be disclosed to partners before engaging in sexual activities.

People living with HIV in Arkansas should be aware that penalties for engaging in a broad range of sexual activities without first notifying partners of one’s HIV status can result in criminal penalties. If a person in Arkansas is aware that she/he is HIV-positive, she/he must disclose this to a sexual partner before engaging in penile-vaginal sex, anal sex, oral sex, or the insertion of any body part of an HIV-positive person into the genital or anal openings of another person.23 Though the statute’s title emphasizes “transmitting AIDS/HIV”, neither the intent to transmit HIV, actual transmission of HIV, or ejaculation of semen are required for prosecution.

The only affirmative defense to prosecution is the disclosure of one’s HIV status. However, it is difficult to prove whether HIV status was disclosed in the course of private sexual activities because the evidence in these matters is often, if not always, limited to “she/he said, she/he said” testimony by the parties or third party witnesses. In *State v. Weaver*, for example, an HIV-positive man was sentenced to thirty-year imprisonment for allegedly having sex without disclosing his status, even though he maintained at trial that he did disclose his status to his partner.24 To rebut the defendant’s testimony, the prosecution called a health official to testify that the defendant said he would infect anyone he could if he was HIV-positive. On appeal, the court found that the rebuttal testimony was sufficient as it went to the intent of the defendant to expose others to HIV and therefore to the fact that the defendant probably did not tell the complainant that he was HIV positive.25

Prosecutions of HIV exposure cases raise serious issues as to the confidentiality of medical records and patient history. In criminalization matters, states often authorize the disclosure of otherwise confidential HIV information. Disclosure of this information does not require the defendant’s authorization even though it is her/his confidential medical information that is being disseminated to third parties. In a second trial to prosecute the same defendant from *Weaver* on two additional counts of exposing another to HIV, the state obtained the defendant’s medical records from the county health department by issuing an investigative subpoena, which did not require court approval.26 The defendant was convicted of those remaining counts and sentenced to thirty years for each count to be served concurrently with his prior conviction. On appeal, the defendant argued that the medical records were obtained in violation of the state’s rule of criminal procedure, rules of evidence, as well as the state and federal constitutions. The Arkansas Court of Appeals found that the prosecutor’s use of the investigative subpoena was proper because prosecutors are statutorily allowed to subpoena medical records without court approval if it is for the investigation of a crime.27

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23 ARK. CODE ANN. § 5-14-123 (West 2010).
25 Id. at 319.
27 Id. at 574-75, (citing ARK. CODE ANN. § 20-15-904(c)) ( “[a] person with Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of Human Immunodeficiency Virus (HIV) antigen or antibodies is infectious to others through the exchange of body fluids during sexual intercourse and through the parenteral transfer of blood or blood products and under these circumstances is a danger to the public. (b) A physician whose patient is determined to have Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of Human Immunodeficiency Virus (HIV) antigen or antibodies shall immediately make a report to the Arkansas Department of Health in such manner and form as the department shall direct.(c) (1) All information and reports in connection with persons suffering from or suspected to be suffering from the diseases specified in this section shall be regarded as confidential by any and every person, body, or committee whose duty it is or may be to obtain, make, transmit, and
Arkansas also requires court-ordered involuntary HIV testing for complainant notification. All criminal defendants in Arkansas charged with sexual assault, incest, or prostitution may be required to submit to an HIV test and upon conviction, and at the victim’s request, will be required to take an HIV test. At least thirty-three states have passed similar statutes permitting involuntary HIV testing of certain suspects, defendants, or convicts.

Sentences for violating Arkansas’s HIV exposure statute are severe. The minimum sentence for the class A felony is six years, but sentences and fines of up to thirty years and $15,000 are possible. Sex offender registration may also be required by a sentencing court, which often leads to community ostracism and serious problems finding employment. The following cases serve as illustrations of possible penalties for violating Arkansas’ criminal exposure statute:

- An HIV-positive man was sentenced to twenty years imprisonment in March 2010 after engaging in unprotected sex with a woman without first disclosing his status.
- In May 2009, a 17-year-old high school student was arrested for failing to inform his teenage sexual partner of his HIV status before engaging in unprotected sex. He was charged as an adult and sentenced to fifteen years in jail after pleading guilty to five counts of exposing another person to HIV. Part of his sentence included mandatory sex offender registration.
- In May 2008, a 33-year-old, HIV-positive man was sentenced to twelve years in prison for failing to disclose his HIV status to his girlfriend and another woman prior to engaging in sexual conduct. The man also had to register as a sex offender. Neither of the women tested positive for HIV.

receive such information and reports. (2) However, any prosecuting attorney of this state may subpoena such information as may be necessary to enforce the provisions of this section and 5-14-123 and 16-82-101, provided that any information acquired pursuant to such subpoena shall not be disclosed except to the courts to enforce the provisions of this section.” (Emphasis added).

Arkansas Code Ann. § 16-82-101(3)


Arkansas Code Ann. § 5-4-401(a)(2) (West 2010); § 5-4-201(a)(1).


positive for HIV. 34

Exposing another to HIV-positive blood is criminally punishable.

Because the law punishes “parenteral” exposure—i.e., exposure through a break in the skin or through a mucus membrane—prosecutions are possible if any amount of HIV-positive blood makes contact with another individual's non-intact skin, eyes, nose, mouth, or other area involving a mucus membrane. In May 2010, a 41-year old, HIV-positive man was charged with criminal exposure to HIV after allegedly spitting blood at a police officer. 35

HIV status must be disclosed before receiving medical treatment.

All people in Arkansas who are aware that they are HIV-positive must inform doctors or dentists of their HIV status before receiving treatment. 36 Failure to meet this requirement is punishable by up to one year in prison, a $2,500 fine, or both.

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California Statute(s) that Allow for Criminal Prosecution Based on HIV Status:

**CAL. HEALTH & SAFETY CODE § 120291**

*Unprotected sexual activity by one who knows self to be infected by HIV*

Any person who exposes another to HIV by engaging in unprotected sexual activity (anal or vaginal intercourse without a condom) 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 three, five, or eight years imprisonment. A person’s knowledge of his or her HIV-positive status, without additional evidence, is not sufficient to prove specific intent.

**CAL. HEALTH AND SAFETY CODE § 120290**

*Willful exposure of self or others to disease*

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**

*Sentence enhancement for sexual offenses*

Any person who commits rape, unlawful intercourse with a female under age eighteen, spousal rape, sodomy, or oral copulation with the knowledge that he or she is infected with HIV at the time of commission shall receive a three-year enhancement for each violation in addition to the sentence provided for the sexual offense itself.
HIV positive persons may be prosecuted for engaging in unprotected sexual intercourse with the specific intent to transmit HIV.

Under California’s felony exposure statute, imprisonment for three, five, or eight years may follow if an HIV positive person (1) engages in unprotected penile-vaginal sex or unprotected anal sex, (2) with knowledge of her/his positive status, (3) without disclosing HIV status to sexual partners, and (4) with the specific intent to transmit HIV. No actual transmission of the virus is required.

Proof of disclosure of one’s status and/or using condoms, or other protection, are affirmative defenses to prosecution. Importantly, an HIV positive person will only be prosecuted if there is proof that the person specifically intended to transmit HIV to a partner. Knowledge of one’s HIV

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37 CAL. HEALTH & SAFETY CODE § 120291 (West 2010).
status alone is insufficient for prosecution. In other jurisdictions intent has been shown through statements a defendant made about wanting to infect others with HIV.\(^{38}\)

In September 2010, a 41-year-old man pleaded guilty to having unprotected sexual activity while knowing he was HIV-positive and acting with the intent to infect his sexual partner.\(^ {39}\) This is the only case on record of anyone ever being charged or convicted under California’s statute.

**HIV-positive individuals may receive enhanced sentences or aggravated assault charges for sex crimes.**

California imposes sentence enhancements for sex offenders who are HIV positive. Specifically, if a person living with HIV/AIDS knows her/his status and commits a sex offense, or multiple sex offenses, an additional three years in prison are required for each offense.\(^ {40}\)

No intent to transmit HIV or actual transmission is required.

The sentencing law may be applied regardless of the defendant’s viral load, whether condoms or other protection were used, or whether HIV could have been transmitted during the acts in question.

Although cases arising under sentence enhancement laws are rare in California, in 1998 a man received a sentence enhancement of nine additional years in prison for having unprotected sex with a minor while being HIV positive.\(^ {41}\) On a challenge to the sentencing enhancement statute, the California Court of Appeal declined to label the application of the statute “cruel and unusual punishment” under the Eighth Amendment, as it did not punish HIV positive status but punished conduct.\(^ {42}\)

Sexual assault charges may also be elevated to aggravated assault charges if the HIV positive defendant fails to use protection. In *Roman v. Superior Court*,\(^ {43}\) an HIV-positive man anally raped a minor 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.

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38 See *State v. Stark*, 832 P.2d 109 (Wash. Ct. App. 1992)(finding that HIV-positive defendant’s statement, “I don’t care. If I’m going to die, everybody’s going to die” when talking about his sexual activity was sufficient to show intent to inflict bodily injury on his sexual partners through exposure to HIV); *Commonwealth v. Walker*, 836 A.2d 999 (Pa. Super. Ct. 1999)(an HIV-positive man 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 court found that the statement was sufficient to show intent.


40 CAL. PENAL CODE § 12022.85 (West 2010).


42 Id. at 425; (distinguishing *Robinson v. California*, 370 U.S. 660 (1962) and finding a statute punishing the status of being addicted to drugs while in California void as cruel and unusual punishment).

Heightened penalties may result from activities as a sex worker or soliciting sex while HIV-positive.\textsuperscript{44}

California prostitution laws provide for additional penalties when an HIV-positive individual is found guilty of either engaging in or soliciting prostitution. Under § 647F of the California Penal Code, if an individual is (1) found guilty of either soliciting or engaging in prostitution, (2) has previously been convicted of a sex offense, and (3) tested positive for HIV following a previous sex offense conviction, she/he is guilty of a felony and may be imprisoned for up to three years.\textsuperscript{45}

This sentencing law that punishes a defendant for being HIV-positive regardless of whether she/he intended to transmit HIV, transmitted the virus, or engaged in activities likely or possible to do so. To commit a felony under this statute, no actual sexual activity is required. A conviction for prostitution is possible as long as a defendant does some act proving an intent and agreement to engage in prostitution.\textsuperscript{46}

In 2007, an HIV-positive sex worker was charged with exposing others to HIV and felony prostitution.\textsuperscript{47} She had previously been convicted of prostitution and had tested positive for HIV.\textsuperscript{48} The defendant had condoms in her possession and had not yet engaged in sex with an undercover officer. On appeal, the court upheld the felony prostitution charge but dismissed the exposure charge finding that there was not a specific intent to transmit HIV.

Individuals with HIV must not donate blood, organs and other tissues, semen, or breast milk, to others.\textsuperscript{49}

A person may face two, four, or six years imprisonment if she/he is aware of her/his HIV positive status and donates blood, body organs or tissues, semen, or breast milk. No intent to transmit HIV or actual transmission of the virus is required. An individual will not be prosecuted under the following circumstances:

- She/he is mentally incompetent;
- Blood is donated and official procedures for “self-deferring” their blood\textsuperscript{50} (indicating that blood should only be used for science purposes, and not for transfusion);
- Donate blood for autologous use (use in another part of the donor’s own body).

\textsuperscript{44} Prior to California’s statutes on HIV-exposure and HIV-specific statute enhancements, there were a few cases where persons who knew they were HIV-positive and solicited or engaged in prostitution faced penalties under general criminal laws. In 1987, an HIV-positive sex worker was charged with attempted murder and her pimp was charged with pimping and willfully exposing another to a contagious disease. However, the charges were later dropped when a witness refused to testify. \textit{Main News: The State}, LOS ANGELES TIMES, July 24, 1987, at 2.

\textsuperscript{45} See above discussion of California sentencing laws for a list of sex offenses covered under this statute; See also CAL. PENAL CODE § 647F (West 2010); CAL. PENAL CODE § 18 (West 2010).

\textsuperscript{46} CAL. PENAL CODE § 647(B) (2010).


\textsuperscript{48} Id.

\textsuperscript{49} Prior to California’s HIV-specific statute on blood and organ donations, an HIV-positive homeless man was acquitted on charges of attempting to poison a pharmaceutical product after selling his blood. Terry Pristin, \textit{Jury Frees AIDS Victim Who Sold Infected Blood}, LOS ANGELES TIMES, March 3, 1998, at 1.

\textsuperscript{50} See CAL. HEALTH & SAFETY CODE § 1603.3(B) (West 2010).
HIV-positive persons have also been convicted under general criminal charges.\textsuperscript{51}

In \textit{Benford v. People}, the California Court of Appeals confirmed a conviction for, amongst other charges, making criminal threats.\textsuperscript{52} The defendant was resisting arrest and while spitting at the officers made comments including, “I’ll make your life miserable because I’m infected with HIV.” A criminal threat under California law is a threat that is intended to and does cause fear in the person threatened.\textsuperscript{53} The State must prove that the defendant threatened to kill or inflict bodily injury on another person, intended the threat to be understood as such and communicated the serious intention that the threat would be carried out, and the threat caused the person to be in fear and such fear was reasonable. The court held that the language and actions of the defendant could reasonably be found to be criminal threats by a jury.

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\textsuperscript{51} In a 1987 case, the defendant successfully sued the San Diego police department for taking and testing his blood for HIV without consent or a warrant after he bit the officers. \textit{Barlow v. County of San Diego}, 190 Cal. App. 3d 1652 (Cal. Ct. App. 1987). He was originally charged with intent to kill and inflict great bodily harm on the officers. A jury later acquitted him of all criminal charges. \textit{Barlow v. Ground}, 943 F.2d 1132 (9th Cir. 1991)


\textsuperscript{53} \textsc{Cal. Penal Code} § 422 (West 2010).
Colorado Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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). See also COLO. REV. STAT. § 18-1.3-1004.

**COLO. REV. STAT. § 18-7-201.7**

Prostitution with 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). This law does not apply to spouses.

**COLO. REV. STAT. § 18-1.3-401**

Felonies classified – presumptive penalties

Class 5 felony sentence: minimum one year imprisonment, maximum three years imprisonment

Class 6 felony sentence: minimum one year imprisonment, maximum eighteen months imprisonment.
The prison sentences of HIV-positive persons convicted of sex offenses may be severely increased due to HIV status.

Individuals living with HIV in Colorado should be aware that they may receive prison sentences dramatically above those of HIV-negative persons if they are convicted of a sex offense, including rape and sexual assault, regardless of whether their alleged conduct exposed others to a significant risk of HIV transmission or if they had the intent to expose others to HIV. Specifically, if an HIV-positive person is convicted of a sexual offense involving penetration and aware that she/he is HIV-positive, a sentencing judge is required to impose a sentence of at least three times the upper limit of the normal sentencing range which could extend to the remainder of a person’s natural life. “Penetration” is defined as penile-vaginal sex, oral sex, oral stimulation of the anus, or anal sex. Even under the most lenient application of this statute, penalties for sexual assault would be elevated from six to eighteen years.

The use of protection during a sexual offense is not a defense, no ejaculation or emission of bodily fluid is required, and any degree of penetration, however slight, is sufficient to support the imposition of an increased sentence. The actual likelihood of HIV transmission during a sexual assault is not a consideration. Neither the intent to transmit HIV nor actual transmission is required.

HIV exposure cases have been prosecuted under general criminal laws in Colorado.

Incidents of HIV exposure in Colorado have been prosecuted under a variety of general criminal laws, including reckless endangerment statutes, regardless of the actual likelihood of transmission. In a 1999 case, an HIV-positive man was charged with attempted manslaughter when, knowing his HIV status, he did not use a condom during anal sex with a twelve-year old boy. The man was eventually convicted of two counts of sexual assault and reckless endangerment, an originally lesser included offense for an attempted murder charge, for failing to use a condom during the sexual encounter though he knew he was HIV positive. 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. Reckless endangerment statutes do not require proof of purpose or intent to transmit HIV, nor does it matter if HIV is actually transmitted as long as there was a “risk” of transmission.

Felony menacing charges may also apply if an HIV-positive person attempts to or succeeds in placing another in fear of “imminent serious bodily injury.” Menacing is defined as a person knowingly, by threat or physical action, placing another in fear of imminent serious bodily injury and

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54 COLO. REV. STAT. § 18-3-415.5 (2004).
55 § 18-3-401 (2004).
56 § 18-1.3-401(1)(V)(A) (2) (2004).
57 Id.
59 Dembry, 91 P.3d at 433.
60 COLO. REV. STAT. § 18-3-208 (2004).
61 § 18-3-206.
is a class 5 felony if it is committed by a deadly weapon or by representing that the person is armed with a deadly weapon.\textsuperscript{62} In \textit{People v. 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.\textsuperscript{63} In that case, 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 \textit{likely} to cause serious bodily injury, only \textit{capable} of doing so.\textsuperscript{64} 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.”\textsuperscript{65}

In \textit{People v. Perez}, an HIV-positive man in Colorado was convicted of attempted extreme indifference murder\textsuperscript{66} 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.\textsuperscript{67} On appeal, the defendant argued that he did not act with the “universal malice” necessary for the attempted murder conviction. The crime of extreme indifference murder (now known as murder in the first degree) requires that an attitude of universal malice manifesting in extreme indifference to the value of human life, the defendant knowingly engages in conduct which creates a great risk of death to another person, and thereby causes the death of another.\textsuperscript{68} “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.\textsuperscript{69} 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.

Other cases of HIV exposure being prosecuted under general criminal laws in Colorado include:

- In 2009, an HIV-positive man pleaded guilty to felony child abuse and was sentenced to fifteen years imprisonment after he failed to tell his pregnant fiancée that he was HIV-positive.\textsuperscript{70} His fiancée and son tested positive for HIV after

\textsuperscript{62} Id.
\textsuperscript{63} 107 P.3d 1033, 1036 (Colo. App. 2004).
\textsuperscript{64} Id. at 1036
\textsuperscript{65} Id. at 1037
\textsuperscript{66} The crime has since been renamed “murder in the first degree.” \textsc{Colo. Rev. Stat.} § 18-3-102 (2004).
\textsuperscript{67} 972 P.2d 1072, 1073 (Colo. App. 1998).
\textsuperscript{68} \textsc{Colo. Rev. Stat.} § 18-3-102(d) (2004).
\textsuperscript{69} \textit{Perez}, 107 P.3d at 1074, (citing \textit{Longinotti v. People}, 102 P. 165, 168 (Colo. 1909)).
doctors were puzzled why the four month old baby wasn’t gaining weight and had pneumonia.  

- In June 2010, an HIV-positive man was charged with assault with a “deadly weapon” after he allegedly spat on a technician while being fitted for an electronic monitoring bracelet. His charge was later reduced to misdemeanor harassment.

It is a felony to solicit prostitution while HIV-positive.

Individuals living with HIV/AIDS in Colorado will face felony charges for engaging in prostitution with knowledge of their HIV-positive status. It is a class 6 felony punishable by up to eighteen months in prison and/or a $1,000 fine to “patronize” a prostitute after testing positive for HIV. “Patronizing” a prostitute is defined as (1) engaging in sexual or “deviate sexual conduct” with a prostitute, or (2) entering or remaining in a “place of prostitution” with intent to engage in such acts.

Although the meaning of “deviate sexual conduct” is not defined, Colorado defines “sexual intercourse” for the purposes of prostitution as penile-vaginal sex, oral sex, masturbation, and anal sex in exchange money or things of value.

It is a felony to engage in prostitution while HIV positive.

It is a class 5 felony punishable by up to three years in prison and/or a $1,000 fine for a person who is aware of her/his HIV-positive status to perform, offer to perform, or agree to perform any act of penile-vaginal sex, oral sex, masturbation, or anal sex in exchange for money or any other thing of value.

In July 2007, an HIV-positive sex worker in Denver was arrested after a police officer saw him offering to perform sexual acts for money. The man was charged with engaging in prostitution with knowledge that he was HIV-positive and received an eighteen-month prison sentence after pleading guilty to attempted prostitution. Following another arrest in November 2009, he was once again charged for prostitution with knowledge of being positive for HIV.

The solicitation and prostitution statutes punish individuals for being HIV positive, regardless of whether or not they exposed another to a significant risk of HIV transmission. Because intent to engage in prostitution is punishable, an HIV-positive person may be imprisoned regardless of whether there was any sexual conduct that could have resulted in HIV transmission or if one's HIV

73 COLO. REV. STAT. § 18-7-205.7 (2004); § 18-1.3-401(v)(a).
74 § 18-7-201.
75 § 18-7-201.7.
76 Manny Gonzales, Hooker Tells Cop at Arrest He Has AIDS, DENVER POST, July 18, 2007, at B-05.
status would have been disclosed to the sexual partner. Neither the intent to transmit HIV or actual HIV transmission are required and using condoms or other protection is not a defense.

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Connecticut Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statutes regarding HIV exposure

There are no statutes explicitly criminalizing HIV transmission or exposure in Connecticut. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault.

At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person’s HIV status in Connecticut.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.
Delaware Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

There is no explicit statute criminalizing HIV exposure except for donations

There are no statutes explicitly criminalizing HIV transmission or exposure in Delaware other than in the context of organ, tissue, or semen donations. Under Delaware public health laws, it is a felony to fail to test for HIV or to knowingly, recklessly, or intentionally use the semen, corneas, bones, organs, or other human tissue donations of a person who has tested positive for HIV. \(^{78}\) Violation of this statute is punishable by up to five years in prison. Sperm and tissue banks must follow state regulations for the testing and disposal of tissue donations found to be positive for HIV. \(^{79}\)

Though Delaware does not have other HIV criminal exposure statutes, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault in other states. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of a person’s HIV status in Delaware.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

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\(^{79}\) See generally id. 16, § 2801.
District of Columbia Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statutes criminalizing HIV exposure

There are no statutes explicitly criminalizing HIV transmission or exposure in the District of Columbia, and as of the date of publication the authors are not aware of any cases of prosecutions or sentence enhancements of individuals in the District of Columbia based on the HIV status of a defendant.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should
Florida Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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)**

*Prostitution 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**

*Criminal “transmission” of HIV (repeated sex offenses)*

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.
HIV-positive persons may face felony charges for failing to disclose their status to sexual partners.

In Florida, one may be prosecuted for failing to disclose HIV status to sexual partners. It is a third-degree felony, punishable by up to five years in prison and/or a $5,000 fine, if an HIV-positive person (1) knows that she/he is HIV positive, (2) has been informed that HIV may be transmitted during sexual intercourse, and (3) has sexual intercourse with any other person without disclosing her/his HIV status. It is a first-degree felony punishable by up to thirty years imprisonment if there is a failure to disclose one’s HIV status on multiple occasions.

Florida’s statute penalizes conduct where HIV-positive persons know their status and engage in sexual conduct, including penile-vaginal sex and anal sex, which may expose others to HIV. It is an affirmative defense if a sexual partner knows of her/his sexual partner’s HIV status and consents to engage in sexual conduct with that knowledge. It is not a defense to prosecution if protection, such as a condom, was used during sex. Neither the intent to transmit HIV nor HIV transmission is required for prosecution.

The following cases illustrate prosecutions under this statute:

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81 “Sexual intercourse” is defined as the “penetration of the female sex organ by the male sex organ, however slight, emission of semen is not required. § 826.04 (statute on Incest). However, Florida’s HIV exposure statute has also been applied to sexual intercourse between two men, therefore, the definition of sexual intercourse as per Fla. Stat. Ann. § 384.24(2) is not limited to only male-female sexual intercourse. There is no statutory indication whether oral sex is considered “sexual intercourse.”
82 § 384.24(2).
83 § 384.34(5) (“any person who commits multiple violations of s. 384.23(2) commits a felony of the first degree”); See also §§ 775.082-775.083.
84 Id.
In February 2010, a 45-year-old HIV-positive man was charged with a first-degree felony of unlawful acts related to HIV exposure after allegedly failing to tell his sexual partner that he was HIV-positive during their long-term romantic, sexual relationship.\textsuperscript{85}

In August 2009, a 39-year-old HIV-positive woman was arrested after she allegedly had unprotected sex with a man and lied about her HIV status.\textsuperscript{86}

In July 2010, a 39-year old, HIV-positive man was arrested after he allegedly had unprotected sex with a woman, also without disclosing his HIV status.\textsuperscript{87} The man’s partner tested positive for HIV.

Donation of blood, organs, or other human tissues to others is a third degree felony.

HIV-positive persons in Florida should be aware that they may receive up to five years in prison and/or a $5,000 fine\textsuperscript{88} if they know their HIV positive status and donate their blood, plasma, organs, skin, or human tissues.\textsuperscript{89} It is a defense if the HIV-positive person has not been informed that HIV can be transmitted through human blood, plasma, organ, and tissue donations. Neither the intent to transmit HIV nor actual transmission of the virus is required.

Engaging in prostitution with knowledge of one's HIV-positive status is a felony.

Up to five years imprisonment and/or a $5,000 dollar fine\textsuperscript{90} can be imposed upon conviction if an individual (1) has tested positive for HIV, (2) been informed that HIV can be transmitted through sexual activity, and (3) commits prostitution, offers to commit prostitution, or procures another for prostitution by engaging in sexual activity in a manner likely to transmit HIV.\textsuperscript{91}

Neither the intent to transmit HIV, actual transmission, or engaging in activities known to transmit HIV are required for prosecution.

Florida defines “prostitution” as the “giving or receiving of the body for sexual activity for hire.” Much of what Florida defines as “sexual activity” does not transmit HIV, including: anal or vaginal penetration of another by any other object and the handling or fondling of another for the purpose of masturbation. In these instances, sex workers can face penalties for conduct that has absolutely no risk of exposing another to HIV.

\textsuperscript{85} Katie Thomas, \textit{Equestrian Charged with HIV-Related Offenses}, N.Y TIMES, Apr. 12, 2010, at A12.
\textsuperscript{88} FLA. STAT. ANN §§ 775.082-775.083.
\textsuperscript{89} § 381.0041(11)(a).
\textsuperscript{90} §§ 775.082-775.083.
\textsuperscript{91} § 796.08(5).
\textsuperscript{92} § 796.07.
In HIV exposure cases involving prostitution, disclosure of HIV status is not a defense, whether condoms or other protection was used is not a consideration, and ejaculation or the exchange of bodily fluids known to transmit HIV is not required for prosecution.

Though there is a HIV-specific statute for sex workers, many of the reported cases of prosecutions of HIV-positive sex workers have fallen under the criminal "transmission" of HIV statute (see section below on page 32). The only prosecutions of sex workers on record that have not fallen under the criminal “transmission” statute occurred prior to many of Florida’s HIV-specific laws being enacted:

- In the first HIV-based prosecution of a sex worker, prior to the HIV criminalization law, a woman was charged with two counts of attempted manslaughter for agreeing to have sex with two men for money. Confirming the lower court’s holding, the district court dismissed the case because there was not enough evidence to prove that the woman intended to kill the men.

- In 1988, an HIV-positive male sex worker was sentenced to five years imprisonment based on his HIV status.

Prosecution under this statute is also possible if an HIV-positive individual “procurers” another for prostitution by engaging in sexual activity in a “manner likely to transmit” HIV. At least one case in Florida suggests that “procurement” goes beyond mere solicitation and finds that it requires the inducement of another to provide sexual services to a third party (i.e.: a pimp). The meaning of “likely to transmit HIV” is not defined. If “likely” is construed to mean more probable than not, few if any sexual activities would be likely to transmit HIV.

### Prosecution for HIV exposure in Florida has occurred under general criminal laws.

At least one case has found that HIV can be considered a deadly weapon for prosecution under general criminal law. In August 2009, a 35-year-old, HIV-positive man in Florida was charged with attempted murder when he allegedly yelled that he had HIV and threatened to kill a police officer with HIV before biting him in the shin and leaving a permanent bruise. He was later convicted of aggravated battery on a law enforcement officer and sentenced to fifteen years in prison. The crime of aggravated battery requires that a person intentionally and knowingly causes great bodily harm or uses a deadly weapon. Many HIV positive persons convicted of aggravated assault or aggravated battery have been convicted based on their HIV status, with courts finding that the defendant’s

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93 Though the title of FLA. ANN. STAT. § 775.0877 is “criminal transmission of HIV”, the actual transmission of HIV is not required as an element for prosecution.
95 Mark Journey, AIDS Carrier in Jail for Soliciting, ST. PETERSBURG TIMES, Aug. 15, 1990, at 1B.
96 FLA. STAT. ANN. § 796.08(5)(West 2010).
100 FLA. STAT. ANN. § 784.045(West 2010).
teeth or bodily fluids (including saliva) used in the assault are “deadly weapons.” The officer did not test positive for HIV.

During the trial, the Florida prosecutor told the jury that the police officer had to avoid intimate “contact with his wife or children for fear he could severely affect them” because he was bitten by an HIV positive person. This statement ignores the fact that the CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.” The scientific and factual misrepresentations created by criminal HIV exposure laws and the prosecutions of HIV positive persons only increase the risk that HIV positive individuals may be prosecuted for conduct that cannot transmit HIV.

**HIV positive persons may face additional felony penalties for committing or attempting to commit identified sex crime(s) after a previous conviction for a similar offense.**

Florida has a felony statute where an HIV-positive person who commits a sex offense after a previous sex offense conviction can face additional felony charges. Under Florida law, an individual must be tested for HIV if she/he is convicted of, pleads guilty to, or pleads no contest to an offense or attempted offense involving the transmission of bodily fluids (i.e.: sex-based offenses). If an individual tests positive for HIV, knows of her/his HIV status, and commits another sex offense involving the transmission of bodily fluids she/he is guilty of an additional felony, punishable by up to five years in prison and/or a $5,000 fine. Although this statute is labeled a “criminal transmission” law, transmission of HIV is not required.

Felonies that may trigger additional penalties under this statute include:

- Sexual battery
- Incest
- Lewd, lascivious, or indecent assault upon any person less than 16 years of age
- Assault or aggravated assault
- Child abuse or aggravated child abuse
- Abuse or aggravated abuse of any elderly person or disabled adult
- Sexual performance by a person less than 18 years of age
- Prostitution
- Donation of blood, plasma, organs, skin, or other human tissue

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102 [FLA. STAT. ANN. § 775.0877 (West 2010).](http://www.cdc.gov/hiv/resources/qa/transmission.htm)
103 § 775.0877 (4); §§ 775.082-775.083.
104 § 775.0877(5).
105 §§ 775.0877(1)(a)-(n).
It is an affirmative defense to prosecution under this statute if the person exposed knew that the offender was infected with HIV, knew that the action being taken could result in transmission of the HIV infection, and consented to the action voluntarily.\(^\text{106}\)

There have been prosecutions of sex workers under this statute despite the fact that there is a separate HIV-specific prostitution statute. Such prosecutions include:

- In 2007, a female sex worker was charged with criminal “transmission” of HIV for offering an undercover officer oral sex.\(^\text{107}\)
- In 2002, a sex worker was charged with criminal “transmission” of HIV and was sentenced to three years of probation.\(^\text{108}\)
- In August 2009, a 32-year old, HIV-positive sex worker was arrested under Florida’s criminal exposure prostitution statute after she offered to perform a sexual act on an undercover officer for $20 dollars.\(^\text{109}\)
- A woman was charged with prostitution, resisting arrest, and criminal “transmission” of HIV after negotiating the price of a sex act with an undercover officer.\(^\text{110}\) Prosecutors had also considered charging her was attempted murder even though she told the officer after her arrest that she had HIV and had condoms in her purse.

Florida courts have also imposed sentencing enhancements based on HIV status.

Early in the epidemic Florida courts imposed sentence enhancements based on a person’s HIV-positive status. The cases noted here are from the late 1980s and mid 1990s and there are no recent cases, to the authors’ knowledge, demonstrating that Florida courts continue to apply sentence enhancements based on HIV status. The following cases are included as a comprehensive review of Florida’s approach to HIV criminalization but are not necessarily reflective of current trends in criminal sentencing in Florida.

In *Morrison v. State*, the HIV-positive defendant was convicted of aggravated battery and was sentenced to ten years imprisonment and ten years of parole.\(^\text{111}\) 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.

One Florida case has even held that an HIV-positive defendant’s status could be enhanced even if there was no proof that the defendant knew he was HIV-positive at the time of the crime. In *Cooper v. State*\(^\text{112}\), the defendant was convicted of aggravated battery, solicitation, and sexual battery and

\(^{\text{106}}\) §775.087(6)
\(^{\text{108}}\) Id.
\(^{\text{110}}\) Sue Carlton, *HIV-Positive Woman Free of Attempted murder charge*, ST. PETERSBURG TIMES, June 18, 1996, at 4B.
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 the 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.

In *Brooks v. State*[^4] 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.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.


[^13]: *Id.* at 511.

[^14]: *Id.* at 512.
Georgia Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**GA. CODE ANN. § 16-5-60(C)**

*Reckless conduct; HIV infected persons*

*Felony (punishable by imprisonment for not more than ten years)*

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.

**GA. CODE ANN. § 16-5-60(D)**

*Reckless conduct; HIV infected persons*

*Felony (punishable by imprisonment for between five & twenty years)*

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.

HIV-positive status must be disclosed to sexual partners to avoid criminal penalties.

Georgia’s HIV exposure statute targets HIV-positive persons who fail to disclose their HIV status prior to engaging in anal, oral, and penile-vaginal sex with another person. A violation of the statute results in felony penalties of up to ten years imprisonment. Neither the intent to transmit HIV nor the actual transmission of HIV is necessary for prosecution.

Disclosure of one’s HIV status is the only affirmative defense to prosecution. A defendant’s viral load is not a consideration and it is no defense if protection, such as a condom, was used during sexual activities. It is a violation of the statute even if an HIV-positive person fails to disclose her/his status and performs oral sex on an HIV-negative person despite the fact that there is at best a remote risk of HIV exposure from such activity.

Though disclosure is a defense to prosecution there are difficulties in proving whether or not
disclosure actually occurred in these situations and such evidence normally depends on the words of one person against another. In a 2008 case, an HIV-positive woman 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.\(^\text{116}\) 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.

In a January 2009 case, a 38-year-old man from Georgia was sentenced to two years in jail and eight years probation after pleading guilty to reckless conduct for having sex with a woman without telling her he was HIV-positive.\(^\text{117}\) The HIV-positive man and his partner, who tested negative for HIV, met at a housing center for people living with HIV. The fact that he was living at a home solely for people living with HIV was not enough to be considered disclosure for the purposes of the reckless conduct statute.

In November 2010, an HIV positive man was charged with rape and reckless conduct for allegedly sexually assaulting a woman.\(^\text{118}\)

**Engaging in prostitution without disclosing HIV status is a felony.**

Georgia’s reckless conduct law imposes criminal penalties for HIV-positive persons who do not disclose their status before engaging in solicitation or acts of prostitution. A maximum sentence of ten years imprisonment can be imposed if an HIV-positive person is aware of her/his HIV status and fails to disclose it before (1) offering or consenting to engage in sexual intercourse for money, or (2) soliciting another to submit to or perform oral or anal sex for money.\(^\text{119}\) Neither the intent to transmit HIV nor actual transmission is required. A conviction for prostitution is normally a misdemeanor\(^\text{120}\) but is prosecuted as a felony based on one’s HIV positive status.

This statute penalizes an individual for being HIV-positive, regardless of whether she/he exposed another to a significant risk of HIV transmission. It is not a defense if protection was used during alleged acts of prostitution and because offering or soliciting to engage in sexual intercourse actual sexual conduct is not required.

**HIV-positive status must be disclosed before sharing needles.**

Georgia imposes criminal penalties for HIV positive persons sharing needles or syringes. Up to ten years imprisonment may follow if an HIV-positive individual is (1) aware of her/his HIV status, (2) uses a needle or syringe for the injection of drugs or withdrawal of bodily fluids, and (3) shares that needle with another without disclosing her/his HIV status.\(^\text{121}\) It is a complete defense if HIV status


\(^{119}\) GA. CODE ANN. §§ 16-5-60(c)(3)-(4)(West 2010).

\(^{120}\) § 16-6-9.

\(^{121}\) § 16-5-60(c)(2).
is disclosed before needle-sharing. Neither the intent to transmit HIV nor actual transmission are required.

**HIV-positive status must be disclosed before donating blood or body tissues.**

It a felony punishable by up to ten years imprisonment if an HIV-positive individual is aware of her/his HIV status and fails to disclose her/his status before donating blood, blood products (i.e., plasma, platelets), other bodily fluids, or any other body organ or body part. Neither the intent to transmit HIV nor actual transmission are required.

**Assaulting a peace or correctional officer using bodily fluids with intent to transmit HIV is a felony.**

Georgia’s reckless conduct/endangerment statute includes a prevision that is tailored to cases involving peace officers and correctional officers. It is a felony, punishable by five to twenty years in prison, for individuals who are aware that they are HIV-positive to commit an assault against a peace or correctional officer engaged in her/his duties with the intent to transmit HIV using her/his blood, semen, vaginal secretions, saliva, urine, or feces. This statute punishes conduct that poses only remote possibilities of HIV exposure and though intent is considered an element of the prosecution many of the bodily fluids listed cannot transmit HIV.

In *Burk v. State*, 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. Despite the fact that the CDC has long maintained that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood,” the Georgia Court of Appeals found the Burk’s alleged attempt to bite the officer sufficient to uphold his conviction for reckless conduct. Contrary to the CDC’s position, 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 Georgia Code § 16-5-60.

The conviction in Burke reflects the issues associated with “expert” testimony on HIV transmission and exposure. HIV positive persons can be convicted for conduct that presents at best a remote

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122 § 16-5-60(c)(5).
123 § 16-5-60(d)
125 Burk, 478 S.E.2d at 417.
127 Burk, 478 S.E.2d at 417.
possibility of HIV exposure or transmission if the expert testimony fails to provide scientifically supported facts on HIV.

**HIV positive persons have also been prosecuted under aggravated assault charges.**

In *Scroggins v. State*, the defendant, while struggling with a police officer sucked extra saliva into his mouth and then bit the officer.\(^{128}\) When the defendant was treated at the hospital he told a nurse he was HIV positive and laughed when the officer who was bit asked the defendant about his status. He was convicted of aggravated assault with intent to murder. On appeal, the Georgia Court of Appeals found that the impossibility of transmitting HIV via a bite and/or saliva was not a defense as long as Scroggins believed HIV could be transmitted in such a manner. The court ruled that a wanton and reckless state of mind could be the equivalent of a specific intent to kill for the purposes of the charges, and that Scroggins biting the officer while knowing that he was HIV positive was sufficient evidence to establish a wanton and reckless disregard for whether HIV was transmitted.

A person commits aggravated assault when there is an intent to murder, rape, or rob someone using a deadly weapon that does or is likely to result in serious bodily injury.\(^{129}\) Despite the fact that the CDC has long maintained that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood” Georgia’s application of its aggravated assault statute ignores these facts and continues to prosecute HIV positive persons for acts that at best have a remote possibility of transmitting HIV.\(^{130}\) The CDC has also concluded that spitting alone has never been shown to transmit HIV.\(^{131}\)

Other prosecutions under the aggravated assault statute include:

- In August 2009, a 42-year-old, HIV-positive man was charged with aggravated assault after he bit an Atlanta police officer, allegedly shouting “I have full-blown AIDS” and stating that his bite would infect the officer with HIV.\(^{132}\) He later received eighteen months for aggravated assault.\(^{133}\)
- In a July 2008 case, a 43-year-old HIV-positive woman was charged with aggravated assault when she spat in the face of another person. The woman pleaded guilty and was sentenced to three years in jail.\(^{134}\)

**Important note:** While we have made an effort to ensure that this information is current, the law is

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\(^{129}\) GA. CODE. ANN. § 16-5-21 (West 2010).


\(^{133}\) *Id.*

always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.
Hawaii Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute

There are no statutes explicitly criminalizing HIV exposure or transmission in Hawaii. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person’s HIV status in Hawaii.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.
Idaho Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**IDAHO CODE ANN. § 39-608**

**Felony: 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 if:

1. The sexual activity took place between consenting adults after full disclosure by the accused of the risk of HIV transmission.
2. The transfer of body fluid, tissue or organs occurred after advice from a licensed physician that the accused was noninfectious.

“Body fluid” means semen (with or without sperm), blood, saliva, vaginal secretion, breast milk, and urine.

“Transfer” means:

- Engaging in sexual activity by:
  - Genital-genital contact; or
  - Oral-genital contact; or
  - Anal-genital contact;
- Permitting the use of an unsterilized hypodermic syringe, needle, or similar device; or
- Giving blood, semen, body tissue, or organs for transfer to another person.

**Sentences and Fines:** Up to 15 years in prison and/or up to a $5,000 fine

**IDAHO CODE ANN. § 39-601**

**Misdemeanor: knowingly exposing another to a venereal disease**

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

To avoid the risk of prosecution, HIV status must be disclosed to sexual partners.

Individuals living with HIV in Idaho should be aware that it is against the law to engage in sexual intercourse without disclosing one’s HIV status. It is a felony, punishable by up to fifteen years in
prison and/or a $5,000 fine, for an HIV-positive person to act with intent, or knowing one’s HIV status, to transfer or attempt to transfer bodily fluids through any genital-to-genital, mouth-to-genital, or genital-anal contact.\textsuperscript{135} Though intent to transfer HIV is an element of the crime, simply knowing one’s HIV status and failing to disclose that status is enough for prosecution. Actual transmission is not required.

An HIV-positive person engaging or attempting to engage in anal, oral, or vaginal sex has a defense under this statute if she/he can prove that (1) the sex was consensual and (2) that her/his partner was informed “of the risk of such activity.”\textsuperscript{136} Informing a partner only of one’s HIV-positive status, without disclosing the risk of transmission, is not a sufficient defense on the face of this statute. It is not a defense of condoms, or other protection, was used.

But whether or not disclosure actually occurred is often open to interpretation and always depends on the words of one person against another. In \textit{State v. Thomas}, an HIV-positive man was convicted under Idaho’s statute and sentenced to fifteen years in prison for engaging in anal and oral sex, without ejaculating, with a transsexual woman without disclosing his HIV status.\textsuperscript{137} At trial, the defendant questioned his accuser’s credibility regarding her denial that he had disclosed his HIV-positive status, suggesting that he had a history of drug use, psychological problems, a reputation “untruthful and dramatic” behavior, and that she had several drinks before having sex with him that would have affected her memory of the evening’s events. Friends of the complainant, however, testified that they were in her apartment, could hear her sexual encounter, and when they, knowing of the defendant’s status, told her he was HIV positive, she was very upset and alluded to the fact that she had no knowledge of his HIV status. The Idaho Court of Appeals saw this testimony as sufficient to sustain the jury’s guilty verdict despite the contradictions in testimonies.

In 2009, after serving fifteen years in prison, the defendant in \textit{State v. Thomas} pleaded guilty to two more charges of exposing women to HIV. A judge chastised the defendant for giving his sexual partners “a potential death sentence,” and sentenced him to thirty years in prison with the possibility of parole after twenty years.\textsuperscript{138} The woman in this case did not test positive for HIV but transmission of HIV is not an element of the crime and as such would not have been a consideration to the conviction. The same defendant was also charged under Idaho’s exposure law during a 1990 statutory rape case.\textsuperscript{139}

HIV-positive persons prosecuted under Idaho’s felony HIV exposure law may have a defense if they can prove that a licensed physician informed them that they were “noninfectious” (could not transmit HIV to others).\textsuperscript{140} This could occur if a person’s viral load was undetectable.

In 2010, a man was charged with knowingly transferring bodily fluids with HIV for failing to disclose his status to sexual partners he had met on the internet.\textsuperscript{141} The man told detectives that he

\textsuperscript{135} IDAHO CODE ANN. § 39-608 (2010).
\textsuperscript{136} § 39-608(3)(a).
\textsuperscript{139} Id.
\textsuperscript{140} IDAHO CODE ANN. § 39-608(3)(b)(2010).
failed to tell his sexual partners, with whom he had had unprotected sex, that he was HIV positive after he had been booked on an unrelated DUI conviction.

HIV-positive persons have also been prosecuted under Idaho’s statute for engaging in acts that are not known to transmit HIV. In *State v. Mubita*, an HIV-positive man was sentenced to forty-four years in prison (eleven counts of transferring bodily fluids) with a possibility of parole after four years for performing oral sex on his female partner and ejaculating on her thigh. On appeal, defense counsel argued that it was factually impossible to violate Idaho’s felony exposure law, intended to criminalize “knowingly expos[ing] another person to AIDS,” because oral sex, when being performed by an HIV-positive party, and ejaculating on intact skin, has no, or only a remote, possibility of transmitting HIV. The Idaho Court of Appeals did not go beyond the plain language of Idaho’s felony exposure law and found that because the man engaged in oral sex, which is a prohibited act without disclosure, and the law specifically included saliva in its list of “bodily fluids” capable of transmitting HIV, the man violated Idaho Code Ann. §39-608. “Bodily fluids” that can be transferred under Idaho law include saliva and urine in addition to blood, semen, vaginal secretions, and breast milk despite scientific evidence that HIV is not transmitted through saliva or urine.

Idaho’s definition of bodily fluids disregards scientific facts surrounding the risks of HIV transmission, only adding to public confusion concerning how the disease is transmitted and worsening the stigma faced by HIV-positive persons. It ignores the fact that the CDC has long maintained that saliva and urine have not been found to transmit HIV. Breast milk is included in this statute’s list of “bodily fluids,” but breastfeeding is not included in a list of activities that “transfer” bodily fluids.

**Sharing needles/syringes is a felony.**

Idaho’s HIV statute specifically targets intravenous drug users and others who share their needles and syringes. To avoid prosecution, HIV-positive individuals should not share needles, syringes, and similar drug paraphernalia capable of transferring fluids through the skin. It is a felony, punishable by up to fifteen years in prison and/or a $5,000 fine, for an individual who is aware that she/he is HIV positive to “transfer” bodily fluids by allowing others to use their hypodermic syringes, needles, or similar devices without sterilization.

Neither the intent to transmit HIV nor actual transmission is required for conviction. Disclosure of HIV status is not a defense to a syringe-sharing charge, it is only a defense for sexual activity. An HIV-positive person sharing needles or syringes only has a defense to prosecution if she/he can...
prove that a licensed physician advised them that they were “noninfectious” (not capable of infecting others with HIV).  

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

It is a felony, punishable by up to fifteen years in prison and/or a $5,000 fine, for an individual who is aware that she/he is HIV positive to “transfer” bodily fluids to another by giving blood, semen, organs, or body tissues to any person, blood bank, hospital, or medical facility for the purposes of transfer to another person. Neither the intent to transmit HIV nor actual transmission is required. However, an HIV-positive person donating blood, semen, organs, or body tissues does have a defense if she/he can prove that the donation(s) occurred after a licensed physician advised that she/he was “noninfectious” (not capable of infecting others with HIV).  

**Prosecution may result from exposing another to HIV, but the meaning of “exposing” is not defined.**

Idaho has a generalized, catch-all HIV exposure statute, Idaho Code Ann. § 39–601, in addition to the felony statute criminalizing such activities as needle-sharing and unprotected sexual intercourse (as discussed above). This is a communicable disease control statute and such statutes are rarely used in prosecutions.  

In Idaho it is a misdemeanor for an HIV-positive person to knowingly expose another to HIV infection. The penalties for violating this law are not specified, although penalties for exposing others to syphilis, gonorrhea, or chancroid may include up to six months in prison and/or up to a $300 fine. Unlike Idaho’s felony exposure statute, discussed above, disclosure is not a defense. Neither the intent to transmit HIV or actual transmission is required.

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147 § 39-608(3)(b).
148 § 39-608(2)(b).
149 § 39-608(3)(b).
150 § 39-601.
151 § 39-607.
Illinois Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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 (“intimate contact”);

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 non-sterile 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 HIV-positive, knew the action could result in infection, and consented with that knowledge.

Violation of this statute is a class 2 felony.

**720 ILL. COMP. STAT. § 5/8-4(c)(4)**

*Penalties for attempt*

The sentence for attempt to commit a class 2 felony is the sentence for a class 3 felony.

**730 ILL. COMP. STAT. § 5/5-4.5-35 - 40**

*Penalties*

For a class 2 felony, not less than 3 years in prison and not more than 7 years.

For a class 3 felony, not less than 2 years in prison and not more than 5 years.

**730 ILL. COMP. STAT. § 5/5-4.5-50**

*Fines*

A felony offender may be sentenced to pay a fine not to exceed, for each offense, $25,000 or the amount specified in the offense, whichever is greater.
HIV-positive persons may be imprisoned for exposing others to their “bodily fluids.”

HIV-positive persons may face prosecution for engaging in a broad range of contact. There have been numerous prosecutions in Illinois for HIV exposure under the state’s HIV-specific “criminal transmission” law. Though the law is entitled “criminal transmission” neither the intent nor the transmission of HIV is required for prosecution.

It is a class 2 felony punishable by three to seven years in prison and a $25,000 fine, for a person who is aware that she/he is HIV-positive to engage in “intimate contact” with another. “Intimate contact with another” is defined as the exposure of the body of one person to the bodily fluid of another person in a manner that could result in the transmission of HIV. Prosecutions under the statute have included the following cases:

- In February 1993, a 37-year old, HIV-positive man was charged with “criminal transmission” of HIV and attempted murder when he allegedly attacked a nurse and stuck her with a needle filled with his blood. The man died before trial. (Christian Hawes, Man with AIDS Held in Attack, Chi. Trib., Feb. 28, 1993, at 3-L; Teresa Jimenez, HIV Transmission Law Faces a Test, Chi. Trib., Feb. 13, 1996, at 1-L.)
- A 30-year old, HIV-positive sex worker was charged with “criminal transmission” of HIV in May 1999 after she was discovered having sex with a man in exchange for money. A condom wrapper was found at the scene of the woman’s arrest. It is not known whether the man later tested positive for HIV but that would not be relevant to prosecution, nor is it relevant that a condom may have been used during sex. (Mark Shuman, Prostitution Suspect faces HIV Charge, Chi. Trib., May 6, 1999, at 2-NW.)
- In October 1999, a 36-year old, HIV-positive man pleaded guilty to “criminal transmission” of HIV after he allegedly threatened police officers with HIV infection and attempted to splatter them with his blood during an interrupted suicide attempt. The man’s wrists were already cut and bleeding before the officers arrived. (Art Barnum, Man Pleads Guilty to Trying to Pass HIV, Chi. Trib., Oct. 21, 1999, at 1-D.)
- An HIV-positive man was charged with “criminal transmission” of HIV in August 2004 after he sexually assaulted a 17-year old girl. It is not known whether the girl tested positive for HIV but transmission is irrelevant to prosecution. (Patrick Rucker, HIV-positive Suspect Charged in Rape of Teen, Chi. Trib., Aug. 18, 2004, at 3-SSW.)

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153 5/5-4.5-50(b).
154 5/12-16.2.
155 5/12-16.2(b).
156 Man Pleads Guilty to HIV Transmission, Chi. Trib, Feb. 25, 1992, at 3-D.
158 Mark Shuman, Prostitution Suspect faces HIV Charge, Chi. Trib., May 6, 1999, at 2-NW.
159 Art Barnum, Man Pleads Guilty to Trying to Pass HIV, Chi. Trib., Oct. 21, 1999, at 1-D.
160 Patrick Rucker, HIV-positive Suspect Charged in Rape of Teen, Chi. Trib., Aug. 18, 2004, at 3-SSW.
In 1993, an HIV-positive man stuck a syringe with his blood into a nurse and was originally charged with criminal transmission of HIV.\textsuperscript{161} The charges were later changed to attempted murder but the man died before trial. The nurse did not test positive for HIV.

An individual prosecuted under Illinois’ criminal transmission law has an affirmative defense if she/he can prove that the individual exposed to HIV was (1) aware that she/he was HIV positive, (2) knew that the alleged “intimate contact” could result in HIV infection, and (3) consented to HIV exposure with knowledge of these risks.\textsuperscript{162} It is not a defense if condoms or other protection was used during sexual relations though such use has been demonstrated to be highly effective in preventing HIV transmission.\textsuperscript{163}

Several individuals in Illinois have been prosecuted for allegedly failing to disclose their HIV to sexual partners. The following cases serve as examples:

- A 39-year old sex worker was charged with “criminal transmission of HIV” in December 1996, when she allegedly failed to disclose to a man that she had AIDS before having sex with him for money.\textsuperscript{164}

- In December 2004, a 33-year old, HIV-positive man was charged with criminal transmission of HIV for having sex with his girlfriend without disclosing his HIV status. The man’s HIV status was discovered in a letter from hospital officials during a police search related to another investigation. It is not known whether the woman tested positive HIV or whether protection was used during sexual intercourse but these facts would be irrelevant to prosecution.\textsuperscript{165}

- A 42-year-old man pleaded guilty to criminal transmission of HIV in 2006 after he failed disclose his HIV status before engaging in unprotected sex with a 19-year old woman. The man was sentenced to six years in prison.\textsuperscript{166}

Illinois’ definition of “bodily fluids” for the purpose of its HIV exposure law does not limit its definition only to fluids known to transmit HIV. Even though the CDC has long maintained that saliva, tears, and sweat do not expose others to a risk of HIV transmission, these bodily fluids are not excluded from consideration under Illinois’ criminal transmission law.\textsuperscript{167} This means that spitting, biting, scratching, and other activities posing, at best, only theoretical risks of HIV transmission may be subject to prosecution. There have been numerous prosecutions in Illinois for

\textsuperscript{162} 720 ILL. COMP. STAT. ANN. 5/12-6.2(5)(d) (West 2010).
\textsuperscript{163} CTR. FOR DISEASE CONTROL \& PREVENTION, Condoms and STDs, http://www.cdc.gov/condomeffectiveness/latex.htm (last visited Oct 19, 2010).
\textsuperscript{164} Mark Shuman, \textit{Woman Accused of HIV Crime}, CHI. TRIB., Dec. 10, 1996, at 3-NW.
\textsuperscript{165} Krystyna Slivinski, \textit{Elgin Man Charged with HIV Exposure}, CHI. TRIB., Dec. 16, 2004, at 2-NW.
criminal transmission of HIV stemming from an HIV-positive person biting someone, despite the fact that the CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”

The following case studies illustrate how activities posing only theoretical risks of HIV transmission have been prosecuted in Illinois:

- In March 1993, a 35-year old, HIV-positive woman was charged with criminal transmission of HIV when she allegedly refused to leave a hospital after treatment, biting a security guard and spitting at others in the process. Her bite did not break the guard’s skin.

- In April 1996, a 45-year old, HIV-positive man received a ten-year prison sentence after he allegedly forged a check at a Sam’s Club, fled the store when employees became suspicious, and bit a man attempting to stop him. In addition to fraud and forgery charges, the man was charged with criminal transmission of HIV. The HIV charge was dropped in exchange for a guilty plea on his other charges and a lesser charge of aggravated battery. Despite the fact that biting has been shown to present only a remote risk of transmitting HIV, a state attorney suggested that HIV infection would be a “concern that is going to follow this victim the rest of his life.”

- In January 2006, an HIV-positive man was charged with aggravated battery and criminal transmission of HIV when he allegedly bit a sheriff’s deputy. The man died in a car crash shortly before his initial court hearing.

HIV-positive persons have also been imprisoned for attempting to transmit HIV, regardless of whether any exposure would have been possible if the task had been completed. In Illinois, it is a Class 3 felony, punishable by two to five years in prison and a $25,000 fine, to attempt to criminally transmit HIV. In a February 2003 case concerning attempt, a 47-year old, HIV-positive woman pleaded guilty to attempted criminal transmission of HIV after leaving a bar with a man to go to his home to engage in intimate contact. She was sentenced to the six months in county jail for time she had already served since her arrest the previous September, plus two years probation.

In Illinois, as in many states, it is not a defense if HIV transmission was impossible under the

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169 Jerry Crimmins, Police: Woman with HIV Bit Security Guard, CHI. TRIB., Mar. 30, 1993, at 2-D.
170 Teresa Jimenez, Biter is Given a 10-year sentence, CHI. TRIB., Apr. 19, 1996, at 7-N.
172 730 ILL. COMP. STAT. ANN. 5/5-4.5-40(a) (West 2010).
173 5/5-4.5-50.
174 5/8-4(c)(4).
175 Art Barnum, Woman Pleads Guilty in HIV Case, CHI. TRIB., Feb. 4, 2003, at 3-D.
circumstances.176 Even a verbal offer to engage in “intimate contact” may result in prosecution despite the fact that the completed act would not have had any risk of HIV exposure (i.e.: a hand job, fingering, or performing oral sex). In 1991, a 34-year old, HIV-positive sex worker was sentenced to three years in prison after she agreed to have sex with an undercover police officer.177 She was released from prison by the Governor of Illinois shortly before her death.178

In another case, a 26-year old, allegedly HIV-positive sex worker was arrested and charged with attempted criminal transmission of HIV when she walked up to a police officer and offered to have sex with him for money.179 In each of these cases it did not matter that there was no evidence to show that even if the proposed act had been completed there would have been a risk of HIV transmission, if disclosure would have occurred, or condoms or other protection would have been used.

There have been repeated unsuccessful legal challenges to the constitutionality of Illinois’ criminal HIV transmission law.

Despite its flawed language and broad scope, the Illinois HIV criminal transmission law has survived multiple legal challenges arguing that its language is unconstitutionally vague. In People v. Dempsey,180 a 34-year old, HIV-positive man was convicted of aggravated criminal sexual assault and criminal transmission of HIV when he allegedly ejaculated in the mouth of his 9-year old brother.181 On appeal, the defendant argued that Illinois’ criminal transmission law was unconstitutionally vague, as the phrase “could result in the transmission of HIV” is overbroad and fails to define precisely what conduct is prohibited.182 He also contended that the Illinois legislature’s failure to define “bodily fluid” meant that exposure to saliva and tears could conceivably be criminalized, and an individual interpreting the law would be left to speculate about the legality of activities that pose no risk of transmitting HIV, such as spitting.

The Illinois Appellate Court rejected this challenge, finding that the defendant’s conduct fell squarely within the language of Illinois’ criminal transmission statute, and that the law was not unconstitutionally vague as applied to him. The court reasoned that the defendant clearly exposed his brother to HIV because semen was well known as a “transmitter of HIV” and oral sex was a recognized route of HIV transmission. Given that the defendant’s conduct was clearly targeted under Illinois’ HIV transmission statute, the court found that he was given fair notice that his conduct would be considered criminal. The defendant did not have standing to challenge the statute on hypothetical scenarios that were not reflective of his conduct.

In 1994, the Illinois Supreme Court also ruled that the state’s transmission law was not unconstitutionally vague.183 People v. Russell concerned two prosecutions for HIV “transmission”184

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176 720 ILL. COMP. STAT. ANN. 5/8-4(b).
177 Rob Karwath, Prostitute with AIDS Wants Out, CHI. TRIB., Aug. 29, 1991, at 8-NW.
178 Edgar Frees Prostitute with AIDS, CHI. TRIB., Oct. 23, 1991, at 6-C.
179 Jeff R. Grandziel, Woman Charged with Prostitution, CHI. TRIB., Sept. 23, 1997, at 3-NW.
181 Dempsey, 610 N.E.2d at 210. The opinion does not indicate that the nine-year-old boy was infected with HIV as a consequence.
182 Id. at 222.
183 People v. Russell, 630 N.E.2d 794 (Ill. 1994).
that were consolidated into one appeal. In one case, an HIV-positive woman was charged with criminal transmission of HIV when she engaged in consensual sexual intercourse allegedly without disclosing her status to her partner. In the second, an HIV-positive man was charged with the same offense after he raped a woman with knowledge of his HIV status. In both cases, the trial judges found Illinois’ criminal transmission law to be unconstitutionally vague.

The Illinois Supreme Court reversed the trial courts decisions finding that the specific conduct of the defendants were clearly addressed by the statute, and that the argument that the Illinois’ criminal transmission law “might open the innocent conduct of others to possible prosecution is a matter of pure speculation and conjecture.”

Despite the fact that Illinois’ HIV “criminal transmission” statute has and continues to lead to numerous prosecutions of conduct that pose only theoretical or remote risks of HIV transmission, provides limited definitions of what conduct could be criminally liable, and does not consider ameliorating factors such as condom use, it has managed to withstand constitutional challenge.

HIV positive persons are prohibited from donating or providing blood, tissue, semen, organs, or bodily fluids.

HIV positive persons also are subject to prosecution and imprisonment if they donate blood, bodily fluids such as semen, and human tissue. It is a class 2 felony, punishable by three to seven years in prison and a $25,000 fine, for an HIV positive person to donate, transfer, or provide blood, tissue, semen, organs, or “other potentially infectious bodily fluids” for transfusion, transplant, insemination, or administration to another.

The meaning of “potentially infectious bodily fluids” is undefined in the statute. Taken literally, any bodily fluid containing any amount of HIV virus could “potentially” infect another if the odds of HIV transmission are greater than zero. Neither the intent to transmit HIV nor actual transmission is required for liability.

Individuals prosecuted under this statute have a defense if they can prove that the individual exposed to a blood, fluid, organ, or tissue donation (1) was aware that her/his donor was HIV positive, (2) knew that accepting a donation could result in HIV infection, and (3) consented to HIV exposure knowing of this risk.

Individuals with HIV may also be prosecuted for attempting to donate blood, semen, organs or other human tissues, and bodily fluids. Such offenses are Class 3 felonies, punishable by two to five years in prison and a $25,000 fine.

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184 As noted earlier, charges brought under Illinois’ HIV exposure statute are call “criminal transmission” even though no transmission occurred.
185 Russell, 630 N.E.2d at 796.
186 Id. at 796.
187 730 ILL. COMP. STAT. ANN. 5/5-4.5-35 (West 2010).
188 5/5-4.5-50.
189 5/12-16.2(a)(2).
190 5/12-6.2(3)(d).
years in prison\textsuperscript{191} and a $25,000 fine.\textsuperscript{192} A verbal offer to donate blood, fluids, organs, or other tissues may be sufficient for prosecution.

**HIV positive persons can be prosecuted and jailed for sharing dirty syringes with others.**

Criminal liability, including imprisonment, may result from sharing or exchanging needles and other drug paraphernalia. Specifically, it is a class 2 felony, punishable by three to seven years in prison\textsuperscript{193} and a $25,000 fine,\textsuperscript{194} for an HIV-positive person aware of her/his HIV positive status to dispense, deliver, exchange, sell, or transfer in any other way to another person any non-sterile “intravenous or intramuscular paraphernalia.”\textsuperscript{195} This includes syringes, or “any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.”\textsuperscript{196}

HIV positive persons in Illinois are prohibited from selling, sharing, or exchanging, or otherwise transferring to any other person unsterilized needles or any other unsterilized items used to inject substances into the human body. Simply giving someone a dirty syringe is sufficient for a conviction; neither the intent to transmit HIV nor actual transmission is required.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

\textsuperscript{191} 5/5-4.5-40(a).
\textsuperscript{192} 5/5-4.5-50.
\textsuperscript{193} 5/5-4.5-35.
\textsuperscript{194} 5/5-4.5-50.
\textsuperscript{195} 5/12-6.2(3).
\textsuperscript{196} 5/12-6.2(3)(b).
Indiana Statute(s) that Allow for Criminal Prosecution based on HIV Status:

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 HIV-positive body fluids for research purposes.)
HIV-positive persons can face felony charges for failing to disclose their HIV-status to their sexual and needle sharing partners.

Indiana’s “duty to warn” statute requires that HIV-positive persons disclose their status to past, present, and future sexual or needle-sharing partners that have or will engage in activities that have been “demonstrated epidemiologically to transmit” HIV. Such activities include sharing non-sterile needles and engaging in oral, anal, and penile-vaginal sex. It is a class D felony for a person who knowingly or intentionally fails to disclose her/his HIV status, punishable by up to three years imprisonment and the possibility of a $10,000 fine.

Neither the intent to transmit nor the transmission of HIV is required.

Though disclosing HIV status is the only affirmative defense to prosecution, condom use may potentially be a successful defense. Condoms, when used consistently and correctly, are highly effective in preventing the transmission of HIV in sexual contact “demonstrated epidemiologically to transmit” the virus. Indiana’s failure to warn statute does not state whether condom use or the use of other protection is a defense to prosecution, but one case has found that for a successful prosecution the State must prove that (1) the defendant knew she/he was HIV positive, (2) engaged in unprotected sex, and (3) failed to disclose her/his HIV status during the sexual conduct. Other cases that have been prosecuted under the failure to warn statute have typically involved HIV-positive persons who engaged in unprotected sex with their partners. Though there is limited case law on whether condom use provides a successful defense, the application of the statute appears to be limited to cases where no condom or other form of protection was used.

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197 IND. CODE. § 16-41-7-1 (b)-(c) (2006).
199 Johnson, 785 N.E.2d at 1145 n.1.
Other cases and prosecutions in Indiana of HIV-positive persons failing to warn their partners include:

- In June 2010, a 19-year-old woman was charged with failing to disclose her HIV-status to her sexual partner, a 22-year-old man that she had met on the social networking site, MySpace. The two engaged in unprotected sex on numerous occasions.  

- In March 2010, a man pleaded guilty to two counts of failing to warn his sexual partners that he was HIV positive. Following his guilty plea, he was charged with, and pleaded not guilty to, fifteen additional counts of failing to tell his sexual partners about his status.

- A man charged with two counts of failing to disclose his HIV status to his sexual partners was sentenced to three years of probation and a suspended one and a half year prison sentence.

- A 27-year-old woman was charged with failing to warn her sexual partner, with whom she had engaged in unprotected sex, that she was HIV positive.

- An HIV-positive man was charged with failing to tell his girlfriend that he was HIV-positive. They had been having unprotected sex for four months.

- A 47-year-old HIV-positive man was charged with failing to warn his sexual partner that he was HIV positive.

It is a felony for HIV-positive persons to expose others to any bodily fluid, including those not known to transmit HIV.

In Indiana, there are multiple statutes that make it a felony to expose others to blood, semen, saliva, feces, and urine that are “infected with HIV.” This law applies to a wide range of acts and bodily fluids that are not means of transmitting HIV, including spitting saliva or throwing urine and feces.

Under Indiana’s battery by body waste statutes, it is a class C felony punishable by up to eight years imprisonment if an HIV-positive person intentionally or knowingly in a rude, insolent, or angry manner places blood, bodily fluid (including tears, saliva, and nasal secretions), or waste on a law enforcement officer, corrections officer, firefighter, or first responder. It is a class A felony if the exposure results in transmission. The same statute applies when a person intentionally causes another person, who is not a law enforcement officer or first responder, to come in contact with

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202 *Charges Mount in HIV-warning Case*, FORT WAYNE JOURNAL GAZETTE, March 17, 2010, at 3C.
205 *AIDS Victim charged for having unprotected sex, supra note 213.*
209 IND. CODE § 35-42-2-6(E) (West 2010).
bodily fluids “infected with HIV”, but the penalties are less severe. To be prosecuted under this statute, it is only necessary that the bodily fluid make some sort of contact with another’s skin or clothing.

It is also a felony under the malicious mischief statute to recklessly, knowingly, or intentionally place bodily fluids (including blood, semen, urine, or feces) with the intent that another person might unintentionally touch or eat them. The penalties increase if the person knew the bodily fluids contained HIV or if HIV transmission occurs as a result.

The battery by body waste and malicious mischief statutes provide increased penalties if the bodily fluids in question contain traces of HIV despite the fact that HIV transmission may be impossible under the circumstances. These statutes fail to recognize that urine, feces, and saliva do not transmit HIV, and throwing, spitting, or placing these fluids on another person has never been shown to result in HIV transmission. There have been prosecutions under these statutes involving HIV-positive defendants exposing others to saliva or fecal waste. For example, in Nash v. State, 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.” In these cases, though there is no risk of HIV transmission, HIV-positive persons face increased penalties solely due to their HIV status.

There is only one case on record that challenges the battery by body waste statute. In Newman v. State, 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 defendant was sentenced to three years for battery by body waste. If she had been convicted under the original charges she would have been sentenced to a maximum of eight years imprisonment. Despite the trial court’s scientifically sound approach to the facts of the case, the Indiana Court of Appeals disagreed with the trial court’s ruling but did not address the sentencing because the State did not raise the issue on appeal.

In a 2002 case, a 37-year-old HIV-positive homeless man was charged with battery by bodily waste

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210 § 35-42-2-6(F).
211 Thomas v. State, 749 N.E.2d 1231 (Ind. Ct. App. 2001)(holding that statute was not ambiguous and affirming conviction when fluid lands on body of person, because legislature intended to penalize the mere “offensive” and “disgusting” nature of such contact).
212 IND. CODE § 35-45-16-2(A)-(D) (West 2010).
213 See Newman, 677 N.E.2d at 593; HIV-Infected Man Charged with Spitting on Officer, FORT WAYNE SENTINEL, June 11, 2002, at 4A.
215 Id. at 1062.
216 Newman, 677 N.E.2d at 593.
217 Id.
after he allegedly spat on a confinement officer. He was in custody for car-jacking, resisting arrest and battery. Prior to the spitting incident, he had been charged under the same statute for throwing a cup of urine on another officer.

It is a felony for HIV-positive persons to donate or sell their semen, blood, or plasma.

It is a class C felony, punishable by two to eight years in prison and a fine of not more than $10,000 fine for a person to donate or sell blood, blood products, or semen that contains HIV. The law does not apply to people who donate semen or blood for research purposes or notify the blood center that the blood or blood component must be discarded and not used for any purpose. It is a class A felony if the act results in transmission of HIV, which is punishable by twenty to fifty years in prison.

There have been numerous cases of individuals being prosecuted under Indiana’s transfer and donating contaminated fluids statutes:

- In 2010, a 39-year-old woman, who tested positive for HIV in 2005, pleaded not guilty to donating her plasma.
- In 2004, a HIV-positive man pleaded guilty and was sentenced to four years imprisonment for selling his plasma.
- A 20-year-old HIV-positive homeless woman was sentenced to two years of probation for selling her plasma. She received $20 for her donation and testified that she was going to use the money to feed herself and her baby.
- A 46-year-old HIV-positive man was sentenced to two years imprisonment for selling his blood at a blood plasma donation site.
- In 2003, five HIV-positive persons were charged with multiple counts of transferring contaminated fluids for selling their plasma.

HIV-positive individuals have also been charged under general criminal laws.

In *State v. Haines*, the HIV-positive defendant attempted suicide by slashing his wrists but was

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218 *HIV-positive man charged with spitting on officer*, FORT WAYNE SENTINEL, June 11, 2002, at 4A.
219 IND. CODE §§ 35-42-1-7, 16-41-14-17 (West 2010)
223 *Sale of tainted blood nets HIV-positive man 2 years*, MERRILLVILLE POST TRIBUNE, April 21, 2007, (A5).
225 In *White v. State*, 647 N.E.2d 684 (Ind. Ct. App. 1995), the court found that HIV could not be considered an aggravating factor during the sentencing of a crime, in this case child molestation, where the record contains no evidence that the defendant was HIV-positive, knew he was HIV-positive, or had received risk counseling.
interrupted by police and emergency medical technicians. When the police and emergency team arrived, Haines began yelling at them not to come closer or else he would infect them with HIV. He began to scratch, bite, spit at, and throw blood at the officers. Haines was convicted of three counts of attempted murder but the trial judge vacated the conviction because the state did not prove that HIV could be spread by the defendant’s conduct.

On appeal, the court reinstated the attempted murder conviction because the defendant was HIV-positive, knew of his status, and intended to infect others with HIV by spitting, biting, scratching, and throwing blood. The court likened the defendant’s actions as “biological warfare […] akin to a sinking ship firing on his rescuers” and found that even if the conduct in question couldn’t result in HIV infection the defendant still believed that his conduct could result in HIV transmission.

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226 545 N.E.2d 834 (Ind. Ct. App. 1989). It should be noted that Indiana’s battery by body waste statute was adopted after this case.

227 *Id.* at 838.
Iowa Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

**IOWA CODE § 902.9**

*Maximum sentence for felons*

A class B felony shall be confined for no more than twenty-five years.

Failure to disclose HIV status before sexual activities may result in prosecution.

Individuals with HIV in Iowa should be aware that a broad range of sexual activities may result in prosecution and imprisonment under the state’s “criminal transmission” laws. The language of Iowa’s HIV exposure statute is nearly identical to the criminal transmission laws of Illinois (See Illinois). Also, though Iowa’s statute is called “criminal transmission of HIV,” neither the intent nor actual transmission of HIV are required for prosecution.
In Iowa, it is a class B felony, punishable by up to twenty-five years in prison,\(^{228}\) for a person who is aware that she/he is HIV-positive to engage in “intimate contact” with another.\(^{229}\) Sex offender registration is also required.\(^{230}\)

“Intimate contact” is defined as 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.\(^{231}\) The use of condoms or other protection during sexual intercourse is not a statutory defense to prosecution without disclosure of one’s HIV status.

In Iowa’s first prosecution for criminal transmission of HIV, a 46-year old, HIV-positive man was sentenced to twenty-five years in prison after he engaged in anal and oral sex with an 11-year old boy. The boy reportedly told the police that he knew of the defendant’s HIV-positive status.\(^{232}\) However, because he was under the age of consent, the boy’s consent to HIV exposure was not considered valid.

Like its Illinois counterpart, Iowa’s “criminal transmission” law has survived legal challenges arguing that it is unconstitutionally vague. In *State v. Keene*,\(^{233}\) 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. It is not known whether he ejaculated or if the woman tested positive for HIV,\(^{234}\) nor are those factors relevant in a prosecution under the statute. 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.”\(^{235}\)

In *Keene*, 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].”\(^{236}\)

\(^{228}\) IOWA CODE ANN. § 902.9(2) (West 2010).
\(^{229}\) § 709C.1(1)(a).
\(^{230}\) § 692A.102(1)(c)(22).
\(^{231}\) § 709C.1(2)(b).
\(^{233}\) 629 N.W.2d 360, 362 (Iowa 2001).
\(^{234}\) *Id.*
\(^{235}\) *Id.*
\(^{236}\) *Id* at 363.
Another case, *State v. Stevens*, following *Keene*, held that an HIV-positive individual may be prosecuted under Iowa’s criminal transmission laws if she/he engages in oral sex. In *Stevens*, an HIV-positive man was sentenced to twenty-five years in prison for criminal transmission of HIV when he engaged in oral sex with a 15-year old boy and ejaculated in the boy’s mouth. He also received a ten-year sentence for sexual abuse of a child. Notably, the court in *Stevens* interpreted the definition of “sexual intercourse” in *Keene* to include oral sex holding that “oral sex is a well-recognized means of transmission of the HIV.”

As interpreted by various court decisions, Iowa’s criminal transmission laws, “intimate contact” language includes anal sex, penile-vaginal sex, and oral sex.

Individuals living with HIV should also note that a conviction for HIV exposure may not require ejaculation, even though Iowa’s definition of “intimate contact” requires exposure to bodily fluids. In *Keene*, 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. In 2002, 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. In his appeal, *State v. Musser*, 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.

In a different appeal involving the defendant in *Musser*, Iowa’s Supreme Court rejected another challenge that Iowa’s criminal transmission law was unconstitutionally vague. 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 addresses conduct that could result in HIV transmission. Common knowledge dictated that HIV could be transmitted from contact with blood, semen, or vaginal fluid, and a separate Iowa statute defined “infectious bodily fluids” as “bodily fluids capable of transmitting HIV infection as determined by the [C]enters for [D]isease [C]ontrol and

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237 719 N.W.2d 547 (Iowa 2006).
238 Id. at 551.
238 *Keene*, 629 N.W.2d at 366.
241 *Musser*, 721 N.W.2d at 761.
242 *Musser*, 721 N.W.2d 734 (Iowa 2006).
243 Id. at 746.
This means that exposure to saliva, tears, sweat, and other bodily fluids that have not been identified by the CDC as transmitting HIV would not be a violation of this statute.

An individual prosecuted under the criminal transmission laws of Iowa may have a defense that will prevent conviction if she/he can prove that the person exposed to HIV (1) knew that she/he was HIV-positive, (2) was aware that the exposure could result in the transmission of HIV, and (3) consented to HIV exposure with this knowledge of the risks. It is a defense if HIV status is disclosed to sexual partners, although proving disclosure may be difficult in many cases and the evidence is limited to the testimonies of the parties. In Musser, for example, the defendant testified that his sexual partner knew of his HIV-positive status but the jury chose to believe the testimony of the complainant.

According to one report, there have been at least thirty-six arrests and twenty-four convictions under Iowa’s statute. The following Iowa cases serve as other examples of prosecutions that have resulted from failing to disclose HIV-positive status to sexual partners:

• In April 2009, a gay man in Iowa was sentenced to twenty-five years in prison after he failed to disclose his HIV status to a one-time sexual partner he met online. The man was also required to register as a sex offender and undergo a sex offender treatment program. His sentence was later reduced to five years probation and mandatory sex offender registration.

• In December 2009, a 38-year-old, HIV-positive man was charged with criminal transmission for failing to tell his sexual partners that he was HIV-positive.

HIV positive persons are prohibited from donating or providing blood, human tissue, semen, organs, or bodily fluids.

In Iowa, it is a class B felony, punishable by up to twenty-five years in prison, for an HIV-positive person who is aware of her/his HIV status to donate, transfer, or provide blood, tissue, semen, organs, or “other potentially infectious bodily fluids” for transfusion, transplant, insemination, or administration to another. Neither the intent to transmit HIV nor actual transmission is required for prosecution.

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245 Id.
246 IOWA CODE ANN. § 709C.1(5) (West 2010).
247 Musser, 721 N.W.2d at 760.
248 Lynda Waddington, Iowa courts stand firm on HIV transmission law, THE IOWA INDEPENDENT, July 1, 2009, available at http://iowaindependent.com/16621/iowa-courts-stand-firm-on-hiv-transmission-law. Please note that these cases were not documented within the report and the authors were not able to confirm the numbers provided in the article.
251 IOWA CODE ANN. § 902.9(2) (West 2010).
252 § 709C.1(1)(b).
253 § 709C.1(4).
HIV positive persons are prohibited from sharing needles and syringes with others.

Iowa specifically targets HIV-positive drug users who share or exchange their needles and syringes. Specifically, it is a class B felony, punishable by up to twenty-five years in prison,\(^{254}\) for an HIV positive person aware of his/her HIV positive status to dispense, deliver, exchange, sell, or transfer in any other way to another any non-sterile “intravenous or intramuscular paraphernalia” that she/he has previously used.\(^ {255}\)

Such paraphernalia includes needles, syringes, or any other “equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.”\(^ {256}\) Neither the intent to transmit HIV nor actual transmission is required.\(^ {257}\)

An HIV-positive individual prosecuted under this statute may have a defense that will prevent conviction if she/he can prove that the individual exposed to unsterilized drug paraphernalia (1) was aware that she/he was HIV positive, (2) knew that using unsterilized drug paraphernalia could result in HIV infection, and (3) consented to HIV exposure knowing of this risk.\(^ {258}\)

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

\(^{254}\) § 902.9(2)(West 2010).
\(^{255}\) § 709C.1(1)(c).
\(^{256}\) § 709C.1(2)(c).
\(^{257}\) § 709C.1(4).
\(^{258}\) § 709C.1(5).
Kansas Statute(s) that Allow for Criminal Prosecution based on HIV Status:


*Severity Level 7, Person Felony: intentional exposure to life threatening disease*

It is unlawful for a person who knows oneself to be infected with a life threatening communicable disease, to:

1. Engage in sexual intercourse or sodomy with another individual with the intent to expose that individual to that life threatening communicable disease;

2. 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; or

3. 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.

Violation of this section is a severity level 7, person felony**

“Sexual intercourse” shall not include penetration by any object other than the male sex organ.

“Sodomy” shall not include penetration of the anal opening by any object other than the male sex organ.

* Re-codification of KAN. CRIM. CODE. ANN. § 21-3435 (West 2010).


Engaging in penile-vaginal sex or anal sex with the specific intent to transmit HIV is a felony.

It is a severity level 7, person felony punishable by up to twenty-six months in prison for a person who knows that she/he is infected with a “life threatening communicable disease” to (1) engage in

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sexual intercourse or sodomy (2) with the intent to expose another to the disease.\textsuperscript{260} Although “life threatening communicable disease” is not defined, HIV appears to be included, as at least one HIV-positive person in Kansas has been charged for HIV exposure under this statute.\textsuperscript{261}

Under Kansas exposure laws, “sexual intercourse” only includes penetration by the penis.\textsuperscript{262} Because even the slightest insertion of the penis into the vagina can be considered “penetration,” ejaculation or the emission of bodily fluids are not required for prosecution.\textsuperscript{263} Under the terms of this exposure statute, “sodomy” is limited to anal penetration by nothing other than the penis.\textsuperscript{264} Oral sex is not prosecuted under this statute.

In the 2009 case \textit{State v. Richardson},\textsuperscript{265} an HIV-positive man 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 \textit{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.”\textsuperscript{266}

Importantly, the \textit{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 man’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.\textsuperscript{267} Without taking into account such elements the prosecution cannot prove specific intent. In light of \textit{Richardson}, people living with HIV in

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\textsuperscript{260} 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (\textit{See} New Sec. 59(a)(1), repealing and re-codifying KAN. CRIM. CODE. ANN. § 21-3435(a)(1) (West 2010)).
\textsuperscript{261} State v. Richardson, 209 P.3d 696 (Kan. 2009)
\textsuperscript{262} 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (\textit{See} New Sec. 59(c)(1), repealing and re-codifying KAN. CRIM. CODE. ANN. § 21-3435(b) (West 2010)).
\textsuperscript{263} \textit{See}, e.g. KAN. CRIM. CODE ANN. § 21-3501(1) (defining “sexual intercourse” as any act of penetration, however slight).
\textsuperscript{264} 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (\textit{See} New Sec. 59(c)(2), repealing and re-codifying KAN. CRIM. CODE. ANN. § 21-3435(b)).
\textsuperscript{265} 209 P.3d 696 (Kan. 2009)
\textsuperscript{266} \textit{Id.}
\textsuperscript{267} \textit{Id.} at 704.
\end{flushleft}
Kansas should strongly consider disclosing their HIV positive status to sexual partners and using condoms or other protection in order to avoid prosecution under Kansas’ HIV exposure statute.

**HIV-positive persons are prohibited from donating blood, blood products, semen, human tissue, organs or body fluids.**

In Kansas, it is a severity level 7, person felony, punishable by up to twenty-six months in prison\(^{268}\) for a person who knows that she/he is infected with a “life threatening communicable disease” to (1) sell or donate blood, blood products (plasma, platelets, etc.), semen, tissue, organs or other body fluids, (2) with the intent to expose the recipient to the disease.\(^{269}\)

**HIV-positive persons are prohibited from sharing needles or syringes.**

In Kansas, it is also a severity level 7, person felony, punishable by up to twenty-six months in prison\(^{270}\) for a person who knows that she/he is infected with a “life threatening communicable disease” to share a hypodermic needle and/or syringe with another for (1) the introduction of drugs or any other substance, or (2) the withdrawal of body fluids from that person’s body.\(^{271}\) Intent to expose another to HIV is also required for conviction.

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\(^{269}\) 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (See New Sec. 59(a)(2), repealing and re-codifying KAN. CRIM. CODE. ANN. § 21-3435(a)(2) (West 2010)).


\(^{271}\) 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (See New Sec. 59(a)(3), repealing and re-codifying KAN. CRIM. CODE. ANN. § 21-3435(a)(3) (West 2010)).
Kentucky Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

**KY. REV. STAT. ANN. § 532.060(2)(D)**

*Sentence of imprisonment for felony*

For a Class D felony, not less than one year nor more than five years.

**KY. REV. STAT. ANN. § 534.030(1)**

*Fines for felonies*

Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount not less than one thousand dollars ($1,000) and not greater than ten thousand dollars ($10,000) or double his gain from commission of the offense, whichever is the greater.
**HIV-positive persons are prohibited from donating organs, skin, or other human tissues.**

It is a class D felony, punishable by one to five years in prison\(^{272}\) and a $1000- $10,000 fine\(^{273}\) for a person who (1) knows that she/he is HIV-positive and (2) has been informed that she/he may transmit HIV through organ, skin, or tissue donations to provide any such donations.\(^{274}\) Neither the intent to transmit HIV nor infection of another are required for conviction, and prosecution is possible regardless of whether an HIV-positive donor is paid.

**Engaging in prostitution or solicitation while HIV positive is a felony.**

It is a class D felony, punishable by one to five years in prison\(^{275}\) and a $1000- $10,000 fine,\(^{276}\) if an HIV person (1) knows or has been informed that she/he has tested positive for HIV, (2) is aware or has been informed that HIV can be transmitted through sexual activities, and (3) commits, offers, or agrees to commit prostitution by engaging in sexual activity “in a manner likely to transmit HIV.”\(^{277}\) Neither the intent to transmit HIV nor actual transmission is required for conviction. Disclosing HIV status to sexual partners nor the use of protection are defenses to prosecution.

Kentucky’s prostitution laws penalize individuals for being HIV-positive, regardless of whether they engage or plan to engage in activities that expose others to a significant risk or any risk of HIV infection. Under the terms of this statute, “prostitution” is defined as engaging, agreeing to engage, or offering to engage in “sexual conduct” in return for a fee.\(^{278}\) “Sexual conduct” is defined as “sexual intercourse or any act of sexual gratification involving the sex organs.”\(^{279}\)

It is also a class D felony, punishable by one to five years in prison\(^{280}\) and a $1000- $10,000 fine,\(^{281}\) if an HIV-positive person (1) knows or has been informed that she/has tested positive for HIV, (2) is aware or has been informed that HIV can be transmitted through sexual activities, and (3) procures another to commit prostitution.\(^{282}\) Procurement laws often punish “pimping” as opposed to solicitation of prostitution, but this provision is presumably a solicitation law targeting HIV-positive persons who seek out or hire sex workers.

**HIV-positive individuals have been prosecuted under Kentucky’s general criminal laws.**

Kentucky has used general criminal laws to prosecute HIV-positive individuals for transmitting HIV, failing to disclose HIV status to sexual partners, or otherwise exposing others to HIV infection. These prosecutions often disregard whether HIV-positive defendants actually exposed

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\(^{272}\) KY. REV. STAT. ANN. § 532.060(2)(d) (West 2010).

\(^{273}\) § 534.030(1).

\(^{274}\) § 311.990(24)(b).

\(^{275}\) § 532.060(2)(d).

\(^{276}\) § 532.060(4).

\(^{277}\) § 529.090(3).

\(^{278}\) § 529.020(1).

\(^{279}\) § 529.010(9).

\(^{280}\) § 532.060(2)(d).

\(^{281}\) § 534.030(1).

\(^{282}\) § 529.090(4).
others to a significant risk of HIV infection or if there was even a scientific possibility that HIV could be transmitted.

Kentucky’s “wanton endangerment” law is one example of a general criminal law that has been used to prosecute HIV-positive persons for alleged HIV exposure. In Kentucky, the crime of first-degree wanton endangerment, punishable by one to five years in prison and a $1000- $10,000 fine, requires than an individual wantonly engage in “conduct which creates a substantial danger of death or serious physical injury to another person.”

In *Hancock v. Commonwealth*, Kentucky’s first case determining whether HIV exposure could be prosecuted under the state’s wanton endangerment laws, 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.” 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.

Neither the intent to transmit HIV nor actual transmission is required for prosecution for wanton endangerment. Because the defendant in *Hancock* pleaded guilty, there is no jurisprudence on how condoms or other protection during sexual intercourse or evidence of a defendant’s low viral load would factor into a prosecution for wanton endangerment, although it certainly could be argued that those factors reduce the risk to below that of the statutory “substantial danger” standard.

In another case, in April 2008 a 29-year old, HIV-positive woman was charged with attempted murder when she allegedly bit a store clerk on the chest during a robbery and then shouted that she had AIDS. She later pleaded guilty to first-degree robbery and first-degree wanton endangerment and was sentenced to twelve years imprisonment. The store clerk tested negative for HIV. Two years of her prison sentence arose from the endangerment charge based solely on her HIV-positive status, despite the fact the CDC has concluded that there is only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”

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283 § 532.060(2)(d).
284 § 534.030(1).
285 § 508.060(1).
286 998 S.W.2d 486, 497 (Ky. Ct. App. 1998).
287 Id. at 498.
Another case in Kentucky involved HIV-positive status as a factor during sentencing for sexual assault. In *Torrence v. Commonwealth*, 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.

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269 S.W.3d 842 (Ky. 2008).
Louisiana Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

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291 Under the public health laws of Louisiana, it is unlawful for any person to “inoculate or infect another person in any manner with a venereal disease or to do any act which will expose another to inoculation or infection with a venereal disease.” LA. REV. STAT. ANN. § 40:1062 (1918); See also LA. REV. STAT. ANN. § 40:1068 (1918); Meany v. Meany, 639 So.2d 229 (La. 1994) (imposing a civil duty on those infected with a venereal disease to either abstain from sex or warn sexual partners). A venereal disease is defined as “syphilis, gonorrhea, chancroid, or any other infectious disease primarily transmitted from one person to another by means of a sexual act.” LA. REV. STAT. ANN § 40:1061 (2007). However, because this law was enacted in 1918, long before the discovery of HIV, and because Louisiana has enacted a separate criminal statute concerning HIV exposure, it is unlikely that this statute will be used to penalize HIV exposure.
Any number of consensual sexual activities may result in prosecution and imprisonment. It is an unlawful act, punishable by up ten years in prison and/or a $5,000 fine, to expose another to HIV/AIDS through sexual contact. Sex offender registration may also be required. Despite the language in the statute, Louisiana courts have found that neither the intent to transmit HIV nor actual transmission is required. It is a defense if exposure to HIV was with “knowing and lawful consent.” This means that an HIV-positive person will not likely be prosecuted for engaging in consensual sexual intercourse with a partner fully aware of her/his HIV status, as long as that partner is above the age of consent in Louisiana.

However, disclosure of HIV status may be difficult to prove as most evidence is based on the testimony of the parties where it is one person’s word against the other’s. In State v. 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 HIV-positive status during the entire relationship. The defendant was convicted and sentenced to ten years in prison at hard labor.

On appeal, the defendant in Gamberella 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.” The preceding phrase, in and of itself, is ambiguous and provides absolutely no clarity as to what types of sexual conduct can be prosecuted under the statute. Under the court’s definition acts that don’t involve an exchange of bodily fluids or penetration could be prosecuted. The court’s findings also don’t provide insight into whether or not the use of condoms or other form of protection would be a defense to prosecution.

293 § 14:43.5(A).
295 See, e.g., State v. Roberts, 844 So. 2d 263, 272 (La. Ct. App. 2003) (“La. R.S. 14:43.5 does not require the State to prove that a defendant acted with the specific intent to expose the victim to [HIV] … it requires the State to prove that the defendant intentionally committed an act proscribed by the statute which exposed the victim to [HIV].”)
296 See, e.g., State v. Gamberella, 633 So. 2d 595, 602 (La. Ct. App. 1993) (“By use of the word ‘expose’ rather than the word ‘transmit,’ the legislature obviously intended that the element of the offense be the risk of infection, rather than actual transmission of the virus.”); accord Roberts, 844 So. 2d at 272.
298 See, e.g., LA. REV. STAT. ANN. § 14:80 (2004) (defining “juvenile” as an individual under the age of seventeen for the purpose of “carnal knowledge” laws).
299 Gamberella, 633 So. 2d at 598-60.
Other cases that have been prosecuted under the statute include:

- In *State v. Serrano*, an HIV-positive man was sentenced to one year in prison at hard labor after he engaged in unprotected sex with his girlfriend without disclosing his HIV status.  

- In *State vs. Turner*, an HIV-positive woman received two concurrent five-year prison sentences after she pleaded guilty to engaging in “some sort of sexual contact” with two men. A sentencing court equated the woman’s activities to “pointing a gun to [the victims’] head[s] and pulling the trigger.”

- In 1999, an HIV-positive woman received four years probation and registered as a sex offender after engaging in unprotected sex with at least two men.

- In 2002, an HIV-positive man was arrested after he allegedly engaged in unprotected sex with a woman without disclosing his HIV status.

- In *State v. Roberts*, an HIV-positive man received ten years in prison at hard labor for exposing his rape victim to HIV. Although a dispute existed as to whether bodily fluids were exchanged, an appeals court found that the defendant’s conviction could be sustained on evidence that he anally and vaginally raped his victim.

**Spitting, biting, and other exposures to bodily fluids can result in criminal liability.**

Louisiana criminalizes several forms of HIV exposure beyond sexual contact that pose no risk of HIV infection, including biting and spitting. It is an unlawful act, punishable by up ten years in prison (with or without hard labor) and/or a $5,000 fine, to expose a person to any AIDS virus through any means or contact without the knowing and lawful consent of the person exposed.

If an HIV-positive person (1) exposes a police officer to HIV through “any means or contact,” and (2) has reasonable grounds to believe that the person exposed is a police officer, HIV exposure is punishable by up to eleven years in prison (with or without hard labor) and/or a $6,000 fine. This sentence enhancement also applies to correctional officers, parole officers, and several other “police officers,” including probation officers, sheriffs, deputy sheriffs, marshals, deputy marshals, constables, and wildlife enforcement agents.

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303 Turner, 927 So.2d at 441.
305 Metairie Man Arrested on HIV Charge, TIMES-PICAYUNE (New Orleans), May 25, 2002, at 4-Metro.
306 Roberts, 844 So.2d at 270.
307 Id.
309 § 14:43.5(B).
310 § 14:43.5(C).
311 § 14:43.5(D)(2).
Neither the intent to transmit HIV nor actual transmission is required.

Under the terms of this statute, “means or contact” is defined as spitting, biting, stabbing another with an AIDS-contaminated object (e.g., a used needle), or throwing blood or other “bodily substance.” Although throwing blood or other “bodily substances” is listed as a criminal offense under the terms of this statute, “bodily substance” is not defined. This statute thus presents the risk that exposure to saliva, urine, sweat, or other “bodily substances” posing no risk of HIV infection may result in criminal prosecution.

In *State v. Roberts*, for example, 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 HIV-positive 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. The court did not consider that the CDC has long maintained that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”

The CDC has also concluded that spitting alone has never been shown to transmit HIV. Louisiana’s statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

**Attempted murder** prosecutions have been used for intentional exposure to HIV.

Individuals with HIV in Louisiana may be prosecuted for HIV exposure under general criminal laws, including attempted murder. In the past, these prosecutions have arisen from the rare and extreme cases where HIV-positive persons attempt to purposefully infect others with the virus. In *State v. Caine*, 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

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312 § 14:43.5(D)(1).
313 § 14:43.5(D)(1).
315 *Id.* at 270-71.
316 *Id.* at 271.
319 In another case involving HIV-infected syringes, a Louisiana doctor received fifty years in prison at hard labor after he was convicted of injecting his ex-lover with HIV and Hepatitis C. The doctor extracted tainted blood from two patients and transferred it to the woman, who believed she was getting an injection of a vitamin supplement. This case was not based on the doctor’s HIV status and as such as not reflective of prosecutions against HIV positive persons. 771 So. 2d 131 (La. Ct. App. 2000) (affirming conviction and sentence), *writ denied*, 798 So. 2d 105 (La. 2001), *cert. denied*, 535 U.S. 905 (2002); see also *State v. Schmidt*, 699 So. 2d 448 (La. Ct. App. 1997) (denying writ application concerning two pre-trial evidentiary rulings regarding admissibility of DNA evidence), *writ denied*, 706 So. 2d 451 (La. 1997); *Schmidt v. Hubert*, No. 05-2168, 2008 WL 4491467 (W.D. La. Oct. 6, 2008) (denying habeas corpus petition challenging conviction).
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.

**HIV-positive status can result in an enhanced sentence upon conviction.**

HIV-positive status can be a factor in enhanced sentences for sexual assault. Sentencing courts sometimes see HIV-positive status as a relevant consideration when measuring the impact of a crime on the victim. *(See, e.g., Kentucky, Utah, Texas).*

In *State v. 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. Despite the fact that the defendant did not engage in oral sex, and even if she had there was only a remote chance of exposing another to HIV in such a manner, she was sentenced to the full extent of the law, in large part based on her HIV status.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

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321 *Cain*, 652 So. 2d at 616.
323 *Richmond*, 734 So. 2d 33 at 38.
324 *Richmond*, 708 So. 2d at 1276.
325 *Id.* at 1273.
Maine Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statutes regarding HIV exposure

There are no statutes explicitly criminalizing HIV transmission or exposure in Maine. However, some states have prosecuted HIV-positive people for exposing others to the virus under general criminal laws, such as those governing reckless endangerment and aggravated assault. At the time of this publication, we are not aware of a criminal prosecution of an individual on the basis of his/her HIV-positive status in Maine.

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Maryland Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

HIV-positive persons may face misdemeanor penalties for engaging in various activities.

In Maryland, it is a misdemeanor punishable by a sentence of up to three years in prison and/or a $2,500 fine for an HIV-positive person to knowingly transfer or attempt to transfer HIV to another. This law targets HIV-positive persons who are (1) aware of their HIV status and (2) knowingly engage in activities posing risks of HIV infection. Any number of HIV exposures, including consensual sexual intercourse, blood and tissue donation, breastfeeding, and/or needle-sharing, may be subject to prosecution.

On its face, neither disclosure nor the use of condoms or other protection would be an affirmative defense to prosecution. The statute potentially targets a wide range of activities without defined limitations to what conduct may or may not face potential prosecution.

Few cases in Maryland clarify the scope of this HIV exposure statute. One prosecution suggests that individuals with HIV may face prosecution regardless of whether they expose others to an actual risk of HIV transmission. In May 2008, a 44-year old, HIV-positive man was charged with knowingly attempting to transfer HIV after he bit a police officer during an arrest. He later received eighteen years in prison after pleading guilty to drug and assault charges. The officer did not test positive for HIV but such evidence is not relevant to prosecution. The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.” Maryland's statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

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In March 2010, a 29-year-old, HIV-positive man was charged with seven counts of knowingly attempting to transfer HIV after he had consensual sex with a woman he met online and did not disclose his HIV status. He later pleaded guilty to reckless endangerment and received eighteen months in jail. The same man was charged under Maryland’s HIV exposure law in 2005 after he engaged in consensual, unprotected, but undisclosed intercourse with a different woman. He also pleaded guilty to reckless endangerment in that case.

HIV exposure cases have been prosecuted under general criminal laws, including attempted murder and reckless endangerment.

Prosecutions for HIV exposure in Maryland have typically arisen under general criminal laws as opposed to the knowing transfer of HIV statute. General criminal law charges occur regardless of whether HIV-positive persons exposed others to significant risks of HIV infection. In Maryland, reckless endangerment, which has been used in multiple prosecutions, is defined as recklessly engaging in “conduct that creates a substantial risk of death or serious physical injury to another.”

In 1999, a 20-year old, HIV-positive man was convicted of second-degree assault and reckless endangerment for biting a security guard in the arm during a struggle. He was sentenced to five years in jail, with all but eighteen months suspended. The guard tested negative for HIV but the transmission of HIV is not required for a prosecution for reckless endangerment.

In July 2010, a 44-year old, HIV-positive defendant was sentenced to five years in prison for second-degree assault after he was convicted of spitting on a police officer. Because the defendant had no teeth and often spat unintentionally, it is not clear whether the man intended to spit on the police officer. The CDC has long maintained that spitting alone has never been shown to transmit HIV and on the basis of the facts of the case the defendant engage in conduct creating a substantial risk of death or serious injury that would warrant his conviction and five year sentence.

At least two cases in Maryland have ruled that an attempted murder charge cannot be used in cases of HIV exposure unless there is a specific intent to murder through the transmission of HIV. In 1996, a 47-year-old, HIV-positive man was convicted of assault with intent to murder and sentenced to ninety years in prison after he sexually assaulted his 9-year-old step-grandson. The man’s sentence was later reduced to sixty years after the Maryland Court of Special Appeals ruled that his awareness of his HIV-positive status was not proof of intent to murder. The boy twice tested...
negative for HIV but this information is not relevant in a prosecution unless it would go to show the intent of the defendant.\textsuperscript{339}

The Court of Appeals of Maryland came to a similar conclusion in \textit{Smallwood v. State}.\textsuperscript{340} In \textit{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 prosecution countered that engaging in unprotected sexual intercourse while HIV-positive is equivalent to firing a loaded firearm at an individual, an act from which a jury could infer the 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.

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\textsuperscript{339} \textit{Id.}\textsuperscript{.} \\
\textsuperscript{340} 680 A.2d 512 (Md. 1996).
Massachusetts Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Though there is no explicit statutes regarding HIV exposure prosecution under general criminal laws have occurred.  

There are no statutes explicitly criminalizing HIV transmission or exposure in Massachusetts. However, HIV-positive individuals have been prosecuted under general criminal laws in Massachusetts.

In Commonwealth v. 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 in Smith and the defendant later pleaded guilty. Conviction for assault with intent to commit murder can result in imprisonment of up to ten years.

Smith demonstrates that HIV-positive status can be the basis for a serious criminal charge in Massachusetts regardless of whether the complainant was exposed to any risk of HIV infection. In a 1996 case, a 38-year old man in Massachusetts was charged with assault with a “deadly weapon” after he allegedly told two police officers he had AIDS and spat at them. The police officers said that “by him spitting at us, he was attempting to infect us.” The CDC has long maintained that spitting alone has never been shown to transmit HIV.

Murder charges may also be possible in cases where an HIV-positive person intentionally infect others with HIV and those infected later die of AIDS. In Commonwealth v. Casanova, the court, upholding a murder conviction where the defendant shot a man who became paralyzed and died of breathing problems six years later, supported its ruling analogizing the facts to an HIV infection.

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341 Massachusetts statute, Mass. Gen. Laws Ann. 265 § 22b(6) (2008), mandates a fifteen year to life sentence for a defendant who has forced sexual intercourse with a child under 16 years old, the defendant “knew or should have known” that she/he was a carrier for an STI or STD, and that the minor could have contracted the STD or STI. There is no case on record that this statute has been applied to HIV positive persons.


344 Smith, 790 N.E.2d at 709.

345 MASS. GEN. LAWS ANN. ch. 265 § 15 (West 2010).


situation where murder charges could result even if a victim dies long into the future. The defendant argued that the “the year and a day” rule, no longer in effect in Massachusetts (dictating that murder charges may only result if victims die within a year and a day of an alleged attack), should be replaced by another time limit in order to protect rights to due process and a speedy trial. The Supreme Judicial Court of Massachusetts disagreed, stating that medical science had advanced enough to make arbitrary time limits unnecessary in cases where the link between an assault and a victim’s death can be proven.

Of course, in situations of HIV exposure there are often problems establishing if the defendant indeed infected another person. The first person to test positive can often be deemed the culprit even though she/he may have been infected by someone else, including the complainant. Even if it was the accused party who was infected first, it could have been a third party who infected the complainant. Prosecutors have been using “phylogenetic testing,” which focuses on establishing a genetic connection between the HIV viruses of the two parties. But such evidence only indicates similarities in the viruses and does not prove who infected whom or the source of the virus. Such technology is also not well understood by law enforcement, attorneys, judges, or people living with HIV and fails to provide sufficient evidence for prosecution.

HIV-positive status may also lead to increased prison sentences in sexual assault cases. In Commonwealth v. 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.

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349 Id. (“Although it will undoubtedly be difficult in many cases for the prosecution to prove causation where death is remote in time from the allegedly precipitating injury, in cases where this link can be proved, such as where a slow-acting poison is used or where a person purposely infects another with a virus such as HIV, prosecution should not be barred by some arbitrary time limit.”)
350 Id. at 90.
351 RALF JURGENS ET AL., 10 REASONS TO OPPOSE THE CRIMINALIZATION OF HIV EXPOSURE OR TRANSMISSION 18 (Open Society Institute 2008).
Michigan Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**MICH. COMP. LAWS ANN. § 333.5210**

*Class F, Person Felony: Sexual penetration with uninformed partner*

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.

“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. § 333.1101**

*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.

Engaging in sexual intercourse without disclosing HIV status can lead to felony charges.

In Michigan, it is a felony punishable by up to four years in prison if a person aware that she/he is HIV-positive and engages in “sexual penetration” with a person uninformed of her/his HIV status. Neither the intent to transmit HIV nor actual transmission is required.

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353 MICH. COMP. LAWS ANN. § 777.13k (West 2006) (categorizing sexual intercourse with an uninformed partner as a class F, person felony). For information on minimum sentences, consult sentencing instructions at § 777.21. See also § 777.22 (outlining offense variables apply to different offense categories); MICH. COMP. LAWS ANN. §§ 777.31-49a (2006) (providing point system for each offense variable); § 777.67 (providing minimum sentences for class F felonies). But see H.B. 6328, 95th Leg., 2010 Reg. Sess. (Mich. 2010) (proposing to require definite terms of imprisonment and repeal portions of Michigan’s sentencing guidelines); see also MICH. SENTENCING GUIDELINES MANUAL (2010), available at http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm..
Michigan defines “sexual penetration” as penile-vaginal sex, oral sex, anal sex, and 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. The emission of semen is not required. The use of condoms or other protection during sexual penetration is not a defense.

The only defense to prosecution is if HIV-positive persons disclose their HIV status to sexual partners before engaging in sexual penetration. However, the disclosure of HIV status during private, sexual activities may be difficult to prove without witnesses or documentation and evidence often rests on the testimonies of the parties where it’s one person’s word against the other. In People v. Flynn, a former lover of an HIV-positive man testified that she engaged in unprotected sexual intercourse with him and he failed to inform her of his HIV-positive status. The man testified that he informed the complainant of his HIV status before they engaged in sexual intercourse and that he wore a condom. He further argued that the woman’s testimony was inadmissible evidence against his character. The court ruled that the woman’s testimony was admissible as it had the clear purpose of showing that the man had a general scheme to conceal his HIV status. In these situations, there are inherent problems when the only evidence available is the testimonies of the parties.

Despite its potential to criminalize safe sexual practices, Michigan’s uninformed partner law has survived legal challenges that it is unconstitutionally overbroad. In People v. Jensen, a mentally-impaired, 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.

Looking to the reasoning of the Michigan legislature, the court held that the statute required only a general intent to engage in sexual penetration while failing to disclose HIV status. An HIV-positive person who fails to disclose her/his status could be considered gross negligence because non-disclosure could only achieve the “further dissemination of a lethal, incurable disease in order to gratify the sexual or other physical pleasures of the already infected individual.”

354 Mich. Comp. Laws Ann. § 333.5210; See also Doe v. Johnson, 817 F.Supp. 1382 (W.D. Mich. 1993) (finding that a woman’s claims for negligent or fraudulent transmission of HIV could be maintained if defendant knew (1) that he was HIV-positive, (2) that he was suffering from HIV-related symptoms, or (3) that a prior sex partner was HIV-positive). 355 Mich. Comp. Laws Ann. § 333.5210(2) (2001).
356 Id.
360 Id. at 754.
The Michigan Court of Appeals rejected another constitutional challenge to the state’s HIV disclosure laws in *People v. Flynn*.\(^{361}\) In that case, 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.

Several other HIV-positive individuals in Michigan have been prosecuted for engaging in sexual intercourse without disclosing their status to partners:

- In November 2010, a man was charged with two felony counts of sexual penetration of an uninformed partner for allegedly having sex with two women without disclosing his HIV status.\(^{362}\)

- In *People v. Selemogo*,\(^{363}\) an HIV-positive man received 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.

- In *People v. Clayton*,\(^{364}\) an HIV-positive man received 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.

- An HIV-positive man received four to six years in prison in 1999 after pleading guilty to failing to disclose his HIV status to his then-girlfriend.\(^{365}\)

- In September 2008, an HIV-positive man was charged with four counts of engaging in sexual penetration with an uninformed partner when he allegedly had sex with multiple women without disclosing his HIV status.\(^{366}\)

- In December 2008, a 36-year-old woman pleaded guilty for failing to inform several sexual partners that she was HIV-positive. She was sentenced to the sixty-eight days

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in prison for time already served and five years probation. The woman was arrested again after engaging in sex work and allegedly violating her probation.

- In November 2009, a 21-year-old man received a nine month prison sentence, three years probation, and a $1,250 fine after he engaged in sexual intercourse with a woman without informing her that he was HIV-positive.

- In July 2009, an HIV-positive woman employed at a sex club was arrested by police informants for failing to disclose her HIV status. She was sentenced to sixteen months to twenty years for failing to disclose her HIV status and for drug offenses.

- In February 2009, a 25-year-old man was sentenced to two months in prison after he failed to disclose his HIV-status to several sexual partners.

- In March 2010, a 54-year-old, HIV-positive woman was arrested and charged under Michigan’s uninformed partner law after she allegedly engaged in sexual intercourse without disclosing her HIV status to her partner.

HIV-positive blood has been considered a “harmful biological substance” under Michigan bioterrorism laws.

HIV-positive blood is considered a “harmful biological substances” under the Michigan’s bioterrorism laws and exposing others to HIV-positive blood may increase prison sentences for assault or may be prosecuted as a crime of its own.

Enhanced sentences for blood exposure are possible regardless of whether HIV infection was possible under the circumstances. In People v. 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

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375 740 N.W.2d at 560.
containing blood was deemed a “harmful biological substance” under state bioterrorism laws,\(^{377}\) the spitting incident led to an increased sentence of five to fifteen years.\(^{378}\)

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.”\(^{379}\) The man’s elevated sentencing was therefore upheld.\(^{380}\)

*Odom* failed to address how state sentencing laws could apply to HIV-positive individuals who act in self-defense in an altercation or have no knowledge or intention of exposing another to HIV. The ruling leaves open the possibility that HIV-positive persons will be prosecuted for unintentional blood exposures that occur when they are attacked by others or are victims of prison guard misconduct. The defendant in *Odom* denied that he initiated the altercation or that he spit at the officers. Although the defendant did have a bloody mouth after his altercation with prison guards, the court did not discuss how he received his injuries.

In 2010, another HIV-positive man was charged under Michigan’s bioterrorism law for allegedly biting his neighbor during an altercation. In *People v. Allen*,\(^{381}\) the 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.\(^{382}\) 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.\(^{383}\)

This initial charge disregarded the fact that the CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”\(^{384}\) The CDC has also concluded that spitting alone has never been shown to transmit HIV.\(^{385}\)

\(^{376}\) Id. at 561.

\(^{377}\) Id.; see also MICH. COMP. LAWS ANN. § 750.200h(g) (2004) (defining “harmful biological substance” as a bacteria, virus, or other microorganism or a toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.)

\(^{378}\) Odom, 740 N.W.2d at 560; see also MICH. COMP. LAWS ANN. § 777.31(1)(b) (2006) (imposing 20 additional sentencing points for exposures to harmful biological substances).

\(^{379}\) Id.

\(^{380}\) Id. at 562.


\(^{382}\) Id. at *2; see also MICH. COMP. LAWS ANN. § 750.200h(1)(a) (2004).

\(^{383}\) Allen, No. 2009-4960 at *3.


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. Thus, Allen did nothing to remove the risk that an HIV-positive individual can be arrested and charged as a "bioterrorist" under Michigan state law but did help illuminate the fallacies of prosecuting HIV-positive persons for spitting and biting.

**HIV-positive status can be considered a factor in sentencing.**

Under Michigan state law, a sentencing court may go beyond sentencing guidelines and impose a minimum sentence above what is recommended if there is a substantial and compelling reason to do so. In this past, this provision of state sentencing guidelines has lead to increased sentences where sexual assault victims are exposed to or infected with STIs, such as HPV. In *People v. Holder*, the Michigan Court of Appeals affirmed the eighty to 120 month sentence of the HIV-positive defendant’s conviction for sexual penetration of an uninformed partner. The court held that because the defendant did not tell his partner about his HIV status he infected her and risked infection to his partner’s as-of-then unborn child. The court found that these facts were sufficient to uphold a sentencing of twice the standard range because of the risk he presented to the complainant’s child and the other potential people he could have exposed to HIV.

**Donating blood or product products while HIV-positive is a criminal offense.**

The Michigan Public Health Code prohibits individuals who are aware that they have tested positive for HIV from donating or selling blood or blood products (plasma, platelets, etc.). Neither the intent to transmit HIV nor actual transmission is required. Disclosure of HIV status before blood sales or donations is not a defense on the face of the statute. If an individual violates this law, her/his local health department will be notified immediately, and she/he she may be declared a health threat to others. The health department may send the individual an official warning, requiring that she/he participate in mandatory education programs or take legal action if the HIV-positive person continues to expose others to HIV.

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387 See, e.g., People v. Grissom, No. 251427, 2004 WL 2625034, at *2 (Mich. Ct. App. Nov. 18, 2004) (unpublished) (“Further, although points were scored for bodily injury requiring treatment, the guidelines do not take into account the extent of injury to this victim of the transmission of disease. In this case, the victim contracted Human Papillomavirus Virus (HPV), a disease that potentially may cause cervical cancer in the future.”); People v. Castro-Isaquirre, No. 242134, 2004 WL 737489, at *2 (Mich. Ct. App. Apr. 6, 2004) (unpublished) (“Here, the trial court based its departure on the fact that defendant, who has a sexually transmitted disease, exposed the victim, her mother, and her sister to the disease.”)


390 MICH. COMP. LAWS ANN. § 333.11101; See also MICH. COMP. LAWS ANN. § 333.5201(1)(b) (defining a “health threat to others” as an individual who is a carrier has demonstrated an inability or unwillingness to conduct himself or herself in such a manner as to not place others at risk of exposure to a serious communicable disease or infection.”)

391 MICH. COMP. LAWS ANN. § 333.5203 (outlining the procedure for issuing a health department warning notice); see also MICH. COMP. LAWS ANN. § 333.5205 (outlining court proceedings that may result from refusing to comply with health department warnings).
Important Note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.
Minnesota Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

HIV is not identified in the statute but “communicable disease” means a disease or condition that causes serious illness, serious disability, or death, or the infectious agent of which may pass or be carried from the body of one person to the body of another through direct transmission.

“Direct transmission” means predominately sexual or blood-borne transmission.

“A person who knowingly harbors an infectious agent” refers to a person who receives from a physician or other health professional:

1. Advice that the person harbors an infectious agent for a communicable disease;
2. Educational information about behavior which might transmit the infectious agent; and
3. Instruction of practical means of preventing such transmission.
“Transfer” means to engage in behavior that has been demonstrated epidemiologically to be a mode of direct transmission of an infectious agent which causes the communicable disease.

“Sexual penetration” may include Sexual intercourse, cunnilingus, fellatio, or anal intercourse when the acts described are committed without the use of a latex or other effective barrier, regardless of whether emission of semen (ejaculation) occurs. MINN. STAT. § 609.341(12).

HIV status must be disclosed to sexual partners and condoms or other protection must be used during sexual activities.

In Minnesota, HIV-positive persons must disclose their HIV status to sexual partners. It is a criminal offense for any individual who knowingly “harbors” the infectious agent for a communicable disease (i.e., HIV) to engage in sexual penetration with another person without first informing that person that she/he carries that infectious agent. This offense may be charged as assault (of the first, second, third, fourth, and fifth degrees), attempted assault, murder (first or second degree), or attempted murder. Potential prison sentences depend on the offense charged. However, if an HIV-positive person violates this “sexual penetration” law on multiple occasions, consecutive sentencing is possible.

The statute provides that communicable diseases (i.e., HIV) may not be transmitted by engaging in behavior that has been “demonstrated to be a mode of direct transmission.” A “communicable disease” is defined as a disease or condition that causes serious illness, serious disability, or death, or the infectious agent of which (i.e., HIV) may pass or be carried from the body of one person to the body of another through direct transmission. “Direct transmission” means predominately sexual or blood-borne transmission. Transferring a communicable disease is defined as engaging in behavior that has been “demonstrated epidemiologically to be a mode of direct transmission” of the communicable disease or condition that causes serious illness, serious disability, or death; the infectious agent of which may pass or be carried from the body of one person to the body of another through direct transmission.

See Appendix to Minnesota Sentencing Guidelines at MINN. STAT. ch. 244 App. VI.
disease. The statute is limited to only prosecuting sexual activities that are known to HIV, including sexual and anal intercourses.

Neither the intent to transmit HIV nor actual transmission is required for prosecution.

Under the terms of this statute, any individual who is (1) advised that she/he is HIV-positive by a physical or health official, (2) receives educational materials about how HIV is transmitted, and (3) is instructed how to prevent HIV transmission, “knowingly harbors an infectious agent.”

It is a defense to prosecution under this statute if condoms, dental dams, or other latex barriers are used during sexual intercourse. It is also a defense if HIV status is disclosed to sexual partners. However, it should be noted that the disclosure of HIV status or the use of condoms or other protection during private, sexual activities may be difficult to prove without witnesses or document. The statute also holds that an HIV-positive individual prosecuted under this “knowing transfer” law may have a defense to prosecution if she/he can prove that she/he took practical means to prevent HIV transmission as advised by a doctor or health care professional.

In March 2010, a 28-year old, HIV-positive man was charged with third-degree assault after he engaged in sexual intercourse with two men without disclosing his HIV status. At least one of the men tested positive for HIV but such information is not relevant to the prosecution. In October 2009, an HIV-positive man pleaded guilty to intentionally inflicting or attempting to inflict bodily harm on another (misdemeanor assault in the fifth degree) and was sentenced to ninety days in jail after he had unprotected sex with a woman without disclosing his HIV status.

HIV-positive persons are prohibited from donating their blood, organs, semen, or body tissues.

Minnesota’s “knowing transfer laws” also prohibit HIV-positive persons from transferring their blood, semen, organs, or body tissues to others. This activity may be charged as assault (of the

406. § 609.2241(1)(d).
407. It is important to note that Minnesota’s definition of “sexual penetration” includes multiple types of activity that do not transmit HIV. (See MINN. STAT. § 609.2241(1)(e) (2009) (citing MINN. STAT. § 609.341(12) (2009), amended by 2010 Minn. Sess. Law Serv. Ch. 270 (S.F. 2717) (West)). This definition is cited by many other statutes (i.e., sexual assault and aggravated sexual assault statutes) and is overly broad for the purposes of the HIV exposure statute. It was probably a legislative oversight to include the entire definition of “sexual penetration” in the HIV exposure statute, as the HIV exposure statute specifically notes that only behavior known to transmit HIV may be prosecuted and the use of latex barrier protection is an affirmative defense. This suggests that it was not the intent of the legislature to prosecute sexual activities that are not known to transmit HIV and the entire definition of “sexual penetration” is not applicable to Minnesota’s HIV exposure law.
408. See MINN. STAT. § 609.2241(1)(d).
410. MINN. STAT. § 609.2241(1)(c).
411. MINN. STAT. § 609.2241(2)(1)
412. MINN. STAT. § 609.2241(3) (2009).
413. Vince Tuss, Assault Charged in HIV Case, STAR TRIB. (Minneapolis), Mar. 25, 2010, at 1B.
414. Id.
416. MINN. STAT. § 609.2241(2)(2).
first, second, third, fourth, and fifth degrees), attempted assault, murder (first or second degree), or attempted murder. Although sentences will depend on which offense is charged, consecutive sentencing is possible if an individual violates this law on multiple occasions. The intent to transmit HIV nor actual transmission is required for prosecution.

Prosecution will not result if (1) the transfer of blood, semen, organ, or tissue was deemed necessary for medical research, or (2) HIV-positive individuals disclose their HIV status on donation forms before transferring these bodily fluids and tissues.

Sharing needles or syringes may lead to criminal penalties.

It is unlawful for a person who is HIV positive to transfer the virus to another by sharing non-sterile needles/ syringes for the purpose of injecting drugs. Under Minnesota sentencing laws, consecutive sentencing is possible if an HIV-positive person shares a needle/ syringe on multiple occasions.

Although disclosing HIV status to sexual partners may prevent prosecution in Minnesota, on the face of the statute it is not a defense if HIV status is disclosed before sharing needles with another. Prosecution for HIV exposure may result even if an HIV-positive person shares a needle with another individual fully aware of her/his HIV status and understands the risk to HIV exposure.

Neither the intent to transmit HIV nor actual transmission is required for prosecution.

HIV-positive status results in enhanced prison sentences for sex offenses.

Under Minnesota sentencing guidelines, a defendant may receive a sentence higher than what is recommended if aggravating circumstances make her/his conduct more serious than the conduct normally involved in the commission of the offense. A defendant’s exposure of sexual assault victims to sexually transmitted infections (STI) or HIV has been used as a justification for elevated

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417 § 609.221(2009).
418 § 609.222.
419 § 609.223.
420 § 609.2231.
421 § 609.224.
422 § 609.17.
423 § 609.185.
424 § 609.19.
425 § 609.17.
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427 Minnesota Sentencing Guidelines app. (2009), available at Minnesota Statute ch. 244 App. VI.
428 See Appendix to Minnesota Sentencing Guidelines at Minnesota Statute ch. 244 App. VI.
prison sentences. In *State v. Vance*, a man who sexually assaulted a 16-year old girl received a prison sentence twenty-nine months higher than usual due to (1) his victim’s young age, and (2) the fact that he infected her with both venereal warts and pubic lice. In *Perkins v. State*, a man with AIDS received the statutory maximum of thirty years in prison for a sexual assault (three times higher than the sentence recommended by guidelines).

HIV-positive criminal defendants may receive enhanced sentences regardless of whether they transmit HIV to sexual assault victims. At the time of trial in *Perkins*, it was not made public whether or not the woman involved was infected with HIV but such facts were not necessary for the enhanced sentencing. The trial judge who sentenced the HIV-positive man remarked that he could not “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. The victim of this offense will not know for several months whether or not she contracted the HIV virus.”

**Note on civil commitment:** Under the “civil commitment” laws of Minnesota, an individual found to be “sexually dangerous,” a “sexual psychopathic,” or “mentally ill and dangerous” can be indefinitely confined by the state to protect the public safety. New York State has attempted to use a similar law to impose further punishments for HIV exposure (See New York). In 2008, a civil commitment proceeding was initiated against an HIV-positive man in *In re Renz*. Renz appealed his commitment for being “mentally ill and dangerous,” arguing that though he is mentally ill he is not dangerous and his commitment should only be for his mental illness. To be confined as “mentally ill and dangerous”, in addition to having a mental illness, the person must present a “clear danger to the safety of others” because she/he has “engaged in an overt act causing or attempting to cause serious physical harm to another” and there is a “substantial likelihood that the person will engage in acts capable of inflicting serious harm on another.” Renz contended that there was no clear and convincing evidence that he engaged in any act causing or attempting to cause physical harm to another.

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433 Perkins v. State, 559 N.W.2d 678, 683-85 (Minn. 1997); see also State v. Sebasky, 547 N.W.2d 93, 100-101 (affirming a triple departure from the recommended sentence for criminal sexual conduct where defendant knew he was HIV-positive while sexually abusing two boys), denial of post-conviction relief affirmed by Sebasky v. State, No. A05-507, 2006 WL 463619 at *1 (Minn. Ct. App. Feb. 28, 2006).

434 Perkins, 559 N.W.2d at 682, 684.

435 Id. at 684.

436 MINN. STAT. § 253B.185 (2007), amended by 2010 Minn. Sess. Law Serv. Ch. 300 (S.F. 2713), Ch. 357 (H.F. 2612), Ch. 385 (H.F. 3787).


438 There are stark differences between being committed for being “mentally ill” versus commitment for “mentally ill and dangerous.” This includes the place and duration of commitment as well as the procedures for being discharged. See MINN. STAT. §§ 253B.09, 253B.18 (2006).

The court held that because Renz knew his HIV status and engaged in unprotected, undisclosed sex with his partners such activity was a danger to others. The court reasoned that because of Renz’s history of unprotected sex, as evidenced by his contracting gonorrhea and syphilis, he presented a danger despite the fact that there was no evidence of a specific person or instance of such sexual conduct. The court also noted that though earlier case law held that any commitment of an HIV-positive person who intended to have sexual intercourse with others without advising them of his HIV status had to be addressed by the Health Threat Procedures Act rather than civil commitment, one’s HIV status would not preclude civil commitment if other requirements of the law were met. Here, the court found that due to Renz’s sexual history he met the requirements for commitment as mentally ill and dangerous.

Minnesota’s civil commitment laws are also in the process of amendment.

**Note on coercion:** Under Minnesota victims’ rights laws, any individual coerced into sex work by another person may pursue a civil action against that person. Evidence of “coercion” may include “exploiting HIV status, particularly where the defendant’s previous coercion led to the HIV exposure.”

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440 In re Stilinovich, 479 N.W.2d 731, 735-36 (Minn. Ct. App. 1992) (finding the use of Minnesota’s “psychopathic personality” statute inappropriate for civil commitment where HIV-positive defendant failed to show concern for the risk of HIV transmission through sexual intercourse). *In re Stilinovich* pre-dates Minnesota’s HIV exposure and “sexually dangerous person” laws.

441 For a general overview of Minnesota’s civil commitment laws, please see House Research, Minnesota House of Representatives, Minnesota Civil Commitment System for Sexually Dangerous Persons, http://www.house.leg.state.mn.us/hrd/pubs/ss/sscivct.htm (last visited Aug. 1, 2010).

442 MINN. STAT. § 611A.81 (2009).

443 § 611A.80(2)/(22).
Mississippi Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**MISS. CODE ANN. § 97-27-14(1)**

*Exposure to HIV, hepatitis B or hepatitis C*

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.

**MISS. CODE ANN. § 97-27-14(2)**

*Endangerment by Bodily Substance with knowledge of HIV status*

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.

**MISS. CODE ANN. § 97-27-14(3)**

*Penalties for felony HIV exposure or Endangerment by Bodily Fluids*

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.

A broad range of HIV exposures may result in imprisonment.

In Mississippi, it is a felony punishable by up to ten years in prison and/or a $10,000 fine if an HIV-positive person knowingly exposes another to HIV.\(^{444}\)

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\(^{444}\) MISS. CODE ANN. § 97-27-14(1) (West 2010).
Neither the intent to transmit HIV nor actual transmission is required for conviction.

It is a defense to prosecution if the complainant (1) is aware of the other’s HIV status and (2) willingly consents to HIV exposure. Disclosure is a complete defense in Mississippi; however, proving disclosure of HIV status during private, sexual encounters is difficult without witnesses or documentation. Whether or not disclosure actually occurred is often to interpretation and always depends on the words of one person against another.

The only prosecution on record for HIV exposure in Mississippi occurred in October 2008, when a 28-year-old wife pleaded guilty to knowingly exposing her husband to HIV after she failed to tell him that she was HIV-positive. The woman allegedly knew she was HIV-positive since 1997, but never told her husband, whom she married in 2003. Under the terms of her plea agreement, she received a ten-year prison sentence, with nine years suspended and one year to be served under house arrest. Neither the woman’s ex-husband nor her five-year-old son tested positive for HIV though such facts play no role in a prosecution.

Exposing prisoners, prison guards, or prison visitors to bodily fluids is prohibited.

Mississippi’s HIV statute specifically targets HIV-positive inmates who throw or otherwise expose others to their bodily fluids during confrontations. It is a misdemeanor punishable by up to one year in jail and/or a $1,000 fine if a person attempts to cause or knowingly causes a corrections employee, visitor to a correctional facility, or fellow prisoner or offender to come into contact with her/his blood, seminal fluid, urine, feces, or saliva. A violation of this law becomes a felony, punishable by up to ten years in prison and/or a $10,000 fine, if an individual convicted knew that she/he was HIV-positive.

This “bodily substance” statute may cover a large class of persons beyond prisoners and prison guards. Under the terms of this statute, “offenders” include anyone in the custody of the department of corrections and “prisoners” include anyone confined in a city or county jail. “Corrections employees” include any employee of an agency or department responsible for operating a jail, prison, or correctional facility, or anyone working in these facilities. Exposing visitors to these facilities is also criminalized.

Neither the intent to transmit HIV nor actual transmission is required.

This statute imposes additional fines and prison sentences for offenders who are HIV positive, regardless of whether they expose others to a risk of HIV infection. An HIV-positive offender will

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446 MISS. CODE ANN. § 97-27-14(4) (West 2010).
447 § 97-27-14(2).
448 § 97-27-14(3).
452 § 97-27-14(2)(a).
serve up to ten times more prison time than an HIV-negative offender even if the “bodily substance” in question is urine, feces, or saliva, which pose only theoretical risks of HIV infection.

Furthermore, because attempting to expose others to bodily substances is punishable, it is not a defense that these substances did not come into contact with another or that HIV transmission was impossible under the circumstances.

**Violating a quarantine order of the health department is a felony.**

Imprisonment may result from violating directions from the state health department. HIV-positive persons may be mandated by the health department to disclose their HIV status to sexual partners and avoid intravenous drug use.

Under the public health and quarantine laws of Mississippi, the state department of health is authorized to “investigate and control the causes of epidemic, infectious and other disease affecting the public health.” Part of this authority includes the power to “establish, maintain and enforce isolation and quarantine,” and “to exercise such physical control over property and individuals as the department may find necessary for the protection of the public health.” It is a felony, punishable by up to five years in prison and/or a $5,000 fine, for an individual afflicted with a “life-threatening communicable disease” to willfully violate an order of the state health department issued under this authority.

Individuals living with HIV in Mississippi should be aware that this public health law has been used to prosecute at least one HIV-positive person for failing to disclose his HIV status to sexual partners. In *Carter v. State*, 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.

The only impetus for the defendant's quarantine order was a positive test for HIV. Under the terms of the order, using protection during sexual intercourse was not a defense.

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453 MISS. CODE ANN. § 41-23-5 (West 2010).
454 § 41-23-5.
455 MISS. CODE ANN. § 41-23-2 (West 2010).
457 Id. at 1192-93.
Missouri Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.
Missouri’s criminal HIV exposure statute makes it a felony punishable by up to fifteen years in prison, or as many as thirty years imprisonment if HIV is transmitted, for an HIV-positive person who knows her/his status to expose another person’s mucus membrane or non-intact skin to blood, semen, or vaginal fluids through various activities, including “sexual activities.”\textsuperscript{458} The statute does not define “sexual activities” but because the semen and vaginal fluids must come into contact with

\textsuperscript{458} \textsc{Mo. Rev. Stat. §§} 558.011, 565.085 (West 2010)
a person’s mucus membrane, “sexual activities” would include sexual intercourse, anal sex, and oral sex.

The only affirmative defense to this statute is if one has disclosed her/his HIV status to sexual partners prior to engaging in sexual conduct. Disclosure of HIV status can be difficult to prove in court, as the only evidence available is often the word of one party against that of another.

In *State v. Yonts*, a 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 *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 complainant did not test positive for HIV but such facts were irrelevant to the prosecution.

It is difficult to comprehend how a jury could possibly find the defendant’s actions “reckless” when the complainant still engaged in unprotected sex with full knowledge of the man’s status. This case serves as a stark example of the difficulty in defending oneself against accusations of HIV exposure and proving disclosure to sexual partners under criminal HIV transmission statutes. These statutes not only penalize persons based on HIV status, they also result in disclosure of HIV status to the public via sensationalized news media reports, including photos and personal information regarding the defendant. Conviction leads to a felony on one’s record that could severely impact one’s life and career after release from imprisonment.

It is specifically noted in the statute that disclosure is the only affirmative defense to prosecution. Any unprotected sexual contact can be considered reckless. In *State v. 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’s mucus membrane 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

459 State v. Wilson, 256 S.W.3d 58, 64 (Mo. 2008) (“The statute is unambiguous that one who knows he is HIV positive is reckless [and subject to prosecution] if he has sexual intercourse with another without making the other person aware of his HIV status.” Neither condom use nor ejaculating outside of the body is a defense).
460 84 S.W.3d 516 (Mo. Ct. App. 2002) (appealed on the sole issue of whether trial court erred is allow evidence of how defendant may have contracted HIV over the defense’s objection. The court found that the evidence was not prejudicial enough to deprive the defendant of a fair trial).
461 Id.
462 Id. at 518.
463 MO. REV. STAT. § 565.08(4) (West 2010)
464 Wilson, 256 S.W.3d at 64.
465 Wilson, 256 S.W. 3d 58.
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.

The Missouri statute has been unsuccessfully challenged for being unconstitutionally vague. In State v. Mahan, the Missouri Supreme Court consolidated 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 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.

One notable aspect of Missouri’s law is that one can be prosecuted under this statute if, in addition to HIV, the defendant tests positive for syphilis, gonorrhea, or chlamydia. Positive test results for STIs are used by Missouri officials to show that HIV-positive persons are engaging in unprotected sex. This statute allows prosecutors to more easily prosecute HIV-positive persons charged with failing to tell a sexual partner about their HIV status because as opposed to relying on facts and witness testimony, prosecutors can rely on the defendant’s medical records to prove that she/he was “recklessly” having unprotected sex and placing others at risk. This segment of the statute all but eliminates the need for complainant testimony and other evidence to prove whether or not the defendant engaged in undisclosed, “reckless” sex. This unjustly prosecutes persons based on their medical history as opposed to the facts of a case.

466 Id. (the court also noted that the State had provided evidence that HIV can be transmitted by sexual fluids even if the actor withdraws prior to ejaculation).
467 State v. Mahan, 971 S.W.2d 307 (Mo. 1998)
468 Id.
469 Id. at 312. (it is important to note that there have been many scientific studies since State v. Mahan concluding that HIV has a very low rate of transmission even in the most aggravating of circumstances).
471 The Centers for Disease Control and Prevention (CDC) have found that persons who are infected with syphilis are two-five times more likely to acquire HIV when exposed to the virus because the sores, ulcers, or breaks in skin or mucus membrane caused by syphilis break down the barriers against infection. CDC Fact Sheet: Syphilis, Ctr. for Disease Control and Prevention, Dec. 2007, http://www.cdc.gov/std/syphilis/syphilis-fact-sheet.pdf. The CDC has also found that people with gonorrhea can more easily contract and transmit HIV. CDC Fact Sheet: Gonorrhea, Ctr. for Disease Control and Prevention, Dec 2007, http://www.cdc.gov/std/chlamydia/ChlamydiaFactSheet-lowres-2010.pdf . And
The Missouri statute also provides that if a complainant tests positive for HIV and one of her/his former sexual partners is found to be HIV positive, this would be enough to bring a charge of HIV exposure. Under the statute the prosecution would have to prove a sexual relationship existed between the complainant and HIV-positive defendant and that the HIV-positive defendant knew of her/his HIV-positive status at the time of the sexual activity. This statute enables prosecutions of persons where, without direct evidence as to the actual source of the infection, the defendant can face up to thirty years imprisonment for transmitting HIV.

Other cases and prosecutions for exposing persons to HIV in Missouri include:

- In 2004, a man pleaded guilty and was sentenced to fifteen years imprisonment for five counts of exposing his sexual partners to HIV without disclosing his HIV status.

- An HIV-positive man was convicted of two counts of exposing his sexual partners to HIV and was sentenced to ten years imprisonment in addition to being convicted as a sex offender.

- A man was convicted of exposing his ex-girlfriend to HIV because he failed to tell her that he was HIV-positive.

- In 2000, an HIV-positive man was convicted of exposing his former girlfriend to HIV and was sentenced to five years imprisonment. His sentence was later suspended and he was placed on five years probation and fined $5000.

- A 43-year-old man was arrested for failing to disclose his HIV status to his sexual partners.

- In 2009, a 40-year-old HIV-positive man was charged with exposing his sexual partner to HIV after allegedly failing to disclose his HIV status.

Sexually violent predator statutes have been applied to persons in Missouri based solely on their HIV-positive status.

In the Missouri Court of Appeals case, In re Coffel, an HIV-positive woman’s status was the


472 MO. REV. STAT. § 191.677(1)(2)(c)(c) (West 2010)

473 Id.


475 In one case an HIV-negative man was convicted of attempted murder and sentenced to life imprisonment for injecting his son with HIV-positive blood. This case did not involve a prosecution based on the defendant’s HIV status, because the defendant was HIV-negative, but rather involved the prosecution of a man who tried to murder his son using HIV positive blood. State v. Stewart, 18 S.W.3d 75 (Mo. Ct. App. 2000).


481 Missouri man with HIV charged with reckless sexual contact, Kansas City Star (MO), Sept. 23, 2009, no page available.
determining factor in her three year civil confinement as a sexually violent predator. Missouri defines a sexually violent predator as “any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who [...] has pled guilty or been found guilty [...] of a sexually violent offense.”

Coffel 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.

This case highlights the extent to which a person’s HIV status can be erroneously applied in civil confinement and sexually violent predator status.

Acts known not to transmit HIV, such as spitting, are punishable by felony penalties of five to thirty years imprisonment.

Under Missouri’s exposure statute it is a felony to bite, or by acting purposefully in any other manner, to expose someone to the semen, vaginal secretions, or blood of an HIV-positive person. The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.” The CDC has also

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482 In re Coffel, 117 S.W.3d 116 (Mo. Ct. App. 2003)
484 In most cases involving spitting individuals have been charged under the specific HIV-criminalization statute. However, in November 2010 a man who claimed he had HIV was charged with two counts of assault for allegedly threatening and spitting on police officers. Kathryn Wall, Man claiming he has HIV charged in assault on officers, NEWS-LEADER.COM, Nov. 2, 2010, http://www.news-leader.com/article/20101102/NEWS01/11020343/Man-claiming-hes-HIV-charged-in-assault-on-officers.
concluded that spitting alone has never been shown to transmit HIV.\footnote{C\textsc{tr.} f\textsc{or} D\textsc{isease} C\textsc{ontrol} \& P\textsc{revention}, H\textsc{iv} Transmission: \emph{Can Hiv' be transmitted through by being spit on by an H\textsc{iv}' infected person?}, (March 25, 2010) \url{http://www.cdc.gov/hiv/resources/qa/transmission.htm} (last visited Oct. 19, 2010).} Missouri’s statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

In 2010, an HIV-positive man was charged with exposure to HIV for spitting at a police officer.\footnote{\textit{Seymour Man Charged with Recklessly Exposing Someone to HIV}, K\textsc{sp}r \textsc{n}ews, June 1, 2010, \url{http://www.kspr.com/news/local/95346789.html}}

In a case from 2004, an HIV-positive man was arrested for knowingly exposing another to HIV after he bit a police officer.\footnote{\textit{Man accused of Hiv' exposure}, K\textsc{ansas C\textsc{ity} S\textsc{tar}} (\textsc{mo}), June 11, 2004, at B4.} Though the man had been intoxicated, as his blood alcohol level was twice the legal limit, and probably had no intention of transmitting HIV, the prosecutor noted that “the law doesn’t distinguish between whether he intended to give the officer HIV or not. The mere fact that he bit him constitutes reckless exposure, and he can be charged and convicted for that.”\footnote{\textit{Id.}}

This statute is unduly harsh and punishes activities that not only are not known to transmit HIV but also can apply to individuals who have no intention to transmit HIV.

\textbf{It is a felony to expose prison guards, prison visitors, and others prisoners to HIV through bodily fluids.}

In Missouri, it is a class D felony, punishable by up to four years in prison\footnote{Mo. Ann. Stat. § 558.011 (West 2010).} for a HIV-negative person in confinement to attempt to cause or knowingly cause a correctional employee,\footnote{A “correctional employee” receiving protection under this statute includes any person who is an employee of any department or agency responsible for operating a jail, prison, correctional facility, or sex offender treatment center or any person assigned to work in these locations. Mo. Ann. Stat. § 565.085(2)(1) (West 2010).} visitor to a correctional facility, or fellow prisoner to come into contact with her/his blood, semen, urine, feces, or saliva.\footnote{Mo. Ann. Stat. § 565.085 (West 2010).} A violation of this statute becomes a Class C felony, punishable by up to seven years in prison\footnote{§ 558.011} if the incarcerated person is infected with HIV, hepatitis B, or hepatitis C.\footnote{§ 558.011(3)} Areas of confinement covered by this statute include prisons, jails, sex offender treatment centers, and any other correctional facilities.\footnote{§ 565.085} Neither intent to transmit HIV nor is actual transmission required for prosecution.

This “endangerment” statute imposes specific penalties for offenders who are HIV-positive, even if they expose others to fluids that cannot transmit HIV or attempt to expose others to the bodily fluids listed. It is not a defense if HIV transmission was impossible under the circumstances. This statute is not based on scientific evidence but rather fear and stigma and perpetuates ignorance about HIV transmission.
Under this statute, there is also a risk of prosecution if a prisoner begins to bleed during a fight and a complainant claims that he was intentionally exposed to the blood. The facts surrounding sporadic fights are hard to determine, and because juries often consider the testimony of HIV-positive criminal defendants less credible than an HIV-negative complainants regarding HIV exposure, this statute has the unfair potential of imposing additional prison sentences for HIV-positive inmates who accidentally and unintentionally expose others to their blood due to an injury sustained during a fight.

**HIV-positive persons face potential criminal penalties if they donate blood, organs, semen, or tissue unless such donation is for medical research.**

It is a Class B felony, carrying a sentence of five to fifteen years, for an HIV-positive person to donate any blood, blood products, organs, sperm or tissue, unless the donation is for medical research.\(^{497}\)

**It is a felony for an HIV-positive person to share needles and not disclose one’s HIV status.**

If HIV-positive persons fail to disclosure their HIV status to fellow needle sharers it is a Class B felony punishable by five to fifteen years in prison.\(^{498}\) However, if the complainant tests positive for HIV then the HIV-positive defendant can be sentenced to a Class A felony with the possibility of ten to thirty years imprisonment.\(^{499}\)

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

Montana Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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 (MONT. CODE ANN. § 50-80-101).

Exposing another to an STI, including HIV, is punishable via a communicable disease control statute.

It is a misdemeanor, punishable by up to six months in county jail and/or a $500 fine, for a person with a sexually transmitted disease to “knowingly” expose another to that disease. HIV is considered an STD for the purposes of this exposure law. Though this statute may target HIV, at the time of the manual’s publication, there has been no recorded prosecution of HIV exposure. Also, communicable disease statutes tend to go unenforced for any STI exposure, including HIV. (See Introduction).

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Nebraska Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No explicit statute

There are no statutes explicitly criminalizing HIV transmission or exposure in Nebraska. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, we are not aware of a criminal prosecution of an individual on the basis of that person’s HIV status in Nebraska.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.
NEVADA STATUTE(S) THAT ALLOW FOR CRIMINAL PROSECUTION BASED ON HIV STATUS:

**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.

**HIV positive persons are prohibited from engaging in conduct known to transmit HIV.**

In Nevada, it is a class B felony, punishable by two to ten years in prison and/or a fine of up to $10,000, for a person who knows she/he is HIV-positive to intentionally engage in conduct that is intended or likely to transmit the disease to another person. Actual transmission of HIV is not required under the statute.

Though the statute is entitled “intentional transmission” of HIV neither intent to expose another to HIV nor transmission is required. A person must only engage in conduct “likely to transmit HIV” regardless of any specific intent to expose another person to HIV. Conduct “likely to transmit” HIV is not defined under the statute.

Nevada law provides an affirmative defense to the intentional transmission of HIV if the other person who was subject to possible HIV exposure knew the defendant was HIV positive, knew that the conduct in which they were engaging could lead to HIV exposure, and voluntarily engaged in the conduct. This most likely applies to sexual activities or needle sharing, although the statute does not explicitly define such conduct. At a minimum, disclosure must occur prior to engaging in any acts known to transmit HIV. It may be difficult to prove whether one’s HIV status was disclosed in the course of private sexual activities, because whether or not disclosure actually occurred is often open to interpretation and always depends on the words of one person against another. Condom use without disclosure is not a defense to prosecution.

In June 2010, in what appears to be a case of first impression under the statute, two men were charged with felony intentional transmission of HIV for engaging in sex with an HIV-negative man whom they had met on Adam4Adam, a male dating website. One of the defendant’s, who has an undetectable viral load, HIV status was prominently displayed on his dating profile and he maintains that the claimant was fully aware of his HIV status. In exchange for a guilty plea, the felony charges

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504 Prior to this incident, at least one case held that a person’s HIV status is relevant to whether there was consent during sexual intercourse. In *Shelton v. State*, the court held that the defendant’s HIV status was relevant for determining whether the complainant in the case had agreed to engage in unprotected oral sex. 2009 WL 1490929 (Nev. 2009). The defendant was convicted of first degree kidnapping, sexual assault of a minor under 16 years of age, battery with the intent to commit sexual assault of a minor under 16 years of age, and the use of a minor in the production of pornography.

505 Interview with defendant and his attorney, names have been omitted to protect the identities of the parties (November 11, 2010).
were reduced to gross misdemeanor charges for intentional transmission of HIV carrying a maximum sentence of one year in county jail.

Engaging in acts of prostitution while HIV positive can result in felony charges.

Nevada is the only state that has legalized prostitution and it is a misdemeanor for anyone to engage in prostitution except in a licensed “house of prostitution.”606 As prostitution is regulated, sex workers must be tested monthly for HIV and STIs and are required to wear latex condoms.607 In Nevada, it is a class B felony, punishable by two to ten years in prison and/or a fine of up to $10,000, for an HIV positive sex worker to engage in licensed or unlicensed sex work after knowledge of his/her HIV positive status.

In Glegola v. State, 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.608 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 sentence609 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.”610 The “legislature did not intend for the unsuspecting client to be fatally infected […] [and as such] her crime should be treated differently [as] it is much more serious and obviously much more deadly than an ordinary crime of mere solicitation defined as a misdemeanor.”611

Such severe sentences may create an incentive for unlicensed prostitutes (who are not mandated by the state to do monthly HIV testing) to avoid being tested for HIV. If unlicensed prostitutes continue to work without knowledge of their HIV status they, at worst, face a misdemeanor conviction for being unlicensed carrying a sentence of no more than six months. However, if they continue to work knowing their HIV status they can face felony penalties of up to ten years imprisonment.

Nevada also imposes penalties on HIV positive persons for failing to comply with health authorities.

An HIV-positive person who ignores or fails to comply with orders from health authorities, and engages in behavior known to transmit HIV, may be subject to confinement and criminal penalties.612 There are no records of a person being subject to prosecution or penalties under this

606 NEV. REV. STAT. § 244.345 (West 2010).
607 NEV. ADMIN. CODE § 441A.800-815 (2010).
608 871 P.2d at 950 (Nev. 1994).
609 Since the decision in Glegola, the penalties for violating NEV. REV. STAT. § 201.358 have been revised, decreasing the maximum sentence to ten years from fifteen years.
610 Glegola v. State, 81 P.2d at 953.
611 Id.
statute.

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New Hampshire Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No explicit statute criminalizing HIV exposure but prosecutions have arisen under general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in New Hampshire. However, there has been at least one prosecution for HIV exposure under the state’s general criminal laws.

In the 2002 case, State v. CJ, 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. Though there is no law specifically targeting HIV exposure, HIV positive persons should disclose their status and/or wear condoms or other protection during sex.

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514 Id. See also N.H. REV. STAT. ANN § 631:2(b) (2010); N.H. REV. STAT. ANN. § 631:3(2010).
New Jersey Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

**N.J. STAT. ANN. §§ 2C:43-6; 2C:43-3**

*Sentence for imprisonment of a crime: Third Degree*

A crime of the third degree shall be punishable between three years and five years imprisonment and/or a maximum fine of $15,000.

An HIV positive person must disclose her/his status to sexual partners.

In New Jersey a person who knows that she/he is HIV-positive may be criminally liable for a crime punishable by up to five years in prison and/or up to a $15,000 fine for having sex with another person without disclosing her/his HIV status.\(^{515}\) Neither intent nor actual transmission of HIV is necessary for conviction.

In March 2010, a twenty-year-old HIV-positive man was charged under New Jersey’s diseased persons statute for having sexual relations with two women without disclosing his HIV status.\(^{516}\) It is not known whether either woman tested positive for HIV but such facts are irrelevant to prosecution.

**HIV positive persons have been prosecuted under general criminal laws, including attempted murder, in HIV exposure cases.**

In *State v. Smith*, the New Jersey Superior Court Appellate Division upheld the conviction and twenty-five year sentence of an HIV positive inmate who was found guilty of attempted murder, aggravated assault, and terrorist threats for biting a corrections officer.\(^{517}\) The correctional officer did not test positive for HIV but that was not relevant to the prosecution. The court acknowledged


\(^{517}\) 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993). This case was tried prior to New Jersey’s diseased person’s statute being amended in 1997 to include HIV.
that there was only a theoretical possibility that HIV is transmitted through biting or saliva, but the conviction was upheld because the defendant subjectively believed he could cause the death of the corrections officer and intended to do so.\textsuperscript{518}

The defendant offered evidence at trial and on his appeal that he knew that HIV could not be transmitted through biting because he had been counseled on the matter from various health professionals, and therefore, his threats were only made to take “advantage of the ignorance and fears of his jailors.”\textsuperscript{519} The court discounted this evidence and instead relied upon the threats the defendant made to the correctional as sufficient evidence that the defendant subjectively believed that HIV could be transmitted via a bite and saliva and therefore intended to infect the correctional officer with HIV. Although such transmission would have been an impossibility, impossibility is not a defense under New Jersey law.\textsuperscript{520}

In 1994, a 17-year-old woman was charged as an adult on charges of attempted murder and aggravated assault for biting a juvenile detention officer, with the possible sentence of twenty-five years imprisonment.\textsuperscript{521} At the time of the indictment it was not confirmed if the girl had tested positive for HIV, only that “she believ[ed] she” had HIV.

In another case, the New Jersey Superior Court Law Division found that a hypodermic needle purportedly infected with HIV is a deadly weapon.\textsuperscript{522} A deadly weapon is defined as an object “which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury.”\textsuperscript{523}

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\textsuperscript{518} Id.
\textsuperscript{519} Id. at 511-14.
\textsuperscript{520} Id. at 511.
\textsuperscript{521} Joseph F. Sullivan, *Girl Who Thinks She has AIDS to Stand Trial for Biting of Guard*, N.Y. TIMES, Aug. 31, 1994, at B6. This case also occurred prior to New Jersey amending its diseased person’s statute.
\textsuperscript{523} Id. at 331.
No specific statute on record.

New Mexico Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No explicit statute

There are no statutes explicitly criminalizing HIV transmission or exposure in New Mexico. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault.

At the time of this publication, the only criminal prosecution that the authors were aware of was that of an HIV-positive woman was charged with battery for licking the cheek and mouth of a police officer.524 The news article did not make clear whether the battery charge was based off of the woman’s HIV status.

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New York Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.”

New York law is not defined on whether there are criminal penalties for HIV exposure.

In New York, a person who is aware that she/he is living with an infectious venereal disease may be guilty of a misdemeanor if she/he has sexual intercourse with another person. HIV is not identified as an infectious venereal disease under this statute but there is nothing preventing its inclusion. Neither the intent to transmit nor actual transmission of HIV is necessary for a conviction. The statute provides no indication of whether disclosure of one’s status, consent prior to engaging in sexual activity, or using protection would be a defense under the statute.

There are no reports of prosecutions of persons with HIV under this statute.

**HIV positive persons have been prosecuted under general criminal laws.**

In 1997 Nushawn Williams pleaded guilty to two counts of statutory rape and two counts of reckless endangerment and was sentenced to twelve years imprisonment. The Williams case was heavily covered in the media after local public health and law enforcement officials publicized it, claiming that Williams may have transmitted HIV to numerous women in upstate New York. As Williams’ sentence was nearing completion, on April 13, 2010, New York Attorney General Andrew Cuomo sought to keep Williams in indefinite civil confinement for sex offenders under the Sex Offender Management Treatment Act of 2007. A civil jury trial will determine whether or not he suffers from a mental abnormality and should be confined in a psychiatric facility or released under intensive supervision.

In **People v. 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.

New York courts have also found that HIV can be considered a “deadly weapon.” In 2007, an HIV positive man was found guilty of aggravated assault and sentenced to ten years in prison for biting a police officer. In that case, the judge found that the saliva of an HIV positive person could be

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526 Id.

527 525 N.Y.S.2d 752 (Suffolk County Ct. 1988).
considered a “deadly weapon” for the purposes of aggravated assault, despite the fact that there is no scientific evidence to support such a claim.\textsuperscript{528} In another case, \textit{People v. Nelson}\textsuperscript{529}, the court held that a hypodermic needle which the defendant claimed contained the AIDS virus, constituted a “dangerous instrument” under New York law.

At least one New York court has allowed access to medical records to determine a defendant’s HIV status for criminal charges. In an attempted assault and reckless endangerment case, the court granted the state’s motion to have access to the defendant’s medical records to prove whether or not she was HIV positive for the reckless endangerment charges.\textsuperscript{530} The Rockland County Court found that there was a “compelling need”\textsuperscript{531} to disclose the defendant’s confidential HIV information as the state needed to show whether the defendant biting the complainant created a grave risk of death or a depraved indifference to human life. Such claims could only be sustained if the defendant was HIV-positive.

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\textsuperscript{528} Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae in Support of Defendant-Appellant, X v. The People of New York, ___ N.Y. ___ (2010) (The identifying information has been redacted to protect the identity of the defendant. The brief can be found at http://www.hivlawandpolicy.org/resources/view/526).
\textsuperscript{529} 627 N.Y.S.2d 412 (N.Y. App. Div. 1995)
\textsuperscript{530} In re Gribetz, 605 N.Y.S.2d 834 (Rockland County Ct. 1994).
\textsuperscript{531} Id.
North Carolina Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

**N.C. GEN. STAT. ANN. § 103A-144**

*Investigation and control measures*

All persons shall comply with control measures, including submission to examinations and tests, prescribed by the Commission subject to the limitations of G.S. 130A-148.

**N.C. GEN. STAT. ANN. § 130A-25**

Violation of these control measures is a misdemeanor. Special provisions related to sentencing and release apply. But no person shall be imprisoned for longer than two years. No person shall be released prior to the completion of the term of imprisonment and it has been determined that the person is no longer be a danger to the public health.

HIV exposure is prohibited under the health code and can result in incarceration.

Although there is no specific HIV-related criminal transmission statute in North Carolina, HIV is considered a communicable disease requiring compliance with health regulations and control
measures governing the spread of such a disease. A maximum of two years imprisonment may occur from violating these regulations and individuals will not be released before the end of their sentence unless they are no longer considered a public danger by local authorities.

Condoms or other protection must be used during sexual intercourse and HIV status must be disclosed.

HIV-positive persons must notify all sexual partners that they have tested positive for HIV. If the date of infection is known, sexual or needle partners from that date forward must be notified of the individual’s HIV status. Otherwise, all such partners from the year prior to testing positive for HIV must be notified.

The North Carolina regulation does not provide guidance on what activities are considered “sexual intercourse” and whether oral sex or anal sex is included in the definition. Any acts of sexual intercourse require, under the statute, the use of condoms and disclosure.

In August 2008, a 23-year-old, HIV-positive man was sentenced to thirty months of probation for having unprotected sex with numerous partners. He was later sentenced to six months of house arrest for further acts of unprotected sex.

**HIV positive persons are prohibited from donating blood, organs, human tissue, semen, or breast milk.**

Under North Carolina’s Administrative Code, persons who are HIV-positive must not donate or sell blood, plasma, platelets, any other blood products, semen, ova, tissues, organs, or breast milk.

**Sharing needles while being HIV positive can result in criminal penalties.**

North Carolina’s Administrative Code prohibits individuals who are HIV-positive from sharing needles, syringes, or any other drug paraphernalia that may be contaminated with blood.

**HIV positive persons are also subject to general criminal laws in North Carolina.**

In many states, including North Carolina, HIV exposure is often prosecuted under general criminal laws such as assault or reckless endangerment. In 2009, a 41-year-old HIV-positive man was charged with assault and battery with intent to kill in North Carolina after biting his neighbor. The original simple assault and battery charge was upgraded for the sole reason that the alleged attacker was HIV-positive despite the fact the CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various

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532 N.C. GEN. STAT. § 130A-144(f) (2010).
533 § 130A-25(b)-(c) (2010)
aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”

The CDC has also concluded that spitting alone has never been shown to transmit HIV.

At least two courts have found that HIV is can be considered a “deadly weapon” for purposes of sexual assault cases. In 2005, a man was convicted of, among other charges, sexual assault with a deadly weapon inflicting serious injury and violation of control measures for having sex with an underage boy. The boy later tested positive for HIV but transmission is irrelevant for prosecution. In *State v. 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 HIV-positive when he sexually assaulted the minor victim, were properly joined with charges of first-degree statutory rape and taking indecent liberties with minor.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

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537 The control measure charges were dismissed due to the statute of limitations. *State v. Murphy*, 612 S.E.2d 694 (N.C. Ct. App. 2005).
538 State v. Murphy, 612 S.E.2d 694 (N.C. Ct. App. 2005).
539 *Id.*
North Dakota Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

**N.D. Cent. Code §12.1-32-01**

*Classification of Offenses: Class A Felony*

A class A felony is punishable by a maximum of twenty years imprisonment and/or a fine of ten thousand dollars.

### HIV status must be disclosed before sexual activity and condoms or other protections must be used.

In North Dakota, a person who is aware that she/he is HIV-positive may be criminally liable and face penalties of twenty years in prison and a $10,000 fine if she/he engages in sexual activity, including penile-vaginal sex, anal sex, and oral sex, with another person without disclosing her/his status. It is an affirmative defense if the HIV positive person disclosed her/his status and used condoms or other protection during the sexual activity.

Neither the intent nor actual transmission of HIV is necessary for a conviction under this statute. At the time of this publication there were no HIV related prosecutions for exposure in North Dakota.

### HIV positive persons may not share needles.

In North Dakota, a person who is aware that she/he is HIV-positive may be criminally liable if she/he transfers blood or bodily fluids to another person by allowing them to use a needle or syringe previously used by the HIV-positive person without first sterilizing it. Neither actual transmission nor intent to transmit HIV is necessary for a conviction.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This
information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.
Ohio Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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 2010

**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.

**OHIO REV. CODE ANN. §2929.14**

*Prison terms*

For a felony of the second degree: two, three, four, five, six, seven, or eight years.
For a felony of the third degree: one, two, three, four, or five years.
For a felony of the fourth degree: six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.
For a felony of the fifth degree: six, seven, eight, nine, ten, eleven, or twelve months.

**OHIO REV. CODE ANN. §2929.14**

*Possible financial sanctions*

For a felony of the second degree, not more than fifteen thousand dollars;
For a felony of the third degree, not more than ten thousand dollars;
For a felony of the fourth degree, not more than five thousand dollars;
For a felony of the fifth degree, not more than two thousand five hundred dollars.
HIV-positive persons can be prosecuted for failing to disclose their HIV status to sexual partners.

Ohio’s felonious assault statute specifically criminalizes failing to disclose one’s HIV-positive status to sexual partners. Under this statute it is also a felony punishable by up to eight years imprisonment for engaging in sexual conduct with a person who cannot appreciate one’s HIV status or engaging in such conduct with someone under the age of eighteen.

“Sexual conduct” includes penile-vaginal sex, anal sex, oral sex, and, without consent, the insertion, however slight, of any part of the body or any instrument that carries the bodily fluids of an HIV-positive person into another’s vagina or anus.541

The only affirmative defense to prosecution is the disclosure of one’s HIV status to sexual partners prior to engaging in any of the above mentioned conduct. The disclosure must be made prior to the first initial act of such conduct and using condoms or other forms of protection is not a defense.

Neither the intent to transmit HIV nor HIV transmission is required for prosecution.

Ohio’s felonious assault statute has survived constitutional challenges. In State v. 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 HIV-positive 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. Verbal disclosure was also held to be sufficient as the court reasoned it was disingenuous to suggest that written, signed, and notarized disclosure would be necessary to avoid prosecution.

541 OHIO REV. CODE ANN. § 2903.11(E)(4)(1996)
The court also held that thought there was a violation of the state’s HIV confidentiality statutes when the prosecution failed to obtain court authorization for Gonzalez’s HIV status, this was deemed “harmless error” because of the other evidence of the defendant’s HIV status.

As State v. Gonzalez demonstrates, it is very difficult to prove disclosure in court. In many of these cases, there is no proof that an HIV-positive person disclosed her/his status and the only evidence available is the testimony of the defendant, complainant, or other witnesses.

Below are other examples of prosecutions under Ohio’s felonious assault HIV exposure statute:

- In October 2010, a man was charged with felonious assault for allegedly failing to tell his wife that he was HIV positive.\footnote{Tom Giambroni, Husband Allegedly kept HIV a secret, MORNING JOURNAL, Oct. 2, 2010, available at http://www.morningjournalnews.com/page/content.detail/id/526618/Husband-allegedly-kept-HIV-a-secret.html?nav=5006} After the man was admitted to the hospital with pneumonia his doctor allegedly threatened to tell the man’s wife about his HIV status if the man didn’t disclose.

- In 2010, a 51-year-old HIV-positive man pleaded guilty to felonious assault and was sentenced to five years imprisonment for failing to tell his wife that he was HIV positive.\footnote{Gabriel Baird, Man who gave wife AIDS gets five years in prison, THE PLAIN DEALER, March 8 2010, available at http://blog.cleveland.com/metro/2010/03/man_who_gave_wife_aids_gets_5.html.} He was originally charged with attempted murder in addition to felonious assault.\footnote{Id. at 3. (vacating and remanding because the state failed to live up to its plea negotiations of recommending the defendant to a term of imprisonment of two to four years.).}

- An HIV-positive man pleaded guilty for failing to disclose his HIV status to his sexual partner.\footnote{State v. Jones, 2009 WL 4811329 (Ohio Ct. App. 2009).} He was originally sentenced to ten years imprisonment for felonious assault and for possessing cocaine.\footnote{State v. Russell, No. 09AP-226, 2009 WL 3090190 (Ohio Ct. App. Sept. 29, 2009).}

- In 2009, 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.\footnote{Id. at 3. (vacating and remanding because the state failed to live up to its plea negotiations of recommending the defendant to a term of imprisonment of two to four years.).}

- In 2006, an HIV-positive man was convicted of nine counts of felonious assault for exposing his sexual partner, who was under the age of 18-years-old and not his wife, to

\footnote{Felonious assault statutes also apply to persons who “knowingly cause physical harm to another.” OHIO REV. CODE ANN. § 2903.11(A)(1)(1996) A woman was convicted of attempted felonious assault for biting a hospital employee who was trying to restrain her. State v. Reif-Hill, 1998 WL 787389 (Ohio Ct. App. 1998). 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.}

\footnote{Gabriel Baird, Woman hopes tale can warn others after husband conceals illness, THE PLAIN DEALER, February 28, 2010 available at http://blog.cleveland.com/metro/2010/02/oman_hopes_she_can_warn_others.html}
HIV. He was sentenced to four years imprisonment and forced to register as a sex offender. The trial court ordered that the sentences be served consecutively. On appeal, the court found that the trial court’s determination of consecutive sentencing was proper because the defendant may have transmitted HIV to the complainant and because it was unclear how many other people the defendant may have exposed to HIV through unprotected sex.

• An HIV-positive man was sentenced to four years imprisonment for abduction and six years for felonious assault for failing to tell his sexual partner that he was HIV positive. The trial court ordered that the sentences be served consecutively. On appeal, the court found that the trial court’s determination of consecutive sentencing was proper because the defendant may have transmitted HIV to the complainant and because it was unclear how many other people the defendant may have exposed to HIV through unprotected sex.

• An HIV-positive man was sentenced to four years in jail under felonious assault charges for failing to tell his sexual partner that he was HIV-positive.

• An HIV-positive man pleaded guilty to two counts of felonious assault and was sentenced to twelve years imprisonment for failing to tell his sexual partners about his HIV status.

• In 2008, an HIV-positive man was charged with felonious assault for failing to disclose his HIV status to his sexual partner.

After being released from prison for felonious assault charges, HIV-positive persons may be subject to invasive parole and community control standards. In 2006, an HIV-positive man was sentenced to two years imprisonment for failing to tell his sexual partner that he was HIV-positive. A year later he was released and put on community control for five years. As part of his community control, the defendant could “have no sexual conduct with any individual without prior approval of the court.” During his community control, the defendant engaged in two sexual relationships, one with a man and one with a woman, both of whom knew of his HIV status, but only one of them (the woman) had received court approval. In the trial regarding whether the defendant had violated his community control sanctions by engaging in sexual relationship with the man without court approval the trial court found the defendant guilty and sentence him 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. The Ohio Court of Appeals was “concerned” about the breadth

551 A sex offender is classified as someone who is convicted of or pleads guilty to a sexually oriented offense. Felonious assault, when committed with a sexual motivation is a sexually oriented offense. Ohio Rev. Code Ann. § 2950.01(G)(1)(c)(West 2010). The court in this case found that because the defendant knew he was HIV positive and engaged in sexual conduct with a person under 18 years old, who was not his spouse, such conduct had a sexual motivation and therefore was a sexual oriented offense. The court upheld the defendant’s sexual offender status.
557 Id. at 644.
of the community control requiring court approval for sexual partners but found that the defendant failed to timely appeal the right to privacy issue and would therefore not address it.\textsuperscript{558} 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.”\textsuperscript{559} The court held that the defendant was in violation for failing to tell the trial court about his sexual relationship with man despite the fact that the man had full knowledge of defendant’s HIV status.

**HIV-positive persons can face criminal penalties for prostitution and solicitation of prostitution.**

It is a third degree felony for HIV-positive persons to solicit (advertising the illegal sale of sex for hire) or encourage another to solicit prostitution.\textsuperscript{560} It is a felony in the fifth degree for an HIV-positive person to “loiter to engage in prostitution.”\textsuperscript{561} For HIV-negative persons the charge is a misdemeanor in the third degree.\textsuperscript{562}

A person “loiters to engage in prostitution” when she/he tries to stop another person, engages or attempts to engage another in conversation, stops or attempts to stop the operator of a car, or approaches a stationary car with the intent to engage in sexual activity for hire while in or near a public place.\textsuperscript{563} A person can also be charged with loitering to engage in prostitution if she/he is the driver or passenger in a car and tries to do any of the aforementioned activities or entice another person to approach or enter the vehicle with the purpose of engaging in sexual activity for hire.

Under this statute it does not matter whether any sexual act was performed, if there was any possibility of transmitting HIV, or if there was an intent to transmit HIV. The mere discussion of engaging in sexual conduct for money is sufficient for prosecution. In \textit{State v. McPherson}\textsuperscript{564}, the appellant was found guilty of solicitation of prostitution while HIV-positive and was sentenced to three years imprisonment and forced to register as a sex offender. McPherson 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

\begin{footnotesize}
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\item \textsuperscript{558} \textit{Id.} at 646.
\item \textsuperscript{559} \textit{Id.} at 647.
\item \textsuperscript{560} \textsc{Ohio Rev. Code Ann.} \textsection{2907.24, 2907.25} (West 2010).
\item \textsuperscript{561} \textsc{Ohio Rev. Code Ann.} \textsection{2907.241(B)} (West 2010).
\item \textsuperscript{562} \textsection{2907.241(D)(1)}.
\item \textsuperscript{563} \textsection{2907.241(A)}.
\item \textsuperscript{564} 758 N.E.2d 1198 (Ohio Ct. App. 2001).
\end{itemize}
\end{footnotesize}
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.

Other examples of prosecutions for solicitation and prostitution after an HIV-positive test include:

- An HIV-positive woman was convicted of two counts of soliciting another to engage in sexual activity for hire after a positive HIV test.\(^{565}\) She was sentenced to four years imprisonment, each charge to be served concurrently.

- In 2000, an HIV-positive man was convicted of solicitation while being HIV-positive and was sentenced to two years imprisonment.\(^{566}\)

- A 25-year-old HIV-positive man was arrested for attempted solicitation of prostitution while knowing he was HIV-positive.\(^{567}\)

- In 2010, an HIV-positive woman was charged with solicitation after testing positive for HIV.\(^{568}\)

- In 2003, a woman was sentenced to two years imprisonment for solicitation after testing positive for HIV.\(^{569}\)

**HIV-positive persons face penalties for exposing others to any bodily fluid.**

Under Ohio’s harassment by inmate statute HIV-positive persons can face third degree felony charges for exposing any other person to their urine, feces, saliva, blood, or any other bodily substance with the intent to annoy, threaten, alarm, or harass.\(^ {570}\) Though the statute is named “harassment by inmate” a person does not have to be imprisoned or in confinement to be prosecuted under this statute.

HIV-positive persons face increased sentences despite the fact that many of the bodily substances at issue present no risk risks of transmitting HIV. Urine, feces, and saliva are not known transmitters of HIV but despite these facts HIV-positive persons can face five years imprisonment for exposing others to these fluids while HIV-negative persons only face a maximum of one year imprisonment. Many of the cases under this statute arise from people spitting at or throwing urine at law enforcement officials. Neither act is known to transmit HIV.

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\(^{570}\) OHIO REV. CODE ANN. §2921.38(c)(West 2010).
In *State v. Thompson*, the HIV-positive defendant was a prisoner at the Southern Ohio Correctional Facility (“SOCF”) and threw a cup full of feces at a nurse employed by SOCF. The feces hit her in the face, hair, arms, chest and leg. 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. If one is imprisoned and convicted under the harassment by inmate statute she/he may face penalties implemented by the prison system as well as additional sentences forced by the courts.

In *State v. Lewis*, an HIV-positive man was found guilty of nine counts of third degree felony harassment by an inmate charges, one count of intimidation by a public servant, and was sentenced to twenty years imprisonment. The appellant denied he was HIV-positive and though the state produced medical records stating that the appellant had been diagnosed in 1996 those medical records had not been given to the appellant during the discovery phase of the trial. The appellant argued at trial that he needed to obtain exculpatory lab tests proving that he was HIV-negative and asked for a continuance, which was denied, to prepare this defense. On appeal the Ohio Court of Appeals found that the trial court abused its discretion by admitting the medical records on the first day of the trial before the defendant had time to prepare a defense and rebut the prosecution's assertion that he was HIV positive. The conviction was reversed and the case remanded.

Other prosecutions and cases under the harassment by inmate statute include:

- In 2010, a 41-year-old HIV-positive man was charged with harassment by an inmate, among other charges, for spitting in the eye of an officer after trying to break into a convenience store.

- A 48-year-old HIV-positive man was charged with two counts of harassment by an inmate for spitting at a police officer.

The CDC has long maintained that saliva, urine, and feces are not means of transmitting HIV.

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571 726 N.E.2d 530 (Ohio Ct. App. 1999).
573 *Akron Police Say Man Spit on Officer, Store Break-In Suspect says he's HIV positive, Akron Beacon Journal*, Feb. 17, 2010 at B10.
HIV-positive persons are prohibited from donating or selling blood or plasma.

It is a felony, punishable by up to eighteen months imprisonment, for an HIV-positive person to donate or sell her/his blood, plasma, or any other blood product.

HIV-positive persons have been incarcerated for using saliva as a “deadly weapon.” Ohio’s felonious attempt statute, in addition to prosecuting persons for failing to disclose their HIV status to sexual partners, has also been used to prosecute HIV-positive persons for using their saliva or other bodily fluid as a “deadly weapon.” Under the felonious assault statute, “no person shall knowingly [...] cause or attempt to cause physical harm to another or another’s unborn by means of a deadly weapon.” In multiple cases, Ohio courts have determined that any spit of an HIV-positive person containing a mixture of blood and saliva is a “deadly weapon.”

In *State v. Price*, the appellant, an HIV-positive hemophiliac, spat at and bit a police officer. He was indicted on one count of felonious assault, one count of attempted felonious assault, and one count of assault on a peace officer. He was sentenced to six years imprisonment because the court found that his spit and saliva constituted a deadly weapon.

On appeal, the appellant argued that his spit and saliva should not be considered a deadly weapon. A “deadly weapon” is defined as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.” During the trial the defendant’s treating physicians testified that though there is only a remote risk of transmitting HIV via saliva, because the defendant is a hemophiliac, his saliva would have blood in it a majority of the time and as such there would be a potentially high concentration of the HIV virus. The Ohio Court of Appeals determined, based on this testimony, that because the appellant was HIV-positive and a hemophiliac, his saliva was a deadly weapon. The court reasoned that the appellant was correctly convicted under the felonious assault statute because he knew about his illness, knew that “his saliva was a deadly weapon,” and still assaulted the officer.

In a similar case, *State v. Branch*, the HIV-positive defendant spit in the eye of a police officer and was arrested for felonious assault and attempt. He was sentenced to four years imprisonment. At trial there was evidence to suggest that the spit may have contained blood. The medical examiner testified that there was a small risk of getting HIV from spitting when the saliva contains blood but that saliva alone is not “a significant risk factor in transmitting HIV.” On appeal, the defendant argued that he could not be convicted under the statute because the risk of spitting in the officer’s eye was negligible.

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576 State v. Bird, 692 N.E.2d 1013 (Ohio 1998)(the HIV-positive defendant pleaded no contest to felonious assault charges for spitting in the eye of a police officer and was sentenced to three to fifteen years imprisonment).
579 Id.
581 Price, 834 N.E.2d at 849.
582 2006 WL 2045911 (Ohio Ct. App. 2006)
In order to convict defendant of attempted felonious assault, the prosecution was required to prove that appellant attempted to knowingly “cause or attempt to cause physical harm to another [...] by means of a deadly weapon or dangerous ordnance” and that the defendant engaged in “conduct that, if successful, would constitute or result in the offense.” The court determined that even if it was factually or legally impossible under the circumstances for the appellant transmit HIV to the officer, it is no defense if the act could have been completed had the circumstances been as the appellant believed. The court upheld the conviction, finding that the appellant intended to harm the officer and because his saliva was mixed with blood it could be considered a deadly weapon.

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584 OHIO. REV. CODE. ANN. §§ 2923.11(a), 2923.02(A)(West 2010)
Oklahoma Statute(s)\textsuperscript{585} that Allow for Criminal Prosecution based on HIV Status:

\textbf{OKLA. STAT. TIT. 21, § 1192.1}

\textit{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 AIDS 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.

\textbf{OKLA. STAT. TIT. 21, § 1031}

\textit{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.

\textsuperscript{585} Oklahoma also has a felony communicable disease statute that penalizes exposure to venereal diseases. However, this statute was enacted long before HIV and there has never been a prosecution against an HIV-positive person under the statute. “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.” OKLA. STAT. TIT. 63, § 1-519(1967). “Venereal disease” means any disease which may be transmitted from any person to any other through or by means of sexual intercourse and found and declared by medical science or accredited schools of medicine to be infectious or contagious. OKLA. STAT. TIT. 63, § 1-517(1963).
HIV-positive persons can face felony charges for failing to disclose their HIV-status to their sexual partners.

It is punishable by up to five years in prison for HIV-positive persons to engage in conduct that carries a “reasonable likelihood” of transmitting HIV, with the intent to infect another. For prosecution the complainant must not have agreed to engage in such conduct or must not have known of the HIV-positive person’s status. HIV transmission is not required for conviction.

Although Oklahoma’s HIV exposure statute requires intent to transmit HIV, prosecutions under this statute have resulted in convictions even if there was no indication that the defendant acted with intent to transmit HIV but only failed to inform her/his sexual partner about her/his HIV status:

- In 2009, a 40-year-old HIV-positive man was arrested and charged with HIV exposure for failing to tell a man that he had HIV before engaging in oral sex.\(^{586}\)
- A 20-year-old woman was charged under Oklahoma’s exposure statute solely because she allegedly failed to inform her partner that she was HIV positive.\(^{587}\)
- A 41-year-old HIV-positive man was charged with engaging in conduct likely to transfer HIV for failing to disclose his HIV status to his sexual partner.\(^{588}\)

The common element in all of these cases was the defendant’s apparent failure to disclose her/his HIV status to sex partners.

Disclosure is an affirmative defense to prosecution under this statute but it is important to note that even when a person does disclose her/his HIV status it can be difficult to prove such disclosure in court. In these matters, relying on party testimony has inherent. For example, an HIV-positive man was charged with knowingly spreading HIV to his girlfriend, who asserted that she did not know the man’s status over the period of their relationship.\(^{589}\) It wasn’t until six months after the initial charges were brought that detectives determined, due to the testimony of witnesses, that the woman had in fact been aware of the man’s HIV status before starting their sexual relationship.

The statute does not carve out a specific defense based on the use of a condom or other protection during penile-vaginal, anal, or oral sex, nor has the use of a condom or low viral load been relied upon as a defense in any currently-available reported case decisions in Oklahoma.

HIV-positive persons have been prosecuted under Oklahoma’s criminal HIV exposure law for spitting and biting.

Oklahoma’s HIV exposure statute creates criminal liability for “conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen, or vaginal

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587 Enid woman will be arraigned next week on felony charge that she exposed a former love to HIV, AP ALERT, June 8, 2004.


secretions into the bloodstream of another, or through the skin or other membranes of another person.\textsuperscript{590} HIV-positive individuals have been charged with HIV exposure for acts, such as biting and spitting, that have only theoretical or remote risks of transmission of HIV and that contravene the actual requirements of the statutes:

- In May 2010, a man claiming to be HIV-positive was booked on four felony complaints of spreading an infectious disease and knowingly engaging to transfer HIV after slinging his head to throw blood at emergency medical workers. He is also alleged to have spit at the workers during his rescue.\textsuperscript{591}

- A 50-year old, HIV-positive woman was arrested in October 2008 and charged with engaging in conduct likely to transfer HIV after biting a security guard.\textsuperscript{592}

In both of the above cases, the risk of HIV transmission is remote at best. The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”\textsuperscript{593} The CDC has also concluded that spitting alone has never been shown to transmit HIV.\textsuperscript{594} The application of Missouri’s statute ignores these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

Engaging in sex work while HIV-positive can lead to enhanced penalties of up to five years in jail.

Upon conviction for prostitution, sex workers face up to five years in prison if they know they are HIV-positive. This specifically targets HIV-positive persons regardless of whether they intended to transmit HIV, transmitted the virus, or engaged in activities likely or possible to do so. On the face of this statute, no actual sexual activity is required to face felony prosecution.

HIV positive persons have also been convicted under general criminal laws.

Though Oklahoma enacted its HIV exposure statute in 1997, there has been at least one case of HIV exposure since that time that has been prosecuted under general criminal laws. In 2000, a 41-year-old, HIV-positive man pleaded guilty to fifty-six counts of sexual abuse and one count of attempted murder after he engaged in sexual intercourse with two female minors.\textsuperscript{595} Each count represented a month that he engaged in sexual conduct with one or both of the minors. The

\textsuperscript{590} OKLA. STAT. TIT. 21, § 1192.1 (West 2010).
\textsuperscript{595} Bill Braun, \textit{Tulsa Man Imprisoned for Life on Sex Counts}, TULSA WORLD, May 24, 2000, at A13.
attempted murder charge arose from allegations that he knew he was HIV-positive and repeatedly engaged in unprotected sex with one of the minors, who later became pregnant and both she and her baby tested positive for HIV. The other minor tested negative for HIV. The defendant was sentenced to four consecutive life sentences and fifty-three concurrent life sentences.

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Oregon Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Persons with HIV have been prosecuted for HIV exposure under the general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in Oregon, however, Oregon has prosecuted HIV-positive persons for exposing others to HIV under general criminal laws, including attempted murder, assault, and reckless endangerment. Failing to disclose HIV status to sexual partners may result in prosecution and conviction.

In State v. 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. Before his attempted murder conviction, the defendant also served eleven months in prison for recklessly endangering two women by engaging in unprotected sex and sexually abusing a 15-year old girl.

In 1993, another HIV-positive man in Oregon was convicted of assault and reckless endangerment when two of his sexual partners tested positive for HIV. He was sentenced to three years in prison, registered as a sex offender, and was forbidden from going into bars, contacting victims, contacting girls without written permission, and having unprotected sex with an HIV-negative person. He later received seven years in prison for exposing a Canadian woman to HIV in 1996. It is not known whether the man used condoms during sex or disclosed his status.

597 Hinkhouse, 912 P.2d at 923.
598 Id.
599 Id. at 922.
600 Id. at 925.
602 Hinkhouse, 912 P.2d at 922.
603 New Charges Face Man Infected with AIDS Virus, OREGONIAN, Nov. 2, 1993, at B03.
Individuals living with HIV in Oregon should be aware that they risk criminal liability if they fail to disclose their HIV status to sexual partners or engage in unprotected sex. The two cases above concern the rare and extreme instances when HIV-positive individuals repeatedly failed to disclose their HIV status, refused to use condoms or other protection. In Hinkhouse, the defendant’s long history of failing to tell his partners about his HIV status and refusal to wear condoms certainly went to the court’s determination of specific intent but the facts of the case could have been more appropriately applied to a charge of reckless endangerment.

HIV-positive status may also be a factor in sentencing. In State v. 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. Given that the defendant in Guayante exposed a girl to the risk of HIV infection, neither the intent to transmit HIV nor actual HIV transmission is required for aggravated factor sentencing.

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Pennsylvania Statute(s) that Allow for Criminal Prosecution based on HIV Status:


**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.


**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.


**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.
HIV-positive persons have been convicted under Pennsylvania’s general criminal laws for various types of conduct, including failing to disclose their HIV status to their sexual partners.

Although Pennsylvania does not have a specific criminal HIV-exposure law to address non-incarcerated persons and those who are not sex workers, numerous persons have been prosecuted for HIV exposure under general criminal laws, including murder, attempted murder, and reckless endangerment.

In Pennsylvania, HIV-positive persons have been prosecuted for failing to disclose their HIV status to their sexual partners. In the 2006 case, Commonwealth v. Cordoba, a man 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.

The court found that “[U]nder the Commonwealth’s theory, even if an HIV-positive individual informs his or her partner of this status prior to engaging in unprotected sexual activity, the statute would still be violated. A person carrying an infectious disease would commit a crime every time he/she had consensual sex. This is an absurd result, as individuals in this Commonwealth are free to make such intimate decisions outside the glare of state scrutiny. Lastly, allowing an HIV-positive individual to be prosecuted under this statute for allegedly having consensual sexual contact with another adult would open the floodgates to jilted lovers and angry spouses to file charges after a relationship has soured.”

On appeal, the Superior Court did not address this issue because it was outside of the scope of the case and was not at issue because the defendant never disclosed his status. Commonwealth v. Cordoba, 902 A.2d 1280, 1286 (Pa. Super. 2006).

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18 PA. CONS. STAT. ANN. §§ 1103, 1101

Sentence of imprisonment for Felonies

Second degree felony: a term which shall be fixed by the court at not more than ten years.
Third degree felony: a term which shall be fixed by the court at not more than seven years.

Fines for Felonies

First or second degree felony: $25,000.
Third degree felony: $15,000.
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 defendant only ejaculated on the face and chest of the complainant, however, HIV has been found in pre-seminal fluids), 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.

To establish a prima facie case for reckless endangerment, the court found that there only needs to be a possibility of the risk of harm, regardless of the likelihood of that harm actually occurring. 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.

The statute does not explicitly provide for a defense based on use of condoms, or other protection, or a low viral load (amount of active HIV virus in an individual’s bloodstream) even though both significantly reduce the risk of HIV transmission to near zero.

Though disclosing one’s HIV status is a defense to this type of prosecution, disclosure of HIV status is difficult to prove in court without witnesses or documentation, and juries often consider the testimony of HIV-positive defendants less credible than the testimony of HIV-negative persons claiming that they were exposed to HIV without consent.

In addition to reckless endangerment, HIV-positive individuals have also been charged with murder and attempted murder for failing to disclose their HIV positive status to their sexual partners:

- In 1999, a 30-year-old man is charged with murder, attempted homicide and aggravated assault for failing to tell five female sex partners that he had HIV. Each of the women allegedly tested positive for HIV after engaging in sexual conduct with the man. The man died in 2000 before the case could go to trial.

- In 1996, an HIV-positive man received twenty years to life in prison for sexually assaulting a
12-year old girl, after which she tested positive for HIV. In 1992, a 50-year old man with AIDS was arrested after he allegedly paid several hundred Philadelphia boys for their sexual favors, underwear, and feces. The man’s bail was increased to $20 million after it was disclosed that he was HIV-positive. He died before the trial.

In Commonwealth v. Bey, the court affirmed the ten to twenty year sentence of the single count of a deviate sexual intercourse due in part to the defendant’s HIV-positive status. The court reversed the trial court’s determination that the defendant was a sexual predator.

In Commonwealth v. Walker, an HIV-positive man 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.

Other prosecutions of HIV-positive persons under Pennsylvania’s general criminal laws have included convictions for acts that are not known to transmit HIV:

- A 39-year old, HIV-positive man was charged with aggravated assault and was sentenced to thirteen years and six month to twenty-seven years in prison in 1999 for biting a security guard who was arresting him for shoplifting. The guarded tested negative for HIV.
- In October 2009, a 34-year-old HIV and Hepatitis C-positive woman was charged for aggravated assault after she spat in the face of another inmate. She was later sentenced to

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616 Jeff Gelman, AIDS-Related Death Leads to 3rd-Degree Murder Charge, MORNING CALL (Allentown), Nov. 20, 1999, at A03.
617 Michael DeCoury Hinds, Man Who Has AIDS May Have Infected Hundreds of Boys, MORNING CALL (Allentown, PA), Mar. 28, 1992, at A02.
619 Lee Linder, Sex Charges Dropped Against Savitz but Alleged Victims Sue Dead Man’s Estate, MORNING CALL (Allentown, PA), Apr. 6, 1993, at A05.
twenty-one months to ten years imprisonment.  

- In 1997, a 32-year old HIV-positive woman was arrested and charged with attempted murder after she allegedly stabbed a CVS employee with a syringe, claiming the syringe was infected with HIV.  

- In Commonwealth v. Brown, a defendant, who was HIV-positive and had Hepatitis B, was convicted of aggravated assault for throwing fecal matter on a guard’s face.

Many of these convictions are based on the stigma and fear surrounding HIV and not on the science of how HIV is transmitted.

**HIV-positive persons who are incarcerated face increased penalties for exposing others to their bodily fluids, including saliva.**

The Pennsylvania HIV exposure statute for incarcerated persons is overly broad and criminalizes conduct that does not in fact transmit HIV. Under the statute, if a person in confinement intentionally causes another person to “come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material” and “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” that person can face an additional sentence of up to ten years in prison. The CDC has long maintained that there is no risk of transmission from saliva, urine, or feces unless there is contamination with infected blood.

If the incarcerated person is already serving a life sentence or is on death row and violates the statute then that person will be prosecuted for second degree murder.

**It is a felony for people who are HIV-positive to engage in or solicit prostitution.**

A person is guilty of prostitution while HIV-positive if she/he is part of a house of prostitution, engages in sexual activity as a business, or loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

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626 The statute was rewritten in 1998 to include “HIV” after the 1992 conviction of inmate, who tested positive and been counseled for both HIV and Hepatitis B, for throwing urine and feces at a prison guard. See Commonwealth v. Brown, 605 A.2d 429 (Pa. Super. Ct. 1992). The 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. 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. Id. at 431.  
627 18 PA. CONS. STAT. §§ 5902(a), 1103 (West 2010).  
628 § 5902(A).
Sexual activity for the purposes of the statute is broadly defined as “sexual intercourse for hire” and “includes homosexual and other deviate sexual relations.” The lack of a clear definition of “sexual acts” in the statute has led the Pennsylvania courts to attempt to define what types of sexual acts are punishable under the prostitution statute. Many of the acts that the courts have found to be criminally liable “sexual acts” pose no risk of transmitting HIV, including acts that do not involve penetration of the body or the transfer of blood or semen, such as massaging another person’s genitals and giving a hand job or fingering. This broad definition of “sexual acts” poses the risk of severe penalties for HIV-positive sex workers who engage in conduct that does not transmit HIV.

Disclosure of one’s HIV status, the use of condoms or other protection, or the sex worker’s viral load are not considered a defense to prosecution. This creates a situation where HIV-positive person are prosecuted and suffer increased penalties due to their HIV-status alone and not to the risk they pose of transmitting HIV.

The punishment for HIV-positive sex workers is significantly harsher than the punishment for sex workers who do not test positive for HIV. Prostitution is normally punished under varying degrees of misdemeanors that range from a few months to a few years imprisonment, based on the number of prior convictions. However, if a sex worker is HIV-positive she/he is subject to third degree felony charges, punishable by up to seven years in prison.

Examples of prosecutions under this statute include:

- In January 2009, a 26-year old sex worker pleaded guilty to reckless endangerment and engaging in prostitution while HIV-positive. She received three years probation.

- In 1996, an HIV-positive sex worker was charged with engaging in prostitution while being HIV positive. Another HIV-positive sex worker was convicted of the same offense in 1998, and sentenced to seven years imprisonment.

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629 § 5902(A), (F).
633 Id.
634 18 PA. CONS. STAT. ANN. § 5902(A.1)(WEST 2010). Prostitution charges that are non-HIV specific are normally prosecuted as either first, second, or third degree misdemeanors that range in maximum sentences from one to five years imprisonment. 18 PA. CONS. STAT. ANN. § 1104 (WEST 2010)
635 § 5902 (A.2).
638 April Adamson, Obscure Law Used on Reckless Hookers, PHILA. DAILY NEWS, June 16, 1998, at 8.
Rhode Island Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Rhode Island has a communicable disease control statute but this statute has not targeted HIV exposure.

Rhode Island does have a general sexually transmitted disease (STD) exposure statute. It is an offense punishable by up to $100 or three months in prison for an individual with an STD to knowingly expose another to infection. 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.

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639 R.I. GEN. LAWS § 23-11-1 (1921) (imposing penalties for knowing exposure to sexually transmitted diseases including, but not be limited to, syphilis, gonorrhea, chancroid, granuloma inguinale and lymphogranuloma venereum).
South Carolina Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

HIV-positive persons face criminal penalties for engaging in sexual activity without disclosing their HIV status.\(^{640}\)

It is felony, punishable by a fine of no more than $5,000 and/or imprisonment for up to ten years, for a person who is aware that she/he is HIV-positive to knowingly engage in penile-vaginal, anal, or

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\(^{640}\) Though there is a separate misdemeanor penalty for exposing people to venereal diseases, including HIV, S.C. CODE ANN. §§ 44-29-60, 44-29-140, this statute is not in practical effect for HIV exposure prosecutions as there is an HIV-specific statute for HIV exposure, S.C. CODE ANN. § 44-29-145. There does not appear to be any HIV cases prosecuted under the venereal disease statute.
oral sex with another person without first informing that person of her/his HIV status. Neither actual transmission nor the intent to transmit HIV is necessary for prosecution.

On its face, the statute does not recognize the use of protection, such as condoms, or low viral load as defenses to prosecution. Under the terms of the statute, even if HIV-positive persons protect their sexual partners by using a condom, they must also disclose their status to avoid application of the statute.

In South Carolina there have been numerous prosecutions of HIV-positive individuals for engaging in consensual sex but who allegedly failed to disclose their HIV status:

- An HIV-positive man who failed to disclose his HIV status and engaged in unprotected, consensual sex with a female partner was charged with exposing another to HIV.\textsuperscript{641}

- An HIV-positive man was sentenced to six years in prison and four years of probation for knowingly exposing his wife to HIV.\textsuperscript{642} She did not test positive for HIV and maintained that she had no knowledge that her husband was HIV-positive.

- A 40-year-old HIV-positive man pleaded guilty to knowingly exposing his ex-girlfriend to HIV and was sentenced to four and a half years imprisonment.\textsuperscript{643} Investigators claim that the man never told the woman he was HIV-positive nor did he insist on using condoms. The woman learned she was HIV-positive during a pre-natal checkup for the twins that the man fathered. But the woman’s HIV status was irrelevant to the charges.

- A 35-year-old HIV-positive man was charged with exposing another to HIV after he failed to disclose his HIV status to his sexual partner with whom he engaged in consensual, unprotected sex.\textsuperscript{644}

Though disclosure is an affirmative defense to prosecution in South Carolina, whether or not disclosure actually occurred is often open to interpretation and always depends on the word of one person against another.

**General criminal laws have been used to prosecute HIV-positive persons for alleged HIV exposure.**

In a recent South Carolina case, a 41-year-old HIV-positive man was charged with assault and intent


\textsuperscript{642} Stephanie Toone, Former Aiken County teacher found guilty of exposing others to HIV, AUGUST CHRONICLE, Nov. 13, 2009, available at http://chronicle.augusta.com/stories/latest/lat_703284.shtml


to kill after biting his neighbor. The original charge of simple assault was upgraded to intent to kill after it was discovered that the defendant was HIV-positive. The CDC has long maintained that spitting alone has never been shown to transmit HIV.

**HIV-positive persons can be fined and imprisoned if convicted of prostitution.**

In South Carolina a person who is aware that she/he is HIV-positive may be criminally liable for committing an act of prostitution, facing penalties of up to ten years in prison and/or be subject to a $5,000 fine. In contrast, prosecutions for HIV-negative sex workers have penalties limited to ninety days to one year in prison and a fine of a few hundred dollars. By the mere fact of being HIV-positive, sex workers are subject to more than ten times greater penalties than their HIV-negative counterparts. In addition to disproportionate penalties for HIV-positive sex workers, South Carolina’s HIV exposure statute potentially targets activities that pose no risk of HIV transmission.

Prostitution is defined as “engaging or offering to engage in sexual activity with or for another in exchange for anything of value.” Under this definition, the mere offer of a sexual act could result in imprisonment under the HIV exposure statute even when there is no risk of HIV transmission. And even if the offered act was completed there is no consideration about whether the activities posed a risk of HIV exposure or transmission (i.e.: an HIV-positive sex worker performing oral sex has a remote possibility of HIV exposure/transmission because saliva is not a means to transmit HIV).

The term “sexual activity” for a prostitution charge, and subsequent HIV exposure prosecution, has a broad definition and includes many acts that pose no risk of transmitting HIV. Under the original HIV exposure statute, S.C. CODE ANN. § 44-29-145, prosecutions were limited to penile-vaginal sex, anal sex, and oral sex. However, for prostitution prosecutions “sexual activity” includes, but is not limited to, acts of masturbation; touching a person’s clothed, or unclothed, genitals or breasts; and other acts such as using sex toys. These activities pose absolutely no risk of HIV transmission but HIV-positive sex workers may face felony charges for engaging in them. It is not a defense if condoms or other protection were used during sexual activity or if HIV status was disclosed.

**HIV-positive persons are can face criminal penalties for donating blood, organs, human tissue, semen, or other body fluids.**

It is felony, punishable by a fine of no more than $5,000 and/or imprisonment for up to ten years, for a person who is aware that she/he is HIV-positive to knowingly donate or sell blood, semen, tissue, organs or other bodily fluids. Neither the intent to transmit HIV nor actual transmission is required for liability.

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646 Id.
649 § 16-15-375(4).
650 § 16-15-375(5).
HIV-positive persons can be prosecuted and jailed for sharing dirty syringes with others.

It is felony, punishable by up to ten years imprisonment and/or a maximum fine of $5,000 for a person who is aware that she/he is HIV-positive and knowingly share equipment used for injecting drugs with another without disclosing her/his HIV status.

HIV positive persons in South Carolina should not share, or exchange, or otherwise transfer to any other person unsterilized needles used to inject substances into the human body. Simply giving someone a dirty syringe is sufficient for a conviction; neither the intent to transmit HIV nor actual transmission is required.

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South Dakota Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.
S.D. CODIFIED LAWS § 22-6-1

Felony classes and penalties

Class 3 felony: maximum fifteen years imprisonment in the state penitentiary. In addition, a fine of $30,000 may be imposed.

Engaging in sexual intercourse without disclosing HIV status can result in imprisonment

In South Dakota, failing to disclose HIV status to sexual partners may result in imprisonment. It is a class 3 felony punishable by a maximum of fifteen years in prison if an individual aware that she/he is HIV-positive intentionally exposes another to infection through sexual intercourse or “other intimate physical contact.” A $30,000 fine may also be imposed. Sex offender registration is mandatory. “Intent” for the purposes of this statute requires a specific design to expose another to HIV or an intent to engage in the prohibited activities under the statute.

Neither the intent to transmit HIV nor actual transmission is required.

An individual prosecuted under this exposure law has a defense that may prevent conviction if she/he can prove that the person exposed to HIV (1) was aware of her/his HIV status, (2) knew that the sexual contact could result in HIV infection, and (3) consented to HIV exposure with knowledge of these risks. However, a sexual partner's consent to HIV exposure may be difficult to prove as whether or not disclosure occurred is often open to interpretation and always depends on the words of one person against another.

Engaging in unprotected sex while HIV-positive can result in imprisonment. In South Dakota’s first prosecution for HIV exposure, an HIV-positive college student received 120 days in jail and 200 hours of community service after he had unprotected sex with several classmates without disclosing his HIV status. Under the terms of his guilty plea, the man was also ordered to abstain from unprotected sex unless he notified partners that he was HIV-positive. He later received four

653 § 22-6-1(6)(2005).
655 § 22-1-2(1)(b)(West 2010).
660 Jo Napolitano, supra note 679.
years in prison for failing to return to jail on schedule.  

The following cases serve as further examples of prosecutions that may result under South Dakota law:

- In August 2005, a 26-year old, HIV-positive man was arrested and charged with several counts of intentional exposure to HIV after he allegedly lied about his HIV status to multiple sexual partners.  

- In November 2006, an HIV-positive woman received a suspended prison sentence after she exposed several sexual partners to HIV.  

- In May 2002, two HIV-positive partners in a gay couple were indicted for exposing several sexual partners to HIV.  

- In March 2003, a 30-year old, HIV-positive woman received three months imprisonment and five years probation for intentionally exposing a sexual partner to HIV. She was also ordered to abtain from unprotected sex and submit to lie detector tests when requested.

Consecutive, as opposed to concurrent, sentencing is allowed at the discretion of a sentencing court in South Dakota.  

Thus, if an HIV-positive person is found guilty of exposing multiple partners to the virus, it is possible for her/him to receive a sentence of fifteen years per offense.

It is a felony to provide blood, tissue, semen, organs, body parts, or body fluids for use by another.

In South Dakota, imprisonment may also result from donating bodily fluids or tissues. It is a class 3 felony, punishable by up to fifteen years in prison, if an individual aware that she/he is HIV-positive intentionally exposes another to infection by transferring, donating, or providing blood, tissue, semen, organs, or other “potentially infectious bodily fluids” for use by another. Specifically, fluids or tissues may not be provided for “transfusion, transplantation, insemination, or other administration to another in any manner that presents a significant risk of HIV transmission.”

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661 Leslie E. Wolf, supra, at 863-65.
662 Denise Tucker, Inmate May Have Spread H1V’, ARGUS LEADER (Sioux Falls, SD), Aug. 6, 2005, at 1B.
665 John-John Williams, supra note 279.
666 Id.
667 S.D. CODIFIED LAWS § 22-6-6.1(1939).
668 § 22-6-1(6).
669 § 22-18-31(2).
transmission. A $30,000 fine may also be imposed.

Neither the intent to transmit HIV nor actual transmission is required.

An individual prosecuted for HIV exposure has an affirmative defense if she/he can prove that the individual exposed to HIV (1) was aware of her/his HIV positive status, (2) knew that HIV infection could result from the exposure in question, and (3) consented to exposure with knowledge of these risks.

**Sharing non-sterile needles or syringes can result in imprisonment.**

South Dakota’s “intentional exposure” laws explicitly prohibit HIV-positive drug users from sharing used needles and syringes. It is a Class 3 felony for an individual aware that she/he is HIV-positive to intentionally expose another to infection by dispensing, delivering, exchanging, selling, or in any other way transferring to another any non-sterile “intravenous or intramuscular drug paraphernalia” that she/he has contaminated. In South Dakota, Class 3 felonies are punishable by up to fifteen years in prison and possibly a $30,000 fine.

Neither the intent to transmit HIV nor actual transmission is required.

Under the terms of this statute, “intravenous or intramuscular drug paraphernalia” is defined as any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body. To avoid prosecution, HIV-positive drug users should not share needles, syringes, or any other devices used to inject drugs into the body. Presumably, if these items are sterilized before transfer to another, prosecution may be avoided. However, it may be difficult to prove that a needle or syringe was sterile at the time of transfer to another without witnesses or documentation.

An individual prosecuted under this needle-sharing law has a defense if she/he can prove that the individual exposed to HIV (1) was aware of her/his HIV positive status, (2) knew that HIV infection could result from sharing drug paraphernalia, and (3) consented to exposure with knowledge of these risks. However, an individual’s consent to HIV exposure may also be difficult to prove without documentation.

**Exposing the body of another person to blood or semen can result in imprisonment.**

In South Dakota, it is also a Class 3 felony, punishable by a maximum of fifteen years in prison, if
an individual aware that she/he is HIV-positive intentionally exposes a person to HIV infection by throwing, smearing, or otherwise causing blood or semen to come in contact that person. A $30,000 fine may also be imposed.

Actual transmission of HIV is not required. An individual will only be prosecuted under this prong of South Dakota’s HIV exposure laws if she/he acted with the purpose of exposing another to HIV infection. This reduces the risk that HIV-positive persons will be prosecuted for accidentally exposing others to their bodily fluids. However, it is important to note that cases concerning the intent or purpose to spread HIV sometimes hinge on uncorroborated testimony from prison guards, police, or assault victims claiming they were attacked by HIV-positive persons attempting to infect them.

No individual in South Dakota has been prosecuted for throwing or “smearing” blood or semen on another.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

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681 § 22-6-1(6).
682 § 22-18-34.
683 See, e.g., Stephanie Ramage, *Too Lenient?,* SUNDAYPAPER.COM, Aug. 30, 2009, http://www.sundaypaper.com/More/Archives/tabid/98/articleType/ArticleView/articleId/4452/Too-lenient.aspx (reporting on a 2008 Georgia case, where an officer bitten by an HIV-positive man during a confrontation claimed that the man screamed “I have full-blown AIDS … You’re going to die.”); but see Marvin S. Arrington, *Judge Marvin S. Arrington responds to the Sunday Paper,* SUNDAYPAPER.COM, Oct. 4, 2009, http://www.sundaypaper.com/More/Archives/tabid/98/articleType/ArticleView/articleId/4572/Default.aspx (explaining that a state patrol police report had no mention of the alleged threat, even though a threat of HIV infection would clearly be an important piece of information for such a report. Records may actually suggest that the HIV-positive man only said “I’m HIV positive.”); see also Idaho, Michigan, Massachusetts.
Tennessee Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

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684 It is a class C misdemeanor, punishable by a fine of no more than $50 and/or imprisonment for no more than thirty days, for a person who is aware that she/he is infected with a sexually transmitted disease (including HIV) to knowingly expose another to that sexual transmitted disease by any means. TENN. CODE ANN. §§ 68-10-107, 68-10-101. However, because there is a specific HIV exposure statute it is unlikely that an HIV-positive person would be prosecuted under this statute.
HIV-positive persons may face criminal penalties for engaging in sexual activities without disclosing their HIV status.

In Tennessee, it is against the law for a person who is aware that she/he is HIV-positive to engage in “intimate contact” with another without first disclosing her/his HIV status. Intimate contact is defined as any contact between the body of one person and the bodily fluids of another person in a manner that presents a significant risk of HIV transmission. Actual transmission of HIV is not necessary for a conviction.

Violating this statute is a class C felony, punishable by three to fifteen years imprisonment as well as a possible $10,000 fine. If an HIV-positive person is convicted under this statute she/he will also have to register as a sex offender.685

If HIV-positive persons disclose their HIV status to sexual partners prior to engaging in activities that present a significant risk of HIV transmission is an affirmative defense. Proving disclosure can be challenging because there are rarely documents or other incontrovertible proof of disclosure and these cases often result in the defendant and complainant’s versions of the story pitted against one another.

In *State v. Smith*, there was a discrepancy between the defendant’s and complainant’s evidence regarding whether or not the defendant had disclosed his HIV status.686 The defendant, who was charged with criminal exposure to HIV, among other charges, 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.

Tennessee’s criminal exposure statute requires that there be “exposure” of bodily fluids between an HIV positive person and another that presents a significant risk of transmission, but the scope of such exposure is not defined in the statute. In *State v. Bonds*, the Tennessee Court of Appeals defined “exposure” to encompass acts that presented a risk of transmission but declined to require an exchange of bodily fluids.687 The HIV-positive defendant in that case 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.689

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 HIV transmission.”690 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.691 After reviewing previous cases of HIV exposure in Tennessee, the court in *Bonds* 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.692

The prosecutions of HIV exposure involving “intimate contact” in Tennessee appear to be limited to cases where the HIV-positive defendant did not disclose her/his HIV status and a condom or other protection was not used during sexual intercourse. Other prosecutions of criminal exposure to HIV involving intimate contact include:

688 Id.
689 Id. at 257.
690 Id. at 258.
691 Id.
692 Id. at 259.
• In October 2010, an HIV-positive man was charged with four counts of criminal exposure of HIV after allegedly having sex with at least two women.\(^{693}\)

• A 24-year-old HIV-positive defendant was sentenced to fourteen years for HIV exposure and an additional six years for statutory rape for having unprotected sex with a 14-year-old. The defendant never told the minor that he was HIV-positive.\(^{694}\)

• The HIV-positive defendant pleaded guilty to twenty-two counts of criminal exposure to HIV and was sentenced to twenty-six years and six months imprisonment.\(^{695}\) The defendant engaged in unprotected sex with multiple men without disclosing her HIV status. Though the defendant maintained that she told her partners about her HIV status, the complainants testified otherwise. The men maintained that the defendant purposefully denied her HIV status and they did not use condoms. After ten years imprisonment the defendant was released and is currently on parole for twelve years.\(^{696}\)

• A 31-year-old HIV-positive defendant pleaded guilty to criminal exposure to HIV and was sentenced to five concurrent four-year sentences. The defendant engaged in five consensual, unprotected sexual encounters with the same female and did not disclose his status.\(^{697}\)

• In October 1999, an HIV-positive defendant pleaded guilty to nine counts of criminal exposure to HIV and three counts of statutory rape. He was sentenced to seventeen years imprisonment.\(^{698}\) The defendant failed to disclose his HIV status, and when asked by his sexual partners, denied that he had HIV.\(^{699}\) At least two of the women that he was intimate with tested positive for HIV but that did not matter for the purposes of the charges or prosecution.\(^{700}\)

• In June 1999, a man was charged with statutory rape and criminal exposure to HIV.\(^{701}\)

Though the most of the prosecutions for HIV exposure in Tennessee involve unprotected sexual activity without disclosure of HIV status, there has been multiple cases of arrests and prosecutions for criminal exposure to HIV that presented only a remote risk of transmission of HIV:


\(^{699}\) Jones, 2001 WL 30198, at *1.

\(^{700}\) Id.

\(^{701}\) Man Allegedly Shot Girlfriend in front of Son, DAILY NEWS JOURNAL, June 28, 1999, at X.
• In September 2009, an HIV positive man was charged with criminal exposure to HIV, among other offenses, for spitting blood on an officer during a robbery.\(^{702}\)

• In November 2010, a man was charged with aggravated assault and criminal exposure of another to HIV for allegedly spitting on a detention officer.\(^{703}\) At the time of the charges there was no evidence to prove that the man was in fact HIV positive.

• A 34-year-old HIV-positive man was indicted on charges of criminal exposure to HIV for allegedly spitting on a police officer.\(^{704}\)

**HIV-positive persons who engage in prostitution face enhanced criminal penalties.**

It is a class C felony, punishable by three to fifteen years in prison for an HIV-positive person who knows her/his status to engage in acts of prostitution.\(^{705}\) Conviction under this statute also results in the defendant having to register as a sex offender.\(^{706}\) Actual transmission of HIV is not required for conviction. A conviction for prostitution in a case not involving HIV is a class B misdemeanor punishable by no more than a six month sentence and/or a $500 fine, but an HIV-positive defendant faces a thirty times greater penalty for the same offense.\(^{707}\)

Under the statute, it is not required that an act that could transmit HIV occur for conviction. It is not a consideration whether condoms or other protection were used or if the HIV-positive defendant had a low viral load.

There are approximately thirty-nine women in Tennessee who have been convicted of aggravated prostitution.\(^{708}\)

**One’s HIV status may also be considered an aggravating factor in sentencing.**

Tennessee’s sentencing enhancement notes that if a defendant knew her/his HIV status during the commission of an aggravated rape, sexual battery, rape of a child, or statutory rape, the sentencing court may consider the defendant’s HIV status in sentencing.\(^{709}\) In order to sustain a sentence enhancement under this provision, the defendant must have known her/his HIV status during the

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\(^{706}\) § 40-39-202(20).

\(^{707}\) § 39-13-513; § 40-35-111.


commission of the assault. In *State v. Banks*, Tennessee Court of Criminal Appeals vacated a trial court’s imposing consecutive sentencing for a defendant convicted of aggravated kidnapping and rape because there was no trial court finding to show that the defendant knew his HIV status during the offense. The defendant was originally sentenced to two twenty-three year consecutive sentences, for a total of forty-six years imprisonment.

**Donating blood, organs, tissue, semen, or other body fluids is prohibited.**

HIV-positive persons must not donate or sell blood or any other body parts meant for transfer to another person. Actual transmission of HIV is not necessary for a conviction and a violation of this statute could result in up to fifteen years imprisonment.

**HIV-positive persons may be criminally prosecuted for sharing needles.**

A person who is aware that she/he is HIV-positive may be criminally liable for providing another person with any non-sterile equipment used for injecting drugs that has been used by an HIV-positive person. Actual transmission of HIV is not necessary for a conviction.

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Texas Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Though there is no explicit HIV criminal transmission statute in Texas, there have been prosecutions for HIV exposure under general criminal laws.

Despite the fact that Texas does not have a criminal statute for HIV exposure or transmission, HIV-positive persons have been prosecuted for HIV exposure under general criminal laws, including attempted murder and aggravated assault.

Texas’s aggravated assault statute makes it a felony in the second degree to cause serious bodily injury to another or use or exhibit a deadly weapon in the commission of the assault. A felony of the second degree carries a punishment of two to twenty years in jail and a possible fine of $10,000. If an aggravated assault is committed against of security officer, including a police officer, it is a felony in the first degree punishable by five to ninety-nine years in prison and a possible fine of $10,000. Texas courts have held that HIV is a deadly weapon for the purposes of conviction under the aggravated assault statute and numerous prosecutions in Texas have led to incarcerating individuals whose alleged criminal conduct presented no known risk of transmitting HIV.

In Mathonican v. State, the Texas Court of Appeals found that HIV status can be considered a deadly weapon in aggravated assault and aggravated sexual assault cases. Similar to assault cases, sexual

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711 Prior to 1994, Texas had an HIV transmission statute that made it a third degree felony punishable by up to ten years in prison and a $10,000 fine for an HIV-positive person to intentionally, and without consent, transfer bodily fluids to another. TEX. PENAL. CODE. Ann § 22.012 (1987). In 1994, Texas deleted this statute from its code but a handful of cases were charged under the statute prior to its repeal. In 1993 an HIV-positive man was charged of exposing a sexual partner to HIV. TJ Milling, Woman Claims Lover Had His HIV, HOUSTON CHRONICLE, Aug. 17, 1993, at A 13. In 1992, an AIDS activist was charged with exposure to AIDS and HIV for scratching a police officer when he was being dragged from the Houston City Council Chambers. The charges were later dropped. Id. Another AIDS activist was charged after he bit a man on the hand and fingers. R.A. Dyer, Ex-AIDS Activist Charged, Biting brings up rarely used law, HOUSTON CHRONICLE, June 11, 1992, at A31.

712 Parker v. State, 2010 WL 2784428 (Tex. App. 2010)( HIV positive defendant convicted and sentenced to life imprisonment for aggravated assault with a minor who tested positive for HIV); Weeks v. State, 834 S.W.2d 559 (Tex. App. 1992)(HIV-positive defendant was convicted of attempted murder for spitting at a prison guard and sentenced to life in prison); Najera v. State, 955 S.W.2d 698 (Tex. App. 1997) (HIV positive defendant convicted of aggravated sexual assault, aggravating element was that defendant’s seminal fluid was considered a deadly weapon.); Lopez v. State, 288 S.W.3d 148 (Tex. App. 2009) (remanding case in which defendant convicted of two counts of aggravate sexual assault, charged solely due to defendant’s HIV status); Hoffman v. State, 2005 WL 1583552 (Tex. App. 2005)(affirming eighteen year sentence for defendant convicted of aggravated sexual assault of a child, aggravating factor was that his seminal fluids were considered a deadly weapon.); Sierra v. State, 2007 WL 2265170 (Tex. App. 2007)(HIV-positive defendant was convicted of three counts of aggravated sexual assault of a minor and sentenced to life imprisonment and to pay a fine of $10,000 per count.); Suarez v. State, 2004 WL 1660938 (Tex. App. 2004).

713 TEX. PENAL CODE ANN. § 22.02(a)(2009).

714 § 12.33.

715 § 22.02(2)(D); § 12.32(2009).


assault can be enhanced to aggravated sexual assault if the assailant used a deadly weapon in the commission of the crime.\textsuperscript{718} The HIV-positive defendant in this case was sentenced to ninety-seven years imprisonment for sexually assaulting another individual.\textsuperscript{719} The original indictment held that the defendant’s seminal fluid was a deadly weapon because he was HIV positive.\textsuperscript{720} The defendant appealed his case asserting that the deadly weapon finding was erroneous because HIV status should not be considered a deadly weapon.

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.”\textsuperscript{721} 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.\textsuperscript{722} 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.\textsuperscript{723} This reasoning suggests that if an HIV positive person engages in any unprotected sexual activity, regardless of the person’s viral load, whether the sexual activity posed any possibility of transmission, criminal liability could follow.

Despite the scientific evidence on HIV transmission, numerous prosecutions still occur for activities that pose no risk of transmission to others. In 2006, an HIV-positive man, Campbell, was convicted of aggravated assault when he allegedly became confrontational and spat on a police officer's eyes and mouth during an arrest.\textsuperscript{724} The officer did not test positive for HIV but because the Campbell’s saliva was considered a possible means of transmitting HIV, his charges were elevated to aggravated assault with a deadly weapon and he was later sentenced to thirty-five years in prison.\textsuperscript{725}

In the 2009 appeal of the conviction, \textit{Campbell v. State} presented the Texas Court of Appeals with an opportunity to revisit whether or not the saliva of an HIV-positive person could be considered a "deadly weapon." In 1992, the same court in \textit{Weeks v. State} upheld the attempted murder conviction of an HIV positive man for spitting on a prison guard, allegedly believing that his saliva could kill the guard.\textsuperscript{726} In \textit{Weeks} the defendant was sentenced to life in prison because he had two former felony convictions.\textsuperscript{727} Unfortunately in both the \textit{Weeks} and \textit{Campbell} cases the state medical witness testified that there was a theoretical possibility of HIV transmission through saliva, and the convictions were upheld.\textsuperscript{728}

These convictions were affirmed despite the fact that no officers involved in the altercations were

\textsuperscript{718} TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(iv)
\textsuperscript{719} \textit{See Mathonican}, 194 S.W.3d at 6.
\textsuperscript{720} \textit{Id}. at 67.
\textsuperscript{721} \textit{Id}. at 69 citing \textit{Najera v. State}, 955 S.W.2d 698, 701 (Tex. App. 1997)(court found that evidence of unprotected sex by an HIV-positive man, even if there was no evidence of ejaculation by defendant, is sufficient for a finding that penis and seminal fluids are deadly weapons).
\textsuperscript{722} \textit{Id}. at 71.
\textsuperscript{724} \textit{Id}.
\textsuperscript{726} \textit{Id}.
\textsuperscript{727} \textit{Campbell}, 2009 WL 2025344; \textit{Weeks}, 832 S.W.2d 559.
infected with HIV and, most importantly, saliva has never been documented to transmit HIV. The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.” The CDC has also concluded that spitting alone has never been shown to transmit HIV. The Texas Court of Appeals has set a poor precedent that HIV-positive individuals may be prosecuted for conduct that bears no risk or only a remote risk of HIV transmission and may be convicted for crimes solely on the basis of HIV status.

Other cases in Texas where HIV positive persons have been prosecuted for conduct that pose no risk of HIV transmission include:

- An HIV-positive woman spit in the face of a prison guard and was convicted of attempted capital murder and sentenced to twenty-five years imprisonment.
- A 26-year-old, HIV-positive man was charged with aggravated assault after he bit a security guard during a struggle in May 2008. Police suggested that the man used his HIV status “as a deadly weapon.”
- In 2005, an HIV-positive man’s twenty-five year sentence for biting a police officer was upheld by the Texas Court of Appeals. A nurse who testified at the trial said that HIV could be transmitted via the saliva in a bite and the court affirmed the conviction solely based on the nurse’s testimony.

**HIV-positive persons who fail to disclose their HIV status to their sexual partners may be prosecuted for aggravated assault.**

Because an HIV-positive individual’s saliva and other bodily fluids can be considered a deadly weapon in Texas, HIV-positive individuals may face aggravated assault charges for failing to disclose their HIV status to sexual partners.

In May 2009, an HIV-positive man was sentenced to five concurrent forty-five year sentences for aggravated assault with a deadly weapon for exposing and infecting multiple women with HIV. Because he allegedly did not disclose his HIV status to his partners and did not use condoms during sex, the prosecutors charged him with aggravated assault. The man had been involved in romantic, intimate relationships with each of the women and maintained that he himself may have even been

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731 Brenda Rodríguez, Sisterhood forms in Prison AIDS Center, SAN ANTONIO EXPRESS NEWS, Sept. 15, 1997, at 8A.
734 Diane Jennings, Man Who Spread HIV Gets 45 Years, DALLAS MORNING NEWS, May 30, 2009, at 1B.
infected by one of the complainants. He will be eligible for parole after twenty-two and a half years.

In July 2010, an HIV-positive man pleaded guilty to aggravated sexual assault and other aggravated assault charges for failing to disclose his HIV status to his sexual partners. The court found that the man’s penis and seminal fluids were deadly weapons.

In October 2010, a 32-year-old HIV-positive Iraq war veteran was sentenced to three life sentences without parole for super aggravated assault of a child and continuous sexual abuse of a child. A super aggravated assault conviction requires that the jury find that the defendant used a deadly weapon on a child, in this case HIV, during the assault.

In *Henry v. State*, the Texas Court of Appeals affirmed the seventy-five year sentence of an HIV-positive man 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” despite the fact that these broad generalizations are questionable and should not be applied to individual defendants without at least considering the viral load of a defendant and her/his medical treatment. Otherwise, “it is difficult to see how a qualified witness could reliably testify as to the risk posed by the defendant’s sexual activity.”

**HIV status as a consideration in sentencing even if there was no exposure to HIV.**

HIV status can be considered admissible evidence at the punishment stage of a conviction if it is determined that HIV status is relevant to the offense. This consideration of HIV status most often involves cases of aggravated assault and aggravated sexual assault. Texas courts have found there is a “viable concern” that testimony and evidence of the defendant’s HIV status should be admitted to consider the “potential long term effect of the injury” to the complainant.

Though the courts have established that information concerning a defendant’s life and characteristics may not be relevant to an issue of ultimate fact in the case, such considerations are appropriate when determining a sentence. In *Martinez v. State*, the defendant was sentenced to life in prison and a $10,000 fine for aggravated sexual assault against a child. The defendant appealed

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736 Id.


his sentence, arguing that his sentence was largely based on his HIV status. The court, upholding the conviction and the sentence, found that HIV status can be considered as victim impact evidence at sentencing.\textsuperscript{743} Victim impact evidence reflects the “defendant’s personal responsibility and moral guilt and is thus relevant to punishment issues.”\textsuperscript{744}

Taking into account HIV status in the penalty phase has lead to increased sentences for many individuals in Texas, including those who did not expose others to HIV during the commission of the crime.

In \textit{Atkins v. State}, an HIV-positive man was convicted of attempted sexual performance of a child and, because of two prior felony convictions, was sentenced to life in imprison.\textsuperscript{745} 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.

In \textit{Lewis v. State}, an HIV positive man was sentenced to consecutive life sentences for aggravated sexual assault of a minor. The man inserted his finger into the child’s vagina and masturbated while doing so. In his appeal of his sentence, he argued that his HIV status should not have been considered because at no time did he expose the child to HIV. The defendant also asserted that the state did not produce any medical testimony regarding the defendant’s HIV status, the nature of HIV, or how the acts in question could have exposed the minor to a risk of transmission.\textsuperscript{746} The court disagreed and found that the defendant’s HIV positive status was properly used during the trial and sentencing because the defendant had volunteered his HIV status to the police. The court held that “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.”\textsuperscript{747}

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\textsuperscript{744} Id.
\textsuperscript{747} Id. at *4.
Utah Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**UTAH CODE ANN. § 76-10-1309**

*Enhanced penalties: HIV-positive offenders*

A person who is an HIV positive individual and has actual knowledge of that fact and has received written personal notice of the positive test results from a law enforcement agency pursuant to Section 76-10-1312 and is convicted of:

1. Prostitution under Section 76-10-1302 shall be guilty of a felony of the third degree;
2. Patronizing a prostitute under Section 76-10-1303 shall be guilty of a felony of a third degree; or
3. Sexual solicitation under Section 76-10-1313 shall be guilty of a felony of the third degree.

**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.
HIV-positive persons convicted of sex offenses, particularly prostitution, may receive increased sentences.

Individuals with HIV in Utah should be aware that increased prison sentences may result from repeated violations of the state’s prostitution laws. Utah is one of many states with a “sentence enhancement” statute that may increase penalties for HIV-positive offenders, regardless of whether they expose others to a significant risk of HIV infection. In Utah, if an individual pleads guilty or no contest to, or is convicted of any of the following offenses, she/he is required to take an HIV test:  

- Prostitution
- Patronizing a prostitute
- Sexual solicitation

If the defendant tests positive and receives notice of the positive test result, it will be a third-degree felony, punishable by up to five years in prison and a $5,000 fine if that HIV positive defendant is subsequently convicted of one of the above noted offenses. A violation of Utah’s prostitution laws for those who are not HIV positive is a class B misdemeanor punishable by at most six months in prison and a $1,000 fine (or one year and a $2,500 fine for repeat

748 Utah Code Ann. § 76-10-1311 (West 2010).
749 § 76-10-1302.
750 § 76-10-1303.
751 § 76-10-1313.
752 See Utah Code Ann. § 76-10-1312 (West 2010) (outlining test result notification standards).
753 § 76-3-203(3).
754 § 76-3-301.
755 § 76-10-1309.
756 § 76-3-204.
757 § 76-3-301.
758 § 76-3-204.
759 § 76-3-301.
prostitution\(^{760}\) and “sexual solicitation” offenses\(^{761}\)). HIV-positive persons, on the basis of their status alone, may face a prison sentence four years more than that of HIV-negative persons.

In September 2010, an HIV-positive sex worker was sentenced to five years imprisonment after pleading guilty to one count of third degree felony solicitation.\(^{762}\) The woman had tested positive for HIV in 2007 after her fourth prostitution conviction. She had also been imprisoned in 2008 and 2009 for prostitution.

This “penalty enhancement” law increases penalties for HIV-positive criminal defendants, regardless of whether they exposed others to a significant risk of HIV infection or if infection was even possible under the circumstances. Utah defines “prostitution” as engaging in “sexual activity” for a fee.\(^{763}\) “Sexual activity” includes “acts of masturbation, sexual intercourse, or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.”\(^{764}\) Under this definition, which includes fingering and masturbation, felony-level prison sentences may result despite the fact that HIV cannot be transmitted in this manner.

The use of condoms or other protection is not a defense, even though they can significantly reduce risks of HIV transmission. Disclosure of HIV positive status is not a defense on the face of the statute nor is a defendant’s viral load taken into consideration, even though a low viral load (amount of active HIV virus in the human bloodstream) can significantly reduce transmission risks.

Sexual activity is not required for prosecution. Conviction of “loitering” in a public place for the purpose of being hired for prostitution also results enhanced penalties.\(^{765}\) Because “patronizing” a prostitute is penalized, offering, agreeing, or entering a house of prostitution for the purpose of having sex for a fee is a third-degree felony even if no sexual act took place.\(^{766}\) Offering or agreeing to commit any sexual activity for a fee also triggers sentence enhancement for repeat, HIV-positive offenders.\(^{767}\) There is no consideration given to whether the act, if it had been completed, would have a risk of HIV exposure or transmission. The statute assumes that the completed act would pose a risk of HIV transmission.

HIV positive sex workers in Utah should be aware that being an “inmate of a house of prostitution” also triggers enhanced sentencing.\(^{768}\) Presumably, this means that any sex worker in a commercial sex establishment may face up to five years in prison,\(^{769}\) regardless of whether they engaged in sexual activities posing significant risk of HIV infection.

\(^{760}\) § 76-10-1302(2).
\(^{761}\) § 76-10-1313(2).
\(^{763}\) § 76-10-1302(1)(a).
\(^{764}\) § 76-10-1301(4).
\(^{765}\) § 76-10-1302(1)(c).
\(^{766}\) § 76-10-1303.
\(^{767}\) § 76-10-1313.
\(^{768}\) § 76-10-1302(1)(b).
\(^{769}\) § 76-10-1301(1).
HIV status may be taken into consideration during sentencing.

Transmission of HIV may be a factor in sentencing decisions. In State v. Scott, a man with chlamydia pleaded guilty to three counts of sodomy on a child for sexually abusing a six-year old girl. Each count came with the possibility of a ten year to life sentence. On appeal, the defendant argued that the trial court should not have considered his victim’s infection with chlamydia as an “aggravating factor” when deciding whether to impose concurrent sentences (prison sentences served at the same time) or consecutive sentences (prison sentences served one after the other), because it was not certain that the defendant was the source of the victim’s infection. The Court of Appeals of Utah disagreed, as evidence suggested that the defendant had chlamydia, and the transmission of a sexually transmitted infection (STI) to a sexual abuse victim was a valid aggravating factor. Scott suggests that the transmission of HIV may be taken into consideration for sentencing purposes and result in consecutive sentences for conviction of multiple charges of a sex offense.

There are currently proposals in Utah that would increase penalties for HIV positive persons even if such persons were unaware of their HIV status.

As of the summer 2010, Utah’s statutes related to HIV exposure were being considered for amendment that would broaden their terms. A proposed senate bill would eliminate any requirement that an HIV-positive person have a previous conviction for a prostitution-related offense or knowledge of an HIV-positive test result.

Under this new law, if enacted, any person who committed a prostitution-related offense and knew or should have known that she/he was HIV-positive would receive a penalty enhancement. A court apparently could take into consideration highly private information concerning a defendant’s sexual or health history to determine whether that defendant “should have known” that she/he was HIV positive.

Assaulting a police or correctional officer with bodily fluids can result in increased prison sentences.

Utah has an HIV exposure statute specifically addressing situations where HIV-positive inmates throw or otherwise expose others to their bodily fluids during confrontations. Prison guards and other correctional employees involved in altercations with inmates often allege that they were attacked by HIV-positive inmates who intentionally spat at them or exposed them to their bodily fluids.

In Utah, it is a class A misdemeanor, punishable by one year in prison and a $2,500 fine, if any prisoner or any person throws or otherwise propels any substance or object at a police or correctional officer.

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771 Scott, 180 P.3d at 776.
772 Id. at 777.
773 Id.
775 UTAH CODE ANN. § 76-3-204(1) (West 2010).
This offense becomes a third-degree felony, punishable by up to five years in prison\textsuperscript{779} and a $5,000 fine,\textsuperscript{780} if the object or substance is (1) blood, urine, or feces, or (2) the saliva of a person who knows she/he is infected with HIV, hepatitis B, or hepatitis C, and any of these substances come into contact with an officer’s face, eyes, or mouth, or an open wound on the officer’s body.\textsuperscript{781} Neither the intent to transmit HIV nor actual transmission is required.

The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”\textsuperscript{782} The CDC has also concluded that spitting alone has never been shown to transmit HIV.\textsuperscript{783} Utah’s statute ignores these scientific findings, leading to potential prosecutions for behavior that has at best a remote possibility of transmitting HIV.

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\textsuperscript{776} § 76-3-301.
\textsuperscript{777} Pursuant to UTAH CODE ANN. § 77-7-15 (West 2010).
\textsuperscript{778} UTAH CODE ANN. § 76-5-102.6.
\textsuperscript{779} § 76-3-203(3).
\textsuperscript{780} § 76-3-301.
\textsuperscript{781} § 76-5-102.6.
\textsuperscript{782} CTR. FOR DISEASE CONTROL & PREVENTION, HIV Transmission, Can HIV be transmitted through a Human Bite?, (March 25, 2010), http://www.cdc.gov/hiv/resources/qa/transmission.htm.
\textsuperscript{783} CTR. FOR DISEASE CONTROL & PREVENTION, HIV Transmission, Can HIV be transmitted by being spit on by an HIV infected person?, (March 25, 2010) http://www.cdc.gov/hiv/resources/qa/transmission.htm.
Vermont Statute(s) that Allow for Criminal Prosecution based on HIV Status:

| No specific statute on record. |

There is no HIV-specific criminalization statute but there has been at least one case prosecuted under general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in Vermont. However, at least one person has been prosecuted for HIV exposure under general criminal laws. In Vermont, a 31-year-old HIV-positive man was charged with aggravated assault for spitting in the face of a police officer in July 2009.784

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Virginia Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

**VA. CODE ANN. § 18.2-10(f)**

*Punishment for conviction of felony; penalty*

Class 6 felonies a punishable by either (1) a term of imprisonment of one to five years, or (2) in the discretion of the jury or the court trying the case without a jury, confinement in jail for up to one year and/or a fine of up to $2,500.

**VA. CODE ANN. § 18.2-11**

*Punishment for conviction of misdemeanor*

Class 1 misdemeanors are punishable by confinement in jail for up to one year and/or a fine of up to $2,500.
Virginia criminalizes a broad range of sexual activities for people living with HIV.

Virginia criminalizes oral sex, anal sex, and vaginal sex for people living with HIV. If an individual knows he or she has HIV and engages in these activities with the intent to transmit HIV, she/he is guilty of a felony that can result in up to five years of prison and a fine of up to $2,500. Even if the individual has no intent to transmit HIV, an individual who knows she/he has HIV is guilty of a misdemeanor if she/he engages in oral sex, anal sex, or vaginal sex without disclosing her/his HIV-status to her/his partner.

This statute may disproportionately punish an individual for being HIV-positive, regardless of whether the alleged conduct involved a risk of transmission. There is no exception for condom use and no consideration of the defendant's viral load, both of which might significantly reduce the risk of transmission. There is also no exception or consideration under the statute for situations in which both partners are HIV-positive.

An individual living with HIV must disclose her/his HIV status to a partner before engaging in certain sexual activities.

The misdemeanor statute requires the prosecution to demonstrate that the individual did not disclose her/his HIV status. Under the felony statute there is no requirement of disclosure but the prosecution must prove that the defendant intended to transmit HIV. The difference between the statutes rests in the defendant's state of mind which could be difficult to prove under the felony statute. Hypothetically, a person could disclose her/his HIV positive status to her/his partner but still be prosecuted under the felony provision if there were elements to suggest that the person intended to transmit HIV.

Cases of arrests and prosecutions under Virginia’s statute include:

- In October 2010, a man was charged with one count of felony infected sexual battery for allegedly exposing women to HIV without disclosing his status.\(^785\)

- In 2008, a man was sentenced to nine months imprisonment after being convicted under Virginia’s misdemeanor infected sexual battery statute.\(^786\) The man had a sexual relationship with a woman and did not tell her his status until months into the relationship. After the disclosure, they continued their sexual relationship but she pressed charges against him after the relationship ended.

Virginia criminalizes the donation or sale of blood, bodily fluids, tissue, and organs of an HIV-positive person.

Involvement in the sale of blood, bodily fluids, tissue, and organs of a person living with HIV is prohibited if the defendant knows the donor is or was HIV-positive and the materials may transmit

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\(^{785}\) [Man accused of infecting women with HIV](http://www.wtvr.com/news/wvkr-man-infecting-women-with-hiv-101410,0,2366386.story)

\(^{786}\) [Keith Epps, Keeping HIV secret lands man in jail](http://fredericksburg.com/News/FLS/2008/032008/03272008/366616).
HIV.

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Washington Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**WASH. REV. CODE ANN. § 9A.36.011**

*First Degree Assault*

A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm, administers, exposes, or transmits to another, HIV. First degree assault is a class A felony.

**WASH. REV. CODE ANN. §§ 9.94A510, 9.94A.515, 9.94A.550**

*Class A Felony*

In Washington State, a class A felony carries a sentencing range of 93-318 months in prison and a fine of up to $50,000.

In Washington, any person may be imprisoned if she/he engages in activity with the “intent” to expose another to HIV.

Washington’s HIV assault provision makes it a first degree felony to expose another to HIV with the intent to inflict bodily harm. The statute fails to define what activity “administers” or “exposes” others to HIV. This may allow prosecutors to interpret the statute to include activities in which there is little to no risk of HIV transmission, such as spitting, biting, oral sex, sexual activity with the use of a condom, or performing or submitting to medical procedures. It also fails to account explicitly for an individual’s viral load and as such an individual may be prosecuted under the statute even if her/his low viral load makes transmission extremely unlikely.

The Court of Appeals has rejected challenges to this statute on the basis that it violates the equal protection clauses of the U.S. and Washington constitutions, the privileges and immunities clause of the Washington constitution, and that it is unconstitutionally vague. 787 In *State v. Stark*, 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. 788

The Court of Appeals in both *Stark* and *State v. Whitfield* provide limited guidance that sexual activity with a condom may not constitute exposure under Washington’s criminalization statute. In *Stark*, the Court specifically cites the fact that the defendant “engaged in unprotected sexual intercourse”

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788 *Stark*, 832 P.2d at 116 (affirming conviction and sentence of 163 months for HIV-positive man who engaged in unprotected oral and vaginal sex with three women). In *Stark*, the defendant was convicted under a second degree assault statute, but 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.
in determining that his conduct constituted exposure. However, in *State v. Whitfield* the Court of Appeals interpreted exposure to include oral, anal, and vaginal sex without a condom.  

In Washington, disclosure of HIV status and using condoms or other protection may provide a defense that there was no intent to inflict harm through exposure or transmission of HIV. The Court of Appeals in both *Whitfield* and *Stark* inferred criminal intent because the defendants did not disclose their HIV status to their sexual partners and failed to use condoms.

For prosecution under this statute, the State must also show intent to inflict great bodily harm through exposure to HIV. Despite the fact that the statute requires intent to inflict great bodily harm, some courts have interpreted that knowing one’s HIV positive status and failing to take precautions limiting exposure is enough to constitute an intent to harm or expose another to HIV. In *Stark*, the Court of Appeals 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. Similarly, in *Whitfield*, the Court of Appeals found sufficient evidence of intent based on the fact that the defendant knew he was HIV positive; had been counseled on how HIV was transmitted, how to prevent transmission during sex, denied or failed to disclose that he had HIV or STIs to his sexual partners, and insisted on not using a condom or other type of protection. In both cases defendants made statements indicating a desire to infect other individuals and that this evidence also lead to the court’s determination of intent.

However, recently there has been a prosecutorial trend in Washington where if someone is HIV-positive and engages in sexual activities that may be enough to arrest her/him for assault. The following cases had absolutely no evidence to suggest that the defendant intended to expose or transmit HIV to others but only engaged in sexual activities allegedly without disclosing her/his status:

- In October 2010, a 19-year-old perinatally infected college student was charged with first degree assault for having sex with his long-term girlfriend.
- Also in October 2010, a 23-year-old HIV positive man was sentenced to 87 months imprisonment after pleading guilty to first degree assault charges for allegedly not disclosing his status to a man that he met on manhunt.com, a dating website.

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789 *Whitfield*, 134 P.3d at 1214 (Wash. Ct. App. 2006) (affirming conviction on 17 counts of first-degree assault and sentence of 178 years in prison for HIV-positive man who engaged in anal, oral, and vaginal sex with seventeen women, usually without a condom, with transmission occurring in five of the 17 cases).
791 See *Whitfield*, 134 P.3d at 1213-14.
792 See *Stark*, 832 P.2d at 114.
793 See *Whitfield*, 134 P.3d at 1213; *Stark*, 832 P.2d at 114.
In June 2009, a man with HIV pleaded guilty to first degree assault after he failed to disclose his HIV status to a bisexual married man with whom he had an affair with after meeting online.  

Disclosure of one's HIV status may be a defense to prosecution.

Washington’s statute does not explicitly provide an exception for disclosure or consent but, as noted above, there is supporting case law that disclosure may be considered as a possible defense against intent to transmit HIV though disclosure is not an absolute defense. In State v. Ferguson, the Washington Court of Appeals left open the question of whether consent could constitute a defense but held that, even if consent is a defense, the partner must have “knowledge of all relevant facts,” including whether the defendant is using a condom. In Ferguson, the defendant’s partner knew the defendant was living with HIV before consenting to sex, but did not know that the defendant removed his condom during sex. The court refused to determine whether consent could be a defense to the statute, but held that, even if consent were a defense, the partner did not consent in these circumstances because she did not consent to sex without a condom.

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

In Washington, class A felonies carry a maximum penalty of life in prison and a $50,000 fine. Prison sentences must run consecutively, meaning that sentences for every offense must be served one after the other. In State v. Whitfield, although the trial court interpreted multiple incidents of sexual activity with one partner as a single offense, the activity with each of seventeen partners resulted in conviction of seventeen class A felony counts and seventeen consecutive sentences, resulting in a 178-years. The Court of Appeals rejected his argument that this amounted to cruel and unusual punishment.

HIV status may be a factor in sentencing.

In In re Farmer, the Washington Supreme Court imposed a sentence of almost eight years for a 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

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798 State v. Ferguson, No. 21329-0-II, 1999 WL 1004992, at *6-*7 (Wash. Ct. App. Nov. 5, 1999). In Ferguson, the defendant was convicted under a second degree assault statute, but 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.
799 See id.
800 See id.
801 See Whitfield., 134 P.3d at 1209.
802 Farmer was one of the first people in the state to under-go a court ordered blood test to determine if he was HIV-positive. Such testing was later ruled unconstitutional by the Washington Supreme Court. Debra Carlton Harrell, Steven Farmer, Central Figure in Case on HIV Testing, Dies, SEATTLE POST INTELLIGENCER, Sept. 30, 1995, at B2.
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. \(^{804}\)

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\(^{804}\) See *id.* Although the supreme court specified that the defendant knew or believed he had AIDS, previous opinions were amended to state that the court was relying on the fact that he knew or believed he “was HIV-positive.” *See* State v. Farmer, 812 P.2d 858 (Wa. 1991).
West Virginia Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

**West Virginia has a communicable disease statute that may criminalize HIV exposure.**

West Virginia’s Public Health Code imposes penalties of up to $100 and thirty days in jail for knowingly exposing others to venereal diseases. “Venereal disease” is not defined but HIV is considered sexually transmittable. 805 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.

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805 W. VA. CODE ANN. § 64-7-17 (West 2010).
Wisconsin Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**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.

HIV-positive status may lead to higher prison sentences for sex offenses.

Wisconsin has no statute explicitly criminalizing HIV transmission or exposure but Wisconsin allows HIV-positive status during the commission of certain sex offenses to serve as an “aggravating factor” that may lead to additional prison time.

HIV-status may be considered an aggravating factor in sentencing for the following offenses: first degree or second degree sexual assault; first or second degree sexual assault of a child; repeated acts of sexual assault of the same child; or sexual assault of a child placed in substitute care.

In order for the individual's HIV-positive status to serve as an aggravating factor sentencing, the individual must have tested positive for HIV and known of his or her positive test result, and the crime must have “significantly exposed” the victim to HIV. The statute defines “significantly exposed” as “sustaining a contact that carries a potential for transmission of a sexually transmitted disease or HIV” through the following:

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806 *Wis. Stat. § 940.225(1),(2) (West 2010).*
807 *§ 948.02(1), (2).*
808 *§ 948.025.*
809 *§ 948.085.*
810 *§ 973.017(4)(a)(4).*
• Either (1) transmission into a body orifice or onto mucous membrane; or (2) Exchange during the accidental or intentional infliction of a penetrating wound; or (3) Exchange, into an eye, an open wound, an oozing lesion, or other place where a significant breakdown in the epidermal barrier has occurred

• Of any of the following bodily fluids: blood; semen; vaginal secretions; cerebrospinal, synovial, pleural, peritoneal, pericardial, or amniotic fluid; or other body fluid that is visibly contaminated with blood.

Neither intent to transmit HIV nor actual transmission is required for HIV status to become an aggravating factor.

Aggravating factors may increase prison sentences by several years and even decades, depending on the specific offense and other factors considered in sentencing.

Mere risk of contracting HIV may lead to an increased sentence, even if the defendant is HIV-negative.

At least one Wisconsin court has considered an HIV-negative defendant’s risk of contracting and transmitting HIV in sentencing. In State v. Holloway, a trial court sentenced a woman convicted of prostitution to the maximum term, in part because of her “high HIV risk, both to herself and others” even though the woman was HIV-negative.

Arrests and prosecutions for HIV exposure have also come under general criminal laws.

In 2008, an 18-year-old teen was charged with second degree reckless endangerment, a felony punishable by up to ten years imprisonment, for allegedly having unprotected sex with a fellow teen and not disclosing his HIV status. The defendant denied that he and the woman ever had sex.

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811 Cerebrospinal fluid is a bodily fluid that surrounds the brain and spinal cord.
812 Synovial fluid is bodily fluid that surrounds the joints.
813 Pleural fluid is a bodily fluid that surrounds the lungs.
814 Peritoneal fluid is a bodily fluid that surrounds organs in the abdominal cavity.
815 Pericardial fluid is a bodily fluid that surrounds the heart.
816 Amniotic fluid is a bodily fluid that surrounds a fetus in the womb.
817 See, e.g., WIS. SENTENCING Comm’n, SENTENCING WORKSHEET FOR FIRST DEGREE ASSAULT, available at http://wsc.wi.gov/docview.asp?docid=3298 (last visited June 29, 2010) (showing a mitigated level offense sentencing range of probation to 20 years in prison, an intermediate level offense sentencing range of five to 30 years, and an aggravated level offense sentencing range of 10 to 40 years).
Wyoming Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute

There are no statutes explicitly criminalizing HIV transmission or exposure in Wyoming. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors were not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Wyoming.

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UNITED STATES TERRITORIES
American Samoa Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute:

There are no statutes explicitly criminalizing HIV transmission or exposure in American Samoa. However, in other jurisdictions HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person’s HIV status in American Samoa.

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Guam Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**GUAM CODE ANN. tit. 9, § 28.10**

*First degree felony: prostitution with knowledge of HIV status*

A person convicted of prostitution who is determined to have known that he or she was infected with either HIV or AIDS at the time of the commission of the act shall be guilty of a felony of the first degree.

“Sexual penetration” includes an “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.” GUAM CODE ANN. tit. 9, § 25.10(a)(9) (2009).

**GUAM CODE ANN. tit. 9, § 80.30**

*Duration of imprisonment*

In the case of a felony of the first degree, the court shall impose a sentence of not less than five (5) years and not more than twenty (20) years.

**GUAM CODE ANN. tit. 9, § 80.50**

*Fines*

A person who has been convicted of an offense may be sentenced to pay a fine or to make restitution not exceeding $10,000 when the conviction is of a felony.

Engaging in prostitution while HIV-positive may result in imprisonment for up to twenty years.

Guam is one of many jurisdictions with a “penalty enhancement” provision specifically targeting HIV-positive individuals who engage in prostitution.\(^\text{820}\) Such provisions frequently authorize increased prison sentences for HIV-positive individuals, regardless of whether they expose others to significant risks of HIV transmission.

In Guam, engaging in, offering to engage in, or agreeing to engage in any sexual conduct in return for a fee is normally a misdemeanor punishable by up to one year in prison\(^\text{821}\) and a $1,000 fine.\(^\text{822}\)

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\(^\text{820}\) See generally GUAM CODE ANN. tit. 9, § 28.10 (2009).

\(^\text{821}\) GUAM CODE ANN. tit. 9, § 80.34(a) (2009).

\(^\text{822}\) § 80.50(c); § 28.10(b)(1).
However, if an individual convicted of prostitution is aware of her/his HIV positive status, prostitution is a first-degree felony punishable by five to twenty years in prison and a $10,000 fine. Thus, HIV-positive individuals convicted of prostitution may receive prison sentences up to twenty times higher than those of HIV-negative individuals.

This prostitution law is intended to punish both HIV-positive sex workers and HIV-positive persons who seek out the services of a sex worker. Neither the intent to transmit HIV nor actual transmission is required. The use of condoms or other protection during sexual intercourse is not a defense and neither is the disclosure of HIV status to sexual partners. This statute thus fails to provide sex workers with HIV with any incentive to use condoms, because the increased sentence applies whether they do so or not.

Guam’s prostitution law is a penalty enhancement statute that may severely increase the prison sentences of HIV-positive persons, regardless of whether they expose others to any risk of HIV transmission. Guam’s definition of “sexual contact” includes sexual activities that do not present any risk of HIV transmission. The territory’s prostitution laws define “sexual contact” as including:

- The intentional touching of the victim’s or actor’s intimate parts;
- The intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

Under this definition, even contact between the hands of a sex worker and the clothes covering the penis of an HIV-positive man could result in penalty enhancement. Exchanging money for sexual penetration or any sexual conduct triggers elevated sentencing for any party who is HIV positive regardless of whether the act, if completed, would have posed any risk of HIV exposure or transmission (i.e.: hand job). Applying penalty enhancement provisions to this broad definition of prostitution may lead to felony-level penalties for HIV-positive persons engaging in sexual contact that cannot transmit HIV.

**Note:** Under Guam’s public health laws, it is unlawful for any person with a “communicable disease” to “willfully expose himself” in any public place, street or highway. Although Guam defines both HIV and AIDS as communicable diseases, this exposure statute was intended to

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823 § 80.30(a).
824 § 80.50(a); § 28.10(b)(3).
825 § 28.10(a). (“It is the intent of this section that guilt attach to both the payor and the recipient of the fee or pecuniary benefit that is the consideration for the act of prostitution, except that a police officer engaged in the performance of his or her official duties in the performance of an investigation of offenses committed under this chapter shall not be charged under this section.”)
826 § 28.10(c) (citing GUAM CODE ANN. tit. 9, § 25.10(a)(8) (2009)).
827 § 28.10(c) (citing GUAM CODE ANN. tit. 9, § 25.10(a)(8) (2009)).
828 Id.
830 § 3301(a).
address contagious disease outbreaks, and is seemingly inapplicable to HIV exposure or transmission.

**Important Note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.
Northern Mariana Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

There are no criminal statutes explicitly addressing HIV or STD exposure in the Northern Mariana Islands.

There are no statutes explicitly criminalizing HIV transmission or exposure in the Northern Mariana Islands. Some states have prosecuted HIV-positive people for exposing others to the virus under general criminal laws, such as those governing reckless endangerment and aggravated assault. However, at the time of this publication the authors are not aware of this type of prosecution on the basis of an individual’s HIV-positive status in the Northern Mariana Islands.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.
Puerto Rico Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

There are no criminal statutes explicitly addressing HIV or STI exposure in Puerto Rico.

There are no statutes explicitly criminalizing HIV transmission or exposure in Puerto Rico. While some states have prosecuted HIV-positive people for exposing others to the virus under general criminal laws, such as those governing reckless endangerment and aggravated assault, at the time of publication there were no reported cases of this type of prosecution in Puerto Rico.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.
U.S. Virgin Islands Statute(s) that Allow for Criminal Prosecution based on HIV Status:

**V.I. CODE ANN. tit. 14, § 888**

Any person who exposes another to HIV by:

1. Engaging in unprotected sexual activity; or
2. Sharing hypodermic needles/syringes; or
3. Donating, selling, or attempting to donate or sell blood, semen, tissues, organs, or other bodily fluids for the use of another, except as determined necessary for medical research or testing;

When the infected person (1) knows at the time that he is infected with HIV, (2) has not disclosed his HIV-positive status, (3) and acts with the specific intent to infect the other person with HIV, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Evidence that the person had knowledge of his HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.

Transmission of HIV is not required.

“**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.

“**Unprotected sexual activity**” means sexual activity without the use of a condom.

Engaging in unprotected sexual intercourse with the specific intent to transmit HIV is prohibited.

In the U.S. Virgin Islands, conviction and imprisonment may result from engaging in unprotected sexual intercourse, but only under very specific circumstances. It is an offense punishable by up to ten years in prison and/or a $10,000 fine if an HIV-positive person (1) knows that she/he is HIV-positive, (2) has not disclosed HIV status to sexual partners, and (3) engages in unprotected sexual
activity with the specific intent to infect her/his partner with HIV.\textsuperscript{831} Evidence that an HIV-positive person knew of her/his HIV status and engaged in unprotected sex is not sufficient, however, to prove specific intent to infect.\textsuperscript{832} It is not clear what evidence would be required to prove intent to infect. Presumably, testimony regarding statements from an HIV-positive person that she/he wished to spread HIV could suffice.

Transmission of HIV to a sexual partner is not required for conviction.\textsuperscript{833}

This HIV exposure law is explicitly limited to situations where HIV-positive persons expose others to activities known to transmit HIV, and where proof of intent to transmit HIV is required.

If a condom is used during sexual intercourse, then there is no violation of the statute.\textsuperscript{834} In addition, the law’s definition of “sexual activity” includes only: “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; or receptive consensual anal intercourse on the part of an infected man or woman with a male.”\textsuperscript{835}

Under the terms of this HIV exposure law, it is a complete defense to prosecution if HIV status is disclosed to sexual partners before engaging in consensual sexual activity.\textsuperscript{836} However, individuals living with HIV should be aware that disclosure of HIV status may be difficult to prove without witnesses or some form of incontrovertible evidence.

At the time of publication, the authors were not aware of any criminal prosecutions of individuals on the basis of their HIV-positive status in the U.S. Virgin Islands.

Sharing needles or syringes with the specific intent to infect another person with HIV is prohibited.

In the U.S. Virgin Islands it is an offense punishable by up to ten years in prison and/or a $10,000 fine if an HIV-positive person (1) knows that she/he is HIV-positive, (2) has not disclosed her/his HIV status, and (3) shares a hypodermic needle or syringe with the specific intent to infect another with HIV.\textsuperscript{837}

Transmission of HIV is not required for prosecution.\textsuperscript{838}

It is a complete defense to prosecution if HIV-status is disclosed to those sharing needles/ syringes with an HIV-positive person.\textsuperscript{839} However, individuals living with HIV should be aware that

\textsuperscript{831} V.I. CODE ANN. tit. 14, § 888(a) (2010).
\textsuperscript{832} 14, § 888(c).
\textsuperscript{833} § 888(d).
\textsuperscript{834} § 888(a) (limiting punishable conduct to “unprotected sexual activity”); § 888(c)(2) (defining “unprotected sexual activity” as sexual activity without the use of a condom);
\textsuperscript{835} § 888(c)(1).
\textsuperscript{836} § 888(a).
\textsuperscript{837} § 888(a).
\textsuperscript{838} § 888(d).
\textsuperscript{839} § 888(a).
disclosure of HIV status may be difficult to prove without witnesses or documentation. Fortunately, successful prosecution hinges on the state’s ability to prove specific intent to infect another with a needle.

This needle-sharing law is a rare example of a statute explicitly limited to the unusual situation where an HIV-positive person intentionally attempts to infect others. To be convicted of HIV exposure through sharing a needle, the government must prove that the HIV-positive defendant had the specific intent to infect by sharing the needle or syringe. Evidence that an HIV-positive person knew of her/his HIV status and shared a contaminated needle is not alone sufficient to prove this specific intent requirement.

**Donating or selling blood, semen, human tissues, organs, or bodily fluids with the specific intent to infect another person is prohibited.**

HIV exposure laws also prohibit HIV-positive persons from donating or selling blood, organs, and other human tissues or bodily fluids. Specifically, it is an offense punishable by up to ten years in prison and/or a $10,000 fine if an HIV-positive person (1) knows that she/he is HIV-positive, (2) has not disclosed her/his HIV status, and (3) donates, sells, or attempts to donate or sell blood, semen, tissues, organs, or bodily fluids for the use of another, except as necessary for medical research or testing.

Transmission of HIV is not required for prosecution.

It is a complete defense to prosecution if HIV-status is disclosed before donation of blood, tissues, and bodily fluids.

**Important note:** While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

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840 § 888(c)(2010).
841 § 888(c).
842 § 888(b).
843 § 888(d).
844 § 888(a).
FEDERAL LAW
INCLUDING U.S. MILITARY LAW
Federal Criminal Statute(s)

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.

Federal law explicitly addresses HIV transmission as a criminal offense in only one area, that of donation or sale of blood or other potentially infectious fluids or human tissues. Federal law provides that for conviction, the person must receive “actual notice” of testing HIV positive, although there is no requirement that the person be informed that HIV can be transmitted by blood, other body fluids, or human tissues. There is an exception for donations or sales that are necessary for medical research or testing.

Transmission of HIV is not required for conviction.

Because of widespread use of testing to screen HIV in donated blood (and widespread testing of donors of semen or other human body fluids or tissue), there is very little likelihood that a donor who knows of his/her HIV status will be undetected in attempting to donate or sell blood.

Although this law was originally enacted by Congress in 1994, there are no reported cases involving prosecutions under it. Many states have similar statutes, and prosecutions of individuals have been reported under those statutes.

Enhanced federal sentences for defendants with HIV

Unlike many states, Congress has not enacted a law imposing enhanced sentences for defendants in criminal cases involving conduct posing a risk of HIV transmission. The U.S. Sentencing

Commission considered issuing a guideline for enhanced sentences in cases of intentional exposure to HIV through sexual contact, and declined to do so given the rarity of such cases in the federal courts. Instead, the Commission concluded that the federal guidelines' “general departure” provision, which allows for an upward departure from the guideline range for aggravating circumstances, is the appropriate way to handle cases involving HIV. As a result of recent U.S. Supreme Court decisions, the federal sentencing guidelines are now largely advisory, and federal judges can determine sentences based on concerns other than those set forth in the guidelines.

Very few federal cases have involved upward departure sentences involving sex offenses committed by HIV-positive defendants. For example, in United States v. Blas, the Court of Appeals for the Eleventh Circuit affirmed an “extreme conduct” upward sentence departure based on an HIV-positive defendant’s numerous sexual acts with a 15-year-old girl. 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. In another federal case, United States v. Burnett, the court’s use of the defendant’s HIV status to impose an upward departure was much more problematic. In that case, there was no risk of HIV transmission presented by the underlying offense, public lewdness when soliciting an undercover federal officer for sex, and the court’s opinion fails to determine the risk of HIV transmission involved in the sexual activity that was solicited from the undercover agent.

In at least one case, a federal judge has imposed a sentence far beyond the federal sentencing guidelines based solely on HIV status. In 2009, a federal judge in Maine determined a pregnant woman’s sentence based solely off of her HIV status. The woman was charged with possession and use of false immigration documents, a crime for which the federal sentencing guidelines recommend 0-6 months incarceration. The woman had been incarcerated for almost 4 months at the time of her sentencing, and both the defense and prosecution recommended that the judge enter a sentence of “time served.” However, the judge sentenced her to a total of 7.9 months because, he argued, the interests of the “unborn child” necessitated that the woman remain in prison past her due date so that he could ensure she received treatment to prevent HIV transmission to the child she was carrying.

**Prosecution of HIV-Positive Federal Inmates for Risk of HIV Transmission to Correctional Officers**

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846 U.S. SENTENCING COMM'N, REPORT TO CONGRESS: ADEQUACY OF PENALTIES FOR THE INTENTIONAL EXPOSURE OF OTHERS THROUGH SEXUAL ACTIVITY TO THE HUMAN IMMUNODEFICIENCY VIRUS 4 (1995) (concluding that HIV transmission issues are rare in federal sentences, based on a review of 235 criminal cases sentenced in fiscal year 1993 in which HIV was mentioned in only four cases, and in only one of those cases, which was not a sexual offense case, was intentional transmission of HIV an issue).

847 U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 5K2.0 (2009).


849 360 F.3d 1268 (11th Cir. 2004).


Although there are many convictions of HIV-positive persons, increased penalties for posing an alleged risk of HIV transmission, and matters in state courts for altercations (often involving biting or spitting) with law enforcement personnel, very few such federal cases have been reported. The reported cases tend to involve substantial prison sentences for conduct posing a limited risk of HIV transmission. One such case, *United States v. Moore*, involved an assault prosecution of a federal inmate for severely biting two federal corrections officers. The Court of Appeals for the Eighth Circuit concluded that HIV is not transmitted by exposure to saliva, and thus it rejected the argument that the risk of HIV transmission from a human bite is such that an HIV-positive inmate’s teeth and mouth can be used as a deadly and dangerous weapon under the federal assault statute. But in another inmate biting case, *United States v. Sturgis*, the Court of Appeals for the Fourth Circuit concluded to the contrary on the question of whether saliva could transmit HIV, given the expert testimony in the record before it, and thus concluded that the inmate’s HIV infection was a basis for finding that the inmate’s teeth were used as a deadly weapon. The conclusion in *Sturgis* that HIV is transmitted by saliva exposure from a human bite was followed in *United States v. Studnicka*, which resulted in a ten year prison term for an HIV-positive federal inmate’s biting of a correctional officer.

**Prosecution of HIV-Related Offenses in the U.S. Military**

Members of the U.S. Armed Forces have been prosecuted and convicted for offenses involving sexual transmission or risk of transmission of HIV. Although applicants with HIV are barred from enlisting in the armed forces, military service members are tested for HIV, and those who test positive are retained in the service as long as they are able to meet fitness for duty standards. All prosecutions of service members for HIV-related offenses are pursuant to the Uniform Code of Military Justice, which does not include any provision explicitly addressing HIV transmission. Instead, service members with HIV have been prosecuted under general criminal assault provisions, similar to the criminal assault prosecutions of civilians with HIV under state law. Military service members have also been prosecuted under two provisions unique to the military: failing to follow safe-sex orders and for conduct prejudicial to good order. All military cases appear to involve sexual contact, and thus there is an absence of reported biting, spitting, or similar assault cases of the sort prosecuted in the civilian state courts.

**Military service members with HIV been convicted of aggravated assault in cases in which HIV status is disclosed and their sexual partner consents, or in cases in which condoms are used.**

Numerous military service members with HIV have been prosecuted under the aggravated assault provision contained in Article 28 of the Uniform Code of Military Justice (UCMJ). Article 128

852 846 F.2d 1163 (8th Cir. 1988). Although the court rejected the argument that the inmate’s HIV infection caused his mouth and teeth to be a deadly and dangerous weapon, the court instead held that because of the risk of disease transmission and infection, other than HIV, the deadly and dangerous weapon standard nevertheless applied, and the inmate received a five year sentence to run consecutively with his current sentence.


854 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).


defines an aggravated assault as an assault undertaken with a means likely to produce death or grievous bodily harm. Assault in this context has been defined as any contact, even that consented to by the service member’s partner. Article 128 includes both attempted, as well as completed, assaults and thus an HIV-positive service member’s attempt to have unprotected, consensual insertive anal intercourse, which was abandoned before achieving penetration, has been held to be an aggravated assault.\(^{857}\) Military courts have held that there is no requirement that the defendant have a specific intent to infect a sexual partner, but instead only a general intent to engage in unprotected sex.\(^{858}\) Because a partner in an assault cannot, as a matter of law, consent to the assault, disclosure of HIV status is not a defense. Thus, even in cases in which a service member has disclosed his HIV status to his sexual partner, and the partner has given an informed consent to the sexual contact, the service member has been convicted of aggravated assault.\(^{859}\)

The military courts have stretched the meaning of the “likely to produce” death or grievous bodily harm element in the aggravated assault definition to encompass circumstances that present nothing more than a highly remote possibility of harm. First, in United States v. Johnson,\(^{860}\) the Army Court of Military Review decided that “likely” need only be “more than merely a fanciful, speculative, or remote possibility,” and it therefore held that unprotected anal intercourse “would have been likely to transmit a disease which can ultimately result in death.” Next, in United States v. Joseph,\(^{861}\) the Court of Military Appeals further diluted the meaning of “likely.” In that case, the service member had sexual intercourse with a woman on one occasion without having disclosed his HIV infection. At trial, it was undisputed that the service member used a condom, although his partner testified that the condom broke during sex. A medical expert testified that the risk of HIV transmission as a result of one act of sexual intercourse was small, and that using a condom, although not 100 percent effective in preventing HIV transmission, would be extremely effective in reducing the risk. Although this evidence clearly indicated that transmission of HIV was not likely from the one act of sexual intercourse, the court reframed the issue, concluding that “the question is not the statistical probability of HIV invading the victim’s body, but rather the likelihood of the virus causing death or serious bodily harm if it invades the victim’s body.”\(^{862}\) The court thus abandoned any requirement that the risk of HIV transmission must be likely, with the result that under Joseph, conviction under the Article 28 aggravated assault provision is possible for sexual contact posing any theoretical risk


\(^{858}\) United States v. Schoolfield, 40 M.J. 132 (C.M.A. 1994) (holding that HIV-positive service member who had unprotected sex with a woman on five occasions without disclosure of his HIV status, but without evidence that he intended to infect her with HIV, was guilty of aggravated assault), cert. denied, 513 U.S. 1178 (1995).

\(^{859}\) United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997) (affirming conviction on ground that informed consent to sexual intercourse with HIV-positive service member was not a defense).

\(^{860}\) United States v. Johnson, 27 M.J. 798, 801 (A.C.M.R. 1988); aff’d, 30 M.J. 53 (C.M.A.), cert. denied, 498 U.S. 919 (1990). In Johnson, there was no act of sexual intercourse because the case was prosecuted as an attempted assault. The court’s ruling requiring “more than remote” likelihood of HIV transmission thus was a determination regarding the likelihood of transmission resulting from one instance of unprotected anal intercourse.

\(^{861}\) 37 M.J. 392 (C.M.A. 1993).

\(^{862}\) 37 M.J. 392, 397. The court’s ruling may reflect the fact that Joseph’s sexual partner subsequently tested positive for HIV. For a similar ruling, see United States v. Stewart, 29 M.J. 92 (C.M.A. 1989) (holding that unprotected sexual intercourse with a woman on numerous occasions, apparently resulting in the woman’s infection with HIV, was aggravated assault in view of the probability that death would result from HIV infection).
of transmission, including sexual contact using condoms or other protection. Along this same line, in *United States v. Goldsmith*, the Air Force Court of Criminal Appeals held that unprotected sex, even if the probability of transmission was only 1 in 1,000 in each instance of sexual intercourse, is an aggravated assault. Consistent with a zero risk approach, in *United States v. Perez*, the court held that evidence of risk of transmission was insufficient to support conviction for aggravated assault because there was no evidence that the defendant, who had had a vasectomy, could transmit HIV.

At the same time, however, the Court of Appeals for the Armed Forces has started to show receptiveness to evidence that a low viral load reduces the risk of HIV transmission below the level necessary to prove an aggravated assault. In *United States v. Dacus*, the court applied *Joseph* and affirmed, based on the defendant’s guilty plea, aggravated assault convictions for sexual intercourse involving inconsistent condom use. At sentencing, however, undisputed expert testimony established that the defendant’s viral load was extremely low, and although he posed a risk of HIV transmission from sexual intercourse, such transmission was “very, very unlikely.” A concurring opinion noted that had the defendant chosen to litigate the issue, then the evidence would not satisfy the statutory aggravated assault standard. The court used that same reasoning in *United States v. Upham* when it reversed an aggravated assault conviction based on evidence that the risk of HIV transmission was too remote because of the defendant’s low viral load. Even if the use of aggravated assault charges in military cases is limited by these decisions in the future, military prosecutors can bring charges under the UCMJ for violation of safe-sex orders, as discussed below.

**Military service members with HIV have been convicted of disobeying a “safe-sex order” in cases in which HIV status is not disclosed or in which condoms are not used.**

HIV positive military service members, upon testing positive, are counseled regarding the risk of HIV transmission, and are routinely issued orders from their commanding officers that they both disclose their HIV infection to their sexual partners, avoid sexual activities posing a significant risk of HIV transmission, and use condoms or other protection to reduce the risk of transmission. Violation of safe-sex orders are prosecuted under Article 90 of the UCMJ, which provides for court-martial of service members who willfully disobey a lawful order. Obtaining the consent of a sexual partner, after disclosure of HIV status, to sexual intercourse without a condom or other protection would be irrelevant to whether a safe-sex order was violated. Military service members with HIV have been convicted under Article 90 for using condoms but failing to disclose HIV status, and for both failing to use condoms or other protection and for failing to disclose.

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863 The implication in *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993), that any risk of HIV transmission whatsoever is adequate to support an aggravated assault charge conflicts with the military’s own HIV prevention approach, which uses “safe-sex” orders to compel service members to reduce, but not entirely eliminate, the risk of transmission. Apparently no service member has been prosecuted for an aggravated assault based on behavior (i.e. disclosure of HIV status, use of condoms) that conforms to a safe-sex order.


869 United States v. Negron, 28 M.J. 775, 776–79 (A.C.M.R.) (upholding conviction for violation of safe-sex order by service member who used condom during heterosexual intercourse but did not inform partner of his HIV infection), aff’d, 29 M.J. 324 (C.M.A. 1989).
Service members have been convicted of violating safe-sex orders for their sexual relations with their spouses. Article 90 failure to obey a lawful order charges can be combined with the aggravated assault charge discussed above.

In September 2010, an airman in Kansas was charged with aggravated assault, adultery, indecent acts for having sexual relations in public, obstruction of justice, and violating a squadron commander’s orders for allegedly engaging in unprotected and undisclosed sex with various partners. The squadron commander’s order included that the airman not engage in any sex without disclosing his HIV status and to always use condoms. If convicted on all charges the airman could face at least fifty-three years imprisonment, a dishonorable discharge, forfeiture of pay, and a reduction of rank.

Some safe-sex orders have been overly broad in prohibiting service members from engaging in behaviors that pose no risk of HIV transmission, but have nevertheless been upheld as lawful orders in subsequent prosecutions. In United States v. Womack, the service member was issued an order requiring him to take affirmative steps “during any sexual activity to protect your sexual partner from coming in contact with your blood, semen, urine, feces, or saliva.” The defendant service member was accused of having oral-genital contact with another man, and thus the order was upheld on the basis that the service member’s saliva came in contact with his partner during sexual activity. At trial, two military doctors testified that “it was possible but not very likely that one could transmit the virus through his saliva incident to an act of fellatio.” The military judges acknowledged, however, that as more is learned about HIV, future safe-sex orders would have to be adjusted “to reflect current knowledge.”

Military service members with HIV have been convicted of “conduct prejudicial to good order” for engaging in sexual activities posing a risk of HIV transmission.

Military service members with HIV have been convicted under the “general article,” Article 134 of the UCMJ. This catch-all provision criminalizes all conduct “to the prejudice of the good order and discipline in the armed forces” and “all conduct of a nature to bring discredit upon the armed forces.” Despite the absence of any reference in this provision to behaviors posing a risk of HIV transmission, or any reference to what behaviors involve a sufficient risk to constitute a violation, the Court of Military Appeals upheld its application to HIV-positive service members on the basis that the safe-sex counseling they have received provides sufficient notice regarding conduct.

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871 United States v. Pritchard, 45 M.J. 126 (C.A.A.F. 1996), cert. denied, 520 U.S. 1253 (1997). Prosecutions involving spousal sexual contact, or others involving regulation of service members’ consensual sexual contact, particularly with civilians, could violate constitutional privacy rights, see Lawrence v. Texas, 539 U.S. 558 (2003), although no military case has directly addressed this issue.


875 29 M.J. 88, 89. The order also required disclosure of HIV status to all health care professionals.

876 29 M.J. 88, 89.

prohibited by Article 134. As is the case with aggravated assault charges under the UCMJ, disclosure of HIV status and consent of the service member’s sexual partner is not a defense to an Article 134 prosecution.

879 United States v. Morris, 30 M.J. 1221 (A.C.M.R. 1990) (affirming Article 134 conviction, and sentence of bad-conduct discharge, forfeiture of $400 pay per month for three months, and restriction to the limits of his base, for service member who disclosed HIV status and used condoms approximately 25 percent of the time with female sex partner).
Illustrations and Resources of
Prosecutions and Arrests based on
HIV status in the United States

The following section provides illustrations of prosecutions and arrests in the United States, in addition to a fact sheet on the issues surrounding HIV criminalization.

The first two charts represent the number of cited arrests, prosecutions, and sentencing enhancements based on HIV status in various jurisdictions. The first chart is arranged by alphabetical order based on the name of the jurisdiction. The second chart is arranged according to aggregate number of prosecutions. These charts provide a snapshot of all the cases illustrated in this volume. As noted earlier, although the authors have attempted to include all reported cases from either news media sources or official judicial opinions, not all cases of HIV exposure are reported in the media and many prosecutions do not result in published judicial opinions. As a result, the cases represented here are assumed not to constitute an exhaustive representation of all HIV-related prosecutions in the U.S. but are likely only a sampling of a much more widespread, but generally undocumented, use of criminal laws against people with HIV.

The third chart in the series is an illustrative list of arrests and prosecutions in the United States for HIV exposure between 2008 – November 16, 2010.

The last resource is a fact sheet that provides a summary on the issues surrounding HIV criminalization in the United States. This fact sheet is intended to be used by advocates as informative talking points on HIV criminalization.
Arrests and Prosecutions for HIV Exposure in the United States:  
50 States, U.S. Territories, and Military Courts 
List is illustrative not exhaustive (Last Updated November 16, 2010) 

*Chart 1 arranged according to alphabetical order*

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Number of Prosecutions and Arrests †</th>
<th>Sentence Enhancements Due to HIV-Positive Status</th>
<th>HIV-Specific Criminal Statute?*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>1</td>
<td>0</td>
<td>No* **</td>
</tr>
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<td>0</td>
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<tr>
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<td>Yes (status was a determining factor in civil commitment)</td>
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<td>50 (39 for aggravated prostitution)</td>
<td>Yes</td>
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<td>22</td>
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<td>Totals:</td>
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**Chart 2 arranged according to number of prosecutions and arrests**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Number of Prosecutions and Arrests</th>
<th>Sentence Enhancements Due to HIV-Positive Status</th>
<th>HIV-Specific Criminal Statute?</th>
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<tbody>
<tr>
<td>Tennessee</td>
<td>50 (39 for aggravated prostitution)</td>
<td>1</td>
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<tr>
<td>Iowa</td>
<td>36</td>
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<tr>
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<td>Yes</td>
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<td>13</td>
<td>1 (status was a determining factor in civil commitment)</td>
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</tr>
<tr>
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<td>1 (civil commitment hearing currently in progress and is based on the defendant’s HIV status)</td>
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<td>Alabama</td>
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</table>

* Asterisk indicates that the HIV-specific criminal statute either does not impact the sentencing or is not applicable.
** Asterisk indicates that the status was a determining factor in civil commitment.
<table>
<thead>
<tr>
<th>State</th>
<th>Prosecutions</th>
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<td>Totals</td>
<td>350</td>
<td>26</td>
<td>36</td>
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</table>

**KEY**

† Please note, there is some overlap between prosecution and sentence enhancement cases (i.e.: the defendant may be the same in both proceedings). Also, some of the prosecutions are reflective of prosecutions that occurred prior to changes in the state’s criminal law related to HIV exposure (i.e.: California and Texas)

*Many prosecutions also arise under general criminal laws (i.e.: reckless endangerment, aggravated assault, etc.) even if the state has an HIV-specific statute.

**These states have “communicable” or “contagious disease” control statutes that criminalize STI exposure, which may or may not include HIV. Many of these statutes were enacted prior to the discovery of HIV and have typically not been enforced. The penalties under the statutes are limited to misdemeanors. There is no record of a case of HIV exposure ever being prosecuted under such statutes.

*Massachusetts statute, Mass. Gen. Laws Ann. 265 § 22b(f)(2008), mandates a fifteen year to life sentence for a defendant who has forced sexual intercourse with a child under 16 years old, the defendant “knew or should have known” that she/he was a carrier for an STI or STD, and that the minor could have contracted the STD or STI. This statute has not yet been applied to HIV-positive persons.
## Arrests and Prosecutions for HIV Exposure in the United States, 2008–2010

(List is illustrative, not exhaustive)

<table>
<thead>
<tr>
<th>DATE</th>
<th>STATE</th>
<th>TYPE OF EXPOSURE</th>
<th>LAW</th>
<th>DESCRIPTION &amp; OUTCOME</th>
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<tr>
<td>Nov. 2010</td>
<td>GA</td>
<td>Sex</td>
<td>Reckless Conduct, HIV Infected Persons</td>
<td>An HIV positive man was charged with rape and reckless conduct for allegedly raping a woman. Under the reckless conduct charge it is a felony for HIV positive persons to have sexual intercourse without first disclosing their HIV status. [Andria Simmons, HIV positive man to stand trial on rape charge, ATLANTA JOURNAL CONSTITUTION, Nov. 12, 2010, <a href="http://www.ajc.com/news/gwinnett/hiv-positive-man-to-stand-trial-on-rape-charge/738690.html">http://www.ajc.com/news/gwinnett/hiv-positive-man-to-stand-trial-on-rape-charge/738690.html</a>]</td>
</tr>
<tr>
<td>Nov. 2010</td>
<td>NV</td>
<td>Sex</td>
<td>Intentional Transmission of HIV</td>
<td>Two HIV-positive men were charged with intentional transmission of HIV after meeting another man through a male dating website. One of the defendant’s, who has an undetectable viral load, dating profile noted that he was HIV positive and he and his co-defendant maintain that the complainant knew of their HIV positive status. Though the Nevada statute is called “intentional transmission of HIV”, neither the intent to transmit nor actual transmission of HIV is required for prosecution. Conviction under the statute carries a maximum ten years imprisonment. [Interview with defendant and his attorney, names have been omitted to protect the identities of the parties (November 11, 2010)].</td>
</tr>
<tr>
<td>Nov. 2010</td>
<td>TN</td>
<td>Spitting</td>
<td>Aggravated assault and Criminal Exposure of Another to HIV</td>
<td>A man allegedly spit at a detention officer’s face while he was in custody and was charged with aggravated assault and criminal exposure of another to HIV. The family of the man said that the guard used pepper spray to subdue the man, prompting the spitting and, moreover, that the man is not even HIV positive and as of July 2009 had not tested positive for HIV. [Inmate charged with exposing jailer to HIV, WKRN.COM, Nov. 8, 2010, <a href="http://www.wkrn.com/Global/story.asp?S=13466403">http://www.wkrn.com/Global/story.asp?S=13466403</a>; Chris Graham, Family Disputes HIV Charge, THE DAILY HERALD, Nov. 10, 2010, <a href="http://www.c-dh.net/articles/2010/11/09/top_stories/01thomason.txt">http://www.c-dh.net/articles/2010/11/09/top_stories/01thomason.txt</a>]</td>
</tr>
<tr>
<td>Nov. 2010</td>
<td>MO</td>
<td>Spitting</td>
<td>Assault</td>
<td>A man who claims he has HIV was charged with two counts of</td>
</tr>
<tr>
<td>Date</td>
<td>State</td>
<td>Charge</td>
<td>Description</td>
<td></td>
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<td>----------</td>
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<td>-------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Oct. 2010</td>
<td>OH</td>
<td>Sex</td>
<td>A man was charged with felonious assault for allegedly failing to tell his wife that he was HIV positive. When the man was admitted to the hospital with pneumonia his doctor allegedly threatened to tell the man’s wife about his HIV status if the man didn’t. [Tom Giambroni, Husband Allegedly kept HIV a secret, MORNING JOURNAL, Oct. 2, 2010, available at <a href="http://www.morningjournalnews.com/page/content/detail/id/526618/Husband-allegedly-kept-HIV-a-secret.html?nav=5006">http://www.morningjournalnews.com/page/content/detail/id/526618/Husband-allegedly-kept-HIV-a-secret.html?nav=5006</a>]</td>
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</tr>
<tr>
<td>Oct. 2010</td>
<td>TX</td>
<td>Sex</td>
<td>A 32-year-old HIV-positive Iraq war veteran was sentenced to three life sentences without parole for super aggravated assault of a child and continuous sexual abuse of a child. A super aggravated assault conviction requires that the jury find that the defendant used a deadly weapon, in this case HIV, during the assault. [Craig Kapitan, HIV Molester Handed three life sentences, EXPRESS NEWS, Oct. 7, 2010, available at <a href="http://www.mysanantonio.com/news/local_news/molester_with_hiv_gets_life_without_parole__times_three_104532769.html?c=y&amp;page=1#storytop">http://www.mysanantonio.com/news/local_news/molester_with_hiv_gets_life_without_parole__times_three_104532769.html?c=y&amp;page=1#storytop</a>]</td>
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<tr>
<td>Sept. 2010</td>
<td>KS</td>
<td>Sex</td>
<td>An airman was charged with assault and related crimes after allegedly having unprotected sex with multiple sexual partners and failing to disclose his HIV status. He could face more than 53 years imprisonment if convicted of all charges, a dishonorable discharge, forfeiture of pay, and reduction of rank. [Kan. Airman with HIV charged with assault for sex, ASSOCIATED PRESS, Sept. 24, 2010, available at</td>
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<tr>
<td>Date</td>
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<td>Crime</td>
<td>Offense Description</td>
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<td>--------------------------------------------------------------------------------------------------</td>
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<tr>
<td>July 2010</td>
<td>MD</td>
<td>Spitting</td>
<td>Second Degree Assault</td>
<td>A 44-year-old HIV positive man was sentenced to five years in prison for spitting on a police officer. [Don Aines, Man with HIV who Spit on Police Officer Sentenced to Five Years, HERALD-MAIL (Hagerstown, MD), July 26, 2010, <a href="http://www.herald-mail.com/?cmd=displaystory&amp;story_id=249796&amp;format=html&amp;autoreload=true">http://www.herald-mail.com/?cmd=displaystory&amp;story_id=249796&amp;format=html&amp;autoreload=true</a>]</td>
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<tr>
<td>May 2010</td>
<td>OK</td>
<td>Spitting</td>
<td>Spreading Infectious Disease and Knowingly Engaging to Transfer HIV</td>
<td>A man claiming to be HIV-positive was booked on four felony complaints after moving his head to throw blood at emergency medical workers. He is also alleged to have spit blood at the workers during his rescue and treatment for injuries from a fire. [Shannon Muchmore, Man Who Says He Has HIV Allegedly Spits on Emergency Workers, TULSA WORLD, May 23, 2010, <a href="http://www.tulsaworld.com/news/article.aspx?subjectid=11&amp;articleid=20100523_298_0_Amanwh547994">http://www.tulsaworld.com/news/article.aspx?subjectid=11&amp;articleid=20100523_298_0_Amanwh547994</a>]</td>
</tr>
<tr>
<td>May 2010</td>
<td>MI</td>
<td>Biting</td>
<td>Bioterrorism</td>
<td>A HIV+ man was charged with bioterrorism for biting his neighbor during an argument. The man refused to take a plea that would have dropped the bioterrorism charge for a felony assault charge that could carry 10 years in jail. The outcome is still pending. [MLive.com 5/9/10]</td>
</tr>
<tr>
<td>Mar. 2010</td>
<td>TX</td>
<td>Sex</td>
<td>Aggravated Sexual Assault of a child.</td>
<td>A 49-year-old HIV+ man, who was aware of his HIV status, was charged with having unprotected sex with a minor. The charge</td>
</tr>
<tr>
<td>Date</td>
<td>State</td>
<td>Category</td>
<td>Description</td>
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<td>-----------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Mar. 2010</td>
<td>MN</td>
<td>Sex</td>
<td>Assault</td>
<td></td>
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<tr>
<td></td>
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<td></td>
<td>A 28-year-old HIV+ man was charged with assault after failing to tell his partners his HIV status prior to having unprotected consensual sex. One partner tested positive for HIV. [Star Tribune 3/24/10]</td>
<td></td>
</tr>
<tr>
<td>Mar. 2010</td>
<td>AR</td>
<td>Sex</td>
<td>Knowingly Exposing Another to HIV</td>
<td></td>
</tr>
<tr>
<td></td>
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<td>A 33-year-old HIV+ man was arrested for having unprotected sex with a woman, knowing he had HIV, and failing to inform her of his illness. Woman has now tested positive for HIV. Pled not guilty; sentenced to 20 years in prison. [Times Record Online 3/11/10] [Times Record Online 9/17/09]</td>
<td></td>
</tr>
<tr>
<td>Mar. 2010</td>
<td>MI</td>
<td>Sex</td>
<td>Failing to Disclose HIV Status to Sexual Partner</td>
<td></td>
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<tr>
<td></td>
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<td></td>
<td>A 54-year-old HIV+ woman allegedly failed to tell her sexual partner that she had HIV. [The Morning Sun 3/11/10]</td>
<td></td>
</tr>
<tr>
<td>Mar. 2010</td>
<td>MD</td>
<td>Sex</td>
<td>Knowingly Exposing Others to HIV</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>A 29-year-old HIV+ man was sentenced to 18 months in prison after he knowingly exposed an 18-year-old woman to the HIV virus. [Gazette.net 3/10/10]</td>
<td></td>
</tr>
<tr>
<td>Mar. 2010</td>
<td>NJ</td>
<td>Sex</td>
<td>Third Degree Diseased Person Charge (HIV Specific)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>A 20-year-old HIV+ man charged with having “high risk sexual behavior” with a female without her informed consent. [LehighValleyLive.com 3/10/10]</td>
<td></td>
</tr>
<tr>
<td>Mar. 2010</td>
<td>OH</td>
<td>Sex</td>
<td>Loitering to Engage in Sexual Activity Being HIV Positive and Soliciting with Previous Conviction Being HIV Positive</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>A 38-year-old HIV+ woman was charged with attempted solicitation. [Chicago Tribune 3/10/10]</td>
<td></td>
</tr>
<tr>
<td>Mar. 2010</td>
<td>IN</td>
<td>Donating Plasma</td>
<td>Donating Plasma when Knowing HIV+ Status</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>A 39-year-old HIV+ woman plead not guilty to donating plasma in 2008, though she had been diagnosed with HIV since 2005. [Chicago Tribune 3/9/09]</td>
<td></td>
</tr>
<tr>
<td>Feb. 2010</td>
<td>FL</td>
<td>Sex</td>
<td>Failing to Disclose HIV Status to Sexual Partner</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>A 45-year-old HIV+ man pled not guilty to a first degree felony charge for allegedly failing to tell his sexual partner that he was HIV positive. [POZ 2/24/10]</td>
<td></td>
</tr>
<tr>
<td>Feb. 2010</td>
<td>IN</td>
<td>Sex</td>
<td>Failure of Carriers Duty to Warn</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>A HIV+ man had sexual relations with a woman without telling her he was HIV+ [Chicago Tribune 2/10/10]; pled guilty, sentence pending. [Chicago Tribune 2/24/10]</td>
<td></td>
</tr>
<tr>
<td>Dec. 2009</td>
<td>IA</td>
<td>Sex</td>
<td>Criminal Transmission of HIV (transmission need not occur)</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>A 38-year-old HIV+ man was charged with a felony after he allegedly failed to tell his sexual partner is HIV status. [wcfcourrier.com 12/23/09]</td>
<td></td>
</tr>
<tr>
<td>Nov. 2009</td>
<td>MI</td>
<td>Sex</td>
<td>AIDS-sexual penetration with an Uninformed Partner</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>A 21-year-old HIV+ man had consensual sexual relations; pled guilty and sentenced to 9 months in jail. [Midland Daily News 11/18/2009]</td>
<td></td>
</tr>
<tr>
<td>Nov. 2009</td>
<td>SC</td>
<td>Sex</td>
<td>Knowingly Exposing Another to HIV</td>
<td></td>
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<tr>
<td></td>
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<td></td>
<td>A man was sentenced for knowingly exposing his wife to HIV; sentenced to 6 years in prison. Wife did not contract HIV. [The Augusta Chronicle 9/14/09]</td>
<td></td>
</tr>
<tr>
<td>Oct. 2009</td>
<td>SC</td>
<td>Sex</td>
<td>Knowingly Exposing Another to HIV</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>A 24-year-old HIV positive man exposed another to HIV. [WMFBNews.com 10/27/09]</td>
<td></td>
</tr>
<tr>
<td>Oct. 2009</td>
<td>PA</td>
<td>Spitting</td>
<td>Aggravated Assault (HIV and prisoner specific)</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>A HIV and Hepatitis C positive woman was charged after she spit in the face of another inmate; sentenced to 21 months to 10 years in prison. [citizensvoice.com 10/15/09] [Wyoming County Press Examiner 9/9/09]</td>
<td></td>
</tr>
<tr>
<td>Oct. 2009</td>
<td>VA</td>
<td>Sex</td>
<td>Aggravated Assault (HIV Specific). Court Martial (Military)</td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td>Two women, including ex-wife, chose to have consensual, unprotected sex with a Military Officer, knowing that he had HIV. The man was sentenced to 3 months in confinement and a bad</td>
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</tr>
<tr>
<td>Date</td>
<td>State</td>
<td>Charge</td>
<td>Description</td>
<td>Source</td>
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<tr>
<td>Sept. 2009</td>
<td>IL</td>
<td>Sex</td>
<td>Conduct discharge after pleading guilty to two counts of aggravated assault and disobeying an order. The order was for him to have sex only with the use of protection. Neither woman contracted HIV. [Virginian Pilot 10/7/09]</td>
<td></td>
</tr>
<tr>
<td>Sept. 2009</td>
<td>ID</td>
<td>Sex</td>
<td>A 42-year-old HIV+ man had sex with a 19-year-old woman with allegedly failing to inform the woman that he was HIV+. Unknown if the woman has tested positive for HIV. Criminal statute applies even if the sex partner is not subsequently infected with HIV. [Journal Gazette Times Courier 9/21/09] Pled Guilty; sentenced to 6 years in prison. [Herald Review 2/6/10]</td>
<td></td>
</tr>
<tr>
<td>Sept. 2009</td>
<td>OH</td>
<td>Sex</td>
<td>A 44-year-old HIV+ man pled guilty to two felony charges of exposing women to HIV. Sentenced to 30 years in prison with the possibility of parole after 20 years. At least one woman was not infected with HIV. [Idahostatesman.com 9/17/09]</td>
<td></td>
</tr>
<tr>
<td>Sept. 2009</td>
<td>SC</td>
<td>Sex</td>
<td>A 25-year-old HIV+ man was arrested for prostitution. It was later discovered that the man knew he was HIV positive. [Dayton Daily News 9/11/09]</td>
<td></td>
</tr>
<tr>
<td>Sept. 2009</td>
<td>TN</td>
<td>Spitting</td>
<td>A 35-year-old HIV+ man had sexual relations with a woman without telling her that he was HIV positive. [WMBFNews.com 9/11/09].</td>
<td></td>
</tr>
<tr>
<td>Aug. 2009</td>
<td>FL</td>
<td>Biting</td>
<td>A 32-year-old woman was arrested for working as a prostitute while she knew she was HIV positive. [Palm Beach Post 8/21/09]</td>
<td></td>
</tr>
<tr>
<td>Aug. 2009</td>
<td>FL</td>
<td>Sex</td>
<td>A 39-year-old HIV+ woman was arrested for having unprotected sex with a man without disclosing her HIV status. [Ocala.com 8/14/09]</td>
<td></td>
</tr>
<tr>
<td>Aug. 2009</td>
<td>MN</td>
<td>Sex</td>
<td>39-year-old HIV+ man had sex with girlfriend w/o disclosing his HIV status; girlfriend tested negative; ex-wife tested positive[ Duluth News Tribune 8/11/09]; pled guilty; sentenced to 90 days in jail. [POZ Magazine 10/29/09]</td>
<td></td>
</tr>
<tr>
<td>July 2009</td>
<td>SC</td>
<td>Biting</td>
<td>A 41-year-old HIV-positive man was charged with assault and intent to kill after biting his neighbor. An original charge of simple assault was upgraded after it was discovered that the assailant was</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>State</td>
<td>Case Type</td>
<td>Description</td>
<td>Details</td>
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<tr>
<td>------------</td>
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<td>------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>July 2009</td>
<td>OR</td>
<td>Sex</td>
<td>Assault and attempted assault (not HIV-specific)</td>
<td>21-year-old HIV+ man had unprotected sex with woman w/o disclosing his HIV status; pled guilty; woman tested positive for HIV; sentenced to 2 yrs in prison, 3 yrs post-prison supervision, sex offender evaluation [The Oregonian 7/17/09]</td>
</tr>
<tr>
<td>July 2009</td>
<td>VT</td>
<td>Spitting</td>
<td>Aggravated assault against a police officer</td>
<td>31-year-old HIV+ man spat on police officer while being restrained for treatment after police responded to possible drug overdose; pending [Times Argus 7/30/09]</td>
</tr>
<tr>
<td>June 2009</td>
<td>KS</td>
<td>Sex</td>
<td>Exposing another to a life-threatening communicable disease</td>
<td>Kansas Supreme Court reversed convictions for exposing another to a life-threatening communicable disease, finding that the prosecution failed to prove that defendant intended to expose the complainants to HIV. [State v. Richardson, 209 P.3d 696 (Kan. 2009)]</td>
</tr>
<tr>
<td>June 2009</td>
<td>NC</td>
<td>Biting</td>
<td>Assault inflicting serious bodily injury &amp; assault with a deadly weapon</td>
<td>A 45-year-old HIV+ man cut a police officer’s thumb and bit the police officer’s ear during an altercation; pending [The News &amp; Observer 6/21/09]</td>
</tr>
<tr>
<td>June 2009</td>
<td>NY</td>
<td>Spitting</td>
<td>Aggravated assault on a police officer by means of a deadly weapon (saliva)</td>
<td>HIV+ man allegedly spat on police officer while being subdued for erratic behavior after learning HIV diagnosis; took 10-year plea deal &amp; reserved right to appeal; appeal pending [Information from defendant and defense counsel]</td>
</tr>
<tr>
<td>June 2009</td>
<td>OH</td>
<td>Spitting</td>
<td>Harassment by inmate (HIV-specific; not limited to inmates)</td>
<td>HIV+ man spat on police officer and EMT while being subdued for erratic behavior after suicide attempt; attorney challenged validity of statute; pled no contest; sentenced to 60 days house arrest in Sept. 2009 [Information from defense counsel]</td>
</tr>
<tr>
<td>May 2009</td>
<td>AR</td>
<td>Sex</td>
<td>Knowingly transmitting AIDS, HIV</td>
<td>HIV+ teenage boy had sex with teenage girl w/o disclosing his HIV status; being tried as an adult; pending [4029tv.com 5/19/09]</td>
</tr>
<tr>
<td>May 2009</td>
<td>OH</td>
<td>Sex</td>
<td>Felonious assault (HIV-specific)</td>
<td>HIV+ man had sex with woman without disclosing his HIV status; appeal pending; attorney challenged constitutionality of statute [Information from defense counsel]</td>
</tr>
<tr>
<td>May 2009</td>
<td>TX</td>
<td>Sex</td>
<td>Aggravated assault (not HIV-specific), Assault with a deadly weapon.</td>
<td>53-year-old HIV+ man had sex with multiple women w/o disclosing HIV status; at least 6 women tested positive for HIV [Dallas Morning News 5/28/09]; sentenced to 5 45-yr and 1 25-yr prison terms [Dallas Morning News 5/30/09]</td>
</tr>
<tr>
<td>May 2009</td>
<td>FL</td>
<td>Sex</td>
<td>Unlawful acts (HIV-specific)</td>
<td>HIV+ woman had sex with multiple men w/o disclosing her HIV status; pending [Orlando Sentinel 5/8/09]</td>
</tr>
<tr>
<td>May 2009</td>
<td>IA</td>
<td>Sex</td>
<td>Criminal transmission of HIV (transmission need not occur)</td>
<td>HIV+ man had sex one time with man he met online; was under influence of drugs during sex; not clear if condom was used; other man not HIV+ after testing; received 25-year sentence &amp; must register as sex offender [wfcourier.com 5/2/09]; later released on 5 yrs probation after reconsideration hearing on Sept. 11, 2009 [accesslineiowa.com 9/14/09]; the HIV+ man is now listed as a sex offender.</td>
</tr>
<tr>
<td>April 2009</td>
<td>MI</td>
<td>Sex</td>
<td>Sexual penetration w/ knowledge of AIDS or HIV infection</td>
<td>An HIV+ woman employed at a sex club had sex w/ multiple partners w/o disclosing her HIV status; [Michigan Live 4/29/09]; sentenced to 16 mos. to 20 yrs [Niles Daily Star 9/22/09]</td>
</tr>
</tbody>
</table>

Center for HIV Law and Policy  211
<table>
<thead>
<tr>
<th>Date</th>
<th>State</th>
<th>Charge</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan. 2009</td>
<td>GA</td>
<td>Sex</td>
<td>38-year-old HIV+ man had sex with a woman w/o disclosing his HIV status; woman agreed to unprotected sex with man who lived in housing program for people with HIV; woman tested negative; pled guilty; sentenced to 2 yrs in prison and 8 yrs probation [macon.com 1/13/09]</td>
</tr>
<tr>
<td>Dec. 2008</td>
<td>MI</td>
<td>Sex</td>
<td>A 38-year-old HIV+ woman pled guilty to failing to inform her sexual partners of her HIV status. She was sentenced to time already served, 68 days. [mlive.com 12/10/08]</td>
</tr>
<tr>
<td>Dec. 2008</td>
<td>CO</td>
<td>Sex</td>
<td>33-year-old HIV+ man had sex with pregnant fiancée w/o disclosing his HIV status; both mother and baby tested positive for HIV [GJSentinel.com 12/23/08]; sentenced to 15 yrs in July 2009 [GJSentinel.com 7/18/09]</td>
</tr>
<tr>
<td>Dec. 2008</td>
<td>NE</td>
<td>Sex</td>
<td>48-year-old HIV+ man had consensual sex with 17-year-old boy w/o disclosing his HIV status; videotaped sexual encounter; boy tested positive for HIV; sentenced to 20 years (cut to 10 per state sentencing guidelines) [Omaha World Herald 12/22/08]</td>
</tr>
<tr>
<td>Oct. 2008</td>
<td>MS</td>
<td>Sex</td>
<td>HIV+ African-American woman had sex with white husband over many years w/o disclosing her HIV status; husband alerted police when woman tried to get custody of son in divorce proceeding; husband and son both tested negative; pled guilty; 10-year sentence w/ 9 suspended; one year house arrest [Clarion Ledger 5/16/08, 10/7/08]</td>
</tr>
<tr>
<td>Oct. 2008</td>
<td>KY</td>
<td>Sex</td>
<td>The Kentucky Supreme Court held that a defendant’s HIV status may be considered during the sentencing portion of a trial. [Torrence v. Commonwealth, 269 S.W.3d 842 (Ky. 2008)]</td>
</tr>
<tr>
<td>Sept. 2008</td>
<td>GA</td>
<td>Sex</td>
<td>A woman was sentenced to 8 years imprisonment for failing to disclose her HIV status to her sexual partners. She argued that her sexual partner must have known of her HIV status because it had been published on the front page of the local newspaper. [Ginn v. State, 667 S.E.2d 712 (Ga. Ct. App. 2008)]</td>
</tr>
<tr>
<td>Sept. 2008</td>
<td>MI</td>
<td>Sex</td>
<td>A 32-year-old HIV+ man had sex with two women w/o first disclosing his HIV status; HIV status of women unknown. [mlive.com 9/5/08] He was sentenced to 2 months in jail. [mlive.com 2/3/09]</td>
</tr>
<tr>
<td>Date</td>
<td>State</td>
<td>Charge</td>
<td>Description</td>
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</tr>
<tr>
<td>Aug. 2008</td>
<td>NH</td>
<td>Spitting</td>
<td>Simple assault</td>
</tr>
<tr>
<td>July 2008</td>
<td>GA</td>
<td>Spitting</td>
<td>Aggravated assault (not HIV-specific)</td>
</tr>
<tr>
<td>June 2008</td>
<td>MD</td>
<td>Biting</td>
<td>Knowingly transfer or attempt to transfer HIV</td>
</tr>
<tr>
<td>June 2008</td>
<td>ID</td>
<td>Sex</td>
<td>Transferring body fluids containing HIV</td>
</tr>
<tr>
<td>May 2008</td>
<td>TX</td>
<td>Spitting</td>
<td>Harassing a public servant (not HIV-specific) with deadly weapon (saliva)</td>
</tr>
<tr>
<td>May 2008</td>
<td>TX</td>
<td>Biting</td>
<td>Aggravated robbery (not HIV-specific)</td>
</tr>
<tr>
<td>May 2008</td>
<td>AR</td>
<td>Sex</td>
<td>Knowingly transmitting AIDS (text of statute refers to exposure)</td>
</tr>
<tr>
<td>April 2008</td>
<td>KY</td>
<td>Biting</td>
<td>Wanton endangerment (not HIV-specific)</td>
</tr>
<tr>
<td>Mar. 2008</td>
<td>SC</td>
<td>Sex</td>
<td>Exposing others to HIV</td>
</tr>
<tr>
<td>Feb. 2008</td>
<td>MO</td>
<td>Sex</td>
<td>Prohibited acts (HIV-specific)</td>
</tr>
<tr>
<td>Jan. 2008</td>
<td>KS</td>
<td>Sex</td>
<td>Exposing another to a life threatening communicable disease (not HIV-specific)</td>
</tr>
</tbody>
</table>

**Total Number of Cases:** 81
HIV CRIMINALIZATION FACT SHEET

MOST STATES HAVE TARGETED HIV-POSITIVE INDIVIDUALS FOR CRIMINAL LIABILITY BASED ON THEIR HIV STATUS

- Thirty-four (34) states and two (2) U.S. territories explicitly criminalize HIV exposure through sex, shared needles or, in some states, exposure to “bodily fluids” that can include saliva. At least thirty-four (34) states have singed out people who have tested positive for HIV for criminal prosecution or enhanced sentences, either under HIV-specific criminal laws or under general criminal laws governing crimes such as assault, attempted murder or reckless endangerment.
- Proof of intent to transmit HIV, or actual transmission, typically are not elements of these prosecutions.
- Spitting and biting, which pose no significant risk of HIV transmission, have resulted in criminal convictions and severe sentences despite the absence of HIV transmission in these cases.
- Disclosure is often the only affirmative defense to prosecution, but typically is difficult to prove. Condom use is rarely a defense.
- The common factor in all of these cases is that the criminal defendant knew her/his HIV status.
- Also common to these cases is severe ignorance of the routes and actual risk of HIV transmission in varying circumstances, and grossly exaggerated characterizations of the risk of harm defendants pose.

CRIMINALIZATION HAS NO EFFECT ON BEHAVIOR & UNDERMINES PUBLIC HEALTH GOALS

- Studies show that the criminalization of HIV exposure has no effect on risk behavior.
- HIV criminalization can discourage individuals from seeking testing and treatment because a positive test result subjects a person to criminal liability for otherwise non-criminal conduct.
- Health care providers frequently are forced to disclose HIV-related medical records, including documentation of private communications, as part of a criminal investigation or trial, interfering with the physician-patient relationship and delivery of health services and generating mistrust among patients.
- In some states, health officials actually participate in creation of evidence that can be used against individuals with HIV, by requiring them to sign forms acknowledging criminal liability if they engage in certain otherwise-legal conduct.
- Sex between two consenting adults is a shared decision; the responsibility for protection against disease should not be borne by one partner. Placing exclusive responsibility on the person living with HIV undermines public health messages that everyone should take responsibility for individual sexual health.
- Criminalization further stigmatizes an already marginalized population, and reinforces ignorance and unfounded beliefs about the routes and actual risks of HIV transmission.

HIV PROSECUTIONS DISCRIMINATE AGAINST HIV-POSITIVE PERSONS

- Charges for HIV exposure often are accompanied by sensationalist media coverage, which often includes disclosure of the HIV-positive person’s identity, disclosing the person’s HIV status not only to the individual’s community but also, with the internet, to the world.
- Sentences for people convicted of HIV exposure are typically very harsh and grossly disproportionate to any actual or potential harm, perpetuating the misconception that people with HIV are toxic, highly infectious and dangerous.
- HIV-positive persons increasingly are forced to register as sex offenders after conviction, leading to a host of life-long problems with future employment, living conditions, and the right to privacy.
- HIV exposure laws are applied unfairly and selectively, targeting those who are socially and economically marginalized, such as sex workers, while those with other STIs or infectious diseases are not targeted.