

March 21, 2019

Via Email

Kwame Raoul
Attorney General
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[email address]

Re: Criminalization of People Living With HIV

Dear Attorney General Raoul:

We are a coalition of legal, health, and policy organizations, as well as individual advocates, including people living with HIV, who are committed to ending HIV-based criminal prosecutions in Illinois. We believe that state's attorneys can significantly reduce the harm of the state's HIV-specific criminal law by correctly interpreting the *mens rea* required under it. Accordingly, we write to request that you issue a formal written opinion interpreting 720 ILCS 5/12-5.01 to require specific intent to transmit HIV.

Current Enforcement of Illinois' "Criminal Transmission" Statute

Illinois law states that "[a] person commits criminal transmission of HIV when he or she, with the specific intent to commit the offense," engages in certain activities. First, the statute criminalizes people living with HIV (PLHIV) who engage in condomless anal or vaginal intercourse without being able to later prove disclosure of their HIV status.¹ Second, the law prohibits PLHIV who are aware of their HIV status from donating, transferring or providing "blood, tissue, semen, organs, or other potentially infectious bodily fluids for transfusion, transplant, insemination, or administration to another . . ." ² "Potentially infectious bodily

¹ 720 ILCS 5/12-5.01(a)(1); 720 ILCS 5/12-5.01(a)(1) (defining sexual activity as "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"); 5/12-5.01(a)(d) (specifying that disclosure is an affirmative defense).

² 720 ILCS 5/12-5.01(a)(2).

fluids” is undefined in the statute. Third, the statute prohibits PLHIV who are aware of their HIV status from sharing or exchanging non-sterile needles and other drug paraphernalia.³

Violating this statute is a Class 2 felony, punishable by three to seven years in prison and a \$25,000 fine.⁴ Actual HIV transmission is not required for prosecution⁵; however, the statute explicitly requires “specific intent to commit the offense.”⁶

Since this statute was last amended in 2012, it has become increasingly clear—and is now widely accepted—that people living with HIV who are receiving medical care and adhering to their HIV medications will become virally suppressed and, therefore, incapable of transmitting HIV sexually.⁷ Though the purported aim of this statute is to protect HIV-negative members of the public from acquiring HIV [acquisition], Illinois state’s attorneys have prosecuted PLHIV under this statute when there was no apparent risk of HIV transmission as a result of effective HIV treatment. For example, in 2016, the Cook County State’s Attorney charged Jimmy Amutavi with criminal transmission of HIV for failing to disclose his HIV status to his partners, despite the fact he had been taking antiretroviral medication, virtually eliminating the risk of transmission.⁸ The charges, which should never have been filed, were later dropped.⁹ Similarly, in 2014 Cook County prosecutors charged John Savage under the law after his sexual partner learned of his status and alerted police.¹⁰ Savage, like Amutavi, posed virtually no risk of transmission because his viral load was undetectable.¹¹ Savage pled to a lesser charge.¹² There

³ 720 ILCS 5/12-5.01(a)(3).

⁴ 720 ILCS 5/12-5.01(b).

⁵ 720 ILCS 5/12-5.01(a)(1), 5/12-5.01(e); 730 ILCS 5/5-4.5-35(a), 5/5-4.5-50(b).

⁶ 720 ILCS 5/12-5.01(a).

⁷ See e.g., Eugene McCray, *Dear Colleague: September 27, 2017*, Centers for Disease Control and Prevention, Division of HIV/AIDS Prevention, available at <https://www.cdc.gov/hiv/library/dcl/dcl/092717.html>; Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV, Centers for Disease Control and Prevention, Division of HIV/AIDS Prevention December 2018, available at <https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf>.

⁸ William Lee, Wilmette personal trainer accused of knowingly transmitting HIV, CHICAGO TRIBUNE, Oct. 10, 2016, available at <https://www.chicagotribune.com/news/local/breaking/ct-wilmette-personal-trainer-accused-of-knowingly-transmitting-hiv-20161009-story.html>.

⁹ Brian L. Cox, Charges Dropped Against Man Accused of Criminal Transmission of HIV, CHICAGO TRIBUNE, April 20, 2017, available at <https://www.chicagotribune.com/news/local/breaking/ct-hiv-transmission-charges-dropped-met-20170420-story.html>.

¹⁰ George Houde, Cicero Cop Pleads Guilty to Misdemeanor in HIV Case, CHICAGO TRIBUNE, Sept. 5, 2014, available at <https://www.chicagotribune.com/news/ct-hiv-transmission-charge-met-20140906-story.html>.

¹¹ Kim Geiger, HIV Exposure Cases Head To Court, Stoke Debate, CHICAGO TRIBUNE, Sept. 5, 2014, <https://www.chicagotribune.com/news/ct-hiv-criminal-cases-met-20140905-story.html>.

¹² Cicero Cop Pleads Guilty to Misdemeanor in HIV Case, *supra* note 11.

have been other prosecutions of which some of the undersigned are aware, but because of the sensitive and highly stigmatizing nature of a charge based on HIV status, many individuals are reluctant to publicize what has happened to them or to become advocates on this issue.

HIV-Specific Criminal Laws are Harmful and Unjust

Rather than protect the public, HIV-specific criminal laws harm public health by discouraging individuals from getting tested for HIV¹³ and reducing the likelihood of disclosure to sexual or needle-sharing partners.¹⁴ Fearing prosecution, as well as stigma, some PLHIV avoid learning their HIV status.¹⁵ These laws also increase stigma towards PLHIV¹⁶ by leading to inflammatory or ill-informed media coverage that may perpetuate misinformation regarding modes of HIV transmission, reveal a person's sexual orientation or HIV status against their will, or play on harmful stereotypes.¹⁷

Enforcement of HIV-specific criminal laws also foster racial and sex-based disparities. While comprehensive data on prosecutions in Illinois does not exist, research conducted in other jurisdictions indicates that prosecutions disproportionately impact women and the black community. For example, the Williams Institute and California HIV/AIDS Research Programs found that between 1988 and 2014, 800 people came into contact with the state's criminal justice system either under an HIV-specific criminal provision or under the misdemeanor exposure law because of the person's HIV-positive status.¹⁸ Black people and Latinxs made up two-thirds

¹³ Erin M. O'Toole, *HIV-Specific Crime Legislation: Targeting an Epidemic for Criminal Prosecution*, 10 J.L. & Health 183, 207 (1996); Leslie E. Wolf, Richard Vezina, *Crime and Punishment: Is There A Role for Criminal Law in HIV Prevention Policy?*, 25 Whittier L. Rev. 821 (2004).

¹⁴ Carol L. Galletly & Steven D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS & Behav. 451, 451-61 (2006).

¹⁵ See e.g., Maya A. Kesler, et. al. *Prosecution Of Non-Disclosure Of HIV Status: Potential Impact On HIV Testing And Transmission Among HIV-Negative Men Who Have Sex With Men*, PLoS ONE 13(2) (Feb. 28, 2018), available at <https://doi.org/10.1371/journal.pone.0193269>; Edwin J Bernard, *Canada: Study Finds HIV Criminalisation Creates Uncertainty, Fear, And Vulnerability*, HIV Justice Network (Oct. 11, 2012), available at <http://www.hivjustice.net/news/canada-study-finds-hiv-criminalisation-creates-uncertainty-fear-and-vulnerability/>.

¹⁶ Zita Lazzarini & Robert Klitzman, *HIV and the Law: Integrating Law, Policy, and Social Epidemiology*, 30 J. L. Med. & Ethics 533 (2002); *Crime and Punishment*, supra note 14; Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. Med. & Ethics 239, 242-43; Richard Elliott, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* (UNAIDS, June 2002), available at http://data.unaids.org/publications/IRC-pub02/jc733-criminallaw_en.pdf; *Conflicting Messages*, supra note 14.

¹⁷ *Criminal law, public health and HIV transmission*, supra note 17.

¹⁸ Amira Hasenbush, et. al., *HIV Criminalization In California: Penal Implications For People Living With HIV/AIDS*, THE WILLIAMS INSTITUTE and CALIFORNIA HIV/AIDS RESEARCH PROGRAM, Dec.

(67%) of the people who came into contact with the criminal justice system based on an HIV-related charge, although only around half (51%) of people living with HIV/AIDS in California are Black and Latinx.¹⁹ Women—especially black women—were disproportionately impacted.²⁰ Although women make up less than 13% of the HIV-positive population in California, they accounted for 43% of the individuals who came into contact with the criminal justice system based on their HIV-positive status.²¹ Black women, who make up 4% of the population of people diagnosed with HIV in California represented 21% of the population of people who had contact with the criminal justice system related to their HIV status.²² A similar study in Florida, released last year, found 874 HIV-related arrests in Florida from 1986 to 2017. Florida’s HIV criminalization statute has also been disproportionately enforced against white women (39% of arrests while only 4% of the population of PLHIV) and black women (23% of arrests and 18% of population).²³ In Georgia too, research has shown troubling disparities: 67% of arrestees for HIV-related offenses were black.²⁴ White women—3% of the population of people diagnosed with HIV in Georgia—were most disproportionately arrested under HIV-related laws, making up 11% of HIV-related arrests in the state.²⁵

Illinois’ “Criminal Transmission of HIV” Statute Already Requires Specific Intent to Transmit

The Illinois “criminal transmission of HIV” statute requires the “specific intent to commit the offense[.]” and the offense is the transmission of HIV. Hence, the plain language of the statute requires *specific intent* to transmit HIV.²⁶ Where the statutory language is clear and unambiguous, courts apply the statute and no further analysis is necessary.²⁷

Furthermore, however, the phrase “acted with the specific intent to commit the offense”—which was added when the statute was amended in 2012—would be rendered superfluous if the legislature simply meant that a person must have the intent to engage in each of the component elements of the offense (e.g., to engage in sexual activity, to not use a condom,

2015, available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf>

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Amira Hasenbush, HIV Criminalization In Florida: Penal Implications For People Living with HIV/AIDS, THE WILLIAMS INSTITUTE, Oct. 2018, available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-Florida-Oct-2018.pdf>.

²⁴ Amira Hasenbush, HIV Criminalization In Georgia: Penal Implications For People Living with HIV/AIDS, THE WILLIAMS INSTITUTE, Jan. 2018, available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-Georgia-Jan-2018-1.pdf>.

²⁵ *Id.*

²⁶ 720 ILCS 5/12-5.01.

²⁷ *Id.*

etc.). Every criminal statute requires a “general intent” to engage in the individual acts that make up the crime; the statutes for general intent crimes do not state the required intent, which is implied.²⁸ Thus, the only interpretation of “acted with the specific intent to commit the offense” that does not render the phrase superfluous and inconsequential is that the person must have acted with the *specific intent to transmit HIV*.

The history of HIV-specific criminal laws in the U.S., as well as the subsequent history of amendments, similarly reflect the Illinois General Assembly’s intent to require specific intent to transmit HIV. The widespread promulgation of HIV-specific criminal laws began following the 1988 Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (the “Report”) and the resulting Ryan White Care Act, which passed in 1990.²⁹ The Report recommended that states criminalize HIV transmission for individuals “who knowingly conduct themselves in ways that pose a significant risk of transmission to others”³⁰ and the Ryan White Care Act provided states with funding for HIV/AIDS contingent on states having laws protecting against the *intentional* transmission of HIV.³¹ Mistakenly believing the Ryan White Care Act required an HIV-specific law—or perhaps in an overabundance of caution, given the amount of federal financial assistance at stake—many states, including Illinois, passed an HIV-specific law that did not require actual transmission or an intent to harm.³² In 2012, the Illinois statute was amended to its current language, and was widely recognized to require that prosecutors prove that an individual specifically intended to transmit HIV to another individual.³³

Thus, under any possible interpretation of the law, Illinois’ HIV criminalization law requires specific intent *to transmit HIV*.

Illinois Lags Behind

With medical breakthroughs transforming what it means to live with HIV and providing new ways to prevent HIV transmission, including pre-exposure prophylaxis medication taken by

²⁸ See e.g., *People v. Williams*, 191 Ill. App. 3d 269, 275 (4th Dist. 1989).

²⁹ Angela Perone (FNd1), *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization That Departs from Penalizing Marginalized Communities*, 24 *Hastings Women's L.J.* 363, 373 (2013).

³⁰ Presidential Comm’n on the Human Immunodeficiency Virus Epidemic, *Report of the Presidential Comm’n on the Human Immunodeficiency Virus Epidemic*, at 130 (1988) available at <https://ia800200.us.archive.org/8/items/reportofpresiden00pres/reportofpresiden00pres.pdf>.

³¹ Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, § 2647, 104 Stat. 576 (codified at 42 U.S.C. § 300ff-47) (repealed 2000).

³² CRIMES AND OFFENSES—TRANSMISSION OF HIV, 1989 Ill. Legis. Serv. P.A. 86-897 (West).

³³ HUMAN IMMUNODEFICIENCY VIRUS—CRIMINAL TRANSMISSION OF HIV, 2012 Ill. Legis. Serv. P.A. 97-1046 (S.B. 3673) (WEST); AIDS Foundation of Chicago, “How Illinois’ HIV Criminalization Law Has Changed,” <http://www.aidschicago.org/page/news/all-news/how-illinois-hiv-criminalization-law-has-changed> (July 27, 2012).

the HIV-negative individual, a number of state governments³⁴ have reformed their laws to more clearly require a specific intent to transmit HIV. For example, the 2012 amendment to Illinois was understood to clarify that individuals prosecuted under the statute must have intended to transmit HIV to another individual.³⁵ The U.S. Department of Justice in 2014 recommended that states choosing to maintain HIV-specific criminal laws prosecute PLHIV only when “the evidence clearly demonstrates that individual’s intent was to transmit the virus”³⁶ Iowa improved its HIV criminalization law in 2014³⁷ and California fully modernized its HIV criminalization laws in 2017.³⁸ Colorado,³⁹ North Carolina,⁴⁰ and Michigan⁴¹ have also recently reformed their laws.

Conclusion

The plain language of the amended statute requires the specific intent to transmit HIV (720 ILCS 5/12-5.01), and this specific-intent requirement is consistent with the historical context and legislative history of the law. Nonetheless, some Illinois prosecutors are charging PLHIV under the law without any evidence of their specific intent to transmit HIV. It is possible, for example, that state’s attorneys are filing charges based on the intent to perform the acts enumerated in the statute, *e.g.*, engaging in sexual activity and not using a condom. Because choosing to take medications that essentially eliminate one’s ability to transmit HIV is antithetical to the intent to transmit HIV, proper interpretation of the law should prevent

³⁴ See *e.g.*, note 17, *supra*.

³⁵ HUMAN IMMUNODEFICIENCY VIRUS—CRIMINAL TRANSMISSION OF HIV, 2012 Ill. Legis. Serv. P.A. 97-1046 (S.B. 3673) (WEST); AIDS Foundation of Chicago, “How Illinois’ HIV Criminalization Law Has Changed,” <http://www.aidschicago.org/page/news/all-news/how-illinois-hiv-criminalization-law-has-changed> (July 27, 2012).

³⁶ *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors*, U.S. DEP’T OF JUSTICE, CIVIL RTS. DIV. (July 15, 2014), available at <https://files.hiv.gov/s3fs-public/doj-hiv-criminal-law-best-practices-guide.pdf> (The DOJ guidance actually goes a step further and recommends that laws be amended to allow prosecution only when “the behavior engaged in had a significant risk of transmission,” a requirement absent in current Illinois law.).

³⁷ IA LEGIS 1119 (2014), 2014 Ia. Legis. Serv. Ch. 1119 (S.F. 2297) (WEST)

³⁸ CAL. HEALTH & SAFETY CODE § 120291 (2017), CAL. PENAL CODE § 647f (2017), CAL. HEALTH & SAFETY CODE § 120292 (2017), CAL. HEALTH & SAFETY CODE § 1621.5 (2017), repealed by Chapter 537, SB 239.

³⁹ 2016 Colo. Legis. Serv. Ch. 230 (S.B. 16-146) (WEST).

⁴⁰ Although there is no specific HIV-related criminal exposure statute in North Carolina, it is a misdemeanor to violate any administrative regulation concerning public health. N.C.GEN.STAT. § 130A-25(a)(2017). The North Carolina Commission for Public Health revised control measures relating to HIV after a process of notice and public comment in 2017 and the revised regulations went into effect on January 1, 2018. 10A N.C. Admin. Code § 41A.0202.

⁴¹ 2017 Michigan House Bill No. 6020, Michigan Ninety-Ninth Legislature - Regular Session of 2018, 2017 Michigan House Bill No. 6020, Michigan Ninety-Ninth Legislature - Regular Session of 2018.

prosecutions of individuals who—like Amutavi and Savage—do not pose any real possibility of HIV transmission, as well as others who have no harmful intent. As the U.S. DOJ has recommended—and the Illinois legislature decided—the criminal law in this context should be reserved for situations in which the person living with HIV has an intent to harm another. For this reason, interpretive guidance from the Attorney General is needed.

During your campaign, you spoke passionately of your long-standing commitment to criminal justice reform. As part of that promise, we urge you to prioritize ending unjust prosecutions of people living with HIV. We look forward to your prompt action issuing guidance that Illinois law requires the specific intent to transmit HIV. If you have questions or concerns regarding this matter, we would welcome the opportunity to meet with you.

Sincerely,

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