New Guidance on Prosecuting HIV Crimes in New Jersey

In stressing U=U, New Jersey's acting attorney general wants to ensure that no one living with HIV is charged unjustly.

October 6, 2021 By Trent Straube

New Jersey's Acting Attorney General Andrew Bruck issued new guidance regarding enforcement of a 24-year-old law that criminalizes certain activities by people living with HIV, according to a press release from Bruck's office.

Specifically, the guidance directs prosecutors to take into account three factors when deciding whether to charge someone under the state's HIV crime law. The guidance is based on modern scientific knowledge about how HIV is and isn't contracted—notably that people who maintain an undetectable viral load do no transmit HIV via sex, a fact known as Undetectable Equals Untransmittable, or U=U. What's more, the guidance follows the lead of several professional organizations, including the American Medical Association, the American Psychological Association and the Department of Justice's Civil Rights Division.

The state law in question is NJSA 2C:34-5(b). Enacted in 1997, the law "made it a third-degree crime for an individual living with HIV to engage in an 'act of sexual penetration' without the informed consent of their partner," according to the two-page guidance, which adds that the disease was then thought to be a death sentence.

Thanks to modern treatment, HIV mortality and transmission risk have been greatly reduced. However, the guidance continues, stigma remains a public health challenge and crime laws discourage people from getting tested and accessing treatment.

The guidance then states:

> Of course, NJSA 2C:34-5(b) remains on the books, and it is the responsibility of the legislature—not prosecutors—to decide whether and how the law should be modified. And while relatively few individuals are charged with violating NJSA 2C:34-5(b), it is helpful to provide statewide guidance to ensure that its enforcement does not undermine current public-health strategies.

> As always, prosecutors retain significant discretion in deciding whether and under what circumstances to charge individuals with certain criminal offenses. In deciding whether to charge a violation of NJSA 2C:34-5(b), prosecutors should consider the following factors:
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> Whether the individual forced or coerced their partner to engage in sexual activity;
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> Whether the individual engaged in sexual activity for the purpose of transmitting HIV to their partner; and/or
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> Whether the individual was adhering to a medically appropriate HIV treatment plan at the time of the sexual activity.
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> It is virtually impossible to imagine a scenario where it would be appropriate for a prosecutor to charge an individual with NJSA 2C:34-5(b) when that person's HIV viral load was undetectable at the time of the sexual activity and no aggravating factors existed. Prosecutors who are considering criminal charges in such circumstances must consult with the Director of the Division of Criminal Justice before proceeding.

"This guidance is designed to ensure that people are not prosecuted unjustly and that we do not undermine public health strategies aimed at encouraging testing, treatment and prevention," the acting attorney general said in the press release.

"The guidance that we are providing to prosecutors makes clear that this state law should be enforced only when specific aggravating factors are present," added director Lyndsay Ruotolo of the Division of Criminal Justice. "Our goal is to ensure that if anyone living with HIV is criminally charged under this statute, it is done justly and consistently."

"We recognize that 40 years after the first…reported AIDS case in this country, medical advancements have dramatically changed outcomes for individuals living with HIV. However, outdated laws such as this have remained on the books and are highly discriminatory, have not proven to reduce HIV transmission and discourage individuals from learning their HIV status," said Hudson County prosecutor Esther Suarez, president of the County Prosecutors Association of New Jersey. "Acting Attorney General Bruck's guidance issued today will ensure that individuals living with HIV in New Jersey are not unjustly stigmatized or prosecuted and will reinforce public health protocols that are critical to sustaining the progress made in treatment of this disease."

In other New Jersey news, see "Newly Signed State Law Protects LGBTQ Seniors and Those With HIV," "How One Man Stole $8.2M Worth of HIV Meds in Two Years" and "Atlantic City Votes to Close the State's Largest Syringe Service Program."

And for the latest in HIV crime laws, click the hashtag #Criminalization, where you'll find headlines such as "Supreme Court Declines Case of 'SEX OFFENDER' Stamp on Driver's Licenses" and "Breaking HIV Laws: A Roundup of Efforts to Decriminalize HIV."

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