

HIV CRIMINALIZATION IN OHIO

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Ohio

PRESENTATION OVERVIEW

- Legal landscape
- Ohio law & prosecutions
- Constitutional law reform:
State v. Batista
- Legislative reform:
recodification committee
- Representing clients



BASICS OF HIV CRIMINALIZATION

- ▶ The laws we're talking about penalize PLHIV for things that either are not crimes, or are lesser crimes, for others
- ▶ 34 states have statutory HIV criminalization including Ohio
- ▶ Operates like sentencing enhancement, often

What's wrong with this picture?

- ▶ HIV criminalization doesn't correspond to science—no rational basis
- ▶ Laws don't promote health or safety; increase stigma
- ▶ Other criminal laws already address actual criminal behavior

Legal landscape in Ohio

- Background – Ohio statutes criminalize HIV
 - Prostitution and solicitation provisions were passed in 1996 (1995 OH H.B. 40)
 - Harassment with a bodily substance provision passed in 1997 (originally only referred to persons confined in a detention facility) (1997 OH H.B. 37)
 - HIV-specific felonious assault law passed in 1999 (1999 OH H.B. 100)

R.C. §§ 2907.24, 2907.25 and 2907.241: penalty enhancements for sex workers

- §2907.24 and §2907.25: Solicitation or prostitution while living with HIV is a 3rd degree felony punishable by 9 months to 3 years in prison
 - Normally a 3rd degree misdemeanor punished by no more than 60 days in jail
 - Nearly 20-fold disparity in sentencing severity
- §2097.241: Loitering to engage in solicitation is a 5th degree felony, meaning it is punished by up to one year in jail
 - Normally it is a third degree misdemeanor punished by no more than 60 days in jail
 - More than 6-fold disparity in sentencing severity
 - Includes activities like calling out to someone, talking to someone, or approach a vehicle

R.C. § 2921.28(c): Harassment with a bodily substance

- Includes an intent requirement
- Includes TB and HCV
- Includes “attempt” and not just the complete act
- Includes variety of bodily fluids that we know don’t transmit HIV
- 3rd degree felony = 9 months to 3 years of incarceration

- Misinformation about transmission; prison context

O.R.C. §§ 2927.13: Donation or sale of blood/blood products by PLHIV

- ◆ It is a 4th degree felony for PLHIV who knows their status to sell or donate their blood, plasma, or a product of the person's blood if they “know or should know” that it will be used for the “purpose of transfusion to another individual.”
- ◆ Punishment of 6-18 months incarceration
- ◆ No requirement for intent or actual use of the donated material
- ◆ Modern technology capable of screening blood and blood products for HIV

R.C. § 2903.11:

HIV-specific felonious assault for non-disclosure

- Under felonious assault statute, a person who knows their status may not:
 - Engage in “sexual conduct” without prior disclosure
 - Engage in sexual conduct with an individual who they know or reasonably believe “lack[s] the mental capacity” to fully understand the significance of fact that person is living with HIV
 - Engage in sexual conduct with a person <18 years who is not their spouse
- “Sexual conduct” is defined as vaginal, anal, and oral sex, as well as insertion of an object carrying bodily fluids. Ejaculation is not required.
- When felonious assault committed with a “sexual motivation,” can require registration as a sex offender.
- 2nd Degree Felony = 2-8 years of incarceration

Comparison to non-enhanced sentences

What other kinds of crimes in Ohio are punished at the same level?

- 2nd degree felonies (felonious assault)
 - ▶ Sexual battery when the victim is under age 13
 - ▶ Abduction
 - ▶ Aggravated vehicular manslaughter
- 3rd degree felonies (harassment with a bodily substance; solicitation)
 - ▶ Reckless homicide
 - ▶ Extortion
 - ▶ Child endangerment resulting in serious physical harm to the the child
- 5th degree felonies (loitering to engage in solicitation)
 - ▶ Assaulting a school teacher at a school

Collateral consequences for felonies

- What happens to a person with a felony conviction in Ohio?
 - Restrictions on voting rights, ability to hold public office or serve on a jury, access to benefits like public housing, etc.
 - Possible sex offender registration for HIV-related prosecutions
 - Extensive registration requirements
 - Severe penalties for violation

Example prosecutions— not a dead-letter law

- ▶ JB of Akron, OH, was convicted of felonious assault in 2016 after allegedly not disclosing his status before a one-night-stand. He was sentenced to 5 years' imprisonment.
- ▶ In August 2015, a 24-year-old woman was sentenced to seven years' imprisonment after pleading guilty to two counts of felonious assault after having sex with two men without disclosing her HIV status. Neither sex partner tested positive. The prosecutor had recommended a sentence of four to six years.

Murder charges under the law

- In early June 2017, a man was charged with both felonious assault *and* murder after his former partner died of AIDS-related causes.
- O.R.C. § 2903.2(b): No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree . . .

Constitutional law: Ohio v. Batista (2017)

- The case:
 - In July, 2014, Orlando Batista was indicted for felonious assault in Hamilton county.
 - Admitted in court to infecting two other women, one of whom transmitted to her child
 - Convicted and sentenced to 8 years in prison
- The appeal: challenging the constitutionality of the HIV felonious assault statute

State v. Batista cont'd

- **Equal Protection:** Is the law rationally related to a state interest?
 - The law discriminates against PLHIV by singling them out for prosecution for conduct that is not criminal for other groups.
- **Free Speech:** Is the disclosure compelled speech, or is it incidental to informed sexual consent?
 - The law compels speech by requiring PLHIV to disclose their HIV status.

Batista decision and meaning, 1 yr out

- ▶ Ohio Supreme Court rejects challenges on all grounds
 - ▶ Amicus support for State from prosecutors, AG
 - ▶ Amicus support for Batista from PDs, LGBTQ+ groups
- ▶ Other states with these statutes on the books, similar decisions
 - ▶ Missouri, Illinois, upheld
- ▶ Cert petition to SCOTUS denied
 - ▶ Someday, possible from other jx

Legislative approach: criminal justice recodification committee

- Convened in 2015 by the OGA to simplify criminal code
 - Bi-partisan, 24 members incl. judges, prosecutors, etc
- Voted on a comprehensive plan for the Ohio legislature on June 15th, 2017 that aims to simplify the criminal code and makes efficient use of resources
 - Aligning statutes with purpose of defining a culpable mental state for all crimes and reviewing or revising statutes in which no culpable mental state is provided

Recodification committee proposals

- Working group submitted suggestions
 - Committee formulated bill
 - No representative picked it up...
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- Communication and education occurred but fundamentally **no reforms were passed**

Supporting your clients

- ▶ Given the state of the law, how does the defense bar support clients living with HIV
 - ▶ Ethical considerations
 - ▶ Motions to file / issues to preserve
 - ▶ Educate judges and prosecutors
 - ▶ Get holistic support for your client – resources are available, connect w non-legal practitioners

Contact information & attributions

- ▶ This material was significantly created by the Center for HIV Law and Policy (CHLP)
- ▶ In partnership with the ACLU
- ▶ And the Ohio Association of Criminal Defense Lawyers
- ▶ Thank you!