From: Fair, Kris Delegate
To: Fair, Kris Delegate (Laptop)
Subject: FW: Attorney General Opinion
Date: Monday, February 5, 2024 4:44:06 PM

From: Harrison, Shaunee <sharrison@oag.state.md.us>
Sent: Monday, February 5, 2024 4:43 PM
To: Fair, Kris Delegate <Kris.Fair@house.state.md.us>
Subject: RE: Attorney General Opinion

Dear Delegate Fair –

You asked for advice on whether an individual can be charged with reckless endangerment and assault in the second degree for the transfer, or the attempted transfer of HIV. In my view, an individual who transfers or attempts to transfer HIV could be charged with reckless endangerment; but not second-degree assault if the contact in which the transfer or potential transfer of HIV occurred is consensual.

In effort to determine if an individual can be charged with reckless endangerment and second-degree assault for transmitting or attempting to transmit HIV, how the virus can be transferred and the peril of contracting the virus must be reviewed. Maryland courts have previously discussed transmitting HIV. In *Faya v. Almaraz*, the court described HIV as a retrovirus that attacks the human immune system, weakening it, and ultimately destroying the body's capacity to ward off disease. *Faya v. Almaraz*, 329 Md. 435, 438-445 (1993). HIV typically spreads via genital fluids or blood transmitted from one person to another through sexual contact, the sharing of needles, blood transfusions, or from infiltration into wounds. *Faya*, 329 Md. 435, 439. These fluids must come from contact with a mucous membrane or damaged tissue or be directly injected into the bloodstream for transmission to occur. https://www.cdc.gov/hiv/basics/hiv-transmission/body-fluids.html. Mucous membranes are found inside the rectum, vagina, penis, and mouth. *Id*. The higher a person's viral load is, the more likely that person is to transmit HIV. *Id*. The viral load is the amount of HIV in the blood of an individual who has the virus. *Id*. The viral load is the highest during the acute phase of HIV, and without treatment. *Id*. Taking HIV medicine can reduce the viral load, making the load an undetectable viral load. *Id*. It is possible for people with HIV who keep an undetectable viral load to live normal healthy lives. *Id*. Having an undetectable viral load also helps prevent the transmission of the virus to others. *Id*.

The reckless endangerment statute is aimed at deterring the commission of potentially harmful conduct before an injury or death occurs. *Holbrook v. State* 364 Md. 354 (2001). The purpose of the statute is to punish or deter criminal, reckless conduct which creates a substantial risk of death or serious physical injury to another person. *Id*. For an individual to be found guilty of reckless endangerment, the State would have the burden to prove beyond a reasonable doubt that the individual engaged in conduct that: (1) created a substantial risk of death or serious physical injury to another; (2) that a reasonable person would not have engaged in that conduct; and (3) that the defendant acted recklessly. *In re David P*., 234 Md. App. 127 (2017). Guilt based on a charge for reckless endangerment does not depend upon whether an individual intended that their reckless conduct create a substantial risk of death or serious injury to another; rather the test is whether the individual's misconduct, viewed

objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe. *Thompson v. State*, 229 Md. App. 385 (2016).

In *Williams v. State*, the court reasoned that, "[t]he state of mind of recklessness, in the context of reckless endangerment……is variously described as an attitude wherein the criminal agent, is conscious of the life-endangering risk involved, nonetheless acts with a conscious disregard of or wanton indifference to the consequences." *Williams v. State*, 100 Md. App 468, 474 (1994). Since there is no cure for HIV, a person who has HIV would have to take treatment for the rest of his or her life. https://www.cdc.gov/hiv/basics/whatishiv.html#:~:text=People%20who%20take%20HIV%20treatment,into%. Further, everyone's immune system is different and the HIV treatments available can cause side effects in some people or may not be effective in preventing the progression of HIV. *Id*. The progression of HIV could turn into acquired immunodeficiency syndrome (AIDS). *Id*. An individual with AIDS can have a badly damaged immune system; and could get an increasing number of opportunistic infections or other illnesses. *Id*. AIDS is thus the acute clinical phase of immune dysfunction and is invariably fatal. *Smallwood v. State*, 340 Md. 97, 103 (1996). Here, even with the advances of treatment for HIV, the virus still poses a risk to an individual's health and overall well-being. Therefore, it could be reasonably concluded that an individual who knowingly engaged in activity that transmits HIV, or could possibly transmit HIV, participated in conduct that created a risk of death or serious physical injury; and arguably that individual consciously disregarded that risk.

For an individual to be convicted for assault in the second-degree, the state must prove: (1) that the individual caused offensive contact with physical harm; (2) that the contact was the result of an intentional or reckless act of the individual and was not accidental; and (3) that the contact was not consented to or legally justified. MPJI-Cr 4:01C. A reckless act in the context of proving second-degree assault, is conduct that under all circumstances, shows a conscious disregard of the consequences to other people and is a gross departure from the standard of conduct that a law-abiding person would observe. *Id*. It is clear that if a person were to bite, spit, rape, etc. another, then the elements of second-degree assault are satisfied, regardless of if the individual who committed those acts had HIV or not. However, the issue is when the contact is not offensive, such as the act of consensual sex.

In this case, I think the question is whether an individual who knows that he or she has HIV and fails to disclose this information to their sex partners, amounts to offensive contact that was not consented to. Maryland courts have not explored this issue in depth. Nonetheless, I am not certain that an individual who transfers HIV or attempts to transfer HIV during consensual sex, qualifies as offensive and harmful contact that was not consented to. Moreover, looking at how Maryland courts have previously examined the facts that amount to nonconsensual offensive physical contact that causes harm, I do not think that an individual engaging in consensual sex, who fails to tell their partner that they have HIV, will satisfy those elements. For an example, most recently in *Johnson v. State*, the court reasoned that offensive physical contact occurred when the victim awoke and the defendant was holding her legs in the air, to assault her further sexually. *Johnson v. State*, No. C-02-CR-20-001566 (Sept. 16, 2022). The court further reasoned that the victim did not consent to this contact or touching, because she woke up to it happening, and she was passed out when the defendant initiated the contact. *Id*.

While it is recognized that there have been medical advancements in the treatment of individuals with HIV that may reduce the transmission and mortality rates associated with the

virus, dying from the progression of HIV or having other health complications because of HIV are still plausible factors. It is my view that those who have HIV, and knowingly transmit or attempt to transmit the virus to others, pose a risk to the lives of others and have a reckless disregard for their actions and the consequences of their actions; and therefore, could be charged under the reckless endangerment statute. Essentially, reckless endangerment is an inchoate crime, designed to punish not only harmful conduct but also potentially harmful conduct even under circumstances where a reckless act yields no harm. *Marlin v. State*, 192 Md. App. 134, 156 (2010) (citing *Williams*, 100 Md. App. at 480). Moreover, I think that charging a person who acts with such a disregard for the harm that could stem from their actions, would be in accordance with the legislative intent behind the reckless endangerment statute.

Further, it is my view that it would be difficult to sustain a conviction under the second-degree assault statute for the transfer or potential transfer of HIV during consensual sex. Although transferring HIV or attempting to transfer HIV meets the intentional and reckless part of the second-degree assault statute, I do not think the conduct amounts to offensive contact that is not consented to, if the contact happened during consensual sex. One could make the argument that no one would consent to getting or being exposed to an incurable potentially deadly virus such as HIV. However, looking at Maryland courts' assessment of what is considered to be offensive harmful contact and lack of consent, I'm not certain that the act of transferring or attempting to transfer HIV meets the statutory requirements for assault in the second degree if the transfer or attempt transfer happened during a consensual act.

I hope this advice is responsive to your request. Please let me know if you have further questions.

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From: Fair, Kris Delegate <Kris.Fair@house.state.md.us>
Sent: Wednesday, January 24, 2024 8:09 PM
To: Brantley, Sandra <sbrantley@oag.state.md.us>
Cc: Spangler, Adam <aspangler@oag.state.md.us>
Subject: Attorney General Opinion

> You don't often get email from kris.fair@house.state.md.us. Learn why this is important

Good evening Ms. Brantley,

Earlier today I met with Adam Spangler and he suggested that I reach out to you. The Maryland States Attorney Association has inquired about whether or not they can use reckless endangerment and second-degree assault when an individual transmits a sexually transmitted infection (STI) to another individual. My office is reintroducing the bill to repeal Section 18-601.1 of the public health code criminalizing the transfer or attempt to transfer (HIV). The Maryland States Attorney Association believes that previous successful use of reckless endangerment and second-degree assault that they can use this in place of Section 18-601.1 should the case arise. Additionally, the Williams Institute the attached guidance about Maryland's laws outlining the conviction law utilizing reckless endangerment and second-degree assault.

I was wondering if the Attorney General can weigh in on this question while I know it is a tight timeline our hearing on this bill is Tuesday, February 6th and if possible I would be very appreciative if I could have a formal or informal response from the Office of the Attorney General.

As I mentioned, I know this is a quick turnaround request. I greatly appreciate any assistance you can provide.

Delegate Kris Fair (he/him) | District 3 of Frederick County, Maryland

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