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This memo briefly summarizes some of the legislative history of Nevada's HIV crimes, notably Nev. Rev. Stat. § 201.358(a) and (b) (prostitution), and Nev. Rev. Stat. § 201.205 (other conduct that is likely or intended to transmit HIV). It also summarizes all of the publicly available data on the enforcement of these HIV crimes in Nevada, and discusses how the criminalization of HIV is in conflict with the goals of Nevada's statewide plan to fight HIV—which has identified stigma as the key barrier to HIV testing and prevention and calls for cooperative engagement with the very communities that HIV crimes disproportionately impact, including Black people, Latinx people, women, and LGBTQ youth.

Based on this research, and other Williams Institute research, we make the following recommendations for modernizing the criminalization of disease in Nevada:

1. Nevada should fully embrace a public health approach to combatting disease. This is a decision that Nevada made in 1989, but HIV remains the only exception to the state's efforts in doing so. That exception should end, and all crimes, penalties, and mandatory testing related to disease should be removed from the Nevada penal code.
2. Crimes and penalties that are only applicable to People Living with HIV (PLWH) are stigmatizing. No crime or penalty in the Health and Safety Code should solely focus on HIV. All such crimes and penalties should be amended to focus on serious communicable diseases.

3. Every crime and penalty related to disease in the Health and Safety Code should be based on traditional principals of criminal law and current science and medicine related to HIV and other diseases. Accordingly, any crime or penalty should require 1) the specific intent to transmit the disease; 2) engaging in conduct with a significant likelihood of transmitting the disease; and 3) actual transmission. Any conduct that falls short of meeting these requirements should be addressed through Nevada public health programs, services, and power, not through criminalization.

I. Legislative History of Nevada's HIV Crimes

While the legislative history of Nevada's HIV crimes does indicate that the intent of the legislators at the time was to slow the spread of HIV in Nevada, it is also clear that they were uncertain about what the actual impact of these crimes would be and whether they would even be constitutional. Today, we know that HIV crimes impact hundreds of people in the state, but do nothing to stop the spread of HIV. In fact, some research indicates quite the opposite.

Further, the information that Nevada legislators had about HIV/AIDS at that time was far bleaker than what we know about HIV-disease today. At that time, only 84 people in Nevada had been diagnosed with AIDS and 60% of them had died. No effective treatments were available. Today, HIV is a manageable chronic condition allowing most to lead healthy lives. Properly treated, PLWH cannot transmit HIV through sex.

Moreover, it is clear that stigma and discrimination against LGBTQ people, and in particular gay and bisexual men, greatly influenced the passage of the state's HIV crimes. This is not speculative: NRS § 201.205 was explicitly framed as necessary because, in the same legislative session, the Nevada legislature had just repealed the state's sodomy law. Testifying in favor of NRS § 201.205 was the founder of the Family Research Council, Paul Cameron, who

presented a brochure to the legislature linking homosexuality to child molestation and serial killers despite having already been kicked out of several professional associations because his research was not based in science. The passage of the law suggests the legislature was swayed by this testimony, but does not reflect that much, if any, weight was given to the testimony of medical professionals warning against the singling out of one communicable disease for criminal prosecution, and despite the legislature having recently completed its comprehensive overhaul of the state's statutes to reflect a public health (rather than penal)-centered approach to controlling the spread of such diseases.

To receive a fuller picture of what the Nevada legislature was presented with during its passage of the state's HIV laws, we invite the committee to review the following legislative history documents, attached as Exhibits A–D, and offer our own review of them below:

Legislative History of AB 550 (1987), available at

<https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1987/AB550,1987.pdf>.

Legislative History of SB 514 (1993), available at

<https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/SB514,1993.pdf>.

Legislative History of SB 466 (1993), available at

<https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/SB466,1993.pdf>.¹

Legislative History of SB 73 (1989), available at

<https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1989/SB073,1989.pdf>.

¹ See also Special Collection on SB 466 at the University of Nevada, Las Vegas <https://www.library.unlv.edu/speccol/finding-aids/MS-00726.pdf>.

- a. At the time the Nevada Legislature passed these HIV criminal laws, they did not know what their impact would be. Today, we know that HIV criminal laws have a negative impact on fighting HIV-disease, not a positive one.**

The legislative history of Nevada’s HIV criminal laws contains a number of instances in which both the witnesses and the legislature confirm their inability to predict the impact of the HIV crimes that they were passing, and to determine whether the new crimes were constitutional. For example, NRS § 201.358 was passed in 1987 through Assembly Bill 550.² As enacted, the law’s first section prohibited any person from engaging in prostitution or solicitation, except for in a licensed house of prostitution.³ Anyone in violation of section 1 was guilty of a misdemeanor, punishable by up to 6 months imprisonment and/or a fine of up to \$1,000. In the next section, the law prohibited people living with HIV from 1) engaging in prostitution in a licensed house of prostitution after testing positive for HIV and 2) engaging in prostitution in violation of the first section of the law.⁴ Violation of either crime was charged as a felony.⁵

Assemblyman John DuBois was the prime sponsor of AB 550 with nine other assemblymen co-sponsoring the bill.⁶ In the opening minutes of the Senate Judiciary Committee hearing on the bill, Assemblyman DuBois stated that while the legislation primarily targeted illegal prostitution, the bill “was, in fact, an AIDS bill.”⁷ DuBois acknowledged that AB 550 would not “resolve the problem completely,” but “would provide a tool to remove a carrier from circulation for five years.”⁸

² A.B. 550, 64th Leg. Sess. (Nev. 1987).

³ *Id.*

⁴ *Id.*

⁵ *Id.*; see also NEV. REV. STAT. § 193.120 (2019).

⁶ NEV. LEGIS. COUNS. BUREAU, SUMMARY OF LEGISLATION, A.B. 550, 64th Leg. Sess. at 6 (Nev. 1987). [hereinafter AB 550 LEG. HIS.]

⁷ *Id.*

⁸ *Id.* at 7.

When the Clark County district attorney who initiated the idea for the bill and drafted “its more expansive language” was questioned about whether the bill would address the problems he identified, he responded that “in essence, this was an area of such total inexperience that [he] did not propose to even guess how the law would operate in practical application.”⁹ When asked about whether certain parts of the bill would be feasible or even constitutional, he responded that he did not know all of the answers, that he would rather be the defense attorney than the prosecutor if such a challenge was brought, and that “the law is like the weather – you don’t know what it’s going to be tomorrow.”¹⁰

Similarly, in 1993 when NRS § 201.205, which criminalizes engaging in conduct in a manner that is intended or likely to transmit HIV to another person, was enacted through Senate Bill 514,¹¹ no fiscal impact for the bill was estimated because “it [was] not possible to provide an estimate of the number of persons who will be prosecuted of this crime, and if prosecuted, who would be sentenced to prison and for how long.”¹²

What we now know is that while HIV criminal laws impact the lives of hundreds of people in each state that the Williams Institute has studied (specifically, Missouri, Florida, Georgia, and California), they nonetheless do nothing to prevent the spread of HIV. Some research shows that HIV criminal laws have no public health benefits, while other studies suggest they actually have a *negative* impact, including on:

⁹ *Id.* at 8.

¹⁰ *Id.* at 9.

¹¹ S.B. 514, 67th Leg. Sess. (Nev. 1993).

¹² See NEV. LEGIS. COUNS. BUREAU, SUMMARY OF LEGISLATION, S.B. 514, 67th Leg. Sess. at 4 (Nev. 1993). [hereinafter SB 514 LEG. HIS.]

Behaviors: Most studies have found that HIV criminal laws do not impact sexual risk behaviors for either PLWH or people who do not have HIV; a few have found that such laws actually *increase* sexual risk behaviors.¹³

Testing: While more systematic reviews have found that HIV criminalization laws have little impact on testing rates for people in general, some studies suggest that they may lead those from the highest risk groups to avoid testing altogether.¹⁴ Some research suggests that HIV criminalization laws may discourage individuals from getting tested and knowing their HIV-status, since these laws (including Nevada’s) require knowledge of one’s status in order to be convicted.¹⁵ This can undermine prevention efforts, as those who do not know their status are more likely than those who do to transmit the virus, and are estimated to account for one-third of all new transmissions.¹⁶ One study found higher rates of PLWH who don’t know their positive status in states with laws criminalizing HIV exposure, suggesting that such laws may be disincentivizing testing among those most at risk.¹⁷ Another study found that testing rates

¹³ Patrick O’Byrne et al., *HIV Criminal Prosecutions and Public Health: An Examination of the Empirical Research*, 39 MED. HUMANIT. 85 (2013), available at <https://doi.org/10.1136/medhum-2013-010366>; Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. STATE LAW J. 467 (2007), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=977274; Keith J. Hovath et al., *Men Who have Sex with Men Who Believe that Their State has a HIV Criminal Law Report Higher Condomless Anal Sex than Those Who are Unsure of the Law in Their State*, 21 AIDS BEHAV. 51 (2017), available at <https://doi.org/10.1007/s10461-016-1286-0>.

¹⁴ Dini Harsono et al., *Criminalization of HIV Exposure: A Review of Empirical Studies in the United States*, 21 AIDS BEHAV. 27 (2017), available at <https://doi.org/10.1007/s10461-016-1540-5>; O’Byrne et al., *supra* note 13.

¹⁵ See, e.g., Sienna Baskin et al., *Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences*, 93 DENVER L. REV. 355 (2016); Margaret H. Wurth et al., *Condoms as Evidence of Prostitution in the United States and the Criminalization of Sex Work*, 16 J. INT. AIDS SOC. (2013), available at <https://doi.org/10.7448/IAS.16.1.18626>; CENTER FOR HIV LAW AND POLICY & NATIONAL LGBTQ TASK FORCE, *THE INTERSECTION OF SEX WORK AND HIV CRIMINALIZATION: AN ADVOCATE’S TOOLKIT* (2017), https://www.hivlawandpolicy.org/sites/default/files/Sex_Work_HIV_Toolkit_FINAL_R2_0.pdf.

¹⁶ Jacek Skarbinski et al., *Human Immunodeficiency Virus Transmission at Each Step of the Care Continuum in the United States*, 175 JAMA INTERNAL MED. 588 (2015), available at <https://doi.org/10.1001/jamainternmed.2014.8180>.

¹⁷ Pratha Sah et al., *HIV Criminalization Exacerbates Subpar Diagnosis and Treatment Across the United States: Response to the ‘Association of HIV Diagnosis Rates and Laws Criminalizing HIV Exposure in the United States’*, 31 AIDS 2437 (2017), available at <https://doi.org/10.1097/QAD.0000000000001636>.

remained stable following enactment of an HIV criminal law, but decreased following increased media coverage of HIV criminal exposure prosecutions.¹⁸

Disclosure: Similarly, rather than encouraging disclosure, HIV criminal laws may lead PLWH to hide their status from sexual partners out of fear of criminal prosecution, including that a partner may later falsely claim that they did not reveal their HIV status.¹⁹ Other studies suggest that such laws may also make PLWH less likely to disclose their HIV status or risk behaviors to health care providers.²⁰

Services for PLWH: For HIV service providers, these laws can shift the focus from having open conversations and providing crucial prevention information toward discussions over legal, rather than health, consequences.²¹ By criminalizing sex work, in particular, with much harsher penalties, HIV criminal laws may discourage sex workers from seeking health care services including testing and treatment (for fear of criminal liability) or from negotiating safer sex practices with clients (for fear of being picked up by law enforcement while having longer conversations with clients to negotiate those practices).²²

Increasing HIV Stigma: HIV criminalization laws contribute to the stigmatization of PLWH in a number of ways. First, they perpetuate inaccurate beliefs about how HIV is

¹⁸ Patricia Sweeney et al., *Association of HIV Diagnosis Rates and Laws Criminalizing HIV Exposure in the United States*, 31 AIDS 1483-1488 (2017), available at <https://doi.org/10.1097/QAD.0000000000001501>; Sun Goo Lee, *Criminal Law and HIV Testing: Empirical Analysis of How At-Risk Individuals Respond to Law*, 14 YALE J. HEALTH POL'Y L. & ETHICS 194, iv (2014), available at <https://digitalcommons.law.yale.edu/yjhple/vol14/iss1/4/>.

¹⁹ Carol L. Galletly & Stephen D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS BEHAV. 451 (2006), available at <https://doi.org/10.1007/s10461-006-9117-3>;

²⁰ O'Byrne et al., *supra* note 13; ERIC MYKHALOVSKIY ET AL., *THE PUBLIC HEALTH IMPLICATIONS OF CRIMINALIZING HIV, NON-DISCLOSURE, EXPOSURE, AND TRANSMISSION: REPORT OF AN INTERNATIONAL WORKSHOP* (2014), available at <https://www.hivlawandpolicy.org/sites/default/files/Public%20Health%20Implications%20of%20Criminalizing%20HIV%20Non-Disclosure,%20Exposure%20and%20Transmission.pdf>.

²¹ Eric Mykhalovskiy, *The Problem Of "Significant Risk": Exploring The Public Health Impact Of Criminalizing HIV Non-Disclosure*, 73 SOC. SCI. MED. 668 (2011), available at <https://doi.org/10.1016/j.socscimed.2011.06.051>.

²² See *supra* note 15.

transmitted by criminalizing behavior that cannot transmit the virus. Further, by carrying significant criminal penalties, they convey that the consequences of the disease are much more severe, if not fatal, despite the reality that, for most today, HIV is managed much like other chronic health conditions.²³ In addition, these laws send the message that PLWH are a threat even when engaged in consensual conduct that cannot transmit the virus. This undermines an important public health message created in the earliest days of the AIDS epidemic and maintained through to this day—that specific types of conduct, not certain types of people, transmit HIV.²⁴ The negative and inaccurate messages conveyed by these laws serve to reinforce discriminatory attitudes and behavior towards PLWH, contribute to PLWH having a negative self-image, and lead PLWH to isolate themselves because they fear discrimination and harassment.²⁵ All of these are forms of stigma.

Finally, the link between HIV stigma and worse health outcomes for PLWH is well documented. Stigma has been described as a “fundamental cause of health inequalities,” serving as a significant source of stress while imposing structural, social, material, and even economic disadvantages on those stigmatized, ultimately leading to their experiencing poorer health.²⁶

²³ Matthew Weait, *HIV Stigma and the Criminal Law*, On Health, BIOMEDCENTRAL.COM (Dec. 1, 2016), <https://blogs.biomedcentral.com/on-health/2016/12/01/hiv-stigma-and-the-criminal-law/>; Carol L. Galletly & Stephen D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS BEHAV. 451 (2006), available at <https://doi.org/10.1007/s10461-006-9117-3>; Sienna Baskin et al., *Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences*, 93 DENVER L. REV. 355 (2016).

²⁴ Aziza Ahmed et al., *Criminalising Consensual Sexual Behaviour in the Context of HIV: Consequences, Evidence, and Leadership*, 6 GLOB. PUBLIC HEALTH S357 (2011), available at <https://doi.org/10.1080/17441692.2011.623136>; Matthew Weait, *HIV Stigma and the Criminal Law*, BIOMEDCENTRAL.COM (Dec. 1, 2016), <https://blogs.biomedcentral.com/on-health/2016/12/01/hiv-stigma-and-the-criminal-law/>.

²⁵ Ahmed et al., *supra* note 24; Sergio Rueda et al., *Examining the Associations Between HIV-Related Stigma and Health Outcomes in People Living With HIV/AIDS: A Series of Meta-Analyses*, 6 BMJ OPEN (2016), available at <https://doi.org/10.1136/bmjopen-2016-011453>.

²⁶ Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 AM. J. PUBLIC HEALTH 813 (2013), available at <https://doi.org/10.2105/AJPH.2012.301069>; Patrick W. Corrigan, *Structural Stigma in State Legislation*, 56 PSYCHIATR. SERV. 557 (2005), available at <https://doi.org/10.1176/appi.ps.56.5.557>; Jo C. Phelan et al., *Social Conditions as Fundamental Causes of Health*

More specifically, higher rates of HIV stigma have been linked with depression, worse mental and physical health, more severe HIV symptomology, lower medication adherence, and lower social support.²⁷ By furthering HIV stigma, HIV criminal laws increase the risk of these adverse outcomes, as well as PLWH's vulnerability to discrimination, harassment, and violence.²⁸

In short, while the Nevada legislature did not know the impact that criminalizing HIV would have when these statutes were enacted, we now have three decades of experience and research documenting that such statutes are in fact counterproductive to the legislature's goal—then and now—of slowing the spread of HIV.

b. When Nevada passed its HIV criminal laws, it was facing a much different and more frightening AIDS epidemic. Today, HIV is a manageable disease that, for most, does not result in serious illness or an early death.

Nevada's HIV criminal statutes were enacted at a time when little was known about HIV and there was widespread fear of the disease. Nevada's HIV crimes focused on prostitution were enacted in 1987,²⁹ just three years after the virus itself was identified as the cause of AIDS and one year after the first effective HIV test was developed. At that time, almost everyone known to

Inequalities: Theory, Evidence, and Policy Implications, 51 J. HEALTH SOC. BEHAV. S28 (2010), available at <https://www.jstor.org/stable/20798314>.

²⁷ Rueda, *supra* note 25; C. Logie & T.M. Gadalla, *Meta-Analysis of Health and Demographic Correlates of Stigma Towards People Living With HIV*, 21 AIDS CARE 742 (2009), available at <https://doi.org/10.1080/09540120802511877>; Bulent Turan et al., *How Does Stigma Affect People Living with HIV? The Mediating Roles of Internalized and Anticipated HIV Stigma in the Effects of Perceived Community Stigma on Health and Psychosocial Outcomes*, 21 AIDS BEHAV. 283 (2017), available at <https://doi.org/10.1007/s10461-016-1451-5>; Peter A. Vanable et al., *Impact of HIV-Related Stigma on Health Behaviors and Psychological Adjustment Among HIV-Positive Men and Women*, 10 AIDS BEHAV. 473 (2006), available at <https://doi.org/10.1007/s10461-006-9099-1>.

²⁸ Peter A. Vanable et al., *Impact of HIV-Related Stigma on Health Behaviors and Psychological Adjustment Among HIV-Positive Men and Women*, 10 AIDS BEHAV. 473 (2006), available at <https://doi.org/10.1007/s10461-006-9099-1>; Aziza Ahmed et al., *Criminalising Consensual Sexual Behaviour in the Context of HIV: Consequences, Evidence, and Leadership*, 6 GLOB. PUBLIC HEALTH S357 (2011), available at <https://doi.org/10.1080/17441692.2011.623136>; Matthew Weait, *supra* note 24.

²⁹ NEV. REV. STAT. § 201.358.

have HIV was dying. During this period, widespread stigma and fear led to the implementation of policies and practices that excluded PLWH from public life.

All of Nevada’s HIV criminal laws were passed when HIV was an untreatable, and almost always fatal, disease. The first drug used to treat HIV, AZT (zidovudine), did not receive FDA approval until 1987—the same year Nevada passed its HIV criminal law focused on prostitution. AZT had very limited long-term effectiveness and caused significant side effects. By the time Nevada passed its next HIV criminal statute in 1993, AIDS was the leading cause of death in the U.S. for men aged 25 to 44; by 1994, it would go on to be the leading cause of death for all Americans in that age group.

The stark reality of the AIDS epidemic was reflected in the legislature’s discussion of Nevada’s HIV crimes in 1987 and 1993. For example, comments made during the Senate Judiciary Committee hearing in 1987 included that 30% to 50% of those who tested HIV-positive would develop to “full-blown AIDS;”³⁰ that in 1985, “AIDS was considered a disease of homosexual and intravenous drug users;”³¹ and that the virus was “becoming more viral with time, not less.”³² Of the 84 cases of known AIDS in Nevada at the time, 61% had already died.³³ Only two of those cases were among women, and 91% were gay or bisexual men.³⁴

Fortunately, the difference between HIV treatment then and now could not be starker. Today, after three decades of experience with and research on HIV, we have a greater understanding of how difficult it is to transmit HIV, even without medical or other precautions to prevent transmission. We now have effective treatments that allow PLWH to lead full, healthy

³⁰ NEV. LEGIS. COUNS. BUREAU, SUMMARY OF LEGISLATION, A.B. 155, 64th Leg. Sess. at 4 (Nev. 1987). [hereinafter AB 155 LEG. HIS.]

³¹ *Id.* at 5.

³² *Id.* at 4.

³³ *Id.* at 9.

³⁴ *Id.*

lives, with little risk of transmitting the virus to others. Further, advances in prevention such as PrEP (pre-exposure prophylaxis) and PEP (post-exposure prophylaxis) can dramatically reduce one's risk of contracting HIV.

In 1995, researchers discovered that using multiple antiretroviral drugs in tandem prevents HIV from both reproducing and acquiring resistance to the drugs.³⁵ This treatment is known as antiretroviral therapy (ART). Recent studies have found that initiating modern ART medication as soon as HIV infection is diagnosed is of great benefit for the patient, resulting in decreased morbidity, especially when medication is initiated early following HIV infection.³⁶ Soon after starting ART, the vast majority of PLWH reach an “undetectable” viral load.³⁷ ART usually involves only once-daily pills³⁸ and relatively infrequent checkups.³⁹ For most people,

³⁵ Nat'l Inst. of Allergy & Infectious Diseases, *Antiretroviral Drug Discovery and Development*, NIAID.NIH.GOV (Nov. 26, 2018), <https://www.niaid.nih.gov/diseases-conditions/antiretroviral-drug-development>; U.S. Dep't of Health and Human Svcs., *HIV Overview: FDA-Approved HIV Medicines*, AIDSINFO.NIH.GOV, <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/19/58/fda-approved-hiv-medicines>; Nat'l Inst. of Allergy & Infectious Diseases, *Starting and Staying on Antiretroviral Treatment*, NIAID.NIH.GOV (Nov. 27, 2018), <https://www.niaid.nih.gov/diseases-conditions/starting-antiretroviral-treatment>. [hereinafter “NIAID on Antiretroviral Treatment”]

³⁶ The Insight Start Group, *Initiation of Antiretroviral Therapy in Early Asymptomatic HIV Infection*, 373 N. ENGL. J. MED. 795 (2015).

³⁷ Nat'l Inst. of Allergy & Infectious Diseases, *10 Things to Know About HIV Suppression*, NIAID.NIH.GOV (Nov. 14, 2017), <https://www.niaid.nih.gov/news-events/10-things-know-about-hiv-suppression>. Suppression of HIV to undetectable levels means that, while a person will retain latent HIV virus in the body, the virus is controlled. U.S. Dep't of Health and Human Svcs., *HIV Overview: What is a Latent HIV Reservoir?*, AIDSINFO.NIH.GOV (Jul. 3, 2019), <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/19/93/what-is-a-latent-hiv-reservoir>; Nat'l Inst. of Allergy & Infectious Diseases, *HIV Treatment, the Viral Reservoir, and HIV DNA*, NIAID.NIH.GOV (Nov. 27, 2018), <https://www.niaid.nih.gov/diseases-conditions/hiv-treatment-viral-reservoir-hiv-dna>; U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Limitations to Treatment Safety and Efficacy*, AIDSINFO.NIH.GOV (Oct. 17, 2017), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/30/adherence>. [hereinafter “HHS on Antiretroviral Limitations”]

³⁸ HHS on Antiretroviral Limitations, *supra* note 37; NIAID on Antiretroviral Treatment, *supra* note 35. Each pill contains all three or four of the antiretroviral medications that person needs. These pills have no special storage or handling requirements. Such once-daily treatment regimens are associated with higher levels of adherence.

³⁹ U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Tests for Initial Assessment and Follow-up*, AIDSINFO.NIH.GOV (Dec. 18, 2019), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/3/tests-for-initial-assessment-and-follow-up> (see Table 3); U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Plasma HIV-1 RNA (Viral Load) and CD4 Count Monitoring*, AIDSINFO.NIH.GOV (May 1, 2014), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/458/plasma-hiv-1-rna--viral-load--and-cd4-count-monitoring>; HHS on Antiretroviral Limitations, *supra* note 37; U.S. Dep't of Health and Human Svcs.,

ART causes few side effects, if any, and those that do occur are generally well tolerated.⁴⁰

Developing resistance to ART is rare,⁴¹ and switching to a different combination can once again suppress the virus to undetectable levels.⁴² Those who sustain undetectable HIV levels because of ART can expect to live a healthy life with a normal life expectancy.⁴³

An undetectable viral load has significant implications for the risk of transmission: Those with an undetectable viral load have virtually no risk of transmitting HIV to an uninfected partner during sex.⁴⁴ Research conclusively demonstrates that those who maintain an undetectable viral load have effectively zero chance of transmitting HIV to an uninfected partner, even if no other form of prevention is used.⁴⁵ The U.S. federal government has recognized this

Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Laboratory Testing for Initial Assessment and Monitoring of Patients with HIV Receiving Antiretroviral Therapy, AIDSINFO.NIH.GOV (Dec. 18, 2019), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/3/testsfor-initial-assessment-and-follow-up>.

⁴⁰ *HIV Treatment Overview*, HIV.GOV (Mar. 29, 2019), <https://www.hiv.gov/hiv-basics/staying-in-hiv-care/hiv-treatment/hiv-treatment-overview>; U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Adverse Effects of Antiretroviral Agents*, AIDSINFO.NIH.GOV (Dec. 18, 2019), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/31/adverse-effects-of-arv>.

⁴¹ In almost all cases, resistance to a particular ART regimen develops only if the patient is unable to adhere to the prescribed medications. See, e.g., HHS on Antiretroviral Limitations, *supra* note 37; resistance is rare in people who achieve an undetectable viral load and continue taking ART as directed. Eric J. Arts & Daria J. Hazuda, *HIV-1 Antiretroviral Drug Therapy*, 2 COLD SPRING HARBOR PERSPECTIVES IN MED. a007161 (2012), available at <https://doi.org/10.1101/cshperspect.a007161>.

⁴² U.S. Dep't of Health and Human Svcs., *supra* note 35. Resistance to multiple drugs is increasingly uncommon, thus it is unlikely that a PLWH would be unable to find an alternate therapeutic option and be unable to retain/maintain viral suppression. See U.S. Dep't of Health and Human Svcs., *Guidelines: Drug-Resistance Testing*, AIDSINFO.NIH.GOV, <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/6/drug-resistance-testing>; Alison F. Feder et al., *More Effective Drugs Lead to Harder Selective Sweeps in the Evolution of Drug Resistance in HIV-1*, eLIFE 2016; 5: e10670 (2016), available at <https://doi.org/10.7554/eLife.10670>.

⁴³ U.S. Centers for Disease Control & Prevention, *About HIV/AIDS*, CDC.GOV (Dec. 2, 2019), <https://www.cdc.gov/hiv/basics/whatishiv.html>.

⁴⁴ U.S. Centers for Disease Control & Prevention, *HIV Treatment Can Prevent Sexual Transmission*, CDC.GOV (Jul. 2019), <https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-tasp-101.pdf>; Nat'l Institute of Allergy and Infectious Diseases, *HIV Undetectable = Untransmittable (U=U), or Treatment as Prevention*, NIAID.NIH.GOV (May 21, 2019), <https://www.niaid.nih.gov/diseases-conditions/treatment-prevention>; U.S. Centers for Disease Control & Prevention, *HIV Treatment as Prevention*, CDC.GOV (Nov. 12, 2019), <https://www.cdc.gov/hiv/risk/art/index.html>.

⁴⁵ *Id.*; *U=U Taking Off in 2017*, 4 LANCET HIV e475 (2017), available at [https://doi.org/10.1016/S2352-3018\(17\)30183-2](https://doi.org/10.1016/S2352-3018(17)30183-2).

principle as “firmly established” by “an overwhelming body of clinical evidence.”⁴⁶ Today, 34% of all PLWH in Nevada currently have an undetectable viral load and therefore cannot transmit the virus through sex.⁴⁷

c. Bias against gay and bisexual men permeates the legislative history of the state’s HIV criminal laws and was reflected by members of the state legislature at the time of these laws’ passage.

While HIV criminal laws passed in the late 1980s and early 1990s were motivated by a widespread fear of AIDS, it is impossible to disentangle such fear from an underlying fear of gay and bisexual men. In fact, these laws were passed at a time when public opinion polls consistently showed that not only did a majority of Americans oppose marriage equality, they also thought same-sex sexual activity was immoral. As stated above, AIDS was framed as “homosexual disease.” Bias against, and stereotypes about, gay and bisexual men greatly influenced both the passage of Nevada’s HIV crime focused on prostitution in 1987 and the broader criminal law enacted in 1993.

As mentioned above, when the state legislature enacted the HIV criminal law focused on prostitution, only two of the 84 documented AIDS cases in the state were among women. Further, the Clark County district attorney who initiated the effort said that he was motivated after watching a “video of a male prostitute in Jackson, Mississippi, who was a known AIDS carrier.” The concluding statement of that video was a quote: ““AIDS is something people volunteer for with risky choices, and you can’t protect people from themselves.””⁴⁸

⁴⁶ U.S. Dep’t of Health and Human Svcs., *The Science is Clear: With HIV, Undetectable Equals Untransmittable* (Jan. 10, 2019), <https://www.nih.gov/news-events/news-releases/scienceclear-hiv-undetectable-equals-untransmittable>.

⁴⁷ See Nev. Dept’t of Health and Hum. Svcs., *Continuum of Care (2017)*, http://endhivnevada.org/wp-content/uploads/2018/12/Report_Continuum-of-Care-NV-2017.pdf.

⁴⁸ AB 155 LEG. HIS., *supra* note 30, at 7.

Even when the one witness before the Senate Judiciary Committee who spoke against the bill (Jim Shields, ACLU Director of Nevada) was asked about what he would do “to remove the homosexual AIDS carrier [in the video] from circulation,” he replied that the public health department should go to court to get a restraining order against the person and that “he should not be allowed to leave the state.”⁴⁹ Fortunately, this type of draconian measure was not adopted by Nevada or any state during the history of the AIDS epidemic.

In 1993, the link between homophobia and the passage of an HIV criminal law was even more stark as shown throughout the development and passage of SB 514.⁵⁰ The HIV crime passed in 1993 was intended to shore up legislators’ fears about gay men when decriminalizing sodomy. SB 466 and SB 514 were both heard simultaneously as a part of the 67th Senate Session and were both passed in June of 1993, with SB 466 passing 13 days prior to SB 514.⁵¹ Further supporting the link between the two, the Legislative Counsel Bureau’s contemporaneous summary of SB 514 states in its introduction that “this bill was requested after the passage of Senate Bill 466, which decriminalized certain sexual activities.”⁵² In fact, when SB 514 went before the Assembly Judiciary Committee, the President of the Nevada Hospital Association (Jerry Ash) testified in support of the bill and characterized it as having “been discovered on the floor of the Senate during the debate over the sodomy legislation.”⁵³

The hearings on the two 1993 bills before the Senate Judiciary Committee also occurred two weeks apart. The hearing on SB 466 occurred first and included testimony from many anti-

⁴⁹ *Id.* at 5.

⁵⁰ S.B. 514, 67th Leg. Sess. (Nev. 1993).

⁵¹ *See* S.B. 466, 67th Leg. Sess. (Nev. 1993); S.B. 514, 67th Leg. Sess. (Nev. 1993). Bill 466 passed on June 14, 1993. Bill 514 passed on June 27th, 1993.

⁵² *See* NEV. LEGIS. COUNS. BUREAU, SUMMARY OF LEGISLATION, S.B. 514, 67th Leg. Sess. at 2 (Nev. 1993). [hereinafter SB 514 LEG. HIS.]

⁵³ *Id.* at 23.

LGBTQ organizations in Nevada, including the Nevada Coalition of Concerned Citizens, the Independent American Party, the Family Research Council, the Nevada Families Eagle Forum, and Nevada Eagle Women.

While these groups were unsuccessful in encouraging the legislature to maintain the state's sodomy law,⁵⁴ they did create the pressure that led to the criminalization of HIV during the same legislative session. For example, Janine Hansen, a lobbyist on behalf of the Nevada Eagle Forum, made the long-debunked, homophobic claim that “it is not the purpose of homosexuals to gain rights just so they can exercise them themselves” and that instead they wish to “forc[e] their lifestyle on others.”⁵⁵ Ms. Hansen then provided an article about the “National Man Boy Love Association” to the committee, attached to its report on the hearing as an exhibit, and alleged that “although S.B. 466 does not legalize sex with children, once the floodgate is let down, the continuing pressure will mount as it has everywhere. She stated the purpose of the NMBLA is to eliminate all laws regarding sexual consent . . . in other words, homosexuals seek to undermine, eliminate and destroy the parent responsibility for their child.” When asked if she was suggesting SB 466 would lead to “little children and teenagers . . . be[ing] abused by pedophiles and others[,]” Ms. Hansen stated that the bill would “open the floodgate to the problem” and “that children will be victimized by the acceptance of homosexuality.”⁵⁶

Ms. Hansen's central theme that failing to criminalize the conduct of gay and bisexual men would signal the state's acceptance of them, and would play into an organized effort by those groups to force the state to legalize all manner of “devious” acts, was a constant throughout testimony offered in opposition to S.B. 466. For example, David Horton on behalf of the

⁵⁴ See NEV. LEGIS. COUNS. BUREAU, SUMMARY OF LEGISLATION, S.B. 466, 67th Leg. Sess. at 47–48 (Nev. 1993). [hereinafter SB 466 LEG. HIS.]

⁵⁵ *Id.* at 23.

⁵⁶ *Id.* at 24.

Committee to Restore the Constitution testified that “he was struck by the pattern of strategy described [in a C-Span program] as to how the homosexual movement is using influence on the press and education to attain their ends, and the instrumentalities he had seen focusing in the testimony at this hearing [in support of SB 466], which are in conformity with that strategy.”⁵⁷

Minister James Foulk on behalf of Glory Temple Church went further, and argued that “by retaining the current law on Nevada books, [it] is to say to the people that the state is opposed to this type of activity in our community and that homosexuality on the street will not be condoned. . . . He stated his belief that if the current Nevada law is removed the legislature is saying it is alright to do this the current law is a deterrent to other laws which will be passed in generations to come [including] for gay couples to adopt children”⁵⁸

Members of the public who did not link themselves to specific organizations offered similar testimony, and went further to connect gay and bisexual men, and their sexual activities, to AIDS and disease generally. One alleged that SB 466 was connected to “pro-homosexuals” who wished to “kill and defile those who think what they do is wrong” and that “if S.B. 466 is passed, the public will be playing into the hands of the activists who hate morality, family, government and the human race.”⁵⁹ Another stated that the bill “plays into hands of disease,” that “homosexuality costs society[,]” and described that “diaries [are] kept by gays . . . suggest[ing] these people had close to 100 partners per year.”⁶⁰ She continued to state that an “exchange of viruses, bacteria, and fungus [] occurs among homosexuals, garden variety sexual practices of homosexuals are a medical horror story this population of homosexuals and lesbians is a cesspool for disease. She asked if this is what Nevadans want for our society, and to drain the

⁵⁷ *Id.* at 29.

⁵⁸ *Id.* at 27–28.

⁵⁹ *Id.* at 21.

⁶⁰ *Id.* at 22.

financial resources of Nevada.”⁶¹ Another stated that “AIDS is an issue of the gay community, because expansion of AIDS in the heterosexual community has not been documented. . . . the law in question [criminalizing same-sex sexual behavior] does not deal with something a person has no control over, but a particular behavior.”⁶² He continued, alleging that the “homosexual population tends to have a higher degree of AIDS. . . . he should have a right to have a say in the kind of behavior of other people which ends up impacting him financially [due to rising insurance costs he attributed to AIDS in gay and bisexual men].” As a final example, another testified that she was “fearful” of her acquaintances who were PLWH, and that she “did not understand how the behavior which spreads this disease can be condoned.”⁶³ When advised that the existing sodomy law did not appear to be being enforced by the state, she responded that “the problem is that by repealing the law, an okay is being put on the behavior which can cause the spread of the disease and can cause death.”⁶⁴

After hearing this testimony, the legislative record shows that contentious debate emerged among members of the Senate when it was confirmed that existing law did not (1) penalize transmission of HIV outside of “those people in prison and prostitutes” or (2) “close the door . . . to the prospect of same-sex brothels.”⁶⁵ As such, amendments to S.B. 466 were proposed that would have (1) made it a felony to “willfully, wantonly, or negligently” engage in conduct intended or likely to transmit HIV and (2) made it a misdemeanor to “engage in prostitution with a member of the same sex.”⁶⁶ While these amendments were defeated, the Senate Judiciary Committee Chairman stated that if such a defeat occurred, the committee would

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 28.

⁶⁴ *Id.*

⁶⁵ *Id.* at 84.

⁶⁶ *Id.* at 83.

immediately move to introduce a bill at least speaking to the HIV infection piece.⁶⁷ This bill was SB 514, which was quickly passed to become Nev. Rev. Stat. § 201.205.

Some of the same witnesses who opposed SB 466 also testified before the same committee two weeks later in favor of SB 514, including representatives from the Nevada Eagle Forum and the Family Research Council. This time, they were successful. As one example, the legislature heard testimony from Dr. Paul Cameron, an already discredited psychologist by that time, who led the Family Research Institute. The mission of the Family Research Institute is “to restore a world... where homosexuality is not taught and accepted, but instead discouraged and rejected at every level.”⁶⁸ Dr. Cameron provided testimony that all of the findings from his research and studies had a bearing on the bill. Dr. Cameron’s testimony was based, in part, upon a brochure, “Violence and Homosexuality,” that he had written and was included as an exhibit in the committee’s materials. Among other things, this brochure links homosexuality to child sexual abuse and serial killers. Ms. Hansen of the Nevada Eagle Forum returned to testify, this time in support of SB 514, and reiterated her past view that it is important to develop a policy “which indicates to the public ‘ . . . that the state wants to protect the individual as well as society from the costly spread of AIDS.’”⁶⁹ Ms. Hansen went on to argue that the law should do more than simply criminalize intentional transmission of HIV and should punish those that “knew or should have known” they were living with the virus before engaging in a sexual act, to ensure that the state could nonetheless prosecute those who “would avoid being tested if penalties were involved in connection with being responsible for transmitting HIV.”⁷⁰

⁶⁷ *Id.* at 85.

⁶⁸ SB 514 LEG. HIS., *supra* note 52, at 13. Dr. Paul Cameron was one of the first witnesses to speak on the bill. *See also* Family Research Institute, *About*, <http://www.familyresearchinst.org/about/> (last visited August 28, 2020). The about page of this website contains the institute’s mission statement, which is quoted above.

⁶⁹ SB 514 LEG. HIS., *supra* note 52, at 10.

⁷⁰ *Id.*

Such homophobia was not confined to witnesses during that legislative session. For example, Nevada legislators Tom Collins, Ray Rawson, Bill O'Donnell, and Ann O'Connell were particularly harsh in their opposition to SB 466. Speaking in favor of the aforementioned defeated amendments to SB 466, Senator Rawson claimed that “[t]he fact is, and this is fact, that much of the activity associated with homosexual sex is dangerous.”⁷¹ Similarly, while largely against the proposed amendments discussed above, Senator Joe Neal nonetheless criticized SB 466—but specifically for its “includ[ing] heterosexuals” in the prohibition on public sex acts, stating that this could lead to people like he and his wife being arrested for engaging in sexual activity while camping, which he saw as “a bit too much.”⁷² Before the Assembly Committee on Judiciary, an amendment was proposed to again have an enacted SB 466 prohibit same-sex prostitution, with Assemblymember Scott Scherer urging its adoption as “[a]llowing legal houses of prostitution for same-sex activities would counteract the attempts to portray Nevada as a family vacation state,”⁷³ despite the fact that those likely to see brothels as being anathema to a “family vacation state” image would likely think so regardless of who is being served at any particular establishment. Assemblymember John Bonaventura was perhaps the most direct in expressing homophobia on the floor while SB 466 and 514 were considered, calling a vote to defeat the sodomy legislation a “vote on behalf of decency,” stating that his constituents “could not understand where passage of S.B. 466 would benefit anyone in Nevada except the minority of homosexuals,” expressing concern with “the image Nevada would portray should the proposed legislation pass even with the suggested amendments,” and ultimately stating that a motion to approve the bill “sickened him.”⁷⁴ That summer, he exhibited a sign at his legislative

⁷¹ SB 466 LEG. HIS., *supra* note 54, at 85.

⁷² *Id.* at 87–88.

⁷³ *Id.* at 123.

⁷⁴ *Id.* at 124, 127.

desk which read, *No Special Rights for Sodomites*.⁷⁵ In a letter he wrote about SB 466, he stated:

“I will diligently work to not legalize perverted homosexual acts. You can be assured that I will protect our children from being exposed to this socially destructive behavior.” (Exhibit E)

Although writing in favor of repealing the state’s sodomy law, even then-Assemblymember Jim Gibbons felt it necessary to clarify that he “personally abhors homosexual conduct, either in public or private” and that “his decision should be in no way taken to support homosexual conduct.” (Exhibit F)

Finally, claims that the legislature was merely acting in the interest of public health by passing SB 514 are unsupported by the legislative history of the bill, which shows a clear interest in the prosecution of HIV transmission, and therefore gay and bisexual men, specifically. At the time of its initial hearing on SB 514, the Senate Judiciary Committee first heard from Dr. Jerry Cade, M.D.—then the Medical Director for HIV Services at University Medical Center in Las Vegas—who indicated his “concern with singling out HIV” and is quoted as advising the committee that “[HIV] really is simply another virus . . . you have other diseases which are like it.”⁷⁶ As an example, Dr. Cade noted that Hepatitis B is transmitted in the same manner as HIV, many die from complications related to Hepatitis B similar to HIV at the time, and Hepatitis B was far more easily transmitted than HIV (*e.g.*, comparing injection-based infections, Dr. Cade reported a four in one-thousand chance for HIV and a 24% chance for Hepatitis B).⁷⁷ Despite this testimony however, the legislative history of SB 514 does not show that the committee ever considered amending what ultimately became NRS § 201.205 to no longer single out HIV or otherwise reflect such an intent to protect the public from communicable diseases generally.

⁷⁵ Dennis McBride, *Senate Bill 466*, OUTHISTORY.ORG (2009), <http://outhistory.org/exhibits/show/las-vegas/articles/sb-466>.

⁷⁶ See SB 514 LEG. HIS., *supra* note 52, at 7.

⁷⁷ *Id.*

In sum, it is not an overstatement to say that in repealing the state’s sodomy laws, the legislature felt it necessary to continue criminalizing the sexual behavior of gay and bisexual men. It did that by passing SB 514: The state’s new HIV crimes were effectively its new sodomy laws.

d. The passage of Nevada’s existing HIV criminal laws was, and remains, a deviation from the state’s efforts to take a public health-centered approach to stopping the spread of communicable and infectious diseases.

The first statute in Nevada that penalized the transmission of communicable and infectious diseases was Nev. Rev. Stat. § 202.150.⁷⁸ At the time, a misdemeanor held the penalty of imprisonment of no more than 6 months or a fine of no more than \$1,000.⁷⁹

This statute was maintained for 78 years when it was repealed in 1989; notably, its repeal (and that of many others) came as the state legislature worked to create a comprehensive public health and safety code—now encompassed within Title 40 of the Nevada Revised Statutes—governing the treatment and control of communicable and infectious diseases.⁸⁰ In other words, in 1989, and for every disease except HIV, the Nevada legislature replaced its practice of nine decades of criminalizing disease transmission in the state’s penal system with instead taking a modern, public health-centered approach.

Notably, many policymakers at the time meant for this switch to a public health approach to include HIV; several legislators involved with the reform were members of the State AIDS Task Force, and discussion regarding the application of sections of the bill in AIDS-specific

⁷⁸ NEV. REV. STAT. § 202.150 (repealed 1989). Enacted in 1911, the statute provided that any person who was afflicted with any infectious or contagious disease who then willfully exposed another person without their knowledge would be charged with a misdemeanor.

⁷⁹ NEV. REV. STAT. § 193.120. The statutes defining the classifications of crimes was enacted in 1911 as well.

⁸⁰ See NEV. LEGIS. COUNS. BUREAU, SUMMARY OF LEGISLATION, S.B. 73, 65th Leg. Sess. (Nev. 1989).

contexts was frequent throughout its consideration.⁸¹ At the time of the bill’s introduction, Dr. Daniel Wilkes—Vice Chairman of the State Board of Health, and Chairman of the State AIDS Task Force—characterized the state’s existing statutory scheme for controlling the spread of disease as “an unnecessarily complex set of laws which weakens communicable disease control efforts” and noted the unanimous recommendation of the State AIDS Task Force that the bill be adopted.⁸² In fact, many Nevada public health officials expressed their support for the reform bill; for example, Washoe County District Health Officer Michael Ford wrote to confirm he was “completely in support” of the bill, noting that the proposed reform “would modernize the outdated and incomplete statutes regarding communicable disease control . . . and will deal with issues regarding diseases of particular concern, i.e., AIDS, rabies, etc.”⁸³

However, only a few years later in 1993, the legislature returned to the state’s recently abandoned penal approach to disease control through SB 514, but only for HIV specifically and despite, as noted above, testimony from medical experts warning against the singling out of one disease for renewed prosecution. To this day, HIV remains the only infectious or communicable disease or virus that is specifically named across all of Nevada’s criminal statutes.⁸⁴ Other communicable diseases, like Hepatitis B and C, are named specifically among Nevada’s public health and safety statutes, but not in its criminal statutes.⁸⁵

⁸¹ *Id.*

⁸² *Id.* at 18–20.

⁸³ *Id.* at 76.

⁸⁴ There is one technical exception, but it arises in a vastly different context and does not criminalize the conduct of the individuals living with such diseases, but rather those who would seek to prey on such individuals. More specifically, a statute exists in Nevada criminalizing advertisements by members of the public claiming to be able to treat certain, specifically named disorders and sexually transmitted infections. *See* NEV. REV. STAT. § 202.240.

⁸⁵ This does not mean that there are no criminal penalties for other communicable diseases; some of the public health and safety statutes carry penalties if violated, although limited to the misdemeanor level. *See e.g.*, NEV. REV. STAT. § 441A.180 (imposing misdemeanor penalties for a person who conducts themselves in a manner likely to expose others to a disease, but only after having received a statutorily-defined warning by a public health official).

II. Enforcement History of Nevada’s HIV Crimes

There is little publicly available enforcement data of Nevada’s HIV criminal statutes. We searched published and unpublished cases, media reports, and academic and other studies. Our findings are summarized below.

a. Published and Unpublished Cases

We found only one published case and one unpublished case. In the one published case—*Glegola v. State*—an individual was sentenced to 15 years for “solicitation for prostitution after notice of testing positive for HIV.”⁸⁶ Notably, the defendant was arrested and convicted despite not having engaged in acts that could have led to the transmission of HIV (she was arrested while leaving a bar with an undercover officer) and without evidence that she ever intended to do so (she testified that instead intended to take the money and leave). However, the Nevada Supreme Court upheld the conviction, finding that evidence that one actually intended to engage in sexual activity was not necessary for a conviction under the statute—despite it having been justified by the legislature as needed to control the spread of HIV through sex—because the law was written as a general intent crime.⁸⁷ The defendant in this case also appealed her sentence on the basis of it being disproportionate to the crime for which she was convicted and that, due to the likelihood of her dying of an AIDS-related illness during her sentence, the sentence should be considered cruel and unusual punishment.⁸⁸ According to the Court, however, the District Court did not abuse its broad discretion in imposing the prison term, and the likelihood of Glegola’s AIDS-related death did not make the sentence cruel and unusual.⁸⁹

⁸⁶ 871 P.2d 950 (Nev. 1994). At the time, the offense was punishable by up to 20 years imprisonment.

⁸⁷ *Id.* at 952–53.

⁸⁸ *Id.*

⁸⁹ *Id.* at 953. The Supreme Court cited the State’s argument that both the conviction and sentence were appropriate “because the harm threatened by the act of solicitation of prostitution while HIV positive is great; because the legislature did not intend for the unsuspecting client to be fatally infected before criminals like appellant are treated

We were able to identify a separate, unpublished matter⁹⁰ with charges related to NRS §§ 201.354, 201.356, and 201.358, and were able to confirm that this matter resulted in a conviction for “solicit[ing a detective] to engage in an act of prostitution . . . after having been tested for exposure to [HIV] and said test resulting in a positive test for [HIV], and then having received notification of the positive test results” about six months prior to the alleged solicitation.⁹¹ However, the issue raised on appeal was limited to the appropriateness of sentencing on grounds similar to those in the *Glegola* case, with the sentence here also being affirmed by the Nevada Supreme Court, and no further information on this case appears to be available.

b. Studies

We also searched for documentation of enforcement through published and unpublished studies and manuscripts. According to a 2003 review of studies, one study indicates that from 1987 through 1999, there were 292 cases of prostitutes testing positive in Clark County.⁹² Among them, there were only 89 repeat offenders.⁹³ Another study reviewed reported that the LVMPD made 771 misdemeanor and 43 felony arrests for prostitution from April through June 2002, with approximately three felony convictions for soliciting while knowing their HIV positive status.⁹⁴

as felons; [and] because 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.” *Id.*

⁹⁰ Harris v. State, 2013 Nev. Unpub. LEXIS 804 (Nev., June 13, 2013).

⁹¹ See *Appellate Case Management System*, NEV. APPELLATE COURTS, <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=30368> (last visited Aug. 31, 2020).

⁹² Cheryl L. Radeloff, *Vectors, Polluters, and Murderers: HIV Testing Policies Toward Prostitutes in Nevada*, UNLV Retrospective Theses & Dissertations (2004), available at <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=3604&context=rtds> (citing Seppa Arroyo, Candice, *Labor Violations and Discrimination in the Clark County Outcall Entertainment Industry*, MA Thesis, Department of Sociology, University of Nevada, Las Vegas (2003)).

⁹³ *Id.*

⁹⁴ *Id.* (citing to Joe Schoenmann, *Girls, Girls, Girls*, Las Vegas Weekly (2003), originally available at http://www.lasvegasweekly.com/2003/07_10/news_coverstory.html).

According to a recent report by the Center for HIV Law and Policy, two HIV-positive Nevada men were charged with intentional transmission of HIV in 2010 after meeting another man through a male dating website.⁹⁵ One of the defendants had an undetectable viral load, alleged that his dating profile noted that he was HIV positive, and maintained alongside his co-defendant that the complainant knew of their HIV-positive status.⁹⁶ However, the report does not offer additional information as to the disposition of this case.

While not specifically focused on the enforcement of HIV criminal laws, another study does have relevant data about sex workers in Nevada. According to a meta-analysis of early AIDS studies on prostitutes, drug use “overshadow[ed] sexual exposure as a[n HIV] risk factor among those women.”⁹⁷ Looking at Nevada data specifically, the report cited to a 1987 cross-sectional study which found that among 535 non-incarcerated prostitutes in Nevada—7% of whom admitted to intravenous drug use in the last five years—none were positive.⁹⁸ In contrast, the study found that among 370 incarcerated prostitutes in Nevada—all of whom had used drugs intravenously within the last five years—6.2% were living with HIV.⁹⁹

c. Government Hearings

At a March 2019 meeting of the Southern Nevada Health District’s HIV Prevention Planning Group, a community member belonging to the group noted that there were “three cases

⁹⁵ ARRESTS AND PROSECUTIONS FOR HIV EXPOSURE IN THE UNITED STATES, 2008–2019, CENTER FOR HIV LAW AND POLICY (2019), https://www.hivlawandpolicy.org/sites/default/files/Chart%20of%20U.S.%20Arrests%20and%20Prosecutions%20for%20HIV%20Exposure%20in%20the%20United%20States%20%28June%202019%29_0.pdf.

⁹⁶ *Id.*

⁹⁷ Michael J. Rosenberg & Jodie M. Weiner, *Prostitutes and AIDS: A Health Department Priority?*, 78 AM. J. PUB. HEALTH 418 (1988).

⁹⁸ *Id.*, citing Padian N, Carlson J, Browning R, Nelson L, Grimes J, Marquis L: Human immunodeficiency virus (HIV) infection among prostitutes in Nevada. In: Abstracts from the III International Conference on AIDS, June 1-5, 1987, Washington, DC. Washington, DC: US Department of Health and Human Services and the World Health Organization, 1987; 119.

⁹⁹ *Id.*

in Nevada of intentional transmission” and that more than 30 women were in prison at the time “due to soliciting sex work while being HIV-positive.”¹⁰⁰

d. Media Reports

In 2000, POZ Magazine worked to survey then-existing cases alleging intentional HIV transmission across the U.S.¹⁰¹ In Nevada, they identified only three cases: the matter discussed above in *Glegola v. State*, an incident involving a “20-year-old university student [] charged with intentional transmission of HIV in a consensual relationship” for which we could find no further information, and a matter discussed at length involving a Mr. B. L.¹⁰² Mr. B. L. was convicted for engaging in consensual oral sex with a 16-year-old while living with HIV, despite the other individual testifying under oath that he did in fact consent (being able to do so under Nevada’s age of consent law) and was aware of Mr. Lepley’s status prior to their encounter.¹⁰³ Notably, the other individual never tested positive for HIV.¹⁰⁴ The report indicates that Mr. Lepley may have been convicted a second time for having sex with an adult who denied that Mr. Lepley used protection or disclosed his status, but was allegedly in a relationship with him and therefore would have likely known of Mr. Lepley’s position as director of Pahrump’s local AIDS agency.¹⁰⁵

In 2003, the Las Vegas Sun reported that the Las Vegas Metropolitan Police Department was aware of “368 HIV-infected prostitutes who are working the streets of Las Vegas,” and that “as of [mid-September 2003], police have arrested 17 HIV-positive prostitutes this year,

¹⁰⁰ See MINUTES, SOUTHERN NEV. HEALTH DIST. (Mar. 29, 2019),

<https://media.southernnevadahealthdistrict.org/download/meetings/hppg/20190329-SoN-HPPG-Minutes.pdf>.

¹⁰¹ Laura Whitehorn, *America’s Most Unwanted*, POZ (Aug. 1, 2000), <https://www.poz.com/article/America-s-Most-Unwanted-10206-4932>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

compared to 15 in 2002.”¹⁰⁶ The Sun also reported that a Reno woman living with HIV was sentenced to six years in prison in July of 2002 for soliciting while positive, and that the Nevada Supreme Court actually vacated a 10-year-sentence imposed for a separate woman’s solicitation while positive,¹⁰⁷ but we were unable to find additional information on these matters. Notably, the Sun’s report suggests that these arrests may have done nothing to stop the spread of HIV and that enforcement efforts were likely unrelated to that goal; the LVMPD Vice Sergeant interviewed for the piece admitted that “he has no way of knowing if any prostitutes passed the HIV virus along to any customers.”¹⁰⁸

In 2014, the Pahrump Valley Times reported that a pastor in Pahrump was accused of making sexual advances on a disabled member of his congregation while living with HIV.¹⁰⁹ The victim’s family pressed the prosecution to seek a conviction and enhanced sentence based on the pastor’s HIV-positive status, arguing in an interview that “[s]eeing that he has full-blown AIDS, I [the victim’s mother] believe he should also be charged with attempted murder and aggravated assault.”¹¹⁰ However, the matter was ultimately resolved with the defendant pleading no contest to a gross misdemeanor of open and lewd behavior, with the HIV charge being dismissed.¹¹¹

Finally, earlier this month, reports emerged that a Las Vegas-area dance instructor has been charged with a number of crimes, including “sexual assault, lewdness with a minor, sexual

¹⁰⁶ Jen Lawson, *Police say HIV Growing Threat Among Call Girls*, Las Vegas Sun (Sept. 26, 2003), <https://lasvegassun.com/news/2003/sep/26/police-say-hiv-growing-threat-among-call-girls>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Selwyn Harris, *Pastor in Lewdness Bust Said to be HIV Positive*, PAHRUMP VALLEY TIMES (Aug. 1, 2014), <https://pvtimes.com/news/pastor-in-lewdness-bust-said-to-be-hiv-positive>.

¹¹⁰ *Id.*

¹¹¹ Selwyn Harris, *Pastor Pleads No-Contest Lesser Lewdness Charge*, PAHRUMP VALLEY TIMES (Aug. 1, 2014), <https://pvtimes.com/news/pastor-pleads-no-contest-lesser-lewdness-charge>.

conduct between a school employee and pupil and intentional transmission of HIV.”¹¹²

However, as the case remains pending and is in its early stages, no concrete allegations or findings of fact have been made as to whether the defendant specifically engaged in conduct able and likely to transmit HIV, whether he did so with that intent in mind, and whether any such transmission actually occurred.

III. Nevada’s HIV Criminal Laws Impede the Goals Articulated in the State’s Plan to End HIV

Nevada’s comprehensive plan to fight the AIDS epidemic is articulated in the Nevada Integrated HIV Prevention and Care Plan 2017–2021 (Nevada’s HIV Plan).¹¹³ However, the state’s HIV criminal laws directly contradict core goals and strategies in the plan, including fighting HIV stigma and engaging PLWH and those most at risk for contracting HIV. While today Nevada takes a research-supported, community-based public health approach to fighting HIV, the states outdated criminal laws continue to take a punitive approach which has no impact on combatting HIV.

a. Reducing Stigma

The comprehensive statewide needs assessment process that informed Nevada’s HIV Plan found that one of the “top HIV prevention service needs identified” for the state was the “reduction of stigma.”¹¹⁴ Stigma was also identified as the “main social barrier that negatively

¹¹² Joe Moeller, *Woman Who Knows Dance Instructor Facing Sex Charges Says She’s ‘Not Surprised’ at What Happened*, 8NEWSNOW (Aug. 20, 2020), <https://www.8newsnow.com/news/local-news/woman-who-knows-dance-instructor-facing-sex-charges-says-shes-not-surprised-at-what-happened/>.

¹¹³ INTEGRATED HIV PREVENTION AND CARE PLAN 2017–2021, STATE OFFICE OF HIV/AIDS, NEVADA DIVISION OF PUBLIC AND BEHAVIORAL HEALTH (2016), <http://endhivnevada.org/wp-content/uploads/2020/01/Integrated-HIV-Prevention-and-Care-Plan-Final-9-29-16.pdf>. [hereinafter STATE HIV PLAN]

¹¹⁴ *Id.* at 6, 54.

impacts HIV prevention and care efforts in Nevada[,]”¹¹⁵ including “ongoing stigma and fear related to HIV and HIV testing.”¹¹⁶

Both PLWH and service providers identified stigma as a significant current problem facing PLWH and those populations who are at most at risk— a problem which prevents testing, prevention and treatment. For example, the SCSN Client Survey (2015–2016) completed by 177 PLWH found that fear, stigma, and stereotypes associated with HIV were one of the most frequently mentioned reasons why some PLWH were not in care.¹¹⁷ Focus groups reached the same conclusion, and identified stigma as “a top prevention barrier.”¹¹⁸ More specifically:

The social barrier of stigma related to HIV impacts both prevention and care efforts as it can prevent individuals from getting tested, from participating in HIV education, and from accessing care after a diagnosis. Some statewide client survey respondents indicated that a barrier to them getting into a doctor’s office after their HIV diagnosis was not wanting anyone to know they had HIV. Stigma against people with HIV, against lesbian, gay, bisexual, transgender, and questioning (LGBTQ) individuals, and against injection drug users are present in Nevada. In communities of color, the stigma can be even more pronounced, often discouraging individuals from knowing their status and seeking treatment.¹¹⁹

Notably, one of the key strategies identified for reducing HIV racial and health disparities was to “[i]mprove . . . care for PLWH who experience multiple ‘layers’ of stigma (e.g., HIV infected, gay, minority, female, transgender, IV drug user, etc.)[:.]”¹²⁰

¹¹⁵ *Id.* at 7, 60.

¹¹⁶ *Id.* at 55.

¹¹⁷ *Id.* at 138.

¹¹⁸ *Id.* at 10.

¹¹⁹ *Id.* at 158.

¹²⁰ *Id.* at 9.

Many HIV infected individuals in priority populations experience multiple layers of stigma, and some may have had negative experiences or poor treatment from workers in the HIV or other social service care system that they attribute to this stigma. Such first-hand experiences or even just hearing second-hand about the experiences of others may cause people to avoid seeking services and getting into and staying in care frustrations they have or perceive that prevent them from seeking care or that make it less likely that they will access care.¹²¹

While reducing stigma is a key strategy to ending HIV in Nevada, the state's HIV criminal laws do the opposite. As explained more fully above in Part I(a) of this memo, HIV criminalization laws contribute to the stigmatization of PLWH in a number of ways, including by perpetuating inaccurate beliefs about how HIV is transmitted, criminalizing behavior that cannot transmit the virus, inaccurately conveying that the consequences of the disease are much more severe than in reality, and signaling that PLWH are a threat even when engaged in consensual conduct that cannot transmit the virus.¹²²

b. Engaging PLWH and Those Most at Risk

For Nevada's HIV prevention efforts to be successful, the state's public health and medical systems must engage people of color, women, and LGBTQ communities. However, these are precisely the groups of people that are disproportionately impacted by HIV criminal laws. The risk is that the state's criminal laws alienate these communities and individuals, as opposed to creating the cooperative environment needed to successfully combat HIV-disease.

¹²¹ *Id.* at 92.

¹²² *See supra* notes 23–25 and accompanying text.

In Nevada’s Integrated HIV Prevention and Care Plan, 2017-2021, the following are designated as priority populations: men who have sex with men (MSMs), youth/young adults (13-34 years), and people of color.¹²³ Perhaps one of the starkest HIV disparities in Nevada, and nationally, is based on race: “Large racial/ethnic disparities exist within Nevada, especially among Blacks/African Americans. In 2014, the rate of new HIV diagnoses among Blacks was over four times that of Whites (43.6 vs. 10.5 per 100,000 population). . . . Among females, the rate of new diagnoses was 8.4 times higher for Black females than White females.”¹²⁴

A primary goal of the state plan is “reducing HIV related disparities and health inequities . . . among Nevada’s priority populations.” And the first specific strategy listed under that goal is to “[e]ngage the community in order to find out how to best reach priority populations.”¹²⁵ Specific ideas for that engagement include community education programs, community listening sessions, peer-to-peer education programs, “peer navigator” programs, “[p]artnerships with trusted organizations, community leaders, and agencies serving priority groups,” training more members of priority populations to become service providers for their communities, and deploying “social network strategies.”¹²⁶ In addition, the plan recommends that:

Intensified outreach efforts are needed for individuals in priority populations. Intensified outreach may include outreach efforts “on the ground” at community events, in popular “hang outs”, and in neighborhoods. It also includes the development of a strong peer navigator program where a person from the same priority population group who is knowledgeable about the care system literally walks with a person to take them through the system One strategy also provides for the replication of the ‘Living Room’, a

¹²³ STATE HIV PLAN, *supra* note 110, at 32 and 90–91.

¹²⁴ *Id.* at 5, 25.

¹²⁵ *Id.* at 61.

¹²⁶ *Id.* at 88–97.

current successful model of entry into care. This is more of a drop in site as opposed to an agency or clinic that is relaxed and friendly where newly diagnosed people or their friends and family can get information about getting tested and/or getting into care.¹²⁷

Even the way that the Integrated HIV Prevention and Care Plan was developed demonstrates the extent to which positive engagement with PLWH, including MSMs, transgender people, women, and people of color, is essential for combating HIV-disease in Nevada:

People involved in developing the Integrated HIV Prevention and Care Plan are reflective of the epidemic in Nevada in a variety of ways. People from all areas of the state were invited to participate in meetings, focus groups, paper surveys, and online surveys. PLWH and people at risk for HIV infection were included in all stages of the needs assessment and plan development. . . .¹²⁸

PLWH are members of the planning groups in the north and south as well as the Part A Planning Council. The Part A Planning Council is comprised of 48% PLWH, of which 39% are non-aligned consumers... The planning groups and council were actively involved in the stakeholder meetings; and they reviewed the integrated plan drafts and provided feedback to the plan development workgroup. PLWH also contributed to plan development through their participation in the needs assessment focus groups, client surveys, and community surveys. Focus groups conducted for the statewide needs assessment included 43% of participants who had tested positive for HIV¹²⁹

¹²⁷ *Id.* at 91–92

¹²⁸ *Id.* at 99.

¹²⁹ *Id.* at 100.

*The inclusion of PLWH was extremely valuable to the development of the plan. Their voices were key to determining the needs of PLWH and to generate ideas for improving HIV prevention and care in the state of Nevada.*¹³⁰

In both how it was created and in the recommendations that it makes, Nevada's Integrated HIV Prevention and Care Plan makes clear that the only effective way to fight HIV is to positively engage PLWH, including people of color, LGBTQ communities, and women at every stage of the process, including within their own treatment and prevention efforts. As opposed to engaging PLWH in medical and public health systems, Nevada's HIV criminal laws make PLWH, and those most at risk of HIV, distrustful and fearful of the state. As shown from research in other states, HIV criminal laws disproportionately impact the very people that Nevada most needs to engage, including Black People, Latinx people, women, and LGBTQ people, and therefore directly conflict with the goals of Nevada's state plan and ultimately its efforts to stop the spread of HIV in the state.

¹³⁰ *Id.* at 101. "A variety of methods were used to engage communities, people living with HIV, those at substantial risk of acquiring HIV infection and other impacted groups to ensure that HIV prevention and care activities were responsive to their needs in the service area. As described previously, community members and people at risk for HIV infection were sought out to complete the community survey and to participate in focus groups. The community survey was administered in paper and online in many different settings to engage a diverse group of people in the state. Focus groups were held in diverse locations. The needs of PLWH were assessed through client needs assessment surveys and client satisfaction surveys at different times, locations, and modes. Furthermore, client focus groups were used to further understand the needs of PLWH. Finally, in the stakeholder meetings, planning group and planning council meetings, and through review of the plan drafts, PLWH and community members had further opportunities to have their voices heard in the process. The stakeholder meetings and planning groups and councils proved to be valuable means for generating ideas and solutions to challenges in the HIV prevention and care system."