

No Argument Requested by Amici

APPELLATE DIVISION CASE NO. KA ____
____ COUNTY INDICTMENT NO. ____

Supreme Court of the State of New York
Appellate Division – Fourth Department

[X],

Defendant-Appellant,

- against -

THE PEOPLE OF NEW YORK STATE,

Respondent.

**BRIEF AMICUS CURIAE OF
AMERICAN ACADEMY OF HIV MEDICINE,
ASSOCIATION OF NURSES IN AIDS CARE,
HIV MEDICINE ASSOCIATION, AND
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF DEFENDANT-APPELLANT [X]**

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INTRODUCTION

Given the nature of the human immunodeficiency virus (“HIV”) and its transmission, the saliva of someone living with HIV is not readily capable of causing death or other serious injury, even when exposure to the saliva results from a bite. Since it was identified in 1983, HIV has been extensively studied, with particular focus on the ways in which the virus can be transmitted. Those many years of study have revealed no instance in which a person became infected with HIV simply due to exposure to the saliva of a person who had HIV.

[X] was charged with aggravated assault upon a police officer, a felony premised on use of a “dangerous instrument,” because he has HIV and bit a police officer, breaking the officer’s skin. Those facts do not support that charge. As explained in Section III.A., *infra*, medical and scientific investigations of HIV and its modes of transmission show that the saliva of a person who has HIV is *not* a fluid which transmits HIV. In the very rare instances in which a bite is believed to have resulted in transmission of HIV, it was exposure to blood of the biter, not saliva of the biter, which is believed to be the mechanism by which HIV was transmitted.

Therefore, saliva cannot constitute a “dangerous instrument” within the meaning of New York’s Penal Law, as discussed in Section III.B.1. Moreover, only instruments, articles, and substances which are external to the human body come within the definition of dangerous instrument and therefore neither saliva nor teeth can be dangerous instruments, as explained in Section III.B.2.

Because the saliva of someone living with HIV cannot be considered a dangerous instrument under New York’s law, the trial court erred in refusing to dismiss the count charging Mr. [X] with aggravated assault on a police officer. Accordingly, *amici* request that this

Court dismiss the First Count of Indictment No. _____ and vacate the conviction of the charge of aggravated assault upon a police officer.

I. INTERESTS OF *AMICI CURIAE*

Amici curiae the American Academy of HIV Medicine, the Association of Nurses in AIDS Care, the HIV Medicine Association, and Lambda Legal Defense and Education Fund, Inc. submit this brief in support of Appellant [X]. *Amici* are vitally interested in ensuring that individuals who have HIV are afforded the full protection of the law, that the criminal law serves as a vehicle for only legitimate state purposes, and that people living with HIV are not prosecuted and incarcerated due to ignorance or misunderstandings about HIV.

The American Academy of HIV Medicine (“AAHIVM”) is an independent organization of AAHIVM HIV Specialists and others dedicated to promoting excellence in HIV/AIDS care. Through advocacy and education, AAHIVM is committed to supporting health care providers in HIV medicine and to ensuring better care for those living with AIDS and HIV disease. As the largest independent organization of HIV frontline providers, its 2,000 members provide direct care to more than 340,000 HIV patients (more than two thirds of the patients in active treatment for HIV disease). AAHIVM has a diverse membership composed of infectious disease, internal medicine, family practitioners and general practice specialists as well as nurse practitioners and physician’s assistants. AAHIVM believes that it is important that courts rely on accurate medical and scientific information when considering issues related to HIV/AIDS.

The Association of Nurses in AIDS Care (“ANAC”) is dedicated to promoting the individual and collective professional development of nurses involved in the delivery of health care to persons infected or affected by HIV and to promoting the health and welfare of infected persons by: creating an effective network among nurses in AIDS Care; studying, researching and

exchanging information, experiences, and ideas leading to improved care for persons with AIDS/HIV infection; providing leadership to the nursing community in matters related to HIV/AIDS infection; advocating for HIV infected persons; and promoting social awareness concerning issues related to HIV/AIDS. ANAC has nearly 2,500 members who work in all aspects of HIV care, prevention, treatment, research and education. Inherent in ANAC's mission and goals is an abiding commitment to the prevention of further HIV infection through sound science and evidence-based programs. ANAC's commitment includes promoting an accurate understanding of HIV infection and modes of transmission.

The HIV Medicine Association ("HIVMA"), nested within the Infectious Diseases Society of America ("IDSA"), represents more than 3,700 physicians and other health care providers who practice HIV medicine. HIVMA's members represent 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and 36 countries outside of the United States. As an organization that represents researchers and clinicians who devote a majority of their time to preventing, treating and eventually eradicating HIV disease, HIVMA has a strong interest in the promotion of sound public health policies that are grounded in science.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and people living with HIV (regardless of their sexual orientation) through impact litigation, education and public policy work. With its roots in New York City stretching back to its founding in 1973, Lambda Legal has been working on behalf of people living with HIV in the State of New York, and representing people with HIV in the courts of New York, since the very early days of the AIDS epidemic. Lambda Legal brought the first HIV discrimination lawsuit in the country – on behalf of a New York City physician who faced

eviction because he treated patients with HIV – and has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts, raising the civil rights and liberty interests of people living with HIV. Lambda Legal is well aware that accurate information about HIV and its transmission is vitally necessary to combat and reduce HIV stigma and discrimination.

II. FACTUAL AND PROCEDURAL BACKGROUND

[X], a man living with HIV, was arrested following an altercation with police on _____, 2006, during which Mr. [X] bit one of the police officers. (*See* Complaint, _____, 2006 [Defendant-Appellant’s Record on Appeal (“R.”) at 205-206]; _____ Grand Jury Testimony 17:22 [R. at 17].) An indictment was filed against Mr. [X] in County Court, County of _____ on _____, 2006, charging him with one count of aggravated assault upon a police officer, in violation of Section 120.11 of the New York Penal Law, along with two counts of assault in the second degree, one count of resisting arrest and one count of criminal possession of marijuana. (Indictment, _____, 2006 [R. 195-197].) The count asserting violation of Section 120.11 was based on the following allegations:

That [Mr. X], . . . , with intent to cause serious physical injury to a person whom he knows or reasonably should know to be a police officer engaged in the course of performing his official duties, he causes such injury by means of a deadly weapon or dangerous instrument, to wit: [Mr. X] did cause serious physical injury to [Investigator] _____ by means of a dangerous instrument.

(*Id.* [R. at 195].)

Mr. [X] moved to dismiss the aggravated assault charge pursuant to Sections 210.20 and 210.30 of the Criminal Procedure Law, due to the legal insufficiency of the proof submitted to the grand jury. (*See* Def.’s Omnibus Mot., _____, 2006 [R. at 243-252]; Def.’s Addendum to Omnibus Mot., _____, 2007 [R. at 253-263].) Specifically, Mr. [X] moved for dismissal of that charge on the grounds that a person’s teeth are not considered a “dangerous instrument”

for purposes of the statute. (See Def.'s Addendum to Omnibus Mot. [R. at 253]; Decision & Order, _____, 2007 [R. at 199-200].) In that motion, Mr. [X] relied in large part on the New York Court of Appeals' decision in *People v. Owusu*, 93 N.Y.2d 398 (1999), in which the Court held that an individual's body parts, including teeth, are not dangerous instruments within the meaning of New York's Penal Law. (See *id.*) County Judge _____ denied Mr. [X]'s motion, ruling:

The definition of a dangerous instrument includes (among other things) substances, "... which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury." Penal Law Section 10.00(13). It is the Defendant's saliva, infected with the AIDS virus that is the substance that is a dangerous instrument and was administered to the victim by intentionally biting him. It is important to note that Defendant was aware that he had the AIDS virus at the time of the assault.

(Decision & Order, _____, 2007 [R. at 200].) Judge ___ found the matter distinguishable from *Owusu* "in that the Defendant in the instant matter, knowing he was infected with the AIDS virus, intentionally bit a police officer with his teeth, breaking through the officer's skin." (*Id.*) On _____, 2007, Mr. [X] was sentenced, receiving a ten year term of incarceration for his conviction of aggravated assault upon a police officer. (See Sentencing Transcript, _____, 2007 [R. 185-193].) On _____, 2007, Mr. [X] filed a Notice of Appeal from his judgment and conviction, appealing, *inter alia*, his conviction of the charge of aggravated assault upon a police officer. (Notice of Appeal, _____, 2007 [R. 1].)

III. ARGUMENT

A. Saliva Is Not A Route For Transmission Of HIV.

1. Background Information About HIV

The human immunodeficiency virus ("HIV") is a virus that causes illness by interfering with the proper functioning of the human immune system. *E.g.*, N.Y. State Dep't of Health

(“NYSDOH”), *100 Questions and Answers About HIV/AIDS* at 5 (Feb. 2008), available at <http://www.health.state.ny.us/publications/0213.pdf>. Although HIV is the virus that causes acquired immunodeficiency syndrome (“AIDS”), not everyone infected with HIV has AIDS, which is the stage of HIV infection in which the person’s immune system is weakened to the point that it becomes very difficult to fight routine infections. *E.g.*, Centers for Disease Control & Prevention, *Basic Information About HIV and AIDS*, <http://www.cdc.gov/hiv/topics/basic/> (last visited June 1, 2010); Eileen Schneider *et al.*, *Revised Surveillance Case Definitions for HIV Infection Among Adults, Adolescents, and Children Aged <18 Months and for HIV Infection and AIDS Among Children Aged 18 Months to <13 Years – United States, 2008*, 57 *Morbidity and Mortality Wkly. Rep. (“MMWR”) Recommendations and Reps. (“RR”)* 10 (Dec. 5, 2008), available at <http://www.cdc.gov/mmwr/pdf/rr/rr5710.pdf>.

In 1981, medical professionals first encountered the disease now called AIDS, and two years later researchers identified the virus that causes AIDS – now called “HIV,” with the most common variant termed “HIV-1.” *E.g.*, Nat’l Inst. of Allergy & Infectious Diseases, Nat’l Inst. of Health, *HIV/AIDS: The HIV-AIDS Connection*, <http://www.niaid.nih.gov/topics/HIVAIDS/Understanding/howHIVCausesAIDS/pages/connection.aspx> (last visited June 1, 2010). In the years since, the understanding of HIV infection has greatly increased and the terms used to describe HIV infection have changed. The federal Centers for Disease Control and Prevention (“CDC”) recently revised the case definitions to be used for public health surveillance of HIV infections, so that the term “HIV infection” would be used for all cases of HIV infection, including those diagnosed as having AIDS. Schneider *et al.*, *supra*, at 3-4 (categorizing HIV infection as “HIV Infection, Stage 1,” “HIV Infection, Stage 2,” “HIV Infection, Stage 3 (AIDS),” and “HIV Infection, Stage Unknown”). Being classified as having

HIV or AIDS now requires laboratory-confirmed evidence of HIV infection, typically obtained by testing an individual's blood for the presence of HIV antibodies. *E.g., id.* at 1-2; NYSDOH, *supra*, at 15. The term "HIV-positive" is frequently used for individuals living with HIV – including those who have been diagnosed as having AIDS – because they test "positive" for the presence of HIV antibodies. *Cf. Schneider et al., supra*, at 3 (referring to positive test results as one of laboratory criteria for HIV infection).

As part of its leadership role in helping control the HIV/AIDS epidemic, the CDC has been tracking the patterns of HIV infection and transmission since HIV was identified. *See CDC, CDC Responds to HIV/AIDS*, www.cdc.gov/hiv/aboutDHAP.htm (last visited June 1, 2010). The CDC estimates that, as of the end of 2006, slightly over one million people in the United States were living with HIV and that, as of the end of 2007, slightly over half a million people had died from AIDS in this country. *CDC, Basic Statistics*, <http://www.cdc.gov/hiv/topics/surveillance/basic.htm#ddaids> (last visited June 1, 2010); NYSDOH, *supra*, at 6. Drug treatments for HIV infection available starting in 1996 have enabled many people with HIV to live much healthier, longer lives and to avoid progressing to AIDS, in part by reducing the levels of the virus in the blood of the person receiving treatment. *E.g., NYSDOH, supra*, at 27-29; U.S. Dep't of Health & Human Servs., Panel on Antiretroviral Guidelines for Adults and Adolescents, *Guidelines for the Use of Antiretroviral Agents in HIV-1-Infected Adults and Adolescents* (2009), available at <http://aidsinfo.nih.gov/contentfiles/AdultandAdolescentGL.pdf>.

The continuing public health effort to stem the spread of HIV focuses both on getting treatment to those with HIV and preventing the spread of HIV infection. These efforts are aided by increasing public awareness of the uncontroverted fact that there are very limited routes of HIV

transmission – and are undermined when public misconceptions about HIV transmission are reinforced by the courts and the criminal justice system. In furtherance of its public health mission, the CDC has developed educational materials which summarize the state of knowledge about HIV, drawing on information from, *inter alia*, medical and scientific research, epidemiologic studies, and surveillance data. *See CDC, CDC Responds to HIV/AIDS, supra; CDC, Basic Information About HIV and AIDS, supra.* The information provided by public health authorities such as the CDC is entitled to great weight when courts consider issues involving HIV and its transmission. *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998) (stating that, in assessing matters such as the risks of being infected by HIV, “the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority.”).

2. How HIV Is Transmitted

The ways that HIV can be transmitted have been clearly identified for many years and the consensus of the medical, scientific, and public health communities is that HIV can be transmitted in one of the following ways:

- (1) by sexual contact (anal, vaginal, or oral) with someone who has HIV;
- (2) by sharing infected needles or injection equipment with someone who has HIV;
- (3) by transmission of HIV from a mother with HIV to her infant *in utero*, during delivery or through breast feeding; or
- (4) by receiving transfusions of blood or blood clotting factors which contain HIV.

E.g., CDC, Questions and Answers: How Is HIV Passed from One Person to Another?, <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited June 1, 2010); NYSDOH, *supra*, at 9.

Some people continue to fear that HIV can be transmitted in other ways, despite the lack of scientific evidence for other routes of transmission. Countering these irrational fears – which both result in stigma for people living with HIV and interfere with public health efforts – has been a priority of public health officials from the early years of the epidemic to the present. In 1988, the U.S. Surgeon General sent a brochure to *every household* in the United States, seeking to educate the public regarding the actual routes of HIV transmission and to dispel any lingering, unfounded fears that contact with body fluids such as sweat and saliva could lead to infection. See U.S. Dep’t of Health & Human Servs. (“HHS”), *Understanding AIDS: A Message from the Surgeon General*, HHS Publication No. HHS-88-8404 (1988), available at http://profiles.nlm.nih.gov/BB/D/R/L/_/qqbdrl.pdf; *Glick v. Henderson*, 855 F.2d 536, 539 n. 1 (8th Cir. 1988) (quoting the 1988 message from the Surgeon General and noting that it was sent to “every household in this nation because of its importance”). That brochure stated, *inter alia*:

No matter what you may have heard, the AIDS virus is hard to get and is easily avoided.

You won’t just “catch” AIDS like a cold or flu because the virus is a different type. The AIDS virus is transmitted through sexual intercourse, the sharing of drug needles, or to babies of infected mothers before or during birth.

You won’t get the AIDS virus through everyday contact with the people around you in school, in the workplace, at parties, child care centers, or stores.

* * *

You won’t get AIDS from saliva, sweat, tears, urine or a bowel movement.

You won’t get AIDS from a kiss.

* * *

It can’t be passed by using a glass or eating utensils that someone else has used.

HHS, *supra*, at 3 (emphasis in original). The information currently on government websites continues to seek to refute the same unfounded fears addressed by the Surgeon General in 1988. *E.g.*, CDC, *Q & A: How Is HIV Passed from One Person to Another?*, *supra*; NYSDOH, *supra*.

Transmission of HIV can occur when one of the following fluids containing HIV gets into the bloodstream of another person: blood, semen, vaginal fluids, or breast milk. *E.g.*, NYSDOH, *supra*, at 9; *accord* CDC, *Questions and Answers: Which Body Fluids Transmit HIV*, <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited June 1, 2010) (listing the same four fluids and “other body fluids containing blood” and noting that a few body fluids with which health care workers may come into contact – fluid surrounding the brain and spinal cord, fluid surrounding bone joints, and fluid surrounding an unborn baby – are considered potentially capable of transmitting HIV).

3. HIV Is Not Transmitted By Saliva.

In contrast to the fluids that *can* transmit HIV, “[c]ontact with saliva alone has *never* been shown to result in transmission of HIV, and there is no documented case of transmission from an HIV-infected person spitting on another person.” CDC, *Questions and Answers: Can HIV be Transmitted by Being Spit on by an HIV-infected Person?*, <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited June 1, 2010) (emphasis added); *accord, e.g.*, NYSDOH, *supra*, at 9. For example, although there have been reported exposures of health care workers to saliva from patients with HIV, none of those exposures resulted in HIV transmission. David M. Bell, *Occupational Risk of Human Immunodeficiency Virus Infection in Healthcare Workers: An Overview*, 102 *Am J. Med.* 9, 12 (1997). Similarly, HIV transmission by saliva has not been demonstrated in any of the epidemiological studies of household contacts of people infected with HIV. *Id.*

Although saliva – a body fluid secreted by salivary and mucous glands in the mouth – has not been found to transmit HIV, HIV has been found in the saliva of some people living with HIV. *E.g.*, CDC, *Q & A: Can HIV be Transmitted by Being Spit on by an HIV-infected Person?*, *supra*. Several scientific phenomena related to HIV and saliva appear to explain why saliva is *not* a mode of transmission for HIV. First, when HIV has been detected in the saliva of someone who has the virus, only very small quantities of viable virus have been found. *Id.* In contrast, the body fluids that can transmit HIV have been found to contain high concentrations of HIV. CDC, *Q & A: Which Body Fluids Transmit HIV?*, *supra*.

Second, saliva contains several components that appear to inhibit HIV. *E.g.*, Shamim H. Kazmi *et al.*, *Comparison of Human Immunodeficiency Virus Type 1-Specific Inhibitory Activities in Saliva and Other Human Mucosal Fluids*, 13 *Clinical & Vaccine Immunology* 1111, 1115 (2006); Jan G. M. Bolscher *et al.*, *Inhibition of HIV-1 IIIB and Clinical Isolates by Human Parotid, Submandibular, Sublingual and Palatine Saliva*, 110 *Eur. J. Oral Sci.* 149 (2002); Diane C. Shugars & Sharon M. Wahl, *The Role of the Oral Environment in HIV-1 Transmission*, 129 *J. Am. Dental Ass'n* 851 (1998). The inhibitory mechanisms of those components include blocking the growth of HIV, binding to HIV particles, disrupting the integrity of HIV, or attaching to the surface of white blood cells to protect against HIV infection. Bolscher *et al.*, *supra*, at 154; *accord, e.g.*, Kazmi *et al.*, *supra*, at 1115 (reporting that saliva contains “at least three components of different molecular sizes that appear to inhibit HIV-1 activity” and that several different factors, working in synergy, probably account for saliva’s inhibitory effect on HIV). Third, researchers have found that saliva has a significant disruptive effect on HIV-infected white blood cells, apparently due to the hypotonicity (relatively lower osmotic pressure) of saliva. Samuel Baron, Joyce Poast & Miles W. Cloyd, *Why Is HIV Rarely Transmitted by*

Oral Secretions? Saliva Can Disrupt Orally Shed, Infected Leukocytes, 159 *Archives of Internal Med.* 303, 308 (1999).

4. The Rare Instances Of HIV Being Transmitted Via A Bite Have Not Been Attributed To The Presence Of Saliva.

The manner in which a person comes into contact with the saliva of a person who has HIV does not change these properties of saliva and therefore does not change the fact that *saliva* does not transmit HIV. Whether the saliva of a person with HIV enters the body of another person through the mouth, an eye, skin broken by a bite, or any other entry point, saliva nonetheless contains very low levels of HIV – if any – and has the anti-HIV properties and effects noted above. Thus, during the more than twenty years between the identification of HIV and Mr. [X]’s indictment – during which undoubtedly many people came into contact with the saliva of someone with HIV, including via bites – there have been no instances in which saliva was found to transmit HIV.

Though there have been rare reports of HIV apparently being transmitted by a bite, the presence of the biter’s blood – one of the few body fluids of a person with HIV which *does* have the potential to transmit HIV – was reported in each of those instances. *See CDC, Questions and Answers: Can HIV Be Transmitted By Human Bite?*, <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited June 1, 2010); *see also* Louisa E. Chapman *et al.*, *Recommendations for Postexposure Interventions to Prevent Infection with Hepatitis B Virus, Hepatitis C Virus, or Human Immunodeficiency Virus, and Tetanus in Persons Wounded During Bombings and Other Mass-Casualty Events – United States*, 57 *MMWR (RR-06)* 1, 6 (2008), *available at* <http://www.cdc.gov/mmwr/pdf/rr/rr5706.pdf> (“Feces, nasal secretions, saliva, sputum, sweat, tears, urine, and vomitus are not considered infectious [with respect to HIV] unless visibly bloody.”).

For example, in one of the earliest reported instances of transmission of HIV by biting, a person with HIV had blood in his saliva when he bit through the skin of another person's fingers. Ludvik Vidmar *et al.*, *Transmission of HIV-1 by Human Bite*, 347 *Lancet* 1762 (1996); *see also* Bell, *supra*, at 12 (mentioning two reported cases of HIV transmission via a bite, both attributed to contact with blood). In what was reported as the "first unequivocal evidence of HIV-1 transmission by human bite" – because laboratory analysis of HIV from the person who did the biting and from the person who was bitten showed the HIV was epidemiologically related, ruling out other people as the source of the bitten person's HIV infection – a person living with HIV had his own blood in his mouth when he bit through the skin of another person's hand. Sandra Mara S. Andreo *et al.*, *HIV Type 1 Transmission by Human Bite*, 20 *AIDS Research & Human Retroviruses* 349, 349 (2004). In a recent case in which a person was found to have HIV after having been bitten during a fight, researchers were unable to absolutely rule out other HIV infection routes (including sexual intercourse) and were unable to learn whether the biter had blood in her mouth before she bit, although it was suspected that she did. Samuel A. Uzoigwe, Christian I. Akani, & Benneth Ariweriokuma, *Human Bite and Human Immune Deficiency Virus (HIV) Transmission*, 2 *Port Harcourt Med. J.* 88, 89 (2007) (discussing report of a woman in Nigeria found to be infected with HIV following incident in which she was bitten); *cf.* CDC, *Transmission of HIV Possibly Associated with Exposure of Mucous Membrane to Contaminated Blood*, 46 *MMWR* 620, 622-23 (July 11, 1997), *available at* <ftp://ftp.cdc.gov/pub/Publications/mmwr/wk/mm4627.pdf> (identifying exposure of a woman's mucous membrane to her HIV-positive male sex partner's blood during frequent, prolonged "deep kissing" – due to his bleeding gums or oral lesions – as the probable source of

transmission of HIV to the woman, although the investigators were not able to rule out exposures of the woman to other blood or to semen of her partner through vaginal intercourse or oral sex).

As the New York State Department of Health has explained, in order for a person with HIV to transmit HIV to another person by biting, the person with HIV would have to *both* have blood in his or her mouth *and* break the skin of the other person. NYSDOH, *supra*, at 13; *accord CDC, Q & A: Can HIV Be Transmitted By Human Bite?, supra* (stating that both blood and “[s]evere trauma with extensive tissue damage” were reported in each of the few reports of transmission of HIV by a bite). Furthermore, any HIV-infected blood in a person’s saliva will be subject to the inhibitory substances present in saliva, noted above. Therefore, even if a person with HIV *who has blood in his or her saliva* bites another person, breaking the skin, it is highly unlikely that transmission of HIV from that infected blood can occur. *E.g.*, Baron, Poast & Cloyd, *supra*, at 307 (reporting that it has been found that oral shedding of blood during dental treatment of a person with HIV usually does *not* result in the presence of infectious HIV in the person’s saliva even though the person’s blood contains HIV-infected white blood cells); Chris M. Tsoukas *et al.*, *Lack of Transmission of HIV Through Human Bites and Scratches*, 1 J. Acquired Immune Deficiency Syndromes 505 (1988) (reporting on study of health care workers bitten by patient who had AIDS and had blood in his saliva, which found no evidence of HIV transmission).

Thus, there is no scientific basis for stating that merely the saliva of a person with HIV can transmit HIV. Even a bite that breaks the skin of another person, exposing that person to the saliva of someone with HIV, has not been found to result in transmission of HIV due to HIV in saliva. The thousands of studied instances of HIV transmission in the United States have found a very few instances in which someone became infected after being exposed to the *blood* of a

person with HIV as the result of being bitten. But exposure solely to the saliva of someone with HIV, even via a bite, has not been found to result in transmission of HIV.

B. The Lower Court Erred In Ruling That The Element Of A “Dangerous Instrument” Was Present In This Case.

No evidence which could support the assertion that Mr. [X] used a “dangerous instrument” was set forth in the indictment or presented to the grand jury. For an indictment to be valid, the evidence before the grand jury must be “legally sufficient to establish the offense charged.” Crim. Proc. § 210.20(1)(b). Legally sufficient evidence supporting each element of each charged offense must be present. *E.g.*, *People v. Watson*, 32 A.D.3d 1199, 1200 (4th Dep’t 2006); *People v. Woodruff*, 4 A.D.3d 770, 772 (4th Dep’t 2004). In order to validly charge and convict Mr. [X] for violating Penal Law Section 120.11, an allegation (and some evidence) that he used something that could possibly fit the legal definition of a “dangerous instrument” was required. That requirement was not satisfied here.

Mr. [X] was charged with violating New York Penal Law section 120.11, which provides that a person commits the offense of aggravated assault upon a police officer

when, with intent to cause serious physical injury to a person whom he knows or reasonably should know to be a police officer . . . engaged in the course of performing his official duties, he causes such injury by means of a deadly weapon or dangerous instrument.

Penal Law § 120.11. For purposes of the Penal Law, “serious physical injury” is defined as “physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.” *Id.*, § 10.00(10). “Physical injury” is defined as “impairment of physical condition or substantial pain.” *Id.*, § 10.00(9). The term “dangerous instrument” is defined as “any instrument, article or substance . . . which, under the circumstances in which it is

used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.” *Id.*, § 10.00(13).

In evaluating this appeal, this Court may rely on generally accepted information about HIV and how it is and is not transmitted. *See, e.g., Brown v. New York City Health and Hosp. Corp.*, 225 A.D.2d 36, 43 (2d Dep’t 1996) (relying on “characteristics of [HIV disease] which are generally accepted in the scientific community” to evaluate issues on appeal). Here, comparing accepted information about HIV transmission to the Penal Law’s definition of a “dangerous instrument” makes it clear that the necessary element of a dangerous instrument was lacking in this case.

Indicting Mr. [X] for aggravated assault upon a police officer was in error for both of the following reasons:

(1) the saliva of a person living with HIV cannot be categorized as a “dangerous instrument” because it is not “readily capable of causing death or other serious physical injury” within the meaning of the Penal Law, *see* Section III.B.1, *infra*; and

(2) parts of the human body – including saliva and teeth – are not “dangerous instruments” within the meaning of the Penal Law, even if those body parts have unusual qualities, *see* Section III.B.2, *infra*.

1. The Saliva Of A Person Living With HIV Is Not Readily Capable Of Causing Death Or Other Serious Physical Injury.

Only substances which are “readily capable of causing death or other serious physical injury” can be considered “dangerous instruments” under the Penal Law. *See* Penal Law §§ 10.00(10), 10.00(13). The saliva of someone with HIV, even if that saliva contains HIV, is not such a substance. Therefore, the indictment of Mr. [X] for violating Section 120.11 of the Penal Law was legally defective.

To determine if an “instrument, article or substance” is or can be “dangerous” such that it can constitute a “dangerous instrument,” New York courts must consider the item’s “ability to produce a serious physical injury or death in the *circumstances* in which it is used or threatened, or attempted to be used.” *People v. Owusu*, 93 N.Y.2d 398, 404 (1999) (emphasis in the original). Under this “use-oriented approach,” *id.*, instruments that are used in a manner which makes them capable of causing death or other serious injury have been found to be dangerous instruments, even if they would be considered innocuous when used for their proper purpose. *See, e.g., People v. Carter*, 53 N.Y.2d 113, 117 (1981) (ruling that rubber boots were a dangerous instrument when defendant used them “to stomp upon the head and face of his victim, causing her head to contact the pavement below with tremendous force”); *People v. Byrd*, 51 A.D.3d 267, 275 (1st Dep’t 2008) (ruling that hard plastic sandals were a dangerous instrument when defendant used them to repeatedly stomp on victim’s abdomen); *Holloway v. Travis*, 289 A.D.2d 821, 822 (3d Dep’t 2001) (ruling that fire used to damage a building was a dangerous instrument because of serious harm it posed for firefighters and anyone in building).

New York law imposes a high threshold to satisfy the “serious physical injury” element of the “dangerous instrument” definition. ““Since the causing of serious physical injury is generally a felony, the injury threshold is, reasonably, substantial.” *Matter of Andre D.*, 182 A.D.2d 1108 (4th Dep’t 1992) (quoting Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, *Penal Law* § 10, at 20). Moreover, the capability of a normally innocuous instrument to readily cause serious injury must be reasonably inferable from its use, not a “remote and unforeseeable consequence” of its use. *People v. Travis*, 273 A.D.2d 544, 547-48 (3d Dep’t 2000) (ruling that conviction for assault in the second degree was unsupported because compressed balls of wet toilet paper thrown at correction officer, some containing

banana, were not capable of causing serious injury and therefore could not be a dangerous instrument).

In general, saliva or spittle cannot cause “physical injury” within the meaning of the Penal Law, much less “serious physical injury.” *See Hitchcock Plaza, Inc. v. Clark*, 1 Misc. 3d 906A (Civ. Ct. City N.Y., N.Y. County 2003) (finding that spitting on someone cannot be grounds for an assault charge, because it cannot satisfy the required “physical injury” element). Clearly, the trial court here erroneously believed that HIV could be transmitted by saliva, thus creating a risk of serious physical injury. But the fact that Mr. [X] has HIV does not make his saliva capable of causing physical injury – serious or otherwise.

As discussed in Section III.A, saliva from a person infected by HIV has never been shown to transmit the virus. Typically, the saliva of someone who has the virus does not even contain any HIV; if it does, any HIV particles are likely to be non-infectious. *See* Section III.A.3, *supra*. The decades of study of HIV and those infected with it have resulted in the Centers for Disease Control and Prevention concluding that contact with the saliva of a person with HIV does not put someone at risk for becoming infected with HIV. *Id.*; *see also* Sections III.A.1, III.A.2, & III.A.4, *supra*.

Thus, even if the saliva of Mr. [X] did contain some HIV at the time of his altercation with the police, his saliva would not have been readily capable of transmitting HIV to the officers and therefore could not possibly constitute a “dangerous instrument” within the meaning of the Penal Law. Accordingly, the Court erred in failing to dismiss Count One of the Indictment on the grounds of legal insufficiency.

Moreover, the fact that Mr. [X] bit the police officer, breaking the officer’s skin, does not transform Mr. [X]’s saliva into a substance readily capable of causing death or

serious physical injury. Contact between the saliva of a person with HIV and the blood of another person does not transmit HIV. The various reasons why saliva of a person living with HIV does not transmit HIV – including the fact that, at most, only very low levels of infectious HIV may be present in the saliva and saliva’s various inhibitory and disruptive effects upon HIV – are not altered when a person with HIV bites another person and breaks the person’s skin. *See* Sections III.A.3 & III.A.4, *supra*. For a person with HIV to pose a risk of HIV infection by biting someone, not only must the skin be broken by the bite, but the *biter’s* blood must be in his mouth, so that his or her *blood* can come into contact with the blood of the person he or she bites. *See* Section III.A.4, *supra*.

Here, the indictment did not allege that Mr. [X]’s saliva contained blood when he bit the officer, nor did the trial court rule based on an allegation that Mr. [X] had blood in his saliva. Even if Mr. [X] *had been* alleged to have blood in his saliva, the risk of HIV transmission might be too remote to support a dangerous instrument felony charge given how few instances of HIV infection have occurred after contact with HIV-infected blood via a bite. But where, as here, there is no allegation that blood was present in the biter’s saliva, the saliva of someone with HIV cannot possibly be considered to be readily capable of causing HIV infection. Therefore, no instrument, article or substance readily capable of causing death or other serious injury was at issue in this case.

2. The Teeth And Saliva Of A Person Living With HIV Are Not External To The Human Body And Therefore Cannot Constitute “Dangerous Instruments.”

Parts of the human body cannot constitute “dangerous instruments” under the Penal Law. Therefore, for this additional reason, the trial court erred in failing to dismiss the First Count of the Indictment.

The New York Court of Appeals has ruled that the term “dangerous instrument” does not apply to parts of the human body. *Owusu*, 93 N.Y.2d 398 (ruling, in case where defendant severed nerves in victim’s finger by biting him, that counts predicated upon use or threatened use of a dangerous instrument must be dismissed). In *Owusu*, the Court concluded that parts of the body, no matter how they are used, cannot come within the meaning of the term dangerous instrument based on the plain meaning of the statutory term, the legislative history, and prior case law. 93 N.Y.2d at 401-05. Both the legislative history of the Penal Law and prior court decisions interpreting it clearly support limiting the meaning of the term to matters *external* to the human body. *Id.* at 402-03. As the Court explained, “[i]ncreased criminal liability arises from the use or threatened use of a dangerous instrument because the actor has upped the ante by employing a device to assist in the criminal endeavor.” *Id.* at 405. The Court rejected an approach that would allow the issue of whether a dangerous instrument has been used to be determined based on physical attributes of the defendant. *Id.* at 403-04 (discussing appropriateness of interpreting “dangerous instrument” to exclude any part of the body and thus avoiding differing results depending on the “weight, strength” or other specific features or attributes of the defendant). Therefore, the Court ruled that the defendant’s teeth – which “came with him” – simply could not be considered a “dangerous instrument.” *Id.* at 405.

Here, the trial court correctly ruled that Mr. [X]’s teeth could not be considered a dangerous instrument, based on the Court of Appeal’s ruling in *Owusu*. (See Decision & Order at 1 (citing *Owusu*, 93 N.Y.2d 398) [R. at 199-200].) However, the trial court erred in trying to escape the application of the Court’s holding by ruling that Mr. [X]’s saliva was a “dangerous instrument” that was administered to the police officer by biting through his skin. (See *id.* at 2 (“It is the Defendant’s saliva, infected with the AIDS virus that is the substance that

is a dangerous instrument and was administered to the victim by intentionally biting him.”) [R. at 200].) Saliva is internal to and created by the human body. *See* Section III.A.3, *supra*. Therefore, even if Mr. [X]’s saliva contained HIV, it was internal to his body and thus “came with him” and cannot be considered a “dangerous instrument.”

CONCLUSION

For all of the foregoing reasons, *amici curiae* the American Academy of HIV Medicine, the Association of Nurses in AIDS Care, the HIV Medicine Association, and Lambda Legal Defense and Education Fund, Inc. respectfully urge this Court to dismiss the First Count of the Indictment and vacate the conviction of the charge of aggravated assault upon a police officer in this case.

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June 2, 2010

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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