

Date Completed: March 19, 2012
Oral Argument Requested
To Be Argued by:
Scott A. Schoettes, Esq.
Time Requested: 10 minutes

APPELLATE DIVISION, FOURTH DEPARTMENT CASE No. KA 09-01437
HERKIMER COUNTY INDICTMENT No. 06-063

**State of New York
Court of Appeals**

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

vs.

DAVID PLUNKETT,

Defendant-Appellant.

**BRIEF *AMICUS CURIAE* OF
AMERICAN ACADEMY OF HIV MEDICINE,
ASSOCIATION OF NURSES IN AIDS CARE, CENTER FOR HIV LAW
AND POLICY, HIV MEDICINE ASSOCIATION, AND LAMBDA
LEGAL DEFENSE AND EDUCATION FUND, INC.,
IN SUPPORT OF DEFENDANT-APPELLANT DAVID PLUNKETT**

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
Hayley J. Gorenberg, Esq.
120 Wall Street, 19th Floor
New York, NY 10005
Tel: (212) 809-8585
Fax: (212) 809-0055
Attorney for Amici Curiae

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
Scott A. Schoettes, Esq.
11 East Adams Street, Suite 1008
Chicago, IL 60603
Tel: (312) 663-4413
Fax: (312) 663-4307
Attorney for Amici Curiae
(pro hac vice admission pending)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), *amici curiae* hereby disclose that they do not have any corporate parents, subsidiaries or affiliates, except as follows: *amicus* HIV Medicine Association has as its parent company the Infectious Diseases Society of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
I. INTERESTS OF <i>AMICI CURIAE</i>	2
II. FACTUAL AND PROCEDURAL BACKGROUND.....	4
III. ARGUMENT.....	6
A. Saliva Is Not a Route for Transmission of HIV.....	6
1. Background Information about HIV.....	6
2. How HIV Is Transmitted	9
3. HIV Is Not Transmitted by Saliva.	11
4. The Rare Instances of HIV Being Transmitted Via a Bite Have Not Been Attributed to the Presence of Saliva.	13
B. The Lower Court Erred in Ruling That the Element of a “Dangerous Instrument” Was Present in This Case.	16
1. The Saliva of a Person Living With HIV Is Not Readily Capable of Causing Death or Other Serious Physical Injury.....	17
2. The Teeth and Saliva of a Person Living with HIV Are Not External to the Human Body and Therefore Cannot Constitute “Dangerous Instruments.”	21
CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998)	9
<i>Brown v. New York City Health and Hosp. Corp.</i> , 225 A.D.2d 36 (2d Dep’t 1996)	17
<i>Glick v. Henderson</i> , 855 F.2d 536 (8th Cir. 1988)	10
<i>Hitchcock Plaza, Inc. v. Clark</i> , 1 Misc. 3d 906A (Civ. Ct. City N.Y., N.Y. Cnty. 2003)	19
<i>Holloway v. Travis</i> , 289 A.D.2d 821 (3d Dep’t 2001)	18
<i>Matter of Andre D.</i> , 182 A.D.2d 1108 (4th Dep’t 1992)	18
<i>People v. Anonymous</i> , 153 Misc.2d 436 (N.Y. Cnty. Ct. 1992)	13
<i>People v. Byrd</i> , 51 A.D.3d 267 (1st Dep’t 2008)	18
<i>People v. Carter</i> , 53 N.Y.2d 113 (1981)	18, 23
<i>People v. Owusu</i> , 93 N.Y.2d 398 (1999)	5, 18, 22, 23
<i>People v. Travis</i> , 273 A.D.2d 544 (3d Dep’t 2000)	19
<i>People v. Watson</i> , 32 A.D.3d 1199 (4th Dep’t 2006)	16
<i>People v. Woodruff</i> , 4 A.D.3d 770 (4th Dep’t 2004)	16

NEW YORK STATUTES

N.Y. Crim. Proc. Law § 210.20	16
N.Y. Penal Law § 10.00.....	17, 18
N.Y. Penal Law § 120.11	16, 18

MISCELLANEOUS

Sandra Mara S. Andreo et al., <i>HIV Type 1 Transmission by Human Bite</i> , 20 AIDS Research & Human Retroviruses 349 (2004).....	14
Samuel Baron, Joyce Poast & Miles W. Cloyd, <i>Why Is HIV Rarely Transmitted by Oral Secretions? Saliva Can Disrupt Orally Shed, Infected Leukocytes</i> , 159 Archives of Internal Med. 303 (1999).....	12, 15
David M. Bell, <i>Occupational Risk of Human Immunodeficiency Virus Infection in Healthcare Workers: An Overview</i> , 102 Am J. Med. 9 (1997)	11, 14
Jan G. M. Bolscher et al., <i>Inhibition of HIV-1 IIB and Clinical Isolates by Human Parotid, Submandibular, Sublingual and Palatine Saliva</i> , 110 Eur. J. Oral Sci. 149 (2002).....	12
Centers for Disease Control and Prevention, <i>CDC Responds to HIV/AIDS</i> , http://www.cdc.gov/hiv/aboutDHAP.htm	8
Centers for Disease Control and Prevention, <i>Basic Information About HIV and AIDS</i> , http://www.cdc.gov/hiv/topics/basic/	6, 8
Centers for Disease Control and Prevention, <i>Basic Statistics</i> , http://www.cdc.gov/hiv/topics/surveillance/basic.htm#ddaids	8
Centers for Disease Control and Prevention, <i>Questions and Answers: Can HIV be Transmitted by Being Spit on By an HIV-infected Person?</i> , http://www.cdc.gov/hiv/resources/qa/ transmission.htm	11, 12
Centers for Disease Control and Prevention, <i>Questions and Answers: Can HIV be Transmitted by Human Bite?</i> , http://www.cdc.gov/hiv/resources/qa/transmission.htm	13, 15

Centers for Disease Control and Prevention, <i>Questions and Answers: How Is HIV Passed from One Person to Another?</i> , http://www.cdc.gov/hiv/resources/qa/transmission.htm	9, 10, 12
Centers for Disease Control and Prevention, <i>Questions and Answers: Which Body Fluids Transmit HIV</i> , http://www.cdc.gov/hiv/resources/qa/transmission.htm	11, 12
Centers for Disease Control and Prevention, <i>Transmission of HIV Possibly Associated with Exposure of Mucous Membrane to Contaminated Blood</i> , 46 MMWR 620 (July 11, 1997), ftp://ftp.cdc.gov/pub/Publications/mmwr/wk/mm4627.pdf	14
Louisa E. Chapman et al., <i>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</i> , 57 MMWR (RR-06) 1 (2008), http://www.cdc.gov/mmwr/pdf/rr/rr5706.pdf	13
Shamim H. Kazmi et al., <i>Comparison of Human Immunodeficiency Virus Type 1-Specific Inhibitory Activities in Saliva and Other Human Mucosal Fluids</i> , 13 Clinical & Vaccine Immunology 1111 (2006)	12
N.Y. State Dep’t of Health, <i>100 Questions and Answers About HIV/AIDS</i> (Feb. 2008), http://mole.health.state.ny.us/publications/0213.pdf	<i>passim</i>
Nat’l Inst. of Allergy & Infectious Diseases, Nat’l Inst. of Health, <i>HIV/AIDS: The HIV-AIDS Connection</i> , http://www.niaid.nih.gov/topics/HIVAIDS/Understanding/howHIVCausesAIDS/pages/connection.aspx	7
Eileen Schneider et al., <i>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</i> , 57 Morbidity and Mortality Wkly. Rep. Recommendations and Reps. 10 (Dec. 5, 2008), http://www.cdc.gov/mmwr/pdf/rr/rr5710.pdf	6, 7

Diane C. Shugars & Sharon M. Wahl, <i>The Role of the Oral Environment in HIV-1 Transmission</i> , 129 J. Am. Dental Ass'n 851 (1998).....	12
Chris M. Tsoukas et al., <i>Lack of Transmission of HIV Through Human Bites and Scratches</i> , 1 J. Acquired Immune Deficiency Syndromes 505 (1988)	15
U.S. Dep't of Health & Human Servs., <i>Understanding AIDS: A Message from the Surgeon General</i> , HHS Publication No. HHS-88-8404 (1988), http://profiles.nlm.nih.gov/ps/access/QQBDRL.pdf	10
U.S. Dep't of Health & Human Servs., Panel on Antiretroviral Guidelines for Adults and Adolescents, <i>Guidelines for the Use of Antiretroviral Agents in HIV-1-Infected Adults and Adolescents</i> (2009), available at http://aidsinfo.nih. gov/contentfiles/AdultandAdolescentGL.pdf	8
Samuel A. Uzoigwe, Christian I. Akani & Benneth Ariweriokuma, <i>Human Bite and Human Immune Deficiency Virus (HIV) Transmission</i> , 2 Port Harcourt Med. J. 88 (2007).....	14
Ludvik Vidmar et al., <i>Transmission of HIV-1 by Human Bite</i> , 347 Lancet 1762 (1996)	14

INTRODUCTION

Given the nature of the human immunodeficiency virus (“HIV”) and its transmission, the saliva of someone living with HIV is not capable—much less “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 decades of study have revealed no instance in which a person became infected with HIV due to exposure to the saliva of a person who had HIV.

David Plunkett 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 the blood—not the saliva—of the biter that was the mechanism by which HIV was possibly 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 criminal law, the trial court erred in refusing to dismiss the count charging Mr. Plunkett with aggravated assault on a police officer. Accordingly, *amici* urge this

Court to dismiss the First Count of Indictment No. 06-063 and to 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 Center for HIV Law and Policy, the HIV Medicine Association, and Lambda Legal Defense and Education Fund, Inc., submit this brief in support of Appellant David Plunkett. *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 HIV specialists and other medical providers 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, physician’s assistants, and pharmacists. 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 2,000 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 Center for HIV Law and Policy ("CHLP") is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP's interest in this case is consistent with its mission to reduce the impact of HIV on vulnerable and marginalized communities and to secure the rights of people affected by HIV. Exaggerated fears about HIV, and ignorance about the routes and relative risks of HIV transmission, perpetuate discrimination and unfair treatment of those with HIV. Government endorsement of such fears, through the use of the criminal law to single out people with HIV for severe punishment on the basis of conduct that poses no risk to others, undermines national goals to engage people with HIV in medical care and to prevent further spread of the disease.

The HIV Medicine Association ("HIVMA"), nested within the Infectious Diseases Society of America ("IDSA"), represents more than 4,800 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 more than 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 HIV/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

David Plunkett, a man living with HIV, was arrested following an altercation with police on September 18, 2006, during which Mr. Plunkett allegedly bit one of the police officers. (*See* Compl., Sept. 18, 2006 [Record on Appeal of Defendant-Appellant (“R.”) 205-206]; Paul Rose Grand Jury Test. 16:22 [R. 17].) An indictment was filed against Mr. Plunkett in County Court, County of Herkimer on October 16, 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, Oct. 16, 2006 [R. 195-197].) The count asserting violation of Section 120.11 was based on the following allegations:

[D]efendant . . . 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 [*sic*] such injury by means of a deadly weapon or dangerous instrument, to wit: Said defendant did cause serious physical injury to Inv[estigator] Paul Rose by means of a dangerous instrument.

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

Mr. Plunkett 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., Dec. 14, 2006 [R. 243-252]; Def.'s Addendum to Omnibus Mot., May 4, 2007 [R. 253-263].) Specifically, Mr. Plunkett moved for dismissal of that charge on the grounds that a person's teeth are not a "dangerous instrument" for purposes of the statute. (*See* Def.'s Addendum to Omnibus Mot. [R. 253]; Decision & Order, May 22, 2007 [R. 199-200].) In that motion, Mr. Plunkett 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 Patrick L. Kirk denied Mr. Plunkett's motion orally on May 7, 2009, and subsequently issued a written decision and order, ruling that:

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, May 21, 2007 [R. 200].) Judge Kirk 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.*)

Subsequently, pursuant to a conditional plea agreement, Mr. Plunkett pled guilty to the above charge and two others, specifically preserving his right to appeal "certain circumstances that have come up in rulings that [the trial court] made[.]" (Tr. Court Proceedings, May 9, 2007 [R. 173]; *see also*, Tr. Court Proceedings, May 7, 2007, 3:1-4 [R. 25] ("So I will not be dismissing that first count, and I will have a written decision on that. I note Ms. Dunning's exception to that ruling.") On May 23, 2007, Mr. Plunkett was sentenced, receiving a ten year term of incarceration for his conviction of aggravated assault upon a police officer. (*See* Sentencing Tr., May 23, 2007 [R. 185-193].) On June 22, 2007, Mr. Plunkett 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, June 22, 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://mole.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 Mar. 14, 2012); 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—the human immunodeficiency virus, which is commonly referred to as “HIV” *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 Mar. 14, 2012). 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*, <http://www.cdc.gov/hiv/aboutDHAP.htm> (last visited Mar. 14, 2012). The CDC estimates that, as of 2008, approximately 1.2 million people in the United States were living with HIV and over 600,000 people with an AIDS diagnosis had died in this country. CDC, *Basic Statistics*, <http://www.cdc.gov/hiv/topics/surveillance/basic.htm#ddaids> (last visited Mar. 14, 2012). 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 large part by greatly reducing the levels of the virus in the treated individual's blood. *E.g.*, NYSDOH, *supra*, at 27-29; U.S. Dep't of Health & Human Servs. ("HHS"), 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 people to test for HIV, providing treatment to those with HIV, and preventing the further 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 they are seriously 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 that 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 the following ways:

- (1) by sexual intercourse (anal, vaginal or—in rare circumstances—oral);
- (2) by sharing infected needles or injection equipment;
- (3) with decreasing frequency, from mother to child perinatally; or
- (4) with extremely low frequency, by exposure to infected blood, transfusion of infected blood or blood products, and transplantation of infected organs.

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 Mar. 14, 2012); NYSDOH, *supra*, at 9.

Despite the lack of scientific evidence for any other routes of transmission, some people continue to fear that HIV can be transmitted in other ways. 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. Nearly a quarter-century ago, 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., *Understanding AIDS: A Message from the Surgeon General*, HHS Publication No. HHS-88-8404 (1988), available at <http://profiles.nlm.nih.gov/ps/access/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, *Understanding AIDS: A Message from the Surgeon General*, *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, *Questions and Answers: 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.¹ *E.g.*,

¹ Note that urine, feces and mucous are *not* listed among the fluids that can transmit HIV. Therefore, not only are the State's attempts to color their brief with reference to these other body fluids and substances (see Respondent's Brief at 5, 6, 14, 16, & 19) legally irrelevant—because these other substances did not serve as the basis for the “dangerous instrument” charge or the trial court's ruling on

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 Mar. 14, 2012) (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 amniotic fluid surrounding a fetus—are considered potentially capable of transmitting HIV).

3. HIV Is Not Transmitted By Saliva.

Saliva—a body fluid secreted by salivary and mucous glands in the mouth—is not a fluid through which HIV can be transmitted. 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 Mar. 14, 2012) (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.*

Though trace amounts of HIV have been found in the saliva of some people living with HIV (see, e.g., CDC, *Questions and Answers: Can HIV be Transmitted by Being Spit on by an HIV-infected Person?*, *supra*), several scientific phenomena appear to explain why saliva is

the sufficiency of the evidence presented to the grand jury—but they are also medically irrelevant, because they (like saliva) are incapable of transmitting HIV.

nonetheless *not* a mode of transmission for HIV. See, e.g., CDC, *Questions and Answers: How Is HIV Passed from One Person to Another?*, *supra* (“It is important to understand however, that finding a small amount of HIV in a body fluid or tissue does not mean that HIV is transmitted by that body fluid or tissue.”) 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. CDC, *Questions and Answers: Can HIV be Transmitted by Being Spit on by an HIV-infected Person?*, *supra*. In contrast, the body fluids that can transmit HIV have been found to contain high concentrations of HIV. CDC, *Questions and Answers: 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, if any, very low levels of HIV and has the anti-HIV properties and effects noted above. Thus, during the more than twenty-five years between the identification of HIV and Mr. Plunkett'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.²

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 that *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 Mar. 19, 2012); see also Louisa E. Chapman *et al.*, *Recommendations for Postexposure Interventions to Prevent Infection*

² The People's reliance upon *People v. Anonymous*, 153 Misc. 2d 436 (N.Y. Cnty. Ct. 1992) is misplaced. In addition to the different equities involved in that court's assessment of whether to order HIV testing (vs. adding years to a person's sentence), the fact that a court in 1992 perhaps misunderstood the risks and routes of HIV transmission provides no support for perpetuating such misconceptions in 2012 and/or for perpetrating an unjustified deprivation of liberty based on those misconceptions. Our understanding of HIV, its routes and risks of transmission, and its treatment—which has rendered the disease a chronic, manageable condition for most HIV-positive people with regular access to quality care—has come a long way since 1992. One would hope the People would embrace the current medical science and realities of living with HIV, instead of attempting to tie the Court to mistakes of the past.

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—the person 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 both unable to rule out other HIV infection routes (including sexual intercourse) and 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 an 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, Questions and Answers: Can HIV Be Transmitted By Human Bite?*, *supra* (stating that both "[s]evere trauma with extensive tissue damage and the presence of blood" were reported in each of the very rare instances where transmission by a bite was documented or suspected). 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 just

the saliva of someone with HIV, has not been found to result in transmission. 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 never 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 that could support the assertion that Mr. Plunkett 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.” N.Y. Crim. Proc. Law § 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. Plunkett 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. Plunkett 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.

N.Y. 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. Plunkett 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* N.Y. Penal Law §§

10.00(10), 10.00(13). The saliva of someone with HIV, if that saliva even contains HIV, is not such a substance, because it is not capable—much less *readily* capable—of causing death or other serious physical injury. Therefore, the indictment of Mr. Plunkett 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 readily 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, 582 N.Y.S.2d 890, 890-891 (4th Dep’t 1992) (quoting Donnino, Practice Commentaries, McKinney’s Cons. Laws of N.Y., 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 by means of a dangerous instrument was unsupported because compressed balls of wet toilet paper thrown at correction officer, some containing banana, were not capable of causing serious injury and the prosecution established no additional circumstances that made those comparatively soft materials a foreseeable threat of serious injury).

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. Cnty. 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.³ But the fact that Mr. Plunkett has HIV does not make his saliva

³ Somewhat puzzlingly, the People and (to a lesser degree) the trial court attempt to rely upon the decision of the law enforcement officers to take antiretroviral medications—and the resulting side effects of those medications—as a basis for the “serious physical injury” caused by Mr. Plunkett’s alleged use of his saliva as a dangerous instrument. (See Respondent’s Brief at 14, 17, 19 (“The victim was given medical advice to combat the possibility of contracting the HIV virus and as a result sustained serious physical injury.”); Mem./Order dated Mar. 23, 2007, at ¶ 2 (“The Court has specifically reviewed the evidence presented as it pertains to the First Count, Aggravated Assault Upon a Police Officer. The facts and theory that the defendant, who claims to have HIV or AIDS, in biting Investigator Rose resulting in prolonged treatment to hopefully prevent infection by the HIV virus [*sic*] is sufficient for this Court to stand.”); *see also* Tr. of Court Proceedings, May 9, 2007, at 9:5-7, 11:3-24 [R. 179, 181]; Tr. of Court Proceedings, May 23, 2007, at 6:20–7:12 [R. 190-91].) However, it cannot be that this intervening cause—an erroneous belief about the possibility of transmission via saliva (or any other substances incapable of transmitting HIV) and the precautionary measures taken as a result of that erroneous belief—can govern whether the defendant, in the circumstances presented, affirmatively used an instrument, article or substance readily capable of causing death or other serious physical injury.

Similarly, the decision of the medical personnel to prescribe treatment for any alleged possible exposure (*see* Respondent’s Brief at 18) is irrelevant in determining whether the saliva of a person with HIV may be classified as a dangerous instrument. First, the testimony before the grand jury makes clear that the emergency room personnel who provided treatment were informed before even examining or talking to the law enforcement officers that the officers had been “exposed” to HIV, so any decision the medical professionals reached to prescribe medications to prevent the possible transmission of HIV may

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. Plunkett had contained 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. Plunkett bit the police officer, breaking the officer’s skin, does not transform Mr. Plunkett’s saliva into a substance readily capable of causing death or

have been based on or colored by these preconceived notions about what had taken place during the arrest. (*See* Tr. of Grand Jury Proceedings, at 19:14-24 [R. 20]; *id.* at 9:11-19 [R. 9]; *see also* Arrest Report, dated Sept. 18, 2006, p. 2 [R. 218] (“All responding officers and EMTs have been exposed to AIDS and tuberculosis.”) Second, the prescribed course of treatment could not have been based on the alleged bite, because precautionary HIV medications were given to *both* Officer Darrow and Investigator Rose (*see* Tr. of Grand Jury Proceedings, at 9:11-21 [R. 9]; *id.* at 19:21–20:6 [R. 20-21])—but only Investigator Rose was alleged to have been bitten. Therefore, the fact that precautionary medications were recommended in this case indicates nothing about whether the saliva of a person with HIV may be considered a dangerous instrument.

Furthermore, there are some indications that Mr. Plunkett was thought to have suffered “rug burns and cuts” as a result of a scuffle on carpeting (*see* Tr. of Grand Jury Proceedings, at 8:11-18 and 16:24–17:5 [R. 8, 17-18]). However, there was no allegation before the trial court that Mr. Plunkett “used” (or attempted to use, or threatened to use) as a dangerous instrument any blood that may have been present on his body from the injuries he suffered during his arrest. Therefore, the precautionary treatments prescribed—perhaps inappropriately based on the mere presence of Mr. Plunkett’s blood outside of his body—do not in any way legitimize or justify a charge based on Mr. Plunkett’s “use” of a dangerous instrument.

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 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. Plunkett’s saliva contained blood when he bit the officer, nor did the trial court rule based on an allegation that Mr. Plunkett had blood in his saliva. Even if Mr. Plunkett *had been* alleged to have blood in his saliva, the risk of HIV transmission would likely be too remote to support a dangerous instrument felony charge given the statute’s requirement that the substance be “readily” capable of causing serious injury and the very few instances of HIV infection having occurred after contact with HIV-infected blood via a bite. But where, as here, there is no allegation that the biter was bleeding in or near his mouth or that blood was even present there, a bite—merely with one’s saliva naturally coating one’s teeth—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.”

Neither the human body itself—nor its constituent parts and products—may be classified

as “dangerous instruments” under the Penal Law. *See Owusu*, 93 N.Y.2d at 401-05. For this additional reason, the trial court erred in failing to dismiss the First Count of the Indictment.

Barely a decade ago, this Court ruled that the term “dangerous instrument” does not apply to parts of the human body. *Id.* at 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). After thoroughly examining the text of the statute, the legislative history, and prior case law, this Court concluded that parts of the body—no matter how they are used—cannot come within the meaning of the term “dangerous instrument.”⁴ *Id.* at 401-05. Both the legislative history of the Penal Law and prior court decisions interpreting the Penal Law 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 (“Mr. Owusu’s teeth came with him. In our view, that alone should not expose him to criminal liability beyond that measured by the extent of his victim’s injury.”).

Furthermore, this Court explicitly rejected an approach that would allow for enhanced penalties due merely to the potential for additional harm as a result of particular physical attributes of the defendant. *See id.* at 403-04 (discussing appropriateness of interpreting “dangerous instrument” to exclude any part of the body, thus avoiding differing results

⁴ The *Owusu* Court’s textual analysis examines the distinction between a body part and an “instrument,” focusing on the particular subcategory in the definition of “dangerous instrument” raised by the case before the Court at that time. *See id.* at 400-01. But the Court’s reasoning and analysis based on the legislative history, legislative intent and prior case law strongly supports the broader conclusion that no constituent part or product of the human body—even one that could be classified as a “substance”—will support a charge involving the use of a “dangerous instrument” under the Penal Law. *See id.* at 400-05 (“[T]he best evidence suggests that the Legislature always intended that the ‘dangerous instrument’ concept be limited to external objects.”).

depending on the “weight, strength” or other specific features or attributes of the defendant). The Court’s sound approach staved off anomalous results with respect to the increased criminal liability a heavyweight boxer could incur for use of a “dangerous instrument” merely from threatening a blow, in comparison to an “ordinary man” who actually beats someone to death. *See id.* at 403. Those undesirable, anomalous results are strikingly similar to the anomalous results that could ensue if a person with HIV happens to sustain a cut on his knuckles while engaging in fisticuffs with someone who does not have HIV. Though both parties would have engaged in the same conduct—throwing comparable punches, with the same degree of culpability—the latter individual could be prosecuted only for assault, while the former individual could be prosecuted for assault with a dangerous weapon or instrument.⁵ Because, as noted in *Owusu*, such anomalous results were not intended by the Legislature—and are also justifiably unacceptable to this Court (*see id.*)—this Court should clarify that its holding in *Owusu* applies not only to body parts, but also to all internal products and byproducts of the human body that naturally come with a person.

Here, based on this Court’s ruling in *Owusu*, the trial court correctly ruled that Mr. Plunkett’s teeth could not be considered a dangerous instrument. (*See* Decision & Order at 1 (citing *Owusu*, 93 N.Y.2d 398) [R. 199-200].) However, the trial court erred in trying to escape

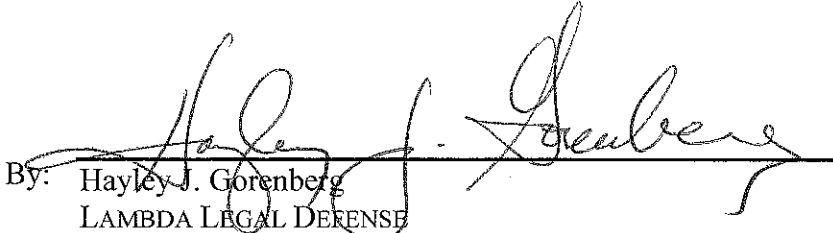
⁵ The People’s reliance upon *People v. Carter*, 53 N.Y.2d 113 (1981) is entirely misplaced. In *Carter*, this Court stated that “ ‘any instrument, article or substance,’ no matter how innocuous it may appear to be when used for its legitimate purpose, *becomes* a dangerous instrument when it is *used* in a manner which renders it readily capable of causing serious physical injury.” *Id.* at 116 (internal citations omitted) (emphasis in original). Here, quite to the contrary, the People are asserting that any body fluid containing HIV is *inherently* dangerous—because, in the People’s erroneous view, it is capable of transmitting HIV and thereby causing serious physical injury—and that even that fluid’s *incidental* presence renders a person with HIV subject to increased criminal liability and an enhanced penalty, regardless of that person’s intentions and/or whether the person may legitimately be characterized as “using” the body fluid at all. As this Court recognized in *Owusu*, its opinion in *Carter* simply does not address whether a constituent part of the human body falls within the definition of a “dangerous instrument” under the Penal Law. *Owusu*, 93 N.Y.2d at 401 (“The Penal Law and our jurisprudence have long recognized that how an object is used determines if it is ‘dangerous.’ Neither the Legislature nor the courts, however, have classified a person’s hands, teeth or other body part as a weapon or instrument.”).

the application of the Court's holding by ruling that Mr. Plunkett'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. 200].) Saliva is an internal creation of the human body. *See* Section III.A.3, *supra*. Therefore, even if—contrary to all of the science (*see* Section III.A.)—the People could prove that Mr. Plunkett's saliva was readily capable of causing serious physical injury, the fact is that Mr. Plunkett cannot be present without his saliva also being present. It is, quite simply, a part of him. And because, in the words of this Court, his saliva "came with him[,] " it cannot be considered a "dangerous instrument" under New York criminal law.

CONCLUSION

For all of the foregoing reasons, *amici curiae* the American Academy of HIV Medicine, the Association of Nurses in AIDS Care, the Center for HIV Law and Policy, 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.

Dated: New York, New York
March 19, 2012

By: 
Hayley J. Gorenberg
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, 19TH FLOOR
New York, NY 10005
Tel: (212) 809-8585
Fax: (212) 809-0055

Scott A. Schoettes, Esq. (*pro hac vice* admission pending)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
11 E. Adams St., Suite 1008
Chicago, IL 60603
(312) 663-4413
(312) 663-4307 (facsimile)

Attorneys for *Amici Curiae*
American Academy of HIV Medicine, Association of
Nurses in AIDS Care, Center for HIV Law and Policy,
HIV Medicine Association, and Lambda Legal Defense &
Education Fund, Inc.