IN THE IOWA SUPREME COURT

Supreme Court No. 12-0180

District Court No. PCCV112123

NICK RHOADES,
Applicant/Appellant,

v.

STATE OF IOWA,
Respondent/Appellee.

Appeal from the Iowa District Court for Black Hawk County
THE HONORABLE DAVID F. STAUDT, JUDGE

REPLY BRIEF OF APPELLANT

Joseph C. Glazebrook
Dan L. Johnston
GLAZEBROOK & MOE, LLP
118 SE 4th Street, Suite 101
Des Moines, IA 50309
T: 515-259-1110
F : 515-259-1112
joseph@glazebrookmoe.com
djohn1945@aol.com

Christopher R. Clark
Scott A. Schoettes
LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.
11 East Adams, Suite 1008
Chicago, IL 60603
T: 312-663-4413
F: 312-663-4307
cclark@lambdalegal.org
sschoettes@lambdalegal.org

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F: 312-663-4307
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ARGUMENT

This appeal presents two requests for relief. In his first request, Mr. Rhoades asks this Court to set aside his conviction in order to allow him to withdraw his guilty plea, because the plea colloquy conducted by the criminal trial court did not establish a factual basis on the record for the elements of the charge against Mr. Rhoades. In particular, the court failed to make any inquiry into the *mens rea* element of the crime.

In his second request for relief, Mr. Rhoades asks this Court to dismiss the charges against him altogether, because there is simply no factual basis for the State to convict Mr. Rhoades of an intentional exposure of a bodily fluid to the body of another in a manner that could transmit HIV.

To resolve this case, this Court need do only two things: (1) examine the transcript of the plea colloquy to assess its adequacy, and (2) assess the factual basis for the criminal conviction under Chapter 709C.1 in light of the undisputed facts of this case and this Court's prior interpretation of the statute in *State v. Musser*, 721 N.W.2d, 734, 749 (Iowa 2006). Contrary to the arguments set forth in the State's Response Brief, this case does not require this Court to determine if prejudice resulted from the inadequate plea colloquy—prejudice in such cases is presumed. This appeal also does not require this Court to determine whether a "specific intent" or "general intent" label should be attached to Chapter 709C.1—

this Court has already stated that these labels are unhelpful and that courts should instead simply interpret statutes as written. Nor does this appeal require this Court to turn to cases from other jurisdictions—cases involving fundamentally different statutes and facts—to assist in interpreting the *mens rea* required under Chapter 709C.1, because in *Musser* this Court has already identified the *mens rea* required under this statute. Finally, this case certainly does not require this Court to pronounce a legislative intent to criminalize any and all sexual activity by HIV-positive individuals who do not disclose their HIV status—particularly when such an intention is contradictory to the plain language of the statute. Simply put, the State is attempting to distract the Court from the task at hand, which is to assess the facts of this case in light of existing precedent regarding plea colloquies and criminal intent. When this case is viewed in that light, it becomes apparent that Mr. Rhoades's conviction must be set aside.

I. Mr. Rhoades is entitled to withdraw his guilty plea, because his defense attorney provided ineffective assistance by allowing the criminal trial court to accept a guilty plea without conducting a proper plea colloquy.

Mr. Rhoades's first argument for overturning his conviction is based on the fact that the plea colloquy conducted by the criminal trial court failed to inquire about the factual basis for—and Mr. Rhoades's understanding of—the intent element of Chapter 709C.1. (*See* Opening Brief at 20-32.) Iowa courts have repeatedly held that the failure to inquire into the intent element of a crime is legal

error requiring that the underlying conviction be set aside. (Opening Brief at 22-24.)

The plea colloquy in the criminal proceedings below did not include an adequate inquiry into the factual basis for the crime. In the criminal proceedings below, the court merely asked Mr. Rhoades if he had engaged in "intimate contact," a legal term of art that is specifically defined at Iowa Code §709C.1(1)(a) to include a *mens rea* element. (Opening Brief at 25-28.) By using a legal term of art that also has a very different, common, colloquial meaning—devoid of any criminal *mens rea*—the court took a confusing and constitutionally impermissible "short cut" to establish the factual basis for the alleged crime. (*Id.*) Such error requires that Mr. Rhoades's conviction be set aside and that the matter be remanded to allow Mr. Rhoades to withdraw his guilty plea.

A. The State concedes that the criminal trial court did not conduct the constitutionally required inquiry into the factual basis for the intent element of the crime.

The State does not even attempt to argue that the trial court conducted the required explicit inquiry into the intent element of the crime. Instead, the State suggests that the burden was on Mr. Rhoades to reveal that he did not understand this element: "Although the court did not discuss the phrase 'intimate contact,' the defendant did not ask or indicate that he lacked any understanding of the phrase." (Response Brief at 31.) The State flatly misstates the law. The Iowa Rules of

Criminal Procedure, the United States Constitution (as interpreted by the United States Supreme Court), and Iowa case law all require the court to address the defendant in open court and conduct an inquiry that probes the basis for every element of the alleged crime – including, and especially, the intent element. *See* Opening Brief at 20-24, *citing* Iowa R. Crim. P. 2.8(2)(b)(1); *Bousley v. United States*, 523 U.S. 614, 618, 118 S. Ct. 1604, 1609, 140 L. Ed. 2d 828, 837 (1998); and numerous decisions from Iowa courts. Simply put, it is the court's—as well as defense counsel's—responsibility to ensure that a proper inquiry is done. It is not the defendant's obligation to alert the Court that he does not know that a commonly used phrase, "intimate contact," has a very specific and different legal meaning.

The State attempts to brush past the deficiency of the plea colloquy by directing the Court's attention to the fact that Mr. Metcalf, Mr. Rhoades's former defense counsel, testified at the hearing on Mr. Rhoades's petition for post-conviction relief, that he had "discussed the elements with the defendant on more than one occasion" prior to entry of the guilty plea and that, in Mr. Metcalf's opinion, "Rhoades was an intelligent person and readily understood what was being discussed between them." (Response Brief at 31-32.) The State's reliance on Mr. Metcalf's vague testimony about "discussing elements" with Mr. Rhoades

is legally irrelevant.[1] Any conversations that Mr. Rhoades may have had with defense counsel prior to entry of the guilty plea do not relieve the criminal trial court of its constitutionally required obligation to establish during the plea colloquy that each and every element of the crime has been met—particularly any intent component.

B. Because the plea colloquy is constitutionally deficient, Mr. Rhoades is entitled to withdraw his guilty plea without making any separate showing of prejudice.

The State also incorrectly suggests that Mr. Rhoades must demonstrate prejudice as a result of the inadequate plea colloquy. The State notes that the court that presided over the hearing on Rhoades's petition for post-conviction relief ("PCR") found that "Rhoades was not credible when he disputed that he understood what the phrase 'intimate contact' meant." (Response Brief at 33.) The State then states that "Rhoades would have this Court conclude that he would have gone to trial if properly advised . . . ." (*Id.*)

The State ignores, as did the trial court below, a fundamental and well-established legal principle: defense counsel who permits a client to plead guilty to a crime for which there is no factual basis in the record is deemed to have breached

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[1] This is especially so in this case, where the defense attorney himself continued, even at the post-conviction relief proceeding, to evince a less than clear understanding of this particular element of the crime and/or of the specific facts relating to the alleged conduct that would be determinative as to whether this element was met. (*See* Opening Brief at 46-48.)

an essential duty, without any separate showing of prejudice. (Opening Brief at 21.) Indeed, Iowa courts have routinely held that defense counsel provides ineffective assistance to his client when he permits a trial court to accept a guilty plea without the court's fulfilling its obligation under Rule 2.8(2)(b) to conduct a thorough and proper inquiry into the factual basis for the charges and the defendant's understanding of the elements of the alleged crime. (Opening Brief at 24, *citing State v. Schminkey*, 597 N.W.2d 785, 788-92 (Iowa 1999); *State v. Gaines*, No. 1-327/00-0045, 2001 Iowa App. LEXIS 617 at *16-22 (Iowa App. 2001); and, *United States v. Nairn*, No. CR02-4078MWB, 2005 U.S. Dist. LEXIS 6458 at *28-35 (N.D. Iowa 2005). In such cases, a defendant is not required to demonstrate what he would have done if the plea colloquy had been conducted properly.

This Court is not required to probe and evaluate Mr. Rhoades's current or past understanding of the phrase "intimate contact" to determine that the plea colloquy was inadequate. Rather, the Court need only examine the transcript of the plea colloquy to evaluate the nature and extent of the criminal trial court's inquiry into the intent element of Chapter 709C.1.[2] Such an examination reveals, as the State concedes, that the court failed to explain or discuss the phrase "intimate

[2] *See* Opening Brief at 25-28, *citing* Tr. of Criminal Proceedings, May 1, 2009, at App. 36-38.

contact" during Mr. Rhoades colloquy. As a result, the court failed to conduct a meaningful inquiry into Mr. Rhoades's understanding of the intent element of Chapter 709C.1 Mr. Rhoades, therefore, is entitled to have his conviction set aside so he may withdraw his guilty plea.

II. The charge should be dismissed altogether, because there is no factual basis for the alleged crime.

In his second request for relief, Mr. Rhoades asks this Court to set aside his conviction and dismiss the charge altogether because there is no factual basis for the charge. A conviction under Chapter 709C.1 requires proof that "the defendant intentionally expose another person to the defendant's infected bodily fluid in such a way that the virus could be transmitted."[3] *Musser*, 721 N.W.2d at 749. In this case, the evidence presented to the district court below demonstrates there is no factual basis to establish that Mr. Rhoades intended to expose his bodily fluid to

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[3] In the interest of brevity, Mr. Rhoades uses the term "infectious bodily fluid" to describe an "infected bodily fluid" that is exposed to another in "such a way that the virus could be transmitted," because there are certain bodily fluids, such as saliva, that contain the virus (*i.e.*, are technically "infected") but are incapable of transmitting the virus (*i.e.*, are not "infectious"). *See* J. Campo, et al., "Oral Transmission of HIV, Reality or Fiction? An Update," 12 Oral Diseases 219, 220 (2006) ("The presence of the virus in saliva does not necessarily imply a risk of its transmission to a partner."); 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 ("You won't get AIDS from saliva, sweat, tears, urine or a bowel movement."). It is apparent from the statute itself—and this Court's previous interpretation of it—that one must start with a bodily fluid that is capable of transmitting the virus, or in other words, an "infectious bodily fluid."

Mr. Plendl in a manner that could result in the transmission of HIV. Indeed, the undisputed facts—the use of a condom during anal intercourse, the lack of ejaculation during oral sex, and Mr. Rhoades's undetectable viral load at the time of the alleged crime—all indicate that he did not have the required criminal intent. To the contrary, these facts affirmatively demonstrate that Mr. Rhoades *did not* intend to expose an infectious bodily fluid to Mr. Plendl in a manner that could transmit HIV.

A. The State's argument that there is a factual basis for Mr. Rhoades's conviction relies on an interpretation of the statute that is contrary to its plain meaning.

The State's entire argument regarding the factual basis for Mr. Rhoades's conviction rests on an interpretation of Chapter 709C.1 that effectively eviscerates the *mens rea* element in the statute. Mr. Rhoades was convicted of engaging in "intimate contact" without disclosing his HIV status to Mr. Plendl. Chapter 709C.1 defines the prohibited conduct as follows:

> "Intimate contact" means the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus.

Iowa Code § 709C.1(2)(b). The State essentially urges this Court to interpret Chapter 709C.1 as simply requiring an intent to do an act which, in turn, results in the exposure of the defendant's bodily fluid to the body of another in a manner that could result in the transmission of HIV. According to the State, the defendant's

intent with respect to the exposure of his bodily fluid to the body of another is irrelevant—all that matters is that the defendant intended to do an act which had as its result any possibility of "exposure" to HIV, which the State defines quite broadly. According to the State, the *mens rea* element of the crime exists merely to establish that the statute prohibits acts done intentionally rather than accidentally. Under this interpretation, a defendant can be convicted of violating Chapter 709C.1 even if he does not intend to expose his bodily fluid to the body of another.

The fundamental problem with the State's interpretation of Chapter 709C.1 is that it is contradicted by the plain words of the statute. The prohibited conduct at issue here is "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV." The adjective "intentional" modifies the noun "exposure"—*i.e.*, the "exposure" must be "intentional." Thus, contrary to the State's interpretation, the intent of the defendant regarding the exposure of his bodily fluid to the body of another is not only highly relevant, it is *determinative* of whether a person has, in fact, committed a crime. In effect, the State wants to rewrite the statute to define the prohibited conduct as "*any intentional act that might result in the* exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV." Because the State's interpretation requires that new words

be inserted into the statute, and its argument finds no basis in the current and actual statutory text, it should be summarily rejected.

The State's argument is also at odds with this Court's prior interpretation of the intent element of Chapter 709C.1. In *Musser*, 721 N.W.2d at 749, the Court stated that Chapter 709C.1 makes it a crime for someone to "intentionally expose another person to the defendant's infected bodily fluid in such a way that the virus could be transmitted." The *Musser* interpretation tracks the language of Chapter 709C.1 because, like the statute, it links the required *mens rea* ("intentional") to the specific prohibited *actus reus* ("exposure of bodily fluid to another's body in a manner that could result in the transmission of HIV"). In contrast, the State's interpretation disengages the *mens rea* from the prohibited act, resulting in an interpretation that is different than both the plain meaning of the statutory text and this Court's prior interpretation of that text. Such a rewriting of the statute is unwarranted and unnecessary.

The State attempts to persuade this Court to abandon its prior interpretation of the statute by arguing that the Court should characterize Chapter 709C.1 as a "general intent" crime (as opposed to a "specific intent" crime). The Court should decline the State's invitation to categorize Chapter 709C.1 as a "general intent" crime for several reasons. First, as this Court has noted in several cases, the labels "general intent" and "specific intent" are of limited utility in determining the *mens*

rea required by a particular criminal statute. Over the past decade, this Court has decided several cases presenting the question of what *mens rea* is required under Iowa's assault statute. In these cases, the parties argued that the Court's interpretation should be guided by whether assault is a "general intent" or "specific intent" crime. *State v. Heard*, 636 N.W.2d 227, 231-233 (Iowa 2001) (overruling prior precedent and holding that assault is a specific intent crime); *State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003) (holding that the legislature's amendment to the assault statute declaring assault to be a general intent crime did not alter the substantive elements of the crime); *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004); *State v. Keeton*, 710 N.W.2d 531, 533-534 (Iowa 2006) (declining to revisit which label applies to assault and instead simply focusing on the elements); *State v. Wyatt*, 744 N.W.2d 89, 94 (Iowa 2008) (same); *State v. Fountain*, 786 N.W.2d 260, 263-265 (Iowa 2010) (concluding that a trial court erred in failing to give a specific intent jury instruction because the court concluded that the crime had a specific intent element even though the legislature had declared it to be a general intent crime). Having discussed the applicability of the "general intent" and "specific intent" labels in several of the earlier cases, this Court in *Keeton* expressed significant skepticism about their ultimate utility. In *Keeton*, this Court was asked to decide whether there was sufficient evidence to convict a defendant of second-degree robbery that was based on an underlying assault. The Court

determined that it could decide the question before it—namely, whether the evidence satisfied the statutory definition of assault—without considering whether the statutory language used to define the crime of assault requires a specific or general intent:

> Indeed, "specific intent" and "general intent" do not define criminal mental states. Rather, they are essentially "labels" attached to particular crimes to identify them as admitting ("specific intent") or not admitting ("general intent") the defense of voluntary intoxication. There is no need to attach one of the labels here. The issue is not implicated before this court. Indeed, there is a need not to attach either label. "Specific intent" and "general intent" have been "notoriously difficult . . . to define and apply," and "have proved to be mischievous."

Keeton, 710 N.W.2d at 532, *quoting In re M.S.*, 896 P.2d 1365, 1383-84 (1995) (Mosk, J. concurring) (*internal citations omitted in original).* In *Fountain*, the Court reiterated its view that these labels were not particularly helpful:

> [R]egardless of the specific label attached to the crime—specific intent or general intent—the state must prove the elements of the crime and their accompanying *mens rea* beyond a reasonable doubt.

State v. Fountain, 786 N.W.2d at 265, *citing Keeton*, 710 N.W.2d at 534. Thus, contrary to the State's suggestion, the interpretation of Chapter 709C.1 does not require this Court to attach a label to the criminal offense. Rather, the Court must do what it did quite easily in *Musser*—interpret the statute in light of the plain meaning of the words and then assess the facts before it in light of that meaning.

Furthermore, even if this Court were to conclude that the text of Chapter 709C.1 does not neatly conform to the traditional grammatical structure of a "specific intent" crime, it does not necessarily follow that the crime is a "general intent" crime, as that term has historically been applied. The State describes a general intent crime as one where "the definition of a crime consists of only the description of a particular act, without reference of an intent to do a further act or achieve a further consequence." (Response Brief at 14.) Here, the "particular act" prohibited by Chapter 709C.1 is the "intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus." The "particular act" that is the criminal *actus reus* includes a *mens rea* that cannot simply be brushed aside or ignored. In other words, the selection of a particular label does not change the fact that the plain language of the statute requires the State to demonstrate that Mr. Rhoades ***intended*** to expose his bodily fluid to Mr. Plendl in a manner that could result in the transmission of HIV. This requirement renders the crime for all practical purposes as one of "specific intent," irrespective of whether the grammatical framework of the statute fits neatly into the historical and traditional form.

B. The cases from other jurisdictions to which the State cites are not controlling, not persuasive, and not relevant to the inquiry at hand.

In an apparent attempt to steer this Court toward an interpretation of "intentional exposure" that is not supported by the plain language of Iowa's statute, as well as to bolster the State's view of the public policy purportedly advanced by Chapter 709C.1,[4] the State relies upon opinions from other jurisdictions interpreting language that the State describes as "similar" to the language of the Iowa statute. While it may be true that these statutes generally address a similar concern or legislative interest in promoting public health and slowing the spread of HIV, the fact is that these opinions are not controlling, not persuasive, and not even relevant to the determinations this Court needs to make here.

It is axiomatic that the opinions from these other jurisdictions—none of which are even from the highest court of the states involved (*see, e.g., State v. Bonds*, 189 S.W.3d 249 (Tenn. Crim. App. 2005); *People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App. 1998); *State v. Gamberella*, 633 So. 2d 595 (La. Ct. App.

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[4] It is perplexing that the State acknowledges that the lack of legislative history makes it impossible to establish what the policy aims of the statute are beyond those that can be gleaned from the statute itself (*see* Response Brief at 28), but simultaneously argues that the State's interpretation of the language is supported by the statute's purpose (*see* Response Brief at 14, 20). The purpose of the statute is to prevent the precise conduct the statute prohibits—nothing more, nothing less—and that any additional purpose or public policy the State attempts to graft on to the statute by reference to its own sense of right and wrong, the intent of the Legislature, or statutes and case law in other jurisdictions, is pure speculation.

1993); *State v. Stark*, 832 P.2d 109 (Wash. Ct. App. 1992))—are not in any sense controlling or binding upon this Court. Nor is it apparent in this instance how resorting to an analysis of foreign statutes, allegedly aimed at advancing the same or similar public policies, conducted by the courts of sister jurisdictions are helpful to this Court's task at hand, which, as the ultimate arbiter of Iowa law, is to interpret the plain language of the statutes of the Iowa legislature. In the end, it is this Court's previous opinions interpreting Chapter 709C.1, with appropriate respect for *stare decisis*, that provides all the guidance necessary.

Perhaps more important, the statutes in these foreign jurisdictions differ in significant respects from Chapter 709C.1. For instance, in contrast to the Iowa statute, the Tennessee statute discussed in *State v. Bonds*, 189 S.W.3d 249 (Tenn. Crim. App. 2005)—which the State points to as instructive on the interpretation of the word "exposure" contained in the definition of "intimate contact" included in both statutes—lacks the key modifier "intentional" before it. The juxtaposition of these two terms in the definition of "intimate contact" is a critically important feature of the Iowa statute and the complete absence of the word "intentional" from the Tennessee statute arguably renders it applicable to a much broader range of conduct.

Likewise, the Louisiana statute at issue in *State v. Gamberella*, 633 So. 2d 595 (Ct. App. La. 1993), differs significantly from the Iowa statute. It does not

prohibit only the intentional exposure of a bodily fluid to a body in a manner that could transmit HIV, but much more expansively prohibits intentional exposure to HIV through *any* "sexual contact." Without belaboring the point, each of the statutes at issue in the cases from other jurisdictions cited by the State differs in a meaningful way from Iowa's statute. Not a single one of the cases on which the State relies interprets statutory language identical to that found in Chapter 709C.1. Thus, none of them should be viewed by this Court as persuasive authority for interpreting Iowa's statute on this subject.

Finally, even if the statutes at issue in the cases cited by the State were identical to Chapter 709C.1, the opinions would be of little or no relevance here because their facts differ significantly from the facts here. None of those cases involved consensual sexual activities between two adults, consisting of oral sex without ejaculation followed by protected vaginal or anal intercourse. In fact, many of the cases involved convictions for sexual assault of one kind or another—with the attendant implication of an undeniable intent to harm (*see, e.g.*, *State v. Roberts*, 844 So. 2d 263 (La. Ct. App. 2003); *State v. Morrow*, No. E2001-02796-CCA-R3-CD, 2001 WL 1105371 (Tenn. Crim. App. Sept. 18, 2001))—and the others involved *unprotected* vaginal or anal intercourse and the well-established risk of transmission that accompanies such activity. Therefore, the holdings in

these cases provide little guidance to this Court in determining whether Chapter 709C.1 can properly be applied to the undisputed facts here.

In the end, this Court must apply the unique language of Iowa's HIV criminalization statute to the facts presented by this case. Decisions from other jurisdictions construing different statutes in the context of dissimilar facts are of limited value.

C. The purpose of the statute is not to criminalize any and all sexual acts performed by HIV-positive individuals who do not disclose their status.

The State's articulation of the alleged legislative intent underlying Chapter 709C.1 should be rejected as contrary to the statutory text. The State argues that Chapter 709C.1 should be interpreted as compelling an HIV-positive individual to disclose his or her status to a sexual partner before engaging in any acts of protected and unprotected sex (Response Brief at 20), because the intent of the legislature was to "punish nondisclosure with a criminal statute." (Response Brief at 30.) But Chapter 709C.1 does not criminalize all sex without disclosure. While disclosure is an affirmative defense under Iowa Statute § 709C.1(5), lack of disclosure is not an element of the actual crime itself. Rather, Chapter 709C.1 limits criminal liability to situations involving the intentional exposure of an infectious bodily fluid to another person in a manner that could result in the transmission of HIV. If the legislature had intended to criminalize any and all sex by HIV-positive individuals who do not disclose their HIV status to the partners, it

would have written the statute to say just that. In the end, the State's argument regarding legislative intent is nothing more than an attempt to re-write or paraphrase the statute to bring it in line with the interpretation and public policy goals that the State now wants the Court to adopt and endorse.[5]

D. The State ignores the most probative piece of evidence regarding intent – the use of a condom.

Recognizing that criminal liability under section 709C.1(1)(a) requires proof that the defendant intentionally exposed his infectious bodily fluid to another person in such a way that HIV could be transmitted leads to the inescapable conclusion that no factual basis exists for Mr. Rhoades's conviction. As discussed in the Opening Brief, there are no facts to suggest that Mr. Rhoades acted with the required *mens rea*, and there are no facts to support the conclusion that Mr. Plendl was exposed to bodily fluid in a manner capable of transmitting HIV. Mr. Rhoades used a condom during anal sex. (Opening Brief at 8.) He did not ejaculate

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[5] Given the State's attempt to rewrite the statute to serve the public policy goals the State envisions it should serve, it is somewhat ironic that the State accuses *amici* of attempting to convince this Court to engage in what is properly a legislative function and/or of inappropriately introducing "legislative" facts to adjudicate this matter. (Response Brief at 27-28.) Whether the State likes it or not, the Legislature drafted a statute that included a flexible standard—one that is able to incorporate, at least to a degree, our growing knowledge about HIV transmission and the scientific advances with respect to its treatment. The plain truth is that the courts of this state cannot properly apply Chapter 709C.1 without an understanding of the type of exposure that "could result in the transmission of HIV." It is entirely appropriate for this Court to take judicial notice, as it has done in the past, of the current and widely-held beliefs of the scientific community with respect to HIV.

during the oral sex that preceded the anal sex. (*Id.*) His viral load was medically undetectable. (Opening Brief at 7.) These undisputed facts conclusively demonstrate that Mr. Rhoades did not intentionally expose Mr. Plendl to an infectious bodily fluid in a manner that could result in the transmission of HIV. (Opening Brief at 33-43.)

Mr. Rhoades's use of a condom alone defeats any claim by the State that Mr. Rhoades acted with the requisite intent. Condoms are used by people who intend to have sex, but who do ***not*** intend to expose their bodily fluid to the body of another. Thus, Mr. Rhoades's decision to use a condom is direct evidence that he did not act with criminal intent.

The State does not—because it cannot—refute the argument that the use of a condom reflects the intent *not* to expose one's bodily fluids to another. Instead, the State urges the Court to view the sexual encounter between the two men as involving three separate sexual acts (Response Brief at 6, 12 and 17**)** and to evaluate Mr. Rhoades's intent by "focusing simply on the oral sex." (Response Brief at 34.)

The State's attempt to cobble together a factual basis for criminal liability based on oral sex during which there was no ejaculation should be summarily rejected for several reasons. First, the State's attempt to isolate and evaluate the intent behind each sexual act is inconsistent with the settled legal principle that a

defendant's criminal intent is assessed by evaluating the totality of the circumstances. *See Heard*, 636 N.W.2d at 232 (holding that, when evaluating criminal intent, court consider "the totality of the facts," including both verbal and nonverbal actions). Contrary to the State's argument, Mr. Rhoades and Mr. Plendl did not engage in "three separate sexual acts." (*See* Response Brief at 6, 12 and 17.) Rather, they had a single sexual encounter in which they engaged in oral sex without ejaculation as a precursor to anal sex with a condom. When these facts are viewed in their totality, it is clear that Mr. Rhoades took affirmative steps to avoid exposing Mr. Plendl to his bodily fluid in a manner that could result in the transmission of HIV.

Second, the State utterly fails to explain how oral sex without ejaculation manifests intent to expose infected bodily fluids to another person in a manner that could result in HIV. The State goes to great lengths to argue that Mr. Rhoades's lack of ejaculation does not prove he did not intend to ejaculate, but rather is simply evidence that he did not. (Response Brief at 34-35.) This point is considerably undermined by the fact that the oral sex was a precursor to anal sex, supporting the conclusion that Mr. Rhoades did not intend to ejaculate during oral sex. Further, even assuming that lack of ejaculation during oral sex does not conclusively establish an intent not to ejaculate, it certainly does not establish an affirmative intent to expose another person to a bodily fluid. Indeed, the State's

suggestion that the failure to do an act somehow demonstrates an intent to do the act borders on absurd. The State cannot point to a single fact in support of its position that Mr. Rhoades intended to expose, or did in fact expose, Mr. Plendl to an infectious bodily fluid in a manner that could result in the transmission of HIV.

Third, the State's reliance on *State v. Stevens*, 719 N.W.2d 547 (Iowa 2006), for the proposition that any and all oral sex should be presumed to be an exposure of a bodily fluid to the body of another in a manner that could result in the transmission of HIV is misplaced. In *Stevens*, a thirty-three-year old man was convicted of violating Chapter 709C.1 for having unprotected oral sex with, and ejaculating into the mouth of, a fifteen-year-old boy. *Id.* In affirming the conviction, this Court held that "oral sex is a well-recognized transmission of the HIV." *Stevens*, 719 N.W.2d at 551. Although advancing medical and scientific understanding of HIV transmission makes it unclear whether this holding from *Stevens* will remain helpful,[6] the Court need not revisit that holding here. Unlike the defendant in *Stevens*, Mr. Rhoades did not ejaculate, and the oral sex he engaged in was a precursor to anal sex with a condom – facts which negate

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[6] Indeed, there is a lack of any definitive medical evidence demonstrating that HIV has ever been transmitted through oral sex, particularly by someone with an undetectable viral load. *See* "Risk of HIV Infection Through Receptive Oral Sex," available at http://hivinsite.ucsf.edu/insite?page=pr-rr-05 (last visited Dec. 3, 2012) (panel of scientific experts discussing whether oral sex involves extremely low risk or no risk, in light of the inability to solidly document even one case over 20 years into the HIV/AIDS epidemic).

numerous elements of the alleged offense. Indeed, in *Stevens*, this Court based its conclusions about oral sex on cases in other jurisdictions in which courts recognized that semen was a bodily fluid "well known as a transmitter of the HIV" and applied that knowledge to cases in which defendants ejaculated into another person's mouth. *Id.* Thus, *Stevens* is factually distinguishable from the present case, and its conclusion about oral sex has no applicability here.

Finally, the State's last-ditch effort to save its case by relying on the possible presence of pre-ejaculatory fluid as evidence of Mr. Rhoades's intent is unavailing.[7] The State references a publication by the United States Center for Disease Control that allegedly supports the notion that oral sex without ejaculation constitutes an exposure of bodily fluid to the body of another that could result in

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[7] The State is grasping at straws when it argues that Petitioner could have transmitted HIV while performing oral sex because he had or has periodontal disease. Though the State's assumption that a risk exists under these circumstances may have some surface appeal to the uninformed layperson, the science simply does not support this theory. *See* Stephen C.H. Yeung, et al., "Patients Infected with Human Immunodeficiency Virus Type 1 Have Low Levels of Virus in Saliva Even in the Presence of Periodontal Disease," 167(4) J. Infectious Disease 803, 809 (1993) ("In these patients, virus is present at very low levels, even in the presence of severe periodontal disease."). Furthermore, to the extent periodontal disease plays *any* role in the transmission of HIV, it would be as a result of the HIV-negative person suffering from this condition. J. Campo, et al., "Oral Transmission of HIV, Reality or Fiction? An Update," 12 Oral Diseases 219, 225 (noting that it is the seronegative [HIV-negative] person with bleeding gums who *may* be at some unquantifiable degree of risk while performing oral sex on another).

the transmission of HIV. But the publication on which the State relies addresses the effectiveness of *coitus interruptus* as a method of birth control and disease prevention. The study only discusses heterosexual intercourse and, even in that context, the study makes the following observation about pre-ejaculatory fluid: "The pre-ejaculate fluid can contain HIV-infected cells, although epidemiologic studies ***have not determined the potential of the pre-ejaculate to infect a man's sexual partner***." *See Coitus Interruptus (Withdrawal)* in Family Planning Methods and Practice: Africa, (2nd ed. 2000) Centers for Disease Control and Prevention available at www.cdc.gov/reproductivehealth/ProductsPubs/Africa/Chap_19.pdf at p. 493 (emphasis supplied). Thus, even in the context of unprotected vaginal intercourse, there is no scientific or medical evidence that pre-ejaculatory fluid constitutes an exposure of a bodily fluid to the body of another that could result in the transmission of HIV.[8] The State cites to no authority—either legal or medical—to

[8] It is important to recognize that the mere presence of HIV in a bodily fluid does not render that bodily fluid capable of transmitting HIV. *See* CDC, *Questions and Answers: How is HIV Passed from One Person to Another?,* available at http://www.cdc.gov/hiv/resources/qa/transmission.htm (last visited Dec. 3, 2012) ("HIV can be detected in several fluids and tissue of a person living with HIV. 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. Only specific fluids (blood, semen, vaginal secretions, and breast milk) from an HIV-infected person can transmit HIV.") Therefore, stating that a bodily fluid,

support the claim that pre-ejaculatory fluid emitted during oral sex constitutes a manner in which HIV can be transmitted.

The State should not be permitted to base a conviction under Chapter 709C.1 on a record that lacks any evidence of criminal intent, particularly in light of the significant penalties that attach to the crime. This is not a case involving unprotected sexual intercourse with ejaculation—the behavior that is universally recognized as the primary way in which HIV is transmitted sexually.[9] Rather, this is a case in which safe sex practices were used. Thus, the Court should find that no factual basis exists to conclude that Mr. Rhoades intentionally exposed an infectious bodily fluid to Mr. Plendl in a manner that could result in the transmission of HIV.

CONCLUSION

For the foregoing reasons, the conviction should be set aside, and the charges against Mr. Rhoades should be dismissed altogether or, the matter should be remanded with instructions that Mr. Rhoades be permitted to withdraw his guilty plea.

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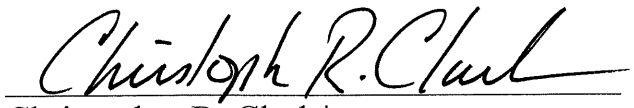
such as pre-ejaculatory fluid, contains HIV tells us nothing about whether it is a bodily fluid capable of *transmitting* HIV.

[9] *See* J. Campo, et al., "Oral Transmission of HIV, Reality or Fiction? An Update," 12 Oral Diseases 219, 219 (2006) ("The immense majority of HIV infections are produced during unprotected sexual intercourse via the vaginal mucosa and especially via the anal mucosa.")

Respectfully Submitted,



Christopher R. Clark*

Christopher R. Clark*
Scott A. Schoettes*
LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.
105 West Adams, Suite 2600
Chicago, IL 60603
Tel: (312) 663-4413
Fax: (312) 663-4307
cclark@lambdalegal.org
sschoettes@lambdalegal.org

Joseph C. Glazebrook
Dan L. Johnston
GLAZEBROOK & MOE, LLP
118 SE 4th Street, Suite 101
Des Moines, IA 50309
T: 515-259-1110
F : 515-259-1112
joseph@glazebrookmoe.com
djohn1945@aol.com

*Admitted pro hac vice

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DATED: December 3, 2012

Christoph R. Clark
Christopher R. Clark

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I, Christopher Clark, hereby certify that on the 3rd day of December 2012, the original and 17 copies of this Reply Brief were mailed to the Iowa Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, IA 50319.

Christoph R. Clark
Christopher R. Clark

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Christoph R. Clark
Christopher R. Clark

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Attorney General
Criminal Appeals Division
1305 E. Walnut Hoover Building
Des Moines, IA 50319

Counsel for Respondent-Appellee

Christoph R. Clark
Christopher R. Clark