IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 12-180

NICK RHOADES,
Applicant-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT
OF BLACK HAWK COUNTY
THE HONORABLE DAVID F. STAUDT, JUDGE

APPELLEE'S BRIEF
AND
CONDITIONAL NOTICE OF ORAL ARGUMENT

THOMAS J. MILLER
Attorney General of Iowa

KEVIN CMELIK
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
Ph: 515/281-5976
Fax: 515/281-4902
e-mail:kevin.cmelik@iowa.gov

THOMAS J. FERGUSON
Black Hawk County Attorney

KIMBERLY GRIFFITH
Assistant County Attorney

ATTORNEYS FOR RESPONDENT-APPELLEE

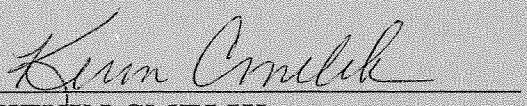
PROOF COPY

PROOF OF SERVICE

On the 17th day of October, 2012 I, the undersigned, did serve the within Appellee's Brief and Argument on all other parties to this appeal by mailing one copy thereof to the respective counsel for said parties:

Joseph C. Glazebrook
Glazebrook & Moe, LLP
118 SE 4th Street, Suite 101
Des Moines, Iowa 50309

Christopher R. Clark
Attorney at Law
11 East Adams, Suite 1008
Chicago, IL 60603



KEVIN CMELIK
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
Telephone: 515/281-5976
Fax: 515/281-4902

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTE

STATE STATUTES

MISCELLANEOUS

UNPUBLISHED OPINION

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

A FACTUAL BASIS EXISTED FOR THE OFFENSE OF THE CRIMINAL TRANSMISSION OF THE HUMAN IMMUNODEFICIENCY VIRUS (HIV) WHERE RHOADES PARTICIPATED IN THREE SEPARATE SEXUAL ACTS WITH THE VICTIM WITHOUT DISCLOSING HIS HIV INFECTED STATUS.

Authorities

State v. Allison, 576 N.W.2d 371 (Iowa 1998)

State v. Bergmann, 600 N.W.2d 311 (Iowa 1999)

McMann v. Richardson, 397 U.S. 759 (1970)

U.S. Const. Amend. VI

State v. Smitherman, 733 N.W.2d 341 (2007)

Iowa Const. art. I, § 10

State v. Straw, 709 N.W.2d 128 (Iowa 2006)

Strickland v. Washington, 466 U.S. 668 (1984)

Hill v. Lockhart, 474 U.S. 52 (1985)

Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)

Paters v. United States, 159 F.3d 1043 (7th Cir. 1997)

Carroll v. State, 767 N.W.2d 638 (Iowa 2009)

State v. Young, 293 N.W.2d 5 (Iowa 1980)

State v. Schminkey, 597 N.W.2d 785 (Iowa 1999)

Ryan v. Iowa State Penitentiary, Ft. Madison, 218 N.W.2d 616 (Iowa 1974)

Brainard v. State, 222 N.W.2d 711 (Iowa 1974)

State v. Williams, 224 N.W.2d 17 (Iowa 1974)

State v. Black, 324 N.W.2d 313 (Iowa 1982)

State v. Fluhr, 287 N.W.2d 857 (Iowa 1980)

State v. Kirchoff, 452 N.W.2d 801 (Iowa 1990)

State v. Marsan, 221 N.W.2d 278 (Iowa 1974)

State v. Bond, 189 S.W.3d 249 (Tenn. Crim. App. 2005)

Karasek v. State, 310 N.W.2d 190 (Iowa 1981)

State v. Aldape, 307 N.W.2d 32 (Iowa 1981)

Parsons v. Brewer, 202 N.W.2d 49 (Iowa 1972)

Sallis v. Rhoads, 325 N.W.2d 121 (Iowa 1982)

Iowa Code § 709C.1(1)(a)

Iowa Code Chapter 709C

Iowa Code § 709C.1(2)(b)

Iowa Code § 709C.1

State v. Knowles, 602 N.W.2d 800 (Iowa 1999)

State v. Buchanan, 549 N.W.2d 291 (Iowa 1996)

State v. Brown, 376 N.W.2d 910 (Iowa App.1985)

State v. Conner, 292 N.W.2d 682 (Iowa 1980)

Eggman v. Scurr, 311 N.W.2d 77 (Iowa 1981)

Musser v. Mapes, 854 F.Supp.2d 652 (S.D. Iowa 2012)

State v. Redmon, 244 N.W.2d 792 (Iowa 1976)

Bacon v. Bacon, 567 N.W.2d 414 (1997)

People v. Jensen, 586 N.W.2d 748 (Mich.App. 1998)

People v. Russell, 158 Ill.2d 23, 196 Ill.Dec. 629, 630 N.E.2d 794 (1994)

People v. Dempsey, 242 Ill.App.3d 568, 182 Ill.Dec. 784, 610 N.E.2d 208 (1993)

Recreational Devs. of Phoenix, Inc. v. City of Phoenix, 83 F.Supp.2d 1072 (D.Ariz.1999)

Alan Stephens, Annotation, *Transmission or Risk of Transmission of Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS) as Basis for Prosecution or Sentencing in Criminal or Military Discipline Case*, 13 A.L.R.5th 628 (1993)

State v. Stevens, 719 N.W.2d 547 (Iowa 2006)

Iowa Code § 915.40(11)

State v. Musser, 721 N.W.2d 734 (Iowa 2006)

Keene v. Ault, Not Reported in F.Supp.2d, 2005 WL 1177905 (N.D Iowa 2005)

State v. Gamberella, 633 So.2d 595 (La.App., 1993)

Idaho Code 39–608

Okla Stat tit 21, 1192.1

ND Cent Code 12.1–20–17

Iowa Code § 707.6A(1)

www.ncbi.nlm.nih.gov/pubmed/12286905

www.catie.ca/fact-sheets/prevention/hiv-transmission-overview

State v. Ferguson, 15 P.3d 1271 (Wash. 2001)

www.cdc.gov/reproductivehealth/ProductsPubs/Africa/Chap_19.pdf.

Borden v. Selden, 259 Iowa 808, 146 N.W.2d 306 (Iowa 1966)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

State v. Hearn, 797 N.W.2d 577 (Iowa 2011)

www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002051/.

State v. Keene, 629 N.W.2d 360 (Iowa 2001)

State v. Walker, 574 N.W.2d 280 (Iowa 1998)

State v. Salkil, 441 N.W.2d 386 (Iowa Ct. App. 1989)

State v. Knox, 536 N.W.2d 735 (Iowa 1995)

State v. Simpson, 528 N.W.2d 627 (Iowa 1995)

State v. Roberts, 844 So.2d 263 (La. App. 4 Cir. 2003)

State v. Stark, 832 P.2d 109 (Wash. App. 1992)

ROUTING STATEMENT

Because this case involves the application of existing legal principles to the facts herein, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(*a*).

STATEMENT OF THE CASE

The petitioner-appellant appeals from the order of the Iowa District Court in Black Hawk County denying him the relief requested in his application for postconviction relief.

On October 8, 2008, Nick Rhoades was charged by trial information with criminal transmission of the human immunodeficiency virus under Iowa Code Chapter 709C. Trial information; App. _____. On May 1, 2009, Rhoades pled guilty and was sentenced to an indeterminate term not to exceed twenty-five years. Judgment and Sentence; App. _____. On September 11, 2009, that sentence was reconsidered and Rhoades was given a suspended sentence with five years of probation. Order on Reconsideration; App. _____.

On March 15, 2010, Rhoades filed an application for postconviction relief. PCR; App. _____. Trial began on April 25, 2011, and concluded on September 6, 2011. Judgment was granted in favor of the State affirming Rhoades' judgment and sentence. PCR Ruling; App. _____. Notice of appeal was filed on January 23, 2012. Notice; App. _____.

ARGUMENT

A FACTUAL BASIS EXISTED FOR THE OFFENSE OF THE CRIMINAL TRANSMISSION OF THE HUMAN IMMUNODEFICIENCY VIRUS (HIV) WHERE RHOADES PARTICIPATED IN THREE SEPARATE SEXUAL ACTS WITH THE VICTIM WITHOUT DISCLOSING HIS HIV INFECTED STATUS.

Preservation of Error and Standard of Review.

Rhoades's failure to file a motion in arrest of judgment does not bar his postconviction appeal, where he alleges that failure to file the motion resulted from ineffective assistance of counsel. *See State v. Allison*, 576 N.W.2d 371, 374 (Iowa 1998).

Review of an allegation of ineffective assistance of counsel is de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

Merits.

The defendant asserts that trial counsel breached an essential duty in failing to file a motion in arrest of judgment. Essentially the defendant's argument is two-pronged, but closely related; that is, that a factual basis was lacking and that counsel was ineffective in failing to correctly inform the defendant about the elements of the offense, primarily the intent element, and allowing him to plead to an offense that was unsupported by the minutes of testimony. Because the "intelligence of the plea" claim is largely dependent upon what factual basis is required, the State will address the factual basis first.

A. General Principles on Ineffective Assistance of Counsel

The United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *See McMann v. Richardson*, 397 U.S. 759, 771 (1970); U.S. Const. 6th Amend. This right is also guaranteed under the Iowa Constitution. *State v. Smitherman*, 733 N.W.2d 341, 347 (2007); Iowa Const. art. I, section 10.

To establish his claim of ineffective assistance of counsel, Defendant must demonstrate that: "(1) his trial counsel failed to perform an essential duty and (2) this failure resulted in prejudice." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006); *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *see also Hill v. Lockhart*, 474 U.S. 52, 57 (1985). The defendant must prove both the "failure to perform" and "prejudice" prongs by a preponderance of the evidence. *Straw*, 709 N.W.2d at 133.

As to the "failure to perform" prong, the defendant must demonstrate his attorney failed to meet the standard of performance required of a reasonably competent attorney. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). The court presumes that the attorney met this standard and avoids second-guessing and hindsight. *Id.* The essential duties required of counsel cannot be set out as a list of detailed rules; simply, if counsel's assistance was reasonable considering all the circumstances, he will have fulfilled his duty. *Strickland*, 446 U.S. at 668, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *Karasek v.*

State, 310 N.W.2d 190, 192 (Iowa 1981). "Improvident trial strategy, miscalculated tactics, mistakes, carelessness, or inexperience do not necessarily amount to ineffective assistance of counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981), *quoting Parsons v. Brewer*, 202 N.W.2d 49, 54 (Iowa 1972); *see also Sallis v. Rhoads*, 325 N.W.2d 121, 123 (Iowa 1982).

Once the defendant establishes the first prong, he must then establish he was prejudiced by his attorney's error. *Id.* at 143. However, the court need not always address both elements; "[i]f the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma*, 626 N.W.2d at 142. On review, the court gives "weight to the lower court's findings concerning witness credibility." *Id.* at 141. When a guilty plea is challenged based on ineffective assistance of counsel, the defendant, to establish prejudice, must show that there is a reasonable probability that, but for counsel's errors, a plea of guilty would not have been entered and the defendant would have insisted on going to trial. *Hill*, 474 U.S. at 59, 106 S. Ct. at 370. This Court has adopted the *Hill v. Lockhart* test for ineffective assistance of

counsel in a guilty plea context. *State v. Straw*, 709 N.W.2d at 133. An objective test is employed to evaluate the likelihood that the defendant would have gone to trial. *Paters v. United States*, 159 F.3d 1043, 1047 (7th Cir. 1997) (requiring objective corroborating evidence to establish prejudice from ineffective assistance that led to entering a plea). In *Carroll v. State*, 767 N.W.2d 638 (Iowa 2009), this Court concluded that whether a particular act by counsel rendered the decision of the defendant to plead guilty involuntary and unintelligent must be determined on a case by case basis.

B. The Factual Basis

A plea of guilty relieves the State from proving the essential elements of the offense. *State v. Young*, 293 N.W.2d 5, 7 (Iowa 1980). However, "[w]here a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty [and] [p]rejudice in such a case is inherent." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999) (citations omitted).

When a guilty plea is tendered the trial judge must make an inquiry on the record, by appropriate method, to satisfy himself there

is a factual basis for the plea. *Ryan v. Iowa State Penitentiary, Ft. Madison*, 218 N.W.2d 616, 618-620 (Iowa 1974); *Brainard v. State*, 222 N.W.2d 711 (Iowa 1974); and *State v. Williams*, 224 N.W.2d 17, 18 (Iowa 1974). The Court has recognized four methods for determining that a factual basis exists for a guilty plea: (1) inquiry of the defendant, (2) inquiry of the prosecutor, and (3) examination of the presentence report and (4) minutes of testimony attached to the indictment or county attorney's information. Those portions of the minutes that are necessary to establish a factual basis for the guilty plea are deemed admitted by the act of the guilty plea. *See State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982) (noting that where portions of the minutes are not necessary to establish a factual basis for the guilty plea, they are considered denied by the defendant); *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980) (overruled on other grounds by *State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990)); *State v. Marsan*, 221 N.W.2d 278, 280 (Iowa 1974).

Iowa Code section 709C.1(1)(a) provides:

> A person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person's human immunodeficiency virus status is positive, does any of the following:

a. Engages in intimate contact with another person.

Iowa Code § 709C.1(1)(a). Chapter 709C defines "intimate contact" as "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." *Id.* § 709C.1(2) (b). The person exposed to the HIV need not become infected with the virus in order for the infected person to be prosecuted under this section. *Id.* § 709C.1. The dispute here, in part, focuses on the meaning of the "intentional exposure" language of the statute. Rhoades asserts that the statute creates a specific intent crime and the facts surrounding the incident demonstrates that he took care to avoid transmitting the virus, thereby indicating a lack of intent. The State submits, contrary to the district court's conclusion, the crime is one of general intent and because the act or acts creating Plendl's exposure to the bodily fluids of Rhoades was not accidental, a factual basis is apparent in the record based upon any one of the three sex acts committed. Rhoades argument that a factual basis is lacking misconstrues both words in the phrase "intentional exposure."

First, Rhoades asserts he did not intend to expose another to his bodily fluid because he wore a condom for one act and did not ejaculate in another. The problem with such an analysis is that the statute does not create a specific intent crime and the word "exposure" is not a synonym for "exchange" or "transfer.". The facts upon which Rhoades relies create no defense and, thereby, do not undermine the factual basis necessary to enter judgment.

The term "intentional" is not defined in the statute. Iowa statutes routinely identify the mens rea of a crime by the terms "knowingly," "intentionally," or "with the intent." *See State v. Knowles*, 602 N.W.2d 800, 804 (Iowa 1999). "Intent" can be either specific intent or general intent. *Id.* In some cases, this Court has looked to the ordinary definition of the word to interpret its meaning. For instance, in *Knowles*, this court noted that the word "intentionally" meant "purposely." *Id.* However, the court also recognized that defining the word is not always itself sufficient to discern the meaning of the statute. "Intent" is a term of art and a definition has developed over time. This is consistently how the court has distinguished the meaning of the word "intentionally" when used

in a statute. *See e.g. State v. Buchanan*, 549 N.W.2d 291, 293 (Iowa 1996) (*citing State v. Brown*, 376 N.W.2d 910, 913 (Iowa App.1985)). The meaning of the statute must be determined as a matter of construction from the language of the act in connection with its manifest purpose and design. *State v. Conner*, 292 N.W.2d 682, 685 (Iowa 1980). When 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, the question for the court is whether the defendant intended to do the proscribed act. *Eggman v. Scurr*, 311 N.W.2d 77, 79 (Iowa 1981) (citation omitted). This intention is commonly referred in the law as general criminal intent, that is, acts that are not intended to achieve an additional consequence, but acts which are not accidental. *Id.* When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. *Id.*

Given the purpose of the statute, it seems unlikely that the legislature would have intended the statute to require any specific intent element. Certainly, the plain language of the statute does not

permit an interpretation that the defendant specifically intended to expose his bodily fluids to the body part of another individual. The crime is one of general, not specific intent. *See Musser v. Mapes*, 854 F.Supp.2d 652, 663 (S.D. Iowa 2012) (statute does not require a specific intent to do harm).

General intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result. *State v. Redmon*, 244 N.W.2d 792, 797 (Iowa 1976) (citation omitted); *see also Bacon v. Bacon*, 567 N.W.2d 414, 417 (1997). The voluntary act here is engaging in a sex act in a manner through which the virus could be transmitted. That act exposes the other to the risk of transmission intentionally. *See also People v. Jensen*, 586 N.W.2d 748, 753 (Mich.App. 1998) (the distinction between a strict-liability crime and a general-intent crime is that, for a general-intent crime, the people must prove that the defendant purposefully or voluntarily performed the wrongful act, whereas, for a strict-liability crime, the people merely need to prove that the defendant performed the wrongful act, irrespective of

whether he intended to perform it). In other words, the defendant must purposely expose his infected fluids to the body part of another, that is, the exposure must not be accidental. Like *Knowles*, the legislature here was creating a statute "to establish and safeguard the public" and "no further interdiction of deed or consequence is contemplated." *Id.* In short, the statute does not contemplate that the act intend a consequence. Rather, it seeks to prohibit acts done intentionally rather than accidentally.

Second, the term "exposure" as used in the statute does not require the exchange or transfer of any bodily fluid. Other state's examining the use of the term "exposure" in similar statutes have found the term means "simply to submit to a risk of contact with bodily fluids or the virus itself." *State v. Bond*, 189 S.W.3d 249, 259-60 (Tenn. Crim. App. 2005). The Louisiana Court of Appeals, upon which the *Bond* court relied, concluded that the terms of a statute very similar to that of Iowa did not require scientific evidence or expert testimony to prove its terms. Evidence of sexual contact was all that was required. *State v. Roberts*, 844 So.2d 263, 271 (La. App. 4 Cir. 2003). The Washington Court of Appeals had also previously

found that the word "exposure" does not mean "transfer." *State v. Stark*, 832 P.2d 109, 112 (Wash. App. 1992). These courts commonly recognize that the term "exposure" means that a risk of contact is created not that fluids are actually transferred. The term includes even acts of protected sex because even condoms are not infallible. Any sexual act of intercourse or oral sex creates a risk of the transmission of the virus.

As a general intent crime, the question remains whether the three separate acts, anal intercourse and two acts of oral sex, described in the minutes were sufficient to establish a factual basis for the offense. This Court has already said it is.

In *State v. Stevens*, this Court said:

> oral sex is a well-recognized means of transmission of the HIV. *See People v. Russell*, 158 Ill.2d 23, 196 Ill.Dec. 629, 630 N.E.2d 794, 795 (1994) (court took judicial notice that intimate sexual contact whereby blood or semen of an infected person is transferred to an uninfected person is a primary method of spreading the infection); *People v. Dempsey*, 242 Ill.App.3d 568, 182 Ill.Dec. 784, 610 N.E.2d 208, 223 (1993) ("In the instant case, defendant placed his penis in the mouth of the victim and ejaculated semen. Defendant acknowledged that semen is a bodily fluid well known as a transmitter of the HIV. Oral sexual intercourse is a penetrative sexual contact which is recognized as allowing transmission of the virus. Thus, defendant clearly exposed the body of another to his bodily fluid in a manner that could result in the transmission of HIV."

> (Emphasis added.)); *Recreational Devs. of Phoenix, Inc. v. City of Phoenix*, 83 F.Supp.2d 1072, 1101 (D.Ariz.1999), aff'd, 238 F.3d 430 (9th Cir.2000) ("It is common knowledge that engaging in sexual intercourse and oral sex without the use of condoms place people at risk for sexually transmitted diseases, including HIV/AIDS."); see also Alan Stephens, Annotation, *Transmission or Risk of Transmission of Human Immunodeficiency Virus (HIV) or Acquired Immunodeficiency Syndrome (AIDS) as Basis for Prosecution or Sentencing in Criminal or Military Discipline Case*, 13 A.L.R.5th 628 (1993) (It is "generally known" that the HIV is "spread by the transfer of bodily fluids such as blood, genital secretions, and perhaps saliva.").

719 N.W.2d 547, 551 (Iowa 2006). This Court recognized that the legislature had actually codified a presumption. *Id. (citing* Iowa Code § 915.40(11). Factually, here Rhoades exposed Plendl to pre-ejaculatory fluid, and potentially both semen and blood by participating in two separate acts of oral sex and one act of anal intercourse.

The factual basis for the offense was established by reference to the minutes of testimony. Through those minutes Adam Plendl informed the court that he had met the defendant in an online chat room. Narrative Report Mohling; APP. ____. The two met personally later and engaged in consensual sex. NR Mohling; App. ____. Plendl asked the defendant if he was "clean" or disease free and the

defendant replied that he was. NR Mohling; App. ____. In fact, the defendant had provided a false name of Nick Weber to him. NR Mohling; App. _____. The anal sex in which they participated was protected, but the oral sex was not. Supplemental Narrative Report pp. 1-2; App. ____. The defendant's online profile also represented that the defendant had a negative HIV status. SNR p. 2, Copy of Webpage; App. ____. In an arranged call from Plendl to Rhoades, Rhoades admitted that he was HIV positive and apologized for not telling Plendl. SNR p. 2; App. _____. He acknowledged that he was receiving treatment at the Mayo Clinic. SNR p. 2; App. _____. Rhoades admitted that he had no excuse, including alcohol, for his lack of candor. SNR p. 2; App. ____. Rhoades also agreed with Plendl's reminder that the oral sex had been unprotected.

In an interview with the police, Rhoades informed the officer that he was HIV positive and had known since 1999. SNR p. 3; App. ____. Following the interview, Rhoades contacted Plendl by phone expressing concern for Plendl, but also pleading with him not to pursue charges against him. SNR p. 4; App. ____. A search of

Rhoades' home uncovered medications used to treat HIV. SNR p. 1; App. ____.

The lack of a specific intent requirement and the lack of an actual transfer fluids is consistent with the public policy reasons underpinning the statute. The purpose of the statute is prevent the spread of the HIV virus by requiring an infected person to obtain informed consent to the act. *See State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006). If given the choice, many would choose not to have sex with someone infected with the HIV virus, even if that sex was protected. Society expects, and more importantly, the legislature codified the right to make that choice. The defendant chose to have sex with Adam Plendl. The statute compelled Rhoades to inform Plendl before engaging in acts of protected and unprotected sex. *Id.* It is also significant that Rhoades did not simply fail to inform Plendl, he affirmatively mislead Plendl by lying to him in writing through the website and in person when asked. By lying to Plendl Rhoades denied Adam Plendl the opportunity to make the choice that the statute requires he be allowed to make. The defendant's intentional act of sexual intercourse and his two acts of oral sex exposed his

bodily fluids to the body part of another in a manner that was possible to transmit the virus.

As the federal court state in *Keene v. Ault*,

> In this case, there is clear evidence that Keene knew of his HIV-positive status; he had unprotected sex with the victim; he knew about the risk of transmitting the virus through unprotected sex; and he did not inform the victim about his HIV-positive status. The statute clearly applies to this conduct. . . .

Keene v. Ault, Not Reported in F.Supp.2d, 2005 WL 1177905 (N.D Iowa 2005). So too did the Michigan court interpret identical language. The "defendant's conduct, i.e., engaging in sexual intercourse with the victim without previously telling him that she was HIV positive, is clearly encompassed by the language of the statute." *People v. Jensen,* 586 N.W.2d 748, 751-52 (Mich.App. 1998) (citing *State v. Gamberella*, 633 So.2d 595, 603 (La.App., 1993) (upholding the constitutionality of Louisiana's statute criminalizing the intentional exposure of individuals to AIDs or HIV without their informed consent). In fact, as the Michigan Court noted fewer than half the states have criminal statutes penalizing the exposure of others to HIV, and very few contain an explicit mens rea requirement. *Id. (citing* Idaho Code 39–608 ("Any person who exposes another in

any manner with the intent to infect or, knowing that he or she is or has been afflicted with [AIDS, ARC, or HIV], transfers or attempts to transfer any of his or her body fluid, body tissue or organs to another person is guilty of a felony"); Okla Stat tit 21, 1192.1 (it is unlawful for a person who knows he or she has AIDS or HIV "and with intent to infect another" to engage in sexual penetration with another where the other person did not consent to the penetration or had not been informed of the AIDS or HIV); ND Cent Code 12.1–20–17 (a person with HIV or AIDS who "willfully transfers" any of that person's body fluid to another person is guilty of a felony unless the risk was fully disclosed and an "appropriate prophylactic device" was used). Still, the court noted that even without a mens rea requirement the statute could be seen as creating a "strict liability, public welfare offense" without requiring the prosecutor to prove mens rea. *Id.*

The rationale that this Court adopted in *Musser* does not require that the statute be interpreted as possessing specific intent. *See Musser*, 721 N.W.2d at 748-49. A defendant who intentionally exposes another to the virus may be just like the first-degree robber who attempts to inflict serious injury on his victim without requiring

specific intent. The risk that is created is the rationale behind the statute, not the intent with which the person acts. This state also has statutes which increase the level of punishment based upon the potential consequences or the results as opposed to the intent. Perhaps a better comparison is the vehicular homicide statute which requires only the voluntary act of driving while under the influence to impose a twenty-five year indeterminate sentence. *See* Iowa Code § 707.6A(1) (2011). A reckless act, an intentional act, or an act that is intended to result in serious consequences can all be punished similarly. The comparative analysis made in *Musser* does not dictate a need to characterize the statute as one of specific intent.

Even if the statute is interpreted to require specific intent to expose bodily fluids to another, whether the defendant intentionally exposed the defendant to bodily fluids is simply a fact question that may be inferred from the nature of the acts and the circumstances surrounding the case. The fact that the defendant did not ejaculate while participating in oral sex does not undermine the factual basis in this case. As to the intent element of the statute, it is significant that first, the defendant concedes that the fact he did not ejaculate was not

because he chose to refrain from doing so. The reason he asserts that he did not ejaculate was because he had psychological problems that made it difficult from him to do so. Tr. p. 187, lines 3-25, Tr. p. 208, lines 4-11; App. _____. Even if one accepts that testimony, an assertion greatly undermined by the fact he did ejaculate during the anal sex and that a fact upon which no other evidence was offered, the psychological problems did not make it impossible for him to ejaculate nor did it necessarily make it unusual for him to do so.

More importantly, as already argued, the lack of ejaculation is not a defense. Again, the court has already rejected the defendant's argument. In *State v. Musser*, 721 N.W.2d at 761 , this Court stated that the undisputed testimony in the record was that the HIV virus could be transmitted without ejaculation. Even the medical expert testifying on behalf of the petitioner concedes it is possibility that the virus is transmitted through unprotected oral sex. Tr. pp. 417-20, lines 14-9; App. ____. The risk reduces, said the doctor, with treatment. Tr. p. 420, lines 1-9; App. _____. It is unlikely that the legislature intended the statute to turn on whether a particular individual was consistent with his medication or inconsistent and the

rising and falling risk based upon that continuing treatment. Additionally, the act of oral sex without protection is the manner in which the virus could be transmitted. Whether the petitioner ejaculated or did not ejaculate is not relevant for the purposes of the statute. The phrase "in a manner that could" does not refer to the particular act that Rhoades committed, that is, whether he ejaculated or did not ejaculate, it refers to the acts generally. Any kind of act in which a potential exchange of fluids exists is the kind of act that is criminalized by the statute. For the purposes of this case, one question accepting the Rhoades interpretation of the statute is whether unprotected oral sex is a manner in which the virus can be transmitted? The answer to that question is yes, even if improbable. The State is not required to prove whether the defendant ejaculated or did not ejaculate because that is not the "manner" to which the statute refers. Although recent studies debate whether sperm is present in pre-ejaculate fluid, at least, one recent study has found evidence that HIV was present in that fluid.

www.ncbi.nlm.nih.gov/pubmed/12286905; see also

www.catie.ca/fact-sheets/prevention/hiv-transmission-overview

(HIV may be transmitted through preejaculate during oral sex); *see also State v. Ferguson,* 15 P.3d 1271, 1272 fn. 6 (Wash. 2001) (recognizing expert testimony that the virus could be present in pre-ejaculatory fluids). The United States Center for Disease Control notes that the potential for infection exists both from unintentional ejaculation and pre-ejaculate fluid. www.cdc.gov/reproductivehealth/ProductsPubs/Africa/Chap_19.pdf . In *Musser*, this Court concluded that the manners in which the virus could be transmitted could be determined by reference to the position of the United States Center for Disease Control. *State v. Musser*, 721 N.W.2d 734, 747 (Iowa 2006).

Additionally, the minutes reveal that the petitioner also performed oral sex upon Adam Plendl and did so while suffering from periodontal disease. Minutes, 07-08-08 University of Iowa Hospital Report; App. _____. Of course, one of the symptoms of periodontal disease is bleeding gums. www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002051/. By having unprotected oral sex with Plendl when he risked transferring blood to Plendl's penis, the possibility of transmission existed as this court has

already judicially noticed the risk of transmission through the exchange of blood. *State v. Keene*, 629 N.W.2d 360, 365 (Iowa 2001); *State v. Stevens*, 719 N.W.2d 547, 550 (Iowa 2006).

Further, the amicus brief in support of the petitioner's cause is largely an issue of policy for the legislature and not the courts. The basic premise of the argument may be summarized as follows: the understanding of HIV both as to its transmission and its treatment have significantly advanced over the last thirty years rendering the statute outdated and unjustly harsh. First, it is generally for the legislature to determine the interests of public when drafting legislation and the court should avoid declaring public policy with generalized concepts of fairness and justice. *Fitzgerald*, 613 N.W.2d at 283. The remedy for unwise or oppressive legislation within constitutional bounds is not to be found in the courts but by appeal to the legislators. *Borden v. Selden*, 259 Iowa 808, 146 N.W.2d 306 (Iowa 1966). Secondly, the policy argument is supported by a wealth of "evidence" that does not exist in this record. Anyone with a computer and Google can now offer in the form of secondary authority a wealth of facts that are not legislative but, in fact,

adjudicatory. This court in *Keene* took judicial notice of the fact that the HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse in that case is one of the most common methods of passing the virus. However courts should take care when the assertions being offered through secondary sources are offered to adjudicate the decision in this particular case. *See Varnum v. Brien*, 763 N.W.2d 862, 881 (Iowa 2009) (recognizing the distinction between legislative and adjudicative facts). However, underlying policy considerations are relevant only where the statute is subject to different interpretations.

It is significant that legislative history does not exist in any organized fashion in this state and the policies supporting a particular interpretation or construction are best found in what the statute says, bnot what it could have said. *See State v. Hearn*, 797 N.W.2d 577, 586 (Iowa 2011) (Because extrinsic legislative history in Iowa is generally sparse, our cases rarely discuss such materials in reaching an authoritative construction of a criminal statute.) Criminal statutes "are not to be construed so strictly as to defeat the obvious intention of the Legislature". *Id.* (citations omitted). First, the statute is a

class "B" felony which indicates the concern that the legislature had with people's exposure to the virus. Secondly, the criminal act is simply the potential exposure to the virus, not contraction of the disease that the legislature chose to punish. The sexual act that risked exposure was the nature of the thing they sought to deter. Finally, the only codified defense that exists in the statute is that the other person participating knew that the defendant was HIV positive, understood the risk of infection, and consented to the action of exposure with that knowledge. The affirmative defense language most significantly points to the public policy underpinning the statute, that is, informed consent. It is significant that the statute does not create an affirmative defense that the defendant wore a condom or "chose" not to ejaculate. It is this language that undermines the assertion that the public policy that the statute promotes is "safe sex." In fact, one expert testifying in the postconviction hearing testified that transmission in the statute "is a misnomer....it's a disclosure law." Tr. pp. 402-03, lines 10-3; App. _____.

While continuing discoveries in medical science may convince the legislature to revisit the statute, those continuing studies do not shed much light on the legislative policy when the statute was adopted. Nor do those studies necessarily dictate a change in the statute. It is an indisputable fact that if left untreated HIV infection is highly probable to develop into AIDS. As such the disease is largely fatal. With treatment, it is significantly less likely to result in death, but it is a chronic illness that will need regular treatment and medication for a lifetime. It is eminently reasonable that a person who might infect someone with a chronic disease requiring a lifetime of medication disclose that fact before exposing another. It is within the legislature's prerogative to punish nondisclosure with a criminal statute.

Counsel was not ineffective in failing to file a motion in arrest of judgment based upon a lack of a factual basis because a factual basis existed. Counsel has no duty to file a frivolous motion.

C. The Intelligence of the Plea

The evidence Rhoades now offers with regard to the prejudice prong of the *Strickland* test is primarily his own testimony and that

of his mother. Neither presents the kind of objective evidence that courts examine when applying the *Hill* standard. In fact, neither actually testifies specifically had they understood the elements of the offense Rhoades would have gone to trial. Subjectively, the *Hill* standard is not satisfied.

Furthermore, the applicant's newly found objections to the factual basis in this case are undermined by both the record created at the time of the plea and his lack of credibility as demonstrated at the postconviction hearing.

At the time of the plea, the court asked the defendant if he understood what the state would have to prove. Plea Tr. p. 8, lines 8-18; App _____. He replied that he did. Tr. p. 8, line 19; App. ____. The court asked the defendant if he had engaged in intimate contact with another. Tr. p. 9, lines 3-5; App. ____. 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. Rhoades's counsel testified that he discussed the elements of the offense with the defendant on more than one occasion. First, he discussed the elements of the offense with his family. PCR Tr. p. 289,

lines 3-13; App. _____. Me.tcalf also consulted with doctors about HIV/AIDS before the defendant took his advice to plead guilty. Tr. pp. 289-90, lines 04-03; App. _____. He obtained statistics on infection rates and manners of infection. Tr. p. 302, lines 4-14; App. _____. Then he discussed those elements with Rhoades. Tr. p. 290, lines 23-25; App. _____. When Rhoades returned to Black Hawk County after treatment, he seemed to understand the circumstances better. Tr. p. 292, lines 17-25; App. _____. Counsel's perception was that the Rhoades was an intelligent person and readily understood what was being discussed between them. Tr. p. 302, lines 4-20; App. _____. For his part, Rhoades simply asserted that defense attorney Metcalf did not explain those things and, in fact, Rhoades claimed that he had lied to the court during his entire colloquy because he was "controlled" by Metcalf. Tr. p. 216, lines 6-14; App. ____. In examining other issues raised by the applicant below, the court found that applicant's testimony lacked credibility. Ruling p. 7; App. _____. For instance, the applicant conveniently testified that he was never told that even with a low viral load he could transmit the virus to others. PCR Tr. pp. 159-60, lines 18-17; App. _____. He insisted he

was unaware of the risks. Yet in a recorded telephone conversation with Adam Pleml, he talked openly about the risks. PCR Tr. pp. 160-62, lines 18-3; App. ____. Further, medical professionals involved with his treatment testified that they would have informed him of all the attendant risks. PCR Tr. pp. 408-09, lines 8-7; App. ____. The court found that it was "obvious" from the record that the Rhoades was "very well-versed in the causes and preventative measures needed to be taken. . . ." Ruling p. 7; App. _____. The "applicant was aware of how a person could be infected from sexual contact." Ruling p. 7; App. _____. The court specifically found that Rhoades was not credible when he disputed that he understood what the phrase "intimate contact" meant. Ruling p. 8; App. ____. The standard for effective assistance of counsel is not that counsel acted perfectly or even that he be correct in his assessment. The record demonstrates that counsel did what was necessary to allow Rhoades to make a informed decision.

In part, Rhoades would have this Court conclude that he would have gone to trial if properly advised because when he performed anal sex on Plendl he used a condom and when he received oral sex

he did not ejaculate. Focusing simply on the oral sex, it is significant that first, the defendant concedes that the fact he did not ejaculate was not because he chose to refrain from doing so. The reason he asserts that he did not ejaculate was because he had psychological problems that made it difficult from him to do so. Tr. p. 187, lines 3-25, Tr. p. 208, lines 4-11; App. _____. Even if one accepts that testimony, on which no other evidence was offered and about which the court had substantial doubt, the psychological problems did not make it impossible for him to ejaculate nor did it necessarily make it unusual for him to do so. More importantly, anyone with a minimal understanding of sex must recognize that bodily fluids are released without ejaculation. As discussed in the above subdivision, this Court has already taken judicial notice of manner in which HIV can be transmitted including unprotected oral sex in which bodily fluids are exchanged. At least one recent study has found evidence that HIV is present in pre-ejaculate fluid, and the United States Center for Disease Control notes that the potential for infection exists both from unintentional ejaculation and pre-ejaculate fluid, as set forth above. Objectively, it is unreasonable to believe that Rhoades would have

chosen to go to trial to offer the defense that he did not think he could ejaculate during unprotected oral sex. First, because it is no defense as the possibility exists that the virus may be transmitted in that way and, secondly, because his testimony is not credible. He offered no evidence to substantiate his condition and his conduct as revealed in Andrew Plendl's testimony belies that assertion.

More importantly, that he did not ejaculate, if true, is not evidence that he did not intend to ejaculate, assuming the statute requires such a showing. It is simply evidence that he did not. Intent is seldom capable of direct proof. *State v. Walker*, 574 N.W.2d 280, 289 (Iowa 1998). Intent instead must frequently be proven by circumstantial evidence. *Id.* Because intent is rarely susceptible to direct proof, the factfinder may determine intent by such reasonable inference and deduction as may be drawn from the facts proved by evidence in accordance with common experience and observation. *State v. Salkil*, 441 N.W.2d 386, 387 (Iowa Ct. App. 1989). It is important to recall that circumstantial evidence is as probative as direct evidence. *State v. Knox*, 536 N.W.2d 735, 741 (Iowa 1995). In fact, it has been routinely recognized that circumstantial evidence

may be superior to direct evidence. *Id.* Further, inferences from that circumstantial evidence are a staple of the adversarial fact-finding system. *State v. Simpson*, 528 N.W.2d 627, 631 (Iowa 1995).

The defendant's act of oral sex does not reveal that he took precautions to avoid exposing Plendl to his bodily fluids. Quite the opposite, the act was unprotected and fluids were exchanged. Rather, based upon the defendant's own testimony, it was obvious with the oral sex he was willing to accept the lower risk of transmission without disclosing the presence of the virus. First, he asserted that he was basically impotent and did not successfully ejaculate and, second, he offered testimony about his low viral load and the lower probability of transmitting the virus through oral sex. In other words, he was willing to take that risk, but deprived Plendl of making that choice by failing to disclose his condition.

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this Court affirm the defendant's judgment and sentence.

CONDITIONAL NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon submission of this cause, and in the event that appellant is granted oral argument, counsel for appellee hereby desires to be heard in oral argument.

COST CERTIFICATE

We certify that the cost of printing Appellee's Brief and Argument was the sum of $13.50.

THOMAS J. MILLER
Attorney General of Iowa

KEVIN CMELIK
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) or (2) because:

   - This brief contains **6,385** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. P. 6.903(1)(*f*) because:

   - This brief has been prepared in a proportionally spaced typeface using WordPerfect 8.0 in Georgia font, size 14.

Kim Cmelik
Signature

10-19-12
Date