IN THE IOWA SUPREME COURT

Supreme Court No. 12-0180

Court of Appeals No. 5-372 / 12-0180

District Court No. PCCV112123

NICK RHOADES,
Applicant/Appellant,

v.

STATE OF IOWA,
Respondent/Appellee.

Court of Appeals Decision Filed October 2, 2013

APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED

I. Is a defendant's Sixth Amendment right to effective assistance of counsel violated if the court accepts a guilty plea for an alleged violation of Chapter 709C.1 without establishing *during the plea colloquy* that the defendant understands the State would be required to prove both that the defendant intentionally exposed his bodily fluid to the body of another and that the alleged intentional exposure of bodily fluid was one that could result in the transmission of HIV?

II. Is a defendant's Sixth Amendment right to effective assistance of counsel also violated if the criminal trial court accepts a guilty plea to a violation of Chapter 709C.1 when a factual basis does not actually exist for one or more of the aforementioned elements of the crime?

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STATEMENT SUPPORTING FURTHER REVIEW

This Court should grant further review to enforce Iowa R. Crim. P. 2.8(2)(b) and prevent a violation of constitutional rights in this and future cases.[1] Rule 2.8(2)(b) requires the court to address the defendant in open court to determine that the defendant understands the nature of the charge to which the plea is offered. An examination of the transcript of the plea colloquy in this case reveals that the criminal trial court did not discuss or explain two critical elements of Chapter 709C.1, and thereby failed to ensure the defendant adequately understood the crime to which he was admitting guilt. Neither court below addressed these manifest violations of criminal procedure and the constitutional rights such procedures are designed to safeguard. It is therefore imperative that this Court do so—to rectify the constitutional violation that has taken place in this case, and to reiterate and reinforce how seriously this Court takes the procedures it has established to protect an individual's constitutional rights.

This Court should also grant further review to correct the misinterpretation and misapplication of previous statements it has made regarding HIV and its transmission, to ensure that criminal defendants are not found guilty of—or encouraged to plead guilty to—violations of Chapter 709C.1 for which there is no

[1] *See* Iowa R. App. P. 6.1103(1)(b)(1); Iowa R. App. P. 6.1103(1)(b)(2).

factual basis.[2] By its explicit terms, Chapter 709C.1 requires the State to establish there was an intentional exposure of bodily fluid to body part that could result in the transmission of HIV. Unlike statutes in some other states addressing potential exposure to HIV, the Iowa statute requires the State to prove that the particular exposure of bodily fluid at issue was one that could result in transmission. In previous cases involving Chapter 709C.1, this Court has made statements about HIV and its transmission that have been overtaken by advances in medical treatment and our ever-evolving, more nuanced understanding of HIV transmission. This Court should grant further review in order to revisit these statements, to clarify the role such statements should play in this and future prosecutions, and to prevent convictions under Chapter 709C.1 for which—according to current scientific understanding of HIV—there is no factual basis.

[2] *See* Iowa R. App. P. 6.1103(1)(b)(3); Iowa R. App. P. 6.1103(1)(b)(4).

STATEMENT OF THE FACTS

Mr. Rhoades has HIV. (Rhoades Testimony, App. at 46:10-13.) As of June 2008, he had been receiving treatment for this condition for some time, including highly active antiretroviral medications used to prevent HIV from replicating in the human body. (Aff. of Dr. Jeffery L. Meier, MD ("Aff. of Dr. Meier"), App. at 329, ¶ 16; Dr. Meier Testimony, App. at 369:10-21.) As a result of his treatment, his viral load—a measure of the amount of HIV in a person's blood—was undetectable as of May 2008. (Aff. of Dr. Meier, App. at 329, ¶ 16; Rhoades Testimony, App. at 48:14-49:20.)

In the late night hours of June 25, 2008 or the early morning hours of June 26, 2008, Mr. Rhoades met Adam Plendl ("Mr. Plendl") online. (Narrative Report, App. at 13.) After the two men chatted for some time online, Mr. Plendl invited Mr. Rhoades to his residence. (Ruling, App. at 387; Rhoades Testimony, App. at 54:3-24.)

At Mr. Plendl's residence, the two men chatted for several hours. (Ruling, App. at 387; Rhoades Testimony, App. at 57:12–58:3.) At some point, the social conversation advanced to physical contact. (Ruling, App. at 387.) The physical activity progressed from kissing and caressing to oral sex and anal intercourse. (Rhoades Testimony, App. at 59:9-18; Plendl Testimony, App. at 184:9–185:5; Ruling, App. at 387.) The district court found that Mr. Rhoades was the insertive

partner during both oral sex and anal intercourse, and Mr. Plendl was the receptive partner. (Ruling, App. at 387.) It is *undisputed* that Mr. Rhoades did not ejaculate during oral sex. (Rhoades Testimony, App. at 62:2-7; Plendl Testimony, App. at 185:14-20.) It is also *undisputed* that the parties used a condom during anal intercourse. (Narrative Report, App. at 13; Rhoades Testimony, App. at 60:12–61:2; Plendl Testimony, App. at187:16-19.)

Several days after their encounter, Mr. Plendl learned from a friend that Mr. Rhoades might be HIV positive. (Ruling, App. at 387.) Subsequently, the police were contacted and began investigating the matter. (Narrative Report, App. at 13.) The police investigation yielded an assortment of evidence, including medical records, a blood sample from Mr. Rhoades, written statements from Mr. Plendl and recorded statements of Mr. Rhoades speaking to Mr. Plendl and to the police. (Narrative Report, App. at 15-16.) There is, however, no evidence within the investigation file to support the conclusion that Mr. Plendl was ever exposed to an infectious bodily fluid, and it is undisputed that Mr. Plendl did not contract HIV as a result of his encounter with Mr. Rhoades. (Plendl Testimony, App. at 180:17–181:4.)

The police arrested Mr. Rhoades on or about September 29, 2008. (Ruling, App.at 387.) After his arrest, Mr. Rhoades engaged the services of Attorney Metcalf. (Rhoades Testimony, App. at 67:1-5.) Attorney Metcalf did not avail

himself of any formal discovery, except for one incomplete deposition of the complaining witness. (Metcalf Testimony, App. at 295:19–297:6; Rhoades Testimony, App. at 77:5–78:2.) Attorney Metcalf did not speak with Mr. Rhoades's HIV specialist, Dr. Meier, other than to arrange for his appearance to testify at sentencing. (Dr. Meier Testimony, App. 347:13-18; Rhoades Testimony, App. at 105:21-25; Metcalf Testimony, App. at 266:22–267:3.)

During his plea colloquy, Mr. Rhoades was never asked whether he intentionally exposed Mr. Plendl to bodily fluids containing HIV or whether he did so in a manner that could result in HIV transmission. (Tr. of Criminal Proceedings, May 1, 2009, App. at 31:16–38:9.) Instead, Mr. Rhoades was simply asked whether he had engaged in "intimate contact" with Mr. Plendl. (*Id.,* App. at 37:3-5.) Acceptance of the plea was predicated upon his affirmative response to this question.

ARGUMENT

Further review is justified when the court of appeals has erroneously decided (or ignored) a substantial issue of constitutional law in conflict with decisions of this Court, as well as when there is an important question of changing legal principles or issue of broad importance that this Court should determine or address. *See* Iowa R. App. P. 6.1103(1)(b). Mr. Rhoades seeks further review of the two issues originally presented on appeal in these post-conviction relief proceedings,

both of which are based on the ineffective assistance he received from counsel in the criminal proceedings that resulted in his conviction. The district court erred in denying Mr. Rhoades's petition for post-conviction relief, because Mr. Rhoades's counsel in the criminal proceedings provided ineffective assistance: (1) by allowing the criminal trial court to accept a guilty plea without inquiring properly into Mr. Rhoades's understanding of the elements of the crime; and (2) by allowing Mr. Rhoades to plead guilty when there was no factual basis for the plea.

To understand how Mr. Rhoades's Sixth Amendment right to effective assistance was violated, it is necessary to evaluate the elements of criminal liability under Chapter 709C.1. Chapter 709C.1 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.
>
> * * *

Iowa Code § 709C.1(1)(a). The term "intimate contact" is defined in a separate section of the statute:

> "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).

Chapter 709C.1 includes both an explicit *mens rea* element—requiring the State to prove that a defendant *intentionally* exposed his bodily fluid to the body of another[3]—and a separate element regarding whether that intentional exposure could result in the transmission of HIV.

I. The Court should grant further review to enforce the rules of criminal procedure designed to safeguard against violation of a defendant's constitutional rights.

The criminal trial court was required to conduct a plea colloquy that adequately explored the factual basis for each of the elements of the crime, including the intent element. By allowing the criminal trial court to accept a guilty plea based on a constitutionally defective colloquy, defense counsel provided ineffective assistance to Mr. Rhoades.

A. A criminal defense attorney provides ineffective assistance when counsel permits a client to plead guilty to a crime for which there is no factual basis.

Mr. Rhoades's right to effective assistance of counsel during the criminal proceedings that resulted in his conviction is guaranteed by the Sixth Amendment to the United States Constitution. *See* U.S. Const. amend. VI. To prevail on a

[3] It is beyond dispute that the intent element of the crime is found within the definition of "intimate contact." *State v. Musser*, 721 N.W.2d 734, 749 (Iowa 2006) (holding that the definition of "intimate contact" requires a state of mind that is the functional equivalent of an intent to injure); Appellate Decision at 7-8 (discussing conduct the court believes generally "evidences one's intent to expose that person to bodily fluid").

claim of ineffective assistance of counsel, a defendant must show, by the preponderance of the evidence, that (1) trial counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

It is well-established that counsel fails to perform an essential duty if he permits a client to plead guilty to a crime when there is no factual basis in the record for the offense. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005); *Schminkey*, 597 N.W.2d at 788; *Doggett*, 687 N.W.2d at 102; *see also State v. Gaines*, No. 1-327/00-0045, 2001 Iowa App. LEXIS 617 at *20 (Iowa App. 2001). When counsel breaches an essential duty in this particular way—*i.e.*, by permitting a client to plead guilty to a crime for which there is no factual basis—a separate showing of prejudice is not required, because prejudice in such cases is inherent. *Schminkey*, 597 N.W.2d at 788, *citing State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996) (holding that where there is no factual basis for a guilty plea, ineffective assistance of counsel is established); *State v. Myers*, 653 N.W.2d 574, 579 (Iowa 2002) ("Establishing ineffective assistance of counsel on the basis that a guilty plea lacks a factual basis does not require a separate showing of prejudice.").

To ensure there is a factual basis for a criminal conviction pursuant to a guilty plea, Rule 2.8(2)(b) of the Iowa Rules of Criminal Procedure requires the court to address the defendant in open court and to determine that the defendant

understands the nature of the charge to which the plea is offered. Iowa R. Crim. P. 2.8(2)(b)(1). The court's inquiry into the defendant's understanding of the nature of the charge must "be sufficient to demonstrate the defendant's understanding of the law in relation to the facts." *State v. Galbreath*, 525 N.W.2d 424, 427 (Iowa 1994), *citing State v. Brown*, 262 N.W.2d 557, 562 (Iowa 1978). A plea colloquy fails to satisfy Iowa R. Crim. P. 2.8(2)(b)(1) if the court leaves it to the defendant to determine for himself if his conduct falls within the purview of the criminal statute, or if subtle but crucial nuances of the criminal statute are left unexplained. *Galbreath*, 525 N.W.2d at 427.

A crucial component of any plea colloquy is the trial court's inquiry into the factual basis for—and the defendant's understanding of—any intent element in the applicable criminal statute:

> Where the State must prove an element of intent, a court must be certain that the defendant, before pleading guilty, understands that element.

State v. Worley, 297 N.W.2d 368, 371 (Iowa 1980), *citing State v. Fluhr*, 287 N.W.2d 857, 866 (Iowa 1980); *see also State v. Henning*, 299 N.W.2d 909, 910 (Iowa App. 1980). In numerous cases, Iowa courts have concluded that legal error occurs if a trial court fails to conduct an adequate inquiry into the intent element of a crime during a plea colloquy. For example, in *Schminkey,* this Court vacated a defendant's theft conviction because no facts and circumstances in the plea

recitation would allow an inference the defendant intended to permanently deprive the owner of his vehicle. *Schminkey*, 597 N.W.2d at 789-92. Similarly, in *Fluhr*, this Court set aside a theft conviction and permitted a defendant to plead anew because there was no sign that the defendant had the intent to deprive the owner of property or that he even understood that intent was a necessary element of the crime. *Fluhr*, 287 N.W.2d at 866. *See also Brainard v. State*, 222 N.W.2d 711, 721 (Iowa 1974) (reversing the denial of petition for post-conviction relief because the trial court's inquiry into the intent component of a theft conviction was inconclusive as to both whether the defendant understood the charge and whether a factual basis existed to establish the requisite intent); *Gaines*, 2001 Iowa App. LEXIS 617 at *21 (vacating defendant's conviction on various charges because the record was "devoid of any attempt by the district court to determine whether [the defendant] possessed the requisite intent or knowledge for the offenses charged"); *Henning*, 299 N.W.2d at 911 (reversing defendant's conviction because the trial court did not advise defendant regarding the intent element).

B. During the plea colloquy, Mr. Rhoades's counsel was ineffective when he permitted the trial court to accept a plea without probing the factual basis for the elements of the crime, including the intent element.

A review of the transcript of the colloquy between the criminal trial court, the prosecutor, Mr. Rhoades and Mr. Metcalf reveals that Mr. Metcalf permitted the trial court to accept a guilty plea when there was no factual basis in the record.

(*See* Tr. of Criminal Proceedings, May 1, 2009, App. at 36:8–38:9.) Set forth below is the full extent of the criminal trial court's exploration of Mr. Rhoades's understanding of the specialized legal meaning of "intimate contact" under the statute:

> THE COURT: And did you engage in intimate contact with another person?
>
> THE DEFENDANT: Yes, sir.

(Tr. of Criminal Proceedings, May 1, 2009, App. at 37: 3-5.)

Mr. Rhoades's counsel provided ineffective assistance by allowing the court to accept a plea without probing the factual basis for all of the individual elements of the crime and, in particular, the *mens rea* element. By simply asking Mr. Rhoades if he engaged in "intimate contact" with another person, the court was using a legal term of art without explaining its meaning. "Intimate contact" has a very specific definition in the statute, which includes several of the critical elements that the state must prove to convict someone, including the *mens rea* required. The court took an impermissible "short cut" to establish the factual basis for the plea and, in the process, failed to inquire meaningfully about the elements of the crime, resulting in a violation of Mr. Rhoades's constitutional rights to due process and effective assistance of counsel. *See Galbreath*, 525 N.W.2d at 427.

It is important to recognize that the plea colloquy required under Rule 2.8 is not merely some picayune, technical requirement. Rather, the requirement that the

court establish the defendant's understanding of the elements of a crime reflects the bedrock principle that "[a] plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" *Bousley v. United States*, 523 U.S. 614, 618, 118 S. Ct. 1604, 1609 (1998), *citing Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970). A plea is not considered intelligent unless the defendant receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Bousley*, 523 U.S. at 618, *citing Smith v. O'Grady*, 312 U.S. 329, 334, 61 S. Ct. 572, 574 (1941).

Similarly, the plea colloquy required under Rule 2.8 is not subject to a "harmless error" analysis. Quite the opposite: because this Court has recognized how very important it is for the defendant to understand the elements of the crime and to make a voluntary and intelligent plea based on that understanding—as well as how difficult it would be for a defendant to subsequently prove confusion or lack of understanding regarding the elements of the crime and resulting prejudice—this Court has held that prejudice is presumed when the requirements of Rule 2.8 are not evidently met within the record. *Schminkey*, 597 N.W.2d at 788. This presumption in favor of a criminal defendant serves as the only truly meaningful bulwark against an erroneous conviction based on a misunderstanding as to the conduct in fact prohibited by the statute.

C. Both the district court and the court of appeals ignored the argument that the plea colloquy was inadequate.

In their respective rulings on post-conviction relief, both the district court and the court of appeals effectively ignored Mr. Rhoades's argument that the plea colloquy was constitutionally defective. Mr. Rhoades's assertion that the plea colloquy was inadequate required these courts to examine the criminal court transcript to determine if the court had conducted a proper examination of the factual basis of the alleged crime. As discussed above, such an examination quickly reveals that the criminal trial court failed to conduct a proper inquiry, particularly with respect to the intent element of the crime. The district court, however, never discussed the plea colloquy at all in its opinion, and the court of appeals discusses it only to describe the petitioner's argument on appeal. (Ruling, *passim*; Court of Appeals Decision at 4.) Instead of addressing this argument, both courts skip to the question presented by Rhoades's other basis for post-conviction relief—*i.e.*, that no factual basis for the guilty plea in fact existed—and then do not circle back to the original claim of a deprivation of constitutional rights inherent in the failure to ensure on the record *that the defendant* understood, before pleading guilty, what conduct would constitute a violation of Chapter 709C.1.

In essence, both courts appear to have misunderstood the ramifications of, and the remedy for, Mr. Rhoades's claim regarding the plea colloquy. The criminal court's failure to conduct an adequate plea colloquy was a constitutional

deprivation that could not subsequently be erased, discounted, or disregarded as a result of subsequent testimony presented at sentencing or in the civil proceeding. Rather, when it is determined that a criminal trial court has conducted an inadequate inquiry into the factual basis for a guilty plea, the defendant is, as a matter of law, entitled to withdraw his plea and determine, with the effective assistance of counsel and with a proper understanding of the elements of the crime, whether he should instead plead "not guilty" and proceed to trial. *See, e.g., Fluhr*, 287 N.W.2d at 868-69 (setting aside conviction and permitting defendant to plead anew because trial court had not determined a factual basis for the plea existed).

The refusal of the lower courts to enforce the criminal procedural protections established by this Court—and the potential deprivation of constitutional rights to due process and effective assistance of counsel that those protections are designed to safeguard—is a compelling and entirely independent reason for this Court to grant further review. Iowa R. App. P. 6.1103(1)(b)(1)-(b)(2).

II. This Court should grant further review to correct the misinterpretation and misapplication of its prior statements regarding HIV transmission, and thereby prevent convictions under 709C.1 for which there is no factual basis.

Although the procedural defect of a constitutionally inadequate plea colloquy alone necessitates further review, Mr. Rhoades also urges this Court to grant further review to correct the misinterpretation and misapplication of its prior statements regarding HIV in opinions addressing violations of Chapter 709C.1,

which are effectively being used to rewrite the statute and/or excuse the State from proving one or more elements of the crime.

A. There is no evidence that Mr. Rhoades intended to expose his bodily fluid to the body of another or that any exposure one might deem intentional could have resulted in the transmission of HIV.

It is evident from the plain language of the statute that to convict a person of violating Chapter 709C.1, the State would be required to prove *beyond a reasonable doubt* that the person intentionally exposed his bodily fluid to the body of another and that this intentional exposure of bodily fluid to body could result in the transmission of HIV. Iowa Code § 709C.1. Because in this case a condom was used during anal sex and no ejaculation occurred during oral sex, the State lacks evidence that Mr. Rhoades acted with the requisite intent to expose another to his bodily fluid. Furthermore, there is simply no generally accepted scientific understanding that pre-ejaculatory fluid exposed to the mouth during oral sex, the alleged exposure exclusively relied upon by the court of appeals,[4] is one that can result in the transmission of HIV.

First, this Court has never held—and there is simply no competent, credible evidence proving—that pre-ejaculatory fluid is a bodily fluid that is capable of transmitting HIV.[5] Second, the fact that any potential exposure to pre-ejaculatory

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[4] *See* Appellate Decision at 6 n.6.

[5] This Court has previously taken judicial notice of the fact that only certain bodily fluids are capable of transmitting HIV–namely, blood, semen or vaginal fluid. *See*

fluid in this case occurred only in the context of oral sex would make it even more difficult, if not impossible, for the State to sustain its burden on this element.[6] Third, any argument that a theoretical risk of transmission through pre-ejaculatory fluid during oral sex is sufficient to establish a factual basis for Mr. Rhoades's conviction is further undermined by the undisputed medical evidence regarding

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State v. Keene, 629 N.W.2d 360, 365 (Iowa 2001). Although there is some indication from public health officials that it may be possible *in theory* to transmit HIV via pre-ejaculatory fluid, there has never been a transmission in this manner documented. *See Family Planning Methods and Practice: Africa*, Centers for Disease Control and Prevention (2nd ed. 2000), Chap. 19, p. 493, available at http://stacks.cdc.gov/view/cdc/12090 (last visited Oct. 18, 2013) ("The pre-ejaculate fluid can contain HIV-infected cells, although epidemiological studies have not determined the potential of the pre-ejaculate to infect a man's sexual partner.").

[6] Dr. Meier states in his testimony at the post-conviction relief hearing that even before effective HIV treatment, scientists could not put a hard number on the risk of transmission during receptive oral sex—regardless of whether semen was present after ejaculation—and that there might be zero risk involved in this activity. (*See* Dr. Meier Testimony, App. at 356:1-9; *id.* at 372:18–373:20 (explaining that transmission through semen via "ulcers and so forth in the mouth" is theoretically possible, but that no study has been conducted demonstrating that oral sex is an independent risk factor for transmission).) Therefore, transmission during oral sex via pre-ejaculate—a bodily fluid that has not even been conclusively established as capable of transmitting HIV—becomes an even more theoretical risk about which scientists can do nothing more than hypothesize. *See* Laurence Peiperl, Director, UCSF Center for HIV Information, et al., "Risk of HIV Infection Through Receptive Oral Sex" (March 14, 2003) (a panel of experts convened to discuss the data on risk of HIV infection associated with receptive oral sex), available at http://hivinsite.ucsf.edu/insite?page=pr-rr-05 (last visited Oct. 18, 2013), at 2, 8.

Mr. Rhoades's viral load.[7] Quite frankly, the purportedly "intentional" exposure upon which the court of appeals relies as a route of potential transmission simply does not hold up to scientific scrutiny.

B. Facts such as those necessary to sustain a conviction under 709C.1 should be proven through properly admitted evidence at trial, not predetermined by legal pronouncements from appellate courts.

Instead of looking to the significant amount of evidence presented at the hearing on the petition for post-conviction relief to evaluate whether a factual basis exists for this guilty plea, the court of appeals looked primarily to—and clearly felt bound by[8]—the prior pronouncements of this Court regarding HIV transmission, pronouncements which were in turn often based on the taking of judicial notice. *See* Appellate Decision at 3 n.2, 5-7; *State v. Stevens*, 719 N.W.2d 547, 551 (Iowa

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[7] *See* Pietro Vernazza, et al., "HIV-Positive Individuals Without Additional Sexually Transmitted Diseases and on Effective Anti-Retroviral Therapy Are Sexually Non-Infectious," available at http://www.ternyata.org/books/wisdom/swiss_english.pdf (last visited Oct. 21, 2013) (statement from a panel of Swiss HIV/AIDS experts after an extensive review of the scientific data); *see also* Aff. of Dr. Meier, App. at 329, ¶ 16; Dr. Meier Testimony, App. at 369:17–370:3 (stating that the viral load in Mr. Rhoades's body at the time of the alleged crime was medically "undetectable," which may have rendered his bodily fluids non-infectious); Aff. of Dr. Meier, App. 329, ¶ 17; Dr. Meier Testimony, App. at 356:23–358:9, 369:4–370:3 (stating that because of Mr. Rhoades's undetectable viral load, transmission of HIV by Mr. Rhoades to another individual, regardless of the type of sex involved, was "extraordinarily unlikely if not impossible.")

[8] In fact, the court of appeals advises the defendant to take to this Court any claims that its pronouncements regarding the statute are outdated. Appellate Decision at 3 n.2.

2006) (taking judicial notice that "oral sex is a well-recognized means of HIV transmission"); *State v. Keene*, 629 N.W.2d 360, 366 (Iowa 2001) (declaring that a claim of non-ejaculation is irrelevant). The crux of the underlying problem with this is that the elements of a criminal statute, such as Chapter 709C.1, are not generally susceptible to proof through judicial notice. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Iowa R. Evid. 201(b). Determinations regarding when a particular exposure of bodily fluid to body part could result in the transmission of HIV do not fall into this category. For instance, whether it is possible to transmit HIV via exposure to pre-ejaculatory fluid during oral sex is not capable of "accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[9] There is simply no credible source—much less a source that cannot be reasonably questioned—that makes this assertion.

Similarly, it is inappropriate to conclude that engaging in oral sex—even unprotected oral sex—violates the statute as a matter of law. *Cf. State v. Tusing*,

[9]*See* "Risk of HIV Infection Through Receptive Oral Sex," at 2 ("The problem with the discussion, though, continues to revolve around the inability to quantify risk. And because these are cases or, in fact, even *uncorroborated* cases, of acquiring HIV from fellatio without ejaculation, besides saying 'exceedingly low risk' or 'very low risk,' that's the best you can do. *It is all still hypothetical*." (emphasis added).)

344 N.W.2d 253, 254 (Iowa 1984) (noting that while knives and revolvers are obviously capable of inflicting death, the court cannot conclude as a matter of law that all brass knuckles are). There are simply too many caveats and conditions to the statements made by public health officials regarding the risks associated with oral sex for a court to make such a blanket and immutable determination.[10] While sources such as the Centers for Disease Control and Prevention indicate that HIV may be transmitted via oral sex,[11] they do not indicate the specific circumstances under which such an unlikely event is actually possible. *Compare* CDC, "HIV Transmission Risk," available at http://www.cdc.gov/hiv/policies/law/risk.html (last visited Oct. 18, 2013) *with* Dr. Meier Testimony, App. at 372:18–373:20 (explaining that transmission through semen via "ulcers and so forth in the mouth" is theoretically possible, but that no study has been conducted demonstrating that

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[10] *See* "Risk of HIV Infection Through Receptive Oral Sex," at 2. The members of this panel stated that because there are no corroborated reports of transmission through oral sex without ejaculation, researchers could only hypothesize as to whether any risk existed, describing any possible risk that exists as "extremely low" and any transmissions in this context as "exceedingly rare," and likely taking place only in the event of a urethral discharge—or ulcerative sores on the penis—occurring as a result of another sexually transmitted disease.

[11] It should also be noted that in making statements advising the public regarding purported risks of HIV transmission via various activities, public health officials are not subject to the standard of proof employed at a criminal trial and have a strong bias toward encouraging the most cautious approach. Furthermore, even in the civil context, the U.S. Supreme Court has noted the opinions of entities such as the CDC should not be treated as conclusive. *Bragdon v. Abbott*, 524 U.S. 624, 650, 118 S. Ct. 2196, 2211 (1998).

oral sex is an independent risk factor for transmission). If one explores the science behind such assertions, one discovers that most researchers believe that for transmission to even be possible via oral sex (between two men), there must be ejaculation by the HIV-positive insertive partner and some type of trauma or open sore in the mouth of the HIV-negative receptive partner.[12] Given the fact-specific nature of such determinations, as well as an ever-evolving scientific understanding of HIV and its transmission, it is simply not appropriate for an appellate court to allow prosecutors to bypass proving this element of the crime by declaring entire categories of sexual contact a violation of the statute.

For an appellate court to usurp the fact-finding function of the trial court in this fashion is to rewrite the statute. It would undoubtedly be easier for the State to prosecute people under a statute like Michigan's, which expressly prohibits any type of "sexual penetration"without first informing the other person of one's HIV-positive status, but the Iowa statute simply is not written this way. *Compare* Mich. Comp. Laws § 333.5210 (2006) *with* Iowa Code § 709C.1. Unlike the Michigan statute, the Iowa statute was written with at least some degree of adaptability to our advancing understanding of HIV and its transmission. And it is inescapable that

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[12] *See* "Risk of HIV Infection Through Receptive Oral Sex," at 2-9. One panelist (Jeffrey D. Klausner, MD, MPH) made clear that he did not believe any risk of transmission via oral sex without ejaculation existed: "If there is no infectious pre-cum, which is still a hypothetical route of transmission, and there is no ejaculate, there should be no transmission, [because] there should be no exposure to virus." *Id.* at 2.

under the Iowa statute, the State must prove, beyond a reasonable doubt, not only that there was an intentional exposure of bodily fluid to body part, but that the intentional exposure at issue could have resulted in the transmission of HIV.

Until Chapter 709C.1 is amended or repealed—and no one can say whether that will ever happen—it falls to this Court to faithfully interpret the plain language set forth therein. This case presents an opportunity for this Court to fulfill that obligation by clarifying the scope, applicability and limitations of its previous judicial statements regarding HIV and its transmission in relation to Chapter 709C.1. If this Court does not seize this opportunity to correct course, injustices like the one in this case will only multiply as medical science moves forward.

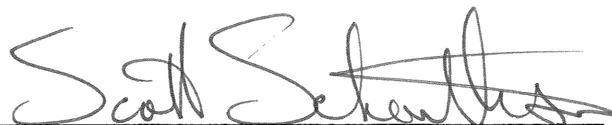
CONCLUSION

For himself and all others subsequently accused under 709C.1, Petitioner respectfully requests that this Court grant further review and address both of the questions presented.

REQUEST FOR ORAL SUBMISSION

Mr. Rhoades requests the opportunity to submit supplemental briefing and oral argument on the issues presented by this application for further review.

DATED: October 22, 2013



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1. This application complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) and Iowa R. App. P. 6.903(1)(g)(1) because this application contains 5400 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4).

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DATED: October 22, 2013

Scott A. Schoettes

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I hereby certify that on the 22nd day of October 2013, the original and 17 copies of the *Application for Further Review* were sent via FedEx overnight delivery to the Iowa Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, IA 50319.

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This is to certify that the true and actual cost of printing the foregoing *Application for Further Review* was the sum of $42.75.

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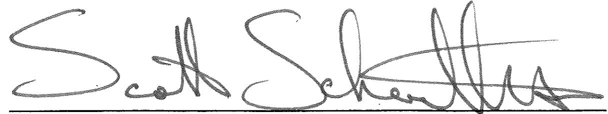

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Certificate of Service

The undersigned hereby certifies that a copy of this *Application for Further Review* was served on the following persons by enclosing the same in an envelope with appropriate first-class postage, addressed to such party listed below via United States Postal Service on October 22, 2013.

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