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

PROOF BRIEF OF APPLICANT/APPELLANT AND REQUEST FOR ORAL ARGUMENT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

This is an appeal of a denial of a petition for post-conviction relief, and it asks this Court to determine whether Petitioner-Appellant Nick Rhoades ("Mr. Rhoades") received ineffective assistance of counsel during criminal proceedings in which he pled guilty to one count of "criminal transmission of human immunodeficiency virus ("HIV")" in violation of Iowa Code § 709C.1 ("Chapter 709C.1"). Specifically, this appeal presents the following two interrelated issues:

First Issue Presented

I. Did Mr. Rhoades receive ineffective assistance of counsel when his defense attorney allowed the criminal trial court to accept his guilty plea without establishing during the plea colloquy that Mr. Rhoades understood that Chapter 709C.1 required the State to prove that Mr. Rhoades *intentionally* exposed his bodily fluids to the body part of another in a manner that could result in the transmission of HIV?

Cases

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

State v. Chang, 587 N.W.2d 459 (Iowa 1998)

State v. Burns, 541 N.W.2d 875 (Iowa 1995)

State v. Lohr, 266 N.W.2d 1 (Iowa 1978)

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

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State v. Doggett, 687 N.W.2d 97 (Iowa 2004)

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

State v. Philo, 697 N.W.2d 481 (Iowa 2005)

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State v. Galbreath, 525 N.W.2d 424 (Iowa 1994)

State v. Brown, 262 N.W.2d 557 (Iowa 1978)

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Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)

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Iowa Code § 709C.1(2)(b) (2011)

Iowa Code § 709C.1(5) (2011)

Iowa Code § 716.1 (2011)

Constitutional Provisions

U.S. Const. amend. VI

Rules

Iowa R. Crim. P. 2.8(2)(b) (2011)

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Merriam Webster Online Dictionary 2012, http://www.merriam-webster.com (June 11, 2012)

H.F. 2369, Iowa 77th General Assembly Ch. 1087 (1998)

W. La Fave & A. Scott, Jr., *Handbook on Criminal Law* (1972)

Joshua Dressler, *Understanding Criminal Law* (5th ed. 2009)

Second Issue Presented

II. Did Mr. Rhoades receive ineffective assistance of counsel when his defense attorney allowed him to plead guilty to a violation of Chapter 709C.1 when there was, in fact, no factual basis for the charge?

Cases

State v. Galbreath, 525 N.W.2d 424 (Iowa 1994)

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

State of Kansas v. Richardson, 209 P.3d 696 (Kan. 2009)

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

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ROUTING STATEMENT

This appeal should be retained by the Supreme Court because the meaning of the *mens rea* element of Chapter 709C.1 is a matter of first impression and the interpretation of Chapter 709C.1 is a fundamental and urgent issue of broad public importance requiring ultimate determination by the Supreme Court.

STATEMENT OF THE CASE

This is an appeal from the denial of a petition for post-conviction relief. Mr. Rhoades was arrested in late September 2008 and charged with one count of violating Chapter 709C.1. (Ruling on Application for PCR ("Ruling") at 1.) Mr. Rhoades was represented in the criminal proceeding by attorney James Metcalf ("Attorney Metcalf"). (Ruling at 1.) On May 1, 2009, Mr. Rhoades pled guilty to the offense and, on that same day, was sentenced to the maximum penalty – 25 years in prison and lifetime registration as a sex offender.[1] (Ruling at 1; Rhoades Testimony, Tr. at 144:6-17.)[2] Mr. Rhoades did not appeal his criminal conviction. (Ruling at 3.)

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[1] Mr. Rhoades's sentence was reconsidered on September 11, 2009. At that time, the court resentenced Mr. Rhoades to up to 25 years, but suspended his prison sentence and placed him on supervised probation for 5 years. (Ruling at 3.) Mr. Rhoades was in custody from the time of his arrest until the time of his resentencing. (*Id.*)

[2] Citations to the civil bench trial include the name of the testifying witness, the abbreviation "Tr.," and the relevant page and line numbers.

Through different counsel, Mr. Rhoades filed a Petition for Post-Conviction Relief on March 15, 2010. (Petition for Post-Conviction Relief, dated March 15, 2010.) The petition was amended on December 3, 2010. (Amended Petition for Post-Conviction Relief, dated Dec. 3, 2010.) The petition asserts, *inter alia*, that Mr. Rhoades received ineffective assistance of counsel because Mr. Metcalf allowed him to plead guilty to a crime for which there was no factual basis and because Mr. Metcalf failed to research, understand, investigate and explain to Mr. Rhoades the elements of the crime. (Amended Petition for Post-Conviction Relief, dated Dec. 3, 2010.)

On February 24, 2011, Mr. Rhoades filed a motion for summary judgment. (Motion for Summary Judgment, dated Feb. 24, 2011.) The motion was denied on April 22, 2011. (Order Denying Motion for Summary Judgment, dated Apr. 22, 2011.) The district court conducted a civil bench trial on Mr. Rhoades's petition on April 25-27, 2011 and September 6, 2011. (Ruling at 1.) On December 23, 2011, the court issued a ruling denying Mr. Rhoades's petition. (Ruling at 10.) Mr. Rhoades timely filed his notice of appeal on January 23, 2012. (Notice of Appeal, filed Jan. 23, 2012.)

STATEMENT OF THE FACTS

Mr. Rhoades has HIV. (Rhoades Testimony, Tr. at 111:10-13.) 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"), ¶ 16; Dr. Meier Testimony, Tr. 431:10-21.) 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, ¶ 16; Rhoades Testimony, Tr. at 113:14–114:20.)

In June 2008, Mr. Rhoades was living in Plainfield, Iowa. (Narrative Report of Officer Abernathy (hereinafter "Narrative Report"), p. 3.) In the late night hours of June 25th or the early morning hours of June 26th, Mr. Rhoades met Adam Plendl ("Mr. Plendl") on an online social networking site called Gay.com. (Narrative Report, p. 1.) After the two men chatted for some time online, Mr. Plendl invited Mr. Rhoades to his residence in Cedar Falls, Iowa. (Ruling at 2; Rhoades Testimony, Tr. at 119:3-24.) Mr. Rhoades accepted the invitation and arrived at Mr. Plendl's residence in the early morning hours on June 26, 2008. (Narrative Report, p. 1; Rhoades Testimony, Tr. at 122:1-9; Plendl Testimony, Tr. at 239:19-21.) It was the stated intention of both parties to socialize and not to engage in sexual activities. (Rhoades Testimony, Tr. at 121:18–122:7; Plendl Testimony, Tr. at 343:15-18.)

At Mr. Plendl's residence, the two men chatted for several hours. (Ruling at 2; Rhoades Testimony, Tr. at 122:12–123:3.) Both men consumed significant amounts of alcohol provided by Mr. Plendl. (Rhoades Testimony, Tr. at 123:8-20,

174:3-9; Plendl Testimony, Tr. at 243:15-22.) At some point, the social conversation progressed to physical contact. (Ruling at 2.) The physical activity progressed from kissing and caressing to oral sex and, finally, to anal intercourse. (Rhoades Testimony, Tr. at 124:9–18; Plendl Testimony, Tr. at 244:9–245:5; Ruling at 2.) 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 at 2.) Mr. Rhoades did not ejaculate during oral sex. (Rhoades Testimony, Tr. at 127:2-7; Plendl Testimony, Tr. at 245:14-20.) Although there is a dispute as to whether Mr. Rhoades ejaculated during anal intercourse,[3] it is *undisputed* that the parties used a condom during that activity. (Narrative Report, p. 2; Rhoades Testimony, Tr. at 125:12–126:2; Plendl Testimony, Tr. at 247:16-19.)

Several days after their encounter, Mr. Plendl learned from a friend that Mr. Rhoades might be HIV positive.[4] (Ruling at 2.) Subsequently, Mr. Plendl

[3] Mr. Plendl claims that Mr. Rhoades did ejaculate during anal intercourse (Plendl Testimony, Tr. at 247:24–248:1); Mr. Rhoades testified that he did not recall ejaculating but highly doubted that he did, because of the difficulty he was having at the time in achieving sexual climax (Rhoades Testimony, Tr. at 127:2-7, 187:6–188:21).

[4] The parties dispute whether they had a conversation about Mr. Rhoades's HIV status prior to engaging in sexual activity – Mr. Plendl testified that they did and that Mr. Rhoades stated he was "clean" (Cedar Falls Police Department Incident Report, p.3), while Mr. Rhoades testified that it was not discussed (Rhoades Testimony, Tr. at 171:15–172:2, 184:2–185:8). In either case, it is not disputed

contacted the police, who began investigating the matter. (Narrative Report, p. 1.) The police investigation yielded an assortment of evidence, including medical records, a blood sample from Mr. Rhoades, pictures of his medications, written statements from Mr. Plendl and recorded statements of Mr. Rhoades speaking to Mr. Plendl and to the police. (Narrative Report, p. 3-4.) There is, however, no evidence in the record to support the conclusion that Mr. Plendl was ever exposed to HIV, and it is undisputed that Mr. Plendl did not contract HIV as a result of his encounter with Mr. Rhoades. (Plendl Testimony, Tr. at 240:17–241:4.)

The police arrested Mr. Rhoades on or about September 29, 2008. (Ruling at 2.) After his arrest, Mr. Rhoades engaged the services of Attorney Metcalf. (Rhoades Testimony, Tr. at 132:1-5.) Attorney Metcalf did not avail himself of any formal discovery, except for one incomplete deposition of the complaining witness. (Metcalf Testimony, Tr. at 318:19–320:6; Rhoades Testimony, Tr. at 142:5–143:2.) 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 Tr. 409:13-18; Rhoades Testimony, Tr. at 166:21-25; Metcalf Testimony, Tr. at 289:22–290:3.)

During his plea colloquy, Mr. Rhoades was never asked whether he intentionally exposed Mr. Plendl's body to bodily fluids containing HIV or

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that Mr. Rhoades did not tell Mr. Plendl he was HIV positive. (Ruling at 2; Rhoades Testimony, Tr. at 185:6-8.)

whether he did so in a manner that could result in HIV transmission. (Tr. of Criminal Proceedings, May 1, 2009, at 3:16–10:9.) Instead, Mr. Rhoades was asked whether he had engaged in "intimate contact" with Mr. Plendl. (*Id.* at 9:3-5.) Mr. Rhoades testified at his post-conviction relief trial that the specific legal meaning of "intimate contact" in Chapter 709C.1 was never explained to him by Attorney Metcalf. (Rhoades Testimony, Tr. at 145:4-12; 181:16-25.) Although the State elicited testimony from Attorney Metcalf at the same trial indicating that he had reviewed this element of the crime with Mr. Rhoades (Metcalf Testimony, Tr. at 291:1-11.), Attorney Metcalf did not have a specific recollection of any particular conversation he had with Mr. Rhoades regarding either the elements of the crime or the details of the sexual contact between the two men. (Metcalf Testimony, Tr. at 290:14-25, 291:12–293:20, and 295:17–296:9.) Furthermore, despite the State's leading questions, Attorney Metcalf failed to demonstrate a clear understanding of the *mens rea* the State would be required to prove to secure a conviction under the statute. (Metcalf Testimony, Tr. at 290:14–297:13.)

ARGUMENT

Mr. Rhoades's petition for post-conviction relief is 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.

Preservation of Error: Both of the issues Mr. Rhoades presents in this appeal relating to ineffective assistance of counsel have been properly preserved for appellate review. The issues were raised in the proceedings below in Mr. Rhoades's summary judgment motion and were renewed in arguments raised at trial. (Memorandum of Legal Authorities in Support of Applicant's Motion For Summary Disposition at 11-17; Tr. at 1:24–11:11; Applicant's Summary of Evidence and Argument, *passim*.) The district court addressed the issues in its post-trial ruling. (Ruling at 3-10.)

Standard of Review: Claims that a defendant's constitutional right to effective assistance of counsel has been violated are reviewed *de novo*. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999), *citing State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

I. Mr. Rhoades received ineffective assistance of counsel when his defense attorney allowed the criminal trial court to accept a guilty plea without establishing that Mr. Rhoades understood that Chapter 709C.1 required the State to prove that Mr. Rhoades *intended* to expose his bodily fluid to the body part of another in a manner that could result in the transmission of HIV.

Mr. Rhoades's first assignment of error relates to the constitutionally defective plea colloquy that the criminal trial court conducted. To understand how Mr. Rhoades's Sixth Amendment right to effective assistance was violated during the plea colloquy, it is first necessary to evaluate the elements of criminal liability under Chapter 709C.1 and, in particular, the *mens rea* element.

A. Chapter 709C.1 includes an explicit *mens rea* element, requiring the State to prove that a defendant *intentionally* exposed his bodily fluid to the body part of another in a manner that could result in the transmission of HIV.

Mr. Rhoades was convicted of violating the following provision of Chapter 709C.1:

> 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).

These provisions of the statute have several elements that the State would be required to prove beyond a reasonable doubt in order to convict a person of violating the statute. First, the defendant must know that he has HIV. Second, the defendant must expose his bodily fluid to the body part of another person.[5] Third, the exposure of bodily fluid to the body part of another must be such that it could result in the transmission of HIV. Finally, it must be shown that the defendant *intended* to expose his bodily fluid to the body part of another in a manner that could result in the transmission of HIV.[6] If there is an insufficient factual basis for any one of these elements, then a person could not be convicted of violating Chapter 709C.1[7]

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[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 State v. Keene*, 629 N.W.2d 360, 365 (Iowa 2001).

[6] Although the statute does not require an intent to transmit HIV, it does require that the exposure of the bodily fluid (to the body part of another in a manner that could transmit HIV) be intentional.

[7] The statute also includes the following affirmative defense: "It is an affirmative defense that the person exposed to the human immunodeficiency virus knew that the infected person had a positive human immunodeficiency virus status at the time of the action of exposure, knew that the action of exposure could result in transmission of the human immunodeficiency virus, and consented to the action of exposure with that knowledge." Iowa Code § 709C.1(5). This affirmative defense

1. The statute imposes criminal liability only if the defendant intends to expose his bodily fluid to the body part of another and that intentional exposure is in a manner that could result in the transmission of HIV.

As this Court has previously noted, interpretation of a criminal statute focuses primarily on the plain meaning of the statutory language. *See, e.g.*, *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998), *citing State v. Burns*, 541 N.W.2d 875, 876 (Iowa 1995)("When a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms.") It is the word "intentional" in the definition of "intimate contact" that describes the *mens rea* that must be proven to convict someone under this portion of the statute. An "intentional" act is one that is "done by intention or design" – i.e., it is "intended." Merriam Webster Online Dictionary, http://www.merriam-webster.com/dictionary/intentional. A person who has an "intention" to do something has a "determination to act in a certain way." *Id.* at http://www.merriam-webster.com/dictionary/intention. Stated in a different way: if a person has an "intention" to do a particular act, then that act is "what one intends to do or bring about." *Id.* Finally, to "intend" to do an act is to have the act "in mind as a purpose or goal" or to "plan" to do the act. *Id.* at http://www.merriam-webster.com/dictionary/intend. Thus, by the plain terms of

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is not implicated under the facts of this case, both because Mr. Rhoades did not violate the underlying statute and because he does not contend that Mr. Plendl knew of his HIV status prior to their sexual encounter.

the statutory language, conviction requires proof that the defendant intended – *i.e.*, planned or had in mind as a purpose or goal – the exposure of his bodily fluid to the body part of another in a manner that could result in the transmission of HIV. Thus, if the facts demonstrate that a defendant did not intend, plan or have in mind as a purpose the exposure of his bodily fluid in a manner that could result in HIV, then there is no factual basis for the alleged crime.

This analysis of the plain meaning of the intent element of Chapter 709C.1 is consistent with this Court's decision in *Chang*. In *Chang*, the defendant was convicted of second-degree criminal mischief, a violation of Iowa Code § 716.1, for damaging two vehicles in the course of a car chase with police. *Chang*, 587 N.W.2d at 461. The statute states that "any damage, defacing, alteration, or destruction of tangible property is criminal mischief when done intentionally by one who has no right to so act." Iowa Code §716.1. On appeal, the defendant argued that the statute required the State to prove that he intended to damage, deface, alter or destroy tangible property. *Chang*, 587 N.W.2d at 461. In contrast, the State argued that it simply had to show that the defendant intended to do the act that resulted in the damage. *Id.* Based on its review of the plain meaning of the statute, this Court agreed with the defendant, concluding:

> The language of this statute does not speak to acts causing damage but to the damage itself. In interpreting written language, modifiers must be taken as relating to the preceding antecedents. *State v. Lohr*, 266 N.W.2d 1, 3 (Iowa 1978). The only antecedents to which the modifier

> "intentionally" may refer are the words "damage, defacing, alteration, [and] destruction."

Id.

Like the criminal mischief statute at issue in *Chang*, Chapter 709C.1 speaks of the intent to cause a prohibited result (exposure of bodily fluid to body part of another in a manner that could result in transmission of HIV) and not merely the intent to do an act that leads to the prohibited result. Thus, consistent with the statutory interpretation employed in *Chang*, Chapter 709C.1 must be interpreted as requiring proof that the defendant intended the exposure of bodily fluid to the body part of another in a manner that could result in the transmission of HIV, rather than simply proof that the defendant intended to do some act that happened to result in the exposure of bodily fluid to another in a manner that could result in the transmission of HIV. Simply put, just as the word "intentionally" was correctly viewed as modifying "damage, defacing, alteration and destruction" in the criminal mischief statute, the word "intentional" in Chapter 709C.1 must be viewed as modifying "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 statutory provisions of Chapter 709C.1 that attach criminal liability only to "intentional" conduct are also consistent with the purpose of the statute as reflected in the legislative history. The Iowa General Assembly passed Chapter

709C.1 in 1998 as part of a bill regarding "Human Immunodeficiency Virus (HIV) – Testing and ***Intentional*** Transmission." *See* H.F. 2369, Iowa 77th General Assembly Ch. 1087 (1998) (emphasis added). The description of the bill states that it is "[a]n Act relating to the Human Immunodeficiency Virus including . . . the ***intentional*** transmission of the Human Immunodeficiency Virus." *Id.* Thus, when it considered and passed the bill that included Chapter 709C.1, the legislature was focused solely on criminalizing conduct that was intentional.

2. This Court has interpreted the *mens rea* component of Chapter 709C.1 as requiring the State to prove the "functional equivalent" of an intent to injure.

This Court acknowledged the significance of the *mens rea* element of Chapter 709C.1 in *State v. Musser*, 721 N.W.2d 734 (Iowa 2006). In *Musser*, the Court noted that the plain language of the statute required proof that a defendant acted "intentionally," a state of mind that the Court characterized as the "functional equivalent" of an intent to injure:

> While section 709C.1 may not expressly require an intent to *injure*, it does require the functional equivalent: that the defendant intentionally expose another person to the defendant's infected bodily fluid in such a way that the virus could be transmitted.

Musser, 721 N.W.2d at 749. The court subsequently held that the potential 25-year prison sentence was not grossly disproportionate in view of the gravity of the offense addressed, because the statute imposes criminal liability *only* when a defendant acts with the functional equivalent of an intent to injure. *Id.* at 749-50.

In addition to reflecting the plain meaning of the statutory language, this Court's interpretation of Chapter 709C.1 as requiring the functional equivalent of an intent to injure is consistent with longstanding, basic principles of criminal law. As this Court has previously noted, "a basic premise of criminal liability . . . is that an act alone does not make one guilty unless his mind is also guilty." *Eggman v. Scurr*, 311 N.W.2d 77, 78 (Iowa 1981), *citing* W. La Fave & A. Scott, Jr., *Handbook on Criminal Law* § 27 at 192 (1972). In *Musser,* the Court determined that the "guilty mind" required by the statute is proof that the defendant *intentionally* exposed his bodily fluid to the body part of another in a manner that could result in the transmission of HIV. *Musser*, 721 N.W.2d at 749.

The Court's characterization of the term "intentionally" as requiring a *mens rea* that is the functional equivalent of an intent to injure is consistent with the prevailing academic understanding of the term "intentionally" in a criminal statute:

> At common law, a person "intentionally" causes the social harm of an offense if: (1) it is his desire (i.e., his conscious object) to cause the social harm; or (2) he acts with knowledge that the social harm is virtually certain to occur as a result of his conduct.
>
> * * * * *
>
> Both versions of "intent" involve subjective fault. An actor's fault is "subjective" if he possesses a wrongful state of mind–in this case, the conscious desire to cause the social harm, or the awareness that the harm will almost certainly result from his conduct. If the defendant lacks either of these states of mind, he has not "intentionally" caused the harm.

Joshua Dressler, *Understanding Criminal Law*, at 121-22 (5th ed. 2009) (describing the definition of the *mens rea* term "intentionally"). Thus, consistent with this Court's holding in *Musser*, to be criminally liable under Chapter 709C.1, a defendant must have the functional equivalent of an intent to injure – in other words, he must either desire the prohibited social harm (*i.e.*, exposure of his bodily fluid to the body part of another in a manner that could result in the transmission of HIV) or must act knowing that the social harm (*i.e.*, exposure of his bodily fluid to the body part of another in a manner that could result in the transmission of HIV) is almost virtually certain to occur.

In summary, it cannot be denied that the statute has a specified *mens rea* element – criminal liability attaches only if the defendant has *intentionally* exposed his bodily fluid to the body part of another in a manner that could result in the transmission of HIV. Thus, to convict Mr. Rhoades, the State was required to prove that Mr. Rhoades acted with the requisite intent. If, however, there are no facts to suggest that Mr. Rhoades had an intent to expose his infected bodily fluid to Mr. Plendl, then there is no factual basis for his guilty plea or the conviction pursuant to that plea.

B. Mr. Rhoades received ineffective assistance of counsel when his defense attorney allowed the criminal trial court to accept his guilty plea without conducting a plea colloquy establishing that Mr. Rhoades understood the elements of the crime.

The elements of criminal liability under Chapter 709C.1 are relevant to the first issue raised by Mr. Rhoades's appeal because 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.

1. 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 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); *Schminkey*, 597 N.W.2d at 788.

Mr. Rhoades's petition for post-conviction relief asserts that he received ineffective assistance of counsel when his counsel breached an essential duty by allowing Mr. Rhoades to plead guilty when there was no factual basis for the

charges against him. 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.

The requirement that a court inquire about a 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, 140 L. Ed. 2d 828, 837 (1998), *citing Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (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 v. United States*, 523 U.S. at 618, *citing Smith v. O'Grady*, 312 U.S. 329, 334, 61 S. Ct. 572, 574, 85 L. Ed. 859, 862 (1941).

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 there were no facts and circumstances in the plea recitation that would allow an inference that 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 there was a factual basis for determining whether the defendant acted with 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 of assault with intent to inflict serious injury because the "trial court did not advise defendant as to the specific intent requirement of the crime charges, nor did trial court determine that defendant understood the element").

Although it is the trial court's obligation under Rule 2.8(2)(b) to conduct a proper inquiry into the factual basis for the charges and the defendant's understanding of the elements of the alleged crime, defense counsel provides ineffective assistance to his client if he permits the trial court to accept a guilty plea without fulfilling this obligation. *Schminkey*, 597 N.W.2d at 788-92 (concluding that trial counsel rendered ineffective assistance in allowing defendant to plead guilty when the trial court had an inadequate record to conclude whether a factual basis existed for the charges); *Gaines*, 2001 Iowa App. LEXIS 617 at *16-22 (holding that defendant received ineffective assistance of counsel when the trial court failed to advise the defendant of the intent element of the crime). Simply put, if a trial court's inquiry about and explanation of the elements of a crime is inadequate, incomplete or incorrect, then defense counsel breaches an essential duty if he fails to point out the court's errors to his client. *See, e.g., United States v. Nairn*, No. CR02-4078MWB, 2005 U.S. Dist. LEXIS 6458 at *28-35 (N.D. Iowa April 12, 2005).

2. 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:

> THE COURT: What the state would have to prove is that on or about June 26th of 2008, here in Black Hawk County, Iowa, you did knowing that you had human – and I – I apologize. Have a hard time saying the word – immunodeficiency virus, that you knew that you had that, that you were positive for that and that you engaged in intimate contact with another person and you didn't acknowledge or that person didn't know that you had the virus.
>
> Do you understand what it is you would – the state would have to prove?
>
> THE DEFENDANT: I do.
>
> THE COURT: Were you here in Black Hawk County on June 26th?
>
> THE DEFENDANT: I was.
>
> THE COURT: And at that time were you positive for the human immunodeficiency virus?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You were aware of that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did you engage in intimate contact with another person?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did that person not know that you had this virus?

THE DEFENDANT: No, sir.

THE COURT: Can the court rely upon the minutes for a factual basis, state?

MS. FANGMAN: Yes, Your Honor.

THE COURT: Any further factual basis requested?

MS. FANGMAN: No, Your Honor.

THE COURT: Can the court rely upon the minutes, Mr. Metcalf?

MR. METCALF: Yes, sir.

THE COURT: Any further factual basis?

MR. METCALF: No, sir.

THE COURT: Mr. Rhoades, keeping in mind the rights that we have talked about, the penalties and everything else that we have talked about, what is your plea to this offense, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Any reason why I should not accept the defendant's plea, state?

THE DEFENDANT: No, Your Honor.[8]

THE COURT: Mr. Metcalf?

MR. METCALF: No, Your Honor.

THE COURT: I do accept your plea at this time, Mr. Rhoades. I find that you voluntarily entered into your plea, that you understand your rights, you've made an understanding waiver of those rights, and you understand the consequences of your plea, and that there is a factual basis, and I do therefore find you guilty.

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[8] Although this reply is attributed in the transcript to "The Defendant," it is possible that it actually came from Ms. Fangman, because the Court directed its question to the State.

(Tr. of Criminal Proceedings, May 1, 2009, at 8:8–10:9.)

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 specific *mens rea* required. In essence, the court took an impermissible "short cut" to establish the factual basis for the statute and, in the process, failed to inquire meaningfully about the elements of the crime.

Counsel's error in allowing the court to proceed in this way was particularly egregious because "intimate contact" has a common, colloquial meaning that would encompass behavior that does not fall within the purview of the statute. For example, some might describe kissing, hugging and even holding hands as "intimate contact," but, as this Court has previously acknowledged, Chapter 709C.1 does not criminalize such behavior. *See, e.g., Musser*, 721 N.W.2d at 746 (noting that, because Chapter 709C.1 only proscribes contact that exposes bodily fluid from the infected person to the body part of another in a manner that could result in the transmission of HIV, it does not apply to "kissing another" or

"sweating on another while playing a game of basketball"). In short, by using the term "intimate contact" to inquire about the factual basis for the crime, the trial court created a risk that Mr. Rhoades would admit to engaging in conduct that he might consider to be "intimate," but which did not fall within the purview of the statute.

The testimony submitted during the civil bench trial below suggests that Mr. Rhoades was, in fact, confused by the criminal trial court's use of the term "intimate contact." During the trial, Mr. Rhoades provided the following testimony regarding his understanding of the term at the time of his guilty plea:

> Q: When you went to court on May 1, 2009, for your guilty plea and sentence, at any time up to that time had Mr. Metcalf ever explained to you what the term intimate sex meant under the Iowa HIV statute?
>
> A: It was never discussed.
>
> Q: And when you used the word intimate sex in you – intimate contact. I'm sorry, I should be saying intimate contact. Was that ever described to you?
>
> A: No.
>
> * * * * *
>
> Q: Well what did you think – what did you mean by intimate contact or intimate sex when you used that term in your guilty plea before Judge Harris?
>
> A: Becoming intimate with someone on any sort of sexual level I suppose.
>
> Q: Did you mean in any way the intentional transmission of infected fluids?

A: No.

(Rhoades Testimony, Tr. at 145:4–146:4.) Obviously, this confusion would not have occurred if the criminal trial court had conducted a thorough and proper plea colloquy.

It is important to note that Mr. Rhoades's testimony regarding his confusion surrounding the phrase "intimate contact" simply illustrates the type of confusion that can occur when a trial court improperly uses terms of art in a plea colloquy. Because prejudice is presumed when counsel allows a trial court to conduct an inadequate plea colloquy,[9] Mr. Rhoades does not have to prove that he was confused at the time. For this reason, the district court's finding that Mr. Rhoades's testimony about his confusion lacked credibility (Ruling at 8) is legally irrelevant.

The inquiry conducted by the criminal trial court regarding the factual basis for the guilty plea fell far short of the standards set by the Iowa Rules of Criminal Procedure and prior case law. As noted earlier, when the state must prove that a criminal defendant acted with a particular intent, then a trial court must conduct an inquiry that is sufficient to ensure that the court is "certain" that the defendant understands that element. *See Henning*, 299 N.W.2d at 910. The trial court here made no such inquiry. Instead, as in *Gaines*, the plea colloquy in the criminal trial

[9] *Schminkey*, 597 N.W.2d at 788, *citing State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996); *State v. Myers*, 653 N.W.2d at 579.

court was devoid of any attempt by the court to determine whether Mr. Rhoades possessed the requisite intent for the charge. *See Gaines*, 2001 Iowa App. LEXIS 617 at *21; *see also Henning*, 299 N.W.2d at 911 (reversing defendant's conviction because the trial court failed to advise defendant as to the specific intent element of the crime). In fact, the trial court did not even mention the intent element to Mr. Rhoades, and the court certainly never asked Mr. Rhoades if he intended to expose his bodily fluid to his partner in a manner that could result in the transmission of HIV. By allowing the trial court to proceed in this way, Mr. Rhoades's counsel deprived his client of his constitutional right to effective assistance, because he allowed the court to accept a guilty plea for which there was no factual basis in the record. Counsel's failure to prevent the trial court from conducting an inadequate plea colloquy is reason alone to reverse the district court and grant Mr. Rhoades's petition for post-conviction relief.

C. The district court ignored the argument that the plea colloquy was inadequate.

In its ruling, the district court effectively ignored Mr. Rhoades's argument that the plea colloquy was constitutionally defective. Mr. Rhoades's assertion that the plea colloquy was inadequate required the district court 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. In the district court's opinion below, however, the court never discussed the plea colloquy at all. Instead, it determined, based on evidence presented to the district court at the civil bench trial, that Mr. Rhoades had failed to prove there was no factual basis and failed to prove any prejudice. (Ruling at 4, 9.)

If the district court had examined the plea colloquy, it should have determined it to be inadequate and concluded that Mr. Rhoades was deprived of effective assistance of counsel ***at the time of his plea*** – or, at least, the court should have explained on the record why that was not the case. It did not. Furthermore, the district court erred when it suggested, incorrectly, that Mr. Rhoades had to prove prejudice. With respect to this type of ineffective assistance, Mr. Rhoades was *not* required to demonstrate prejudice because prejudice is *presumed* when counsel permits a court to accept a guilty plea when there is no factual basis. *Schminkey*, 597 N.W.2d at 788, *citing State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996); *State v. Myers*, 653 N.W.2d at 579.

In essence, the district court 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 in a subsequent 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 Schminkey*, 597 N.W.2d at 792 (vacating guilty plea and remanding for further proceedings when there was no factual basis to prove the requisite intent); *Fluhr*, 287 N.W.2d at 868-69 (setting aside conviction and permitting defendant to plead anew because trial court had not determined that a factual basis for the plea existed); *Brainard*, 222 N.W.2d at 719 (same); *Gaines*, 2001 Iowa App. LEXIS 617 at *22 (same); and, *Henning*, 299 N.W.2d at 911 (same). Because his counsel clearly provided ineffective assistance by allowing the trial court to accept a guilty plea based on an inadequate plea colloquy, Mr. Rhoades respectfully urges this Court to reverse the district court's ruling, to set aside his conviction, and to allow him to withdraw his guilty plea.

II. The record before the trial court demonstrated – and the evidence presented during the post conviction relief hearing confirmed – that Mr. Rhoades received ineffective assistance of counsel because his defense attorney permitted him to plead guilty to a crime for which no factual basis existed.

Although the procedural defect of a constitutionally inadequate plea colloquy alone is sufficient for this Court to set aside Mr. Rhoades's conviction and allow him to withdraw his plea, Mr. Rhoades also urges the Court to dismiss

the indictment against him altogether because the evidence presented to the district court – even when viewed in the light most favorable to the State – demonstrates that there is an insufficient factual basis for a conviction under Chapter 709C.1. Indeed, this Court has held that, although the usual remedy for a plea taken without a factual basis is the right to withdraw the plea, it is appropriate to dismiss the charges altogether when the facts simply do not support the charge. *See, e.g., State v. Galbreath*, 525 N.W.2d 424, 427 (1994).

A. There is no evidence that Mr. Rhoades intended to expose his bodily fluid to the body part of another in a manner that could result in the transmission of HIV.

Consistent with the elements of the alleged crime, to convict Mr. Rhoades of a violation of Chapter 709C.1, the State would be required to *prove beyond a reasonable doubt* that Mr. Rhoades intended to expose his bodily fluid to Mr. Plendl, that such exposure actually occurred and that the exposure was in a manner that could result in the transmission of HIV. An examination of the evidence presented during the post-conviction proceedings reveals not only that there is no factual basis for proving these elements, but moreover that the evidence affirmatively *demonstrated* that Mr. Rhoades intended ***not*** to expose his bodily fluid to Mr. Plendl.

One of the chief deficiencies in the State's case against Mr. Rhoades is that there is no evidence that he acted with the requisite intent. As discussed above, to

convict Mr. Rhoades, the State was required to have evidence proving that he intended to expose his bodily fluid to the body part of another in a manner that could result in the transmission of HIV. Because proof of what a defendant was thinking when an act was done is frequently incapable of being established with direct evidence, courts will examine the facts and circumstances surrounding the act, as well as any reasonable inferences to be drawn from those facts and circumstances, to ascertain a defendant's intent. *See Schminkey*, 597 N.W.2d at 789 (citations omitted). Here, the facts and circumstances surrounding the encounter between Mr. Rhoades and Mr. Plendl conclusively demonstrate that Mr. Rhoades did not intend to expose his bodily fluid to Mr. Plendl's body in a manner that could result in the transmission of HIV, but rather intended the contrary result.

1. Mr. Rhoades's decision to use a condom during anal sex demonstrates affirmatively his intent not to expose Mr. Plendl to bodily fluid.

The use of a condom by Mr. Rhoades during anal intercourse refutes any suggestion that he intended to expose his bodily fluid to the body part of another in a manner that could result in the transmission of HIV. A condom is a barrier that is designed for the very purpose of *preventing* the exposure of the bodily fluid of one person to the body part of another so that pregnancy and/or sexually transmitted diseases are avoided. *See* American Heritage Online Dictionary, http://ahdictionary.com/word/search.html?q=condom (defining condom as "a

flexible sheath, usually made of latex or polyurethane, designed to cover the penis during sexual intercourse for contraceptive purposes or as a means of preventing sexually transmitted diseases.”). In fact, Dr. Jeffrey L. Meier, MD, an infectious disease specialist and Mr. Rhoades’s physician, testified that “[c]ondoms are the most effective safe sex tool in preventing the spread of HIV during anal intercourse.” (Dr. Meier Affidavit, ¶ 8.) Mr. Rhoades testified that he understood that the use of a condom “would prevent any possibility of any fluids being exchanged.” (Rhoades Testimony, Tr. at 126:23–127:1.) To put it bluntly, the only purpose for using a condom during anal sex is to prevent the exchange of bodily fluids and disease transmission. In fact, the use of a condom not only evinces a lack of intent to expose another to one’s bodily fluids in a manner that could transmit HIV, it actually demonstrates the *opposite* intent – *i.e.,* to prevent the exchange of bodily fluids. By using a device that has, as its very purpose, the prevention of the exposure of bodily fluid to another’s body part, Mr. Rhoades could not have intended to do the act prohibited by Chapter 709C.1.[10]

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[10] Interpreting a similar statute – one requiring proof that the defendant intended to expose his sexual partner to a life-threatening communicable disease – the Supreme Court of Kansas held that evidence of condom use would be important in determining whether the defendant acted with the requisite intent to expose. *See State of Kansas v. Richardson*, 209 P.3d 696, 704 (Kan. 2009). After noting that the State had failed to present, *inter alia,* any evidence that the defendant had *not* used a condom, the Kansas high court reversed both convictions, because “the State failed to prove circumstances from which a rational trier of fact could reasonably infer that the defendant had the specific intent to expose either M.K. or

There are also no facts proving that Mr. Plendl's body was even exposed to Mr. Rhoades's semen, the only bodily fluid at issue in this case that can transmit HIV.[11] Here again, the use of a condom defeats an element of the crime because the condom would have prevented semen from coming into contact with Mr. Plendl. Furthermore, it is not even clear that any ejaculation occurred during the anal intercourse. Mr. Plendl claims that Mr. Rhoades did ejaculate during the anal intercourse; Mr. Rhoades testified that he did not recall ejaculating but highly doubted that he did, because of the difficulty he was having at the time in achieving sexual climax. (Rhoades Testimony, Tr. at 127:2-7, 187:6–188:21.) Thus, the State's "evidence" that Mr. Rhoades's bodily fluid came into contact with Mr. Plendl consists of disputed evidence that ejaculation even occurred and undisputed evidence that the two men used a condom.

The State may try to claim that this was a rare instance in which there was somehow an exposure to bodily fluid despite the use of a condom, but the State faces a steep uphill battle in light of its burden to prove this element beyond a reasonable doubt. The State elicited testimony from Mr. Plendl at the PCR

E.Z. to HIV." *Id.* at 705. In Mr. Rhoades's case, the evidence is even more definitively in his favor on the intent issue, because it is undisputed that Mr. Rhoades in fact used a condom during anal intercourse.

[11] This court has previously taken judicial notice of the fact that "HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid . . . ." *State v. Keene*, 629 N.W.2d 360, 365 (Iowa 2001).

hearing that the condom slipped off Mr. Rhoades's penis – allegedly after Mr. Rhoades had ejaculated, but while Mr. Rhoades's penis was still inside Mr. Plendl (Plendl Testimony, Tr. at 247:24–248:6) – and, as a result, Mr. Plendl believes that he was exposed to Mr. Rhoades's bodily fluid. (Plendl Testimony, Tr. at 248:7-18.)

The problem for the State is, when viewed through the lens of intent, Mr. Plendl's testimony during the post-conviction proceedings regarding the accidental slipping off of a condom becomes legally irrelevant. Because Chapter 709C.1 does not criminalize accidental conduct, Mr. Plendl's testimony about condom slippage does not provide a factual basis for the intent component of the criminal charge.

Moreover, even if the condom slipped off upon removal of Mr. Rhoades's penis from Mr. Plendl's body,[12] it does not necessarily follow that Mr. Rhoades's semen came into contact with Mr. Plendl. Indeed, absent direct proof otherwise, the expected result is that the semen would remain inside the condom. Given the weakness of the testimony and the improbability of exposure in this manner, it is highly unlikely the State would be able prove beyond a reasonable doubt that Mr. Plendl was exposed to Mr. Rhoades's bodily fluid.

[12] Mr. Plendl's claim that the condom slipped off was first made at the hearing regarding the petition for post-conviction relief and, therefore, it was not part of the record that the criminal trial court had when it accepted Mr. Rhoades's guilty plea.

2. That Mr. Rhoades and Mr. Plendl also engaged in oral sex without ejaculation does not change the result.

The State's case is not saved by focusing on the oral sex that preceded the anal intercourse as the allegedly criminal sexual act. Indeed, the case on this point is even weaker. The State's suggestion that engaging in oral sex without ejaculation qualifies as proof that Mr. Rhoades *intended* for Mr. Plendl to be exposed to Rhoades's bodily fluid in a manner that could result in the transmission of HIV is a complete non sequitur. Although a condom was not used during oral sex,[13] it is *undisputed* that no ejaculation occurred during the oral sex. To address this evidentiary deficiency, the State would have to argue that, although Mr. Rhoades did not ejaculate, he emitted pre-ejaculatory fluid – a substance that Mr. Plendl erroneously equated to semen.[14] (Plendl Testimony, Tr. at 245:16-22.)

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[13] According to Dr. Meier, although it is included in recommendations for safe sex, a condom is very rarely used during oral sex, because it has not been established that transmission can occur via this activity in the absence of ulcers or open wounds in the mouth and any risk that actually exists is so low as to be unquantifiable. (Dr. Meier Testimony, Tr. at 434:18–436:24).

[14] "Pre-ejaculate (also known as pre-ejaculatory fluid, pre-seminal fluid, or Cowper's fluid, and colloquially as pre-cum) is the clear, colorless, viscous fluid that emits from the urethra of a man's penis when he is sexually aroused. It is similar in composition to semen, but has some significant chemical differences. The presence of sperm in the fluid is debated. Existing research has found none or low levels of sperm in pre-ejaculate, though these existing studies are non-generalizable due to examining small numbers of men." Wikipedia, the Free Encyclopedia, *Pre-ejaculate*, available at http://en.wikipedia.org/wiki/Pre-ejaculate (last modified June 7, 2012.)

Mr. Plendl's testimony regarding the oral sex is insufficient to establish a factual basis for the charge against Mr. Rhoades. This Court has never held that this type of sexual contact – oral sex without ejaculation – is sufficient to support a conviction under Chapter 709C.1. The reality is that the available scientific evidence regarding HIV transmission is inconclusive and certainly does not supply proof beyond a reasonable doubt that HIV *could* be transmitted by a person with an undetectable viral load during oral sex without ejaculation.

First, this Court has never held – and the State offered no competent, credible evidence proving – that pre-ejaculatory fluid is a bodily fluid that is capable of transmitting HIV. 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://www.cdc.gov/reproductivehealth/ProductsPubs/Africa/Chap_19.pdf (last visited June 9, 2012) ("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.").[15]

[15] Note that this statement is made in the context of vaginal sex, where transmission is much more likely than it is through oral sex.

Second, the fact that any potential exposure to pre-ejaculatory fluid in this case occurred only in the context of oral sex makes it even more difficult for the State to sustain its burden on this element. Researchers find it extremely difficult to assess the existence of and/or quantify the risk of HIV transmission during oral sex. *See*, *e.g.,* "CDC HIV/AIDS Facts: Oral Sex and HIV Risk, Oral Sex and the Risk of HIV Transmission," Centers for Disease Control and Prevention (June 2009) available at http://www.cdc.gov/hiv/resources/factsheets/pdf/oralsex.pdf ("[B]ecause most sexually active individuals practice oral sex in addition to other forms of sex, such as vaginal and/or anal sex, when transmission occurs, it is difficult to determine whether or not it occurred as a result of oral sex or other more risky sexual activities."). Dr. Meier acknowledged this in his testimony at trial when he explained 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, Tr. at 418:1-9 ("But, you know, we're talking about a risk of anywhere *from 0 [zero]* to .004 depending on type." (emphasis added)); *id.* at 434:18–435:20 (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* "Risk of HIV Infection Through Receptive Oral Sex" (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 June 9, 2012) ("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).).[16] Such hypothesizing is insufficient to sustain the State's burden of proving beyond a reasonable doubt that oral sex without ejaculation is an actual method of HIV transmission.

[16] 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 (STD)). *See id.* 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.*

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 Mr. Rhoades's viral load. Dr. Meier stated that, as a result of antiretroviral medications used to treat persons with HIV, the viral load in Mr. Rhoades's body at the time of the alleged crime was medically "undetectable." (Dr. Meier Affidavit, ¶ 16.) Because of Mr. Rhoades's undetectable viral load, Dr. Meier opined that transmission of HIV by Mr. Rhoades to another individual was "extraordinarily unlikely if not impossible." (Dr. Meier Affidavit, ¶ 17; Dr. Meier Testimony Tr. 418:23–420:9, 431:4–432:3)[17]

In the absence of any available expert evidence to prove that transmission has ever occurred through oral sex without ejaculation, it would be impossible for the State to sustain its burden of proof. It certainly would be inappropriate to allow the State to infer that Mr. Rhoades subjectively intended to expose Mr. Plendl to a bodily fluid that could transmit HIV when there is no medical evidence that pre-ejaculate is such a bodily fluid in the first place. Thus, the State's entire case with respect to oral sex as the alleged criminal act rests on a bodily fluid that has never been proven to transmit HIV and an allegedly guilty individual who has no

[17] Dr. Meier also testified that, as a result of the undetectable viral load, if Mr. Rhoades engaged in anal intercourse with a condom, "the risk of transmission would be nearly impossible." (Dr. Meier Affidavit, ¶ 18.)

detectable level of infectious HIV in his blood. Mr. Rhoades's intent must be measured in light of these objectively demonstrated circumstances established in the record.[18]

The bottom line is that Mr. Rhoades engaged in oral sex without ejaculation as a precursor to anal sex with a condom. This behavior is consistent with a determination that Mr. Rhoades was engaging in safe sex practices consistent with his intention ***not*** to expose his bodily fluid to Mr. Plendl in a manner that could transmit HIV. There simply is no evidence in the record to support the State's position that Mr. Rhoades intended to expose his bodily fluid in a manner that could transmit HIV or that any such exposure actually occurred. Indeed, all of the evidence affirmatively demonstrates that Mr. Rhoades *did not* intend to expose his bodily fluid and took reasonable steps to prevent such a result. Thus, there is no factual basis for the charge against Mr. Rhoades, and his defense counsel provided ineffective assistance by allowing Mr. Rhoades to plead guilty.

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[18] Mr. Plendl's testimony regarding an alleged cut on the corner of the lip from shaving the day before his encounter with Mr. Rhoades (Plendl Testimony, Tr. at 245:10-13) – which appears designed to address Dr. Meier's statement that "[t]ransmission of HIV in the context of oral sex would require an open wound in the mouth or genitals for infection to occur" (Dr. Meier Affidavit, ¶ 8.) – does nothing to refute the evidence that Mr. Rhoades did not act with the intent required by the statute, because there is no evidence that Mr. Rhoades even knew about Mr. Plendl's alleged cut.

B. Defense counsel's failure to prevent Mr. Rhoades from pleading guilty to a crime for which there is no factual basis was caused by counsel's failure to research, understand and investigate the elements of the crime.

Although Mr. Rhoades does not have to prove how or why his counsel failed to prevent him from pleading guilty to a crime for which no factual basis exists, an examination of defense counsel's woefully inadequate understanding of the elements of Chapter 709C.1 explains why Mr. Rhoades was encouraged to plead guilty and further demonstrates that Mr. Rhoades received constitutionally deficient representation throughout the criminal proceedings. The record shows that Attorney Metcalf failed to research and understand the elements of the alleged crime, to investigate or to inquire into the details of the alleged conduct, and/or to advise his client as to viable defenses based on the application of the law to the facts. As a result, he allowed Mr. Rhoades to plead guilty to a crime that he did not commit.

It is axiomatic that an attorney cannot perform the essential duty of ensuring that there is a factual basis for a guilty plea if he himself does not understand the elements of the crime. Thus, researching and understanding the elements of a crime are part and parcel of an attorney's essential duties. Similarly, counsel must investigate – or at least inquire into – the details of the alleged conduct and develop a sufficient understanding of the manner in which the law applies to the alleged facts, in order to advise the client of viable defenses. Indeed, this Court has

recognized that counsel provides ineffective assistance if he or she fails to conduct basic legal research that would reveal a viable defense. *Millam v. State*, 745 N.W.2d 719, 723 (Iowa 2008).

Claims that an attorney has failed adequately to research and investigate the charges against a client are evaluated by considering whether the attorney "perform[s] below the standard demanded of a reasonably competent attorney." *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Although mere mistakes in judgment do not normally rise to the level of ineffective assistance of counsel, judgments made after a "less than complete investigation" must be based on reasonable professional judgments that support the particular level of investigation conducted. *Id.* In *Millam*, this Court applied this standard and concluded that a defendant had received ineffective assistance of counsel when his attorney failed to research the law regarding whether rape-shield laws in other jurisdictions had been interpreted as precluding the admissibility of prior false claims of sexual abuse. *Id.* Because such research would have revealed that a strong argument could be made that prior false claims by the complaining witness were admissible, despite the existence of rape-shield laws, the court found that counsel had provided ineffective assistance by failing to research the issue and present the evidence of prior false claims. *Id.*

The record demonstrates that Mr. Rhoades's defense counsel similarly failed to research, understand, and investigate the elements of the crime and to advise Mr. Rhoades that there was a very strong argument that there was no factual basis for a conviction. Mr. Rhoades testified, both on direct and cross-examination, that Attorney Metcalf never explained to him the legal meaning of the statutory phrase "intimate contact." (Rhoades Testimony, Tr. at 145:4-12, 181:16-25.) Attorney Metcalf stated simply that he "went through each element" with Mr. Rhoades, but he gave no indication that he discussed the meaning and nature of the specified *mens rea* element of the statute. (Metcalf Testimony, Tr. at 290:14–291:25.) As a result, there is no evidence that Attorney Metcalf understood and discussed with Mr. Rhoades that the use of a condom would make it difficult, if not impossible, for the State to prove that Mr. Rhoades had acted with the necessary criminal intent.

The lack of evidence of any discussion between Attorney Metcalf and Mr. Rhoades regarding the intent element of the statute is not surprising given Attorney Metcalf's lack of understanding of Chapter 709C.1 and the science of HIV transmission. Noting that he had no prior familiarity with the statute (Metcalf Testimony, Tr. at 296:16-25), Attorney Metcalf testified that he believed that if an HIV positive person touched the penis of another person without disclosing his HIV status, that would create a "jury question" and might "provide an adequate

basis for a plea of guilty." (Metcalf Testimony, Tr. at 380:16–381:2; *see also* Tr. at 367:17–369:18.) Of course, for an HIV-positive person merely to touch another man's penis poses absolutely no possibility of exposure and HIV transmission (Dr. Meier Testimony, Tr. 434:5-8), so such conduct could not provide the evidentiary support for proving an intent to expose to infectious bodily fluids. Indeed, any attempted prosecution based on such facts should be summarily dismissed as lacking any factual basis. Attorney Metcalf's belief that such facts could form the basis for a guilty plea indicates that he simply did not understand the statute or how HIV is transmitted.[19]

Attorney Metcalf also displayed a shocking lack of familiarity with the specific facts of the case. He testified that he believed that there had been a transfer of semen during oral sex (Metcalf Testimony, Tr. at 296:1-7), yet the undisputed evidence is that no ejaculation occurred during oral sex (Rhoades Testimony, Tr. at 127:2-7; Plendl Testimony, Tr. at 245:14-20.). He also testified that he believed that the condom had broken during anal sex (Metcalf Testimony, Tr. at 296:1-9), yet there was no testimony regarding a broken condom. Furthermore, Attorney Metcalf indicated he did not have a discussion with Mr. Rhoades about the fact that Mr. Rhoades had an undetectable viral load; nor did he

[19] Attorney Metcalf also testified that he believed the *mens rea* element term in the statute was "knowingly." (Metcalf Testimony, Tr. at 304:11-17). In fact, the *mens rea* term in the statute is "intentional."

discuss with Mr. Rhoades the impact his undetectable viral load might have on the State's ability to satisfy its burden of proof. (Metcalf Testimony, Tr. at 312:18–314:23.) Attorney Metcalf's misunderstanding of the facts,[20] combined with his lack of understanding of the intent element of the statute, led Attorney Metcalf to conclude, erroneously, that the State had a strong case against Mr. Rhoades and would likely obtain a conviction. (Metcalf Testimony, Tr. at 296:10-20.) Attorney Metcalf never explained to the district court below – or to Mr. Rhoades – how he believed the State could satisfy its burden of proving beyond a reasonable doubt that Mr. Rhoades had acted with the intent to expose Mr. Plendl to infectious bodily fluid when Rhoades used a condom during intercourse.

By failing to research and adequately understand the elements of the HIV criminal transmission statute or to inquire and investigate the details of the alleged conduct, Mr. Rhoades's counsel did not recognize that there was no basis for the charges against Mr. Rhoades and, therefore, he failed to so advise his client. This lack of due diligence resulted in counsel allowing the criminal trial court to accept a guilty plea for which there was no factual basis.

[20] Attorney Metcalf's misunderstanding of the facts might have been corrected had he completed the deposition of the complaining witness, Mr. Plendl, which he had started. Attorney Metcalf testified that he believed there was nothing to be gained by completing the deposition. (Metcalf Testimony, Tr. at 319:12–320:6.)

C. A holding that the State has insufficient evidence to support the charges against Mr. Rhoades is consistent with this Court's prior decisions.

Mr. Rhoades's lack of any criminal intent distinguishes this case from prior cases in which this Court has upheld convictions under Chapter 709C.1. For example, in *Keene,* this Court affirmed the guilty plea of a man who engaged in unprotected intercourse with a mentally ill woman. The record was unclear as to whether the defendant had ejaculated (the defendant testified that he did not believe that he had ejaculated, but if he did, he believed that he did so only on his or his partner's stomach), but the parties were sufficiently concerned about the possibility that they went to a clinic together for a pregnancy test. *Keene*, 629 N.W.2d at 362-63. Similarly, in *Musser*, this Court upheld the conviction of a man who had unprotected sexual intercourse on numerous occasions. *Musser*, 721 N.W.2d at 741. Finally, in *State v. Stevens*, 719 N.W.2d 547, 548 (Iowa 2006), the Court upheld the conviction of a 33-year old man who had oral sex with, and ejaculated in the mouth of, a 15-year old boy. In each of these cases, the defendants engaged in, and were convicted for, sex acts that are not present in this case – namely, sexual acts involving the ejaculation by an HIV positive person into the bodily orifice of another without the use of a condom. These acts result in criminal liability under Chapter 709C.1 because they reflect an intent to expose bodily fluid to the body part of another in a manner that could result in the transmission of HIV. In contrast to the defendants in *Keene*, *Musser* and *Stevens*,

Mr. Rhoades engaged in safe-sex practices that reflected an intent ***not*** to expose his bodily fluid to the body of his partner in a manner that could result in the transmission of HIV. Simply put, the defendants in *Keene*, *Musser* and *Stevens* acted with the intent required to find criminal liability under the statute, and Mr. Rhoades did not.

CONCLUSION

The Court should conclude that there is no factual basis for the charge against Mr. Rhoades and should set aside his conviction and dismiss the charge against him.

In the alternative, the Court should find that the criminal trial court conducted a plea colloquy that inadequately informed Mr. Rhoades of the elements of the crime and, therefore, did not establish a factual basis on the record for the charge. If so, the Court should set aside Mr. Rhoades's conviction and remand the case to allow him to withdraw his guilty plea and for further proceedings consistent with the Court's opinion.

REQUEST FOR ORAL OR NON-ORAL SUBMISSION

Mr. Rhoades requests oral argument on the issues presented by this appeal.

DATED: June 13, 2012

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Christopher R. Clark

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