

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, |) | On Appeal from the |
| <i>Plaintiff-Appellee</i> |) | Franklin County |
| |) | Court of Appeals, |
| v. |) | Tenth Appellate District |
| |) | |
| JIMMY L. BIRD, |) | S.C. Case No. 97-376 |
| <i>Defendant-Appellant</i> |) | App. No. 96APA04-505 |
| |) | Com. Pleas No. 93CR-10-5878 |
| |) | |

BRIEF OF AMICI CURIAE
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
AND THE OHIO HUMAN RIGHTS BAR ASSOCIATION
IN SUPPORT OF APPELLANT JIMMY L. BIRD

Heather C. Sawyer
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
11 East Adams, Suite 1008
Chicago, IL 60603
(312) 663-4413
(312) 663-4307 (facsimile)

Attorney for Amici Curiae

INTEREST OF AMICI CURIAE

Amici Lambda Legal Defense and Education Fund, Inc. and The Ohio Human Rights Bar Association submit this brief in support of Appellant Jimmy Bird. Amici are vitally interested in ensuring that individuals infected with the human immunodeficiency virus ("HIV") or living with acquired immune deficiency syndrome ("AIDS") are afforded the same constitutional protections in the criminal context as are all other individuals, and that the criminal law serve as a vehicle for only legitimate state purposes.

Amicus Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national non-profit public interest legal organization working for the civil rights of people with HIV or AIDS, lesbians, and gay men through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns. In 1983 Lambda filed the nation's first AIDS discrimination case. As part of its efforts to protect the civil liberties of people with HIV/AIDS, Lambda works to ensure that government policies and actions involving HIV/AIDS are based on scientific and medical evidence, not prejudice, fear or lack of information. Lambda has appeared as counsel or amicus curiae in scores of cases in state and federal courts raising the civil rights and liberty interests of people infected with HIV such as School Board of Nassau County v. Arline (1987), 480 U.S. 273; Chalk v. U.S. District Court (C.A. 9, 1988), 840 F.2d 701; Sattler v. New York Com. on Human Rights (N.Y., 1992), 580 N.Y.S.2d 35; State of Minnesota v. Clausen (Minn. Ct. App. 1992), 491 N.W.2d 662; Cahill v. Rosa (N.Y., 1996), 651 N.Y.S.2d 344.

Amicus The Ohio Human Rights Bar Association ("OHRBA") advocates for issues of importance to members of Ohio's lesbian/gay/bisexual community, and for persons living with

HIV/AIDS. An Ohio not-for-profit corporation, OHRBA also provides support and advocacy for lesbian and gay lawyers, law students, and paraprofessionals and fights for sound public policy to protect those living with HIV/AIDS. **INTRODUCTORY STATEMENT**

In the sixteen years since the discovery of HIV, spitting has never resulted in the transmission of HIV from an infected individual to another person. Both now, and at the time of Mr. Bird's indictment and conviction, all medical and scientific evidence bearing on the issue demonstrated that saliva does not transmit HIV. Amici provide a summary of this medical and scientific evidence in Section I.

The medical and scientific evidence establishes that Mr. Bird should not have been convicted of felonious assault. As described in Section II, felonious assault requires the knowing attempt to harm by use of a weapon capable of inflicting death. Under Ohio law, and in accordance with constitutional principles of due process, Mr. Bird should not be convicted for conduct that could not constitute this crime. The State's mistaken conclusion that there is "some dispute" regarding the possible transmission of HIV through saliva does not alter the fact that Mr. Bird's saliva is incapable of inflicting death and, therefore, this Court should reverse his conviction.

Finally, as described in Section III, singling out persons with HIV for enhanced criminal penalties frustrates several important public policy goals. The use of the criminal justice system to bring very serious charges against people with HIV or AIDS for committing acts that cannot possibly endanger society undermines proven public health policies that combat HIV infection and AIDS. Such criminal prosecutions confuse the public about ways in which HIV can be transmitted, and encourage discrimination and violence against those who have been infected

with the virus. They also undermine the credibility and effectiveness of the criminal justice system as a central vehicle for encouraging respect for society's laws and protecting members of the public from preventable harm.

I. BIRD'S CONVICTION MUST BE REVERSED BECAUSE OF THE TRIAL AND APPELLATE COURTS' FAILURE TO ACKNOWLEDGE THAT SPITTING CANNOT TRANSMIT HIV.

HIV causes illness by interfering with the proper functioning of the human immune system. After initial infection with HIV, an individual usually remains asymptomatic for some period of time.¹ HIV infection typically produces a "continuum of conditions, ranging from the acute, mononucleosis-like syndrome which occurs at seroconversion, to asymptomatic HIV infection, to symptomatic HIV infection, and finally, to AIDS, a spectrum that encompasses a great variety of clinical symptomatology." Center for Disease Control and Prevention ("CDC"), 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, 41 MMWR 1-4 (Dec. 18, 1992).

Although recent treatment developments have returned many persons diagnosed with AIDS to relative health and raised hopes that AIDS may become a chronic, treatable illness in the foreseeable future, the public health effort to stem the spread of HIV remains focused on preventing infection by the virus. That effort is aided by public awareness of the uncontroverted fact that there are very limited routes of HIV transmission.

By 1987 it had become clear that, "the three routes of transmission initially described still remain the only ones demonstrated to be important." Friedland & Klein, Transmission of the

¹The most common way to determine whether someone has been infected with HIV is to test for antibodies to the virus in the individual's blood. When blood reveals the antibodies, the

Human Immunodeficiency Virus, 317 N. Eng. J. Med. 1125 (Oct. 1987) ("Transmission").

Those three known routes of transmission are: (1) inoculation of blood, including through blood transfusions, needle-sharing among intravenous drug users, accidental needle-stick injuries, and the exposure of open wounds or mucous membranes to blood; (2) sexual transmission, in both heterosexuals and gay or bisexual men and women; (3) perinatal transmission, both intrauterine and peripartum. Transmission at 1126, Table 1; see also Institute of Medicine, National Academy of Sciences, Confronting AIDS: Update 1988 36 at 38-39 ("Confronting AIDS") ("Epidemiological data continue to support the observation that HIV transmission *is limited to* sexual contact, the sharing of contaminated needles and syringes, exposure to infected blood or blood products, transplantation of infected organs or tissue, and transmission from mother to child either across the placenta or during delivery *A change in HIV transmission modes would be biologically unprecedented in a virus*") (emphasis added); The AIDS Reader: Social, Political, Ethical Issues, "HIV Infection and Its Epidemiology," at 78 (N. McKenzie ed. 1991).

Comprehensive research on individuals who were extensively exposed to persons with AIDS has proven that HIV is not spread by casual contact. By 1986, 17,000 persons with AIDS had been studied and in no instance had a family member who was not a sexual partner become infected with HIV. CDC, Apparent Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus from Child to Mother Providing Health Care, 35 MMWR 76 (Feb. 1986). In another study of over 300 family members, the contacts between the HIV-positive individuals and their family members included sharing: toothbrushes (7%), eating utensils (25%), towels (37%), beds (37%), dishes (46%), drinking glasses (48%), toilets (90%), and baths (92%). Over 19% of those studied had kissed the HIV-positive family member on the

individual is termed "HIV seropositive" or "HIV-positive."

lips, and 83% had kissed on the cheek. G. Friedland, et. al., Lack of Transmission of HTLV-III/LAV Household Contacts of Patients with AIDS or AIDS Related Complex with Oral Candidiasis, 314 N. Eng. J. Med. 344 (Feb. 1986). Again, no transmission was found. Id.

By the end of 1993, the CDC reaffirmed that in 17 studies conducted in the United States and Europe, there were no new infections of persons who had household contact with HIV-infected persons but did not have sex or share needles with them. CDC, HIV Transmission in Household Settings (Dec. 4, 1993); see also R.J. Simonds and Martha F. Rogers, HIV Prevention -- Bringing the Message Home, 329 N.Eng.J.Med. 1883-1885 (Dec.16, 1993).

There never has been a documented case of transmission by saliva, despite close observation and follow-up investigation of contacts with HIV-positive persons involving spitting and kissing. Brett-Smith & Friedland, AIDS Law Today, A New Guide for the Public, "Transmission and Treatment," at 23 (1993) ("Sweat, tears, and saliva are not considered to be infectious body fluids because the virus, if present at all, occurs in such low numbers that it is medically insignificant. No case of transmission has been shown to have resulted from contact with any of these fluids."); Gostin, The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties, 49 Ohio St. L.J. 1017, 1023 (1989). Not only has it been demonstrated that HIV is rarely even present in saliva but also that the antiviral activity of saliva "likely has a major role in the oral defense against AIDS." P. Fox, D.D.S., et. al, Saliva Inhibits HIV-1 Infectivity, 116 J.A. Dental Ass'n 635-37 (May 1988); A. Lifson, Do Alternative Modes for Transmission of Human Immunodeficiency Virus Exist?, 259 JAMA 1353 (March 4, 1988) (finding that, although early reports indicated that HIV could be recovered from the saliva of infected persons, subsequent laboratory data suggests the HIV is rarely found in the saliva of

infected persons, and noting "[f]or example, in another study, virus was isolated from the saliva of only 1 of 83 infected patients") (emphasis added) (citation omitted).²

There is no question that in October 1993, when Mr. Bird was indicted on a charge of felonious assault, there was no scientific or medical reason to believe that the saliva of an HIV-positive person could cause death. In fact, in 1988 -- five years before Mr. Bird's indictment -- the federal government sent a letter *to every household in the United States* to educate the public regarding the real routes of HIV transmission and to dispel any lingering, uninformed fears that contact with bodily fluids such as sweat and saliva would lead to infection:

The AIDS virus is hard to get and is easily avoided. You won't just 'catch' AIDS like a cold or flu because the virus is a different type. The AIDS virus is transmitted through sexual intercourse, the sharing of drug needles, or to babies of infected mothers before or during birth. You won't get the AIDS virus through everyday contact with the people around you in school, in the workplace, at parties, child care centers, or stores . . . ***You won't get AIDS from saliva***, sweat, tears, urine or a bowel movement. You won't get AIDS from a kiss. You won't get AIDS from clothes, a telephone or from a toilet seat. It can't be passed by using a glass or eating utensils that someone else has used.

Understanding AIDS: A Message From The Surgeon General, U.S. Department of Health and Human Services, HHS Publication No. HHS-88-8404 (1988)("Understanding AIDS")(emphasis

²A recent report regarding the possible transmission of HIV through deep, prolonged kissing involving the exchange of contaminated blood confirms these findings. CDC, Transmission of HIV Possibly Associated with Exposure of Mucous Membrane to Contaminated Blood, 46 MWR No. 27 (July 11, 1997) (confirming that saliva inhibits HIV infectivity, HIV is infrequently isolated from saliva and occurs at low levels in the saliva of HIV-positive persons, and that "*none of the approximately 500,000 cases of AIDS reported to the CDC have been attributed to exposure to saliva*") (emphasis added). Acknowledging that the "exact route of transmission in this report cannot be determined" and that "other exposures of the woman to the man's blood or semen [through vaginal intercourse and oral sex] cannot be excluded," the CDC said that exposure of the woman's mucous membrane to the man's contaminated blood during frequent "deep kissing" made oral transmission possible. Id. The CDC made it clear that contaminated blood -- not saliva -- was the alleged culprit.

added).³

Based on the consensus within the medical and scientific community that has developed over the years since AIDS was first identified in the early 1980s, legislatures, government agencies, and courts called upon to address situations in which transmission risk has been raised have noted how HIV is transmitted and how it is not. For instance, the California Legislature has officially stated that "the medical evidence is conclusive that this infection is spread by sexual contact with infected persons, exposure to contaminated blood or blood products through transfusion, and by perinatal transmission, and there is *no known risk of transmission by other means.*" Cal. Stats. 1986, ch. 498, sec. 1 (emphasis added). Similarly, the Occupational Safety and Health Administration of the United States' Department of Labor ("OSHA") has recognized that "epidemiologic evidence implicates *only* blood, semen, vaginal secretions and breast milk in the transmission of the virus." OSHA, Occupational Exposure to Bloodborne Pathogens, 56 Fed. Reg. 64,004 (Dec. 6, 1991)(emphasis added). And, prior to Mr. Bird's indictment in 1993, courts that had considered how HIV is transmitted had overwhelmingly concluded that the virus is transmitted only through exchange of blood, semen, vaginal or cervical fluids, or from mother to fetus.⁴

³See Glick v. Henderson (C.A. 8, 1988), 855 F.2d 536, 539 n. 1 quoting Understanding AIDS at 2, and noting that, "because of its importance," the U.S. government sent the publication to every household in this nation.

⁴e.g., Glover v. Eastern Nebraska Community Office of Retardation (C.A. 8, 1989), 867 F.2d 461 ("[t]he medical evidence is undisputed that the disease is not contracted by casual contact"); Chalk v. United States District Court (C.A. 9, 1988), 840 F.2d 701, 706 (noting the "overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS" and that "[t]here is no evidence of transmission (spread) of AIDS virus by everyday contact . . ."); Thomas v. Atascadero Unified School Dist. (C.D. Cal., 1986), 662 F.Supp. 376, 380 ("the virus is transmitted from one person to another only by infected blood, semen, or vaginal fluids (and possibly, mother's milk)"); Ray v. School Dist. of DeSoto County (M.D. Fla, 1987), 666 F.Supp. 1524, 1530-31 ("there is no evidence that close personal, but non-sexual interaction, such as giving a bath, shaking hands or kissing on the lips, will cause HIV-

Despite all of the medical and scientific evidence showing that HIV is transmitted through very specific routes, none of which include saliva, public speculation as to other hypothetical routes and consequent hysteria continues. Although such speculation may be understandable, theoretical risk is an impermissible standard to employ in making legal decisions, particularly those involving criminal penalties. As the Eighth Circuit emphasized in Moore, "[w]hile Dr. Gastineau testified that 'in medicine everything is conceivable', in a legal context the possibility of AIDS transmission by means of a bite is too remote to support a finding that mouth and teeth may be considered deadly and dangerous because of the theoretical possibility of HIV transmission." 846 F.2d at 1168. The court went on to reject HIV transmission as a consideration in the prosecution of an inmate for biting a guard. Id.⁵

Here Bird's conviction for felonious assault under Ohio law hinges on the State's mistaken conclusion that there is "some dispute" as to whether HIV may be transmitted through saliva. State of Ohio v. Bird (Dec. 31, 1996), No. 96APA04-505 at 6097. There is no such dispute, nor was there a genuine dispute at the time of Mr. Bird's indictment and conviction.

infection"); United States v. Moore (C.A. 8, 1988), 846 F.2d 1163, 1168 ("[t]he evidence established that there are no well-proven cases of AIDS transmission by way of a bite; *that contact with saliva has never been shown to cause the disease*; Indeed one study has indicated that saliva actually may contain substances that protect the body from AIDS. N.Y. Times, May 6, 1988 at A16, col. 4.") (emphasis added).

⁵In Weeks v. Scott (C.A. 5, 1995), 55 F.3d 1059, an inmate with HIV who threatened corrections officers, announced he was HIV-positive, and spat twice at a corrections officer was convicted of attempted murder and sentenced to life in prison. In Texas, a conviction for attempted murder has three requirements: (1) a person with intent to kill, (2) performs an act that goes beyond mere preparation, (3) which tends, but fails, to effect the commission of murder. Id. at 1061. The court relied in large part on the testimony of Paul Cameron, who admitted that he is not a medical doctor (Trial Transcript at 507) and Lorraine Day, who has no training in infectious diseases generally or HIV/AIDS specifically (Trial Transcript at 56062). Both of these individuals testified that there were cases of HIV transmission by saliva, despite the fact that the CDC and other respected epidemiological research centers have not recognized any such occurrences. Amici know of no law or precedent in Ohio which provides for similar relaxation of standards in the admission of "expert" testimony or the elements of attempted murder to allow

II. MR. BIRD'S CONVICTION FOR CONDUCT THAT COULD NOT CONSTITUTE FELONIOUS ASSAULT UNDER OHIO LAW OFFENDS CONSTITUTIONAL PRINCIPLES OF DUE PROCESS.

A. A Conviction Based Upon A No Contest Plea To Facts That Cannot Constitute The Charged Crime Violates Due Process.

Rule 11 of the Ohio Rules of Criminal Procedure allows a defendant to plead no contest with the consent of the court, and specifies that this plea is not an admission of guilt but, instead, "an admission of the truth of the facts alleged in the indictment, information, or complaint" *Crim.R. 11(A)(2)* (Anderson 1997). Because a defendant admits only those facts alleged by the State, a court cannot convict a defendant following a no contest plea unless the State has alleged sufficient facts to establish each of the essential elements of the charged crime. "[T]here being no admission of guilt by a no contest plea and such plea only admitting the truth of the facts alleged in the indictment, if those facts do not, in and of themselves, constitute the allegation of an offense under the statute, or statutes involved, the defendant has admitted to nothing upon which the court can base a conviction." *State v. Luna* (1994), 96 Ohio App. 3d 207, 209 citing *State v. Hayes* (Jan 14, 1983), Hancock App. No. 5-82-11, unreported, 1983 WL 7178.

The necessary corollary to the State's obligation to establish all of the essential elements of a crime before an accused may be convicted based upon a no contest plea is the court's obligation to determine whether the State has met this burden prior to accepting a defendant's no contest plea and basing conviction upon that plea. *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St. 3d 148, 150 ("a defendant has a substantive right to be discharged by a finding of not guilty where the statement of facts reveals a failure to establish all of the elements of the offense"; *State ex rel. Stern v. Mascio* (1996), 75 Ohio St. 3d 422, 423 (in felony cases, the court should refuse to accept a no contest plea where the facts alleged by the State are not "sufficient to justify

conviction of the offense charged") citing State of Ohio v Thorpe (1983), 9 Ohio App. 3d 1, 2 (where "the facts as recited by the prosecutor do no constitute the offense charged in the indictment the court should refuse to accept the plea"); State v. Cohen (1978), 60 Ohio App. 2d 182, 184. In felony cases such as this one, the court should refuse to accept a defendant's no contest plea where the State has failed to establish the essential elements of the charged crime . Mascio, 75 Ohio St. 3d at 423; Thorpe, 9 Ohio App. 3d at 2.

The procedure governing an Ohio court's acceptance of a defendant's no contest plea embodies a defendant's substantive right not to face conviction by an admission to facts that do not constitute the charged offense. Crim.R. 11(C)(2) (Anderson 1997). Rule 11(C) grants the court discretion to refuse a plea of no contest, and requires the court to ensure that certain safeguards have been met prior to any acceptance of this plea. Interpreting the identical procedural provisions for acceptance of guilty and no contest pleas in the Federal Rules of Criminal Procedure, the Court of Appeals of the Fifth Circuit concluded that these safeguards are absolutely necessary to ensure that constitutional guarantees of due process have been met. United States v. Briggs (C.A. 5, 1991), 939 F.2d 222, 227. In Briggs, the defendant pled guilty to charges of bank fraud and transportation of stolen money and was sentenced to thirty years' imprisonment. Id. at 223. Finding that the indictment to which the defendant had pled did not sufficiently allege the essential elements of the charged crimes, the Court of Appeals recognized that "to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution." Id. at 228. A defendant's guilty or no contest plea should never be sufficient to absolve the state of its obligation to ensure that sufficient facts exist to warrant conviction for a criminal offense.

Indeed, Ohio courts have recognized a defendant's right to be free from conviction where the State has not established that the alleged conduct constitutes the charged crime. Bowers, 9 Ohio St. 3d at 150 (vacating defendant's no contest plea to driving under the influence and holding that "a defendant has a substantive right to be discharged by a finding of not guilty where the statement of facts reveals a failure to establish all of the elements of the offense"); Cohen, 60 Ohio App. 2d at 184 (reversing defendant's conviction and setting aside his no contest plea where the facts alleged by the State negated an essential element of robbery); Luna, 96 Ohio App. 3d at 209-10 (reversing conviction based on no contest plea where the State failed to allege the essential elements of theft); Cleveland v. Technisort, 20 Ohio App. 3d at 143 (reversing conviction based on the defendant's no contest plea to a criminal complaint alleging violation of the municipal tax code and noting that "a trial court is not permitted to accept a plea of no contest when the facts recited to the court establish that the defendant could not be convicted of the offense charged.") As discussed below, the facts alleged by the State do not establish the crime of felonious assault and, therefore, Mr. Bird's conviction should be reversed.

B. The State Failed To Allege Facts Establishing Felonious Assault.

The facts recited to the court in Mr. Bird's case, both in the underlying indictment and in court following Mr. Bird's plea, indicate that the State did not, and could not, establish the essential elements of felonious assault. The indictment charged that Mr. Bird "did knowingly cause or attempt to cause physical harm to Officer Shirk by means of a deadly weapon, to wit: spit and/or saliva." A "deadly weapon" is defined under Ohio law as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon . . .," and is an essential element of the crime of felonious assault. R.C. 2903.11(A)(2); R.C. 2923.11(A).

In order to act "knowingly", a defendant must be "aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

Under Ohio law, saliva is not an instrument, device, or thing capable of inflicting death. State v. Bailey (1992), 83 Ohio App.3d 544, 547 (reversing defendant's conviction for attempted assault for spitting on his arresting officers.) The State argues that its allegation that Mr. Bird is HIV-positive and its erroneous conclusion that "there is some dispute between health care professionals as to whether or not that disease can be spread through salivary transmission" (1/7/94 Tr. at 7) provides a sufficient factual basis upon which the court could convict Mr. Bird of felonious assault. The representation that there is "some dispute" does not translate into actual factual evidence or scientific data from qualified experts that saliva poses a measurable, let alone a reasonably predictable, risk of transmitting HIV, and certainly does not provide a factual foundation for the conclusion that Mr. Bird acted with any intent to, or belief that his spit would harm the arresting officer.⁶ The State did not -- and cannot -- provide a factual foundation establishing the essential elements of felonious assault because there is not one documented case in which HIV has been transmitted via saliva nor any evidence to suggest that Mr. Bird believed he could, or intended to, seriously harm the arresting officer by spitting. See, Section I.A. above.

The State now argues that the actual capability of transmission of HIV through saliva is

⁶In a recent decision, the Maryland Court of Appeals recognized that a defendant's knowledge of his HIV status is not per se evidence that the defendant charged with sexual assault possessed the mental state required to commit attempted murder. Smallwood v. State of Maryland (Md. 1996), 343 Md. 97, 680 A.2d 512. Notably, in concluding that the defendant's knowledge that he was HIV-positive was not evidence of an intent to kill, the court rejected the argument that the defendant's actions were the equivalent of "firing a deadly weapon at a vital part of someone's body." 343 Md. at 106, 680 A.2d at 516. The court noted that the extremely small chance of transmission in a single incident, even when the single contact was sexual intercourse, precluded any assumptions about the defendant's intent. Id.

not relevant because Mr. Bird's no contest plea constitutes an admission that his spit is a deadly weapon under Ohio law. The State misconstrues the effect of Mr. Bird's plea. While he may admit the facts alleged in the indictment, he does not admit the legal conclusion to be drawn from those facts. As discussed above, a defendant does not admit to a legal conclusion and thereby waive his right to challenge the State's duty to establish all of the essential elements of an offense by pleading no contest. See, Cohen, 60 Ohio App. 2d at 184 Technisort, 20 Ohio App. 3d at 143.

In Cohen, the defendant pled no contest to robbery, an essential element of which is that the accused "use[d] or threaten[ed] the immediate use of force against another." Id. at 183 citing R.C. 2911.02. During the hearing on Cohen's no contest plea, the State alleged that he had used "force" by rearranging the sleeping body of the victim in order to remove a wallet. Id. The appellate court reversed the conviction, holding that the facts -- moving a sleeping body -- could not establish that force had been used. Id. The court explicitly rejected the State's argument that the defendant's no contest plea constituted an admission that the defendant had used force. Id. In fact, the court concluded that the statement of facts recited to the trial court not only failed to include but actually negated an essential element of the offense charged in the indictment. Id. at 184. In an analysis strikingly applicable to the prosecution's arguments in this case, the Court of Appeals observed:

It is one thing to rely on Crim.R.11(B)(2) to supply the fundament for the correction of an inadvertent omission in the statement of facts or even to furnish the dispositive weight where facts are in some dispute, but it is quite another to use it, as the state would have it, to paper over an obvious, unarguable, and dispositive deficiency in the state's case against the defendant.

Id. In Mr. Bird's case, the State has made the same argument, namely that Mr. Bird's no contest

plea constituted an admission that his spit was a deadly weapon. As in Cohen, the State's argument in this case must be rejected. Id. at 184.

No reasonable court would accept a plea of no contest and proceed to sentence a defendant on a charge of felonious assault where the facts alleged to constitute the crime indicate that the "deadly weapon" used in the assault was the saliva of someone whose HIV status is negative or unknown. See, Cohen, 60 Ohio App. 2d at 184 (noting that a court would not accept a no contest plea and proceed to sentence a defendant who pled to murder where the alleged victim still lived). Were it not for the lingering ignorance and stigma associated with HIV, it is unlikely a court would have accepted Mr. Bird's plea and imposed a sentence in this case. Mr. Bird's conduct did not and could not constitute the crime of felonious assault. Fear and lack of information regarding HIV infection and its real routes of transmission cannot be, and should not be, the basis for a criminal conviction.

III. SINGLING OUT PERSONS WITH HIV FOR ENHANCED CRIMINAL PENALTIES BASED ON BEHAVIOR SUCH AS SPITTING THAT CANNOT TRANSMIT HIV FRUSTRATES IMPORTANT PUBLIC POLICY STRATEGIES AND GOALS.

Public health officials have rejected the use of coercive measures as a strategy to stop HIV transmission. Such measure are counterproductive because they discourage people from coming forward and learning about HIV and how to reduce the risk of its transmission.

Confronting AIDS at 63 (noting that fear of reprisal based on HIV infection is a "major constraint" on the acceptance of important public health efforts, such as voluntary testing and methods of infection prevention).⁷ In rare, near universal agreement, public health experts have

⁷The recent report of President Clinton's Office of National AIDS Policy ("ONAP"), published by The White House, reaffirmed that "fear of discrimination and stigma causes many people not to seek testing for HIV; thus many remain unaware of their HIV status and may unknowingly

recommended that AIDS be combatted through intensive efforts to educate people about the true modes of HIV transmission and risk-reduction techniques.⁸ The CDC, for example, repeatedly has stated that "education is the *only* intervention tool available." CDC, Guidelines for AIDS Prevention Program Operations (Oct. 1987) (emphasis in original). The National Academy of Sciences similarly believes that "educational efforts to foster and sustain behavioral change remain the only presently available means to stem the spread of HIV." Confronting AIDS at 64. The original President's Commission on AIDS also concluded almost a decade ago that "education, [voluntary] testing, and counseling" of those who may be infected are crucial in controlling HIV. Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 119 (June 1988). There is a clear consensus that "education and behavior modification are the only effective means of preventing the spread of the disease [AIDS]." Cal. Assem. Conc. Res. No. 108, ch. 132 (1988); ONAP, The National AIDS Strategy 1997 at 10 (reaffirming that education and behavior modification are crucial to effective infection prevention).

Mr. Bird's indictment and conviction for behavior that cannot transmit HIV directly undermines the nation's public health strategies for several reasons. First, it undermines AIDS education efforts. The trial court clearly acknowledged the educational message it intended to send through Mr. Bird's conviction and sentencing: "I cannot and will not release you, *to the detriment of the public safety*, nor will I send a message to other persons diagnosed with a terminal disease that it is okay to callously and with indifference recklessly disregard the right to life unfettered by worry . . ." (4/7/94 Tr. at 8-9) (emphasis added). Unfortunately, far from

infect others. The stigma attached to HIV remains a co-factor in HIV infection." ONAP, The National AIDS Strategy 1997, Washington, D.C. 1997, at 10.

⁸Risk-reduction techniques include wearing a condom while having sex, or sterilizing needles before using drugs intravenously. See Condoms Prevent Transmission of AIDS Associated Retrovirus, 255 JAMA, 1706 (Apr. 1986); CDC, 1985 STD Treatment Guidelines, 34 MMWR

providing an accurate message regarding the possible routes of transmission of HIV, the false message that people are at risk of getting AIDS from the saliva of a person infected with HIV undermines specific attempts to educate the public about the real routes of HIV infection, and about safe and unsafe behaviors, and fuels unfounded fears about HIV and those who live with it.

Second, such prosecutions directly conflict with the efforts of public health officials to encourage people to be tested voluntarily for HIV infection. A diagnosis of HIV infection allows for earlier and more promising treatment and lessens the risk of infection of others. Prosecutions and convictions criminalize knowledge of one's HIV status and create a disincentive to be tested because prosecution for a supposedly AIDS-related crime involving intent as an element is difficult, if not impossible, when the defendant does not know whether he or she is HIV-positive. Furthermore, such prosecutions discourage testing in a more general way by raising the specter of punishment for even spontaneous and, while perhaps rude and insulting, harmless acts by HIV-positive individuals. Mr. Bird's conviction sends the message that, in view of the risk of serious criminal sanctions based solely on HIV status, the safer course for an individual is to avoid being tested for HIV infection at all.

Third, the punishment of persons with HIV for conduct that poses no risk of transmission of the virus contributes to other medically unjustified discrimination against people with HIV or AIDS. A 1990 nationwide survey, canvassing more than 600 agencies and organizations throughout the country, found that ignorance of the facts regarding HIV was one of the prime reasons behind reported incidents of discrimination:

[I]gnorance about how HIV is transmitted continues to fuel irrational fears of infection. . . . in spite of the scientifically recognized conclusion that, as the American Public Health Association has stated, 'HIV is not transmitted through casual contact, animals, blood donation, food, inanimate objects, insects, *saliva*,

755 (Supp.) (Oct. 1985); Understanding AIDS at 4.

skin, vaccines or water,' medically unjustified firings, evictions, and denials of service remain common.

American Civil Liberties Union AIDS Project, Epidemic of Fear: A survey of AIDS Discrimination in the 1980s and Policy Recommendations for the 1990s 2 (N. Hunter, principal investigator, 1990) (emphasis added). By encouraging medically unfounded reprisals against people living with HIV, prosecutions such as Mr. Bird's undermine and contradict the aim of civil rights laws such as the Rehabilitation Act of 1973, the Fair Housing Amendments of 1988, the Americans with Disabilities Act of 1990, and Ohio Revised Code Sec. 4112.02, all of which protect individuals with disabilities such as HIV against unfounded, adverse treatment. In turn, such discrimination further undermines prevention and treatment efforts. ONAP, The National AIDS Strategy 1997 at 23 ("[d]iscrimination against people living with HIV or AIDS violates the human rights of individual Americans and undermines our efforts to prevent and treat HIV infection.")

Finally, such prosecutions create an atmosphere of fear and ignorance that encourages violence against those with HIV. In the name of law enforcement, the State has delivered a message -- that even the saliva of HIV-positive persons is deadly -- that feeds a public perception which itself has proved deadly to those infected with the virus. Every year, national and local organizations report an alarming amount of discrimination and violence directed against those with HIV disease. A recent publication by the National Coalition of Anti-Violence Programs (the "National Coalition"), a network of twenty-two organizations that monitor and provide services to victims of anti-gay violence, confirms that the number of reported incidents of violence against people believed to be HIV-positive still is on the rise. National Coalition, Programs, Anti-Lesbian/Gay Violence in 1995 (1996) (hereinafter "Anti-Lesbian/Gay

Violence"). In 1995, national tracking programs documented 274 incidents of violence in which hatred, fear and/or ignorance about HIV and persons believed to have the virus was a motivating factor in the incident. Anti-Lesbian/Gay Violence at 47. This figure represents a *90% increase* over the number of incidents documented during 1994. Id.

The data discussed in the National Coalition's report addresses only reported, documented cases known to the National Coalition of Anti-Violence Programs; accordingly, it offers only a detail of the entire picture of violence against people who have, or are suspected of having, HIV. In an earlier survey conducted by the National Association of People with AIDS ("NAPWA") and discussed in the National Coalition's report, almost 22% of the 1800 persons who responded to NAPWA's survey reported that they had been victimized in their communities because of their HIV status. These incidents "ranged from harassment by neighbors and landlords, to anti-gay assaults in which the victims were called 'AIDS faggots,' to 'murderers.'" Anti-Lesbian/Gay Violence at 48.

The effects of HIV-related violence are far-reaching and the fear of encountering violence and discrimination "prevents many with HIV from obtaining medical care, counseling, referral to support groups, and other supportive services." Terry Maroney, HIV and Hatred: Hazardous To Your Health, Health/PAC Bulletin 14, 19 (Winter 1993) Hereinafter "HIV and Hatred"); ONAP, The National AIDS Strategy 1997 at 23 ("The extraordinary stigma that has been attached to HIV disease hampers the ability of people living with HIV and AIDS to live full lives free of fear . . . thus many remain unaware of their HIV status and go without the care that could help them live longer, healthier lives. Opportunities to educate people are also lost as people avoid prevention programs because of the stigma associated with HIV.") People with

HIV report that their fear of violence, experience of harassment, and perception of being in danger, have made them virtual prisoners in their own homes. HIV and Hatred at 15-16.

The indictment, conviction, and imprisonment of Mr. Bird for spitting on someone -- an act which cannot cause death and which, if done by an uninfected person, would almost certainly go unprosecuted and unpunished -- was the product of fear and misinformation. Such prosecutions breed antipathy and suspicion towards, as well as other unjust prosecutions of, persons infected with HIV and those suffering from AIDS.

CONCLUSION

For all of the foregoing, as well as the reasons contained in the Merit Brief Of Appellant Jimmy L. Bird and the brief of amicus curiae The Ohio Association of Criminal Defense Lawyers, amici curiae Lambda Legal Defense and Education Fund, Inc. and The Ohio Human Rights Bar Association respectfully urge this Court to reverse Mr. Bird's conviction for felonious assault.

Respectfully submitted,

Heather C. Sawyer
Lambda Legal Defense & Education Fund, Inc.
11 E. Adams, Suite 1008
Chicago, Illinois 60603
(312) 663-4413

Attorney for Amici Curiae

August 7, 1997