

**A120058**

**STATE OF MINNESOTA**

**IN COURT OF APPEALS**

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State of Minnesota,

Respondent,

**ORAL ARGUMENT REQUESTED**

vs.

Daniel James Rick,

Appellant.

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***APPELLANT'S BRIEF, ADDENDUM  
& APPENDIX***

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## PROCEDURAL HISTORY

May, 2009	Date of charged offense.
April 27, 2010	Compliant filed in Hennepin County charging Appellant with Assault in the Third Degree – Knowing Transfer of a Communicable Disease. Minn. Stat. § 609.2241.
May 5, 2010	Case assigned to the Honorable Beryl Nord, Judge of Hennepin County District Court.
March 15, 2011	First Amended Complaint filed in Hennepin County charging Appellant with Assault in the First Degree – Knowing Transfer of a Communicable Disease.
September 26, 2011	Case assigned to the Honorable John Stanoch, Judge of Hennepin County District Court.
October 3, 2011	State filed Second Amended Complaint filed in Hennepin County charging Appellant with Attempted Assault in the First Degree –Knowing Transfer of a Communicable Disease. Jury trial commenced under Second Amended Complaint.
October 6, 2011	Fourth day of jury trial. Appellant objected to the jury instructions, arguing that the jury should not be instructed on Subdivision 2(2) of Sec. 609.2241. Court denied the defense’s motion and instructed the jury on Subdivision 2(2).
October 7, 2011	Jury verdict acquits Appellant under Subdivision 2(1) and convicts Appellant under Subdivision 2(2) of Sec. 609.2241.

October 21, 2011	Appellant files Motion for Judgment of Acquittal or New Trial.
November 28, 2011	Court hears and denies appellant's Motion for Judgment of Acquittal or New Trial. Appellant sentenced to a stayed term of 49 months imprisonment. Court stays sentence pending appeal.
January 10, 2012	Appellant files Notice of Appeal to Court of Appeals.
January 20, 2012	Court reporter mailed last transcript to Appellant's counsel.

## STATEMENT OF ISSUES

**Issue #1:** Were the District Court’s jury instructions an error of law because the plain meaning and context of Minn. Stat. § 609.2241 subd. 2(2) applies to medical procedures and not sexual penetration?

**Ruling below:** The District Court held that the plain meaning of Minn. Stat. § 609.2241 subd. 2(2) applied to cases involving sexual penetration.

**How issue was preserved for appeal:** Appellant objected to the jury instructions at trial and in his Motion for Judgment of Acquittal or New Trial. (Trial T., pp. 272-279; ADD-3-10; Sent. T. 14-28; ADD-14-28; AA-34-35.)

**Apposite authority:** Minn. Stat. §§ 609.2241, subd. 2(1), 2(2); 645.17, subd. 1; *Hyatt v. Anoka Police Dept*, 691 N.W.2d 824 (Minn. 2005).

**Issue #2:** Did the District Court err in refusing to consider the legislative intent of Minn. Stat. § 609.2241 subd. 2(2) because the statute is ambiguous and creates a strict liability element?

**Ruling below:** The District Court held that Minn. Stat. § 609.2241 subd. 2(2) was not ambiguous and does not create a strict liability element.

**How issue was preserved for appeal:** Appellant objected to the jury instructions at trial and in his Motion for Judgment of Acquittal or New Trial. (Trial T., pp. 272-279; ADD-3-10; Sent. T. 14-28; ADD-14-28; AA-34-35.)

**Apposite authority:** *U.S. v. Balint*, 258 U.S. 250 (1922); *Staples v. United States*, 511 U.S. 600 (1994); *In re Welfare of C.R.M.*, 611 N.W.2d 802 (Minn. 2000); *State v. Peck*, 773 N.W.2d 768 (Minn. 2009).

**Issue #3:** Were the District Court’s jury instructions an error of law because the Legislature intended for Minn. Stat. § 609.2241 subd. 2(2) to apply to medical procedures and not sexual penetration?

**Ruling below:** The District Court did not reach this issue because it made its ruling under the belief that Subdivision 2(2) was clear, unambiguous and was not a strict liability element.

**How issue was preserved for appeal:** Appellant objected to the jury instructions at trial and in his Motion for Judgment of Acquittal or New Trial. (Trial T., pp. 272-279; ADD-3-10; Sent. T. 14-28; ADD-14-28; AA-34-35.)

**Apposite authority:** Minn. Stat. §§ 645.16, 645.17.

**Issue #4:** Were the District Court's jury instructions an error of law because its application of Minn. Stat. §609.2241 subd. 2(2) to issues of sexual penetration was in violation of the Due Process clauses of the United States and Minnesota Constitutions because the District Court's interpretation was unconstitutionally vague and violated the right to privacy?

**Ruling below:** The District Court held that its application of Minn. Stat. § 609.2241 subd. 2(2) to charges involving sexual penetration was not unconstitutionally vague and did not violate the right to privacy under the United States and Minnesota Constitutions.

**How issue was preserved for appeal:** Appellant objected to the jury instructions at trial and in his Motion for Judgment of Acquittal or New Trial. (Trial T., pp. 272-279; ADD-3-10; Sent. T. 14-28; ADD-14-28; AA-34-35.)

**Apposite authority:** *U.S. v. Lanier*, 550 U.S. 259 (1997); *Lawrence v. Texas*, 529 U.S. 558 (2003); *SooHoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007).

## STATEMENT OF THE CASE

The appellant, Daniel James Rick, was charged in Hennepin County District Court by amended complaint with Attempted Assault in the First Degree – Knowing Transfer of a Communicable Disease under Minn. Stat. § 609.2241. The fact at issue in the case was whether Mr. Rick, who was diagnosed with HIV, disclosed his HIV status to Dustin Bailey, the alleged victim, before engaging in sexual penetration with Mr. Bailey.

Mr. Rick proceeded to jury trial, the Honorable John Stanoch, Judge of Hennepin County District Court, presiding. The state alleged that Mr. Rick's conduct violated two provisions of Sec. 609.2241: 1) the state alleged that Mr. Rick violated subdivision 2(1) of the by engaging in sexual penetration without disclosing his HIV status to Mr. Bailey; and 2) the state alleged that Mr. Rick violated subdivision 2(2) of the statute by attempting to transfer sperm to the Mr. Bailey. Unlike subdivision 2(1), subdivision 2(2) does not require the state to prove that Mr. Rick did not disclose his HIV status before engaging in sexual penetration. The state sought to instruct the jury under subdivisions 2(1) and 2(2).

Mr. Rick objected to the inclusion of subdivision 2(2) into his jury instructions on the grounds that it applied to medical procedures and not sexual penetration. The District Court overruled Mr. Rick's objection and instructed the jury on subdivision 2(1) and 2(2). The jury acquitted Mr. Rick under subdivision 2(1) and convicted him under 2(2).

Mr. Rick filed post-verdict motions for a judgment of acquittal or a new trial based on the inclusion of subdivision 2(2) into his jury instructions. The District Court

denied these motions and sentenced Mr. Rick to 49 months imprisonment, but stayed execution of his sentence and stayed his sentence pending appeal.

Mr. Rick appealed from the judgment to challenge his conviction.

## STATEMENT OF FACTS

The Appellant, Daniel James Rick, was charged by Amended Complaint with one count of Attempted First Degree Assault – Knowing Transfer of a Communicable Disease under Minn. Stat. § 609.2241 (hereinafter referred to as “Knowing Transfer Statute”). (ADD-1.)<sup>1</sup> Before trial, Mr. Rick was charged with First Degree Assault under the Knowing Transfer Statute and before that he was charged with Third Degree Assault – Knowing Transfer of a Communicable Disease. (AA-2-AA-8) The state amended the charge to Attempted First Degree Assault under the Knowing Transfer Statute at trial because it could not prove that Mr. Rick actually transferred HIV to Dustin Bailey, the alleged victim. (Trial T. Vol. I, p. 4; Sent. T., p. 50.)<sup>2</sup>

The accusations centered around a consensual sexual relationship Mr. Rick had with Mr. Bailey. Mr. Bailey testified that he came in contact with Mr. Rick through, Manhunt.com and Adam4Adam.com which are websites, not dissimilar to Facebook, where homosexual men look for relationships or sexual partners. (*Id.* at pp. 153, 155.) Mr. Rick and Mr. Bailey then met by happenstance at the Saloon Bar in Minneapolis, Minnesota where Mr. Bailey was working at the time. (*Id.* at pp. 155-156.) During their first in person meeting, Mr. Rick and Mr. Bailey chatted and arranged to meet when Mr. Bailey got off of work. (*Id.* at p. 157.)

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<sup>1</sup> Appellant’s Addendum is Abbreviated as “ADD-X” herein. Appellant’s Appendix is abbreviated as “AA-X” herein.

<sup>2</sup> There are two trial volumes of trial transcripts and a sentencing transcript submitted in this case. The two volumes of the trial transcript cited as “Trial T. Vol. I” and “Trial T. Vol. II” respectively. Mr. Rick’s sentencing transcript is cited as “Sent. T.”



After Mr. Bailey got off of work at about 3:30 A.M., he met Mr. Rick outside of the Saloon Bar. (*Id.* at pp. 157-158.) Mr. Rick and Mr. Bailey then went to Mr. Rick's house in North Minneapolis. (*Id.* at p. 158.) After spending some time together and beginning a movie, Mr. Bailey testified that he gave Mr. Rick fellatio and then he and Mr. Rick engaged in unprotected anal intercourse with Mr. Bailey as the recipient. (*Id.* at pp. 159-163.) Mr. Bailey testified that he told Mr. Rick not to ejaculate into him during intercourse. (*Id.* p. 164.) However, Mr. Bailey testified that after intercourse, he went to the bathroom and found what he believed to be Mr. Rick's ejaculate in his stool. (*Id.* at pp. 164-165.)

The next morning Mr. Bailey testified that he woke up to Mr. Rick engaging in anal sex with him. (*Id.* at pp. 166-167.) Mr. Bailey testified that all sexual intercourse with Mr. Rick was consensual. (*Id.* at p. 194.) Mr. Rick then drove Mr. Bailey back to the Saloon Bar. (*Id.* at p. 168.)

Mr. Bailey and Mr. Rick met two additional times. (*Id.* at p. 169.) During their second encounter, Mr. Rick and Mr. Bailey testified that they engaged in three-way intercourse with a person named Patrick. (*Id.* at p. 170.) During this encounter, Mr. Bailey testified that Mr. Rick ejaculated into him. (*Id.* at p. 172.) Mr. Bailey testified that at no time before or after their first sexual encounter, did Mr. Rick tell him that he was HIV positive. (*Id.* at pp. 162, 167, 171.)

Mr. Bailey testified that he heard from another person that Mr. Rick was HIV positive. (*Id.* at p. 173.) Thereafter, Mr. Bailey testified that he went to the Red Door Clinic in order to get an HIV test and tested positive. (*Id.* at pp. 174-175.)

Mr. Bailey and Mr. Rick met for the final time in November, 2009, after Mr. Bailey's positive HIV test. (*Id.* at pp. 172, 176.) The final meeting was instigated by Mr. Bailey who testified that he called Mr. Rick with the intent of engaging in sexual intercourse. (*Id.* at p. 172) Later, he and Mr. Rick met up and engaged in sexual intercourse. (*Id.* at pp. 176-177.) Mr. Bailey did not tell Mr. Rick that he was HIV positive before intercourse. (*Id.*, Vol. II, p. 206.)

In April, 2010, Mr. Bailey spoke to police. (*Id.* at p. 189.) Mr. Bailey testified that when he originally spoke to the police, he told them about his first sexual encounter with Mr. Rick, but did not disclose the two subsequent sexual encounters. (*Id.* at pp. 191, 195, 202-204.)

Mr. Bailey described himself as a "poly-addict", which means he is addicted to everything that makes him happy. (Trial T. Vol. I, p. 144, Vol. II, p. 198.) Mr. Bailey testified that he has abused methamphetamine, marijuana, alcohol, acid and ecstasy. (*Id.* at p. 144-145.) At the time of his testimony, Mr. Bailey had been sober, except for alcohol and marijuana, for two years. (*Id.* at p. 144.)

After the state rested its case, the parties discussed jury instructions on the record. (ADD-3-ADD-13; Trial T., Vol. II, p. 264.) The state proposed that the jury be allowed to convict Mr. Rick under two sections of the Knowing Transfer Statute. (Trial T., Vol. II, p. 264.) First, the parties agreed to instruct the jurors on Subdivision 2(1) of the Knowing Transfer Statute which states that it is a crime for Mr. Rick to sexually penetrate Mr. Bailey without first telling Mr. Bailey that he had a communicable disease. (*Id.*)

The second proposed jury instruction was under Subdivision 2(2) of the Knowing Transfer Statute, which allowed the jury to convict Mr. Rick if it found that Mr. Rick knowingly harbored an infectious agent and attempted to transfer blood, sperm, organs or tissue to Mr. Bailey, except as deemed necessary for medical research. (*Id.* at pp. 264-265.) The defense objected to the inclusion of Subdivision 2(2) into the jury instructions. (*Id.* at p. 266, 272; ADD-3-ADD-9.) The defense based its objection to the Subd. 2(2) instructions on: 1) subdivision 2(2) was vague; 2) subdivision 2(1) and not subdivision 2(2) applied to sexual penetration cases; 3) the legislature intended to apply subdivision 2(2) to medical procedures only; and 4) subd. 2(2) was unconstitutional as applied because it allowed for conviction if Mr. Rick told Mr. Bailey that he was HIV positive before intercourse. (*Id.*)

The District Court overruled the defense's objection to the instructions and allowed the jury to be instructed on Subdivision 2(2). (Trial T., Vol. II at pp. 281-283; ADD-10-ADD-13.) The District Court stated it overruled the defense objections because the statute was constitutional and it read Subdivision 2(2) to apply to Mr. Rick's case. (*Id.*) However, the parties agreed to a bifurcated Special Verdict Form which required the jury to make separate findings under Subdivision 2(1) and 2(2). (Trial T., Vol. II, p. 281-282; ADD-12-13.)

That afternoon, Mr. Rick testified in his defense. Mr. Rick testified that he first met Mr. Bailey at the Saloon Bar where they engaged in a conversation and Mr. Rick left alone. (*Id.* at pp. 296-297.) One or two weeks later, Mr. Rick again encountered Mr. Bailey at the Saloon bar, where they chatted and Mr. Rick again left alone. (*Id.* at pp.

298-299.) Later, Mr. Rick and Mr. Bailey set up a time to meet and go on a date at the Saloon Bar. (*Id.* at p. 299.) Up until this point, no sexual intercourse had happened between Mr. Rick and Mr. Bailey.

On their third meeting, Mr. Rick testified that he told Mr. Bailey that he was HIV positive. (*Id.* at pp. 300, 310.) Mr. Rick testified that Mr. Bailey heard him say he was HIV positive and that Mr. Bailey did not appear shocked by this news. (*Id.* at p. 302.) Mr. Rick and Mr. Bailey continued on their date and eventually went to Mr. Rick's house. (*Id.* at p. 303.)

At Mr. Rick's house, he asked Mr. Bailey if he was HIV positive as well. (*Id.* at 304.) Mr. Rick learned that Mr. Bailey believed he was already HIV positive due to his previous sexual encounters. (*Id.* at p. 304.) Mr. Rick admitted that he and Mr. Bailey had intercourse that night. (*Id.* at p. 305.) However, Mr. Rick testified that he did not ejaculate inside of Mr. Bailey. (*Id.*) Mr. Rick testified that he and Mr. Bailey had sexual intercourse two more times on two other days. (*Id.* at pp. 308-310.) Mr. Rick testified that during his three sexual encounters with Mr. Bailey, he never ejaculated inside of him. (*Id.* at p. 310.) After Mr. Rick's testimony, the defense rested. (*Id.* at p. 327.)

In its closing, the state discussed the different findings the jury had to make under Subdivision 2(1) and Subdivision 2(2) of the Knowing Transfer Statute. In discussing the state's burden under Subdivision 2(1), the state correctly told the jury that it had to find, beyond a reasonable doubt, that Mr. Rick did not disclose his HIV status to Mr. Bailey before intercourse. (*Id.* at p. 345.) In discussing the state's burden under Subdivision 2(2) of the Knowing Transfer Statute, the state stressed to the jury that "[i]nforming the



If you answered “YES” to either question 4a or 4b, the answer to question 4 is “YES.” If you answered “NO” to both question 4a and 4b, the answer to question 4 is “NO.”

(Answer to Question 4) \_\_\_\_\_ YES \_\_\_\_\_ NO

(AA-31-AA-32.)

The jury returned a verdict which checked “NO” on 4a of the verdict form and checked “YES” on 4b of the verdict form. (Trial T., Vol. II, p. 389; AA-31-AA-32.) Therefore, the answer to Question 4 on the verdict form was “YES”. (*Id.*) The jury convicted Mr. Rick. (Trial T., Vol. II, p. 390; AA-32.)

Before Mr. Rick’s sentencing, the defense timely filed a Motion for Judgment of Acquittal or New Trial based on the District Court instructing the jury on Subdivision 2 (2) of the Knowing Transfer Statute. (AA-34-AA-35.) The defense alleged that the Subdivision 2(2) jury instruction in was in error for the following reasons: 1) applying Subdivision 2(2) of the Knowing Transfer Statute to Mr. Rick’s case violated the plain meaning of the Knowing Transfer Statute because Subdivision 2(2) applied to medical procedures, not sexual penetration ; 2) the legislature intended for Subdivision 2(2) to apply to medical procedures; and 3) the District Court’s application of Subdivision 2(2) was unconstitutionally vague and violated the right to privacy. (*Id.*)

The District Court heard and overruled Mr. Rick’s post-verdict motions at Mr. Rick’s sentencing hearing. (Sent. T., pp. 14-28; ADD-14-ADD-28.) The District Court held that the plain meaning of Subdivision 2(2) applied to Mr. Rick’s case. (Sent T, p. 17-ADD-17.) The District Court declined to review legislative intent because it found that the plain meaning of Subdivision 2(2) applied to Mr. Rick’s case. (Sent. T, p. 18-

ADD-18.) The District Court held that Subdivision 2(2) did not yield an absurd result or constitute a strict liability statute because an affirmative defense was available under Subdivision 3(1) of the Knowing Transfer Statute, which states that it is an affirmative defense for someone who knowingly harbors an infectious agent for a communicable disease to take practical means to prevent transmission, as advised by a physician or other health professional. (Sent. T., p. 19; ADD-19.)

The District Court held that Subdivision 2(2) was not unconstitutionally vague as applied because the elements on medical counseling were met and that the statute was not so vague that a reasonable person could not figure out what they should do. (Sent. T., p. 23; ADD-23.)

Finally, the defense argued that the Subd. 2(2) instruction violated the right to privacy because it will lead to prosecutions of individuals in consensual relationships while being fully informed of their partners' communicable disease status. (Sent. T., p. 27; ADD-27.) The District Court did not consider this hypothetical because it was not at issue in Mr. Rick's case (*Id.*)

At sentencing, the District Court granted a downward dispositional departure to Mr. Rick and sentenced him to 49 months in prison, stayed for five years. (Sent T., p. 52.) One of Mr. Rick's probation conditions was to spend 180 days in jail, credit 40 days served. (*Id.*) Mr. Rick's sentence was stayed pending appeal. (*Id.* at p. 61.)

## ARGUMENT

Described briefly, the issue in this case is whether Mr. Rick can be convicted under the Knowing Transfer Statute despite telling the Mr. Bailey that he was HIV positive before engaging in sexual penetration.

The Knowing Transfer Statute reads, in pertinent part:

It is a crime, which may be prosecuted under ... [Attempted Assault in the First Degree] for a person who knowingly harbors an infectious agent to transfer, if the crime involved:

- (1) sexual penetration with another person without having first informed the other person that the person has a communicable disease (hereinafter referred to as Subd. 2(1));
- (2) transfer of blood, sperm, organs, or tissue, except as deemed necessary for medical research or if disclosed on donor screening forms (hereinafter referred to as Subd. 2(2)); or
- (3) sharing of nonsterile syringes or needles for the purpose of injecting drugs.

Minn. Stat. § 609.2241 subd. 2 (1)-(3); (ADD-2.)

At Mr. Rick's trial, the parties agreed to instruct the jury on Subd. 2(1). The defense objected to an instruction on Subd. 2(2) because Subd. 2(2) applied to medical procedures and not cases involving sexual penetration. The District Court overruled the defense's objection and instructed the jury on Subd. 2(2). The jury acquitted Mr. Rick under Subd. 2(1) and convicted Mr. Rick under Subd. 2(2). (AA-31-AA-33.)

The relevant difference between Subd. 2(1) and Subd. 2(2) is that Subd. 2(2) does not require the state to prove that Mr. Rick failed to inform Mr. Bailey that he was HIV positive before engaging in sexual penetration. The Special Verdict Form shows that the state did not prove Mr. Rick failed to inform Mr. Bailey of his HIV status before



engaging in intercourse. Indeed, Mr. Rick would have been acquitted but for the District Court's instruction on Subd. 2(2).

The jury should not have been instructed on Subd. 2(2) in Mr. Rick's case. The scope of Subd. 2(2) is limited to medical procedures and the like, while the scope of Subd. 2(1) is all acts involving sexual penetration. In this case, the only conduct at issue was sexual penetration.

The District Court erred in instructing the jury on Subd. 2(2) for the following reasons: 1) a plain reading and the context of Subd. 2(2) shows that Subd. 2(2) applies to medical procedures, while Subd. 2(1) applies to sexual penetration; 2) the District Court should have considered legislative intent because Subd. 2(2) is ambiguous and imposes a strict liability element; 3) the legislature intended for Subd. 2(2) to apply to medical procedures and not sexual penetration; and 4) the District Court's interpretation of Subd. 2(2) violated the right to Due Process under the Minnesota and United States Constitutions because applying Subd. 2(2) to cases involving sexual penetration renders the statute unconstitutionally vague and violates the right to privacy.

None of the errors listed above are harmless. Therefore this Court must reverse the District Court's ruling and enter a verdict of acquittal for Mr. Rick.

### **Standard of Review**

Mr. Rick made a timely objection to the inclusion of Subd. 2(2) into the jury instructions. Questions of statutory interpretation are reviewed *de novo*. *State v. Nelson*, 523 N.W.2d 667, 669 (Minn. Ct. App. 1994).

This appeal is based on the District Court’s interpretation of Subd. 2(2) of the Knowing Transfer Statute in the form of jury instructions. Therefore, the District Court’s rulings are reviewed *de novo*.

**A. The District Court Erred in Instructing the Jury on Subd. 2(2) because the Plain Language and Context of Subd. 2(2) Applies to Medical Procedures, and Not Sexual Contact, Which is Governed Under Subd. 2(1).**

When construing a statute, “words and phrases are construed according to rules of grammar and according to their common and approved usage”. Minn. Stat. § 645.08, subd. 1. Courts must begin construing a statute by giving words their “plain and ordinary meaning”, but “words of a statute are to be viewed in their setting, not isolated from their context.” *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009); *State v. Anderson*, 683 N.W.2d 818, 822 (Minn. 2004) (quoting *Chiodo v. Bd. of Educ. of Special Sch. Dist. No. 1*, 215 N.W.2d 806, 808 (Minn. 1974)). Statutory provisions should be interpreted in light of each other in order to avoid conflicting interpretations. *Clark v. Pawlenty*, 755 N.W.2d 293, 305 (Minn. 2008) (citing *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000)). When construing the plain meaning of a statute, the Court must assume that the legislature did not intend an absurd result. Minn. Stat. § 645.17 subd. 1.

In overruling the defense’s objection to including Subd. 2(2) into Mr. Rick’s jury instructions, the District Court held that a plain reading of Subd. 2(2) applied to Mr. Rick’s conduct. (Trial T. Vol. II, p. 281; Sent. T., p. 17; ADD-12, 17.) The District Court based its ruling on the belief that Subd. 2(2) creates a crime if there is a “transfer” of sperm. (Trial T., Vol. 2, pp. 279, 281; Sent. T., p. 17; ADD-10, 12, 17.) “Transfer” is defined as “engag[ing] in behavior that has been demonstrated epidemiologically to be a

mode of direct transmission of an infectious agent which causes the communicable disease.” Minn. Stat. § 609.2241 subd. 1(d) (ADD-1.)

In making this ruling, however, the District Court ignored: 1) the portion of Subd. 2(2) that relates to medical research; 2) the context of Subd. 2(1) and 2(2) and the fact that the entire scope of sexual penetration is addressed in Subd. 2(1); and 3) the absurd result created by construing Subd. 2(2) to apply to sexual penetration.

1. *A Plain Reading of Subd. 2(2) Applies to Medical Research and Not Sexual Penetration.*

Subd. 2(2) of the Knowing Transfer Statute requires the state to prove that the transfer was not deemed necessary for medical research and not disclosed on donor screening forms.

The common usage of the phrases “medical research” and “donor screening forms” is to define acts which have a medical context, such as blood transfusions, organ transplants or artificial insemination. Therefore, the “medical research” and “donor screening forms” language limits the scope of Subd. 2(2) to medical procedures and not sexual intercourse.

2. *By Instructing the Jury on Subd. 2(2), the District Court Ignored the Context of Subd. 2(2) and the Fact that the Scope of Subd. 2(1) Covers all Sexual Penetration.*

By instructing the jury on Subd. 2(2), the District Court either intentionally or inadvertently distinguished two types of sexual penetration: 1) sexual penetration where a defendant did not ejaculate inside of a victim, which would be prosecuted under Subd. 2(1); and 2) sexual conduct where a defendant attempted to ejaculate inside of a victim,

which could be prosecuted under Subd. 2(1) and Subd. 2(2). This distinction ignores the contexts of Subdivisions 2(1) and 2(2) because Subd. 2(1) covers all types of sexual penetration.

The reviewing Court construes statutes as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *Am. Family Ins. Group*, 616 N.W.2d. at 277. Whenever possible, the Court should read a statute to give effect to all of its provisions. *Allen v. Burnet Realty, LLC*, 801 N.W.2d 153, 157-158 (Minn. 2011).

Subd. 2(1) states that an individual can be convicted under the Knowing Transfer Statute if he engages in: “sexual penetration with another person without having first informed the other person that the person has a communicable disease.” “Sexual penetration” is defined as:

any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, *whether or not emission of semen occurs*:

(1) sexual intercourse, cunnilingus, fellatio, or anal intercourse...

Minn Stat. §§ 609.2241, subd. 1 (d); 609.341, subd. 12 (1) (emphasis added).

Since the entire spectrum of sexual penetration is already governed by Subd. 2(1). Furthermore, consent, or in this case full disclosure, is not just a defense under Subd. 2(1); the state has to prove beyond a reasonable doubt that a defendant did not disclose his communicable disease to his partner.

In passing Subd. 2(1) of the Knowing Transfer Statute, the legislature clearly articulated the scope of liability for sexual acts under the statute: when a person is

engaged in sexual acts, the state must to prove that a defendant did not tell the alleged victim that he had a communicable disease in order to be convicted under the Knowing Transfer Statute.

By ignoring the respective scopes and contexts of Subd. 2(1) and 2(2), the Trial Court's jury instructions created a conflict between the two provisions. By expanding the scope of Subd. 2(2) to include any attempted transfer of semen, Subd. 2(1) and 2(2) prohibit the same conduct – sexual penetration. The District Court's jury instructions therefore created a conflict: while both provisions prohibit the same conduct, Subd. 2(1) requires the state to prove that Mr. Rick did not inform Mr. Bailey about his HIV status, while Subd. 2(2) does not. Through this interpretation, Subd. 2(2) negates the “failure to disclose” language of Subd. 2(1). In order to give effect to both Subd. 2(1) and 2(2) Subd. 2(1) must only apply to sexual penetration and Subd. 2(2) must only apply to medical procedures.

The District Court ignored the context and scope of Subd. 2(1) which covers all forms sexual penetration, regardless of whether or not ejaculation occurs. The Court erred in expanding the scope of Subd. 2(2) to apply to sexual penetration where the emission of semen occurs, instead of limiting Subd. 2(2) to its proper scope and context – medical procedures.

### 3. *The Court's Interpretation of Subd. 2(2) Yields an Absurd Result.*

Along with the District Court's interpretation of Subd. 2(2) ignoring the context of Subd. 2(1), the Court's interpretation yields an absurd result because it renders Subd. 2(1) meaningless.

Minnesota Courts have long held that:

[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.'

*Thoresen v. Schmahl*, 24 N.W.2d 273, 277 (Minn. 1946) (quoting *United States v. Kirby*, 74 U.S. 482, 486 (1868)). The Court has applied the absurd result doctrine to construing jury instructions. See *State v. Weber*, 741 N.W.2d 402, 403-404 (Minn. Ct. App. 2007) (applying the absurd result doctrine to jury instructions in a felon in possession of a firearm case).

A law or jury instruction is absurd if the statute's "plain meaning utterly confounds a clear legislative purpose." *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 827 (Minn. 2005). A statutory interpretation is absurd if the law is "[r]idiculously incongruous or unreasonable" or "obviously and incomprehensibly inconsistent with the manifest truth, opinions generally held, or the plain dictates of common sense." *State v. Basal*, 763 N.W.2d 328, 334 (Minn. Ct. App. 2009) (quoting *The American Heritage Dictionary* 6 (4th Ed. 2007); *Webster's New Int'l Dictionary* 11 (2d ed. 1946)). If a law is absurd, the Court can "deviate a little from the received sense and literal meaning of

the words, and interpret the instrument in accordance with what may appear to have been the intention and meaning of its framers.” *Id.* (citations omitted).

As the prosecution stated in its closing, “[w]henver the male penis is inserted inside an anus or vagina, that is the attempt to transfer a fluid.” (Trial T., Vol II, p. 349, ln. 20-25.) Therefore, any prosecution involving sexual penetration under the Knowing Transfer Statute could result in attempt charges being brought under Subd. 2(1) and 2(2).

In denying the Defense’s Motions for Judgment of Acquittal or New Trial the Court stated that an absurd result did not exist in this case because the Knowing Transfer Statute contained an affirmative defense which states:

[i]t is an affirmative defense to prosecution, if it is proven by a preponderance of the evidence, that:

(1) the person who knowingly harbors an infectious agent for a communicable disease took practical means to prevent transmission as advised by a physician or other health professional.

Minn. Stat. § 609.2241, subd. 3(1). (Sent. T. pp. 18-19; ADD-1, 18-19.)

That affirmative defense does not apply to Mr. Rick. In fact, the affirmative defense heightens the absurdity of applying Subd. 2(2) to Mr. Rick. A plain reading the affirmative defense in Subd. 3(1) of the Knowing Transfer Statute clearly applies to acts that actually prevent transmission. Mr. Rick telling Mr. Bailey that he is HIV positive only prevents transmission if they do not have sex. If they did not have sex, there would have been no prosecution under the Knowing Transfer Statute. Here however, Mr. Rick told Mr. Bailey he was HIV positive and they had sex anyway. This type of conduct does nothing to prevent transmission and does not constitute an affirmative defense under Subd. 3(1) of the Knowing Transfer Statute. Furthermore, it is absurd to find that the

legislature intended for the state to prove nondisclosure under Subd. 2(1) and make the defendant prove nondisclosure as an affirmative defense under Subd. 2(2).

In *State v. Hanson*, the Minnesota Supreme Court held Minnesota Sentencing Guidelines yielded an absurd result where it allowed consecutive sentences for individuals who sexually assaulted two different victims, but not for instances where the offender sexually assaulted the same victim on more than one occasion. 572 N.W.2d 307, 308-10 (Minn. 1997). For this reason the Supreme Court disregarded the express wording of the Sentencing Guidelines and applied the apparent legislative intent of the guidelines, which allowed for consecutive sentences for a defendant who sexually assaulted a victim on more than one occasion. *Id.*

Like the Sentencing Guidelines in *Hanson*, the District Court's plain reading of Subd. 2(2) yields an absurd result. It is unreasonable for the legislature to contradict itself within the same statute by providing an extra element under Subd. 2(1)—*i.e.* requiring the state to prove that the defendant did not disclose his communicable disease – and removing that element under Subd. 2(2). In order to give effect to both provisions, Subd. 2(1) must apply to sexual penetration and Subd. 2(2) must apply to medical procedures.

Allowing the jury to convict Mr. Rick under Subd. 2(2) for the exact same conduct proscribed under Subd. 2(1) yields an absurd result.

\* \* \* \*

The plain meaning and context of Subd. 2(2) applies to medical procedures and not sexual penetration. Allowing the jury to be instructed on Subd. 2(2) in Mr. Rick's



case, was in error because the plain meaning and context of Subd. 2(2) applies to medical procedures, and the District Court's interpretation of Subd. 2(2) yields an absurd result.

For these reasons, the District Court erred in instructing the jury on Subd. 2(2).

Mr. Rick's conviction must be reversed.

**B. The District Court Erred in Refusing to Consider Legislative Intent When Interpreting Subd. 2(2) Because the Subd. 2(2) is Ambiguous and is a Strict Liability Element.**

1. *If the Plain Meaning of Subd. 2(2) Does Not Apply to Medical Procedures, Subd. 2(2) of the Knowing Transfer Statute is Ambiguous.*

A Court should not delve into statutory interpretation and legislative intent unless the statute is ambiguous. *Peck*, 773 N.W.2d at 772. A statute is ambiguous if it can be given more than one reasonable interpretation. *Beck v. City of St. Paul*, 231 N.W.2d 919, 923 (Minn. 1975).

As argued in Sec. A, above, a plain reading of Subd. 2(2) in its context applies to medical procedures and not sexual penetration. If this Court does not find that Subd. 2(2) applies only to medical procedures, Subd. 2(2) is ambiguous. The ambiguity rests in the reasonable interpretation that matters involving sexual penetration should be applied to Subd. 2(1), which covers all types of sexual penetration. The ambiguity exists because Subd. 2(1) requires the state to prove that a victim was uninformed of a defendant's communicable disease in order to incur liability under the Knowing Transfer Statute, while Subd. 2(2) does not.

If a plain reading of Subd. 2(2) does not establish that Subd. 2(2) applies only to medical procedures, then Subd. 2(2) is ambiguous, since the interpretation in section A of this brief is reasonable.

2. *Subd. 2(2) Is A Strict Liability Element as Applied to Mr. Rick.*

The inclusion of Subd. 2(2) into Mr. Rick's jury instructions imposes strict liability on Mr. Rick. Subd. 2(2) does not require the state to prove that Mr. Rick misinformed Mr. Bailey of his HIV status before sexual penetration. Therefore, Subd. 2(2) lacks an element of scienter, which at common law "was a necessary element in the indictment and proof of every crime." *U.S. v. Balint* 258 U.S. 250, 251-252 (1922). *See also Carter v. U.S.*, 530 U.S. 255, 256-257 (2000) ("[t]he presumption in favor of scienter generally requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct"). The District Court's interpretation of Subd. 2(2) included a strict liability element in Mr. Rick's jury instructions.

The District Court held that the Subd. 2(2) element did not impose a strict liability element for the same reasons it held that its interpretation of Subd. 2(2) did not yield an absurd result – the affirmative defense in subd. 3(1) of the Knowing Transfer Statute. *See* Sec. A(4), above. For the same reasons listed above, the District Court's rationale fails because subd. 3(1) does not apply to Mr. Rick's conduct.

Strict liability criminal statutes are generally disfavored. *Staples v. United States*, 511 U.S. 600, 606 (1994). For this reason, "legislative intent to impose strict liability must be clear". *In re Welfare of C.R.M.*, 611 N.W.2d 802, 805 (Minn. 2000) (citations

omitted). Legislative silence on the *mens rea* requirement does not mean that the legislature intended for an element of a crime to be strict liability. *Staples*, 511 U.S. at 605. In fact, the U.S. Supreme Court has held that “the common-law rule requiring *mens rea* has been ‘followed in regard to statutory crimes even where the statutory definition did not in terms include it.’” *Id.* at 606 (quoting *U.S. v. Balint* 258 U.S. 250, 251-252 (1922)).

Since the Subd. 2(2) jury instructions created a strict liability element, the state must show that Subd. 2(2) constitutes a “public welfare offense.” *Staples*, 511 U.S. at 608-609. In determining what constitutes a “public welfare offense”, the Court should look to whether an offense criminalizes “a broad range of apparently innocent conduct” and the harshness of the criminal sentence, since “public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary.” *Id.* at 610, 616 (citations omitted).

The legislative intent of the Knowing Transfer Statute, as well as how the current interpretation of Subd. 2(2) criminalizes a broad range of innocent conduct is discussed below in Section C of this brief. The Knowing Transfer Statute as applied to Mr. Rick is not a “public welfare offense” because of the harsh potential penalty.

In *Staples*, the Court found that a ten year sentence was excessive if the statute were interpreted to be strict liability. 511 U.S. at 616. In Minnesota, Courts “are guided by the public policy that if criminal liability, particularly gross misdemeanor or felony

liability, is to be imposed for conduct unaccompanied by fault, the legislative intent to do so should be clear.” *State v. Niesen*, 415 N.W.2d 326, 329 (Minn. 1987).

Mr. Rick was convicted of a felony. If he was given a guidelines sentence, Mr. Rick would have received 49 months in prison. *See* Minn. Stat. § 609.17 (attempt statute); (Trial T., p. 49.) While the 49 month potential sentence here was lower than the 10 year sentence in *Staples*, the potential penalty here far exceeds the “short jail sentences” and “light penalties” that “almost always” accompanied public welfare offenses as stated in *Staples*.

Legislative intent must be clear to impose a strict liability interpretation against Mr. Rick. As argued below, the legislature did not intend to apply subd. 2(2) to sexual acts or to make Subd. 2(2) a strict liability crime where sexual penetration is involved.

\* \* \* \*

Subd. 2(2) applies only to medical procedures. However, if the Court disagrees, it must look at the legislative intent of the Knowing Transfer Statute because Subd. 2(2) is ambiguous, and imposes a strict liability element.

**C. The Legislative Intent in Passing the Knowing Transfer Statute Was to Allow Prosecutions Under Subd. 2(2) For Cases Involving Medical Procedures and Not Sexual Penetration. In Prosecutions for Sexual Acts Under the Knowing Transfer Statute, the Legislature Intended for the State to prove that the Accused Did Not Disclose His Communicable Disease Before Having Intercourse.**

In determining legislative intent, the following eight factors are considered: 1) the occasion and necessity of the law; 2) the circumstances under which it was enacted; 3) the mischief to be remedied; 4) the object to be attained; 5) the former law, if any, including laws on similar subjects; 6) the consequences of a particular interpretation; 7) the contemporaneous legislative history; and 8) legislative and administrative interpretations of the statute. Minn. Stat. § 645.16.

Furthermore, when determining legislative intent, the Court is guided by the following presumptions: 1) The legislature does not intend a result that is absurd, impossible of execution, or unreasonable; 2) The legislature intends the entire statute to be effective and certain; 3) The legislature does not intend to violate the constitution of the United States or of this state; 4) When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and 5) The legislature intends to favor the public interest as against any private interest. Minn. Stat. § 645.17 subd. (1)-(5). “Penal statutes must be construed strictly with any reasonable doubt concerning legislative intent resolved in the defendant's favor.” *State v. Olson*, 325 N.W.2d 13, 19 (Minn. 1982).

Interpretation of the Knowing Transfer is an issue of first impression. Legislative intent is based on deliberations by the Minnesota Legislature Conference Committee on May 12 and 15, 1995. From the Conference Committee tapes, it is clear that the intent of the legislature to criminalize three types of conduct under the Knowing Transfer Statute: sexual penetration, medical procedures and needle use. The legislature did not intend for the state to prosecute people like Mr. Rick under Subd. 2(2), which only applies to medical procedures. Furthermore, the Conference Committee tapes show that the legislature intended for the state to prove beyond a reasonable doubt that Mr. Rick lied about his HIV status in a prosecution involving sexual penetration under the Knowing Transfer Statute.

These conclusions on legislative intent are based on three factors. First, the rationale behind the Knowing Transfer Statute was to punish individuals who failed to disclose their disease status to their sexual partners. Second, the facts that lead the passage of the Knowing Transfer Statute in its current form show that Subd. 2(2) was intended to apply to medical procedures and not sexual penetration. Finally, the consequences of the District Court's interpretation of Subd. 2(2) can and will result in prosecutions against individuals in consensual and committed sexual relationships where parties are fully informed of their partner's disease status. Such an interpretation exceeds the scope of conduct the legislature sought to prohibit.

1. *The Rationale Behind the Knowing Transfer Statute Was to Punish Individuals Failed to Disclose Their Disease Status to Their Sexual Partners.*

Before 1995, legislators sought to introduce a bill criminalizing the transfer of HIV through intercourse, however, the bill was voted down in the past because the legislature did not want to “use criminal law to deal with an issue that is a public health issue.” MN House Conf. Comm. 5/12/95 Tape 1 Side B at 42:50-43:35. This belief was affirmed by Michael Moen, Director of Disease Prevention and Control at the Minnesota Department of Health, who testified that data does not support laws criminalizing the transmission of HIV as a matter of health policy. *Id.* at Tape 2 Side A, 7:24-8:10. At its inception, the Knowing Transfer Statute was not viewed as advancing public health issues. *Id.*

During the debate of the statute, legislators and advocates said the purpose of the Knowing Transfer Statute is to protect people from an “individual who has a communicable disease that can cause a serious or life threatening illness deliberately and intentionally infects another individual.” and “people who are deliberately going to use a communicable disease that they carry themselves to injure somebody else with.” MN House Conf. Comm. 5/12/95 Tape 2 Side A at 2:45 (statements of Bob Tracy, Public Policy Director of MN AIDS Project); MN House Conf. Comm. 5/15/95 Tape 2 Side A at 39:40 (statements of Representative Skoglund). Statements like “deliberately and intentionally infects” and “injure somebody else with” shows that the intent of the legislature was to punish those who were dishonest about their communicable disease

status and not someone like Mr. Rick, who told his partner that he was HIV positive before having sex.

Furthermore, in response to questions about the definition of “sexual penetration” in Subd. 2(1), Ms. Shapiro, legislative counsel, responded that in order to incur liability under the Knowing Transfer Statute for allegations involving sexual penetration “there would have to be unprotected sexual penetration plus lack of disclosure”. MN House Conf. Comm. 5/15/95 Tape 2 Side A at 43:56-45:35.

The legislature intended for the state to prove that an alleged victim did not know his partner had a communicable disease before engaging in sexual penetration. The legislature sought to criminalize dishonesty with sexual partners about communicable disease, not sexual acts between fully informed, consenting adults.

2. *The Facts that Lead to the Knowing Transfer Statute In its Current Form Show That Subd. 2(2) Was Intended For Medical Procedures Only.*

The Knowing Transfer Statute was originally introduced as a bill which criminalized transfer of HIV through sexual intercourse. MN House Conf. Comm. 5/12/95 Tape 1 Side B at 41:40-42:40. However, the Conference Committee received testimony from Bob Tracy, director of the Minnesota AIDS Project, who submitted a proposed change to the statute. MN House Conf. Comm. 5/12/95 Tape 2 Side A at 2:00. Mr. Tracy testified that along with sexual intercourse, any statute focusing on the criminalization of transferring HIV should focus on, along with sexual penetration, the transfer of HIV through intravenous transfer, breastfeeding, blood donations or medical research. *Id.* at 2:25-6:54. Mr. Tracy stated that the prior proposal, which only



criminalized spreading HIV through intercourse, didn't consider other ways HIV could be transmitted, namely through blood transfusion and medical research. *Id.* For this reason, the current Knowing Transfer Statute was introduced, which added liability for medical procedures and intravenous drug use which transferred a communicable disease.

The intent of Mr. Tracy and the legislature was to expand the scope of the Knowing Transfer Statute to criminalize acts, other than sexual contact, which transfer a communicable disease. It was for this reason that Subd. 2(2) (the provision Mr. Rick was convicted under) and Subd. 2 (3) (provision dealing with intravenous needle use) were added. The Legislature clearly intended for Subd. 2(2) to apply to acts *other* than sexual penetration.

3. *The Effect of Applying Subd. 2(2) to Individuals Who Inform Their Partners They Have a Communicable Disease Exceeds the Scope of Conduct the Legislature Sought to Prohibit.*

The District Court's interpretation of Subd. 2(2) will result in criminal prosecutions against people who tell their partner they have a communicable disease before having intercourse, even if these individuals are married or in a committed relationship. The consequences of a particular statutory interpretation are to be considered in discerning legislative intent. Minn. Stat. § 645.16. Also, a statute or statutory element which imposes strict liability, like Subd. 2(2) in this case, must not criminalize a broad range of innocent conduct pursuant to *United States v. Staples*, as argued in section B(2) of this brief, above.

The District Court's interpretation of Subd. 2(2) criminalizes a broad range of innocent conduct – namely intercourse between two consenting adults who choose to

have sex in spite of being informed that their partner has a communicable disease. These consenting, informed adults could be convicted of a felony assault, or in the case of individuals with HIV, Attempted First Degree Assault.

For example, if a husband has a communicable disease but he and his wife want to naturally conceive a child, the husband could be charged and convicted under the Knowing Transfer Statute even if his wife knew her husband had a communicable disease and chose to naturally conceive. This is not the type of conduct that the legislature intended to criminalize when it passed the Knowing Transfer Statute. The legislature intended to punish only those who lied about their disease status to their partners.

The state may argue that it will use its prosecutorial discretion and not prosecute cases like the example above. However, even if the state uses its discretion in such a way, negative consequences still follow. Under the District Court's interpretation of Subd. 2(2), Subd. 2(1) is rendered meaningless, since any sexual penetration could constitute an "attempted transfer of sperm" and therefore attempted assault. Thus, the state is not required to prove that a defendant failed to disclose his disease status to his potential partner in order to secure a conviction under the Knowing Transfer Statute.

Such a situation happened in Mr. Rick's case. The issue of whether Mr. Rick told Mr. Bailey he was HIV positive before having intercourse was based solely on the jury believing Mr. Rick (who testified he told Mr. Bailey about his HIV) and disbelieving Mr. Bailey (who testified that Mr. Rick never disclosed his HIV status). With the inclusion of Subd. 2(2) into Mr. Rick's jury instructions, the jury essentially had to convict Mr. Rick,

despite finding that the state could not prove that he lied to Mr. Bailey about his HIV. This will give rise to selective prosecution of defendants solely based on whether an alleged victim says he was not informed of his partner's communicable disease, despite any evidence to the contrary.

\* \* \* \*

The legislature intended to apply Subd. 2(2) to medical procedures and not sexual penetration based on the rationale of the Knowing Transfer Statute, the facts leading to passage of the Knowing Transfer Statute and the harsh consequences which will result if Subd. 2(2) applies to sexual penetration. Nor is there a clear legislative intent to impose a strict liability element under Subd. 2(2), which is required under *In re Welfare of C.R.M.* Therefore, the District Court erred in instructing the jury on Subd. 2(2) in Mr. Rick's conviction must be reversed.

**D. The District Court's Interpretation of Subd. 2(2) Violated the Due Process Clauses of the United States and Minnesota Constitutions Because the District Court's Interpretation is Unconstitutionally Vague and Violates the Right to Privacy.**

The Due Process Clauses of the United States and Minnesota Constitutions provide that "no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amends. V, XIV; Minn. Const. Art. I, § 7. The District Court's interpretation of Subd. 2(2) as manifested in Mr. Rick's jury instructions and verdict form was unconstitutionally interpreted in violation of due process. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional

problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.” *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005). *See also State v. Bourke*, 718 N.W.2d 922, 926 (Minn. 2006) (The Court’s general practice is to “avoid a constitutional ruling if there is another basis on which a case can be decided.” (citations omitted.)) Mr. Rick bears the burden of establishing that a statute is unconstitutional beyond a reasonable doubt and must overcome every presumption in favor of its constitutionality. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997) (citation omitted); *State v. Burns*, 524 N.W.2d 516, 519 (Minn. Ct. App. 1994).

In this case, the District Court’s interpretation of Subd. 2(2) of the Knowing Transfer Statute, as manifested in Mr. Rick’s jury instructions and verdict form, renders the statute unconstitutionally vague and violates the right to privacy.

1. *Subd. 2(2) As Applied In This Case Is Unconstitutionally Vague*

The prohibition of vague statutes is incorporated into the due process clauses of the United States and Minnesota Constitutions. *U.S. v. Lanier*, 550 U.S. 259, 265 (1997). The rationale for the vagueness doctrine is “fair warning” and “the principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Id.* (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). When applying the vagueness doctrine to a law, the Court should consider three principles: 1) due process forbids “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application”; 2) whether, through the rule of lenity, resolves ambiguity to apply to conduct clearly covered; and 3) due process forbids a “novel

construction” that applies it to acts that “neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” *Id.* (internal citations omitted).

Here, the District Court’s interpretation of Subd. 2(2) fails all three principles that underlie the vagueness doctrine. No person of common intelligence would apply Subd. 2(2) to anything other than medical procedures. The statute references medical procedures when listing elements that the state has to prove – namely that the transfer was not deemed necessary for medical research or not disclosed on donor screening forms. The confusion and vagueness is heightened because Subd. 2(1) already provides a provision dealing with sexual penetration, which requires the state to prove that the accused did not inform the alleged victim that he had a communicable disease.

In light of these facts, the jury instructions in this case were a novel construction. This vagueness would be erased if the Court applies Subd. 2(2) to the obvious conduct sought to be prohibited – medical procedures. For these reasons, the jury instructions and verdict form were unconstitutionally vague by allowing the jury to return a verdict of guilty under Subd. 2(2) of the Knowing Transfer Statute.

2. *Subd. 2(2) As Applied and In General Violates the Right To Privacy.*

Along with being vague, the jury instructions violate Mr. Rick’s right to privacy because Subd. 2(2) does not contain a provision, like Subd. 2(1), which requires the state to prove that he did not tell Mr. Bailey that he was HIV positive before having sex. Applying the law as interpreted to others will also result in a violation of their due process right to privacy.

Where a fundamental right under the Due Process Clauses under the Federal and Minnesota Constitutions is involved, the Court must apply the strict scrutiny standard. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). The *SooHoo* Court applied strict scrutiny to a grandparent visitation statute because the United States Supreme Court held that a parent’s right to make decisions for his or her child implicates a fundamental right. *Id.* (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). In order to survive strict scrutiny, a law must advance “a compelling state interest and must be narrowly tailored to further that interest.” *Id.* (citing *Khan v. Griffin*, 701 N.W.2d 815, 831 (Minn. 2005)).

The Knowing Transfer Statute is constitutional if Subd. 2(2) is applied to only medical procedures. However, the District Court’s interpretation of Subd. 2(2), which convicts a defendant even if he tells his partner he harbors a communicable disease, violates the right to privacy. Like the parental interests at stake in *SooHoo* and *Troxel*, Subd. 2(2) implicates a fundamental right – the rights of fully informed, consenting adults to choose their sexual partners. Furthermore, Subd. 2(2) as interpreted by the District Court, is not narrowly tailored to further a compelling state interest.

i. The Knowing Transfer Statute, as interpreted by the District Court, implicates a fundamental right.

The right to privacy is enshrined in the due process clause of the United States and Minnesota Constitutions and is considered a fundamental right. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003); *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Lawrence* struck down sodomy statutes as unconstitutional, and based its holding that due process is about “autonomy of the person” in choosing who to have sex with. 539 U.S. at 574 (citing

*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)). The Court in *Lawrence* further held that the petitioners in the case were “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.” *Id.* at 578.

The Court however did not hold that all private sexual conduct was protected; it exempted sex with minors, or people who were injured, coerced or situated in relationships where consent might not easily be refused, and prostitution. *Id.* at 578. For these reasons, the Court in *Lawrence* held that the sodomy statute gave no “legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Id.*

While HIV is not common to a homosexual lifestyle, consensual anal sex between two adults is. The jury acquitted Mr. Rick under Subd. 2(1) of the Knowing Transfer Statute because the state could not prove that Mr. Rick failed to disclose his HIV status to Mr. Bailey before engaging in sexual penetration. Where two adults engage in consensual sex, being fully informed of their partners’ sexually transmitted disease status, they are protected by the right to privacy in deciding who to have sex with. Whether someone chooses to have sex with someone who has a communicable disease is that persons’ decision to make.

The facts of this case do not fall under the exceptions listed in *Lawrence*. Both Mr. Rick and Mr. Bailey were adults and the sex was consensual. Mr. Bailey consented to intercourse knowing Mr. Rick was HIV positive. Therefore, Mr. Bailey assumed the risk in having sex with Mr. Rick. Also, there was no injury because Mr. Rick was

charged with attempt under the Knowing Transfer Statute. The state decided to charge Mr. Rick with attempt because it could not prove that Mr. Bailey got HIV from Mr. Rick. Finally, this case is not similar to prostitution as there was no exchange of money for sex. Therefore, a due process right to privacy exists in this case.

- ii. The District Court's interpretation of Subd. 2(2) fails strict scrutiny because it is not narrowly tailored to advance a compelling state interest.

The District Court's interpretation of Subd. 2(2) – *i.e.* applying it to cases involving sexual penetration – fails strict scrutiny because the state can convict an individual under Subd. 2(2) even if all parties are informed of their respective partners' communicable disease statuses.

Presumably, the state will argue that the Knowing Transfer Statute and Subd. 2(2) furthers a compelling state interest because the state has an interest in preventing the spread of communicable disease. The undersigned concedes that the state has an interest in preventing the spread of communicable disease if it seeks prosecution under Subd. 2(1), since that subdivision requires the state to prove that the victim was unaware of his partners' disease status before sex. However, the District Court's interpretation applying Subd. 2(2) to all sexual penetration cases does not further a compelling state interest.

In order for a state interest to be “compelling”, the law must be necessary to accomplish said interest. *See Wygant v. Jacoson Board of Education*, 476 U.S. 267, 280 (1986) ([u]nder strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly tailored to accomplish that purpose.”)



Here, the state's interest in preventing the spread of communicable diseases is not furthered by the Knowing Transfer Statute. Mr. Moen's testimony in conference committee showed that the Minnesota Department of Health did not believe that the Knowing Transfer statute would promote public health; in fact, the Knowing Transfer would be a detriment. Instead, the Knowing Transfer Statute was passed to criminalize sexual relations where an individual was dishonest about his disease status, not to further public health goals.

Nor is the Court's interpretation of Subd. 2(2) narrowly tailored or the least restrictive alternative to accomplish achieve the state's interest. Under the District Court's interpretation of Subd. 2(2) anyone, regardless of whether they informed their partner of their communicable disease status before sex can be liable for Assault or Attempted Assault, because the state could prove an attempted transfer of semen every time an individual engages in sexual penetration. This interpretation has far reaching consequences. For example, a married individual, who has unprotected sex with his wife for the purposes of procreation could be liable under Subd. 2(2). Furthermore, under the Knowing Transfer Statute, two sexual partners who have the same communicable disease could both be liable for attempted assault.<sup>3</sup> In these instances, the Knowing Transfer Statute goes beyond its intended scope, is not the least restrictive alternative and is not narrowly tailored.

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<sup>3</sup> In fact, this hypothetical occurred in the present case when Mr. Bailey was notified he was HIV positive and engaged in sexual relations with Mr. Rick. (Trial T., Vol. II, pp. 205-206.)

However, if Subd. 2(2) were to be interpreted as applying to medical procedures, the Knowing Transfer Statute would be constitutional. Preventing the spread of communicable disease to people infected by lying or misleading partners is a legitimate governmental interest and is already prohibited under Subd. 2(1). By applying Subd. 2(1) and not Subd. 2(2) to all cases involving sexual penetration is narrowly tailored and the least restrictive alternative because it only punishes individuals who did not disclose their disease status to their respective partners before sex.

For these reasons, the Knowing Transfer Statute is not narrowly tailored to achieve a legitimate state interest and is unconstitutional as interpreted by the District Court.

\* \* \*

The constitutional issues created by Mr. Rick's jury instructions are avoided if Subd. 2(2) of the Knowing Transfer Statute was interpreted the way it was intended – that Subd. 2(2) applies only to medical procedures and the state must prove the accused did not inform his partner about his communicable diseases before having sex. Also, Subd. 2(2) as interpreted by the District Court violated Due Process under the United States and Minnesota Constitutions because its interpretation was unconstitutionally vague, and violated Mr. Rick's right to privacy. Therefore, Mr. Rick's conviction must be reversed.

**E. The District Court's Erroneous Inclusion of Subd. 2(2) Into Mr. Rick's Jury Instructions Was Not Harmless.**

“An error is harmless if all relevant factors indicate that, beyond a reasonable doubt, the error did not have a significant impact on the verdict.” *State v. Shoop*, 441 N.W.2d 475, 480-81 (Minn.1989).

Here, the erroneous inclusion of Subd. 2(2) into Mr. Rick's jury instructions was not harmless because but for the inclusion of Subd. 2(2) into Mr. Rick's jury instructions and verdict form, Mr. Rick would have been acquitted. (AA-31-AA-33.)

### **CONCLUSION**

For the reasons mentioned above, Mr. Rick's conviction must be reversed. The plain meaning of Subd. 2(2) applies to medical procedures and not sexual penetration. In the alternative, the Court should look to legislative intent because Subd. 2(2) is ambiguous and is a strict liability element. In reviewing legislative intent, it is clear that the legislature intended for Subd. 2(2) to apply to medical procedures and not sexual penetration. Finally, the District Court's interpretation violated the Due Process Clauses of United States and Minnesota Constitutions because the District Court's interpretation was unconstitutionally vague and violated the right to privacy.

Dated: March 7, 2012

Respectfully submitted,

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**CERTIFICATE OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 10,684 words. This brief was prepared using Microsoft Word 2007.

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