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

NICK RHOADES,
Defendant-Appellant,
vs.
STATE OF IOWA,
Plaintiff-Appellee.

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

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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QUESTION PRESENTED FOR REVIEW

THE COURT OF APPEALS CORRECTLY APPLIED IOWA CODE SECTION 709C.1, AND THIS COURT'S PRIOR HOLDINGS IN *KEENE* AND *MUSSER* ,TO THE FACTS OF THIS CASE, TO DETERMINE THAT RHOADES DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT A FACTUAL BASIS EXISTED TO SUPPORT HIS GUILTY PLEA.

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STATEMENT RESISTING FURTHER REVIEW

COMES NOW the State of Iowa pursuant to Iowa Rule of Appellate Procedure 6.1103(2) and resists Nick Rhoades' Application for Further Review.

1. Rhoades contends that the district court erred in its plea colloquy and that this Court should take further review to require the district court to comply with its own rules. Iowa R. App. P. 6.1103(1)(b). The error in the defendant's rationale is that this claim is raised as ineffective assistance. Therefore his has waived the claimed defect, if any defect exists, by failing to file a motion in arrest of judgment. The issue on appeal is not whether the court missed an element in the colloquy, it is whether applying *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985), the defendant has proved both a breach of an essential duty and prejudice. Although the claim that a factual basis is lacking is a claim that results in *pre se* prejudice, the defendant's attempts to shoehorn a court's failure to conduct a proper colloquy into that procedural posture should not be rewarded. The failure to fully

explain an element, if error at all, is an error that must be challenged by filing a motion in arrest of judgment. *State v. Meron,* 675 N.W.2d 537, 540 (Iowa 2004). Unlike *State v. Hack,* 545 N.W.2d 262 (Iowa 1996) and *State v. Schminkey*, 597 N.W.2d 785 (Iowa 1999), cases upon which the defendant relies heavily, the defendant is required to prove prejudice. *State v. Straw*, 709 N.W.2d 128, 134-35 (Iowa 2006). Furthermore, the record reflects that the district court did not err in accepting the defendant's plea and the ruling of the Court of Appeals should be affirmed. App. 36–37; *See also State v. Null*, 836 N.W.2d 41, 49 (Iowa 2013) ("the court need not review and explain each element of the crime if it is 'apparent in the circumstances the defendant understood the nature of the charge.'") (citations omitted). Further review is not warranted where the authorities upon which the defendant relies are misapplied.

2. This Court has clearly stated the purpose and the scope of Iowa Code section 709C.1, and this case does not present any new questions of law or fact for this Court to consider. *See State v.*

Musser, 721 N.W.2d 734 (Iowa 2006)l; *State v. Keene*, 629 N.W.2d 360 (Iowa 2001). Rhoades does not present any issues of changing legal consequence, therefore the Court of Appeals decision should be affirmed.

WHEREFORE, the Court should deny the Application for Further Review.

STATEMENT OF THE CASE

Nature of the Case:

Nick Rhoades seeks further review of the Court of Appeals' decision, filed on October 2, 2013, affirming the district court's order.

Rhoades pleaded guilty in Black Hawk County District Court to criminal transmission of the human immunodeficiency virus in violation of Iowa Code sections 709C.1(1)(a) and 709C.1(2)(b) (2011).

Course of Proceedings and Disposition:

On May 1, 2009, Rhoades pled guilty to criminal transmission of the human immunodeficiency virus and was sentenced to an indeterminate term not to exceed twenty-five years. Judgment and Sentence; App. - -.

On March 15, 2010, Rhoades filed an application for postconviction relief. PCR; App. - -. Judgment was granted in favor of the State affirming Rhoades' judgment and sentence. PCR Ruling; App. 386-395.

On October 2, 2013, the Court of Appeals affirmed the ruling of the district court. *Rhoades v. State*, 2013 WL 5498141, * 1–5 (Iowa Ct. App. October 2, 2013). The Court found that a factual basis did exist to establish Rhoades' guilt and that his trial counsel was not ineffective in permitting him to plead guilty. *Id.*

ARGUMENT

THE COURT OF APPEALS CORRECTLY APPLIED IOWA CODE SECTION 709C.1, AND THIS COURT'S PRIOR HOLDINGS IN *KEENE* AND *MUSSER* , TO THE FACTS OF THIS CASE, TO DETERMINE THAT RHOADES DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL AND THAT A FACTUAL BASIS EXISTED TO SUPPORT HIS GUILTY PLEA.

Preservation of Error and Standard of Review:

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

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

Discussion:

A. Grounds for further review.

Rhoades contends the Court of Appeals erroneously decided and ignored substantial issues of constitutional law in conflict with the decisions of this Court. Appellant Br. at 5. However, Rhoades then contradicts this argument by stating this Court should hear his case due to changing legal principles of broad importance. Appellant Br. at 5. In his Application for Further review, Rhoades argued that this Court should hear his case in order to correct its misinterpretation and misapplication of previous statements it has made regarding HIV. Statement Supporting Further Review at 1. Rhoades is essentially arguing that the Court of Appeals misapplied this Court's prior holdings regarding Iowa Code section 709C.1, even though he believes those previous holdings by this Court were incorrect interpretations of section 709C.1. Appellant Br. at 6–7.

Rhoades cannot have it both ways. Either the prior precedent of case law is wrong and this Court should hear his case to determine a possible question of changing legal principles (see Iowa R. App. P. 6.1103(1)(b)(3)), or the Court of Appeals decision was in conflict with a decision of this Court on an important matter. See Iowa R. App. P. 6.1103(1)(b)(1). Rhoades fails to set-forth a clear and consistent argument for why his case should be heard. His argument lacks proper grounds for further review and this Court should deny his application.

The State will specifically address Rhoades' ineffective assistance of counsel claims below.

B. Rhoades trial counsel did not fail to perform an essential duty.

Rhoades argues that his trial counsel failed to establish that he understood the elements of the crime to which he was pleading guilty. Appellant Br. at 5–6. To establish his claim of ineffective assistance of counsel, a defendant must demonstrate that: "(1) his trial counsel failed to perform an essential duty and (2) this failure

resulted in prejudice." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006); *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984); *see also Hill v. Lockhart*, 474 U.S. 52, 57 (1985). The defendant must prove both the "failure to perform" and "prejudice" prongs by a preponderance of the evidence. *Straw*, 709 N.W.2d at 133.

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

Rhoades' argument for how the "intimate contact" definition of Iowa Code section 709C.1(1)(a) should be applied is without support. Appellant Br. at 7–10. This Court's previous holdings, as

the Court of Appeals made clear in its decision, directly contradict Rhoades' misinterpretation of the law. *Rhoades,* 2013 WL 5498141 at * 3 (Iowa Ct. App. October 2, 2013). Rhoades footnotes to the *Musser* case in his brief (Appellant Br. at 7 fn. 3), but misstates what this Court held in that case. In *Musser* this Court stated:

> [S]ection 709C.1 may not expressly require an intent to injure, it does require the functional equivalent: that the defendant intentionally expose another person to the defendant's infected bodily fluid in such a way that the virus could be transmitted. See Iowa Code § 709C.1(2)(b).

721 N.W.2d at 749. Rhoades misstates in his brief what this Court held and therefore changes the overall meaning of the statute. Appellant Br. at 7 fn. 3. In *Musser* this Court did not use the term, "state of mind" (Appellant Br. at 7 fn. 3), and it did not state that "intimate contact" requires an intent to injure. *See id.* at 749. The only intent that is needed is *the intent of the defendant to expose another person. Id.* at 749. This Court has been clear that the intent of the defendant to exchange bodily fluid, cause harm or to transmit the disease is immaterial to the meaning of the statute. *See Keene,* 629 N.W.2d at 365.

Rhoades contends that the statute requires a specific *means rea* element to establish that he intentionally exposed his bodily fluid to another. Appellant Br. at 7. Again, Rhoades misstates the language of the statute and the prior rulings of this Court. *Musser,* 721 N.W.2d at 749; Iowa Code § 709C.1(2)(b) (2011). Specific intent is not necessary to establish intimate contact, "for a person to be guilty of violating section 709C.1, it must simply be shown that transmission of the HIV from the infected person to the exposed person was possible considering the circumstances."*Keene,* 629 N.W.2d at 365. Rhoades is arguing what he *wants* the statute to say or what he wants it to mean, but this does not change the state of the law.

The defendant's argument about the meaning of the word intentionally as it is used in that statute ignores or misconstrues the precedent in opposition to his argument. The word "intentional" has been frequently construed in Iowa law. While it may be true that the terms "specific intent" and "general intent" are not particularly easy to define, the word "intentional" is used in

that statute and is integral to the interpretation of it. The important question is what antecedents does the term modify? *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998). The antecedents that are modified by the term define the parameters of the statute. For instance, in *Chang* the term "intentionally" modified "damages" and therefore the statute required proof that the defendant intended the consequence of his action, the damage. *Chang* contrasted this use of the term with the manner in which it was used in *State v. Francois*, 577 N.W.2d 417 (Iowa 1998). The statute in question used the phrase "intentionally escapes." The modifier in that instance related to the act, not the consequence. This distinction is a consistent thread through Iowa precedent interpreting intent. *See e.g. State v. Conroy*, 604 N.W.2d 626, 638 (Iowa 2000) ("intentional discharge" required proof of the intent to discharge the firearm, not to injure the person fired upon). It was this principle that caused the court to conclude in *Keene* and *Musser* that the term "intentional" in the HIV statute required only that the defendant intended to commit the act exposing another

without requiring the transmission, or even the intent to, of any bodily fluid or the virus itself. Because neither the ordinary definition of the term "exposes" nor its modifier "intentional" require proof that the victim come in contact with the bodily fluids of the person infected with the virus, the presence of a condom or the lack of ejaculation is irrelevant and the court was correct in so concluding.

Rhoades' argument is one best addressed to the legislature, as the case law on this issue is clear and undisputed. *See Rhoades,* 2013 WL 5498141 at *5 fn. 2 (Iowa Ct. App. October 2, 2013) ("the proper recourse to address these policy concerns is through the legislature not the court.")(citations omitted). Given the lack of legislative action after the decisions in both *Keene* and *Musser*, the legislature has acquiesced in the Court's interpretation of the statute. *See Ackelson v. Manley Toy Direct LLC,* 832 N.W.2d 678, 688 (Iowa 2013) (legislative inaction for years after a decision is rendered indicates its acquiescence.)

Therefore, Rhoades cannot demonstrate that his counsel failed to perform an essential duty by not advising him to interpret Iowa Code section 709C.1 against all existing legal precedent. *See Ledezma*, 626 N.W.2d at 142. His trial counsel could only have informed him of the current state of Iowa law. *State v. McCoy*, 692 N.W.2d 6, 14 (Iowa 2005) (Normal range of competency for counsel includes being familiar with the current state of the law.). Rhoades' counsel did not fail to perform an essential duty and therefore no prejudice can be shown.

As to the somewhat related issue as to whether the court's failure to explain the elements of the offense, the defendant makes no argument for prejudice and, instead, misapprehends and misapplies cases finding that a where factual basis is lacking reversal is required. The need to show prejudice is discussed at length in *State v. Straw*, 709 N.W.2d 128 (Iowa 2006). The Court explained that in many guilty plea cases the prejudice inquiry will resemble the same inquiry as when the conviction was obtained through trial. *Id.* For example, when the alleged error of counsel is

a failure to investigate potentially exculpatory evidence, the determination whether this failure prejudiced the defendant by causing him to enter into a plea agreement rather than go to trial will depend on whether it was likely the discovered evidence would have changed his counsel's recommendation as to the plea. *Id.* The dissent was critical of the majority analysis citing *Hack* as an example where the prejudice prong was presumed. *Id.* at 141. The distinction between the majority position and the minority position in *Straw* illustrates the error that the defendant makes in this instance. Again, he tries to equate an error in the colloquy with the failure to find an adequate factual basis. They are distinct issues and the legal analysis different.

Here, the question is whether an explanation by the court of the elements as already interpreted by this Court would have resulted in the defendant choosing to go to trial rather than plead guilty. Because the conviction was just as likely had the case gone to trial, there is no objective evidence in the record to prove the defendant would have gone to trial. Additionally, the explanation

would not have included the interpretation urged by the defendant so there is no reason to believe the choice he would have made would have been different than the choice he did make. The ruling of the Court of Appeals should be affirmed.

C. A factual basis existed for the court to accept Rhoades' guilty plea.

When a guilty plea is tendered the trial judge must make an inquiry on the record, by appropriate method, to satisfy himself there is a factual basis for the plea. *Ryan v. Iowa State Penitentiary, Ft. Madison*, 218 N.W.2d 616, 618-620 (Iowa 1974); *Brainard v. State*, 222 N.W.2d 711 (Iowa 1974); and *State v. Williams*, 224 N.W.2d 17, 18 (Iowa 1974). The Court has recognized four methods for determining that a factual basis exists for a guilty plea: (1) inquiry of the defendant, (2) inquiry of the prosecutor, and (3) examination of the presentence report and (4) minutes of testimony attached to the indictment or county attorney's information. Those portions of the minutes that are necessary to establish a factual basis for the guilty plea are deemed

admitted by the act of the guilty plea. *See State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982) (noting that where portions of the minutes are not necessary to establish a factual basis for the guilty plea, they are considered denied by the defendant); *State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980) (overruled on other grounds by *State v. Kirchoff*, 452 N.W.2d 801, 805 (Iowa 1990)); *State v. Marsan*, 221 N.W.2d 278, 280 (Iowa 1974).

The factual basis in this case was established by reference to the minutes of testimony. Through those minutes, the victim, Adam Plendl informed the court that he had met the defendant in an online chat room. Narrative Report Mohling; APP. 12. The two met personally later and engaged in sex. NR Mohling; App. 12. Plendl asked the defendant if he was "clean" or disease free and the defendant replied that he was. NR Mohling; App. 12. In fact, the defendant had provided a false name of Nick Weber to him. NR Mohling; App. 12. The anal sex in which they participated was protected, though the condom itself came off before the act was completed, but the oral sex was not. Supplemental Narrative

Report pp. 1-2; App. 13-14. The defendant's online profile also represented that the defendant had a negative HIV status. SNR p. 2, Copy of Webpage; App. 14, 384-85. In an arranged call from Plendl to Rhoades, Rhoades admitted that he was HIV positive and apologized for not telling Plendl. SNR p. 2; App. 14. He acknowledged that he was receiving treatment at the Mayo Clinic. SNR p. 2; App. 14. Rhoades admitted that he had no excuse, including alcohol, for his lack of candor. SNR p. 2; App. 14. Rhoades also agreed with Plendl's reminder that the oral sex had been unprotected.

Rhoades contention is that since he used a condom while engaging in anal sex, and because he did not ejaculate during oral sex, he lacked the specific intent required by the statute. Appellant Br. at 15. Once again, Rhoades argument is predicated upon the belief that Iowa Code section 709C.1(2)(b) requires specific intent to transmit or exchange bodily fluid or to harm the victim. The State has already addressed Rhoades' misinterpretation of the statutory language and this Court's prior holdings regarding this

issue, in section B of its brief above. The statute does not create, nor has this Court ever determined that section 709C.1(2)(b) creates a specific intent crime. *See Keene*, 629 N.W.2d at 365; *Musser*, 721 N.W.2d at 749. However, Rhoades own argument on this issue contradicts itself.

Rhoades argues that, because he did not ejaculate during oral sex, the State lacks the evidence needed to prove that he acted with the requisite intent to expose another to bodily fluid. Appellant Br. at 15. However, under Rhoades' own reasoning the act of ejaculation is the act that would attach to the element of intent. Therefore, the State would only need to prove that Rhoades intended to ejaculate in order to satisfy the intent element of intimate contact under Rhoades' own definition, and this could be inferred from Rhoades' actions. See NR Mohling; App. 12; *See also State v. Evans*, 671 N.W.2d 720, 725 (Iowa 2003) (Intent is seldom capable of direct proof, and a trier of fact may infer intent from the normal consequences of one's actions.). Even if the statute was

interpreted as Rhoades argues, his factual basis argument would still fail.

Rhoades contentions whether he ejaculated or not, and the understanding of pre-ejaculatory fluid (Appellant Br. at 15) are immaterial, as this Court made clear in *Keene:* "Additionally, any claim by Keene that he did not ejaculate on October 9 or that if he did ejaculate, he ejaculated outside of C.J.H.'s body, is irrelevant." 629 N.W.2d at 365. Iowa Code section 709C.1 does not require the State to prove that a person had the specific intent to exchange fluid or transmit HIV. *Musser*, 721 N.W.2d at 749. The purpose of the statute is to criminalize the risk created by someone *intentionally engaging* in an act that *could* transmit the virus, as this Court has previously made clear. *See Id.* at 749–50. This Court in *Musser* provided that "[t]he crime of criminal transmission of HIV is actually quite similar to the crime of first-degree robbery for purposes of proportionality analysis." *Id.* at 749. Therefore, the Court of Appeals correctly concluded that Rhoades argument regarding ejaculation is immaterial when

applying section 709C.1. *Rhoades,* 2013 WL 5498141, * 5 (Iowa Ct. App. October 2, 2013). As the Court of Appeals stated, "the minutes of testimony unequivocally establish Rhoades engaged in unprotected oral sex with A.P., and consequently, Rhoades's claim that he did not ejaculate provides no support to his argument there was a lack of a factual basis regarding the 'intent element' of 'intimate contact.'" *Rhoades,* 2013 WL 5498141, at *5 (Iowa Ct. App. October 2, 2013).

Rhoades fails to establish the his counsel was ineffective and that a factual basis did not exist to allow the district court to accept his guilty plea. The ruling of the Court of Appeals should be affirmed.

CONCLUSION

The Court should affirm the decision of the Court of Appeals and the judgement and sentence of the district court.

CONDITIONAL NOTICE OF ORAL ARGUMENT

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

COST CERTIFICATE

We certify that the cost of printing this Resistance to Application for Further Review was the sum of $31.25.

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CERTIFICATE OF COMPLIANCE

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

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