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**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC13-2336

DCA NO. 3D11-3094

**GARY DEBAUN,**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

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ON APPLICATION FOR DISCRETIONARY REVIEW

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# PETITIONER'S BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS[1]

This case is about what the term, "sexual intercourse," means in section 384.24(2), Florida Statutes (2011). This statute prohibits persons with HIV from having "sexual intercourse" with another without informing that person of their HIV status.[2] The State alleged that Mr. Debaun, the Petitioner, violated section 384.24(2) by engaging in fellatio and penile-anal penetration with a male partner without informing him of his HIV status. (R. 14). Defense counsel moved to dismiss the charge on the ground that the charged acts did not constitute sexual intercourse. (R. 24-26).

Specifically, the motion to dismiss contended that the plain and ordinary meaning of "sexual intercourse" was limited in Florida law to penetration of the vagina by the penis. (R. 24-26). Although section 384.24 did not define the term, it was defined in section 826.04 (the incest law) as being limited to sex between a

[1] In the proceedings below, the Petitioner, Gary Debaun, was the Appellee and the Respondent, the State of Florida, was the Appellant. In this brief, "R" will refer to the record on appeal.

[2] Section 384.24(2), Florida Statutes (2011), reads:

> It is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through **sexual intercourse**, to have **sexual intercourse** with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the **sexual intercourse**.

(Emphasis added).

man and woman. (R. 24-26). Additionally, several Florida statutes had distinguished "sexual intercourse" from homosexual acts, terming the latter conduct as "deviate sexual intercourse."[3]

The trial judge granted the defense's motion, finding that the case was controlled by the Second District's opinion, *L.A.P. v. State*, 62 So. 3d 693 (Fla. 2d DCA 2011), which held that in Florida law, the meaning of "sexual intercourse" was penetration of the vagina by the penis. (R. 34-36). In that case, the defendant was accused of engaging in oral sex and digital penetration of the vagina without informing the other person of her HIV status. 62 So. 2d at 693. The defendant argued that section 384.24 did not apply to her because her alleged conduct was not "sexual intercourse." *Id*.

The Second District agreed with the defendant, holding that "sexual intercourse" is a plain and unambiguous term that refers to penile-vaginal union. *Id*. at 695. The Second District relied on definitions in several Florida statutes, as well as definitions in several Florida courts, including this one. *Id*. Upon finding that the meaning of sexual intercourse was clear, the court opined that the Legislature could, in its discretion, "amend the statute to broaden its application." *Id*.

[3] For example, section 827.071, Florida Statutes (2011), defines "deviate sexual intercourse" as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vagina."

After the trial judge in this case granted dismissal based on *L.A.P.*, the State appealed the trial judge's order, and a majority in the Third District Court of Appeal found that "sexual intercourse" referred to homosexual activity. The Third District's opinion, *Debaun v. State*, 129 So. 3d 1089 (Fla. 3d DCA 2013), rested on three main grounds:

(1) *A Dictionary*. The court highlighted the *secondary* definition of the 1986 Merriam Webster Dictionary, which defined "sexual intercourse" as "involving genital contact between individuals other than penetration of the vagina by the penis." 129 So. 3d at 1091. The Third District mentioned but did not discuss the *primary* definition in that dictionary edition: "heterosexual intercourse involving penetration of the vagina by the penis." *Id*. at 1091-92.

The *Debaun* dissent stressed that the dictionary term relied upon by the majority did not support its position since the word, "genital," describes generative organs, which are limited to the penis and vagina. 129 So. 3d at 1098. The dissent also maintained that the meaning of the term was already defined by controlling case law. *Id.* The majority's reliance on other authorities was therefore prohibited. *Id*. at 1097.

(2) *Legislative Amendment*. The majority referred to a 1986 amendment to the statute which added HIV to the enumerated diseases and changed gender specific pronouns to gender neutral pronouns. *Id*. at 1094. The Third District viewed this change as evidence that the Legislature impliedly sought to "expand

the definition of 'sexual intercourse' beyond relationships between only a man and a woman." *Id*.

The *Debaun* dissent asserted that the switch from gender specific to gender neutral terms in the statute was not directed at broadening the definition of sexual intercourse. *Id*. at 1097. Rather, it was part of a general restatement of the entire criminal code, aimed at eliminating gender discrimination. *Id*. The dissent reasoned that if the amendment was intended to change the definition of sexual intercourse, the Legislature would have said so in the Definitions section of the chapter, which was included for the first time that year. *Id*.

(3) *Legislative Intent*. The court reasoned that since the purpose of section 384.24(2) was to limit the spread of sexually transmitted diseases, the Legislature must have intended for the statute to include *any* sexual act that could transmit those diseases. *Id*. It did not matter that the Legislature never said so, despite consistently using the term, "sexual intercourse" for nearly a century in Florida's venereal disease statutes.

The *Debaun* dissent acknowledged that it would be tempting to construe the statute broadly, but concluded that the court had no authority to alter clear statutory language, regardless as to how or why that language had been enacted:

> It might be that the legislature simply overlooked the need to expand the definition of sexual intercourse in section 384.24 in 1986. Or, it might have been that twenty-five years ago, there were insufficient votes in the state legislature to expand the definition. I prefer the former explanation. If I were a legislator, I would vote to amend the

> statute to clearly define the crime. Other state legislatures with nearly identical state statutes have done so.

*Id*. at 1098.

The dissent further cautioned that the majority's holding merely amounted to a statutory amendment that violated the separation of powers:

> Over time, the legislature may come to depend on the courts to fix statutes rather than do the hard work necessary to enact a properly tailored statute in the first instance. Politically, legislators may prefer this arrangement, for it frees them to pass the statute they want, knowing that courts will save as much of their handiwork as they can. But this arrangement breeds an unhealthy dependency on courts and results in a loss of accountability. We have no more right to correct the mistakes of the Legislature than it would have to correct ours. This is especially so in this criminal case, where the rule of lenity must apply, whether we wish it to or not. *See* § 775.021(1), Fla. Stat. (2012).

*Id*. at 1099 (citations and internal quotations omitted).

The Third District certified express and direct conflict with the Second District's opinion, *L.A.P.*, as to whether "sexual intercourse" means sexual contact other than penile-vaginal penetration. *Id*. at 1094-95. This Court exercised its discretionary jurisdiction to resolve that conflict.[4]

[4] The Fifth District, in *State v. D.C.*, 114 So. 3d 440 (Fla. 5th DCA 2013), also found that "sexual intercourse," as used in section 384.24(2), was intended to include homosexual activity. Like the Third District, the court certified conflict with *L.A.P. v. State*, 62 So. 3d 693 (Fla. 2d DCA 2011). *D.C.*, 114 So. 3d at 443.

## QUESTION PRESENTED

**Does the term, "sexual intercourse," in section 384.24(2), mean penetration of the vagina by a penis – as defined by the Legislature and this Court – or, contrary to those authorities, does it also include homosexual activity and oral sex?**

## STANDARD OF REVIEW

"The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review." *Kephart v. Hadi*, 932 So. 2d 1086, 1089 (Fla. 2006).

## SUMMARY OF THE ARGUMENT

The Florida Legislature, and this Court, have *always* identified penile-vaginal union as "sexual intercourse" and distinguished it from all other sexual contact. Neither this Court, nor the Legislature, has ever said otherwise. The plain meaning of the term is therefore clear and unambiguous: "sexual intercourse" as used in section 384.24(2) does not refer to homosexual acts or oral sex.

Nevertheless, the Third District has interpreted "sexual intercourse" to mean any sexual contact that can transmit HIV. By ignoring the statute's plain meaning and applying its own expansive definition of the term in this case, the Third District usurped the role of the legislature and violated Mr. Debaun's constitutional right to due process. Thus, this Court should reverse the Third District's opinion, and reinstate the trial court's correct ruling below.

## ARGUMENT

**IT IS WELL SETTLED IN FLORIDA LAW THAT THE MEANING OF "SEXUAL INTERCOURSE" IS THE PENETRATION OF THE VAGINA BY THE PENIS, TO THE EXCLUSION OF ALL OTHER SEXUAL ACTS. THE USE OF THAT TERM IN SECTION 384.23(2), FLORIDA STATUTES (2011), THEREFORE EXCLUDES THE SEXUAL ACTS OF WHICH MR. DEBAUN WAS ACCUSED.**

In Florida law, the plain and ordinary meaning of "sexual intercourse" is the penetration of the female sexual organ by the male sexual organ. This Court has defined it as such. *See Williams v. State*, 92 Fla. 125 (Fla. 1926) (defining the term as "actual contact of the sexual organs of a man and a woman and an actual penetration into the body of the latter."). The Legislature has also defined it as such. §826.04, Fla. Stat. (2011) ("sexual intercourse" is "the penetration of the female sex organ by the male sex organ, however slight . . ."). The definition is in harmony with all other Florida law.[5]

But in *State v. Debaun*, 129 So. 3d 1089 (Fla. 3d DCA 2013), the Third District in effect amended the definition to mean "*any* sexual contact that can lead

[5] *Lanier v. State*, 443 So. 2d 178, 183 (Fla. 3d DCA 1983) (defining sexual intercourse as "'actual contact of the sexual organs' of two persons and penetration of the body of another" (quoting *Williams v. State*, 109 So. at 306)), *overruled on other grounds by State v. Lanier*, 464 So. 2d 1192 (Fla. 1985); *Green v. State*, 765 So. 2d 910, 913 (Fla. 2d DCA 2000) (defining sexual intercourse as when "a male's penis is placed inside the female's vagina."); §§ 365.161(1)(b), 800.02, 827.071(1)(a), 847.001(5), Fla. Stat. (2011) (defining Mr. Debaun's alleged conduct – penile-anal contact and oral sex – as "deviate sexual intercourse" or an "unnatural and lascivious act").

to the transmission of HIV." This expanded definition would not just include the penetration of the penis into any bodily orifice, but also any non-penetrative sexual conduct that could transmit the disease. The Third District should be reversed because the court's amendment of section 384.24 violates the separation of powers, the rules of statutory interpretation, and Mr. Debaun's constitutional right to due process.

### A. Both the Florida Legislature and Florida courts have consistently recognized that "sexual intercourse" means penetration of the vagina by the penis.

"If statutory language is 'clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (1931)). "In the absence of a statutory definition, it is permissible to look to case law or related statutory provisions that define the term." *State v. Fuchs*, 769 So. 2d 1006, 1009 (Fla. 2000). "The doctrine of in pari materia requires the courts to construe related statutes together so that they illuminate each other and are harmonized." *McGhee v. Volusia County*, 679 So. 2d 729, 730 n.1 (Fla. 1996).

Although the Legislature has not defined "sexual intercourse" in Chapter 384, it has defined it in another sex crime law, the incest statute, section 826.04: "'Sexual intercourse' is the penetration of the female sex organ by the male sex organ, however slight . . ." Under that definition of "sexual intercourse," Mr. Debaun's alleged conduct does not violate the statute. To the contrary, where the Legislature has meant to criminalize penile/anal penetration and oral sex, it has clearly said so, labeling such conduct as "deviate" or "unnatural."

For example, in both the Obscenity and Child Abuse Chapters, the meaning of "*deviate* sexual intercourse" is "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva." §§ 827.071(1)(a); 847.001(5). The Legislature also designated "deviate sexual intercourse" as separate and distinct from "sexual intercourse" in Chapter 827. That chapter discusses actual or simulated **sexual intercourse, deviate sexual intercourse**, sexual bestiality, masturbation, or sadomasochistic abuse . . ." § 827.071(1)(h) (emphasis added).[6] By using both "sexual intercourse" and "deviate sexual intercourse" in the same sentence, the Legislature made clear that the terms refer to different sexual acts. Only the latter

[6] Similarly, the sexual battery statute, section 794.011(h), Florida Statutes (2011), also distinguishes the acts, defining sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object . . ."

term – deviate sexual intercourse – describes Mr. Debaun's alleged conduct. §§ 827.071(1)(a); 847.001(5).

Notably, the definition of "deviate sexual intercourse" was for the first time included in the Obscenity Chapter in 1986. Chs. 86-238, § 1 Laws of Fla. (1986). Accordingly, the same lawmakers who defined "deviate sexual intercourse" in 1986 overlooked or declined to expand the meaning of "sexual intercourse" in Chapter 384. *See id*; *see also* Chs. 86-220 § 90 Laws of Fla. (1986) (amended venereal disease law, which included a new definitions section but did not define sexual intercourse).

Mr. Debaun's alleged conduct has also been specifically identified in Florida's sodomy laws, sections 800.01 and 800.02, which predate the enactment of Florida's first venereal disease law in 1919. Courts have explained that "[t]he history of section 800.02, which proscribes "unnatural and lascivious acts" indicates that it has been applied to homosexual acts, bestiality, digital sex, and oral sex—**anything other than adult male and female sexual intercourse**." *Harris v. State*, 742 So. 2d 835, 838 (Fla. 2d DCA 1999); *see also Franklin v. State*, 257 So. 2d 21 (Fla. 1971); *Button v. State*, 641 So. 2d 106 (Fla. 2d DCA 1994); *McGahee v. State*, 561 So. 2d 333 (Fla. 1st DCA 1990); *Mohammed v. State*, 561 So. 2d 384 (Fla. 1st DCA 1990). *Harris* instructs further that "[t]he term 'unnatural' is defined generally as 'violating natural law; inconsistent with an individual pattern or custom; deviating from a behavioral, ethical, or social norm."

*Id*. (quoting *Mohammed*, 561 So. 2d at 385). It has therefore been recognized that when the Legislature meant to include homosexual or "unnatural" conduct in a statute, it used terms other than "sexual intercourse."

In harmony with this legislative distinction, this Court and other Florida courts have consistently identified sexual intercourse as the limited act of penile-vaginal penetration. *See Washington v. State*, 302 So. 2d 401 (Fla. 1974) (holding that "carnal knowledge" in the sexual assault statute encompassed two distinct acts: sexual intercourse, in addition to "the forcible penetration of a man's sexual organ into any bodily orifice . . ."; *Green v. State*, 765 So. 2d 910, 913 (Fla. 2d DCA 2000) (defining sexual intercourse as when "a male's penis is placed inside the female's vagina.").

Florida is not alone in defining "sexual intercourse" in this way. Every other state that has criminalized HIV sexual contact has used broader or more specific language than Florida's venereal disease statute to identify prohibited sexual acts.[7] As Florida did in Chapter 827 (The Obscenity Law) some of those states list "sexual intercourse" *in addition to* other sexual acts, which further evidences a universal distinction between heterosexual intercourse and all other sexual

[7] *See* ACLU Lesbian & Gay Rights Project AIDS Project, State Criminal Statutes on HIV Transmission – 2008, available at: https://www.aclu.org/files/images/asset_upload_file292_35655.pdf. The only state which exclusively uses "sexual intercourse" as the prohibited sexual act in its venereal disease law is New York, a state which does not specifically enumerate any diseases in its statute. *Id*.

conduct. Thus, whenever homosexual acts are meant to be referred to, they are identified specifically with labels such as oral sex, anal penetration, or digital penetration.

For example, Georgia's venereal disease law prohibits an HIV positive person from engaging in "sexual intercourse *or any sexual act involving the sex organs of one person and the mouth or anus of another person* . . ." Ga. Code Ann. § 16-5-60 (c) (2011) (emphasis added). The Kansas law prohibits an HIV infected person from engaging "in sexual intercourse *or sodomy*." Kan. Stat. Ann. § 21-5424 (2013). The Michigan law prohibits infected persons from engaging in "sexual penetration," which it defined as "sexual intercourse, cunnilungus, fellatio, anal intercourse, or any other intrusion . . ."). Mich. Comp. Laws Ann. § 333.5210; *see also Debaun*, 129 So. 3d at 1098-99 (Shepherd, J., dissenting) (referencing the similar venereal disease statutes of South Carolina, Virginia, and Washington); *Blanchflower* v. *Blanchflower*, 834 A. 2d 1010, 1011 (N.H. 2003) (to construe state's adultery law, New Hampshire Supreme Court held that the "plain and ordinary meaning of sexual intercourse is 'sexual connection esp. between humans: COITUS, COPULATION,'" and excludes homosexual conduct).

Thus, Florida, along with every other state that criminalizes the unconsented exposure to HIV, defines "sexual intercourse" as one specific type of sexual act – penetration of the vagina by the penis. In each state's statutory scheme, all other sexual acts are referred to individually or broadly enough to cover all types of

sexual conduct. The Third District was therefore bound to apply that plain and ordinary meaning of "sexual intercourse" without further resort to the rules of statutory interpretation. This is the only way to construe section 384.24 in harmony with the rest of Florida's criminal code.

### B. The Third District's resort to a dictionary was improper because as the Second District in *L.A.P.* correctly concluded, the plain and ordinary meaning of "sexual intercourse" is clear. And even if the term *could* be construed broadly, the Third District erred by not applying the Rule of Lenity.

#### 1. The Second District properly applied the plain and ordinary meaning of section 384.24, and correctly found that the defendant's conduct was not criminalized under the statute.

The Second District, in *L.A.P. v. State*, 62 So. 3d 693, 694-95 (Fla. 2d DCA 2013), correctly concluded that in Florida law, "sexual intercourse" clearly and unambiguously refers to "an act where a male's penis is placed inside the female's vagina." (Citing *Green v. State*, 765 So. 2d 910, 913 (Fla. 2d DCA 2000)). To reach that conclusion, the *L.A.P.* court relied upon case law and related statutory provisions that defined the term. 62 So. 3d at 694. The Second District referred to the definition of "sexual intercourse" in the sexual incest law, as well as the definition of "deviate sexual intercourse" in other parts of the Florida Statutes. *Id.*

Since those authorities had already addressed the meaning of "sexual intercourse," the court properly declined to consult a dictionary definition. Thus, the Second District's conclusion was in keeping with the rules of statutory interpretation, which require courts to give statutory language its plain and ordinary meaning, and to interpret a statute so as to harmonize it with related statutory provisions.

The Second District noted that this interpretation did not, as the State had argued, lead to an absurd result. Rather, "it is merely an application of the statutory language to [the defendant's] actions." *Id*. In other words, if application of the term's plain meaning led to a result undesired by the Legislature, it could "of course, amend the statute to broaden its application." *Id*. It would not be the court's role to do the Legislature's work for it.

### 2. The Third District erred by ignoring the plain and ordinary meaning of "sexual intercourse" in Florida law, and by failing to apply the Rule of Lenity.

Unlike the Second District, the Third District ignored the well-established meaning of "sexual intercourse" in Florida law and turned to a single dictionary definition to justify its inference that "sexual intercourse" had a broader meaning than penile-vaginal union. However, the Third District was foreclosed from turning to a source outside of Florida law for a definition of "sexual intercourse"

when the plain and ordinary meaning of the term was already established. *Paul v. State*, 112 So. 3d 1188, 1195 (Fla. 2013) ("When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to the rules of statutory construction to ascertain intent.").

Even if the Third District was correct to interpret "sexual intercourse" in accordance with a much broader dictionary definition, such an interpretation would be to the detriment of the accused and therefore impermissible in a criminal case. This is because by "statutory directive," an ambiguity in a criminal statute triggers the Rule of Lenity in favor of Mr. Debaun. *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998) (citing *State v. Camp*, 596 So. 2d 1055, 1056 (Fla. 1992)).

The basis for this rule is the right of due process, which requires that a defendant must be put on adequate notice as to what conduct constitutes a crime. Without addressing Mr. Debaun's due process rights, the Third District considered two definitions in the Merriam-Webster Dictionary. 129 So. 3d at 1091-92. The first definition favored Mr. Debaun: "heterosexual intercourse involving penetration of the vagina by the penis." *Id*. at 1091. The second definition disfavored Mr. Debaun: "intercourse involving genital contact between individuals other than penetration of the vagina by the penis." *Id*. Assuming that Mr. Debaun carefully considered these definitions and the Rule of Lenity, as well

as Florida's obscenity, incest, sexual battery, and sodomy laws,[8] he would have correctly understood that his alleged acts *were not* sexual intercourse. However, the Third District applied the more expansive definition to his detriment.

The Legislature prohibits such a result by mandating the application of the Rule of Lenity whenever an ambiguous criminal statute calls for it:

> In Florida, the rule [of lenity] is not just an interpretive tool, but a statutory directive. *See* § 775.021(1), Fla. Stat. (2007) ("The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.").

*Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008) (some internal citations omitted). Thus, had the Legislature not already made the plain meaning of "sexual intercourse" clear, the Third District's preferred definition could not be applied in Mr. Debaun's case because the statute would have to be construed in his favor, not the State's.

### C. The Third District had no authority to amend the plain meaning of "sexual intercourse," and the court relied on erroneous reasoning regarding the legislative intent behind the statute's enactment.

The Third District reached its conclusion by committing two additional errors. First, it judicially amended the statute so that it would read the way the court preferred. Second, it erroneously assumed that stylistic, gender-neutralizing

[8] These definitions are discussed above, on pages 8 through 13 of this brief. *See* §§ 794.011(h), 800.02, 827.071(1)(a), 847.001(5), Fla. Stat. (2011).

changes in the wording of section 384.24(2) compelled an interpretation of "sexual intercourse" that it thought better comported with the Legislature's intent.

### 1. As this Court has held in analogous sex crime cases, the judiciary lacks the authority to modify clear statutory language even where it appears that the Legislature failed to act.

Where the Legislature does not announce an intent to change the meaning of a plain statutory term, the judiciary may not alter it, even where it appears that the Legislature made a mistake or failed to act. *Holly*, 450 So. 2d at 219 ("[T]he courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.") (emphasis omitted). This Court has said so even with respect to sex crime laws that have much broader application than the venereal disease statute at issue in this case. As this Court held in *Wilson v. State*, 288 So. 2d 480, 482 (Fla. 1974), "the courts should not shoulder the burden and responsibility of the Legislature," even where the lack of a protective statute "has affected the judicial conscience."

The *Wilson* Court came to that conclusion after addressing disputed language in the "Sexual Battery" laws in Chapter 794, which are the oldest and

closest analogue in Florida law to section 384.24(2).[9] Originally, Chapter 794 only prohibited nonconsensual "carnal knowledge" of a woman. Rape was therefore limited to sexual contact between opposite sexes

> At the time of the offenses alleged in this case, the crime of rape as prohibited by section **794.01 was defined in Florida case law as sexual intercourse only, and required penetration of the female sex organ by the male sex organ**. *See, e.g., Wright v. State,* 199 So. 2d 321 (Fla. 1st DCA 1967) (interpreting an earlier version of 794.01 having language identical to that in the 1969-1972 versions as requiring intercourse); *Askew v. State,* 118 So. 2d 219 (Fla. 1960) (interpreting an earlier version of 794.01 with the same language as the 1969-1972 statutes, as having two elements: (1) penetration of the female private parts by the private male organ, and (2) force).

*McGahee v. State,* 561 So. 2d 333, 335 (Fla. 1st DCA 1990) (emphasis added).

In the time that the rape law included only penile-vaginal penetration, all other sexual acts were punished under Florida's Sodomy Laws, sections 800.01 and 800.02. *Id*. at 335-36. Accordingly, Florida law divided felony sex crimes into two categories: (1) "crimes against nature" and (2) "carnal knowledge" between a man and woman. The interplay between section 794.01 and 800.01 changed in 1971, when this Court, in *Franklin v. State,* 257 So. 2d 21, 24 (Fla.

[9] The venereal disease laws are essentially sexual battery statutes. Section 384.24 contains the additional elements of knowledge of HIV status by the offender, and a lack of knowledge by the victim, which retroactively nullifies their consent. The crime therefore turns on consent to sexual contact, just like sexual battery. Some states even prosecute unconsented HIV contact as such. *See, e.g.,* § 9A.36.011, Wash. Stat. (1997) (Washington law making the crime identified in Florida statute 384.24(2), an aggravated assault akin to an attack with a firearm); Cal. Penal Code § 12022.85 (applying 3-year enhancement to sexual assault offense where defendant has knowledge of HIV status).

1971), held that section 800.01 was unconstitutionally vague. However, the *Franklin* Court did not find it unconstitutional to prohibit homosexual acts, *per se*: "We anticipate and recommend legislative study of the subject and, pending further legislation in the matter, society will continue to be protected from this sort of reprehensible act [consensual anal penetration] under Section 800.02 [misdemeanor sodomy law prohibiting "unnatural and lascivious acts"]. *Franklin*, 257 So. 2d at 24.[10]

For two years after *Franklin*, non-consensual anal penetration could not be punished as a felony. The rape statute was still limited to "carnal knowledge" of a female: "Whoever ravishes and carnally knows a Female of the age of ten years or more, by force and against Her will, or unlawfully or carnally knows and abuses a Female child under the age of ten years, shall be guilty of a capital felony . . ." § 794.01, Fla. Stat. (1971). Based on that definition, "[t]he cases in this and other jurisdictions which discuss[ed] the material elements of [rape] almost always contemplate[d] that a female be the victim of a forcible act and that the penetration be of the female sexual organ." *Brinson v. State*, 278 So. 2d 317, 321 (Fla. 1st DCA 1973).

[10] Section 800.02 only became unenforceable in 2003 when the United States Supreme Court found such statutes to be unconstitutional on due process grounds. *See generally Lawrence v. Texas*, 539 U.S. 558 (2003). Nevertheless, the statute has not been repealed.

In between the time that the felony sodomy statute was struck down and the rape statute was amended by the Legislature to protect any "person" from any forcible penetration,[11] the First District considered *Brinson*, in which a male prison inmate was forcefully penetrated in the anus by other male prisoners. The First District reasoned that despite clear language to the contrary, the rape statute had to be interpreted to include anal-penile penetration. 278 So. 2d at 320-21. To the First District, any other outcome would be beyond absurd – reinterpreting the statute was necessary "in order to maintain public order" and put "the law in harmony with the demands of our society." *Id*.

This Court reversed the district court's judicial amendment of the statute. *Wilson v. State*, 288 So. 2d 480, 482 (Fla. 1974). It held that it is "not the province of the judiciary to legislate; therefore, for the Court to change the definition of 'female' found in Florida Statutes, s 794.01, F.S.A., to be the same as the more inclusive word 'person' is to invade the province of the Legislature." *Id*. By judicially expanding the meaning of the term, "person," the district court had impermissibly "shoulder[ed] the burden and responsibility of the Legislature." *Id.* To the extent that "the lack of a protective statute" was a problem, the proper solution was for the Legislature to act to fill the void. *Id*. ("The Legislature has

[11] Section 794.011(h), Florida Statutes (2011), now defines sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object . . ." The drafters of this provision knew not to use the term "sexual intercourse" to describe those acts. Oral, anal, and vaginal penetration were identified explicitly, lest they be excluded.

had two years to fill the void created by the holding of the sodomy statute unconstitutional. The wording has been changed in section 794.01, Florida Statutes, F.S.A. to read 'person' but related crimes classified at common law as 'sodomy' are as yet uncovered.").

This Court's prohibition in *Wilson* must control here, where the Third District has bypassed the legislative process to, in effect, turn an unequivocally narrow term, "sexual intercourse," into the much broader phrase, "any sexual contact that can transmit HIV."[12] The Third District's rationale – that its interpretation avoided an "absurd" result – is the same rationale that this Court rejected in *Wilson*. As this Court explained, when statutory terms are clear, courts have no authority to change them on the ground that they are unreasonable or a shock to the "judicial conscience." 288 So. 2d at 482. Accordingly, a dictionary cannot be consulted to define a term that the Legislature and this Court have already defined. *Hankey v. Yarian*, 755 So. 2d 93 (Fla. 2000) ("Because the word 'toll' has been consistently used by the Legislature and interpreted by the courts to mean 'suspend' when used in a statutory limitations context, we conclude that it was intended to have the same meaning in section 766.106(4)."); *Green v. State*,

[12] The Third District suggests that any type of sexual contact that can transmit venereal disease is "sexual intercourse" under section 384.24. However, sexual activity without penetration can also transmit venereal disease. For example, non-penetrative genital contact, or "outercourse," such as "tribadism" and "frottage," are by definition not intercourse. *See generally* http://en.wikipedia.org/wiki/Non-penetrative_sex. Nevertheless, the Third District's reasoning would categorize them as such.

604 So. 2d 471, 473 (Fla. 1992) ("*If necessary*, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary.") (emphasis added).

Moreover, even if the Third District could consider the reasonability of construing section 384.24(2) in Mr. Debaun's favor, he should still prevail. One reasonable explanation for why the Legislature chose to narrow the scope of the statute is that Mr. Debaun's alleged sexual activity (oral and anal penetration with another man) was already criminalized as sodomy at the time section 384.24 was enacted. Consequently, there would have been little reason to impose an additional punishment for that conduct in either 1919, when sodomy was punishable as a felony (section 800.01), or 1986, when it was still punishable as a misdemeanor (section 800.02). As in *L.A.P.*, "the result here is neither unreasonable, nor ridiculous; it is merely an application of the statutory language to [the defendant's] actions." 62 So. 3d at 695.

Here, the Third District has followed the First District's *Brinson* decision by shouldering the Legislature's burden to reach its desired outcome. Yet, section 384.24 leaves no room for the Third District's interpretation of the law. The language of the statute is clear, and the Legislature never expanded the term "sexual intercourse" to mean something different than what it has always meant. The *Debaun* majority's holding therefore amounts to judicial legislation that this Court should strike down, just as it did in *Wilson*. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the

meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Johnson v. State*, 91 So. 2d 185, 187 (Fla. 1956) "[C]ontemporaneous construction and long acquiescence in a particular construction are entitled to great weight."); *see also Blanchflower*, 834 A. 2d at 1012 (holding that it "is not the function of the judiciary to provide for present needs by an extension of past legislation," where the state's adultery statute prohibited extra-marital "sexual intercourse," which was limited to sex between a man and woman.) (quotation and brackets omitted).

**2. The removal of gender specific terms in section 384.24(2) had nothing to do with changing the established definition of "sexual intercourse," which has been consistently used in Florida's venereal disease laws from 1919 until the present day.**

In the 1986 amendment of section 384.24(2), some of the gender specific language in the statute was made gender neutral, and HIV was listed as an enumerated disease. The Third District incorrectly relied on those amendments to determine that the Legislature impliedly sought to expand the definition of "sexual intercourse." A brief history of the venereal disease law reveals that these amendments were meant to serve a completely different purpose than the Third District attributed to them.

The original incarnation of section 384.24(2), Florida Statutes, was passed in 1919 to protect the public against syphilis, gonorrhea, and chancroid, all of which were declared "communicable and dangerous to public health." Ch. 7829, § 1, Laws of Fla. (1919). The first section of the new law made it a misdemeanor offense "for any one infected with either of these diseases to expose another to infection." *Id*. The statute clarified the meaning of "any one" and "expose" by specifying that it was a crime for a man with a venereal disease to have uninformed "sexual intercourse" with a woman, and vice-versa. *Id*. at §2. The statute did not specify that sexual contact between two women or two men would qualify, despite that the diseases were just as transmittable by sexual activity other than penile-vaginal union.

In *Debaun*, the Third District seemed to accept that the 1919 version of the venereal disease statute, all the way through the 1985 version, did not encompass homosexual activity – "[i]t is evident that the legislature [in 1986] sought not only to address additional sexually transmissible diseases, but also to *expand* the definition of 'sexual intercourse' beyond relationships between only a man and a woman." 129 So. 3d at 1094 (emphasis added). The Third District held that the Legislature *implied* it was changing its mind in 1986, as evidenced by the elimination of gender specific pronouns in the statute and the new inclusion of HIV as an enumerated disease. *Id*.

In 1985, a year before some, but not all of the gender specific terms were eliminated in section 384.24, the venereal disease statute read as follows:

> It is unlawful for any female afflicted with any venereal disease, knowing of such condition, to have sexual intercourse with any male person, or for any male person afflicted with any venereal disease, knowing of such condition, to have sexual intercourse with any female.

§384.24(2), Fla. Stat. (1985). Then, in 1986, the gender specific terms in the statute were replaced with gender specific terms. "Female" and "male person" were changed to "any person." The statute's statement of legislative intent did not explain this change. Nor did the new "definitions" section in Chapter 384 reflect an intent to broaden the scope of prohibited sexual acts. The same is true regarding the subsequent 1995 amendment, which made the statute completely gender inclusive. *See* Chs. 95–147–.148, Laws of Fla. (1995) (i.e., changing "his" to "his and her," and "himself" to "himself and herself" throughout the chapter).

The only explanation for these changes is in the materials cited by the *Debaun* dissent, which prove that the amendment had nothing to do with expanding the scope of "sexual intercourse" to include all sexual activity. Rather, it was part of a sweeping effort to promote gender equality throughout the entire code:

> The majority excuses the legislature's failure to act by holding that the legislature implicitly re-defined the phrase "sexual intercourse" by substituting the gender neutral term "person" for the gender specific terms "male" and "female." I believe this is a stretch too far. First, the substitution on which the majority places its reliance was made during

> a time when the gender neutralization of state statutes was in vogue. *See* Fla. HB 176 (1984); Fla. SB 41 (1984); Fla. SB 282 (1983) (proposed bills for creation of committees to eradicate, insofar as possible, sex discrimination in Florida Statutes) (available from Fla. Dep't of State, Div. of Archives); Report of the Fla. Supreme Court Gender Bias Study Commission (March 1990); Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation,* 42 Fla. L. Rev. 181 (1990). Florida completed this process with a comprehensive amendment to the Florida Statutes in 1995 and 1997. *See* Chs. 95–147–.148, Laws of Fla. (1995); Chs. 97–102–.103, Laws of Fla. (1997).

*State v. Debaun*, 129 So. 3d 1089, 1097 (Fla. 3d DCA 2013) (Shepherd, J., dissenting) (internal footnote excluded).

Based on the history of the statute's enactment and subsequent amendments, it is clear that the outbreak of HIV/AIDS in the early 1980s merely coincided with the gender-equality reforms of the 1980s and 1990s. Contrary to the Third District's justification for its statutory amendment, there are no grounds to interpret any legislative changes to section 384.24(2) as an implied expansion of the statute's scope. The Legislature has consistently referred to all sexual acts with complete clarity throughout Florida's criminal code. From 1919 until the present day, the Legislature has prohibited only "sexual intercourse" in Florida's venereal disease statutes. The term has been defined in other statutes and case law as referring solely to penile-vaginal penetration.

By adding words to a statute that the Legislature had omitted, the Third District has violated the separation of powers and deprived Mr. Debaun of his constitutional rights. To remedy that error, this Court should vacate the Third

District's opinion and allow the Legislature to speak for itself. Whether 384.24 should be amended, unchanged, or repealed is not something for the courts to decide.

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court vacate the Third District's reversal of the order granting dismissal of this case.

Respectfully submitted,

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## CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times Roman.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by e-mail to CrimAppMIA@MyFloridaLegal.com and by mail to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this 28th day of May, 2014.

/s/Brian Ellison
_____
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