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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.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On August 9, 2011, the State filed an information against Petitioner charging him with "Uninformed HIV Infected Sexual Intercourse § 384.24 (2), a third degree felony. (R.14).[1] The events leading to the charges were alleged to have occurred approximately between January 1, 2011 and March 31, 2011 in Monroe County. Id. According to the arrest affidavit, the victim, Charles Marlin, had requested that Petitioner show him a negative HIV lab test result prior to beginning a sexual relationship. (R.2). Mr. Marlin had heard rumors that the Petitioner was HIV positive. Id.

Petitioner produced lab results from LabCorp noting that Petitioner was HIV negative. Id. At the bottom of the lab results was a handwritten note stating that the Petitioner was suffering from Lupus and signed "Mark Whiteside". Id. Marlin stated that the Petitioner had informed him that he was suffering from Lupus and that he was negative for HIV. Id. But when Mr. Marlin questioned Dr. Mark Whiteside about the lab results, he was informed that Petitioner was in fact HIV positive. (R.3). When Petitioner spoke with Detective Standerwick of the Key West Police Department on July 28, 2011, he told the officer that he had disclosed his HIV status to Marlin. (R.3). On August 1, 2011, Marlin performed a controlled

[1] References to the record will be designated as "R" and page number.

phone call to Petitioner in which Petitioner told Marlin he was sorry for not disclosing his HIV status. (R.3). Petitioner was subsequently charged with "HIV Infected Person Having Sex Without Informing Partner" under Florida Statute § 384.24. Id.

On October 27, 2011, Mr. Debaun moved to dismiss. (R.24). He argued that he did not violate § 384.24(2) because he was charged with violating the statute by a means other than "sexual intercourse." (R. 24-25). Because the statute did not define 'sexual intercourse," he resorted to other Florida Statutes which mentioned sexual intercourse and claimed those statutes, relating to deviate sexual intercourse, obscenity, and bestiality were the basis for interpreting this statute. (R. 25). He also argued that the §384.24(2) statute specifically provided for sexual intercourse to be the prohibited act. Id.

On November 4, 2011, the State Attorney responded. (R.27). Judge Wayne M. Miller heard argument on November 9, 2011. (SR.2). The defense's argument cited to *L.A.P. v. State*, 62 So.3d 693 (Fla. 2nd DCA 2011). (SR. 7), which concluded that sexual intercourse was the penetration of the female sex organ by the male sex organ. Id. [2]

[2] The facts of *L.A.P.* are different in that the defendant in *L.A.P*. was a female who was accused of exposing her female partner to HIV when they engaged in oral sex and digital penetration of the vagina. 62 So.3d 693 (Fla. 2nd DCA 2011). Petitioner

Judge Miller granted defense's motion to dismiss on November 17, 2011 (R.36). In his ruling, Judge Miller stated that since the Second District had spoken on the issue in *L.A.P.* and no other appellate court had so ruled, he was bound to follow the decision of the Second District Court as legal precedent. Id. The State appealed. (R.45). On October 30, 2013, the Third District Court of Appeal reversed and remanded Judge Miller's decision in *State v. Debaun*, 129 So.3d 1089 (Fla. 3d DCA 2013).

The Third District Court held that: the definition of sexual intercourse in the statute that prohibited an individual from engaging in sexual intercourse without informing his partner of his HIV status was not limited to only vaginal penetration by a penis. *Id*. Furthermore, the Court noted that when a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent; but, where the legislature has not defined words used in a statute, it is appropriate to refer to dictionary definitions to ascertain the plain and ordinary meaning of a word. *Id.* The Court noted that the statute was enacted to prevent the spread of sexually transmissible diseases, many of which were transmitted by sexual contact other than vaginal penetration by a

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Debaun is accused of exposing his male partner to HIV when they engaged in oral and anal sex.

penis, and thus limiting the statute to vaginal penetration by a penis would be absurd. *Id.*

The Third District then explained that a statute must be construed in its entirety and as a whole, and in such manner that it does not render part of the statute meaningless. *Id*. The Court noted that it was appropriate in this matter to refer to a dictionary to ascertain the plain and ordinary meaning of the term sexual intercourse. *Id.* at 1091. The Court noted that:

> While reference to case law and other statutes is a permissible means of determining the plain and ordinary meaning of words of common usage, we believe doing so in this case thwarts the legislative intent behind this law. *See Paul v. State,* 112 So.3d 1188, 1195 (Fla. 2013) (quoting *State v. Burris,* 875 So.2d 408, 410(Fla. 2004) (recognizing that the "statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent").

On May 28, 2014, the Petitioner filed his brief on the merits to the Florida Supreme Court. Respondent's answer is as follows.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal did not err in its decision. Legislative intent, as expressed in the statute's text, is the polestar that guides statutory interpretation. The statute is clear and unambiguous. Under the statute:

> 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.

Fla. Stat. §384.24(2). The Third District Court of Appeal correctly interpreted this text to give meaning to all the language and give effect the statute's purpose.

The Third District properly held that, in light of the clear intent of the Florida legislature, the purpose of § 384.24(2) was to further public health, not criminalize certain sex acts, and thus the Third District correctly rejected resort other criminal statutes for interpreting this statute. The statute targeted exposure to and transmission of HIV and AIDS and sought protect the citizens of Florida from a public health threat.

Analysis of other statutes was unnecessary because the Legislature chose to use words with plain meaning. The lack of a definition of "sexual intercourse" within §384.24(2) did not render the statute ambiguous or unclear. The Third District Court of Appeal could properly consider the dictionary for definition, common usage, and legislative intent when analyzing the statutory construction and purpose of § 384.24(2). Furthermore, the doctrine of "in pari materia" made it proper to consider the statute as a whole when analyzing the legislative intent.

Because the statute is clear, a narrow interpretation pursuant to the rule of lenity is unnecessary. The rule of lenity should not be considered here. Lenity is necessary only if the statute is ambiguous. Section 384.24(2) is not unclear. And,

Petitioner's interpretation runs contrary to the statute's texts. Furthermore, the cases and statutes the petitioner cites, which are taken from other areas of law, do not fit with the statute before this Court. In rejecting resort to such authority, the Third District Court of Appeal did not "judicially amend" § 384.24(2), as the reasonable and correct interpretation of the definition of "sexual intercourse" in § 384.24(2) includes more than a man's penis penetrating a woman's vagina.

ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN ITS ANALYSIS OF THE DEFINITION OF "SEXUAL INTERCOURSE" FOUND IN FLORIDA STATUTE § 384.24(2)

A. The issue before this Court is a question of law: the meaning of a statute's text.

"This case concerns a matter of statutory interpretation and construction, which is a question of law that this Court reviews de novo." *Anderson v. State*, 87 So. 3d 774, 777 (Fla. 2012). It is a fundamental principle of statutory construction that, where language of statute is plain and unambiguous, there is no occasion for judicial interpretation. *Pardo v. State*, 596 So.2d 665 (Fla. 1992). In construing statutes, this Court first considers the plain meaning of the language used; when the language is unambiguous and conveys a clear and definite meaning, that meaning controls *unless* it leads to a result that is either unreasonable or clearly contrary to legislative intent. *J.M. v. Gargett*, 101 So.3d 352 (Fla. 2012). "In attempting to discern legislative intent, [this Court] first look[s] to the actual language used in the statute." *Bautista v. State*, 863 So. 2d 1180, 1185 (Fla. 2003). 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. *State v.*

D.C. 113 So.3d 440 (Fla. 5th DCA 2013) (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984)). *See also Paul v. State*, 112 So.3d 1188, 1195 (Fla. 2013).

B. Because the statute is unambiguous, the Third District did not err in consulting a dictionary, as dictionaries contain the plain and ordinary meaning of words.

Petitioner challenges the Third District's resort to a dictionary as the source of the plain meaning of the term "sexual intercourse," which the Legislature did not define when authoring the statute. Despite Petitioner's contention, it was proper to consider the legislative intent of the statute and consider the rules of statutory construction of § 384.24(2) to define "sexual intercourse." The lack of a definition in the statute does not render the statute ambiguous, as "such words are construed in their plain and ordinary sense." *State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980). And, as this Court has recognized, dictionaries are proper reference sources in addressing the plain and ordinary meaning of a term the Legislature did not specifically define:

> One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or by the clear intent of the legislature. If necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary.

Green v. State, 604 So. 2d 471, 473 (Fla. 1992) (internal citations omitted). Consequently, there was no error in resort to a dictionary, and indeed, it was the

proper place to address a dispute over the plain and ordinary meaning of the words used in the statute.

Under facts similar this case, the Fifth District Court of Appeal in *D.C.* concluded that the plain and ordinary meaning of the term "sexual intercourse" as used in Florida Statute § 384.24(2), included vaginal, anal, and oral intercourse between persons, regardless of their gender. 114 So.3d at 442. As in this case, in *D.C.*, the defendant was charged under § 384.24(2) after he allegedly had homosexual oral and anal sex without disclosing his HIV status. *Id.* at 441. The defendant filed a motion to dismiss contending that sexual intercourse, as that term was used in § 384.24(2) only applied when a female sex organ was penetrated by the male sex organ. *Id*. The trial court granted the motion to dismiss and the Fifth District Court of Appeal ultimately reversed it ruling that "sexual intercourse" as used in § 384.24(2) included homosexual oral and anal sex. *Id*. at 440.

Like the Third District, the Fifth District concluded that dictionaries are repositories of the plain meaning of words, and concluded the defendant's view advanced an unnecessarily narrow view of the term at issue. After reviewing governing authority, the Fifth District Court noted that courts may determine the plain and obvious meaning of a statute's test by referring to dictionaries. Id. at 442 *citing to W. Fla. Reg'l. Med. Ctr., Inc. v. See*, 79 So.3d 1, 9 (Fla.2012). The Fifth

District then summarized its review of multiple dictionaries, which yielded an interpretation contrary to the defendant's view of the words at issue:

> Webster's Third New International Dictionary defines sexual intercourse as including heterosexual vaginal intercourse as well as "intercourse involving genital contact between individuals other than penetration of the vagina by the penis." Webster's Third New International Dictionary Unabridged 2082 (1976). Similarly, Merriam–Webster's Collegiate Dictionary defines sexual intercourse as including vaginal intercourse and "intercourse (as anal or oral intercourse) that does not involve penetration of the vagina by the penis." Merriam–Webster's Collegiate Dictionary 1141 (11th ed. 2012). The American Heritage Dictionary defines sexual intercourse as including "sexual activity that includes insertion of the penis into the anus or mouth." The American Heritage Dictionary of the English Language 1606 (5th ed. 2011). The World Book Dictionary defines the term as "the uniting or joining of sexual organs." World Book Dictionary 1909 (2011). *Notably, our research did not disclose any dictionary definition that limited sexual intercourse to heterosexual vaginal intercourse, and the additional online dictionaries cited by the defendant do not so limit the definition*. See http:// lexic. us/ definition- of/ sexual_ intercourse (defining sexual intercourse as sexual interaction, usually involving genital and/or anal and/or oral penetration, between at least two organisms); http:// dictionary. reference. com/ browse/ sexual+ intercourse (defining sexual intercourse as including vaginal intercourse and sexual union between humans involving genital contact other then vaginal penetration by the penis). As such, we conclude that the plain and ordinary meaning of the term sexual intercourse, as used in section 384.24(2), includes vaginal, anal, and oral intercourse between persons, regardless of their gender.

D.C., 114 So.3d at 442 (Fla. 5th DCA 2013) (emphasis added). Thus, contrary to Petitioner's contention, the Third District's resort to a dictionary definition neither yielded an out-of-the-ordinary meaning for the phrase at issue nor ignored

prevailing meanings of that phrase. This Court should affirm, as the Third District did not deviate from governing law in interpreting the statute.

C. The Third District did not "judicially amend" § 384.24(2), when it interpreted the statute consistent with the requirement that statutes must be read as a whole to give meaning to the entire statute and ensure legislative intent is respected.

A statute must be construed in its entirety and as a whole. *Koile v. State*, 934 So.2d 1226, 1233 (Fla. 2006). In construing a statute, a court will consider its history, the evil to be corrected, intention of legislature, subject to be regulated, objects to be obtained and will be guided by legislative intent even though the intent may apparently contradict the strict letter of the statute. *Singleton v. Larson*, 46 So.2d 186 (Fla. 1950).

In determining the intent of the legislature, Florida courts must construe a statute in light of purposes for which it was enacted and the evils it was intended to cure. *Jennings v. State*, 667 So.2d 442 (Fla. 1st DCA 1996). This Court has stated:

> We have long recognized that [i]f a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others in pari materia, the Court will examine the entire act and those in pari materia in order to ascertain the overall legislative intent.

Larimore v. State, 2 So.3d 101, 106 (Fla. 2008) (quoting *Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So.2d 1260, 1265–66 (Fla.2008)). The doctrine of "in pari materia" is a principle of statutory construction that requires

that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the legislature's intent. *Florida Department of State, Division of Elections v. Martin,* 916 So.2d 763 (Fla. 2005). *See also McGhee v. Volusia County*, 679 So.2d 729 (Fla. 1996). Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. *Id*. at 768.

1. Petitioner's interpretation is inconsistent with the language in the paragraph at issue.

Under Title 29, Public Health, Chapter 384 (Sexually Transmissible Diseases) of Florida Statute § 384.24(2), 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

The Petitioner was charged under this statute when he engaged in sexual relations with the victim, knowing that he, the Petitioner, was HIV positive, and did not inform the victim of his HIV status. The arrest affidavit alleged that the Petitioner hid his HIV status by presenting a false lab report in addition to lying to the victim stating that he had Lupus and not HIV. The Petitioner has argued in the lower court and argues now, that he engaged in fellatio and anal sex; and that those acts

do not constitute "sexual intercourse" under § 384.24(2). The Petitioner claims that the meaning of sexual intercourse is clearly limited to the act of the man's penis penetrating the woman's vagina and that his actions do not constitute sexual intercourse and thus, he is not guilty of violating § 384.24(2). This argument ignores the use of the modifier "any" when describing the proscribed criminal act.

Under the statute "[i]t 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 . . . and has consented to the sexual intercourse." § 384.24(2). Petitioner contends the Third District ignored the limitation to penile-vaginal sex in this language, yet there is no such limitation apparent from the language. The proscribed conduct is for "*any* person": a) who knows he or she is infected, and that he or she can transmit the virus through sexual intercourse; b) to have sexual intercourse with "*any* other person" without receiving informed consent. *Id.* Because it is not a crime for a person who has not "been informed" both that he or she is infected and that it can be transmitted by sexual intercourse, the statute criminalizes, not sex acts, but willfully exposing a sex partner to the disease. This

is consistent with the Third District's conclusion that the statute is a public health statute intended to curb the spread of disease.

If Petitioner's view is accepted, the statute's language regarding knowledge of exposure and the potential to transmit becomes unnecessary, because it is only illegal to have vaginal-penile sex while infected, and perfectly legal to knowingly expose one's sex partner to the disease by other means of sexual transmission. Thus, Petitioner's view rewrites the statute to read that it is:

> unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease, 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

Petitioner cites no authority for any legislative intent to allow for exposure by one means of sex to be legal but another illegal. Unlike Petitioner's narrowing interpretation, the Third District's interpretation gives meaning to the public health purpose of the statute: to prevent unknowing exposure to the disease by victims, and willful exposure and transmission of the disease by perpetrators.

2. Petitioner's limiting interpretation of the statute as criminalizing certain sex acts is inconsistent with the express public health purpose of Chapter 384.

The title of Chapter 384 is "*Sexually Transmissible Diseases*". Chapter 384 is part of a series of chapters (chapters 381-408) found under Title XXIX of the Florida Statutes known as "*Public Health*." The purpose of § 384.24(2) was to

reduce the incident of sexually transmissible disease of HIV in Florida. Under § 384.22, findings; intent:

> *The Legislature finds and declares that sexually transmissible diseases constitute a serious and sometimes fatal threat to the public and individual health and welfare of the people of the state and to visitors to the state. The Legislature finds that the incidence of sexually transmissible diseases is rising at an alarming rate and that these diseases result in significant social, health, and economic costs, including infant and maternal mortality, temporary and lifelong disability, and premature death. The Legislature finds that sexually transmissible diseases, by their nature, involve sensitive issues of privacy, and it is the intent of the Legislature that all programs designed to deal with these diseases afford patients privacy, confidentiality, and dignity. The Legislature finds that medical knowledge and information about sexually transmissible diseases are rapidly changing. The Legislature intends to provide a program that is sufficiently flexible to meet emerging needs, deals efficiently and effectively with reducing the incidence of sexually transmissible diseases, and provides patients with a secure knowledge that information they provide will remain private and confidential.*

When construed together, it is clear that the Legislature enacted this statutory scheme to 1) address the AIDS epidemic, 2) amend section § 384.24 to add HIV to the list of enumerated sexually transmissible diseases, 3) and to subject a defendant to criminal sanctions for willful transmission of the disease through sex.

It is common knowledge that HIV was first introduced into the American consciousness when gay men began falling ill and dying. [3] Before it became clear

[3] http://en.wikipedia.org/wiki/HIV#Origins

that HIV and AIDS could be transmitted by other methods, [4] it was believed that the disease was transferred primarily among homosexuals.[5] As HIV and AIDS

[4] http://en.wikipeida.org/wiki/AIDS Wikipedia's discussion of AIDS provides "[t]his condition progressively reduces the effectiveness of the immune system and leaves individuals susceptible to opportunistic infections and tumors. HIV is transmitted through direct contact of a mucous membrane or the bloodstream with a bodily fluid containing HIV, such as blood, semen, vaginal fluid, preseminal fluid, and breast milk. [4] [5]. This transmission can involve anal, vaginal or oral sex, blood transfusion, contaminated hypodermic needles, exchange between mother and baby during pregnancy, childbirth, breastfeeding or other exposure to one of the above bodily fluids."

However, according to the CDC, "In the United States, HIV is spread mainly by having sex or sharing injection drug equipment such as needles with someone who has HIV," and "In general . . . [a]nal sex is the highest-risk sexual behavior" while "[v]aginal sex is the second highest-risk sexual behavior." Centers for Disease Control and Prevention, "HIV/AIDS", *at* http://www.cdc.gov/hiv/basics/transmission.html

[5] *See, e.g.*, James J. Goedert, et al., "Acquired Immune Deficiency Syndrome (AIDS) in Hemophilia," Am. Society of Clinical Oncology – 19th Annual Meeting, (San Diego, California, May 22-24, 1983) *available at* http://history.nih.gov/NIHInOwnWords/assets/media/pdf/press/1983/PR_NCI_1983_05_23.pdf (stating 71% of cases discovered occurred in "homosexual men."). Anthony S. Fauci, "Current issues in developing a strategy for dealing with the acquired immunodeficiency syndrome," *Proceedings of the National Academy of Sciences of the United States of America* (December, 1986) available at http://history.nih.gov/NIHInOwnWords/docs/page_34.html (last accessed August 8, 2014) (discussing the rates of infection among various groups and means of transmission, and addressing the dispute over whether heterosexual contact could transmit the disease). Even today, anal sex remains a recognized method for

became an epidemic, Florida's legislature enacted a statute directed at the purposeful transmission of this disease to unsuspecting parties. To that end, the Legislature added HIV to the list of sexually transmitted diseases whose dissemination to an unwilling participant constitutes a criminal act.

As noted above, related statutory provisions must be read together to achieve a consistent whole, and where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another. *Larimore v. State*, 2 So.3d 101 (Fla. 2008). Thus, to attempt to limit § 384.24(2) to the heterosexual acts of "penetration of the female sex organ by the male sex organ" would exclude many sexual acts highly likely to transmit the disease, which is contrary to the purpose of the statute and would not be in harmony with the statutory provisions of Chapter § 384. It would not make sense to limit § 384.24(2) as Petitioner requests, as the language evidences no intent to create such a carve-out.

Further, even assuming Petitioner's resort to sources outside the statute's words is proper; his interpretation runs afoul of the interpretation of the statute's

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transmission of the virus. *See* Centers for Disease Control and Prevention, "HIV/AIDS", at http://www.cdc.gov/hiv/basics/transmission.html.

original committee chair, Representative Lois J. Frankel.[6] The statute, as drafted in 1986 and amended in 1988, addressed the subject of AIDS and its spread. *Id.* Because there is no dispute that intercourse other than penis-vagina intercourse *can* expose an uninfected partner to the virus that causes AIDS, and this defendant does not contend he was unaware of this commonly-known fact, reading the statute as he suggests would frustrate this purpose. The expressed intent of the Legislature in accepting the statute as proposed was to protect every citizen of the State of

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[6] In testimony on the comprehensive AIDS bill by the House Legislative task force on AIDS to the committee on health care, Ms. Frankel stated that: "*AIDS is probably considered now the number one health care crisis facing the world.*" Fla. PCB HC 88-07 Comm. On Health Care, transcript of testimony at 1 (April 13, 1988) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.) [hereinafter HC CHC Transcript] (statement of Lois J. Frankel).

> "*Our Task Force has attempted to develop an overall bill that presents a rational and a reasonable policy in addressing the subject of AIDS…The purpose is to stop the spread of AIDS…Id*. at 2. *We want HIV carriers to know if they are infected because we want them to act responsibly, and we believe that the overwhelming majority of Americans who are infected, if they know they are infected, will act responsibly, and will not want to harm people that they love." Id*. at 5.

> "*Let me say that there is a provision in our bill that deals with those persons who, despite our best efforts to try to educate them and counsel them, will continue to expose other people with the infection unknowingly and what we have done in that area is to, I think, improve procedures that are already in the law…We make it a crime to engage in sexual activity knowing that person is HIV infected and not notifying one's partner." Id*. at 7

Florida from unknowing exposure to HIV and AIDS through sexual intercourse with an infected partner who failed to disclose his or her status.

Because the statute relates to public health, the legislative intent behind § 384.24(2) was not to criminalize specific sex acts. The purpose of the statute was to criminalize knowingly exposing another person to HIV and AIDS through sexual intercourse without first advising that person. The statute applies to anyone, male or female, who may expose their partner through sexual intercourse, even if that sexual intercourse includes an act other than the penetration of the female sexual organ by the male sexual organ. It is not the sexual act that the legislature meant to criminalize, but knowingly exposing one's sex partners to HIV and AIDS.

Statutes may be read in pari materia without such being specifically directed, because "(l)aws should be construed with reference to the constitution and the purpose designed to be accomplished, and in connection with other laws in pari materia, though they contain no reference to each other." *Miami Dolphins, Ltd. v. Metropolitan Dade County, etc*. 394 So.2d 981 (Fla. 1981) *citing American Bakeries Co. v. Haines City*, 131 Fla. 790; 180 So. 524, 528 (Fla.1938). While the legislature may direct that statutes be read in pari materia, the absence of such a directive does not bar construing two statutes in that manner. *Id.* Thus, § 384.24(2) should be read with other chapters pertaining to sexually transmissible diseases

under title XXIX of the Florida Statutes regarding public health. It should also be construed with other statutes pertaining to the control of sexually transmissible diseases (§ 384.21 is cited as "The Control of Sexually Transmissible Disease Act.") It is more logical and proper under the doctrine of in pari materia, to construe statute § 384.24(2) with the public health statutes than the statutes under say, Chapter 794, the Sexual Battery statutes as the Petitioner argues when citing to *Wright v. State*, 199 So.2d 321 (Fla. 1st DCA 1967). [7] The primary purpose of § 384.24(2) is the public health. All the statutes, codes, and case law the Petitioner cites address different purposes, such as sexual battery and incest. None of the authority petitioner cites relates to public health. They are not even under the same title or chapter as Title 29 of the Florida Statutes.

II. BECAUSE THE STATUTE IS UNAMBIGUOUS AND ITS PLAIN MEANING IS ACCESSIBLE AND CLEAR, A NARROWING INTERPRETATION PURSUANT TO THE RULE OF LENITY IS UNNECESSARY

The rule of lenity is codified in section 775.021(1), Florida Statutes, and provides that "[t]he 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." § 775.021(1), Fla. Stat. (2011). *See Ramsey v. State*, 124 So.3d 444 (Fla. 1st DCA 2013). The

[7] *Wright v. State* was a case involving the rape of a ten year old girl.

rule of lenity, which requires that any ambiguity or situations in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense, is a canon of last resort, with respect to the canons of statutory interpretation. *Kasischke v. State,* 991 So.2d 803 (Fla. 2008). The rule of lenity requires that any ambiguity or situations in which statutory language is susceptible to differing constructions must be resolved in favor of the person charged with an offense. *State v. Byars,* 823 So.2d 740, 742 (Fla.2002). The Florida Supreme Court noted that one of the most fundamental principles of Florida law was that the penal statutes must be strictly construed according to their letter. *Id.*

The rule of lenity comes into play when the text of a statute is subject to competing reasonable interpretations. *North Carillon, LLC v. CRC 603, LLC,* 135 So.3d 274 (Fla. 2014). The Petitioner's position regarding the definition of sexual intercourse in § 384.24(2) is not reasonable. Not only does the Petitioner's resort to lenity require ignoring the "intercourse" element of the phrase "sexual intercourse," in doing so Petitioner advances a reading that would frustrate the legislative purpose of limiting exposure and transmission of HIV/AIDS by excluding specific types of intercourse. The rule of lenity does not apply where the interpretation urged by a defendant is not reasonable. *State v. Pierre,* 854 So.2d 231 (Fla. 5th DCA 2003); *see also Nettles v. State*, 850 So.2d 487 (Fla.2003). The

rule of lenity should not prevail if interpretation favoring accused adversely affects efficacy of statute and appears contrary to legislative intent. *State v. Mounce,* 866 So.2d 132 (Fla. 5th DCA 2004). See also *Ellsworth v. State*, 89 So.3d 1076 (Fla. 2d DCA 2012) (The doctrine that mandates construing statutes in favor of the accused also requires that courts give effect to the language and intent of the legislature in its interpretations of statutes.)

Additionally, defining "sexual intercourse" in Florida Statute § 384.24(2) as more than just the penetration of the female sexual organ by the male sexual organ would not deprive the Petitioner of any adequate notice regarding the notice of what would constitute the crime in the statute. Our system of jurisprudence is founded on a belief that "everyone must be given sufficient notice of those matters that may result in a deprivation of life, liberty, or property." *Perkins v. State*, 576 So.2d 1310, 1312 (Fla. 1991). The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants because it is they who would be subjected to them. The Petitioner argues in his brief that the basis for the rule of lenity is the right of due process, which requires that a defendant be put on adequate notice as to what conduct constitutes a crime. (P.B. 16). Both the language and the purpose of the statute clearly convey the scope of the statutory coverage. Petitioner's argument would narrow the interpretation of "sexual intercourse" to the point that it would completely frustrate the purpose of the

statute which is to protect the public health and mandates that informed consent be given. This purpose, the protection of the public's health through informed consent is a well-known concept in public health.

Under the rule, penal statutes must be strictly construed in favor of the accused where there is doubt as to their meaning and must be sufficiently explicit so that men of common intelligence may ascertain whether a contemplated act is within or without the law, and so that the ordinary man may determine what conduct is proscribed by the statute. *State v. Winters*, 346 So.2d 991, 993 (Fla. 1977). But, the Florida Supreme Court has said that the rule of lenity does not apply where the legislative intent to the contrary is clear. *Bautista v. State,* 863 So.2d 1180, 1185 (Fla. 2003) (citing *Grappin v. State*, 450 So.2d 480 (Fla. 1984) and *Gore v. United States,* 357 U.S. 386 (1958)). In the matter before this Court, § 384.24(2)'s plain and ordinary meaning of "sexual intercourse" according to the Petitioner would lead to an unreasonable result which would be contrary to its legislative intent.

Thus, the rule of lenity is not applicable here and the statutory interpretation to be considered is the one in which all sexual intercourse which may criminally expose another to HIV and AIDS is illegal. Although the legislature may not have expressly stated that sexual intercourse for purposes of § 384.24(2) is not limited to the penetration of the female sex organ by the male sex organ, the statute when

read in pari materia evidences a clear legislative intent to punish an individual who knowingly exposes their partner to HIV or AIDS. *See Denmark v. State*, 538 So.2d 68 (Fla. 1st DCA 1989).

III. THE THIRD DISTRICT COURT OF APPEAL DID NOT USURP THE ROLE OF THE FLORIDA LEGISLATURE IN REGARD TO ITS ANALYSIS OF § 384.24(2)

Contrary to the Petitioner's argument, the Third District Court did not "*judicially amend*" § 384.24(2). In this case, the Third District Court did not modify the statutory language of the statute. Instead, the Court discerned the legislative intent from the statute, and gave the terminology its clear meaning. In contrast, Petitioner's interpretation is inconsistent with the statute's text. Because Petitioner's argument fails to overcome the plain meaning of the statute, this Court should reject the proffered interpretation. Under Petitioner's view, regardless of the risk of transmission or infection of HIV from anal or oral sex, it is only a felony to knowingly infect someone with HIV if they engage in penetration of the vagina via the penis. The Petitioner's interpretation means that any male or female citizen who engages in any type of sexual intercourse without penetration of the male sexual organ into the female sexual organ could freely expose unknowing partners to HIV or AIDS. The plain meaning does not contemplate such a limitation, and thus this Court should not endorse the Petitioner's interpretation. *See, e.g., Davila v. State*, 75 So. 3d 192, 196 (Fla. 2011) (quoting *Velez v. Miami*

Dade County Police Dep't, 934 So. 2d 1162,1164 (Fla. 2006))(stating the rule that this Court will not "construe an unambiguous statute in such a way which would extend, modify, or limit *its express terms or its reasonable and obvious implications*.") (emphasis added).

Petitioner argues that the Third District's rationale that its interpretation avoided an "absurd" result was the same rationale this Court rejected in *Wilson v. State*, 288 So.2d 480 (Fla. 1974) (P.B. 22). In *Wilson*, the Court disapproved of the District Court's changing of the word '*female*' in the rape and forcible carnal knowledge statute, as it read at time of offense, to the more inclusive word *'person'*, because it added words not found in the statute. *Id*. The Court also held that the new interpretation of the rape and forcible carnal knowledge statute, as it read at the time of the offense, to cover rape of a male violated the due process clause of the United States Constitution and Florida Constitution because it would be an ex post facto application of a criminal statute as to these defendants. *Id*.

In contrast, in this case, the Petitioner was not charged with a different crime after the Monroe County judge dismissed the information charging him with violating § 384.24(2), and thus there is no ex post facto problem. The criminal conduct the Petitioner is charged under was a crime when the incident occurred and remains a crime today. Further, the Third District did not invade the province of the Legislature, as it did not substitute new language into the statute. At the

time of Petitioner's prosecution, the statute used the phrase "any person" to describe the defendant and the phrase "any person" when describing the victim. There is nothing in the Third District's opinion to suggest that it changed the meaning of the statute to protect persons not previously protected from unknowing exposure to HIV/AIDS by their partners.

IV. PETITIONER'S RESORT TO AUTHORITY CONSTRUING OTHER STATUTES IS UNNECESSARY BECAUSE THE STATUTE BEFORE THIS COURT IS CLEAR AND REQUIRES NO FURTHER CONSTRUCTION.

Petitioner argues that the Florida Legislature and the Florida courts have consistently recognized that sexual intercourse means penetration of the vagina by the penis. He then goes on to cite to various cases and statutes. Petitioner's argument runs into problems though when utilizing the doctrine of in pari materia. Petitioner argues in essence that, since the Legislature did not define sexual intercourse in Chapter 384, we must thus look to other statutes to define sex crime law. (P.B. 10). It is important to understand that the intent of § 384.24(2) was not to punish a "sex crime." The Legislature's intent was to punish knowingly exposing a victim to potentially deadly disease. Thus, while it is permissible to look to case law or related statutory provisions that define the term "sexual intercourse"; the doctrine of in pari materia requires that related statutes be construed together. For purposes of § 384.24(2); that means looking at the statutes

under Public Health and Chapter 384, not at statutes involving such crimes as sexual battery and incest. See, e.g., *Bautista v. State*, 863 So. 2d 1180, 1186 (Fla. 2003) (resorting to the criminal code, not the traffic code, to interpret a statute because "the gravamen of the offense of DUI manslaughter is not a traffic violation, but the killing of a human being").

The cases, codes, and laws the Petitioner relies on, are all under criminal statutes. None of the Petitioner's statutes and cases addresses the issue of health or of preventing the spread of HIV and AIDS. Any mention of the health code in general, or of HIV and AIDS specifically, is absent from the Petitioner's citations.

Petitioner argues that this Court should look to Florida Statute § 826.04 as a source for defining sexual intercourse. This argument should be rejected because § 384.24(2) is not about sex or sexual crimes, it is about public health. It should be noted that § 826.04 is the incest statute which makes it illegal to have sexual intercourse with someone who is related by "lineal consanguinity." Petitioner argues that "*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.*" (P.B. 10). Once again, as argued above, none of those statutes, unlike this statute, is in the health code. None of them are concerned with stopping the spread of a potentially fatal disease. The spread of disease is *always* harmful,

and thus the legislature did not need to isolate the act as "deviate" or "unnatural" when choosing to proscribe exposure through sex.

The Petitioner also resorts to Florida Statute § 827.071(1)(a), where deviate sexual intercourse is defined separately from § 827.071(1)(h) (which includes sexual intercourse, as well as bestiality, masturbation, etc) in order to define sexual intercourse in § 384.24(2). However, Florida Statute § 827.071 pertains to "sexual performance by a child and its penalties and is found under Chapter 827 "Abuse of Children" under Title XLVI "Crimes" (Chapters 775-899). It is improper and unnecessary under the doctrine of in pari materia and of statutory construction, when looking at the legislative intent of § 384.24(2), to use sex crime acts against children as a guide. Here again, it is the *sexual act* that is a crime, not anything separate from the offense, such as exposure to disease, as in § 384.24. The gravamen of an offense under § 384.24 is knowingly exposing a sexual partner to the virus or disease; the sexual intercourse is otherwise legal unless it violates some other statute (*e.g.*, is with a minor).

Petitioner also cites to Florida Statute § 847.001(5) which 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 vulva*." In his brief, the Petitioner argues that only deviate sexual intercourse describes his alleged conduct and thus, it cannot be considered sexual

intercourse for purposes of § 384.24(2). Chapter 847 of the Florida Statutes is the Obscenity statute, under Title XLVI "Crimes." Petitioner then argues his alleged conduct has been specifically identified in Florida's sodomy laws. (P.B. 11). Florida Statute § 800.01. § 800.02 pertains to "unnatural and lascivious act" under Chapter 800 "Lewdness; Indecent Exposure" under Title XLVI Crimes. Petitioner's argument seems to be that his sexual conduct should be defined as unnatural and lascivious so long as he is not found to be guilty under § 384.24(2). These statutes criminalize specific sexual acts. The issue of stopping the spread of HIV and AIDS is absent from all these statutes and cases. This distinction is significant because the spread of disease is *always* harmful, and thus the legislature did not need to isolate the act as "deviate" or "unnatural" when choosing to proscribe exposure through sex.

The cases that Petitioner cites to in his brief are distinguishable from the issue here and need not be considered for purposes of statutory construction and determining legislative intent. *Williams v. State*, 92 Fla. 125 (Fla. 1926) involved a crime of rape and whether proof of "previous chaste character" was essential for "carnal knowledge." Petitioner argues that the case should be used to define sexual intercourse, but ignores that the elements of the crime specifically included "carnal intercourse" or "sexual intercourse" *with a female* and thus its definition of "sexual intercourse" is inapplicable here. 92 Fla. at 125. In *Washington v. State*, 302

So.2d 401 (Fla. 1974) also involved the prosecution of a rape. The Court in *Washington* held that the term "carnally know" was completely understandable and the statute not constitutionally vague. *Id*. Further, this Court held "that males are entitled to the same protection from degrading ravishment and *sexual* assaults, *regardless of the orifice involved*, as are females." 302 So. 2d at 403. Thus, although the *Washington* court purported to state that "carnal knowledge includes sexual intercourse, but that is not all that carnal knowledge includes," it is clear the *Washington* court recognized that anal sex could be a source of criminal harm, and accordingly, Petitioner is incorrect that *Washington* supports limiting the protections of Section 384.24 to penile-vaginal sex.

Similarly, cases regarding alleged "unnatural" sex are not persuasive in this context. For example, Petitioner cites to *Mohammed v. State*, 561 So.2d 384 (Fla. 1st DCA 1990) as authority for the claim that when the Legislature means to include homosexual or "unnatural" conduct in a statute, it has used terms other than sexual intercourse. (P.B. 12). *Mohammed* involved aggravated child abuse and the calculation of sentencing guidelines, based upon a Georgia conviction of "sodomy for engaging in consensual fellatio with a woman in his motel room in Georgia." 561 So. 2d at 385. The First District held that Florida's statute would not extend to those actions, because the Florida statute criminalized acts that were "unnatural *and* lascivious." 561 So. 2d at 387 (emphasis added). The Mohammed

court then noted "Lascivious is generally defined as tending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in respect to sexual relations; licentious; conduct which is wanton, lewd, and lustful, and tending to produce voluptuous or lewd emotions." *Mohammed* 561 So. 2d at 385. Thus, contrary to Petitioner's suggestion, Florida courts read these statutes to criminalize not just the sex act, but the manner in which it was performed, and thus, under the analysis in *Mohammed*, the same act might be legal in public but not in private, or legal among two adults but not when involving children. *See id*. Thus, this line of authority does not counsel that "sexual intercourse" was intended to mean only penile-vaginal penetration, as even "deviate" or "unnatural" sex could involve penile-vaginal penetration.

In determining the legislative intent and the purpose behind § 384.24(2), it is reasonable to conclude that, by 1986, the Florida Legislature understood that sexual intercourse included sexual acts beyond the male sex organ penetrating the female sex organ. Thus, even assuming that older statutes might have separated penile-vaginal sex from other types of sex, it is reasonable to conclude that society understood sexual intercourse to include such acts as fellatio and anal sex, particularly as applicable to transmission of HIV/AIDS. By 1986, one of the major changes that had occurred in Florida was the introduction of HIV and AIDS into the population. The understanding that HIV could be transmitted between people

engaged in sexual intercourse that involved more than the male sex organ penetrating the female sex organ was understood and has to be considered in relation to the statutory language of § 384.24(2).

The Petitioner cites to other state cases, arguing that in other states that criminalize the unconsented exposure to HIV, sexual intercourse is defined as one specific type of sexual act: the penetration of the vagina by the penis. (P.B. 13). Petitioner proceeds from this authority to argue that therefore, the Third District Court was bound to apply the plain and ordinary meaning of sexual intercourse without further resort to the rules of statutory interpretation. (P.B. 14). But this argument fails to account for two features of this case: the statute is unambiguous and resort to other states' interpretation is unnecessary; and Petitioner cites no authority in support of the premise that the Florida Legislature modeled this statute on another statute. Florida's statute contains no limitation on the plain meaning of the term "sexual intercourse" as found in dictionaries. Given this lack of authority, Petitioner's argument must yield to the statute's plain language and the manifest intent of the legislature, as detailed above.

CONCLUSION

Based on the foregoing, the Respondent respectfully requests that this Court affirm the Third District Court's opinion and order.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed to Brian Lee Ellison, Esq. Assistant Public Defender, 1320 N.W. 14th Street Miami, Florida 33125 appellatedefender@pdmiami.com , this 15th day of August 2014.

s/ Joanne Diez
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+CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

s/ Joanne Diez
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