

Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

– against –

TERRANCE WILLIAMS,

Defendant-Respondent.

ON APPEAL FROM THE APPELLATE DIVISION, FOURTH DEPARTMENT
APL 2014-00012

BRIEF OF AMICI CURIAE NEW YORK CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION

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DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The NYCLU hereby discloses that it is a non-profit, 501(c)(4) organization, and is the New York State affiliate of the American Civil Liberties Union.

The ACLU hereby discloses that it is a non-profit, 501(c)(4) organization.

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St. Helen v. Senkowski, 374 F.3d 181 (2d Cir. 2004).....11

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Allan M. Brandt, “AIDS: From Social History to Social Policy,” 14 J.L.
Med & Ethics 231 (1986).....4

A.P. Mahajan et al., “Stigma in the HIV/AIDS Epidemic: A Review of the
Literature and Recommendations For the Way Forward,” 22 AIDS
S67 (2008), *available at*
www.ncbi.nlm.nih.gov/pmc/articles/PMC2835402/15

Carol Galletly & Steven Pinkerton, “Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV,” 10 AIDS Behav. 451 (Sept. 2006).....16

Caroline Palmer & Lynn Mickelson, “Falling Through the Cracks: The Unique Circumstances of HIV Disease Under Recent Americans With Disabilities Act Caselaw and Emerging Privacy Policies,” 21 J. Law & Ineq. 219 (2003).....4

Centers for Disease Control and Prevention, “Act Against AIDS: Testing” (Feb. 2014), www.cdc.gov/actagainstaids/basics/testing.html..... 17

Center for Disease Control, “HIV Prevention Strategic Plan through 2005” (January 2001), <http://stacks.cdc.gov/view/cdc/6442>.....15

Centers for Disease Control and Prevention, “HIV Transmission Risk: Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act” (July 2014), <http://www.cdc.gov/hiv/policies/law/risk.html>.....5

Centers for Disease Control and Prevention, “Monitoring Selected National HIV Prevention and Care Objectives by Using HIV Surveillance Data—United States and 6 Dependent Areas—2011” (Oct. 2013), http://www.cdc.gov/hiv/pdf/2011_Monitoring_HIV_Indicators_HSSR_FINAL.pdf.....17, 18

Hasina Samji et al., “Closing the Gap: Increases in Life Expectancy among Treated Individuals in the United States and Canada” (Dec. 2013), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0081355>5

J. D. Fortenberry et al., “Relationship of Stigma and Shame to Gonorrhea and HIV Screening,” 92 Am. J. of Pub. Health 378 (Mar. 2002), <http://ajph.aphapublications.org/doi/full/10.2105/AJPH.92.3.378>.....16

Katherine R. Waite et al., “Literacy, Social Stigma, and HIV Medication Adherence,” 23 J. Gen. Internal Med. 1367 (2008).....14

Lambda Legal, “HIV Stigma and Discrimination in the U.S.: An Evidence-Based Report” (Nov. 2012),

http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_hiv-stigma-and-discrimination-in-the-us_1.pdf.....6, 14

Merriam-Webster Dictionary Online, “Imminent” (2014),
<http://www.merriam-webster.com/dictionary/imminent>9

National HIV/AIDS Strategy (Jul. 2010),
<http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>.....17

Nirav R. Shah, New York State Commissioner of Health, Dear Colleague Letter (May 2, 2014),
https://www.health.ny.gov/diseases/aids/providers/testing/law/letter_2014.htm.....4

Press Release, “Governor Cuomo Announces Task Force to Develop Plan to End AIDS Epidemic” (Oct. 14, 2014),
<http://www.governor.ny.gov/news/governor-cuomo-announces-task-force-develop-plan-end-aids-epidemic>19

Ronald O. Valdiserri, “HIV/AIDS Stigma: An Impediment to Public Health,” 92 Am. J. Pub. Health 341 (Mar. 2002),
<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447072/>.....15, 16

Sarah J. Newman, “Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform,” 107 Nw. U.L. Rev. 1403 (2013)3, 15

Stephen V. Kenney, “Criminalizing HIV Transmission: Lessons from History and A Model for the Future,” 8 J. Contemp. Health L. & Pol’y 245 (1992)3, 4

U.S. Department of Justice, “Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically Supported Factors” (July 15, 2014), <http://aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf>5, 15, 16

World Health Organization, “Gender Dimensions of HIV Status Disclosure to Sexual Partners: Rates, Barriers, and Outcomes” (2004),
<http://www.who.int/gender/documents/en/genderdimensions.pdf>.17

INTRODUCTION AND INTEREST OF AMICI

The Onondaga County District Attorney attempts in this case to employ hyperbolic and medically inaccurate myths about HIV to win a felony conviction under the first degree reckless endangerment law for the act of having consensual sex while living with HIV—a legally-unsupportable reframing of the criminal statute that would also frustrate public health efforts. The lower courts understood the current science of HIV, including the low rate of transmission and the range of medications available for treatment, and correctly held that engaging in consensual sex while living with HIV cannot as a legal matter constitute first degree reckless endangerment, which requires a prima facie showing of “a depraved indifference to human life” and “a grave risk of death to another person.” This Court should affirm.

The underlying facts of the case are undoubtedly tragic. Defendant Terrance Williams, in a lapse of judgment spurred by fears regarding the stigma that attends disclosure, failed to tell his partner that he was HIV positive before engaging in consensual sex. There was a very small chance that his partner would contract HIV, but he did. Regardless of what one may think about Mr. Williams’s actions, he should not have to live the rest of his life with a felony conviction equivalent to the convictions of those who fire a gun into a crowd of people or leave a bomb in a public place. The interpretation of the reckless endangerment statute offered by the

District Attorney rests upon a gross distortion of the law and would invite open-ended and potentially expansive applications of the statute in violation of due process principles. Moreover, public health data and proven HIV-prevention strategies indicate that such a prosecution would also frustrate attempts to curb the spread of HIV.

The New York Civil Liberties Union is the New York State affiliate of the American Civil Liberties Union. Both organizations are committed to the protection of basic civil rights and civil liberties, including the rights and liberties of those living with HIV/AIDS, through approaches including litigation, advocacy, and public education. The NYCLU and the ACLU submit this *amici* brief to express concern about the District Attorney's attempt to use misinformation and fear to criminalize consensual sex by people living with HIV.

In Part I, *amici* will supplement the defendant's argument that the felony reckless endangerment statute cannot be used to criminalize consensual sex by people living with HIV. In particular, *amici* will explain that "grave risk of death" and "depraved indifference to human life," as redefined by the District Attorney, are terms that are susceptible to vague interpretations and therefore arbitrary enforcement. Applying the felony reckless endangerment statute to consensual sex by people living with HIV would so dramatically expand the meaning of those