No. 129289

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- RAMON TORRES, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-0990. There on appeal from the Circuit Court of Cook County, Illinois , No. 16 CR 17805. Honorable William Raines, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

Ramon Torres was deprived of the effective assistance of trial counsel, where counsel failed to challenge the admission of Torres' privileged medical information, his 2013 and 2016 positive chlamydia test results, as the State was not entitled to admit such evidence under 725 ILCS 5/8-8042(4), nor under 725 ILCS 5/8-802(7), two narrow exceptions to the physician-patient privilege.

In his opening brief, Ramon Torres argued that he was prejudiced at his jury trial by the erroneous admission of extremely sensitive medical information – his positive chlamydia test results in 2013 and 2016 – where such evidence was privileged and did not fall under any of the enumerated statutory exceptions to the physician-patient privilege, and the test results constituted what the State argued was "incredibly strong" evidence against Torres. (R. 582); 735 ILCS 5/8–802. Relying on *People v. Bons*, 2021 IL App (3d) 180464, in which the Third District Appellate Court found similar evidence inadmissible under sections 8-802(4) and 8-802(7), Torres argued that his trial counsel rendered ineffective assistance by failing to object to or exclude this inadmissible evidence. Torres urged this Court to adopt the Third District's narrow interpretations in *Bons* of the exceptions to the privilege set forth in sections 8-802(4) and 8-802(7), as such an approach better effectuates the purpose of the privilege, which is to "encourage free disclosure between a doctor and a patient . . ." in order to facilitate treatment. *People ex. Rel. Department of Professional Regulation v. Manos*, 202 Ill.2d 563, 575 (2002).

The State responds by arguing that Torres waived the privilege. It also urges this Court to adopt the overly broad interpretation of the exceptions to the privilege used by the First District Appellate Court below, interpretations that are so expansive that they threaten to completely undermine the purpose the

privilege exists to serve and "render[] the privilege virtually meaningless." *Palm v. Holocker*, 2018 IL 123152, ¶ 30. For the reasons that follow, as well as those argued in Appellant's opening brief, this Court should reject the State's arguments and hold that Torres was deprived of his constitutional right to the effective assistance of counsel. This Court should accordingly reverse his conviction and remand for a new trial.

A. Torres did not waive his privilege.

The State begins by arguing that Torres waived his privilege by disclosing his diagnosis to both Jasmine and the police, citing this Court's decision in *Novak v. Rathnam*, which held that disclosure of confidential information by the privilege holder waives the privilege. (State's Br., p. 16, citing *Novak v. Rathnam*, 106 Ill.2d 478, 484 (1985)). However, the State's arguments contain both factual and legal problems and should not persuade this Court.

First, with respect to any disclosure to Jasmine, the State mischaracterizes the record. The record does not indicate that Torres disclosed his chlamydia test results to Jasmine. As to his 2016 test results, Jasmine testified only that she "learned" at some point that Torres had tested positive, but did not disclose whether it was Torres who had informed her of the same, or whether she learned of his test results from Nurse Guzman, DCFS, or some other source. (R. 376-377) As to his 2013 test results, Jasmine testified that Torres falsely told her he did not get tested for chlamydia, and DCFS later advised her Torres had tested negative. (R. 371-372) If anything, this evinced an intent on Torres's part *not* to disclose his 2013 test results to Jasmine. In any event, the record does not reveal any disclosure by Torres to Jasmine about his chlamydia test results.

The State also argues, for the first time, that Torres waived his privilege by disclosing his 2013 and 2016 test results in his statements to the police. (State's Br. 16) The State notably did not argue below that Torres's statements to the police waived his privilege; nor did the First District Appellate Court make any such finding. See *People v. Torres*, 2022 IL App (1st) 210990-U.

It is true that, in response to police questioning while in custody for this offense, Torres confirmed to the police that he had tested positive for chlamydia in both 2013 and 2016. (R. 527-528); State's Exhibit 6. Importantly, this was information of which the police was already aware at this point. Detective Rodriguez testified that she had learned, through a nurse, that Torres had tested positive for chlamydia in 2013 and 2016. (R. 520-521) She then filed a grand jury subpoena for Torres' medical records, from November 2013 through October 2016, addressed to St. Mary's and St. Elizabeth's Hospitals. (R. 521-522) She reviewed the records and had Torres located and arrested on November 8, 2016. (R. 522) Rodriguez then conducted a recorded interview with Torres at Area 3 on November 9, 2016, in which, after being asked directly by the police, he confirmed that he had tested positive for chlamydia twice. (R. 523)

Under these facts, Torres did not "disclose" anything in any meaningful sense. The dictionary definition of "disclose" is "to make known; reveal or uncover." See "disclose," Dictionary.com, https://www.dictionary.com/browse/disclose (last accessed November 7, 2023). Here, rather than revealing, making known, or bringing to light any new information, Torres merely verified, in response to police questioning, what the police already knew and were asking him to confirm. Because of the manner in which the police questioned Torres on the subject, it would have

been apparent to Torres that the police were already aware of his medical information. As such, his mere affirming of information already known to the police cannot reasonably be said to evince any intent on Torres's part to relinquish the confidentiality of his privileged medical information. Yet, such an intent must be present for any finding that Torres waived his privilege.

This Court has explained that a waiver is an intentional relinquishment or abandonment of a known right or privilege. *People v. Blair*, 215 Ill.2d 427, 444 n.2 (2005); *People v. Kidd*, 178 Ill.2d 92, 104 (1997); *People v. Lesley*, 2018 IL 122100, ¶ 36. A defendant may impliedly waive a right or privilege through his or her conduct, such as, for example, publicizing or disclosing confidential information in a manner inconsistent with any subsequent assertion that such information should remain confidential or privileged. *Id*. at ¶ 38; *Dalen v. Ozite*, 230 Ill.App.3d 18, 29 (2d Dist. 1992) (Corporate defendant waived any privilege regarding the confidentiality of a document prepared by its attorney when it gave the document to plaintiff's attorney for review, which was conduct "completely inconsistent" with a claim of confidentiality). Because of the important public interests at play in the context of physician-patient confidentiality, "[t]o constitute an implied waiver, the patient's act must show a clear unequivocal purpose to divulge confidential information . . . made with an intention and willingness on the part of the patient to waive or renounce the secrecy secured by the statute." *State ex rel. Lutman v. Baker*, 635 S.W.3d 548, 553 (Mo. 2021) (patient's "brief and nondescript statements to investigating police officers" about his medical condition at the scene of the accident did not waive his physician-patient privilege because it did "not show a clear, unequivocal purpose to divulge confidential information.").

Here, Torres merely verified, in response to police questioning, what it was clear the police already knew. This stands in stark contrast, for example, to the facts in *Novak*, cited by the State. (State's Br., p. 16) There, the patient's conduct of calling his psychiatrist to testify publicly to his psychiatric evaluation of him at a prior homicide trial was conduct that evinced an unequivocal intent to abandon the confidentiality of his psychiatrist's evaluation of him, *Novak v. Rathnam*, 106 Ill.2d 478, 483-485 (1985). As such, the patient was held to have waived his privilege as to the psychiatrist's testimony on the same subject at a subsequent wrongful death trial. *Id*. The facts here are entirely distinguishable. Torres's statements to the police, in a non-public custodial setting, merely confirming information of which the police were already aware, did not show any clear or unequivocal purpose to divulge confidential information, nor any intentional relinquishment of his right to maintain the secrecy of his sensitive medical information.

Moreover, to find waiver, the requirement of a knowing and intelligent relinquishment of a right or privilege "calls for nothing less than a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Lesley*, 2018 IL 122100, ¶ 51. Here, a knowing waiver cannot be found where Torres would have no reason to know that confirming to the police the contents of his medical records, which were already in the police's possession anyway, would completely abrogate his privilege and permit the subsequent revelation of these records and their contents by his medical providers and medical expert witnesses at a criminal proceeding. Nor would a general *Miranda* warning that his statements could be used against him at trial lead him to know that he would also be waiving the right to prevent his medical providers or medical expert

witnesses from testifying about his confidential medical information. As such, where there was there was no intentional relinquishment of a known right or privilege, and no unequivocal intent to divulge any confidential information, as the police already had his medical records, Torres's statements to the police did not constitute any waiver of his physician-patient confidentiality.

Lastly, the State argues that Torres's privilege did not apply to Nurse Guzman's testimony about his 2016 test results "because she was not treating him." (State's Br., p. 18) This, too, is another variety of a waiver argument. As Appellant discussed in his opening brief, this Court has explained that the privilege does not apply where a patient sees a medical provider to obtain medical information to be shared with some other party for some nonmedical purpose. *Palm*, 2018 IL 123152, ¶¶ 34-35. This is premised on the well-established principle that the patient has impliedly waived any entitlement to patient confidentiality in the circumstances in which the patient discloses or acquiesces in the disclosure of his private medical information for some nonmedical purpose, rather than maintaining the privacy of the medical information by confining it to a medical context. *Novak*, 106 Ill.2d at 484; *McCormick on Evidence*, 1 McCormick Evid., § 103 (8th ed.) ("The physician-patient privilege, like most other privileges, may also be waived in advance of trial by a disclosure of the privileged information"). As such, in *Palm*, when the defendant submitted Dr. Nau's physician's report pertaining to his ability to drive to the Secretary of State for the purpose of maintaining his driving privileges, he impliedly waived the physician-patient privilege as to that report. *Palm*, 2018 IL 123152, ¶¶ 34-35.

Here, unlike in *Palm*, Torres did not affirmatively forward his test results to a third party with the intent to share or publicize them, waiving any privilege;

nor was he warned that Nurse Guzman or DCFS could do the same. Had he been warned his privilege could be pierced, he might not have acquiesced to DCFS's request for testing. *See Lesley*, 2018 IL 122100, ¶ 42 (waiver by conduct requires that a defendant receive a warning about the consequences of his conduct). In the absence of such warning, Torres would have expected his privilege to remain intact because, unlike Dr. Nau in *Palm*, Nurse Guzman did not merely evaluate Torres. She treated him. Guzman testified that after DCFS requested everyone in the household to get tested, Torres denied sexual contact with his daughter but admitted that he had unprotected sexual intercourse with someone other than Jasmine. (R. 477) Upon his positive test result, Guzman did render, and Torres did accept, medical treatment for his diagnosis of chlamydia. (R. 477)

As the State itself admits, the relationship of physician and patient exists where "the physician's consultation with, or attendance upon, the prospective patient is with a view to protective, alleviative or curative treatment." (State's Br., p. 18, citing *Palm*, 2018 IL 123152, ¶ 35) Here, Nurse Guzman did attend upon Torres for the purpose of curative treatment once his condition was identified. Notably, there appears to be at least a partial medical purpose for Torres's acquiescence to testing, where he informed Nurse Guzman that he had had an unprotected sexual encounter with someone other than Jasmine. (R. 477) In any event, regardless of Torres's purpose in initially acquiescing to testing, their relationship was transformed once Guzman administered treatment to him, and he accepted that treatment from her, and would then have reasonably expected the privileges that attend the relationship between a patient and treating health provider to attach. Thus, where a patient-provider relationship existed, where Torres did not knowingly or intelligently waive the privilege that attends that

relationship, and where, as explained *infra*, as well as in the opening brief, no statutory exception to the privilege applied, counsel should have challenged the admission of Torres's chlamydia test results.

B. The exception to the privilege in section 8-802(7) does not apply.

Section 8-802(7) provides: "No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient . . . except only . . . (7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act" ("ANCRA"). 735 ILCS 8-802(7). The State insists that this language is unambiguous, even though differing interpretations among two learned districts of the appellate court have already demonstrated the ambiguity inherent in the statutory language that comprises section 8-802(7). *People v. Bons*, 2021 IL App (3d) 180464, ¶ 44; *People v. Torres*, 2022 IL App (1st) 210990-U, ¶ 76.

As Appellant explained in the opening brief, in its interpretation of section 8-802(7) the Third District Appellate Court has found, "The plain language of the statute excepts from the physician-patient privilege information 'arising' from the filing of a report in compliance with the [ANCRA]." *Bons*, 2021 IL App (3d) 180464, ¶ 44. In contrast, the First District below found, "[T]he plain language of the statute clearly provides that the exception under subsection (7) is not based on the origin of the medical information, but rather, is based on where or in what type of proceedings the information is being disclosed . . . As applicable in this case, in a criminal action that arises from the filing of a DCFS report, medical information that would usually be considered confidential under the physician-patient privilege may be disclosed." *Torres*, 2022 IL App (1st) 210990-U, ¶ 76. The difference here appears to be over what the phrase "arising from the

filing of a report" modifies. The Third District interpreted this phrase to modify the medical information sought to be admitted, and the First District interpreted this phrase to modify the legal proceedings or action in which the disclosure occurs.

In examining this language in the opening brief, Appellant invoked the corollary rule to the last antecedent doctrine to divine the meaning of the statutory language at issue here. While the last antecedent rule provides that qualifying words or phrases should be applied to the words or phrases immediately preceding them, a corollary rule provides that a qualifying phrase can apply to a more remote antecedent instead of only to the immediately preceding one where it is separated from the antecedents by a comma. *In re E.B.*, 231 Ill.2d 459, 468 (2008); *Advincula v. United Blood Services*, 176 Ill.2d 1, 27 (1996) Under this rule of construction, the fact that "in actions, civil or criminal," is separated from "arising from the filing of a report" by commas, implies that the qualifying phrase of "arising from the filing of a report" can be read to modify the more remote language of "information [a physician] may have acquired . . ." as the Third District in *Bons* found. *See* 735 ILCS 5/8-802(7); *Bons*, 2021 IL App (3d) 180464, ¶ 44.

The State argues that this results in a "strained interpretation [that] impair[s] the meaning of the sentence." (State's Br., p. 25) Yet, this interpretation is perfectly reasonable and does not result in any impaired or illogical meaning. As the Third District in *Bons* found, section 8-802(7) may be read to "except from the physician-patient privilege information 'arising' from the filing of a report in compliance with the Act" – that is to say, it excepts medical information, sought to be used at civil or criminal actions, that arises out of or comes out of a report filed in compliance with the ANCRA. See *Bons*, 2021 IL App (3d) 180464, ¶ 44. In essence, it excepts from the privilege information that is required to be reported to be

compliance with the ANCRA. Although the State characterizes such an interpretation as "nonsensical" (State's Br., p. 25), it is no less plausible and logical an interpretation than the one the State posits, as evidenced by the *Bons* Court's opinion. Moreover, as explained in the opening brief, and *infra*, this interpretation strikes the better balance of supporting the purpose that the privilege serves while still protecting children by permitting the disclosure of reports of abuse.

The State argues that Appellant's construction of section 8-802(7) would render section 10 of the ANCRA redundant because section 10 of the ANCRA already exempts from any statutory privilege evidence "relating to communications between the alleged perpetrator of abuse or neglect, or the child subject of the report under this Act and any person who is required to report a suspected case of abuse or neglect." (State's Br., p. 26, quoting 325 ILCS 5/10) To the contrary, rather than creating a redundancy, section 8-802(7) merely ensures that there is no conflict between the statute setting forth the physician-patient privilege and the statute outlining a medical provider's reporting obligations. Without the exception outlined in section 8-802(7), it would not be clear to a physician, when faced with what appeared to be case of child abuse, which should prevail – the physician's duty of confidentiality under the physician-patient privilege statute or the physician's duty to report under the ANCRA. Appellant's construction of 8-802(7) brings the two statutes into harmony with each other.

The State's construction of section 8-802(7), in contrast, goes much farther, eviscerating the privilege as to any medical information a party seeks to introduce about any person in any case pertaining to a DCFS report, even if the medical information sought to be introduced is other than that which triggered the filing of the DCFS report, and regardless of whether the underlying allegations of the

report prove true or not. Although the State asserts that its interpretation "balance[s] the need to protect children from abuse with the need to protect physician-patient confidences" (State's Br., p. 28), its approach does not grapple with the weight of the evidentiary privilege at issue and the underlying societal interests served by the free disclosure between doctor and patient that the privilege seeks to protect. In fact, the State spends little to no time at all even discussing the privilege's purpose in its brief. *See People ex. Rel. Department of Professional Regulation v. Manos*, 202 Ill.2d 563, 568 (2002) (Privilege enacted to "recogniz[e] [] a patient's interest in maintaining confidentiality in his or her medical dealings with his or her health-care provider"). Nonetheless, in assessing the expansive construction of section 8-802(7) urged by the State, this Court should consider the chilling effect on the free disclosure between a doctor and a patient that such an interpretation would have, as well as the disincentivizing effect on testing for contagious sexually transmitted diseases ("STDs"). Under the State's construction, sensitive and potentially embarrassing medical information could, unbeknownst to the patient, become subject to public disclosure at some future time due to a DCFS investigation that might be later initiated based on allegations that may or may not prove true. This could result in a decline in the confidential testing and detection of STD's that our legislature has sought to encourage. See 410 ILCS 325/8. The State's arguments do not even begin to address these policy implications.

Nor does the State contend with another troubling implication of the broad interpretation of section 8-802(7) that it espouses: the State's interpretation would allow the privilege to be pierced by a mere allegation, an approach this Court has eschewed in its interpretation of another exception to the privilege, that contained in section 8-802(4). See *Palm,* 2018 IL 123152, ¶¶ 28-30. Although addressing

a different section of 8-802, this Court's reasoning in *Palm i*s nevertheless applicable: the privilege belongs to the patient and cannot be waived by someone else simply making allegations, be it DCFS, or the State, or another family member. *Palm*, 2018 IL 123152, ¶¶ 28-30. As such, Torres' privilege of privacy in his STD status cannot be waived by the State simply alleging that Torres has committed the charged offense in this case.

Thus, for the reasons argued here and in Appellant's opening brief, this Court should adopt a narrow construction of section 8-802(7) because it better supports the purpose the physician-patient privilege was meant to serve while still protecting children by permitting the disclosure of reports of abuse and neglect under the ANCRA. In accordance with this construction of section 8-802(7), the results of Torres's STD testing did not constitute information that his medical providers would have been required to report under the ANCRA, and therefore these results were privileged, and not subject to disclosure.

C. The exception to the privilege in section 8-802(4) does not apply.

Section 8-802(4) of the physician-patient privilege statute provides, "No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient . . . except only . . . (4) in all actions brought by or against the patient, . . .wherein the patient's physical or mental condition is an issue." 735 ILCS 5/8-802(4). As Appellant explained in the opening brief, this Court has already closely examined how section 8-802(4) is to be interpreted in *Palm v. Holocker*, and interpreted it narrowly such that this exception to the privilege is only triggered where the defendant affirmatively places his medical information in dispute, or possibly when his medical information is an element of a criminal offense. *Palm v. Holocker*, 2018 IL 123152, ¶¶ 28-29, 33. While *Palm*

was a civil case, Appellant argues that the same principles that this Court espoused in *Palm* logically extend to criminal cases as well.

The State responds that this provision should be interpreted broadly, as excepting from the privilege medical information in any case in which the patient's physical or mental condition is merely relevant to establishing the charged offense. (State's Br., p. 29) The State acknowledges that this Court in *Palm* rejected this broad interpretation of the term "an issue," in section 8-802(4), but argues that this Court confined its interpretation in *Palm* to civil cases only. (State's Br., p. 30) In criminal cases, the State argues, this Court intended that lower courts follow pre-*Palm* cases such as *People v. Botsis*, 388 Ill.App.3d 422, 435 (1st Dist. 2009), *People v. Beck*, 2017 IL App (4th) 160654, ¶ 138, and *People v. Popeck*, 385 Ill.App.3d 806, 811 (4th Dist. 2008), which all interpreted 8-802(4)'s "at issue" language broadly and allowed the State to waive the defendant's physician-patient privilege for him by asserting that the defendant-patient's medical condition was merely relevant to the case somehow. (State's Br., pp. 29-30)

The State misunderstands this Court's decision in *Palm*. In *Palm*, this Court acknowledged that civil courts had generally applied a narrower construction of section 8-802(4) than criminal courts had, but this Court did not appear to endorse this disparate treatment. To the contrary, this Court suggested that 8-802(4) was intended to apply in the same way to civil and criminal cases alike, noting that a previous version of 8-802(4) had stated the exception applied "in all civil cases," but was later changed to "in all cases." *Palm*, 2018 IL 123152, ¶ 24, fn. 6.

As Appellant explained in the opening brief, Section (4) previously excepted from the privilege medical information, "in all civil suits brought by or against the patient, his personal representative, a beneficiary under a policy of insurance,

or the executor or administrator of his estate wherein the patient's physical or mental condition is an issue." Ill. Rev. Stat. 1981, ch. 51, ¶5.1(4). When this section was re-codified as part of the Illinois Compiled Statutes, "civil suits" was replaced with "actions." See 735 ILCS 5/8-802(4) (West 2016). This amendment indicates the legislature's intent that section 8-802(4) apply identically to civil and criminal cases, even though it had previously only applied to civil suits. *See Ready v. United/Goedecke*, 232 Ill.2d 369, 380 (2008) (applying the rule of construction that an amendment to a statute creates a presumption that the amendment was intended to change the law). The State has failed entirely to respond to this argument in its brief and has thus forfeited any further opportunity to do so. *People v. Smith*, 2015 IL 116572, ¶ 22 (Points not argued in a party's brief are waived).

The State argues that "[t]he concerns in *Palm* regarding allowing a plaintiff in a civil action to make a defendant's medical condition an issue do not apply with the same force in the criminal context." (State's Br., p. 31) The State reasons, "It is entirely reasonable to believe that the General Assembly sought to permit disclosure of medical information when there is probable cause to believe a defendant perpetrated a crime." (State's Br., p. 32) Yet, the State's position is undercut by the manner in which the other subsections of the physician-patient privilege statute have been written. This Court observed in *Palm* that "if, as plaintiff insists, section 8-802(4) is a broadly applicable section, allowing disclosure in every case in which a patient's medical condition is 'relevant,' then other subsections of section 8-802 are redundant and unnecessary." *Id*. This reasoning is no less true in criminal cases such as Torres's case than in civil cases.

For example, section 8-802(1) provides an exception to the privilege "in trials for homicide when the disclosure relates directly to the fact or immediate

circumstances of the homicide." 735 ILCS 8-802(1). If, as the State argues, section 8-802(4) is intended apply broadly as an exception to the privilege in all criminal cases in which the patient's physical or mental condition is merely relevant to establishing the charged offense, then section 8-802(1)'s exception for homicide cases would be entirely redundant and superfluous. Section 8-802(4) clearly must have a narrower meaning than that espoused by the State.

Thus, where Torres did not affirmatively place his disease status at issue or in dispute, and his disease status is not an element of the offense, this Court should find, in accordance with its reasoning in *Palm*, that section 8-802(4) was inapplicable, and trial counsel had an obligation to exclude as privileged information Torres's chlamydia test results at his trial.

D. There was a reasonable probability of a different outcome had counsel excluded this evidence.

The State argues that the evidence was so overwhelming that there is no reasonable probability of a different outcome had counsel succeeded in excluding Torres's chlamydia test results. (State's Br., pp. 36-37) However, with no less than six witnesses testifying that Torres tested positive for chlamydia, it would be hard to characterize Torres' medical test results as anything other than an integral part of the State's case against him. (R. 377, 437-438, 443-444, 466-467, 476-478, 520-522) The repetitive nature of the evidence undoubtedly heightened the prejudice from counsel's failure to seek its exclusion pursuant to Torres' physician-patient privilege. *People v. Brown*, 319 Ill.App.3d 89, 96-97 (4th Dist. 2001) (Cumulativeness or repetitiveness of certain evidence heightens its prejudice). Such an error cannot reasonably be considered to have insignificant or *de minimis* effect, and instead "undermine[s] confidence in the outcome" of Torres' jury trial. *Strickland v.*

Washington, 466 U.S. 668, 694 (1984). Moreover, as Appellant noted in the opening brief, the State itself argued to the jury that Torres' test results constituted "incredibly strong" supporting evidence, rendering the prejudice from counsel's failure to seek its exclusion exceedingly high. (R. 582)

The State also argues that counsel did not perform deficiently by failing to move to exclude the admission of privileged medical information from Torres's medical providers at trial because Torres's own statements to the police about his positive chlamydia test results were in any event admissible as part of his confession. (State's Br., p. 35) Yet, it is not clear that Torres's reference to his medical information in his statement to the police would have been deemed admissible had counsel litigated the issue prior to trial in a motion *in limine*. This Court has found, in other instances of evidence that violate the rules of evidence or are otherwise somehow improper, that defendant's confession should be redacted to strip it of references to improper or inadmissible evidence. *People v. Lampkin*, 98 Ill.2d 418, 430 (1983) (Improper other-crimes evidence contained in defendant's otherwise proper statement or confession must be redacted before the statement or confession is published to a jury, unless the redaction would impair its evidentiary value). It is certainly conceivable that the trial court would have done the same in Torres's case had counsel prevailed on his motion to exclude references to Torres's privileged medical information.

In any event, even if Torres's own statements to the police about his positive chlamydia test results would have remained admissible after litigating a motion to exclude references to his privileged medical information, the constant repetition of this information would have unfairly highlighted this prejudicial evidence, such that it warranted a motion to exclude. (R. 437-438, Dr. Lauren Bence); (R. 466-467,

physician assistant Denise Sher); (R. 443-444, physician assistant Richard Montes); (R. 476-477, nurse practitioner Susana Guzman,); (R 520-522, Detective Rodriguez); (R. 377, Jasmine (whose testimony did elicit a hearsay objection by counsel)); See *Brown*, 319 Ill.App.3d at 96-97. Moreover, Torres's medical information was coming from expert medical professional providers, whose testimony would have carried a different weight than that of Torres's statements made to the police in a custodial interrogation setting where he was merely confirming to the police what they apparently already knew. As such, the failure to assert Torres's privilege would have had a profoundly prejudicial effect, regardless of whether Torres's own statements about his privileged medical information would have been admissible.

As the State points out, Torres did make a statement to Detective Rodriguez in which he admitted to genital-to-genital contact with J.T. (R. 527-528) However, Torres stated that this incident occurred in 2014, and he never accepted responsibility for J.T.'s 2016 chlamydia results. (R. 542) It is therefore not clear that his statement related to the incident charged by the State, which occurred in 2013. Given this lack of clarity in Torres's confession, given J.T.'s inconsistencies in identifying her perpetrator, given that six witnesses testified to Torres' medical test results, making it a very significant part of the State's case, and given the State's heavy reliance on this evidence throughout its closing arguments, there is at least a reasonable probability that a different outcome would have resulted absent counsel's error of failing to exclude Torres's medical information as privileged.

Thus, where Torres was deprived of his constitutional right to the effective assistance of counsel, this Court should accordingly reverse his conviction and remand for a new trial.

CONCLUSION

For the foregoing reasons, Ramon Torres, defendant-appellant, respectfully requests that this Court, reverse the decision of the First District Appellate Court, reverse Appellant's conviction, and remand for a new trial

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 18 pages.

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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 16, 2023, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Carol M. Chatman
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