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.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

DEEPA PUNJABI
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
6/28/2023 9:49 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

Page

Nature of the Case. 1

Issue Presented for Review. 1

Statute Involved 2

Statement of Facts 3

Argument 11

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 11

735 ILCS 5/8-802 11

Pritchard v. Swedish American Hospital, 191 Ill.App.3d 388 (2d Dist. 1989) 11

People ex. Rel. Department of Professional Regulation v. Manos, 202 Ill.2d 563 (2002) 11, 29, 32

725 ILCS 5/8-802(4) 11

Palm v. Holocker, 2018 IL 123152. . . . . *passim*

725 ILCS 5/8-802(7) 12

People v. Bons, 2021 IL App (3d) 180464 . . . . . *passim*

U.S. Const. amends. VI, XIV; Ill. Const. art. I, section 8 . . . . . 12, 40

Strickland v. Washington, 466 U.S. 668 (1984) . . . . . *passim*

People v. Albanese, 104 Ill.2d 504 (1984) 12, 40

People v. Torres, 2022 IL App (1st) 210990-U. . . . . *passim*

People v. Johnson, 2021 IL 126291 13

People v. Maggette, 195 Ill.2d 336 (2001) 13

CIR v. Clark, 489 U.S. 726 (1989) 13

A. Section 8-802(4) does not apply as an exception to the physician-patient privilege in this case because Torres did not affirmatively place his health at issue, and his disease status is not an element of the offense 14

735 ILCS 5/8-802(4) 14

Palm v. Holocker, 2018 IL 123152. 14

1. This Court has applied a narrow interpretation of section 8-802(4) in *Palm v. Holocker* 14

Palm v. Holocker, 2018 IL 123152. 14

Palm v. Holocker, 2017 IL App (3d) 170087. 15

People v. Bons, 2021 IL App (3d) 180464 17

People v. Torres, 2022 IL App (1st) 210990-U 17

People v. Botsis, 388 Ill.App.3d 422 (1st Dist. 2009) 18

People v. Beck, 2017 IL App (4th) 160654. 18

People v. Popeck, 385 Ill.App.3d 806 (4th Dist. 2008) 18

2. The reasoning of *Palm* extends to criminal cases such as this one 18

Ill. Rev. Stat. 1981, ch. 51, ¶5.1(4) 19

735 ILCS 5/8-802(4) (West 2016). 19

Palm v. Holocker, 2018 IL 123152. 19

Ready v. United/Goedecke, 232 Ill.2d 369 (2008). 19

735 ILCS 5/8-802(1) 20

735 ILCS § 8-802(2), (7) 20

735 ILCS § 8-802(6) 20

735 ILCS § 8-802(9), (10) 20

735 ILCS § 8-802(11) 20

People v. McCarty, 223 Ill.2d 109 (2006). 20, 29

720 ILCS 5/11-1.40(a)(1) 21

State v. Allen, 994 P.2d 728 (N.M. 1999) 21

State v. Berry, 324 So.2d 822 (La.1975) 21

State v. Tallabas, 746 P.2d 491, 494 (Ariz. Ct. App. 1987) 21

People v. Sullivan, 586 N.W.2d 578 (Mich. Ct. App. 1998) 21

People v. Carkner, 213 A.D.2d 735 (N.Y. App. Div. 1995) 21

Schultz v. State, 417 N.E.2d 1127 (Ind. Ct. App. 1981) 21

State v. Gore, 451 N.W.2d 313 (Minn. 1990). 22

Gray v. District Court of Eleventh Judicial Dist., 884 P.2d 286 (Col. 1994) 22

State v. George, 575 P.2d 511 (Kan. 1978) 22

B. Section 8-802(7) does not apply as an exception to the physician-patient privilege in this case because the medical providers in this case were not required to report Torres's disease status to the Department of Children and Family Services to be in compliance with the Abused and Neglected Child Reporting Act 23

735 ILCS § 8-802(7) 23

People v. Bons, 2021 IL App (3d) 180464 23

1. The Third District of the Appellate Court has found the exception to the physician-patient privilege in section 8-802(7) inapplicable to chlamydia test rests under circumstances similar to those in Torres' case 24

735 ILCS § 8-802(7) 24

People v. Bons, 2021 IL App (3d) 180464 24

Palm v. Holocker, 2018 IL 123152 25

People v. Torres, 2022 IL App (1st) 210990-U 25

2. Principles of statutory construction favor the Third District's narrower interpretation of section 8-802(7) . . 26

People v. Goossens, 2015 IL 118347 26

People v. McChriston, 2014 IL 115310 26

Landis v. Marc Realty, L.L.C., 235 Ill.2d 1 (2009) 26

People v. Torres, 2022 IL App (1st) 210990-U 26

City of Mount Carmel v. Partee, 74 Ill.2d 371 (1979) 27

People v. Bons, 2021 IL App (3d) 180464 . . . . . 27, 28, 29

735 ILCS 5/8-802(7) 28

In re E.B., 231 Ill.2d 459 (2008) 28

Advincula v. United Blood Services, 176 Ill.2d 1 (1996). 28

People ex. Rel. Department of Professional Regulation v. Manos, 202

Ill.2d 563 (2002) 29, 32

325 ILCS 5/4 (a)(1), (4). 29, 30

Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 Colum. L. Rev. 679 (1966) 30

In re Estate of Rivera, 2018 IL App (1st) 171214 31

C. Torres's 2016 chlamydia test results were subject to the physician-patient privilege, as there was a legitimate medical purpose for this testing, and the legislature has recognized strong privacy interests in the uniquely sensitive and stigmatizing medical information pertaining to STDs, such that Torres would have expected this information to remain private. 33

People v. Torres, 2022 IL App (1st) 210990-U. 33, 38

Palm v. Holocker, 2018 IL 123152. . . . . 34, 35

Muller v. Rogers, 534 N.W.2d 724 (Minn. Ct. App. 1995) 34

People v. Covington, 19 P.3d 15 (Col. 2001) 35

Djeddah v. Williams, 89 A.D.3d 513 (N.Y. App. Div. 2011). 35

Los Angeles Gay and Lesbian Center v. Superior Court, 194 Cal.App.4th 288 (Cal. Ct. App. 2011) 35

McCormick on Evidence, 1 McCormick Evid., § 103 (8th ed.) 35

410 ILCS 325/2. . . . . 35, 39

410 ILCS 325/4. 36

410 ILCS 325/8. . . . . 36, 39

People v. Rivera, 33 N.E.3d 465 (N.Y. App. Div. 2015) 36

People v. Blair, 215 Ill.2d 427 (2005) 37

People v. Kidd, 178 Ill.2d 92 (1997). 37

People v. Lesley, 2018 IL 122100 . . . . . 37, 38

Dupuy v. McDonald, 141 F.Supp.2d 1090 (N.D. Ill. 2001) 38

D. Torres was deprived of the effective assistance of counsel . . . 40

Strickland v. Washington, 466 U.S. 668 (1984) 40

People v. Albanese, 104 Ill.2d 504 (1984) 40

People v. West, 187 Ill.2d 418 (1999) 40

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992) 40

People v. King, 316 Ill.App.3d 901 (1st Dist. 2000) 41, 42

People v. McCarter, 385 Ill.App.3d 919 (1st Dist. 2008) 41, 46

United States ex rel. Hampton v. Leibach, 347 F.3d 219 (7th Cir. 2003) 41, 46

1. Deficient performance. 41

People v. Royse, 99 Ill.2d 163 (1983) 41

People v. Simpson, 2015 IL 116512 42

People v. Othman, 2020 IL App (1st) 150823-B 42

2. Prejudice 42

People v. Bons, 2021 IL App (3d) 180464 44

Conclusion 47

Appendix to the Brief. A-1

NATURE OF THE CASE

Ramon Torres was convicted of predatory criminal sexual assault after a jury trial and was sentenced to 55 years in prison.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether this Court should find that Ramon Torres was deprived of the effective assistance of trial counsel for failing to challenge the admission of Torres' privileged medical information, his 2013 and 2016 positive chlamydia test results, where the State was not entitled to admit such evidence under 725 ILCS 5/8-802(4), or under 725 ILCS 5/8-802(7), two narrow exceptions to the physician-patient privilege.

STATUTE INVOLVED

735 ILCS 5/8-802. Physician and Patient.

§ 8-802. Physician and patient. No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in case of his or her death or disability, of his or her personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his or her life, health, or physical condition, or as authorized by Section 8-2001.5, (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) (blank), (7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act, (8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment, (9) in prosecutions where written results of blood alcohol tests are admissible pursuant to Section 11-501.4 of the Illinois Vehicle Code,2 (10) in prosecutions where written results of blood alcohol tests are admissible under Section 5-11a of the Boat Registration and Safety Act,3 (11) in criminal actions arising from the filing of a report of suspected terrorist offense in compliance with Section 29D-10(p)(7) of the Criminal Code of 2012,4 (12) upon the issuance of a subpoena pursuant to Section 38 of the Medical Practice Act of 1987; the issuance of a subpoena pursuant to Section 25.1 of the Illinois Dental Practice Act; the issuance of a subpoena pursuant to Section 22 of the Nursing Home Administrators Licensing and Disciplinary Act; or the issuance of a subpoena pursuant to Section 25.5 of the Workers' Compensation Act, (13) upon the issuance of a grand jury subpoena pursuant to Article 112 of the Code of Criminal Procedure of 1963, or (14) to or through a health information exchange, as that term is defined in Section 2 of the Mental Health and Developmental Disabilities Confidentiality Act, in accordance with State or federal law.

STATEMENT OF FACTS

In 2016, Ramon Torres was charged with predatory criminal sexual assault of a child under the age of 13 years, for sexually assaulting his 4-year-old daughter, J.T., in November of 2013, after J.T., then age 7, made an outcry in 2016. (C. 33; R. 380) Torres was tried *in absentia* after the judge made a finding that Torres had willfully absented himself. (R. 210-212) After a jury trial, Torres was convicted of predatory criminal sexual assault of a child. (R. 593) The judge later sentenced Torres *in absentia* to 55 years in prison on August 1, 2019. (R. 614-615)

Prior to trial, the court conducted a hearing pursuant to 725 ILCS 5/110-15 and ruled that the State would be permitted to introduce J.T.'s hearsay statements to her mother and to her forensic interviewer, Lynn Aladeen. (R. 48-49) The court also allowed the State's motion to admit as propensity evidence proof of other crimes, namely that Torres sexually assaulted J.T. in 2016. (R. 149-151)

At trial, Jasmine T. testified that she was 32 years old, and a mother to J.T., then age 10, and two other children. (R. 361) Ramon Torres, whom she started dating in 2008 and married in 2011, is the father to J.T. and one of her other children. (R. 361) In 2012, she and Torres split up for a bit, and Torres moved to Chicago, where he lived with his cousin, Vanessa Valentin. (R. 364) The children would visit their dad at Vanessa's home. (R. 364) Vanessa had a son named J., who is a little bit older than J.T., who also lived in that house. (R. 365) In the fall of 2013, Jasmine was still separated from Torres and bringing the children to visit him overnight every other weekend. (R. 366) Jasmine testified that between Halloween and Thanksgiving of 2013, J.T., age 4 at the time, complained that her private area hurt and that she could not use the restroom. (R. 366) She examined J.T. and saw that her vaginal area was very red, so she took J.T. to the emergency

room that day at St. Mary's Hospital, where she was tested for chlamydia, and the test came back positive. (R. 367-368) The Department of Child and Family Services ("DCFS") contacted Jasmine and requested that she and Torres get tested too. (R. 368) Shortly after that Jasmine took J.T. to the Children's Advocacy Center ("CAC") for a forensic interview. (R. 369) In the interview, J.T. stated that her cousin, J., did something to her. (R. 370) Two weeks after J.T. tested positive for chlamydia, Jasmine spoke with Torres, who said that he had not gotten tested for chlamydia. (R. 371) They later reconciled and began living together again. (R. 371-373)

In October of 2016, Jasmine took J.T. to St. Elizabeth's for a routine pediatric visit for a school physical. (R. 373) She told the assistant, Susana Guzman, about J.T.'s history, and also that J.T. had recently had some vaginal discharge. (R. 373) Guzman suggested another chlamydia screening, which was conducted. (R. 374) A couple of days later, Jasmine received a phone call asking her to bring J.T. in immediately for treatment. (R. 374) She, J.T. and Torres all went in. (R. 375) J.T., now age 7, had tested positive for chlamydia again. Jasmine subsequently learned she was also positive for chlamydia, and so was Torres. (R. 375-377) Jasmine brought J.T. back to CAC for a forensic interview, but J.T. did not disclose any abuse or assault at this time. (R. 378) Torres then moved out of the home, and Jasmine subsequently had a conversation with J.T. about what occurred. (R. 378) J.T disclosed that when Torres lived at Vanessa's house, while J.T. was visiting and sleeping there, he had put his private part in her private part, and she had cried and asked him to stop but he would not. (R. 380) Upon this disclosure, Jasmine went to the police and filed a report. (R. 380-381) They went back to CAC, and J.T. took part in another forensic interview. (R. 381)

J.T. testified that she was ten years old at the time of trial. (R. 395) She testified that when she was a little girl there was a period of time when she and her brother would go visit her father for overnight stays at Vanessa's house. (R. 397-398) J., a kid who was older than her, also lived there. (R. 398) One time at Vanessa's, her dad woke her in the bedroom in the middle of the night and began touching his private part in her private part. (R. 400-401) She told him to stop, he did, and then he walked out of the room. (R. 403) She went back to bed and did not tell anybody what happened because she was scared she was going to get in trouble. (R. 405) After this happened her private part started stinging, and she eventually told her mom, who took her to see a doctor. (R. 405-407) After that she went to talk to some people who asked her questions in an interview room. (R. 407) She did not tell them about what her dad did; instead she said J. touched her because she was afraid her mom would be mad at her if she said what really happened. (R. 408-409) Then, when she was a little older, she went to see a female doctor and then went back to that same building to do another interview. This time, she told them what her dad did to her because she had already told her mom what had happened, and she was not afraid anymore. (R. 410-411)

Dr. Katherine Schroeder testified that she worked as an emergency room doctor at St. Mary's Hospital. (R. 422) On November 23, 2013, she met and treated J.T, age 4, who had tested positive for chlamydia, a sexually transmitted disease. (R. 423-424) She discussed the results with J.T.'s mother, contacted DCFS and prescribed and administered azithromycin, a one-time dose for the treatment of chlamydia. (R. 426-427) Dr. Lauren Bence testified that she took over treatment of J.T. from Dr. Schroeder that day at shift change. (R. 433) On November 24, 2013, Dr. Bence met with physician assistant Denise Sher, who had treated Torres,

and learned that Torres had been treated with antibiotics for a high suspicion of sexually transmitted disease due to reported symptoms. (R. 435-437)

Denise Sher testified that on November 24, 2013, she was working as a physician's assistant alongside Dr. Bence at St. Mary's Hospital. (R. 3465) She examined Torres, who was complaining of pain with urination, and ordered an STI panel of tests. (R. 466) He disclosed that he had had a recent unprotected sexual encounter. (R. 467) She gave him an intramuscular injection (Ceftriaxone) and a pill (azithromycin) as treatment for gonorrhea and chlamydia. (R. 467) Richard Montes, a physician's assistant at the same facility, testified that two days later, he reviewed a lab result for Ramon Torres showing that he tested positive for chlamydia. (R. 441-443) He informed Torres by phone of the lab results and advised that he should inform any other sexual partner he may have had. (R. 444)

Susana Guzman, a nurse practitioner at Young Family Health Associates, a clinic associated with St. Mary's Hospital and St. Elizabeth Hospital, testified that on October 8, 2016, she saw J.T. for what was supposed to be a routine physical exam. (R. 471) Her mother disclosed that J.T. was a victim of sexual abuse at around age 3 in 2013 and had tested positive for chlamydia at that time. (R. 472) She also disclosed that J.T. had recently been having vaginal discharge, so Guzman ordered a urine test for gonorrhea and chlamydia. (R. 472) The test results were positive for chlamydia. (R. 473) She called J.T.'s mother to bring J.T. in right away for treatment, less than a week from the initial test. (R. 473) J.T.'s father and brother came too. (R. 474) She administered azithromycin to J.T., as well as a shot of ceftriaxone. (R. 474) She notified DCFS, which requested that everyone in the household be tested. (R. 475) Jasmine was tested, and her labs returned positive for chlamydia. (R. 476) Guzman administered treatment to her, told her

about the DCFS involvement, and informed her that Torres was not to be allowed in the home during the investigation. (R. 476) Torres himself was also tested, and Guzman testified that his results were also positive for chlamydia. (R. 477) Torres denied sexual contact with his daughter but admitted to unprotected sexual intercourse with someone other than Jasmine. (R. 477) Guzman testified that she noticed that Torres' chart indicated that he had tested positive for chlamydia in 2013. (R. 478)

Lynn Aladeen a forensic interviewer with CAC, testified that on October 24, 2016, shortly before noon, she conducted a forensic interview with J.T., age 7. (R. 483-485) Detective Emily Rodriguez, ASA Jeremiah Lewellen and Cynthia Pettis all observed the interview from behind a mirror in the interview room, and the interview was recorded, a copy of which was admitted and published at trial. (R. 487-492) In it, J.T. referred to Lisa, another forensic interviewer that J.T. had spoken to six days earlier, on October 18, 2016. (R. 494) On cross examination, Aldadeen testified that she was not aware of the specific contents of the October 18 interview but was aware that J.T. gave a different story. (R. 501) Aladeen testified that she did not know that there was a forensic interview conducted with J.T. at CAC on December 2, 2013. (R. 501)

Detective Emily Rodriguez testified that she worked for the Chicago Police in Special Investigations at the CAC, investigating sex offenses against children. (R. 509-510) On November 25, 2013, she was assigned to investigate a case involving J.T. who she learned, at age 4, had contracted chlamydia. (R. 512-513) On December 2, 2013, she observed that interview from behind a mirrored window. (R. 513-514) J.T. disclosed that a 6-year-old boy named J. had touched her. (R. 515) They suspended the investigation at that point. (R. 515) Then, on October 18, 2016,

she learned that J.T. had again contracted chlamydia. (R. 516-517) She set up another forensic interview that day. (R. 517) In the interview J.T. still mentioned J., and did not disclose any other offender. (R. 518)

Detective Rodriguez testified that six days later, on October 24, 2016, Jasmine called her and informed her that she and Torres had tested positive for chlamydia, and that Jasmine had had a conversation with J.T. about what happened. (R. 518-519) They conducted another forensic interview that day, in which Lynn Aladeen was the forensic interviewer. (R. 519) In the interview J.T. named her father, Ramon Torres. (R. 520) Rodriguez also learned, through a nurse, that not only had Torres just tested positive for chlamydia, he had also tested positive for chlamydia in 2013. (R. 520-521)

Rodriguez 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 conducted a recorded interview with Torres at Area 3 on November 9, 2016, at 1:09 p.m. (R. 523) In it, Torres admitted to making contact between his penis and J.T.'s vagina while living at Vanessa's, and he said that he had tested positive for chlamydia. (R. 527-528); State's Exhibit 6. However, on cross examination, she acknowledged that she questioned Torres further on November 10, 2016, at which time he stated that the incident that he was talking about occurred in 2014, not 2013. (R. 541-542)

The defense's case consisted of videos of the previous forensic interviews in which J.T. named J., not Torres, as her abuser. (R. 553-554) The defense argued to the jury that while J.T. appears to have been sexually assaulted, her accounts of who the perpetrator was were inconsistent and unreliable. (R. 579) The State

argued that Torres' test results constituted "incredibly strong" and "overwhelming corroborative" evidence that Torres sexually penetrated J.T. (R. 582) After closing statements and deliberation, the jury found Torres guilty of predatory criminal sexual assault of a child under the age of 13 years. (R. 593) The defense filed a post-trial motion, which was denied. (R. 602) After finding Torres' absence at sentencing was willful (R. 609-610), the court sentenced Torres *in absentia* to 55 years in prison. (R. 614-615)

On November 20, 2020, Torres was arrested pursuant to a warrant and remanded to custody. (R. 625) Defense counsel filed a motion for new trial and sentencing pursuant to 725 ILCS 5/115-4.1 (C. 248-250), and a hearing was held on the motion, which was subsequently denied. (R. 674-676) Torres appealed that denial, as well as his conviction and sentence, as permitted under 725 ILCS 5/115-4.1(g). (C. 275-278); *See People v. Williams*, 274 Ill.App.3d 793, 800 (4th Dist. 1995).

On appeal, Torres argued that he was deprived of the effective assistance of trial counsel for failing to challenge the admission of his positive chlamydia test results in 2013 and 2016, where the State was not entitled to admit such evidence because it did not fall under any of the enumerated statutory exceptions to the physician-patient privilege set forth in 735 ILCS 5/8-802. Relying on *People v. Bons*, 2021 IL App (3d) 180464, Torres argued that the exceptions under sections 8-802(4) (in an action against the patient where the patient's physical condition is "an issue") and 8-802(7) (to information arising from the filing of a report in compliance the Abused and Neglected Children Reporting Act) were inapplicable to his 2013 and 2016 chlamydia test results, and that evidence should have been excluded as privileged. The State argued that Torres' chlamydia test results were admissible under 8-802(4), but did not address 8-802(7). (State's Br. pp. 12-14)

The First District Appellate Court found Torres's 2013 chlamydia test results admissible under 8-802(7), and found the privilege inapplicable to Torres's 2016 chlamydia test results. *People v. Torres*, 2022 IL App (1st) 210990-U, ¶¶ 71-73. The First District declined to rule on admissibility under 8-802(4), noting that this Court had urged the legislature to clarify 8-802(4), but that the legislature had not yet done so. *Torres*, 2022 IL App (1st) 210990-U, ¶¶ 71-72.

Torres petitioned this Court for leave to appeal, and this Court granted leave to appeal on March 29, 2023.

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 Illinois, the physician-patient privilege protects patients' medical records from disclosure without their consent. 735 ILCS 5/8-802. Medical care providers often acquire and record sensitive information because it is necessary to enable the provider to serve or treat the patient. *Pritchard v. Swedish American Hospital*, 191 Ill.App.3d 388, 404 (2d Dist.1989). In order to "encourage free disclosure between a doctor and a patient . . ." to facilitate treatment, our legislature has provided that patients' medical records are privileged unless one of the 14 enumerated statutory exceptions applies. *People ex. Rel. Department of Professional Regulation v. Manos*, 202 Ill.2d 563, 575 (2002); 735 ILCS 5/8–802. Here, Ramon Torres was severely prejudiced by the admission of extremely sensitive medical information – his positive chlamydia test results in 2013 and 2016 – where such evidence was inadmissible, as it 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)

With respect to 725 ILCS 5/8-802(4), which applies in an action against the patient where the patient's physical condition is "an issue," this exception to the physician-patient privilege does not permit the admission of Torres' chlamydia test results because Torres did not affirmatively place his health at issue during his trial, and his disease status is not an element of the offense. *Palm v. Holocker*, 2018 IL 123152, ¶ 28 ("[T]he physician-patient privilege belongs to the patient

and therefore only the patient may waive it by putting his physical or mental condition at issue."). With respect to 725 ILCS 5/8-802(7), which applies to information "arising from the filing of a report in compliance the Abused and Neglected Children Reporting Act" ("ANCRA"), this exception to the physician-patient privilege does not permit the admission of Torres' chlamydia test results because the medical providers in this case were not required to report Torres's disease status to the Department of Children and Family Services in order to be in compliance with the ANCRA. *People v. Bons*, 2021 IL App (3d) 180464, ¶ 43 (the purpose section 8-802(7) is to protect children by permitting physicians to disclose the reports of abuse and neglect required to be in compliance with the ANCRA). Thus, these exceptions to the physician-patient privilege were inapplicable to Torres' 2013 and 2016 chlamydia test results.

Torres argued that his trial counsel rendered ineffective assistance by failing to challenge the admission of this inadmissible evidence. *See* U.S. Const. amends. VI, XIV; Ill. Const. art. I, section 8; *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *People v. Albanese*, 104 Ill.2d 504, 525-526 (1984). In addressing these arguments below, the First District Appellate Court found Torres' 2013 chlamydia test results admissible under 8-802(7), and found the privilege inapplicable altogether to Torres' 2016 chlamydia test results. *People v. Torres*, 2022 IL App (1st) 210990-U, ¶¶ 71-73. With respect to section 8-802(4), the First District expressed uncertainty about the applicability to criminal cases of this Court's interpretation of this provision in *Palm*, 2018 IL 123152, a civil case. *Torres*, 2022 IL App (1st) 210990-U, ¶¶ 71-72. In its ruling, the First District interpreted section 8-802(7) broadly and expressly rejected the Third District's narrowly tailored interpretations of the exceptions in sections 8-802(4) and 8-802(7) in *People v.*

Bons, 2021 IL App (3d) 180464, a decision Torres relied on in making his arguments on appeal. Yet, the First District's overly broad interpretation of the exceptions to the physician-patient privilege threaten to completely undermine the purpose the privilege exists to serve and "render[ ] the privilege virtually meaningless." *Palm*, 2018 IL 123152, ¶ 30. Thus, this Court should adopt the Third District's narrower interpretations of sections 8-802(4) and 8-802(7) and find that trial counsel should have asserted Torres's privilege as to his 2013 and 2016 chlamydia test results, and that the failure to do so deprived him of the effective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed in a bifurcated manner. While factual findings should be upheld unless they are against the manifest weight of the evidence, the ultimate legal question of whether counsel provided ineffective assistance is reviewed *de novo*. *People v. Johnson*, 2021 IL 126291, ¶ 52. The interpretation of a statute is a question of law which is also reviewed *de novo*. *People v. Maggette*, 195 Ill.2d 336, 348 (2001).

The cardinal rule of statutory construction is to give effect to the intent of the legislature, presuming the legislature did not intend to create absurd, inconvenient, or unjust consequences. *People v. Goossens*, 2015 IL 118347, ¶ 9. The best indicator of such intent is the language of the statute, which is to be given its plain and ordinary meaning. *People v. McChriston*, 2014 IL 115310, ¶ 15. If a statute is capable of being understood by reasonably well-informed persons in two or more different ways, the statute will be deemed ambiguous. *Landis v. Marc Realty, L.L.C.*, 235 Ill.2d 1, 11 (2009). In "construing provisions ... qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *CIR v. Clark*, 489 U.S. 726, 739 (1989).

A. Section 8-802(4) does not apply as an exception to the physician-patient privilege in this case because Torres did not affirmatively place his health at issue, and his disease status is not an element of the offense.

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 in a professional character, necessary to enable him or her professionally to serve the 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). This Court has already closely examined the issue of how section 8-802(4) is to be interpreted in *Palm v. Holocker*, 2018 IL 123152. In keeping with the principles espoused in *Palm*, a civil case, this Court should apply the same narrow interpretation of section 8-802(4) to criminal cases, such that this exception to the privilege is only triggered where the defendant affirmatively places his medical information in dispute, or his medical information is an element of the offense.

1. This Court has applied a narrow interpretation of section 8-802(4) in *Palm v. Holocker*.

In *Palm*, the plaintiff was a pedestrian who brought a personal injury action against the defendant, alleging he was negligent when he struck her with his car as she was crossing the street. *Palm v. Holocker*, 2018 IL 123152, ¶¶ 3-4. In discovery, the plaintiff sought information regarding eye examinations that the defendant had undergone in the previous five years. *Id.* at ¶ 6. The defendant objected, arguing that the information was protected by the doctor-patient privilege. *Id*. at ¶7. In response, the plaintiff argued that the privilege was inapplicable based on 8-802(4), because the defendant's physical condition (his ability to see) was an issue in the case where the defendant drove his car into a pedestrian. *Id.*

at ¶ 8. The trial court agreed, and ordered that the defendant turn over the requested information to the plaintiff. *Id*. at ¶ 9 The defendant refused, and the trial court issued a civil contempt order, which the defendant subsequently appealed. *Id*. at ¶¶ 10-11.

On appeal, the Third District Appellate Court agreed with the defendant, holding that, under section 8-802(4), "defendants maintain their physician-patient privilege until they waive it by affirmatively placing their health at issue." *Palm v. Holocker*, 2017 IL App (3d) 170087, ¶ 16. The Third District expressly rejected the plaintiff's argument that "an issue" as used in section 8-802(4) merely means "relevant to the case," reasoning that if the legislature "meant section 8-802(4) to except all relevant medical information from the privilege's scope, it would have simply stated the privilege does not apply in any litigation[.]" *Id*. at ¶ 22. Upon review, this Court affirmed, finding that the records were privileged and that the exception in section 8-802(4) did not apply. *Palm*, 2018 IL 123152, ¶¶ 28, 33.

Like the Third District Appellate Court, this Court expressly rejected the plaintiff's contention that section 8-802(4) broadly allowed for the disclosure of medical records in any action in which a party has a relevant physical or medical condition. *Id*. at ¶ 28. First, this Court examined case law from other states and noted that there was nearly universal agreement among courts that "the physician-patient privilege belongs to the patient and therefore only the patient may waive it by putting his physical or mental condition at issue." *Id*. Thus, this Court concluded, section 8-802(4) was intended to "codify the near-universally recognized principle of waiver by implied consent" and not "to enact a broadly applicable exception allowing the privilege to be vitiated any time a party's medical condition is relevant." *Id*. at ¶ 33. Further, this Court found that plaintiff's broad

interpretation of the exception was "problematic when viewed in context of the entire statute." *Id.* at ¶ 29. This Court reasoned that if, as plaintiff contended, section 8-802(4) was broadly applicable and allowed disclosure in every case in which a patient's medical condition was relevant, other sections of 8-802 would be redundant and unnecessary. *Id*. This Court concluded that the "sheer number of codified exceptions to the privilege" suggested that the scope of section 8-802(4) was narrow. *Id*.

Additionally, this Court found that the plaintiff's broad interpretation rendered the privilege meaningless, as it would allow one party to effectively waive another party's privilege simply by making an allegation in a pleading. *Id.* at ¶ 30. The *Palm* Court acknowledged that, by rejecting the broad interpretation suggested by the plaintiff, relevant information would be kept from the fact-finder, but determined that such a result was "simply inherent in the nature of privileges" and was "not justification for construing the statute in a way to render the privilege virtually meaningless for parties to litigation." *Id.* at ¶ 32.

In the instant case, in responding to Torres's argument that counsel was ineffective for failing to exclude defendant's privileged chlamydia test results, the State argued to the First District Appellate Court that the 2013 and 2016 chlamydia test results were admissible under section 8-802(4). The State argued that this provision should be interpreted broadly as, essentially, any case in which the patient's physical or mental condition is merely relevant to the issues in the case. (State's Br. pp. 12-14) Torres replied that this Court has analyzed 8-802(4) and already rejected the broad interpretation of this provision that the State urged in this case. (Reply Br., p. 3); *See Palm*, 2018 IL 123152, ¶¶ 24, 29. The First District, in addressing the issue, noted that this Court in *Palm* had requested the legislature

to amend section 8-802(4), and the legislature had not done so:

> *Palm* urge[d] the legislature to address section 8-802(4) and to make its intentions clear." *Id.* ¶ 39. It specifically requested that the legislature "clarify how something becomes 'an issue' for purposes of this section, whether one party may put another party's physical or mental condition at issue, and if the rule is any different for civil and criminal cases." *Id.* However, subsection (4) has not yet been amended by the legislature.

People v. Torres, 2022 IL App (1st) 210990-U, ¶ 69, quoting *Palm,* 2018 IL 123152, ¶ 39. Notably, the First District did *not* reject the State's argument that the exception to the privilege in 8-802(4) should apply broadly in criminal cases whenever the patient's medical condition is merely relevant, even though this was an interpretation that this Court expressly rejected in *Palm*. *People v. Torres*, 2022 IL App (1st) 210990-U, ¶ 69.

In contrast, the Third District in *Bons* interpreted section 8-802(4) narrowly to find this exception inapplicable to the defendant's privileged chlamydia test results at his predatory criminal sexual assault trial. *People v. Bons*, 2021 IL App (3d) 180464, ¶¶ 37-38. The Third District found that this Court had already clarified that this particular statutory exception was not to be construed so broadly as to apply any time a defendant's medical information was relevant to the case. *Id.* at ¶ 37, citing *Palm,* 2018 IL 123152, ¶¶ 29, 33. The *Bons* Court noted that *Palm* found the physician-patient privilege belonged to the patient and, therefore, only the patient could waive it by putting his physical or mental condition at issue, and that a broad application of section 8-802(4) which would allow disclosure in every case in which a patient's medical condition was merely "relevant" would render the other 13 exceptions in the statute unnecessary. *Id.* at ¶ 37. However, the Third District acknowledged that this Court, in *Palm*, left open the validity "of those criminal cases that have held that subsection (4) applies when the

legislature has made a party's physical or mental condition an element of an offense." *Id*. at ¶ 37, citing *Palm*, 2018 IL 123152, ¶ 33. Yet, "[b]y taking no position on the applicability of subsection 8-802(4) to criminal cases where a defendant's physical or mental condition is an element of the offense, the supreme court left open the possibility that its rationale could apply to the instant case where defendant's physical or mental condition was not an element of the offense." *Id*. at ¶ 38 (citations omitted). Thus, *Bons* concluded that pursuant to *Palm*, the exception under section 8-802(4) did not apply to the defendant. *Id*. at ¶ 38.

The State below acknowledged to the First District Appellate Court that this Court in *Palm* rejected a broad interpretation of the term "an issue," in section 8-802(4). However, the State argued that this Court confined its interpretation only to civil cases. In criminal cases, the State argued below, 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 relevant to the case. (State's Br., p. 15) Yet, as explained *infra*, a close reading of *Palm* reveals that this Court's interpretation of 8-802(4) in that case applies with equal force to civil and criminal cases alike, particularly where a defendant's medical condition or status is not an element of the charged offense.

2. The reasoning of *Palm* extends to criminal cases such as this one.

This Court should hold that Torres's chlamydia test results were not admissible because their mere relevance to the offense did not overcome the

physician-patient privilege, and that the application of section 8-802(4) does not differ between civil and criminal cases, particularly in criminal cases in which the medical information at issue is not an element of the offense. 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 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, 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. 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).

If the legislature intended 8-802(4) to operate one way for criminal cases and a different way for civil cases, it would not have written this exception to apply to "all actions." Examining the different enumerated exceptions to the privilege *in pari materia*, this Court itself pointed out in *Palm*, "In other subsections of section 8-802 . . . the legislature was very specific when it wanted to draw a

distinction between civil and criminal cases, and subsection (4) contains no such distinction." *Palm*, 2018 IL 123152, ¶ 24 (citing 735 ILCS 5/8-802(1) ("in trials for homicide), *id*. § 8-802(2), (7) ("in actions, civil or criminal), *id*. § 8-802(6) ("in any criminal action"), *id*. § 8-802(9), (10) ("in prosecutions")), and *id*. § 8-802(11) ("in criminal actions")); *see People v. McCarty*, 223 Ill.2d 109, 133 (2006) (doctrine of *in pari materia* allows "two statutes dealing with the same subject [to] be considered with reference to one another to give them harmonious effect."). This Court in *Palm* encouraged the legislature to clarify whether the manner in which something becomes "an issue" is "any different for civil and criminal cases." *Id*. at ¶ 39. However, the legislature has already clarified the matter by writing 8-802(4) to apply to "all actions," in contrast to the way it has written other sections of the same statute. From its inception in the Illinois Compiled Statutes, the legislature has indicated its intent that 8-802(4), unlike some of the other sections, is to operate identically to civil and criminal actions alike.

Moreover, all of the reasons that the *Palm* Court held as favoring a narrow construction of section 8-802(4) in a civil case apply with equally persuasive force in the criminal context, particularly where the defendant's medical condition is not an element of the offense. As noted *supra*, *Palm* examined case law from other states and found nearly universal agreement among courts that "the physician-patient privilege belongs to the patient and therefore *only* the patient may waive it by putting his physical or mental condition at issue." *Id*. at ¶ 28 (emphasis added). The only conceivable exception to this rule occurs when the defendant's medical condition is an element of the offense, with the legislature thereby having made the defendant's condition "an issue" in the case. However, where Torres's disease status was not an element of the offense, such circumstances

are not implicated here. *See* 720 ILCS 5/11-1.40(a)(1). Outside of those limited circumstances, this Court has concluded that section 8-802(4) was intended to "codify the near-universally recognized principle of waiver by implied consent" and not "to enact a broadly applicable exception allowing the privilege to be vitiated any time a party's medical condition is relevant." *Id.*, ¶ 33. There is no reason that the principle of waiver by implied consent should not apply in criminal cases.

In fact, many other states have applied the principle of waiver by implied consent as an exception to their physician-patient privilege statutes in the criminal context. These cases have held that the privilege is waived when the defendant places his medical condition at issue, by way of raising an affirmative defense, for example, but that the State may not waive the privilege for the defendant by alleging his medical information is merely relevant to the case. *State v. Alle*n, 994 P.2d 728, 748 (N.M. 1999) ("the confidential medical records at issue in this case were not a proper subject of discovery because Defendant did not place his mental health at issue at any phase of his trial"); *State v. Berry*, 324 So.2d 822, 827 (La.1975) (privilege waived where defendant raised affirmative defense of insanity, impliedly waiving his right to claim the privilege); *State v. Tallabas*, 746 P.2d 491, 494 (Ariz. Ct. App. 1987 (same); *People v. Sullivan*, 586 N.W.2d 578, 582 (Mich. Ct. App. 1998) (same); *People v. Carkner*, 213 A.D.2d 735, 737 (N.Y. App. Div. 1995) (defendant impliedly waives the privilege by affirmatively placing his or her physical or mental condition in issue; because defendant did not do so, the hospital records in his vehicular manslaughter prosecution should have remained privileged); *Schultz v. State*, 417 N.E.2d 1127, 1135 (Ind. Ct. App. 1981) (voluntary testimony of a criminal defendant about his medical condition constitutes an implied waiver of the physician-patient privilege as to that condition);

State v. Gore, 451 N.W.2d 313, 317-318 (Minn. 1990) (same); *Gray v. District Court of Eleventh Judicial Dist.*, 884 P.2d 286, 292 (Col. 1994) (privilege waived where defendant raised affirmative defense of impaired mental condition, impliedly waiving his right to claim the privilege); *State v. George*, 575 P.2d 511, 517 (Kan. 1978) (privilege waived only if the medical condition is an element of the offense or if defendant affirmatively places his medical condition at issue; defendant's plea of not guilty does not by itself place his condition at issue).

Like these other states, this Court should find that, absent the limited circumstances where the defendant's medical condition is an element of the offense, the physician-patient privilege belongs only to a criminal defendant and therefore only the defendant may waive it by putting his physical or mental condition at issue. In *Palm*, this Court noted that applying a broad interpretation of section 8-802(4) as applicable every time a litigant's medical condition was merely relevant would "render[ ] the privilege virtually meaningless," because it would allow one party to waive the privilege for another "simply by making an allegation in a pleading." *Palm*, 2018 IL 123152, ¶ 30. The same concerns apply to the criminal context. If, in a criminal case, section 8-802(4) applied every time the State alleged a defendant's condition was merely relevant somehow to the facts of the case, it would allow the State to waive the defendant's privilege for him and publicly expose sensitive medical information "simply by making an allegation."

Furthermore, in *Palm*, this Court reasoned, "The sheer number of codified exceptions to the privilege suggests that section 8-802(4) must have a narrower scope than plaintiff contends." *Id.* at ¶ 29. This reasoning applies with equally persuasive force to the criminal context. The *Palm* Court observed 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, too, is no less true in criminal cases than civil cases.

As such, 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, 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.

B. Section 8-802(7) does not apply as an exception to the physician-patient privilege in this case because the medical providers in this case were not required to report Torres's disease status to the Department of Children and Family Services to be in compliance with the Abused and Neglected Child Reporting Act.

Section 8-802(7) 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 in a professional character, necessary to enable him or her professionally to serve the 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 5/5-802(7). The rules of statutory construction as well as the purpose that the privilege and that the exception to the privilege exist to serve both favor a narrow construction of the provision. A narrow construction of this provision, such as that espoused by the Third District Appellate Court in *People v. Bons*, 2021 IL App (3d) 180464, balances society's interest in protecting children and discovering child abuse by permitting the disclosure of reports of abuse and neglect under the ANCRA, with the equally important public health interest in protecting medical privacy so as to foster an open discourse between patient and physician and to incentivize testing for stigmatized contagious diseases such as chlamydia.

1. The Third District of the Appellate Court has found the exception to the physician-patient privilege in section 8-802(7) inapplicable to chlamydia test rests under circumstances similar to those in Torres' case.

In *Bons*, as in this case, the defendant was convicted of predatory criminal sexual assault of a child. *People v. Bons*, 2021 IL App (3d) 180464, ¶¶ 3, 27. On appeal, the defendant argued that the trial court erred when it admitted evidence of his chlamydia test results without his consent under sections 8-802(4) and 8-802(7) of the Code. *Id*. at ¶ 30. The Third District Appellate Court agreed with the defendant, finding that the exceptions to the physician-patient privilege in 8-802(4) as well as 8-802(7) should have been held by the trial court to be inapplicable to the defendant's chlamydia test results. *Id.* at ¶¶ 38, 43. As to section 8-802(7), *Bons* stated that the purpose of this provision was to protect children by permitting physicians to disclose reports of abuse and neglect under the ANCRA. *Id.* at ¶ 43. *Bons* found that the purpose of the ANCRA was satisfied in the case before it when a school counselor made a sexual abuse report to DCFS. *Id.* The chlamydia test results at issue in *Bons*, however, did not arise from or come out of the making of a report under the ANCRA; as such, the exception under section 8-802(7) did not apply to the test results. *Id*. *Bons* further found that the exception did not apply to the testimony of a medical professional regarding the defendant's medical condition because the medical professional was not the one to have made a report under the ANCRA. The Third District explained its reasoning as follows:

> The plain language of the statute excepts from the physician-patient privilege information 'arising' from the filing of a report in compliance with the Act. *Id.* Here, there is no indication that defendant's medical records regarding his chlamydia diagnosis and treatment *arose from* the DCFS investigation or report. The record indicates that defendant independently sought medical care approximately two weeks after [the victim] reported the sexual abuse to [the school counselor]. Additionally, the State obtained defendant's medical records through

> its own investigation and by subpoena, rather than through the DCFS investigation and report. Since defendant's medical condition information was not procured from a DCFS report or investigation, we reject the State's assertion that subsection 8-802(7) excepts the information from the physician-patient privilege.

Id. at ¶ 44 (emphasis in original). *Bons* concluded that the State's reading of section 8-802(7) was "overly broad" because it would automatically waive the physician-patient privilege of all individuals who were connected to or implicated in a report filed under the Act, thereby rendering the other 13 exceptions meaningless in cases that involve or relate to a DCFS report. *Id*. at ¶ 45., citing *Palm* 2018 IL 123152, ¶ 29. Therefore, the *Bons* Court found a narrow construction appropriate.

In the instant case, the First District Appellate Court rejected *Bons* and construed section 8-802(7) much more broadly under similar facts. The First District found that section 8-802(7) applied to any privileged medical information a party seeks to introduce about any person pertinent to the case, in any criminal action relating to a DCFS report, even if the medical information sought to be introduced is other than that which came out of the filing of the DCFS report. *People v. Torres*, 2022 IL App (1st) 210990-U, ¶¶ 71-74. In arriving at this broad interpretation of section 8-802(7), the First District rejected the reasoning in *Bons*.

The First District took issue with the Third District's interpretation of the plain meaning of section 8-802(7) as excluding from the physician-patient privilege only the medical information that "arose from" or came out of the making of a report to DCFS in compliance with the ANCRA. *Id*. at ¶ 76. Instead the First District viewed the plain meaning of 8-802(7) as applying to *any* medical information of *any* person pertinent to the case. *Id.* The *Torres* Court explained,

> [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.

Id. The First District disagreed with the Third District that its interpretation of section 8-802(7) as applying to *any* medical information of *any* person pertinent to a case in which a DCFS report has been filed would be an "overly broad" reading of the statute. *Id*. at ¶ 78. Instead, the First District found that the plain language of section 8-802(7) indicates the legislature's intention that the exception in section 8-802(7) sweep broadly. *Id*.

2. Principles of statutory construction favor the Third District's narrower interpretation of section 8-802(7).

The cardinal rule of statutory construction is to give effect to the intent of the legislature, presuming the legislature did not intend to create absurd, inconvenient, or unjust consequences. *People v. Goossens*, 2015 IL 118347, ¶ 9. The best indicator of such intent is the language of the statute, which is to be given its plain and ordinary meaning. *People v. McChriston*, 2014 IL 115310, ¶ 15. However, in cases in which a statute is capable of being understood by reasonably well-informed persons in two or more different ways, the statute will be deemed ambiguous. *Landis v. Marc Realty, L.L.C.*, 235 Ill.2d 1, 11 (2009). Here, differing interpretations among two learned districts of the appellate court demonstrate 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.

Section 8-802(7) 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 in a professional character, necessary to enable him or her professionally to serve the 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"). In its interpretation of section 8-802(7) the Third District Appellate Court 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 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 that has been obtained by the physician, and the First District interpreted this phrase to modify the legal proceedings or type of action in which the disclosure occurs.

A well-established canon of statutory construction is instructive in these circumstances. The last antecedent doctrine, a long-recognized grammatical canon of statutory construction, provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not generally construed as extending to more remote clauses. *City of Mount Carmel v. Partee*, 74 Ill.2d 371, 375 (1979). At first blush, this would appear to favor the First District's interpretation of the phrase "arising from the filing of a report"

as solely modifying the immediately preceding language of "in actions, civil or criminal," and *not* the more remote language of "information [a physician] may have acquired . . ." *See* 735 ILCS 5/8-802(7).

However, there is a corollary rule to the last antecedent rule. According to this rule of punctuation, evidence that a qualifying phrase is supposed to apply to a more remote antecedent instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma. *In re E.B.*, 231 Ill.2d 459, 468 (2008); *See Advincula v. United Blood Services*, 176 Ill.2d 1, 27 (1996) ("Significantly, there is no punctuation setting this qualifying phrase apart from the sentence which precedes it, which might connote that the phrase was intended to modify more remote terms"). 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 legislature easily could have made the choice not to insert commas in that portion of the text, so that it would read "in civil or criminal actions arising from the filing of a report," which would trigger application of the last antecedent rule and support the First District's interpretation. Instead, the use of commas in this portion of the text triggers the corollary rule and supports the Third District's interpretation.

When a statute is ambiguous, this Court may look beyond the language as written to discern the legislative intent and consider the purpose of the law and the evils that the law was designed to remedy. *Palm v. Holocker*, 2018 Il 123152, ¶ 21. In this case, the purpose of the physician-patient privilege supports appellant's

reading of this ambiguous statute. The purposes of the physician-patient privilege are to "encourage free disclosure between a doctor and a patient and to protect the patient from embarrassment and invasion of privacy that disclosure would entail." *People ex. Rel. Department of Professional Regulation v. Manos*, 202 Ill.2d 563, 575 (2002). The privilege illustrates a "legislative balancing between the relationships that society feels should be fostered through the shield of confidentiality and the interests served by disclosure of the information." *Id.* at 575-76. The construction of this provision espoused by the Third District Appellate Court in *People v. Bons*, 2021 IL App (3d) 180464, strikes a better balance than the construction espoused by the First District Appellate Court below. This balanced approach accounts for society's interest in protecting children and discovering child abuse by permitting the disclosure of reports of abuse and neglect under the ANCRA, while also accounting for the equally important public health interest in protecting medical privacy so as to foster an open discourse between patient and physician and to incentivize testing to help contain contagious diseases.

Section 8-802(7) specifically references the ANCRA and deals with the same subject matter as the ANCRA. As such, section 8-802(7) should be read *in pari materia* with the ANCRA. The doctrine of *in pari materia* allows "two statutes dealing with the same subject [to] be considered with reference to one another to give them harmonious effect." *People v. McCarty*, 223 Ill.2d 109, 133 (2006). The ANCRA imposes a statutory duty on certain individuals – such as medical and school personnel – to make a report to the Department of Children and Family Services ("DCFS") when those individuals have "reasonable cause to believe a child known to them in their professional or official capacity may be an abused child." 325 ILCS 5/4 (a)(1), (4).

Prior to the enactment of such mandatory reporting provisions, physicians often failed to report suspected cases of abuse, in part because doing so was regarded as "a breach of the special confidential relationship between physician and patient." Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 Colum. L. Rev. 679, 710 (1966). In 1963, the Children's Bureau and the American Humane Association released model legislative language and guidelines, which were designed to assist states in drafting statutes that would encourage physicians to report cases of suspected child abuse. *Id*. The model laws "require[d] physicians to report cases in which abuse [was] suspected, free[d] them from civil and criminal liability for doing so, and remove[d] any legal prohibition that may [have] prevent[ed] the physician from testifying about the case in court." *Id*. at 711. By 1966, 48 states – including Illinois – had enacted statutes "designed to bring about and increase the reporting of child abuse cases." *Id.* All 48 reporting statutes designated physicians of all types as reporting agents. *Id.* at 712. In Illinois, physicians and dentists were the only designated reporting agents. *Id.* at 713.

The reason that many early reporting statutes focused the reporting requirement solely on doctors was that doctors had the skill and judgment to recognize cases of abuse, but risked being threatened with legal action if they breached patient confidentiality to report a suspected case of abuse. Thus, the main aim of reporting legislation was "to uncover cases that only a physician's skill [could] detect in the course of a comprehensive medical examination and review of the child's medical history." *Id*. In other words, the mandatory reporting statutes released from the confines of the doctor-patient privilege information indicating that a child was being abused.

When considered within this historical framework, it is clear that section

8-802(7) simply exempts from privilege information a doctor is required to disclose in order to comply with his obligations as a mandatory reporter – *i.e.*, information that a child has been abused or neglected. By exempting this sort of information from privilege, section 8-802(7) ensures that the obligation to report abuse and the obligation to protect a patient's privacy are not in conflict. In other words, the privilege is abrogated based on the substance of the information – *i.e.*, that a child has been abused or neglected. The "in compliance" language of section 8-802(7) supports this construction. To act "in compliance" with the ANCRA, a doctor must disclose, in the form of a report to DCFS, information that a child has been abused or neglected. Accordingly, there is no physician-patient privilege with regards to that information because the doctor is required by law to disclose it. In other words, section 8-802(7) exempts from the privilege only that information that a doctor is required to report in order to comply with his obligations as a mandatory reporter. Presumably, had the legislature intended the exception to sweep more broadly in child abuse cases, it would have plainly said so, using language such that the exception is to apply "in all cases involving child abuse," or some such broader language. *See In re Estate of Rivera*, 2018 IL App (1st) 171214, ¶ 51 ("[T]he words chosen by the legislature are the most reliable indication of the legislature's intent"). The "in compliance" language narrows the focus of the exception to only that information that a doctor is required to report in order to comply with the ANCRA.

The reason that information indicating a child has been abused is exempted from the privilege is because the legislature has determined, as a matter of public policy, that cases of suspected abuse should be brought to the attention of the authorities responsible for child protection, and exempting this information from

privilege is necessary to serve that goal of exposing abuse. However, the privilege nevertheless continues to work to protect the revelation of confidential information beyond what is required to be reported by statute. Accordingly, the fact that a doctor may have information that would be circumstantially relevant to an abuse or neglect claim, does not serve to override the defendant's privacy interest. To find as much would be directly contrary to this Court's determination in *Palm*. 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. *Palm v. Holocker*, 2018 IL 123152, ¶¶ 28-30. As such, Torres' privilege of privacy in his STD status cannot be waived by the State simply on the basis of the State's allegation that Torres has committed the charged offense in this case.

The First District's broad interpretation of section 8-802(7) would completely undermine the purpose the privilege exists to serve. This is particularly so with respect to Torres's 2013 chlamydia test results, which resulted from Torres independently seeking care for his uncomfortable physical symptoms. The purpose of the physician-patient privilege is to "encourage free disclosure between a doctor and a patient . . ." *People ex. rel. Department of Professional Regulation v. Manos*, 202 Ill.2d 563, 575 (2002). It would have a chilling effect on such free disclosure between a doctor and a patient, and it would also discourage testing for contagious sexually transmitted diseases, if such sensitive and potentially embarrassing medical information could, unbeknownst to the patient, become subject to disclosure at some future time due to future DCFS investigations or proceedings that might be later initiated, whether the allegations underlying those proceedings eventually prove true or not. This free and open disclosure, which would be discouraged by

the holding below, benefits society by facilitating treatment and helping to contain the transmission of contagious STDs. The Third District's narrow construction of section 8-802(7) 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), because the results of Torres's STD testing did not constitute information that his medical providers would have been required to report under the ANCRA,,these results were privileged, and not subject to disclosure.

C. Torres's 2016 chlamydia test results were subject to the physician-patient privilege, as there was a legitimate medical purpose for this testing, and the legislature has recognized strong privacy interests in the uniquely sensitive and stigmatizing medical information pertaining to STDs, such that Torres would have expected this information to remain private.

As discussed *supra*, the First District Appellate Court below found that Torres's 2013 chlamydia test results were admissible under 8-802(7). With respect to Torres's 2016 chlamydia test results, however, the appellate court found the physician-patient privilege inapplicable to begin with because Torres acquiesced to the request by DCFS to get tested for chlamydia in 2016, rather than seeking testing independently, as he did in 2013. *People v. Torres*, 2022 IL App (1st) 210990-U, ¶¶ 71-73. In so holding, the appellate court cited this Court's *Palm* decision, which explained "that when a patient is not seeking medical treatment, but sees a physician for another purpose, such as obtaining a report to maintain his driving privileges, the physician-patient privilege does not apply." *Torres*, 2022 IL App (1st) 210990-U, ¶ 68. As such, *Torres* found, "The record therefore shows that defendant was tested for chlamydia on October 2016 not for the purpose of seeking

medical treatment, but because he was ordered to do so by DCFS." *Id.* at ¶ 71. Thus, the appellate court concluded, "Guzman was treating J.T., not defendant. There was no physician-patient relationship between Guzman and defendant. Thus there was no privilege." *Id.* at ¶ 71, citing *Palm*, 2018 IL 123152, ¶¶ 34-35.

Yet, the appellate court below misapplied this Court's *Palm* decision to circumstances in this case that are factually distinct. *Palm* relied on *Muller v. Rogers*, a case in which the defendant in a wrongful death action arising from automobile accident was held by the Minnesota Court of Appeals to have waived his right to assert the physician-patient privilege with respect to medical information he provided to the Department of Public Safety for the benefit of keeping his driver's license or obtaining handicapped license plates. *Palm*, 2018 IL 123152, ¶ 35, citing *Muller v. Rogers*, 534 N.W.2d 724 (Minn. Ct. App. 1995). The *Muller* Court reasoned:

> Disclosure of otherwise confidential information to third persons with the acquiescence of the patient destroys the confidentiality of a communication and constitutes a waiver of the physician-patient privilege. In this case, the defendant disclosed medical information to the Department of Public Safety "for the benefit of keeping a driver's license or obtaining handicapped license plates." . . . Defendant voluntarily provided information about his medical condition or, at the very least, he acquiesced in that disclosure. The purpose of the defendant's disclosure to the Department of Public Safety was to obtain driving or licensing privileges, and not to obtain medical treatment. The defendant has not maintained the confidentiality of his medical records, and he has communicated that medical information outside the context of a patient seeking treatment. By so doing, he has waived his right to assert the privilege as to the information disclosed.

Muller, 534 N.W.2d at 727 (citations omitted).

Thus, there is no privilege where a patient sees a physician to obtain medical information to be shared with some other party for some nonmedical purpose, rather than for the purpose of seeking medical treatment for a medical problem. *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 intends to share his medical information with others to effectuate some nonmedical purpose, rather than have the information remain private in a purely medical context. *People v. Covington*, 19 P.3d 15, 20 (Col. 2001) (disclosure of medical information to third party waives physician-patient privilege); *Djeddah v. Williams*, 89 A.D.3d 513, 514 (N.Y. App. Div. 2011) (same); *Los Angeles Gay and Lesbian Center v. Superior Court*, 194 Cal.App.4th 288, 309 (Cal. Ct. App. 2011) (same); *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 either made or acquiesced in by the privilege holder."). As such, in *Palm*, when the defendant submitted his physician's report 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.

Yet, such reasoning does not extend to Torres's 2016 chlamydia test results, as these circumstances differ from those in *Palm*. Torres would have expected uniquely sensitive and stigmatizing medical information such as his sexually transmitted disease ("STD") status to remain privileged, given the strong privacy interests our legislature has recognized in such information. *See* 410 ILCS 325/2 ("The General Assembly finds that sexually transmissible diseases, by their nature, involve sensitive issues of privacy, and it is the intent of the General Assembly that all programs designed to deal with these diseases afford patients privacy, confidentiality and dignity."). Our legislature has passed the Illinois Sexually Transmissible Disease Control Act ("STDCA"), which requires health providers treating individuals with STDs and labs performing tests for STDs to report the

results to the Department of Public Health. 410 ILCS 325/4. However, in doing so, the legislature has enacted stringent standards of confidentiality to prevent the public disclosure of this particularly sensitive medical information. The STDCA requires that all records and information held by the Department of Health and its representatives relating to STDs are kept confidential and exempt from inspection and copying under the Freedom of Information Act. 410 ILCS 325/8. Such disclosures of information are also prohibited in court or before any tribunal, board, or agency without the consent of the subject of the information, unless such information is presented statistically and made unidentifiable. 410 ILCS 325/8. Violation of these confidentiality provisions may result in criminal sanctions. 410 ILCS 325/8.

These enactments show that our legislature has recognized very strong privacy interests in medical information pertaining to STDs. Given Illinois' legislative policy preferences favoring strong privacy for STD status, Torres reasonably would have assumed his 2016 STD results would have remained confidential, or perhaps limited to DCFS proceedings, but would not necessarily have understood that acquiescing to DCFS's request for testing would abrogate his physician-patient privilege completely, even in criminal proceedings, with respect to his 2016 chlamydia test results. *See People v. Rivera*, 33 N.E.3d 465, 469-470 (N.Y. App. Div. 2015) ("[I]t is one thing to allow the introduction of statements or admissions in child protective proceedings, whose aim is the protection of children, and quite another to allow the introduction of those same statements, through a defendant's psychiatrist, at a criminal proceeding . . . Even if a patient is cognizant of his psychiatrist's reporting obligations under child protective statutes, that does not mean that he should have any expectation that statements made during treatment will be used against him in a criminal matter.").

Because Torres would not have reasonably understood that acquiescing to the DCFS request for chlamydia testing would have completely abrogated his right to keep this deeply sensitive information confidential, his acquiescence to DCFS testing did not impliedly waived his right to assert the privilege. To so hold would be at odds with this Court's precedent on what it means to waive a right or 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. The requirement of a knowing and intelligent relinquishment "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. A defendant may impliedly waive a right or privilege through his or her conduct. *Id*. at ¶ 38. Waiver by conduct requires that a defendant receive a warning about the consequences of his conduct. *Id.* at ¶ 42. While these principles have often been cited in connection with the waiver of the constitutional right to counsel, this Court has also cited them as applicable to a purely statutory right, such as the right to post-conviction counsel. *Id*. at ¶¶ 36-38, 42, 51.

Here, there was no intentional relinquishment of a known right or privilege. Torres reasonably would have expected sensitive information such as his STD status to be treated with care and confidentiality, particularly given the strong privacy and public health interests in the confidentiality of medical information pertaining to STDs recognized by our legislature. This stands in stark contrast to the kind of less stigmatizing medical information contained in a physician's report to maintain driving privileges, such as eye examinations. Neither can waiver by conduct be said to apply here where Torres was not warned that acquiescing

to the DCFS request for testing could result in preventing him from subsequently being able to assert his right to confidentiality over such medical information in criminal proceedings against him. *See Lesley*, 2018 IL 122100, ¶ 42 (waiver by conduct requires that a defendant receive a warning about the consequences of his conduct). As such, this Court should reject the First District Appellate Court's reasoning with respect to whether the privilege applied to Torres's 2016 chlamydia test results, as such a holding would be inconsistent with this Court's precedent on the standards applicable to waiver, and would result in the unjust consequence of permitting an unknowing waiver of a privilege or right. *People v. Goossens*, 2015 IL 118347, ¶ 9 (statutes must be construed with the presumption that the legislature did not intend to create absurd, inconvenient, or unjust consequences).

Furthermore, it was misleading for the appellate court to state that "Guzman was treating J.T., not defendant." *People v. Torres*, 2022 IL App (1st) 210990-U, ¶ 71. In fact, 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) Therefore, Guzman did treat Torres for a medical condition, so there was in fact a patient-provider relationship between them. Torres was not required to acquiesce to DCFS's request for testing; he could have refused. *Dupuy v. McDonald*, 141 F.Supp.2d 1090, 1106 (N.D. Ill. 2001) (compliance with safety and protective measures put in place by DCFS during a pending investigation are entirely voluntary). His agreement to the STD test appears to be at least in part motivated by his unprotected sexual encounter that he admitted to Nurse Guzman, and he readily accepted treatment once his condition

had been identified. Therefore, it is not fair to characterize his testing and treatment as for a purely nonmedical purpose, even if it was DCFS that initiated the idea that Torres get tested and requested him to do so. Given that there appears to be a legitimate medical purpose for Torres' getting tested and treated by Guzman, he would have expected the privileges attendant a patient-provider relationship to apply, especially to the uniquely sensitive and stigmatizing kind of medical information at issue here.

Lastly, the policy implications of the appellate court's holding below in this case are troubling and substantial. Finding the privilege inapplicable to circumstances such as these would be inconsistent with the legislature's stated policies and goals regarding sexually transmitted diseases. Our legislature has "f[ound] and declare[d] 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 visitors to the State." 410 ILCS 325/2. Furthermore, the legislature has "f[ound] 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." *Id.* For these reasons, the legislature has sought to enact the strictest standards of confidentiality to encourage testing and detection of STDs. *See* 410 ILCS 325/8. These policies would be completely undermined by the appellate court's holding below. Particularly given that the 2016 test and incident does not even constitute any proof of the underlying 2013 charged offense, allowing the admission of such information would constitute a very broad application of the exception to the privilege indeed, which would disincentivize the confidential testing and detection of STD's that the legislature

has sought to encourage.

Thus, this Court should find that Torres's 2016 chlamydia test results were subject to the physician-patient privilege, and counsel should have sought to exclude them, along with Torres's 2013 chlamydia test results.

D. Torres was deprived of the effective assistance of counsel.

Torres received ineffective assistance of trial counsel when counsel failed to object to or exclude as privileged the admission of Torres's private medical information at his trial. Both the United States and Illinois Constitutions guarantee a defendant the right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Ill. Const. art. I, section 8; *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *People v. Albanese*, 104 Ill.2d 504, 525-526 (1984). In addressing ineffective assistance claims, reviewing courts use the standard that the United States Supreme Court announced in *Strickland*. *Albanese*, 104 Ill.2d at 525-526. To prove ineffectiveness, *Strickland* requires the defendant show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, a reasonable probability exists that the result of the proceedings would have been different. *Id*.; *Strickland*, 466 U.S. at 687.

In determining whether counsel's conduct was objectively reasonable, ordinarily, trial counsel's decisions are treated as strategic matters that deserve great deference. *People v. West*, 187 Ill.2d 418, 432-33 (1999). However, "strategy" is not a magic word that insulates an attorney's performance from review. *Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992) ("we wish to emphasize the district court's observation that the mere incantation of the word 'strategy' does not insulate attorney behavior from review"). Tactical decisions that do not seek to avoid "the admission of incriminating statements, harmful opinions, and

prejudicial facts" are not sound trial strategy. *People v. King*, 316 Ill.App.3d 901, 916 (1st Dist. 2000). For purposes of demonstrating *Strickland* prejudice, a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A reasonable probability of a different outcome may exist even if the chance of acquittal is significantly less than fifty percent. *People v. McCarter*, 385 Ill.App.3d 919, 935 (1st Dist. 2008). The defendant need only show that the chance of a different outcome was "better than negligible." *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003).

1. Deficient performance.

At trial, the parties presented evidence that J.T. participated in three forensic interviews at the Children's Advocacy Center ("CAC"). On two occasions, she named someone other than Torres, a boy named J., as the person with whom she had had sexual contact. (R. 370, 518) It was only on the third occasion, after a conversation with her mother, about which she and her mother were unable to recall basic details, that Torres became the person she named as having sexually assaulted her. (R. 378, 412) Given the inconsistencies in J.T.'s account about the identity of the perpetrator, the fact that Torres tested positive for chlamydia at the same time as J.T. became an essential part of the State's evidence against Torres. This was evidenced by the State's extensive arguments about Torres' test results in its opening closing and rebuttal closing arguments. (R. 568-570, 572, 575, 582-583) Yet, as explained *supra*, there was a strong basis to exclude this evidence; as such, counsel had a professional obligation to prevent its admission.

Counsel's failure to prevent the admission of this harmful evidence constituted deficient performance. Counsel has a duty to exclude damaging evidence where there is a legal basis to do so. *See People v. Royse*, 99 Ill.2d 163, 171–74 (1983)

(finding defense counsel's representation ineffective after counsel failed to object to damaging testimony that should have been excluded as hearsay and volunteered incriminating information about other drug transactions in which defendant was involved); *see also People v. Simpson*, 2015 IL 116512, ¶ 36 (finding that defense counsel was ineffective in failing to object to the introduction of a witness's statement where the "personal knowledge" requirement for admission of a prior inconsistent statement was not satisfied); *People v. Othman*, 2020 IL App (1st) 150823-B, ¶ 76 (counsel's assistance found to be unreasonable when counsel did not object to prejudicial testimony identifying her client as the culprit that should have been excluded as hearsay). Tactical decisions that do not seek to avoid "the admission of incriminating statements, harmful opinions, and prejudicial facts" do not constitute *sound* trial strategy, the only kind of strategy that is protected. *People v. King*, 316 Ill.App.3d 901, 916 (1st Dist. 2000). Here, there was no conceivable strategic purpose for not challenging the admission of Torres' positive chlamydia test results, as this was highly damaging evidence, and asserting Torres' privilege would have prevented its admission. As such, counsel's performance was deficient.

2. Prejudice

Counsel's failure to assert Torres' physician-patient privilege was sufficiently prejudicial that there was a reasonable probability of a different outcome absent the error. The damaging evidence at issue in this case, Torres' positive chlamydia test results in 2013 and 2016, was elicited repeatedly throughout the State's case-in-chief as corroborative evidence of J.T.'s account, and was used by the State repeatedly and extensively to support its position during both opening closing and rebuttal closing arguments. (R. 568-570, 572, 575, 582-583) Particularly where J.T. repeatedly named someone other than Torres as the perpetrator before

ultimately identifying Torres, the positive chlamydia results were an essential part of an otherwise weak case against Torres.

The prejudice in this case from counsel's error was exacerbated by the repetitive nature of the evidence. Indeed, numerous witnesses testified that Torres tested positive for chlamydia in 2013 and 2016. First, Dr. Lauren Bence testified that she talked to Torres on November 24, 2013, to answer any questions about his treatment for high suspicion of sexually transmitted disease due to penile discharge and pain while urinating. (R. 437-438) She also testified that urine cultures from Torres' sample were sent out to the lab that day. (R. 438) Physician assistant Denise Sher testified that on November 24, 2013, she examined and treated Torres for sexually transmitted disease after he complained of painful urination and disclosed that he had had an unprotected sexual encounter. (R. 466-467) Physician assistant Richard Montes testified that on November 26, 2013, he reviewed Torres' lab results and informed him by phone that he had tested positive for chlamydia. (R. 443-444) Next, nurse practitioner Susana Guzman testified that in October of 2016, she administered treatment to J.T., Jasmine T., as well as Torres, after all three of them had tested positive for chlamydia. (R. 473, 476-477) Nurse Guzman testified that Torres denied any sexual contact with his daughter at that time but disclosed that he had had an unprotected sexual encounter with someone other than Jasmine. (R. 477) Nurse Guzman also testified that she noticed in Torres' chart that he had tested positive for chlamydia in 2013. (R. 478) Jasmine T. testified that Torres tested positive for chlamydia in 2016. (R. 377) Lastly, Detective Rodriguez testified that she learned from a nurse that Torres had tested positive for chlamydia in 2013 and 2016, and then filed a grand jury subpoena for Torres' medical records, leading to his arrest on November 8,

2016. (R. 520-522)

Thus, 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. The repetitive nature of the evidence undoubtedly heightened the prejudice from counsel's failure to seek its exclusion pursuant to Torres' physician-patient privilege. 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).

In *Bons*, the appellate court found harmless the error of admitting the defendant's positive chlamydia test result in violation of his physician-patient privilege, in part because the victim's reports and description of the defendant's abuse were "detailed and consistent." *Bons*, 2021 IL App (3d) 180464, ¶ 48. Such was not the case here. The parties presented evidence that J.T. participated in three forensic interviews at the Children's Advocacy Centerm and it was only on the third occasion, after a conversation with her mother, about which she was unable to recall basic details, that Torres became the person she named as having sexually assaulted her. (R. 412, 520) On two prior occasions, she named someone other than Torres, a boy named J., as the person with whom she had had sexual contact. (R. 515, 518) Because there was no testimony on any of the details of the conversation with her mother in which she first made the outcry involving Torres, it is impossible to know whether her identification of Torres was natural and unprompted, or whether her mother said anything that would have influenced J.T.'s identification of Torres. (R. 412) Given the inconsistencies in J.T.'s account about the identity of the perpetrator, the fact that Torres tested positive for

chlamydia at the same time as J.T. became an important part of the State's evidence against Torres.

The prejudice of counsel's error is also demonstrated by the State's heavy reliance on Torres' chlamydia test results throughout its opening closing and rebuttal closing arguments. (R. 568-570, 572, 575, 582-583) First, early in the State's opening closing statement, the prosecutor devoted significant time to recounting in detailed fashion the timeline of Torres' testing and treatment for chlamydia in both 2013 and 2016. (R. 568-570, 572) The prosecutor then argued that the timing of Torres' positive chlamydia test results coinciding with J.T.'s positive chlamydia test results circumstantially proved that Torres had sexually penetrated J.T. (R. 575) The State then returned to this theme even more forcefully in its rebuttal closing statement, arguing that Torres' test results constituted "incredibly strong" and "overwhelming corroborative" evidence that Torres sexually penetrated J.T.:

> The chlamydia is not anything that needs to be proven but what it does do is offer incredibly strong circumstantial evidence, overwhelming corroborative evidence that supports that it is Ramon Torres who is the one who sexually assaulted his own daughter. And the way it corroborates that is if you look at the time line of it. Is it a coincidence, do you think, that both the defendant, Ramon Torres, and his 4-year-old daughter happen to have chlamydia at the same time in 2013 and that they both have it again in 2016? I mean, is that a coincidence? Is he trying to say it's not him? And his wife, Jasmine T[.], also has chlamydia in 2016. He's the only person that has access to both of those women. And both of those women and himself turn up with chlamydia. Not a coincidence.

(R. 582) Thus, in the State's own words, Torres' test results constituted "incredibly strong" supporting evidence, and the repeated references to this evidence indicated a heavy reliance on it, rendering the prejudice from counsel's failure to seek its exclusion exceedingly high.

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. (542) Thus, it is not clear that his statement related to the incident charged by the State, which occurred in 2013. Torres' statement notwithstanding, 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, or a "better than negligible" chance, that a different outcome would have resulted absent counsel's error. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003) (to demonstrate *Strickland* prejudice, a defendant need only show that the chance of a different outcome was "better than negligible."); *People v. McCarter*, 385 Ill.App.3d 919, 935 (1st Dist. 2008) (A reasonable probability of a different outcome may exist even where the chance of acquittal is significantly less than fifty percent).

Thus, where Torres has demonstrated that his counsel rendered deficient performance, and he has demonstrated that there was a reasonable probability of a different outcome absent counsel's error, 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 District, reverse appellant's conviction, and remand for a new trial.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

DEEPA PUNJABI
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 47 pages.

/s/Deepa Punjabi
DEEPA PUNJABI
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Ramon Torres No. 129289

Index to the Record A-1

Appellate Court Decision A-4

Notice of Appeal A-29

INDEX TO THE RECORD

Common Law Record ("C") **Page**

Docket Sheet. 6

Indictment (December 6, 2016) 32

Arrest Report (November 11, 2016). 40

Complaint for Preliminary Examination (November 11, 2016). 45

Appearance (November 11, 2016) 46, 74

Memorandum of Orders ("Half Sheet") 53

State's Motion for Discovery (December 13, 2016) 67

Defendant's Motion for Discovery 69

State's Answer to Discovery (December 13, 2016) 75

Defendant's Answer to Discovery (July 25, 2017) 112, 187

Motion for Hearing Pursuant to 725 Ilcs 5/115-10 117

Motion to Allow Evidence of Other Conduct (January 3, 2018). 125

Motion to Suppress Statements (January 14, 2018) 134

People's Second Motion to Admit Proof of Other Crimes (July8, 2019). 204

Defendant's Motion in Limine (July 8, 2019) 218

Motion for New Trial (August 1, 2019) 223

Motion to Reconsider Sentence (August 1, 2019) 226

Sentencing Order (August 1, 2019) (June 4, 2021). 227, 258

Notice of Appeal (August 1, 2019) 231, 267

Impounding Order (January 15, 2020) 238

Mandate of the Appellate Court, 1-19-1691 (Febraury 27, 2020) 241

Motion for this Court to Order a Hearing to Determine If Ramon Torres Is Entitled to a New Trial Or in the Alternative a New Sentencing Hearing (December 2, 2020) 248

Motion for Defendant to Submit Blood Specimens To the Illinois Department of State Police For Genetic Analysis 262

Order for Defendant to Submit Blood Specimens To the Illinois Department of State Police For Genetic Analysis 263

Motion for Defendant to Undergo Medical Testing for Sexually Transmittable Diseases (July 14, 2021) 264

Supplemental Common Law Record ("C.I.")

Presentence Investigation Report (August 1, 2019) 4

Victim Impact Statements 8

Jury Verdict Form Signed 43

Jury Instructions 44

Report of Proceedings ("R")

		Direct	Cross	Redir.	Recr.
July 9, 2019					
Jury Trial					
Witnesses					
	Jeanne Kolasa	338			
	Gerardo Murillo	344	352	354	
	William Simon	355	358		
	Jasmine Torres	360	382		
	J.T.	395	412	419	
	Katherine Schroeder, M.D.	421	427		
	Lauren Bence, M.D.	429			
	Richard Montes	440			
July 10, 2019					
	Danice Sher	463			
	Susana Guzman	468	479		
	Lynn Aladeen	481	494		
	Detective Emily Rodriguez	508	530	543	544

		Direct	Cross	Redir.	Recr.
August 1, 2019					
Witnesses in Aggravation					
	Investigator Gerardo Murillo	603			
	Investigator William Simon	607			
	J.T.	611			
July 15, 2021					
	Ramon Torres	665	668		

2022 IL App (1st) 210990-U

No. 1-21-0990

Order filed December 16, 2022

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 CR 17805
	)	
RAMON TORRES,	)	Honorable,
	)	William B. Raines
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ODEN JOHNSON delivered the judgment of the court.
Justices Walker and Tailor concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for predatory criminal sexual assault of his four-year-old daughter is affirmed where trial counsel was not ineffective for failing to challenge the admission of defendant's positive test results for a sexually transmitted disease.

¶ 2 Following a jury trial, defendant Ramon Torres was convicted, *in absentia*, of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and sentenced to 55 years' imprisonment. On appeal, defendant contends his trial counsel rendered ineffective assistance because counsel failed to challenge the admission of defendant's positive test results for

chlamydia. Defendant argues the State was not entitled to admit such evidence because it did not fall under any of the exceptions to the physician-patient privilege enumerated in section 8-802 of the Code of Civil Procedure (735 ILCS 5/8-802 (West 2018)). For the reasons below, we affirm.

¶ 3 Defendant was charged with one count of predatory criminal sexual assault of a child for allegedly committing an act of sexual penetration upon his four-year-old daughter, J.T., by making contact between his penis and her sex organ. The charge alleged that the act occurred between March 1, 2012, and November 30, 2013.

¶ 4 On April 15, 2019, the day defendant's jury trial was scheduled to begin, defendant failed to appear in court. Defense counsel stated that defendant's phone had been disconnected and his family was unaware of his whereabouts. The trial court noted that it had twice admonished defendant that he was required to appear for every court date, and that he could be tried and sentenced *in absentia*.

¶ 5 Defendant's jury trial ultimately began on July 8, 2019. Prior to the start of trial, the State presented testimony from two investigators with the Cook County State's Attorney's Office regarding their unsuccessful attempts to locate defendant. The prosecutor also pointed out that the clerk of the circuit court had sent notice to defendant via certified mail informing him of the trial date and that the trial would commence without him if he failed to appear. The trial court found that defendant's failure to appear in court was willful and proceeded with the trial in his absence.

¶ 6 At trial, Jasmine T. testified that J.T. was born April 6, 2009. Defendant is J.T.'s father and was born February 13, 1990. Jasmine and defendant were married in July 2011. They initially lived in Rantoul, Illinois with their two children and Jasmine's first child. In mid-2012, the couple separated. Defendant moved to Chicago and lived with his cousin, Vanessa Valentin. Vanessa had

a young son, J.,[1] who was "a little bit older" than J.T. During that time, J.T. and her brother, E.T., visited defendant at Vanessa's house every other weekend.

¶ 7 In November 2013, J.T. told Jasmine that she could not use the restroom because her "private area" hurt. Jasmine observed that J.T.'s vagina was "very red and burned." J.T. was four years old. Jasmine took J.T. to the emergency room at St. Mary's Hospital. J.T. tested positive for chlamydia. The same day or the next day, the Department of Children and Family Services (DCFS) told Jasmine that she and defendant had to get tested for chlamydia. Jasmine got tested within a few days. Defendant did not get tested with her.

¶ 8 Shortly thereafter, Jasmine brought J.T. to the Children's Advocacy Center (CAC) for an interview. DCFS informed Jasmine that J.T. had stated during the interview that her cousin, J., had done something to her.

¶ 9 About two weeks later, Jasmine spoke with defendant over the phone and asked him if he had gotten tested for chlamydia. Defendant told Jasmine he had not. By the end of 2013, no one had been charged with an offense against J.T.

¶ 10 At the end of 2013 or beginning of 2014, DCFS informed Jasmine that defendant had tested negative for chlamydia. Consequently, Jasmine and defendant reconciled and resumed living together with their children. Jasmine and defendant resumed having intimate relations.

¶ 11 On a Saturday in October 2016, Jasmine took J.T. to her pediatrician's office for a routine school physical. J.T. was examined by the physician's assistant, Susana Guzman. Jasmine told Guzman she was concerned because J.T. recently had vaginal discharge and had a history of chlamydia. Guzman tested J.T. for chlamydia.

[1] J.'s last name or initial does not appear in the record.

¶ 12 The following Monday, the doctor's office informed Jasmine that J.T. had again tested positive for chlamydia and advised her to bring J.T. in immediately for treatment. Jasmine and defendant brought J.T. in that day. DCFS also contacted Jasmine that day. A day or two later, Jasmine was tested for chlamydia. During the week, Jasmine brought J.T. to the CAC for an interview. J.T. did not disclose anyone as a possible abuser. On Saturday, Jasmine and defendant learned they both tested positive for chlamydia. The trial court overruled defense counsel's hearsay objection. Jasmine testified that defendant moved out of their house that night.

¶ 13 Shortly thereafter, Jasmine asked J.T. to tell her what happened. Jasmine told J.T. that if she did not speak up, her father, defendant, could get in trouble for something he did not do. J.T. told Jasmine that defendant did do something to her when she visited him at Vanessa's house. J.T. told Jasmine that while she was sleeping, defendant put his private part in her private part. J.T. told Jasmine that she began crying and asked defendant to stop but he did not.

¶ 14 Jasmine testified that she immediately went to the police station and filed a sexual assault report. Jasmine and J.T. returned to the CAC to speak with their DCFS caseworker so they could conduct another interview. Jasmine never told J.T. what to say during the interview. Jasmine was still married to defendant at the time of trial because she could not afford to file for divorce.

¶ 15 On cross-examination, Jasmine testified that in 2013 she moved back to Chicago and rented an apartment with her brother, Calvin[2], and his girlfriend. Jasmine had another brother named Jonathan Rodriguez. Jasmine's cousin, Enrique Mendez, lived with her mother.

¶ 16 Pursuant to defense counsel's questioning, Jasmine confirmed that shortly after November 22, 2013, DCFS entered "an order" that anyone who had contact with J.T. was "ordered to be

[2] Calvin's last name does not appear in the record.

tested" for chlamydia. That order was not "limited" to defendant. Jasmine's brother Calvin and Alberto Rosado both tested negative. Jasmine could not recall if DCFS prohibited J.T. from going to Jasmine's mother's house. Nor did Jasmine recall if Mendez had been tested at that time because he did not move into her mother's house until 2016. Jasmine acknowledged that during the CAC interview in 2013 and the first CAC interview in 2016, J.T. identified her young cousin, J., as the person who touched her.

¶ 17 J.T. testified that she was born April 6, 2009, and was 10 years old at the time of trial. J.T. confirmed she knew the difference between a truth and a lie and would only tell the truth in court. Defendant was J.T.'s father. J.T. testified that when she was younger, she sometimes slept overnight at Vanessa's house. Defendant and J.T.'s brother, E.T., slept in the same bedroom with J.T. at Vanessa's house. One night at Vanessa's house, J.T. awoke in the middle of the night because her dad was touching her "private part" with his "private part." J.T. described her private part as being in front where she goes "pee" and defendant's private part as what he uses "to pee." When J.T. went to bed that night, she was wearing a pajama shirt and pants with underwear underneath. When J.T. awoke, her pajama pants and underwear were down. Defendant touched J.T. with his private part for about five seconds. J.T. asked defendant to stop. Defendant stopped and left the room. J.T. fell asleep. The next day, she did not tell anyone what happened because she was afraid she would get in trouble from her mom and dad.

¶ 18 Sometime thereafter, J.T.'s private part hurt and was stinging in the same area where defendant had touched her with his private part. It hurt more when she went "pee." J.T. told her mom that it hurt when she "peed," and her mom took her to the doctor. After seeing the doctor, J.T. went to a colorful building with an interview room. During her first interview, J.T. did not tell

the person what defendant did to her because she was afraid she would get in trouble and her mom would be mad at her. Instead, J.T. said J. touched her.

¶ 19 J.T. testified that when she was a little older, she went to see a lady doctor. After seeing that doctor, J.T. returned to the same building for another interview. J.T. told a woman there what defendant did to her. J.T. could not recall what she said during the interview but remembered saying defendant was the person who did something to her. J.T. was no longer afraid to say it was defendant because she had already told her mom what happened, and she did not get in trouble.

¶ 20 On cross-examination, J.T. acknowledged that at the interviews, she told the people that she knew the difference between the truth and a lie and said J. had done something to her private part. She also told them defendant had not done anything to her. J.T. acknowledged that she spoke with several people, including her mom, about the case and her testimony. When J.T. told her mom what defendant did, her mom became angry with defendant.

¶ 21 On redirect examination, J.T. testified that no one told her what to say in court. She confirmed that her trial testimony was the truth.

¶ 22 Dr. Katherine Schroeder testified that on November 23, 2013, she treated J.T. in the emergency room of St. Mary's Hospital for chlamydia. A lab test taken the previous day indicated J.T. was positive for the disease. Hospital personnel notified DCFS that day of J.T.'s health status. After J.T.'s treatment was complete, she waited at the hospital for DCFS to arrive.

¶ 23 On cross-examination, Schroeder explained that symptoms of chlamydia manifest one to two weeks after the disease is acquired. There is no method to determine how a person acquired the disease.

¶ 24 Dr. Lauren Bence testified that on November 23, 2013, she took over J.T.'s care from Schroeder following a shift change at St. Mary's Hospital. Schroeder told Bence that J.T. had tested positive for chlamydia and was treated with antibiotics. Schroeder also told Bence that they were waiting for DCFS to return the hospital's call. Bence testified that it was her duty to ensure DCFS had been contacted and that they had a "safe plan." DCFS was supposed to go to the family's home that day to evaluate the safety situation in the home. However, DCFS informed the hospital that it would not be able to evaluate the home until the following morning. Bence spoke with Jasmine to ensure that no one in the home posed a threat to J.T.

¶ 25 The next day, November 24, 2013, Bence and physician's assistant Danice Sher were seeing patients in the emergency room with Bence overseeing the care given to all the patients. Defendant came to the hospital that day complaining of symptoms that were highly suspicious of him having an STD.

¶ 26 Danice Sher testified that on November 24, 2013, she was working with Bence in the emergency room at St. Mary's Hospital. Defendant came to the emergency room complaining of stinging when he urinated. Defendant told Sher he recently had an unprotected sexual encounter which, coupled with his symptom, raised suspicion that he had an STD. Sher examined defendant, ordered tests for gonorrhea and chlamydia, and administered medication to him to treat the STDs.

¶ 27 Physician's assistant Richard Montes testified that on November 26, 2013, he was working in the emergency room of St. Mary's Hospital and received lab test results indicating defendant was positive for chlamydia. Montes called defendant and informed him of his positive test result. Montes advised defendant to contact any sexual partners he may have had and to tell them to get treated for chlamydia. Defendant confirmed he understood and said he had no questions.

¶ 28 Nurse practitioner Susana Guzman testified that on October 8, 2016, she was working at the Young Family Health Associates clinic when Jasmine brought J.T. in for a physical exam. Jasmine told Guzman J.T. had been a victim of abuse in 2013 and had tested positive for chlamydia and herpes. She also said J.T. recently had vaginal discharge. Guzman tested J.T. for gonorrhea and chlamydia. A few days later, Guzman received the test results which indicated J.T. was positive for chlamydia. Guzman called Jasmine and told her to bring J.T. back to the clinic. Guzman did not tell Jasmine the test results over the phone.

¶ 29 Jasmine arrived at the clinic with J.T. and defendant. Guzman spoke with Jasmine alone and informed her of the positive chlamydia result. Guzman then administered medication to J.T.

¶ 30 Guzman notified DCFS that day of J.T.'s positive chlamydia test. As part of that process, all the family members in J.T.'s household were required to be tested for chlamydia, including Jasmine and defendant, who were tested the next day. A few days later, Guzman received the test results for Jasmine and defendant, and they returned to the clinic together. Both had tested positive for chlamydia. Guzman spoke with Jasmine about DCFS's involvement and told her defendant was not allowed to be in the home during "the investigation."

¶ 31 Guzman testified that defendant adamantly denied having any sexual contact with J.T. but admitted he had unprotected sex with someone other than Jasmine. When looking at defendant's medical history, Guzman noticed he had tested positive for chlamydia in 2013. Consequently, Guzman notified DCFS and the CAC.

¶ 32 Lynn Aladeen, forensic interviewer with the CAC, testified that on October 24, 2016, she interviewed J.T., who was about seven years old. Prior to the interview, Aladeen met with the people investigating J.T.'s case, including Cynthia Pettis from DCFS, Chicago police detective

Emily Rodriguez, and Assistant State's Attorney Jeremiah Lewellen. Aladeen's interview with J.T. was videorecorded. Aladeen testified that the recording truly and accurately reflected the interview. The videorecording was published to the jury.

¶ 33 This court viewed the video of the interview. Therein, J.T. told Aladeen that a long time ago, she was sleeping at Vanessa's house in a bed she shared with her dad and her brother, E.T. J.T. woke up when her dad put his private part in her private part. J.T. stated that she began crying because her private part was hurting. J.T. stated that her private part was the part of her body where girls go "pee." J.T. said her dad had pulled down her clothes while she was sleeping, and he pulled them back up when she woke up. J.T. told Aladeen that her dad told her not to tell anyone.

¶ 34 Chicago police detective Emily Rodriguez testified that on November 25, 2013, she was assigned to investigate J.T.'s case. That day, Rodriguez received a DCFS hotline report that J.T., a four-year-old, had contracted chlamydia. Someone had also filed a case report with the police. Rodriguez contacted Jasmine and told her she would be the detective in charge of J.T.'s case and that someone from the intake office at the CAC would contact her to schedule a forensic interview for J.T. The forensic interview was conducted on December 2, 2013. During that interview, J.T. named her six-year-old cousin, J., as the person who touched her. J.T. did not name any other possible offenders and Rodriguez had no other lead. Thus, the investigation was suspended.

¶ 35 Nearly three years later, on October 18, 2016, Rodriguez received a report from the DCFS hotline that J.T. had contracted chlamydia again. J.T. underwent a second forensic interview at the CAC that same day. J.T. again said her cousin, J., had touched her. Rodriguez told Jasmine to call her if any new information became available.

¶ 36 On October 24, 2016, Jasmine told Rodriguez that DCFS directed Jasmine and defendant to get tested for chlamydia. They both tested positive. Jasmine also told Rodriguez about a conversation she had with J.T. Based on that conversation, Aladeen conducted a forensic interview with J.T. that same day at the CAC. During that interview, J.T. named defendant as the person who had sexually abused her. Around the same time of the interview, Rodriguez requested J.T.'s past medical records. A nurse told Rodriguez that defendant had been treated for chlamydia in 2013. Rodriguez then filed grand jury subpoenas for defendant's medial records from November 2013 through October 2016. On November 2, 2016, Rodriguez received defendant's medical records from the hospital. On November 8, 2016, defendant was arrested.

¶ 37 On November 9, 2016, Rodriguez and her partner, detective Manuel De La Torre, interviewed defendant while he was in custody. The interview was videorecorded. After being advised of his *Miranda* rights, defendant admitted he made contact between his penis and J.T.'s vagina. The videorecording of defendant's interview was published to the jury.

¶ 38 This court viewed the video of defendant's interview with the police. Therein, after being advised of his *Miranda* rights, defendant told the detectives that both he and J.T. tested positive for chlamydia. Defendant told the detectives that the incident happened when he was living at his cousin Vanessa's house. Defendant had his own room at Vanessa's. J.T. and E.T. were asleep in the room. Defendant was "frustrated" because a couple of girls were supposed to come over that night, but they did not come. Defendant stated that he got drunk and was smoking. Defendant began crying and told the detectives he made a mistake. Defendant stated that while J.T. was sleeping, he removed her clothes. He then "took out" his "private part." Defendant acknowledged to Detective Rodriguez that he was referring to his penis. Defendant stated that he rubbed his penis

on J.T.'s "private area" for a couple minutes. He acknowledged to the detectives that he meant J.T.'s vagina. Defendant said he stopped because he realized what he was doing was wrong and J.T. woke up. Defendant said he left the room. J.T. put her clothes back on herself. Defendant told the detectives that he later told J.T. that he was sorry and that it would never happen again.

¶ 39 Defendant told the detectives that he did not know how J.T. got chlamydia a second time. He swore that he never abused her again. Defendant stated that he went to the hospital in 2013 because it burned when he went to the bathroom. At that time, he knew that Jasmine had taken J.T. to the hospital. Defendant stated that he tested positive for chlamydia in 2013 and received medical treatment. Detective De La Torre asked defendant why he got tested again in 2016. Defendant stated that DCFS and the doctors told the family that everyone in the house had to get tested. Defendant maintained that he did not give J.T. chlamydia again in 2016.

¶ 40 On cross-examination, Rodriguez testified that she never interviewed Enrique Mendez. Rodriguez did not recall interviewing defendant on November 10, 2016, but acknowledged the interview was reflected in a "crimes printout" from the State's Attorney's Office. She did not recall defendant telling her that the sexual contact incident at Vanessa's house occurred in 2014.

¶ 41 The State presented defendant's birth certificate indicating he was born February 13, 1990.

¶ 42 Defense counsel presented a stipulation that Marilyn Soto, a forensic interviewer at the CAC, interviewed J.T. on December 2, 2013, which was videorecorded. Counsel presented a second stipulation that Elizabeth Perez, a forensic interviewer at the CAC, interviewed J.T. on October 18, 2016, which was videorecorded. Defense counsel published videos of both interviews to the jury.

¶ 43 This court viewed the two videos presented by the defense. In both interviews, J.T. names J., whom she says is six years old, as the only person who touched her "private part."

¶ 44 The jury found defendant guilty beyond a reasonable doubt of predatory criminal sexual assault of a child. Defense counsel filed a motion for a new trial which the trial court denied. On August 1, 2019, the trial court sentenced defendant, *in absentia*, to 55 years' imprisonment.

¶ 45 More than a year later, on November 19, 2020, defendant was arrested. Defense counsel moved for a hearing to determine if defendant was entitled to a new trial or sentencing hearing pursuant to section 115-4.1(e) of the Code of Criminal Procedure (725 ILCS 5/115-4.1(e) (West 2020)). At that hearing, defendant testified that he did not appear at his trial or sentencing because he was afraid. Defendant acknowledged that the trial court had admonished him that if he did not appear in court, he could be tried and sentenced *in absentia*. The trial court found that defendant had purposefully absented himself from the court proceedings and therefore was not entitled to a new trial or sentencing hearing.

¶ 46 On appeal, defendant contends his trial counsel rendered ineffective assistance when counsel failed to challenge the admission of defendant's positive test results for chlamydia from 2013 and 2016. Defendant argues that the State was not entitled to admit such evidence where it did not fall under any of the exceptions to the physician-patient privilege enumerated in section 8-802 of the Code of Civil Procedure (Code) (735 ILCS 5/8-802 (West 2018)). Therefore, a motion to bar the evidence would have been granted. Defendant further claims he was prejudiced by counsel's failure to have the evidence barred because the State used it as an integral part of its otherwise weak case by repeatedly eliciting testimony about the positive results from six witnesses and referring to the results in its arguments to the jury, which affected the outcome of the trial.

¶ 47 The State responds that trial counsel did not render ineffective assistance because defendant's positive test results for chlamydia were admissible pursuant to subsection 8-802(4), which allows a physician to disclose a patient's medical information in all actions brought against a patient where the patient's physical condition is at issue. The State further argues defendant was not prejudiced by the admission of his chlamydia diagnoses where the 2013 positive result was properly admitted through Detective Rodriguez's testimony, the 2016 result was properly admitted through the testimony of lay witnesses, and the evidence of defendant's guilt was overwhelming.

¶ 48 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29. To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice that deprived him of a fair proceeding. *Strickland*, 466 U.S. at 687. Specifically, defendant must show that counsel's performance was objectively unreasonable and that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Veach*, 2017 IL 120649, ¶ 30.

¶ 49 Generally, whether counsel objects to the admission of evidence is a strategic decision that does not serve as a basis for a claim of ineffective assistance of counsel. *People v. Perry*, 224 Ill. 2d 312, 344 (2007). Counsel may be found ineffective where there was no valid reason for failing to object to evidence that was, in fact, inadmissible. *People v. Smith*, 2014 IL App (1st) 103436, ¶ 63. However, if the evidence was admissible, an objection would have been futile, and thus, counsel's failure to object cannot be deemed ineffective assistance. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 33.

¶ 50 In this case, to determine whether counsel was ineffective for failing to challenge the admissibility of defendant's positive test results for chlamydia, we must first determine whether the evidence was admissible under an exception to the physician-patient privilege. This is a question of statutory interpretation.

¶ 51 The main purpose of statutory interpretation is to ascertain and give effect to the intent of the legislature. *People v. Leib*, 2022 IL 126645, ¶ 28. "The most reliable indicator of the legislator's intent is the language of the statute itself, which must be given its plain and ordinary meaning." *People v. Grant*, 2022 IL 126824, ¶ 24. When the language of a statute is clear and unambiguous, courts must construe the statute by its plain language and may not depart from the terms of the statute. *Id.*

¶ 52 "Under the guise of construction, a court may not supply omissions, remedy defects, annex new provisions, substitute different provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of language employed in the statute." (Internal quotation marks omitted.) *Id.* ¶ 25. Nor may a court, under the pretext of statutory construction, "correct" a perceived oversight or error by the legislature. *Id.* In addition, when determining the legislative intent of a statutory provision, it is often necessary to consider the provisions of other statutes that relate to the same subject matter. *Id.*

¶ 53 The physician-patient privilege statute provides, in relevant part, as follows:

> "No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only *** (4) in all actions brought by or against the patient *** wherein the patient's physical or mental condition is an issue, ***

(7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act[.]" 735 ILCS 5/8-802 (West 2018).

¶ 54 Defendant states that subsections (4) and (7) are the only two exceptions in the statute which might possibly apply in this case but argues neither is applicable. Defendant relies primarily upon the reasoning of the Third District in *People v. Bons*, 2021 IL App (3d) 180464.

¶ 55 In *Bons*, the defendant was charged with predatory criminal sexual assault of a child. *Bons*, 2021 IL App (3d) 180464, ¶ 3. The defendant filed a motion *in limine* to bar any evidence at trial regarding his chlamydia diagnosis. The hearing on that motion was continued for the State to address the foundational requirements to admit the defendant's chlamydia diagnosis. *Id.* ¶ 4. The State subpoenaed the hospital for the defendant's medical records and the defendant moved to quash the subpoena. *Id.* ¶ 5. The defendant argued that he did not consent to the release of his medical records and that none of the statutory exceptions to the physician-patient privilege applied. *Id.* ¶ 6. Specifically, the defendant argued that the exception under subsection 8-802(4) did not apply because his medical condition was not an element of the offense and not at issue. He further argued that subsection (7) did not apply simply because a DCFS report was filed. The defendant claimed subsection (7) required a physician to disclose findings made during an evaluation of a child after a DCFS report was made. *Id.*

¶ 56 The State responded that subsection (4) applied because the defendant's medical condition was relevant where he and the child were both diagnosed with chlamydia. It further argued the defendant's condition was evidence of a sexual act and, therefore, evidence of an element of the offense. *Id.* ¶ 7. The State also argued that subsection (7) applied because the criminal proceeding arose from a report filed under the Abused and Neglected Child Reporting Act (Act). *Id.* ¶ 8.

¶ 57 The trial court found the defendant's medical records admissible under subsections (4) and (7). Under (4), the court found the defendant's medical condition was at issue due to the sexual nature of the offense. It further found that a physician could disclose protected health information any time there was a proceeding against a patient whose physical or mental condition was at issue. The court also found subsection (7) applied because the criminal case arose from the filing of a DCFS report. *Id.* ¶ 9. Following a bench trial, the court found the defendant guilty. *Id.* ¶ 27.

¶ 58 On appeal, the defendant argued that the trial court erred when it admitted evidence of his medical condition under subsections 8-802 (4) and (7) of the Code. *Id.* ¶ 30. The Third District relied on the reasoning of our supreme court in *Palm v. Holocker*, 2018 IL 123152. The *Bons* court found two of *Palm's* findings relevant to its analysis of the applicability of subsection (4). First, it noted that *Palm* found the physician-patient privilege belonged to the patient and, therefore, only the patient could waive it by putting his physical or mental condition at issue. Second, *Bons* noted that *Palm* found that a broad application of subsection (4) which would allow disclosure in every case in which a patient's medical condition was "relevant" would render the other 13 exceptions in the statute unnecessary. *Bons* quoted the supreme court's finding that " 'the legislature's intent in enacting subsection (4) was to codify the near-universally recognized principle of waiver by implied consent[.]' " *Bons*, 2021 IL App (3d) 180464, ¶ 37 (quoting *Palm*, 2018 IL 123152, ¶ 33).

¶ 59 *Bons* further pointed out that the supreme court stated in *Palm* that it expressed no opinion about the criminal cases which held that subsection (4) applies where the legislature made a party's physical or mental condition an element of an offense. *Id. Bons* reasoned that by doing so, the supreme court left open the possibility that *Palm's* rationale applied to the case before it where the defendant's physical or mental condition was not an element of the offense. *Id.* ¶ 38.

¶ 60 Consequently, *Bons* found that, although the defendant's physical condition was relevant to and highly probative of the element of sexual contact, that alone was insufficient to invoke the exception under subsection (4). Further, *Bons* found that the State could not place the defendant's medical condition at issue by alleging he had an STD to force him to waive the privilege, thereby waiving the privilege for him. *Bons* found that the criminal cases which found subsection (4) applicable involved charges where the defendant's physical or mental state was an element of the offense and, thus, were distinct from the case before it. *Id.* ¶ 39. Accordingly, *Bons* concluded that the exception under subsection (4) did not apply. *Id.* ¶ 38.

¶ 61 As to subsection (7), *Bons* stated that its purpose was to protect children by permitting the disclosure of reports of abuse and neglect under the Act. *Bons* found that the purpose of the Act was satisfied in the case before it when a school counselor made a sexual abuse report to DCFS. *Bons* found that the medical records at issue did not arise from making a report under the Act and, therefore, the exception under subsection (7) did not apply. *Id.* ¶ 43.

¶ 62 *Bons* further found that the exception did not apply to the testimony of a medical professional regarding the defendant's medical condition because the medical professional did not make a report under the Act. The *Bons* court explained its reasoning as follows:

> "The plain language of the statute excepts from the physician-patient privilege information 'arising' from the filing of a report in compliance with the Act. *Id.* Here, there is no indication that defendant's medical records regarding his chlamydia diagnosis and treatment *arose from* the DCFS investigation or report. The record indicates that defendant independently sought medical care *** approximately two weeks after [the victim] reported the sexual abuse to [the school counselor]. Additionally, the State obtained

> defendant's medical records through its own investigation and by subpoena, rather than through the DCFS investigation and report. Since defendant's medical condition information was not procured from a DCFS report or investigation, we reject the State's assertion that subsection 8-802(7) excepts the information from the physician-patient privilege." (Emphasis in original.) *Id.* ¶ 44.

Bons concluded that the State's reading of subsection (7) was "overly broad" because it would automatically waive the physician-patient privilege of all individuals who were connected to or implicated in a report filed under the Act, thereby rendering the other 13 exceptions meaningless in cases that involve or relate to a DCFS report. *Id.* ¶ 45.

¶ 63 Although the Third District found that the exceptions under subsections (4) and (7) did not apply in *Bons*, it concluded that the admission of the defendant's chlamydia diagnosis was harmless error because the evidence against him was overwhelming. *Id.* ¶ 47.

¶ 64 Here, defendant argues that this court should follow the reasoning in *Bons* and conclude that the exceptions under subsections (4) and (7) do not apply in this case. Defendant asserts that subsection (4) does not apply because defendant's physical condition, although relevant, was not "an issue" where it was not an element of the offense, and the State cannot place his medical condition at issue by alleging he had an STD to force him to waive his privilege. Defendant further argues subsection (7) does not apply because the purpose of that exception is to permit disclosure of child abuse, which was satisfied when Schroeder reported J.T.'s chlamydia diagnosis to DCFS in 2013, and Guzman did so in 2016. Defendant argues that, similar to *Bons*, in 2013, he sought medical treatment for his condition independently, and his positive chlamydia test result was procured by the State through a subpoena rather than a DCFS report.

¶ 65 The State responds that the exception under subsection (4) applies in this case. The State asserts that *Bons*'s interpretation of subsection (4) was incorrect because it was contrary to the plain meaning of the language of the statute and against prior precedent. The State disagrees with *Bons*'s finding that the phrase "at issue" means that a defendant's physical or mental condition must be an element of the offense for the exception to apply. The State argues that *Bons* read exceptions, limitations, or conditions into the statute that conflict with the legislative intent. The State points out that, in *Palm*, the supreme court noted there was a conflict regarding the application of subsection (4) in civil and criminal cases. *Palm* found that in civil cases, the courts held that only the patient could waive his privilege by putting his physical or mental condition at issue, but in criminal cases, the courts allowed the State to waive a defendant's privilege by putting his physical or mental condition at issue. *Palm*, 2018 IL 123152, ¶ 24. The State also notes that *Palm* found that the legislature had "acquiesced" in the conflicting interpretations of the statute by amending it without addressing the varied interpretations. *Id.* ¶ 31. The State argues that, here, defendant's physical condition was in issue because the evidence that defendant tested positive for chlamydia at the same time as J.T. tended to prove that he had sexual contact with her. The State did not address subsection (7) in its brief.

¶ 66 *Palm* is a personal injury negligence case wherein the defendant struck the plaintiff, a pedestrian, with his vehicle. *Id.* ¶ 4. The issue before the court was whether the defendant's attorney could assert the physician-patient privilege and refuse to answer two interrogatories seeking the defendant's medical information on the basis that his medical information was not an issue in the case. *Id.* ¶ 1. The appellate court held that the defendant had not affirmatively placed

his physical or mental condition at issue; therefore, the exception under subsection (4) did not apply and his medical information was protected by the privilege. *Id.* ¶ 13.

¶ 67 On appeal to the supreme court, the issue became whether a plaintiff may put a defendant's physical or mental condition at issue thereby waiving the defendant's physician-patient privilege. *Id.* ¶ 18. As noted by the State above (*supra* ¶ 77), *Palm* found a "genuine conflict between how the courts have applied subsection (4) in civil and criminal cases" with the State being allowed to put a defendant's medical condition at issue in criminal cases. *Id.* ¶ 24. The court noted that in the previous version of the statute, subsection (4) applied only to civil cases. *Id.* n.6. The exception was amended when the statute was recodified as part of the Illinois Compiled Statutes at which time its application was changed from "in all civil suits" to "in all actions." *Id.*

¶ 68 *Palm* stated that the purpose of the physician-patient privilege is to encourage patients to make a full disclosure of all their medical facts to the physician to ensure the best diagnosis and outcome for the patient. *Id.* ¶ 34. The court then explained that when a patient is not seeking medical treatment, but sees a physician for another purpose, such as obtaining a report to maintain his driving privileges, the physician-patient privilege does not apply. *Id.* In referencing several authorities, *Palm* included the following quote:

> " 'As a general rule, the relationship of physician and patient does not exist unless the physician's consultation with, or attendance upon, the prospective patient is with a view to protective, alleviative, or curative treatment. *** There is no privilege as to information acquired by a physician through the physical or mental examination of a person unless it is made in contemplation of, and as preparation for, medical care and treatment; hence, if the physician's examination of, or conference with, the person is for a purpose other than

> prescribing or doing any act for him in the way of medical care or treatment, the physician is not disqualified as a witness and may disclose any information so acquired concerning such person, since the relation of physician and patient does not exist under such circumstances.' " *Id.* ¶ 35 (quoting Clinton DeWitt, Privileged Communications Between Physician and Patient 104-05 (1958)).

¶ 69 *Palm* "urge[d] the legislature to address section 8-802(4) and to make its intentions clear." *Id.* ¶ 39. It specifically requested that the legislature "clarify how something becomes 'an issue' for purposes of this section, whether one party may put another party's physical or mental condition at issue, and if the rule is any different for civil and criminal cases." *Id.* However, subsection (4) has not yet been amended by the legislature.

¶ 70 Nevertheless, this court can affirm on any basis supported by the record. See *People v. Johnson*, 208 Ill. 2d 118, 129 (2003) ('The rule that a lower court decision may be sustained on any ground of record is both universally recognized and long established.") Here, in accordance with *Palm*, we find that the evidence that defendant tested positive for chlamydia in 2016 was not subject to the physician-patient privilege. The record shows that on October 8, 2016, J.T. went to the clinic for a routine physical exam and was seen by Nurse Guzman. Jasmine told Guzman that J.T. previously tested positive for chlamydia and recently had vaginal discharge. Guzman tested J.T. for gonorrhea and chlamydia. A few days later, Guzman received the test results which indicated J.T. was positive for chlamydia. Guzman notified DCFS that day of J.T.'s positive test. Guzman testified that, as part of that process, all the members of J.T.'s household were required to be tested for chlamydia, including defendant and Jasmine, who were both tested the next day. A few days later, Guzman received the test results which indicated that both defendant and Jasmine

had tested positive. The record further shows that during the detectives' interview with defendant, De La Torre asked defendant why he got tested for chlamydia again in 2016. Defendant replied that DCFS and the doctors told the family that everyone in the house had to get tested.

¶ 71 The record therefore shows that defendant was tested for chlamydia in October 2016 not for the purpose of seeking medical treatment, but because he was ordered to do so by DCFS. There is no indication in the record that defendant was complaining of symptoms in 2016. He did not go to the clinic independently, but instead, went with Jasmine for the sole purpose of submitting to a chlamydia test because they were ordered to do so. Guzman was treating J.T., not defendant. There was no physician-patient relationship between Guzman and defendant. Thus, there was no privilege. *Palm*, 2018 IL 123152, ¶¶ 34-35.

¶ 72 Since the evidence of defendant's 2016 positive chlamydia test was not subject to the physician-patient privilege, the evidence was admissible. Any attempt by counsel to bar the evidence under the privilege would have been futile. Accordingly, counsel's failure to challenge or object to the admission of the evidence did not constitute ineffective assistance. *Lucious*, 2016 IL App (1st) 141127, ¶ 33.

¶ 73 As for defendant's chlamydia diagnosis from 2013, we find that evidence was admissible under the exception provided in subsection (7), which allows a physician to share privileged medical information "in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act[.]" 735 ILCS 5/8-802(7) (West 2018). The language of this exception is clear and unambiguous. Therefore, we must construe the statute by its plain language, and we may not depart from its terms or read into it any limitations or conditions

that would change the plain meaning of the language employed in the statute. *Grant*, 2022 IL 126824, ¶ 24.

¶ 74 Here, the record shows that on November 24, 2013, defendant went to the emergency room complaining of stinging when he urinated and seeking treatment for his condition. On November 26, 2013, defendant's lab results indicated he tested positive for chlamydia. Under those circumstances, defendant's medical information, which was obtained by Dr. Bence and physician assistants Sher and Montes for the purpose of treating defendant's medical condition, was information that is normally confidential and protected by the physician-patient privilege. 735 ILCS 5/8-802. However, this case is a criminal action that arose from the filing of a report with DCFS in compliance with the Act. Accordingly, pursuant to the plain language of the exception in subsection (7), Bence, Sher, and Montes were permitted to disclose defendant's chlamydia diagnosis at trial.

¶ 75 We recognize that in *Bons*, the Third District reached an opposite conclusion. *Bons* found that the plain language of the statute provided an exception for "information 'arising' from the filing of a report in compliance with the Act." *Bons*, 2021 IL App (3d) 180464, ¶ 44. *Bons* noted that the defendant in that case independently sought medical care. *Id.* Consequently, the court concluded that because the defendant's medical records did not arise from the filing of a report under the Act, the exception under subsection (7) did not apply. *Id.* ¶¶ 43-44. *Bons* further found that because the State obtained the defendant's medical records through its own investigation rather than from a DCFS report or investigation, the exception did not apply. *Id.* ¶ 44. In addition, *Bons* found that applying the exception to all individuals implicated in a report filed under the Act

would be an "overly broad" reading of the statute and would render the other 13 exceptions to the privilege meaningless in cases involving a DCFS report. *Id.* ¶ 45.

¶ 76 We disagree with the interpretation and reasoning in *Bons*. First, the plain language of the statute does not provide an exception for "information" that arises from the filing of a report in compliance with the Act. Instead, the plain language provides an exception "*in actions, civil or criminal*, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act[.]" (Emphasis added.) 735 ILCS 5/8-802(7) (West 2018). Thus, the 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. In fact, all 14 of the exceptions enumerated in the statute address specific proceedings or circumstances where the otherwise privileged medical information could be disclosed. See 735 ILCS 5/8-802 (West 2018). 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.

¶ 77 Second, *Bons*'s reasoning that the exception does not apply where a defendant independently sought medical treatment and his medical records did not arise from the filing of a DCFS report is flawed. As discussed above, the privilege only exists where a person has sought medical treatment from a physician and, hence, a physician-patient relationship exists. It therefore follows that the 14 exceptions to the privilege apply only where a physician-patient relationship exists. If a defendant's medical records arise from the filing of a DCFS report, as they did here in 2016, there is no physician-patient relationship and, thus, no privilege. In that circumstance, section 8-802 would not apply.

¶ 78 Finally, we disagree with the finding in *Bons* that applying the exception to all individuals implicated in a report filed under the Act would be an "overly broad" reading of the statute. The plain language of the exception in subsection (7) clearly states that it applies "in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act[.]" 735 ILCS 5/8-802(7) (West 2018). The plain and ordinary meaning of the language indicates that the legislature intended for the exception to sweep broadly in cases involving child abuse and neglect. This court is prohibited from adding a limitation or condition to the exception as doing so would depart from the plain meaning of the statute. *Grant*, 2022 IL 126824, ¶ 24.

¶ 79 Defendant's chlamydia diagnosis from 2013 was admissible under the exception provided in subsection (7). Any attempt by trial counsel to bar the evidence under the physician-patient privilege would have been futile. Accordingly, counsel's failure to challenge or object to the admission of the evidence did not constitute ineffective assistance. *Lucious*, 2016 IL App (1st) 141127, ¶ 33.

¶ 80 Based on our conclusion, we need not consider whether defendant's chlamydia diagnosis from 2013 could also have been admitted under the exception in subsection (4). In *Palm*, our supreme court "urge[d] the legislature to address section 8-802(4) and to make its intentions clear." *Id.* ¶ 39. The legislature has not yet done so.

¶ 81 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 82 Affirmed.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

☐ PEOPLE OF THE STATE OF ILLINOIS

v.

RAMON TORRES

FILED
AUG 01 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

No. 16 CR 17805
Trial Judge JUDGE WILLIAM RAINES
Court Reporter
Attorney MICHAEL E. BAKER
Appeal Check Date
Appeal Bond

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below:
Appellant's Name: RAMON TORRES
Appellant's Address: LKA: 3548 W. EVERGREEN AVENUE, CHICAGO, ILLINOIS 60651
Appellant's Attorney: MICHAEL E. BAKER
Address: 190 S. LASALLE ST., SUITE 520, CHICAGO, ILLINOIS 60603
Primary Email: MIKE@SPECTORBAKER.COM
Secondary Email: Tertiary Email:
Offense: PREDATORY CRIMINAL SEXUAL ASSAULT
Judgment: Guilty of PREDATORY CRIMINAL SEXUAL ASSAULT

ENTERED
Judge William B. Raines-2120
AUG 01 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

on a
Date: JULY 10, 2019
Sentence:
Date Notice Filed: AUGUST 1, 2019

RAMON TORRES Appellant

VERIFIED PETITION FOR REPORT OF PROCEEDINGS AND COMMON LAW RECORD

Under Supreme Court Rules 605-608 Appellant requests the Court to order; (1) the Official Court Reporter to transcribe an original and the copy of the proceedings, file the original with the Clerk and deliver the copy to the Appellant, or upon Appellant's written request to the Appellant's attorney of record, and (2) the Clerk to prepare the Record on Appeal.

The Appellant, being duly sworn, states that at the time of his/her conviction, s/he was and s/he now is unable to pay for the Record or an appellate lawyer.

RAMON TORRES Appellant

SUBSCRIBED and SWORN TO before me this 1ST day of AUGUST 2019 Notary Public

ORDER

IT IS ORDERED; 1. the State Appellate Defender is appointed as counsel on appeal, and 2. the Record and Report of Proceedings be furnished to appellant without fees.

ENTERED:

Dated: 8/1/19 William Raines 2120
Judge Judge's No.

I acknowledge receipt: Court Reporter

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

C 231

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.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Ramon Torres, Register No. Y44941, Hill Correctional Center, P. O. Box 1700, Galesburg, IL 61402

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 June 28, 2023, the Brief and Argument 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 Brief and Argument to the Clerk of the above Court.

/s/Carol M. Chatman
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us