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Notes: Smallwood v. State: Maryland's High Court Refuses to Permit the Fact Finder to Infer a Specific Intent to Kill from Aids Rape

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SMALLWOOD v. STATE: MARYLAND'S HIGH COURT REFUSES TO PERMIT THE FACT FINDER TO INFER A SPECIFIC INTENT TO KILL FROM AIDS RAPE

I. INTRODUCTION

Few would argue that one who attempts to wrongfully take the life of another should not be punished. Nonetheless, this proposition becomes controversial when speaking of imposing criminal liability upon a defendant who attempts to transmit a deadly virus. One of the most debated topics in criminal law today is whether criminal liability for attempted murder should be imposed on "AIDS rapists,"[1] HIV-positive[2] individuals who rape women while fully aware of their own infected status and the consequences that result from transmission.[3] The debate centers around whether a spe-

1. *See generally* Jennifer Grishkin, Casenote, *Knowingly Exposing Another to HIV*, 106 YALE L.J. 1617, 1620 n.2 (1997) (using the term "AIDS rape" "to refer to a rape in which the offender is HIV-positive or has AIDS"); Cathleen J. Schaffner, Note, *Inferring the Intent of AIDS Rapist:* Smallwood v. State, 14 T.M. COOLEY L. REV. 375, 375 n.1 (1997) (using the term "AIDS rape" to refer to "one who knowingly exposes another to the risk of HIV/AIDS transmission through the act of rape"); Stefanie S. Wepner, Note, *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 J. MARSHALL L. REV. 941, 943-44 n.15 (1993) (using the term "AIDS rape" to refer to an "intentional AIDS transmission through rape").

2. *See generally* Linda K. Burdt & Robert S. Caldwell, Note, *The Real Fatal Attraction: Civil and Criminal Liability for the Sexual Transmission of AIDS*, 37 DRAKE L. REV. 657, 657-64 (1988) (discussing the historical and medical background of HIV and Acquired Immunodeficiency Syndrome (AIDS)).

3. *See* Kimberly A. Harris, Note, *Death at First Bite: A Mens Reas Approach in Determining Criminal Liability for Intentional HIV Transmission*, 35 ARIZ. L. REV. 237, 264 (1993) (advocating adoption of HIV-specific criminal statutes); Jacob A. Heth, Note, *Dangerous Liaisons: Criminalizing Conduct Related to HIV Transmission*, 29 WILLIAMETTE L. REV. 843, 866 (1993) (advocating adoption of HIV-specific criminal statutes). Indeed, three additional law review notes addressing *Smallwood v. State* were published while this Note was progressing through the editorial phase. *See generally* Grishkin, *supra* note 1; Scott A. McCabe, Note, *Rejecting Inference of Intent to Murder for Knowingly Exposing Another to a Risk of HIV Transmission, The Maryland Survey: 1995-1996*, 56 MD. L. REV. 762 (1997); Schaffner, *supra* note 1. Where appropriate, this Note attempts to summarize and distinguish the positions taken in these three notes.

cific intent to kill can be inferred from the AIDS rapist's actions.[4]

In *Smallwood v. State*,[5] the Court of Appeals of Maryland was confronted with this controversial issue. Smallwood was diagnosed with HIV in 1991.[6] In 1992, a social worker informed him of the necessity of practicing safe sex to prevent transmission of the deadly virus.[7] Despite these warnings, Smallwood raped three women on three separate occasions in September 1993.[8] Smallwood did not wear a condom during any of the attacks.[9] However, the *Smallwood* court held that knowingly engaging in unprotected sex while infected with HIV does not, by itself, satisfy the intent to kill element required for a finding of attempted murder.[10]

This Note critically analyzes the *Smallwood* decision. Part II of this Note provides a historical background of criminal liability for HIV transmission.[11] It discusses the elements of attempt crimes, focusing in particular on the presumptions of intent that apply,[12] the concept of malice aforethought,[13] and the defense of impossibility.[14] Part II then compares the Court of Appeals of Maryland's decisions involving HIV transmission and criminal liability with decisions from other jurisdictions.[15] Part II also provides statistical data regarding HIV transmission and AIDS in general.[16] Part III traces *Smallwood* from the trial court through the court of appeals, discussing in detail the facts, holding, and rationale of the *Smallwood* court.[17] Part IV analyzes the holding and rationale in *Smallwood*, arguing that the opinion was wrongly decided for three reasons.[18] First, the *Smallwood*

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4. *See* Heth, *supra* note 3, at 866; *see also* Harris, *supra* note 3, at 248; Rorie Sherman, *Criminal Prosecutions on AIDS Growing*, NAT'L L.J., Oct. 14, 1991, at 3.
5. 343 Md. 97, 680 A.2d 512 (1996).
6. *See id.* at 100, 680 A.2d at 513.
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.* at 106, 680 A.2d at 516. The court of appeals held that Smallwood lacked the specific intent to kill; therefore, the court reversed both the assault with intent to murder and attempted murder convictions. *See id.* at 109, 680 A.2d at 518.
11. *See* discussion *infra* Part II.
12. *See infra* notes 45-51 and accompanying text.
13. *See infra* notes 52-59 and accompanying text.
14. *See infra* notes 60-67 and accompanying text.
15. *See infra* notes 68-131 and accompanying text.
16. *See infra* notes 132-46 and accompanying text.
17. *See* discussion *infra* Part III.
18. *See* discussion *infra* Part IV. For an opposing view, see Grishkin, *supra* note 1, at 1619 (arguing that the court of appeals reached the "only legally proper re-

court incorrectly applied the standard for reviewing the trial court's decision.[19] Second, this Note contends that even under the test adopted by the *Smallwood* court—that specific intent cannot be inferred in cases where an infected person exposes another to HIV unless there is additional evidence indicative of an intent to kill[20]—Smallwood's conviction should have been upheld because additional evidence was present.[21] Specifically, Part IV explains why AIDS rape, as opposed to mere exposure to HIV from consensual sex, provides sufficient additional evidence indicative of an intent to kill.[22] Third, this Note demonstrates that the court of appeals misconstrued the precedent it relied on in reaching its conclusion.[23] Furthermore, Part IV highlights an alternative approach to establishing the requisite mental state for attempted murder by AIDS rapists—permitting malice aforethought to substitute for specific intent to kill—adopted by other jurisdictions, but rejected by Maryland courts.[24] Finally, Part IV concludes with a discussion of the future implications of the *Smallwood* decision.[25]

II. HISTORICAL DEVELOPMENT

A. Addressing Criminal Liability for HIV Transmission—Maryland Case Law and Statutes

1. Maryland Law Addressing HIV/AIDS

In *Faya v. Alvarez*,[26] the Court of Appeals of Maryland recognized the deadliness of HIV and its progression to AIDS.[27] The court noted that HIV is a retrovirus that attacks the human immune

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sult" by disallowing a finding of attempted murder). *See also* McCabe, *supra* note 3, at 778-80 (noting the dangers inherent in criminalizing HIV transmission, particularly perinatal transmission).

19. *See infra* notes 213-36 and accompanying text.
20. *See* Smallwood v. State, 343 Md. 97, 106, 680 A.2d 512, 516 (1996).
21. *See infra* notes 266-99 and accompanying text.
22. *See infra* notes 237-65 and accompanying text.
23. *See infra* notes 300-29 and accompanying text.
24. *See infra* notes 230-41 and accompanying text.
25. *See infra* notes 342-44 and accompanying text.
26. 329 Md. 435, 439, 620 A.2d 327, 329 (1993). *Faya* was a negligence action brought by two patients against Johns Hopkins Hospital and a surgeon who was employed at the hospital. *See id.* at 440-41, 620 A.2d at 329. The patients brought suit against Johns Hopkins and the surgeon for not informing them that the surgeon had AIDS. *See id.* The court held that the plaintiffs could recover under negligence principles for their fear of acquiring AIDS. *See id.* at 460, 620 A.2d at 339.
27. *See id.* at 439, 620 A.2d at 328.

system, ultimately destroying the body's capacity to fight off various diseases.[28] The court also recognized that "HIV typically spreads via genital fluids or blood transmitted from one person to another through sexual contact."[29] Most importantly, the court took judicial notice of the fact that AIDS is the final result of "an immune system gravely impaired by HIV" and that most people who carry HIV will eventually develop AIDS.[30] Finally, the court emphasized that "AIDS is invariably fatal."[31]

In conjunction with judicial findings recognizing the deadliness of HIV, the Maryland General Assembly has established that it is a criminal offense for anyone to knowingly transfer or attempt to transfer HIV.[32] An individual who is convicted of violating this statute "is subject to a fine not exceeding $2500 or imprisonment not exceeding 3 years or both."[33]

2. The Crime of Attempted Murder Under Maryland Law

The Maryland legislature has not adopted a statutory definition of "attempt"; therefore, the elements of attempt are derived from common law.[34] The common-law definition of "attempt" includes two basic elements: (1) mens rea, a mental element requiring specific intent to be proven, and (2) the actus reus, requiring an act by the defendant that encompasses a substantial step towards committing the underlying crime which goes beyond mere preparation.[35] Additionally, the fact that the defendant had the apparent ability to commit the crime is encompassed within the actus reus requirement.[36] However, attempt crimes exist only in relation to other of-

28. *See id.*
29. *Id.* at 439, 620 A.2d at 329.
30. *Id.*
31. *Id.* at 440, 620 A.2d at 329.
32. *See* MD.CODE ANN., Health-General II § 18-601.1 (1997) (making the knowing transfer or attempted transfer of HIV a misdemeanor). Adoption of an HIV-specific statute in Maryland and in at least 24 other states occurred in part because of conditions placed on federal grants for health care programs serving HIV-infected persons. *See* McCabe, supra note 3, at 777 n.106 (citing 42 U.S.C. §§ 300ff-11, 300ff-47 (1994)).
33. MD.CODE ANN., Health-General II § 18-601.1 (1997).
34. *See* Selby v. State, 76 Md. App. 201, 211, 544 A.2d 14, 19 (1988) (quoting Cox v. State, 311 Md. 326, 534 A.2d 1333 (1988)).
35. *See id.*
36. *See* Warren v. State, 29 Md. App. 560, 572, 350 A.2d 173, 181 (1976) (quoting Wiggins v. State, 8 Md. App. 598, 604, 261 A.2d 503, 507 (1970)).

fenses.[37] Accordingly, the defendant must be charged with an attempt to commit a specifically described crime.[38]

In *State v. Earp*,[39] the court of appeals held that the required intent for attempted murder is the specific intent to kill.[40] Consequently, conduct that would support a conviction for depraved-heart murder, felony murder, or murder with the intent to do grievous bodily harm would not support a conviction for attempted murder if the victim were to survive.[41] The only type of conduct that would support an attempted murder conviction is an act done with the specific intent to kill.[42]

The specific intent to kill may be proven by direct or circumstantial evidence.[43] Courts permit proof by circumstantial evidence because the intent to kill is personal to the accused and generally not able to be directly and objectively proven.[44]

a. Presumptions of Intent

Whenever circumstantial evidence is used to prove an element of a crime, the fact finder must draw inferences in order to reach a guilty verdict.[45] However, in all criminal cases, mandatory or conclusive inferences are unconstitutional.[46] In the case of attempted murder, if inferences are to be drawn by the fact finder, they must be permissible inferences.[47] Thus, the Court of Appeals of Maryland

37. *See Selby*, 76 Md. App. at 211, 544 A.2d at 19.
38. *See id.* at 211, 544 A.2d at 19-20.
39. 319 Md. 156, 571 A.2d 1227 (1990).
40. *See id.* at 167, 571 A.2d at 1233 ("[T]he specific intent to kill under circumstances that would not legally justify or excuse the killing or mitigate it to manslaughter."). The required intent for assault with intent to murder is defined as a "specific intent to kill under circumstances such that if the victim had died, the offense would be murder." Smallwood v. State, 343 Md. 97, 103, 680 A.2d 512, 515 (1996) (quoting State v. Jenkins, 307 Md. 501, 515, 515 A.2d 465, 472 (1986)).
41. *See Earp*, 319 Md. at 165, 571 A.2d at 1232 (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 59 (1972)).
42. *See id.* at 165, 571 A.2d at 1232.
43. *See Smallwood*, 343 Md. at 104, 680 A.2d at 515.
44. *See id.* (quoting Davis v. State, 204 Md. 44, 51, 102 A.2d 816, 819 (1954)).
45. *See* Dinkins v. State, 29 Md. App. 577, 579, 349 A.2d 676, 678-79 (1976); Evans v. State, 28 Md. App. 640, 349 A.2d 300 (1975).
46. *See* Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (holding that a conclusive presumption conflicts with the presumption of innocence and invades the fact-finding function of the jury).
47. *See* Kashansky v. State, 39 Md. App. 313, 320, 385 A.2d 811, 815 (1978) ("[S]tatutes containing permissible inferences do not violate due process as

has recognized that the intent to kill *may* be inferred from surrounding circumstances, such as "the accused's acts, conduct and words."[48]

One common permissible inference provides that the fact finder "is permi[tted] to infer that the [defendant] intends the natural and probable consequence of his or her act."[49] Thus, in certain cases, the specific intent to murder has been rationally inferred by the fact finder when the defendant used a deadly weapon which was pointed "at a vital part of the human body."[50] Nonetheless, in order for the State's evidence to support any criminal conviction, the essential elements of the crime charged must be proven beyond a reasonable doubt.[51]

b. Malice Aforethought

The crime of attempted murder generally requires proof that the accused had the specific intent to kill.[52] Regarding HIV transmission, some jurisdictions hold that the specific intent to kill can be satisfied by proving the defendant knew he was HIV-positive and took some action evidencing an intent to transmit the virus.[53] In rape cases, however, the act of rape alone is arguably insufficient to show the specific intent to kill because the transmission of the virus occurs simultaneously with the rape.[54] Nonetheless, the requisite intent to kill may be satisfied if the defendant is proven to have acted with malice aforethought.[55]

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long as the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt.").

48. State v. Raines, 326 Md. 582, 591, 606 A.2d 265, 269 (1992) (citing Taylor v. State, 238 Md. 424, 433, 209 A.2d 595, 600 (1965)).

49. Ford v. State, 90 Md. App. 673, 686-87, 603 A.2d 883, 889 (1992).

50. Smallwood v. State, 343 Md. 97, 104, 680 A.2d 512, 515 (1996) (quoting *Raines*, 326 Md. at 591, 606 A.2d at 269). In *Raines*, the defendant fired a pistol at the driver's side window of the victim's vehicle. *See Raines*, 326 Md. at 585, 606 A.2d at 266. The Court of Appeals of Maryland held that "Raines's actions in directing the gun at the window, and therefore at the driver's head on the other side of the window, permitted an inference that Raines shot the gun with the intent to kill." *Id.* at 592-93, 606 A.2d at 270.

51. *See Smallwood*, 343 Md. at 104, 680 A.2d at 515 (quoting Wilson v. State, 319 Md. 530, 535, 573 A.2d 831, 834 (1990)).

52. *See supra* note 40 and accompanying text.

53. *See* Thomas Fitting, Note, *Criminal Liability for Transmission of AIDS: Some Evidentiary Problems*, 10 CRIM. JUST. J. 69, 78 (1987).

54. *See id.*

55. *See id.* at 78 n.48.

Malice aforethought may be established if the conduct of the accused is "reckless and wanton, and a gross deviation from a reasonable standard of care . . . ."[56] If the prosecution can prove that the accused acted with malice aforethought, it can sufficiently establish the requisite intent for attempted murder, regardless of whether specific intent has been proven.[57] Thus, it is possible to establish criminal culpability without proving a defendant's specific intent.[58] However, Maryland does not permit this method of proving malice aforethought in attempted murder cases.[59]

c. The Impossibility Defense to Attempted Murder

Legal impossibility is generally a defense to any attempt crime.[60] That is, if it were impossible for a legal element of the crime to exist based upon the facts before the court, the accused could not be convicted of an attempt crime.[61] However, *factual* impossibility will not generally bar a defendant from being convicted of an attempt crime.[62] Even when a statute calls for the present ability to commit the crime, a conviction may be sustained where the intended crime was factually impossible to complete.[63]

The rationale underlying the distinction between factual and legal impossibility is of particular relevance to any attempt crime. In the case of legal impossibility, a court cannot impose punishment

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56. *Id.* (quoting United States v. Black Elk, 579 F.2d 49, 51 (9th Cir. 1978)).
57. *See id.* at 78 n.48.
58. *See id.* at 79-80.
59. *See* Abernathy v. State, 109 Md. App. 364, 371, 675 A.2d 115, 119 (1996) ("Although the depraved-heart state of mind may serve as an adequate *mens rea* for a conviction of consummated murder, it does not exist as an available *mens rea* to support a conviction for attempted murder.").
60. *See* Waters v. State, 2 Md. App. 216, 226, 234 A.2d 147, 153 (1967) ("[A]ttempting to do what is not a crime is not attempting to commit a crime."). *But cf.* Lane v. State, 348 Md. 272, 285, 703 A.2d 180, 187 (1997) (noting that the discussion of the legal impossibility defense by the *Waters* court was dicta); Grill v. State, 337 Md. 91, 96, 651 A.2d 856, 858 (1996) (stating that the issue of whether legal impossibility is a defense to an attempt crime has never been decided in Maryland).
61. *See In re* Appeal No. 568, 25 Md. App. 218, 221, 333 A.2d 649, 651 (1975) (holding that factual impossibility is never a defense to an "attempt to commit an intended crime"); *Waters*, 2 Md. App. at 226, 234 A.2d at 153. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.3(a), at 510-18 (2d ed. 1986) (discussing the voluminous amount of scholarly research on the impossibility defense).
62. *See Waters*, 2 Md. App. at 226-27, 234 A.2d at 153.
63. *See id.*

for a crime when elements of the crime do not exist under the facts of the case.[64] If this were permitted, the State would be absolved of meeting its burden of proving all elements of a crime beyond a reasonable doubt. However, regarding attempt crimes, a defense based on factual impossibility will fail[65] because the focus is on the mental state of the accused and the steps the accused took towards accomplishing the object of that mental state.[66] Therefore, legal culpability exists despite the accused's unreasonable belief that his acts could accomplish his intended result.[67]

B. Addressing Criminal Liability for HIV Transmission—Precedent From Other Jurisdictions

In *Scroggins v. State*,[68] the Court of Appeals of Georgia affirmed an assault with intent to murder conviction[69] of an HIV-positive defendant who sucked up excess spit and bit a police officer, laughing in reply to the police officer's question as to whether he had AIDS.[70] The Georgia intermediate appellate court stated that an intent to kill can be proven by direct or circumstantial evidence of malice or a wanton and "reckless disregard of [another's] life equivalent to an actual intention deliberately to kill [the victim]."[71]

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64. *See Lane*, 348 Md. at 285, 703 A.2d at 187 (acknowledging that the majority view is that legal impossibility is a defense for attempt crimes); LAFAVE, *supra* note 41, § 6.3(a), at 514 ("[W]hat is not criminal may not be turned into a crime after the fact by characterizing the [accused's] acts as an attempt.").

65. *See In re* Appeal, 25 Md. App. at 221, 333 A.2d at 651; LAFAVE, *supra* note 41, § 6.3(a), at 511 ("[F]actual impossibility, where the intended substantive crime is impossible of accomplishment merely because of some physical impossibility unknown to the defendant, is not a defense.").

66. *See* LAFAVE, *supra* note 41, § 6.3(a), at 513-14.

67. *See* Scroggins v. State, 401 S.E.2d 13, 18 (Ga. Ct. App. 1990) (quoting 22 C.J.S. *Criminal Law* § 123 (1989)).

68. 401 S.E.2d 13 (Ga. Ct. App. 1990).

69. *See id.* at 23.

70. *See id.* at 15.

71. *Id.* at 19 (alteration in original) (quoting Johnson v. State, 17 S.E. 974, 975 (Ga. 1893)). Unlike Georgia law, the required intent for attempted murder under Maryland law only includes the specific intent to kill, not malice or wanton disregard equivalent to an intent to kill. *Compare id.*, *with* State v. Earp, 319 Md. 156, 167, 571 A.2d 1227, 1233 (1990), *and* Abernathy v. State, 109 Md. App. 364, 371, 675 A.2d 115, 119 (1996) (holding that the depraved-heart state of mind will not meet the mens rea requirement to support a conviction for attempted murder). *See generally* Schaffner, *supra* note 1, at 394 (noting the *Smallwood* court failed to address this jurisdictional difference when distinguishing *Scroggins*).

The court held that an assault with intent to murder existed beyond a reasonable doubt because of the defendant's act of deliberately biting the officer with the knowledge that he was HIV-positive.[72]

Based on the defendant's actions, the *Scroggins* court concluded that the jury could infer that either Scroggins believed he could transmit the deadly virus through biting, or that he had no care whatsoever whether he actually transmitted the virus to the officer.[73] The court reasoned that a jury could infer a malicious intent to murder because Scroggins's assault was equal to a wanton and reckless disregard as to whether he might transmit HIV.[74] Thus, the *Scroggins* court concluded that the defendant's actions were so wanton and reckless that they could be equated to a specific intent to kill.[75] The court highlighted that it is not necessary that the attempted crime be factually possible to complete.[76] Rather, the intent to commit the crime itself renders an act or omission the crime of attempt.[77]

In 1992, two years after *Scroggins*, the Court of Appeals of Texas faced a similar issue in *Weeks v. State*.[78] The defendant, who knew he was HIV-positive, was convicted by a jury of attempted murder for spitting on a prison guard.[79] On appeal, the court affirmed the verdict, holding that the evidence supported a finding that the defendant could have transmitted HIV by spitting in the prison guard's face on two separate instances.[80]

In reaching this decision, the *Weeks* court first specified the elements of attempted murder.[81] The court stated that to prove attempted murder, "it is sufficient to show that the accused had the intent to cause the death of the complainant and that he committed an act, which amounted to more than mere preparation, that could have caused the death of the complainant but failed to do so."[82] Applied to this case, the court explained that the State had to prove that the defendant intended to kill when he spat at the of-

72. *See Scroggins*, 401 S.E.2d at 19.
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.* at 18.
77. *See id.* (emphasis omitted) (quoting 22 C.J.S. *Criminal Law* § 123 (1989)).
78. 834 S.W.2d 559 (Tex. Ct. App. 1992).
79. *See id.*
80. *See id.*
81. *See id.* at 561.
82. *Id.* (citing Flanagan v. State, 675 S.W.2d 734 (Tex. Ct. App. 1984)).

ficer.[83] The court concluded that the State had met this burden by proving that the defendant knew he was HIV-positive when he spat.[84] Weeks's act went beyond "mere preparation, which tended, but failed, to effect the commission of the offense intended, which was the officer's death."[85]

The *Weeks* court also relied on the *Texas Penal Code* to support its decision.[86] The *Texas Penal Code* makes it a crime to intentionally expose an individual to the AIDS virus.[87] Additionally, the *Weeks* court relied on experts who testified that HIV transmission through saliva was possible and that the disease could be transmitted by a "one-shot deal."[88] Although State and defense experts disagreed on this point, the court concluded that "[w]hile the evidence was highly controverted, there is sufficient evidence . . . [that the defendant] could have transmitted HIV by spitting."[89]

Likewise, in *State v. Smith*,[90] an HIV-positive defendant was convicted by a jury of attempted murder[91] for biting a corrections officer.[92] Previously, the defendant had threatened to kill various corrections officers by biting and spitting on them.[93] In affirming the jury verdict, the Appellate Division of the Superior Court of New Jersey held that the defendant could be found guilty of attempted murder upon a showing that the defendant intended to kill by biting.[94] The court noted that the defendant could be found guilty regardless of whether it was medically possible for the defendant's bite to transmit HIV.[95] Simply put, the court reasoned that it was sufficient that the defendant believed he could cause death by bit-

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83. *See id.*
84. *See id.* at 562.
85. *Id.* at 561-62.
86. *See id.* at 561.
87. *See id.* (citing TEX. PENAL CODE ANN. § 22.012 (West 1992)).
88. *Id.* at 562-63. The *Weeks* court cited two experts: Mark E. Dowell, M.D., a doctor of infectious diseases at Baylor College of Medicine, and Paul Drummond Cameron, Ph.D., Chairman of the Family Research Institute. *See id.* Both doctors were qualified as experts in the area of HIV transmission through saliva. *See id.* at 562.
89. *Id.* at 565.
90. 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993).
91. *See id.* at 495. The defendant was also convicted of aggravated assault and terroristic threats. *See id.*
92. *See id.*
93. *See id.*
94. *See id.* at 493.
95. *See id.*

ing and that he intended to do so.[96]

In reaching this decision, the *Smith* court analyzed the New Jersey attempted murder statute.[97] The trial judge found that the defendant had violated subsection 2 of the statute.[98] Subsection 2 provides that a person is guilty of attempt to commit a crime if, acting with the requisite culpability required for the commission of the crime, the person, "[w]hen causing a particular result [which] is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his part."[99] The trial judge explained that in order for the defendant to be found guilty of attempted murder, he must have purposely intended to cause the death of his victim.[100] The court explained that this specific intent was a required element for the offense of attempted murder.[101]

The defendant challenged the trial judge's description of attempted murder and the requisite elements, arguing that he was deprived of an inherent impossibility defense within the statute.[102]

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96. *See id.*

97. *See id.* at 501. The New Jersey statute governing criminal attempts provides:

> a. Definition of attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be;
>
> (2) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his part; or
>
> (3) Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

N.J. STAT. ANN. § 2C:5-1 (West 1995).

98. *See Smith*, 621 A.2d at 501-02.

99. *Id.* at 501.

100. *See id.* at 502 (citing State v. Rhett, 601 A.2d 689 (N.J. Sup. Ct. 1992)).

101. *See id.*

102. *See id.* at 501-02. The defendant's impossibility defense was premised on expert testimony explaining that HIV transmission through biting was " 'extremely remote' and 'very slim.' " *Id.* at 499-500. Therefore, the defendant reasoned that because medical science finds it nearly impossible to transmit the virus through biting, the trial court committed plain error in finding him guilty of attempted murder under the statute. *See id.* at 500-02. The court rejected this argument by holding that impossibility is not a defense to attempted murder. *See id.* at 502. The court emphasized that under its criminal statutes, conduct

Both the trial and appellate courts rejected the defendant's argument, concluding that "impossibility is not a defense to . . . attempted murder."[103] Both courts acknowledged that the attempt statute punishes conduct based on the defendant's state of mind, not whether a particular result can be accomplished.[104] The appellate court emphasized that under subsection 2 of the attempt statute, "where the actor has done all that *he believes* necessary to cause the particular result which is an element of the crime, he has committed an attempt."[105] In sum, the appellate court held that the statute's purpose was to criminalize the defendant's mental intent when he participated in an activity which he knew would result in that crime.[106] Thus, the probability or likelihood of the defendant infecting the officer was irrelevant.[107]

In *State v. Caine*,[108] the Court of Appeals of Louisiana affirmed a jury conviction for attempted second degree murder.[109] The court held that the defendant's actions, which consisted of telling a victim, "I'll give you AIDS," and then sticking the victim in the arm with a needle that contained a syringe full of clear liquid, were sufficient to support the attempted second degree murder conviction.[110]

The *Caine* court first explained that guilt for an attempt crime is bestowed upon "[a]ny person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object."[111] The court then examined statutory provisions which indicated that in crimes of attempt, it is irrelevant whether the crime was actually accom-

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is punished based on the defendant's state of mind. *See id.* Thus, the court surmised that purposeful actions are punished regardless of whether the attempted result could actually be accomplished. *See id.* Finally, the court specified that the *Model Penal Code* rejected the impossibility defense because " 'liability . . . focus[es] upon the circumstances as the actor believes them to be rather than as they actually exist.' " *Id.* (quoting MODEL PENAL CODE § 5.05 commentary at 490-91 (1985)).

103. *Id.* at 502.

104. *See id.*

105. *Id.*

106. *See id.* at 505.

107. *See id.*

108. 652 So. 2d 611 (La. Ct. App. 1995).

109. *See id.* at 617.

110. *Id.* at 613.

111. *Id.* at 615 (citing LA. REV. STAT. ANN. § 14.27(a) (West 1986)).

plished.[112] The court concluded that the crime of attempted murder merely requires that the defendant posses the specific intent to kill.[113]

Applying the law to the facts in *Caine*, the court held that the defendant's actions supported the finding that he possessed the specific intent to kill his victim.[114] The court reasoned that the defendant had the requisite specific intent to kill because he purposely stabbed the victim with a needle attached to a syringe full of clear liquid.[115] Additionally, the court concluded that there was a strong possibility that the needle was contaminated with HIV because the defendant was HIV-positive, "TRACK MARKS" were apparent on the defendant's arms, and the defendant had retrieved the needle from his own coat pocket.[116] Furthermore, prior to the stabbing, the defendant told the victim, "I'll give you AIDS."[117] The court concluded, therefore, that the combination of all of the evidence before it, coupled with a finding that the defendant possessed the specific intent to kill, equaled a preparatory step towards the defendant killing the victim.[118]

In 1996, in *State v. Hinkhouse*,[119] the Court of Appeals of Oregon affirmed the conviction of an HIV-positive defendant for ten counts of attempted murder and attempted assault.[120] The *Hinkhouse* court concluded that sufficient evidence supported the defendant's convictions.[121] First, the defendant was aware of his HIV-positive status

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112. *See id.*

113. *See id.* at 616.

114. *See id.*

115. *See id.*

116. *See id.*

117. *Id.*

118. *See id.*

119. 912 P.2d 921 (Or. Ct. App. 1996), *modified*, 915 P.2d 489 (Or. Ct. App.), *cert. denied* 925 P.2d 908 (Or. 1996). In *Hinkhouse*, the defendant repeatedly engaged in unprotected sex while knowing he was HIV-positive. *See id.* at 922-23. Notwithstanding exhaustive warnings concerning the consequences of his actions, the defendant would either deny his status to his partners when asked or fail to inform them. *See id.* The defendant's unprotected sexual encounters were so numerous that, as a condition of his probation violation, the defendant was required to sign a probation agreement which contained a "commitment not to engage in any unsupervised contact with women without express permission from his parole officer." *Id.* at 923. Despite this agreement, the defendant continued to engage in unprotected sex. *See id.* at 922-23.

120. *See id.* at 922.

121. *See id.* at 924.

and that his condition was terminal.[122] Second, he knew that this condition could be transmitted through unprotected sex and that transmission would eventually kill the transferee.[123] Finally, despite his knowledge, the defendant engaged in persistent unprotected sex with multiple partners, concealing his HIV-positive status from them.[124]

The court reiterated that when a person unjustifiably attempts to kill another human being, that person has committed the offense of attempted murder.[125] The court further defined "intentionally" as "act[ing] with a conscious objective to cause the result or to engage in the conduct so described."[126]

The *Hinkhouse* court concluded that the defendant's acts satisfied the required elements of attempted murder.[127] The court reasoned that the defendant was aware of his status and was counseled concerning the deadliness of the disease.[128] Specifically, the defendant was fully aware that a single encounter could transmit the virus and that he should wear a condom during sex to reduce the likelihood of transmission.[129] Nevertheless, the defendant pursued multiple partners, continuing to engage in unprotected sex with women while concealing his HIV-positive status.[130] Based on this evidence, the court affirmed the convictions and concluded that the defendant's conduct would allow "a rational fact finder [to] conclude beyond a reasonable doubt that [the] defendant acted . . . deliberately to cause his victims serious bodily injury and death."[131]

C. Statistical Data on AIDS and HIV Transmission

Statistical studies documenting the magnitude and continuous spread of AIDS in the United States illustrate the fatal nature of the disease and support efforts to impose criminal liability for intentionally transmitting the virus. In the United States, 501,310 cases of

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122. *See id.*
123. *See id.* at 924-25.
124. *See id.* at 922, 925.
125. *See id.* at 924 (citing OR. REV. STAT. §§ 163.115, .005 (1995)).
126. *Id.* (alteration in original) (quoting OR. REV. STAT. § 161.085(7) (1995)).
127. *See id.* at 922, 925.
128. *See id.* at 922-23.
129. *See id.* at 922-23, 925. The defendant acknowledged that he was informed that engaging in unprotected sex and transmitting the disease was equivalent to murder. *See id.* at 925.
130. *See id.* at 923, 925.
131. *Id.*

AIDS were reported as of October 31, 1995.[132] Sixty-two percent of those AIDS victims were reported dead.[133] As of June 1996, the Centers for Disease Control estimated that 223,000 adolescents and adults were living with AIDS in the United States.[134] The World Health Organization estimates that 18 million adults have been infected with HIV worldwide.[135] Of the 501,310 nationally reported AIDS cases, forty-nine percent of those occurred between October 1993 and October 1995.[136]

In 1993, HIV infection was the most common cause of death for persons aged twenty-five to forty-four.[137] In 1994, approximately 41,930 United States residents died as a result of HIV infection, which represents a nine percent increase from 1993.[138] Mortality data for 1993 and 1994 show a continuing increase in HIV infection as one of the leading causes of death in the United States.[139] Furthermore, from January 1996 to December 1996, 36,434 known AIDS cases were reported.[140] Of these cases, 25,410 deaths occurred during this same reporting period.[141] Finally, studies underscore the fact that the AIDS epidemic is increasing most rapidly among per-

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132. *See First 500,000 AIDS cases—United States*, 44 CDC MORBIDITY AND MORTALITY WKLY. REP. 849, 850 (1995) [hereinafter *AIDS Cases*]. As of December 1996, the Centers for Disease Control reported that AIDS cases totaled 15,037 in Maryland. *See* U.S. DEPT. OF HEALTH AND HUMAN SERVICES, 8 HIV/AIDS SURVEILLANCE REPT. 7 tbl.1 (1996) [hereinafter SURVEILLANCE REPT.]. The number of AIDS cases in Washington, D.C., totaled 9,272. *See id.*

133. *See AIDS Cases, supra* note 132, at 850.

134. *See* SURVEILLANCE REPT., *supra* note 132, at 2. The report concludes that there was a "substantial increase in AIDS prevalence in the United States." *Id.* Furthermore, the report states that these figures represent a 65% increase since January 1993. *See id.* This increase illustrates a decline in AIDS deaths, but a stable number of new AIDS cases. *See id.*

135. *See AIDS cases, supra* note 132, at 851.

136. *See id.* at 849.

137. *See Update: Mortality Attributable to HIV Infection Among Persons Aged 25-44 Years—United States, 1994*, 45 CDC MORBIDITY AND MORTALITY WKLY. REP. 121, 121 (1996) [hereinafter *Update*]. HIV infection accounted for 19% of all deaths in this age group, making it the leading cause of death for persons aged 25-44. *See id.*

138. *See id.*

139. *See id.*

140. *See* SURVEILLANCE REPT., *supra* note 132, at 19 tbl.13.

141. *See id.* These figures equate to a 70% death rate of those reported AIDS cases during this particular reporting interval. *See id.* at 19 n.1. These figures include both adults and adolescents. *See id.* at 19. Furthermore, the fatality rates reported may be underestimated because of incomplete reporting of deaths. *See id.* at 19 n.1.

sons, particularly women, infected through heterosexual contact with a partner infected with HIV.[142] The majority of new AIDS cases among women are a result of sex with an HIV-infected man.[143]

There are no available studies that report the rate, or potential rate, of HIV transmission for a victim of AIDS rape.[144] During a single encounter of unprotected, consensual sex, a female with an HIV-infected male partner faces a .01% to .02% chance of being infected with the virus.[145] Moreover, sexual encounters that involve violent penetration, such as sodomy and rape, increase the likelihood of transmission.[146] Therefore, while we cannot conclude from the available data a particular rate of transmission from one act of AIDS rape, we can deduce from the available statistics that the rate is greater than .01% to .02%.

III. THE INSTANT CASE

A. *Facts*

In *Smallwood v. State*,[147] Dwight Ralph Smallwood pleaded guilty to attempted first degree rape and robbery.[148] Smallwood was convicted of assault with intent to murder, attempted murder, and reck-

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142. *See Update: AIDS Among Women—United States*, 1994, 44 CDC MORBIDITY AND MORTALITY WKLY. REP. 81, 83 (1995) [hereinafter *AIDS Among Women*]; *see also Heterosexually Acquired AIDS—United States, 1993*, 43 CDC MORBIDITY AND MORTALITY WKLY. REP. 155, 159 (1994) [hereinafter *Heterosexually Acquired AIDS*].

143. *See Heterosexually Acquired AIDS*, *supra* note 142, at 155-56. This conclusion was demonstrated by the following figures: AIDS cases resulting from heterosexual contact increased 130% compared to 1992. *See id.* Furthermore, 49.7% of AIDS cases are a result of heterosexual contact with an HIV-infected individual. *See id.* at 156.

144. *See* Scroggins v. State, 401 S.E.2d 13, 19 (Ga. Ct. App. 1990) (noting "the unsettled state of the body of knowledge as to the transmission of the AIDS virus"); Kevin A. McGuire, Comment, *AIDS and the Sexual Offender: The Epidemic Now Poses New Threats to the Victim and the Criminal Justice System*, 96 DICK. L. REV. 95, 96 (1991) ("At the present, there are no statistics regarding the risks of transmission of the HIV virus through sexual assault.").

145. *See* McGuire, *supra* note 144, at 97 (citing a 1:500 male to female rate of transmission); Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1022 (1989) (citing a 1:1000 male to female rate of transmission).

146. *See* State v. Hinkhouse, 912 P.2d 921, 923-24 (Or. Ct. App. 1996). In *Hinkhouse*, Dr. Beers, an expert, testified that a violent, traumatic sexual experience increases the likelihood of tissue tears. *See id.* These tears weaken the body's barriers to the virus. *See id.*

147. 343 Md. 97, 680 A.2d 512 (1996).

148. *See id.*

less endangerment in the Circuit Court for Prince George's County.[149]

Smallwood was initially diagnosed as being infected with HIV on August 29, 1991.[150] He was informed of his HIV status by September 25, 1991.[151] In early 1992, a social worker warned Smallwood of the importance of practicing safe sex to avoid transmission of the virus.[152] In July 1993, Smallwood assured medical personnel that he only had one sex partner and that he always wore a condom during intercourse.[153]

On September 26, 1993, Smallwood and an accomplice robbed and raped a woman at gunpoint.[154] The two men forced the woman into a grove of trees and placed a gun to her head while they raped her.[155] On September 28, 1993, Smallwood was again involved in a similar robbery and rape of a woman at gunpoint.[156] Finally, on September 30, 1993, Smallwood and an accomplice completed yet a third robbery and rape at gunpoint.[157] Smallwood raped this woman and forced her to perform fellatio on him.[158] In all three incidents, the women were threatened with death if they did not cooperate.[159] Furthermore, Smallwood sexually penetrated all three women without wearing a condom.[160]

B. The Court of Special Appeals's Opinion

Following Smallwood's conviction in the circuit court, he was sentenced to prison on an array of charges.[161] On appeal to the Court of Special Appeals of Maryland, the court affirmed

149. *See id.* at 101, 680 A.2d at 513-14.
150. *See id.* at 100, 680 A.2d at 513.
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.* at 101, 680 A.2d at 514. Smallwood was sentenced to life imprisonment for the charge of attempted rape. *See id.* This sentence was to run concurrently with a 20-year sentence for robbery with a deadly weapon, a 30-year sentence for assault with intent to murder, and a 5-year sentence for the charge of reckless endangerment. *See id.* In addition, the court assessed a concurrent sentence of 30 years for each of the three charges of attempted second degree murder. *See id.*

Smallwood's convictions for attempted second degree murder and assault with intent to murder.[162] For sentencing purposes, the court merged the conviction for assault with intent to murder into the conviction for attempted second degree murder and remanded the case to the circuit court for re-sentencing.[163] The court acknowledged that the issue before it was one of first impression and noted its reliance on cases from other jurisdictions for guidance.[164]

The court of special appeals reiterated that the applicable standard in reviewing the sufficiency of the evidence for a criminal conviction was " 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.' "[165] Thus, the appropriate inquiry at the appellate level is "whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" after viewing all the evidence most favorable to the prosecution.[166] Moreover, the court of special appeals noted that the trial court's verdict would not be set aside unless it was clearly erroneous.[167]

The court began its discussion by outlining the elements of attempted second degree murder. First, the court of special appeals noted the crime of attempt requires an " 'overt act . . . that goes beyond mere preparation.' "[168] The court went on to note that the crime of attempted second degree murder requires the specific intent to kill,[169] which may be inferred from surrounding circumstances.[170] Finally, the court quoted the Court of Appeals of Maryland in defining the element of specific intent as " 'the specific intent to kill under circumstances that would not legally justify or

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162. *See* Smallwood v. State, 106 Md. App. 1, 15, 661 A.2d 747, 754 (1995), *rev'd by*, 343 Md. 97, 680 A.2d 512 (1996).

163. *See id.* at 16, 661 A.2d at 754.

164. *See id.* at 6, 661 A.2d at 749.

165. *Id.* at 4-5, 661 A.2d at 749 (quoting State v. Raines, 326 Md. 582, 588-89, 606 A.2d 265, 268 (1992)).

166. *Id.* at 5, 661 A.2d at 749 (emphasis omitted) (quoting *Raines*, 326 Md. at 588-89, 606 A.2d at 268).

167. *See id.* (citing *Raines*, 326 Md. at 588-89, 606 A.2d at 268).

168. *Id.* at 6, 661 A.2d at 754 (quoting State v. Earp, 319 Md. 156, 162, 571 A.2d 1227, 1230 (1990)).

169. *See id.* (quoting *Earp*, 319 Md. at 163, 571 A.2d at 1231).

170. *See id.* The court illustrated such an inference through the circumstances which existed in *State v. Jenkins*, 307 Md. 501, 514, 515 A.2d 465, 471 (1986) (inferring specific intent to kill from the act of firing a gun while pointed at a vital part of the human body).

excuse the killing or mitigate it to manslaughter.' "[171]

After laying this foundation, the court of special appeals affirmed the trial court's verdict and concluded that Smallwood's act of inserting his penis into the vaginas of the victims "constituted an overt act in furtherance of the intent that went beyond mere preparation."[172] Smallwood conceded to this conclusion and admitted that, by raping his victim, he "did something that went 'past that mere tenuous, theoretical or specter of chance of transmitting the disease.' "[173] In light of all the evidence, the court of special appeals concluded that the offense of attempted first degree rape satisfied the elements required for a finding of attempted second degree murder.[174]

The court of special appeals found that the element of specific intent was present and rejected Smallwood's argument that his attempt to rape was just that—an attempt to rape—and insufficient to infer a specific intent to kill.[175] The court cited several pieces of evidence which permitted a rational fact finder to infer beyond a reasonable doubt that Smallwood possessed the specific intent to kill.[176] First, the court affirmed the trial court's finding that malice and the intent to kill could be inferred from the following facts: Smallwood knew that he was HIV-positive; he knew that HIV is deadly and can be transmitted during unprotected sex; and he made statements to medical personnel that he always used a condom when engaging in intercourse.[177] Notwithstanding this wealth of knowledge, Smallwood forcibly engaged in unprotected sex with three women.[178]

Considering all of the evidence, the court of special appeals determined that the trial court could have found that Smallwood possessed the specific intent to kill, and the court relied on a well-grounded principle of criminal law which holds that " 'one intends the natural and probable consequences of his act.' "[179] The court

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171. *Smallwood*, 106 Md. App. at 6, 661 A.2d at 749 (quoting *Earp*, 319 Md. at 167, 571 A.2d at 1231).
172. *Id.* at 10, 661 A.2d at 751.
173. *Id.*
174. *Id.*
175. *See id.*
176. *See id.* at 14-15, 661 A.2d at 753-54.
177. *See id.*
178. *See supra* notes 150-60 and accompanying text.
179. *Smallwood*, 106 Md. App. at 15, 661 A.2d at 754 (quoting Ford v. State, 330 Md. 682, 704, 625 A.2d 984, 994 (1993)). In *Ford*, the defendant claimed that he did not intend to hurt anyone when he threw rocks at the windshields of vehicles traveling on a highway. *See Ford*, 330 Md. at 690, 625 A.2d at 988. Rejecting

concluded that the natural and probable consequence of Smallwood's acts would be the transmission of HIV–the deadly AIDS producing virus.[180] Thus, the Court of Special Appeals of Maryland affirmed the trial court's verdict regarding the conviction for attempted murder and assault with intent to murder.[181] The Court of Appeals of Maryland then granted certiorari.[182]

C. The Court of Appeals's Decision

The issue before the Court of Appeals of Maryland was whether the trial court properly found that Smallwood possessed the specific intent to kill required for his convictions of attempted second degree murder and assault with intent to murder.[183] Smallwood contended that the trial court lacked sufficient evidence to prove that he intended to kill his victims.[184] He argued that having unprotected sex when he knew that he was HIV-positive was insufficient to infer an intent to kill.[185] The State, however, urged that Smallwood's HIV-positive status was analogous to the use of a deadly weapon in the commission of a crime.[186] The State argued that "engaging in unprotected sex when one is knowingly infected with HIV is equivalent to firing a loaded firearm at that person."[187]

The court of appeals held that despite Smallwood's knowledge of his HIV-positive status, that fact was not sufficient, by itself, to prove that Smallwood had the specific intent to kill required to prove attempted murder and assault with intent to murder.[188] Rejecting the State's argument, the court reasoned that before the

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the defendant's contention, the *Ford* court held: "It is a reasonable inference that a 'natural and probable consequence' of throwing a large rock through the windshield of a fast moving vehicle is permanent injury of various forms to the vehicle's occupants." *Id.* at 704, 625 A.2d at 994. Drawing an analogy to the *Ford* court's proposition, the court of special appeals in *Smallwood* concluded that the trial court could have reasonably found that a "natural and probable consequence of an HIV-infected assailant attempting to rape his victim, without using a condom, would be the transmission of the deadly AIDS virus." *Smallwood*, 106 Md. App. at 14-15, 661 A.2d at 753.

180. *See Smallwood*, 106 Md. App. at 14, 661 A.2d at 753.
181. *See id.* at 1, 15, 661 A.2d at 747, 754.
182. *See* Smallwood v. State, 342 Md. 97, 101, 680 A.2d 512, 514 (1996).
183. *See id.* at 101-02, 680 A.2d at 514.
184. *See id.* at 102, 680 A.2d at 514.
185. *See id.*
186. *See id.*
187. *Id.*
188. *See id.* at 106, 680 A.2d at 516.

State could infer that Smallwood's actions evidenced an intent to kill, the State must first show that the natural and probable result of the defendant's conduct would have been death to his victims.[189] In concluding that the State failed to meet this burden,[190] the court explained that although exposure to AIDS is "one *natural* and possible consequence of exposing someone to a risk of HIV infection," it is not as clear that death will be a probable result from a single exposure to the virus.[191] Therefore, without sufficient probability that death would result from a single exposure to the virus, the court found that there was insufficient evidence to support an inference that Smallwood intended to kill his victims.[192] The court added that because there was insufficient evidence to prove that death would be a probable result of the defendant exposing his victims to HIV, the State's analogy to a deadly weapon was tenuous.[193]

Additionally, the court of appeals rejected the State's position on the grounds that no other evidence existed to infer an intent to kill.[194] Specifically, the court stated, "[Smallwood's] actions fail to provide evidence that he also had an intent to kill."[195] The court charged that some form of additional evidence, such as specific statements or actions by Smallwood, was necessary to allow the fact finder to infer that Smallwood possessed the requisite intent to kill.[196]

To bolster this conclusion, the court relied on several cases from other jurisdictions that involved similar issues.[197] The cases relied on by the court were those cited by the State—*State v. Hinkhouse*,[198] *Weeks v. State*,[199] *State v. Caine*,[200] and *Scroggins v. State*.[201]

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189. *See id.* at 105-06, 680 A.2d at 516.
190. *See id.* at 106, 680 A.2d at 516.
191. *Id.*
192. *See id.*
193. *See id.* at 105-06, 680 A.2d at 516.
194. *See id.*
195. *Id.* at 106, 680 A.2d at 516. The court explained that Smallwood's actions did not illustrate an intent to kill. *See id.* Rather, Smallwood's actions demonstrated the intent to commit the crimes of rape and armed robbery, crimes for which he had already pled guilty. *See id.*
196. *See id.* at 107, 680 A.2d at 516 (quoting Fitting, *supra* note 53, at 78). The *Smallwood* court was the first court to espouse the "additional evidence" test. The court adopted the test verbatim from a student-written article. *See id.* The student-author cited no authority for this additional evidence test. *See generally* Fitting, *supra* note 53.
197. *See Smallwood*, 343 Md. at 107-08, 680 A.2d at 516-17.
198. 912 P.2d 921 (Or. Ct. App. 1996).

The Court of Appeals of Maryland contended that each of these cases demonstrated the type of additional evidence that is necessary to infer an intent to kill:[202] in *Hinkhouse*, the defendant concealed his HIV-positive status from the numerous women with whom he engaged in unprotected sex;[203] in *Caine*, the defendant stabbed his victim with a syringe containing clear liquid after stating "I'll give you AIDS";[204] in *Weeks*, the defendant knew he was HIV-positive[205] and said he was "going to take someone with him when he went" before he spat in a prison guard's face;[206] in *Scroggins*, the defendant "sucked up excess spitum" and then bit a police officer while fully aware of his own HIV-positive status.[207]

Based on these cases, the court of appeals concluded that the State failed to provide any additional evidence, outside of rape, that would allow the fact finder to infer an intent to kill.[208] In addition, the court held that the State failed to meet its burden of proof because it did not provide evidence tending to prove that death was a natural and probable result of the defendant's actions.[209] Specifically, the court stated that "the State has presented no evidence from which it can reasonably be concluded that death by AIDS is a probable result of Smallwood's actions *to the same extent* that death is the probable result of firing a deadly weapon at a vital part of someone's body."[210]

IV. ANALYSIS

The AIDS virus has presented society with a health catastrophe.[211] Predictably, this catastrophe has made its way into courtrooms across the nation. In light of the magnitude of the AIDS epidemic, society as a whole must accept responsibility for hindering its

199. 834 S.W.2d 559 (Tex. Ct. App. 1992).
200. 652 So. 2d 611 (La. Ct. App. 1995).
201. 401 S.E.2d 13 (Ga. App. 1990).
202. *See Smallwood*, 343 Md. at 107, 680 A.2d at 516.
203. *See id.* at 107, 680 A.2d at 516-17.
204. *Id.* at 107, 680 A.2d at 517.
205. *See id.*
206. *Id.* at 107-08, 680 A.2d at 517.
207. *Id.* at 108, 680 A.2d at 517. The defendant in *Scroggins* laughed when the police officer inquired whether he, the defendant, had AIDS. *See* Scroggins v. State, 401 S.E.2d 13, 15 (Ga. Ct. App. 1990).
208. *See Smallwood*, 343 Md. at 109, 680 A.2d at 518.
209. *See id.* at 105-06, 680 A.2d at 516.
210. *Id.* at 106, 680 A.2d at 516 (emphasis added).
211. *See supra* notes 132-43 and accompanying text.

proliferation. Courts are not exempt from this responsibility and must hold those who knowingly expose others to the fatal disease accountable for their actions.[212] Thus, the importance of the decision rendered by the *Smallwood* court and its effect on society cannot be overlooked.

A. Where the Court of Appeals Erred

After stating the appropriate standard of review of the trial judge's decision to infer Smallwood's specific intent to kill, the Court of Appeals of Maryland then erred in applying that standard.[213] Had the appropriate standard of review been correctly applied to the facts before the *Smallwood* court, the convictions for attempted murder would have been upheld.[214] Moreover, although the additional evidence requirement advanced by the court of appeals was unnecessary, it was satisfied nonetheless.[215] The circumstantial evidence present in Smallwood's agreed-upon statement of facts should have satisfied any additional evidence the court of appeals sought.[216] Furthermore, the court of appeals inappropriately

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212. This principle has been supported internationally. Specifically, the Legal Working Party of the Intergovernmental Committee on AIDS was created to review the complex legal issues resulting from the HIV/AIDS epidemic. This committee recognizes a twofold principle: (1) individuals have a personal responsibility to protect their own health; and (2) these same individuals owe a duty to others to prevent the spread of HIV/AIDS. *See* Simon H. Bronitt, *Criminal Liability for the Transmission of HIV/AIDS*, 16 CRIM. L.J. 85 (1992). The Committee contended that this two-part principle is consistent with the policy of recognizing that criminal liability should be extended to those persons who intentionally transmit HIV/AIDS. *See id.* at 86. Simon Bronitt opined that criminal liability for the transmission of HIV/AIDS should be extended to those individuals who knowingly transmit HIV/AIDS and either intend for transmission to occur or act recklessly regarding whether transmission occurs. *See id.* at 90; *cf.* Wepner, *supra* note 1, at 943-44, 951 (advocating that those who spread the AIDS virus through rape should receive the death penalty).

213. The *Smallwood* court correctly stated the proper standard of review when it explained that Smallwood's conviction could only be affirmed if the decision of the fact finder was reasonable in light of the evidence before it. *See Smallwood*, 343 Md. at 104, 680 A.2d at 515. However, upon applying this standard, the court erroneously altered it, requiring the State to prove that death is just as likely to result from AIDS rape as it would be from "firing a *deadly* weapon at a *vital* part of the human body" in order for the fact finder's decision to be reasonable. *Id.* at 106, 680 A.2d at 516.

214. *See infra* notes 232-65 and accompanying text.

215. *See infra* notes 266-99 and accompanying text.

216. The agreed-upon statement of facts demonstrated Smallwood's knowledge of his HIV status, the extensive medical counseling that he received, and his de-

relied on precedent that failed to support its holding.[217]

B. The Appropriate Standard of Review

Smallwood intended, as the court of appeals requires, "the natural and probable consequences" of his acts.[218] In order for the trial court to allow the fact finder to infer a specific intent to kill, the judge must be convinced that this permissible inference would be reasonable in light of the surrounding circumstances and actions taken by the defendant.[219] This does not mean that the element of intent is reduced to a reasonableness standard.[220] It merely permits the fact finder to infer a specific intent to kill when it would be reasonable under the facts of the case.[221] The inference is permissible and may be drawn by the fact finder only if it would be rational to infer that the fact was proven in light of all of the evidence advanced by the State.[222]

When dealing with a permissible inference, if the State proves the basic facts that give rise to the inference, then their burden of production has been met.[223] The fact finder is then instructed that it may draw the permissible inference, but remains free to accept or reject the inference.[224] In *Smallwood*, the trial judge sat as both

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liberate acts of ignoring the warnings regarding the deadliness of the virus by raping three women without wearing a condom. *See Smallwood*, 106 Md. App. at 3-4, 661 A.2d at 748.

217. *See infra* notes 300-31 and accompanying text.

218. *Smallwood*, 106 Md. App. at 14, 661 A.2d at 753; *see also supra* notes 189-193 and accompanying text.

219. *See Smallwood*, 343 Md. at 104, 680 A.2d at 515; *see also* County Court of Ulster County v. Allen, 442 U.S. 140, 157 (1979) ("Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference."); LAFAVE, *supra* note 41, § 3.5(f), at 225 (distinguishing between the reasonableness requirement for permissive presumptions and mandatory presumptions).

220. *See* LAFAVE, *supra* note 41, § 3.5(f), at 225.

221. *See id.*

222. *See Ulster County*, 442 U.S. at 164.

223. *See id.* at 157; *see also* LYNN MCLAIN, MARYLAND RULES OF EVIDENCE § 2.301.4(b) (1994). "The federal rules [and the Maryland Rules] contain no rule on the effect of 'presumptions' in criminal cases, (when helpful to the State they are actually only permissible inferences) . . . . The governing questions . . . are constitutional ones and are amply treated in the case law." *Id.* § 2.301.4(a). .

224. *See Ulster County*, 442 U.S. at 157.

judge and fact finder.[225] The court of appeals reviewed whether the underlying facts that were proven by the State supported an inference that Smallwood had the specific intent to kill.[226]

The standard for reviewing this decision is whether the trial judge's conclusion to allow an inference of the specific intent to kill was so clearly erroneous[227] that "under the facts of the case, there is no rational way the trier of fact could make the connection permitted by the inference."[228] If this "rational connection" is absent, the result is that the burden of proof regarding the inferred fact unconstitutionally shifts to the defendant.[229] Nonetheless, only where the rational connection is missing has the court violated the defendant's due process rights, and the decision should therefore be reversed.[230]

The *Smallwood* court stated that it was reviewing whether the trial court's decision to allow the fact finder to infer a specific intent to kill was reasonable in light of the facts before it.[231] However, the *Smallwood* court altered the standard upon applying it to the facts of the case.

1. The Court of Appeals Erred When Applying the Standard of Review to the Trial Court's Decision

The court of appeals erred by requiring the State to prove that AIDS rape is as probable to result in death as the act of "firing a deadly weapon at a vital part of the human body."[232] While the State

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225. *See* Smallwood v. State, 106 Md. App. 1, 5, 661 A.2d 747, 749 (1995).

226. *See* Smallwood v. State, 343 Md. 97, 101-02, 680 A.2d 512, 514 (1996).

227. *See Smallwood*, 106 Md. App. at 10, 661 A.2d at 751. The court of special appeals correctly applied this element of the standard of review stating, "[w]hen reviewing the sufficiency of the evidence, 'we look at the evidence of guilt under the microscope of Maryland Rule [8-131] which permits us to set aside the verdict of the court if it was clearly erroneous . . . .' " *Id.* (alteration in original) (quoting Murray v. State, 35 Md. App. 612, 614, 371 A.2d 719, 721 (1977)). Moreover, case law indicates a trial court's judgment should be afforded relatively greater deference on review. *See id.* (citing State v. Raines, 326 Md. 582, 589, 606 A.2d 265 (1992)).

228. *Ulster County*, 442 U.S. at 157.

229. *See id.*

230. *See id.* at 160 n.17; Sandstrom v. Montana, 442 U.S. 510 (1979); Mullaney v. Wilbur, 421 U.S. 684, 686-88 (1975).

231. *See Smallwood*, 343 Md. at 103, 680 A.2d at 515.

232. *Id.* at 106, 680 A.2d at 516; *cf.* McCabe, *supra* note 3, at 778-80. One commentator opined that the court of appeals's decision establishes a dangerous precedent because it could open the door to convicting mothers who transmit HIV to their fetus upon birth of attempted murder. *See id.* Even though seroconversion rates are typically cited as quite high, this fear ignores the obvi-

may have analogized the two,[233] appellate courts must review trial courts' decisions not in light of analogies advanced on appeal, but by the standards announced by the legislature or the Supreme Court.[234] In *Smallwood*, the proper standard was whether the three acts of AIDS rape were rationally connected to the specific intent to kill.[235] That is, could a reasonable fact finder have concluded that the AIDS rapes and their surrounding circumstances demonstrated that the defendant possessed the specific intent to kill his victims.[236] This query should have been answered affirmatively.

2. The Appropriate Standard of Review as Applied to *Smallwood*

In light of what is commonly understood about HIV, a reasonable person could conclude that when an individual commits three separate acts of AIDS rape, that person intends to kill his victims by infecting them with the deadly virus. The appropriate standard of review is one of reasonableness; therefore, an appellate court should not consider only medical statistics regarding the efficacy of the means employed by the assailant to spread the virus.[237] Instead, the court should consider the common understanding of the efficacy of the means employed in conjunction with available medical statistics.[238]

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ous differences between one who makes the decision to have a child and one who decides to rape another. *See* Gostin, *supra* note 145, at 1044 n.144. It can hardly be imagined that future courts would equate the two, and prosecution for acts of giving birth are implausible. *See id.* ("Compare the relatively low risk of sexual intercourse with the much more significant risk of an HIV-infected mother having a seropositive baby. Here the risk is approximately 50% or greater. Yet, the criminal law would not establish a penalty on the mother for conceiving and failing to abort.").

233. *See Smallwood*, 343 Md. at 102, 680 A.2d at 514.

234. *See supra* notes 219-23, 227-28 and accompanying text.

235. *See Ulster County*, 442 U.S. at 157.

236. *See id.*

237. *See* Schulz v. Pennsylvania R.R. Co., 350 U.S. 523, 526 (1956) ("Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be fairly drawn.").

238. *Cf.* Wills v. State, 329 Md. 370, 391, 620 A.2d 295, 305 (1993) (reversing a criminal conviction based upon a finding that reasonable jurors' common understanding of "substantial and grave" improperly altered the reasonable doubt standard); Perion v. United Fruit Co., 226 Md. 591, 603, 174 A.2d 777, 784 (1961) (quoting *Schulz*, 350 U.S. at 526); Fabritz v. State, 30 Md. App. 1, 3, 351 A.2d 477, 478 (1976) (holding that in a conviction for child abuse, the jury

Medical experts have no data regarding the transmission rates from a single act of AIDS rape.[239] In fact, medical experts have reached different conclusions as to the probability of transmission during single incidents of unprotected, consensual sex.[240] The only statistical evidence of transmission rates before the trial court was the rate of heterosexual, unprotected, consensual sex.[241] This statistical evidence placed the odds of transmission at 1:500.[242]

Reasonable persons, without any statistics whatsoever, generally know that the most prevalent mode of transmission of the AIDS virus is through unprotected sex. Society is constantly bombarded with public service announcements to this effect. Certainly, the trial judge was aware of this commonly known fact.[243] Moreover, a reasonable person could conclude that a violent act of rape substantially increases the likelihood of transmission.[244] In light of what reasonable persons understand about AIDS, the inference drawn by the trial judge, that Smallwood intended to kill his victims, becomes more convincing when considered in conjunction with the aggravating circumstantial evidence.[245]

Due to the arguably spontaneous nature of rape, it may seem reasonable to imagine a person not having the specific intent to kill by committing a single act of AIDS rape.[246] However, this was not the case with Smallwood. Smallwood raped three women on three separate occasions.[247] It would certainly be reasonable to construe

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should consider the terms of the applicable statute as they are commonly understood).

239. *See* McGuire, *supra* note 144, at 96 ("At the present, there are no statistics regarding the risks of transmission of the HIV virus through sexual assault.").

240. *Compare* Gostin, *supra* note 145, at 1022 (citing research indicating a 1:1000 male-to-female transmission rate), *with* McGuire, *supra* note 144, at 97 (citing research indicating a 1:500 male-to-female rate of transmission).

241. *See* McCabe, *supra* note 3, at 778 n.111 (citing Petitioners Brief, *Smallwood* (No. 122)).

242. *See id.*

243. *See* Smallwood v. State, 106 Md. App. 1, 10, 661 A.2d 747, 751 (1995) ("That HIV can be transmitted through sexual contact is undisputed.").

244. *See* McGuire, *supra* note 144, at 97 (explaining how statistics demonstrate that the acts of rape and sodomy increase the rate of transmission to an even greater likelihood of transmission than 1:500).

245. *See infra* notes 247-49 and accompanying text.

246. *See* Scroggins v. State, 401 S.E.2d 13, 18 (Ga. Ct. App. 1990) (noting the importance of spontaneity, the court stated that the defendant's act of "suck[ing] up excess spitum before biting [a police officer was] evidence of a deliberate, thinking act rather than purely spontaneous").

247. *See* Smallwood v. State, 343 Md. 97, 100, 680 A.2d 512, 513 (1996).

these three separate acts as the result of a contemplated, deliberate motive.[248]

The fact finder may consider the surrounding circumstances of the events when inferring the element of intent.[249] However, this does not require the fact finder to view the events as if they took place in isolation. Therefore, in light of both what reasonable persons commonly understand about the AIDS virus and Smallwood's three separately occasioned, deliberate acts, it was reasonable for the trial judge to conclude that Smallwood possessed the specific intent to kill his victims by exposing them to the AIDS virus.

3. Statistics Support a Finding That Death Would Be the Natural and Probable Result of Smallwood's Actions

Even if the efficacy of the means employed are considered, expert opinions, statistics, and case law illustrate that a reasonable person could conclude that when an individual commits three separate acts of AIDS rape, that person intends to kill his victims by infecting them with the virus. Courts, legal authorities, scholars, and medical experts all agree that HIV is the cause of AIDS and that AIDS is invariably fatal.[250] In the United States, another individual becomes infected with HIV every thirteen minutes.[251] Moreover, studies have repeatedly shown that heterosexual contact is the leading cause of HIV transmission.[252]

Even though experts have not reached a consensus, data exists which indicates that the potential rate of transmission accompanying one act of unprotected, consensual sex lies between 1:1000 and 1:500.[253] In viewing the trial court's decision in the light most favorable to the State, the court of appeals in *Smallwood* must have considered the 1:500 transmission rate that was advanced by the State[254] because this was the only data before the court that corre-

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248. The trial judge agreed with this view and stated, "I believe that [Smallwood] also had sufficient time to consider the consequences of his act." *Smallwood*, 106 Md. App. at 5, 661 A.2d at 749.

249. *See id.* at 6, 661 A.2d at 749.

250. *See supra* notes 26-33 and accompanying text; *see also Scroggins*, 401 S.E.2d at 20; State v. Caine, 652 So. 2d 611, 617 (La. Ct. App. 1995); *supra* notes 132-46 and accompanying text.

251. *See* Michael L. Closen, *The Arkansas Criminal HIV Exposure Law: Statutory Issues, Public Policy Concerns, and Constitutional Objections*, 1993 ARK. L. NOTES 47, 47 (1993).

252. *See supra* notes 142-43 and accompanying text.

253. *See supra* notes 144-46 and accompanying text.

254. *See* McCabe, *supra* note 3, at 778 n.111 (citing Petitioners Brief, *Smallwood* (No.

sponded to some of the circumstances of Smallwood's acts.[255]

To date, the medical community has not published any data regarding the rate of transmission for victims of AIDS rape.[256] This is due in part to the delayed incubation period of the virus and medical sophistication regarding its immediate detection.[257] However, the consensus in the expert community, which is accepted by courts, is that rough, violent penetration increases the likelihood of transmission.[258] Whether the penetration is anal or vaginal, it often causes a tearing of flesh accompanied by blood and genital fluid exchanges that result in open wounds being directly exposed to the virus.[259] Rape is the epitome of violent sex.

However, medical science cannot yet quantify the increased risk of transmission a person faces when they are victimized by an AIDS rapist.[260] When medical experts can tell a court that death could result from AIDS rape, but cannot quantify the transmission rates, the issue becomes one within the domain of the fact finder.[261] In this situation, medical experts are in no better position to draw conclusions than are average members of the community with all of the

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255. Smallwood committed three acts of AIDS rape. *See* Smallwood v. State, 343 Md. 97, 100, 680 A.2d 512, 513 (1996). These acts included both heterosexual conduct and unprotected sex. *See id.* Only these two elements match the available data on transmission rates. *See supra* notes 144-46 and accompanying text. Statistics also demonstrate that violent sexual encounters increase the risk of HIV transmission. *See supra* note 146 and accompanying text. However, because the data regarding the increased risk of transmission as a result of violent sexual acts has not been quantified by experts, it must be deduced from available statistics. *See supra* notes 144-46 and accompanying text.

256. *See* Scroggins v. State, 401 S.E.2d 13, 19 (Ga. Ct. App. 1990) (noting "the unsettled state of the body of knowledge as to the transmission of the AIDS virus" supported upholding the jury's verdict as reasonable).

257. *See* McGuire, *supra* note 144, at 97-98.

258. *See* State v. Hinkhouse, 912 P.2d 921, 923-24 (Or. Ct. App. 1996). In *Hinkhouse*, Dr. Beers, an expert, testified that a violent, traumatic sexual experience increases the likelihood of tissue tears. *See id.* These tears weaken the body's barriers to the virus. *See id.*

259. *See id.*

260. *See supra* notes 144-46 and accompanying text.

261. *See Scroggins*, 401 S.E.2d at 20 ("Where a medical expert under thorough examination, testifies to his knowledge of the subject and still cannot state one way or another whether a particular instrumentality is "deadly," the jury in considering all the circumstances, including the risk to the victim and to society, is at least as competent as the witness to determine whether it was an instrumentality likely to produce death.").

available data before them.[262]

Thus, not only is HIV deadly, but given the fatal nature of the disease as illustrated by these statistics, HIV can certainly be the natural and probable result of unprotected sexual contact, thus resulting in death.[263] Regardless of whether the court of appeals considered the efficacy of the means employed or the common understanding of the efficacy of these means, the issue was properly before the fact finder. When the court of appeals held that the State failed to meet its burden of proof,[264] it was asking the State to prove, through statistical data, that which is not yet available from the medical research community.[265] The trial judge made the proper decision to allow the inference to be drawn, and his reasonable conclusion as trier of fact should have been upheld by the court of appeals.

4. "Additional Evidence" Requirement Advanced by the Court of Appeals Unnecessary, but Satisfied

Turning to the element of specific intent to kill required for attempted murder, the Court of Appeals of Maryland held that there was insufficient evidence to prove that Smallwood intended to kill his victims.[266] More specifically, the court held that Smallwood's AIDS rapes failed to prove that he possessed the specific intent to kill his victims.[267] The court required that the State demonstrate some sort of "additional evidence," such as explicit statements illustrating Smallwood's intent, in order for a fact finder to infer Smallwood's intent to kill.[268]

a. Source of Authority for the Additional Evidence Requirement

The court of appeals advanced a novel theory when it held that the State must demonstrate additional evidence, apart from the acts involved in an AIDS rape, in order to support an inference of the

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262. *See id.*

263. The fatal nature of the virus satisfies the "natural and probable" death element that the court of appeals required the State to show in order to find Smallwood guilty of attempted murder. *See supra* notes 189-93 and accompanying text.

264. *See* Smallwood v. State, 343 Md. 97, 105-06, 680 A.2d 512, 516 (1996).

265. *See supra* notes 144-46 and accompanying text.

266. *See Smallwood*, 343 Md. at 106-07, 680 A.2d at 516.

267. *See id.*

268. *See id.* (quoting Fitting, *supra* note 53, at 78).

specific intent to kill.[269] The court applied an "inverse merger of intent"[270] rationale when it concluded that Smallwood's acts wholly demonstrate an intent to rob and rape and, therefore, they preclude the possibility of having a simultaneous specific intent to kill.[271] This rationale has no statutory or case law support.[272] It was merely a theory advanced by a law student from Western State University College of Law.[273] Possibly, the court confused this theory with that of the inference discussion advanced by the dissent in the court of special appeals's decision in *Smallwood*.[274]

The court of special appeals's dissent in *Smallwood* discussed Judge Cardozo's theory on competing inferences.[275] The competing inference theory holds that if "two different, mutually exclusive states of mind are inferable: the stronger, more reasonable inference" must be adopted over the weaker.[276] However, the intent to rape and rob a victim are not mutually exclusive of an intent to

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269. *See id.* at 107, 680 A.2d at 516.

270. The term "inverse merger of intent" is used to explain, by analogy, one of the legal theories adopted by the *Smallwood* court. The term "merger" is meant to analogize to the common-law doctrine of merger, whereby a lesser included offense merges into the more inclusive, greater offense when each charge is based on the same acts. *See generally* Williams v. State, 323 Md. 312, 316-17, 593 A.2d 671, 673-74 (1989). The terms "inverse" and "intent" are used to describe the *Smallwood* court's conclusion that because the intent to rape and rob fully describe Smallwood's acts, the intent of greater culpability, the specific intent to kill, cannot be proven by the same acts. *See Smallwood*, 343 Md. at 107, 680 A.2d at 516 ("Smallwood's actions are wholly explained by an intent to commit rape and armed robbery . . . . For this reason, his actions fail to provide evidence that he also had an intent to kill."). In effect, the court held that the more culpable intent (to kill a victim) will merge into the less culpable intent (to rape and rob the victim) when the same act (AIDS rape) is relied on to prove both states of mind. *See generally id.* at 107-08, 680 A.2d at 516 ("As one commentator noted, . . . '[b]ecause virus transmission occurs simultaneously with the act of rape, that act alone would not provide evidence of intent to transmit the virus.' " (alteration in original) (quoting Fitting, *supra* note 53, at 78)).

271. *See Smallwood*, 343 Md. at 106, 680 A.2d at 516.

272. *See id.* at 106-07, 680 A.2d at 516.

273. *See id.* (citing only one source for the "additional evidence" requirement); Fitting, *supra* note 53, at 78, 97 (explaining the additional evidence requirement that arises as a result of the simultaneous intent to murder and rape). The student-author cited no authority to support this proposition. *See id.* at 78.

274. *See* Smallwood v. State, 106 Md. App. 1, 19-23, 661 A.2d 747, 756-58 (1995) (Bloom, J., dissenting).

275. *See id.* at 20, 661 A.2d at 756.

276. *See id.*

kill.[277] This theory would only be applicable to exclude a specific intent to kill when "depraved-heart" intent is more likely.[278] There is no reason that Smallwood could not have intended to rape his victims and simultaneously intended to kill them by infecting his victims with HIV. In fact, in a case cited by the court of appeals, the defendant committed an attempted assault and an attempted murder and was held to simultaneously have the requisite intent for both crimes.[279]

b. Rape Satisfied the "Additional Evidence" Requirement

Case law supports a showing that, in addition to the general dangers of transmitting HIV via consensual sex, Smallwood's acts of AIDS rape greatly increased the likelihood of transmitting the deadly virus to his victims.[280] Courts have acknowledged that an unprotected, violent sexual encounter increases the risk of HIV transmission.[281] Smallwood raped three women.[282] Not only is rape a traumatic experience, but it tends to be much rougher and forceful than consensual sex. Thus, Smallwood's act of rape, which according to medical science increased the likelihood of HIV transmission,[283] should satisfy the additional evidence sought by the court of appeals to support a finding of attempted murder.[284]

c. Circumstantial Evidence Satisfied the "Additional Evidence" Requirement

Specific intent can be proven by circumstantial evidence.[285] A fact finder could infer a specific intent to kill from the surrounding

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277. *See id.* at 22, 661 A.2d at 758.

278. *See id.*

279. *See* State v. Hinkhouse, 912 P.2d 921, 922, 924 (Or. Ct. App. 1996) (upholding convictions for 10 counts of attempted assault and 10 counts of attempted murder).

280. *See id.* at 923-24. In *Hinkhouse,* Dr. Beers, an expert, testified that a violent, traumatic sexual experience increases the likelihood of tissue tears that weaken the body's barriers to the virus. *See id.*

281. *See id.*

282. *See* Smallwood v. State, 343 Md. 97, 100, 680 A.2d 512, 513 (1996).

283. *See supra* note 280 and accompanying text.

284. The *Smallwood* court apparently agreed with this proposition. *See Smallwood,* 343 Md. at 108-09 n.4, 680 A.2d at 517 n.4 (1996) ("An increased probability of infection would strengthen the inferences that could be drawn from the defendant's knowingly exposing his victim to the risk of infection.").

285. *See id.* at 104, 680 A.2d at 515.

circumstances, including the "accused's acts, conduct and words."[286] In *Smallwood*, two separate arguments support a finding of specific intent based on circumstantial evidence.

First, the facts and surrounding circumstances noted by the State, but overlooked by the court of appeals, evidenced Smallwood's specific intent to kill. This specific intent could be inferred from Smallwood's actions in light of his knowledge regarding his HIV-positive status. Specifically, Smallwood was fully aware, prior to and during the rapes, that he was HIV-positive.[287] Smallwood had also received counseling from medical personnel regarding the fatal nature of the virus and that the virus could be transmitted through unprotected sex.[288] In addition, medical counselors informed Smallwood that he must wear a condom when engaging in intercourse to reduce the risk of transmitting the fatal virus.[289]

In sum, Smallwood was exhaustively informed about the nature, methods of transmission, and consequences of the deadly virus.[290] In response to these warnings, Smallwood acknowledged his understanding and assured counselors that he always used a condom during intercourse.[291] Notwithstanding Smallwood's wealth of knowledge about his condition and all of the above warnings, Smallwood raped three women, on three separate occasions, without wearing a condom.[292] Based on this evidence, it was within the fact finder's discretion to find, as the Court of Special Appeals of Maryland properly held, that Smallwood's acts and conduct evidenced a specific intent to kill as required for attempted second degree murder.[293]

Coupled with the above, a second argument exists for holding Smallwood criminally liable by inferring specific intent from his actions, conduct, or words.[294] The court of appeals has allowed this inference to be made when an individual uses a deadly weapon aimed at a vital part of another person's body.[295] However, the court re-

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286. State v. Raines, 326 Md. 582, 591, 606 A.2d 265, 269 (1992) (citing Taylor v. State, 238 Md. 424, 433, 209 A.2d 595, 600 (1965)).
287. *See supra* notes 151-53 and accompanying text.
288. *See supra* notes 151-53 and accompanying text.
289. *See supra* note 152 and accompanying text.
290. *See supra* notes 151-53 and accompanying text.
291. *See supra* note 153 and accompanying text.
292. *See supra* note 154-60 and accompanying text.
293. *See* Smallwood v. State, 106 Md. App. 1, 14-15, 661 A.2d 747, 753-54 (1995).
294. *See supra* note 48 and accompanying text.
295. *See supra* note 50 and accompanying text.

jected this same inference when the State analogized HIV to a deadly weapon.[296] By erroneously requiring an equivalent likelihood of death from the two acts, the court adopted a narrow approach that ignores palpable similarities. Specifically, Smallwood's deadly weapon is the virus itself—a virus thoroughly and extensively documented for its deadliness.[297] Indeed, other courts have reached similar conclusions.[298] Thus, the latent force of the virus can be found to be deadly when Smallwood, its carrier, immerses it into the human body of another.[299] For the purpose of allowing the fact finder to draw an inference of intent to kill, the virus can be equated to a deadly weapon. Smallwood's use of this weapon against another individual should give rise to a permissible inference of specific intent to kill.

C. *The Court of Appeals Misconstrued the Precedent it Relied On*

Turning first to the elements of attempt crimes, the court of appeals has established that "[t]he crime of attempt consists of a specific intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation."[300] This definition does not require proof that the crime attempted actually be completed or be factually possible to complete.[301] Furthermore, the cases relied upon by the court of appeals in support of its holding espouse the same understanding of this definition.[302]

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296. *See* Smallwood v. State, 343 Md. 97, 106-07, 680 A.2d 512, 516 (1996). The State noted that Smallwood was aware that HIV ultimately results in death. *See id.* at 105, 680 A.2d at 516. Furthermore, the State noted that Smallwood knew he could transmit the virus to his victims through unprotected sex. *See id.* Therefore, the State argued that one could infer Smallwood intended to kill his victims. *See id.*

297. *See supra* notes 132-43 and accompanying text.

298. See United States v. Schoolfield, 40 M.J. 132, 134 (1994) ("His aggravated assault is similar to that of pointing a loaded gun at a victim . . . by analogy, because [the appellant] is HIV positive, the appellant's gun is loaded and he assaults his victims by merely placing his penis in their vagina, whether or not he ejaculates in them."); *cf.* Scroggins v. State, 401 S.E.2d 13, 20 (Ga. Ct. App. 1990) (holding that a jury could conclude that a bite from a person who was HIV-positive was a deadly weapon).

299. *See Schoolfield*, 40 M.J. at 134.

300. State v. Earp, 319 Md. 156, 162, 571 A.2d 1227, 1230 (1990); *see also supra* notes 34-38 and accompanying text.

301. *See supra* notes 62-67 and accompanying text.

302. *See supra* notes 197-208 and accompanying text. These cases focused on the issue of impossibility of transmission and not on whether specific intent could

1. The Precedent of *Scroggins, Weeks,* and *Smith*

In *Scroggins,* the defendant contended that his conviction was unjust because no proof existed which demonstrated that HIV could be transmitted via human saliva.[303] However, the Georgia Court of Appeals concluded that an attempt crime is determined by the intent to commit the crime, not the likelihood of its success or completion.[304] The court also explained that factual impossibility is not a defense to attempted murder.[305] The *Scroggins* court stated that although the possibility of HIV transmission may be slight, it did not preclude the defendant's conviction for assault with intent to murder.[306] The court reasoned that "[s]o long as medical science concedes this theoretical possibility," the jury was well within the evidence to consider the human bite of a person infected with HIV to be "deadly."[307] Thus, Scroggins's conviction was affirmed based on his act of biting.[308]

Parallel to *Scroggins,* the *Weeks* court refused to take judicial notice that it is impossible to spread HIV through spitting.[309] The expert testimony conflicted regarding this mode of transmission and, thus, the court concluded that even though "[m]any of the AIDS experts express the opinion that it is impossible to spread HIV through saliva[;] . . . this has not been conclusively established and is not free from reasonable dispute."[310]

Similarly, the *Smith* court rejected impossibility as a defense to attempted murder.[311] The defendant argued that he could not be found guilty of attempted murder because he knew "without dispute [that] a bite cannot transmit HIV . . . ."[312] In rejecting this argument, the *Smith* court concluded that the issue of whether a bite could transmit HIV was irrelevant.[313] The court reasoned that "our

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be inferred.

303. *See Scroggins,* 401 S.E.2d at 16.

304. *See id.* at 18 (quoting 22 C.J.S. *Criminal Law* § 124 (1989)); *see also* OR. REV. STAT. § 161.405(1) (1995); TEX. PENAL CODE ANN. § 15.01(a) (West 1992).

305. *See Scroggins,* 401 S.E.2d at 18.

306. *See id.* at 18-19.

307. *See id.* at 20.

308. *See id.* at 23.

309. *See* Weeks v. State, 834 S.W.2d 559, 562 n.2 (Tex. Ct. App. 1992).

310. *Id.*

311. *See* State v. Smith, 621 A.2d 943 (N.J. Super. 1993).

312. *Id.* at 495.

313. *See id.* at 496.

criminal statutes punish conduct based on state of mind."[314] Thus, the court held that purposeful actions will result in punishment, regardless of whether the result is accomplished.[315]

In *Scroggins, Weeks,* and *Smith,* the courts affirmed convictions for attempted murder based on less likely modes of transmission—biting or saliva exchange—as compared to Smallwood's more recognized method of transmission: unprotected sex (in the form of AIDS rape).[316] Unlike the acts of Scroggins, Weeks, and Smith, Smallwood's acts were more likely, and arguably certain, to have fatal results. The above holdings demonstrate that to establish the elements of attempted murder, courts allow for more liberal findings of intent than the reluctance embodied in *Smallwood.*

The majority opinions in these jurisdictions espouse the principle that the act attempted does not have to result in the likelihood of accomplishment.[317] Unlike the Court of Appeals of Maryland, the courts referenced above do not require a showing that death would have been as probable a result as would firing a gun at a person.[318] Nonetheless, the court of appeals relied upon them in support of its holding. Had the Maryland Court of Appeals followed and applied the majority standards set forth in *Scroggins, Weeks,* and *Smith,* Smallwood's conviction for attempted murder based on his three acts of AIDS rape would have been upheld.

2. The Proper Interpretation of *Scroggins, Weeks,* and *Smith*

The appropriate standard for attempted murder that can be derived from the opinions in *Scroggins, Weeks,* and *Smith* merely requires that the defendant possess a "specific intent to commit a particular offense coupled with some overt act in furtherance of the intent that goes beyond mere preparation."[319] Applying this standard, Smallwood's acts met the requirements of attempt crimes. Smallwood voluntarily and fully aware of his HIV-positive status raped his victims without wearing a condom.[320] Additionally, Smallwood's concession that he was aware of the deadly consequences of his acts[321] constituted an overt act in furtherance of an

314. *Id.*
315. *See id.*
316. *See supra* notes 303-15 and accompanying text.
317. *See supra* notes 300-16 and accompanying text.
318. *See supra* notes 300-16 and accompanying text.
319. Smallwood v. State, 106 Md. App. 1, 6, 661 A.2d 747, 749 (1995).
320. *See* Smallwood v. State, 343 Md. 97, 100, 680 A.2d 512, 513 (1996).
321. *See Smallwood,* 106 Md. App. at 10, 661 A.2d at 751.

intent that goes beyond mere preparation.

Regardless of this reasoning and notwithstanding the fact that the majority of courts addressing the issue have upheld attempted murder convictions on less recognized modes of transmission, the Court of Appeals of Maryland reversed the trial judge's decision based on the improper inference ground.[322] The court of appeals held that no reasonable fact finder could conclude that death would be a natural and probable result of Smallwood's actions, thus finding Smallwood not guilty of attempted murder.[323]

Based on the extensive counseling and warnings Smallwood received, coupled with the deadly nature of the virus, of which Smallwood was cognizant, one could reasonably infer that Smallwood intended death to be the consequence of his actions.[324] This conclusion was soundly supported by *State v. Hinkhouse*;[325] nonetheless, the *Smallwood* court found *Hinkhouse* factually distinguishable.

3. Distinguishing *Smallwood* from *Hinkhouse*: a Formidable Task

The *Hinkhouse* court held that evidence showing Hinkhouse was aware of his HIV-positive status, that HIV could be transmitted through unprotected sex, and that he repeatedly engaged in unprotected sex with multiple partners while concealing or lying about his fatal disease supported a finding that Hinkhouse possessed the requisite intent to kill.[326] The *Hinkhouse* facts were analogous to the facts in *Smallwood*. Smallwood was no less culpable than Hinkhouse, yet Smallwood was found to lack the requisite intent to kill.[327]

In both cases, the defendants were aware of their HIV-positive status and that the deadly virus they carried could be transmitted through unprotected sex.[328] Furthermore, both defendants concealed their status from their partners and engaged in unprotected sex while fully aware of the consequences that could result.[329] The only distinguishing characteristic of these two cases is the fact that

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322. *See Smallwood*, 343 Md. at 109, 680 A.2d at 518.
323. *See supra* notes 209-10 and accompanying text.
324. *See supra* notes 132-43, 152-53 and accompanying text.
325. 912 P.2d 921 (Or. Ct. App. 1996). *See generally supra* notes 119-31 and accompanying text.
326. *See Hinkhouse*, 912 P.2d at 924-25.
327. *See supra* notes 208-10 and accompanying text.
328. *See supra* notes 128-30, 151-53 and accompanying text.
329. *See supra* notes 128-30, 153-60 and accompanying text.

Hinkhouse engaged in consensual sex while Smallwood raped his victims.

The *Hinkhouse* decision supports the conclusion that Smallwood had the requisite intent to kill. Thus, it was reasonable for the trial judge to conclude that Smallwood desired his victims to suffer the slow, debilitating death he faced. Therefore, in the light most favorable to the State, Smallwood's convictions for attempted murder should have been affirmed by the Court of Appeals of Maryland.

D. Alternative Approach: Malice Aforethought

The concept of malice aforethought embodies conduct that can be characterized as reckless and wanton, evidencing a gross disregard for human life.[330] This type of conduct gives rise to malice.[331] Malice aforethought is a degree of intent.[332] When malice is present, it establishes sufficient intent to allow criminal liability for murder to be found.[333]

This reckless and wanton conduct that meets the malice element of intent is usually associated with depraved-heart murder.[334] However, some states also allow this depraved-heart intent to establish malice aforethought in support of a conviction for attempted murder.[335] Therefore, criminal liability may be found without proving specific intent.[336] Applying this element to the actions of an AIDS rapist, one can reasonably conclude that he acts with a wanton and reckless disregard for human safety, thus establishing malice aforethought, which satisfies the mens rea requirement for attempted murder in some jurisdictions.[337]

In *Scroggins*, the Georgia Court of Appeals held that the defendant's deliberate act of biting an officer when the defendant knew he was infected with the AIDS virus allowed the fact finder to infer a malicious intent to murder due to the defendant's "wanton and reckless disregard as to whether he might transfer the disease."[338] The court concluded that such a wanton and reckless disregard for

330. *See supra* note 56 and accompanying text.
331. *See supra* note 56 and accompanying text.
332. *See* Fitting, *supra* note 53, at 78 n.48.
333. *See supra* note 57 and accompanying text.
334. *See* LAFAVE, *supra* note 41, § 7.4, at 617.
335. *See* Scroggins v. State, 401 S.E.2d 13, 18-19 (Ga. Ct. App. 1990).
336. *Id.*
337. *See, e.g., id.*
338. *See Scroggins*, 401 S.E.2d at 18.

another's life is equivalent to a specific intent to kill.[339] Smallwood's acts are parallel to those of Scroggins—Smallwood recklessly and without regard to another's life violently raped three women, fully cognizant of his deadly condition and the consequences that could result to his victims.[340] *Scroggins* supports a finding that Smallwood's actions equaled malice aforethought; thus, this concept would seem to allow for imposing criminal liability on Smallwood. Unfortunately, however, Maryland courts have specifically rejected this reasoning and do not permit malice aforethought to support a conviction for attempted murder.[341]

E. Future Implications of Smallwood

The *Smallwood* court not only adopted a lenient, narrow approach to imposing criminal liability for attempted murder on AIDS rapists, but the *Smallwood* opinion also does not provide guidance for Maryland courts addressing future, related situations. For example, the court's reasoning does not provide guidance as to whether a murder conviction would be upheld on showing that an AIDS rape victim acquired HIV and died of AIDS. Before October 1, 1996, if the death of a victim did not result within one year, the "year and a day" rule applicable to murder would prohibit a conviction under Maryland law.[342] The practical result of the year and a day rule would be to effectively bar any conviction for murder as a result of HIV transmission.[343] However, in the 1996 legislative session, the Maryland General Assembly abrogated the year and a day rule, thus raising the possibility of a murder conviction based on AIDS rape when an infected victim eventually dies of AIDS.[344]

The aftermath of *Smallwood* will be that AIDS rapists will usually face only the additional charge of reckless endangerment. It is an act of injustice when the court of appeals deems it appropriate not

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339. *See id.*

340. *See* Smallwood v. State, 343 Md. 97, 109, 680 A.2d 512, 518 (1996).

341. *See* Abernathy v. State, 109 Md. App. 364, 375-76, 675 A.2d 115, 121 (1996).

342. *See* State v. Minister, 302 Md. 240, 241, 486 A.2d 1197, 1197 (1984) (declining to abrogate the common-law "year and a day" rule); *see also* Lori A. David, *The Legal Ramifications in Criminal Law of Knowingly Transmitting AIDS,* 19 L. & PSYCHOL. REV. 259, 263 (1995).

343. This is due to the slow incubation period of the virus and its even slower effects on the immune system. *See supra* note 257 and accompanying text.

344. *See* MD. ANN. CODE art. 27, § 415 (1996). Despite this recent development, it is unlikely to have a significant impact on prosecuting AIDS rapists for murder when their victims die from AIDS. Due to the delayed incubation period of the virus, an AIDS rapist will rarely outlive his victim.

to punish, beyond a mere conviction for reckless endangerment, the carrier of a fatal virus for his heinous conduct. To be sure, AIDS rape is more heinous than rape alone. It places the rape victim in reasonable fear of death—fear that can stay with the victim until well after the traumatic attack has occurred.

V. CONCLUSION

The central issue addressed in *Smallwood v. State* is whether a specific intent to kill could be inferred from three acts of AIDS rape.[345] The Court of Appeals of Maryland held that such evidence was insufficient to infer an intent to kill.[346] This issue is of great importance in Maryland and throughout the nation. Considering the deadliness of HIV and the fatality rate of AIDS victims, severe criminal liability should be imposed upon those who knowingly, without regard or value to human life, expose rape victims to the fatal virus. Punishment should not come in the form of reckless endangerment, but should be commensurate with the savage act of the AIDS rapist, who is void of any value to society and so seriously threatens his victim's existence.

In addition, criminal liability is necessary in order to further the public health and safety goals of the state. It is unjust that a defendant who immediately takes another's life is held criminally liable for the resulting death, whereas a defendant who knowingly injects a deadly virus into another, in which death is quite possibly the final result, is not held to a comparable level of culpability for his actions. The narrow approach taken by the court of appeals is inequitable because it allows criminals to escape any meaningful liability for their potentially lethal actions. Courtrooms are not exempt from the battle to thwart the spread of AIDS. Therefore, Maryland courts have a duty to impose criminal liability on AIDS rapists who subject innocent victims to the risk of death. In a civilized society, AIDS rapists must receive severe punishment. The court's decision is problematic because its narrow application of the requirement of specific intent for attempted murder makes it almost impossible to impose criminal liability for AIDS rape.

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345. *See Smallwood*, 343 Md. at 99, 101-02, 680 A.2d at 513-14.
346. *See id.* at 109, 680 A.2d at 518.