

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.CT. NO. 16-0134  
 )  
 MICHAEL KELSO-CHRISTY, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR MARION COUNTY  
HONORABLE GREGORY A. HULSE, JUDGE

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APPELLANT'S REPLY BRIEF AND ARGUMENT

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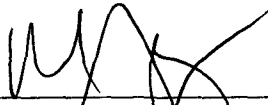
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**CERTIFICATE OF SERVICE**

On the 21st day of February, 2017, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Michael Kelso-Christy, No. 6746067, Newton Correctional Facility, 307 S. 60th Avenue, West, Newton, IA 50208-9064.

APPELLATE DEFENDER'S OFFICE



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**MELINDA J. NYE**

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MJN/lr/02/17

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## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

**WAS THE EVIDENCE INSUFFICIENT TO SUPPORT KELSO-CHRISTY'S CONVICTION FOR BURLGARY IN THE SECOND DEGREE BECAUSE THE SEX ACT HE INTENDED TO COMMIT WHEN ENTERED HER HOUSE WAS CONSENSUAL AND DID NOT CONSTITUTE SEX ABUSE?**

### **Authorities**

United States v. Booker, 25 M.J. 114, 116 (C.M.A. 1987)

State v. Bolsinger, 709 N.W.2d 560 (Iowa 2006)

Simmons v. State Pub. Defender, 791 N.W.2d 69, 74 (Iowa 2010)

State v. Schultz, 604 N.W.2d 60, 62 (Iowa 1999)

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## STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about January 20, 2017. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

## ARGUMENT

**THE EVIDENCE WAS INSUFFICIENT TO SUPPORT KELSO-CHRISTY'S CONVICTION FOR BURLGARY IN THE SECOND DEGREE BECAUSE THE SEX ACT HE INTENDED TO COMMIT WHEN ENTERED HER HOUSE WAS CONSENSUAL AND DID NOT CONSTITUTE SEX ABUSE.**

While some courts in other jurisdictions may have concluded misrepresentation about identity renders a sex act against the will or without the consent of the deceived participant, the reasoning used by such courts must be carefully considered. Take for example, the case of United States v. Booker:

The question is—what is fraud in the *factum* in the context of consensual intercourse? The better view is that the "*factum*" involves both the nature of the act and some knowledge of the identity of the participant.

*Thus in the “doctor” cases, consent would not be present unless the patient realized that the “procedure” being employed was not medical, but sexual.* Further, while it is arguable that there may be people who are willing to hop into bed with *absolutely* anyone, we take it that even the most uninhibited people ordinarily make some assessment of a potential sex partner and exercise some modicum of discretion before consenting to sexual intercourse. Thus, consent to the act is based on the identity of the prospective partner.

United States v. Booker, 25 M.J. 114, 116 (C.M.A. 1987)

(internal citations omitted) (emphasis added).

Thus, while Booker concludes misrepresentation or misunderstanding about the identity of the sex partner is fraud in the factum, that court would have also held “doctor” cases would also involve fraud in the factum. However, the current interpretation of Iowa’s sex abuse statute is based on a “doctor” case—Bolsinger—which reached the opposite conclusion, that misrepresentation about the nature of the act is not fraud in the factum and does not vitiate consent. State v. Bolsinger, 709 N.W.2d 560 (Iowa 2006). And importantly, Bolsinger has not been overruled by statute. Six times the legislature has considered amending Iowa Code section 709.1 to reverse the

Bolsinger holding and six times the legislature has declined to change the law to clarify it intended a different interpretation of the sex abuse criminal statutes. In the face of clear legislative intent, reinterpreting the statute would be inappropriate.

In addition, given the slippery slope created by an interpretation that “misrepresentation” by one sexual partner may negate the consent of the other partner, it is appropriate to leave such line-drawing and policy-making to the legislature. Maybe at first blush it seems a straightforward proposition to reason that a person who has been deceived about his or her sexual partner’s “identity” has not consented to the sex act. But what constitutes a person’s identity? Name? Social security number? Social status or wealth? Religious or ethnic background? Some combination of all of these factors? Any factor determined by the other sex partner to be material to his or her decision to have sex? While the State is confident common sense will prevail, with no guidance from the statutory language regarding what sort of misrepresentation will invalidate consent, an interpretation that misrepresentation



can vitiate consent raises concerns of constitutional vagueness. See Simmons v. State Pub. Defender, 791 N.W.2d 69, 74 (Iowa 2010) (court will strive to avoid constitutional problems when interpreting a statute).

The issue before the court is not whether it condones the misrepresentation by Kelso-Christy or whether good public policy should criminalize such behavior. Rather, the court's role is to interpret and enforce the statute as it is written by the legislature and not as it might have or should have been written. State v. Schultz, 604 N.W.2d 60, 62 (Iowa 1999).

Certainly the appropriate scope of and policy considerations underlying criminal sex abuse statutes are subject to debate. See generally Jed Rubenfeld, The Riddle of Rape-by Deception and the Myth of Sexual Autonomy, 122 Yale L. J. 1372 (2013) (detailing history of rape laws in this country and arguing rape laws should not protect sexual autonomy but should protect a person's right to self-possession); Russell L. Christopher and Kathryn H. Christopher, Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape, 101 Nw. U. L.

Rev. 75 (2007) (arguing that if fraud vitiates consent, then a minor's misrepresentation about his/her age should be a defense to statutory rape); Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 Brook. L. Rev. 39 (1998) (noting "courts, legislatures, and legal commentators have struggled with the controversial and highly charged question of whether accomplishing sexual intercourse by means of fraud or coercion is blameworthy and appropriately condemnable as rape" for over a century). However those debates and the resolutions to those issues are left in the hands of the legislature.

### **CONCLUSION**

Because Iowa law currently does not punish the fraudulent inducement of sex as sexual abuse and the legislature has declined to amend the statute to do so. Accordingly, Kelso-Christy's conviction for burglary should be vacated and his case remanded for dismissal of the charge.

## **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 1.30, and that amount has been paid in full by the Office of the Appellate Defender.

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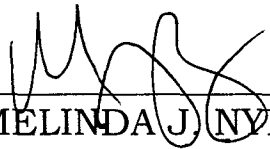
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