No. 122059

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- THEOPHIL ENCALADO Defendant-Appellee	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-2548. There on appeal from the Circuit Court of Cook County, Illinois , No. 10 CR 4270. Honorable Matthew E. Coghlan, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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POINT AND AUTHORITIES Page

ISSUE PRESENTED FOR REVIEW

Whether the appellate court correctly concluded that the trial judge committed reversible error when he refused to ask potential jurors if hearing evidence of prostitution would bias them in any way.

STATEMENT OF FACTS

In October 2008, the Illinois State Police notified the Chicago Police Department that an association had been made between semen identified in a sexual assault kit collected from Y.C. in 2006 and Theophil Encalado's DNA profile. (R. AAAA72-76, BBBB16-17). The State subsequently charged Encalado with multiple counts of aggravated criminal sexual assault. (C. 59-78).

Before trial, the State filed a motion to introduce testimony from J.H., S.A., and C.C. (C. 145-159). After hearing arguments, the judge ruled that the State could call S.A. and C.C. for intent, lack of consent, and propensity. (R. MMM27-30).

The judge also granted a State motion *in limine* to admit Encalado's prior conviction for predatory criminal sexual assault, over defense objection. (C. 200-201; R. ZZZ4-6). The judge refused the defense request to question potential jurors by asking, "[Y]ou will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?" (R. ZZZ36, ZZZ38-39, ZZZ42-43).

The State proceeded to trial on six counts of aggravated criminal sexual assault. (R. ZZZ33). In opening statement, the State argued that what was supposed to be a happy day for Y.C. turned into a "nightmare" because of Encalado. (R. AAAA12-14). The defense argued that Encalado and Y.C. had a consensual encounter via the "world's oldest profession," prostitution. (R. AAAA15-16).

Y.C. testified that on March 5, 2006, she was living in Chicago at Kedzie and Fullerton with her boyfriend; she had grown up in the area, but was living in South Carolina at the time of trial. (R. AAAA18-19). At around 6:00 a.m., she was walking to a bakery on Armitage, listening to music on her phone while she

walked. (R. AAAA19-21). As she approached the bakery, she noticed a car on the street. (R. AAAA22). Crossing in front of it, the driver, whom she later identified as Theophil Encalado, called out to her. (R. AAAA22). She responded but kept going, and Encalado said, "[Y]our cousin Jose, he was looking for you." (R. AAAA22). She asked what Jose wanted, and Encalado said, "[C]ome on . . . he needs you," and said he would take her to Jose's. (R. AAAA23). Y.C. had a cousin Jose, who lived five or six blocks away, so she got into the car. (R. AAAA23-24).

Y.C. noticed that Encalado did not drive toward Jose's, and asked where they were going. (R. AAAA25). According to Y.C., Encalado said, "You know what this is"; Y.C. thought he was going to rob her. (R. AAAA25). Encalado drove into an alley. (R. AAAA25). Y.C. told Encalado she was pregnant and it was her birthday, but Encalado said, "Shut the fuck up, bitch, you know what this is." (R. AAAA26-27). Y.C. tried to get out of the car, but it was locked. (R. AAAA27). Encalado started punching her, hitting her in the face and head. (R. AAAA27-28). She tried to block the blows. (R. AAAA28, AAAA52). Encalado then reached over and opened the glove box, where Y.C. saw a pistol pointing at her. (R. AAAA28-29, AAAA49).

Y.C. said Encalado then grabbed her hair, and forced her head into his crotch, where his pants were unzipped and his penis erect. (R. AAAA29-30). Encalado forced Y.C.'s mouth onto his penis. (R. AAAA30). Encalado then pulled her head up, put his coat over her face, and got on top of her. (R. AAAA32). He pulled down Y.C.'s pants, and forced his penis first into her vagina, and then into her anus. (R. AAAA33-34). When he was done, Encalado pushed Y.C. out of the car, saying "[G]et the fuck out of the car," threw a shoe at her, and threatened to kill her.

(R. AAAA35-36).

Y.C. ran out to Armitage, where off-duty Sheriff's Deputy Fernando Rodriguez picked her up. (R. AAAA62-64). Rodriguez said Y.C. looked distressed, and when he asked her what happened, she told him that she had been raped. (R. AAAA64). Rodriguez took Y.C. to the nearest police station. (R. AAAA65).

Police took Y.C. to St. Elizabeth's Hospital, where a sexual assault kit was collected. (R. AAAA68-75). Chicago Police Detective James Gillespie and his partner talked to Y.C. at St. Elizabeth's. (R. AAAA89-90). After interviewing her, Gillespie and his partner went to the alley behind 3121 West Moffat, where they found a pair of underwear Y.C. later identified as hers. (R. AAAA91). The detectives also looked for surveillance cameras at businesses around Armitage and Kedzie, but did not find any, as several businesses were closed. (R. AAAA93).

On cross-examination, Y.C. said she could not use her phone to make calls, because she was out of minutes, but could listen to songs she had downloaded onto the phone. (R. AAAA48, AAAA54). She acknowledged that she previously testified that she believed Encalado ejaculated because she felt moisture between her legs. (R. AAAA53-54).

The case went cold until October 2008, when Detective Andrew Perostianis received the notification from the Illinois State Police (ISP) lab of an association between the semen from Y.C.'s sex assault kit and Encalado's DNA profile. (R. BBBB15-17). Detective Perostianis found Y.C. in South Carolina in December 2008, and arranged for local police to show her a photo array he compiled. (R. BBBB17-18). In January 2009, Y.C. identified the photo of Encalado, and in May

2009, she came to Chicago and identified Encalado in a live lineup. (R. BBBB19-21).

The ISP lab also notified Perostianis that Encalado's DNA profile was connected to semen collected in a sex assault kit of C.C., who reported a sexual assault at 1612 North Winchester on September 1, 2002. (R. BBBB21-22). Perostianis found C.C. in Florida, where he went to interview her. (R. BBBB22). C.C. did not identify Encalado in a photo array. (R. BBBB22-23).

C.C. testified as an other-crimes witness. (R. BBBB27-46). She testified that in the early morning hours of September 1, 2002, she was at the Red Dog nightclub at 1958 West North Avenue with her sister. (R. BBBB29). They had been dancing and drinking, but she insisted she was not drunk. (R. BBBB30, BBBB48-49). She went outside for some fresh air, and began looking for her sister's car, where she planned to get in and wait for her sister. (R. BBBB30-31).

C.C. did not immediately find her sister's car, but continued walking down the alley. (R. BBBB32). As she stopped to spit, a car drove up and the driver asked if he could help her. (R. BBBB32). She declined and kept walking. (R. BBBB32). Down another alley, the same car drove up and offered to help, and, because she was cold, C.C. agreed and got into the car. (R. BBBB33-34). She briefly turned and spat out the window, and when she turned back, the driver had a bandana around the lower part of his face. (R. BBBB34). C.C. asked what he was doing, and the driver punched her in the face and told her to "[S]hut the fuck up." (R. BBBB34). She tried to get out of the car, but the door was locked. (R. BBBB35). The driver punched her again and told her to take off her clothes, because "it was going to happen whether [she] liked it or not." (R. BBBB36). He pulled out a knife,

and jumped on top of her, pulled off her pants, and forced his penis into her vagina. (R. BBBB36-37). He "pumped" for a while, seemed to have ejaculated, and then told her "I'm done with you." (R. BBBB37). He drove her back to the club and then forcibly kicked her out of the car, threatening her not to tell. (R. BBBB37-38). The driver also pulled a necklace off of her. (R. BBBB38).

C.C. said she spoke to detectives in Florida in 2009, but could not identify her assailant. (R. BBBB47). She acknowledged that she did not immediately go to the police in Chicago. (R. BBBB39). She did go to the hospital, where a sex assault kit was collected. (R. BBBB38-39). C.C. also acknowledged that she had a conviction for aggravated assault in Florida, from 2009. (R. BBBB39, BBBB47, BBBB53-54).

On cross-examination, C.C. acknowledged that she was in custody facing assault charges when she spoke to police about this case. (R. BBBB53, BBBB58-59). She denied being "drunk drunk" in the early morning hours of September 1, 2002. (R. BBBB52).

Testimony from several forensic witnesses established that Encalado's DNA was found on Y.C.'s vaginal swab and C.C.'s vaginal swab. (R. BBBB79-80, BBBB88-89, BBBB100, BBBB109-113). Encalado's DNA was not on Y.C.'s anal swab. (R. BBBB114).

Encalado testified that he did not rape Y.C. or C.C. (R. BBBB126). He testified that on March 5, 2006, he was driving on Armitage in an area known for prostitutes when he saw Y.C. (R. BBBB127). He rolled down the window and asked if she was working, and she said yes and got into the car. (R. BBBB127-128). He showed her some money, and said he wanted oral and vaginal sex. (R. BBBB128-129).

He had cash and some marijuana to pay with. (R. BBBB128-129). Encalado parked nearby on Cortland, and he and Y.C. started touching each other. (R. BBBB129-130). But someone walked by, so he drove into an alley, where Y.C. performed oral sex on him. (R. BBBB131-132). Then he got on top of her for vaginal sex, but at one point he "slipped" and accidentally entered her anus, which caused her to jump. (R. BBBB132, BBBB149-150). He was simply going too fast and put his penis in the wrong place; it caused him to lose his erection, though he continued to try to put it back into Y.C.'s vagina. (R. BBBB132, BBBB150). He said some pre-ejaculate came out, and got onto Y.C. and the car. (R. BBBB151). Unable to reach climax, Encalado admitted he "was an idiot" and took his money and drugs back. (R. BBBB132-133, BBBB152). Seemingly mad, Y.C. yelled and screamed at him, and slapped his hand. (R. BBBB132). He opened the door and threw her pants and underwear out, told her to get out, and threatened that "she better not be there when I get back." (R. BBBB133, BBBB152). Then he drove away. (R. BBBB154). Encalado insisted that his sexual encounter with Y.C. was consensual, and denied punching or hitting her. (R. BBBB139-140, BBBB154).

Similarly, Encalado testified that he drove up on C.C. at North Avenue and Wood. (R. BBBB133-134). He asked if she was working, and she said yes and got into the car. (R. BBBB134-135). They negotiated $60 for a blowjob, and C.C. said she would do vaginal sex if he could get her some cocaine. (R. BBBB135-136). Encalado drove and parked, and they engaged in sexual activity. (R. BBBB136-137). Encalado said he again took back his money after the sex, from C.C.'s pants pocket. (R. BBBB137-138). Angry, C.C. slapped him and pulled his hair, and he pushed

her off and tried to drive away. (R. BBBB138). Encalado denied forcing himself on C.C., and said he did not take her jewelry. (R. BBBB139).

Encalado acknowledged a prior conviction for predatory criminal sexual assault. (R. BBBB139). He also acknowledged that from 2002 to 2006, he repeatedly had sex in cars with prostitutes, and that sometimes he took his money back. (R. BBBB161).

In closing, defense counsel argued that Y.C. and C.C. were both working as prostitutes and were angry because Encalado took his money back. (R. CCCC29-43). Counsel also pointed out that the DNA evidence corroborated Encalado's version of the events. (R. CCCC37-38). The State argued that Encalado should not be believed, and is a serial rapist. (R. CCCC44-48).

The jury found Encalado guilty on all counts. (R. CCCC71-73).

Defense counsel filed a motion for new trial preserving several claims of error, including the trial judge's refusal to question potential jurors on their attitudes toward prostitution. (C. 308-310; R. FFFF3). The judge denied the motion. (R. FFFF7).

At sentencing, Encalado's aunt and mother testified in mitigation. (R. FFFF11-18). His mother said Encalado struggled after losing his leg in 1996, and she did not know until this happened that Encalado was molested as a child. (R. FFFF15-17).

In aggravation, S.A. testified that Encalado sexually assaulted her in 2007 while she was working as a prostitute. (R. GGGG5-14). The State also read a victim impact statement from Y.C. (R. FFFF9). After hearing arguments, the trial judge sentenced Encalado to 20 years on each of three counts, to run consecutively, for

a total of 60 years. (R. GGGG36).

Encalado timely appealed, arguing that the trial judge erred in refusing his proffered voir dire questions aimed at probing potential juror bias about drug use and prostitution, and in allowing the State to impeach him with a prior conviction for predatory criminal sexual assault. *People v. Encalado*, 2017 IL App (1st) 142548, ¶1. A majority of the Appellate Court, First District agreed that the trial judge committed reversible error in refusing to ask potential jurors if hearing evidence of prostitution would bias them in any way. *Encalado*, at ¶¶34-36, 41-45.

ARGUMENT

The Appellate Court Correctly Concluded That Refusing To Voir Dire Theophil Encalado's Venire On Whether Evidence of Prostitution Would Bias Them In Any Way Deprived Encalado of a Fair Jury Trial.

The defense theory in this case was that Theophil Encalado arranged to have consensual oral and vaginal sex with Y.C. in exchange for cash and cannabis. To ensure the jury could fairly consider such evidence without prejudice or bias, Encalado's counsel sought to have the judge question potential jurors about their attitudes and potential biases on the issues of drug use and prostitution – concepts about which potential jurors are likely to have strong opinions. Specifically, defense counsel asked that the judge ask veniremembers, "[Y]ou will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?" The trial judge refused, finding such questioning would be inappropriate and "indoctrinate" the jury on the theory of defense. Yet it was not: prostitution is an issue on which potential jurors may hold strong biases, and Encalado's jury was going to hear evidence about Encalado engaging the services of prostitutes. The appellate court majority correctly held that the trial judge's refusal to question the potential jurors about whether evidence of prostitution would bias them denied Encalado his right to a trial before fair and impartial jurors, and this Court should affirm the appellate court. *People v. Encalado*, 2017 IL App (1st) 142548, ¶¶31-43.

The right to a jury trial guarantees a fair trial by a panel of impartial jurors. *People v. Strain*, 194 Ill. 2d 467, 475 (2000), *citing People v. Lobb*, 17 Ill. 2d 287, 298 (1959); U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I §§2, 8, 13. Specifically, the constitutional guarantee of a fair trial by jury means "the right

to have the facts in controversy determined, under the direction and superintendence of the judge, by the unanimous verdict of twelve impartial jurors who possess the qualifications and are selected in the manner prescribed by law." *Strain*, 194 Ill. 2d at 475; *Lobb*, 17 Ill. 2d at 298. The trial judge is responsible for conducting voir dire, and in doing so should allow parties to submit supplemental questions based on "the complexity of the case, and the nature of the charges." Ill. Sup. Ct. R. 431. The purpose of voir dire "is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath." *Strain*, 194 Ill. 2d at 476, *citing People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993).

The jurors must harbor no bias or prejudice that would "prevent them from returning a verdict according to the law and evidence." *Strain*, 194 Ill. 2d at 476. Thus, limiting *voir dire* questioning is reversible error when the limitation denies a party a fair opportunity to probe an important area of potential bias or prejudice among prospective jurors. *People v. Stack*, 112 Ill. 2d 301, 312-13 (1986); *Lobb*, 17 Ill. 2d at 300. When a certain type of testimony is pervasive or integral to the case, an inquiry into prospective jurors' biases regarding that subject is necessary to ensure a fair trial. *Strain*, 194 Ill. 2d at 476; *People v. Lanter*, 230 Ill. App. 3d 72, 76 (4th Dist. 1992). *Voir dire* questions about controversial issues are permissible even if the issue itself is not a defense in the case. *People v. Lear*, 175 Ill. 2d 262 (1997) (finding trial court must question venire regarding racial bias if race is "inextricably bound up" in case); *Strain*, 194 Ill. 2d at 477, 480-81 (bias

against gangs); *Lanter*, 230 Ill. App. 3d at 75-76 (recognizing drug and alcohol use and addiction as controversial social issue); *People v. Jimenez*, 284 Ill. App. 3d 908, 910 (1st Dist. 1996) (gangs); *People v. Murawski*, 2 Ill. 2d 143, 147 (1954) (abortion); *People v. Clark*, 278 Ill. App. 3d 996, 1004 (1st Dist. 1996) (interracial relationships).

It must be noted on this point that the State relies on an improper standard throughout its brief, urging that an issue must be one of "intense controversy" in order for it to be appropriate to question potential jurors about it. (St. Br. 19-24). But there is no "intense controversy" standard on this question; the word "intense" appears nowhere in this Court's decisions on the question, or in the appellate court's decision. *See Strain*, 194 Ill. 2d at 476-77; *Encalado*, at ¶¶27-32. In fact, the only cases in which courts discuss "intense controversy" are those involving proposed voir dire questions on controversial legal theories that support affirmative defenses, like insanity. *See Stack*, 112 Ill. 2d at 310; *People v. Gregg*, 315 Ill. App. 3d 59, 66-67 (1st Dist. 2000). Legal theories or affirmative defenses that are not "intensely" controversial, like self-defense, for example, do not require voir dire questions. *See People v. Boston*, 383 Ill. App. 3d 352, 354 (4th Dist. 2008) (noting questions about affirmative defenses generally excluded from voir dire, including self-defense and compulsion).

The standard this Court has established, and the one the appellate court followed here, as described above, is simply that, when testimony regarding a matter subject to "strong prejudice," or "considerable disfavor," or where a "particularly fertile field for preconceived notions and prejudices," will be "an integral

part of the defendant's trial," the defendant "must be afforded an opportunity to question the prospective jurors" concerning that matter. *Strain*, 194 Ill. 2d at 476-77; *Encalado*, at ¶¶30-31, 37; *Murawski*, 2 Ill. 2d at 147. Indeed, Illinois courts consistently allow parties to pose neutrally-phrased questions aimed at discovering potential jurors' prejudice or bias. For example, in addition to allowing broad questions on attitudes about gangs in *Strain*, this Court allowed the State to ask jurors generally about preconceptions about sexual assault in *People v. Rinehart*, 2012 IL 111719, ¶21, and about whether deep-seated beliefs would prevent a guilty verdict based on circumstantial evidence alone, specifically the lack of a body in a murder case, in *People v. Faulkner*, 186 Ill. App. 3d 1013, 1027 (5th Dist. 1989). *See also People v. Freeman*, 60 Ill. App. 3d 794, 799-800 (4th Dist. 1978) (acceptable for prosecutor to ask potential jurors if lack of eyewitness testimony would prevent guilty verdict). The question in this case is consistent with *Strain* and *Rinehart*, and hardly represents the "slippery slope" the State complains of. (St. Br. 23-25). On the contrary, it is a single question on an unusual factual scenario. (R. ZZZ38-39); *Strain*, 194 Ill. 2d at 480-81; *Rinehart*, at ¶21.

The right to an impartial jury "is so fundamental to due process that any infringement of that right requires reversal by a reviewing court." *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *People v. Boston*, 271 Ill. App. 3d 358, 360 (1st Dist. 1995). Limiting *voir dire* questioning constitutes reversible error "if it results in denying a party a fair opportunity to properly investigate an important area of potential bias and or prejudice among prospective jurors." *People v. Oliver*, 265 Ill. App. 3d 543, 548 (1st Dist. 1994). Where a defendant challenges a trial judge's

restrictions on *voir dire* questions aimed at probing prospective jurors' potential biases, the defendant is not required to show that the impaneled jury was actually prejudiced against him to earn relief. *Jimenez*, 284 Ill. App. 3d at 913.

The issue of prostitution pervaded this case; indeed, it was central to Encalado's defense. Though the State's theory was simply that Encalado lured Y.C. into his car and sexually assaulted her, the defense presented a consent defense. (R. AAAA12-17). Specifically, starting with his opening statement, defense counsel explained that Encalado and Y.C. had a consensual sexual encounter much like a business transaction via "the world's oldest profession," in which Y.C. agreed to engage in certain sexual acts with Encalado in exchange for money and cannabis. (R. AAAA15-16). Encalado testified that he asked Y.C., whom he saw in an area known for the availability of prostitutes, for a "date," and that they negotiated terms for oral and vaginal sex that included Encalado paying Y.C. with a combination of cash and cannabis. (R. BBBB127-133, BBBB142-155). Encalado testified to a similar experience with the State's other-crimes witness, C.C.; he saw her in an area known for prostitutes, they made arrangements for oral and vaginal sex in exchange for cash and cocaine, and had consensual sex. (R. BBBB133-138, BBBB157-159). And at the time of voir dire and opening statement, the defense believed the State would call another other-crimes witness, S.A., who consistently stated that she was a prostitute and engaged in negotiations and sexual relations with Encalado. (C. 145-165; R. MMM4-5, MMM12, MMM20, MMM23, MMM29, AAAA115). Encalado acknowledged that, over a period of several years, he had a habit of frequenting prostitutes, and that sometimes he became mad or upset

and took his money back. (R. BBBB139-140, BBBB161).

Thus, Encalado's habit of frequenting prostitutes was necessarily part of the evidence and arguments presented to the jury in this case. Nevertheless, the trial judge refused to ask the potential jurors whether hearing evidence of prostitution would "bias [them] in any way," finding it inappropriate to comment on a particular kind of evidence. (R. ZZZ36, ZZZ38-39, ZZZ42-43). Yet the judge did exactly that in admonishing jurors not to consider law enforcement officers' testimony as inherently more credible than the average citizen, to treat the defendant's testimony the same as any other witness's, and in asking potential jurors whether the nature of the charges would prevent them from being fair. (R. ZZZZ49-60). Prostitution is no different, as the appellate court correctly found. *Encalado*, 2017 IL App (1st) 142548, ¶¶32-34. This case is unlike *People v. Howard*, 147 Ill. 2d 103 (1991), cited by the State, (St. Br. 20-21), because there, the use of a handgun was unrelated to any defense or question of credibility, whereas here, Encalado's consent defense was dependent on jurors' attitudes about prostitution – both the consumers and purveyors of commercial affections. *Howard*, 147 Ill. 2d at 135-136 (fact that gun used to commit murder at issue was insufficient reason to question potential jurors about attitudes on handguns); *Encalado*, at ¶¶36-37, 41-43.

Indeed, commonly referred to as the world's oldest profession, prostitution is a controversial social issue that carries significant and myriad negative biases. *See, e.g., City of Chicago v. Pooh Bah Enterprises*, 224 Ill. 2d 390, 421-22 (2006) (citing prostitution as "negative" effect of adult entertainment establishments);

McLean v. State of Texas, 312 S.W.3d 912, 913-14 (Ct. App. Tx., 1st Dist. 2010) (finding trial judge's comments and questions about jurors' attitudes on prostitution appropriate); *People v. Hickey*, 178 Ill. 2d 256, 291 (1997) (noting labeling of witness as "a member of the oldest profession known to man" was "demeaning personal attack[]"); *see also* H. Vogell, "Neighbors Join Forces To Keep Out Prostitutes," Chicago Tribune (Oct. 15, 2000)[1]; N. Kristof, "Targeting the Johns in Sex Trade," The New York Times (Feb. 26, 2014) (discussing growing law enforcement trend, including in Chicago, toward arresting men who purchase sex instead of arresting woman selling sex). And while engaging in a sexual act in exchange for money is a crime, 720 ILCS 5/11-14(a), employing a prostitute's services is a crime as well, 720 ILCS 5/11-14.1(a). Thus, testimony or evidence about frequenting prostitutes is likely to be viewed negatively, and is just as likely to be held against the defendant as it is to be held against the sex worker.

As an issue of social import and controversy, prostitution is analogous to gang membership and drugs as a social issue relevant to prospective juror bias. *See Strain*, 194 Ill. 2d at 477, 480-81 (gang membership); *Lanter*, 230 Ill. App. 3d at 75-76 (drugs). Given that Encalado's defense rested heavily on his admission that he repeatedly solicited prostitutes, and the negative connotations commonly associated with prostitution, the trial judge should have probed the potential jurors for biases about prostitution; without such questioning, both the State and the defense were left with incomplete information on the impartiality of the

[1] Available at http://articles.chicagotribune.com/2000-10-15/news/0010150042_1_anti-prostitution-neighborhoods-residents

veniremembers. *Pooh Bah Enterprises*, 224 Ill. 2d at 421-22; *Strain*, 194 Ill. 2d at 477, 480-81. Indeed, the State ignores the fact that, by revealing jurors who held negative biases against women who engage in "commercial affection," it, too, would have been able to ensure that no members of the jury unfairly held biases against its witnesses. *Encalado*, at ¶¶34, 36-37, 41-43.

The State's brief entirely fails to acknowledge the negative attitudes potential jurors might have held against men, like Encalado, who engage a prostitute's services. (St. Br. 13-34). Yet by revealing himself to be a man with a habit of seeking out and employing the services of prostitutes, Encalado painted himself in an extremely unflattering light – that of not only a criminal, but a sleazy one who regularly buys sex from strangers. (R. BBBB127-138, BBBB139-140, BBBB142-161); 720 ILCS 5/11-14.1(a). Further, the recent trend in both law enforcement and social settings is to target, arrest, and publicly shame men who engage a prostitute's services. S. Khimm, "The Shame Game," New Republic (Mar. 9, 2016); N. Kristof, "Targeting the Johns in Sex Trade," The New York Times (Feb. 26, 2014); A. Sewell, "L.A. County plans to shame 'johns' who solicit prostitutes," Los Angeles Times (Dec. 9, 2014); S. Algar, "Heeeere's the 'johnnies'! 104 horndogs exposed in prostitution sting's wall of shame," New York Post (Jun. 4, 2013); G. Ruethling, "Chicago Police Put Arrest Photos Of Prostitution Suspects Online," The New York Times (Jun. 23, 2005) (noting Chicago Police posting photos and information online "in a move intended to embarrass offenders"); *see also Encalado*, at ¶¶31-33. And it is not only law enforcement that aims to "shame" those who seek commercial affections, demonstrated by weblogs that urge private citizens to post photos of

men engaging with sex workers. S. Khimm, "The Shame Game," New Republic (Mar. 9, 2016); http://www.shamingjohns.com/ (reg. req.). This shift soundly refutes the State's position that the only bias a potential juror might harbor in a case involving prostitution is against the prostitute herself. (St. Br. 16-18). Prostitution is, therefore, exactly like the gang evidence at issue in *Strain* – fraught with negative attitudes and biases that potential jurors may not necessarily reveal unless questioned about it specifically. *Strain*, 194 Ill. 2d at 476-77.

Also noticeably absent from the State's argument is the question defense counsel sought to pose to the venire: "[Y]ou will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?" (R. ZZZ38-39). By asking if hearing evidence of prostitution would prevent jurors "from being fair ***to either side***," the proposed question neutrally sought to expose biases against persons who patronize prostitutes and/or prostitutes themselves. *Encalado*, 2017 IL App (1st) 142548, ¶34; *Strain*, 194 Ill. 2d at 480. The proposed question would not have, as the State argues, improperly indoctrinated the jury. (St. Br. 16-17). Again, the question was carefully calibrated to neutrally expose biases against either, or both, customers and purveyors of "commercial affections." (R. ZZZ38-39); *Encalado*, at ¶34; *Strain*, 194 Ill. 2d at 480.

The cases on which the State relies are easily distinguished. (St. Br. 17). In *People v. Reeves*, 385 Ill. App. 3d 716 (1st Dist. 2008), the defense sought to question potential jurors about attitudes on "false confessions," and the appellate court found that the judge properly refused it. *Reeves*, 385 Ill. App. 3d at 729-30. Notably, the question posed in that case presupposed what the defense hoped

the jurors would conclude – that the defendant's confession was false. *Id.* Similarly, in *People v. Bowel*, 111 Ill. 2d 58 (1986), this Court found the trial judge properly refused questions about "mistaken identity," similarly finding that the questions presupposed what the defense wanted the jurors to conclude, *i.e.*, that the defendant was mistakenly identified. *Bowel*, 111 Ill. 2d at 64-65. Here, in contrast to those posed in *Reeves* and *Bowel*, the question presumes nothing, but instead asks broadly about whether hearing evidence of prostitution would bias potential jurors in any way. (R. ZZZ38-39).

People v. Anderson, 407 Ill. App. 3d 662 (1st Dist. 2011), and *People v. Brandon*, 157 Ill. App. 3d 835 (1st Dist. 1987), are likewise dissimilar to this case, as in both, the defense sought to ask potential jurors about whether the defendant's prior felony convictions would bias them against him; the court in each case found the question improper because it specifically commented upon only the defendant's credibility, and thus had the effect of indoctrinating the jury and encroaching on jury instructions, in violation of Supreme Court Rule 234. *Anderson*, 407 Ill. App. 3d at 681; *Brandon*, 157 Ill. App. 3d at 841. Here, again, the proposed question, "[Y]ou will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side?" is neutral and applies equally to both prosecution and defense witnesses. (R. ZZZ38-39). Finally, in *People v. Boston*, 383 Ill. App. 3d 352 (4th Dist. 2008), the prosecutor questioned potential jurors at length about domestic violence, orders of protection, and consent, including:

> And along those same lines, the woman with the order of protection, if she invites that person over, is there anyone that believes the woman is responsible for anything violent that may happen after the person comes over? * * * And is there anyone that believes a person consents

> to a sexual act if they do[no]t scream or fight or kick or yell or scratch or hit? Anyone require a victim to do any of those things while she [i]s being assaulted?

Boston, 383 Ill. App. 3d at 355. These questions, as the appellate court found, were clearly improper and effectively asked prospective jurors to prejudge the facts of the case. *Id.*; *see also People v. Mapp*, 283 Ill. App. 3d 979, 988-89 (1st Dist. 1996) (prosecutor's questions about accountability, including "Would you have any problems following the law that says it doesn't matter whether he intended the guy to die or not or whether he knew that the other guy was going to shoot him, that he would still be guilty of murder?" and "That when you're part of the plan when you set up an armed robbery with other people and you get guns and masks and things you can be found responsible for the crime even though somebody else is the one who actually did the shooting?" improperly previewed evidence and misstated law). The questions posed by the State in *Boston* and *Mapp* could not be more different than the broad, neutral question proposed by the defense in this case, asking if hearing evidence about prostitution would bias the potential jurors in any way. (R. ZZZ38-39); *Encalado*, at ¶34. There is simply no support for the State's position that the question proposed in this case was improper. On the contrary, it was broad, neutral, and sought to ferret out bias and prejudice in a controversial area that would pervade the trial. *Encalado*, at ¶¶32-34; *Strain*, 194 Ill. 2d at 480-81.

Nor does the proposed voir dire question violate the rape shield statute, as the State and dissenting justice contend; it is a red herring. (St. Br. 27-29); *Encalado*, at ¶¶54-67 (Mason, J., dissenting). The rape shield statute prohibits

the introduction of evidence of a complainant's prior sexual activity, unless 1) the prior activity was with the accused and it is offered for evidence of consent, or 2) such evidence is constitutionally required. 725 ILCS 5/115-7(a). But no such evidence was offered in this case. Here, the question to potential jurors was not evidence – it was a question seeking to expose biases on a social issue on which many hold strong prejudices. *Encalado*, at ¶¶31-33, 39; *Pooh Bah Enterprises*, 224 Ill. 2d at 421-22. And there is no question that Encalado's testimony that he negotiated with Y.C. and C.C. for specific sexual acts was relevant to whether he and the complainants engaged in a single, consensual sexual encounter. (R. BBBB127-138, BBBB139-140, BBBB142-161). This case involved no evidence of Y.C.'s or C.C.'s sexual history. *Encalado*, at ¶¶38-39. Encalado's testimony described a single encounter with each woman, that, if true, established the offenses of solicitation, patronizing, and prostitution, but in no way involved any history of prior sexual activity. 720 ILCS 5/11-18(a); 720 ILCS 5/11-14; 720 ILCS 11-14.1(a); (R. BBBB127-138, BBBB139-140, BBBB142-161). In fact, the State and dissenting justice's point addressing rape shield affirmatively illustrates why the judge should have asked the proposed defense question about biases about prostitution, so jurors would not assume a tawdry sexual history upon hearing Encalado's account of a single encounter. *Encalado*, at ¶¶39-42.

Finally, Encalado maintains that, if this Court finds error occurred, no harmless error analysis is necessary. *Strain*, 194 Ill. 2d at 476-81; *Jimenez*, 284 Ill. App. 3d at 91. If this Court nevertheless finds a harmlessness analysis necessary, the error in refusing to inquire into jurors' potential prejudices in the area of

prostitution was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). This case was undoubtedly a contest of credibility: the jury had to decide whether to believe Encalado's version of the events, in which he arranged to pay Y.C. for oral and vaginal sex with cash and cannabis, and then engaged in consensual sex with her, only to later take back his money after becoming frustrated, or Y.C.'s version, in which Encalado lured her into his car at 6 o'clock in the morning by saying her cousin Jose needed her, threatened and punched her, and forcibly penetrated her. (R. AAAA22-35, BBBB127-133, BBBB145-155); *People v. Naylor*, 229 Ill. 2d 584, 609 (2009). The State ignores the contradictions and improbabilities in Y.C.'s testimony, like her claim that she was using her phone for music but could not use it to call police or her cousin, her claim at trial that Encalado punched her more than ten times even though she mentioned only two punches to hospital staff, her inability to clarify whether or not Encalado ejaculated, the oddity of her walking to a bakery before 6:00 a.m. despite not having to work until mid-afternoon, or her inexplicable willingness to get into a car with a complete stranger when her cousin lived not far away. (R. AAAA47-54). Finally, the State's suggestion that Y.C. was not dressed consistently with the sartorial stereotypes popularly associated with prostitution is inappropriate. (St. Br. 32). The State cites no authority for the proposition, and there is none, that a woman dressed appropriately for March temperatures cannot possibly be engaged in prostitution; this Court should flatly reject the State's insinuation.

Nor does the State explain why Encalado was not believable. (St. Br. 31-33). Encalado explained why he tried to take back his payment, saying that he became

frustrated when his penis slipped out of Y.C.'s vagina and he lost his erection. (R. BBBB149-151). No evidence contradicted Encalado's testimony that the areas where he met Y.C. and C.C. were known for prostitution, and the State's own other-crimes evidence essentially corroborated Encalado's testimony that he was in a habit of frequenting prostitutes. (R. 145-165; R. MMM4-5, MMM12, MMM20, MMM23, MMM29, AAAA115, BBBB139-140, BBBB161). The State again cites no authority for its suggestion that prostitution cannot occur at 5:30 or 6:00 a.m. (or at any time); the State's repeated reliance on outdated stereotypes associated with the "world's oldest profession" only serves to underscore why asking a broad and neutral question to potential jurors about ***any*** biases involving prostitution would have allowed the parties to attempt to discover those biases and ensure a fair trial for both sides. (St. Br. 32); *Encalado*, at ¶41. Encalado's version of the events is no more a stretch than Y.C.'s, illustrating the closely balanced nature of the evidence in this case, and demonstrating precisely why the judge's refusal to ask potential jurors about any biases was not harmless beyond a reasonable doubt. *Naylor*, 229 Ill. 2d at 609.

In sum, the trial judge's refusal to allow defense counsel's proposed question asking if hearing evidence of prostitution would bias the jurors in any way deprived Encalado of a fair trial before an impartial jury. Without that question, both the defense and the State were left to exercise challenges without the benefit of knowing whether potential jurors would be fair, or whether they harbored biases on such a socially controversial issue. Accordingly, the parties lacked an important tool in attempting to impanel an impartial jury, depriving Encalado of a fair trial before

an impartial jury. This Court should affirm the appellate court's decision reversing Encalado's convictions and remanding for a new trial. *Encalado*, at ¶¶32-33, 41-45; *Strain*, 194 Ill. 2d at 480-81.

CONCLUSION

For the foregoing reasons, Theophil Encalado, Defendant-Appellee, respectfully requests that this Court affirm the decision of the Appellate Court, First District, in this cause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jennifer L. Bontrager, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 25 pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- THEOPHIL ENCALADO Defendant-Appellee	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-14-2548. There on appeal from the Circuit Court of Cook County, Illinois , No. 10 CR 4270. Honorable Matthew E. Coghlan, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On November 13, 2017, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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