

No. 122059

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

vs.

THEOPHIL ENCALADO,

Defendant-Appellee.

On Appeal from the Illinois Appellate Court, First Judicial District, No. 1-14-2548
There on Appeal from the Circuit, Court of Cook County,
Criminal Division, Case No. 10-CR-4270
The Honorable Mathew E. Coghlan, Judge Presiding

**AMICUS CURIAE BRIEF OF
THE JOHN MARSHALL LAW SCHOOL'S
PRO BONO PROGRAM & CLINIC**

FILED

AUG 15 2017

SUPREME COURT
CLERK

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STATEMENT OF INTEREST

The *Amicus*, The John Marshall Law School's Pro Bono Program & Clinic ("Clinic"), is a nonprofit organization that promotes, protects, and advocates for the rights of those in our community. Since 2013, the Human Trafficking Project of the Clinic has focused on assisting survivors of prostitution, while also raising awareness in the community regarding prostitution and its relationship to human trafficking. The Clinic has assisted survivors of prostitution by filing petitions to vacate, expunge, and seal criminal convictions as well as petitions for executive clemency. The Clinic has worked closely with the Cook County Sheriff's Office to compile research on the effect of law enforcement's efforts, locally and nationally, to reduce the demand for prostitution and attempt to end human trafficking.

In *People v. Encalado*, 2017 IL App (1st) 142548, ¶ 45, the appellate court essentially held that sexual assault defendants have a right to question the venire on its views regarding prostitution. *Id.* This decision not only circumvents the policies behind the Illinois Rape Shield Statute, 725 ILCS 5/115-7 (2009), ("IRSS") but also discourages rape victims from coming forward. Prostituted people are a marginalized group at increased risk of sexual violence and the Clinic has an interest in ensuring that this population is adequately protected. The *Amicus* writes to aid this court in understanding why the appellate court erred in reversing the trial court's decision in denying Defendant's leave to question the venire regarding prostitution in an aggravated criminal sexual assault case.

INTRODUCTION

A jury found Defendant guilty on three counts of aggravated criminal sexual assault. *People v. Encalado*, 2017 IL App (1st) 142548. On appeal, the appellate court reversed his conviction. *Id.* at ¶ 45. Prior to trial, defense counsel proposed to ask the venire, “You will hear evidence about prostitution. Would that fact alone prevent you from being fair to either side[?]” *Id.* at ¶ 6. The appellate court reversed and held that Defendant was denied a fair trial because the trial court refused to allow defense counsel to question the venire members about potential bias against individuals who participate in prostitution. *Id.*

First, the Appellate Court’s decision allowing venire to be questioned on their feelings about “prostitution” in a sexual assault case should be reversed because it circumvents the IRSS. *See* 725 ILCS 5/115-7 (2009). The purpose of the IRSS is to protect victims of sexual assault from having their privacy violated by having their irrelevant sexual past exposed in sexual assault prosecutions. Evidence that a woman is a prostitute is generally inadmissible pursuant to the IRSS. Defense counsel was attempting to educate the jury pool regarding its defense and disclose inadmissible evidence of the complaining witness’s sexual past. Defendant was attempting to prey upon society’s contempt for prostitutes and predispose the jury to the notions that prostituted people are not credible and are unable to be raped. The trial court properly denied such attempts to indoctrinate the jury when it ruled that questioning venire regarding such matters was improper. It is irrational and contrary to public policy to allow the IRSS to be circumvented during *voir dire*.

Secondly, the appellate court's decision will have a chilling effect on rape reporting. Sexual assault is the most underreported violent felony. The appellate court's decision will exacerbate the underreporting problem and having a chilling effect on rape victims' willingness to come forward and report their sexual assaults. Because prostituted people are at increased risk of sexual assault and already face juror bias, allowing such questioning of the venire, will be particularly detrimental for this marginalized group.

Finally, buyers of sex are not a group that faces strong juror bias and thus the trial court's failure to ask the requested question on *voir dire* does not render the defendant's trial fundamentally unfair. No other court in Illinois has found that buyers of sex are a group that faces juror bias. To the contrary, there is strong juror bias *against* prostitutes and not against the buyers of sex. *See supra* Part A.

ARGUMENT

I. THE APPELLATE COURT'S DECISION SHOULD BE REVERSED BECAUSE IT CIRCUMVENTS THE ILLINOIS RAPE SHIELD LAW, IT WILL HAVE A CHILLING EFFECT ON RAPE REPORTING, AND THERE IS NOT A STRONG JUROR BIAS AGAINST BUYERS OF SEX

The appellate court erred when it reversed Defendant's conviction for aggravated sexual assault. The trial court properly denied Defendant's request to question the venire regarding their opinion of prostitution. First, prostituted people who have been sexually assaulted face great juror bias. Illinois courts have recognized this by holding that the IRSS precludes evidence that a complaining witness in a sexual assault cases is a prostitute. *People v. Ivory*, 139 Ill. App. 3d 448, 453 (1st Dist. 1985). The decision of the appellate court is contrary to the strong policy interests reflected in the IRSS. Secondly, the decision will have a chilling effect on rape reporting. The impact of the

appellate court's decision on prostituted people, a marginalized group at increased risk of sexual assault, will be detrimental. Finally, buyers of sex are not a group that has ever been found to face strong juror bias. To the contrary, it is prostituted people who have faced strong juror bias and need protection from the deeply-rooted belief that they are incapable of being sexually assaulted.

A. The Appellate Court's decision will circumvent the Rape Shield Statute.

The Appellate Court's decision, reversing Defendant's conviction, disregards the strong public policies embodied in the IRSS. The IRSS, passed in 1978 and is vital to protecting victims' constitutional right to privacy and the highly prejudicial nature associated with exposing rape victims' irrelevant sexual history in sexual assault prosecutions. The underlying policy behind the rape shield law is to "prevent the defendant from harassing and humiliating the complaining witness with evidence of either her reputation for chastity or specific acts of sexual conduct with persons other than the defendant, since such evidence has no bearing on whether she consented to sexual relations with the defendant." *People v. Summers*, 353 Ill. App. 3d 367, 373 (4th Dist. 2004) and 725 ILCS 5/115-7 (2009). The purpose of the IRSS was to address highly patriarchal and discriminatory views regarding sexually active women victimized by sexual assault and to preclude the introduction of irrelevant and prejudicial evidence of a victim's sexual past that would mislead the jury. Harry Kalven Jr. & Hans Zeisel, *The American Jury*, 249, 252-53 (1966).

Prior to the IRSS, evidence of a victim's prior sexual conduct with anyone was admissible when a defendant claimed that the victim consented. A study conducted by Harry Kalven Jr. & Hans Zeisel on how juries decided rape cases before the enactment of

rape shield laws, determined that 60% of juries acquitted a defendant, where a judge would have convicted on the same evidence. The researchers concluded that this was due to a “presumption on the part of jurors that women engaging in certain behaviors deserved whatever outcomes they received.” Kalven & Zeisel, *supra* at 210. Evidence of a women’s general reputation for immorality and unchastity was admissible to prove consent because “no ‘unchaste’ woman was expected to be truthful, and it was ‘more probable that an unchaste women would assent to such an act than a virtuous woman.’” *People v. Sandoval*, 135 Ill.2d 159, 167–68 (1990) (citing *People v. Collins*, 25 Ill.2d 605, 611 (1962)). Thus, to prevent similar biases due to prior sexual conduct, Illinois courts have long held that evidence that a complaining witness is a prostitute is inadmissible under the Rape Shield Statute. *People v. Ivory*, 139 Ill. App. 3d at 1039.

Historically, prostitutes face great bias when reporting sexual assault because many people believe that prostitutes cannot be the victims of rape. One study found that out of the 113 buyers surveyed, 43% felt that because the buyer paid for sex, the seller should do anything that the buyer asked. Rachel Durschlag & Samir Goswami, *Deconstructing The Demand for Prostitution: Preliminary Insights From Interviews With Chicago Men Who Purchase Sex* 18 (2008). A participant in the study further stated, that a prostitute “gave up her rights when she accepted my money.” *Id.* at 18. The same study also found that 21% of buyers believe that a person involved in prostitution could not be raped and that 41% believed that if a seller voluntarily participates in sexual activity, then the buyer has a right to rape the seller. *Id.* at 21–22.

The belief that prostitutes are unrapeable has led to many unjust results in sexual assault prosecutions. In 2015, a columnist for the Chicago Sun-Times stated that

prosecutors should not have charged a man who raped a prostitute at gunpoint with rape because the crime was really “theft of services.” Mary Mitchell, *Rape Case Sends Mixed Message on Prostitution*, The Chicago Sun Times, June 24, 2015. Similarly, a Municipal Court Judge in Philadelphia, dismissed sexual assault charges against a man accused of letting friends rape a prostitute that he had hired in 2007. The 20 year-old woman met the buyer and agreed to exchange sex for money. When he invited three friends to the hotel, the woman would not consent to have sex with the friends. The Defendant ordered the woman at gunpoint to have sex with his friends. The Judge ruled that this was a case of theft of services and not sexual assault. Associated Press, *Pennsylvania: Judge Criticized in Rape Case*, The New York Times, Nov. 1, 2007. Likewise, a jury acquitted after three men kidnapped and brutally raped a young woman because evidence was presented that she was unmarried with two illegitimate children. The defendant asserted that she was a prostitute, even when no evidence was presented to support that claim. Kalven & Zeisel, *supra* at 210.

Bias against prostituted individuals has been used as a tactic to defend against sexual assault charges. This is exactly the type of tactic the Defendant in this case was attempting to employ. When Defendant requested to ask about “persons who participate in prostitution,” this was a backdoor attempt to introduce the witness's past sexual conduct, as his theory of the case was that--they were prostitutes. It was an attempt to discredit the complaining and corroborating witness during jury selection. To prompt the venire that they will hear evidence about prostitution implicates a sexual past that would be inadmissible at trial. This essentially circumvents the IRSS by exposing the jurors to information of a complaining witness’ sexual past.

Additionally, the appellate court's reliance on the dissent in *Commonwealth v. Harris*, 825 N.E.2d 58 (Mass. 2005), is inapplicable. The *Harris* dissent stated, "Prostitutes are frequent victims of rape. Yet societal beliefs persist that prostitutes cannot be raped, or that they are not harmed by rape, or that they somehow deserved to be raped." *Id.* at 75. The dissenting opinion stands for the proposition that a victim's prior prostitution conviction should not be admitted as evidence because this would run contrary to the purpose of the Rape Shield Statute. *Id.* The *Harris* dissent acknowledged that prostitutes are frequent victims of rape and bias against prostitutes is extreme that jurors are disinclined to believe that a prostitute can be raped.

Therefore, allowing a defendant to introduce questions regarding prostitution in *voir dire* would invoke the very bias that the IRSS sought to preclude. *See* 725 ILCS 5/115-7 (2009).

B. The Appellate Court's decision will have a chilling effect on future sexual assault reporting.

The appellate court's decision to reverse the Defendant's convictions will have a chilling effect on future sexual assault victims' willingness to come forward and make criminal reports. Rape is notoriously underreported. According to the U.S. Department of Justice, of all the violent felonies "rape is the least reported, least indicted, and least convicted." Timothy C. Hart & Callie Rennison, U.S. Dep't of Justice, Reporting Crime To The Police 5 (Mar. 2000), *available at* http://www.icasa.org/docs/reporting_to_police_1992-2000.pdf (Last visited, August 1, 2017). Rape victims remain reluctant to report because of the risk of embarrassment from having their sexual history dredged up at trial. Therefore, shielding a victim from this humiliation and embarrassment must be a priority. Ilene Seidman & Susan Vickers,

The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform, 38 Suffolk U. L. Rev. 465, 470 (2005).

According to the National Intimate Partner and Sexual Violence Survey, over a million women were raped in 2016, yet only 16–18% of these rapes were reported to the police. Jody Raphael, *The Prevalence of Rape in the United States* 3–8 (2016). Given this overwhelmingly low reporting rate, some 40 years after the enactment of the Rape Shield Statutes across all jurisdictions in this country, rape victims are still hesitant to report sexual assault. In a study analyzing data from the National Violence Against Women Survey, the reporting rates of sexual assault victims has remained essentially unchanged since 1990. Clay-Warner, J., & Burt, C. H *Rape reporting after reforms: Have times really changed? Violence Against Women*, 11, 150–76 (2005). The Appellate Court’s decision will only give rape victims more pause before reporting assault. As the *Encalado* dissent noted, a defendant can now just claim that the complaining witness is a prostitute and circumvent the Rape Shield Statute in *voir dire*.

The appellate court’s decision will also deter prostitutes who are raped from reporting that they have been victims of sexual assault. Prostitutes are at substantial risk of being victims of sexual assault. One researcher, Dr. Mimi Silbert, opined that prostituted women were the “most raped class of women in history.” Susan Kay Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 Mich. J. Gender L. 92 (1993). Research on prostitution in Chicago found that 100% of survey participants had experienced some type of violence while in the sex trade. Durschlag & Goswami, *Deconstructing the Demand for Prostitution*, *supra* at 5. Another report on prostitution in San Francisco indicated that 82% had been physically assaulted and 68% had been raped.

Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27 *J. Women & Health* 37 (1998). Other research has concluded that up to 85% of women in prostitution have been raped. Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 *Harv. C.R.-C.L. L. Rev.* 271, 282 n.31 (2011). 59% of those prostitutes that reported being raped said that they were raped more than 5 times. *Id.* at 280. And 75% of those raped have indicated that they have been raped by the buyers of sex. *Id.* Further, homicide rates of women in prostitution exceeds that of any group of women in the United States. One study found that prostituted women are 18 times more likely to be murdered than non-prostituted women. John J. Potterat, *Mortality in a Long-term Open Cohort of Prostitute Women*, 159 *Am. J Epidemiol* 8 (2004). Claire E. Sterk, research found that all of the 180 prostitutes interviewed had experienced physical abuse at the hands of customers. Claire E. Sterk, *Tricking and Tripping*, 123, 134 (1999). Injuries included bruises, strained muscles to arm or leg twisting, and cigarette burns. *Id.* Many reported being beat up and left naked. The physical violence prostitutes' face is undeniable. One buyer described the dehumanization of prostitutes, "Prostitutes are like a product, like cereal. You go to the grocery, pick the brand you want, and pay for it. It's business." Durschlag & Goswami, *supra* at 16. As one buyer said, "She has no rights because you are paying for a sex act- she gives up the right to say no." *Id.* at 21.

The sex trade is so violent that prostitutes often suffer from posttraumatic stress disorder ("PTSD") at a rate that is equal to, or higher than that of veterans. Farley & Barkhan, *supra* at 45. PTSD is a mental health diagnosis describing symptoms that result from violence and trauma. *Id.* In the study of 130 women in street prostitution in San

Francisco conducted by Melissa Farley and Howard Barkhan, it was determined that 68% of prostituted people met the criteria for PTSD. *Id.* at 45. The researchers determined that the severity of PTSD was found to be directly related to the frequency of rape. *Id.* at 46. Further, 80% of women in one prostitution support group reported that they had seriously contemplated suicide. Jody Raphael, *Listening to Olivia, Violence, Poverty, and Prostitution 101* (2004). Prostituted people are at increased risk of rape and suffer harmful effects from the violent sex trade. There is a strong public policy interest in ensuring that prostitutes, a marginalized and oppressed group, report when they have been victims of sexual assault.

In the case at bar, S.A., a witness, explained why she initially failed to disclose to police officers that she was a prostitute after being raped, “I wanted to be taken seriously, I didn’t want them to shrug it off and say, oh, it was just a prostitution gone bad, and I wanted to be treated like a human.” *Encalado*, 2017 IL App (1st) 142548 ¶ 15. Her experience evinces what research has shown, rape of prostituted people is not taken seriously. Therefore, if a defendant is allowed to inform the jury that a complaining witness is a prostitute, this important policy of encouraging all victims to report rape, prostituted and non-prostituted people alike, will be undermined.

C. Buyers of sex do not face strong juror bias and therefore not being able to question the venire on their attitudes regarding prostitution would not render the proceedings fundamentally unfair.

The appellate court erred when it held that buyers of sex are a group that face strong juror bias. The trial court properly thwarted Defendant’s attempts to inform and indoctrinate prospective jurors about Defendant’s theory of the case. In order for a *voir dire* question to be constitutionally compelled, “the trial court’s failure to ask the question

must render the defendant[’s] proceedings fundamentally unfair.” *Encalado*, 2017 IL App (1st) 142548, ¶ 53 (quoting *In re Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 17) (alteration in original). Buyers of sex are not a group that faces strong juror bias and so failing to ask about juror bias against buyers of sex would not render the trial fundamentally unfair.

Further, the purpose of *voir dire* is to afford a defendant the right to have a jury that is free from bias or prejudice, not for the parties to argue their case. This Court has held that “specific questions which are tailored to facts of the case and intended to serve as a party’s preliminary final argument are generally not allowed.” *People v. Rinehart*, 2012 IL 111719, ¶ 17. This Court has also noted that *voir dire* is not to be used to indoctrinate prospective jurors or to impanel a jury with particular predispositions. *People v. Buss*, 187 Ill. 2d 144, 178 (1999). The appellate court has stated that questions designed to seek out “particular kinds of jurors, rather than simply fair and impartial jurors,” indoctrinate the jurors as to a defendant’s theory of defense and are improper. *People v. Bommersbach*, 228 Ill. App. 3d 877, 881 (1st Div. 1992).

Defendant’s request to question the venire about prostitution was merely an attempt to seek out jurors predisposed to believe that prostitutes cannot be raped and to indoctrinate jurors to the long-standing bias against prostitutes in rape cases. Defendant cites no cases that support the proposition that juror bias exists towards buyers of sex. The appellate court has stated that the limitation of *voir dire* questioning may be reversible error if it results in denying a party a fair opportunity to investigate an important area of potential bias among the venire. *People v. Oliver*, 265 Ill. App. 3d 543, 548 (1st Dist. 1994). The fact that Defendant was an admitted sex buyer would not

prevent prospective jurors from deciding Defendant's case impartially. The normalization of buying sex is evidenced by Defendant referring to prostitution as one of the world's "oldest professions." As one buyer of sex stated, "A man who buys sex is viewed simply as a man doing what men do. Therefore, there is nothing unique or interesting about his behavior." Durschlag & Goswami, *supra* at 14.

The appellate court equates the buyers and sellers of sex as both "participants" in prostitution. However, the reality is that vast inequality exists between the two groups and therefore they cannot be treated the same. Sellers, not buyers, are subject to strong juror bias. Prostituted people, not buyers of sex, are in need of protection from juror bias as they face violence, discrimination, and prejudice. Prostitution results from a lack of meaningful choices in life, as prostituted people are overwhelmingly poor, minority and women. MacKinnon, *supra* at 274. A research study interviewed 100 young women in the sex trade industry in Chicago and found that the average age of entry into the sex trade was 16.4 years. *See* Jody Raphael & Jessica Ashley, Illinois Criminal Justice Information Authority, Domestic Sex Trafficking of Chicago Women and Girls, i (2008), *available at* <https://humantraffickinghotline.org/sites/default/files/Domstic%20Sex%20Trafficking%20Chicago%20-%20ICJIA.pdf>. (Last visited, August 1, 2017). Many of the interviewees reported entering the sex trade due to running away from an abusive home, where they ended up on the streets and were recruited by pimps. *Id.* at 7.

Buyers of sex, are not a group in need of protection from juror bias. Buyers are usually wealthier and in a position of power over sellers. Buyers are more educated than sellers of sex. A report from the Cook County Sheriff's Office finds that sex buyers are

often educated and financially stable, while sellers are often coerced or forced into selling sex. Zak Koeske, *Sex buyers are 'often educated and of means,' Sheriff's Office report finds*, Chicago Tribune, February 13, 2017, available at <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-sex-trafficking-sting-st-0214-20170213-story.html>. (Last visited, August 1, 2017). Moreover, a research study reported that out of 159 sex buyers surveyed, only four had come into contact with law enforcement as a result of soliciting prostitution. Chicago Coalition for the Homeless, *Buying Sex: A Survey of Men in Chicago* 6 (2004). Conversely, another study found that 74% of prostitutes had been arrested at least once. Jody Raphael & Deborah L. Shapiro, *Sisters Speak Out: The Lives and Needs of Prostituted Women in Chicago* 28 (2002).

Therefore, the appellate court ignored the differences that exist between buyers and sellers of sex. Sellers, are often poor, uneducated, and disproportionately prosecuted in comparison to buyers. Buyers do not face the same deep-seated juror bias that sellers do warranting special probing during *voir dire*. Accordingly, *Amicus* suggest that the appellate court reversal was error because it held that the Defendant, as a buyer, was denied a fair trial when he was precluded from questioning the venire regarding juror bias against buyers of sex. Illinois courts have long recognized that it is the prostitutes and the victims of sexual assault who face strong patriarchal juror biases, not buyers of sex. In precluding evidence of a victim's irrelevant sexual history, the IRSS protects this marginalized group from such biases.

Therefore, if not overturned, the decision of the appellate court will deter rape victims from reporting and will further exacerbate the underreporting problem in sexual

assault cases and the results will be particularly detrimental for prostitutes, a class who is at substantially higher risk of sexual assault.

CONCLUSION

WHEREFORE, *Amicus*, respectfully submits this brief to indicate that the appellate court erred when it reversed the trial court's decision to preclude Defendant from questioning the venire regarding their attitudes regarding prostitution. For the foregoing reasons, the appellate court's decision should be reversed.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) 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 14 pages or words.



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