No. 2-09-1060
IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JUAN A. RIVERA, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois. No. 92-CF-2751 Honorable Christopher Starck, Judge Presiding.

AMICUS CURIAE BRIEF ON BEHALF OF THE:
ILLINOIS COALITION AGAINST SEXUAL ASSAULT
CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION
NATIONAL CRIME VICTIM LAW INSTITUTE
VICTIM RIGHTS LAW CENTER

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST

The amici are a group of national and local nonprofit organizations that promote, protect, and advocate for crime victims' rights. Three of the four amici specifically promote, protect, and advocate for the rights of sexual assault victims. The amici are:

Illinois Coalition Against Sexual Assault;

Chicago Alliance Against Sexual Exploitation;

National Crime Victim Law Institute; and

Victim Rights Law Center.

The Illinois Coalition Against Sexual Assault (ICASA) is a not-for-profit organization consisting of thirty-three community-based sexual assault centers throughout the state of Illinois and a central headquarters located in Springfield. Founded in 1977, the purpose of ICASA is to end sexual violence and to alleviate the suffering of its victims. To accomplish these goals, ICASA centers counsel victims, advocate for victims who choose to report the crime to medical and criminal justice personnel, present educational programs to the general public, provide information and referral services and promote public policies affecting sexual assault victims. In fiscal year 2009 alone, ICASA sexual assault centers provided individual and group counseling as well as legal and medical advocacy to 9,991 victims of sexual assault. The centers also provided crisis intervention to 8,442 individuals. The ICASA administrative staff in Springfield also conducts trainings, maintains a resource library and advocates on a statewide level for the rights of victims of sexual abuse and sexual assault. ICASA advocates for a criminal justice system that holds sex offenders accountable and treats victims with respect and dignity.

The Chicago Alliance Against Sexual Exploitation (CAASE) is a not-for-profit organization committed to stopping sexual exploitation by directly addressing the culture,

institutions, and individuals that perpetrate, profit from, or tacitly support, sexually exploitive acts such as the sale or consumption of others through prostitution, and sexual assault. Through its law project, the Justice Project Against Sexual Harm, CAASE provides legal representation to individual survivors of sexual assault and prostitution, and advocates for public policies and laws that increase the efficacy of criminal and civil laws opposed to sexual violence and exploitation. On behalf of its individual clients and in support of its overall mission, CAASE is interested in seeing that Illinois' various laws against sexual assault are appropriately interpreted and applied so as to further—and not undermine—efforts to hold perpetrators of sexual assault and trafficking appropriately accountable for their actions.

The Victim Rights Law Center (VRLC) was established in 2003 as the first nonprofit law center in the nation solely dedicated to serving the needs of rape and sexual assault victims. The VRLC provides free legal direct representation to sexual assault victims in Massachusetts (in education, immigration, privacy, employment, housing, safety, and economic and criminal justice matters) and legal advocacy, training and education nationally regarding civil remedies for victims of sexual assault. VRLC's work focuses on services to victims of non-intimate partner sexual assault. VRLC provides legal counsel to over five hundred clients each year in Massachusetts, and uses what they learn to train and provide technical assistance to thousands of legal professionals across the United States and U.S. Territories each year. Their unique and successful model for legal intervention in rape and sexual assault cases has been recognized by the U.S. Department of Justice Office on Violence Against Women (OVW); they serve as the OVW's primary trainer and technical assistance provider on these matters so that these services may be replicated nationally, helping an exponential amount of victims. The VRLC is a

nationally recognized expert on both (non-tort) civil remedies and privacy issues for victims of non-intimate partner sexual assault.

Finally, the National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource-sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide.

The amici have an interest in this case because the Illinois Rape Shield Act is a critical tool in securing for victims their constitutional right to privacy and protecting them from blame for the violent acts perpetrated upon them. The amici write to aid this Court in understanding that the trial court's error in allowing the State to present irrelevant evidence of the victim's prior sexual activity, in direct contravention of the text and policies supporting the Illinois Rape Shield Act, has a serious and far-reaching negative impact on protecting victims' rights and promoting victim cooperation in the prosecution of sexual assault crimes.

The amici recognize that they write in detail about the evidence of the victim's prior sexual activity that the State presented at trial. The amici feel compelled to do so in order to fully expose the trial court's error and to elucidate its serious negative consequences. However, the amici believe that evidence of this type should never be otherwise mentioned or repeated in connection with any criminal case, as it is completely irrelevant and violative of the victim's

fundamental rights to privacy and dignity, the Illinois Rape Shield Act, and the Illinois Constitution.

INTRODUCTION

Juan Rivera was convicted of felony murder for killing an eleven-year-old girl while committing aggravated criminal sexual assault. The scientific evidence presented at trial demonstrated that Rivera was not the source of male DNA recovered from the victim's vagina. The trial court nevertheless allowed the State to present irrelevant evidence purporting to suggest that the eleven-year-old victim might have engaged in prior sexual activity. The State relied on this evidence to improperly argue that the victim had vaginal intercourse with a different unidentified male within three days of her rape and murder. The State argued that this evidence explained the presence of the exclusionary DNA evidence.

The irrelevant evidence purporting to show the victim's prior sexual activity was admitted in direct violation of the victim's right to privacy and dignity as guaranteed by the Illinois Rape Shield Act and the Illinois Constitution. The trial court misapplied and misinterpreted the Illinois Rape Shield Act in three ways. First, the Act applies to prosecutions of felony murder predicated on sexual assault. Second, the exception to the Act permitting otherwise inadmissible evidence "where constitutionally required" cannot be invoked by the State. Finally, even if this exception were available to the State, the evidence at issue is wholly irrelevant and does not meet the relevancy standard for admissibility under the exception.

ARGUMENT

I. THE ADMISSION OF EVIDENCE TO SUGGEST THAT THE ELEVEN-YEAR OLD VICTIM WAS SEXUALLY ACTIVE VIOLATED THE CENTRAL PURPOSES OF THE RAPE SHIELD ACT.

The trial court gutted the core principles supporting the Rape Shield Act when it permitted the State to present wholly irrelevant evidence of the eleven-year-old victim's prior

sexual activity. The State elicited testimony that the victim wore red lace panties on the day of her death, had once masturbated, and had been the victim of criminal sexual assault at the age of eight to suggest that she agreed to have vaginal intercourse with an unidentified male within three days of her rape and murder. This wholly improper evidence, used to attribute sexual promiscuity and to leverage the negative connotations associated with sexual promiscuity, is exactly the type of evidence that the Rape Shield Act was meant to preclude. Even the State admitted that this was a situation in which it was presenting the "prior reputation and prior sexual acts of the victim . . . to dirty her up"; the evidentiary epitome of what the Rape Shield is supposed to prohibit. (Transcript of Record at 012551). Further, in arguing for its admission, the State claimed that the Rape Shield Act did not apply to cases of felony murder because "the victim is dead," and thus there is no longer a concern that the victim would be harassed and humiliated in court. (Transcript of Record at 012548). This conclusion offends every notion of privacy and dignity afforded victims by victims' rights statutes and constitutional provisions, including the Rape Shield Act.

a. The Act bolsters a victim's constitutional right to be treated with privacy and dignity throughout the criminal justice process and encourages victims to report incidents of sexual assault.

The Rape Shield Act provides that a victim's prior sexual activity or sexual reputation is inadmissible in prosecutions for sexual assault, subject to two enumerated exceptions, neither of which applied. 725 ILCS 5/115-7 (2009). The Rape Shield Act has two main purposes. First, the Act protects victim privacy. A victim's right to privacy and dignity is expressly guaranteed by the Illinois Constitution and has been recognized as a critically important concern for years. Ill. Const. § 8.1. Because of the violative nature of sexual assault, "rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Michigan v. Lucas*, 500 U.S. 145, 150 (1991). "For most sexual assault victims, privacy is like

oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot." Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform,* 38 Suffolk U. L. Rev. 467, 473 (2005). Thus, guarding a sexual assault victim's privacy is at the core of the Rape Shield Act. The Act ensures that a victim's constitutional right to be treated with dignity and respect for her privacy throughout the criminal justice process is effectuated to the fullest. The statute specifically "protects the victims of sexual assault from the ignominy of having their irrelevant yet embarrassing prior sexual habits paraded before them at a defendant's trial." *People v. Jones*, 264 Ill. App. 3d 556, 563 (1st Dist. 1993).

Second, the Act is designed to free victims "from the concern that certain episodes in their sexual history might be dredged up," so that "they would be more forthcoming about sexual abuse thereby promoting more effective law enforcement." *People v. Weatherspoon*, 265 Ill. App. 3d 386, 391 (1st Dist. 1994). Sexual assault is a notoriously underreported crime. It is estimated that 80% of these crimes go unreported, and of those that are reported, only an estimated 2%-5% of complaints lead to convictions. Richard I. Haddad, *Shield or Sieve? People v. Bryant and the Rape Shield Law in High Profile Cases*, 39 Colum. J.L. & Soc. Probs., 185, 189 (2005). Sexual assault victims frequently choose not to report the crime and many further choose not to participate in prosecution rather than openly relive the details of their attack and endure the humiliation and judgment associated with society's tendency to "blame the victim" and the court's willingness to admit irrelevant and embarrassing episodes of prior sexual activity. The Rape Shield Act exists to ensure the safety and privacy of victims and to encourage their participation in the system.

b. The Act redresses sexually discriminatory attitudes and practices that are historically levied on sexually active female victims of sexual assault.

Sexual assault is unparalleled in that no other crime has an offense-specific, comparable law protecting victims' privacy and dignity. The Act was passed to alleviate the gender inequality, harassment, judgment, and blame that sexual assault victims uniquely and too often face. The Illinois Supreme Court has recognized that these obstacles have impeded traditional legal approaches to the crime. The Court noted in *People v. Sandoval* that prior to the Rape Shield Act's enactment, evidence of a female victim's general reputation for immorality and unchastity was admissible to prove the probability of consent because "no 'unchaste' woman was expected to be truthful," and it was "more probable that an unchaste woman would assent to [sex] than a virtuous woman." *People v. Sandoval*, 135 Ill. 2d 159, 167-168 (1990) (citing *People v. Collins*, 25 Ill. 2d 605, 611 (1962)); Murphy, *Rape Shield Statute Upheld by Illinois Appellate Court*, 69 Ill. B.J. 110, 110 (1980)). *See also People v. McKenna*, 585 P.2d 275, 277 (Colo. 1978) (noting that prior to the enactment of the Rape Shield Act "it was thought that the fact that she had consented to sexual relations with others on other occasions might justify a factfinder in concluding she probably had consented to the sexual act giving rise to the prosecution"). In contrast, courts uniformly maintained that a man's bad character for chastity did not, "even in the remotest degree, affect his character for truth." *Sandoval*, 135 Ill. 2d at 168. *See also People v. Blackburn*, 56 Cal. App. 3d 685, 690 (Cal. Ct. App. 1976) (recognizing that the historical rule allowing evidence of prior sexual activity to demonstrate consent "may have been more of a creature of a one time male fantasy of the 'girls men date and the girls men marry' than one of logical inference").

As alluded to by these courts, sexual assault and the accompanying prejudices disproportionately affect girls and women. All available research shows that girls and women

are overwhelmingly more frequently sexually assaulted than boys and men, and rape is overwhelmingly committed by men. This reality does not mean that boys and men are never assaulted, or that individual male victims of sexual assault are less harmed than are individual female victims of rape. What it means is that sexual assault is quintessentially sex discrimination because it lands mostly on girls and women, to their significant detriment. The sexually discriminatory nature of sexual assault is highlighted by the courts' language above and the continuing power of the expressed belief that women who consent to sexual activity on one occasion subsequently invite all later sexual interactions. Thus, in addition to the privacy and dignity protections afforded by constitution and statute, the Rape Shield Act acts as a bulwark against the pervasive sexually discriminatory attitudes and practices that view the claims of a woman who has been sexually active with more hostility than those of a woman who lacks a sexual past.

c. The evidence presented at trial was in flagrant violation of the policies supporting the Rape Shield Act.

The policies supporting the Rape Shield Act are especially merciless toward entirely irrelevant evidence of prior sexual activity. The Act was designed to prevent victims from being harassed and humiliated when confronted with evidence of specific acts of sexual conduct that have no bearing on the matters before the court. *People v. Weatherspoon*, 265 Ill. App. 3d 386, 391 (1st Dist. 1994). "Exclusion of such evidence keeps the jury's attention focused on issues relevant to the controversy at hand and promotes effective law enforcement because victims can report crimes of rape and deviate sexual assault without fear of having the intimate details of their past sexual activity brought before the public." *Id.* at 392. These principles are rendered hollow when irrelevant sexual history is admitted into evidence and used to suggest that the victim engaged in consensual sexual activity. The introduction of this evidence can only serve to

heighten a victim's harassment, humiliation, and unnecessary public exposure, distract a jury, and broaden the scope of facts and circumstances that might dissuade a victim of sexual assault from coming forward.

The evidence here falls squarely within the scope of what the Act is supposed to prohibit. The evidence evoked every negative consequence that the Act was intended to address. To assert that the an eleven-year-old girl had vaginal intercourse within 72 hours of her rape and murder based on the type and color of her underwear, her previous sexual victimization, and the fact that she once masturbated at an unknown time is absurd. The evidence had no bearing on the exclusionary unidentified male DNA found in her vagina. There is no doubt the jury dwelled on the State's suggestions that this little girl was promiscuous; the shocking insinuations would have been impossible to ignore. The State certainly succeeded in "dirty[ing] her up;" the testimony could not have been more harassing or humiliating. Most troubling, recent or future victims of criminal sexual assault now know that being a victim of criminal sexual assault many years prior, one's choice of underwear, and a single instance of masturbation may be revealed by the State in open court and used to impute blame and responsibility. The trial court's decision to admit this evidence violated the victim's constitutional right to privacy and dignity, and was in flagrant disregard of the Rape Shield Act.

d. The policies behind the act apply just as forcefully to situations in which a sexual assault victim was killed by her attacker.

The fact that the victim was killed by her attacker in no way nullifies the policy concerns supporting the Rape Shield Act. Contrary to the State's suggestion, "the statute makes no exception if the victim is deceased." *Jenkins v. Indiana*, 627 N.E. 2d 789, 795 (Ind. 1994). As one court aptly stated, "[n]o part of the rape shield law suggests that a deceased victim's sexual history is less protected than that of a living victim." *State v. Craig*, 853 N.E. 2d 621, 636 (Ohio

2006)."If the statute is not applied to victims who ultimately are murdered, then perpetrators of sex crimes will be encouraged to kill their victim, thus enabling them to defend the charges through exploitation of evidence of the victim's prior sexual activity." *Jenkins*, N.E. 2d at 795. The Rape Shield Act provides victims with privacy and dignity protections that are not extinguished upon death. The statute's two main purposes are equally eviscerated when a dead victim's sexual history is entered into evidence as when a live victim's sexual history is entered into evidence. It is "irrational and illogical to suggest that the rape shield law should be made inapplicable when the victim is killed after a sexual assault. The statutory goals of protecting the privacy of the victim and seeking to avoid character assassination are no less consequential when the victim is killed. A deceased rape victim's life is entitled to the same privacy as a surviving victim." *New Jersey v. Clowney,* 690 A.2d 612, 619 (N.J. App. Ct. 1997).

Further, once revealed in court, the sexual history of a deceased sexual assault victim is disseminated just as quickly as that of a live victim. Media outlets and neighborhood gossips do not discriminate. That was certainly the case here. One newspaper published the State's assertions as if they were proven facts:

> So much time has passed since the crime, and the depiction of [the victim] has changed during those 17 years. She had a sexual experience when she was eight, her sister testified. She might have had sex with somebody else before Rivera stabbed her 27 times, prosecutors suggested. Such a hard and brutal life for a little girl.

[The Victim] murdered at age 11, but her search for justice turns 17, Daily Herald, May 9, 2009, at 11. A reporter from the Chicago Tribune asked whether the victim's "red lace panties, that prosecutors dwelt on portentously," indicated that "the 11-year old was sexually active and the semen came from a mysterious, unknown boyfriend." Eric Zorn, *Rape-murder retrial sounds familiar—maybe too familiar*, Chicago Tribune, Apr. 16, 2009, at C6. The headline of another

article read: "Sister says [the victim] had sexual encounter years before murder." Tony Gordon, *Sister says [the victim] had sexual encounter years before murder*, Daily Herald, Apr. 22, 2009.

There is little doubt that recent or future victims of sexual assault read or were exposed to these reports. It would not matter to these individuals that the sexual history described on the front page was that of a dead victim; they would have had no reason to make such a distinction. Their only takeaway would have been that the State elicited testimony that the victim was unlawfully forced to perform oral sex many years ago, had masturbated once, and wore red lace panties on the day she was raped and murdered to suggest that she agreed to have vaginal intercourse with an unidentified male around the same time that she was violated. The impact and chilling effect of these reports are no less profound because the victim had been murdered. Whether the victim was alive or dead is of no consequence.

II. THE STATE'S EVIDENCE IS INADMISSIBLE UNDER THE RAPE SHIELD ACT.

The trial court misapplied and misinterpreted the Illinois Rape Shield Act, giving rise to the gross violations of the Act, its underlying policies, and the victim's constitutional right to privacy and dignity mentioned above. First, the court erred in suggesting that the Act did not apply to a prosecution of felony murder predicated on aggravated criminal sexual assault. Second, the court ignored precedent in (1) ruling that the State could invoke the "constitutionally required" exception to the Act, and (2) finding that entirely irrelevant evidence was constitutionally required to guarantee the State a fair trial. The evidence presented here should not have been admitted in any circumstance, regardless of the party seeking to introduce it.

a. The Rape Shield Act applies to prosecution for felony murder predicated on aggravated criminal sexual assault.

Following argument on the defense's Motion in Limine, the trial court made an ambiguous ruling as to whether the Rape Shield Act applied to Juan Rivera's prosecution and

why the State would be allowed to present evidence of the victim's prior sexual activity that would be otherwise barred by the statute. The court stated that the statute did not apply to prosecutions for murder, but may apply to prosecutions for those offenses listed in the Act. (Transcript of Record at 012559) The court further stated that because Rivera was not separately charged with rape, it did not "really apply in a murder case. . . . However, in this case . . . even if it did apply, . . . the State would be allowed to go into those areas because . . . the evidence could in fact be in rebuttal to [the defense] testimony that would be that someone other than Juan Rivera had sex with this little girl." (Transcript of Record at 012559) When asked whether the State would be allowed to do so because it qualified for the Act's "constitutionally required" exception, the court replied, "The Court has ruled." (Transcript of Record at 012563)

Chapter 725, Section 5/115-7 of the Illinois Code (the Rape Shield Act) provides, "In prosecutions for . . . aggravated criminal sexual assault, [or] criminal sexual assault . . . the prior sexual activity or the reputation of the alleged victim . . . is inadmissible except . . .(2) when constitutionally required to be admitted." 725 ILCS 5/115-7 (2009). Its application is limited to prosecutions for the enumerated sex related offenses. Intentional and depraved heart murder are not among the listed crimes and do not directly implicate the Act. However, this is not true in prosecutions for felony murder where the underlying felony is one of the enumerated sex-related offenses. In felony murder, the predicate felony is charged as a lesser included offense, even if not expressly done so in the indictment. As a result, the prosecution, as in this case, is subject to the Rape Shield Act.

b. The Rape Shield Act applies to this prosecution because Juan Rivera was charged with aggravated criminal sexual assault, an offense enumerated in the Rape Shield Act.

Because the predicate felony is charged as a lesser included offense, a victim's privacy and dignity are protected by the Rape Shield Act in prosecutions for felony murder where the

underlying felony is aggravated criminal sexual assault. Under Illinois law, "the predicate felony underlying a charge of felony murder is a lesser-included offense of felony murder." *People v. Smith*, 233 Ill. 2d 1, 17 (2009); *People v. Bailey*, 364 Ill. App. 3d 404, 410 (4th Dist. 2006) (finding armed robbery to be a lesser included offense of felony murder); *People v. Gilyard*, 251 Ill. App. 3d 117, 119 (2d Dist. 1993) (finding the charged home invasion "necessarily a lesser included offense of the felony murder" that would "not support a separate conviction and sentence"). To secure a conviction for felony murder, the State must prove each element of the underlying offense beyond a reasonable doubt. *People v. Jeffrey*, 94 Ill. App. 3d 455 (5th Dist. 1981) (holding that the prosecution is required to prove beyond a reasonable doubt that the defendant killed the victim while committing or attempting to commit the predicate felony). Thus, a defendant charged with felony murder is also charged with and may be convicted of the predicate felony as a lesser included offense. *See People v. Rosenthal*, 394 Ill. App. 3d 499 (1st Dist. 2009) (reversing defendant's conviction for felony murder and remanding for sentencing on conviction of aggravated battery with a firearm as a lesser included offense); *Smith*, 233 Ill. 2d at 17 (noting that a defendant convicted of felony murder is also convicted of the underlying offense and that in such instances double jeopardy prohibits the predicate offense from supporting a separate conviction and sentence).

Rivera was charged with two counts of felony murder predicated on aggravated criminal sexual assault. The indictment alleged that Rivera, while committing a forcible felony, aggravated criminal sexual assault, 720 ILCS 5/12-14(a)(1)(use of a weapon during sexual assault), caused the death of the victim. The indictment also alleged that Rivera, while committing a forcible felony, aggravated criminal sexual assault, 720 ILCS 5/12-14(a)(1)(sexual assault of minor), caused the death of the victim. He was not separately charged with aggravated

criminal sexual assault. While "[i]t is axiomatic that no person may be convicted of an offense the person has not been charged with committing, . . . an accused may be convicted of an offense not expressly included in the charging instrument if that offense is a 'lesser included offense of the offense expressly charged.'" *People v. Jones*, 149 Ill. 2d 288, 292 (1992). The predicate felony supporting a felony murder charge need not be independently averred because "it is unnecessary and superfluous to allege a lesser included offense in an indictment." *People v. Knaff*, 196 Ill. 2d 460, 475 (2001). Thus, even though it was not separately alleged in the indictment, Rivera was charged with and convicted of aggravated criminal sexual assault as a lesser included offense of felony murder. His was not just "a murder case" – his was a rape and murder case. Therefore, the Rape Shield Act applied to his prosecution.[1]

c. The exception allowing evidence of prior sexual activity where constitutionally required does not apply to the State.

During the hearing on the Defense's motion in limine, the trial court stated that the evidence in question was admissible under this exception because the "People of the State of Illinois also have constitutional rights," and "fundamental fairness" requires that the State be permitted to admit evidence under the exception. (Transcript of Record at 012557-58) The State's assertion is misplaced. The federal and Illinois constitutions, the case law interpreting the Act, and the Act's legislative history confirm that the constitutional exception does not apply.

[1] Courts in other jurisdictions have reached a similar result. *See, e.g., State v. Friend*, 493 N.W. 2d 540, 545 (Minn. 1992) (Minnesota Supreme Court ruled that because the State needed to prove the elements of criminal sexual assault in order to convict for felony murder predicated on criminal sexual assault, the rape shield law applies to the prosecution.); *Commonwealth v. Gentile*, 773 N.E.2d 428, 441 (Mass. 2002) (Massachusetts Supreme Court ruled that rape shield applied to felony murder where predicate offense was aggravated rape.); *Mitchell v. Artus*, 2008 WL 2262606, *24 (S.D.N.Y. June 2, 2008) (New York trial court applied rape shield law to prosecution for first- and second-degree murder).

i. The federal and Illinois constitutions dictate that only the defendant's right to a fair trial is protected by the Constitution.

Even a cursory glance at the text, use, and history of the Illinois Rape Shield Act defeats any argument that its "constitutionally required" exception can be invoked by the State. The applicable provisions of both the federal and Illinois constitutions guarantee a fair trial specifically to the defendant. These constitutions dictate that no "*person* be . . . deprived of life, liberty, or property, without due process of law," and that "the *accused* . . . be confronted with the witnesses against him." U.S. Const. amends. V, IV, XIV § 2; Ill. Const. art. I §§ 2, 8, 10.

ii. Illinois case law interpreting the Rape Shield Act dictates that only the defendant's right to a fair trial is protected by the "constitutionally required" exception to the Rape Shield Act.

Countless cases affirm only the defendant's right to a fair trial. In *People v. Sandoval*, the Supreme Court of Illinois specifically addressed the Illinois Rape Shield Act, and held that a *defendant's* constitutional rights may sometimes require the admission of evidence of the victim's prior sexual activity. 135 Ill. 2d 159, 178-81 (1990). In making its holding, the court expressed concern that the Rape Shield Act might exclude evidence that the *defendant* would be entitled to present under the confrontation clause. *Id*. at 173-78. Similarly, the court in *People v. Hill* held that the Rape Shield Act must not be applied in a way that violated the *defendant's* constitutional rights. 289 Ill. App. 3d 859, 863 (5th Dist. 1997). The *Hill* court stated that the "statute's protection yields to constitutional rights that assure a full and fair *defense*." *Id*. at 862. It went on to explain that the constitutional exception is necessary for the statute to conform with the "sixth amendment's confrontation clause [and] the fourteenth amendment's due process clause." *Id*.

In fact, every case that concerns the exception affirms that it serves to protect a criminal defendant's constitutional rights. *See People v. Mason*, 219 Ill. App. 3d 76, 79 (4th Dist. 1991)

("The statute should be construed and applied so as to uphold the constitutional rights of the defendant. . . ."); *People v. Anthony Roy*, 324 Ill. App. 3d 181, 186 (3d Dist. 2001) ("due process requires the admission of evidence of the victim's sexual history where that evidence is relevant to a critical aspect of the defense."); *People v. Starks*, 365 Ill. App. 3d 592, 600 (2d Dist. 2006) (Admission of certain evidence is "constitutionally required where the exclusion of the evidence prevents the defendant from presenting his theory of the case."); *People v. Summers*, 353 Ill. App. 3d 367, 373 (2d Dist. 2004) (defendant must "be permitted to offer certain evidence which was *directly* relevant to matters at issue in the case.'"); *People v. Darby*, 302 Ill. App. 3d 866, 874 (1st Dist. 1999) ("[A] defendant's constitutional right to confront witnesses must, in certain instances, supersede the statutory exclusion.").

iii. The legislative history of the Rape Shield Act dictates that only the defendant's right to a fair trial is protected by the "constitutionally required" exception to the Rape Shield Act.

The legislative history of the Act dispels any doubt that the trial court erred in allowing the State to invoke the exception. Prior to 1994, the Illinois Rape Shield Act only allowed the introduction of the victim's past sexual conduct with the accused when consent was an issue in the case. In 1994, the legislature revised the statute so that it would allow for evidence of a victim's sexual history to be admitted "where constitutionally required." 725 ILCS 115-7. The legislative history of the Act demonstrates that the "constitutionally required" exception was only intended to be available to defendants.

The exception was added to the statute in order to make it consistent with the corresponding federal rule of evidence, Rule 412, which at the time contained an exception for a victim's prior sexual activity "where constitutionally required." H.R. Debate, May 25, 1993, Ill. 88th General Assembly; Fed. R. Evid. 412 (1993). In presenting the revisions to the House, Representative Currie, the amendment's sponsor, explained that the bill as originally drafted

failed to include "certain language in the federal rule that reserves the right to a defense based on constitutional grounds." H.R. Debate (statement of Representative Currie); *see also* Senate Debate, May 17, 1993, Ill. 88th General Assembly (the statute was amended "to avoid any conflict with the federal rules").

The legislative history of Federal Rule of Evidence 412 confirms that the rule's constitutionally required exception exists to protect the constitutional rights of criminal defendants. When it was first drafted in 1978, the federal rule allowed an exception for evidence of a victim's sexual history "where constitutionally required." Fed. R. Evid. 412 (1979). During discussion of the bill on the House floor, Speaker Mann explained this exception was added "to cover those infrequent instances where, because of an unusual chain of circumstances, the general rule . . . would result in denying the defendant a constitutional right." 124 Cong. Rec. H. 1194 (1978) (statements by Speaker Mann).

After an overall revision in 1994, the exception to Rule 412 was amended to specify that the Rule could not be used to exclude evidence that "would violate the *constitutional rights of the defendant*." Fed. R. Evid. 412 1993 amend. notes. The Advisory Committee Notes make clear that this revision was simply organizational and that the constitutionally required exception would remain "virtually unchanged" in its application in criminal cases. Thus, the Advisory Committee Notes confirm that at no time was the constitutionally required exception to Rule 412 intended to be available to any party other than the defendant. *Id*.

The text of the constitution operates to protect individuals from the powers of the state. There is no reason that the constitutional exception to the Illinois Rape Shield Act should be interpreted to the contrary. The text, history, and application of the Act prove that this exception cannot be invoked by the State.

d. Even if the State had such a constitutional right, the admission of the State's evidence of prior sexual activity was not "constitutionally required" to ensure a fair trial.

i. Even if the Court finds that the constitutional exception is available to the State, the evidence presented here was wholly irrelevant and should never have been considered "constitutionally required" to guarantee a fair trial for the State.

Even if the Court finds that the constitutional exception is available to the State, the evidence presented here was wholly irrelevant and should have never been considered admissible under the "constitutionally required" exception. Evidence otherwise barred by the Rape Shield Act is admissible only where *required* by the constitution. The constitution must *demand* it. Accordingly, the constitution requires that a defendant "be permitted to offer certain evidence which was *directly* relevant to matters at issue in the case, notwithstanding that it concerned the victim's prior sexual activity." *People v. Summers*, 353 Ill. App. 3d 367, 373 (4th Dist. 2004). For example, evidence of prior sexual activity "would have the necessary probative value if it could explain physical facts in evidence such as semen, pregnancy, or a physical condition indicative of sexual intercourse." *People v. Hill*, 289 Ill. App. 3d 859, 864 (5th Dist. 1997). However, "minimally relevant evidence of prior sexual activity should not be admitted." *Id*. at 374. Thus, "[t]he true question is always one of relevancy." *Id.* at 373.

The evidence here did not have the necessary probative value to be deemed constitutionally required. The State's evidence was grossly anemic; it was incapable of explaining away the physical facts and was not directly relevant to matters at issue in the case. Even the court, after erroneously admitting the evidence, outlined the reasons this evidence is irrelevant: "[T]here is a big dispute as to the viability of the sample that was tested . . . the fact of whether or not anyone else may have had some sexual encounter with the victim at some point. I mean there was testimony about a sexual encounter. It wasn't testified as far as vaginal

sex with somebody else, but it was certainly a sexual act. There was testimony about that that was not close in time to this occurrence by any means." (R. 17960, Trial Tr., May 4, 2009.)

It cannot be that evidence of remote instances of masturbation and sexual victimization are directly relevant to whether the victim had vaginal intercourse with an unidentified male within 72 hours of her rape and murder.

The type of the prior sexual activity presented did not make it more likely than not that the victim had vaginal intercourse within 72 hours of her death. There is no causal relationship between the victim's choice of red lace panties and the suggestion that she engaged in consensual vaginal intercourse. The fact that she was the victim of criminal sexual assault at the age of eight does not make it more likely that she engaged in vaginal intercourse at age eleven; and, likewise, a single instance of masturbation simply cannot prove the victim engaged in vaginal intercourse at any time.

Also, the evidence of prior sexual activity cannot directly explain the presence of exclusionary unidentified male DNA in the victim's vagina. The red lace panties are certainly not the source of exclusionary unidentified male DNA; the perpetrator who sexually assaulted the victim three years earlier by forcing her to perform oral sex is not the source of the exclusionary unidentified male DNA; and, obviously, the victim did not provide the exclusionary unidentified male DNA while masturbating.

The State's evidence does nothing to demonstrate that the victim had ever engaged in sexual intercourse, much less that she had engaged in vaginal intercourse in a short time period before her death. The evidence is wholly irrelevant and certainly not "constitutionally required" to guarantee a fair trial for the State.

ii. Barring this evidence is consistent with the entire body of case law on the Illinois Rape Shield Act.

A survey of the cases concerning the Illinois Rape Shield Act indicates that the State's invocation of the statute's constitutional exception was in direct contravention to the exception's intended purpose. During the hearing on the disputed evidence, the State relied on *People v. Anthony Roy* for the proposition that evidence of a rape victim's prior sexual history is admissible where it explains otherwise unaccounted-for physical evidence. (Transcript of Record at 012550); *People v. Anthony Roy*, 324 Ill. App. 3d 181 (3d Dist. 2001). The State argued that *Roy* is analogous on "all fours" with the facts in the present case, but upon closer examination, it becomes clear that *Roy* could not be more distinguishable. (Transcript of Record at 012549)

Roy illustrates that evidence of a victim's sexual history may be admissible under the constitutional exception where specific instances of sexual intercourse between the victim and someone other than the defendant provide a plausible explanation for the physical evidence in the case. In *Roy*, the court admitted evidence that the child victim had intercourse with an acquaintance in the same period of time that the defendant allegedly abused the victim. *Roy*, 324 Ill. App. 3d at 186.Although the court did not cite it directly, the evidence was likely admissible under the "constitutionally required" exception. *Id*. The court reasoned that the evidence of prior sexual contact was admissible as a plausible explanation as to why the victim's hymen was no longer completely intact at the time of her examination. *Id*. In the present case, the victim's sister's testimony could not have served the same function.

First, in *Roy*, the court was able to point to a specific instance of sexual conduct in order to provide a plausible explanation for the physical evidence. *Id*. The victim's sexual contact with the acquaintance was recent and may have been the very reason for the physical evidence at

issue. *Id*. In this case, the State cannot point to a specific instance of sexual conduct that would explain why the unidentified DNA was found in the victim's body. The victim's choice in underwear and prior engagement in sexual acts could not have been the very reason that unidentified DNA was found in her body.

Second, the evidentiary threshold to explain away the presence of unidentified male DNA is significantly higher than the evidentiary threshold to explain away a damaged hymen. Unlike evidence of a torn or cleft hymen, DNA evidence can only be located within the body for a few short days. Thus, only evidence of sexual acts that occurred one to two days prior to the alleged assault would provide a plausible explanation for the physical evidence. In the present case, the State cannot cite one instance where the victim engaged in sexual intercourse, much less an instance that occurred close enough in time to the charged crime to explain the unidentified male DNA. Unlike the evidence in *Roy*, the evidence in this case does not demonstrate in the slightest way a plausible explanation for the physical evidence.

The remaining case law clearly condemns the State's claim that the constitution required the court to allow minimally relevant evidence to intimate that the victim was sexually active in the days before her death. *See People v. Sandoval*, 135 Ill. 2d 159, 176 (1990) (victim's prior sexual encounters with third party had no impact on issue of consent); *People v. Hodges*, 264 Ill. App. 3d 785, 787 (1st Dist. 1993) (defendant's constitutional rights not violated where statute prohibited evidence that victim was raped before and did not report; proffered evidence was entirely irrelevant to consent issue); *People v. Darby*, 302 Ill. App. 3d 866, 875 (1st Dist. 1999) (evidence that victim may have been molested by others three weeks after the charged incident is not relevant to whether charged incident took place and thus not admissible under "constitutionally required" exception); *People v. Summers*, 353 Ill. App. 3d 367, 372 (4th Dist.

2004) (evidence that the teenage victim had previously been convicted of molesting another child was not admissible under the constitutional exception to the rape shield statute); *People v. Weatherspoon*, 265 Ill. App 3d. 386, 393 (1st Dist. 1994) (defendant had no constitutional right to present evidence that victim had previously engaged in sexual activity to obtain drugs).

Because none of the evidence introduced by the State does anything to explain why unidentified male DNA was found in the victim's vagina, the State's evidence is barred by the Rape Shield Act.

CONCLUSION

The trial court erred in allowing the State to present evidence of the victim's prior sexual activity to suggest that the victim engaged in vaginal intercourse within 72 hours of her rape and murder. This evidence was admitted in direct contravention of the literal terms of the Rape Shield Act and the policies that support it. Rape victims deserve better from the criminal justice process. The Rape Shield Act should be strictly enforced to protect victims against further violations of their privacy and dignity and to encourage recent and future victims of criminal sexual assault to come forward.