

COLORADO SUPREME COURT
Court Address: 2 E. 14th Ave.
Denver, CO 80203

Colorado Court of Appeals
Hon. Webb; Hon. Davidson, C.J. and Casebolt, J.
concurring
Court of Appeals Case No. 09CA1396

JULIE STENE, an individual
Petitioner-Appellee,
v.
CAROL CHAMBERS, District Attorney, 18th
Judicial District
Respondent-Appellant.

Attorney for Amici Curiae:

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MOTION OF AMICI CURIAE THE HARVARD LAW SCHOOL GENDER VIOLENCE CLINIC; THE NATIONAL CRIME VICTIM LAW INSTITUTE; JOANNE BELKNAP, PROFESSOR OF SOCIOLOGY; THE COLORADO COALITION AGAINST DOMESTIC VIOLENCE; THE COLORADO COALITION AGAINST SEXUAL ASSAULT; EQUAL RIGHTS ADVOCATES; WENDY J. MURPHY, ADJUNCT PROFESSOR OF LAW; THE NATIONAL COALITION AGAINST VIOLENT ATHLETES; AND THE NATIONAL WOMEN'S LAW CENTER; RAPE ASSISTANCE AND AWARENESS PROGRAM; AND SEXUAL ASSAULT SERVICE ORGANIZATION FOR LEAVE TO PARTICIPATE IN SUPPORT OF PETITIONER-APPELLEE'S PETITION FOR CERTIORARI

Pursuant to Colorado Appellate Rule 29, *Amici* respectfully request this Court's permission to file a brief as *Amici Curiae* in the above-captioned case, and as grounds for this request state:

1. The Harvard Law School Gender Violence Clinic is part of the Harvard Law School Clinical Legal Education Program. Through consultation with Harvard faculty and seasoned attorneys, law students work on gender-based violence policy matters and provide legal advocacy to victims of sexual assault. The clinic is dedicated to using the law to empower victims of sexual assault, as well as advocating for the removal of barriers victims face in the pursuit of justice.

2. The National Crime Victim Law Institute 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. This case involves fundamental rights and interests of all crime victims, including the rights to access justice and to be treated with fairness, dignity and respect.

3. Joanne Belknap, Ph.D, is a Professor of Sociology at the University of Colorado at Boulder who is well known for her book, *The Invisible Woman: Gender, Crime, & Justice*, for which she is currently working on the fourth edition. She has received numerous grants, mostly from the National Institute of Justice, for her work on violence against women. In addition to her book, she has published extensively in women's victimization, and won the 2008 award for the best article in the journal *Violence Against Women*.

4. The Colorado Coalition Against Domestic Violence (CCADV), 1120 Lincoln Street, Suite 900, Denver, Colorado 80203, is a non-profit statewide membership organization whose purpose is to offer a strong statewide voice for survivors of domestic violence, their families, and providers of service. CCADV represents over 70 domestic violence programs, resource centers, allied organizations and individuals. The majority of CCADV's member programs are of a dual nature; they also serve and advocate on behalf of victims of sexual assault. CCADV

supports its program and individual members in serving over 40,000 survivors of domestic and sexual violence each year. CCADV also plays an instrumental role in advocating for and supporting laws and policies that affect victims of domestic and sexual violence and their children. CCADV has a long history of working at the local and state levels to promote a strong criminal justice response to domestic and sexual violence. Holding domestic and sexual violence offenders accountable, and increasing victim safety and access to justice is an integral part of a criminal justice system response. CCADV is therefore immensely interested in the proper resolution of this case, to ensure that all victims are protected by Colorado's sexual assault statutes.

5. Equal Rights Advocates (ERA) is a San Francisco-based human and civil rights organization dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has litigated and participated as amicus curiae in numerous cases throughout the country to enforce the rights of women, including their right to be free from harassment and violence in their schools and workplaces.

6. Wendy J. Murphy is an Adjunct Professor of Law at New England Law – Boston, and Director of Judicial Language Project and Sexual Violence Legal News Projects, providing pro-bono legal services for victims of sexual violence. A former prosecutor, Ms. Murphy has represented victims at the trial and appellate level in state and federal courts, and has filed briefs on policy issues of significance to victims of sexual violence in state and federal appellate courts, including the US Supreme Court.

7. The National Coalition Against Violent Athletes is a 501c3 nonprofit that seeks to advocate for victims of violence by athletes while aiding in the prevention of athlete violence through education. In doing so, we work to curb the escalation of athlete violence and create an environment in which people are equally respected and equally held accountable, regardless of their status in society.

8. The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated since 1972 to the advancement and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Ending sex discrimination encompasses ending violence against women, including sexual assault. The NWLC has litigated and participated as

amicus curiae in numerous cases throughout the country involving the enforcement of women's statutory and constitutional rights.

9. The Colorado Coalition Against Sexual Assault (CCASA) is the collective voice of survivors of sexual violence and those who support a society free from violence and oppression. CCASA was founded in 1984 to reduce the impact of sexual violence by advocating that each and every survivor is treated with dignity and respect, and has full access to quality services. This includes participating in efforts to ensure that victims' rights are protected as they pursue action through the Criminal Justice System.

10. Rape Assistance and Awareness Program (RAAP) is Denver based sexual assault agency dedicated to ending sexual violence in all its forms. Founded in 1983 by three women whose friend was raped. In the process of trying to help their friend, the women learned that there was no non-profit agency providing low-cost services or immediate crisis intervention services for survivors of sexual assault in the Denver metro area. Today RAAP continues to provide no or low-cost services to sexual assault survivors through therapy services, a 24 hour crisis line, advocacy and prevention education services.

11. Sexual Assault Services Organization (SASO) is a Durango-

based non-profit organization dedicated to providing advocacy to victims of sexual assault and providing education and prevention programs aimed at increasing public awareness and safety. Through communication and partnership within the community, SASO promotes changes in attitudes, values and behaviors toward sexual assault.

12. This case raises the issue of whether the Colorado Court of Appeals erred in reversing the Arapahoe County District Court's decision to compel prosecution and to appoint a special prosecutor pursuant to C.R.S. § 16-5-209.

13. *Amici* have an interest in this issue because *amici* support victims in their pursuit of justice. By overturning the District Court's decision, the victim in this particular case was denied justice.

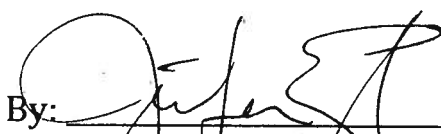
Additionally, the appellate decision, if allowed to stand, would chill the pursuit of justice by other victims.

14. Additionally, *amici* have an interest in ensuring that victims of sexual crimes are given just and equal access to the criminal justice system. The appellate decision, if allowed to stand, would have the effect of further discouraging the reporting and prosecution of sex

crimes – crimes which are already under-reported and under-prosecuted.

WHEREFORE *amici* respectfully move for leave to file the concurrently filed brief as *amici curiae*.

Respectfully submitted this 23rd day of November,
2009

By:  _____

Jennifer Eyl, No. 40215
Law Office of Jennifer Eyl
On behalf of *amici curiae*

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2009, I served a copy of the foregoing **MOTION OF *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE'S PETITION FOR CERTIORARI** and **BRIEF OF *AMICI CURIAE* OF PETITIONER-APPELLEE'S PETITION FOR CERTIORARI** upon the below-listed persons at the below-listed location by depositing a copy in the United States Mail, postage prepaid:

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Arapahoe County Justice Center
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Jennifer Eyl, Esq.

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STATEMENTS OF INTEREST FROM AMICI

Harvard Law School Gender Violence Clinic

The Harvard Law School Gender Violence Clinic is part of the Harvard Law School Clinical Legal Education Program. Through consultation with Harvard faculty and seasoned attorneys, law students work on gender-based violence policy matters and provide legal advocacy to victims of sexual assault. The clinic is dedicated to using the law to empower victims of sexual assault, as well as advocating for the removal of barriers victims face in the pursuit of justice.

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Joanne Belknap, Ph.D., Professor of Sociology, University of Colorado at Boulder

Joanne Belknap is a Professor of Sociology who is well known for her book, *The Invisible Woman: Gender, Crime, & Justice*, for which she is currently working on the fourth edition. She has received numerous grants, mostly from the National Institute of Justice, for her work on violence against women. In addition to her book, she has published extensively in women's victimization, and won the 2008 award for the best article in the journal *Violence Against Women*.

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Failure to prosecute rape because of a prosecutor's arbitrary and capricious decision is unconscionable. RAAP supports all efforts to prosecute rape to the fullest extent of the law. Therefore, we are genuinely interested in the outcome of the Amicus Brief.

Colorado Coalition Against Sexual Assault

The Colorado Coalition Against Sexual Assault (CCASA) is the collective voice of survivors of sexual violence and those who support a society free from violence and oppression. CCASA was founded in 1984 to reduce the impact of sexual violence by advocating that each and every survivor is treated with dignity and respect, and has full access to quality services. This includes participating in efforts to ensure that victims' rights are protected as they pursue action through the Criminal Justice System.

Sexual Assault Services Organization

Sexual Assault Services Organization (SASO) is a Durango-based non-profit organization dedicated to providing advocacy to victims of sexual assault and providing education and prevention programs aimed at increasing public awareness and safety. Through communication and partnership within the community, SASO promotes changes in attitudes, values and behaviors toward sexual assault.

I. Introduction

This case raises the issue of whether the Colorado Court of Appeals erred in reversing the Arapahoe County District Court's decision to compel prosecution and to appoint a special prosecutor pursuant to C.R.S. § 16-5-209. Although an action to compel prosecution is only granted in rare circumstances, the District Court correctly found that the law, as well as sound public policy, compel prosecution in this instance.

Broadly stated, the interest of amici is to support victims in their pursuit of justice. Amici are deeply concerned about the effect of the Court of Appeals decision overturning the appointment of a special prosecutor—thereby denying the victim in this case her day in court—and the significant chilling effect the decision will have on other victims seeking justice through the criminal law system.

Of course, a prosecutor has discretion in determining which cases to pursue. But the legislature, in enacting C.R.S. § 16-5-209, clearly intended that this discretion not be unbounded. If the prosecutor acts arbitrarily or capriciously in refusing to prosecute, C.R.S. § 16-5-209 provides the mechanism to remedy that abuse. The extraordinary facts of the case persuaded the District Court to appoint a special prosecutor after an extensive evidentiary hearing. As the District Court determined, if there were ever a case in need of a remedy, this is it. To let the

Court of Appeals' decision overturning the District Court stand would effectively render C.R.S. § 16-5-209 meaningless.

Colorado Appellate Rule 49 gives the Colorado Supreme Court discretion to grant certiorari "when there are special and important reasons therefore." C.A.R. 49. Rule 49 sets forth a non-exclusive list of four instances in which an appellate decision may be reviewed. Of these, two are particularly applicable. First, the Court may grant review if the court of appeals "has decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court." C.A.R. 49(a)(2). As discussed in Section II.A., the prosecutor's arbitrary and capricious decision to refuse prosecution was in contravention of this Court's decision in *Sandoval v. Farish*, 675 P.2d 300 (Colo. 1984).

Second, this Court may grant review "[w]here the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings . . . as to call for the exercise of the Supreme Court's power of supervision." C.A.R. 49(a)(4). The appellate court's decision merits review under this factor because, as discussed in Section II.B., if the decision is allowed to stand, it will result not only in the failure to prosecute the potential defendants in this case, but also defendants in other serious criminal cases.

II. Argument

A. Review is Warranted Because the Court of Appeals Sanctioned the Prosecutor's Arbitrary and Capricious Decision to Refuse to Prosecute in Contravention of Colorado Supreme Court Precedent

Prosecutors have a great deal of discretion in determining whether to prosecute a case. However, this discretion is not unlimited, and prosecutors must be accountable to the public for their decisions. Prosecutors may not refuse to prosecute a case based on an “arbitrary or capricious” reason without “reasonable excuse.” Colo. Rev. Stat. Ann. § 16-5-209 (West 2009). If a prosecutor refuses to prosecute a case for an arbitrary or capricious reason, a court either may order the prosecutor to prosecute the case or may appoint a special prosecutor to do so. *Id.*

In *Sandoval v. Farish*, this Court set forth guidelines for reviewing a prosecutor's charging decisions. First, the court pointed to the American Bar Association's standards for reviewing a prosecutor's charging decision, which are: (i) the prosecutor's reasonable doubt that the accused is in fact guilty; (ii) the extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense; (iv) possible improper motives of a complainant; (v) reluctance of the victim to testify; (vi) cooperation of the accused in the apprehension or conviction of others; and (vii) availability and likelihood of prosecution by another jurisdiction. *Sandoval*, 675 P.2d at 303. Second, the court

referred to a number of factors cited by other courts: (i) the likelihood of conviction; (ii) sufficiency of the evidence; (iii) availability of witnesses in corroboration of the offense; (iv) credibility of the victim; (v) evidence relating to motive or intent of the offender; (vi) seriousness of the injuries inflicted; and (vii) the competing demands of other cases on the time and resources of the prosecution. *Id.* at 303 n.4.

In this case, the decision not to prosecute was based on rationales that are unsupported by the record and beyond the scope of the guidelines set forth in *Sandoval*. The prosecutor determined that the case could not be pursued because of: (1) the victim's desire not to go forward with the prosecution at an earlier date; (2) a determination that the passage of time made it less likely the witnesses would remember the incident; and (3) a concern that the prosecutor's office would be seen as "pressing charges now only to gain a piece of the spotlight" due to the fact that one of the victim's assailants had gone on to commit another rape in a high-profile case involving the University of Colorado. *J.S. v. Chambers*, Orders Reversed and Case Remanded with Directions, Case No. 09CA1396 (Colorado Court of Appeals, Sept. 17, 2009) ("Appellate Decision"), pp. 34-35.

The first reason cited by the prosecutor has been disproven on the record and is irrelevant, as the victim does wish to go forward now. *See Stene v. Chambers*,

Order Regarding Petition Pursuant to C.R.S. § 16-5-209 to Compel Prosecution and to Appoint a Special Prosecutor, Case No. 08CV689 (Colo. Dist. Ct., Arapahoe County May 22, 2009) (“District Court Decision”), p. 82 (noting that the victim’s “commitment to assist in the investigation of her claims since 2000, and to participate in the prosecution of charges since early 2004, cannot be questioned”).

With regard to the prosecutor’s second explanation for declining prosecution, it was conceded at the District Court proceeding that the passage of time would have no effect on the integrity of the evidence because all of the witnesses have indicated their ability to testify and would do so in a manner consistent with their statements to law enforcement at the time of the incident. *Id.* at 51.¹

The final reason cited by the prosecutor in declining to file charges, that she did not want to appear interested in “gaining a piece of the spotlight,” essentially expresses a political decision not to proceed, and thus falls outside the guidelines of *Sandoval*. Further, as a matter of public policy, any prosecutor who declines to press charges should be *encouraged* to change her mind when a suspect who

¹ The district court made these factual findings in an exhaustive 91-page opinion. The Court of Appeals found that the District Court’s factual findings should stand on appeal, absent error. Appellate Decision, pp. 29-30.

escapes justice the first time commits a similar offense again, rather than feel compelled to decline prosecution to avoid appearing interested in “the spotlight.”

In sum, the three factors identified by the prosecutor in support of her non-prosecution decision are woefully inadequate under *Sandoval*. If the three factors cited by the prosecutor are allowed to stand as justification for a declination decision, a prosecutor could decline to pursue many types of cases on similarly inappropriate bases, without accountability. If the Court of Appeals is correct that a prosecutor can decline to pursue charges in such cases, with impunity, the statute that empowers the public with oversight duties, as well as the principles of *Sandoval*, are rendered meaningless.

In short, if the facts of this case are insufficient to merit compelled prosecution, then it would be hard to imagine what set of facts would suffice. Thus, this Court should grant review because the Court of Appeals decision sanctioning the prosecutor’s decision is “not in accord with applicable decisions of the Supreme Court.” C.A.R. 49(a)(2).

B. This Court should Grant Review in the Interest of Maintaining the Integrity and Effectiveness of Judicial Proceedings.

1. Justice Requires Consideration for Delays in Prosecution Because Victims of Sexual Trauma Often Are Not Able to Immediately Assist in the Prosecution of Their Offenders

Rape Trauma Syndrome (RTS) is generally accepted to be a common reaction to sexual assault. *See, e.g., State v. Marks*, 647 P.2d 1292, 1299 (Kan. 1982) (citing seven psychiatric treatises on RTS). A common symptom of RTS is the avoidance of activities that arouse recollection of the traumatic event—such as participating in the prosecution surrounding that traumatic event. *See generally* Bonnie J. Buchele & James P. Buchele, *Legal and Psychological Issues in the Use of Expert Testimony on Rape Trauma Syndrome*, 25 Washburn L.J. 26, 29 (1986).

In refusing to prosecute on the basis that the victim did not wish to proceed at an earlier date, the prosecution ignored the fact that the victim is now able and willing to go forward, and failed to consider that the effects of RTS may have made earlier participation impracticable. *See* District Court Decision, p. 39 n.27 (noting that the victim was not emotionally stable due in part to an attempted suicide, which was based on the alleged sexual assault and the laboratory tests incriminating one of the offenders in this case). Allowing such reasoning to stand is troubling not only for this victim, but for future victims of rape and sexual assault.

Because RTS is so common, refusing to prosecute a rape case on the basis that the victim, at some point, did not feel emotionally able to participate would exclude the prosecutions of an untold number of rapists and abusers. The fact is, as the district court determined, the victim *now* is able to participate in the prosecution. That the victim is able to participate now is what *Sandoval* seeks and what policy requires. *See* District Court Decision, p. 82. By holding otherwise, the appellate court “departed from the accepted and usual course of judicial proceedings” to such a degree as to call for the exercise of this Court’s power of supervision. *See* C.A.R. 49(a)(4).

2. Allowing the Appellate Court’s Decision to Stand Will Deter Future Victims from Reporting Sex Crimes

In Colorado, 24 percent of women and 6 percent of men are sexually assaulted in their lifetime, and over 11,000 Coloradans are sexually assaulted each year. Colorado Dept. of Pub. Health and Env’t & Colorado Coalition Against Sexual Assault, *Sexual Assault in Colorado: Results of a 1998 Statewide Survey* (1999), available at <http://www.ccasa.org/documents/BRFSS%20AGAIN.pdf>.

Yet, despite its prevalence, sexual violence is the most underreported crime in America. Heather M. Karjane, Bonnie S. Fisher, and Francis T. Cullen, U.S. Dept. of Justice, Nat’l Inst. of Justice, NCJ 205521, *Sexual Assault on Campuses: What*

Colleges and Universities Are Doing About It, ii, 6–7 (2005), available at <http://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

In addition to being underreported, rapes are under-prosecuted. See Catharine MacKinnon, *Sex Equality* 742 (2nd ed. 2007). A “study of the 1993 Senate Judiciary Committee’s survey of eight states reports . . . that prosecutors dismissed 89 percent of rape cases before even pleas, let alone trials took place.” Susan Caringela, *Addressing Rape Reform in Law and Practice* 35 (2009).

Acquaintance rape cases, in particular, are severely under-prosecuted. See Corinne Casarino, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. Pub. Int. L.J. 185, 186 (1996) (noting that stranger rapes have higher rates of reporting and prosecution than acquaintance rapes). The prosecution’s failure to prosecute in this case may be seen as symptomatic of the larger failure of our court systems generally, and Colorado court systems particularly, to prosecute acquaintance rape cases—particularly when alcohol is involved. See generally Karen M. Kramer, *Rule by Myth, The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 Stan. L. Rev. 115, 131 (1994) (discussing the impact of social myths concerning women and alcohol in the adjudication of rape cases).

Particularly in a high-profile case such as this one, in which there is conclusive DNA evidence and there are numerous witnesses who can attest that the

victim was physically unable to consent to sex, the failure to prosecute can be seen as a signal that the state does not take the prosecution of acquaintance rape cases, particularly those involving alcohol, seriously. This, too, is a violation of the prosecutor's duty not to act arbitrarily and capriciously because it results in the systematic under-prosecution of a particular type of crime. *See generally* Colo. Rev. Stat. Ann. § 16-5-209. Moreover, if allowed to stand, this behavior will have a huge deterrent effect on future victims of sexual assault and rape, who may choose not to report rather than risk being dismissed by the state. Because of the effect on future prosecution of rape cases, this Court has a "special and important reason" for hearing this case, and showing that Colorado will not turn a blind eye to the prosecution of rape.

III. Conclusion

Because the appellate court erroneously applied the law in a manner inconsistent with the decisions of this Court, and because the appellate court's decision violates public policy, this Court should exercise its discretion and grant review. The extraordinary facts of this case support the decision to appoint a special prosecutor. The chilling effect that this high profile and important case would have on reporting by other rape victims compels this Court to grant certiorari.

Finally, Amici are mindful of the likely burdens that would befall the criminal justice system if victims in every case had a right to compel prosecution in all cases. However, the unique facts here ensure there will be no flood of similar litigation. In general, victims do not need an independent opportunity to pursue criminal charges because the prosecution adequately represents and protects the public's rights and interests in criminal cases. In this case, however, the prosecution failed to adequately represent the victim, and the District Court was fully justified in appointing a special prosecutor to avoid the failure of the justice system in addressing this case. We urge this Court to uphold this appointment.