

# Editorial: Kobe Judge has an Ito Moment

(From “DV News,” Brigner Webmail Service, July 28, 2004.)

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As many predicted, Judge Ruckriegle ruled that the Kobe Bryant victim’s sex life will be fair game at trial.

It wasn’t a huge victory for the defense because the judge only allowed a 72 hour window – just a small period of time prior to her rape kit examination at the hospital.

From what we know, this means the victim will probably have to talk about the consensual sex she had 2 days before the rape; something that should be off limits but that the victim may not care much about because she revealed that information to police and prosecutors a long time ago, when she first reported the rape.

For this reason, the ruling is not a big deal in the Bryant case. The prosecutor won’t even try to appeal because he knows the evidence won’t hurt his case and he knows the victim is eager to get to trial. Remember, the victim (not Kobe) filed a speedy trial motion which means the victim (not Kobe) is pushing to get a full public airing of the truth. Given that Kobe recently lost a motion to suppress evidence including his t-shirt stained with the victim’s blood as well as his statements to police (statements his lawyers have described as too “prejudicial” to be revealed to the public prior to trial), Bryant has an even stronger reason to delay the trial at this point, if not avoid it altogether by pleading guilty.

Nevertheless, the judge got it wrong. Ruckriegle’s ruling not only violates the Colorado Supreme Court’s recent decision in a very similar case from 2002 (State v. Harris) it’s bad public policy (for women and men – more on this point later).

With the whole world watching, there’s little doubt the judge’s decision was influenced by his concern for public opinion and was a thumb on the scale in favor of Bryant. Let’s face it, given the lies that have been disseminated about the victim, the public would have been outraged if the judge ruled the victim’s sex life off limits completely. Think about it – the myth that the victim had “sex with three men in three days” is widely accepted as true (it isn’t) and most people think if she DID have so much sex, maybe Bryant didn’t cause her vaginal injuries. With this idea floating around, the public would be incredulous if the judge ruled the victim’s past sexual behavior was irrelevant.

I know, I know, the judge could have explained it all in a carefully written decision – but to a public largely blinded by celebrity and gullible enough to believe everything they read, the judge knew that Kobe sycophants wouldn’t accept anything less than at least a peek into the victim’s sex life.

This is not unlike what Judge Ito did in the OJ Simpson case when he allowed F. Lee Bailey to ask Mark Furman if he’d ever used the “N-word”. At the time the question was asked, crowds of

people were outside the courthouse; people filled with race-based rage. If Ito had ruled that such a question was both irrelevant AND unduly prejudicial (not to mention incendiary), the crowd would not have understood. How could a judge, in a case where the defense had successfully whipped the public into a frenzy about race, expect the mobs at the gates to accept his decision that a lead detective's use of the "N-word" was simply not relevant in a case where a black man was accused of murdering two white people?

"Acquittal by frenzy" (or "pretrial motion victory by frenzy") has nothing to do with law – but it is certainly effective. And all judges are affected by it.

The judge in the Louise Woodward case (the "Nanny trial") in Boston also ruled-by-frenzy when pro-British/anti-victim forces gathered outside the courthouse. Woodward was lawfully convicted of murder after her lawyers stupidly refused to let the jury consider manslaughter as an option during deliberations. The judge warned the defense that if they gambled with an all or nothing verdict strategy, he would not "cleanup" the mess if they lost. But they did lose, and the judge did clean up the mess by reducing the verdict to manslaughter and sentencing Woodward to time-served. Once again, the mobs at the gates prevailed over justice.

It wouldn't be so bad in the Bryant case if the judge had narrowly crafted his ruling such that it would apply only to a unique set of facts not likely to occur elsewhere.

No such luck.

Judge Ruckriegle's decision – if it were the law in all states – would undermine important fundamental rights for all women. Here's why:

By allowing in prior sexual activity – even for the limited period of 72 hours, the judge has essentially ruled that any rape victim who suffers the additional harm of vaginal bruising or tearing will have to subject herself to questioning by the defense about her sexual activity in the days before the rape, whether or not that activity caused any harm.

Not only does such a rule render certain women more vulnerable to sexual violence for engaging in constitutionally protected behavior, it violates fundamental privacy and sexual autonomy rights (*Lawrence v. Texas*) and runs afoul of the most basic rule in any criminal trial – that evidence, to be admitted, must be relevant. Simply put, if there is no evidence of prior vaginal injury, prior sexual activity is per se irrelevant. And while the defendant's constitutional rights are important, there is no due process right to speculate or lie about prior injuries.

The victim suffered 2 relatively large vaginal tears and many smaller ones as a result of the force and friction of Bryant's assault (the injuries have nothing to do with size). The defense wants to argue that the injuries could have resulted from prior consensual sex. Fair enough. But the defense can't just SAY the injuries were preexisting. They have to have proof – which doesn't exist in this case. There is simply no evidence the victim previously suffered injuries to her vagina, from consensual sex or anything else.

Ruckriegle's ruling literally encourages sex offenders to be especially violent in their assaults. Why wouldn't all rapists want to injure, bruise or tear a victim's genital area now that they know this is the gateway to getting around the rape-shield rule? Let's be real. If Kobe didn't tear the victim's vagina, there would be no basis for the judge's ruling. Thus, it's not only cruelly ironic but bad public policy that a rapist should be rewarded with a better defense because he chose to be super-brutal during his attack.

Oh – I almost forgot – here's the part that's bad for men:

Lots of guys - especially pro-Kobe types and guys who like lots of sex – will celebrate the decision because they will assume this ruling protects male entitlement. But the celebration will be short-lived because when women get the message that consensual sex is fair game in any rape trial where there are vaginal injuries, they are going to want less sex, and certainly less “creative” sex. Few women want their fantasies and erotic experiments aired for public inspection. But if Ruckriegle is right – women should refuse to have frequent sex with their husbands, boyfriends, etc. – to prevent the defense from arguing that the victim's vagina was vulnerable to tearing because the victim was TOO active. And when they DO have sex, they should refuse to do anything funky that might give rise to a defense argument that they “like it rough” or wild, etc.

So go ahead and celebrate guys – oh, and when your girlfriends and wives start saying “no” and stop trying new tricks – be sure and give Kobe a call and tell him “thanks”.

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