

Date: 6/15/2018

Hon. Stephen A. Zappala, Jr.  
Allegheny County District Attorney  
Courthouse, Room 303  
436 Grant Street  
Pittsburgh, PA 15219

Dear District Attorney Zappala,

On behalf of the undersigned organizations we urge you to take immediate steps to end policies that endanger and undermine the health of Pittsburghers: 1.) police and prosecutors' practice of citing condom possession as evidence of intent to engage in prostitution-related crimes, 2.) police seizure of condoms and other contraceptives, and 3.) the practice of adding the more severe possessing-instrument-of-crime ("PIC") charges under 18 Pa.C.S. § 907 when defendants are charged with prostitution.[1]

Allowing condoms to be used as "evidence" of prostitution-related offenses or increasing criminal penalties for sex workers who carry condoms is contrary to a sound public health policy that encourages Pittsburghers to carry and use condoms to reduce the transmission of HIV/AIDS, other sexually-transmitted infections, and unwanted pregnancies. This practice is particularly troubling when the Allegheny County Health Department expends public funds on a Condom Distribution Program targeted toward populations that "engage in high risk sexual activities,"[2] only to have the very same condoms be confiscated by the police to languish in evidence lockers. As a result, this practice has a chilling effect on Pittsburghers' willingness to carry and use condoms, especially those who are most vulnerable to contracting HIV/AIDS and other STIs including women and men of color, LGBTQ people, young people, victims of trafficking, and people in the sex trades. Addressing this issue is particularly urgent, given that Pennsylvania already suffers from high rates of sexually transmitted diseases and infections, particularly in minority communities.[3]

Faced with the risk of serious charges for possessing condoms, sex workers are forced to choose between potential jail time and their health (and the health of their sexual partners, their sexual partners' sexual partners, etc.). Several studies, including a 2013 article from the *Journal of the International AIDS Society*, [4] show that condom use decreases in localities where condoms are used as evidence for prostitution charges. A survey of sex workers conducted in New York City—before New York state prohibited condoms from being used as evidence of prostitution—found that nearly half of the respondents had at some point not carried a condom for fear of police harassment or criminal prosecution. Human Rights Watch found that such policies had similar consequences in California, which one respondent illustrated, saying, "After the arrest, I was always scared... There were times when I didn't have a condom when I needed one, and I used a plastic bag." [5] This study also found that strip clubs and other adult venues

turned away outreach workers distributing condoms and other safer sex materials out of concern that these materials would be used as evidence that the venues were facilitating prostitution. There is every reason to believe that the threat of additional PIC charges for condom possession—in addition to using them as evidence of prostitution—will only further exacerbate these negative public health consequences.

Charging alleged sex workers with an additional and more serious crimes for using cell phones also puts sex workers at greater risk. Cell phones are an essential safeguard for people who may need to stay in contact with a trusted individual in order to ensure their safety or to call emergency services. Allegheny County Police Superintendent Coleman McDonough claimed in the recent Tribune-Review article that PIC charges are necessary to combat human trafficking. While combating human trafficking is a worthy goal, efforts to address trafficking should not make workers in the sex trade more susceptible to violence, exploitation, and disease.

The practice of using condoms as evidence in prostitution-related crimes and the practice of designating condoms and/or phones as instruments of crime in such cases are both legally suspect.

In addition to the serious public health threat posed by discouraging the use of contraceptives and safer sex practices, confiscating condoms and prosecuting people for possessing them violate a Pennsylvania statute that explicitly forbids Commonwealth interference with the provision or use of contraceptives.[6] By both treating condoms as evidence of intent to engage in prostitution and by singling out condoms as instruments of crime, Pittsburgh is defying this statutory mandate.

The criminalization of condom possession also violates well-established constitutional precedent. As early as 1965, the U.S. Supreme Court declared the right to privacy in the possession and use of contraceptives.[7] Reinforced by numerous subsequent cases, the right to reproductive privacy is fundamental, and incursions on that right are subject to strict scrutiny. The current actions taken against sex workers disregards that protection.

Moreover, there is no probable cause to charge an individual suspected of prostitution with the more severe charge of PIC under 18 Pa.C.S. § 907 simply because an individual used a cellular device or carried condoms.

The statute defines “Instrument of crime” as “(1) Anything specially made or specially adapted for criminal use; or (2) Anything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have.”[8] Neither cellular phones nor condoms fit the first definition. And the Superior Court ruled in *Commonwealth v. Williams* that “the mere use of an item to facilitate a crime does not transform the item into an instrument of crime for purposes of the PIC statute.”[9] *Williams* involved the use of walkie

talkies to set up a drug transaction, a scenario closely resembling the use of cell phones to facilitate a sexual encounter. The reasoning of *Williams* not only casts doubt on PIC charges for using cell phones to arrange an illegal transaction but also forecloses any argument that the mere possession of condoms can be considered an instrument of a crime, even if the individual carrying them is charged with prostitution.

This application of the PIC statute is also void for vagueness. The Supreme Court explained: “Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.”[10] The police tactics here create a scenario implicating both concerns. The ordinary person would not consider a condom an instrument of crime or believe carrying a condom appeared suspicious. Also, in the words of the Supreme Court, this practice “vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute.”[11] Without statutory direction, police officers, without oversight, can target anyone who may have condoms. Such discretion lends itself to discrimination; particularly, LGBTQ people and people of color are more likely to be targeted,[12] which is in conflict with the police department’s inclusivity efforts.[13]

We, the undersigned groups, urge you to immediately take action on this critical public health issue by announcing Allegheny County will no longer allow condoms as evidence in support of prostitution-related charges, will no longer confiscate contraceptives, and will cease filing PIC charges against defendants who possess condoms/phones when they are charged with prostitution. We also request that your office participate in a public education effort to reverse any harm to public health and safety these practices have had in the community and to spread the word that, under no circumstances, is possession of condoms a criminal offense in Allegheny County.[14]

To the extent that you require further discussion about our concerns before making such an announcement, we request a meeting at your earliest convenience.

Respectfully,

Abolitionist Law Center  
ACLU of Pennsylvania  
Coalition Against Death by Incarceration - West  
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)  
Elsinore Bennu  
Fair Moans Collective  
New Voices for Reproductive Justice  
Open Door

Persad Center  
Pittsburgh DSA  
Planned Parenthood of Western Pennsylvania  
Prevention Point Pittsburgh  
Queer Pittsburgh  
Sex Worker Outreach Project (SWOP) Pittsburgh  
Sisters Pittsburgh  
TransPride Pittsburgh  
Unitarian Universalists Advocacy Network (UUPLAN)  
University of Pittsburgh Center for Women's Health Research and Innovation  
Women's Law Project

---

[1] See Megan Guza. "[Condoms criminalized in Allegheny County prostitution cases.](#)" *Pittsburgh Tribune-Review*. (June 3, 2018).

[2] <http://www.achd.net/std/cdp.html>

[3] Pennsylvania already suffers from high rates of sexually transmitted diseases and infections, particularly in minority communities. See John Shumway. "[Beaver County Sees Uptick In STD Numbers Among Young People](#)" (March 9, 2018); Kathleen J. Davis. "[Cases Of STDs At An All-Time High Nationally. And Rising In Allegheny County](#)" (Oct. 2, 2017).

[4] Wurth et al., "[Condoms as evidence of prostitution in the United States and the criminalization of sex work.](#)" (May 24, 2013).

[5] Human Rights Watch. "[Sex Workers at Risk Condoms as Evidence of Prostitution in Four US Cities.](#)" (July 19, 2012).

[6] 18 Pa. C.S. § 3208.1

[7] *Griswold v. Connecticut*, 381 U.S. 479 (1965)

[8] 18 Pa.C.S. § 907(d)

[9] *Commonwealth v. Williams*, 808 A.2d 213, 215 (Pa. Super. 2002)

[10] *City of Chi. v. Morales*, 527 U.S. 41, 56 (1999).

[11] *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

[12] See Danielle Butler. "[The Criminalization Of Sex Work Is Not A 'Fringe' Issue](#)" (April 18, 2018).

[13] See Danielle Garrand. "[Pittsburgh Police Department unveils rainbow decal in support of Pride Month](#)" (May 30, 2018); Alex Zimmerman. "[Pittsburgh police looking to expand LGBT recruitment, training](#)" (March 10, 2015).

[14] The efforts undertaken by the Metropolitan Police Department in DC serve as an excellent model of how the police can work in tandem with community organizations to accomplish these public health goals. See Melissa Gira Grant. "[How D.C. Finally Stopped Punishing Sex Workers for Carrying Condoms.](#)" *CityLab*. June 19, 2014).