ORIGINAL

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

In re: House Bill 2302, Grading of Sexual Offenses

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Stenographic report of hearing held in Room 140, Main Capitol, Harrisburg, Pennsylvania

Wednesday, April 15 1992, 10:00 a.m.

HON. THOMAS R. CALTAGIRONE, CHAIRMAN

MEMBERS OF COMMITTEE

Hon. Kevin Blaum
Hon. Michael C. Gruitza
Hon. Karen Ritter
Hon. Jeffrey Piccola
Hon. James Gerlach
Hon. Robert D. Reber, Jr.
Hon. David W. Heckler
Hon. Frank Dermody

Also Present:

Mary Woolley, Esquire
Counsel to the Committee

David Krantz, Executive Director,
House Judiciary Committee

Mary Beth Marschik, Research Analyst

Katherine Em Manucci, Secretary

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Reported by:
Emily R. Clark, RPR

1992-088

I N D E X

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CHAIRMAN CALTAGIRONE: I would like to open up the public hearing on House Bill 2302, grading of sexual offenses. This is the House Judiciary Committee. I'm Chairman Tom Caltagirone.

I would like the other members of the panel to introduce themselves, and any of the staff that's present. We'll start with my left.

REPRESENTATIVE DERMODY: My name is Frank Dermody. I'm the representative from Allegheny County.

REPRESENTATIVE RITTER: And I'm Karen Ritter, representative from Lehigh County.

REPRESENTATIVE PICCOLA: I'm Representative Jeff Piccola, Dauphin County.

REPRESENTATIVE REBER: I'm Robert Reber from Montgomery County.

MS. WOOLLEY: Mary Woolley, staff to the Republican caucus.

MS. MILAHOV: Galena Milahov, House research analyst for the Committee.

MR. KRANTZ: David Krantz, executive director of the House Judiciary Committee.

CHAIRMAN CALTAGIRONE: I would also like to mention that today we're going to have Karen Ritter share the co-chair of the hearing today, along with Chairman Piccola and myself, since she's done the bulk of the lion's

work on this legislation.

We would like to start off with some comments from Karen.

REPRESENTATIVE RITTER: Thank you. I'm going to leave the description of the history of this legislation to the Pennsylvania Coalition Against Rape, because they have been working on this, on legislation like this for about 10 years and had come to me earlier this session and asked me if I would introduce a bill based on a lot of the research that they have done.

What I want to just talk about briefly are some of the changes that you can see, I think, if you have a copy of the revised version of the bill, the extensive amendments that have already been made to the bill. And those amendments were made as a result of discussions with the Attorney General's office, the District Attorney's office in Philadelphia, the Defender's Association and the ACLU, and also I'm trying to remember who else. And of course, PCAR was involved in all of those discussions. So so I want to look quickly at some of the changes that have been made from the original bill.

The Attorney General's Office suggested language to make the bill a lot easier to read by consolidating not only rape under the title of sexual assault, but also deviate sexual intercourse and indecent assault, both of

which had the same penalties and putting them all under the title of sexual assault. It makes the bill easier to read, makes it easier to charge, has a definition that includes all of those various acts, and we put in a definition of aggravating circumstances so that there will be sexual assault, sexual assault with aggravating circumstances, and it makes it a lot easier the follow.

Also, we had a definition in the original bill of forcible compulsion, which was based on recent court decisions, and we thought that that would be something we should include in the law. However, the prosecutors felt that they were better off using the court decisions, using the legal precedent, rather than being tied to statutory language. So at the request of the prosecutors, in order to make their jobs easier, which is, of course, the intent of this legislation, we removed that definition.

We also narrowed the definition of position of authority, because it was too broad in the original bill.

We took out the entire section on continuous victimization of a child, only because of problems with sentencing and how it would be enforced. That was an area that the prosecutors and the defenders had a problem with. So it was clear to me that that was a section that needed to come out since everyone had a problem with it. We're going to look at that issue as part of sentencing reforms at some

later date.

I also had meetings with the sentencing commission was the other entity I forgot about, that had sent some comments on the original bill. So we will look at that issue later, if it's possible as part of a sentencing reform bill.

We also took out the section regulating court testimony. We had a section in there that gave advice to judges on limiting children's testimony in court and so on, and the prosecutors and the defenders felt that this was intruding into the court's discretion. So we've taken that section out of the bill, but I intend to see if I can have a meeting with the trial judges to address that issue through the Trial Judges Association.

Those are the major highlights. I would be happy to answer any questions, if anybody has questions. Otherwise, I would turn it over to PCAR. Does anybody have any?

(No audible response.)

REPRESENTATIVE RITTER: No. All right. Then if Sue Cameron, the executive director of the Pennsylvania Coalition Against Rape, would come forward. You have a copy of her testimony.

MS. CAMERON: Good morning, and thank you for the opportunity to testify this morning. I'm Sue Cameron,

executive director of the Pennsylvania Coalition Against Rape.

Last year, the 45 sexual assault centers funded through PCAR provided direct service to more than 30,000 persons and presented more than 8800 prevention education programs to nearly 225,000 students. In the past, the General Assembly and particularly the House Judiciary Committee have been supportive of the services to victims of sexual violence and the PCAR centers funded to provide such service.

Representatives Blaum, Hagarty and Ritter also served as members of the House Select Committee on the rape crisis and domestic violence services. It was chaired by former Representative Connie Maine during the past session or the previous session.

Most often, PCAR, this Committee and its individual members have worked together as allies on behalf of the victims of sexual violence. Today, we welcome the opportunity to present testimony on House Bill 2302 because we believe that it offers another opportunity to directly impact the lives of women, men and children who are victims of sexual violence.

In 1972, Pennsylvania enacted major changes to the sex offense statutes. At that time only two rape crisis centers existed in Pennsylvania: Pittsburgh Action Against

Rape and Women Organized Against Rape in Philadelphia. At that time, our knowledge about sexual violence was limited, most often, bound by myths and stereotypes that we now know are false.

Today, we know that sexual violence is not only rape, it is far more pervasive and complex and intrudes into far more peoples' lives in ways that we never imagined in 1972.

The changes enacted then essentially defined four major offenses: Rape, statutory rape, involuntary deviate sexual intercourse and voluntary deviate sexual intercourse. The penalty for rape was reduced from life to 20 years.

As our knowledge and understanding about sexual violence and its impact on victims increased, several significant changes in law have been enacted.

The rape shield law protecting the victim's past sexual history, and the confidentiality law protecting communication between a sexual assault counselor and a victim, are two notable examples. Most recently the legislature acted to extend the criminal statute of limitations for child sexual assault victims.

All of these changes are important and demonstrate this legislature's sensitivity and increased knowledge about the impact of sexual violence on the lives

of victims.

However, the sex offense statutes remain essentially the same as they were 20 years ago. To accommodate our new knowledge about sexual violence, special circumstances have been added pertaining to the age of the victim, or the age of the perpetrator, or the age of the victim, or the circumstances of the crime, or the relationship of the victim to the perpetrator, or the type of weapon used.

What once was offered as a simplification of offense statutes has become a complicated and often confusing offense code, especially to victims who are desperately seeking clarity, rationality and justice.

For the last several years, one of PCAR's priorities has been the revision of the sex offense statutes. We presented testimony before the House Select Committee about the need for such reform. The Committee endorsed this recommendation in part of its final report.

Our sense of urgency about this issue increased, when more than a year ago we began to look at the reconsideration of sentencing guidelines by the Pennsylvania Commission on Sentencing. In reviewing the '89-'90 annual report of the Commission, we found that only 49 percent of rape sentences fall within the standard range. Of the remaining sentences, 29 percent are below the standard

range, due to mitigating and other circumstances.

The length of sentences for rape, a first degree felony, ranged anywhere from one to 13 years of incarceration. For statutory rape, the same report indicated that the length of incarceration ranged from less than one year to a little over five years. In fact, 21 percent of persons convicted of statutory rape received probation.

In reviewing this information, it would be easy to conclude that the sentencing guidelines are in need of change, and that's true and that's in the process of being done. But beyond that, we have to look at what offenses can be initially charged. Changes in sentencing guidelines can and will be only as effective as the adequacy of the front end offense charges. It is here, at the beginning of the process, where the revisions of 20 years must be re-examined.

House Bill 2302 and the accompanying omnibus amendment represent a comprehensive rethinking of the Pennsylvania sex offense statutes. It represents the culmination of research, discussion, lengthy meetings and negotiations among victim advocacy groups such as PCAR, prosecutors, public defenders and the Attorney General's office and the Sentencing Commission. The major players have all been involved.

We are pleased to be a part of this process and strongly recommend House Bill 2302 and the omnibus amendment for consideration and swift passage.

We commend Representative Ritter for her persistence and patience over the last several months during the drafting process.

Two years ago the goals of reform were to increase reporting of these crimes to improve the system's treatment of and response to sexual violence victims, to improve case processing and disposition, crime deterrence, increase conviction rates and change societal attitudes about rape. These goals remain today. We believe that House Bill 2302 is a major step toward their achievement.

The changes proposed are lengthy and comprehensive. I would like to address only several specific changes from PCAR's perspective.

Several changes in language are important. Throughout the bill the terms victim and defendant are used. The bill is gender neutral. Structurally this avoids the awkward he/she construction. More importantly, it indicates the reality that males, both adults and children, are victims of sexual violence, and victim and defendant may be of the same sex.

While the majority of offenses are committed by males upon females, sexual violence is not gender limited.

Approximately seven to ten percent of all victims are male. Males below the age of 18 account for 25 percent of children in sexual abuse cases.

The legislation proposes a major change, in that the term rape and deviate sexual intercourse are replaced by the more encompassing term sexual assault.

For many, the term rape is narrowly defined and limited to the act of sexual intercourse by a man against a woman. In fact, this is the definition used in many dictionaries. It is a common usage definition with which we are most familiar. But it reinforces a narrowness of thinking about sexual violence and legitimizes old myths and stereotypes.

The term sexual assault is more truly reflective of the aggressive nature of the crime and the sexual violence that is used to control another person. These changes in language are important and more indicative of our knowledge about and understanding of sexual violence.

The legislation provides for what PCAR believes is a more appropriate and comprehensive tiering of offenses. Currently, sex offense that can be charged include felony 1 and felony 2 offenses. No felony 3 and only misdemeanor 1 offenses exist.

Too often prosecutors have only choices at the extremes for charging and for plea bargaining. There is

little middle ground. We should not then be surprised when a felony is not charged or when a felony charge is quickly pleaded to a misdemeanor, or when all reference to a sex offense is pleaded out in favor of simple or aggravated assault. The system works after a fashion, but all too often the victim is at a loss as to understand how and why.

The proposed legislation provides for a more complete range of tiering of offenses from felony 1 to misdemeanor 2 status. More alternatives for charging are available. PCAR believes that this change will increase the number of cases charged and narrow the limits of plea bargaining.

Recent court decisions have made it increasingly more difficult to offer testimony regarding the reasons for a victim failing to promptly report a sexual offense and to offer testimony on behavior patterns of sexually victimized children. Our knowledge about the behavioral of sexual assault victims, both adults and children, is far more comprehensive than the courts have chosen to entertain. It is important that both general and specific knowledge supported by research be available to the jury as part of its deliberations. The bill provides for the introduction of such information in ways that encourage understanding and education, but control the battle of expert witnesses to carefully prescribed circumstances.

PCAR is pleased that House Bill 2302 provides direction on the use of lie detector tests by law enforcement officials with regard to the investigation of a sexual offense. Section 3110 does not prohibit the use of such tests, but clearly states that no jurisdiction require that a victim submit to a lie detector test as a condition for proceeding with an investigation, the charging or prosecuting of a sexual offense.

While certainly not a common practice, nor one anywhere written in policy, sexual violence victims do report that investigations have ended or charges been dropped after refusal to submit to a polygraph. PCAR believes that no investigation or prosecution should be dependent upon a victim's willingness or unwillingness to take a lie detector test.

Some may argue that this provision is unnecessary because requiring a victim to take a lie detector test is the quid pro quo for continuing an investigation or charging is not common practice and an unusual circumstance. PCAR maintains that it should not even be the uncommon practice or unusual occurrence. Section 3110 makes this position a matter of public policy that recognizes the usefulness of such tests as an investigative tool but legislatively cautions its misuse.

For those jurisdictions where this is not an

issue, current practice is ratified. For those few jurisdictions or exceptions where the prohibition is appropriate, legislative notice and direction is given.

Section 5991 addresses the issue of the competency of children to testify. Currently, Pennsylvania statutes do not address this issue. However, case law assumes that all children under the age of 14 incompetent to testify unless proven competent. PCAR believes that this places an unnecessary burden on the prosecution and further discourages the reporting of child sexual abuse. This case law assumption in Pennsylvania is contrary to the Federal Rules of Evidence which consider all individuals, with few exceptions, competent to testify, including children.

Unfortunately, in many states, including Pennsylvania, case law requirements based on age have made it necessary to act through statute. To date, 40 other states have enacted laws which either statutorily declare all children competent to testify unless proven otherwise, or declare sexually and physically abused children competent to testify. Adoption of section 5991 would make Pennsylvania the 41st state to rectify this problem.

Finally, this bill provides for the elimination of the offense of spousal sexual assault. Eight years ago, PCAR was outspoken in its support of legislative action to include spousal sexual assault in the crimes code. Its

adoption was hard fought and controversial. I hope that its proposed elimination will be less controversial and more easily won.

While the current spousal sexual assault law validates the fact that spouses can and do sexually victimize their spouses, its construction still limits the rights of the victim because of marital status. Individuals filing charges of spousal sexual assault are given only 90 days from the date of the assault, essentially a 90-day statute of limitations. The same person, if assaulted by a stranger, acquaintence or other family member, would have five years from the date of the assault to file charges.

This restriction, enacted out of a fear of false allegations or manipulation of the law by a vengeful spouse, has been proven groundless after eight years of experience.

Since the mid 1970s, 18 states have eliminated the spousal exemption provisions of their law. PCAR believes that the time has come for Pennsylvania to join these other states in declaring the marital status of a victim does not lessen the severity of a crime nor deny the victim equal protection under the law.

As an attachment to the testimony, we've included a summary of the provisions of state sexual offense statutes. A quick review indicates that only the District of Columbia addresses fewer of the listed variables in

statute than does current Pennsylvania law. The alternative to statutory action is a reliance on case law. In some instances, this has proven satisfactory and sufficient. But it is also appropriate to periodically codify case law into statute and establish clear legislative direction for the future.

In endorsing House Bill 2302, PCAR believes that an appropriate balance is struck between statute and case law. While the example of other states is instructive, Pennsylvania's experience over 20 years indicates that comprehensive action is required.

On behalf of the victims of sexual violence for whom PCAR advocates, we urge that you act favorably on House Bill 2302 and the omnibus amendment. Thank you. If you have any questions, I'm happy to try and respond.

REPRESENTATIVE RITTER: It's self evident I think by the fact that you're here, but if you can just clarify for some people who seem to be confused about the intent of this legislation, what is the intent as you see it? Is it to make it easier for rape victims? For rapists, for people who commit sexual crimes, to get off the hook? Or is it supposed to be tougher?

MS. CAMERON: Our intent is to increase the number of charges brought based on sexual offenses, which hopefully will result in more convictions.

I think if you look in the testimony, I included a chart that looks like this. And what I think you'll see is under current law, we have felony of rape and involuntary deviate sexual intercourse. There are four felony 2 offenses. If you look in detail at those four offenses, you'll find they're very narrow in their definition and there are very clear requirements that have to be met to meet that felony 2 definition.

So what happens is a prosecutor is faced with a choice of either having to bring the felony 1 charge or the alternative then is to drop down to a misdemeanor. There's no room in the middle. So that I think what we're trying to accomplish is a more even distribution of offenses that can be charged so that more charges are brought.

I think the other piece then is what happens through plea bargaining is too often that the sexual assault behavior that accompanies the offenses gets wiped out during plea bargaining. So that when you end up in trying to determine treatment, in trying to provide for an assessment of sentence, in trying to prescribe supervision that may occur during either probation and parole, that piece is eliminated. So that what we're looking at are charges that more accurately reflect the actual behavior involved.

REPRESENTATIVE RITTER: Thank you.

Chairman Caltagirone?

Chairman Piccola?

REPRESENTATIVE PICCOLA: No questions.

REPRESENTATIVE RITTER: Anybody else?

REPRESENTATIVE DERMODY: Just one. I don't know if you had the part drafted, the section on competency of child victim witnesses? Section there's a section that says the child could testify through interpretation. On the competency of child -- in abuse? The last page, page 24.

MS. CAMERON: Okay.

REPRESENTATIVE DERMODY: There's a section there that seems to say that the child can testify through interpretation by a person without direct interest. I just want to know what means.

MS. CAMERON: That was in cases I think where a child might be hearing impaired? Where there may be a physical disability that would make testimony difficult, that there can, in fact, be an interpreter present in the courtroom.

The clarifying language was intended that it that would have to be someone with no direct interest in the case that would act as that interpreter.

REPRESENTATIVE DERMODY: What you contemplated was a child, a hearing-impaired witness? I mean, could you end up in situations where a child, a friend or, I don't know, I guess --

MS. CAMERON: I think that's where the amendment, a person with no direct interest, where that amendment was proposed to avoid that kind of a situation.

REPRESENTATIVE RITTER: Because there were concerns brought up about, well, the parents or the sibling could be interpreting for the child and could be directing the testimony. We didn't want that to occur.

REPRESENTATIVE DERMODY: Thanks.

REPRESENTATIVE RITTER: Next we have Attorney Karl Baker from the ACLU.

MR. BAKER: Good morning, Chairman Caltagirone and Representative Ritter. My name is Karl Baker and I serve as the president of the Philadelphia branch of the ACLU. I'm pleased to be here this morning to have an opportunity to comment on this legislation.

I have, as you've seen, submitted written testimony, and the first thing I would like to do is apologize, Chairman Caltagirone, for misspelling your name on the first page.

Rather than give you a dramatic reading of 15 pages, perhaps it would be best for me to go through and deal with some of the major points, major concerns that the ACLU has with this legislation.

Let me preface my remarks by saying that we're very pleased with this process. We see that a lot of work

has gone into preparing this legislation over the years. There's changes that need to have been made and have been made with these amendments.

We're also quite pleased with the effort to accommodate the views of a number of different groups. I think it's very important and beneficial to get those views together and perhaps even to get the groups together from time to time to raise these concerns beforehand and see if we can improve this legislation.

Now, I've listed approximately seven concerns that we have with the legislation. We feel that if an effort is made, this legislation can be improved, both with respect to sound social policy and also strengthened with respect to possible challenges that could be brought on a number of constitutional grounds, and I'm referring to due process, equal protection and First Amendment objections, possible violations, which I'll touch upon.

The first concern that I have listed is the fact that this legislation as redrafted would make marriage an aggravating factor. The legislation as it stands consists of a number of different sections defining assaults. The most serious are the aggravated sexual assault provision, section 3121, and the sexual assault provision, section 3122. The difference between these two provisions is that one is aggravated and one is not, and the aggravating

circumstances are set forth in the definitions, in the definition section which I believe is section 3101.

Another difference between these two sections is whether or not the person who is victimized is incapable, is deemed incapable of consent.

Now, the definitions which set out the aggravating factors provide that marriage, the status of marriage may be or must be used to aggravate the crime of sexual assault to aggravated sexual assault, and we believe that this is unwarranted.

The status of marriage and the fact of marriage is a fundamental right in our society and has been so recognized, and there is no possible reason that we can see to use that status alone by itself as an aggravating factor. And yet, that is what occurs. I'm referring specifically to the aggravating factor, I believe it's subsection F of 3101 that defines family member. That definition starts off stating a spouse or person who has been a spouse, a person living as a spouse or who has lived as a spouse. That status is used to enhance punishment by making the felony a felony in the first degree rather than a felony in the second degree.

The Crime Code of 1972, the major previous redrafting excluded spouse from those who could be convicted of a crime of rape. The ACLU at that time opposed that

exclusion and continues to oppose it. Efforts have been made over the years to rectify that, and most recently that was in part rectified by the enactment of the spousal sexual assault statute, section 3128. However, that section has certain shortcomings. It lessens the crime of rape for a person who is a spouse, and it also requires a special reporting period, 90 days.

This bill would swing the law in the opposite direction entirely, and make the status of marriage an aggravating factor as opposed to an exemption from the crime of rape as it was in 1972. We opposed that and it's our belief that the status of being a spouse or the fact that someone is married should have no bearing upon whether a person is convicted of the crime of rape, if that person engages in a sexual assault by forcible compulsion.

The next concern which is related is the fact that family membership per se is an aggravating circumstance within the definitions. I'm not referring to the section of that definition that deals with the spousal relationship. I'm referring to the remainder of that definition.

Now, certainly a parent who abuses a minor child, there may be justification under those circumstances to enhance the punishment that's implied, that's applied for the crime of the rape. But when there is sexual assault between siblings, and siblings are defined in this section

as whether by whole blood, half blood or as a sibling, where there's sexual assault between siblings, there is no abuse of authority as there would be where a parent abuses a minor child, and as a result there's no justification for enhancing or increasing the punishment of the crime of sexual assault.

The evil clearly that this legislation is attempting to address is the abuse of authority, the abuse of authority of a parent or someone else who is in a position of authority over a minor within the family. We believe that this evil, this abuse, can be properly addressed by removing family membership as an aggravating factor and redrafting that section, possibly as follows, and I have on page 5 of my testimony a suggested redrafting, and it goes as follows. It would be a substitute for subsection F.

The defendant serves in a position of authority in respect to the victim, or, as a family member who serves in a position of authority over a victim under 18 years of age within the household.

I believe that that would properly address the concerns which underlie this section of the statute.

We're also concerned that this legislation would impose an additional disability upon disabled persons who are deemed helpless under this statute. Section 3109

classifies certain groups of persons as being incapable of consent. Section 3121 B and section 3124 B, that's indecent assault and aggravated assault, criminalize all sexual contact between such persons, contact with such persons. By so doing, this legislation creates several classes of persons for whom all sexual contact with others is forbidden by law.

There's no excuse in this society to prohibit disabled persons or those who are physically unable to flee, those who may be in wheelchairs or otherwise disabled, from having any sexual contact with another, not even with their spouse or another sexual partner, perhaps even by invitation. This statute, however, does just that by making any sexual act or intimate contact with such persons punishable by law.

It's no defense under this legislation if the sexual contact or intimate contact is at the invitation of the disabled party. This may not have been contemplated in the drafting of this legislation, but clearly this is the effect of the legislation on its face.

Within that definition of physically helpless we also have another subcategory, those persons who are physically unable to communicate an unwillingness to act, and there are many examples of these types of persons but one example is a stroke victim. A stroke victim who may be

married and may have been married for the last 20 or 30 years under this statute, it would be a criminal act for the spouse of that stroke victim to have any intimate contact or to engage in a sexual act with that person.

Now, in an attempt to meet the purpose of this legislation, but to avoid this the imposition of an additional disability on such persons, we would propose that the statute might add in section 3101 under aggravating factors, an additional aggravating factor and withdraw from the definition of those persons who are incapable of giving consent, the definition of physically helpless. In other words, we would offer language that the fact that a defendant committed the act upon a victim who is physically unable to flee or physically unable to communicate unwillingness to act, would be an aggravating factor. That would move the crime up from a felony in the second degree to a felony in the first degree, and the question of consent could be addressed as it's always been by the courts, on a case-by-case basis.

We have a similar concern about another section of the statute which would make those persons who suffer from a mental disability also be deemed incapable of giving consent. I'm referring to, again, to that section of the statute, section 3109 which says a victim is considered incapable of consenting to a sexual act if the victim is,

and subsection 2 states, mentally disabled. There's a definition for mentally disabled within section 3101.

Again, mentally disabled people are frequently people who have been happily married for many years, who have had an ongoing concensual sexual relationship with a partner, who may become mentally disabled. They should not be deemed under the law, incapable of giving consent.

The spouse of such a person, if the spouse of such a person were to have intimate contact as defined under this statute, that person would be subject to a misdemeanor in the first degree. If the mentally disabled person were to expect to have a continuing sexual relationship with a spouse and the spouse complied, the spouse would be subject to a first degree felony conviction with the punishment that that carries.

Again, the way to deal with this concern, and it is a concern that such persons can be victimized, is to redraft the legislation and place within the section on aggravating factors, language which would make it an aggravating factor to victimize a person who is mentally disabled as defined by these statutes. This would avoid placing an additional social disability on persons who are mentally disabled and would avoid, also, fostering a social discrimination against persons who may or may not be mentally disabled, may be mentally retarded and should not

be discriminated against within their social relations with others.

The next concern that we touch upon is the criminalization of all sexual activities among teenagers. Now, what House Bill 2302 would do would be to repeal the section on statutory rape and to replace that statute with a set of provisions that would, in fact, criminalize all sexual acts and intimate contact between a 13-year-old and a 14-year-old, or a 13-year-old and a 15-year-old. It does so as follows.

Section 3109, again, conditions constituting incapacity to consent, reads as follows: A victim is considered incapable of consenting to a sexual act if the victim is, subsection 1, 13 years of age or younger. And of course, other subsections use this as a basis to convict and apply felony in the first degree.

What the result would be, would be to criminalize all sexual activities between 13-year-olds and their older peers, and the problem in this context is that it's made even more serious by the fact that mistake of age has been specifically removed as a defense under these statutes. And we well know that teenagers, many younger teenagers pretend to be older. Many younger teenagers obtain false identification. Many younger teenagers attend parties with older teenagers and make the pretense that

they're older. And they engage in sexual activity and they engage in intimate contact and touching, which under this statute would be criminalized.

This is an extreme change in the laws in this jurisdiction, and it's a change that's unwarranted. The result of such a change would not be to succeed in ending all sexual activity on the part of those persons who are under 13. Rather, I think the result would be to stigmatize youngsters, 14, 15, 16, who might engage either knowingly or unknowingly in such behavior, and to alienate young people from government and to, in fact, diminish their respect for the law.

Such legislation, and I don't think the intent, the underlying intent of this legislation was to criminalize such behavior, but clearly on the face of the legislation that is the effect, and it will lead to a stigmatization of youngsters who engage in this activity, and prosecution under these laws.

We believe that a better approach would be to retain the current statutory rape provisions and simultaneously to remove this designation of persons 13 years of age or younger from the list of persons who are deemed incapable of consenting to a sexual act.

The concern that persons who are under the age of 13 would be victimized by those who are over the age of

18 would or could continue to be met by the statute that prohibits statutory rape, and in those instances where the rape is accomplished by forcible compulsion, the fact that the victim is under the age of 13 could be recast as an aggravating circumstance and, therefore, increase the penalty from a felony in the second degree to a felony in the first degree.

The next concern of ours is the imposition of strict liability under the statutes. Under section 3102 of House Bill 2302, a mistake of age is no defense to any prosecution of an offense under this bill, regardless of whether the defendant has a bona fide belief that the other person is over a specific age, or even where there has been a false misrepresentation, as there is from time to time, which creates a bona fide belief.

Now, the imposition of strict liability, or in other words, punishment for a crime where there's no mens rea, where there's no knowledge that one is committing a guilty act, constitutes a violation of due process of law in the absence of a compelling reason.

The fact that persons engage in consensual sex is not a compelling reason to criminalize this area by imposing strict liability.

Strict liability normally is placed upon behavior which is absolutely prohibited, absolutely

prohibited. Behavior in this context, sexual touching, or sexual contact or activity with others, between a 13- and a 14-year-old, or otherwise, is not absolutely prohibited. Sexual relations between adult persons who believe that they're both adults, should not be so chilled by enacting a statute that does away with mens rea and requires strict liability.

The result of such a statute is bound under certain circumstances to, in fact, turn the defendant into a victim in some instances. Again, most of those who will be swept up by this strict liability provision under the proposed statutes will be teenagers, the 13- and 14- and 15-year-olds.

Finally, our final concern has to do with the provisions that deal with child pornography. We're concerned with the impact that this section as currently drafted would have on the First Amendment rights of all citizens in this Commonwealth. Specifically, we believe that the inclusion of one section in this statute and the exclusion of another will cause the statute to be struck down if challenged by current United States Supreme Court and federal court decisions.

Now, I'm referring to section 6312, sexual abuse of children. That section criminalizes the production, distribution and dissemination of certain films,

photographs, et cetera, of persons engaged in a prohibited sexual act. The term prohibited sexual act is defined within the statute and includes a broad range of sexual acts. It also, however, includes, and I'm quoting this language from the statute, lewd exhibition of genitals or nudity, if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction. In other words, we're talking about Playboy magazine. That's what we're talking about.

Although the statute originally contained a section which provided for exceptions, as currently drafted that subsection is gone. The exceptions that I'm referring to are bona fide educational, scientific, artistic, governmental or judicial purpose. Photographs or films that are used for that purpose. We're talking about textbooks. We're talking about government literature. We're talking about photographs that are used in the course of criminal prosecutions.

The section which has been placed into this statute is the section which removes the defense of mistake of age, and it removes the defense of the mistake of age from those persons who are producers of this material and those persons who are distributors.

Taken together, these provisions present a serious violation of due process and First Amendment rights

of all citizens, and those rights have been defined by recent decisions of the United States Supreme Court and the federal courts. I'm referring to the case of Osborne versus Ohio, which is a 1990 United States Supreme Court decision that dealt with a prosecution for child pornography. In that case the statute was a statute in Ohio that had been interpreted by the Ohio Supreme Court. The statute actually contained a section which had far more extensive exceptions than the original proposed legislation here, and I have on page 13 a quotation which sets forth those exceptions. It includes, of course, artistic.

The Ohio Supreme Court, in an effort to protect the statute from constitutional challenge, had also read into the statute the element of scienter. Now, Blacks Law Dictionary defines scienter as a term that's used to signify the defendant's guilty knowledge. So we're talking about the fact that the defendant in this context knows that the picture in the pin-up calendar is that of a person who is 17-years-old instead of 18-years-old.

Given those two provisions, the existence of scienter and the existence of an extensive series of exceptions, the United States Supreme Court found that this statute was not subject to First Amendment challenge, although even with those exceptions, it found that it could, and I quote, imagine circumstances in which the statute by

its terms criminalized constitutionally protected behavior.

What is constitutionally protected? The court in that case, and I quote, states: Depictions of nudity, without more, constitute protected expression.

It's talking about Playboy magazine. Playboy magazine is published and disseminated and distributed and given from friend to friend, that's a form of distribution. So that people can look at those pictures and be titillated by them. That's constitutionally protected.

What this statute would do would be to remove those legitimate exceptions and to place persons in strict liability, so that when they buy a Playboy magazine or when they give it to a friend or receive it from someone, possess it or produce it, they take the chance that they will be subject to criminal prosecution, despite the fact that to the best of their ability, they believe that the depictions in that magazine or pin-up calendar depict someone or some persons who are over the age of 18.

This particular problem has been addressed recently in 1988 by a circuit court, I believe it's the 8th Circuit, I don't have it here, which found that under such circumstances, when you impose strict liability in this context, it severely inhibits and chills otherwise protected lawful forms of protection. And the court explained, and I quote: The First Amendment does not permit the imposition

of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech.

The ACLU urges this Committee to delete the section that would take away the defense of mistake of age, mens rea, the fact that someone believes that they're doing something that's lawful, and restore that section which provides for a list of exceptions, and include in that section all of the legitimate exceptions that have been accepted as necessary by the United States Supreme Court in the recent Osborne decision. Thank you.

REPRESENTATIVE RITTER: Thank you. I would like to make a couple of comments.

First of all, I appreciate your testimony and some of the advice and some areas that I was having trouble deciding how to handle it, particularly the issue of people with disabilities. That was brought up in a brief that was sent to me by the Defenders Association. It was something I had never thought of; certainly did not intend to prohibit, concensual sex between folks who have disabilities. So I appreciate the language that you've suggested and am going to also run it by the Coalition for Citizens with Disabilities and see if they have any other suggestions. But I think that your idea on that is a good one and is going to be very helpful.

In terms of the issue of consent, my comment

would just be that our intent is to say that a child under the age of 14 is incapable of consenting to a sexual act, whether it's a sexual act with another teenager or with a adult. I certainly appreciate your comments on that, but that's something I feel pretty strongly about keeping that in the bill.

I think if we're going to say that a child is not capable of consenting to a sexual act, and particularly when we look at the number of sexual offenders who are juveniles these days, the numbers are going up and it's a very scary thing. And I don't want to see 11- and 12-year-olds feeling that in order to keep their boyfriends or girlfriends they need to engage in sexual activity that they're really not prepared for. So I see that as a protection that we need to have.

MR. BAKER: I believe that protection is largely provided by the statutory rape statute that currently exists. The problem that we run into is that although we may believe that a person who is 13 years of age and under should not engage in sexual intercourse, the question is, are we going to criminalize that behavior when the 13-year-old and her 14-year-old boyfriend engage in sexual intercourse? And are we going to criminalize the behavior of the 13- and 14-year-old when they don't engage in sexual intercourse and they engage in petting? Because petting

falls within the section of the statute that deals with indecent contact.

That's the problem. And I don't think we want to go so far as to stigmatize those teenagers by criminalizing their behavior, although we may not approve of it. I don't think that's the way to go.

REPRESENTATIVE RITTER: Well, I appreciate that.

In terms of your item number 7 dealing with section 6312, I think, and I looked again at the amendment to see if I had drafted it wrong and it hasn't come back from the Legislative Reference Bureau, and they may correct it more to me, but it seems to me it's drafted correctly.

The intention was to keep section F as it currently exists in law, have it remain unamended, and the language, I'm just trying to find it here.

Well, what we do was we struck that section from the amendment, but in order to strike it out of existing law we would have had to keep it in the amendment and surround it by brackets. That would have deleted it from current law. Striking it from the amendment just means we're not going to amend it, it's going to stay the way it is. That was the intention.

MR. BAKER: If that's the intention, that considerably improves that section. But there are problems

that remain. The section would still be subject to First Amendment challenge, because there are certain legitimate purposes which are not listed there. One is artistic.

REPRESENTATIVE RITTER: Again, that's the reason the language was included in the first place, is because I had advice from many attorneys who suggested that that needed to be included in there so as to protect the statute from being held unconstitutional.

MR. BAKER: The other problem --

REPRESENTATIVE RITTER: If I could just finish.

What I'm going to do on that, the reason I've taken it out of there for the time being is because I want to get some advice from someone, not to slight your advice, which is important, but some advice from some other constitutional lawyers who can look at that and give us some advice as to how we should proceed.

My goal was to protect the statute from challenge under the First Amendment, to be sure that the exceptions were not so broad as to cause the court to find it unconstitutional.

Looking at the Osborne case, obviously there are several -- there's religious, there's artistic pictures, there's medical, I think, which are exceptions under Osborne which are not in our law. I don't know where the Supreme Court stops and says, well, all right, if you don't have

artistic, it's okay, or you don't have, I don't know how many of those exceptions can be dropped from the law or don't need to be included in the law until the Supreme Court says, all right, now it's too broad.

And so that's where I would like to get some advice from -- nobody can read the minds of the Supreme Court, obviously, but looking at the Osborne decision and trying to see if there's anything in there that will give us advice as to what sorts of exceptions should be included.

So I anticipate we may add this back into the bill at some later point, but until we can get some more advice, that issue has been certainly detracting from the main goal of this legislation, and until I can get it resolved and I feel we're accomplishing what I want to do, which is to protect the statute, we're going to leave it out. So that was the intent.

In terms of the misrepresentation of the age, I think the amendment that we offered did limit that to photographing and disseminating and not to possession, because obviously someone who possesses a photograph has no idea how old the person was who posed for that photograph. And so I can certainly -- that was, again, that was in the Defenders' brief, too, and that was part of what we accepted.

In terms, though, of someone photographing, I

don't have any problem with the fact that the person who is going to make these kinds of photographs should require some sort of identification and should be more careful about making sure that the persons that are posing for them are old enough.

MR. BAKER: But the language in there goes beyond that. The language goes beyond that. You have no problem with requiring them to demand identification.

REPRESENTATIVE RITTER: Right.

MR. BAKER: However, if that identification is demanded and provided and yet it's false, that person can still be liable under this statute. That's the problem. You may want to hold them to a higher standard of making sure that that person is not below the age of 18, but once you do that, then you can't also prosecute them when they've been subject to misrepresentation and they have a bona fide belief that what they've done was legal. That's the problem.

With respect to distribution, we're talking about news stands that have these magazines, and if there's a picture of somebody that proves to be below the age of 18, that person is subject to prosecution. We're talking about a student in school who has a Playboy Magazine, gives it to his friend. That's distribution under the current interpretation of this statute by the Pennsylvania Superior

Court. That's distribution. And to hold that person to strict liability is simply a denial of due process.

REPRESENTATIVE RITTER: I appreciate your testimony on that. I at this point don't agree, but we can certainly take a look at that later.

Does anyone else --

REPRESENTATIVE PICCOLA: Thank you, Madam Chairperson, or Mr. Chairman, I don't know which we're dealing with here.

Thank you, Mr. Baker. I found your comments concerning the use of marriage as an aggravating factor interesting, and I think I share some of your feelings.

As a matter of public policy I think what you were saying is you don't believe marriage, the status of marriage should be an aggravating factor for any crime. Am I reading your comments correctly?

MR. BAKER: Yes.

REPRESENTATIVE PICCOLA: Is there any constitutional defect in the statute that would do that?

MR. BAKER: I think so.

REPRESENTATIVE PICCOLA: What would that be?

MR. BAKER: Well, marriage, the right to marry and to remain in a marriage relationship is a fundamental right. To use a status which is a fundamental right simply to enhance punishment I think is clearly a denial of due

process, broadly speaking, and possibly equal protection in addition.

Why should someone who is married and has exercised their fundamental right to enter a marriage relationship, be punished more harshly than someone who has not married and commits virtually the same act? So I think it's a denial of equal protection in addition.

REPRESENTATIVE PICCOLA: Thank you. That's all I had.

REPRESENTATIVE RITTER: Does anybody else have any questions?

(No audible response.)

REPRESENTATIVE RITTER: Thank you, Attorney Baker.

If you could introduce yourselves to the folks?

REPRESENTATIVE BLAUM: I'm David Blaum, Wilkes Barre.

REPRESENTATIVE HECKLER: Dave Heckler, Bucks County.

REPRESENTATIVE RITTER: Thank you very much.

Mary Beth Seiverling from the Attorney General's office.

MS. SEIVERLING: Good morning, Mr. Chairman, members of the Committee. My name is Mary Beth Seiverling. Appearing with me is Joe Curcillo. We're deputy attorneys

general under Attorney General Ernie Preate Jr. I am an attorney assigned to the appeals and legal services section of the criminal law division, and Joe is in the criminal investigation and prosecution section.

My appearance is on behalf of Attorney General Preate to offer remarks and comments on House Bill 2302 and its accompanying amendments.

In this testimony, the Committee is acting timely. As you know, April has been recognized as sexual assault awareness and child abuse awareness month. From a historical perspective, the issue of violent crime has been an important issue to both elected Attorneys General.

In the fall of 1985, Attorney General Leroy Zimmerman established the Attorney General's Family Violence Task Force and gave it the mission of recommending specific and practical measures to enhance the capability of law enforcement agencies and the criminal justice system in responding to incidents of violence against children, abuse of the elderly and violence between spouses.

Though there are similarities and interrelationships among these several forms of violence, their breadth alone necessitated that they be examined separately. Three reports were actually generated, and I believe copies of the reports have been provided to the committee.

The Attorney General's statutory role as the Commonwealth's chief law enforcement officer dictated in large measure both the organization and approach of the task force.

In terms of organization, the task force was designed to be interdisciplinary, but to reflect the Attorney General's jurisdiction and the mission of the task force to provide practical guidance to law enforcement and the criminal justice system. Thus, while the membership included representatives of diverse government and private agencies and institutions, fully half of the task force members were judges, prosecutors and police officers.

The first task force report offered legislative recommendations for changes in law that were designed to afford children a greater measure of protection from violence and to better equip law enforcement and the criminal justice system to play a vital and effective role in helping society to cope with and combat this persistent and tragic problem.

The task force offered specific legislative recommendations to address sexual crimes against children, including some which have become law. For example, the definition of section 3101 concerning deviate sexual intercourse was amended to include within the term penetration, penetration with a foreign object.

Sections 3125 and 3126 were amended, increasing the grading of indecent assaults and aggravated indecent assaults against minors.

Section 5902 was amended to render patronizing a prostitute a third degree misdemeanor, if the prostitute is a child under 16.

Section 6312 concerning sexual abuse of children was also amended.

After completing the report entitled Violence Against Children, the task force continued work, and in September 1988 issued its report on violence against elders, followed by issuance of Domestic Violence, A Model Protocol for Police Response, issued in January 1989.

Attorney General Preate shares the concern of his predecessor for the victims of crime. In 1987 during his tenure as district attorney of Lackawanna County, he was instrumental in the creation of a victim witness assistance program to lessen the uncertainty, inconvenience and hardship victims and witnesses often experience as the case in which they are involved makes its way through the judicial system. His goal was to make sure that victims of crime are not revictimized a second time by the criminal justice system.

As Attorney General, Ernie Preate has committed the resources of his office to continue to advocate for

crime victims, specifically by working towards the implementation of the task force legislative recommendations, and continuing the work of his predecessor with the Attorney General's medical-legal advisory board on child abuse.

In this session, there are several bills that have been introduced under the sponsorship of Representatives Blaum and Hagarty in the child and elder abuse area. Those child abuse bills, House Bill numbers 1414 and to 1433, have been assigned to the Committee on Aging and Youth, while the elder abuse bills are in this committee. We are grateful for their cooperation and sponsorship.

In May of 1989, the Office of Attorney General began training of approximately 1100 police officers pursuant to the manual developed by the Office of Attorney General, entitled Violence Against Children. Topics in the training include sexual victimization, child pornography, child homicide, treatment of the victim and physical abuse.

Through this training, the Attorney General has brought the stated goals of the task force to fruition. The Pennsylvania District Attorneys Association and individual county district attorneys successfully continue the role of training and educating of prosecutors, police and child protection agency members. This training is evidenced by

numerous specialty seminars offered by PADAA in the area of child abuse and domestic violence. More specifically, we would point to the recent mid-winter meeting when the association offered two days of training in prosecuting child abuse and domestic violence cases.

As a resource available to supplement their effort, the Attorney General's medical-legal advisory board on child abuse provides assistance to the various district attorneys when additional investigative review of a child homicide is necessary, or when further expert consultation would assist in a more effective prosecution.

While recognizing that the district attorneys have jurisdiction over the prosecution of cases involving rape and child abuse, the Attorney General has continued the position established by his predecessor to assign an office prosecutor to the field of child abuse investigation. When a conflict arises or assistance is required in prosecution, the Attorney General makes this deputy available to aid in those prosecutions, in addition to other duties assigned. Presently, Joe Curcillo holds this position.

The Attorney General's commitment to improving law enforcement's ability to respond to cases of child abuse is what brings me to testify before this Committee today. I have been personally involved in the formation of some of the amendments which Representative Ritter has prepared.

Joe Curcillo and I have worked with the Pennsylvania Coalition Against Rape and have helped to produce the document which was distributed to members of the Committee this morning.

In our meetings and discussions with representatives of PCAR and Representative Ritter, there appeared to be a general agreement with regard to the goals which the proposed legislation sought to achieve. We have agreed that the criminal justice system must insure that incidents of domestic violence receive the vigorous response that once was reserved to crimes perpetrated by strangers;

that sexual offenses against and exploitation of children require specialized legislative action due both to the heinous nature of the crimes as well as the particular needs of the victims;

that a gradation of offenses was needed to further societal interest in successful prosecution of sexual offenses, and that such a gradation would provide prosecutors with more options for charging and at the same time provide for penalties appropriate to the offense.

As I said before, we worked with Representative Ritter and PCAR in formulation of some of the amendments which were proposed today by the sponsor. With the proposed amendments, the Attorney General believes House Bill 2302 furthers these goals appreciably.

Our primary concerns in reviewing this legislation have been its impact on victims and the need to facilitate and encourage prosecution. Nonetheless, we believe the proposals promote fairness for defendants by providing prosecutors with the flexibility to bring more appropriately graded offenses. We think the amendments go far to improve the bill.

With these goals in mind, I will address some of the specific provisions in House Bill 2302.

The bill is designed to overhaul Pennsylvania's rape law. The proposed provisions begin with amendments to the definitional provisions of existing law.

Under section 3101, it is proposed consistent with the goal of establishing gradations that a definitional provision be included which outlines a list of six aggravating circumstances. The presence or lack thereof of the aggravating circumstance will be used to determine whether a sexual assault is graded as a second degree or first degree felony. All rapes, excepting statutory rape, are presently graded as felonies of the first degree.

The proposed legislation makes rapes and other sexual offenses felonies of the second degree unless one of the six aggravating factors is present or unless a victim is incapable of consent. Those incapable of consent include those who fall within the definitions of physically

helpless, mentally disabled or mentally incapacitated.

The definition of these terms is taken from New Jersey law. In fact, each of the proposed provisions finds a counterpart in state law elsewhere, according to the research of PCAR.

We agree with the sponsor's decision to delete the proposed definitions of consent and forcible compulsion. These definitions would have been a return to model penal code language from which Pennsylvania case law has departed substantially. In the absence of a definition of forcible compulsion, our courts have looked to the dictionary and common usage to determine that forcible compulsion is not simply compulsion by use of physical force or threat but is also compulsion through moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against a person's will.

In an attempt to further clarify sexual offenses, the amendment provides a definition of sexual act which would include the prior definitions of deviate sexual intercourse and sexual intercourse.

Under proposed section 3102, there are amendments to the mistake-as-to-age provision. Because the age at which a child is considered incapable of consent has been uniformly set in this legislation at age 13 or younger, the amendment to paragraph A of this section will have

little effect in practicality.

Sections 3105 through 3110 are all amendments designed to encourage prosecutions by recognizing the plight of victims in the circumstances of having been the subject of a sexual assault.

Section 3105 appropriately authorizes rebuttal testimony to permit explanation of delays in complaints of sexual assaults.

Section 3107 explains that neither verbal nor physical resistance is required by the victim.

Section 3108, drawn from Florida law, is intended to prohibit evidence related to the victim's dress where that evidence is offered to show that the victim provoked the offense.

Section 3109 defines the conditions which constitute incapacity to consent, as discussed above, as well as establishing that children 13 and younger are considered incapable of consent.

Section 3110 does not prohibit the use of lie detector tests but will prevent prosecutors from making decisions as to whether to charge based upon a victim's refusal to submit to a polygraph.

Sections 3121 and 3122 concerning sexual assault are the key provisions of the bill. These sections replace current proscriptions against rape, involuntary deviate

intercourse and aggravated indecent assault. The clarity and simplification of the law as proposed is laudible. As discussed above, the proposals do not reflect a desire to increase penalties across the board.

A sexual assault is graded as a felony of the first degree where an aggravating circumstance is present. Sexual assaults against those incapable of consent remain felonies of the first degree. All other sexual assaults become second degree felonies.

The separate prohibition against statutory rape now found in section 3122 is deleted. The separate prohibition against spousal assault now found at section 3128 is also deleted. These crimes are subsumed in the sexual assault sections.

Voluntary deviate sexual intercourse, now prohibited at 18 Pennsylvania Consolidated Statutes, section 3124, is decriminalized.

Aggravated indecent criminal assault, now found at section 3127 of the Crimes Code, will continue to be graded as a second degree felony, most of the time.

As with rape and with involuntary deviate sexual intercourse, these assaults will now be graded as first degree felonies if the victim is incapable of consent or if an aggravating circumstance is present. Whereas, involuntary deviate sexual intercourse was a felony of the

first degree where the victim was less than 16 years of age, under section 3123 as it currently stands it would now become a felony of the first degree if an aggravating factor was present or if the victim was 13 years of age or younger.

In numerous instances, the gradations will offer prosecutors more flexibility, encourage more prosecutions and provide a penalty appropriately tied to the level of culpability.

Section 3124, indecent contact, in most instances this proposal continues present law which makes indecent contact a misdemeanor of the second degree. Indecent contact is elevated to a misdemeanor of the first degree where the victim is incapable of consent or where the touching is done by forcible compulsion or threat of forcible compulsion.

Sexual exploitation of a child. Proposed section 3125 is an important provision which prohibits exploitation of a child in circumstances which do not fall within the definition of prostitution.

Promoting prostitution of a child is prohibited under section 5902 of the Crimes Code. This provision prohibits procurement of a child for sexual activity and would apply to a context where sexual activity is not as a business.

Sections 5989 and 5990 are geared at codifying a recognition of trial court discretion applicable where victims are children. The first requires that the court consider the effect of delay on the victim and the wellbeing of the child where a continuance is sought. The second recognizes the trial judge's discretion to allow certain expert witness testimony.

As a side note, there is a significant piece of legislation that this Committee has considered and sent to the floor, Senate Bill 1115. That presently is on the table bill calendar in the House. This proposed Constitutional amendment would allow child witnesses to testify by video outside the presence of the alleged perpetrator. I am hopeful that that bill will receive first passage before the close of this legislative session. This would go far in compassionately treating children, who are victims, in keeping with the intent of this section.

Section 5991, competency of child victim witnesses, is the last substantive provision under the proposal. This section appropriately provides a rebuttable presumption of competency should be accorded to a child victim.

In conclusion, the Attorney General urges this Committee to give serious consideration to the thoughtfully compiled proposals set forth in House Bill 2302. We

appreciate the opportunity to testify today, and will entertain any questions which Committee members have.

REPRESENTATIVE RITTER: I want to thank you again for the assistance of your office in preparing some of these amendments.

It's nice to see you again, Joe. You testified on the panel together on this similar subject.

Do you have any questions?

CHAIRMAN CALTAGIRONE: No.

REPRESENTATIVE RITTER: David, are you standing in for Chairman Piccola?

REPRESENTATIVE HECKLER: Thank you. Thanks, Mr. Chairman.

I did have a couple questions. One, I'm certainly pleased to see that I think we're headed in the right direction from some of the earlier drafts I had seen concerning the issue of the clothing worn by the victim and testimony about it.

I'm a little bit concerned that in meeting some of the concerns that I know I and some other people had expressed about the fact that there were certainly going to be a number of situations in which the introduction of the clothing was going to be important frequently for the prosecution of a case, I'm concerned that we may have reopened a loophole that you wanted to address with the

language as a whole, which is having the defense counsel wave around some garment that's viewed as skimpy or in some way provocative. And I use the word provocative because I note that the language there appears that evidence relating to the manner in which the victim was dressed at the time of the offense, to suggest that the victim provoked the offense, not be admissible.

I'm just wondering whether if I'm defending a rape case, you know, I don't think that's the proper location. I don't think I'm ever going to argue that a woman provoked the offense. The legal issue before the jury is going to be consent. I'm going to argue that she consented and that she communicated her inclination to consent by the way in which she was dressed and that she in some way, the way in which she was dressed was indicative of her state of mind on the day or evening in question.

So I don't know whether anybody's thought much about that, but I'm wondering why we just don't say that it's not admissible as to the issue of consent.

REPRESENTATIVE RITTER: To say that the victim provoked or consented to the offense?

REPRESENTATIVE HECKLER: Okay. Or somehow or other we get the word consent in there. Because provoke, you know, may be the point at issue, but it's sort of beside the point in terms of legal issues. I think, again, I'm not

as familiar with the whole framework that's created by this, but I wonder if you have any comments.

MS. SEIVERLING: That's a suggestion which I think is worth looking into. I follow what you're saying, that the reason as a prosecutor and as a former prosecutor, that you would be concerned that this evidence might be misused would be to try to make out that this victim consented because of what she wore.

REPRESENTATIVE HECKLER: Sure.

MS. SEIVERLING: And you don't think that's correct. That's a suggestion certainly worth looking at.

REPRESENTATIVE RITTER: The other sentence, if I could just ask you a question, that other sentence, I added, I thought it was clear and I think that Mary Beth had indicated, you thought the language was clear the way it was originally drafted, that we did not intend to exclude evidence of bloodstains or clothing being torn or any -- does that sentence do you think address that?

REPRESENTATIVE HECKLER: Yes.

REPRESENTATIVE RITTER: Because some people were confused. We were not because --

REPRESENTATIVE HECKLER: Again, if you make it, it seems to me that if you make it very clear that evidence is not going to be admissible for the limited purpose of proving, and I think proving consent is enough, you know,

again, the issue of whether they provoked or not, that again gets into all kinds of notions about whether a woman's desirable, you know, to the particular creton who did this, and that's kind of beside the point.

The issue is did certain physical acts take place and were they consented to. If you have that clear limitation on the evidence, then I don't know that it's as important that you reiterate what you think would be the case.

But again, given the fact that every once in a while our courts, such as they are, delighted in sort of sitting back a saying, well, we know this is a ridiculous result but this is what these fools in the legislature did.

REPRESENTATIVE RITTER: That's why I put it in there, because I thought -- I'm not a lawyer, I thought it was clear. Lawyers thought it was clear. Other lawyers thought it wasn't clear.

REPRESENTATIVE HECKLER: I don't think it hurts anything. But I am concerned that if the only term is provoked, that I'm going to persuade a judge that consent is another issue. We're not talking provoke now, we're talking about these people are away together privately somewhere and something happens.

REPRESENTATIVE RITTER: Thank you.

REPRESENTATIVE HECKLER: Thank you. I apologize

for getting here late and not having done my homework as I should, but I see the definition of sexual conduct and I haven't yet found where it pops up. I would have thought it would have been in one of the --

MS. SEIVERLING: Indecent touching I believe is where that's used, is it not?

REPRESENTATIVE HECKLER: Okay. So obviously the use of that definition would be to limit the kinds of testimony we're going to get into.

See, there are a number of -- I will express some misgivings and I think you may have just misapprehended me. Whenever we rewrite the law, we launch onto an uncharted sea and, you know, I remain a skeptic about this whole endeavor, frankly, simply because our law, such as it is, has developed a body of case law; everybody knows what we're dealing with.

Now, certainly we all in this room I think are in favor of making it easier to convict people who commit violent acts against women and children, but we should do this very circumspectly. That's why it's great that you've gotten as many people involved as you have, Karen, and we have to keep combing over this until we're absolutely sure that we're not creating a problem for every problem we solve in passing this legislation.

I'm looking at that definition. I don't know,

is that from the existing act?

REPRESENTATIVE RITTER: I think it is. Under the rest of the rape shield law, I believe, isn't it?

MS. SEIVERLING: I believe that that section was a definition which was then used in proposed amendments to section 3104, which are no longer part of the proposal.

So it may be that what happened is the 3104 amendments were omitted but we didn't omit the definition tied to those amendments. I think you're correct, it doesn't show up later.

REPRESENTATIVE HECKLER: Thank you.

REPRESENTATIVE RITTER: I have to go back and look though and see if 3104 refers to sexual conduct at all in its current form, and that this amendment, whether or not that should -- maybe that was intended to define the word as it's used currently.

REPRESENTATIVE HECKLER: Good point.

REPRESENTATIVE RITTER: I'm going to look at that.

REPRESENTATIVE HECKLER: Again, if indeed that broad definition is, and again, in this context, I would assume that that broad definition would pop up in some way that would say you can't present testimony about it, I would think that the previous witness from the ACLU might have something to say about that.

I think that while certainly defense attorneys over the years have done a lot of miserable and outrageous stuff in terms of beating up on the victims in sexual conduct cases, there still needs to be some way of examining the credibility of the victim in these cases, and one, you know, again, let's take a look at 3104, but I note some concerns with the breadth of that definition if it's going to pop up to say, hey, you can't present any testimony about any of this, or question any way about that.

I think that's all I have. Thank you.

REPRESENTATIVE RITTER: Anyone else?

(No audible response.)

REPRESENTATIVE RITTER: Thank you very much.

MS. WOOLLEY: Just to follow up on Mr. Baker's testimony, with regard to the issue of repealing statutory rape and criminalizing concensual intercourse between a 13-year-old female and, for example, her 15-year-old boyfriend, and it will make it an F-1, right? That's aggravated sexual assault?

REPRESENTATIVE RITTER: Because she's under 13.

MS. WOOLLEY: Because she's 13?

REPRESENTATIVE RITTER: Right.

MS. WOOLLEY: Did you contemplate that issue when you were engaged --

MS. SEIVERLING: We have looked at it

generally. We have not looked at every single possible result. Because of limited time between the amendments and the first round, that's an issue which I see the arguments both ways.

We have not specifically discussed with the Attorney General, and I can't tell you whether that's something that he would support or not support specifically, that result, the criminalizing of a 15-year-old with the 13-year-old as an F-1.

REPRESENTATIVE RITTER: Okay. Thank you.

CHAIRMAN CALTAGIRONE: I would like to find out what your thoughts are, because you're both Deputy Attorney Generals and you would have to be involved in the prosecution of such situations. What are your thoughts? I'm just curious.

MS. SEIVERLING: I think that that is an appropriate area for a societal judgment made through the legislature. I'm not a prosecutor. I'm in the appeals and legal services section and Joe's role as a prosecutor is only going to come into play when the district attorney has already made a charging decision and finds a conflict of interest, usually. So we're not usually at that stage.

Since we are here as representatives of the Attorney General, I wouldn't want to guess what his point of view might be and perhaps offer a different point of view.

REPRESENTATIVE HECKLER: If I may. Obviously the Attorney General has very able and artful staff who are able to think on their feet. But let me just make a general observation, because when Counsel Woolley raised this it just rang a bell with me.

I used to teach the Crimes Code years ago to police officers and their ilk. We have over the years done all kinds of crazy things on this marginal area. I remember a time when I was an assistant DA when it would have been probably not a crime at all for a couple, and this would have been like I forget whether the line was 15, 16, a 15-year-old and a 16-year-old or a 16-year-old and a 17-year-old, to have actual genital sexual intercourse but a felony for them to have oral relations.

I mean, it is easy to keep your eye on the main objective, which is criminalizing certain kinds of conduct, and ignore the actual effect of what we do. And prosecutors and police get stuck with this, and this conduct, since it is generally consensual, doesn't come to light to begin with. But it's kind of nutsy to create a situation in which you look at it and say, gee, if somebody happens to, you know, if some diligent police officer happens to catch these folks in the back of a car, this is a felony.

I think we need to be careful, and maybe the thing that only seemed to me, at least, at that time is

widening that gap a little bit so that you get enough years between the parties' ages so that there is some reason to believe that there's the typical statutory rape situation, a difference of age and experience and authority which does lead to compulsion.

REPRESENTATIVE RITTER: If I can just say, too, on the issue of the age of consent, that's in this bill, when we first introduced it I mentioned that the reason we came up with putting an age of consent into law is that PCAR found during their research that there are court decisions that hold that a child under the age of 14 has to be proven competent to testify in court, which is why we reversed it to say the child has to be proven incompetent, but at the same time there were court decisions that set the age of consent at nine or ten; that a child, say, 10 or 11 years old was capable of consenting to sex but by other court decisions was not capable of testifying in court about it. We thought that just didn't make any sense at all so that's why we set an age of consent.

And I want to, if we're going to have age of consent, we need to say that's the age of consent. You can't consent if you're less than that, legally, and that may cause some other problems. But to fix the problem of the testifying and also to say that there is going to be an age of consent.

REPRESENTATIVE HECKLER: Again, the courts, my understanding, and I haven't prosecuted cases for a while so I get way behind on this, the courts don't have the right to set the age of consent. They certainly have everything to do with the competency of witnesses, but --

REPRESENTATIVE RITTER: But they have held that a child in the particular cases was capable of consenting if that was the defense that was argued, even though the child was 10- or 11-years-old.

REPRESENTATIVE HECKLER: Well, we would have to look at those cases. But I think it would be helpful for us to sit down and make like a time line, you know, actually figure out the effect, because you can get some unintended effects.

REPRESENTATIVE RITTER: Right. Anybody else?

(No audible response.)

REPRESENTATIVE RITTER: Thank you very much.

Now we have with us Commissioner Maryann Conway from Schuylkill County.

MS. CONWAY: I've been sitting in my seat rutching around waiting to raise my hand and here is my chance.

Before I begin my formal remarks, I hate to do this to you, but can I talk a little bit about that age question?

REPRESENTATIVE RITTER: Yes.

MS. CONWAY: The cases that you're talking about are Commonwealth versus Baldwin and Commonwealth versus Rhodes, okay? And then there's a line of cases that followed them, but Baldwin and Rhodes came down about I would say 10 years ago, or so.

And I want to correct Ms. Ritter. They didn't say that beyond a certain age a child is capable of consenting. What they said was that under a certain age a child will be presumed incapable of consenting, and there's a little difference there. Okay?

The age that they set was eight. Now, that's not to say that when a kid reaches the age of nine they are automatically capable of consenting. It just happened that in both of those cases the child was eight-years-old, okay? So what they said was this child is eight-years-old, we are going to presume that this child is incapable of consent.

Now, so what you're doing by raising it to 14 is getting into some real muddy area, because I think Mr. Baker is right. Kids 13 and 14 are, you know, they really are able to consent to have sexual contact with one another. Moms like me don't want to think that, but it's true. So you have to be thinking in terms of an age below which a child will be presumed incapable of consenting, and I would suggest that you think in terms of looking at Baldwin,

looking at Rhodes, Shepardizing it and I think you'll come up with a line of cases that the court will agree with you on, because they've already sort of de facto made case law at that age.

Okay. So now that I've said that.

One other thing I wanted to say, and that is I think the ACLU remarks are very well taken, especially in the areas where the language may be overbroad with regard to incompetent -- not incompetent. What's the word? Incapacitated people.

REPRESENTATIVE RITTER: I definitely agree with that.

MS. CONWAY: But I also think that Mr. Baker, his suggestion is good. Don't delete it. Just move it, and it's very clever and you'll do what you want to do without condemning all these poor people to celebacy.

All right. Thank you for inviting me to come and speak with you this morning. I'm delighted personally and professionally to be here. My resume appears at the back of the comments.

Very briefly, I'm presently a county commissioner. I've been a county commissioner for three months. I've been practicing law, however, for 20 years. Started as a criminal defense attorney with the Defenders Association of Philadelphia, and went over to the Attorney

General's Office in Philadelphia where I was an Assistant Attorney General in the office of the special prosecutor. Shortly after that, became an assistant district attorney in Pottsville, and I've been an assistant district attorney for 15 years. For the past five years, I was first assistant under Claude Shields in Pottsville. I also maintained a private civil practice for about 10 years with the majority of my practice in family law.

Now, what I did in the DA's office and I think probably the reason why we're sitting here is because we've seen this mushrooming of child abuse and this incredible increase in reports of sexual assault over the past few years.

When I started out on the DA'S office 15 years ago, I may have had one rape case or one child abuse case maybe a month. By the time I finished in the DA's office in December of this past year, I was -- and Schuylkill County is a very small county, it's got 150,000 people in it, very small -- I was getting anywhere from five to ten sexual assault cases a week. And that's running the gamut, that's all the way from rape all the way down to the most minor indecent assault. We were swamped. So I'm very happy that you have done this wonderful effort to amend our sexual offense statutes.

I had a pretty good conviction rate while I was

practicing in the DA's office. However, notwithstanding the conviction rate, I have long felt that our sex crimes laws needed change, from the definition side, from the procedural side and from the sentencing side. And apparently I'm not alone, because Representative Ritter has responded to that need.

This bill goes a long way toward alleviating the frustrating, absurd or tragic situations that the present law sometimes fosters and often allows to take place. So what I would like to do very briefly is to discuss the various amendments by using examples, and I will avoid using names because these are real cases that we really prosecuted in Schuylkill County.

At present in Pennsylvania rape is rape. If there was a sexual intercourse and there was no permission and there was some degree of coercion, that was a rape, a felony of the first degree punishable by up to 20 years in jail with a mandatory minimum sentence of three years in prison.

About four years ago, a lady was brutally raped both vaginally and anally by two men on a stripping bank. Then her throat was cut and she was left, like so much garbage, to die. The two men were charged with rape and an assortment of other crimes and convicted, and no one had any problem calling this rape.

But about two years ago, a 17-year-old girl drank a little bit too much at an all-night party. She fell asleep, and when she woke up, she was being undressed by her host, who happened to be 18. She protested that she did not want this to happen, but she didn't fight him and she didn't scratch and she didn't kick and he didn't have to hit her, and he did succeed in having sexual intercourse. Two days later she told her mother.

Now, this case came to our office, too, and of course, the name of the crime was rape with the same 20-year maximum and the same three-year mandatory minimum sentence. With this case, I had no doubt that the young lady had been sexually assaulted without her consent. I had no doubt about the culpability of the boy, but I did have a problem with the punishment and I had a great problem with equating an act like that one with the atrocious conduct of the first.

Under the law as it presently stands, I had to charge that young man with rape. And then for the next six months or so, I had to work with his defense attorney, who was a very capable guy who knew very well that there was no way that I was going to convict his client of rape. On the other hand, the young lady believed that she was raped, and she was, under our law. So we had to make a pretty painful decision, and the bottom line came when her mother and she

both agreed that she couldn't go through a trial. She just couldn't do it, because she just wasn't emotionally strong enough and the facts weren't strong enough to be able to convict that young man of rape. So we reduced it to an indecent assault. The young lady wasn't satisfied, although she understood why we did it.

I wanted very much to educate that young man so that he can have his attention drawn to the fact that this is not civilized behavior. I'm not sure that by convicting him of indecent assault I educated him very well.

So the point is that if you give police officers and prosecutors a greater variety of language describing a crime, we may result with more real justice.

I believe that had I been able to charge the young man with sexual assault under section 3122, we may have successfully tried the case, or equally likely, and if we have a former DA here, you know that defense lawyers are very realistic and if he took a look at the state of the law and the state of the facts, he probably would realize that I would get a conviction under 3122, whereas I probably would not get it under 3123 or 3121.

So that your amendments are very practical because you will make it possible for guilty pleas to be entered, and that has lots of advantages. One of them obviously is that you relieve a 17-year-old girl of the

burden, and believe me, it's a burden, of going through a trial.

You also relieve the court of the burden of going through a trial, and it's an expensive burden, because neither side can concede, and right now, the law makes it so damned difficult to concede, because I had to call that crime something it wasn't. It wasn't an indecent assault.

So you're going to relieve court time, you're going to make it possible to get convictions, you're going to make it possible to get guilty pleas. You're also going to save probation departments a lot of time, because right now when we have guilty pleas or convictions and there are mitigating circumstances, such as the young lady was half drunk, the young lady was asleep, the gentleman probably thought she wanted all this because she wasn't effectively protesting, probation departments right now have quite a time doing presentence evaluations with young men like this. And it happens a lot.

So I'm suggesting that when you make your language more precise, you make it possible for a probation department to do a more efficient job, and that's going to save the Commonwealth money, which is always useful.

Finally, and I'm putting this in here although you notice I have a caveat. It's arguable that this bill may have a side effect of reducing the prison population

somewhat, since the numbers of sexual assaults are statistically much higher than the number of aggravated sexual assaults. In other words, mandatory sentences for a felony 2 are significantly lower than for a felony 1. That is, 4 months as opposed to 36 months. And assuming that there are cases at present where date rapes are being convicted as a felony 1, the lengths of those sentences in the future should go down.

However, I thought Dr. Kramer was going to be here to talk about the sentencing aspects. It is arguable also that this bill will have no effect or it may even increase prison populations because you might wind up increasing convictions. So I don't know. I'm not an expert in that area.

Now, I wanted to talk about children, because in the last five years, if anything, I've become something of a specialist in helping children get through this process. One of the most difficult parts of prosecuting assaults on children is the requirement that children understand the nature and meaning of an oath under Roche versus McCoy. Those of you who have ever prosecuted a child abuse case know that it's conceivable that the most very difficult part of your entire process is qualifying the child. And I see where one of us is nodding our head.

Sometimes prosecutors run dangerously close to

subborning perjury because you have to educate many children with regard to God and what an oath is. And if you have an intelligent child, she will listen to you and parrot it right back to the judge. And you're sitting there saying thank you, God, thank you, God, except you know that kid still doesn't understand what an oath is. But the law requires it and so we jump through that hoop.

If you have a child who's not very intelligent, you wind up having the child not be able to tell the judge what an oath is, even though you just spent the previous two hours trying to teach the child what an oath was, and you wind up with the defendant having committed the perfect crime, because you've got a witness who is not permitted to talk.

So what you've done by relieving children of the obligation of making a meaningless act below a certain age, is very, very useful, and I thank you for that. That's not to say that you're relieving children of the obligation to tell the truth, and I do think that an intelligent judge will be able, by way of intelligent examination, sensitive examination, hopefully, of the child, to tell whether or not the child understands his obligation to tell the truth.

And that brings us to the next section of your bill, and that is the section about I think the word is moving along with dispatch or something like that. I did

want to talk a little bit about that, because I know your previous bill did have a section in it about how long an examination of a child should take.

I don't have a problem with your bill, although I know you took the language out, but I did want to tell you about my three-year-old. She was the youngest victim I've ever had. When she was raped she was two and a half. She was apparently raped both anally and vaginally, so that there were, I hope I don't gross anyone out, there were scars on her vagina and her anus the size of quarters. The defendant had significantly enlarged both orifices so that the pediatrician had no difficulty saying that this was a sexual assault.

So there were only two questions that I needed to ask that three-year-old: Who did it and how was it done. Two questions. That three-year-old was on the witness stand from 9:30 in the morning until four o'clock in the afternoon getting qualified. In my talk here, I would say the qualification occupies about 150 pages of transcript. In the middle of the qualification at about two o'clock in the afternoon, the child fell asleep on the witness stand. She was sitting in a little chair. She just conked right out. And if you read the transcript after that, you realize that even though she was awake, her eyes were open, after that her answers were meaningless.

The only reason that we managed to get through that was because there was a wonderful judge, Judge Wilbur Rubright, terrific guy, knows kids, and said, this kid's telling the truth, I don't have a problem with it, and he qualified her. And believe it or not, the Supreme Court has affirmed. So it is possible to have a witness fall asleep and you can still get a conviction.

The point is that it shouldn't be necessary for a three-year-old to go through an eight-hour examination. That's ridiculous. It's absurd. And if you don't have somebody like Wilbur Rubright on the bench, you might even wind up not having a victim. Okay?

So I thank you for making it easier to qualify a child. I was hoping that you would possibly throw in some language cautioning the court about the fact is that very, very young victims get tired, but I do think that your language about allowing continuances judiciously is very wise.

Those of you who have prosecuted also know that when you're dealing with very young victims, they tend to forget. They tend to forget what has happened to them. Defense lawyers know this, too. And I'm not saying that defense lawyers are cynical, because that's unfair to the defense bar. But they do have an obligation to represent their clients vigorously, and one of the ways they do it is

by filing a series of motions.

Ordinarily, under the Omnibus Pretrial Motions section of the Title 42 which is criminal procedure, all motions are supposed to be filed at the same time. The trouble is that naturally courts want to protect the rights of a defendant to a fair trial, and so if you have an imaginative defense attorney, you still can have a series of motions, and you wind up having delays. And that means that a little child, say, four- or five-years-old, doesn't see anything happen with his case for as long, let's say, as a year, and in the meantime the prosecutor, namely myself, and the counselors, have to keep reminding this child of what happened to him, when all you want to do is have him forget it. And at the age of four or five, psychologists will tell you it is possible that children will largely forget what happened to them. Not all of it, understand, but they can actually heal. But not when you keep reminding a kid every month, do you remember what daddy did, well, do you remember what daddy did? That's not what we do, but I mean, that is, in fact, what we're doing. That's so unfair to a child. It is cruel. And our system permits it.

So if we can encourage the judiciary to limit the amount of time that this takes, I think we will not be violating any constitutional rights as long as it's done reasonably. And besides, let's face it, laws require them

to file all their motions at once, anyhow, so let's just require them to do it.

Okay. Finally, expert testimony. There's a case in Pennsylvania called Commonwealth versus Seese. Commonwealth versus Seese is also about 14-years-old, and there is a line of cases that have followed Commonwealth versus Seese. Commonwealth versus Seese has made Pennsylvania an anomaly among the 50 states, because we permit testimony regarding rape trauma, we permit testimony regarding post-traumatic stress, we permit testimony regarding battered wife syndrome, but our courts do not permit testimony at the present time regarding the characteristics of abused children, under the rationale that such testimony, quote, bolsters the credibility of the child.

Any of you who have ever tried cases know that all testimony is designed to bolster the credibility of someone. That's the whole idea of presenting testimony. And I have many times wanted to scream in frustration with these nonsense Supreme Court decisions that come down and say you can't bolster the credibility of a child, and you see this tiny thing sitting there and telling you that he recanted three times and some juror is going to think that kid is lying, but the juror doesn't know that that's what children do. They're not lying. They're scared to death.

Okay?

So if we can have someone come in and say, children don't tell right away, they are not adults, they don't know what you've just done to them. No one has told them what sexual intercourse is so how can they know that they're supposed to tell?

Now we have good touch, bad touch. I have rape counselors telling me that even good touch, bad touch does not always get kids to tell, for many reasons, and I've listed some of them here. They recant because they've been removed from their homes. They fear the loss of the love of their abuser. They don't want to see their family destroyed, which, in fact, that's what happens. They think they are guilty of something.

Sexually abused children allow the abuse to go on for long periods of time because they like the attention and the love that they think they're getting. They think this is love. Until they get to be around 14 or perhaps 12, they don't know that they're being used. And then someone in health class at about the age of 11 or 12 tells them that's sexual intercourse, you're supposed to be having babies, husbands do that to wives, and all of a sudden this little girl sits there and realizes that she's been having sexual intercourse for the last five years. And even then she may not tell. She might tell a girlfriend, she might

tell a friend's mother. Mommy's the last person she's going to tell. Okay?

And these are things that experts reasonably can tell juries. I got so annoyed, as a matter of fact, at the Supreme Court one time about 10 years ago, that I spent a great deal of the county's money by putting this question into Lexis at the Jenkins Law library in Philadelphia, and I discovered that even 10 years ago Pennsylvania was in the minority. Then we decided not to take it to the Supreme Court.

By the way, I'm going to stop.

But that's another horrible case. I started out with a 12-year-old who was testifying about a rape that had happened when she was eight, and our Superior Court, I did use physician's testimony because there was no law about that just then, Superior Court says, nope, that's expert testimony designed to bolster the credibility of a child. You have to retry the case.

Took me four years more. She was 16, and she had to go through it all over again. But she did and we got a conviction and the gentleman is still in jail. But now that's the sort of nonsense that children should not have to go through. Okay?

The last thing I did want to suggest to you is mentally retarded folks, they are very childlike, and if

you're talking about dispensing with the requirement of oath taking for children under 10 and making it easier for children under 10 to be qualified as witnesses, I'm respectfully asking would you consider including some language about retarded people.

I did have a 36-year-old with the mentality of a six-year-old who had a great deal of difficulty understanding why she wasn't just allowed to tell what happened. And that was Judge Rubright, again. And she turned to him and she said, but I am telling the truth. And he said, I know you are. Everything was all right, we got another conviction, but that was tough. And you ought to consider that.

REPRESENTATIVE RITTER: I'm glad you brought it up, actually, because I think we've had so many discussions for so many hours on this bill, and I do remember that we broached that subject at one point and then it just never got put on paper. So yeah. I just looked at your testimony. That's right, we did miss that. So I definitely did want to do that.

MS. CONWAY: Yes, because they're like children.

I think that's all I wanted to say. If anyone has any questions.

CHAIRMAN CALTAGIRONE: No.

REPRESENTATIVE HECKLER: I just wanted to thank you very much for your testimony. You have converted me to the virtues of this approach to the legislation.

As to the subject you just touched on, retarded persons, I would suggest that, again, we say that and we picture a certain kind of individual that that net may get tossed over an awful lot of different people with an awful lot of dysfunctions and disabilities. Perhaps it would be appropriate to require some kind of expert testimony in that situation to --

REPRESENTATIVE RITTER: Physician certification.

REPRESENTATIVE HECKLER: Yes, exactly.

MS. CONWAY: Also I would pick an age, a mental age or some such thing, or an IQ.

REPRESENTATIVE RITTER: Or a comparable.

REPRESENTATIVE HECKLER: I'm not sure how readily, given the various different kinds of dysfunction, how readily quantifiable that is down to a, which is why I would suggest some kind of physician involvement.

I thought I had one question along the way but I think that covers it. Thank you very much.

MS. WOOLLEY: Thanks for your testimony. I would like to ask you a question about evidence relating to the manner in which the victim was dressed.

MS. CONWAY: Go ahead.

MS. WOOLLEY: In my discussions with members, legislators, a number of whom are former district attorneys and some of whom are criminal defense lawyers, in addition to discussions with district attorneys, several of whom are women, we've had some pretty feisty discussions about the merits of this section. And there are women district attorneys who have talked to me who feel strongly that a woman's dress, be it be tight and fairly short black dress and the matching panties is indeed relevant and should not be excluded.

MS. CONWAY: I can't agree, sorry.

MS. WOOLLEY: I don't mind. I'm not advocating that position, I'm just curious about your thoughts.

MS. CONWAY: Dress used to be language, and perhaps as much as 40 years ago or more, dress definitely communicated messages. Nowadays dress is still language but it communicates different messages. So that right now I look like Mother Teresa, but if I were going out in the evening I would want to look pretty sexy, but that doesn't mean I want to have sex with Joe Blow who sees me on the corner. Okay?

So I think while lawyers who talk about dress, I think they're telling us more about themselves. So I think I would say that nowadays, since your bill really is designed to bring us into the 20th century, to the late 20th

century in Pennsylvania, I think we must also acknowledge that communication by way of dress in the late 20th century has changed, too, and therefore, drawing messages from it is dangerous and I submit irrelevant.

MS. WOOLLEY: Thank you.

REPRESENTATIVE RITTER: Anybody else?

(No audible response.)

REPRESENTATIVE RITTER: Thank you very much.

MS. CONWAY: Thank you.

REPRESENTATIVE RITTER: The meeting's adjourned.

(Whereupon, the hearing was adjourned at 12:22 p.m.)

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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.

Emily Clark

Emily Clark, CP, CM
Registered Professional Reporter

The foregoing certification does not apply to any reporduction of the same by any means unless under the direct control and/or supervision of the certifying reporter.

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