
Testimony of Mary B. Seiverling

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Before the
House Of Representatives
Committee of the Judiciary

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Mr. Chairman, Members of the Committee, my name is Mary Benefield Seiverling. Appearing with me is Joe Curcillo. We are Deputy Attorneys General under Attorney General Ernie Preate, Jr. I am an attorney assigned to the Appeals & 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.~~

The testimony this Committee is receiving on this topic is very 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 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. See Attorney General's Report: Violence Against Children (Jan. 1987) at pp. 40-45. Some of these, with modifications, have become law. See e.g. Act No. 4, P.L. 6 (Feb. 2, 1990) (amending inter alia 18 Pa.C.S. § 3101 definition of deviate sexual intercourse to include penetration with "a foreign object;" amending 18 Pa.C.S. §§ 3125 and 3126, increasing the grading of indecent assaults and aggravated indecent assaults against minors;

amending 18 Pa.C.S. § 5902, to render patronizing a prostitute a third degree misdemeanor if the prostitute is a child under 16); and see Act No. 158, P.L. 1275 (Dec. 19, 1988) (amending inter alia the provisions of sexual abuse of children statute at 18 Pa.C.S. § 6312).

After completing the report Violence Against Children, the Task Force continued work and in September 1988, issued its report on ~~Violence Against Elders~~, followed by issuance of the ~~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 crimes. In 1987, during his tenure as the 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 re-victimized 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 toward 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, H.B. Nos. 1414-1433, 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 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 Attorney's Association (PADAA) and individual County District Attorneys have successfully continued the role of training and education of prosecutors, police and child protection agencies and it continues today. This training is evidenced by the numerous specialty seminars offered by the 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 formulation of some of the amendments, which Representative Ritter has prepared. Joe Curcillo and I worked with the Pennsylvania Coalition Against Rape, and have helped to produce the document that I understand has been circulated to the Members of this Committee.

In our meetings and discussions with representatives of the Pennsylvania Coalition Against Rape and with Representative Ritter, there appeared to be a general agreement with regard to the goals, which the proposed legislation sought to achieve. We agreed that the criminal justice system must "ensure that incidents of domestic violence receive the vigorous response that once was reserved to crimes perpetrated by strangers." Attorney General's Domestic Violence Protocol, supra (at vi); 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 interests 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 H.B. 2302 furthers these goals appreciably. Our primary concerns in review of this legislation have been its impact on victims and the need to facilitate and encourage prosecution. Nonetheless, we believe that 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 proposed in H.B. 2302. The bill is designed to overhaul Pennsylvania's rape law. The proposed revisions begin with amendments to the definitional provisions of existing law.

Section 3101. Definitions.

Consistent with the goal of establishing gradations of the offense of sexual assault, the definitional provision outlines a list of six "aggravating circumstances." The presence, or lack thereof, of an aggravating circumstance will be used to determine whether a sexual assault is graded as a second degree or first degree felony. All rapes, except statutory rape, are presently classified 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 the "physically helpless," "mentally disabled" or "mentally incapacitated." The definition of these terms is taken from New Jersey law. See N.J. section 2C: 14-1(h)(i). In fact, each of the proposed provisions finds a counterpart in state law elsewhere according to the research of the Pennsylvania Coalition Against Rape.

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. See e.g. Commonwealth v. Rhodes, 510 Pa. 537, 510 A.2d 1217 (1986)(forcible compulsion defined as including not only physical force or violence, but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against the person's will)). See also Attorney General Report: Violence Against Children, p. 40 (declining to make statutory recommendation with regard to defining consent based upon the sound and ~~comprehensive approach of the Pennsylvania Supreme Court in Rhodes~~).

In an attempt to further clarify sexual offenses, the amendment defines sexual act to include prior definitions of deviate sexual intercourse and sexual intercourse.

Section 3102. Mistake as to age or condition.

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.

These 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 the victim provoked the offense. Section 3109 defines the conditions which constitute incapacity to consent 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 test, 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. Sexual Assault.

These are the key provisions of the bill. These sections replace current proscriptions against rape, involuntary deviate sexual intercourse, and aggravated indecent assault. The clarity and simplification of the law as proposed is laudable. 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 §3122 is deleted. The separate prohibition against spousal assault now found at §3128 is also deleted. These crimes are subsumed in the sexual assault sections. Voluntary deviate sexual intercourse now prohibited at 18 Pa. C.S. §3124 is de-criminalized.

Aggravated indecent criminal assault, now found at 18 Pa. C.S. §3126, 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 presence.

~~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, it would be a felony of the first degree if an aggravating factor was present or if the victim was 13 years of age or younger under the proposal.

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. (Compare proposed section 3124(c) with present section 3126(b).) 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."

Section 3125. Sexual exploitation of child.

This important provision 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 the sexual activity is not as a business.

Sections 5989 and 5990.

These sections 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 well being 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, i.e. **Senate Bill 1115**, that presently is on the tabled 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 the 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 witness.

The last substantive provision is section 5991. 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.

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