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COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

In re: House Bill 160, Codification of Sex Crimes

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

Wednesday, September 1, 1993, 10:00 a.m.

HON. THOMAS R. CALTAGIRONE, Chairman

MEMBERS OF THE COMMITTEE

Hon. Karen Ritter
Hon. Albert H. Masland, Jr.
Hon. Michael C. Gruitza
Hon. Jerry Birmelin
Hon. Robert D. Reber, Jr.
Hon. Christopher R. Wogan
Hon. Tim Hennessey
Hon. Dennis O'Brien
Hon. Pete Daley

Also Present:

William H. Andring, Chief Counsel to Committee

Kenneth Suter, Counsel to the Committee

Galina Milohov, Research Analyst

Reported by:
Emily R. Clark, RPR

I N D E X

CHAIRMAN CALTAGIRONE: This is the House Judiciary Committee. I'm Chairman Tom Caltagirone of Berks County.

I would like to start today's hearing and I would like the members and staff that are present to identify themselves. We will have additional members that will be joining us, but rather than wait, I think it's time that we get started. We're going to be dealing with House Bill 160, and if those that are here would introduce themselves, please.

MS. MILOHOV: Galina Milohov, research analyst.

MR. SUTER: Ken Suter, Republican counsel.

REPRESENTATIVE RITTER: Karen Ritter, member from Allentown.

MR. ANDRING: Bill Andring, chief counsel to the committee.

REPRESENTATIVE MASLAND: Al Masland, Cumberland County.

REPRESENTATIVE HENNESSEY: Tim Hennessey, Chester County.

CHAIRMAN CALTAGIRONE: And Representative Jerry Birmelin has just joined us.

I would like to start off with comments from the prime sponsor of the bill, Representative Karen Ritter.

REPRESENTATIVE RITTER: Thank you, Mr. Chairman.

House Bill 160, which was introduced in February

of this year, proposes major changes to the current sexual offenses law in Pennsylvania. It's been 20 years since we last comprehensively reviewed these laws. In that time, we've learned a great deal about the nature of sexual assault and abuse. So it is certainly time that we update our laws to bring them in line with the things we know and understand about the nature of these crimes.

The increased reporting of attacks and abuses has focused much attention on the prosecution of a case, and we have seen played out in courtroom after courtroom, some of the inadequacies of our laws. This legislation, requested by both prosecutors and victims, reflects our new attitudes and thoughts on sexual assault.

Many of the changes I'm proposing will protect victims of sexual assault from being victimized a second time in the courtroom. Additionally, this bill provides greater protection for child victims. We need to change the manner in which we handle child victims in the prosecution of a case by making accommodations for their unique circumstances.

This legislation was introduced in the previous session, but it's been substantially changed since then. Prior to its initial introduction in the 1991-'92 session, the legislation had actually been in the works for about ten years.

PECAR, the Pennsylvania Coalition Against Rape,

had done quite a bit of research on laws in other states as well as discussing with prosecutors and other law enforcement folks in Pennsylvania the deficiencies in our law.

Since the introduction of the first bill in January 1992, we've continued to do more research and talk with many other people involved in law enforcement.

One of the most helpful sources has been Attorney General Ernie Preate's office, especially Fran Cleaver and her staff. The Attorney General's office was particularly helpful in suggesting some excellent modifications to the bill which has resulted in making it much more efficient and effective. House Bill 160 as it was introduced in February of this year reflects those modifications.

I've attached to my testimony a short summary of the major changes to the sexual offenses statutes proposed by this legislation, as well as some newspaper articles and editorials which appeared across the state.

The major change in this bill involves renaming the crimes of rape, involuntary deviate sexual intercourse, and aggravated indecent assault all under the category of sexual assault. This was done by defining a sexual act to include all of the activities currently defined under those separate crimes, and then defining sexual assault as occurring when the defendant engages in a sexual act with another person by forcible compulsion or threat of forcible compulsion.

The other major change that's been hailed by prosecutors as a long-needed change that will help them get more convictions and with more serious penalties is the fact that there will be two classes of sexual assault. That is, sexual assault and aggravated sexual assault.

Aggravating circumstances which would make the charge aggravated sexual assault are defined to apply when the defendant is armed with a weapon or an object fashioned to lead the victim to believe it's a weapon, and threatens by word or gesture to use that weapon or object; he inflicts serious bodily injury upon the victim or anyone else in the course of the committing the offense; if the defendant commits the sexual act during the commission or attempted commission of any other felony, such as kidnapping; commits the act upon a victim who is mentally disabled, mentally incapacitated or physically helpless, all of which are defined in the bill; serves in a position of authority in respect to the victim; is a family member of a victim under 18 years of age; or, if the defendant and one or more other persons engage in a sexual act with the victim without consent.

Aggravated sexual assault will be a first degree felony and sexual assault will be a second degree felony. Now, some people have looked at that two-tier penalty and decided that this bill is bad for people who are victims of what is commonly called date rape or acquaintence rape because

the penalty is lower if no aggravating circumstances are present than the first degree felony penalty which currently applies to rape.

On the contrary, however, the bill, which has the full support of PECAR and their representatives here today, of that organization, the bill shows that we consider acquaintence rape to be a more serious crime than simple assault, which is what, if charges are even filed by the prosecutor, is what it's often plea bargained down to.

Acquaintence rape cases are very difficult to prosecute because of the severe penalty and the jury's propensity to look for weapons, serious injuries and so on in order to convict. As a prosecutor who testified in favor of the bill at a Judiciary Committee hearing in the last session said, this change will enable more sexual assault victims to get justice because it will ensure that their assailants are convicted of a more serious crime and one that makes them guilty of a sexual offense rather than simple assault.

The public's perception is that date rape or acquaintence rape really isn't sexual assault, and this law will show that that perception is wrong.

Other major changes include elimination of the charge of spousal sexual assault. Up until 1984, the law said you couldn't sexually assault your spouse. In 1984 the law was changed, but spousal sexual assault, regardless of whether

or not a weapon is used or other serious bodily injury is inflicted, is currently a second degree felony just like incest. In other words, current law in Pennsylvania says it's a lesser crime to sexually assault a family member than it is to sexually assault a stranger. We think it's more appropriate to base the punishment on the nature of the assault or the age of the victim rather than on the relationship of the victim to the defendant. And so this bill would treat spousal sexual assault the same as any other sexual assault.

Also, there's a section in the bill, Section 3109 called Condition Constituting Incapacity to Consent. This section says the prosecutors would not be required to prove that forcible compulsion was used to commit the sexual assault if the victim was 13 years of age or younger. This establishes the minimum age of consent for most sexual assaults that does not now exist. In fact, there have been court cases holding that children as young as nine years old are capable of consenting to sex and, therefore, the prosecutor must prove, for example, that the ten-year-old victim did not consent to sexual activity with his or her father, because there is no age of consent for incest in our current law.

This legislation says that children thirteen years of age and younger are not capable of consenting to sexual

acts and, therefore, that the prosecutor does not have to prove that the victim did not consent to the activity charged. It doesn't change the penalties or the circumstances for charging these crimes. It doesn't say that all children 14 years old and older are going to be considered automatically capable of consent or to have consented to a particular act. The only thing that will be charged will be the burden of proof on the issue of consent. Children age 14, 15, 16 and older will still be able to prosecute sexual assailants who use forcible compulsion, which includes intellectual, moral, emotional or psychological force, as well as physical force.

Some of the members of this committee have expressed to me concerns that 14 is too young for this age of consent. As I said several times during the last campaign, when my opponent continually harped on this issue, the Attorney General and I chose age 14 because we felt that it was a minimum age, that no one would argue that it should be lower. Also, since it's my understanding that this state recognizes common law marriages made by 14 year olds, and since the statutory rape law has used age 14 as the age of consent, we felt that that age would provide some consistency under the law.

However, I'll say again as I also said several times during the campaign, if there is a consensus among the

members of this committee, the members of the House, the members of the Senate, wherever the bill ends up, that the age should be higher, I will support that. I have no problem with whatever age this General Assembly would decide is appropriate.

You need to remember, however, that since we've eliminated the requirement in this bill for the defendant to be 18 or older, as is in the current statutory rape law, we could have some 14-, 15- or 16-year-old boys facing first degree felony sexual assault charges for having consentual sex with their girlfriends if the girlfriends are under the threshold age. So we need to keep that in mind as we consider that part of the bill.

We've also created a new crime called Sexual Exploitation of a Child, which is procuring a child for purposes of engaging in sexual activity with another person, and has a penalty of a first degree felony. This is to deal with situations such as children being given to someone for use for sexual activity in exchange for drugs, money, et cetera, that are often separate and apart from pornography rings or prostitution. After discussions with my local prosecutor of sex crimes and a police officer who deals with child sexual abuse cases, a suggestion has been made to rename this crime as Sexual Procurement of a Child, and divide it into two levels: A first degree felony and a second degree

felony for forcing the child to perform different types of sexual acts, bringing different penalty levels.

We would then add another crime called Sexual Exploitation of a Child, which would apply to those persons who knowingly allow or force a child to watch any sexual act, whether live or on videotape, and that would be a third degree felony.

This is not intended to apply to those parents whose children accidentally walk into their bedrooms, but to those parents who, as part of a pattern of sexual abuse or the beginning of such a pattern, force their children to watch them or other persons having sex.

Also under this bill, incest has been redefined to cover only knowing and concensual sexual activity between relatives, most commonly cousins, I would suppose, and is therefore reclassified as a misdemeanor. This would force prosecutors to charge any sexual victimization of a child under Chapter 31 as a sexual assault, which said any family member, it would be a first degree felony if a family member assaults a child under the age of 18.

This would guarantee that all sexual offense cases are governed by the special provisions of Chapter 31, such as the rape shield law and so on, but would also guarantee that the penalty for sexual assault of a minor family member would be increased and have the same penalty as the sexual assault

of a minor who is a stranger.

Several changes would make it easier for child victims or witnesses to testify in court. The major change addresses the competency of child victims or witnesses to testify. Some court rules have declared a child to be considered incompetent to testify unless otherwise proven if the child is below age 14. This is particularly ironic in view of the cases that have held that children as young as nine years old can be considered competent to consent to sexual acts as I mentioned earlier.

This means under current law, you could have, for example, a 10 year old who the court might consider old enough to consent to the sexual act being charged if that's part of the defense, so the prosecutor would have to prove lack of consent in order to get a conviction. Yet, that same youngster would have to be proven competent to testify about that act in court because the court would presume the child is not competent to testify unless otherwise proven.

This legislation would deem child victims of sexual assault, abuse or neglect, to be competent to testify unless proven otherwise. And there are conditions in the bill which would allow the court to declare that child to be incompetent. Prosecutors and police officers who work with child victims say this could save most children as much as a full day in court.

Now, also, in cases where the criminality of the conduct depends upon the child victim being below a certain age, including producing or distributing child pornography, this legislation would eliminate as a defense the defendant's ignorance of the child victim's age, misrepresentation of the child's age by the child, or the defendant's belief that the child was older. In the case of child pornography, the age for a child to participate in pornography would be raised under this bill from 17 in current law to 18.

Legislation would also set the statute of limitations for all sexual offenses at five years. Currently some offenses are five years and some are two years, so they would all be five under this bill, and the statute of limitations for all these crimes would not begin until a child victim reaches age 18.

Those are the highlights of the legislation. I would like to when we get -- later on as we have the testimony here and also as part of the roundtable discussion, I would be happy to discuss any of the points that are of concern to the members of the committee. But I think we can make significant and meaningful changes to the sexual offenses statutes and we can protect the victim without trampling on the rights of the accused. In fact, as I said, a lot of the changes that have been made since the original introduction are intended to address concerns expressed at the previous hearing by the

Defenders Association and the ACLU in their testimony. We'll hear from them today to see whether or not we were successful in eliminating some of their objections and see how many they still have left.

I'm not suggesting that we throw out our whole body of law on sex crimes. Rather, I'm suggesting we base our laws on what is proven and not what is mythical. Sex crimes are unique on the one hand, in that the violation a victim feels is all-encompassing. Yet they are no different from any other crime in that the criminal should be punished and the victim should be protected.

This bill intends to see to it that sexual offenders are adequately punished and that their victims are not subject to further victimization by the criminal justice system. Thank you.

CHAIRMAN CALTAGIRONE: Thank you, Representative Ritter.

We do have Representative O'Brien and Daley that have also joined the panel today.

We'll next hear from Suzanne Beck-Hummel, Lehigh Valley Crime Victims.

MS. BECK-HUMMEL: Good morning. My name is Suzanne Beck-Hummel and I'm very pleased to be here providing support of House Bill 160.

Crime Victims Council of Lehigh Valley is a

comprehensive victims center serving all victims of violent crime for the past 20 years. As executive director of this organization, I've not only seen the devastating destruction that crime can have on an entire family but also the emotional turmoil that it can cause child victims.

I personally have accompanied a six-year-old girl to the hospital emergency room for her first pelvic exam following the brutal rape by her uncle. I've sat in a courtroom with a mother while her 12-year-old daughter explained to a room full of strangers how two teenage boys shoved her into the woods behind her bus stop and brutally raped her. I've sat in high school classroom presentations and listened to young women discuss the emotional coercion, manipulation and pressure used by their boyfriends even after they've said no to their sexual advances.

Last year, Crime Victims Council served 536 victims of sexual assault. Almost 40 percent of these victims were under the age of 18. People are always shocked when I share that stastic, and I have trouble understanding why. Who do you think is the easiest target for a perpetrator of sexual assault? Who is the most vulnerable victim? Who needs the most protection? It's children.

As executive director of a victim center and as a victim advocate who has heard first-hand the violent, vicious and vile acts perpetrated against people who are your friends,

your neighbors, and your relatives, I urge you to support House Bill 160. The last major revamping of Pennsylvania's sexual offense laws took place in the early 1970s, and it is reprehensible to think that our knowledge of sexual victimization has not increased in nearly a quarter of a century. Representative Karen Ritter's proposed legislation provides for greater response to sexual violence, not only by expanding the laws, but also by strengthening the protection under the laws, especially for children.

This legislation addresses the ongoing dilemma of endless continuances in the criminal proceedings involving child victims and witnesses. It indicates that the court must consider any adverse impact that granting delays will have on a child. Is this truly asking for too much? Ongoing continuances are a form of intimidation and re-victimization of children, and the defense knows this and uses it very well. Providing testimony in court is a difficult experience for anyone. Imagine how traumatic it must be for a child who must do this in front of their attacker. The stress, nightmares, fear and terror that we are making our children, our most vulnerable citizens, endure over and over and over again is unconscienable.

The initial victimization and then the continued re-victimization not only affects the child's emotional wellbeing but also the child's education, physical health and

development. How can a child concentrate on tomorrow's spelling test when all they've thought about day in and day out for the past several years is this continued court experience? The legislation ensures that a child going through this awful ordeal will experience as little turmoil as possible, so that there is a chance for them to grow into a strong, healthy productive adult.

Another aspect of this bill which will reflect the reality of sexual violence is the area dealing with spousal sexual assault. Why the act of sexual assault should be treated less severely because of a marriage certificate is absurd. Yes, sexual assault by a stranger happens and is a horrible crime. But statistics show that more than 80 percent of sexual assaults are committed by someone the victim knows, including her spouse.

A victim of sexual assault by a stranger or non-relative has five years to bring charges. A sexual assault by a perpetrator with a marriage license essentially has a license to commit sexual assault and get away with it.

A woman in her relationship with her attacker needs more time to bring charges, not less. She needs to secure shelter, financial independence, before she can think about pressing charges. This takes more than 90 days. I can recall a case where a woman called our hotline from our local domestic violence shelter where she had finally escaped the

night before. She had been brutally beaten and raped by her husband 93 days prior. A sexual assault counselor had to explain to this horrified woman that nothing could be done with the sexual assault charges. He had essentially gotten away with the crime.

Sexual assault is sexual assault. Every single aspect of the demeaning act is identical, whether or not it's committed by a stranger or by someone known to the victim.

A final point about Representative Ritter's legislation that needs to be made is around the issue of lie detector tests. Law enforcement officers and prosecutors must be prohibited from requiring sexual assault victims to take a lie detector test as a condition for proceeding with the investigation or for bringing charges. We're not certain about the reliability of lie detector tests and they're not admissible when used with criminals. Why should there be a double standard for victims? Lie detector tests can be controlled and affected by so many different outside factors including emotional state and fear. Very rarely will you encounter the relaxed victim, and of course she's going to fail the test.

We are scaring our victims into not reporting and prosecuting sexual assault. Currently, only 16 percent of sexual assaults are ever reported to the police. Victims are already carrying around a huge amount of guilt and self blame,

and requiring this unreliable form of questioning only adds to these feelings and to the feelings that no one believes them, anyway. Lie detector tests serve to discourage and defeat victims and the prosecution of a crime a large portion of our society doesn't want to believe happens.

In conclusion, I would like to commend Representative Karen Ritter for her patience, perserverance, and persistance in working to bring Pennsylvania's sexual offense statutes into the 1990s. While I was only able to touch on a few points of this legislation, I urge you to support House Bill 160 in its entirety. Thank you.

CHAIRMAN CALTAGIRONE: Representative Wogan also joined us.

Are there any questions from the members of the witness that testified?

No questions. Thank you very much.

We'll next move to Thomas Ritter from Allentown.

MR. RITTER: I would like to thank this committee for the opportunity to testify today. I've arranged my testimony in the form of question and answer because although I've done quite extensive research on this bill, I want to be sure that what I'm looking at is what I think I'm looking at, so I'll move right along.

The first question I would like to ask about this bill is, does this bill reduce from 16 to 13 the age at which

children may legally be seduced for homosexual sex?

REPRESENTATIVE RITTER: No.

MR. RITTER: You're say it does not?

REPRESENTATIVE RITTER: Not from 16 to 13.

MR. RITTER: Well, from 16 to under 14? Would that be correct?

REPRESENTATIVE RITTER: I think, Mr. Chairman, I think what would be easier, because we have a lot of people who want to testify and who have valuable information to provide to the committee, we have a list of your written questions. If I can answer them succinctly when you're finished, I'll do that. Otherwise, I'll provide written answers to you and the members of the committee at some later date, rather than try to get into it now. I think it would be better.

CHAIRMAN CALTAGIRONE: I agree. We do have a very lengthy agenda of a number of very important people that came from around the state to participate in this hearing, and rather than delay the matter with questions, I would like for you to present your testimony. Representative Ritter will, in fact, attempt to answer those very briefly and then at a later date give you written remarks so that we can expedite the process here. I would hope that you would cooperate with us.

MR. RITTER: I will, Mr. Chairman, but I would like to point out that she jumped in on this, and she says

that --

REPRESENTATIVE RITTER: And I made a mistake. I admitted it.

MR. RITTER: Okay. But I think the committee would very much like to know if this bill does reduce the age at which children may legally be seduced for homosexual sex?

CHAIRMAN CALTAGIRONE: It's so pointed out. Please proceed.

MR. RITTER: In my opinion it does. Current age under Section, and this is all, of course, Title 18, Section 3123, Subsection 5, homosexual sex is statutory rape under the age of 16. House Bill 160 would lower this age, and of course, here it depends because the language is not consistent with the current law. If it were consistent, it would say below the age of 14. The House Bill 160 calls it age 13. The same thing is below the age of 14. This is by Sections 3121 and Subsection (b), and the definition of 3109.

Next the question, does this bill reduce the number of first degree counts for homosexual rape? By my reading it does. Under current law, homosexual rape would incur two first-degree felony counts by way of Section 3121, which is rape, and also Section 3123, which is involuntary deviate sexual intercourse, both first-degree felonies. That would be two counts, Felony 1. House Bill 160 would reduce the severity of this crime. This bill would reduce the

severity of homosexual rape to one first-degree count under 3121 and second-degree count under 3122.

Am I misreading that, Representative Ritter?

CHAIRMAN CALTAGIRONE: We would like you to proceed.

REPRESENTATIVE RITTER: I'll answer that later.

MR. RITTER: Okay. Third point. Artists can produce quite accurate drawings of children engaged in prohibited sexual acts, and images of live poses can be scanned into computers and then graphically altered or faxed without ever using videotape.

Would this bill change Pennsylvania law to legalize sexually explicit depictions of children, which is child pornography, which are not photographs, films or videotapes?

The federal child pornography statute, which is Title 18, Section 2251, uses the term depiction no less than six times in what is a very short section of the law. In the recent case of Osborne vs. Ohio, I don't have the final three digits of the citing but it's there, this is 1990, the Supreme Court of the United States went out of its way to say it found no constitutional problems with any state kiddie porn statutes, many more poorly written than Pennsylvania's, including, I might add, Ohio's, which was significantly inferior to Pennsylvania's.

But House Bill 160 removes the broad and effective word depict or depicting or depiction everywhere in 61 or 6312 and substitutes the much less inclusive photograph, videotape or film. Now, you may recall that earlier this year, the feds broke up a ring which was faxing kiddie porn, I think out of York. Faxes and direct computer scans are depictions but they are not photographs, videotapes or films. If you were prosecuting this case under House Bill 160, how would you prove beyond a reasonable doubt that these faxes did not originate from direct computer scans, remembering the burden of proof is on the prosecution?

Accurate paintings or drawings or sketches like those used by the media in trials where cameras are not permitted are depictions but not photographs of videotapes or films. House Bill 160 is an amended version of last year's House Bill 2302. That bill that is last year's bill proposed to exempt from our law child pornography which is possessed, controlled, brought or caused to be brought into this Commonwealth for a bona fide artistic purpose. In other words, House Bill 2302 proposed to legalize child pornography for artistic purposes. Is that correct, representative Ritter?

CHAIRMAN CALTAGIRONE: I would appreciate if you would continue your comments.

REPRESENTATIVE RITTER: We're not discussing House

Bill 2302.

MR. RITTER: Taken together, it would seem these bills are trying to legalize artistic productions like the Mapplethorpe exhibit but featuring children instead of adults. When I say that, I'm fully aware that Mapplethorpe was photographs, but I say, like, in a similar manner to perhaps drawings or whatever. There seems to be an artistic angle to this.

Fifth question. I'm sorry, the fourth. In the 1980 case of Commonwealth vs. Bonadio, the state supreme court overturned Pennsylvania's anti-sodomy law which is Section 3124. Let me read these four subquestions and then answer them all together.

In light of the AIDS epidemic, do you believe the Court's reasoning would be valid today? Do you believe that a municipality's attempts to pass a gay rights ordinance would produce an opportunity for the court to re-examine Bonadio? If the anti-sodomy law stays on the books, would an intact anti-sodomy law overturn municipal gay rights ordinances? In that these ordinances would seek to protect that which is a felony under state law. Would this bill remove the statute's anti-sodomy law from the books? And of course, I think it would. And I think even Representative Ritter would agree with that.

First, it's worth noting that anti-sodomy laws

like Section 3124 are not used by police to invade private bedrooms. Liberals constantly harp on this. They'll say, well, this is police intrusion into private matters. This is not how these laws have been enforced. To the contrary, in each of the cases cited here, the perpetrators flattered the law with some public action.

In Commonwealth vs. Bonadio, which is the 1980 case, two exotic dancers were caught performing sexual acts on customers in a nightclub. In Commonwealth vs. Waters, which was handed down by the state superior court very shortly after Bonadio, an undercover policewoman was solicited for deviate sex.

And in Bowers vs. Hardwick, which is the 1986 United States Supreme Court case involving a Georgia anti-sodomy law, the defendant apparently asked to be prosecuted. The court gives a brief outline of how the case got there and it's not entirely clear what went on, but it's apparent that the defendant asked to be prosecuted in order to test the law and, in fact, the DA tried to decline this offer, he didn't really want to get involved, but for some reason or other, the thing went forward and that's not clear either, why. It's also worth noting, a married couple tried to join Hardwick as defendants saying they engage in deviate sex and were afraid of prosecution. The court told them they had no basis for their fear and denied them standing.

Although 3124 was overturned by the 1980 Bonadio decision, since then, two matters make it quite possible the State Supreme Court might reverse itself, given the opportunity to re-examine Bonadio. One is the AIDS epidemic, unknown in 1980 when Bonadio was handed down. Anal sex is a major mechanism for spreading AIDS and other sexually transmitted diseases put on married practitioners of anal or oral sex at great risk.

Perhaps more significant is the 1986 case of Bowers vs. Hardwick in which the Supreme Court of the United States upheld a Georgia anti-sodomy law saying the states did have the power to pass such acts without infringing on federal constitutional rights. Bonadio was based in part on federal constitutional principles, and it would seem that Bowers would overturn that.

3124 has been overturned for criminal purposes, but a municipality's attempt to pass a gay rights ordinance would clear a path for a re-examination of that decision. If a gay rights ordinance were to force an unwilling resident of the municipality to hire or rent to an avowed homosexual, and this is generally what these ordinances propose to do, the resident could argue in court that the municipality was trying to protect an activity which is a felony under state law. Lower courts would, of course, dismiss under precedent, but as this would not be a criminal proceeding as double jeopardy

would not apply, plaintiff could appeal all the way to the state supreme court.

As stated above, if the court reversed Bonadio, if Bonadio were overturned, all municipal gay rights ordinances would fall beneath it. In other words, gay rights ordinances would become impossible in Pennsylvania because the municipalities would be attempting to legalize something which is a felony under state law. Thus for the militant homosexuals, abolishing 3124 may well be the most important feature of this bill.

The fifth question. Does this bill remove the concept of deviate sex from this part of the bill? And does this bill remove all references to men and women or husband and wife from the definition of a spouse in this part of the law? Yes. All references to homosexuality is deviant sex or any reference which would suggest that spouses are man and woman or husband and wife are stricken in House Bill 160, which must be very pleasing to the homosexual lobby.

Does including the following paragraph, anyone who by virtue of living arrangement acts in a position of authority within the household, and this can be found in the definition section under family member for anyone who is interested, that would be page 3, lines 6, 7 and 8. Does including this statement mean that homosexuals living together would be defined as family members under this part of the

bill? At first glance it would seem both necessary and appropriate to include in the 3101 definition of family member, protection for children who are victimized by, quote, anyone who by virtue of living arrangements, end quote. But notice that everywhere a crime refers to this definition of a family member, it also refers to position of authority. And I cite here about four or five places where this is the case. And, in fact, the very words, position of authority, are used within the definition itself. It would seem the only practical effect of putting this definition under family member instead of under position of authority is that homosexuals living together would thus be defined as family members.

This bill aims to revise the sexual abuse laws and I don't doubt it does that. But it's also a major piece of homosexual rights legislation. And it doesn't need to be. There is no reason the two of them must be connected.

What effect on children -- what is the effect on children of legalizing homosexuality? I've included at the end of my testimony copies of a front page article from the Washington Post on July 15th of this year. It shows why homosexuality must stay in the closet. This shows how vulnerable adolescents are at interpreting their growing acceptance of homosexuality as a green light to experiment with their sexual orientation. When one considers the

potentially lethal physical consequences of homosexual sex, and the added potential for long-term emotional scars which such ill-considered liaisons can produce, it is apparent that for the sake of the children, homosexuality, by law, must stay in the closet.

Much has been said and will be said in these hearings about protecting children with this law. I submit to you as a matter of personal opinion that basically what you're doing here is closing the barn door after the horses are out. Trying to prosecute cases after the offense, I think will have little impact on reducing the number of offenses. However, if these homosexual provisions are allowed to stand in House Bill 160, you can see by the consequences which are outlined in this article of the Washington Post, that you will do great harm to the children of this Commonwealth. Thank you.

CHAIRMAN CALTAGIRONE: I want to recognize that Representative Reber and Representative Gruitza have also joined the panel.

Thank you for your testimony.

Representative Ritter, did you have some comments?

REPRESENTATIVE RITTER: If I could just respond real quickly. That's all right, Tom, we don't need you anymore, thanks.

First of all, as to the first question, seduction

is not a legally defined term, but I would think that forcible compulsion could in many circumstances cover that. Current law on IDSA says that a child has to be under 16. That means it's 15. Just as under 14 means it's 13.

Reducing the number of first-degree felony counts for homosexual rape, I fail to see whether that, why that's even important in terms of the eventual penalty and the eventual conviction. You can be convicted of several counts depending on the types of acts or how many times it occurred and so on. That hasn't changed.

I already had discussions with the assistant DA in Lehigh County in terms of the computer depictions and that is something that we've already decided. In fact, the members of the committee will see it on the amended copy of the bill that I gave you. We've included computer depictions also.

The anti-sodomy law, yes, this bill does eliminate voluntary deviate sexual intercourse. I think that probably you would be better off raising taxes and going back to your constituents and telling them that you've removed that law from the books. It doesn't change anything for non-consensual activity. It still would continue to be a crime, it just allows sexual conduct that is consensual, and the court has already declared this law to be unconstitutional, to continue.

In terms of man or wife and husband, man or woman,

husband and wife definition of spouse, there's no definition of spouse anywhere in this section of the law and and it has not been changed in this way at all.

As far as family member including homosexuals, I think that that's a conflict with the previous part, because we're defining family members and giving the higher penalty for family members assaulting anyone under the age of 18. So if, in fact, you want to get to homosexual rape and you're worried about homosexuals in the home, I would think you would want that to apply as broadly as possible so that those types of crimes could apply. We're not trying to redefine what a family is. We're simply trying to cover as many circumstances as we can so as to protect our children. And that's probably it.

CHAIRMAN CALTAGIRONE: Any comments from any of the members?

(No audible response.)

CHAIRMAN CALTAGIRONE: Can we get into the roundtable? I would like the participants, Judges Stallone, Temin, Cleland, Sgt. Bogart, if we could come up and assemble at the table here. We'll start off with Judge Stallone first and then if Judge Temin, or if you could sit aside of Judge Stallone and Judge Cleland.

(Discussion held off the record.)

CHAIRMAN CALTAGIRONE: I think the members have

the written testimony that has been shared with us from, I think from almost all of the participants. We would like to start with Judge Stallone?

JUDGE STALLONE: All right. Chairman Tom Caltagirone, Representative Karen Ritter, members of the House Judiciary Committee, my distinguished two colleagues here to my immediate left, and many that are here that have a vital interest in this bill.

The sexual offenses enumerated under this proposed act where consent is at issue, either as an element of the crime or at least as a possible defense, are as follows: Simple assault, as you will see, I like to use the word simple especially when you're using aggravated from a judge's point of view. I like to see the word simple in there but that's not why I'm here. But simple assault, aggravated sexual assault and indecent contact, the sexual offenses where consent or a lack of consent or neither elements of the crime are a matter of defense are incest, concealing death of a child, indecent exposure, sexual exploitation of a child, and the sexual abuse of children.

The title sexual offenses as I understand it, that will be gone by this legislation, and I might be wrong on this, I only received this bill the day before yesterday, believe it or not. I had a court calendar yesterday to attend to, and you'll see that I'm making some changes from the

written statement since I had a chance to look over it this morning, that those that are passing out of the picture are rape, statutory rape and voluntary deviate sexual intercourse, voluntary deviate sexual intercourse to the extent that still is a crime, simple indecent assault, again, as I used to like to call it, aggravated indecent assault, and spousal sexual assault.

So we, as trial judges, and I'm speaking now again for myself -- I do not represent the trial judges of the State of Pennsylvania -- so we as trial judges now have only two crimes where consent is a defense and a third, that being indecent contact where a lack of consent is a material element of the crime itself.

Now, I know that this is somewhat technical. However, I also know that there are several members of this committee who are lawyers and the rest of you have had so much exposure to this kind of thing that I think you can follow what I'm about to say.

Therefore, the two crimes I am here to express a viewpoint on are the two sexual assualts, simple and aggravated, where the terms consent or lack of consent, although material to the outcome of the case, are not even alluded to in House Bill No. 160. Instead, if this legislation is adopted as written, we will continue to use the term forcible compulsion, or threat of forcible compulsion,

which came about as we now know almost 20 years ago when the Pennsylvania State Legislature employed that term for the first time to convey the thought that the result produced by the sexual act must be non-voluntary. The legislature did not want to describe the character of the force that would bring about that result, thereby constituting that particular crime.

Beginning on line 12 of House Bill No. 160, we find that simple sexual assault, another new term to describe a criminal offense, is defined as, quote: When the defendant engages in a sexual act with another person by forcible compulsion or threat of forcible compulsion. Aggravated sexual assault, which is to apply where an aggravating circumstance is present, I assume was to have the same wording but does not include the words "threat of forcible compulsion" as does simple sexual assault. And I just call that to your attention because I think it's something that you might want to correct. That's not my concern but I thought I would point it out to you.

I venture to say that if I were to ask you what forcible compulsion or threat of forcible compulsion meant as opposed to the term consent, or a lack of consent, at least as it is applied to a sexual assault, that each one of you would give me today a different answer. My proposition is supported by the fact that someone decided in the April 7th, 1992,

revisions, to totally eliminate the definition of that term from the first bill because perhaps, it was at best unwieldy, if not totally meaningless.

When it was put back into what is now known as the '93 bill, which I said I got the day before yesterday, the definition as I understand it is far different than what it was in the original 1991 House Bill.

I further suggest to you that your task would not become any easier in telling me what those terms meant, forcible compulsion, if I were to ask you as jurors to first read the definition which begins, again, on your line 19, and I quote: Forcible compulsion means to compel by use of physical, intellectual, moral, emotional or psychological force, either expressed or implied.

I say this even though I am well aware of where that definition came from. It came from our Pennsylvania Supreme Court's landmark decision of Commonwealth vs. Rhodes, and I have the citation, where, for the first time, the highest court through Justice Larsen, sought to define what you, the legislators, meant by the use of that term 20 years ago.

It would be my suggestion, and that is why I am here today, that you not only eliminate that term from the definitions section of the bill, but that you totally eliminate any and all references to it in this new

legislation. Because its continued use, again, in my opinion, by judges and juries will only lead to more confusion. And this is especially so when you consider what you have added to the House Bill, including but not limited to those legal words of art, quote, either expressed or implied.

My original plan when I first talked to Galina perhaps almost two years ago when some of the members of the House Judiciary Committee was in Reading to view my courtroom and talk to my staff, was to have you listen to a judge's instruction on forcible compulsion, or threat of forcible compulsion, and then ask you whether the use of that term by the judge in trying to explain the law to a lay jury, makes it easier or harder as a juror to decide whether the criminal act of sexual assault as defined by the use of the words forcible compulsion or threat of forcible compulsion, has any meaningful application to a particular set of facts. Facts perhaps similar to the ones you may have heard if you were in Reading when Galina and her committee were in Reading, because in Reading, when I tried back-to-back two acquaintence rape cases, one involving an employee at the Maple Grove Raceway, and the other involving a student in the co-ed dormitory of Kutztown State College.

However, time will not permit me to read my charge or my instruction to you. Perhaps when we get to the Roundtable discussion, I might have a chance to say something

or point to it.

What I would further suggest is that you simply separate all other kinds of force from physical force. Because forcible compulsion, no matter how hard a judge tries to explain that to a jury, still means force. And force to a layperson implies some kind of physical force, and this, in my mind, may very well be the reason we are getting verdicts that do not reflect the contempt today's society has for anyone's sexual domination over another.

And if I had another 15 minutes, I would make reference to some of the things that Representative Ritter said about the confusion. This is where I think much of the confusion is. Not in the substantive law. I don't want to change one word of the substantive law. I just want it written properly in a bill, and written so that judges can explain it to a jury and a jury can understand it and apply it. And I think that you will be pleased with the results.

Wouldn't it be far easier if we could go back to the common law that said that a person commits a sexual assault any time one engages in a sexual act without the other person's consent? But then go on to set forth those circumstances in which a person is deemed not to have consented to the act? And you can do that. You talked about it here already this morning, whether it's age or whether it's this or whether it's that. Perhaps we could say that one acts

without the consent of another if the victim is, 1) mentally disabled, or incapacitated; 2) physically helpless; 3) physically forced to submit; or, 4) is compelled to submit to a sexual act because of malicious intimidation.

You already have the definition of consent beginning on line 19 as being the intelligent, informed and voluntary affirmation, not to be construed as coerced or reluctant submission. Mentally disabled is defined on line 21. Mentally incapacitated is defined on line 24. And physically helpless is defined on line 29.

The term physical force should be defined in accordance with the ordinary meaning of that term, as referenced in the Oxford English dictionary, such as, and these are my words so don't look in the dictionary but they basically come out there and I've taken the words that don't apply and have written it this way: To exert physical strength of power upon another, or to use physical strength to constrain the action of another person, or to use violence or to violate or to ravage. Malicious intimidation could have almost the same meaning as your forcible compulsion definition, except to eliminate the words forcible, which again, I suggest implies physical force to anyone, and the words we also want to eliminate, either express or implied, which obviously only serve to further confuse the issue.

I suggest that the wording could encompass one or

more of the following, when you talk about malicious intimidation: To act under self-constraint and against one's natural impulses; to exert mental or moral strength for the purpose of overcoming resistance; or C, to influence, effect or control.

The court in Justice Larsen's opinion in Commonwealth vs. Rhodes stated that there is one common thread to the meaning of the term force, or any of its synonyms; compel, coerce, constrain, oblige, and that is to make someone yield. Therefore, I would suggest that any definition used to define this illegal behavior, which again is something other than physical force, encompasses those concepts.

The reason I have chosen to encompass that behavior in the term malicious intimidation is because malicious intimidation is something that I believe everyone at one time or other in their lives experiences and, therefore, knows what it is. It is something like pornography as we lawyers know, or our justices said that you can't define it but damn it, you know it when you see it. And you know what malicious intimidation is when you experience it.

To be in fear because of malicious intimidation could come from something as simple as a change in another person's voice, but the effect of that, being fear, is as real as the threat of physical force. That to me, Representative Ritter, is what we are trying or what we should be trying to

clarify in this legislation.

My term, perhaps together with the terms compel, coerce, constrain, oblige, et cetera, et cetera, if used, should be clearly defined so that judges and jurors alike can apply them to the facts of a particular case with a greater degree of confidence than we as judges and jurors can now apply to the term forcible compulsion, or threat of forcible compulsion.

In summary, and at the sake of repeating, which is, of course, what judges do when they give a charge, we repeat and repeat, hopefully the jury will understand it, is let me say that it would be a lot easier and make a lot more sense if the crimes of sexual assault were considered once again in the context of the terms consent, incapacity, force, together with the new term or whatever other term you want to use. I say the term of malicious intimidation, because the general public knows what those terms mean. The same cannot be said of the term forcible compulsion or threat of forcible compulsion. Thank you very much.

CHAIRMAN CALTAGIRONE: Thank you, Judge Stallone.

If we could, each in their turn would testify and then we can open up for an exchange of the members of the panel.

JUDGE TEMIN: Thank you, Chairman Caltagirone. My name is Carolyn Engel Temin and I'm a judge from Philadelphia

County. I sit on the Common Pleas Court. I want to thank Chairman Caltagirone and Representative Ritter for inviting members of the Pennsylvania Conference of State Trial Judges to participate in this discussion concerning this very important piece of legislation.

I have the honor to serve as the immediate past president of the conference, and I know that I speak on behalf of all the members of our conference when I tell you how deeply appreciative we are of the opportunity to participate with you in this continuing dialogue on matters of mutual concern. One of the great pleasures I had in my year as president was to watch the development of this growing relationship between the judiciary and the state conference of trial judges, and I know that particularly Representative Caltagirone had a lot to do with that and I am delighted to have this opportunity to personally participate in this process.

I must emphasize that the Pennsylvania Conference of State Trial Judges has taken no position on House Bill 160 and that my comments this morning are expressions of my own personal reactions to the legislation. For the past ten years I have been a judge on the Court of Common Pleas of Philadelphia County and I have tried literally hundreds of cases involving charges of sexual assault against both children and adults. House Bill 160 is clearly a very

important attempt to reorganize the laws relating to these offenses.

Cases involving sexual assault, particularly those involving assaults on children, are among the most difficult cases that a judge must handle. Young children often do not understand what has happened to them and do not have an adequate vocabulary with which to describe what has occurred. The use of anatomically correct dolls, or I should say the so-called anatomically correct dolls, often does not enhance the factfinding process, and problems are sometimes created by well-meaning prosecutors who over-prep their witnesses and add to the difficulty of the factfinder in separating truth from fantasy and suggestion.

First of all, I would like to say that I have had the opportunity previously to review the remarks of my colleague, Judge Cleland. Judge Cleland has very cogently covered the necessity to coordinate Bill 160 with the proposed Evidence Code S.B. 176. I agree with Judge Cleland's remarks concerning the competency of child victims, the use of expert testimony to evaluate credibility, and the oath to be administered to child victims, and I'll leave the exposition of those remarks to Judge Cleland.

With regard to section 3108 relating to evidence of the manner in which the victim was dressed, I would make the following suggestion. Apparently, the purpose of this

section was to protect a victim from demeaning questions concerning manner of dress where such testimony would not be relevant to the case. However, the wording contained in section 3108 is from a practical point of view, meaningless.

What would happen in a trial is that the defense would attempt to bring this evidence in, the factfinder would hear it, that is, the judge or the jury, and we're mostly concerned here about a jury, of course, or at least they would hear the question, and the prosecution would object on the grounds that it was not relevant. This is what happens with regard to all evidence, and in that regard, evidence of the manner in which the victim was dressed does not need to be singled out. As Judge Cleland points out, the real issue here is relevance, and that should be coordinated with the parts of the evidence code that covers this.

Moreover, this section as presently drafted, does nothing to ensure that the victim will not be needlessly embarrassed by the questions about dress. I suggest that the solution is to provide that evidence relating to the manner in which the victim was dressed shall not be admissible unless such evidence is ruled to be relevant by the trial judge and in an in-camera hearing. In other words, evidence of the manner in which the victim was dressed would be handled similarly to evidence of the victim's prior sexual conduct under the rape shield law. And that, I think, would better

suit the purpose of that section.

Section 3107 concerning resistance is internally inconsistent. As a practical matter, whether evidence of a particular act is construed as consent or not, will be up to the factfinder. A better way, I think, to deal with this would be to define consent in the definition section, section 3101, more precisely. That way, when the judge was charging the jury on the defense of consent, the statutory definition of consent would be read to the jury and they would apply that standard in deciding whether or not a particular act constituted consent. For instance, consent might be defined, and here again, these are just my words, I say the same thing Judge Stallone said, these are suggestions only, but consent might be defined as intelligent, informed and voluntary affirmation by the victim. Coerced or reluctant submission or actions done for self preservation, shall not constitute consent. Use of the word accommodation, I think, poses problems because of its unfamiliarity to the jury and imprecise meaning in the context of sexual offenses.

The proposed bill in Section 3105 provides that expert testimony may be introduced regarding reasons for failure to make prompt complaint. This is usually referred to as rape trauma syndrome evidence, and rape, I would just suggest that rape trauma syndrome evidence covers a much wider sphere than just why someone might not have made a prompt

complaint, and it seems to me this section was drafted to overcome the case in which the Supreme Court specifically said that type of evidence could not come in. I would suggest that it may be a little bit narrow.

Section 5990 would also permit expert witness testimony regarding, quote, the typcial behaviors of children who are victims of sexual assault. These sections were apparently included in order to overcome previous Pennsylvania appellate court decisions holding such evidence inadmissible. These sections may be problematical. It is important to understand that the reason that appellate courts have rejected this type of evidence heretofore is because the courts are not convinced of the validity of the evidence or because it invades the province of the jury.

You are all aware, I'm sure, that there is a plethora of scientific and pseudo-scientific evidence available today on any one of a number of issues and there are real experts and so-called experts willing to testify, often for large fees, on a variety of these issues. We must remember that the purpose of the trial is to seek the truth and the purpose of the rules of evidence is to assist in that process. Ultimately, it has to be up to the trial judge in each individual case to evaluate expert testimony and to decide whether or not that testimony is legally relevant.

In fact, in a recent decision by the United States

Supreme Court, in fact, a case that was decided June 28th of this year, the case is called Daubert vs. Merrill Dow Pharmaceuticals, the court held that it's up to the trial judge in each case to determine whether expert testimony is scientifically valid and properly can be applied to the facts at issue. The court pointed out that in this context, many considerations will bear on the inquiry, including whether the theory or technique in question can be and has been tested, whether it has been subjected to peer review or publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. This type of approach allows for the flexibility that is so important in the truth seeking process.

The proposed code of evidence is based, to a large degree, on the federal rules of evidence, and though it has specifically not included the specific section the Supreme Court of the United States referred to when it made this decision, nevertheless, from a practical point of view, this is what would occur. Because when expert testimony was sought to be introduced on any of these issues, you can bet your bottom dollar that the other side will object. That will require the judge. They will do it by virtue of a motion in liminae, which is a motion held outside the hearing of the

jury, before the trial, asking the court to rule that the evidence should be excluded. The judge would then, of necessity, hold this kind of hearing, even though the evidence code as drafted and as it's going to stay, will not require it. But that's what the bottom line would be.

So I would suggest that rather than the present approach of having the statute expressly allow certain types of expert testimony, the statute should merely provide that expert testimony will be admissible where it would be admissible in other cases under the applicable rules of evidence. In other words, that sexual assault kind will not be different than anything else.

And now I would just like to briefly touch on two areas that are not addressed in the present legislation.

First of all, I would like to discuss the problem of sexual abuse of small children. And I'm really talking about children, say, below the age of eight or nine. Very often I have had children of four years of age testify before a jury in my courtroom. In referring to this, I am relying not only on my experience as a trial judge, but also my experience as president of the board for 15 years of the Joseph J. Peters Institute in Philadelphia, which is a mental health clinic which I think is known internationally, actually, which treats victims of sexual abuse, most of them children, and also, treats sex offenders.

Now, it is well known in the treatment of sexually abused children that the trauma to the small child of any sort of sexual abuse, whether or not penetration actually results, is pretty much the same. In other words, the trauma depends really on the child but it doesn't really depend on the nature of the touching. Where a child of tender years, and I would leave that definition up to the legislature involved, the distinction such as the one made in the proposed legislation between crimes involving penetration and crimes not involving penetration, seems less rational. Furthermore, because under the present statutory scheme, that is in existence now and the statutory scheme in Bill 160, crimes involving penetration are more serious and involve more serious penalties, and there is a tendency on the part of prosecutors in prepping child witnesses to attempt to get them to testify that penetration actually occurred, because of the nature of the penalty and the seriousness of the crime.

And I think prosecutors are well meaning. I'm not criticizing prosecutors in doing this. It's very difficult to deal with small children. They're inarticulate, they lack of vocabulary to describe what is actually happening. But very often, as I say, a small child will not be able to describe whether something went in or was placed on the anus or the vagina. The combination of the child's inarticulateness coupled with the zealous and sometimes overzealous preparation

of the child witness by the prosecutor, may result in making the child sound totally incredible. This sometimes results in a not guilty verdict where prohibited sexual activities actually occurred, but the evidence comes in as too inconsistent on which to base a verdict.

One of the solutions to this problem is to create a special crime involving sexual abuse of children where no distinction is made as to the greater the crime between crimes involving penetration and crimes involving touching. The committee may wish to consider this.

Another area which is not considered in the present legislation is the issue of sentencing. If the present bill becomes law, the sentencing statute presently in place would apply, including the mandatory minimum sentence of five to ten years for section 3121, crimes, in this case, it would be aggravated sexual assault. One of the groups of offenders who are subject to mandatory sentences under present law and would continue to be so under the proposed bill are the group known as, I should say, incest parents. In my written testimony, I use the very sexist term incest fathers, and I apologize to the men in the room for the use of that term.

Judge Cleland has properly pointed out that very often there is charge bargaining with relation to sexual offenses because many of the issues concerned with the trauma

to the child and the desire on the part of the victim to lessen the consequences to the offender when the offender is a close relative, particularly one in loco parentis. The problem with charge bargaining is that it distorts the criminal record of the offender, providing the record of a much less serious conduct than the one that actually was committed. When the purpose of charge bargaining is really to alleviate the possible penalty or avoid the effect of the mandatory sentence, the issue, I think, is better dealt with by facing the sentencing aspect head-on rather than distorting the nature of the actual act that was committed.

Incest parents constitute a very special group of sex offenders for a number of reasons. First of all, they are almost all of them themselves victims of child sexual abuses. It's one of the things that turned them into incest parents.

Secondly, they are very often otherwise law-abiding citizens who are providing the total financial support for their family.

Thirdly, they are one of the few types of offenders who can be absolutely insulated from their victim. They are not likely to prey on strange children and they are only likely to commit sexual offenses with young children with whom they are associated in loco parentis.

To subject incest parents to mandatory five- to ten-year sentences often results in punishing the victim as

much as the offender. If the mandatory minimum sentence did not apply to incest parents, then a judge would have the flexibility to provide a sentence that would punish the offender, protect the victim from the offender, but at the same time, where it is appropriate, allow the offender to be on a work release program whereby he or she could continue to support the family. This type of possible result would also greatly enhance the prosecution of these offenses, since the victim would be less deterred from reporting and prosecuting the offense because of the consequences to the parent.

We must keep in mind that the parent will always be the child's parent and regardless of the sexual acts committed, the relationship is likely to remain and to have to be resolved at some level in the future. An incest parent may have to undergo treatment before being permitted any contact whatsoever with the victim or other siblings of the victim, but removing the incest parent from the effects of the mandatory minimum sentence would permit judges to make discretionary decisions and fit the punishment to the situation.

That is not to say that there are not situations in which the act of an incest parent is so reprehensible as to require a very long prison sentence. It is merely a suggestion that the matter should be left within the discretion of the sentencing judge.

I want to thank you again for this opportunity and I look forward to the roundtable discussion. Thank you.

MR. CLELAND: Good afternoon. My name is John Cleland. I'm president judge of the Court of Common Pleas of the 48th Judicial District, which is McKean County. I want to reiterate what Judge Temin said, that we're appearing here today in response to the invitation of the committee to the Conference of Trial Judges, and although we are representing the conference, we certainly don't represent any official position which the conference has taken. And her views, as are mine, are solely our own. We do appreciate the opportunity to participate in this process.

I intend to limit my comments to the substantive and procedural issues which this bill raises for the judiciary. I think it's important that this bill be coordinated with the proposed Evidence Code. I am aware that that code is also working its way through the legislation and I don't know what the status of that is, but I would like to point out some possible conflicts that might be taken into consideration.

The proposed legislation House Bill 160 addresses four evidentiary issues: The competency of child victims; the use of expert testimony to evaluate credibility; the oath to be administered to child victims; and evidence relating to the manner in which the victim is dressed.

In terms of protecting children, I find section 5951, competency of child victim witnesses, very troublesome. Under current law, a child over 14 is presumed competent, a child under four is presumed incompetent, and a child in between may only testify after the judge determines the child to be competent. That is, had the capacity to observe events, remember events and communicate events.

Under the proposed bill, a different procedure would be employed. Section 59951 of the bill proposes that every child victim of sexual assault be presumed to be competent to testify in any judicial proceeding regarding the alleged offense. It provides, however, that this presumption may be rebutted by evidence to the contrary.

As a practical matter, then, what is going to happen is that the child is going to take the stand at the calling of the Commonwealth. He or she will be presumed to be competent, and defense counsel will then immediately request an opportunity to voir dire that child witness. As a result, that child then faces his or her first questioning not from the impartial judge, but from the attorney for the defendant.

It does not seem to me that this furthers the intention of protecting the child witness. This might be better done through the proposal in the evidence code, which handles the matter differently. It simply provides that every child is presumed to be competent unless the witness is

incapable of remembering or expressing in a way that can be understood either directly or indirectly through an interpreter, or does not understand the duty to tell the truth.

This approach tracks the intent of the sexual assault legislation, but by deleting the language about rebuttable presumptions, it leaves the questioning regarding competency, in my view, in the hands of the judge and more likely protects the child.

Subsection (c) of the competency section also proposes a change in the law regarding the oath to be administered to child victims of sexual assault under 10 years of age. In effect, it provides that no special form of oath is required, and the child only needs to promise to tell the truth. The proposed evidence code in 6243 also deals with this problem, but it applies the principle not just to children under 10, but to all witnesses, and provides that the oath or affirmation shall be administered in a form calculated to awaken the witness's conscious and impress the witness's mind with the duty to tell the truth.

These two sections involving competency of child witnesses and the oath administered to them point out the need to coordinate the sexual offense recodification with the code of evidence. Why, for example, should there be one oath for an eight-year-old victim witness, and a different one for an

eight-year-old non-victim witness? And why should there be one procedure to determine the competency of a child victim of sexual assault, and a different procedure for determining the competency of a child witness to such abuse?

I'm going to delete what I said with regard to the matter of dress in the interest of time and rely on Judge Temins' cogent comments in that regard.

Similarly, I want to abbreviate what I said about expert witnesses to help the jury understand the typical behaviors of children. The problem, of course, as the court points out in Commonwealth vs. Dunkle is not whether the evidence of this kind is relevant, but whether it's credible, because the underlying scientific principles may not be firmly enough established.

Having said that, it seems to me that it might be worthwhile to explore the admissibility of expert testimony first to explain the particular child victim's cognitive abilities and limitations.

One of the most difficult things any of us do as a judge is to evaluate the credibility of a child witness. Children see things differently, they remember things differently, they recall things differently, and they express themselves differently than adult witnesses. It has been my experience, and I must constantly protect against my tendency to accept a child witness's testimony at face value, when they

may be speaking figuratively instead of literally.

I do not mean to say that children lie, although I think it is obvious that sometimes they do, as do all people of any age. But with the help of expert opinion, the jury may be able to understand a child's testimony and use that expert's opinion to evaluate the credibility of that child witness.

I'm also going to skip over my comments about not restricting prosecutors to engage in meaningful charge bargaining. I appreciate that that is a delicate subject. I understand Judge Temin is concerned about the intellectual honesty of this. But in any event, there are practical problems involving this that should not be overlooked and that we should not tie up a prosecutor's hands in very difficult cases to protect a child and their family from having to go through a trial because they don't have any charging options.

I do want to use the balance of my time to suggest the possibility of another approach to the problem of defining and codifying sexual offenses. I'm suggesting simply that we treat assaults as assaults and that we do not make a separate category for sexual assaults, any more than we make a separate category for assaults with a knife or assaults with a fist. If the assault is sexual in nature, then that can be used as a factor considered in grading the offense or in establishing the offense gravity score under the sentencing guidelines.

Rape is not an act of sexual passion, it is a crime of violence. It is an assault. Why should we complicate the law by making separate rules and proceedings for this particular kind of crime, and in the process, stigmatize the victim? At common law, a battery was defined as an offensive touching of another without the other's consent. In common parlance, of course, we no longer speak of this conduct as a battery, we call it an assault. But certainly, that definition is broad enough to cover rape, indecent assault and involuntary deviate sexual intercourse.

But by trying to do what House Bill 160 does, we end up in a definitional maze that leads us to results that I don't believe are intended. For example, conduct which would clearly be an indecent assault under current law would not be prosecutable under House Bill 160. Consider a recent case from Somerset County, and in that case, a camp counselor rubbed and touched the calf, neck and cheek and kissed the neck of a 12-year-old girl. He was charged with indecent assault. Under the proposed statute, however, he could not have been prosecuted for the crime of sexual assault because there was no intercourse, and he could not have been prosecuted for the crime of indecent contact because he did not touch the child's intimate parts as defined in the bill so that he would not have been prosecuted for any clearly sexual, what is clearly improper sexual conduct.

To use another example, under the statute as proposed, an uncle could use his 10-year-old nephew for his own sexual gratification almost with impugnity. Suppose the uncle rubbed the nephew's genitals. Well, the genitals are an intimate part. There has been no sexual act as defined by the bill, and therefore, even though the child is under 13, he could consent to the uncle's advances, a consent probably not difficult for the uncle to obtain. Because the child consented, no crime defined in the bill has been committed by that uncle who rubbed the child's genitals.

To expand the example even farther, even if the child did not consent, the uncle cannot be charged with aggravated indecent contact since he does not fall within the definition of family member, which is an element of the crime. This is where the definitional maze leads us.

Instead, why not treat sexual assaults for what they are? Offensive touching without the other person's consent. This is essentially the good-touch/bad-touch approach that we teach kids in our elementary schools. If there is no intent to either harm the victim or to use the victim for the defendant's own sexual gratification, there is no crime. It is nothing more than good touch. If there is intent to harm or if there is no consent, or if the victim is being used for sexual gratification, then it's bad touch and prosecutable as an assault. I'm aware that this would involve

substantial changes to the assault statutes since the focus of the assault statutes as now written is on bodily injury. And in sex crimes, there is frequently no physical injury as such. Nevertheless, in terms of explaining the law of sexual assault to a jury, to the public, to the victims, to the defendants, such simplification may well be worth the effort.

In closing, I want to thank again the committee for extending the invitation to the Conference of State Trial Judges. I hope that my comments have been helpful to you in the pursuit of your very serious responsibilities. Thank you.

CHAIRMAN CALTAGIRONE: Thank you, Judge. Just to let you know, we do have two days of Code of Evidence exchange that will be taking place, I think it's sometime in October, David?

MS. MILOHOV: Tuesday and Wednesday of next week.

CHAIRMAN CALTAGIRONE: Next week? Sorry. Next week, and your Commonwealth association will be participating in that.

MR. KRANTZ: 7th and 8th.

REPRESENTATIVE RITTER: I did bring that up at the roundtable discussion. I think you might have been here, Judge Stallone?

JUDGE STALLONE: No. I don't think so.

REPRESENTATIVE RITTER: There was somebody else

here from the Trial Judges Association.

JUDGE STALLONE: Judge Cohen.

REPRESENTATIVE RITTER: And I asked at that time that they would look at this to see how --

JUDGE TEMIN: As a matter of fact, I had the opportunity to talk to Judge Cohen about 160 before I came.

REPRESENTATIVE RITTER: Right, because I knew there was going to be definitely some conflicts there, and I do like some of the discussions.

CHAIRMAN CALTAGIRONE: One of the reasons why we have exchanges like this is to get the life history of what's actually taking place out there. And I think coming at it from that perspective, you see what is working and what isn't working. And it looks like we're making bad law. It doesn't make any sense at all to continue to turn that kind of process, and hopefully the kind of dialogue we've established can make some corrective amendments to the legislation that we're presently considering and how it's going to interplay with the Code of Evidence. Your point's well made, Judge.

SGT. BOGART: Good afternoon. Thank you for the opportunity to speak before this committee. I'm Cindy Bogart. I'm a sexual assault investigator at East Stroudsburg University. I also work for the Borough of East Stroudsburg, Borough of Delaware, Water Gap, and a member of the Monroe County Drug Task Force.

My comments here today are my own. I'll make them short and brief. I did not get a copy of the House bill until Monday so my time was rather limited.

As a police officer specializing in sexual assault cases, I have had the opportunity to work with various sections of Chapter 31 of the Crimes Code of the Commonwealth of Pennsylvania. It is my professional opinion that this section of offenses has been in serious need of updating for a long time. I have received House Bill 160 which covers the recodification of the sex offenses statutes for Pennsylvania, and recommend that the changes in this bill be adopted by the legislation.

With the recent Pa. Superior Court denouncing the decision in the Commonwealth vs. Berkowitz case, the state sex offense laws have been seriously questioned by everyone who utilizes them. I am the arresting and prosecuting officer of Robert Berkowitz, and I must admit that I do not feel comfortable enforcing laws that I no longer have faith in. These are the same laws that I, as a police officer, have taken an oath to uphold. As the statutes presently read, they can be confusing and perplexing to those who need to work within the system. I have found this to be true among the law enforcement community.

The clarification of the statutes as they read in House Bill 160 simplifies the enforcement of the statutes.

Since I have worked with victims of sex offenses, I have been exposed to the painful ordeal that they must endure for such a crime and that they, the victims, feel re-victimized by the insensitivity of the same system that was set up to protect them.

Investigation of a sex offense is not easy. The victims are usually emotionally traumatized, and since most assault victims are acquainted in some manner with their assailants, fluctuation between these emotions can be severely extreme. It makes it imperative that all criteria in such an investigation be met to the fullest, and that enforcement is done by the letter of the law. Having these statutes clearly defined and without question as to interpretation makes enforcement more successful for police as well as prosecutors.

The statistics for sex offenses are alarming. Rape is the most under reported violent crime in the United States. One of every four women will be a victim of a sex offense in her lifetime, and only one out of every ten offenses will ever be reported to authorities. Very few of these cases that are reported are ever prosecuted in a court of law.

I feel that the Commonwealth of Pennsylvania has a responsibility to society, to the victims of such crimes, and to its law enforcement personnel and to the prosecutors of

these offenses, to clarify and simplify the statutes of Chapter 31. Hopefully by doing so, more victims will come forward and file a formal complaint and victims will be treated with the same respect and dignity as victims of other violent crimes.

You'll find attached to this statement my individual comments to each topic in House Bill 160, and again, I urge that the amendments be adopted into the Crimes Code of Pennsylvania.

I won't read all of that but I do thank you for the opportunity, again, like I said.

MR. FRANKEL: Good afternoon, Chairman Caltagirone, Representative Ritter and other members of the House Judiciary Committee. The American Civil Liberties Union of Pennsylvania welcomes this opportunity to participate in today's consideration of House Bill 160.

Last session we were involved in productive efforts to accommodate several of our concerns about the proposed revisions to portions of the Crimes Code dealing with sexual offenses and many of our concerns in the prior bill were addressed, as Representative Ritter mentioned when she gave her statement.

And while we acknowledge that considerable progress has been made with regards to civil liberties problems which appeared in that earlier version, there still

remain a number of provisions that we believe violate rights protected by the United States and Pennsylvania Constitution. We think that each of these problems can be addressed and resolved without impairing the main thrust of House Bill 160, which we do applaud which is the modernization and the simplification of the sexual assault portions of the Crimes Code.

The first problem I would like to address is the language of subparagraph (5) of aggravating circumstances which reads: The defendant serves in a position of authority in respect to the victim or is a family member of a victim under 18 years of age.

The ACLU does not think that every family member should be treated similarly. We believe that only those family members who actually serve in a position of authority over a victim under 18 years of age should be faced with the enhanced penalty which necessarily flows from classification as an aggravating circumstances. For example, a sexual assault committed by a 19-year-old step-sibling who lacks any authority over a 17-year-old victim should not be treated with the same degree of severity as a sexual assault perpetrated by a parent or step-parent upon a child or step-child directly under his or her authority and control. The evil in question is commited by someone who exercises some authority over the child and that is the behavior which should be more severely

punished.

I believe Representative Ritter, when she was talking about treating spouses the same as anybody else, mentioned that it was the act that was important and not necessarily the relationship. And here again, I would say it is the authority that a family member, if the family member has the authority, and the abuse of that authority, which is the evil, which is being addressed here rather than the mere fact that they are within the same family unit.

I have offered here and it's written here in the testimony, a possible amendment to this section which would make it clear that we intend to treat only family members who exercise authority over the victims in this manner.

Our next concern is with the definitions of consent and forcible compulsion. Some of the other people here today have already testified to this with regard to those matters.

The factual context in these kinds of cases varies so widely that we believe that our courts should be the proper body to continue developing the concept of what constitutes consent or forcible compulsion rather than having the legislature provide fixed definitions for those terms.

The definition of consent set forth in House Bill 160 appears to be a reaction to a Superior Court decision in Commonwealth vs. Berkowitz. That opinion was based on the

specific facts at issue in that case.

We believe that it is inappropriate for the legislature to overrule a decision of an intermedial appellate court. We think the judiciary, again, should consider the facts as they come up in various cases and refine definitions, rather than have a definition fixed at this time by the legislature which may not deal with the next factual context that might come up, and may actually create more problems because they set forth a fixed definition.

And I would also point out, the Supreme Court has granted allocatur in the Berkowitz case. They will be having that case briefed with oral arguments, and they may, indeed, reverse what the Superior Court did.

I would submit we should be more prudent and wait to see how the Supreme Court deals with the concepts of consent and forcible compulsion before this legislature acts to put those terms in a fixed form.

We also find the phrase which defines forcible compulsion, "psychological, emotional, moral and intellectual force," whether expressed or implied, to be so vague that it will be impossible for a jury or defendant to know with certainly what conduct is forbidden. I would challenge any of you to explain to me what implied intellectual force is and how it could be applied in the context of a sexual assault case. And I understand that those terms come from a Supreme

Court decision, but I find them very problematic to understand. I think I've heard at least one judge here today say he's not sure he understands them, fully believes that juries don't understand them, and I don't think we want to codify a term that people more experienced in the law don't even understand.

We would suggest that the definitions of consent and forcible compulsion be dropped from the bill and that the refinement of those concepts be left to our courts for them to continue developing them.

With regard to Section 3102 which refers to mistake as to age, that section provides that under no circumstance will a defendant's mistaken knowledge or belief as to a child's age be permitted as a defense. It thus goes farther than the current law does in this area. This section imposes a standard of strict liability on a defendant. It allows punishment for a crime even where the mature victim intentionally misrepresents his or her age. The defendant would not be able to present any evidence as to that misrepresentation.

The section would take away from a jury the opportunity to weigh any evidence of the reasonableness of a defendant's belief as to a victim's age. It precludes the jury from using its own common sense as well as the standards of the community in determining whether a particular defendant

should be punished for mistakenly believing that his or her victim is over a certain age.

We do not believe there is a need for an absolute rule and urge the adoption of mistake as to age as a defense.

Under House Bill 160, a defendant can claim as a defense a mistaken belief that the victim was not disabled when, in fact, the victim was disabled. I do not understand why we make a difference between a disabled victim and a victim who is under age who may very well have represented that they were over age.

At the hearings on this bill under its other number in the last session, we testified to our concern about the criminalization of sexual activity among teenagers. Section 3109 and Section 3121(b), when read together, result in the criminalization of consensual sexual activity among teenagers where one of the sexual partners is 13 years of age or younger. These proposed sections, along with a repeal of the crime of statutory rape, would dramatically change the law in this area.

Under current law, statutory rape, which is graded as a felony of the 2nd degree, occurs only when the defendant is over 18 and the victim is under 14. Under the proposed changes, all consensual sexual activity between an individual of whatever age, and someone 13 years of age or younger, is considered to be aggravated sexual assault, a felony of the

first degree. Thus, a 14-year-old girl who had sexual intercourse with her 13-year-old boyfriend would be committing a serious crime and could be sentenced as severely as an adult who engages in sexual assault upon an infant.

I have had an opportunity to examine what I believe Representative Ritter has prepared as suggested changes to the bill, and I believe, if I recall correctly, that there is a suggestion that this section only applies when there's at least four years' age difference between the victim and the accused, and we would support that kind of a change. It begins to resolve the problem of not, you know, we all know teenagers engage in sex, and I don't think the intent is to compound the problem that we already have with trying to get safe sex information to them and birth control information to them.

So we would support the kind of change that is being proposed with that amendment. However, we would also note that consideration should still be given as to whether it should be a first degree felony or second degree felony, as, again, the situation may not be deemed as serious as some of the other aggravating circumstances which are noted in the bill.

I would like to now move to some of the child pornography sections and the First Amendment considerations they raise.

We have previously suggested that Section 6312 contain the full list of exceptions which were in the Ohio statute which was interpreted by the Supreme Court in Osborne vs. Ohio. There are only a limited number of exceptions which are contained in the bill, and that Supreme Court case addressed an Ohio statute which had a list of other exceptions. Those additional exemptions would be for bona fide artistic, medical, religious, or other proper purposes. In order to fully guarantee First Amendment protection for those kinds of works, we believe that those exceptions should be added to Section 6312(f).

We are particularly troubled that there is no requirement under Section 6312(c) that a defendant who is charged with the sale or distribution of photographs, videotapes, films, and computer depiction has been added, that kind of representation also, there is no requirement that the defendant know that such photographs, videotapes, films, or depictions actually depict a person younger than 18 in order to be found guilty under this section.

Recently, last year, the 9th Circuit Court of Appeals out on the west coast held that the section of the Federal Protection of Children Against Sexual Exploitation Act that prohibits the distribution, receipt or shipping of child pornography, violated the First Amendment because it did not require knowledge of the minority of at least one of the

performers as an element of the crime. That case is United States of America vs. X-Citement Video, Inc., and I have a citation to that.

That court stated with regard to the federal section, that that section potentially applied to all kinds of recipients or distributors of videotapes and magazines. To render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is under age, without the distributor's or recipient's knowledge would be to create precisely the chilling effect condemned by Smith, and Smith is the United States supreme court case on pornography.

That we cannot do consistently with the First Amendment as the Supreme Court has interpreted it. That case demonstrates that the First Amendment mandates that knowledge of the age of the participant is a critical element of the crime such as that defined in Section 6312(c).

The ACLU is also troubled by Subsection 6312(e), which bans the defense of mistake of age with regard to pornography, child pornography cases. If the First Amendment requires that an element of this crime be knowledge of the minority of the persons depicted, then it certainly cannot bar a defense as to mistake of age. To comply with First Amendment concerns, Section 6312 should both require guilty knowledge of the age of the performer and permit a defense of reasonable belief that the depicted person is 18 years of age

or older.

The last issue I would like to address, and this is, I think, having heard what two of the judges said about expert witnesses, falls in line with what they've said. We're concerned mostly with the discretion given to permit expert testimony and prosecution for offenses committed against children. We can see that this might be a tool for both the prosecutor and defense, but we think that the legislature should act carefully before sanctioning the use of such expert witnesses.

I've attached to my testimony a recent article from the Philadelphia Inquirer concerning an ongoing child sexual abuse trial in San Diego. There have been a number of other well-publicized cases in recent years where there has been use of expert witnesses and even testimony from therapists, which have raised considerable questions as to fabrication of testimony. And I would underscore what Judge Cleland said. I'm not saying that all children lie or that all cases are fabricated, but there are concerns that that does occur, and before we move into an area where we're going to allow expert witnesses in these cases, I think we ought to carefully examine and set up some procedural safeguards so that those experts don't become tools for further abusing people accused of these kinds of crimes.

I think we can carefully go through this area. I

think someone's suggestions with respect to coordinating with the Evidence Code are appropriate. I think the reference to the Supreme Court decision which came down this summer as to the use of expert witnesses is appropriate in determining what should and should not come into the courtroom. This is an area of considerable controversy at this time and I think that we ought to be very careful in moving in this area.

In conclusion, I would again like to commend Representative Ritter, Chairman Caltagirone and the other members of the House Judiciary Committee for your efforts in modernizing, simplifying and rationalizing the law in Pennsylvania with regards to sex crimes. We urge you to consider our concerns we have highlighted in our testimony so that House Bill 160 will not result in the diminishing of the civil liberties of any Pennsylvanian. Thank you.

MR. ROSALSKY: Good afternoon. I am Peter Rosalsky from the Defenders Association of Philadelphia.

Representative Ritter in her opening remarks suggested that the purpose of this legislation was, and I think I got it correctly, to protect victims from being victimized again in the courtroom. And of course, we all want to do that as a society, but we also want to be fair, not solicitous, but fair to an accused who is, after all, presumed innocent. And though many accused are guilty, the law is designed to protect the innocent by giving them a fair trial.

And what I would like to do in the remainder of my comments is to point out exactly what certain provisions are doing by giving hypothetical examples and then ask if that, in fact, is what we want to do and if we're doing the right thing and if we're being fair.

My comments are broken down into two general categories. The first ones deal with the admissability of evidence, and the second group of comments deal with specific substantive offenses and substantive defenses.

My first comment deals with the definition in the definitions section of sexual conduct. I raise that even though none of the proposed legislation in House Bill 160 uses the term sexual conduct, but I raise that because another provision in the Crimes Code, the rape shield law, does use that precise term, sexual conduct, and if this new definition is included in House Bill 160, if it's passed, it will, in a sense, modify the existing rape shield law, and that's why I discussed the notion of sexual conduct.

The last sentence of the definition of sexual conduct provides, quote: The term, the term being sexual conduct, includes any sexual offense committed or alleged to have been committed against the victim.

Now, that's in the context of a rape shield law which provides that except in limited circumstances, i.e., consent, that evidence of the complainant's past sexual

conduct is inadmissible. So sexual conduct is now being defined to include any past sexual offenses committed against the victim. And what that does is this in certain situations. If the victim has in the past falsely claimed to have been a victim of sexual abuse, that is not admissible in this trial.

In other words, let's just say, and this is a hypothetical, the victim had made charges in the past, they were unfounded, she recanted or he recanted and it was found that those allegations were false. If that victim makes another allegation of sexual conduct, the jury or the judge, the tryer of fact, is disabled from hearing the fact that there's been a prior false accusation.

Another example of this, and it's used frequently as the situation where a relatively youthful complainant, let's say a nine- or ten-year-old girl or boy alleges to have been the victim of a sexual assault, and he or she explains some of the mechanics of the sexual activity. The male assailant gave a discharge after the act was done. The prosecutors often argue, well, listen, this accusation must be true, for after all, how would a nine-year-old or a ten-year-old know about the mechanics of sexual acts unless this perpetrator committed it on this occasion? And of course, there may be situations where this unfortunate victim has been the victim of other sexual assaults and could have

learned about the mechanics of sexual acts from prior sexual assaults on her.

Again, that's another example where the existence of a prior sexual assault is important and significant, and we suggest that for a fair trial, the tryer of fact should be able to know that. These pieces of evidence, of course, subject to the discretion of the sentencing judge as to whether they're relevant or probative.

The bottom line that I'm trying to make as to this definition of sexual conduct is that what the legislation does is it excludes a category of testimony which, in a given case, could be probative and it could really expose either the truthfulness or the fantasy of the victim. And we suggest that since trials are to get to the truth, that a class of evidence not be excluded.

My second comment goes to something that has been alluded to before by several other people so I won't dwell on it but I just do want to mention it, and that's Section 5990, which allows expert witness testimony on typical behaviors of child sexual abuse victims.

I would just like to suggest that there has been mention of the recent Pennsylvania Supreme Court case that disallowed it but I would like the mention why it was disallowed. The Supreme Court in that case, which was Dunkle, after extensively surveying the literature on the subject,

found that there are, and that experts agree, that there are no typical behaviors of sexual abuse victims as opposed to other children who are placed in stress. In other words, whatever behaviors that a psychologist or an expert might testify are typical of a child subjected to sexual abuse, they're the same behaviors as a child who may have been subject to a dysfunctional family, a divorce, a death, a bad parent. And therefore, that these so-called typical behaviors are not specific as to child sexual abuse victims.

The Supreme Court also surveyed the literature finding that these behaviors exist significantly in many children who are not sexually abused or in any way stressed at all. And therefore, the Supreme Court concluded that the child sexual abuse syndrome is not generally accepted by the scientific community, is unreliable and misleading and evidence pursuant to it is inadmissible.

I would suggest that whether this body believes that the Supreme Court is right, it at least is the type of determination that should be made by judges and the judiciary, and is not the type of subject that the General Assembly should legislate on. At the very least, well, I would just suggest that the section be deleted altogether and the courts will struggle with this issue and if, in fact, such expert testimony does at some point come to the dignity of being generally accepted, then at that point, it does become

admissible.

My second group of comments deal with substantive offenses. I have six or seven concrete suggestions. I would like to give examples as to what I think the evil is in the legislation as it presently exists, and give an example of why I think that.

The first one deals with Aggravating Factor No. 4. If an aggravating factor exists, a sexual assault is raised to an aggravated sexual assault. Aggravating Factor No. 4 provides that sexual assault becomes an aggravated sexual assault if the act, that is, the sexual act, is committed during the commission or attempted commission of any other felony by the defendant. And we suggest that this factor should be narrowed to require some sort of a nexus or connection between the sexual assault and the accompanying felony in order to aggravate the crime.

Representative Ritter, you gave the example in your opening remarks that a kidnapping consummated pursuant to a rape should be aggravated, and we believe that that is correct. On the other hand, suppose that after the unwarranted sexual act occurs, on the way out the perpetrator decides to take car keys and therefore the car or a mink coat. Now, this independent theft is independently punishable but it in no way makes the sexual assault any more aggravated.

So we suggest that in Aggravated Factor No. 4, the requirement be included that the felony was committed not only during the sexual assault but in furtherance of the sexual assault, so there would be some sort of a requirement of a nexus or connection between the underlying felony and the sexual assault.

I also have a serious objection to the definition of forcible compulsion. Other speakers have spoken to it. It requires physical, intellectual, moral, emotional, or psychological force, express or implied. Mr. Frankel asked what implied emotional force is or implied moral force. Again, it's certainly a hard concept to define. But it would seem to me that under that definition, the following people would be sexual assailants: A boy who threatens to tell his friends, or a boy who tells his girlfriend that he will tell his friends that she's a chicken and afraid to have sex unless she agrees to do so. Is that implied emotional force? A man who wines, dines and gifts his date and than persistently requests sex as recompense for these expenses. A wife who demands that her husband engage in sexual activity on their anniversary as part of his conjugal duties. These are just examples that I thought of, and it would seem to me that the expansive definition would require that each of those individuals be found as serious felons, and I question whether this is what this legislature wants.

I think a better solution would simply be to leave the term forcible compulsion there and and let sensitive courts, and obviously some decisions I don't like and some decisions prosecutors don't like, and some decisions this body doesn't like, but let sensitive courts resolve the issue of what is forcible compulsion.

I have two specific concerns about the new crime of indecent contact. Indecent contact is defined as the touching of the intimate parts of the body without consent, and my two concerns are as follows.

The first one is the definition of consent. And this definition of consent includes reluctant submission. And I would suggest that reluctant submission is consent. A married person who, due to the bonds of marriage, reluctantly submits to sexual overtones of a non-spouse, is not a victim at all and has not been, and there should should be no criminal punishment.

Again, reluctant submission is submission. And as long as the will of the person has not been overborne, if a person is struggling with the decision, should I do it or not, well, I don't know, okay, I'll go ahead and do it, that should not be criminal conduct by the person who requests the sexual act. If you reluctantly submit, you consent.

My second concern with the indecent contact statute is there's no mens rea. Again, the statute says

you're guilty if you touch the intimate parts of someone without consent. What about somebody who unintentionally touches somebody, and on the elevator on the way up today, somebody backed into me and I accidentally touched the person in one of the prescribed areas, but I didn't do it intentionally. And I would suggest that unless you intentionally do it, there should be no indecent contact offense.

I would also suggest that touching, even to the prescribed areas without an intent for sexual gratification, should not be an offense. I changed my daughter's diaper this morning and again, that was the second time this morning I committed indecent contact because I did touch one of the prescribed areas. Not with an intent for sexual gratification, with legitimate intent, but I nevertheless committed the crime.

So I would suggest that the intent element of the indecent contact require that the touching of the intimate part be intentionally and with an intent or with a purpose of sexual gratification.

I did have comments about the 13-year-old age of incapacity, but since there is apparently some sort of a modification, I will not comment on that.

My last comment has to do with mistake of age not being a defense. And again, my hypothetical again is a

complainant says she is of age, maybe has false identification showing she's of age. The defendant reasonably believes she's of age and he thereupon engages in some sexual activity. Society does have an interest in protecting young girls, but an individual who reasonably, not unreasonably, you know, you don't have a reasonable mistake of age when the complainant is seven or eight. But a defendant who reasonably makes a mistake of fact in this situation, has not taken advantage of someone that he reasonably knows is an inappropriate subject of sexual gratification, and I would suggest that a reasonable mistake of fact should be a defense, and if we don't want to make it easy for defense to prove reasonable mistake of facts, making it an affirmative defense, make the defendant do all sorts of things and jump through all sorts of hoops, but to that defendant who reasonably believes that the victim is of age, there should be no criminal culpability, especially where we're talking now about crimes which are first degree felonies, 20 years in jail. Thank you.

CHAIRMAN CALTAGIRONE: What I would like to do now is to take a 15-minute break. We do have a cold lunch back there for both guests and those that have testified as well as the committee. There's refreshments back there. So if you would like to just go back and help yourself, anybody that's in here certainly is free to go back there and grab a bite to eat and bring it back to the table and we'll engage in

dialogue. So we will take 15 minutes, if that's okay with everybody, and we'll get right back at it.

(Whereupon, the record was closed at 1:07 p.m.)

* * * * *

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

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