TESTIMONY OF THE HONORABLE CAROLYN ENGEL TEMIN
BEFORE THE HOUSE JUDICIARY COMMITTEE
SEPTEMBER 1, 1993 CONCERNING
HOUSE BILL 160

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 proposed legislation. I have the honor to serve as Immediate Past President of the Conference and I know I speak on behalf of all our members when I tell you how deeply appreciative we are of this opportunity to participate with you in a continuing dialogue on matters of mutual concern. One of the great pleasures of my year as President of the Conference of trial judges was to watch the development of this growing relationship between our Conference and the Legislature and I am delighted to personally participate in the process this morning.

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 reaction to the legislation. For the past ten years I have served as a judge on the Court of Common Pleas of Philadelphia County and have tried hundreds of cases involving charges of sexual assault of both adults and children.

House Bill 160 is clearly an important attempt to reorganize the laws relating to sexual offenses.

Cases involving sexual assault, particularly those involving assaults on children, are among the most difficult cases that a trial 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" does not

necessarily enhance the factfinding process and very often problems are created by well-meaning prosecutors who over-prep their witnesses and add to the difficulty of the factfinder in separating truth from fantasy or suggestion.

First of all I would like to say that I have had the opportunity prior to preparing my remarks to review a draft of the remarks of my colleague, Judge John 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.

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, or at least hear the questions and the prosecution would object on the ground 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 Evidence Code which covers this. Moreover, this Section as presently drafted does nothing to insure that the victim will not be needlessly embarrassed by 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 at 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".

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 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 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" 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 a prompt complaint (usually called "Rape Trauma Syndrome evidence"). Section 5990 would also permit expert witness testimony regarding, "The typical 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 such

evidence, or because it invades the province of the jury. You are all aware 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 (many times for very large fees) on a variety of 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 the expert testimony and to decide whether or not that testimony is legally relevant.

In fact, in a recent decision of the United States Supreme Court [Daubert v. Merrill Dow Pharmaceuticals, 113 S. Ct. 2786 (decided June 28, 1993)] the Court held that it is 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 on whether the theory or technique in question can be and has been tested, whether it has been subjected to peer review and 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 (S.B. 176) is based, to a large degree, on the Federal Rules of Evidence which are construed in the Daubert case. If the Code is adopted, then no doubt the Daubert case reasoning will apply to Pennsylvania evidence as well. Perhaps, rather than the present approach of having the statute permit specific 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.

I would like to briefly touch on two areas that are not addressed by the present proposed legislation.

First of all I would like to discuss the problem of sexual abuse of small children. In doing so I am relying not only on my experience as a trial judge but also my experience as President of the Board of the Joseph J. Peters Institute for fifteen years. The Peters Institute is a mental health clinic that specializes in the treatment of sex offenders and sexually abused persons. Many of their clients are sexually abused children. It is well known that the trauma to a small child of any sort of sexual abuse is the same whether or not penetration actually results. Thus, where a child of tender years (and I leave that definition to the legislature) is 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 and the statutory scheme in the proposed legislation, crimes involving penetration are more serious and involve more serious penalties (for instance mandatory sentences), there is a tendency on the part of prosecutors, in prepping child witnesses, to attempt to get them to testify that penetration actually occurred. Very often, a small child may not be able to describe whether something went "in" or "on" the child's anus or 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. Thus, the result may be a not guilty verdict in a case where prohibited sexual activity actually occurred but the evidence is 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 grade of the crime between crimes involving penetration and crimes involving touching. This is an issue the Committee may wish to consider.

Another area which is not touched by the present legislation is the issue of sentencing. If the present Bill becomes law, the sentencing statutes presently in place would apply including the mandatory minimum sentences (five to ten years) for Section 3121 crimes (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 "incest fathers". Judge Cleland has properly pointed out that very often there is "charge bargaining" with relation to sexual offenses because of many 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 in fact a close relative, particularly one in *loco parentis*. The problem with charge bargaining is that it distorts the criminal record of the offender providing a record of much less serious conduct than the one actually committed. When the purpose of charge bargaining is really to alleviate the possible penalty or avoid the effect of the mandatory sentence, the issue is better dealt with by facing the sentencing aspect head on rather than distorting the nature of the actual act that was committed.

Incest fathers constitute a very special group of sex offenders for a number of reasons. First of all they are almost all themselves the victims of child sexual abuse. It's one of the things that turns them into incest fathers. 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 victims. They are not likely to prey on strange children and are only likely to commit sexual offenses when they are living with someone, usually a young child, with whom they are in *loco parentis*. To subject incest fathers to a mandatory five to ten year sentence often results in punishing the victim as much as the offender. If the mandatory minimum sentence did not apply to incest fathers, 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 allow the offender to be on a work release program whereby he/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 father may have to undergo treatment before being permitted any contact whatsoever with the victim or other siblings of the victim but removing the incest father from the effects of the mandatory minimum sentence would permit judges to make discretionary decisions and fit the punishment to the situation. This is not to say that there are not situations in which the acts of an incest father are so reprehensible as to require a 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 the opportunity to make these comments to you. I look forward to participating in the round table discussion that has been planned for today.