House Bill 160

Testimony Before the House Judiciary Committee
September 1, 1993

My name is John Cleland and I am President Judge of the Court of Common Pleas of McKean County, the 48th Judicial District.

I am appearing here today in response to the invitation of the House Judiciary Committee to the Pennsylvania Conference of State Trial Judges. Although I have been asked by the Conference to present testimony on this bill, I want to make it clear that the views I express are my own and do not represent any official position of the Conference.

Nevertheless, I am confident that I do speak for the Conference, and for Pennsylvania's trial judges, when I express my appreciation to the committee for offering to the judiciary the opportunity to provide input into the legislative process. This kind of continuing dialogue cannot help but be beneficial to the citizens of the Commonwealth.

I intend to limit my comments to the substantive and procedural issues which this bill raises for the judiciary. I would like to present my comments in three parts: first, regarding the need to coordinate this proposed legislation with the proposed evidence code also under consideration by the legislature; second, regarding some technical and practical problems; and third, to briefly suggest the possibility of another approach to the problems which this bill seeks to address.

Initially, however, I want to commend the committee for its attention to the problems of sexual assault in our society. Because I sit in a one judge county I have the unfortunate opportunity to observe the realities of sexual assault not only as a criminal offense, but also as its effects ravage children in dependency and delinquent proceedings, how it devastates families that I deal with in divorce and child custody litigation, and the difficulties it presents to our correctional and mental health systems.

Having said that, let me turn first to the need, in my view, to coordinate this proposal with the proposed evidence code.

I think that it is important that the rules of evidence be consolidated in one place. By fragmenting the rules, by creating one set of rules for sexual assaults and another set for other forms of assault, we unduly complicate the administration of justice for the bench and bar.

The proposed legislation 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 was dressed.

In terms of protecting children, I find section 5991, "competency of child victim witness," very troublesome. Under current law a child over 14 years of age is presumed to be competent, while a child under 4 years is presumed to be incompetent. When the child is between 4 and 14 the child may

only testify after the judge questions the child and determines that the child had the capacity to observe the acts in question; has the capacity to remember those events; and has the capacity to give intelligent and truthful answers.

Under House Bill 160 presumably a different procedure would be employed. Section 5991 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, and that the child will be disqualified if the child is incapable of expressing him or herself or cannot understand the duty to tell the truth.

As a practical matter, then, the prosecution will present a child witness and the child will be presumed to be competent. Defense counsel will immediately request the opportunity to question the child to test his or her competency. The child then faces his or her first questioning not from an 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.

The proposed evidence code handles the problem differently. It simply provides that every person, including children, I assume, is presumed to be competent unless the witness is incapable of remembering the event, or expressing himself in a way that can be understood either directly or through an interpreter, or does not understand the duty to tell the truth.

This approach tracks the intent of the proposed 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.

Subsection (c) of the competency section of House Bill 160 also proposes a change in the law regarding the oath to be administered to child victims of sexual assault under ten 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 section 6243, also deals with this problem. But it applies the principle not just to children under ten, but to all witnesses. It provides that the oath or affirmation shall be "administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to tell the truth."

These two sections involving the 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 abuse and a different procedure for determining the competency of a child witness to such abuse?

A similar problem arises in the area of relevancy. Section 3108 of House Bill 160 prohibits the introduction of evidence

regarding the victim's dress to suggest that the victim provoked the offense. The section then states "Nothing under this section shall prevent the introduction of evidence that would otherwise be relevant." That appears to me to be internally inconsistent. If the victim's consent, or lack of consent, is at issue, and the judge determines that the victim's manner of dress is relevant to that issue, then this section as proposed would arguably allow introduction of such evidence.

The question should not be whether or not evidence regarding the victim's dress should be admitted as a matter of law, the question should be whether or not the manner of dress is relevant, that is whether it tends to prove or disprove a fact which is at issue. That decision should be left within the discretion of the trial judge who is best able to judge the circumstances of the particular trial.

That is the approach taken by the proposed evidence code and, it seems to me, the more logical view.

Regarding evidentiary issues, I finally want to mention section 5990, the use of expert witnesses to help the jury understand the typical behaviors of children who are victims of sexual assault. It appears to me that this is essentially a reversal of the current case law as established by Commonwealth v. Dunkle, ____Pa.____, 602 A.2d 830 (1992).

I think in appropriate cases such testimony could be helpful. The problem with this type of testimony, however, is not whether it is relevant, clearly it is. The problem is, as

the Court's opinion in Dunkle demonstrates, that the validity of the scientific research underlying such opinions is not well enough developed to be of significant help to the jury. It is difficult to transfer the experience of child victims generally to the experience of a particular child victim. Such opinion testimony may deter the fact finding function and not enhance it.

These same considerations apply to §3105 regarding prompt complaint to the extent that the bill may authorize expert testimony regarding the reasons children in general may not complain promptly.

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

One of the most difficult things I do as a judge is to evaluate the credibility of a child witness in any case -- as the victim of an assault, or in a dependency proceeding, or in a custody case. A child sees, remembers, recalls and expresses things differently than an adult does. It has been my experience that I must constantly protect against my tendency to unquestioningly accept a child's testimony at face value.

I do not mean to say that children lie, although some obviously do, only that a particular child witness may be expressing himself or herself figuratively and the testimony should not be accepted literally. In addition, of course, recently there have been reports of research evaluating the degree to which childrens' testimony may be the product of

fabrication or manipulation resulting from improper questioning techniques. To the extent that expert testimony focuses on the particular child victim, in an appropriate case, it could be helpful to jury.

In terms of the practical administration of the statute, it seems to me that we should in some way allow an escape hatch so that prosecutors and defense counsel may engage in meaningful charge bargaining. If the prosecutor cannot offer the defendant anything more than a second degree felony or a first degree misdemeanor, then many more cases will go to trial. Aside from the burden this will put on the court system, it will put an additional significant burden on victims and their families. It is not at all unusual for the prosecutor to ask me to accept a plea to a second degree misdemeanor indecent assault, even involving serious sexual assault, at the request of the victim. I have had children, bruised in body and spirit, tell me that they do not want their daddy to go to jail, they only want him to stop hurting them. I have had wives tell me that they do not want their childrens' father to go to prison, but they do want him to get treatment.

By reducing the options the prosecutor has to bargain in appropriate cases we may end up punishing the child twice -- once by requiring the child to testify and a second time by making the child feel responsible for the fact that the child's father is in prison. This is a reality that I see frequently and it should not be discounted.

I would like to use the balance of my time to suggest the possibility of another approach to the problem of defining and codifying sexual offenses.

I am suggesting, simply, that we treat assaults as assaults; and that we do not make a separate category for sexual assault anymore than we do not make a separate category for assaults with a knife or 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 procedures 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 battery; we call it assault. Certainly that definition is broad enough to cover rape, indecent assault and involuntary deviate sexual intercourse.

By trying to do what HB 160 attempts to do we end up in a definitional maze that leads us to results that we never intended.

For example, conduct which clearly would be an indecent assault under the current law would not be prosecutable as such under HB 160. Consider a recent case from Somerset County,

Commonwealth v. Pettiford, 10 D&C4th 413 (1991). 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 of 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 by the bill.

To use another example, under the statute as proposed an uncle could use his ten year old nephew for his own sexual gratification almost with impunity. Suppose the uncle rubbed the nephew's genitals. While the genitals are an "intimate part," there has been no "sexual act" and, therefore, the child, even though under 13, can 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.

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.

That 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 is taught in our 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 a 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 is a bad touch and prosecutable as an assault.

I am 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 sexual crimes there frequently is no physical injury as such. Nevertheless, in terms of explaining the law of sexual assault to a jury, to the public, to victims and defendants such a simplification may well be worth the effort.

In closing, I want to thank the Committee once again for extending this invitation to the Conference of State Trial Judges. I hope that my comments have been helpful to you in the performance of your very important responsibilities.