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STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA ON HOUSE BILL 160 PRESENTED TO THE HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE ON SEPTEMBER 1, 1992

By Larry Frankel, Legislative Director

The American Civil Liberties Union of Pennsylvania welcomes this opportunity to participate in the consideration of House Bill 160 in the format of a Round Table discussion. Last session we were involved in productive efforts to accommodate several of our concerns about proposed revisions to portions of the Pennsylvania Crimes Code dealing with sexual offenses. While we acknowledge that progress has been made with regards to civil liberties problems which appeared in earlier versions of HB 160, there remain a number of provisions that we believe violate rights protected by the United States and Pennsylvania Constitutions. We think that each of these problems can be addressed and resolved without impairing the main thrust of HB 160.

Family Membership as an Aggravating Circumstance.

The present language of subparagraph (5) under the definition of "Aggravating circumstances" 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 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 circumstance. 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 the abuse committed by someone who exercises some authority over the child and that is the behavior which should be more severely punished. Therefore, the ACLU suggests that subparagraph 5 be rewritten as follows:

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

Definitions of consent and forcible compulsion

The ACLU is concerned with the definitions of consent and forcible compulsion and their application in specific criminal

cases. Because the factual context varies so widely in these kinds of cases, we believe that our courts should be allowed 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 HB 160 appears to be a reaction to the Superior Court's decision in Commonwealth v. Berkowitz, 609 A.2d 1338 (1992). 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 intermediate appellate court. We think that the judiciary is the appropriate branch for refining the notion of consent because its meaning varies with circumstances. In fact, the Supreme Court granted allocatur in the Berkowitz case on September 22, 1992. 613 A.2d 556. Certainly, we should wait until we see the Supreme Court's discussion of the concept of consent before fixing a definition of consent in the Crimes Code.

We also find the phrase "psychological, emotional, moral and intellectual force, whether express or implied" to be so vague that it will be impossible for a jury or defendant to know with certainty what conduct is forbidden. The ACLU suggests that the definitions of consent and forcible compulsion be dropped and that the refinement of those concepts be left to our courts.

Mistake as to Age

Section 3102 provides that under no circumstances will a defendant's mistaken knowledge or belief as to a child's age be permitted as a defense. This section imposes a standard of strict liability on the defendant. It allows punishment for a crime even where the mature "victim" intentionally misrepresents his or her age. This section would take 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 a 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/her victim is over a certain age. We do not think that there is any need for an absolute rule and urge the adoption of mistake as to age as a defense. Under HB 160, a defendant can claim a mistaken belief when the victim is disabled. Such a defense should be allowed for a defendant who wishes to assert a mistake as to age.

Criminalization of Sexual Activity Among Teenagers

Sections 3109 and 3121(b) 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 the 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 second 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 has 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 a sexual assault upon an infant.

The ACLU does not believe that the legislature should be criminalizing consensual sexual activity among teenagers. We think that such a change could have adverse side effects. It is unlikely that these changes will discourage teenagers from engaging in sexual activities. Rather, teenagers will become more reluctant to seek information from family planning clinics or organizations providing safe-sex educational materials for fear of being treated as criminals. This could lead to a further increase in the incidence of teen pregnancy and HIV infected teenagers. In order to avoid such adverse consequences, the ACLU suggests that the existing Section 3122, which sets forth the crime of statutory rape and grades it as a felony of the second degree, be retained with appropriate changes in terminology.

First Amendment Considerations and Section 6312

The ACLU has previously suggested that this section contain the full list of exceptions contained in the Ohio statue which was interpreted by the Supreme Court in Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691 (1990). Those additional exceptions would be

for bona fide artistic, medical, religious or other proper purposes. In order to fully guarantee First Amendment protection for works of artistic, medical and religious merit, those exceptions should be added to Section 6312(f).

We are particularly troubled that there is no requirement that a defendant who is charged under 6312(c) with the sale or distribution of photographs, videotapes and films know that the photographs, videotapes or films depict a person younger than 18 in order to be found guilty under this section. Recently, the Ninth Circuit Court of Appeals 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. United States of America v. X-Citement Video, Inc., 982 F.2d 1285 (1992). As that court stated:

> Section 2252 potentially applies 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 underage, without the distributor's or recipient's knowledge would be to create precisely the chilling effect condemned by Smith. That we cannot do consistently with the First Amendment as the Supreme Court has interpreted it.

982 F.2d at 1291. The First Amendment mandates that knowledge of the age of the participant be a critical element of the crime described in section 6312(c).

We are also troubled by subsection 6312(e) which bans a defense of mistake of age. If the First Amendment requires that an element of this crime be knowledge of the minority of the person depicted, then it certainly cannot bar a defense as to mistake of age.

To comply with the First Amendment, section 6312(c) 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.

Expert witnesses in child abuse cases.

Section 5990 provides a trial court with the discretion to permit expert testimony in a prosecution for offenses committed against children. While we can envision cases where such testimony might be of assistance to the prosecution or the defense, the ACLU thinks that this legislature should act carefully before sanctioning the use of such expert witnesses.

I have attached to my testimony a recent article from the Philadelphia Inquirer. This article describes an ongoing child sexual abuse trial in San Diego. This case is only one of a number of recent controversial trials for child sexual abuse in which significant questions have been raised about the role played by therapists and expert witnesses.

This controversy over the involvement of child abuse experts in criminal proceedings is not an isolated problem. Over the last several months there have been quite a number of media

reports about possible witch hunts conducted under the guise of child sexual abuse investigations. The qualifications and conduct of the experts are coming under greater scrutiny. The potential for destroying the lives of innocent adults is considerable.

The ACLU considers the issue of expert witnesses in child sexual abuse proceedings to be extremely serious. We are concerned that there are insufficient protections in current law to prevent the potential abusive uses of such expert witnesses. The ACLU does not have specific recommendations to make at this time other than to suggest that Section 5990 be removed from this bill and that an appropriate committee or subcommittee of this legislature be empowered to conduct hearings and round table discussions on the use of expert witnesses in child sexual abuse cases. That process could provide a full examination of the benefits and dangers of expert witnesses and procedural problems related to such cases, without unnecessarily delaying a consideration of the other portions of HB 160.

Conclusion

The ACLU commends Representative Ritter, Chairman Caltagirone and the other members of the House Judiciary Committee for their efforts at modernizing, simplifying and rationalizing the law in Pennsylvania with regards to sex crimes. We urge you to consider the concerns we have highlighted in our testimony so that HB 160 will not result in the diminishing of the civil liberties of any Pennsylvanian.

The Philadelphia Inquirer

Saturday, August 21, 1993

Dale Akiki is accused of abusing children he cared for in a San Diego church's Sunday school.

Molestation trial divides San Diego

His supporters say Dale Akiki is a victim of children's fantasies and the zeal of therapists.

By Robin Clark
INQUIRER STAFF WRITER

SAN DIEGO — If prosecutors are to be believed, Dale Akiki ran a most unholy Sunday school.

Each week, for more than a year, the 35-year-old church volunteer would turn his 90-minute class into a session of sex and terror for his 3- and 4-year-old pupils, according to the charges against Akiki.

In more than three months of court testimony, children have told of being tied up, photographed in the nude, locked in cupboards, driven to remote locations, urinated on, dunked in toilets, forced to eat feces, kicked, punched and made to witness mutilations of animals and the sacrifice of a human baby.

All this allegedly occurred while hundreds of unwitting adults attended church services down the hall.

Akiki's attorney, former Philadelphia public defender Kathleen Coyne, agrees children have been abused, but not by her client, who has spent the last two years in jail awaiting trial.

In Coyne's eyes, the children — and Akiki — have been victims of a witch hunt by misguided parents, overzealous therapists and a district attorney whose office brought charges only after pressure from a prominent businessman with personal ties to the case.

"These people have created a bogyman and projected it into the mouths of children," she said.

Supporters of Akiki have repeatedly asked: How, during a year of terrorizing children at the Faith Chapel evangelical church, did Akiki avoid being detected, reported by his victims, or even suspected of foul play?

Why do the children not bear scars from maltreatment that allegedly included sexual abuse with glass, bot-

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Accused Calif. child molester called victim of imaginations

AKIKI from A1

tle cops, a toy firetruck ladder and a rubber curling iron?

And how did Akiki manage to leave no physical evidence of crimes that are said to include human and animal sacrifices in a church classroom?

"I think the whole thing is mass hysteria involving child abuse in this country," said Rose Marie Royster, a San Diego businesswoman and a leader of the Akiki Support Group, which has staged six rallies since March. "What they've done to these children over the past four years is the real child abuse — abuse by therapists."

Even as the prosecution rested its case here recently, a growing number of Akiki supporters insist that the defendant's only "crime" is having a low IQ and a grotesque, even frightening appearance.

Born with a rare genetic disorder called Noonan's syndrome, Akiki has drooping eyelids, a concave chest, a clubfooted gait and thick, woolly hair. He also suffers hydrocephalus, or water on the brain, giving him an enlarged head.

"Those are the kind of things that can scare little kids," says attorney Thomas Maloney, who represented Akiki early in the case. "It's like *To Kill a Mockingbird*. When something bad happened, it was always Boo Radley."

Parents and prosecutors reject that notion. "Just because this man has a handicap, you want to make it OK for him to commit these kinds of crimes?" one mother asked. "My child was severely affected."

Regardless of the outcome, the case has added to the growing national debate over the reliability of child witnesses and the role played by adults in eliciting their testimony.

The case has added to the debate over child witnesses and the role played by adults in their testimony.

Mary Avery, the chief prosecutor in the case, has declined to give interviews while the trial is in progress. But she said last week that she stood by her opening statement, in which she described the Faith Chapel saga as "a classic case in which children have been severely traumatized by physical, emotional and sexual abuse."

Even so, the prosecution clearly has suffered setbacks.

Fourteen of the original 52 counts against Akiki have been dismissed for lack of evidence.

The mother of one child Akiki is accused of fondling testified that her son told her: "Mr. Dale didn't do anything. I should be the one who is in jail. I lied." (The boy later repeated his allegations and said he was confused.)

Another child, the son of a church official, was dropped from the case after his father developed misgivings about the "unrestrained sensationalism and paranoia" being fostered by investigators with a "predisposition toward [finding] ritualistic abuse." The man is now expected to testify for the defense.

And the testimony of some children has been so bizarre as to seem incredible.

One child told his therapist that he had been hung by his feet from a chandelier.

Another child reported being kidnapped and driven to a "fake museum" with Styrofoam doors, where children were shown a three-foot gold ostrich egg and given drugged candy. The boy, who attended Akiki's preschool class just once, also said Akiki had donned an alligator costume, cooked monkeys and made the children drink "gorilla juice."

It "tasted like yuck, but smelled like gorillas," the boy said.

The most bizarre testimony involved allegations that Akiki had brought an elephant and a giraffe into the classroom, stabbed them with a "crocodile knife," and had drunk their blood from a cup.

The boy who told the story described the animals at different times as "real" and "not real." His therapist saw no reason to dispute the account in either case.

"Why would you take it that I would not believe him?" the therapist, Cynthia Thayer, testified in response to questions from Akiki's attorney.

"Did you believe an elephant and a giraffe were in the classroom?" she was asked.

"Well," Thayer said, "I was sitting there wondering how that could be possible. ... It occurred to me that it might have been something that was made to look real."

Akiki's supporters say that such exchanges support Coyne's contention that "this case is an example of parents and therapists run riot on little kids."

"The whole thing is ridiculous," says Paul Clingerman, who worked closely with Akiki at the Naval Supply Center in San Diego for 10 years before his friend's arrest.

At the center, co-workers' children who visited the data-processing office where Akiki worked "would immediately glom onto Dale," Clingerman says. "He would show them how to use the bar-code gun or put the work in bins. He loved the children, and they loved him."

After Akiki's arrest, employees questioned their children about possible abuse or "improper touching," Clingerman says. "They all said, 'No, Mommy. I like Mr. Dale.'"

Children at Faith Chapel had much the same response when first asked about Akiki's conduct as a baby sitter, according to testimony.

No one accused Akiki of abuse during the year he worked at the church, from April 1988 to April 1989, when he was asked to give up his volunteer job after parents complained he was an "inappropriate teacher" for their young children because of his appearance.

The first allegation surfaced several months later when a little girl told her mother that Akiki had exposed himself to her.

As word spread of possible abuse, parents talked among themselves and questioned their children. Meetings were held, and children were sent to therapists, some of whom specialized in the controversial field of ritual child abuse.

Initially, most children denied being molested. But after weeks of therapy and parental interrogation, they began to tell stories that grew increasingly more lurid.

Typical was the case of a 5-year-old boy, who initially told therapists he enjoyed kindergarten because the boys and girls got to "do fun stuff." Asked repeatedly if there were "problems with touching," the boy said no, adding that he liked "Mr. Dale," as the children knew Akiki.

Two months later, the boy said that Akiki, his wife, Sharon, and a third teacher had all touched his "private parts." He said that Akiki had urinated on one child and that Sharon Akiki had stripped naked, defecated in the middle of the floor and flung her clothes around the room. Neither Akiki's wife nor the third teacher has been charged in the case.

Avery said the children initially denied abuse because Akiki had terrified them into silence. "These children were severely traumatized," she said.

But Coyne and fellow defense attorney Sue Clemmens cite recent research showing that children 6 and younger can be led to give elaborate accounts of events that never happened, even after first denying them.

Even the prosecution once expressed doubts that a case could ever be brought to trial because of problems with the children's stories.

Sally Penso, the original prosecutor assigned to the case, declined to file charges against Akiki and refused a parent's request to interview a child for a third time, after two previous sessions had been unproductive.

"I believed that the information the child was giving could have been contaminated," Penso has testified, noting that the boy's parents had been questioning him every night for two weeks.

Akiki's supporters say the case would never have proceeded were it not for the intervention of San Diego businessman Jack Goodall, a part-owner of the San Diego Padres baseball team and chairman of Foodmaker Inc., the parent company of the Jack-in-the-Box fast-food chain.

Two of Goodall's grandchildren were complainants against Akiki. Goodall's wife, Mary, has testified that, in late 1989, she became frustrated by the pace of the district attorney's investigation.

At her request, Jack Goodall arranged a meeting with San Diego District Attorney Ed Miller in which the couple expressed their concerns.

Within a week, Avery, another attorney in the office, had replaced Penso.

In addition to being a senior prosecutor, Avery was a founding director of the Child Abuse Prevention Foundation, a nonprofit group to which the Goodalls had contributed or promised almost a half-million dollars in recent years. Jack Goodall was board chairman, and Miller was an honorary board member.

Alleging a potential conflict of interest, Akiki's attorneys unsuccessfully sought last year to have Avery removed from the case.

As the prosecution rested its case last week, Akiki sat impassively behind the defense table, as he has throughout the trial, occasionally scribbling notes to his attorneys.

He is expected to testify in coming weeks, and Coyne predicted he would be "his own best witness."

Before his arrest, Akiki worked as a computer assistant at the Naval Supply Center and, before that, at a doughnut shop that hired mostly handicapped employees.

In an interview since his arrest, Akiki told reporters that he once became so depressed in jail that he wanted to kill himself by turning off the shunt that drains excess fluid from his brain.

But friends convinced him that suicide would only confirm his guilt. So, instead, he took and passed a sodium brevitol — or "truth serum" — test.

"I wasn't supposed to live six months when I was born," he said. "I've overcome all these obstacles in my life, and now this hits me. ...

"I'll do anything they want me to do to prove I'm innocent. I loved every one of those kids. I wouldn't harm a hair on their heads."