COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

IRVIS OFFICE BUILDING
ROOM G50
HARRISBURG, PENNSYLVANIA

PUBLIC HEARING ON
HOUSE BILL 265

MONDAY, DECEMBER 21, 2009
11:00 A.M.

BEFORE:

HONORABLE THOMAS R. CALTAGIRONE,
MAJORITY CHAIRMAN
HONORABLE JOSEPH F. BRENNAN
HONORABLE JOSEPH A. PETRARCA
HONORABLE RONALD G. WATERS
HONORABLE RON MARSICO, MINORITY CHAIRMAN
HONORABLE TOM C. CREIGHTON
HONORABLE RICHARD R. STEVENSON

ALSO IN ATTENDANCE:

HONORABLE T. MARK MUSTIO
HONORABLE MARK B. COHEN

BRENDA J. PARDUN, RPR
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ALSO PRESENT:

DAVID D. TYLER, EXECUTIVE DIRECTOR (D)
V. KURT BELLMAN, LEGISLATIVE ASSISTANT (D)
WENDELL HANNAFORD, LEGISLATIVE ASSISTANT FOR REP. CALTAGIRONE (D)
KAREN S. COATES, SENIOR LEGAL COUNSEL (R)
KAREN L. DALTON, SENIOR LEGAL COUNSEL (R)

BRENDA J. PARDUN, RPR
REPORTER - NOTARY PUBLIC

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P R O C E E D I N G S

CHAIRMAN CALTAGIRONE: I'd like to start the House Judiciary Committee hearing on House Bill 265, Representative Mustio's bill.

And with that, if the members that are here, if they'd care to introduce themselves, start from my right and across, and staff.

REPRESENTATIVE PETRARCA: Representative Joe Petrarca, Westmoreland County.

MR. TYLER: Dave Tyler, executive director, House Judiciary Committee.

MS. DALTON: Karen Dalton, counsel, House Judiciary Committee.

REPRESENTATIVE MUSTIO: Mark Mustio, Allegheny County.

REPRESENTATIVE CREIGHTON: Representative Tom Creighton, Lancaster County.

CHAIRMAN CALTAGIRONE: And we'll start off with Representative Mustio, opening remarks.

REPRESENTATIVE MUSTIO: Mr. Chairman, did you want me to go right into my

testimony?

CHAIRMAN CALTAGIRONE: Yes.

REPRESENTATIVE MUSTIO: First of all, I'd like to thank you for holding the hearing today, and for those members coming after a weekend of tough weather conditions. And for those that are in attendance who will be testifying, I also want to thank you. And I also want to thank the advocacy groups for weighing in, pro and con, passionately, on your positions.

Before I give my testimony, I cannot even begin to feel the testimony that I'm going to give on behalf of the young lady and what she's gone through. As a father of a young woman, a father of a daughter, I can't even begin to relate to what the parents went through when they came to my office and relayed their frustration, but I'm going to give it my best shot. And please bear with me, and appreciate, again, Mr. Chairman, the time. And I'll be reading from these prepared remarks.

HB 265 is inspired by a true story. It is the story of a young woman named

Jennifer, a student at one of Pennsylvania's universities. Jennifer's life took a dramatic turn some months ago when she was raped. Thankfully, the perpetrator was caught quickly after committing this despicable and cowardly act.

After the attack, Jennifer sought help from medical professionals. She went to the hospital and was seen by doctors and nurses and, later, victim advocate. She informed her parents. Both Jennifer's mom and dad sought help from the district attorney and the police. At every stop along the way, Jennifer and her parents asked if the perpetrator could be tested for HIV.

As a victim, Jennifer wanted peace of mind. She wanted to know if the man who had raped here also gave her a life-threatening illness. She wanted to know if she could start treatment for the HIV infection called nPEP, which must be given within a short time frame and which has pernicious side effects. She wanted peace of mind.

Jennifer's father contacted me about his daughter. He told me of his anger -- and

showed me his anger as well, as a side note -- at not being able to have the attacker's HIV status revealed through testing. No one that he, his wife, or Jennifer spoke with knew of a way to have Jennifer's attacker tested.

The fact of the matter is that Pennsylvania law allows a court to order HIV-related testing based upon compelling need. Under the Confidentiality of HIV-Related Information Act, the court can order a person to submit to testing even if the person refuses to give consent for the test, if the person seeking the test was exposed to the other person's bodily fluid and the exposure represents a significant risk of HIV infection. This is a procedure that district attorneys use when a police officer, for example, has be exposed to the blood or other bodily fluid of a perpetrator during arrest.

At minimum, Jennifer's case reveals the need for more training regarding the law governing HIV testing. Jennifer cannot be the only rape victim who ever asked that an attacker be tested. Victims deserve to get

the correct answer from the police, from the victim advocate, from the district attorney, and from doctors and nurses when they ask whether there was a way to test the perpetrator for HIV. Victims deserve peace of mind.

That brings us to HB 265. If it weren't for Jennifer's courage, I would not have known about the Violence Against Women Act. Enacted by congress, the Violence Against Women Act requires all fifty states to write a law that allows an attacker to be tested for HIV upon request of the victim. Failure to enact such a law results in the state suffering a severe monetary penalty, a lock-out or denial of 5 percent of the grant money given to the state under the Violence Against Women Act.

Digging a little deeper, I discovered that because Pennsylvania has not complied with congress's directive, the commonwealth has already forfeited $37,500. The $37,500 represents 5 percent of the money given to Pennsylvania in 2006 under the Violence Against Women Act to fund programs for victims

of domestic violence.

That's $37,500 which cannot be used to make sure these women -- the abused mom and her children have a safe place to sleep. That $37,500 that cannot be used to make sure there are enough counselors to meet the needs of those battered by a loved one.

If we don't enact a statute allowing the victim to request HIV testing of an offender, by the end of this legislative session, we will lose 5 percent of the grant money awarded in 2007 and 2008 and each year thereafter. That's 5 percent of the $400,000 given to the borough of State College and 5 percent of the $399,000 given to Schuylkill County in 2007. That's 5 percent of the 358,000 given to Berks County, 5 percent of 389,000 given to Dauphin County, 5 percent given -- of the 400,000 given to Butler County and 5 percent of the 1.1 million given to the city of Philadelphia in 2008.

In other words, 5 percent of over $3 million given to communities in Pennsylvania during 2007-2008, will be subject to lock-out if we fail to act.

But failure to act will not only hurt victim of domestic violence. It will hurt victims of sexual assault like Jennifer, who won't have the peace of mind they so desperately seek.

HB 265 was drafted with assistance from the United States Department of Justice, specifically the Office of Violence Against Women. Since congress was very specific about what a state law must contain, I asked for help in the bill's drafting.

Congress requires that the attacker be tested within forty-eight hours of establishing a prima facie case if the victim wants to know the HIV status of the attacker. In Pennsylvania, that means an attacker would be tested within forty-eight hours of being bound over for trial through a preliminary hearing. Again, that is only, if, like Jennifer, the victim requests it. Testing the attacker is not automatic.

Congress also requires that the results be provided to the victim and attackers as soon as possible, that follow-up tests be provided as medically appropriate,

and that results of those tests be provided as soon as possible.

I have been informed by the Department of Justice that HB 265 meets the requirements of the Violence Against Women Act.

The number of rape victims in Pennsylvania has remained somewhat constant over the past twenty years, reaching about three thousand. My understanding from speaking with prosecutors is that the overwhelming majority of these victims know their attackers and do not request testing. Prosecutors tell me that the victim who will ask for testing is the victim who was attacked by a stranger.

Under HB 265, a victim can request testing within forty-eight hours of the attacker being bound over for trial in the case of rape, incest, involuntary deviate sexual intercourse, aggravated indecent assault. The term "victim" includes a parent of a minor who has been sexually assaulted.

After the victim asks that the attacker be tested, the prosecutor makes

application to the court. The prosecutor must show there was a probable cause to believe there has been a probable transmission of bodily fluids between the accused and the victim. If probable cause can be shown, then the court must order HIV testing.

The standard probable cause to believe that there has been a probable transmission of bodily fluids was chosen because that is the standard in New Jersey Supreme Court case, in the State of New Jersey, in the Interest of J.G., N.S. and J.T. This is the infamous case of the three teenagers from Glen Ridge, New Jersey, who forced a ten-year-old mentally retarded girl to commit sodomy. The New Jersey Supreme Court ruled that testing of these young men could go forward under New Jersey's statute authorizing HIV of those indicted or convicted of sexual assault if the prosecutor could prove there was probable cause to believe that there had been a probable transmission of bodily fluid.

To protect the Fourth Amendment rights of the accused in Pennsylvania, HB 265

borrows this standard from New Jersey law.

Congress is currently considering whether to make changes to the Violence Against Women Act. Patrick Leahy, chairman of the Senate Judiciary Committee, has a bill in the senate, S 327. House of Representatives is reviewing HR 3401, authored by Representative Debbie Wasserman Shultz of Florida.

Those who oppose HB 265 believe that the correct action is no action. Critics say that the privacy of the accused is more important than the peace of mind of the victim or the money that goes to victims of domestic violence. They also charge that testing the assailant only serves to give the victim a false sense of security. Since congress is going to strike the provision regarding testing anyway, the issue will simply go away.

While I understand and appreciate the arguments, I believe they are far from the point. If we listen to Jennifer and other victims, they are telling us they want and need the peace of mind that testing of the assailant provides. Since the survivors of

sexual assault are the only ones who know how they truly feel, I believe we should listen to them. Congress has.

In fact, according to the Department of Justice, both S 327 and HR 3401 include provisions allowing a victim to request HIV testing of the assailant in order to avoid the lock-out of funds.

While we must continue to watch as events unfold in the halls of congress, we must also comply with the law today. We must take action by the end of the session, so that when grants are reauthorized, the borough of State College, Schuylkill County, Butler County, Berks County, Dauphin County, and the city of Philadelphia will not take a 5 percent hit. If we want to avoid having other grantees face the same predicament we faced in 2006, when Pennsylvania lost $37,500, we must act.

Congress has spoken clearly on the issue of victims being able to discover the HIV-status of an attacker. What we know at this moment -- what we know at this moment is that through S 327 and HR 3401, congress

hasn't changed its mind. Congress agrees with Jennifer and other victims who want to know whether they have been exposed to the HIV virus. When congress wrote the Violence Against Women Act, it directed that states enact a statute providing for testing of assailants, the request of the victims -- at the request of the victims.

Congress is on the side of the victims. Pennsylvania should be, too.

Mr. Chairman, I just wanted to highlight something. I was re-reading something that I received this morning -- or I received in the past but was re-reading it, from one of the advocate groups that will be testifying today, and the point that I would make here is that we should listen to Jennifer, because she really is the victim that's gone through the intensity.

One of the letters that I received copy of was that compulsory testing of perpetrator's HIV status does not achieve the goal of meeting victim's needs -- this is the point that really kind of struck a nerve with me -- nor does it provide them with peace of

mind as to the risks and options regarding exposure and/or infection with HIV.

I've done a lot of reading over the past few years on abuse, particularly verbal abuse. And when you take the time to and have the nerve to, in my opinion, to tell someone how they should be feeling or how they feel or how they don't feel or what something does or doesn't give them, I think it's abuse and I think compounds this problem. I wouldn't begin, after the reading that I have done and listening to her testimony in my office, to begin, as I said in my opening remarks, to tell her how she feels or what will or will not give her peace of mind, particularly when we have some legislation that has the opportunity.

But I just wanted to thank you, again, for your time this morning to speak on her behalf.

CHAIRMAN CALTAGIRONE: Thank you, Mark.

Do any members have any questions of Mark?

If not, I want to welcome Chairman

Marsico.

REPRESENTATIVE MARSICO: Good morning.

CHAIRMAN CALTAGIRONE: And Representative Brennan also, and of course counsel, Karen Coates. Thank you all.

We'll next move to Andy Hoover, executive director of the ACLU.

MR. HOOVER: Good morning, Chairman Caltagirone, Chairman Mustio, members of the committee.

Thank you for the opportunity to be here today. I am here today on behalf of the sixteen thousand members of the ACLU of Pennsylvania.

I think when taking on an issue like this, it's always helpful to remember where we all -- what we share in common, which is that we all are interested in ensuring that transmission of HIV through sexual assault is stopped or, at least, slowed, and also to ensure that survivors have what they need to deal with the trauma they've been through.

The ACLU of Pennsylvania opposes House Bill 265. We believe it is not the

answer for survivors. You've heard Representative Mustio describe what the bill does. This legislation is largely symbolic and would not aid sexual assault survivors. In fact, it may even harm survivors in that it gives them a false sense of security and implies the survivor can wait until after an arrest to address healthcare issues related to the assault.

When a person has potentially been exposed to HIV, whether it is the result of sexual assault, in the healthcare industry, or in other situations, a person must make an immediate decision about her care. She has approximately a three-day window to begin taking post-exposure drugs.

The Centers for Disease Control and Prevention recommends that a person should begin taking Nonoccupational Post-Exposure Prophylaxis, nPEP, a drug treatment that can stop HIV transmission, within seventy-two hours after possible exposure.

In fact, seventy-two hours is the maximum recommended time frame for starting the drugs. Ideally, a person begins the

regimen within two to thirty-six hours of the possible exposure.

A defendant in a criminal case typically has his first preliminary hearing within seven to ten days of arrest. Often the defendant is not held for court at this first hearing, as prosecutors often ask for a continuance in order to pull together the evidence to prove probable cause and, thus, to continue to hold the defendant for a trial.

Even if the defendant is held for court at the first hearing, the survivor is now well beyond the window when she must begin taking post-exposure drug regimen.

There are two other problems with HB 265 that render it useless for survivors. The first is the possibility that the police arrested the wrong person. According to the Innocence Project, primary suspects have been pursued and only cleared through DNA testing prior to conviction in tens of thousands of cases in the last twenty years. Two hundred and forty-five people have been exonerated through DNA testing after conviction. And many of these cases, including cases in

Pennsylvania, have involved sexual assault.

Forcing an HIV test on the wrong person will not help a survivor of sexual assault.

Second, a person who has recently contracted HIV will test negative for it, a false negative, for at least six weeks and possibly for as long as six months. Research indicates that the person's viral load, the amount of HIV in the bloodstream, during this period is very high, and that possibly as much as 50 percent of HIV transmission occurs during this period after initial infection. In other words, at the same time that a person is susceptible to passing on HIV, he is also testing negative for it. Thus, even if a suspect is arrested and tested and they have the right person, those test results may provide misleading information to the survivor of sexual assault, with potentially life-threatening consequences if she delays nPEP in reliance on a falsely negative test.

Pennsylvania law already ensures that sexual assault survivors receive the assistance they need. Act 148 of 1990, the

Confidentiality of HIV-Related Information Act, provides sexual assault survivors with access to HIV testing, pre- and post-test counseling, and the nPEP drug regimen, if necessary. And, as Representative Mustio pointed out, also provides full testing of the suspect.

Healthcare professionals recognize that a sexual assault survivor cannot put her own care on hold to wait for a suspect to be arrested and tested. The CDC recommends that healthcare providers discuss with sexual assault survivors the limitations and benefits of the nPEP drug regimen and offer a three- to seven-day supply, if necessary.

If a survivor thinks it is possible she contracted HIV from a perpetrator, the CDC also recommends testing for survivors at the initial examination, and after six weeks, three months, and six months.

The World Health Organization also recommends that sexual assault victims initiate the nPEP regimen as soon as possible after an assault. Pennsylvania law should follow and does follow these respected

recommendations.

The ACLU of Pennsylvania opposes mandatory HIV testing in all forms. The best care occurs and privacy rights are respected when a person agrees to be tested through a written informed consent with pre- and post-test counseling.

HIV is a disease that requires life-long care. A patient with HIV needs to have a trusting relationship with his or her healthcare provider. That trust is lost when a patient is forced to take an HIV test.

Mandatory HIV testing in sexual assault cases also comes with significant privacy concerns. As discussed previously, the Commonwealth, on behalf of the sexual assault survivor, has little medical interest or need to force a suspect to take an HIV test.

In addition, the results of the test cannot and should not be used as criminal evidence. Thus, HB 265 presents Fourth Amendment search-and-seizure problems.

While the ACLU of Pennsylvania opposed HB 265, medically accurate policies

are already in place to ensure that sexual assault survivors receive the care they need.

Chairman Caltagirone, thank you for the opportunity to testify today.

CHAIRMAN CALTAGIRONE: I'm sure there is going to be some questions.

Mark?

REPRESENTATIVE MUSTIO: Just a couple. You had indicated in your testimony that -- and as I did, that Pennsylvania law currently has a mechanism to do this. What do you say about the -- I guess, the lack of informed knowledge in the community, whether it be the law enforcement community or DA's offices or whomever, that said there was really no way for her to have the accused tested?

MR. HOOVER: You're saying that law enforcement community said that now, that there is no way to have that tested?

REPRESENTATIVE MARSICO: She asked, as I said in my testimony, every step along the way -- the medical professionals, the prosecutor's office -- and that's why they came to my office, because they said there was

no way for them to require this testing take place.

MR. HOOVER: One thing I learned dealing with these issues is that training is an essential part. When the legislature does something, training the law enforcement community and judicial branch is really important. In fact, just last week we were having discussions about RRRI program. Some judges don't even know what it is. DAs and defense attorneys, they don't even know what they're talking about, so I would suggest that it is a training issue. That if we have this in the law, that law enforcement needs to know about it, essentially.

I'm also curious, you didn't -- Representative Mustio, you said you talked with the Department of Justice. We do have this in place now where we can -- testing can be done on a perpetrator potentially, and apparently -- I don't know if there was discussion about whether our current law does fit that provision of Violence Against Women Act, but I certainly think that's something worth exploring.

REPRESENTATIVE MUSTIO: I'm not an attorney. And I rely heavily on Republican staff, and I would maybe ask Karen Dalton to weigh in on that at this point.

MS. DALTON: I've been in touch with Marty Shields, who's the counsel to the -- in the office of Violence Against Women. I've been in touch with her every step of the way. My understanding from -- and I don't want to speak for her -- but my understanding from Attorney Shields is that House Bill 265 meets the requirements of the Violence Against Women Act.

The statute that congress passed is very specific about what that law must -- must provide. And one of the things it must provide is for testing within forty-eight hours of the defendant's being bound over for trial. That's not in an HIV -- the Confidentiality of HIV-Related Information Act. There are other provisions in there about sharing results and some other things that are, again, not in the current law.

So one of the things that I did was share with Miss Shields the draft. And she

came back with comments. So the provisions that you see before you come after receiving those comments, and we do have on file a comment from her that it meets the statute.

So, again, I don't want to speak for her, but based upon everything I've seen and I've been told, House Bill 265 meets it. There are things in there that are not in the current law.

MR. HOOVER: I know you have witnesses coming from Pennsylvania Coalition Against Domestic Violence. They were actually one of the agencies that took a hit from the grant program. And rather than pursuing a bill like this, they're actually pursuing the bill that Representative Mustio referred to, Senate Bill 327. I'm sure they can -- that's in the federal, U.S. Senate. I'm sure they can talk about that more than I can, but that's noteworthy.

REPRESENTATIVE MUSTIO: The only other comment I have is, in the legislation, it says that the results of HIV-related testing may not be used to establish guilt of the defendant. So I think that you made a

comment that alluded to that.

And I think that's really all that I have at this point.

MR. HOOVER: Sure. Just a response to that. Actually, I guess what I'm saying, maybe I didn't say it clearly enough, is that because of the provision, now you have a Fourth Amendment problem that the commonwealth did -- if the victim -- if it would not help her healthcare -- the survivor -- to have the information -- she already has to make a decision before getting the test results, so put that aside. Now you have no reason for -- no criminal reason for -- there's no reason for evidence -- to introduce as evidence because of that provision.

REPRESENTATIVE MUSTIO: I can't believe in one -- this decision is not being made in a vacuum where this is the only piece of information that the family and the medical professionals that are taking -- providing the care will use. It's just a piece. It's just another piece of information that, you know, based on where the technology is with the tests and -- you know, you've outlined it very

well as far as some of the waiting periods and certain scenarios that does or doesn't. It's just giving the victim, who has had absolutely a horrific experience, another tool to make an informed decision. And the frustrating piece in her situation was, wasn't even given that opportunity to pursue it because every step along the way from the professionals, the advocates supposedly for her were not relaying the proper information to her.

MR. HOOVER: Sounded like she's getting -- sounds like she's getting that from all different places, the way you describe, the healthcare professionals, victim advocate, law enforcement.

You know, as I said in my testimony, they have to -- a survivor has to make a decision before a test would ever come back. So at that point, they've already moved several steps down the line in terms of getting the care they need before you ever get test results.

REPRESENTATIVE MUSTIO: I think I saw that in one of the -- one of -- it may have been even your written letter on the issue,

which I think it was, where, you know, even in the case where you got the perpetrator immediately and were able to do the testing, would you support it under those scenarios?

MR. HOOVER: I went back and re-read, and we actually got a little advice from some defense attorneys talking about being held over for court provision and how -- before you get to the preliminary hearing, that's a good week, usually, week and a half before you even get to that first hearing. This is when HB 265 allows for the DA to request the test.

We do oppose mandatory testing, as I said, for privacy reasons. Actually, I am saying mandatory testing, I should probably elaborate. We're really supportive of written informed consent with pre- and post-test counseling in all forms, whether you're talking about pregnant women or suspects, inmates. This committee dealt with a bill with inmates last week, which we're working on.

So, I guess, to answer your question, I have to say that ACLU's position is that we oppose all mandatory testing.

CHAIRMAN CALTAGIRONE: Representative Petrarca.

REPRESENTATIVE PETRARCA: Thank you, Chairman.

One question here about the science. I respect Representative Mustio and what he's trying to do, certainly. I'm also a very strict interpretationalist, I guess I would say, when it comes to violations of a person's right to privacy.

Were you saying that the science is not clear here, or that this test is pretty much not going to show what someone would hope that it would show at this stage, at this point? I wanted to be clear on what -- the medical science. Could you just speak to this again?

MR. HOOVER: A little bit, although I would refer to Rhonda Goldfein from AIDS Law Project of Pennsylvania. I'm sure she could speak to the science as well. I guess, when you're saying it would come back with wrong information, is that what you said?

REPRESENTATIVE PETRARCA: I thought you said that taking a test at this time would

not provide the results --

MR. HOOVER: Sure. It depends.

REPRESENTATIVE PETRARCA: -- accurate results that could be relied upon or used by someone involved.

MR. HOOVER: It's possible for two reasons. One is the fact that sometimes the wrong person is arrested. The second reason is that if a person has just been infected themselves -- so the perpetrator has just been infected recently, they're going to test negative for HIV for at least six weeks and maybe for six months. It's possible as long as six months. And that's actually the period when a person is most likely to transmit HIV.

In fact, there is research that suggests maybe as many as 50 percent of new cases occur during this period when a person is actually testing negative but does have HIV. So it's possible you could get an incorrect result.

Should also mention that the majority of rape cases actually don't get reported to the police. And so in the majority of cases, survivors are doing what I suggest in my

testimony, which is going through the healthcare steps they need to go through whether it's testing or taking the nPEP drug regimen.

REPRESENTATIVE PETRARCA: Thank you.

Thank you, Chairman.

CHAIRMAN CALTAGIRONE: The issue raised by Representative Mustio about the funding and the loss of that funding, that concerns me, to be very honest with you, because it impacts just about every one of the counties, everybody's losing money, that I think rightfully could be a tremendous help to those groups that depend on that money. And in these desperate times with money shrinking the way it is, to lose that kind of money, albeit maybe a small piece, but you add it all together, and before you know it, that's a pretty large chunk of money that is not going to the people that desperately need that help.

MR. HOOVER: That's not an easy issue. I respect you for bringing it up, Mr. Chairman. The amount of money -- it depends on the grant, obviously, and how much

money we're talking about. It's 5 percent. Obviously, you're still getting 95 percent of the grant. I guess the legislature has to ask themselves, you know, what kind of policy they want to put in place and whether this is going to be helpful or not. Of course, you know, we don't think it is helpful.

And to what Representative Petrarca said, we certainly appreciate the intent of Representative Mustio, as well I think everybody here is interested in helping survivors as much as possible. But to go back to the money that's -- I'll be honest with you, that's -- I don't have much of an answer for that. That's hard. I think, because we're talking about a small percentage, it's a little bit easier to take. But, yes, you have to ask yourself if you want to put the policy into place and whether or not it's helpful.

CHAIRMAN CALTAGIRONE: You know, we're reacting to what congress is mandating. If we don't do something, we are going to continue to lose that money. And in these desperate times, money is getting to be extremely tight at all levels of government.

And I know these agencies depend on that money to do the good work that they do. And, you know, how do you replace it?

MR. HOOVER: There certainly is precedent for the state's bucking what the federal government is asking them to do. I just got an e-mail this morning that the Real I.D. Act has been put off once again, back into 2011. The Adam Walsh Act, the states have been raising a fuss about that because of implementation. That's been delayed. So there is precedent for the states to tell congress, Hey, we don't necessarily like this.

CHAIRMAN CALTAGIRONE: But the real fact is, right now, we are losing money.

MR. HOOVER: Right. I understand.

REPRESENTATIVE MUSTIO: Mr. Chairman, there's also been precedent, as I testified, back to the funds from 2006 where we're taking a hit, and we are going to continue to take a hit. And I would venture to say that if we voluntarily said we're going to cut the appropriations to any of those agencies that assist victims, that the victim advocacy groups would be lined up at our doors

screaming bloody murder.

So when we have an opportunity to not only help victims and -- those that have actually been attacked, been raped, and have approached their elected officials to help, and at the same time, the federal government has said, unless you do something along these lines, we're going to start taking money.

This isn't the only time the federal government does it. We see this all the time in highway legislation. How many times have we passed DUI or testing for level reform? So I think we're in a position to address exactly your concerns from the monetary aspect as well.

Even if you disagree on the science and the testing and all these other things, I don't know the legislation itself -- I don't think -- I don't look at this at all as a step back for a victim. It's a minimum -- at a minimum, it helps give them the information to make the overall decisions, based on all the other information that they have.

MR. HOOVER: I think that's the question that the legislature's going to have

and this committee will have to deal with. Obviously, we have three groups here saying this does not help survivors and it might harm them. I expect Representative Mustio has a different view. And, you know, just have to ask yourself, does this harm or help survivors and is it worth the money.

CHAIRMAN CALTAGIRONE: All right. Any other questions?

Thank you.

We'll next hear from Sean McCormack, Dauphin County's DA's office.

MR. MCCORMACK: Good morning. This is a little bit different. I'm usually the one asking the questions.

Good morning, Chairmen Calta -- I knew I was going to --

CHAIRMAN CALTAGIRONE: Caltagirone.

MR. MCCORMACK: Caltagirone --

CHAIRMAN CALTAGIRONE: Those Italians.

MR. MCCORMACK: -- Marsico and the other members of the House Judiciary Committee. Thank you for having us here to testify today.

My name's Sean McCormack. I'm the chief deputy district attorney here in Dauphin County. I've been with the Dauphin County district attorney's office for twenty years now. And I've been in charge of our child abuse prosecution and sex crimes unit since 1995.

And I'm also here on behalf of the District Attorneys Association. I'm the chair of our Child Abuse Prosecution Coalition, which is a network of child abuse prosecutors across the state. We get together and discuss cases and strategies, trial strategies, and those sorts of things.

I'm here today concerning House Bill 265, the proposed legislation regarding pre-conviction testing of sex offense cases. House Bill 265 has been introduced to create the right for victims of sexual assault to request pre-conviction testing of criminal offender for Human Immunodeficiency Virus, HIV.

During my two decades as a prosecutor, I have tried literally hundreds of sex offense cases and support this bill

because it assists victims already dealing with a heinous crime by providing ready access to critical medical information. This bill eases and clarifies the procedure by which victims can access the health status of the defendant.

An individual who becomes HIV positive needs to take important and timely steps to best counteract the development of Acquired Immune Deficiency Syndrome, AIDS, a deadly disease.

During the sexual assault or abuse, there's a level of added trauma for victims facing the possibility of having contracted a virus that leads to a terminal illness. One study by the National Center for Victims of Crime and the National Crime Victim Research and Treatment Center found that 40 percent of sexual assault victims had a primary fear of contracting HIV/AIDS. Such anxiety and fear can be partly alleviated by Bill 265, which provides for counseling for victims and testing of the defendant at the establishment of probable cause.

Pre-conviction has become increasing

common -- pre-conviction testing, pardon me, has become increasingly common in the United States. Almost 70 percent of the states nationwide require pre-conviction HIV testing in sexual assault offense cases, including our sister states of New York, New Jersey, Delaware, and Maryland.

The provision of House Bill 265 would allow testing only at the request of the victim and only when probable cause that the defendant committed the offense has been established. The bill also properly limits who has access to the results of the test to the victim, the defendant, their attorneys, the judge and any individual so necessarily appointed by the court.

House Bill -- there is typo there -- 265 says that the test results cannot be used in the case in chief or to establish guilt in any way.

The Pennsylvania District Attorneys Association suggests that the language be amended to allow the test results to be used if they establish an element of the crime or the court determines their usage proper or in

the interest of justice. House Bill 265 should not prevent or what prosecutors can already do legally with the results of pre-conviction blood tests.

Current Pennsylvania law does allow for pre-conviction testing in certain cases. However, the current procedure is much more difficult for victims. They must either acquire a private attorney or make a court appearance and advocate for themselves to request an HIV test. House Bill 265 eases the obstacles victims face in making such requests, allowing the Commonwealth alone to apply to the court for testing on behalf of the victim.

House Bill 265 also provides for the victim and the defendant counseling to ensure that they understand the nature and reliability of the testing results. While HIV testing may be imperfect in certain respects, this bill recognizes the right of victims to have timely and critical information on issues that influence their health.

With the unpredictability of the lengths of a trial process, the date of

conviction can well be beyond a year or two from the time of sexual assault. This bill allows for testing from forty-eight hours post-arraignment until six weeks after conviction.

As for concerns that pre-conviction testing violates defendants' rights, courts have consistently upheld similar state statutes as constitutional. Whether challenged under privacy rights, unreasonable searches, or presumptions of innocence, courts have followed the supreme court's decision in Schmerber v. California and upholding routine blood alcohol testing as not substantial intrusion into one's bodily integrity. Also there's a Commonwealth case, Commonwealth v. Murray, which is a Pennsylvania Supreme Court case.

Reasoning by analogy, most courts have held that blood tests for HIV, when conducted as part of the important governmental interest in the health of the victim, is constitutional.

Finally, the federal government, in recognition of the dangers of AIDS

transmission and violent sexual crimes, has enacted legislation requiring states to pass mandatory testing programs for sex offenders that -- at the request of their victims in order to qualify for federal funds. A failure to pass this bill will result in the loss of large sums of grant money that could provide even greater resources for victims of sexual crimes. Therefore, it is also in the fiscal interest of the Commonwealth to pass House Bill 265.

Because of the enhanced rights and protections this bill grants victims of sexual assaults and abuse, we support this bill.

Thank you for allowing the Pennsylvania District Attorneys Association the opportunity to comment on this important legislation.

CHAIRMAN CALTAGIRONE: Thank you. Appreciate your testimony.

Are there any questions?

Mark.

REPRESENTATIVE MUSTIO: Thank you for your testimony.

I have a couple questions. You had

heard a previous witness say that because of the nPEP window being seventy-two hours, that HB 265 has no value to the victim, and I was wondering if you thought that was true. And then under existing law, the district attorney's office or a lawyer can meet the seventy-two hour deadline. If not, is that a reason not to go forward with testing, if they don't meet the seventy-two-hour deadline?

MR. MCCORMACK: As to the first question, I think it is still important, even with those testing timelines, for -- if anything else, the emotional welfare of the victim to have the knowledge as to whether the person that attacked them has exposed them to a disease that when most people hear it, they immediately think that is something that is going to kill me. And it is a common event when I'm dealing with victims, whether it be young children, which is what the majority of my victims are and I'm dealing with their parents too, who are extremely worried that their child is now going to get AIDS.

So, I -- you know, the windows and time frames, and I heard a question before I

testified concerning the -- you know, if the person has just been -- the defendant has just been exposed to HIV, that they may not show up in their tests for a certain time frame. But there's still the circumstances where they may have full blown AIDS. We don't know that until we do this testing.

The part of this bill that I like with this bill is the counseling aspects, that no matter what, I think the victim needs to be getting counseling as to these different time frames and the things that they need to do.

I think part of the problem is there is a lack of knowledge as to what we can and cannot do and who we can get tested and when we can get them tested.

As with this second question, I'm -- could you repeat that question? I'm not quite sure --

REPRESENTATIVE MUSTIO: Under the current law, can a lawyer, district attorney like yourself, meet the seventy-two-hour deadline? Is it possible for you to meet -- to meet that seventy-two-hour deadline?

MR. MCCORMACK: Is it possible? It's

possible. Now, I can tell you, we don't get that many requests for this type of testing. When we do get it, it's something that we want to do.

Under the current law, I mean, we've even had -- not myself but I know other people in my office had had situations where we have filed something on behalf of the victim and the judge is questioning whether we should even be the person doing it, because, as I understand the current law that we have, it doesn't -- it's not as clear as this particular bill. This particular bill says that the Commonwealth, the district attorney, will do it upon request of the victim.

The bill that's currently on the books, it's my understanding, doesn't say that. So there's a question as to who -- does the victim have to go out and get their own attorney? Should they be having the district attorney to do it.

We had an attorney in my office, Fran Chardo, who is our first assistant, who related to me that one of our judges was questioning whether the Commonwealth should

even be the right party to do it.

So I think that this bill is -- the language in this bill clarifies as to who can be the moving party on this.

It does go to education. If we've properly trained our assistant district attorneys to know what the law is, know what the timelines are and what they can do, we should be able to do these things within the time frame that's set forth by law.

I hope that answers your question.

REPRESENTATIVE MUSTIO: It does.

You had made a comment also in your testimony about being able to use the results in the prosecution process. My reaction to that, that was not the intent of my legislation, nor was it the intent of the victim who came to me seeking the main purpose of this legislation.

So I would think that, from my perspective, that would be a separate piece of legislation and not in this bill.

MR. MCCORMACK: One of our concerns is that we don't want this bill to block something that we already have the ability to

do. A lot of times -- and it's less with HIV but more with sexually transmitted disease, if the victim comes up having a sexually transmitted disease, we want to be able to go and test the defendant. And, you know, most times, we will seek consent. Sometimes we'll get consent, sometimes we won't. But I want to be careful that this bill doesn't close out that opportunity for us to be able to go get an HIV test if it becomes pertinent during the course of -- and that's -- perhaps if language could be added notwithstanding this provision, that the Commonwealth would still be able to seek a -- you have to have probable cause, probably would have to go get a court order for one of those tests, but I want to make sure we don't close off our ability to do that. That's what my comments were referencing.

REPRESENTATIVE MUSTIO: Thank you.

CHAIRMAN CALTAGIRONE: Any other questions?

REPRESENTATIVE WATERS: Just a quick question.

CHAIRMAN CALTAGIRONE: Representative

Waters.

REPRESENTATIVE WATERS: Thank you. Thank you, Mr. Chairman.

As you know, I wasn't here for all the testimony as it occurred. Would this -- will the results of this test and the intent or the knowledge of the creditor be used to enhance their -- greater their punishment?

MR. MCCORMACK: I don't believe. And I believe the way the bill was written is that it can't be used for that purpose. So I would have to say no.

REPRESENTATIVE WATERS: Okay. So if a person knowingly possessing this disease -- like in other cases I know they say that if they attack somebody, bite them or something, and they know they have that, that it could be thought of as a lethal weapon that they were using against a person. So it wouldn't --

MR. MCCORMACK: Well, I think if -- what I was just speaking to concerning, I don't want to close the door that we already have open to us. If that becomes an issue in a case where we believe that maybe somebody has told us, maybe the suspect's ex-girlfriend

has told us, I know he has AIDS, or maybe that he made a comment to the victim that, you know, I have AIDS and I'm going to kill you, or something like that, we would, separate from this bill, seek to have him tested. And that may become an argument that we would make at either trial or sentencing.

So under those circumstances, we might do that if it becomes -- you know, evidentiary necessary as part of our case.

REPRESENTATIVE WATERS: Thank you, Chairman.

CHAIRMAN CALTAGIRONE: Certainly. I do want to mention that we've had three new members join us, Representatives Waters, Cohen, and Stevenson on the panel.

Any questions?

Yes, sir.

REPRESENTATIVE CREIGHTON: You mention counseling is so important to the victim as related to false negatives and false positives, and your comments there would say -- would give the probabilities of those situations I'm sure; right?

MR. MCCORMACK: Yes.

REPRESENTATIVE CREIGHTON: Now, is a false positive possible if you don't have AIDS?

MR. MCCORMACK: That, I'm not sure. I'd have to defer to people that know that better. As to -- as I see this bill, you may have certain situations where you may have -- because, I mean, you see with testing other things, you see them in the news where somebody thought they had something and later on it turns that they were misdiagnosed or something like that, so whether it's a possibility or not -- and it's purely a guess on my part -- would be that there could be a possibility, but I think if properly handled with counseling, with follow-up medical treatment, that would be something that could be caught.

If someone was told that they were exposed to it, you know, and the defendant, as part of the whole thing, as I understand the bill, would get counseling also, I think it is important. They may not know that they're HIV positive. So I think they need the counseling. They need to know. They need the

medical treatment. They're not always going to be incarcerated. They may be on the street. They need to know that they have to follow up with the test results and get the proper treatment so that they can be properly treated.

REPRESENTATIVE CREIGHTON: Okay. Thank you.

CHAIRMAN CALTAGIRONE: Okay. Thank you. Thank you very much. Appreciate your testimony.

We'll next hear from Rhonda Goldfein, AIDS Law Project of Pennsylvania.

MR. TYLER: While we're changing over real quick, there's a lot of new faces in the audience. Is anyone here from the Pennsylvania Coalition Against Rape? I don't know everyone here, so there's nobody from the coalition.

Thank you.

MS. GOLDFEIN: Good morning, Chairman Caltagirone and Chairman Marsico and other members of the House Judiciary Committee.

My name is Rhonda Goldfein, and I'm the executive director of the AIDS Law Project

of Pennsylvania. I thank you all and the members of the committee -- excuse me -- for this opportunity to share my concerns about House Bill 265.

I would also like to thank Representative Mustio for his interest and concern for sexual assault victims who may be at risk for HIV infection.

Founded in 1988, the AIDS Law Project is the nation's only independent public-interest law firm providing free legal service to people affected by HIV. And for more than two decades, our lawyers and staff have seen firsthand how Pennsylvanians with HIV are fighting not only a disease but also the right to be treated fairly.

We have risen to the defense of more than thirty thousand residents of this commonwealth and educated thirty-two thousand others on AIDS-related legal issues.

I'd like to momentarily depart from my remarks to follow up on a question posed by Representative Mustio to my colleague, Andy Hoover. And there was a question about training. And Representative Mustio, your

question is completely correct, and what happened to Jennifer was a tragedy. And some of what happened to her after that initial tragedy could have been avoided if the medical professionals had the proper information.

And what they needed to help Jennifer and her family understand is that the focus didn't need to be on the status of the assailant. The focus needed to be on her. And the question would be whether what happened to her was something that would make impact, which we've heard about, that's the nonoccupational exposure prophylaxis, whether that would be have been appropriate. Because all exposure does not run the risk of infection. And so, they could have done an easy analysis with Jennifer and her family that perhaps whatever happened to her, as horrible and as awful as that may have been, maybe that wasn't something that was going to cause her to be infected, because exposure is not infection.

And even if she did suffer an assault that could have lead to her being infected, we also need to remember what the real risks are

for infection after exposure. The CDC says the risks are about one in one hundred thousand in consensual sex. So even if we adjust those rates for the physical trauma after a sexual assault, we know the risks are still low.

Now, I understand if you're that person, you don't care how high those risks may be or low those risks may be, but I think that the service that's provided is to help the victim, the family, understand what the risks are, understand whether transmission was really possible. In that situation, she should have had that full consultation around nPEP.

The thing that we know about HIV is that it's completely preventible. Completely preventible. And that any legislation that's proposed around HIV should be assessed through the prism of whether this will help or hinder prevention efforts. And despite the bill's good intentions and Representative Mustio's heart-felt concern over his constituent and all Pennsylvanians, the reality is that House Bill 265 has no prevention benefit. And, in

fact, it's more likely to hinder prevention efforts.

We've heard a little bit so far today about nPEP, and we know that that needs to be -- that it's recommended that it be initiated, if at all, within seventy-two hours. After seventy-two hours, the efficacy is really at question.

So you have a situation where you're expecting that for House Bill 265 to have real benefit, that the arrest, that the testing, that the results back to the victim, all of that would have to begin within seventy-two hours. If it doesn't happen within seventy-two hours, there isn't any real victim -- excuse me -- any real benefit to the victim.

So what do we know is that House Bill 265 simply doesn't get clinically important information to a victim in sufficient time to make a decision on whether to start treatment.

So, now, let's assume for the moment that everything happens timely. Person's arrested, held for court, tested, the results get back. That all happens within twenty-

eight hours of beginning treatment. So there's a question of would you continue treatment? Well, given the inconclusive testing and misidentifications -- if your healthcare provider had said, based on all that we know about HIV transmission, I suggest that you begin treatment, would you stop treatment if you got some other information?

There was a question about the conclusiveness of the testing. There is a recognized window period after infection when a person who's tested for HIV will not -- will not have yet developed the antibodies to show they have been exposed to HIV but still will certainly be infectious and contagious. So we will get information, but it still isn't going to be conclusive. It still wouldn't give Jennifer or anyone in her shoes that peace of mind.

We also know, as we've heard this morning, that there is already a provision in our state law for that kind of testing. As Mr. Duffy -- I hope I have that correct, the gentleman from the DA's association -- said that his office doesn't get a lot of calls for

that, and, in fact, I haven't heard a lot of calls for it throughout the state, and the reason why is that sound healthcare providers put the focus on the victim. Knowing the status of the assailant is not how the healthcare provider needs to move forward to helping the victim.

Effective HIV prevention begins with evidence-based understanding of transmission. And embedded in House Bill 265 are assumptions about risks that aren't supported by the science. And that's kind of the answer to Representative Caltagirone's question about the money. You said, Look, we're losing money. That is important.

As someone who ran a publicly funded agency for a hundred and one days this summer and couldn't make payroll, I understand that deeply. But I also understand that passing a bill that embeds false assumptions about HIV isn't about HIV prevention.

And, in fact, false assumptions about HIV risk and the possibility of transmission just furthers AIDS hysteria, furthers AIDS stigma. And the CDC has clearly said that the

stigma is one of the drivers of HIV infection. We can't get a handle on the epidemic if we're so afraid of people with HIV and we don't understand transmission.

And so no one wants to take a hit on the money, but I think that for responsible HIV prevention, we can't institutionalize incorrect information about risk.

Thank you.

CHAIRMAN CALTAGIRONE: Mark.

REPRESENTATIVE MUSTIO: No questions.

MR. TYLER: Just a couple of notes for the record.

I haven't seen any -- what's the cost of the test on itself? If someone believes to be affected and just went to the doctor and say, I have been raped. I want to buy this for myself. How much does that cost?

MS. GOLDFEIN: You know, I tried to find out some of those numbers, and I think that it depends whether Medicaid's paying for it, Medicare's paying for it, private health insurance is paying for it, your local health department's paying for it. So there's a whole range. But I can provide some

additional information on that.

MR. TYLER: But for the most part, I, as an average citizen, if I believe I am infected, I can go to my doctor and I can readily get this prescription and come up with a way to pay for it and get it myself.

MS. GOLDFEIN: Yes. Or you can go to any one of the anonymous test sites that are provided by the Pennsylvania Department of Health.

MR. TYLER: The other thing that I just wanted to clear up, we keep talking about possibilities. We talk about the fact that there is a possibility that you may get a false result, or there is a possibility that you don't get this test done in time. Isn't there also a possibility that you get the right result? And isn't there also a possibility that you do get it done in time? I was wondering if you'd comment on that.

MS. GOLDFEIN: Sure. Under our state law now, there's a showing upon a compelling need, you can get the test right away. We don't have any of the "held for court." You can have that done right away.

And I think it's telling that although that provision has been in the law since 1991 or '2, when the law was passed, it's rarely used. And it's rarely used because it's not the right focus. It was rarely used when we didn't have PEP, when we didn't have any prophylaxis, and that the only thing we could tell folks who thought they were exposed was to get treated at regular intervals.

Now that the science has surpassed the law, we actually had something to do, we actually have prophylaxis, folks still aren't using it. It's not because they don't know about it, but that they know that there's so many possibilities and so many risks inherent in coming to the wrong decision, why not just cut to the chase and assess what happened to the person and to determine if it makes sense to start the drugs. This is how you get your best answer, because it's directed towards you and your experience.

MR. TYLER: Thank you so much.

MS. GOLDFEIN: Thank you.

REPRESENTATIVE MUSTIO: Just one

follow-up.

You had made a comment that it's very rarely used. As I was sitting here today, I'm looking at groups that are victim advocates. And none of them, in my opinion -- this may not be correct -- have really helped to facilitate the awareness of this. Right? The awareness of the ability -- everywhere along -- every step along the way that Jennifer went in asking the question, even with her advocate, was told no.

MS. GOLDFEIN: And I think that that's a tragedy, and, you know, while I'm in great solidarity with the victim advocates groups, that's not who I represent. And I can tell you, we do statewide trainings, and we train healthcare providers and law enforcement officials, and we'd be thrilled to train state legislators, and we always include that as part of the law.

And we may say, you know, The law provides for this, but you really want to talk to your healthcare provider first. But we're clear on that that's an available option, and I think it's telling, particularly in

Philadelphia, where we are -- we try to be everywhere and do that training, that if you go into the emergency rooms at some of our Philadelphia area hospitals, they know that provision exists, but they also know that that's not the way to get the best medical care to their patients.

REPRESENTATIVE MUSTIO: Thank you.

MS. GOLDFEIN: Thank you.

CHAIRMAN CALTAGIRONE: Yes, sir, Mark.

REPRESENTATIVE COHEN: Do you actively -- do you take steps to actively push nPEP?

MS. GOLDFEIN: Well, we're a law firm, so from the law firm, we take steps to make sure that providers understand that what's important for them is to look at getting that best healthcare for their clients.

So we don't actively push or advocate for nPEP. What we actively advocate for is doing an individualized assessment, based on what that happened to that individual. And based on what happened to that individual,

nPEP may not be appropriate. There may be other trauma issues and other counseling issues, but if there's not a risk for HIV, then those drugs shouldn't be started.

REPRESENTATIVE COHEN: So you recommend immediate assessment or close to immediate assessment for all rape victims all of the time, regardless of facts?

MS. GOLDFEIN: Well, because of the facts.

REPRESENTATIVE COHEN: Even if the facts vary from case to case.

MS. GOLDFEIN: Absolutely. Because as part of -- what I understand that happens in the Philadelphia area emergency rooms as part of the rape kit is going to be the question: Let's do a little risk assessment. What happened? Tell me the details. Did you know the person? Do you know that person's status? All of those factors would then help the provider determine whether nPEP should be recommended.

And so that's why I pose the question that even if everything was done timely and you could get those results while the person

was still taking the twenty-eight days of nPEP, would a reasonable provider say, Well, here are all the reasons why we thought it was appropriate for you to start. Now we've got some information, you know. How do we feel about you stopping? And there's not a strong recommendation that you stop once you start.

REPRESENTATIVE COHEN: So suppose a person starts and is negative, is not going to get AIDS at all, is there a risk to that person's health going through the -- going through the retroviral therapy?

MS. GOLDFEIN: These are very serious drugs. I don't think we have fully studied the long-term effect on all of our systems from these drugs, and so they should really be started only when necessary, which is why we feel that it's important to keep the focus on what happened to you and is that likely to be exposure and not all of the focus on let's track down this assailant and find out his or her status.

REPRESENTATIVE COHEN: And according to figures -- I think I'm summarizing right -- in consensual sex, there's a one-in-one-

thousand --

MS. GOLDFEIN: One-in-one-hundred-thousand chance of getting infected after consensual sex.

REPRESENTATIVE COHEN: One in one hundred thousand.

MS. GOLDFEIN: So even if we adjust that to include the physical trauma for sexual assault, again, we see that the risk is low, and that's a piece of information that Jennifer and her family should have had.

REPRESENTATIVE COHEN: And -- and is rape more likely or less likely or no difference to produce infection than consensual sex?

MS. GOLDFEIN: I think that the act of rape, with an associated physical trauma, is more likely to cause an infection, but, again, we see that those statistics are low.

REPRESENTATIVE COHEN: Thank you, Mr. Chairman.

CHAIRMAN CALTAGIRONE: Thank you.

We'll next hear from -- if you'd like to both come up -- Nicole A. Lindemyer, policy and special projects manager, Pennsylvania

Coalition Against Domestic Violence, and Terri Hamrick, executive director of Survivors, Inc.

MS. LINDEMYER: Good morning. My name is Nicole Lindemyer, and I'm the policy manager at the Pennsylvania Coalition Against Domestic Violence.

The coalition's members include all sixty-one community-based domestic violence programs throughout the commonwealth. On behalf of those sixty-one programs as well as the hundreds of thousands of victims they serve, we want to thank the committee for the opportunity to articulate why we do not support House Bill 265.

The coalition's primary purpose is to assist as domestic violence victims in securing justice, safety, and self-sufficiency through empowering them to break free of abuse and rebuild their lives. For victims who have been sexually assaulted, that purpose is best achieved through ensuring victims have access to services, that is, assist them in coping with both the physical and the emotional consequences of sexual assault.

For the coalition and our member

programs, the first issue arising from House Bill 265 is whether it would benefit victims. In other words, does knowledge of the perpetrator's HIV status provide victims with genuine peace of mind? The answer to that question requires a thorough understanding of what services victims need in the acute crisis response to sexual assault and how HIV testing arises within the context of those services.

With regard to possible exposure to HIV via sexual assault, the services most critical to victims are free, confidential, and reliable HIV testing; comprehensive information given at the time of testing that explains the test limitations; confidential, in-person notification of the test results; post-test counseling; and in cases of positive test results, comprehensive information about and access to Post-Exposure Prophylactic, or PEP, treatment.

These services are already provided under current Pennsylvania law and practice without any relation to the HIV status of the perpetrator. Further, as we've already heard, Pennsylvania law already provides for both

post-conviction HIV testing and a similar process for compulsory testing on court order with the showing of exceptional circumstances and compelling needs.

As mentioned, these critical services are already provided for without relation to the HIV status of the perpetrator. These services are also without relation to any involvement with the criminal justice system.

Ensuring that victims receive all the services they need independent of whether they report the assault to law enforcement is crucial, because the majority of sexual assaults are not reported to law enforcement.

The primary reason victims don't report sexual assaults is overwhelming fear, the fear of retaliation by the perpetrator, the fear of the criminal justice process and the risk of the results in no conviction, and the fear of having their personal life scrutinized and made public.

Moreover, the great majority of sexual assaults, about two-thirds of them, are committed by someone with whom the victim has a personal relationship: A current or former

intimate partner, family member, or acquaintance. Those relationships also influence whether a victim will report the assault to law enforcement and underscore the need to ensure that services are available to victims independent of whether they report the assault. However, House Bill 265 would apply only where there is a criminal case pending.

The HIV testing provided by this bill is necessarily contingent upon the defendant being charged and held for court. Therefore, because it hinges on a criminal case and because most victims don't report their assault and, hence, have no criminal case, House Bill 265's pre-conviction HIV testing would not be applicable to the majority of HIV -- or, I'm sorry, rape victims.

For victims who do choose to report their assaults to law enforcement, the question of whether this would benefit those victims requires a thorough understanding of HIV testing issues. On that, my co-presenter is Terri Hamrick, who will address HIV testing issues in the context of providing direct services to victims in her program.

MS. HAMRICK: Good morning and thank you.

My name is Terri Hamrick, and I'm the executive director of Survivors, Incorporated, a program in Adams County. It serves not only domestic violence victims but also victims of sexual assault.

Also, prior to my current position, I worked in the HIV advocacy field for fifteen years. Based in experience, I know both the services victims need following a sexual assault and the HIV testing issues involved.

From that experience, I can tell you that testing perpetrators cannot provide victims with conclusive information about their own HIV status. It is important to understand that not every exposure to HIV will result in an infection. The risks of an HIV infection from one act of sexual intercourse, male-to-female transmission, is about one in one hundred thousand. Due to the violent nature of sexual assault, that risk may be greater.

At the same time, it's important to stress that there are many factors that

influence whether exposure results in infection and factors that vary from person to person.

It's also important to understand the risks of false negative HIV results. HIV tests look for the presence of antibodies that -- HIV antibodies that a person develops in response to HIV infection. It takes some time for the immune system to produce enough antibody for the test to be able to detect those antibodies.

This time period is called the window period, and it varies from person to person. Most people develop detectable antibodies within two to eight weeks. The average is about twenty-five days. However, there's a chance that people will take longer to develop detectable antibodies.

In Pennsylvania, the most common HIV tests are the ELISA, which is the Enzyme-Linked Immunosorbent Assay, and the Western Blot. If the initial ELISA test is reactive, indicating the presence of HIV antibodies, that preliminary test result must be confirmed by the Western Blot, a more specific and

expensive test.

A person cannot be informed of a positive test result unless the ELISA test results have been confirmed by the Western Blot.

Importantly, if the initial ELISA test is nonreactive, this does not mean the individual is not infected. That -- it may be the test was done before sufficient antibodies were developed in the immune system of the person tested.

In the context of House Bill 265, if the perpetrator's exposure to HIV was close in time to the assault, the perpetrator may not have developed sufficient antibodies to appear on the HIV test, resulting in a false negative result, with potentially devastating consequences to a victim who had relied on the test result.

The possibility of a victim relying on a test result, and a perpetrator's false negative test result, is very real and a very harmful consequence of House Bill 265.

Even if the perpetrator has confirmed the test positive, this only confirms the

victim's risk of HIV -- or risk of exposure to HIV, not necessarily infection. The perpetrator's results are confirmed as positive, the victim will still have to undergo further testing, and this testing can span several weeks in order to confirm HIV status.

However, if the goal of pre-conviction HIV is to give victims the opportunity to know the perpetrator's HIV status so they can decide whether to pursue Post-Exposure Prophylactic treatment, then it must be recognized that this goal will rarely, if ever, be possible to achieve.

Post-Exposure Prophylactic, or PEP, treatment is effective only if given within seventy-two hours of exposure. Assuming the victim pursues criminal charges, the perpetrator must be identified, located, arrested, and tested, then the test results processed immediately, and then the test results received and given to the victim, all within seventy-two hours after the sexual assault. And that's a feat that's impossible in most cases.

I have to tell you, back when I was working with the local HIV program, I used to go into prisons to conduct HIV testing with the inmates. There were such backlogs of inmates who wanted testing, and the backlogs were six weeks to twelve weeks to receive the test, and then to get the results, it was an additional six weeks to twelve weeks to get that result.

Knowing these backlogs under current law, I can't imagine that pre-conviction HIV testing could ever be accomplished within the seventy-two-hour window for administering PEP.

As I mentioned, I run a program for victims of domestic violence and sexual assault. I have personally sat with rape victims in the immediate aftermath of the assault and talked to them about the risk and the options that they have. I've held their hand in the emergency room, and -- while they underwent the forensic exams. I have talked with them through the decision on whether or not to get PEP, which is already available under existing law and practice.

I know from firsthand experience, the services victims need and the timing of these services that works best in the trauma and chaos following a rape. Diverting the focus away from the victim's immediate safety, emotional and health concerns, and putting that focus on whether or not her rapist is HIV positive is not in the best interest of the victim.

What victims need is to be connected with their local domestic violence or rape crisis program so they can be informed of their risks and their options from trained professionals who specialize in crisis response.

Thank you.

MS. LINDEMYER: Returning to the question of whether compulsory pre-conviction HIV testing would benefit victims who choose to report their assault to law enforcement, we believe that, based in both the research and in experience, the experience of helping rape victims in the wake of acute crisis, we believe the answer is no. It does not benefit victims.

As explained, immediate testing of alleged sexual assault perpetrator can't provide conclusive information as to their HIV status. A positive test result for the perpetrator can do nothing, other than put the victim on notice that there's a definite risk of infection, which may, in fact, increase her trauma without giving her any useful information.

Even the presumed benefit of knowing the perpetrator's HIV status so as to make an informed decision about whether to pursue prophylaxis, it's just not feasible, given the timing issues, the seventy-two-hour window period for initiating prophylaxis in the context of a criminal justice proceeding.

In addition to there being no real benefit to victims, House Bill 265 may, in fact, bring unintended consequences that are adverse to victims. The risk of a false negative test result would mislead victims into a false sense of security, preventing them from pursuing the ongoing testing required to confirm their own HIV status.

What's more, relying on the

perpetrator's HIV status would cause even greater confusion as to the difference between HIV exposure and HIV infection. A perpetrator's positive test result may mislead victims into believing they're infected with HIV, again, intensifying the trauma of an already horrific experience.

In conclusion, our position to oppose House Bill 265 is based in knowing it will not benefit victims, and it may, in fact, have unintended adverse consequences. We certainly recognize that this is a well-intentioned proposal. And we are grateful for the effort to advance the rights of victims of sexual assaults. However, victims' needs are best addressed through ensuring the range of services, including a timely, free, and anonymous testing along with the immediate information and counseling by a trained professional. And, again, these services are already provided under current Pennsylvania law and practice without any relation to the HIV status of the perpetrator.

We appreciate your consideration of our concerns, and we welcome the opportunity

to provide further information.

I want to actually address two questions that have already come up. The first is the issue of awareness and training. As I mentioned, the population of sexual assault victims that the domestic violence coalition is specifically dealing with here is a majority of sexual assault victims who are assaulted by someone they know, making it domestic in nature.

We -- our network of sixty-one domestic violence programs struggles mightily with funding issues. And one of the things that they struggle to continue to provide is community education and awareness about the risk of domestic violence, including sexual assault as one component of domestic violence.

We're trying. We're out there. We're working. We're training prosecutors. We're training healthcare professionals. We're training anyone and everyone we can reach about proper responses to domestic violence, including the HIV risks involved in sexual assault. So, yes, we certainly do

provide extensive community outreach and education.

I also want to address the issue of funding, and the fact that there is a penalty that is on certain funds that come from the federal government. The Violence Against Women Act initially enacted in 1994, reauthorized in 2000, reauthorized again in 2005. When it was reauthorized in 2005, it included this provision that provides a 5 percent penalty of one particular grant program within VAWA, the Violence Against Women Act.

That particular program's called Grants to Encourage Arrest and Prosecution, GTEAP. PCADV was the recipient those funds in 2006. We took that 5 percent penalty. We suffered that loss. And our response was to go to the source of the problem, that federal penalty, and try to fix it. We are actively lobbying, actively pursuing enactment of Senate Bill 327 at the federal level.

And at the federal level, what Senate Bill 327 would do is not revoke the 5 percent penalty, but, in fact, allow an alternative

means of complying with it, an alternative means that respects victims' rights and respects the concerns of misleading victims by relying on HIV status of a perpetrator instead of focusing on the victims' needs.

Once 327 is enacted, Pennsylvania will comply with it. Existing Pennsylvania law will comply with the VAWA provision as amended by Senate Bill 327.

CHAIRMAN CALTAGIRONE: Thank you.

But let me, for the benefit of my fellow brothers that joined us, the testimony given by Representative Mustio, Philadelphia lost 5 percent of $1.1 million in 2007, '8, '9. It's going to go on until that law gets changed, and knowing the way congress works, let alone the way we work, anybody's guess is probably as good as anybody's guess. And we're going to continue to lose that money. Berks County, Butler. And money being what it is, and it's in short supply right now because we don't have a printing press like Washington, we are getting hurt.

And I understand where you're coming from, and I respect your position, but I

also -- you know, like to weigh the balance here on what is realistic. We heard from the District Attorneys Association, and it's a balance that we try to perform in this committee to be fair and reasonable with the issues that we address. And certainly victims have got to be paramount in what we're all doing here today, number one.

But, number two, in order to address those issues and concerns of victims, you need the money, the juice, to keep it flowing. If you don't have it, you can't provide the full routine of services that I know you're doing. And you're making due with --

MS. LINDEMYER: Very, very little.

CHAIRMAN CALTAGIRONE: -- short funds. I just keep saying, Is there something we can do?

Now, I know what you're saying about the bill in Washington as to whether or not that is going to be approved and fix this situation. And if it doesn't, then we are going to suffer under the loss of those funds. You know, I just keep looking at, in order to provide the services that we all know

we need takes money. I mean, nobody works for nothing. And in order to provide those services, we've got to access whatever funds are available.

I just keep grueling on that point, because I know you all do a good job. And we've had a very tough budget year, and it's probably going to be even tougher next year when we have to deal with the issue. I just look at that and I say, you know, we've got to come up with a solution. This may or may not be the solution. I think at least Mark is making an attempt to address the issue, first of all, paramount, the constituent that he was dealing with and the situation that he was made aware of.

I just want to give you that food for thought.

I'll open it up.

Mark.

REPRESENTATIVE MUSTIO: Thank you, Mr. Chairman. I know we're running a little over here.

I first want to thank everybody that testified today. I don't look at this as an

adversarial position at all. I respect your passion and admire all that you do.

And as you're talking about the inmates and what you need, you just feel it. And, you know, just this is part of any process that we've gone through here. It's almost like you're being held hostage with this funding and it's an issue.

But, anyway, we've met months ago in my office, yourselves, and I think that we had a representative from the Pennsylvania Coalition Against Rape. I'm sure you're aware they're in support of the legislation.

MS. LINDEMYER: Actually, they're not. They have a process similar to what PCADV has, in that their membership has to vote on a bill before they can come to a policy position. And they have not and they will not vote until February.

So, they are -- they don't have a position right now either to support or to oppose.

REPRESENTATIVE MUSTIO: I'd like my staff to address -- my staff person to the committee to address that, if you don't mind,

Mr. Chairman.

MS. DALTON: The Pennsylvania Coalition Against Rape, a short time ago, sent me an e-mail, Diane Moyer, their counsel, specifically that they've changed their position. They're now in support of the legislation, Mr. Chairman.

MS. LINDEMYER: I understand that there was some confusion as to a change in PCAR's position, and we have clarified that. I can tell you that most of PCAR's programs, about two-thirds of them, are dual programs. They're also domestic violence programs, so they're our members as well.

Terri Hamrick is one of those programs. She is on the board of PCAR as well as on the board of the PCADV. And that is a -- the accurate description of their position is that right now they don't have one.

MS. DALTON: Well, then, I guess, Mr. Chairman, we'll look for something in writing, given what we have in writing is that they support, that's the latest data that we've been given directly by them.

MS. LINDEMYER: If I may, I want to again talk about the funding issue. I know that everyone here understands that our domestic violence programs are a network of programs. They are struggling mightily right now to keep their doors open, to keep the lights on, to keep enough staff available to answer those twenty-four-hour hotlines that they're trying to keep open for victims. We are having a really hard time. And a 5 percent penalty on a grant is a big deal to us.

The fact that we contemplated the penalty, contemplated a potential solution, and chose not to pursue pre-conviction HIV testing we hope is seen as testament to the strength of our conviction that this bill potentially will harm victims and certainly will not benefit them.

REPRESENTATIVE MUSTIO: I guess my only closing comment is it really just strikes a nerve with me, the way you phrase some of these things. It really bothers me. As I said in my opening statement, I treat -- I heard it as abuse. When I heard you say that

if you're telling someone who's written a very detailed letter requesting something, that you don't know what you're talking about, this isn't going to give you what you think you want. And maybe some of that's coming because the system failed her? Maybe? But I just don't -- I don't like hearing that. I mean, it just really strikes a nerve with me.

MS. LINDEMYER: Well, I apologize for that. It's certainly not my intention. I do think that in the case that you're describing, the victim who has come to you and her family who has come to you, my heart breaks for her. I want to go back in time and put her in touch with her local rape crisis program or her local domestic violence program, so that she could connect with an advocate who has the experience and the training to talk her through what her options are and what the benefit of each course of action she has in front of her may be so that she could make an informed decision.

And I wish that the people that she did, in fact, turn to had the training and the information that they needed to help her in a

way that was effective, because what she went through, not just the assault but the consequences afterward, is so unjust.

Again, I apologize.

REPRESENTATIVE MUSTIO: I'm listening to you and I hear you.

Thank you.

MR. TYLER: Could you just real quickly -- go ahead, please, Terri.

MS. HAMRICK: Oh, I'm sorry.

If I can say one thing. When it comes to how the programs also, just to follow up on what Nicole just said, in dealing with folks, you know, we throw the term around "client focused," but that's basically what we are. We do not assume that we know everything there is to know. Each victim is their own expert, and we just provide options, talk to them about consequences, you know, what the pros, what the cons are and help them to make that decision.

You know, it's not our place to inflict, you know, to use that word meaningfully, what we believe on them. They're the ones that have to make that

decision.

But I totally understand what you're saying and thank you.

MR. TYLER: Real quickly, we keep talking about misleading the victims, and I was hoping you could clarify something when you say misleading the victim, that's because we're afraid that the test result says they may be infected and now they're going through additional trauma for -- you said that they may be infected with something but they're not. Could clarify that for me? Because I don't understand how that's -- if someone is told incorrectly that they may have the disease, obviously they're going to go out and seek the treatment or -- if they're within that seventy-two-hour window. I realize that. How is that worse than not being told you have the disease and finding out you get it?

MS. LINDEMYER: Well, I think there are two -- there are two different actors at issue there. There's the perpetrator and the victim. We're talking about a perpetrator's test result. So if the perpetrator's test result came back positive, the victim may be

in a panic because she's thinking, Oh, no, I've been exposed to HIV. I'm infected. And, in fact, she won't know whether she's infected unless and until she's had the initial screening, confirmatory screening. So that is a process of weeks or months.

If the perpetrator's HIV status comes back negative, it's an unreliable test result, because he may, in fact, be positive and be testing negative. So she may rely on that and think, Well, thank goodness that test was negative. I don't have to get an HIV test. I'm not exposed. And that is unreliable.

So in either result of the HIV test of the perpetrator, there are consequences to the victim.

Does that make sense?

MR. TYLER: Was there anything, sir, Mr. District Attorney, that you needed to review? They've had an opportunity to respond to your comments. Did you wish to respond to anything that was presented after you, sir?

MR. MCCORMACK: The only thing I would say -- and I appreciate be given another opportunity -- is that, you know, I deal with

so many victims, and, you know, a lot of times it's -- and I understand the position dealing with if it's a negative test, the victim may feel that they don't need to follow through with the treatment. But, you know, we're talking about individual cases. There are individuals out there that want to know this information. And they want to know it as soon as possible.

And I don't see how this bill hurts them. So, I mean, that's all I have to say about that.

CHAIRMAN CALTAGIRONE: Karen has a follow-up.

MS. DALTON: Mr. McCormack, if I could ask, under the present law, the Confidentiality of HIV-Related Information, my understanding is that DAs like yourself have brought petitions to test, for example, police officers who've been bitten or -- during arrest by a perpetrator or who have been poked by a needle of -- if a suspect is carrying a hypodermic on him.

My further understanding is that the seventy-two hours still applies in those

cases, no matter who the person is, whether it's a police officer or a woman or a man.

In your experience, when you brought that petition for testing, did the judge ever say, well, you know what, counsel, that seventy-two-hour window for nPEP is closed. I'm not going to grant the test.

MR. MCCORMACK: I haven't seen that, but I think the seventy-two-hour window is a little bit of a nonissue, because that should be counseled and be taken care of whether you have this bill or not. The victims should be counseled on those things.

This is just something additional. It's something additional that provides additional information, additional medical information that now the victim can take back to their provider as, I now know this information also, maybe we need to do follow-up things.

And as I said before, the suspect themselves may never have known if this test -- if the victim didn't ask. So there's a benefit to the suspect.

You know, I understand about forcing

someone to do something that they don't want to do. And we're faced with that situation a lot of times. When we -- it's an adversarial process when you get into the criminal justice system.

There have been search warrants that I've had to authorized the police to go get, and there have been situations where we've had to have the prisoners held down at the prison to draw blood. But there's going to be those times that that occurs. But with the seventy-two hours, I think that needs to be done whether there's this bill or not.

So, you know, I -- the thing that I think with this particular bill is that it puts it on the district attorneys, and in this situation, if it comes up, it specifically says who can move for this. The victim doesn't have to go out and get their own counsel. They don't have to pay for their own attorneys. They don't have to show that there's a -- you know, the things that the current law requires.

And if we're waiting till after conviction -- you know, I have cases sometimes

that take two years. And people are wondering why they can't find out what someone's status is. So --

MS. DALTON: If I can just ask one follow-up, and that's this: If I heard you correctly, what I think you're saying is -- and please tell me if I've got this right -- that self-determination of each individual victim is what's paramount, that House Bill 265 allows that self-determination in each individual case and it should be provided. Do I have that correct?

MR. MCCORMACK: That's my position.

MS. DALTON: Thank you.

And, Mr. Chairman, if I could just add one thing. Just in terms of the scope of the problem -- and thank you very much, Mr. McCormack.

On December 1, 2009, the Harrisburg Patriot-News ran an editorial called Forgotten Epidemic: AIDS remains Serious Disease Worldwide. And so this is by the Patriot-News Editorial Board.

It says that: Today is World AIDS Day. In a year when global attention has been

focused almost exclusive on the H1N1 virus, it's all too easy to forget other epidemics the world still faces. Too many Americans wrongly believe HIV/AIDS is a problem for Africa and South Asian countries. Here in Pennsylvania, more than thirty thousand people have been infected with the virus.

According to the latest figures from the state Department of Health, two thousand two hundred seventy-two people tested positive last year alone. Despite the fact that there are many people infected with AIDS than ever before in the United States, apathy about the disease is on the rise.

It also goes on to say: Most new cases are found in those under twenty-five and over fifty-five. Heterosexuals are now just as likely as homosexuals to become infected.

Just for the benefit of the members regarding the scope of the AIDS problem.

CHAIRMAN CALTAGIRONE: Thank you, ladies, for your testimony.

Before we close the hearing, I just want to remind the members, at 2 o'clock today, we're going to be going down to the

Dauphin County Courthouse, President Judge Lewis's chambers, on information -- an informational meeting dealing with MH/MR issues.

And with that, we'll conclude the hearing. Thank you all.

(Whereupon, the hearing concluded at 12:37 p.m.)

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REPORTER'S CERTIFICATE

I HEREBY CERTIFY that I was present upon the hearing of the above-entitled matter and there reported stenographically the proceedings had and the testimony produced; and I further certify that the foregoing is a true and correct transcript of my said stenographic notes.

_____
BRENDA J. PARDUN, RPR
Court Reporter
Notary Public