IN THE
SUPREME COURT OF PENNSYLVANIA

Docket No. 0099 MD 1999

COMMONWEALTH,

Appellant,

v.

KURT FISCHER,

Appellee.

BRIEF FOR AMICI CURIAE WOMEN'S LAW PROJECT, PENNSYLVANIA COALITION AGAINST RAPE, ET AL., IN SUPPORT OF APPELLEE

Michelle Anderson*
299 N. Spring Mill Road
Villanova, PA 19085
610-559-3207

Robert E. Welsh, Jr.
Pa. I.D. No. 28143
Lisa A. Mathewson
I.D. No. 77137
Welsh & Recker, P.C.
2000 Market Street
Suite 2903
Philadelphia, PA 19103
215-972-6430

*Not admitted to practice in Pennsylvania.

Terry L. Fromson
Pa. I.D. No. 27795
Tara S. Crean
Pa. I.D. No. 82776
Women's Law Project
125 S. Ninth Street
Suite 300
Philadelphia, PA 19107
215-928-9801

Attorneys for *Amici Curiae*

Amici Curiae:

ABUSE & RAPE CRISIS CENTER
ALICE PAUL HOUSE
AW/ARE INC.
BERKS WOMEN IN CRISIS
C.A.R.E. CENTER
CENTER FOR VICTIMS OF VIOLENT CRIME
CENTER FOR WOMEN POLICY STUDIES
COMMUNITY WOMEN'S EDUCATION PROJECT
CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND
CRIME VICTIM SERVICES
DELAWARE COUNTY WOMEN AGAINST RAPE
DOMESTIC ABUSE PROJECT OF DELAWARE COUNTY, INC.
DOMESTIC VIOLENCE CENTER OF CHESTER COUNTY, INC.
ERIE COUNTY RAPE CRISIS CENTER, INC.
NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS
NATIONAL COALITION AGAINST DOMESTIC VIOLENCE
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC.
NETWORK OF VICTIM ASSISTANCE
NOW LEGAL DEFENSE AND EDUCATION FUND
PENN WOMEN'S CENTER
PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE
PENNSYLVANIA COALITION AGAINST RAPE
PENNSYLVANIA NOW, INC.
RAPE AND VICTIM ASSISTANCE CENTER OF SCHUYLKILL COUNTY
SULLIVAN COUNTY VICTIM SERVICES
SUSQUEHANNA VALLEY WOMEN IN TRANSITION
TCWC ABUSE, RAPE CRISIS, HIV/AIDS & SHELTER SERVICES
VICTIMS RESOURCE CENTER
VICTIM SERVICES, INC.
WOMEN AGAINST ABUSE
WOMEN ORGANIZED AGAINST RAPE
WOMEN'S CENTER OF BEAVER COUNTY
WOMEN'S CENTER OF COLUMBIA/MONTOUR, INC.
WOMEN'S LAW PROJECT
WOMEN'S RESOURCE CENTER, INC.
WOMEN'S RESOURCES OF MONROE COUNTY, INC.
WOMEN'S SHELTER/RAPE CRISIS CENTER OF LAWRENCE COUNTY
YWCA SEXUAL ASSAULT PREVENTION & COUNSELING CENTER OF LANCASTER COUNTY

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INTEREST OF AMICI CURIAE

Amici are thirty-eight (38) non-profit organizations committed to vindicating the legal rights of sexual assault victims. Many of the organizations provide direct services to victims of sexual assault, ranging from crisis intervention and counseling to court accompaniment. These services include education and prevention advocacy to raise the awareness of the public, the legislature, and the courts about the realities of sexual assault and the dangerous myths that continue to prevent its victims from obtaining justice. Many of the amici engage in system advocacy, working for fair and equal treatment of women in the judicial system and for sexual assault laws that effectively protect women. Almost every organization has worked in this area for twenty or more years.

Amici are highly knowledgeable about the experience of the sexual assault victim, both with the perpetrator and with the legal system. They have encountered the barriers faced by victims of assault who prosecute their perpetrators and have worked hard to eliminate those barriers. Amici share a common interest in preserving the gains made in eliminating those barriers. If this Court creates a mistake of fact as to consent defense, perpetrators will defend against sexual assault charges on the basis of spurious, post hoc rationalizations premised on stereotypes about victim conduct that do not comport with either the reality of the victim's experience or the legal standards developed over the last three decades. Amici therefore respectfully urge this Honorable Court to reinforce the legislature's commitment to protecting victims of sexual assault by affirming the judgment of sentence and denying Fischer's appeal for a change in the law.

STATEMENT OF THE QUESTION INVOLVED

Whether trial counsel was ineffective for failing to request a reasonable mistake of fact as to consent instruction when the law does not recognize a mistake of fact defense in sexual assault cases and Fischer's conduct was unreasonable as a matter of law.

(Answered in the negative by the courts below.)

SCOPE AND STANDARD OF REVIEW

The scope of this Court's review is whether counsel was ineffective for not requesting a jury instruction on mistake of fact as to consent.

The standard of this Court's review of the Superior Court's ruling is de novo, but trial counsel is presumed to have rendered effective assistance. Commonwealth v. Williams, 524 Pa. 218, 231, 570 A.2d 75 (1990). In order to rebut this presumption, a defendant must demonstrate that his counsel failed to raise a claim of arguable merit; that counsel had no objectively reasonable basis for the challenged conduct; and that defendant suffered such actual prejudice as to render the verdict unreliable. Commowealth v. Copenhefer, 526 Pa. 555, 563, 587 A.2d 1353 (1991). Counsel's conduct must be judged under the existing law at the time of trial. Commonwealth v. Todaro, 549 Pa. 545, 551-52, 701 A.2d 1343, 1346 (1997).

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case in the Brief for Appellee and supplement herein with additional record references to the testimony of Fischer as to the encounter which is the basis of the sexual assault charges brought against him.

Fischer testified that after he and the victim arrived at his dorm room, he locked the dorm room door (R.676a), and pushed the victim down on the bed. (R. 633a). He held the victim's wrists above her head (R. 681a), because he did not want her to move her arms. (R. 684a). He straddled her (R. 634a, 677a), so that "if she would have gotten up, she would have cut off her neck." (R. 687a).

According to the medical evidence offered at trial, the victim had linear abrasions all the way around both of her wrists and bruises on both of her breasts. (R. 269a, 276a-77a).

Fischer testified that he held the victim's hands above her head, because she had done it to him in the afternoon. (634a -635a). He "figured it's my turn to do it to her." (R. at 635a). Fischer identified no other way in which his conduct imitated that of the victim in the afternoon. (R. 634a, 681a).

The record additionally reflects Fischer's testimony as to the following eight interactions:

1. After Fischer placed his penis on the victim's mouth, she said she had to go and Fischer told her "no, you don't, no one will know you're not there." (R.636a).

2. The victim then turned her head to the right away from his penis, a move which Fischer understood "to communicate that this is something involuntary on her part." (R. 637a, 685a).

3. Fischer told the victim "You know you want my dick in your mouth," and she responded "no, I don't" (R. 637a, 686a).

4. Fischer told the victim "no means yes," and "you want my dick in your mouth" and the victim responded "no, I honestly don't." (R. 638a-639a, 686a).

5. Fischer "got out of the straddling position and lied down on top of her," rubbed her crotch, and inserted his penis into the hole in her jeans; she said she had to go. (R. 639a-640a, 707a).

6. Fischer said "I know" but then opened the victim's pants and pulled them down and rubbed her; she closed her fly, pulled up her pants and said she had to go. (R. 640-a-641a, 709a).

7. Fischer repeated "I know" and pulled the victim's pants down again; the victim managed to get out from under him and stand up and said she had to go. (R. 641a, 709a-710a).

8. Fischer put his hands between her thighs and pulled her towards him; the victim yelled: "Stop it," and "You're pissing me off." (R. 713a-714a).

Fischer recognized that "the victim was responding in a way to tell [him] that she didn't want these things to happen to her," but he was attempting "to get her to do things he wanted her to do." (R. 724a - 725a).

SUMMARY OF ARGUMENT

This Court should reject Fischer's attempt to excuse his forceful, unconsented-to sexual assault on the basis of a mistake of fact defense. Pennsylvania does not and should not recognize a mistake of fact as to consent defense in sexual assault cases.

There is no reasonable mistake of fact as to consent defense in a sexual assault crime based on forcible compulsion. The only mistake of fact defense to a sexual assault crime based on forcible compulsion is a mistake that negates the intent to apply force, not a mistake as to consent to sexual penetration. Forcible compulsion negates the possibility of effective consent and therefore precludes a mistake of fact as to consent in sexual assault cases. The defense that Fischer is actually asking this Court to create – a defense based on a mistake of fact as to consent to force – does not exist.

There is also no reasonable mistake of fact as to consent defense in a sexual assault crime based on non-consent. The creation of such a defense would be irreconcilable with the documented reality of sexual assault and with the elimination of "special rules" that inappropriately impeded prosecution of rapists. It would open the door to bogus claims based on disproved rape myths that have been soundly rejected by the legislature. Neither the legislature's codification of the definition of forcible compulsion nor the entirely unrealistic view of "date rape" promoted by Fischer support the creation of such a defense. To the contrary, the legislative reform of rape law in Pennsylvania requires that the law protect women from force and treat rape by acquaintances with the same degree of severity as rape by strangers.

Should this court decide to create a reasonable mistake of fact as to consent defense in sexual assault cases, the defense must be narrowly circumscribed to avoid

undermining the reforms in rape law enacted by the Pennsylvania legislature. The legislature's elimination of the resistance requirement and declaration that "no" means non-consent to sexual contact preclude a reasonable mistake of fact defense in a case in which the defendant proceeds with sexual contact either without the victim's overt expression of consent or in the face of a verbal expression of non-consent. Fischer, who proceeded (1) with force, (2) in the absence of an overt expression of consent, and (3) in the face of an explicit expression of non-consent, acted entirely unreasonably and therefore is not entitled to a reasonable mistake of fact as to consent defense.

ARGUMENT

I. THERE IS NO REASONABLE MISTAKE OF FACT AS TO CONSENT DEFENSE IN A SEXUAL ASSAULT CRIME BASED ON FORCIBLE COMPULSION.

Fischer is not entitled to a reasonable mistake of fact defense in this case. Fischer relies on Section 304 of the Pennsylvania Crimes Code, 18 P.S. § 304, to assert that he is entitled to a reasonable mistake of fact as to consent defense. However, Section 304 does not provide a reasonable mistake of fact as to consent defense to a crime based on forcible compulsion.

A. The Only Reasonable Mistake Of Fact Defense To A Sexual Assault Crime Based On Forcible Compulsion Is A Mistake That Negates The Intent To Apply Force.

The involuntary deviate sexual intercourse ("IDSI") law in Pennsylvania, which Fischer was convicted of violating, is a prime example of a forcible compulsion crime. IDSI contains both an actus reus element and a mens rea element. The actus reus of IDSI is engaging in oral or anal sex by forcible compulsion. See 18 P.S. §§ 3101, 3123 (Supp. 1998). Forcible compulsion is defined as including "compulsion by use of physical, intellectual, moral, emotional, or psychological force, either express or implied." 18 P.S. § 3101 (Supp. 1998).[1] The mens rea of IDSI is the mental state of recklessly, knowingly, or intentionally engaging in forced oral or anal sex. See 18 P.S. § 302(c). Fischer's assertion that he is entitled to a mistake of fact as to consent defense for the forcible compulsion crime of IDSI on the basis of Section 304 is a misinterpretation of the statute.

[1] Fischer claims that this Court should construct a mistake of fact as to consent defense for forcible compulsion crimes because the definition of forcible compulsion was recently changed to include moral, emotional, and psychological force. See Br. for Appellant at 36. Neither the facts nor the law support Fischer's thesis. As the Superior Court recognized, this is a physical force case. Commonwealth v. Fischer, 721 A.2d 1111, 1118 (1998). Moreover, the statutory definition of forcible compulsion was merely a codification of this Court's pronouncement in Commonwealth v. Rhodes, 510 Pa. 537, 555, 510

Section 304, entitled "Ignorance or Mistake," clarifies the circumstances in which a mistake of fact defense is available to defendants. It indicates that:

> Ignorance or mistake as to a matter of fact, for which there is reasonable explanation or excuse, is a defense if: (1) the ignorance or mistake negatives the intent, knowledge, belief, recklessness, or negligence required to establish a material element of the offense; or (2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

18 P.S. § 304. This statute clarifies that there is a reasonable mistake of fact defense for IDSI and for other forcible compulsion crimes only: (1) if the mistake negates the mental state required to establish a material element of the offense, or (2) if the law explicitly provides for such a defense. Id. Because the law of forcible compulsion crimes does not explicitly provide for a mistake of fact defense (Subsection (2)), only Subsection (1) of Section 304 is at issue here.

Under Subsection (1) of Section 304, the mistake of fact defense to a forcible compulsion crime must negate the mental state required to establish forcible compulsion. Therefore, the mistake under Section 304 must negate the mental state of recklessly, knowingly, or intentionally engaging in forced oral or anal sex. Because the intent required is the intent to engage in forcible conduct, the mistake defense applies only to a mistake as to the intent to engage in that forcible conduct. See People v. Williams, 614 N.E.2d 730, 736 (N.Y. Ct. App. 1993) ("The intent required is the intent to perform the prohibited act -- i.e., the intent to forcibly compel another to engage in intercourse or sodomy."). The only Section 304 mistake of fact defense for forcible compulsion crimes, therefore, is mistakenly engaging in the forcible conduct, that is, mistakenly pinning, striking, straddling, or forcing someone.

A.2d 1217, 1226 (1986), and has been the law of the Commonwealth since 1986. Furthermore, as discussed infra at 11, consent is incompatible with forcible compulsion.

In this case, Fischer is not entitled to the mistake of fact defense available to forcible compulsion crimes. In terms of the actus reus of IDSI, Fischer obviously used express physical force to sexually penetrate his victim. Fischer himself testified that he pushed the victim on the bed, pinned her arms above her head, straddled her, and then penetrated her orally. (R. 633a-634a, 637a, 677a, 681a, 684a-85a, 687a).[2] The medical evidence offered at trial corroborated his admitted application of physical force: the victim had linear abrasions all the way around both of her wrists and bruises on both of her breasts. (R. 269a, 276a-77a).[3] Therefore, the actus reus element of IDSI was easily satisfied.

Fischer's testimony at trial also revealed his culpable mental state: he had an intention to engage in the relevant forcible conduct. (R. 633a-634a, 687a, 677a, 681a, 684a-85a, 687a). There is no sense from his testimony that he accidentally pushed the victim onto the bed, inadvertently pinned her arms, mistakenly straddled her, or penetrated her mouth in response to an involuntary reflex. He engaged in all of these behaviors with intention and by design. Therefore, by his own admission, Fischer intentionally engaged in the relevant forcible conduct, and thus is not entitled to the mistake of fact defense available under Section 304.

B. There Is No Defense Of Reasonable Mistake Of Fact As To Consent To Sexual Penetration In A Sexual Assault Crime Based On Forcible Compulsion.

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[2] The victim testified that Fischer employed even more egregious, intentional physical force against her. See R. 134a (Fischer pushed victim across room onto bed); id. (Fischer restrained victim's wrists forcibly above her head); R. 138a (Fischer ripped larger hole in victim's jeans); id. (Fischer grabbed victim's hip bone and flipped her onto her abdomen); R. 140a (Fischer put his arms up in frame of doorway on either side and spread his legs, to block victim's exit). Fischer additionally admitted to psychologically coercing his victim to forcibly compel her to submit to him. R. 636a-639a (when victim said she had to go, Fischer responded "No you don't. No one will know you are not there.").

[3] For this reason, Fischer's attempts to distinguish Commonwealth v. Williams, 294 Pa. Super. 93, 439 A.2d 765 (1982), on the facts is unavailing. See Br. for Appellant at 28-31. Both cases involve physical force.

Under the statutory scheme in Pennsylvania, there is no mistake of fact as to consent defense for forcible compulsion crimes. It is the forcible nature of the sexual penetration that is "the harm or evil . . . sought to be prevented by the law" of IDSI. 18 P.S. § 103 (defining the "material element of an offense"). As this Court has determined when examining an analogous crime:[4] "The Legislature seeks to protect all females from force and where force is used, the actor is guilty of rape." Commonwealth v. Walker, 468 Pa. 323, 334, 362 A.2d 227, 232 (1976). Consent is not at issue where force is employed, and the legislative history of the forcible compulsion statute reveals "the legislative intent to deter and punish force as the most reprehensible element of the law of unlawful sexual intercourse." Id. at n.6 (emphasis added).

Forcible compulsion itself is incompatible with any meaningful notion of consent. As this Court has determined, "'forcible compulsion' as an act, including but not limited to physical force or violence," is that which is "used to compel a person to engage in sexual intercourse against that person's will." Rhodes, 510 Pa. at 549-54, 510 A.2d at 1223-1226. Forcible compulsion negates the possibility of consent. Other jurisdictions have recognized this common-sense approach.[5] In short, any forcible compulsion, even

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[4] In reliance on Commonwealth v. Smolko, 446 Pa. Super. 156, 162-63, 666 A.2d 672, 675 (1995), and other cases that have held that "forcible compulsion" carries identical meanings in the IDSI statute, 18 P.S. § 3123, as in the rape statute, 18 P.S. § 3121, amici cite to cases interpreting the "forcible compulsion" element of the rape statute to illuminate the "forcible compulsion" element of the IDSI. Fischer makes the same assumption. See Br. for Appellant at 16 n.2.

[5] See Williams, 614 N.E.2d at 736 ("Manifestly, it is unnecessary to forcibly compel another to engage in sexual acts unless that person is an unwilling participant."); State v. Faehnrich, 359 N.W.2d 895, 900 (S.D. 1984) ("Although [defendant] testified that he believed [the victim] had consented to engage in sexual intercourse, there was substantial evidence adduced negating a reasonable belief. The record reflects that [defendant] placed his hand over [the victim]'s mouth during the encounter to prevent her from screaming and yelling, an act to which he freely admitted. Moreover, the record also reflects [the victim] suffered cuts, abrasions, and other injuries about her person, particularly in her lower back. There was hemorrhaging in the blood vessels of her left eye after the rape encounter."); Lamar v. State, 243 Ga. 401, 403, 254 S.E.2d 353, 355 (Ga. 1979) ("The element of force negates any possible mistake as to consent.").

that which is based on intellectual, moral, emotional, or psychological force, precludes effective consent.

Particularly where the victim is compelled through raw physical force, however, there is absolutely no possibility of consent, and hence no possible defense of mistake of fact as to consent. Submission to force is not legally effective consent. See 18 P.S. § 311(c)-(d) ("assent does not constitute consent if . . . it is induced by force, duress or deception."). Physically forced penetration is the nature of this case, and consent is therefore not a possibility in it. As the Superior Court determined, "The victim in this case testified that she was physically forced to engage in sex against her will, that she resisted verbally and physically and that she had to strike appellant in order to leave the room." 721 A.2d at 1118 n.4. In a case involving physically forceful behavior, such as this one, consent and mistake of fact as to consent are not possible defenses, as the lower court correctly concluded. Id. In sum, one who engages in sexual penetration due to forcible compulsion has not acted with legally valid consent, and a mistake of fact as to consent is not an available defense to forcible compulsion crimes.

C. There Is No Defense Of Reasonable Mistake Of Fact As To Consent To Force In Any Sexual Assault Crime.

It is important to point out that Fischer is not even asking this Court for an ordinary mistake of fact as to consent defense, with good reason. In this case, the victim's non-consent to sexual penetration is indisputable. According to both parties, the victim repeatedly told Fischer "no" as he sexually penetrated her. See infra at 29-30 (citing to Record). "No" conclusively communicated her non-consent to that sexual penetration. Because a defense based on a mistake of fact as to consent to sexual penetration would obviously fail on these facts, Fischer is actually asking this Court to

construct an entirely newfangled defense, sweeping in scope: a defense based on a mistake of fact as to consent to force.

According to Fischer's counsel on appeal, Fischer's position at trial was that he had mistakenly thought that the victim wanted to be pushed onto the bed, pinned by her wrists, straddled, and penetrated orally despite her objections because, as Fischer put it, "she did it to me in the afternoon. I figured it's my turn to do it to her." (R. 635a). Amplifying that theme in his brief before this Court, Fischer argues that "the 'rough sex' of the first encounter might subject the resistance of the second incident to a conflicting interpretation that 'the Lady dost [sic] protest too much.'" Br. For Appellant at 34.[6] Fischer therefore concedes, as he must, that he employed physical force on his victim to penetrate her and that she physically resisted his advances. His position, however, is that he mistakenly thought she wanted to be forced and that he is, therefore, entitled to a mistake of fact as to consent to force defense. Such a mistake defense does not exist in this or any other jurisdiction.

Moreover, to allow a mistake of fact as to consent to force defense in sexual assault cases would be entirely unsound judicial policy. It would authorize every rape defendant to argue that that victim wanted to be forced to have sex. This spurious, post hoc rationalization would become widely employed as a defense, further harassing and traumatizing victims and wasting precious judicial resources. The floodgates would be opened by this bogus claim, allowing all rape defendants to bolster their position at trial

[6] See also Br. for Appellant at 21 ("he genuinely believed that his words and actions were merely a replay of the earlier consensual encounter"); id. at 38 ("his recent rough sexual liaison with the complainant" led to his "possibly mistaken perception"); id. at 41 ("where a history of 'rough sexual behavior' exists between two individuals, resistance can be easily mistaken for 'role play'").

with the sexist notion that women enjoy being forced into sex.[7] There is no such thing as the unprecedented mistake of fact as to consent to force defense that Fischer actually seeks, and this Court should wisely decline to invent one. Additionally, a mistake of fact as to consent to sexual penetration cannot provide a defense to forcible compulsion crimes in Pennsylvania.

II. THERE IS NO REASONABLE MISTAKE OF FACT AS TO CONSENT DEFENSE IN A SEXUAL ASSAULT CRIME BASED ON NON-CONSENT.

Not only is there no reasonable mistake of fact as to consent defense to sexual assault crimes based on forcible compulsion, there is also no reasonable mistake of fact as to consent defense to sexual assault crimes based on non-consent. These crimes include sexual assault, 18 P.S. § 3124.1 (Supp. 1998), aggravated indecent assault, 18 P.S. § 3125(1) (Supp. 1998), and indecent assault, 18 P.S. §3126(a)(1) (Supp. 1998). The application of Section 304 to non-consensual sexual penetration would conflict with twenty-five years of research on the reality of sexual assault and with the legislative reforms that Pennsylvania has undertaken to make the law comport with that reality. This Court should expressly decline to apply Section 304 to the crime of sexual assault in order to implement the legislature's intent of protecting rape victims.

In a series of reforms since 1972, the Pennsylvania legislature dramatically changed the laws surrounding sexual assault. The legislature eliminated the requirements

[7] Sexually violent men often justify their actions by claiming that, once the rape began, their victims relaxed and enjoyed it. See Diana Scully, Understanding Sexual Violence: A Study of Convicted Rapists 105-107 (1994). This claim is entirely incorrect. See id. at 107 (studies reveal that victims experience trauma during and after the rape). See also Timothy Beneke, Men on Rape 30 (1982) (reviewing rapists' false justifications for their behavior and noting that "a logical extension of 'she asked for it' is the idea that she wanted what happened"); Ida Johnson & Robert Sigler, Forced Sexual Intercourse in Intimate Relationships 68, 95 (1997) (discussing the "rape myth" that women enjoying being forced to have sex).

of resistance,[8] independent corroboration,[9] and prompt complaint.[10] The legislature abolished consideration of the victim's prior sexual history, except in limited circumstances.[11] The legislature abolished cautionary jury instructions requiring special care in evaluating testimony of rape victims.[12] With the most recent 1995 changes, the legislature eliminated completely the differential treatment of spousal rape, codified a broader definition of forcible compulsion, upgraded the offense of non-consensual sexual contact, and confirmed as a matter of law that "no means no."[13]

These reforms were intended to reduce the trauma that sexual assault victims experience when pursuing criminal charges against their assailant, and to reduce inappropriate common law barriers to the prosecution and conviction of rapists. As State Representative Ritter commented when introducing the legislation that led to the most recent set of reforms:

> I am suggesting we base our laws on what is proven, and not what is mythical... This bill is intended to see to it that sexual offenders are adequately punished, and that their victims are not subjected to further victimization by the criminal justice system.

Hearings on H.B. 160 Before the House Judiciary Comm., Sess. of 1993-94 (1993) (statement of Rep. Ritter).

Pennsylvania enacted this incremental, but cumulatively massive, reform in response to solid and persuasive data about the nature of sexual assault and the deterrent

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[8] See Act of May 18, 1976, Pub. L. 120, No. 53, § 2 (codified at 18 P.S. § 3107).
[9] See id. (codified at 18 P.S. § 3106).
[10] See Act of May 18, 1976, Pub. L. 120, No. 53, § 1 (codified at 18 P.S. § 3105).
[11] See id. (codified at 18 Pa. Con. Stat. § 3104 (a)).
[12] See Act of May 18, 1976, Pub. L. 120, No. 53, § 2 (codified at 18 P.S. §3106).
[13] See Act of Mar. 31, 1995, Pub. L. 985, No. 10, § 8, Spec. Sess. No. 1 (codified at 18 Pa. Cons Stat. § 3124.1).

effect that the common law had on rape prosecutions.[14] Research indicates that rape is a major social problem in the United States today. A recent study by the National Center for Health Statistics at the Centers for Disease Control and Prevention reveals that 20.4% of women have been forced to have sexual intercourse against their will at some point in their lives.[15] Fear of rape is widespread and extremely high among women of all ages.[16] For most rape victims, the assailant is a man they know.[17] Despite this fact, there remains a bias against women who are raped by acquaintances. Women are less likely to be believed if they report having been raped by acquaintances; moreover, acquaintance rapes are less likely to be prosecuted, and if prosecuted, they are less likely to result in convictions.[18]

Because this case involves two people who knew each other, the bias against women who are raped by acquaintances has unfortunately emerged. For example, the lower court approvingly cited to a hypothetical "date rape" scenario imagined in the subcommittee notes to the suggested standard jury instructions in Pennsylvania. See Subcomm. Note, Pa. Crim. Suggested Standard Jury Instruction ("Pa.C.S.S.J.I.") 15.3121A, quoted in 721 A.2d at 1117-1118 ("The boy does not intend or suspect the intimidating potential of his vigorous wooing. The girl, misjudging the boy's character,

[14] When introducing the reform bill that was adopted in 1995, Sen. Greenleaf remarked upon the need to reform sexual assault laws to accomplish justice for victims:

> [T]he statistics we have seen over the years indicate that many of these crimes are not reported, and if they are reported, they are not successfully prosecuted, and therefore, many victims in Pennsylvania and many women in Pennsylvania do not report these offenses and their assailants are not convicted, and therefore, are free to pursue other victims in the future because of escaping their just punishment for their acts.

4 Sen. Legis. J., 220-21 (Jan. 31, 1995) (statement of Sen. Greenleaf).

[15] See National Center for Health Statistics at the Centers for Disease Control and Prevention, Fertility, Family Planning, and Women's Health: New Data from the 1995 National Survey of Family Growth 5, 33 (1997).

[16] See Scully, supra at 171.

[17] See Johnson, supra at 53-54.

[18] See Scully, supra at 178.

believes he will become violent if thwarted; she feigns willingness, even some pleasure.").[19] Fischer essentially argues to this Court that this case involves merely his vigorous wooing. See Br. For Appellant at 34. Studies indicate, however, that men convicted of raping acquaintances, like Fischer, use the same coercive tactics to forcibly compel their victims that stranger rapists do.[20]

Moreover, victims do not experience acquaintance rape as "vigorous wooing." Research indicates that many rape victims respond to physical attack with a "frozen fright" or cognitive dissociation that prevents them from resisting.[21] Other women do not resist because they are terrified of what they have been told will happen if they do: that they will suffer greater physical injury or even death.[22] Regardless of whether or not they resist, victims experience rape as a major life trauma.[23] They often suffer from rape-related Post Traumatic Stress Disorder, a set of physical, emotional, and behavioral stress reactions that can include, inter alia, sleep and eating pattern disturbances, anxiety, fear, lowered self esteem, phobias, depression, nightmares, and flashbacks.[24] Studies show

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[19] Fischer also implies that the suggested jury instructions "mandate" an instruction that would exculpate forced sex renamed as vigorous wooing. See Br. for Appellant at 32. However, the suggested jury instructions are not mandatory. They have not been approved by the Supreme Court and this Court has not hesitated to uphold jury instructions that deviated from the Pennsylvania Criminal Suggested Standard Jury Instructions. See Commonwealth v. Collins, 546 Pa. 616, 687 A. 2d 1112 (1996).

[20] See Scully, supra at 179 ("Acquaintance rapes were far from gentle seductions. In about a third of these rapes, weapons had been present . . . The tactics used to create fear and gain compliance were the same as in stranger rapes—verbal threats, with and without a weapon, restraining, beating, and choking.").

[21] See People v. Barnes, 721 P.2d 110, 118-21 (Cal. 1987); Sarah Ullman & Raymond Knight, Women's Resistance Strategies to Different Rapist Types, 22 Crim. Just. & Behav. 263, 280 (1995); Judith L. Herman, Trauma and Recovery 42-43 (1992); Sedelle Katz & Mary A. Mazur, Understanding the Rape Victim: A Synthesis of Research Findings 172-73 (1979).

[22] See Understanding Violence Against Women 98-99 (Nancy Crowell et al. eds., 1996); Patricia Rozee et al., The Personal Perspective of Acquaintance Rape Prevention in Acquaintance Rape: The Hidden Crime 337, 348 (Parrot & Bechhofer eds., 1991).

[23] See Ann Burgess & Lynn Holmstrom, Rape: Crisis and Recovery 411 (1986).

[24] See id. at 35- 46 (1986); Ronnie Janoff-Bulman, The Aftermath of Victimization, in Trauma and Its Wake: The Study and Treatment of Post-Traumatic Stress Disorder 15, 28 (Charles Figley ed., 1985).

that these traumatic reactions can last for years and perhaps decades after the event.[25] When the rapist is a person whom the victim knows and trusts, the victim is often even more emotionally tormented in response to the attack.[26] These are the realities of sexual assault which studies confirm.

Allowing a mistake of fact as to consent defense would give rape defendants the opportunity to reintroduce the rape myths disproved by this research and rejected by the Pennsylvania legislature. If this Court provides defendants with a reasonable mistake of fact as to consent defense, it would allow them to assert or imply that acquaintance rape is somehow nonviolent, that rape victims enjoy the experience of sexual assault, and that some women just want to be forced.[27] These rape myths are, of course, exactly what Fischer argues. He claims that his forcible compulsion was nonviolent, that his victim "was enjoying it," and that she wanted to be forced. (R. 638a-642a). Fischer actually testified himself that when the victim said no, he responded "no means yes." (R. 638a-639a, 686a). His tale is suspect not only because it comports so neatly with sexist stereotypes disproved by years of research on sexual assault. It is, in fact, utterly incredible given the physical condition of the victim's body after the attack. Medical

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[25] Dean G. Kilpatrick, et al., Criminal Victimization: Lifetime Prevalence, Reporting to Police, and Psychological Impact, 33 Crime & Delinquency 479 (1987).

[26] See Johnson, supra at 69; Bonnie Katz, The Psychological Impact of Stranger Versus Nonstranger Rape on Victims' Recovery, in Acquaintance Rape: The Hidden Crime 267 (Parrot & Bechhofer eds., 1991); Bonnie Katz & Martha Burt, Self Blame in Recovery from Rape, in Rape and Sexual Assault II 106 (Ann Burgess ed., 1988).

[27] Allowing for a mistake of fact as to consent defense would also be antithetical to the fact that the Pennsylvania legislature chose to treat stranger rape and acquaintance rape with equal severity. See Rhodes, 510 A.2d at 1224. So does Fischer's attempt to distinguish Williams, 294 Pa. Super. 93, 439 A.2d 765 (1982), by arguing that it does not apply to cases where the perpetrator was known to the victim. See Br. for Appellant at 28-31. The legislature specifically deviated from the Model Penal Code's separate, more lax provision for defendants whose victims had the bad luck to be "a voluntary social companion [who] had . . . previously permitted him sexual liberties." Model Penal Code § 213.3 (1962). Subsequent statutory amendments have done nothing to change the Pennsylvania legislature's commitment to treating stranger rape and date rape equitably.

evidence indicated that Fischer's victim suffered contusions on her breasts and linear abrasions around both of her wrists. (R. 269a, 276a-77a).

The absence of a jury instruction on a mistake of fact as to consent actually poses no harm to defendants. Prior to deliberation, the trial judge instructs the jury on, among other things, "reasonable doubt." The judge will instruct the jurors that they must acquit if they find that the Commonwealth has not proven each element of each offense charged beyond a reasonable doubt. Therefore, the mental state of the defendant is already considered fully by juries when determining reasonable doubt as to the element of intent. Thus, under the status quo, if jurors believe that a defendant was reasonably mistaken as to consent, they would have a reasonable doubt as to his intent and acquit him. An explicit jury instruction on a defense of mistake of fact as to consent would confuse the jury into thinking that it was supposed to consider something other than the relevant evidence before it, such as the defendant's subjective knowledge of the victim's consent. Consideration of subjective intent would be contrary to the legislature's adoption of a reasonableness requirement in Section 304. An explicit jury instruction on a defense of mistake of fact as to consent would essentially give the defendant a second bite at the apple by offering the jury a second opportunity to acquit.

Moreover, and more importantly to amici, the presence of an explicit mistake of fact as to consent defense would seriously prejudice sexual assault victims by providing defendants with the perfect opportunity to infect their trials with the rape myths that the legislature has already soundly rejected. This Court should hold that Section 304 does not provide a mistake of fact as to consent defense for sexual assault crimes in order to facilitate the legislature's attempt to protect rape victims in the legal process.

III. IF THERE IS A REASONABLE MISTAKE OF FACT AS TO CONSENT DEFENSE, DEFENDANTS ARE NOT ENTITLED TO IT IN CASES SUCH AS THIS ONE, WHERE THERE IS NO OVERT EXPRESSION OF CONSENT OR THERE IS EXPRESSED NON-CONSENT.

If this Court creates a mistake of fact as to consent defense in sexual assault cases, the contours of the defense must be narrowly circumscribed to avoid undermining the reforms in rape law enacted by the Pennsylvania legislature over the past three decades. See supra at 14-15 (summarizing reforms). Primary among these reforms were the elimination of the resistance requirement and the legal recognition that a woman who says "no" effectively communicates her non-consent. These reforms and the structure of the resulting statutory scheme preclude a mistake of fact defense in a case in which the defendant proceeds with sexual contact without the victim's overt expression of consent or in the face of a verbal expression of non-consent.

If, as Fischer argues, the starting point for such a mistake of fact defense is Section 304 of the Crimes Code, then the touchstone for the defense of mistake of fact in Pennsylvania must be reasonableness. Under Section 304, a mistake of fact constitutes a defense only "if there is reasonable explanation or excuse" for it. 18 P.S. § 304 (emphasis supplied).[28] By inserting a standard of reasonableness into a statutory provision otherwise modeled on the Model Penal Code, Pennsylvania explicitly rejected the subjective standard in the Model Penal Code. Compare Model Penal Code § 2.04(1)

[28] The reasonable mistake of fact defense also implicitly includes a requirement that the reasonable mistake be honestly held. See Commonwealth v. Namack, 444 Pa. Super. 9, 663 A.2d 191, 194-95 (1995). Whether the defendant behaved as if he believed the victim had consented must be considered. Force, ignoring protests, and threatening or deceptive behavior are not consistent with a good faith belief in consent. In this case, Fischer's conduct, using deception to lure the victim to his room, locking his door, using force, and ignoring the victim's protests, fails to establish a good faith belief. (R. 673-74a, 633a – 34a, 636a –640a, 677a, 681a, 684a-86a, 707a, 709a-10a, 713a-14a).

(lacking the "for which there is reasonable explanation or excuse" language of 18 P.S. § 304).[29]

Reasonableness is measured objectively. It requires an assessment based on what a reasonable person would do under the circumstances. In every other context in which this Court has considered the meaning of the word "reasonable," this Court has held the actor to an objective standard that refuses to accommodate the actor's idiosyncratic view of the world.[30]

Fischer, however, does not assert a defense based on a reasonable and therefore objective belief in consent. Rather, Fischer is trying to assert a mistake of fact defense that is entirely subjective. At trial and on appeal, rather than arguing what a reasonable person would have believed when his victim repeatedly said "no," Fischer's arguments are based solely on his own subjective beliefs. See Br. For Appellant at 15-16 ("trial counsel prompted the jury to ponder his client's confusion"); id. at 18 ("Trial counsel meticulously questioned . . . Fischer as to his state of mind throughout the encounter. A number of questions were designed to show the jury that . . . Fischer believed the [victim] had no objection to his words and actions."); id. at 19 ("Trial counsel continued to take

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[29] Pennsylvania's adoption of a reasonableness standard is consistent with that of most of those states that recognize such a defense. See State v. Koperski, 578 N.W.2d 837 (Neb. 1998); People v. Williams, 841 P.2d 961 (Cal. 1992); Boyd v. State, 564 N.E.2d 519 (Ind. 1991); State v. Smith, 554 A.2d 713 (Conn. 1989).

[30] See, e.g., Office of Disciplinary Counsel v. Werner, 732 A.2d 599, 604 (Pa. 1999) ("whether the pleader reasonably believed the accusations were true" must be assessed using "an objective standard, which examines the factual basis for the assertion"); In re D.M., 727 A.2d 556, 557 (Pa. 1999) ("The question of whether reasonable suspicion existed at the time of an investigatory detention must be answered by examining the totality of the circumstances to determine whether there was a particularized and objective basis for suspecting the individual stopped of criminal activity."); Agnew v. Dupler, 553 Pa. 33, 41, 717 A.2d 519, 523 (1998) ("Since the standard for such expectation of privacy is one that society is prepared to accept as reasonable, the standard is necessarily an objective standard and not a subjective standard as appellant urges this Court to adopt."); Commonwealth v. Hawkins, 553, Pa. 76, 82, 718 A.2d 265, 267 (1998) ("Even if a subjective expectation could be claimed, such an expectation would not be objectively reasonable."); Dalrymple v. Brown, 549 Pa. 217, 224, 701 A.2d 164, 167 (1997) ("The standard of reasonable diligence is objective, not subjective.).

the jury on a journey through . . . Fischer's mental state. He asked . . . Fischer whether he believed that the [victim] had any objections."); id. ("Fischer never believed that his actions were unwelcome"); id. ("'as you understand it, were you forcing yourself on her in any way'") (quoting trial counsel); id. at 20 ("'did you ever feel like what you were doing was something she didn't want you to do'") (quoting same) (emphasis omitted); id. ("'did you ever feel like what you were doing was something that she didn't want you to do'") (quoting same); id. ("'did you believe that you were doing something that she didn't want you to do'") (quoting same). His subjective belief is irrelevant under the statute.[31]

Moreover, the evidence demonstrates that Fischer's conduct was per se unreasonable because he proceeded without overt consent and in the face of the victim's explicit expressions of non-consent. In reforming Pennsylvania rape law, the legislature declared such conduct unreasonable. These legislative declarations must serve as guideposts in defining the applicability and reasonableness of any asserted defense of mistake of fact. The law cannot be construed in a way that would undermine the reform of sexual assault law or reintroduce a requirement that has been eliminated.

A. There Is No Reasonable Mistake Of Fact As To Consent Defense In The Absence Of Overt Consent Because Proceeding In The Absence Of Overt Consent Is Per Se Unreasonable.

The Pennsylvania legislature appropriately did away with archaic requirements that impeded sexual assault prosecutions. Special rules that effectively established a presumption of consent that the victim had to rebut emerged from the suspicion with

[31] The October 1983 subcommittee note to the Pennsylvania suggested jury instructions relied upon by Fischer does not properly apply the reasonable person standard to the mistake of fact defense the subcommittee seeks to insert into Pennsylvania law, suggesting that a "socially obtuse" defendant would

which charges of rape have been viewed historically. Commonwealth v. Berkowitz, 415 Pa. Super. 505, 519, 609 A. 2d 1338, 1345 n.5 (1992) ("Traditionally, Pennsylvania law looked with peculiar suspicion upon the rape complaint."), vacated in part on other grounds, 537 Pa. 143, 641 A.2d 1161 (1994). The victim had to prove that "while the commission of the offense was in progress, she cried aloud, struggled and complained on the first opportunity, and prosecuted the offender without delay." Id. (reviewing history of resistance requirement in Pennsylvania) (quoting Stevick v. Commonwealth, 78 Pa. 460, 460 (1875)).

In 1972, Pennsylvania enacted a statute that declared that a victim is not required to prove resistance to sexual assault.[32] The legislature recognized that failure to resist does not indicate that a rape did not occur. See Rhodes, 510 Pa. at 556, 510 A.2d at 1226 n.14. As discussed supra at 17, many women do not resist their assailants because they are frozen in fright or dissociating; others do not resist because they have been instructed that they will suffer more injury if they do.

By eliminating the resistance requirement, the legislature removed the burden on victims to prove that they had actively and affirmatively expressed non-consent in order to obtain a conviction for rape. The only reasonable interpretation of the legislature's action is that the absence of resistance, e.g., silence or passivity, does not establish consent.

If unacceptable to establish the defense of consent, silence and passivity also cannot be the basis for the assertion of a mistake of fact as to consent defense to a sexual assault charge. See, e.g., Smith, 554 A.2d at 718 (rejecting as unreasonable defendant's

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not be culpable. See Pa. C.S.S.J.I 15.3121A. Such an interpretation would invite all defendants in sexual assault crimes to claim to be obtuse.

assertion of mistake of fact defense based on the victim's cessation of resistance following threat). Because silence and passivity are common responses that victims have to being raped, legislatures recognized that the resistance requirement had to be eliminated. If defendants are permitted to rely on passivity and silence to claim a reasonable mistake of fact as to consent, the mistake of fact defense becomes a proxy for the resistance requirement.

The elimination of those inappropriate special rules leaves as the only logical standard one that does not permit defendants to infer consent except when the victim overtly expresses consent. This interpretation is consistent with the plain reading of the statutory provisions. Pennsylvania does not make sexual contact criminal only when the victim expresses refusal. Rather, it defines as criminal those actions that are "without the complainant's consent." The dictionary defines consent as "capable, deliberate, and voluntary agreement to or concurrence in some action." Webster's Third New International Dictionary 482 (1986). A natural reading of the term "without consent" is that a defendant's actions are criminal when they occur without an overt expression of consent.[33]

The requirement of overt consent is not an undue burden; persons who wish to engage in sexual contact have merely to ask in cases where consent would appear ambiguous to a reasonable person.[34] Other courts have reached this same conclusion.

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[32] See Act of May 18, 1976, Pub. L.120, No. 53, No. 53, § 2 (codified at 18 P.S. § 3107).

[33] This interpretation is in line with the interpretation given to the element of non-consent for other crimes, such as assault, which can be defended on the basis of consent only by evidence of an overt manifestation of consent. For example, while 18 P.S. § 2701(b)(1) downgrades the offense of simple assault from a second- to a third- degree misdemeanor where the victim and the defendant "mutually consent[ed]" to a fistfight, there still must be evidence of the victim's overt manifestation of consent to support a request for such a reduction. See Commonwealth v. Coleman, 344 Pa. Super. 481, 496 A.2d 1207 (1985).

[34] See Lani A. Remick, Read Her Lips: An Argument For A Verbal Consent Standard In Rape, 141 U. Pa. L. Rev. 1103, 1135 (1993) ("The availability of a reliable method of ascertaining consent in the form of a

The Supreme Court of New Jersey, in In re M.T.S., 129 N.J. 422, 438-39, 609 A.2d 1266 (N.J. 1992), concluded that the goal of its legislative reform effort, to "eliminate the burden that had been placed on victims to prove they had not consented," compelled it to define consent as affirmative and freely given permission. To conclude otherwise, it reasoned, "would be fundamentally inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted or expressed non-consent." Id. 129 N.J. at 443, 609 A.2d at 1276. See also Koperski, 578 N.W.2d at 846 (defining "without consent" as without an indication of affirmative and freely given consent).

If consent requires an affirmative expression of consent, a mistake of fact as to consent cannot be reasonable in the absence of such an expression. As articulated by the New Jersey Supreme Court:

> [R]easonable people do not engage in acts of penetration without permission, and it is unlawful to do so. The role of the factfinder is to decide not whether engaging in an act of penetration without permission of another person is reasonable, but only whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable.

M.T.S., 129 N.J. at 448, 609 A.2d at 1279. The Supreme Court of Nebraska likewise has recognized that a mistake of fact is reasonable only when "evidence is produced which, under all of the circumstances, could reasonably be viewed by the jury as an indication of

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verbal inquiry provides a fair opportunity to avoid the mistake of having a sexual contact with a nonconsenting partner. This is a simple task with an easily understandable response that places no burden on the actor other than the possibility of a loss of sexual enjoyment if it turns out that his or her partner is not consenting. If a person chooses not to avail himself or herself of this opportunity, he or she cannot be said to be without culpability."); Lynn Henderson, Getting to Know: Honoring Women in Law and In Fact, 2 Tex. J. Women & L. 41, 68 (1993) ("If a man is receiving 'mixed signals,' he is on notice to ascertain whether his partner is willing to continue, and if he does not stop and clarify things, he is reckless."); Toni M. Massaro, Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony, 69 Minn. L. Rev. 395, 414-417 (1985) ("To redefine a 'reasonable perception' that a woman consents to intercourse in a way that requires the man to obtain overt consent would pomote the policy interest in protecting women from rape without unjustifiable harm to defendants: they need only ask and not hoodwink, bludgeon, blindside, or proceed without conscious regard for their partners' wishes.").

affirmative and freely given consent to sexual penetration by the alleged victim. Koperski, 254 Neb. at 637, 578 N.W.2d at 846 (emphasis added).

The record in this case is devoid of any evidence of an overt expression of consent by the victim. In his brief, Fischer asserts that his mistake of fact as to consent was based on an encounter with the victim in his room several hours earlier in the afternoon and the victim's return to his room in the evening. See Br. For Appellant at 15. However, Fischer fails to recount how the victim came to return to his room – that he led her there under the deceptive pretense of picking up a forgotten book. (R. 626a). More importantly, Fischer does not ascribe his belief of consent to any overt and contemporaneous expression of consent by the victim. Rather, his explanation is that he was imitating and "reciprocating" the victim's afternoon behavior.[35] Br. For Appellant at 19. While Fischer may have "figured it's my turn to do it to her" (R. at 635a), imitation by one party is not consent by the other. Even if Fischer had sexual relations with the victim in the afternoon, he points to no evidence that the victim affirmatively consented to any sexual contact that evening.[36]

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[35] In fact, Fischer's own testimony does not even reveal much in the way of "imitation." Based on Fischer's own description of the events of the afternoon and evening, the only imitation he identified was placing the victim's hands above her head. (R. 634a, 681a). There the comparison ends. Although Fischer locked the dorm room door (R.676a), pushed the victim down on the bed (R. 633a), straddled her so she could not escape, (R. 634a, 677a, 687a), and used threatening language (R. 631a, 686a), he testified to no such behavior by the victim during the afternoon encounter.

[36] To the extent that Fischer attempts to make headway with words, he gets nowhere. His argument that the victim's alleged statement "this has got to be a quick one" meant consent is fatuous. When asked by his trial counsel what he thought the words meant, Fischer admitted that "I don't know exactly what she meant;" nor did he "know to what extent" he thought she might want another sexual contact. (R. 633a). Those words, even if spoken by the victim, do not on their face convey consent to sexual contact. Fischer admitted as much on cross examination when he agreed that the words could have meant "we've got to get in and out of here quick because I have a mandatory seminar that I have to attend and my friends are on the way from McKean." (R. 666a). Fischer's further admission that he thought the victim was angry at him for disclosing their first encounter to his friends further undercuts his theory on appeal that he thought she was interested in engaging in sex with him. (R. 627a-628a, 651a).

The only reasonable conclusion to draw from the legislature's elimination of the resistance requirement is that consent must be overtly expressed. Fischer has presented no evidence that comes anywhere near establishing the minimal communication necessary to proceed to sexual penetration. Moreover, he admits that the victim repeatedly said "no." Regardless of whether the victim consented to sexual contact earlier in the day or consented to going to Fischer's room that evening, Fischer cannot be said to have reasonably relied on any previous conduct of the victim once she promptly, clearly, and consistently expressed her non-consent by saying "no." See infra at 29-30(citing to Record). See also Tyson v. Trigg, 50 F.3d 436, 448 (7th Cir. 1995) (per Posner, C.J.) ("The law of rape is not a part of the law of contracts. If on Friday you manifest consent to have sex on Saturday, and on Saturday you change your mind but the man forces you to have sex with him anyway, he cannot use your Friday expression to interpose, to a charge of rape, a defense of consent or of reasonable mistake as to consent. You are privileged to change your mind at the last moment.").

B. There Is No Reasonable Mistake Of Fact As To Consent Defense Where There Is Express Non-Consent Because Proceeding In The Face Of Express Non-Consent Is Per Se Unreasonable.

Pennsylvania's reform of sexual assault law also makes a mistake as to consent unreasonable where the victim verbally expresses her non-consent.[37] When the Pennsylvania legislature revised the law in 1995, one of its purposes was to clarify that "no" means non-consent to sexual activity and that non-consent makes the subsequent perpetration of sexual contact a felony. Upon passage of the 1995 amendments, Senator Mellow, a cosponsor of the Senate bill, remarked:

[37] Nor is a defendant entitled to a mistake of fact defense where he used force. See supra at 12-14.

> The important thing with this piece of legislation is that it closes a very important loophole that was pointed out to us by the Pennsylvania Supreme Court, because in Pennsylvania we should have the very clear understanding to anyone who wants to commit the violent crime of rape that in Pennsylvania 'no means no' and that Senate Bill No. 2 will accomplish that.

Sen. Legis. J. 24 (Jan. 31, 1995) (remarks of Sen. Mellow). Echoing Senator Mellow's remarks, Senator Heckler commented specifically on the significance of the amendments for victims who are acquainted with their assailants:

> There has been a great question raised about whether 'no' means 'no.' Today we are saying.... In the situations in which the victim and defendant knew each other, there may have been some kind of consensual relationship but consent was not given to sexual relations. We recognize the difference, but "no" means "no."

Id. at 23 (remarks of Sen. Heckler).

The legislature's purpose was to remedy the situation faced in Commonwealth v. Berkowitz, 537 Pa. 143, 148-49, 152, 641 A.2d 1161, 1164, 1166 (Pa. 1994), where this Court found that "no" meant "no" for purposes of consent but that such evidence alone was insufficient to support a felony conviction for rape. See Sen. Legis. J. 20 (January 30, 1995) (remarks of Sen. Greenleaf). In response, the legislature made sexual assault without consent a felony. See Act of Mar. 31, 1995, Pub. L. 985, No. 10, Spec. Sess. No. 1, § 8 (codified at 18 P.S. §3124.1).

That "no" means "no" is consistent with other decisions by Pennsylvania courts, See, e.g., Commonwealth v. Meadows, 351 Pa. Super. 354, 553 A.2d 1006 (1989), and by courts in other jurisdictions. See, e.g., Smith, 554 A.2d at 718 ("Only by entertaining the fantasy that 'no' meant 'yes,' and that a display of distaste meant affection, could the defendant have believed that [the victim]'s behavior toward him indicated consent. Such a distorted view of her conduct would not have been reasonable."); Commonwealth v. Sherry, 437 N.E. 2d 224, 228 (Mass. 1982) (victim's verbal protestations are sufficient to

prove lack of consent is "honest and real"); State v. Lederer, 99 Wis. 2d 430, 436, 299 N.W. 2d 457, 461 (Wis. Ct. App. 1988) ("'No' means no, and precludes any finding that the [victim] consented to any of the sexual acts performed during the night"); Commonwealth v. Lefkowitz, 481 N.E.2d 227, 232 (Mass. App. Ct. 1985) (Brown, J., concurring) ("It is time to put to rest the societal myth that when a man is about to engage in sexual intercourse with a 'nice woman' a little force is always necessary... I am prepared to say that when a woman says 'no' to someone any implication other than a manifestation of non-consent that might arise in that person's psyche is legally irrelevant, and thus no defense.").

Because "no" establishes non-consent, it is unreasonable as a matter of law to proceed with sexual contact after someone says "no." By saying "no," the victim puts the perpetrator on notice that she does not consent. Continuing sexual contact after someone says "no" is, at a minimum, reckless and is, more often, knowing or intentional. In any case, it is an inexcusable violation of a woman's sexual autonomy. See R. v. Ewanchuk, 1999 Can. Sup. Ct. LEXIS 7, *44 (Can. 1999) ("Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable.").

The record is clear that the victim in this case said "no," that Fischer was aware of her communications of non-consent, and that he proceeded despite her consistent message of non-consent. Fischer admits in his testimony that the victim expressed non-consent no less than eight times and that, notwithstanding her repeated expression of non-consent, he persisted in forcing sexual penetration and sexual contact:

1. After Fischer placed his penis on the victim's mouth, she said she had to go and Fischer told her, "No, you don't, no one will know you're not there." (R.636a).

2. The victim then turned her head to the right away from his penis, a move which Fischer understood "to communicate that this is something involuntary on her part." (R. 637a, 685a).

3. Fischer told the victim "You know you want my dick in your mouth," and she responded "no, I don't." (R. 637a, 686a).

4. Fischer told the victim "no means yes,"[38] and "you want my dick in your mouth" and the victim responded "no, I honestly don't." (R. 638a-639a, 686a).

5. Fischer "got out of the straddling position and lied down on top of her" rubbed her crotch, and inserted his penis into the hole in her jeans; she said she had to go. (R. 639a-640a, 707a).

6. Fischer said "I know" but then opened the victim's pants and pulled them down and rubbed her; she closed her fly, pulled up her pants and said she had to go. (R. 640-a-641a, 709a).

7. Fischer repeated "I know" and pulled the victim's pants down again; she managed to get out from under him and stand up and said she had to go. (R. 641a, 709a-710a).

8. Fischer put his hands between her thighs and pulled her towards him; the victim yelled, "Stop it," and "You're pissing me off." (R. 713a-714a).

[38] The "no" means "yes" excuse that Fischer presents is simply an attempt to reintroduce a rape myth: that women want forced sex. Fischer further compounds the problem by posing the hypothetical example of a husband and wife with a history of consensual "rough sex." See Br. for Appellant at 41. For the word "no" to mean "yes" between two people, there must be substantial evidence of a mutual negotiation between

The Pennsylvania legislature has already sent a clear message that "no" means "no" and that proceeding in the face of a "no," without more, is sufficient for criminal liability. When someone expresses explicit non-consent by uttering the word "no," she has held up a large, red stop sign to further sexual contact. Here, Fischer's victim repeatedly held up this sign and Fischer had every reason to recognize its simple message. See Br. For Appellant at 37. In fact, Fischer testified that he recognized that the victim "didn't want these things to happen to her." (R. 724a-25a). Instead of stopping his attempt to force sexual contact in the face of a clear stop sign (or even pausing or slowing down), Fischer proceeded to forcibly penetrate his victim, bruising her breasts and abrading her wrists in order to achieve his goal. His behavior was per se unreasonable and cannot form the basis of a reasonable mistake of fact as to consent defense. There simply is no reasonable mistake of fact as to consent in the face of express non-consent.

IV. FISCHER'S CLAIMS OF INEFFECTIVENESS OF TRIAL COUNSEL ARE MERITLESS.

It is important to remember that Fischer's plea for substantive relief comes before this Court as an ineffective assistance of counsel claim. Fischer is seeking a change in the substantive law through the vehicle of an ineffectiveness claim based on what he portrays as trial counsel's failure to request a mistake of fact jury instruction. As the lower court held, Fischer's use of ineffectiveness as a means to accomplish a substantive change in the law is barred by the law of this Court. 721 A.2d at 1118 (citing Commonwealth v. Todaro, 549 Pa. 545, 551-52, 701 A.2d 1343, 1346 (1997)). It has been the law of this Court for almost thirty years that the performance of trial counsel

them establishing an arrangement of shared meaning. Of course, no such evidence was presented in this

will be evaluated on the basis of the law as it existed at the time of the proceedings in the trial court. See Commonwealth v. Alvarado, 442 Pa. 516, 518, 276 A.2d 526, 527 (1971); Commonwealth v. Logan, 468 Pa. 424, 431, 364 A.2d 266, 270 (1976); Commonwealth v. Miller, 494 Pa. 229, 234, 431 A.2d 233, 235 (1981); Commonwealth v. Fahy, 537 Pa. 533, 541-42, 645 A.2d 199, 203 (1994). The Court has been unwilling to "impose upon trial counsel the qualities of a seer and fault him for not foreseeing that this Court would" change the law. Commonwealth v. Miller, 494 Pa. at 234, 431 A.2d at 235 (quoting Commonwealth v. Triplett, 476 Pa. 83, 89, 381 A.2d 877 (1977)). Expressed in other terms, counsel will not be deemed ineffective for failing to predict a change in the law. Commonwealth v. Dunbar, 503 Pa. 590, 596, 470 A.2d 74, 77 (1983).

Fischer does not discuss or even cite any of this Court's decisions on this principle in his brief. Nor does he present any arguments that overcome this principle of law. He attempts to distinguish Commonwealth v. Williams, 294 Pa. Super. 93, 439 A.2d 765 (1982), on its facts, and thereby limit it. However, as is discussed supra at n.3 and accompanying text, the facts in Williams do not differ in any legally relevant way from the facts in this case. Moreover, the Williams court rejected a mistake of fact defense as to consent as a matter of law.

Fischer also cites Commonwealth v. Hutchinson, 423 Pa. Super. 571, 621 A.2d 681 (1993), for the proposition that a failure to request a jury instruction on the theory of the defense constitutes ineffectiveness per se. Fischer's analysis omits the fact that the theory of the defense which trial counsel ignored in Hutchinson had been established in the case law for thirty-two years and regularly reaffirmed by the courts of this

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case.

Commonwealth before the trial. That ineffectiveness was found is no surprise but is of no solace to Fischer in this connection.

Moreover, there is neither deficient performance of counsel nor prejudice to support a claim of ineffectiveness in this case. The jury instructions accomplished what Fischer seeks in this appeal by way of an instruction on mistake of fact as to consent. Additionally, counsel made a strategic decision not to object to these instructions because they included no limitation to a "reasonable mistake" as required by Section 304. Following the charge on the elements of the offense, the trial court outlined the evidence, as follows:

> [The defendant] testified . . . . that he considered all of this consensual, although she did say no and said she had to go. . . .
>
> The gist of his testimony, members of the jury, is that this was all consensual. Although words were said in protest, the actions were not, and that's why he considered the entire second episode to have been consensual and not over her objections.

(R. 959a.) Thus, the Court instructed on two defenses. The instruction included consent in fact ("this was all consensual") and mistake of fact as to consent ("he considered the entire second episode to have been consensual") (emphasis added). The instruction given lacks any requirement that the mistaken perception be objectively reasonable as is required by Section 304, providing a windfall to the defense at trial. The obvious strategic advantage implicated here alone should defeat Fischer's ineffectiveness claim. Commonwealth v. Williams, 537 Pa. 1, 28, 640 A.2d 1251, 1265 (1994) (citing Commonwealth v. Savage, 529 Pa. 108, 112, 602 A.2d 309, 311 (1992)) (strategic decisions not ordinarily subject to ineffectiveness attack). Fischer's trial counsel was not

ineffective and Fischer is procedurally barred from reaping any benefits from any ineffectiveness claim on appeal.

CONCLUSION

For all of the foregoing reasons, amici respectfully request that this Court affirm the judgment of sentence and deny Fischer's appeal for a change in the law.

Respectfully submitted

Terry L. Fromson
I.D. No. 27795
Tara S. Crean
Pa. I.D. No. 82776
Women's Law Project
125 South Ninth Street
Suite 300
Philadelphia, PA 19107
215-928-9801

Michelle Anderson*
299 N. Spring Mill Road
Villanova, PA 19085
610-559-3207

Robert E. Welsh, Jr.
I.D. No.28143
Lisa A. Mathewson
I.D. No. 77137
Welsh & Recker, P.C.
2000 Market Street
Suite 2903
Philadelphia, PA 19103
215-972-6430

Attorneys for *Amici Curiae*

*Not Admitted to Practice in Pennsylvania

APPENDIX

STATEMENTS OF INTEREST OF AMICI CURIAE

ABUSE & RAPE CRISIS CENTER

The Abuse and Rape Crisis Center (ARCC) was incorporated as a private, non-profit in 1979 in Bradford County, Pennsylvania to provide services to victims of sexual, physical, and emotional abuse and their significant others. Services include a hotline, crises intervention counseling, transportation, accompaniment and advocacy with the medical, law enforcement and justice systems, individual and group counseling, shelter, children's services, and information and referral to other resources. It is also ARCC's mission to educate the community to prevent abuse/violence. In the past year ARCC served 667 new clients and taught abuse prevention to 13,638 students in 66 classes. ARCC is a member of the Pennsylvania Coalition Against Rape. Judicial interpretation of sexual assault law has a tremendous impact on the daily lives and fears of women in Pennsylvania.

ALICE PAUL HOUSE

The Alice Paul House (APH) is the domestic violence shelter and rape crisis center that serves the residents of Indiana County, Pennsylvania. The APH is a private, non-profit organization and member agency of the Pennsylvania Coalition Against Rape (PCAR). Each year more than 900 victims of sexual assault, domestic violence, and other violent crimes receive counseling, advocacy, and emergency shelter from the APH. In the course of providing these services, APH has observed that criminal laws and the way in which they are enforced have an important impact on the victims' ability to heal from the well-documented psychological trauma accompanying sexual assault.

AW/ARE INC.

AW/ARE, Inc., Mercer County's Center Against Domestic and Sexual Violence, has been incorporated as a private, non-profit entity since 1976. As a member of the Pennsylvania Coalition Against Rape and the Pennsylvania Coalition Against Domestic Violence, AW/ARE provides a twenty-four hour accessible shelter, individual and group counseling, legal and medical advocacy and accompaniment services, and a strong prevention/education program. For the last twenty-three years, AW/ARE has worked to debunk the myths and stereotypes and promote the realities of sexual assault and domestic violence.

BERKS WOMEN IN CRISIS

Berks Women in Crisis (BWIC) is a non-profit corporation that has been serving victims of domestic and sexual violence in Berks County since its inception in 1976. We provide numerous services to victims of abuse, including a 24-hour hotline

in both English and Spanish, counseling services, legal representation and advocacy, medical advocacy and accompaniment and emergency shelter and housing. We also perform educational programs aimed at the prevention and understanding of violence in all Berks County schools. We are very concerned about any interpretation of sexual assault laws that perpetuates stereotypical myths about rape.

C.A.R.E. CENTER

The C.A.R.E. Center has been serving victims of sexual assault since 1982 in Washington and Green Counties. Our services include a 24-hour hotline service, legal advocacy, medical advocacy, prevention education to local community agencies and schools and a variety of counseling services – individual, group, and family. It is critical for the clientele we serve that the sexual assault laws be interpreted to treat women fairly.

CENTER FOR VICTIMS OF VIOLENT CRIME

The Center for Victims of Violent Crime is one of the oldest comprehensive crime victim agencies in the nation. A member of the Pennsylvania Coalition Against Rape, the Center is a not-for-profit 501(c)(3) agency that provides free, high-quality support services to crime victims and those directly affected by crime in Allegheny County. The Center's advocates work on behalf of sexual assault victims, rape victims and sexual harassment victims. Its services include hotline work, emergency room advocacy, counseling, court accompaniment, and post-trial advocacy. The Center also provides prevention and education programs to businesses, community agencies, senior centers, schools and colleges. As an agency that works with victims of sexual assault and rape, the Center struggles diligently to raise public awareness surrounding sexual assault and the myths that remain entrenched regarding this crime, including the dangerous myth that "no means yes" when women share intimacy with men.

CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies is a national non-profit, multiethnic and multicultural feminist policy research and advocacy institution. The Center has been a leader in research, policy analysis and advocacy on violence against women since its founding in 1972. The Center contributed to the definition of rape as a federal as well as state issue, to the development of the Rape Prevention and Control Act of 1975, and to early federal and state responses to acquaintance rape. Most recently, it worked to pass the 1996 federal Drug Induced Rape Prevention and Punishment Act that addresses drug-induced sexual assault, and consulted with state legislators on complementary comprehensive approaches to the problem of "date rape drugs."

COMMUNITY WOMEN'S EDUCATION PROJECT

Community Women's Education Project (CWEP) is a community-based education agency serving low-income families throughout the city of Philadelphia. For twenty-one years, CWEP has been on the cutting edge of providing services that help women help themselves. Through a continuum of education programs, vital educational supports, and connections to the workplace, CWEP has helped more than 13,000 women and their families move from public assistance to self-assistance. Embedded in our mission is a commitment to advancing the legal and economic status of women and promoting women's safety, dignity and freedom. One of the most serious barriers to self-sufficiency that many of CWEP's clients face is the threat of domestic violence and partner assault.

CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,400 individuals and organizations. CWEALF receives calls from victims of sexual assault and has worked with other interested groups on this topic for over twenty-five years.

CRIME VICTIM SERVICES

Crime Victim Services (CVS) is now in its twenty-first year of providing services to victims of sexual assault and other violent crimes, and educating the community about victims' issues. CVS is a private, non-profit agency that serves Butler County and is a member of the Pennsylvania Coalition Against Rape. Each year, CVS provides services to over 700 victims and their families. These services include crisis intervention, twenty-four hour hotline, medical and legal accompaniment, group and individual counseling, and advocacy. Since 1978, CVS has advocated for greater awareness around the myths and realities of sexual assault.

DELAWARE COUNTY WOMEN AGAINST RAPE

Delaware County Women Against Rape is a private, non-profit rape crisis center that provides direct services to victims of rape and sexual assault in Delaware County, Pennsylvania as well as education programs to school, community groups and allied professional. Delaware County Women Against Rape has provided these services to Delaware County residents since 1974. Direct victim services include a 24-hour hotline, hospital and other medical accompaniment, police interview accompaniment, criminal and civil court accompaniment, counseling, and advocacy. The majority of the victims we serve have been assaulted by acquaintances. In some of these cases, the offender is a former husband or boyfriend with whom the victim has engaged in consensual sexual relations at some time tin the past. It is crucial that

sexual assault laws be applied to such a way as to take into account the realities of the crime and provide justice to all victims.

DOMESTIC ABUSE PROJECT OF DELAWARE COUNTY, INC.

The Domestic Abuse Project of Delaware County, Inc. (DAP) is a non-profit agency dedicated to preventing domestic violence. Sexual assault between intimate partners is one of the forms of violence the agency works to prevent. The decision in this case is likely to have important ramifications for many of DAP's clients whose abusers assault them sexually.

DOMESTIC VIOLENCE CENTER OF CHESTER COUNTY, INC.

Domestic Violence Center of Chester County, Inc. (DVCCC) is the sole Chester County provider of services for victims of domestic violence. DVCCC was founded in 1976 as a private non-profit agency. The mission of the Domestic Violence Center is to provide intervention, programs, outreach and systems advocacy to prevent and reduce domestic violence in Chester County. DVCCC delivers services which include a 24-hour hotline, emergency shelter and transitional housing, crisis intervention, individual and group counseling, services and safety planning, information and referrals and community outreach and training.

ERIE COUNTY RAPE CRISIS CENTER, INC.

Erie County Rape Crisis Center, Inc. is a private, non-profit corporation that has provided services to victims of sexual violence and their significant others since 1975. Approximately 1500 victims a year contact the agency for crisis intervention, counseling, medical and court accompaniment, information and referral. The Center is a member of Pennsylvania Coalition Against Rape. Daily, the Center sees the traumatic, long-lasting effects of non-consensual sexual intercourse. As advocates for victims of sexual violence, the Center is deeply concerned about developments in the law relating to sexual assault that make it more difficult for victims to achieve justice in our system.

NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS

The National Alliance of Sexual Assault Coalitions (NASAC), organized in 1995, is a national membership organization for state sexual assault coalitions which focuses on public policy and public education to end sexual violence. NASAC advocates for the needs, rights and concerns of sexual assault victims. In furtherance of those goals, NASAC has a strong interest in the availability of legal redress for victims of rape and sexual assault.

NATIONAL COALITION AGAINST DOMESTIC VIOLENCE

Founded in 1978, the National Coalition Against Domestic Violence (NCADV) is a grassroots organization representing a national network of over 2,000 local programs and state coalitions that serve battered women and their children. NCADV serves as a national information and referral center for the general public, the media, battered women and their children, public and private agencies and organizations. NCADV maintains a Public Policy office in Washington, D.C. in order to impact federal legislation that relates to violence against women, including domestic violence, sexual assault and stalking. NCADV organized testimony for the Attorney General's Task Force Hearings on Family Violence; worked with federal legislators to develop priorities for the Victims of Crime Act; supported the development and passage of the Violence Against Women Act; and was a key player in the passage of the Domestic Violence Gun Ban Law. NCADV provides information and technical assistance, and promotes the development of innovative model programs which address the special needs of battered women and battered women's programs. NCADV has sponsored seven national conferences on violence against women and is also the sponsor of "National Domestic Violence Awareness Month," in which communities across the country organize special events and activities to draw attention to the magnitude of the problem of domestic violence and the work that is being done to end it.

NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC.

The National Organization for Women Foundation (NOW Foundation) is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 500 chapters in all fifty states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to stop violence against women, including sexual assault. NOW Foundation has a strong interest in assuring fair and equal treatment of women in the judicial system, and preserving effective sexual assault laws which protect women from the violence committed against them.

NETWORK OF VICTIM ASSISTANCE

Founded in 1974 as Women Organized Against Rape of Bucks County, Network of Victim Assistance (NOVA) is a non-profit, community-based organization which supports, counsels and empowers victims of sexual assault and other serious crimes and works to eliminate violence through advocacy, community education and prevention programs. Annually, NOVA serves over 1600 victims of sexual assault and their family members, half of whom are under the age of eighteen. Most have been victims of rape, attempted rape, indecent assault or involuntary deviate sexual intercourse. The emotional support, counseling and accompaniment

that NOVA provides to victims of sexual assault encourages healing from the well-documented psychological trauma of rape.

NOW LEGAL DEFENSE AND EDUCATION FUND

Now Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. NOW LDEF has been engaged on many fronts in efforts to eliminate gender-motivated violence, including sexual assault, and has a longstanding commitment to addressing inequality and gender bias in our state and federal judicial systems. NOW LDEF chaired the national task force that was instrumental in passing the historic Violence Against Women Act and has participated as counsel and as amicus curiae in numerous cases in support of the rights of women who have been the victims of sexual assault and other gender-motivated violence. NOW LDEF's project, the National Judicial Education Program, developed a model judicial education curriculum, Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault, now in use across the country.

PENN WOMEN'S CENTER

The Penn Women's Center was formed in 1973 in response to the safety and security needs of the Penn women's community at the University of Pennsylvania after a series of rapes on and around campus. It provides individual counseling and advocacy for victims of sexual assault and initiates and participates in numerous educational programs related to acquaintance rape on campus. It is a resource for a variety of women's issues with special expertise in the areas of violence against women, personal and community safety, health and sexuality.

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

The Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV) is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children. PCADV is a membership organization of 64 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependant children in the Commonwealth. For over twenty years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence.

PENNSYLVANIA COALITION AGAINST RAPE

Founded in 1975, the Pennsylvania Coalition Against Rape (PCAR) is a non-profit organization that advocates for the rights and needs of victims of sexual violence. PCAR's network of fifty-three centers provides free and confidential crisis counseling and intervention twenty-four hours a day, one-on-one counseling, prevention education programs to the public, information and referral, and hospital and court accompaniment for all victims of sexual violence and their significant others. It is critical that these victims are not re-victimized by the criminal justice system.

PENNSYLVANIA NOW, INC.

Pennsylvania NOW, Inc. is a nonprofit, social change, membership organization founded in 1972 and is affiliated with the National Organization for Women. Through grassroots organizing efforts, Pennsylvania NOW's thirty-two chapters with over 9,000 members work to eliminate all forms of discrimination against women, including race, economic status, age, sexual orientation, religious affiliation, ethnic origin, and/or disability. Pennsylvania NOW has had a long history of working for civil rights for women and other minority groups. Over the years, Pennsylvania NOW has worked closely with other organizations to educate the public on key issues affecting women and their families and has been a strong advocate for enforcement and improvement of laws covering sexual assault.

RAPE AND VICTIM ASSISTANCE CENTER OF SCHUYLKILL COUNTY

The Rape and Victim Assistance Center of Schuylkill County was established in 1983 to address the issue of sexual violence on a local level through the delivery of direct support services and community education. The Center currently serves approximately 900 clients each year: men, women and children whose lives have been significantly affected by sexual victimization. The Center advocates on behalf of those individuals who have been victimized as well as those at risk. Over the past sixteen years, community members have become more sensitive and educated about sexual violence, and local systems have made changes in policies and procedures to preserve the rights of victims built upon facts, not misconceptions about these crimes.

SULLIVAN COUNTY VICTIM SERVICES

Sullivan County Victim Services provides information, referrals, counseling, educational programs, and advocacy services for victims and survivors of abuse and other crimes. It offers free and confidential services twenty-four hours a day, seven days a week. Its services include a twenty-four hour hotline, individual and group counseling, medical and legal accompaniment, transportation, and community and school based education programs.

SUSQUEHANNA VALLEY WOMEN IN TRANSITION

Susquehanna Valley Women in Transition (SVWIT) is a non-profit organization providing services to survivors of domestic violence and sexual assault in Union, Snyder and Northumberland Counties. SVWIT services include a twenty-four hour hotline, emergency shelter, legal advocacy and accompaniment, medical advocacy and accompaniment, individual and group counseling, children's programming and community education and prevention. In the last fiscal year, Susquehanna Valley Women In Transition's trained sexual assault counselors served 403 adult victims, 51 child victims and 60 significant others. In addition, SVWIT staffed 786 victim-related sexual assault hotline calls.

TCWC ABUSE, RAPE CRISIS, HIV/AIDS & SHELTER SERVICES

TCWC Abuse, Rape Crisis, HIV/AIDS & Shelter Services (TCWC) is the only victim assistance agency in Tioga County dedicated to serving victims of sexual assault and other violent crimes and educating the community about victimization issues. TCWC is a non-profit, private organization which serves Tioga County residents and is a member agency of the Pennsylvania Coalition Against Rape (PCAR). On a daily basis TCWC provides rape victims and their loved ones with a range of services including crisis intervention, twenty-four hour hotline, emergency room advocacy, supportive counseling, court accompaniment, shelter and post-trial advocacy. Since its founding in 1984, TCWC has promoted greater awareness of the realities of sexual assault. It has found that most rapes are perpetrated by someone the victim knows. It is therefore important for sexual assault laws to protect women from acquaintance rape as well as rape by strangers.

VICTIMS RESOURCE CENTER

The Victims Resource Center (VRC) has been providing services to victims of sexual assault for twenty-five years. VRC is a non-profit, private organization which serves residents of Luzerne, Wyoming and Carbon Counties and is a member agency of the Pennsylvania Coalition Against Rape. Over 1000 victims of sexual violence and their families and friends receive services annually including crisis intervention, counseling, hospital, police and court accompaniment, advocacy, and support group services. Since the Center's earliest days, volunteers and staff have educated the public about the myths surrounding sexual assault. One of the most pervasive myths the Center encounters is the belief that women who say no to sexual contact actually are consenting to it. Reinforcing this myth would gravely undermine the safety of women in Pennsylvania.

VICTIM SERVICES, INC.

Victim Services, Inc. is a private, non-profit organization which serves Cambria and Somerset Counties and is a member of the Pennsylvania Coalition Against Rape. It was chartered in 1983 to provide confidential, free services to

victims of sexual assault and other violent crimes. Since then, the agency has been dedicated to serving victims of violent crimes and educating the community about victimization issues. Annually, over 600 sexual assault victims and their loved ones receive direct services including crisis intervention, twenty-four hour hotline, accompaniment to medical, police and justice proceedings, empowerment counseling, victims' compensation claims assistance and information and referral.

WOMEN AGAINST ABUSE

Women Against Abuse (WAA) is a private non-profit organization committed to halting violence against women via the provision of intervention, prevention, and advocacy programs and services. WAA is one of the largest and most comprehensive domestic violence service providers in the country. This agency provides hotline, emergency shelter, transitional housing, counseling, advocacy, legal representation, and other supportive services to battered women and their children. It is the only organization in Philadelphia dedicated solely to assisting victims of domestic violence and their families. Annually, WAA serves an average of 20,000 victims of domestic violence. In our more than two decades of service, WAA has assisted approximately 200,000 victims of domestic violence.

WOMEN ORGANIZED AGAINST RAPE

Women Organized Against Rape (WOAR) was founded in 1973 for the purpose of fighting sexual violence and assisting survivors of sexual assault and sexual abuse throughout Philadelphia. WOAR provides a range of services to over 6,000 children and adults annually through a combination of staff and volunteers. These services include counseling and information through a twenty-four hour hotline, accompaniment for survivors in emergency rooms, court accompaniment and advocacy, and short-term counseling. WOAR also provides community education programs about sexual assault prevention.

WOMEN'S CENTER OF BEAVER COUNTY

The Women's Center of Beaver County was the first and continues to be the only agency in Beaver County dedicated to serving victims and survivors of sexual assault and domestic violence and providing prevention/education programs dealing with these issues to the community. Clients receive a range of services including twenty-four hour hotline, safe, temporary shelter, medical advocacy, legal accompaniment and advocacy, individual counseling, and support groups. The focus of these services is to provide the necessary support needed to aid in the healing process for the victims of such trauma.

WOMEN'S CENTER OF COLUMBIA/MONTOUR, INC.

The Women's Center of Columbia/Montour, Inc. (TWC), has been serving victims of domestic violence and sexual assault in the communities of Columbia and

Montour counties for twenty-five years. We provide a variety of services to victims including twenty-four hour emergency hot-line and phone counseling services, shelter, options and empowerment counseling, sexual assault counseling, legal advocacy and representation, medical advocacy and accompaniment, and community education services.

WOMEN'S LAW PROJECT

The Women's Law Project is a non-profit public interest law firm located in Philadelphia, Pennsylvania. Founded in 1974, the Law Project works to abolish discrimination and injustice and to advance the legal and economic status of women and their families. The Law Project is committed to ending violence against women and children and to safeguarding the legal rights of women and children who experience sexual abuse. To that end, the Law Project has provided counseling to victims of violence through its telephone counseling service, engaged in public policy advocacy work, and written and participated in amicus curiae briefs which seek to improve the response of the legal system to victims of sexual assault and violence.

WOMEN'S RESOURCE CENTER, INC.

The Women's Resource Center, Inc. is a private non-profit organization dedicated to addressing the issues of physical and sexual violence against women and children. Founded in 1977, and located in Scranton, PA, the primary purpose of the Center is to offer crisis intervention, counseling, support services and shelter to women and their children who are being physically or sexually abused in their own homes. Last year, WRC provided services to over 2,000 women and 300 children from Lackawanna and Susquehanna Counties. Along with these services, the Center conducts an extensive education program to acquaint schools, hospitals and the community at-large with the consequences of sexual violence. Since its founding in 1977, the WRC has advocated for greater awareness of the myths and realities of sexual assault.

WOMEN'S RESOURCES OF MONROE COUNTY, INC.

Women's Resources of Monroe County, Inc. (WR) has been working with victims of sexual assault for over twenty years. WR is a non-profit 501(c)(3) organization serving Monroe County and is a member of the Pennsylvania Coalition Against Rape and Pennsylvania Coalition Against Domestic Violence. Its services range from a twenty-four hour hotline and domestic violence shelter to a wide variety of community prevention and education programs. Women's Resources believes strongly that it is the right of any individual to say no to a sexual encounter and have it mean no, regardless of whether the couple has a history of sexual involvement.

WOMEN'S SHELTER/RAPE CRISIS CENTER OF LAWRENCE COUNTY

The Women's Shelter/Rape Crisis Center of Lawrence County (WS/RCC) located in Lawrence County, Pennsylvania has provided services to victims of domestic and sexual violence since 1981. Educational programs are provided to community groups, professionals, and school students. WS/RCC is a non-profit, private organization which is a member agency of the Pennsylvania Coalition Against Rape and Pennsylvania Coalition Against Domestic Violence. Annually, over 400 sexual assault victims and their family members receive a range of services including crisis intervention, twenty-four hour hotline, emergency room advocacy, supportive counseling, court accompaniment, and post-trial advocacy. As an agency which works to advocate for victims of sexual violence, the Women's Shelter strives to raise public awareness surrounding sexual assault myths and realities and about the trauma and pain victims face following an assault.

YWCA SEXUAL ASSAULT PREVENTION & COUNSELING CENTER OF LANCASTER COUNTY

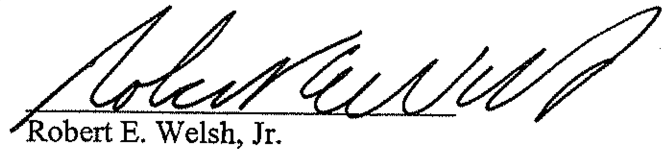
The YWCA Sexual Assault Prevention & Counseling Center has been the designated rape crisis center in Lancaster County for nearly ten years. Over 800 clients receive counseling, advocacy, accompaniment, information, and referral both in-person and through our twenty-four hour hotline annually. Our community education and awareness programs reach people of all ages, with particular emphasis on personal safety, sexual harassment, and dating violence in elementary, middle, and high schools, as well as at local colleges and universities. Over 10,000 children and adults participate in these programs each year.

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 1999, I caused to be served two true and correct copies of the foregoing Brief of Amici Curiae (substituting for the copy served by mail on September 29, 1999) upon the following by First-Class Mail, Postage Pre-paid, which service satisfies the requirements of Pa.R.A.P. 21:

Michael M. Mustokoff, Esq.
Jonathan L. Swichar, Esq.
Duane, Morris & Heckscher, LLP
One Liberty Place
Philadelphia, PA 19103-7396

Hugh Burns
Assistant District Attorney
District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102



Robert E. Welsh, Jr.