

**TESTIMONY ON ELDER ABUSE
BEFORE HOUSE AGING AND OLDER ADULT SERVICES
COMMITTEE
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and

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Good morning Chairmen Day and Samuelson, and members of the Aging and Older Services Committee. Thank you for the opportunity for the three of us to appear before you this morning. Let us first introduce ourselves. We are:

Mary Kate Kohler, Deputy District Attorney for Bucks County. I have been a prosecutor for just over 7 years and am assigned to the Special Victims Unit and the Elder Abuse Task Force. As such, I handle the investigation and prosecution of physical and sexual abuse crimes that occur in this county. I specifically handle cases involving elderly victims in addition to neglect of care cases for the County.

AJ Garabedian, Deputy District Attorney for Bucks County. I am assigned to the Economic Crimes/Arson Division, where I specialize in prosecuting high value thefts, forgery, embezzlement, identity theft and home improvement fraud. I serve as Chief of Elder Abuse prosecutions and am the office's liaison to the Bucks County Elder Abuse Task Force.

Greg Rowe, Director of Legislation and Policy for the Pennsylvania District Attorneys Association.

Physical and Sexual Abuse

As you know, physical and sexual abuse remain prevalent in this country. Our most vulnerable are particularly at risk. Many in our elderly population, unfortunately, are extremely vulnerable and are often easy prey for abusers. The majority of abuse occurs at the hands of someone the victim knows, such as a family member, friend, or caregiver, with caregivers committing a majority of these cases.

One particularly vulnerable setting is the nursing home. Perpetrators in nursing homes are usually staff. *See* Wenche Malmedal, et al. Sexual Abuse of Nursing Home Residents: A Literature Review, *Nursing Research and Practice*, January 6, 2015. According to this study:

- 70% of reported abuse occurs in nursing homes;
- Only 30% of victims of elder sexual abuse report it to authorities;
- The abuser is the primary caregiver 81% of the time; and
- Elderly women are six times more likely than men to be sexually abused.

We know that in most cases, perpetrators of sexual abuse of the elderly believe they can act with impunity. Elderly women are much more likely than elderly men to be abused, but that does not mean

that men are not abused. Nursing home residents who are older are at greater risk of abuse. And those who suffer from cognitive impairment, such as dementia or Alzheimer's, are at a heightened risk. *Id.*

The elderly is a more vulnerable subset of the community because they often depend on others for their care, whether it be for transportation, mobility, food, health care, or medication. Identifying and prosecuting perpetrators of such abuse is critical because we have a collective responsibility to protect victims, especially our most vulnerable.

One significant way of preventing or minimizing the risk of abuse is to increase monitoring efforts. Legislation, such as HB 397, to allow families to monitor their loved ones via camera in a care facility would most likely reduce abuse and if it occurs, allow us to better hold perpetrators accountable.

Regarding HB 397, we wanted to offer two technical points. First, any criminal penalty for tampering with or otherwise destroying a monitoring device should be specifically set forth in the bill. It presently references the tampering with physical evidence statute. But criminal statutes are clearer and less susceptible to challenge if they are specifically set forth in law. Second, the immunity section should have language that makes clear that it applies to the use of monitoring devices as provided by the legislation. Such language would ensure that such immunity did not apply to using monitoring devices in circumstances completely unrelated to the purposes of HB 397.

Cases Demonstrating Need for Improvements to the Law

Let's take a step back for a moment and think about abuse cases that actually have occurred here in Bucks County. One case, *Commonwealth v. Shimer*, is particularly gruesome. Here, the victim was a 96 year-old physically disabled woman with dementia. She lived with her daughter and son-in-law. The victim depended on them for literally everything. One day, the victim's daughter walked in on her husband in the living room with his pants down, crudely demanding the 96 year-old victim perform oral sex on him. The perpetrator fled. His wife subsequently recorded a phone call with him to discuss the situation, during which time the defendant confessed and claimed he regretted what he had done. The

defendant was charged with involuntary deviate sexual intercourse. But at trial, the defendant sought to prevent the recorded telephonic admissions to be introduced into evidence because of the applicable spousal privilege. As a matter of law, the defendant was correct.

We believe that consideration should be given to providing narrow exceptions to the spousal privilege in cases where the victim is elderly, care-dependent, or otherwise vulnerable and the underlying crime at issue involves physical, sexual abuse, or even financial abuse.

A second case was *Commonwealth v. Frederici*. Here, the victim was in her 80s and a resident at a nursing home who relied on her caretakers to meet her basic needs. One caretaker had been sexually abusing her for a period of time unknown to law enforcement. Another worker walked in on this caretaker while he was receiving oral sex from the victim, and thankfully, reported it. The defense in this case was that this resident consented to having performed oral sex. We could not say as a matter of law that the victim could never consent to sexual activity and, unfortunately, we could not use her as a witness given her limited mental state.

Consent in this case is a troubling legal defense. But it was a valid legal defense. We believe that consideration should be given to expanding the crime of institutional sexual assault to include in-home care workers and nursing home facility employees. Such a change would eliminate consent as a defense in such cases. Presently, institutional sexual assault applies in settings such as prison and schools, where those in a position of power, such as prison guards and teachers, are not permitted to have sex with prisoners or students, respectively, because when someone is in a position of power, true consent cannot really occur.

Financial Abuse of the Elderly

A majority of the financial abuse that we see comes from individuals who obtain the power of attorney of an elderly individual either legitimately or illegitimately and then raid his or her bank account. More broadly, those who financially exploit the elderly are those typically in positions of trust or power or with fiduciary obligations. The consequences are significant. By the time law enforcement discovers

the fraud, the money is often gone, and there is often little hope of recovering it. We often learn about financial exploitation from those who work in assisted living facilities themselves, when the bills of elderly individuals have not been paid.

In terms of prosecution, our challenges typically exist because of the mental and/or physical state of the victim. In many instances, they will have some form of dementia, which makes proving the elements of the crime difficult. Then there is the fact that victims are embarrassed.

We need to identify these crimes early before all the money has been depleted. Reducing or eliminating civil liability for a bank, for example, to report instances of suspected financial theft or fraud would help this effort tremendously because increasing cooperation between the banking community and law enforcement is so critical.

HB 399 provides an important framework for holding perpetrators accountable. We recommend focusing on the salient point of the legislation: holding those that commit financial crimes against the elderly, especially by those in positions of trust. To that end, we would recommend that enhancements to the current theft include instances where the perpetrator is a person in a position of trust and the victim is elderly. New Jersey recently enacted such a law (N.J.S. 2C:20-1-2), where a person in a position of trust includes:

- Parent, spouse, adult child or other relative;
- Joint tenant or tenant in common;
- A person with a fiduciary obligation;
- A person who receives money or other consideration for providing care;
- A person who lives with or provides some component of home care service.

Penalties could be increased further if the elderly victim is a dependent-care person.

Additionally, New Hampshire (N.H. Rev. Stat. Chapter 173-D) permits protective orders for those who have engaged in exploitation of a vulnerable elderly person, such as those who are unable to manage their own finances, and there are criminal penalties for violating such an order.

Thank you again for the opportunity to speak with you this morning, and we would be happy to answer any questions.