

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

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COMMONWEALTH OF PENNSYLVANIA,  
Appellant  
v.

Docket No. 4 MAP 2012

JASON SALE CLAYBROOK,  
Appellee

Appeal from the Decision of the Superior Court Filed May 24, 2011  
Commonwealth of Pennsylvania v Jason Sale Claybrook, No. 1926 EDA 2010

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COMMONWEALTH OF PENNSYLVANIA,  
Appellant  
v.

Docket No. 3 MAP 2012

JAMEL CLAY,  
Appellee

Appeal from the Decision of the Superior Court Filed May 24, 2011  
Commonwealth of Pennsylvania v. Jamel Clay, No. 1835 EDA 2010

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COMMONWEALTH OF PENNSYLVANIA,  
Appellant  
v.

Docket No. 5 MAP 2012

RASHID LEWIS,  
Appellee

Appeal from the Decision of the Superior Court Filed May 24, 2011  
Commonwealth of Pennsylvania v. Rashid Lewis, No. 1762 EDA 2010,

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**BRIEF FOR *AMICI CURIAE* WOMEN'S LAW PROJECT AND 42 PENNSYLVANIA  
AND NATIONAL ORGANIZATIONS DEDICATED TO JUSTICE FOR VICTIMS OF  
SEXUAL ASSAULT IN SUPPORT OF APPELLANT**

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CRISIS SHELTER OF LAWRENCE COUNTY  
DELAWARE COUNTY WOMEN AGAINST RAPE  
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NATIONAL WOMEN'S LAW CENTER  
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THE WOMEN'S CENTER, INC. OF COLUMBIA/MONTOUR  
VICTIM RIGHTS LAW CENTER  
VICTIM SERVICES CENTER OF MONTGOMERY COUNTY  
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YWCA LANCASTER  
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TABLE OF CONTENTS

TABLE OF AUTHORITIES .....iv

STATEMENT OF INTEREST OF *AMICI CURIAE* ..... 1

STATEMENT OF JURISDICTION..... 2

DETERMINATION IN QUESTION ..... 2

STATEMENT OF SCOPE AND STANDARD OF REVIEW ..... 2

STATEMENT OF QUESTIONS INVOLVED..... 3

STATEMENT OF THE CASE..... 4

SUMMARY OF ARGUMENT ..... 6

ARGUMENT ..... 7

    I. INTRODUCTION ..... 7

    II. THE SUPERIOR COURT ERRONEOUSLY RELIED UPON MYTHS ABOUT FEMALE SEXUAL ASSAULT VICTIMS AND IGNORED LEGAL REFORMS TO DISCREDIT [REDACTED] AND VACATE THE JUDGMENTS OF SENTENCE. .... 7

        A. THE SUPERIOR COURT’S OPINION DEMONSTRATES A LACK OF UNDERSTANDING OF THE PREVALENCE AND NATURE OF ACQUAINTANCE RAPE ON CAMPUS..... 10

        B. THE SUPERIOR COURT BASED ITS FINDING OF CONSENT ON THE SEXUAL ASSAULT MYTH OF IMPLIED CONSENT..... 12

        C. THE SUPERIOR COURT’S RELIANCE ON [REDACTED]’S LACK OF RESISTANCE TO VACATE THE JUDGMENTS OF SENTENCE IS INCONSISTENT WITH THE LAW AND VICTIM BEHAVIOR. .... 16

        D. THE SUPERIOR COURT IMPOSED AN UNREALISTIC STANDARD OF “INSTANTANEOUS COMPLAINT” THAT IS INCONSISTENT WITH SOCIAL SCIENCE RESEARCH AND RELIES ON VICTIM-BLAMING MYTHS REJECTED BY THE PENNSYLVANIA GENERAL ASSEMBLY..... 19

E. THE SUPERIOR COURT INAPPROPRIATELY REQUIRED CORROBORATION THROUGH VICTIM’S INJURIES THAT IS INCONSISTENT WITH THE REALITY OF RAPE AND IS NO LONGER A LEGAL REQUIREMENT IN PENNSYLVANIA.....	23
F. BY RELYING ON GENDER-BASED SEXUAL ASSAULT MYTHS, THE SUPERIOR COURT ERRONEOUSLY FOCUSED ON THE VICTIM’S BEHAVIOR INSTEAD OF THE DEFENDANTS’ BEHAVIOR.....	26
III. CONCLUSION.....	28

APPENDICES

APPENDIX A: STATEMENTS OF INTEREST OF *AMICI CURIAE*

APPENDIX B: DECISION OF THE SUPERIOR COURT

## TABLE OF AUTHORITIES

### CASES

<i>Commonwealth v. Andrulewicz</i> , 2006 Pa. Super. 309, 911 A.2d 162 (2006).....	16
<i>Commonwealth v. Berkowitz</i> , 537 Pa. 143, 641 A.2d 1161 (1994).....	9, 16
<i>Commonwealth v. Charlton</i> , 2006 Pa. Super. 149, 902 A.2d 554 (2006) .....	24
<i>Commonwealth v. Davis</i> , 437 Pa. Super. 471, 650 A.2d 452 (1994) .....	24
<i>Commonwealth v. Kelley</i> , 569 Pa. 179 6, 801 A.2d 551 (2002).....	10, 17
<i>Commonwealth v. Mlinarich</i> , 345 Pa. Super. 269, 498 A.2d 395 (1985).....	24
<i>Commonwealth v. Mlinarich</i> , 518 Pa. 247, 542 A.2d 1335 (1988).....	16
<i>Commonwealth v. Rhodes</i> , 510 Pa. 537, 510 A.2d 1217 (1986) .....	16
<i>Commonwealth v. Shaffer</i> , 2000 Pa. Super. 356, 763 A.2d 411 (2000) .....	24
<i>Stevick v. Commonwealth</i> , 78 Pa. 460 (1875).....	17

### OTHER AUTHORITIES

Ann Burgess & Lynn Holmstrom, <i>Rape: Crisis and Recovery</i> (1986).....	26
Bonnie S. Fisher, et al., <i>The Sexual Victimization of College Women</i> (2000) .....	10, 18, 25, 26
Christopher P. Krebs et al., Nat'l Inst. of Justice, <i>The Campus Sexual Assault (CSA) Study</i> (2007).....	10, 11, 22, 25, 26
David Lisak, <i>Understanding the Predatory Nature of Sexual Violence</i> , 14 <i>Sexual Assault Rep.</i> 1 (2011) .....	11
David Spiegel, et al, <i>Dissociative Disorders in DSM -5</i> , <i>Depression and Anxiety</i> 824 (2011).....	19
Dean G. Kilpatrick et al., <i>Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study</i> (2007) .....	22
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Grace Galliano et al., <i>Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates</i> , 8 J. of Interpersonal Violence 109 (1993) .....	18
Heather M. Karjane, et al., <i>Campus Sexual Assault: How America's Institutions of Higher Education Respond</i> (2002) .....	11
Jennifer Gentile Long, Am. Prosecutors Research Inst., <i>Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases</i> , 1 The Voice 1 (2006).....	20
Jolie Williamson, <i>Lawmaker Wants Rape Laws Overhauled</i> , Valley News Dispatch, Sept. 15, 1995 .....	25
Kimberly A. Lonsway & Louise F. Fitzgerald, <i>Rape Myths in Review</i> , 18 Psych. of Women Quarterly 133 (1994).....	8
Kimberly A. Lonsway, <i>The Use of Expert Witnesses in Cases Involving Sexual Assault</i> (2005).....	20
Kristine M. Chapleau et al., <i>How Ambivalent Sexism Toward Women and Men Support Rape Myth Acceptance</i> , 57 Sex Roles 131 (2007) .....	8
Martha R. Burt, <i>Rape Myths and Acquaintance Rape</i> , in <i>Acquaintance Rape: The Hidden Crime</i> (Andrea Parrot & Laurie Bechhofer eds., 1991) .....	8, 11
Michelle J. Anderson, <i>Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims</i> , 13 New Crim. L. Rev. 644 (2010).....	14
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Patricia Tjaden & Nancy Thoennes, <i>Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey</i> , Nat'l Inst. of Just. Special Report (2006).....	18, 22
Pennsylvania Bar Institute, Pa. Suggested Standard Jury Instructions (Crim) 4.13A.....	23

Rana Sampson, U.S. Dep’t of Justice, Acquaintance Rape of College Students (2003) .....	11, 22, 25
Ronnie Janoff-Bulman, <i>The Aftermath of Victimization, in Trauma and Its Wake: The Study and Treatment of Post-Traumatic Stress Disorder 15</i> (Charles Figley ed., 1985).....	26
Sarah E. Ullman, <i>A 10-Year Update of Review and Critique of Empirical Studies of Rape Avoidance</i> , 34 <i>Crim. Just. &amp; Behav.</i> 411 (2007) .....	18
Shannan Catalano, Bureau of Justice Statistics, U.S. Dep’t of Justice, Criminal Victimization, 2005 (2006).....	22
Shirley Kohsin Wang, et al., Research Summary: Rape: How Women, the Community and the Health Sector Respond (2007) .....	20
Susan Caringella, Addressing Rape Reform in Law and Practice (2009) .....	14
Susan Rees, et al., <i>Lifetime Prevalence of Gender-Based Violence in Women and the Relationship with Mental Disorders and Psychosocial Function</i> , 306 <i>JAMA</i> 513 (2011).....	26
Tammy Garland, <i>An Overview of Sexual Assault and Sexual Assault Myths, in Sexual Assault: The Victim, the Perpetrators, and the Criminal Justice System</i> (eds. Frances P. Reddington & Betsy Wright Kreisel) (2009).....	7
V.E. White Kress, et al, <i>Responding to Sexual Assault Victims: Considerations for College Counselors</i> , 6 <i>J. College Counseling</i> 124 (2003) .....	20

**TREATISES**

3 S. Greenleaf, Evidence § 212 (15th ed. 1892) .....	8
3A J. Wigmore, Evidence § 924a (Chadbourn rev. ed.1970) .....	8

**PENNSYLVANIA STATUTES AND LEGISLATIVE MATERIALS**

18 Pa. Cons. Stat. § 3104 (2012) .....	14
18 Pa. Cons. Stat. § 3107 (2012) .....	16
18 Pa. Cons. Stat. § 3124.1 (2012) .....	10
18 Pa. Cons. Stat. Ann. § 3105 (1973) (amended 1976) .....	22
18 Pa. Cons. Stat. Ann. § 3121(2) (repealed 1976) .....	17

Act No. 10, P.L. 985 1995 .....	14
Act No. 230 1983-1984 Sess. P.L. 1210 1984.....	14
Act No. 53, 1975-76 Sess. P.L. 120 1976.....	14
Act of Mar. 31, 1995, Pub. L. 985, No. 10, Spec. Sess. No. 1, § 8 .....	15
Act of May 18, 1976, Pub. L. 120, No. 53, §§ 1-2 .....	9, 16

**PENNSYLVANIA LEGISLATIVE HISTORY**

House Leg. J. 198, 199 (Mar. 7, 1995) .....	12, 25
Sen. Leg. J. 1462 (Apr. 6, 1976).....	27
Sen. Leg. J. 20 (Jan. 30, 1995).....	14
Sen. Leg. J. 24 (Jan. 31, 1995).....	15



## STATEMENT OF INTEREST OF *AMICI CURIAE*

*Amici Curiae* are the Women's Law Project and 42 non-profit organizations dedicated to improving the criminal justice system's response to women and girls who are victims of sexual assault. *Amici* include organizations that provide direct services to individuals, ranging from crisis intervention and counseling to intervention with law enforcement and court accompaniment. Many engage in policy advocacy to improve institutional responses to violence and reduce the incidence of violence against women. These efforts include law reform, as well as education and training programs designed to raise the awareness of the public, police, and courts about the realities of sexual assault and the harmful myths that continue to prevent victims from obtaining justice.

*Amici* have special expertise in the impact of sexual assault on survivors, the nature of acquaintance rape, and the changes in sex crime definitions and proof enacted by Pennsylvania over the past several decades. They submit this brief to aid the Court in evaluating whether the Superior Court erred in vacating the judgments of sentence of the three defendants based solely on rape myths rejected by the Pennsylvania General Assembly.

Individual statements of interest of *Amici Curiae* are contained in Appendix A to this brief.

## **STATEMENT OF JURISDICTION**

*Amici Curiae* incorporate by reference the Statement of Jurisdiction set forth in Brief of Appellant Commonwealth of Pennsylvania.

## **DETERMINATION IN QUESTION**

In a non-precedential memorandum decision filed on May 24, 2011, the Superior Court entered the following determination:

Judgment vacated. Case remanded per our instructions. Jurisdiction relinquished.

Judgment Entered.

/s/ Karen Bramblett, Prothonotary

Date: May 24, 2011

## **STATEMENT OF SCOPE AND STANDARD OF REVIEW**

*Amici Curiae* hereby incorporate by reference the Statement of Scope and Standard of Review of Appellant Commonwealth of Pennsylvania.

## STATEMENT OF QUESTIONS INVOLVED

The issues on appeal are:

- (1) Did the Superior Court panel apply the wrong standard of review in this case by bypassing the analysis of the trial court's exercise of discretion on the challenge to the weight of the evidence and substituting its own judgment on this issue and its own interpretation of the underlying facts?
- (2) In addition to erroneously reaching the weight claim directly rather than affording deference to the judgment of the court below, did the superior Court panel further misapply the weight standard in clear contravention fo prevailing precedent?
- (3) In addition to usurping the discretion of the trial court judge and invading the providence of the jury, did the Superior Court panel also draw factually and legally insupportable conclusions from the record?

## STATEMENT OF THE CASE

*Amici Curiae* hereby incorporate by reference the Statement of the Case of Appellant Commonwealth of Pennsylvania, with additional references to trial testimony relating to defendants' actions, [REDACTED]'s state of mind during the events underlying this case, and a stipulation as to the forensic evidence.

[REDACTED] testified that after defendant Lewis's advances were rebuffed, he restrained [REDACTED] by throwing his body across her chest and face and placing his hands around her neck. (*See* Oct. 26, 2009, Notes of Testimony ("N.T. 10/26/09"), at 155, 258). The registered nurse who specialized as a Sexual Assault Nurse Examiner testified that she checked "strangulation" on the sexual assault documentation form that she completed while performing the examination of [REDACTED] later that day. (*See* Oct. 27, 2009, Notes of Testimony ("N.T. 10/27/09"), at 497).

[REDACTED] further testified that when defendant Claybrook penetrated her orally, he held both sides of her face. (N.T. 10/26/09, at 162). [REDACTED] testified that she was afraid while he penetrated her, stating, "I was really scared. I didn't know what was going to happen." (*Id.* at 162-163).

After the assault had ended and the three men were getting dressed, [REDACTED] testified that she "sat there and tried to cover up because [she] was really embarrassed and didn't know what they were going to do next." (*Id.* at 164). Once they left the room, [REDACTED] got dressed, went to the bathroom, and sat down in her room to collect herself, not knowing at first what to do. (*Id.* at 164-166). Then she called her friend and told him that she had been raped. (*Id.* at 166-67). After considering what to do next for ten to twenty minutes, she contacted a second friend, the one who had introduced her to the three men. (*Id.* at 168-69). Explaining what was going through her mind, [REDACTED] testified:

I didn't know what to do after I told Rich. I didn't know if I should tell anyone else, and I was scared to tell Rhonda because

they were I guess friends of hers. I just didn't know if I wanted to say anything to anyone about it.

(*Id.*). She remained unsure of what to do next while talking to her friend; as she testified, she “wasn't sure at that moment right then. I kind of just stood there and I... I just cried for like five minutes. I didn't know what to do.” (*Id.* at 170). ■■■ explained that she did not call the police at that time because she was “in shock of [the assaults] happening.” (*Id.* at 261). Shortly thereafter, ■■■ contacted campus authorities. (*Id.* at 170-71).

Counsel for the defendants and the Commonwealth stipulated, “Seminal material was identified in the vaginal, vulvar and rectal swabs” in the rape kit performed on ■■■ (N.T. 10/27/09, at 529). The defendants continued to deny that they had anally penetrated ■■■ Defendant Claybrook testified that “nobody” had anal sex that night. (*See* Oct. 27, 2009, Notes of Testimony (“N.T. 10/28/09”), at 578). When asked how there was semen in the victim's rectum, he replied, “I don't know how it got there.” (*Id.*). Similarly, Defendant Lewis denied having anal sex. (*Id.* at 625).

## SUMMARY OF ARGUMENT

The Superior Court lifted the convictions of three men for sexual assault and indecent assault by infusing its review of the lifeless written record with gender-biased sexual assault myths that have been discredited by social science research and eliminated by the Pennsylvania General Assembly. When Pennsylvania repealed the requirements of victim resistance, corroboration, and prompt complaint and criminalized sexual penetration without consent, it sent a clear message rejecting the myths that primarily strangers perpetrate sexual assault and that social interaction, absence of physical resistance, absence of severe physical injuries, and certain post-assault behaviors imply consent.

The Superior Court resurrected these misconceptions about sexual assault victims when it erroneously concluded that the victim, ██████ had implicitly consented to vaginal, oral, and anal penetration by three men, because she permitted the men into her dorm room, did not physically resist her attackers to the extent the panel expected, sustained only “minor” injuries, and did not “instantaneously” complain to campus authorities. In doing so, the Superior Court ignored evidence in the record supporting the jury verdict and explaining ██████’s behavior. In fact, ██████ said “no” to sexual interaction with the defendants and was physically prevented from physically resisting, the defendants having either restrained her and/or forced their penises into her mouth during the assault. In addition, the behavior ██████ displayed both during and after the assault, as well as the visible injuries she suffered, were all within the range of injuries and behaviors common to sexual assault victims.

The Superior Court incorrectly substituted its own findings for those of the jury and trial court by treating gender-biased myths about female sexual assault victims as fact. The decision of the Superior Court must be reversed and the judgments of sentence reinstated.

## ARGUMENT

### I. INTRODUCTION

Turning a cold eye to the facts of this case — the vaginal, anal, and oral penetration of an eighteen-year-old freshman (█<sup>1</sup> in college by three men who took turns holding her down — the Superior Court vacated the judgments of sentence rendered by a jury and confirmed by the trial court. The Court did so by relying on misconceptions about sexual assault that have no place in the adjudication of sexual assault crimes, Pennsylvania law having prohibited their consideration decades ago. These misconceptions hold that it is strangers who perpetrate sexual assault, and that consent is implied by lack of physical resistance, absence of severe physical injuries, and post-assault behavior that is inconsistent with baseless stereotypes about how a victim should react to an assault. These long-discredited beliefs about sexual assault distort the criminal justice system’s response to sex crimes and harm women.<sup>2</sup> The Superior Court’s reliance on these myths threatens the safety of students who are unlawfully subjected to sexual violence on college campuses.

### II. THE SUPERIOR COURT ERRONEOUSLY RELIED UPON MYTHS ABOUT FEMALE SEXUAL ASSAULT VICTIMS AND IGNORED LEGAL REFORMS TO DISCREDIT █ AND VACATE THE JUDGMENTS OF SENTENCE.

Viewing the written record through the lens of sexual assault myths, the Superior Court substituted its own credibility findings by rejecting █’s testimony as not credible and concluding that she had consented to sexual activity with three men with whom she had been acquainted for only a brief time. In drawing upon gender-based myths about “typical” victim

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<sup>1</sup> Out of respect for the victim’s privacy, this brief refers to her by her initials.

<sup>2</sup> Although this case is about a female victim and this brief addresses the impact of sexual assault myths on women, men are also victimized sexually and are also impacted by myths that distort the response of the criminal justice system to rape victims. See Tammy Garland, *An Overview of Sexual Assault and Sexual Assault Myths*, in *Sexual Assault: The Victim, the Perpetrators, and the Criminal Justice System* (eds. Frances P. Reddington & Betsy Wright Kreisel) 19 (2009).

behavior and misconceptions about acquaintance rape that blame the victim, the Superior Court focused on [REDACTED]'s perceived failure to resist the attack and her behavior after the attack, and ignored the evidence in the record about [REDACTED]'s state of mind that explained her behavior. *Amici* submit that the Superior Court held that [REDACTED] consented because the Court implicitly and explicitly applied rape myths to its review of the case, myths that have been both discredited by social science research and rejected by the Pennsylvania General Assembly.

Rape myths are “attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women.” Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review*, 18 *Psych. of Women Quarterly* 133, 133-34 (1994). Many of these myths blame the victim, trivialize the seriousness of sexual assault, excuse the assailant’s behavior, or assume the victim’s untruthfulness. *See*, Martha R. Burt, *Rape Myths and Acquaintance Rape*, in *Acquaintance Rape: The Hidden Crime* 27 (Andrea Parrot & Laurie Bechhofer eds., 1991). These myths are tied to biased stereotypes about women and notions of how women should behave before, during, and after rape. *See, e.g.*, Kristine M. Chapleau et al., *How Ambivalent Sexism Toward Women and Men Support Rape Myth Acceptance*, 57 *Sex Roles* 131, 136 (2007) (suggesting that sexist beliefs towards women and men support rape myth adherence).

Historically, rape laws were based on the false belief that rape is rare and women are likely to lie about it. *See, e.g.*, 3 S. Greenleaf, *Evidence* § 212 (15th ed. 1892) (citing Lord Hale’s observation that rape is “an accusation easily made, hard to be proved, and still harder to be defended.”); *see id.* (victim’s credibility should be measured by “whether she is a person of good fame;” “whether she made complaint . . . without any inconsistent delay;” “whether her person or garments bore token of the injury done to her.”); *see also* 3A J. Wigmore, *Evidence* §



924a, at 737 (Chadbourn rev. ed.1970) (recommending mandatory psychiatric evaluation for all rape complainants to assess whether the victim “suffers from some mental or moral delusion or tendency . . . causing distortion of the imagination in sex cases.”). Special evidentiary rules and burdens of proof imposed only in sexual assault cases severely disadvantaged and stigmatized rape complainants and rendered a successful prosecution extraordinarily difficult.

In a series of reforms that started in the early 1970s, the Pennsylvania legislature dramatically changed the laws surrounding sexual assault in Pennsylvania. The legislature eliminated the requirements of resistance, corroboration, and prompt complaint so that a victim’s lack of active resistance, lack of physical injuries, or delay in reporting the crime would not bar prosecution. *See* Act of May 18, 1976, Pub. L. 120, No. 53, §§ 1-2 (codified at 18 Pa. Cons. Stat. §§ 3107, 3106, and 3105 respectively). The legislature also recognized that spousal rape is a crime, although it continued to treat spousal rape differently from non-spousal rape; abolished consideration of the victim’s prior sexual history, except in limited circumstances; and eliminated cautionary jury instructions requiring special care in evaluating the testimony of rape victims. *Id.* (codified at 18 Pa. Cons. Stat. § 3104 (a)); *id.* (codified at 18 Pa. Cons. Stat. § 3106).

In 1995, the legislature dramatically changed Pennsylvania’s rape laws again, after the Pennsylvania Supreme Court upheld the reversal of a conviction for rape due to the absence of sufficient “forcible compulsion.” Although the victim, a female college student, clearly said “no,” the law at that time did not criminalize penetration without consent. The case, *Commonwealth v. Berkowitz*, generated a public outcry. 537 Pa. 143, 641 A.2d 1161 (1994). Recognizing the complexity of sexual assault, particularly in situations in which the parties know each other, the Pennsylvania General Assembly adopted a broader definition of forcible compulsion, eliminated differential treatment of spousal rape, and recognized the crime of non-

consensual sexual penetration. In a major step forward for sex crime victims, the legislature created a new offense titled “Sexual Assault” that criminalized “engag[ing] in sexual intercourse or deviate sexual intercourse with a complainant without the complainant’s consent” as a second degree felony, with no requirement of forcible compulsion or the threat of forcible compulsion. 18 Pa. Cons. Stat. § 3124.1 (2012); *see Commonwealth v. Kelley*, 569 Pa. 179, 189 n. 6, 801 A.2d 551, 557 n.6 (2002) (noting how *Berkowitz* provided the impetus for legislative rape reform). The Superior Court’s opinion in the instant case undermines these reforms by relying on rape myths, ignoring evidence of non-consent, and focusing exclusively on the victim’s behavior, while failing to examine the behavior of the defendants.

A. **The Superior Court’s Opinion Demonstrates a Lack of Understanding of the Prevalence and Nature of Acquaintance Rape on Campus.**

Underlying the Superior Court’s opinion is an implicit misconception that rape and sexual assault are crimes committed by strangers, not people the victim has met or knows. Contrary to both the social science research concerning sexual assault and the General Assembly’s purpose in reforming the laws surrounding sexual assault, the Superior Court’s entire opinion reflects the panel’s refusal to accept that sexual assault could be perpetrated in the social context under which the events underlying this case took place.

Data document that women attending college are particularly vulnerable to sexual assault, to an extent greater than their non-college age-group peers. Bonnie S. Fisher, et al., *The Sexual Victimization of College Women 1* (2000) [hereinafter “*Sexual Victimization of College Women*”]. During their college career, 20-25% of young women will be subjected to a completed or attempted rape. Christopher P. Krebs et al., Nat’l Inst. of Justice, *The Campus Sexual Assault (CSA) Study 2-1* (2007) [hereinafter *CSA Study*]. Women are at the greatest risk

of being sexually assaulted in the first two years of college. CSA Study, *supra*, at 2-7. More than four out of five female students who reported sexual coercion in college were victimized during their first four semesters on campus. CSA Study, *supra* at 5-5.

Research demonstrates that most rapes are committed by someone the victim knows. The National Intimate Partner and Sexual Violence Survey found that the majority of both female and male victims of rape knew the perpetrator. Studies of campus rape have found that 84 to 97.8 percent of sexual assaults against students are committed by young men known to the victim. Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* vii (2002). Acquaintance rapes on campus are therefore likely to involve voluntary socializing and no weapons. Rana Sampson, U.S. Dep't of Justice, *Acquaintance Rape of College Students* 9 (2003).

When society fails to recognize the prevalence of acquaintance rape on campus and to understand the circumstances under which those rapes are perpetrated, rape victims are blamed and disbelieved, sexual assault is trivialized, and assailants are excused and free to rape others in the future. *See, e.g.*, Burt, *supra* at 27-28; David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 *Sexual Assault Rep.* 1, 2 (2011) (summarizing research on sex offenders, including findings that the majority of college rapists are serial rapists).

In its reform of Pennsylvania's sex crime laws, the General Assembly sought to rid the criminal justice system of the misconception that sexual assault is perpetrated primarily by strangers, and specifically opened the door for increased prosecutions of acquaintance rapes, where perpetrators are less likely to use force or threats of force to cause injury in addition to the rape. As Representative Manderino said in support of the adoption of the sexual assault amendment in 1995,

There is a stereotypical version that if it was not a stranger as the defendant against the victim, who was also beaten and seriously bodily injured, then it does not rise to the level of rape and we lose convictions. But the reality of it is that that is not what rape is about, and this change in terminology is clearly making the policy statement that that is not what rape is about.

House Leg. J. 198 (Mar. 7, 1995). In the instant case, however, the Superior Court did not grasp the “reality of... what rape is about” when it vacated the judgments of sentence rendered by the jury and affirmed by the trial court. Rather, the Superior Court reinstated old misunderstandings of acquaintance rape that the General Assembly had rejected in a series of reforms that culminated in 1995, nearly two decades ago.

**B. The Superior Court Based its Finding of Consent on the Sexual Assault Myth of Implied Consent.**

The Superior Court places great weight on the victim’s social interactions with the defendants prior to the sexual assaults. The Court’s starting point in finding █████ not credible on the issue of consent is that she invited the defendants “to stay in her room.” App. B at 9. This invitation, the court infers, was an invitation to sexual activity. The facts surrounding the events of the early morning hours in question do not support such an inference, and the law does not permit such a conclusion.

To the contrary, the context in which the events transpired is a common scenario on college campuses across the country, and socializing in such a way does not amount to consent to sex. It was a typical Saturday night on campus involving late night partying, and, on this evening, the arrival of seven friends of a friend after midnight. (*See* Oct. 26, 2009, Notes of Testimony, (“N.T. 10/26/09”), at 145-146). After █████ returned to her dorm from an off-campus party, she fell asleep. Two friends woke her between 1:00 and 1:30 a.m., shortly after █████ had fallen asleep, and invited █████ to socialize with the male visitors from Philadelphia. (*Id.* at 147).

Socializing took place in the hallway between ██████'s room and a friend's room and in the rooms themselves, which were open. (*Id.* at 147-148). Sometime after 3:30 or 4 a.m., when they were asked to reduce the noise level, the seven male visitors settled in for the night, and three of them, the three defendants in this case, went to ██████'s room. (*Id.* at 145-153). In the campus context, none of this was unusual, including letting friends "crash" for a couple hours, and nothing ██████ did constituted consent to oral, vaginal, and anal intercourse with three men she had just met.

In fact, ██████ testified that she did not consent and had protested to the extent she could. (*Id.* at 154). ██████ testified that she asked defendant Lewis to get off of her bed and that he refused. (*Id.*). When he then attempted to kiss her and touch her, she said "No," moved away from him, and tried to get off the bed. (*Id.*). After his advances were rebuffed, he restrained ██████ by throwing his body across her chest and face and placing his hands around her neck. (*Id.* at 155, 258; *see* Oct. 27, 2009, Notes of Testimony ("N.T. 10/27/09"), at 497). Next, defendant Claybrook started to undress himself and undressed ██████ (N.T. 10/26/09, at 155). With her face covered by defendant Lewis' body, ██████ was unable to speak. (*Id.*). Later, defendant Claybrook held both sides of ██████'s face as he penetrated her orally. (*Id.* at 162). ██████ testified that she did not scream during this ordeal because, for much of the time, the defendants had either restrained her and/or forced their penises into her mouth. (*Id.* at 165).

The Superior Court places too much emphasis on whether ██████ invited the men into her room to stay overnight. Permitting the defendants to stay in her room is not sufficiently compelling evidence of consent to oral, vaginal, and anal penetration to overturn the jury's verdict and overcome ██████'s testimony that she said "no" to sexual activity. (N.T. 10/26/09, at 154). Contrary to the Superior Court's opinion, Pennsylvania law narrowly construes consent so that "no" means non-consent to any sexual activity that occurs after that point.

Historically, the common law presumed a broad notion of consent that was temporally imprecise. An example of consent as a “temporally unconstrained permission” is the archaic notion that a woman permanently consented to all sexual activity with her husband through her wedding vows. Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 New Crim. L. Rev. 644, 657-58 (2010). Pennsylvania rape law contained the same imprecise notion of implicit consent until the General Assembly narrowed its meaning through the series of reforms noted above. For instance, between 1976 and 1995, the General Assembly recognized and upgraded the felony status of spousal rape, ultimately eliminating the law’s differential treatment of spousal and non-spousal rape. *See* Act No. 53, 1975-76 Sess. P.L. 120 1976; Act No. 230 1983-1984 Sess. P.L. 1210 1984; Act No. 10, P.L. 985 1995. In another example, the legislature abolished this notion of implicit, temporally unconstrained consent when it eliminated consideration of a victim’s prior sexual history, except in limited circumstances. 18 Pa. Cons. Stat. § 3104 (2012); *see* Susan Caringella, *Addressing Rape Reform in Law and Practice* 114, 117 (2009).

Importantly, one of the purposes behind the General Assembly’s 1995 reform was to clarify that “no” means non-consent to sexual activity and that non-consent makes the subsequent perpetration of sexual contact a felony. The legislature intended to reverse the result in *Berkowitz*, a case stemming from facts similar to the case here: the sexual assault of a college student in a dorm room where the offender was an acquaintance who penetrated the victim vaginally after she had said “no.” In response to this Court’s holding in *Berkowitz* that “no” meant “no” for purposes of consent but that such evidence alone was insufficient to support a felony conviction of rape, the legislature made sexual assault without consent a felony. *See* Sen.

Leg. J. 20 (Jan. 30, 1995) (remarks of Sen. Greenleaf); *see* Act of Mar. 31, 1995, Pub. L. 985, No. 10, Spec. Sess. No. 1, § 8 (codified at 18 Pa. Cons. Stat. §3124.1).

Upon passage of the 1995 amendments, Senator Mellow, a cosponsor of the Senate bill, remarked:

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 the Senate bill No. 2 will accomplish that.

Sen. Leg. J. 24 (Jan. 31, 1995). 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). Thus, to the extent the pre-1995 reforms did not already eliminate archaic notions of consent, the legislative history surrounding the criminalization of nonconsensual sexual assault has made it clear that “consent” is narrowly construed so that “no” means “no.”

In this case, as described above, the record is clear that ██████ said “no.” Even the Superior Court concluded that “On [the essential issue of whether there was consensual sex] ██████ was clear: she consistently stated that she initially said no to Lewis, and did not consent to sex.” App. B at 11, n. 4. Nevertheless, on the transcripts alone, the Superior Court decided not to believe ██████’s consistent testimony. It instead relied on misunderstandings and myths about sexual assault on college campuses, including the assumption that an invitation to stay in a dorm

room for a couple of hours is somehow compelling evidence of consent to subsequent sexual activity.

**C. The Superior Court's Reliance on [REDACTED]'s Lack of Resistance to Vacate the Judgments of Sentence is Inconsistent with the Law and Victim Behavior.**

The Superior Court concludes that [REDACTED] consented by focusing on what [REDACTED] did not do to resist the attack while failing to acknowledge both the actions [REDACTED] did take as well as the reasons she gave for not doing more. The Superior Court's inference of consent due to lack of adequate resistance is based on the assumption that victims should engage in active forms of resistance during a sexual assault. *See, e.g., Commonwealth v. Mlinarich*, 518 Pa. 247, 259-260, 542 A.2d 1335, 1342 (1988). This assumption is not accurate. Nor is it consistent with the message sent by the Pennsylvania legislature when it eliminated the resistance requirement almost four decades ago. *See Act of May 18, 1976, Pub. L. 120, No. 53, §§ 1-2 (codified at 18 Pa. Cons. Stat. § 3107).*

Under the Crimes Code, it is clear that a victim need not resist her assailant to sustain a conviction for any sex crime, including the crimes for which the defendants were convicted, sexual assault and indecent assault. 18 Pa. Cons. Stat. § 3107 (2012); *Commonwealth v. Rhodes*, 510 Pa. 537, 557 n. 14, 510 A.2d 1217, 1227 n. 14 (1986) (victim's resistance is not necessary to sustain a conviction for rape); *see, e.g., Commonwealth v. Andrulowicz*, 2006 Pa. Super. 309, 911 A.2d 162, 165 (2006) ("In order to sustain a conviction, resistance to the sexual assault is not required."). Even in the controversial *Berkowitz* decision, this Court recognized that resistance is not required. 537 Pa. 143, 148 ("The victim of a rape need not resist," citing 18 Pa. Cons. Stat. Ann. § 3107). When the General Assembly created the crime of sexual assault, it intentionally



drafted the provision to “criminalize non-consensual sex where the perpetrator employs little force or threat of force, if any.” *Kelley*, 569 Pa. 179 at 189 n. 6.

The archaic resistance requirement essentially mandated the victim to prove that “while commission of the offense was in progress, she cried aloud, struggled and complained on first opportunity, and prosecuted the offender without delay.” *Stevick v. Commonwealth*, 78 Pa. 460, 460 (1875). By eliminating this 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.

In this case, however, the Superior Court effectively imposed a resistance requirement by rejecting the jury’s factual findings and placing undue emphasis on ██████’s perceived failure to cry out loud and struggle. The panel concluded that “██████ did not tell [defendants] to stop, did not cry out for help from someone in the dorm, did not try to escape, and, other than her claim of scratching [one of the defendants], did not physically resist [Defendants].” App. B at 4, 10. By focusing so heavily on ██████’s behavior, particularly on whether she actively resisted the attack, the Superior Court went beyond examining the evidence of consent proffered by the defense into faulting the prosecution and the victim for *failing to show resistance*, the exact sort of evidence § 3107 provides need not be shown to sustain a conviction. 18 Pa. Cons. Stat. Ann. § 3121(2) (repealed by the Act of May 18, 1976, P.L. 120).

In fact, ██████ was for the most part physically unable to resist during the assault. This inability to resist is largely because she was pinned down by one of the three assailants during most of the assault. In addition to restraining ██████ with their bodies, one of the men placed his hands on her neck before penetrating ██████ vaginally and another placed his hands on either side

of her face as he penetrated her orally. (N.T. 10/26/09, at 155, 258; N.T. 10/27/09, at 497). [REDACTED] could not speak because, for most of the time, the men either covered her face with their bodies or forced their penises into her mouth. (N.T. 10/26/09, at 165). She was also afraid, testifying, “I was really scared. I didn’t know what was going to happen.” (*Id.* at 162-163).

[REDACTED]’s limited resistance is consistent with research that demonstrates that many victims of rape do not resist. Only about half of all victims of completed rape attempt to physically resist their attackers. Sexual Victimization of College Women, *supra* at 19-21. Ability to resist is even less likely when, as here, the rape is committed by more than one man. *See* Sarah E. Ullman, *A 10-Year Update of Review and Critique of Empirical Studies of Rape Avoidance*, 34 *Crim. Just. & Behav.* 411, 417 (2007).

Many victims cannot or do not fight back during a sexual assault for a number of reasons. Studies reveal that almost half of sexual assault victims fear serious injury or death. *See, e.g.*, Dean G. Kilpatrick, et al., Nat’l Victim Ctr. & Crime Victims Research and Treatment Ctr., *Rape In America* 4 (1992); Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*, Nat’l Inst. of Just. Special Report 27 (2006). In fact, the media and the police warn women against resistance to avoid serious injury or death and instead encourage them to “play along or try to talk their way out of rapes.” Ullman, *supra* at 412; Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 *U. Ill. L. Rev.* 953, 986-7 (1998). In addition, the trauma that is associated with sexual assault may prevent a victim from actively resisting an attacker. Events that are traumatic and overwhelming cause some victims to “freeze with fright” and become immobilized. Ullman, *supra* at 414-15; Grace Galliano et al., *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates*, 8 *J. of Interpersonal Violence*

109, 110 (1993). Some people “dissociate” and experience a detachment from their mind or body that results in an involuntary disruption of normal functioning and control. David Spiegel, et al, *Dissociative Disorders in DSM -5*, Depression and Anxiety 824, 825-26, 830-32 (2011).

The Superior Court had no legal or factual basis for overturning the conviction based on insufficient resistance by [REDACTED]

**D. The Superior Court Imposed an Unrealistic Standard of “Instantaneous Complaint” that Is Inconsistent with Social Science Research and Relies on Victim-Blaming Myths Rejected by the Pennsylvania General Assembly.**

The Superior Court inappropriately treated [REDACTED]’s post-assault conduct as compelling evidence of consent, even though the jury found otherwise. Specifically, finding that, “once the sexual activity ended... [REDACTED] had not fearfully locked the door to keep [the three men] out or contacted the police or dorm security,” App. B at 10, and that she “left [the door] ajar and proceeded to clean her room.” *Id.* The panel faulted [REDACTED] for not calling for help sooner and instead occupying herself with activities that, the Superior Court implied, do not appear consistent with someone who was just sexually assaulted. In doing so, the Superior Court imposed an unrealistic standard of “instantaneous complaint,” and ignored [REDACTED]’s testimony explaining her state of mind, which is consistent with research demonstrating the variable responses victims have after a sexual assault.

Research reveals a wide range of behaviors and feelings victims have in the aftermath of sexual assault, and it is erroneous to assume that [REDACTED] would exhibit any particular set of behaviors. After an attack, sexual assault victims often suffer a variety of physical, psychological and emotional symptoms immediately and in the long-term. Patricia L. Fanflik, Am. Prosecutors Research Inst., Nat’l Dist. Attorneys Ass’n, Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive? 5 (2007) [hereinafter “APRI”] (quoting Patricia

Frazier, *The Role of Attributions and Perceived Control in Recovery from Rape*, 5 J. of Pers. & Interpersonal Loss 203, 204 (2000)); Shirley Kohsin Wang, et al., Research Summary: Rape: How Women, the Community and the Health Sector Respond 2 (2007). These symptoms may include fear, anxiety, anger, self-blame, dissociation, guilt, loss of trust, flashbacks, PTSD, depression, phobias, panic disorder, and obsessive compulsive disorder. Wang, *supra*. A rape survivor may experience all, some, or none of these reactions. APRI, *supra* at 5.

In addition, victims often have great difficulty making sense of what happened to them, *Id.* at 10 (citing V.E. White Kress, et al, *Responding to Sexual Assault Victims: Considerations for College Counselors*, 6 J. College Counseling 124, 125 (2003)), and therefore, may behave in a manner that appears counterintuitive, but is in fact merely a normal expression of the victim's unique strategy for coping with the overwhelming stress of the assault. See Jennifer Gentile Long, Am. Prosecutors Research Inst., *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, 1 The Voice 1 (2006); Kimberly A. Lonsway, *The Use of Expert Witnesses in Cases Involving Sexual Assault* (2005), available at <http://www.mincava.umn.edu/documents/commissioned/svandexpertwitnesses/svandexpertwitnesses.html>. These counterintuitive behaviors may include avoidance strategies to manage the negative impact of the victimization, including denying that the event occurred and avoiding thinking about it, which may be misperceived by others as deception. APRI, *supra*, at 15.

█'s post-assault behavior falls into the range of behaviors that sexual assault victims commonly exhibit. In shock, embarrassed, and struggling to grasp what had happened to her and to figure out what she should do, █ was unable to reach out instantaneously for help and engaged in avoidance behavior.

After the assault had ended and the three men were getting dressed, █████ testified that she “sat there and tried to cover up because [she] was really embarrassed and didn’t know what they were going to do next.” (N.T. 10/26/09, at 164). Once they left the room, █████ got dressed, went to the bathroom, and sat down in her room to collect herself, not knowing at first what to do. (*Id.* at 164-166). Then she called her friend and told him that she had been raped. (*Id.* at 166-67). After considering what to do next for ten to twenty minutes, she contacted a second friend, the one who had introduced her to the three men. (*Id.* at 168-69). Explaining what was going through her mind, █████ testified:

I didn’t know what to do after I told Rich. I didn’t know if I should tell anyone else, and I was scared to tell Rhonda because they were I guess friends of hers. I just didn’t know if I wanted to say anything to anyone about it.

(*Id.*). She remained unsure of what to do next while talking to her friend; as she testified, she “wasn’t sure at that moment right then. I kind of just stood there and I... I just cried for like five minutes. I didn’t know what to do.” (*Id.* at 170). █████ explained that she did not call the police at that time because she was “in shock of [the assaults] happening.” (*Id.* at 261). Shortly thereafter, █████ contacted campus authorities. (*Id.* at 170-71).

Despite the difficulties █████ experienced trying to cope with the assault, █████’s reporting of her rape cannot be described as anything but prompt under any reasonable standard. Within, at most, a half-hour from the time the men left her room, █████ had contacted a friend. Shortly thereafter, she had contacted another friend and campus authorities, including her Resident Advisor and campus police. The Superior Court’s expectation that she should have done more sooner is unrealistic for someone who is experiencing the trauma of an assault. Under the circumstances, █████ demonstrated extraordinary strength in reaching out for assistance as quickly as she did.

█'s initial reluctance to contact the police is also understandable. Decades of research has documented the fact that the vast majority of sexual assault victims do not report their sexual assault to police. *See, e.g.,* Kilpatrick, et al., *Rape In America, supra* at 5; Shannan Catalano, Bureau of Justice Statistics, U.S. Dep't of Justice, *Criminal Victimization, 2005*, at 91 (2006). Various studies suggest that only 5-11.5% of campus sexual assaults are reported to law enforcement, meaning that 89.5-95% go unreported. *CSA Study* at 2-9; Dean G. Kilpatrick et al., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study* 44 (2007).

Young people in particular may fear that the police will not treat them properly, that the perpetrator may retaliate against them for making a report, or that their family and friends will react negatively to their allegations. Sampson, *supra*, at 4-5; *CSA Study, supra*, at 2-9; *see* Tjaden & Thoennes, *supra* at 35. In fact, █ testified that part of the reason she was scared to contact the police was due to her belief that, "Most police officers are male as far as I know... so after just having dealt with three males and a forcible situation like that..." (N.T. 10/26/09, at 265). This particular case provides an example of how such fears about the criminal justice system may be reasonable and unfortunately based in the reality of the "second assault" victims may experience when they report a sexual assault.

Furthermore, the Superior Court's undue emphasis on █'s perceived failure to report the crime promptly enough — despite the fact that she actually did report it to a friend within minutes of the men leaving her room and to campus authorities within an hour — runs counter to the General Assembly's intent in limiting the prompt complaint requirement in the prosecution of sex crimes. *See* 18 Pa. Cons. Stat. Ann. § 3105 (1973) (amended 1976) (requiring victims to report to public authorities within three months of the rape). The elimination of the prompt complaint requirement signaled a shift away from the implicit assumption that victims typically

lie about rape. By amending § 3105, the General Assembly made it clear that post-assault behavior, particularly whether or not a victim promptly reported the crime, is not conclusive evidence that a victim is lying. This change is reflected in the Pennsylvania Suggested Standard Criminal Jury Instructions, which state: “You must not consider [victim]’s [failure to make or delay in making] a complaint as conclusive evidence that the act did not occur or that it did occur but with [his or her] consent.” Pennsylvania Bar Institute, Pa. Suggested Standard Jury Instructions (Crim) 4.13A (edited for clarity).

In overturning the jury’s verdict, largely due to its perceptions of how a victim “should” act after a sexual assault, the Superior Court dangerously ignored the wide range of behaviors victims exhibit. As a result, the panel imposed a standard for how a rape victim “should” act that is inconsistent with the varied post-assault behaviors of real victims and reinstated the archaic assumption that victims typically lie.

**E. The Superior Court Inappropriately Required Corroboration Through Victim’s Injuries That is Inconsistent with the Reality of Rape and is No Longer a Legal Requirement in Pennsylvania.**

In concluding that █████ consented to sexual relations, the Superior Court recounted the results of the nurse’s examination of the victim at the hospital, noting the absence of injuries to the victim’s genital areas and fingernails, and concluded “█████’s physical injuries were minor.” App. B at 5, 6 and 10. █████’s immediate physical injuries consisted of a suction mark on her neck, a scratch on her right arm, an abrasion on her left arm, and substantial redness on both her inner thighs. (N.T. 10/27/09, at 491, 498). The Superior Court’s conclusion that these injuries were insufficient evidence of her credibility is flawed for two reasons. First, Pennsylvania law does not require “corroborating” evidence such as physical injuries to sustain convictions for sex crimes, and such a requirement is an application of a sexual assault myth that assumes that

victims would have physical injuries. Second, social science research and crime statistics have consistently shown that observable physical injuries are uncommon following sex crimes.

Section 3106 of the Crimes Code plainly states, “The testimony of a complainant need not be corroborated in prosecutions under this chapter.” The Superior Court has consistently held that “the uncorroborated testimony of a sexual assault victim, if believed by the trier of fact, is sufficient to convict a defendant, despite contrary evidence from defense witnesses.”

*Commonwealth v. Charlton*, 2006 Pa. Super. 149, 902 A.2d 554, 562 (2006), quoting *Commonwealth v. Davis*, 437 Pa. Super. 471, 650 A.2d 452, 455 (1994); see *Commonwealth v. Shaffer*, 2000 Pa. Super. 356, 763 A.2d 411, 414 (2000) (victim’s uncorroborated testimony is sufficient evidence to support a sexual assault conviction). As stated previously, in this case, the Superior Court held that the victim’s testimony was *not* contradictory “on the ‘essential issue’ of whether this was consensual sex,” App. B at 11, n. 4, but nonetheless overturned the jury’s verdict and reversed the trial court’s denial of a new trial because of what it considered inadequate corroborating evidence such as physical injuries to the victim. The Superior Court’s focus on this corroborating evidence contravened section 3106’s mandate that corroborating evidence need not be presented and reinstated the rape myths that “real” victims have obvious physical injuries and should not be believed without these corroborating injuries.

The General Assembly attempted to root out these victim-blaming myths, such as the myths underlying the corroborating evidence requirement, when it reformed the rape and sexual assault laws. See, e.g., *Commonwealth v. Mlinarich*, 345 Pa. Super. 269, 307-308, 498 A.2d 395, 414 (1985) (J. Spaeth, dissenting) (“the legislature’s explicit provision, in 1976, [was that] an alleged victim of rape was not to be regarded as probably untrustworthy and emotionally imbalanced, but instead was to be treated by the standard that alleged victims of other crimes



were treated.”). With the creation of non-consensual sexual assault as a felony offense in 1995, the General Assembly facilitated the prosecution of acquaintance rape, which often does not result in substantial physical injuries apart from the rape itself. *See Sampson, supra*, at 7. The legislature specifically intended to hold rapists accountable even when the perpetrator did not inflict injuries on the victim apart from the sexual assault. As Representative Feese said:

The issue, Mr. Speaker, is the public’s misconception of the term “rape.” The public perceives “rape” only to be when the victim is severely beaten, not to mention raped. There have been countless prosecutions, when I was district attorney, where we had acquittals. Although the jury believed that there was no consent, the jury advised us that they felt “rape” included a requirement that there be a beating of the woman. The public has a misconception about what “rape” is.

House Leg. J. 199 (Mar. 7, 1995). Thus, the law does not require that the victim suffer physical injuries in order to hold the perpetrator accountable for sexual assault. The point of the sexual assault law, according to Representative Ritter, is “to keep the jury focused on whether the act occurred and whether the victim consented,” steering away from the “myth that in order to be raped, there has to be an injury.” Jolie Williamson, *Lawmaker Wants Rape Laws Overhauled*, Valley News Dispatch, Sept. 15, 1995.

The Superior Court’s consideration of injury as relevant to whether █████ consented to sexual activity with the three men is also inconsistent with the reality of sexual assault. In fact, observable physical injuries are uncommon. Research has shown that victims report physical injuries in only about 20% of completed and/or attempted rape incidents. CSA Study, *supra* at 5-20 (physically forced sexual assault victims report more injuries (18%) than incapacitated sexual assault victims (3%)); Sexual Victimization of College Women, *supra* at 22 (2000). The most common physical injuries are from the sexual contact, bruises, black-eyes, cuts, scratches,

swelling or chipped teeth. CSA Study, *supra* at 5-20; Sexual Victimization of College Women, *supra* at 22.

More common are the psychological injuries caused by rape and sexual assault. CSA Study, *supra* at 5-18 – 5-20 (finding 79.5% of forced sexual assault victims and 53.3% of incapacitated assault victims reported experiencing emotional or psychological injury). Victims experience rape as a major life trauma. See Ann Burgess & Lynn Holmstrom, Rape: Crisis and Recovery 411 (1986). As discussed earlier, they often suffer from a variety of physical, emotional, and behavioral stress reactions. 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 15-17 (Charles Figley ed., 1985). Studies show that these traumatic reactions can last for years and perhaps decades after the event. Susan Rees, et al., *Lifetime Prevalence of Gender-Based Violence in Women and the Relationship with Mental Disorders and Psychosocial Function*, 306 JAMA 513, 518 (2011).

F. **By Relying on Gender-Based Sexual Assault Myths, the Superior Court Erroneously Focused on the Victim’s Behavior Instead of the Defendants’ Behavior.**

The Superior Court contravened the legislative intent behind the reform of Pennsylvania’s sex offense laws when it overturned the factual findings of the jury by effectively putting [REDACTED] the victim—on trial. The panel improperly parsed [REDACTED]’s actions and mischaracterized the meaning of her inactions to wrongly conclude that she had consented because, in the panel’s opinion, she had not adequately resisted the sexual advances of three men, did not exhibit sufficient injuries, and did not “behave” in accordance with stereotypes about rape victims.

In reforming the sex offense laws of Pennsylvania, as discussed above, the General Assembly sent the message that the criminal justice system must treat victims of sexual violence the way it treats victims of other crimes. As Senator Robert Jubelirer, a sponsor of the 1976 amendments to Pennsylvania's rape laws, said, "We should have... a situation now where the victim of the heinous crime of rape is no longer treated as the defendant." Sen. Leg. J. 1462 (April 6, 1976). In the instant case, the Superior Court panel did not meet the standard set by the Pennsylvania legislature nearly forty years ago because the panel treated [REDACTED] like the defendant by weighing her behavior too heavily and downplaying the behavior of the three men.

The Superior Court's biased restatement of the facts reflects the great lengths to which it went to downplay the defendants' actions. The opinion states, for example, that "all three of the Appellants engaged in vaginal intercourse, for which they used condoms, and oral sex with [REDACTED]," omitting the evidence that the defendants anally penetrated [REDACTED] App. B at 4. The three defendants denied having anal sex, but this denial was not credible, given that the stipulated forensic evidence established otherwise. As the defendants and the Commonwealth stipulated, "Seminal material was identified in the vaginal, vulvar and rectal swabs" in the rape kit performed on [REDACTED] (N.T. 10/27/09, at 529). Despite this stipulation, the defendants continued to deny that they had anally penetrated [REDACTED] Defendant Claybrook testified that "nobody" had anal sex that night. (Oct. 28, 2009, Notes of Testimony, at 578). When asked how there was semen in the victim's rectum, he replied, "I don't know how it got there." (*Id.*). Similarly, Defendant Lewis denied having anal sex. (*Id.* at 625). The Superior Court chose to ignore these inconsistencies in the defendants' testimony and instead improperly discredited [REDACTED] by applying sexual assault myths to her testimony.

The Superior Court opinion is flawed throughout by a biased perspective that places [REDACTED] on trial in contravention of the intent of the General Assembly to treat sexual assault victims no differently from victims of other crimes.

### III. CONCLUSION

The Superior Court lifted the convictions of three young men for sexual assault and indecent assault by infusing its review of the lifeless written record with gender-biased sexual assault myths that wrongly re-focus rape law on the victim's, rather than the attacker's, behavior. By unreasonably focusing on and misinterpreting [REDACTED]'s behavior and perceived inaction and concluding that her "physical injuries were minor," the Superior Court repudiated the General Assembly's elimination of these myths from Pennsylvania's sexual offense laws. For these reasons, *Amici* respectfully request that this Court reverse the decision below.

Dated: \_\_\_\_\_

Respectfully Submitted,

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## APPENDIX A

### STATEMENTS OF INTEREST OF AMICI CURIAE

#### **A WAY OUT**

A Way Out provides services to victims of sexual assault in Potter County, Pennsylvania, and has been an important voice in the community since 1989. We provide counseling to victims, advocacy, and community education, including presentations to school, church, and community groups about the life-long harm caused by any form of sexual assault. Our presentations stress healthy, respectful relationships; relationships in which both parties have equal power and respect for one another. Rape changes lives. To have one's person so violated causes tremendous fear, loss of trust, pain, and grief and is accompanied by self-blame. No one asks to be hurt in this way — ever. We are each responsible for our own behavior and rapists must be held accountable.

#### **ALLE-KISKI AREA HOPE CENTER, INC.**

Alle-Kiski Area HOPE Center, Inc. is an organization of social change whose mission is the safe elimination of violence through intervention, prevention, and collaboration. HOPE values equality and believes that, at its core, domestic violence and intimate partner violence stem from the diminished power and protection available to women in our society. HOPE works to educate all facets of society. HOPE works to serve victims from a trauma-informed perspective to offer restoration and empowerment. HOPE works to create strategic collaboration and alliance to expand and enhance opportunities for social changes that will cause the reduction and elimination of violence against women. For more than thirty years, HOPE's work has focused on building safety in homes, communities, and society.

#### **BERKS WOMEN IN CRISIS**

Berks Women in Crisis provides supportive services to victims of sexual and domestic violence in Berks County. Our free and confidential services include: Hotlines in both English and Spanish, emergency shelter, specially trained staff members to accompany victims to local hospitals or the courthouse, individual counseling and group support, support, advice, and legal representation for individuals seeking protection from abuse orders, and a vast range of support and advocacy services for victims of sexual assault. We also have programs that provide educational presentations to schools, colleges, child care centers, churches, social organizations, service agencies, businesses, government employees or any entity who requests a program, and transitional housing. As a provider of services to sexual and domestic violence victims, Berks Women in Crisis is interested in the outcome of *Commonwealth of Pennsylvania v. Claybrook, et al.* as it directly impacts the ability of victims of sexual assault to seek justice for their victimization.

## **BLACKBURN CENTER AGAINST DOMESTIC & SEXUAL VIOLENCE**

Blackburn Center Against Domestic & Sexual Violence (Blackburn Center) was established in 1975 to provide services for rape victims in Westmoreland County. Blackburn Center is the only organization in the county offering free services for survivors of sexual assault, sexual harassment, child sexual abuse, and incest. Blackburn Center operates one of two domestic violence programs in Westmoreland County. The Blackburn Center actively advocates for the rights of all people to live free from violence and oppression in their homes and communities and provides supportive services to survivors of all forms of domestic violence and sexual assault.

## **CALIFORNIA WOMEN'S LAW CENTER**

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center specializing in the civil rights of women and girls. CWLC's issue priorities are violence against women, sex discrimination, women's health, race and gender, exploitation of women and women's economic security. Since its inception, CWLC has placed a particular emphasis on eradicating all forms of discrimination and violence against women. The issue raised in this case has an enormous impact on the rights of women and girls to be free of the terrible consequences of discrimination, harassment and violence. CWLC has authored numerous *amicus* briefs, articles, and legal education materials on this issue. This appeal raises questions within the expertise and concern of CWLC. Therefore, CWLC has the requisite interest and expertise to join in this *amicus* brief.

## **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 defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights.

## **CRIME VICTIM CENTER OF ERIE COUNTY**

The Crime Victim Center of Erie County, located in Erie, Pennsylvania, is dedicated to helping any person affected by crime, especially sexual violence. Our Mission is to reduce the impact of crime through education, counseling and advocacy.

## **CRISIS SHELTER OF LAWRENCE COUNTY**

The Crisis Shelter of Lawrence County, established in 1980, serves the Lawrence County community by providing critical and life-saving programming and services that focus on victims of domestic violence, sexual assault and other violent crimes; helping them when they are most vulnerable and giving them hope and resources for a brighter future. We also provide community and in-school education and prevention programming that help to make our

community a safer place, engages bystanders, and empowers students and residents to intervene and say no to violence. We have been recognized across the state for our *Fight For Zero* and *Believe Me When I Tell* initiatives as well as for our *Mandated Sex Offender Accountability* and *Lethality Assessment Programs*. Our commitment to victim advocacy has resulted in Crisis Shelter nomination for the Ed Stout Memorial U.S. Congressional Award for Outstanding Victim Advocacy each year since 2009.

### **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 other sexual assaults in Delaware County, PA. The agency also provides education programs to schools, community groups, and allied professionals in the county. Women Against Rape has provided these services to Delaware County 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. We have a strong interest in this case. Antiquated myths and assumptions about sexual assault and its victims have a seriously detrimental effect on the willingness of women to come forward to report and prosecute sex crimes.

### **END VIOLENCE AGAINST WOMEN INTERNATIONAL**

End Violence Against Women International (EVAWI) is a nonprofit organization working to improve the response of the criminal justice system and community professional to violence against women. We inspire and educate those who respond to gender-based violence, equipping them with the knowledge and tools they need to support victims and hold perpetrators accountable. EVAWI promotes victim-centered, multidisciplinary collaboration, which strengthens the response of the criminal justice system, other professionals, allies, and the general public – making communities safer.

### **FEMINIST MAJORITY FOUNDATION**

The Feminist Majority Foundation, a 501 (c)(3) non-profit organization founded in 1987, is dedicated to the pursuit of women's equality, utilizing research and action to empower women economically, socially, and politically and to end violence against women. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, leadership training and development programs, and participates in and organizes forums on issues of women's equality and empowerment. Feminist Majority Foundation was directly involved in the passage of the Violence Against Women Act and has long advocated for fair treatment for victims of rape and sexual assault.

### **HAVEN OF TIOGA COUNTY**

HAVEN of Tioga County is a private non-profit organization committed to helping all individuals affected by domestic and sexual violence. HAVEN provides services to all men, women, and children, regardless of age, sex, class, ethnic background, or sexual orientation.

## **H.A.V.I.N. (HELPING ALL VICTIMS IN NEED)**

H.A.V.I.N., Helping All Victims In Need, is a Sexual Assault/Domestic Violence Program located in Armstrong County, Pennsylvania. HAVIN provides crisis counseling, support and advocacy for victims of sexual violence. It is critical that victims of sexual assault do not experience re-victimization based on misinterpretations and the basic lack of understanding of sexual violence and the victims. These challenges for victims play out in society in general and more disturbingly within the criminal justice system.

## **LEGAL MOMENTUM**

Legal Momentum is the nation's oldest legal defense and education fund dedicated to advancing the rights of all women and girls. Founded in 1970 as NOW Legal Defense and Education Fund, Legal Momentum has long engaged in efforts to eliminate gender-motivated violence, including sexual assault, and has a longstanding commitment to addressing inequality and gender bias in state and federal judicial systems. Legal Momentum was instrumental in drafting and passing the Violence Against Women Act in 1994 and its subsequent reauthorizations in 2000 and 2005. The organization has served as counsel and joined *amicus curiae* in numerous cases to support the rights of victims of sexual assault and other forms of gender-motivated violence. Legal Momentum, through its National Judicial Education Program (NJEP), and in cooperation with the National Association of Women Judges, has developed several award-winning judicial education curricula and training DVDs about sexual assault, including *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault* and *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case*, in use across the country since 1994. In 2009, Legal Momentum created and launched a Web course on the intersection of sexual abuse and domestic violence, *Intimate Partner Sexual Abuse: Adjudicating this Hidden Dimension of Domestic Violence Cases*. Lynn Hecht Schafran, Senior Vice President of Legal Momentum and Director of its NJEP, has written frequently on sexual violence, including: Lynn Hecht Schafran, *The Importance of Voir Dire in Rape Trials*, TRIAL (August 1992) at 26; *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979 (1993); *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URBAN L.J. 439 (1993); *Credibility in the Courts: Why Is There a Gender Gap?*, JUDGES' JOURNAL (Winter 1995), at 5; *Risk Assessment and Intimate Partner Sexual Abuse: the Hidden Dimension of Domestic Violence*, JUDICATURE (2010).

## **LEGAL VOICE**

Legal Voice (formerly known as the Northwest Women's Law Center) is a regional nonprofit public interest organization based in Seattle that works to advance the legal rights of all women through litigation, legislation, education, and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country and is currently involved in numerous legislative and litigation efforts. Legal Voice has been a regional leader in combating all forms of violence against women, including sexual violence. Legal Voice has a strong



interest in this case because it concerns a trial court's dangerous reliance on "rape myths" and misconceptions about how survivors of sexual violence should be expected to behave.

### **NATIONAL CENTER FOR VICTIMS OF CRIME**

The National Center for Victims of Crime (National Center), a non-profit organization headquartered in Washington, DC, is one of the nation's leading resource and advocacy organizations for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. The National Center is dedicated to serving individuals, families and communities harmed by crime. Among other things, the National Center advocates for laws and policies that create resources and secure rights and protections for crime victims. The National Center has a particular interest in this brief due to its work and dedication to the interests of victims of sexual assault.

### **NATIONAL CRIME VICTIM LAW INSTITUTE**

NCVLI is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide.

### **NATIONAL WOMEN'S LAW CENTER**

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, the NWLC has worked to secure equal opportunity in education for girls and women and to ensure that they are able to learn in an environment that is free from discrimination, degradation, and fear. The Center has a longstanding and demonstrated commitment to advocating for a woman's right to be free from sexual harassment and violence and has appeared either as counsel or as an *amicus* in a wide variety of cases involving sexual harassment and violence on college campuses.

### **NETWORK OF VICTIM ASSISTANCE**

Network of Victim Assistance, founded in 1974 as the rape crisis center in Bucks County, PA, serves more than 3,200 victims of crime annually and provides a range of services including 24 hour a day crisis intervention, accompaniment to emergency rooms, police interviews and court proceedings, individual and group counseling, advocacy and case management. In 2011, staff members responded to more than 1,200 requests for help from victims of sexual assault, provided support at more than 100 rape examinations in emergency rooms, and provided support to 350 victims at interviews with the police and the District Attorney. Many more victims and their family members were served through individual and group counseling to help address such issues as self-blame, fear and trust of others. In only 5% of the cases was the perpetrator a

stranger while the largest single group of victims (24%) described the perpetrator as an “acquaintance.” Few of those served had physical injuries.

### **PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE**

The Pennsylvania Coalition Against Domestic Violence (“PCADV”) is a private non-profit organization working at the state and national levels to eliminate violence, secure justice for victims, enhance safety for families and communities, and create lasting systems and social change. PCADV was established in 1976 and has grown to a membership of 60 organizations across Pennsylvania. PCADV’s members provide crisis and transitional assistance to survivors of violence and their children, including temporary shelter, emergency hotline, counseling, access to safe home networks, legal and medical advocacy, and transitional housing assistance. PCADV is committed to enhancing the justice system’s response to violence against women.

### **PENNSYLVANIA COALITION AGAINST RAPE**

The Pennsylvania Coalition Against Rape (PCAR) is a private non-profit organization. Founded in 1975, PCAR is the oldest anti-sexual violence coalition in the country and is widely respected at both the state and national levels for its leadership in efforts to prevent sexual violence. Over the past 37 years, PCAR has successfully worked as an agent of change — educating society about the severe and long-lasting impact of sexual violence, confronting victim-blaming attitudes, challenging injustice, and advocating for policies for victims of sexual violence to provide them with the compassion, privacy and dignity they deserve. To confront the myths and victim blaming attitudes about victims of sexual violence, PCAR has joined with legislators to try to enact a law that would allow expert testimony on victim behavior, HB 1264, that would serve to combat the myths preventing successful prosecution of offenders.

### **PITTSBURGH ACTION AGAINST RAPE**

Pittsburgh Action Against Rape (PAAR) has focused on the treatment and prevention of sexual violence for over 40 years. PAAR has focused on the treatment and prevention of sexual violence for 40 years. Founded in 1972, PAAR is one of the oldest and largest rape crisis centers in the country, and remains the only organization in Allegheny County dedicated exclusively to victims of sexual violence. PAAR provides comprehensive, cost-free services to child and adult victims of sexual abuse throughout Allegheny County, including crisis intervention, a 24-hour hotline, medical and legal advocacy, crisis counseling; group and individual counseling, education/prevention programming for children and community groups; and clinical training for mental health professionals. There is still much education to do and social change to occur so that victims of sexual violence are not further victimized by society and the justice system.

### **SECURITY ON CAMPUS, INC.**

Security On Campus, Inc. is a national 501(c)(3) non-profit organization located in Wayne, PA. Our mission is to prevent violence, substance abuse, and other crimes on college and university campuses and to compassionately assist the victims of those crimes. In our 25-year history we continue to see sexual assault on college and university campuses minimized.

We work with non-profits both locally and nationally to assist survivors in their search for justice and educate the public about the epidemic of sexual assault on our college and university campuses.

### **SOUTHWEST WOMEN'S LAW CENTER**

The Southwest Women's Law Center is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring meaningful enforcement of laws against sexual assault.

### **SULLIVAN COUNTY VICTIM SERVICES**

Sullivan County Victim Services (SCVS) is a safe haven and source of support for victims of domestic violence, sexual assault, and other crimes. SCVS provides emergency shelter, emergency transportation, individual and group counseling, and information on Protection From Abuse (PFA) orders, and court accompaniment. In order to achieve a violence free society, domestic violence and sexual assault must be treated as serious crimes that are punishable by law.

### **SURVIVORS, INC.**

The vision of Survivors, Inc. is an end to domestic violence and sexual assault. Domestic violence and sexual assault violate the sanctity and the safety of our relationships, homes and communities. We provide comprehensive services and advocacy to those seeking lives free of violence. We believe that domestic violence and sexual assault violate our inherent civil rights. We believe that no one should use domestic violence and sexual assault to exert power and control over anyone. We believe that everyone is entitled to safety in their relationships, homes, and communities, free of domestic violence and sexual assault. We believe that advocacy is critical for the elimination of domestic violence and sexual assault. We believe that prevention of domestic violence and sexual assault is essential so that they no longer exist.

### **THE CARE CENTER, INC.**

For over two decades, the SPHS CARE Center STTARS Program has been providing a variety of services to survivors of sexual assault in Washington and Greene Counties of Southwestern Pennsylvania. As a sexual assault center, the program provides the following services: confidential counseling, medical advocacy, legal advocacy, prevention education, and a 24 hour hotline service. Services are provided to victims, families and significant others of all ages. In 2010-2011, 574 individuals were served totaling 2,339 service hours. 271 prevention programs were completed for schools and community groups reaching over 5,000 individuals. 3,363 publications were distributed on sexual violence prevention.

## **THE CENTER FOR VICTIMS OF VIOLENCE AND CRIME**

Incorporated in 1975 as a non-profit and based in Allegheny County, The Center for Victims of Violence and Crime (CVVC) is one of the oldest and largest rape crisis/comprehensive crime victim assistance agencies in the region. CVVC's mission is: "Healing Trauma, Resolving Conflict, and Ending Violence." All CVVC direct services are offered to women, men, and children who are victims/survivors of sexual assault/violence and their significant others. CVVC's mission has always revolved around an awareness of the emotional, physical, mental, financial, and spiritual impacts of sexual violence, and how some sexual assault victims suffer additional trauma while they negotiate the complicated justice system. Throughout CVVC's 36-year history we have developed cooperative relationships with law enforcement and criminal justice agencies. These working relationships have enabled CVVC to work diligently on creating a more victim sensitive criminal and juvenile justice system.

## **THE CRIME VICTIMS' CENTER OF CHESTER COUNTY, INC.**

The Crime Victims' Center of Chester County, Inc. (CVC) was established in 1973 as The Rape Crisis Council of Chester County, Inc. and in 1976 became a comprehensive victim services center handling all types of crimes. CVC is a private, non-profit victim service agency whose purpose is to support adult and child victims of crime as they work toward recovery. As the designated sexual assault center for Chester County, CVC is deeply concerned about the persistent misconceptions regarding acquaintance rape and how the behavior of victims of sexual assault is perceived by the courts and members of the law enforcement community.

## **THE WOMEN'S CENTER, INC. OF COLUMBIA/MONTOUR**

The Women's Center, Inc of Columbia and Montour counties is a non-profit organization that provides critical services to victims of domestic and sexual violence. All of our services are free and confidential and include a range of supportive options, including 24 hour hotline, immediate crisis response, accompaniment to medical facilities and law enforcement agencies, legal support and options, support groups and empowerment counseling.

## **VICTIM RIGHTS LAW CENTER**

The Victim Rights Law Center ("VRLC") is a nonprofit organization based in Boston, Massachusetts, with a satellite office in Portland, Oregon. The mission of VRLC is to provide legal representation to victims of rape and sexual assault to help rebuild their lives; and to promote a national movement committed to seeking justice for every rape and sexual assault victim. The VRLC meets its mission through direct representation of victims in Massachusetts (in education, immigration, privacy, employment, housing, physical safety, and other civil and administrative matters) and national legal advocacy, training and education regarding civil remedies for victims of sexual assault. The VRLC has a particular focus on meeting the needs of victims of non-intimate partner sexual assault. The VRLC provides legal counsel to over four hundred victims of rape and sexual assault each year in Massachusetts, and trains and provides technical assistance to thousands of legal professionals across the United States and U.S.

Territories each year. The VRLC provides legal representation to individual campus sexual assault victims and consistently encounters the damaging impact misconceptions about sexual assault have on the adjudicatory process. The VRLC signs onto this *amicus* in an effort to combat the myths of rape and sexual assault that continues to silence victims on college campuses and in all of our communities.

## **VICTIM SERVICES CENTER OF MONTGOMERY COUNTY**

Victim Services Center of Montgomery County (VSC), located in Montgomery County, Pennsylvania, provides free and confidential comprehensive support services to crime victims, their families and significant others; prevention education and risk reduction programs, and training to the professionals who work with the victims of these crimes. Our vision is to empower the community and to aid in the creation of a society free from violence. Our mission is to provide advocacy and counseling for all who have been affected by sexual violence and other crimes against the person, and to promote sensitivity and awareness in the community through education. With over 34 years of service, VSC has achieved a strong position in the community as a provider of free and confidential supportive services. Without the presence of VSC in the community, crime victims would be left to fend for themselves through a maze of government institutions, court proceedings, and to cope with the trauma of victimization alone.

## **VICTIMS' INTERVENTION PROGRAM**

Victims' Intervention Program is a non-profit organization based in Wayne County, Pennsylvania, that provides services to victims of domestic violence, sexual assault and other serious crimes. Our mission is to Educate~Empower~Envision. We work to educate the community on the issues of domestic and sexual violence; we empower victims to make the best choices for their individual situations; and we invite the community to envision a world free from violence. We provide services to women, men and children ages 5 and up. Our services include: 24-hour crisis hotline, crisis intervention, individual and group counseling, legal and medical advocacy and accompaniment, emergency shelter assistance, emergency food vouchers, relocation assistance, information and referral, emergency transportation, risk reduction programs, and training programs.

## **VICTIMS RESOURCE CENTER**

Victims Resource Center (VRC) has been providing services to victims of sexual violence since 1974. VRC is strongly committed to protecting the rights afforded victims of sexual violence. There are many myths about sexual violence victims that impair the system's ability to fairly investigate and prosecute these crimes. These myths must be eliminated to safeguard future victims of sexual violence.

## **WOMEN AGAINST ABUSE**

Women Against Abuse is the leading domestic violence service provider in Pennsylvania. We operate the only emergency shelter in the City for abused women and their children, the nation's first legal center for domestic violence victims, as well as transitional housing, the

Philadelphia Domestic Violence Hotline, and community-wide education to prevent Domestic and Teen Dating Violence. Our services reach over 15,000 people each year through our residential services, legal aid, hotline counseling, and education and advocacy. It is our mission to provide quality and compassionate services in a manner that foster self-respect and independence, and to lead the struggle to end domestic violence.

### **WOMEN ORGANIZED AGAINST RAPE**

Women Organized Against Rape (WOAR) is the only rape crisis center in Philadelphia. WOAR's mission is to end all forms of sexual violence through advocacy and education. Each year, WOAR provides professional counseling and court and medical accompaniment to an average of 5,000 victims of sexual violence and reaches more than 65,000 children and adults in the Philadelphia community with educational programs about sexual assault and abuse. WOAR knows from experience that individuals respond to the trauma of assault differently and that an individual's failure to seek immediate services or cooperate with law enforcement does not mean the assault did not happen. WOAR is committed to advocating for the fair and equitable treatment of sexual assault victims.

### **WOMEN'S LAW CENTER OF MARYLAND, INC.**

The Women's Law Center of Maryland, Inc. is a nonprofit membership organization with a mission of improving and protecting the legal rights of women, particularly regarding domestic violence, sexual assault, family law and employment law. Through its direct services and advocacy, the Women's Law Center seeks to promote the legal rights of women and girls and to protect their safety by assisting them to access the remedies and protections available through the civil and criminal legal system.

### **WOMEN'S LAW PROJECT**

The Women's Law Project (WLP) is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, the WLP engages in high-impact litigation, advocacy, and education. The core values of the WLP are a belief in the right of all women to bodily integrity and personal autonomy; dedication to listening to women and being guided by their experiences; and commitment to fairness, equality, and justice. WLP 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, WLP has provided counseling to victims of violence through its telephone counseling service, engages in public policy advocacy work, and serves as counsel for and joins as *amicus curiae* seeking to improve the response of the legal system to victims of sexual assault and violence.

### **WOMEN'S RESOURCE CENTER**

The Women's Resource Center (WRC) is a private non-profit organization founded in 1976. WRC serves over 2,000 adults and children each year in Lackawanna and Susquehanna Counties. WRC's mission is to provide programs and services that support and uphold the

principle that women have the right to choose and maintain a life free from oppression and violence. WRC provides services that support justice, autonomy, restoration, and safety for survivors of sexual violence and domestic violence. WRC seeks to eradicate sexual assault myths from the civil and criminal justice systems in Pennsylvania.

### **YOUR SAFE HAVEN, INC.**

Your Safe Haven, Inc. (YSH) is a comprehensive crime victims' center located in Pennsylvania's Bedford County. YSH is committed to eliminating violence and protecting the right of people to live free of emotional, physical and sexual violence. YSH services include safe and accessible shelter, supportive and confidential counseling, appropriate medical care, crime victim compensation assistance, legal advocacy and court accompaniment. YSH provides direct services to approximately 1,400-1,500 adults and children each year. YSH strongly supports the rights of sexual assault victims.

### **YWCA OF GREATER HARRISBURG**

The YWCA of Greater Harrisburg has provided comprehensive services to victims of sexual assault and domestic violence since 1979 in Dauphin, Perry and Cumberland Counties. Our services include 23-hour crisis counseling, hospital, court and police station accompaniments, individual counseling, and counseling sessions at local schools, support groups, referral information, age-appropriate prevention education and professional trainings. Our goal in providing services is to empower victims to reclaim their lives and not be re-victimized by the very systems that are in place to protect them.

### **YWCA LANCASTER**

YWCA Lancaster is a non-profit organization. Founded in 1889, the YWCA Lancaster is an association of the oldest and largest international women's membership movement in the world. Our mission is dedicated to the elimination of racism and the empowerment of women. Over the past 123 years, the YWCA Lancaster has successfully worked as an agent of change.

### **YWCA NORTHCENTRAL PA**

The YWCA Northcentral PA is dedicated to eliminating racism, empowering women and promoting peace, justice, freedom and dignity for all. Our YWCA began serving the Williamsport, PA community in 1893. Our services include a comprehensive victim center (domestic violence, sexual assault, and victims of other crimes), a transitional living shelter for homeless women and women with children, and a CASA or Court Appointed Special Advocate program service abused and neglected children of Lycoming County, PA.

**APPENDIX B**

**DECISION OF THE SUPERIOR COURT**



## CERTIFICATE OF SERVICE

I hereby certify that I served 2 copies of the Brief for *Amici Curiae* Women's Law Project and 42 Pennsylvania and National Organizations Dedicated to Justice for Victims of Sexual Assault in Support of Appellant on the persons and date indicated below by First Class mail in compliance with Pa. R.A. P. 121:

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Amal Bass