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April 23, 2013

The Honorable Sheldon Silver
Speaker of the New York State Assembly
Legislative Office Building, Room 932
Albany, NY 12248

Re: A3339-A

Dear Speaker Silver:

On behalf of the District Attorneys Association of the State of New York (DAASNY), a voluntary organization comprised of the 62 elected District Attorneys in our State and the Special Narcotics Prosecutor of the City of New York, I write to express the Association's views on the amended version of the above-referenced bill. While the Association recognizes that this version has taken a significant step forward in eliminating the penetration requirement for Rape, something which the Association strongly supports, because the bill continues to repeal our existing Criminal Sexual Act laws and incorporates the actions constituting those crimes into the existing Rape statute, the Association cannot support this proposal.

DAASNY has serious concerns about merging rape crimes and criminal sexual act crimes into one statute for several reasons.

First, such a merger would not increase the penalties for rapists or offer any enhanced protections for crime victims. Penalties and burdens of proof would remain the same; only nomenclature would be changed. Let me be clear that District Attorneys are sympathetic to the frustration victims feel when their violent sexual assault is called anything other than rape. But DAASNY has serious concerns about altering some of the most serious crimes that form the bedrock of our penal law, particularly considering a legal issue we identify below, in order to alter the semantics of a law.

Second, we have a legal concern. In light of the 2011 New York Court of Appeals decision in *People v. Alonzo*, 16 NY3d 267 (2011), a reorganization of sex crimes laws could preclude consecutive sentences for crimes involving multiple acts of rape and criminal sex acts (i.e. oral and anal sexual conduct). It would be disastrous if an amended law, which is clearly intended to give additional protection and comfort to victims of sexual assault, were interpreted in a way that would reduce the penalties offenders could receive. Crime victims and public safety would be seriously harmed.

The potential problem is that under existing law, an assailant who rapes a woman and also anally violates her can receive consecutive sentences if a judge finds that the facts of

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the case warrant it. If folded into the rape laws, this type of crime -- with multiple acts against a victim -- could be viewed by appellate courts as a single continuous act of sexual assault. Under the reasoning of Alonzo, the courts could find that the offender could only be charged and convicted of a single count. If that were to happen, the proposed legislation would significantly reduce the penalty for offenders by one half or more.

Consider the all-too-common situation where a perpetrator takes a woman off the street and forces her to perform vaginal intercourse and anal intercourse. Under existing law, the perpetrator's separate acts of vaginal and anal intercourse are defined as separate crimes, Rape and Criminal Sexual Act. Trial courts have discretion to impose consecutive sentences for different crimes committed during the same criminal episode provided they were not committed through a single act or by an act which constitutes one offense and a material element of the other. See Penal Law §70.25(2). Being that vaginal and anal intercourse are the product of separate and independent acts, and are defined as distinct crimes by different statutory provisions, a trial judge has the discretion to impose consecutive sentences should he or she feel it is warranted under the circumstances.

In short, defining these separate acts as merely different theories of the same crime -- "rape" -- could have unintended, and unfavorable, repercussions that would significantly reduce the penalty for offenders of these vicious crimes.

This is not to say that the frustration expressed by some victims about the fact that their violent sexual assault is not called "rape" cannot be addressed. One approach, that we believe does not present the legal issues raised above, would be to break out and rename the acts constituting the current crime of criminal sexual act as oral rape and anal rape. This would convey more clearly the seriousness and brutality of the crimes involved while not creating a legal problem under the Alonzo case. A bill that takes this approach is S4743, which was recently introduced.

Once again, DAASNY recognizes the important goals which A3339-A seeks to achieve and hopes that our comments will be helpful in furthering the dialogue about how best to move forward while protecting both crime victims and public safety.

Sincerely,

Cyrus Vance

Cyrus R. Vance, Jr.
President, DAASNY

cc: Assembly Member Joseph Lentol
Assembly Member Aravella Simotas