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February 15, 2013

The Honorable Dean G. Skelos
Majority Leader, New York State Senate
Legislative Office Building, Room 909
Albany, NY 12247

The Honorable Jeffrey D. Klein
Leader, Independent Democratic Conference
Legislative Office Building, Room 304
Albany, NY 12247

Re: Support of S. 3710A

Dear Senator Skelos and Senator Klein:

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 our strong support of S. 3710A (Young, Golden) and express our concern regarding any proposal that seeks to repeal our Criminal Sexual Act laws.

I appreciate your attention to the specific concerns that District Attorneys, who are guided by the some of the most skilled and experienced sex crimes prosecutors in the country, have regarding these proposals.

For some time, prosecutors have called for changes in Article 130 of the Penal Law to address the inconsistent requirement that penetration be proved as an element of Rape, while mere contact is sufficient to prove Criminal Sex Act (the crime formerly known as Sodomy). This incongruity leads to anomalous results that are ripe for legislative change. Thus, while forcible, non-consensual contact between a penis and the mouth or anus is currently a class B violent felony, the same contact with a woman's genitalia constitutes only a D felony. There is no valid reason why one is worthy of a potential 25-year sentence, while the other only merits a maximum of 7 years.

S. 3710A would redefine sexual intercourse – as an element in the crime of Rape – as any contact between the penis and the vagina or vulva, rather than the current definition, which requires penetration. The proposal would therefore eliminate the disparity in possible punishment between Rape and Criminal Sexual Act, and provide equal protection against forcible sexual attack to all intimate parts of a victim's body. DAASNY strongly supports this bill.

At the same time, I would like to express DAASNY's serious concerns with proposals that would seek to repeal our current laws against Criminal Sexual Act and fold the actions that constitute that crime into the existing Rape statutes. We are told that this proposal, currently

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in A. 3339, is under discussion, so we are not prepared to express a formal view at this time. But we think it is useful to set forth our concerns.

First, such proposals would not increase penalties for rapists or offer any enhanced protection 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, criminal sex acts and aggravated sexual abuse. It would be disastrous if a bill like A. 3339 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 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 a 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 are 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.

DAASNY respectfully submits these thoughts and welcomes a dialogue about these and other proposals that will enhance the safety and security of New Yorkers.

Sincerely,

Cyrus R. Vance, Jr.
President