COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

COMMONWEALTH v. BERNARD F. BARAN, JR..	IND. Nos. 18042-18051; 18100; 18101

OPPOSITION TO THE COMMONWEALTH'S MOTION TO RESTRAIN DEFENSE COUNSEL FROM MAKING PUBLIC EXTRAJUDICIAL STATEMENTS

Bernard F. Baran ("Baran") served twenty years in prison in the aftermath of a trial which this Court (Fecteau, J.) found to be riddled with error. One month after Baran's Motion for a New Trial was granted, in part because the prosecution did not make crucial videotape evidence available to defense counsel, *see* Memorandum of Decision and Order on Defendant's Motion for a New Trial, Berkshire Superior Court Criminal Action Nos. 18042-51; 18100-1 (June 13, 2006) ("Decision"), the Commonwealth remarkably now seeks a blanket prohibition against defense counsel making *any* statement outside of the confines of the courthouse about *any* aspect of this case. The Commonwealth's request is an unprecedented intrusion into defense counsel's First Amendment rights, unsupported by law or the facts of this case, and certainly not required under Massachusetts Rule of Professional Conduct 3.6 ("Rule 3.6"). It also offends Mr. Baran's Sixth Amendment right to effective assistance of counsel, and, as Judge Fecteau ruled, Mr. Baran has already been deprived of that right at his trial.

I. SUMMARY OF ARGUMENT

The Commonwealth claims that a gag order is necessary to ensure a fair retrial. To be sure, Mr. Baran's interest in justice should be paramount. Given the history of this case, it would

appear that without the zealous advocacy, including the public insistence that defendant was entitled to access withheld evidence, Mr. Baran would never have the chance to obtain a fair trial. To his credit, District Attorney Capeless, after the death of his predecessor, undertook the search that had proven futile for nearly four years and uncovered and turned over the videotapes that form the core of Judge Fecteau's Decision.

The Commonwealth has failed to demonstrate any need for the Court to restrict extrajudicial public speech. The Commonwealth certainly has not demonstrated any cause to issue a gag order under Rule 3.6 or even remotely satisfied the constitutional requirement that counsel's First Amendment rights may only be restricted where counsel's speech would reasonably result in a "substantial likelihood of material prejudice" in an adjudicative proceeding. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75 (1991).

(i) The Commonwealth relies upon statements by the defense counsel that simply do not concern any upcoming trial. The news accounts cited by the District Attorney contain statements of defense counsel that were either made *before* Judge Fecteau's Decision ordering a new trial and while Mr. Baran was serving his term, or statements which comment on and, in fact, praise that judicial decision. There is neither case law, nor any justification for a gag order to protect a judge from hearing what defense counsel may say in public. Judges are presumed well capable to resist being influenced by the news media. Further, because the challenged statements concern claims and defenses and/or matters that are already in the extensive public record in this case, these statements fall within the explicit safe harbor provisions of Rule 3.6.

(ii) A significant amount of information about the case is already public record. Unlike most gag order cases, there has been a trial, heavily covered by the media, and a comprehensive judicial decision which reviewed much of the withheld evidence and criticized the conduct of that trial. This case's history and evidence, as well as the District Attorney's actions in the first trial, are detailed in Judge Fecteau's 79-page Decision. The genie is out of the bottle; the relevant information resides in the public record. A gag order now may protect public officials from further embarrassment, but that in our system cannot be the predicate for a prior

restraint on First Amendment activity.

(iii) No trial is imminent. The District Attorney has appealed Judge Fecteau's Decision. We do not know and cannot know if, or when, a new trial will occur. The District Attorney speculates that some future publicity may impact an unscheduled trial which may never happen.

For the reasons stated below, the Commonwealth's Motion for an Order Requiring Counsel to Cease Making Public Extrajudicial Statements Concerning the Case should be denied.

II. BACKGROUND

The Commonwealth's Motion comes on the heels of Judge Fecteau's Decision granting Defendant's Motion for a New Trial. As detailed in that Decision, in January 1985, Mr. Baran, a 19-year old day care worker, was convicted of three counts of rape of a child and five counts of indecent assault and battery on a child and sentenced to life in prison. Of importance here, in late 2000, new defense counsel began an intensive effort to obtain discovery. In particular on December 4, 2000, counsel moved for copies of the unedited videotaped statements of the complaining children, which had not been provided to Mr. Baran's counsel. After four years and numerous court orders, on September 17, 2004, District Attorney Capeless finally located the unedited tapes, that his predecessor claimed to have been unable to find, in the office's possession. In the interim, on June 18, 2004, Mr. Baran moved for a new trial, claiming that he had not received a fair trial for reasons including prosecutorial misconduct and ineffective assistance of counsel.

After an evidentiary hearing and argument on the merits, on June 16, 2006, Judge Fecteau vacated the convictions and granted Mr. Baran's Motion for a New Trial. Without specifically addressing the arguments of prosecutorial misconduct, Judge Fecteau detailed the numerous failures and errors of counsel that separately and jointly led to the finding that Mr. Baran's convictions constituted a "substantial risk of miscarriage of justice" and that "the trial cannot be relied on as having produced a just result." Decision at 78. In footnote 10 of his

decision, Judge Fecteau details the four year effort by defense counsel and the Court to obtain the long missing interview tapes from District Attorney Capeless' predecessor. On June 22, 2006, the Commonwealth filed a notice of appeal of the Decision. On June 30, 2006, Mr. Baran was released on bail. On July 17, 2006, the Commonwealth filed this motion for a gag order.

III. ARGUMENT

A. The Commonwealth Seeks a Gag Order that Is Contrary to Rule 3.6 and the First Amendment.

1. An Absolute Ban on All Public Extrajudicial Statements by Defense Counsel Is Facially Unconstitutional and Is Not Supported by Rule 3.6.

The Commonwealth's Motion proceeds on the erroneous assumption that the Court can impose an absolute ban on any and all extrajudicial comments. Such an extraordinary request is not supported by governing case law or Rule 3.6. An attorney participating in a pending case does not forfeit his First Amendment rights. Under the First Amendment, counsel's speech cannot be restricted unless it would result in a "substantial likelihood of material prejudice" in an adjudicative proceeding. *See Gentile*, 501 U.S. at 1074-75 (Rehnquist, J., opinion of the Court) (emphasis added) ("[T]he substantial likelihood of material prejudice standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."); Rule 3.6 (prohibiting speech which a lawyer "knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding" and enumerating certain safe harbor provisions). *See also United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993) (order barring counsel in first World Trade bombing case from publicly discussing any aspect of the case held an overly broad prior restraint). The absolute ban on counsel's speech proposed by the Commonwealth is patently unconstitutional.

2. Under Rule 3.6 and Governing Case Law, Only If Extrajudicial Statements Create a Substantial Likelihood of Material Prejudice in Obtaining a Fair Trial May Speech Be Restricted.

Because an absolute ban is unconstitutional, the Commonwealth's Motion must be

measured against the governing standard for restricting counsel's speech as articulated in *Gentile* and Rule 3.6. As shown below, the Commonwealth has failed to point to anything that would indicate that counsel's speech in this case creates a substantial likelihood of materially prejudicing a potential future trial. *See, e.g., Clement v. Sheraton Boston Corp.*, 1993 WL 818763 (Mass. Super. Dec. 17, 1993) ("It is incumbent for [party seeking gag order] to demonstrate that the statements attributed to the attorneys . . . created 'a substantial likelihood of materially prejudicing an adjudicative proceedings.'") (*quoting Gentile*, 501 U.S. at 1074-75).[1] Further, "limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." *Salameh*, 992 F.2d at 447.

Obviously, the central concern of Rule 3.6 is the impact that pretrial publicity will have on the ability to impanel an impartial jury. *Gentile*, 501 U.S. at 1075 ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."). *See* Rule 3.6, Comment 1 ("Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved."). Thus, any comments of counsel must be examined to determine whether they would have a substantial likelihood of materially prejudicing the ability to impanel an impartial jury.

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[1] Although there is little Massachusetts case law directly addressing gag orders such as the one requested, the Supreme Judicial Court's decisions in other areas indicate that it imposes a stringent burden on a party that contends that publicity will result in prejudice. *See Commonwealth v. Clark*, 432 Mass. 1, 8 (2000) (explaining that before a trial may be closed to the public, "[1] the party seeking closure must advance on overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] [the judge] must consider reasonable alternatives to closing the proceeding, and [4] [the judge] must make findings adequate to support the closure.") (*quoting Commonwealth v. Martin*, 417 Mass. 187, 194 (1994)). *Cf. Commonwealth v. Colon-Cruz*, 408 Mass. 533, 551 (1990) (trial judge should exercise power to change venue because of pretrial publicity with "great caution" only after "solid foundation in fact has been first established", noting that "[a] defendant's right to a fair and impartial jury does not require that jury members have no prior knowledge of the crime").

Substantial likelihood of material prejudice is a high standard. Even comments that are reasonably likely to cause material prejudice are not proscribed by the Rule. The difference between the two standards is not mere semantics. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986) (reversing trial court for applying standard of "reasonable likelihood of substantial prejudice" to issue of whether pretrial proceeding should be closed to the public and holding that correct standard was a showing of a "substantial probability" of prejudice to fair trial rights). *Compare Gannett v. DePasquale*, 443 U.S. 368, 441 (1979) (Blackmun, J., concurring in part and dissenting in part) *with id.* at 400 (Powell, J., concurring) (contrasting standard of "substantial probability" with that of whether fair trial is "likely to be prejudiced by publicity").

As shown below, the comments challenged by the Commonwealth do not come close to having a "substantial likelihood of materially prejudicing" Mr. Baran's right to a fair trial or the ability to impanel an impartial jury. More importantly as discussed below, a jury trial which was the subject of extensive publicity and a judicial decision (granting a new trial) which also received substantial publicity already have occurred. *See infra* Section B.2 and attached articles. The operative information already is in the public domain.

It is not clear what, if anything of substance, the lawyers have or can add to the material already available to the press and public. And a gag order on defense counsel is certainly not in Mr. Baran's interest. As Judge Fecteau concluded when ruling that the closure of Mr. Baran's trial to the public and press violated his Sixth Amendment rights, "No conceivable benefit in the exclusion of the press and public from Mr. Baran's trial can be imagined, but rather, there was benefit to Mr. Baran to exposing the judicial process to public scrutiny." Decision at 76.

B. The Commonwealth Cannot Establish a Substantial Likelihood of Material Prejudice in Obtaining a Fair Trial that Warrants Restricting Counsel's First Amendment Rights.

1. The Statements Cited in the Commonwealth's Motion Do Not Violate Rule 3.6 and Do Not Indicate any Threat of a Substantial Likelihood of Material Prejudice to Impaneling a Jury or to a Fair Trial.

The Commonwealth contends that certain statements made by defense attorneys John G. Swomley and Harvey A. Silverglate violate Rule 3.6 and undermine the ability of their client, Mr. Baran, to obtain a fair trial. None of the referenced statements, however, even directly concern an upcoming trial. They concern past conduct, particularly about discovery, and comment on a judicial opinion. Those are protected areas and do not create a substantial likelihood of materially prejudicing any hypothetical future jury pool.

Attorney Swomley's statements were made six or more months *before* the Decision ordering a new trial was issued. *See* Motion ¶¶ 2, 4. As such, they simply are irrelevant to this discussion.

First, since Mr. Baran was incarcerated, no trial was pending and no reasonable attorney would view these statements as causing a substantial likelihood of materially prejudicing a new trial which had not and might never be ordered. *See* Rule 3.6(a). Moreover, the statements concern Mr. Baran's protracted efforts over a number of years to obtain from the prosecution unedited videotapes of the interviews of the children -- two decades after Mr. Baran's convictions. *See* Motion ¶¶ 2, 4.

Second, the statements criticize the Commonwealth's delay in producing key evidence which the prosecution produced four years after defense counsel requested the evidence and after numerous court orders issued regarding the evidence. As noted by Justice Kennedy in *Gentile*, "[p]ublic awareness and criticism have even greater importance where, as here, . . . the criticism questions the judgment of an elected public prosecutor." 501 U.S. at 1035-36 ("[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.") (*quoting Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)). Statements that criticize prosecutorial conduct in providing

information to a defendant do not rise to the level of substantial likelihood of materially prejudicing any trial or make it more difficult to impanel a jury. *See* Rule 3.6, Comment 1 ("[T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. . . . [The public] has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern.") and Comment 7 (extrajudicial statements are permissible "where a reasonable lawyer would believe that public response is required in order avoid prejudice to the lawyer's client").

Third, in any event, the statements fall within Rule 3.6 safe harbor provisions, which permit a lawyer to make extrajudicial comments regardless of whether they have a substantial likelihood of materially prejudicing a trial. Rule 3.6(b) provides that, "[n]otwithstanding paragraph (a) [of Rule 3.6], a lawyer may state:

(1) the claim, offense or defense involved, and ...

(2) the information contained in a public record ...."

The statements challenged by the Commonwealth concern the claims and the defenses presented by Mr. Baran in his Motion for a New Trial include that the Commonwealth failed to turn over exculpatory evidence. As such, since each of the comments at issue concern a "claim, offense or defense involved" in plaintiff's case, they are permitted by the terms of Rule 3.6(b)(1).

The statements about the Commonwealth's conduct and the course of the trial also reflect no more than what the public record in the case already reveals. *Compare Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 610 (2d Cir. 1988) (affirming gag order where defendant claimed and district court found "serious violations of grand jury secrecy rules" that impacted right to fair trial). Even if the precise words could not be found in the public record, it strains reason to suggest that the gist of these comments is not found within the publicly available pleadings and briefs concerning the defendant's allegations of prosecutorial misconduct and legal error. Thus, the Court need not decide whether the statements present a "substantial likelihood" of material prejudice in order to deny the Commonwealth's Motion on the grounds that the statements are within the safe harbor provisions of Rule 3.6(b)(1) and (2).

Similarly, any statement by Mr. Swomley that his client was wrongly convicted, *see* Motion ¶ 3, would be no more likely to cause material prejudice to the conduct of another trial than statements by the Commonwealth that Mr. Baran was convicted or correctly convicted. As the Supreme Court has stated in an analogous context: "If the point had been made in a petition for a rehearing, and reduced to lawyer's language, it would be of trifle inconsequence. The fact that it was put in layman's language, colorfully phrased for popular consumption, and printed in a newspaper does not seem to us to elevate it to the criminal level." *Craig v. Harney*, 331 U.S. 367, 377 (1947). Because Mr. Baran has been tried, convicted and incarcerated for these charges, unlike other cases where a gag order is sought to prevent the dissemination of unreleased material, here the Court is not operating on a blank slate. In this context, the prior history of the case, including the convictions, as well as the defendant's claims that the evidence did not support the convictions, are clearly established in the public record.[2] *See* Rule 3.6(b)(2) (lawyer may state "the information contained in the public record"). *See also Gentile*, 501 U.S. at 1043 (Kennedy, J., concurring) ("An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client.").

Finally, Attorney Silverglate's statement, *see* Motion ¶ 5, describes Judge Fecteau's decision allowing the Motion for a New Trial. Judge Fecteau's Decision properly was not filed under seal, and there is no order restricting its public access. It cannot be permissible under the First Amendment to bar a lawyer from describing and commenting on a judicial decision. Indeed, as noted above, the safe-harbor provisions of Rule 3.6(b)(2) expressly allow statements

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[2] Mr. Baran's claim that he was wrongly convicted runs throughout the pleadings that are part of the public record in this case. To cite but a few examples, the Motion for a New Trial explains that there was a wave of panic about child sexual abuse and "a propensity to believe in the guilt of anyone accused" and Mr. Baran was "a victim of this phenomenon"; *id.* at 2-3, that he was the subject of a "farcical trial", *id.* at 4, and that "newly discovered evidence [] casts grave doubts on the justice of his convictions." *Id.* at 291. The Reply to Commonwealth's Response to Defendant's Motion for a New Trial argues that Mr. Baran "is the victim of a grave and prolonged injustice", *id.* at 1, and "that he is the victim of a substantial miscarriage of justice", *id.* at 22. In the Proposed Rulings of Law, Mr. Baran claims that "[t]he very evidence supporting the allegations -- the accusations by the children -- has now proven unreliable and forever tainted." *Id.* at 31.

about information contained in the public record.

2. Any Additional Comments Made By Counsel Must Be Considered in the Context of the Extensive Publicity that Has Already Occurred in this Case, as well as the Significant Public Record, Notably Judge Fecteau's Decision.

Any argument that the limited comments made by defense counsel were themselves substantially likely to prejudice the jury pool must be viewed in the context of the extensive publicity that already has surrounded this case and the first trial. *See generally Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Division of the District Court*, 403 Mass. 628, 639 (1988) (Wilkins, J., concurring) ("The adverse consequences of the disclosure of the contents of the affidavit would seem likely to have paled in comparison with the consequences of the disclosure, already made, that the criminal defendant had been charged with murder in the first degree.") As in *Bridges v. California*, "[i]f there was electricity in the atmosphere, it was generated by the facts; the charge added by [counsel] can be dismissed as negligible." 314 U.S. at 278. *See generally Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 110 (1979) (Rehnquist, J., concurring) (absent a showing of effectiveness at serving its intended purpose, restriction on First Amendment rights, even if intended to serve a compelling state interest, is unconstitutional). Any statements by counsel now cannot undo the fact that there has already been media coverage in the case. *See ABA Annotated Model Rules of Professional Conduct* 243 (1984) (extent to which information already circulated significant factor in determining likelihood of prejudice), *cited in Gentile*, 501 U.S. at 1046 (Kennedy, J., concurring). *See also Commonwealth v. James*, 424 Mass. 770, 777 (1997) ("A defendant's right to a fair and impartial jury does not require that jury members have no prior knowledge of the crime."); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) ("[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically ... to an unfair trial.") *Gentile*, 501 U.S. at 1054-1055 (Kennedy, J., concurring) (citations omitted) ("Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court."). Rather, it is enough that prospective jurors will decide the case on the evidence, laying aside

whatever preconceived notions of guilt or innocence they may have. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

As noted by Judge Fecteau, the accusations against the defendant were "well publicized through local and state print media." Decision at 4. This extensive coverage occurred over a condensed period of time: Mr. Baran was arraigned on October 9, 1984 and his trial began in January, 1985. The then District Attorney Ruberto even held a press conference because of the media interest in the case. *See Suspect in DayCare Abuse Case Faces Additional Charge of Rape, Berkshire Eagle*, Oct. 10, 1984 (copies of articles are attached). During this time, statements made by the Commonwealth before the first trial are significantly more prejudicial than the statements of defense counsel about which the Commonwealth now complains: they contained conclusory assertions about the evidence and the defendant's role. For example, at the press conference, the District Attorney stated that the investigation would screen all 160 children to determine which are potential victims, and that "[t]here were touchings, there were fondlings and there was penetration in one case, which resulted in a rape charge." *Id.* Later, the District Attorney stated that the children "are all doing well, under the circumstances, but that the long-term effects of such an experience are not fully known." *Former ECDC Worker Faces Added Charges In Sex Case, Berkshire Eagle*, Nov. 10, 1984. In another statement, the chief of detectives and the officer in charge of the investigation stated that "I think there may be more cases, I'm not sure how many." *Sexual Abuse Probe Expands, The Morning Union*, Oct. 11, 1984. After reports that one of the children had contracted gonorrhea had been released, this same police detective stated, "The plot sickens, the plot thickens." *Day-Care Worker Faces a New Rape Charge, Berkshire Eagle*, Oct. 12, 1984. At no time was the fact that Mr. Baran tested negative for gonorrhea mentioned. *See, e.g., Patients of ECDC Pupil Say It Should Be Closed, Berkshire Eagle*, Oct. 13, 1984. The coverage also included an interview with the parents of one of the alleged victims, *see id.*, and the disclosure that "a physical examination of one girl revealed that she had been penetrated." *Former ECDC Worker Faces Added Charges in Sex Case, Berkshire Eagle*, Nov. 10, 1984. On December 2, 1984, in the midst of this extensive

coverage, there was also an article about prosecuting child molestation cases in which an Assistant District Attorney stated that children are "honest" and that "[c]hildren just do not lie about it." *The Secret Crime, Berkshire Eagle*, Dec. 2, 1984. It is a little late in the day for the Commonwealth to find religion on the subject of pretrial publicity.

Not only has there already been extensive coverage of this case, but there is a significant public record. Statements about the public record are, of course, permissible under Rule 3.6(b)(2). There has already been trial, a direct appeal, and post conviction practice. Most significantly, Judge Fecteau's Decision recounts not only the evidence already presented in the first trial, but recites in detail evidence that was not presented in the first trial, including four and a half pages of excerpts from the transcripts of the interviews with the children. *See* Decision, 7-11 n. 13. The Decision is also highly critical of the interview techniques used with the children, *see, e.g., id.* at 34-39; the testimony of the Commonwealth's experts, *see, e.g., id.* at 43-49; the impermissible use of fresh complaint testimony to corroborate and, in some instances enhance, the children's testimony, *see, e.g., id.* at 64-70; and notes that information about a complainant's prior allegations of child abuse was not disclosed to the defense. *See, e.g., id.* at 51-53. Judge Fecteau also states that expert testimony about gonorrhea and the defendant "came through speculation and innuendo," *id.* at 55-60 and that evidence about "[w]hether Mr. Baran was indeed a homosexual was both irrelevant and highly prejudicial." *Id.* at 60; *see also id.* at 60-62. As a result of the voluminous public record in this case, all of these issues are within the public domain.

Given the public record and the information in the public domain from the prior media coverage, and Judge Fecteau's Decision, there is no basis for concluding that the relatively innocuous comments of defense counsel have any substantial likelihood of materially prejudicing any possible future trial in this case. *See Gentile*, 501 U.S. at 1055 (Kennedy, J., concurring) (noting there was "not a single example defense where a defense attorney has managed by public statement to prejudice the prosecution of the State's case").

3. Because the Commonwealth Has Appealed the Order Granting a New Trial, No New Trial Is Imminent, and Any Extrajudicial Statements Cannot Have a Substantial Likelihood of Materially Prejudicing Any Prospective Jury.

Because of the Commonwealth's own Notice of Appeal, filed on June 22, 2006, the prospect of trial is not imminent.[3] Indeed, a trial may not occur at all. Only if the Commonwealth's appeal is denied and the Commonwealth decides to pursue a new trial will there be a trial, and that will not be determined for many months or perhaps even a year or more. Because no trial is likely in the near future, a gag order is simply not warranted. *See Gentile*, 501 U.S. at 1037 (Kennedy, J., concurring) (standard "requires an assessment of proximity and degree of harm"). *See also Commonwealth v. Carter*, 537 Pa. 233, 250, 643 A.2d 61, 69 (1994) (where "there was a fifteen month 'cooling off' period between the prejudicial articles and the jury selection," no error in not issuing a gag order). One of the key indicators of whether pretrial publicity is likely to impact the ability to obtain a fair trial or impanel a jury is the proximity of the publicity to the time of the trial. *See, e.g., Gentile*, 501 U.S. at 1044 (Kennedy, J., concurring) ("[E]xposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date."); *United States v. Kelly*, 722 F.2d 873, 879 (1st Cir. 1983) (to be prejudicial pretrial publicity, "the publicity must be proximate in time to the trial"); *United States v. Pfingst*, 477 F.2d 177, 186 (2d Cir. 1973) (where press conference occurred "some six months before the jury in the bankruptcy trial was drawn," no prejudicial pretrial publicity because "the memory of the public for such news is short"); *Oryang v. State,* 642 So.2d 989, 993 (Ala. Crim. App. 1994) (where approximately one year and four months elapsed from the time of articles to trial, "[t]he passage of so much time clearly weighs against any prejudicial impact that the articles may have had"). Here, that is simply not a pressing concern.

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[3] Surely the Commonwealth is not seeking this gag order to shield appellate judges from the effects of any publicity. *Cf. Bridges*, 314 U.S. at 273 ("To regard [newspaper articles], therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor, which we cannot accept as a major premise.").

Further, in cases where there has been widespread pretrial publicity, the traditional remedy is to delay the trial for some period of time, perhaps six months. Here, any trial would be more than six months away. *Cf. Commonwealth. v. Burden*, 15 Mass. App. Ct. 666, 672 (1983) (denying motion to continue trial because of pre-trial publicity where moving party "presented no evidence that there had been any unusual media coverage during the six months preceding the trial"). If the Commonwealth loses the appeal, and decides to retry the case, and there is prejudicial pre-trial publicity at that time, the Commonwealth may then request continuance for a "quiet period" or even a change of venue. *See Commonwealth v. James*, 424 Mass. 770, 776 (1997). Now, however, there is no indication of any substantial likelihood of materially prejudicial pretrial publicity in this case. Certainly nothing warrants the imposition of a gag order and restraining the attorneys' First Amendment right to speech.

CONCLUSION

In a case such as this one, which has generated understandable and justifiable public interest, the delicate balance that Rule 3.6 attempts to strike between the First Amendment and the interests of a fair trial should not be used by any party as a tactical weapon to silence its opponents. Andrew Hamilton, arguing in defense of John Peter Zenger, stated:

> It is a privilege, I will go farther, it is a right which all free men claim, that they are entitled to complain when they are hurt; they have a right publicly to remonstrate the abuses of power ... Were this to be denied, then the next step may make them slaves. For what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions without the liberty of complaining....

Andrew Hamilton, argument to the jury, *The Trial of John Peter Zenger*, W. Lewis, 46 ABA J 27, 110 (1960). Here, the speech that the Commonwealth effectively seeks to silence is at the core of the First Amendment: criticism of the governmental police power. Nothing about this case indicates that a gag order is necessary or warranted to safeguard the defendant's right to a fair trial or, even, the public's interest in the administration of justice. To the contrary, in this case, a gag order would be a disservice to those very goals.

For all of the foregoing reasons, the Commonwealth's Motion For An Order Requiring Counsel to Cease Making Public Extrajudicial Statements Concerning The Case should be denied.

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Dated: July 31, 2006

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the following attorney of record by overnight mail on July 31, 2006:

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City & County News

The Berkshire Eagle

Wednesday, October 10, 1984

Photos by Joel Librizzi

HOUSE at 48 Francis St. contains the Early Childhood Development Center, where Bernard Baran Jr., suspected of sexually abusing children, was formerly employed.

Suspect in day-care abuse case faces additional charge of rape

By Lynne A. Daley

The 19-year-old former day-care worker who on Saturday was charged with sexually molesting two preschool children in his care yesterday pleaded not guilty in Central Berkshire District Court to those charges and to an additional charge of forcible rape of a child.

Bernard Baran Jr., who has been suspended from his post at the Early Childhood Development Center at 48 Francis Ave., was charged with the rape count after a medical examination of the 3-year-old female victim. Baran, who has put up $5,000 bail, is free, pending a pretrial conference Nov. 8.

While the indecent assault and battery charges carry with them a possible 10-year state prison term, the rape count could mean up to life in jail if Baran is convicted.

Start of investigation

The other alleged victim, a 4-year-old boy, is the one who brought the case to the attention of the authorities, said county District Attorney Anthony J. Ruberto Jr. at a [illegible] conference yesterday after[illegible] his office.

Ruberto said the boy told his parents Friday afternoon that he had been molested by Baran and they in turn notified the police. The police called in the district attorney's office, the Department of Social Service, the Rape Crisis Center and ECDC staff, Ruberto said.

The second complaint, from the parents of the little girl, came to police Friday night, Ruberto said.

However, the district attorney said, efforts to pinpoint the exact day that the incidents occurred have been unsuccessful. Baran's court records list Oct. 6, the day he was arrested, as the date of offense. The incidents occurred at the ECDC, Ruberto said.

In court yesterday morning, the slight, dark-complexioned Baran appeared calm at his arraignment. Judge Clement A. Ferris, who appointed attorney Leonard H. Cohen to represent Baran for the bail hearing only, named the Public Counsel Division, the reorganized public defenders' committee, to represent Baran in future hearings.

District Attorney Ruberto
Still investigating

Assistant District Attorney Michael J. McCarthy asked the judge to increase Baran's bail to $25,000, citing the case's "changed circumstances" as a result of the addition of the rape charge. And, the prosecutor added, "there may be further charges" in the case.

McCarthy said that because of the serious charges Baran faces, he "has a great incentive to not appear to face the music."

"Adding a rape charge isn't going to make any difference to this young man," Cohen retorted, adding that the chance that Baran would default on his appearance date "is practically nil."

Cohen, emphasizing Baran's non-existent criminal record prior to these charges, told Ferris that Baran, a 9th-grade dropout, lives with his mother and brother in Pittsfield. Police, at the time of Baran's arrest, listed his address as 168 First St. However, court records indicated that he lives on Lanesboro Road, Lanesboro.

Cohen said that Baran has lived in Pittsfield his whole life and in fact "he wouldn't know how to leave Pittsfield, Mass." Baran's father, Cohen said, lives in North Adams.

Baran's family, the defense lawyer said, "scrimped and scraped" to get the bail bond that freed Baran and would be unable to raise any additional money.

Ferris refused to increase the bail, noting that "he is presumed innocent." The judge also cited Baran's lack of prior record.

McCarthy asked Ferris to order Baran to stay away from the center and from the alleged victims, pending the conference, but Ferris said he could not legally impose such an order. Cohen, however, said he had advised Baran to voluntarily agree to that condition.

Case draws attention

The local case attracted widespread attention because it comes in the wake of a number of news stories about sexual abuse in day-care centers across the nation.

Ruberto's press liaison, Frederick A. Lantz, said the district attorney called a press conference after several television stations from Hartford, Conn., Albany and Schenectady, N.Y., and Springfield expressed an interest in the case.

Facing the lights of the television cameras, Ruberto began by reading from a prepared statement. He said that "the exact extent of the situation is unknown to us at this point."

He said a meeting between ECDC officials, social workers and law enforcement officials Monday night was called to explain details of the investigation to parents of children who attend ECDC. Rape Crisis Center employees, he said, told parents to watch out for possible indications that their children have been abused. They also told parents how to broach the subject delicately, he said.

"We do not want parents interrogating the child," Ruberto said. "We're dealing with children that are 3, 4 and 5 years old. Our primary concern is to elicit the information from them without causing any more stress or trauma than is necessary."

He said the investigation would begin with a screening-out process, to determine which of the center's 160 children are "potential victims."

Asked to elaborate on the charges, Ruberto said, "There were touchings, there were fondlings and there was penetration in one case, which resulted in the rape charge."

ECDC interim director Janie Trumpy yesterday declined comment on the case. However, she told reporters who questioned her that the center was remaining open.

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The Morning Union

SPRINGFIELD, MASSACHUSETTS, THURSDAY, OCTOBER 11, 1984 58 PAGES 25 CENTS

Sexual abuse probe expands

By JOHN HITCHCOCK
Union bureau chief

PITTSFIELD — Police Wednesday were investigating a third instance of alleged assault against a child in a day care center here, in the wake of the arraignment Tuesday of a 19-year-old teachers' aide on sexual assault and rape charges.

"I think this is just the tip and we will find more cases," said Police Capt. William Dermody, chief of detectives and in charge of the investigation. "I think there may be more cases, I'm not sure how many."

He declined to reveal details of the case under investigation, except to say it did not appear to involve the rape of a child. "We still have to have doctors examine the child," he said.

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On Tuesday, a 19-year-old aide at the Early Childhood Development Center pleaded innocent to charges of raping and sexually assaulting a 3½-year-old girl and sexually assauting a 4-year-old boy at the center.

Following his arraignment, Bernard Baran Jr. of Lanesboro was released on $5,000 bail by Pittsfield District Court Judge Clement A. Ferris on condition he stay away from children enrolled at the center. A pre-trial conference was scheduled for Nov. 8.

Mayor Charles L. Smith Wednesday ordered the Police Department to "work right straight through" in its investigation of sexual abuses at the day care center at 48 Francis Ave.

The mayor said approximately 90 children were attending the day care center and all are being interviewed, along with parents, by the police.

"We have only talked with about 20 children," the mayor said Wednesday evening.

Dermody said his detectives are working closely with the Berkshire district attorney's office and with the state Department of Social Services as well as with the day care center staff and the Berkshire Rape

The interim director of the center, Janie Trumpy, has declined comment since an initial statement that she and her staff were working closely with the police.

The center remains open and Dermody said he did not think any parents have removed their children.

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Barbara Gardner, a nurse whose daughter attends the center, told the Associated Press Wednesday, "I knew the man. He had taken care of my daughter. We always thought he was terrific with the kids."

She said she had no plans to take her child out of the school.

"It could happen anywhere else just as easily," she said.

The interviews are taking place at the state social services offices on North Street, with a team of child behavior specialists brought in to assist, according to Dermody.

"You have to be very delicate about this, as the children have a tremendous sense of guilt," he said. The interviews are conducted with the help of video tapes and dolls, he added.

Saturday's arrest came only a few weeks after the police had conducted a seminar for day care workers on how to spot children who have been abused.

The mayor said he was particularly aware of the problems of child abuse as he and his wife have taken in more than 50 wards of the state in the past 20 years and had come across instances of sexual abuse.

"Unfortunately, Captain Dermody could be right about the tip of the iceberg, although I hope it is not

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District Attorney Anthony A. Ruberto Jr. stressed Wednesday that parents should not "attempt to interrogate their children."

"Our main concern in dealing with 3 to 5-year-olds is to obtain the information without causing any more stress or trauma than is necessary."

The case has aroused considerable interest throughout the Berkshires, as well as the region.

Mark Leonas, director of the Williamstown Day Care Center, said Wednesday that staffing and site supervision, along with communiation among parents, staff and children, play a key role in the prevention of child abuse.

City & County News
The Berkshire Eagle
Friday, October 12, 1984

Day-care worker faces a new rape charge

By Lynne A. Daley

Bernard J. Baran Jr. yesterday pleaded not guilty to a fourth morals charge against him, the forcible rape of 3-year-old boy at the day-care center where he worked.

Meanwhile, officials revealed the teen-ager's other alleged victim, a 3-year-old girl, is suffering from gonorrhea.

The suspended 19-year-old day-care worker yesterday was held in lieu of $15,000 bail at the Berkshire County House of Correction after his arraignment in Central Berkshire District Court. Baran, who gives his address as Cheshire Road, Lanesboro, actually lives at 28 Dartmouth St., Apartment 5, according to police, who twice arrested him there.

The other charges against Baran are two counts of indecent assault and battery on each of the children and a count of forcible rape of the 3-year-old girl. The boy, whose age has been reported as both 3 and 4 years old, will turn 4 next month according to court records.

All the offenses allegedly occurred at the Early Childhood Development Center, 48 Francis Ave., during the last six months.

The four charges involve only two children, but police and social workers, who are interviewing children and their parents, said they believe there may be more victims.

Bail is increased

Judge Alfred A. Barbalunga set the bail for Baran, who had been released on $5,000 bail, at $15,000, citing the nature of the offense, the stiff penalty — a life jail sentence — that Baran faces if convicted and Baran's "reputation" in the community.

Assistant District Attorney Michael J. McCarthy had requested that bail be set at $25,000. He told the court that there is a "continuing investigation and a likelihood of new charges."

"Parents are outraged," McCarthy said. Baran, he said, "has to be wary about hanging around the Pittsfield area. He has plenty of reason to leave the area."

Baran's attorney, Leonard B. Conway of Westfield, reminded Barbalunga that his client is innocent until proven guilty. District Attorney Anthony J. Ruberto Jr., Conway said, reported on television news that Baran posed "no threat" to the community.

"He has no place to go, no funds," the Westfield lawyer said, adding that the circumstances of the case

Bernard J. Baran Jr.

really hadn't changed that much. "We've only added one more charge of sexual intercourse," he said.

Baran, who on Tuesday at his first arraignment presented a calm, kempt and clean-cut appearance, yesterday was shaking noticeably as he appeared in sweat pants and an old flannel jacket, head bowed and arms folded. Arrested on the new charge at about 8:30 Wednesday night, he had spent the night in jail in lieu of $25,000 bail.

Police speculated that any more charges, if they exist, would probably be brought directly to a county grand jury, now that Baran is behind bars.

Parents sent letters

Parents of children at the center yesterday received letters about the case that were hand-delivered, according to interim director Janie Trumpy. Trumpy, who called the letter "a personal communication," refused to reveal its contents.

According to one parent, who read the letter to a reporter, it said that, as a result of a recent investigation, a child from ECDC has been treated for gonorrhea. The letter stressed that there is "no immediate danger to any child," but urged parents who are worried about their children to take them to a pediatrician immediately.

The letter also informed parents of a medical hotline that ECDC to answer parents' questions, as well as a hotline staffed by the state De-

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artment of Social Services.

A second letter, from Charlene O'Brien of the Department of Public Health, told parents, "Don't panic," and went on to say that gonorrhea cannot be transmitted through such casual contact as kissing, sharing a glass, holding hands, using a public toilet or sharing a bed.

Michael Coughlin, a spokesman for the Office for Children, which licensed the ECDC, said his office is "aware" of the case of venereal disease. The Office for Children, he said, had ordered the ECDC to send out yesterday's letter explaining the alleged abuse to parents.

The order did not include an order to mention the venereal disease, simply because, Coughlin said, it wasn't necessary. Since venereal diseases are communicable, he said, the center is already mandated by its regulations to inform parents that their children may have been exposed.

Ruberto refused to confirm or deny that the girl has the disease, as did Police Captain William M. Dermody. But, Dermody said when asked about it, "The plot sickens, and the plot thickens."

Police said tests have not yet revealed whether or not Baran has any venereal disease.

5 officers assigned

Ruberto announced yesterday four city police and a trooper from his office have been assigned full-time to the case. They are Dermody, Sgt. Frank Polidoro, Detective Peter T. McGuire, Detective Joseph Collias and Trooper Robert Scott.

According to Ruberto's spokesman, Frederick A. Lantz, the investigation up to now has centered on those two children, who complained of the abuse last Friday. Now, he said, the investigators will begin screening other children. Baran, according to Ruberto, worked with about 50 of the center's 85 children.

One mother of a child who attends ECDC praised both the center and the investigatory tactics, which, she said, include a puppet show about sexual abuse. Any child who has an unusual reaction to the presentation, which he or she sees with parents, is questioned afterward.

Another parent, who called the incident "a sad situation," said she wonders how and where this could have taken place" with so many teachers and students around.

She said she has no intention of removing her child from the school because "where do you put them?"

"They're a good group," at ECDC, she said. "They've been super to me."

Mayor Charles L. Smith, however, expressed a perhaps more common attitude. "A lot of parents are angry and scared to death," he said. "I'd certainly be angry if I was one of the parents."

Trumpy, who admitted "a couple" of parents have taken their children out of ECDC, said her staff was meeting every night to develop services for the children and their families. Beginning Monday night, and continuing each night next week, she said, ECDC would stage meetings of parent support groups, with counselors and child specialists for the parents to talk to.

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Parents of ECDC pupil say it should be closed

By Lynne A. Daley

The parents of the 5-year-old boy who allegedly was molested by an Early Childhood Development Center employee said yesterday they thought the center should be closed down pending a further investigation of its employees.

David and Julie Heath of 21 Faulkner Place, whose son Paul was diagnosed this week as having gonorrhea of the throat, called The Eagle because, they said, they wanted to share their thoughts on the case. They said they felt people weren't taking the problem seriously enough.

A report in yesterday's Eagle quoted sources as saying the alleged female victim, who is also 3 years old, suffered from gonorrhea. However, court records confirm that it is Paul Heath who suffers from the ailment, which is treatable with penicillin.

Bernard J. Baran Jr., 19, a suspended ECDC employee, is in jail in lieu of $15,000 bail on two counts each of forcible rape on a child and indecent assault and battery on a child. Two children, Paul and a 3-year-old girl, are involved.

According to an affidavit filed in Central Berkshire District Court by Detective Joseph D. Collias, the policeman was notified Wednesday that a test on the Heath boy came back positive for gonorrhea. The warrant, which was granted by Judge Clement A. Ferris, sought medical tests on Baran for the presence of gonorrhea. According to the return of the warrant, also on file, the tests were completed on Oct. 10. No results have been released by police.

Working through Trumpy

Asked last night about the Heath comments, Genne LaVasseur of Lenox, chairman of the board at ing through Janie Trumpy, interim executive director, on the case.

Trumpy said yesterday her only comment is that the center is cooperating in every way with the district attorney's office.

LaVasseur added that speaking only as a mother of two children at the center, she was "quite confident" in bringing her children there.

[redacted] is in a class in which Baran was serving as [redacted] aide, LaVasseur said, adding that she had had no com-

The Heaths, occasionally leaning on each other for support during an interview in their sunny living room yesterday afternoon, expressed both rage that their son could have been molested, and regret that they didn't do something sooner.

According to Julie Heath, Paul first complained that "teacher touched me" three months ago, but refused to elaborate, saying that "it's a secret."

"We let it slide, stupidly enough," she said. "We couldn't face the fact that this could happen at a day care center in Pittsfield. And I didn't want to admit the fact that my son had been molested."

But, she said, "Deep down, I knew three months ago something very wrong was going on."

Helpful and supportive

Paul didn't mention it again, the couple said, until last Friday. They immediately called the police. Police, along with the district attorney's office, have been very helpful and supportive, the parents said.

Both said they decided to go public with their identities and experiences to try to wake up other

David Heath quoted a report he saw on television in which, he said, a father said 'I don't want to see the whole school closed because of an isolated incident. Look what they've done for my little guy,' " and he patted the air, mimicking the man on television patting the boy's head.

"Look what they did to ours," he retorted to the invisible pair, letting his hand fall.

The Heaths are enraged, they said, that, first, a 16-year-old, 9th-grade dropout would be hired by the center, a move that interim director Trumpy has said was "not unusual," although she has no 16-year-old employees now.

Also, they complained that anyone would have time to molest the children.

And last, the Heaths scored center employees for both failing to recognize the problem and for trying to

"Everything it showed on there, Paul had," Julie Heath said. "These people [the center staff] are trained to work with children. I'm a parent who watched something on TV, and I picked up on it like that."

Her first reaction was, she said, "I'm scared. And how do I prove it?"

Now that the case is out of their hands, the Heaths have talked friends into taking their children out of the center. Paul, they said, has stated that he knows of at least two more children who were molested.

"How can people let their kids go back to that school," Julie Heath asked. "How do they know it wasn't their kid?"

They admitted they no longer "trust anyone," and that camp for Paul is out of the question. Paul has told them that he and his friends screamed and cried, and they question how the screams could have gone unnoticed.

Frederick A. Lantz, spokesman for District Attorney Anthony J. Ruberto, said his office is investigating all school employees.

"Our investigation is not leaving

Parents on ECDC
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Parents on ECDC

Continued from Page 7

any stone unturned," Lantz said. "We want to get to the bottom of the situation."

But the consolation is small for the Heaths, who are just now pulling themselves back together from the shock.

"I'm dealing with it now," Julie Heath said. "I've cried a thousand tears. Now I have more hate in me."

A student majoring in human services at Berkshire Community College, she plans to enroll Paul at a day care center there, only because, she said, "I can walk in any time of day."

"I just get so keyed up sometimes, I want to blow up," David Heath said. "I want to go out in the street and scream and cry."

Paul's reaction is even more heart-wrenching, his mother said. "He asks, 'shouldn't I go to jail, too?' I think he thinks that it's his fault. I really do."

To soothe her son, she said, "I told him how important he is, how he saved all his little buddies. That's what he calls them, his little buddies."

Julie Heath shook her head. "I wish I had acted on my suspicions three months ago. I could have saved three months of misery. He was in great fear up there."

Nov. 10

Former ECDC worker faces added charges in sex case

The 18-year-old former child care worker who last month denied raping two children in his charge, yesterday at his arraignment in Berkshire Superior Court denied additional charges involving three more children.

Bernard J. Baran Jr., a former employee of the Early Childhood Development Center, is charged altogether with five counts of rape, with no force, and five counts of indecent assault and battery. The victims, all children who were in his care at the center, are three girls and two boys, ages 3 through 5 years old.

He was arraigned as a result of the 10 Berkshire County grand jury indictments returned against him earlier this week.

Baran is being held at the Berkshire County House of Correction in lieu of $15,000 bail, which was set originally in District Court.

The rape-without-force charges are downgraded from the charges brought in Central Berkshire District Court. Those charges, which involved the two initial victims, both claimed forcible rape.

Baran's lawyer, Leonard B. Conway of Westfield, termed the bail "excessive." He asked Judge Lawrence B. Urbano to reduce it to $5,000. That figure was initially set on Oct. 9 when Baran denied two counts of indecent assault and battery. Baran, who purchased a bail bond to free himself, cannot make the larger figure, his lawyer said.

'Has no record'

"The boy has no record at all," Conway stressed, reminding Urbano of the "presumption of innocence" that accompanies defendants through the legal system.

First Assistant District Attorney Daniel A. Ford, who argued for the higher bail, said Baran's trial would most likely be in January. This caused Conway to state that his client would spend "six months" in jail awaiting trial.

Urbano maintained the $15,000 figure, but did so without prejudice, he said, so that Conway can petition again for a lower figure if the trial does not take place in January.

Baran, a 9th-grade dropout, was employed as an aide at ECDC for 2½ years when a little boy, now 4 years old, complained on Oct. 5 to assaulted. They in turn notified the Pittsfield Police, who notified the district attorney's office. That same day, a 5-year-old girl made similar complaints to her parents, who also called police.

After Baran was arrested on the indecent assault and battery charges, a physical examination of the girl revealed that she had been sexually penetrated, and a charge of forcible rape was brought against Baran on Oct. 9. Then on Oct. 10, it was revealed that the little boy suffered from gonorrhea, and a second rape charge was brought.

Puppet show

Meanwhile, the district attorney's office carefully screened each ECDC child who may have had contact with Baran, presenting them with a puppet show that gently broached the subject of molestation. Any child who reacted passionately to the presentation was further interviewed.

This process turned up three other alleged victims, and resulted in the six new charges.

The interviews that dealt with the molestations were video-taped, perhaps for use in court, District Attorney Anthony J. Ruberto Jr. said yesterday. But, he added, they would not preclude the in-person testimony the children would still be required to give the court, under state law.

Ruberto said the children are all doing well, under the circumstances, but that the long-term effects of such an experience are not fully known. He said he expects that they'll all be found competent to testify. Some judges rule that young children do not fully comprehend the difference between truth and fiction, and therefore do not make credible witnesses.

Ruberto refused to comment on unofficial reports that Baran, who was tested last month for gonorrhea, does not have the disease, but admitted his investigation is not confined to Baran.

"We're looking," Ruberto said, "but we haven't really got anything. There is no evidence that others are involved."

The secret crime

Dec 2

Sexual abuse of children comes of age

By Steve Moore

Putting aside for a moment the greater question of the apparent epidemic of sex crimes involving children, one thing nagging society right now is whether convicted sex offenders are being treated appropriately [illegible] the findings and sentences [illegible] to [illegible] crimes. There may not be [illegible] in the gen[illegible] [illegible] is certainly a growing [illegible] unspoken [illegible] sense of consternation and outrage, perhaps [illegible] shame, over our widespread [illegible] of our children. One judge terms [illegible] thereby [illegible] covering physical and [illegible] in a single [illegible]

Curiously, the problem lies more with the disposition [illegible] offenders than with the incidence. Some defen[illegible]s are convicted, some not. Of those who are, some are sent to the House of Correction, some to the state [illegible]

least severe sentence and Walpole the most severe. In terms of the potential impact on the prisoner, that is certainly accurate. But are there hidden factors, and what distinguishes the sentences? What does each connote?

To begin, it would be worthwhile to examine the crimes. Again leaving aside the question of the effect on the victim, the least of the infractions in the eyes of the law is molestation. That is the sexual and perforce unauthorized touching of a clothed child.

Next comes indecent assault and battery, the touching of bare skin. Given that the term A & B, a common act of criminality, suggests kinetic images, it is interesting to learn that any mere touching is enough to complete the offense even though it is not generally violent. Most of the incidents fall into this category.

The most serious offense is rape. Rape is the penetration, however slight, of any orifice by the penis or of a sexual organ by any object. While there are no degrees of penetration, there are degrees of rape. The working term is "staircase rape," a recognition that not every offense involves the same amount of damage. Sentences tend to reflect the given degree.

"We try to follow guidelines from across the state," Berkshire County District Attorney Anthony J. Ruberto says. "Thus in a typical case, indecent A & B is worth a trip to the House of Correction, where violent penetration means Walpole."

But one thing that becomes quickly apparent to an investigator is that there is no such thing as a typical case. Each is unique. Thus what appear to be disparities in sentences are not necessarily.

The DA knows this and so do the judges. Superior Court Judge Lawrence B. Urbano: "Not every defendant ought to go to Walpole. Some sentences seem [illegible] the public because they are not the ones doing

"People say they would be tough if they were on the jury but when they get there they suddenly realize there are two sides to the story. They now are not so tough."

[illegible] the Superior Court has adopted a set of voluntary guidelines in sentencing. Decisions that fall outside of the limits, high or low, must be accompanied by a written explanation.

To make these guidelines binding, Gov. Michael S. Dukakis has brought forward a bill that would establish sentencing criteria. It has not yet passed and Urbano, for one, is not sure it ever will. And if it should, he allows, it looks like fertile ground for plea bargaining.

As with any charge, the job of the district attorney is to obtain the maximum appropriate sentence. Taken into account is the record of the defendant, the offense

Ruberto finds that most judges want to hear the victim's preferences. That request, usually honored, is developed through counseling both with the DA and with the Rape Crisis Center, fast becoming a major factor in prosecution.

Eileen McKnight, the center's police court advocate, sees two types of offenders.

"The child molester is very remorseful. Very often he was molested himself."

"The child molester is very remorseful," she says. "Very often he was molested himself. It took away his power and the only way he can see to get it back is to take it from someone else.

"One way to protect himself is to have it be their secret. 'If you tell, I'll have to go to jail and they will kill me or beat me.' Often the mother is right in the house.

"Usually the molester is very good to the child. Often he even loves the child, gives it presents and favors."

She cites the case of a junior high teacher in Pittsfield convicted of abuse who selected his victims carefully from the poorer section of town and gave them things their parents could not.

"I can't say I hate the offender," McKnight says. "He's coming from somewhere. I simply want to stop it at this generation."

Urbano has much the same viewpoint. In deciding on where to send the convicted offender, Urbano must consider the prison.

"You want to talk about rape," Urbano says of the [illegible] offender, the rapist. "You

Berkshire Sampl[e]

send an 18-year-old to Walpole. There's rape. But what are you going to do with him?"

What indeed? Ruberto: "No one in the country, this old, knows what appropriate treatment is. But as ... as I am concerned, I believe in time as a component of any sentence. For someone to receive a suspended sentence and to get counseling, he *must* admit it.' But 'Me? Diddle little girls? Uh uh.' That's a different story."

To get an inkling of the difficulties of counseling as an effective tool, consider that of all the cases handled by the DA's office, a mere three — two out of jail and one in — are now submitting to counseling. Ruberto sees progress with those three but admits that the only reliable clue to failure is recidivism.

Ruberto notes that in his first year as DA he prosecuted only five cases of child sex abuse and those were the only five he received. During 1984 he has reviewed between 12 and 15 cases a month. Not all have merit, but they do find their way to his desk, partially because of new legislation requiring that he be notified.

One matter of considerable divergence if not outright misunderstanding, is bail.

"I would like to see no bail in rape cases," McKnight says simply.

She reasons that the offender otherwise could be released on his own recognizance or on bail the same day and be back in the neighborhood, if not the house, of the victim. In such a case, the victim can be kept in seclusion by the parents, effectively and ironically becoming a prisoner instead.

"The police try," McKnight says. "I have nothing but praise for the police and DA. But I have gone to w[illegible]oops on rape all over the state and I have seen only one judge at any of them. That was a black woman."

Urbano, a frank, thoughtful man who sometimes finds himself wondering why he gave up his quiet, country law practice in Williamstown, is realistic enough to understand that the bench can be a hotseat and issues like bail can be a firebrand to some people.

"One thing the public forgets," he says, "is that the accused, under our system, is innocent until proved guilty. In the case of rape, like murder, it is difficult for the public to accept that.

"The judge has to be on guard against any personal bias he might have about a particular kind of crime. He cannot be swayed by publicity on notorious cases. If he cannot take the heat, it may be time to step down."

Bail cannot serve that purpose.

When a judge considers bail, Urbano explains, one question is always: When do you expect to come to trial? If the answer is one or two months, there is no problem. But Urbano, like other judges, will often prescribe bail as "without prejudice," meaning that if

"Children just do not lie about it."

things begin to drag out, the defense lawyer can come back and the bail will be reviewed. This is in keeping with the call for speedy justice.

Urbano explains that often a defendant is released on his personal recognizance, a term meaning that his stature in the community is such that he is not a candidate for flight.

"If you get some guy who has held up a service station, raped a hitchhiker, is from Tucson and has a record as long as your arm, and is wanted in four states," he says, "you're going to slap a good, stiff bail requirement on him. Otherwise, you're never going to see him again.

"But some guy who's lived here all his life, with a family, a good job, a house, all the things that make him a stable member of the community, where's he going?"

There is another generally misunderstood aspect, he feels.

"If there is a request for bail or PR," Urbano says, "it comes early in the proceedings. I don't know much about the case yet. I take the recommendations of the DA, by and large, although people believe I am just turning the guy loose. I am not complaining but sometimes there is a feeling of frustration on the part of judges."

Ruberto, on the subject of bail, points out that one of the conditions of a bail hearing can be to demand that the defendant keep away from the victim. This is done to avoid the tragic irony that McKnight dreads. If it sounds namby-pamby, Urbano recalls that a judge in Springfield recently "whacked someone solidly" for a violation of that provision.

The same goes for a suspended sentence, often a finding that raises public hackles.

"Open suspension is no great deal," Urbano reveals, "although the public often thinks it is. In fact, any good defense lawyer will not accept it. It leaves the entire sentence hanging over the guy's head. Again, it sounds light, but you and I are not the ones doing it."

As a result of the 1983 DeNucci bill, any physical or sexual assault reported to the Department of Social Services must also be reported to the DA. This accounts in part for the increased caseload. Ruberto is quick to point out that his office and DSS had an exceptional relationship even before the mandate.

"When ECDC broke," he says, referring to the alleged rapes and assaults at the West Side Early Childhood Development Center, "we were able to move quickly and efficiently. Other DAs actually have called us and asked how we did it."

Much of the burden of developing a case of child sexual abuse falls to Elizabeth Keegan, an assistant district attorney. Keegan, who handles all violent crimes for the DA's office, has the least trouble with the youngest children.

"They are honest," she says. "Older children often try to deal with it by themselves and it takes a while to open them up."

Keegan's office looks more like a day-care center than a lawyer's base of operations. It is full of toys and games, all designed to put the victims at ease. The in-

the children do not lie, that if they say someone did something to them, they did.

"Interestingly," Urbano says, "anatomically incorrect descriptions are the most convincing. 'He put his tall between my legs' is very graphic."

"I have never had a false case with a child," McKnight says. "Never."

"Children just do not lie about it," Keegan says.

One issue on the horizon for dealing with the sexual abuse of children is use of video testimony. McKnight, not surprisingly, is an advocate of the technique, thinking to spare the child the ordeal of appearing in court. Part of her work, with that of Keegan's, is to apprise the victim of what is going to happen.

"By the time court comes around," Keegan says, "there should be no shock or surprise. Most children handle it well, although everyone is different."

Urbano sees some troublesome features of video testimony. For one thing, in and of itself, it violates the Sixth Amendment, the right of a defendant to confront his accuser.

"I have no problem with it in show-cause or pre-trial conferences," he says. "Perhaps we need to amend the Constitution and I would be for that, but as it is, we cannot deprive the defendant of his right. We must be careful of that."

The difficulties are apparent to Keegan as well, although on slightly different grounds.

"I am not sure the best thing for the victim is to have a judge and the defendant and the victim and the lawyers all in this room," Keegan says. "It's small. The child can see who is who. It might be more upsetting to have the defendant right there. In the vast Superior courtroom, at least, there is more space, more separation."

One of Urbano's more odious tasks when the victim is a child is to establish, according to state law, the child's ability to testify. It is called *voir dire*, literally, "to see, to say." Urbano says when he hears the DA call for a voir dire, he bows his head and mutters an Oh, no, in the name of the difficulty ahead.

"If we are to have a conviction," McKnight says, "the child must testify."

The question left hanging, both at the beginning of this piece and over society, is: Is the sexual abuse of children increasing or is it merely being reported and prosecuted more?

"I doubt it," Urbano says of increase. "It has always been out there. But now there is an atmosphere in which it can be prosecuted. Thirty years ago the parents would have hushed it up, protecting good old Uncle Ned.

"Now there is no longer the stigma attached to being a victim. It has dawned on society that the person raped is not responsible for it. I would credit rape counseling for that. They are doing a very good job."

Ruberto expresses much the same sentiments and McKnight agrees. But she notes an important development for our sad times.

"Children are being taught how to handle it," McKnight says. "When they grow up they will have a sense that society tried to stand with them."

She refers to a recent case in which a Pittsfield police officer was arrested for allegedly assaulting a child. The implications should he be convicted have shaken the entire system.

"It used to be that you could turn to a cop if the parents were not available," she says. "What now?"

Dec. 8, 1994 7

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

COMMONWEALTH, Plaintiff, v. BERNARD F. BARAN, JR., Defendant.	IND. Nos. 18042-18051; 18100; 18101

NOTICE OF APPEARANCE

The undersigned, John Reinstein, hereby notices his appearance as counsel to John G. Swomley, Harvey A. Silverglate and their associates (defense counsel of defendant Bernard F. Baran, Jr.) for the purposes of opposing the Commonwealth's Motion for an Order Requiring Counsel to Cease Making Public Extrajudicial Statements Concerning The Case.

JOHN G. SWOMLEY, HARVEY A. SILVERGLATE AND THEIR ASSOCIATES,

By their attorneys,

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July 31, 2006

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the following attorney of record by overnight mail on July 31, 2006:

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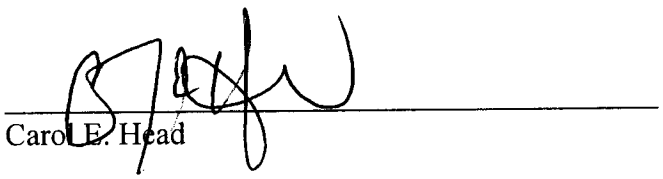

Carol E. Head

COMMONWEALTH OF MASSACHUSETTS

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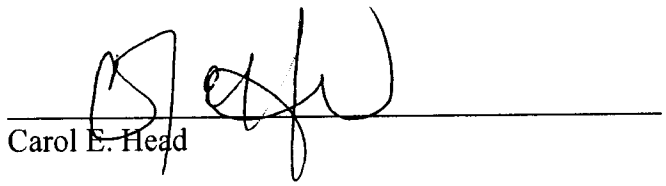

Carol E. Head