

## **Question: Are the laws in the area of child abuse fair for the accused?**

I want to talk to you about how biased and unfair the law has become. Let me give you some examples. We used to have a preliminary hearing. This is a hearing that's held prior to the trial where a judge decides whether or not there is enough evidence to warrant having a trial. We used to be able to call witnesses at that hearing and it gave us an opportunity to question the accuser. Well what happened is in the McMartin case the preliminary hearing lasted about a year and a half. Most preliminary hearings last about a day or a day and a half. The prosecution put a proposition on the ballot to change that – and now they don't even have to call the child in one of these cases, a police officer can get up and testify at the preliminary hearing on behalf of the child. Further, we can't call witnesses, we used to be able to, so if there was a reluctant witness who wouldn't talk to our investigator we could put them on the stand, now we can't do that.

The next law that is really unfair has to do with sentencing. The acts are parsed down into individual little components. Let's say child molestation carries 8 years and the child says "well he touched me on the left breast, then he touched me on the right breast, then he touched me on the vagina, then he touched me on the left breast", well there's four counts at 8 years a piece and that took about 15 seconds, that is why you hear about sentences of 400 years things. The law also is designed to favor that each act be served consecutive, not concurrent tying the judge's hands, which means you add one sentence on top of another, on top of another for each count. Every year there are more and more laws covering this area and they are all designed to make it easier to prosecute and require more severe punishment. For example, people who got sent to state prison get fifty percent credits for good time work time, but not for sex cases. They have to serve eighty-five percent of their sentence, that's an effective increase of seventy percent more time that you spend in a prison even though there's been no change in the law having to do with the length of each count.

What else happened, discretion is taken away from the judges. Most allegations can be filed as mandatory prison sentences with few exceptions. If force or duress is used, you can get a mandatory prison sentence. Well when the legislature passed the law and it said child molestation with force, I think they were thinking about real force. Well the courts of appeal have stepped in and interpreted what force means. And it basically is the physics definition, you know if you push a penny across the table that takes force. The cases I've looked at I've only seen one case that held an act not to be forced and in that case the victim said that she opened her and a penis was in her mouth and it was pulled out and the person didn't touch her with his hands in any way, held no force. However, there are cases where somebody was led down the hallway by the hand, held to be force. A case where somebody was placed on the bed, held to be force. A case where someone put a hand on a shoulder to guide the head of the child towards the penis for oral copulation, the placing of the hand on the

shoulder, held to be force and that makes it mandatory state prison.

But what's duress, duress is another way you can get mandatory state prison. Duress is when you're forced or threatened to do something, you know –“if you don't do it I'll kill you” - that type of thing. Then the court of appeals gets in and starts interpreting what duress means. There's actually a case where it came down that well he was big and I was little and I felt intimidated by that. So mere size difference was held to be duress.

You've heard about the three strikes and you're out law. Were you aware there is a one strike and you're out in sex cases when you have penetration with force? One strike and you're out, 25 to life.

The other area of imbalance in the law that developed had to do with the evidence code. We've spent hundreds of years developing the evidence code based upon only allowing in evidence that's reliable. Well they've made a series of exceptions to the hearsay rule to assist in prosecuting these types of cases. If a child tells a doctor what happened and the child's statements are used in his diagnosis, the hearsay statements are admissible. It doesn't seem to matter that there is no such thing as a diagnosis of sex molest. Remember, sex molest is an event, not a medical condition. That's an exception to the hearsay rule. They just made one, after another, after another exception to the hearsay rules. No such exceptions have been made to help the defense.

The next thing is that for over two hundred and fifty years, propensity evidence has never been allowed in. Propensity evidence means you did something like this in the past, therefore, you must be guilty of it now. What the court found was that people would be convicted for their history rather than for what currently occurred. The courts found it to be extremely prejudicial evidence and it was never allowed in. Well, guess what, a new law has passed which allows in propensity evidence in sex cases.

We also have sex registration. That was a good idea when it started. The police would have a way of keeping track of everyone, but every year the law changes. At first you had to register once where you live and you didn't have to register again. So if you owned a home and stayed there for 30 years you didn't have to register again. They then changed it and you have to register within ten days of your birthday every year and if you don't you're going to go to prison. Then they changed it again and said that if you're out of your domicile for five days, you have to register. Now think about that, that means if you go on a vacation to Hawaii for a week you have to run down to the Honolulu police and register as a sex offender. That can put a little damper on a vacation.

The last thing and the one that I think we're going to be struggling with for years to come is Megan's law. It used to be that the police had access to this information, now this information is available at every police station available for

public view. The problem is if you ever get put on the registry where do you live? They tell your neighbors. Where do you work? They tell your employer.

Every year more and more laws are passed and they are always designed to help the prosecution and strip away the right of the defendant to defend himself. Another thing that I want to mention is the sexually violent predator law. After you've finished serving your complete sentence they can now transfer you to a mental hospital, but the mental hospital has wire around it, cells, looks exactly like a prison. The theory behind it is that it's a civil commitment. If you have somebody whose insane and going out and going to kill everybody with an ax, they can be put that person inside of a mental institution while they are recovering their sanity. Well, here they are saying that you are still a violent dangerous sexual predator even though you've served your complete sentence so we're going to send you to the mental hospital. It's a one way ticket. Very few people ever get out.