

## Senate Judiciary Committee

*Jennifer Horgan 271-3092*

**SB 9**, relative to the admissibility of prior consensual sexual activity in sexual assault cases.

**Hearing Date:** January 24, 2017

**Time Opened:** 9:00 a.m.

**Time Closed:** 9:23 a.m.

**Members of the Committee Present:** Senators Carson, Lasky, French, Gannon and Hennessey

**Members of the Committee Absent :** None

**Bill Analysis :** This bill provides that evidence of prior consensual sexual activity shall not be admitted in any appeal in any court in the state.

**Sponsors :**

Sen. Avar

Sen. Birdsell

Sen. Guida

Rep. Burt

Rep. Hoell

Rep. LeBrun

Rep. Kotowski

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**Who supports the bill:** Senator Avar; Senator Birdsell; Senator Guida; Representative Cushing; Representative Hoell; Lyn Schollett, NH Coalition Against Domestic and Sexual Violence; David Goldstein, NH Chiefs Association

**Who opposes the bill:** Katherine Cooper, NH Association of Criminal Defense Lawyers

**Who is neutral on the bill:** Elizabeth Woodcock NH Attorney General

**Summary of testimony presented in support :**

**Senator Avar**

- Following the conviction of Seth Mazzaglia in the murder of Lizzi Marriott, the defense appealed the case to the Supreme Court.
- Within that appeal, there was a question as to whether or not the Rape Shield Law applies to appeals.
- The Rape Shield Law exists to protect victims from having their past consensual sexual history brought in as evidence during a trial.
- This bill is not perfect and some work needs to be done, but the protections of the Rape Shield Law need to be ensured.

**Lyn Schollett** (NH Coalition Against Domestic and Sexual Violence) (provided written testimony)

- Sexual assault victims have a tendency to not report.
- To a victim, privacy is essential and the Rape Shield Law offers that protection.
- The Internet has made it much more difficult to hold on to that privacy during trials.
- At one point in time there was a move from focusing on the offender to the victim, including what the victim was wearing and their past consensual sexual history.

- This resulted in many states passing rape shield laws in the 1970s.
- During the Lizzi Marriott trial, the Court ruled twice that information on the victim's sexual past would be kept out of the trial.
- When the defense appealed the case to the Supreme Court, the Supreme Court announced that they would be releasing Lizzie Marriott past sexual history as the Rape Shield Law is not applicable in an appeal. The Court eventually decided to not release that information.
- The defense also argued during the trial that Lizzi's thoughts and expressions should not fall under the Rape Shield Law.
- There are two main reasons why rape shield should still apply in an appeal. One, rape shield protections are governed by statute and the NH Rule of Evidence. Rule 412 clearly states that evidence of prior sexual activity between the victim and another person should not be admitted in a case. Furthermore, Rule 1101(a) says that evidentiary rules apply to proceedings in the district and probate divisions of the circuit court, the superior court, and the supreme court.
- This bill is simply bringing NH's statutory language in line with NH's rules.
- There are no other privileges that disappear in an appeal.
- Without this protection, if an offender was acquitted of rape, the information that was kept private during the trial would remain private and sealed, but if an offender is convicted of a rape and appeals the case that information would become public.
- This would hamper the state from prosecuting and would deter victims from coming forward.
- Seth Mazzaglia's lawyer argued during the trial that the interests or thoughts on sexual activity of the victim were not covered by the rape shield.
- If lawyers were to introduce what an individual thought or said at one time regarding sexual activity that would completely remove the protections of the rape shield.
- Provided language to the Committee that will make it clear that the Rape Shield Law applies to thoughts and expressions, as well as, in an appeal.
- Senator Hennessy questioned the use of the language "any person other than the actor" on line 3.
  - When looking at rape shield laws around the country there is often an exception for the sexual history of the victim with the person that is being charged. Would love to see that go away, but the reason for it is the idea that the defendant be able to argue that it wasn't clear there wasn't consent because of the victim's past consent to that activity. Therefore, the court gets to consider that activity.

### **Representative Cushing**

- Looking at the history of the treatment of gender crimes, there has been a lot of progress in recognizing that preexisting relationships should not be considered in these cases.
- Agrees with amending the bill to encompass thoughts and expressions.
- Given the actions of the Supreme Court this last summer, thinks this is an opportune time to bring this forward.
- The actions by the Supreme Court and the prosecution had a direct effect on the Marriott family.
- The idea that, that kind of information would be put out in the public domain where the family could not escape it, would be a further traumatization of the Marriott Family.

- Survivors of homicide victims are co-victims under NH state law.

**Summary of testimony presented in opposition :**

**Katherine Cooper** (NH Association of Criminal Defense Lawyers)

- The bill does not do what the sponsors are trying to achieve.
- During an appeal at the Supreme Court there is no introduction of new evidence.
- This has the ability to cause confusion.
- The Supreme Court did decide to keep the information confidential in the Marriott case.
- Senator Lasky asked if she had any comments on the amendment.
  - It still has the same problem as the original bill and the additional language removes an aspect that is frequently necessary for mental state and proving or disproving consent. Does not think the amendment would pass constitutional muster.

**Neutral Information Presented:**

**Elizabeth Woodcock** (NH Attorney General)

- Here to answer questions on behalf of the Attorney General.
- Shares the concerns of Attorney Cooper.
- Thinks the point of the bill is well taken because victims are protected during the course of the trial.
- This probably needs to be rewritten to make it clear as to exactly what the intent of the bill is.
- Is happy to work with the sponsors and look at what other states have done to address this.

**Future Action:** Pending

JCH

Date Hearing Report completed: January 24, 2017