**MEMORANDUM OF LAW AND ARGUMENT SUPPORTING OPPOSITION TO MOTION TO DISMISS THE CHARGES BASED ON LACK OF SPECIFICITY**

**Commonwealth of Pennsylvania**

**Court of Common Pleas**

The Commonwealth alleges that the defendant, on diverse dates between [DATES], engaged in prohibited sexual conduct with complainants [VICTIMS]. These acts occurred while the complainants were cleaning for the defendant at his place of business, after school hours and on weekends and throughout the week while school was out. The defendant threatened the complainants in order to prevent their disclosure of his acts.

The bills of information, read in conjunction with the Commonwealth’s response to the request for a bill of particulars, outlines the dates of the alleged instances with more than sufficient specificity. In accordance with *Commonwealth v. Niemetz*, 422 A.2d 1369 (Pa. Super. Ct. 1980) and *Commonwealth v. Shirey*, 481 A.2d 1314 (1984), *aff’d*, 494 A.2d 420 (Pa. Super. Ct. 1985), the defendant’s motion to dismiss must be denied.

In *Niemetz*, the Commonwealth alleged in its information that the offenses occurred “on or about diverse dates beginning in 1972 and continuing until August, 1977.” The case involved a continuing course of sexual assault of the victim by her stepfather. The appellate court upheld the trial court’s denial of defendant’s motion to quash based on lack of specificity.

The *Niemetz* court found no harm done to the defendant’s substantial rights. In so holding, the court wrote:

The information in the instant case averred the commission of offenses “on (or about) diverse [sic] dates beginning in 1972 and continuing until August, 1977.” This course was adopted because the Commonwealth was unable to “state the dates on which the offenses occurred with any more specificity.” Since time is not of the essence in the crimes for which appellant was charged and convicted, the pertinent allegation contained in the information appears to fit precisely Rule 225’s proviso that an allegation that an offense was committed “on or about any date within the period fixed by the statute of limitations shall be sufficient” when (1) time is not of the essence and (2) a precise date is unknown . . . . Moreover, we do not believe that it would serve the ends of justice to permit a person to rape and otherwise sexually abuse his child with impunity simply because the child failed to record in a daily diary the unfortunate details of her childhood. *Id*. at 1373.

The Commonwealth would also point out that the time period specified in the instant case is approximately five months; in *Niemetz*, the upheld information specified a *five* year period during which the offenses occurred.

In *Commonwealth v. Shirey*, the appellate court again upheld the trial court’s denial of the defendant’s motion to quash, citing *Niemetz*. The bills of information in *Shirey* involved sexual assault of several minors which occurred between June, 1979 and December 1979. The court rejected defendant’s claim that the lack of specificity of the information so hindered defendant’s ability to present an alibi defense so as to compel dismissal. The court found the information to be sufficiently specific as the case involved a continuing offense.

In *Commonwealth v. Fanelli*, 547 A.2d 1201 (Pa. Super. Ct. 1988), *appeal denied*, 565 A. 2d 1165 (Pa. 1989) (*en banc*) a six-year-old’s testimony that her mother’s boyfriend sexually assaulted her once within a two-year span was held to be sufficient to withstand the defendant’s due process challenge. The court noted the victim’s age, the threatened harm by the defendant if she disclosed the abuse, and the apparent lack of support from her family as factors supporting the broad time frame alleged. And in *Commonwealth v. McClucas*, 516 A.2d 68 (Pa. Super. Ct. 1986), the court upheld an indictment charging ongoing sexual assault over a five-year period as sufficient.

The position of these Pennsylvania decisions is consistent with that of other jurisdictions. Throughout history, courts have routinely held that, because a specific date or time is not an element of the crime of sexual abuse, the failure to provide such information with specificity is not a deprivation of the defendant’s right to adequate notice. *See, e.g., State v. Spigarolo,*  556 A.2d 112 (Conn.), *cert. denied*, 493 U.S. 933 (1989) (allegation that defendant sexually abused two girls, ages six and nine, on various dates between October 1984 and January 3, 1985 sufficient); *Johns v. State*, 352 S.E.2d 826 (Ga. Ct. App. 1987) (indictment alleging that crime occurred between March 1981 and September 1981 sufficiently established time when offense occurres, given evidence defendant committed offense during March 1981 and offense within statute of limitations period); *State v. Mulkey,* 560 A.2d 24 (Md. 1989) (indictment stating offenses occurred over three consecutive summers sufficient); *State v. Hobain*, 738 S.W.2d 536 (Mo. Ct. App. 1987) (allegation of multiple sexual assaults over 15-month period sufficient); *State v. D.B.S.*, 700 P.2d 630 (Mont. 1985) (four-year-old’s allegation of single incident of incest during 10-month period sufficient); *State v. Corbin*, 809 P.2d 57 (Ct. App.), *cert.denied*, 809 P.2d 634 (N.M.1991) (assault occurring over a four month period); *People v. Mendoza,* 5651 N.Y.S.2d 183 (App. Div. 1990) (counts in indictment designating four distinct periods reasonable); *State v. Hoyt*, 806 P.2d 204 (Utah Ct. App. 1991) (indictment charging defendant with sexual abuse of child at particular motel where defendant registered at four well-defined times over course of four months sufficient).

*See also*, *United States v. Williams,* 40 M.J. 379 (C.M.A. 1994); *Cure v. State*, 600 So.2d 415 (Ala.Crim.App. 1992); *People v. Jones,* 792 P.2d 643 (Cal. 1990); *Dell’Orfano v. State,* 616 So.2d 33 (Fla. 1993); *Brewer v. State,* 562 N.E.2d 22 (Ind. 1990); *Commonwealth v. King,* 441 N.E. 2d 248 (Mass. 1982); *State v. Weller,* 801 S.W.2d 417 (Mo. 1990); *State v. Little,* 861 P.2d 154 (Mont. 1993); *In Re K.A.W.,* 515 A.2d 1217 (N.J. 1986); *People v. Morris,* 461 N.E. 2d 1256 (N.Y.S. 1984); *State v. Oliver,* 354 S.E.2d 527 (N.C. 1987); *State v. Daniel,* 647 N.E.2d 174 (Ohio 1994); *State v.Wingo,* 403 S.E. 2d 322 (S.C. 1991); *State v. Floody,* 481 N.W. 2d 242 (S.D. 1992); *State v. Bates,* 784 P.2d 1126 (Utah 1989); *State v. Infante,* 596 A.2d 1289 (Vt. 1991); *State v. Miller,* 466 S.E.2d 507 (W.Va. 1995); *State v. Sorenson,* 421 N.W.2d 77 (Wis. 1988).

It is widely recognized that the nature of child abuse and children’s development limitations frequently make it difficult for the prosecution to allege offense dates with specificity. Child abuse in general is a secretive crime which is usually not observed by an independent witness who might be in a better position than the child to specify when the offense occurred. Offenders commonly manipulate children to maintain secrecy of the abuse, often coupling this with threats to the child if they disclose, all of which may operate to delay disclosure of the offense until a substantial period of time has elapsed and the child is not in a position to recall the time period with greater specificity. Furthermore, the repeated nature of abusive acts occurring on multiple occasions over longer periods of time makes it more difficult for children to place any one incident within a specific time period. Additionally, child victims do not have the developmental capacity to recall time periods with the same degree of specificity as do adult witnesses, since they have greater difficulty in placing the abusive acts within a chronological framework associated with their life events.

In recognition of these difficulties, legislatures in several states have drafted specific statutes to permit charging of multiple incidents over broad time periods.  *See*, *e.g*., Ariz. Rev. Stat. § 13-1417, Cal. Penal Code § 288.5, Del. Code Ann. tit. 11, § 778, Haw. Rev. Stat. § 707-733.5, Wis. Stats. Ann. § 948.025. These statutes provide additional persuasive authority that the Commonwealth’s information in this instance satisfies due process.

Under the authority of *Niemetz*, *Shirey*, *McClucas* and *Fanelli*, as well as the supporting case and statutory authority from other jurisdictions cited above, the Commonwealth requests that the court deny the defendant’s motion to dismiss.

Dated:

Respectfully submitted,

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***Assistant District Attorney***