

PROSECUTING SEXUAL VIOLENCE IN CORRECTIONAL SETTINGS: EXAMINING PROSECUTORS' PERCEPTIONS[†]

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Introduction

The Prison Rape Elimination Act of 2003¹ (PREA) is the first piece of federal legislation, which expressly and exclusively addresses sexual abuse of persons in custody. Notwithstanding passage of the Act, there is clear belief, echoed by correctional leaders, that prosecutors are reluctant at best, and unwilling at worst, to prosecute cases of sexual violence in correctional settings. In order to gather information on prosecutor interest in and capacity to prosecute these cases, the National Institute of Corrections Project on Addressing Prison Rape at the Washington College of Law the (the NIC/WCL Project) collected data from state and federal prosecutors.

This article draws on that research and data to examine the perception that prosecutors are unwilling to prosecute cases of sexual violence in custody, discusses barriers to prosecution identified by prosecutors regarding investigating and prosecuting allegations of sexual abuse of persons under correctional supervision, and recommends tools to overcome those barriers.

Background and Methodology

Background

In 2000, the NIC/WCL Project began training high-level correctional administrators on identifying, addressing, and investigating allegations of staff sexual misconduct with offenders. Each year eight training teams from different states fielded three-person teams composed of key correctional decision makers for the state or agency, e.g., sheriffs, wardens, commissioners, and heads of human resources, investigations and training. Relatively quickly, correctional leaders acknowledged that staff sexual misconduct was an important safety issue that agencies needed to address. However, strengthening investigations and sanctions remained challenging. While investigators and correctional administrators knew they had much work to do to improve investigations, they complained that prosecutors were unwilling to take cases to trial. As a result, often their only tool was termination of the employee in strong cases and allowing the employee to resign in others.²

After hearing for some time that investigations were fruitless because of a lack of prosecutorial interest in sexual violence against persons under custodial supervision, the NIC/WCL Project required each three-person team that attended its investigative training to include a state or local prosecutor. They believed this inclusion would create collaboration and

help each—corrections leaders and prosecutors—understand the other's challenges in addressing sexual violence in custody. Segments of the training, *Investigating Allegations of Staff Sexual Misconduct with Offenders*, were specifically designed to identify the barriers to prosecuting cases of sexual abuse of individuals under correctional supervision and strategies for overcoming those barriers.³

While training eight prosecutors a year for each of the state teams was helpful to the states, the NIC/WCL Project sought to have a larger impact. Seeking to address the lack of information on prosecuting sexual violence in custody, the NIC/WCL Project sought, and was granted, funding from the National Institute of Corrections (NIC) to work with prosecutors to develop a report addressing the existing relationships between law enforcement, correctional professionals, and prosecutors in addressing and prosecuting cases of prison rape.

Methodology

The NIC/WCL Project used three methods to compile information for the report. First, it conducted a literature review in order to identify previously identified barriers to prosecuting cases of sexual abuse of individuals in custody. Second, a NIC/WCL Project consultant conducted telephone and in-person, one-on-one interviews of prosecutors from February to May of 2006. Finally, the Project conducted a series of focus groups with federal and state/local prosecutors.

Literature Review

The NIC/WCL Project reviewed five kinds of resources: (1) case law; (2) statutes; (3) government reports; (4) reports by advocacy groups; and (5) news stories. The literature review provided background on sexual abuse of individuals in custody and validated barriers that prosecutors later identified in interviews and focus groups. The literature review also assisted in drafting questions to be asked during interviews of individual prosecutors and during focus groups of federal and state/local prosecutors.

Interviews

An NIC/WCL Project consultant conducted both telephone and face-to-face interviews with state/local and federal prosecutors from around the country. Eight formal interviews and twelve informal interviews were conducted. The interviewees were selected based on the following criteria: (1) jurisdiction; (2) experience prosecuting sex cases; (3) experience prosecuting prison cases; and (4) referrals by other legal and correc-

tional professionals in the field.

Interview participants were asked the following questions:

1. What is your experience in the area of prisons (prosecutions, sexual abuse, contract facilities)?
2. Why are allegations of sexual abuse of prisoners rarely prosecuted?
3. What barriers exist to prosecuting these cases?
4. What can be done to lift the barriers and improve the likelihood of prosecuting these cases?
5. What is the response of judges and juries regarding the sexual abuse of prisoners?
6. What about cases involving inmate-on-inmate sexual violence - are these cases successfully prosecuted?

Focus Groups

After holding a series of “breakout sessions” with prosecutors during NIC/WCL Project training sessions, it was apparent that group discussions with prosecutors would yield rich information on this subject. In the interest of reaching a greater population of prosecutors, the NIC/WCL Project held focus groups with federal and state/local prosecutors. The focus groups also generated discussions and encouraged the exchange of ideas between prosecutors, which could not be accomplished through one-on-one interviews. Twenty-seven prosecutors attended the focus group meetings—seven federal and twenty state and local prosecutors.⁴

Federal Focus Group

The federal focus group consisted of seven federal prosecutors, two federal investigators and one federal victim services coordinator. The NIC/ WCL Project extended invitations to individuals based on recommendations from former prosecutors and the United States Department of Justice (DOJ). During the first session of the meeting, prosecutors identified their experience with prosecuting cases from correctional agencies with a focus on sexual assault and abuse. During the second session, prosecutors addressed issues of barriers to federal prosecution and tools available to overcome those barriers.

State Focus Group

The state focus group consisted of nine state and local prosecutors. The NIC/WCL Project extended invitations to individuals based on recommendations from correctional practitioners and past participants of NIC/WCL Project trainings. Specifically, the NIC/WCL Project sent a request to its listserv for contact information of prosecutors who had either prosecuted these cases or were particularly helpful in getting these cases heard. The NIC/WCL Project received over twenty responses from correctional professionals across the country. In extending the final invitations, the NIC/WCL Project considered geo-

graphic location and prosecutorial success. While all of the prosecutors who received invitations were interested in the Project, many could not attend the focus group because of scheduling conflicts. Issues addressed during the state prosecutors’ focus group mirrored those from the federal prosecutors’ meeting. Findings from the study are detailed below.

The Perception that Prosecutors Are Unwilling to Prosecute Cases of Sexual Violence in Custody

The perception that prosecutors are either reluctant or unwilling to prosecute cases of sexual violence in custody is well-founded. Both government reports⁵ and testimony by current⁶ and former prosecutors⁷ reveal that these cases present significant challenges in the current prosecution environment. First, these cases are not high profile, high value cases; they do not increase the stature of the prosecutor within his office and the community at large. In fact, prosecuting these cases could significantly weaken a prosecutor’s standing in the community by making her appear to be soft on criminals. Additionally, in many jurisdictions correctional staff are sworn peace officers who, as alleged sexual offenders, are the same individuals that prosecutors must rely on to testify in their other criminal cases.

Second, unsympathetic victims, delayed reports of the assault, lack of physical evidence, poor investigations, and conflicting testimony in these cases make them high risk cases. Prosecutors often measure their success by their wins.⁸ Sexual assault cases are notoriously hard to win.⁹ Custodial sexual abuse cases are even more difficult and expose prosecutors to the possibility of expending valuable resources on a case that may not have a high likelihood of prosecutorial success – either a plea or conviction.

Third, prosecutors often see their role as securing significant sentences for hardened criminals. Some may even believe that being assaulted, physically or sexually, is a part of the penalty for the crime. However, the more informed view is that prosecutors must ensure that individuals who are sentenced to imprisonment are in safe and secure environments. Either way, prosecutors may be reluctant to pursue prison sexual assault cases because they see their job as done after securing the conviction or because they do not view crimes that occur in confinement as part of their purview.¹⁰

Barriers to Prosecuting Prison Sexual Assault Cases

Differences between Administrative and Criminal Cases

One of the major barriers identified by both state and federal prosecutors is the difference in standards of proof required for discipline in administrative proceedings and the burden of proof that prosecutors must meet in criminal proceedings. In administrative proceedings, the standard of proof required by the person seeking the administrative action is generally “preponderance of the evidence.”¹¹ In criminal cases, prosecutors will only secure convictions if they prove each

element of an offense “beyond a reasonable doubt.”¹² Both Inspector General Glenn Fine and Senator Jeff Sessions discussed the lack of prosecutions in custodial sexual abuse cases in their testimony before the National Prison Rape Elimination Commission (NPREC).¹³ They both noted the importance of prosecutions, yet acknowledged the difficulty in bringing these cases.¹⁴ Each raised the standard of proof as one of the major difficulties in prosecuting prison sexual assault cases.¹⁵

Staff Sexual Abuse of Offenders

During focus groups held with state and federal prosecutors, attendees pointed out that proceedings to impose administrative sanctions often preceded criminal prosecutions in staff sexual misconduct cases. They agreed that this timing often creates a problem for criminal prosecutions.¹⁶

First, the burden of proof in an administrative proceeding is lower. If a staff member is successful in the administrative proceeding, it often implicitly discourages additional action in the criminal matter, given the lower burden of proof in administrative cases. Second, investigations that are conducted for purposes of the administrative proceedings can often taint later criminal prosecutions, particularly if the suspect employee is compelled to testify under threat of losing employment. Case law makes clear that, employee testimony secured under threat of firing is compelled and cannot be used in a later criminal prosecution.¹⁷ Finally, often correctional staff are allowed to resign, an administrative sanction, in lieu of being criminally prosecuted for sexual abuse with persons in custody. Prosecutors generally recognize that with the burden of proof so high for a criminal case, administrative sanctions will be the most likely outcome in many cases and thus recommend harsher administrative penalties as a substitute for prosecution.¹⁸

While this may seem to be an appropriate solution, it creates a number of problems. In particular, staff who resign or are even fired are often rehired in other correctional environments, potentially importing their predatory behavior with even more vulnerable populations. Moreover, in the absence of a criminal conviction, it is difficult to flag predatory staff. Agency fears of employee lawsuits for libel or slander,¹⁹ mean that in practice employers provide little information other than the dates of employment for past employees, giving little notice to others of the reason for termination. Finally, the resignation creates a sense among employers and prosecutors that the matter is resolved. Given the high burden of proof in criminal cases, many prosecutors see this as a just result, failing to realize that prosecution accomplishes other goals – a public recognition that sexual abuse of offenders rises to the level of a crime, that prisoners are victims who deserve their day in court as well, and that no one is above the law.

Inmate-on-Inmate Sexual Abuse

Most prosecutors, federal and state, who were interviewed and attended focus group meetings, had not tried inmate-on-inmate sexual abuse cases. Federal investigators and prosecutors noted that they may not have seen inmate-on-inmate cases because investigation of those incidents in Federal Bureau of Prison (BOP) facilities are handled by the Federal Bureau of Investigations (FBI). Both federal and state prosecu-

tors agreed though, that a more likely scenario is that the incidents of inmate-on-inmate sexual abuse are not being reported or are handled administratively. While federal prosecutors stated that they would prosecute a forcible rape case if one was brought to them, none who participated in the focus groups or individuals interviewed had ever done so.²⁰

“Consensual” v. Forced Sex

Another barrier to prosecuting cases of sexual violence in custody is the issue of consent.²¹ The defense of consent is a major factor in the decision to prosecute these cases, according to both federal and state prosecutors. This is true whether the case involves staff sexual abuse of inmates or inmate-on-inmate abuse.

Staff Sexual Abuse of Offenders

All fifty states, the District of Columbia, and the federal government prohibit staff sexual abuse of offenders.²² Twenty-five states and the District of Columbia specifically provide that inmates cannot consent to sex with staff.²³ The large majority of states recognize that staff have tremendous control over every aspect of an offender’s custody. That imbalance of power negates consent. However, two states, Nevada and Delaware, have laws which recognize that inmates can consent to sex with staff. In Delaware and Nevada, inmates can be prosecuted for consensual sex with staff members.²⁴

Even though statutes, were enacted to address the issue of inmate consent by creating separate crimes for this offense, prosecutors still find it difficult to prosecute these cases. Both state and federal prosecutors noted that while it was easier for juries to understand the abuse of power issue, juries have problems accepting the credibility of inmates. Juries perceived inmates as liars with a bias against corrections staff, as well as having a financial motive for making the allegations. Additionally, prosecutors reported that juries often viewed both male and female inmates as seducers of correctional staff.²⁵ Often, both male and female inmates have histories of work in the sex industry, and histories of physical and sexual victimization.²⁶ These histories make them more vulnerable to sexual abuse and at the same time more willing to use sex to bargain for better treatment.²⁷ For example, in a 2005 Bureau of Justice Statistics (BJS) publication on correctional authorities’ reports of sexual violence in custody, correctional agencies classified two-thirds of all staff sexual abuse of inmates as romantic; in 2007, they classified fifty-seven percent of staff sexual abuse of inmates as “appeared willing.”²⁸

Inmate-on-Inmate Sexual Abuse

Inmate-on-inmate sex in correctional settings presents a different barrier to prosecution. In correctional settings, there is a continuum of sexual behavior between inmates that goes from rape to completely consensual sex. Between those ends of the spectrum are coerced and strategic sex.²⁹ Complicating matters, consensual sex today can become forced, coerced or strategic at some other point. In other words, the behavior and the motivation of the parties are not static and often change. This flux in the conduct creates tremendous bar-

riers to prosecution both in the community and in prison. One federal prosecutor stated that she would be unlikely to prosecute a case of inmate-on-inmate sexual abuse unless there was physical evidence of violence such as injuries or eyewitness testimony.³⁰ Prosecutors reported less interest in a case where “consent” is an available defense unless there was also evidence of additional crimes, such as the presence of contraband or the threat of violence.

While consensual sex between inmates may be a conduct code violation punishable administratively, it is generally not a crime. Even in those places where it is a crime,³¹ it is not a high priority for prosecutors. If one offender claims that the sex was consensual, prosecutors complain that they become “he said, she said” cases involving two inmates, both convicted offenders with clear issues of credibility.

Deficiencies in Criminal Laws Prohibiting the Sexual Abuse of Individuals in Custody

Prior to 1990, most state and federal jurisdictions did not have laws which specifically prohibited the sexual abuse of individuals under correctional supervision by correctional staff. As a result, few corrections staff could be prosecuted for the sexual abuse of persons in custody. Today, each of the fifty states and the federal government have passed laws making it a crime for correctional staff members to engage in any sexual conduct with a person in custody.³²

Even after this conduct was criminalized, however, sexual abuse of persons in custody by corrections staff carried relatively lenient sentences compared to sexual assault statutes covering rape in the community.³³ This was especially true under federal law, where prior to 2006, sexual abuse of a ward was a misdemeanor.³⁴ Not surprisingly, federal prosecutors cited low penalties as the primary reason for not prosecuting custodial sexual abuse cases.³⁵ Recent amendments to state and federal laws have substantially increased the penalties for sexual abuse of offenders, but it is difficult to determine the effect of these enhancements on prosecution, particularly in the federal system where the changes are so recent and prosecution statistics for these cases have not been studied.³⁶

Federal Law

In April 2005, the Office of Inspector General (OIG) issued a report which found federal laws prohibiting sexual abuse of persons in custody deficient in two respects. First, while the federal law³⁷ criminalized all sexual relations or contact between prison staff and offenders, those acts were classified as misdemeanors, and thus punishable by a maximum sentence of one year, unless the conduct involved force or overt threats. Second, the OIG report noted that the federal laws did not apply to employees of contract facilities,³⁸ further hampering OIG and federal prosecutors in “obtaining prosecutions” of sexual abuse in those facilities.³⁹ Compounding the problem was the fact that state prosecutors often had limited resources which they could focus on prosecuting sexual abuse in correctional facilities at the state level. This lack of resources fore-

closed them from prosecuting cases that occurred in private contract facilities which often housed federal inmates.

OIG recommended that federal law be amended to correct these deficiencies. Amendments were passed and became effective on January 5, 2006, making sexual abuse of an offender by corrections staff, absent force or overt threats, a felony punishable by up to five years imprisonment. The amendment also expanded federal jurisdiction to include sexual abuse of federal prisoners housed in private correctional facilities. Another piece of legislation, The Adam Walsh Child Protection and Safety Act, also passed in 2006. This Act increased penalties for the sexual abuse of a minor or ward to fifteen years.⁴⁰

The new legislation should result in more cases involving allegations of sexual abuse in BOP facilities being investigated⁴¹ and presented to United States Attorney’s Offices (USAOs) for prosecution. However, the likelihood of full prosecution on the merits after a case is presented remains to be seen. Still, prosecutors faced with limited resources must consider investing time and resources in cases where victim/witness reliability is an issue and where potential defendants are law enforcement officers who are community members without criminal records. Prosecutors are also concerned about jury and judge appeal for the reasons identified above. The combination of these two factors creates a perceived and real risk that prosecutions will fail. Additionally, sex offender registration requirements, while providing stronger penalties,⁴² also makes judges and juries more reluctant to convict these law enforcement defendants in the absence of exceptionally strong evidence.⁴³

State Law

While all states have criminalized, in some form, the sexual abuse of persons in custody, these laws are not uniform and vary widely. State prosecutors report that often state statutes still do not cover custodial sexual abuse in a number of settings--parole and probation for example.⁴⁴ Some states allow consent as a defense in staff abuse of inmates⁴⁵ and still others impose minimal sanctions.⁴⁶

In some states, prosecutors voiced frustration with their statutory scheme that only made prosecution of sex offenses of persons in custody a misdemeanor. With low maximum penalties, i.e., misdemeanor status, prosecutors believed it signaled that the offense was not serious, or at least not a priority. Others felt it gave them far less bargaining power in plea negotiations. Moreover, in many states, corrections officers cannot be terminated simply because they have a misdemeanor conviction.⁴⁷

Some state prosecutors pointed out that other tools such as revoking peace officer certifications or licenses may help. Additionally, they felt that sex offender registration could act as a bargaining chip because fewer people would risk going to trial if they knew they might be required to register as a sex offender if convicted. Ultimately however, state prosecutors agreed with their federal counterparts that, especially in cases of staff sexual misconduct, mandatory sex offender registration

could hinder successful prosecutions because agencies are more likely to keep incidents in house and because defendants are more likely to go to trial.

Lack of Prosecutorial Experience

Trying Sex Abuse Cases

Prosecutors face a number of difficulties proving allegations of sexual abuse of persons under correctional supervision. Prosecutors recognize that sex crimes are among the most difficult cases to prosecute regardless of the status of the victim. Many prosecutors and investigators interviewed for this article articulated the unique difficulties in prosecuting allegations of sexual abuse or assault, whether or not those crimes occurred in institutional settings. They noted that these cases are difficult to prosecute because they rely on many aspects of a good investigation to corroborate the victims' reports including: proper processing of crime scenes; collection and preservation of evidence; knowledge of physical, medical and scientific evidence; prompt reporting and cooperation from the victim; proper interviewing of victims and witnesses; and corroboration of the victim's testimony by other witnesses or physical evidence. Unfortunately, these ingredients are often missing in institutional investigations of custodial sexual abuse.

Prosecutors believe that obtaining a thorough and prompt investigation is more difficult in the corrections environment. This difficulty is compounded by the lack of training that correctional investigators receive in responding to sexual assaults in custody.

Additionally, most states lack staff or units who primarily prosecute sex cases. These cases are often assigned to prosecutors who must take any case that comes to them. Prosecutors who lack experience trying sexual assault cases may not fully understand the dynamics of sexual violence, which is important at every stage of the investigation and prosecution from the first interview with the victim, to crafting opening statements, direct examinations, and closing arguments. Moreover, understanding the dynamics of sexual violence and a jury's possible reaction to the victim or circumstances of a particular case, can inform prosecutors' decisions about cases. Familiarity with forensic evidence, like DNA, and special rules of evidence that apply in sexual assault cases, such as rape shield laws, are also important for successful prosecutions.

One former federal prosecutor illustrated the need for experience and training by describing a case that he tried and lost involving the sexual abuse of a fourteen-year old girl by a corrections official at a halfway house. The prosecutor said that at the time of the trial he was surprised at the loss because he thought the case was strong, but realized in hindsight that his lack of experience trying sexual assault cases led him to misjudge the strength of his evidence and how the jury would view the credibility of the victim.⁴⁸

State prosecutors reported that sex crimes in general require a very specialized knowledge. Even seasoned prosecutors expressed concern that prosecutors know little about corrections institutions making prosecuting sex crimes an even more daunting task.⁴⁹ These cases, according to state prosecutors, require prosecutors to learn an entirely new culture. In

some ways, prosecuting sexual abuse of an offender is at odds with prosecutors' culture and belief systems. State prosecutors noted that they spend most of their career sending people to prison, and it is a shift in culture and way of thinking to advocate for offenders by prosecuting their abusers.⁵⁰

Trying Cases from Correctional Settings

Prosecutors and investigators noted that prosecutors are not sufficiently knowledgeable about prisons, prison culture or correctional practices. Federal investigators also felt that prosecutors did not have sufficient knowledge of issues such as the coercive influence of contraband on sex and security in the institution, and admittedly, many prosecutors and investigators have never been inside a correctional facility prior to their involvement in these cases.

One prosecutor, who has seen many cases from her state prison system, said that it took prosecutors in her office some time just to understand the prison's record keeping system. She said that every time they prepared for trial and assured defense counsel and the judge that all documentation from the prison had been provided in discovery, they learned of new documents. Finally, her office learned that the prison kept two sets of records, one for the prison and a second to provide to prosecutors and police. She said that in some cases, they also described crimes in a third set of documents created and maintained by the intelligence branch of the prison. The prosecutor said that until all of the document problems were resolved with the prison, the prosecutors had trouble meeting their discovery obligations in these cases.

Lack of Understanding About the Correctional Environment

Some corrections administrators and investigators believe that prosecutors do not have a full appreciation of the impact of sexual abuse on inmates.⁵¹ Sexual abuse of persons in custody violates constitutional rights, creates psychological and emotional trauma,⁵² may result in disciplinary actions against the victim, and undermines the safety and security of the institution.⁵³

Sexual abuse of persons in custody also undermines the system of security of the institutions because often it is not limited to sexual abuse. Nearly half of the subjects in federal staff sexual misconduct cases also smuggled contraband into prisons for the offenders with whom they had sexual relationships.⁵⁴ Many of these staff members helped offenders conceal contraband by alerting the offenders to unannounced searches or by storing contraband with the staff's possessions.⁵⁵ This quid pro quo relationship for the purpose of engaging in sexual conduct with an inmate compromises safety barriers and subjects the remaining prison population and correctional staff to substantial risk.

Witness Credibility

Credibility of witnesses is paramount in any sexual assault case. The credibility of an inmate witness in cases of sexual abuse in correctional settings is immediately suspect because of his status as an offender.

Both state and federal prosecutors have reported that in cases where the only evidence is the victim's report with no corroboration—the case is virtually untriable. Credibility issues that are not supported by physical evidence, corroborated by correctional staff, or have multiple victim incidents become a case of “he said, she said.”⁵⁶ According to prosecutors, the risk of trying these cases is great. The high likelihood of an acquittal may offset the deterrent effects of investigating these cases as well as discourage prompt reporting of sexual assaults for fear of retribution following an acquittal at trial.

Multiple interviews of victims that generally happen in the correctional setting can also have an impact on whether prosecutors accept a case. Inconsistencies in statements and the victim's credibility in general led one federal prosecutor to believe a victim was lying.⁵⁷ That prosecutor indicated that there are many cases of sex between staff and offenders that are not presented to prosecutors because there was often no evidence. In order to corroborate the victim's story, prosecutors want physical evidence and contemporaneous reporting, or the knowledge that the staff member had assaulted more than one offender.⁵⁸

Federal prosecutors also agreed that if there is no physical evidence or non-inmate proof of the abuse, they are less likely to take the case generally because of credibility issues with the victim.⁵⁹ Prosecutors admitted that even if they do prosecute, witnesses who are incarcerated are often immediately impeached with past convictions. One prosecutor felt that jurors assess the credibility of a witness from a correctional setting the same way they assess the credibility of any witness, but because they are felons, they are presumed to lack credibility by many jurors and indeed jury instructions direct that jurors may consider previous convictions in assessing credibility.⁶⁰

Recommendations for Improving Prosecutions of Correctional Sex Abuse Cases

Train Prosecutors on the Dynamics of Sexual Abuse in Correctional Settings

Training prosecutors on techniques for prosecuting custodial sexual abuse cases is critical. Additionally, while it is important to train prosecutors, it is essential to take a team approach and include federal and state level investigators, law enforcement, facility administrators and correctional staff, and victim advocates to have a collaborative effort in understanding the dynamics of prison rape.

The Civil Rights Division of the Department of Justice recommends that U.S. Attorneys team with them in order to train prosecutors on the unique techniques used in sex crimes cases such as the use of a grand jury, interview techniques, and the benefits of having an OIG investigator involved—techniques that are not used in other cases. They suggested curricula that included: (1) correctional culture; (2) prosecuting a sex crime; (3) security implications; (4) understanding sexuality in a correctional setting; (5) corroboration and alternative evidence to DNA; (6) helping judges and juries to sympathize

with your victim; and (7) creative tools for prosecution.

Finally, prosecutors and investigators need to understand that investigating and prosecuting custodial sexual abuse cases are important. These prosecutions are essential to maintaining safe, secure and humane institutions and communities. Custodial sexual abuse closely correlates with other issues such as contraband, coercion and use of force. In order to protect other staff and inmates in these environments, it is important to prosecute these cases.

Build Relationships with Others in the Field

In order to overcome barriers to prosecuting these cases, it is important for correctional officials, investigators and prosecutors to understand each other's roles and challenges. In order to build these relationships, focus group participants recommended forming agency task forces, composed of investigators, prosecutors, correctional staff, law enforcement and victim services.

Specific to federal prosecutions, focus group participants recommended having an investigative agent housed in the U.S. Attorney's Office in order to reduce problems prosecutors have identified in regards to resources—staff time and cost for the prosecutor's office. For state systems, using outside law enforcement can help gain credibility. Many agencies recommend using third-party investigative units in state prisons and local jails. Establishing an investigative protocol that includes outside law enforcement, who often have special sexual assault units, adds credibility to the case because they often bring special skills and resources and are not perceived as allied with correctional agencies.

Amend State and Federal Criminal Law

Prosecutors have noted deficiencies in both federal and state criminal law in this area. First, prosecutors recommend stronger penalties. Prosecutors feel that misdemeanor sanctions for these offenses are inappropriate for the crime and limit their bargaining power; staff will not accept a plea and inmate defendants will only receive limited penalties in addition to current sentences. On the other hand, especially where correctional officers are concerned, jurors may be reluctant to convict staff members of a felony for sexually abusing inmates.

Additionally, laws need to be amended to cover all personnel in all correctional settings, and provide that inmate consent is not a defense to sexual abuse. Furthermore, correctional administrators should sanction behavior that may not be criminal, but which is sexually abusive – such as inappropriate viewing or photographing of inmates.

Utilize a Variety of Laws as Tools for Prosecuting Sexual Abuse

Both investigators and prosecutors pointed out that sex cases in prisons do not “sell.” Often, only the introduction of other violations—such as contraband, bribery or malfeasance in office—committed by staff members or inmate defendants

result in convictions. Prosecutors should be encouraged to use all of the tools available to them when prosecuting sexual abuse of persons in custody. Mandatory reporting, obstruction of justice, malfeasance in office, statutory rape, sexual assault and conspiracy are all legal tools which are available to prosecute custodial sexual abuse and surrounding circumstances. In addition, prosecutors could look to loss of license and sex offender registration, as ways to either secure pleas or impose additional sanctions, which ensure that the staff defendant does not secure employment in other institutional settings.

Develop Special Prosecution Units for Sexual Abuse Cases

In general, federal prosecutors rotate through a variety of assignments, while state prosecutors often prosecute whatever case they are assigned. Federal and state prosecutors recommend having dedicated staff who are familiar with sex cases or having allegations of sexual abuse of a person in custody referred to specialized sex crimes or civil rights units⁶¹ where they exist. At a minimum, there should be a designated prosecutor in every jurisdiction who is trained and prepared to prosecute these crimes when they occur. Historically, the types of experience and support provided by specialized units has improved the rate of successful prosecution for crimes once considered difficult to prosecute, such as domestic violence, sexual assault, and crimes against children.

Increase Resources for Prosecution of Sexual Abuse

Federal prosecutors have suggested a resource shift would be most helpful for them. To begin to elevate this issue, federal prosecutors have suggested that an OIG agent be assigned to each USAO, and funds to prosecute cases of sexual violence in institutions be increased. While federal prosecutors recognize that there are staff and budgetary limits, they suggest that moving the resources, both funding and personnel, to offices that have more of these cases, would improve prosecution outcomes.

State prosecutors have stated that the only way to prosecute these cases with any expertise would require an increase of resources. In addition to needed financial support and manpower, state and local prosecutors called for some clarity on the responsibility of prosecuting these cases—are they state cases, federal cases, local cases and who pays for prosecution and who investigates.

Change the Culture of Prosecutors and Judges Regarding Sexual Abuse in Correctional Settings

Prosecutors agreed that a cultural shift would elevate this issue on the political agenda of many elected prosecutors as well as appointed and elected judges.⁶² Investigators and corrections officials report that the likelihood that a particular case will be prosecuted often has a lot to do with the perception of the individual prosecutor and his or her office about the importance of these cases, especially in relation to the case prosecution priorities in her jurisdiction.

The Attorney General, United States Attorneys, and

the heads of state and local prosecutors' offices must send the message to their prosecution staff that sexual abuse of persons in custody will be prosecuted vigorously, and they must provide them with the resources and training to do it.

Conclusion

Prosecutors believe that, in addition to training and resources to improve investigations and prosecutions of allegations, decision makers must have the political will to change prosecutorial and investigative responses to custodial sexual violence. Prosecutors requested that policy makers at the highest levels of government put their authority behind this issue because where the interest of such persons lie, so go the resources. Organizations like Human Rights Watch,⁶³ The Commission on Safety and Abuse in America's Prisons,⁶⁴ and a myriad witnesses testifying before the NPREC have echoed this sentiment.⁶⁵

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¹ Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601-15609 (2003).

² See generally The National Institute of Corrections/ Washington College of Law Project on Addressing Prison Rape (NIC/WCL Project), Addressing Staff Sexual Misconduct with Offenders (March 2006), Investigating Allegations of Staff Sexual Misconduct with Offenders (March 2005, 2004), Responding to Inmate – on – Inmate Sexual Violence (March 2007), and Addressing Sexual Abuse of Youth in Custody (July 2007, Nov. 2005), under National Institute of Corrections (NIC) cooperative agreements 01P18G108 through 07S24GJQ1.

³ See NIC/WCL Project, Investigating Allegations of Staff Sexual Misconduct with Offenders, *Prosecutor Break Out Sessions* (July 9-14, 2006), under NIC Cooperative Agreements 06S20GJJ1 (meeting notes on file with author) [hereinafter 2006 Prosecutor Breakout Sessions]; NIC/WCL Project, Investigating Allegations of Staff Sexual Misconduct with Offenders, *Prosecutor Break Out Sessions* (July 15-20, 2007), under NIC Cooperative Agreement 07S24GJQ1 (meeting notes on file with author) [hereinafter 2007 Prosecutor Breakout ses-

sion].

⁴ See NIC/WCL Project, Improving Prosecutions of Allegations of Sexual Abuse in Correctional Settings, *A Meeting with Federal Prosecutors* (Oct. 13, 2006), under NIC Cooperative Agreements 06S20GJJ1 (attendance list on file with author) [hereinafter Federal Meeting]; NIC/WCL Project, Improving Prosecutions of Allegations of Sexual Abuse in Correctional Settings, *A Meeting with State Prosecutors* (Oct. 27, 2006), under NIC Cooperative Agreements 06S20GJJ1 (attendance list on file with author) [hereinafter State Meeting].

⁵ See U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL: DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 3 (2005) [hereinafter OIG REPORT] (noting that sexual abuse of female inmates is both underreported and alarmingly prevalent).

⁶ See The Honorable Kim Worthy, Prosecuting Attorney for Wayne County, Michigan at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (August 3, 2006), available at http://nprec.us/docs/detroit_testimony_worthy.pdf [hereinafter NPREC Worthy Testimony] (elaborating on why Wayne County is unable to continue to prosecute inmate sexual abuse cases); see also The Honorable Gregory Miller, United States Attorney for the Northern District of Florida at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (August 3, 2006), available at http://nprec.us/docs/detroit_issues_miller.pdf (discussing the many issues which make it difficult for prosecuting sexual assault within prisons).

⁷ See Senator Jeff Sessions, Address at the *Public Hearing Before the National Prison Rape Elimination Commission: The Cost of Victimization: Why Our Nation Must Confront Prison Rape* (June 14, 2005), available at http://nprec.us/docs/SenatorJeffSessionsRemarks_Vol_1.pdf [hereinafter NPREC Sessions Testimony] (encouraging the criminal justice system to take the problems of incarcerated sexual abuse seriously).

⁸ See generally Mary De Ming Fan, *Disciplining Criminal Justice: The Peril and Promise of Numbers*, 26 YALE L. & POL. R. 2 (2007) (explaining that the seemingly favorable statistics regarding criminal justice prosecutions do not necessarily signify success).

⁹ See Rape, Abuse and Incest National Network, Reporting Rates, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Mar. 26, 2008) (finding that if a sexual assault is reported there is a 50.8% chance of an arrest; if there is an arrest made, there is an 80% chance of prosecution; and if there is a prosecution there is a 58% chance of a conviction). Factoring in unreported rapes, only 6% of sexual assault perpetrators will spend time incarcerated—15 of 16 perpetrators walk free. *Id.*

¹⁰ See NPREC Worthy Testimony, *supra* note 6 (explaining that in the wake of budgetary constraints, prosecution of crimes between inmates is not a priority for Wayne County).

¹¹ See *Steadman v. S.E.C.*, 450 U.S. 91 (1981) (finding that in

an administrative proceeding, matters in issue need only be established by a preponderance of the evidence).

¹² See *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (finding that the standard of proof beyond a reasonable doubt “is an ancient and honored aspect of our criminal justice system”).

¹³ See NPREC Sessions Testimony, *supra* note 7; see also Glenn Fine, Inspector General, Address at the *Public Hearing Before the NPREC: The Cost of Victimization: Why Our Nation Must Confront Prison Rape* (June 14, 2005), available at http://www.nprec.us/docs/InspectorGeneralGlennFine_Vol_1.pdf (admonishing that the laws criminalizing staff sexual relations with federal inmates are not sufficient).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Garrity v. State of New Jersey*, 385 U.S. 493 (1967) (discussing employees’ rights against criminal self-incrimination).

¹⁸ See Federal Meeting, *supra* note 4 (discussing that while investigators in general agreed with the need to increase administrative penalties, they complained that more often than not, those were met with opposition by unions).

¹⁹ See *Robinson v. Robinson*, No. 05-CV-01433, 2006 WL 726296 (D. Colo. Mar. 20, 2006) (issues included: malicious prosecution, defamation, 14th Amendment Due Process); *Corona v. Lunn*, No. 00-CIV-7330, 2002 WL 550963 (S.D.N.Y. Apr. 11, 2002) (issues included: false arrest and malicious prosecution).

²⁰ See Federal Meeting, *supra* note 4 (noting the lack of experience in prosecuted forcible prison rape cases).

²¹ See *id.*; see also State Meeting, *supra* note 4 (discussing and indentifying consent as one of the most difficult issues in prosecuting prison rape).

²² Brenda V. Smith, Fifty State Survey of State Criminal Laws, *Prohibiting the Sexual Abuse of Individuals Under Custodial Supervision* (January 2008), under NIC Cooperative Agreement 07S27GJT7 [hereinafter 50 State Survey].

²³ *Id.*; see, e.g., CAL. PENAL CODE § 289.6 (2001) (“Consent by a confined person or parolee to sexual activity proscribed by this section is not a defense to a criminal prosecution for violation of this section.”); FLA. STAT. ANN. § 944.35 (2006) (“The consent of the inmate or offender supervised by the department in the community to any act of sexual misconduct may not be raised as a defense to a prosecution under this paragraph.”); WIS. STAT. ANN. § 940.225 (West 2005) (“Consent is not an issue in alleged violations . . .”).

²⁴ See 50 State Survey, *supra* note 22; see, e.g., DEL. CODE ANN. tit. 11, § 1259 (1995) (“A person is guilty of sexual relations in a detention facility when, being a person in custody at a detention facility or being an employee working at a detention facility, the person engages in sexual intercourse or deviate sexual intercourse on the premises of a detention facility.”); NEV. REV. STAT. ANN. § 212.187 (1997) (“A prisoner who is in lawful custody or confinement, other than in the custody of the Division of Parole and Probation of the Department of Public Safety or residential confinement, and who voluntarily engages in sexual conduct with another person is guilty of a category D felony.”);

see also *Phillips v. Bird*, Dept. of Corrs. of the State of Del., 2003 U.S. Dist. LEXIS 22418 (D. Del. Dec. 1, 2003).

²⁵ See Federal Meeting, *supra* note 4; State Meeting, *supra* note 4; see also *Carrigan v. Davis*, 70 F. Supp. 2d 448 (D. Del. 1999).

²⁶ See generally CAROLINE HARLOW, BUREAU OF JUSTICE STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf> (detailing the statistical results of prior sexual abuse in state and federal prisons).

²⁷ See DC Rape Crisis Center, Effects of Sexual Abuse: Internal, <http://dcrcc.org/effects.htm> (last visited Feb. 6, 2008) (discussing the internal effects of sexual abuse as including: depression, low self-esteem, anger or control issues, anxiety, shame, guilt); Angela Browne & A.J. Sabree, NIC/WCL Project, Responding to Inmate-on-Inmate Sexual Violence, *Presentation on the Impact of Victimization* (March 2007), available at http://www.wcl.american.edu/nic/conference_march_07/modules/11_impact_of_past_victimization.pdf?rd=1 (noting the links between incarceration and victimization); Brenda V. Smith, NIC/WCL Project, *Continuum of Sexual Behavior in Institutional Settings* (2006), under NIC Cooperative Agreement 06S20GJJ1 (PowerPoint presentation on file with author) [hereinafter Smith, *Continuum of Sexual Behavior*] (illustrating that strategic sex or sex as a bargaining tool is used).

²⁸ See ALLEN BECK & TIMOTHY HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 9 (2005) [hereinafter BECK & HUGHES 2004]; see ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 6 (2007) [hereinafter BECK, HARRISON & ADAMS 2006].

²⁹ See Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 225 (2006) [hereinafter Smith, *Rethinking Prison Sex*] (discussing the continuum of sexual expression in correctional environments the main concern of which is whether the state has an ability to regulate that expression); see also Smith, *Continuum of Sexual Behavior*, *supra* note 27 (analyzing (through a visual) the limits placed on prisoners' ability to sexual express themselves).

³⁰ See Federal Meeting, *supra* note 4.

³¹ See generally *U.S. v. Brewer*, 363 F. Supp. 606 (M.D. Pa. 1973); *People v. Frazier*, 64 Cal. Rptr. 447 (1967); *People v. Coulter*, 288 N.W.2d 448 (Mich. Ct. App. 1980) (holding the state sodomy law constitutional as applied to sex in prison); *George v. Lane*, No. 82 C 7084, 1987 U.S. Dist. LEXIS 3659 (N.D. Ill. Apr. 30, 1987) (finding that prison regulations prohibiting consensual sex are constitutional); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *Croom v. Wagner*, No. 06-1431, 2006 U.S. Dist. LEXIS 64915 (E.D. Pa. Sept. 11, 2006); *Barnes v. Ozmint*, 3:04-21836-CMC-JRM, 2005 U.S. Dist. LEXIS 38173 (D.S.C. Nov. 7, 2005); *People v. Rollins*, 569 N.E.2d 1251 (Ill. App. 1991); *U.S. v. Robert White* (Criminal Action

No. F130-05, 2006).

³² See 50 State Survey, *supra* note 22.

³³ See, THE NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, INVESTIGATING STAFF SEXUAL MISCONDUCT WITH OFFENDERS TRAINING MATERIALS: IN THE NEWS : CRIMINAL CONVICTIONS CHART STAFF SEXUAL MISCONDUCT WITH OFFENDERS (2007) (illustrating that prosecutions and the sentence received by staff in sexual misconduct cases are relatively low); see also, Rape Abuse and Incest National Network, Reporting Rates, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited March 30, 2008) (providing statistics regarding the reporting and prosecution of sexual assaults).

³⁴ See 18 U.S.C. §§ 2243(b), 2244(a)(4), 2244(b) (2006) (raising the penalty for sexual abuse of a ward from misdemeanor to felony punishable levels).

³⁵ OIG REPORT, *supra* note 5, at 8.

³⁶ See Interview with Federal Prosecutor (Feb. 28, 2006) [hereinafter FP Interview] (stating that “[t]here have not been enough cases since the penalties were enhanced, to make any type of meaningful judgment about the impact the amended law will make on the rate of prosecutions); see also OFFICE OF THE INSPECTOR GENERAL, TRAINING: INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH OFFENDER (June 2006), under NIC cooperative agreement 06S21GJL7.

³⁷ 18 U.S.C. §§ 2241, 2243-2244.

³⁸ OIG REPORT, *supra* note 5, at 18.

³⁹ *Id.* at 19.

⁴⁰ See Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat 587 (2006) (codified in scattered sections of 18 U.S.C.).

⁴¹ Federal investigators are concerned that these amendments may decrease prosecutions due to the increased severity of the sentences. See generally OFFICE OF THE INSPECTOR GENERAL TRAINING: INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH OFFENDER (June 2006), under NIC cooperative agreement 06S21GJL7.

⁴² See *Smith v. Doe*, 538 U.S. 84, 101 (2003) (holding that “[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Ac’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant”).

⁴³ See Federal Meeting, *supra* note 4.

⁴⁴ See State Meeting, *supra* note 4; see also Brenda V. Smith & Jaime M. Yarussi, NIC/WCL Project, Breaking the Code of Silence, A Correction Officers’ Handbook on Identifying and Addressing Sexual Misconducts 4 (June 2007) [hereinafter CO HANDBOOK] (highlighting that agencies include but are not limited to: jails, lock-ups, prisons, community facilities for adults or juveniles, juvenile detention centers, immigration detention facilities and community corrections agencies including probation, parole, half-way homes, electronic or home monitoring,

work release, pre-release centers or pre-trial release and contract facilities). Personnel includes but is not limited to: correctional officers, administrators and staff, volunteers, medical and mental health personnel, contract employees and maintenance and food service workers. *Id.*; see also 50 State Survey, *supra* note 22.

⁴⁵ See 50 State Survey, *supra* note 22; see also DEL. CODE ANN. tit. 11, § 1259 (2008); NEV. REV. STAT. ANN. § 212.187 (LexisNexis 2007).

⁴⁶ See 50 State Survey, *supra* note 22 (indicating that while the

⁴⁶ See 50 State Survey, *supra* note 22 (indicating that while the vast majority of states define staff sexual misconduct as a felony, some also still only charge it as a misdemeanor or define the crime as a graduated sanction allowing the prosecutor to charge either a misdemeanor or a felony depending on the facts of the case).

⁴⁷ See State Meeting, *supra* note 4.

⁴⁸ NIC/WCL Project, The Role of Prosecutors in Cases of Staff Sexual Conduct with Offenders, *Investigating Allegations of Staff Sexual Misconduct with Offenders* (July 2005), available at http://www.wcl.american.edu/nic/Training/Curriculum/July_2005/Prosecution.ppt?rd=1 (“On the day of her testimony, the victim dressed provocatively and giggled nervously. Because of the prosecutor’s lack of experience he had not instructed her on how to dress for court, did not ask her questions on direct examination that would help her to explain to the jury why she was giggling and not crying and that in general he felt that he had misjudged the amount of time it would take to prepare her to testify.”).

⁴⁹ See State Meeting, *supra* note 4.

⁵⁰ *Id.*

⁵¹ See Federal Meeting, *supra* note 4; 2006 Prosecutor Breakout Sessions, *supra* note 3; 2007 Prosecutor Breakout Sessions, *supra* note 3.

⁵² See generally WOMEN’S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996); WOMEN’S RIGHT’S PROJECT, HUMAN RIGHTS WATCH, NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE (1998), available at <http://www.hrw.org/reports98/women/>; HUMAN RIGHTS WATCH REPORT, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) [hereinafter NO ESCAPE]; AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE,” VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999); AMNESTY INT’L, USA: THE FINDINGS OF A VISIT TO VALLEY STATE PRISON FOR WOMEN, CALIFORNIA (1999); AMNESTY INT’L, CHILDREN AND WOMEN ABUSED IN CORRECTIONAL FACILITIES (1998).

⁵³ OIG REPORT, *supra* note 5, at 7-8; see also CO HANDBOOK, *supra* note 44, at 8.

⁵⁴ See Federal Meeting, *supra* note 4.

⁵⁵ OIG REPORT, *supra* note 5, at 7; see also Chitra Subramanyam, *FCI Guard Sentenced for Sex Act*, TALLAHASSEE DEMOCRAT, Aug. 29, 2006 (noting that in a case in the Federal District Court in Tallahassee, Florida, Bureau of Prison guards were charged with and found guilty of crimes arising out of trading contraband for sex with at least ten offenders). In this same case, an OIG agent was shot and killed at the Federal Correctional Institution in Tallahassee as he and another law enforcement agent were in the process of arresting one of the guards. *Id.* This is an indication of how such activities can lead

to corruption and violence in correctional settings.

⁵⁶ See Federal Meeting, *supra* note 4; State Meeting, *supra* note 4.

⁵⁷ See FP Interview, *supra* note 36 (noting that initially the inmate was believed, but that after a thorough investigation it was determined that she was lying). The prosecutor said that the inmate never admitted to lying, but that a “huge amount” of information, including inconsistencies in her statements as well as statements of other prisoners that discredited her version of events and her credibility, generally led prosecutors to believe the inmate was lying. *Id.*

⁵⁸ *Id.*

⁵⁹ See Federal Meeting, *supra* note 4.

⁶⁰ See FP Interview, *supra* note 36 (stating that because they are felons by virtue of their status as a prisoner, you need to corroborate their testimony).

⁶¹ See Federal Meeting, *supra* note 4 (discussing Washington, DC’s prosecution unit and how some specialize in sex crimes). Prosecutors noted that because of the difficulty prosecuting sex crimes, many prosecutors’ offices have specialized sex crimes units or at least one or two veteran sex crimes prosecutors who handle these cases. *Id.* In addition, while state and local prosecutor’s offices are more likely to have experience trying these cases, the depth of that experience depends on the number and types of cases that occur in their districts and the resources they are able to devote to those cases. *Id.*; see also Gina DeBottis, Chief Prosecutor, Special Prosecution Unit, Texas at the *Public Hearing Before the National Prison Rape Elimination Commission: Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?* (Aug. 3, 2006), available at http://nprec.us/docs/detroit_issues_debottis.pdf (describing the special sex crimes prosecution unit in Texas and their experience with prison sex cases).

⁶² CO HANDBOOK, *supra* note 44, at 7.

⁶³ See NO ESCAPE, *supra* note 52, at 68-75.

⁶⁴ See generally JOHN J. GIBBONS AND NICHOLAS DE B. KATZENBACH, VERA INSTITUTE OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS (2006), available at <http://www.wcl.american.edu/nic/documents/4.VERACommissionReport.pdf?rd=1> (reporting on the violence and abuse in U.S. jail and prisons).

⁶⁵ See generally National Prison Rape Elimination Commission Hearings, available at <http://nprec.us/proceedings.htm> (listing the nationwide public hearings which discuss the elimination of prison rape).

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PRESS RELEASE

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Former Metro Transit Officer found guilty
of sexually abusing a prostitute

Washington, D.C. - A former Metro Transit Officer, Darren M. Way, has been found guilty of sexually abusing a prostitute while on duty in 2005, United States Attorney Kenneth L. Wainstein announced today.

Way, 32, of Gaithersburg, MD, was convicted today in D.C. Superior Court of four counts of Second Degree Sexual Abuse. At the time of the incident, Way had been a Metro Transit Police Officer for about three years. His employment was terminated on August 5, 2005. Sentencing before the Honorable Judge Erik Christian is scheduled for July 14, 2006. Under the voluntary sentencing guidelines, Way faces three to seven years of incarceration. He must also register for ten years as a convicted sex offender.

According to the government's evidence, on June 26, 2005, Way called the victim, a 19-year-old escort/prostitute who was staying at the Gallery Inn at 1850 Florida Avenue, NW, and made an appointment to see her. Way, who was on duty, arrived at approximately 1:30 a.m. the next morning in full uniform and told the victim that he wanted to go up to her room. Despite the victim's repeated refusals, the defendant insisted and the victim, afraid that she would be arrested, finally relented. Once in the room, the defendant performed various sex acts on the victim against her will. Immediately after the assault, the defendant told the victim, "Welcome to D.C.," and told her that an officer in uniform cannot pay a prostitute because doing so would be a crime. Before the defendant left, the victim gained control of the defendant's Metro

Transit keys, including a master key to all of the region's Metro Stations. She later turned the keys over to law enforcement authorities in Huntington Beach, California, when she was arrested during a prostitution sting operation.

In announcing the verdict, United States Attorney Wainstein praised the efforts of Metropolitan Police Department Sergeant Deborah Pearce, Detectives Lisa Williams, James Dukes, Steven Schwalm and Jeffrey Folts, and Officers Shannon Strange, Michael DePrince, Stanley Rembish and Derrick Potts. He also commended the efforts of former MPD Senior Officer Joseph Haggerty; Metro Transit Police Captain George Heilmann, Lieutenant Robert Melan and Sergeant Randolph Dawson; Montgomery County (MD) Police Department Captain Nancy Demme; Deputy U.S. Marshal James Cyphers; Detectives John Sheridan and Donald Cox; and Huntington Beach (CA) Police Department Sergeant Mitchell O'Brien and Detective Erik Krause. He also commended the work of Victim Witness Advocate Iris Vega; Victim Witness Specialist David Foster; Intelligence Unit Chief Ray McAllister and Specialist Francis Morgan; Paralegals Nina Hammond and Charice Dickey; Legal Assistants Teesha Tobias and Tiffany Jones; Litigation Support Supervisor Debbie Dunn and Specialist Thomas Royal; Librarian Jay Farris; and Assistant United States Attorney Roy L. Austin, Jr., who prosecuted the case.

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washingtonpost.com

Ex-Metro Police Officer Guilty in Rape of Prostitute

By Henri E. Cauvin
Washington Post Staff Writer
Wednesday, May 10, 2006; B04

A former Metro Transit Police officer who set up a date with a prostitute and showed up for the liaison wearing his uniform was convicted yesterday of raping the woman.

With his parents looking on, Darren Way, 32, was found guilty of four counts of second-degree sexual abuse stemming from the encounter in June with the 19-year-old woman at a Dupont Circle inn.

It was by all accounts a bizarre episode: a police officer showing up in uniform to have sex with a prostitute, who was, she testified, apprehensive and reluctant but expected to be paid nonetheless.

Way didn't pay, she said, claiming he had no money but promising to come back and offering his keys as collateral.

Worried about what might happen, the woman said she called 911, but the recording was incomplete, and what she told the dispatcher is unclear. Later that morning, she went to the Third District police station and explained what had happened. An officer -- who testified in the trial that he believed her account -- told her she should go to the Metro Transit Police to report the incident.

Instead, she and her pimp left the District and went to California. It was there, 11 days later, that her allegations about Way came to light, after she was arrested in a prostitution sting.

But her accusations weren't the only allegations Way was going to have to worry about.

Way also was charged in the summer with raping a 33-year-old Silver Spring woman who advertised as an escort; prosecutors later dropped the charge amid discrepancies in the woman's account.

The charges in the District did not go away, and last week, Way went on trial before Judge Erik P. Christian in D.C. Superior Court.

The woman testified for hours, sometimes in tears. Recounting an adolescence addled by depression and drug use, she made for a sympathetic figure. But Jon W. Norris, Way's defense attorney, highlighted apparent holes in her account of how she turned to prostitution. He also suggested that she first contacted police not because she was raped but because she had been cheated out of her earnings.

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What happened in the woman's room at the Gallery Inn on Florida Avenue NW, Norris told the jury, was "consensual sex." Way, he said, was guilty of soliciting a prostitute but not of raping one.

But the prosecutor, Assistant U.S. Attorney Roy L. Austin Jr., said it was rape. "She had no options," Austin said in his closing argument.

After about four hours of deliberation, the jury came to the same conclusion.

Way, who was fired from the transit police after the allegations came to light, looked stunned by the verdict, clenching his lips and trying to hold back tears.

Afterward, in a telephone interview, the jury foreman said the decision was not easy or fast. The foreman, who spoke on the condition that he not be identified, said that an important element in the case was the fact that Way was in uniform when he met with the woman.

"An issue for her was fear of arrest," he said, "and the uniform carries with it some inherent weight."

Way, of Gaithersburg, had been free before and during the trial. After the verdict, he was ordered into custody by the judge, who set sentencing for July 14.

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News Stories: Sexual Abuse of Youth in Custody

Note: This is a representative sample of relevant news stories. This is not meant to function as an exhaustive list.

State	Locale	Date	Article Title	Situation	Setting	Personnel	Allegation/ Charge	Outcome and Penalty
Arkansas	Washington County	2/19/09	Fired Juvenile Officer Found Not Guilty of Sexual Abuse	Male juvenile court officer accused of making sexual advances towards a female assigned to his case load	Families in Need of Services	Juvenile Court Officer	Sexual Assault	Not Guilty
Colorado	Denver County	6/25/09	Denver Youth Facility Staffer Charged with Abuse	Male staff charged with sexually assaulting a 16 year old	Third Way Center	Staff Member	Sexual Assault	<i>Outcome unknown at this time</i>
Florida	Okeechobee County	6/16/07	Allegation of Sex between Female Guard, Juvenile Investigated	A female guard at the juvenile detention facility is being investigated for having sex with one of the residents in the facility. Love letters were found allegedly written by the female guard and detainee. The detainee is mentally retarded.	Okeechobee Juvenile Offender Corrections Center operated by the private company G4S Youth Services	Guard	An active criminal investigation is ongoing.	<i>Outcome unknown at this time</i>
Georgia	Macon County	6/14/06	Macon Youth Detention Center Guard Resigns after Rape Accusations	An investigation has begun into the rape of an 18 year-old by a guard at the Macon YDC	Macon Youth Detention Center	Guard	No charges have been filed and the investigation is awaiting the rape kit results.	<i>Outcome unknown at this time</i>
Illinois	DuPage County	8/3/2006	Jailer Convicted in Sex Case	Jailer has sex with a 16 year old female under his supervising	Illinois Youth Center	Supervisor	Sexual Conduct	4 Felony Counts
Illinois	St. Joseph County	4/7/08	Correctional Officer Accuse of Having Sex with Juvenile Offenders	Male security officer accused of sex with two female teenage offenders	Indianapolis Juvenile Correctional Facility	Security Officer	Investigation Ongoing	<i>Outcome unknown at this time</i> Currently Suspended

News Stories: Sexual Abuse of Youth in Custody

Note: This is a representative sample of relevant news stories. This is not meant to function as an exhaustive list.

State	Locale	Date	Article Title	Situation	Setting	Personnel	Allegation/ Charge	Outcome and Penalty
Illinois	St. Clair County	4/8/08	Former Juvenile Detention Guard gets Probation in Sexual Abuse Case	Male detention guard admitted to molesting a 14 year old male detainee in 2005	St. Clair County Juvenile Detention Center	Guard and Transportation Coordinator	Official Misconduct Custodial Sexual Abuse Aggravated Criminal Sexual Abuse	Guilty 48 mos. probation
Indiana	Marion County	9/15/06 10/3/06	Former Juvenile Center Guard Pleads to Misconduct Ex-Juvenile Center Guard Gets Home Detention for Misconduct	One of nine former center workers charged with sexually abusing female detainees- ages 13 to 15.	Marion County Detention Center	Guard Superintendent	Guard: sexual misconduct with a minor and child solicitation Superintendent: concealing evidence of abuse and failing to report an allegation to child welfare	Guard pled guilty to official misconduct and the other charges were dismissed. The superintendent resigned Guard sentenced to one year of home detention and one year of probation.
Indiana	Marion County	9/22/06	Guard Accused of Sex with Juvenile Girl is Fired	Male guard allegedly has sexual contact with a female youth	Indianapolis Juvenile Correctional Facility	Guard	Sexual Contact was founded after an IA investigation- the case has been referred for criminal prosecution	<i>Outcome unknown at this time</i>

News Stories: Sexual Abuse of Youth in Custody

Note: This is a representative sample of relevant news stories. This is not meant to function as an exhaustive list.

State	Locale	Date	Article Title	Situation	Setting	Personnel	Allegation/ Charge	Outcome and Penalty
Indiana	Marion County	1/10/10	Marion County Juvenile Center Worker Accused of Forcing Teen into Sex	Male youth manager is accused of forcing a 16 year old boy to perform oral sex on him.	Marion County Juvenile Detention Center	Youth Manager	Sexual Misconduct Child Seduction	<i>Outcome unknown at this time</i> Placed on administrative leave during investigation
Indiana	Madison County	1/29/10	4 Charged with Misconduct at Ind. Juvenile Center	4 female workers are charged with exchanging explicit photos and/or engaging in sexual acts with an 18- year old male.	Pendleton Juvenile Correctional Facility	Laundry Worker Contract Food Service Worker 2 were Correctional Officers	Sexual Misconduct Official Misconduct	<i>Outcome unknown at this time</i> All 4 women have been fired
Kentucky	Grant County	12/8/08	Ex-Jailers Jailed in Young Inmate's Rape	Two former county deputies were sent to prison for arranging to have a teenage boy raped by inmates	Grant County Detention Center	Deputy Jailers	Conspiring to Violate Civil Rights	Guilty. 15 years in prison and 3 years of supervised release
Maryland	Baltimore County	10/1/09	Escaped Juvenile had Sex with Counselor	Female counselor helped a male youth to escape and then had sex with him	Chesapeake Treatment Center	Counselor	Harboring Child Sexual Abuse	<i>Outcome unknown at this time</i>
New Mexico	Bernalillo County	10/2/06	Second Sexual Abuse Reported at YDDC	A youth was sexually assaulted by two other boys age 15 and 17) in a shower room.	Youth Diagnostic and Development Center	Youth/ Youth	Criminal Sexual Contact charges have been forwarded to the DA for review	<i>Outcome unknown at this time</i>
Ohio	Delaware County	12/9/04 and 4/19/05	Probe at Scioto youth Prison May Lead to More	Five guards charged with crimes ranging from felonious assault to sexual	Scioto Juvenile Correctional	Guards	Assault Sexual Battery	One guard had pled guilty

News Stories: Sexual Abuse of Youth in Custody

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State	Locale	Date	Article Title	Situation	Setting	Personnel	Allegation/ Charge	Outcome and Penalty
Ohio	Delaware County Cont'	1/14/05	Charges; Alleged Abuse May Not be Isolated Incidents Delaware County Juvenile Facility; Five More Guards Indicted in Probe of Prison Abuse	battery. A grand jury indicted them on a combines 23 charges Five more guards indicted on felony counts of sexual battery and endangering children for sexually or physically abusing youth.	Center		Guard 1: one count each of endangering children and illegal use of a minor in nudity-oriented material and public indecenty Guard 2: One count of sexual battery and three counts of sexual imposition Guard 3: one count each of endangering children, assault, falsification and dereliction of duty Guard 4: one count each of tampering with evidence, obstruction of justice, falsification and dereliction of duty Guard 5: two counts each of endangering children and assault	<i>Outcome unknown at this time</i>

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State	Locale	Date	Article Title	Situation	Setting	Personnel	Allegation/ Charge	Outcome and Penalty
Oregon	(unknown)	2/6/07	Oregon Youth Authority Staff Failed to Report Hints of Abuse	7 youth authority employees failed to report or thoroughly investigate suspicious conduct by a youth parole officer who was convicted of sexually abusing teenage boys he supervised. Allegations against the officer surfaced in 1994 but he remained until 2002. The officer was convicted of sexually abusing five boys in 2005.	Oregon Youth Authority/ Community	Parole Officer	Failure to Report Failure to Investigate Sexual Abuse	No criminal charges were brought Parole Officer: 80 years in prison
Tennessee	Jefferson County	9/15/06	Two Former Youth Officers Indicted	Assault and child abuse of youths	Mountain View Youth Development Center	Officers	Officer 1: aggravated child abuse and aggravated assault Officer 2: six counts of sexual exploitation of a minor	<i>Outcome unknown at this time</i>
Tennessee	Montgomery County	9/2/07	Rape Investigation at Tennessee Youth Center	13 year old boy is charged with raping another boy at the center	Chad Youth Enhancement Center	Youth/Youth	Youth was arrested Center is being accused of not handling the case properly- did not contact police or seek medical care for youth victim until mother insisted	<i>Outcome unknown at this time</i>

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Texas	Ward County	2/18/07	Officials at Texas Juvenile Prison Accused of Molesting Inmates	Former principal lured youth into sexual acts with offers of cake and promises of help to get into college and the former assistant superintendent was accused of sexual contact with several youth. Youth were kept quiet by threats of lengthening sentences.	Teas Youth Commission- West Texas State School	Assistant Superintendent	No criminal charges filed but are currently pending	Both were allowed to resign in lieu of termination
		4/11/07	Two Former Youth Commission Administrators Indicted on Sex Abuse Charges	The principal and assistant superintendent was indicted on charges that they sexually abused teenagers in their care. They are accused of sexually abusing six youth ages 16-19. The principal is accused of giving oral sex, having oral sex and/or fondling several youth over the course of ten months and the Ast. Superintendent is accused of oral sex and fondling on two occasions.		Principal	Ast. Superintendent was indicted on 2 counts of improper relationship with a student and 2 counts of improper sexual activity with a person in custody. Principal was indicted on 1 count of sexual assault, 9 counts of improper sexual activity with a person in custody and 9 counts of improper relationship between a student and educator.	
Texas	(unknown)	4/11/07	Inside Youth Prisons, Scores of Female Guards Violated Boys	Female guards having sex with male youth in facilities throughout TYC. Roughly 2/3 of TYC employees disciplined for sexual contact with youth since 2000 are women.	Texas Youth Commission	Guard	Improper relationship/ sexual contact with a person in custody	<i>Outcome unknown at this time</i>

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Texas	Tarrant County	4/26/07	Corrections Officer Accuse of Sex with Teen	A CO from the TYC was arrested on charges that he has sex with a teenager in his care during a park outing.	Texas Youth Commission-Willoughby House (actual abuse at Benbrook Park)	Corrections Officer	Improper sexual activity with a person in custody	<i>Outcome unknown at this time</i>
Texas	Hidalgo County	4/27/07	Head of TYC Facility Fired Amid Claims of Inmate Abuse	Sexual abuse and misconduct between youth and staff and youth and other youth- 27 open investigations are currently pending at the facility	Texas Youth Commission-Evans Regional Juvenile Center	Sex abuse involving staff on youth and youth on youth	No formal charges filed at this time	Superintendent fired. Criminal Outcome still unknown at this time
Texas	Brown County	5/10/07 8/7/07 10/29/09	Ex-TYC Guard Charged with Sexual Assault of S.A. Girl Former Youth Prison Guard Accused of Sex with Teen Inmate Ex Guard Guilty of Youth Sex Assault	Former guard indicted on sexual abuse of a minor in connection with the alleged abuse of an incarcerated San Antonio girl in his care. An internal investigation done by TYC concluded that the guard molested four girls in their dormitory.	Texas Youth Commission-Ron Jackson Correctional Center	Guard	Indicted on one count of felony sexual assault, three felony counts of indecency with a child, four felony counts of improper sexual activity with a person in custody and four misdemeanor counts of official oppression.	Guilty Punishment phase TBD.

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Texas	Jefferson County	3/20/08	Former TYC Officer Indicted on Charge of Having Sex with Teen at Al Price Unit	Former female correctional officer indicted on a charge of having sex with a teenager in custody	Al Price Juvenile Correctional Facility	Correctional Officer	Violating the Civil Rights of a Teenager in Custody	<i>Outcome unknown at this time</i> Fired
Texas	Travis County	12/17/08	Detention Officer Arrested	Mother allegedly paid for hotel rooms and drugs for her son and his detention officer	CHOICES	Probation Officer and Counselor	Hindering Apprehension Improper Sexual Activity with a Person in Custody	<i>Outcome unknown at this time</i>
Texas	McLennan County	12/17/08 1/10/09	Sexual Incidents Reported at TYC TYC Investigators Looking into Sex Assaults at Waco-Area Facility	Five juvenile inmates either engaged in or were sexually assaulted over the past 45 days TYC Investigators are looking at policies and practices at the facility. Investigators are trying to determine why several boys who were classified as sex offenders were double bunked with other boys in the facility	TYC Jail-Mart	Youth/ Youth	Investigation Ongoing	<i>Outcome unknown at this time</i>
Texas	Dallas County	1/14/09	Two Boys Accuse Dallas ISD Instructor of Molesting them at County Jail	Two boys accused a Dallas Independent School District Instructor of repeatedly molested them at the Dallas County Jail while teaching them.	Dallas County Jail	Teacher	One count of Child Sexual Assault Additional charges to follow	<i>Outcome unknown at this time</i> Administrative Leave

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State	Locale	Date	Article Title	Situation	Setting	Personnel	Allegation/ Charge	Outcome and Penalty
Texas	Ector County	4/20/10	Texas Youth Prison Official's Sex Trial Begins	Former Texas juvenile jail administrator accused of sexually abusing a teenage inmate	TYC- West Texas State School	Assistant Superintendent	Indicted in 2007 on two counts of improper sexual activity with a person in custody, and two counts of improper relationship between an educator and a student	Guilty. Sentencing Phase began 4/22.
		4/22/10	Ex-Texas Youth Prison Official Guilty of Abuse					
Virginia	Powhatan County	8/8/07	Two Teen Inmates Face Sex Charges	Two 17 year old male inmates have been charged with tying up and sexually assaulting a cellmate	Beaumont Juvenile Correctional Center	Youth/ Youth	Aggravated Sexual Battery Malicious Wounding Abduction Conspiracy to Commit a Felony Indecent Exposure	<i>Outcome unknown at this time</i>
Washington	King County	7/25/2006	Former King County Jail Guard Accused of Having Sex With Juvenile Inmates	2 juvenile inmates had sex with a female guard in exchange for candy	King County Juvenile Detention Center	Detention Officer	4 counts of first-degree custodial sexual misconduct Trial set for April	Plead guilty to two counts of custodial sexual misconduct
		8/1/2006	Female Guard Pleads Not Guilty					

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Washington	King County Cont'd	8/2/2006	to Sex Charge A Sex Scandal Widens Among Guards at the County and Juvenile Jail					
		6/7/07	Ex-officer Admits She had Sex with Teens at Detention Hall					
Washington	King County	9/13/07	Counselor Accused of Abusing Teenager	A female mental health counselor is under investigation for alleged sexual misconduct with a male teenaged inmate	King County Juvenile Detention Center	Contract Mental Health Counselor	Sexual Misconduct	<i>Outcome unknown at this time</i>