

# THE PROSECUTORS' RESOURCE

## *Sexual Abuse in Confinement*

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## I. INTRODUCTION

Contemporary research indicates that sexual abuse of inmates in confinement facilities, perpetrated by staff members or by other inmates, is a common occurrence.<sup>1</sup> In the 2003 Prison Rape Elimination Act (PREA),<sup>2</sup> Congress declared that at least 13% of inmates in the United States were sexually abused in prison, and many of those inmates had suffered repeated acts of sexual abuse.<sup>3</sup> In response to this staggering statistic, PREA<sup>4</sup> was passed unanimously by Congress and signed into law to prevent and respond to incidents of sexual abuse<sup>5</sup> in all confinement facilities, including adult prisons and jails, lockups, community confinement facilities, and juvenile confinement facilities. While the Act did not create a new crime – sexual abuse is a crime regardless of where it occurs – Congress and the President determined that the incidence, prevalence,<sup>6</sup> and negative impacts of sexual abuse in confinement warranted specific legislative intervention.

This *Prosecutors' Resource on Sexual Abuse in Confinement* was written to assist prosecutors in understanding the factual and legal issues surrounding sexual abuse in confinement, to assist them in understanding and utilizing the Standards prescribed and the resources available as a result of PREA, and to provide practical advice and strategies for prosecution of these important yet challenging cases, with an ever-present focus on victim safety and offender accountability.<sup>7</sup> The focus of this *Resource* is on cases involving an adult abuser and victims in adult confinement facilities, but the strategies and resources provided are, for the most part, equally applicable and helpful in the prosecution of cases involving juvenile victims in juvenile facilities. This *Resource* does not, however, purport to address the unique concerns and challenges in cases involving juvenile victims.<sup>8</sup> The *Resource* is organized into three parts. *Part One* addresses the steps to be taken

- 1 BUREAU OF JUSTICE STATISTICS, PRISON RAPE ELIMINATION ACT OF 2003: DATA COLLECTION ACTIVITIES, 2012 (June 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdca12.pdf>. See also ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008 (May 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf>; Allen J. Beck et al., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012: NATIONAL SURVEY OF YOUTH IN CUSTODY, 2012 (June 2013), <http://www.bjs.gov/content/pub/pdf/svjfry12.pdf>; RAMONA R. RANTALA, JESSICA REXRAOT & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2009-11 (Jan. 2014), <http://www.bjs.gov/content/pub/pdf/svraca0911.pdf>.
- 2 Prison Rape Elimination Act, 42 U.S.C. § 15601 *et seq.* (2003).
- 3 42 U.S.C. § 15601 (Findings).
- 4 Prison Rape Elimination Act, 42 U.S.C. § 15601 *et seq.* (2003).
- 5 “Sexual abuse,” as defined in the National Standards to Prevent, Detect, and Respond to Prison Rape, varies depending upon whether the perpetrator is another inmate or staff. In the case of inmate perpetrators, abuse includes nonconsensual “[c]ontact between the penis and the vulva or the penis and the anus, including penetration, however slight; [c]ontact between the mouth and the penis, vulva, or anus; [p]enetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and [a]ny other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation.” Abuse by staff includes the same acts, regardless of “consent,” that are “unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire,” in addition to acts of indecent exposure or voyeurism on the part of staff, as well as attempts, requests, or threats to engage in such acts. The National Standards to Prevent, Detect, and Respond to Prison Rape, 28 CFR § 115.6 [*hereinafter* “National Standards” or “Standards”].
- 6 See Appendix B for prevalence statistics for adult and juvenile sexual abuse in confinement.
- 7 Sexual harassment is addressed in the National Standards and can potentially be prosecuted under various statutes, depending on the jurisdiction’s laws. See, e.g., 28 C.F.R. § 115.6 (Defining sexual harassment); 28 C.F.R. § 115.11 (Zero tolerance of sexual abuse and sexual harassment; PREA coordinator). This *Resource* is primarily intended to provide prosecutorial strategies. For additional information about sexual abuse in confinement, see The National PREA Resource Center, <http://www.prearesourcecenter.org> (last visited Nov. 19, 2015). Note that portions of this *Resource* were adapted from materials developed by AEQuitas on witness intimidation, including TERESA M. GARVEY, AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN, WITNESS INTIMIDATION: MEETING THE CHALLENGE (2013), and AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN THE PROSECUTORS’ RESOURCE ON WITNESS INTIMIDATION (Mar. 2014) (both resources are available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm)).
- 8 For additional resources on sexual abuse against juveniles in confinement, see Janine M. Zweig, et al., URBAN INSTITUTE, ADDRESSING SEXUAL VIOLENCE IN PRISONS: A NATIONAL SNAPSHOT OF APPROACHES AND HIGHLIGHTS OF INNOVATIVE STRATEGIES, FINAL REPORT 3 (Jan. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/216856.pdf>; NAT’L CENTER FOR JUVENILE JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT (Dec. 2014), available at <http://www.ojjdp.gov/ojstatbb/nr2014/>; *One in Eight: The Reality of Sexual Abuse in Juvenile Detention*, JUST DETENTION INTERNATIONAL, <http://justdetention.org/webinar/one-in-eight-the-reality-of-sexual-abuse-in-juvenile-detention/#search> (last visited Nov. 23, 2015) *Training & Technical Assistance*, NATIONAL PREA RESOURCE CENTER, <http://www.prearesourcecenter.org/training-and-technical-assistance> (last visited Nov. 19, 2015).

during the initial response and criminal investigation, including safety measures, victim support, evidence gathering, and charging decisions. *Part Two* addresses the pretrial phase, including ongoing investigation and pretrial motion practice. *Part Three* focuses on promising trial strategies, from jury selection through sentencing.

## A. WHY PROSECUTE SEXUAL ABUSE IN CONFINEMENT?

Prosecutors have a legal and ethical duty, as well as a duty emanating from their leadership role in their communities, to prosecute cases of sexual abuse in confinement. Prosecutors must be leaders in the pursuit of justice, and the importance of their role in educating allied professionals and the public about crimes involving sexual abuse in confinement cannot be overstated. Our nation's courts "have repeatedly stated that a 'prosecutor is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public.' The duty of the prosecutor is to see that justice is done on behalf of both the victim and the defendant."<sup>9</sup> The ability to execute these duties is directly tied to the culture of the prosecutor's office, particularly as it relates to its commitment to cases of sexual abuse.

The responsibility of prosecutors to seek justice for victims extends to those held in confinement facilities. Every person in confinement has the right to be free from harm, and the prosecutor's duty to be fair and to respect all persons includes those they may have previously prosecuted. Cases involving sexual abuse in confinement are particularly critical because sexual abuse has "severe consequences for victims, for the security of correctional facilities, and for the safety and well-being of the communities to which nearly all incarcerated persons will eventually return."<sup>10</sup> Victims of sexual abuse in confinement need to know that prosecutors will aggressively seek convictions of their abusers, and abusers need to know this as well. Perpetrators of sexual abuse will continue to offend with impunity if they believe that their criminal behaviors committed inside of the facility will go unpunished.

The consequences of sexual abuse may extend beyond confinement into the community. Abusers, as well as their victims, may carry sexually transmitted infections that present threats to public health.<sup>11</sup> Victims may also experience emotional and psychological trauma related to the abuse, which can manifest in a number of ways, including difficulty with rehabilitation and assimilation into the community following release.<sup>12</sup> The negative repercussions of sexual abuse in confinement facilities can, therefore, be felt immediately and for generations to come.

### *Bookmarks*

## B. THE PRISON RAPE ELIMINATION ACT (PREA) AND THE PREA NATIONAL STANDARDS

Although PREA and the National Standards promulgated thereunder do not directly impose specific duties or obligations upon prosecutors, these federal laws nevertheless recognize the critical role of criminal prosecution as a means of eliminating sexual abuse in confinement. Many of the Standards are designed to promote the central prosecutorial goal of serving justice by protecting victims and witnesses and by holding offenders accountable. It is essential for the prosecutor responsible for charging and trying cases involving sexual abuse in confinement to become familiar with the Standards. Standards promoting the safety of victims and witnesses will increase their willingness to participate in the criminal justice process. In addition, familiarity with the Standards will help the prosecutor understand what evidence may be available as a result of

<sup>9</sup> State v. Penkaty, 708 N.W.2d 185, 196 (Minn. 2006).

<sup>10</sup> See *Executive Summary* in National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

<sup>11</sup> ZWEIG, *supra* note 8.

<sup>12</sup> *Id.* at 3, 47-48.

the evidence-gathering and preservation techniques mandated by the Standards. To the extent institutions conscientiously implement the Standards, the prosecutor preparing and trying a case will have better evidence with which to work.

In 2012, the Department of Justice implemented PREA by establishing the National Standards to Prevent, Detect and Respond to Prison Rape. These Standards provide guidance and mandatory minimum requirements for confinement facilities, with the goals of preventing sexual abuse in confinement and having trained professionals and established protocols in place to respond to reports of sexual abuse in confinement.<sup>13</sup> The PREA Standards are divided into Subparts that establish procedures and practices applicable to different types of confinement facilities. The Standards under Subpart A (28 C.F.R. § 115.11 *et seq.*) pertain to adult prisons and jails; the Standards under Subpart B (28 C.F.R. § 115.111 *et seq.*) pertain to lockups that detain individuals temporarily; the Standards under Subpart C (28 C.F.R. § 115.211 *et seq.*) pertain to community confinement facilities; and the Standards under Subpart D (28 C.F.R. § 115.311 *et seq.*) pertain to juvenile facilities.<sup>14</sup>

### STATED PURPOSES OF THE ACT<sup>15</sup>

- (1) Establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;
- (2) Make the prevention of prison rape a top priority in each prison system;
- (3) Develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape;
- (4) Increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities;
- (5) Standardize the definitions used for collecting data on the incidence of prison rape;
- (6) Increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;
- (7) Protect the Eighth Amendment rights of Federal, State, and local prisoners;
- (8) Increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and
- (9) Reduce the costs that prison rape impose on interstate commerce.<sup>16</sup>

<sup>13</sup> NATIONAL STANDARDS, *supra* note 5.

<sup>14</sup> Each of the four Subparts pertaining to the different types of facilities contain similar provisions tailored to that type of institution and are numbered accordingly, with a two-digit Subsection number for adult prisons and jails, a three-digit Subsection number beginning with "1" for lockups, a three-digit Subsection beginning with "2" for community confinement facilities, and a three-digit Subsection beginning with "3" for juvenile facilities. The remaining two digits refer to the same subject as for adult prisons and jails. For convenience, this *Resource* will cite to the Subsections dealing with adult jails and prisons unless discussing an important difference that is specific to another type of facility. The reader can refer to the corresponding Subsection in the other sets of standards to see how the standards differ by facility type.

<sup>15</sup> 42 U.S.C. § 15602 (Purposes)

<sup>16</sup> 42 U.S.C. § 15602.

The Standards are rules – not guidance – that create a regulatory floor for facilities. The Standards aim to create confinement environments that will minimize the risk of sexual abuse to inmates, provide maximum support for the victims of such abuse, and ensure that perpetrators of sexual abuse are held accountable. The Standards regulate inmate screening at the time of intake to reduce the likelihood that vulnerable inmates will be housed or placed in program settings with those likely to commit acts of abuse.<sup>17</sup> They provide for background checks of staff and outside contractors or volunteers to ensure that those with a history indicative of potential abusiveness are not placed in positions where they interact with inmates. The Standards also define and control staff interactions with inmates (*e.g.*, the manner in which searches are conducted) to minimize the opportunity for abuse.<sup>18</sup>

The Standards govern virtually all of the responsibilities of the institution and its staff with regard to facilitating reports of abuse (*e.g.*, providing the means for anonymous reports or reports to entities outside of the institution, and for reporting by third parties) and responding to such reports.<sup>19</sup> Initial responses provide for the safe separation of victims from abusers; access to medical care (including sexual assault forensic examinations), mental health care, and advocacy services for victims; and protection of the crime scene and other evidence.<sup>20</sup> Following the initial response and investigation, the Standards place upon the institutions a responsibility to see to the ongoing safety and protection of the victim from retaliation, as well as protection for anyone else cooperating with the investigation who requests such protection.<sup>21</sup> The Standards also impose a duty on the institution to keep the victim informed of the status of the investigation and prosecution or other official proceedings, such as disciplinary actions.<sup>22</sup>

Prevention and response efforts, however, cannot end with the confinement facilities. These facilities are only one part of the larger criminal justice system landscape, particularly as it concerns sexual abuse in confinement. An effective criminal justice response to this abuse is integral to the successful implementation of PREA. Prosecutors and their multidisciplinary team partners must take full advantage of the tools and resources available as a result of PREA to aggressively prosecute all cases of sexual abuse in confinement.

It is important to remember, too, that the Standards represent the minimum requirements for response to sexual abuse in confinement. Prosecutors should consistently endeavor to go beyond what the Standards require by enhancing their working relationships with correctional institutions and agencies to advance the shared goals of reducing the incidence of abuse, supporting victims in their recoveries, and conducting thorough investigations that will result in successful prosecutions.

### Bookmarks

17 *E.g.*, 28 C.F.R. § 115.41 (Screening risk for risk of victimization and abusiveness).

18 *E.g.*, 28 C.F.R. § 115.17 (Hiring and promoting decisions).

19 *E.g.*, 28 C.F.R. § 115.61 (Staff and agency reporting duties). Historically, reports of sexual abuse in confinement have been low. *See Beck, supra* note 1.

20 *E.g.*, 28 C.F.R. §§ 115.64, 67, 81, 82, 83 (Staff first responder duties, Agency protections against retaliation, Medical and mental health screenings; history of sexual abuse, Access to emergency medical and mental health services, Ongoing medical and mental healthcare for sexual abuse victims and abusers).

21 *E.g.*, 28 C.F.R. §§ 115.67, 73 (Agency protections against retaliation, Reporting to inmates).

22 28 C.F.R. § 115.73 (Reporting to inmates).

## II. PART ONE: INITIAL RESPONSE AND INVESTIGATION

Although prosecutors typically are not directly involved in the earliest phases of the initial response to an allegation of sexual abuse in confinement, it is important for them to be aware of the institutional practices involved when an act of sexual abuse is reported or suspected. The PREA Standards dictate that investigations conducted by the institution proceed in a specific manner, and that investigations conducted by outside investigative agencies (*e.g.*, local law enforcement or investigative unit in the prosecutor's office) follow a specific protocol adopted by that agency that is consistent with the Standards.<sup>23</sup> The Standards are not, however, the full extent of what can—and often should—be done in terms of investigating and responding to cases of sexual abuse in confinement. This *Resource* will suggest strategies complementing the minimum requirements set forth in the Standards.

An act of sexual abuse in confinement can come to the attention of institutional staff in several ways: it may be reported by the victim, a witness, or a third party (including family members in whom the victim may have confided); it may be discovered as the result of following up with investigation of a reported incident; or it may be discovered as a result of staff who noticed unusual inmate behavior or other suspicious circumstances that indicate an act of abuse may have occurred.<sup>24</sup> Institutions must have multiple, internal avenues for reporting sexual abuse, at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency that oversees the institution, and a process in place to thoroughly investigate any reported or suspected incidents of sexual abuse.<sup>25</sup>

### A. FIRST RESPONDERS

The very first response to an incident of sexual abuse in confinement is obviously crucial to evidence retention, and it also shapes how the victim will feel about participating in the investigation and prosecution processes. The PREA Standards have recognized this, and they include rules governing “staff first responder duties.”<sup>26</sup> First responders are required to separate the victim and suspect, and preserve and protect the crime scene until appropriate steps can be taken to collect any evidence. If the abuse occurred within a time period that still allows for the collection of physical evidence, the staff first responder must request that the victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating, and must ensure that the suspected abuser refrain from the same activities. The extent to which the Standards are followed has an obvious bearing on what evidence may or may not be available.

Beyond the need to preserve physical evidence, the first responder's demeanor, language, tone, and other behavior may have a profound effect on the victim's initial willingness to report the crime and ongoing participation in the investigation and prosecution of the case.<sup>27</sup> It is important to note, too, that the Standards require that the credibility of victims, witnesses, or suspects not be judged according to their status as an inmate or as staff, and that inmates reporting abuse are not to be compelled to submit to a polygraph as a condition of investigation.<sup>28</sup> All staff having contact with inmates are required to be trained on sexual abuse in confinement, responses, and procedures. This training should include respectful communication techniques, and those staff assigned to investigative duties must receive specific training on proper techniques for interviewing victims of sexual abuse.<sup>29</sup>

23 28 C.F.R. § 115.71 (Criminal and administrative agency investigations).

24 The term “inmate” will be used to refer to inmates, residents, and detainees throughout this *Resource*.

25 28 C.F.R. §§ 115.51, 71 (Inmate reporting, Criminal and administrative agency investigations).

26 *E.g.*, 28 C.F.R. § 115.64 (Staff first responder duties).

27 *See, e.g., About Us, START BY BELIEVING* <http://www.startbybelieving.org/AboutUs.aspx> (last visited Nov. 19, 2015).

28 *E.g.*, 28 C.F.R. § 115.71(e) (Criminal and administrative agency investigations).

29 28 C.F.R. § 115.34 (Specialized training: investigations).

Since the PREA Standards require facilities to have a *written* plan to coordinate actions in response to an incident of sexual abuse,<sup>30</sup> it will be helpful for prosecutors to obtain the written plan to provide a framework for understanding the parameters of the official response to the initial report.

### Bookmarks

## B. SEXUAL ASSAULT RESPONSE TEAM

A sexual assault response team (SART) “is a multidisciplinary, interagency team of specially-trained service providers who share resources and work together when responding to victims of sexual assault.”<sup>31</sup> Although the PREA Standards do not require a SART, they do require a coordinated response.<sup>32</sup> After the first responder learns of an incident, the victim should be offered the services of a SART if one is available. The SART may include an advocate, a sexual assault nurse examiner (SANE)<sup>33</sup> or other medical professional, a law enforcement officer, and – in some jurisdictions – a prosecutor. Even where prosecutors are not directly involved in the SART, they can contribute to the support provided by the team by helping to determine how best to protect victim safety while preserving evidence in anticipation of trial.<sup>34</sup> Prosecutors in jurisdictions without SARTs can reach out to law enforcement, advocates, SANEs, confinement professionals, and other agencies in order to coordinate to the greatest extent possible.<sup>35</sup>

The PREA Standards’ requirement of a coordinated response has improved the ease with which a sexual abuse victim can “activate” a SART response from within the confinement facility by increasing accessibility to the team members and by removing barriers, including costs.<sup>36</sup> The PREA Standards require that a victim be offered the services of an advocate—preferably one who works independently of the confinement facility.<sup>37</sup> The Standards also require that a victim of sexual abuse receive medical care immediately and at no cost, and that the care should be provided by a SANE, if such a profes-

30 28 C.F.R. § 115.11 (Zero tolerance of sexual abuse and sexual harassment; PREA Coordinator); *see also* 28 C.F.R. § 115.65 (Coordinated response).

31 *VIDEO: SARTs at Work: An introduction to the SART Approach*, OFFICE FOR VICTIMS OF CRIME, <http://ovc.ncjrs.gov/sartkit/about-video.html> (last visited Nov. 19, 2015).

32 28 C.F.R. § 115.65 (Coordinated response).

33 For the purposes of this *Resource*, SANE will be used, but it should be noted that some jurisdictions refer to sexual assault forensic examiners and/or forensic nurse examiners (SAFE/FNE).

34 “Vertical prosecution ... is desirable whenever possible ... Vertical prosecution ... allows prosecutors and investigators to develop a high level of expertise in sensitive cases, and permits them to take full advantage of cooperative relationships with the allied professionals who provide collateral support services to these victims and witnesses.” TERESA M. GARVEY, *AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN, WITNESS INTIMIDATION: MEETING THE CHALLENGE* (2013), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm). Vertical prosecution also limits the number of victim interviews, which have the potential to re-traumatize, that need to be conducted, and provides prosecutors with more of an opportunity to develop a rapport with the victim.

35 *SART Toolkit: Resources for Sexual Assault Response Teams*, OFFICE FOR VICTIMS OF CRIME, <http://ovc.ncjrs.gov/sartkit/> (last visited Nov. 19, 2015).

36 Although there have been no studies specific to confinement, there is research that shows that SARTs are effective in encouraging victim participation in the criminal justice response and improving case outcomes. *See* MEGAN R. GREESON, REBECCA CAMPBELL & DEBORAH BYBEE, *SEXUAL ASSAULT RESPONSE TEAM (SART) FUNCTIONING AND EFFECTIVENESS: FINDINGS FROM THE NATIONAL SART PROJECT* (May 2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/243829.pdf>.

37 *E.g.*, 28 C.F.R. § 115.21 (Evidence protocol and medical forensic examination). PREA Standards also require the facility to “provide inmates with access to outside victim advocates for emotional support services related to sexual abuse. . . .” 28 C.F.R. § 115.53 (Inmate access to outside confidential support services). *See also* 28 C.F.R. § 115.21(d) (Evidence protocol and forensic medical examinations) (“The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization, or a qualified agency staff member”).

sional is available.<sup>38</sup> From a practical standpoint, depending on the location of the facility, the availability of SANEs in the jurisdiction, and the number of historically reported sexual abuse cases in the institution, it will be the rare facility that has a SANE on staff. In most circumstances, the victim will receive immediate medical care at the institution, and then be transferred to an outside location for a complete sexual assault forensic examination.

### CONFINEMENT-SPECIFIC SARTS

Although PREA does not require confinement-specific SARTs, several jurisdictions have created such a SART, or have designated SARTs prepared to assist inmate-victims. Two jurisdictions that have implemented such programs are Miami-Dade, Florida and the Oregon Department of Corrections. More information can be found at:

- MARYDELL, GUEVERA, MIAMI-DADE CORRECTIONS AND REHABILITATION DEPARTMENT PREA ANNUAL REPORT (2014), <http://www.miamidade.gov/corrections/library/prison-rape-elimination-act-annual-report-2014.pdf>.
- “Sexual Assault Response Teams,” The OREGON DEPARTMENT OF CORRECTIONS, NATIONAL PREA RESOURCE CENTER, <http://www.prearesourcecenter.org/training-technical-assistance/prea-in-action/prea-readiness/odoc-profile-page> (last visited Nov. 20, 2015).

For additional information about creating a confinement-specific SART, see “SART Protocol,” *Tools for Service Providers*, JUST DETENTION INTERNATIONAL, <http://justdetention.org/resource/tools/> (last visited Nov. 23, 2015).

### Bookmarks

## C. INVESTIGATION

A solid investigation of an allegation of sexual abuse in confinement begins with the reported incident itself and expands to include events that occurred before and after that incident, including other potential acts of sexual abuse involving other victims.<sup>39</sup> All multidisciplinary professionals must collaborate to advance the goals of such an investigation: to keep the victim safe; to provide services and support to the victim throughout the criminal justice process; to preserve and examine all physical evidence; to secure all documentary or electronic evidence; to carefully interview the victim and, if possible, the suspect; to identify and interview all potential witnesses; to probe into all relevant behaviors exhibited by the suspect, by the victim, and by other inmates or staff; to look for other incidents of abusive or threatening conduct; and to prevent and respond to intimidation and retaliation. Prosecutors should effectively communicate these goals to the multidisciplinary team members so they can collectively establish a protocol for victim support and information sharing. This kind of coordinated effort will result in more thorough investigations with more evidence available for trial. To the

<sup>38</sup> “The agency shall offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible ....” 28 C.F.R. § 115.21 (Evidence protocol and forensic medical examinations). See also 28 C.F.R. § 115.82(c) (Access to emergency medical and mental health services) (“Inmate victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment”); 28 C.F.R. § 115.83 (Ongoing medical and mental health care for sexual abuse victims and abusers). If a SANE is not available, facilities can consider the use of telemedicine, which has proven efficacious in areas without SANEs. Sheridan Miyamoto et al., *Impact of Telemedicine on the Quality of Forensic Sexual Abuse Examinations in Rural Communities*, 38 CHILD ABUSE & NEGLECT 1533-39 (2014). Additionally, facilities can work to ensure that a local emergency department physician or registered nurse has relevant training to conduct the forensic examination. U.S. DEPT. OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, MINNESOTA COALITION AGAINST SEXUAL ASSAULT, ENSURING FORENSIC MEDICAL EXAMS FOR ALL SEXUAL ASSAULT VICTIMS: A TOOLKIT FOR STATES AND TERRITORIES (2008), [http://www.mcasa.org/uploads/docs/MCASA\\_ToolKit\\_FINAL.pdf](http://www.mcasa.org/uploads/docs/MCASA_ToolKit_FINAL.pdf).

<sup>39</sup> See Jennifer G. Long, Viktoria Kristiansson & Charlene Whitman-Barr, *Establishing Penetration in Sexual Assault Cases*, 24 STRATEGIES IN BRIEF (Jan. 2015), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).

extent victims are kept safe, informed, and engaged in the process, they are more likely to continue to participate in the ongoing criminal justice proceedings. And, ultimately, more abusers will be held accountable for their abusive acts.

Some confinement facilities have their own investigative units that are responsible for investigating allegations of sexual abuse and sexual harassment by inmates or staff. Other confinement facilities handle the details of the initial response, ensuring the victim's safety and preserving the crime scene and any other evidence for collection by an outside law enforcement agency. Where a facility's own investigative unit handles the initial investigation, it is obligated to refer the matter for prosecution if it appears a criminal act has been committed.<sup>40</sup> In such cases, a local police agency or the prosecutor's office may assume responsibility for any necessary follow-up investigation.<sup>41</sup>

The most important evidence to be secured immediately includes typical crime scene evidence, such as photographs of the scene; collection of bodily fluids or other DNA or trace evidence (from items such as bedding, or swabs of floors or walls where sexual abuse may have occurred); statements from the victim and any witnesses who can be immediately identified; a statement from the suspect, if possible; any recordings from audio or video monitoring equipment in the facility (including recordings from days prior to the incident); the results of any medical examination and associated evidence collected from the victim during such examination; and any documentary evidence, such as logs of housing, work, or program assignments, disciplinary reports, and relevant inmate written communications and complaints.

In the days and weeks to follow, examination of records from other institutions or prior periods of incarceration may yield useful evidence about prior acts and additional victims. Additional interviews with current and previous cellmates and associates of both parties, as well as additional interviews with staff, may prove useful as well.

- **INTERVIEWS WITH THE VICTIM, ANY WITNESSES, AND THE SUSPECT**

Interviews with the victim of sexual abuse in confinement must demonstrate the same sensitivity required for the interview of any other victim of sexual violence. The interviewing techniques should recognize the impact of trauma on victims and focus on sensory information.<sup>42</sup> The PREA Standards mandate that investigators interviewing victims be specially trained in proper interviewing techniques. The victim should be encouraged to be entirely truthful, and the investigator's words and demeanor should be objective and nonjudgmental. The questioning should include the history of the interactions between the parties, and any history of coercion or intimidation. The act of abuse itself should be described in as much detail as possible, with the understanding that victims of recent trauma often are unable to recall certain or specific details until later, if at all.<sup>43</sup> The questioning should also elicit details about other witnesses and evidence that might corroborate various aspects of the victim's statement. The victim should also be asked about any previous victimization, either by the same abuser or anyone else. This information is important not only so that appropriate charges can be filed, but also for purposes of safety planning and litigation of relevant pre-

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<sup>40</sup> 28 C.F.R. § 115.71(h) (Criminal and administrative agency investigations).

<sup>41</sup> The practices and capabilities of the prosecutor's office will determine which agency will conduct any necessary follow-up investigation. One obvious consideration is whether the prosecutor's office has its own investigators who are able to conduct such investigations.

<sup>42</sup> See, e.g., RUSSELL W. STRAND, FORENSIC EXPERIENTIAL TRAUMA INTERVIEW (FETI), UNITED STATES ARMY MILITARY POLICE SCHOOL, <http://www.mncasa.org/assets/PDFs/Forensic%20Trauma%20Interviewing%20Techniques-%20Russell%20Strand.pdf>; see also *The Forensic Experiential Trauma Interview (FETI)*, BATTERED WOMEN'S JUSTICE PROJECT, <http://www.bwjp.org/resource-center/resource-results/the-forensic-experiential-trauma-interview-feti.html> (last visited Nov. 19, 2015). See also Viktoria Kristiansson & Charlene Whitman-Barr, *Integrating a Trauma-Informed Response in Violence Against Women and Human Trafficking Prosecutions*, 13 STRATEGIES (Feb. 2015), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).

<sup>43</sup> LONG, KRISTIANSSON & WHITMAN-BARR, *supra* note 39.

trial motions. Interviews with other witnesses, including other inmates or staff, should be similarly comprehensive.

Investigators and prosecutors<sup>44</sup> should attempt to interview the suspect. In the case of an inmate suspect, the usual *Miranda* warnings should be given.<sup>45</sup> In the case of a staff suspect, there is the additional consideration of whether such statements have been compelled under threat of professional discipline. In *Garrity v. New Jersey*,<sup>46</sup> the United States Supreme Court held that the statement of a government employee, compelled under threat of discipline if the employee refuses to give a statement, is not voluntary and, therefore, cannot be used in subsequent criminal proceedings. While the government employer remains free to discipline the employee for refusing to give a statement, or for any conduct admitted in such a statement, the *Garrity* rule presents obvious issues when a criminal investigation is also pending. Any statement compelled from an employee suspect should not be shared with the criminal investigator, lest the compelled statement or fruits thereof taint any further investigation. Although an outside criminal investigator may attempt to interview a staff suspect (if the suspect has not been arrested), the PREA Standards require that the facility's or agency's internal investigators refrain from obtaining a compelled statement from the staff suspect until the prosecutor has been consulted with regard to the potential impact such a statement may have on the criminal prosecution of the suspect.<sup>47</sup>

- **EVIDENCE FROM MEDICAL EXAMINATION AND RECORDS**

Evidence from the victim's medical examination and records can be helpful in corroborating other evidence in a sexual abuse in confinement case. It is important, however, for prosecutors to understand the limitations on the utility of such evidence to prove or disprove that a particular act of sexual abuse occurred. First, where victims are examined subsequent to a report of sexual abuse—even abuse that is quite recent—the examination and evidence collection will often yield no determinative signs of physical injury or other forensic evidence.<sup>48</sup> Second, even in cases where injury is present, medical professionals are “limited in [their] ability to distinguish between injuries resulting from a sexual assault and those sustained during consensual sexual activity.”<sup>49</sup> Because judges and juries often expect a sexual abuse case to include evidence of injury, and because they expect to hear that any such injury is proof of abuse and that lack of injury means the abuse did not occur, prosecutors should consult with medical experts who can explain the significance of any injury or lack of injury, and should plan to call such experts as witnesses at trial.

In cases involving female victims, lack of injury is generally not inconsistent with a history of sexual abuse.<sup>50</sup> “In many cases [involving female victims of sexual abuse], injury will not be noted, but this could either be because there was truly no injury, or there were no specialty evaluation techniques employed, such as toluidine blue dye or magnification. A finding of no injury could also be seen when the examination occurred after the anogenital injury had already healed. This can take place in as little as 36-48 hours; healing is often much quicker than the 72-120 hour timeframe for sexual assault medical-forensic exams.”<sup>51</sup> Factors including lapse of time between the abuse and the examination, and the nature of the abuse, could certainly impact findings.

44 Prosecutors should interview suspects only when their lawyers are present.

45 Although a suspect's status as an inmate does not automatically mean that any questioning within the prison is “custodial” interrogation implicating *Miranda*, the safest course is to provide the warning before questioning. *Howe v. Fields*, 132 S.Ct. 1181 (2012).

46 *Garrity v. New Jersey*, 385 U.S. 493 (1967).

47 28 C.F.R. § 115.71(d) (Criminal and administrative agency investigations).

48 “Documentation from sexual assault medical-forensic examinations will often note that no injury was found to the female genitalia or anus.” Jenifer Markowitz, *Absence of Anogenital Injury in the Adolescent/Adult Female Sexual Assault Patient*, 13 STRATEGIES IN BRIEF (Oct. 2012), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).

49 *Id.* Note that staff-on-inmate sexual abuse is per se criminal in many jurisdictions as well as being forbidden in personnel policies. Evidence of injury and/or absence of injury may still be relevant to cases involving staff-on-inmate abuse.

50 *See, e.g., Commonwealth v. Miner*, 562 Pa. 46, 753 A.2d 225 (2000).

51 MARKOWITZ, *supra* note 48.

There have been fewer studies on penile penetration of a male anus, but those that have been published indicate that male victims are more likely to exhibit signs of injury than are female victims.<sup>52</sup> This may be because “[m]en may experience more digital or object penetration than women, who are more likely to experience penile penetration.”<sup>53</sup> “Not surprisingly, men are more likely to manifest anal injury than women, and less likely to experience external body injury.”<sup>54</sup>

With regard to the fact that injuries often cannot be specified as caused by consensual or nonconsensual sexual activity, prosecutors should again consult with medical experts to evaluate the evidence in each specific case within the context of the facts of the case and the most recent research in the field. Current studies indicate that the “vast majority of injuries assessed during a medical-forensic examination are non-specific, meaning they could result from non-consensual sexual activity (either with or without applied physical force) or from consensual sexual contact.”<sup>55</sup>

Even considering the limited presence of injury and the limited conclusions that can be drawn about the source of any such injury, “evidence of anogenital injury (or the lack thereof) is significant in its own right. As with all evidence in a sexual assault case, the goal is not just to present physical evidence of the sexual assault, but also to document evidence that can be used to corroborate statements made by the victim, including the history of the sexual assault.”<sup>56</sup> Prosecutors should examine any statements and medical records, and discuss with the examining professional, and with other experts, the significance of any injuries. Bruising is not always evident immediately after an injury occurs—it may not be visible until later, and the appearance of bruises tends to change over time.<sup>57</sup> If the suspect strangled the victim, the victim could have petechiae, which are small red or purple spots caused by bleeding under and into the skin.<sup>58</sup> Petechiae and redness thus might be consistent with strangulation, suggesting a nonconsensual act.

The victim’s medical records will contain the victim’s medical history, discharge, and follow-up plan, all of which are important to victim care and may be a source of important evidence about the victim, potential witnesses, and the suspect.

Prosecutors should speak to the examining SANE or physician, and to a medical expert about the examination, records, and medical findings.<sup>59</sup> Prosecutors should also obtain information on the most recent studies and articles on sexual assault forensic examinations and related research in order to prepare for trial.

- **FORENSIC EVIDENCE**

Just as in cases of sexual abuse that occur outside of an institutional setting, the potential existence of physical evidence connected to sexual abuse in confinement depends on several factors, including the facts surrounding the incident itself, the lapse of time between the incident and the report, any cleaning or other contamination that may have occurred around the crime scene, and attempts by the suspect or by another person to conceal or destroy evidence.

52 See Iain A. McLean, *The Male Victim of Sexual Assault*, xxx BEST PRAC. & RES. CLINICAL OBSTETRICS & GYNAECOLOGY 1-8 (2012).

53 Curriculum module on Male Patients developed by Jenifer Markowitz (citing IA McLean, V Balding, C. White, *Forensic medical aspects of male-on-male rape and sexual assault in greater Manchester*, 44(2) MED SCI LAW 165-69 (Apr. 2004)).

54 Curriculum module on Male Patients developed by Jenifer Markowitz (citing H. Nesvold, A.M. Worm, U. Vala, & G. Agnarsdottir, *Different Nordic Facilities for Victims of Sexual Assault: A Comparative Study*, 84(2) ACTA OBSTET GYNECOL SCAND. 177-83 (Feb. 2005); McLean, Balding & White, *supra* note 53; R.F. Geist, *Sexually Related Trauma*, 6(3) EMERG MED CLIN NORTH AM. (Aug. 1988)).

55 MARKOWITZ, *supra* note 48.

56 MARKOWITZ, *supra* note 48.

57 See U.S. DEP’T OF JUSTICE, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT FORENSIC EXAMINATIONS ADULTS/ADOLESCENTS, SECOND EDITION (Apr. 2013), <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>.

58 For more information on strangulation and petechiae, see J. Stephan Stapczynski, *Strangulation Injuries*, 31 EMERGENCY MEDICINE REPORTS (Aug. 2, 2010).

59 The examining SANE or physician may also be an expert and may be qualified as one in court.

Regardless of any delay in the report, investigators should exhaust all efforts to collect forensic evidence, including DNA from the victim's and suspect's bodies;<sup>60</sup> DNA from the crime scene (*e.g.*, clothing, bedding, bedframe, wall, floor, furnishings, or other items); DNA from the areas where the victim and suspect live or work;<sup>61</sup> and fingerprints from the crime scene, area surrounding the crime scene, and the skin of the suspect and the victim (the latter almost always must be specifically requested).<sup>62</sup> Several cases have relied upon forensic evidence recovered after a lapse of a significant period of time, including a case of sexual abuse perpetrated by a court officer where corroborative DNA evidence was recovered from a carpet many months after the incident occurred.<sup>63</sup>

Responding investigators processing a crime scene or other relevant locations should also be on the alert for other physical evidence, including lubricants such as Vaseline, hair cream, or grease, as well as condoms, although the latter are not often used in sexual abuse in confinement.<sup>64</sup>

- **ADDITIONAL EVIDENCE**

Investigators, with the support of prosecutors, should ensure that there is not an overreliance on medical or forensic evidence, particularly since many cases of sexual abuse in confinement involve delayed disclosures.

Very significant corroborative evidence can be obtained as a result of interviews with other witnesses, including other inmates, cellmates (current and former), family members, visitors, staff, medical professionals, and first responders. In addition, a fresh complaint witness can be important to corroborate evidence concerning the abuse and circumstances of the disclosure.<sup>65</sup> The fresh complaint rule is a special evidentiary rule applicable only to sexual abuse cases that allows the prosecution to introduce the victim's out-of-court statements to another person(s) that the abuse occurred.<sup>66</sup> Investigators should ask the victim when and to whom s/he first disclosed information about the sexual abuse, and obtain a statement from that person(s).<sup>67</sup>

60 See 28 C.F.R. § 115.64 (Staff first responder duties).

61 DNA evidence might be transferred to these locations even if the assault took place elsewhere.

62 See I.R. Futrell, Hidden Evidence: Latent Prints on Human Skin, 65(6) FBI LAW ENFORCEMENT BULLETIN 21-24 (Apr. 1996), available at <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=161111>; see also, ALAN MCROBERTS, ED., NAT'L INSTITUTE OF JUSTICE, THE FINGERPRINT SOURCEBOOK, SCIENTIFIC WORKING GROUP ON FRICTION RIDGE ANALYSIS, STUDY AND TECHNOLOGY (SWGFAST) (Aug. 2011), <https://www.ncjrs.gov/pdffiles1/nij/225320.pdf>. It is sometimes possible to obtain fingerprint evidence from skin surfaces, but this type of examination is not commonly done by crime scene technicians, so the prosecutor should request it in addition to a DNA swab. Even if no fingerprints are recovered, prosecutors should consider calling a witness at trial to explain that the State looked for and tested for such evidence, and then explain the statistical probability of finding such evidence.

63 See Alysha Palumbo, *Boston Court Officer Charged With Rape, Sexual Conduct for Fee*, NECN (Jan. 16, 2014), [http://www.necn.com/news/new-england/\\_NECN\\_Boston\\_Court\\_Officer\\_Charged\\_With\\_Rape\\_Sexual\\_Conduct\\_for\\_Fee\\_NECN-251593851.html](http://www.necn.com/news/new-england/_NECN_Boston_Court_Officer_Charged_With_Rape_Sexual_Conduct_for_Fee_NECN-251593851.html).

64 Charles B., *Rape in Prison*, PRISON PLANET FORUM (Oct. 11, 2008), <http://forum.prisonplanet.com/index.php?topic=64415.0> (last visited Nov. 19, 2015).

65 See, *e.g.*, *New Jersey v. Buscham*, 360 N.J. Super. 346, 358-59, 823 A.2d 71, 78-79 (2003) ("The fresh complaint doctrine is a common law exception to the hearsay rule."). See also NJ J.I. CRIM Non 2C Charges ("Fresh Complaint" and "Fresh Complaint: Silence Or Failure To Complain).

66 It is important to note, however, that the rule itself creates a paradox—while "fresh complaint" evidence is intended to corroborate the victim's testimony, the rule lends credence to the myth that a victim would "complain" immediately, when in fact we know the opposite to be true in many cases.

67 Check your jurisdiction's case law and jury instructions for permissible application of this doctrine, including the permissible lapse of time between the incident and the disclosure.

In looking for additional evidence, investigators should be guided by what research and anecdotal evidence have repeatedly indicated—that many sexual abusers have multiple victims.<sup>68</sup> Investigators and prosecutors should, therefore, look for *additional* people the sexual abuser may have victimized, both within and outside of the confinement facility. To find them, investigators should examine the suspect's criminal history, talk to neighbors or to law enforcement in the offender's home neighborhood who might have heard about other possible victims, and communicate with staff and inmates, including those at other institutions where the suspect may have worked or been confined, who might be familiar with the suspect's actions and reputation. Evidence of other acts of abuse or assault may be admissible through Fed. R. Evid. 404(b) or its equivalent, which permits admission of other "bad acts" to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.<sup>69</sup>

One advantage to investigating a crime that occurred in a secure facility is that many areas are constantly monitored by video and/or audio recorders. Investigators should check for recordings that might show the behavior of the suspect or the victim shortly before and after the incident. Such recordings may capture relevant acts such as intimidation, cleaning up, changing clothes, concealing evidence, or conversing with other potential witnesses. As more facilities "develop, document, and make best efforts to comply with a staffing plan that provides for adequate levels of staffing, and where applicable, video monitoring[.]"<sup>70</sup> the likelihood of finding helpful recordings may increase.

Finally, it is important to examine any relevant documentary evidence maintained by the institution, such as logs of housing, work, or program assignments, disciplinary reports, or relevant inmate written communications or complaints. These may provide important information about the interactions between the abuser and the victim before or after the abuse, or may lead to the identification of other potential victims or witnesses.

### Bookmarks

## D. VICTIM/WITNESS SAFETY FOLLOWING ABUSE

PREA Standards dictate that the victim should be immediately separated from the abuser and should receive all necessary medical and mental health support.<sup>71</sup> In addition to those responses, the victim and cooperating witnesses must be protected on an ongoing basis from further acts of abuse or retaliation by the suspect or his/her allies.<sup>72</sup>

68 A study by David Lisak showed that 63% of all rapes are committed by serial offenders; a similar study conducted by the Navy indicated that 71% of all rapes are committed by serial offenders. David Lisak, *Understanding the Sexual Nature of Sexual Violence*, 14 SEXUAL ASSAULT REPORT 49-61 (Mar./Apr. 2011). The utility of an investigation to find other victims cannot be overstated. *But see* Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, XX JAMA PEDIATR. XX (July 2015), <http://archpedi.jamanetwork.com/article.aspx?articleid=2375127> (this study "investigate[d] the extent to which most campus rapists consistently perpetrated rape during their high school and college years ... [using] the Federal Bureau of Investigation (FBI) definition of *rape* ... [and including] only completed acts ... as rape; attempts that failed to result in penetration were excluded ... 10.8% (177 of 1645) of the college men reported perpetrating at least 1 rape from 14 years of age through the end of college ... Most men (74.7%) who committed college rape only did so during 1 academic year ... Analyses revealed 3 cohesive groups of men in terms of their likelihood to commit rape across time: men with low or time-limited (91.7%), decreasing (5.6%), and increasing (2.7%) patterns ... Although a small group of men perpetrated rape across multiple college years, they constituted a significant minority of those who committed college rape and did not compose the group at highest risk of perpetrating rape when entering college."

69 FED. R. EVID. 404(b).

70 28 C.F.R. § 115.13 (Supervision and monitoring).

71 The Standards require that "[i]nmate victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment." 28 C.F.R. § 115.82 (Access to emergency medical and mental health services).

72 28 C.F.R. § 115.67 (Agency protection against retaliation) (The Standards require agencies to establish a policy to protect all inmates and staff who report abuse from retaliation by other inmates or staff; staff members or departments shall be charged with monitoring retaliation. In addition, multiple protection measures (*e.g.*, housing changes, transfers for inmate victims or abusers, removal of abusers, and emotional support services for inmates or staff) shall be employed).

Where the initial investigation reveals that an act of abuse has been committed by a staff member, the Standards permit immediate suspension of that staff member's contact with all inmates pending the outcome of an investigation.<sup>73</sup> Nevertheless, the staff-abuser may have allies in a position to intimidate or to retaliate against the victim or any cooperating witnesses. Where the abuser is an inmate, that abuser is also likely to have allies in a position to do harm to the victim and other cooperating witnesses.

Ongoing protection of the victim and other cooperating witnesses requires careful examination of their vulnerability, the dangerousness of the abuser, and the dynamics that led to the abuse. Simply placing the victim and other witnesses in protective custody is usually not appropriate. Protective custody often involves restrictions on the availability of normal activities such as work assignments, program participation, recreational opportunities, and other privileges available to inmates in general population. The PREA Standards state that involuntary placement in protective custody is permissible only for a very limited time and where the institution has documented the "basis for the facility's concerns for the inmate's safety" and the reason why no other housing option is available.<sup>74</sup>

- **ASSESSING RISK OF VICTIMIZATION AND ABUSIVENESS**

The PREA Standards require that inmates be screened at the time of intake to assess their risk of sexual abuse victimization and their risk of committing acts of abuse against others.<sup>75</sup>

Safety planning requires that the risk of both sexual victimization and abusiveness be carefully assessed at intake and carefully reassessed following a report of an act of sexual abuse (or upon receipt by the facility of additional relevant information). Moreover, if the abuser is a staff member, assessment of his/her dangerousness is important for determining the amount and conditions of bail when criminal charges are brought.

Prosecutors should keep in mind what research tells us about sexual abusers—that many are serial abusers with multiple victims.<sup>76</sup> Therefore, the identification of just one act of sexual abuse may present an important opportunity to protect not only the known victim, but past and future victims as well. A post-incident assessment should consider not only the abuser's intake assessment and the facts of the current case, but should include an evaluation of factors that may bear on the risk for future abuse, intimidation, or other crimes, both inside and outside of a confinement facility.<sup>77</sup>

Regardless of whether the abuser is an inmate or a staff member, prosecutors should scrutinize the abuser's predatory behaviors, some of which may be unique to confinement. These behaviors include physically and emotionally isolating victims; grooming victims by befriending them; offering prospective victims scarce goods or valuable con-

<sup>73</sup> 28 C.F.R. § 115.66 (Preservation of ability to protect inmates from contact with abusers). Specifically, agencies cannot be limited by collective bargaining or other agreements in their ability to limit a suspected staff abuser's contact with inmates pending the outcome of an investigation. 28 C.F.R. § 115.66 (Preservation of ability to protect inmates from contact with abusers). Additionally, "[t]he departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation." 28 C.F.R. § 115.71(j) (Criminal and administrative agency investigations).

<sup>74</sup> 28 C.F.R. § 115.43 (Protective custody).

<sup>75</sup> 28 C.F.R. § 115.41 (Screening for risk of victimization and abusiveness).

<sup>76</sup> LISAK, *supra* note 68; SWARTOUT ET AL., *supra* note 68.

<sup>77</sup> See, e.g., *Danger, Lethality, and Risk Assessment*, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, [http://www.ncdsv.org/publications\\_danger.html](http://www.ncdsv.org/publications_danger.html) (last visited Nov. 19, 2015).

traband; entering into an initially consensual relationship in which the victim comes to rely on the abuser;<sup>78</sup> and entrapping the victim by covering up for illegal or banned activity. All of these supposed acts of “kindness” are actually designed to exploit vulnerabilities and cause prospective victims to let down their guard.

Coercion—the use of subtle or direct force or threats—is a common tactic in sexual victimization in confinement facilities.<sup>79</sup> Coercion *negates* consent; when a victim is pressured or compelled to do something, s/he is not able to willingly agree to participate in the activity.<sup>80</sup> In confinement facilities, coercion may be very common in the day-to-day lives of inmates, where the simplest transactions—obtaining a single contraband cigarette or an extra blanket—may be considered a “favor.” Some inmates inevitably become indebted to other inmates, and this indebtedness may be considered “repaid” with sexual acts that are not truly voluntary. An expert in confinement culture might be useful to explain to the factfinder the dynamics and the consequences of unpaid “debt” in confinement settings.

Inmate-abusers are not the only perpetrators of sexual abuse who employ coercion in committing their offenses; staff-abusers often coerce inmates into victimization by promising them “protection”—from other inmates or from disciplinary charges. Abusive staff may also promise other types of favorable treatment to induce victims to submit to their demands. The most recent Bureau of Justice Statistics (BJS) study on adult prisons and jails found that “[a]n estimated 1.5% of prison inmates and 1.4% of jail inmates reported that they had sex or sexual contact unwillingly with staff as a result of physical force, *pressure*, or *offers of special favors or privileges* [emphasis added].”<sup>81</sup>

Coercion is one of the most effective weapons in an abuser’s arsenal: it not only blocks a victim’s ability to self-identify as a victim, but it also may cause a victim to minimize an abuser’s culpability and to engage in self-blame. Victims may be fearful of reporting abusive conduct because of their own perceived violations of institutional rules. Law enforcement professionals and prosecutors who investigate these cases must maintain their focus on the abuser’s coercive behavior rather than the victim’s compliance with the abuser’s demands.

#### • SEPARATION ORDERS/INSTRUCTIONS

In assessing dangerousness and maintaining the safety of victims and cooperating witnesses, prosecutors must consider factors beyond the incident(s) of sexual abuse.<sup>82</sup> Any case of sexual abuse in a confinement facility presents the danger of witness intimidation and retaliation. Suspicion that the defendant may be an experienced abuser, coupled

78 Staff have a duty of care of refrain from any sexual contact with an inmate. “Staff have total control over inmates ... Inmates are not allowed to tell staff, ‘no,’ so oftentimes those coercive relationships take place because staff have total control over an inmate’s life, making them a victim.” PREA and state statutes legally proscribe any sexual contact between confinement staff or volunteers and an inmate. *Investigating Sexual Assault and Sex Related Crimes in Confinement Settings: Guidance for Criminal Investigators*, VIMEO, <https://vimeo.com/137285337> (last visited Nov. 16, 2015) (quote from Carrie Gerlicher, Director of Special Investigations, Minnesota Dep’t of Corrections).

79 Coercion is not uncommon in violent intimate partner relationships, and the possibility of intimate partner sexual abuse among inmates should be explored. Intimate partner relationships among inmates are administratively prohibited in confinement facilities, and all sexual contact between inmate and staff is forbidden.

80 *See, e.g.*, N.H. REV. STAT. ANN. § 632-A:2(m) (When at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act); WASH. REV. CODE ANN. § 9A.44.010(7) (Consent” means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact); *see also* N.D. CENT. CODE ANN. § 12.1-20-02(1) (“Coercion” means to exploit fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance).

81 BECK, *supra* note 1. *See also* G. Z. MAZZA, ED., U.S. DEP’T OF JUSTICE, REPORT ON SEXUAL VICTIMIZATION IN PRISONS AND JAILS: REVIEW PANEL ON PRISON RAPE 55 (Apr. 2012), [http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea\\_finalreport\\_2012.pdf](http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_2012.pdf). (The report included a review of sexual victimization in jails, and noted a case where “a male detention officer ... used coercion to perform oral sex on a male inmate.”) Sexual abusers in juvenile confinement facilities are also coercing their victims. The 2012 BJS study of juvenile confinement facilities found that 12.3% of victims of staff sexual misconduct were offered protection in exchange for engagement in sexual contact.

82 PREA Standards require that protection be afforded any cooperating witness requesting such protection. 28 C.F.R. §§ 115.43, 67, 68 (Protective custody, Agency protection against retaliation, Post-allegation protective custody).

with any verbal and/or physical threats, however, should be viewed as an indication that the situation is especially ripe for intimidation. Safety is a prosecutorial must; it should be considered first and foremost, as it has a direct effect on the ability to seek justice and prosecute abusers.

Prosecutors should request a standing separation order<sup>83</sup> for confinement, transport, and the courthouse, with serious consideration given to whether to keep the victim, any witnesses, and abuser in the same facility. Safety must be the preeminent consideration when deciding whether and where to transfer either the victim or the abuser. Inmate networks are vast, and information about inmates in one facility can become known to inmates in any facility, and thus create the potential for intimidation and even other crimes perpetrated against the victim. Therefore, in addition to separation from the abuser, the victim and witnesses should be separated from any of the abuser's allies, where possible, to reduce the potential for intimidation or retaliation.

As discussed previously, protective custody is inappropriate for many victims and witnesses due to its punitive impact on their daily lives. Carefully constructed separation orders, either judicial or administrative, can ensure that victims and witnesses have continued access to programming and services, which may be particularly essential for victims after suffering the trauma of sexual abuse.

### Bookmarks

## E. CHARGING DECISIONS

Initial charges should include all criminal acts for which there is probable cause, including any previous, uncharged incidents within the applicable limitations period, as well as any intimidation crimes, such as criminal coercion, witness intimidation, threats, and assault or aggravated assault. If there are multiple incidents involving a course of conduct of intimidation, assault, or sexual abuse, it is usually statutorily appropriate to add a charge of stalking, which may ultimately permit evidence of many related "bad acts" as part of the course of conduct, without the need to file a motion to admit evidence of those acts under Fed. R. Evid. 404(b) or its equivalent.

In deciding what charges can be proved at trial, it is important to take into account the limitations on admissible hearsay pursuant to the Sixth Amendment's Confrontation Clause, as interpreted in *Crawford v. Washington*<sup>84</sup> and its progeny. If a witness will definitely be unavailable for trial (as in the case of a deceased witness or one who has clearly gone into hiding or adamantly refuses to testify), only out-of-court statements of the witness that are nontestimonial, or statements that are testimonial but subject to prior opportunity for cross-examination, will be admissible, unless a motion to admit evidence under the doctrine of forfeiture by wrongdoing is successful.<sup>85</sup>

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83 In many states, the trial court may lack jurisdiction to order the institution or the corrections agency (not a party to the proceeding) to do anything specific with regard to the conditions of confinement or transportation. In such cases, the prosecutor should communicate directly with the institution's administration, or with the correctional agency, to see that appropriate procedures for safe separation are created and followed. An administrative order or instruction may be placed on file at the institution.

84 *Crawford v. Washington*, 541 U.S. 36 (2004). See AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY (Oct. 2012), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).

85 *Crawford*, 541 U.S. 36; *Davis v. Washington*, 547 U.S. 813 (2006); *Michigan v. Bryant*, 131 S.Ct. 1143 (2011). Forfeiture by wrongdoing is codified at FED. R. EVID. 804(b)(6), and in the rules of evidence in many states. In other states, the doctrine is recognized in the state's case law. AEQUITAS has produced sample briefs to admit evidence under the doctrine of forfeiture by wrongdoing, which may be obtained on request. Please visit <http://www.aequitasresource.org/contact.cfm>. See also *infra* Part II. Pretrial, Pretrial Motions Practice, Unavailable witnesses (*Crawford* issues and forfeiture by wrongdoing).

It is also important to charge any offenses that may carry sentencing enhancements, such as those involving gang activity or organized crime, abuse of authority, or official misconduct, if such circumstances are applicable. Some of these enhanced-penalty crimes may require the prosecutor to provide written notice to the defense within a specified time frame.

*Bookmarks*

## F. BAIL

Bail amounts and conditions are obviously a more significant consideration for abusers who are staff members or inmates subject to release prior to trial than for inmate-abusers already serving lengthy terms. The trial court should be presented with all evidence pertaining to the defendant's dangerousness, as well as all evidence supporting the prosecution's case. Bail conditions should include a no-contact provision, as well as any other conditions appropriate to reduce the likelihood of further offenses or of witness intimidation or retaliation.

*Bookmarks*

## G. PREPARING FOR VICTIM/WITNESS LACK OF PARTICIPATION

Despite the best efforts of the criminal justice system, including the confinement facility, some attempts at victim or witness intimidation inevitably will succeed. Consequently, some victims and witnesses who are initially willing to participate may, as time goes by, become reluctant or unwilling to testify. By taking certain pretrial measures as soon as practicable, the prosecutor will increase the likelihood of successfully proving the case, even if the witness later becomes unavailable to testify at trial.

- **PRESERVE WITNESS TESTIMONY**

When a witness is unavailable at trial due to intimidation or for any other reason, the State can present recorded testimony from any proceeding at which the defense had an opportunity to cross-examine the witness.<sup>86</sup> Because cross-examination is essential for purposes of the Confrontation Clause, grand jury testimony of an unavailable witness will not be admissible at trial (absent a successful motion to admit evidence under the doctrine of forfeiture by wrongdoing). However, testimony of a witness at a bail hearing or at a preliminary probable cause hearing, when given subject to cross-examination by defense counsel, can be admitted at trial without violating the Confrontation Clause, provided that the witness is unavailable for trial.<sup>87</sup>

These preliminary hearings, therefore, present the opportunity to preserve the witness' testimony while the witness is still participating in the prosecution process. To ensure the admissibility of such testimony at trial, the prosecutor should provide all available discovery to defense counsel prior to the hearing, and refrain from objecting to any reasonable adjournments to enable defense counsel to prepare an effective cross-examination of the witness. Objections to questions during cross-examination should be kept to a minimum as well, so that the trial court will be assured that the defendant had a full and fair opportunity to cross-examine the witness.

<sup>86</sup> See *California v. Green*, 399 U.S. 149 (1970).

<sup>87</sup> Some jurisdictions also have provisions for depositions to preserve witness testimony when it is anticipated a witness may not be available for trial. See, e.g., FED. R. CRIM. P. RULE 15(a); *United States v. Yida*, 498 F.3d 945, 959-60 (9th Cir. 2007). The availability of such a deposition, and the procedures for conducting it, vary across jurisdictions.

- **PREPARE A “FORFEITURE FILE” FOR WITNESSES VULNERABLE TO INTIMIDATION**

Forfeiture by wrongdoing<sup>88</sup> is an exception to the Sixth Amendment’s confrontation guarantee. When a defendant’s own wrongful act results in the unavailability of a witness for trial, and when the defendant can be shown to have intended that result, the defendant is deemed to have forfeited the right to cross-examine that witness.<sup>89</sup> As a result, the absent witness’s hearsay statements can be admitted at trial without offending the Confrontation Clause. For any witnesses who may be at risk of intimidation causing eventual refusal or inability to testify, the prosecutor can open a “forfeiture file” in one section of the trial folder or notebook. This file should contain any investigative reports, statements, or other evidence that would support a finding that the defendant intended to prevent the witness from testifying. By maintaining a “forfeiture file,” perhaps with a draft motion to admit hearsay statements of an absent witness under the forfeiture rule (including copies of any cases supporting such a motion), the prosecutor can be prepared to conduct a forfeiture hearing on short notice, if necessary.<sup>90</sup>

### Bookmarks

## III. PART TWO: PRETRIAL

During the time between the initial response and the trial date, there is much to be done to prepare a case that will withstand the inherent challenges in successfully prosecuting sexual abuse in confinement. The investigation must continue, with efforts made to obtain sufficient evidence to corroborate witness testimony to the fullest extent possible. The prosecutor must take the time and expend the effort to understand every aspect of the dynamics that led to the act of abuse, and perhaps prevented the prompt reporting of the act, so that those circumstances can be clearly explained to, and understood by, the factfinder at trial. The safety of victims and witnesses must be subject to continued monitoring. Pretrial motions will be necessary to determine what evidence will be admissible at trial, including determinations under Fed. R. Evid. 404(b) or its equivalent as to the admissibility of “other bad acts” by the defendant, determinations under the rape shield laws<sup>91</sup> to protect the victim from introduction of irrelevant and prejudicial evidence, and determinations on the admissibility of hearsay statements under the doctrine of forfeiture by wrongdoing where the defendant has intimidated witnesses and thus prevented them from testifying at trial. The prosecutor must decide whether expert testimony on victim behavior, prison culture, or gang culture will be necessary to enable the factfinder to understand the evidence presented at trial, and must consult with such experts to prepare a report of their proposed testimony. Other forensic experts may be necessary, as well, including DNA experts, medical experts, and any others depending upon the available evidence. Finally, the prosecutor must construct a coherent theory of the case and strategy for presenting it to the factfinder.

### A. ONGOING INVESTIGATION

The investigation must continue throughout the pretrial phase, up until the eve of trial, and in some cases during the trial itself. Witnesses who were initially reluctant to cooperate may change their minds, and some evidence not readily available at the time of the initial response must be explored. In addition, because inmates may be transferred in and out of

<sup>88</sup> Forfeiture by wrongdoing is codified at FED. R. EVID. 804(b)(6). Most states recognize the rule, either in their evidence rules, or by case law based upon equitable considerations. See further discussion of motions to admit evidence under the doctrine in Part Two, *infra*.

<sup>89</sup> Forfeiture by wrongdoing is also applicable where the “defendant acquiesced in wrongful acts that resulted in the witness’s unavailability at trial.” AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS’ RESOURCE ON FORFEITURE BY WRONGDOING (Oct. 2012), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).

<sup>90</sup> AEQUITAS has produced sample briefs to admit evidence under the doctrine of forfeiture by wrongdoing, which may be obtained on request. Please visit <http://www.aequitasresource.org/contact.cfm>.

<sup>91</sup> FED. R. EVID. 412; see also Rape Shield Statutory Compilation and Rape Shield Case Law Digest, available upon request from AEQUITAS.

facilities for administrative or other reasons, investigators should work with those witnesses and the facilities to obtain updated information about their whereabouts on an ongoing basis.

- **MEET WITH THE VICTIM**

The best place to begin is with an in-person interview of the victim at the earliest possible time. The prosecutor and lead investigator should meet with the victim, when possible, in the prosecutor's office, where the setting is more relaxed and private than in the institution. This is important not only for investigative purposes, but to establish rapport and trust with the victim. If there is an assigned advocate, that person should be present as well.<sup>92</sup> Details about the incident of abuse and the events that preceded it can be more fully explored and clarified. Victims often have better recall of certain details after some time has passed. The victim also may be able to identify other inmates who have been victimized in some fashion by the abuser.

Ask how the victim felt after the sexual abuse, particularly when the report of the incident was delayed. Was the victim embarrassed and ashamed? Were there threats made, either explicit or implied? Was there fear of being labeled a "snitch" if the incident was reported? Was there fear of additional victimization at the hands of this abuser or another? Whether or not expert testimony about common victim behaviors following an act of sexual abuse is presented, it is best to have the victim testify about his/her own reactions.

Ask about corroboration of details—were there any witnesses to any aspect of the incident of abuse, or to events that preceded or followed the incident? It is important not to assume that the initial investigation identified all important witnesses. Sometimes corroboration of the smallest details can make a tremendous difference in the factfinder's assessment of the victim's credibility.

### A SNAPSHOT OF BEST PRACTICES

- Collaborate with multidisciplinary professionals in order to respond holistically to the sexual abuse and to support the victim throughout the investigative and prosecutorial processes.
- Educate and train all professionals who respond to incidents of sexual abuse.
- Respond in a trauma-informed manner that aims to prevent re-traumatization of the victim.
- Recognize, prevent, and effectively respond to witness intimidation.
- Charge abusers in a manner that takes into account the full spectrum of their crimes.
- Prepare, file, and litigate pretrial motions.
- Introduce evidence and create trial themes that keep the focus on the abuser and his/her crimes and behaviors.
- Consider sentencing options that incorporate victim privacy, victim and community safety, and the need to contain and deter the abuser and others.

For additional information on these best practices, see Appendix A.

<sup>92</sup> 28 C.F.R. § 115.21(e) (Evidence protocol and forensic medical examinations. "As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.").

- **NONPARTICIPATING VICTIMS**

Victims in some of these cases may be reluctant or refuse to participate in the criminal justice process for a number of reasons. Some victims are fearful or have been intimidated, either by the defendant and the defendant's allies, or by a prison culture that despises and punishes "snitches." Some sexual abuse involves a "relationship" that the victim may perceive as consensual.<sup>93</sup> Such victims may be hesitant about testifying, if not downright hostile to the prosecution.

In these cases, try to determine the cause of the witness' reluctance, and to prepare the case to proceed without the victim's testimony if necessary. Evidence-based prosecution techniques, commonly used in domestic violence cases where victims are often reluctant to testify against their abuser, can be employed to successfully prosecute sexual abuse in confinement cases. Crime scene photographs, the testimony of other witnesses, assignments and schedules of the victim and defendant, forensic evidence, and other evidence can be introduced at trial in cases where the victim does not fully participate. A victim's out-of-court statements can sometimes be introduced if they are "nontestimonial" statements under *Crawford v. Washington*<sup>94</sup> and its progeny, and fall within an exception to the hearsay rule. If there is evidence that the defendant engaged in wrongdoing with the intention of preventing the witness from testifying, hearsay statements of the victim can be admitted at trial pursuant to a successful motion to admit the evidence under the doctrine of forfeiture by wrongdoing.<sup>95</sup>

- **REVIEW INSTITUTIONAL RECORDS**

Reports of any prior incidents involving the defendant and either the present victim or other potential victims should be carefully reviewed and investigated. The victim's institutional records, including medical, social services, or disciplinary records, may provide important corroboration concerning previous incidents. Requests for cell reassignment, visits to the infirmary, or disciplinary infractions for fighting with other inmates may all help to corroborate a history of sexual abuse. The abuser's inmate records or staff personnel files from any previous institutions where the abuser was housed or employed should also be reviewed for indications of previous incidents of sexual abuse. Depending on the defendant's age, school records may also have relevant information.

- **VISIT THE CRIME SCENE**

The trial prosecutor should personally visit the institution where the crime occurred and, with the assistance of an investigator or senior officer from the institution, observe all locations involved. This is essential to understanding how and why the sexual abuse occurred where and when it did. Have the investigator or a facility staff member explain the movement of inmates and staff during the pertinent times, and point out the location of any cameras or other monitoring equipment. Be sure to have photographs and diagrams made of the scene, including any equipment or furnishings that may be important to explaining the scene to the factfinder.

- **INVESTIGATE OTHER INCIDENTS**

Follow-up investigation of any other incidents of sexual abuse by the defendant – either with the present victim or others – should be conducted. Evidence of any of those incidents outside the scope of the charging instrument may be introduced pursuant to a motion to admit evidence of "other bad acts" under Fed. R. Evid. 404(b) or its equivalent, if they are relevant to prove issues such as motive, intent, opportunity, or absence of mistake or accident. If there is sufficient proof of other acts of abuse within the applicable limitations period, particularly where those acts evidence a common scheme or plan, consider a superseding indictment or information to include those incidents. To the extent they are tried together with the original charges, evidence of those incidents will not require a Rule 404(b) motion.

<sup>93</sup> Under PREA, consent is never a legitimate defense to sexual activity between staff and an inmate.

<sup>94</sup> *Crawford*, 541 U.S. 36.

<sup>95</sup> See discussion of forfeiture by wrongdoing, *infra*.

- **LOOK FOR CORROBORATIVE EVIDENCE**

In cases involving sexual abuse in confinement, where the credibility of the victim is likely to be attacked at every turn, the importance of corroborating details in the victim's testimony cannot be overstated. Even seemingly insignificant details, when corroborated, lend credibility to the inmate-victim's version of what occurred.

- **DEFENSE WITNESSES**

All identified defense fact witnesses should be interviewed, if possible, preferably in a recorded interview. The questioning should commit the witness to as many details as possible, which will provide a basis for follow-up investigation that may disprove the truth of the statement, and a basis for cross-examining the witness at trial. Investigation of the witness' background and criminal history may prove useful, as well. Explore any potential biases, and investigate for bias independently. It is important to find out what kind of relationship, if any, the witness had with the defendant or with the victim. Were they cellmates? Close friends? Were they acquainted outside of the institution? Has the victim or witness been disciplined for fighting or engaging in other institutionally-banned activities with the defendant?

Any identified defense character witnesses (most commonly used in the case of defendants without criminal histories) should be interviewed, as well. Again, it is important to explore any potential biases that can be used to impeach the witness at trial.

Character evidence itself, combined with a powerful jury instruction, may be enough to derail the prosecution's attempts to hold the abuser accountable.<sup>96</sup> Specifically, case law and jury instructions often direct factfinders to regard evidence of the defendant's "good" character "as evidence of substantive fact just as any other evidence tending to establish innocence and [that it] may be considered by the jury in connection with all of the evidence presented in the case on the general issue of guilt or innocence."<sup>97</sup>

Prosecutors can rebut—or even prevent—the introduction of "good" character evidence by finding witnesses to testify to an opinion about, or to the defendant's reputation for, bad character. Prosecutors should identify potential character witnesses as early as possible by talking to staff and inmates regarding the offender's reputation.<sup>98</sup>

- **PROSECUTION WITNESSES**

It is important to investigate the State's own witnesses because the defense most certainly will. Inmate-witnesses are likely to have criminal backgrounds and may have histories of disciplinary infractions or other problematic issues in their backgrounds. To the extent any of these problems are indicative of bias (*e.g.*, the accused staff member has issued disciplinary charges against the witness), such matters may be admissible at trial. However, if the prosecutor is aware of what adverse information the defense may try to use to discredit the witness, there may be ways of excluding the evidence (*e.g.*, on grounds of relevance) or of minimizing its impact at trial. This kind of damage control is best prepared for well in advance of trial.

96 *See, e.g.*, Pa. SSJI (Crim.), § 3.06 (2005) (Defendant's Character (Reputation)).

97 *Commonwealth v. Luther*, 317 Pa. Super. 41, 49, 463 A.2d 1073, 1077 (1983).

98 *See, e.g.*, FED. R. EVID. 404 (Character Evidence; Crimes or Other Acts).

In addition to criminal convictions, inmate-witnesses may have pending charges or pending parole hearings. Such matters may be introduced at trial on the theory that the inmate-witness is motivated to cooperate with the prosecution in hopes of receiving favorable treatment. Be sure all inmate-witnesses are informed, in no uncertain terms, that they are being promised no favorable treatment in exchange for their testimony.

### Bookmarks

## B. CONTINUED EFFORTS TO SUPPORT AND PROTECT VICTIMS AND WITNESSES

The PREA Standards require that victims or other individuals (staff or inmates) who report an act of sexual abuse (as well as cooperating witnesses who fear retaliation) be monitored by the institution for at least 90 days following the report for any indications (in the form of behavioral changes, disciplinary reports, negative performance reviews, or staff reassignments) of possible retaliation.<sup>99</sup> Such monitoring is to continue beyond the initial 90-day period if it appears to be warranted. Any such acts of retaliation are to be promptly remedied by the institution. Despite such monitoring, investigators and advocates outside of the institution should keep in contact with victims or vulnerable witnesses to be sure that they are safe. Although not required by the Standards, the inmate-victim and any vulnerable witnesses should, when possible, have a phone number for the assigned investigator and an advocate, so that any acts of intimidation or retaliation can be promptly investigated and appropriately addressed, with criminal charges where appropriate.<sup>100</sup>

An advocate should also help ensure that victims have access to any necessary counseling, and medical or mental health treatment, during the months between the initial report and the time of trial. Although not required by the Standards, the advocate should also communicate with victims to keep them apprised of any important developments in the criminal case. While the Standards place upon the institution a responsibility to monitor the case and keep the victim informed of developments,<sup>101</sup> direct communication from the assigned investigator is likely to be more timely and accurate, as well as provide better information in response to any questions or concerns the victim may have. These actions will not only enhance victim safety, but also keep victims engaged in the criminal justice process, and thus increase the likelihood of their continued participation.

It is important for the prosecutor to communicate with advocates, victim support professionals, corrections staff, and supervising administrators of confinement facilities to determine how best to keep victims safe throughout the investigation and prosecution of the case. Separation orders or instructions should be considered at the outset, and should take into account the specific conditions of confinement. Separation may be ordered within a facility, with a victim and a suspect housed in different units where they will not come into contact, or it may be determined that the victim or abuser should be transferred to a different facility. Separation should also be ordered for transport to court proceedings, and for any temporary holding facilities at the courthouse or local jail during court appearances to prevent even incidental contact.<sup>102</sup> To ensure the safety of the victim, s/he might also need an order that separates him/her from the abuser's associates.

<sup>99</sup> 28 C.F.R. § 115.67 (Agency protection against retaliation).

<sup>100</sup> While the Standards do not require an ongoing direct line of contact between inmates and detectives or inmates and advocates, they do encourage support for victims. For example, the Standards require that inmates be permitted to contact investigators to report abuse and to contact advocates for emotional support services. *See* 28 C.F.R. § 115.51 & 115.21. Additionally, “[t]he facility shall enable reasonable communication between inmates and these organizations and agencies, in as confidential a manner as possible.” 28 C.F.R. § 115.53.

<sup>101</sup> 28 C.F.R. § 115.67, 73 (Agency protection against retaliation, Reporting to inmates).

<sup>102</sup> *See, e.g., State v. Weathers*, 724 S.E.2d 114, 116 (N.C. Ct. App. 2012), in which the trial court allowed the direct testimony of an intimidated witness to be considered by the jury without any cross-examination by the defendant, where the State presented evidence that the defendant had threatened the witness and his family during the time they were being transported together from the prison to the courthouse for trial.

Separation orders should also be utilized when the abuser is a staff member. Whether a staff-abuser has been placed on administrative leave or remains on desk duty, the victim should be protected from the abuser. Investigators should ask the victim if any other staff members have threatened or otherwise harmed the inmate – due to the report of sexual abuse or any other seemingly independent incident – and seek separation orders whenever possible.

### Bookmarks

## C. CONSULTATION WITH EXPERT WITNESSES

There are a number of different types of experts who may be consulted or called to testify at trial for the purpose of assisting the factfinder in understanding the evidence presented. Most jurors and judges will have limited, if any, knowledge about the realities of life in confinement, official practices and procedures in confinement facilities, or the slang used among the inmate population. Where gang activity is involved, the factfinder may need to understand that culture as well. Factfinders also may need to be educated regarding common behaviors exhibited by victims as a result of sexual abuse in confinement, many of which may strike jurors and judges as counterintuitive to their conception of how a “real” victim would behave.<sup>103</sup>

Appropriate, qualified experts should be identified and consulted as early as possible in the trial preparation process so they can prepare reports summarizing the substance of their proposed testimony, a copy of which, along with a *curriculum vitae* describing their education, training, and experience, must be provided to the defense well in advance of the trial date. Longtime correctional officers or similar professionals can often serve as experts to explain prison culture, including such matters as the taboo against “snitching” (which may help to explain delayed reporting or reluctance of victims or witnesses to cooperate), barter for contraband or sexual “favors,” offers of “protection” from other inmates, forms of “survival sex” within confinement, or institutional practices that may have a bearing on the facts of the case. An expert may also offer testimony on unique issues associated with lesbian, gay, bisexual, transgender, and intersex (LGBTI) inmate-victims who may have unique vulnerabilities,<sup>104</sup> as well as safety and housing concerns, in confinement

103 See, e.g., Jessica Woodhams et al., *Behaviors Displayed by Female Victims During Rapes Committed by Lone and Multiple Perpetrators*, 18(3) PSYCHOLOGY, PUBLIC POLICY, AND LAW 415-52 (2011); Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths in Review*, 18 PSYCHOL. WOMEN Q. 133 (1994); and Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 BRIT. J. CRIMINOLOGY 202 (2009); for a more in-depth discussion on understanding and explaining victim behavior at trial, see JENNIFER G. LONG, NAT'L DISTRICT ATTORNEY'S ASSOC., INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS (Aug. 2007), [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).

104 “[T]he heightened vulnerability of prisoners with non-heterosexual orientations” is well documented in research. Margaret Colgate Love & Giovanna Shay, *Gender & Sexuality in the ABA Standards on the Treatment of Prisoners*, *Western New England University School of Law*, 38 WM. MITCHELL L. REV. 1216, 1234 (2012) (citing NATIONAL PRISON RAPE ELIMINATION COMMISSION (NPREC), NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 7 (June 2009), <http://www.ncjrs.gov/pdffiles1/226680.pdf>). The NPREC also recognizes “the particular vulnerabilities of inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations.” *Id.* at 73). “Reports of harassment, assault, and prolonged isolation of LGBTI individuals in custody are staggering.” AMERICAN CIVIL LIBERTIES UNION, END THE ABUSE: PROTECTING LGBTI PRISONERS FROM SEXUAL ASSAULT, ADVOCACY GUIDE 1 (2014), <https://www.aclu.org/sites/default/files/assets/012714-prea-combined.pdf>. See also JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 167-68 (2011), [http://endtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf). See also Jessica Testa, *Is A Georgia Prison Trying To Cover Up The Rape Of A Transgender Woman?* BUZZFEEDNEWS (Dec. 16, 2014), <http://www.buzzfeed.com/jtes/georgia-prison-rape-zahara-green#.kb9d8MzOe> (Zahara Green’s recent lawsuit against prison officials may reveal how the state is failing to protect transgender people — or even recognize them). Some facilities have addressed housing issues by creating separate pods for inmates who are LGBTI. See, e.g., German Lopez, *Inside The Gay and Transgender Wing at the Los Angeles County Jail*, VOXXPRESS (Nov. 19, 2014), <http://www.vox.com/xpress/2014/11/19/7246889/LGBT-LA-Central-Jail>; see also Amy Lieberman, *GBT Housing ‘Pod’ Offers National Detention Model*, WENews (Sept. 9, 2013), [http://womensenews.org/story/immigration/130908/gbt-housing-pod-offers-national-detention-model?utm\\_source=email&utm\\_medium=email&utm\\_campaign=email](http://womensenews.org/story/immigration/130908/gbt-housing-pod-offers-national-detention-model?utm_source=email&utm_medium=email&utm_campaign=email) (see note 106, supra, for limitations on housing arrangements).

facilities.<sup>105</sup> The institution's "security threat group" coordinator or an officer or investigator specializing in gang activity may provide information and insight about gang-related aspects of the case. A well-trained and experienced advocate specializing in sexual assault may serve as a qualified expert in common victim behaviors such as delayed reporting or inconsistent details in victim statements attributable to the effects of trauma.

Other commonly used experts include medical experts who can testify about the significance of any injuries or other findings as a result of medical examination, and forensic experts who can explain the significance of evidence such as DNA, fingerprint evidence, bite mark or toolmark evidence, or trace evidence such as hair or fibers. The prosecutor must thoroughly understand the evidence before it can be presented to the jury, and it is important to explore any weaknesses or limitations in the expert's conclusions, in order to prepare for the expert's cross-examination.

The parameters of proposed expert testimony should be discussed. The expert must not offer opinions about any ultimate issues in the case that are the within the sole province of the factfinder, such as an opinion as to the truthfulness of the victim or an opinion as to whether the victim was sexually abused. Rather, the testimony should be limited to explaining facts that otherwise would not be understood by the factfinder. The prosecutor must also be careful to comply with any timeframes prescribed by statute or court rules for notice regarding expert testimony, and any doubts about the admissibility of expert testimony should be resolved by filing a pretrial motion.

### *Bookmarks*

## **D. PRETRIAL MOTION PRACTICE**

The filing and litigation of pretrial motions is crucial to trial preparation and strategy, particularly in cases of sexual abuse in confinement. Not only do pretrial motions allow for the introduction of important evidence, such as expert testimony or evidence of "other bad acts," but they also provide definitive rulings on the exclusion of irrelevant evidence, as in the case of evidence coming under the rape shield law. The results of such motions sometimes facilitate plea agreements, as elements of uncertainty are removed and both sides have a more accurate basis for assessing the likelihood of conviction after trial. Early resolution of disputed evidentiary issues also conserves time and effort needed at trial, allowing the prosecutor to focus on a trial strategy fully informed by knowledge of what evidence is likely to be admitted. Litigation of evidentiary issues prior to trial often results in a more comprehensive record, with a more thorough and articulate ruling from the bench than rulings issued during the course of a trial, which may be hurried because a jury is waiting for the trial to proceed. Such a record can be useful if either side appeals an adverse evidentiary ruling on an interlocutory basis,<sup>106</sup> or if a conviction is later appealed on the grounds that the evidence was improperly admitted.

In these sensitive cases, the defense may seek to make the inmate-victim the focus of the trial, exploiting the victim's status as an inmate to impugn the victim's character and credibility, particularly where the defendant is a staff member or where the victim's criminal history is more serious than the defendant's. By excluding irrelevant and prejudicial evidence

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<sup>105</sup> In contemplating the impact of such vulnerabilities on confinement facility and housing assignments, see 28 C.F.R. § 115.42(c) (stating "[i]n deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems." The Standards do not require separate housing, and "strictly regulate the use of protective custody," as it is "often synonymous with isolation or solitary confinement so that individuals subject to it are frequently harmed or 'punished' as a result of their vulnerable status." *Id.*

<sup>106</sup> Interlocutory appeals of adverse rulings on pretrial motions are usually discretionary; the party who wishes to appeal typically must seek leave to appeal, first from the trial court and then from the appellate court. In cases where the issue is important enough to seek interlocutory review, the prosecutor should consult with the office appellate unit or with the State attorney general's office.

that serves only to attack the victim, the prosecutor can protect the victim's dignity and privacy, and keep the focus of the trial where it belongs—on the defendant and the defendant's actions.

- **EXPERT TESTIMONY**

A pretrial motion is unlikely to be necessary for admission of routine scientific expert testimony, such as DNA testimony, fingerprint expert testimony, or trace evidence testimony. Such evidence is generally admissible as long as the proper foundation is laid. However, the admissibility of expert testimony on other subjects, such as victim behavior, prison culture, or gang culture, may be less certain. Pretrial motions to allow such testimony will establish the admissibility (or not) of expert testimony, as well as the parameters of the testimony. Pretrial rulings will save time and effort during the trial itself, allowing the prosecutor more certainty about what evidence may be anticipated for mention in the opening statement.

- **RAPE SHIELD EVIDENCE**

Rape shield statutes provide, generally, that a defendant cannot offer evidence to “prove that a victim engaged in other sexual behavior” or to “prove a victim's sexual predisposition.”<sup>107</sup> Rape shield laws, which may be codified in the rules of evidence or in a separate statute, are intended to protect sexual abuse victims from humiliating and embarrassing public ‘fishing expeditions’ into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. The rules and statutes aim to protect victims of sexual abuse from being subjected to psychological or emotional abuse in court as the cost of their participation in the trial of their abusers.

If the defense intends to offer evidence under one of the exceptions to the rape shield statute, it generally must file a motion in writing within a specified timeframe, with notice to the victim, and the court must conduct an *in camera* hearing to determine admissibility.<sup>108</sup> All evidence will be analyzed through a balancing test, weighing the probative value of the proposed evidence against the unfair prejudice it poses to that victim and to the case.<sup>109</sup> Even where the evidence has some relevance, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Particularly in cases of sexual abuse in confinement, where studies have shown high levels of trading and bartering of sexual activity for “protection,” goods, or other benefits, prosecutors should prepare for the defense to seek to introduce evidence of a victim's prior sexual conduct by arguing that it fits a pattern of behavior that is so similar to the charged offense that it proves consent or is relevant to the victim's credibility.<sup>110</sup>

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107 Exceptions to the general rule of preclusion permit “(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) evidence whose exclusion would violate the defendant's constitutional rights.” FED. R. EVID. 412. See also Rape Shield Statutory Compilation, available upon request from AEquitas.

108 FED. R. EVID. 412(c).

109 See, e.g., FED. R. EVID. 403.

110 See, e.g., Shannon K. Fowler et al., *Would They Officially Report an In-Prison Sexual Assault? An Examination of Inmate Perceptions*, 90(2) THE PRISON JOURNAL 226 (2010). See also *Turned Out: Sexual Assault Behind Bars (Limestone Correctional, Alabama)*, YouTube, <http://www.youtube.com/watch?v=gtdtJTJdnfM> (last visited Nov. 19, 2015).

Rape shield applies to any victim—including 404(b) victims.<sup>111</sup> While many jurisdictions prohibit the introduction of almost all such evidence, the rape shield statute does not act as an absolute bar to the admission at trial of evidence regarding the victim's past sexual conduct. Defense attempts to admit the evidence may be successful if the pattern of behavior is so distinctive and "so closely resembles the defendant's version of the encounter that it tends to prove that the complainant consented to the acts charged or behaved in such a manner as to lead the defendant to believe that the complainant consented."<sup>112</sup> Rape shield laws vary in different jurisdictions; some (*e.g.*, New Jersey and North Carolina) allow for admission of such evidence pursuant to certain defense arguments, while that evidence would be barred in other jurisdictions.<sup>113</sup> In jurisdictions taking a more liberal view of the rape shield law's exceptions, the defense may be able to introduce some evidence of a victim's past conduct to show inconsistencies in testimony. Jurisdictions also vary in whether they protect previous "false accusations" under the rape shield statute.<sup>114</sup>

If the defense has failed to file the necessary motion to admit prejudicial evidence under an exception to the rape shield statute, but the prosecutor is concerned that the defense may attempt to introduce such prejudicial and legally irrelevant evidence at trial or allude to it through witness testimony, there are a couple of approaches the prosecutor can take in order to prevent surprises or delays during trial. Depending on local practice and the judge's preference, it may be possible to confirm, on the record at a pretrial conference, that the defense does not intend to introduce any evidence coming within the ambit of the rape shield statute. Alternatively, the prosecutor may wish to file a pretrial motion *in limine* seeking an order precluding any references to such evidence during trial.

- **"OTHER BAD ACT" EVIDENCE UNDER RULE 404(B)**

The State may wish to present evidence of "other bad acts" of the defendant at trial—acts of sexual abuse against other victims; prior or subsequent acts of harassment, threats, or intimidation against this victim or others; evidence of gang activity; or other acts that are highly probative on disputed issues in the case but also prejudicial to the defendant. Under Fed. R. Evid. 404(b) or its equivalent, evidence of such acts is admissible where it is relevant to such matters as motive, intent, identity, absence of mistake or accident, or other legitimate issues in the case.<sup>115</sup> As with all evidence in a criminal case, the probative value of evidence admitted under Rule 404(b) must not be outweighed by the danger of unfair prejudice.<sup>116</sup>

A pretrial motion should be filed in support of the admissibility of any evidence the State wishes to present under this Rule. The motion must identify with specificity what evidence it seeks to admit, on what issues the evidence is relevant and probative, and explain why the probative value of such evidence outweighs the danger of any unfair prejudice.<sup>117</sup> Admission of such evidence must be accompanied by a limiting instruction explaining to the jury the limited purpose for which it may consider such evidence, and cautioning the jury not to consider the evidence as

111 See Rape Shield Case Law Digest, available upon request from AEQUITAS. *But see*, State v. J.M. Jr., 438 N.J. Super. 215 (N.J. Super. Ct. App. Div. 2014).

112 Kaplan v. State, 451 So.2d 1386 (Fla. 1984). See also Jeffries v. Nix, 912 F.2d 982 (8th Cir. 1980); State v. Shoffner, 302 S.E.2d 830 (N.C. 1983); State v. Thompson, 884 P.2d 574 (Or. Ct. App. 1984); State v. Sheline, 955 S.W.2d 42 (Tenn. 1997); State v. Hudlow, 659 P.2d 514 (Wash. 1983); State v. Mounsey, 643 P.2d 892 (Wash. 1982).

113 N.J. STAT. ANN. § 2C:14-7 (West 2013); N.C. R. EVID. 412.

114 See, *e.g.*, ARIZ. REV. STAT. ANN. § 13-1421 (2012) (permitting evidence of false accusations following a hearing on relevance and prejudicial nature versus probative value); VT. STAT. ANN. tit. 13, § 3255 (2012) (permitting evidence of complaining witness' past false allegations). *But see also* David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010).

115 Although not specifically mentioned in the rules of evidence, another proper basis for admitting such evidence is to show consciousness of guilt, as in the case of destruction or concealment of evidence, or intimidation of witnesses. See, *e.g.*, United States v. Shippley, 690 F.3d 1192 (10th Cir. 2012); United States v. Hayden, 85 F.3d 153, 159 (4th Cir. 1996).

116 FED. R. EVID. 403.

117 AEQUITAS has sample motion briefs, which may be obtained upon request. Please visit <http://www.aequitasresource.org/contact.cfm>.

showing a propensity to commit crime or as evidence of bad character. Providing a carefully drafted proposed limiting instruction along with the motion may help to persuade the court to grant the motion.

In some jurisdictions, another type of motion to admit evidence of prior acts is available in sexual abuse cases. Pursuant to Fed. R. Evid. 413, “[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense(s) of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.” Under Fed. R. Evid. 414, “[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.” The prosecutor must provide written notice of intent to introduce evidence under either of these rules no later than 15 days before trial.<sup>118</sup>

- **UNAVAILABLE WITNESSES (CRAWFORD ISSUES AND FORFEITURE BY WRONGDOING)**<sup>119</sup>

If the victim or another witness is unavailable to testify at trial (most often because the witness is deceased, cannot be located, or refuses to testify), it may be possible to admit that witness’ out-of-court statements at trial.<sup>120</sup> Statements that are “nontestimonial” in character—generally, those that are not made to law enforcement, not made for evidentiary purposes, and not made in a formal setting—can be admitted at trial if they fall within an exception to the hearsay rule. “Testimonial” statements—those that are made in response to official questioning, those that are made at prior judicial proceedings, sworn affidavits, etc.—are inadmissible unless the witness is unavailable and unless the defendant has had a prior opportunity to cross-examine the witness.

If the defendant has, through wrongful conduct, intentionally caused the witness to be unavailable for trial, the prosecutor can file a motion to admit the witness’ out-of-court statements under the doctrine of forfeiture by wrongdoing, pursuant to Fed. R. Evid. 804(b)(6) or its equivalent. Forfeiture by wrongdoing generally requires the State to prove, by the applicable standard of proof (a preponderance of the evidence in most jurisdictions; clear and convincing evidence in Washington,<sup>121</sup> Maryland,<sup>122</sup> and New York<sup>123</sup>), (a) that the defendant engaged in wrongdoing, (b) that caused the witness to be unavailable for trial and (c) did so intending that result.<sup>124</sup> At the forfeiture hearing in most jurisdictions, the State may present hearsay evidence, including the hearsay statements that are the subject of the motion.<sup>125</sup>

- **Proving wrongdoing**

“Wrongdoing” is easily proved where the defendant has made threats or otherwise caused criminal harm to a victim or witness. In addition, acts of violence or threats against third parties, serving to enhance the abuser’s fearsome reputation, may intimidate a victim or witness who (not unreasonably) fears similar treatment as a consequence

118 FED. R. EVID. 413(b); 414(b).

119 Details about the legal requirements to admit evidence of statements made by unavailable witnesses can be found in two other AEQUITAS RESOURCES. SEE AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN, *supra* notes 83 & 88.

120 For many reasons, it is helpful to have a victim’s testimony in a sexual abuse prosecution; without such testimony, it may be difficult to prove some of the essential statutory elements. However, in some cases (*e.g.*, very violent rapes, or cases with eyewitnesses or video recordings, among others), the necessary testimony can be introduced through other sources.

121 *State v. Mason*, 160 Wash.2d 910 (2007).

122 MD. CODE ANN., CTS. & JUD. PROC. § 10-901 (West 2011).

123 *People v. Geraci*, 85 N.Y.2d 359, 649 (1995).

124 Some states have additional requirements, such as the showing that the statement to be admitted is reliable. See *State v. Byrd*, 967 A.2d 285, 304 (N.J. 2009).

125 FED. R. EVID. 804(b)(6). See also THE PROSECUTORS’ RESOURCE ON FORFEITURE BY WRONGDOING, *supra* note 88.

of cooperating with the prosecution.<sup>126</sup> However, “wrongdoing” in the forfeiture context may include more subtle acts of manipulation intended to dissuade the victim from testifying.<sup>127</sup> Such acts may include declarations of love, promises to protect the victim, or plays for sympathy. The court may need to be educated about the role of this kind of manipulation in the prison setting. Expert testimony at the forfeiture hearing from an expert in prison culture may help the trial court understand how such seemingly innocuous acts are used by abusers to control the actions of their victims, which will enable the court to make a finding that the defendant has engaged in wrongdoing.

- **Proving the defendant’s involvement/acquiescence in third-party wrongdoing**

Where the intimidating conduct was actually committed by a third party (a friend, relative, or criminal associate of the defendant), the defendant will have forfeited his right to cross-examine the witness only if the defendant either instigated the intimidating conduct or acquiesced in it. Acquiescence implies both knowledge and approval of the act. Such knowledge and approval must be provable, at least circumstantially, before third-party acts can be considered wrongdoing on the part of the defendant.

- **Proving the defendant’s intention to cause the witness’ unavailability for trial**

As the United States Supreme Court’s opinion in *Giles v. California*<sup>128</sup> held, evidence is admissible under the forfeiture doctrine only where the defendant, in committing the act of wrongdoing, had the intent to prevent the witness from testifying. Such intention can be proved circumstantially, by introducing evidence of prior instances of conduct intended to prevent the victim from reporting assaultive or threatening conduct.<sup>129</sup>

- **PRIOR CONVICTIONS**

Prior convictions of a crime, unless they are too remote in time considering the nature of the conviction, are generally admissible to attack the credibility of any witness, although a defendant’s prior convictions are admissible only where they are not unfairly prejudicial.<sup>130</sup> Under the Federal Rule, and in some state jurisdictions, juvenile adjudications for the equivalent of adult crimes may also be admissible to affect credibility.<sup>131</sup> Because sexual abuse in confinement occurs in a correctional setting, it is likely that many of the witnesses, including the victim and perhaps the defendant and defense witnesses, will have criminal histories that include convictions or adjudications for criminal offenses.

- **OTHER PRETRIAL MOTIONS**

- **Records-related motions**

The defense may seek to introduce at trial (or may ask the State to produce in discovery) information or records that are privileged or confidential and/or in which the victim has a privacy interest.

126 In such cases, it is important to remember that forfeiture requires the state to prove that the wrongdoing was *intended*, at least in part, to prevent the witness from testifying. *Giles v. California*, 128 S.Ct. 2678 (2008).

127 See, e.g., *People v. Byrd*, 855 N.Y.S.2d 505, 51 A.D.3d 267 (Supreme Court, App. Div. 2008) (hospital visits and hundreds of phone calls constituted “wrongdoing” in context of abusive relationship); *People v. Santiago*, No. 2725-02, 2003 WL 21507176 at \*4 (Apr. 7, 2003) (apologies and promises constituted “wrongdoing” in context of abusive relationship).

128 *Giles*, 128 S.Ct. 2678.

129 See *id.* at 2695 (Souter, J., concurring in part) (evidence of “classic abusive relationship” in domestic violence context can be used to prove, circumstantially, the defendant’s intent in committing an act that caused the victim’s unavailability for trial). If the court grants the motion to admit the unavailable witness’ hearsay statements, a special jury instruction may be appropriate. A suggested jury instruction is provided in Appendix F. Jury instructions are discussed further in Part Three, *infra*.

130 FED. R. EVID. 609.

131 *Id.*

*Confidentiality is the broad application of privacy laws used to create a duty to protect a victim's information and safety. A privilege is a legal right that gives both the sharer and the holder of information special protection to refuse to disclose privileged communications within the confines of certain relationships, including: advocate/client; psychiatrist/client; clergy/penitent; physician/patient; spousal; and attorney/client. Although confidentiality and privilege are separate legal principles, some courts have found that some information qualifies as both a privileged communication protected by statute, rule, or constitutional provision, as well as a confidential communication. In such cases, the rights of privilege control, and the information can be released only with the victim's permission.*<sup>132</sup>

Throughout all proceedings, prosecutors should be mindful of a victim's right to privacy, and strive before and during the trial to prevent, where possible, additional scrutiny into the victim's life. Motions to protect all or portions of private records, including school, child protective services, or others, should be filed and litigated prior to trial.

Prosecutors also must prepare for defense attempts to pierce protections afforded under rules related to confidential communications. "At its most basic level, confidentiality allows victims to fully disclose the details of the violence they have endured so that they can receive services without fear that their personal information will be exposed."<sup>133</sup> The social utility of these confidential relationships is so substantial that it outweighs society's interest in having all possible information available as evidence in court.

When filing and litigating these motions, prosecutors should carefully review their jurisdiction's statutes and case law regarding the extent to which the records can or should be redacted, and whether they are subject to *in camera* review.

### Bookmarks

## E. CONSTRUCTING A THEORY OF THE CASE AND PLANNING TRIAL STRATEGY

Throughout the investigation and preparation of a case involving sexual abuse in confinement, prosecutors should continually consider, and revise, a coherent theory of the case that can be presented to the factfinder in a way that can be clearly understood. In these cases, as in many other cases involving sexual violence, abusers tend to choose their victims carefully. The victims will usually be inmates who are vulnerable, both in the sense that they are easily victimized and in the sense that the abuser is confident that the victim will not report the sexual abuse or will not be believed if s/he does. The location and timing of the attacks will be chosen to minimize the likelihood of discovery. The abuser may engage in "grooming" behavior designed to make the victim dependent upon the abuser for protection, for necessary or desired goods, or for special privileges. The sexual abuse may be part of gang activity or used as a way for the abuser to assert authority. Sometimes multiple dynamics are at work.

All of these considerations are essential to putting the act of sexual abuse in context and to understanding how and why the crime occurred—why this defendant chose this victim, how the act was committed, why the victim responded as s/he did to the act of abuse, and how and why inmates and staff around them responded or failed to respond.

<sup>132</sup> Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions, Part I: An Overview of the Importance of Confidentiality and Privilege Laws*, 9 STRATEGIES (May 2013), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).

<sup>133</sup> *Id.*

It is important not to allow the State's case to be controlled by defense tactics. Irrelevant prejudicial evidence should be kept from a jury when at all possible; however, where damaging evidence is properly admitted (or even improperly allowed by the court), the State's case should remain focused on the defendant's conduct. Jurors have a keen sense for detecting issues that cause concern to the prosecutor, and too much focus on prejudicial evidence about the victim or other inmate-witnesses only plays into the defense's strategy to make the case about the victim. If evidence—however unflattering to the victim—is ruled admissible, the prosecutor should frankly, and unapologetically, acknowledge it, while persistently returning the focus to the evidence implicating the defendant.

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## **F. FINAL PRETRIAL PREPARATION AND PRETRIAL CONFERENCE**

During the last week or two before trial, the prosecutor should meet with the victim and any other lay witnesses (including inmate-witnesses) to conduct final preparation for trial. Review the testimony the witnesses will give on direct examination, and also prepare them for cross-examination. If there is any possibility of intimidation tactics during the trial (from the defendant, from other staff in the case of a staff-defendant, or from an inmate-defendant's associates who are not in custody), explain to witnesses that they should avoid looking at the defendant or at the courtroom gallery, focusing instead on the jury or the prosecutor during their testimony.

Any necessary transportation arrangements for the defendant and for inmate-witnesses, including any writs, should be confirmed, both with the court and with the facilities involved, including the local jail for any witnesses who must be held overnight. Be certain it is understood that the victim and any prosecution witnesses are to be transported and held separately from the defendant and any defense witnesses so no inadvertent contact occurs.

The final pretrial conference is the time to review all of the charges to be sure that the State is proceeding only with charges for which there is sufficient evidence to proceed. It is also the time to be sure that any special security measures, which should already have been discussed with the court and defense counsel in advance, are implemented or at the ready if they should be needed. Review with the court, and with defense counsel, all preliminary rulings on evidentiary issues that may have been the subject of preliminary hearings. If the court has postponed ruling on any of the evidentiary motions until the evidence is more developed at trial, ask the court for an order that neither party allude to the disputed evidence until it has been finally ruled upon.

Advise the judge that witnesses have been advised to ask to speak with the judge or prosecutor if they observe any intimidating behavior on the part of the defendant or anyone else in the courtroom during their testimony. Ask if the court can excuse the jury should this occur and whether it can permit the witness to communicate with the court and both counsel at sidebar. Assure the court that the State wishes to avoid a potential mistrial by ensuring that any perceived intimidation is initially addressed outside the presence of the jury.

Depending upon court rules or the judge's preference, the final pretrial conference may also be the time to present any proposed jury instructions, including proposed limiting instructions for any evidence you can anticipate before trial (*e.g.*, for Fed. R. Evid. 404(b) evidence) or special instructions, such as a "consciousness of guilt" instruction for acts of intimidation. Jury instructions are discussed further in Part Three, *infra*.

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## G. PLEA NEGOTIATIONS

Plea negotiations can occur at any time after arraignment up until the return of a verdict. After a defendant is charged, prosecutors have an ethical obligation to be available to engage in plea negotiations.<sup>134</sup> There is no legal or ethical obligation, however, to offer a particular defendant a plea agreement of any kind, nor to execute a plea agreement in a criminal case. Plea agreements can take many forms – from admissions of no contest to the charges levied against the defendant, to a plea of guilty to a criminal charge.<sup>135</sup> As part of the plea agreement, a prosecutor may commit to recommending a particular sentence, or, where applicable, conditions of probation or release. In some cases, there is no agreement on the sentencing recommendation, but only to the charge to which the defendant will plead guilty. Significantly, the prosecutor cannot commit to the imposition of a particular sentence; only the court has the power to impose sentences.<sup>136</sup> At the time of a plea, the court will question the defendant to ensure that s/he understands the process, his/her rights, and is voluntarily entering a plea. A defendant can move to withdraw a plea before sentencing; in some jurisdictions, the plea can be withdrawn at any time before sentencing, and others dictate the defendant has so many days to move to withdraw before the courts imposes a sentence.<sup>137</sup> In some jurisdictions, requests to withdraw are readily granted; in others, the defendant may have to proffer sound reasons for permitting withdrawal.

For the prosecutor, the goal in a plea negotiation is to secure a guilty plea to one or more offenses that will satisfy the prosecution's interest in achieving a just result—one that will hold the abuser appropriately accountable, deter this abuser and others from engaging in similar conduct, and protect the victim as well as the public. Defendants are notoriously reluctant to plead guilty to sex offenses because of the penal consequences, including the risk of being sentenced to a sex-offender treatment facility where parole may be conditioned upon a finding of low risk to recidivate. Additional consequences such as sex-offender registration requirements and extended parole supervision, the possible risk of civil commitment as a sexually violent predator, and the undesirability of being known as a sex offender make even defendants with lengthy criminal histories hesitate to enter a guilty plea to a sex offense. Thus, it is not unusual for defendants to offer to plead guilty to a non-sexual offense (such as kidnapping or aggravated assault), even for a lengthier prison term. It is important to consider whether such a plea would be consistent with the prosecutor's mandate to seek justice and to promote the safety of potential future victims. The public, too, has a strong interest in exercising maximum control over sex offenders; a plea to some other offense may not adequately satisfy that interest.

Sometimes the prosecutor will determine that only a trial will satisfy the interests of justice in a particular case. In such circumstances, a defendant who wanted to avoid a trial could plead guilty to all of the charges without a recommendation as to sentence. It is important to note that courts are not bound by plea negotiations and may determine that the recommended sentence is either inappropriately lenient or severe. The court may impose a more lenient sentence than that recommended under the plea agreement or allow the defendant to withdraw a plea where the court would impose a more severe sentence.

### *Bookmarks*

<sup>134</sup> CRIMINAL JUSTICE SECTION STANDARDS, Standard 3-3.2 (American Bar Ass'n). Prosecution Function.

<sup>135</sup> LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY (Jan. 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

<sup>136</sup> Arthur W. Campbell, Law of Sentencing (Thompson Reuters, 2014) (§ 9:2. Procedures & remedies).

<sup>137</sup> See, e.g., PA. R. CRIM. P. Rule 591 (Withdrawal of Plea of Guilty or *Nolo Contendere*).

## IV. PART THREE: TRIAL

### A. JURY SELECTION/*VOIR DIRE*

In cases involving sexual abuse in confinement, *voir dire* or jury selection may have an even greater impact than in most other criminal cases. Jurors of the kind traditionally favored by the prosecution – the “law and order” type – may not make favorable jurors in these cases. Such jurors may judge inmate-victims and -witnesses harshly, with some even believing that sexual abuse in prison is somehow part of the punishment that goes along with a criminal conviction. Jurors holding this kind of belief should be identified and excused for cause. Conversely, jurors who have had loved ones convicted of crimes and sentenced to prison—often considered “undesirable” jurors for the prosecution of many crimes—may be more willing to understand the fear and pain that these victims experienced, and to understand that a sentence to prison should not include a sentence of sexual abuse. Whatever the juror’s personal background, the prosecutor should try to select jurors willing to keep an open mind, to learn about a world much different from their own, and to decide the case based upon the evidence presented and not upon preconceived notions and discredited myths about sexual abuse, about sexual abuse victims, and especially about sexual abuse in confinement.

*Voir dire* is the prosecutor’s first opportunity to speak to the jurors and begin their education about the unique issues involved in the case. Most jurors will have little knowledge about life inside a confinement facility. Particularly if the victim is unwilling to testify, be sure prospective jurors understand that unlike a civil lawsuit, where one party has brought a claim against another party, in a criminal case it is the State that determines whether a violation of its laws should be criminally prosecuted, and it is the State that is the real party of interest. Prospective jurors should be questioned about their ability and willingness to convict a defendant without the victim’s testimony, provided the State presents sufficient evidence to prove the defendant’s guilt of the offense beyond a reasonable doubt.

Jurors should be questioned about their attitudes concerning conditions of confinement. Do they believe inmates have “too many rights” or that they “have it too good?” Do they believe that the risk of assault and threatening conduct, including sexual abuse, is part of what a person who breaks the law must expect? Have they heard, or told, jokes about prison rape? What was their reaction to such “humor?”

Jurors should also be closely questioned about the existence of any firmly-held beliefs based upon myths about crimes of sexual violence and about victims of such offenses. Where expert testimony is to be presented, jurors should indicate a willingness to set aside any previously held beliefs if the evidence shows that those beliefs are based upon incorrect assumptions.

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### B. OPENING STATEMENT

The prosecutor’s opening statement should continue with the themes introduced during *voir dire*, preview the State’s theory of the case, and preview the evidence the prosecutor anticipates introducing at trial. Let the jury know what to listen for—what evidence merits special attention—so that such evidence will not pass unnoticed.

If the victim or other key witnesses are definitely not available to testify, the prosecutor’s opening statement should tell the jury that they will not be testifying, and should preview for the jury what evidence will be presented to explain their absence. The opening should focus primarily on the other evidence in the case that will prove defendant’s guilt.

The opening statement should place the crime, and the evidence the prosecutor anticipates to be introduced at trial, into context so that the jury will understand the significance of each piece of evidence as it comes in at trial. It is important to frankly acknowledge any of the victim's convictions that will be admitted at trial, as well as any other problematic areas concerning the background of the victim, any of the other prosecution witnesses, or the facts. When the prosecutor knows that negative evidence will be admitted at trial, acknowledgement during the opening statement helps to dilute its impact.

The opening should also mention any evidence that will be presented concerning a defendant's intimidation or manipulation of the victim or witnesses. When intimidation issues are emphasized in the opening statement, the jury can be on the alert for that evidence as it comes in at trial and can be prepared to put the pieces together at the time of summation. The jury should hear the evidence within the context of the act of sexual abuse and the intimidation that accompanies it.

If experts will be testifying about victim behavior, or about prison or gang culture, the anticipated substance of that testimony should be mentioned as well.

Finally, remind the jury that it is the State that is bringing this case, not the victim, and that at the conclusion of the evidence it will be the State that asks the jury to return a guilty verdict if the State has presented sufficient evidence to prove the defendant's guilt beyond a reasonable doubt.

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## C. TRIAL TESTIMONY

It is usually best to call the victim and any intimidated witnesses to the stand as early in the trial as practicable, though it may be desirable to first set the stage with one or two other witnesses who can testify to objective facts about the crime or its immediate aftermath (*e.g.*, a first responder and a medical witness or corrections officer). A corrections officer's testimony could also be used to describe the institution and its practices so that the jury can begin to get a sense of the setting of the crime. By calling inmate-witnesses early in the case, the prosecutor maintains maximum flexibility to structure the questioning of other witnesses in a way that will advance the State's theory of the case and address any problematic issues that may have arisen during the testimony of inmate-witnesses. Calling the victim early also reduces prolonged pretrial anxiety, and reduces the incentive for the defendant or the defendant's allies to engage in further intimidation tactics intended to influence or prevent the witness' testimony.

The direct examination of the victim and any key fact witnesses should elicit as much detail as possible, particularly detail that can be corroborated. Further, such corroborating evidence should be presented as soon as possible after the victim testifies so that the connection is clear in the factfinder's mind.

Throughout the trial, request that the court issue limiting instructions whenever appropriate, regardless of whether they are requested by the defense. For certain kinds of evidence that will require a limiting instruction (*e.g.*, expert testimony or evidence admitted under Fed. R. Evid. 404(b) or its equivalent), it is usually best for the court to give the instruction immediately before or after the testimony (or both, particularly if the testimony is lengthy), as well as at the conclusion of the case. Even if an appellate court later determines the evidence should not have been admitted, a strongly worded limiting instruction may be sufficient to result in a finding of harmless error, allowing the conviction to stand.<sup>138</sup>

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<sup>138</sup> For additional tips on preserving the trial record for appeal, see Teresa M. Garvey, *Making it Stick: Protecting the Record for Appeal*, 12 STRATEGIES IN BRIEF (Apr. 2014), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).

## D. CLOSING

Summation is the prosecutor's final opportunity to speak directly to the jury about the case that has just been presented. Remind the jury that its job is to examine the evidence and to decide the defendant's guilt based upon the evidence presented. Remind the jury that it is the State, not the victim, that is responsible for prosecuting the case.

Review in detail any evidence of intimidation and manipulation that was presented during the trial, as well as any evidence that was presented about the effects those acts had on the victim or witnesses. Review with the jury any expert testimony that was presented. Remind the jury of every tactic the defendant used to prevent them from hearing the truth about what happened.

It is important to take care not to interject into the summation the prosecutor's own knowledge about the dynamics of sexual violence; any comment made in summation must be based solely upon the evidence presented at trial or upon reasonable inferences to be drawn therefrom. Be cautious about asking jurors to put themselves in the victim's position. Such remarks can be considered improper appeals to sympathy, and thus, prosecutorial misconduct. However, there is nothing wrong with asking the jury to imagine how *this* victim probably felt, considering the circumstances (*e.g.*, the history of abuse, the accompanying fear and shame, the consequences of being known as a "snitch" in a prison setting), about coming to court and testifying against the defendant. Such arguments are based upon reasonable inferences that can be drawn from the evidence.

Even if the victim or witness appeared at trial, and testified consistently with prior statements, you should nevertheless argue that any attempts on the part of the defendant to intimidate or manipulate the witness indicates consciousness of guilt—that an innocent person would not resort to such tactics.

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## E. JURY INSTRUCTIONS

You should draft for the court appropriate cautionary or limiting instructions whenever evidence is admissible only for a limited purpose, such as under Fed. R. Evid. 404(b) or the equivalent. These limiting instructions should be given at the time the evidence is admitted, and again at the time of the final jury charge. Such instructions will substantially reduce the risk of any unfair prejudice, and thereby reduce the risk of reversal on appeal based upon the possibility that the jury considered the evidence for any improper purpose.

For Rule 404(b) evidence, it is best to request a restrictive limiting instruction that directs the jury to consider the evidence only as proof of knowledge or intent, absence of mistake, or for some other permitted purpose, and not as evidence of the defendant's bad character. To the extent that evidence of intimidation is admitted on the issue of consciousness of guilt, the instruction should be drafted like a standard flight instruction.<sup>139</sup> Typically, such an instruction tells the jury to decide whether the conduct occurred and, if so, to decide whether the conduct indicates a consciousness of guilt or whether it has an innocent explanation.<sup>140</sup>

If hearsay statements of an unavailable witness were admitted under the doctrine of forfeiture by wrongdoing, a jury instruction on how the jury is to consider such evidence is advisable, as well.<sup>141</sup>

<sup>139</sup> Contact AEquitas for assistance drafting jury instructions: <http://www.aequitasresource.org/taRegister.cfm>.

<sup>140</sup> See suggested jury instructions on consciousness of guilt, Appendix F.

<sup>141</sup> See suggested jury instruction on forfeiture by wrongdoing, Appendix F.

Most jurisdictions have standard jury instructions on the jury's consideration of expert testimony. In cases where an expert has been used to explain the dynamics of prison culture or gang culture for the purpose of explaining the victim's behavior, be sure that the instruction reminds jurors that ultimate responsibility for judging the credibility of trial testimony or any prior statements of the witness rests with them, and that the expert testimony may be used, if they accept it, only to assist them in making such determinations of credibility.

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## **F. VERDICT**

If the jury returns a guilty verdict, immediately move to revoke bail if a sentence of imprisonment is likely to be imposed.

Whether the verdict is guilty or not guilty, arrange to spend some time with the victim after the trial to discuss the verdict. Explain what the verdict means, particularly if it is not obvious, as when the jury returns a guilty verdict on lesser-included offenses. It is important to reassure the victim that a verdict of "not guilty" does not mean that the jury disbelieved the testimony. The jury could have been almost certain about the truth of the victim's testimony, and yet had a reasonable doubt about the defendant's guilt of the crime.

Explain to the victim what will happen at sentencing, and what kind of input the victim may have at that proceeding. The victim usually has the option of addressing the court in person at the time of sentencing, submitting a victim impact statement (including a request for restitution), or both. An advocate can help the victim prepare such a statement and assist in pulling together the necessary documentation to support a request for restitution. Explain what range of sentences is available to the court, in view of the defendant's criminal history and the seriousness of the crime, so that the victim will have a realistic idea of what to expect at sentencing.

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## **G. SENTENCING**

If the defendant is a staff member, promptly file any motions for forfeiture of public employment that may be appropriate or required by law.

Submit to the court a detailed sentencing memorandum in support of whatever sentence you want the court to impose. Where the defendant has been convicted of crimes of intimidation in addition to the original charges, a strenuous argument can be made that those crimes should result in consecutive sentences, since witness intimidation otherwise carries no additional risk to the defendant. Even where the defendant has not been convicted of separate crimes for acts of intimidation, such acts may nevertheless be argued as aggravating factors that should result in a lengthier sentence. Even if a defendant has been acquitted of any charged intimidation crimes, the standard of proof for facts relevant to sentencing is much lower, and it is therefore generally proper for the court take such acts into account in imposing sentence.<sup>142</sup>

Be sure that appropriate arrangements are made for transporting the victim for sentencing. Again, the institutional authorities and court security staff should ensure that the victim is transported and held separately from the defendant.

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<sup>142</sup> United States v. Watts, 519 U.S. 148 (1997).

Be sure that the court has received any victim impact information that may have been submitted. If there is a dispute as to the correct amount of restitution, a hearing on that issue may be necessary. The victim usually has the right to address the court personally at the time of sentencing.

If a probationary sentence is imposed, urge the court to impose appropriate conditions that will maximize the continued safety of the victim and the community. Such conditions may include no-contact conditions, and barring the defendant from contact with fellow gang members or criminal associates. In addition, conditions such as sex offender treatment, substance abuse treatment, mental health treatment, and sex-offender registration should be imposed.

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## V. CONCLUSION

The Prison Rape Elimination Act (PREA) has helped increase allied criminal justice professionals' awareness and understanding of the importance of preventing, detecting, and responding to sexual abuse in confinement. While the Standards have provided a regulatory floor and a framework for accountability within confinement facilities, prosecutors are the ones ultimately responsible for ensuring that these cases are prosecuted to the fullest extent, while keeping the victim safe and supported throughout the process.

Prosecutors must work with allied criminal justice professionals to prioritize the investigation and prosecution of all sexual abuse and work collaboratively to ensure that institutional professionals involved in prevention, detection, and response efforts understand (1) the extent and significance of identifying, collecting, and retaining evidence (including identifying witnesses and preserving their testimony) and (2) the importance of effective victim-centered, abuser-focused strategies that will enhance victim safety while promoting successful prosecution. By working together, prosecutors and allied professionals can continue to move toward the goal of aggressively charging, investigating, and prosecuting sexual abuse in confinement.

Prosecutors fulfill their responsibility for holding abusers accountable for their criminal behavior by seeking and presenting corroboration from a variety of sources; by focusing on the abuser's behavior in targeting the victim; by filing written motions and seeking evidentiary hearings prior to trial; by carefully preparing the case in anticipation of many challenging issues, including defense attacks on the victim's credibility, defense efforts to secure private or confidential records, and victim recantation or non-participation; and by seeking a just sentence that protects the victim, other potential victims, and the public—one that will deter this abuser and others who would victimize vulnerable inmates entrusted to the care of the State. Comprehensive and aggressive trial preparation and strategy must be tempered with a realistic view of the case, and the prosecutor must remain ever mindful of the need to carefully create a record that will withstand challenge on appeal. Vigorous and tenacious prosecution in these cases will not only achieve justice in individual cases, but will enhance the overall credibility of, and respect for, the criminal justice system in which we serve.

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## APPENDICES

### Appendix A. A Snapshot of Best Practices

#### Collaborative, Multidisciplinary Approach

Research has shown that when systems collaborate to provide a coordinated, multidisciplinary response, there are many benefits. More victims will access services and participate in the process, more offenders will be held appropriately accountable, and community and victim safety are improved. This approach calls for collaboration across disciplines: corrections, law enforcement, prosecutors, advocates, medical professionals, and probation and parole. Such collaboration should occur on the ground level, as well as in working groups. Leadership, in the form of messaging and implementation of research-informed practices, is essential. Ideally, this approach should include a dedicated sexual assault response team (SART) that addresses the unique needs of an inmate population. Such needs include access to advocates on a confidential basis and team members trained to work with inmate-victims.

#### Education and Training

Responding professionals should receive education and training that enhance knowledge and skills necessary to conduct more effective investigations and prosecutions. A thorough understanding of dynamics commonly present in cases of sexual abuse in confinement allows professionals to properly assess cases and to shed bias, misunderstanding, and preconceived notions. It is also important that responding professionals have an accurate understanding about factors common to institutional settings that may affect these dynamics, such as the responsibilities of corrections officers, inmates' daily schedules, internal rules and protocols, and the culture of a facility.

Prosecutors should work with first responders on proper interview and report-writing techniques, with emphasis on tone and language used. The most important goals of the first responder are to support the victim and to document statements and observations. First responders should provide inmate-victims with support during the initial report to encourage further participation in the investigation or prosecution of the case.

#### Trauma-Informed Response

Being trauma-informed means recognizing that victims have different levels of current and historical trauma in their lives. Responses should accommodate physical, emotional, and psychological safety of victims. Without such an approach, inmate-victims can be re-traumatized by even well-meaning responders. Because many inmates have been sexually assaulted before, responders should approach these cases with an understanding that they may be asking a victim to confront multiple layers of victimization. Trauma impacts a victim's memory, affecting the victim's ability to provide clear and linear statements. Investigators and prosecutors who understand this, and who take the time to build rapport with victims, increase the likelihood that the victim will feel sufficiently supported to continue with the case.

#### Recognizing, Preventing, and Responding to Witness Intimidation

Witness intimidation is a common issue that must be confronted at the outset of a case and throughout the investigation and prosecution.<sup>143</sup> Prosecutors should work with law enforcement and corrections to be sure victims and witnesses know how to recognize intimidation and how to safely report. Policies intended to protect the witness must not inadver-

<sup>143</sup> See TERESA M. GARVEY, THE PROSECUTORS' RESOURCE ON WITNESS INTIMIDATION (Mar. 2014); TERESA M. GARVEY, WITNESS INTIMIDATION: MEETING THE CHALLENGE (2013); FRANKLIN CRUZ AND TERESA M. GARVEY, IMPROVING WITNESS SAFETY AND PREVENTING WITNESS INTIMIDATION IN THE JUSTICE SYSTEM: BENCHMARKS FOR PROGRESS (2014) (*preceding resources available at* [www.AEquitasresource.org/library.cfm](http://www.AEquitasresource.org/library.cfm)); and Webinar Recording by Viktoria Kristiansson, Intimidation of Victims of Sexual Abuse in Confinement, <http://www.aequitasresource.org/trainingDetail.cfm?id=98> (recorded July 16, 2013).

tently punish him/her. Acts of intimidation should be criminally charged where appropriate, and evidence of intimidation used in the prosecution of the case. Where intimidation results in a witness' refusal to testify, the evidence rule on forfeiture by wrongdoing can be an effective tool for prosecution.

### Charging Decisions

Prosecutors are the gatekeepers to the criminal justice system. They have sole, but not unlimited, discretion in determining whom and what to charge. Appropriate charging of cases of sexual assault in confinement is crucial to holding abusers accountable, keeping facilities and communities safe, supporting victims, and upholding the sanctity and purpose of the criminal justice system. Some prosecutor's offices have adopted practices that discourage the prosecution of cases believed to be "unwinnable" or involving witnesses or facts with perceived credibility issues. Some prosecutors believe their ethical obligations require them to pursue only those cases they think are likely to result in a conviction. These practices can create a self-fulfilling prophecy: if prosecutors don't charge "challenging" cases, they become *incapable* of determining whether cases are likely to result in a conviction, and they will never develop the necessary skills to try them in court.<sup>144</sup> Instead, charging standards should reflect what the research tells us: that rape occurs out of the view of witnesses, delayed reports are common, piecemeal disclosures are common, corroborating physical evidence is often not available, and the lack of vaginal/anal trauma is not inconsistent with a report of sexual assault.

### Pretrial Motions

Pretrial motions on evidentiary issues, such as rape shield, admissibility of evidence under Evidence Rules 403, 404, and 405, and admissibility of hearsay statements, should be filed whenever possible. These motions will enable prosecutors to exclude irrelevant and prejudicial information and arguments (which open up the victim to attack on issues unrelated to the current victimization), to admit relevant evidence under hearsay exceptions or the doctrine of forfeiture by wrongdoing, or to admit evidence of prior "bad acts" of the defendant to prove relevant issues such as motive or intent under Rule 404(b). Other pretrial motions include those relating to the safety of the victim and witnesses, admissibility of confessions or statements by the defendant, admissibility of expert testimony, or motions related to sentencing enhancements (*e.g.*, for repeat offenses, gang activity, or other factors).

### Offender-Focused Trials

The trial itself must be offender-focused, incorporating themes that are specific to the staff offender or inmate offender. An offender-focused approach is based on the acknowledgment that offenders purposefully, knowingly, and intentionally target victims whom they believe they can assault with impunity, choosing vulnerable victims who may be too fearful to report or whose credibility can readily be attacked. Prosecutors should develop and employ offender-focused strategies that are driven by an accurate and unbiased analysis of the case and a thorough understanding of the applicable law.

### Post-Trial Considerations

Protection and support of the victim must not end with the criminal trial. Where the case results in a conviction, victims can be encouraged and assisted in submitting victim-impact statements and restitution can be requested. Regardless of the verdict, a continued no-contact order can be sought from the court and/or from the institution or department. The victim can be afforded long-term counseling and therapy.

### Bookmarks

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<sup>144</sup> See Jennifer G. Long & Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, 12 STRATEGIES (Apr. 2014) available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm); Webinar recording by Elaine Nugent-Borakove and Jennifer G. Long, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, <http://www.aequitasresource.org/trainingDetail.cfm?id=108> (recorded Apr. 28, 2014).

## Appendix B. Prevalence of Sexual Abuse in Confinement

Since PREA was enacted, the Bureau of Justice Statistics (BJS) has conducted several studies on sexual abuse in various types of confinement facilities. These statistics illustrate the pervasiveness of sex crimes in confinement facilities, and the need for the criminal justice system, including prosecutors' offices, to direct significant efforts and resources to protect victims and to hold offenders accountable. The following charts summarize the most relevant data.

Adult Victimization Reported by Inmates <sup>145</sup>	
One or more incidents of sexual victimization reported during most recent period of incarceration	9.6%
Incidents of sexual victimization by staff	5.3%
Of reported incidents of staff sexual misconduct, incidents involving female staff with male inmates	More than 75%
Inmate-against-inmate sexual abuse (females)	13.7%
Inmate-against-inmate sexual abuse (males)	4.2%
Violent sexual inmate-against-inmate incident (females)	17.2%
Violent sexual inmate-against-inmate incident (males)	13.7%
Victimization by other inmates of male former inmates who identified as homosexual, gay (males)	39%
Victimization by other inmates of male former inmates who identified as bisexual (males)	34%
Victimization by other inmates of male former inmates who identified as heterosexual	3.7%

**Table 1.** This information comes from a study of adult parolees actively under supervision following their release from state institutions. The survey considered the entire time the inmates were in custody, including the time they spent in local jails, state prisons, or community-based treatment facilities, prior to release.

<sup>145</sup> BUREAU OF JUSTICE STATISTICS, PRISON RAPE ELIMINATION ACT OF 2003: DATA COLLECTION ACTIVITIES, 2012 (June 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdca12.pdf>. See also ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008 (May 2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf>.

Youth-on-Youth Victimization Reported by Youths <sup>146</sup>	
One or more incidents of sexual victimization in the past 12 months, or since admission if confined less than 12 months	9.5%
Reported forced sexual activity with another youth (females)	5.4%
Reported forced sexual activity with another youth (males)	2.2%
Experienced physical force or threat of force by another youth as part of circumstances of sexual victimization	67.7%
Offered favors or protection as part of circumstances of sexual victimization	25.2%
Given drugs or alcohol to engage in sexual contact	18.1%
Youth victimized by another youth reported more than one incident	69.6%
Youth victimized by another youth reported more than one perpetrator	37.2%
Youth who identified their sexual orientation as gay, lesbian, bisexual, or "other" reported a substantially higher rate of victimization by another youth	10.3%
Youth who identified their sexual orientation as heterosexual	1.5%

**Table 2.** This information comes from the Bureau of Justice Statistics' second National Survey of Youth in Custody, which surveyed 8,707 youth in facilities in every state and the District of Columbia. This table reflects the prevalence of youth-on-youth sexual victimization.

Staff-on-Youth Victimization Reported by Youth	
Reported sexual activity with staff (female inmates)	2.8%
Reported sexual activity with staff (male inmates)	8.2%
Victims of staff sexual misconduct reported more than one incident	85.9%
Repeat victims reporting more than 10 incidents	85.9%
Victims of staff sexual misconduct reported being subjected to physical force or threat of force	20.3%
Victims of staff sexual misconduct were offered protection	12.3%
Victims of staff sexual misconduct were given drug or alcohol to engage in sexual contact	21.5%

**Table 3.** This information comes from the Bureau of Justice Statistics' second National Survey of Youth in Custody, which surveyed 8,707 youth in facilities in every state and the District of Columbia. This table reflects the prevalence of youth-on-youth sexual victimization.

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<sup>146</sup> ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012: NATIONAL SURVEY OF YOUTH IN CUSTODY, 2012 (June 2013), <http://www.bjs.gov/content/pub/pdf/svjfry12.pdf>.

## Appendix C. Relevant PREA Standards<sup>147</sup>

The following have been excerpted from the Prison Rape Elimination Act National Standards, *available at* [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_final\\_rule.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf).

### § 115.6 Definitions related to sexual abuse

For purposes of this part, the term

Sexual abuse includes--

- (1) Sexual abuse of an inmate, detainee, or resident by another inmate, detainee, or resident; and
- (2) Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer.

Sexual abuse of an inmate, detainee, or resident by another inmate, detainee, or resident includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse:

- (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;
- (3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and
- (4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation.

Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer includes any of the following acts, with or without consent of the inmate, detainee, or resident:

- (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;
- (3) Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;
- (6) Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in paragraphs (1) through (5) of this definition;
- (7) Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident, and
- (8) Voyeurism by a staff member, contractor, or volunteer.

<sup>147</sup> Excerpts from THE NATIONAL STANDARDS, *supra* note 5.

Sexual harassment includes--

- (1) Repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another; and
- (2) Repeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.

Voyeurism by a staff member, contractor, or volunteer means an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; requiring an inmate to expose his or her buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions.

#### **§ 115.11 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator**

- (a) An agency shall have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct.
- (b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.
- (c) Where an agency operates more than one facility, each facility shall designate a PREA compliance manager with sufficient time and authority to coordinate the facility's efforts to comply with the PREA standards.

#### **§ 115.13 Supervision and monitoring**

- (a) The agency shall ensure that each facility it operates shall develop, document, and make its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities shall take into consideration:
  - (1) Generally accepted detention and correctional practices;
  - (2) Any judicial findings of inadequacy;
  - (3) Any findings of inadequacy from Federal investigative agencies;
  - (4) Any findings of inadequacy from internal or external oversight bodies;
  - (5) All components of the facility's physical plant (including "blind-spots" or areas where staff or inmates may be isolated);
  - (6) The composition of the inmate population;
  - (7) The number and placement of supervisory staff;
  - (8) Institution programs occurring on a particular shift;
  - (9) Any applicable State or local laws, regulations, or standards;
  - (10) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and
  - (11) Any other relevant factors.
- (b) In circumstances where the staffing plan is not complied with, the facility shall document and justify all deviations from the plan.

(c) Whenever necessary, but no less frequently than once each year, for each facility the agency operates, in consultation with the PREA coordinator required by § 115.11, the agency shall assess, determine, and document whether adjustments are needed to:

- (1) The staffing plan established pursuant to paragraph (a) of this section;
  - (2) The facility's deployment of video monitoring systems and other monitoring technologies; and
  - (3) The resources the facility has available to commit to ensure adherence to the staffing plan.
- (d) Each agency operating a facility shall implement a policy and practice of having intermediate-level or higher-level supervisors conduct and document unannounced rounds to identify and deter staff sexual abuse and sexual harassment. Such policy and practice shall be implemented for night shifts as well as day shifts. Each agency shall have a policy to prohibit staff from alerting other staff members that these supervisory rounds are occurring, unless such announcement is related to the legitimate operational functions of the facility.

### **§ 115.17 Hiring and promotion decisions**

(a) The agency shall not hire or promote anyone who may have contact with inmates, and shall not enlist the services of any contractor who may have contact with inmates, who--

- (1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);
- (2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or
- (3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.

(b) The agency shall consider any incidents of sexual harassment in determining whether to hire or promote anyone, or to enlist the services of any contractor, who may have contact with inmates.

(c) Before hiring new employees who may have contact with inmates, the agency shall:

- (1) Perform a criminal background records check; and
- (2) Consistent with Federal, State, and local law, make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.

(d) The agency shall also perform a criminal background records check before enlisting the services of any contractor who may have contact with inmates.

(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with inmates or have in place a system for otherwise capturing such information for current employees.

(f) The agency shall ask all applicants and employees who may have contact with inmates directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring or promotions and in any interviews or written self-evaluations conducted as part of reviews of current employees.

The agency shall also impose upon employees a continuing affirmative duty to disclose any such misconduct.

(g) Material omissions regarding such misconduct, or the provision of materially false information, shall be grounds for termination.

(h) Unless prohibited by law, the agency shall provide information on substantiated allegations of sexual abuse or sexual harassment involving a former employee upon receiving a request from an institutional employer for whom such employee has applied to work.

### § 115.21 Evidence protocol and forensic medical examinations

- (a) To the extent the agency is responsible for investigating allegations of sexual abuse, the agency shall follow a uniform evidence protocol that maximizes the potential for obtaining usable physical evidence for administrative proceedings and criminal prosecutions.
- (b) The protocol shall be developmentally appropriate for youth where applicable, and, as appropriate, shall be adapted from or otherwise based on the most recent edition of the U.S. Department of Justice's Office on Violence Against Women publication, "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents," or similarly comprehensive and authoritative protocols developed after 2011.
- (c) The agency shall offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.
- (d) The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization, or a qualified agency staff member. Agencies shall document efforts to secure services from rape crisis centers. For the purpose of this standard, a rape crisis center refers to an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages. The agency may utilize a rape crisis center that is part of a governmental unit as long as the center is not part of the criminal justice system (such as a law enforcement agency) and offers a comparable level of confidentiality as a nongovernmental entity that provides similar victim services.
- (e) As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.
- (f) To the extent the agency itself is not responsible for investigating allegations of sexual abuse, the agency shall request that the investigating agency follow the requirements of paragraphs (a) through (e) of this section.
- (g) The requirements of paragraphs (a) through (f) of this section shall also apply to:
- (1) Any State entity outside of the agency that is responsible for investigating allegations of sexual abuse in prisons or jails; and
  - (2) Any Department of Justice component that is responsible for investigating allegations of sexual abuse in prisons or jails.
- (h) For the purposes of this section, a qualified agency staff member or a qualified community-based staff member shall be an individual who has been screened for appropriateness to serve in this role and has received education concerning sexual assault and forensic examination issues in general.

**§ 115.34 Specialized training: Investigations**

- (a) In addition to the general training provided to all employees pursuant to § 115.31, the agency shall ensure that, to the extent the agency itself conducts sexual abuse investigations, its investigators have received training in conducting such investigations in confinement settings.
- (b) Specialized training shall include techniques for interviewing sexual abuse victims, proper use of Miranda and Garrity warnings, sexual abuse evidence collection in confinement settings, and the criteria and evidence required to substantiate a case for administrative action or prosecution referral.
- (c) The agency shall maintain documentation that agency investigators have completed the required specialized training in conducting sexual abuse investigations.
- (d) Any State entity or Department of Justice component that investigates sexual abuse in confinement settings shall provide such training to its agents and investigators who conduct such investigations.

**§ 115.41 Screening for risk of victimization and abusiveness**

- (a) All inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.
- (b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.
- (c) Such assessments shall be conducted using an objective screening instrument.
- (d) The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:
  - (1) Whether the inmate has a mental, physical, or developmental disability;
  - (2) The age of the inmate;
  - (3) The physical build of the inmate;
  - (4) Whether the inmate has previously been incarcerated;
  - (5) Whether the inmate's criminal history is exclusively nonviolent;
  - (6) Whether the inmate has prior convictions for sex offenses against an adult or child;
  - (7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;
  - (8) Whether the inmate has previously experienced sexual victimization;
  - (9) The inmate's own perception of vulnerability; and
  - (10) Whether the inmate is detained solely for civil immigration purposes.
- (e) The initial screening shall consider prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse, as known to the agency, in assessing inmates for risk of being sexually abusive.
- (f) Within a set time period, not to exceed 30 days from the inmate's arrival at the facility, the facility will reassess the inmate's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening.
- (g) An inmate's risk level shall be reassessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the inmate's risk of sexual victimization or abusiveness.
- (h) Inmates may not be disciplined for refusing to answer, or for not disclosing complete information in response to, questions asked pursuant to paragraphs (d)(1), (d)(7), (d)(8), or (d)(9) of this section.

- (i) The agency shall implement appropriate controls on the dissemination within the facility of responses to questions asked pursuant to this standard in order to ensure that sensitive information is not exploited to the inmate's detriment by staff or other inmates.

### **§ 115.43 Protective custody**

- (a) Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate in involuntary segregated housing for less than 24 hours while completing the assessment.
- (b) Inmates placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:
- (1) The opportunities that have been limited;
  - (2) The duration of the limitation; and
  - (3) The reasons for such limitations.
- (c) The facility shall assign such inmates to involuntary segregated housing only until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 30 days.
- (d) If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, the facility shall clearly document:
- (1) The basis for the facility's concern for the inmate's safety; and
  - (2) The reason why no alternative means of separation can be arranged.
- (e) Every 30 days, the facility shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

### **§ 115.51 Inmate reporting**

- (a) The agency shall provide multiple internal ways for inmates to privately report sexual abuse and sexual harassment, retaliation by other inmates or staff for reporting sexual abuse and sexual harassment, and staff neglect or violation of responsibilities that may have contributed to such incidents.
- (b) The agency shall also provide at least one way for inmates to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward inmate reports of sexual abuse and sexual harassment to agency officials, allowing the inmate to remain anonymous upon request. Inmates detained solely for civil immigration purposes shall be provided information on how to contact relevant consular officials and relevant officials at the Department of Homeland Security.
- (c) Staff shall accept reports made verbally, in writing, anonymously, and from third parties and shall promptly document any verbal reports.
- (d) The agency shall provide a method for staff to privately report sexual abuse and sexual harassment of inmates.

**§ 115.53 Inmate access to outside confidential support services**

- (a) The facility shall provide inmates with access to outside victim advocates for emotional support services related to sexual abuse by giving inmates mailing addresses and telephone numbers, including toll-free hotline numbers where available, of local, State, or national victim advocacy or rape crisis organizations, and, for persons detained solely for civil immigration purposes, immigrant services agencies. The facility shall enable reasonable communication between inmates and these organizations and agencies, in as confidential a manner as possible.
- (b) The facility shall inform inmates, prior to giving them access, of the extent to which such communications will be monitored and the extent to which reports of abuse will be forwarded to authorities in accordance with mandatory reporting laws.
- (c) The agency shall maintain or attempt to enter into memoranda of understanding or other agreements with community service providers that are able to provide inmates with confidential emotional support services related to sexual abuse. The agency shall maintain copies of agreements or documentation showing attempts to enter into such agreements.

**§ 115.61 Staff and agency reporting duties**

- (a) The agency shall require all staff to report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against inmates or staff who reported such an incident; and any staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.
- (b) Apart from reporting to designated supervisors or officials, staff shall not reveal any information related to a sexual abuse report to anyone other than to the extent necessary, as specified in agency policy, to make treatment, investigation, and other security and management decisions.
- (c) Unless otherwise precluded by Federal, State, or local law, medical and mental health practitioners shall be required to report sexual abuse pursuant to paragraph (a) of this section and to inform inmates of the practitioner's duty to report, and the limitations of confidentiality, at the initiation of services.
- (d) If the alleged victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the agency shall report the allegation to the designated State or local services agency under applicable mandatory reporting laws.
- (e) The facility shall report all allegations of sexual abuse and sexual harassment, including third-party and anonymous reports, to the facility's designated investigators.

**§ 115.64 Staff first responder duties**

- (a) Upon learning of an allegation that an inmate was sexually abused, the first security staff member to respond to the report shall be required to:
  - (1) Separate the alleged victim and abuser;
  - (2) Preserve and protect any crime scene until appropriate steps can be taken to collect any evidence;
  - (3) If the abuse occurred within a time period that still allows for the collection of physical evidence, request that the alleged victim not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating; and
  - (4) If the abuse occurred within a time period that still allows for the collection of physical evidence, ensure that the alleged abuser does not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating.

(b) If the first staff responder is not a security staff member, the responder shall be required to request that the alleged victim not take any actions that could destroy physical evidence, and then notify security staff.

#### **§ 115.65 Coordinated response**

The facility shall develop a written institutional plan to coordinate actions taken in response to an incident of sexual abuse, among staff first responders, medical and mental health practitioners, investigators, and facility leadership.

#### **§ 115.66 Preservation of ability to protect inmates from contact with abusers**

(a) Neither the agency nor any other governmental entity responsible for collective bargaining on the agency's behalf shall enter into or renew any collective bargaining agreement or other agreement that limits the agency's ability to remove alleged staff sexual abusers from contact with any inmates pending the outcome of an investigation or of a determination of whether and to what extent discipline is warranted.

(b) Nothing in this standard shall restrict the entering into or renewal of agreements that govern:

(1) The conduct of the disciplinary process, as long as such agreements are not inconsistent with the provisions of §§ 115.72 and 115.76; or

(2) Whether a no-contact assignment that is imposed pending the outcome of an investigation shall be expunged from or retained in the staff member's personnel file following a determination that the allegation of sexual abuse is not substantiated.

#### **§ 115.67 Agency protection against retaliation**

(a) The agency shall establish a policy to protect all inmates and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other inmates or staff, and shall designate which staff members or departments are charged with monitoring retaliation.

(b) The agency shall employ multiple protection measures, such as housing changes or transfers for inmate victims or abusers, removal of alleged staff or inmate abusers from contact with victims, and emotional support services for inmates or staff who fear retaliation for reporting sexual abuse or sexual harassment or for cooperating with investigations.

(c) For at least 90 days following a report of sexual abuse, the agency shall monitor the conduct and treatment of inmates or staff who reported the sexual abuse and of inmates who were reported to have suffered sexual abuse to see if there are changes that may suggest possible retaliation by inmates or staff, and shall act promptly to remedy any such retaliation. Items the agency should monitor include any inmate disciplinary reports, housing, or program changes, or negative performance reviews or reassignments of staff. The agency shall continue such monitoring beyond 90 days if the initial monitoring indicates a continuing need.

(d) In the case of inmates, such monitoring shall also include periodic status checks.

(e) If any other individual who cooperates with an investigation expresses a fear of retaliation, the agency shall take appropriate measures to protect that individual against retaliation.

(f) An agency's obligation to monitor shall terminate if the agency determines that the allegation is unfounded.

#### **§ 115.68 Post-allegation protective custody**

Any use of segregated housing to protect an inmate who is alleged to have suffered sexual abuse shall be subject to the requirements of § 115.43.

**§ 115.71 Criminal and administrative agency investigations**

- (a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.
- (b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to § 115.34.
- (c) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.
- (d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for subsequent criminal prosecution.
- (e) The credibility of an alleged victim, suspect, or witness shall be assessed on an individual basis and shall not be determined by the person's status as inmate or staff. No agency shall require an inmate who alleges sexual abuse to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation of such an allegation.
- (f) Administrative investigations:
  - (1) Shall include an effort to determine whether staff actions or failures to act contributed to the abuse; and
  - (2) Shall be documented in written reports that include a description of the physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings.
- (g) Criminal investigations shall be documented in a written report that contains a thorough description of physical, testimonial, and documentary evidence and attaches copies of all documentary evidence where feasible.
- (h) Substantiated allegations of conduct that appears to be criminal shall be referred for prosecution.
- (i) The agency shall retain all written reports referenced in paragraphs (f) and (g) of this section for as long as the alleged abuser is incarcerated or employed by the agency, plus five years.
- (j) The departure of the alleged abuser or victim from the employment or control of the facility or agency shall not provide a basis for terminating an investigation.
- (k) Any State entity or Department of Justice component that conducts such investigations shall do so pursuant to the above requirements.
- (l) When outside agencies investigate sexual abuse, the facility shall cooperate with outside investigators and shall endeavor to remain informed about the progress of the investigation.

**§ 115.73 Reporting to inmates**

- (a) Following an investigation into an inmate's allegation that he or she suffered sexual abuse in an agency facility, the agency shall inform the inmate as to whether the allegation has been determined to be substantiated, unsubstantiated, or unfounded.
- (b) If the agency did not conduct the investigation, it shall request the relevant information from the investigative agency in order to inform the inmate.
- (c) Following an inmate's allegation that a staff member has committed sexual abuse against the inmate, the agency shall subsequently inform the inmate (unless the agency has determined that the allegation is unfounded) whenever:
  - (1) The staff member is no longer posted within the inmate's unit;

- (2) The staff member is no longer employed at the facility;
  - (3) The agency learns that the staff member has been indicted on a charge related to sexual abuse within the facility; or
  - (4) The agency learns that the staff member has been convicted on a charge related to sexual abuse within the facility.
- (d) Following an inmate's allegation that he or she has been sexually abused by another inmate, the agency shall subsequently inform the alleged victim whenever:
- (1) The agency learns that the alleged abuser has been indicted on a charge related to sexual abuse within the facility; or
  - (2) The agency learns that the alleged abuser has been convicted on a charge related to sexual abuse within the facility.
- (e) All such notifications or attempted notifications shall be documented.
- (f) An agency's obligation to report under this standard shall terminate if the inmate is released from the agency's custody.

### **§ 115.81 Medical and mental health screenings; history of sexual abuse**

- (a) If the screening pursuant to § 115.41 indicates that a prison inmate has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.
- (b) If the screening pursuant to § 115.41 indicates that a prison inmate has previously perpetrated sexual abuse, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up meeting with a mental health practitioner within 14 days of the intake screening.
- (c) If the screening pursuant to § 115.41 indicates that a jail inmate has experienced prior sexual victimization, whether it occurred in an institutional setting or in the community, staff shall ensure that the inmate is offered a follow-up meeting with a medical or mental health practitioner within 14 days of the intake screening.
- (d) Any information related to sexual victimization or abusiveness that occurred in an institutional setting shall be strictly limited to medical and mental health practitioners and other staff, as necessary, to inform treatment plans and security and management decisions, including housing, bed, work, education, and program assignments, or as otherwise required by Federal, State, or local law.
- (e) Medical and mental health practitioners shall obtain informed consent from inmates before reporting information about prior sexual victimization that did not occur in an institutional setting, unless the inmate is under the age of 18.

### **§ 115.82 Access to emergency medical and mental health services**

- (a) Inmate victims of sexual abuse shall receive timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment.
- (b) If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders shall take preliminary steps to protect the victim pursuant to § 115.62 and shall immediately notify the appropriate medical and mental health practitioners.
- (c) Inmate victims of sexual abuse while incarcerated shall be offered timely information about and timely access to emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where medically appropriate.
- (d) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

**§ 115.83 Ongoing medical and mental health care for sexual abuse victims and abusers**

- (a) The facility shall offer medical and mental health evaluation and, as appropriate, treatment to all inmates who have been victimized by sexual abuse in any prison, jail, lockup, or juvenile facility.
- (b) The evaluation and treatment of such victims shall include, as appropriate, follow-up services, treatment plans, and, when necessary, referrals for continued care following their transfer to, or placement in, other facilities, or their release from custody.
- (c) The facility shall provide such victims with medical and mental health services consistent with the community level of care.
- (d) Inmate victims of sexually abusive vaginal penetration while incarcerated shall be offered pregnancy tests.
- (e) If pregnancy results from the conduct described in paragraph (d) of this section, such victims shall receive timely and comprehensive information about and timely access to all lawful pregnancy-related medical services.
- (f) Inmate victims of sexual abuse while incarcerated shall be offered tests for sexually transmitted infections as medically appropriate.
- (g) Treatment services shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.
- (h) All prisons shall attempt to conduct a mental health evaluation of all known inmate-on-inmate abusers within 60 days of learning of such abuse history and offer treatment when deemed appropriate by mental health practitioners.

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## Appendix D. Resources

### AEquitas Resources

#### SPECIAL INITIATIVE

Prosecuting Sexual Abuse In Confinement, <http://aequitasresource.org/special-initiatives.cfm>

#### TECHNICAL ASSISTANCE

AEquitas staff are available 24/7 for case consultation and technical assistance requests related to the prosecution of violence against women. Individual staff members can be reached during regular business hours by phone, email, instant messenger, and online submission requests. After normal business hours, an on call Attorney Advisor can be reached at (202) 558-0040.

#### LIBRARY

AEquitas' publications and resources are available for download and viewing at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm) or upon request. You may also register online to stay informed and be notified by email when additional publications and resources become available, <http://www.aequitasresource.org/userRegister.cfm>.

#### Monographs

- Witness Intimidation - Meeting the Challenge
- A Prosecutor's Reference - Medical Evidence and the Role of Sexual Assault Nurse Examiners in Cases Involving Adult Victims

#### The Prosecutors' Resource

- Crawford and Its Progeny
- Forfeiture by Wrongdoing
- Witness Intimidation

#### STRATEGIES Newsletter

- Prosecuting Cases of Sexual Abuse in Confinement, Issue #8
- Educating Juries in Sexual Assault Cases Part I: Using Voir Dire to Eliminate Jury Bias, Issue #2

#### STRATEGIES *in Brief*

- Establishing Penetration in Sexual Assault Cases, Issue #24
- Absence of Anogenital Injury in the Adolescent Adult Female Sexual Assault Patient, Issue #13

#### ADDITIONAL RESOURCES

- Justice for Victims Behind Bars: Improving the Response to Cases of Sexual Abuse in Confinement

#### WEBINAR RECORDINGS

For access to the below webinar recordings as well as additional presentations on sexual abuse in confinement, please visit the PREA Resource Center's Training and Technical Assistance: Archived Webinar page at <http://www.prearesourcecenter.org/training-and-technical-assistance/archived-webinars>.

- The below webinar recordings – as well as additional presentations related to the prosecution of violence against women – can also be accessed at <http://www.aequitasresource.org/webinar-recordings.cfm>.
- *Investigating and Prosecuting the Intimidation of Victims of Sexual Abuse in Confinement* available at <http://www.aequitasresource.org/trainingDetail.cfm?id=98>
- *Overview of Sexual Abuse in Confinement - An Introduction for Prosecutors* available at <http://www.aequitasresource.org/trainingDetail.cfm?id=83>
- *Pretrial Motions: Admitting and Excluding Evidence in the Prosecution of Sexual Abuse in Confinement* available at <http://www.aequitasresource.org/trainingDetail.cfm?id=88>
- *Trial Strategies for the Prosecution of Sexual Abuse in Confinement* available at <http://www.aequitasresource.org/trainingDetail.cfm?id=93>
- *Prosecuting Sexual Abuse in Confinement: A Case Study* available at <http://www.aequitasresource.org/trainingDetail.cfm?id=102>

### **National PREA Resource Center**

The mission of the PREA Resource Center (PRC) is to assist state, local, and tribal confinement facilities nationwide in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, and responses to incidents of sexual abuse including services to victims and their families.

The PRC is managed through a cooperative agreement between the Bureau of Justice Assistance (BJA) within the Department of Justice and the National Council on Crime and Delinquency.

### **Website: [www.prearesourcecenter.org](http://www.prearesourcecenter.org)**

The website includes an extensive searchable library, information about the standards including frequently asked questions, archived webinars, and information about training and technical assistance (TTA) opportunities.

PREA-related questions can be sent to [info@prearesourcecenter.org](mailto:info@prearesourcecenter.org).

### **Additional Resources**

- Bureau of Justice Assistance, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=76](https://www.bja.gov/ProgramDetails.aspx?Program_ID=76)
- Just Detention International, <http://justdetention.org/what-we-do/>
- Washington College of Law's End To Silence: The Project on Addressing Prison Rape, <http://www.wcl.american.edu/endsilence/>
- Review Panel on Prison Rape (2014), [http://ojp.gov/reviewpanel/pdfs/transcript\\_01\\_08\\_2014.pdf](http://ojp.gov/reviewpanel/pdfs/transcript_01_08_2014.pdf) and [http://ojp.gov/reviewpanel/pdfs/transcript\\_01\\_09\\_2014.pdf](http://ojp.gov/reviewpanel/pdfs/transcript_01_09_2014.pdf).

### *Bookmarks*

## Appendix E. Samples

The following samples are available upon request from AEquitas:

- Sample voir dire for sexual assault cases
- Sample voir dire for cases involving witness intimidation
- Qualifying experts to testify about victim behavior
- Qualifying a sexual assault nurse examiner as an expert
- Sample motions on rape shield
- Sample forfeiture by wrongdoing motion
- Sample 404b motion

Please contact AEquitas to request samples and to discuss any cases, questions, or concerns in more detail.

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## Appendix F. Jury Instructions<sup>148</sup>

The following are *suggested* jury instructions. Most court rules require the parties to draft and propose any special jury instructions not contained in the model rules. Since most jurisdictions don't have model rules on these topics (or the model rules are inadequate), prosecutors have to be prepared to provide a proposed instruction to the court. This is important because inadequate jury instructions are a common basis for reversal on appeal. If you would like to discuss your specific case or have any questions regarding this resource, please contact an AEquitas Attorney Advisor at <http://www.aequitasresource.org/taRegister.cfm>.

### Jury Charge for Forfeiture by Wrongdoing

The State has introduced evidence of statements made by \_\_\_\_\_, a witness who did not testify at trial. You should consider this evidence as you would consider any other evidence introduced at trial. It is your responsibility to determine whether such statements were in fact made and, if made, whether they are true.

In making these determinations, you should consider the credibility of the witness who testified about the statements, as well as any circumstances that may affect the credibility of the statements themselves. These circumstances may include such factors as the setting in which the statement was made, the person to whom it was made, the reason the statement was made, whether there is other evidence supporting or contradicting the truth of the statement, and whether \_\_\_\_\_ had any motive to make a false statement. If you find that the statement was made, and that the statement was true, you may consider it just as if \_\_\_\_\_ had testified at trial. On the other hand, if you find that the statement was not made, or if you find that the statement was not true, you should disregard it.

### Jury Charge for Consciousness of Guilt

In this case the State contends that the defendant [made numerous phone calls to \_\_\_\_\_, or engaged in whatever the act may have been] for the purpose of dissuading the witness from testifying at trial in this matter, and that such conduct demonstrates a consciousness of guilt. You must decide first, whether you believe that such conduct took place, and second, if it did take place, whether it demonstrates a consciousness of guilt on the part of the defendant. In determining whether conduct demonstrates a consciousness of guilt, you must consider whether the conduct has an innocent explanation. Common experience teaches that even an innocent person who finds himself or herself under suspicion may resort to conduct which gives the appearance of guilt. The weight and importance you give to evidence offered to show consciousness of guilt depends on the facts of the case. Sometimes such evidence is only of slight value, and standing alone, it may never be the basis for a finding of guilt. If, however, you find that the defendant did engage in this action, and that it does demonstrate a consciousness of guilt, you may consider it as you would any other evidence of guilt presented by the State.

### Bookmarks

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<sup>148</sup> This suggested jury instruction has been excerpted from AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON WITNESS INTIMIDATION (Dec. 2013), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).