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THE PROSECUTORS' RESOURCE  
ON VIOLENCE AGAINST WOMEN

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# **PROSECUTING SEXUAL ABUSE IN CONFINEMENT**

Viktoria Kristiansson • AEQUITAS  
January 4, 2013

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# National PREA Resource Center

The National PREA Resource Center (PRC) was established through a cooperative agreement between the Bureau of Justice Assistance and the National Council on Crime & Delinquency (NCCD). The mission of the PRC is to assist adult prisons and jails, juvenile facilities, lockups, community corrections, and tribal facilities in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, monitoring, responses to incidents, and services to victims and their families

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# AEquitas: The Prosecutors' Resource on Violence Against Women

AEquitas' mission is to improve the quality of justice in sexual violence, intimate partner violence, stalking, and human trafficking cases by developing, evaluating, and refining prosecution practices that increase victim safety and offender accountability

# Presenter

**Viktoria Kristiansson, Attorney Advisor,  
AEquitas**



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# Learning Objectives

## **At the conclusion of this webinar, participants will be better able to:**

- Prepare a sexual abuse in confinement case for prosecution
- Apply Crawford v. Washington and its progeny to a prosecution when a victim or witness is unavailable
- Understand how the Prison Rape Elimination Act (PREA) and the standards may be relevant to state and local investigations and prosecutions

# Definition: Sexual Abuse

“Sexual abuse” refers to “contact between the penis and the vulva or anus; contact between the mouth and the penis, vulva, or anus; penetration of the anal or genital opening; and “[a]ny other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of any person that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire”

28 CFR § 115.6, Definitions related to sexual abuse,  
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 96

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# Timeline

## **PREA and the Standards**

- 2003: PREA legislation passed into law
- June 2009: Report and draft standards published by the National Prison Rape Elimination Commission (NPREC)
- May 2012: Final Department of Justice standards released
- June 20, 2012: Final standards published in the Federal Register
- August 20, 2012: Standards applicable to Bureau of Prisons
- 2013-2014: First audit cycle for corrections facilities

PREA, 42 USC § 15601, <http://www.prearesourcecenter.org/sites/default/files/library/prea.pdf>; National Standards to Prevent, Detect, and Respond to Prison Rape, Final Rule, 28 CFR § 115, <http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>

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# PREA DID NOT CREATE A NEW CRIME

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# Prevalence of Sexual Abuse in Confinement

## Sexual Abuse in Confinement Statistics

- 9.6% of former state prisoners reported one or more incidents of sexual victimization during their most recent period of incarceration
- More than 75% of all reported staff sexual misconduct in state prisons involved male inmate with female staff
- For former state prisoners, the rate of inmate-on-inmate sexual abuse was 3 times higher for females (13.7%) than males (4.2%)
- 13.7% of male (17.2% of female) former prison and jail inmates reported a violent sexual inmate-on-inmate incident\*

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>; \*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>

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# Fact Pattern

- On Thursday, 11/8/12, Victor Jones, age 19, reported an incident of sexual abuse to corrections officer Patrick Morrison, who then contacted the shift supervisor, Tony Gonzalez. Gonzalez interviewed Jones, who revealed the following:
  - On Monday, 11/5/12, Jones was transferred into a cell occupied by Kenneth Douglas, age 28, and two other adult males. The cell contains two bunk beds across from each other, and Douglas' lower bunk is directly across from Jones' lower bunk. On Tuesday, 11/6/12, approximately 2:00 am, Jones was awakened by Douglas when Douglas put his hand over Jones' mouth.

## Fact Pattern (continued)

Douglas stated quietly, "If you say a single word, you'll be dead by morning." Douglas then forcibly inserted his penis into Jones' mouth and, after a period of time, ejaculated into Jones' mouth. Jones spit out some of the ejaculate on the floor, which Douglas wiped up with his shirt.

Douglas then pushed Jones onto Jones' bed, lay on top of him, placed his hand over Jones' mouth and nose, and his forearm over Jones' neck. Jones began to squirm because he couldn't breathe but was unable to get out of Douglas' hold. Douglas was nose to nose with Jones when Jones lost consciousness.

## Fact Pattern (continued)

On Wednesday, 11/7/12, 2:00 pm, Jones sought medical care for a sore throat/pain in swallowing. The physician on duty in the correctional facility noted in the medical records "petechiae to the soft palate and tonsillar pillars, some generalized redness."

**Do you think this case would be prosecuted in your jurisdiction?**

Please indicate **"YES"** or **"NO"**  
using the Feedback option on your left

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**What should the first responder  
within the correctional facility  
do upon receiving a report of  
sexual abuse?**

Please Private Chat  
your narrative answers

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# First Responder

## First Responder Duties

- Separate the alleged victim and abuser
- Preserve and protect any 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, request that the alleged victim and alleged abuser not take any actions that could destroy physical evidence, including, as appropriate, washing, brushing teeth, changing clothes, urinating, defecating, smoking, drinking, or eating

28 CFR § 115.64, Staff first responder duties,  
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 102

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# Sexual Assault Response Team (SART)

## SART Activation

- Advocate
  - Confidential; independent from facility, if possible
  - If not possible, facility required to select and train staff member
- Medical care
  - Immediate; no cost; Sexual Assault Nurse Examiner (SANE) or Sexual Assault Forensic Examiner (SAFE), if available
  - Often, victim will receive immediate medical care at facility; then be transferred to outside location for SAFE exam

National Standards to Prevent, Detect, and Respond to Prison Rape, 28 C.F.R. § 115.11 Zero tolerance of sexual abuse and sexual harassment; PREA coordinator), [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_final\\_rule.pdf?utm\\_source=Test&utm\\_campaign=5058a0c9bc-BJS\\_Report\\_1605125&utm\\_medium=email](http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf?utm_source=Test&utm_campaign=5058a0c9bc-BJS_Report_1605125&utm_medium=email), p. 3, 7, 97; 28 CFR § 115.53 Inmate access to outside confidential support services, <http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 102. See also 28 CFR § 115.21(d) Evidence protocol and forensic medical examinations; 28 CFR § 115.21(c), Evidence protocol and forensic medical examinations; 28 CFR § 115.82(a) Access to emergency medical and mental health services; 28 CFR § 115.83, Ongoing medical and mental health care for sexual abuse victims and abusers, <http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>

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# Medical Examination and Records

## **Sexual Assault Forensic Examination**

After Jones reported the sexual abuse, on Thursday, 11/8/12, at 9:30 pm, Jones was examined by a SANE at a local community hospital. The SANE noted: “petechiae and redness consistent with that previously documented.” STI/HIV prophylaxis provided.

28 CFR § 115.21(c), Evidence protocol and forensic medical examinations, <http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 98-9; 28 CFR § 115.82(a), Access to emergency medical and mental health services; 28 CFR § 115.83, Ongoing medical and mental health care for sexual abuse victims and abusers

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# Potential Evidence

## Questions

- (1) If Jones had been penetrated anally, what evidence would you expect to find?
  - (A) Tear in or injury to anus
  - (B) Blood in/around anus
  - (C) Nothing

Please indicate which letter using the Feedback option on your left

- (2) If Jones was a female and she had been vaginally sexually abused, what evidence would you expect to find?
  - (A) Injury to hymen
  - (B) Bruising in and around her thighs
  - (C) Nothing

Please indicate which letter using the Feedback option on your left

Jenifer Markowitz, Absence of Anogenital Injury in the Adolescent/Adult Female Sexual Assault Patient, 13 Strategies in Brief (Oct. 2012); Iain A. McLean, The Male Victim of Sexual Assault, xxx Best Prac. & Res. Clinical Obstetrics & Gynaecology 1-8 (2012) 1-8

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# Criminalistics Evidence

## **DNA**

- Mouth
- Nose/cheeks
- Neck
- Bed sheets/blankets
- Floor
- Douglas' shirt

## **Fingerprints**

- Skin
- Bed

# Evidence Sources

## Corroborate as Much as Possible

- Witnesses
- Fresh complaint
  - *See, e.g.*, <http://www.judiciary.state.nj.us/criminal/charges/non2c011.pdf>
- Other victims/other acts
  - FRE 404(b): Crimes, wrongs, or other acts. This evidence may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident
- Surveillance tapes

# Character Evidence of Defendant

## **Permissible Uses for Prosecution and Defense**

- FRE 404(a)(2)(A): Defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it
- Important rebuttal evidence often overlooked by the government
- Talk to staff and inmates regarding Douglas' reputation for being peaceful, law abiding, and other relevant traits per jurisdictional law

**What facts would you argue to  
the judge in support of  
demonstrating Douglas'  
dangerousness?**

Please Private Chat  
your narrative answers

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# Assessing Dangerousness

## Dangerousness Facts and Indicators

- Majority of sex offenders are serial offenders
- Offenders can be inmates and staff
  - Predatory behaviors
  - Coercion
- Intimidation and retaliation
  - Prosecutors and investigators should work closely with the victim and institutional staff to ensure that subtle and direct intimidation is prevented, recognized, documented, and addressed immediately, including investigated and prosecuted

David Lisak, Understanding the Predatory Nature of Sexual Violence (2008)(unpublished paper, University of Massachusetts),  
<http://www.middlebury.edu/media/view/240951/original/PredatoryNature.pdf>; 28 CFR § 115.67  
Agency protection against retaliation,  
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 102

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# Assessing Dangerousness

## Victim Selection

- PREA assessment for risk of sexual victimization:
  - (1) Whether the inmate has a mental, physical, or developmental disability;
  - (2) Age of the inmate;
  - (3) 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) Inmate's own perception of vulnerability; and
  - (10) Whether the inmate is detained solely for civil immigration purposes

28 CFR § 115.41. Screening for risk of victimization and abusiveness,  
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 100

# Challenges for Factfinders

## **What Victim Behaviors Have You Encountered That Were Viewed as Challenging in a Sexual Abuse Case?**

Please Private Chat your answers

- Victim is an inmate
- Victim behavior
  - Lack of active resistance
  - Did not cry out/silent
  - Delayed complaint
  - Medical attention for throat
  - Washed away evidence
- Factfinder aversion to being concerned about crime in incarceration

# Victim Credibility

## Assessing Victim Credibility

- Credibility
  - Detail
  - Demeanor
  - Interest
  - Common sense
  - Corroboration
- Work with experts
- Do not polygraph
- Do not permit the introduction of irrelevant evidence; file pre-trial motions
  - FRE 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
  - FRE 404(a)(2)(B). Character Evidence. Exceptions for a Defendant or Victim in a Criminal Case

28 CFR § 115.71. Criminal and administrative agency investigations.  
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 103; Violence Against Women Act. SEC. 2013. Polygraph Testing Prohibition; "Polygraph Testing of Sexual Assault Victims," <http://www.aequitasresource.org/library.cfm>

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# Victim Safety Is Paramount

## How Can Prosecutors Keep Jones Safe?

- Separation order within the facility, during transport, and inside the courthouse
- Alternatives to protective custody must be considered; protective custody should not be involuntary
- Transfer to another facility
- Ensure no measures are unnecessarily restrictive or punitive

28 CFR §§ 115.43, 115.68, 115.368 Protective custody,  
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 50

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# What options do prosecutors have if Jones is unavailable as a witness?

Please indicate **which letter** using the Feedback option on your left:

- (A) Withdraw prosecution
- (B) Analyze statements, evidence, and other witnesses to determine whether we can proceed without Jones' testimony
- (C) Arrest Jones and put him on the witness stand

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# Crawford v. Washington

541 U.S. 36 (2004)

- Not a domestic violence case
- Petitioner charged with assault and attempted murder
  - Petitioner claimed self-defense
- Petitioner invoked marital privilege, preventing petitioner's wife, Sylvia, from testifying at trial
- State introduced a recorded statement of petitioner's wife, made during police interrogation, as evidence that the stabbing was not in self-defense

# Crawford v. Washington

541 U.S. 36 (2004)

- Petitioner argued that admitting the evidence would violate his right of confrontation under the 6th Amendment
- Trial court admitted the statement because it had “sufficient indicia of reliability”
- State Supreme Court upheld the conviction, deeming the statement reliable



# Crawford v. Washington

541 U.S. 36 (2004)

## United States Supreme Court

- Where testimonial statements are at issue, only confrontation can satisfy constitutional demands
- Sixth Amendment, U.S. Constitution Confrontation Clause
  - “[I]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him”

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# IS STATEMENT TESTIMONIAL?

**YES**

**NO**

**NO *CRAWFORD*  
ISSUE**

**WITNESS MUST  
TESTIFY**

**WITNESS  
UNAVAILABLE  
and  
PRIOR  
OPPORTUNITY  
FOR CROSS EXAM**

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# Crawford v. Washington

541 U.S. 36 (2004)

“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”

# Davis v. Washington

547 U.S. 813 (2006)

## What Is Testimonial?

- Domestic violence case
- Victim called 911, identified defendant as assailant, and described the assault to the 911 operator
- Victim did not testify at defendant's trial, but the trial court admitted the 911 tape
- State Supreme Court affirmed, holding that the 911 call was not testimonial and not the equivalent of an in-custody, police interrogation
- It also held that the purpose of the 911 call is to call for help, not bear witness, and therefore is not testimonial

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# Hammon v. Indiana

547 U.S. 813 (2006)

## What Is Testimonial?

- Domestic violence case
- Police responded to scene, and victim described to police how defendant assaulted her
- Victim did not testify at trial, but officers testified to victim's statements
- Trial court admitted statements under "excited utterance" exception to hearsay rule
- Indiana Supreme Court affirmed, reasoning that the statements were not "testimonial" because the officer questioned the victim in order to assess and secure the situation, NOT to preserve the victim's statements for future use in a legal proceeding

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# Davis v. Washington, Hammon v. Indiana

547 U.S. 813 (2006)

## **Police interrogation is TESTIMONIAL if circumstances objectively indicate:**

- No ongoing emergency
- Primary purpose of interrogation is to establish or prove past events potentially relevant to later criminal trial

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# Davis v. Washington, Hammon v. Indiana

547 U.S. 813 (2006)

## **Police interrogation is NONTESTIMONIAL if circumstances objectively indicate:**

- Ongoing emergency
- Primary purpose of interrogation to address emergency

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# Michigan v. Bryant

131 S.Ct. 1143 (2011)

## What Is Testimonial?

- Police responded to a radio dispatch of a man shot
- Police found victim with gunshot to abdomen in great pain/difficulty speaking
- Police asked:
  - What happened?
  - Who shot you?
  - Where did shooting occur?
- Victim identified shooter and circumstances of shooting
- Victim died at hospital within hours

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# Michigan v. Bryant

131 S.Ct. 1143 (2011)

## United States Supreme Court

- Reaffirmed the “primary purpose” test from Davis
- Directed the use of an objective evaluation of the case circumstances to determine the primary purpose of the statement
- Clarified that the existence of an ongoing emergency is among the most important factors to consider, but not the only factor
- Explained that the statements and actions of both the declarant and the interrogators provide objective evidence of the primary purpose of the interrogation

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# Remember

- If the statement is nontestimonial, Crawford does NOT apply, BUT
- State hearsay rules DO apply, and the statement must fall within an exception

# Which of Jones' statements are testimonial?

Please indicate **which letter**  
using the Feedback option on your left:

- (A) Patrick Morrison and prison physician
- (B) Tony Gonzalez and SVU/police detective
- (C) SANE at outside facility and friend/fellow inmate
- (D) Advocate and friend called on phone

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**Would a prosecutor have a  
difficult time prosecuting this  
case without the participation  
of Victor Jones?**

Please indicate **"YES"** or **"NO"**  
using the Feedback option on your left

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# Summary

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 and protocols have provided a framework for best practices and accountability within corrections facilities, prosecutors are ultimately responsible for ensuring that the cases are prosecuted to the fullest extent of the law while ensuring the victim is safe and supported

# Additional Resources

- U.S. Department of Justice National PREA Standards  
<http://www.prearesourcecenter.org/library/488/standards/department-of-justice-national-prea-standards>
- STRATEGIES Newsletter, Prosecuting Cases of Sexual Abuse in Confinement, Issue #8  
[http://www.aequitasresource.org/Proecuting\\_Cases\\_of\\_Sexual\\_Abuse\\_in\\_Confinement.pdf](http://www.aequitasresource.org/Proecuting_Cases_of_Sexual_Abuse_in_Confinement.pdf)
- The Prosecutors' Resources  
<http://www.aequitasresource.org/library.cfm>
- Voices for Justice: Surviving Prison Rape, produced by Just Detention International  
<https://www.youtube.com/watch?v=0bOQet07OIg>



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# For More Information

For more information about the **National PREA Resource Center**, visit [www.prearesourcecenter.org](http://www.prearesourcecenter.org). Direct questions to [info@prearesourcecenter.org](mailto:info@prearesourcecenter.org)

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