



PROSECUTING CASES OF SEXUAL ABUSE IN CONFINEMENT

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INTRODUCTION

Cases involving sexual abuse² are some of the toughest to investigate and prosecute. Sexual abuse in confinement has persistently presented even greater challenge to investigators and prosecutors because of internal and external barriers to reporting, including the behaviors, actions, and decision-making powers of first responders and other corrections staff that may result in the failure to make an official report to law enforcement. Additional challenges include issues related to: the very nature of confinement itself, including an institutional culture that demands its inhabitants be tough and resilient, as well as an inmate's fear of repercussions for reporting to those charged with caring for, overseeing, and policing every aspect of inmate daily life; evidence collection and retention; identification of pre- and post-abuse witnesses; and the multi-level biases against inmates.³ Unfortunately, sexual abuse in confinement historically has been minimized and has even been the subject of

jokes.⁴ Sexual abuse, however, 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."⁵

In recognition of the severity and consequences of sexual abuse in confinement, Congress passed the Prison Rape Elimination Act of 2003 (PREA),⁶ which codified the need for a comprehensive response to the problem on the part of correctional facilities and allied criminal justice professionals. PREA and the subsequent development of PREA standards⁷ have provided guidance and mandates attached to federal grant funding that all confinement facilities must follow.^{8,9} While several resources already are available to help confinement facilities comply with standards, the prosecution of those who perpetrate sexual abuse in confinement is necessary to achieve safety within and outside of facility walls, and is integral to preventing future abuse.

Prosecutors have a duty to lead, and their important role in educating allied professionals and the public about crimes involving sexual abuse in confinement cannot be overstated. While cases involving sexual abuse in confinement may seem formidable to investigate and prosecute, they are not; there are several strategies that prosecutors can utilize to overcome obstacles. This article will address steps that will help prosecutors and their multidisciplinary team (MDT) partners ensure safety, accountability, and justice in these cases.

USING PREA TO IMPROVE MULTIDISCIPLINARY VICTIM SUPPORT: DETECTION, REPORTING, AND RESPONSE

PREA and its standards provide guidelines and best practices for corrections facilities and MDT professionals to prevent and respond to sexual abuse in confinement. While these guidelines are helpful, prosecutors must work with other allied professionals to ensure they fully understand how to apply these protocols to their decision-making and daily practices.

There are unique challenges associated with the detection of, reporting of, and response to sexual abuse in confinement. Although PREA standards require that confinement facilities provide — and notify inmates of — at least one way for inmates to report sexual abuse or harassment to an office or entity that is not part of the corrections facility or agency,¹⁰ victims may still resist reporting the abuse for a variety of reasons. They include: fear of the offender;¹¹ fear of retaliation and additional attacks from the offender, the offender's associates, or other inmates; fear of punishment and retribution from corrections staff; mistrust of law enforcement or corrections officers; embarrassment; humiliation; self-blame; lack of self-identification as a victim; and a lack of faith in the criminal justice system. The resistance to reporting may result in delayed disclosure, piecemeal disclosures, minimization of the offender's behaviors, recantation, refusal to speak to law enforcement or prosecutors, and a lack of participation in the criminal justice process. Many of these dynamics and factors exist in cases of sexual abuse that occur outside of prison, but they often are magnified in a correctional setting, as the victim may literally have no "safe place" to go to escape the offender or the offender's associates.¹²

PREA "standards require facilities to prepare a written plan to coordinate actions taken among staff first responders, medical and mental health practitioners, investigators, and facility leadership in response to an incident of sexual abuse."¹³ Prosecutors should work with corrections facilities to ensure not only that the victim and perpetrator are immediately and continuously separated, but that corrections professionals understand the types of potential evidence that may exist in these cases. Corroboration of sexual abuse may be found in places and from witnesses separate and apart from the location of the incident. In a confinement facility, where so many persons have access to various areas within a short period of time, it is crucial to quickly identify places and potential witnesses with which and whom victims and offenders may have come into contact before and after the sexual attack. While PREA standards focus on protecting the "crime scene," prosecutors should communicate with facility staff to discuss the potential physical and geographic scope of the crime and relevant areas, including places where the victim or offender went before or after the crime, as well as places where and occasions when the offender may have threatened or harassed the victim previously. These actions may lead to the preservation of evidence that is key to corroborating the victim's account of the sexual abuse and connecting the offender to the crime.

CONSIDER OFFENDER IDENTITY IN ENSURING VICTIM SAFETY

Perpetrators of sexual abuse in confinement include fellow inmates,¹⁴ corrections staff,¹⁵ and members of law enforcement.¹⁶ While there are special investigative considerations that must be contemplated in every sexual abuse in confinement case, the identity of the inmate can pose distinctive dynamics that call for particularized attention.

Abuse Perpetrated by a Staff Member

Corrections and facility staff can and do exert great authority over every aspect of inmates' lives. At the same time, the very structure of the corrections staff-inmate relationship often results in the staff member having access to and being familiar with inmates' most personal experiences. The relationship, therefore, requires a level of professionalism that upholds the balance between the staff member's duty to maintain order in the facility and the duty to care for its in-

mates. Because of this relationship, “[a]n [officer’s] attempt, threat, or request to engage in sexual contact, even if it does not result in actual sexual contact, may lead to grave consequences for an inmate, and ... [must] be treated seriously.”¹⁷ In recognizing the seriousness of the duties of corrections staff, some jurisdictions’ statutes include as per se criminal conduct any sexual contact between a staff member and an inmate under the theory that such contact is inherently coercive.¹⁸

Corrections officers have access to rooms and other facility areas that they know are isolated or can be locked, which provides a built-in opportunity to commit sexual abuse of an inmate under their control.¹⁹ That access, opportunity, and control are virtually unparalleled, as few other settings involve environments that victims literally cannot escape.²⁰ In addition to sexual abuse by force and without consent, many incidents of sexual abuse perpetrated by corrections staff involve coercive sexual contact and abuse. A corrections officer might exploit his position of power to unlawfully coerce a victim into sexual activity or penetration by, for example, allowing a victim to leave his or her cell at otherwise unauthorized times or granting other privileges, such as family visitation, additional time on the phone, specialized programming, outdoor activities, and access to items normally difficult to come by or deemed contraband in confinement.²¹ In these cases, corrections staff are not only sexually abusing victims, but they are likely repeatedly manipulating or threatening them.

After prosecutors receive a case involving sexual abuse perpetrated by a staff member, prosecutors should check to see that, consistent with PREA standards for all sexual abuse incidents, separation protocols have been and will continue to be followed.²² Prosecutors should also immediately ensure that the investigation has included a focus on the timeframe surrounding the reported abuse, as relevant evidence and witnesses to events preceding or following the incident may prove critical to the investigation. The offender’s pre- and post-incident words or actions can reveal a possible motive to attack this particular victim, help corroborate the victim’s statements to authorities, or show attempts to cover up or destroy evidence. In addition, prosecutors and investigators should delve into the victim’s possible concerns and fears about retaliation from other corrections staff and how this may or may not have played a part in the reporting of the abuse and its aftermath.²³

Inmates who report sexual abuse perpetrated by a staff member may be in danger of intimidation and retaliation, including punishment and humiliation, from other facility staff.²⁴ Other staff may want to prevent the victim from reporting the abuse for a variety of potential reasons, including protection of the facility’s reputation, internal administrative or punitive repercussions to the facility and staff, the avoidance of criminal charges, the potential filing of lawsuits against the facility and individual employees, personal interest in protecting a colleague, the avoidance of increased internal or external oversight of the facility, concerns over failure to comply with mandatory reporting laws,²⁵ and possible investigations into other criminal or inappropriate behaviors perpetrated by facility staff. Prosecutors should work with law enforcement and internal corrections staff to ensure that the victim knows how to document and report any additional suspected intimidation or retaliation in a safe manner.

Abuse Perpetrated by an Inmate

When sexual abuse perpetrated by an inmate is first reported, responders should ensure that the offender is immediately separated from the victim.²⁶ When prosecutors become aware of a case, they should request a standing separation order for confinement, transport, and the courthouse, with serious consideration given to whether to keep the victim and offender in the same facility.

Safety must be the preeminent concern when deciding to transfer either the victim or the offender. Prosecutors must recognize that confinement social networks are vast, and information about inmates in one facility can become known to inmates and staff in any facility. In addition to separation from the offender, the victim should be separated from any of the offender’s allies, where possible, to reduce the potential for intimidation or retaliation.

At times, when other efforts have been exhausted, protective custody may be necessary to ensure a victim’s safety. However, prosecutors should heed the standards, which clarify “that inmates shall not be placed involuntarily in protective custody, unless an assessment of available alternatives has been made, and a determination has been made that no other alternative means of separating the inmate from the abuser exist.”²⁷ Prosecutors and investigators should talk to victims about safety concerns and carefully consider

the extent of the requested separation order and take measures to prevent or minimize any punitive or negative consequences.²⁸ Protective custody may isolate victims or obstruct their participation in helpful educational, vocational, therapeutic, and other opportunities. Carefully constructed separation orders can ensure victims have continued access to programming and services, which may be particularly essential after suffering the trauma of sexual abuse.

Reporting sexual abuse to internal agency staff or law enforcement may place the victim at risk for retaliation as well as further attack from predators who are looking for a potentially “vulnerable” victim.²⁹ One study identified vulnerable inmates as including “females, [w]hite or multiracial inmates, nonheterosexual inmates, inmates who were college educated, ... inmates who were younger than 25 years ... [inmates who were held] for a violent sexual offense[,] ... inmates with only one arrest[,] and those who had served less time in a correctional facility...”³⁰ Although PREA standards require an initial assessment for risk of victimization that includes consideration of mental, physical, or developmental disability; age; physical build; previous incarceration; nonviolent criminal history; prior convictions for sex offenses; sexuality; previous sexual victimization; internal perception of vulnerability; and whether detainment is only for civil immigration purposes,³¹ there is no guarantee that such an assessment will prevent sexual abuse. However, corrections officials should consider these vulnerabilities when making decisions such as housing, bed, work, education, programming, and others;³² responders should be aware of vulnerabilities when they respond to a report of sexual abuse; and prosecutors should be aware of vulnerabilities when requesting victim safety and protective measures, evaluating evidence, determining motive, and crafting trial strategies and arguments.

PREA standards allow a victim in a prison, jail, community confinement facility, or juvenile facility to anonymously report abuse to a public or private entity or office that is not part of the agency, and also allow an agency to “utilize a private rape crisis center or similar community support service for these purposes,”³³ but once an incident has been reported to agency staff or law enforcement, the victim may fear or in fact face retaliation. Significantly, “current and former inmates ... expressed the view that an outside reporting mechanism is essential to encourage reporting incidents of

sexual abuse, because inmates often do not feel comfortable reporting to staff and may fear retaliation, especially when the abuser is a staff member.”³⁴ Therefore, once an incident has been reported to law enforcement, prosecutors should work with corrections and law enforcement to determine the potential dangers to the victim’s safety and take appropriate steps, including asking a judge to sign protective orders not only to protect the victim from the offender, but also the offender’s allies.

WORKING WITH INVESTIGATORS: WITNESS AND EVIDENCE IDENTIFICATION, RETENTION, AND COLLECTION, WITH SPECIAL CONSIDERATION OF INTIMIDATION

PREA standards require that investigators have specialized training in conducting sexual abuse investigations in confinement settings, including training on interviewing techniques and evidence collection. Prosecutors should supplement this training by helping investigators understand all potential sources of evidence, including any potential witnesses as well as evidence that might be found at, peripherally located near, and away from the actual crime scene, including semen, urine, blood, DNA, and fingerprints.

Upon a report of sexual abuse in confinement, PREA standards require that first responders do the following: “(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.”³⁵

While first responder requirements are helpful in supporting victims and preserving evidence, prosecutors should ensure that investigators are properly trained to understand the powerful probative value of physical evidence and to

use best practices to isolate, preserve, and document crime scene evidence. Even with limited resources, an investigator with a digital camera, sketchpad, and evidence bags can help paint a picture that proves the reality of the victim's experience. For example, the sexual abuse may have occurred in a closet, but the victim or offender may have gone to another room or area after the incident, and thus evidence including blood, saliva, hair, semen, or urine may be present there. Another example may be that the offender used a broom as a weapon in the commission of the abuse, and he or she obtained that broom from a locker. Preserving that locker may provide crucial evidence that the broom was missing from its usual location at the time of the incident. In addition, if the confinement facility's surveillance cameras only preserve video or audio for a short period of time before it is recorded over by fresh images, first responders should take the extra step of preserving the surveillance video and audio. While PREA standards don't specifically require the preservation of surveillance images and sound, their preservation is one example of ways in which confinement facilities, investigators, and prosecutors can work together to secure evidence and support the spirit and intent of PREA and the standards.

PREA standards also include access to medical care after an incident of sexual abuse.³⁶ Not only is medical care important in the support, protection, and healing of the victim, but it can provide crucial evidence during an investigation and at trial. The fact that the victim submitted to an invasive and timely examination that included evidence collection procedures may help corroborate that the abuse occurred, even if the examination and collection yielded no determinative "injuries"³⁷ or evidence. Investigators should work with confinement staff, including medical staff, to ensure that medical evidence collection and chain of custody protocols are followed and that medical records are turned over to authorities in a timely manner. Prosecutors should also work with investigators to provide information about the potential significance of certain injuries, e.g., the presence of petechiae on the eyes, which may indicate the victim was strangled, or petechiae on the soft palate of the mouth, which may indicate forced oral penetration, as well as the significance of certain medical evidence, e.g., that the lack of "injury" does not indicate that sexual abuse did not occur.³⁸ Understanding the significance or lack thereof of particular medical evidence may provide investigative leads to addi-

tional corroborative evidence.

Importantly, investigators should always attempt to Mirandize and interview the suspected offender.³⁹ Prior to the interview, in addition to reviewing the offender's criminal history, investigators should talk to other witnesses to determine if the offender made any admissions or engaged in other relevant behaviors that would be helpful to bring up during the interrogation. For interrogations of suspects who are corrections employees, investigators should carefully consider the implications of *Garrity v. New Jersey*,⁴⁰ not only in preparing for questioning, but also in terms of avoiding the use of information that was obtained as the fruit of a coerced or otherwise improper employer-employee interview.⁴¹ *Garrity* held that "[w]here police officers being investigated were given [the] choice either to incriminate themselves or to forfeit their jobs under [a] New Jersey statute dealing with forfeiture of office or employment, tenure, and pension rights of persons refusing to testify on ground of self-incrimination, and officers chose to make confessions, confessions were not voluntary but were coerced, and [the] Fourteenth Amendment prohibited their use in [the] subsequent criminal prosecution of officers in state court,"⁴² and resulted in the requirement that a public employer provide a Miranda-type warning called a *Garrity* warning.⁴³ Failure to provide a *Garrity* warning may result in statements considered violative of the suspect's Fifth Amendment right against self-incrimination.

Finally, all potential witnesses should be identified and interviews should be attempted. Prosecutors and investigators should work with confinement staff and known witnesses, including the victim, to determine potential witnesses. In cases that occur in confinement, there are potential witnesses that may not exist in cases outside of confinement, as inmates often are divided into groups for housing and other activities.⁴⁴ Even witnesses who did not directly observe the crime may have significant relevant information. They may have overheard something, may have noticed the absence of the victim and offender from the group, may be familiar with other behaviors or the reputation of the victim or offender, and may have a unique understanding of any *opportunity* the offender may have had to attack the victim.

Gang Rape

“Gang rape” refers to sexual abuse committed against a victim by several persons in rapid succession.⁴⁵ The attackers may be affiliated with an actual gang, but most often are not. Perpetrators of gang rape in confinement may be a loosely or closely affiliated group of persons who engage in gang rape as well as other activities together, but whose identity would not be legally categorized as a gang or encompassing organized crime.⁴⁶ Perpetrators of gang rape often target the same perceptually vulnerable victims as other sexual abuse offenders: young, criminally inexperienced, slight in stature, isolated, effeminate, gay, transgender, transsexual, mentally ill, with a mental health issue, or may select a victim based on race, cultural background, or ethnicity.⁴⁷ This is also true for incidents of sexual abuse involving actual gangs.⁴⁸

Gang Affiliation

Investigators should immediately identify any possible gang affiliation that might have enabled and/or served as motive for the attack. A gang affiliation may impact the victim’s, offender’s, and witnesses’ potential cooperation with law enforcement throughout the investigation and prosecution of the case. Gang members may have significant hostility toward law enforcement and may not cooperate with authorities, or may even purposely mislead or lie to authorities in order to protect a fellow member. If the victim was attacked by a gang, prosecutors should recognize that the investigation may also extend to the victim’s and offender’s family, friends, and associates outside of confinement. Not only should investigators and prosecutors carefully review gang or organized crime connections to prevent future crimes or retaliation and protect the victim and others, but they should do so with the understanding that these ties might also yield crucial evidence in an investigation, and be significant in charging certain statutes as well as sentencing enhancements.⁴⁹

Intimidation and Retaliation

The potential for intimidation and retaliation against all witnesses involved in a sexual abuse investigation is significant. When victims are in confinement, they may not have the ability to hide from known or unknown allies of their perpetrators, including other inmates as well as staff, who seek to intimidate or silence them. Witness intimidation

poses serious investigative challenges, and comes in both obvious and more subtle forms.⁵⁰ Intimidation from staff, in particular, may come in less apparent forms, including denial of certain privileges and programming or the addition of other jobs or requirements for the victim. This intimidation can be extremely difficult for the victim to report to others, and for corrections and investigators to identify as actual intimidation that warrants intervention. Prosecutors should ensure that victims and all members of the MDT understand various methods of intimidation and how the intimidation should be reported, documented, and investigated. Intimidation is not an insurmountable challenge, as early steps to keep the victim safe, as well as the provision of avenues that allow the victim to communicate with trusted authorities, may help ensure steps are in place to prevent the offender or the offender’s associates from having access to the victim.

PREA standards include measures to prevent intimidation and retaliation from staff by allowing an agency “to remove alleged staff sexual abusers from contact with any inmates pending the outcome of an investigation”⁵¹ The standards also require agencies to have a policy to protect inmates and staff who report sexual abuse or cooperate with investigations from retaliation.⁵² Policy protections must include “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.”⁵³ Those proactive agency protections provide a solid foundation for prevention of intimidation and retaliation, but must be followed up on by prosecutors to ensure continued measures are taken to identify, document, investigate, and prosecute intimidation and retaliation.⁵⁴

TRIAL STRATEGIES FOR CASES OF SEXUAL ABUSE IN CONFINEMENT

When preparing for a trial involving sexual abuse in confinement, prosecutors should consider filing relevant pretrial trial motions, including motions to introduce testimony and evidence concerning: defendant’s other bad acts/404b;⁵⁵ *res gestae*; defendant’s admissions; expert testimony on gangs;⁵⁶ expert testimony on victim behavior; expert testimony on medical evidence; and rape shield.⁵⁷ In addition, prosecutors should seek to exclude irrelevant evidence of the victim’s other crimes and acts, including the reason for

the victim's current incarceration. In cases involving intimidation, prosecutors should consider filing motions for the use of closed circuit television, exclusion of certain persons from the courtroom, and admission of hearsay statements under forfeiture by wrongdoing.⁵⁸

These pretrial motions not only ensure that the prosecution will be able to introduce key testimony in its case-in-chief and on rebuttal, but also will help keep the victim safe and supported throughout the trial. Crucially, if the defendant or the defendant's associates have intimidated the victim to such an extent that the victim becomes unavailable⁵⁹ and does not testify, the filing of a forfeiture by wrongdoing motion and admission of the victim's hearsay statements will ensure that the prosecution can proceed to trial when a victim or witness is unavailable due to the defendant's wrongdoing.⁶⁰

The fact that the sexual abuse occurred in confinement and against a convicted individual may impact trial strategy and decision-making. Prosecutors should conduct voir dire to determine what, if any, biases potential jurors hold that would interfere with their ability to be open and fair when evaluating evidence regarding the sexual abuse of an inmate. Similarly, when developing a trial theme and plan, prosecutors must embrace the fact that the abuse occurred in a confinement facility and explain that the facility provided a unique opportunity to perpetrate the sexual abuse. In a confinement facility, an offender – and this is particularly true for corrections staff – can view and track inmates' schedules and facility layout, both of which are crucial to an offender's ability to perpetrate the crime.

During their case-in-chief at trial, prosecutors should address the following topics: the circumstances of the report, the presence or lack of physical evidence, the medical examination and any evidence it yielded, the location of the abuse incident, and the offender's position or status within the facility (for example, the victim's youth, slight stature, or others' knowledge of him as a relative newcomer to the criminal justice system and its confinement facilities). All of these are crucial for providing a framework through which finders of fact can evaluate the actual abuse, including how and why the offender selected this particular victim and location.

In addressing the circumstances of the report, the victim should testify to the conditions under which the sexual abuse was reported and to whom. If applicable, the victim should

explain the reasons for a delayed report. This is critical to countering the prevalent but inaccurate expectation that "real" victims immediately report their victimization. Victim testimony often provides the clearest evidence of the victim's state of mind during and after the abuse and is also relevant to the development of an accurate context through which fact finders can assess victim credibility.

While a delayed complaint may result in the destruction of evidence, the lack of this evidence at trial certainly is not dispositive of trial outcome. Corroboration exists in many forms, and prosecutors should ask questions during direct examination to corroborate as many facts as possible. The victim's behavior after the abuse may itself provide significant corroboration; for example, a victim who previously was social but withdrew from interaction with others after the attack may corroborate the attack by providing behavioral or emotional signs of trauma suffered. In addition, the fact that the victim underwent a medical examination at any time as a result of the sexual abuse may corroborate that the incident occurred, in that the victim presented with a history of a sexual abuse and received medical treatment, even if just to check for possible sexually transmitted infections (STIs) spread by the offender. Undergoing an examination, however, is not proof that an attack occurred. The victim may refuse treatment for several possible reasons, including such extensive post-incident emotional trauma or shock that the victim does not want to undergo an examination. In those circumstances, that refusal should be explained during direct examination. These behaviors may directly tie into the circumstances under which the sexual abuse was reported, which the victim should also testify to in detail on direct examination. It is important for the victim to explain when, why, and to whom the report was made, as the victim's feelings and state-of-mind are relevant to the victim's credibility.

Prosecutors also can call an expert to testify regarding sexual abuse victim behaviors to explain behaviors that are commonly seen and misperceived, including a delayed complaint, minimization of the abuse, piecemeal disclosures, lack of cooperation with authorities, and recantation.⁶¹

In addition to the victim's behavior, the defendant's behavior before and after the attack may corroborate its occurrence. If the defendant was watching, following, or harassing the victim in any way, other inmates or corrections staff — or surveillance video — may have witnessed these actions and can

testify to them. Where and when the sexual abuse occurred can provide important evidence of the crime, as location and time provide a usually small window during which the victim could have been attacked. Even in cases involving a delayed complaint, facility records and time logs would likely show which inmates and staff had access to certain areas of the facility, thus providing key corroboration.

Finally, there are corroborative opportunities in looking at the victim and offender's status within the prison, including their allies and other group or gang affiliations that may have provided an opportunity or motive to attack the victim. Tattoos, phone calls, prior acts, prior crimes, and other activity both in and outside of prison can provide significant substantiation of these relationships or connections. Mental illness, mental health issues, race, youth, criminal inexperience, a perceived lack of street savvy, a victim's physical stature or qualities in relation to the offender, gang ties, or actual or perceived homosexuality may themselves provide motive, as rape is an act of power, dominance, and control.⁶²

CONCLUSION

PREA has helped increase the awareness and understanding of the importance of preventing, detecting, and responding to sexual abuse in confinement by allied criminal justice professionals. While the standards and protocols have provided a framework for best practices and accountability within corrections facilities, prosecutors must take a leadership role in ensuring that the practices articulated in PREA, as well as those that complement its mission, are fully understood, implemented, and maintained throughout the investigation and prosecution of a case. They must work with allied criminal justice professionals to prioritize the investigation and prosecution of all sexual abuse and train those who are involved in detection and response to understand the extent and meaning of evidence and witness identification, retention, and collection; effective victim-centered, offender-focused prosecution strategies; and practices that enhance victim safety and protection. By working together, prosecutors and other professionals can continue to work toward eradicating sexual abuse in confinement and bring offenders to justice.

ENDNOTES

1 Viktoria Kristiansson is an Attorney Advisor at AEquitas. Ms. Kristiansson would like to acknowledge Charlene Whitman, Associate Attorney Advisor at AEquitas, for her contributions to this article.

2 The Prison Rape Elimination Act standards use the term "sexual abuse" to refer to acts that include rape, sexual assault, and unlawful sexual contact. For purposes of consistency, this article will use the same term. See National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 119, 37200-01 (June 20, 2012)(to be codified at 28 CFR 115), available at <http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf> [hereinafter *National Standards*]. "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)-(5) of this section;

(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.

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." 28 CFR section 115.6. Definitions related to sexual abuse, at 37200.

3 “The standards themselves refer to persons confined in prisons and jails as ‘inmates,’ persons confined in lockups as ‘detainees,’ and persons confined in juvenile facilities or community confinement facilities as ‘residents.’ For simplicity, however, the discussion and explanation of the standards refer collectively to all such persons as ‘inmates[.]’” and, therefore, this article will utilize the term “inmate.” *National Standards, supra* note 2, at 37107, n.1.

4 See, e.g., Victor Medina, *Eva Longoria tweets rape joke about Paul Ryan*, EXAMINER.COM (Oct. 12, 2012), <http://www.examiner.com/article/eva-longoria-tweets-rape-joke-about-paul-ryan>; Evan McMurry, *And Then Came The Sandusky Rape Jokes*, POLITICOLOGY (June 25, 2012), <http://www.ology.com/post/122610/and-then-came-the-jerry-sandusky-rape-jokes>.

5 See *National Standards, supra* note 2, at 37106.

6 Prison Rape Elimination Act, 42 U.S.C. § 15601-15609 (2012). It is important to note that “[t]he statute defines ‘prison’ as ‘any confinement facility,’ including jails, police lockups, and juvenile facilities, and defines ‘rape’ to include a broad range of unwanted sexual activity. 42 U.S.C. 15609(7) & (9).” See *National Standards, supra* note 2, at 37106.

7 Subsequent to the passage of PREA, the National Prison Rape Elimination Commission made recommendations to the United States Attorney General to enable him to create national standards governing “the detection, prevention, reduction, and punishment of prison rape ...” 42 U.S.C. 15607(a)(1)-(2). See also NAT’L PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT, (2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>. “Because the purposes and operations of various types of confinement facilities differ significantly, there are four distinct sets of standards, each corresponding to a different type of facility: adult prisons and jails (§§ 115.11–.93); lockups (§§ 115.111–.193); community confinement facilities (§§ 115.211–.293); and juvenile facilities (§§ 115.311–.393). The standards also include unified sections on definitions (§§ 115.5–.6) and on audits and State compliance (§§ 115.401–.405, 115.501). The standards ... apply to facilities operated by, or on behalf of, State and local governments and the Department of Justice. [In addition], ... PREA encompasses all Federal confinement facilities.” 42 U.S.C. 15607(a)(2). See *National Standards, supra* note 2, at 37107. In addition, the Department of Homeland Security issued its own Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities, (Dec. 6, 2012)(to be codified at 6 CFR 115), available at <http://www.dhs.gov/sites/default/files/publications/prea-nprm-final-120612.pdf>.

8 PREA does not mandate state compliance; rather, the Act provides certain incentives for confinement facilities to implement the standards, including possible reduction in federal grant funds as a result of noncompliance. The national standards apply to the Federal Bureau of Prisons, and require compliance certification for facilities in a state that are “under the operational control of the State’s executive branch, including facilities operated by private entities on behalf of the State’s executive branch.” See *National Standards, supra* note 2, at 37107. “A State whose Governor does not certify full compliance with the standards is subject to the loss of five percent of any Department of Justice grant funds that it would otherwise receive for prison purposes, unless the Governor submits an assurance that such five percent will be used only for the purpose of enabling the State to achieve and certify full compliance with the standards in future years. 42 U.S.C. 15607(c) While state correctional facilities would be subject to losses of federal grant funds, “[t]he certification, by its terms, does not encompass facilities under the operational control of counties, cities, or other municipalities,” including local jails, lockups, and community confinement facilities. See *National Standards, supra* note 2, at 37115. If the latter facilities are not in compliance, consequences may include not receiving new or renewed contracts. In addition, any correctional accreditation organization that seeks Federal grants must adopt accreditation regarding sexual abuse that are consistent with the national standards in this final rule. 42 U.S.C. 15608.” *Id.*

9 This article will focus mainly on the National Standards To Prevent, Detect, and Respond to Prison Rape; Final Rule that focus on adult prisons and jails, but the aforementioned document contains all four sets of standards: adult prisons and jails, lockups, community confinement facilities, and juvenile facilities, available at <http://www.prearesourcecenter.org/library/search?keys=&cat=4>.

10 “[C]urrent and former inmates ... expressed the view that an outside reporting mechanism is essential to encourage reporting incidents of sexual abuse, because inmates often do not feel comfortable reporting to staff and may fear retaliation, especially when the abuser is a staff member.” See *National Standards, supra* note 2, at 37155. The standards require a facility to provide private internal and external avenues for reporting: “28 CFR § 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.” *National Standards, supra* note 2, at 37205. See also *National Standards*, §§ 115.151, 115.251, and 115.351, *supra* note 2, at 37212, 37218, 37226.

11 Although PREA and the standards use the term “abuser” to refer to those who commit sexual abuse, this article will utilize the terms “offender” and “perpetrator,” as those terms are more commonly used by prosecutors and allied criminal justice professionals.

12 “While any abuse by law enforcement officials or other government agents is reprehensible, PREA appropriately addresses the unique vulnerability of incarcerated persons, who literally cannot escape their abusers and who lack the ability to access community resources available to most victims of sexual abuse.” See *National Standards, supra* note 2, at 37113.

13 See *National Standards, supra* note 2, at 37109. PREA standards also require the facility to “provide inmates with access to outside victim advocates for emotional support services related to sexual abuse” *Id.* at 37205 (“Inmate access to outside confidential support services”). See also *Id.* at 37203 (“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.”)

14 See *supra* note 3.

15 For purposes of this article and to ensure consistency with the final standards, corrections and facility “staff” include employees, contractors, or volunteers of a prison, jail, lockup, community confinement facility, or juvenile detention facility. The standard’s final rule regarding abuse perpetrated by staff includes sexual abuse “that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse or gratify sexual desire.” *National Standards, supra* note 2, at 37200 (“Definitions Related to Sexual Abuse”).

16 See, e.g., KCAL9, *OC Deputy Arrested for Having Sex with an Inmate!*, YOUTUBE, http://www.youtube.com/watch?v=_9vsuFTt4 (last visited Dec. 1, 2012); *Ottawa Cellblock Strip Search Trial Resumes*, CBC NEWS (Oct. 9, 2012), <http://www.cbc.ca/news/canada/ottawa/story/2012/10/09/ottawa-cellblock-strip-search-trial.html>.

17 *National Standards*, *supra* note 2, at 37116.

18 For information on a specific jurisdiction's statutes, see "Rape and Sexual Assault Analysis and Laws." *Library*, AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, <http://www.aequitasresource.org/library.cfm>; Carol E. Tracy, Terry K. Fromson, Jennifer G. Long, & Charlene Whitman, *Rape and Sexual Assault in the Legal System*, http://sites.nationalacademies.org/dbasse/cnstat/currentprojects/dbasse_073316-.UMiUoBwrnr6. See also Matt Clarke & Alex Friedmann, *State-by-State Prisoner Rape and Sexual Abuse Round-Up*, PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/displayArticle.aspx?articleid=24298&AspxAutoDetectCookieSupport=1> (last visited Dec. 1, 2012) ("According to a survey by the U.S. Department of Justice, Bureau of Justice Statistics, from 2008 to 2009, 2.8% of state and federal prisoners and 2.0% of jail prisoners reported at least one incident of sexual victimization by a corrections employee within the preceding 12 months. While those percentages may seem low, they reflect an estimated 57,000 incidents of sexual victimization by staff members in just one year. Most of those incidents (an estimated 36,800) were described as "unwilling"; e.g., unwanted sexual contact involving prison and jail employees. While the remaining incidents were considered "willing," prisoners cannot legally consent to sex acts with staff members."). See also *Prison Guard Rapes Male Prisoners*, YOUTUBE, <http://www.youtube.com/watch?v=zx1WOeKxJfE> (last visited Dec. 1, 2012). Notably, all states have statutes or specific provisions that per se prohibit any sexual penetration or other specified sexual conduct involving a juvenile under the age of, e.g., twelve or thirteen. All states except Georgia, Massachusetts, Texas, and Wisconsin have statutes or specific provisions that per se prohibit sexual penetration of a juvenile under a certain age by a person who is specified number of years older than the juvenile. All states except Georgia, Indiana, Kentucky, Mississippi, New Hampshire, Texas, and Wisconsin have statutes or specific provisions that per se prohibit sexual contact of a juvenile under a certain age by a person who is specified number of years older than the juvenile. "Rape and Sexual Assault Analysis and Laws" *supra* note 18; *Rape and Sexual Assault in the Legal System*, *supra* note 18 at 24. See also, e.g., 18 PA. CONS. STAT. §§ 3121(c), 3123(b), 3122.1 (2012). These laws are specifically significant when considering the 2008-2009 National Survey of Youth in Custody, which collected anonymous and confidential allegations of sexual victimization of youths in custody. The survey found that, of the 9,189 youth participating in the survey, "[a]n estimated 4.3% of youth (1,150 nationwide) reported that they had sex or other sexual contact with facility staff as a result of force. An estimated 6.4% (1,710) of youth said they had sexual contact with facility staff without any force, threat, or other explicit form of coercion." ALLEN J. BECK, PAIGE M. HARRISON & PAUL GUERINO, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09, 3 (January 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfry09.pdf>

19 See, e.g., *Lisa Buchman, Taconic Corrections Officer Guilty of Criminal Sex Act*, BEDFORD-KATONAH PATCH (May 1, 2012), <http://bedford.patch.com/articles/taconic-corrections-officer-convicted-of-having-sex-with-inmate>.

20 Other similar settings include day care centers, schools, drug treatment facilities, facilities housing those with mental illness, facilities housing those with physical disabilities, and facilities housing the aged or infirm.

21 See, e.g., Cary Aspinwall, *Prison Guard Faces More Rape Charges*, TULSA WORLD (Aug. 5, 2012), http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20120805_11_A23_CUTLIN585654 (where corrections officer who committed repeated acts of sexual abuse allowed a victim to "remain outside of her cell during daily counts and allowed her to leave for medical visits without recording it in logs").

22 *National Standards*, *supra* note 2, at 37206 ("Staff first responder duties").

23 See, e.g., Gary Craig, *A Raped Inmate Victimized Again*, DEMOCRAT AND CHRONICLE.COM, <http://blogs.democratandchronicle.com/watchdog/?p=2141> (last visited Dec. 1, 2012) (where the victim delayed reporting due to fear "she would be placed in solitary confinement, or SHU" (special housing unit)).

24 See, e.g., *EJI Complaint Filed Today with Department of Justice Finding Widespread Pattern of Officer-on-Inmate Sexual Violence at Prison for Women in Alabama*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/node/637> (last visited Dec. 1, 2012) ("Despite this known high rate of sexual contact between male staff and incarcerated women, the warden and correctional officers at Tutwiler continue to punish and humiliate women who report sexual misconduct, routinely placing them in segregation, stripping them of their property, denying them contact with their families, and forcing them to submit to unwanted medical procedures. This mistreatment of prisoners who speak out about abuse intimidates and discourages women from reporting sexual misconduct.").

25 For additional information on mandatory reporting laws, contact AEQUITAS at <http://www.aequitasresource.org/library.cfm> for the compilation, "Reporting Requirements for Competent Adult Victims of Sexual Violence."

26 *National Standards*, *supra* note 2, at 37206 ("Staff first responder duties"). See also PETER FINN & KERRY MURPHY HEALEY, NAT'L INSTITUTE OF JUSTICE, PREVENTING GANG- AND DRUG-RELATED WITNESS INTIMIDATION 45 (Nov. 1996), available at <https://www.ncjrs.gov/pdffiles/163067.pdf>.

27 *National Standards*, *supra* note 2, at 37154.

28 PREA acknowledges the negative consequences that such separation may have. The final standards mandate that if the facility restricts an inmate's "access to programs, privileges, education, or work opportunities, it must document the opportunities that have been limited, the duration of the limitation, and the reasons for such limitations." *National Standards*, *supra* note 2, at 37154.

29 In consideration of retaliation and the importance of providing support to victims who have reported sexual abuse, the final standards require an agency to "establish a policy" to protect against retaliation, "and shall designate which staff members or departments are charged with monitoring retaliation." Further, "the agency must monitor the conduct and treatment of inmates who have been reported to have suffered sexual abuse, in addition to inmates and staff who have reported sexual abuse directly." *National Standards*, *supra* note 2, at 37168. In addition, the agency shall provide "multiple internal ways" and "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." *Id.* at 37205 ("Inmate Reporting"). Further, the agency shall provide "a method to receive third-party reports of sexual abuse and sexual harassment" *Id.* at 37206.

30 Carrie L. Cook & Jodi Lane, *Examining Differences in Attitudes About Sexual Victimization Among a Sample of Jail Officers: The Importance of Officer Gender and Perceived Inmate Characteristics*, 37 CRIM. JUST. REV. 191, 193 (2012).

31 *National Standards*, *supra* note 2, at 37204 ("Screening for risk of victimization and abusiveness").

32 *Id.* ("Use of screening information").

33 *Id.* at 37155.

34 *Id.*

35 *Id.* at 37206 ("Staff first responder duties").

36 "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 Ex-

aminers (SANEs) where possible” *National Standards, supra* note 2, at 37202-03 (“Evidence protocol and forensic medical examinations”). *See also Id.* at 37208 (“Access to emergency medical and mental health services... (c) 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”); *Id.* (“Ongoing medical and mental health care for sexual abuse victims and abusers”).

37 “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), http://www.aequitasresource.org/Absence_of_Anogenital_Injury_in_the_Adolescent_Adult_Female_Sexual_Assault_Patient_Issue_13.pdf. *See also* Iain A. McLean, *The Male Victim of Sexual Assault*, xxx BEST PRAC. & RES. CLINICAL OBSTETRICS & GYNAECOLOGY 1-8 (2012) 1-8.

38 Dean A. Hawley, George E. McClane, & Gael B. Strack, *Violence: Recognition, Management, and*

Prevention: A Review of 300 Attempted Strangulation Cases, Part III: Injuries in Fatal Cases, 21 J. EMER. MED. 317-22 (2001); FORENSIC EMERGENCY MEDICINE 98 (Jonathan S. Olshaker, Christine M. Jackson & William S. Smock eds., 2007); Markowitz, *supra* note 37; McLean, *supra* note 37.

39 *Miranda v. Arizona*, 384 U.S. 436 (1966).

40 *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (holding that “[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights [T]he protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.”).

41 Employees cannot be given the choice of incriminating themselves during an interview or losing their jobs, as those confessions will be considered involuntary.

42 *Garrity*, 385 U.S. at 493.

43 *See, e.g.*, King County, *Garrity Rights and Public Employees available at* http://search.kingcounty.gov/search?q=garrity&btnG=Search&site=w&client=w_frontend&output=xml_no_dtd&proxystylesheet=w_frontend (last visited Dec. 1, 2012).

44 *See, e.g.*, *Curran-Fromhold Correctional Facility*, PHILADELPHIA PRISON SYSTEM, http://www.phila.gov/prisons/curran_fromhold.htm (where the prison is divided into four buildings, each of which “has eight housing units, or pods, four on each floor. Each pod consists of 32 cells, divided into two tiers, organized around a common living and dining area. Inmates housed on each pod have access to indoor and outdoor recreation, medical triage, law library, and program areas.”).

45 *Gang Rape*, MERRIAM-WEBSTER, [http://www.merriam-webster.com/dictionary/gang rape](http://www.merriam-webster.com/dictionary/gang%20rape) (last visited Dec. 1, 2012).

46 *See, e.g.*, 18 PA. CONS. STAT. § 5702 (2012).

47 42 U.S.C. § 15601 (2012), For Findings, *see National Standards, supra* note 2. *See also, e.g.*, *Prison Rape – It’s No Joke*, PRISON FELLOWSHIP <http://www.justicefellowship.org/key-issues/issues-in-criminal-justice-reform/issue-1/pf-commentary-prison-rape/12780-prison-rape-its-no-joke> (last visited Dec. 1, 2012); *SPLC: Louisiana Inmate Has Been Continually Raped and Tortured for the Past Month*, DAILY KOS, (Mar. 31, 2012), <http://www.dailykos.com/story/2012/03/31/1079460/-SPLC-Louisiana-inmate-has-been-continually-raped-and-tortured-for-the-past-month>; *Survivor Testimony*, JUST DETENTION INTERNATIONAL, <http://www.justdetention.org/en/survivortestimony/stories/stephendonaldson.aspx> (last visited Dec. 1, 2012).

48 *See, e.g.*, *Survivor Testimony, supra* note 47; Alan Prendergast, *Raped and Extorted by a Prison Gang, Scott Howard Was Called a ‘Drama Queen’ by Corrections Officials*, DENVER WESTWORD NEWS (Feb. 2, 2011), <http://www.westword.com/2011-02-03/news/211-crew-rapes-extorts-scott-howard-colorado-prison/>; *Prison Gang Rape and Beheading (Shaun Attwood)*, YOU TUBE, <http://www.youtube.com/watch?v=3lrwVLjJmU> (last visited Dec. 1, 2012).

49 *See, e.g.*, ALASKA STAT. § 12.55.137 (2012); ALASKA STAT. § 12.55.155; CAL. PENAL CODE §§ 186.20-186.33 (2012); FLA. STA. § 874.04 (2012).

50 *See, e.g.*, *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982); *State v. Byrd*, 967 A.2d 285 (N.J. 2009); James Myers, *Pottstown Woman Sentenced to Prison for Intimidating Witness on Facebook*, NORRISTOWN PATCH Sept. 22, 2012, <http://norristown.patch.com/articles/pottstown-woman-sentenced-to-prison-for-intimidating-witness-on-facebook>; Maria A. Schaefer, *Woman Gets Jail for Witness Intimidation*, PHILLY.COM Dec. 21, 2011, http://articles.philly.com/2011-12-21/news/30542362_1_witness-intimidation-gang-members-chester; John Anderson, *Gang-Related Witness Intimidation*, 1 NATIONAL GANG CENTER BULLETIN (Feb. 2007), *available at* <http://www.nationalgangcenter.gov/Content/Documents/Gang-Related-Witness-Intimidation.pdf>; A. Bonomi, R. Gangamma, C. Locke, H. Katafiasz, & D. Martin, *Meet Me at the Hill Where We Used to Park*, 73 SOC. SCI. MED. 1054-1061 (2011).

51 *National Standards, supra* note 2, at 37206 (“Preservation of ability to protect inmates from contact with abusers”).

52 *Id.*

53 *Id.*

54 AEquitas has a special initiative, “Improving the Justice System Response to Witness Intimidation” (IWI), which is designed to improve the ability of the justice system and of the community to keep victims safe and to hold offenders accountable. For more information, *see Special Initiatives: Improving the Justice System Response to Witness Intimidation*, AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN, <http://aequitasresource.org/special-initiatives.cfm>. IWI is a field-initiated project funded by the U.S. Department of Justice, Bureau of Justice Assistance (BJA) award number 2010-MU-BX-K079.

55 *See* FED. R. EVID. 404, “Character Evidence; Crimes or Other Acts, (b) Crimes, Wrongs, or Other Acts. (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.”

56 *See, e.g.*, *People v. Gardeley*, 14 Cal.4th 605, 59 Cal.Rptr.2d 356 (1996).

57 *See* FED. R. EVID. 412, “Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition. (a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence

offered to prove a victim's sexual predisposition. (b) Exceptions. (1) Criminal Cases. The court may admit the following evidence in a criminal case: (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. (2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy. (c) Procedure to Determine Admissibility. (1) Motion. If a party intends to offer evidence under Rule 412(b), the party must: (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered; (B) do so at least 14 days before trial unless the court, for good cause, sets a different time; (C) serve the motion on all parties; and (D) notify the victim or, when appropriate, the victim's guardian or representative. (2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed. (d) Definition of "Victim." In this rule, "victim" includes an alleged victim."

58 See FED. R. EVID. 804(b)(6), "(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: (6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result." The doctrine of forfeiture by wrongdoing, i.e., the ability to introduce hearsay statements from a witness whom the defendant has intimidated and caused the to be unavailable, has been upheld by the United States Supreme Court and multiple jurisdictions. See, e.g., *Davis v. Washington*, 547 U.S. 813, 833 (2009) ("We reiterate what we said in *Crawford*: that 'the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.' ... That is, one who obtains the absence of a witness by wrongdoing forfeits the constitution right to confrontation."); *Reynolds v. U.S.*, 98 U.S. (8 Otto.) 145 (1878); *U.S. v. Thevis*, 665 F.2d 616 (1982); *Steele v. Taylor*, 684 F.2d 1193 (1982); *People of the State of N.Y. v. Pappalardo*, 152 Misc.2d 264 (1991); *People of the State of N.Y. v. Geraci*, 254 A.D.2d 522 (1998); *Devonshire v. U.S.*, 691 A.2d 165 (D.C. 1997); *State v. Hallum*, 585 N.W.2d 249 (Iowa 1998); *Crawford v. Washington*, 541 U.S. 36 (2004); *U.S. v. Montague*, 421 F.3d 1099, 1100-01 (10th Cir. 2005); *Giles v. California*, 554 U.S. 353 (2008).) See also AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON FORFEITURE BY WRONGDOING, (Oct. 2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

59 See FED. R. EVID. 804, "Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness. (a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies; (2) refuses to testify about the subject matter despite a court order to do so; (3) testifies to not remembering the subject matter; (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying."

60 See FED. R. EVID. 804(b)(6), "(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: (6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result;" THE PROSECUTORS' RESOURCE ON FORFEITURE BY WRONGDOING, *supra* note 58.

61 See Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, NAT'L DISTRICT ATTORNEY'S ASS'N (2007), available at http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

62 David Lisak, *Understanding the Predatory Nature of Sexual Violence* (2008)(unpublished paper, University of Massachusetts), available at <http://www.middlebury.edu/media/view/240951/original/PredatoryNature.pdf>.

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