

U.S. Department of Justice
Review Panel on Prison Rape: Supplemental Hearings on Sexual Victimization in Prisons and Jails
U.S. Department of Justice, Office of Justice Programs Building
810 7th Street NW; Main Conference Room, Third Floor; Washington, DC

Testimony of Viktoria Kristiansson
Attorney Advisor, AEQUITAS: The Prosecutors' Resource on Violence Against Women

Thank you for the opportunity to present testimony on the challenges and strategies for successfully prosecuting cases of sexual assault in confinement. There are many challenges faced by prosecutors responsible for handling these cases.

- First, many victims are unable or unwilling, for many reasons, to report the assault. So reports may be delayed, resulting in loss of physical evidence and witnesses.
- Second, jurors may be reluctant to believe the testimony of an inmate simply because of that person's status as an inmate.
- Third, when the assailant is a correctional officer, jurors may find such a defendant inherently more trustworthy or perceive the defendant to be a professional with "too much to lose" to be convicted based on the word of a convicted criminal.
- Fourth, the professionals responsible for investigating and prosecuting these cases, and those who provide support services for victims, may not understand the dynamics of sexual violence in confinement due to lack of training and relative inexperience in this area. Consequently, they may bring their own associated misconceptions and biases with them.
- Fifth, some state statutes permit misdemeanor charges for corrections staff who have engaged in so-called consensual sexual contact with inmates. This can result in cases that are charged or resolved in ways that fail to recognize the seriousness of such exploitation and breaches of trust.
- Finally, prosecutors may prioritize other types of cases based on limited resources or a belief that what happens within the walls of confinement is not a concern or relevant to the public.¹

My testimony will focus on eight strategies for prosecuting cases of sexual assault in confinement. While many of the fundamentals are similar to cases that occur outside of confinement, the very nature and fact of confinement require that the strategies be modified to address the unique issues that arise in this setting. I would

¹ For additional information on challenges and strategies associated with investigating and prosecuting cases of sexual abuse in confinement, *see* Viktoria Kristiansson, Prosecuting Cases of Sexual Abuse in Confinement, Strategies, No. 8, Dec. 2012, *available at* http://www.aequitasresource.org/Prosecuting_Cases_of_Sexual_Abuse_in_Confinement.pdf; Viktoria Kristiansson, Sexual Abuse in Confinement: An Introduction for Prosecutors Webinar, Jan. 11, 2013, *available at* <http://www.aequitasresource.org/trainingDetail.cfm?id=83>; Viktoria Kristiansson, Pretrial Motions: Admitting and Excluding Evidence in the Prosecution of Sexual Abuse in Confinement Webinar, Mar. 14, 2013, *available at* <http://www.aequitasresource.org/trainingDetail.cfm?id=88>; Christopher Mallios, Trial Strategies for the Prosecution of Sexual Abuse in Confinement Webinar, May 14, 2013, *available at* <http://www.aequitasresource.org/trainingDetail.cfm?id=93>; and Viktoria Kristiansson and Mona Shea, Sexual Abuse in Confinement: A Case Study Webinar, Nov. 22, 2013, *available at* <http://www.aequitasresource.org/trainingDetail.cfm?id=102>.

be happy to answer questions and provide additional details about these strategies at the conclusion of the allotted time for testimony.

Strategy 1, 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 institution of research informed practices, is essential. Ideally, this approach should include a dedicated sexual assault response team (or 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.

Strategy 2, Education and Training

Like all sexual assaults, we see cases involving overt force and threats, but we also see crimes perpetrated through more subtle and less detectable methods, like coercion. Responding professionals, therefore, should receive education and training that enhance their knowledge and skills necessary to conduct more effective investigations and prosecutions. It is critical that they have a thorough **understanding of dynamics commonly present** in sexual assault in confinement. Without this knowledge, these professionals cannot properly assess cases, since their evaluations may be clouded by bias, misunderstanding, and pre-conceived notions. It is also important that they have an accurate understanding about factors common to institutional settings that may affect these dynamics, such as the jobs and responsibilities of corrections officers, inmates' daily schedules, internal rules and protocols, and the culture of a facility.

First responders also must be trained for 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. If the inmate-victim finds no support during the initial report, that experience alone could well discourage the victim from further participation in the investigation or prosecution of the case. A poorly-handled first response can also impede the investigation by shutting off access to further evidence. While PREA standards are helpful in noting what a first responder's duties are, prosecutors should work with these professionals to explain the how and why.

In addition, when the offender is an inmate, prosecutors may face defenses that include consent, voluntary exchange of sex for goods or other services, or fabrication with ulterior motive of revenge or a cell transfer. When the offender is a staff member, lack of force is a common dynamic, as many inmates believe they do not have a choice and they must do whatever necessary to survive in the facility. Staff-offenders exploit this vulnerability further by sometimes doing favors for the inmate-victim, which may lead the victim to self-blame, minimize the staff-offender's culpability, or even claim that they were in an intimate relationship. Prosecutors who understand these dynamics will be better able to properly evaluate facts, interview witnesses, gather evidence, and try a case.

Strategy 3, Trauma-Informed Response

A victim-centered, **trauma-informed response** to investigations, particularly to victim interviews, is essential.² Being trauma-informed means recognizing that victims have different forms of current and historical trauma in

² A victim-centered response is based on an awareness of the central role that victims and survivors play in the judicial process as well as a consideration of their needs throughout that process. The best possible case outcomes hold offenders accountable, but they also take into account a victim's history, experience, and perspective, as well as the impact of the criminal justice process on the victim, victim's family, workplace, and community.

their lives. Our responses should accommodate their physical, emotional, and psychological safety. 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.

Strategy 4, 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.³ Witness intimidation causes additional trauma and injury to the victim, and it impedes investigation and prosecution of the case. Unchecked, it gives offenders power over the criminal justice system. Prosecutors can work with law enforcement and corrections to be sure victims and witnesses know how to recognize intimidation and how to safely report it. Policies intended to protect the witness must not inadvertently punish him or her. Acts of intimidation should be criminally charged where appropriate, and evidence of intimidation used in 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.

Strategy 5, 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 offenders accountable, keeping facilities and communities safe, supporting victims, and upholding the sanctity and purpose of the criminal justice system. Some prosecutors' offices have adopted practices discouraging 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. This practice ends up becoming 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.⁴ Instead, charging standards should reflect the research, which tells us that rape occurs out of the view of witnesses, delayed reports are common, piecemeal disclosure is common, corroborating physical evidence is often not available, and the lack of vaginal/anal trauma is not inconsistent with a report of sexual assault.

Strategy 6, Pretrial Preparation, Including the Filing and Litigating of Pretrial Motions

Prosecutors should **meet early on with the victim**. Many victims of sexual assault in confinement will have had only adversarial contact with a prosecutor. Meeting with the victim in the early stages of a case will demonstrate support of the victim and an investment in the case. It will allow the prosecutor and the victim to establish rapport, and allow the prosecutor to answer questions about the process, what to expect at trial, plan in-court attire, explain sentencing, etc.

³ See Teresa M. Garvey, The Prosecutors' Resource on Witness Intimidation, Mar. 2014, *available at* <http://www.aequitasresource.org/The-Prosecutors-Resource-Intimidation.pdf>; Teresa M. Garvey, Witness Intimidation: Meeting the Challenge, 2013, *available at* <http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf>; Franklin Cruz and Teresa M. Garvey, Improving Witness Safety and Preventing Witness Intimidation in the Justice System: Benchmarks for Progress, 2014, *available at* <http://www.aequitasresource.org/Benchmarks-for-Progress.pdf>; and Viktoria Kristiansson, Intimidation of Victims of Sexual Abuse in Confinement Webinar, July 16, 2013, *available at* <http://www.aequitasresource.org/trainingDetail.cfm?id=98>.

⁴ See Jennifer G. Long and Elaine Nugent-Borakove, Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions, Strategies Issue No. 12, April 2014, *available at* <http://www.aequitasresource.org/beyond-conviction-rates.pdf>; Elaine Nugent-Borakove and Jennifer G. Long, Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions Webinar, Apr. 28, 2014, *available at* <http://www.aequitasresource.org/trainingDetail.cfm?id=108>.

Pretrial motions, when possible, should be filed. These motions will enable us to keep out irrelevant and prejudicial information and arguments, which open up the victim to attack on issues unrelated to the current victimization. Such motions include those related to safety, rape shield, admissibility of evidence under Evidence Rules 403, 404, and 405, and admissibility of hearsay statements. At the same time, prosecutors must file motions to introduce relevant evidence pertaining to the offender under 404(b), behaviors indicative of consciousness of guilt, and admissions. Motions related to sentencing enhancements for repeat offenses, gang activity, or other factors, should also be filed.

Strategy 7, 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 and impugn. The offending inmate who is physically larger or more criminally experienced may have looked for a target perceived to be especially vulnerable. The staff-offender may have targeted an inmate desperate for early release or one whose quiet demeanor suggested the victim would not resist or report the assault. Whatever the theory, prosecutors should develop and employ offender-focused strategies that are driven by an accurate and unbiased analysis of a case and a thorough understanding of the applicable law.

Jury selection should uncover biases and aim to avoid jury nullification. Opening statements should frankly acknowledge any facts that may cause jury concern, and should promise that those facts will be explained through witness testimony. Evidence explaining facility layout, staff-to-inmate ratio, the defendant's access to the victim, and surveillance cameras or lack thereof will help the jury to understand how the defendant exploited these opportunities. Experts on victim behavior and medical evidence should be called. The closing argument should incorporate the chosen theme, and should focus on the offender's selection of the victim, corroboration of details, credibility of the evidence, and offender accountability. This approach helps to keep the jury's focus on the actions, behaviors, characteristics, and intent of the offender.

Strategy 8, 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.

A conviction is not necessary for a prosecution of sexual assault in confinement to be considered successful. Implementation of strategies such as those I have just discussed will go a long way toward creating solid prosecutorial practices that support the victims as they heal, while giving them every opportunity to do so. At the same time, they hold offenders appropriately accountable for their actions, and will increase the number of cases taken to trial and ultimately resulting in convictions. These strategies will send a clear message to victims, to offenders, and to the public that sexual assault in confinement is a crime that will no longer be ignored—that these are serious crimes that will be prosecuted to the fullest extent of the law.