

IDENTIFYING, INVESTIGATING, AND PROSECUTING WITNESS INTIMIDATION IN CASES OF SEXUAL ABUSE IN CONFINEMENT

Viktoria Kristiansson, JD and Charlene Whitman-Barr, JD¹

INTRODUCTION

Regardless of the setting in which it occurs, witness intimidation² is a chronic problem with devastating implications for victims and for the prosecution of crimes. Intimidation associated with sexual abuse³ decreases victim and community safety, contributes to lower levels of crime reporting, and hinders investigations and prosecutions of cases. Intimidation compounds the already significant barriers victims face, leading them—and their cases—to continue to fall through the cracks. Victims of sexual abuse in confinement are especially vulnerable to intimidation because they typically have fewer opportunities to escape from (or even avoid) their abusers.⁴

Investigation and prosecution of sexual abuse in confinement present many challenges, not least of which are the multiple opportunities for witness intimidation in the confinement setting. The confinement setting is, to a great extent, inherently intimidating. Inmates—individually or in groups—may assert power over and inspire fear in other inmates, while correctional staff wield considerable power over inmates and lower-ranking (or less-senior) staff. These dynamics make it possible for abusers who are inmates or staff—or their allies—to intimidate not only the victims of abuse, but also other inmates and staff who are witnesses in these cases, discouraging them from reporting abuse that they know about or from testifying at disciplinary proceedings or in criminal prosecutions.

Fortunately, there are policies, protocols, and strategies that allow justice system professionals to more effectively prevent, detect, and respond to witness intimidation associated with sexual abuse in confinement.⁵ This *STRATEGIES in Brief* will detail the steps necessary for effective response to intimidation: 1) understanding the prevalence of sexual abuse in confinement and the forms of intimidation commonly encountered in this context, 2) recognizing the barriers to reporting abuse and intimidation, and 3) implementing effective justice system responses to intimidation. It will also provide an overview of prosecution strategies for combating intimidation and proceeding with cases when witnesses are unavailable.

PERVASIVENESS OF SEXUAL ABUSE IN CONFINEMENT

Sexual abuse in confinement is pervasive, affording multiple opportunities for intimidation associated with these and related crimes. The prevalence of inmates' risk of victimization (and, for some, repeated victimization) creates barriers to reporting and the potential for experiencing offense-related intimidation. There are some inmate groups that are particularly vulnerable. New or youthful inmates, those with mental illnesses, those who are (or are perceived to be) LGBTI,⁶ and inmates who have been previously sexually abused experience higher rates of sexual abuse than other inmates residing in a facility.⁷

Victims of sexual abuse in confinement are often victimized by more than one perpetrator (*i.e.*, separate incidents perpetrated by different abusers). One study indicated that more than 70% of prison and jail inmates ages 18-24 who experienced sexual abuse were sexually abused at separate times by two or more inmate-abusers.⁸ In another study, more than

37% of juvenile victims of sexual abuse in confinement reported being sexually abused by more than one person.⁹ In both prisons and jails, female inmates are victimized by other inmates at a higher rate than males.¹⁰ Once an inmate has been sexually abused in a confinement facility, actual intimidation can escalate.

Acts of sexual abuse are perpetrated not only by inmates, but also by facility staff. Incidents of staff-perpetrated sexual misconduct were experienced by an estimated 2.5% of state and federal prison inmates, 2% of jail inmates, and 3% of juveniles ages 16-17 held in adult prisons and jails.¹¹

Approximately 8% of adjudicated youth in state juvenile facilities and state-contract facilities reported a sexual abuse incident involving facility staff.¹² Of those, an estimated 89% were males victimized by female staff, and 3% were males victimized by both male and female staff.¹³ Almost 86% of victims of staff sexual misconduct in juvenile facilities reported more than one incident; among these inmates, more than 20% reported eleven or more incidents.¹⁴ According to the research, the pervasiveness and repeated sexual abuse of victims strongly correlates with fear of and actual intimidation.¹⁵

EXPLOITATION OF THE PRISON ENVIRONMENT

Confinement facilities have their own sets of rules, environmental structures, and behavioral standards. Not only is there no means of physical escape for inmate-victims and -witnesses, but facilities also control inmates' housing, schedule, access to food, and any privileges such as recreational activity, classes, and education. Nonviolent inmates may be housed with violent criminals, and may face intimidation or abuse related to their race, size, criminal background, perceived or actual sexuality, and gang or group affiliation or lack thereof. Institutional rules and practices, as well as interactions with other inmates and staff, control virtually every aspect of an inmate's day-to-day existence. This environment is rife with opportunities for sexual abuse and intimidation perpetrated by both inmate- and staff-abusers.

Inmate-Abusers

Inmate-abusers are inmates who have sexually abused another inmate while in the custody of a confinement facility. As a result of wanting to avoid arrest, prosecution, and any extension of their stay in confinement, inmate-abusers and their allies (friends, group, gang, or other) may go to great lengths to cover up the abuse. Inmate-abusers often employ a variety of strategies to make the detection, investigation, and prosecution of sexual abuse cases more challenging for criminal justice professionals.

The "inmate social system [consists of] a complicated and unusual set of norms that differ substantially from those operating in the free society."¹⁶ These internal norms, inmate groups and hierarchies, internal facility culture, and the organizational setup of the facility may make the facilitation of sexual abuse easier for some perpetrators. Sometimes sexual abuse is another way to intimidate "weaker" inmates, and sometimes an abuser will simply exploit the opportunity to sexually victimize an already-intimidated inmate. The intimidating environment also aids the abuser and the abuser's allies in their efforts to discourage the victim or any witnesses from reporting or testifying about the abuse.¹⁷

Inmates who report crimes are particularly vulnerable because prison culture labels them as "snitches," exposing them to potentially lethal reprisals.¹⁸ One study found that "inmates [were] afraid to report that they, or other inmates, have been sexual[ly] assaulted due to their fear of retaliation by the perpetrator(s) or other inmates who object to 'snitching.' In every facility in the study, staff said that inmates who reported any kind of sexual assault were subject to more violence or feared they would be the target of continued violence."¹⁹

Sexual abusers are adept at identifying and isolating vulnerable victims whom they can sexually abuse while intimidating them and other witnesses into silence.²⁰ Inmate-abusers may exploit the rules of the facility's "market system"²¹ to further manipulate, intimidate, and control the victim and witnesses by limiting their ability to have access to, barter for, or

pay for goods or contraband that inmates often rely upon to make their incarceration less onerous.²² If the abuser is part of a gang or group, s/he may use that affiliation as a means to silence the victim and any witnesses.

Staff-Abusers

Staff-abusers include prison and jail staff, contractors, or volunteers who sexually abuse an inmate.²³ The level of control that staff have over inmates' lives can lead to exploitation. Staff have the authority, for example, to demand that an inmate accompany him/her somewhere private, to bring disciplinary charges against an inmate, to control his/her interactions with other inmates or staff, or to affect almost any aspect of an inmate's life within the facility. Staff-abusers may threaten or intimidate victims and other inmates or potential witnesses and may collude with allies to cover up their crimes.²⁴ Staff allies of the abusers who conspire with them to conceal acts of abuse may be motivated by a number of factors, including an attempt to support and protect other staff, a dislike of or bias against inmates, and a desire to avoid negative attention directed toward (or an audit of) the facility.²⁵ Staff-abusers can challenge or thwart investigations simply through their intimate knowledge of the prison layout and internal systems that can help them furtively perpetrate and conceal crimes, including access to information about the availability of evidence and the potential ability to destroy evidence. In addition, obtaining information from staff-suspects and -witnesses presents special challenges during the investigation of an incident.²⁶

INTIMIDATION AS A BARRIER TO REPORTING

In cases of sexual abuse in confinement, abusers may escape justice due to a number of formidable challenges and circumstances, including "guilt, stigma, and fear of retaliation." Inmate-victims may be subjected to intimidation and retaliation, both inside and outside of confinement facilities.²⁷

Victim Distrust of the System

Even without the presence of overt intimidation, an inmate-victim may be reluctant to report sexual abuse or participate in the prosecution of the abuser. A victim's history with criminal justice professionals – particularly law enforcement officers – may create an inherent distrust that includes corrections officers and staff, and results in the desire to avoid participation in a process that requires victims to engage those professionals. "[I]nmates' general distrust of 'the system' ... and their belief that 'the system cannot protect them, have a chilling effect on the reporting of incidents of inmate-against-inmate and staff-against-inmate' sexual abuse in confinement."²⁸ Victims may also feel that, at best, corrections staff would do nothing to respond to their report, or, at worst, the report would lead to lost privileges, additional punishment, housing in solitary confinement, or transfer to a different facility for safety reasons.²⁹ This distrust and the emotional trauma that accompanies victimization may result in delayed reporting or failure to report at all. Failure to make a prompt report can result in other possible investigatory and prosecutorial challenges, including the destruction of evidence and additional defense challenges to a victim's credibility at trial.

Fear of Retaliation

Barriers to reporting sexual abuse in confinement also arise from the behavior of other inmates or staff in the aftermath of the crime.³⁰ In all sexual abuse cases, the risk and incidence of intimidation and retaliation is high.³¹ Similar concerns regarding the consequences of reporting apply to abuse perpetrated in confinement. A recent study of Texas prison inmates found that inmates would not report sexual abuse for reasons including anticipation of retaliation (29%) and fear of harassment by inmates (21%).³² These fears feed into the creation of an environment where it can feel like the abuser is "in control."

Feeling of Helplessness and Fear of Future Victimization

Inmates often feel unable to report sexual abuse due to “fear of renewed threats or retaliation, or lack of trust that the report will be taken seriously.”³³ This fear and lack of trust can lead to inmate-victims feeling powerless and as though nothing can be done to help them.³⁴ The impact of intimidation on victims is tremendous and can include physical and emotional injury; an increased fear of the abuser, other inmates, staff, and life in general in a confinement facility; and feelings of helplessness, as victims may believe they just have to comply with whatever the abuser says or does lest they suffer additional harm. In particular, a male victim’s fear that others could find out that he has been sexually abused can be overwhelming.³⁵ Similar fears may exist for female inmates.³⁶ Once others find out that an inmate has been sexually victimized in a jail or prison, that inmate could be at risk for future sexual abuse by others.

The feeling of helplessness and the fear of future victimization could be exacerbated depending on the culture of the facility, particularly if the jail or prison has a gang or group of inmates that dominate a certain housing area. This reality was captured in a recent documentary on prison life: “If the gangs get a foothold in one of the housing units, they ... run everything.”³⁷

The Culture of “No Snitching”

The confinement culture of “no snitching” is well known,³⁸ and may prevent many victims from reporting.³⁹ When inmates enter a facility, they adopt or adhere to its cultural norms by “taking on in greater or less[er] degree the folkways, mores, customs, and general culture of the penitentiary.”⁴⁰ The culture of a facility presents barriers to reporting sexual abuse, such as a sense of entitlement on the part of some inmates and imposed isolation on others.⁴¹ The culture blames the victims of sexual abuse, with researchers “conclud[ing] that inmates view sexual assault as reprehensible and unjustified but simultaneously blame the victims, not perpetrators, for sexual violence.”⁴²

One recent study found 65% of inmates felt that reporting sexual abuse in confinement “is the same as snitching.”⁴³ Even those inmates who do not feel that reporting rape is snitching “may still be reluctant to report based on the negative consequences associated with being recognized as a snitch in prison.”⁴⁴ Sexual abuse of male victims “is a highly under-reported phenomenon and even less reported in prisons due to inmate cultural norms...”⁴⁵ This culture also prevents witnesses and bystanders from intervening and reporting.⁴⁶ “[A]ny type of support provided for a rape victim is viewed within the inmate society as a sign of weakness and can thereby increase the victimization of those who may wish to intervene on the victim’s behalf.”⁴⁷

Meaningful Implementation of Relevant PREA Standards

The Prison Rape Elimination Act (PREA) Standards address intimidation and retaliation, recognizing that mitigation of their effects will help implement the Standards’ prevention and support measures. Some notable measures include protecting victims and witnesses from intimidation/retaliation and not penalizing them by removing them from the general population or into protective custody where they might lose access to privileges and programs.⁴⁸ In some jurisdictions or facilities, however, a significant gap may exist between the requirements of the Standards and their successful implementation.⁴⁹ For example, Standard 115.67 requires there to be a policy that protects from retaliation inmates and staff who report sexual abuse or participate in a sexual abuse investigation. In order to bridge the gap, adopted policies should provide specifics about *how* reporters will be protected. The policies should account for numerous scenarios to ensure the Standards’ true purposes are meaningfully fulfilled. After all, “[a]lthough PREA is grounded in good intentions, an underlying obstacle to full and accurate compliance by prison authorities is the underreporting of sexual [abuse] by inmates.”⁵⁰ Necessary systemic change requires that corrections administration and staff, along with other allied criminal justice professionals (PREA Coordinators,⁵¹ law enforcement, medical professionals, advocates, and others), collaborate with prosecutors to comprehensively identify, document, and respond to intimidation associated with sexual abuse in confinement.⁵²

RESPONDING TO INTIMIDATION

Prosecutors must work to better understand, recognize, and respond to intimidation in order to prevent the devastating effects of sexual abuse in confinement. The prosecutor's response is most effective when it occurs through collaboration with allied professionals, involves open communication with victims about mechanisms for safe reporting, and includes aggressive investigation and prosecution of intimidation and retaliation.⁵³ Prosecutors should work with corrections administration and staff, PREA Coordinators, law enforcement, medical professionals, advocates, and others to develop methods that ensure all professionals share information, respond in a coordinated fashion, and manage their professional performance in a manner aimed at safeguarding victims and keeping sexual abusers away from all potential victims. This level of coordination and collaboration serves to prevent intimidation and to ensure that victims and witnesses can recognize it and safely report incidents.⁵⁴ Specifically, prosecutors and allied criminal justice professionals should communicate with victims and witnesses about intimidation as soon as the sexual abuse is reported and then again at every contact with the victim. The prosecutor should ensure that someone – the assigned detective, investigator, and/or the prosecutor him/herself – clearly explains signs and behaviors indicative of witness intimidation. The conversation with the victim should include examples of what behaviors actually constitute intimidation and a clear explanation that intimidation comes in many forms and variations, and often can be subtle or disguised. Intimidation in cases of sexual abuse in confinement may include, for example, direct threats from a staff-abuser that reporting will get the victim in trouble and delay a release date; threats of or actually taking away privileges from inmates; and statements from a staff-abuser that willingly submitting to sexual abuse with him/her will speed up the victim's release date. An inmate-abuser may intimidate through force or threat of force; threats to have others abuse the victim if the victim reports; and threatening notes, gestures, or glances from the abuser and/or the abuser's allies.

Once the victim understands the range of behaviors that constitute intimidation, allied professionals should create a plan specific to incarceration that enables the victim to safely report intimidation, including identifying a safe place where the victim can make reports and receive assistance.⁵⁵ Safe reporting is only achieved when intimidation that is reported can be immediately stopped and appropriately investigated.⁵⁶ The criminal justice system cannot prevent intimidation if it does not create standard procedural norms designed to support victims who report, followed by affirmative *action* to facilitate protection, investigation, and prosecution.

Confinement staff, contractors, and volunteers are also required to report intimidation when they learn of it. Staff, contractors, and volunteers, as well as law enforcement, therefore, should be trained on how to identify intimidation and how to work with those who identify, document, and investigate evidence of intimidation.⁵⁷ Prosecutors must also be fully informed about various charging and prosecutorial options to respond to intimidation.⁵⁸

PROSECUTORIAL STRATEGIES FOR OVERCOMING WITNESS INTIMIDATION

Witness intimidation is intended to discourage and prevent meaningful participation in the criminal justice process. All forms of intimidation can result in an immediate and long-term impact on the victim's emotional state and can have a direct effect on a victim's behavior, as well as the behavior of other witnesses.⁵⁹ As a result of intimidation, victims may recant, disappear upon release, communicate that they do not want to testify, or state that they cannot testify due to fear of retaliation from the abuser or the abuser's associates. Particularly in confinement, intimidation may also be directly linked to fear that the abuser will tell others about what was done to the victim, making him/her vulnerable to future sexual abuse by other abusers. Consequently, witnesses may become unavailable at trial.

Investigative/Charging Strategies

When intimidation is identified, investigators and prosecutors must react quickly to investigate and, when appropriate, charge it or otherwise incorporate the intimidating conduct into the prosecution of the abuser.⁶⁰ This can be done through prosecution of a separate case, amending the sexual abuse case to add charges of witness intimidation, or incorporating evidence of witness intimidation in to the prosecution of the sexual abuse.⁶¹ Diligent preparation includes collecting and documenting evidence and analyzing the context through which the acts of intimidation and sexual abuse occurred. The evidence of intimidation could be admissible under a number of arguments, including relevance, defendant's state of mind, consciousness of guilt, *res gestae*, and more. This accountability will not only keep the victim safer, but will also increase the prosecution's ability to proceed to trial by calling a supported and safe victim as a witness, or proceeding via forfeiture by wrongdoing if the victim is unavailable due to the abuser's intimidating conduct. Only through these efforts will prosecutors be able to help curb witness intimidation.⁶²

Reluctant/Recanting Victims or Witnesses

When a victim or witness has recanted, or has become reluctant to testify—perhaps minimizing the offense—after initially providing a statement, there is a high degree of probability that intimidation or fear has played a part in that reversal. Evidence of intimidation, as well as expert testimony, can provide the jury with satisfactory explanations for the change of testimony. Presentation of expert testimony in the area of victim behavior, as well as an expert in prison culture, can help the jury understand the extraordinary pressures facing an inmate who testifies to his/her own sexual abuse or that of another. As long as the witness is available to testify at trial and subject to cross-examination, out-of-court statements by that witness can be admitted if they fall within a recognized hearsay exception. Such statements, as well as other evidence in the case, will often be sufficient in a carefully investigated and prepared case to satisfy the prosecution's burden of proof beyond a reasonable doubt, particularly if the jury has an understanding of the role that fear and intimidation play in the dynamics of sexual abuse in confinement.

The Absent Victim or Witness: Crawford and Forfeiture by Wrongdoing

Where the victim or witness is absent from court, whether that witness' out-of-court statements will be admissible will depend, primarily, upon whether the statement is "testimonial" or "nontestimonial" under the Confrontation Clause, as interpreted in *Crawford v. Washington* and its progeny.⁶³ Testimonial statements are generally those made formally or to law enforcement authorities for the purpose of memorializing events for potential later prosecution. In the context of a case involving sexual abuse in confinement, statements given to investigators or to facility staff for the purpose of reporting what occurred will almost certainly be considered testimonial, unless the statement is made for the primary purpose of responding to an *ongoing* emergency situation. If a statement is testimonial, then it will be admissible at trial only if (A) the witness is present in court and subject to cross-examination OR (B) the witness is unavailable to testify AND the defendant had a prior opportunity to cross-examine the witness (for example, at a preliminary probable cause hearing).

Nontestimonial statements, on the other hand, will be admissible at trial as long as they fall within a hearsay exception. Nontestimonial statements are less formal, and are most often made to those not connected with law enforcement. Thus, an inmate who confides in another inmate, or in a family member or friend, about something s/he experienced, saw, or heard, is making a nontestimonial statement—it is informal and not made for purposes of prosecution.

Generally speaking, statements made for purposes of medical treatment are considered nontestimonial, and most jurisdictions have a hearsay exception for statements made for that purpose, or for statements involving present sense impressions or statements involving one's mental state. A difficult area, however, is classification of statements made for a dual purpose, such as statements to a sexual assault nurse examiner or forensic nurse examiner (SANE/FNE).

Such statements are often made primarily for purposes of medical treatment, but may also have a component of evidence preservation. The United States Supreme Court has not yet determined how such statements are to be treated, and the courts in various states have taken different positions on such statements. It is important to consult your own jurisdiction's case law to determine whether and to what extent such statements will be considered testimonial.

Because nontestimonial statements falling under a hearsay exception are likely to be admissible, it is important for investigators to interview those in whom the victim may have confided because these witnesses may be called to testify if the victim is unwilling or unable to testify in court. Such statements might be admissible as excited utterances, or statements of mental or physical condition.

Finally, in cases where the prosecution can show that the witness is unavailable due to intimidation or other wrongful conduct on the part of the defendant, the doctrine of forfeiture by wrongdoing is a powerful tool to introduce that witness' out-of-court statements. Forfeiture by wrongdoing is a principle of equity and fairness.⁶⁴ "The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts ... if he voluntarily keeps the witnesses away, he cannot insist on his privilege."⁶⁵ Found in Federal Rule of Evidence 804(b)(6), and recognized in most jurisdictions, either by evidence rule or by case law, the rule states that the out-of-court statements of an unavailable witness are admissible at trial if offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the witness' unavailability, and did so intending that result.⁶⁶

In cases of sexual abuse in confinement where the abuser has intimidated the victim with the intent of dissuading the victim from participating in the investigation or prosecution of the abuser, and where that intimidation has caused the victim's unavailability at trial, the prosecution should file a motion to introduce the victim's out-of-court statements under the doctrine of forfeiture by wrongdoing.⁶⁷ At the forfeiture hearing, the prosecution can call witnesses and introduce evidence demonstrating the intimidating conduct.⁶⁸ The prosecution must show by a preponderance of the evidence (in most jurisdictions)⁶⁹ that the defendant caused the witness' absence with the purpose of preventing that witness from testifying.⁷⁰ Although there does not have to be an open case at the time of the intimidating conduct, the prosecution must show that the abuser had the specific intent of making the witness unavailable when the intimidation was committed.⁷¹

Forfeiture by wrongdoing, particularly in cases of witness intimidation related to sexual abuse in confinement, is crucial to holding abusers accountable and keeping other inmates and all of society safe. Further, trying cases by introducing evidence when intimidated witnesses are unavailable sends a message to abusers that a thorough investigation will be conducted at all stages and that prosecutors will aggressively fight to hold them accountable.

CONCLUSION

Witness intimidation is pervasive inside of confinement facilities.⁷⁵ Collaboration with allied professionals to address the prevention, reporting, and investigation of sexual abuse and witness intimidation is critical to creating a culture and reality that addresses systemic needs and the safety of individual victims and witnesses. Prosecutors and allied justice professionals must prepare for and directly address victim and witness safety – including retaliatory violence, verbal and physical intimidation, and emotional manipulation – in cases of sexual abuse in confinement. Combating witness intimidation and ensuring that when it does occur it is safely identified, reported, documented, investigated, and prosecuted are crucial steps in a meaningful implementation of the PREA Standards and improving upon our nation's overall justice system.

PRACTICE TIPS

- Be proactive in efforts to encourage victim participation in the investigation and prosecution.
- Work with a coordinated, multidisciplinary response team, including specially-trained victim advocates, to increase victim participation. The team should be confinement-specific, when possible.
- Provide victims with resources and services that make them feel safe and secure, such as an officer or other designated professional who regularly checks in on the victim and his/her well-being.
- Correction officers, law enforcement, and the prosecutor should communicate with each other and with the victim about witness intimidation in order to prevent and better respond.
- Oppose delays and continuances, as trial delays provide additional time for intimidation to occur and are a way of “frustrating” justice for the victim or otherwise keeping justice out of reach for the victim.⁷²
- At the preliminary hearing, provide a full and fair opportunity for cross-examination of a witness who may later be unavailable.⁷³
- Use *voir dire* as an opportunity to educate the jury on the seriousness of sexual abuse in confinement and the pervasiveness of intimidation in these crimes.⁷⁴ *Voir dire* is also an opportunity to begin to break down myths and biases that potential jurors may hold.
- Seek consecutive sentences for intimidation-related offenses or ask the court to consider witness intimidation as an aggravating factor.

PREA STANDARDS RELEVANT TO PREVENTING AND RESPONDING TO SEXUAL ABUSE AND INTIMIDATION

The following Standards have been excerpted from the *National Standards to Prevent, Detect, and Respond to Prison Rape*. These provisions specifically address issues of witness intimidation in confinement and are aimed at prevention and response efforts.⁷⁶

- § 115.13 Supervision and monitoring: This prevention planning standard requires an agency to develop and document a staffing plan/staffing levels, and, where applicable, video monitoring, to protect inmates against sexual abuse.
- § 115.41 Screen for risk of victimization and abusiveness: During an intake screening and upon transfer to another facility, all inmates have to be assessed for their risk of being sexually abused by other inmates or of being sexually abusive toward other inmates.
- § 115.43 Protective custody: Inmates at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment and determination have been made that there is no available alternative means of separation from likely abusers.
- § 115.51 Inmate reporting: The agency shall provide multiple *internal* ways for inmates to *privately* report sexual abuse and retaliation, *as well as* staff neglect or violation of responsibilities that may have contributed to such incidents.
- § 115.54 Third-party reporting: The agency shall establish a method to receive third-party reports of sexual abuse and sexual harassment,⁷⁷ and shall publicly distribute information on how to report sexual abuse and sexual harassment on behalf of an inmate.
- § 115.61 Staff and agency reporting duties: All staff have to immediately report any knowledge, suspicion, or information regarding an incident of sexual abuse; retaliation against inmates or staff who reported such an incident; and any staff neglect or violations that may have contributed to an incident or retaliation.
- § 115.66 Preservation of ability to protect inmates from contact with abuser: There shall be no agreement that limits the agency's ability to remove alleged staff abusers from contact pending the outcome of an investigation or disciplinary determination.
- § 115.67 Protecting staff and inmates from retaliation: The agency shall establish a policy to protect all inmates and staff who report sexual abuse or sexual harassment or cooperate with investigations from retaliation.
- § 115.76 Disciplinary sanctions for staff: Staff will be subject to disciplinary sanctions up to and including termination for violating sexual abuse or sexual harassment policies. Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.
- § 115.78 Disciplinary sanctions for inmates: Inmates shall be subject to disciplinary sanctions following an administrative finding that the inmate sexually abused another inmate, or following a criminal finding of guilt for sexual abuse of an inmate.

ENDNOTES

1 Viktoria Kristiansson is an Attorney Advisor and Charlene Whitman-Barr is an Associate Attorney Advisor at AEQUITAS: The Prosecutors' Resource on Violence Against Women. The authors would like to thank AEQUITAS Attorney Advisor Teresa M. Garvey for her significant contributions to this article.

2 "Witness intimidation can take many forms, and it may be direct or indirect. Regardless of the form it takes, its purpose is invariably the same: to allow the offender to escape justice by preventing witness testimony or other cooperation with law enforcement (*e.g.*, providing information or physical evidence, or even obtaining medical treatment that might result in disclosure). Common forms of intimidation include acts of physical violence, verbal and nonverbal communication of threats, threats implied by conduct, and emotional manipulation." TERESA M. GARVEY, AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, WITNESS INTIMIDATION: MEETING THE CHALLENGE (2013), available at www.aequitas-resource.org/library.cfm. See, *e.g.*, CAL. PENAL CODE § 136.1 (2014); IDAHO CODE § 18-2604(2014); see also AEQUITAS: The Prosecutors' Resource on Violence Against Women, Witness Intimidation Statutory Compilation (available upon request).

3 "Sexual abuse" as defined by the National Standards to Prevent, Detect, and Respond to Prison Rape; Final Rule, 77 Fed. Reg. 119, 37200-01 (June 20, 2012) 28 C.F.R. § 115.6 [hereinafter *National Standards*], at 37200.

4 *National Standards*, *supra* note 3, at 37113. Sexual abuse in jails, prisons, lockups, juvenile confinement facilities, and community confinement facilities presents "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." *Id.* at 37106.

5 See, *e.g.*, *Improving the Justice System Response to Witness Intimidation*, AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, <http://www.aequitasresource.org/Improving-the-Justice-System-Response-to-Witness-Intimidation.cfm> (last visited Oct. 28, 2014).

6 LGBTI stands for lesbian, gay, bisexual, transgender, and intersex.

7 See Table 8. *Prevalence of sexual victimization, by type of incident and inmate sexual characteristics, National Inmate Survey, 2011-12* in ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12: NATIONAL INMATE SURVEY 18 (May 2013), <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

8 See definition of "inmate-abuser," *infra*; BECK, *supra* note 7, at 23 (Table 13, indicating that, among prison and jail inmates ages 18-19 who experienced sexual abuse, 73.8% of inmates experienced two or more incidents by another inmate perpetrator, and among prison and jail inmates ages 20-24 who experienced sexual abuse, 70.1% of inmates experienced two or more incidents by another inmate perpetrator).

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

10 BECK, *supra* note 7.

11 *Id.* An estimated 0.4% of state and federal prison inmates and 0.2% of jail inmates reported both an incident perpetrated by staff and an incident perpetrated by another inmate. *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 See generally KELLY DEDEL, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, WITNESS INTIMIDATION (July 2006), available at http://www.popcenter.org/problems/pdfs/witness_intimidation.pdf.

16 David Skarbek, *Prison Gangs, Norms, and Organizations*, 82 J. OF ECON. BEHAVIOR & ORG. 96-109, 99 (2012)(citing M. KAMINSKI, GAMES PRISONERS PLAY: THE TRAGICOMIC WORLDS OF POLISH PRISONS (Princeton University Press 2004)).

17 See, *e.g.*, Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L.L. REV. 45 (2007). In particular, staff may ignore or cover up reports of abuse in order to avoid the scrutiny that accompanies an investigation. See also, *e.g.*, Greg Burton, *Prison Rapes Covered Up, Inmates Say*, SALT LAKE TRIBUNE (Nov. 9, 1997), available at <http://www.justdetention.org/en/jdinews/archived/110997.aspx>.

18 M. Dyan McGuire, *The Impact of Prison Rape on Public Health*, 3(2) CAL. J. HEALTH PROMOTION, 72-73 (2005), http://www.cjhp.org/Volume3_2005/Issue2/72-83-mcguire.pdf (citing PRISON MASCULINITY (D. Sabo, T. Kupers & W. London eds., Temple University Press (2001); and C. Struckman-Johnson & D. Struckman-Johnson, *Sexual coercion rates in seven midwestern prison facilities for men*, 80 THE PRISON JOURNAL 379-390 (2000)).

19 HALLIE MARTYNIUK, PENNSYLVANIA COALITION AGAINST RAPE, UNDERSTANDING RAPE IN PRISON 13 (2014), <http://www.pcar.org/sites/default/files/docs/7%20Understanding%20Rape%20in%20Prison.pdf> (citing Barbara Owens & James Wells, National Institute of Corrections & The Moss Group, Inc. *Trends from focus group interviews*, 1 STAFF PERSPECTIVES: SEXUAL VIOLENCE IN ADULT PRISONS & JAILS 1-24 (2006), <https://s3.amazonaws.com/static.nicic.gov/Library/021619.pdf>).

20 See, *e.g.*, David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 SEXUAL ASSAULT REPORT (Mar./Apr. 2011). (This article evaluates previous studies and literature on characteristics of rapists, serial offending, recidivism, and crossover offending. Studies focusing on men ages 18-24 showed that sexual abusers "are extremely adept at identifying 'likely' victims and testing prospective victims' boundaries.").

21 Jail and prison inmates have created internal market systems that exist in various forms. "Without cash of their own, inmates are forced to improvise. Having recently lived in legitimate society, they are used to a certain standard of living. So the black market flourishes, based on a barter system." Charlie LeDuff, *The Exchange Rate Behind Bars*, N.Y. TIMES (Oct. 15, 2000), <http://www.nytimes.com/2000/10/15/magazine/the->

exchange-rate-behind-bars.html. See also Brent Rose, *Deep Inside Prison's Dark and Tangled Economy*, GIZMODO (Oct. 27, 2011), <http://gizmodo.com/5853770/deep-inside-prisons-dark-and-tangled-economy>; Ben Paynter, *Prison Economics: How Fish and Coffee Become Cash*, WIRED (Jan. 31, 2011), http://www.wired.com/2011/01/st_prisoncurrencies/. Other internal market systems may be facilitated by groups or gangs, which “enable prisoners to trade illicit substances—such as drugs—far more efficiently. Consider an inmate working alone. He faces substantial challenges: other sellers can threaten to kill him if he lures their customers away. If, as is common, he allows people to buy drugs on credit, he faces the risk that they will not pay him back, especially if he is not sufficiently frightening to make his threats seem credible. ... [G]angs, by contrast, are altogether more effective. Fail to pay a prison gang for your drugs and they have many more members who can kill you. Murder a dealer instead of paying him and his fellow gangsters will retaliate. Gangs can steal customers from individual dealers without worrying about revenge. And members can help facilitate trade from the outside after their release.” J.D., *Why Prisoners Join Gangs*, THE ECONOMIST (Nov. 12, 2014), <http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-7>. See also, e.g., Vivian Giang, *Inmate Talks to Us Over an Illegal Cell Phone About Working the Jailhouse Black Market*, BUSINESS INSIDER (July 2, 2012), <http://www.businessinsider.com/prisoner-shares-with-us-a-glimpse-of-the-hustle-behind-bars-2012-6>.

22 MARTYNIUK, *supra* note 19, at 7.

23 28 C.F.R. § 115.6 (Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer).

24 See, e.g., *Women Prisoners of the D.C. Dep’t of Corr. v. District of Columbia*, 877 F. Supp. 634, 666 (D.D.C. 1994), *vacated in part, modified in part*, 93 F.3d 910 (D.C. Cir. 1996) (“By leaking private information prison officials coerce women prisoners and staff into silence and insulate themselves from scrutiny”); *Lucas v. White*, 63 F. Supp. 2d 1046, 1050 (N.D. Cal. 1999) (plaintiff alleged that she was attacked and her life was threatened in retaliation for filing a formal complaint against the prison guards for allowing male inmates to enter her cell at night); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L.L. REV. 45, 66 (2007) (stating that staff abusers often threatened victims of sexual abuse that if they reported the sexual abuse no one would believe them. Further, “guards and prison officials notoriously disregard institutional rules and procedures, often refusing to provide prisoners with the required forms within the grievance time limit or claiming not to have received the complaint or to have lost it”); Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 242 (2003) (the National Institute of Ethics founds that 46% of the responding officers had witnessed misconduct, but had covered it up).

25 See, e.g., National Standards, *supra* note 3 at 37108; see also, e.g., G.J. MAZZA, ED., DEP’T OF JUSTICE, REVIEW PANEL ON PRISON RAPE: REPORT ON SEXUAL VICTIMIZATION IN PRISONS AND JAILS 28-29 (Apr. 2012), http://ojp.gov/reviewpanel/pdfs/prea_finalreport_2012.pdf; HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION (2010), available at <http://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf>. In addition, facility leaders may cover up abuse for a variety of reasons. See Kevin Koeninger, *Prison Guard Repeatedly Rapes Inmate; Warden Shrugs: ‘Go On Birth Control,’ Lawsuit Claims*, ALTERNET (Nov. 1, 2013), <http://www.alternet.org/civil-liberties/prison-guard-repeatedly-rapes-inmate-warden-shrugs-go-birth-control-lawsuit-claims>.

26 For example, if a staff member provides statements to supervisors that are not freely given, the admissibility of those statements could be later challenged and barred from a criminal trial. *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.”).

27 JANINE M. ZWEIG, REBECCA L. NASER, JOHN BLACKMORE & MEGAN SCHAFER, URBAN INSTITUTE, ADDRESSING SEXUAL VIOLENCE IN PRISONS: A NATIONAL SNAPSHOT OF APPROACHES AND HIGHLIGHTS OF INNOVATIVE STRATEGIES, FINAL REPORT 40, 50 (Jan. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/216856.pdf>. (“Human Rights Watch (1996) found that every woman they identified as having filed a sexual misconduct complaint had also faced retaliation from either correctional officers or from other prisoners.”).

28 ZWEIG ET AL., *supra* note 27 at 40.

29 See *id.* (“Whether assaulted by a fellow inmate or a staff person, inmate victims may fear retaliation, in the form of violence or in the form of punishment or lost privileges, if they report being the victim of sexual assault.”). In cases involving a staff-abuser, 46% resulted in the victim being written up, 41% resulted in the victim being moved to solitary confinement, and 15% resulted in no response or action. In cases involving an inmate-abuser, 29% resulted in the victim being written up, 34% resulted in the victim being moved to solitary confinement, and 37% resulted in no response or action. ALLEN BECK, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008, (May 12, 2012), <http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf>.

30 *Id.* See also, 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](http://www.eji.org/node/637), [hereinafter *EJI Complaint*].

31 National Standards, *supra* note 3, at 37116, 37155. See also *EJI Compliant*, *supra* note 30.

32 Brett Garland & Gabrielle Wilson, *Prison Inmates’ Views*, 28(6) J. OF INTERPERSONAL VIOLENCE 1201-22, 12012 (2012) (citing K.L. Miller, *The Darkest Figure of Crime: Perceptions of Reasons for Male Inmates to Not Report Sexual Assault*, 27 JUSTICE QUARTERLY 692-712 (2010)). See also ZWEIG ET AL., *supra* note 27; and Shannon K. Fowler et al., *Would They Officially Report an In-Prison Sexual Assault? An Examination of Inmate Perceptions*, 90(2) THE PRISON JOURNAL 220-43, 229 (2010).

33 ZWEIG ET AL., *supra* note 27 at 44.

34 See BECK, *supra* note 7; see also BECK, *supra* note 9.

35 See *Turned Out: Sexual Assault Behind Bars (Limestone Correctional, Alabama)*, YOUTUBE, <http://www.youtube.com/watch?v=gtedtTJdnfM> (last visited Oct. 28, 2014); see also *Prisoners’ Voices*, HUMAN RIGHTS WATCH: NO ESCAPE: MALE RAPE IN U.S. PRISONS, <http://www.hrw.org/reports/2001/prison/voices2.html> (last visited Oct. 30, 2014).

- 36 See, e.g., *Survivor Testimony: National Prison Rape Elimination Commission Testimony of Mayra Soto*, JUST DETENTION INTERNATIONAL (Dec. 13, 2006), <http://www.justdetention.org/en/NPREC/esmeraldasoto.aspx>.
- 37 *Hardest Prisons Correctional ++ Maximum Security ++ Documentary Prisons Life Ful*, YOU TUBE, [HTTPS://WWW.YOUTUBE.COM/WATCH?V=O_DQAKs78Y4](https://www.youtube.com/watch?v=O_DQAKs78Y4) (last visited Oct. 28, 2014). See also J.D., *supra* note 21.
- 38 See GARLAND & WILSON, *supra* note 32 at 1203 (“The proscription against snitching in prisons is perhaps one of the best known aspects of the inmate code.”).
- 39 “Beliefs fundamental to this inmate code documented for decades include ‘do your own time,’ ‘don’t whine,’ ‘don’t break your word,’ ‘be a man,’ and ‘don’t be a sucker.’” GARLAND & WILSON, *supra* note 32 at 1203 (citing A.Y. HASABALLA, *THE SOCIAL ORGANIZATION OF THE MODERN PRISON* (Edwin Mellen Press 2001); R. JOHNSON, *HARD TIME: UNDERSTANDING AND REFORMING THE PRISON* (Wadsworth 3d ed. 2002); G.M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF MAXIMUM SECURITY PRISON* (Princeton University Press 1958); G.M. Sykes & S. Messinger, *The Inmate Social System* in *THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON* 5-19 (R. Cloward and D.R. Cressey eds. 1960).
- 40 GARLAND & WILSON, *supra* note 32 at 1203 (citing D. CLEMMER, *THE PRISON COMMUNITY* 299 (Rinehart and Company 1958)).
- 41 “[S]tranger inmates [feel] entitled to take what they please and inmates [are] expected to do their own time and not interfere with others.” GARLAND & WILSON, *supra* note 32 at 1202 (citing Barbara Owens & James Wells, National Institute of Corrections & The Moss Group, Inc. *Trends from focus group interviews*, 1 *STAFF PERSPECTIVES: SEXUAL VIOLENCE IN ADULT PRISONS & JAILS* 1-24 (2006)).
- 42 GARLAND & WILSON, *supra* note 32 at 1205 (describing researchers Fleisher and Krienert’s study of “the culture of prison sex” in 30 prisons across the United States in 2004-2005).
- 43 GARLAND & WILSON, *supra* note 32 at 1215 (“Identifying the reporting of prison [rape] as equivalent to snitching also may depend on staff culture as well as inmate culture. Liebling (2008) maintains that each prison has a distinctive organizational culture, with staff in each prison having a collective working personality. In a prison where the organizational and staff culture portrays inmate sexual victimization as an unconscionable and intolerable act, inmates may perceive the reporting of prison rape as less of a violation against institutional norms. It is also possible that staff culture may influence inmate culture and thereby diminish the collective inmate identification ... of reporting sexual assault as equivalent to snitching.”).
- 44 GARLAND & WILSON, *supra* note 32 at 1217.
- 45 GARLAND & WILSON, *supra* note 32 at 1201.
- 46 GARLAND & WILSON, *supra* note 32 at 1203 (“Fear of being labeled a snitch and its consequences should naturally enter the calculation of whether to inform prison authorities about sexual violence as suggested by Miller’s (2010) study.”).
- 47 GARLAND & WILSON, *supra* note 32 at 1205.
- 48 See, e.g., *National Standards*, *supra* note 3, 28 C.F.R. §§ 115.31 Employee training; 115.33 Inmate education; 115.51 Inmate reporting; 115.64 Staff first responder duties; 115.66 Preservation of ability to protect inmates from contact with abusers; 115.67 Agency protection against retaliation; and 115.68 Post-allegation protective custody. The National Standards are designed to help prevent, detect, and respond to cases of sexual abuse in all confinement facilities, and that includes combating and responding to intimidation. “Notably, the standards are generally not outcome-based, but rather focus on policies and procedures.” *Id.* at 37107.
- 49 After the passage of PREA, but prior to publication of the Standards, departments of corrections reported that barriers to developing policies to address sexual violence in confinement facilities included “changing correctional culture, staff resistance, fears of inmates making false allegations, lack of adequate resources, and operational issues.” ZWEIG ET AL., *supra* note 27 at iii (Research indicates that many of these barriers still exist, in spite of issuance of the PREA Standards in 2012.).
- 50 GARLAND & WILSON, *supra* note 32 at 1202.
- 51 “(b) An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all of its facilities.” 28 C.F.R. § 115.11 (Zero tolerance of sexual abuse and sexual harassment; PREA coordinator).
- 52 Collaboration that occurs in a community among various professionals at multiple levels has been shown to improve the effectiveness of responses to crimes involving intimate partner and sexual violence. A coordinated community response that includes law enforcement, health care providers, emergency responders, child protective services, advocates, employers, local businesses, media, clergy, and more “use[s] the full extent of the community’s legal system” and resources to protect victims and hold abusers accountable. *Coordinated Community Response*, STOP VIOLENCE AGAINST WOMEN, http://www.stopvaw.org/coordinated_community_response (last visited Oct. 30, 2014). See Ellen Pence & Martha McMahon, *A Coordinated Community Response to Domestic Violence*, in *FROM THE MULTI-AGENCY APPROACH TO DOMESTIC VIOLENCE: NEW OPPORTUNITIES, OLD CHALLENGES?* 150-68 (Nicola Harwin et al., eds., Whiting & Birch Ltd 1999); Christopher Mallios & Jenifer Markowitz, *Benefits of a Coordinated Community Response to Sexual Violence*, 7 *STRATEGIES IN BRIEF* (Dec. 2011), http://www.ncdsv.org/images/AEquitas_BenefitsOfaCoordinatedCommunityResponseToSexualViolence_12-2011.pdf.
- 53 See Rebecca Campbell, Debra Patterson & Deborah Bybee, *Prosecution of Adult Sexual Assault Cases: A Longitudinal Analysis of the Impact of a Sexual Assault Nurse Examiner Program*, 18 *VIOLENCE AGAINST WOMEN* 223-44 (2012); see also *Responses to Sexual Violence: Effectiveness of SANE/SART Programs*, NAT’L INSTITUTE OF JUSTICE, <http://www.nij.gov/topics/crime/rape-sexual-violence/Pages/response.aspx> (last visited Oct. 28, 2014).
- 54 One way that prosecutors can help prevent intimidation is by ensuring that protection orders are in place for victims of sexual abuse in confinement. See *Pretrial Motions: Admitting and Excluding Evidence in the Prosecution of Sexual Abuse in Confinement*, AEQUITAS: THE PROSECUTORS’ RESOURCE ON VIOLENCE AGAINST WOMEN, <http://www.aequitasresource.org/trainingDetail.cfm?id=88> (last visited Oct. 28, 2014) (link to Mar.

2013 webinar presented by Viktoria Kristiansson). In addition, prosecutors can communicate with those who work in facilities as well as agency managers, agency investigators, law enforcement, advocates, and others to identify examples of intimidating conduct and tactics, and to develop policies to hinder intimidation and provide safe avenues for reporting.

55 Safety planning should be done on an individual, case-by-case basis, with specific components included for each victim. General plans and protocols for inmates and others to report incidents of intimidation should be established by facilities as they implement PREA Standards. These general protocols should be explained to the inmate as part of general PREA Standards notification, and they can be reviewed again with victims and witnesses when an incident of abuse is reported. For additional information on facilities that have developed implementation plans for the PREA Standards, including preventing and responding to witness intimidation and retaliation, contact the PREA Resource Center, <http://www.prearesourcecenter.org>.

56 *National Standards*, *supra* note 3, 28 C.F.R. § 115.51 Inmate reporting.

57 It is recommended that training on the dynamics of intimidation in confinement be included in general training and education. 28 C.F.R. § 115.31 – 35 (Employee training; Volunteer and contractor training; Inmate education; Specialized training education; and Specialized training: Medical and mental health care).

58 See TERESA M. GARVEY, *AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, WITNESS INTIMIDATION: MEETING THE CHALLENGE* (2013), available at www.aequitasresource.org/library.cfm; and *AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON WITNESS INTIMIDATION* (Mar. 2014), available at www.aequitasresource.org/library.cfm.

59 Forms of intimidation can include, among others, violence, direct and indirect contact, threats, written and electronic communications, gestures, property damage, veiled promises, and messages delivered through others. See, e.g., *State v. Snook*, 94 Wash.App. 1001 (Wash. Ct. App. 1999), *People v. McClaine*, 270 N.E.2d 176 (Ill. App. Ct. 1971), and *GARLAND & WILSON*, *supra* note 32.

60 See, e.g., *State v. Thompson*, 305 Conn. 412, 45 A.3d 605 (Conn. 2012).

61 See, e.g., *United States v. Hayden*, 85 F.3d 153 (4th Cir. 1996) (evidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent if the evidence is related to the offense charged and is reliable).

62 The trauma associated with sexual abuse in confinement can be emotional and physical, and can include severe health and other consequences that can spread within a facility and to the community at large. See, e.g., MCGUIRE, *supra* 18; *Body and Soul: The Physical and Psychological Injury of Prison Rape*, HUMAN RIGHTS WATCH: NO ESCAPE: MALE RAPE IN U.S. PRISONS, <http://www.hr.org/reports/2001/prison/report6.html> (last visited Oct. 30, 2014).

63 For a more in depth discussion of *Crawford*, see *AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON CRAWFORD AND ITS PROGENY* (Oct. 2012), available at www.aequitasresource.org/library.cfm.

64 *Reynolds v. United States*, 98 U.S. 145, 158 (1878). See also *AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON FORFEITURE BY WRONGDOING* (2012), available at www.aequitasresource.org/library.cfm.

65 *Reynolds*, 98 U.S. at 158.

66 FED. R. EVID. 804(b) **Hearsay exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

67 *AEQUITAS* has sample forfeiture by wrongdoing motions available and is happy to help in the drafting or review of motions. For more information, please visit *Technical Assistance*, *AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN*, <http://www.aequitasresource.org/taRegister.cfm> (last visited Oct. 28, 2014).

68 See, e.g., *State v. Hand*, 840 N.E.2d 151, 172 (2006) (A murder victim's out-of-court statements to third parties admitting the victim's and defendant's involvement in the murder of the defendant's first two wives – and implicating defendant in those murders – was admissible at trial after a forfeiture by wrongdoing hearing at which the prosecution demonstrated that the defendant caused the murder victim's unavailability with the purpose of preventing her from cooperating with law enforcement and eventually testifying against him).

69 Preponderance of the evidence is the burden in the majority of jurisdictions, but the burden is clear and convincing in Washington, Maryland, and New York. See *AEQUITAS*, *supra* note 63.

70 *Giles v. California*, 554 U.S. 353 (2008).

71 *Giles*, 554 U.S. 353. For additional information, see *AEQUITAS*, *supra* note 64.

72 Cheryl Hanna, *Supreme Court Advocacy and Domestic Violence: Lessons From Vermont v. Brillion and Other Cases Before the Court*, 4 ST. JOHN'S J. LEGAL COMMENT 567 (2010) (citing Robert C. Davis et al., *Prosecuting Domestic Violence Cases with Reluctant Victims: Assessing Two Novel Approaches in Milwaukee*, in *Legal Interventions in Family Violence: Research Findings and Policy Implications* 71, 71-72 (1997), www.ncjrs.gov/pdffiles/171666.pdf).

73 The provision of an opportunity for full and fair cross-examination of a witness at a hearing is an important step to take if the prosecutor is concerned that the witness might be unavailable at trial. That is because, under *Crawford*, testimonial statements cannot be admitted into evidence at trial unless: the witness testifies at trial and is cross-examined, or the witness is unavailable at trial but there was a prior opportunity for cross-examination. *AEQUITAS*, *supra* note 64. See also *AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON FORFEITURE BY WRONGDOING* (OCT. 2012), available at www.aequitasresource.org/library.cfm.

74 See AEQUITAS: *The PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, THE PROSECUTORS' RESOURCE ON WITNESS INTIMIDATION* (Mar. 2014), available at www.aequitasresource.org/library.cfm (see also sample voir dire and jury instructions at Appendices C & D specifically addressing witness intimidation).

75 See generally, MAZZA, *supra* note 25.

76 *National Standards*, *supra* note 3.

77 28 C.F.R. 115.6. Definitions related to sexual abuse (Sexual harassment includes— (1) Repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another; and (2) Repeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures).



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Contact: info@prearesourcecenter.org

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1100 H Street NW, Suite 310 • Washington, DC 20005

P: 202-558-0040 • F: 202-393-1918