

New Jersey Legislature

Committee on Law and Public Safety

Testimony of Prof. Brenda V. Smith

American University, Washington College of Law

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Hearing on

Pervasive Problem of Sexual Abuse against Women in Prison & Best Practices for
Prevention and Reporting Sexual Violence within the Prison Setting

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[speaking notes – Final Testimony will be submitted for the record]

I. Introduction

Good afternoon, Chairman Greenstein and Vice-Chairman Diegnan. Thank you for inviting me here today and for the opportunity to speak with the members of the Committee on Law and Public Safety.

I am a Professor at the American University, Washington College of Law. I have a long investment in issues of treatment of individuals in custodial settings, dating back to my early years of running a program for women inmates imprisoned in the Minimum Security Annex of the District of Columbia Department of Corrections.¹ Because of my work with women in custody, I learned about sexual victimization in custodial settings, serving as class counsel in *Women Prisoners v District of Columbia*² from 1993 to 2003. In November 2003, I was appointed by then House Minority Leader, Nancy Pelosi to serve on the National Prison Rape Elimination Commission. I served in that capacity until August 2009, when the commission “sunsetted” after having issued comprehensive standards to address sexual abuse of individuals in custodial settings – prisons, jails, juvenile detention facilities, community corrections and immigration detention settings. The United States Department of Justice issued its final rule in August 2012 after several years of consultation with stakeholders and a robust public comment period.

In addition to those roles, I have also directed the Project on Addressing Prison Rape for the past 20 years. In that capacity, I have provided training and technical assistance to correctional agencies – adult and juvenile – on a variety of issues including labor and employment issues; sexual abuse in custodial settings; culture change; treatment of LGBTQI persons in custody, and the specific needs of women and girls under authority of law.

Additionally, I have litigated and served as counsel and an expert in sexual abuse cases in correctional settings, and been involved as a scholar researching and writing on issues of sexuality and victimization in custody.³ My work investigating the legal construct of

¹ Brenda V. Smith, AN END TO SILENCE: WOMEN PRISONERS’ HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL MISCONDUCT (1998) *available at* http://www.wcl.american.edu/endsilence/documents/NWLC_Silence_Final.pdf.

² *Women Prisoners of the D.C. Dep’t of Corr. v. Dist. of Columbia*, 93 F.3d 910, 929 (D.C. Cir. 1996).
Expert witness work includes xxx

³ Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, Symposium on Sexuality and the Law, 15 Colum. J. Gender & L. 185 (2006); *Uncomfortable Places, Close Spaces: Theorizing Female Correctional Officers’ Sexual Interactions with Men and Boys in Custody*, 59 U.C.L.A. L. Rev. 1690 (2012).

employment in correctional setting is also longstanding dating back to my initial work on cross-sex supervision in custody.

As many have said including Dostoevsky, Mandela and de Tocqueville, the mark of a civilization is in how we treat those we punish. I submit to you today, that while the United States has made progress with the promulgation of the final PREA standards, there is still much work to do. I think the allegations of sexual abuse in the Edna Mahan Facility are proof of that.

Today, I would like to do two things – focus on what I know of past reports of abuse in the Edna Mahan Facility and focus on the PREA standards and the other best practices for preventing, reporting and punishing sexual abuse in custody.

II. Past History of Reported Complaints Involving the Edna Mahan Correctional Facility

This hearing was called in response to the pervasive problem of sexual violence in The Edna Mahan Correctional Facility. Most recently in fall 2017, a female prisoner in the Edna Mahan Correctional Facility alleged that she was sexually assaulted by Officers Ambroise and May. In her civil complaint, she claimed that Defendants Ambroise and/or Mays and/or other EMCF officers in the past five years assaulted at least sixteen other women.

Further, the female prisoner stated that at least five EMCF officers and/or employees were fired and/or criminally indicted over the past three years over claims of sexual abuse. Lastly, the prisoner claimed that for several years Edna Mahan falsely reported no cases of sexual abuse of inmates and/or under-reported cases of sexual abuse of inmates.

Unfortunately, most recent event that is the genesis of this hearing is not an isolated incident. Edna Mahan has a long-standing history of sexual violence against female inmates. Over the last twenty years, female and male officers at the Edna Mahan Facility have been disciplined, fired, or criminally prosecuted for offenses including exchanging sexual favors for gifts or money. Detailed below are a number of the reported cases I located in anticipation of testifying today:

A. Current Case -- Owens v. Ambroise et al., No. 317-cv-07159-PGS-LHG (amended complaint filed Sept. 15, 2017).

Plaintiff filed suit pursuant to § 1983 for violation of her First, Fourth, Eighth, and Fourteenth Amendment rights. Plaintiff alleges that she was sexually assaulted by Officers Ambroise and May. Upon information and belief, at least sixteen (16) other women have been assaulted by Defendants Ambroise and/or Mays and/or other EMCF officers in the past five years. Further, upon information and belief, at least five (5) EMCF officers and/or employees were fired and/or criminally indicted over the past three (3) years over claims of sexual abuse, including but not limited to Defendants Ambrose

and Mays, as well as EMCF officers/employees Ahnwar Dixon, Thomas Seguine, and Joel Herscap. Notably, upon information and belief, for several years Edna Mahan falsely reported no cases of sexual abuse of inmates and/or under-reported cases of sexual abuse of inmates.

Cases

B. Matter of Colon, No. A-1726-15T4, 2017 WL 2991771 (N.J. Super. Ct. App. Div. July 14, 2017)

Petitioner appealed a final administrative action from the Civil Service Commission (Commission) and a denial of reconsideration of a Department of Correction (DOC) disciplinary action against petitioner removing him from his position for using excessive force against an inmate. Petitioner worked for the DOC as a senior corrections officer at Edna Mahan Correctional Facility for Women. This case stems from a January 26, 2015 incident between petitioner and an inmate, who is a special needs inmate receiving psychiatric care. The interaction was captured on the correctional facility's security cameras from two angles. The video showed the inmate approaching the control booth twice; the second time when she began to walk away, she stopped and said something over her shoulder. Next, the video shows petitioner walking towards the inmate, who turned and continued to walk back towards the housing unit. Petitioner closed the gap between himself and the inmate, standing inches from her. Petitioner pushed the inmate, causing the inmate to stumble, and eventually petitioner forcefully pushed her to the floor. The video shows petitioner punching the inmate while she was on the floor.

C. In re Coluccio, NO. A-0772-11T2, 2012 N.J. Super. Unpub. LEXIS 1883 (N.J. Aug. 6, 2012).

Plaintiff appealed a final determination of the Commissioner of Education removing him from his tenured position as a teacher with the New Jersey Department of Corrections. Coluccio was employed as a cosmetology teacher at the Department's Edna Mahan Correctional Facility for Women. On June 24, 2009, the Department filed a preliminary notice of disciplinary action, alleging that Coluccio had an improper relationship with an inmate at Edna Mahan, who was serving a six-year sentence. Coluccio was charged with conduct unbecoming an employee, improper and unauthorized contact with an inmate, and sexual harassment or discrimination. The Court affirmed the Commissioner of Education's decision.

D. Heggenmiller v. Edna Mahan Corr. Inst., No. 04-1786, 128 Fed. Appx. 240 (3rd Cir. Apr. 11, 2005).

Plaintiffs alleged that a prison guard raped and sexually assaulted them between 1997 and 1999. The matter was allegedly investigated, and the guard was fired and brought up on charges. The inmates claimed that the administrators were deliberately indifferent to a serious risk of harm and failed to train the guards. While there was evidence of 10 different incidents of various sexual incidents between guards and inmates, none of the prior incidents was shown to have involved the guard who assaulted both inmates. As to

the past incidents, the administrators investigated, fired, and prosecuted at least five of the six guards involved in the incidents. Thus, there was no evidence that the administrators either looked the other way or attempted to intervene on behalf of any guard. The judgment of the district court was affirmed.

E. Raymond v. Edna Mahan Correctional Facility, NO. 2002-2678, 2005 WL 1190413 (N.J. Adm. May 4, 2005).

Appellant appealed his removal from respondent (“Edna Mahan”) effective January 8, 2002 upon the determination that he had “improper or unauthorized contact with inmate-undue familiarity with inmates, parolees, their families, or friends,” such contact being “conduct unbecoming an employee.” The Court affirmed the respondent's removal of appellant from the position of Correction Captain.

F. State Of New Jersey V. Ralph W. Grier.

The guard, Lt. Ralph Grier, was found guilty of second-degree official misconduct in a criminal trial. That same jury acquitted him of three counts of sexual assault on inmates at Edna Mahan Correction Facility for Women, where Grier had worked for 20 years. According to court records. Judge Victor Ashrafi, sitting in Flemington, said that Grier took advantage of his position of authority in January 2002 and used it to develop a relationship with the victim, a female former inmate whose name was withheld. Grier gave the inmate cigarettes and candy to become friendly with her. Additionally, he sent her a \$30 money order and disguised it to come from a relative in exchange for allowing him to take nude photographs of her, according to court records. As part of the sentencing, Grier was permanently barred from seeking a position in law enforcement or holding a public office.

III. The Prison Rape Elimination Act

In 1994, the Supreme Court ruled that prison officials’ deliberate indifference to a substantial risk of serious harm to an inmate violates the cruel and unusual punishment clause of the Eighth Amendment. The court also ruled that. rape in prison is simply not "part of the penalty" for committing a crime⁴ Nine years later, Congress passed the Prison Rape Elimination Act (PREA), creating a zero-tolerance for sexual abuse in custody and the protect the 8th amendment rights of prisoners⁵.

⁴ *Farmer v. Brennan*, 511 US 825 (1994) (ruling that ruled that a prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the cruel and unusual punishment clause of the Eighth Amendment. Farmer, a transgender female, was placed with the general population at a male prison and was beaten and raped).

⁵ *See generally*, THE PRISON RAPE ELIMINATION ACT OF 2003, Pub. L. 108-79. 4 Sept. 2003. Stat 117.972. +

While we are here today to talk about sexual abuse in custody and how the Prison Rape Elimination Act Standards address that important issue, it goes without saying that PREA is about much more than abuse. Sexual abuse of people in custody has been a problem since the inception of prisons. It has led to the creation of classification systems to detect vulnerability, and separate housing for men, women, and children.

Congress made several findings in passing The Prison Rape Elimination Act that bear on today's proceedings:

- (1) most prison staff are not adequately trained or prepared to prevent, report, or treat inmate sexual assaults;
- (2) prison rape often goes unreported, and inmate victims often receive inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all;
- (3) inmates with mental illness are at increased risk of sexual victimization (America's jails and prisons house more mentally ill individuals than all of the Nation's psychiatric hospitals combined);
- (4) the high incidence of sexual assault in prisons involves likely violations of the U.S. Constitution .

In order to address these findings, Congress implemented the PREA Standards. I have detailed below standards this body should review in crafting a response to the abuse at Edna Mahan. I will discuss these standards in my testimony and answer any questions from the committee related to them.

V. PREA Standards

PREA provided unprecedented funding to state and federal agencies to address sexual abuse in custody including:

1. funding for training and technical assistance to the National Institute of Corrections;⁶
2. funding for data collection by the Bureau of Justice Statistics;⁷
3. grants to state to address sexual violence in custody.⁸
4. funding to create the National Prison Rape Elimination Commission (NPREC), which Congress required to perform a comprehensive legal and factual analysis of the physical, mental, medical, social, penological, and economic consequences of prison rape.⁹

⁶ 42 U.S.C. § 15604.

⁷ 42 U.S.C. § 15603.

⁸ 42 U.S.C. § 15605.

⁹ 42 U.S.C. § 15606(d).

After conducting hearings, expert panels and gathering data, the National Prison Rape Elimination Commission (NPREC) used the information it gained to inform its development of draft standards for the prevention, detection and punishment of prison rape. After notice and comment and consultation with the field through listening sessions, the Department of Justice (DOJ) issued final standards on August 20, 2012.

DOJ's standards require a variety of conditions related to staff training, reporting options, availability of mental and medical health resources, cross-gender supervision policies, and general oversight of compliance with PREA standards. For example, every agency is required to employ an agency-wide PREA coordinator who has sufficient time and resources to implement PREA and oversee agency efforts to comply with the standards. In addition, each facility within the agency is required to employ a PREA compliance manager who similarly has sufficient time and resources to effectively monitor and prevent sexual abuse in accordance with the PREA standards.¹⁰

The statute made clear that the PREA standards are minimum standards. In other words, they are the floor not the ceiling. States can and should do what is necessary to provide a safe environment where people in custody are not at risk for sexual victimization by staff, other prisoners, volunteers or the public. .

In the PREA Standards, there are specific measures intended to prevent abuse perpetrated by prison officials that are relevant here including: (1) limits on cross-gender searches and viewing¹¹; 2) hiring and promotion decisions¹²; (3) criminal and administrative agency investigations¹³; (4) disciplinary sanctions for staff¹⁴; and (5) training. I detail those standards below.

A. Cross-gender viewing and searches

28 CFR § 115.15 provides that:

(a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

(b) As of August 20, 2015, or August 20, 2017 for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances. Facilities shall not restrict female inmates' access to

¹⁰ 28 C.F.R. § 115.11(b) – (c).

¹¹ 115.15

¹² 115.17

¹³ 115.71

¹⁴ 115.76

regularly available programming or other out-of-cell opportunities in order to comply with this provision.

(c) The facility shall document all cross-gender strip searches and cross-gender visual body cavity searches, and shall document all cross-gender pat-down searches of female inmates.

(d) The facility shall implement policies and procedures that enable inmates to shower, perform bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of the opposite gender to announce their presence when entering an inmate housing unit. . . .

(f) The agency shall train security staff in how to conduct cross-gender pat-down searches, and searches of transgender and intersex inmates, in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

B. Hiring and Promotion Decisions

28 CFR § 115.17 provides that:

- (a) The agency shall not hire anyone who may have contact with inmates, and shall not enlist the services of any contractor who may have contact with inmates, who
- (1) Has engaged in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility or other institution;
 - (2) Has been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse;
 - (3) Has been civilly or administratively adjudicated to have engaged in the activity described in paragraph (a)(2) of this section.
- (b) The agency shall consider any incidents of sexual harassment in determining whether to hire . . . anyone, or to enlist the services of any contractor, who may have contact with inmates.
- (c)-(f) The agency shall ask all applicants and employees who may have contact with inmates directly about previous misconduct described in paragraph (a) of this section in written applications or interviews for hiring.

The issue of hiring and promotion directly relates to the requirement for robust background checks. The PREA standards require background checks for any incidents involving sexual abuse and sexual harassment, and prohibit agencies from hiring staff with past convictions or substantiated incidents of sexual abuse in a facility or sexual activity in the community by force or without consent.¹⁵ Agencies must do background checks on three occasions—at the point of hire, when being considered for a promotion and finally in a general five-year cycle.

The PREA Standards enumerate the following offenses that bar hiring or promotion of staff:

- (1) engaging in sexual abuse in a prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in 42 U.S.C. 1997);
- (2) convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or
- (3) has been civilly or administratively adjudicated for engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse.¹⁶

While good on its face, the background check standard assumes a reporting culture in correctional environments that often does not exist.¹⁷ The scandal in the Baltimore City Detention Center illustrates this problem. In April of 2013, twenty-five people including thirteen corrections officers were indicted for a widespread criminal enterprise that included smuggling drugs, cell phones and other contraband into the facility.¹⁸ In the course of the investigation, one inmate was discovered to have impregnated four officers.¹⁹ This scandal was so widespread and the actors were so powerful that other staff members either knew and/or turned a blind eye to the misconduct.

¹⁵ 28 C.F.R. § 115.317.

¹⁶ *Id.*

¹⁷ The Code of Silence is very prevalent in the corrections setting and results in staff staying silent about abuse, refusal to cooperate with investigations and actively hiding evidence of misconduct. *See, e.g.,* Kathleen M. Dennehy & Kelly A. Nantel, *Improving Prison Safety: Breaking the Code of Silence*, 22 WASH. U. J.L. & POL'Y 175 (2006); Lois Henry, 'Code of Silence' Pervades Prison System, BAKERSFIELD CALIFORNIAN (July 27, 2011) available at <http://www.bakersfield.com/news/columnist/henry/x468147796/Code-of-silence-pervades-prison-system>.

¹⁸ Ian Duncan et al., *Inside a Jail Run From Within*, THE BALTIMORE SUN (Apr. 28, 2013) available at <http://www.baltimoresun.com/news/maryland/bal-black-guerrilla-family-tavon-white-prison-corruption-20130425,0,7483161.html>

¹⁹ *Id.* (“Corrections department investigators discovered BGF documents outlining that new recruits are trained to target female officers with “low self-esteem, insecurities and certain physical attributes,” according to the affidavit.”).

C. Criminal And Administrative Investigative Investigations

Other standards that seem relevant include those related to criminal and administrative investigations and the disciplinary sanctions as a result of a finding of violations.

28 CFR § 115.71: Criminal and administrative agency investigations

- (a) When the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports.
- (b) Where sexual abuse is alleged, the agency shall use investigators who have received special training in sexual abuse investigations pursuant to §115.34.
- (c) Investigators shall gather and preserve direct and circumstantial evidence, including any available physical and DNA evidence; any available electronic monitoring data; shall interview alleged victims, suspected perpetrators, and witnesses; and shall review prior complaints and reports of sexual abuse involving the suspected perpetrator.
- (d) When the quality of evidence appears to support criminal prosecution, the agency shall conduct compelled interviews only after consulting with prosecutors as to whether compelled interviews may be an obstacle for criminal prosecution.

28 C.F.R. § 115.76: Disciplinary sanctions for staff

- a) Staff shall be subject to disciplinary sanctions up to and including termination for violating agency sexual abuse or sexual harassment policies.
- b) Termination shall be the presumptive disciplinary sanction for staff who have engaged in sexual abuse.
- c) Disciplinary sanctions for violations of agency policies relating to sexual abuse or sexual harassment (other than actually engaging in sexual abuse) shall be commensurate with the nature and circumstances of the acts committed, the staff member's disciplinary history, and the sanctions imposed for comparable offenses by other staff with similar histories.
- d) All terminations for violations of agency sexual abuse or sexual harassment policies, or resignations by staff who would have been terminated if not for their resignation, shall be reported to law enforcement agencies, unless the activity was clearly not criminal, and to any relevant licensing bodies.

D. Staff Training

It goes without saying that staff, inmate and volunteer training could prevent abuse or provide guidance about steps to take upon discovering sexual abuse. The PREA standards provide for extensive training including that referenced in the standards below.

28 C.F.R. § 115.31: Employee Training

- a) The agency shall train all employees who may have contact with inmates on:
 - 1) Its zero-tolerance policy for sexual abuse and sexual harassment;
 - 2) How to fulfill their responsibilities under agency sexual abuse and sexual harassment prevention, detection, reporting, and response policies and procedures;
 - 3) Inmates' right to be free from sexual abuse and sexual harassment;
 - 4) The right of inmates and employees to be free from retaliation for reporting sexual abuse and sexual harassment;
 - 5) The dynamics of sexual abuse and sexual harassment in confinement;
 - 6) The common reactions of sexual abuse and sexual harassment victims;
 - 7) How to detect and respond to signs of threatened and actual sexual abuse;
 - 8) How to avoid inappropriate relationships with inmates;
 - 9) How to communicate effectively and professionally with inmates, including lesbian, gay, bisexual, transgender, intersex, or gender nonconforming inmates; and
 - 10) How to comply with relevant laws related to mandatory reporting of sexual abuse to outside authorities.
- b) Such training shall be tailored to the gender of the inmates at the employee's facility. The employee shall receive additional training if the employee is reassigned from a facility that houses only male inmates to a facility that houses only female inmates, or vice versa.
- c) All current employees who have not received such training shall be trained within one year of the effective date of the PREA standards, and the agency shall provide each employee with refresher training every two years to ensure that all employees know the agency's current sexual abuse and sexual harassment policies and procedures. In years in which an employee does not receive refresher training, the agency shall provide refresher information on current sexual abuse and sexual harassment policies.
- d) The agency shall document, through employee signature or electronic verification, that employees understand the training they have received.

28 C.F.R. § 115.33: Inmate education

- a) During the intake process, inmates shall receive information explaining the agency's zero-tolerance policy regarding sexual abuse and sexual harassment and how to report incidents or suspicions of sexual abuse or sexual harassment.
- b) Within 30 days of intake, the agency shall provide comprehensive education to inmates either in person or through video regarding their rights to be free from sexual abuse and sexual harassment and to be free from retaliation for reporting such incidents, and regarding agency policies and procedures for responding to such incidents.

Finally, to combat the problems that sexual and familial relationships between inmates and correctional workers can raise, including security breaches and the reputation of the agency, correctional authorities have created and implemented anti-fraternization policies to regulate relations between correctional staff and inmates, both within and outside the correctional environment. These policies prohibit employees from engaging in relationships, romantic, financial, or otherwise, with current or former inmates and their families. Shoring up these policies would create another measure of protection for the agency and address another vector for sexual abuse in custody.

E. Recommendations for Moving Forward

I hope I have given you a useful overview of the some of the concerns I see in the Edna Mahan Facility based on the information I had at my disposal. To that end, I would recommend the following:

1. Strengthen the ability of Edna Mahan to address sexual abuse in custody as part of their PREA and other compliance efforts.
2. Provide funding for development of specialized training for staff and administrators.
3. Improve data collections for prevalence of sexual abuse by including all reported incidents whether substantiated or not.
4. Ensure inmate safety comes first and protect complainants from retaliation following their filing a report.
5. Create training practices for new officers and regular training and sensitization specific to sexual assault/PREA as current training only addresses "undue familiarity," "inmate manipulation," and broadly, PREA.
6. Provide training to prisoners and volunteers
7. Provide confidential ways for inmates, staff and volunteers to report suspected sexual abuse
8. Encourage the agency to seek technical assistance from the PREA Resource Center and the National Institute of Correction

F. Conclusion

Given over 30 years working on the issues of sexual violence in custody -- as an advocate for people in custody, as Project Director of a national effort to address sexual abuse in custody, and as a Commissioner serving 9 years on the National Prison Rape Elimination Commission -- I feel strongly that New Jersey has a unique responsibility to address sexual abuse in its correctional facilities, especially the Edna Mahan Facility. In order to do that, however, the issue of sexual abuse in custody has to be a priority for New Jersey. This hearing suggests that it is for this body of lawmakers.

Thank you again for inviting me to be here today, for the opportunity to speak to the PREA standards, and to my recommendations for addressing sexual abuse at the Edna Mahan Correctional Facility.