

**The Prison Rape Elimination
Act of 2003 and
Law Enforcement Agencies:
What Every Law Enforcement
Executive Needs to Know
[draft]**

Objectives

- Educate law enforcement executives about PREA and its relevance to agencies who manage short term prisoner holding facilities and court holding.
- Overview legal issues
- Provide recommendations re:
 - arrestee and detainee safety from sexual violence, and
 - staff sexual misconduct with arrestees and detainees
- Highlight prevention activities
- Identify resources

Logistics and Introductions

Module One

PREA Overview

Definitions

- For the purposes of this training the term “prison” applies to all federal, state, and local prisons, jails, police lock-ups, temporary holding cells, private facilities, and community settings such as residential facilities. The term “inmate” applies to any person held in a custodial setting for any length of time by any of the facility types mentioned above.

Quiz!

What Do You Know?

Overview of the 2003 Prison Rape Elimination Act (PREA)

These materials were developed by The Moss Group, Inc. under cooperative agreement #03P21G1Y4 awarded by the National Institute of Corrections.



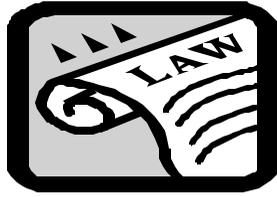
Highlights of the Act

- Supports the elimination, reduction and prevention of sexual assault within the corrections system
- Mandates several national data collection activities
- Provides funding for program development and additional research
- Creates a national commission to develop standards and accountability measures



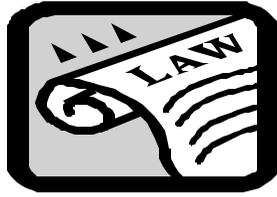
The Law

- Public Law 108–79 signed by President Bush on September 4, 2003
- Applies to all federal and state prisons, jails, police lock-ups, private facilities and community correctional settings such as residential facilities (includes adult and juvenile agencies)
- “Safe communities” has implications for probation, parole and other types of non-residential supervision
- Authorization is \$60 million annually. Appropriations for 2004 at \$40 million – no guarantee that funding will continue at full level (2004 through 2010)



Current Activities Under the Law

- BJS to collect prison rape statistics
- NIJ to provide grants for research
- NIC to offer training, technical assistance, and clearinghouse functions
- AG's Office authorized to provide grants to corrections to prevent, investigate, and punish (BJA); and create review panel
- National Prison Rape Elimination Commission appointed



The Law Findings

- The PREA law describes a variety of research findings and data, such as:
 - In 1999, there were over 10,000,000 admissions to and discharges from prisons and jails in US
 - Estimates of sexual assault rates and total number of assaulted inmates vary widely
- Discusses the impact of rape and prison sexual assault on:
 - Public safety
 - Public health
 - Institutional violence



The Law Purposes

1. Establish a zero-tolerance standard for the incidence of rape in correctional facilities in the United States.
2. Make the prevention a top priority in each correctional system.
3. Develop and implement national standards for the *detection, prevention, reduction, and punishment* of rape in correctional facilities.
4. Increase available data and information on the incidence of rape facilities.



The Law Purposes

5. Standardize the definitions used for collecting data on the incidence Increase the accountability of prison officials who fail act to *detect, prevent, reduce, and punish* arrestee sexual assault
6. Protect the Eighth Amendment rights of federal, state, and local prisoners.



The Law Purposes

8. Increase the efficiency and effectiveness of federal expenditures *through grant programs* such as health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness.
9. Reduce the costs imposed on interstate commerce.



The Law Statistics, Data, Research

- Bureau of Justice Statistics (BJS)
“shall carry out...a comprehensive statistical review and analysis of the incidence and effects of prison rape.”
- Includes national inmate survey and administrative data collection.
- Data collection from lock-ups – administrative record reviews



The Law Grants

- Grants are available to help states implement the PREA law.
 - Police/sheriffs not directly eligible for grants – work through state DOC
- Grants provide funds for:
 - Personnel
 - Training
 - Technical assistance
 - Data collection
 - Equipment to prevent and prosecute prisoner rape



The Law NPREC

National Prison Rape Elimination Commission

- Nine-member commission appointed by the President and Congress
- Commission reports to AG:
 - Findings and conclusions
 - Recommendations for national standards to reduce prison rape



The Law NPREC

Additionally, the National Prison Rape Elimination Commission will:

- Consult with accrediting organizations in developing its recommendations.
- Conduct public hearings whenever deemed necessary or appropriate.
- Collect any information from federal or state agencies deemed necessary to carry out duties.



The Law

National Standards

One year after receiving the Commission report, the Attorney General shall publish a final rule adopting national standards for the *detection, prevention, reduction, and punishment* of prison rape.

Development of Standards

- Now underway
 - Law enforcement professional membership organizations involved
- Draft due in Federal Register 2008
- Approve by NPREC in 08
- Forward to AG in late 08



The Law Requirement to Adopt Standards

- An organization responsible for the accreditation of federal, state, local, or private prisons, jails, or other penal facilities *may not receive any new federal grants* during any period in which such organization *fails* to meet any of these requirements.

What Does the Law Say About the Costs if We Don't Implement PREA?

- Higher levels of violence in facilities
- Health care expenditures, inside and outside of corrections systems
- Reduces the effectiveness of disease prevention programs by increasing the spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases
- Increases mental health care expenditures, inside and outside of corrections systems
- Increases the rate of post-traumatic stress disorder, depression, suicide, and exacerbates existing mental illnesses among current and former inmates/arrestees

What Does the Law Say About the Costs if We Don't Implement PREA?

- Liability – lawsuits from arrestees who have been sexually assaulted
- Public relations risk – bad press creates ill will in the community and the organization
- Risks of recidivism, civil strife, and violent crime by arrestees/inmates who have been victimized

What Does the Law Say about the Benefits of Implementing PREA?

- Reduced liability exposure to litigation
- Reduced costs in administration, medical, and mental health
- Safer environment for arrestees and staff
- Protects *public health* from sexually transmitted diseases arrestees may contract
- Protects *public safety* by releasing arrestees into the community who have not been sexually assaulted

Measuring Sexual Violence

Nonconsensual sexual acts

- Contact of any person without his or her consent, or of a person who is unable to consent or refuse; and
- Contact between the penis and the vagina or the penis and the anus including penetration, however slight; or
- Contact between the mouth and the penis, vagina, or anus; or
- Penetration of the anal or genital opening of another person by a hand, finger, or other object.

Measuring Sexual Violence

Abusive sexual contacts

- Contact of any person without his or her consent, or of a person who is unable to consent or refuse; and
- Intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person.
- Excluding incidents in which the intent of the sexual contact is to harm or debilitate rather than sexually exploit.

Measuring Sexual Violence

Staff sexual misconduct

- Any behavior or act of a sexual nature directed toward an inmate by an employee, volunteer, official visitor, or agency representative. Romantic relationships
- between staff and inmates are included. Consensual or nonconsensual sexual acts include:
 - Intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse, or gratify sexual desire; or
- Completed, attempted, threatened, or requested sexual acts; or
- Occurrences of indecent exposure, invasion of privacy, or staff voyeurism for sexual gratification.

Measuring Sexual Violence

Staff sexual harassment

- Repeated verbal statements or comments of a sexual nature to an inmate by an employee, volunteer, official visitor, or agency representative, including:
 - Demeaning references to gender or derogatory comments about body or clothing;
or
 - Profane or obscene language or gestures.

Why Now for Law Enforcement?

- Why is PREA relative unknown in law enforcement circles?
- Emphasis on institutional corrections
- Title of law
- Confusion in the field
- Lack of data about lock-ups
 - 2003, BJS 12,666 local police departments in the United States 26% (N=3,293 agencies) indicated that they operated a lock-up.

What Other Chiefs/Sheriffs Say

- Need to divert persons with mental illness/homeless – pose challenges as victims or predators
- Definitions of staff sexual misconduct with arrestees are vague.
- Employees are fearful of false allegations of misconduct
- Lack of knowledge about PREA and lack of coordination/collaboration with the state's department of corrections who may have received funding under PREA.
- Inexperienced staff are assigned to lock-ups.
- Training for police/law enforcement officers doesn't include information on the pathways of women and other vulnerable victims into the justice system.

Chiefs/Sheriffs, continued

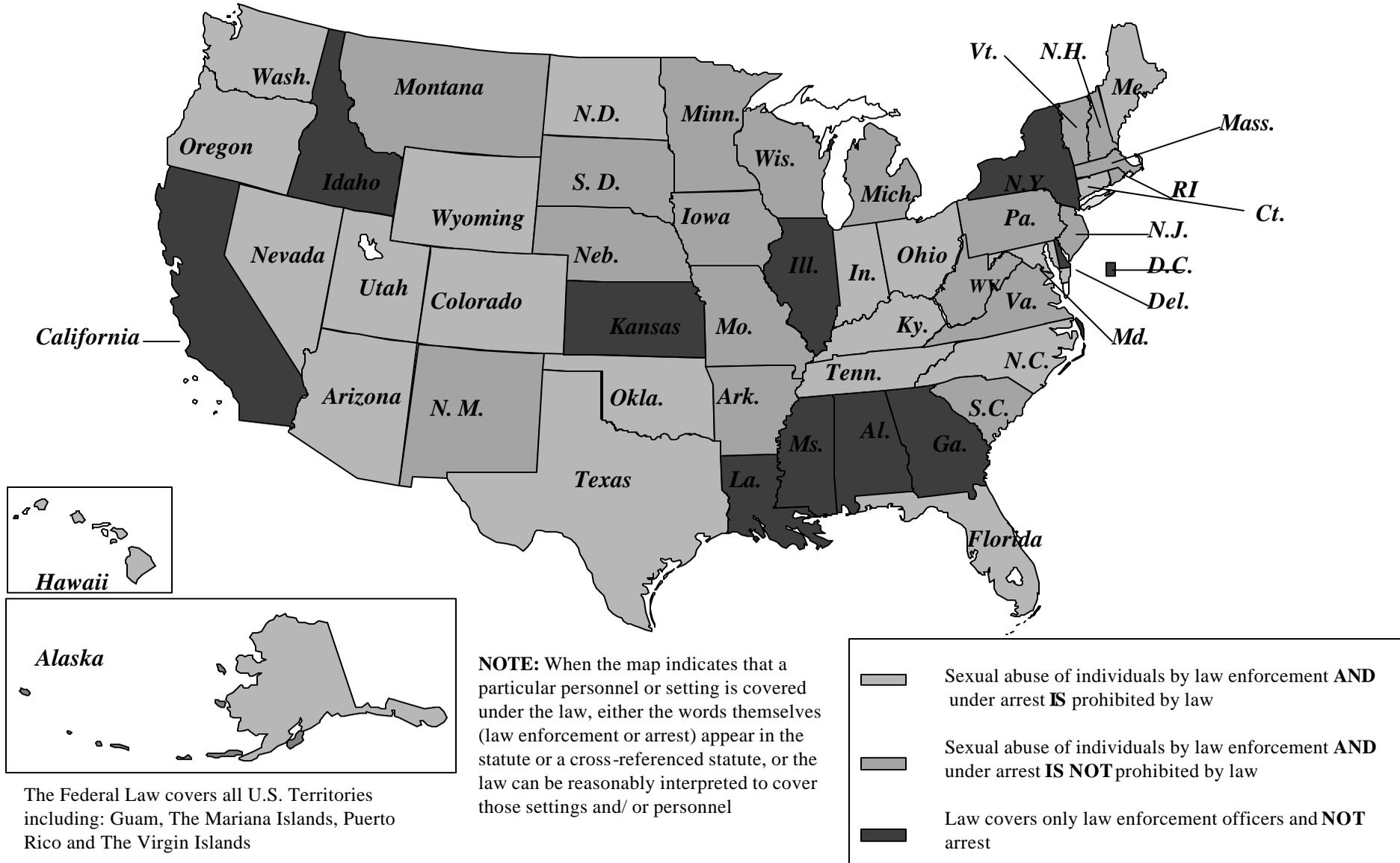
- Policies and procedures, along with risk assessment need updating, and in some cases, need to be written
- Link CALEA and PREA.
- Operating short-term holding facilities, lock-ups, are not the primary mission of law enforcement.
- Funds are scarce for improving or implementing risk assessments for arrestees, providing medical/mental health/pharmaceuticals for arrestees, improving the physical plant, and upgrading training and supervision of employees who work in lock-ups.

Overview of Legal Issues

State Criminal Laws Prohibiting the Sexual Abuse of Individuals by Law Enforcement

Smith Consulting – January 2007

Source: The NIC/WCL Project on Addressing Prison Rape 50 State Survey of State Criminal Laws Prohibiting the Sexual Abuse of Individuals in Custody (Current as of January 2007)



State Criminal Laws Prohibiting the Sexual Abuse of Individuals in Jails

Smith Consulting – January 2007

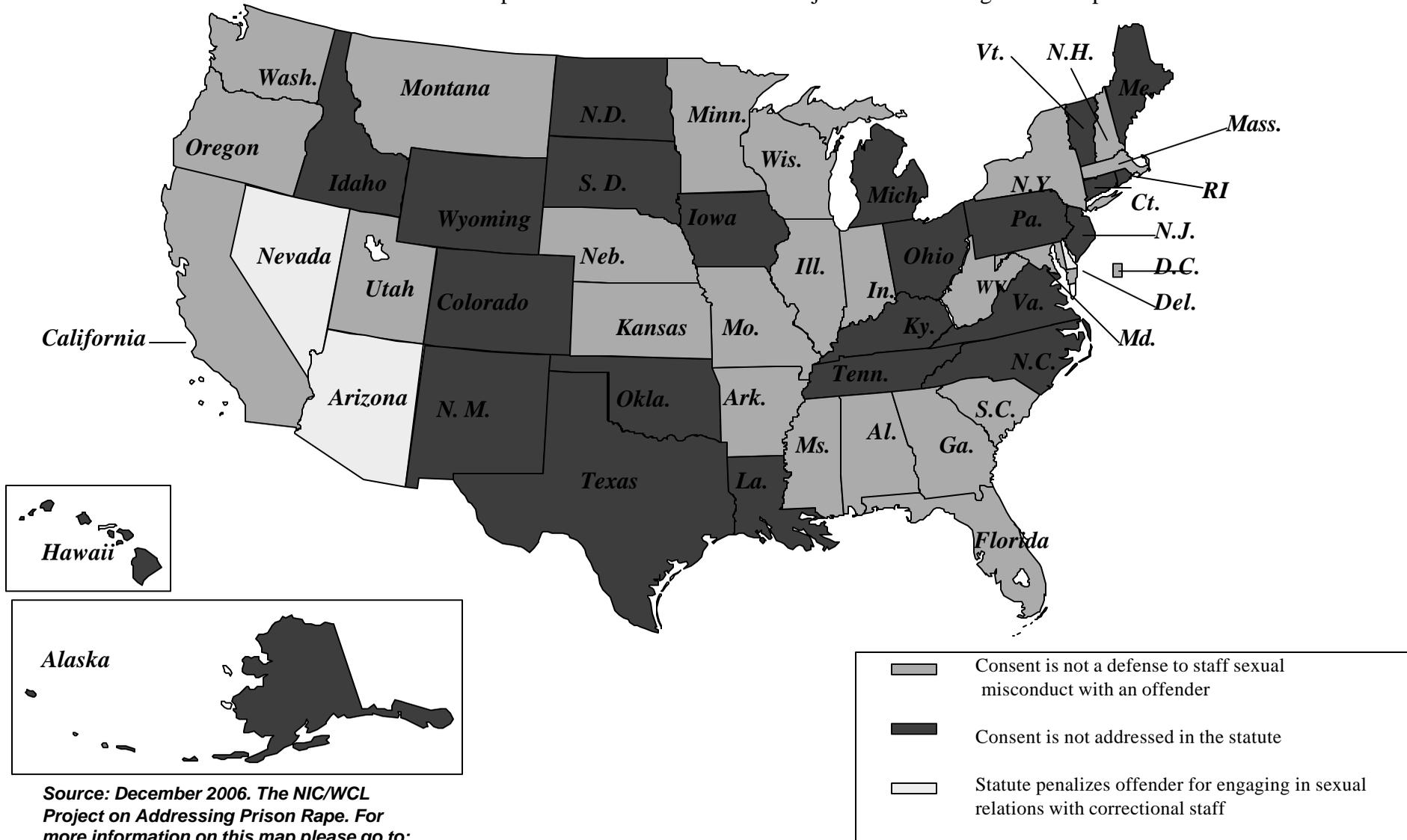
Source: The NIC/WCL Project on Addressing Prison Rape 50 State Survey of State Criminal Laws Prohibiting the Sexual Abuse of Individuals in Custody (Current as of January 2007)



State Criminal Laws Prohibiting Sexual Abuse of Individuals Under Correctional Supervision: Consent as a Defense

National Institute of Corrections/American University, Washington College of Law – December 2006

~ Used with permission of the NIC/WCL Project on Addressing Prison Rape



Source: December 2006. The NIC/WCL Project on Addressing Prison Rape. For more information on this map please go to: www.wcl.american.edu/nic/response.cfm

Need to Know:

- PREA = no new “cause of action”
- Focuses on existing duty to protect arrestees
- Need to involve prosecutors
- Arrestees cannot consent to sex with employees
- Lock-ups have duty to protect arrestees from other arrestees

Sources of Liability

- PREA
- Agency Policy
- State statutes prohibiting the abuse of persons in custody
- Laws enacted to Implement PREA (California)
- Other State Laws
- Constitutional Law

Sexual Misconduct Laws

- All 50 states, the federal government and DC have laws specifically covering the sexual abuse of persons in custody
- 32 states cover law enforcement officers
- 21 states cover arrests
- 39 states cover police lockups
- 49 states cover jails

Other State Criminal Laws

- Sexual Assault
- Statutory Rape
- Sodomy
- Sex Offender Registration
 - Juveniles
 - Adults
- Vulnerable Adult Statutes
- Licensing
- Malfeasance in Office/Official Misconduct
- Obstruction of Justice
- Making False Statements to a government official
- Mandatory Reporting
- Notification

Civil Liability -- Constitutional Claims

- Most common legal bases for challenges
 - 42 U.S.C. 1983
 - Eighth Amendment
 - Fourth Amendment
 - Fourteenth Amendment
 - State tort claims

42 U.S. C. 1983

- Creates a federal cause of action for the vindication of rights found elsewhere
- Key elements
 - Deprived of a right secured by the constitution or law of U.S.
 - Deprivation by a person acting under color of state law

Eighth Amendment

- Prohibits cruel and unusual punishment
- Legal standard is deliberate indifference
 - Established in a prison rape case Farmer v. Brennan, 511 U.S. 825 (1994)
 - Two part test
 - the injury must be objectively serious and must have caused an objectively serious injury
 - the official must have a sufficiently culpable state of mind and have acted with deliberate indifference or reckless disregard for the inmate's constitutional rights

What the court looks for

- Deliberate indifference to inmate vulnerability -- safety or health
 - Official knew of and disregarded an excessive risk to inmate safety or health
 - Official must be aware of facts from which an inference could be drawn that a substantial risk of harm exists and he must draw the inference

Fourteenth Amendment : Substantive Due Process

- Was the individual deprived of a life, liberty or property without due process of law?
- Lower legal standard than 8th Amendment
- Depending on situation – 14th Amendment may apply – juveniles and pre-trial detainees in particular

State Tort Law Claims

- Assault
- Battery
- Intentional infliction of emotional distress
- Negligent infliction of emotional distress
- Negligent hiring, firing, supervision, training

Liability

- Municipal
- Official
- Individual
- Personal

Qualified Immunity

- No violation of federal law -- constitutional or otherwise
- Rights and law not clearly established at the time of the incident
- Official's action was objectively legally reasonable in light of clearly established legal rules at time of the incident

Lessons Learned

- Examine patterns of misconduct at department
- Same employee/officer accused many times
- Off duty conduct which reflects on work performance
- Ineffective investigative procedures
- Must lead, manage and discipline

Conclusions

- Law enforcement officials can be held liable in their official, individual and personal capacities for sexual violence against arrestees by either staff or other offenders

Conclusions

Knowledge and involvement of prosecutor
important.

Conclusions

- Municipalities can be held liable for sexual violence against arrestees if the violence is a result of a policy or custom of the county or if it follows official policy set by the Chief of Police/Sheriff

Conclusions

- Failure to address sexual violence and misconduct has criminal, administrative and civil consequences for cities, counties, chiefs of police, sheriff, and law enforcement personnel.

Burning Issues



Module One - Summary

- This module has addressed:
- What is PREA
- Why now an issue for law enforcement
- Legal issues
- Burning issues (if used)

Module Two

What Should Your Agency Be
Doing about PREA?

Assuring Arrestee and Detainee
Safety

Issues

- Effective, systemic, strategies
- Policies and procedures
 - Investigations
 - Compliance/Data
 - Training
- Arrestee risk assessments
- Physical plant assessments
- Stakeholders
- Next steps - prevention

Is there a systemic issue?

- Policies/procedures
- Training
 - Professional boundaries
- Supervision of employees
- Supervision of detainees
 - Risk assessment
- Adequate physical plant
- Modeling the expected employee behavior
- Effective investigations
- Corrective actions
- Prosecutions

Policies and Procedures

- Administrative, Management and Operations
- Zero Tolerance
 - Definitions
 - What are prohibited behaviors?
 - What behaviors constitute staff misconduct and harassment?
 - What are reporting requirements for employees?
 - What are reporting avenues for arrestees/detainees
 - Commitment to investigate to exonerate
 - Commitment to improve operations
 - Fraternalization rules, reporting

Policies and Procedures

- Booking Procedures
- Supervision of arrestees
- Meals
- Bedding
- Arrestee Hygiene
- Emergency Procedures
- Maintenance/Janitorial

Policies and Procedures

- Assess to counsel
- Detainee privacy
- Searches, opposite sex
- Transferring information
- How arrestees ask for help or report allegations of misconduct
- Meth lab decontamination

Policies and Procedures

- Weekly inspections/documentation
- Transport
- Court Holding
- Investigations
- Memoranda of Agreement
- Firearms policy, use of force, chemical spray, non-lethal force
- Pharmaceutical distribution

Investigations

- Mechanism for complaints/allegations to reach investigators
- Mandate that all employees report allegations of arrestee/arrestee sexual violence and staff sexual misconduct with arrestees
- Commitment to fully investigate all allegations
- Commitment to refer for prosecution sustained allegations
- A means to incorporate lessons learned from investigations into agency policy, supervisory training, pre-and-in-service training, to improve arrestee risk assessment and lock-up physical plant.
- Address employees' code of silence

BJS Definitions

- substantiated, if they were determined to have occurred
- unsubstantiated, if the evidence was insufficient to make a final determination that they occurred
- unfounded, if they were determined not to have occurred
- investigation ongoing, if a final determination had not been made at time of data collection.

Compliance/Data Reporting

- BJS administrative record reviews
- Definitions
- Recording allegations
- Recording investigative outcomes

Training

- Assess current training.
- What topics are included in pre-service training?
- What topics are in in-service training?
- Are lesson plans up to day?
- Demonstration of proficiencies?
- Supervisory training
- Assessment of what topics need to be included
- How often to train?
- Who are you trainers?
- Challenges of instructing this subject?

Arrestee Risk Assessment

- Health
- Mental Health
- Vulnerability

What if . . . an arrestee . . . ?

- Needs medication and/or medical care?
- Exhibits behavior indicating mental illness and/or drug or alcohol withdrawal/reactions?
- States they are a victim of sexual assault/abuse while in your custody?
- Indicates he/she is a transsexual?
- States she is pregnant or nursing?
- Indicates they are fearful of a particular other arrestee?
- Appears to staff as a potential victim?
- Appears to staff as a potential predator?
- Past criminal history indicates violence?

Arresting Officer

- Did the arrestee exhibit any behaviors indicating mental health issues?
- Did the family, or bystanders, indicate the arrestee has any mental health issues?
- Does the arrestee appear physically injured?
- Is the arrest sober? Alcohol or legal or illegal drugs?
- Did the arrestee indicate any thoughts of self-harm or suicide?
- Did arrestee come from active meth lab?
 - Decontaminated before transport?

Mental Health

- Appears anxious
- Hallucinating
- Hearing voices
- Unfocused
- Acting out
 - Crying
 - Withdrawing
- Psychiatric history
 - Current treatment/immediate past treatment
- Developmentally disabled, appearance of low functioning

Suicide risk

- Nature of offense
- Shame/humiliation
- Sex offense involving minor
- Past attempts; evidence of past attempts
- First arrest
- Alcohol/drug involvement
- Voicing self-harm
- No family/friends in community

Medical Screening

- Appearance
 - Obvious pain/swelling
 - Injury (old or new)
 - Visible trauma, bruises, lacerations
 - Infection
 - Profuse sweating
 - Sutures, bandages, cast
 - Color
 - Pupils
 - Withdrawing from substance
- Pregnant/recent delivery/breast feeding
- Allergies
- Asthma
- Diabetes
- Seizures
- Epilepsy
- Cardiac health issues
- High blood pressure
- Recent surgery
- Current drug use
- Past drug use
- Current alcohol use
- Past alcohol use
- Did arrestee come from meth lab?
 - User?
 - Decontaminated?
- Movement impaired, wheelchair, crutches
 - ADA issues
- Current medications
 - With arrestee?
- Name of physician

Risk Assessment/Sexual Violence

- Indicates is homosexual [gay man, lesbian woman]
- Indicates is transsexual, inter-sex
- Physical stature indicates potential victimization
- Physical stature indicates potential predator
- Anger
- Fear
- Criminal charge (past and present)
- Disabled
- Young
- Old
- Developmentally disabled
- Mental Illness
- Previous sexual assault victim/perpetrator

Medical Attention

- On-site
- Hospital
 - Criteria for transport
- Allegations of sexual assault/misconduct
 - Transporting criteria
- Supervision at the hospital; secure area
- Medical information from hospital re: arrestee
 - Precautions
 - Drug interactions
- Prescriptions, how filled
- Medical authority approves procedures (CALEA 72.6.1)

Physical Plant Assessment

- Fire/Life Safety/Sanitation
- Sleeping provisions
- Suicide Hazards
- Meal Service
- Maintenance
- ADA Accessibility
- Secure pharmaceutical storage
- Communication ability with arrestees in the cell area

Stakeholder Involvement

- What MOUs are Needed?
- Investigating authority
 - Same agency investigative functions
- Sexual Assault Treatment Center
- Medical/Mental Health/Pharmacies
- Prosecutors
 - Education
 - MOU
- Other MOUs?

Next Steps

- Triage policies and procedures
 - Zero tolerance for misconduct
 - Commitment to investigations
 - Training of employees
- Review arrestee risk assessment
- Physical plant assessments regularly conducted
- Consider partnerships and options

Summary

- PREA includes police/law enforcement lock-ups and short-term holding facilities.
- PREA focuses agencies on already existing legal obligations to protect arrestees
- A systemic approach – examining all agency operations relating to arrest and short term holding is important
 - Policies/procedures
 - Training
 - Data maintenance
 - Investigations
 - Providing information to arrestees about their rights and how to report allegations
- Arrestees are screened to keep them safe is critical
- Adequate physical plant is maintained
- There are partnerships to insure safety

Technical Assistance is Available

- Training – contact Susan McCampbell
 - 239.597.5906
 - cippinc@aol.com
- On-Site technical assistance
 - Drew Molloy
 - Andrew.Molloy@usdoj.gov