

## Testimony to the National Prison Rape Elimination Commission

Courthouse, United States District Court for the Eastern District of Louisiana  
New Orleans, Louisiana

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### **Introduction**

My name is Carrie L. Sandbaken Hill, and I am an attorney who focuses her efforts in the areas of corrections law and administration. I have been involved in the corrections field for over twenty years, including time as General Counsel to the Utah Department of Corrections, and more recently as a criminal justice consultant providing training and consulting on a local, state and national basis.

### **Executive Summary**

It is my distinct privilege to provide this testimony from a legal and corrections administration perspective. If you take anything from my testimony, I would like it to be this: Decisions regarding prisoners require a balancing act between the prisoners' constitutional rights and the correctional institutions' need to maintain a safe and secure environment. It is a delicate balance that cannot be taken lightly, and, as recognized repeatedly by the United States Supreme Court, corrections administrators must be accorded deference in the operation of their facilities on a daily basis.

Addressing the issues being reviewed by this Commission, specifically in reducing, if not eliminating, rape in jails and prisons throughout the United States, thus requires a balancing of the competition between prisoner needs and rights and a facility's need to maintain a safe and secure environment. While the Prison Rape Elimination Act is a commendable piece of legislation, supported in my opinion by the vast majority of corrections administrators in this country, I urge this Commission to respect the institutional need to maintain safe and secure institutions and the judicially recognized deference according corrections administrators. In short, it is respectfully suggested that this Commission recommend broad mandates and then allow the administrators "in the trenches" to determine how best to implement those mandates.

## Constitutional and Legal Parameters

To understand the context in which PREA and any related rules and regulations will affect correctional administrators and institutions, it is essential to first understand what legal parameters those being asked to implement the Act and its progeny currently live with. Otherwise, this Commission might ask corrections officials to take actions inconsistent with other legal obligations to which they are bound and/or force them to choose between compliance and liability under a different act such as 42 USC §1983, for example.

The United States Constitution prohibits through the Eighth Amendment the infliction of any cruel and unusual punishment upon prisoners, both as to sentenced inmates and for pre-trial detainees as well through the Fourteenth Amendment.<sup>1</sup> On the other hand, the Constitution “does not mandate comfortable prisons,” Rhodes v. Chapman, 452 U.S. 337, 349 (1981), but neither does it permit inhumane ones, and it is now settled that “the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.” Helling v. McKinney, 509 U.S. 25, 31 (1993).

It is equally well-established that the Eighth and Fourteenth Amendments ultimately result in a “duty to protect” prisoners. This “duty to protect” stems from the premise that once incarcerated, the prisoner’s ability to protect him or herself is limited.

[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action [set by the Eighth and Fourteenth Amendments].

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 200 (1989).

The “duty to protect” requires “**reasonable measures** to guarantee the safety of the inmates.” Hudson v. Palmer, 468 U.S. 517, 526-27 (1984). Correctional officials are thus required to protect their prisoners from such ills as assault, suicide, fire, and preventable illnesses, as well as pains inflicted by themselves or by other prisoners or staff.

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<sup>1</sup> For purposes of this discussion, my use of the term “prisoner” includes both convicted inmates and pre-trial detainees.

Knowing that a duty is owed to prisoners to provide “reasonable” safety, correctional officials wrestle daily with the enormous task of ensuring a prisoner’s safety in an inherently unsafe environment.

Prisons are necessarily dangerous places; they house society’s most antisocial and violent people in close proximity with one another. Regrettably, “[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do...unless all prisoners are locked in their cells 24 hours a day and sedated.”

Farmer v. Brennan, 511 U.S. 825, 858-859 (1994), quoting McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991).

However, Farmer’s recognition of the inherently dangerous correctional environment does not give administrators a *carte blanche* excuse when a prisoner is harmed. Prison conditions may be “restrictive and even harsh,” Rhodes, 452 U.S. at 347, but gratuitously allowing the beating or rape of one prisoner by another serves no “legitimate penological objectiv[e].” Farmer, 511 U.S. at 833. “Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” Farmer, 511 U.S. at 834 citing Rhodes, 452 U.S. at 347. Therefore, knowing a duty is owed to prisoners to provide “reasonable care,” correctional officers must arm themselves with an understanding of their duty to protect those in their care and custody and also how to protect themselves against the ever present risk of liability in the event of litigation.

The starting point in every prisoner assault case is the U.S. Supreme Court’s decision in Farmer v. Brennan, 511 U.S. 825 (1994). The Supreme Court in Farmer laid out the legal standards applicable when determining whether a correctional institution failed to protect a prisoner in violation of the Eighth or Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. §1983. The Court ruled that an injured prisoner or a relative of an injured prisoner must establish by a preponderance of the evidence four elements, namely:

1. Conditions existed which posed a substantial risk of serious harm to the prisoner; and
2. Correctional officials knew of the substantial risk of serious harm; and
3. Correctional officials consciously disregarded the substantial risk of serious harm; and
4. The prisoner was harmed as a result of the defendant official’s deliberate indifference to the risk.

The first part of the Farmer equation involves determining whether a “substantial risk of serious harm” exists.

[A] prisoner can establish exposure to a sufficiently serious risk of harm “by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates....” [An] example [includes where] prison officials were aware that inmate “rape was so common and uncontrolled that some potential victims dared not sleep [but] instead...would leave their beds and spend the night clinging to the bars nearest the guards’ station.”

Farmer, 511 U.S. at 843-44 citing Hutto v. Finney, 437 U.S. 678, 681 n.3 (1978).

“[I]t would obviously be irrelevant to liability that the officials could not guess before hand precisely who would attack whom.” Farmer, 511 U.S. 844. Intake screening, classification, disciplinary proceedings, grievance, and incident reports and forms all thus become extremely critical documents in determining whether a substantial risk of serious harm existed and whether and when it was known by defendants.

The second and third elements in a failure to protect case involve knowledge and action or inaction. “Deliberate indifference” is established if the defendants knew of and yet consciously disregarded an excessive risk to the offender’s health or safety. Farmer, 511 U.S. at 837. It must be established using the facts and information available to the officials at the time of the incident that the defendants actually knew there was a substantial risk of harm. Actual knowledge is a term of art in this context. It is not enough that the plaintiff establish that there existed facts upon which the defendants could have inferred a substantial risk of harm. Instead, it must be established that the defendants actually drew the inference there was a substantial risk of harm to the prisoner.

Such knowledge is determined by the facts of each particular case. As stated earlier, intake screening, medical screening, classification, disciplinary history, grievance, and incident reports and forms are direct indications of knowledge. In addition, those same documents reflect action or inaction taken by officials. Each officer’s conduct is determined individually. Assuming the next shift or a fellow officer will handle a given situation could prove disastrous to an officer’s defense. As I train throughout the country, I preach, “Do something; Don’t do nothing!” Poor grammar aside, the concept is sound.

Once knowledge is determined, the court then wants to know what the officer did with the knowledge when it was understood or recognized by him or her. The officers essentially must have ignored or disregarded the substantial risk of harm to incur liability. “Officials could show that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger,” or “[t]hat they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.” Most importantly, a “reasonable response” does not deliberate indifference make. “Prison officials who actually knew of a substantial risk to

inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.” Farmer, 511 U.S. at 844. Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Eighth Amendment’s cruel and unusual punishment clause.

Perhaps a more detailed review of the seminal “duty to protect” case will be instructive in determining how knowledge is determined, the conduct required, and, ultimately, how deliberate indifference to a substantial risk of serious harm is determined.

Farmer v. Brennan is the forerunner of all duty to protect cases. At the center of the case is Farmer, a diagnosed transsexual; “[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,” and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change. Farmer, 511 U.S. at 829.

Prior to incarceration, Farmer wore women’s clothing, received silicone breast implants, was undergoing estrogen therapy, and underwent unsuccessful testicle removal. He alleged while incarcerated that he smuggled hormonal drugs into the facility. It was also alleged that he wore his uniform in a “feminine manner” with his shirt draped “off one shoulder.” Both parties agreed that Farmer displayed “feminine characteristics.” Id.

It was the practice of the federal prison in question to house “preoperative” transsexuals with inmates of the same biological sex. In Farmer’s case he was thus housed with other male inmates. At times he was housed in general population, although he was also segregated on numerous occasions. He was segregated several times for disciplinary reasons, yet on one occasion he was segregated for safety concerns.

Farmer was eventually transferred to another federal correctional facility for disciplinary reasons. Initially, Farmer was placed in administrative segregation, and later placed into general population with no objection from Farmer to any correctional staff regarding his move. Farmer alleged that within two weeks of his move into general population he was raped and beaten by another inmate. After Farmer reported the alleged assault, he was moved to a segregation unit. When Farmer sued, the Supreme Court adopted essentially a criminal law standard for determining liability under the Eighth Amendment.

[S]ubjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for ‘deliberate indifference’ under the Eighth Amendment.

Farmer, 511 U.S. at 839-40.

Correctional administrators “must both be aware of facts from which the inference could be drawn that substantial risk of serious harm exists, and [they] must also draw the inference.” Farmer, 511 U.S. at 837. Although the case was remanded for further analysis and proceedings before liability could be determined, Farmer is pivotal in establishing that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he or she **knew** that the inmate faced a substantial risk of serious harm and also disregarded that risk by failing to take reasonable measures to abate it.

## **PREA**

Re-connecting to the issue at hand, PREA aligns itself with the United States Supreme Court rulings in that sexual assault, rape, beatings or abuse of any kind is not only cruel and unusual punishment, but it is also not part of the prisoners’ penalty and most certainly it is unacceptable for pre-trial detainees who have not yet been adjudicated. Not only does the Supreme Court dictate that corrections officials cannot tolerate or close an eye to this kind of behavior, but now, Congress thru PREA demands it in more detail as well. The liability is high, and rightly so, for corrections officials who are deliberately indifferent in failing to protect their prisoners.

How correctional officials implement protocols to ensure that prisoner abuses, such as those specifically targeted by PREA, are reduced if not eliminated (although a goal that even the Supreme Court recognizes is unattainable given the corrections environment and the individuals confined therein) must be given a wide range of latitude. The Supreme Court recognizes that deference must be given to the judgment, expertise and discretion of correctional officials in the day to day operation of its facility. Each institution is unique and embraces its own unique operating styles given the institutional size, prisoner population, and staff, for example. One common objective remains the same, however; that is, to provide a safe and secure environment consistent with the constitutional rights of those confined. The balancing act required to achieve this object is ensuring that a prisoner’s Constitutional rights are not violated and at the same time maintaining the institutional mandate to maintain a safe and secure environment.

Deference though, according to well established judicial precedent, must be accorded those operating the institution so as to allow them the ability to determine how to best meet this objective. Detail oriented obligations could place administrators between the proverbial rock and a hard place. For instance, 42 USC §1983 requires "reasonable measures" when knowledge of a serious risk exists. More specific reporting obligations might not, in varying circumstances, constitute a reasonable reaction. As a result, the administrators are conflicted. Do they take the requisite reasonable measure to avoid §1983 liability, or do they follow overly detail oriented PREA guidelines?

The National Prison Rape Elimination Commission, in striving to attain its goal of developing national standards for enhancing the “detection, prevention, reduction, and punishment of prison sexual assault,” is encouraged to recognize the uniqueness of correctional institutions and recognize that great deference must be afforded each in meeting the NPREC’s objective of eliminating prison rape. It is a goal that correctional officials share with this Commission. Specifically how those goals and mandates are achieved though is the difficult part of the Commission’s task.

### **Mandatory Reporting**

To make PREA a reality requires reporting of rapes and similar abuses. Protection, treatment, investigation and reduction of sexual misconduct or battery cannot be rendered without knowledge. Of that there should be no issue. However, who should be required to report and what, as well as to whom such reports should be rendered, and possible confidentiality concerns surrounding such reports are each very difficult and individual issues. Given the existing Constitutional requirements and duties of jails and prisons, as well as the Supreme Court’s deference to correctional administrators with regards to the day to day operations of the their facilities, I urge the Commission to move cautiously in its recommendations for specific PREA protocols regarding reporting. How the individual institution chooses to implement a reporting system is best left to the individual jail or prison. Facility size, prisoner population, staffing, on-site medical care, and the like all play a role in how a correctional administrator chooses to comply with the Constitutional requirements of protecting their prisoners, as well as the requirements of PREA.

### **Required Policies vs. Required Procedures**

Despite the need for deference, required legislative policies would be appropriate for uniformity amongst the jails and prisons as they offer guidance into what is expected. The specific procedures though of how to implement those policies should be left to the expertise of each individual institution based on their unique operating structures.

In response to their recognized Constitutional requirement of protecting their prisoners and PREA, Broward County Florida Sheriffs’ Office (BSO), for example, opted for a mandatory reporting system by any individuals who come into contact with their prisoners.<sup>2</sup> The Broward County policy requires that all staff, contractors, vendors, and visitors who know of or suspect that a prisoner may be the victim of a sexual battery or engaged in sexual misconduct, must report this information to correctional officials. In keeping with the Eighth and Fourteenth Amendments’ constitutional dictates, an institution cannot put up

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<sup>2</sup> Aligning with the requirements of the Eighth and Fourteenth Amendments, reporting cannot and should not be only by the prisoner.

blindness and say that they did not know of a sexual battery or assault because of a failed reporting system. One could easily argue that it is clearly established law that a reporting system, of whatever kind the institution chooses to implement, is vital in obtaining the requisite knowledge. Failure to do so would not only trigger a possible 42 USC §1983 action, but also now potential sanctions from PREA.

Specific policies the NPREC could include which mirror the Broward County model, and thus mandate action without micro managing, include:

- **Mandatory Sexual Misconduct/Battery Prevention Training** to include but not be limited to:
  - Potential signs of victimization, potential victimization or sexually aggressive behavior;
  - Mandatory medical referral for individuals who are either victims, potential victims or exhibit aggressive sexual behavior; and
  - Classification review for individuals exhibiting signs of victimization, potential victimization or aggressive sexual behavior.
- **Mandatory reporting** by all staff, vendors, and visitors who know of or suspect that a prisoner may be the victim of a sexual battery, or engaged in sexual misconduct to jail/prisoner officials. Who the designated individual is that will receive such reports would be decided by the correctional administrator (in BSO's case, a report by a prisoner, staff member, vendor, or visitor can be made to any jail staff). The designated individual should then immediately notify not only medical personnel for treatment, evidence gathering and potentially a mental health referral, but also security staff who can identify the victim, identify the perpetrator, act quickly to prevent further victimization, preserve the crime scene, protect other prisoners from potential victimization, and affect discipline, both administrative and criminal if warranted. The classification of those involved should also be reviewed.
- **Mandatory Sexual Misconduct/Battery education for prisoners** upon intake and/or in the prisoner handbook.
- **Mandatory Sexual Misconduct/Battery training for all staff** of an institution on Sexual Misconduct/Battery.
- **Mandatory Sexual Misconduct/Battery intervention, response and investigation** policies.
- **Mandatory Documentation.**

- **Mandatory internal audits.**

**The Broward County Sheriffs' Policies and Procedures regarding sexual misconduct and/or battery is impressive and thorough. It is reflective of how one institution chooses to embrace their constitutional obligation to protect their prisoners but also the laudable goals of PREA.**

### **Confidentiality in Reporting**

The mandatory reporting of rape and similar abuses may run into some difficulties depending on to who the complainant reports the incident. For example, what if a prisoner initially reports the incident to a medical doctor or the prisoner's clergy? Is there a doctor-patient, or a religious privilege applicable which must be honored by the doctor? Such privileges are often a matter of state law. This Commission should thus consider the implications of a broad scale obligation to report a rape applicable to all who come into contact with such allegations, or at least the applicable sanctions against those who might fail to comply with PREA regulations.

It may be useful for this Commission to know, however, that, from at least a federal correctional perspective, jail and prison medical records of their prisoners are considered property of the institution. Correctional officials must have access to "confidential" information in a prisoner's medical files for legitimate penological purposes such as classification, housing, diet and a host of other special needs the prisoner might have.

It is thus not surprising to note that the Sixth Circuit Court of Appeals, for example, does not recognize the "confidentiality" of prisoner medical records. For instance, in Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir.1994), the Sixth Circuit Court of Appeals explicitly held that the right of privacy is not implicated at all by prison officials' disclosure of an inmate's medical status. Id. at 740; see also J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981) (concluding that "the Constitution does not encompass a general right to nondisclosure of private information"); Tokar v. Armontrout, 97 F.3d 1078, 1084-1085 (8th Cir. 1996) (noting that prisoners do not have a constitutional right to confidentiality of their medical records); see also Reeves v. Engelsjerd, 2005 WL 3534906, \*4 (E.D. Mich. 2005) ("Although other Circuits have recognized a constitutional right to privacy in the information in one's medical records, the Sixth Circuit has specifically held that such a right generally does not exist.").

There may be a legal conflict between at least federal and state law in this area. In Tennessee, for instance, T.C.A. § 10-7-504(a)(1) provides that the medical records of county inmates shall be treated as confidential and shall not be open for inspection by members of the public. One could argue though that no conflict exists with federal law here because security staff are not members of the public and therefore are entitled to the information on a need-to-know basis.

Correctional officials have a duty to know so that they can carry out their constitutional obligations to the prisoners they safe guard. In fact, should the officials fail to act in the face of knowledge, they may incur liability.

As mentioned previously, in my experience prisoner medical records are, in most instances, statutorily considered privileged and are required to be kept separate from other prisoner files. This is, in my opinion, standard practice throughout the United States. Access to a prisoner's medical file(s) is permitted on a need-to-know basis. That "need-to-know" basis includes security staff. Pertinent medical information regarding a prisoner is critical in making decisions regarding classification, housing, diets and other needs individual to that particular prisoner. Again, in my experience, I have never encountered a situation where medical is reluctant to share medical information with security staff, assuming there is a valid penological reason for the information.

It goes without saying that not every officer or deputy requires access to this information. However, depending on the situation, they would and should be able to access the information in the event it is required. This medical "access" is part of the requisite knowledge required by correctional staff in protecting their prisoners. If a prisoner were to report that he/she has been a victim of sexual battery or misconduct, that information is imperative to share with correctional staff. It is imperative for decisions regarding housing, classification, discipline and the like.

Correctional officials are professionals and the word "confidential" is a term of art, and one which must include the correctional officials whose purpose is to provide a safe and secure environment for those individuals confined within. Corrections cannot be left out of the loop. The liability is significant for not only the institution in that it may be subject to liability for failing to act. In addition, failing to know may put other prisoners at risk since security staff are unable to act upon that about which they are unaware.

As this Commission considers confidentiality issues, I encourage it to include correctional security staff under this "confidential"- "need-to-know" umbrella. They must be involved and they must have access. As professionals, correctional staff can define who has a "need-to-know;" it is part of their expertise that the Supreme Court acknowledges and confers deference. Turner v. Safley, 482 U.S. 78 (1987). If an improper disclosure is made, there can and should be repercussions.

In addition, to avoid any conflict between federal and state law, medical staff should be required to report sexual battery or misconduct to security staff and then be exempt from any statutory liability for doing so. The ultimate goal is to protect this particular prisoner as well as every other prisoner within the institution. Sharing this confidential information is not a form of harassment,

gossip or punishment, but rather a means to ensure a safe and secure environment for everyone.

How many and which correctional staff should be aware of the complaint? A broad based disclosure could result in unwanted retribution. On the other hand, security and punitive issues can not be addressed unless the allegations are aired. As a result, this witness again suggests with all due respect that this Commission be judicious in the scope and extent of any regulations or mandates it recommends. Correctional staff, however, remains a vital link in the reporting and confidentiality of a sexual battery and misconduct charges.

**HIPPA CONSIDERATIONS:**

The Commission should further consider whether HIPPA (Health Insurance Portability and Accountability Act) will be implicated by any mandatory reporting guidelines. This witness is not by any means an expert in HIPPA, but suggests the issue nonetheless be considered. I would like to point out though that an exception to HIPPA for corrections exists. In the event a prisoner reported a rape or sexual battery to a health care provider falling within the definition of a "cover entity" as defined by HIPPA, the "covered entity" is allowed to disclose protected health care information regarding the prisoner without the prisoner's consent or authorization so long as the correctional staff "represents" that the protected health care information is needed for:

- The provision of health care to such individuals;
- The health and safety of such individuals or other inmates;
- The health and safety of the officers or employees or others at the correctional institution;
- The health and safety of such individuals and officers or other persons responsible for the transporting of inmates or their transfer from one institution, facility or setting to another;
- Law enforcement on the premises of the correctional institution; and
- The administration and maintenance of the safety, security, and good order of the correctional administration.

45 C.L.R. §164.512(k)(5)(i).

As my esteemed colleague, William Collins, stated in his article "*What Is All The HIPPA Fuss About?*", Corrections Managers' Report, Volume X, No 2, at 26 (August/September 2004):

"Correctional institutions (which include jails) may use protected health information for any purpose for which the information may be disclosed."  
45 C.L.R. §164.512(k)(5)(ii).

I reiterate that I am not an expert on HIPPA, but the regulations and exceptions within the Act should be considered by this Commission concerning

confidentiality and again the inherent need for correctional staff to fall within any regulations concerning those having a need-to-know of any reported sexual battery, assault or sexual misconduct.

### **Conclusion**

PREA is necessary and well intended legislation. Its importance, however, should not be diminished by overly detailed regulations and mandates. Instead, this witness recommends that the officials trusted with the difficult task of running our nation's jails and prisons on a daily basis be given broad mandates and sufficient deference to implement those mandates consistent with the unique characteristics and qualities of their specific institution. Should they fail to comply, our judicial system already has in place consequences and remedies. Such an approach will achieve the necessary goal of protecting prisoners from sexual abuses such as rape, while at the same time allowing the correctional system to continue its efforts to balance their other mandate of providing a safe and secure environment consistent with the constitutional rights of those confined within the institution's walls.

I thank you for your consideration.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge and belief.

Executed this \_\_\_\_ day of November, 2007.

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Carrie L. Sandbaken Hill