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Testimony: Brenda V. Smith
Position: Support
House Bill 456
Before the House Judicial Proceedings Committee

Good Afternoon,

My name is Brenda V. Smith, I am a Professor of Law at American University's Washington College of Law and Director of the National Institute of Correction/Washington College of Law Project on Addressing Prison Rape. I am also a sitting commissioner with the National Prison Rape Elimination Commission. I was appointed to that position in November 2003 by House Minority Leader Nancy Pelosi.

I am here to testify in support of HB 456 which is a modest proposal that seeks to strengthen Maryland's existing law prohibiting the sexual abuse of individuals in custody. I testified in front of this body over ten years ago in support of the original legislation and am happy to be here once again to support Maryland's legislative efforts.

My testimony will cover three areas: (1) national standards and definitions; (2) the proposed coverage expansion; and (3) penalty enhancements.

I. National Standards and Definitions

This proposed expansion of the Maryland legislation will put Maryland's current law more in line with legislation prohibiting the sexual abuse of person in custody in other states. It is also clearly indicated give the recent passage of federal legislation, the Prison Rape Elimination Act (PREA) of 2003.¹ With the passage of the proposed legislation, Maryland would be more in line with definitions and coverage set forth under PREA.

The Prison Rape Elimination Act was passed in September, 2003, with unanimous support by both Democrats and Republicans in the United States Congress – no mean feat. The Prison Rape Elimination Act does not create any new causes of action, for offenders to sue either states or the federal government for failure to abide by its terms. However it redefines what states and jurisdictions should be doing to address staff on offender and offender on offender sexual abuse in correctional settings. Though PREA uses prison in the name, it applies to a wide variety of correctional settings including

¹ See generally The Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2003)

juvenile settings, immigration detention facilities, jails, community correction agencies and police lock-ups.

With the passage of the PREA, two new sources for defining staff sexual misconduct emerged -- the definition in the new law itself and a definition developed by the Bureau of Justice Statistics (BJS) for the purpose of uniformity in data collection. The Prison Rape Elimination Act establishes a zero-tolerance standard for rape in correctional settings and defines it as,

“The carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person forcibly or against that person’s will or achieved through the fear or threat of physical violence or bodily injury.”²

Additionally, PREA requires the Bureau of Justice Statistics to collect data on the incidence and prevalence of sexual violence in correctional facilities. Under the PREA mandate, and for the purposes of its data collection, BJS is able to create a definition of inmate on inmate rape and importantly for the purposes of this hearing, for staff sexual misconduct. The Bureau of Justice Statistics defines staff sexual misconduct as,

“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 and non-consensual sexual acts include: intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to arouse or gratify sexual desire; completed, **attempted, threatened, or requested sexual acts; or occurrences of indecent exposure, invasion of privacy, or staff voyeurism for sexual gratification.**”³

(emphasis added). While BJS has developed a definition that relates to offender on offender rape, I will limit my testimony to discussing staff on offender sexual abuse. I would be happy to discuss the contours of their response to inmate on inmate rape in response to any questions you might have.

II. Expansion of Coverage

The proposed amendments in HB 456 are both good and necessary and should be passed absent some compelling reason or a particularly local concern. Maryland’s law should be consistent with the laws in other states both in terms of staff that the law covers and prohibited conduct. I reiterate HB 456 is a modest expansion of coverage.

² *Id.* at §15609

³ See generally Allen J. Beck and Timothy A. Hughes., Bureau of Justice Statistics, U.S. Department of Justice, Sexual Violence Reported by Correctional Authorities, 2004 (2005).

A. Conduct

Currently only 11⁴ other states have laws that are as narrowly drawn as the Maryland law, covering only penetration [or intercourse] between offenders and correctional employees. So Maryland's approach is in the clear minority. Comprehensive laws acknowledge that an act of intercourse or penetration is only one step along the continuum of sexual abuse of offenders. Acts such as touching, fondling, forcing the offender to masturbate, staff masturbation, and exposure of either the staff or offender are all acts that have been reported in case law. These are also acts that other states prohibit in their staff sexual misconduct statutes. These states recognize that many other acts, in addition to penetration, are sexually abusive and have no place in a correctional environment, particularly when perpetrated by staff against inmates.

B. Personnel Coverage

1. In General

Most states cover a broad range of correctional employees and staff including corrections staff, administrators, contractors, clergy, food service employees, volunteers, medical and mental health staff, and maintenance workers. Currently only nine states⁵ have laws which only cover "employees." The reality is that in today's environment, a wide range of individuals with different statuses interact in the correctional environment- contractors who provide medical services, teachers who are employed by the department of education, and volunteers from a wide variety of agencies.

Well-crafted state criminal laws prohibiting sexual abuse of person in custody should cover everyone who comes into an agency and could have contact with an offender. It is important to recognize that even individuals who may not have authority over an offender still have the opportunity to be in direct contact with them. Those individuals include volunteers, food service providers, teachers, contractors, medical and mental health staff, clergy, and social workers. It is because many of these individuals have the greatest interaction with an offender in the most private of settings that covering them under any criminal law seeking to protect inmates from abuse is important. States that do not include provisions for volunteers, clergy, medical staff, food service workers, maintenance crews, and contractors have found themselves severely limited in who they can criminally sanction for staff sexual misconduct.

⁴ See Brenda V. Smith, *50 State Survey of Criminal Laws Prohibiting the Sexual Abuse of Individuals in Custody*, National Institute of Corrections/Washington College of Law Project on Addressing Prison Rape (2005). The eleven states criminally sanctioning only penetration are: Arkansas, Delaware, Rhode Island, New Jersey, Virginia, Oklahoma, New Mexico, Iowa, Mississippi, West Virginia, and South Dakota.

⁵ *Id.* Those states are Alabama, Arkansas, Delaware, Louisiana, Mississippi, Missouri, South Dakota, Tennessee and Wisconsin

2. Juvenile Agencies

Currently 26 states cover juvenile agencies explicitly, 18 states cover juvenile agencies by implication. Only five states⁶ do not cover juvenile justice agencies in their criminal laws prohibiting sexual abuse of persons in custody. States have used a range of terms to structure coverage of juvenile facilities. For example, Iowa defines juvenile detention facilities as “juvenile detention and juvenile shelter care homes.”⁷ In Washington, “a person is guilty of custodial sexual misconduct when the victim is a resident in a juvenile detention center,”⁸ while Texas includes all facilities “operated by or under contract with the Texas Youth Commission or a facility operated by or under contract with a juvenile board or a juvenile offender.”⁹

3. Community Corrections Agencies

While your current law and HB 456 do not provide for it, most state laws prohibiting the sexual abuse of individuals in custody also cover community corrections agencies in their staff sexual misconduct statutes. At present, 41 states cover probation and parole agencies. I encourage you to consider including these agencies in this legislation or at another time. The trend in state laws is to cover offenders under correctional supervision – whether institutional or in the community. Criminal laws which include both secure confinement (prisons and jails) and community corrections agencies (probation and parole), can begin to address misconduct which occurs in institutions but persists into the community.

III. Enhanced Penalties

Though enhancing penalties for staff sexual misconduct is not part of the current legislative proposal, I urge you to consider penalty enhancement either in this bill or at a later time. Currently Maryland is among only four states that provide misdemeanor penalties for sexual abuse of offenders by staff.¹⁰ In most states a conviction of staff sexual misconduct with an offender carries a felony conviction including jail or prison time and heavy fines.¹¹ Penalties also may include loss of license and in some states registering as a sex offender. In April of 2005 the Office of the Inspector General (OIG) published a report which found that misdemeanor penalties for Bureau of Prisons staff who sexually abused federal prisoners significantly impeded prosecution of sexual

⁶ *Id.* Those states are Rhode Island, Mississippi, Missouri, Indiana and South Carolina.

⁷ West's Iowa Code Ann. §§ 709.16 (2) (2003)

⁸ Wash. Rev. Code Ann. Ch 9A §§ 44.160, 44.170 and 20.021 (2004)

⁹ Tex. Penal Code Ann. §§ 39.04 and 12.35 (2004)

¹⁰ Smith *supra* note 3 Those states are Iowa, Kentucky and Tennessee

¹¹ *Id.* Those states are Washington, Oregon, California, Idaho, Montana, Wyoming, Utah, Nevada, Arizona, New Mexico, Colorado, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Minnesota, Missouri, Arkansas, Louisiana, Mississippi, Illinois, Wisconsin, Michigan, Indiana, Ohio, Alabama, Georgia, Florida, Alaska, Hawaii, Maine, New Hampshire, Massachusetts, New York, Rhode Island, Connecticut, Pennsylvania, West Virginia, Virginia, New Jersey, Washington, DC, Delaware, North Carolina and South Carolina.

misconduct in the Bureau of Prisons.¹² The report indicated that prosecutors were less interested in prosecuting sexual abuse case of offenders regardless of the strength of the evidence because the crimes are not felonies.¹³ On the heels of that report, recently enacted legislation increased the penalties for sexual abuse of prisoners in Federal Bureau of Prisons facilities and broadened the scope of coverage to include contractors.¹⁴

The impact of having minimal sanctions for these offenses is clear. Prosecutions are rare. Staff receives probation, a fine or minimal jail time. In most cases staff are not prosecuted and are allowed to resign with no record of the behavior that contributed to the firing. They are then free to secure correctional employment in other jurisdictions and settings and may go on to repeat the same behavior.

IV. Conclusion

In conclusion, HB 456's proposed changes to the Maryland law prohibiting sexual conduct between correctional or Department of Youth Services and inmates or confined children is a small but necessary step to provide greater protections for persons under custodial supervision in Maryland. If passed this amendment would place the state of Maryland more in line with the current state laws on prohibition of sexual misconduct between staff and offenders. I strongly urge you to pass HB 456, and to look further into including community corrections agencies such as probation and parole as well as to enhancing penalties for this crime in Maryland.

Thank you.

¹² See generally Office of Inspector General Deterring Staff Sexual Abuse of Federal Inmates (April 2005)

¹³ *Id.*

¹⁴ See 18 U.S.C. §§ 1177 (a), 2243 (b) and 2244 (2005). Section 1177(a) was amended to include contractors; § 2243(b), Sexual Abuse of a Ward increases penalties from one to five years in prison; § 2244, Abusive Sexual Contact increases penalties from six months to two years.