



# PREA LEGAL LANDSCAPE: Prisoner Litigation

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**IMPACT/JUSTICE**

NATIONAL  
**PREA**  
RESOURCE  
CENTER



# Erica Gammill

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Senior Program Associate

National PREA Resource Center

[egammill@impactjustice.org](mailto:egammill@impactjustice.org)

## **National PREA Resource Center Mission**

The mission of the PRC is to assist adult prisons and jails, juvenile facilities, lockups, community corrections, and tribal facilities in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, monitoring, responses to incidents, and services to victims and their families.

# Logistics

## Technical support

- Please contact the ZoomPro Webinar support line at (888-799-9666)—select “2” when prompted to get support with technical difficulties.
- When asked please provide the Webinar ID (978-3324-7538) so they know which event is associated with your technical issues.
- If you have trouble using this function, please contact Zack Ali at: [zali@impactjustice.org](mailto:zali@impactjustice.org).

# Logistics

## Submitting questions

- Due to the detailed content of this webinar, we have scheduled a separate Q&A Live Session.
- A live Q&A session for this webinar will be held the following week on Friday, March 5, 2021 at 2:00 p.m. EST.
- A registration link will be included with the evaluation survey and also posted with the archived webinar recording of this presentation shortly.

# PREA Legal Landscape



Prisoner  
Litigation

Employment  
Issues

Criminal  
Prosecution



# Brenda Smith

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**Professor of Law**

**Director, The Project on Addressing Prison Rape**

American University

Washington College of Law

4300 Nebraska Avenue

Washington, DC 20016

**[bvsmith@wcl.american.edu](mailto:bvsmith@wcl.american.edu)**

# Prisoner Litigation: Topics Covered

Common Legal Terms

PREA as Causes of Action

PREA Bolstering Other  
Causes of Action

PLRA and PREA

Oversight: CRIPA

# Common Legal Terms

## Who sues?

### Individual



# Common Legal Terms

## Who sues?

### Class Action

- **Numerous** members of class
- **Commonality** of law or fact amongst class
- **Typical** claims for representatives and the class
- **Adequacy of representation** for the class



# Common Legal Terms

## Why people sue?

### Tort

- Act or omission causing injury or harm
- Civil liability
- Generally defined by state law

# Common Legal Terms

## Why people sue?

### Civil Rights Claim, 42 U.S.C. § 1983

- Violation of Constitutional rights by a person acting “under color of” state-level or local law

# Constitutional Amendments in PREA-Related Cases

## Eighth Amendment

- *“Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted.**”*
- Government’s deliberate indifference to sexual abuse of incarcerated person is cruel and unusual punishment.

# Constitutional Amendments in PREA-Related Cases

## Eighth Amendment

Legal standard of “deliberate indifference”- two-part test. *Farmer v. Brennan*, 511 U.S. 825 (1994).

- The injury must be objectively serious;
- The official must have acted with deliberate indifference or reckless disregard for the inmate’s constitutional rights.

# Constitutional Amendments in PREA-Related Cases

## First Amendment

- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and **to petition the Government for a redress of grievances.**”
- Retaliation for reporting abuse violates free speech rights.

# Constitutional Amendments in PREA-Related Cases

## Fourth Amendment

- *“The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable searches and seizures**, shall not be violated, ...”*
- Sexual abuse during search is violation of Constitutional right against unreasonable searches.

# Constitutional Amendments in PREA-Related Cases

## Fourth Amendment – considerations

- Whether the individual has a legitimate expectation of privacy.
- Whether the search or intrusion was reasonable.
- Important implications for cross-gender searches.

# Constitutional Amendments in PREA-Related Cases

## Fourteenth Amendment

- *“... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**”*
- Lack of due process in deprivation of rights.

# Constitutional Amendments in PREA-Related Cases

## Fourteenth Amendment

- **Lower legal standard** than Eighth Amendment, asking whether the individual was deprived of life, liberty, or property without due process of law.
- Applicable to **juveniles** and **pre-trial detainees**, when inmate is in detention and not convicted of a criminal offense.

# Common Legal Terms

## Motion to Dismiss

- Early stage of case
- Does not consider facts
- Asks, “Does Court have power to do anything?”
- Dismiss with prejudice or without prejudice

# Common Legal Terms

## Motion for Summary Judgment

- After Motion to Dismiss phase
- Evaluation of facts
- Asks, “Do the facts entitle moving party to win?”
- Can be filed after case has moved out of the motion to dismiss phase

# Common Legal Terms

## Sovereign Immunity

- Government cannot be sued without its consent.
- Only applies to federal and state governments, not local governments or municipalities.
- Federal and state governments can waive immunity, as they have in tort matters.
- State governments are not immune to violations of federal or state constitutions.

# Common Legal Terms

## 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.
- Only applies to suits against government officials as individuals, not suits against the government for damages caused by the officials' actions.

# Common Case Outcomes

## Settlement

- Instead of reaching a verdict through trial,
- especially if anticipate losing more if take case to trial.
- Best to avoid this choice by implementing PREA standards.



# Common Case Outcomes - Settlement

**Trans Woman Wins  
\$100K Settlement After  
Reporting Brutal Rape in  
a Men's Prison**

**Man pleads guilty in sexual  
assault of female detainee at  
Markham courthouse that  
sparked reforms, led to  
\$3.25M settlement**

**Federal Court Awards  
\$3,750,000 in Damages for  
Sexual Assault by Prison  
Guards**

**Women in jail endured group strip  
searches. L.A. County to pay  
\$53 million to settle suit**

**Rikers Inmate Who Accused Guard of Rape  
Settles Suit for \$1.2 Million**

**\$100 Million Settlement in Michigan  
Prisoners' Sexual Abuse Suit**

# Common Case Outcomes

## Damages

- The amount of money which a plaintiff (the person suing) may be awarded in a lawsuit. Common forms of damages include:
- Compensatory - for what was actually caused by injury
- General - subjective valuation for pain and suffering, mental anguish, future problems, other harm
- Punitive - punishment, setting an example



# Common Case Outcomes

## Injunctive Relief

- Court Order prohibiting an act
- Act requested in a petition to the court
- Not a monetary judgment



# Common Case Outcomes - Case Law

***Zollicoffer v. Livingston***, No. 4:14-CV-03037, 2016 WL 1165776 (S.D. Tex. Mar. 14, 2016).

**Facts:** Plaintiff, a transgender woman, claimed that since being incarcerated twelve years prior, she has been repeatedly raped, forced into non-consensual sexual relationships, and assaulted by other inmates. Plaintiff allegedly reported the sexual assaults to Defendant employees on multiple occasions, but no action was taken.

**Court Ruling:** The court granted Plaintiff **injunctive relief** to be kept out of the general population. The court stated, “Plaintiff was sentenced to serve time in prison. She was not sentenced to be raped and assaulted by her fellow inmates.”

# PREA Not a Cause of Action

## **PREA is not a reason for which you can bring an action to court.**

- Prison Rape Elimination Act of 2003 did create new individual rights.
- Congress did not create a private right of action for prisoners to sue for noncompliance with PREA.
- Prisoners cannot sue claiming PREA violations

**However, prisoners can use noncompliance with PREA to support claims of Constitutional or torts violations**

# PREA Not a Cause of Action - Case Law

**Moore v. Jordan**, No. TDC-16-1741 (D. Md. Aug. 23, 2017)

## Facts:

Plaintiff filed a 42 U.S.C. § 1983 action against prison officials, alleging they violated his Eighth Amendment rights by failing to protect him from physical and sexual assault by another inmate. Plaintiff also filed to amend his complaint to add PREA violation to his claims against Defendants.

## Court's Ruling:

Court granted motion to dismiss and motion for summary judgment for Defendants and denied Plaintiff's motion to add PREA violation claim. **“Nothing in the PREA suggests that Congress intended to create a private right of action for prisoners to sue for non-compliance. *The proposed addition of a PREA claim would therefore be futile.*”**

# PREA Not a Cause of Action - Case Law

*Longoria v. Cnty. of Dallas*, No. 3:14-CV-3111-L (N.D. Tex. Mar. 13, 2017)

## Facts:

Plaintiff filed a 42 U.S.C. § 1983 complaint for violation of her Fourth, Fifth, Eighth, and Fourteenth Amendment rights and PREA. Plaintiff claims that Defendant officer escorted her out of her cell to a mattress room in the infirmary and raped her.

## Court's Ruling:

The court dismissed the Plaintiff's claims of inadequate training and deliberate indifference stating, **"The Plaintiff's claims based on PREA are fundamentally flawed, as it is based on the faulty assumption that the standards established by PREA are mandatory requirements."**

# PREA Not a Cause of Action - Case Law

***Bennett v. Parker***, No. 3:17-cv-1176 (M.D. Tenn. Oct. 13, 2017).

## **Facts:**

Plaintiff filed suit under 42 U.S.C. § 1983 alleging violations of the Eighth Amendment and PREA. Plaintiff alleged that the Defendant Warden raped him several times and made the Plaintiff perform oral sex on him. Plaintiff also claimed that he tried to file a PREA report, but Defendant officers refused to process it.

## **Court's Ruling:**

The court allowed the Plaintiff's Eighth Amendment claims to proceed but dismissed Plaintiff's PREA claims, as **PREA has "not yet been addressed by the Sixth Circuit, [but] several district courts recognized that this statute does not create a private cause of action."**

# PREA Bolstering Other Causes Of Action: Eighth Amendment

**Hayes v. Dahkle**, No. 9:16-CV-1368 (N.D. N.Y Oct. 30, 2017). Plaintiff filed suit under 42 U.S.C. § 1983 alleging violations of his First and Eighth Amendment rights. Plaintiff claimed that Defendant officer sexually assaulted him during a pat-frisk and sexually harassed him saying, “Do you consider yourself a man or woman” and other profane remarks on multiple occasions.

The court examined the Eighth Amendment claims “by looking beyond historical conceptions to **the evolving standards of decency** that mark the progress of a maturing society,” and **referenced PREA** in its analysis.

# PREA Bolstering Other Causes Of Action: Eighth Amendment

**Doe v. District of Columbia**, DC Circuit , 215 F. Supp. 3d 62 (D.D.C. Oct. 18, 2016).

**Facts:** Plaintiff, a transgender woman, was detained in the DC Jail. Although designated “house alone” status, she was placed in a cell with another inmate, who raped her twice overnight. “This was the second time in eight months that guards improperly transferred [inmate perpetrator] into the cell of another prisoner whom [inmate perpetrator] allegedly raped.”

**Court Ruling:** The court allowed Plaintiffs’ Eighth Amendment claims against Defendant officers placing Plaintiff in cell with inmate perpetrator to proceed, as **Defendant officers had been trained in PREA and should have been aware of Plaintiff’s heightened risk of sexual victimization.**

# PREA Bolstering Other Causes Of Action: First Amendment

## First Amendment - Filing a grievance is an expression of speech.

“Thus, if an inmate exercises his First Amendment right when he files a prison grievance, **retaliation against him for doing so is unconstitutional.**” *Booker v. S.C. Dep’t of Corrs.*, 855 F.3d 533, 540 (4th Cir. 2017).

Retaliation or threats for reporting PREA violation, such as reporting to staff or calling outside entity to report, is a violation of constitutional right of free speech.

# PREA Bolstering Other Causes Of Action: First Amendment

## Hayes v. Dahkle,

Plaintiff filed suit under 42 U.S.C. § 1983 alleging violations of his First and Eighth Amendment rights. Plaintiff alleged that he was placed in solitary confinement pending the investigation of his PREA complaint. Defendants reprimanded the Plaintiff and gave him a misbehavior report for “falsely reporting incidents of sexual abuse.”

The court allowed the Plaintiff’s First Amendment retaliation claims to proceed, as well as his Eighth Amendment claims against Defendant officer.

# Prison Litigation Reform Act (PLRA)

## Prison Litigation Reform Act (PLRA) 1995

- Passed to curb prisoner litigation
- Must exhaust administrative remedies;
- Must avoid filing frivolous cases;
- Must show physical injury;
- Must pay court filing fees
- Litigants and courts are using PREA to determine whether the PLRA provisions are being met.

# Prison Litigation Reform Act (PLRA): Exhaustion of Administrative Remedies

## PLRA: Exhaustion of Administrative Remedies

PLRA requires exhaustion of administrative remedies prior to filing suit, but

- What about **PREA Standard 115.52(b)(1)**, where there is no time limit on when inmate may submit a grievance alleging sexual abuse?
- What if an administrative remedy process is not available, actually or constructively?

# Prison Litigation Reform Act (PLRA): Exhaustion of Administrative Remedies

*Doe et al. v. Snyder et al.*, Sixth Circuit, Dec. 18, 2019

**Facts:** Does 8, 9 and 10 were part of a class action of juveniles who were sexually abused by adult inmates while incarcerated in adult Michigan facilities. Their case was dismissed in district court because they failed to exhaust administrative remedies under PLRA. Plaintiffs appealed.

**Ruling:** Court analyzed use of PREA grievance policy to examine whether plaintiffs exhausted administrative remedies. For Does 8 and 10, **PREA grievance policy was implemented so poorly that there was essentially no administrative remedy available** to them to exhaust. As for Doe 9, the process was not available to him due to retaliation for filing a prior grievance. Reversed and remanded.

# Prison Litigation Reform Act (PLRA): Frivolous Claims

## PLRA: Avoiding Frivolous Claims

**Three Strikes Rule** - Unless in “imminent danger of serious injury,” may not file if three prior filings were dismissed for being frivolous, malicious, or failing to state a claim.

**But what about the chill on judicial oversight?**

Former corrections agency head: **“Lawsuits have helped the state make dramatic improvements to its deeply flawed prison system.”**

# PREA Can Bolster Torts Claims: State Torts Claims

*Tara McCullough v. N.C. Dept. of Public Safety*, North Carolina (N.C.Ind.Com. June 8, 2016). Plaintiff claims that she was sexually assaulted by an officer and claimed other employees failed to follow PREA policies and report their observations of inappropriate behavior of their fellow officer towards Plaintiff.

The NC Industrial Commission, per state's Tort Claims Act, found that **the behavior employees observed the officer direct toward Plaintiff constituted a "red flag" under PREA and triggered an obligation for those employees to report the conduct.** The Commission found that the negligence of the employees was the proximate cause for the Plaintiff's sexual abuse, emotional and psychological injury, and a loss of her dignity.

# Oversight

- Independent monitors or monitoring body.
- Usually no enforcement power.
- However, can be court-appointed with court using monitoring reports to recommended enforce change.
- Also, legislatures and decision-makers influenced by oversight.



# Oversight: The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997

## What is CRIPA?

- The Civil Rights of Institutionalized Persons Act (CRIPA) **protects the constitutional and federal statutory rights of people confined to residential institutions.**
- Department of Justice's Civil Rights Division (Division), Special Litigation Section
- Pattern or practice of abuse/deprivation of rights
- Facility/agency under a CRIPA investigation can be monitored for years

# Oversight: The Civil Rights of Institutionalized Persons Act (CRIPA)



# Oversight: CRIPA - Tutwiler Prison for Women



# In Favor of PREA Implementation: *J.K.J. v. Polk County*

*J.K.J. And M.J.J. v. Polk County*, Wisconsin

## Criminal Prosecution

- Corrections Officer Darryl Christensen repeatedly abused Plaintiffs while they were in Polk County Jail between 2011 and 2014.
- The abuse was discovered after another victim reported abuse by Christensen in a neighboring county. Further investigation revealed sexual abuse of Plaintiffs.
- In Nov. 2015, Christensen pleaded guilty five counts of second-degree sexual assault by correctional staff. *Wis. Stat. § 940.225(2)(h)*.
- Sentencing recommendation was 8 years in prison, but court rejected this and sentenced him to 30 years in prison.



# In Favor of PREA Implementation: *J.K.J. v. Polk County*

*J.K.J. v. Polk County*, Wisconsin

Plaintiffs alleged that Defendants – Polk County and offending corrections officer - were deliberately indifferent to a serious risk of sexual assault in violation of their Eighth and Fourteenth Amendment rights, and that the county violated state law by negligently supervising Christensen. Plaintiffs won at trial. Defendants appealed.

**Finding of 3-Judge Panel, 7<sup>th</sup> Circuit, 928 F.3d 576 (7th Cir. 2019)**

“Christensen's acts [of sexual assault] were reprehensible, but the evidence shows no connection between the assaults and any county policy. We therefore reverse and remand for entry of judgment in favor of the county.”

***But wait...***



# In Favor of PREA Implementation: *J.K.J. v. Polk County*

## *J.K.J. v. Polk County*, Wisconsin

Plaintiffs alleged that Defendants – Polk County and offending corrections officer - were deliberately indifferent to a serious risk of sexual assault in violation of their Eighth and Fourteenth Amendment rights, and that the county violated state law by negligently supervising Christensen. Plaintiffs won at trial. Each of the two defendants were awarded compensatory and punitive damages, with the county to pay \$2 million to each plaintiff. Defendants appealed.



# In Favor of PREA Implementation: *J.K.J. v. Polk County*

*J.K.J. v. Polk County*, 960 F.3d 367 (7th Cir. 2020)

En banc decision of 7<sup>th</sup> Circuit reversed decision of 3-judge panel:

- Jury CAN find **Polk County liable** for sexual abuse of Plaintiffs.
- From evidence presented at trial, jury could find that:
- Polk County did not provide way for victims or witnesses to report except to other corrections officers;
- Polk County did not train on how to prevent and detect sexual abuse or provide gender-responsive training;
- “Tier talk” bespoke of jail’s “denigrating culture” that confirms risk of staff committing sexual misconduct;
- “Tizzy email” and only a written reprimand for suspected sexual abuse of an inmate by another officer point to jail’s “dismissive attitude about preventing and detecting” sexual abuse.

# In Favor of PREA Implementation: *J.K.J. v. Polk County*

## *J.K.J. v. Polk County,*

*It is difficult to conceive of any setting where the power dynamic could be more imbalanced than that between a male guard and a female inmate.*

*"The high degree of predictability" that constitutes notice, the Supreme Court has emphasized, "may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable."*



# In Favor of PREA Implementation: *J.K.J. v. Polk County* - What does this mean?

## *J.K.J. v. Polk County,*

- *“Faced with that notice, the County had a legal obligation to act—to take reasonable steps to reduce the obvious and known risks of assaults on inmates,”* and
- *“The high degree of predictability” that constitutes notice.*

**But,**

*Dissent – “The Supreme Court has never ruled that a Monell claim [claim of municipal liability] based on a municipality's failure to act is viable in the absence of a pattern.”*

Until decided by the higher court, a prudent course of action is **“to *take reasonable steps to reduce the obvious and known risks of assaults on inmates.*”**



# PREA Considerations

- While PREA did not create a new cause of action, courts will look to see if implementation (or lack thereof) of PREA standards contribute to Constitutional violations and tortuous injury from sexual abuse and retaliation.
- If have a PREA administrative remedies process, make it consistent with 115.52, fair and comprehensible.
- Thoroughly implement PREA standards and enforce zero-tolerance policy to change from a culture of abuse and suppression to one of sexual safety and accountability.
- Litigation is an important oversight tool, and you can learn from others' litigation experiences and implement PREA standards accordingly.

# Toolkit and Resources

## TOOLKIT

- PREA Policies
- State Criminal Laws
- Anti-fraternization Policies
- Collective Bargaining Agreements
- Mandatory Reporting Laws

## RESOURCES

- PREA Resource Center
- Project on Addressing Prison Rape
- National Institute of Corrections
- Just Detention International
- RAINN
- Prison Legal News
- Human Rights Watch
- Local News/Social Media

# Question & Answer Live Session Reminder

- **A live Q&A session for this webinar will be held the following week on Friday, March 5, 2021 at 2:00 p.m. EST.**

**A registration link will be included with the evaluation survey and posted with the archived webinar recording shortly. Please submit your questions in advance to: [bvsmith@wcl.american.edu](mailto:bvsmith@wcl.american.edu)**



# PRC library



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## Resource library

423 results Sort by Date

**TOOL: AUDIT**

### Documentation Requirements - Juvenile PREA Standards

**STANDARDS:** All

<b>FACILITY:</b> Juvenile Facility	<b>TERMS:</b> Audit Audit Instrument (+1)
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**TOOL: AUDIT**

### Documentation Requirements - Prisons and Jail PREA Standards

**STANDARDS:** All

<b>FACILITY:</b> Prisons and jails	<b>TERMS:</b> Compliance Audit (+1)
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**FEATURED RESOURCE**

**WEBINAR**

### Power Hour: Chat with a PREA Expert on Standard 115.32

**STANDARDS:** 115.32

<b>FACILITY:</b> Community Confinement Juvenile Facility (+2)	<b>TERMS:</b> Volunteers Contractors (+2)
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**WEBINAR**

### PRC Website Revision: Overview and Q&A

**STANDARDS:** None

**FEATURED RESOURCE**

**WEBINAR**

### Developing a PREA-Compliant Language Access Plan for Incarcerated...

**STANDARDS:** 115.16, 115.21, 115.51, 115.53

<b>FACILITY:</b> Community Confinement Juvenile Facility	<b>TERMS:</b> Accessibility Limited English proficient
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**TOOL: AUDIT**

### Audit Report Template - Juvenile Facilities

**STANDARDS:** 115.401

<b>FACILITY:</b> Juvenile Facility	<b>TERMS:</b> Audit Audit Instrument (+2)
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The screenshot shows the National PREA Resource Center website. At the top left is the logo with the text 'NATIONAL PREA RESOURCE CENTER'. To the right are navigation links: 'About', 'Implementation' (underlined), 'Library', 'Audit', and 'DOJ FAQ'. Below this is a dark blue header with the word 'Implementation' in white, and a sub-header 'Implementation | Training | Request for assistance'. On the left side, there is a vertical menu with links: 'PREA Standards', 'PREA toolsets', 'PREA in action', 'Training' (with sub-links for 'PREA Academy', 'Field training audit', 'Webinars', 'Upcoming events', and 'Request for assistance'), and a 'Request Assistance' button. The main content area features the heading 'Request for assistance' with a yellow underline. Below the heading is a paragraph: 'Please fill out the form below in order to request PREA-related training and/or technical assistance for your jurisdiction or agency. The more detail provided in your request will improve the PREA Resource Center's (PRC) ability to meet your needs. For jurisdictions less familiar with PREA, the PRC would encourage you to browse the resources on the [Where to begin page](#). If your jurisdiction has general questions or comments for the PRC you can communicate those through the [Contact us form](#).' Below this is another paragraph: 'To submit information on complaints or concerns about the conduct of a DOJ-certified PREA auditor, please refer to the [Auditor feedback form](#).' At the bottom of the main content area is a final paragraph: 'The PRC collects the information below in order to efficiently route and respond to inquiries. While all fields are not required, please fill out as much information as possible so that we may better assist you.'

## Request assistance

Jurisdictions can request assistance by completing a web form on the PRC website under the “Implementation” tab and clicking “Request for assistance” under “Training”.

Michela Bowman

**PRC Co-Director**

[mbowman@prearesourcecenter.org](mailto:mbowman@prearesourcecenter.org)

Jenni Trovillion

**PRC Co-Director**

[jtrovillion@prearesourcecenter.org](mailto:jtrovillion@prearesourcecenter.org)

For more information about the National PREA Resource Center, visit [www.prearesourcecenter.org](http://www.prearesourcecenter.org).

To ask a question, please visit our [Contact us](#) page.

**Thank you!**



**Good luck!**

# Notice of Federal Funding and Federal Disclaimer

This project was supported by Grant No. 2019-RP-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. The opinions, findings, and conclusions or recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice or grant-making component.