

**Testimony of Stop Prisoner Rape
For the House Judiciary Subcommittee on Crime, Terrorism and Homeland
Security, November 8, 2007**

Stop Prisoner Rape (SPR) thanks the Subcommittee on Crime, Terrorism and Homeland Security for holding a hearing to review the impact of the Prison Litigation Reform Act (PLRA) 10 years after its enactment. We were proud to work with Representatives from both sides of the aisle to secure the unanimous passage of the Prison Rape Elimination Act (PREA) of 2003, and are pleased to provide this testimony to illustrate how the PLRA has often rendered the judicial system powerless to provide redress to the scores of men, women and children who have been sexually abused while behind bars.

SPR is an international human rights organization whose mission is to combat sexual violence in all forms of detention. Through our policy efforts and direct interaction with prisoner rape survivors, we have seen how the PLRA has shielded government officials from accountability for the sexual violence in their facilities and has denied victims of this form of abuse the ability to seek outside protection and legal recourse. We believe that reforms are urgently needed to ensure that the courts are able to address prisoner rape and other serious constitutional violations.

I. Experiences of Prisoner Rape Survivors Barred from Obtaining Judicial Relief Because of the PLRA

Many of the PLRA's provisions have created insurmountable legal barriers to inmates seeking legal redress for serious civil and human rights abuses, such as sexual abuse in detention. Every day, SPR receives letters from prisoner rape survivors around the country, recounting their ordeals and requesting assistance. Many survivors have tried to access the legal system, but their claims were dismissed under the PLRA before they could be substantively reviewed by a judge. Others never attempted to use the judicial process, aware of the extensive barriers posed and the significant costs to attempting litigation.

- Garrett Cunningham was sexually harassed and raped in a Texas corrections facility by the officer who supervised his work in the laundry facility. He

reported the abuse to a prison psychologist and to the facility's internal affairs unit but, because the officer threatened retaliation, Garrett did not file a formal grievance. Despite his efforts to resolve the matter at the prison level, Garrett had not met the exhaustion requirement and consequently had no legal recourse. (Garrett has provided his own testimony to the Subcommittees.)

- Keith DeBlasio was repeatedly raped by a gang member while housed in a dormitory at a federal prison, and contracted HIV from these attacks. Although he had told prison officials of his assailant's threats, nothing was done to protect him. Keith timely filed his initial grievance with prison officials but, because he was transferred to solitary confinement, he was unable to meet the short deadlines of the facility's appeal process. In hopes of obtaining injunctive relief that would protect him for the remainder of his sentence, Keith contacted numerous lawyers. All of the attorneys refused to take his case, citing their inability to recover the extensive costs of litigation per the PLRA's attorney's fees restrictions.
- "Jane Doe"¹ is currently incarcerated in a California women's prison. While in the receiving area, she was sexually assaulted by the officer assigned to her housing area. Fearful of his threats, the prospect of being isolated in segregation, and the retaliation that comes with being known as a snitch, Jane did not report the assault. Jane initially tried to bring a lawsuit, but gave up because she could not afford an attorney.
- "Lance Jacobs" was 20 years old when he was sent to a federal prison for political protesting. Shortly after arriving at the facility, a corrections officer subjected Lance to a sexually abusive and humiliating strip search. He was forced to masturbate in front of the officer, who also fondled Lance's genitals. Humiliated and traumatized by this experience, Lance did not report it or tell anyone what happened for nearly two years. In addition to failing to exhaust administrative remedies, in many jurisdictions, Lance

¹ Several of the accounts provided are from survivors who remain fearful for their safety or otherwise wish to remain anonymous. In these instances, a pseudonym has been used, and is indicated by quotation marks around the name.

would not be considered to have suffered a physical injury, as required to seek compensatory damages.

- “John Smith” was serving a drug sentence in a Minnesota prison when he was forced to perform sex acts on an inmate who had threatened him with physical violence. After promptly informing an officer about what had happened, John was taken to the hospital and then questioned by several corrections officials. Several days later, an officer told him that, because he complied with the perpetrators’ demands, John had engaged in consensual sexual activity, a violation of prison rules. John was then pressured into signing a confession and was placed in segregation for 15 days, making it both pointless and impossible for him to use the internal grievance system.
- “Samantha Taylor” worked as a porter in the segregation unit of the Colorado prison where she was incarcerated. The sergeant who supervised her work forced her to have sex with him, from which she contracted gonorrhea. Although she attempted to report what had happened, Samantha’s medical records were lost and the investigation delayed. The sergeant remained at the facility with Samantha until he was convicted of sexually assaulting two other inmates. Samantha never received any redress for the rapes.
- “Howard Scott” was raped by a fellow inmate in a North Carolina prison. He told several officials about his assault. While aware of the risk that he faced, they did nothing to protect him. To comply with the facility’s procedures and meet the PLRA’s exhaustion requirements, Howard had to file his grievance with one of the officers whom he had named in the grievance for refusing to protect him.
- T.J. Parsell was 17 years old when he was sent to an adult prison in Michigan. A few weeks into his sentence, T.J. was drugged, gang-raped, and “sold” to another prisoner, who protected T.J. from other inmates in exchange for sex. Young, traumatized, and new to the prison setting, T.J. was too afraid to report the abuse, and therefore could never seek judicial relief.

- “James Hughes” was forced to perform oral sex on a corrections official at the Louisiana prison where he was incarcerated. James tried to use the internal grievance process to obtain a transfer and otherwise request protection from future assaults, but his requests were all denied. He contacted an attorney to seek relief from the courts, but was told that he would have to pay the full filing fee before bringing a lawsuit.

II. Recommendations for PLRA Reform

Intended to limit the number of frivolous lawsuits filed by inmates, the PLRA has instead greatly undermined the crucial oversight role played by courts in addressing sexual assault and other constitutional violations in corrections facilities. SPR believes that Congress must amend the PLRA as a matter of urgency.

Repeal the Physical Injury Requirement (42 U.S.C. § 1997e(e)): The PLRA precludes inmates from receiving monetary damages unless they can prove a “physical harm.” Sadly, sexual abuse is not always considered a physical injury on its own. For example, in *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (Jan. 4, 2006), a Mississippi district judge found that the plaintiffs’ allegations that the defendant-officer made sexually suggestive comments, fondled their genitalia, and sodomized them did not establish a physical injury. Several courts have relied on injuries accompanying a sexual assault to find a physical injury, thereby inferring that the assault itself was not sufficient. *See, e.g., Kemner v. Hemphill*, 199 F. Supp. 2d 1264 (N.D. Fla. 2002) (relying on cuts, bruises, abrasions, shock, and vomiting to find that a plaintiff who alleged that he was forced to perform oral sex had suffered a physical injury); *see also* Deborah M. Golden, *The Prison Litigation Reform Act – A Proposal for Closing the Loophole for Rapists*, American Constitution Society for Law and Policy (June 2006). In light of these precedents, inmates like Lance Jacobs, who was fondled by an officer, and James Hughes, who was forced to perform oral sex on an officer, may be unable to hold their abusers accountable. A repeal of the physical injury requirement would allow all inmates who have been sexually abused to seek compensation.

Amend the Exhaustion Requirement (42 U.S.C. § 1997e(a)): The PLRA’s exhaustion provision precludes any judicial consideration of even the most meritorious

claim if a prisoner makes the slightest misstep in the facility's informal grievance process. The short deadlines to file a grievance – often a matter of days – require prisoner rape survivors to navigate a Byzantine maze of procedural rules while still in trauma from the assault. As Keith DeBlasio learned, even if the first deadline is met, fully exhausting the facility's internal procedures requires meeting numerous additional deadlines, without regard for the limitations posed by transfers, placement in segregation, and hospitalization. For survivors like Garrett Cunningham and Jane Doe, threats of retaliation make the decision to report even more difficult, and make it nearly impossible to adequately weigh the risks of filing within the time permitted. The risks of reporting are heightened for prisoners like Howard Scott who, in order to comply with procedures, must file the report with an officer who participated or acquiesced in the assault. To strike a better balance between encouraging complaints to be resolved administratively and ensuring judicial review of serious abuse that is not addressed at the facility level, the exhaustion provision should be amended to authorize judges to provide a 90-day stay for administrative consideration after which, if the complaint remains unresolved, a judge will provide substantive review.

Exempt Juveniles from the PLRA (18 U.S.C. § 3626(g); 28 U.S.C. §§ 1915(h), 1915A(c); 42 U.S.C. § 1997e(h)): As Congress noted in the Prison Rape Elimination Act (PREA), “[y]oung first time offenders are at increased risk of sexual victimization.” 42 U.S.C. § 15601(4). Like T.J. Parsell, most children are too afraid to report their sexual abuse. Children also are less prone than adults to file lawsuits and generally lack the sophistication needed to understand the processes associated with litigation. Youth in juvenile facilities do not have access to legal materials, making it even more difficult for them to prepare adequate pleadings. SPR believes that the PLRA should be limited to the inmates it was intended to target – adults in adult facilities who file frivolous lawsuits.

Lessen the Financial Burden for Poor Inmates (28 U.S.C. § 1915 (a), (b), (g)): Survivors often tell SPR about the insurmountable financial barriers to seeking relief in court, including the expensive filing fees. While many survivors are unable to work because of the trauma they have experienced, even those with prison jobs rarely earn more than a few dollars per month. Requiring poor inmates to pay the full filing fee

(often \$350-450) ensures that most prisoner rape survivors who seek judicial redress will be in financial debt throughout their incarceration.

Survivors who make missteps in court pleadings may have particularly onerous filing costs. In accordance with the “three strikes provision,” prisoners who have had three lawsuits dismissed as frivolous, malicious, or failing to state a claim for relief are required to pay the entire filing fee up front. As a result, survivors who have been repeatedly abused and do not develop proper pleadings will be forever barred from judicial relief.

SPR recommends that Congress amend the filing fee provision so that inmates whose cases are found to state a valid claim at the preliminary screening stage pay only a partial filing fee and that the three strikes provision be limited to inmates who have had three lawsuits or appeals dismissed as malicious within the past five years.

Allow Successful Attorneys to Recover Fees as They Would in Other Civil Rights Cases (42 U.S.C. § 1997e(d)): Survivors who seek legal representation are generally unable to find an attorney who can bear the costs required for successful prisoner rape litigation. Without an attorney, the vast majority of survivors are ill-equipped to develop the legal arguments required in courtroom pleadings and to navigate the complex procedural rules of civil rights litigation. As a result, courts bear a greater burden in processing *pro se* cases. SPR urges Congress to allow inmates who prevail in prisoner rape litigation to recover reasonable attorney’s fees.

Provide Judges with the Full Range of Remedies Available in Other Civil Rights Cases (18 U.S.C. § 3626): Sexual violence in detention is a systemic problem that plagues facilities across the country. To ensure that officials make their prisons and jails safer, judges need to have the full range of options available, including on-going injunctive relief and the ability to encourage settlements. The prospective relief provision of the PLRA prohibits a judge from using these remedies. SPR believes that Congress should repeal the prospective relief provision and restore judicial discretion in providing relief.

III. Conclusion

The stigma and safety concerns that come with reporting a sexual assault make it a notoriously underreported crime both in prison and in the community at large. When inmates are brave enough to report prisoner rape, the PLRA often bars them from any judicial protection or relief.

The procedural hurdles of the PLRA that prisoner rape survivors must overcome to seek judicial redress are at direct odds with the Prison Rape Elimination Act (PREA) of 2003. With PREA, the stated intent of Congress was to “make the prevention of prison rape a top priority in each prison system” and to “increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape.” 42 U.S.C. § 15602 (2), (6). Because of the PLRA, however, many prisoners who have endured sexual abuse are barred from seeking judicial relief.

SPR calls on Congress to amend the PLRA so that inmates who have been sexually assaulted behind bars or experienced other egregious constitutional violations can seek protection, and so that officials who allow such abuse to occur on their watch are held accountable.