

Investigating and Prosecuting Law Enforcement Sexual Misconduct Cases

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I. Introduction

Those who commit crimes involving sexual misconduct exploit the disparate power dynamic between victim and offender, be it teacher and student, producer and actor, coach and athlete, or law enforcement officer and arrestee, probationer, or inmate. By wielding weapons of authority, in the many forms that may take, the perpetrator leaves the victim with little choice but to submit to his actions and stay quiet in the aftermath, fearing that no one will believe her and everyone will blame her.¹ This is especially true in the law enforcement context, where victims are usually in the custody of their offender, have a history of criminal activity, and whose status in life lowers their credibility in the eyes of those that might judge them. After all, who is going to believe a victim with such a background when it is a criminal's word, alleged or otherwise, against an officer, who has a badge and a gun, and who has sworn to uphold the Constitution? In short, such an individual is the perfect victim against whom to commit a crime and get away with it. Investigators and prosecutors therefore have to take care not to immediately discount the account of such victims without further investigation.

To be sure, most law enforcement officers serve their communities honorably. However, for those that do not, the federal government has jurisdiction to prosecute law enforcement officers who commit sexual misconduct under 18 U.S.C. § 242,² the statute more commonly used to prosecute law enforcement officers who use unreasonable or excessive force. Section 242 makes it a federal crime for those acting under color of law to willfully deprive an individual of his or her Constitutional or federally protected rights.³ As described in more detail below, law enforcement officers who engage in nonconsensual sexual contact with individuals in their care or custody or under their authority, for the most part, deprive those individuals of liberty without due process of law in violation of the Fourteenth Amendment,⁴ which includes the right to bodily integrity.⁵ Depending on the circumstances, these acts may also violate a person's right not to be subjected to "unreasonable searches and seizures,"⁶ the right

¹ For the sake of consistency and clarity, the pronouns "he" and "him" will be used to refer to perpetrators, and the pronouns "she" and "her" will be used to refer to victim, with the understanding that males can also be victims of crimes of sexual violence, and likewise, females can perpetrate such crimes.

² 18 U.S.C. § 242.

³ *Id.*

⁴ U.S. CONST. AMEND. XIV § 1.

⁵ See *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994) (en banc) (Individuals have a right to be free from sexual assaults committed under color of law just as they have a right to be free from other unreasonable physical assaults); citing *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir.1981) ("[t]he right to be free of state-occasioned damage to a person's bodily integrity" is protected by the Fourteenth Amendment's guarantee of substantive due process).

⁶ U.S. CONST. AMEND. IV.

not be subjected to “cruel and unusual punishment,”⁷ and the right to privacy.⁸ Section 242 covers, among others, police officers, probation officers, corrections officers and other employees of jails and prisons, judges, and other federal, state, and local law enforcement and public officials. Prosecutable acts of sexual misconduct include sexual assault without consent, sexual contact procured by force, threat of force or coercion, and unwanted or gratuitous sexual contact such as touching or groping. There are also instances where gratuitous strip searches, taking of nude photographs, staring, leering, and ogling may be prosecutable. The federal government can also prosecute perpetrators for obstruction of justice, e.g., attempting to prevent the victim from reporting sexual misconduct, lying to federal officials during the course of a federal investigation into the sexual misconduct, and writing a false police report to cover up sexual misconduct.

Because victims are often in the custody or under the authority of their perpetrators, it is not uncommon for them to feel like they cannot report the police to the police. Yet, they often disclose to family, friends, clergy, hospital staff, legal aid groups, tribal leaders, national and local civil rights organizations, counselors, or criminal and civil rights attorneys. These disclosure or “outcry” witnesses are largely unaware of the federal government’s jurisdiction. The Criminal Section of the Civil Rights Division (Criminal Section), which has primary jurisdiction over Section 242 violations, has been working to decrease barriers to reporting by “spreading the word” to the aforementioned stakeholders that the federal government has the ability to hold these offenders accountable, and is thereby able to vindicate the interests of the victims and the communities in which these law enforcement officers serve.

By actively investigating and charging meritorious cases more often, federal prosecutors can increase awareness of our jurisdiction, one case at a time, so that reporting instances of law enforcement sexual misconduct to federal authorities becomes an apparent and realistic option. The underreporting of these crimes is not because they are not happening, but rather because in addition to the general reluctance to report sex crimes, victims of law enforcement sex crimes, in particular, do not know where or how to report. This article will address the steps prosecutors and investigators should take upon learning of a law enforcement sexual misconduct allegation. This article will also look at the statutory nuances of Section 242 in the sexual misconduct context, and the evidentiary hurdles and investigatory challenges associated with effectively prosecuting a sexual misconduct case, where the offender is in law enforcement and the victim lacks credibility by virtue of her status as an arrestee, an inmate, or a probationer. To overcome these hurdles and develop a strong case, there must be an intense focus on developing credible evidence to both corroborate the victim’s account and discredit the anticipated defense of the offender.

II. Proving the Elements: 18 U.S.C. § 242

To establish a violation of Section 242, the government must prove the following elements beyond a reasonable doubt:⁹ (1) the defendant must have been acting under color of law; (2) the defendant must have deprived the victim of a right protected or secured by the Constitution or the laws of the United States; and (3) the defendant must have acted willfully.¹⁰ To establish a felony violation of Section 242, the government must prove at least one additional element: (4) either: (a) that the act resulted in bodily

⁷ U.S. CONST. AMEND. VIII.

⁸ See *Roe v. Wade*, 410 U.S. 113, 153 (1983) (right to privacy in Fourteenth Amendment’s “concept of personal liberty and restriction upon state action”); *Terry v. Ohio*, 392 U.S. 1 (1968) (freedom from unreasonable governmental intrusion under Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 484, (1965) (recognizing “zones of privacy” found in the First, Third, Fourth, Fifth and Ninth Amendments, but no general right to privacy).

⁹ For a comprehensive legal discussion of [Section 242](#), please contact the Criminal Section of the Civil Rights Division. This article summarizes the statute to provide context for sexual misconduct prosecutions.

¹⁰ § 242.

injury or included the “use, attempted use, or threatened use of a dangerous weapon, explosives, or fire,” (subject to not more than ten years in prison), or (b) that “death results from the acts . . . or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill,” (subject to a maximum of life in prison).¹¹ The statute of limitations for a violation of Section 242 is five years unless it involves one of the latter enhancements involving death, aggravated sexual abuse, or attempts thereof, in which case there is no statute of limitations.¹²

A. Color of Law and Willfulness

For the most part, law enforcement sexual misconduct investigations will focus on proving the Constitutional deprivation as well as the statutory enhancements, which is why, as discussed below, the victim interview is so essential to making the correct charging decision. Although proving color of law and willfulness can sometimes present novel issues of law and fact, it will seldom be the reason for prosecution over declination or vice versa.

With regard to the first element, acting under color of law means that the defendant was acting in his capacity as a local, state, or federal law enforcement officer, or was otherwise cloaked in the authority of the state, regardless of whether the defendant was on or off-duty.¹³ The Criminal Section has prosecuted police officers, corrections officers, probation officers, judges, city attorneys, private prisoner transport officers, and other public officials for committing sexual misconduct under color of law.

To prove the willfulness element, the government must establish that the defendant acted with the specific intent “to deprive a person of right which has been made specific either by the express terms of the Constitution or the laws of the United States or by decision interpreting them.”¹⁴ A “willful act” for purposes of Section 242 is one committed either “in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.”¹⁵ The defendant need not specifically intend the resulting constitutional deprivation, as long as the defendant intended to commit the act, the act resulted in a constitutional deprivation, and the defendant knew that what he was doing was wrong. Willfulness can also be inferred from an act that violates a clearly established constitutional right, such as sexual misconduct under color of law. That is, if the government proves that the defendant engaged in nonconsensual sexual contact with the victim, the defendant will be hard pressed to argue that he did not know that such conduct was wrong and against the law. While the defendant may argue that the conduct was consensual, as described below, that goes to whether he deprived the victim of a Constitutional right. Moreover, evidence illustrating consciousness of guilt that is often present in typical stranger or acquaintance sexual misconduct cases is also likewise often present in the law enforcement context, and serves to further bolster willfulness, e.g., threats that the victim must keep the misconduct a

¹¹ *Id.*

¹² *Id.*

¹³ *United States v. Classic*, 313 U.S. 299, 326 (1941); *see Screws v. United States*, 325 U.S. 91, 111 (1945) (“Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.”); *see also Hafer v. Melo*, 502 U.S. 21, 28 (1991) (explaining color of law requirement was designed to enforce Fourteenth Amendment “against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it”) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974) (quoting *Monroe v. Pape*, 365 U.S. 167, 172); *West v. Atkins*, 487 U.S. 42 (U.S. 1988) (physician who was under contract with state to provide medical services to inmates at state prison hospital on part-time basis acted under color of state law and such conduct was fairly attributable to state); *Gwynn v. TransCor Am., Inc.*, 26 F. Supp. 2d 1256, 1265-66 (D. Colo. 1998) (privately-contracted transport officer acted under color of law when he sexually assaulted an inmate in his custody. But for his cloak of state authority, he would not have been able to violate her Constitutional rights.).

¹⁴ *Screws*, 325 U.S. at 104.

¹⁵ *Id.* at 105.

secret or face repercussions, committing the acts in secluded places or out of surveillance camera view to avoid detection, falsifying reports, and lying to local and federal authorities.

B. Deprivation of a Constitutional Right

The Constitutional right at issue depends on the status of the victim at the time of the crime. As a general matter, those under arrest or those stopped by the police during an investigation are subject to the Fourth Amendment's protections against unreasonable seizure. Pretrial detainees are protected by the Due Process Clause of the Fourteenth Amendment. Convicted persons are protected by the Eighth Amendment's prohibition against cruel and unusual punishment.

1. Gratuitous Searches

The right at issue does not always exactly correlate to the victim's custodial status or lack thereof. For example, the Fourth Amendment applies to pretextual or gratuitous searches of arrestees as well as inmates. Such searches are unconstitutional if done for the purpose of sexually humiliating a victim or obtaining personal sexual gratification, be it, for example, a cavity search in a locked cell of a pretrial detainee, or a search incident to arrest on the side of the road.¹⁶

2. Nonconsensual Sexual Contact/Sexual Assault

Some circuits also apply the Fourth Amendment to analyze sexual assault occurring during an arrest, detention, or other "seizure."¹⁷ Most circuits, however, analyze sexual assaults of non-convicted persons, regardless of whether they have been stopped by police, are under arrest, or are in custody awaiting trial, under the Due Process Clause of the Fourteenth Amendment, as a violation of fundamental bodily integrity.¹⁸ To prove a violation of fundamental bodily integrity, the law enforcement officer's

¹⁶ [Bell v. Wolfish](#), 441 U.S. 520, 558 (1979) (to determine whether a search was objectively reasonable, the court balance the need for the particular search against the invasion of the personal rights that the search entailed); [Sims v. Labowitz](#), No. 16-2174, 2017 WL 6031847 (4th Cir. Dec. 5, 2017) ("Sexually invasive searches require that the search bear some discernible relationship with safety concerns, suspected hidden contraband, or evidentiary need," and therefore ordering a 17-year old to masturbate in front of an officer to obtain photographs of his erect penis is objectively unreasonable). [Amaechi v. West](#), 237 F.3d 356, 361 (4th Cir. 2001) (arrestee's right to be free from public, sexually intrusive search was clearly established); [Florence v. Bd. of Chosen Freeholders of Cty. of Burlington](#), 566 U.S. 318 (2012) (routine strip searches of non-dangerous detainees arrested for minor offenses upheld); [Harris v. Miller](#), 818 F.3d 49, 62-63 (2d Cir. 2016) ("inmates retain a limited right of bodily privacy under the Fourth Amendment. If an inmate exhibits an actual, subjective expectation of bodily privacy, and if the inmate challenges an isolated search as infringing on his or her right of bodily privacy, courts should assess the claimed violation for reasonableness under the four *Bell* factors: (1) the scope of the intrusion; (2) the manner in which it was conducted; (3) the justification for initiating it; and (4) the place in which it was conducted.").

¹⁷ See, e.g. [Fontana v. Haskin](#), 262 F.3d 871, 881 (9th Cir. 2001); [United States v. Langer](#), 958 F.2d 522, 523-24 (2d Cir. 1992).

¹⁸ See [Rogers v. City of Little Rock, Ark.](#), 152 F.3d 790, 793-96 (8th Cir. 1998) (Where a woman was raped by a road patrol officer, the essence of the claim was not excessive force but a claim of "nonconsensual violation of intimate bodily integrity which is protected by substantive due process."); [Jones v. Wellham](#), 104 F.3d 620, 622-23 (4th Cir. 1997) (where an officer forcibly coerced a woman into having sex in his patrol vehicle, the Fourth Amendment was inapposite because "the harm inflicted did not occur in the course of an attempted arrest or apprehension of one suspected of criminal conduct."); see [Rochin v. California](#), 342 U.S. 165 (1952) (recognizing a substantive due process right to bodily integrity); [Walton v. Alexander](#), 44 F.3d 1297, 1302 (5th Cir. 1995) (recognizing "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the Fourteenth Amendment guarantee of due process.") ([Taylor Indep. Sch. Dist.](#), 15 F.3d at 451) (en banc) (quoting [Shillingford](#), 634 F.2d at 265).

conduct must be “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”¹⁹

Sexual assaults of convicted persons are analyzed under the Eighth Amendment as a violation of the prohibition against cruel and unusual punishment.²⁰

3. Lack of Consent

Regardless of which Amendment forms the basis of the Constitutional violation, consent is a complete defense to violation of Section 242. It may seem counterintuitive that a person in custody has the ability to consent to sexual contact with the individual who has authority over her. Nonetheless, unlike some state statutes, Section 242 is not a strict liability statute. The government has to prove lack of consent, and the victim has to articulate to investigators and prosecutors that she did not consent and that the offender knew that the victim did not consent, highlighting why the victim interview is integral to developing a prosecutable case, and why the prosecutor must be well-versed in the nuances of the statute. Importantly, however, is that federal law does not require the victim to actually say the word, “no” to the perpetrator.

The key inquiry is whether the victim truly made a voluntary decision as to what she wanted to do with her body. A thorough interview will help inform as to how and why sexual contact came about. It will often be, for example, that because of the officer’s size, the remote location where the stop occurred, the fact that the officer threatened to falsely charge the victim, and a host of other factors that will only come out through a detailed interview, the victim had to submit to the officer’s advances. Submission is not consent. However, if, for example, an officer legitimately arrested the victim, the victim then chose to perform a sex act in lieu of getting arrested, and it therefore was a true quid pro quo exchange where the victim received a benefit, there is no violation of Section 242. It may otherwise be a violation of state law and, most likely, a violation of department policy, but it is not a federal civil rights crime. The same is true for an inmate who engages in sexual contact with a corrections officer in return for phone privileges, snacks from the commissary, and the like.

A significant point to keep in mind, however, is that what appears at first blush to be a quid pro quo may actually be a Section 242 violation. If the would-be victim was legitimately arrested, it is helpful to ask the victim the following during the investigative interview: What would have happened if you had told the officer, “no?” If the answer is that the officer would have legitimately arrested the victim, then the act was likely a quid pro quo, but if the answer is that the officer would have forced the victim to perform the sex act anyway, then it may very well be a federal civil rights crime. Again, a thorough interview will reveal the factors that led to the victim’s decision to perform the sex act. If the victim submitted, relented, or gave in, then the victim did not consent.²¹ Indeed, if the victim uses the word “rape” or “sexual assault” to describe what happened, it is more likely, though not dispositive, that Section 242 is implicated.

¹⁹ [County of Sacramento v. Lewis](#), 523 U.S. 833, 846 (1998); *see also* [United States v. Guidry](#), 456 F.3d 493, 498 (5th Cir. 2006) (affirming conviction of an on-duty officer who raped a woman in a secluded area); [United States v. Contreras](#), 950 F.2d 232, 236 (5th Cir. 1991) (affirming conviction of an officer who sexually assaulted a woman he detained and later conspired to kill).

²⁰ *See* [Smith v. Cochran](#), 339 F.3d 1205 (10th Cir. 2003) (explaining that sexual assault violates both the objective and subjective prongs of the Eighth Amendment); [Schwenk v. Hartford](#), 204 F.3d 1187, 1197 (9th Cir. 2000) (“In the simplest and most absolute of terms, the Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established”); [Castillo v. Day](#), 790 F.3d 1013, 1018-19 (10th Cir. 2015).

²¹ [United States v. Cobenais](#), 868 F.3d 731, 739 (8th Cir. 2017) (Upholding jury instruction that states, “There is no consent if the sexual act was accomplished against the will of [the victim] by the use of force, coercion, or threats. Consent may be verbal or implied based on the facts, circumstances, and evidence presented to you.”).

Similarly, if, for example, a victim consents to a specific sexual act to get out of a legitimate arrest, but then the officer goes beyond that agreement and rapes the victim or performs an act beyond the scope of the initial consent, that subsequent act is a due process violation. Likewise, if the officer threatened to falsely charge the victim or made a false threat of a lengthy imprisonment in an effort to coerce a sex act, and the victim succumbed so that the officer would not carry out his threat, such an act violates due process.²²

C. Section 242: Felony Enhancements

The language of Section 242 provides for several enhancements that, if proven, make the constitutional deprivation a felony. The statute reads in part,

if bodily injury results or if such acts involve use, attempted use, or threatened use of a dangerous weapon, explosives, or fire . . . or if death results . . . or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill . . .²³

Acts of sexual misconduct may result in bodily injury, involve the use of dangerous weapon, or include aggravated sexual abuse and kidnapping.²⁴ As detailed throughout the section, sometimes the only way to gather evidence of these enhancements is through painstakingly thorough, detailed interviews.

1. Bodily Injury

To prove bodily injury, the government must establish that the victim suffered an injury to the body as a result of the defendant's actions. The defendant need not have intended to cause the injury.²⁵ The injury may be minor or temporary, including pure physical pain.²⁶

This is significant because most sexual assaults, regardless of whether the perpetrator is in law enforcement, do not result in physical injury that can be documented. Moreover, even if vaginal injury did result, such injury tends to heal within 72 hours of the assault. It is therefore crucial that the victim immediately undergo a rape kit or similar sexual assault medical examination if the victim reports the assault within the first few days of the sexual assault. The exam could yield DNA evidence to both help identify the perpetrator and to foreclose a defense that sexual contact did not happen. As discussed below, DNA and documented injury could help prove an obstruction of justice charge where the defendant lies to state and/or federal authorities and denies sexual contact. The exam could also serve to document injuries that are consistent with the victim's account and corroborate lack of consent, while also proving the bodily injury element.

However, most reports of sexual assaults are delayed, meaning that significant physical evidence is often lost. Delayed reports occur for a variety of legitimate reasons, all of which the victim should be able to explain when asked during an investigative interview: for example, the perpetrator threatened to

²² See [Alexander v. DeAngelo](#), 329 F.3d 912, 917 (7th Cir. 2003) (holding that forcing confidential informant to have sexual contact with subject of sting operation by using false threats of lengthy imprisonment violated the confidential informant's due process rights).

²³ § 242.

²⁴ *Id.*

²⁵ See e.g., [United States v. Marler](#), 756 F.2d 206, 216 (1st Cir. 1985) (holding that, in a Section 242 case in which death results, the government need not prove that the defendant intended the victim's death) (citing [United States v. Hayes](#), 589 F.2d 811, 821 (5th Cir. 1983)).

²⁶ See [United States v. Myers](#), 972 F.2d 1566, 1572-73 (11th Cir. 1992) (citing definition of "bodily injury" in statutes throughout Title 18 and finding no error in court's instruction that "bodily injury means any injury to the body, no matter how temporary," including "any burn or abrasion," bruise, or just "physical pain."). Accord [United States v. Gonzalez](#), 436 F.3d 560, 575 (5th Cir. 2006); [United States v. Bailey](#), 405 F.3d 102, 111 (1st Cir. 2005).

harm her if she reported the sexual assault; the victim did not know to whom she should report; the victim feared that she would not be believed, etc. Given the delay and the fact that most sexual assaults do not result in observable injury, it may be necessary to prove bodily injury based on “physical pain.” The victim must therefore provide specific detail of the assault because the victim is the only witness who can establish pain. Likewise, prosecutors and investigators have to ask specific, pointed questions without leading the victim. Pain can be established by asking the victim, for example, what the penetration felt like, whether the perpetrator was holding her in place and how he went about doing so, whether the victim was being restrained with handcuffs and shackles, and if the handcuffs and shackles caused pain during the assault. Previous Section 242 cases established pain in the following ways, among others: a victim’s belly chain digging into her back during the assault; the defendant tightly gripping the victim’s head as he forced her to perform a sex act; the defendant holding the victim’s arms in place such that she was left with fingerprint bruises; anal or vaginal penetration that was painful for the victim; or bleeding as a result of the assault.

2. Dangerous Weapon

Because law enforcement officers often carry firearms as part of their uniforms, it is not uncommon for the perpetrator to possess his gun in furtherance of the sexual assault. Establishing that the officer used his gun to further his crime will not only prove the dangerous weapon enhancement, but will also help prove that he forced the victim to submit and/or put the victim in fear of serious bodily injury, death, or kidnapping required for the Aggravated Sexual Abuse enhancement (see discussion below).²⁷ It may also give rise to a separate violation of 18 U.S.C. § 924(c).²⁸ In order to implicate Section 924(c), the underlying crime must be a crime of violence. Therefore, sexual misconduct in violation of Section 242 that only gives rise to a misdemeanor likely will not qualify. Similarly, a Section 242 violation resulting in bodily injury may also not qualify as a crime of violence. However, establishing aggravated sexual abuse—and in some circuits, the kidnapping enhancement would qualify—depends upon how each circuit defines a crime of violence and whether it is so “by its nature.”²⁹

In some instances, perpetrators overtly use their gun during the commission of the crime by threatening to shoot the victim during or after the assault, brandishing it as a means of intimidation, or making a show of loading the bullets. However, in other instances, the perpetrators’ threats are not as overt. In *United States v. Contreras*, the Fifth Circuit Court of Appeals recognized that a law enforcement officer’s weapon can serve to both embolden the officer and coerce a victim in a sexual assault, without having to point the gun at her.³⁰ In that case, as is common in many patrol officer sexual misconduct cases, the defendant-officer drove the victim to an isolated location, stopped the car, told the victim to get out, placed his gun belt on the roof of the car, and sexually assaulted her. The court cited several factors from which the jury reasonably could have inferred that the defendant’s possession of a firearm was not “mere inadvertence,” even when there was no direct threat with the firearm: (1) the defendant was emboldened by his possession of the gun; (2) the defendant displayed the gun in order to intimidate the victim; (3) the defendant had the opportunity and ability to discharge the gun during the entire incident; and as a result (4) the victim believed the defendant would kill her if she tried to escape.³¹ The court also

²⁷ 18 U.S.C. § 2241(a) (2012).

²⁸ 18 U.S.C. § 924(c) (2012) (possessing a firearm in furtherance of a crime of violence).

²⁹ See *Johnson v. United States*, 135 S. Ct. 2551 (2015); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016) (noting that “the statutory language of § 924(c)(3)(B) is distinctly narrower [than the ACCA], especially in that it deals with physical force rather than physical injury.”) (citing *United States v. Taylor*, 814 F.3d 340, 376 (6th Cir. 2016); *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (“Section 924(c)(3)(B) defines a crime as a crime of violence if ‘by its nature it involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.’”) (citing 18 U.S.C. § 924(c)(3)(B)).

³⁰ *Contreras*, 950 F.2d at 232.

³¹ *Id.* at 241-42.

noted that the victim “testified that she ‘had to obey him because of fear’ and that she thought he ‘would kill [her] or hit [her]’ if she attempted to run away.”³²

3. Aggravated Sexual Abuse

In most law enforcement sexual misconduct cases, aggravated sexual abuse can be established in one of two ways as defined by 18 U.S.C. § 2241(a): “by knowingly caus[ing] another person to engage in a sexual act (1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempting to do so . . .”³³

Less commonly in the law enforcement context, aggravated sexual abuse can also be established when, as defined by 18 U.S.C. § 2241(b) the defendant:

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or (2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—(A) substantially impairs the ability of that other person to appraise or control conduct; and (B) engages in a sexual act with that other person; or attempts to do so . . .³⁴

For the purposes of this enhancement and assuming the victim is at least 16-years old, a sexual act is defined under 18 U.S.C. § 2246(2) as:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; [or] (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person . . .³⁵

With regard to establishing force as set forth by Section 2241(a)(1), actual violence is not necessary.³⁶ Legislative history shows that Congress intended that “force” be defined broadly:

[t]he requirement of force may be satisfied by a showing of the use, or threatened use of a weapon [see the discussion above]; the use of such physical force as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.³⁷

³² *Id.* at 235, 241 (“Congress intended § 924(c) to apply when police officers . . . abuse the privilege of carrying a firearm by committing a crime with the weapon.”) (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 315 n. 10 (1983)); *Guidry*, 456 F.3d at 498 (Where the defendant kept his gun belt on during the rape of a victim in a secluded area and the victim testified that she could hear the gun striking the car during the rape, but at no point did the defendant threaten her with the gun, the court commented that the gun was always within the defendant’s reach, and the court found that “[a] jury could reasonably conclude that [the defendant] was emboldened by his possession of the gun to rape [the victim], and that the gun was a threat to and intimidated [the victim].”).

³³ § 2241(a).

³⁴ § 2241(b).

³⁵ 18 U.S.C. § 2246(2) (2012).

³⁶ See *United States v. H.B.*, 695 F.3d 931, 936 (9th Cir. 2012); *United States v. Lauck*, 905 F.2d 15, 18 (2d Cir. 1990) (rejecting a violence requirement for § 2241).

³⁷ *Id.*

Further, “the force requirement is met when the sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact.”³⁸

Despite this broad definition of force, the mere disparity in size between the offender and the victim may not, in and of itself, be enough to prove force in the context of aggravated sexual abuse.³⁹ When interviewing the victim, it is therefore essential to determine, e.g., whether the victim felt free to resist or escape, the type of restraint, if any, the perpetrator used on the victim, whether the victim was fearful, and whether that fear was rooted in fear of death, serious bodily injury, or kidnapping, as opposed to fear of legitimately getting arrested and going to jail.

4. Kidnapping

To establish the kidnapping enhancement under 18 U.S.C. § 242, the government need not prove that the defendant transported the victim across state lines. Rather, the kidnapping enhancement is analogous to false imprisonment where the victim is confined or restrained against her will.⁴⁰ Even if the defendant lawfully takes the victim into custody, but later keeps her confined for the purposes of sexually assaulting her, the kidnapping enhancement may be applicable.⁴¹

Considering the line of cases referenced in the previous footnote, bear in mind that the same evidence used to establish the kidnapping enhancement may also establish substantive kidnapping in violation of 18 U.S.C. § 1201.⁴² Just like the kidnapping enhancement, there is no requirement for substantive kidnapping that the defendant transport the victim across state lines. Rather, to establish a violation of 18 U.S.C. § 1201(a), the government must prove three elements beyond a reasonable doubt: (1) the defendant knowingly and willfully seized, confined, inveigled, decoyed, kidnapped, abducted or carried away the victim; (2) the defendant held the victim for ransom, reward or some other benefit; and (3) the defendant used a means, facility or instrumentality of interstate commerce in committing the offense or in furthering its commission.⁴³

³⁸ *Id.*, citing [United States v. Fulton](#), 987 F.2d 631, 633 (9th Cir. 1993) (quoting [Lauck](#), 905 F.2d at 18); see also [United States v. Lucas](#), 157 F.3d 998, 1002 (5th Cir. 1998) (“A defendant uses force within the meaning of § 2241 when he employs restraint sufficient to prevent the victim from escaping the sexual conduct.”), see [United States v. Allery](#), 139 F.3d 609, 611 (8th Cir. 1998) (holding that “force sufficient to prevent the victim from escaping the sexual contact satisfies the force element” of § 2241(a)(1)); [United States v. Webb](#), 214 F.3d 962 (8th Cir. 2000) (same).

³⁹ [United States v. Bordeaux](#), 997 F.2d 419, 421 (8th Cir. 1993) (Disparity in size between the defendant and the child-victim might be enough, in itself, to establish a restraint that was sufficient that the victim could not escape the sexual contact.); [United States v. Holly](#), 488 F.3d 1298, 1302 (10th Cir. 2007) (“Force may be inferred by such facts as disparity in size between victim and assailant, or disparity in coercive power,” does not require “the brute force [commonly] associated with rape.”) (Internal citations omitted).

⁴⁰ [Guidry](#), 456 F.3d 493 (Affirming the kidnapping enhancement where a police officer detained the victim, and then then drove her to a dark, wooded area and raped her, and finding that the enhancement did not require transportation across state lines, but rather is defined in a more modern, evolved form that only requires confinement.).

⁴¹ See [United States v. Denny-Shaffer](#), 2 F.3d 999, 1018-19 (10th Cir. 1993) (When a victim voluntarily accompanies her perpetrator but was later confined by him, the perpetrator was guilty of violating 18 U.S.C. § 1201, the federal kidnapping statute.); [United States v. Redmond](#), 803 F.2d 438, 439 (9th Cir. 1986) (Merely confining a victim after she willingly began to journey with the defendant, sufficed to serve as a violation of the [kidnapping] statute even though the victim was not physically abducted or initially taken by force.); [United States v. Wesson](#), 779 F.2d 1443, 1444 (9th Cir. 1986) (per curiam) (Kidnapping occurs where the victim voluntarily accompanies the defendant, but makes her desire to go home known, yet stays with defendant after he rapes her, too scared to try to escape.).

⁴² 18 U.S.C. § 1201 (2012).

⁴³ § 1201(a).

With regard to the first element, “kidnapping” means “to unlawfully hold, keep, detain, or confine the person against that person’s will.”⁴⁴ “Inveigling” means to lure or lead a person astray by false representations, or by some other deceitful non-forcible means.⁴⁵

With regard to proving the second element, “holds for ransom or reward or some other benefit” may be satisfied by virtually any benefit or thing that the defendant values.⁴⁶

The Criminal Section has successfully charged both substantive kidnapping and the enhancement where law enforcement officers have isolated, constrained, or confined their victims in secluded locations. The kidnapping enhancement and substantive kidnapping may be particularly applicable where road patrol officers veer from their route and take victims to remote locations in deserted areas at night or out of radio range. Similarly, the enhancement may be used in prosecutions of corrections officers who lure inmates to locked closets, shower rooms, or similar areas where there are no surveillance cameras or means of being detected. Prosecutors may want to consider charging the kidnapping enhancement or substantive kidnapping where the perpetrator’s conduct does not rise to the level of aggravated sexual abuse in that the perpetrator only groped or fondled the victim. In those instances, the perpetrator’s conduct may otherwise be a misdemeanor, but for evidence that supports charging the kidnapping enhancement or substantive kidnapping, making the crime(s) a felony.

III. The Investigation

A. Victim Interview

Unlike most law enforcement excessive force investigations which focus on developing law enforcement corroboration as a means to build a prosecutable case, law enforcement sexual misconduct investigations are victim-centric. Indeed, they rarely have law enforcement corroboration because sex crimes typically do not occur in front of an audience of witnesses. Therefore, the cases rise and fall with the credibility of the victim. As detailed below, in order to effectively corroborate the victim’s account, there are steps that prosecutors and investigators should take from the outset of the investigation, i.e. the very first meeting with the victim, to ensure the strength of the case.

1. What to Do

As any sex crimes prosecutor, counselor, or detective will confirm, it is not uncommon for a sexual assault victim to skip over details and minimize events during her first interview or any interview thereafter, especially if the victim is not comfortable with the prosecutor or investigator. This is especially true when investigating a potential violation of 18 U.S.C. § 242, because there is already distrust of law enforcement. These interviews take patience, time, and the ability to simultaneously be objective, fact-driven, detail-oriented, and sensitive to topics of an intimate and sometimes embarrassing nature. At the same time, it is incumbent upon the prosecutor to make the victim feel comfortable enough to disclose the entire truth, including details that both prove the elements (as set forth in the previous section), as well as “bad” facts and those facts that may be the subject of motions in limine, e.g. prior bad acts or instances

⁴⁴ See Pattern Crim. Jury Instr. 5th Cir. 2.58.

⁴⁵ *Id.*; See also Pattern Crim. Jury Instr. 10th Cir. 2.55 (2011); Pattern Crim. Jury. Instr. 11th Cir. 49.; See [United States v. Jacques, 2011 No. 2:08-CR-117, WL 1706765, 12 \(D. Vt. May 4, 2011\)](#) (noting that “a kidnapping that begins with an inveiglement and evolves into a confinement by force is one offense, not two, and begins with the inveiglement, not the confinement by force.”).

⁴⁶ § 1201(a); See, e.g., [United States v. Williams, 998 F.2d 258 \(5th Cir. 1993\)](#) (approving a charge using the term “for immoral purposes,” because “some benefit” can include sexual gratification).

of prior sexual activity.⁴⁷ Note that there are several exceptions under which specific instances of a victim's sexual behavior may be admissible: "(A) If the evidence is offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence; (B) If evidence of specific instances of a victim's sexual behavior is with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and (C) If exclusion of the evidence would violate the defendant's constitutional rights."⁴⁸

As prosecutors and investigators, we are trained to be skeptical, especially when the person alleging misconduct, sexual or otherwise, is in custody, is addicted to drugs, or has a lengthy criminal history, as the victims of law enforcement sexual misconduct often are and do. After all, their offenders chose them because others may question their credibility even before they begin to give their accounts. But we can maintain our objectivity and a healthy dose of skepticism without outwardly treating the victim like we do not believe her, and without placing blame, the very things the victim feared when she first decided to report the misconduct. As with any witness, we have to reconcile inconsistencies to the extent they can be reconciled, and seek answers to questions we anticipate a jury will have: for example, Why did you wait to report the misconduct?; Why did you choose to report misconduct now?; Did you try to escape, scream, fight?; Why did you not tell the state investigator all of these details when you were first interviewed?; Describe how it felt when the perpetrator penetrated you, pulled down your pants, pulled the car over; I know this is obvious, but why did you not actually say the word, "no," kick, bite, tell the first person you saw as soon as it was over?; What do you think would happen to you if you kicked, bit, or screamed for help?

For the most part, experienced prosecutors and investigators know the answers to these questions because most sex crimes committed by law enforcement follow the same pattern as sex crimes committed by teachers, bosses, babysitters, etc. But the victim needs to articulate the answers, and prosecutors and investigators need to ask the questions, not in an accusatory manner, but in an inquisitive way, designed to both put the victim at ease that she is being taken seriously and to give the case a fighting chance should there later be enough evidence to charge the offender and proceed to trial, because trial preparation begins as soon as a complaint is made. If we as prosecutors and investigators dismiss a victim's account at the outset because we deem it implausible, and then later find out that the allegation was true, we not only run the risk of losing valuable evidence because we failed to do a follow-up investigation, but we also risk irreparably destroying the victim's already-tenuous trust in the legal system.

Consider, for example, the case of a probation officer who engaged in a pattern of harassing and grooming behavior with a female probationer, culminating in groping her breasts during an office visit. The victim explained that her probation officer always kept his door open. Nonetheless, he groped her while the door was open and while there were people present in other nearby offices. Such brazen behavior on the part of the officer seemed implausible. But because prosecutors and investigators followed up on the victim's report, several other probationers came forward, the officer made recorded admissions, and he ultimately pled guilty and went to federal prison. Similarly, consider a woman who was arrested for Driving Under the Influence and was, by all accounts, intoxicated. Nevertheless, she alleged that the arresting officer pulled over on the side of the road, fondled her while she was handcuffed, put his mouth on her breast, and took pictures of her bare breasts. Investigators made it clear to the victim that they did not believe her, solidified by the subject-officer's denials that were accepted at face value by the investigators. Just prior to closing the investigation, DNA analysis revealed that the subject-officer's DNA was located inside the victim's bra cup, consistent with her account. Forensic analysis of the subject-officer's personal phone then revealed a deleted photo of the victim, bare-breasted and handcuffed in the back of the patrol vehicle. Where she was initially deemed a drunk liar, just as the

⁴⁷ See [FED. R. EVID. 412](#), which prohibits the admissibility of prior sexual conduct for the purpose of proving that a victim engaged in other sexual behavior or to prove sexual predisposition.

⁴⁸ [FED. R. EVID. 412\(b\)](#).

subject-officer was banking on, it ultimately turned out that the victim had indeed endured an egregious assault just as she reported.

While not every allegation is true, nor will every allegation be prosecutable, investigating with objectivity will help inform which ones have merit. Doing so will further lessen the likelihood that those with merit get overlooked.

2. What Not to Do

The likelihood of successfully prosecuting a law enforcement sexual misconduct case is not only rooted in a solid investigation that corroborates the victim's account, but also in the consistency of the victim's account. As described above, there are many reasons why a victim may not provide all of the details during the first interview, just like there may be reasons why a victim remembers more details as time goes on, none of which bear on the truth of what happened. Experts in rape trauma and post-traumatic stress disorder can testify about traumatic memory and how traumatic events, can, for example, affect a victim's ability to recall and recount events in a chronological or linear manner.

Ideally, the victim will give one account and remain entirely consistent each time she recounts the events thereafter. Yet, even the most honest person who has not been traumatized makes inconsistent statements, even if about irrelevant details, inadvertently providing fodder for cross-examination. Where the entire case rests on the credibility of the victim, as it often does in law enforcement sexual misconduct prosecutions, there is no reason to create unnecessary inconsistencies.

Therefore, the victim should *not* testify before the federal grand jury, nor should the victim be given a polygraph examination. Neither will, by any means, strengthen the case. With regard to grand jury testimony:

- (1) No matter how consistent the victim is, she will never repeat the exact words in the same exact way at trial such that defense counsel will be unable to impeach her;
- (2) There is no reason to "lock in the victim's testimony" because unlike cooperating or reluctant witnesses, if the victim refuses to testify or if she disappears, there is no case;
- (3) Memorializing the victim's account while the victim is clear-headed or sober can be accomplished via a detailed FD-302, which the victim can use to refresh her recollection.⁴⁹ There is no need for a grand jury transcript. Moreover, the victim has to be clear-headed and sober to testify at trial anyway. If the victim is intoxicated at trial, there are certainly bigger issues than the victim's faulty memory;
- (4) There is no "practice" to be had by testifying before the grand jury. The grand jury is not the petit jury, and it is therefore not the proper measure of how credibly a victim will testify at trial;
- (5) Along the same lines, the purpose of the grand jury is not to test the credibility of the victim. That is the prosecutor's role;
- (6) There is no way to guarantee that grand jury testimony will be the vehicle by which to memorialize every detail of the assault in one transcript. As stated above, sometimes sexual assault victims remember details as time progresses. It is not ideal for trial, but it is the reality of handling these types of cases.

⁴⁹ FED. R. EVID. 612.

B. Corroboration: Federal Rule of Evidence 413 and 404(b) —Similar Fact Witnesses

Federal Rule of Evidence 413 allows evidence of prior sexual assaults to be used for any matter “to which it is relevant,” including propensity, when the defendant is charged with a sexual assault.⁵⁰ Further, there is a presumption to allow admission of such evidence.⁵¹

Sex crimes defendants are rarely caught the first time they commit an offense. Because prior acts of sexual assault are admissible to prove propensity as well as a pattern of behavior, it is therefore advisable to focus the investigation on finding past victims in an effort to corroborate the initial victim. When offenders are probation officers or corrections officers, there is often a finite number of potential victims to whom they had access. Although time consuming, speaking with each probationer on a probation officer’s caseload or each inmate assigned to a corrections officer’s pod may mean the difference between indictment instead of declination, conviction instead of acquittal, or plea instead of trial. Similarly, for example, if the offending officer victimized a DUI arrestee or someone seeking a temporary domestic violence injunction, it may be fruitful to obtain other police reports involving DUI arrests or injunctions in an effort to identify additional victims.

Congress created Rule 413 to encourage the prosecution of sexual offenders by allowing in propensity evidence for that very reason.⁵² As the Congressional Record set forth:

Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over his wallet as a gift—the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.⁵³

Furthermore, “since . . . rapes generally [do not] occur in the presence of credible witnesses, [FED. R. EVID. 413] permits other victims to corroborate the complainant’s account via testimony about the defendant’s prior sexually assaultive behavior . . . Corroboratory information about the defendant also limits the prejudice to the victim that often results from jurors’ tendencies to blame victims in acquaintance rape cases.”⁵⁴

Nonetheless, FED R. EVID. 413 is subject to analysis pursuant to FED. R. EVID. 403 to ensure that the danger of prejudice does not substantially outweigh the probative value of uncharged conduct.⁵⁵ In performing the Rule 403 balancing test, courts have typically considered “the similarity of the prior acts to the acts charged . . . the closeness in time of the prior acts to the charged acts . . . the frequency of the prior acts, the presence or lack of intervening events . . . and the need for evidence beyond the testimony

⁵⁰ FED. R. EVID. 413(a).

⁵¹ *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir.1998).

⁵² *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998); *United States v. Seymour*, 468 F.3d 378, 386 (6th Cir. 2006) (“Rule 413 was enacted as an exception to the default position set forth in Rule 404(b) that propensity evidence is presumptively more prejudicial than probative.”).

⁵³ *Enjady*, 134 F. 3d at 141 (citing 140 Cong. Rec. S129901–01, S12990 (R. Dole, Sept. 20, 1994)).

⁵⁴ FED. R. EVID. 413; *Enjady*, 134 F.3d at 1432 (citing Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 69-70 (1995)); *United States v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998) (“[P]ropensity evidence has a unique probative value in sexual assault trials and that such trials often suffer from a lack of any relevant evidence beyond the testimony of the alleged victim and the defendant.”).

⁵⁵ FED. R. EVID. 413, FED. R. EVID. 403; *United States v. Strong*, 826 F.3d 1109, 1113 (8th Cir. 2016).

of the defendant and alleged victim.”⁵⁶ As expected, courts have frequently assigned high probative value to prior act evidence when it indicates a common pattern of behavior.⁵⁷

Moreover, even when the defendant’s prior conduct does not rise to the level of sexual assault as required under Rule 413, it may still demonstrate a pattern of behavior similar to what the main victim described, and therefore be admissible under Federal Rule of Evidence 404(b) to show intent, modus operandi, common plane or scheme, or lack of mistake.⁵⁸ Rule 404(b) is considered “an inclusive rule, admitting all evidence of other crimes or acts except [contrary to Rule 413] that which tends to prove only criminal disposition.”⁵⁹ When intent is at issue, as it is to prove willfulness in Section 242 prosecutions, prior acts have been permitted to prove that element.⁶⁰

It is not uncommon for sex offenders to engage in a pattern of “grooming,” in which they begin testing their victims to see how far they can push their behavior. By exploiting their victims’ weaknesses, be it substance addiction, prior victimization, or their relationship as probation officer to probationer, for example, offenders begin to push the boundaries by asking inappropriate questions or making suggestive comments, all of which may be admissible under Rule 404(b) to show his pattern and intent.

C. Corroboration: Outcry Witnesses

As previously mentioned, while victims may not immediately report law enforcement sexual misconduct to the authorities, they do often disclose their assaults to friends, family members, cellmates, and the like, sometimes in person or sometimes on a recorded jail call. These disclosures are important to corroborate the victims’ tone, demeanor, and behavior after the assault. Because outcry witnesses may be nurses, counselors, or religious leaders, and do not have the same criminal history, drug addiction, etc. that afflicts the victim, their credibility is less likely to be questioned. Outcry witnesses may give details of the assault that victims were at first reluctant to disclose to investigators and prosecutors. They may have information about other victims or longtime suspicions about the offender.

Statements that victims make to outcry witnesses are also substantively admissible under Federal Rule of Evidence 801(d)(1)(B) as non-hearsay if such prior consistent statements are “offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.”⁶¹ More often than not, that is the very defense that the offender will put forth. In other words, it is very common for the defendant to claim that the victim is lying. In such cases, the victim’s initial disclosures to those outcry witnesses, whether they be written jail grievances or verbal statements to a pastor, are admissible for the truth of the matter asserted and go directly to proving the crime charged.

FED. R. EVID. 801(d)(1)(B) is particularly significant in the context of Rule 413 victims, where the defense may argue that the victims fabricated their accounts because they were approached by federal prosecutors and agents and wanted to be helpful in the face of their own legal problems. Jail calls, grievances, letters to family members, counseling sessions, and other disclosures to outcry witnesses are admissible to rebut such an assertion and can effectively bolster these victims’ credibility.

⁵⁶ *Guardia*, 135 F.3d at 1331 (citations omitted); *Blind-Doan v. Sanders*, 291 F.3d 1079, 1082 (9th Cir. 2002).

⁵⁷ *See, e.g., United States v. Benally*, 500 F.3d 1085 (10th Cir. 2007); *United States v. Crow Eagle*, 705 F.3d 325 (8th Cir. 2013).

⁵⁸ FED. R. EVID. 404(b).

⁵⁹ *United States v. Tan*, 254 F. 3d 1204, 1208 (10th Cir. 2001) (citing *United States v. Van Metre*, 150 F. 3d 339, 349 (4th Cir. 1998)).

⁶⁰ *Huddleston v. United States*, 485 U.S. 681 (1988); *See United States v. Mohr*, 318 F.3d 613 (4th Cir. 2003) (Similar fact evidence was properly admitted to prove that the defendant officer acted willfully when she previously used unreasonable force in a similar manner); *United States v. Dise*, 763 F.2d 586, 592 (3d Cir. 1985) (Court upheld the admissibility of a state hospital aide’s other acts of abuse because “[t]he evidence was plainly relevant on the issue of Dise’s willfulness.”).

⁶¹ FED. R. EVID. 801(d)(1)(B); *Tome v. United States*, 513 U.S. 150 (1995).

D. Subject Interview

When conducting a subject interview, there are several charging and strategic considerations to keep in mind. First, it is unlikely that a law enforcement officer will admit to engaging in sexual contact without consent. Second, unless confronted with what they perceive to be credible evidence (e.g., DNA), most law enforcement officers will deny engaging in any type of sexual contact with someone in their custody. Therefore, it is probably not strategically prudent to attempt to get the subject to admit to nonconsensual contact and then, when that fails, disclose to him that DNA was recovered. Such a disclosure will allow him to easily and falsely claim that the sex was consensual and then explain that he did not at first admit to sexual contact because he did not want to get fired.

It may be a better course of action to consider interviewing the subject early in the investigation before he learns of the state of the evidence. Despite the natural instinct to confront a subject with concrete evidence, investigators should consider not disclosing DNA evidence, but rather getting a detailed account from the subject and locking him into his story, later to be used for impeachment should he testify at trial. Investigators should focus on the specific interactions between the subject and the victim, where and why the subject took the victim to a certain location, who he saw and why he did what he is claiming to have done. By doing so, the investigative team can then work to disprove aspects of the subject's account, thereby discrediting the subject's story overall.

Importantly, even where a Section 242 violation without statutory enhancements is a misdemeanor, making material false statements to federal agents is a felony in violation of 18 U.S.C. § 1001.⁶² Similarly, engaging in misleading conduct by lying to either state or federal investigators can be a violation of 18 U.S.C. § 1512(b)(3).⁶³ Where a subject officer falsely claims that he did not have sexual contact with anyone while on duty, in his custody, etc., it may be worth charging violations of either 18 U.S.C. § 1001 or 18 U.S.C. § 1512(b)(3) as a means of admitting uncharged conduct into evidence to prove the false statements/obstruction charge. In short, specific acts of uncharged sexual assault and misconduct would necessarily be admissible as direct evidence to prove the aforementioned false statements, obviating the need for a Rule 413 or 404(b) hearing (though filing notice of intent to admit such evidence is still good practice).

IV. Other Statutory Violations to Consider

In addition to violations of 18 U.S.C. § 242 and its statutory enhancements, as well as other statutory violations already discussed (i.e., 18 U.S.C. §§ 924(c), 1201, 1001, 1512(b)(3)), it is worth keeping in mind other available federal statutes as investigations progress.⁶⁴ For example, law enforcement officers who commit sexual misconduct may falsify reports and delete messages and photographs to cover up their crimes in violation of 18 U.S.C. § 1519.⁶⁵

Additionally, sexual misconduct by tribal law enforcement officers can implicate statutes for offenses committed within Indian Country pursuant to 18 U.S.C. § 1153.⁶⁶ Additionally, sexual assaults occurring in federal prisons implicate 18 U.S.C. §§ 2242 and 2243.⁶⁷ Notably unlike Section 242, Section 2243 is a strict liability crime. It is a per se violation for a corrections officers or other employees in an

⁶² 18 U.S.C. § 1001 (2012).

⁶³ 18 U.S.C. § 1512(b)(3) (2012); *see United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998) (finding that 18 U.S.C. § 1512(b)(3) applies to misleading conduct toward state investigators); *United States v. Serrata*, 425 F.3d 886, 891 (10th Cir. 2005) (applying Veal's holding to federal investigators); *see also United States v. Anderson*, 229 F. Supp. 2d 17, 22 n.3 (D. Mass. 2002).

⁶⁴ 18 U.S.C. §§ 242; 924(c); 1201, 1001, 1512(b)(3).

⁶⁵ 18 U.S.C. § 1519 (2012).

⁶⁶ 18 U.S.C. § 1153 (2012).

⁶⁷ 18 U.S.C. § 2242 (2012); 18 U.S.C. § 2243 (2012).

“institution[] or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency . . . [to] engage . . . in a sexual act with another person . . . in official detention; and under the custodial, supervisory, or disciplinary authority,” regardless of whether the victim consented or engaged in a quid pro quo exchange.⁶⁸

Finally, when determining available statutory penalties and theories of liability, it may be prudent to coordinate with state and local law enforcement officers and prosecutors. Deferring to state prosecution or reaching a global resolution that includes both state and federal charges may best vindicate the federal interest, hold the perpetrator accountable, and be the best outcome for the victim.

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⁶⁸ § 2243(b)(1)(2); *United States v. Urrabazo*, 234 F.3d 904, 907 (5th Cir. 2000) (“The term ‘detention facility’ is not limitless—it includes only those facilities designed or intended to detain prisoners. A federal courtroom does not become a federal detention facility simply because a prisoner is held in custody there during a trial or sentencing hearing. In contrast, the federal government intended the Marshals’ Service cell block to detain prisoners in the . . . federal courthouse, albeit for short periods. As a consequence, the cell block is a detention facility that qualifies as a federal prison.”).