

# Child Victims and Child Witnesses' Rights in Federal Court *December 2014*



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# 18 U.S.C. § 3509/Child Victims' and Child Witnesses' Rights

## Definitions - 18 U.S.C. § 3509(a)

- Child – a person who is under the age of 18, who is or is alleged to be
  - A. A victim of a crime of physical abuse, sexual abuse, or exploitation; or
  - B. A witness to a crime committed against another person.

## Definitions cont.

- Child Abuse – means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child
- The term “child abuse” does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty

## Definitions cont.

- Multidisciplinary child abuse team – a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse

## Other defined terms in 18 U.S.C. §3509(a).....

- Adult attendant
- Physical injury
- Mental injury
- Exploitation
- Sexual abuse
- Sexually explicit conduct
- Sex crime
- Negligent treatment

# Alternatives to live, in-court testimony by child

## § 3509(b)(1)

- Closed circuit TV testimony (§ 3509(b)(1));
- Used when child unable to testify in open court in the presence of the defendant because of:
  - fear
  - substantial likelihood, established by expert testimony, that child would suffer emotion trauma from testifying
  - child suffers a mental or other infirmity
  - defendant's (or his counsel's) conduct causes child to be unable to continue testifying

# Closed Circuit TV Testimony cont.

- Alternatives to live, in-court testimony by child, continued
  - Supreme Court has found alternatives don't violate defendant's Confrontation Clause rights (*Maryland v. Craig*, 497 U.S. 836 (1990))
  - But, in some cases courts have found CC violations where there either was no evidence that child was afraid of defendant, or that fear was not dominant reason child could not testify
  - Best course: when appropriate, establish that fear of defendant (or emotional trauma) is dominant reason child cannot testify in open court



## Testimony by 2-way closed circuit TV

- Court must make findings on the record.
- Court may question the child in chambers, or a comfortable place other than the courtroom, on the record for a reasonable time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense attorney present.

## How does testimony by 2-way closed circuit TV work?

- Child's testimony shall be transmitted into the courtroom for viewing and hearing by the D, jury, judge, and public.
- D shall be provided with private, contemporaneous communication with the D's atty during the testimony.
- The closed circuit TV transmission shall relay into the room where the child is testifying the D's image and the voice of the judge.

## Videotaped Deposition of Child – 3509(b)(2)

- in a proceeding involving an alleged offense against a child, the attorney for the Gov., the child's atty, the child's parent or guardian, or the GAL may apply for an order that a deposition be taken of the child's testimony and the deposition be recorded and preserved on videotape.

# Videotaped Deposition of Child cont.

- Court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the D, jury, judge, and public for any of the following reasons:
  - fear
  - substantial likelihood, established by expert testimony, that child would suffer emotion trauma from testifying
  - child suffers a mental or other infirmity
  - defendant's (or his counsel's) conduct causes child to be unable to continue testifying

# Videotaped Deposition of Child cont.

- If Court finds that the child is likely to be unable to testify in open court, the court shall order that the child's deposition be taken and preserved by videotape.
  - Trial judge shall preside at the deposition and shall rule on all questions as if at trial. The only other persons who may be present are the following:
    - Prosecutor
    - Defense Atty
    - Child's atty or GAL
    - Persons necessary to run equipment
    - Maybe D
    - Other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child

# Videotaped Deposition of Child cont.

- The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on videotape in addition to being stenographically recorded.
- The videotape is given to Clerk of the Court and shall be made available to the AUSA, D, and D's atty.
- At trial, court may admit into evidence the child's deposition in lieu of the child testifying at trial.
- Statute provides for destruction of the videotape.

# Competency Examinations 3509(c)

- Presumption that a child is competent to testify
- Party attacking presumption must file written motion and offer of proof that child is incompetent – standard is compelling reason for examination
  - allegation that child is mildly retarded or is simply reciting a narrative about the alleged incident is not enough, because it does not show child cannot understand and answer questions, or that child does not know difference between truth and lie
  - exam usually conducted by court
- Related point: leading questions may be permitted of child witnesses under FRE 611(c) if needed to develop child's testimony

# Privacy Protection § 3509(d)

- Keep documents disclosing child's name and other identifying information in a secure place and disclose only to persons with a need to know (§ 3509(d)(1))
  - Applies, in part, to all employees of the government connected with the case, including DOJ employees, any law enforcement agency involved in the case, and any person hired by the government to provide assistance in the proceedings
- File documents disclosing child's name or other identifying information under seal (§ 3509(d)(2))



# Protective Orders § 3509(d)(3)

- Privacy protection
  - Protective orders – non-disclosure of child’s name in court, closure of courtroom during child’s testimony (3509(d)(3))
  - Court may permit disclosure of information to the defendant, the atty for the defendant, a multidisciplinary child abuse team, a GAL, or an adult attendant, or to anyone whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child (§ 3509(d)(4))

# Closing the Courtroom § 3509(e)

- When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case.
- Court must determine on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order will be narrowly tailored to serve the Government's specific compelling interest.

# Victim Impact Statement § 3509(f)

- When preparing the presentence report, the *probation officer* shall request information from the MDT and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected.
- A *GAL* shall make every effort to obtain and report information that accurately expresses the child's and the families views concerning the child's victimization.
- *GAL* shall use communication forms commensurate with the age and ability of the child.

# Use of Multidisciplinary Teams

- 18 U.S.C. § 3509(g)
  - Medical diagnoses and evaluation of services
  - Telephone consultation services in emergencies and other situations
  - Psychological and psychiatric diagnoses and evaluation services for the child, parent, etc.
  - Expert medical, psychological and related professional testimony
  - Case service coordination
  - Training services

## Guardians Ad Litem § 3509(h)

- May be appointed to protect best interests of child in cases where child is victim of, or witness to, abuse or exploitation offense
- Prosecutors should consider whether moving for appointment of a GAL would be appropriate in any case involving child victim or witness
- Can attend all proceedings in which child participates and make recommendations to court concerning child's welfare
- A GAL shall be presumed to be acting in good faith and shall be immune from civil and criminal liability.

# Adult Attendant § 3509(i)

- Provides emotional support to child testifying at or attending a proceeding
  - In court's discretion, AA may remain in close physical proximity to or in contact with the child during testimony
  - Court may allow AA to hold child's hand or allow the child to sit on the AA's lap throughout the course of the proceeding
- AA shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child.
- The image of the AA, for the time the child is testifying or being deposed, shall be recorded on videotape.

# Speedy Trial § 3509(j)

- Designation of case as one of special public importance
  - For proceeding in which a child is called to give testimony
  - Motion by prosecutor, GAL, or Court on its own motion.
  - The court shall expedite the proceeding and ensure that it takes precedence over any other
  - Court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being

# Testimonial Aids § 3509(I)

- Court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.



# Crime Victims' Rights Act -18 U.S.C. § 3771

1. The right to be reasonably protected from the accused.
2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

# Crime Victims' Rights Act -18 U.S.C. § 3771

5. The reasonable right to confer with the attorney for the Government in the case.
6. The right to full and timely restitution as provided in law.
7. The right to proceedings free from unreasonable delay.
8. The right to be treated with fairness and with respect for the victim's dignity and privacy.

# Attorney General Guidelines for Victim and Witness Assistance

- Victims' rights laws and policies are of particular importance to victims of DV, SA, or stalking.
- These crimes often cause emotional trauma in addition to physical injury.
- It may be more difficult for Vs to report these crimes because of on-going relationships with the offender.
- These victims often are in great danger of future violence after reporting a crime, during investigation and prosecution of cases, and after Ds are released from prison.

# Attorney General Guidelines for Victim and Witness Assistance

- “Department personnel should be aware of the trauma that child victims and witnesses experience when they are asked to relive the crime during the investigation and prosecution of a criminal case, particularly when testifying in court.”
- “A primary goal of Department personnel, therefore, shall be to reduce the potential trauma to child victims and witnesses that may result from their contact with the criminal justice system. To that end, Department personnel are required to provide age-appropriate support services to these victims, and referrals for community-based services to parents and guardians as indicated.”

# Payment for Forensic Sexual Assault Examinations

- The responsible official or the head of another department or agency that conducts an investigation into a sexual assault shall pay, either directly or by reimbursement to the victim, the cost of the physical examination of the victim and the costs of materials used to obtain evidence. 42 U.S.C. § 10607(c)(7).
- In no case shall the victim be held responsible for payment for the examination or be required to seek reimbursement for the exam from his/her insurer.
- In no case shall a victim of SA be required to cooperate with police or prosecution in order to be provided with an exam free of charge.

# Victim's right to be tested

- 42 U.S.C. § 10607(c) – “the AG shall provide for the payment of the cost of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission.....of sexually transmitted diseases to the victim as the result of the assault.

# Motion to Test for HIV

- US v. Ward, 131 F.3d 335 (3<sup>rd</sup> Cir. 1997)
- 42 U.S.C. § 14011(b)
  - Offense D is charged w/ must pose risk of transmission
  - PC determination that D committed assault
  - Victim requests the test
  - Test would provide info necessary for V's health
  - D must receive notice & opportunity to be heard
  - Test results must be confidential – may be disclosed only to V, D, V doctor or counselor, family member, or post-assault sexual partners
  - May not be used in any criminal trial against D

## Plea Agreement Language.....

- The Defendant Agrees to Medical Testing. The Defendant agrees to be tested for the etiologic agent for acquired immune deficiency syndrome. The Defendant further agrees that if the initial test for the etiologic agent for acquired immune deficiency syndrome is negative, he will be retested six (6) months and again twelve (12) months following the initial test. Title 42, United States Code § 14011.



# Restitution 18 U.S.C. § 2248

- Mandatory Restitution, “the court ***shall*** order ...”
  - Full amount of victim losses including any costs incurred by victim for..
    - Medical services relating to physical, psychiatric, or psych care
    - Physical and occupational therapy or rehabilitation
    - Necessary transportation, temporary housing and child care
    - Lost income
    - Atty’s fees, plus any costs incurred in obtaining a protection order
    - Any other losses suffered by the victim as a proximate result of the offense

# Sex Offender Registration

“The defendant agrees that prior to sentencing he will report to the appropriate local law enforcement agency and complete all paperwork necessary to become registered as a sexual offender under the laws of the State of Michigan.”

# Medical Testing

“The defendant agrees to be tested for the etiologic agent for acquired immune deficiency syndrome. The defendant further agrees that if the initial test for the etiologic agent for immune deficiency syndrome is negative, he will be retested six (6) months and again twelve (12) months following the initial test. Title 42, United States Code § 14011.”

Questions?