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NOT OUT OF MIND, OUT OF SIGHT – CRIPA INVESTIGATIONS
& EMPLOYMENT OF ILLEGAL ALIENS

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CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT: ARE YOU PREPARED FOR AN INVESTIGATION?

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In 1980, Congress enacted the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 *et. seq.* authorizing the Attorney General of the United States through the Department of Justice (DOJ) to conduct investigations and initiate litigation relating to the conditions of confinement in state or locally operated institutions. The statute does not apply to private facilities, but explicitly includes state and local facilities. 42 U.S.C. § 1997(2). CRIPA does not authorize the DOJ to represent individuals, but allows DOJ to take actions to remedy systemic problems in state or locally operated facilities. CRIPA was not designed to create any new substantive rights, but was meant to confer the power on the Department of Justice to bring investigations or litigation based upon previously established constitutional or statutory rights of persons who have been institutionalized.

The Civil Rights Division of the Department of Justice has been assigned the responsibility for enforcing CRIPA. Within the Civil Rights Division, the Special Litigation Section is the department which initiates investigations and litigation.

The Special Litigation Section's enforcement work with respect to CRIPA is divided into five areas:

(1) Jails and Prisons
(2) Juvenile Correctional Facilities
(3) State or locally-run Mental Health Facilities
(4) State or locally-run Developmental Disability and Mental Retardation Facilities; and
(5) State or locally-run Nursing Homes

Pursuant to its mandate under CRIPA, the DOJ since 1980 has investigated approximately 450 different facilities in 39 states, the District of Columbia, and also in Puerto Rico, Guam, and the Virgin Islands.

Closely related to the Special Litigation Section's enforcement of CRIPA is the Section's mandate to investigate the conduct of law enforcement agencies. Under the Violent Crime Control and Law Enforcement Act of 1994, the Attorney General of the United States is authorized to file lawsuits seeking judicial orders for injunctive relief against police departments found to be engaging in a pattern or practice of violating citizens' federal civil rights. Although the mandate to investigate the conduct of law enforcement agencies is separate from CRIPA, the investigations and litigation sometimes overlap due to the fact that local law enforcement agencies operate lock-ups and pretrial detention centers in many jurisdictions.

We will address CRIPA's investigations into the primary five areas and also comment on its investigation into conduct of law enforcement agencies.

1. Jails and Prisons

Pursuant to CRIPA, the DOJ has conducted more than 100 investigations into jails and prisons throughout the United States and its territories. Under the mandate in CRIPA, the DOJ focuses on several issues. Primarily the DOJ is concerned about the physical safety of inmates and looks at issues involving violence and sexual abuse by inmate on inmate and possible abuse by staff on inmates. Accordingly, during an investigation the DOJ reviews every general order, written policy, standard operating procedure, and post order of each jail and prison. Emphasis is placed on whether the policies and practices of the institution require incident reports relating to use of force by staff, the follow-up on those incident reports, and the actions taken if the reports are well founded. In addition, the DOJ looks for accountability and command staff procedures in dealing with physical and sexual abuse. Importantly, the DOJ frequently requires remedial measures including extensive training to make sure that the proper policies and practices are being imparted to the jail and prison staff.

A CRIPA investigation will also include reviews of fire and safety policies and practices and environmental and sanitation conditions. The remedies sought by DOJ will include the adoption of written policies and practices designed to deal with maintaining a safe and sanitary facility.

Jail and prison reviews under CRIPA will always include a review and assessment of medical care and mental health care at the jail or prison facility. The DOJ investigation will include the adequacy of medical care, the accessibility of medical care, the administration of medication, the control of communicable diseases, the provision of mental health services, including the administrative discipline of inmates with mental health problems. Another issue looked at very closely by the DOJ under CRIPA is the assessment of suicide risks and the training of all staff to recognize and deal with potentially suicidal inmates.

Some of the more recent jail and prison investigations by DOJ have included the Lake County Indiana Jail, the Westchester County Jail in Valhalla, New York, the Orleans Parish Prison System in New Orleans, Louisiana, the Erie County Holding Center and Correctional Facility in Buffalo, New York, the Harris County Jail in Houston, Texas, the Mobile, Alabama County Jail, and the Oklahoma County Jail and Jail Annex.

2. Juvenile Correctional Facilities

CRIPA gives the Department of Justice authority to investigate and take action to enforce the constitutional rights and federal statutory rights of juveniles in Juvenile Justice Facilities. The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 makes it unlawful for any governmental authority with responsibility for the incarceration of juveniles to engage in a pattern or practice of conduct that deprives incarcerated juveniles of constitutional federal statutory rights. Typically, CRIPA investigations of juvenile correction facilities involve a review of complaints and incident reports involving the use of force. Another area of review is the restraint of juvenile offenders. The focus is on the types of restraints being employed and the frequency of the application of restraints.

CRIPA investigations of juvenile facilities will delve into whether use of force incidents are adequately reported and once reported, if they are adequately investigated. Again, the written policies and procedures, general orders, and standard operating procedures are reviewed in depth to determine whether or not the written policies are adequate and whether they are being applied in practice. In both the adult jail and prison investigations as well as in juvenile detention facility investigations, the DOJ takes a close look at whether staff has been appropriately trained and whether there is an appropriate mechanism for taking corrective action against staff who have violated accepted professional standards.

As with the adult jails and prisons, the DOJ takes a close look at whether juveniles have been provided adequate physical and mental health care and treatment. In juvenile facilities, the generally accepted professional standards require that the facilities establish individualized behavior management programs to address behavior of the youths. The DOJ frequently brings in mental health experts to determine whether or not the behavioral management programs comply with contemporary professional standards and whether the behavioral management plans include efforts to reduce the potential for reoccurrence through psychiatric treatment, treatment planning or behavioral modification. Also included in the DOJ assessment is the provision of medical care, the access to medical care, and the appropriate administration of medication. Within the juvenile correctional facility investigation there is also great emphasis placed on the youths' substance abuse issues and treatment.

It is important to note that municipalities which contract with private facilities for the provision of juvenile detention are responsible under CRIPA even though their duties have been contracted to an independent contractor.

3. Mental Health Facilities

As with correctional and detention facilities, state and local mental health facilities fall under the authority of CRIPA. Again, private facilities under contract to state and local governments may be and have been investigated by the DOJ. Generally, DOJ investigations of mental health facilities focus on basic sanitation and the environmental safety of the facility itself. In addition, investigations are often directed at issues surrounding sufficient levels of professional staffing, the adequacy of treatment planning, and monitoring of psychiatric medications. Use of restraints and the isolation of patients in mental health facilities is a frequent topic of investigations. Specifically, the DOJ investigates to determine whether restraints or isolation are used frequently and in an unnecessary way strictly for the convenience of staff. Other issues include violence and abuse by resident on resident or at times by facility staff. A mental health facility's treatment and suicide prevention policy is also reviewed closely. Unlike jails and prisons, DOJ delves into a review of the adequacy of discharge planning and community re-entry programs and support services in the instance of mental health facilities.

Since the passage of CRIPA in 1980, the Department of Justice has investigated more than 35 state or local mental health facilities.

4. State or Locally Run Developmental Disability and Mental Retardation Facilities

CRIPA gives the DOJ authority to investigate conditions and facilities for the developmentally disabled and mentally retarded. The investigations focus on safety of the individual, environmental and sanitation safety, and adequate medical and mental health care as in other facilities. However, in developmental disability facilities, there is an additional focus on compliance with the Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.*, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.* and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The Department of Justice Special Litigation Section employs several attorneys and other professionals whose specialty is the enforcement of the ADA. Since the ADA investigations involve the physical structures as well as the amenities of the facilities, compliance frequently requires expensive and extensive rehabilitation and remediation of buildings.

Investigations by the DOJ into the developmental disability and mental retardation facilities have not been as widespread as in the other areas already

discussed. However, the Department of Justice represents on its website that it currently monitors conditions in 22 facilities that presently operate under settlement agreements or court orders.

5. Nursing Homes

Until recently, the DOJ has not been active in its investigation of conditions in public nursing homes. However, that has recently changed and nursing homes operated by or under contract with a local government have been the subject of investigations, litigation, and settlement agreements. The DOJ has investigated nursing homes in at least 12 states over the last six years.

When investigating nursing home conditions, the DOJ focuses primarily on the accessibility to and adequacy of basic medical and nursing care. Frequently, investigations into nursing homes focus on whether the residents are receiving the proper food and liquids necessary to maintain their health. There is also emphasis on whether the residents of the nursing homes are being exposed to sufficient physical activities and needed therapies and not being merely warehoused in isolation without sufficient activity and stimulation. Again, emphasis is also placed on compliance with the Americans with Disabilities Act in the operation of the nursing home.

The Conduct of Law Enforcement Agencies

Separate from but intimately related to its CRIPA work, the Department of Justice investigates the conduct of law enforcement agencies pursuant to the Violent Crime Control and Law Enforcement Act of 1994. The overlap between CRIPA and the Violent Crime Control Act comes as a result of a municipality's police department maintaining a jail, detention center, or holding facility. CRIPA governs the conditions of confinement not only in a municipality's jail, but also in a lock-up or holding facility. The DOJ, employing both CRIPA and the Violent Crime Control and Law Enforcement Act of 1994, has investigated hundreds of police departments including New Orleans, Louisiana, Austin, Texas, Cleveland, Ohio, Prince George's County, Maryland, Miami, Florida, Detroit, Michigan, District of Columbia, and the Los Angeles Police Department.

The Prison Rape Elimination Act of 2003

The Department of Justice pursuant to data complied by the Bureau of Justice Statistics (BJS) concluded that 4.4% of the prison population and 3.1% of the jail population within the United States suffered sexual abuse during the year 2008. The Prison Rape Elimination Act of 2003 (PREA) (P.L. 108-79) requires the Department of Justice to promulgate regulations adopting national standards for the detection, prevention, reduction and punishment of rape in a confinement setting. A commission was established by the Attorney General to draft a

comprehensive set of national standards to reduce and eliminate prison rape and other forms of sexual abuse. A set of standards and a proposed rule was promulgated in 2011. A period of time that was allowed for public comments suggesting additions and revisions has recently concluded. It is expected that the final rule promulgating regulations will be published by the end of 2011. PREA and the enforcement of the soon to be adopted rules and regulations will no doubt be a focus of future CRIPA investigations into prisons, jails and juvenile detention centers. However, the initial report by the National Prison Rape Elimination Commission recommended four sets of national standards for eliminating prison rape. Each different set of standards is applicable to one of four confinement settings. There is a set of rules and regulations for adult prisons and jails, juvenile facilities, community corrections facilities, and police lock-ups and temporary holding facilities. In speaking with various police officials, some have expressed surprise that PREA applies to local police lock-ups and holding facilities because of the title "Prison Rape Elimination Act." However, it is clear from the Act that it is designed to include police lock-ups and holding facilities.

Under the rules and regulations that have been suggested to date, compliance with PREA will require drafting and revising policies, procedures and practices to be provided to staff and to detainees to ensure compliance with PREA standards. PREA regulations will require that staff be assigned to keep track of incidents of rape and sexual abuse, reporting of the incidents, assessment of the incidents, and bringing criminal complaints against offenders. PREA regulations will also require the establishment of an infrastructure to reduce or mitigate the risks of sexual violence. Jails, prisons and lock-ups will be required to have a procedure in place to assess the vulnerability of certain detainees and to identify and isolate both vulnerable detainees and those who are most likely to offend. The PREA rules and regulations have suggested, but as of yet, do not require the employment of a PREA coordination officer and medical and mental health practitioners. Compliance with the soon to be released PREA regulations will likely prove to be expensive. Conversely, a failure to comply with the PREA regulations to be issued could be even more costly in terms of an investigation and litigation.

Initiation of a CRIPA Investigation

CRIPA investigations can be initiated in a myriad of ways. Often, the Civil Rights Division of the Department of Justice obtains information from other government agencies such as Health and Human Services which have found problems with an institution. In many instances, investigations are instigated by complaints from sources outside of the federal government. In the case of prisons, jails and police departments, DOJ can become aware of alleged violations of statutory and constitutional rights from arrestees, detainees, lawsuits, media reports and disgruntled employees. In the case of institutionalized persons, it is not uncommon for the investigation to be started by family members or parents

writing and calling to the Civil Rights Division. Frequently, advocate groups also initiate investigations through complaints and reports they have received even though the information may be anecdotal.

DOJ's Decision to Investigate

Upon receipt of information about alleged unlawful conditions, DOJ must determine that it has the authority to conduct the investigation and that the investigation is warranted. The DOJ must first determine whether the institution complained of is truly a public institution.

In order to be considered a public institution, it must be one "which is owned, operated, or managed by, or provides services on behalf of any state or political subdivision of a state." 42 U.S.C. § 1997(1). Therefore, if a private facility enters into a contract for the state, city or county to house individuals who are pretrial detainees, nursing home residents, developmentally disabled, or juveniles, the institution would fall under the ambit of the CRIPA statute even where the contractor controls the facility and employs the staff. Once the DOJ has determined that a facility meets the requirements of a public institution, it must decide whether the allegations of misconduct and illegality are serious enough to warrant further investigation. The Attorney General of the United States has delegated to the Assistant Attorney General for Civil Rights the final decision whether to proceed with an investigation. Usually, investigations are initiated when the DOJ has received substantial evidence of systemic violations of federal rights. In most instances, investigations are instituted when there are several different areas of violations including lack of access to adequate medical care or treatment, excessive uses of force, lack of mental health care, and lack of environmental and sanitation safety.

Notice of the Investigation

At the time that the DOJ has made a decision to investigate an institution, the Attorney General is required to send a letter to the state or municipality giving at least one week's notice of the impending investigation. Contained in the letter is generally a request to the state or local government to set up a physical visit to the institution. The notice also requests the production of various documents and is ordinarily very comprehensive.

Site Visit and Investigation

The DOJ contracts with various "experts" throughout the United States in various occupational specialties related to the type of facility which is being investigated. Typically, in the investigation of a jail, the team of investigators from the DOJ would include one or more lawyers from the DOJ, experts on the use of force, correctional standards and practices, recordkeeping and data,

environmental health and sanitation, and medical doctors with expertise in both correctional medicine and mental health care. Record production is generally completed prior to the site visit by the experts. The site visits usually take place over two weeks. There is generally a preliminary visit and inspection, followed by another series of inspections several weeks later.

At the conclusion of the production of documents and the site visits, the DOJ makes a determination whether there has been sufficient evidence of a pattern or practice of civil rights violations. If there is not sufficient evidence, a letter from DOJ to the jurisdiction indicates that the investigation is completed and closed. If, however, the DOJ believes that it has observed evidence of civil rights violation, the DOJ sends the state or local government a formal "findings letter." The letter enumerates the alleged allegations, sets forth alleged allegations which it believes supports its findings, and insists that certain steps be taken to correct the violations. The allegations contained in the findings letter as they relate to individual detainees or residents, do not include the names or identify the individuals making the allegations. Furthermore, the findings letters do not include the specific findings of the various "experts" who visited the facility and those experts' notes are not made available to the municipality.

After the findings letter is issued, the local authorities have at least 49 days to comply with the suggested remedial measures, prior to the filing of a complaint in the United States District Court. During that 49 days, the findings letter is not made public or published on the Department of Justice's website. However, after 49 days if there has not been complete compliance with the remedial measures, the findings letter is published and becomes a matter of public record. It should be noted that in most instances, it would be impossible for the local authorities to make the remedial measures suggested during the 49 day period.

A findings letter must include a request to meet with the local authorities to attempt to work out an agreement to pursue the remedies suggested. Unless conciliation is attempted, DOJ may file suit. The DOJ publishes the findings letter after 49 days regardless of whether attempts to reach an agreement are being made. This immediately creates adverse publicity for the institution and local authority. Furthermore, the findings letter is filled with the opinions and conclusions of unnamed so-called "experts" based on self reported or anecdotal events from unidentified detainees, residents, or patients. Frequently, the findings letter presents a snapshot of the institution that is grossly exaggerated and misleading. The CRIPA provision should be amended to require that if the local authority is attempting to reconcile the perceived issues with DOJ during the 49 day period, the findings letter will not be published while negotiations continue.

Of even more concern is the fact that some courts have been allowing the findings letter to be admitted as evidence in litigation by inmates and patients against the institution. There is no question that the "findings letter" is rank

hearsay composed without an opportunity for the institution investigated to respond to or refute the findings. It is totally untrustworthy because it is based on anonymous reports of incidents and written by nameless, faceless "experts." Yet, some courts are admitting the findings letter into evidence as an exception to the hearsay rule FRE 803(8)(c) which allows the admission of a government report. *See Bell v. Harris County*, No. H-10-2421, 2011 WL 2494103 (S.D. Tex. June 22, 2011), *Shepard v. Dallas County*, 591 F.3d 445 (5th Cir. 2009). A findings letter in which the subject of the investigation has no opportunity to refute the findings or present evidence in opposition is clearly not the type of government report that was intended to be excepted from the hearsay rule pursuant to FRE 803(8)(c).

There is no question that the Department of Justice attempts to emphasize negotiation which results in most CRIPA investigations being settled without trial. The negotiations of a remedy with the DOJ can take from months to years. In negotiating with the DOJ, it is necessary to always keep in mind that CRIPA requires only compliance with federal statutes and the constitutional minimums. Throughout the negotiations, DOJ will attempt to impose more than is required by either federal statute or the United States Constitution. Those attempts must be strenuously resisted by the localities. If a local government agrees in a settlement agreement or consent decree to more than is minimally required by the federal statute or Constitution, it is almost impossible to later on obtain relief in court from those provisions. The courts rarely modify settlement agreements or consent decrees unless there has been a substantial change of circumstance. If circumstances have not changed significantly, the court will assume that the local government negotiated to do more than was required by law freely and voluntarily. Obviously, the negotiation stage subsequent to a findings letter and leading to a settlement agreement or consent decree is critically important.

Litigation

If the local authority and the DOJ cannot come to an agreement on remedial measures, the DOJ will bring a lawsuit in the United States District Court. Additionally, even if the local authorities and the DOJ reach an agreement, it is often memorialized in a court endorsed agreement. Generally, a consent decree results after a considerable period of negotiation and the drafting of an Agreed Order. The Agreed Order is filed contemporaneously with a CRIPA complaint in the United States District Court. Once the complaint is on file, the order is taken directly to the District Judge to sign and the consent decree is entered the same day as the complaint is filed or shortly thereafter. In order for the DOJ to file a complaint under CRIPA against a local government, the Attorney General, him or herself, must execute the complaint and verify that DOJ has complied with the procedural requirements of CRIPA, specifically notification and conciliation, and must certify that a CRIPA action is in the public interest.

CRIPA actions brought by the Department of Justice may only seek equitable relief and are not permitted to seek monetary damages. In negotiating a settlement agreement or consent decree with the Department of Justice, local authorities should make sure that there are recitations in the agreement or order specifically indicating that the settlement was made as a matter of expediency only and that no person or entity is intended to be a third party beneficiary of the provisions of the agreement or order for purposes of any civil, criminal or administrative action. The order should also specify that it does not create the basis of a cause of action for any non-party and that it is not intended to expand the right of any person or organization to seek relief against the local government.

Conclusion

CRIPA investigations can be extremely costly and time consuming. Adverse findings may lead to an increase in lawsuits as well as adverse publicity. With the advent of PREA regulations and the DOJ Special Litigation Section's hiring of 12 new attorneys, it is likely that the number of CRIPA investigations will increase substantially. Conducting annual reviews of policies, procedures, and practices of institutions subject to CRIPA oversight including police departments can prepare a local municipality for the institution of a CRIPA investigation and may go along way toward preventing an adverse findings letter and subsequent litigation.

Respectfully submitted,

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