

# Unique Aspects of Prosecuting Cold Case Sexual Assaults

Investigators and other law enforcement officials may reopen a “cold case”<sup>1</sup> sexual assault investigation when new evidence is brought forth. Most cold cases are reopened because previously unsubmitted sexual assault kits (SAKs) reveal new findings after being tested, or the SAKs were tested prior to technological advancements made in more recent years. Renewed investigations informed by considerations of trauma, and a fresh and deeper look at evidence move these cases toward closure.

Reopened cold cases present additional challenges beyond those of standard sexual assault cases; these challenges stem from the passage of time and a variety of factors that may have caused the case to go cold after the original investigation. This brief focuses on unique challenges you may face in cold case sexual assault prosecution: Victim notification, renewed investigations, forensic and expert witnesses, presentation of a cold case at trial, and defense arguments.<sup>2</sup>

## Victim Notification

In most sexual assault cases, a victim reports the assault to the police; law enforcement officials then involve the prosecution team. This sequence is reversed in cold case sexual assault prosecutions (i.e., the criminal justice system reaches out to the victim to initiate the process). This “reverse” process raises questions about when individual victims should be notified that their SAK has been tested or that the investigation into their case has been renewed. As a prosecutor, you should partner with law enforcement officials and victim advocates to notify victims about their SAK and the status of their case.<sup>3</sup>

Notification can impact victims differently; therefore, the timing of notification serves as a key initial question. Members of the multi-disciplinary team (MDT) or sexual assault response team (SART) should discuss and determine whether to notify the victim after receiving test results (known as early notification) or at the time of charging.<sup>4</sup> Victims will likely have many questions and concerns if they are notified shortly after test results have been received but prior to any significant renewed investigation and charging decision. Victim concerns may involve the following:

- ◆ Location of the perpetrator
- ◆ Risk to personal safety

- ◆ Timeline for the completion of any further investigation
- ◆ Strength of the evidence and how the evidence impacts an eventual charging decision
- ◆ Impact and reactions from the victim’s current family and support network.

The individual(s) who notify may not be able to answer all of the victim’s questions; in which case, the MDT and/or SART should discuss these questions to protect the integrity of the ongoing investigation. Early notification provides an opportunity to do the following:

- ◆ Build rapport with the victim at the earliest stages of a renewed investigation and prosecution<sup>5</sup>
- ◆ Avoid the risk of a victim learning about the renewed investigation from third parties outside of the criminal justice system
- ◆ Obtain informed victim input
- ◆ Provide time for a victim to process the renewed trauma of the assault and understand their personal involvement in helping to prosecute the cold case.

Alternatively, notifying a victim after a charging decision may provide greater certainty about what happens next when considering results from a previously unsubmitted SAK. Individual jurisdictions are encouraged to develop their own policies around victim notification.<sup>6</sup>

## Renewed Investigation

Cold case sexual assaults also present unique questions for investigators and prosecutors about the steps taken to renew the investigation and what additional avenues should be considered as part of the renewed investigation.

Any cold case prosecution will require some degree of additional investigation that involves finding personal information (including the current location and contact details) for the victim and witnesses. The victim is a special witness to the case; therefore, give careful consideration about whether the victim should be reinterviewed. A follow-up interview may be necessary if the victim did not discuss detailed psychological and physiological trauma related to the assault during the initial interview. Third-party witnesses are also important and may further corroborate aspects of

the victim's experience. Therefore, a follow-up interview should be conducted if the victim or witnesses

- ◆ were not fully interviewed at the time of the initial report,
- ◆ were not interviewed in a trauma-informed manner, or
- ◆ were not recorded on video during the initial interview.

Interviews must facilitate the victim's and/or witnesses' ability to recall and describe events in a way that would make memories of these events immediate and urgent to a jury, in the event the case goes to trial. Moreover, the victim's perspective may have changed since the crime occurred, which may have given the individual a chance to reflect more deeply or to provide additional, more detailed information in a new interview. Some witnesses may be more willing to provide information due to changed relationships or other personal considerations.

## Evidence Evaluation

The passage of time may also impact physical evidence. Accounting for all evidence when reopening the case is important, as is ensuring the chain of custody has been documented and maintained. Reviewing the chain of custody may provide leads on the location of evidence that is lost, misplaced, or not immediately available. If a witness to chain of custody or forensic testing is unavailable, investigators should identify other witnesses who may have similar information. You should assess the available evidence and determine if an additional investigation would further support and corroborate the case.

DNA testing leads to many cold cases being reopened; such evidence will be critically important in identifying an unknown offender or corroborating a victim's disclosure. Moreover, a resulting Combined DNA Index System (CODIS) "hit" may lead to more evidence and case associations.<sup>7</sup> Additional testing may need to be performed on SAK evidence once the case is renewed. For instance, in the time since the SAK was first tested or the sexual assault first reported, the testing laboratory may have modified policies pertaining to the number of items eligible for testing or the type of testing that may be conducted. Moreover, expanded recognition of confrontation rights since *Crawford v. Washington* may necessitate additional testing if the original analyst is not available.<sup>8</sup> *Williams v. Illinois* may also require laboratory technicians who conducted previous tests (including the protocol used and obtained results) to testify.<sup>9</sup> Further testing should also be weighed against the risk of spoliation or consumption, and the defense argument for independent testing.

In addition to forensic DNA experts, other experts may be available who may not have been considered at the time

of the assault. Experts may be consulted in new fields such as toxicology, medicine, or digital forensics. Prosecutors, investigators, and experts should collaborate to conduct a thoughtful exploration of the cold case, regardless of whether the new investigation utilizes a forensic DNA analyst or other experts.

## Presenting the Cold Case at Trial

Preparing and presenting the cold case sexual assault for trial presents some unique challenges, in addition to issues associated with prosecuting standard cases. Many of these unique concerns can be prevented or mitigated with thorough, collaborative, and active investigating skills from the time the investigation is renewed, up to the time of trial.

Obtaining witnesses from allied agencies or disciplines may prove challenging because some individuals may have retired since the crime was originally reported.<sup>10</sup> Another challenge lies in having witnesses testify when their memories may need refreshing or if they are referencing crime scenes and locations that may have changed since the assault. This issue is further complicated if proper documentation, such as photograph evidence, from the original investigation is inadequate. Meet with witnesses to identify these potential issues at the earliest opportunity. Even a generic photograph of a location may serve to refresh witnesses' memories and provide a useful demonstrative exhibit to help jurors understand the testimony.

Sometimes, delayed prosecution can be attributed to failing to recognize or understand the victim's responses to trauma inflicted by the offender. Experts in victim responses to trauma (such as advocates, medical/psychological professionals, or scholars) can help educate jurors about such responses so the jury can assess the victim's credibility in the proper context.<sup>11</sup> When the victim's response can be attributed in part to cultural considerations with which the jury may be unfamiliar, an expert in the appropriate ethnic or religious culture can help jurors better understand the unique cultural factors affecting the victim.

## Pretrial and Trial Due Process Arguments

A cold case sexual assault will likely see many common defense themes that attempt to shift jurors' focus from the offender to the victim. One such issue may involve claims of pre-accusatorial or pre-indictment delay; the defense may present these due-process claims to highlight the lapse in time between when the crime occurred and when a complaint or an indictment was filed.<sup>12</sup> These claims are brought up pretrial. However, the arguments may continue at trial, even if the claims are dismissed.

Another common defense tactic involves appealing to the jury that the prosecution's delay in charging shows evidence of reasonable doubt. That is, if the initial investigation did not utilize existing best or promising practices, the defense may argue that law enforcement officials did not take the initial investigation seriously. These approaches are in many ways extra-legal because they are not relevant to any witness' credibility or to whether the prosecution has successfully proven an element of a crime. Sometimes, these arguments can be negated or blunted with *in limine* motions that highlight the irrelevance of such evidence.<sup>13</sup> If the defense is given the opportunity to develop such arguments, a carefully planned *voir dire* with experience-based questions can be vital in maintaining an offender-focused prosecution.<sup>14</sup>

## Conclusion

Cold case sexual assault prosecutions present unique challenges when reopening investigations, evaluating evidence, and bringing justice for victims. Considerations for victim safety and security, along with the effective presentation of evidence to hold the offender accountable, will guide your decisions and actions. While the age of a case may present an additional layer of complexity, employing informed strategies throughout the proceedings will enable you to withstand challenges and bring to the courtroom the sense of immediacy and urgency the victim deserves.

### References:

1. A cold case is "any case whose probative investigative leads have been exhausted." National Institute of Justice, *What Is a Cold Case?*, <https://nij.gov/journals/260/pages/what-is-cold-case.aspx> (last visited August 23, 2017). While some cold sexual assault cases may have led to investigative dead ends, others may have involved unsubmitted SAKs that are newly submitted to crime labs for testing; other cases, for a myriad of reasons, did not go forward.
2. This is not an exhaustive list. As a prosecutor, you may face these as well as many other issues when preparing a cold case sexual assault for prosecution. Please contact SAKI TTA at [sakitta@rti.org](mailto:sakitta@rti.org) or call toll-free 1.800.957.6436.
3. Regardless, the prosecution, along with its law enforcement and advocacy partners, must decide when and how to notify the victim that the case has been reopened. Notification should be done in a trauma-informed manner, with an awareness that even when a victim may be relieved at the prospect of receiving justice, the reopening of the case is likely to disrupt the victim's life—particularly if the victim's family and friends were unaware of the crime. If protecting the integrity of the case necessitates a decision to withhold certain information, this should be candidly discussed with the victim as well

as other involved professionals. After the initial notification, it is important to value the victim's participation and maintain ongoing contact to ensure that safety and other needs continue to be addressed throughout the case proceedings. Multiple meetings may be necessary to elicit all of the important details about the case and to prepare the victim to testify about events that happened long ago. *Practitioner Resources: Victim Notification/Advocacy*, Sexual Assault Kit Initiative, <https://sakitta.org/resources/index.cfm?cat=Victim%20Notification/Advocacy>.

4. Id. See also, *Navigating Notification: A Guide to Re-engaging Sexual Assault Survivors Affected by the Untested Rape Kit Backlog*, Joyful Heart Foundation, available at [http://www.endthebacklog.org/information-survivors/victim-notification?utm\\_source=03-2016-vn-report%20&utm\\_medium=eblast&utm\\_campaign=jhf-etb-outreach](http://www.endthebacklog.org/information-survivors/victim-notification?utm_source=03-2016-vn-report%20&utm_medium=eblast&utm_campaign=jhf-etb-outreach).
5. This factor may be especially critical when investigative response at the time of initial reporting may not have been trauma-informed and in line with current best practices. See *Practitioner Resources*, Sexual Assault Kit Initiative, <https://sakitta.org/resources/index.cfm>.
6. *Supra* note 3. The SAKI partners are available to review and discuss policies; contact SAKI TTA at [sakitta@rti.org](mailto:sakitta@rti.org) or call toll-free 1.800.957.6436.
7. A CODIS "hit" can be made by a DNA profile from evidence in an unsolved case matching the DNA profile from a convicted offender or an arrestee. A "hit" can also be made between evidence in an unsolved case and another unsolved case or to a previously solved case. Chris Lacroix, *What Does a CODIS Hit Mean?* Virginia Department of Forensic Science, [http://www.dfs.virginia.gov/question\\_\\_answer/what-does-a-codis-hit-mean/](http://www.dfs.virginia.gov/question__answer/what-does-a-codis-hit-mean/).
8. 541 U.S. 36 (2004). See *The Prosecutors' Resource on Crawford v. Washington*, AEQUITAS (2012), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).
9. Teresa Garvey, *Williams v. Illinois and Forensic Evidence: The Bleeding Edge of Crawford*, 11 Strategies (2013), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm); Webinar recording by Teresa Garvey, *Williams v. Illinois and Forensic Evidence: The Bleeding Edge of Crawford* (recorded December 3, 2013).
10. Often, these witnesses are cooperative and cognizant of their civic duties. However, there may be instances when an individual believes his/her separation from an agency implies a separation from his/her obligations. Best practice is to ascertain whether there is such an issue at the earliest opportunity possible.
11. For example, see Louis Ellison & Vanessa Munro, *Complainant Credibility & General Expert Witness Testimony in Rape Trials: Exploring and Influencing Mock Juror Perceptions*, University of Nottingham and University of Leeds (2009); Jennifer Gentile Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, National District Attorney's Association (2007); Brief of Amicus Curiae Pennsylvania Coalition Against Rape in Support of Appellant, *Commonwealth v. Olivo*, 127 MAP 2014 (Pa. 2014), available at [www.aequitasresource.org/library.cfm](http://www.aequitasresource.org/library.cfm).
12. See also [article title re: forthcoming article on pre-accusatorial or pre-indictment delay]. Contact SAKI at [sakitta@rti.org](mailto:sakitta@rti.org) or call toll-free 1.800.957.6436 for more information.
13. "Preliminarily; presented to only the judge, before or during trial." *In Limine*, Black's Law Dictionary, 10th edition (2014).
14. See also *Prosecuting Cold Case Sexual Assault: Jury Selection/Voir Dire*, AEQUITAS, Sexual Assault Kit Initiative (2017).

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AEQUITAS, The Prosecutors' Resource on Violence Against Women