

**MISSOULA COUNTY ATTORNEY'S  
OFFICE**

**SEXUAL ASSAULT  
POLICY & PROCEDURE MANUAL**



**First Edition, December 2014**

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# INTRODUCTION<sup>1</sup>

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Sexual assault cases are among the hardest to successfully prosecute. While no manual can take the place of the hard work, collaboration, skill, training, and experience needed to successfully prosecute sexual assault cases, this is an attempt to provide necessary information to experienced and inexperienced prosecutors alike to assist in evaluating and trying cases and in developing relationships with victims and with community partners. The Manual includes information on issues that prosecutors will encounter in their first sexual assault case, and in their hundredth. There is no formula prosecutors can apply to every sexual assault case; however, the information in this manual will assist in developing critical, nonjudgmental, and sensitive frameworks for approaching the very difficult issues inherent in sexual assault cases.

This manual starts at the beginning; in addition to providing legal information and practice tips, it covers critical areas such as the stereotypes and rape myths seen in jury pools, society in general, and sometimes within

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<sup>1</sup> A substantial portion of this chapter has been excerpted and modified with permission from the Michigan Domestic and Sexual Violence Prevention and Treatment Board and the Prosecuting Attorneys Association of Michigan. Originally published in *The Michigan Prosecutors Sexual Assault Prosecution Manual* (2013). All rights reserved.

the criminal justice system itself; offender dynamics; and communicating with victims. Several sections focus on specific issues in prosecuting sexual assault cases; however all chapters contain themes and practice tips that universally apply to responding to and prosecuting sexual assault cases.

Because of the prevalence of the stereotypes and biases surrounding sexual assault, we must recognize that sexual assault truly is not like other crimes, and the scope of knowledge required is broader than that required to prosecute other types of crimes. Prosecutors, therefore, must be armed with current research and employ best practices, defined as “commercial or professional procedures that are accepted or prescribed as being correct or most effective.”<sup>2</sup>

This Manual also includes detailed information about recent research on trauma. Emerging research in psychology and neurobiology shows that many common victim behaviors and reactions upon which rape myths are based actually have a basis in psychology and neurobiology. The application of trauma research to the prosecution of sexual assault cases is relatively new; therefore a significant portion of this Manual is devoted to

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<sup>2</sup> Oxford Dictionary.

the research underlying common victim behaviors that often serve as obstacles to successful prosecution.

The guidelines laid out in this Manual are intended to promote consistency and coordination and reflect a comprehensive set of best practice responses to sexual assault. While these guidelines reflect the priorities of victim safety and offender accountability, the ways to get there may vary from one case to another. These guidelines are not intended to serve as a rigid set of rules, but rather as a solid foundation of information and guidance.

These guidelines are based on the following principles:

- We recognize that victims are never responsible, in all or in part, for their victimization, regardless of the circumstances leading up to or surrounding the assault, such as lifestyle choices or behavior;
- We recognize that sexual assault is the ultimate loss of personal control and autonomy and we are committed to working with advocates, law enforcement, and our Just Response multi-disciplinary team to empower victims by giving them choices, support, and respect;
- We recognize that most sexual assaults are non-violent and are committed by someone known to the victim, and reject the “real rape” stereotype;

- We recognize that rape myths and stereotypes commonly employed by defense attorneys, reflected in popular culture, and believed by some jurors must be confronted and dispelled by the criminal justice system wherever possible;
- We recognize that victims display a wide range of behaviors and emotions, and are committed to becoming more trauma-informed;
- We recognize that prosecuting sexual assault cases is particularly demanding and complex, and requires expertise in many areas, including trauma and victim and offender dynamics.

The gender-specific language used in this Manual is not intended to minimize the experience of male victims of sexual assault; we know that many men of all ages experience sexual assault. However, most victims of sexual assault are women and girls, and most offenders are men. The use of those pronouns in this Manual reflects that reality. And because the English language contains no singular gender neutral pronoun, the writing quickly becomes stilted and confusing if one or the other is not used consistently.

The term “sexual assault” is used throughout this manual to refer to sexual offenses in general, not a specific offense.

This Manual is the result of a collaboration between the Missoula County Attorney’s Office and the Montana Attorney General’s Office. Some

parts of this manual are original writing. We also reviewed a number of excellent manuals from other jurisdictions and have cited many of them here, including the Oregon Sexual Assault Task Force's 2009 Oregon SART Handbook and The Massachusetts District Attorneys Association's Massachusetts Prosecutors' Manual: Domestic Violence & Sexual Assault.

We want to express particular gratitude to several organizations who generously permitted us to use full excerpts of, and adapt several sections of, their publications: the Prosecuting Attorneys Association of Michigan, the Wisconsin Office of Justice Assistance, and the National District Attorneys Association. Their research made ours much easier. We have included some of their research references at the end of this Manual. We also thank Anne Munch for her assistance.

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# Chapter 1

## VICTIM CENTERED, OFFENDER-FOCUSED PROSECUTION<sup>3</sup>

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According to a White House study, nearly one in five women is sexually assaulted in her lifetime.<sup>4</sup> In light of this extraordinarily high rate of victimization, developing a coordinated community response - in which the victim's needs are prioritized - is more important than the defendant - to provide effective medical care, support and advocacy to survivors and meaningful criminal justice intervention with sex offenders is imperative.

The primary role of prosecution is to see that justice is accomplished.<sup>5</sup> In pursuing that goal in

*A victim-centered, offender-focused response to the prosecution of sexual assault crimes is predicated on the need to protect the victim's safety, privacy and well-being while holding offenders accountable.*

cases of sexual assault, prosecutors must work in a coordinated and collaborative fashion with law enforcement, advocates, medical

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<sup>4</sup> Rape and Sexual Assault: A Renewed Call to Action. White House Council on Women and Girls, January 2014.

<sup>5</sup> NDAA Prosecution Standards, 1991.

professionals and crime labs. Prosecutors are responsible for assessing reports of sexual assault to determine if enough evidence exists or could be obtained to file criminal charges. Prosecutors must also consider the ethical issues involved in determining whether or not to file a criminal complaint, and to consider the victim's wishes and well-being in making decisions in a particular case, with the understanding that going through the criminal justice process is not the right thing for all victims.

When someone who has been sexually assaulted comes to a prosecutor as a victim, the actions

*Prosecutors have the power to help reduce victims' trauma and help them become survivors.*

that prosecutors takes, and the choices the prosecutor makes, can have a life-long impact on that victim. Research has confirmed that the initial interactions the victim has with medical personnel, law enforcement and prosecutors have a profound impact on their recovery. Prosecutors have the power to help reduce victims' trauma, and to help them move from being victims to becoming survivors – regardless of the outcome of the criminal justice process.

A victim-centered, offender-focused response to the prosecution of sexual assault crimes is predicated on the need to protect victims' safety,

privacy and well-being while holding offenders accountable. The goal of this approach is to decrease re-victimization by ensuring survivors of sexual assault are treated with compassion and respect. Myths and misinformation surrounding the crime of sexual assault, along with the tendency of the defense and jurors to focus on the victim's actions instead of the offender's, present unique challenges in the successful prosecution of the crime of sexual assault. Prosecutors are uniquely positioned to educate the community, jury by jury, about sexual assault dynamics and the tactics used by offenders.

The need for prosecutors to support victims cannot be overstated. In communities that lack victim advocates, the prosecutor's office may be the only resource available to support victims through the process and to educate victims about their rights as crime victims – rights to participation, information, confidentiality, financial restoration and restitution.<sup>6</sup>

### **The Victim-Centered Response**

A victim-centered response to sexual assault prioritizes the needs of victims, seeks to preserve their safety and restore their dignity, and supports victims

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<sup>6</sup> See Mont. Code Ann., Title 23, Chapter 24.

in their efforts to seek justice and healing. At its core, it includes:

- Recognizing that victims are never responsible for the crimes committed against them;
- Recognizing that offenders are always responsible for their crimes;
- Recognizing that the victim's choices, safety, and well-being are the primary focus;
- Recognizing and respecting victims' choices about and input into the criminal justice response;
- Recognizing that the victim is at the center of all decisions regarding recovery and any involvement with the criminal justice system and that pursuing prosecution may not be in the best interest of every victim; and
- Recognizing that responding to the needs of the victim become everyone's concern and a collective effort.

A victim-centered approach acknowledges that justice represents more than a successful prosecution. It is important for victims to have an experience of justice, regardless of the legal outcome of an individual case. Justice exists when victims are listened to and taken seriously. This is particularly important given that victims often choose not to report out of fear that they won't be believed. Furthermore, research has increasingly demonstrated that victims who experience a supportive and compassionate response, regardless of the criminal justice system outcomes, have lower rates of post-traumatic stress than victims who experience a secondary

trauma in the form of disbelief and blame. The goal is to create response protocols that mitigate the harm and trauma that victims experience and that allow individual survivors to experience justice regardless of the legal outcome of the case.<sup>7</sup>

### **The Offender-Focused Response**

Prosecution of sexual assault crimes should also be offender-focused.

An offender-focused response acknowledges that *offenders purposefully, knowingly and intentionally target victims whom they believe they can*

*successfully assault*. This includes

potential victims who offenders

perceive as vulnerable, accessible,

and/or lacking in credibility. The

victim's perceived lack of credibility

is seen by the offender as an

***Offenders purposely, knowingly and intentionally target victims whom they believe they can successfully assault – victims they perceive as vulnerable, accessible, and/or lacking in credibility.***

assurance of the offender's ability to escape accountability. Unfortunately, a

lack of focus on the offender is exactly what the offender needs to continue

offending. Therefore, an offender-focused response draws attention to the

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<sup>7</sup> Oregon Sexual Assault Task Force SART Handbook, p.6.

actions, behaviors, characteristics and, to the extent permitted by the Rules of Evidence, the prior criminality of the offender.

An offender-focused response requires knowledge of the nature of sex offenders and considers the following:

- Adult sex offenders are often repeat or serial offenders;
- Adult sex offenders often target people they know;
- Adult sex offenders are often practiced liars who have a history of avoiding detection through deception and manipulation.

Prosecutors should incorporate this knowledge of sex offenders into the investigation and prosecution of sexual assault cases while keeping an open mind about the facts and not prejudging the case during the course of an investigation.

***No sexual assault report should ever be dismissed or deprived of a fair and full investigation on the basis of anyone's initial reaction to the facts. Offenders count on such responses, and our falling prey to them. Whether it is the investigating detective or the prosecutor – it amounts to playing into the offender's hands."***

In an offender-focused response, taking care to make decisions about a case can only be done after a full and fair investigation, to do justice for victims, hold offenders accountable, and uncover the rare but real false

reports.<sup>8</sup> “Knowing what we do about sexual assaults – that truth is stranger than fiction – no sexual assault report should ever be dismissed or deprived of a fair and full investigation on the basis of anyone’s initial reaction to the facts. Offenders count on such responses, and our falling prey to them – whether it is the investigating detective or the prosecutor – it amounts to playing into the offender’s hands.”<sup>9</sup>

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<sup>8</sup> A study of false reporting research found that when “methodologically rigorous research has been conducted, as opposed to estimates for the percentage of false reports begin to converge around 2-8%.” False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault, Lonsway, Archambeault, and Lisak. *The Voice*, Vol. 3, No.1, published by the National Center for the Prosecution of Violence Against Women, National District Attorneys Association.

<sup>9</sup> Wisconsin Prosecutors’ Sexual Assault Reference Book, p.130.

## Chapter 2

# DEVELOPING AND MAINTAINING RELATIONSHIPS WITH VICTIMS<sup>10</sup>

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Because the physical, emotional, and psychological well-being of the victim is considered in all phases of the case, communication with victims is of paramount importance. Advocates play a critical role in this process.

Although prosecutors may not be in the position to oblige all the requests of victims, research has demonstrated that showing an interest in a victim's perspective and giving consideration to her requests may have a more significant impact on the victim than the resolution of the case in the criminal justice system.<sup>11</sup>

### **Timelines**

Prosecutors will meet with victims as early in the process as possible and, if possible, before the decision to charge a case has been made. When a case is referred to the Missoula County Attorney's Office for possible prosecution, the assigned prosecutor will make contact with the law

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<sup>10</sup> Parts of this chapter are sourced from the Oregon Sexual Assault Task Force SART Handbook and The Massachusetts Prosecutor's Manual: Domestic Violence and Sexual Assault, Third Edition, Massachusetts District Attorney's Association, 2010.

<sup>11</sup> Oregon SART Handbook, p.49.

enforcement investigator within two weeks. The prosecutor will make requests for additional investigation, in writing, in a timely fashion. We agree that “it is best practice for prosecutors to take a proactive role in identifying and acquiring information and corroborative details necessary to prosecute the case” and that, in circumstances where a suspect has not already been arrested, “choosing to file or not to file charges should be avoided until all of the information related to the circumstances leading up to and surrounding the sexual assault has been fully pieced together.”<sup>12</sup>

In cases in which a probable cause arrest is made and a complaint has to be filed within 48 hours, a pre-charging meeting with the victim will often not be feasible. In those cases, the victim meeting will occur as soon as possible.

In cases in which the investigator does not believe a prosecutable case exists, a prosecutor will be assigned to review the case. The prosecutor will review the case within one month of referral or provide explanation for any delay. The prosecutor will then provide written guidance as to concurrence or suggested alternatives, including a request for additional investigation. If

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<sup>12</sup> Oregon SART Handbook, p.48.

the victim wishes to meet with the investigator and the prosecutor, the investigator will schedule a meeting.

In cases referred for prosecution and cases referred for review only, as well as cases still in the investigative phase, an investigator or prosecutor wanting input or assistance can request the case be staffed at a Missoula County Attorney's Office staff meeting, a Just Response case review meeting, or the weekly meeting between the Missoula County Attorney's Office and the Missoula Police Department Special Victims Unit. Any prosecutor or investigator can request a staffing meeting at any time.

Whether a case is charged or declined, it is helpful to victims to hear a unified message about the case. The assigned prosecutor and detective will meet with the victim and the victim's advocate to explain a decision to charge the case, a decision to decline the case, or a decision to request additional investigation before making a charging or declination decision. In some cases, particularly those in which a decision is delayed by the need for additional investigation, multiple meetings with the victim and advocate will be necessary, although some victims may wish to minimize their contact with the criminal justice system and will choose to delay meeting until the followup investigation has been completed.

## **Advocate Involvement**

Often, victims will have an advocate assigned to their case before the case is referred to the Missoula County Attorney's Office, as law

enforcement attempts  
to facilitate contact  
between the victim

*Advocates play a critical role in guiding victims, their family members, and witnesses through the criminal justice system and can be invaluable to the success of a case.*

and an advocate at the earliest possible stage in the investigation. Law enforcement will also indicate on the referral form whether the victim prefers contact from the advocate, the investigator, or by the prosecutor directly, as well as whether the victim prefers to be contacted by phone, email, or other means. Every effort will be made to accommodate the victim's preferences. If the victim has not had contact with an advocate or has previously declined advocacy services, the prosecutor, with the assistance of the Missoula County Attorney's Office Victim/Witness Coordinator, will explain the advocacy services available and make contact with the Crime Victim Advocate Program to obtain advocacy services for the victim, if the victim so wishes.

## **Relationships with Advocates**

Advocates play a critical role in guiding victims, their family members,

and witnesses through the criminal justice system and can be invaluable to the success of a case. They explain the process, notify victims of the scheduling and outcomes of court hearings, attend court hearings and trials with victims, and provide information about victims' rights and services available to victims. They "help victims and witnesses 'cope with the realities of the criminal justice system and the disruption of personal affairs attending a criminal prosecution during a time of personal trauma.'"<sup>13</sup> Prosecutors, law enforcement, and advocates should work together to provide direct and referral services to victims of crimes and assist in protecting the victim's right to privacy regarding personal identifying information and other personal information.<sup>14</sup>

Advocates can be of enormous assistance to prosecutors as well. Most victims come into the system having had little exposure to the criminal justice process. The complexities of statutes, evidentiary rules, court procedures, and the multi-layered analyses involved in evaluating a case, negotiating plea agreements, and strategizing and preparing for trial can be overwhelming for victims who are already dealing with the complexities and

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<sup>13</sup> The Massachusetts Prosecutor's Manual: Domestic Violence and Sexual Assault, p.111.

<sup>14</sup> NDAA National Prosecution Standards 2-9.4.

difficulties of coping with a traumatic event.

Victims often need assistance remembering, processing and understanding the large amounts of complex information imparted to them by prosecutors, and significant misunderstandings can result if they are not provided an opportunity to react to and process the often complicated - and sometimes gut-wrenching - conversations prosecutors frequently have to initiate. Advocates can also provide notification and support services that are time-consuming and difficult for prosecutors to provide at times, due to high caseloads and full court schedules.

Every effort should be made to develop a collaborative relationship with advocates, preferably through a coordinated community response, or MDT (multi-disciplinary team). Developing collaborative relationships can also result in prosecutors obtaining valuable feedback from advocates, on everything from the prosecutor's interviewing style and demeanor in talking with victims and paying attention to victims' wishes and needs to courtroom presentation. The Missoula County Attorney's Office is a longstanding member of Missoula's sexual assault multi-disciplinary team (MDT), which operates under the organizational umbrella of Just Response, Missoula's coordinated community response to sexual violence, domestic violence, and

child abuse. See Chapter 10 for more information about Just Response and sexual assault collaborations in Missoula.

### **Meetings with Victims**

Whenever possible, meetings between the prosecutor and victim should also be attended by an advocate. Meetings regarding decisions to charge, decline, or request additional information in a case should also be attended by the investigator whenever possible. The victim should be consulted as to who will attend the meetings. The prosecutor has the ultimate responsibility to make sure the victim is kept informed of developments of the case and is provided opportunities to meet and consult with the prosecutor, and will consult with the Missoula County Attorney's Office Victim/Witness Coordinator and the victim's advocate to schedule those meetings.

Depending on the stage of the case, meetings with victims will generally include general information, case-specific information, discussion about strategy, and/or consultation about decisions to be made in the case. However, it is critically important for the prosecutor to gauge how much information a victim can reasonably handle in one sitting. Some victims will have a great need for information in great detail; others will be able to

process only small amounts of information at a time and may initially need a simple assurance that they will be consulted and listed to.

The volume of information prosecutors must impart to victims will likely necessitate several meetings to orient the victim to the criminal justice system, even before the case specifics are discussed in detail. Some victims will want to meet with the prosecutor frequently, while others will want contact only when necessary. If possible, the prosecutor should consult with the advocate and/or investigator before meetings with victims, particularly the first meeting, in order for the prosecutor to get a sense of what the victim can handle.

### ***Tips for Meetings with Victims***

The best thing a prosecutor can do when talking to a victim is to be

***It is critically important for the prosecutor to gauge how much information a victim can reasonably handle in one sitting.***

honest - about the strengths and weaknesses of the case, the likelihood of conviction or of a particular sentence, anticipated defenses, possible defense motions and tactics, trial, and any other topics. This includes delivering bad news about a case and taking care not to promise anything that can't be delivered.

*The impulse to shield a victim from bad news may be well-intentioned, however, the act of concealing information is an act that takes control away from the victim based on what someone else thinks is best for her or him. This is a compassionate but disempowering approach to the victim, one that has no place in a victim-centered response.*

It is important for prosecutors to remember that:

During the course of a prosecutor's work on a sexual assault case, there will be times of setbacks and potential barriers, motions for suppression of evidence by the defense, rulings to bar certain testimony, and even motions for case dismissal. When these setbacks arise, it is sometimes a prosecutor's instinct to not disclose them for fear they may unduly "upset" the victim, particularly if it is a motion or ruling the prosecutor intends to fight. This impulse to shield a victim from bad news may be well-intentioned. It is important to remember, however, that the act of concealing information is an act that takes control away from the victim based on what someone else thinks is best for her or him. It does not allow the victim a chance to make decisions about how to react and assumes that the victim does not have the emotional strength to "handle" the news. This is a compassionate but disempowering approach to the victim, one that has no place in a victim-centered response. Instead of shielding the victim from "upsetting" news, the prosecutor should make sure the victim has an advocate available to offer support. A prosecutor might want to inform the victim's advocate when bad news has been delivered to ensure the

advocate is available to the victim, if needed. Spending time to fully prepare a victim for all possibilities and outcomes of a case in the very first prosecutor/victim meeting will also help ensure that setbacks, when they arise, can be handled in a way that minimizes trauma to the victim.<sup>15</sup>

To that end, prosecutors should:

- Develop a rapport with the victim, and realize that developing a rapport takes time. Prosecutors are put in the position of having to ask victims to trust them, as total strangers, with very private information about a very personal, traumatic event. Without that information, prosecutors are less equipped to protect victims from defense tactics during a criminal case, but it takes time to gain that trust. Let them know you will give them that time. Victims should be encouraged to ask questions about the prosecutor’s background and experience in addition to questions about the case and the criminal process.
- Recognize that all members of the criminal justice system can have a significant impact on the victim, and on the victim’s experience with the criminal justice system. Every member of the criminal justice system the victim deals with has the ability to make or break that victim’s feelings about the system, and therefore his or her ability and willingness to cooperate with and trust in the system.
- Take care to tell victims they are never responsible for the assault.
- Approach difficult subjects with care. Be mindful of language and non-verbal communication. Some questions and statements that seem benign to a prosecutor can feel very judgmental or victim-blaming to the victim. For example, ask “why did you decide to report when you did?” rather than “why didn’t you report right away?”

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<sup>15</sup> Oregon SART Handbook, p.48.

- Recognize that sexual assault victims can sometimes be difficult to interview.
- Acknowledge and empathize with the victim’s fears. Many victims have multiple fears: the fear of not being believed, the fear of being ridiculed, the fear of confronting the offender, fear of retribution, fears of both winning and losing the case, fear of testifying in open court, the fear of the social stigmas surrounding being a victim, etc. Direct expressions of genuine concern and sympathy are appropriate and critical.<sup>16</sup>
- Give victims the time, space, and support to make decisions when reacting to bad news, considering a plea agreement, or preparing for trial. Victims may need to process some things with you, and to process some things without you and come back to talk again.
- Examine your own attitudes and experiences.
- Be prepared to discuss the victim’s concerns about trial and hopes for how the case will be resolved. And, be prepared for disagreements. Many victims are reluctant to participate in a trial. Some victims feel conflicted about participating in the prosecution of someone they know, and some don’t want to see their offenders go to prison or register as a sexual offender, particularly in cases in which the victim knew and trusted the offender.

*Spending time to fully prepare a victim for all possibilities and outcomes of a case in the very first prosecutor/victim meeting will also help ensure that setbacks, when they arise, can be handled in a way that minimizes trauma to the victim.*

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<sup>16</sup> The Massachusetts Prosecutor’s Manual: Domestic Violence and Sexual Assault, p.117.

- Don't interrupt. It is a common reaction to try to guide, or even control, a conversation with a victim, particularly when the victim is having difficulty staying on track. However, allowing victims to express themselves fully will give the prosecutor better information and can result in the victim trusting more in the system. To accomplish that, it is also important to schedule ample time to meet with a victim.
- Keep in mind that talking to victims about how "hard" the process can be can sound discouraging to a victim.
- Ask if the victim has any other concerns, fears, or questions and respond fully and honestly.

### *Topics for Meetings with Victims*

- The role of the prosecutor.

Prosecutors should be mindful that victims, like most of the public, might believe that the prosecutor is the victim's attorney and represents the victim's individual interests. Because prosecutors actually represent the state and community, this misperception may result in misunderstandings and disappointment on the part of the victim if this is not addressed and clarified from the first contact.<sup>17</sup> The prosecutor should also explain to the victim that, although the prosecutor must also consider the safety and well-being of the community in deciding how to resolve a sexual assault case, the needs and wishes of the victim will remain at the forefront of the prosecutor's analysis of the case.

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<sup>17</sup> Oregon SART Handbook, p.48.

- Information about advocacy services, if such services have not yet been provided.

Victims should be encouraged to use advocacy services; however, whether to do so must be left up to the victim. If the case is getting close to trial and the victim has previously declined advocacy services, the prosecutor should consider making another attempt. Because the prosecutor is essentially unavailable to the victim during a trial, a victim might decide that advocacy services would be helpful during trial.

- The phases of the criminal justice system and the victim's role in the system.

Most victims will want to know how the system works and how long it takes. They should be advised of the general chronology of events in a criminal case and when their participation will be required. While most victims vacillate about their feelings about participating in a public trial, it is never too early to let the victim know that is natural and expected, and that the victim will be consulted along the way.

- Delays.

Repeated delays in the proceedings can be traumatizing to victims. The prosecutor should discuss how and why delays occur and assure the victim that while attempts will be made to minimize delays, the risks of creating appeal issues and/or ineffective assistance of counsel claims must be considered in determining whether to agree to, oppose, or request a continuance of any proceeding.

- Interviews.

The victim should be informed that every attempt will be made to minimize repeated interviews, but the victim should also be advised that interviews with the defense attorney and/or defense investigator

will likely be necessary, and that additional law enforcement interviews may be necessary if new issues develop in the case.

- Preparation.

The prosecutor should assure victims that they will be prepared for all stages of the case, from arraignment through sentencing and appeal. Although people working within the criminal justice system understand that the entry of a “not guilty” plea serves as a mechanism to get a case moving, victims are often unprepared to hear their assailants plead “not guilty.” Victims need to know that they will be prepared for their interviews with defense counsel and their direct examination and cross-examination at trial. Prosecutors should also inform the victim’s supporters about what they can do to support the victim throughout the process and what is expected of them both inside and outside the courtroom.

- Legal Protections for Victims.

Victims are often terrified that they will be further victimized by defense attorneys in pretrial pleadings or hearings and at trial. This fear is often centered on things in the victim’s past that are not relevant or admissible in the case, but most victims do not understand that rules of evidence regarding character evidence and the Rape Shield statute can exclude evidence and arguments defense attorneys may want to use. While prosecutors should never promise a victim that a defense attorney will not be able to use victim-blaming tactics in a criminal case, victims are often relieved to know there are pretrial motions prosecutors can file to be sure victims are protected to the fullest extent possible, and that the prosecutor will fight to do just that.

- Defense discovery requests.

Defense discovery requests are often significant intrusions into the victim’s privacy. In the digital age, more requests are being seen for

victims' text messages, social media, and other digital information. Some of these are subjects in which the law is just beginning to develop. Victims should be told that they will be informed of defense discovery requests or requests for such information by law enforcement or the prosecutor and why such evidence could be important to a case, and that the prosecutor will take care to protect any private information that is not relevant or admissible in the case.

- Media.

Victims are also often nervous and scared about the possibility that the media will cover their case. Assuring victims that their names and photographs will not be used by the media can go a long way in helping victims feel more comfortable participating in the process. Prosecutors should also take care when writing Affidavits of Probable Cause and other pleadings to not include unnecessary information that may identify or embarrass the victim.

- Victim's Wishes.

Victims should be advised that they will be consulted as to their wishes regarding charging, testifying, and plea negotiations. It is important to assess a victim's ability to participate in the legal process. The best way of doing so is to establish a rapport with the victim and talk openly about the strengths and weaknesses of the case and the victim's desired outcome, preferably with the assistance of an advocate.

- Later Meetings and Discussions About Difficult Topics.

Unless a victim is ready and willing to talk about the specifics of the assault, or unless discussing those specifics is critical to an initial meeting (such as when additional investigation is being requested and there are time-sensitive reasons for doing so in an initial meeting), it is generally best for prosecutors to let the victim know in an initial

meeting that the discussion will not go into the assault itself. Victims need to develop a rapport and build trust with the prosecutor; it is simply asking too much of victims to expect they will immediately trust everyone in the system while they are still processing the trauma of the assault itself.

- Victims' Rights under Montana law.

Victims of sexual offenses have the right under Montana law to:

- Receive emergency social and medical services;<sup>18</sup>
- Receive notice of the availability of crime victim compensation, community-based victim treatment programs, and contact information for the law enforcement officer and prosecutor assigned to the case;<sup>19</sup>
- Receive information on the availability of services to protect victims from intimidation, including the process for obtaining an Order of Protection;<sup>20</sup>
- Have a victim advocate present when the victim is interviewed about the offense;<sup>21</sup>
- Receive notification, in advance if possible, of proceedings pertaining to the case, including: the arrest of the accused; release of the accused; the charge(s) filed and an explanation of the elements of the offense(s) when necessary to an understanding of the nature of the crime; hearings, trial dates, and scheduling changes;<sup>22</sup>

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<sup>18</sup> Mont. Code Ann. 46-24-201(1).

<sup>19</sup> Mont. Code Ann. 46-24-201.

<sup>20</sup> Mont. Code Ann. 46-24-202.

<sup>21</sup> Mont. Code Ann. 46-24-106(7).

<sup>22</sup> Mont. Code Ann. 46-24-203.

- Be consulted, wherever possible, in decisions concerning the reduction of charges, plea agreements, offers of diversion programs, dismissal, or other dispositions;<sup>23</sup>
- Receive information about pre-sentence reports; sentencing hearings; and the sentence imposed;<sup>24</sup>
- Attend any hearing or trial, and may not be excluded unless a judge deems it necessary or for disruptive behavior;<sup>25</sup>
- Receive a copy of all public documents filed in the case;<sup>26</sup>
- Provide a victim impact statement for sentencing purposes.<sup>27</sup>
- Request assistance with contacting employers, if the victim requests assistance in communicating to the employer that the victim's cooperation in the prosecution of the case may necessitate the victim's absence from work;<sup>28</sup>
- Request assistance with explaining to creditors the reason for any financial strain resulting from the crime or cooperation with the case;<sup>29</sup>
- Promptly receive any of the victim's property held for evidentiary purposes, unless there is a compelling law enforcement reason for retaining the property;<sup>30</sup>

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<sup>23</sup> Mont. Code Ann. 46-24-104.

<sup>24</sup> Id.

<sup>25</sup> Mont. Code Ann. 46-24-106.

<sup>26</sup> Mont. Code Ann 46-24-106(6).

<sup>27</sup> Mont. Code Ann. 46-18-112(1)(e), 46-18-115(4).

<sup>28</sup> Mont. Code Ann. 46-24-205.

<sup>29</sup> Mont. Code Ann. 46-24-205.

<sup>30</sup> Mont. Code Ann. 46-24-205.

- Receive information about appeals, petitions for post-conviction relief, related hearings, and decisions;<sup>31</sup>
- Receive information about an offender's incarceration.<sup>32</sup>

In addition, prosecutors should be mindful of the National District Attorneys Association National Prosecution Standards pertaining to victims and witnesses.<sup>33</sup>

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<sup>31</sup> Mont. Code Ann. 46-24-211.

<sup>32</sup> Mont. Code Ann. 46-24-212.

<sup>33</sup> NDAA National Prosecution Standards, 2-9.1 – 2-9.8; 2-10.1 – 2-10.10.

## Chapter 3

# RAPE MYTHS, COMMON RESPONSES TO SEXUAL ASSAULT, AND TRAUMA<sup>34</sup>

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### Rape Myths

Rape myths are stereotypes or false beliefs that are widely held about sexual assault, victims, and offenders. They blame victims, trivialize their experiences, and minimize and justify sexual assault.

Prosecutors are forced to confront rape myths on a daily basis. We confront them in our dealings with defense attorneys, jury panels, the media, and at times, within the criminal justice system itself. Rape myths are exploited by offenders and many defense attorneys, believed by many jurors, and internalized by many victims. They are not “just a set of harmless beliefs....They encourage silence, shame and pain.”<sup>35</sup>

Rape myths are, at their core, a fundamental misunderstanding about sexual assault. It is against this backdrop of unfair rape myths that prosecutors must evaluate cases, conduct trials, and persuade juries to

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<sup>35</sup> Rape Myths. Research and Advocacy Digest, Washington Coalition of Sexual Assault Programs (wcsap.org), Volume 9, May 2007.

convict offenders. The playing field for prosecutors, who already have a substantial burden of proof, is not level when defense attorneys unfairly characterize normal victim behaviors as credibility problems. Prosecutors therefore must arm themselves with knowledge of rape myths and the research that refutes them.

*The science of trauma refutes the assumptions, inferences, and conclusions people make about victim behavior.* In order to achieve justice for victims, science must trump myth, in the courtroom, the media, and society as a whole. It is critical for prosecutors to understand the link – or disconnect - between societal expectations and the science of trauma. Prosecutors must be adept at identifying rape myths, understand the ways in which trauma manifests, and be able to present the underlying science of trauma to a jury.

The most insidious rape myths are those which make assumptions about both victims and offenders – who they are, and how they behave. As applied to victims, they attack a victim for not behaving like a “real” victim of a “real” sexual

*The science of trauma refutes assumptions, inferences, and conclusions people make about victim behavior.*

assault. Expectations of strenuous resistance, a hysterical response, a clear, coherent, and chronological memory of an assault, and an immediate report to law enforcement are some of the most common rape myths.

This section will provide the groundwork to better understand the trauma associated with being a victim of sexual assault. It will describe common responses to the trauma of sexual assault, stages of healing and the underlying neurobiology of trauma. The purpose is to provide prosecutors with information in order to offer a positive victim-centered response and be able to effectively confront and refute defenses that seek to exploit ignorance and misunderstanding.

### **Understanding Common Victim Responses to Sexual Assault**

Many of the normal human responses to the trauma of sexual assault run counter to the ingrained societal views as to how a victim of sexual assault should respond. For this reason, victim responses often are termed “counterintuitive” or “paradoxical,” in that victim responses are not what people would intuitively expect. These terms describe the perceptions of others that a “real” victim should act in a certain manner. A “real” victim would do everything in her power to fight off the offender. A “real” victim would look and act like a victim; she would be hysterical and report right

away to the police. A “real” victim wouldn’t have put herself in that position to begin with.

It is useful to underscore that sexual assault victim responses are anything but counterintuitive; they are in fact indicative of how the human brain responds to trauma. In fact the presence of such “counterintuitive” responses should support the presence of a real trauma, not negate it.

However, because of societal stereotypes of how a “real” victim of sexual assault should behave, normal responses to trauma create credibility

problems for prosecutors in the courtroom. For example, our society expects a victim

*The presence of “counterintuitive” responses should support the presence of a real trauma, not negate it.*

of sexual assault to have all the details of the assault seared into her memory with crystal clarity. These expectations are held by jurors in sexual assault cases and they will be exploited by the defense to argue that the victim is not credible because she did not conform to the expectations of how a “real victim” would behave. Furthermore, because these myths are ingrained in our society, victims of sexual assault may believe them as well. Thus a sexual assault victim may delay reporting the assault not only due to the

*A sexual assault victim's responses are anything but counterintuitive; they are in fact indicative of how the human brain responds to trauma. However, expectations about how a victim is "supposed" to behave are strongly held by jurors in sexual assault cases and will be exploited by the defense to argue that the victim is not credible because she did not conform to the expectations of how a "real victim" would behave.*

neurobiological response to trauma and the inhibition of memory. Additionally, victims who are sexually assaulted by someone they know may not report right away for many

memory impact caused by trauma, but also because of a fear of not being believed once she does come forward.

The following discussion reviews some of the more common counterintuitive victim responses.

### ***Delayed Reporting***

Delayed reporting of sexual assault, particularly in non-stranger sexual assaults, is the norm rather than the exception. It can be directly attributed to the consequences of trauma described above – including the

*The victim may not even recognize that what happened fits the legal definition of sexual assault because the offender and/or the circumstances of the assault itself do not fit the mold of what our society believes offenders of sexual assault, and sexual assault itself, look like.*

reasons. One may be because it does not fit the stereotype that most people are sexually assaulted by strangers. Thus the victim may not even recognize that what happened to them fits the legal definition of sexual assault because the offender, or the circumstances of the assault itself, do not fit the mold of whom our society believes are offenders. Another reason may be fears about the consequences or potential safety concerns that may arise from reporting a sexual assault by someone the victim knows, whether it is a family friend, co-worker, or former intimate partner.

Delayed reporting of sexual assault is seen as counterintuitive because jurors expect that a victim of sexual assault will report immediately to law

*It is critical to begin to view delayed reporting as a natural and expected reaction to trauma that is very common, particularly in non-stranger sexual assault cases.*

enforcement. As a result, the presence of a delayed report creates a perceived credibility issue for the prosecution. It is critical to begin to view delayed

reporting as a natural and expected reaction to trauma. Prosecutors also have the opportunity to educate the jury about trauma – and explain that what is seen as a problem with the victim’s credibility is really a normal psychological reaction to trauma. This can be done as early as voir dire, and

can continue throughout the trial via expert testimony and direct examination of witnesses.

### ***Inconsistent Accounts of the Assault***

The effects of trauma-related neurochemicals on memory may also affect a victims' ability to report a chronological or "consistent" narrative. Neurochemicals released as a result of a traumatic event may cause certain

portions of the

traumatic event to be

remembered clearly,

while other portions of

the event remain fuzzy

or forgotten

completely.

*The impact of memory is now understood and accommodate by law enforcement. For example, in officer-involved shootings, a more comprehensive interview is conducted after some time has lapsed, often two sleep cycles, allowing the officer's brain time to integrate and recover memory. It is best practice to apply similar interviewing strategies to sexual assault victims.*

Additionally, memories of the traumatic event may be fragmented and surface in pieces over time. Thus, the victim's report naturally may evolve over time, but is then perceived by others as "inconsistent."

The impact of trauma on memory has major implications as to when and how a victim reports the sexual assault. A sexual assault victim may not report the assault right away because she has no memory, or unclear

memories, of the assault. Furthermore, a sexual assault victim with an unclear or fragmented memory may not give a clear, coherent, chronological description of the assault, which may lead to inconsistencies in the reports. The fact that memories come in pieces may lead to ongoing disclosure of certain facts related to the assault, which some term “layered reporting.”

The impact of trauma on memory is now understood and accommodated by law enforcement when officers are involved in “critical incidents,” such as officer-involved shootings. In these situations, the involved officer typically will be asked only to provide very basic information immediately after the incident. A more comprehensive interview will be conducted after some time has lapsed, often two sleep cycles, allowing the officer’s brain some time to integrate and recover memory. It is now best practice to apply similar interviewing strategies to sexual assault victims.

Layered reporting may create credibility problems as a case makes its way through the criminal justice system. Additionally, layered reporting may occur when some victims withhold or change facts of the story because of fear of judgment or criticism. For example, although an estimated 50% or more of sexual assaults involve alcohol, societal stereotypes hold that

drinking makes a woman more sexual and available. A woman who is drunk may be seen as “asking for it” despite the fact that the use of alcohol actually hampers the ability for a woman to give consent. Many victims may not immediately disclose that they were drinking or how much they had to drink for fear that they will be judged or

not be believed. When these inconsistencies come to light, defense attorneys, jurors and sometimes investigators, prosecutors may question the veracity of the entire report. Again, this behavior is normal in response to sexual assault.

When viewed through a trauma-informed lens and understood in relationship to the guilt, shame, and

fear victims experience – as well as unrealistic or victim-blaming attitudes in society – it can be seen for what it is: a normal and expected behavior following a sexual assault. As a result of this more sophisticated understanding of trauma and memory, new techniques have been developed to obtain better information from victims with less traumatic impact. The

*The Forensic Experiential Trauma (FETI) interview method obtains significantly more information, enhances a victim’s ability to recall, reduces the potential for false information, and allows the victim to recount the manner in which the trauma was experienced. This technique significantly enhances the quality and quantity of evidence obtained. This method had also been shown to reduce victim recantations, increase victim cooperation and participation and significantly improves chances for successful investigations and prosecutions.*

Forensic Experiential Trauma Interview (FETI), developed by Russell Strand, acknowledges the ways in which traumatic memories are encoded and retrieved by combining the principles used in critical stress incident debriefing and defusing, the neurobiology of memory and psychological trauma, and the principles and techniques developed for forensic child interviews, to interview victims of sexual assault. “This method has resulted in reports of better victim interviews by those who have used it. More importantly, the FETI interview process obtains significantly more information about the experience, enhances a trauma victim’s ability to recall, reduces the potential for false information, and allows the interview to recount the experience in the manner in which the trauma was experienced....This technique significantly enhances the equality and quantity of testimonial and psychophysiological evidence obtained. This method had also been shown to drastically reduce victim recantations, increase victim cooperation and participation and significantly improves chances for successful investigations and prosecutions.”<sup>36</sup>

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<sup>36</sup> The Forensic Experiential Trauma Interview (FETI), Russell Strand, United States Army Military Police School.

## *Apparently Cooperative Behavior of the Victim*

One of the immediate psychological reactions to trauma is the feeling of intense fear, helplessness and horror. Sexual assault victims commonly report fearing for their lives

during an assault, whether or not weapons, violence, or threats were used by the offender. In an effort to

*In an effort to survive the situation, a victim may engage in some cooperative behavior with the offender, both during and after the assault. For example, the victim might give the offender a ride home after the assault.*

survive the situation, a victim may engage in some cooperative behavior with the offender, both during and after the assault. This is normal. The victim may be in shock and not making what others would see as rational choices. The victim may be doing what she needs to do to get the offender away, or to ensure she survives the assault. The victim may be in denial and trying to normalize the assault.

For example, the victim might give the offender a ride home or have contact with the offender after the assault. This type of behavior may be seen as evidence of consensual sexual activity rather than sexual assault, and defense attorneys will latch onto these behaviors as part of a consent defense. Prosecutors should anticipate these defense strategies in a sexual

assault case, and educate juries to view these cases through an informed and educated perspective, usually through the use of expert testimony.

### ***Misunderstood Emotion***

Societal stereotypes hold that a “real” victim of sexual assault should be hysterical. But the stereotypes also suggest that a victim should move on after “enough” time has passed. However, as described in subsequent sections, victims of trauma have a variety of responses that may vary depending on the stage of healing they are experiencing. One common psychological reaction to sexual trauma is for a victim to withdraw or shut down.

This may manifest itself as “flat affect” in which the victim displays little to no emotion, which may be wrongly perceived as evidence of a false report. Reactions to trauma can also

include anger or irritability, especially in later stages of healing. Although these reactions may make the victim more difficult to work

*Victims experience a wide range of emotions, including withdrawal or flat affect. This is not evidence of deception, but rather evidence of a traumatic response.*

with and less sympathetic to a jury, these emotions may be positive signs of healing. Prosecutors should anticipate a range of emotions from sexual

assault victims they encounter. They should also understand that these emotions should not be considered evidence of deception, but rather as evidence of a traumatic response.

### ***Lack of Resistance***

Many people expect victims to fight vigorously against a sexual assault. There may be two reasons a victim does not resist during a sexual assault. First a victim may choose not to act, being passive or even

cooperating with the assailant,

***Under Montana law, resistance to a sexual assault is not required. Force, fear, or threat is sufficient alone to show lack of consent.***

in an attempt to survive the event. As has been mentioned before, most sexual assault

victims perceive that their life is in danger, regardless whether a weapon is present, even if doing so seems irrational to an outsider. Passivity or apparent cooperation may be the best way to survive the assault, or to survive without serious physical injury. Passivity or apparent cooperation do not imply consent.

Another normal response to a traumatic event is *tonic immobility* (TI). This response is one in which the human body enters a state of paralysis. What is important to understand about this response is that it is an automatic

response, not a choice a person makes. Tonic immobility differs from choosing not to act; it also differs from “freezing,” in that the freeze response is a momentary response and tonic immobility is an ongoing physical paralysis that may occur during and immediately after the assault.

Both tonic immobility and making the conscious choice not to resist or otherwise act – both of which are perfectly normal and adaptive responses

***Both tonic immobility and making the conscious choice not to resist or otherwise act -- both of which are normal and adaptive responses to sexual assault -- defy the rape myth that a “real victim” of sexual assault will resist to the utmost.***

to sexual assault -- defy the rape myth that a “real” victim of sexual assault will resist to the utmost. Montana law recognizes this, the Legislature having enacted a statute which states that “resistance is not required. Force, fear, or threat is sufficient alone to show lack of consent.”<sup>37</sup>

However, people nevertheless often expect a victim of sexual assault to fight back, even at the risk of serious injury. Many prosecutors have encountered a juror who expected that a legitimate victim would “fight to the death.” If she does not, her “acquiescence” is held against her in terms of

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<sup>37</sup> Mont. Code Ann 45-5-511(5).

her credibility. These rape myths are so ingrained in our society that many victims may adhere to them as well. Thus a victim who did not act during an assault, whether because of tonic immobility or survival strategy, may feel increased levels of guilt and self-blame because she did not fight back or scream for help. These feelings of guilt and self-blame, in addition to other impacts of trauma, may lead to delayed reporting of the sexual assault to law enforcement.

## **Trauma**

### ***Definition of Trauma***

Psychological trauma is a disruption of equilibrium that severely taxes a person's ability to cope in response to an experience that is emotionally painful, distressing, or shocking. It may leave lasting mental and physical effects. Psychological trauma is a normal human response to an extreme event.

People often use the word "traumatic" to describe stressful life events. However, mental health professionals define a traumatic event in a very specific way. According to the American Psychiatric Association, a traumatic event must involve both of the following:

- The person experienced, witnessed, or was confronted with an event where there was the threat of or actual death or serious injury. The event may also have involved a threat to the person's physical well-being or the physical well-being of another person; and
- The person responded to the event with strong feelings of fear, helplessness or horror.

*Traumatic events* can be differentiated from *stressful events* and *crises*

by the nature and severity of the event. A stressful event is one that provokes a physical and emotional stress response. Stressors can be categorized as acute or chronic, and as external or internal to the person. A crisis is an emotionally significant event or radical change of status in a person's life. Certainly a traumatic event is both stressful and a crisis, but the reverse is not always true. It is important to note that an event is not defined as traumatic by the severity of the reaction to the event but by presence of the factors described above.

*Although most sexual assaults do not result in physical injury, most victims report experiencing intense fear of injury and/or death during an assault.*

Using these definitions, a sexual assault would always be categorized as a traumatic event. Although most sexual assaults do not result in physical injury, most victims report experiencing intense fear of injury and/or death during an assault. Sexual assault victims report feeling terror, helplessness,

and horror during the event. These experiences and feelings occur regardless of the amount of force used, the presence of a weapon or the relationship with the offender.

### ***The Science of Trauma***

Although the medical and psychological community began to recognize and treat traumatized soldiers during World War II, an understanding of

***A person who experiences a traumatic event always has a reaction to the event, although their reaction may not be apparent or logical to others. Although these attempts to cope may seem strange, counterproductive or counterintuitive to others, there are a wide range of reactions that are normal and even expected.***

nature and dynamics of trauma was propelled into the national consciousness by the Vietnam War. During that time, research into the impact of traumatic events beyond the battlefield exploded as sexual assault, child abuse, and natural disasters began to be defined as events that could traumatize. Today, trauma, and in particular post-traumatic stress disorder (PTSD), is well-recognized by the general public. Yet, while

considerable resources are devoted to the needs of traumatized veterans, the needs of victims of rape and sexual assault are not as widely understood. Yet rape survivors represent the largest non-combat group of individuals with PTSD.

## ***Common Reactions to a Traumatic Event***

A person who experiences a traumatic event always has a reaction to the event, although their reaction may not be apparent or logical to others.

Reactions to traumatic events involve conscious and unconscious employment of coping strategies in the attempt to return the person to equilibrium. Although these attempts to cope may seem strange, counterproductive or counterintuitive to others, there are a wide range of reactions that are normal and even expected. There are a number of factors that influence a person's response including but not limited to: pre-trauma

functioning, age at the time of the trauma, frequency of the traumatic event (one-time v. repeated), resources, and social support.

***Reactions to traumatic events involve conscious and unconscious employment of coping strategies in the attempt to return the person to equilibrium. Although these attempts to cope may seem strange, counterproductive or counterintuitive to others, there are a wide range of reactions that are normal and even expected. There are a number of factors that influence a person's response.***

All traumatic events evoke cognitive, emotional, physical and social responses. Often they include *avoidance* of reminders of the event, *re-experiencing* the event through intrusive memories, flashbacks and nightmares and *hyperarousal* displayed as anxiety, heightened startle

response, irritability, or insomnia. There is significant overlap in these responses across all types of trauma with obvious specification to the nature of the event. Victims typically experience a range of cognitive, emotional, social, and physical reactions to a sexual assault.

- Common Cognitive Reactions to Sexual Assault
  - Minimizing the assault
  - Blaming herself for the assault by thinking she did something to cause the assault (e.g. “if only I had/hadn’t done X”)
  - Feeling like “damaged goods” and worrying about ever being okay or be able to be in a relationship
  - Feeling unlovable
  - Feeling like a burden/not wanting to bother people
  - Avoiding associations with the trauma
  - Being unable to control memories surfacing
  - Having difficulty with concentration and/or memory
  - Worrying she isn’t “getting over it” fast enough
  
- Common Emotional Reactions to Sexual Assault
  - Feelings of guilt/self-blame
  - Shock and/or disbelief
  - Hyper alertness/hypervigilance
  - Feelings of helplessness, panic, feeling out of control
  - Flashbacks (i.e., feeling as if the trauma is currently happening)
  - Nightmares
  - Worrying or ruminating
  - Irritability, restlessness, outbursts of anger or rage
  - Grief, disorientation, denial
  - Fear and/or anxiety
  - Mood swings (e.g., crying then laughing)
  - Feelings of detachment

- Emotional numbing or restricted range of feelings
- Difficulty trusting and/or feelings of betrayal
- Shame
- Depression or diminished interest in everyday activities
- Common Social Reactions to Sexual Assault
  - Tendency to isolate oneself
  - Fear of being alone
  - Increased sexual activity or withdrawal from sexual contact
  - Avoidance of friends and family/isolating
  - Increased conflicts in relationships due to mood swings, anger, misunderstandings
  - Increased need to control situations and environment
- Common Physical Reactions to Sexual Assault
  - Aches and pains, such as head, back, and/or stomach aches
  - Sudden sweating and/or heart palpitations
  - Changes in sleep patterns, appetite, interest in sex
  - Digestive problems -- Constipation or diarrhea
  - Easily startled by noises or unexpected touch
  - More susceptible to colds or illnesses
  - Physical discomfort from sexual activity
  - Increased use in alcohol or other drugs and/or overeating

Reactions to traumatic events usually do not involve the development of post-traumatic stress disorder or mental illness. In fact, only 8% of people in the US who experience a traumatic event develop PTSD. *However, this rate changes depending on the type of event experienced.* The estimated risk for developing PTSD for people who have experienced rape is 49%, and 24% for people who have experienced other types of sexual assault. By contrast, the rate of PTSD for people who have experienced a shooting or

stabbing is 14%, and the rate for those who have experienced a natural disaster is 4%.

### ***Neurobiology of Trauma***

When a person experiences a traumatic event, there is a cascade of neurological and biological responses that occur during and after the event. These reactions influence physical and psychological responses to the event and may continue for weeks, months or years following the experience. The neurobiological response is controlled by our autonomic nervous system (ANS) – our survival system. The ANS bypasses our “thinking” brain to provide us with critical responses that insure our survival. Most of us have heard of the “fight or flight” response. Recent research suggests that our reaction to feeling threatened is more complex and nuanced than the fight or flight dichotomy.

***The neurobiological response to trauma is a physical reaction to the perception of threat that is not mediated by conscious thought – it is like pulling your hand away from a hot surface. This reaction involves the release of chemicals in the body that control respiration, blood flow, heart rate, muscle control, speech, as well as cognition and memory. These involuntary neurochemical responses have a significant effect not only on the behavioral response during the event but also on the memories and perceptions the victim may have and be able to communicate following the event.***

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### Fight, Flight, or Freeze

One's reaction to threat depends on two factors: 1) the level of fear and 2) the proximity of the threat. An initial response to threat is to *freeze*. When a threat appears distant (spatially, temporally, or perceived likelihood) and the fear is low, freeze is the involuntary, momentary reaction. It allows the organism to assess the situation, and avoid detection in the hopes that the threat may pass without incident. For example, the mouse freezes when it hears movement in the brush. This response allows it to assess whether a predator is present, and if it is, the stillness may protect the mouse from being detected. In a sexual assault scenario, “freeze” may happen when an

offender first crosses a boundary initiating an assault. Offenders may take advantage of this momentary lack of response to further their goal of sexual assault.

The “*fight or flight*” response is next. If danger is determined to be present and fear is increasing, the chemicals released encourage a response of fight or flight. In the case of the mouse, if the fox has found the mouse’s scent and is moving closer sniffing the ground, the mouse can choose to make a run for cover, or bare its teeth and claws to take on the fox. For

humans, this process is more complicated and can involve a series of strategies a victim may

*In a sexual assault scenario, “freeze” may happen when an offender first crosses a boundary initiating an assault. Offenders may take advantage of this momentary lack of*

employ from non-verbal communication of resistance (turning away, pulling on clothes, non-responsiveness) to verbal resistance (saying no, pleading to stop, bargaining with the offender) to direct physical resistance (hitting, punching, biting). It can also involve psychological defenses such as dissociation in which the victim may have the sensation of leaving her body – and detaching from the horror of the assault. This can be a form of flight.

## Tonic Immobility

A less well-known response that is critical for understanding sexual assault is *tonic immobility*. This response happens when the threat is imminent and fear is high – the victim’s central nervous system feels there is no escape. It is similar to what occurs when the mouse is trapped under the fox’s paw and he can feel the fox’s mouth is closing around him. The chemicals released involve a type of paralysis – a profound motor inhibition. The victim is physically unable to move or respond, and the ability to speak is lost. Victims often describe feeling unable to speak or move; tonic immobility may be the reason.

This paralysis may have a few benefits to the victim. One common phrase that describes it is “playing possum.” Tonic immobility may serve as an involuntary form of playing possum, increasing the prey’s chance of survival because the predator believes its prey already dead. The predator may leave the victim to return for a meal later – allowing the prey to escape.

Tonic immobility may also serve to reduce the amount of pain and suffering the prey may experience. The chemicals released during tonic immobility may dull the senses lessening the experience of physical experience of pain as well as distorting the cognitive functions such as

memory, a physiological attempt to lessen emotional pain. Research indicates that 12-50% of rape victims experience tonic immobility. This response has critical implications for the prosecution of sexual assault cases – as it is an oft-repeated question to the sexual assault survivor: “why didn’t you scream/fight back?” The answer may lay in part in the fact that many physically cannot.

### Trauma and Memory

The nature of the neurobiological response to a traumatic event also impairs the normal process for encoding of memories. This can affect a victim’s memory immediately after the assault as well as over the long-term. For example, the event may be remembered over a period of days, weeks, months or even in some cases years. Also the chronology of the event may be disrupted so that it is difficult for a victim to give a clear, linear story. Parts of the event may be remembered in vivid detail, while other aspects of the event that may seem important or memorable to others are not remembered at all by the victim. For example, a victim may remember the smell of garlic on the offender’s breath with nauseating detail, but not be able to recall how he removed her pants. However, victim-centered techniques such as the FETI interview can assist in retrieving memories.

## *Recovery from the Trauma of Sexual Assault*

Recovery from sexual assault begins immediately after the assault occurs and continues for days, weeks, months and years after the assault. Research shows that the initial responses a victim receives when she discloses the assault affect the trajectory of her recovery. A victim who is believed, supported and encouraged to regain a sense of control may move more quickly to the later stages than victims who are met with disbelief or criticism.

Many survivors who engage in the criminal justice system experience re-

*A victim who is believed, supported and encouraged to regain a sense of control may move more quickly to the later stages of recovery than victims who are met with disbelief or criticism.*

victimization. Even if a victim is met with uniform support and a victim-centered response from sensitive and understanding law enforcement and prosecutors, the criminal justice process is designed to “prove or disprove” her experience. This requires repeated retelling of the story, and facing those seeking to undermine the victim’s credibility, including the offender and his counsel. Often it involves many procedures, interactions and situations that the survivor is unable to control.

Additionally, neurologic responses to trauma may cause a victim to respond to certain stimuli related to the assault as if it were occurring again. These “triggers” are unconscious and often connected to the senses; for example, the sound of the assailant’s voice or the smell of his aftershave. This has major implications for victims of sexual assault who are going through the criminal justice system. Dr. David Lisak states that “to participate in that process – to endlessly recount their trauma, to appear in the court room where the offender sits – is equivalent to the zebra choosing to return to the water hole where the lion attacked.” This analogy speaks volumes about how important it is to institute a victim-centered response that has as a main part of its focus the minimization of retraumatization by the criminal justice system.

In working with victims in the criminal justice system, it is important to understand the stages of trauma and recovery. The stage the survivor is experiencing will affect her thoughts, emotions, and behavior. It may also manifest in physical symptoms or reactions.

*To participate in the legal process – to endlessly recount their trauma, to appear in the court room where the offender sits – is equivalent to the zebra choosing to return to the water hole where the lion attacked.*

## *Stages of Trauma and Recovery*

The following stages of trauma and recovery are generalizations. Each victim has her own path and process. Some may never experience certain stages or symptoms, some may fluctuate between stages, and some may become stuck in a particular stage.

### Pre-Impact Terror

This stage occurs during the very frightening moments just prior to the assault itself, when the victim knows, without a doubt, what will happen but is powerless to stop it. In other words, trauma does not start after the assault; it starts before it. The concept of pre-impact terror has been used to describe the pain and suffering (beyond loss of life or limb) of airplane passengers who know the plane is going to crash.

### Initial Crisis or Acute Stage of Trauma

The acute phase of trauma occurs immediately after the event and often lasts a few days or weeks, but could also last only a few minutes or a few hours. The initial reaction following a sexual assault can take on many forms. As described above, a victim may experience emotional as well as

physical shock such as feeling weak, nauseated, moving slowly, nightmares, and insomnia. During this phase the victim may appear withdrawn -- having flat affect, being unresponsive or appearing confused. The victim may also be highly expressive, including crying, screaming or shaking. Or, she may vacillate between many presentations.

Working with victims in this stage may be difficult due to the intense nature of the emotional reactions – whether the victim is withdrawn and unresponsive or highly expressive. Memories of the event may come in pieces during this

time, and new memories may bring

*The victim may be highly expressive, including crying, screaming or shaking. Or she may vacillate between many presentations.*

another wave of intense emotional and physical reactions. Victims in this phase may be emotionally and physically exhausted by simple tasks of daily living, and have difficulty engaging in discussion about the event.

### Outward Adjustment

Once a victim has moved through the initial crisis, she often moves into Outward Adjustment. In this stage, the victim returns to her normal routine, wanting to forget about the assault. Often well-intentioned family members, friends, or significant others encourage this “moving on.” While

in this phase, victims may attempt to make sense out of the crime, or block the experience out of memory. This can be an important and self-protective coping mechanism for the short term. Victims focus most of their emotional energy attempting to resume their day-to-day activities. This stage may last weeks, months or years.

Victims in this stage may be very reluctant to talk about the assault or to engage in any activity that is a reminder of the event. If a victim reports an assault during the initial crisis, she often will enter into this second stage during the criminal justice process. This may mean a victim who appeared very interested and cooperative with police during the initial phase may become reluctant, withdrawn or combative during the Outward Adjustment phase. This is due to the normal healing process, and is not indicative of the veracity of the report, or the victim's mental health. If the victim did not come forward during the initial crisis, most of them will not decide to report during this second stage, as most of their efforts are focused on returning to "normal." If a victim does report during this stage, it

*A victim may be very interested and cooperative with police during the initial phase, but may become reluctant, withdrawn or combative during the outward adjustment phase. This is due to the normal healing process, and is not indicative of the veracity of the report, or the victim's mental health.*

may be in response to pressure from family or friends, and not the victim's true desire to engage with the criminal justice system.

### Secondary Crisis or Reactivation

This stage involves a re-experiencing many of the feelings from the pre-impact terror stage, usually brought on by the triggering of memories of the assault. Feelings of depression, anxiety and shame increase. Also the victim may experience intense anger as she moves through this stage. Other symptoms can include nightmares, flashbacks, a sense of vulnerability, mistrust and physical complaints. When a victim seeks help at this stage, it can confuse family and friends who thought that their loved one had fully recovered.

Victims are more likely to seek out help and the criminal justice system in this stage than in the previous outward adjustment stage. The anger that surfaces during this stage may fuel a desire for justice, and be an important part of the victim's healing.

### Integration

The integration phase may be the most challenging. One day, a victim may announce her recovery. Another day, she may fear that she will never

be what she considers to be normal again. Eventually, most victims' intrusive memories and emotional turmoil lessen. The victim may still spend time thinking about and talking about the assault, but finds that when triggers and flashbacks do occur, the feelings surrounding the experience are abbreviated and less intense. The sexual assault is integrated into a victim's life as a significant life event among many others.

Most prosecutors will not see victims in this stage, as it usually takes time, sometimes years, to reach. Some victims never do. However, a victim in this stage will be more able to identify her needs and boundaries related to the assault and an ongoing court case, if there is one. She may be more aware of her triggers and able to predict her reactions. She may still have intense responses to situations that remind her of the assault but should have more resources to cope. However, it is possible that if her coping is overwhelmed she could return to an earlier stage, for example the stress of a court case may bring up anxiety, anger, nightmares, and flashbacks. She may return to previous coping strategies, helpful or unhelpful, that she had used in the past.

## Chapter 4

# RAPE MYTHS AND THE REALITIES OF OFFENDERS OF SEXUAL ASSAULT<sup>38</sup>

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The term “rape myth” applies to beliefs about offenders and their behaviors as well as to victims. There are many myths and misconceptions about sexual assault and about those who perpetrate sexual assault. Many people mistakenly believe that “real” offenders:

- Are strangers to their victims and select their victims randomly;
- Stalk and attack the victims at night in dark but public places, or break into the victims’ homes and attack them there;
- Use weapons and violence to perpetrate their assaults, leaving victims with obvious physical injuries;
- Look like offenders, i.e. mean, thug-like, or weird and scary; and
- Don’t have consensual sex partners and are driven to rape by unmet sexual needs, or that offenders have abnormal sexual needs that they can only meet through raping non-consenting victims.

These myths are believed for a variety of reasons. The stereotype of the “typical offender” gives potential victims a sense of security. If you can figure out who the likely offenders are based on their appearance, and if you

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can avoid being in a place where strangers who look like an offender could attack or abduct you, then you can protect yourself from being sexually assaulted.

“[W]e all seem to recognise that crimes are common. However, we simultaneously believe that “it can’t happen to me”. . . . . Janoff-Bulman suggests we make sense of our world by regarding what happens as controllable. We believe we can prevent misfortune by engaging in sufficiently cautious behaviours, and that we are protected against misfortune by being good and worthy people.”<sup>39</sup>

Additionally, our culture has formed its beliefs about what “real” rape looks like, and who “real” offenders are, in part based on media portrayal of only a small subset of sexual assaults. Cases involving strangers, abductions, and weapons receive the most publicity and generate the most fear and attention from the public. These myths about offenders function to hide the majority of actual sex offenders from the public eye and to shield them

*Our culture has formed its beliefs about what “real” rape looks like, and who “real” offenders are, in part based on media portrayal of only a small subset of sexual assaults. These myths about offenders function to hide the majority of actual offenders from the public eye and to shield them from accountability for their crimes.*

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<sup>39</sup> Cook et al. (1999) Victim’s Needs, Victim’s Rights: Policies and Programs for Victims of Crime in Australia. *Australian Institute of Criminology Research and Public Policy Series, 19*: 19-20.

from accountability for their crimes. In reality, the great majority of sexual assaults are perpetrated by someone known to the victim.

In part as a result of these erroneous yet widely held beliefs, when a victim reports having been raped by a friend, co-worker, or someone she met in a social setting, the report is likely to be viewed with more suspicion by law enforcement and less likely to be charged by prosecutors. People often refer to non-stranger sexual assault as “date rape,” perceive it as having resulted from a “miscommunication” or “misunderstanding” between the offender and the victim, and believe it is somehow less serious than “real” rape. Nothing could be further from the truth.

However, there is no profile of a typical offender. Their personalities and characteristics are far too diverse. Research has emerged that sheds light on offenders of non-stranger sexual assault that sharply contradicts stereotypes about non-stranger rapes as being misunderstandings, miscommunications, or the result of too much alcohol.

### ***Offenders of Non-Stranger Sexual Assault Tend to Be Serial Criminal Offenders***

Until fairly recently, the great majority of research looking at sexual offenders was drawn from studies of convicted and incarcerated offenders.

These were the “detected” offenders, the ones who were pursued and caught. Significantly, their crimes were more likely to have been reported and prosecuted because violence and weapons were used, because there was injury, and/or because the offender targeted a stranger.

It has been known for some time that a significant percentage of offenders who have been caught are serial offenders. In studies in which convicted offenders were assured of confidentiality and asked to self-report about other sexual assaults and crimes, a significant number disclosed that they had committed many more offenses, and against more victims, than those offenses for which they had been convicted. In one study, 127 offenders admitted to 907 paraphilic acts against 882 victims. In another study, 37 men in a sex offender treatment program had been charged with 66 offenses against a mean of 1.8 victims. However, in confidential self-reporting, the 37 offenders admitted to 433 rapes against a mean of 11.7 victims.

In the last 10-15 years, however, some researchers began looking at the population of undetected offenders and asking how those offenders might be similar to, or different from, the offenders who had been caught. This was an important question, given the numbers of cases that go

unreported. Because most research focused on convicted or incarcerated offenders, there was a huge population of undetected sexual offenders about whom little was known.

As it turned out, a substantial number of undetected sex offenders are also serial criminals. Dr. David Lisak, associate professor of psychology and researcher at the University of Massachusetts-Boston, conducted a comprehensive research project examining these “undetected rapists” to determine whether they were similar to their convicted counterparts in terms of engaging in multiple sexual assaults and other crimes. The offenders identified in the study were not asked if they had committed various forms of sexual assault. They were given a survey on life experiences, including sexual experiences. They were asked if they had ever 1) tried to have sexual intercourse by using or threatening to use physical force (twisting her arm, holding them down, etc. if they did not cooperate; 2) had sexual intercourse with someone, even though they did not want to, because they were too intoxicated to resist; 3) had sexual intercourse with an adult who didn’t want to by using or threatening to use physical force; or 4) had oral sex with an adult who didn’t want to by using or threatening to use physical force.

Dr. Lisak's research showed that 120 (6.4%) of the men in the study had committed rape or attempted rape while in college, and those crimes had never been reported. 76 of these men (63%) reported committing repeated rapes, against multiple victims and/or against the same victims. These 120 undetected offenders were responsible for a total of 483 rapes; the 76 repeat offenders averaged 5.8 rapes each.

These undetected offenders also acknowledged committing other crimes, including sexual assault or attempted sexual assault, physical or sexual abuse of children, and physical assaults against intimate partners. Including the 483 admitted rapes, these 120 men committed a total of 1225 acts of interpersonal violence. Like those offenders who have been caught and convicted, the majority of undetected sexual offenders are one-man crime sprees who present a serious risk of harm to many different victims.

Lisak's findings were replicated in a study of 1146 male Navy recruits. In that study it was found that 13% had committed sexual offenses, and 71% of those were serial offenders who admitted to an average of 6 rapes per offender. Of the total 865 rapes admitted to, 95% of them were committed by the serial offenders. Dr. Lisak's research has also been duplicated in other studies, with similar results.

***Offenders of Non-Stranger Sexual Assault Seek To Create or Exploit Victim Vulnerability, Accessibility, and Lack of Credibility***

It is now becoming more widely understood that offenders of non-stranger sexual assault deliberately target victims who:

- Are vulnerable, or can be made so;
- Are accessible, or can be made so; and/or
- Are lacking in credibility, or can be made so.

When people think of sexual assault by strangers, it is not hard for them to perceive how stranger offenders take advantage of victims who are vulnerable and accessible. The stranger in a car who pulls up next to an adolescent girl walking alone to school in an urban area and asks for directions, then pulls her into the car and drives away; the two men who wait in an unlighted area of a mall parking lot late at night and sexual assaults the woman who walks to her car after her shift – these are easily seen as acts that take advantage of someone who is vulnerable and accessible. After all, these offenders didn't go into the school or the crowded mall where they could be seen or stopped.

***Offenders of non-stranger sexual assault deliberately target victims who are vulnerable, or can be made so; are accessible, or can be made so; and/or are lacking in credibility, or can be made to seem so.***

It has been harder for people to recognize that offenders of non-stranger sexual assault also engage in selective and predatory behavior with

their victims. The undetected offenders in Lisak's research provide a strikingly clear example of this strategic behavior. The majority of those offenders:

- Knew their victims, at least casually;
- Were proficient at identifying potential victims;
- Tested victims' boundaries for vulnerability and ease of access;
- Used physical force or violence only instrumentally and strategically, and only as much as was required in order to frighten or intimidate the victim into submission;
- Used psychological strategy (cunning, control, manipulation, and threats) to accomplish the sexual assault, with physical force only as a backup;
- Almost never resorted to use of weapons;
- Used alcohol deliberately to render victims more vulnerable or completely unconscious;
- Isolated the victim using manipulation.

Sexual offenders target someone who is already vulnerable and then test that victim's boundaries. For example, a predator will look for someone who is already drinking a lot, or who is already in a situation where the victim is socially off

balance or nervous. The

*Offenders of non-stranger sexual assault also engage in selective and predatory behavior with their victims.*

offender will test to see how vulnerable that potential victim is. He may approach and invade that victim's personal space – sitting or standing too close, putting an arm around her, to gauge whether she demonstrates a

capacity to resist that small violation of personal boundaries. The offender will ignore a request to be left alone to see if doing so overcomes the victim's expression of her personal wishes. If it does, the offender has identified a potential vulnerable victim.

Then, the offender seeks to enhance that vulnerability. He may draw the victim away from her friends, give her alcohol and encourage her to drink. He may act overly solicitous, and play the "white knight" who offers to help the victim get home.

The manner in which non-stranger offenders create or exploit victim vulnerability, accessibility, and credibility is nowhere more clearly demonstrated than in the video-recorded re-enactment of one of Dr. Lisak's research interviews with a male pre-law college student referred to as "Frank."<sup>40</sup> The student recounts in his interview how he and his fraternity brothers would "scout" the campus for "easy prey." He and his fraternity brothers would prepare a sweet punch laced with alcohol and serve these drinks to their "targets." When the alcohol clearly was affecting the women,

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<sup>40</sup> The "Frank" video is available from the National Judicial Education Program, <https://www.legalmomentum.org/store/undetected-rapist-dvd>

Frank and his fraternity brothers would “make [their] move” and take their specifically invited guests to the rooms prepared for the assault.

In the video, Frank explains how he took his targeted guest up to this special room. He noticed that she was “really woozy,” so he brought her another drink. Then he “leaned her down on the bed,” and began working her clothes off even as she told him she didn’t want to do this. When she “squirmed” underneath him and tried to resist, Frank pushed her down and put his arm across the woman’s upper chest and neck. She stopped squirming, and Frank raped her.

### ***Use of Alcohol by Sexual Offenders***

“Frank” and his fraternity brothers are not unique in their use of alcohol to create vulnerable victims. In Dr. Lisak’s research, 80.8% of the undetected offenders reported that they raped women who were incapacitated because of drugs or alcohol. Other studies have confirmed that alcohol is used as a tool -- and voluntary intoxication is used as an opportunity -- by those who perpetrate sexual assault. In one study of college men:

- 15% acknowledged using some form of alcohol-related sexual coercion;

- 35% reported that their friends approved of getting a woman drunk to have sex with her;
- 20% acknowledged having friends who had gotten a woman drunk or high to have sex.

***A person can be extremely drunk with friends who are not sexual predators and be in absolutely no danger. It is the presence of an offender willing to exploit the vulnerability created by intoxication***

Sexual assault offenders need not purposely ply their victims with alcohol, although some do. An offender may target a victim who has voluntarily consumed alcohol and is intoxicated. An intoxicated woman is more vulnerable than a sober one, due to the effects of the alcohol on cognitive functioning and motor skills.

Offenders also may target an intoxicated victim because those victims can more easily be made accessible and isolated by the offender. The offender may use the pretext of “helping” her by walking her to her dorm room or driving her home, where he can assault her without fear of discovery or intervention.

Finally, societal perceptions about intoxicated women can make the victim appear less credible when she reports the assault and the offender claims she consented. Offenders understand these perceptions and take

advantage of them. Experiments conducted among sober college students revealed that participants perceived women who consumed a few alcoholic drinks as behaving more sexually and more interested in having sex than women who had consumed only non-alcoholic beverages, despite the fact that the description of the women's actual behavior was the same.

Alcohol consumption can make anyone more vulnerable, more accessible, and less credible. But alcohol consumption does not by itself create the risk of victimization. For example, a person can be extremely drunk with friends who are not sexual predators and be in absolutely no danger. It is the presence of an offender willing to exploit the vulnerability created by intoxication that creates the danger. Just as a gazelle may drink at a watering hole without harm if there are no lions waiting to pounce, any person may safely drink alcohol, even to the point of intoxication, if there is no sexual predator waiting to take advantage.

One of the reasons why society perceives reports of non-stranger sexual assault with doubt or as somehow less serious is because the offenders of these assaults do not fit the stereotype of the stranger offender. Non-stranger sex offenders can be the neighbor, the co-worker, the high school star athlete, or someone's intimate partner. It is important to

remember that the typical non-stranger sex offender would not seem at all frightening or intimidating to others, including to his victim, in his day-to-day interactions. Like everyone else, he is adept at showing the world only his “first persona.” Dr. Russell Strand of the United States Army Military Police School, notes that “[e]veryone has three personas. The first persona is the one we show most people or acquaintances. We show our second

*When a person is assaulted by someone she knows, she no longer knows who he really is or what he is willing to do if she resists. At that moment, he becomes a stranger, someone she doesn't know, because she never thought that the person she knew would do this to her.*

persona to people we trust not to judge us, such as our family and close friends. The third persona we usually keep to ourselves; this persona is the part of us that we feel most people wouldn't accept about us.”

People want to believe that they can truly know a person, but the third persona remains hidden from us until the actor chooses to reveal it. “[W]hether our third persona is

harmless or not, a wicked trick of the mind is that we almost always fail to recognize that it exists in others. We assume, tragically at times, that we can fully know people around us because of the personas they reveal to us. We tell ourselves that we can sense, we can see, we can discern.”

It is vital that prosecutors recognize this phenomenon. Friends, family, and acquaintances of the offender will jump to the offender's defense, because he has never seemed to them like anyone who could possibly sexually assault another person. That is because they have never seen that third persona, they may have only ever seen the person he has presented to the world at large. The jury may not understand, for example, how this man could be a sex offender when the victim has known this person, gone to the movies with him, or hung out with him and their group of friends several times. That is because, unless the prosecutor addresses it, they will not understand the ways in which offenders can mask their true selves from others. The jury may not understand why the victim did not physically resist, or may not believe the victim if she testifies that she was afraid the offender was going to kill her. After all, the offender was someone the victim knew and never threatened to hurt her during the assault.

It is imperative that we help the jury understand that there is a "third persona" that the non-stranger sexual offender reveals to his victim when he makes clear that the sexual contact is going to happen whether or not she consents. At that moment, he becomes a stranger, someone she doesn't know, because she never thought that the person she knew would do this to

*One of the reasons why society perceives reports of non-stranger rape with doubt or as somehow less serious is because the offenders of these assaults do not fit the stereotype of the stranger offender.*

her. And because he is a stranger, the victim may experience fear and terror, regardless of whether there

was any express threat of physical harm. The victim no longer has any foundation for predicting the offender's propensity for violence – she no longer knows who he really is or what he is willing to do if she resists.

This more recent research has led to a greater understanding of offenders. The research “conflicts sharply with the widely-held view that sexual assaults .... are typically the result of a basically ‘decent’ young man who, were it not for too much alcohol and too little communication, would never do such a thing. While some...assaults do fit this more benign view, the evidence points to a far more sinister reality, in which the vast majority of sexual assaults are committed by serial, violent predators.”<sup>41</sup> In fact, this research has led to the term “date rape” being viewed with disfavor, the criticism being that the connotation associated with “date rape” is that

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<sup>41</sup> Understanding the Predatory Nature of Sexual Violence, David Lisak, Sexual Assault Report, Volume 14, no. 4 March/April 2011

victims suffer less harm, and “date offenders” are less serious offenders, than stranger offenders.

All of these things conspire to normalize sexual assault, or to disguise it as something consensual. Sexual assault is excused as “hooking up,” “one-night stand,” or drunk sex that the victim later regrets. Offenders count on the jury thinking that, at worst, this was sex gone wrong or a misunderstanding. The prosecutor’s job is to remove the disguise and recreate the reality of what happened.

When police receive a report of a non-stranger sexual assault, there is a high likelihood that the suspect is a serial offender. Accordingly, the investigation and case development should be as rigorous and thorough as the investigation and prosecution of any other crime where there is reason to believe that the offense is not likely the first offense. Instead of viewing the report with skepticism and scrutinizing the victim and her behavior, law enforcement and prosecutors need to engage in an offender-focused investigation and prosecution, with the current research on offenders firmly in mind.

## **Chapter 5**

### **MONTANA SEXUAL ASSAULT STATUTES**

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Montana's core criminal statutes prohibiting various types of non-consensual sexual contact are contained in Title 45, Part 5 of the Montana Code Annotated and include Sexual Assault, Sexual Intercourse without Consent (SIWOC), Indecent Exposure and Incest. Of these, Sexual Assault and SIWOC will be the focus of this chapter since they are most often the statutes at issue in non-stranger sexual assault cases. There are, however, other sexually related criminal statutes that may occasionally be of consideration in a case involving sexual conduct including the crimes entitled "Offenses Against the Family," which are found in Title 45, Part 6. These include the human trafficking related offenses of promoting prostitution and the child pornography focused offense of sexual abuse of children.

The statutory definitions and case law applicable to the crimes of Sexual Assault and SIWOC are sufficiently distinct that separately considering these topics lends itself to less confusion. Accordingly, this Chapter will first address the elements and critical definitions relating to SIWOC, followed by a separate discussion elements and critical definitions

related to Sexual Assault. This will be followed by a discussion of statutes generally related to sex crime prosecutions, including statutory provisions on evidence in sex cases, and statutory jury instructions on sex cases, and a basic discussion of Montana's rape shield statute.

### **Sexual Intercourse Without Consent**

Montana Code Annotated § 45-5-503 provides that “[a] person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent.” Montana’s Standard Criminal Jury instruction requires that the State prove the following elements, beyond a reasonable doubt to convict on this crime:

1. The Defendant had sexual intercourse with the victim;

AND

2. The act of sexual intercourse was without the consent of the victim;

AND

3. The Defendant acted knowingly.

The elements of “sexual intercourse” and “without consent” are defined by statute, and each will be discussed in turn.

### ***Sexual Intercourse***

“Sexual intercourse” is defined at Mont. Code Ann. § 45-2-101(68)(a):

“Sexual intercourse” means penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by a body member of another person, or penetration of the vulva or anus of one person by a foreign instrument or object manipulated by another person to knowingly or purposely (i) cause bodily injury or humiliate, harass, or degrade; or (ii) arouse or gratify the sexual response or desire of either party.

Furthermore, sexual intercourse includes “any penetration, however slight.”

*Mont. Code Ann. § 45-2-101(68)(b).*

It is important to remember, however, that the State must present affirmative evidence of penetration by the Defendant in order to secure a conviction. For example, it is insufficient when the only evidence of penetration is the female victim stating that “he was performing oral sex on me” and that “I was lying down and he had his arms over my legs and his head between my legs.” *State v.*

***In a Sexual Intercourse Without Consent case, any penetration, however slight, is sufficient for a charge.***

*Lundblade*, 221 Mont. 185, 187-88,  
717 P.2d 575 (1986). The *Lundblade*  
court held that the prosecutor needed to  
elicit specific evidence from the victim

***The definition of “without consent” found in MCA 45-5-501 applies only to the offense of Sexual Intercourse without Consent.***

establishing that her vulva was penetrated, assuming that was the case, in order to prove this element beyond a reasonable doubt. *Id.*

### ***Without Consent***

“Without consent” is defined at Montana Code Ann. § 45-5-501. *This*

***“Without consent” includes force, deception, coercion, surprise, physical helplessness, mental incapacitation caused by intoxication, and a number of circumstances in which a victim is incapable of giving consent.***

*definition only applies to use of the term in SIWOC cases.* For purposes this manual, this statute is divided into three categories of “without consent:” 1) the victim was compelled to submit by force; 2) the victim’s physical or mental disability made her incapable of consent, or 3) the victim’s

circumstances made her incapable of consent.

The victim is compelled to submit by force:

A victim is deemed to have acted “without consent” if the State can show that she was compelled to engage in sexual intercourse because of

“force against the victim or another.” *Mont. Code Ann. § 45-5-5-1(1)(a)(i)*.

“Force” is defined as:

(a) the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender; or (b) the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat.

*Mont. Code Ann. § 45-5-5-1(2)*.

The Montana Supreme Court has strictly construed this statutory definition of “force.” In *State v. Haser*, the State argued a theory of “constructive force” when the Defendant suddenly and without warning, digitally penetrated the vulva of women he was supposed to be photographing. *State v. Haser*, 2001 MT 6, ¶ 43, 304 Mont. 63, 20 P.3d 100. The court rejected this theory, pointing to “Montana's clear legislative mandate that ‘force’ must be related somehow to bodily injury, the attempted infliction of bodily injury, or an actual threat of some kind.” *Id.* at ¶ 54.

In the wake of this decision, the Montana legislature filled this gap by defining a person as incapable of consent who is “overcome by deception, coercion, or surprise.” *Mont. Code Ann. § 45-5-501(1)(a)(ii)(C)* (effective October 1, 2001). While this provision is apparently meant to at least

encompass someone who is digitally penetrated without prior warning in a massage or photography session, this language could also be more broadly applied to non-stranger assault situations where the deception or coercion takes place through the use of isolation or other common techniques.

The meaning of part Mont. Code Ann. § 45-5-5-1(2) (b) also is best defined by reference to the Montana Supreme Court case that prompted its passage. In *State v. Thompson*, a teacher threatened a high school student with non-graduation if she refused to perform oral sex. *State v. Thompson*, 243 Mont. 28, 29, 792 P2d 1103, 47 St. Rep. 1065 (1990).

The State charged SIWOC based on the theory that the high school principal had “in his position of authority as the principal, intimidated Jane Doe into the alleged acts.” *Id.* at 32. The State argued “the fear and apprehension of Jane Doe show [that the school principal] used force against her.” *Id.* The statutory definition of “force” in effect at the time of these events, however, was limited to situations where “the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone.” *Id.* at 31. The district court granted a motion to dismiss because no “force” was alleged in the charging document. *Id.* at 31.

The Montana Supreme Court reluctantly affirmed, finding that the facts did not fit within the definition of “force” in effect at the time. *Id.* at 33.

In the wake of this decision, the Legislature passed part (b), which defines force as “the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat.” *Mont. Code Ann. § 45-5-501(2)(b) (effective April 27, 1991).*

The victim is incapable of consent because of physical or mental disability:

“Without consent” includes a victim who is incapable of consent because she is “mentally defective,” “mentally incapacitated,” or “physically helpless.” The term “mentally defective” “means that a person suffers from a mental disease or defect that renders the person incapable of appreciating the nature of the person's own conduct.” *Mont. Code Ann. § 45-2-101 (40).* The Montana Supreme Court has not interpreted this definition directly. Proof that a victim meets this definition would likely be best addressed with expert testimony after an appropriate examination of the victim.

The term “mentally incapacitated” means that a person is rendered temporarily incapable of appreciating or controlling the person's own conduct as a result of the influence of an intoxicating substance. *Mont. Code*

*Ann. § 45-2-101 (41)*. It makes no difference whether the victim is intoxicated voluntarily or involuntarily. *State v. Gould*, 273 Mont. 207, 220, 902 P.2d 532 (1995). Where the intoxicating substance at issue is alcohol, lay opinion testimony of eyewitness may be sufficient to prove the victim was “mentally incapacitated.” *See generally State v. Carter*, 285 Mont. 449, 948 P.2d 1173 (holding that lay persons may offer an opinion on intoxication). However when drugs or other substances are at issue, proof of this element should be handled with the testimony of a toxicologist, along with analysis of the victim’s blood, if available. *See State v. Nobach*, 2002 MT 91 (holding lay people are not sufficiently knowledgeable about common symptoms of drugs to offer lay opinion testimony.)

The term “physically helpless” means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act. *Mont. Code Ann. § 45-2-101 (58)*. The Montana Supreme Court has made it clear that a person who is sleeping is “physically helpless.” *See State v. Stevens*, 2002 MT 181, ¶ 44, 311 Mont. 52, 53 P.2d 356. This remains true regardless of whether the sleep is drug-induced or achieved normally, and even if that person had some sensory perception. *Id.* at ¶ 45.

The evidence must establish, however, that the victim was “physically helpless,” which includes the state of being asleep, at the time of the sexual intercourse. In *State v. Stevens*, evidence that the victim “awoke . . . when she felt the sensation of something inside her vagina” was sufficient to support a conviction for SIWOC. *Stevens*, ¶¶ 11, 45. Evidence that the victim was aware of a sexual assault, but then “stops breathing,” becomes “glued to the table” or is “frozen out of fear” at the time of the penetration was not sufficient to support SIWOC conviction. *Id.* at ¶¶ 47-49. The court reasoned that this particular victim was not “physically helpless” because she was “not sedated and, although frightened” she had control over her body and therefore was “conscious and otherwise physically capable of communicating unwillingness to act.” *Id.* at 49.

Notably, the *Stevens* case did not address the issue of tonic immobility. The *Stevens* case does not foreclose the possibility that with the proper expert testimony a jury may be within its bounds in finding that a sober, awake and aware person may in fact be “physically helpless” because of the effects of tonic immobility.

The victim is incapable of consent due to other circumstances:

Finally, Montana Law provides a list of circumstances under which the victim is incapable of consent to sexual intercourse. *See* 45-5-501(1)(a)-(c). These circumstances are generally described as:

- The victim is overcome by deception, coercion or surprise, as described above;
- The victim is under 16 years of age;
- The victim is incarcerated in an adult or juvenile correctional, detention, or treatment facility or is on probation or parole and the offender is an employee, contractor, or volunteer of the supervising authority and has supervisory or disciplinary authority over the victim, unless the act is part of a lawful search;
- The victim is admitted to a mental health facility, a community-based facility or a residential facility, or is receiving community-based services, as those terms are defined by statute; and the offender has supervisory or disciplinary authority over the victim or is providing treatment to the victim; and is an employee, contractor, or volunteer of the facility or community-based service.

### ***Sentencing in Sexual Intercourse Without Consent***

Any person convicted of a SIWOC will face up to life imprisonment.

*Mont. Code Ann. § 45-5-502.* The statute provides for a mandatory minimum of “not less than 2 years” in a state prison. This means that the defendant must be sentenced to a minimum of two years in either the

Montana State Prison or a commitment to the Department of Corrections.

However, the court can reduce this to a minimum of two years deferred execution of sentence, pursuant to Mont. Code Ann. § 46-18-205(2), if the Court finds one of the following exceptions applies:

(1) the offender was less than 18 years of age at the time of the commission of the offense for which the offender is to be sentenced;

(2) the offender's mental capacity, at the time of the commission of the offense for which the offender is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution. However, a voluntarily induced intoxicated or drugged condition may not be considered impairment for the purposes of this subsection.

(3) the offender, at the time of the commission of the offense for which the offender is to be sentenced, was acting under unusual and substantial duress, although not such duress as would constitute a defense to the prosecution;

(4) the offender was an accomplice, the conduct constituting the offense was principally the conduct of another, and the offender's participation was relatively minor;

(5) in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense; or

(6) the offense was committed under 45-5-310, 45-5-311, 45-5-502(3), 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), 45-5-603(2)(b), or 45-5-625(4) and the judge determines, based on the findings contained in a sexual offender evaluation report prepared by a qualified sexual offender evaluator pursuant to the provisions of 46-23-509, that treatment of the offender while incarcerated, while in a residential treatment facility, or while in a local community affords a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society, in which

case the judge shall include in its judgment a statement of the reasons for its determination.

*Mont. Code Ann. § 46-18-222.*

With regard to subsection (5), the Montana Supreme Court has held that because “the threat or infliction of actual bodily harm may, depending on the circumstances, be an element of the offense of sexual intercourse without consent, it is reasonable to conclude that the exception to the minimum sentence found at § 46-18-222(5), MCA, when no “serious bodily injury was inflicted on the victim” is applicable to that offense. *State v. Goodwin*, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991). Accordingly, where the victim has not suffered at least the threat of “bodily injury,” this finding is appropriate, and the court’s discretion is only limited by a mandatory minimum of a two-year deferred imposition of sentence. *See* Mont. Code Ann. § 46-18-205 (where restricting deferrals or execution of sentence based on age of victim implies that a deferral or suspension of sentence is otherwise appropriate).

The mandatory minimum sentence becomes increasingly severe based on the age of the victim and the relative age of the Defendant. If the victim is under 16, the first 30 days of the sentence may not be deferred or suspended. *Mont. Code Ann. § 46-18-205(1)*. This means that the minimum

sentence would be a two-year sentence to a state prison with all but 30 days suspended. If the victim is under 16 and the offender is four or more years older than the victim, then the minimum would be four years with all but 30 days suspended. *Mont. Code Ann. § 45-5-503(3)(a); Id.* If the victim is 12 or younger and the Defendant is 18 or older at the time of the offense, the Defendant will be subject to a mandatory life sentence with 25 years of no parole, unless the Court finds one of the exceptions described in Mont Code Ann. § 45-18-222, as described above. *Mont. Code Ann. § 45-5-503(4)(a).*

Finally, the Defendant must be sentenced to life without release if he has previously been convicted of one of the following qualifying offenses: deliberate homicide, aggravated kidnapping, sexual intercourse without consent, sexual abuse of children, and ritual abuse of a minor. *Mont. Code Ann. § 46-18-219.* The only exception to this minimum is provided at § 45-19-219(3). This language is confusing, and has yet to be directly addressed by the Montana Supreme Court. The likely interpretation would be that the court may depart from mandatory life without release if the court that previously sentenced the defendant for one of the qualifying offenses found that a Mont Code Ann. § 45-18-222 exception applied to that offense, and sentenced accordingly.

## **Sexual Assault**

Montana Code Annotated § 45-5-502 provides that “[a] person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.” Unlike SIWOC, sexual assault can be charged as a misdemeanor or a felony. In order to charge and convict as a felony, the State must allege and prove one or more of the following circumstances:

- The present offense is a third or subsequent offense of sexual assault;
- The victim is less than 16 years old and the offender is 3 or more years older than the victim; or
- The offender inflicted bodily injury on the victim in the course of the sexual assault, regardless of the victim’s age.

With regard to the third circumstance, “bodily injury” is defined at § 45-2-101(5) as “physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.”

In order to convict a Defendant of Sexual Assault, Montana’s Standard Criminal Jury Instructions require that the State to prove the following elements, beyond a reasonable doubt:

1. The Defendant subjected the victim to sexual contact;

AND

2. The act of sexual contact was without the consent of the victim;

AND

3. The Defendant acted knowingly.

The two critical definitions required to be proved in these elements are “sexual contact” and “without consent.” Each is addressed here in turn.

### Sexual Contact

"Sexual contact" means touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely cause bodily injury to or humiliate, harass, or degrade another; or to arouse or gratify the sexual response or desire of either party. *Mont. Code Ann. § 45-2-101(67)*. The legislative policy underlying this definition “is to criminalize and punish sexual or intimate impositions that do not involve penetration . . . but which express a societal concern for such impositions because they provoke outrage, disgust or shame in the victim.” *State v. Kern*, 2003 MT 77, ¶ 24, 315 Mont. 22, 67 P.3d 272.

Applying this policy, the Montana Supreme Court has determined that the definition of “sexual contact” reaches a broad swath of conduct.

Essentially any type of intimate contact is sufficient regardless of who does the touching or what body part is involved, especially when the victim is under the age of consent. All of the following factual scenarios were deemed to fall within the definition:

- An adult male rubbing the belly and chest of a 9-year old girl. *State v. Weese*, 189 Mont. 464, 467-68, 616 P.2d 371, 373-74 (1980).
- An adult male ordering a seven-year-old female to touch his penis. *State v. Kern*, 2003 MT 77, ¶ 24, 315 Mont. 22, 67 P.3d 272.
- An adult male admitting that he “touched [a minor female] intimately and told her not to tell.” *State v. Kao*, 245 Mont. 263, 268, 800 P.2d 714 (1990).

***In sexual assault cases charged under MCA 45-5-502, the term “without consent” retains its ordinary meaning, with a few narrowly defined circumstances where consent is ineffective.***

Furthermore, the Montana Supreme Court has repeatedly held that the State need not prove direct evidence of arousal, or intent to be aroused, in order to meet its burden of proving the "sexual contact" element of sexual assault. "[I]t is well-settled that the jury may infer intent of sexual arousal from the defendant's acts." *State v. Rogers*, 2007 MT 227, ¶ 30, 339 Mont. 132, 168 P.3d 669.

## Without Consent

The term “without consent” is not defined for purposes of its use in the crime of sexual assault. Instead, “without consent” retains its ordinary meaning, with a few narrowly defined circumstances where consent is ineffective. Mont. Code Ann. § 45-5-502(5); *State v. Williams*, 2010 MT 58, ¶ 24, 355 Mont. 354, 228 P.3d 1127. The circumstances where consent is ineffective generally include:<sup>42</sup>

- Where the victim less than 14 years old and the offender is 3 or more years older than the victim;
- Where the victim is incarcerated in an adult or juvenile correctional, detention, or treatment facility or is on probation or parole and the offender is an employee, contractor, or volunteer of the supervising authority and has supervisory or disciplinary authority over the victim, unless the act is part of a lawful search;
- Where the victim receiving services from a youth care facility, as defined in 52-2-602, and the offender has supervisory or disciplinary authority over the victim or is providing treatment to the victim; and is an employee, contractor, or volunteer of the youth care facility;

When sexual assault and SIWOC are charged in the same information, the instructions must clearly distinguish the different definitions of without consent. For example, the “without consent” instruction could state that “In

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<sup>42</sup> Mont. Code Ann 45-5-502.

regard to Count I, Sexual Assault, the term “without consent” retains its ordinary meaning, In regard to Count II, SIWOC, the term “term without consent means . . . .” This type of instruction will prevent confusion in cases where the both sexual assault and sexual intercourse are charged in the same Information.

This all begs the question of what is the “ordinary meaning” of “without consent.” The dictionary definition of “consent” is “to give assent or approval.” *Merriam Webster Dictionary, Online*, 2013. Arguably, this definition may permit a judge or jury to convict on cases where the victim fails to give affirmative consent to sexual contact, which would be broader in scope than the definition of “without consent” that applies to SIWOC cases.

The Montana Supreme Court appears to disagree. The court has held, in the context of a lesser included offense analysis that the plain meaning of “without consent” in sexual assault is actually included, and thus narrower in scope, than the statutory definition of “without consent” used in SIWOC cases. *State v. Williams*, 2010 MT 58, ¶ 27, 355 Mont. 354, 228 P.3d 1127. The court reasoned that “[t]he ordinary meaning of “without consent” fits

squarely within the definition under § 45-5-501(1)(a)(i), MCA, that "the victim is compelled to submit by force against the victim or another."

### ***Sentencing in Sexual Assault Cases***

A person convicted of felony sexual assault based on the fact that it is a third conviction is subject to up to five years in prison. Mont. Code Ann. § 45-5-502(2)(c). A person convicted of felony sexual assault based on the age of the victim being less than 14 or the infliction of bodily injury is subject to up to life in prison. Mont. Code Ann. § 45-5-502(3). The mandatory minimum when the victim is less than 14 or bodily injury is inflicted is four years to a state prison with two years suspended. *Id.*; Mont. Code Ann. § 46-18-205(2)(f). If the judge wishes to suspend less than 4 years, the judge must make a "written finding that there is good cause." Mont. Code Ann. § 45-5-502. If the judge wishes to impose less than two years in prison or the Department of Corrections, the jury must make a finding pursuant to Mont. Code Ann. § 46-18-222, as described above in sentencing for SIWOC cases.

### ***Knowledge***

It is critical to pay close attention to the "knowingly" element in sexual offense cases. As discussed throughout this manual, offenders take

advantage of the stereotypes many people hold in order to commit a sexual assault. Many defendants claim, and juries often believe, that the sexual act was not an assault, but simply the result of a “misunderstanding” or “miscommunication.” This can make proving a defendant’s knowledge more difficult. It is easy for prosecutors to focus primarily on the “without consent” element, since that is often the biggest issue in non-stranger sexual assault cases; however, the State must prove mental state as to each and every element. *Mont. Code Ann. § 45-2-103*. Therefore, attention must be paid to all indications, large and small, of a defendant’s knowledge, starting in the investigative stage of the case.

### ***Laws Generally Applicable to Sex Crimes***

Montana Code Ann. § 45-5-511 provides a number of miscellaneous provisions that are important to SIWOC and Sexual Assault cases. First, this section provides the basis for two important jury instructions that attempt to dispel common rape myths.

#### Failure to Make a Prompt Outcry

Jurors unfamiliar with the dynamics of sexual assault

***Several Montana statutes directly counter some of the most long-standing and firmly entrenched rape myths.***

might assume that a person being assaulted would immediately yell, scream and report the crime to police. They may assume that someone who does otherwise must be lying. Section 45-5-511(4) counters this myth with a statement of law that “[e]vidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.”

### Resistance is Not Required

Jurors might also mistakenly assume that anyone who is sexually assaulted would physically resist. Section 45-5-511(5) states, to the contrary, that “[r]esistance by the victim is not required to show lack of consent. Force, fear, or threat is sufficient alone to show lack of consent.”

While neither of these principles have been adopted as standard jury instructions, they are commonly offered and given as instructions by judges in Montana and should be considered in any case where these issues arise.

### Rape Shield Statute

The second important provision in § 45-5-511 is what is commonly called the “rape shield” statute. Section 45-5-511(3) states:

Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of

the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.

The Montana Supreme Court has strictly enforced this statute to prevent the trial from becoming a trial of the victim. See e.g. *State v. Detonancour*, 2001 MT 213, ¶ 21, 306 Mt 389, 34 P.3d 487.

There are three exceptions to the statute. Before discussing these exceptions, it is important to realize that the rape shield is a rule of exclusion, not a rule of admissibility. Evidence that passes through the rape

***Evidence that passes through the rape shield pursuant to an exception still must comply with the remaining rules of evidence in order to be admissible.***

shield pursuant to an exception must still comply with the remaining rules of evidence in order to be admissible. See *State v. Bishop*, 2012 MT 259, ¶ 40, 367 Mont. 10, 291 P.3d 538. Frequently, evidence of past sexual conduct is irrelevant under Rule 401 or unfairly prejudicial under Rule 403,

regardless of the rape shield statute. *Id.*

The first exception to the rape shield is “evidence of the victim’s past sexual conduct with the offender.” The important question here is defining what constitutes “sexual conduct.” The Montana Supreme Court has interpreted this term to include “sexually intimate” behavior, but to exclude

“flirtatious behavior.” *State v. Detonancour*, 2001 MT 213, ¶ 24, 306 Mt 389, 34 P.3d 487. The Court did, however, exclude evidence of flirtatious behavior on relevance grounds, stating,

We decline to adopt this broad definition of sexual conduct. As the compiler's comments note, if Detonancour and [the victim] had been sexually intimate previous to the assault, that evidence would have been admissible. However, flirtatious behavior is not, contrary to Detonancour's opinion, an invitation to engage in sexual relations. An examination into the nuances of the victim's interactions with the defendant days before an alleged rape would effectively put the victim on trial. Not only is this evidence irrelevant to the issue of consent, it is precisely the harm that the rape shield statute is designed to prevent.” *Id.*

Where the conduct in a specific case falls on this spectrum is fact-intensive and will depend on the particular circumstances of the case, and will typically be intertwined with an a relevancy analysis under Rules 402 and 403. *See e.g. Bishop*, ¶ 48.

The second exception to the rape shield is “evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution.” The important issue to keep in mind here is that just because the facts of the case involve semen, pregnancy or disease does not mean that evidence falls within this exception. The semen, pregnancy or disease must be “at issue in the prosecution.” For example, in *State v. Bauer*, seminal fluid of a person other

than the Defendant was allegedly found in the bed sheets of the victim. *State v. Bauer*, 2002 MT 7, ¶ 28, 308 Mont. 99, 29 P.3d 689. The court held that this DNA is not at issue in the prosecution and excluded by the rape shield where the State has not offered the seminal fluid as evidence that the Defendant committed the rape. *Bauer*, ¶ 31. On the other hand, if the State offered evidence that the Defendant impregnated the victim around the time of the sexual assault, the rape shield would probably not exclude evidence that the victim had sex with someone else around the time of c

Finally, there is a Sixth Amendment exception to the rape shield that permits the Defendant to offer past sexual conduct of the victim, if the evidence is probative to the victim's credibility. However, "speculative or unsupported allegations are insufficient to tip the scales in favor of a defendant's right to present a defense and against the victim's rights under the rape shield statute." *State v. Johnson*, 1998 MT 107, ¶ 24, 288 Mont. 513, 958 P.2d 1182. The Montana Supreme Court has specifically articulated a test for offering evidence of prior false allegations of non-consensual sexual conduct:

[t]he defendant must establish, by a preponderance of the evidence, that (1) the accusation or accusations were in fact made; (2) that the accusation or accusations were in fact false; and (3) that the evidence is more probative than prejudicial. If

the defendant satisfies these three conditions, the trial court will authorize cross-examination of the complaining witness concerning the alleged false accusations. The defendant may thereafter present extrinsic evidence of the false accusations only if the complaining witness denies or fails to recall having made such accusations.

*State ex. Rel. Mazurek v. Fourth Judicial District Court*, 277 Mont. 349, 922

P.2d 474 (1996).

## **Chapter 6**

# **ISSUES IN PROSECUTING SEXUAL ASSAULT CASES<sup>43</sup>**

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In a non-stranger sexual assault case, rape myths and societal attitudes about victims and offenders conspire to normalize sexual assault, or to disguise it as something consensual. Sexual assault is excused as “hooking up,” a “one-night stand, or drunken sex that the victim later regrets. Offenders count on the jury, media, and society at large thinking that, at worst, it was sex gone wrong or a misunderstanding. The prosecutor’s job is to remove the disguise and recreate the reality of what happened.

When police receive a report of a non-stranger sexual assault, there is a high likelihood that the suspect is a serial offender. Accordingly, the investigation and case development should be as rigorous and thorough as the investigation and prosecution of any other crime where there is reason to believe that the offense is not likely the first offense. Instead of viewing the report with skepticism and scrutinizing the victim and her behavior, law

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<sup>43</sup> This chapter was excerpted and modified with permission from: the Michigan Prosecutors Sexual Assault Prosecution Manual, published by the Domestic and Sexual Violence Prevention and Treatment Board and the Prosecuting Attorneys Association of Michigan (2013); the Wisconsin Sexual Assault Reference Book, published by the Wisconsin Office of Justice Assistance (2009); Prosecuting Alcohol-Facilitated Sexual Assault, published by the National District Attorneys Association (2007); and Prosecuting Intimate Partner Sexual Assault, The Voice, Volume II, No.2, published by the National District Attorneys Association. All rights reserved.

*It is important for the prosecutor to take a proactive role in identifying the information needed to successfully prosecute these cases.*

enforcement and prosecutors need to engage in an offender-focused investigation and prosecution.

It is important for the prosecutor to take a proactive role in identifying and

acquiring the information needed to successfully prosecute these cases. This may mean being in direct communication with law enforcement as the case is being reviewed, and requesting additional investigation and witness interviews, to ensure that all corroborative details have been addressed. Further, it is vital that the prosecutor wait until all the information has been collected before deciding whether or not to file charges.

### **Investigating and Analyzing Sexual Assault Cases**

The prosecutor's responsibilities in an offender-focused sexual assault prosecution include oversight and involvement in the investigation of the sexual assault. In order to properly analyze a sexual assault case, the investigation should be designed to uncover and address a number of topics. The investigation should provide the prosecutor the ability to develop:

- Pretrial motions in limine to exclude information that invades the victim's privacy or is otherwise irrelevant and/or prejudicial;
- Expert witnesses to address the jury's culturally created skepticism of victim behavior; and
- A trial strategy that will demonstrate the predatory nature of the victim's conduct.

Perhaps most importantly, prosecutors must be willing to prosecute cases that may not be easy to win.

*Prosecutors must be willing to prosecute cases that may not be easy to win.*

The following sections contains information and questions that investigators and prosecutors could keep in mind, on issues both general and specific, starting at the beginning of the case.

### ***General Questions***

- Is there a motive to lie? Although the defense will always claims there is a motive for the victim to lie, the better question to ask is whether there is compelling, corroborated evidence that the victim did lie or likely lied. However, anticipating defense claims about a victim's alleged motive to lie is important to do from the outset of a case.
- If there is no evidence the victim lied, why is her veracity being questioned?

- Where did the incident happen? Which of the parties was at the incident location first? Is this a case where the victim went to bed and the defendant followed her to her bedroom? Are the facts of the incident consistent with a consensual encounter?

### *Reporting Issues*

- What are the time and circumstances of the report? Did the victim come forward as soon as she was physically able or did she wait? What made her come forward? Did she tell anyone about the incident prior to going to the hospital or calling the police? What prompted her to report when she did and why? A delayed report is the norm and should not be considered fatal to the prosecution of a sexual assault case; however, considering and understanding the circumstances surrounding the report, and the reasons for any delay, must be explored. Investigators must interview any eye or ear witnesses to the delayed report, the sexual assault itself, and to anything that might have happened in the intervening time between the sexual assault and the report to the police.
- When analyzing the impact of a delayed report, remember that, according to the National College Women Sexual Victimization Survey, almost half of the women who are by definition rape victims do not self-identify as rape victims. These women know that something bad happened to them, that someone had sex with them when they were too drunk to consent, or that someone held them down and forced them to have sex against their will. But they often do not label themselves as victims of sexual assault. If a victim does not self-identify as such, it will impact her choice to call the police immediately. Victims also need time to process what has happened, as well as people to confide in about what happened.

### ***Injuries/Victim's Physical Condition***

- What was the victim's physical condition? Was she menstruating? Was she wearing a tampon? Was she previously injured? Was she undergoing medical treatment for a yeast or fungal infection or other uncomfortable condition? Was there anything else that would argue against the intercourse being voluntary?
- Was the victim injured? If so, what do the injuries show?
- Was there prior interaction between the victim and the defendant? Are they boyfriend and girlfriend? Did they even know each other before the night in question?
- Can the victim testify to all elements of the crime?
- What theory applies? Did the defendant use force or threaten the victim? Use deception, coercion, or surprise? Was the victim "mentally incapacitated due to intoxication? Was the victim asleep, unconscious, or passed out?

### ***Investigation of the Suspect***

Although approaching other potential victims who have not reported a sexual assault is an extremely sensitive issue, the investigation should include looking into the suspect's past to determine if there are other victims. If other victims are located, the investigator and prosecutor should involve an advocate, and consider staffing the case with the MDT to

determine whether it is advisable to approach other potential victims. The investigation of the suspect should include:

- Where the suspect hangs out;
- What has he told his friends, co-workers about his sexual activities with others;
- Investigation of the suspect's behavior before, during and after the incident for evidence of premeditation and partial admissions;
- How he selected the victim;
- What he did to test the victim for vulnerability;
- What did he do to create and/or exploit vulnerabilities, e.g., did he buy the victim drinks;
- What did he do during the incident;
- The suspect likely will concede significant information to officers, such as acknowledging that the victim was really drunk or that she threw up just before the sexual act
- Exactly how each sexual act occurred and who did what, in anticipation that some of what the suspect describes will indicate a lack of mutuality;
- What he is claiming is evidence of consent;
- What he did after the assault – who he talked to, whether he bragged about the assault, whether he made partial admissions; typically there are witnesses who observed the suspect's

behavior and his interaction with the victim, and to whom the suspect spoke after the assault, yet all too often those victims are never interviewed;

- Look at the defendant's level of intoxication. What was his capacity to do other things? Could he walk? Talk? Play pool? Drive a car? Was his speech slurred? The more sober he was, the easier it is to show he was a predator, especially if the victim was extremely intoxicated.
- Was there any planning or manipulation on the part of the defendant? Were there any attempts to deceive the victim? Did the defendant do anything to control the situation and overcome the victim's will? Did he isolate her? Did he lie to her?
- Is there any evidence of grooming? Did the defendant do anything during the time prior to the sexual assault to gain the victim's trust? Did he do anything to make it easier to sexually assault her? Is there any evidence that he set her up? For example, did he talk about making a "special punch" to get his "target" drunk? Did he buy her drinks and encourage her to drink them in an attempt to get her drunk?
- Did the defendant prey upon the victim's vulnerabilities? Did he do anything to wear down the victim's resistance? Is there any evidence that the defendant selected the victim because he knew that she would be an easy target?
- Has the defendant done it before? Have anyone else ever accused him of rape or other misconduct? Has anyone ever seen women leaving his room/apartment/home crying or distraught?"
- Did the defendant know the victim? If so, did he use his knowledge or familiarity with the victim to gain access to her or

to isolate her? Did he use his knowledge to attempt to silence her?

### ***Analyzing Credibility and Corroboration***

Critical to the prosecution of sexual assault cases is performing an analysis of the victim's credibility as well as any corroboration that exists. Jurors' negative perceptions of a victim's credibility can be a significant barrier to successful prosecution. Unfortunately, those negative perceptions are usually based on rape myths. In sexual assault cases, credibility of the victim and provability of the case are inherently intertwined, in large part because sexual assault is a crime of secrecy. There are almost never eyewitnesses to a sexual assault. Moreover, sexual assault cases rarely have physical evidence that conclusively proves that a sexual assault occurred. Prosecutors are often left with the victim's word, which means that

***Jurors may be reluctant to convict on the victim's word alone because they believe they need evidence to corroborate the victim's testimony regarding the actual moment the sexual assault occurred. This belief is so strong that a number of states, including Montana, have jury instructions advising jurors that the victim's word need not be corroborated. However, a prosecutor should not be discouraged when presented with a case where the primary evidence is the victim's testimony.***

a jury must find the victim credible before they will convict the defendant. Jurors may be reluctant to convict on the victim's word alone because they believe they need evidence to corroborate the victim's testimony regarding the actual moment the sexual assault occurred. This belief is so strong that a number of states, including Montana, have jury instructions advising jurors that the victim's word need not be corroborated.

However, a prosecutor should not be discouraged when presented with a case where the primary evidence is the victim's testimony. Although a prosecutor may be unable to present physical or other evidence to corroborate the victim's testimony about the moment of the sexual assault, the prosecutor can give context to the victim's version of events, thereby allowing the jury to evaluate her credibility.

*The victim's credibility can be broken down into five components: (1) actual credibility; (2) the victim's ability to perceive at the time of the incident; (3) the victim's ability to remember what happened; (4) the existence of corroborative evidence; and (5) the victim's likeability. The first four factors are valid charging considerations; the fifth is not.*

The victim's credibility can be broken down into five components: (1) actual credibility; (2) the victim's ability to perceive at the time of the incident; (3) the victim's ability to remember what happened; (4) the

existence of corroborative evidence; and (5) the victim's likeability. The first four factors are valid charging considerations; the fifth is not. However, victim likeability must be understood and recognized by law enforcement and prosecutors if they are to obtain a conviction; therefore it is discussed herein.

### Actual Credibility

The first factor is actual credibility. A victim who was voluntarily intoxicated at the time of a sexual assault may feel shame or self-blame for allowing herself to be placed in a risky situation. Consequently, she may be reluctant to reveal embarrassing details. As a result, she may appear to have something to hide. She may also become hostile and defensive in order to protect herself. Furthermore, a victim may withhold information she views as insignificant without realizing that it is critical to be truthful about every minor detail, regardless of how insignificant it may seem to her. In a case where the victim deliberately withholds information, lies about small details, or is inadvertently inaccurate, jurors will likely be reluctant to convict the defendant because they will be worried that a victim who lies about small details may be inclined to lie about the sexual assault itself, especially when

the law requires the jury to believe the prosecution's case beyond a reasonable doubt.

Prosecutors should encourage the victim to be completely honest, even about embarrassing or seemingly insignificant details. First, explain to the victim the importance of telling the truth, no matter how painful or embarrassing it might be. Explain to the victim the significance of omitting information, even about seemingly insignificant details. Again, it may take time to develop a rapport with a victim before she is comfortable sharing personal details, but taking the time to do so can make an enormous difference – to the case, and to the victim's experience with the criminal justice system.

### Ability to Perceive

The second factor that relates to a victim's credibility is how well she was able to perceive what was happening at the time of the incident. This generally weighs more heavily in drug- and alcohol- facilitated sexual assault cases, as the ability to perceive diminishes as the level of intoxication increases. A victim who could not clearly perceive what was happening at the time of the crime will not be able to testify in detail about what happened because she does not know. If the victim was passed out at the time of the

sexual assault, she had no ability to perceive because she was unconscious. Unless the victim woke up during the sexual assault, the prosecution will have to find an alternative way to prove what happened.

In an alcohol- or drug-facilitated sexual assault, it rare to know the victim's BAC at the time of the sexual assault. Even in cases where the BAC is known, the prosecution must analyze the victim's ability to perceive by determining how the victim was impacted by the consumption of alcohol. It is important to explain the relevance of perception to victims, especially in cases where the lack of perception is the primary barrier to prosecution.

In determining whether the victim's ability to perceive was impaired, look at the following:

- What is the victim able to tell you she perceived at the time?
- Can she relate details of the incident?
- Can she tell you who else was there? What were they doing?
- How intoxicated was the victim?
- Were the victim's motor skills impaired? Was she able to walk? Did she fall?
- What was the victim's physical condition? Was she vomiting?
- Was her speech slurred?

The defense may attempt to challenge the witness's testimony on the grounds that the witness is not competent; however, it is unlikely that a court will find a witness incompetent on this basis as long as the witness can

testify that she was able to perceive the incident. There is a distinction between attacks on competence and attacks on credibility. When a witness is intoxicated at the time of an occurrence about which the witness has testified, intoxication is a proper matter for the jury to consider as affecting the witness's credibility.

### Ability to Remember

A victim's memory may be impaired due to trauma, or by the consumption of alcohol or drugs. In order to be able to testify about what happened, the victim must, of course, be able to remember what happened. If she does not remember, there must be some other way to prove what happened or the case cannot go forward. Although the victim may not remember every detail of the assault, she may have other information that is crucial to the case. When interviewing the victim about her memory, explain why you are asking. Encourage the victim to speak with an advocate for additional support.

### Existence of Corroborative Evidence

The fourth factor that relates to victim credibility is the prosecution's ability to corroborate the victim's version of events. In cases where

corroborative evidence exists, it may compensate for lack of perception or memory. There is always something more to corroborate the victim if we look hard enough.

Corroboration is important because it gives the jury a context in which to evaluate the victim's testimony. The evidence might only corroborate a small piece of the victim's version of events, but each piece of corroboration builds upon the last and enhances a jury's ability to find the victim credible. In the majority of sexual assault cases, there are almost never any eyewitnesses to the sexual assault. In order to decide who is credible, jurors need a context in which to evaluate the victim's credibility. Prosecutors can give jurors a context by giving them the "circles of credibility." These include, among other things, medical evidence, eye and ear witnesses, and physical evidence. In some cases, a prosecutor might be able to corroborate a victim's testimony with expert testimony that explains behavior that is counterintuitive to juror expectations. In others, corroboration might consist of the defendant's statement or confession. The corroborative evidence need not conclusively prove that a sexual assault occurred; rather, it must give the jury a sufficient context in which to evaluate the victim's credibility.

Consequently, prosecutors should corroborate everything possible.

Corroboration may include the following:

- Physical evidence.

Instruct investigators to look for physical evidence that not only proves that the act occurred, but also evidence that over- comes the consent defense. In addition to traditional physical evidence, investigators should look for photos on digital cameras and cell phones, cell phone records, and any recordings that might exist. Investigators should also look for proof of where the victim was and what was done there. Such evidence can include blood, hair, urine, vomit, clothing, personal items, or even credit card receipts. Photographs of any scene related to the sexual assault should be taken in all cases.

- Outcry witnesses.

As in many sexual assault cases, in cases where the victim was intoxicated, the victim may delay reporting, thereby causing evidence collection problems. A delay in reporting may also cause credibility issues. Therefore, it is crucial to explore why the victim delayed reporting. What did she do after the incident? Who saw her first after the incident? Who did she first tell? Why did she report when she did and to whom did she report? Law enforcement must interview each of those people.

- Eyewitnesses to any part of the chain of events.

When looking for corroboration, investigators should ask the victim whether anyone else was present during any part of the incident. Are there any witnesses to the ingestion of the alcohol or to the incident? What did they see or hear?

- Bartenders and waitresses.

These witnesses can be critical to a sexual assault prosecution, even if the case is proceeding under a theory other than mental incapacitation. Investigators should ask them how much the victim had to drink. Did she appear to be drunk or high? In addition, they should be asked whether the defendant frequents that bar and, if so, how he behaves when he is there, given the research that tells us that a high number of these offenders are serial offenders.

- Friends and family of the victim.

Who sees the victim on a regular basis? Who saw the victim around the time of the incident? What can the victim's friends tell you? Before doing so, however, it may be advisable to discuss this with the victim, as there may be people in her life she does not want to know about the assault.

- Other women the defendant may have dated.

Although they may not offer anything beneficial to the prosecutor, they may be victims who never reported.

- Friends of the defendant.

Even though interviewing these witnesses may seem illogical because one would presume they would be on the defendant's side, they can frequently corroborate innocuous details, or even disclose details they do not believe to be important, but which are crucial to the prosecution's case.

- Surveillance recordings.

Recordings from any place the victim and/or defendant may have gone, can uncover important evidence.

- Medical evidence.

Are there any physical injuries? What, if anything, do they demonstrate? Remember that seemingly innocent injuries, such as scrapes to the victim's knees from falling down, might provide corroboration of force or incapacitation.

- Interview the defendant whenever possible.

Although the defendant may refuse to speak to an investigator, many times suspects in sexual assault cases will want to tell the police why they are not guilty. They will often want to talk about how the victim consented. In DFSA cases, the suspect will often admit that he had sex with the victim, but [will claim] that it was a consensual act. The suspect may use the victim's history of substance abuse or promiscuous behavior to direct blame to her and hold her responsible for the sexual contact. In the case of a consent defense involving a DFSA, investigators should get the suspect to acknowledge the victim's extreme level of intoxication. For example, he may admit that she was throwing up and lying in her own vomit. He will often try to convince the investigator that the sex act was still consensual, but it becomes more difficult for the jury to believe. However, even if you know the defendant will refuse to make a statement, making an attempt to do so will foreclose defense arguments that the investigator didn't try to get the defendant's "side" of the story.

- Pretext phone calls<sup>44</sup>.

Montana allows pretext phone calls in which the victim calls the defendant and the conversation is recorded. A warrant is required. In these calls, Defendants may acknowledge that intercourse occurred and that the victim was intoxicated, which can be useful as corroboration even if, by itself, the recording of the pretext call does not conclusively prove that a sexual assault occurred. Investigators planning to do a pretext phone call should check the law and plan carefully. What is going to be said during the call? What is the goal of the call? Is it to corroborate intercourse, to corroborate that the victim was passed out, to show that the victim said no, or some other goal? Decide who is going to make the call. Will it be the victim or a mutual friend? If it is going to be the victim, make sure that the victim is emotionally stable enough to handle the call. If the victim is working with a victim advocate

*The victim may be viewed with skepticism or dislike by a jury that assumes that she put herself in danger with her behavior. The jury may be inclined to believe that she assumed the risk of sexual assault by becoming intoxicated to the point of being unable to protect herself.*

*Jurors will be more likely to find a victim credible when other aspects of her testimony are corroborated. For this reason, corroboration is key.*

or counselor, work with that individual as well. A pretext phone call should not be made at the cost of further emotionally injuring the victim.

Jurors will be more likely to find a

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<sup>44</sup> See International Association of Chiefs of Police Training Key #574 (theiacp.org).

victim credible when other aspects of her testimony are corroborated. For this reason, corroboration is key, regardless of how small the point being corroborated. Although the evidence may corroborate non-essential points in the case, when it surrounds the victim's testimony, it gives the jury a context in which to evaluate it.

### Victim Likeability

Although victim likeability is not a valid charging consideration, nor is it legally relevant for a jury to consider, jurors tend to believe people they like. In addition, a jury may decide that a victim who engaged in risky behavior is not as worthy of protection as a victim who did not engage in risky behavior. The unfortunate reality of sexual assault cases is that the flaws that make the victim a target for the offender also make the victim less credible in a jury's eyes. For example, a victim who goes to a bar and drinks to the point of vomiting and unconsciousness will be an easy target for a predator. This victim may be viewed with skepticism or dislike by a jury that assumes that she put herself in danger with her behavior. The jury may be inclined to believe that she assumed the risk of sexual assault by becoming intoxicated to the point of being unable to protect her. Although assumption of the risk is not a defense to sexual assault, defense attorneys

may use it to achieve jury nullification. Also, the jury may believe that the victim's risky behavior translated into a "yes" and was equivalent to consent; therefore, they may find the defendant not guilty.

*Approximately half of sexual assaults are associated with alcohol use by the offender, victim, or both.*

Furthermore, a victim who was voluntarily intoxicated at the time of the sexual assault may blame herself for putting herself in a risky situation. As a result, she may not want to cooperate with the prosecution. She may appear hostile or defensive, which may cause her to appear less sympathetic or less credible.

It is important for the prosecution to consider whether the victim is likeable because there are a number of strategies that can limit the impact of victim likeability on the jury's decision making. For example, prosecutors should force the defense to follow the rules which were established to protect victims and level the playing field by filing motions in limine.

All victims deserve protection; prosecutors and allied professionals should implement strategies for protecting each and every one. In doing so, however, prosecutors must be cognizant of any flaws that may exist either with the victim or the case in order to ensure the greatest chance of success at trial.

## Alcohol- and Drug-Facilitated Sexual Assault

Widespread anecdotal evidence indicates that the majority of rape and sexual assault cases being reported to law enforcement involve alcohol use by the victim, the defendant, or both.

Arriving at a definitive statistic on the prevalence of alcohol in rape and sexual assault cases is an arduous, if not impossible, task. Only a fraction of sexual victimizations are reported to police, and those that are reported rarely include accurate details on the level of offender or victim intoxication. Statistics on the prevalence of alcohol in sexual assault cases vary. “Research with convicted offenders, community samples of sexual assault offenders and victims, and college student

*Jurors may question whether the offender actually committed rape or just had consensual, albeit drunken, sex with the victim. Second, jurors may view a voluntarily intoxicated victim with skepticism or dislike, and may assume that she put herself in danger with her behavior. Research has demonstrated that individuals tend to view women who drink or get drunk as more sexually available, and more likely to engage in sexual acts than women who abstain from alcohol.*

offenders and victims consistently finds that approximately half of sexual assaults are associated with alcohol use by the offender, victim, or both.”

‘Crowell and Burgess suggest that alcohol use as been reported in up to

seventy-five percent of acquaintance rapes.’ Yet another estimate finds that 97,000 college students between the ages of eighteen and twenty-four are the victims of alcohol related sexual assaults each year. Clearly, a high percentage of sexual assaults are facilitated by alcohol.

Despite the prevalence of alcohol-facilitated sexual assault (AFSA), a number of barriers to successful prosecution exist. First, the use of alcohol in American society is quite common. Jurors may question whether the offender actually committed sexual assault or just had consensual, albeit drunken, sex with the victim. Second, jurors may view a voluntarily intoxicated victim with skepticism or dislike, and may assume that she put herself in danger with her behavior. Research has demonstrated that individuals tend to view women who drink or get drunk as more sexually available, and more likely to engage in sexual acts than women who abstain from alcohol. Third, AFSA cases are complicated by the physical manifestations of alcohol. “Alcohol decreases inhibitions, impairs perception, and may cause amnesia and/or loss of consciousness, especially if used in conjunction with other drugs.” Victims may not be able to clearly perceive and/or remember the details of the assault.

“If recreational drugs were tools, alcohol would be a sledgehammer. Few cognitive functions or behaviors escape the impact of alcohol, a fact that has long been recognized in literature.” Alcohol is a central nervous system (CNS) depressant.” As the consumption of alcohol increases, its effect increases as well. “A small amount of alcohol eases tension, a large amount removes inhibitions, and a still larger amount prevents the potential victim from resisting the aggressor.”

*If recreational drugs are tools, alcohol would be a sledgehammer.*

Alcohol impairs both cognition (the process of knowing, thinking, learning, and judging) and psychomotor skills (voluntary movement). Alcohol first affects the most recently developed parts of the brain, which are responsible for judgment, inhibition, personality, intellectual, and emotional states. As alcohol concentration increases, the impairment of psychomotor functions such as muscular coordination, balance, eye movement, etc. also increase. As alcohol concentration continues to increase, involuntary movement, such as respiration, is affected, leading to possible coma or death.

Alcohol progressively impairs all bodily functions and abilities governed by the brain. Impairment increases as blood alcohol concentration (BAC) increases. BAC can be measured with a sample of blood or breath. The effects of alcohol are exacerbated when ingested in the presence of other drugs having depressant effects such as sedatives, hypnotics,

***Due to the cognitive and motor impairments caused by alcohol, intoxicated women may be less likely than sober women to realize that the offender is trying to sexually assault them. Moreover, offenders may not need to be as physically forceful with extremely intoxicated victims because less force is required to subdue them.***

anticonvulsants, some antidepressants, tranquilizers, some analgesics, and opiates.

Due to the cognitive and motor impairments caused by alcohol, intoxicated women may be less likely than sober women to realize that the offender is trying to sexually assault them. Moreover, “offenders may not need to be as physically forceful with extremely intoxicated victims because less force is required to subdue

them.” “The desirable effect of alcohol to a sexual offender is its similarity to therapeutic and abused drugs such as tranquilizers, narcotics, sedatives, and hypnotics.” However, unlike many other drugs used to facilitate sexual assault, alcohol is legal and readily available.

Alcohol and drug consumption also diminish memory. “As the amount of alcohol consumed increases, so does the magnitude of the memory impairments.” Large quantities of alcohol, particularly if consumed rapidly, may result in the victim experiencing either a fragmentary or an en bloc blackout. Fragmentary blackouts occur when people may recall portions of the episode after the incident when cues for events are provided. En bloc blackouts have “definitive starting points, contain amnesia for all events within a discrete period, end with a sense of lost time, and require a high blood alcohol concentration.” “The en bloc blackout is not a “process of forgetting, but rather one of not remembering.” “In contrast, fragmentary blackouts involve a more transient, perhaps forgetful memory loss for which aspects of experience are recalled via provision of pertinent cues. Thus, memory traces form but require facilitation to be accessed.” For offenders, the toxicological effects of alcohol are a useful weapon. However, for prosecutors, the toxicological effects of alcohol can present an extreme

***When beginning to analyze whether charges should be filed, the prosecutor should assume that the victim’s version of events and any supporting evidence is true and accurate. Analysis of credibility and corroboration will occur next, but prosecutors should start with the best possible case scenario. If the elements of the crime cannot be proven when this assumption is made, the prosecutor ultimately will not succeed at trial.***

challenge. One reason the cases are so difficult is that most cases are reported at a time when the victim is no longer intoxicated, making it difficult to assess the victim's BAC at the time of the incident.

Too often, AFSA cases are lost due to improper charging decisions or investigations that are inadequate to support the charging decision that was made.

### ***Charging AFSA Cases***

The most important step in successfully prosecuting AFSA where the victim is voluntarily intoxicated is making the correct charging decision. A prosecution cannot succeed if the charges have not been properly filed. When beginning to analyze whether charges should be filed, the prosecutor should assume that the victim's version of events and any supporting evidence is true and accurate. Analysis of credibility and corroboration will occur next, but prosecutors should start with the best possible case scenario. If the elements of the crime cannot be proven when this assumption is made, the prosecutor ultimately will not succeed at trial.

To begin, the prosecutor should determine which theory of sexual assault to allege. Three potential charging theories exist for proving sexual

assault of a voluntarily intoxicated victim. First, sexual assault can be proven in the traditional way by demonstrating that the defendant had intercourse with a victim without consent by using force or the threat of force. In these cases, the victim is intoxicated but proof of the level of intoxication is not an element of the crime. Intoxication is only relevant to the victim's credibility and vulnerability. Second, sexual assault can be proven by showing that the victim was unconscious at the time of the sexual assault and therefore could not consent. Third, sexual assault can occur when the victim was "mentally incapacitated," or too intoxicated to consent. In those cases, the victim's level of intoxication must be to the level of the victim being "temporarily unable of appreciating or controlling the person's own conduct as a result of the influence of an intoxicating substance."<sup>45</sup>

When possible, the prosecution should proceed under a theory of force as this is more consistent with the stereotype of sexual assault believed by the public, and thus, by potential jurors. Moreover, the victim's state of intoxication, which can be difficult to prove, need not be proven under this theory.

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<sup>45</sup> Mont. Code Ann. 45-5-201(41).

Even where the measured values are reliable and accurate, substantial variability in tolerances for alcohol, absorption rates, and clearance rates, both among individuals and within the same individual from one situation to another, complicates efforts to deduce the true extent of intoxication at the time of an arrest or accident. “Expert testimony would ordinarily be needed to establish that the party with the measured or inferred BAC was intoxicated during the period in question.”

If no physical force was used but the victim was unconscious or asleep, whether intoxicated or not, the prosecution should proceed under the theory that the victim was “physically helpless,” or that the victim was “unconscious or otherwise physically unable to communicate unwillingness to act.”<sup>46</sup> When dealing with a victim who was unconscious, the primary challenge will be showing that the victim actually was unconscious for all or part of the sexual assault. Meeting the element of penetration also will usually be a challenge with an unconscious victim. If the first two alternatives are not options, the prosecution can proceed under the theory that the victim was too intoxicated to consent.

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<sup>46</sup> Mont. Code Ann. 45-2-101(58).

The State must also prove that the defendant knew the victim was incapacitated or physically helpless. Once the charging theory has been determined, a chart analyzing what evidence exists regarding each element should be prepared. Can the victim testify to all elements of the crime? It is not uncommon for victims who were intoxicated at the time of the crime to forget pieces of the incident. This may or may not be fatal to a prosecution, depending on whether other evidence exists. For this reason, the chart is helpful in visualizing which memory lapses are fatal and which are not.

The primary challenge in prosecuting sexual assault cases where the victim is voluntarily intoxicated is that society tends

to have difficulty distinguishing between drunken sex and sexual assault.

Instead of assuming that it was probably sexual assault because the woman was too drunk to consent, people tend to assume that the woman consented because she was intoxicated and simply regretted the sexual encounter later.

In these cases, the defense tends to argue it was regret or “buyer’s remorse.”

***Instead of assuming that it was probably sexual assault because the woman was too drunk to consent, people tend to assume that the victim consented because she was intoxicated and simply regretted the sexual encounter later. In these cases, the defense tends to argue it was regret or “buyer’s remorse.”***

Prosecutors must overcome the tendency to focus on and blame the victim and re-direct the focus back to the offender's actions, and thus on the elements of the crime. It is the prosecutor's job to show jurors why the case before them is a case of sexual assault and can be distinguished from drunken or "regret" sex.

Generally, there is not a bright-line test for showing that the victim was too intoxicated to consent, thereby distinguishing sexual assault from drunken sex. In drunk driving cases, the prosecution can show that the driver had a certain BAC; therefore, the driver is guilty. Sexual assault cases involving alcohol are not as clear cut. There is not a universal BAC at which the law or the experts agree that people are no longer capable of consenting to intercourse. Instead, the equation involves an analysis of the totality of the circumstances and numerous factors. The factors discussed herein are divided into two parts: (1) general factors; and (2) predatory behavior on the part of the defendant. By analyzing these factors and considering the totality of the circumstances, the prosecutor can determine whether the case is sexual assault or not.

### ***Analyzing Consent: General Factors***

How drunk was the victim? The more intoxicated the victim was, the

less likely it is that she was capable of consenting. The following factors can aid in this determination:

- Was she conscious or unconscious? Did she regain consciousness during the sexual assault? Did she pass out during the sexual assault? If so, what did the accused do?
- Did she black out?
- Did she vomit?
- Could she speak? Was she slurring? Was she able to communicate coherently?
- Was she able to walk or did someone (in particular, the defendant) have to carry her? Did she have to lean on someone?
- Was she able to dress/undress herself?
- Were her clothes disheveled?
- Was she responsive or in a nonresponsive state?
- Was she able to perform physical tasks or was her coordination impacted? For example, did she light the wrong end of a cigarette or spill things?
- Did she urinate or defecate on herself?
- What was her level of mental alertness?
- Did she do anything else to indicate whether she was capable of cognitive functioning? For example, did she use her credit card? Did she use her cell phone or e-mail?

### ***Analyzing Consent: Defendant's Predatory Behavior***

Prosecutors will face perhaps their greatest challenge in AFSA cases where the defendant was drunk as well. Alcohol consumption by offenders and victims tends to co-occur. The reality is that approximately fifty percent of all sexual assaults are committed by a man who has been drinking.

“Although alcohol consumption and sexual assault frequently co-occur, this phenomenon does not prove that alcohol use causes sexual assault.”

Nevertheless, many defendants will attempt to use alcohol as an excuse for sexual assault. The public has a tendency to view sexual assault of a voluntarily intoxicated victim as more of an opportunistic crime than a predatory crime. When a jury hears that the defendant was drinking, it is easy for jurors to assume that it was drunken sex as opposed to sexual assault unless prosecutors disenchant them of the idea. Jurors may think: “There but for the grace of God, go I (or my son or my friend).” It is the prosecutor’s job to keep the focus on the defendant and his behavior.

Most states, including Montana, do not recognize voluntary intoxication as a defense. Prosecutors can overcome the hurdle of the intoxication defense by looking for the defendant’s predatory behavior. The prosecutor must look carefully at all the facts of the case to determine whether the defendant is a predator. Often, a successful predator will mask his actions in such a way that they appear opportunistic as opposed to predatory.

## ***Trying Alcohol- and Drug-Facilitated Sexual Assault Cases***

AFSA cases are difficult to win at trial. Jurors tend to view AFSA cases as crimes of opportunity rather than deliberate, intentional crimes; therefore, it is not uncommon for them to be forgiving of defendants accused of AFSA. The prosecutor can overcome this tendency by using an offender-focused approach to the trial. This focus explains to the jury why an offender would prey upon a person like the victim. The characteristics that cause the victim

***The characteristics that cause the victim to seem flawed to the jury--and thus unlikeable--are the same characteristics that made her an appealing victim to the offender.***

to seem flawed to the jury--and thus unlikeable--are the same characteristics that made her an appealing victim to the offender. The offender selected her because of those very characteristics.

Communicating this to the jury refocuses the jury's attention on the defendant's predatory behavior. Utilizing an offender-focused investigation and prosecution can show jurors why the defendant before them is a predator, not a nice guy caught in a bad predicament through no fault of his own. Although prosecutors generally focus on the offender when trying any other criminal case, they tend to focus on the victim and any of the victim's flaws or vulnerabilities in sexual

assault cases. Sexual assault cases must be tried in the same way that other criminal cases are tried--with a focus on the offender.

Instead of viewing a victim's vulnerabilities as weaknesses, explain why a predator would target a person with those vulnerabilities. The reality of sexual assault cases is that the better a target a victim is for an offender, the worse the victim generally will be viewed as a witness for the prosecution. The flaws that make the victim a target for the offender also often make the victim less credible in a jury's eyes. For example, a victim who goes to a bar and drinks to the point of vomiting and unconsciousness will be an easy target for a predator. A victim who becomes voluntarily intoxicated does not do so with the expectation that she will be sexually assaulted. Voluntary intoxication does not equal consent to sexual acts. Remind the jury that defendants generally select their victims with the intention of not getting caught. Show the jury that the crime was intentional and deliberate, even if it was opportunistic.

*Instead of viewing a victim's vulnerabilities as weaknesses, explain why a predator would target a person with those vulnerabilities. The reality of sexual assault cases is that the better a target a victim is for an offender, the worse the victim generally will be viewed as a witness for the prosecution.*

Using an offender-focused approach to the investigation and prosecution

of sex crimes can overcome a number of common challenges in sexual assault cases, for example, a prosecutor may be able to explain how a defendant was able to sexually assault a victim without using a traditional weapon. Jurors generally expect that an offender will use a weapon, or at least use some form of excessive force. However, in 2005, only seven percent of sexual assaults involved the use of a firearm and three percent involved a knife.” Non-stranger offenders generally use only the force necessary to

*Non-stranger offenders are also far more likely to gain control of their victims through psychological or emotional force-the use of deception, manipulation, planning, premeditation, and*

overcome the victim’s resistance. In many cases, this may equate to nothing more than lying on top of the victim and pinning her arms down. Non-stranger offenders are also far more likely to gain control of their victims through psychological or emotional

force-the use of deception, manipulation, planning, premeditation, and betraying victims’ trust. One of the most common tools used by non-stranger offenders is alcohol. Prosecutors should look for evidence of all of these tools.

- Did the defendant lie to the victim by promising her a safe ride home and then driving her to a field where he sexually assaulted her?

- Did he trick her by asking to come inside her home to use the bathroom?
- Did he buy her drinks or convince her to keep drinking when she wanted to stop?

The prosecutor can focus on other themes as well when prosecuting an offender-focused AFSA case. Sample themes include: “Who needs force when you have alcohol?” or “The defendant committed the perfect crime.” The prosecutor can also argue, “A predator picks his prey;” however, use caution when labeling an offender of AFSA a “predator” at trial. Although a person who sexually assaults an incapacitated victim is a predator, the jury may view the prosecution as overzealous if jurors are not convinced that the defendant is a predator. Instead, show that the defendant acted intentionally, deliberately, thoughtfully, and freely, and that he was in charge.

### **Victims with Mental Illness**

In working with survivors of sexual assault, it is important to understand how mental health and mental illness may interact with sexual assault to affect the person’s thinking, emotions and behavior. One must understand the nuances of mental health issues or normal coping responses and mental illness. This may be difficult as mental health and mental illness exist on a continuum. Mental health can be defined as a psychological state

of someone who is functioning at a satisfactory level of emotional and behavioral adjustment. This definition does not exclude one from experiencing a full range of emotions--anger, sadness, happiness, frustration--or from exhibiting a wide range of behaviors. For example, a person who comes home and picks a fight with their spouse every night during a difficult week at work may be experiencing a mental health issue--stress and anger. However, she would not necessarily be diagnosed with a mental illness.

A mental illness is the psychological state of someone who has emotional or behavioral problems serious enough to require psychiatric intervention. If the same person realizes over a few months that she is chronically angry and has begun to fight with multiple people in her life, is experiencing insomnia, tearfulness, and feels hopeless about future possibilities, she may be diagnosed with depression. Her coping skills have been overwhelmed to a point that her emotional experience and her behaviors are interfering with her ability to function well.

When one experiences a traumatic event like sexual assault, there are three possible scenarios for the interaction of that event with mental illness. All three of them are important to understand.

### **Scenario 1**

Any person who experiences a sexual assault and has no pre-existing mental illness will engage in coping behaviors--which is the normal response to trauma. Some of those behaviors may appear to be “mental illness” but may simply be a normal response to trauma. For example, a victim may cry frequently, experience extreme anxiety at going out with friends, and/or lose her appetite. These may be described as mental health issues, but they are not an illness. However, the victim may benefit from and be receiving mental health support and services around these issues. As is described previously, there is a wide variety of cognitive, psychological, physical and emotional coping behaviors a victim may use in an attempt to regain her equilibrium. If these behaviors continue unabated, or are so severe that she is unable to function, the victim may develop mental illness as is depicted in Scenario 2.

## **Scenario 2**

Another scenario that may happen to the person who has no pre-existing mental illness is the sexual assault overwhelms this person’s ability to cope and their efforts to regain equilibrium are unsuccessful. This situation may lead a person to develop a mental illness in response to the event. Research suggests that victims of sexual assault are more likely than

the non-victimized population to develop depression, substance abuse and eating disorders. It is estimated that 17-65% may develop post-traumatic stress disorder.

### **Scenario 3**

In the third scenario, a person who has a mental illness experiences a sexual assault. A traumatic experience will increase the likelihood of re-occurrence or the worsening of symptoms of a mental illness. It is also important to note that people who suffer from a mental illness are more likely to be targeted by an offender of sexual

assault. This may be due to several factors. A person with mental illness may be seen as a less capable or credible witness. For example, a

*It is critically important to know that a recantation is not the same thing as a false report.*

person who experiences delusions or psychotic episodes may have a difficult time giving a clear account of the assault, and those who are hearing that account may have difficulty distinguishing reality from the person's illness. People with mental illness may be more accessible as well, especially when in institutional settings or needing care.

### **Recanting Victims**

It is critically important to know that a recantation is not the same thing

as a false report. A false report is when the investigation factually proves the sexual assault never occurred. Recantation is when there is a retraction or withdrawal of a reported sexual assault. A recent study found that the actual percentage of false reports in sexual assault is between 2-8%. This is no different than false reports for any other crime.

There are many reasons why a victim would recant a report of sexual assault even if the sexual assault really did occur. Victims of sexual assault may recant because:

- They did not realize the toll that the criminal investigation (lengthy court delays, etc.) would take on them mentally, emotionally, physically, and financially. They just want it to end and try to go on with their life and put it behind them.
- Pressure from the offender his or offender's family or friends to recant because the victim is "ruining" his life; or, pressure from the victim's family or friends, particularly in a higher-profile sexual assault case.
- Pressure that they are the whole case for the prosecution and therefore they are responsible for sending the offender to prison. Many times victims do not want the offender to go to prison--they just want the abuse to stop. A victim may also worry about the offender, worry about whether the offender is okay while waiting for the outcome of the trial, and worry if the offender will be okay in prison.

- Victims are dealing with the trauma of the sexual assault and are unable to cope with even the basic life tasks, such as working or school, let alone testifying in a courtroom.
- Victims fear that they will be blamed or attacked within the system for the sexual assault and therefore drop out to avoid further attacks and doubt from others in their life (family, criminal justice professionals, friends, etc.).

Because recantation is used by victims to halt criminal justice involvement, it should never be viewed, in and of itself, as an indication of a false report.” A victim-centered response necessitates that prosecutors and police investigate whether a recantation is a result of a system failure, witness tampering or other factors that are outside the control of investigators or responders. While recantations present challenges for the criminal justice system, they should not deter prosecutors from considering the viability of the case. In the event that a recantation is the result of duress the victim experienced, prosecutors may be able to successfully educate the judge and jury on the causes of the recantation. Prosecutors should carefully consider the victim’s needs and wishes in making a decision when a recantation arises.

### **Issues Specific to Adolescent Victims**

Adolescent victims face their own unique challenges, and are targeted by the same rape myths and stereotypes adult victims face, and then some. This section will discuss some of the negative stereotypes the defense may use and strategies prosecutors can use to educate juries about how offenders prey on adolescents.

### *Negative Stereotypes of Adolescents*

Adolescents face an uphill battle when they are reporting themselves as victims of sexual abuse. There are many negative stereotypes within our society concerning adolescents. These include that adolescents are:

- Promiscuous
- Liars
- Lazy
- Untrustworthy
- Rebellious
- Drug and alcohol-using
- Delinquents
- Difficult
- Disrespectful
- Gang members
- Have bad attitudes

As with any stereotype, sometimes one or more of these generalizations may be true for a particular individual. However, most adolescents are not most of these things, and if one or more generalization does apply, it should not dictate an out-and-out disregard for an adolescent report of abuse. In fact, sometimes adolescents engage in these behaviors because they have been physically or sexually abused or neglected. Many of these qualities are responses to trauma, or armor which the adolescent wears to cover up his/her vulnerability and seem tougher than he/she really is.

Knowing that you and/or the investigating officers might approach an adolescent case viewing it through the lens of one or more of these stereotypes is the first step in getting past the stereotype and assessing the case with a more objective lens. Knowing that your jury may also view the case through a stereotype--or that the defense might exploit these stereotypes to discredit an adolescent victim--requires planning during the pre-charging stage. Prosecutors can deconstruct the stereotype by taking the time to learn about the individual adolescent:

- What is his/her life like, and how did he/she get to this place in his/her life?

- How/why did this victim become involved with the offender?
- What did the offender exploit in his/her relationship with the adolescent?
- Why did the adolescent make the decisions he/she did concerning cooperating with abuse?
- When did the adolescent disclose the assault and to whom?
- How does the adolescent view his/her involvement with the offender?
- Does the “stereotype” hold up under this scrutiny or can it be humanized and understood?

Once you start to deconstruct the stereotype, you must continue to develop ways to explain the adolescent’s actions, not only in your presentation of the child, but also in the supporting evidence you provide. Is this the kind of case that could benefit from an expert to explain about a particular adolescent lifestyle or about adolescent developmental issues?

In addition, prosecutors should explore strategies to: (a) expose the stereotypes about adolescents; (b) move jurors past making a decision based upon stereotypes (starting with voir dire questions); and (c) identify ways to develop testimony designed to raise this sort of consciousness. For instance, emphasizing that adolescents are protected by the law, and eliciting

responses as to why adolescents are viewed by the legislature as children and not “little adults” may be one area of topic development during voir dire. Asking an expert or a police officer to expound on how adults are able to prey on adolescents may develop this theme further during the presentation of evidence. This strategic planning should begin at the pre-charging level.

***Adolescents Make Bad Decisions/Lie to Cover Themselves/Tell Partial Truths***

Adolescents do not have fully developed frontal lobes, which is where rational thinking takes place. In addition, adolescents are, developmentally speaking, operating very much within the “emotional” world. As a result of the level at which their brains are operating, their decision-making is frequently irrational, and emotionally

driven. Consequently, adolescents make bad decisions. Furthermore, when asked why they made a particular bad decision, adolescents often cannot

***As a result of the level at which their brains are operating, their decision-making is frequently irrational, and emotionally driven. Consequently, adolescents make bad decisions. Furthermore, when asked why they made a particular bad decision, adolescents often cannot really provide a rational explanation--because there really isn't a rational explanation. While their decision may make sense to them at the time they are making it, these decisions usually don't measure up to the same level of rational thought that we expect from an adult decision.***

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### Covering Behavior

Adolescents, like adult victims, will at times lie or mislead about how they got into that situation, what they did prior to or during the situation, or leave out important facts. Adolescents do this because they believe that revealing accurate information will get them into trouble and/or they'll be blamed or disbelieved.

For example, an adolescent may have slept late and missed the school bus, and then accepted a ride from a stranger, who then took the adolescent somewhere other than school and assaulted the adolescent. The adolescent, when disclosing the abuse, made up a story about being forced into the car in some fashion, thinking that he'd get into trouble for admitting that she missed the bus and/or that she accepted a ride from a stranger. The part about the abuse is true and accurate, but how and why she ended up in the car with the stranger in the first place is a lie.

Other typical topics about which adolescents frequently lie to cover for a bad decision include:

- Skipping school
- Drinking alcohol
- Using drugs
- Engaging in cooperative sexual activity
- Lying to the offender about their age
- Prostituting
- Runaway status

### Withholding Information

In addition to outright lying, adolescents also may leave out this negative information. For instance, in the example given above, add that en route, the adolescent smoked marijuana with the stranger. The detail about the marijuana may be completely absent from the adolescent's story.

Investigators often find these sorts of facts out in conversation with the offender, who has every motive to want to make the child look bad and unbelievable, and therefore provides lots of negative information about the child. Or, the adolescent may disclose the negative fact to a friend, or may be "caught" being truant, drunk or high, etc.

### Interviewing Adolescents

These behaviors create credibility issues which have to be assessed at the pre-charging stage. There are several strategies that prosecutors can use to encourage adolescents to provide a full and accurate accounting of events:

- Get the most factually complete, accurate and truthful information from the adolescent victim. Utilizing interview techniques that address the potential concerns of the adolescent, including that they may be “in trouble” should be done at the outset.
- Reassure the adolescent that her drinking is not the focus of your inquiry, and that a sexual assault is a serious matter that far outweighs the gravity of the adolescent’s drinking.
- Emphasize that crime deals in reality and that you can handle whatever the truth is--in fact, that you need to know the whole truth because that is the only way that you can properly address it in your case.
- Let the adolescent know that lots of kids initially choose to withhold important information or even make up something they think might make them look better. Stress that the best time to set the record straight is at the beginning of the case.

The types of “lies” or omissions outlined above are not insurmountable credibility hurdles to a criminal prosecution. They will require that the adolescent be truthful under oath, even if that means admitting that part of what he/she said was initially a lie. This would be an

area to flesh out during a direct exam of the victim at trial, and to prepare the victim for thoroughly. It may also be appropriate to consider the testimony of an expert who is well-versed in adolescent issues to remind jurors that this kind of poor decision-making is typical of adolescents. You can also remind jurors that this is one of the reasons why we have laws protecting adolescents from their own bad decisions in the first place. These are also issues which should be addressed in voir dire with a jury.

### Adolescent Brain Development Issues

As with child victims, a basic understanding of adolescent brain development is useful to inform prosecutor's interactions with youth during the investigation and prosecution of a sexual assault. Knowledge of brain development can also be used to educate a jury on why a youth behaved the way that he/she did before, during and following the assault.

While many adolescents have a mature physical appearance, no one should be deceived into thinking that an adolescent is equal to an adult in maturity or cognitive development.

Research shows that the capacity for "formal operation thought" begins in adolescence, according to developmental psychologist Jean Piaget.

This kind of thought characterizes adult cognition, and involves the ability to reason hypothetically, to take into account a wide range of alternatives, and to reason “contrary to fact.” Studies have shown that this capability exists in only 30-40% of adolescents and adults in America.” A formal thinker can understand similes, allegories and metaphors. They can also think about their own thinking and about other people’s thinking. They can consider someone else’s motives and perspectives. They can develop theories and concepts apart from concrete reality. In contrast to these abilities, most adolescents think concretely, which is more black and white, immediate and has a more restricted perspective.

### *Egocentrism*

In their interaction with the world, adolescents display this egocentrism. In their world, there is an “imaginary audience,” (a term used by psychologist David Elkind) who, from the standpoint of the adolescent, knows the adolescents private thoughts and feelings. They feel very much like they are always being watched and judged by this “audience.” Elkind also describes that adolescents have a “personal fable” which results in an unrealistic belief in their own invulnerability and uniqueness. In other words, they believe and act like they are a lot older and more mature than

they really are. As a result, an adolescent can put himself or herself into a situation that is way over his/her head, but which he/she thinks he/she can handle just fine. Youth who have been sexually victimized experience the ultimate assault to their egocentric belief that they are invulnerable.

### *Self-Blame*

Adolescents may have some cognitive ability to understand how the world works, but they are psychologically predominantly egocentric. Since they are so self-focused, they have a more difficult time seeing the perspectives of others, and they also tend to blame themselves for events, even when that attribution of blame is excessive. Adolescents may blame themselves for things beyond their control. This kind of self-blame differentiates adolescent egocentrism from that of the younger child. While the younger child thinks “everything happened because of me,” the adolescent thinks “I should have been able to stop it.” The implications for youth who have been sexually victimized are clear.

An adolescent’s emotional development is focused on forming his/her identity and fitting in with peers. They are far less concerned with how adults view them. Adolescents have been described as being more confident than competent. Most adults are familiar with adolescent emotional

volatility. Some of the ramifications of adolescent brain development include that the adolescent may include:

- Fearing being disbelieved
- Being embarrassed by the topic or his/her actions
- Feeling responsible
- Wanting to protect others, including the abuser
- Expressing the belief that he/she is the only one who can and should address the situation
- Being uncertain of how their actions in the situation will be judged by you
- Fearing retaliation or social consequences

In addition, adolescents may also experience language or communication issues that result in the adolescent having trouble putting events in order, not completely understanding questions, answering only parts of questions, and not listening well.

For the adolescent, control is an important issue. Allow the adolescent to feel in control of as much of an interview as possible. Also, give the adolescent some control over decisions. Examples include asking the adolescent for input and feedback, and planning with the adolescent for future safety at pre-charging, as well as throughout the course of any case.

In cases where you have an adolescent who looks a lot older than he/she is cognitively or emotionally, it may be helpful to consider how you can inform the jury about this. Is there a teacher or social worker who can provide information that will be helpful to the jury in their credibility determinations, especially if you think the jury may initially have unrealistic or uninformed opinions about your victim?

### Adolescent Runaways

An adolescent runaway lives an extremely high-risk lifestyle (a risk they do not appreciate), in which his/her vulnerability is almost always exploited and manipulated. When “on the run,” the adolescent necessarily has to find food and shelter, and is generally at the mercy of the adult who steps in to provide those basic needs. Perhaps the adolescent is required to have sex with the adult. Perhaps the adolescent is required to prostitute himself or herself for the adult, or to pose for pornographic photos, engage in “exotic” dancing, etc. The adolescent may consider this to be voluntary activity on their part. In addition to these behaviors, the

*She may not view himself as a victim. She might conclude that the consequences of reporting are worse than the consequences of not reporting. She may have little opportunity to report, and if she does, is faced with disbelief and blame.*

offender will often reward the adolescent with alcohol or require the adolescent to engage in drug use, making the adolescent even more vulnerable and enhancing the adolescent's feelings of self-blame.

As a general rule, runaway adolescents do not come from healthy, stable homes. Many have been abused within the family and the family is unstable and dysfunctional. Life on the streets may seem safer and more appealing to the adolescent for this reason. It is easy to manipulate the vulnerable adolescent by telling her what she wants to hear, treating her like the "adult" she thinks she is, and yet providing basic needs. Often the sexual abuse is pitched as a quid pro quo for this protection and care. He's "helping her get on her feet." As time with an adult pimp continues, however, the "feel-good" techniques are replaced with more overt violence. They are watched. Runaways are also beaten and threatened. They are isolated and imprisoned, literally and figuratively.

It is very hard for this adolescent to disclose her runaway status. She may not view herself as a victim. She might conclude that the consequences of reporting are worse than the consequences of not reporting. She may have little opportunity to report, and if she does, is faced with disbelief and blame. She might have built up a tough shell, hard to puncture.

Often, adolescent runaways are arrested for prostitution or picked up as missing and treated as suspects instead of as victims.

### *Strategies for Working with Runaways*

- Before an interview, get as much history about the adolescent as possible. CPS or prior delinquency files should be reviewed.
- Do not lecture or interrogate the adolescent. These are surefire ways for shutting the child down and creating impenetrable barriers. Instead, use a more open-minded, empathetic listening approach, not only in getting a disclosure, but in cementing a relationship with the child that can carry through the prosecution.
- Runaway adolescents present with a number of personal physical, medical and psychological needs, all of which should be attended to.
- Find out what the adolescent is concerned about and allay any fears you can. Stick to the truth.
- Recognize that the adolescent has been groomed not to disclose. Understand how the child was particularly vulnerable and how the offender used that to groom the adolescent.
- Prepare for the reality that the adolescent will likely come armed with rationalizations for what happened and probably have a history involving law enforcement that has probably negatively colored his/her views of authority figures. This will color his/her interest in cooperation.

- Talk about protecting others, about what the offender may have wanted in return for being “nice.” Stress a focus on the “facts” before turning to any judgments about “what should happen.”
- Although tempting, do not lower your vocabulary to match the adolescent. An equally fatal mistake is to engage in questioning that carries with it negative assumptions. Take care with your language to avoid judgments and don’t assume that the adolescent felt one way or another.
- Adolescent runaway cases can almost always be corroborated. Make sure your investigator has obtained search warrants for the various places involved and a list of names of people who witnessed anything. This could include other adolescent victims, adult prostitutes, or adult “customers.” Adolescents are sometimes advertised on Craigslist or other websites or newspapers. Motels may have security cameras or records that could yield corroborative information. The large market for child porn makes it tempting for predatory adults to film or photograph these adolescents, as well.

In deciding on charges, factor in what you can prove with witness statements and outside evidence. Realistically, you may not have the victim available for trial, as there is always the possibility that the child will run again. To this end, there may be a need to call for CPS services, even including placement in a facility where it would be difficult to run away. This is, of course, entirely dependent on the needs of the adolescent.

Keeping track of this victim, and having periodic meetings, just to keep in touch, can be helpful.

### Adolescents Have Sex

It's a bad idea for adolescents to have sex with each other, but they do. They don't think it's a bad idea. Sometimes a prosecutor will charge these adolescent-on-adolescent cases, usually when there is some aggravating factor, like a pregnancy, or a significant age difference.

Adolescent-on-adolescent cases may also require, if they are going to be charged, mutual charges. Often these cases resolve with misdemeanors which can be expunged, via deferred prosecution agreements or diversion agreements. Deciding on what facts should come into play about whether to charge, what to charge, and how to resolve these cases is good to do as a matter of policy, with an eye toward the goal of reducing irresponsible adolescent sex. Important points to remember include:

- It is always a crime when an adult has sex with an adolescent. Adults and adolescents are not on the same playing field, and virtually anyone would agree that the 30 year old man cannot reasonably be said to be a legitimate boyfriend of the 14 year old girl.
- When dealing with a case where an adolescent has had sexual intercourse with others, cooperatively, prior to the situation you

are reviewing, it is important to remember that such prior actions by the adolescent do not explain, excuse or justify the decisions of the adult in having intercourse with that adolescent. They are also inadmissible under the Rape Shield statute. Her reputation of promiscuity is irrelevant to a determination of any of the issues in your case.

- Discussion about therapy to help the adolescent make better decisions about sexual behavior is also in order. Having the adolescent’s parent on board with this is essential. It may be preferable to delegate that conversation to the advocate.
- With adolescents who have engaged in “promiscuous” behavior, it is important to make advocacy and mental health referrals, if they haven’t already been made. Sexual acting out is often a sign of other serious issues in that adolescent’s life.

*Consistent with a victim-centered approach, prosecutors must educate judges and juries about the realities about adolescent sexuality in our society and help juries to understand that the past sexual behavior of the adolescent victim does not justify the assault.*

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### Adolescents Easily “Get In Over Their Heads”

Adolescents often find themselves in situations that move beyond their ability to effectively handle. This is because adolescents feel invincible, are more confident than competent, disregard or don’t understand potential

***In talking to the adolescent, it is always important to try to get at the issue of “consent” from several angles. First, stop using the word “consent.” Instead, talk about whether she “wanted” to have sex with the offender.***

risks, and are trying to develop their independence. These factors all operate against the fact that their brains are not operating at the level of good rational decision-making. Their judgments are more characterized by impulsivity and emotion. Consequently, they are easily overwhelmed

in these circumstances.

Like adult victims, once an adolescent is in a situation that is “over her head,” an adolescent may experience panic and fear, confusion about what to do, and be unable to think of a way to extricate her other than “cooperating” with the demands of the offender. The adolescent may also be feeling the neurobiological effects of trauma or tonic immobility.

This “cooperation” can look like consent and the adolescent may even describe that she “willingly” engaged in sex. Adolescents are not good at parsing out true “consent” from buckling under pressure or subtle coercion that resulted in her cooperation. Given the adolescent tendency to accept blame and responsibility, the perspective that she “consented” is understandable, although flawed.

In talking to an adolescent, it is always important to try to get at the issue of “consent” from several angles. First, stop using the word “consent.” Instead, talk about whether she “wanted” to have sex with the offender. Ask about what led up to the sex. Ask who brought up the idea of having sex. Discuss how she was feeling and what she was thinking leading up to the sex. Many times the adolescent will say that offender suggested sex, or tried to take her clothes off, and she didn’t want him to. Find out what she said to let him know that--or whether she didn’t know how to tell him to stop, or that she did not want to have sex. Be sure to ask whether the perpetrator would have seen or heard anything to indicate she did not want to have sex.

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If she initially said “no” or “stop,” what was the offender’s reaction? How did that make her feel? What was she thinking at that point? Why did she end up having sex? Was she planning

on having sex before she went there/before Joe brought it up? Did she think the offender might bring sex up?

### Adolescent Grooming Behaviors

The goals of the offender in grooming an adolescent are the same as when an offender grooms a young child--to make sexual assaulting the child “easier” to do and to get away with. Methods used by offenders with adolescents can be the same as some used with smaller children: exposure to ever-increasing physical contact in the context of some initially “innocent” play, which serves to blur the place where the line is crossed from “innocent” or “accidental” to sexual and purposeful.

One might also see the use of “rewards” like money, taking the adolescent to fun special places, or buying her desired objects.

With adolescents, grooming can also include other, more “mature” rewards, like providing alcohol, drugs or cigarettes, sexy underwear or clothes (that the child may have to keep at the offender’s home) and viewing adult pornography. Other offender grooming strategies specific to adolescents include:

- Offenders also take advantage of the adolescent's egocentricity and desire for independence. They become the "best friend" or the adolescent's confidant. They nurture the impression that they really care about the adolescent and plant seeds in the adolescent's mind that no one else understands them the way the offender does. They are "always there" for the victim, often offering the chance to get out of the house, to talk, to have dinner, a place to crash, etc. for the adolescent.
- Offenders also exploit any troubles (even ordinary issues) the adolescent might be experiencing at home and take the opportunity to offer exaggerated characterizations of how the adolescent's parents really don't understand, don't care, or are bad parents. If any of these things happens to be true, it works to the offender's advantage even more.
- Offenders will often play to the adolescent's desire to be considered competent and "adult." They may foster the belief that the adolescent doesn't need to be at home, doesn't need parents. They may encourage runaway behavior.
- Offenders will often compliment adolescents on their adult appearance, which the offender can easily manipulate into physical actions that flatter the adolescent. These compliments may make the adolescent uncomfortable, or the adolescent may tolerate these advances because of all the perks the offender offers.
- Sometimes the offender will characterize the relationship with the adolescent as an "affair" and introduce sexual behavior with the adolescent as though the adolescent is an equal partner. To the extent that the adolescent goes along with, or even enjoys, the sexual activity, then the offender can point out that the adolescent "wanted it" or that the adolescent even "initiated it." The offender will make the adolescent feel responsible by

saying they “can’t control themselves” because of the adolescent’s “sexiness” or their “affection/love” for the adolescent.

- Adolescents can also be “seduced” by the prospect of making money in exchange for sexual pictures, films, or acts. Offenders pose as photographers who set up appointments to photograph girls in sexy clothes. These operators easily introduce sexy underwear, then require removal of some or all of the clothes. They may convince groups of girls to participate, even getting them to pose in lewd or sexually suggestive ways with each other, or to even engage in sexual contact or sexual intercourse which he photos or films. An offender may commit sexual assaults during or after the filming, under the guise of his role as the photographer having been “seduced” by the adolescent.

As one can see, there are a number of ways that many of these grooming techniques can be corroborated--which can offer powerful

*There are a number of ways that these grooming techniques can be corroborated--which can offer powerful evidence of mental state and may provide a basis for additional crimes. Whenever there is any sort of “relationship” or longer-term contact between the offender and the adolescent it is worth exploring the grooming techniques he used.*

evidence of mental state and may provide a basis for additional crimes. Whenever there is any sort of “relationship” or longer-term contact between the offender and the adolescent it is worth exploring the grooming techniques he used.

## *Consent Issues*

From the strictly legal perspective, no adult can ever have sexual intercourse or sexual contact with anyone under the age of consent. This is true even if the minor “consents.”

When an adolescent is “willingly” engaging in sexual behavior with an adult, several factors must be taken into account:

- What is the age difference between the victim and the offender and what is the relationship between them? If they are legitimately “boyfriend/girlfriend” and are close in age, it may be more equitable to consider issuance of a lesser charge, or the use of a deferred prosecution or diversion agreement, or to keep the case in Youth Court. In addition to the equities, issuance of harsher charges may be viewed as unwarranted or unfair by a jury, who may sympathize with the defendant, or ruminate about how his life will be ruined by conviction for the greater charge, even if the facts support it.
- What are your prosecution goals? This is often determined, in part, by not only the age difference, but the nature of the acts, whether there were other types of crimes involved, whether there was manipulation of the younger victim, or whether pregnancy or an STD was involved.
- What are the victim’s and his/her family’s wishes?
- How will the prosecution impact the victim? Is there any potential that she will respond to the filing of charges by running away or otherwise engaging in high risk behaviors?

Even if there is potential for this, there may be significant community interests in prosecution. These interests should be communicated to the victim.

- What is the defendant's history? Is this his first run-in with the system or is he always having sex with the young neighborhood girls?
- What are the personal characteristics of your victim? Is she average or does she have special needs? Is she vulnerable for some other reason?
- Was this truly "willing" on the victim's part or more the product of subtle coercion or pressure that she was not able to overcome?

In cases where the adult offender is significantly older than the victim, the fact that the victim and the defendant are not on the same playing field is easier for a jury to see and there is less sympathy for the older adult than to the victim. In these cases, it is still important to develop the idea that "statutory rape" is part of our law, and it's there for a reason. This discussion should help weed out those who simply cannot put aside the "consent" issue, and should further help in getting the jurors to focus on the elements of the crime.

It is often the case that the adolescent believes that he/she is "in love" with the offender, that they have a "relationship" and that the offender really

loves them, too. This comes, of course, from what they have been told by the offender. Adolescents can believe this after only a very short time of being involved with the offender.

In cases like this, the adolescent usually feels very guilty about having disclosed the sex (if they have disclosed it at all) and especially guilty about the fact that charges may be or have been issued. Often the disclosure is to a friend, who then disclosed to an adult who contacted parents or police. This adolescent accepts all blame and responsibility and will be heavily invested in reminding you and the court that they wanted to do this, that the offender did not do anything wrong, and that they do not want any bad consequences to befall the offender.

In addition, the adolescent may decide to foil prosecution efforts by being uncooperative, running away, or refusing to cooperate with the prosecution. She may persist in the belief that the defendant is planning to marry them. She may have even been trying to get pregnant, to forge an even stronger bond between themselves and

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the offender. Adolescents often do not engage in safe sex for this reason.

Offenders know that if they continue to keep in contact with an adolescent, by writing letters, placing calls and making arrangements to meet, they can manipulate the adolescent to their advantage. No contact orders are important, as well as surveillance efforts to try to prevent continued manipulation.

The victim, too, may initiate contact with the defendant. It would be entirely predictable if he/she were to contact the offender by phone or mail, or even go visit him/her in the jail.

These cases require continued and steady attention to the adolescent's medical and emotional needs. Adolescents with lower self-esteem seem to be especially vulnerable to oaths of love and promises of a future. The loss of that attention--whether because the offender is taken out of the picture, or the offender shows his true colors somehow to the victim--can result in self-

*These cases require continued and steady attention to the adolescent's medical and emotional needs.*

destructive behaviors by the adolescent.

### ***Predatory Use of the Internet***

In the broadest sense, the Internet intersects with sex crimes against adolescents in two ways:

(a) it is used to commit crimes; and (b) it is used by offenders to prejudice the community's view of the adolescent victim.

When used to commit crimes, the Internet can be used by offenders in multiple ways, including meeting in chat rooms, connecting with an adolescent using social networking sites such as Facebook or other social media, and continuing to have inappropriate contact via instant messages and texting.

Offenders may pretend to be a child themselves, or they may identify themselves as an adult. They introduce topics of sex and are extremely graphic in these discussions, which can be very enticing to the adolescent that sees herself as older, wiser and more mature than her years. Offenders play on these feelings. They may exchange pornographic photos with the child, or may convince an adolescent to take photos of herself and send it to the offender. They may convince an adolescent to actually meet them for the purpose of engaging in sexual behaviors together. They use many of the grooming techniques described above in convincing an adolescent to become involved.

Offenders are also adept at finding out personal information about adolescents, which they can use either to locate the adolescent, or to further manipulate the adolescent to engage in illegal behavior.

### ***Using the Internet to Discredit the Adolescent***

The Internet is also a very handy tool for offenders who want to ruin the character of the adolescent, to turn community sentiment against the adolescent and to try to fatally damage a prosecution involving the adolescent. Adolescents have been known to put compromising photos of themselves onto the internet, thinking it's funny, cute or sexy. They may also engage in vulgar, sexually explicit conversations or make those types of statements putting them onto Facebook or other social media. Of course, once these materials are out there, it is publicly consumable, and offenders (and often defense attorneys) will try to use this material to suggest that the adolescent "wanted it" or that the adolescent "victimized" the offender. Offenders or their supporters may publish these materials via news media, or by sending it on to others in the community, including the victim's peers. This kind of campaign can devastate a victim, as well as a prosecution, by damaging the victim's credibility and permanently silencing her.

Prosecutors should be honest with adolescent victims about what would be found if someone went into his/her Facebook or other social media accounts, and learn whether she has ever engaged in sexual conversations with peers or adults. This will enable prosecutors to engage in damage control to the greatest extent possible.

Aside from preventing adolescents from putting things like this out there on the Internet, the prosecutor should also consider motions like Rape Shield if it appears that an offender may try to attack victim character or credibility through the use of these kinds of materials.

### ***Multiple Offenders***

The issue of multiple offenders arises in several scenarios. There can be many individuals who are all participating in concert to sexually assault an adolescent, as in cases of gang rapes. There can be cases involving individuals who are each assaulting the adolescent or who are connected with the assault of the adolescent, as in cases of an adolescent prostitution ring where some of the offenders are pimps or pimp helpers and some are the “customers.” And there are cases where the same adolescent is assaulted first by one person, then later by another, and so on. Considerations for each are discussed below:

## *Gang Rape Cases*

In “gang rape” cases, the situation is usually one where the adolescent has voluntarily placed him or herself into the situation in the first place.

Often the adolescent is on the run from home or a placement, or is otherwise where he/she should not be at a time when he/she should not be there. The adolescent may “know” (as in “be acquainted with”) one or more of the subjects who ultimately participate in the assault. Often these situations involve initial “cooperation” of the victim, which frequently becomes less “cooperative” and more “I couldn’t get away,” although sometimes there is “cooperation” throughout the assaults by the victim. Almost always, the victim was not expecting that he/she would end up having sex with the number of individuals he/she has sex with. Challenges in these kinds of cases include the following:

- The victim may run away again;
- While the case is pending, the victim may engage in this same sort of risky behavior;
- The victim may be or become too emotionally fragile to participate in the prosecution;
- The victim may have significant psychological issues that have led her to be seduced by this kind of encounter;

- The victim may not be able to identify by name some or any of the participants, or may only know the nicknames used during the event;
- Often there are multiple acts occurring at the same time, and the victim may not be able to say who did what in what particular order;
- Drugs and/or alcohol may have been used by the victim, which might compromise his/her ability to recall things as accurately or as completely;
- The adolescent may have difficulty articulating when events got out of hand, or when he/she was no longer “wanting” to engage in sex, but being “forced” to do so, and there may be no overt “force” used of any kind;
- Victim demeanor during the assaults, as described by the offenders, may be inconsistent with what the community expects a “victim” of a “gang rape” to look like or do;
- The media may put a spin on the story that is harmful to the prosecution of the case;
- There may be medical issues of a confidential nature (i.e. HIV status.).

Knowing that these challenges may come into play, the best defense is a good offense. Recommendations include:

- Plan for the eventuality that you may not have the victim available to testify;
- Have your investigators work hard to get statements from those involved to try to develop other means of gaining convictions;

- Consider negotiating in exchange for testimony
- Make sure that all witnesses are interviewed and consider taping those interviews;
- Record the victim's statement;
- Secure all physical evidence;
- Determine whether anyone recorded the acts on a cell phone or other electronic device.
- Make sure the adolescent is safe and secure. Protecting his/her identity, making sure therapy is in place and considerations of placement in or out-of-home should be addressed early
- It is important to learn as much as possible about how this adolescent became involved in this—what was he/she hoping to gain from this encounter? Has this happened before? What victimization issues or other serious concerns are present? Do these need to be addressed before a jury should the matter get that far? If they would need to be, would that exposure cause problems for the victim that outweighs the benefits of prosecution? For instance, if your victim is a high school student who has a serious mental health problem that others do not know about, is it likely that the mental health issue will become generally known as a result of prosecutions? Is this exposure “worth it” to the victim, or will it cause more psychological damage than is acceptable?
- Consider using expert testimony—about what, and who may be able to provide that testimony will come into play in these sorts of cases.

## *Adolescent Prostitution*

In cases where an adolescent is exploited by a prostitution scheme, offenders include those who set her up into the situation (and are probably getting the money she makes) along with those who are the customers. Most prosecutors would view the pimps as being more culpable than the johns and you may be able to use that to your advantage in getting cooperation from the johns to testify against the pimp.

These kinds of cases have many forms of corroborating evidence, due to the rise of Internet use. In addition to the more traditional kinds of corroboration (hotel receipts, DNA, etc.), you may want to determine whether the pimp has used any media source to advertise. For instance, Craigslist may contain the ads, including photos, of your victim that were taken and then disseminated there by the pimp. You can get some of this information from the victim, or possibly the john, or even by generally searching those kinds of sites. Search warrants should take into account that this media is probably being used.

Challenges in these cases include, again, that the adolescent is probably a runaway, and may run again. The adolescent in this case most likely has some significant issues that have led to a “choice” on her part of

this risky lifestyle. Being able to understand this adolescent's life and her choices is important to overall credibility, and there may also be a need for enlightenment via an expert witness. The adolescent may not view himself/herself as a victim--this may be one in a long series of episodes of prostituting that has become a way of life. In addition, most adolescents in this situation perceive of themselves as equivalent to adults, who are making "choices" and are not being "forced" to do this.

### ***Adolescents with a History of Victimization***

Cases involving the adolescent who has been assaulted during the course of his/her life, by more than one individual, are frequent. Statistically, a person who has been victimized sexually before is at a greater risk of being assaulted again.

Defense attorneys may attempt to use past abuse in several ways. First, they may argue that the victim is "confusing" the offender with an old abuser and that his/her perceptions can't be trusted. They may also argue that the victim "learned" about abuse via the past acts and that's why they are able to describe it now. They may try to paint past abuse as a "prior false allegation" of sexual assault. Or, they may argue that the victim is simply

making up the current allegations to get attention, having “learned” that they get attention through allegations of sexual abuse from the past episode.

In cases involving adolescents, arguments that the victim wouldn’t otherwise know about sex but for the past abuse are generally ludicrous positions. Adolescents do know about sex, through school and general exposure to life by the time they are adolescents. “Confusion” arguments and “learned attention-getting” arguments are devices designed to try to circumvent the prohibition in the Rape Shield Law that clearly state that other sexual behavior is not admissible. What the defense really wants to do, in making these arguments, is to muddy the waters and get the jury to focus on matters other than the defendant’s culpability. These efforts should be strongly rebuffed via the application of the Rape Shield statute.

### **Working with Marginalized Populations**

As a prosecutor, you want to obtain convictions, make communities safer, and increase the safety of sexual assault survivors who are at the center of your case. In order to accomplish this, it is your responsibility as a prosecutor to: (a) know the make-up of your community; (b) understand the diverse cultures who live within it; (c) understand survivors’ issues and the challenges they face in coming forward and in healing; (d) hold offenders

accountable for crimes against vulnerable populations; and (e) be familiar with local resources that are available to support sexual assault survivors in their efforts to heal from the trauma of sexual assault and seek justice. A victim-centered response to sexual assault also requires that prosecutors understand the strengths, challenges and needs of victims who are seeking justice.

It is especially critical that prosecutors understand the needs of marginalized populations--low-income women, women of color, non-English-speaking women, undocumented women, justice-involved women and LGBTQ people---because they are the most likely victims of sexual violence. Offenders seek them out because they are vulnerable and because offenders know that marginalized people will be the least likely to report a sexual assault, and if they do, the chances are they won't be believed.

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### ***Barriers to Seeking Justice***

Marginalized populations face tremendous, sometimes overwhelming, barriers to seeking justice. These barriers fall under the following themes:

- Fear of formal systems, including law enforcement and prosecution;
- Fear of repercussions from within their own communities;
- Cultural myths and beliefs that prevent them from coming forward;
- Lack of culturally competent resources to support them in seeking justice and healing;
- Accessibility issues (language, social and environmental, etc.);

All of these barriers converge to drive the crime of sexual assault underground, keep offenders from being held accountable, and re-victimize sexual assault survivors who do not have access to justice and healing. Prosecutors who understand these barriers--and who actively work with victims and advocates to remove victim barriers--will experience increased victim participation in the successful prosecution of sexual assault crimes in their communities.

### ***Culture Specific Barriers***

Montana is a vibrant state comprised of richly diverse communities. We are fortunate that so many people of different cultures that have made our state their home. While we enjoy the benefits of having neighbors who

bring a wealth of diversity to our state, we must also appreciate that they bring different beliefs and values with them.

Marginalized populations are not homogenous. While they do face similar barriers to seeking justice, they are also unique communities with their own unique strengths, challenges, and culture-specific needs. Having at least a basic understanding about the cultural differences between these

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communities--and how those differences shape victim participation in prosecution--will better equip prosecutors to provide the support and assistance marginalized people need in order to seek justice.

A full discussion of the unique needs and challenges experienced by marginalized

populations is beyond the scope of this document. However, in the interest of encouraging prosecutors to learn more, this section will describe some of the most predominant cultures that comprise marginalized populations in Montana. It is our hope that this information will educate prosecutors about the values and intricacies of each community, how they respond to sexual

assault, and encourage prosecutors to show victims that they respect their unique cultural difference.

### *Native American Women*

Native American Women experience the highest rates of sexual assault of any marginalized population--they are 2.5 times more likely to experience sexual assault as other women of color. One in three Native American women has experienced sexual assault in their lives. And 80% of the offenders who prey on them are non-Native American.

Native American survivors of sexual assault also face tremendous cultural barriers to seeking justice. The Native American culture places a huge emphasis on harmony and getting along. Most Native American communities are close knit communities. Native American victims who come forward therefore risk disrupting the very fabric of their community. Native American women also stand a high risk of losing their children in instances of physical or sexual abuse.

They often stay with abusive husbands in order to keep their children. For these reasons, they may be reluctant to report or participate in prosecution. And most never see their cases prosecuted due to the alleged

confusion by law enforcement about federal and tribal jurisdictions--when as a matter of fact, these laws are clearly defined.

The issue of statutory rape in the Native American community also presents a challenge for prosecutors. Native American women receive mixed messages from within their culture. While it is looked down upon by tribal elders, there is an unspoken message in some Native American communities that young Native American women (as young as 15 or 16) somehow caused the sexual assault--and because of this myth it is sometimes accepted.

### ***African-American Women***

It is important for prosecutors to recognize that many African-American view formal systems with suspicion. They do not believe that systems are there to help them; in fact, many believe that the justice system will fail them. Many African-American women have had negative experiences with law enforcement or know someone who has. They are also keenly aware that African-American men are disproportionately represented in the criminal justice system and they believe that men in their culture are treated unfairly. For these reasons, some will be reluctant to participate in prosecuting an African-American assailant because they won't want to do

that to “one of their own.” If the offender is kin, they will also resist breaking up the family, subjecting the family to shame, or putting their children at risk of involvement with the child protective services.

African-American women also fear that they will not be believed simply because they are women of color. Rather than seeking justice through formal systems, African-American women are more likely to seek assistance through informal supports--kin, clergy and neighbors. They also face multilayered issues that have a direct effect on their ability to participate in the prosecution of a crime--poverty, housing, child care, lack of supportive resources, etc.

Their inclination to choose race over gender, and informal systems over formal systems, presents a challenge to prosecutors. But the challenge can be overcome when prosecutors make an effort to acknowledge their lack of trust and make an attempt to earn it.

### ***Latina Women***

Latina women are among the least likely to report a sexual assault. Latina survivors face a number of cultural barriers to coming forward--sexual assault and abuse continues to be an “off-limits” subject in the Latino community. Deeply held stereotypes in the Latino community make it

difficult for women to share a history of sexual violence with their partners and families. Survivors fear that coming forward may result in their being ostracized, labeled as “damaged goods,” or even blamed for the assault.

Some Latino males have an extremely difficult time dealing with the sexual assault of a loved one by a stranger, believing that a woman’s chastity is broken during an assault. Latina women know this and they may be unlikely to report a sexual assault out of fear of the long term damage it will create in her relationship with her male partner. Latina women are also fearful of causing shame to their families and this may present another barrier to participating in prosecution.

Latina women are also fearful of formal systems. Like African American women, many have experienced unequal treatment by law enforcement, health care and other systems that are supposed to protect them.

Many believe they will not be treated fairly or will be subject to brutality. They are more likely to seek help through informal supports like clergy.

The lack of bilingual service providers, support systems and sexual assault providers in many communities also presents a challenge for Latino women--making it even more difficult for survivors to seek help.

### ***Undocumented Women***

Undocumented women are among the marginalized groups who are the least likely to seek justice. The primary reasons for this are a belief that justice is not available to them and a fear of retribution and deportation by law enforcement. This distrust of law enforcement and prosecution often follows them from their countries of origin where the law enforcement and justice systems are viewed as opportunistic, corrupt and not helpful to victims of crime.

Undocumented victims also fear retaliation from the offender, who is likely to have threatened to have them deported if they report the crime. Like many women of color, they fear not being believed. They also fear that their own community will not support them or will turn against them to side with the offender -particularly if the offender is also undocumented. The power imbalance in these types of relationships always favors the person with documentation.

Finally, given the current political climate in the U.S., many undocumented women fear drawing any attention at all to the undocumented community at all. For this reason, many victims will put the needs of the community before their own.

### ***Hmong Women***

The most important social structure in the Hmong community is the Hmong kinship, defined by blood relationships or clans. There are about twenty Hmong clans (“xeem”) in the world. Clan membership comes through birth, marriage, or adoption. All children acquire membership into the father’s clan group at their birth. Women acquire the clan membership of their husbands upon their marriage. All Hmong cultural norms are dictated by the beliefs of their clan.

Hmong victims of sexual assault face tremendous cultural barriers. It is important to note that in the Hmong language there are no words equivalent to “rape” or “sexual assault.” Hmong women who are sexually assaulted do not even have the language to describe their experience within their own culture.

When a Hmong woman is sexually assaulted, she is expected to seek help of the clan leader and not involve outsiders. All problems are to be resolved within the clan. Because the clan system is driven by male privilege, wives are viewed as possessions. Hence, a wife cannot claim to have been sexually assaulted by her husband. She is expected to have sex with him is part of her “duty”--whether she wants sex or not. If a Hmong woman charges her husband with sexual assault, she will likely face scorn from her own community who will take the position that he is her husband and she is supposed to have sex with him. If a woman is disowned from her husband’s clan, she will be forced to return to her clan of origin, where she may also be disowned. Thus, if a Hmong woman reports a sexual assault she risks losing all connections to family.

Hmong families will preserve clan dignity and avoid shame at all costs. If a Hmong woman is sexually harassed or fondled against her will, she is expected to accept this violation. Otherwise her family might minimize it or claim that she brought it on herself. Hmong women who are sexually assaulted by a stranger are often expected to marry the offender so as not to shame their family. The message Hmong women receive is that if you are sexually assaulted it is your fault.

International marriages present another challenge for prosecutors. It is not an uncommon practice for a married Hmong man to travel to Laos to marry a second wife. The wife will likely be underage, sometimes as young as 11-14 years old. Hmong men will bring the child back to the U.S. with promises of securing her an education and a better life. Once here, he will expect both “wives” to live under the same roof. This implicit polygamy often falls under the radar of formal systems because more often than not, the child comes to the U.S. with a forged birth certificate. Prosecutors may actually encounter cases where a Hmong man is having sex with a minor who lives in his home--tolerated by a wife who has few options. Prosecutors may also have difficulty corroborating the age of the child without an authentic birth certificate.

Prosecutors should move cautiously when working with Hmong victims of sexual assault who observe the traditional norms and practices of their culture, and respect the victim’s decision about whether or not to participate in the investigation and prosecution. Developing strong ties with organizations who provide services to the Hmong community is critical to increasing your understanding about the unique cultural beliefs of this

population, especially in communities where there is a significant Hmong presence.

### ***Justice-Involved Women***

Poverty, trauma, substance abuse and abusive relationships with men are the primary pathways for women into the criminal justice system. Research has shown that approximately 90% of justice-involved women have experienced repeated sexual assaults and abuse throughout their lives. The trauma of abuse not only shapes their lives, it also creates a mistrust of law enforcement, and prosecutors, and most formal systems, formal systems have failed them. Formal systems have put them in jail.

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Formal systems have returned them to their communities upon their release with few resources to help them escape the cycle of poverty and abuse that put them there in the first place. Justice involved women are more likely to have been involved in the sex trade industry at some point in their lives. For this reason they fear they won't be believed or treated fairly if they are

sexually assaulted. They also face tremendous challenges when they return to their communities: finding a safe place to live, securing employment, and reunifying with their children. These priorities will often trump any desire they have to seek justice for a sexual assault committed against them.

It is important for prosecutors to educate juries that just because a woman has committed a crime it doesn't mean that she is not a victim of sexual assault.

### *LGBTQ Populations*

LGBTQ people (Lesbian, Gay, Bisexual, Transgender and Questioning) are subject to the same spectrum of sexual

*Approximately 10% of hate crimes against gay men and lesbians include sexual assault.*

violence as the general population. In fact, according to many statistics, they are subject to more. Approximately 10% of hate crimes against gay men and lesbians include sexual assault. This percentage may be higher, since it is sometimes difficult for lesbians to discern whether they were attacked because of being identified as a lesbian or as a woman. In a study of 162 gay men and 111 lesbians, 52% reported at least one incident of sexual coercion by same-sex partners. Gay men experienced 1.6 incidents per person; while lesbians experienced 1.2 incidents per person.” In a survey of

412 university students, 42% of LGBTQ students indicated they had been forced to have sex against their will compared to 21% of heterosexual students.”

Unfortunately, LGBTQ people may also face further victimization when dealing with sexual violence. Often an offender will use homophobia/heterosexism as a weapon to threaten victims. Their tactics include suggesting that:

- No help is available because the police/justice system is homophobic.
- The victim/survivor will not be believed because LGBTQ people do not sexually assault.
- LGBTQ people deserve to be sexually assaulted for being LGBTQ.
- The victim/survivor will be “outed” or threatened with being outed to friends, family, employer, police, church, or others if the victim/survivor reports a sexual assault experience.

Because of this, LGBTQ victims may not come forward. They may also fear that they are betraying their close knit LGBTQ community, which is already under attack, by “accusing” another LGBTQ person of sexual assault. Some LGBTQ victims may fear that they are exposing their

assailant to a homophobic criminal justice system if they pursue a legal solution. Most importantly, many fear that they have nowhere to turn for help because they expect hostile and homophobic responses from the police, courts, and service providers.

### ***Victims of Human Trafficking***

Human trafficking is a complex social and legal problem that requires specialized attention from prosecutors. Human trafficking is modern day slavery. Article # 3 of the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines human trafficking as: “the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”

US Federal Legislation addressing human trafficking, the TVPA - Trafficking Victims Protection Act passed in 2000 (reauthorized in 2003, 2005 and 2009), is grounded in this international law.

A full discussion of the needs of human trafficking victims is beyond the scope of this document. However, the crime of human trafficking does intersect with sexual assault because victims of trafficking are often subjected to sexual assault, torture and other inhumane treatment by their traffickers. While trafficking affects men, women and children of all ages, races and social standings, populations

most vulnerable to trafficking are impoverished women and children.

Human trafficking includes labor, sex and other forms of exploitation, and

they often overlap (e.g. labor trafficking cases with sex component). Victims include foreign nationals and U.S. citizens (often referred to as victims of international and domestic trafficking). The crime may originate in Montana, in a different state or in another country, and can occur in urban and rural

*Human trafficking is a complex social and legal problem that requires specialized attention from prosecutors.*

settings, especially large farming communities. Offenders may be part of an organized crime group or act on their own.

One of the greatest challenges of addressing human trafficking is that it is a hidden crime. Prosecutors may encounter victims of sexual assault who are also victims of human trafficking.

Unfortunately, identifying victims of human trafficking is a challenge, because traffickers are experts at controlling victims and coaching them about how to respond to questions. In most cases trafficking victims will not self-identify--in fact, they may not understand what the term “trafficking” means, or even view themselves as a victim.

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There are a number of “red flags” that may indicate a sexual assault victim is also a victim of human trafficking:

- Is anyone forcing the victim to do anything that they do not want to do?
- Can the victim leave their situation and/or job if they want?

- Has the victim been physically harmed in any way or threatened?
- Has the victim been recruited for one purpose and forced to do some other job?
- Is the victim's salary being garnished?
- Was the victim forced to perform sexual acts?
- Is the victim a juvenile engaged in commercial sex?
- Has the victim been harmed or deprived of food, water, sleep, medical care, or other life necessities?
- Can the victim freely contact friends or family?
- Has the victim or family been threatened with harm if she attempts to escape?
- Is the victim allowed to socialize or attend religious services?
- Was the victim coached on what to say to law enforcement or immigration officials?
- Is the victim in possession of identification and travel documents; if not, who has control of those documents?
- Has the victim been threatened with deportation or other law enforcement action?

*Statistics indicate that women with developmental disabilities are sexually assaulted at twice the rate of women without disabilities.*

Prosecutors are uniquely positioned to identify victims of human trafficking and support them in seeking justice and restoration of their

human rights. Prosecutors who are working with a sexual assault victim who they suspect may also be a victim of human trafficking should familiarize themselves with federal and state efforts to address the issue.

### ***Victims with Cognitive or Developmental Disabilities***

Historically, people with disabilities have experienced discrimination because of their disabilities. They have been viewed as incapable or helpless, separated from society at large, and denied opportunities for education and other life experiences. Misperceptions and stereotypes about people with disabilities--and a subsequent history of oppression--put people with disabilities at increased risk to experience sexual assault.

Statistics indicate that women with developmental disabilities are sexually assaulted at twice the rate of women without disabilities. According to one study, 90% of people with developmental disabilities will experience sexual abuse at some point in their lives and 49% of them will experience 10 or more abusive incidents. Only 3% of sexual abuse cases involving people with developmental disabilities are ever reported.” Of that 3%, only 22% of the offenders are charged and only 8.5% are convicted.

- In a 1991 study by Sobsey and Doe they estimate that more than half of the abuse perpetrated against people with

disabilities is generally by family members and peers with disabilities, and that disability professionals (i.e., paid or unpaid caregivers, doctors, nurses) are generally believed to be responsible for the other half.

- There are few studies that document sexual assault against women with physical and/or sensory disabilities, but Young, M.E., et al. reported that 40% of women with physical disabilities reported being sexually assaulted.

It is critically important to remember that sexual offenders deliberately seek out individuals they perceive to be vulnerable and those they believe may be easier to manipulate, control, and groom for the sexual abuse. Offenders target people with disabilities because they think they will be able to get away with abusing a victim who may be unable to communicate what has happened to them and who is unlikely to be believed even if they are able to disclose. In addition, people with disabilities are often isolated from services and supports and denied education about sexual abuse. As a result, individuals may have no one to disclose the abuse to, and/or may not understand that what happened to them is abusive.

Many people within the society at large, as well as people within the criminal justice system have preconceived notions about who are the victims of sexual assault; generally speaking most people do not think of people with disabilities as potential or likely victims of sexual crimes. Some of the common myths are about this population are: (a) that they are oversexed; (b) they are grateful for any sexual attention; (c) they are too undesirable to be targeted for sexual abuse; and (d) they are unreliable, lie and are more

prone to fantasizing. It is important to address these preconceived ideas and myths with juries when prosecuting a case with a victim with disabilities.

***Despite the disturbing frequency of sexual assaults against people with disabilities, few offenders are held accountable.***

Despite the disturbing frequency of sexual assaults against people with disabilities, few offenders are held accountable. There are numerous reasons for this. Some victims with disabilities may not report the assault because they are not aware that the experience was abusive. Some may not report because they fear reprisal from the offender, fear they won't be believed, or are afraid of entering the legal system. Barriers related to communication and accessibility may also prevent victims from reporting the assault. Additionally, some prosecutors

may believe that juries will not perceive individuals with disabilities as credible witnesses; therefore, they may choose not to prosecute. Prosecutors may also aim for plea agreements (which often come with lesser sentences) as a means of “protecting” victims with disabilities from jury trials.

As with any victim who reports, navigating the legal system and retelling the details of the assault can be traumatic. Advocates can help minimize the possibility of further trauma by providing support to victims who are coping with an assault and facing the prospect of potentially lengthy or emotional court procedures.

### ***Victims with Mental Health Problems***

Previous sections have discussed the impact of sexual trauma on victim’s mental health. Mental illnesses affect a person’s psychological or emotional functioning and ability to think, feel, and ability to relate to others to a mild, moderate, or severe degree.

***Systems often focus on what they think is wrong with the person instead of what has happened to them. As a result, victims with mental illness may develop alcohol and other drug problems, eating disorders, and other health problems, as a result of efforts to cope with a sexual assault. Systems that overlook the holistic needs of victims will tend to see individuals as problematic, hopeless, and/or lacking credibility.***

Most mental illnesses are considered to be a biological occurrence or the result of trauma, such as a sexual assault

Offenders target victims they perceive to be vulnerable, including those who had mental illnesses that preceded the assault. In addition, individuals with trauma related mental health issues are targeted for repeat assaults.

- A 2001 study found that women with a psychiatric disability had a high rate of sexual victimization. They also found that 74% of women with co-occurring mental health and substance abuse related problems have histories of sexual abuse.”
- Another study found that the lifetime risk for violent victimization was so high for homeless women with severe mental illness (97%) as to amount to normative experiences for this population.”
- For individuals with psychiatric disabilities, the rate of violent criminal victimization including sexual assault was 2 times greater than in the general population (8.2% vs. 3.1%)

The stigma associated with mental illnesses and difficulty survivors have finding trauma-informed services and supports can have a profound effect on individuals. Systems often focus on what they think is wrong with the person instead of what has happened to them. As a result, victims with mental illness may develop alcohol and other drug problems, eating disorders, and other health problems, as a result of efforts to cope with a

sexual assault. Systems that overlook the holistic needs of victims will tend to see individuals as problematic, hopeless, and/or lacking credibility.

People with mental illnesses face many barriers to reporting a sexual assault. These include fears that they will not be believed, fears that people will think they “made up” the sexual assault because of their illness, and fears about having their mental illness revealed to their families and community. Cases involving victims with a mental health diagnosis may be dropped because of assumptions that evidence will not be considered reliable. Mental health issues may also be used to discredit victims, no matter how far in the past it occurred. Some victims with serious and persistent mental illness may also be so overwhelmed by the assault that they can’t imagine coping with the stress of a trial. For victims with mental illness, the assault often exacerbates their symptoms of anxiety, depression, worthlessness and hopelessness. For these reasons, victims with mental illnesses may not believe they are even worthy of justice. Or, they may make their healing from the assault a necessary priority over justice. Therefore, it is important that victims feel supported by trauma informed advocates and prosecutors in order to overcome many of these barriers.

### *Considerations in Working with Marginalized Populations*

An understanding and appreciation of the unique world view of marginalized populations can guide prosecutors in their interactions with underserved victims and provide the support and encouragement that marginalized people need to seek justice. Strategies that prosecutors can use to increase their own cultural competency include:

- Practice vertical prosecution whenever possible. It will help you gain and retain the trust of marginalized victims.
- Remember that trust is not a given. It must be earned.
- Listen and don't judge.
- Acknowledge the injustice that marginalized people have experienced in their lives.
- Learn key phrases in other languages. It is not necessary to speak fluently. However a few common phrases like "I'm sorry," "Thank you" and "You are courageous" "I believe you," will help to build rapport with non-English speaking people. This genuine gesture will also go a long way to demonstrate your compassion and respect.
- Increase your visibility within communities of color. Attend cultural events in your community where marginalized people gather.
- Know your community and reach out to community-based agencies and resources that support specific cultures and populations.

- Seek to increase your knowledge about marginalized populations by reaching out to advocates and/or agencies that reach communities of color for guidance.
- Understand that communities of color are small and because of this they are interconnected. Be cautious to use interpreters who are independent and not connected to the victim's immediate family, friends or distant relatives.
- Coordinate interviews with victims to include advocates from within the victim's community.
- Seek to increase diversity in your staff. If you do not have staff from the victim's culture, reach out to community advocacy agencies--they may have staff available to assist.
- Engage the victim's informal support people -clergy, friends and kin--if the victim chooses.
- Identify resources to address barriers to participation that are often experienced by marginalized people, e.g. safe shelter, transportation, child care, immigration status, and emergency assistance.
- Become knowledgeable about Federal and State statutes related to human trafficking, and state and regional resources available to support trafficking victims.

*A current or former relationship between the victim and the defendant can lead to additional complexities that often make the arrest, prosecution, and conviction of an intimate partner offender even more difficult.*

**Sexual Assault in Intimate Partner Relationships**

The majority of sexual assault victims know their assailants. Despite this fact, the public still expects offenders to be weapon-wielding strangers who attack their victims in dark alleys.

This expectation, grounded in cultural bias, victim blaming, rape myth acceptance, and faulty expectations about victim behavior, creates unique challenges to the successful prosecution of non-stranger sexual assault.) A current or former relationship between the victim and the defendant can lead to additional complexities that often make the arrest, prosecution, and conviction of an intimate partner offender even more difficult.

Historically, additional barriers to prosecution were created by exempting spouses from the rape statutes. Although the marital exemption is no longer codified, some allied criminal justice professionals have continued to ignore, dismiss, or blame victims of intimate partner sexual assault. A growing number of allied criminal justice professionals recognize the validity of intimate partner sexual violence and conduct aggressive investigations and prosecutions of these offenders. Despite their efforts, however, jurors and judges often fail to hold intimate partner offenders accountable.

The criminal justice system is a critical piece of the coordinated response to sexual violence. If its response is indifferent or ineffective, sexual violence victims are left vulnerable, offenders are not held accountable, communities are less safe, and justice system's response to sexual violence, allied criminal justice professionals must recognize the serious impact of intimate partner sexual assault on the victim as well as the community, understand the contexts in which intimate partner sexual assaults occur, and appreciate the individual responses that victims of intimate partner sexual assaults have to their victimization. In addition, prosecutors must develop strategies to overcome jurors' belief in common sexual violence myths which become barriers to the successful prosecution of an intimate partner sexual assault.

*There is a pervasive idea that in-home offenders are somehow not as dangerous or problematic as 'community' offenders, i.e., offenders who are strangers. They are, however, more experienced; more invested; cross more boundaries; are safer from exposure; create more betrayal and family conflict; and are more psychologically/emotionally involved in*

### ***The Impact of Intimate Partner Sexual Assault***

Intimate partner offenders, like all non-stranger offenders, "hide behind the context of their relationships with their victims. They mask themselves as 'nice guys.' They play upon society's biases and stereotypes.

“There is a pervasive idea that in-home offenders are somehow not as dangerous or problematic as ‘community’ offenders, i.e., offenders who are strangers. They are, however, more experienced; more invested; cross more boundaries; are safer from exposure; create more betrayal and family conflict; and are more psychologically/emotionally involved in offending.” In addition, intimate partner sexual assault victims suffer a higher number of assaults.

*Because of the relationship between the defendant and the victim, there may be a tendency for victims to blame themselves, and there may also be complex feelings involved since they may love the offender but hate the offense.*

For example, most victims of marital rape “report being raped more than once, with at least one third of the women reporting being raped more than twenty times over the course of their relationship. Offenders of intimate partner sexual assault violate their victims physically and emotionally. Offenders are individuals with whom victims share their lives, homes, and possibly children. “In addition to the violation of their bodies, victims are faced with a betrayal of trust and intimacy.” Further, because of the relationship between the defendant and the victim, “there may be a tendency for victims to blame themselves, [and] there may also be complex feelings involved

since they may love the offender but hate the offense.” As a result, although often minimized, intimate partner sexual assault victims often “suffer long-lasting physical and psychological injuries as severe--or more severe--than stranger sexual assault victims, because of the nature of the emotional trauma surrounding their assault.”

Many victims do not recognize their sexual assault as an assault.

Some believe that the law protects their offender. Some believe that a spouse has the right to sexual assault his wife. Others rely on their partners’ insistence that spouses or other intimate partners who have previously given consent to a partner are not able to withdraw it. Unfortunately, society often also shares these views and refuses to hold offenders accountable.

### ***Understanding the Context of an Intimate Partner Sexual Assault***

The term “context” refers to the circumstances surrounding an incident as well as the intent of the offender’s use of violence. Prosecutors must determine the context in which a violent

***Offenders do not rape out of sexual desire or to achieve sexual satisfactions. Rather, sexual assault is about power, and, therefore, sex is a weapon and a means of expressing the offender’s aggression or power. Although some intimate partner assailants limit their violence to sexual assault, the majority of intimate partner sexual assaults occur within a physically abusive relationship.***

incident occurs in order to accurately analyze, charge, try, and dispose of the case. Significantly, not all intimate partner assaults occur in the same context.

Offenders do not sexually assault out of sexual desire or to achieve sexual satisfactions. Rather, sexual assault is about power, and, therefore, sex is a weapon and a means of expressing the offender's aggression or power. Although some intimate partner assailants limit their violence to sexual assault, the majority of intimate partner sexual assaults occur within a physically abusive relationship. As a result, many intimate partner sexual assaults also involve domestic violence dynamics. All violent relationships include some level of control or attempt on the batterer's part to control his partner. Some relationships may include a cycle of violence. The term "cycle of violence" was developed by Lenore Walker to describe three distinct phases in an abusive relationship: tension building, physical abuse, and the honeymoon phase. Prosecutors must understand, however, that although these theories are helpful in understanding domestic violence, not every relationship involves a cycle of violence or the dynamics featured in the Power and Control Wheel. Domestic violence exists on a continuum, and, therefore, most relationships exist at some place--or in many places--

along the continuum, is critical that prosecutors understand the dynamics of each relationship in which an intimate partner assault occurs in order to accurately evaluate and prosecute the case.

### ***Common Domestic and Sexual Violence Victim Behaviors***

Despite the extent of the research on domestic and sexual violence, many jurors still believe stereotypes about sexual and domestic violence victim behavior. For example, jurors expect domestic violence victims to accept responsibility and leave batterers. They also expect victims to be cooperative with prosecutors and to behave in ways consistent with other crimes. As experienced domestic violence prosecutors understand, the opposite is often true: domestic violence victims often stay with their abusers, regularly minimize their abuse, recant, request the dismissal of charges against their batterers, refuse to testify for the prosecution or testify on behalf of their batterers.

***Victims of intimate partner sexual assault may exhibit many of the behaviors described above. They may vacillate in their cooperation with the prosecution, recant, or testify on the defendant's behalf. They may also "consent" to sexual activity with their assailant at some point following their assault. The behaviors create significant difficulties in the prosecution of an intimate partner assailant and require explanations by the victim or an expert.***

The behaviors of sexual assault victims--particularly non-stranger sexual assault victims--also frequently conflict with the type of behavior the public expects from a “real” victim. For example, the public expects sexual assault victims to scream during their sexual assault, to forcefully resist their attackers, to report their sexual assaults immediately, to remain vigilant following their attacks, and to avoid their assailants. Sexual assault victims, however, often do not scream or resist during a sexual assault; they frequently delay reporting their sexual assault; they often do not remain hypervigilant; and they may continue to have contact with their assailant. Victims of intimate partner sexual assault may exhibit many of the behaviors described above. Specifically, they may vacillate in their cooperation with the prosecution, recant, or testify on the defendant’s behalf. They may also “consent” to sexual activity with their assailant at some point following their assault. The behaviors create significant difficulties in the prosecution of an intimate partner assailant and require explanations by the victim or an expert.

***Overcoming Obstacles to the Successful Prosecution of Intimate Partner Sexual Assault***

The prevalence of myths surrounding sexual and domestic violence creates significant barriers to the successful prosecution of intimate partner sexual assault, but prosecutors can take steps to overcome them.

Since many offenders of intimate partner sexual assault use sexual violence in the context of a physically violent relationship, many victims face collateral consequences relevant to domestic assault. Therefore, prosecutors must approach intimate partner sexual assaults in a multidisciplinary manner. Unlike a victim of a random crime, a domestic violence victim's involvement with the criminal justice system may put her at risk of: losing her housing (if her abuser is the primary household wage-earner); losing her employment (if she repeatedly misses work in order to attend the numerous court appearances that may accompany the criminal and civil hearings related to her abuse); losing custody of her children (if the state feels she is unable to protect or provide for her children); losing financial support for herself and her children (if her abuser loses his job once he is convicted or sent to prison); losing her immigration status (if she is unable to qualify for a visa under VAWA provisions); and being prosecuted (if her attempts to protect herself or her children are not recognized as self-defense). In addition, as discussed earlier in this article, victims of intimate

partner sexual assault feel a deep sense of betrayal over their assaults. They also engage in self-blame.

Prosecutors must identify and form relationships with community advocates and agencies to address and attempt to resolve the collateral problems domestic violence victims face as a result of their abuse and to address the emotional distress caused by the assault. Prosecutors alone are not able to provide victims with the attention, advocacy, and resources required to address and resolve the victim's needs. By working with community advocates, prosecutors can help victims procure counseling, create a safety plan, obtain assistance with childcare, secure or maintain housing, and receive vocational training or assistance with a current employer.

Prosecutors can explain the context of an intimate partner sexual assault by introducing evidence of an assailant's other bad acts. The introduction of other acts can demonstrate the defendant's intent with respect to the intimate partner sexual assault for which he is currently on trial. For

***The introduction of other acts can demonstrate the defendant's intent with respect to the intimate partner sexual assault for which he is currently on trial. For example, a defendant's prior violent history with a victim may be relevant to explain her lack of resistance.***

example, a defendant's prior violent history with a victim may be relevant to explain her lack of resistance. If the victim has been previously abused by her partner, her perception of her batterer's ability to cause her imminent harm, even where there has been a passage of time between her batterer's threat and the sexual assault is well-grounded. Domestic violence victims' experience of the repeated violent cycles enable them to predict their partner's impending violence based upon his behavior preceding previous assaults of the victim. Therefore, evidence of the defendant's victimization by the batterer and the cyclical nature of her relationship is relevant and may be admissible establish that the victim's fear is reasonable and well-grounded.

Finally prosecutors must understand the impacts of a victim's lack of cooperation, and the impact of *Crawford v. Washington* and *Davis v. Washington* on their ability to prosecute an intimate partner sexual assault. A prosecutor will rarely be able to successfully prosecute an intimate partner sexual assault of competent adult victim without the victim's cooperation because of the difficulty in overcoming the consent defense.

In the rare instance where an intimate partner sexual assault of a competent adult without the victim's cooperation is prosecuted, prosecutors

must anticipate defense objections to the introduction of hearsay as well as any “testimonial” statements under *Crawford* and *Davis*. *Crawford* held that testimonial statement of an unavailable witness can be admitted at trial only when the defendant has had a prior opportunity to cross-examine that witness. This holding was clarified in *Davis*, in which the Court explained that statements made to government agents for the primary purpose of receiving assistance in an ongoing emergency are non-testimonial. Statements are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Intimate partner sexual assaults pose significant challenges for prosecutors. In order to successfully prosecute these cases, prosecutors must overcome cultural bias, victim blaming, and domestic and sexual violence myth acceptance. Further, they must persuade judges and juries that intimate partner sexual assaults are serious cases that significantly impact the safety and well-being of the community. Prosecutors can debunk prevailing myths by understanding and explaining sexual and domestic violence dynamics and victim behaviors. They can overcome barriers by

demonstrating the context in which an intimate partner sexual assault occurs. They can also persuade judges and juries to hold intimate partner sexual assailants accountable by ethically and aggressively charging and litigating intimate partner sexual assaults in a manner that exposes them as critical weapons in an offender's abuse of his partner.

## Chapter 7

# ISSUES IN CHARGING SEXUAL ASSAULT CASES<sup>47</sup>

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The prosecutor's authority to exercise discretion on charging decisions is a key component of our criminal justice system. ABA Model Rule 3.8(a) requires that the prosecutor refrain from prosecuting a charge not supported by probable cause, while national standards establish that a prosecutor should only proceed on the basis of sufficient admissible evidence to support a conviction.

Prosecutorial discretion is subject to constitutional constraints such as equal protection and due process. The prosecutor should only file charges that adequately encompass the offense or offenses believed to have been committed and that rationally address the nature and scope of the alleged criminal activity.

*A prosecutor should only proceed on the basis of sufficient admissible evidence to support a conviction.*

The ultimate decision of how a case will proceed rests solely within the role of the County Attorney; however, input from the victim is an

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<sup>47</sup> Portions of this chapter were excerpted and modified with permission from: the Michigan Prosecutors Sexual Assault Prosecution Manual, published by the Domestic and Sexual Violence Prevention and Treatment Board and the Prosecuting Attorneys Association of Michigan (2013); and the Wisconsin Sexual Assault Reference Book, published by the Wisconsin Office of Justice Assistance (2009). All rights reserved.

important component in the decision-making process and carries considerable weight in determining the best course of action. A charging decision should not be made in haste.

### **Is the Investigation Complete?**

It is important that the law enforcement investigation is complete before filing charges against the accused. Before charging a case it is important to consider the following items (or lack thereof):

- Forensic interview/statement from the victim (recorded)
- Written reports from law enforcement
- Medical evidence or a sexual assault examination
- Medical report from a Sexual Assault Nurse Examiner (SANE)
- Recorded statement from the suspect
- Recorded statement from all critical witnesses
- Corroborating evidence (anything that might corroborate the victim's statement)
- Documented and properly inventoried physical evidence
- Photographs (crime scene, victim's injuries, etc.)
- Forensic examination and results from State Crime Lab
- Criminal History of suspect(s)
- 404(b) (other acts) of the suspect(s)
- Any requested follow-up investigation by law enforcement

The prosecutor should address any problems, concerns, or needs for follow-up investigation before filing charges, as well as be prepared for defense attorney's arguments.

## **Search for Corroborating Evidence**

Corroboration is essential to the prosecution of sexual assault cases.

As part of the analysis of the case, the prosecutor should develop a time line that includes everything leading up to the assault, including what the victim and offender did after the assault. The prosecutor should then attempt to corroborate as many facts as possible to bolster the victim's credibility.

During this process the prosecutor may determine that there needs to be additional investigation. While some of this may occur before the filing of charges, corroboration should not stop once charges have been filed.

*Meeting with the victim provides prosecutors a feel for the case they cannot get from reading the reports. Meeting with the victim is also a part of being victim-centered and demonstrates to the victim that the prosecution is taking the case seriously.*

## **Meeting with the Victim**

The prosecutor shall meet with the victim prior to making a determination about whether or not to charge the offender. Meeting with the victim provides prosecutors a feel for the case they cannot get from reading the reports. Meeting with the victim is also a part of being victim-centered and demonstrates to the victim that the prosecution is taking the case seriously.

It is recommended that a third party, such as an investigator, paralegal, or fellow prosecutor be present during the interview with the victim if any facts of the case will be discussed. Failure to have a witness present could result in the prosecutor becoming a witness. Using an advocate as the third-party witness is discouraged, as advocates should not be put in the position of potentially having to impeach their own clients.

A victim advocate can, however, provide emotional support to the victim and encourage the victim to share details that are important to reviewing and potentially charging the case. Victims have a statutory right to have a victim advocate during an interview.<sup>48</sup>

Interviewing the victim provides an opportunity to review the case from the victim's perspective, explain the process, uncover details that may have been overlooked in the initial investigation, and determine what outcome the victim is seeking. To ensure the best outcome prosecutors should:

- Allow adequate time for the interview.
- Conduct the interview in a place where the victim feels safe and able to speak freely.

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<sup>48</sup> Mont. Code Ann 46-24-106(7).

- Adopt a “seeking to understand” perspective in questioning the victim.
- Review the victim’s rights and explain the victim’s role in the prosecution process, including the rape shield law, the charging process, trial and possible plea negotiations.
- Inquire about any threats suspects may have made toward the victim and respect and support the victim’s efforts to maintain their safety.

A victim-centered approach also means that prosecutors should support victims who choose not to cooperate in moving the case forward. However, all victims should be assured they will be consulted as the case progresses and well prepared for trial.

### **Charging Considerations/Analytical Framework**

Determining whether to file charges is a broader decision than merely evaluating the evidence; the nature of the sexual assault crimes often results in little or no physical evidence. However, corroborative evidence, witness statements, participation of the victim/witness in the case, and 404b evidence committed by the offender are likely to play a significant role in the prosecution.

Probable cause must exist to file any criminal charge. However, the inquiry does not end with the question of whether probable cause exists to charge the case. The prosecutor must also consider whether there is

sufficient credible, admissible evidence support a reasonable likelihood of prevailing at trial. The prosecutor should consider a number of factors:

- Legal sufficiency. Is there sufficient evidence to prove each element of the offense beyond a reasonable doubt?
- Trial sufficiency: It is simply reality that some cases cannot make it at trial. A case in which a victim's behavior fits neatly into widely held rape myths should not be declined for that reason. Nor should a case be declined because the trial outcome is uncertain; doing so contributes to a vicious cycle. To determine whether a case is sufficient to take to trial, the prosecutor should carefully analyze:
  - The prosecutor's ability to meet anticipated defenses, address rape myths, address victim credibility issues, and address and explain "counterintuitive" victim behavior. Any prosecutors concerned about their level of expertise should consult with the Prosecution Services Bureau;
  - The presence or absence of physical evidence;
  - The presence/absence of corroborative evidence;
  - Opportunities to present expert testimony; and
  - The victim's wishes and well-being, including her ability to testify and be cross-examined.

### **Use of Non-Sexual Assault Charges in the Information**

Frequently there are a multitude of non-sexual assault charges that are supported by the facts. These may include:

- Burglary
- Theft
- Criminal Endangerment
- Kidnapping or Unlawful Restraint
- Privacy in Communications
- Assault/PFMA
- Intimidation
- Stalking
- Tampering with Witnesses/Evidence
- Any number of misdemeanors

There are a number of reasons to include these charges in your original information. These crimes may provide corroboration of the victim as to the circumstances of non-consent. In addition, including them in the original information and discovery may provide sufficient notice of 404(b) evidence or “other acts.” Finally, some charges may be stronger than others, and it may be possible to negotiate from a position of strength to accomplish the goals of the prosecution. If the case goes to trial, however, the prosecutor should consider whether giving the jury a choice between felonies and misdemeanors is a wise course of action, as juries at times render “split the baby” verdicts that could leave the prosecutor and/or the victim disappointed that the jury convicted on less important charges with less significant penalties.

### **Determine If PFO Statute Applies**

Pursuant to Section 46-18-501 a “persistent felony offender” is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first, if the second felony is committed in the time period specified in the statute.

Prosecutors should review the defendant’s prior criminal history and determine pursuant to Mont. Code Ann. § 46-18-501(1) & (2) if he/she can be designated a persistent felony offender.

Except as provided in Mont. Code Ann. § 46-18-219, a persistent felony offender shall be imprisoned in the state prison for a term of not less than five years or more than 100 years or a fine not to exceed \$50,000, or both, if the offender was 21 years of age or older at the time of the commission of the present crime.

Because the intent of the persistent felony offender statutes is that they "replace the sentence for the underlying felony," they should not be made consecutive to a sentence. *State v. Gunderson*, 2010 MT 166, 357

Mont. 142, 237 P.3d 74; *State v. Brooks*, 2010 MT 226, 358 Mont. 51, 243 P.3d 405.

### **Timing of Filing of Charges**

The decision when to file charges in a sexual assault case requires balancing of several factors. While it is desirable for the investigation to be complete before filing charges, prosecutors should carefully balance the desire for a full and complete investigation with the safety concerns of the victim when deciding when to file criminal charges in a sexual assault case.

Upon receiving an investigative file from law enforcement, requesting that criminal charges be filed, the prosecutor shall make contact with the assigned investigator within two (2) weeks of receiving the file to discuss the case. After reviewing the investigative materials the prosecutor should put all requests for follow-up investigation in writing to the lead investigator.

Upon receiving an investigative file from law enforcement for review purposes only, the prosecutor shall complete the review within one (1) month or provide a written explanation to law enforcement for

*The decision about whether and when to file charges is based on a balancing test of many factors.*

the delay. The prosecutor shall provide written guidance as to concurrence with law enforcement or suggested alternatives.

Once a complete file has been presented to the prosecutor, including any and all follow-up investigation, and the prosecutor has met with the victim, a decision to charge a case should be made within 60 days.

Any and all decisions to charge a sexual assault case should be reviewed by the supervising attorney within a reasonable period of time prior to actually filing charges.

### **Procedures for Declined Cases**

After determining that a case should not be charged the prosecutor should review the declined case with the assigned investigator to discuss the issues surrounding the “no file” decision.

After meeting with the assigned investigator and discussing the decision not to file charges in the case, the prosecutor should review the case with his/her supervising attorney and/or staff the case with the other specialized sexual assault prosecutors in the office.

After reviewing the case with his/her supervising attorney and/or staffing the case with the other specialized sexual assault prosecutors in the

office, if it is still the decision of the prosecutor not to file charges then the prosecutor shall prepare a detailed written explanation of why the evidence is insufficient to obtain a conviction or why prosecution of the case is not in the interest of justice. The written explanation should be forwarded to the investigator and made a part of the case file.

If the prosecutor has made a decision to not file charges and the above-listed criteria has been completed, the prosecutor should arrange a meeting with the victim and victim advocate to explain the decision.

## Chapter 8

# ISSUES IN TRYING SEXUAL ASSAULT CASES<sup>49</sup>

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There are few categories of cases that require a prosecutor to use such a wide array of tools as sexual assault cases. Sexual assault cases often require forensics experts, psychologists and psychiatrists, medical experts, counselors, and others.

*It is important to build a relationship of trust with the victim. A rapport cannot be built in one meeting; it takes effort and time.*

In addition, few categories of cases require the attention to the victim and his/her family throughout the criminal adjudication. In addition, it is important to build a relationship of trust with the victim. A rapport cannot be built in one meeting; it takes effort and time.

It is the prosecutor's job to shepherd the victim and others through the criminal justice system, explaining what is happening or will happen, and being available to answer questions and alleviate concerns.

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<sup>49</sup> A substantial portion of this chapter was excerpted and modified with permission from: the Michigan Prosecutors Sexual Assault Prosecution Manual, published by the Domestic and Sexual Violence Prevention and Treatment Board and the Prosecuting Attorneys Association of Michigan (2013); the Wisconsin Sexual Assault Reference Book, published by the Wisconsin Office of Justice Assistance (2009); Prosecuting Alcohol-Facilitated Sexual Assault, published by the National District Attorneys Association (2007); and Prosecuting Intimate Partner Sexual Assault, The Voice, Volume II, No.2, published by the National District Attorneys Association. All rights reserved.

## **Protecting Victims Pre-Trial**

### ***Pretrial Motions***

Prosecutors should utilize pretrial motions to protect the victim's safety and privacy. Pretrial motions also clarify the parameters of admissible evidence, force the defense to reveal and justify some of its tactics, and keep prejudicial and private information about the victim from the jury.

The following are some pretrial motions the prosecutor should consider filing:

- **Bail.**

Conditions of bail should include measures to protect the victim. Ask the judge to prohibit the defendant from having contact with the victim and witnesses. Consider GPS, Pretrial Supervision, testing for drugs and/or alcohol, and anything else that protects the victim from contact or harassment by the defendant, and that protects the safety of the community. File a petition to revoke bail if the defendant violates any conditions of release.

- **Courtroom.**

Let the victim get familiar with the courtroom and where you and the victim's supporters will be while she is testifying. Consider requesting additional law enforcement presence in the courtroom if there are indications the defendant, his supporters, or anyone else may disrupt the courtroom or attempt to

intimidate the victim. You may not always succeed, but the victim will see that you are fighting to protect her.

- Rape Shield and other motions to protect unfair character attacks.

File a proactive motion to foreclose defense attempts to violate the Rape Shield statute by introducing evidence of the victim's past sexual conduct. Think carefully about anything else the defense might try to use to make the victim look bad. Does she have tattoos or piercings? Did she have a baby at a young age? Does she have a history of using alcohol or drugs? Prostitution? Mental illness? Criminal convictions? Political activities the jury could look down on? How would they look at her job, or that she is on some sort of assistance program? Look for anything that is irrelevant or prejudicial, and determine whether those things are actually inadmissible. By identifying those issues early, you can protect the victim, even if the judge lets some of that evidence in.

- 404(b) evidence.

When possible, the prosecutor may file a motion to introduce evidence of the defendant's other bad acts. All too often, in non-stranger sexual assault cases, the investigation looks only at the current case and does not look for prior sexual assaults. When possible, the prosecutor should ask police officers to interview the defendant's friends, prior girlfriends, and others who might know about prior acts. Although these people may have a reason to lie, they may also be willing to assist. If the defendant has any prior cases, review those cases, even if they were dismissed. Further investigation might be warranted. Do not only look for completed sexual assaults; also look for evidence that can be used to demonstrate the defendant's pattern of behavior toward women. Prior bad acts stopping short of actual sexual assault may support the argument that he

deceived the victim, manipulated her, or planned and premeditated the sexual assault.

### *Working with the Victim*

Prosecutors can do at least three things to assist the victim in testifying in a competent and credible manner: (1) support; (2) protect; and (3) prepare the victim.

- Support the Victim.

Support can be provided in a number of ways – by the prosecutor, investigator, and/or advocate. Show the victim the courtroom to ensure the victim is as comfortable as possible on the witness stand. Provide a safe and comfortable place for the victim to wait to testify. A victim who feels supported is more likely to feel more comfortable on the witness stand, which will make her a better witness.

- Protect the Victim.

A prosecutor should protect the victim to the best of his or her ability, through pretrial motions, objections at trial, and other strategies. A victim who feels protected through the process is less likely to become defensive or angry on the witness stand. When a victim becomes angry or defensive, jurors are likely to believe that she has something to hide, rather than recognizing these reactions as normal human behavior. When the defense files frivolous motions intended to harass and intimidate the victim, oppose them. For example, if the defense files motions requesting a psychological examination of the victim or asking

for the victim's medical or counseling records, oppose them. The State is not required to turn over any information not in its possession.<sup>50</sup> Such records are privileged.<sup>51</sup> The Montana Supreme Court has recognized such privileges and has protected confidential records from disclosure.<sup>52</sup>

- Prepare the Victim.

Testifying in court can be as traumatic as the sexual assault itself because the victim is forced to relive the assault. Prosecutors should prepare victims not only for direct examination but also for the harsh reality of cross-examination. To prepare a victim, discuss her substantive testimony as well as basic rules for testifying. Tell the victim that the most important rule for her to follow in the courtroom is to be truthful. Explain to the victim that if she attempts to hide or exaggerate small details, the defense will probably be able to show this on cross-examination. The defense will then argue in closing that the victim is a liar and cannot be believed about the sexual assault if she cannot be believed about the small details. Instruct the victim on the importance of accuracy. For example, a victim may be inclined to say that the defendant "ripped" off her panties, when in fact he pulled them off, but did not rip them. The slightest imprecision opens the door for cross-examination and may call the victim's credibility into question. Ask her to try to stay calm, since a victim who becomes angry will be unable to think clearly. Working with victim advocates can make the preparation for direct examination more comfortable for the victim and thus, more productive for the prosecutor.

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<sup>50</sup> Mont. Code Ann. §46-15-322.

<sup>51</sup> Mont. Code Ann. §26-1-805, 807.

<sup>52</sup> See *State v. Reynolds*, 243 Mont.1,8, 792 P.2d 111, 1115 (1990); *State v. Donnelly*, 244 Mont. 372, 798 P.2d 89 (1990); *State v. Muir*, 263 Mont. 211, 867 P.2d 1094 (1994); *State v. Duffy*, 2000 MT 186, 300 Mont. 381, 6 P.3d 453; *State v. Little*, 260 Mont. 460, 861 P.2d 154 (1993); *State v. Rhyne* (253 Mont. 513, 833 P.2d 1112 (1992).

In cases in which the consent defense is used, cross-examination may be particularly harsh. Victims who are prepared in advance for the challenge of the experience will be better witnesses when they testify. An advocate may be extremely helpful to the victim and to the prosecutor by being present during preparation for cross-examination and during the trial itself. It might also be helpful to have someone other than the prosecutor conduct a mock cross-examination of the victim.

In addition, when prepping the victim for trial, the prosecution team should reinforce that the victim is not responsible for the sexual assault. The defendant, not the victim, is responsible for his behavior, and thus, the assault. Although the victim is not responsible for the assault, it is crucial to be honest about all details of the case, especially drug and alcohol use.

When preparing the victim for cross-examination, discuss questions the defense attorney is likely to ask. Explain that the defense is likely to portray her as a promiscuous party girl. If there is any memory loss, they will be certain to focus on the fact that there are things she does not remember. They might ask questions like, “You consented to drink, and you consented to drug use, didn’t you?” Let the victim know that it is appropriate to respond truthfully that she might have consented to other

things, but she did not consent to intercourse. If there is a delay in reporting, the defense will inquire about it. If there were potential consequences for the victim that were not enforced, such as being kicked out of college for drinking or drug use, these will certainly be raised at trial.

Finally, consider asking in your direct examination of the victim the questions you expect the defense to ask in the victim's cross-examination. The victim will be more comfortable answering you, and the jury will appreciate that you didn't shy away from difficult facts.

### **Jury Selection**

Jury selection is an often overlooked but critical part of a trial. Jury selection in Montana is controlled by M.C.A. §46-16-114 through 118. The purposes of voir dire are to discover grounds for challenges for cause and to gain knowledge to facilitate an intelligent exercise of peremptory challenges. However, prosecutors should look at voir dire as another opportunity to educate the jury.

Jury selection can be persuasive and informative, and at its worst, dull and harmful to the case. The best voir dire is one that sparks a conversation between the panel and the lawyer. It is the only chance prosecutors have to talk directly with the jury. And while voir dire should be persuasive,

prosecutors cannot use it to get the jury to commit to the state's theory of the case, indoctrinate them, or argue the prosecution's case.

One of the first tasks in jury selection is to identify the issues that will likely cause difficulty in the case. The goal is to identify which myths are likely to be most prominent in the minds of the jury given the facts of the case. It may be the absence of injury, or that the victim was drinking with the defendant, but whichever it is the focus of the questions must be on those prominent beliefs.

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Once the issues in the case are identified the process of formulating appropriate jury questions can begin. Due to its limited nature and based on your judges' rules about time limits and subject matter, voir dire cannot be exhaustive. What follows are a few suggested questions

that can be considered. The suggested questions are just that, suggestions.

They are not intended as a script to be scrupulously followed.

- Lack of Physical Resistance

- Analogize to a party store robbery. If someone walks into a convenience store and points a gun at the clerk to demand the money from the cash register, would anyone expect the clerk to physically fight back? Why not?
- And everyone would agree that the clerk made a choice to give the robber the money, wouldn't you? It was a choice? And you would agree that it was a smart choice?
- Does anyone think that the clerk consented or voluntarily gave the robber the money when she made the choice to comply?
- And if the robber tells police that the gun wasn't loaded, or it wasn't a real gun, and the clerk was never in danger, do we expect the police to tell the clerk that it was all a misunderstanding, she was never in any danger and so didn't have to hand over the money? So we all agree that what's important is that the clerk was afraid of what *might* happen if he resisted and said "No"?
- We don't judge consent by what was in the robber's mind, do we? We judge consent by what the clerk believed and understood, don't we?
- The judge is going to tell you at the end of the trial that the victim does not have to resist. Now, you have taken an oath to tell the truth. You haven't yet taken an oath to follow the law. So if any of you think and believe that if the victim didn't resist, then it can't be sexual assault, it's okay to tell me now. If you believe that if the victim didn't resist, that means she consented to the sexual contact, it's okay to tell me that now. Do any of you believe that? [If no one says yes, "That's good, you all agree that when the judge tells you that the victim need not resist, you will be able to follow the law, is that right?"]
- Does anyone think you have to be threatened with a weapon in order to fear being injured or fear for your life?

- You would all agree, wouldn't you, that someone [a man] who is physically bigger or stronger could make another person [a woman] feel afraid by what he says? Or by how he looks or acts? Or perhaps by how he positions his body, say, by standing between that person and the door, or lying on top of them?
- Coercion and Threats
  - Does everyone agree that if someone threatens you with gun, like in the robbery example, that is a threat? The robber wants the clerk to believe that the robber will shoot the gun if he doesn't get what he wants, doesn't he? Putting that all together that's coercing someone by threat of force?
  - Are there other ways besides pointing a gun at someone? What are some of those ways?
  - Parents are good at using their voices, and facial expressions, and body posture to "convince" their children to behave in a certain way, aren't they. That's a kind of coercion, too, isn't it?
  - What was it that got us to behave just by hearing a tone of voice? Did we know what was going to happen if we didn't? When we suspected that something bad was going to happen if we didn't obey, weren't we really just accepting that we had no practical choice but to do as we were told? Where did we get that idea from (experience and circumstances)?
  - So does everyone agree that a person can be coerced into doing something when that person reasonably believes that there's no practical choice but to do it?

- Victim's Response to Trauma
  - Is there anyone here who has ever been through a traumatic event, such as a car accident or physical injury, perhaps even a mugging or burglary?
  - How did you respond right after it occurred? (Ask more than one juror to explain their responses to the trauma; you should get varying responses.)
  - Mr. Jones, you described a response to your situation which was different than Ms. Green's response to hers. Do you think different people react in different ways to stress?
  - After the traumatic event, were you able to think clearly?
  - Did you rely on your instinct to get through it?
  - After the emergency was over and you had some time to reflect, did you come up with things you wish you would have done differently?
  - Did you react the same way you had thought you would?
  - Do you think that victims of sexual assault might respond in a variety of ways to trauma as well?
  - Can you make room in your mind for that possibility and not judge the victim based on the way you think she should react?
  
- Intoxicated Victim

Cases in which the victim is voluntarily intoxicated without reaching the level of physical helplessness can be challenging. A common defense argument is that the victim in fact consented to sexual activity, but because she was drunk she doesn't remember that she did so. The defense can use intoxication to attack the victim's credibility, too. Offenders rely on the jury disbelieving the victim when she says she didn't consent, because she was drunk enough to do something she wouldn't have done sober and now regrets it. The task in jury selection is to find out which of the venire might hold those beliefs, and begin to reframe intoxication as vulnerability.

- Everyone can agree that young people drink, right? And sometimes to excess?
- How many of you have seen really drunk people? How did you know that they were drunk?
- Do you think you could have persuaded that really drunk friend to hand you their wallet? Or that you could have gotten their wallet out of their purse or their pants pocket without resistance?

***Offenders rely on the jury disbelieving the victim when she says she didn't consent, because she was drunk enough to do something she wouldn't have done sober and now regrets it. The task in jury selection is to find out which of the venire might hold those beliefs, and begin to reframe intoxication as vulnerability.***

- Did you do it? Why not? Folks that are that drunk are pretty vulnerable, aren't they? The fact that your friend was drunk doesn't mean that he was consenting to you taking his wallet, does it? That friend might act very differently if you tried to take his wallet while sober, wouldn't he?

Another challenge when the victim was intoxicated is the fact that many people can and do consent to sexual contact while drunk. When one judges whether someone has agreed to something, they look to other facts and not solely that the other person was intoxicated. The prosecutor should try to get jurors to acknowledge that intoxication does not equal consent, and that when someone is intoxicated their physical coordination and judgment are affected in a way that makes the defense argument suspect.

- How many of you have had surgery or have had relatives who had surgery where you were anesthetized? Perhaps even dental surgery where you were given something to relax you?
- And, thanks to all of us lawyers, how many forms did you have to sign acknowledging that you understood the risks and consented to the surgery? Those doctor's didn't have you sign those forms AFTER you were given the sedatives that made you loopy, did they? You were asked to sign those before they gave you anything that would affect your judgment, weren't you? Why do you think that is?
- In our earlier example, how would you know if your drunk friend really consented to giving you the wallet? You would

look to other things, wouldn't you? What kind of things? How many of us would feel comfortable relying on what he says if we ask if we can have his wallet?

- Inconsistent Statements

- In our county, there are several parades every year. Let's imagine that you went to a parade and saw 5 marching bands, 10 politicians shaking hands and kissing babies, and 3 beauty queens. You talked to your neighbor right after the parade, and you told your neighbor that you saw 5 marching bands, 10 politicians shaking hands and kissing babies, and 2 beauty queens. Several hours later you see a friend of yours at dinner, and you tell that friend that you saw 5 marching bands, 10 politicians shaking hands and kissing babies, and 2 beauty queens.
- Now, that is inconsistent with what you told your neighbor – have you lied? How many of you think that under those circumstances you are a liar? Memory is a tricky thing, isn't it?
- Let's suppose a month later you were asked by a reporter, say, and you told the reporter that you saw 5 marching bands, 10 politicians shaking hands and kissing babies, 2 beauty queens and the Shriners in their little cars. Are you lying to the reporter? Were you lying to your neighbor and friend when you didn't tell them about the Shriners?
- Suppose your pastor asks you if you visited the beer tent before you went to the parade, and you lie and say "no" because you don't want the pastor to think you are a bad person. Does that mean you are lying about what else happened at the parade?

- Delay in Reporting

Potential jurors may believe that a victim of a “real” sexual assault would act in specific ways, and of course if the victim’s response to the assault doesn’t meet those beliefs those potential jurors may not believe that the victim was assaulted.

- What do you think would be a person’s first concern if they were a victim of a traumatic event? Can you think of a reason why a victim may not report immediately? Ex. Embarrassment, humiliation, fear of retaliation, fear of not being believed.
- Do you think that all women report being the victim of a sexual assault immediately? Can we agree that not every woman who is sexual assaulted reports it immediately?
- Do you think that the sexual assault might have an emotional impact on a victim? And what might some of those emotions look like to you?
- Have any of you had the experience where you see something unexpected and amazing, something where you say, “I can’t believe my eyes.” And you didn’t tell anyone right away because you weren’t quite sure what it was you just experienced?

- The Defendant becomes a Stranger

One of the most traumatic circumstances of non-stranger sexual assault is the betrayal of trust that a victim experiences when someone she knows turns into a stranger.

- Have you or someone close to you been taken advantage of or been betrayed somehow by someone close to you? Did you expect this to happen or did it take you by surprise? And at times do we look back and still say, “I can’t believe he did that?”
  - How many of us, when that betrayal happened, were speechless? Didn’t know how or even if to react? And later when someone asks, “What did you do?” or “What did you say to that?” all we can say is that we we’re stunned, or speechless?
  - We’ve all heard the story about Dr. Jekyll and Mr. Hyde--- how Dr. Jekyll undergoes a complete personality change to become Mr. Hyde. Now that’s an extreme case, but has anyone in their own life experience encountered someone whose personality seemed to change? Tell us about that. Did you see it coming or were you surprised?
- Consent

Since most non-stranger sexual assaults are defended on the issue of consent it is imperative that the prosecutor ask about the potential jurors’ conception of what consent is, what it looks like, and how to recognize it. Prosecutors should cover any definitions or jury instructions on consent that are going to be read to the jury.

- In our everyday lives how can we tell if someone is consenting to a request?
- Imagine for a minute that when traveling here I was stuck in a line of traffic because of some construction, and someone was pulling into the lane in front of me. How would he know that I

consented to him pulling into the lane ahead of me? I might raise my hand and gesture to the other driver.

- Do we all agree that we can communicate are consent by our actions? In fact, isn't that usually how we do communicate it?
- Now, if I held up my hand and I was trying to tell the other driver to stop inching into my lane, and the other driver misinterpreted my actions and thought I was consenting, does that mean I really was? All agree that what was in my mind is what's important? (Possible follow up with a question about willingness to follow the law that consent is in the victims mind, not the defendants. There's no reasonable mistake of fact defense.)
- Have any of you ever made an online donation to a charity using a credit card? If you're like me, it makes you feel pretty good for having contributed to a worthy cause.
- And if your experience is anything like mine, about a month later you get something in the mail from the charity. A "free gift" like a refrigerator magnet or return address labels. Of course, there's always another letter asking for another donation. Have most of us had that experience?
- So what happens next? Don't we get the phone call asking for a donation? And we think about it, but let's say we decide not to donate at this time.
- So then maybe a few months later you open up your credit card statement and you see another charge to the charity, only you didn't authorize another donation. What do you do? Imagine that the charity says that they charged the card because you donated before. It's no big deal, right?

- How would that make you feel? Does anyone think that we should have to prove to them that we didn't consent to the charge? Can we all agree that it's up to the charity to seek our consent, that it cannot be assumed? And that's true for a whole lot of other things, isn't it?

### **Opening Statement**

Every sexual assault is unique. When a sexual assault case proceeds to a jury trial, the goal of the prosecution is to convince the jury that the assault occurred and that the defendant's conduct meets all of the elements of the offense charged.

The best way to meet the goal of establishing the defendant's guilt is to relate an account of the events that makes sense, explains undeniable facts, and provides reasons for why people acted the way they did through the testimony of witnesses. In other words, you have to have a theory to explain what it is that the defendant did and relate the account in such a way that the jury understands and believes it happened.

The opening statement should be relatively brief, quickly grab the attention of the jury, succinctly relay important facts for the jury through the witnesses they will hear from during the trial, tell them what to look for during the presentation of evidence, and tell them what you expect them to

do after they hear all of the evidence.

First, develop a theme and theory for your case. Then, begin your opening by using a short phrase that quickly and accurately summarizes what the central issue of the case is. Another method is to provide a theme that the jury will be readily able to identify with and provide a perspective through which to view the evidence as it is presented. Another method is to immediately shock the jury with a statement that the defendant made during the course of the assault that they will remember when it is repeated.

*Develop a theme and theory for your case and repeat them throughout your case.*

Selection of the best method depends on the style of the prosecutor and a careful evaluation of the evidence that will be presented at trial. Take care to repeat your

theme and theory, through your opening statement and throughout your trial presentation.

After the introduction, tell the jury through a narrative about the key facts you expect to present in evidence. The narrative should be compelling, using descriptive words and active voice verbs. Other strategies for an effective opening include:

- Using visual aids, like an exhibit such as a photograph you are certain will be admitted at trial, which is simple and presented so that it is easily viewable by all members of the jury.
- Using a PowerPoint presentation. If you decide to use the PowerPoint, make certain that you are familiar and comfortable with its use so that it does not interfere in the message you are trying to convey.
- Holding the jury's interest by using gestures and body language appropriate to the story you are telling. Vary your voice in pitch, rate or pace, volume, and tone. Pause when appropriate to focus attention on the point you want the jury to remember. Look all individual jurors in the eye, but do not make them feel uncomfortable.
- Setting the scene, identifying the critical players and establishing important time sequences and significant events. Continue to introduce the theme of the trial. Identify for jurors the human values present in the facts of the case. Select a point of view from which to narrate the facts and stick with it throughout your opening statement.
- Not arguing the case. The opening statement is not an opportunity to argue the case, nor is it the time to bore the jury with details that in the end are not going to matter one way or the other how the jury is going to find the defendant guilty. Style is just as important as having a command of the facts. It is vital that you relate the facts of your case without being condescending, wooden, argumentative or inarticulate.

Finally, end your opening statement by telling the jury what you expect them to do when they deliberate their verdict. Tell them to find

the defendant guilty. Engage the jury in the process by having them adopt your perspective and the theme that you selected for the trial.

### **Order of Witnesses**

Presentation is key in a jury trial. Juries do not want to hear a collection of facts, they want to hear a story that convinces them that the

*Typically, presenting witnesses who can establish the facts and circumstances which made it possible for the defendant to commit the assault assists the jury and should be presented before the victim testifies in order to place the victim's testimony in proper context.*

victim was sexual assaulted by the defendant. Any good story should begin strong and end strong. If the victim is not a strong witness it may be better to call the initial officer or SANE nurse as the first witness, so that the jury can understand the emotional impact or trauma of the assault. In some cases it is the actual

testimony of the victim giving graphic details about the assault that will grab the attention of the jury.

Presentation is always case specific. Prosecutors must also pay close attention to the order of witnesses presented at trial in order to facilitate the jury's understanding of the context in which the sexual assault took place.

Corroboration of the victim's account of the assault is essential to the jury's

understanding of the case. Typically, presenting witnesses who can establish the facts and circumstances which made it possible for the defendant to commit the assault assists the jury and should be presented before the victim testifies in order to place the victim's testimony in proper context. The victim's testimony should be the focal point of the State's case after the context is set with remaining expert witnesses used to corroborate the victim's testimony. Corroborating testimony typically are fact witnesses who corroborate the victim's version of the event and can include observations by lay witnesses, documentary evidence including bank transactions telecommunication and computer records, medical expert testimony, forensic expert testimony, and/or expert testimony on reactive behavior of victims.

Witness order is important throughout the prosecutor's presentation of the case from beginning to end. The conclusion of the story in your case-in-chief should end as strongly as it began. It is important that the last witness have a powerful impact upon the jury, convincing the jury of the defendant's guilt.

### **Direct Examination of the Victim**

No one knows better what happened, how she felt and why she responded as she did during and after the sexual assault than the victim. This is the reason why the victim's testimony is the most fundamental aspect of your case, and why her credibility is crucial. In order for the jury to properly assess the credibility issues in your case, they must be able to figuratively "walk in her shoes" (although it is impermissible to ask the jury to do so) and look at the assault from her perspective rather than judging and second-guessing from the comfort of their 20-20 hindsight juror seats.

The victim's experience needs to be made known to the jury, especially in cases where consent is the defense, which means that you must, through her, tell the whole story and paint a vivid and clear picture of the crime for the jury. A good place to start in preparing for direct exam, therefore, is by asking the victim to tell you about what she wants to say.

From the time of the first meeting with the victim, through analyzing, preparing, and trying to the case, listen to her to gain information about how the offender observed vulnerability and capitalized

upon it. Her vulnerability is, therefore, a key aspect that must be explored in her testimony. Accordingly, the direct exam of the victim must:

- Humanize the jury and allow them to get to know her;
- Allow the jury to see, her and feel what the victim had to say, what she heard, and how she felt (physically and emotionally) during the assault and after;
- Provide evidence, in the testimony itself, and in addition to any physical evidence you have, that proves every element of the crime(s) charged beyond a reasonable doubt. At the end of the direct, any corroboration is icing on the cake – the jury should be viewing all corroboration as almost expected, because they find themselves believing what the victim had to say;
- Explain the facts fully so that the jury is not left to speculate;
- Make your victim invulnerable to cross-examination.

By this point, you have a developed theme and theory of your case.

How does your victim fit into the plan of proving the elements of the crime? How can you ensure that blame is falling where it should — on the offender, and not on the victim? Your theme should be pointing in the direction of the offender.

*Preparation is key to effective victim testimony.* During an effective direct examination of the victim you are going to have to go into

excruciating detail with her, and she is going to have to trust you to get her safely through what is going to be an ordeal. She must feel prepared, non-defensive and confident in both her ability to field all questions, and in your ability to present her story. Therefore, you cannot be a stranger to her. Developing a good working relationship with the victim is essential for effective presentation of her case. In your pre-trial preparation you must:

- Allow you victim to express herself as she does;
- Allow her to voice her concerns;
- Identify any special skills or problems she has — does she have a somewhat limited vocabulary? Does she think for a long time before she answers? You will have to adjust to, and help the jury adjust to and expect her idiosyncrasies;
- Assess her ability to introduce exhibits;
- Thoroughly vet all the facts;
- Explore apparent "inconsistencies" — is it truly inconsistent, or something else?
- Prepare the victim for expected defense questioning;
- Assure her that you are not afraid of the truth, that knowledge is power, for both of you;
- Show her the courtroom. Tell her where the major players will be sitting when she comes in to testify, where she will go to be sworn in, where you will be, and where her supporters will be in the gallery.

Once the victim can approach the witness stand with confidence and dignity, you are prepared to proceed before the jury to introduce her.

- Ask about school, family, skills and goals.
- Introduce the advent of the defendant into the victim's life — have her explain any relationship, and any changes in the way she feels about him now, vs. before she was attacked.
- Move into a slower, quieter discussion of the events leading up to the assault itself. Begin focusing on every possible sensory and peripheral detail, asking specific questions about what she saw, heard, felt, etc.
- Allow the victim to narrate, and go back over and into details as necessary. As she relates the events of the assault, slow the pace of the questions down even more, and take her and the jury back through important segments, getting more details. Include any words said by either, what the offender looked like, how his voice sounded, how his face, voice or body changed during the assault, how he reacted to her words or actions, what she was thinking at very major point during the assault.
- Have her explain what options she considered, and why she chose the options she did.
- Have her explain any physical sensations
- Have her explain her perceptions of the defendant before, during and after the attack. Remember to include words and phrases that echo your theme, and emphasize the words and phrases she uses that help further the theme, too.
- When consent is an issue, spend time on how she communicated to the defendant through her words and actions that she was not freely and voluntarily engaging in the acts. Use any corroboration available to show her unequivocal "No"
- Discuss her decision to report and her experiences with the police and medical personnel.
- If possible, have her describe the immediate physical and mental

impact of the assault on her, as well as any longer term effects on her life. Include any expressions of humiliation and/or degradation.

- Anticipate areas of cross-examination and defuse them
- End on a strong note

### **Expert Testimony**

In Chapter 3, we discussed the impact of trauma on sexual assault

victims, and how it affects memory and

behavior in ways that are often

misinterpreted by others. Victims of sexual

assault are subjected to intense scrutiny and

often times it is their behavior, rather than

the offenders', that ends up being put "on

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that certain behaviors mean that the victim

*Victims of sexual assault are subjected to intense scrutiny and often times it is their behavior, rather than the offenders', that ends up being put "on trial". The offender counts on the jury believing that certain behaviors mean that the victim is lying.*

is lying. For example, the offender wants the jury to believe that a "real"

sexual assault victim would immediately report the assault to police, or

would scream or cry out for help during the assault. Prosecutors need an

expert to explain that these behaviors are not unexpected and, rather than

being proof that the victim is lying, they are in fact evidence consistent with

the victim's reported history of assault. An expert's testimony can provide

the necessary framework for jurors to accurately interpret a victim's behavior, assess a victim's credibility and to ensure that the victim receives a fair and just trial.

### ***Determining When Expert Testimony Is Needed***

It will be helpful, and perhaps necessary, to call an expert in many sexual assault prosecutions. Do not underestimate

the extent to which inaccurate beliefs about what victims "should" do, or what constitutes "real rape," will affect the jury's understanding of the case.

These beliefs are so deeply ingrained, there is going to be some aspect of the victim's behavior that will need to be explained to the jury. Is it the failure to cry out for help or perceived lack of resistance? Did the victim act in a way that appears to be "cooperative?" As discussed previously, these are behaviors frequently interpreted by jurors as evidence of consent.

Was there a delay in reporting? Did the victim make apparently inconsistent statements? These factors are often used by the defense to impeach the victim's credibility.

***It will be helpful, and perhaps necessary, to call an expert in many sexual assault prosecutions. Do not underestimate the extent to which inaccurate beliefs about what victims "should" do, or what constitutes "real rape," will affect the jury's understanding of the case.***

The prosecutor's first task, then, is to determine which of these issues will need to be addressed and explained through expert testimony in the case. The prosecutors' second task is to identify an appropriate expert and prepare them for trial.

*While education and training are important, those factors are not sufficient. It is the practice wisdom, the knowledge and experience that comes from working with victims over time and integrating education with real life that is most compelling.*

### ***Who Can Be an Expert***

Once it is determined that expert testimony will be necessary the prosecutor needs to find an expert to testify. Potential sources of experts include:

- Sexual assault service providers (counselors or advocates)
- Mental health professionals (psychiatrists, psychologists, social workers, etc.) who specialize in working with sexual assault victims)
- Medical professional (preferably a forensic nurse examiner, or some other professional with substantial experience performing the sexual assault medical forensic exams)
- Police officers

The choice of expert will be driven by the issues that need to be explained, and by the predilections of the judge who will be deciding the

admissibility of the expert's testimony. For example, it shouldn't be necessary in most cases to call a neurobiologist to explain the complex chemical processes that occur during trauma. Instead, a professional with substantial experience working with victims of trauma will be able to explain that gaps in memory, intermittent recall of details of the event, and inconsistent statements, are all common ways in which victims of sexual assault react to the trauma of the assault.

One is qualified as an expert through education, training, specialized, knowledge and experience. *M.R.Evid.702*. The most significant of these will be the expert's experience with victims of sexual assault. While education and training are important, those factors are not sufficient. It is the practice wisdom, the knowledge and experience that comes from working with victims over time and integrating education with real life that is most compelling. This is true in many arenas – if one must have surgery, one typically will choose the doctor who has successfully performed this surgery many, many times, and will pass over the doctor who has only performed the surgery a few times even though that doctor graduated from the best university, top in the class.

If at all possible, the prosecutor should avoid using a treating physician, or a sexual assault counselor or advocate who provided services that are protected by privilege. This helps protect the victim's right of privacy in treatment. When the prosecutor calls the treating professional, it may inadvertently put the victim's mental state at issue in the trial. This could allow the defense an unwarranted opportunity to seek testimony about treatment and diagnosis from that expert. Moreover, calling the treating professional as one's expert can create strong feelings of insecurity and uncertainty in the victim as to what that professional's role is. Victims may worry that what they say to their counselor will not be kept confidential, or they may feel betrayed or disappointed when that professional does not act as an advocate for them at trial. Finally, calling a treating professional gives the defense an opportunity to challenge the expert as biased because of their intimate knowledge of the victim and the circumstances of that victim's case, and can be seen as impermissibly bolstering victim credibility simply by the association of the two people.

### ***Explaining Common Reactions to the Trauma of Sexual Assault***

Experts are called to explain that many of the normal human responses to trauma run counter to the ingrained societal views as to how a

victim of sexual assault should respond. An expert might be called to explain behavior a jury perceives as being inconsistent with one who has been sexually assaulted, such as:

- Delayed reporting
- Victim recantation
- Victim self-blame or minimization
- Memory lapses
- Lack of resistance during sexual assault
- Incomplete or inconsistent recall of the sexual assault
- Lack of physical injuries
- Lack of apparent disruption in daily activities of living
- Inappropriate Affect
- Freeze response
- Compliance during assault
- Continued contact and/or relationship with offender
- Post assault victim behavior

It is important that prosecutors consider that an expert may be helpful not only in explaining victim behavior leading up to and during the assault, but also explaining post-assault behaviors of the victim that are consistent with someone who has experienced a traumatic event. Examples might be

changes in daily life patterns, avoidance of things associated with trauma, diminished interest in day-to-day activities. A woman assaulted at college might stop attending classes, might drop out of school, or might avoid being at the place where the offender is likely to be. This testimony can serve to rebut the defendant's claim of consent.

### ***Direct Exam of the Expert Witness and Cautions***

The questions listed below are not intended to replace the questions typically asked when laying a foundation for the prosecution expert.<sup>53</sup>

- **Laying Foundation**

#### Occupation

- What is your occupation?
- How long have you been employed in that capacity?
- Describe the responsibilities of your position.
- How long has the program/agency been in existence?
- What services does your program/agency offer?
- Do you supervise?
- Do you train staff?
- What is the total number of staff?

#### Rape Crisis Center/Shelter

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<sup>53</sup> These questions were published in the Wisconsin Sexual Assault Reference Book and were adapted with permission from the American Prosecutors Research Institute of the National District Attorneys Association by the Prosecuting Attorneys Association of Michigan.

- How many contacts do you receive yearly from victims identifying themselves as having experienced sexual abuse or violence?
- How many crisis calls do you receive yearly?
- How many residents in your shelter at one time?
- How many residents yearly? Adults? Children?
- How long can residents stay?
- Does your program offer any other services?

### Counseling/Support Services

- Are your services solely for victims of sexual assault?
- Are your services solely for women?
- How many persons are served by this program yearly?
- Do you provide counseling/support services to victims of sexual violence?
- Do you have direct contact with victims of sexual assault
- How many victims do you directly come in contact with yearly?
- What is the approximate period of time you have contact with an individual victim?
- What is the nature of your contact with victims?
- Do you or your program conduct interviews with victims?
- What is the purpose of the interviews?
- Are interviews conducted with both crisis calls and clients?
- What kind of information do you maintain? Type of assault? Age of victim and assailant? Length of relationship?

### Previous occupation (if relevant)

- What was your previous occupation?
- How long did you perform those duties?
- What were your responsibilities?
- Did you have direct contact with victims of sexual violence?
- What was the nature of that contact?
- Have you had any other relevant job experience with victims of sexual violence?

### Education

- What is the highest degree you have obtained?
- What was your area of concentration?
- Did you conduct any fieldwork related to sexual violence?
- Have you conducted research in this area?
- Were the results of your study developed into a paper? Were they published?

Professional affiliations (if relevant)

- Do you belong to any professional organizations or associations?  
Any related to sexual violence?
- What is the nature and purpose of those organizations?
- Do you belong to any county, state, or national organizations which specifically address sexual violence issues?
- What is the purpose of those organizations?
- Are you involved with any committee work of these organizations? What is that nature of that committee work?

Training

- When you began your work at your program, did you receive any training in the issues of sexual? Please describe that training
- Have you received any additional training in sexual issues? Please describe that training
- Have you conducted any trainings yourself?
- What were the topics of the trainings?
- For whom did you conduct the trainings?
- For what purpose were the trainings designed?
- How many attended the trainings?
- How often do you conduct such trainings?

Conferences

- Have you attended state or national sexual violence conferences?
- Who sponsored the conference?
- What was the purpose of the conference?
- When and where was the conference?
- Did you attend any workshops relevant to sexual violence issues?
- Have you conducted any workshops or presentations at these conferences?

### Previous Expert Testimony

- Have you testified previously in court?
- Was it a criminal or civil case?
- How many times?
- For the defense or the prosecution?

After laying this foundation, it is important that you proffer your expert as qualified in as broad an area of expertise as needed. It is too narrow to suggest, for example, that the expert is qualified in the area of delayed reporting, for example. Rather, the expert should be recognized as qualified to testify regarding the effect of sexual assault on victims, and the common victim response to trauma in sexual assault cases. Once the expert is qualified, questions to him or her should immediately begin educating the jury. The questions should focus on telling the jury what they do not know. The following introductory questions can be used to educate the court and jury about sexual violence, as well as to explain victim behavior and dispel rape myths.

- Testimony About Myths Surrounding Sexual Violence
  - Do you give presentations to civic groups, schools, and other public forums on issues associated with sexual assault or have other opportunities to talk with members of the public about those issues?

- Have you found the public to be well informed about sexual assault- how it happens, and how victims react? *This addresses common misperceptions and this is where you can hone the facts in the case that are at issue.*
- Does the public have misconceptions about sexual assault? (Typical answer: Yes. They expect them to report immediately, etc. . . . They believe that there is a set of behaviors and responses that a “real victim” should exhibit.)
- From your experience, how do most people develop these misconceptions?
- Are you familiar with any articles or books (or have you attended any trainings) discussing the myths versus the realities of sexual violence?
- Based on your experience, do all victims behave the same way?
- Testimony About Victim Behaviors
  - Based upon your experience, training, education, and work with victims of sexual assault, what are some common victim behaviors/reactions to assault?
  - Do all victims behave the same way?
  - Through your numerous experiences with sexual assault victims, have you gathered insight into the reasons why a victim may behave a certain way?
  - Based upon your experience, please explain the reasons.

- In your experience, do victims of sexual assault generally report that they have been sexually assaulted right away?
- Do some never report or report only years later? Why is that?
- Do all sexual assault victims characterize what happened to them as a crime or violation?
- Have you personally observed victims having difficulty relating the actual facts of the violence? Why is this so?
- Do some sexual assault victims minimize their experience of a sexual assault or the impact she has endured?
- Based on your knowledge and experience, is it possible that someone could be sexually assaulted and not acknowledge that it was a crime?
- Why does that happen?
- Based on your knowledge, training and experience, what is the impact of a traumatic event like sexual assault?
- Is it unusual for victims of sexual assault to disclose in layers?
- For example, have you ever had a sexual assault victim who when initially asked by police about what happened, gives a very brief account, and then later more details come out? The answer will be something like: Yes, they may not have been able to provide all the details for many reasons. They may not have been able to recall the details because of the traumatic impact on memory recall. They may have made a conscious decision not to give all the details because of lack

of trust and rapport with the officer. Victims respond according to recall and trust.

- In your experience, do victims sometimes deny the level of violence as the incident passes in time?
- Have you ever had a victim tell you they used some sort of illegal substance, like marijuana, but did not tell the police that information?
- Does a victim of trauma recall the event exactly or precisely in the order in which it occurred?
- When you talk to victims of sexual assault, do you expect them to be able to give you a linear, chronological and complete narrative of the incident? Why?
- From your experience, is it common for a victim of sexual violence to completely deny the incident? Why?
- From your experiences with sexual assault victims is it common for victims to be reluctant to testify by the time the trial occurs? Why?
- From your experience, do victims sometimes deny the incident of violence as time passes? Why?
- How does that relate to the dynamics of sexual violence?
- Is it common for the victim to protect the offender? Why?
- Does every victim react to the trauma of sexual assault in the same way?

- Is it uncommon for a victim to show little emotion, or even exhibit seemingly inappropriate emotions, when asked to recount the trauma of sexual assault?
  - Do some victims even react angrily?
  - What are some of the reasons you have discovered for this behavior?
  - Based upon your experience, are you aware of victims who have maintained contact with the individual who allegedly assaulted them?
  - What are some of the reasons for this behavior?
  - Have you interviewed the victim in this case?
  - Have you interviewed any witness connected with this case?
  - Are you familiar with the facts of the case?
  - Is your testimony today based on your experience, training, education, and work with victims of sexual assault?
- Cautions about “Rape Trauma Syndrome” and “Post Traumatic Stress Disorder”

Using the term Rape Trauma Syndrome (RTS) in a criminal case is inappropriate, not only because it misleads the jury into believing that the victim suffers from a mental or emotional disorder – a “syndrome,” but because it unnecessarily and wrongly pathologizes the victims of crime.

Calling something a "syndrome" also assumes that it has a beginning, middle and end, which is not the case with traumatic response. Rape Trauma Syndrome (RTS) was first coined by Ann Burgess and others as a way of describing a constellation of symptoms that they observed among survivors of sexual assault in their clinical practices. The use of the term RTS began as a clinical tool; however, it has never become a diagnosis on the Diagnostic and Statistical Manual of Mental disorders (DSM), and was never intended to be a diagnosis of any disorder or syndrome.

PTSD is in fact a recognized disorder in the DSM. However, not all victims of sexual assault will be diagnosed with PTSD, and whether they are is not relevant. It is the behavior of sexual assault victims in general that needs to be explained to the jury in order to assist them in understanding the issues in the case before them, not whether those behaviors are part of any recognized diagnosis. It is better practice to talk in terms of common reactions to the trauma of sexual assault. That has the added benefit of often being based in large part on the expert's experience working with sexual assault victims. This approach also allows the expert to recognize that each victim is unique, their manner of reacting to the trauma of sexual assault is

unique, and if that behavior seems non-intuitive to the jury it can be explained by an expert with appropriate experience.

The National District Attorneys Association has endorsed the use of “blind” expert testimony to assist the jury in fairly assessing a victim’s behavior:

Prosecutors must explain victim behavior to provide jurors with an accurate context in which to evaluate victim behavior so that jurors do not misjudge certain conduct as evidence of a victim’s dishonesty and incredibility. Many courts have recognized that expert testimony is necessary to prevent jurors from misjudging the victim based upon their misperceptions of victims. For example, in *U.S. v. Rynning*, a case involving child sexual abuse, the United States Court of Appeals for the Armed Forces noted: “the victim’s behavior will not necessarily undermine his or her credibility if an expert can explain that such patterns of counterintuitive behavior often occur in sexual abuse cases.” Prosecutors therefore, should consult an expert – social worker, therapist, counselor, psychologist or physician, among others – to explain victim behavior to the jury. If the prosecutor does not address and attempt to explain victim’s behavior, either through expert testimony or the victim herself, the jury will be left without the proper context in which to evaluate her credibility.<sup>54</sup>

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<sup>54</sup> Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions, p.9, National District Attorneys Association/American Prosecutors Research Institute (2007).

The Montana Supreme Court has recognized that victims of sexual abuse respond with seemingly “puzzling and contradictory behavior.” *State v. Robins*, 2013 MT 71, ¶ 16, 369 Mont. 291, 297 P.3d 1213. An expert’s testimony in this regard was challenged in *Robins*, a case involving the sexual assault of a child.

The Montana Supreme Court stated of Dr. Dutton, the State’s expert:

Dutton’s testimony qualifies under M. R. Evid. 702 as educational testimony on a topic outside of most jurors’ common experience. Dutton’s testimony was intended to help the jury comprehend some of C.G.’s behavior that might have otherwise seemed inconsistent with abuse. For example, Dutton explained that it was not unusual for sexual abuse victims to not report the abuse, especially when the victim has a close relationship with the offender, or for the victim to act inappropriately when discussing the abuse. Dutton also may have helped the jury see Robins’s actions as a pattern of abuse. Dutton’s testimony did not impinge upon the jury’s obligation to ultimately decide C.G.’s credibility; **it merely allowed the jurors to make an informed decision.**

*Id.* ¶ 17 (emphasis added).

The Montana Supreme Court has also held that expert testimony of this kind is admissible in cases involving adult victims of sexual assault and domestic violence.

In *State v. Brodniak*, expert testimony on rape trauma syndrome in a case involving an adult victim was found to be generally admissible, although the expert could not testify as to the victim’s credibility. *State v. Brodniak*, 221 Mont. 212, 222; 718 P.2d 322, 329 (1986). In *State v. Liddell*,

the Court found that “psychiatric testimony is admissible to aid a jury in determining whether there was consent to engage in a sexual act which all parties agree occurred. It remains up to the jury to determine whether the evidence is credible.” *State v. Liddell*, 211 Mont. 180, 188; 685 P.2d 918, 923 (1984).

In *State v. Ankeny*, a social worker testified in a domestic violence case that it was not unusual for victims of domestic violence to recant. The Court noted that the social worker “did not offer any opinion or testimony relating to the fact or parties involved in this case. Instead, the purpose of his testimony was to educate the jury as to why victims of domestic violence often recant.” *State v. Ankeny*, 358 Mont. 32; 243 P.3d 391, ¶42 (2010). The defendant in that case made a claim similar to the one being made in the case at bar - that the testimony went to credibility and therefore invaded the province of the jury. *Id.* at ¶41, 42, The Court noted the precedent that [t]he test for admissibility of expert testimony is whether the matter is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at ¶43. The Court in *Ankeny* also looked to their holding in *State v. Stringer*, in which expert testimony was allowed because

the evidence was not offered to bolster [the wife's] testimony, but to provide the jury with an explanation for the inconsistencies in her testimony. Furthermore, the expert did not comment as to which of [the wife's] statements were more credible or offer an opinion on whether [the wife] is a battered spouse. Rather, she merely provided the jury with information to aid the jury in evaluating the evidence. This type of limited testimony does not invade the jury's role in determining the credibility of witnesses. *Ankeny at ¶44.*

Prosecutors need to be prepared for the challenges experts in this arena typically face, and need to make sure that the expert is prepared too. It is imperative that the prosecutor meet with expert ahead of time, find out how he or she would address any challenges, be prepared to rehabilitate the expert after cross examination if necessary.

### **Defense Experts**

Although Mont. R. Evid. 703 permits experts to rely on inadmissible evidence in forming their opinions, the Montana Supreme Court has made it clear that Rule 703 “does not give a witness permission to repeat inadmissible out-of-court statements to bolster his or her expert opinions before a jury.” *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, ¶ 34, 314 Mont. 303, 65 P.3d 570. A district court should carefully evaluate the proposed statements and determine pursuant to Mont. R. Evid. 401 through 403 whether the statements are relevant, and if so whether the probative value of

the evidence is substantially outweighed by the danger of unfair prejudice. *See State v. Van Dyken*, 242 Mont. 415, 428, 791 P.2d 1350, 1358 (1990).

In *Van Dyken*, the Defendant similarly tried to avoid cross-examination of his statement by offering it through his expert witness. *Van Dyken*, 242 Mont. 415 at 429, 791 P.2d at 1358-59 (1990). The district court prohibited the expert from testifying to the Defendant's out of court statements regarding the events surrounding his charges because they were inherently unreliable. The district court explained that permitting an expert to "repeat defendant's version [of the events at issue] would be to throw out the other rules of evidence and to ignore the time-honored reasons for excluding hearsay and unreliable evidence." *Van Dyken*, 242 Mont. at 429, 791 P.2d at 1359. The Montana Supreme Court agreed, holding that the district court properly exercised its discretion prohibiting this end run on the rules of evidence. *See Id.* at 430.

### **Cross-Examination of the Defendant**

The purpose of cross-examination of the defendant in a sexual assault case is typically governed by the same basic principles for cross examining any witness at trial. Remember the defendant has a lot at stake and will most likely attempt to portray an account of a forcible sexual assault as

consensual in nature, or that in some way the victim is accountable for what occurred. This is true if the defendant has not given a previous statement to law enforcement, but is equally true if the defendant provided a statement to law enforcement that may initially appear to be inculpatory. Prepare for the fact that the defendant's testimony may be substantially different than the initial encounter with law enforcement, and inconsistent with the victim's account of the assault.

Preparation for cross-examination of the defendant needs to occur at the earliest stages of the investigation and prosecution. The prosecutor needs to be well prepared on the rules of evidence and the techniques used to impeach in order to conduct a cross-examination of the defendant with as little interruption from the court and opposing counsel as possible.

The main goals of cross-examination are to:

- Provide favorable information for your case;
- Discredit unfavorable information to your case;
- Discredit the defendant as a witness;
- Discredit other defense witnesses;
- If necessary, establish the foundation for the later introduction of other evidence.

It is extremely likely that the testimony of the defendant will have been well prepared, and in addition, the defendant has had the opportunity to hear all of the testimony in the case and will be prepared to exploit any weaknesses in the State's case. This is not the time to get into an argument with the defendant as to how the assault occurred. Evaluate the direct testimony of the defendant using these criteria: Did what the defendant said hurt the State's case? Can the damage done by the defendant's direct testimony be fixed by cross-examination? Can I establish favorable facts with this witness?

Often, the best approach on cross-examination is to establish favorable facts already testified to by the victim. For example, in an alcohol-facilitated sexual assault cross-examination should be designed to elicit concessions to signs of intoxication testified to by the victim or other witnesses who observed the victim's behavior before and after the assault.

The cross-examination should be organized by topic and needs to be thoroughly prepared before the defendant testifies and written in the form of leading questions. It should also be conducted in a different organizational format from the defendant's direct testimony. For example, in alcohol facilitated-sexual assaults, the topics could be what

corroborating witnesses were present, physical layout of where the assault took place, and the degree of intoxication of the victim. The main focus of the defendant's cross-examination should be preparing for the jury to hear your closing argument, establishing in advance which facts and exhibits support the conclusion you want the jury to reach. Questions should be designed and executed in such a way as to lead the jury to reach a conclusion. You do not want to ask the defendant to agree to the conclusion you want the jury to reach because it is unlikely that the defendant will concede it. You will also have to be prepared for executing alternative cross-examination questions as you force the defendant to choose one path over another, or to add questions depending on how the defendant and/or other witnesses testified at trial. It is also important to consider that shorter cross-examinations usually have more impact. Don't cross-examine on everything you can. Pick out the important points that will stick out in the jurors' minds.

### ***Maintaining Control over the Defendant***

Because the defendant will have been well prepared to withstand cross-examination, control over the defendant and the examination is critical to its success. Control is maintained by preparation in advance,

careful planning of the words of the question posed to the defendant, and the manner in which the question is posed by the prosecutor.

If the defendant is reluctant to answer the question as posed it is essential that the prosecutor maintain control over the defendant. The primary way to maintain control over the defendant during cross-examination is by asking questions that: (a) are short, one fact questions that are based on facts; (b) are not conclusions or opinions; (c) do not require the defendant to make an evaluation in answering the question; and (d) do not contain words that are subject to disagreement.

The prosecutor should also maintain control over the defendant in the manner the prosecutor allows the defendant to answer the question. If the defendant expresses reluctance in answering the question posed, it can demonstrate to the jury that the defendant is untruthful. If there is an escalation of hostility between the prosecutor and the defendant during cross-examination it is vital that the jury becomes upset with the defendant and not the prosecutor.

If you are having difficulty with the defendant during cross-examination there are a number of quick assessments you can use to see if

the problem that is developing can be fixed by making sure the questions are properly framed:

- Your question is not leading;
- Your question is too complex/multiple;
- You are arguing with the witness;
- You mischaracterize the witness's previous answer;
- Your questions wander and do not progress to a conclusion.

### ***Impeachment of the Defendant***

A key component of cross-examination is impeachment of the defendant. The decision on whether to impeach a defendant on cross-examination can be the difference between a successful cross-examination and a failure that results in the defendant becoming credible in the minds of the jury. However, impeachment should not be conducted simply for its own sake.

Impeachment should be done only on an issue that is significant to the case, when what the defendant is asserting is truly implausible. If there is a significant amount of impeachment on several minor issues such that the number impacts the defendant's overall credibility, a longer cross-examination may be warranted.

Keep in mind that the defendant will have an opportunity to address the impeachment on redirect examination through his attorney. Familiarity with the evidentiary rules for the basis of impeachment is also essential. Execution of the impeachment needs to be flawless in order to be successful.

Ethical rules require that prosecutors be fair to the opposing party and counsel, and only ask questions that anticipate an answer for which there is good faith basis to believe will be admissible at trial.

### **Evidence of Defendant's "Good Character"**

Limiting the number of character witnesses a defendant may call in support of his character is a proper exercise of the Court's discretion. *Loux v. United States*, 389 F.2d 911, 917 (9th Cir. 1968). In *Goggans v. Winkley*, 159 Mont. 85, 495 P.2d 594 (1972), despite the defendant's objections that the defendant would be unduly and unfairly prejudiced if the court limited the number of character witnesses he could call from five to three, the court restricted the number of character witnesses the defendant was able to call to three finding that such a number was sufficient. *Id.*, 159 Mont. at 93.

Montana Rule of Evidence 404(a), generally excludes evidence of a person's character for proving action in conformity therewith. The rule allows an exception for a defendant to present evidence of a "pertinent trait of character" to support an inference that he did not commit the offense. Rule 405 established the manner in which that testimony may be presented: by testimony as to reputation or testimony in the form of an opinion. Therefore, testimony that the Defendant is a generally good guy, for example, is irrelevant under Rule 403 to a pertinent character trait, has no nexus to sexual assault, and does not constitute reputation or opinion testimony under Rule 405. The Montana Supreme Court has held that it is improper to allow the Defendant to question character witnesses on the ultimate issue of the Defendant's guilt. *State v. Smith*, 1998 MT 257, 291 Mont. 236, 967 P.2d 424. Specifically, the opinion testimony in *Smith* that was held to be properly prohibited was that, due to his good character, he was not capable of committing the offense. *Id.*

In *Smith*, the Court also noted its caution against allowing an expert to give an opinion which, "instead of being an opinion embracing an ultimate issue of fact, amounts to an opinion of guilt or innocence embracing all issues." *Smith*, 291 Mont. at, 240, 967 P.2d at 427 (citations omitted). The Court notes that caution "applies even more to opinions of non-expert

witnesses that, ordinarily, more prejudice than benefit is likely to be gained from such opinion testimony.” *Id.*, 291 Mont. at 241. The Court cited Montana Rule of Evidence 701, stating that it has “held that lay witnesses may offer their opinions as long as those opinions are based on the witnesses’ own observations.” *Id.* (citing *State v. Henricks*, 201 Mont. 157, 164, 653 P.2d 479, 482(1982)).

As noted above, Rule 404(a) requires character evidence to be pertinent to the charge. Many states differ on whether or not truthfulness or veracity is a pertinent character trait in a sexual assault, but the only Montana case on point holds that it is. *State v. Anderson*, 211 Mont. 272, 686 P.2d 193 (1984). It is clear that any other character traits must be pertinent to some aspect of sexual assault. In *State v. Harper*, 670 P.2d 296 (Wn. App. 1983) *review denied* 100 Wash. 2d 1035 (1984), the Court held that a defendant’s character trait for truthfulness was *not* a pertinent trait to the charge of indecent liberties under Rule 404(a)(1) and, more importantly, stated that the only pertinent traits were sexual morality and decency.

In most cases, the only pertinent character traits in a good character defense are veracity and traits that fall into the realm of “sexual morality and decency.” Specific instances of good conduct are irrelevant in a Sexual

Intercourse without Consent case. General opinions of the Defendant's moral character or standing in the community are likewise irrelevant on the issue of whether or not he would commit the charged offense.

### **Countering Common Defenses to Sexual Assault**

There are a variety of defenses commonly seen in sexual assault cases. At the crux of many of these defenses is the implication that the victim is lying about being sexually assaulted. This is tied to the myth that there are a high number of false reports of sexual assault. The defense may use a variety of explanations to argue why the victim is lying about being assaulted, however, they are mostly variations on a single theme — that the victim's claim of sexual assault is false. These defenses place the focus squarely on the victim, and when combined with other rape myths that blame the victim for her vulnerability (i.e. drinking alcohol/using drugs, a history of mental illness, lack of fighting back, consented to certain activities, etc.) they serve to diminish the credibility of the victim.

### ***"He Said/She Said" Cases***

One common refrain from defense attorneys is that sexual assault cases are simply classified as "he said/she said" cases. The implication of

this defense is that the "only" evidence of the assault is the victim's own statement, which has been contradicted by the defendant. Some of this is a result of the nature of the crime itself; there are rarely witnesses to the sexual assault because offenders tend to not assault their victims in front of others. This enhances the importance of the victim's story, and again allows the defense to focus on the victim's behavior, and in particular those actions that depart from how we expect a "real" victim to behave.

The "he said/she said" problem occurs most often in cases in which: (a) the victim knows the offender; (b) there is a lack of physical evidence; or (c) the physical evidence does not prove the elements of the crime. The defense will often argue that the lack of physical evidence, particularly in regard to injury, bruising, or tearing, equals reasonable doubt. This plays into the common belief that a "real" sexual assault victim is one who sustains serious physical injuries. The reality is, however, that most victims do not experience physical injuries, apart from the sexual assault itself. Even in cases in which there is physical evidence of sexual activity, (semen for example) that evidence is no different than what would be left behind by consensual sexual activity.

In these types of cases, lack of consent is the crucial element the prosecutor must prove. Unfortunately, the legal definition of consent puts the focus squarely on the victim, and this plays into the defense's attempts to portray the case as "he said/she said." Despite these challenges, there are some ways in which a prosecutor can overcome the "he said/she said" problem:

- Look for ways to corroborate the victim's story. Taking a broad view of corroboration can be helpful. Although it may not be possible to corroborate the assault itself, what other facts else can the investigation corroborate about the victims story? Can the timeline of the events leading up to and after the assault be corroborated? What about the demeanor of the victim? These are just a few examples of ways in which the victim's story can be corroborated. The more corroboration, the less the case is a "he said/she said" case.
- It is also possible that the defendant will corroborate much of the victim's story as well. Particularly in cases in which consent is the defense, the defendant may corroborate many of the facts leading up to and after the assault. If the defendant admits to many of the facts but for the one that would convict him — consent — it opens the defendant up to attack on cross examination.
- Consider calling an expert witness to address the confusing myths and misinformation constructed by defense attorneys. Expert testimony can help dispel some of the rape myths so that the jury avoids making a decision based on those myths or misconceptions.

### ***Overcoming the False Report Myth***

One of the most common rape myths about sexual assault is that there is a high incidence of false reports. One of the most frequently cited studies on the false reporting of sexual assaults, the Kanin study, asserted that the 41% of sexual assault reports made to a Midwestern police agency were deemed to be false over a nine year period. This study has subsequently come under attack, and as noted in Chapter 2, more methodologically rigorous research indicates that the percentage of false reports is actually somewhere between 2-8%. In other words, the incidence of false reports for sexual assault cases is no higher than for any other crime.

The key point is that when the facts of a sexual assault are inconsistent with the expectations about what a "real" sexual assault looks like, there is a tendency in our society to view these cases with heightened suspicion. The defense will exploit these myths and argue to the jury that because the facts of the particular case do not meet our societal expectation of what a "real" sexual assault should look like; it must be that the victim is lying about the assault.

The traumatic nature of a sexual assault has a direct impact on how a victim discloses the incident. Additionally, the rape myths that exist in our society may cause a victim to experience high levels of guilt and shame because the assault did not conform to the societal expectations of what a "real" rape looks like (i.e. non-stranger offender, no injuries/weapon used, victim did not resist).

This self-blame may cause the victim to change the details of the assault to make it sound more like the stereotype. While this can present serious problems for the prosecution in terms of victim credibility, one of the key strategies to overcome this challenge is to view the omissions, inconsistencies, and perhaps even untrue statements as understandable. In no way should these "problems" be confused with a false report. Layered reporting is also common, and can lead to opportunities for defense attorneys to exploit what they believe are inconsistent statements. An investigator or prosecutor who anticipates these perceived credibility challenges can

*Self-blame may cause the victim to change the details of the assault to make it sound more like the stereotype. While this can present serious problems for the prosecution in terms of victim credibility, one of the key strategies to overcome this challenge is to view the omissions, inconsistencies, and perhaps even untrue statements as understandable.*

then ask the victim in a non-judgmental manner for clarification of the relevant details. Other strategies that can be used to overcome the false report defense:

- Prosecutors can avoid inconsistent statements made by the victim by utilizing the professional expertise of a Sexual Assault Response Team (SART) during the investigation. A SART is a multidisciplinary response team (comprised of advocates, law enforcement, sexual assault nurse examiners and prosecution) that provides direct intervention to sexual assault victims as they interact with the criminal justice system and coordinates effective investigative and prosecutorial efforts in connection with a report of sexual assault." Participation in a SART may reduce the number of unnecessary professional contacts a victim has during the investigation and therefore, reduce the likelihood of inconsistent statements
- Vertical prosecution is another strategy that will reduce inconsistent statements. With vertical prosecution, victims are able to work with the same prosecutor and investigator from the time potential charges are first reviewed through the sentencing of the offender. Vertical prosecution reduces the number of persons the victim has to share her story with, thereby reducing the likelihood of inconsistent statements. Vertical prosecution has also been shown to improve conviction rates, reduce victim trauma, and provide more consistent, appropriate sentencing. It is therefore considered best practice.
- Prosecutors can also overcome the false report myth by corroborating as many details of the victims account of the incident. Corroboration will highlight the accuracy of the victim's story and thus bolster her/his credibility.

- Finally, the prosecutor could consider using an expert witness to educate juries on rape myths as well as specific information about trauma and its impact on memory and disclosure.

### ***Lack of Physical Injury***

Society expects that a victim will physically resist a sexual assault implies that jurors and judges expect to see injuries in a true sexual assault. Professionals who are educated about victim responses know that physical injuries are rare and that 70% of the time there are no injuries and 24% of the time there are minor injuries. *Only 4% of victims of sexual assault have serious physical injuries.* Many cases involve minor physical injuries or physical findings consistent with, but not specific for, sexual assault.

It is also important to stress that sexual assault is a profound injury by itself. Psychological injury experienced by sexual victims is often overlooked or devalued. It is imperative for judges to know the destructive quality and the extended length of this psychological injury so that offenders can receive appropriate sentences. Witnesses close to the victim who can describe a before/after view of the victim can be critical in helping corroborate the victim's statement and making the impact of the assault clear to the judge at sentencing.

### ***The Consent Defense***

Perhaps the most common defense, particularly in non-stranger assault cases, is the consent defense. This is also known as the "rape is not regret" defense, or in other words, the victim engaged in, but now regrets, the consensual sexual activity with the defendant. This defense may be particularly common in cases in which the victim knows her offender. In this strategy, the defense claims that in an effort to avoid being caught cheating on an intimate partner, or taking responsibility for engaging in sexual activity outside the relationship, the victim instead claims that she was sexually assaulted.

What make these cases so difficult are the various rape myths that lead jurors to believe that these cases do not look like "real" sexual assault. Given that the consent defense is most common in cases in which the victim knows that defendant, we are already dealing with the myth that the defendant does not conform to the cultural belief what an offender looks like. Furthermore, even if there is DNA evidence, it is not helpful in proving an assault occurred.

Defense attorneys will likely portray these cases as "he said/she said" cases, as described previously. Additionally, the defense will focus on the victim's behavior, particularly behaviors that contradict the rape

myths that are pervasive in our culture — i.e. delayed reporting, lack of injury, no weapon involved in the assault — and they will use these myths to attack the victim's credibility.

*Consent defense cases require more time and resources to prosecute successfully. They will require identifying the rape myths implicated by the facts of the case, and then figuring out how to go about refuting them. They will require educating the jury, beginning in voir dire, so that they do not view these cases through a lens of ignorance brought about by the cultural stereotypes surrounding sexual assault. Victims will require a significant amount of preparation, particularly in terms of responding to questions around rape myths. The prosecutor will need to be very familiar with the investigation, and may need to ask for follow-up investigation to corroborate as many facts as possible. Without corroborative details, the jury is more likely to buy the defense's "he said/she said" argument.*

Unfortunately, the statutory definition of consent invites this focus on the victim's behavior. This, combined with the defense's focus on the victim's behavior, presents a challenge for the prosecution.

#### Overcoming the Consent Defense

There are several strategies that prosecutors can use to overcome the consent defense.

Consent defense cases require more time and resources to prosecute

successfully. They will require identifying the rape myths implicated by the facts of the case, and then figuring out how to go about refuting them. They will require educating the jury, beginning in voir dire, so that they do not view these cases through a lens of ignorance brought about by the cultural stereotypes surrounding sexual assault. Victims will require a significant amount of preparation, particularly in terms of responding to questions around rape myths, such as why the victim didn't report right away. The prosecutor will need to be very familiar with the investigation, and may need to ask for follow-up investigation to corroborate as many facts as possible. Without corroborative details, the jury is more likely to buy the defense's "he said/she said" argument.

### *Connect the Victim to Advocates*

Victims of sexual assault have internalized many of the rape myths that exist in our society. As a result, sexual assault victims may experience self-blame, guilt, and shame after the assault. Victims of sexual assault also fear the loss of privacy that often accompanies an individual's experience with the criminal justice system. Finally, victims will have to deal with the consequences of the assault long after the criminal justice process has run its course.

As a result, it is vitally important that the victim be linked with supportive services during the criminal justice process. A victim advocate is protected by privilege in Montana, which may help address some of the victim's privacy concerns.

### *Use Pre-Trial Strategies*

To challenge the consent defense, prosecutors can also protect the victim's privacy through pretrial motions and prepare the victim for testimony — both direct testimony and cross examination. This includes prepping the victim for rape myth questions as well as addressing any inconsistencies that exist in the case.

### *Practice Offender-Focused Prosecution*

One of the main ways a prosecutor can overcome the consent defense — and the inevitable defense focus on the victim — is to develop an offender-focused prosecution. One of the best ways to do this is to develop an offender-focused theme to the case. The theme of the case is a one-sentence statement which represents the thrust of your evidence. It is the prosecutor's read on the human dynamics in the case, or on why the defendant is guilty.

Although the theme will often depend on the facts of the particular case, there are some key traits of sex offenders that may be useful in developing an offender-focused theme. For example sex offenders target their victims based on vulnerability. This vulnerability often presents a challenge for the prosecutor in the form of credibility issues. However, an offender-focused prosecution will take some of the weaknesses/bad facts in the case — which are often about the victim — and demonstrate that these are precisely the reasons that the offender targeted the victim for the assault. As a result, the prosecutor embraces some of the weaknesses/bad facts and turns them into good facts and a strong case. Examples of strategies prosecutors can use to keep the focus on the defendant include:

- *Defendant is a predator* -- This keeps the focus squarely on the defendant, and portrays the victim as a true victim, rather than one who contributed to the defendant's acts. However, be aware that using the term “predator” could, in some courts, be seen as objectionable. In some courts, it may be safer to argue the defendant abused his power or betrayed the victim’s trust to get the point that he is a predator across to the jury without drawing an objection or risking a mistrial.
- *Defendant is a manipulator* -- This presents the defendant as a person who knew full well what he was doing every step of the way. All of his actions were directed toward the same goal — sexual assault.
- *Defendant is an opportunist* -- While sexual assaults are premeditated crimes, there may be cases in which the facts or the nature of the defendant don't lend themselves to portraying the

defendant as a predator or manipulator. This may be particularly true in cases in which the defendant is likely to appear to the jury as sympathetic. In these situations, the prosecutor can portray the defendant as someone who exploited a situation and assaulted the victim. This allows the jury to convict the defendant even if they don't believe the assault was "planned."

*Corroboration is probably the prosecutor's best friend in a consent defense case.*

### *Corroboration*

Corroboration is probably the prosecutor's best friend in a consent defense case. As part of the analysis of the case, the prosecutor should develop a time line that includes everything leading up to the assault, including what the victim and offender did after the assault. The prosecutor should then corroborate as many facts as possible to bolster the victim's credibility. This includes what is often called *micro corroboration*, which includes even the smallest details of her report. Even these small details can help build the credibility of the victim. During this process, the prosecutor may determine that there needs to be additional investigation. While some of this may occur before filing the complaint, corroboration should not stop once the complaint is filed. Although certain avenues of investigation may be cut off once the complaint is filed, such as interviewing the suspect, the prosecutor should not cease trying to corroborate as many facts as possible leading up to trial.

## Potential Areas of Corroboration

- *Victim's Post-Assault Behavior* — What did the victim do after the assault? Who did she talk to? What was her demeanor? This type of evidence can help establish that something traumatic happened. Did the victim develop problems in school, work, or in her relationships? Any of this evidence may help corroborate that the victim was sexually assaulted, because the victim could not fake these after-effects.
- *SANE Exam* — Although injuries in sexual assault cases are uncommon, any injury discovered by a SANE exam should be used, no matter how small. Additionally, a victim who had a SANE exam may help counter the implication that she is lying. A SANE exam is an extremely lengthy and intrusive procedure, and the prosecutor may be able to elicit these facts in a way that refutes the implication that someone would put themselves through such an exam without a valid reason.
- *Expert Witnesses* — An expert witness can corroborate the victim's behavior by comparing it to other known victims of sexual assault. This evidence is often termed "counterintuitive victim behavior" evidence, and it helps disabuse the jury of common misconceptions about sexual assault victims. This type of expert testimony is admissible in Wisconsin.<sup>1</sup> Advocates who work with sexual assault victims can be valuable resources for expert testimony.
- *Details* — Details provide concrete evidence as to the facts of a sexual assault. Prosecutors should strive to provide and corroborate as many details as possible, including: (a) photos of the crime scene and photos of any injuries; (b) statements from any witnesses before or after the assault; and (c) any other detail, no matter how small! Above all, be creative and think big picture.

## *Other Potential Defenses*

Although the list below is not exhaustive, it does represent some of the more common defenses a prosecutor may encounter in sexual assault cases:

- The victim is trying to cover up for her bad behavior
- The victim is looking for revenge
- The victim is a "gold digger."
- The victim is looking for attention
- The victim is exchanging sex for drugs

*If the prosecutor is able to demonstrate that it is precisely because the victim was vulnerable that she/he was targeted for victimization, some of these more victim-focused defenses will lose some of their impact.*

These defenses represent further attempts to shift the focus to the victim's behavior. A prosecutor who has engaged in the good fact/bad fact analysis as described above may identify some of these potential defenses early on in the case. After performing an evidentiary analysis of these potential defenses, there may be pre-trial motions the prosecutor can file to limit these potential defenses.

Additionally, an offender-focused prosecution can also help ensure that the focus is not squarely on the victim. As discussed above, offenders target their victims based on vulnerability. While this vulnerability often presents challenges for the prosecution in terms of credibility, if the prosecutor is able to demonstrate that it is precisely because the victim was vulnerable that she/he was targeted for

*Sex offenders are motivated by a desire to exert power and domination over their victims. While there is a sexual component to their behavior, sex offenders are aroused by sexually deviant stimuli in which they take advantage of the victim's vulnerability.*

victimization, some of these more victim-focused defenses will lose some of their impact.

The defendant is impotent/did not ejaculate.

This defense falls under the rape myth that sexual assault means penis/vagina penetration. Obviously, our

statutory definitions of sexual intercourse and sexual contact broaden the definition of sexual assault to include acts other than penis/vagina penetration (i.e. oral intercourse, digital penetration, etc.). Keeping the focus on the statutory definition of sexual assault, which includes other non-consensual sexual acts helps to limit the impact of this defense.

Additionally, sex offenders are motivated by a desire to exert power and domination over their victims. While there is a sexual component to their behavior, sex offenders are aroused by sexually deviant stimuli in which they take advantage of the victim's vulnerability. Thus the fact that the defendant is impotent does not negate his ability to be aroused by sexually deviant stimuli.

## **Closing Argument and Rebuttal**

Your closing argument is also prepared before the trial begins and should carry through the themes that were developed throughout the entire trial and lead the jury to return a verdict of guilty on the charges that are being tried. Many of the techniques about style and presentation that are contained in the section regarding opening statements are equally applicable in closing statements.

Your primary objective in closing is to get and keep the jury's attention. The themes that were developed throughout the trial are now brought together and repeated again for the jury as the facts support the theme and theory. Now is the time to argue what the jury knows to be the case based on the evidence that was presented, and how that evidence meets the elements of the charges that the jury is considering. Remind the jury by showing them again the particular pieces of evidence that establish and corroborate the assault as recounted by the victim during the trial.

Emphasize portions of testimony, exhibits and other evidence which forcefully and succinctly establish the guilt of the defendant and do so in a manner that is consistent with your style and personality

Consider whether to save elaboration on some arguments for rebuttal based on what you expect the defendant to argue in the defendant's reply. A strong opening in rebuttal with an emphasis that refocuses the jury's attention on the defendant's conduct will add to a strong rebuttal.

## Chapter 9

# ISSUES IN PLEA AGREEMENTS AND SENTENCING IN SEXUAL ASSAULT CASES<sup>55</sup>

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Plea agreements are a necessary and important part of the criminal justice system. Without them, prosecutors would be able to pursue only a small fraction of the cases they prosecute.

Plea agreements provide certainty to victims, allow traumatized victims to avoid the difficulties involved with testifying at trial, and foreclose most lengthy appeal and post-conviction proceedings. In *Santobello v. New York*, 404 U.S. 260 (1971), the Supreme Court characterized the negotiation of plea agreements as "an essential component of the administration of justice" that is "to be encouraged."

*Plea agreements are a necessary and important part of the criminal justice system. Without them, prosecutors would be able to pursue only a small fraction of the cases they prosecute. Plea agreements provide certainty to victims, allow traumatized victims to avoid the difficulties involved with testifying at trial, and foreclose most lengthy*

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<sup>55</sup> Portions of this chapter were excerpted and modified with permission from: the Michigan Prosecutors Sexual Assault Prosecution Manual, published by the Domestic and Sexual Violence Prevention and Treatment Board and the Prosecuting Attorneys Association of Michigan (2013); and the Wisconsin Sexual Assault Reference Book, published by the Wisconsin Office of Justice Assistance (2009).

Plea agreements are contracts and are generally governed by contract principles. *State v. Rardon*, 2005 MT 129, 327 Mont. 228, 115 P.3d 182. However, a plea agreement is a unique kind of contract. It is an agreement between a prosecutor and a defendant for the sole purpose of settling a pending criminal charge, or charges, against the defendant. See Section 46-12-211, MCA. Unlike other contracts, a plea agreement is not self-executing; it is contingent on approval by the court. The court is not bound by a plea agreement, and it may be accepted or rejected, in whole or in part. Upon sentencing, a plea agreement terminates. That is, once each party has fulfilled its obligations under the agreement (each party has performed), the plea agreement has served its purpose and any duties under the contract are discharged. The controlling document becomes the judgment and sentence, which embodies the plea agreement in whatever form the court accepted. *Ronning v. Yellowstone County*, 2011 MT 79; 360 Mont. 108; 253 P.3d 818.

**Section 46-12-204 MCA Plea alternatives.**

(1) A defendant may plead guilty, not guilty, or, with the consent of the court and the prosecutor, nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) The court may not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecutor and the defendant or the defendant's attorney.

(3) With the approval of the court and the consent of the prosecutor, a defendant may enter a plea of guilty or nolo contendere, reserving the right, on appeal from the judgment, to review the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant must be allowed to withdraw the plea.

(4) The court may not accept a plea of nolo contendere in a case involving a sexual offense, as defined in Section 46-23-502, except an offense under Section 45-5-301 through 45-5-303.

Section 46-12-211MCA Plea agreement procedure

(1) The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the prosecutor will do any of the following:

(a) move for dismissal of other charges;

(b) agree that a specific sentence is the appropriate disposition of the case; or

(c) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request may not be binding upon the court.

(2) Subject to the provisions of subsection (5), if a plea agreement has been reached by the parties, the court shall, on the record, require a disclosure of the agreement in open court or, on a showing of good cause in camera, at the time that the plea is offered. If the agreement is of the type specified in subsection (1)(a) or (1)(b), the court may accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subsection (1)(c), the court shall advise the defendant that, if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

(3) If the court accepts a plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) If the court rejects a plea agreement of the type specified in subsection (1)(a) or (1)(b), the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw the plea, and advise the defendant that if the defendant persists in the guilty or nolo contendere plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) For purposes of this section, a disclosure of the agreement through the use of two-way electronic audio-video communication, allowing all of the participants to be heard in the courtroom by all present and allowing the party speaking to be seen, is considered to be a disclosure in open court. Audio-video communication may be used if neither party objects and the court agrees to its use and has informed the defendant that the defendant has the right to object to its use. The audio-video communication must operate as provided in 46-12-201.

Section 46-12-212 MCA Determining accuracy of plea.

(1) The court may not accept a guilty plea without determining that there is a factual basis for the plea in charges of felonies or misdemeanors resulting in incarceration.

(2) A defendant who is unwilling to admit to any element of the offense that would provide a factual basis for a plea of guilty may, with the consent of the court, enter a plea of guilty or may, with the consent of the court and the prosecutor, enter a plea of nolo contendere to the offense if the defendant considers the plea to be in the defendant's best interest and the court determines that there is a factual basis for the plea.

**Consulting with the Victim**

Prosecutors should meet with the victim and discuss plea negotiations when a decision to prosecute has been made. One important consideration in a prosecutor's initial meeting with the victim is ascertaining the unique perspectives of individual victims, whether there are particular safety issues that will need to be addressed at sentencing, collateral issues for victim, and the impact the case and criminal process on the victim.

A victim-centered response prioritizes the participation of victims in

*One important consideration in a prosecutor's initial meeting with the victim is ascertaining the unique perspectives of individual victims, whether there are particular safety issues that will need to be addressed at sentencing, collateral issues for the victim, and the impact the case and criminal process on the victim.*

deciding the State's recommendation for the outcome. A victim-centered response includes explaining the rationale for seeking a plea agreement and asking the victims for their feedback when negotiation options are being considered. Minimally, the prosecutor should:

- Educate the victim about the impact that the defendant's decision to plead other than not guilty would have on the process and the potential outcome.

*Victims should be aware that the plea agreement negotiation process is fluid, and that issues may arise during the course of the case that may impact or change negotiation strategies.*

- Discuss plea agreement options with the victim and solicit their feedback about what the prosecution is seeking.
  - Keep the victim informed of what plea agreement is being offered to the defendant before any plea agreement offer is made. Educate the victim on the process of plea negotiations including the different types of plea agreements and the very broad options available to Montana judges.
- Be up front with the victim. Make sure she/he is aware that while their thoughts and opinions are very important, and will be given due consideration, ultimately it is up to the prosecutor to determine the optimal way to proceed with plea agreement negotiations.

Victims should be aware that the plea agreement negotiation process is fluid, and that issues may arise during the course of the case that may impact or change negotiation strategies. The victim should be aware that the plea offer may change based upon these new factors. The impact of the new

factors should be addressed with the victim, before modification of the offer.

A plea offer on a sexual assault case should never be presented to a defendant without first attempting to contact the victim.

### **Offender-Focused Approach**

The prosecutor should also approach plea agreement negotiations from an offender-focused perspective. This includes consideration of the need for:

- The offender to be subject to Sex Offender Registration;
- Prison/punishment;
- Sex offender treatment – as part of a probation term or prison term as a condition of sentence;
- Specific deterrence – sending a message to the defendant that the conduct will not be tolerated

An offender-focused approach to plea negotiations that carefully considers all of the offender's actions, behaviors and character is consistent with best practice. Any history of sex offenses or other crimes should be fully considered when determining a possible outcome through negotiations. An offender-focused approach does not end at conviction; it continues through sentencing, where the prosecutor can and should advocate for a

sentence that accurately reflects the true nature of the offense and the offender.

### Reviewing the Sexual Offender Evaluation

Section 46-18-111(1)(b) MCA requires that the Pre-Sentence Investigation and report of a defendant convicted of a sex crime include a psychosexual evaluation of the defendant and a recommendation as to treatment of the defendant in the least restrictive environment, considering the risk the defendant presents to the community and defendant's needs, unless the defendant is subject to mandatory life without release.

The evaluation must be completed by a sex offender therapist who is a member of the Montana Sex Offender Treatment Association or has comparable credentials acceptable to the department of labor and industry.

The assessment of sexual offenders involves performing a comprehensive psychiatric evaluation, reviewing available police reports and criminal history, and contacting available collateral sources of information to verify information provided by the defendant.

If a Sexual Offender Evaluation has been provided to the State prior to a plea of guilty or prior to a plea agreement being negotiated, the prosecutor

should carefully review the evaluation and determine its impact on plea negotiations.

When receiving a sexual offender evaluation report, the prosecutor should determine the following:

- Whether the report prepared in accordance with the MSOTA Standards for Evaluation and Ongoing Assessment of Adult Sexual Offenders (see [msota.org](http://msota.org)).
- Whether the evaluator contacted collateral sources to verify the information provided by the defendant.
- Whether, pursuant to the evaluation, the defendant is amendable to treatment
- Whether a tier level indicating whether the defendant is a low, moderate, or high risk to reoffend.

### **Plea Agreement Limitations**

Prosecutors have the discretion to resolve cases according to the strength of the evidence, the victim's needs and wishes, community safety concerns, and the individual facts and circumstances of each case and each offender. However, in recognition of the fact that: 1) most sex offenders are serial offenders; 2) treatment is ineffective if the offenders refuse to admit their conduct; 3) sexual offenses are serious criminal offenses; and 4) victims and the community as a whole need to see sexual offenses treated

seriously and as consistently as possible, some limitations on plea agreements are appropriate.

The prosecutor shall not enter into a deferred prosecution agreement on a sexual assault case unless extraordinary circumstances exist and the County Attorney agrees to and signs off on the agreement. If approved, a memo must be placed in the file explaining the rationale for the agreement.

The prosecutor shall not amend a sexual assault charge to a non-sexual assault offense (i.e. criminal endangerment) pursuant to a plea agreement without the permission of the supervising attorney. If approved a memo must be placed in the file explaining the rationale for the amended charge.

The prosecutor shall not amend a felony offense to a misdemeanor offense pursuant to a plea agreement without the permission of the supervising attorney. If approved a memo must be placed in the file explaining the rationale for the amendment to a misdemeanor charge.

The prosecutor shall not enter into a plea agreement that allows the defendant to enter a plea of nolo contendere in a case involving a sexual

offense, as defined in Section 46-23-502, except an offense under Section 45-5-301 through 45-5-303.

The prosecutor shall not enter into a plea agreement that calls for a recommendation for deferred imposition of sentence, where allowed by statute, unless extenuating circumstances exist and the supervising attorney has approved the agreement. If approved a memo must be placed in the file explaining the rationale for the recommendation of the deferred imposition of sentence.

The prosecutor shall not enter into an agreement that allows the defendant to plead to a sexual assault offense pursuant to an *Alford Plea*, unless extenuating circumstances exist and the supervising attorney has approved the agreement. If approved a memo must be placed in the file explaining the rationale for allowing the defendant to plead via an *Alford* plea. See *North Carolina v. Alford*, 400 U.S. 25 (1971).

## Chapter 10

# COORDINATION WITH COMMUNITY PARTNERS

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The community's response to sexual violence directly impacts when, where and how a victim seeks medical and legal help, the victim's trust in and cooperation with the criminal justice process, and the extent to which the offender is held accountable. A coordinated, victim-centered response includes good and frequent communication between law enforcement, prosecutors, advocates, medical health professionals, and other agencies. Forming a multi-disciplinary team (MDT), also referred to as a Sexual Assault Response Team (SART), can make a significant improvement in a community's response to the crime of sexual violence.

*An MDT is a collaboration of representatives from various organizations in the community that works to evaluate and improve the overall criminal justice systems response to sexual assault crimes, and/or as a case processing and evaluation tool in individual sexual assault cases moving through the criminal justice system. The individual members of an MDT have different roles, but each contributes to the others' work.*

A sexual assault MDT is a collaborative, multidisciplinary team of representatives from organizations and agencies that respond in some way to the crime of sexual assault. The MDT approach is a community-based

problem solving approach. An MDT is a collaboration of representatives from various organizations in the community that works to evaluate and improve the overall criminal justice systems response to sexual assault crimes, and/or as a case processing and evaluation tool in individual sexual assault cases moving through the criminal justice system. The individual members of an MDT have different roles, but each contributes to the others' work.

Studies of communities with active, well-functioning MDTs have revealed many improvements to the response to sexual assault, including:

- Better, more victim-centered care for victims in the acute stage;
- An increase in the number of victims coming forward for help;
- More requests for advocacy services by victims after the acute stage;
- More medical and mental health follow-up services accessed by victims after the acute response;
- Better quality of evidence collection and a more consistent use of evidence and expert witness testimony during prosecution;
- An increased percentage of victims reporting their assault to law enforcement;
- Victims expressing greater satisfaction with the acute care they received from medical personnel and law enforcement, as well as a

greater confidence in the legal system’s ability to achieve a form of justice for them;

- More law enforcement cases referred to the prosecutor for review;
- More cases ending in findings of guilty.<sup>56</sup>

In similar research, the American Prosecutors Research

Institute/National District Attorneys Association confirmed that the SANE/SART intervention model is a valuable tool in the criminal justice system’s ability to effectively respond to adult sexual assault cases. One finding of particular note was the importance of the SANE/SART intervention in collecting and preserving valuable evidence for prosecution, including DNA evidence.

*Missoula has a longstanding MDT which responds to adult and child sexual assault.*

**Missoula’s Collaborative Response – the Just Response MDT**

Missoula has a longstanding MDT which responds to adult and child sexual assault. In acknowledgment of the fact that historically, the criminal justice system’s response to sexual assault mirrored the larger community response and often re-victimized those whom it is supposed to protect, the MDT was developed through the efforts of a

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<sup>56</sup> Oregon Attorney General’s Sexual Assault Task Force, SART Handbook, p.2

number of dedicated individuals from various agencies over the course of several years.

### ***Team Members***

Now organized under the umbrella of Just Response, which coordinates Missoula's MDTs addressing adult sexual violence, child abuse, and domestic violence, the MDT includes representatives from:

- Missoula County Attorney's Office
- Missoula Police Department
- Missoula County Sheriff's Office
- Missoula County's Crime Victim Advocate program
- YWCA of Missoula
- Student Assault Resource Center at the University of Montana
- University of Montana administration;
- Mental health;
- St. Patrick Hospital/First Step Resource Center;
- Youth Court;
- Department of Child and Family Services.

***Just Response is an interagency network of dedicated people who unite Missoula's criminal justice system and community to prove victim safety and healing and increase offender accountability in relationship violence, sexual violence and child abuse cases.***

### ***Mission Statement and Guiding Principles***

The Just Response MDT continues to develop and improve Missoula's

coordinated response to sexual assault. Just Response is an interagency

network of dedicated people who unite Missoula's criminal justice system and community to provide victim safety and healing and increase offender accountability in relationship violence, sexual violence and child abuse cases. The team builds supportive, accountable relationships, shares information, and provides training to improve the system and provide continuity of victim services at any point of entry. This response is both victim-centered and offender-focused. Ultimately, a victim-centered and offender-focused response strives to hold the offender fully accountable for the sexual assault while at the same time respecting the victim's needs. The Just Response MDT is the key to creating and sustaining this response among all organizations that respond to victims and offenders.

*While prosecutors are responsible for evaluating, charging and trying the case, they cannot succeed without the work and support of health care providers, law enforcement, medical professionals, state crime labs, advocates, and other allied professionals. The Missoula County Attorney's Office has played an active role in the initial and continued development of the team response to sexual assault in Missoula.*

A formal MDT with a written mission statement, guiding principles, and officially adopted community response protocols is more likely to be sustained long-term and to survive the inevitable changes in membership, as well as providing a forum and a mechanism for resolving conflict among

team members in a way that keeps members participating, rather than allowing conflict to weaken the collaborative partnership.

To that end, the Just Response MDT member agencies have come together to define common objectives and goals that work towards accomplishing its mission. The team has developed protocols for its responses to sexual assault, child abuse, and domestic violence which are reviewed and modified as the teams develop.

*The Just Response MDT member agencies have come together to define common objectives and goals that work towards accomplishing its mission. The team has developed protocols for its responses to sexual assault, child abuse, and domestic violence which are reviewed and modified as the teams develop.*

The Just Response Sexual Violence Team members meet regularly to review policy and procedure and to trouble-shoot areas in which problems are identified. The team also meets monthly for a confidential review of challenging or problematic cases in order to improve the response in those cases and in future cases. These meetings provide a forum for members to resolve occasional disagreements about how any particular case has been handled by one or more of the members. The team periodically engages in trainings to further its work.

The Just Response Sexual Violence team members regularly engage in conversations to reach a shared understanding of their respective roles and responsibilities in working with victims of sexual assault. Team members regularly bring to the surface, explore and understand the roles and limitations that each member may have in responding to sexual assault in the community. These discussions often focus on confidentiality and information sharing, as the goal of providing seamless and supportive services to victims is always at the forefront of the discussion.

Understanding the different roles, limitations, and obligations has resulted in vast improvement in relationships between member agencies and has significantly reduced the frustration and miscommunication that was previously common. Team members now have accurate expectations of other members of the team and are able to better coordinate efforts on behalf of a victim. Team members are in frequent contact outside of the formal team meetings, coordinating efforts on behalf of victims. The team has found that this improved interagency communication improves the criminal justice response and minimizes the trauma for sexual assault victims when they seek medical and legal help in the community. A recent review of cases found that approximately 2/3 of sexual assault victims over the age of 16

who seek medical care and assistance at the First Step clinic report their assaults to law enforcement.

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In addition to the formal team, informal communication between team members is frequent. The Missoula County Attorney's Office and the Missoula Police Department Special Victims Unit investigators meet weekly to discuss cases.

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