



NIJ

Special

REPORT



The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases

www.nij.gov

U.S. Department of Justice
Office of Justice Programs
810 Seventh Street N.W.
Washington, DC 20531

Eric H. Holder, Jr.
Attorney General

Laurie O. Robinson
Assistant Attorney General

John H. Laub
Director, National Institute of Justice

This and other publications and products of the National Institute of Justice can be found at:

National Institute of Justice
www.nij.gov

Office of Justice Programs
Innovation • Partnerships • Safer Neighborhoods
www.ojp.usdoj.gov

MAY 2011

**The Road Ahead: Unanalyzed Evidence
in Sexual Assault Cases**

Nancy Ritter



John H. Laub

Director, National Institute of Justice

Findings and conclusions of the research reported here are those of the author and do not necessarily reflect the official position or policies of the U.S. Department of Justice.

The National Institute of Justice is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance; the Bureau of Justice Statistics; the Community Capacity Development Office; the Office for Victims of Crime; the Office of Juvenile Justice and Delinquency Prevention; and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART).

About This Report

Untested sexual assault evidence is being discovered in police evidence rooms all across the country. In this report, the National Institute of Justice (NIJ) offers an overview of the issue. We look at a variety of ramifications for the police and crime laboratories, for the courts and for the victims.

It is unknown how many unanalyzed sexual assault kits (SAKs) there are nationwide. There are many reasons for this, but one is that tracking and counting SAKs is an antiquated process in many U.S. jurisdictions. Certainly, there may be legitimate reasons why some of the recently discovered unanalyzed SAKs were not sent to a lab. Not all evidence collected in an alleged sexual assault is going to be probative. For example, in cases where “consent” is an issue (the suspect admits sexual contact but maintains it was consensual), detectives may consider that the SAK does not add any important information to the investigation. That said, it is clear that we, as a nation, need to understand more about how law enforcement decides to submit a SAK to the crime lab for analysis (or not) and how cases are triaged for other investigation.

Should all newly discovered SAKs be analyzed?

What should a jurisdiction do when a large number of untested SAKs are discovered?

Should officials try to come up with the resources to test them all — even cases that may be 25 years old — or should they establish a prioritization or “triage” process to determine which SAKs should be sent to the lab, and when?

This report explores some of the reasons why the answers to these questions are not as straightforward as they may seem. Jurisdictions are using various approaches to tackle the untested SAK problem. However, developing scientific evidence to determine which approaches are the most effective — solving the most crimes with the greatest efficiency, considering current fiscal realities — will take time.

This report also explores some of the issues behind “stranger” and “acquaintance” rape; implications for police investigation and case prosecution, particularly with respect to statutes of limitations; and the sensitive and multifaceted issue of victim notification in older cases.

As the nation grapples with the discovery of thousands of older sexual assault kits, it is crucial that we balance justice, public safety and the victims’ needs. The goal is to move beyond the “crisis management” of the moment to the adoption of systematic practices, procedures and protocols that will prevent this situation from ever happening again.

The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases

Nancy Ritter



Lately it seems that, every few months, thousands of untested rape kits are discovered in another police evidence room around the country: 10,000 in Los Angeles, 12,000 in Dallas, 10,500 in Detroit.

The road ahead for resource-strapped jurisdictions trying to deal with the discovery of older, unanalyzed sexual assault evidence is anything but straightforward. In fact, the repercussions are affecting every stakeholder in the nation's criminal justice system: the police and crime laboratories; the courts; victim service agencies; policymakers at the federal, state and local levels; and, most significantly, the victims.

A rape kit — more accurately called a sexual assault kit (SAK) — is a box or envelope used to collect and store biological evidence from the victim of an alleged sexual assault. Evidence in a SAK can include vaginal, oral or anal swabs that may yield the perpetrator's DNA. Photographs, hair, fingerprints, fibers, bed sheets or clothing would be stored in bags, not in the SAK itself. (See sidebar, p. 2, "What Is a Sexual Assault Kit?")

About the Author

Nancy Ritter is a writer and editor at the National Institute of Justice.

Untested SAKs can be stored in a number of places: police department evidence rooms, crime labs, hospitals, clinics, rape crisis centers. It is unknown how many unanalyzed SAKs there are nationwide. There are many reasons for this, but one of the primary ones is that tracking and counting SAKs is an antiquated process in many U.S. jurisdictions. A recent National Institute of Justice (NIJ) survey found that

four in 10 of the nation's law enforcement agencies — 43 percent — do not have a computerized system for tracking forensic evidence, either in their inventory or after it is sent to the crime lab (see *The 2007 Survey of Law Enforcement Forensic Evidence Processing*, available at <http://www.nij.gov/topics/law-enforcement/handling-evidence/unanalyzed-evidence.htm>). Just one example among many: The Los Angeles County Sheriff's Department still uses handwritten evidence tags and log books.

According to the NIJ survey (more than 2,000 law enforcement agencies responded), 18 percent of unsolved alleged sexual assaults that occurred from 2002 to 2007 contained forensic evidence that was still in police custody (not submitted to a crime lab for analysis). (See sidebar, p. 3, "Untested Evidence in Law Enforcement Agencies.")

There may be legitimate reasons why some of the recently discovered unanalyzed SAKs were not sent to a lab. Not all evidence collected in an alleged sexual assault is going to be probative. In cases where "consent" is an issue (the suspect admits sexual contact but maintains it was consensual), detectives may consider that the SAK does not add any important information to the investigation. Evidence also may not be sent to a lab for analysis if charges against the alleged perpetrator have been dropped or the suspect has pled guilty.

On the other hand, the NIJ survey also revealed some concerns regarding why

WHAT IS A SEXUAL ASSAULT KIT?

Sexual assault kits (SAKs) — often called “rape kits” — were introduced in the 1960s as a tool to collect and store biological and trace evidence in cases of alleged sexual assault. SAKs may contain:

- Vaginal, anal and oral swabs.
- Pubic hair combings.
- Blood and urine specimens.
- Fingernail scrapings.

The victim’s clothing, bedding and other physical evidence in a sexual assault may also be collected and submitted to a lab for analysis, but these are not technically considered part of the SAK.

Unfortunately, the composition of SAKs can vary from jurisdiction to jurisdiction. For example, although the police and sheriff’s departments in Los Angeles County use the same SAK, the rest of California does not. This can affect consistent collection and processing procedures.

In Illinois — where the state police are required to provide SAKs to every state agency — consistency and quality control issues are addressed through a single SAK coordinator, who provides feedback to medical professionals and others who collect evidence.

However, collecting consistent and high-quality evidence can be a particular problem in non-urban jurisdictions. Nine hundred of the 1,350 rape crisis centers in the U.S. are in rural areas, where turnover among hospital and clinic staff is high. Many people in rural America, including Indian Country, do not know how to obtain or use a SAK, and they have no access to a sexual assault nurse examiner (SANE).

SANes and sexual assault forensic examiners (SAFEs) are highly trained professionals who provide medical care to victims and ensure the consistency and quality of evidence collection. This is a balancing act. SANes and SAFEs maintain that evidence collection should not trump health care. In fact, the first concerns for many women who have just been sexually assaulted are fear of HIV or other sexually transmitted diseases, pregnancy and the need for psychological counseling. A well-trained SANE or SAFE is crucial to simultaneously assuring the health of the victim and the collection of high-quality evidence for possible future criminal proceedings.

untested evidence may not be sent to a crime lab for testing. Forty-four percent of the law enforcement agencies said that one of the reasons they did not send evidence to the lab was that a suspect had not been identified. Fifteen percent said that they did not submit evidence because analysis had not been requested by a prosecutor. These findings indicate that some law enforcement agencies may not fully understand the potential value of

forensic evidence in developing new leads in a criminal investigation.

That said, it is clear that we need to understand more about how law enforcement decides to submit a SAK to the crime lab for analysis (or not) and how cases are triaged for other investigation. To do that, we must examine the myriad issues surrounding the discovery of thousands of unanalyzed SAKs.

UNTESTED EVIDENCE IN LAW ENFORCEMENT AGENCIES

In 2009, the National Institute of Justice (NIJ) published the results of a nationwide survey of forensic evidence that had not been submitted by a police agency to the crime laboratory for analysis. More than 2,000 state and local law enforcement departments responded to the survey.

The findings revealed that, during 2002-2007, police had not submitted forensic evidence — including DNA, fingerprints, firearms and toolmarks — to a crime lab in:

- 18 percent of unsolved rapes.
- 14 percent of unsolved homicides.
- 23 percent of unsolved property crimes.

Although there are reasons why police may not send forensic evidence to a lab — it may not be considered probative, the charges may have been dropped, or a guilty plea may already have been entered — the researchers at Research Triangle Institute, International, which conducted the survey, concluded that some police may not fully understand the value of evidence in developing new investigative leads.

Forty-four percent of the responding police departments said one of the reasons they did not send evidence to the lab was because a suspect had not been identified. Fifteen percent said they did not submit evidence because analysis had not been requested by a prosecutor. Three in 10 said they did not submit evidence because they were uncertain of its usefulness.

These are important findings because evidence can potentially identify a suspect in a so-called “no suspect” case. For example, DNA can identify a possible perpetrator through the Combined DNA Index System (CODIS), the national DNA database, and latent prints can identify a possible perpetrator through databases such as the national Integrated Automated Fingerprint Identification System (IAFIS).

The knowledge gap revealed in the NIJ survey — particularly among the nation’s small departments (less than 25 officers) — could be due to a lack of training. Specialized training in these cases may have been beneficial and could have led to a different outcome. Also,

11 percent of the agencies that responded to the survey said that one reason they did not submit evidence was the lab’s inability to produce timely results, and 6 percent said that the lab was not accepting new evidence because of a backlog.

When considering this knowledge gap, it is important to remember that CODIS did not become operational until the late 1990s and could still be considered relatively new. Whether some detectives do not forward evidence to the lab because they do not fully understand how a “no suspect” CODIS hit can aid their investigation — or because there are standing policies or other issues that prevent them from doing so — is an issue that merits further study.

Finally, it is important to understand what the NIJ survey did not determine. For example, the survey did not reveal how many of the cases not sent to a lab would actually have benefitted from analysis. The survey also did not address the number of unsolved cases in which evidence had been analyzed in the past but now — with the benefit of larger offender databases and new forensic technologies — might be solved or yield investigative leads; for example, a latent print submitted to IAFIS several years ago with no successful match could yield a hit now.

Some of the police departments noted that their survey responses were based on estimates. Larger agencies (including large county and state agencies) reported difficulty in providing information about sexual assaults because these records are not maintained in a centralized system. Property crimes in larger agencies are typically investigated at the precinct level (where the case information would be maintained), and

Forty-four percent of the police departments said one of the reasons they did not send evidence to the lab was because a suspect had not been identified.

Continued on page 4

UNTESTED EVIDENCE IN LAW ENFORCEMENT AGENCIES (CONTINUED)

this may also be true for rape cases. Finally, it is important to note that the survey's findings are based on self-reported information; there was no independent verification of the data.

Despite these caveats, however, there is no doubt that the survey reveals problems with an ongoing lack of procedures and policies for collecting, processing and storing forensic evidence, including cases of alleged sexual assault. Policies and practices for evidence retention vary widely from jurisdiction to jurisdiction, with one in five agencies saying that they were not sure whether they had such policies. Less than half of the police departments, for example, said they had a policy regarding the preservation of biological evidence in cases where the defendant was found guilty.

The researchers who performed the survey made a number of recommendations to address these issues, including:

- Training police on the benefits and use of forensic evidence, including protocols for sending cases to the lab for analysis.
- Creating (or improving) information management systems to track forensic evidence and enhance communication among the police, lab and prosecutor's office. This could include connected evidence tracking systems, dedicated staff for case management and regular team meetings for case review.
- Providing more storage capacity for analyzed and unanalyzed forensic evidence, and standardized evidence-retention policies.
- Providing more research to determine what proportion of the open cases could benefit from forensic testing, and how such cases should be prioritized for testing.

The full report, *The 2007 Survey of Law Enforcement Forensic Evidence Processing*, by Kevin J. Strom, Jeri Roper-Miller, Shelton Jones, Nathan Sikes, Mark Pope and Nicole Horstmann, is available at <http://www.nij.gov/topics/law-enforcement/investigations/handling-evidence/unanalyzed-evidence.htm>.

Should all newly discovered SAKs be analyzed?

What should a jurisdiction do when a large number of untested SAKs are discovered? Should officials try to come up with the resources to test them all — even cases that may be 25 years old — or should they establish a prioritization or “triage” process to determine which SAKs should be sent to the lab, and when? Unfortunately, there has been little research in this area, and there are few evidence-based “best practices” to help jurisdictions handle the crisis management of the moment — and to prevent this problem from developing again in the future.

In Dallas, for instance, evidence in 12,000 cases of alleged sexual assault, which occurred from 1981 to 1995, was recently discovered in police custody; the evidence in many of these cases is not even a complete SAK — only swabs taken during the examination of the victim. Dallas officials determined that testing all of the evidence is not possible at current resource levels. As in most jurisdictions, “cold cases” in Dallas are a lower priority than new cases, and it can take up to two years to get DNA results back from their lab. Therefore, at this point, only unsolved stranger rapes are being tested; based on a preliminary analysis, this represents 20–25 percent — about

3,000 cases — of the recently discovered evidence.

In Los Angeles, the recently discovered SAKs were sent to private labs for analysis (a process called “outsourcing”) and paid for, in part, through NIJ’s DNA backlog reduction grant program. Although officials intended to have all of the SAKs tested, cases still had to be prioritized. Therefore, the Los Angeles Police Department (LAPD) established this order for testing: (1) stranger/unknown suspect sexual assaults and cases in which the alleged perpetrator was in a position of trust, (2) acquaintance rape, (3) cases previously rejected by the district attorney’s office, and (4) cases in which there was a question that a crime occurred.

It is important to note that, even with a decision to outsource the analysis of evidence, crime labs in jurisdictions where large numbers of SAKs are discovered are still greatly affected. In the U.S., public labs must perform a technical or “peer” review of analyses done in a private lab. The LAPD crime lab, for example, has had to devote 10–15 analysts to managing the very time-consuming technical review for the recently discovered SAKs. In fact, this has led to what some refer to as the “new backlog” of cases awaiting technical review. This is not an insignificant issue, as current FBI rules require completion of a technical review before a DNA profile can be uploaded to the Combined DNA Index System (CODIS). (See sidebar, right, “The Challenges of Crime Lab Staffing.”)

In Detroit — where 10,500 unprocessed, untested or improperly stored SAKs from 1988 to 2006 were recently discovered — officials have randomly selected 400 cases to review, screen and test. (See sidebar, p. 6, “Detroit: One Jurisdiction Begins.”)

THE CHALLENGES OF CRIME LAB STAFFING

Many of the nation’s state and local crime laboratories are facing significant challenges in hiring and retaining staff. Some forensic scientists leave to pursue careers at federal laboratories, in the private sector, or at other state and local labs that pay more. Just one example: In 2008, the Georgia Bureau of Investigation (GBI) lost 10 of their 22 trained professionals (four lab technicians and six DNA analysts); in 2009, GBI lost seven of their 23 trained professionals (five DNA analysts, one Combined DNA Index System (CODIS) administrator and one lab tech).

The challenge of ensuring a sufficient, well-trained staff in the crime lab also extends to funding sources. Continuing with GBI as an example, officials noted that 17 of the 32 employees at headquarters are paid from federal grants administered by the National Institute of Justice (NIJ). Although federal grants are extremely useful, state and local officials point out that funding analyst positions from nonguaranteed grants makes it difficult to plan for the future.

In a 2007 NIJ-funded survey of 148 public labs, nearly 90 percent said that they would not have sufficient funding to continue operations without federal grants and were falling behind in casework and not keeping up with new technologies. These findings emphasize the importance for state and local jurisdictions to engage in fiscal planning that allows them to sustain strong crime lab operations. (The full report, *2007 DNA Evidence and Offender Analysis Measurement: DNA Backlogs, Capacity and Funding*, by Lisa Hurst and Kevin Lothridge, is available at <http://www.ncjrs.gov/pdffiles1/nij/grants/230328.pdf>.)

Although federal grants are extremely useful, state and local officials point out that funding analyst positions from nonguaranteed grants makes it difficult to plan for the future.

Developing scientific evidence to determine which approaches are the most effective — solving the most crimes with the greatest efficiency, considering fiscal realities — will take time.

Why can't pimp defendants confront the researchers who claim that all prostitution harms women even if they do not know they are harmed?

DETROIT: ONE JURISDICTION BEGINS

In Detroit, where 10,500 previously untested sexual assault kits (SAKs) were recently discovered in police storage, officials are performing a comprehensive audit of 400 randomly selected cases. Evidence in the 400 SAKs is being analyzed, including DNA testing; concurrently, the "400 Project" team — an independent investigator, an attorney and two victim advocates — are looking at the entire case, including a victim-centered, multidisciplinary follow-up investigation.

Based on the outcomes of these 400 cases, researchers at Michigan State University will perform a statistical analysis to help determine the characteristics of the remaining 10,100 cases. This is expected to give officials valuable data upon which to base policies regarding:

- Notification of victims.
- Prioritization of evidence for lab analysis.
- The level of resources to meet increased demands on law enforcement, who will have to investigate cases where a DNA profile is revealed (whether or not there is a Combined DNA Index System (CODIS) hit), and increased demands on prosecutors, who may need to file more cases.

Experts also point to another factor to keep in mind when a jurisdiction out-sources lab testing. Last year, the U.S. Supreme Court upheld a ruling giving defendants a constitutional right to directly confront the analyst who performed tests on evidence used against them. This can be expensive for a jurisdiction that must pay for private lab scientists to go to court to testify.

Certainly, the various approaches now being used to tackle the untested SAKs problem will yield important knowledge. However, developing scientific evidence to determine which approaches are the most effective — solving the most crimes

with the greatest efficiency, considering current fiscal realities — will take time.

The evidence itself

Experts say that everyone — victims, police, politicians, forensic scientists, criminologists — must keep two crucial factors in mind when making smart SAK-testing decisions: the quality of the evidence and the facts of the alleged sexual assault. It is estimated that, on average, 50–60 percent of SAKs test positive for biological material that does not belong to the victim; that percentage is much lower in some parts of the country.

To shed more light on this issue, NIJ is currently funding researchers at California State University, Los Angeles, to study a random sample of the recently discovered cases in Los Angeles. The researchers are looking at specific case "outcomes," such as the percentage of SAKs that yielded a DNA profile and the percentage that were uploaded to CODIS and resulted in a "hit" to other crimes or offenders. (See sidebar, p. 7, "Los Angeles' Sexual Assault Kit Research Study.") Results of the study are expected in 2011.

NIJ is also funding an action research project to help jurisdictions tackle the problem of untested sexual assault kits that have been discovered in police evidence rooms; based on this research, the Institute expects to help develop protocols to prevent this from happening in the future. (See sidebar, p. 8, "NIJ's Action Research Project to Address Untested SAK Evidence.")

Technological advancements in DNA analysis are also likely to play a major role in testing older SAKs. For example, the Georgia Bureau of Investigation (GBI) crime lab first tests evidence to determine if male DNA is present; rather than spending several hours looking at slides, trying

LOS ANGELES' SEXUAL ASSAULT KIT RESEARCH STUDY

After the Los Angeles police and sheriff's departments began testing a large number of previously unanalyzed sexual assault kits (SAKs), the National Institute of Justice (NIJ) funded researchers at California State University, Los Angeles, to randomly select 20 percent of the cases for further study.

The goal of the study is to provide information that will not only help jurisdictions efficiently test (or decide not to test) large numbers of unanalyzed SAKs but may also help prevent this situation from occurring again.

Among the questions being addressed:

- What kind of evidence do the SAKs contain?
- What kind of results are obtained from testing? For example, is semen identified? How many cases yield a DNA profile?
- How many profiles are uploaded to the Combined DNA Index System (CODIS), and what matches link these older, recently discovered sexual assault cases with other crimes or offenders?

The researchers are also looking at police criteria for sending a SAK to the lab for analysis. It is also hoped that the study (findings expected in 2011) will help decision-makers throughout the criminal justice system to craft procedures and protocols for investigating and solving sexual assaults in the future.

to identify sperm, GBI analysts now use a DNA test that looks for male DNA found on the Y chromosome, using robots to test many cases at the same time. If no DNA is detected, it is not necessary to proceed with full analysis to try to develop a DNA profile.

In Los Angeles, the police and sheriff's departments are currently engaged in a

project called "Fast Track Forensics." In this pilot study, sexual assault cases with unknown offenders are processed as usual, while a few swabs are taken from the SAK and sent directly to the state Department of Justice laboratory for immediate analysis. Results are turned around in three days and uploaded into CODIS to search for a DNA match. To date, there have been a number of "hits," with particularly good results from saliva testing.

Stranger rape versus acquaintance rape

When it comes to tackling the multidimensional problem of unanalyzed SAKs, victim advocates point to the proverbial elephant in the room: stranger rape versus so-called acquaintance rape.

Although few would dispute the existence of a bias in the criminal justice system — a higher priority placed on arresting a stranger who attacks an unknown victim than on a college student who rapes an intoxicated date — this distinction is disturbing to some victim advocates, who argue that every rape is a stranger rape: to a victim, some say, an acquaintance *becomes* a "stranger" when he rapes her. Many victim advocates also maintain that not aggressively pursuing acquaintance rape may mean that other sexual assaults are not prevented — that same college student, they say, may continue assaulting women.

As our nation focuses on the SAK backlog issue, we would be naïve to ignore other potential biases. Over the years, biases may have affected the decision to not send sexual assault evidence to the lab if, for example, the victim was a prostituted woman, a drug abuser or mentally ill. Therefore, some argue, testing all SAKs would reveal potential connections between stranger rapes and acquaintance rapes and would go a long way toward

Over the years, biases may have affected the decision to not send sexual assault evidence to the lab if, for example, the victim was a prostituted woman, a drug abuser or mentally ill.

NIJ'S ACTION RESEARCH PROJECT TO ADDRESS UNTESTED SAK EVIDENCE

On October 27, 2010, the National Institute of Justice (NIJ) issued a request for proposals to identify solutions to the nationwide problem of untested evidence in sexual assault cases. This solicitation seeks to better understand why so many sexual assault kits (SAKs) are not forwarded from police evidence rooms to crime labs for DNA testing and to develop innovative approaches to solve the problem. (See the White House announcement on a nationwide violence against women initiative at <http://www.whitehouse.gov/blog/2010/10/05/ending-violence-against-women>.)

This spring, NIJ funded two jurisdictions — Wayne County, Mich., and the city of Houston — to explore the problem and come up with solutions. In phase I of these “action research” projects, each site will form a team to include a criminal justice researcher and representatives from the police department, crime lab, prosecutor’s office and a community-based victim services organization. The teams will first review and inventory cases in their jurisdiction

to determine why the SAKs were not sent to the lab; they will then develop a plan to tackle the problem and evaluate the intervention strategies that were put in place. In phase II of the project, NIJ will award funds to help the sites implement their plans.

To see the solicitation (applications were due January 18, 2011), go to <http://www.ncjrs.gov/pdffiles1/nij/sl000947.pdf>. Follow this research project through NIJ’s website, <http://www.nij.gov/topics/forensics/welcome.htm>.

Shortly after the solicitation was released, NIJ participated in a webinar, hosted by the Harvard University Kennedy School of Government. The two-hour discussion addressed various aspects of the solicitation, including the action research model through which NIJ hopes to develop innovative practices that other jurisdictions will also be able to use. Listen to the November 17, 2010, webinar for free at <http://www.innovations.harvard.edu/xchat-transcript.html?chid=353>.

eliminating victim bias. Advocates of testing of all SAK cases also point out that uploading all profiles into CODIS may link crimes that otherwise would not have been linked. (See sidebar, p. 10, “One Woman’s Story.”)

Finally, it is important to note that increased training and education may help officials and victims in cultures, including some American Indian tribes, where there are cultural taboos concerning a sexual assault examination.

Victim notification

Whether a jurisdiction facing a SAK backlog decides to test all cases or, as in Detroit, begins with a small number, notifying the victims is a crucial part of the process. However, determining best practices for doing this — let alone putting the right mechanisms in place — will not be easy.

When, for example, should the victim be notified? When her unanalyzed SAK has been located after many years? When the kit is sent to the lab for analysis? When analysis reveals that there is no probative evidence — or only when a DNA profile is determined?

What will the victim notification protocol be if the suspect is not in CODIS and a “John Doe” warrant is issued — or if the rapist’s identity is revealed through a CODIS hit and it appears that he raped other women before or after raping her?

And how should victims be contacted — via letter, phone call, in person?

At first blush, it may seem that there is no question that sexual assault victims should be notified at some point in the process. After all, why would a victim *not* want to know if DNA analysis of evidence from a rape when she was an 18-year-old college freshman had — 20 years later — revealed the rapist’s identity?

Experts say there could be as many answers to that question as there are victims. For example, what if the victim, now 38 years old, never told her husband or 15-year-old daughter about the rape? What if she has had years of counseling and moved on? Beyond simply being notified at one step or another in the criminal justice process, does the victim get a say — or not — in whether her case moves from the police evidence room to the lab, from the prosecutor’s office to the courtroom?

Not all victims want to enter the criminal justice process. For some, the primary concern after being raped is medical care: testing for HIV, STDs and pregnancy, or receiving mental health care. Victim advocates estimate that perhaps half of the victims of a long-ago rape would want to be told that evidence had been found in their case; they would want to be told the results of DNA analysis and be a part of any prosecution. The other half, they say, would just want to continue on with their lives.

Beyond determining the best way to contact victims, the logistics of simply *finding* many of them is not likely to be easy. Many victims of sexual violence try to

distance themselves from the crime, including moving away from where the assault happened.

Current victim notification practices vary among jurisdictions that are dealing with large numbers of unanalyzed SAKs. In one city, an official-looking letter is sent, asking the victim to call regarding an unspecified matter. In Detroit, a team of four people (including a victim advocate and a former Detroit homicide detective) has begun in-person notification of the 400 victims in the cases where the SAKs are being tested. In Dallas, authorities initially placed a public service announcement in the newspaper and on TV in an effort to reach some of the victims. Although the notice ran for just one day, authorities say the response was good. At this point, however, Dallas officials have decided to minimize contact with victims unless they identify a suspect.

Victim safety is a major concern during notification. Victim advocates warn that a victim of a long-ago rape could be currently living in a domestic violence situation and that contact by the police could act as a trigger for violence by her current partner. They also note that a victim who is suddenly told that the unsolved crime may now be investigated, including DNA analysis of the SAK, may suddenly feel in greater danger from the person who raped her.

There is also the issue of counseling. Some people experience a host of problems after being sexually assaulted. Officials also should be aware that some of the victims among the thousands of recently discovered SAKs may be drug addicts, prostituted women, mentally ill or homeless. What counseling will they need?

Clearly, with sufficient will and resources, we can decrease the backlog of SAKs and even identify suspects, but as we think about the best way to do this, it is crucial to consider how to support the victims.

Victim advocates estimate that perhaps half of the victims of a long-ago rape would want to be told that evidence had been found in their case The other half, they say, would just want to continue on with their lives.

There are real people behind every one of the sexual assault kits that remain untested. It will be difficult for each one, regardless if they welcome a renewed investigation or have tried to forget and move on in their lives, perhaps never telling their family of the assault.

ONE WOMAN'S STORY

BY KELLIE GREENE

On January 18, 1994, my life changed forever. I was 28 years old when I returned to my Orlando, Fla., apartment and was attacked by a man hiding in my kitchen. He hit me over the head with my tea kettle — then beat and raped me for 45 minutes.

After the stranger fled, I immediately called 911. I was treated at the hospital, where doctors used seven staples to close the wound in my head. Although police found semen on my leggings, Florida, at that time, was only doing DNA testing in cases where a suspect was already identified. Therefore, evidence in my case was put on a shelf, where it became part of the “backlog.”

I tried to move on, but I was haunted by the attack. I spent the next years studying every face in the grocery store, at work, even when I was driving down the road. Every few months, the detective and I talked to see if anything had been missed that might identify a suspect so that my evidence could be sent to the crime lab.

Eventually, evidence in my case was sent to the crime lab because police believed there were similarities with another rape. Although testing revealed that the rapist in that case was not the man who raped me, at least the DNA profile was now in the state database.

One day — three years after I was raped — the detective called to tell me that DNA testing of semen on my leggings had identified the man who raped me. It was the first time in three years that I felt safe. But my relief turned to anger when I was told that the man — David Shaw, a man with a history of burglary and theft — had raped another woman in December, six weeks *before* he raped me. Shaw was arrested for that earlier rape, but, sadly, the evidence in that case was not tested for two years. If it had been tested, this man would have been identified and caught and I would not have been raped and beaten.

Three days before the trial in my case, Shaw pled guilty and was sentenced to 22 years. However,

he was already serving a 25-year sentence for the first rape — and it wasn't for another three years that I would learn that he was allowed to serve the two sentences concurrently. He would spend no extra time in prison for beating and raping me.

In 1999, I founded SOAR[®], Speaking Out About Rape, Inc.[®]. Through SOAR, I work on behalf of rape survivors. I have worked with one woman, for example, who was raped when she was 18 years old. Twenty years later, she was notified by police that the rapist had been identified. By that time, she was 38, married, and had a 15-year-old daughter. She had never told her family that she was raped 20 years earlier. Now, she had to.

I have worked with a woman in Texas whose rapist was identified through DNA only *after* the statute of limitations had expired in her case. Her only option now — the only way she can help keep her rapist off the street — is to testify at his annual parole hearing, which means that, every year, she must re-live the rape.

There are real people behind every one of the sexual assault kits that remain untested. It will be difficult for each one, regardless if they welcome a renewed investigation or have tried to forget and move on in their lives, perhaps never telling their family of the assault. As we move forward in solving the problem of untested evidence in sexual assault cases, I believe it is crucial that our criminal justice system be mindful of the unique issues these survivors will face.

About the author: *Kellie Greene is the founder of SOAR[®], Speaking Out About Rape, Inc.[®], <http://www.soar99.org>. In 2000, she lobbied for and helped write a law that bans concurrent sentencing of sex offenders and murderers in Florida. Greene was a member of the task force that the National Institute of Justice brought together in 2010 to talk about the issue of untested evidence in sexual assault cases.*

And, say the experts, one of the challenges will be to understand that every rape victim may, after so many years, have her or his own idea of what “justice” looks like.

Posttesting: The domino effect

Beyond the notification of victims and decisions regarding the forensic testing of recently discovered SAKs, there are major implications for “downstream” partners in the criminal justice system. (See sidebar, p. 12, “Stakeholders Identify Priorities.”) Where, for example, will the resources and protocols come from, as already strapped police departments face demands for follow-up investigations? If an investigation results in the identification of a suspect, how will already overworked prosecutors and public defenders handle additional cases?

Police investigations in older cold cases require a significant commitment of time, training and talent. If a DNA profile is developed from testing evidence in a SAK, previous investigative leads and past interviews will have to be re-examined, and all this work will have to be prioritized alongside current criminal investigations. What investigative protocols will a jurisdiction use, for example, when a DNA profile is developed from testing but does not match a profile in CODIS or a local database? Will a John Doe warrant be issued?

Police agencies also must have a plan when a DNA profile from an older SAK does have a CODIS hit. What priorities and protocols will govern the often time-consuming effort of tracking down the suspect and gathering a DNA confirmation sample? Can the victim be located and is she available for prosecution? It also should be noted that, in some jurisdictions, a request to send a SAK to the lab for DNA

analysis is not approved until a sample from any potential consensual partner is obtained for “elimination” purposes; might this protocol have to be revisited if a jurisdiction faces a large backlog of older SAKs?

The good news is that there are working models. The Phoenix Police Department, for example, has developed an internal database, called the Post Match Prioritization Model, for all of its sexual assault cases. If analysis of a SAK results in a CODIS hit, investigative priority is on suspects who are in prison but scheduled to be released soon. The second priority level is cases with a high likelihood of successful prosecution. Cases with suspects who are already in custody for 10 or more years receive the lowest priority for follow-up investigation after a CODIS hit.

Another example of a protocol that seems to be working: New York City’s Office of the Chief Medical Examiner sends e-mails to district attorneys, DNA examiners and police when there is a CODIS hit based on the analysis of a SAK. This centralized system has helped detectives prioritize follow-up investigations.

As jurisdictions grapple with these issues, it is important to consider the best way to communicate with the victim at the various stages in the process. Advocates point out that a sexual assault survivor who is told her SAK has been recently discovered and will now be analyzed is likely to start wondering about the next steps: Will a confirmation sample be collected, for example, and when will additional investigative interviews be conducted? Certainly, the impact on the victim must be considered, if evidence in her rape yields a DNA profile or a CODIS hit, but the police department is experiencing resources issues that would delay or prevent further investigation and possible prosecution.

Where will the resources and protocols come from, as already strapped police departments face demands for follow-up investigations?

STAKEHOLDERS IDENTIFY PRIORITIES

In May 2010, the U.S. Department of Justice brought sexual assault nurse examiners, crime laboratory directors, cold case detectives, prosecutors and victim advocates to Washington, D.C., to discuss the challenges surrounding untested evidence in sexual assault kits (SAKs). A full report of the meeting is available at <http://www.ovw.usdoj.gov/docs/rape-kit-roundtable-summary-10262010.pdf>.

Here are some of the priorities identified by the attendees:

Victim Advocates

- Increase the understanding of victim notification issues.
- Strive to eliminate bias in the criminal justice system against certain victims and types of sexual assault.
- Focus on long-term counseling and support to help victims return to normal life, including exploring innovative approaches outside the criminal justice system.
- Consider changes to laws related both to victim compensation and to reimbursement for the cost of sexual assault kits.

Law Enforcement

- Create evidence-based practices for investigating sexual assault cases, including prioritizing before and after a CODIS hit.
- Develop information technology support for evidence and case tracking.
- Improve training regarding the collection of evidence, what prosecutors need to build a case, prioritizing SAKs for lab analysis and assembling a case book.
- Develop protocols for notifying victims that their SAK is going to be tested and that the investigation of their case may be renewed.

- Reconsider funding streams in which law enforcement has to pay for lab analyses.

Crime Laboratories

- Create a plan to handle work if large numbers of previously untested SAKs are suddenly sent to the crime lab.
- Address staff hiring and retention issues.
- Increase implementation of high-throughput analysis procedures.
- Perform research to make DNA analysis faster, better and cheaper, and improve storage capacity for SAKs.

Sexual Assault Nurse Examiners

- Improve the integration of evidence collection into a broader continuum of medical care.
- Improve the quality review/peer review process of SAK collection.
- Update the curricula for Web-based and onsite training, and increase technical assistance.

Prosecutors

- Implement meetings among prosecutors, lead investigators and lab scientists to improve decision making regarding evidence that does and does not need to be analyzed in the lab.
- Improve training on case management, handling cold cases, crime lab techniques and issues, and the use of forensic evidence at trial.
- Create information systems for case management that will automatically notify laboratories to stop working a case if there is a judicial determination (for example, a plea) or it is otherwise not moving forward.

Statutes of limitations

Jurisdictions facing the discovery of older SAKs must consider what their testing policy will be if the statute of limitations (SOL) in a case has passed. The SOL for sexual assault depends on the type of assault and varies across jurisdictions. In Los Angeles, for example, there is a 10-year SOL on sexual assault, but a recent law tolls the SOL (stops the clock) if a DNA profile of a suspect is determined within two years of the assault.

In Dallas, where they recently discovered evidence in thousands of alleged sexual assaults as far back as the 1980s, the SOL situation is complicated. During the 1980s and 1990s, the SOL for sexual assault cases was 5 years. In 2001, however, the law was changed: Now, there is no SOL in sexual assault cases if suspect DNA is present; if there is no DNA evidence, the SOL is 10 years. Although the statutory change allows Dallas officials to go back to September 1, 1996, without running into SOL problems, most of the recently discovered evidence in that jurisdiction is in sexual assaults that occurred before 1996.

If a case cannot be prosecuted because the deadline for filing has passed, is it a wise use of resources to have the SAK evidence tested? The answer is not as obvious as it may seem.

Some proponents of testing all SAKs argue that, even if a case cannot be prosecuted — or the victim does not want to move forward — the evidence should nonetheless be tested to determine if the rapist might have committed other rapes. Evidence of prior, unadjudicated sexual assaults may also be considered in the sentencing of a rapist.

Some argue that cases should be pursued, even if the SOL has passed, as a way to provide some resolution to the victims. It

goes without saying that decisions in these various scenarios will likely be influenced by resources.

State legislatures respond

As we struggle as a nation to deal with the ramifications of the discovery of thousands of unanalyzed SAKs, some states are responding legislatively. Texas, for example, recently passed a law creating a new database — accessible only to local law enforcement — that contains the DNA profiles of alleged rapists. If DNA testing reveals a profile, it goes into the database, even if the case is not filed and prosecuted.

How might such data be used? Information regarding an unadjudicated past rape can be used in the parole hearing of a convicted offender, for example. Prosecutors also note that evidence of past criminal behavior — even criminal behavior that was unadjudicated, if the court deems it is directly relevant to the case at hand — can be used under Federal Rule of Evidence 404(b).

Often simply referred to as “404(b),” this rule allows evidence regarding a defendant’s character or prior criminal conduct into a trial under certain circumstances. Some proponents of analyzing all older SAKs argue that, even when the statute of limitations has passed, it could be important to have 404(b) evidence of a past rape if the person is on trial for another rape. Prosecutors point out that, especially in cases of so-called acquaintance rape, the ability to present 404(b) evidence can effectively turn a “he-said, she-said” case into a case of “he-said, she-said, she-said.”

Illinois recently passed a new law that requires the SAK in every alleged sexual assault to be sent to the lab for analysis. Before this law went into effect, the state police crime lab received approximately

Some proponents of analyzing all older SAKs argue that, even when the statute of limitations has passed, it could be important to have “404(b) evidence” of a past rape if the person is on trial for another rape.

Delays in evidence being sent to a lab — as well as delays in analyzing evidence — result in delays in justice.

1,500 SAKs for analysis every year. Add to that the SAKs that were never sent to the lab — an informal survey found 4,000 unanalyzed SAKs in only 82 of the state's 1,200 law enforcement agencies as of May 2010 — and the current (and future) backlog of SAKs in the Illinois State Police crime lab begins to look daunting.

For more on DNA backlogs nationwide, see the NIJ special report, *Making Sense of DNA Backlogs, 2010: Myths vs. Reality*, available at <http://www.ncjrs.gov/pdffiles1/nij/232197.pdf>.

The road ahead

Ultimately, at the heart of this latest challenge for our criminal justice system are

the victims. Delays in evidence being sent to a lab — as well as delays in analyzing evidence — result in delays in justice. In worst-case scenarios, this can lead to additional victimization by serial offenders or the incarceration of people wrongly convicted of a crime. (See <http://www.nij.gov/journals/262/postconviction.htm> for the story, in the *NIJ Journal*, of one recently exonerated man.)

As the nation grapples with the discovery of thousands of older sexual assault kits, it is crucial that we balance justice, public safety and the victims' needs. The goal, of course, is to move beyond the "crisis management" of the moment to the adoption of systematic practices, procedures and protocols that will prevent this situation from ever happening again.

About the National Institute of Justice

The National Institute of Justice — the research, development and evaluation agency of the Department of Justice — is dedicated to improving our knowledge and understanding of crime and justice issues through science. NIJ provides objective and independent knowledge and tools to reduce crime and promote justice, particularly at the state and local levels.

NIJ's pursuit of this mission is guided by the following principles:

- Research can make a difference in individual lives, in the safety of communities and in creating a more effective and fair justice system.
- Government-funded research must adhere to processes of fair and open competition guided by rigorous peer review.
- NIJ's research agenda must respond to the real world needs of victims, communities and criminal justice professionals.
- NIJ must encourage and support innovative and rigorous research methods that can provide answers to basic research questions as well as practical, applied solutions to crime.
- Partnerships with other agencies and organizations, public and private, are essential to NIJ's success.

The National Institute of Justice is a component of the Office of Justice Programs, which also includes the Bureau of Assistance; the Bureau of Justice Statistics; the Community Capacity Development Office; the Office for Victims of Crime; the Office of Juvenile Justice and Delinquency Prevention; and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART).

Our principle authorities are derived from:

- The Omnibus Crime Control and Safe Streets Act of 1968, amended (see 42 USC §3721-3723)
- Title II of the Homeland Security Act of 2002
- Justice For All Act, 2004

To find out more about the National Institute of Justice, please visit:

www.nij.gov

or contact:

National Criminal Justice
Reference Service
P.O. Box 6000
Rockville, MD 20849-6000
800-851-3420
e-mail: askncjrs@ncjrs.org

U.S. Department of Justice
Office of Justice Programs
National Institute of Justice

Washington, DC 20531
Official Business
Penalty for Private Use \$300



PRESORTED STANDARD
POSTAGE & FEES PAID
DOJ/NIJ
PERMIT NO. G-91

MAY 2011