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## **OVERCOMING A CONSENT DEFENSE TO SEXUAL ASSAULT**

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*Jake, Brian and Mike go to the movies with Chrissy, Maria and Soledad. They all know each other from one of their classes. Afterwards, they go back to Mike's place to listen to some music and kick it. After some drinks, Mike and Soledad start hanging out on the couch. Their other friends leave. One thing leads to another and they start kissing. After a while, Soledad finds Mike forcing himself on her. She didn't mind kissing him, but she didn't want to do anything else. She keeps telling him "No" and saying, "Hey, I don't know you that well, stop." He maneuvers her panties down, puts his finger in her vagina, opens his pants and rapes her."*

As a result of the volume of cases reported similar to the above, the San Diego Police Department Sex Crimes Unit decided to look more closely at prevalent factors that could be used to educate the public to reduce their risk of sexual assault. One significant factor identified was that 7 out of 10, of the sexual assaults reported were perpetrated by non-strangers. These numbers are similar to other towns across the United States. The Bureau of Justice Statistics

(BJS) 1998 National Crime Victimization Survey (NCVS) was based on both reported and unreported crimes. The report shows that 74 percent of rape/sexual assault victims knew their assailant. Eighteen percent of victims were assaulted by an intimate, 8 percent by a relative, and 48 percent by a friend or acquaintance.

### **Evidence Collection in Consent Cases**

A close examination of evidence collected revealed that our investigations, including the forensic sexual assault examination mainly focuses on the genitalia, and trace evidence, such as hairs and fibers, fingerprints, and biological evidence, such as blood, and semen, for DNA analysis. However, almost all non-stranger assailants and many stranger perpetrators, if confronted by police, will claim the victim consented to having sex with him. Therefore, the question is not whether the police identified the correct suspect or whether sexual contact occurred. The question, and the burden for the prosecution, is proving that the victim did not consent to the sexual act. Given the fact that a jury must presume a suspect innocent until proved guilty, a one on one assault with no other corroborating evidence is difficult to prove to a jury beyond a reasonable doubt. As a result, most sex offenders are never prosecuted or held accountable for their violent assaults. Any evidence, no matter how seemingly insignificant, can be used to tip a balanced scale in favor of the victim or the suspect.

Police, prosecutors and SANEs/forensic medical examiners must be trained to look for any and all evidence that can be used to overcome a consent defense. For instance, instead of looking at blood as a way to identify a suspect,

blood can be looked at to corroborate an injury that occurred to either the suspect or the victim during a struggle. Although hair is commonly thought of as a way to identify a suspect, hair can also be examined to determine if it has been pulled out of a person's head. Colposcopic photographs of genital injuries have proved very valuable since they document injuries that can be seen and generally understood by a jury.

External non-genital injuries such as restraint bruises, minor scratches, and abrasions may be overlooked by the untrained medical examiner in favor of careful documentation and collection of trace evidence and biological samples that are rarely looked at by police crime labs. Even if documented by the medical examiner, many fail to include these findings when making and documenting their conclusion. Detectives and prosecutors also often overlook these details if they are not highlighted on the sexual assault exam report or diagram.

### **Clothing Evidence**

Clearly, another area where we have failed to live up to the standards of evidence collection is in identifying and assessing clothing associated with sexual assaults. Both law enforcement and forensic examiners have been correctly taught not to over handle any items with potential trace evidence. However, trace evidence is rarely used in sexual assault cases and DNA is remarkably stable under most conditions. Unfortunately, this means that we often fail to carefully examine clothing for the type of evidence that **CAN** be used to corroborate the majority of sexual assaults, non-stranger sexual assaults, i.e., rips, stretched out elastic, missing buttons, blood, and dirt stains, for fear that we

will disturb fragile trace evidence. The problem is further compounded as a result of police procedures. Most crime scene evidence is transported to police property rooms by patrol officers. The evidence is usually left in the property room in dry storage, refrigerators or freezers until a lab service request is initiated by a detective or prosecutor. As a result of inadequate investigations and prosecution of non-stranger sexual assaults and the shortage of crime lab resources, most rape kits and the clothing impounded with them, are never looked at by anyone. An FBI survey revealed that of all rapes, less than 10 percent had evidence submitted to crime laboratories. As a result of limited resources in crime laboratories, in only 6% of the 250,000 rape cases investigated, was the recovered DNA tested, leaving a backlog of over two hundred thousand cases awaiting processing.<sup>1</sup>

The reality is that there could be many hundreds of thousands of sexual assault kits and other items of evidence, such as clothing and bedding that should be analyzed. The number cited by the FBI only refers to rapes. It does not include all forms of sexual assault or evidence that may have been collected from a crime scene. In addition, most patrol officers have not been properly trained to recognize and collect DNA evidence.

The result is that detectives and prosecutors are making decisions about whether to move forward with a case based on the preliminary investigation, the investigative follow-up, and the forensic examiner's written documentation. As a result, we must ensure that the victim and suspect's clothing, if available, is

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<sup>1</sup> National Institute of Justice Journal, The Unrealized Potential of DNA Testing, December 1997

carefully examined and any visible signs corroborating the use of force by the suspect or resistance by the victim, is carefully documented.

Many times, sexual assault victims present at the hospital wearing clothing put on after she has bathed. Clothing worn during the assault, or put on immediately after the assault, may still be available, but at a different location. SANEs/forensic examiners and law enforcement must communicate to make sure that the clothing is recovered and impounded. Even in those cases, notations should be made by the SANE/forensic examiner, or the investigating officer, indicating where signs of force might be detected by the crime laboratory, based on the victim's history of the sexual assault.

### **Clothing Documentation Form**

To assist SANEs/forensic examiners, law enforcement, and prosecutors, the San Diego County Sexual Assault Response Team created a form to ensure that proper attention and time is given to this critical piece of evidence.

The Clothing Documentation Form has been used by San Diego County Sexual Assault Examiners at all four SART hospitals for the last several months. Both nurses and physicians have found the form to be helpful for the following reasons:

- Provides clear and easy to read documentation of clothing and its condition (current state form did not have enough room for thorough and legible documentation)

- Improves communication between law enforcement and the examiner as to the location of additional clothing or evidence, and the status of that information
- Examiners are encouraged to focus on evidence that can be used by police and prosecutors to corroborate the use of force or resistance by the victim
- The examiner saves time by checking the item of clothing instead of writing out time consuming clothing descriptions

Clearly the SANE/forensic examiner must be aware of the evidence needed in a sexual assault where consent is the likely issue. Proper identification and documentation of evidence can be a significant factor in facilitating case investigation and prosecution. The **San Diego County SART Clothing Documentation Form** has facilitated that process in San Diego County.