



## Increasing Victims' Access to Justice: The Statute of Limitations and the Prosecution of Sexual Assault Cases

Prosecuting rapists is critical to a society that takes sexual assault offenses, public safety, and justice for victims seriously. However, a mere fraction of sexual assault cases make it to prosecution.

The statistics are staggering: only 46 percent of rapes that occur in the United States are reported to police<sup>1</sup> and only 9 percent of these reports result in prosecution.<sup>2</sup> While there are many barriers to prosecution, a common challenge is the expiration of the criminal statute of limitations (SOL). As communities work on their old, untested sexual assault kits, prosecutors will invariably face a deadline for charging on some of those cases. Fortunately, there are several statutory and common law provisions that can potentially expand the standard SOL for sexual assault.<sup>3</sup> By becoming familiar with these laws, prosecutors can help to increase the number of sexual assault cases that are prosecuted.

### **How the Statute of Limitations Affects Sexual Assault Prosecutions**

The statute of limitations prevents the prosecution of a case after a certain period of time has passed. Depending on the state, the SOL in a criminal case starts to run on the date of the crime, the date it was discovered, or the date on which it would have been discovered with reasonable efforts. SOLs for sexual offenses vary based on the severity of the offense and the state where the assault occurred. Some states have SOLs as short as three to six years for felony sexual offenses. Other states adopt a broader approach with no SOL for felony sexual offenses; prosecution in those states can commence at any time. As of August 2013, eight states have no SOL for felony sexual assault.<sup>4</sup>

While there is a legislative trend towards expanding the SOLs for sex offenses, cases will inevitably arise – often through matches of DNA evidence in older cases (“cold hits”) – in which the SOL is about to expire. In such situations, there are several statutory and common law provisions that may expand the time for prosecution.

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<sup>1</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: 2006-2010.

<sup>2</sup> See NAT'L CTR. FOR POLICY ANALYSIS, *CRIME AND PUNISHMENT IN AMERICA* (1999); See also Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOCIAL PROBLEMS 206 (2001).

<sup>3</sup> From a legal standpoint, the mechanisms for SOLs vary by state. Some states toll the SOL (effectively freezing it until a specific condition has passed or is met), while others will extend the SOL for a period of time. For example, Kansas's DNA exception extends the SOL for one year after the offender's identity is known, Kan. Stat. Ann. § 21-5107, while Arizona tolls the SOL during the time with the offenders identity is unknown. Ariz. Rev. Stat. § 13-107. For simplicity, this paper uses the term “suspend”; however, further research is required to determine the exact mechanics of the SOL in a particular state.

<sup>4</sup> DEL. CODE ANN. tit. 11, § 205; KY. REV. STAT. § 500.050; MD. CODE, CTS. & JUD. PROC. §§ 5-106; *State v. Hardin*, 201 S.E.2d 74 (N.C. Ct. App. 1973); VA. CODE ANN. § 19.2-8; W. VA. CODE § 61-11-9; *Boggs v. State*, 484 P.2d 711 (Wyo. 1971).

## The DNA Exception

One option prosecutors may look to is a DNA exception. Increasingly, states are enacting this statutory provision that suspends the SOL where DNA evidence is present. If a rape kit yields a DNA profile from an unknown suspect, the SOL is suspended until the individual is identified. Twenty-seven states have some form of a DNA exception. For example, Michigan's DNA exception provides that "[i]f evidence of the violation is obtained and . . . contains DNA from an unidentified individual, an indictment . . . may be found and filed at any time after the offense is committed."<sup>5</sup> The DNA exception can prove invaluable in situations where DNA evidence yields a profile, but the profile has not been matched to a known suspect.

## John Doe Warrants

Prosecutors in states that do not have a DNA exception might be able to obtain a John Doe warrant instead. A John Doe warrant functions similarly to the DNA exception: an arrest warrant is issued for a suspect who is identified only by genetic information. In lieu of the suspect's name, the warrant will be filed against "John Doe" and cite the DNA profile. This has the effect of filing charges, which satisfies the SOL. Once an individual is matched to the DNA profile, the suspect may be apprehended and charged with the crime at any time. Milwaukee was the first jurisdiction to use the John Doe warrant; it was challenged and upheld by the court in *Wisconsin v. Dabney*.<sup>6</sup> Other states, such as California<sup>7</sup> and New York,<sup>8</sup> have also had success with the use of John Doe warrants.

## Tolling Provisions and Fraudulent Concealment

Some states have other statutory provisions that provide a means to toll the SOL under certain circumstances.<sup>9</sup> Many state statutes suspend the SOL when the defendant is absent from the jurisdiction or fleeing from justice.<sup>10</sup> Some statutes will suspend the SOL if the defendant suffers a disability that would prevent him from understanding the nature of the proceedings.<sup>11</sup> Certain states have a fraudulent concealment exception that suspends the SOL if the defendant is actively concealing himself or evidence of the crime.<sup>12</sup> For example, the Nevada Supreme Court upheld the tolling of the SOL for a sexual assault case after a finding that the defendant committed the acts "in a secretive manner," as the defendant rendered the victim unconscious and videotaped the assault.<sup>13</sup>

## Conclusion

Bringing sexual predators to justice matters to victims of these horrible crimes and to the general public as well. Holding offenders accountable restores public faith in the criminal justice system. In old sexual

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<sup>5</sup> MICH. COMP. LAW § 767.24 (2)(b).

<sup>6</sup> 663 N.W.2d 366 (Wis. Ct. App. 2001).

<sup>7</sup> See *Robinson v. State*, 222 P.3d 55 (Cal. 2010).

<sup>8</sup> See *People v. Martinez*, 855 N.Y.S.2d 522 (App. Div. 2008).

<sup>9</sup> Tolling provisions contain many nuances depending on the state and further research is required.

<sup>10</sup> See, e.g., D.C. CODE § 23-113; N.M. STAT. § 30-1-8 *et seq.*; WASH. REV. CODE § 9A.04.080 (statute of limitations is tolled when the defendant is "not publicly a resident"); See also *Ohio v. Best*, 933 N.E.2d 1076 (2010) (holding that the trial court erred by dismissing an indictment issued against appellee for the alleged sexual abuse of his stepson because the SOL was tolled during the time when he purposely avoided prosecution).

<sup>11</sup> See, e.g., LA. CODE CRIM. PRO. ANN. art. 575.

<sup>12</sup> See, e.g., IND. CODE § 35-41-2; KAN. STAT. ANN. § 21-3106.

<sup>13</sup> *Dozier v. Nevada*, 178 P.3d 149 (2008).

assault cases, prosecutors can use the tools discussed here to avoid expiration of the SOL and work to bring justice to survivors, hold sexual predators accountable, and make our communities safer.

For more information on statutes of limitations in sexual assault cases, visit [victimssofcrime.org/dna](https://victimssofcrime.org/dna).