December 19, 2023

Tessa M. Gorman
Acting U.S. Attorney
Western District of Washington
700 Stewart St.
Ste. 5220
Seattle, Wash. 98101

Bob Ferguson
Attorney General
1125 Washington St. SE
Olympia, Wash. 98501

Pat McCarthy
State Auditor
302 Sid Snyder Ave.
Olympia, Wash. 98501

RE: Request for Formal Investigations Regarding King County Prosecuting Attorney's Office's Juvenile Division's Mishandling of Sexual Assault Cases

Please accept this letter as formal complaints with the civil rights division of the Office of Attorney General and the civil rights division of the U.S. Attorney's Office for the Western District of Washington, respectively, for violations of law identified in this letter. In addition, this communication is a formal request for the U.S. Attorney's Office to independently investigate the juvenile sexual assault case referenced herein. Finally, this communication constitutes a renewed request for the State Auditor's Office to conduct performance and financial audits of the King County Prosecuting Attorney's Office's Juvenile Division and contracted juvenile diversion programs in order to evaluate their use of public funds and grants and whether they are acting in accordance with all applicable federal, state, and local laws.

Dear Acting U.S. Attorney Gorman, Attorney General Ferguson, and State Auditor McCarthy,

I am writing to all of you regarding a matter of great concern that was brought to my attention earlier this year by the father of a sexual assault survivor who was a minor at the time of

the incident. The victim's father was recently interviewed (although his identity was concealed) as part of an investigative series by *KOMO TV* 4 (ABC) that aired on November 16, 17, and 23 of this year. The series contained disturbing allegations about not only how his daughter's case was mismanaged, but also revealed evidence that the King County Prosecuting Attorney's Office's (KCPAO) Juvenile Division ("Division") is violating the civil rights of sexual assault survivors and has been derelict in its constitutional and statutory duties.

According to these reports, the survivor's father submitted numerous public disclosure requests from which he collected significant evidence of official malfeasance. Specifically, the evidence gathered indicates that King County implemented a strategic policy called "Zero Youth Detention" and publicly announced the pending closure of an only recently constructed juvenile detention center by 2025. Pursuant to this policy, Division Operations Manager Stephanie Trollen and Division Chief Deputy Jimmy Hung, established an illegal agreement with a community activist group to segment more than two dozen felony types codified in the RCWs and automatically divert all such referrals up to activist organizations for counseling and other non-punishments, refuse to charge any felony referral for any reason after diversion or else agree to allow activists to participate in charging decisions, and forego tracking attendance once the offenders were diverted into counseling programs.

Contrary to its statutory obligations under RCW 13.40.070 and 13.04.093, which specifically set out the factors prosecutors must consider in determining whether to prosecute a juvenile, the Division adopted an outside group's guidelines in choosing which cases to prosecute and which to send to diversion programs. Evidence in support includes communications that accompany this document. In several emails dated from March 10, 2021, and thereafter (attached hereto as **Exhibit A**), Karisa Morikawa, in her role as Director of Advocacy and Systems Innovation at the non-profit Choose 180 ("180") represented several activist non-profits in negotiations with the Division's Chief Deputy Prosecutor Jimmy Hung, and others. Additional emails reflect they collectively agreed to several modifications to the Division's diversionary practices. (All of the relevant correspondence took place while Leesa Manion, now the elected King County Prosecuting Attorney, was KCPAO's chief of staff.) Specifically, among other points, the parties agreed that the Division would not exercise its prosecutorial discretion to charge juvenile arrestees for any of 28 felonies that the RCP had already either (a) excluded from the list of diversion-eligible charges or (b) left it to case-by-case rather than wholesale prosecutorial discretion.

This evidence is reinforced by an email from Division Operations Manager Stephanie Trollen, who called these changes (which involved zero input from victims' rights groups), "the most significant change in practice I have seen in my 24-year career at the [Prosecuting Attorney's Office]." According to Trollen, the agreement meant that "no charges will ever be filed" for any of the specific crimes 180 requested be diverted, regardless of aggravating circumstances. Division statistics reveal the filing rate has been steadily decreasing since 2019 from 37% down to 28% in 2022.

	Total, All Referrals	All Filings	All Trials	Filing Rate
2019	2808	1031	14	37%
2020	1992	733	8	37%
2021	1144	339	7	30%
2022	1665	462	10	28%

The Division agreed to 180's terms despite the fact that its "Eligibility and PAO Commitments" standards (included within Exhibit A), co-drafted with the RCP, specifically excluded "sex offenses or any offenses alleging sexual motivation" from the diversionary program. This chart was provided by King County after the Division and 180 co-opted the original RCP framework, the former diverted scores of juveniles suspected of sexual offenses who, under normal circumstances, would likely have been charged. Though sex crimes were expressly excluded from the 28 felonies the Division agreed not to charge, the Division provided data through public disclosure that reflects at least 20 offenders have actually been diverted.

It thus appears the Division has and continues to systematically ignore state law, its own agreement with the RCP, and the constitutional rights of victims. Other laws the Division may be violating include the federal Violent Control and Law Enforcement Act of 1994 (42 U.S.C. § 14141) and the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3789d), both of which prohibit the kinds of discrimination the victims of those wrongly diverted may have suffered as a result of the Division's potential malpractice. The Division may also be in violation of federal Title VII protections as well as the Washington Constitution, which reads in relevant part:

> Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.
>
> Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights. This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel.

Wash. Const. art. I, §35 (Victims of Crimes – Rights).

The Division's diversionary practices appear to have an outsized impact on female victims of sexual assault, many of whom belong to minority communities. If true, this likely violates standing U.S. Supreme Court precedent as well. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (law enforcement action with adverse discriminatory impact motivated in part by discriminatory purposes violates the Fourteenth Amendment's Due Process and Equal Protection Clauses); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.").

The results of a policy *not* to enforce the law are, sadly, quite predictable. Prosecutions for sexual assault in the Division have plummeted in recent years despite King County being the thirteenth largest county in the United States by population. The chart below, gathered directly from KCPAO, focuses solely upon juvenile sexual *assault* filings (omitting other sexual charges, including child molestation, voyeurism, etc.).

	Narrowed Data Referrals, Sexual Assault Only	**Narrowed Data Filings, Sexual Assault Only**	**Filing Rate**
2019	253	70	28%
2020	173	58	34%
2021	165	40	24%
2022	236	45	19%

As a former prosecutor who has represented the public in juvenile sexual assault cases, I understand how difficult the job can be especially when applying the burden of proof to specific cases. The public depends on some prosecutorial discretion to maximize appropriate case outcomes. That said, prosecutors are not free to fashion their own legal system, especially one based not upon their own judgements, but on those sourced from a third-party organization (here, 180). Instead, Washington state law prescribes the factors relevant to deciding whether to impose charges and prosecutors are bound to follow them. RCW 13.40.070;13.04.093.

Beyond federal law, Washington state law, and constitutional precedent, the Division's charging practices appear to run afoul of the *National Sexual Assault Investigation and Prosecution: Best Practices Guide* (2021). The *Guide*, published by the National District Attorneys Association's Women Prosecutors Section, includes the following direction on "charging decisions":

> The filing of criminal charges, or the decision not to file, should be made as quickly as reasonably possible and should be reviewed with supervisory staff when appropriate. Additional investigation may be required prior to making a final charging decision. The assigned prosecutor should keep the victim informed of any charging decisions made and/or whether more time is needed to make a charging decision due to a need for further investigation. Also, if charges are not filed and an offender is released from custody, the prosecutor should notify the victim

> immediately to ensure the victim has ample opportunity to take any measures necessary to ensure victim safety (i.e. obtaining protective/restraining orders, changing locks, relocation, etc.).

Id. at 10–11.

Unfortunately, the Division has ignored this guidance. In contracting away their case-by-case discretionary authority, the Division likely has violated both the letter and spirit of several laws designed to protect the broader community and maximize the odds that victims see justice. Moreover, the Division's potential malpractice is not a one-off. Rather, it is just one instance of several in which local prosecutors across the country have failed in their duties to protect the public's interest.

On this, I have attached for your reference a letter prepared by the U.S. Department of Justice discussing its expansive investigation into the Missoula County Attorney's Office's misguided sex crime policies (**Exhibit B**), with which the Division's malfeasance share several similarities. First, for the period during which the Department of Justice found systemic undercharging in Missoula, its County Attorney's Office's sex crime charge rate was a mere 16.4%. Compare that with the Division's admitted 17% charging rate in 2023 on *KOMO TV*. Second, as in Missoula, Division prosecutors have privately and publicly expressed that sexual assault is not a high priority. The fact that its original agreement with RCP made sexual assault charges ineligible for diversion illustrates the initial gravity with which the Division properly viewed such crimes, and makes its subsequent modification that much more egregious. Third, in both cases, it appears prosecutors did not do their due diligence in investigating allegations of sexual assault, leading to many missed opportunities to pursue plausible charges. (**Exhibit C**).

Separately, please take note of articles from the *Seattle Times* (**Exhibit D**) and *KUOW* (**Exhibit E**), which further discuss the Division's apparent misconduct. The Citizen Action Defense Fund (CADF) has twice called for the State Auditor to consider the financial improprieties that have been well-documented in multiple media reports. The latest series from *KOMO* raises additional questions about whether the KCPAO is complying with the terms of the federal and state grants it receives to report and prosecute cases.

In light of this **formal complaint**, CADF hopes you all will take the steps necessary in your respective offices to investigate the Division and its practices. In addition, we respectfully request that your offices independently re-open and investigate the specific incident that served as the basis for the *KOMO TV* series. KCPAO should not object to this step since Chief Deputy Hung indicated in his November 16 television interview that he would welcome an independent review of their handling of the diversion cases.

The elected Prosecuting Attorney, Leesa Manion expressed her "…office's willingness to be transparent in our decision-making…" in an email to all prosecutors on November 9 (in

anticipation of the *KOMO TV* series). It is critical that you review the Division's illegal and immoral diversionary and non-charging tactics.

Please feel free to contact me with any questions or concerns. We look forward to your findings.

Respectfully,

Jackson Maynard
Executive Director and Counsel
Citizen Action Defense Fund
111 21st Ave SW
Olympia, WA 98501
(850) 519-3495

EXHIBIT A

From: Manion, Leesa
To: Hung, Jimmy; Carr, Ben
Subject: Choose 180 Letter of Support for Earmarked Funds
Date: Tuesday, April 6, 2021 9:54:45 AM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
image006.png

Hello Ben and Jimmy:

I am touching base as follow-up to meeting that Ben and I were in yesterday. I don't want to duplicate efforts and I don't want to leave any of our community partners hanging.

Dylan from the Alliance for Gun Responsibility reached out to me to see if the PAO would write a letter of support for PointOneNorth and Choose 180. It's my understanding that you two are working on a letter for Choose 180. Is that correct? If so, then I will simply focus on the letter for PointOneNorth.

Please let me know if my understanding is correct. Thanks!
Leesa

Leesa Manion (she/her)
Chief of Staff
King County Prosecuting Attorney's Office
516 3rd Avenue | Seattle |WA | 98104
Office: (206) 477-1200
Email: leesa.manion@kingcounty.gov

From: Hill, Jennifer-Community Services
To: Trollen, Stephanie; Davis, Zac
Cc: Hung, Jimmy
Subject: RE: Agreements for RCP
Date: Monday, April 5, 2021 4:43:55 PM

Hi Stephanie –

Thank you so much for sending this. I will read carefully before Thursday to make sure I am understanding.

We (Zac and I) definitely do not need to be included in any conversation you all are having with community (and it is likely that Yin Yu, the new RCP manager for the County will be)…our goal for Thursday to confirm we are understanding what has been agreed to, and what has yet to be worked out.

We would like to represent the PAO correctly in the proviso as we have to outline roles/responsibilities of County agencies and address who/when we will have 30-50 referrals per month.

In order to do so, I thought it would be best to go straight to you both for clarification as I have been hearing different things about the agreements made between the PAO and community. I definitely have limited knowledge of the system…and do not always understand the nuances.

Talk soon, Jennifer

From: Trollen, Stephanie <Stephanie.Trollen@kingcounty.gov>
Sent: Monday, April 5, 2021 3:10 PM
To: Hill, Jennifer-Community Services <Jennifer-CommunityServices.Hill@kingcounty.gov>; Davis, Zac <zac.davis@kingcounty.gov>
Cc: Hung, Jimmy <Jimmy.Hung@kingcounty.gov>
Subject: FW: Agreements for RCP

Hi, Jennifer and Zac,

Look forward to talking with you on Thursday. I carefully listened to your feedback today and I've shared all of it with Jimmy.

In advance of our meeting, I thought I should forward some of the agreements and communication that is not reflected in our DRAFT FADS document for RCP. I think some context for the FADS document might be helpful. Below is a summary of some agreements we have already reached with community partners and some of Jimmy's comments (highlighted in yellow) about the topics that need additional conversation. I regret that you were not included in these conversations - perhaps it would have been helpful if you were. Regardless, we were invitees, not conveners, and did not think it was appropriate for us to expand the group. In the future, I will make the suggestion.

The first agreement, that PAO agrees not to file charges for any case referred to RCP regardless of outcome (meaning, even if a youth completely refuses to participate/engage with the community provider) is a significant change to our practice. The only other example of this is our FIRS program for misdemeanor family violence cases. In all other instances of PAO diversion (Choose 180 Program referrals and formal Diversion), we currently retain the ability to file charges if a youth does not complete the agreement. For RCP, we are not even asking for an agreement; we agree up front that no charges will ever be filed. We also agreed to immediately communicate this to law enforcement and request they close the case as "no charges filed". It is probably the most significant change in practice I have seen in my 24 year career at the PAO. I am sharing this just for context.

Best,
Stephanie

From: Hung, Jimmy <Jimmy.Hung@kingcounty.gov>
Sent: Monday, March 15, 2021 2:53 PM
To: Karisa Morikawa <kmorikawa@choose180.org>; Trollen, Stephanie <Stephanie.Trollen@kingcounty.gov>; Komalpreet Sahota <ksahota@restorativecommunitypathways.org>; nikkita@creativejusticenw.org; Martina Kartman <martina@collectivejusticenw.org>; Jessica Rock <jessica@communitypassageways.org>; Sean Goode <Sgoode@choose180.org>; Hurley, Katherine <Katherine.Hurley@kingcounty.gov>
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Thank you Karisa for taking the time to take a stab at documenting the agreements. Also, thank you all for the conversation a couple Fridays ago and for your willingness to push us a little bit. I know that those of us deeply imbedded in system need it.

I put some notes on Karisa's list below for further discussion. Maybe we can find another time to discuss and try to come to some conclusion/consensus.

JH

From: Karisa Morikawa <kmorikawa@choose180.org>
Sent: Wednesday, March 10, 2021 8:30 PM
To: Hung, Jimmy <Jimmy.Hung@kingcounty.gov>; Trollen, Stephanie <Stephanie.Trollen@kingcounty.gov>; Komalpreet Sahota <ksahota@restorativecommunitypathways.org>; nikkita@creativejusticenw.org; Martina Kartman <martina@collectivejusticenw.org>; Jessica Rock <jessica@communitypassageways.org>; Sean Goode <Sgoode@choose180.org>; Hurley, Katherine <Katherine.Hurley@kingcounty.gov>
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Hi all,

Appreciate everyone engaging in these conversations. Here are some of the take-aways and agreements from our meeting last Friday:

- If a misdemeanor or felony is referred from PAO to RCP, PAO cannot file charges after the referral.
- PAO will stick to the list of charges *at a minimum*
- If PAO decides someone should not be eligible despite their charge being RCP eligible, PAO will consult a committee (workgroups will determine who is on the committee) *before* filing; it should be a conversation to discuss filing, not an explanation/justification for filing (I think we're pretty much on the same page here. A couple of considerations: 1) we might need to develop some expected timeframes to bring together committee to discuss. Our decisions may be time sensitive and we may not be able to delay a decision; 2) I think I understand what you're trying to capture with the last comment, i.e. PAO agrees to discuss decision with open mind and that this doesn't just become a token gesture, but a large part of the conversation from our perspective would be to explain/justify why we believe we need to file; 3) I tried to explain this during our meeting, but did a woeful job. While it is exceedingly rare, there may be a circumstance/situation where we may not be able to offer any explanation. I know this can be hard to accept from community, but I can envision a scenario and just want to again be totally up front about the possibility.)
- We are advocating for PAO to create explicit criteria of why a person facing an RCP eligible charge would not be eligible so guidelines are not based on the personality of the specific deputy prosecutor. (We will try our best. But I promise that we will not be able to foresee every possible circumstance that may arise. To mitigate the issue around inconsistency between prosecutors, maybe we install a protocol where the Division Chief needs to okay the exception to the policy.)
- If filing decisions need to be made rapidly, we should continue conversation on how the workgroup can be mobilized rapidly to be involved pre-filing
- PAO will discuss moving Rob2 and Assault2 to the eligible RCP list. These are the cases best suited for RCP. (This is where having rigid standards could result in limiting eligibility. We agree with the points below. But if the ask is that the PAO relinquish all discretion to file a charge that is on it's face eligible, then the natural response is to limit eligibility. When we committed to RCP, we committed to including the cases that were eligible for CEDAR. We retained discretion on A2/Rob2 and excluded when certain degree of harm inflicted. We are open to continuing this conversation. I just wanted to get down what the commitment was up front. That you are pushing us to expand our commitment is a good thing and we welcome the dialogue on this.)
    - International research consistently reports restorative justice is more effective with more serious crimes rather than less serious crimes and is more successful for violent crimes than property crimes.
    - Restorative justice is most effective at addressing serious violent crimes where there is a heightened emotional engagement by victims and offenders.

- Significant impacts on recidivism are seen when restorative justice interventions are used to address violent crimes.
- Rob2 and Assault2 are charges that are extremely disproportionately imposed on Black children in King County (diverting these helps to address the racial disparities in filings)

One area that I'm not sure we've talked about involves how we factor a history of juvenile legal system involvement in the criteria. Eligibility is not purely presenting offense based. CEDAR was a first-time felony program.

Please let me know if this does not accurately capture what we spoke about.

Jimmy and Stephanie- please follow up letting us know how the conversation around eligibility goes and if additional conversation is needed.

Thank you,

Karisa Morikawa | Director of Advocacy and Systems Innovation

Pronouns: she/her/hers (*what's this?*)

Black Lives Matter

CHOOSE 180

Cell: 206.643.1925

Office: 206.457.8940

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Cc: Hung, Jimmy
Subject: FW: Agreements for RCP
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Attachments: RCP FADS.docx

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Restorative Community Pathways (RCP)

Eligibility and PAO Commitments

The King County Prosecuting Attorney's Office (PAO) believes that justice is best achieved when we work in partnership with communities most impacted by the legal system. Meaningful partnership requires that the PAO be willing to share power with community. To this end, the PAO commits to exercising its prosecutorial discretion in a transparent way that directly refers juvenile offender matters through the RCP diversion program. Through this process, youth who cause harm will be held appropriately accountable by the community and have their individual needs met, thereby reducing the likelihood of future harm. The RCP process will also strive to meet the needs of harmed parties, offering opportunities for restorative justice when sought, and financial compensation for loss. The PAO believes that RCP will be an iterative process, where we learn and improve our delivery of service over time. In this spirit, the PAO commits to revisiting eligibility standards as needed.

I. Eligible Offenses:

- Assault 4
- Assault 3
- Burglary 2
- Criminal Trespass 1, 2
- Escape
- Felony Harassment
- Harassment
- Malicious Mischief 1, 2, 3
- Obstructing a Law Enforcement Officer
- Organized Retail Theft
- Possession of Stolen Vehicle
- Reckless Burning
- Residential Burglary
- Robbery 2*
- Taking Motor Vehicle Without Permission 1, 2
- Theft 1, 2, 3
- Theft of a Motor Vehicle
- Unlawful Display of a Weapon
- Unlawful Possession of a Firearm Second Degree
- Vehicle Prowl
- Violation of the Uniform Controlled Substance Act

II. Excluded Offenses:

- Class A Felonies, and Attempt, Conspiracy, or Solicitation to commit a Class A Felony
- Assault in the Second Degree
- Drive-By Shooting
- Sex Offenses or any offenses alleging Sexual Motivation

DRAFT

- Intimate Partner Domestic Violence.
- Intra-familial Domestic Violence (these offenses will continue to utilize the FIRS approach)
- Felony Traffic Offenses.

*Robbery 2 - Cases involving the following factual circumstances are not eligible for RCP: 1) Use or threatened use of a deadly weapon/firearm; and/or 2) bodily injury requiring more than first aid at the scene.

III. History - All presenting misdemeanor offenses are eligible for RCP regardless of the respondent's offender history. Presenting felony offenses are only eligible for RCP if the respondent does not have a prior felony adjudication or pending deferred disposition.

IV. Pending Matters - Respondents who have pending charges in Juvenile Court are not eligible for direct referral to RCP on new matters.

V. Prosecutorial Discretion - The PAO recognizes that there may be circumstances when prosecutorial discretion will be used as an exception to these standards and charge an RCP eligible case into Juvenile Court. In exercising this discretion, the PAO commits to the following process:

   A. All decisions to charge an RCP eligible case shall be staffed with and approved by the PAO Juvenile Division Chief.
   B. If deviation is sought, the PAO will endeavor to staff its decision with the RCP advisory board (?), prior to charging the matter into Juvenile Court. The RCP advisory board will convene the staffing within three business days of notice being provided by the PAO.
   C. The PAO recognizes that there may be circumstances where notice to the RCP advisory board is not feasible. In such cases, the PAO may charge the matter into Juvenile Court and inform the RCP advisory board of this exception. The PAO will still staff the charging decision with the RCP advisory board. If after consultation the PAO determines that referral to RCP is advised, then the PAO will move to dismiss the matter in Juvenile Court and route the case to RCP.

DRAFT

EXHIBIT B

U.S. Department of Justice

950 Pennsylvania Ave, NW
Washington DC 20530

FEB 14 2014

VIA EMAIL AND U.S. MAIL

Mr. Fred Van Valkenburg
County Attorney
Missoula County Courthouse
200 West Broadway
Missoula, Montana 59802

Re: The United States' Investigation of the Missoula County Attorney's Office

Dear Mr. Van Valkenburg:

As you know, for the last ten months, the Civil Rights Division ("Division"), in partnership with the U.S. Attorney's Office for the District of Montana, has been engaged in an investigation of the Missoula County Attorney's Office (the "County Attorney's Office" or "MCAO") concerning allegations of bias by the County Attorney's Office in the investigation and handling of sexual assault cases. This letter summarizes the evidence we have uncovered to date and describes the legal framework for assessing whether a constitutional or statutory violation has occurred.[1] As you are aware, we have delayed issuing this letter in the hopes that we might agree upon remedies to address the problems our investigation has found. You so far have been unwilling to respond to or even discuss the set of remedies we have proposed. Nonetheless, we are hopeful that, in light of your January 9, 2014 letter indicating a desire "to resolve this matter amicably," this letter can serve as a starting point for us to meet with you promptly and discuss a mutually agreeable resolution that will best serve the people of Missoula County, rather than expending scarce resources on protracted litigation.

We are aware of the complaint for declaratory judgment that you recently filed. As we have discussed on several occasions, and as set out further below – and contrary to each claim raised in your complaint – the Department of Justice has jurisdiction to investigate and to seek injunctive relief to remedy discriminatory conduct. This jurisdiction arises from both the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d ("Safe Streets Act"). This letter is sent pursuant to these authorities.

[1] Previous to this letter, the Division's Special Litigation Section investigated and publicly issued findings regarding the response to sexual assault by five other law enforcement agencies: the New Orleans (LA) Police Department; the Maricopa County (AZ) Sheriff's Office; the Puerto Rico Police Department; and, most recently, the University of Montana's Office of Public Safety and the Missoula Police Department. All but one of these law enforcement agencies – the Maricopa County Sheriff's Office – have entered into agreements with DOJ, aimed at cooperatively resolving the issues identified in DOJ's investigations and findings letters. DOJ initiated a civil lawsuit against the Maricopa County Sheriff's Office, based on the concerns described in its letter of findings, in May 2012.

In April 2012, we informed you of our investigation into allegations of bias regarding the MCAO's response to sexual assault cases and invited you to work with us as we explored these allegations. You declined, and throughout the investigation you have refused to provide requested documents, information, or access to staff for interviews. Despite this, we have learned significant information by reviewing documents available from other sources and by interviewing persons knowledgeable about the policies, training, and practices related to the County Attorney's Office's investigation and prosecution of sexual assault.

Our investigation to date has revealed substantial evidence suggesting that MCAO's response to allegations of sexual assault and rape discriminates against women and that this discrimination is fueled, at least in part, by gender bias. This bias erodes public confidence in the criminal justice system, places women in Missoula at increased risk of harm, and reinforces ingrained stereotypes about women. It also undermines sexual assault investigations in Missoula from the outset, impairing the ability of both police and prosecutors to uncover the truth in these cases and hold perpetrators of sexual violence accountable.

In addition, our investigation indicates that the County Attorney's Office has often failed to take the steps necessary to develop sexual assault cases properly so that informed and fair prosecutorial assessments may be made. As a result, female sexual assault victims in Missoula are deprived of fundamental legal protections and often re-victimized by MCAO's response to their reports of abuse.

Specifically, our investigation has uncovered evidence indicating that the County Attorney's Office engages in a pattern or practice of gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and relevant statutes. In particular, there are strong indications that the decisions of the County Attorney's Office regarding the investigation and prosecution of sexual assaults and rape, particularly non-stranger assaults and rapes, are influenced by gender bias and gender stereotyping and adversely affect women in Missoula.

The County Attorney's conduct must be viewed in its totality. While no single fact is determinative, the following facts – taken together – strongly suggest discrimination:

- Sexual assaults of adult women are given low priority in the County Attorney's Office;

- Adult women victims, particularly victims of non-stranger sexual assault and rape, are often treated with disrespect, not informed of the status of their case, and re-victimized by the process – in many instances, victims are not even interviewed by a prosecutor before the decision is made to decline charging their case or to offer a plea agreement to the perpetrator;

- The County Attorney's Office neither has its own dedicated victim-witness personnel, as are routinely employed in prosecutors' offices across the nation, nor sufficiently coordinates with the Missoula Crime Victim Advocate Office to ensure the proper and respectful treatment of and communication with victims;

- The County Attorney's Office routinely fails to engage in the most basic communication about its cases of sexual assault with other law enforcement and other partners;

- The County Attorney's Office generally does not develop evidence in support of sexual assault prosecutions, either on its own or in cooperation with other law enforcement agencies; and

- Not until we began our investigation did the County Attorney's Office begin providing Deputy County Attorneys with the basic knowledge and training about sexual assault necessary to effectively and impartially investigate and prosecute these cases. This training remains insufficient and incomplete.

Our investigation indicates that an institutionalized indifference to crimes of sexual violence, coupled with bias against the women who represent the overwhelming majority of victims of sexual assault, handicaps the County Attorney's Office's ability to protect victims of crime effectively or handle sexual assault cases fairly. Women consistently told us that Deputy County Attorneys treated them with indifference or disrespect, and frequently made statements to women victims, advocates, and the public diminishing the seriousness of sexual violence and minimizing the culpability of those who commit it. We learned that prosecutors did not communicate with female victims about their cases, did not inform them of the charges to be filed and did not seek their input about the type of relief to seek against the accused if convicted. In many cases, prosecutors failed even to return victims' phone calls.

Manifested in these ways, the County Attorney's Office's handling of crimes of sexual assault is indicative of unlawful gender bias, perpetuates a culture that tolerates sexual assault, dissuades victims from reporting crimes, leaves violent criminal activity unaddressed, and compromises the safety of all women in Missoula. Such a situation strongly suggests that MCAO stands in violation of the Constitution and federal anti-discrimination laws. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (law enforcement action with adverse discriminatory impact violates the Fourteenth Amendment when it is motivated, at least in part, by a discriminatory purpose).

We also have repeatedly emphasized, in discussions with you and your Office, that our investigation is focused on the MCAO's policies and practices, not the County Attorney's exercise of prosecutorial discretion. We do not seek to second-guess the decisions of you or your attorneys to charge an individual with a crime. Our goal has been and continues to be identifying gender bias where it may exist in MCAO policies and practices; eliminating that bias in a constructive and cooperative manner; and thereby enhancing the public's trust in your Office's ability to respond to and make effective prosecutorial decisions about allegations of sexual assault and better protecting women in Missoula.

BACKGROUND

Our investigation of MCAO was part of a larger inquiry conducted by the Division's Special Litigation Section and the U.S. Attorney's Office for the District of Montana. It focused not only on the role of the County Attorney's Office but also on the actions of the University of

Montana's Office of Public Safety ("OPS") and the Missoula Police Department ("Missoula Police" or "MPD") in handling allegations of sexual assault against women in Missoula. In May 2013, the Civil Rights Division reached agreements with those two agencies. The Division's Educational Opportunities Section also concluded an investigation of the University of Montana and reached an agreement to protect students from sexual harassment and sexual assault. At the same time it announced these agreements, the Division issued letters documenting its findings regarding OPS, the Missoula Police, and the University of Montana.[2] The reforms carried out pursuant to those findings and agreements have already begun to improve the response of Missoula law enforcement to sexual assault and to serve as models for other campuses and communities nationwide.

The Division's investigation was prompted by widely expressed community concerns that Missoula law enforcement, including the County Attorney's Office, was failing to respond appropriately to reports of sexual assault, both on the University of Montana campus and elsewhere in Missoula. We received information indicating that the MCAO failed to pursue viable sexual assault prosecutions and that this reflected problematic dynamics beyond the generally acknowledged challenges of prosecuting sex crimes. There were concerns in Missoula that, as a result, women reporting sexual assaults were being denied access to criminal justice, and perpetrators of sexual assault were not being held accountable. There were further concerns that because of the experience many women had with the criminal justice system in Missoula, including the widely held perception of poor treatment of women reporting sexual assault, many victims chose not to report the crime.

The Special Litigation Section brought its investigation of the County Attorney's Office pursuant to 42 U.S.C. § 14141, and the Safe Streets Act. Specifically, the investigation sought to determine whether the County Attorney's Office, as well as the Missoula Police Department and the University of Montana's Office of Public Safety, engage in a pattern or practice of unlawful gender discrimination in violation of the Fourteenth Amendment, the Safe Streets Act, and the regulations implementing the Safe Streets Act, 28 C.F.R. §§ 42.201-215. Under these laws, the County Attorney's Office is prohibited from discriminating against female sexual assault victims.

Under Section 14141(a), "[i]t shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." Section 14141(b) gives the Attorney General the authority to seek "equitable and declaratory relief to eliminate the pattern or practice."

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[2] See http://www.justice.gov/crt/about/spl/findsettle.php#police (under "Montana") and http://www.justice.gov/crt/about/edu/documents/classlist.php (under "Sex"). The investigation of sex discrimination by the University of Montana was conducted by the Division's Educational Opportunities Section pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, and Title IX of the Education Amendments of 1972, 42 U.S.C. § 2000h-2.

The Safe Streets Act provides in part that "[n]o person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title." Section 3789d(c)(1). The Safe Streets Act further authorizes the Attorney General to file a civil suit "[w]henever the Attorney General has reason to believe that a State government or unit of local government has engaged in or is engaging in a pattern or practice in violation of the provisions of this section." Section 3789d(c)(3). The County Attorney's Office is covered by Section 3789 as a recipient of federal funding authorized under the Safe Streets Act.

The County Attorney's Office serves as the state prosecutor in Missoula and employs 17 Deputy County Attorneys in two sections, criminal and civil. The Criminal Division prosecutes all felony offenses that occur in Missoula County and all offenses that occur in the County outside Missoula city limits. The County Attorney's Office has been led by the same County Attorney since 1998.[3]

METHODOLOGY

The Special Litigation Section's investigation of Missoula law enforcement has to date included interviews with law enforcement officers and with advocates, victims, witnesses, and other members of the Missoula community, in person over the course of 13 days on-site in Missoula and by telephone over the past year and a half. Our interviews included conversations with a former sex-crimes prosecutor with MCAO; former Missoula Police Chief Mark Muir[4] and nine Missoula Police detectives and officers; representatives of 12 local, statewide, and university organizations that work on behalf of women and victims of sexual assault; and more than 30 women reportedly victimized by sexual assault in Missoula, or their representatives.

We engaged two expert consultants, one with nearly a decade of experience supervising a police department's sex-crimes unit and the other a former sex-crimes prosecutor and national training consultant in sexual assault response. With them, we reviewed policies, procedures, training materials, case files, related court filings, and other data and documentary evidence, including the case files for the more than 350 reports of sexual assault received by the Missoula Police between January 2008 and May 2012. We have made every effort to confirm witness accounts, where possible, with other evidence, including police reports, transcripts, and video recordings of investigative interviews, and gave weight only to those statements we could corroborate or otherwise deem credible. We have consulted with a wide range of advocates, practitioners, and academics with expertise in this field; reviewed academic studies and literature; reviewed Montana state laws relevant to the law enforcement and advocacy response to sexual assault;[5] and reviewed national prosecution standards and training materials published

[3] Missoula County Attorney Home, Missoula County Official Website, http://www.co.missoula.mt.us/cattorney/ (last visited Feb. 14, 2014).

[4] Mark Muir retired as Chief of the Missoula Police Department on December 20, 2013.

[5] Missoula advocates and attorneys expressed frustration with the limitations that Montana's sexual assault laws and sentencing standards impose on law enforcement's ability to effectively seek criminal justice for victims of sexual assault. Without expressing an opinion on these laws, we found that Montana law neither explains nor excuses the deficiencies discussed in this letter.

by the National District Attorneys Association ("NDAA") and the American Bar Association ("ABA").[6]

LEGAL STANDARDS

The Constitution and federal statutes prohibit discrimination by law enforcement, including prosecutors, in responding to reports of sexual assault. When this discrimination amounts to a pattern or practice of unlawful conduct, the United States can sue for equitable and declaratory relief under 42 U.S.C. § 14141 or the Safe Streets Act or both. Sex discrimination by law enforcement may occur in either of two ways: where law enforcement practices reflect intentional sex discrimination, or where law enforcement practices have an unjustifiable disparate impact.

The Equal Protection Clause of the Fourteenth Amendment prohibits intentional sex discrimination, including selective or discriminatory enforcement of the law. *Whren v. United States*, 517 U.S. 806, 813 (1996) ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race."); *Elliot-Park v. Manglona*, 592 F.3d 1003, 1007 (9th Cir. 2010) (Equal Protection Clause prohibits law enforcement from intentionally discriminating in the provision of any services to any degree); *Estate of Macias v. Ihde*, 219 F.3d 1018, 1019, 1028 (9th Cir. 2000) (in case alleging "inferior police protection on account of status as a woman, a Latina, and a victim of domestic violence," holding that there is an equal-protection right to have law enforcement services administered in a nondiscriminatory manner).

In addition to affirmative discrimination against members of protected groups, a failure to take action, on a discriminatory basis, can constitute unlawful discrimination. See *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 197 n.3 (1989) ("The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."); *Bell v. Maryland*, 378 U.S. 226, 311 (1964) (Goldberg, J., concurring) ("[D]enying the equal protection of the laws includes the omission to protect."). The Ninth Circuit has explained specifically that the constitutional right to have law enforcement services delivered in a nondiscriminatory manner "is violated when a state actor denies such protection" to members of protected groups on a prohibited basis. *Estate of Macias*, 219 F.3d at 1028. The courts have applied this principle to under-enforcement of the law when deliberate under-enforcement adversely affects women. See, *e.g.*, *id.*; *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 700-01 (9th Cir. 1988) (recognizing an Equal Protection claim based upon the discriminatory denial of law enforcement services to a victim of domestic violence because of her sex).

Law enforcement action violates the Fourteenth Amendment when a discriminatory purpose is a contributing factor; discrimination need not be the sole motivation for the action or failure to act to violate the Constitution. *Arlington Heights*, 429 U.S. at 265-66. Recognizing that discriminatory purpose is rarely admitted or blatant, courts look to the totality of

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[6] See, *e.g.*, Nat'l Dist. Att'ys Ass'n, National Prosecution Standards (3d ed. updated 2009), http://www.ndaa.org/publications.html; Am. Bar Ass'n, Standards for Criminal Justice: Prosecutorial Function Standards.

circumstances to evaluate whether a law enforcement activity or a failure to act was motivated by discriminatory intent. Courts will consider factors that indirectly indicate an intent to discriminate. A "not exhaustive" summary of the factors that courts may properly consider in conducting an inquiry includes: evidence of discriminatory impact; the "historical background" of the challenged discriminatory conduct; evidence of departures from "the normal procedural sequence" or "substantive departures" from a decision, "particularly if the factors considered by the decision maker strongly favor a decision contrary to the one reached"; and contemporaneous statements by the decision maker. See *id.* at 265-68; see also *Balistreri*, 901 F.2d at 701 (evidence of police officer's statement to domestic violence victim that "he did not blame [the victim's] husband for hitting her, because of the way she was 'carrying on,'" "strongly suggest[s] an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women").

Differential treatment of women premised on sex-based stereotypes, including stereotypes about the role women should play in society or how they should behave, also violates the Equal Protection Clause. See, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 517 (1996) (holding invalid explicit sex-based classification, and stating that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women"); *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 730 (2003) ("Reliance on such [invalid gender] stereotypes cannot justify the State's gender discrimination [in employment]."); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (holding that denying otherwise qualified males the right to enroll in state nursing school violated the Equal Protection Clause). Thus, where a law enforcement agency's failure to adequately respond to allegations of sexual assault is premised, at least in part, on sex-based stereotypes, that failure violates the Equal Protection Clause.

When law enforcement's handling of sexual assault cases is intentionally discriminatory or has an unnecessary disparate impact, it also violates the Safe Streets Act and its implementing regulations. A disparate impact violates the Safe Streets Act and its implementing regulations, even where the discrimination is not intentional, unless the defendant can demonstrate that the discriminatory impact is necessitated by some legitimate law enforcement or other purpose. See 28 C.F.R. § 42.203 (prohibiting recipients of federal funds made available under the Safe Streets Act from "utiliz[ing] criteria or methods of administration which *have the effect* of subjecting individuals to discrimination") (emphasis added); see also *United States v. Virginia*, 620 F.2d 1018, 1022 (4th Cir. 1980) (Safe Streets Act requires showing that defendants' discriminatory employment practices had an adverse impact on female job applicants, not proof of intentional discrimination, before defendants must demonstrate that challenged practices have a necessary relationship to the job).

The Safe Streets Act applies to entities receiving federal funds during the time of the discriminatory acts. The United States has jurisdiction to address discrimination based on gender by the County Attorney through the Safe Streets Act because the County Attorney's Office has received qualifying federal funding during the period in question and during the current fiscal year.

DISCUSSION

Prosecuting sex crimes is difficult. They often present investigative and evidentiary challenges that other crimes do not. Notwithstanding these difficulties, however, the County Attorney's Office's frequent failure to prosecute sexual assaults of women stands out. Based on an analysis of the information available to us, between January 2008 and May 2012, the Missoula Police referred 85 reports of sexual assault of adult women to the County Attorney's Office. According to the Missoula Police, a referral to the County Attorney's Office indicates that the Missoula Police has concluded its investigation of the case and is recommending that the case be prosecuted. During that same period, the County Attorney's Office filed charges in only 14 of the 85 reports of sexual assault referred for prosecution – less than 17 percent. During that same period, the County Attorney's Office notified the Missoula Police that it had declined prosecution in 42 of these 85 referrals, and all but one of these declinations involved a non-stranger sexual assault.[7] The County Attorney's Office did not provide any notification to the Missoula Police in the remaining 29 cases.

MCAO's failure to prosecute sexual assault, particularly non-stranger sexual assault, does not seem to reflect inherent or insurmountable evidentiary hurdles. Rather, it is indicative of bias in the way the County Attorney's Office responds to sexual assault cases as a class. It also demonstrates how ill-prepared MCAO is with respect to prosecuting the bulk of sexual assault cases it receives from the Missoula Police. As discussed further below, our investigation revealed evidence that MCAO has a general disregard for sexual assault cases and the women who report them. This disregard is apparent in statements made by the County Attorney and Deputy County Attorneys, and in the manner in which Deputy County Attorneys interact with, or fail to interact with, women reporting sexual assault.

MCAO's bias against women victims of sexual assault is also apparent in its handling of non-stranger sexual assault cases, its failure to explain or document its decisions not to file charges in those cases, and what appear to be excessively long delays in completing its work in cases of sexual assault. Deputy County Attorneys often do not work with, or in some cases even communicate with, Missoula Police detectives to develop evidence for prosecution or to explain why existing evidence is insufficient to charge a case. They failed to communicate with victims about charging decisions or the status of their cases. Before our recent resolution with OPS and MPD, Deputy County Attorneys lacked sufficient training in the legal and scientific knowledge

[7] We arrived at these numbers by comparing sexual assault and rape charges filed in the Missoula District Court between January 1, 2008, and May 1, 2012, with MPD case reports involving adult women referred to the County Attorney's Office during the same time period. Additional analyses of the 29 cases referred for prosecution by MPD between January 2008 and May 2012 that the County Attorney's Office neither prosecuted nor expressly declined for prosecution was precluded by the County Attorney's refusal to cooperate with our investigation. While the County Attorney's Office filed charges against 68 defendants in sexual assault cases between January 2008 and May 2012, insofar as we can determine based on the information available to us, only 14 of these involved adult women and were referred by MPD after January 1, 2008. For our comparison to be accurate, we had to restrict our count of prosecutions to prosecutions of cases referred after January 1, 2008. Also to ensure an accurate comparison, we excluded referrals from agencies other than MPD (such as the Missoula County Sheriff's Office) because, without the cooperation of the County Attorney, we did not know the number of referrals from other agencies and thus could not calculate the prosecution rate for those referrals.

and strategies necessary to effectively prosecute sexual assault against women. These and other practices related to the prosecution of non-stranger sexual assault cases are at odds with the practices of prosecutors' offices around the nation and run counter to guidance set forth by the NDAA and the ABA.

In addition, MCAO's approach to sexual violence in Missoula has had significant, detrimental impacts on the law enforcement community's overall response to sexual assault. The work of Missoula Police detectives is compromised by the fact that, even if they expend the resources to conduct a comprehensive investigation, the County Attorney's Office often will not charge the case. One woman reported that the Missoula Police detective in her case informed her that because "no one had a limb cut off and there was no video of the incident," prosecutors "wouldn't see this [the rape] as anything more than a girl getting drunk at a party." Whether or not the detective's characterization was accurate, the County Attorney's actions over time left this detective – and many others like him – with the understanding that non-stranger sexual assault of women, and especially drug-facilitated sexual assault, must involve physical force or overwhelming and irrefutable evidence to be considered a crime worthy of prosecution.

For victims of sexual assault, MCAO's response indicates that a decision to report and participate in an assault investigation will be, at best, a waste of time or, at worst, a re-victimization. Indeed, in one case from early 2013, a detective told both the victim and the offender that the detective's role was limited to collecting physical evidence of sexual assault and that the County Attorney's Office would never file charges in the case – despite the fact that the detective acknowledged to the victim that she had been raped by the offender. Similarly, the advocates, social service providers, police officers, and medical and mental health professionals who together comprise Missoula's sexual assault response team (the First Step Resource Center Multidisciplinary Team) are undermined and discouraged by a County Attorney's Office that apparently leaves sexual assault and rape laws largely unenforced.

Moreover, MCAO's inability to investigate adequately or file charges in cases of sexual assault has an adverse effect not only on survivors of sexual assault, but also on the safety of women in the Missoula community as a whole. Since the majority of sexual assaults are committed by repeat offenders,[8] the effect is compounded because perpetrators who escape prosecution remain in the community to reoffend.

Deficiencies in the County Attorney's Office's Response to Sexual Assault Indicate an Impermissible Bias Against Female Victims of These Crimes

Our investigation to date has developed evidence indicating that the County Attorney's Office's failure to adequately respond to sexual assault results at least in part from unlawful bias against women who report sexual assault, and thus violates the Equal Protection Clause of the Fourteenth Amendment and the statutes that we enforce. *See United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (a governmental entity

[8] M. Claire Harwell & David Lisak, Why Rapists Run Free, *Sexual Assault Report*, Vol. 14, No. 2, at 17-27 (Nov./Dec. 2010) (research "clearly demonstrates that most rapes are in fact committed by serial offenders"); Nat'l Dist. Att'ys Ass'n, National Prosecution Standards Pt. II cmt. to § 2-9.

violates the Equal Protection Clause when it adopts a policy or practice that has an adverse effect on a protected group and its actions are motivated in part by discriminatory intent).

The question of whether bias motivates the actions of a law enforcement agency must be assessed by considering the totality of circumstances. *See Arlington Heights*, 429 U.S. at 265-67 (determination of whether actions were motivated by discriminatory intent can be based on both circumstantial and direct evidence, including, *inter alia*, adverse effect, historical background, departures from normal procedures, and substantive departures from decisions supported by nondiscriminatory motives). The County Attorney's Office's practices discussed below indicate its failure to vindicate the rights of women victims of sexual assault and suggest that MCAO is violating the law. *See Estate of Macias*, 219 F.3d at 1028 (discriminatory failure to enforce the law or otherwise administer governmental services violates equal protection).

Together, these failures reflect the County Attorney's Office's disregard for crimes of sexual assault – one of the most violent categories of crimes, and a category of crime whose victims are overwhelmingly female. According to the Montana Board of Crime Control, across the State of Montana, 800 adult women were victims of sexual assault in 2012, compared to 180 men.[9] Of the most serious assaults, rape and forcible sodomy, the gender disparity is even more lopsided: 368 adult women victims and 43 men. Missoula County reported to the State 102 sexual assaults and rapes against adult women and 21 against men for the same period.[10] *See Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into circumstantial and direct evidence of intent as may be available. The impact of the official action – whether it bears more heavily on one [group] than another – may provide an important starting point.") (quotation marks and citation omitted).

1. The County Attorney's Office's Treatment of Female Victims of Sexual Assault Indicates a Significant Level of Animus Toward These Women

Under Montana law, a prosecutor is required to consult with victims of felony and misdemeanor offenses "involving actual, threatened, or potential bodily injury to the victim," including sexual assault, to obtain the victim's views about the disposition of the case, including about plea negotiations. *See* Mont. Code Ann. § 46-24-104 (2013). Our investigation has shown that the County Attorney's Office often neglects to hold these consultations with sexual assault victims, in contravention of Montana law. And the interactions that the County Attorney's Office *does* have with victims of sexual assault often leave them feeling offended, disregarded, and disbelieved by prosecutors. The comments made by prosecutors and their treatment of these victims suggest gender bias on the part of those charged with the obligation to prosecute crimes in Missoula. Such bias is unlawful where it results in decisions and conduct that discriminate against women.

In one instance, for example, a Deputy County Attorney quoted religious passages to a woman who had reported a sexual assault, in a way that the victim interpreted to mean that the

[9] See http://mbcc.mt.gov (last visited Jan. 13, 2014).
[10] *Id.*

Deputy County Attorney was judging her negatively for having made the report. We also spoke to a woman whose daughter was sexually assaulted, at the age of five, by an adolescent boy. In response to a question about why the perpetrator had been sentenced to only two years of community service, the prosecutor handling the case reportedly told the woman that "boys will be boys." Advocates told us that Deputy County Attorneys "said terrible things to victims," including saying to one woman, in the course of discussing the decision not to prosecute her sexual assault, "All you want is revenge."

One woman described her interaction with a Deputy County Attorney as "traumatic." Another woman stated that, by the time the prosecution was over, she was so frustrated by the Deputy County Attorney's treatment and the MCAO's failure to keep her informed about key developments in the case that she "would never suggest" that another woman pursue a sexual assault prosecution in Missoula. She said further that it "broke her heart" that other women had to go through a similar process to have their cases prosecuted. Other women reported that prosecutors treated them with "no compassion," and acted like the prosecutors were "forced to speak" with them. Several women informed us that they left meetings with prosecutors feeling like they were being "judged" for their prior sexual history, or that the prosecutors did not believe them.

Some women told us that they or others had declined to pursue prosecution because of the negative accounts they had heard from friends and acquaintances about their treatment by the County Attorney's Office. For instance, we interviewed a young woman who had suffered a gang rape as a student at the University of Montana and described feeling re-traumatized by the experience of seeking to have the assault prosecuted by the County Attorney's Office. As a result of hearing about that experience, a friend of the woman declined to report her own rape to either the police or to prosecutors. In another example, a clinical psychologist told us that she had counseled numerous sexual assault survivors in Missoula who had pursued criminal charges against their assailants and described their experience with the County Attorney's Office as being so horrendous that, when the psychologist herself was sexually assaulted, she was reluctant to have her case prosecuted by the County Attorney's Office.

In addition to the types of troubling statements and treatment of women described above, prosecutors compound the trauma sexual assault victims experience by failing to convey important information about charging decisions and other aspects of sexual assault cases to women directly, in a timely manner, or sometimes at all. For example, we heard from women that they had to repeatedly request information and updates from MCAO attorneys handling their cases. They told us that the County Attorney's Office failed to initiate communication with them, did not provide status updates or notices of scheduling changes for court dates, and, unless repeatedly prompted, did not even explain expectations for testifying witnesses in advance of hearings. As a result, the task of informing women about charging decisions generally falls to detectives with the Missoula Police or to advocates with the Missoula Crime Victim Advocate Office, despite the fact that those detectives and advocates are not involved in the prosecutor's decision-making process and thus cannot describe that process in any depth.

One woman told us, for example, that she had no contact with the County Attorney's Office during the year after her first and only meeting with the prosecuting attorney handling her

case. She only learned that the prosecutor had offered her assailant a plea agreement from an advocate with the Missoula Crime Victim Advocate Office, despite the fact that she and her mother had left numerous phone messages for the prosecuting attorney throughout the year. The woman told us that she had understood nothing about the Deputy County Attorney's decision to file charges in her case or reasons for offering a plea agreement; that she was frustrated both by what she believed to be a weak plea agreement and by MCAO's lack of responsiveness and regard for her perspective; and that the County Attorney's Office had made her and her mother "feel like [the case] wasn't that important" to the Office. Her advice to other women reporting sexual assault in Missoula, she said, would be "if at all possible, not to go" to the County Attorney's Office. Her statement underscores the reality that, where prosecutors fail to communicate with women directly, it discourages not only their own participation in the criminal justice process but also that of others who hear about their negative experiences with the justice system.

In another case, when the woman finally did meet with the prosecutor assigned to her case, she described getting the sense that the prosecutor was "just telling [her] what [he] want[ed] her to know." This woman asked a Missoula Police detective whom she trusted to accompany her to the meeting to support her and ensure that her questions were answered fully and completely. Through her own advocacy and the detective's prompting, they learned that the defendant's psychosexual evaluation, which provided information relevant to sentencing, had been conducted by doctors of the defendant's choosing. During the evaluation, the defendant had stated that the rape – to which he had already confessed – had been consensual. No one, however, challenged this statement. The woman explained to the prosecutor that the evaluation could not, therefore, be considered particularly reliable. Although MCAO could request a second evaluation, she learned, thanks to the detective's questioning, that it almost never did so. It is the rare sexual assault victim who will advocate for herself in this manner, and access to criminal justice should not depend upon self-advocacy.

MCAO's failure to communicate regularly and appropriately with complaining witnesses is exacerbated by the Office's failure adequately to coordinate and communicate with crime advocates, either by having advocates on staff, or by making proper use of available crime advocates. The Missoula Crime Victim Advocate Office is located right outside of the County Attorney's Office and has a memorandum of understanding with MCAO to notify victims of the court dates where they have a right to be present. Nonetheless, we were told that the County Attorney's Office almost never solicits the involvement of the Crime Victim Advocate Office with its complaining witnesses in cases of sexual assault. Rather, the burden of identifying and communicating with complaining witnesses falls entirely to the Crime Victim Advocate Office, whose advocates do a daily review of jail rosters to identify potential victims of sexual assault. Moreover, the Crime Victim Advocate Office is only rarely included in in-person meetings between Deputy County Attorneys and complaining witnesses. Nor is the Crime Victim Advocate Office involved in working with victims before a case is charged, even though this is when prosecutors need to demonstrate that they will support a meritorious victim through a difficult process.

Treating women with disregard in this manner not only provides evidence of bias and undermines MCAO's ability to successfully prosecute sexual assault cases, it also directly

contravenes national standards for prosecutors. The National District Attorneys Association's standards, for example, require prosecutors to keep victims informed about their cases, to "be mindful of the possibility of intimidation and harm arising from a witness's cooperation with law enforcement," and, to the extent feasible and appropriate, to provide assistance and protection to witnesses of crime.[11] Indeed, the NDAA commentary to these standards states that "[e]ffective prosecution includes a sound understanding of the value of victims and witnesses within the criminal justice system," and that prosecutors have an obligation "to facilitate the relationship with victims and witnesses" to encourage victims to report crime and "follow[ ] through with identifications, statements, and testimony."[12]

2. Public Comments by the County Attorney Raise Concerns of Impermissible Gender Bias

Public comments you have made further suggest that, at the very least, sexual assault is not a high priority for MCAO. Such comments are probative of discriminatory intent, *Arlington Heights*, 429 U.S. at 266-68 ("contemporary statements" by decision makers "may be highly relevant" in determining discriminatory intent), and add to the totality of circumstances indicating impermissible gender bias by the County Attorney's Office, *Balistreri*, 901 F.2d at 701 (statements from decision makers that reflect gender-based stereotypes and bias are among the factors that courts will consider in assessing discriminatory intent).

For example, in responding to questions about delays in charging decisions, you reportedly said that your attorneys review charging decisions in sexual assault cases "when they have spare time."[13] While you have subsequently attempted to explain that by "spare time" you were referring to the "additional time" after other courtroom and litigation functions have been completed, the statement seems inconsistent with the diligent investigation and prosecution of sexual abuse.[14]

Additionally, you reportedly told the Independent Reviewer for the Division's agreements with the Missoula Police and the University's Office of Public Safety (the "Independent Reviewer") that, rather than having attorneys review sexual assault investigations to assess the merits of the case, they "rely on [Missoula Police] detectives to stay on top of the [a]ttorneys to get the decisions they need," and "that if he does not hear from the detective of the case he assumes the case is not a priority for the detective."[15] The statement seems to suggest that unless a detective is willing to aggressively push attorneys in your Office to prosecute sexual assault cases, there is little chance that such cases will receive serious consideration. We note that you have recently acknowledged that you are starting to work on a protocol to ensure timely charging decisions in sexual abuse cases.[16]

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[11] Nat'l Dist. Att'ys Ass'n, National Prosecution Standards Pt. II §§ 2-9.1, 2-10.6, 2-10.7 (3d ed. rev. 2009).
[12] Nat'l Dist. Att'ys Ass'n, National Prosecution Standards Pt. II cmt. to §§ 2-9 & 2-10 (3d ed. rev. 2009).
[13] First Report of the Independent Reviewer, [re] The Agreement between the City of Missoula Police Dep't and the U.S. Dep't of Justice 24 (Nov. 5, 2013), *available at* http://www.ci.missoula.mt.us/1621/Improving-Our-Response-to-Sexual-Assault.
[14] Fred Van Valkenburg, Editorial, Words Twisted on DOJ Compliance, *The Missoulian*, Dec. 16, 2013.
[15] *Id.*
[16] *Id.*

3. The County Attorney's Office's Handling of Non-Stranger Sexual Assault Cases and Its Failure to Explain or Document Its Decisions Not to File Charges in Those Cases Raise Further Concerns of Impermissible Discrimination

While, as stated above, this investigation is not aimed at second-guessing the exercise of prosecutorial discretion, the County Attorney's handling of non-stranger sexual assault cases, and its consistent failure to explain or document its decisions not to file charges in those cases, raises further concerns about impermissible bias. Cf. *Arlington Heights*, 429 U.S. at 267 (it may be further relevant evidence of decision makers' purposes "if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached").

After an extensive review of police files, our prosecutorial expert concluded that the factors considered as part of the charging decision process depart from the standards of the profession. In some cases reviewed by our expert, for example, Missoula Police officers had developed substantial evidence to support prosecution, but MCAO, without documented explanation, declined to charge the case. Non-stranger sexual assault cases rarely have evidence of significant force being used, a confession, or an eyewitness account.[17] But our investigation to date reveals that the County Attorney's Office declined to prosecute some sexual assault cases even where it *did* have a confession or an eyewitness.

In one case, for example, the Missoula Police obtained a confession from a man who admitted raping a woman while she was unconscious. The Missoula Police referred the case to the County Attorney's Office with a recommendation that the prosecutor charge the suspect with sexual intercourse without consent, as well as car theft. The County Attorney's Office declined to bring any charges, citing "insufficient evidence." In another case, the Missoula Police obtained incriminating statements from a suspect who admitted to having intercourse with a mentally ill woman, including statements that he couldn't "determine" how soon he had stopped having sex with the woman after she asked him to stop and told him he was causing her "vagina" to "hurt." The Missoula Police referred the case to the County Attorney's Office, recommending that the prosecutor charge the suspect with sexual intercourse without consent. Despite the incriminating statements, the County Attorney's Office declined to bring any charge in the case.

Of equal concern, we found that the County Attorney's Office declined to prosecute nearly every case of non-stranger assault involving an adult woman victim who was, at the time of the assault, subject to some type of heightened vulnerability – for example, in cases where the assault was facilitated by drugs or alcohol. As noted above, the County Attorney's Office declined prosecution in assaults facilitated by drugs or alcohol, even when the assailant had confessed or made incriminating statements. This pattern of declining to prosecute sexual assault of women with heightened vulnerabilities is particularly troubling given the realities of how perpetrators of sexual assault identify potential victims, and the likelihood of drug- or

[17] See Teresa P. Scalzo, Prosecuting Alcohol-Facilitated Sexual Assault 12 (Nat'l Dist. Att'ys Ass'n Aug. 2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf (noting that there are "almost never eyewitnesses to a rape" and that "rape cases rarely have physical evidence that conclusively proves that a rape occurred").

alcohol-fueled sexual assault affecting women in Missoula. Women who are intoxicated are at increased risk of sexual assault, and more than half of all non-stranger sexual assault involves alcohol use by the victim, assailant alcohol use by the victim, assailant, or both.[18] Moreover, women in campus settings may be particularly likely to be vulnerable or incapacitated due to drug or alcohol use.[19]

We also found that the County Attorney's Office declined to prosecute nearly every case of non-stranger sexual assault involving an adult woman victim who had a mental or physical disability, even in cases where there was evidence such as a confession or incriminating statements by the perpetrator. Here, too, the County Attorney's Office appears to resist prosecuting those sexual assault cases most likely to occur in Missoula. Local advocates report that Missoula is one of Montana's principal locations for services for persons with mental health and physical disabilities and, relatedly, is home to a substantial population of individuals with mental health issues, including a significant transient population. Moreover, women with disabilities are particularly likely to be targeted as victims by perpetrators of sexual assault.[20] Given the realities of sexual assault, and the makeup of the population in Missoula, MCAO's apparent resistance to prosecuting cases of sexual assault against women with disabilities, as well as cases of drug- or alcohol-fueled sexual assault, is of particular concern.

For instance, a woman reported that she had been drugged and raped by an acquaintance the previous day. Missoula Police officers developed evidence that included video footage of the alleged assailant slipping something into the woman's drink. The Missoula Police also obtained admissions by the assailant that although he did not remember putting something in the woman's drink, it was possible he had and, as he stated, "If I were trying to make her relax it would be Xanax." When confronted with the video footage, the assailant also stated, "My memory tells me no, but I can't argue with surveillance." The Missoula Police obtained a search warrant for the suspect's home and learned that the suspect had recently refilled prescriptions for two drugs common in drug-facilitated sexual assaults, including Xanax. Nonetheless, MCAO declined to charge the case, citing insufficient evidence, but with no documented further explanation.[21]

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[18] See Jeanette Norris, The Relationship Between Alcohol Consumption and Sexual Victimization, Nat'l Online Res. Ctr. on Violence Against Women, at 1 (Dec. 2008), http://www.vawnet.org/sexual-violence/summary.php?doc_id=1630&find_type=web_desc_AR.

[19] See Rana Sampson, Acquaintance Rape of College Students, in Problem-Oriented Guides for Police Series Guide No. 17, at 13 (U.S. Dep't of Justice, Office of Community Oriented Policing Servs. 2002) (noting that in over 75% of college rapes, the offender, victim, or both had consumed alcohol).

[20] Bureau of Justice Statistics, Crime Against People with Disabilities, Nat'l Crime Victimization Survey, at table 2 (2008); Jeanette Norris, The Relationship Between Alcohol Consumption and Sexual Victimization, Nat'l Online Res. Ctr. on Violence Against Women, at 1 (Dec. 2008), http://www.vawnet.org/sexual-violence/summary.php?doc_id=1630&find_type=web_desc_AR; William Paul Deal & Viktoria Kristiansson, Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault, vol. 1, no. 12 The Voice, 1 NDAA Nat'l Ctr. for the Prosecution of Violence Against Women (2007).

[21] While toxicology tests did not detect drugs in the woman, given the other evidence, there are indications that this may have been due to a false-negative caused by setting the toxicology levels too high. See, *e.g.*, Adam Negrusz & R.E. Gaensslen, Analytical Developments in Toxicological Investigation of Drug-Facilitated Sexual Assault, 376 *Analytical & Bioanalytical Chemistry* 1192-97 (Apr. 8, 2003) (noting that the sensitivity of the drug screening technique is crucial, as some compounds commonly used in drug-facilitated sexual assaults are typically administered in a single low dose, and discussing various screening techniques).

Moreover, we found no indication that the County Attorney's Office had given any guidance to Missoula Police detectives about how to develop evidence that it believed *would* be sufficient to support bringing charges in this case.[22]

Between 2008 and 2010, the Missoula Police provided a written referral form to the County Attorney's Office, including a section designed for narrative comments about the reasons for declining prosecution. MCAO attorneys rarely documented their decision to decline prosecution in sexual assault cases in a meaningful way. The most common comments were "insufficient evidence" or "insufficient corroboration." After 2011, the written referral form disappeared from the Missoula Police files we reviewed. We learned that this was due to MCAO's chronic failure to return the form to the Missoula Police – a source of frustration for Missoula Police detectives who were often left with no specific information about the reason for MCAO's decision not to prosecute, as well as the responsibility of explaining MCAO's decision to the victim of the sexual assault.

As part of its initial efforts to implement its agreement with DOJ, MPD is revising and reinstating the use of this written referral form, once again seeking feedback from MCAO about its charging decisions in cases referred by the police department. Although we credit the Missoula Police for these efforts, their impact will be limited without the active cooperation of the County Attorney's Office. MCAO's decision not to provide feedback leaves both Missoula Police detectives and women sexual assault victims in the dark about the MCAO's declination decisions – particularly as the County Attorney's Office consistently relies on Missoula Police detectives to communicate with victims of sexual assault about the status of their criminal cases. The lack of information also deprives Missoula Police detectives of an important source of information about how they can improve their investigative techniques to collect the type of evidence the County Attorney's Office deems sufficient or to otherwise assist MCAO attorneys in developing cases for prosecution. The failure to provide material information to the Missoula Police falls far short of meeting a prosecutor's responsibility to provide information to police to aid them in performing their duties.[23]

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[22] Of course, in some cases, a prosecutor may have good reasons to exercise discretion not to charge a particular case. Under the usual circumstances for conducting an investigation such as this one, we would have met with the relevant agency to discuss specific decisions made; but as noted, the County Attorney has refused to cooperate with this investigation.

[23] National standards for prosecutors recognize the importance of maintaining clear lines of communication between prosecutors and police. These standards state that the chief prosecutor, here the County Attorney, "should actively seek to improve communications between his or her office and other law enforcement agencies," and "should keep local law enforcement agencies informed of cases in which they were involved and provide information on those cases in order to aid law enforcement officers in the performance of their duties." Nat'l Dist. Att'ys Ass'n, National Prosecution Standards Pt. II §§ 2-5.1 to 2-5.2, at 22 (3d rev. 2009). Our expert also observed that the County Attorney's Office's practices in this area were significantly out of step both with national standards for prosecutors and with the common practice of prosecutors' offices across the nation.

4. The Practices of the County Attorney's Office Depart from Procedures Commonly Used by Prosecutors Across the Nation and Further Indicate Bias Toward Victims of Sexual Assault

a. The County Attorney's Office Fails to Adequately Investigate Sexual Assault Crimes or Communicate with Law Enforcement Partners to Aid in Their Development of Sexual Assault Cases

Our investigation to date indicates that the County Attorney's Office fails to adequately investigate cases of sexual assault, cf. *Arlington Heights*, 429 U.S. at 267 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."); fails to collaborate with Missoula Police detectives to develop evidence, especially evidence of incapacitation, sufficient to support sexual assault charges; fails to engage in any independent investigative responsibility; and, where additional evidence could be gathered, fails to explain adequately to the Missoula Police why cases are declined. Our expert found that the MCAO's practices concerning sexual assault depart from the standards of other prosecutors' offices, indicating bias.

We also found that the County Attorney's Office fails to develop, or work with Missoula Police detectives to develop, the evidence necessary to make non-stranger sexual assault cases into viable prosecutions, particularly in cases involving drug- or alcohol-facilitated sexual assault. Under Montana law, a victim who is incapacitated is incapable of consent. See Mont. Code Ann. § 45-5-501(1)(a) (2013) (defining "without consent" to include an incapacitated victim). During our investigation, we examined several cases in which Missoula Police detectives did not attempt to develop evidence of incapacitation where the other evidence strongly suggested that incapacitation was relevant to establishing the woman's lack of consent.[24] The Missoula Police then referred these cases to the County Attorney's Office for review. Prosecutors, however, did nothing to ensure the Missoula Police knew what additional evidence they would need in order to build legally sound prosecutions from these cases.[25]

In addition, our investigation revealed that the practices of the County Attorney's Office depart from the standards of respected professional associations. While police departments undertake the majority of criminal investigations, national standards for prosecutors recognize that the investigation of crimes, both independently and through oversight of police investigators, is one of the core functions and duties of a prosecutor's office. The American Bar Association Standards provide that while "[a] prosecutor ordinarily relies on police . . . for investigation, . . . the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies."[26]

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[24] We discuss these cases in more detail in our May 15, 2013 letter to Mayor John Engen regarding the Missoula Police. That letter is available at: http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf.
[25] *See, e.g.*, Teresa P. Scalzo, Prosecuting Alcohol-Facilitated Sexual Assault, at 17-19 Nat'l Dist. Attorney's Ass'n (Aug. 2007) (discussing categories of corroborating evidence and providing numerous examples).
[26] *See* Amer. Bar Ass'n, Prosecutorial Function Standard § 3-3.1(a).

Similarly, the NDAA standards note that "there are times when the prosecutor must use his or her authority to initiate or continue an investigation," and states that "[a] prosecutor should have the discretionary authority to initiate investigations of criminal activity in his or her jurisdiction."[27] These situations may include cases where the primary investigative law enforcement agency has a conflict of interest; where the investigation has been handled improperly; or where the investigation calls for expertise available at the prosecutor's office.[28] It is in keeping with national standards for prosecutors' offices for prosecutors to work collaboratively with police departments to develop or corroborate evidence, and to follow additional investigative leads.

Moreover, both the ABA and the NDAA recognize that prosecutors should employ investigators to supplement law enforcement investigations and, in limited circumstances, conduct independent investigations. *See* ABA Prosecutorial Function Standard § 3-2.4(b) ("Funds should be provided to the prosecutor for the employment of a regular staff of professional investigative personnel and other necessary supporting personnel, under the prosecutor's direct control . . . ."); NDAA National Prosecution Standard § 3-1.6 ("Chief prosecutors should employ properly trained investigators to assist with case preparation, supplement law enforcement investigations, [and] conduct original investigations . . . ."). Our expert has stated that it is quite common for prosecutors to employ their own investigators.

The NDAA further recognizes that prosecutors have a responsibility to provide oversight and training to police investigators. *See* NDAA National Prosecution Standard § 2-5.3 ("The chief prosecutor should encourage, cooperate with and, where possible, assist in law enforcement training."). In its guidance on prosecution of alcohol-facilitated sexual assault, for example, the NDAA recommends that prosecutors "instruct investigators to look for evidence that not only proves the act occurred, but also evidence that overcomes the consent defense" and "train police to conduct offender-focused investigations in rape cases."[29]

We recognize that it is primarily the responsibility of the police to conduct investigations. But it is the responsibility of the prosecutor to work with the police to ensure that investigations are sufficient to support viable prosecutions. The County Attorney's Office falls short of this duty when it comes to crimes of sexual assault. By ignoring its role in the investigation of crimes of sexual assault, the County Attorney's Office substantially departs from national standards for prosecutors and common prosecutorial practices across the nation.

b. The County Attorney's Office Fails to Offer Prosecutors Training that Would Facilitate Their Proper Handling of Sexual Assault Cases

Despite its location in a college town, and widespread community attention to the issue of sexual assault, the evidence we gathered to date indicates that the County Attorney's Office has failed to provide attorneys with sufficient training on prosecuting sexual assault against women,

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[27] Nat'l Dist. Att'ys Ass'n cmt. § 3-1; Nat'l Dist. Att'ys Ass'n, Nat'l Prosecution Standards § 3-1.2 (3d ed. 2009).
[28] Nat'l Dist. Att'ys Ass'n cmt. § 3-1.
[29] Teresa P. Scalzo, Prosecuting Alcohol-Facilitated Sexual Assault, Nat'l Dist. Att'ys Ass'n (Aug. 2007), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf.

and especially non-stranger assaults. Indeed, prior to the initiation of our investigation, the County Attorney's Office provided little, if any, such training. Without training, prosecutors do not have the tools to build strong prosecutions of non-stranger sexual assault, and thus they are more likely to erroneously assess the strength of a case and rely on personal misperceptions or bias in exercising prosecutorial discretion in charging decisions.

Specifically, MCAO attorneys lack sufficient training in the bodies of legal and scientific knowledge necessary to prosecute assaults against adult women, including non-stranger sexual assault. While Deputy County Attorneys have attended trainings concerning domestic violence and the sexual abuse of children, our investigation indicates that until recently, they received no training on sexual assault.

The successful prosecution of sexual assault, like that for most offenses, relies on a grasp of relevant legal and scientific knowledge. An attorney would struggle to prosecute a homicide case that turned on DNA evidence without being familiar with the underlying science, and the same is true of sexual assault cases and the science relevant to sexual assault. As the NDAA explains in its monograph on "Victim's Responses to Sexual Assault," it is "imperative for state and local prosecutors to be aware of rape myths and how juries may be influenced by these myths"; to be educated about the various physical and psychological responses that a woman may have following sexual assault; to be able to persuasively describe to a jury how and why a sexual assault victim may not have expressed her lack of consent in a way that meets the jury's expectations of a response to a violent crime; or to explain why a victim may not be able to recall or describe the details of her sexual assault.[30] This means that, in cases involving sexual assault, the prosecutor should be familiar with core concepts such as tonic immobility, counterintuitive response to sexual assault, the interrelationship between psychological trauma and memory, and means of addressing misinformation about violence and sex.[31]

The County Attorney's Office's inadequate training impacts both charging decisions and the ability to successfully prosecute sexual assault. For instance, under Montana law, the sexual history of a woman is legally protected from introduction at trial in sexual assault cases in all but the most limited circumstances.[32] Yet one woman informed us that the County Attorney's Office stated that MCAO had declined to prosecute her case because of her sexual history. Basing prosecutorial decisions on women's sexual histories not only demoralizes and stigmatizes

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[30] Patricia L. Fanflik, Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?, Nat'l Dist. Att'ys Ass'n (Aug. 2007).

[31] *See, e.g.*, Patricia L. Fanflik, Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?, Nat'l Dist. Att'ys Ass'n (Aug. 2007); Veronique N. Valliere, Understanding the Non-Stranger Rapist, 1 *The Voice* 11 (NDAA Nat'l Ctr. for the Prosecution of Violence Against Women 2007); Jennifer Gentile Long, Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases, 1 *The Voice* 4 (NDAA Nat'l Ctr. for the Prosecution of Violence Against Women 2006); Teresa P. Scalzo, Overcoming the Consent Defense, 1 *The Voice* 7 (NDAA Nat'l Ctr. for the Prosecution of Violence Against Women 2006).

[32] *See* Mont. Code. Ann. § 45-5-511.

victims, it disregards laws and national prosecutorial standards designed to sexual assault prosecution and protect women who report assaults.

According to recent correspondence we have received from you, two Deputy County Attorneys attended a weeklong sexual assault prosecution training session conducted by the National District Attorneys Association in August 2013. Since the announcement of our investigation and in particular since the issuance of the findings letters and the entry of agreements with MPD and OPS, several prosecutors have attended the training provided to MPD and OPS investigators and first responders as part of the DOJ settlement agreements. This is a welcome development. Under the agreements with the Missoula Police and the University, there have been several required training sessions for local law enforcement, and it is our understanding that Deputy County Attorneys have attended these trainings.

While this increased attention to training is important, it is not enough. As national standards from the NDAA and the ABA indicate, training must be targeted to the function of the prosecutor, address the dynamics of working with victims and developing the evidence for a successful prosecution, and be ongoing.

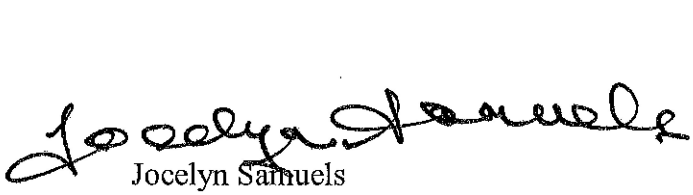
We believe the commonsense remedies we have proposed to you over the last several months will help augment the trainings you have instituted by providing additional tools to prepare Missoula prosecutors to respond appropriately, respectfully and fairly to victims of sexual assault, as well as work with other law enforcement and victims to identify and develop the evidence necessary for successful prosecutions.

CONCLUSION

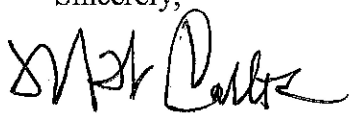
Discrimination, including gender bias and stereotypes, undermines law enforcement's ability to effectively vindicate the rights of sexual assault victims and hold perpetrators accountable, and weakens public confidence in the criminal justice system. The United States has worked cooperatively with the University of Montana and the Missoula Police Department to develop durable and comprehensive remedies that better protect women and make law enforcement more effective. We urge you to join us in these collaborative efforts. We stand ready to meet with you to discuss a mutually agreeable and prompt resolution of this matter.

Please note that this letter is a public document and will be posted on the Civil Rights Division's website. If you have any questions, please contact Jonathan Smith, Chief of the Special Litigation Section, at (202) 514-6255.

Sincerely,



Jocelyn Samuels
Acting Assistant Attorney General
Civil Rights Division

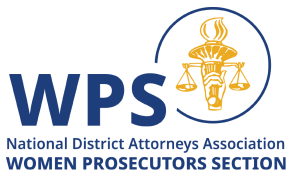


Michael W. Cotter
United States Attorney
District of Montana

EXHIBIT C

National Sexual Assault
Investigation and Prosecution
Best Practices Guide

January 2018
Revised January 2021



The National Sexual Assault Investigation and Prosecution Best Practices Guide is a living document highlighting current best practices in the investigation and prosecution of Sexual Assault.

Prosecutors and allied professionals are encouraged to continue developing this guide by contributing information on emerging best practices. NDAA recognizes that funding, local rules, or other state laws or local restrictions may prevent an office from adopting the various approaches suggested. This guide is not intended to replace practices and procedures already in operation, but to simply inform and recommend practices that are effective and consistent throughout the nation.

For additional edits to this living document, contact Adrian VanNice, avannice@bouldercounty.org, Chair Sexual Assault sub-committee, NDAA Women Prosecutors Section.

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Introduction

Sexual Assault remains one of the most serious, yet under-reported crimes in the country. “According to the 1996 National Violence Against Women Survey in the United States, one in six women has been a victim of sexual assault or rape. The survey also estimated that more than 300,000 women, and nearly 93,000 men, are raped every year in the United States (Tjaden & Thoennes, 2000)The variety of emotions that sexual assault victims experience, including shame, humiliation and even guilt play a significant role in under reporting. However, law enforcement, including prosecutors, must accept partial blame. Despite their best intentions, many jurisdictions have been slow to acknowledge the impact that criminal investigations and trial have on the lives of sexual assault survivors, and have failed to take essential steps to mitigate that impact. This paper is intended to advance a victim-centric approach which is easily adaptable to any jurisdiction. Tailored to address the unparalleled harm victims experience as a result of sexual violence, this approach makes adjustments to guard against re-victimizing survivors who choose to brave the criminal justice process. Until rates of reporting these crimes increase, these offenders will be emboldened to continue destroying lives.

From the officer who takes the initial report to the prosecutor who takes the case to trial, success depends on being able to adapt the “standard” investigation and prosecution response to a response that not only anticipates the challenges and vulnerabilities inherent in these types of crimes, but also pushes the criminal justice system to accommodate for those stressors. This paper incorporates best practices utilized by police agencies, prosecutors, health care providers, crisis counselors, and legislators that can be used to bring about needed change in this arena.

Definitions

Sexual assault is generally defined as any act of sexual contact without consent or without legal consent due to age, or lack of mental or physical incapacity. However, specific legal definitions for sexual assault vary by state, territory and federal statute, as well as by campus, tribal and military codes. For example, The California Penal Code (section 261.6) defines consent to mean positive cooperation in act or attitude. The person must act freely and voluntarily and know the nature of the act involved. Illinois law stipulates that the victim's manner of dress at the time of the offense does not constitute consent (720 ILCS 5/12-17), and according to the University of Virginia, consent means words or actions that show a voluntary agreement to engage in mutually agreed-upon sexual activity. Schools teach students that consent is an uninfluenced “Yes”— where both people feel free to say yes or no or to withdraw consent at any time. The topic of consent will be addressed in more detail below.

Costs of Sexual Assault

Sexual assault is a crime with emotional, physical, and economic consequences for victims and communities. The shock waves that emanate from sexual victimization touch not only the victim but also the victims' immediate family, relatives, colleagues, neighbors and acquaintances. These effects can endure for years or even a lifetime (Programs, 2011). Sexual Assault is not merely a crime against a particular victim, but one that permeates the very fabric of a community.

The Problem

Many law enforcement agencies and prosecutors' offices continue to process sexual assault cases in the same manner as they would a robbery or burglary with little understanding of, or consideration for, the effects of trauma on the victim. Once a report has been made by a victim of a sexual assault, he or she is asked to re-tell what happened over and over again in each stage of the investigation/prosecution of the case, and is expected to do so in a chronological and organized narrative. Weeks may go by without the victim knowing whether the assailant will be arrested, charged, or prosecuted, or, if the assailant is arrested, whether he will be released from custody. During trial, the focus may be on the victim's prior sexual history, behavior or life-style rather than the defendant's conduct. Law Enforcement and Prosecutors must first realize that handling these types of cases requires a different approach, and they must process these cases in a way that will increase positive victim outcomes, and ultimately, increase the reporting of these crimes.

The Solution

The nature of sex crimes demand sensitivity and a nuanced, and trauma-informed, investigative and prosecutorial approach that can only be achieved by vertical units comprised of dedicated, specially trained individuals to conduct victim sensitive investigations and prosecutions. Creating a multi-disciplinary team comprised of law enforcement, medical professionals, victim advocates/counselors, and prosecutors, who will be responsible for devising county-wide protocols for a standardized response to sexual assaults, provides a consistent and collaborative approach.

Use of SART Model

Developing a Sexual Assault Response Team (SART) utilizes a multi-disciplinary, victim sensitive approach to investigating and prosecuting sexual assault cases. The core members of the SART include law enforcement, victim advocates, forensic medical/laboratory personnel (i.e. SANE's and DNA experts), forensic interviewers, and prosecutors. These teams work together collaboratively to ensure a coordinated response ensuring victims' needs are a priority, this will increase public safety and result in

an increase in offender accountability. These teams can be effectively utilized even in smaller jurisdictions.

In general, SARTs support victims' rights, commit to meeting victims' needs, enhance evidence collection, and educate the community about available intervention and prevention services. Teams often define themselves by the level of cooperation and collaboration among members. For example, sexual assault response teams generally include medical, legal, and advocacy agencies or organizations that cooperate and communicate with each other while serving victims. Most response teams have cooperative interagency understandings, host regularly scheduled team meetings, and commonly share resources and expertise. However, the team members and their agencies maintain their own guidelines and protocols rather than establishing a collaborative team identity. This model allows multiple agencies to monitor the overall effectiveness of interagency responses, review the consequences of those responses for criminal justice proceedings, and address emerging issues proactively.

SARTs that define themselves as response teams activate and dispatch team members (law enforcement officers, forensic medical examiners, advocates, and sometimes prosecutors) in a coordinated fashion to provide integrated and immediate responses following sexual assaults. The primary advantage of a response team model is that it minimizes the number of contacts that victims must initially make to receive quality medical, legal, and advocacy services. Since response team members are activated together, the specific roles and responsibilities of participating agencies are interwoven into team guidelines and protocols that coordinate interdisciplinary responsibilities based on expertise. (Programs, 2011).

Trauma Informed Training

To ensure sexual assault victims are being informed and supported at every step in the criminal justice process, it is essential for all agencies who are involved in these cases to be trained in proper trauma informed responses to this vulnerable population. A lack of understanding on this topic can cause harm to a victim and in turn, harm to the case. An investigator's or prosecutor's word choice, question posed, or perceived body language can cause a victim to feel threatened, not believed or worse yet, question why they chose to report the incident to begin with. With proper training from skilled professionals on this topic, the entire multidisciplinary team can effectively support victims through their words and actions. It can be something as simple as telling the victim, "I want you to know at the outset, I believe you," or "I'm sorry this happened to you, how are you doing?" or just acknowledging what a difficult position they are in and admiring the courage they had to come forward. Even in situations where charges may not be filed against the offender, the approach taken with the victim is important to ensure victims feel heard, supported and not deterred to make future reports in the unfortunate event it happens again. If a case does go forward, it would be beneficial for the prosecutor or victim advocate to make regular contact with the victim to make sure they know what is going on with the case, see how they are doing and if they have questions. Flexibility, understanding, and patience are critical in any interaction with a sexual assault victim, and getting the right training is

necessary to appropriately address their concerns and unique issues. Not only will this ensure the victims feel supported and encourage reporting of these crimes, but inevitably it will help down the line with prosecuting these cases.

INVESTIGATIONS

Law Enforcement Response

When a sexual assault is reported, the patrol officer who responds initially will assess the medical needs of the victim and conduct a limited interview of the victim and witnesses to confirm a sex crime has occurred. Once established, the officer notifies the on-call detective from the sexual assault unit who, in turn, responds to the scene to take over the investigation. Where appropriate, the initial patrol officer will arrange for a victim advocate to be present at the same time the detective arrives. The advocate will provide the victim with support and should provide written notification of the victim's rights. The patrol officer will thoroughly document all activity in a report. After the on-call sexual assault unit detective responds and assumes the investigation, the need for a forensic medical examination will be assessed. If needed, the victim is transported to the appropriate facility with sensitivity for her privacy and needs.

It is recommended that prosecutors reach out to local law enforcement and encourage the on-call sexual assault detective to contact designated prosecutors with expertise in sexual assault upon initial dispatch to an acute report. By doing so the prosecutor can communicate with law enforcement at the front end of the investigation regarding what evidence or information might be needed based on the particular facts of each case.

Additionally, it is recommended that as part of, or in addition to, any SART protocol adopted in a given jurisdiction that multi-disciplinary meetings be held on a regular basis (weekly, bi-weekly, monthly, dependent on volume and need) involving prosecutors, investigating officers, victim's service providers, forensic medical professionals (SANEs), forensic interviewers, and other appropriate disciplines at which cases/investigations can be staffed. Prosecutors and investigators can benefit from the expertise of relevant professionals as it relates to unusual or counter-intuitive victim response or behaviors, and such meetings invite open discussions and suggestions for additional investigation needed in order to build a strong case for filing and later trial. Active involvement of prosecutors in assuring that law enforcement conducts complete and thorough investigations prior to the charging decision is a critical tool in ensuring that subsequent prosecutions are successful, and also ensures that charges are not brought in cases which later become impossible to prosecute due to developments in the follow-up investigation – an outcome which is devastating for victims and poses due process concerns for suspects.

Victim interview

Research has shown that the stress and trauma reactions experienced by officers in life threatening situations are very similar to those experienced by Sexual Assault victims. (Archambualt & Lonsway, 2008) Prosecutors should consider encouraging local law enforcement to adopt interviewing

protocols for victims of sexual assault which take in to account the recommended protocol for interviewing officers involved in critical incidents. These protocol generally include components of reassurance on the scene, the provision of mental health advocates, collection of evidence in a private and respectful manner, removal from the scene as expeditiously as possible, the provision of necessary medical care in a timely fashion, and validation of normal stress reactions (stoic denial through abject panic, and back again.) (Miller, 2006)

Investigators should consider the use of techniques like Forensic Experiential Trauma Interviewing when interviewing a victim in order to encourage more free narrative responses, and more complete recall. Likewise, prosecutors should consider using similar techniques when conducting preparatory meetings, or even direct examinations as they are most likely to elicit the most complete information. (Strand, 2017) Further, prosecutors should be cognizant of a victim's age, and culture, and their impact on disclosure in both evaluating the credibility of a victim's statement, and also, in attempting to conduct preparatory interviews and meetings. (Powell, 2003)

The Detective should ensure that the interview with the victim is recorded, whenever possible, to ensure that the victim does not have to re-tell the events of an extremely traumatic occurrence. This recording can be as informal as an audio recording using a smartphone if other facilities are not available, are not feasible, or would be overly intimidating to the victim. The detective should re-interview witnesses previously identified by the initial responding officer. The same detective should remain the investigator on the case and should be responsible for conducting a thorough investigation, including obtaining necessary search warrants, obtaining necessary consents, identifying and interviewing additional witnesses, collecting evidence, submitting evidence to the crime lab, obtaining warrants and utilizing all available investigative tools to develop the case to be presented to the prosecution. The detective should accompany the victim to the initial meeting with the prosecution team to document any additional statements the victim may make and to ensure a smooth transition from the investigative team to the prosecution team.

The Detective should work closely with the prosecutor assigned to the case to ensure the goal of offender accountability is achieved. While both the detective and prosecutor perform different functions in the progression of the case, each adds value to the other's function by sharing their perspectives and insight. Wherever possible, collaboration between the prosecution and investigation teams should be fostered and fortified.

Victim Advocacy

A victim's cooperation can be won or lost very early in the process. It is critical to have a Victim Advocate involved with the investigation and prosecution upon initiation of a case. These advocates are trained in trauma-informed advocacy and will work together with law enforcement to encourage and support the victim through the difficult process. In many jurisdictions, advocates are employed by prosecutors, but work closely with law enforcement officers and detectives, sometimes being physically present during investigations. They provide support and service referrals to victims regardless of whether the case is ever referred for prosecution. Ideally, advocates would have access to all police reports filed the previous day and will scan them for reports of sexual crimes. Within the first week (if

not sooner), an advocate should contact the sexual assault victim to introduce themselves, explain their role, assess the victim's needs, refer to services and answer questions the victim may have about the process. For continuity, the advocate who makes the initial contact with the victim should remain the assigned advocate throughout the case, unless the victim no longer desires his or her services.

Victim Access Through Non-Investigative Reporting

Many times, victims of sexual assault do not call law enforcement for an investigatory response, but, instead, go to the emergency room seeking medical treatment or call a crisis hot-line. These victims may want a forensic exam, but may not wish to report the incident to law enforcement at that time. The Non-Investigative Reporting process ensures a timely collection of biological evidence and retention of that evidence for a specific period of time before destruction. This process permits the victim time to consider his or her options without losing the opportunity to have critical evidence properly collected and stored. Many jurisdictions have begun to provide a mechanism for victims to participate in a non-investigative reporting process, (such as the "You Have Options" program, www.reporting options.org) and some advise that overall reports of sexual assault have increased as a result of the institution of such programs as victims feel more comfortable coming forward, empowered in the process, and ultimately are more likely to move forward with a prosecution. Each law enforcement agency should adopt protocols to address when it is appropriate to explain the non-investigative reporting procedure, who will be responsible for such an explanation, where evidence collection kits will be stored, and the method of labeling the evidence collection kits to ensure victim confidentiality while providing cross reference information to properly identify the victim should an investigation be requested at a later time.

Additionally, consideration should be used by medical professionals who conduct the forensic exam to comply with the victim's wishes not to report to law enforcement while still meeting their obligations as mandated reporters. Some jurisdictions have addressed this dichotomy by having the medical facility contact law enforcement to provide basic information to law enforcement (i.e. Jane/John Doe presented to the medical facility in response to a sexual assault and provide the location of where the assault occurred). Providing the location of the sexual assault is important to establish which law enforcement agency has jurisdiction over the investigation should the victim choose to request an investigation at a later date. The agency identified should be responsible for collecting the rape kit from the facility and assigning a cross-reference number to be affixed to the outside of the rape kit. The same number should be placed on the examination form and deposited inside the sealed kit. By providing the kit and examination form to law enforcement, the medical professional may be deemed to have met their reporting requirement while also complying with the victim's wishes. The cross reference number should also be given to the victim for use if they choose to initiate an investigation at a later time.

The Forensic Examination

In those jurisdictions where prosecutors and investigators lack access to a formalized SAFE (Sexual Assault Forensic Examiner) or SANE (Sexual Assault Nurse Examiner) program, protocols should be developed for medical professionals who conduct the forensic examinations to ensure competent

examination, evidence collection and preservation, including photographic documentation, and acute medical treatment. Some considerations to include when developing these protocols are: identifying designated sites for forensic exams (versus conducting them in multiple Emergency Departments); use of experienced, specially trained, licensed practitioners; necessary steps to ensure preservation of evidence and chain of custody; provision of thorough and objective written documentation of examination and findings; provision of referrals or treatment for general medical needs; STD concerns and testing, protocols for obtaining and execution of search warrants on non-consenting suspects and/or unconscious or medically incapacitated victims; the ability of minors to give consent and/or requirements to obtain consent from a parent or legal guardian of the minor while balancing a minor's right to privacy; and protocols for non-investigative reporting.

PROSECUTION

Vertical Prosecution Units

To maximize victim satisfaction and comfort, as well as ensure successful prosecutions, specially trained prosecutors should be assigned to sexual assault cases. Whenever possible the same prosecutor should be assigned to a case from pre-charging to sentencing. The assigned Prosecutor should seek to work collaboratively with other experienced sexual assault prosecutors through both formal and informal staffings of cases and issues. Such an approach provides the assigned prosecutor with extended support from other experienced and knowledgeable sexual assault prosecutors, and assists in ensuring consistency in plea bargaining. If the Prosecutor's Office has in-house victim advocates and/or investigators, there should also be one particular victim advocate/investigator assigned to assist the prosecutor with the case. Having a pre-determined and unchanging team of professionals communicate and interact with victims may provide a sense of familiarity, and accessibility, and hopefully will engender greater trust in the prosecution team. It is important to remember that typically, the victim advocate in a Prosecutor's office does not owe the same duty of confidentiality to a victim as an independent, or community based, sexual assault victim advocate. Victims should be informed that the communications they have with law enforcement based advocates may, dependent on local discovery rules, be disclosed to the defense attorney, or the defendant. As a result, prosecutors may wish to reach out to community based organizations to assist the victim in accessing additional resources as well as to provide the victim with a more confidential source of support. Providing access to a community based advocate may serve to further empower victims.

Charging Decisions

It is recommended that the prosecution team assigned to a sexual assault case meet with the victim prior to making a charging decision, or as soon as possible thereafter. Goals of the initial meeting with the victim should include assessing victim's needs, building rapport, making sure the victim is advised of their rights , asking questions to fill in gaps where reports are incomplete or need clarification, (prosecutors should avoid requesting the victim attempt to recite the event as part of this initial contact, unless it is necessary to the charging decision due to an insufficient initial investigation), explaining the criminal justice system and how it works. During the initial meeting with the victim, a

prosecutor should be assessing credibility, getting a commitment to cooperate with the prosecution should charges be filed, advising the victim he/she will be notified once a charging decision is made (as a general rule, do not indicate at the initial meeting whether or not charges will be filed) and making them aware of issues that may arise by communicating any details about the case via social media (i.e. other people can obtain those communications and use them in court).

The filing of criminal charges, or the decision not to file, should be made as quickly as reasonably possible and should be reviewed with supervisory staff when appropriate. Additional investigation may be required prior to making a final charging decision. The assigned prosecutor should keep the victim informed of any charging decisions made and/or whether more time is needed to make a charging decision due to a need for further investigation. Also, if charges are not filed and an offender is released from custody, the prosecutor should notify the victim immediately to ensure the victim has ample opportunity to take any measures necessary to ensure victim safety (i.e. obtaining protective/ restraining orders, changing locks, relocation, etc.).

Duty to Educate

Charging decisions, as well as decisions relating to the viability of a case at trial hinge on a prosecutor's assessment of the believability of a victim, as well as the "provability" of the case. In order for a prosecutor to accurately evaluate these cases, it is important for them to know the common behaviors and dynamics that are seen in sexual assault victims. Research demonstrates that the responses of victims of sexual assault, both before, during, and after the assault is often counter-intuitive to the general public, as are common offender dynamics. The counter-intuitive nature of these responses and mechanisms of offending can serve to create barriers in the assessment of a victim's credibility. As a result, it is imperative that law enforcement officers and prosecutors obtain training relating to victim and offender dynamics so that they can better understand and assess the evidence in any given case.

Additionally, research indicates that credibility is the single most important component in a law enforcement officer's investigative decision making, and a prosecutor's decision to file a case (Beichner, 2012) Law enforcement members cite a lack of consistency as the single most important factor in determining that a sexual assault victim lacks credibility. However, the research is clear that trauma impacts a witness' ability to accurately recall and relay information about the traumatic event, especially when confronted with a traditional interview setting (Beahrs, 1996), (Archambault, 2008). As a result, it is important that prosecutors who handle cases involving sexual assault educate themselves on issues surrounding trauma response, and the impact of trauma on memory and recall in order to aid with critical decision making during the life of the case.

Protecting Victim Privacy

When filing charges in sexual assault cases, there are best practices to consider that will protect victim privacy and provide anonymity. These best practices include: redacting police reports and other documents prior to providing in discovery; listing the victim's name as John/Jane Doe, with an initial and either first or last name (i.e. L. Smith or Lisa S.); filing motions requesting that the victim be referred to as such in court hearings. Where media is a concern, request that the court order that the victim's name

not be used nor may they be photographed. Because search warrants are discoverable, the affidavit for the search warrant should refer to the victim as "the victim" only, where appropriate. Assigning a prosecutor to assist law enforcement with search warrants, among other aspects of the investigation, is highly desirable. Federal and State law provide protection to victims and their medical and psychological records. Victims have a right to object to the release of any personal records which may be the subject of a subpoena duces tecum, and a right to be heard. Best practices dictate that a victim be notified when any attempt is made to obtain personal records of the victim. Some states and certain federal laws require notice be provided to the victim, or target of any subpoena duces tecum. In the event that a victim consents to a release of personal information, or if there is a court order requiring the release, efforts should be made to narrowly tailor the information provided to ensure only relevant portions of the records are returned to the court. If the victim objects to the release of records, the Prosecutor should request the court to conduct an in-camera review of the records and determine which portions, if any, are relevant and should be released with a protective order in place to restrict or prohibit dissemination and copying of the records and requiring return of the records upon conclusion of the case.

Likewise, it is often necessary for law enforcement to obtain waivers for the receipt of otherwise confidential or privileged materials such as medical or psychiatric records. Law enforcement and Prosecutors are encouraged to carefully consider the need for such waivers as it relates to the case, and to carefully tailor such waivers (date, subject matter, treatment provider etc.) in order to prevent wholesale release of the entirety of a victim's otherwise irrelevant, and confidential records.

Bail Conditions

In arguing for appropriate bond conditions in sexual assault cases prosecutors must, as in every case, consider community as well as victim safety, and encourage the court to impose those conditions most likely to avoid re-offense and ensure community safety. To that end, it is always appropriate to request the court order an offender to have no contact with the victim in a case. It may also be appropriate to request limitations with respect to an offender's contact with a wide class of individuals, for example anyone under the age of 18, including an offender's own children, or impose certain geographic restrictions. This is so even if the named victim in your case is an adult. Research based on offenders' own self reports with respect to offense patterns demonstrates that offenders frequently cross –offend (i.e.; offend against individuals in a variety of different demographic groups, or engage in multiple types of offending). For example: crossover sexual offenses were analyzed in a sample of 223 incarcerated and 266 paroled sexual offenders at the Colorado Department of Corrections. During polygraph testing the majority of incarcerated offenders admitted to sexually assaulting both children and adults from multiple relationship types. Further, the majority of incarcerated offenders who had sexually assaulted children admitted to sexually assaulting both relatives and nonrelatives. The offenders also admitted to sexually assaulting victims across genders. (Heil, 2003)

Oftentimes, courts will impose conditions which restrict contact to only that contact which is supervised by another adult. These types of conditions, however, do not necessarily ensure the safety of children in the presence of the offender due to the fact that offenders often offend while non-offending

adults are in the room or even within arm's reach of the victim-child and perpetrator.[1] Prosecutors should endeavor to be aware of the research relating to risk assessment, as well as offending patterns in order to make cogent and persuasive bond arguments. However, Prosecutors should also be aware of the growing body of federal case law which addresses due process concerns relating to standard conditions for the supervision of sexual offenders in general and restrictions on contact with one's own children specifically cases like US v. Burns, 775 F.3d 1221 (10th Cir., 2015), and be prepared to advance evidence based arguments for requested conditions/restrictions.

Creating a Victim Friendly Courtroom

By engaging in aggressive motions practice (discussed below), utilizing victim support persons/ animals, and explaining the court room process prior to the victim testifying, prosecutors can create a victim friendly courtroom. Explaining to the victim the ability to use court process to secure witness attendance, including the victim, helps prepare them for the reality that they will have to appear in court and testify. Preparing the victim for testimony is essential in ensuring the victim will be as comfortable as possible presenting his/her testimony in court. Advising the victim of the topics you anticipate covering in your direct examination, as well as those topics you suspect the defense will focus on in cross examination, allows your victim time to mentally prepare for the rigors of testifying. Asking a victim who they would like in the courtroom as a support person while they are testifying, and taking the necessary steps to ensure that individual is present in the courtroom and visible from the witness stand can further boost a victim's sense that s/he is supported through the process, and will increase confidence and comfort on the stand. Further, simply showing the victim the courtroom when it is empty and explaining to him/her where all of the participants in the process will be seated, explaining the rules of the courtroom, and conducting a practice session (involving benign questions not related to the case) from the witness chair can be extremely beneficial.

Jury Selection

In selecting a jury in a sexual assault case a prosecutor should be aware of the inherent biases and prejudices present in the population at large such as beliefs that alcohol is appropriately used as a dis-inhibitor, that sexual assault is only perpetrated by strangers or involves significant physical violence, or beliefs that excuse sexual assault when the perpetrator is young and perhaps intoxicated. These beliefs and phenomena are sometimes referred to as "rape culture", or "rape myth acceptance". Additionally, prosecutors should identify the manner in which rape myths, and commonly held misconceptions about sexual assault, victim response, offender demographics, and memory could impact a prospective juror's interpretation of the evidence and acceptance of prosecutorial themes. In considering the demographics of the jury prosecutors should be mindful of the fact that research indicates that men tend to endorse rape myth acceptance at higher rates than women. Similarly,

[1] . In one study it was found that offenders offended when other non-collaborating persons were present, specifically: 54% of offenders molested one child when another child was present; 23.9% offended when another adult was present; 14.2% offended when another child and another adult were present. 44.3% committed the acts when they knew the other person in the room was awake; 25.7% when another child was in the same bed; 12.4% when another adult was in the same bed; 3.5% when both another child and adult were in the same bed. The reasons given for engaging in this behavior were that it: increased excitement, created a sense of mastery, was compulsive sexual behavior, or "stupidity." (Underwood, 1999).

individuals with lower educational levels tend to endorse acceptance of commonly held rape myths (Suarez, 2010). This does not mean that a sexual assault jury should only consist of women with post-graduate degrees. In fact, there is much to be gained from choosing a jury pool with wide and varying socio-economic backgrounds, genders, and ethnicities, but this knowledge should inform a prosecutor's strategic decisions as to which jurors to *begin* inquiry with regarding specific topics. Prosecutors should be careful, however, to never presuppose that an individual juror endorses or holds any particular value, viewpoint, or bias based on any demographic characteristic.

Prosecutors should consider discussing common evidentiary hurdles in common sense ways. This gives jurors an opportunity to relate what on face may seem like unusual, or "bad" facts, to their own personal experiences; an example would be a discussion with jurors about animals who freeze rather than run or fight in life threatening situations (deer in the headlights). Such a conversation primes jurors for expert testimony later in the case presentation about trauma response, and assists the juror to understand why a victim might not fight, or might offer only minimal resistance. Likewise, prosecutors can use common daily memory flaws, or the differences in how individuals perceive a jointly witnessed event to prepare the jury for anticipated memory flaws or inconsistencies between the victim and other eye witnesses. Prosecutors can use "ripped from the headlines" scenarios to discuss victim responses before, during and after sexual assault (ex: delayed disclosures, failure to fight back), and offender dynamics (ex: offending in "public" locations) to identify those jurors who endorse rape myths, as well as to further lay the ground work for the presentation of evidence in the case. In those jurisdictions in which prosecutors are prohibited from engaging in direct voir dire of the jury panel prosecutors should carefully consider these concepts and issues in formulating questionnaires or suggesting questions for the Judge to use during the court's voir dire.

Framing the Case/Pay Attention to the "Language" of Consent

"No means No" has been the contextual framework of sexual assault, both stranger and non-stranger, for decades, but oftentimes prosecutors and investigators find themselves confronted by cases in which a victim has not, in fact, said the word "No," or engaged in overt physically resistant activities in response to the sexual aggression of the perpetrator. These cases are often viewed as "miscommunication" cases; circumstances where the victim has not communicated her lack of consent and thus the perpetrator has proceeded under the misconception that consent exists. In these cases it is critical that prosecutors and investigators remember that only "Yes" means "Yes." The investigation should be conducted in a way that focuses on how the offender used mechanisms to obtain access to the victim and how the victim was able to communicate their lack of consent (beyond "no"). Exploring the victim's thought process behind each action or statement they made during the sexual assault can be extremely powerful and informative when presenting the case at trial. Investigators and prosecutors should remember that many victims are not aggressive or assertive in verbalizing a lack of consent out of fear that failure to comply will result in great physical harm, and instead utilize indirect methods designed to put the offender off and avoid a physical confrontation. For example, a victim may tell an offender they are interested "but not tonight" or "not here" or may respond in physically subtle ways: turning a head when being kissed, or not responding physically to the ministrations of the offender.

It is important to remain offender focused in the investigation and the case presentation . It is critical to ask oneself, and the jury, at what point the victim communicated *consent,* rather than permit the offender or the defense to frame the issue as when the victim communicated a *lack* of consent. The later defense argument presupposes that all victims consent to an activity until they affirmatively tell the offender they do not. It is useful to utilize examples from other types of offenses to illustrate this point; for example: the victim of a burglary generally does not consent to the entry of his/her home even if they have not posted no trespass warnings which would affirmatively prohibit entry to the dwelling; it goes without saying that generally we recognize that until we are expressly invited in to someone's home that we cannot enter. The same is true in the context of sexual assault. It is incumbent on prosecutors to 1) remind juries of this significant fact and 2) to highlight for the jury all of the ways in which the victim communicated a lack of consent short of the word "No." This can only be achieved if prosecutors and investigators conduct careful, focused and detailed investigations and witness preparation meetings to explore the mechanisms the victim used to communicate with the offender, and the thought process behind each action or statement.

Additionally, prosecutors should be mindful of their word choice when presenting a case to a jury, or in arguing to a judge. Prosecutors should refrain from using verbiage which implies the victim was an active or willing participant in the sexual assault. Use of the "language of consent" has the effect of subtly influencing the listener to interpret the interaction as consensual. Prosecutors should, instead, endeavor to describe the acts committed in terms of the physical action that was done. For example, it is common for individuals when referring to forced oral penetration to state "the victim *performed* oral sex on the perpetrator." The use of the verb "perform" subtly implies that the victim was an active and willing participant. Likewise, phrases such as: "they had sex" or "he had sex with her" imply again that both parties are active and willing participants. Instead prosecutors should consider simply stating "the offender put his penis in the victim's vagina (mouth, anus, etc.)." By specifically describing the physical action the prosecutor avoids using the language of consent and the possibility that a jury or judicial officer will be subconsciously swayed by word choice to interpret the action as consensual rather than as a criminal act.

Aggressive Motions Practice

Several high profile sexual assault cases have demonstrated the aggressive nature with which defense attorneys approach cases involving sexual assault. The aggressive defense posturing often times has the effect of chilling the desire of victims to proceed, of prosecutors to set cases for trial, and of new victims to report and cooperate in the investigation of sexual offenses committed against them. In sexual assault cases prosecutors should engage in active and aggressive motions practice filing both defensive as well as offensive motions; with the goal of limiting the manner in which the proceedings re-traumatize the victim, as well as ensuring a fair and just trial for both the defendant and the Prosecution. Prosecutors should file discovery demands which request strict compliance by the defense with local discovery rules, as well as request any discretionary disclosures to the prosecution authorized by the constitution and local rules. Further, the prosecutor should request protective orders relating to sensitive discovery such as photographs taken of the victim during a sexual assault exam, medical records, the victim's address and even the victim's name (if appropriate). These orders should seek to

limit the members of the defense team who are permitted to access that information and requesting its immediate return upon the return of a verdict or entry of a plea. Additionally, the Prosecutor should file motions prohibiting the issuance of subpoenas for a victim's medical, psychological, school or other privileged or confidential records without prior court order, and should aggressively litigate against the granting of any such order if requested. Prosecutors should be knowledgeable of any local "rape shield" provisions and should file motions demanding compliance in advance of trial, even in those states where the provisions are self-executing. Prosecutors should strategically evaluate the admissibility of child hearsay statements under local rule as well as federal and state confrontation clause provisions and, when appropriate, should file motions for the admission of such statements. Prosecutors should also strategically and humanely evaluate having a therapy animal present during testimony, and/or the use of closed circuit television for the presentation of child victim testimony. Prosecutors should consider filing motions to admit expert testimony to address common myths and misconceptions surrounding victim and offender responses and dynamics, and/or addressing medical findings, or the lack thereof.

Research indicates that many sexual assault perpetrators have committed other acts of sexual violence prior to arrest. One study conducted by Abel, et. al. reveals that when given assurances of confidentiality, 126 identified rapists admitted to 907 acts against 882 victims. (Abel, 1987) Similarly, Weinrott and Saylor reported that 37 rapists in their study had been charged with 66 offenses against a mean of 1.8 victims, but when given an opportunity to self-report confidentially the same 37 offenders admitted 433 rapes against a mean of 11.7 victims. (Weinrott, 1991) Prosecutors should ensure that law enforcement conduct complete and *offender focused* investigations and should inquire as to the existence of other acts evidence and ensure that any such evidence is fully and completely investigated. If other transactions evidence exists, prosecutors should file motions pursuant to local rule and case law seeking the admission of other acts evidence at trial in the case. Prosecutors should further educate themselves on concepts such as grooming as it relates to both adult and child victims and be prepared to argue the relevance of grooming behaviors as res gestae or other acts evidence. Finally, prosecutors should seek to preclude the admission of irrelevant or overly prejudicial other transactions evidence relating to the victim, as well as irrelevant or unduly prejudicial evidence relating to the victim's mental health history, substance use or abuse, lifestyle, sexual orientation, or other character type evidence through the filing of pretrial motions demanding disclosure of the nature of any such evidence and a pre-trial ruling on its admissibility. Overall, a strategic and aggressive approach to motions practice in these cases is effective in protecting and supporting the victim, and in protecting the efficacy and integrity of the case presentation as a whole.

Title IX and Clery Act

Many Prosecutors may, at some point in their careers, find themselves attempting to navigate the intersection between criminal prosecution and the obligations of educational institutions to comply with the provisions of the Clery Act and Title IX. Title IX is explicit that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C.

1681(a). Enacted in 1972 the statute was for many years most closely associated with the struggle to create equality in women's sports programs. In April of 2011 a letter issued by the Department of Education's Office for Civil Rights stated, "The sexual harassment of students, including sexual offenses, interferes with students' rights to receive an education free from discrimination and, in the case of sexual violence, is a crime." Thus it became clear Title IX applies not just to equality of opportunity in program availability, but to equality of treatment in all aspects of campus life and to the prevention of gender based discrimination or harassment at federally funded institutions.

Title IX requires that federally funded educational institutions implement grievance procedures for students and faculty alleging discrimination (to include sexual violence). The Act *requires* that institutions conduct independent investigations, make factual findings, and if a finding of discrimination is made they are required to take steps to prevent the reoccurrence of any sexual violence and remedy the discriminatory effects on the complainant and others. This requirement applies to violence *which occurs both on, and off campus, if such violence involves students, staff or faculty* as the institution must assess whether the violence occurred in the context of an educational program or activity, or had continuing effects on campus, or in an off-campus education program or activity. Prosecutors should be aware that as Administrations change, so too may the reach of Title IX.

Additionally, the Clery Act requires institutions to record and report statistics related to criminal activity which occurs on campuses. The act further mandates institutions make "timely" warnings to students, staff, and faculty when the institution is aware of any campus safety concern. Though no specific definition of "timely" is provided by the Act and the guiding literature most institutions tend to interpret the requirement to mean that warnings must be issued within 24-48 hours. The warnings must state the nature of the safety concern though they do not typically provide the names of victims or suspects.

In conducting Title IX investigations, institutions must conduct their own investigations independent of law enforcement, must provide notice to both parties, and must afford both parties equal due process protections. In addition, institutions are required to complete investigations and issue findings within 60 days of the initiation of the complaint. As a result, prosecutors and law enforcement may find themselves significantly disadvantaged at the outset of an investigation as the suspect, and potentially witnesses, may have already received notice that a complaint had been made either through the issuance of the Clery Act notice, or the issuance by the institution's Title IX office of notice that a complaint has been made and the specifics of the allegations being made. Additionally, suspects are typically privy, at some point during the institution's investigation, to the specific statements of the victim and other witnesses, and often times engage legal counsel who is also privy to the information long before a formal charging decision is made by a prosecuting attorney. The investigatory implications of these facts are obvious. However, prosecutors can also use these processes to their advantage. Many times institutional investigations can uncover witnesses who might be unknown to law enforcement, and because participation in the institutional investigation is mandated for students, staff, and faculty the institutions often have statements from witnesses who may choose not to cooperate with or participate in the law enforcement investigation.

The investigation records are generally confidential and protected under the Federal Educational Right to Privacy Act (FERPA), but may be obtained pursuant to a validly issued search warrant or court issued subpoena (Note: prosecutors should be aware that if they seek a subpoena for the materials, FERPA requires the institution to provide notice to the involved students and their parents of the existence of the subpoena and the content thereof so that they may object if they choose, *unless* the court specifically orders the institution not to reveal the existence of the subpoena or its contents).

Prosecutors in jurisdictions with institutions subject to the provisions of Title IX should actively seek to develop quality working relationships with the Title IX offices of those organizations. They should also endeavor if at all possible to engage the Title IX investigators for those institutions in training related to trauma response and victim and offender dynamics in order to assist the institutions in coming to fair and evidence based factual findings. Having a good working relationship and providing training to these institutions and their investigators can help to ensure that investigations are conducted with an eye towards the issues inherent in cases involving sexual violence such that the investigation conducted by the institution creates as few barriers as possible to a subsequent successful prosecution.

Evidentiary Issues

Hearsay and Reliability of Statements

Some states provide expanded hearsay exceptions that allow victim statements made out of court to be admissible under certain circumstances. For example, in Illinois, if a victim makes statements to ”medical personnel for the purpose of medical diagnosis or treatment, including descriptions of the cause of the symptom, pain or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment”, those statements are admissible. 720 ILCS 5/115-13. Additionally, for victims of sex offenses who are under the age of 13, if a victim makes a statement to another to complain about a sex offense and the statement relates to an element of the sex offense charged, the Court may admit that statement if the court conducts a hearing outside the presence of the jury and finds that “the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and the child either testifies at the proceeding, or is unavailable as a witness and there is corroborating evidence of the act which is the subject of the statement.” 720 ILCS 5/115-10. It is critical to evaluate each out of court statement made by a victim to determine if it meets a hearsay exception, or is potentially “residual hearsay,” and can be admitted at trial as evidence. It goes without saying that these hearsay statements can be quite powerful evidence during case presentation. Such statements can demonstrate consistency in statements made by the victim, provide details into the pain and suffering they have experienced and give real context to the disclosures made.

Evidence of Prior Offenses

Nationally, there exist statutory, or evidential rule provisions that allow evidence of prior sex offenses to be entered as evidence in a subsequent case charging an offender with a sex offense. For example, in Illinois the offender’s commission of a prior sex offense will be admissible as evidence in a subsequent prosecution for a sex offense, if the court finds that the evidence is otherwise admissible

under the rules of evidence. It may then be considered for its bearing on any matter to which it is relevant. To be admissible, the court must weigh the probative value of the evidence against the prejudicial effect to the defendant and consider the proximity in time to the predicate offense, the factual similarities between the offenses, or other relevant facts and circumstances if the prosecution has given notice to the defendant of its intent to introduce evidence and disclosed the evidence, including statements of the witnesses or a summary of the substance of any testimony at a reasonable time in advance of trial. 720 ILCS 5/115-7.3. Many states have similar such provisions which act in concert with, or in place of, Rule 404 of either the Federal or local rules of evidence.. Prosecutors should familiarize themselves with the statutes and rules which apply to the admission of other acts evidence and the case law interpreting those provisions. Prosecutors should aggressively litigate the admissibility of other transactions evidence for legitimate purposes such as proving motive, intent, common plan or scheme, identity, lack of absence or mistake, and any other purpose for which it might be relevant and admissible.

Use of Experts

As previously discussed, sexual offenders often times perpetrate in places or ways which seem counter-intuitive to the average juror. Likewise, victim responses during sexual assault, lack of injury sustained by a victim, and the impact of trauma on memory run counter to commonly accepted rape myths, and what jurors believe they know about sexual assault. Many of these issues can be addressed, and their impact blunted, by a skilled and targeted voir dire (if permitted in your jurisdiction). However, it is of critical importance that prosecutors utilize expert witnesses who can discuss issues relating to memory, delayed disclosure, lack of injury, the fight, flight, or freeze response common during traumatic situations, and the research relating to offender dynamics (grooming, perpetration patterns, victim selection, perpetration when others are present etc.). While urban prosecutors may have access to a larger pool of potential experts, rural prosecutors are encouraged to look to local Universities/Colleges, as well as local victim's services agencies for potential candidates. Expert testimony should not be considered simply superfluous, or an unnecessary expense, but rather as a critical component of a thorough and effective prosecution in these often times emotional charged, and complex cases.

COMMON DEFENSES

Consent

With the advent of DNA technology, defense strategies in adult victim sexual assault cases have increasingly focused on the consent defense versus the traditional general denial. In preparing to confront a consent defense prosecutors should focus on ensuring an exhaustive investigation has been conducted pre-trial and should present a victim-centered, but offender focused, case to the jury. Prosecutors should utilize traditionally "negative" facts such as victim intoxication, mental illness, generally poor decision making, etc. in a positive manner assisting the jury to understand that these very factors are what make the victim a good victim choice for a predatory defendant. In alcohol/drug facilitated sexual assaults prosecutors should very carefully investigate and establish the victim's level of

intoxication through interviews with eye witnesses (friends, bar employees/regulars, other party goers, etc.) as well as through the use of surveillance videos, text messages and voice mail messages that may have been sent by the victim during the night, both before and after the assault, and any other potential information sources. Questions to be answered include (but are not limited to): was the victim vomiting, slurring her speech, oriented to person, place, and time, what was the status of her motor skills, had/did she pass out, did she have control of her bodily functions, was she able to dress/undress herself, was she disheveled? Additionally, investigation should focus on the relationship between the offender and the victim and the offender's actions on the night in question: was he buying drinks for the victim, or surreptitiously ensuring her drink was always full? Did he seek to isolate the victim by either excluding others from conversation or encouraging the victim to move to a different location? Did he lie to the victim? What was his level of intoxication? Where did the perpetrator take the victim, and where was her stated destination?

Also, as previously discussed, prosecutors should seek to admit evidence relating to other transactions, even if those allegations are not identical to the incident in question. Lack of similarity between offenses cannot mitigate the powerful fact that the defendant has previously committed a sexual offense against another before, or after, the charged offense. Finally, prosecutors should present testimony relating to evidence of traumatic response, personality changes observed by friends, family members, co-workers, and teachers, changes in social interactions, changes in school or work performance, steps taken to increase personal sense of safety (did the victim install an alarm, buy a gun/dog, take self-defense courses, get a roommate, move home with her parents or other family?). In other words, who the victim was BEFORE the assault is not who the victim is NOW; such dramatic or extensive behavioral changes would be difficult to characterize as an after effect of a regretful decision, but are strongly indicative of sexual assault.

Lastly, prosecutors should organize cases with an eye towards corroborating as many components of the victim's factual account as possible, not simply those which relate to the assault itself, as each corroborated fact builds the victim's credibility with the jury and places the assault in context. (Scalzo, 2007) Evidence relating to the impact of the assault on the victim can be powerful evidence combatting a "buyer's remorse" defense – juries should be made to understand the various steps of the process including the invasiveness of a sexual assault examination, as well as the social consequences of disclosure. The prosecutor should ask the jury to consider whether a victim would go through what a victim must go through to get to trial if she was merely ashamed of her behavior.

Lack of Injury

Jurors often times expect in sexual assault cases that a victim will sustain physical injury either to the ano-genital region or elsewhere on the victim's body. This belief is a function of acceptance of common rape myths (rapes are terribly violent, and victims fight back) as well as a lack of understanding about human anatomy. It will be useful in combatting this defense to present expert testimony relating to trauma response (fight, flight or freeze), as well as testimony relating to the use of "instrumental violence" (that violence which is sufficient to obtain submission). Instrumental violence can be as little as the perpetrator's weight on the victim's body. With respect to a lack of ano-genital trauma the testimony of a medical professional who can testify as an expert as to the structure and the speed with

which the ano-genital regions heal will be essential in assisting the jury to understand what it is they are (or are not) seeing. This is especially critical in cases involving child sexual assault victims where common misperceptions about the nature of the hymen or fragile anal tissues can often lead juries to doubt a child's testimony due to a lack of medical "evidence" indicating that an assault has occurred. It is important that the jury understand that a normal exam (i.e.; one in which there is no observed physical injury) is, in fact, not inconsistent with, or contradictory of, a report of sexual penetration or abuse. (Horner, 2010)

False Reports/ Suggestibility (i.e.,; The Divorce Myth or Parental Alienation Syndrome)

In child sexual abuse cases it is not uncommon for the defense to assert that the report is a false one. Usually the defense asserts that some adult has coerced or encouraged a child to falsely report an allegation, and most often this is asserted in cases involving divorced or divorcing parents. These cases are those most often viewed with skepticism by prosecutors, law enforcement and social workers as well and are frequently not completely investigated, not filed, or quickly dismissed. (Brown, 2000) However, the research indicates that false reports of sexual abuse in the context of a divorce are no more common in divorce than in non-divorce situations (Thoennes, 1990). Some research places the rate of false report at just 2%. (Trocme, 2005) While disclosures in a divorce context may seem more frequent, the research indicates that this is likely due to the dynamics of disclosure itself in that the child's disclosure may precipitate the non-offending parent's decision to leave the relationship in an effort to protect the child, that a child may feel more safe in disclosing sexual abuse when the offending parent is no longer in the home, or in constant contact with the victim child, or the fact that the divorce itself may precipitate the offending behavior as the offender struggles to cope with feelings of loneliness, isolation, lack of access to a sexual partner, and lack of control over daily life. Indeed at the time when a child may be MOST at risk of sexual abuse they are LEAST likely to be believed. (Faller, 1991) This is another important area in which expert testimony can be an effective tool for combating commonly held, but patently false, beliefs.

Inherent in many false allegation defenses in child sexual abuse cases are assertions that children are naturally "suggestible" and thus the veracity of the allegation should be doubted. There exist a number of prominent and respected defense experts who regularly testify as to the suggestibility of children. These experts generally rely on research generated, or inspired, by Drs. Ceci and Bruck. It is important to note that despite the tenor of this research Drs. Ceci et al. readily admit that their own research demonstrates that the majority of children are NOT suggestible (Ceci, 2002). The research, which primarily has focused on preschool aged children, has been soundly criticized for a lack of ecological validity. Prosecutors should educate themselves on the research done by Dr. Gail Goodman, and others, in which children were studied in more topic appropriate ways (questioning related to body touch by a physician during a medical examination v. questioning relating to self-touch during a game of "Simon Says" conducted multiple weeks prior to the interview). The research clearly indicates that children are not significantly suggestible related to personally significant events, (Goodman, 1990) especially when interviewed shortly after the event (Bruck, 1995). Additionally, the research indicates that it is difficult to get a child to adopt negative attitudes, or make negative assertions, relating to

individuals with whom the child has a positive relationship or about whom the child has developed a positive stereotype (Lyon, 1999).

Finally, many defense attorneys will utilize a parental alienation defense citing the work of Dr. Gardner and his theories relating to what he refers to as a "parental alienation syndrome." In confronting this defense it is again necessary that prosecutors educate themselves on the research. It is important to note that Dr. Gardner's "syndrome" was rejected for inclusion in both the DSMIV and DSMV, and that the research conducted by Dr. Gardner on the topic consisted of interviews with the alienated parent alone (Johnston, 2004).

Variations of this suggestibility theme include expert testimony relating to source monitoring errors (a situation in which the source of a memory is incorrectly attributed to some other recollected experience), and false memory. As with the above discussed defenses extensive research exists, and prosecutors should seek to both independently educate themselves on the asserted defense topic, as well as seek out local or national experts to assist in understanding, and confronting the defense expert.

Drug and/or Alcohol Facilitated Sexual Assault

Studies have repeatedly shown that a large number of sexual assaults are completed or attempted when drugs, or alcohol, have been consumed by either the perpetrator, the victim, or both. Frighteningly, studies have shown that the use of alcohol or drugs by a perpetrator may actually increase the likelihood that an individual will engage in sexually aggressive or violent behavior, not because of the effect of alcohol on the individual, but because of the individual's perceptions of how alcohol will, or does, affect him or her, and an inherent belief that engaging in such activity is excusable when one is intoxicated. Several studies have demonstrated that college men who thought they were drinking alcohol were more sexually aroused by depictions of forcible rape than college men who did not think they had consumed alcohol (George W. M., 1986) (George W. , 1991). It is notable that, *actual* alcohol consumption did *not* affect these men's sexual arousal. The authors have posited that perpetrators may use alcohol use as a justification of behavior they recognize as deviant. Studies have also demonstrated that stereotypes of women who drink lead to the perception that a drinking female is more sexually receptive or promiscuous than a non-drinking female. (George W. C., 1995) Further, studies have shown that perpetrators actively utilize alcohol (and other drugs) in order to facilitate the sexual assault (Kanin, 1985) (Mosher, 1986). Three-quarters of the college date rapists interviewed by Kanin indicated that they purposely got a date intoxicated to have sexual intercourse with her.

The presence of alcohol or drug use creates multiple difficulties for prosecutors. In addition to the impact of the above discussed stereotypes on the perceptions of jurors, and judicial officers, prosecutors are often faced with a victim who cannot remember all or part of the offense. In these cases prosecutors again should encourage investigators to engage in thorough offender centered investigations, as opposed to investigations which focus primarily on the victim's behaviors or responses. Investigations should focus on the victim's level of intoxication and ability to comprehend or capacity for consent as well as the perpetrator's actions which perhaps contributed to the level of intoxication as well as the perpetrator's response to it. The investigation should also encompass an

examination of the ways in which the victim communicated a lack of consent, or failed to communicate consent, as discussed above. These facts should be highlighted and emphasized for the jury or judicial officer in order to overcome the obvious barriers inherent in these types of cases.

DNA

The increase in the availability of DNA evidence, as well as improvements in DNA technology over the years has caused a shift in common defenses from "it wasn't me/it didn't happen" type defenses towards "consent" defenses. That said it is still important that investigating officers collect evidence which may contain genetic materials for testing, as this evidence may be useful in contradicting an offender's narrative of the event, and of course in identifying perpetrators and ensuring strong and proper convictions. Prosecutors should stay abreast of the technology as it develops, and should be aware that with increasing sensitivity and advances in science it may be possible for defendants to argue, with some scientific backing, defenses which are premised on the theory that the transfer of DNA occurred in some innocent fashion (such as both parties touching the same door handle). Prosecutors should not hesitate to discuss such potential defenses with the expert conducting forensic testing in the case in order to effectively address and counter such defenses at trial.

CONCLUSION

Sexual Violence exacts an exorbitantly high cost both literally and figuratively on the victims of the offenses, as well as on society as a whole with the fiscal cost of sexual violence estimated at $250 billion dollars/year (not including the personal expenses incurred by victims or the costs of incarceration of offenders) (Minnesota Department of Health). Despite this fact, it remains one of the most, if not the most, difficult areas of prosecution. The unique challenges presented by the combined impacts of societal misunderstandings of both the nature of the evidence, the offense itself, and victim response thereto, as well as the evidentiary challenges inherent in such cases can be daunting. However, prosecutors can experience success in prosecuting acts of sexual violence through careful investigation, close attention to detail, strong advocacy, and employing victim-centric approaches to case preparation. Cases involving sexual violence have traditionally focused on the victim, the victim's behavior, statements and actions. Successful prosecutions, however, center on providing proper support for the victim/survivor through the process, and focus instead on the offender and the dynamics of the offense itself. Prosecutors should expect to expend significant time on the investigation, preparation, and presentation of such cases, and should not hesitate to utilize a variety of tools to ensure that a just result is reached in each case.

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EXHIBIT D

Editorials

King County's juvenile diversion programs are a mess. Time for a reset

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By The Seattle Times editorial board

King County must make significant changes in how it oversees community groups hired to work with youth caught up in the legal system.

Here's a start: Make sure those who work with vulnerable kids aren't committing crimes themselves. Make sure programs have clear expectations and accountability. Do not partner with community groups that thumb their noses at oversight.

As laid out in a recent KUOW report by Ann Dornfeld, King County and Seattle have so far earmarked $28 million for programs designed to prevent youth gun violence and to divert low-level juvenile cases to community organizations rather than court.

But the county does not conduct background checks of those working with these vulnerable young people. Instead, it leaves it up to each organization to handle that task, and to determine what crimes may disqualify someone from the job.

It hasn't worked out well. Dornfeld cited a shootout last November between two men in a domestic dispute. One was an 18-year-old working with Community Passageways, an organization funded by King County to prevent youth crimes and jail time. The other happened to be a Community Passageways staff member — whose official title was "violence interrupter."

As Dornfeld discovered, at least three Community Passageways staff members who do youth diversion work have current restraining orders against them for domestic violence or other violent crimes. An administrator at one of the nonprofits faces a murder charge.

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Asked for a response, a spokesperson for King County Executive Dow Constantine said: "We have reset a shared expectation and requirement that everyone working with youth — organization staff, volunteers, and subcontractors — has a background check." She added that organizations can use their own human resources processes for determining whether individuals should perform work under the county's agreement.

That's not good enough. Going forward, King County should assert that the county itself will conduct all background checks, determine who is eligible to receive public dollars to work with young people and keep track of any violations.

King County Council President Dave Upthegrove told this editorial board that he also is concerned about how public dollars were being spent on juvenile diversion programs, and how the county was able to ascertain whether the money was producing safer communities.

In its investigation, KUOW noted that King County does not know what nonprofits do with the money they receive, nor which youth have completed the diversion process.

In the county's 2023-25 budget, Upthegrove successfully included a proviso that required Constantine to examine community diversion programs, including a consortium of providers called Restorative Community Pathways. Upthegrove also sought seemingly basic information that has been hard to find, such as the desired outcomes of each program; the annual county budget for the programs; a list of participants (with personal identifiers removed); and the percentage of participants who have completed the programs.

The report must be delivered by April 20, 2024. That's a long wait, considering Constantine announced King County will cut its budget this fall to fix a revenue shortfall. It will do so without knowing much about juvenile court diversion programs.

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Meanwhile, Restorative Community Pathways openly defies any oversight. Its website states: "Our program is designed by local organizations, abolitionist leaders, young people, families and other community stakeholders. The county does not determine what our program looks like or how we go about practicing restorative justice, and they have no control over the funds we receive ... they are not our allies or colleagues."

When contacted by the editorial board about RCP, the King County Prosecuting Attorney's Office attempted to distance itself: "We continue to believe in the effectiveness of juvenile diversion through a community-led response. However, we are disappointed by this public statement from the RCP consortium. This effort can only be successful if there is a true partnership between community and county, including meaningful oversight."

There is a long way to go to get this right. Appropriate background checks and accountability are baseline attributes of any successful alternative justice system. Community safety and the trajectory of young lives are at stake.

The Seattle Times editorial board *members are editorial page editor Kate Riley, Frank A. Blethen, Melissa Davis, Josh Farley, Alex Fryer, Claudia Rowe, Carlton Winfrey and William K. Blethen (emeritus).*

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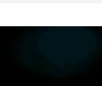
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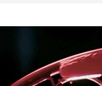
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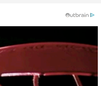
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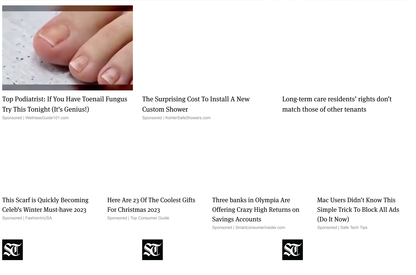

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King County gave millions to 'No New Youth Jail' activists to help kids — and then looked away

Ann Dornfeld
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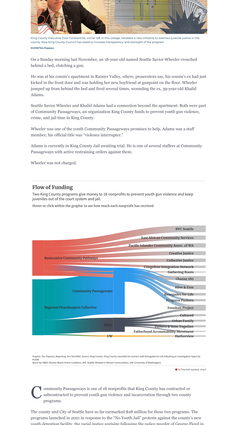

King County Executive Dow Constantine, center left in this collage, heralded a new initiative to expand juvenile justice in the county, saying it would be a better alternative to crises now playing out in Washington's juvenile detention centers. Courtesy photo

On a Sunday morning last November, an 18-year-old named Seattle-Savior Wheeler crouched behind a bed, clutching a gun.

He was at his cousin's apartment in Rainier Valley, where, prosecutors say, his cousin's ex had just broken in to the front door and was holding her boyfriend at gunpoint on the floor. Wheeler jumped up from behind the bed and fired several times, wounding the ex, 39-year-old Khalid Adams.

Seattle Savior Wheeler and Khalid Adams had a connection beyond the apartment. Both were part of Community Passageways, an organization King County funds to prevent youth gun violence, crime, and jail time in King County.

Wheeler was one of the youth Community Passageways promises to help. Adams was a staff member; his official title was "violence interrupter."

Adams is currently in King County Jail awaiting trial. He is one of several staffers of Community Passageways with active restraining orders against them.

Wheeler was not charged.

Flow of Funding

Two King County programs give money to 24 nonprofits to prevent youth gun violence and keep juveniles out of the court system and jail.

Hover or click within the graphic to see how much each nonprofit has received.

$12.7 Total
Community Passageways
Regional Peacekeepers Collective
Restorative Community Pathways
Youth Advocate Programs Inc.
Youth Care
Youth Ventures
Youth Tech Health
Youth Tennis Foundation
Youth Sailing
Youth Rowing
Youth Football
Youth Boxing
Youth Basketball
Youth Baseball
Youth Athletic Foundation
Youth Aquatics
Youth Alpine Foundation
Vietnamese Fraternal Association
Vietnamese Fishermen's Association
Tukwila School District
Tacoma Youth Sailing
Tacoma Pro Tennis
Tacoma Pro Football
Tacoma Pro Boxing
Tacoma Pro Aquatics
Tacoma Pro Alpine
Tacoma Pro Football
Tacoma Pro Baseball
Tacoma Pro Basketball
Tacoma Pro Athletic Foundation