

NATIONAL
PREA
RESOURCE
CENTER



BJA
Bureau of Justice Assistance
U.S. Department of Justice



ÆQUITAS
THE PROSECUTORS' RESOURCE
ON VIOLENCE AGAINST WOMEN

NCCD

National Council on
Crime & Delinquency

TRIAL STRATEGIES FOR THE PROSECUTION OF SEXUAL ABUSE IN CONFINEMENT

Christopher Mallios • AEQUITAS
May 14, 2013

Support

This webinar is funded through the National PREA Resource Center and Grant No. 2010-RP-BX-K001 from the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. Neither the U.S. Department of Justice nor any of its components operate, control, are responsible for, or necessarily endorse this webinar (including, without limitation, its content, technical infrastructure, and policies, and any services or tools provided)

NATIONAL
PREA
RESOURCE
CENTER

National PREA Resource Center

The National PREA Resource Center (PRC) was established through a cooperative agreement between the Bureau of Justice Assistance and the National Council on Crime & Delinquency (NCCD). The mission of the PRC is to assist adult prisons and jails, juvenile facilities, lockups, community corrections, and tribal facilities in their efforts to eliminate sexual abuse by increasing their capacity for prevention, detection, monitoring, responses to incidents, and services to victims and their families

NATIONAL
PREA
RESOURCE
CENTER

AEquitas: The Prosecutors' Resource on Violence Against Women

AEquitas' mission is to improve the quality of justice in sexual violence, intimate partner violence, stalking, and human trafficking cases by developing, evaluating, and refining prosecution practices that increase victim safety and offender accountability

NATIONAL
PREA
RESOURCE
CENTER

Ombudsman Call

This call and accompanying fact pattern contain graphic language and descriptions and was created in connection with prosecutor training on sexual abuse in confinement. The names and incidents in this fact pattern are fictitious.

NATIONAL
PREA
RESOURCE
CENTER

Learning Objectives

At the end of this webinar, participants will be better able to:

- Develop trial themes and strategies throughout your opening statement, case-in-chief, cross-examination, and closing argument
- Support and work with victims who recant or do not want to participate in the criminal justice process
- Overcome challenges, including jury bias and defenses

Definition: Sexual Abuse

“Sexual abuse” refers to “contact between the penis and the vulva or anus; contact between the mouth and the penis, vulva, or anus; penetration of the anal or genital opening; and “[a]ny other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of any person that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire”

28 CFR § 115.6, Definitions related to sexual abuse,
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>, p. 96

NATIONAL
PREA
RESOURCE
CENTER

Statement of Sherry Sullivan (continued)

I have been an inmate at the South Brockland Women's Correctional Facility since November 11, 2012. I got picked up for possession of cocaine and I was just waiting for a trial or something. I am waiting to get released -- maybe this summer. One of the supervising officers on my block was Thomas Anderson. At first, he didn't bother me. But then I started working in the laundry, and he would be transporting a few of us down there every day, Monday through Friday.

NATIONAL
PREA
RESOURCE
CENTER

Statement of Sherry Sullivan (continued)

After just a few days in the laundry, that's when it started. He started pulling me out into a room off to the side and raping me. It was like a closet, but bigger. It had a table in there that looked like it was an old table from a doctor's office. Sometimes he did it twice a day. It was always the same thing, except a couple of times. He always used a condom, turned me over and put me face down so I was bending over on a table, and then he put his penis in my vagina from behind.

Statement of Sherry Sullivan (continued)

The first time he said something like, "If you know what is good for you, and you want me to take care of you and protect you in here, you will do this," or something like that. Honestly, I was so scared, I didn't say a word. I would cry a lot in the beginning. He just ignored it. Sometimes he would give me some food or stuff or cigarettes before or after.

Statement of Sherry Sullivan (continued)

I never said a word to anyone. I really just thought that he could kill me in there so I didn't say anything. I never told anyone. A few of the girls would give me dirty looks, not just in the laundry but like in the cafeteria too, but no one said anything to me. I wasn't going to report this. I just couldn't keep it in anymore. I do not want to press charges. I just thought about him being transferred and that he is going to do this to someone else somewhere, and I just don't want what happened to me to happen to anyone else.

NATIONAL
PREA
RESOURCE
CENTER

Offender-Focused Prosecution

- Offenders purposefully, knowingly, and intentionally target victims whom they believe they can successfully assault
- Keep the focus on the actions, behaviors, characteristics, and intent of the offender

The Context of the Victim

The victim's context is defined by:

- The offender (influence on the truth, relationship, etc.)
- The culture (barriers, disclosure, access to service, etc.)
- The self (blame, prior history and experience)
- The audience

Trial Preparation

Sherry Sullivan is transported to the prosecutor's office for a trial prep session. Sherry says she doesn't want to talk about the rapes; she just wants the prosecutor to talk to her about what will happen during the trial. The prosecutor spends 45 minutes talking about the process. Sherry says she will talk to the prosecutor another time prior to trial.

28 CFR §§ 115.43, 115.68, 115.368 Protective custody,
<http://www.prearesourcecenter.org/sites/default/files/library/2012-12427.pdf>,
p. 50; 28 CFR § 115.67 Agency protection against retaliation, p. 102

NATIONAL
PREA
RESOURCE
CENTER

STATE v. Thomas Anderson

“Hi it’s Sherry Sullivan from the Anderson case. I am calling because I just ... I want this whole thing dropped. I want the charges dropped. I just cannot do this. Please just tell me what I have to do to get the case dropped. If I have to sign something or what.”

STATE v. Thomas Anderson

The prosecutor calls the prison and asks the PREA coordinator to relay a confidential message to Sherry:

“Hello Sherry, I would like to talk about your message. I am here to support you and I just want to talk to you to make sure you are OK. I am here to support you. I will see you tomorrow in court. Please call me back.”

STATE v. Thomas Anderson

On Monday morning, the victim comes to court and tells the prosecutor that the rape never happened.

Discovery

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

Standard 3-3.11, ABA Criminal Justice Section Standards

NATIONAL
PREA
RESOURCE
CENTER

Discovery

(b) A prosecutor should not fail to make a reasonable diligent effort to comply with a legally proper discovery request.

(c) A Prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

Standard 3-3.11, ABA Criminal Justice Section Standards

NATIONAL
PREA
RESOURCE
CENTER

Why recant?

For many victims, recanting is an attempt to stop the criminal case from moving forward and stop cooperating with the investigation or prosecution.

Victim Dynamics

Why do so many victims fail to cooperate with criminal prosecution?

- Trauma
- Mistrust or the criminal justice system
- Embarrassment/shame
- Being treated with suspicion
- Lack of support
- Put the incident behind them
- Intimidation

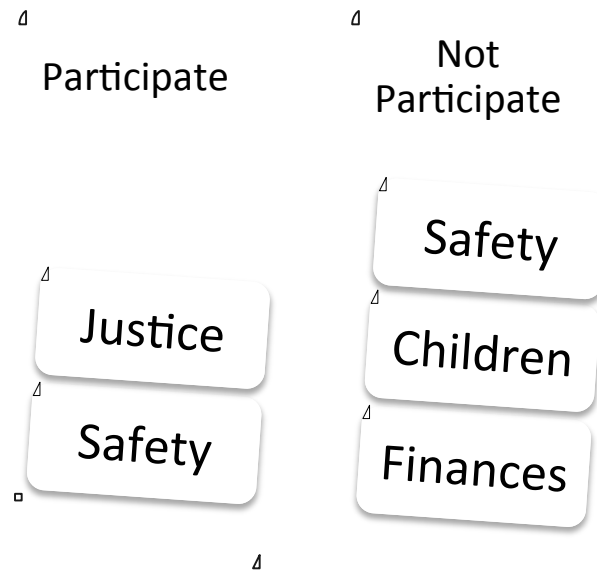
Decisions

Safety risks, cultural barriers, and consideration of life changing, unintended consequences are serious concerns for victims in whether to cooperate with a criminal prosecution against their offender.

These decisions are also serious concerns for the criminal justice system, as prosecutions are often dismissed when victims fail to appear for trial.

Complex Decision

Responsibility is not just to understand these dynamics:



We need to appreciate that perpetrators master and exploit them to circumvent the justice system and community efforts.

Criminal Justice System

Beliefs → Response

NATIONAL
PREA
RESOURCE
CENTER

Rape Myths

“Despite considerable research and publications in professional and popular journals concerning rape, such myths continue to persist in common law reasoning”

Sarah Ben-David & Ofra Schneider, Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance, 53 (5/6) SEX ROLES 385 (Sept. 2005)

NATIONAL
PREA
RESOURCE
CENTER

Question

Assume that the victim recants to the prosecutor and then admits that the recantation was a lie.

- Can the prosecutor be called as a witness?
- What argument would you make in requesting that the subpoena be quashed?

Lawyer as Witness

“A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness.”

Rule 3.7(a). Model Rules of Professional Conduct.

NATIONAL
PREA
RESOURCE
CENTER

Trial



NATIONAL
PREA
RESOURCE
CENTER

□

How we proceed

NATIONAL
PREA
RESOURCE
CENTER

2-Step Charging Process

1. Assuming the victim's version is 100% true, do the allegations constitute rape?
2. Can you prove the victim's allegations?

Corroboration

Consider other evidence

- 911 tapes/Calls to reporting hotline
- Medical records
- 404(b) evidence
- Photographs
- Behaviors, appearance, and demeanor of all parties
- Any requests for cell/other transfer while in prison

Factors to Consider

- Corroboration
- Motive
 - Consequence of making the disclosure
 - Intimidation
- Timing
- Level of detail
- Plausibility

The Crawford Effect

Must consider the effect of *Crawford v. Washington*, 541 U.S. 36 (2004) on your ability to prove the case.

Voir Dire

- What behaviors would you like to address in voir dire?
- What questions do you think would reveal juror bias?

STRATEGIES
The Prosecutors' Newsletter on Violence Against Women
AEQUITAS Issue # 2 • July 2010



Educating Juries in Sexual Assault Cases
Part I: Using Voir Dire to Eliminate Jury Bias
By Christopher Mallios, JD and Toolsi Meisner, JD¹

Crimes of sexual violence continue to be misunderstood even though there has been significant research surrounding the dynamics of sexual assault and its impact on victims during the last three decades.² We now understand much more about these crimes, the people who commit them, and the way victims respond to trauma. Unfortunately, we cannot assume that the results of this research have infiltrated the minds of the average layperson, juror, or judge.

Too many people still believe the outdated and disproved mythology that surrounds sexual violence.³ Rape myths shift the blame for the crime from the rapist to the victim.⁴ When a fact-finder in a sexual assault case accepts a rape myth as true, the prosecutor faces tremendous barriers to achieving justice for victims and holding offenders accountable for their crimes.

This article is the first in a series that will explain strategies to educate juries about sexual violence facts and overcome common misconceptions. In addition to providing data-driven information about sexual assault

based on research, journal articles, and authoritative publications, this article will suggest ideas to improve jury selection techniques. Future articles in this series will provide additional material to provide prosecutors with information and strategies to educate, dispel common misconceptions, and convey the truth to fact finders through other aspects of trial practice, including opening statements, direct examination, calling expert witnesses, and closing arguments.⁵

To be effective in prosecuting crimes of sexual violence, prosecutors must understand the research and statistics about sexual assault in order to educate judges and juries about sexual assault dynamics and common victim responses. Although much of the data in this area is not generally admissible in a criminal case, prosecutors can benefit from a thorough understanding of the dynamics of sexual assault because it will aid them when devising trial strategies, anticipating defenses, preparing victims, and developing effective cross-examinations and arguments.

NATIONAL
PREA
RESOURCE
CENTER

Closing

Theme:

- Who is the defendant?
- Why and how did he select the victim?
- How did he carry out the crime?
- How did he injure her?
- Why is she to be believed (ie, how can you assess her credibility so that you know she is telling you the truth)?

Opening

- Should the prosecutor address the victim's behavior in his/her opening?
- How can the prosecutor address this behavior without putting the focus on the victim?

Witness Order

Potential Witnesses:

- Victim
- Corrections officers assigned to her block
- Corrections official who can explain victim's/defendant's schedule
- Corrections official who can explain map of facility and D's access to victim
- Expert testimony on victim behavior
- Medical testimony
- Prompt complaint witness
- Law enforcement

Direct Examination

- Should prosecutors address victim behaviors through their direct examination of the victim?
- What are the pros and cons of asking victims to explain their behaviors?

Victim Behavior

May be addressed

- In voir dire
- By the victim
- Through an argument
- Through an expert
- Through a combination

Direct Examination of the Victim

NATIONAL
PREA
RESOURCE
CENTER

Victim Behavior

Most common reactions judged to be counterintuitive:

- Earnest resistance
 - Not screaming, not yelling, not shouting “no” during the rape, not fighting back, etc.
- Delayed or piecemeal reporting
- Continued contact with the offender
- Subsequent sexual activity

Victim Responses

Victim's judgment of her behavior influences reaction:

- I should have...
- I shouldn't have...
- Why did I...
- Why didn't I...

Trauma

What Causes Trauma

- Extreme fear or terror
- Betrayal
- Blitz or surprise assaults
- Blame and shame
- Disastrous disclosures or reports
- Lack of support

Effects of Long Term Traumatic Stress

- Anxiety and vigilance
- Anger, resentment, and conflict
- Uncertainty about future
- Prolonged mourning of losses
- Diminished problem solving
- Isolation
- Health Problems
- Physical and mental exhaustion
- Changed world view

NATIONAL
PREA
RESOURCE
CENTER

Expert Testimony on Victim Behavior

Purpose

- Provides jurors with specialized information about a range of victim behavior
- Provides a proper context in which to evaluate a victim's behavior
- Not trying to match victim behavior to a "typical" or "real" victim
- Not using an expert to opine on the victim's reasons for a specific behavior
- Lay a foundation for closing arguments based on factual evidence about how victims behave
- Counter defense arguments the victim behaviors support an inference that the victim is lying

Introducing Expert Testimony

- Identify the behavior that you think will cause a jury to disbelieve the victim
- Decide whether to call an expert
 - Admissible?
 - Available?
 - Pros and cons
- Explain the behavior

Case Law

“[T]he behavioral characteristics or behavioral patterns of an alleged victim in a sexual abuse case may need to be explained by expert testimony, especially where that behavior would seem to be counterintuitive.”

U.S. v. Pagel, 45 M.J. 64, 68 (CAAF 1996)

NATIONAL
PREA
RESOURCE
CENTER

The Danger Zone

An expert CANNOT:

- Testify about a particular witness's credibility
 - Cannot be a human lie detector
- Testify as to whether an assault did or did not happen

□

Combating Defense

It never happened

It wasn't me

NATIONAL
PREA
RESOURCE
CENTER

Closing Argument

Offender-focused

Credibility – statements with the ring of truth

Detail

Demeanor

Interest

Common sense

Corroboration

NATIONAL
PREA
RESOURCE
CENTER

Summary

- Cases involving sexual assault in confinement will require focused and collaborative investigative and victim-centered resources
- Focus on the offender's behavior and how he selected this particular victim
- Look for corroboration from a variety of sources
- Carefully prepare to try the case in anticipation of issues related to recantation or non-participation

Additional Resources

- U.S. Department of Justice National PREA Standards
http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf
- STRATEGIES Newsletter, Prosecuting Cases of Sexual Abuse in Confinement, Issue #
<http://www.aequitasresource.org/library.cfm>
- The Prosecutors' Resources
<http://www.aequitasresource.org/library.cfm>
- Voices for Justice: Surviving Prison Rape, produced by Just Detention International
<https://www.youtube.com/watch?v=0bOQet07OIg>

□

Questions?

NATIONAL
PREA
RESOURCE
CENTER



ÆQUITAS
THE PROSECUTORS' RESOURCE
ON VIOLENCE AGAINST WOMEN

Christopher Mallios
Attorney Advisor

1100 H Street NW, Suite 310
Washington, DC 20005

P: (202) 596-4230
F: (202) 393-1918

cmallios@aequitasresource.org
www.AEquitasResource.org

For More Information

For more information about the **National PREA Resource Center**, visit www.prearesourcecenter.org. Direct questions to info@prearesourcecenter.org

Michela Bowman
PRC Co-Director
mbowman@nccdglobal.org

Jenni Trovillion
PRC Co-Director
jtrovillion@nccdglobal.org

Tara Graham
Sr. Program Specialist
tgraham@nccdglobal.org

For more information about **AEquitas**, visit www.aequitasresource.org. Direct questions to info@aequitasresource.org.

Connect with JDI:



www.facebook.com/aequitasresource



www.twitter.com/AEquitasResourc

NATIONAL
PREA
RESOURCE
CENTER