



# Understanding the Role of DNA Evidence in a Sexual Assault Investigation: Part I

## *Unpacking Common Assumptions*

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This training bulletin is the first in a series developed to explain the role of DNA evidence in a sexual assault investigation. In this first installment, we will unpack some assumptions that influence both discussions and policy initiatives in this area. In subsequent bulletins, we will explore alternative sources of DNA evidence and their potential significance or impact on a sexual assault investigation. We will also provide a case example illustrating many of our points, and offer a brief historical perspective on the use of DNA evidence within the criminal justice system. Finally, we will conclude by charting a course for reform and offering best practice recommendations.

Some of the information in this series will overlap with the recent [training bulletin](#) addressing the question of whether we should “test anonymous kits.” While that bulletin focused specifically on evidence collected during a medical forensic exam with a victim who has not personally reported to law enforcement, this series is designed to address the role of DNA evidence in the investigation of sexual assault cases more generally.

Note: This series is adapted from a collection of articles originally appearing in *Sexual Assault Report* (Volume 14, Number 3), published by the Civic Research Institute, all rights reserved.

### **Underlying Assumptions**

In recent years, there has been extensive media coverage of the “DNA backlog” and the problem of untested evidence in sexual assault cases. There are also significant policy reforms underway – on the local, state, and federal level – to address these problems. Yet underlying the discussion are a number of implicit assumptions. They are not often stated outright, but these assumptions nonetheless influence how these problems are formulated, how their causes are diagnosed, and how the solutions are designed.

In fact, we believe there are three basic assumptions that underlie much of the discourse surrounding the DNA backlog and the problem of untested evidence. If pressed, most people would probably recognize that these assumptions are not accurate – or at least overly simplified. However, we will state them in their absolute form, to more clearly see their influence on how we think about these issues:

1. The purpose of a medical forensic exam of a sexual assault victim is to collect DNA evidence.
2. The process of investigating a sexual assault proceeds directly from the medical forensic exam, to the identification of a DNA profile, to the courtroom trial (from kit to court”).

3. DNA evidence provides a “yes or no” answer to the question of whether a particular suspect committed a sexual assault against a particular victim.

Based on such assumptions, it is understandable that the public is outraged by the images of rape kits piled up in property rooms, never to be sent to crime labs for DNA testing. This image has certainly been fueled by media coverage, including a 2010 report by [Human Rights Watch](#), entitled: [I used to think the law would protect me: Illinois' failure to test rape kits](#). That report opens with the experiences of a sexual assault survivor referred to as Carrie. Both her experiences – and the conclusion of the report’s authors – perfectly illustrate the issues we would like to address in this paper, so we will briefly summarize them here.

#### **Carrie’s Experience**

Carrie was sexually assaulted while she was in high school, by a family friend of her father’s, “someone she barely knew” (p. 2). Immediately afterward, she reported the rape to police and submitted to a medical forensic exam. The police told Carrie that they had picked up this same suspect before, “for sexually assaulting the teenage daughter of a family friend” (p. 2).

The suspect was arrested, and although Carrie called repeatedly to find out what was happening in her case, she did not hear back from the prosecutor until six months later. At that point, the prosecutor “told her that there was not enough evidence” (p. 5) to pursue her case. She reportedly told Carrie: “Maybe if we get this guy coming in again for rape, we can move forward. In acquaintance rapes, it helps to establish a pattern” (p. 5).

Carrie asked if her rape kit could be tested to see if it was linked with any other cases, but her suggestion was refused. When Carrie requested a copy of the investigative file for her case, she discovered that:

*The police had not interviewed the suspect, not interviewed other potential witnesses, nor considered the hospital examiner’s report, which indicated ‘vaginal swelling and tearing consistent with forced penetration.’ As far as Carrie knows, her rape kit continues to sit in police storage, untested (p. 5).*

With stories like this, it is no wonder that the public is outraged. It appears that the criminal justice and community response system completely failed Carrie. However, we believe this outrage is directed to some extent at the wrong problem.

It is clear that the authors of the report viewed the primary problem as the failure to “test Carrie’s rape kit.” That is indeed a failure, which we will discuss in greater detail later.

Suffice it to say that Carrie was exactly right; analyzing the evidence might have linked her case to others, which could potentially have assisted in the prosecution of her case.

Yet the far more significant failure is stated in the sentence *before* that one, which states: “The police had not interviewed the suspect, not interviewed other potential witnesses, nor considered the hospital examiner’s report” (p. 5). This is the sentence that should cause the real outrage in our country, because we can test all the evidence in the world, and we will not be able to hold a single perpetrator accountable *if law enforcement fails to conduct the type of investigation that will support successful prosecution*. In other words, the problem is even more serious than people think; or at least it is larger and more complicated, because it extends beyond possible sources of DNA evidence to the entire investigation.

This series is designed to address the larger contours of this problem. We therefore return to the three basic assumptions outlined above, to understand their influence.

#### **#1: Not Just DNA Evidence**

First, there is the common impression that the purpose of a medical forensic exam is to collect DNA evidence. This is illustrated with the definition of a “rape kit” offered in the 2010 Human Rights Watch report:

*When a person is sexually assaulted and reports the crime, she<sup>1</sup> will be asked by the hospital staff or the police to consent to the collection of a rape kit. A rape kit is the DNA evidence gathered from an examination of the victim’s body, a process which can last between four and six hours (p. 3).<sup>2</sup>*

In fact, biological evidence (such as DNA) is not the only evidence that is collected and documented during a medical forensic exam – and it is not always the most important evidence for advancing a sexual assault case through successful investigation and prosecution.<sup>3</sup> In most sexual assault cases, the victim and suspect know each other,

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<sup>1</sup> We prefer to avoid gendered terminology, in order to be inclusive of both male and female victims of sexual violence. However, this is a direct quote from the 2010 Human Rights Watch report.

<sup>2</sup> While a forensic medical exam *can* take as long as four to six hours to conduct, this is on the long end of the spectrum. The *Sexual Assault Nurse Examiner (SANE) Development and Operation Guide* conducted a survey of SANE programs and found that: “The time estimated to complete an exam ranged from 2.5 to 5 hours with an average of 3.2 hours” (Ledray, 1999, p. 46).

<sup>3</sup> This perception of a “rape kit” as including only biological evidence is further fueled by the description of the process offered in the 2010 Human Rights Watch report. In a breakdown of the steps involved, the final one is described as follows: “The nurse or doctor then collects other samples, such as fingernail scrapings, pubic hair combings, and urine and blood, placing each in separate envelopes or tubes. The swabs are labeled and sealed in containers with evidence tape. All of the evidence is then placed in a large white envelope – the rape kit” (p. 8). While it is true that this type of white envelope (or other similar package) is what people think of when they use the term “rape kit,” this obscures the fact that clothing and other items may also be collected from the victim during a medical forensic exam.

and the suspect does not deny that the sexual act took place. Rather, most suspects argue that the victim consented. Thus, evidence is required to overcome the consent defense, by corroborating the element of force, threat or fear – or establishing that the victim was unable to consent. Typically, biological evidence is not used for this purpose; this is more likely to be accomplished with other evidence that is collected and documented in a medical forensic exam, including a history taken from the victim, photographs, and other documentation of injuries. Ultimately, these other types of evidence are more likely than DNA to help overcome a consent defense and lead to the successful investigation and prosecution of a sexual assault perpetrator.

For this reason, we try to avoid using the term “rape kit,” preferring instead more general terms such as “forensic evidence kit” or even simply the “evidence from an exam.” This highlights the fact that various forms of evidence are collected and documented during the process of a medical forensic exam, and it helps to keep in mind that evidence can be collected from both the suspect as well as the victim.

This more general orientation also reminds us that a medical forensic exam should be obtained in many different types of sexual assault cases. For example, despite the fact that most jurisdictions have established standards for how long an exam can be conducted following a sexual assault (e.g., 96 hours, 120 hours), emerging evidence suggests that forensic evidence may be available on the body of the victim (and suspect) far longer than was previously believed.<sup>4</sup> Moreover, many people think a medical forensic exam is only needed in cases where sexual penetration was completed. However, as our case example will illustrate, critical evidence can be recovered in cases where penetration is attempted but not completed, and in cases where there are other forms of personal contact (e.g., the suspect covers the victim’s mouth with his hand).

This discussion even highlights the fact that these issues are not unique to sexual assault. As DNA technology advances and resources become available, forensic evidence will likely be recovered from the bodies of victims and suspects in other types of cases where there is personal contact (e.g., robberies, assaults). In sum, a variety of types of evidence may be collected and documented during a medical forensic exam, as well as the law enforcement investigation, and some of this evidence may be far more significant in advancing the investigation and prosecution than DNA.

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Photographs and statements will also be taken, and any of these items may be more critical than DNA evidence for advancing the investigation, depending on the assault history.

<sup>4</sup> While the longest of these (120 hours) can be used as a general guideline, best practice is for each sexual assault to be evaluated on a case by case basis as recommended in the [National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents](#) (Second Edition, April 2013). The question of whether or not to conduct an exam should be based on the facts of the case, the victim’s history, the likelihood of recovering evidence, and the types of evidence that will be needed for successful prosecution. This issue is discussed in detail in a [Promising Practices article](#) from the e-newsletter sent on May 19, 2005 from Sexual Assault Training & Investigations (SATI), Inc. The article was also published in *Sexual Assault Report*, Volume 10, Number 3, January/February 2007, p 33-47.

#### #2: Not From “Kit to Court”

Another common assumption is that the process of investigating a sexual assault proceeds directly from the medical forensic exam, to the identification of a DNA profile, to the courtroom trial. Or, as we describe it, “from kit to court.” Clearly, the process is much more complicated than this. Successful prosecution of a non-stranger sexual assault case typically requires a far wider range of evidence than just DNA; the medical forensic exam of the victim (and the evidence collected for a “kit”) is only one part of a much broader investigation. This reiterates the points made in the previous section.

#### #3: Not a “Yes or No” Answer

Finally, the public discussion often makes it sound like DNA evidence provides a “yes or no” answer – as if it could determine whether a particular suspect sexually assaulted the victim. This perception is based on a lack of understanding regarding the alternative sources of DNA evidence, the potential purposes for DNA evidence in a sexual assault case, the process for developing a DNA profile, and the criteria for entering a DNA profile into the national database ([Combined DNA Index System or CODIS](#)). This is particularly true for the majority of cases where the victim knows the suspect and the defense is consent.

This misperception is illustrated quite poignantly with another survivor account in the 2010 Human Rights Watch report. Julie, 25 was raped by a friend of a friend:

*I tried pushing him, I tried screaming, ‘No,’ I screamed, ‘Stop,’ I said, ‘You’re hurting me,’ nothing was helping so I ran out of the apartment and got into my car and was in hysterics and then we ended up going immediately to the hospital. From there I agreed to do a rape kit (p. 4).*

Julie goes on to describe how difficult it was to go through the process of a medical forensic exam. Ultimately, the evidence that was collected during her exam was not sent to the crime lab for analysis, and the case was not prosecuted. She recognizes that her case may not have gone to court even if the rape kit had been analyzed, but she believes this would have provided her with answers or a sense of closure:

*I feel like even though my case may not have gone to court regardless if my kit were tested or not, I feel like I would have had somewhat of a closure, I feel like I would have had answers, maybe not answers that I liked, but I would have answers. If the rape kit was tested, I feel like I, in some part, would have internal justice. It would have ... I wouldn’t be wondering why. It’s hard and it’s difficult to think that you could potentially be setting someone free to do it to someone else, and the reason not testing a kit (p. 4).*

## Training Bulletin

### ***DNA Evidence, Part 1: Unpacking Common Assumptions***

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It is clear from Julie's comment that she is seeking answers or a sense of closure that could never have been provided by submitting forensic evidence to the crime lab for analysis. Her story thus provides an excellent starting place for our discussion of the alternative sources and potential purposes of DNA evidence in a sexual assault case. These issues will be explored in another training bulletin in this series.

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