



Solving the Problem of Untested Evidence in Sexual Assaults

by Nancy Ritter

NIJ's forthcoming special report, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases*, looks into ways to move sexual assault kits forward.

Recently it seems that, every few months, thousands of untested rape kits are discovered in another police evidence room around the country: 10,000 in Los Angeles; 12,000 in Dallas; 10,500 in Detroit.

For resource-strapped jurisdictions dealing with the discovery of large numbers of older, unanalyzed sexual assault kits (SAKs), the solutions are anything but straightforward. Every stakeholder in the nation's criminal justice system is affected: police and crime laboratories, courts, victim-service agencies, federal, state and local policymakers, and, of course, the victims.

A rape kit — more accurately called a sexual assault kit — is a box or

envelope used to collect and store biological and trace evidence in cases of alleged sexual assault. SAKs generally include vaginal, oral or anal swabs that, upon testing, may yield the perpetrator's DNA.

Untested SAKs can be stored in a number of places, such as a police department evidence room, crime laboratory, hospital, clinic or rape-crisis center. It is unknown how many unanalyzed SAKs there are across the United States.

As a nation, we need to understand more about how law enforcement officials decide whether or not to submit SAKs to the crime laboratory for analysis and how cases are triaged for other investigation (i.e., in which order are cases submitted

for investigation, if at all, and on what criteria). In October 2010, NIJ issued an “action-research” solicitation to better understand why so many SAKs are not forwarded from police evidence rooms to crime laboratories and to develop innovative approaches to solve the problem. In phase one, NIJ will award up to \$200,000 to each of three to five sites for the creation of teams; these teams will include a criminal justice researcher and representatives from the police department, the crime laboratory, prosecutor’s office and a community-based victim services organization. The teams will first audit untested SAKs in their jurisdiction to determine why the cases were not sent to the laboratory. Then they will develop a plan to tackle the problem. In phase two of the project, NIJ hopes to award up to a total of \$4 million to help the selected sites implement their plans.

Understanding the Evidence

One of the primary questions that must be answered, with empirical evidence, is this: Should all previously untested SAKs be tested — even kits that may be 25 years old?

To answer this question, it is important to understand the evidence itself. On average, only an estimated 50 to 60 percent of SAKs contain biological material that does not belong to the victim, and that percentage is much lower in some parts of the country.

To shed more light on this issue, NIJ is currently funding researchers at California State University, Los Angeles, to study a random sample of Los Angeles cases. The researchers will look at data, such as the percentage of SAKs that yielded a DNA profile and the percentage that

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were uploaded to the Combined DNA Index System (CODIS) and resulted in a hit to other crimes or offenders. Results of the study are expected in 2011.

Technological advancements in DNA analysis are also likely to play a major role in testing older SAKs. In Georgia, for example, the state crime laboratory first tests evidence to determine if male DNA is present; and, if it is not, the laboratory doesn’t proceed with the full, time-consuming analysis that would develop an actual DNA profile.

Victim Notification

Whether a jurisdiction with a large number of previously untested SAKs decides to test all or only some of the kits, notifying the victims is an important part of the process. Determining best practices for doing this, however, will not be easy.

When, for example, should the victim be notified? When her unanalyzed SAK has been located after many years? When the kit is sent to the laboratory for analysis? Should the victim be notified even if analysis reveals that there is no

probative evidence or only if a DNA profile is determined? Should she be notified only if the rapist’s identity is revealed through a CODIS hit? What if the suspect is not in CODIS, but the police issue a John Doe warrant?

At first blush, it may seem that there is no question that sexual assault victims should be notified at some point in the process. After all, why wouldn’t a victim want to know if DNA analysis of evidence from a rape when she was a college freshman had — 20 years later — revealed the rapist’s identity?

Experts say there could be as many answers to that question as there are victims. What if the victim, now 38 years old, never told her husband or 15-year-old daughter about the rape? What if she has had years of counseling and moved past it? Beyond simply being notified at one step or another in the criminal justice process, does the victim get a say in whether or not her case moves from the police evidence room to the laboratory, or from the prosecutor’s office to the courtroom?

Victim safety is also a factor in the notification issue. Victim advocates warn that a victim of past rape could be living in a domestic violence situation, and contact by the police could act as a violence trigger in her current partner. In addition, they note, victims who are told that an unsolved crime may now be investigated may suddenly feel threatened again by the rapist.

Post-testing: The Domino Effect

Beyond the notification of victims and decisions regarding the forensic testing of recently discovered SAKs, there are major implications for downstream partners in the criminal

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justice system. Some questions jurisdictions might face include:

- Where will the resources come from as already-strapped police departments and crime laboratories receive additional demands for follow-up investigations and DNA analysis?
- What protocols will a police department follow, for example, when testing yields a DNA profile but it does not match a profile in CODIS or a local database? Will a John Doe warrant be issued?

- If an investigation results in a suspect, how will already overworked prosecutors and public defenders handle additional cases?

Jurisdictions facing the discovery of a large number of older SAKs must also consider what their testing policy will be if the statute of limitations in a case has been reached. If a case can't be prosecuted because the deadline for filing has passed, is it a wise use of resources to have the SAK evidence tested? The answer is not as obvious as it may seem.

Some proponents of testing all SAKs argue that, even if a case can't be prosecuted, the evidence should nevertheless be tested to determine if the rapist might have committed other rapes. Evidence of prior, unadjudicated sexual assaults may be considered in the sentencing of a rapist.

Ultimately, at the heart of this latest challenge for our criminal justice

system are the victims. Delays in evidence being sent to a laboratory — as well as delays in analyzing evidence — result in delays in justice. In worst-case scenarios, such delays can lead to additional victimization by serial offenders or the incarceration of people wrongly convicted of a crime.

As the nation grapples with the discovery of thousands of older SAKs, it is crucial that we balance justice, public safety and victims' needs. In the end, our goal must be to move beyond the crisis management of the moment to the adoption of systematic practices, procedures and protocols that will prevent such situations from ever arising again.

Nancy Ritter is a writer with the National Institute of Justice.

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Resources

- To learn more about funding challenges for public crime laboratories, see *2007 DNA Evidence and Offender Analysis Measurement: DNA Backlogs, Capacity and Funding*, <http://www.ncjrs.gov/pdffiles1/nij/grants/230328.pdf>.
- To learn more about evidence in police custody that is not sent to a crime laboratory, see <http://www.ojp.usdoj.gov/nij/journals/266/untested.htm>. The full report is available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228415.pdf>.
- To read the story of one man's exoneration after a wrongful conviction, see <http://www.ojp.usdoj.gov/nij/journals/262/one-mans-story.htm>.
- To read about NIJ-funded research on extending the period of time to obtain a possible DNA profile after a sexual assault, see "Extending the Time Available to Collect DNA in Sexual Assault Cases" (issue 267), <http://www.ojp.usdoj.gov/nij/journals/267/extending.htm>.
- To learn more about action research, see <http://www.ojp.gov/nij/topics/crime/gun-violence/prevention/action-research-model.htm>.
- In May 2010, the U.S. Department of Justice brought sexual assault nurse examiners, crime laboratory directors, cold case detectives, prosecutors and victim advocates to Washington, D.C., to discuss the challenges surrounding untested evidence in sexual assault kits. A full report of the meeting is available at <http://www.ovw.usdoj.gov/docs/rape-kit-roundtable-summary-10262010.pdf>.