

# Key Considerations in Preparing a Cold Case Sexual Assault for Trial

Prosecutors must address the unique complexities of cold case sexual assaults when preparing to bring these cases to trial. Because of the time that has passed since the sexual assault, it is important for prosecutors to recreate the reality and urgency of the crime for the jury. Key considerations include (1) linking the offender's conduct to the victim's trauma by using a carefully developed theory and theme, (2) relying on victim testimony, and (3) corroborating witness and expert accounts. This resource addresses these key considerations for prosecutors in preparing a cold case sexual assault for trial.

## Theory and Theme of the Case

To effectively present a cold case sexual assault for trial, prosecutors must anticipate and answer jurors' questions about the case. The best way to achieve this is to develop a case theory and theme. Before a trial begins, prosecutors should have a global view of how they will present the case at trial, from jury selection all the way through closing. In some cases, a clear theory and theme will naturally suggest the structure on which the case will be organized; this organization can be seen in the order of witnesses, the facts that should be highlighted in trial testimony and other evidence, and the way in which the case will be argued in summation. Yet in other cases, case preparation will reveal the strongest theory and theme. Still, in most cases, the theory and theme will continue developing in a deeper way as evidence is presented at trial.

The **theory** of the case can be distilled to answer the questions of what happened and how it happened. Although it is not unusual for any criminal case to have an odd fact or two that seemingly defies immediate explanation, a good theory of the case accounts for all of the significant evidence. An effective prosecution theory in a cold case should focus on the offender's conduct and motivations. The strength of a cold case emerges from the evidence and how the victim never forgot what happened.

Although delay in investigation and prosecution is an important issue in a cold case sexual assault, focus should remain on the offender's responsibility for the crime, and when appropriate, for delay. There are a few possibilities that commonly account for delay, either alone or in combination:

- ◆ Acts of the defendant (e.g., inflicting trauma of the rape itself that resulted in a delayed report, threats or intimidation, effects of alcohol or drugs provided or exploited by the defendant)
- ◆ Limited DNA technology at the time of the assault
- ◆ Unavailable DNA profile in the Combined DNA Index System (CODIS) for comparison
- ◆ Previously limited criminal justice system response impacting investigation and development of the case, which may include lack of understanding of the dynamics involved in sexual violence or recognition of the victim's behavior as a response to the trauma of the crime.

If the defendant engaged in conduct intended to hinder the investigation or prosecution, such conduct can be used not only to explain the delay but as evidence of consciousness of guilt. Such evidence helps to maintain focus on the offender's conduct rather than on the victim's actions or inactions; additionally, this evidence can be readily incorporated into an offender-focused theme that highlights the delay.

Other common reasons for delay can still be addressed. For example, advances in technology or processes related to CODIS can sometimes cause delays in forensic testing results; the DNA expert who testifies at trial can readily explain these delays. If a limited investigation attributes to the delay, shortcomings should be acknowledged with candor and regret, with a firm understanding about how the renewed investigation addresses these earlier shortcomings.

Details about how the perpetrator committed the crime are also important to the theory of the case. Victim selection, exploitation of vulnerabilities, or use of drugs or alcohol are all predatory behaviors relevant to the case. The focus should always be on the offender's behavior rather than the victim's responses; however, an expert in victim responses to trauma and behavior should explain victim behaviors that jurors may find difficult to understand. These victim responses may include actions (or inactions) that are also part of the theory of the case. They should be presented as part of the reality of the crime and in the context of the offender's actions.

The theory should also include explanations for other evidence in the case—observations by witnesses or absence of observations (e.g., an assault that occurred during a noisy

party); medical findings of physical injury or absence of injury; other evidence or absence of evidence; and details of the victim's experience before, during, or after the assault.

The **theme** of the case is a short, memorable concept that encapsulates the prosecution's theory and evidence. It should be introduced as early as *voir dire* and continued through the opening statement, reiterated and supported during trial testimony as often as possible, and then emphasized during summation for jurors to consider in their deliberation of the case. An offender-focused theme sets the stage to offer evidence in a manner that keeps the jury's focus on the defendant's responsibility for the victim's trauma and responses to the assault over the years. A specific theme will depend on the details of a case; however, following are examples of some offender-focused themes that may be appropriate for a cold case sexual assault trial:

- ◆ Time did not erase the memory.
- ◆ For the victim, this is not a cold case because they have had to live with the trauma since the assault occurred.
- ◆ On the day of the assault, the victim lost trust in someone they thought they knew.
- ◆ Justice does not have an expiration date.

Sometimes, a phrase in the victim's statement will suggest a theme: "I just couldn't believe this was happening to me," or simply, "I trusted this person," while focusing attention on how these memories remained clear and strong over time.

The theme may not directly allude to the passage of time but should employ reference to how the years did not change the crime, providing a compelling reason for the jury to do the hard work to reach a just verdict.

## Witness Availability

The prosecutor should evaluate the availability of witnesses who can provide critical testimony at trial. When witnesses cannot be located or are otherwise unavailable to testify, case law concerning the defendant's sixth amendment right of confrontation will control whether their prior statements will be admissible at trial.<sup>1</sup> Confrontation considerations can be especially problematic when forensic analysts who performed the analysis are unavailable for trial because of the lack of clear guidance in the *Williams v. Illinois* decision about the requirements of what evidence must be presented at trial when the prosecution's case is based on scientific evidence.<sup>2</sup> The analysis required to determine the admissibility of their testimony is discussed in the Expert Witness Preparation section that follows.

## Witness Preparation

Ensure that all necessary witnesses have been properly served with subpoenas to testify;<sup>3</sup> allow sufficient time for review of their prior statements and discussion of anticipated direct and cross examinations. Frequently, witnesses in cold cases can provide additional information to earlier statements. Discovery obligations affecting new information should be prioritized. In addition, avoiding delay is especially important in cold cases when delay has been challenged as prejudicial as well as for advancing the case for the victim.

## Victim Preparation

Prosecutors should work with advocates to provide necessary support for the victim in preparing for trial. The prosecutor should explain what will be asked during direct examination, including questions intended to recreate the reality of the crime for a jury. Anticipating questions that will be asked on cross-examination is also important. Victims have many concerns in cold cases, including if they will recognize the defendant and whether they will be able to remember details of the crime and its aftermath. Even when DNA establishes the offender's identity, the victim will still be asked to identify the perpetrator. If a photo array was previously used, a law enforcement witness may be able to testify to corroborate the victim's identification. If a photo array was not provided, investigators may be able to obtain an older photograph of the offender. Victims should be assured that being unable to identify the defendant in a cold case is understandable because so much time has passed since the crime. It is also acceptable to explain that the victim may not remember certain details of the crime or its aftermath due to fear, trauma, or passage of time. Although memory is important, detailing events in a chronological sequence is not essential.

Victims should be permitted to review their own prior statement(s) with the understanding that their memories may have become clearer with time. A transcript of the statement(s) should be immediately available if the defense seeks to inquire about prior inconsistent facts. The victim should be given an opportunity to review the statement again, if necessary, and be familiar with the context of the particular question. Any recollections at odds with prior statements should be clarified, if possible, before the victim takes the stand. However, victims should not be permitted to review other witnesses' statements.

It is also important to ensure the victim has any necessary support in the courtroom and while waiting to testify, unless the victim specifically requests otherwise. However, anyone who may be called as a witness cannot remain in the

courtroom (i.e., sequestration). Significant delays may exist before bringing a cold case to trial; therefore, presenting the victim's testimony as early in the case as possible may reduce the stress of waiting. If witnesses are excluded from the courtroom before or after their testimony, the prosecutor should explain this to the victim and witness. Prosecutors concerned with an unforeseen need to recall the victim may decide to sequester the witness, even though the victim may want to stay in the courtroom. The prosecutor will also discuss with the victim whether or not they want to be present during the closing argument and verdict.

## Expert Witness Preparation

The prosecutor must prepare forensic experts (e.g., DNA analysts), medical experts (e.g., sexual assault nurse examiners [SANEs]), and victim behavior experts so that these expert witnesses understand the scope, purpose, and context of their testimony as well as any anticipated cross-examination on key issues. If there has been pretrial litigation and areas of testimony excluded, the relevant expert should be advised so they don't inadvertently mention excluded information.

Forensic experts are typically prepared to explain (1) the science underlying their analysis in a clear and understandable way as well as (2) the statistical importance of their findings. Any changes in technology or DNA collection/examination policies or procedures that allowed the cold case to be reopened or items of evidence tested when not previously tested should be explained. As previously mentioned, confrontation considerations can impact the admissibility of evidence when forensic analysts are unavailable for trial. Generally speaking, a substitute analyst cannot be called to testify about another analyst's testing results. In addition, case law is not entirely clear or consistent about how many technicians involved in DNA testing must be called to testify. As a rule, at least the lead analyst on a specific test procedure is generally required to testify. An expert may be able to testify about testing as well as about observance of protocols and results, with careful attention given to the requirements for such in *Williams v. Illinois* and other relevant jurisdiction-specific case law.<sup>2</sup>

SANes or other medical experts who examined the victim should be prepared to testify about the history of the complaint; any clinical signs of trauma; and the significance of any findings, including physical injury or absence of injury—or medical history—as appropriate.

SANE testimony about the victim's demeanor or statements made for purpose of medical treatment or diagnosis from a time closer to the crime can bring the jury back to when the victim disclosed. This type of testimony also provides important corroboration of the victim's testimony. Experts called to testify about victim behavior or trauma must be carefully prepared to avoid any inappropriate conclusions about victim credibility or the determination of whether a crime was committed. In some jurisdictions, evidence-based hypotheticals are required to provide a connection with key aspects of the case underlying an expert's opinion.

It is a near certainty that the defense will attack the quality—or decision to terminate—the earlier investigation as a basis for reasonable doubt. Law enforcement witnesses should be well prepared to explain their investigation efforts, including their reasons for not following up on certain leads—even where that requires an acknowledgment that more investigation should have been done. Having a good working relationship with the law enforcement agencies that participate in the sexual assault response team or other multidisciplinary team can help to ensure that this is addressed in a manner that focuses on the improved response rather than historical limitations. When a viable case has not been advanced, law enforcement witnesses can usually provide an explanation about previous decisions. Inquiry can also be directed to current training and understanding of the impact of trauma on victims and greater crime laboratory resources. Prosecutors and law enforcement officers working on cold cases should be prepared to discuss any other reasoning for not further pursuing the case in the past. In cold cases, establishing diligent efforts may also include recognizing leads that were not previously followed and pursuing a renewed investigation.

## Conclusion

Careful preparation of all aspects of a cold case sexual assault will result in the presentation of compelling evidence in a manner that allows jurors to relate to the reality of a crime that remains acute in the present and offers a sound foundation for reaching a verdict, ensuring accountability across the years.

References:

1. *The Prosecutors' Resource: Crawford and Its Progeny* [PDF]. (2012, October). Washington, DC: AEquitas.
2. *Williams v. Illinois*, 132 S.Ct. 2221 (2012); see also Garvey, T. M. (2013, June). *Williams v. Illinois* and Forensic Evidence: The Bleeding Edge of Crawford. *Strategies*, 1–11.
3. When witnesses have relocated out-of-state, and their willingness to appear is questionable, you may refer to your jurisdiction's *Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings*<sup>4</sup> to establish due diligence. (The Uniform Act has been adopted by all 50 states and the U.S. Virgin Islands.) The Court may otherwise deny a motion to continue based upon unavailability.
4. *Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings* [PDF]. (1936, August). Boston, Massachusetts: National Conference of Commissioners on Uniform State Laws.

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AEquitas, The Prosecutors' Resource on Violence Against Women