

BEADLE COUNTY PROCEDURES AND POLICIES FOR PROSECUTION OF SEXUAL ASSAULT CASES

I. Policy Statement

A. Overview

South Dakota prosecutors have made significant strides in the prosecution of sexual assault cases over the years. Many prosecutors have taken on increased caseloads and devoted substantial resources to address the complexities of this crime. State's Attorneys have also sought to be better informed about this complex issue by participating in continuing legal education sessions and multi-disciplinary training put on by the South Dakota Network Against Sexual Assault and Family Violence. Years of experience in the prosecution of these offenses and continued study into the dynamics of sexual assault have revealed key facts that are essential to consider in order to effectively prosecute sexual assault cases, maximize community and victim safety, and minimize the negative effects of the criminal justice process on sexual assault victims:

*Society often expresses "victim blame" in several ways: victim masochism (e.g. she enjoyed it or wanted it), victim participation (e.g. she asked for it, it only happens to certain type of women) and victim fabrication (e.g. she lied or exaggerated)

*People often believe that a "real" victim would promptly report her assault to authorities, particularly a rape

*Common rape victim behaviors are often incomprehensible to laypeople

*Jurors easily become fixated on their expectations of the victim's, as well as the defendant's, behavior. If the victim fails to measure up to those expectations, jurors often jump to the conclusion that the victim is not credible.

*1 in 6 women, and 1 in 33 men, will be sexually assaulted in their lifetime

*College age women are 4 times more likely to be assaulted

*60% of sexual assaults are never reported to police

*73% of rape victims know their attacker

Statistics courtesy of the National Violence Against Women Survey. Washington (DC):
Department of Justice (US); 2000.

*Sexual Violence is one of only two crimes (the other being domestic violence) that tends to put the victim on trial

Prosecutors should be aware of these factors and react to the challenges they pose for the prosecution of these cases, in a way that does not further victimize those who have suffered a sexual assault, discourage the victim or others from seeking help in the future or embolden those who perpetrate the violence.

The prevalence of sexual assault in our communities is the impetus for these guidelines. If a prosecution of a sexual offender is to be effective, a consistent approach needs to be developed and followed. Such a consistent approach is the aim of these procedures and policies developed by the South Dakota Network and the South Dakota Attorney General's Office, in conjunction with the South Dakota State's Attorney's Association.

B. Goals in Sexual Assault Prosecutions

Prosecutors should focus on the following goals when prosecuting sexual assault cases:

1. Recognize that sexual violence is often more about power and control than the act of sex.
2. Stop the perpetrator from committing another act of sexual violence.
3. Keep the victim and general public safe.
4. Hold the perpetrator accountable for act of sexual violence.
5. Provide resources and restitution for the victim.
6. Rehabilitate the sexual offender, if possible.
7. Deter the offender, and others, from perpetrating acts of sexual violence.

II. Outreach.

A. Leadership

Prosecutors should use their official position in the community to provide leadership in developing a community-wide response to sexual assault. Prosecutors can be especially useful in this position by going into area schools and teaching both males and females about sexual violence and the laws surrounding sexual assault. Sexual assault is prevalent, and often unreported, among teenagers. Developing a community-wide response to sexual assault can help bring this problem into the open so that victims can be helped and offenders held accountable and rehabilitated.

B. Community Response

Prosecuting attorneys should actively foster and participate in multi-disciplinary efforts to maintain an effective and accountable justice system response to sexual violence and to encourage community-wide efforts to end the problem. Persons and agencies that could be involved in such multi-disciplinary efforts are the prosecutor, law enforcement, shelter or system based advocates, court service officers, the Department of Social Services, local counseling agencies, etc. With the prosecuting attorney's leadership regular meetings of the multi-disciplinary community group can transform the way a community as a whole deals with sexual violence among its citizens.

III. Education.

A. Continuing education of state's attorney's staff on issues around sexual violence.

As resources permit, prosecutors should avail themselves of opportunities for continuing education on issues concerning sexual violence, including counterintuitive victim behaviors, updates in legislation, updates in research involving childhood sexual abuse, etc.

B. Working with local law enforcement.

1. Prosecutors should inform local law enforcement officers of prosecution policies and procedures. Prosecutors should update officers on applicable changes in sexual assault legislation and case law. Prosecutors should also work with law enforcement to develop investigations so that victims of sexual assault cases, especially children, are not asked to recount the act of violence over and over.
2. Prosecutors should encourage local law enforcement to thoroughly investigate all sexual assault reports. Prosecutors should encourage collection of evidence, even if a confession is obtained from the perpetrator. Collection of evidence, to include buccal swabs and other physical evidence, should not stop simply because there is an admission by a suspect. Evidence useful in a sexual assault prosecution may include, but is not limited to, the following:
 - photographs of the victim's injuries
 - photographs of the crime scene
 - victim and suspect clothing
 - victim and suspect buccal swabs
 - victim rape examination kit
 - suspect rape examination kit
 - witness statements
 - 911 tapes
 - Excited utterances or "rape complaint" statements made to law enforcement, friends or family
 - Medical records and statements made for purposes of medical treatment, especially to SANE nurse or doctor who does sexual assault examination
 - Bedding or other items from location of assault
 - Forensic interview (if sexual assault of a child)

3. Prosecutors should be aware of the admissibility limitations of out of court statements imposed by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 and *Davis v. Washington*, 541 U.S. 36, 126 S.Ct. 2266, 165 L.Ed.2d 224. Prosecutors should also be knowledgeable about developing case law in this area and assist law enforcement in investigative procedures to maximize the admissibility of such statements.

IV. Communicating with victim.

A. Early contact.

Prosecutors should attempt to have early contact with the victim. Such contact should emphasize the process and goals of the criminal justice system in sexual assault cases and should include a victim advocate or counselor when possible.

B. Victim notification.

Prosecutors should provide the victim written notice of the victim's rights and provide all notices required for South Dakota law. Prosecutors should keep victims informed of the progress of the case. Whenever practical, prosecutors should attempt to notify victims before entering into a plea agreement with the defendant.

C. Support Services.

Prosecutors should provide sexual assault victims with information about available support services in the area. Many counselors across the state specialize in treating sexual assault survivors. Victims should also be given information about the Crime Victims Compensation Program.

D. Subpoenas, non-compliance and material witness warrants.

If a person has been sexually assaulted by a friend or relative, there may be some resistance to cooperating with the prosecution of the offender. Prosecutors should be cognizant of the pressure that can be placed on a victim in this situation. Placing responsibility on the state's attorney for deciding if the victim will testify, and whether the prosecution will proceed, may remove pressure placed on the victim by family members and others not to testify. The use of material witness warrants is disfavored, much like in domestic violence cases, and should only be used in rare and extreme circumstances. Prosecutors should consider potential risks to the victim's safety caused by communication with law enforcement and cooperation with the prosecution, and help the victim plan accordingly.

V. Charging decisions.

A. Doing justice.

Prosecutors should consider all available evidence, the goals of prosecution as set out herein, and the ethical rules and duties applicable to all criminal matters to do justice when making charging decisions regarding sexual assault cases.

B. Requirements of the Victim.

Prosecutors should not require victims to sign criminal complaints or require victims to attend any court appearances, other than ones the victim is subpoenaed to (e.g. Grand Jury or Jury Trial) as a condition for proceeding with prosecution. Grand Jury proceedings, rather than Preliminary Hearings, should be favored as the path to a probable cause finding. This protects the victim's privacy, and provides an environment in which most victims feel more secure testifying. Prosecutors should be cognizant of, and move to quash, defense attempts to intimidate the victim by requesting his or her testimony on baseless motions or evidentiary issues before trial.

C. Considering victim's wishes.

Prosecutors should consider the victim's wishes as one of many factors in the decision whether to file or dismiss charges, but should not allow the victim's desires to be solely determinative of the case disposition. Victims should always have a chance to be heard at sentencing through a Victim Impact Statement. This can be done in writing, or orally, to the court. If done in writing, the statement should be submitted to the court through the state's attorney's office.

D. False Report charges.

Prosecutors considering charges for false reporting to law enforcement should carefully consider all the evidence. Prosecutors should be sure that the reporting party was intentionally lying when making the report of rape to law enforcement. Consider whether the reporting party's perception of events may be substantially different than the suspects, and that the person may not be intentionally fabricating a rape report. Also consider mental health issues of the reporting party. A false report of rape, if proven, is a very serious offense. Even an arrest for a sexual assault, without a conviction, can have a chilling effect on a person's life. Likewise, publicity surrounding a false rape report can have a chilling effect on others making a report of rape. Rape victims often fear not being believed. Prosecutors and law enforcement that have experienced false rape reports can become cynical and less likely to believe a rape report. Be careful to consider all evidence and not jump to early conclusions.

E. Bail and Conditions of Release.

Prosecutors should carefully consider the danger posed to the victim and the community; prior criminal record including nature of offenses; prior compliance with terms of probation or parole and conditions of release; prior failures to

appear; prior violations of no contact or protection orders; and other information relevant to the risk of flight with regard to a defendant and make recommendations to the court on issues of bond and conditions of release that comport with these concerns. Prosecutors should always request a no contact with the victim be ordered as a condition of release. Prosecutors should also insure, either through court order or jail cooperation, that the offender cannot harass the victim while the offender is in custody.

VI. Case Management.

A. Plea Negotiations.

1. Prosecutors should approach plea negotiations with the intent of serving the goals of the prosecution.
2. Before making a plea agreement in a sexual assault case prosecutors should consider several factors, including the following:
 - The strength of the evidence;
 - Seriousness of the offense, including factors such as age of the victim, access to similar victims, injuries inflicted, use or threatened use of weapons, threats of homicide by the defendant;
 - Criminal history, especially of similar offenses;
 - Whether defendant was already a register sex offender and whether defendant was in compliance with registration requirements;
 - Future sex offender registration requirements;
 - General deterrence value;
 - Rehabilitation possibilities, including recommendations of a psychosexual evaluation.

B. Jury Trials

- Prosecutors will want to consider filing motions or notices to enhance the State's case. These motions or notices may include Notice of Intent to Introduce 404(b) Evidence (prior acts of the defendant); Notice of Intent to Use Tender Years Hearsay pursuant to SDCL 19-16-38; Notice of Intent to Use Medical Hearsay pursuant to SDCL 19-16-8; or Notice of Intent to Use "Rape Complaint" Hearsay pursuant to State v. Devall, 489 N.W.2d 371 (S.D. 1992).
- Additionally, the State should consider a motion to preclude introduction of the sexual assault victim's sexual history pursuant to SDCL 23A-22-15 and pertinent case law.
- Regarding discovery requests for victim's medical (non-SART) records, psychological records, and prior reports of

sexual assault made by the victim, the prosecutor should request the court require in camera review of such records. See State v. Karlen, 589 N.W.2d 594 (S.D. 1999)

- Prosecutors may want to consider pre-trial jury questionnaires, depending on the facts of the case and the size of the jurisdiction. Jurors may be more forthcoming regarding personal information that could have an effect on a sexual assault case if not asked to speak about the matter at the time of jury selection.
- At the time of trial, during jury selection, potential jurors should be given the option of discussing sensitive personal matters, regarding sexual assault, in the privacy of the judge's chambers with only required persons present.
- Additionally, prosecutors should determine the level of knowledge of the jury regarding issues in the case, including, but not limited to, DNA evidence and societal misconceptions about sexual assault.
- The prosecutor should spend adequate time with the victim so that the victim is prepared for testimony at trial. At a minimum trial preparation should include, making sure that you as the prosecutor are familiar and knowledgeable about the facts of the case, the possible defenses, and have interviewed all witnesses.
- The most common defense in forcible rape cases is "consent." Know your case well enough to combat this defense. Other defenses include: lying victim, victim blaming, mistaken identity, or poor police investigation.
- Prosecutors must be aware of admissibility issues regarding the State's evidence; including, but not limited to: DNA evidence, hearsay, medical records, expert testimony, and forensic interviews.
- Prosecutors should notice and make motions under 404B to include suspects' criminal history and other acts.

C. Dismissals.

1. Prosecutors should not dismiss sexual assault cases solely because the victim may not testify strongly at trial. Prosecutors should evaluate the totality of the available evidence, including but not limited to:
 - Photographs of injuries, if any;
 - 911 tapes and other non-testimonial hearsay;
 - Forensic interviews (in child sex abuse cases);
 - Potential testimony of other witnesses that corroborate the victim or incriminate the defendant;

- Expert testimony, including sexual assault nurse examiner (SANE), doctors, psychiatrists (to explain counterintuitive behaviors, grooming, or delayed reporting);
 - Potential 404b testimony.
2. Prosecuting attorneys should use the utmost discretion before dismissing sexual assault charges on the condition that the defendant participates in sex offender rehabilitation counseling or similar programs. This should be done only in very limited circumstances.

D. Assignment.

To the extent possible sexual assault cases should be assigned to prosecutors with specific training and experience in this area.

E. Continuances.

Prosecutors should vigorously resist continuances in sexual assault cases unless necessary for the state's case. This is especially true in child sex abuse cases. Delaying the process can often be difficult for children. However, if the child/victim is in counseling and delay may be beneficial, the state should take that into consideration.

VII. No-Contact and Protective Orders

A. Obtaining.

Prosecutors should communicate expeditiously to the court any request or need for protective conditions of release. No Contact Orders are not required by law, but the state may still ask for an order as a condition of release. Prosecutors should also advise sexual assault victims on protective orders. Whether or not a victim obtains a protective order should be left up to the victim to decide. However, conditions of bond can be requested at the discretion of the prosecutor.

B. Enforcing.

Violation of a no contact order or other protective order by a defendant is an indication of increased threat of violence, or an attempt to influence the victim's testimony. When a no contact order is a bond condition, prosecutors should consider a Motion to Revoke or Modify Bond when a no contact order is violated. If the victim has obtained a protection order under South Dakota law, prosecutors should consider bond revocation or modification, as well as additional charges, if the defendant has violated the protection order. Violation of a protection order is a Class One Misdemeanor under South Dakota law. See SDCL 22-19A. No violation of either a no contact or a protective order should be considered too small or technical to justify a thorough investigation by law enforcement and the state. A violation can be an indication of increased danger to the victim.

VIII. Final Disposition.

A. Victim Input.

Prosecutors should encourage sexual assault victims to complete a victim impact statement. This can help victims put closure to this traumatic event in their lives. Prosecutors should give victims notice of plea agreements and advise them of their right to make an impact statement to the sentencing court if they so desire.

B. Sentencing Recommendations.

When deciding what sentence to recommend, prosecutors should consider numerous factors, including but not limited to, the following:

- Defendant's criminal record;
- Whether defendant was previously on probation or parole;
- Whether defendant is already a register sex offender;
- Whether defendant was in compliance with the sex offender registry;
- History of violence with this and other victims;
- Impact of the crime on the victim;
- Seriousness of the victim's injuries;
- Use of, or threatened use of, and access to weapons;
- Defendant's potential for rehabilitation;
- Outcome of a psychosexual evaluation;
- Whether the offense involved drugs or alcohol;
- General and specific deterrence value of the sentence;
- Danger defendant poses to the victim and the community.

C. Sentencing.

1. Prosecutors should request appropriate sentencing provisions, including screening and treatment for substance abuse, sex offender treatment with polygraphs, extending no contact orders as appropriate, and restitution.
2. In sexual assault cases involving intimate partners, prosecutors should seek domestic violence education.
3. In child sexual abuse cases, prosecutors should consider the age of the children at the time of the offense, as well as at the time of sentencing and consider recommending incarceration of the offender until the child is eighteen.
4. Prosecutors should promptly pursue sanctions where a defendant has violated the terms and conditions of the sentence including seeking contempt or probation violations, as well as new charges, if warranted.

IX. Monitoring and Evaluating.

A. Psychosexual Evaluations.

Anyone convicted of a sex offense, as defined in SDCL 22-24B-1(1) to (15) and (19), is required to undergo a psychosexual evaluation as required by SDCL 22-22-1.3. Prosecutors should review the evaluation prior to sentencing and incorporate provisions of the evaluation as necessary. Defendants should be ordered to follow the recommendations given by the evaluator whether they are given probation or sentenced to prison.

B. Sex Offender Registry.

Anyone convicted of certain offenses (see SDCL 22-24B-1) are required to register as sex offenders. See SDCL 22-24B. Prosecutors must complete and file the sex offender information form to submit to the South Dakota Division of Criminal Investigation. See SDCL 22-24B-29. This can be done electronically at: <http://www.sor.sd.gov/SOConvictedForm.asp>. Prosecutors should vigorously prosecute sex offenders who fail to follow the requirements of the sex offender registry.

C. Caseloads.

Prosecutors should continually monitor their sexual assault caseload and adjust their policies and procedures where the goals of prosecution are not being met.