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The Investigating Officer's Direct Exam: Strategic and Tactical Considerations to Take Advantage of the IO's Expertise

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Introduction

When one thinks about the many dramatic moments in trial, the direct examination of the investigating officer (IO) is probably not the first thing that springs to mind. Little can match the emotional impact of a victim recounting the experience of a sexual assault on direct examination, and the cross-examination challenge to it. Depending on the facts of the case, direct examination of the IO can be seen as necessary but not worthy of thoughtful preparation; after all, the elements of the offense are established by the victim's testimony. The investigator's testimony may be necessary for admitting physical evidence, and in some cases, the IO will testify to the defendant's incriminating statements. Also, law enforcement officers are seen as "professional witnesses" who've often done this before and know what is expected and needed in each case. The direct examination of the IO can thus become a rote exercise in box-checking, rather than an integral and important part of the trial. I admit to entertaining that complacency a time or two, only to be reminded by experience that the investigator has a greater role to play in recreating the reality of the crime, and that thoughtful preparation is vital to success.

In this Training Bulletin, I'll begin by explaining the fundamentals of direct examination, particularly with respect to a sexual assault trial. I'll then go beyond the basic direct examination to explore how the IO's trauma-informed investigation can corroborate statements made by the victim, suspect, or other witnesses. Building on the first two parts, I'll describe the valuable yet under – utilized strategy of offering the IO's testimony as an *expert witness*, rather than a *fact witness* simply describing the details of the investigation. Finally, I'll explore the possibility of how robust an investigation can be when it is free, root and branch, from gender bias.

Throughout this Training Bulletin, I provide examples of questions and possible answers that could be used in a direct examination of an investigating officer. Additional examples appear in the Appendix. However, the examples are not intended to be slavishly followed. Direct examination questions should be modified to match the facts of each case, and the witness's own experience and background, as well as individual style. Also, the sample answers provided here are the product of the knowledge and experience of the many people who worked on creating this bulletin. They are not "suggested answers," as any witness must provide her or his own answers.

Part I: The Basic Direct Examination

Like every other part of a trial, the way direct examinations are conducted, and the rules governing them, have their roots in centuries of tradition and experience. The "traditional" approach to a direct examination reflects the justice system's strong preference for oral testimony, provided by a witness who has personal knowledge of the subject of his or her testimony, and presented with a minimum amount of participation from the prosecutor. This has often resulted in witnesses offering a chronological narrative, prompted by a series of questions from the prosecutor: "And what happened next?" Even worse, the questions are often phrased in the unimaginative, stilted language of centuries past: "I would like to direct your attention to the date in question." An effective direct examination can avoid these



traps, while still including the necessary elements, and honoring the preference for oral testimony by a witness with personal knowledge. We begin by exploring the foundation.

General Foundational Information

Every witness's testimony must have a foundation. At its core, this foundation is testimony that establishes the witness's personal knowledge of the facts to which they are about to testify. For example, establishing that the witness was on the corner of 1st and Main Street at the time of the car crash, with an unobstructed view of the intersection, proves the witness's personal knowledge; the witness saw the crash with their own eyes. In other cases, as with the investigator's testimony in sexual assault trials, the connection or personal knowledge comes about through the investigator's job as an investigator.

But foundational testimony should be considered through a wider lens; it is the explanation for why the jury should listen to the witness's testimony. For the investigating officer, establishing their training and experience is a necessary part of why the jurors should believe the investigator did a thorough, complete, and fact-based investigation untainted by bias or prejudice.



Photo credit: Michael Muskal, *Los Angeles Times*

Example: Establishing Foundation for the IO as a Fact Witness

Consider this example, starting after the investigating officer has identified herself.

Prosecutor: Where do you work?

Investigator: I am a detective in the Special Victims Unit at the Cork County Sheriff's Department.

Prosecutor: How long have you been a detective there?

Investigator: Three years.

Prosecutor: Did you attend college?

Investigator: Yes, I have a BS in Criminal Justice from State University.

Prosecutor: Did you join the Sheriff's Department right after graduation?

Investigator: No, my first job after graduation was with the City Police Department.

Prosecutor: How long did you work for the City?

Investigator: I spent about four years with the City before I joined the Sheriff's Department.

Prosecutor: What were your duties while you were an officer with the City?

- Investigator:* I was a patrol officer. I responded to emergency calls, traffic accidents, and other calls for help.
- Prosecutor:* Did you have any investigative duties beyond the first response?
- Investigator:* Yes. We had only one detective in the department, so I completed investigations on my own in many of the cases where I was the first officer on the call.
- Prosecutor:* Did that include sexual assault investigations?
- Investigator:* Yes.
- Prosecutor:* About how many sexual assault investigations did you do during your time with the City?
- Investigator:* I investigated twelve.
- Prosecutor:* Did you have any advanced training on sexual assault investigations while at the City?
- Investigator:* No.
- Prosecutor:* Did you move right into the Special Victims Unit when you joined the Sheriff's Department?
- Investigator:* No, I started as a road patrol deputy.
- Prosecutor:* Did your road patrol duties include investigating sexual assault reports?
- Investigator:* Yes. On road patrol I responded to reports of sexual assault and did the initial interview of the victim. After that, some cases were referred to the Detective Unit and some weren't. I was in charge of the investigation on those that didn't go to the detectives.
- Prosecutor:* Do you remember how many cases you were in charge of and investigated while on road patrol?
- Investigator:* Most were turned over to the detectives, but I investigated six on my own.
- Prosecutor:* How long did you work as a road patrol deputy?
- Investigator:* Two years.
- Prosecutor:* When did you move to the Special Victims Unit?
- Investigator:* The Special Victims Unit was created three years ago, and I became a detective then.
- Prosecutor:* Did you receive any specialized training to prepare you to conduct sexual assault investigations?
- Investigator:* Yes. To join the Unit, you have to have advanced training in responding to sexual assault cases. I attended training on victim interviewing with an understanding of how trauma affects victims of sexual assault, training on investigating and documenting

sexual assault cases, and training in investigating drug and alcohol facilitated sexual assault cases.

Prosecutor: Did this case get referred to you?

Investigator: Yes, it did.

As a legal matter, this detective could testify to her investigation after the prosecutor asked only the first and last questions. However, going into this kind of detail lays the groundwork necessary to argue that the investigation was thorough and complete, and that the result of the investigation (an arrest, or referral to the prosecutor) was based on probable cause developed during the course of the investigation.

Potential Topics for Direct Examination

Physical Evidence

Like any other criminal case, investigating officers who are testifying in a sexual assault case as a fact witness can only testify about what they personally did during the investigation. This includes their investigative steps, findings, and observations, as well as a statement that they followed the department's policy and procedures to ensure a fair and objective discovery of the facts. In other words, the IO should expect to testify regarding the course of the investigation: What did you do, and why? What did you observe and document? For example, if the investigator discovers any potential physical evidence at the scene, it's expected that he or she will describe that physical evidence, articulate the chain of custody, and identify the item if it's offered into evidence at trial.

The Suspect Interview: Exception to Hearsay

It would be unusual for the IO to testify on direct examination about what the victim or any other witness told them during the course of the investigation. This kind of testimony is generally excluded by the rule against hearsay evidence. However, the same is not true with the suspect's interview. I'll explain this in a moment, but first it is necessary to understand a little bit about hearsay, to appreciate why the suspect's interview constitutes an exception.

"Hearsay" is defined as an out of court statement, offered in court to prove the truth of the matter asserted. Breaking it down further, a "statement" is an oral or written *assertion*, or nonverbal conduct of a person that is intended as an assertion. An "assertion" is defined as "a positive statement or declaration."

To constitute hearsay, an out of court statement must actually assert or claim something. Thought of another way, it must be something that can be shown to be true or false. For example, in most jurisdictions a question will not constitute hearsay, because it is not an assertion. On the other hand, most of what a sexual assault victim says during an in-depth investigative interview will meet the definition of hearsay, so the investigator won't be called upon to testify to what was said.¹

Every state and federal court has a general rule prohibiting the admission of hearsay at trial. Yet every state and federal court's evidence rules also include numerous exceptions to the rule, for situations in which some hearsay testimony might be admitted under specified circumstances. Therefore, if someone tells an investigator something that is *not hearsay*, or the circumstances of the telling fall within one of the exceptions, the IO should be prepared to testify to it.

The suspect's interview generally qualifies as one of these exceptions. Specifically, the definitions of hearsay specifically exclude so-called admissions of a party-opponent. These "admissions" extend beyond a full confession to include *any statement* made by the suspect, when it is later offered against the suspect (now defendant at trial). That last part is important; *admissions* made by a suspect are excluded from the definition of hearsay, but *denials* by the suspect are included. The logic underpinning this distinction is that an admission of a negative fact by one suspected of criminal wrongdoing is more likely to be true because it is against the suspect's interest to make the admission. In contrast, a denial of wrongdoing serves the suspect's interest and is, because of that, less reliable. If the prosecutor doesn't bring up denials, the defense counsel may not. However, there may be a good reason why a prosecutor would bring this up. For example, if the suspect denies having any sexual contact with the victim, and that contact is proven through forensic or other evidence, the investigator will certainly be asked to testify about the denial. And if the suspect changes this denial when confronted with contrary evidence, the previous denial and subsequent change will also be admissible.

Part II: Going Beyond the Basics

Law enforcement's response to sexual assault has changed considerably in those jurisdictions where a trauma-informed response has been implemented, and where law enforcement is meaningfully addressing gender bias, both implicit and explicit, through programs like [Start by Believing](#) and [You Have Options](#). It only makes sense that changes should also come to the practice of direct examination with the investigating officer, if not in manner, certainly in content and emphasis.

¹ A minority of jurisdictions exclude prior inconsistent statements from the definition of hearsay, allowing the prosecutor to admit those statements as substantive evidence. See, for example, Wisconsin statute 908.01(4)(a); and California Evidence Code Sec. 770.

Corroborating Statements about Sensory Experience

Admitting physical evidence that corroborates the victim's experience and recreates the reality of the crime has always been part of a basic direct examination. What is different in the trauma-informed response is the knowledge that sensory memories of the experience – what the victim heard, saw, tasted, touched, and smelled, etc. – can often be strongly encoded and accurately retrieved, sometimes more accurately than other types of memories like chronological events and temporal sequencing. Modern training in victim interview techniques are now designed to better capture and document these important sensory memories and other reactions. Any physical evidence that corroborates those sensory memories should therefore also be admitted during direct examination.

Example: Corroborating Sensory Memories

As an example, consider a case in which the victim told the IO during the in-depth interview that he remembered the color and rough texture of the bedspread on the bed where the assault took place.

Prosecutor: During your investigation did you search the defendant's bedroom?

Investigator: Yes.

Prosecutor: Did you seize anything during that search?

Investigator: I did. I took the sheets and bedspread from the bed.

Prosecutor: What did you do with them?

Investigator: I put each of them in a brown paper evidence bag. I sealed each bag with red tape and wrote the date, time and place they were found, and the case number on the bag. I also signed my name.

Prosecutor: What did you do with them from there?

Investigator: I put them in the trunk of my car and drove back to my Department. I took the three bags down to our evidence storage room and turned them over to the Sergeant in charge of the evidence room, after I signed and dated the evidence log next to where I wrote the case number and date.

Prosecutor: Did you check the evidence bags out of the evidence room and bring them to court today?

Investigator: Yes, I did.

Prosecutor: With the permission of the Court, I'm handing you what's been marked as People's Exhibit 1 for identification. Do you recognize it?

Investigator: Yes. It's a brown paper evidence bag we use at the Sheriff's Department for storing evidence. I signed and dated the bag here, and the case number assigned to this case is written here.



Prosecutor: Is it the Department's procedure to require every person who retrieves the evidence bag from the storage room to sign and date the bag and the evidence log?

Investigator: Yes.

Prosecutor: Is there any other signature on the bag?

Investigator: No.

Prosecutor: Would you please open the bag for us, and take out what's inside and describe it for us?

Investigator: This is the green bedspread that I took from the defendant's room during my search.

This isn't any different than a direct examination used to admit physical evidence in another type of case. What is different is the logical relevance of the evidence. The color and texture of the bedspread does not prove an element of the crime in the way a piece of clothing, with biological material, could prove the element of identity or sexual contact, using a DNA test. Rather, the item serves to corroborate the victim's statements regarding *sensory experiences* during the assault.

For example, if the bedspread is admitted as evidence, and the defendant takes the stand, the prosecutor can ask the defendant whether the bedspread was on the bed during the incident in question. When the defendant agrees that it was, this serves to bolster the testimony, and thus the credibility, of the victim. During closing argument, the prosecutor can then reinforce with the jury how many of the victim's sensory experiences were corroborated by the physical evidence and the testimony of the defendant. The prosecutor can even invite the jury to experience the color and rough texture of the bedspread themselves, during the course of deliberations.

Prosecutors should be ready to argue why such evidence, which does not prove any of the elements of the crime, is nonetheless relevant. The answer, of course, is that victim credibility is always relevant; therefore, corroborating evidence is as well – even if it validates minor details. A “devil is in the detail” argument is essential when you have a victim who was trying *not* to focus on the trauma he or she was enduring, and was instead focusing on something else (bedspread, door handle of a car, picture on the wall above the bed) – all of which can be proven to exist just as the victim remembers.

Emotions and Demeanor

Recall that the IO won't in most cases be asked to recount what the victim said during an in-depth interview; it is quintessential hearsay. However, the victim's demeanor is not hearsay, and this includes the emotional and physical responses that are observed when the victim is asked to recount (and, to some extent, re-experience) what happened. Emotional reactions are not assertive conduct, so the IO is free to testify about them. They can be very important corroborative evidence of the crime. They are also frequently necessary to explaining counter-intuitive responses, as discussed in the next section.

Again, this is not far afield from the basic direct examination, rather it's simply a shift in emphasis. When testifying about the victim's reactions during the interview, investigators should keep in mind what's been learned about report writing. It's best to use descriptive, active language when describing the victim's reactions in the interview. This means avoiding conclusory language, like "she was upset" or "he was angry." Instead, investigators should describe the facts that led them to believe the victim was experiencing an emotional reaction while recalling what happened.

Examples of Descriptive Words about Demeanor

- Crying
- Breathing heavily, hyperventilating
- Talking quickly/slowly
- Shuddering breaths
- Eyes darting around
- Looking around
- Staring into space
- Shaking, quivering, quaking

Example: Testifying to Emotions and Demeanor

Prosecutor: Where did you interview the victim?

Investigator: I met with her at the Department and we talked in our soft interview room.

Prosecutor: What's the "soft interview room?"

Investigator: It's a room in our office set aside for interviewing victims and witnesses. We call it a soft interview room because it has comfortable chairs and a couple lamps, we use instead of the overhead fluorescent lights in the rest of the Department. It sort of looks like someone's living room.

Prosecutor: Tell us more about using that room?

Investigator: If we didn't have that room, we would have to do our interviews in an interrogation room, which looks more like a jail cell. We don't want witnesses or victims to feel like they've done something wrong. We've found that victims are more comfortable in the soft room, and we get a more detailed interview.

Prosecutor: How did you start the interview?

Investigator: I started like I do every victim interview by explaining the purpose of the interview. I let her know that I was sorry about

what happened to her, and that she could tell me if at any time she needed a break.

Prosecutor: What was her demeanor in the first part of the interview?

Investigator: She seemed a little nervous, but she was answering the preliminary questions clearly. I could tell she was nervous by the way she was twisting a tissue in her hands. It was nearly shredded to bits, but she kept on twisting it.

Prosecutor: Did her demeanor change at all during the interview?

Investigator: It did. When I asked her about what she recalled about the assault, she looked down at the tissue and became quiet. She was visibly shaking, and she started to cry.

Because the IO will usually be testifying *after* the victim, he or she can clear up areas of the victim's testimony that might be necessary. For example, the prosecutor can ask the investigator to identify the date he or she spoke with the victim, to highlight the fact that the interview took place much closer in time to the assault than the victim's testimony in court.

The victim's demeanor during the interview is just one piece of corroborative evidence that can help to establish the traumatic nature of the assault. Other evidence can include the victim's behavior during and after the assault. It is therefore essential that the trier of fact understand the entire context of the experience.

Explaining what the IO Did or Did Not Do

In a CSI-savvy world, you can not only use your IO to explain what they did and why they did it – they can also explain why they did *not* conduct certain types of investigative procedures, usually relating to forensic evidence collection and testing. Jurors familiar with Hollywood crime dramas will expect the IO to have done certain things during the course of the investigation that are unnecessary, unduly burdensome, or even impossible. As part of the IO's direct exam, they can explain why certain pieces of evidence were not collected, not tested, or why other avenues of investigation were not explored. This will prevent the jury from relying on their own CSI "expertise" back in the jury deliberation room.

Countering Bias with a Robust Investigation

In a previous [Training Bulletin](#), we provided information on how to respond to one particular defense strategy that could be used in a sexual assault case: Attacking the investigation through cross-examination designed to expose bias based on the fact that the law enforcement agency participated in a Start by Believing campaign. No direct examination, no matter how comprehensive or effective, can insulate a witness from such an attack on cross-examination. However, when prosecutors can anticipate such an attack, they can proactively raise the issue of Start by Believing during direct examination. Carefully crafted direct examination questions can blunt later attempts at attack on cross-examination.



But even if such an attack isn't anticipated, it can still be important to educate the jury about victim-centered best practices designed to eliminate gender bias in sexual assault investigations. This can help to explain the course of an investigation, including what an IO did, and the manner in which it was done. This only lends credibility to the investigation.

It is also part of a good foundation for expert testimony. Done properly, a description of how an agency seeks to eliminate gender bias can help illuminate how facts are often misunderstood. In addition, it will underscore the significance of training and reforms designed to enact core agency values: bias-free responses to sexual assault and other gender-based crimes.

Example: Testimony About Start by Believing and Victim-Centered Reforms

Prosecutor: You said that the Sheriff's Department began participating in the Start by Believing campaign. Can you explain what the campaign is about?

Investigator: The Start by Believing campaign is really a way to educate law enforcement and the wider community about how gender bias often operates against victims in the justice system. For law enforcement specifically, it trains us on best practices for investigating sexual assault cases in a trauma-informed, victim-centered way.

Prosecutor: When you say gender bias operated against victims, what do mean?

Investigator: Well, it means that law enforcement can sometimes make decisions about a case way too early on in an investigation. Those early judgments are all too often based on stereotypes or assumptions about how a victim of sexual assault should act, or what they should or should not be able to recall about the assault.

Prosecutor: Can you give us an example of a stereotypical assumption?

Investigator: Sure. One of the first ones I learned about in the SBB training – that's shorthand for Start by Believing – is the assumption that a real victim usually fights back during an assault. I thought that's what I would do, so I kind of expected to see it in sexual assault cases. It made me doubt a little bit what I was hearing from victims when they didn't fight back or resist. SBB training helped me understand that there are many reasons why victims might not fight back, reasons that have to do with trauma, how the victim experiences the assault, and who the suspect is – whether there's a relationship between the two.

Prosecutor: Did the SBB training change how you investigated sexual assault cases?

Investigator: Before the Special Victims Unit was up and running, we didn't know a lot about the impact of trauma on victims. We still investigated every case, but we did it a lot like investigating a burglary. We interviewed sexual assault victims the same way we interviewed burglary victims. Now, in the SVU, we interview victims in a way that lets the victim tell us what they are able to recall, without pressure to give answers to questions they might not remember.

The SBB training taught me more about victim trauma, the impact on victims and the realistic dynamics of sexual assault. It reinforced for us the importance of listening to victims, the importance of thorough documentation, and the importance of completely and thoroughly investigating every case and not making premature assumptions and conclusions until I learned all the facts that I could.

Prosecutor: Does Start by Believing mean that you believe everything someone says when reporting they've been sexually assaulted?

Investigator: At first, yes. But it also means that you're just at the beginning of the investigation. That is just the first step. It's a reminder to keep an open mind and follow the facts before you make any judgment about the victim or the case.

Prosecutor: What's the goal of changing the way you interview victims?

Investigator: The goal is to do better interviews, because that's how we get better investigations. In a sexual assault case, the victim interview is probably the most important part of the investigation. Usually, it's the first thing we do, and in that initial contact we don't know anything about the case yet. Whatever the victim tells us is what we use to write the report and start the investigation.

Prosecutor: Do you do the same thing for suspects? In other words, when you are interviewing a suspect in a sexual assault case, do you Start by Believing them as well?

Investigator: Well, there are a lot of differences between an interview with a victim and an interview with a suspect. Like I said, when we first talk to the victim, we typically don't know anything about the case, except what the victim tells us. That's the starting point for the investigation, so we Start by Believing what the victim tells us. The truth is that during the preliminary investigation, when I'm first contacting witnesses and potential suspects, I'm just documenting statements as thoroughly and accurately as possible. And, of course, a suspect doesn't have to talk to me at all. But if the suspect does agree to a formal interview, this will be based on the totality of the investigation,

At that point, I have gathered a lot of other information. I've reviewed all the reports that might be available, like criminal history checks, crime scene diagrams, photographs, witness statements, lab reports, and preliminary suspect statements, if there are any. If I'm conducting a formal interview, I would have some reason to believe that this person actually committed the crime, or maybe I don't believe they committed the crime, and I'm seeking clarification. Or maybe that person is no longer a suspect, but a possible witness. Regardless, my job is to interview the person with an open mind, because I'll use the interview to see whether the evidence lines up with one person's version of events versus another's.

It should be apparent that this kind of direct examination in a sexual assault trial requires more preparation than many other types of cases. It also requires a greater partnership between the prosecutor and the investigator. Both have to be clear about what Start by Believing, or any other victim-centered approach means to the agency, and to the individual investigator.

Part III: The IO as an Expert Witness

Understanding the context of the experience is doubly important when the jury must consider evidence about what the victim did or didn't do or does or does not remember. Left without an explanation, jurors will often misinterpret the victim's behavior as inconsistent with the crime having occurred, and defense counsel will invite them to do just that.



Photo credit: Press of Atlantic City

A common example is a delay in reporting. Even though there are myriad examples where delayed reports are proven to be true, the default position for many is still to doubt reports of sexual assault that are made days, weeks, or sometimes years after the fact. That delay must be explained, and that is the province of expert testimony. There may be times when the IO will be called upon to offer that expert testimony, perhaps as the sole expert or as a compliment to additional expert testimony.

I've based the examples in this Training Bulletin on a situation where the IO is both a *fact witness* and an *expert witness*. The prosecutor is the one who makes the determination whether or not to call an expert to testify in the case, and whether the IO can serve as both fact and expert witness. Although it's not uncommon for investigating officers to be both types of witnesses in the same case, it is not the only circumstance where a qualified investigator can be called upon for expert testimony. There are circumstances where the expert testimony of another qualified investigator – an officer not involved in the investigation – can be more powerful or persuasive to the jury. This is a strategic and tactical decision the prosecutor must make

Expert Testimony and the Rules of Evidence

The rule governing expert testimony is surprisingly simple:

Federal Rule of Evidence 702 – Expert Testimony

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

The rule is actually quite permissive. If a witness has specialized knowledge beyond the “ken” (common knowledge or experience) of the average person, and that knowledge will help the jury understand the evidence or determine a fact in issue, that witness may testify as an expert witness, provided the court finds that the expert’s testimony is reliable.

Subsections (b) through (d) list several non-exclusive factors, courts may consider when determining that an expert witness’s proffered testimony is reliable. The subsections that follow will explain how to establish the need for expert testimony (subsection 1); how to establish that the witness is qualified as an expert through knowledge, skill, experience, training, or education (subsection 2); how to establish that the witness’s testimony is reliable (subsection 3); and, how to explain the limits of expert testimony (subsection 4).

The Witness’s Knowledge Is Helpful to the Jury

The court’s decision to admit expert testimony is fact driven, and of course dependent on each individual judge’s preferences. However, the first factor to consider, the need for expert testimony, should not be hard to demonstrate under the rule.

The rule actually offers a broad standard for admitting expert testimony: Will the expert’s testimony help the jury understand the evidence or determine a fact in issue? The threshold question is whether there are facts in evidence that need to be explained to be properly understood by the jury. While a delay in reporting is an example, there may be many other facts that require an explanation for the judge or jury to properly understand.

There is another way of considering the need for expert testimony: Does the witness know something the jurors don’t? Does the witness know something about why and how often a victim delays reporting that the ordinary juror does not? Is it likely that the jurors have a misconception about how a victim should act after a sexual assault, a misconception that can be countered by the specialized knowledge of the witness? If so, this argument will form the basis for qualifying an expert to help jurors understand the issue.

Qualifying as an Expert Witness

Once the need for expert testimony is established, the question becomes whether this witness can actually explain the fact in evidence. In other words, what makes them an expert? The rule says that a witness can be qualified as an expert by knowledge, skill, experience, training or education. Which is most important?

The list from the rule (“knowledge, skill, experience, training, or education”) is not hierarchical. No one way of gaining expertise is preferred over another. The rule is sometimes misunderstood as requiring a long list of lettered degrees signifying an extensive formal education. In fact, a formal education of any kind is not necessary, nor is it necessarily persuasive to the jury. A witness who testifies based upon extensive experience can be more effective than a highly-educated witness with little or no practical experience applying their advanced education to the real world.

Prosecutors are accustomed to calling law enforcement officers as fact witnesses, testifying to what they saw or heard. Using law enforcement officers as expert witnesses in sexual assault or domestic violence cases, based on their training and experience, is not common yet. But tapping into an investigator’s knowledge and experience *as an expert*, to help the jury understand the evidence is a more regular occurrence in other kinds of cases. For example, law enforcement officers have been qualified as experts to explain that otherwise innocent conduct might in fact be consistent with or even indicative of criminal conduct,² and to help the jury understand the meaning and importance of gang symbols at a drug scene.³ Law enforcement witnesses have also testified as experts in child sexual abuse cases, based on their experience and training, to explain facts like a victim’s delay in reporting abuse. A good example is found in *People v Dobek*,⁴ where the Michigan Court of Appeals held that a police officer may qualify as an expert on the basis of experience or training in child abuse cases. Similar arguments can be made in cases of sexual assault involving adolescent and adult victims.

Example: Qualifying the IO as an Expert Witness

The general foundation example in Part 1 offers “just the basics” when it comes to a direct examination of an IO. The example shows how to begin the presentation of testimony when the IO is serving as a *fact witness*, testifying from personal knowledge. To qualify a law enforcement officer as an *expert witness*, offering testimony that is helpful to the jury’s understanding of facts already in evidence, requires a more extensive foundation. The following direct examination is based on that previous example but adds the types of questions needed to qualify the IO witness as an expert.

Prosecutor: When did you move to the Special Victims Unit?

Investigator: The Special Victims Unit was created three years ago, and I became a detective then.

² *United States v. Alonso*, 48 F.3d 1536, 1541 (9th Cir.1995).

³ *State v. Brewer*, 195 Wis.2d 295; 536 N.W.2d 406 (1995).

⁴ *People v. Dobek*, 274 Mich App 58, 78; 732 NW2d 546 (2007).

Prosecutor: About how many cases of sexual assault have you investigated since joining the unit.

Investigator: I've been in charge of investigating 27 cases since joining the unit.

Prosecutor: What do you mean when you say you are in charge of investigating a case?

Investigator: The SVU works as a team. Cases are assigned to detectives who are responsible for completing the investigation and referring them to the prosecutor for review. But the team meets regularly to review cases. Sometimes other detectives help out with parts of an investigation, so the detective in charge doesn't have to do everything.

Prosecutor: Were all those cases you investigated essentially the same type? For example, were the victims all children or all adults?

Investigator: No, some involved child victims, but some of the victims were teenagers and some adults.

Prosecutor: Did any of the cases involve victims who were using alcohol or drugs at the time of the sexual assault?

Investigator: Yes, quite a few. It's pretty common in my experience to see that.

Prosecutor: Did you receive any specialized training to prepare you to conduct sexual assault investigations?

Investigator: Yes. To join the Unit, you have to have advanced training in responding to sexual assault cases. I attended general training on how to interview victims, and more specialized training on how to investigate and document sexual assault cases. I also went to a training on the investigation of drug and alcohol facilitated sexual assault cases, and then I attended training on the Forensic Experiential Trauma Interview, what we usually call FETI. That training included information about the neurobiology of trauma, like how sexual assault victims react to the traumatic event, and how that affects their behavior and memories of what happened.

Prosecutor: Would you explain for us what a Forensic Experiential Trauma Interview is?

Investigator: Sure. FETI is a way to interview witnesses and victims of sexual assault, or any other stressful or traumatic experience for that matter. It's based on how the human body and brain react to trauma, and also how this affects their memories and recall. It's designed to understand as much about the experience of the person being interviewed, to get as complete an interview as

possible, or as much information as the victim is able to remember.

Prosecutor: Who presented these trainings?

Investigator: A lot of my training was provided by EVAWI, End Violence Against Women International, after the Sheriff's Department started participating in the Start by Believing campaign. Our Sergeant made their OnLine Training Institute mandatory for all newly assigned SVU detectives. They have 18 modules that total 198 hours of training. I did 6 of them, and I obtained a certificate of completion after successfully passing a test for each module.

Prosecutor: Have you attended any trainings presented locally?

Investigator: Yes, I attended a training at State University on the neurobiology of trauma presented by Dr. Rebecca Campbell, where she talked about the way trauma affects victims of sexual assault, in terms of how their body reacts to the experience and how they recall it.

Prosecutor: Have you gone to any state or national sexual assault conferences?

Investigator: Yes, I got to attend EVAWI's international conference last year in Orlando, and this year I went to the State Sheriff's Association Summer Conference.

Prosecutor: Were any of those conferences split up into workshops or sessions on sexual assault?

Investigator: EVAWI's conference has numerous workshops on gender-based violence including sexual assault and intimate partner violence. The Sheriff's Association Summer Conference had a training track for sexual assault investigators, which is what I attended.

At this point, and depending on local practice, the prosecutor is likely to ask the Court to allow the investigator to testify as an expert. That testimony will be limited by what the Court accepts as the limits of the witness's expertise.

The offered expertise should not be too narrow, such as offering the witness as an expert in delayed reporting. Nor should the offered qualification be too broad; the investigator's training may include specialized knowledge about the neurobiology of trauma but that doesn't qualify them as an expert in the broader field of neurobiology. Possible areas of expertise could include the traumatic effects of sexual assault victimization, or the common reactions of victims to the trauma of sexual assault.

Many law enforcement officers will develop considerable expertise and training without ever leaving their jurisdiction. In the example above, the detective's most comprehensive

training was through EVAWI's [OnLine Training Institute \(OLTI\)](#). Law enforcement agencies, or individual officers can easily supplement the limited opportunities for live training with resources such as the OLT I, and the many other training materials available through EVAWI. Besides the OLT I, officers can access archived webinars and Training Bulletins like this one that address many of the issues in sexual assault investigation in-depth.

In addition, officers and investigators can take advantage of training offered by the sexual assault service provider agency in their jurisdictions. This could include the rape crisis center, or the dual service agency serving victims of sexual assault and intimate partner violence. The overarching point is that the training needed to develop an investigator's expertise is readily available and can be relatively inexpensive, even free. We should benefit the jury with that readily available expertise.

The Importance of Creating and Maintaining a CV

Because the IO is going to be qualified as an expert witness based upon knowledge, skill, training and experience, the prosecutor must know beforehand the extent of the witness's training and experience. No prosecutor wants to ask a question out of ignorance and embarrass the witness, or worse, jeopardize the IO's credibility. The prosecutor's goal during direct examination is to bring positive information before the jury, not to get an answer that suggests the witness *lacks* experience and training. In other words, prosecutors should not be asking questions about an IO's training and experience that will elicit an answer of "no." The primary source of knowledge about an IO's expertise is the IO's *curriculum vitae* (CV).

Many officers will be more familiar with the purpose and format of a resumé than a CV. What is the difference between the two? In general, a resumé is a short summary of a person's professional experience and qualifications, usually used as an introduction for prospective employers. A CV is typically longer, and more familiar in academic settings where it is used by professors and researchers. A CV is intended to be a more detailed account of someone's professional experience, including publications, presentations, memberships in professional societies, board or other specialized certifications, etc.

In Latin, *curriculum vitae* literally translates to "the course of one's life." A CV should therefore describe the course of one's professional life, including an individual's education, expertise, and accomplishments. To provide a sense of what this looks like, we offer two sample CVs for law enforcement professionals in Appendix B.

What to include in a CV has evolved over time, particularly as they have become more of a standard requirement in professions outside academia. Minimally, a CV should include an individual's employment and education history, listed in reverse chronological order. Additional sections can include training or teaching experience, presentations at conferences, publications, any community boards served on, and any awards, honors, and other recognition received for professional or volunteer work.

As an individual's career progresses, one will naturally gain more experience and formalized training, and thus more expertise. For example, an IO might be asked to train

fellow officers or investigators in the department, or even a broader audience at a local, regional, or statewide training conference. For all of these reasons, it is important for investigators to formally memorialize this training and experience.

A complete, up-to-date, and accurate CV serves several purposes for potential expert testimony. First and foremost, a CV showing a broad range of experiences and professional accomplishments lends weight and credibility to one's testimony. Like it or not, humans have a natural tendency to believe those who have a broad range of experiences, outside the offered area of expertise. This doesn't mean that a witness will be asked on the stand to list every position held, every publication, or training attended. A witness's CV may be put into the record and the jury allowed to see for themselves the witness's experience and professional achievements.

The CV is also vital to the prosecutor's preparation. It enables the prosecutor to choose which relevant information is important to bring out as foundation for expert testimony. As an example, Sergeant Michael Crumrine's CV (provided in Appendix B) lists over 70 hours of specialized training in interview and interrogation techniques and 170 hours of specialized training in Critical Incident Negotiation. The prosecutor is likely to bring both of those to the attention of the jury, even though sexual assault investigation probably wasn't the focus of either one. This can help to show a depth of experience and training in how to interact with and interview witnesses of all kinds, under varying circumstances. With that experience, Sergeant Crumrine's testimony is more likely to be fully credited.

It is therefore critical for the IO to know all the information on his or her CV. This can be challenging when a professional has had a long, illustrious career (which is exactly the reason to go through the CV in front of the jury in the first place), with multiple agencies and many different assignments. So too with long lists of training programs an investigator either presented or attended, because it is often difficult to remember exact topics and dates.

After personally reviewing one's own CV before testifying, it's also a good idea for the IO to provide a copy ahead of time to the prosecutor. It might become necessary to refer to it during the direct examination to ensure accurate testimony. In addition, local practice or court rules may require the prosecutor to turn over a copy to the defense prior to trial.

Search Warrant Affidavits: Another Record of Knowledge, Skill and Experience

Even if an IO has never testified as an expert before, and hasn't written a CV, there is one place where they might have listed their professional education, training and experience that can serve a similar purpose: search warrant affidavits. Again, we offer a sample in Appendix C to provide a sense of what this looks like.

While search warrant affidavits cannot be made part of the trial record, they can help the witness and prosecutor prepare for laying the foundation for expert testimony. In some respects, search warrant affidavits are a kind of expert testimony, as officer-affiants routinely base their probable cause opinions on training and experience.

The sample search warrant in Appendix C lays out in detail the affiant's specialized knowledge, experience, and training by:

- Detailing his experience as a law enforcement officer, and his years specializing in sexual assault investigations;
- Highlighting the number of sexual assault investigations in which he was the primary investigator, and the number of investigations in which he has assisted;
- Listing his specialized training, and emphasizing that he has extensive experience as an instructor of that specialized training;
- Giving examples of his experience teaching on the dynamics of sexual assault to a broader audience; and,
- Establishing his acceptance as an expert with specialized knowledge by giving examples of his experience as a keynote speaker at diverse national conferences.

In this request for a search warrant, the officer-affiant is serving as a *de facto* expert witness, bolstering his conclusion that his training and experience, as well as his thorough investigation, leads him to believe that the property he is asking permission to seize, will lead to additional evidence which can be examined to determine the truth, as well as incriminate or exonerate a suspect.

Establishing Reliability of the IO's Testimony

In addition to determining whether expert testimony will be helpful to the jury, and whether the IO is qualified to give expert testimony, the court must also determine if the proffered testimony is reliable. Rule 702 gives courts three factors to consider when making that determination: Whether the testimony is based on sufficient facts or data; whether the testimony is the product of reliable principles and methods; and, whether the expert has reliably applied the principles and methods to the facts of the case.

These specific factors are expressed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁵ They are particularly useful in determining the reliability of expert testimony in what has been called the "hard sciences." But when expert testimony is not about a "hard science" (like physics), but rather is about a "soft science" (like how a sexual assault victim could react to the assault), trial judges are given broad discretion to determine "whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case."⁶ Courts have routinely recognized that the inherent limitations of social science research means that "other indicia of reliability are considered under *Daubert*, including professional experience, education, training, and observations."⁷ Without these other measures of reliability, "many types of relevant and reliable expert testimony – that derived substantially from practical experience – would be excluded.

⁵ *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

⁶ *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

⁷ *US v. Simmons*, 470 F.3rd 1115, 1123 (5th Cir. 2006).

Such a result truly would turn *Daubert*, a case intended to relax the admissibility requirements for expert scientific evidence, on its head.”⁸

One can see that a witness's knowledge, skill, and experience serve to both establish the *foundation* for the witness's expertise and establish *the reliability* of the expert witness's testimony. This dual purpose is illustrated by the 6th Circuit in *Berry v. City of Detroit*:

The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

*On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.*⁹

Limitations on Expert Testimony

Like every witness's testimony, expert testimony has limitations. The most obvious one is that the expert must not testify to matters beyond their demonstrated expertise. An expert witness qualified to explain to the jury the range of reactions a victim of sexual assault might experience cannot testify that the victim was, in fact, assaulted, that the victim is telling the truth, or that the defendant “fits the profile” of a sex offender and is guilty of the offense. All of these opinions exceed the scope of the witness's expertise and the role of the witness as one called to help the jury understand facts in evidence.

Part IV: Potential Topics for Expert Testimony

Testimony Explaining Counter Intuitive Behavior

Once qualified, the direct examination of an IO as an expert witness can turn to helping the jury understand the facts at issue. What needs explaining is, of course, driven by the unique facts of each case. The traditional province of expert testimony in sexual assault cases has been broadly described as explaining “counter-intuitive” victim behavior.

Much has been written supporting the reality that jurors often believe that a “real” victim should or would behave in a certain way before, during, and after the assault. When a

⁸ *United States v. Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997).

⁹ 25 F.3d 1342, 1349-50 (6th Cir.1994), cert. denied, 513 US 1111, 115 S.Ct. 902, 130 L.Ed.2d 786 (1995).

victim does something counter to this belief, it is often misinterpreted as evidence of falsity or deception. Of course, every victim's reaction to the trauma of sexual assault is unique, so expert testimony will of necessity focus on explaining the victim's unique reaction in the case at hand. Some examples of what can be explained by a qualified expert witness include, delayed reporting, progressive disclosures, "inconsistent statements, recantation or minimization, and the impact of trauma on behavior and memory.

Example: Helping the Jury Understand Delayed Reporting

One common, and persistently misunderstood behavior of victims of sexual assault is the delay in reporting. An IO testifying as an expert can help the jury understand that fact as in this example.

Prosecutor: Given your knowledge, training and experience, do victims of sexual assault generally report to police right away after they have been sexually assaulted?

Investigator: Every victim is different, but it's common for victims to delay reporting to police for some time after the assault. In my experience, it is actually rare for victims to contact police right away.

Prosecutor: From your training and experience, can you tell us why that happens?

Investigator: Many victims are afraid to report to law enforcement. Victims are afraid they won't be believed. They're afraid they will be blamed or held responsible for what happened. They are afraid of the loss of privacy that comes with a criminal case, and having their private lives, and possibly even their medical history exposed.

A lot depends on the individual victim and how they experience the assault. If the victim knows their assailant, which is very common, they may be concerned about possible retaliation for reporting. And they may have an emotional attachment to the suspect, and concerns about the possibility of that person going to jail.

Explaining the Neurobiology of Trauma and Its Impact

In the example qualifying the IO as an Expert Witness, the prosecutor asked the witness to describe FETI in some level of detail. In the explanation, the IO testified that the FETI training addressed "how sexual assault victims react to the traumatic event, and how that affects their behavior and memories of what happened." Those questions laid the foundation for later asking the expert to explain that impact in greater detail, thereby helping the jury understand things a victim might do or not do, and what the victim might remember clearly or not remember as clearly.

For example, an IO's expert testimony explaining fragmented memory, grounded in the investigator's experience investigating sexual assault, and in the witness's specialized knowledge regarding how trauma can affect a victim's reaction to and memory of the event, will help the jury understand the fact that the victim's fragmented memories of the assault can be the result of experiencing a traumatic event. While most training on the neurobiology of trauma includes some detail about the brain structures and processes involved, that doesn't mean the IO is an expert in neurobiology, and the jury doesn't require that level of detail.

Example: Testifying About the Effects of Trauma

The following example shows the level of detail at which an IO might be expected to testify.

Prosecutor: Based on your knowledge, experience and training, and especially your FETI training, does the experience of a traumatic sexual assault typically affect a victim's memory?

Investigator: Yes, it can have a significant impact on memory.

Prosecutor: In what way?

Investigator: We've learned that the human body reacts to experiences of trauma in ways that change how the event is recalled. While everyone's reaction is going to be different, one thing we know now is that our brain can sometimes strongly encode sensory memories of a traumatic experience, including smell, taste, sounds, and touch, so those memories can be recalled accurately over time.

At the same time, other details like the order of things might not be as easily remembered, and may be remembered in fragments that can come out long after the assault.

Prosecutor: Have you seen that happen in the cases you've investigated?

Investigator: All the time. I saw it in victims before I started going to trainings on sexual assault. I didn't fully understand why victims remembered the assault in that way until I learned more about it.

Explaining Perpetrator Behavior

The IO is likely to have fairly extensive experience with perpetrators of sexual assault. A significant amount of time in training programs on investigating sexual assault is spent learning about perpetrators and how they commit their crimes and avoid accountability. Can the *defendant's behavior* be the subject of expert testimony?

This may happen indirectly when the expert witness explains why a victim might act in a certain way. Some of this explanation will be based in the dynamics of who the defendant is and how the sexual assault was perpetrated, all of which can influence what the victim does before, during, and after the assault. But rather than indirectly testifying about the

defendant, we should consider the possibility of having an IO testify directly about how sexual assault perpetrators commit their crimes, in general.

It is good here to remember the limitations on expert testimony in sexual assault cases. An expert witness may not testify that the defendant fits the profile of a sexual offender or give an opinion that the defendant is guilty. The expert testimony is limited to an explanation of common practices of sex offenders.

This type of testimony is not yet common in adult sexual assault cases, but it has already been admitted in cases of child sexual abuse and it is more common in some jurisdictions than others. For example, investigators have testified about the common “grooming” behaviors often exhibited by perpetrators in child sexual abuse cases.¹⁰ Judges have determined that this type of testimony is helpful for jurors: “Typical patterns of behavior exhibited by child sex abuse offenders would aid the jury.”¹¹

In adult sexual assault cases, the admissibility of expert testimony about sex offenders should be determined using the same standard of helpfulness. Would most jurors have any experience or direct knowledge about how sex offenders commit their crimes? Would testimony about the “typical” predatory behavior of sexual assault offenders help the jury understand the facts in evidence?

Example: Testimony about Perpetrator Behaviors

Prosecutor: Did your specialized training include information on how perpetrators of sexual assault often commit their crimes?

Investigator: Yes, it did.

Prosecutor: Given your knowledge, training and experience, do all sex offenders commit sexual assault in the same way?

Investigator: No, not all. Human beings are all unique, and just as victims don't all react the same way, perpetrators also do different things when they commit their crimes.

Prosecutor: Based on your knowledge, training and experience, are there some things you commonly see in the way sexual assaults are perpetrated?

Investigator: Yes, perpetrators often do things I would call common or typical. The typical perpetrator often looks for a victim who is vulnerable in some way, or one who can be made even more vulnerable. Maybe that means finding someone who is drunk, or well on the

¹⁰ *People v Petri*, 279 Mich App 407; 760 NW2d 882 (2008) (holding that the police detective who testified regarding the “grooming” behavior of child sex abusers would have qualified as an expert where he testified that he had “15 years of experience with the Livingston County Sheriff’s Department and received training in the forensic interviewing of children.” Also see *Jones v. United States*, 990 A.2d 970, (2010) (FBI agent with over 20 years of experience in the Behavioral Science Unit).

¹¹ *People v. Ackerman*, 257 Mich.App. 434, 445 (2003).

way to being drunk, and approaching them with an offer to buy another drink.

In my experience, perpetrators will often test or push boundaries like this. If the person accepts the offer of another drink, the perpetrator will move on to the next boundary and try to maneuver the person to a place where they can be alone with them.

Again, it is important not to stray into opinion testimony about the present case; the testimony must stick to the typical or general behavior of sexual assault perpetrators.

Conclusion

Effective direct examination of the investigating officer is an important part of every trial. There's no room for complacency in the preparation and presentation for this direct examination. Throughout this Training Bulletin, I offered examples that I hope will be helpful for investigators and prosecutors with respect to this direct examination. However, I cannot emphasize enough that these are not the "right answers," or even necessarily the "right questions." Direct examination questions need to be tailored based on the specific facts and evidence in the case, as well as the knowledge and experience of the investigator – even the personal style of both the prosecutor and IO.

I also hope I have made the case that prosecutors and investigators should consider expanding the investigator's direct examination beyond the more common fact testimony to include expert testimony, where appropriate. This can help jurors recognize the realistic dynamics of sexual assault victimization and perpetration, which helps them to better understand the case. It also lays the groundwork for appreciating all the steps involved in a thorough, professional, and unbiased sexual assault investigation.

This type of testimony can also help the jury to understand and appreciate the meaning of victim-centered and trauma-informed approaches such as Start by Believing. These initiatives are designed to improve the responses of professionals and others when sexual assault victims come forward, report their abuse, and seek help. I hope this Training Bulletin helps to achieve this goal, by supporting their pursuit of justice and healing.

Appendix A: Sample Questions for Direct Examination of the Investigating Officer (IO)

Laying the Foundation

Where do you work?

How long have you had that position?

Did you attend a police academy?

How long was the academy?

How many hours or days at the academy were devoted specifically to sexual assault and sexual assault investigations.

Did you join this Department/Agency right after graduation?

If this is not the witness's first job in law enforcement, the prosecutor will need to cover their previous job experiences as well. Make sure the investigator has sufficiently refreshed their memory to be able to answer these questions. There are a litany of dates and events on every investigator's CV, and it can be embarrassing when something has to be corrected in front of the jury. Even though the witness may have a copy of their CV to refer to, nothing takes the place of thorough preparation and review before testifying.

How long did you work for (the previous agency)?

What were your duties while an officer with (the previous agency)?

Did you have any investigative duties beyond what you just described?

Did that include sexual assault investigations?

Do not ask questions like these if the witness didn't conduct or participate in any sexual assault investigations. If the witness handled only a portion of the investigations before handing cases to other investigators, follow up by asking the witness to describe that. Also note the sexual assault training the investigator had at the agency, and whether or not they directly handled such cases.

About how many sexual assault investigations did you work during that time?

This is a very important question to cover when preparing for trial. However, the investigator may not know an exact number, so an approximation is okay. If the witness has kept track of investigations or included details about them in a CV, be sure to review them for accuracy. Be certain you understand what is being tracked.

Did you receive any advanced training on sexual assault investigations during that job?
A negative answer to this question is okay. If it is known ahead of time that the witness didn't have any specialized training, it can be skipped. However, the witness should be prepared to answer on cross-examination; if you suspect this will be an issue, you might want to draw the sting by asking it on direct examination.

Have you had any other law enforcement jobs before your present job?

If so, go through the duties and sexual assault experience and training for each position.

How long have you been in your present position?

What are your duties?

Since you've been in your present position, about how many sexual assault cases have you investigated?

How are sexual assault investigations different from investigating other types of crime?

Do you have experience investigating adult and adolescent sexual assault?

Do you have experience investigating child sexual abuse?

Do you have experience investigating intimate partner violence? Did any of these investigations include sexual assault?

Did any of the cases involve victims who were using alcohol or other drugs?

Specialized Training

Did you receive specialized training to prepare you to conduct sexual assault investigations?

After listing specialized training, follow up with the IO to explain any specific training that is particularly relevant to the case. For example:

Would you explain for us what you mean by the neurobiology of trauma?

Did any of the specialized training include information on how sex offenders might commit their crimes?

Please go through those trainings.

Other Related Training

Have you attended any other state or national conferences or trainings on the topic of sexual assault?

Have you coordinated or facilitated training for your agency or colleagues?

Start by Believing and the Trauma Focused/Victim-Centered Response

Are you familiar with the Start by Believing campaign?

Has your department adopted the philosophy, or does it participate in the campaign?

Can you explain for us what that campaign is?

Depending on what the investigator can say, it may be necessary to prompt the witness more directly through questions like "Through the participation in the campaign, are you familiar with gender bias in the justice system?" The following questions assume that the witness's explanation brought out extensive details about SBB.

Would you explain what a trauma-focused, victim-centered response means?

When you say gender bias operated against victims, what does that mean?

Can you give us an example of a stereotypical assumption?

Did the SBB training change how you investigate sexual assault cases? How?

Does Start by Believing mean that you believe everything someone says when reporting they've been sexually assaulted?

The Victim's In-Depth Investigative Interview

Did you interview the victim during your investigation?

How long after the incident?

Where did you interview the victim?

What time of day?

Was there anyone else present when you interviewed the victim?

*Why did you let them sit in on the interview? **OR** Did you offer the victim the choice to have someone sit on the interview? Why did you make that offer?*

How did you start the interview?

When you said you were sorry about what happened, are you saying that you already decided at that point that a crime happened?

What was the victim's demeanor when you began the interview?

Did the victim's demeanor change during the interview? When? How?

Given your knowledge, experience and specialized training, is it uncommon for a victim to show little emotion during an interview?

Is it unusual for a victim to exhibit seemingly inappropriate emotions, like laughing when asked to tell you about what happened?

Do some victims even react angrily?

Based on your knowledge, experience and specialized training, what are some of the reasons a victim might react in different ways when recalling what happened?

Other Facts Specific to the Case and Delayed Reporting

Given your knowledge, training and experience, do victims of sexual assault generally report to police right after a sexual assault?

From your training and experience, can you tell us why a victim often doesn't report right away?

Victim did not Resist the Attack

In your experience, is it common for victims to physically resist or fight back during a sexual assault?

Based on that experience, and your specialized training, would you tell us why a victim might not resist or fight back?

Of course, there are many reasons why a victim might not fight back. Whatever the answer, it will likely require some follow-up. For example, if a victim tells the investigator they felt like they couldn't move or says other things that suggest the victim was experiencing tonic immobility, you'll need to have the investigator explain that. But that explanation must be kept very general; the investigator cannot say that the victim actually experienced tonic immobility.

Can you explain what tonic immobility is?

Impact on Memory

Based on your knowledge, experience and training, and especially your training on interviewing victims and FETI, does the experience of a traumatic sexual assault affect a victim's memory? In what way? Have you seen that impact in the cases you've investigated?

When you talk to victims of sexual assault, do you expect them to be able to give you a linear, chronological and complete narrative of what happened? Why not?

Based on your knowledge, training and experience investigating sexual assault cases, can drinking or other drug use have an effect on memory?

Missing Details or Things Remembered Later

You said you end your interviews by encouraging a victim to call you if they remember anything else after the interview. Why do you do that?

In your experience, has a victim ever withheld information from you on purpose?

Based on your knowledge, training and experience, what kinds of things might a victim hold back, and why?

The answers to these questions will differ from witness to witness, but what's important is that the witness describe in some way that disclosure is a process and not an event. This is a key concept for juries to understand so they will not reject a victim's testimony simply because they remembered things differently (or more completely) over time.

Continued Contact with the Perpetrator

Based upon your experience, have you seen victims who have stayed in contact with the individual who assaulted them? For example, they might continue to socialize or even spend the night with them.

Based on your knowledge, training and experience, would you tell us why a victim might do that?

Predatory Act of the Perpetrator

Given your knowledge, training and experience, do perpetrators generally commit sexual assault in the same way?

Based on your knowledge, training and experience, are there some things you commonly see in the way sexual assaults are perpetrated?

Appendix B: Sample CV's

[Sergeant Michael A. Crumrine](#)

[Lieutenant Andrea R. Munford](#)



1 been assigned as the primary investigator in over 500 sexual assault cases. I have assisted other sex
2 crimes investigators in approximately 250 sexual assault cases.

3 I have attended the following training classes in sexual assault at the San Diego Regional
4 Police Academy including; 4 hours in Recognizing Date Rape Drugs, 4 hours in Sexual Assault
5 Investigations for First Responders, and 8 hours in Sexual Assault Victimology. I now teach all the
6 above classes and have been for the last 6 years. I also teach a class on Sexual Assault
7 Investigations for Detectives at the San Diego Regional Police Academy. In June 2001, I attended
8 the Police Officer Standards in Training (POST) mandated 40-hour Sexual Assault Investigators
9 course offered by the California Department of Justice (DOJ). I am also a member and have been a
10 member of the California Sexual Assault Investigator's Association (CSAIA) for the past 6 years. I
11 have received yearly training during the CSAIA conferences.

12 I have spoken on the dynamics of sexual assaults to all San Diego City high schools, San
13 Diego State University, San Diego City College, Remington College, Grossmount College, Rape
14 Advocates for the Center of Community Solutions (CCS), Rape Advocates for the United States
15 Navy (SAVI) program and the United States Military.

16 I have been a keynote speaker at several conferences and 1-day training sessions
17 including; the International Conference on Sexual Assault, Domestic Violence and Stalking,
18 Backster Associates School of Lie Detection, Sex Crimes Summit (San Diego), Sexual Assault
19 Examiner Training for Health Care Professionals, National Sexual Assault Institute, Sexual Assault
20 Survivors Core, California District Attorney's Association, Adult Sexual Assault Workshop,
21 California Sexual Assault Investigator's Association, among others.

22 During the course of my duties, I have learned the following information based upon my
23 discussions with the named witness or by having read the reports of or talked with other SDPD
24 officers who have spoken directly with the named witness. All reference to dates refers to the
25 current calendar year unless otherwise stated.

PROBABLE CAUSE

27 On August 16, 2016, at approximately 1615 hours, a 25-year old female victim was
28 drinking with friends at the Wave House Bar & Grill, located at 3125 Ocean Front Walk, San
29 Diego, California.



1 The victim was approached by Justin Levi Jessup. The victim met Jessup at another local
2 bar two days prior and they exchanged telephone numbers. The victim did not know Jessup was
3 going to be present at the Wave House Bar & Grill.

4 The victim became severely intoxicated due to drinking too much alcohol. The victim
5 blacked out and does not remember leaving the bar. Through my investigation, it was determined
6 Jessup had removed the victim from the bar around 2000 hours.

7 When the victim woke up at approximately 2250 hours, she noticed she was nude. The
8 victim was lying in an unfamiliar bed. Jessup was lying next to the victim. Jessup was also nude.
9 The victim asked Jessup several questions including, "What happened?" and "Did you have sex
10 with me?" Jessup stated he did not know what happened and denied he had sex with the victim.

11 The victim still felt intoxicated and sick from the alcohol. The victim had vomited several
12 times during the night. The victim contacted her male roommate and asked for a ride home. The
13 victim went to a local hospital for treatment. The victim disclosed to the hospital staff that she
14 might have been sexually assaulted. The victim requested the hospital staff to contact the San
15 Diego Police Department and report the assault.

16 When San Diego Police Officer arrived, the victim gave them a statement and participated
17 in a SART examination (rape kit). In my follow-up investigation, the victim told me she did not
18 give Jessup permission to have any sexual contact with her including intercourse.

19 The victim was unconscious for a period of time while she was in Jessup's home and does
20 not know if Jessup had sex with her.

21 On August 18, 2016, at approximately 1820 hours, I conducted a pretext telephone call
22 between the victim and Jessup. Jessup answered the phone and made several incriminating
23 statements. The call was recorded. Jessup stated he knew the victim was intoxicated. Jessup stated
24 he did not have any sexual contact with the victim. Jessup stated he does not know how the victim
25 became nude.

26 The victim's rape kit was processed by the San Diego Police Department Forensic Biology
27 Unit. Sperm cells were found on the victim's vaginal swabs. The sperm cells were processed for
28 Deoxyribonucleic (DNA). A DNA profile was obtained from the collected sperm. The unknown
29 male DNA profile was compared to Jessup's DNA profile. The comparison matched Jessup's

1 profile with the collected profile.

2 I conducted a telephone interview with Jessup. During the interview, Jessup denied any
3 sexual contact with the victim. Jessup stated he knew she was intoxicated and sick from her alcohol
4 intake.

5 During my investigation, I learned Jessup is a registered sex offender. On April 30, 2006,
6 Jessup digitally penetrated a female who was intoxicated and unconscious. Jessup pled guilty in
7 that case and is currently on felony probation (Case SCD200483).

8 San Diego County Deputy District Attorney Melissa Vasel issued the following charges on
9 Jessup; 261(a)(3) Penal Code, rape of an intoxicated person and 261(a)(4) Penal Code, rape of an
10 unconscious person.

11 On January 13, 2017, I arrested Jessup at his home without incident. San Diego County
12 Probation Officer Josh Peterson and I conducted a probation search of Jessup's residence. During
13 the search, I searched Jessup's phone for any photos of this victim passed out. I found four photos
14 of naked unconscious females. I found the below photos with the dates and times attached to them:

- 15 ● 10/26/16 at 0316 hours – Unidentified nude white female who appears to be
16 unconscious, the female's legs are spread wide apart.
- 17 ● 10/26/16 at 0316 hours - Unidentified nude white female who appears to be
18 unconscious, with her legs spread wide apart. A second photo appears to be taken from
19 further away.
- 20 ● 08/24/16 at 2120 hours – Unidentified nude female who appears unconscious.
- 21 ● 08/16/016 at 2122 hours – The image appears to be a buttock with a hand between the
22 legs. (08/16/16 is the date of the victim's assault in this case.)

23 On January 13, 2016, I interviewed Jessup and he stated he did not have any sexual contact
24 with the victim. I confronted Jessup with the photos I found on his phone and stated the female in
25 the photos is a person named Sarah. Jessup does not know Sarah's last name. I found the female
26 named Sarah through my investigation. I obtained the female's driver's license photo and she does
27 not fit the description of the nude female.

28 **OPINIONS AND CONCLUSIONS**

29 Based on my investigation, training and experience, I know that the property to be seized



1 will provide possible evidence of the identity of the unknown female in the photos.

2 I believe Jessup's telephone traffic would help me to identify the unknown female who is
3 possibly a victim of sexual assault. I believe this female knew Jessup and had exchanged telephone
4 numbers with him in order to stay in contact. Because the female appears unconscious she may not
5 be aware the photos exist or she had been possibly sexually assaulted.

6 Therefore, based on my training, experience and the above facts, I believe that I have
7 substantial cause to believe the above-described property, or a portion thereof, will be in the
8 described location when the warrant is served.

9 Based on the aforementioned information and investigation, I believe that grounds for the
10 issuance of a search warrant exist as set forth in Penal Code section 1524

11 I, the affiant, hereby pray a search warrant be issued for seizure of said property, or any
12 part thereof, from said premise at any time of the business day, good cause being shown therefore,
13 and the same be brought before this magistrate or retained subject to the order of this Court.

14 Deputy District Attorney Melissa Vasel has reviewed this affidavit for legal sufficiency.

15 Given under my hand and dated this 1st day of February 2017.

16
17 _____
Detective Carlton Hershman #4146

18 Subscribed and sworn to before me
19 this 1st day of February, 2017
20 at _____ a.m. / p.m.

21 _____
22 Judge of the Superior Court
23 Central Division

24
25
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27
28



IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SEARCH WARRANT

No. _____

The People of the State of California, to any peace officer in the County of San Diego:

Proof, by affidavit, having been this day made before me by Carlton Hershman #4146, a peace officer employed by the San Diego Police Department, that there is substantial probable cause for the issuance of the search warrant pursuant to Penal Code section 1524, as set forth in the affidavit attached hereto and made a part hereof as is fully set forth herein, you are therefore, commanded to make search at any time of the day, good cause being shown therefore,

LOCATION TO BE SEARCHED

1. The records division of Verizon Communications Corporation System, 818 West 7th Street, Los Angeles, California.

ITEMS TO BE SEIZED

For the following property, to wit:

- A. All telephone company subscriber information, listed name and address, for telephone number (858) 555-1212.
- B. All telephone numbers called by or received by telephone number August 16, 2016 to January 13, 2017.
- C. All cell site activations and sectors, together with a complete listing of cell site identification numbers, physical address, latitude and longitude records, sector identifies, and true orientations of all cell sites and sectors in the market where the subject telephone (858) 555-1212 may be located from August 16, 2016 to August 17, 2016.

and if you find the same or any part thereof, to bring it forthwith before me at the Superior Court of the San Diego Judicial District, County of San Diego, State of California, or any other court in which the offenses or things is triable, or retain such property in your custody, subject to the order of this Court, pursuant to section 1535 of the Penal Code, and to dispose of said property pursuant to law when the property is no longer of evidentiary value.



1 Given under my hand and dated this 1st day of February 2017.

2

3

Judge of the Superior Court

