

County of Santa Clara

Office of the District Attorney

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MEMORANDUM

To: Supervisor Michael Wasserman,
Santa Clara County Board of Supervisors

From: Terry Lynn Harman
Assistant District Attorney

Re: SART (Sexual Assault Response Team) Kits

Date: June 28, 2013

The purpose of this memorandum is to provide you with a general overview of SART kits as they relate to the investigation and prosecution of sexual assault crimes in Santa Clara County.

On May 13, 2013, Channel 7 aired an investigative report regarding untested SART kits in the Bay Area. Referring to Santa Clara County, the report included a list of untested SART kits located on property shelves of certain police departments (Sunnyvale Department of Public Safety: 207, Santa Clara P.D.: 49, San Jose P.D.: 1,800+.) The existence of untested SART kits allows for two concerning inferences: (1) That sexual assault cases are not being properly investigated—leaving victims of these crimes feeling frustrated and forgotten; and (2) That we are losing an opportunity to input suspect DNA contained in a SART kit into our databases, preventing the solving of cold crimes.

Subsequently, your Office was contacted by Jim O'Donnell of Channel 7 News. Mr. O'Donnell asked whether you would be interested in "putting a law in place for all sexual assault kits to be sent to the lab for analysis."¹ (May 23, 2013 e-mail to John Gibbs.)

I. SART Exams in Santa Clara County

In California, the elements of a sexual assault forensic medical exam are defined in Penal Code §13823.7, and include:

¹ On May 31, 2013, our Office also received an e-mail from Mr. O'Donnell regarding testing all SART kits in Santa Clara County.

- Notification of injuries and a report of suspected child sexual abuse to law enforcement authorities.
- Obtaining consent for the examination, for the treatment of injuries, for the collection of evidence, and for the photographing of injuries.
- Taking a patient history of sexual assault and other relevant medical history.
- Performance of the physical examination for evidence of sexual assault.
- Collection of physical evidence of assault.
- Collection of other medical specimens.
- Procedures for the preservation and disposition of physical evidence.

Valley Medical Center (VMC) provides forensic exams and medical care to victims of sexual assault. Victims 12 and older are seen through the “Adult SART” program, overseen by Linda Richards. Victims under 12 years old are provided with pediatric SART exams. The pediatric clinic coordinator is Mary Ritter.

Some patients are referred for a SART exam by other medical facilities and sometimes the police bring the victim to VMC.² The adult SART clinic also accepts walk-ins.³ No patient is turned away and these exams are given at no cost to the victim.

The forensic portion of the exam is geared at the collection and preservation of evidence of a sexual assault that has involved oral copulation and/or anal and/or vaginal penetration.⁴ The 72 hour period following a sexual assault is often referred to as the “Golden Window” for purposes of yielding forensic results,⁵ because injuries will heal and semen and saliva can be washed away or will otherwise dissipate and disappear with the passage of time. However, it should be noted that no passage of time will lead the SART clinic to deny a patient’s request for a SART exam.

A. The Use of SART Kits in Sexual Assault Investigations and Prosecutions.

The majority of sexual assault prosecutions in Santa Clara County involve a criminal investigation by the San Jose Police Department. On May 30, 2013, I met with Crime Lab Director Ian Fitch, SJPD Deputy Chief Phan Ngo, and Sexual Assault Unit Lt. David Santos. Lt. Santos emphasized that the San Jose Police Department investigates *every* sexual assault allegation.⁶ Moreover, in cases of stranger assaults where the suspect is unknown, the SART kit will *always* be taken to the Crime Lab for analysis (with the hope

² The San Jose Police Department accounts for 50% of VMC SART patients.

³ Pediatric SART exams are by appointment only as that is generally better for the child.

⁴ Forced oral copulation, anal penetration, and vaginal penetration are felony crimes.

⁵ As technology continues to improve, we may anticipate that the “Golden Window” will expand.

⁶ It is unclear whether the other agencies profiled in the May 13th news program (San Francisco and Alameda County LEAs) have the same investigative policies, resources, or number of sexual assault cases as San Jose P.D.

that the suspect will be identified through a CODIS⁷ hit).

It may be surprising to some that there are a great number of cases where the perpetrator is known to the victim. In 2012, the adult SART clinic had a total of 225 cases; 128 (57%) of which involved a known perpetrator. If the suspect is known but *denies* sexual contact, the SART kit will be submitted for analysis. However, when the victim is able to identify the assailant, a frequent investigative issue is that of consent. In other words, the suspect will admit having had sexual contact with the victim, but will claim that it was consensual. In these “he said/she said” situations, it is not necessary to submit the DNA evidence from a SART kit to the Crime Lab for testing because the identification of the suspect is known and the issues in the case will not be resolved through DNA analysis.

There are also times when a sexual assault investigator will close out a sexual assault case because the victim does not want to pursue criminal charges or is otherwise uncooperative with the investigation. In these cases, a SART kit will not be submitted to the Crime Lab for analysis. Indeed, the Federal Violence Against Women Act (FVAWA) allows victims of sexual assault to choose to undergo a SART exam without a requirement that they cooperate in the investigation. Meaning, a SART kit may be taken, but if the victim does not authorize analysis, it will not be submitted to the Crime Lab.

When criminal charges are filed, the assigned prosecutor will prepare the case for trial. The prosecutor (or the defense attorney) may decide that the SART kit should be analyzed, if it has not already been done, and can make that request. However, if the defendant pleads guilty prior to trial, there is no need to analyze the SART kit because a conviction(s) has been obtained. In these cases, analysis of the SART kit would serve no investigative or prosecutorial function because the offender has been held accountable.

B. State Law Provides for the Procurement of DNA Samples and Entry of Suspect DNA Into Criminal Databases for those Arrested or Convicted of the Majority of Felony Sex Crimes.

Every State in the Nation has a statutory provision for the establishment of a DNA database that allows for the collection of DNA profiles from offenders convicted of particular crimes. The CODIS software enables state, local, and national law enforcement crime laboratories to compare DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scenes with profiles from convicted offenders.

⁷ Combined DNA Index System. CODIS is a computer software program that operates local, State, and national databases of DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons. Every State in the Nation has a statutory provision for the establishment of a DNA database that allows for the collection of DNA profiles from offenders convicted of particular crimes. CODIS software enables State, local, and national law enforcement crime laboratories to compare DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scenes with profiles from convicted offenders.

In California, the collection of DNA profiles from convicted persons is codified in Penal Code § 296. Specifically, section 296 provides that any person who is convicted of a felony offense “shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand... for law enforcement identification analysis.” Moreover, § 296(2)(A) provides for the collection of DNA profiles from those persons who are *arrested* for the majority of felony sex crimes. In light of the mandates of Penal Code § 296, an unanalyzed SART kit will not prevent a convicted sex offender from being identified as a suspect through our DNA databases.

Of course, there are cases involving untested SART kits where the suspect was not arrested and the case was rejected for prosecution—cases where Penal Code § 296 does not apply. Some people may opine that SART kits in these rejected cases should be analyzed for purposes of entering the DNA profiles into certain databases. We should be mindful that a case may be rejected for a number of reasons, including; that the conduct is outside the statute of limitations, that there is insufficient evidence to prove the crime beyond a reasonable doubt, and the existence of a suspicion or belief that the suspect has been falsely accused. There is currently no statutory authority for the creation of a DNA profile database in these situations. In addition to the legal issues, there are ethical issues associated with profiling the DNA of someone who has been falsely accused of sexual assault.

II. The Police and Prosecution Enjoy Good Working Relationships with Local Victim-Advocate Groups.

On June 12, 2013, I had a meeting with Sue Barnes, who is the Director of the Rape Crisis Department of the YWCA of Silicon Valley. Ms. Barnes told me that she has *never* had a problem with untested SART kits and has *never* heard any advocate complain about untested SART kits. Ms. Barnes noted that the YWCA enjoys a good working relationship with both the police and our Office. This would certainly not be the case if they felt we were shirking our duties and allowing evidence to languish on shelves in police property rooms.

Additionally, Linda Richards, the Director of the Adult SART Program confirmed in a June 18th e-mail communication that she finds all the police departments in this County to be very proactive in sexual assault investigations. Ms. Richards noted that SART enjoys a very good working relationship with our local police agencies.

Recently, I also broached this subject with Kasey Halcon, Director of Victim/Witness. Ms. Halcon does not have a problem with the untested SART kits and has never had a victim complain that their SART kit was *not* tested; although some victims have expressed frustration with the time it takes to get SART kit results.

Of course, this is not to imply that there are never differences of opinion regarding how a sexual assault case is handled or whether a case is prosecuted. The benefit of a good working relationship means that when we are presented with problems, we discuss them and work together to find a solution.

III. Conclusion

The testing of “every sexual assault kit”, as suggested by Mr. O’Donnell sounds appealing on its face and we cannot foreclose the possibility that a cold case could be solved through SART kit analysis. We certainly believe in legislative solutions that would bolster and increase the databases that have demonstrated time and again how they serve to identify the guilty and exonerate the innocent.

However, we want to be thoughtful about pursuing Mr. O’Donnell’s suggestion, as stated. First, SART kit analysis is prohibited in all cases where the victim does not consent. Second, in cases where there is a felony arrest or a felony conviction, a DNA profile is obtained and entered into the appropriate database(s). We do not want to see SART kits tested unnecessarily at the expense of having other lab evidence delayed or forsaken due to limited resources. Third, in cases where it appears a false allegation has been made, there are legal and ethical issues associated with analyzing the SART kit for the DNA profile of an innocent person.

The District Attorney’s Office is committed to achieving justice for victims of sexual assault, holding offenders accountable, and protecting the innocent. Within these parameters, we always remain open to exploring additional and improved measures that would allow for the continued successful prosecution of rapists, child molesters, and other sex offenders.

cc: Jeff Rosen
District Attorney