

SEXUAL ASSAULT REPORT™

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View From the Field

The Five Trademarks of Sex Offenders

by Don Howell, B.S.

After almost 40 years in law enforcement, with almost 30 of those years spent investigating sexually motivated crimes, I am becoming alarmed by the perception, which seems to be shared by members of the media and the public as well as sexual assault survivors and responding professionals, that sex offenders will be arrested and convicted if, and only if, a forensic evidence kit is submitted to the crime laboratory and a DNA profile is obtained. I am also concerned about the over-reliance of law enforcement on DNA evidence. Don't misunderstand me: I think DNA evidence is a great tool and I wish it had been available much earlier in my career. Still, I am *old school* and a firm believer in the importance of a comprehensive victim interview, followed by a thorough suspect interview.

I have attended close to 100 lectures, seminars, and specialized trainings hosted by the FBI, psychologists, victims of sex crimes, and just about every other type of expert you can think of. I have read many of the books and articles dealing with sex crimes, interviewing techniques (for both victims and suspects), and a variety of other subjects relating to sexually motivated behavior. I have testified as an expert witness in court and have qualified as an expert for

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Untested Evidence in Sexual Assault Cases: Using Research to Guide Policy and Practice

by Nancy Ritter

Readers of *Sexual Assault Report* are no doubt aware of the existence of thousands of untested sexual assault kits that are stored in police evidence rooms around the country. Making decisions about how best to handle all of this older, unanalyzed evidence is anything but straightforward—and these decisions are affecting every stakeholder in the nation's criminal justice system: law enforcement and crime laboratories, courts, victim service agencies, policymakers at the federal, state and local levels, and, most significantly, victims.

Untested sexual assault kits (SAKs) can be stored in a number of places: police department evidence rooms, crime labs, hospitals, clinics, rape crisis centers. We do not know how many unanalyzed SAKs there are, nationwide. There are many reasons for this, but one of the primary ones is that tracking and counting SAKs is an antiquated process in many U.S. jurisdictions. A survey sponsored by the National Institute of Justice (NIJ) found that, as of 2007, 43% of the nation's law enforcement agencies did not have a computerized system for tracking forensic evidence, either in their property room or after it was sent to the crime lab (Strom et al., 2007).

Survey of Forensic Evidence Practices

This survey, to which more than 2,000 state and local law enforcement agencies responded, also revealed that 18% of unsolved sexual assault cases that were reported from 2002–2007 contained forensic evidence that was still in police custody; that is, evidence that had not been submitted to a crime lab for analysis. The survey also found that police had not submitted forensic evidence (including DNA, fingerprints, firearms and tool marks) to a crime lab in 14% of unsolved homicides and 23% of unsolved property crimes.

There are many reasons why police may not send forensic evidence to a lab; it may not be considered probative, the charges may have been dropped, or a guilty plea already may have been entered. However, the researchers at RTI International who conducted the NIJ-funded survey concluded that some police officers may not fully understand the value of evidence in developing new investigative leads. For example, 44% of the responding departments said one of the reasons they did

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not send evidence to the lab was because a suspect had *not* been identified. Fifteen percent said they did not submit evidence because analysis had not been requested by a prosecutor. Three in 10 said they did not submit evidence because they were uncertain of its usefulness (Strom et al., 2007).

These are important findings because evidence can identify a possible perpetrator in a case in which law enforcement does not have a suspect (a “no suspect” case), using CODIS, the national DNA database. Latent prints can also identify a possible perpetrator through databases such as the national Integrated Automated Fingerprint Identification System (IAFIS).

The “knowledge gap” revealed in the survey, particularly among the nation’s small departments (less than 25 officers), could be due to a lack of training. Specialized training in these cases may have been beneficial and could have led to a different outcome. It is also important to keep these findings in context: CODIS did not become operational until the late 1990s and, for some who responded to the survey, it could still have been considered relatively new. That said, whether some detectives do not forward evidence to the lab because they do not fully understand how a no-suspect

CODIS hit can aid their investigation—or because there are standing policies or other issues that prevent them from doing so—is clearly an issue that merits further study.

Finally, it is important to understand what the NIJ survey did *not* determine. For example, the survey did not reveal how many of the cases not sent to a lab would actually have benefitted from analysis. The survey also did not address the number of unsolved cases in which evidence had been analyzed in the past but now, with the benefit of larger offender databases and new forensic technologies, might be solved or yield investigative leads; for example, a latent print submitted to IAFIS several years ago with no successful match could yield a hit now.

It is also important to recognize that some of the survey responses were based on estimates, according to the police departments. Larger agencies (including large county and state agencies) reported difficulty in providing information about sexual assaults because these records are not maintained in a centralized system. Property crimes in larger agencies are typically investigated at the precinct level (where the case information would be maintained), and this also may be true for sexual assault cases. Finally, it is important to note that the survey’s findings

are based on self-reported information; there was no independent verification of the data.

Despite these caveats, there is no doubt that the survey reveals problems with an ongoing lack of procedures and policies for collecting, processing, and storing forensic evidence, including reports of sexual assault. Policies and practices for evidence retention vary widely from jurisdiction to jurisdiction, with one in five agencies saying they were not sure whether they had such policies. Less than half of the police departments, for example, said they had a policy regarding the preservation of biological evidence in cases where the defendant was found guilty.

The RTI researchers who conducted the survey made a number of recommendations to address these issues, including:

- Training police on the benefits and use of forensic evidence, including protocols for sending cases to the lab for analysis;
- Creating (or improving) information management systems to track forensic evidence and enhance communication among the police, lab and prosecutor’s office; this could include connected evidence-tracking systems, dedicated staff for case management, and regular team meetings for case review;

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- Creating more storage capacity for analyzed and unanalyzed forensic evidence, and standardized evidence retention policies; and
- Conducting further research to determine what proportion of open cases could benefit from forensic testing, and how such cases should be prioritized for testing.

The full report, *2007 Survey of Law Enforcement Forensic Evidence Processing*, by Kevin J. Strom et al., RTI International, is available at www.ojp.usdoj.gov/nij/topics/law-enforcement/handling-evidence/unanalyzed-evidence.htm.

Untested, Stored SAK Evidence vs. “Backlogs”

It is very important to recognize that SAKs stored in law enforcement property

As Nelson wrote in *Making Sense of DNA Backlogs: Myths vs. Reality*, a special NIJ report, backlogs are not static; in many laboratories, new DNA submissions come in faster than case reports go out. This means that the backlog of cases pending analysis will increase, but it does not mean that older cases will not be tested. Laboratories generally require more serious cases to be worked first, and the oldest cases in a backlog to be addressed before newer ones.

NIJ has several programs to help laboratories address their workload. Some address overall DNA backlog reduction; others are specifically for testing samples from convicted offenders and arrestees. Some funds are used by laboratories for in-house processing of cases; other funds are used by laboratories to outsource some of their work. Although NIJ funding helped state and local DNA crime labs increase the

reopened and subjected to DNA testing in an effort to solve them.

- **Post-Conviction Testing.** Numerous older, pre-DNA cases that resulted in a conviction have been reopened so DNA testing can be done.

In addition, all states and the federal government have laws that require collecting DNA from convicted offenders, and 28 states (plus the federal government) now also require collecting DNA from all arrestees (Samuels et. al., 2012). Until laboratories can meet the rising demand for DNA services, backlogs will continue to exist. (For more on the issue of DNA backlogs in crime labs, see *Making Sense of DNA Backlogs: Myths vs. Reality*, www.ncjrs.gov/pdffiles1/nij/232197.pdf.)

Should All SAKs Be Analyzed?

How should a jurisdiction handle the issue of a large number of older, untested SAKs stored in its property rooms? Should officials try to come up with the resources to test them all—even cases that may be 25 years old—or should they establish a prioritization or “triage” process to determine which SAKs should be sent to the lab, and when?

Unfortunately, there has been little research in this area, and there are few evidence-based “best practices” to help jurisdictions handle the crisis management of the moment, and to prevent this problem from developing again in the future.

There may be legitimate reasons why some of the SAKs were not sent to a lab. For example, not all evidence collected in a sexual assault investigation may be probative. In cases where consent is an issue (the suspect admits sexual contact but maintains it was consensual), detectives may consider that the SAK does not add any important information to the investigation. Evidence also may not be sent to a lab for analysis if charges against the alleged perpetrator have been dropped or the suspect has pled guilty.

That said, there is significant support, particularly among victim advocates, policymakers, prosecutors, and sexual assault survivors, for testing all sexual assault kits (SAKs). Proponents of mandatory testing argue that testing SAKs even in non-stranger cases can potentially lead to the identification of a serial rapist in other non-stranger cases or corroborate

Proponents of mandatory testing argue that testing SAKs even in non-stranger cases can potentially lead to the identification of a serial rapist in other non-stranger cases or corroborate either the victim’s and/or the suspect’s statements.

rooms are *not* part of a crime laboratory’s “backlog.” Indeed, many of the newspaper headlines about “backlogs” are actually referring to sexual assault kits stored in police evidence rooms.

NIJ considers untested evidence awaiting submission to laboratories to be a different issue from backlogs in crime laboratories. Untested evidence in law enforcement custody becomes part of a crime laboratory backlog only when the law enforcement agency submits it to the crime laboratory; federal programs that reduce backlogs in crime laboratories are not designed to address untested evidence stored in law enforcement agencies (Nelson, 2011).

That said, determining the exact number of backlogged cases is complicated. “Policymakers frequently ask why DNA backlogs persist even after the federal government has provided hundreds of millions of dollars to eliminate the backlog,” said Mark Nelson, DNA program manager for NIJ, in an interview. “This is a fair question, and answering it requires understanding both what a backlog is and how backlogs can be reduced.”

capacity almost threefold from 2005–2008, the demand for DNA testing continues to outstrip the capacity.

The increasing demand for DNA testing is due to a number of things:

- **Increased Awareness.** Knowledge of the potential for DNA evidence to solve crimes has grown exponentially in recent years, not just among criminal justice professionals but also among the general public.
- **Property Crimes.** The number of property crimes being sent for DNA testing is skyrocketing.
- **Scientific Advances.** We can test smaller DNA samples than ever before, such as “touch DNA” samples, in which DNA is transferred by the simple touching of an object. This has led to more requests for DNA testing of guns (to try to determine who may have handled the weapon) and swabbing steering wheels of stolen cars to try to identify the last driver of the car, for example.
- **Cold Cases.** Many older, unsolved cases from the pre-DNA era are being

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either the victim's and/or the suspect's statements.

In older cases in which the statute of limitations has passed (and the case therefore could not be prosecuted) DNA testing might still have value because, in some situations, results can be deemed relevant in the parole hearing of a convicted offender. It is also possible for a judge to allow evidence at trial of past criminal behavior (even when the criminal behavior was not adjudicated) if the court deems that it is directly relevant to the case at hand under Federal Rule of Evidence 404(b).

Often referred to simply as "404(b)," this rule allows evidence regarding a defendant's character or prior criminal conduct into a trial under certain circumstances. Some proponents of analyzing all older SAKs argue that, even if the statute of limitations has run, it could be important to have 404(b) evidence of a past sexual assault if the person is on trial in the future for another sexual assault.

NIJ-Funded "Action Research"

Because it is so important that we understand more about how law enforcement decides to submit an SAK to the crime lab for analysis (or not) and how cases are triaged for additional investigation, NIJ is currently funding a project to examine this issue. In April 2011, the Institute awarded two competitive research grants to Wayne County (Detroit), Michigan, and Houston, Texas, to examine the issue of untested evidence in sexual assaults. At that time, it was believed that there were more than 16,000 untested SAKs in the Houston Police Department property room and more than 10,000 in Detroit police custody.

The NIJ-funded teams in Houston and Detroit include criminal justice researchers and representatives from the police department, crime lab, prosecutor's office, sexual assault forensic examiners, and community-based victim services organizations. One of the primary goals of the "action research" project is to produce transportable lessons and strategies to help other jurisdictions that have a large number of untested SAKs in their property rooms.

Action research is a method in which researchers engage in an active partnership with practitioner agencies to solve a problem. The research partner plays a key role in identifying the problem and analyzing the data, working with the practitioner

agency to develop intervention strategies to target the problem. The practitioner agency implements the strategies, and the researchers monitor the progress and provide feedback to better refine the strategies. Finally, the researchers conduct an assessment of the implementation of the problem-solving strategies and the impacts they had.

The Houston and Detroit projects are two-phased: the first was a six month planning phase. The teams are now into the second phase, and although it is too early to report any definitive conclusions, some interesting preliminary data has emerged.

The NIJ Project in Detroit

Among the Detroit team's goals in Phase 1 was to get an accurate count of how many SAKs in police custody were, in fact, untested. Their audit has determined that, as of November 1, 2009, there were 8,505 untested SAKs in police storage.

A second goal in Detroit was to examine why the problem developed in the first place. The researchers looked at 20 years of public and internal records and conducted in-depth interviews with key stakeholders from a wide range of disciplinary perspectives. Drs. Rebecca Campbell and Giannina Fehler-Cabral, from Michigan State University, the researchers on the Detroit team, have identified several reasons why there were so many untested SAKs in Detroit. In essence, they say, the following can be regarded as "risk factors" for a large number of untested SAKs:

- Lack of a formal policy and protocol for kit testing;
- Reduction in staffing levels within law enforcement due to budget cuts, which significantly curtailed investigative efforts in sexual assault cases;
- Very high turnover in leadership within law enforcement and supervision of the sex crimes unit;
- Reduction in staffing levels in the crime lab due to budget cuts;
- Use of inefficient DNA testing equipment/methodology within the crime lab, due to budget cuts;
- Lack of good quality sexual assault medical forensic exams;
- Lack of community-based sexual assault advocacy services; and
- Lack of professional training for all multidisciplinary service providers.

In Houston, the other jurisdiction in NIJ's ongoing action research project on untested SAKs, one of the most significant early findings concerns the number of untested kits. As part of its preparation for moving to a new evidence-storage facility, the Houston Police Department performed an audit of all SAKs in their custody. As a result of the audit, officials have determined that there are far fewer untested SAKs in Houston than previously believed. In fact, over half of the stored SAKs had already been screened by the lab. The NIJ project is focusing on approximately 4,000 kits stored in the freezer, of which about one-third had already been examined by the lab.

In the first phase of the project, Dr. Noel Busch-Armendariz and her team at University of Texas at Austin and Dr. William Wells from Sam Houston State University conducted 146 interviews of police investigators, prosecutors, lab analysts, SANEs, victim advocates, and victims. The interviews are helping to develop an in-depth understanding of untested sexual assault evidence in Houston. Final results from the Houston and Detroit projects are expected in 2014.

Stranger vs. Nonstranger Sexual Assault

When it comes to tackling the multidimensional problem of unanalyzed SAKs, victim advocates often point to an elephant in the room: stranger sexual assault versus non-stranger sexual assault. This distinction is disturbing to those victim advocates who believe that stranger sexual assault is more likely to be regarded as "real rape" and, therefore receive a vigorous criminal justice response. Many victim advocates also maintain that not aggressively pursuing non-stranger sexual assault may mean that other sexual assaults are not prevented and that the perpetrator may continue assaulting women.

As our nation focuses on the issue of untested SAKs, we would be naive to ignore potential biases in the system. Over the years, biases may have affected the decision to not send sexual assault evidence to the lab if, for example, the victim was a prostituted woman, someone who uses drugs, or sufferers from a mental illness. Therefore, some argue, testing all SAKs would reveal potential connections between stranger and non-stranger sexual assault and would go a long way toward eliminating bias against certain victims. Proponents of testing of all SAKs also point out that uploading all

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profiles into CODIS may link crimes that otherwise would not have been linked.

Victim Notification

Whether a jurisdiction decides to test all previously untested SAKs or begins with a small number, notifying the victims is a crucial part of the process. However, determining “best practices” for doing this, let alone putting the right mechanisms in place, is not easy.

When, for example, should the victim be notified? When the unanalyzed SAK is sent to the lab for analysis? When analysis reveals that there is no probative evidence? Or only when a DNA profile is determined? What will the victim notification protocol be? And how should victims be contacted: via letter, phone call, in person?

At first blush, it may seem that there is no question that sexual assault victims should be notified at *some* point in the process. After all, why would a victim *not* want to know if DNA analysis of evidence from a sexual assault that occurred when she was 18 years old had, 20 years later, revealed the rapist’s identity?

Experts say there could be as many answers to that question as there are victims. For example, what if the victim, now 38 years old, never told her husband or 15 year old daughter about the sexual assault? What if she has had years of counseling and moved on? Beyond simply being notified at one step or another in the criminal justice process, does the victim get a say or not in deciding whether the case moves from the police evidence room to the lab, from the prosecutor’s office to the courtroom? Of course, prosecuting the case would require a new investigation, including interviews of the victim, suspect, and any witnesses. This can be extremely difficult for many victims.

Furthermore, not all victims want to enter the criminal justice process. For some, the primary concern after being sexually assaulted is medical care: testing for HIV, STDs, and pregnancy, or receiving counseling or other psychological support. In a 2010 roundtable discussion co-hosted by NIJ and the Office of Violence Against Women, victim advocates estimated that perhaps half of the victims of long-ago assaults would want to be told that evidence had been found in their cases; they would want to be told the results of DNA analysis and be a part of any prosecution. The other half, they said, would just want to continue on with their lives, not wanting to have their

lives interrupted by the stress of an investigation and potential prosecution.

Beyond determining the best way to contact victims, the logistics of simply *finding* many of them is not likely to be easy. Many victims of sexual violence try to distance themselves from the crime, including moving away from where the assault happened.

Current victim notification practices vary among jurisdictions that are dealing with large numbers of unanalyzed SAKs. In one city, a letter is sent, asking the victim to call regarding an unspecified matter. In another, authorities initially placed a public service announcement in the newspaper and on TV in an effort to reach some of the victims; although the notice ran for just one day, authorities say the response was good.

Victim safety is a major concern during notification. Victim advocates warn that a victim of a long-ago sexual assault could currently be living with an abusive partner and that contact by the police could act as a trigger for additional violence. They also note that a victim who is suddenly told that the unsolved crime may now be investigated, including DNA analysis of the SAK, may suddenly feel in greater danger from the perpetrator.

There is also the issue of counseling. Some people experience a host of physical and psychological sequelae after being sexually assaulted. Officials also should be aware that some of the victims among the thousands of SAKs that may now be tested use drugs or are prostituted or homeless or suffer from a mental illness. What additional counseling might they need and where will the resources come from to provide it?

Clearly, with sufficient will and resources, we could perform DNA analysis of all previously untested SAKs. But if this policy decision were made, we would also need to consider how to support the victims of these crimes. And, say the experts, one of the challenges will be to understand that each sexual assault victim may, after so many years, have her or his own idea of what “justice” looks like.

These are all issues that NIJ is examining through the ongoing projects in Houston and Detroit.

Post-Testing: The Domino Effect

Beyond the notification of victims and decisions regarding the forensic testing of untested SAKs, there are major implications for “downstream” partners in the criminal justice system. Where, for example, will the resources and protocols come from, as already-strapped police departments face demands for follow-up investigations? If

laboratory analysis results in the identification of a suspect, how will already overworked investigators manage this expanding caseload and how will prosecutors and public defenders handle additional cases?

Police investigations in older, “cold” cases require a significant commitment of time, training and talent. If a DNA profile is developed from testing evidence in an SAK, previous investigative leads and past interviews will have to be reexamined, and all this work will have to be prioritized alongside current criminal investigations. What investigative protocols will a jurisdiction use, for example, when a DNA profile is developed from testing but does not match a profile in CODIS or a local database? If a state provides for a “John Doe” warrant, will one be issued?

Police agencies must also have a plan for handling the situation where a DNA profile from an older SAK case *does* have a CODIS hit. What priorities and protocols will govern the often time-consuming effort of tracking down the suspect and gathering a DNA confirmation sample? Can the victim be located and is she or he available for the follow-up investigation and potential prosecution? It also should be noted that, in some jurisdictions, a request to send an SAK to the lab for DNA analysis is not approved until a sample is obtained from any consensual partner for elimination purposes; might this protocol need to be revisited if a jurisdiction makes the decision to test all previously untested older SAKs?

As jurisdictions grapple with these issues, it is important to consider the best way to communicate with victims at the various stages in the process. Advocates point out that a sexual assault survivor who is told that the SAK will now be analyzed is likely to start wondering about the next steps: Will a confirmation sample be collected, for example, and when will additional investigative interviews be conducted? Certainly, the impact on the victim must be considered if testing yields a DNA profile or a CODIS hit, but the police department is experiencing resources issues that would delay or prevent further investigation and possible prosecution.

Statutes of Limitations

Jurisdictions considering testing many older SAKs must also consider what their testing policy will be if the statute of limitations in a case has run out. The statute of limitations for sexual assault depends on the type of assault and varies across jurisdictions. In California, for example, there is a 10 year statute of limitations on sexual

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assault, but a recent law lifts this deadline if a DNA profile of a suspect is determined within two years of the assault.

In Dallas, the police department stored untested evidence in thousands of sexual assaults as far back as the 1980s. Yet the statute of limitations issue is complicated in Texas. During the 1980s and 1990s, the statute of limitations was five years. In 2001, however, the law was changed. Now, there is no statute of limitations in sexual assault cases if suspect DNA is present. If there is no DNA evidence, however, the statute of limitations is 10 years. Although the statutory change allows the prosecution of cases that occurred after September 1, 1996, most of the evidence stored in Dallas is from sexual assaults that occurred in Texas before 1996.

If a case cannot be prosecuted because the deadline for filing has passed, is it a wise use of resources to have the SAK evidence tested? Some proponents of testing all SAKs argue that, even if a case cannot be prosecuted or the victim does not want to move forward, the evidence should nonetheless be tested to determine if the suspect might have committed other sexual assaults. Evidence of prior, adjudicated sexual

assaults may also be considered in investigations and sentencing resulting from current prosecutions. Others argue that cases should be pursued, even if the statute of limitations has run, as a way to provide some resolution to victims. It goes without saying that decisions in these various scenarios will likely be influenced by resources.

The Road Ahead

Ultimately, victims are at the heart of this latest challenge for our criminal justice system. Delays in evidence being sent to a lab as well as delays in analyzing evidence and conducting police investigations result in delays in justice. In worst case scenarios, this can lead to additional victimization by serial offenders or the incarceration of people who are wrongly convicted of crimes. When this happens, it is devastating not only for the wrongfully convicted person and the victim, but it also means that the true perpetrators remain free. (See www.ojp.usdoj.gov/nij/journals/262/postconviction.htm for the story, in the *NIJ Journal*, of one exonerated man.)

As the nation grapples with the realization that there are thousands of older sexual assault kits in storage, it is crucial that we balance justice, public safety, and the needs of crime victims. However, developing

scientific evidence to determine which approaches are the most effective—solving the most crimes with the greatest efficiency, considering current fiscal realities—will take time. The goal, of course, is to move beyond the “crisis management” of the moment to the adoption of research-based practices, procedures and protocols.

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Nancy Ritter is a writer with the National Institute of Justice, which is the research, technology, and evaluation arm of the U.S. Department of Justice. Prior to joining NIJ, Nancy was an award-winning legal journalist. She has worked in the criminal justice field for 35 years, and can be reached at nancy.ritter@usdoj.gov.

“This book will provide the foundation to assist campuses in the development of a comprehensive plan to address sexual assault.”

—The California Coalition Against Sexual Assault

Campus Sexual Assault Response Teams

Program Development and Operational Management

Donna M. Barry, APN, FN-CSA and Paul M. Cell, Chief of Police, Montclair State University

A National Institute of Justice study* estimates that more than 50,000 rapes will take place this year on college campuses.

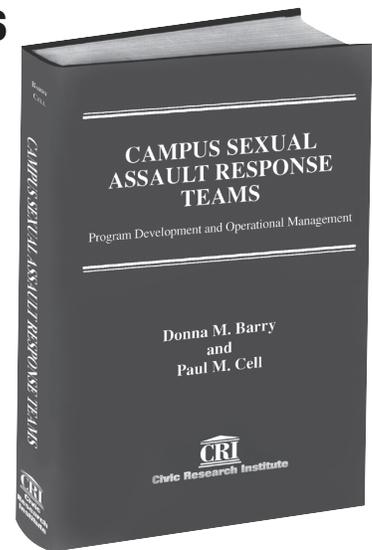
Are you ready to respond?

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