

**REPORT OF THE GEORGIA SUPREME COURT
COMMISSION ON EQUALITY**

*The Georgia Justice System's Treatment of Adult Victims
of Sexual Violence: Some Problems and Some Proposed
Solutions*

Introduction

The Commission spent the last year examining the legal system's treatment of adult sexual violence victims. This report discusses the Commission's findings regarding some of the problems and potential solutions to problems faced by adult sexual violence victims. The report looks at problems and solutions in all phases of a case: the investigatory stage; the charging and indictment phase; the pre-trial phase; at trial and post-trial. Many of the ideas and suggestions in this report are a result of a July 26, 2002 roundtable meeting of prosecutors, defense attorneys, victim advocates, judges and scholars. The following people attended the meeting and their input and suggestions have been greatly appreciated:

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I. THE INVESTIGATORY STAGE

A. Problems in the Investigatory Stage

An overall problem at this stage of a case is lack of victim reporting. Victims' advocates and scholars note that many rape victims do not report the rape,¹ in part, because of perceptions that the system will not treat them well. The Commission identified two specific areas in which victims' treatment during the investigatory stage of a case could be improved: the victim's forensic examination, and the initial police investigation of the reported crime.

Participants in the July 26, 2002 Roundtable discussion² identified three main problems that occur during a sexual violence victim's physical examination. First, victims are being billed for rape kits despite the fact that a statute requires the "law enforcement agency investigating the crime to pay for the cost of the medical examination to the extent the expense is incurred for the limited purpose of collecting evidence." O.C.G.A. § 16-6-1(c) (1996).³ Victims' advocates and prosecutors report that there often is a dispute among the District Attorney, County, and Police Department about who is responsible for paying for the rape kit and there is no funding in law enforcement budgets for rape kits. Second, many victims feel they have no dignity after a forensic examination because they are left without any clothes, and are not given a toothbrush or other toiletry items. Finally, there is a lack of health care professionals trained in forensic evidence collection and a lack of health care professionals trained to deal with victims of sexual assault. Many counties do not have Sexual Assault Nurse Examiners (S.A.N.E. nurses).⁴

¹ Surveys both in Georgia and nationally indicate a much higher incidence of rape than is reported. F.B.I. figures (1998) estimate that in the United States a rape occurs every 6 minutes, with southern states having the highest rate of rape in the nation.

² As stated in the introduction to this report, Georgia prosecutors, victims' advocates, criminal defense attorneys, judges and scholars participated in a day-long roundtable discussion on July 26, 2002. The discussion looked at all phases of a sexual violence claim and problems and potential solutions were discussed by roundtable participants.

³ See e.g. Lucy Soto, *Some Rape Victims Being Charged for Exams*, Atlanta Journal Constitution, page B1, March 5, 2001 (noting that despite a 1996 law requiring law enforcement to pay the bill for rape kits, at least three Georgia Counties are billing victims for forensic exams in rape and sodomy cases.)

⁴ For a detailed explanation of how S.A.N.E. programs operate and the efficacy of the programs, see Linda E. Ledray, *Evidence Collection and Care of the Sexual Assault Survivor: the SANE-SART Response*, August 2001, available from the Violence Against Women Online Resources website: www.vaw.umn.edu.

Roundtable participants also observed that many police officers are not adequately educated and trained about what is a rape. Some officers do not recognize or credit accounts of acquaintance rape or “bad neighborhood” rape. Also, many officers are not aware of various cultural issues confronting sexual assault and rape victims. Finally, victims’ advocates report that often police officers decide who gets a rape kit based upon whom they believe.

B. Solutions to Problems in the Investigatory Stage

To solve some of the problems occurring during a victim’s forensic examination, the Commission makes the following recommendations. First, the Commission recommends that the state legislature authorize state funding for rape kits. Second, the Commission recommends that the state legislature authorize funding to train S.A.N.E. nurses so that in each county, evidence in sexual crime cases can be gathered by specially trained nurses who do not work for law enforcement agencies. Case studies and testimonial evidence indicate that S.A.N.E. programs help ensure that police obtain records of exams in a more timely fashion, shorten the wait time for the victim in the emergency room, provide victims with additional assistance resources and support, result in better forensic evidence collection, and help prosecutors prove their case at trial.⁵ Third, the Commission recommends that the state legislature provide funding so that after a rape exam, a victim is given emergency contraception⁶ and antibiotics for Sexually Transmitted Diseases (S.T.D.s) instead of being given a prescription for these drugs.⁷

⁵ See Ledray, *supra.*, note 4 at 3-4.

⁶ It should be noted that emergency contraception is different from RU486 (the so-called “abortion drug”). Emergency contraception is a hormonal medication that, if taken within 72 hours of sexual intercourse, is between 75 to 89 percent effective in preventing pregnancy. It creates an inhospitable environment for fertilization to occur and will have no impact on an existing pregnancy. RU-486 is a drug that causes medical or chemical abortion in pregnant women if taken within 49 days from the first day of the last menstrual period. RU486 blocks receptors of progesterone, a hormone needed to maintain pregnancy.

⁷ Victims may seek reimbursement for medical costs associated with sexual assault, such as a pregnancy test, test for HIV, emergency contraception, and treatment for injuries through the Victim’s Compensation Fund. However, because the Victim’s Compensation Fund covers victims of all crimes, there are several stipulations for recovering money. See O.C.G.A. § 17-15-8 (2002). Additionally, the victim must complete a relatively lengthy application and the application must be investigated and approved by the compensation fund board. See O.C.G.A. § 17-15-6 (1996). These requirements seem unduly burdensome when an uninsured sexual violence victim merely seeks to cover the cost of a pregnancy test, HIV test, emergency contraception and antibiotics to treat S.T.D.s. Thus, the Commission recommends that the legislature or the Victim’s Compensation Board of the Criminal Justice Coordinating Council develop a simplified application form and process so that either the victim or the health care provider may seek reimbursement for the cost of a pregnancy test, HIV test, emergency

Fourth, the Commission recommends that the state or other public or private agencies provide hospitals with spare clothes, toothbrushes and toiletry items to give to victims after the rape examination. Finally, the Commission recommends that rape crisis volunteers be given additional training that specifically addresses dealing with victims' emotional needs.

To deal with some of the problems occurring during the police investigation of a sexual violence crime, the Commission makes the following recommendations. The Commission recommends that instead of allowing the first responder (officer) to decide if a rape kit is warranted, all officers should be instructed that upon receiving a complaint, they must offer the victim the option of having a rape kit prepared as long as the complaint is made within 72 hours of the alleged rape.

The Commission also recommends that law enforcement officers be educated about the existing protocol for gathering evidence in rape cases. They should understand the need to follow that protocol,⁸ and police and prosecutors should review and update the existing protocol. For example, the existing protocol does not cover how to investigate and deal with the presence of date rape drugs. Nor does the protocol suggest that if the scene will not be investigated by the forensics crime unit, the first responder needs to do the necessary photography, canvass the neighborhood for witnesses, and otherwise collect and record evidence at the scene.⁹

The Commission further recommends that police officers' continuing education programs include mandatory continuing education on sexual assault. These continuing education programs should include information that will educate officers about what legally constitutes the criminal offense of rape (i.e. that acquaintance rape is a rape) and about cultural issues rape victims face. The training should encompass training about cultural issues arising in Georgia's many diverse racial and ethnic communities. Additionally, the content of sexual violence victim training in the police academy should be periodically reviewed and updated.

contraception and antibiotics given to treat S.T.D.s in cases where the claim is due to a crime of sexual violence.

⁸ The existing protocol, *The Georgia Protocol for Responding to Victims of Sexual Assault*. Georgia Protocol was developed by the Protocol Committee of the Georgia Sexual Assault Task Force and published in 1997. It has recommended guidelines for victim support services, law enforcement, sexual assault examination and evidence collection and prosecution.

⁹ In reviewing and updating *The Georgia Protocol for Responding to Victims of Sexual Assault*, *supra.*, note 8, police and prosecutors might consider developing a protocol that allows for a more evidence-based (less victim-dependent) prosecution, such as the protocol set forth in O.C.G.A. § 17-4-20.1 (1996), the primary aggressor family violence statute.

Finally, the Commission recommends that law enforcement preserve rape kits and other evidence for later testing.¹⁰

II. THE CHARGING/INDICTMENT PHASE

A. Problems in the Charging/Indictment Phase

The July 26, Roundtable discussion group identified numerous problems that occur during the charging and indictment phase of a sexual violence crime case. First, victims sometimes do not immediately report the crime, and this makes gathering evidence more difficult. Second, the number of health care professionals trained in forensic evidence collection is inadequate. Third, police do not gather enough evidence. They often do not go to the scene and do the necessary photography, and they do not canvass for potential witnesses. Instead, they rely only on the victim and the medical reports. The lack of evidence makes charging and indictment much more difficult. Finally, sometimes police officers make their own assessments about whether there is enough evidence to charge and about whether the victim is credible and thus whether they should investigate fully. The fact that the victim is perceived to be using drugs or alcohol, or that drugs or alcohol are present at the scene, may impact the investigation, charging and trial. Sometimes, officers fail to investigate, or investigate fully, or fail to charge an alleged perpetrator when they perceive that a victim has been using drugs or alcohol. Thus, sometimes prosecutors never have an opportunity to decide whether a case should be investigated and whether an alleged perpetrator should be charged or indicted.

Roundtable participants agreed that sometimes inadequate communication between the District Attorney and the victim before charging results in cases being over-charged or under-charged. Under-charging and plea bargaining to simple battery often occurs, and this means that the defendant does not end up in the registry of sexual offenders. Prosecutors sometimes over-charge with rape when the behavior is actually a sexual battery. The over-charging then leads to delays in the processing of the case and the inability of the defendant to get bond.

Prosecutors also noted that they sometimes experience a lack of victim cooperation. Victims sometimes retract their statements, or decide they do not want to file charges. Victims' advocates report that this lack of cooperation is often due to victims' encounters with the first responder. In some cases, lack of cooperation is also due to the fact that victims feel stigmatized by rape and, in many cultures, sexual violence victims are actually stigmatized by their family and friends.

¹⁰ Law enforcement is responsible for preserving the sexual assault kit except in cases where there has been a trial and the kit has been tendered into evidence. In those cases, it is the responsibility of the Superior Court Clerk to preserve the sexual assault kit.

B. Solutions to Problems in the Charging/Indictment Phase

The Commission recommends that police officers be trained to investigate and document victims' drug and alcohol use, but not to cut off the investigation simply because a victim has been drinking or using drugs. Officers should also be educated about the existing case law that says a victim who is too impaired by alcohol or drugs is incapable of consent to sexual intercourse.¹¹ Officers also should be trained to recognize the signs and symptoms of date rape drugs and to request that doctors immediately test for the presence of those drugs, because the symptoms of date rape drugs mirror the symptoms of extreme intoxication.

According to the Georgia Bureau of Investigation, (GBI) in 2003, some of the most common "date rape" drugs include Gamma Hydroxybutyrate (GHB), Butendiol and GBL.¹² Numerous other drugs are also used for date rape, including Ketamine and Rohyphnol a.k.a. Flunitrazepam or "Roofies".¹³ All these "date rape" drugs incapacitate victims and facilitate the crime of rape. General signs that a "date rape" drug has been used include: the appearance of intoxication disproportionate to the amount of alcohol consumed, unexplained drowsiness and impaired motor coordination, dizziness, confusion, impaired judgment and loss of inhibition, and anteretrograde amnesia which "may prevent the assault victim from remembering the assault even if she was conscious throughout the ordeal".¹⁴

¹¹ See, e.g. *Evans v. State*, 67 Ga. App. 631, 632, 21 S.E.2d 336, 337 (1942) (noting that "[t]he act of sexual intercourse is against the woman's will (and thus without her consent) when, from any cause, she is not in a position to exercise any judgment about the matter. Thus, intercourse with a woman whose will is temporarily lost from intoxication, or unconsciousness arising from the use of drugs or other cause, or sleep, etc. is rape."); accord, *Paul v. State*, 144 Ga. App. 106, 240 S.E.2d 600 (1977).

¹² This information was obtained in a January 21, 2003 telephone conversation with Robert Ollis, Technical Leader of the GBI Chemistry Section.

¹³ This information was obtained in a January 22, 2003 conversation with GBI agent H. Horton McCurdy, PhD. Mr. McCurdy works in the GBI Division of Forensic Science. For a list of other potential date rape drugs, see, Marc LeBeau, et al, *Recommendations for Toxicological Investigations of Drug Facilitated Sexual Assaults*, J. FORENSIC SCIENCES, 227, 229 (1999). Additional information about date rape drugs can be found at the following websites: www.doj.state.wi.us/dne/drug_trends/trends3.asp; (hereafter State of Wisconsin DOJ Report) www.usdoj.gov/dea/pubs/cngrtest/ct990311.htm. (hereafter DEA Congressional Testimony).

¹⁴ See, State of Wisconsin DOJ Report, *supra.*, note 13; LeBeau, et al *supra.* note 13 at 228.

In fact, the amnesia caused by these drugs often leads to a delay in reporting the assault and thus an inability to detect the drug's presence. It also often makes it difficult for a victim to identify her attacker or even remember what happened.¹⁵

All the "date rape" drugs pass through the victim's system very quickly. The GBI recommends that, at the outside, for GHB, Butanediol and GBL, blood tests must be performed no later than 2 to 4 hours after ingestion and urine samples obtained no later than 4 to 6 hours after ingestion.¹⁶ Because flunitrazepam metabolizes more slowly, it can be detected in a urine sample collected within 72 hours of ingestion.¹⁷ The quicker the urine and blood samples are obtained, the greater the likelihood the drugs will be detected. However, some scientists recommend collecting urine samples up to 4 days after an assault and blood samples up to 24 hours after an assault because trace amounts of the "date rape" drugs may be found in these samples.¹⁸

The Commission notes that part of the problem with many of the "date rape" drugs is that the drugs are easily accessible, and in some cases, possession of the drugs is not even illegal. For example, although GHB is a Schedule I narcotic,¹⁹ GBL is not listed as a scheduled narcotic although it is federally listed so that its distribution is monitored. However, Butanediol is readily available over the counter. Both GBL and Butandiol are solvents with industrial use, thus their possession is not illegal. The GBI would like to see legislation enacted that makes it a felony drug offense to possess and distribute GBL and Butanediol for human consumption.²⁰

¹⁵ Conversation with GBI Agent Ollis, *supra.*, note 12.

¹⁶ *Id.*

¹⁷ See DEA Congressional Testimony, *supra.*, note 13

¹⁸ LeBeau, et al, *supra.*, note 13 at 228. The scientific literature should be reviewed to create guidelines for the type and time frame of evidence collection. For example, the LeBeau article notes that urine samples should be refrigerated immediately after collection, and blood samples "should be collected in a container with preservatives, such as a grey top tube containing sodium fluoride and potassium oxalate and be stored in a refrigerated condition." The article also notes that some scientists also recommend that further study regarding the efficacy of using hair and sweat samples to detect a one time dosage of the "date rape" drugs because hair and sweat may contain trace amounts of the drug for a much longer period of time than blood or urine.

¹⁹ O.C.G.A. § 16-13-25. Illegal possession and distribution of a Schedule I narcotic is a felony punishable with a minimum five year prison term. *See*, O.C.G.A. § 16-13-30 (1996).

²⁰ Conversation with GBI Agent Ollis, *supra.*, note 12. Agent Ollis noted that in the 2002 legislative session, the GBI proposed legislation that would make possession and distribution of these drugs for human consumption a Schedule II felony.

To help deal with some of the problems caused by “date rape” drugs, the Commission recommends educating emergency room physicians, law enforcement officers, and S.A.N.E. nurses about the various date rape drugs and their symptoms. The Commission further recommends that all evidence collection kits contain urine collection containers and that rape investigation protocols call for immediately obtaining blood and urine samples to test for the “date rape” drugs if there is any possibility that they may have been used. The Commission also recommends that the legislature consider adopting the GBI’s proposed legislation that would make it a felony offense to possess and distribute GBL and Butanediol for human consumption. Finally, the Commission advocates widespread community education about these drugs and ways to avoid ingesting them.

To help with charging decisions in sexual violence cases, the Commission recommends that District Attorney offices have immediate contact with the victim - either at the police station or immediately after the defendant’s arrest. The contact should occur before the bond motion and charging in order to help the D.A. determine the appropriate charge.

III. PRE-TRIAL

A. Problems in the Pre-Trial Phase

The Commission found that problems in the pre-trial phase could be broken into three main categories: the time involved in processing cases; lack of victim notification about pre-trial proceedings; and problems arising when there is contact between the victim and the accused. Each of these problems is discussed below.

The Roundtable discussion group noted that one problem during the pre-trial phase is the length of time between charging and trial, especially in cases where there are multiple continuances. This results in a victim who gets discouraged about having to come to court so many times and ends up not wanting to prosecute. It also means that an accused, who is unable to make bond, may end up serving a full sentence even if eventually acquitted. The Commission notes that these problems are commonly due to a lack of statutory time limits for prosecution of these cases.

Another problem in the pre-trial phase is poor communication between victims and prosecuting attorneys’ offices. Often, victims are not notified about the defendant’s bond hearing or release on bond.²¹ The Roundtable participants noted that despite O.C.G.A. § 17-17-5, (1996) victims often do not get notice of a plea bargain, dismissal or other outcomes. In part, this is attributable to the fact that O.C.G.A. § 17-17-5 only requires that notification be given via “land line” and does not provide for notification via

²¹ Defense attorneys note that the D.A.’s sometimes use lack of contact with the victim as an excuse for delaying the bond hearing.

cell phone, pager, fax or e-mail.²² Thus, sometimes even when the prosecuting office attempts to notify the victim about a plea bargain, dismissal or other case outcome, the victim does not receive notification if she does not have a land line phone or is no longer at the same phone number.

The final pre-trial phase problem identified by the Roundtable participants is that of contact between the victim and the accused. Prosecutors note that victim-initiated contact hurts the prosecution's case. They also note that defendant-initiated contact does not raise a bond revocation problem unless the contact is violent or unless there is a special "no contact" condition of bond. Further, the accused often encourages third party contact to discourage the victim from prosecuting.

B. Solutions to Problems in the Pre-Trial Phase

The Commission recommends that the issue of delay in case processing be addressed through the Council of Superior Court Judges' Case Management Subcommittee. The Commission suggests that this Subcommittee devise rules on status hearings and time lines for various phases of the prosecution of crimes involving sexual violence. The Commission also recommends that the state legislature consider that inadequate indigent defense spending may have a negative effect on sexual violence cases; inadequate representation may cause these cases to move more slowly through the system.

The Commission also recommends that O.C.G.A. § 17-17-5, which requires notification of the victim about bond hearings, be amended to provide for notification via cell phone, pager, fax and e-mail, in addition to land lines. The statute should also specifically identify who is responsible for notifying victims about plea bargains, dismissals or other case outcomes.²³ Whichever government agency is responsible for victim notification under O.C.G.A. § 17-17-5 should be given the resources necessary to help them comply with this statute.

Georgia already has Victim's Information and Notification Everyday (V.I.N.E), a computerized network that automatically notifies victims when, after a trial, an offender is coming up for parole, is released from prison, or escapes from custody. It is an automated system that will continue to call the victim until it succeeds in contacting the victim. The Commission recommends that the current V.I.N.E. be enhanced to create a

²² The statute states that notification is not required unless "the victim provides a landline telephone number other than a pocket pager or electronic communication device number to which such notice can be directed." O.C.G.A. § 17-7-5 (1996).

²³ Currently, the statute merely states that "The investigating law enforcement agency, prosecuting attorney or custodial authority who is required to provide notification pursuant to this chapter shall advise the victim of his or her right to notification . . ." O.C.G.A. § 17-17-5(b) (1996). The statute does not explicitly state which state agency is responsible for victim notification.

separate automated system that is designed to notify victims of sexually violent crimes about their alleged perpetrator's bond hearing and pre-trial release. This would help effectuate the intent of O.C.G.A. § 17-17-5 and would address victims' concerns about not knowing the incarceration status of their alleged perpetrator.

To address some of the problems of contact between the accused and the victim, the Commission recommends judicial education about a "no contact" special condition of bond, including education about the fact that a special condition of bond must explicitly include a provision that the accused must not ask third parties to contact the victim.

IV. PROBLEMS AT TRIAL

A. Problems at Trial

The Commission found that in Georgia, at least four problematic areas exist during the trial of sexual violence cases: voir dire; juror misconceptions about sexual violence crimes and victims; problems with proof related to the existing rape statute; and problems with other sexual violence statutes. Problems and proposed solutions in each of these areas are discussed below.

1. Voir Dire

Prosecutors and defense attorneys both observed that in sexual violence cases, potential jurors are hesitant to talk in open court about their experiences with regard to sexual violence crimes. Also, potential jurors may be reluctant to express in open court some strongly held beliefs such as a belief that only stranger rape is a rape or that women who wear suggestive clothing or drink to much are "asking for it". In addition to juror reluctance to discuss personal beliefs and information in open court, voir dire efforts are often hampered by judges. Because judges have the discretion to limit voir dire, many judges, concerned with judicial efficiency, often do not allow more than basic information to be elicited during voir dire.

2. Juror perceptions

In addition to problems with voir dire, prosecutors note that they must often overcome jurors' preconceived notions about rape victims and criminal trials. For example, many jurors expect a traumatized victim, something jurors may not see given that in many cases, the rape occurred months, if not years, before the trial. Also, due to television shows and the media, jurors expect a lot of evidence, such as D.N.A. samples, hair samples, and other physical evidence. Often, this evidence does not exist. For example, if a rape is not immediately reported, it is unlikely that a prosecutor will have access to a lot of physical evidence.

In addition to overcoming juror expectations about the victim and evidence, prosecutors must confront jurors' ingrained attitudes and biases. For example, many jurors believe that a prostitute cannot be raped or that the only "real" rape is stranger

rape. Additionally, prosecutors have found that juries are unwilling to convict in acquaintance rape cases because of the harsh sentence.

3. *Problems with the current rape statute*

Another problem confronting prosecutors is the current rape statute. Prosecutors note that although Georgia case law defines consent,²⁴ force,²⁵ the statute fails to define these key terms. For example, in Georgia, there is case law that holds that a victim may be too impaired to consent.²⁶ However, many prosecutors do not rely on this case law, and in some counties, prosecutors and judges are unfamiliar with this case law.

Roundtable participants also noted that the ten-year mandatory, minimum sentence for rape often is the reason for acquittal or dismissal or a plea bargain to a lesser charge. If a case is not perceived as strong, either due to a lack of physical evidence or because of a jury's possible preconceived notions about acquaintance rape or what a victim should look like or how a victim should behave, many prosecutors would rather take a plea to a lesser offense than risk an acquittal.

4. *Other problems*

One final problem identified by the Commission is that the statute dealing with sexual assault on a person in custody (school or prison), O.C.G.A. § 16-6-5.1(1996) does not encompass oral sex.

B. Solutions to Problems at Trial

1. *Solutions to problems with voir dire*

The Commission recommends individual sequestered voir dire in which the judge asks the potential juror sensitive questions such as “were you or a member of your family ever a victim of sexual assault or accused of sexual assault?” or “were you or a member of your family ever accused of a crime of sexual violence?”. The Commission believes that the judge, rather than the attorneys, should ask certain sensitive questions such as those stated above for two main reasons. First, the judge should serve as a gatekeeper in

²⁴ For example, the case law holds that consent induced by force or fear of intimidation does not constitute consent. *See, e.g., Pierce v. State*, 230 Ga. 766,768, 199 S.E.2d 235, 236 (1973).

²⁵ For example, in *McNeal v. State*, the Georgia appellate court noted that “force is an element of the crime of rape but it may be exerted not only by physical violence but also by threats of serious bodily harm which overpower the female.” *McNeal v. State*, 228 Ga. 633, 635 187 S.E.2d 271, 273 (1972) (quoting *Vanderford v. State*, 126 Ga. 753, 55 S.E. 1025 (1906))

²⁶ *See*, cases cited in note 11, *supra*.

determining which sensitive questions are appropriate to ask. Second, when the questions are asked by the judge, rather than the attorneys, it takes the onus of invading the juror's privacy off the attorneys so that a prospective juror does not become upset with an attorney for breaching the juror's privacy.

In addition to sequestered individual voir dire, the Commission recommends that judges allow more in-depth voir dire in sexual assault cases so that attorneys may attempt to determine if potential jurors have ingrained stereotypes or biases about sexual assault cases or about sexual assault victims.²⁷

2. *Solutions to juror (i.e. public) perceptions about rape*

Juror perceptions about rape are actually a societal problem.²⁸ The Commission believes that education is the key to changing societal attitudes about rape and sexual violence crimes. Thus, the Commission recommends that starting in high school, Georgians should be educated about what a rape is. The education should also include information to counteract societal stereotypes so that young people begin to understand that acquaintance rape is rape, and that there is neither a "typical" rapist or rape victim nor is there a way that a rape victims "should act". The Commission notes that O.C.G.A. § 20-2-314 (1996) states that the State Board of Education shall develop, by the start of the 2000-01 school year, a rape prevention and personal safety education program for grades 8 through 12 which is consistent with the core curriculum. The statute states that local boards shall be encouraged to implement the program for any grade level they find appropriate. The statute further provides that the state board shall make the information regarding such program available to the Board of Regents of the University System of Georgia.

The Commission recommends that the State Board of Education insure compliance with this statute. Additionally, the State Board of Education should encourage schools to insure that any rape prevention program encompasses information designed to counteract stereotypes and misconceptions about what a rape is, who can be a rapist or rape victim and how rape victims should act. Additionally, the Commission recommends that education about rape laws and acquaintance rape be added to all college orientation programs.

²⁷ Note that the Georgia Protocol for Responding to Victims of Sexual Assault at pages 68-70 has a list of sample voir dire questions for prosecutors. The questions are designed to help identify jurors who hold stereotypical views of rape and rape victims.

²⁸ For a discussion of the stereotypes and biases that may impact jurors' decision-making in sexual violence cases, see, e.g. Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 Fla. L. Rev. 487 (1991); Morrison Torrey: *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013 (1991); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. Cal. L. Rev. L & Women's Stud. 387 (1996).

Finally, the Commission also recommends that the Law Related Education Consortium develop an on-going public education campaign, with public service announcements, aimed at educating the public about sexual assault and counter-acting stereotypes about rapists and rape victims.

3. Solutions to problems with the current rape statute

To help address the fact that the current rape statute does not incorporate case law, the Commission recommends that the Standing Committee on Pattern Jury Instructions revise the pattern jury instructions in rape cases. For example, Roundtable participants noted Georgia case law holds that the prosecution does not need to prove there was vaginal trauma and physical injury to the victim.²⁹ However, prosecutors noted that the jury is not always instructed on this law, even when a prosecutor believes such an instruction is appropriate, because judges have the discretion about whether to include case law in a jury instruction. Rather than amending the statute, the Commission recommends the pattern jury instructions be re-written to incorporate the existing case law that explains terms such as penetration, consent, force, “against the victim’s will” and that the instructions include language from the case law that notes a victim may be too impaired to be capable of consent.

The Commission recognizes that because of the mandatory minimum sentence in rape cases, many rape cases are pled as misdemeanor cases.³⁰ Although the evidence is only anecdotal at this point, both prosecutors and defense attorneys at the July 26 Roundtable discussion felt that the mandatory minimum sentence often leads to less prosecutions and convictions because the stakes are so high that defendants are willing to risk a trial. Thus, prosecutors often feel compelled to reduce a rape case to a misdemeanor plea in order to insure a conviction. When a defendant is allowed to plead to a misdemeanor, the defendant receives a much lighter sentence, or in some cases, just probation. Additionally, a plea to a misdemeanor means that a defendant is not listed in the Georgia Sexual Offender Registry. To remedy these problems, and give prosecutors more options, the Commission recommends that the legislature make the crime of sexual battery, O.C.G.A. § 16-6-22.1 (1996), a felony. In order to avoid the problems currently created by the mandatory minimum sentence for rape cases, the Commission recommends that felony sexual battery not carry a ten-year mandatory, minimum sentence.

²⁹ See, *Searcy v. State*, 158 Ga. App. 328, 329, 280 S.E.2d 161, 162 (1981).

³⁰ See, e.g. Norman Arey, *Sex Conviction Leaves Athlete at Play, Victim Dazed at Home*, Atlanta Journal Constitution, Nov. 10, 2002 page B1. (Noting that in a case in which a 15-year-old girl was raped by a 17-year-old acquaintance, the Whitfield County District Attorney allowed the rapist to plead to misdemeanor sexual battery and statutory rape. This plea was offered despite the fact that the D.A. believed the victim’s story and believed that there was an element of force involved. The D.A. explained that the plea happened because “we thought a 10-year sentence for a 17-year-old was not the right thing even though we believe the element of force was utilized.”)

4. Solutions to other problems

The Commission recommends that the legislature amend O.C.G.A. § 16-6-5.1 (1996), the statute making sex with a person in custody a crime, so that the statute includes oral sex.

V. POST-TRIAL PROBLEMS

A. Problems Occurring After the Trial

Roundtable discussion participants noted that there have been problems with the Georgia Sex Offender Registry. The G.B.I. has had inadequate staffing for the sex offender registry; the registry does not have photos; and there is poor enforcement of the registry requirements (e.g. updating addresses, follow-up on reporting change of address by offenders). The Roundtable discussion group also noted that in some cases, special conditions of probation are not being fully enforced.

B. Solutions to Post-Trial Problems

The G.B.I. recently added two staff members to help with the Sexual Offender Registry. It also has figured out a way to get photos into the registry. These developments may solve the problems set forth above. At this point, the Commission recommends that no further action be taken to solve the problems with the sex offender registry. However, the Commission recommends that the registry be monitored to see if the additional staff members fix the problems with enforcement and follow-up.

The Commission also recommends that parole and probation officers fully enforce any special conditions of probation.

VI. ADDITIONAL SUGGESTION

In addition to the recommendations set forth above, the Commission strongly recommends that the Department of Human Resources' Women's Health Division periodically review and update the Georgia Protocol for Responding to Victims of Sexual Assault. The Commission further recommends that the Women's Health Division provide training for those expected to use the protocol.

Appendix – SUMMARY OF RECOMMENDATIONS

Recommendations for Investigatory Phase

- * The state legislature should authorize state funding for rape kits;
- * The state legislature should authorize funding to train S.A.N.E. nurses;
- * The state legislature should provide funding so that after a rape exam, a victim is given emergency contraception and antibiotics for Sexually Transmitted Diseases (S.T.D.s) instead of being given a prescription for these drugs;
- * The state or other public or private agencies should provide hospitals with spare clothes, toothbrushes and toiletry items to give to victims after the rape examination;
- * Rape crisis volunteers should be given additional training that specifically addresses dealing with victims' emotional needs;
- * Instead of allowing the first responder (officer) to decide if a rape kit is warranted, all officers should be instructed that upon receiving a complaint, they must offer the victim the option of having a rape kit prepared as long as the complaint is made within 72 hours of the alleged rape;
- * Law enforcement officers should be educated about the existing protocol for gathering evidence in rape cases and the need to follow that protocol;
- * Police and prosecutors should periodically review and update the existing protocol;
- * Police officers' continuing education programs include mandatory continuing education on sexual assault. These continuing education programs should include information that will educate officers about what legally constitutes the criminal offense of rape (i.e. that acquaintance rape is a rape) and about cultural issues rape victims face. The training should encompass training about cultural issues arising in Georgia's many diverse racial and ethnic communities. Additionally, the content of sexual violence victim training in the police academy should be periodically reviewed and updated; and
- * Law enforcement should preserve rape kits and other evidence for later testing.

Recommendations for the Charging/Indictment Phase

- * Police officers should be trained to investigate and document victims' drug and alcohol use, but not to cut off the investigation simply because a victim has been drinking or using drugs;

- * Officers should also be educated about the existing case law that says a victim who is too impaired by alcohol or drugs is incapable of consent to sexual intercourse;
- * Officers also should be trained to recognize the signs and symptoms of date rape drugs and to request that doctors immediately test for the presence of those drugs, because the symptoms of date rape drugs mirror the symptoms of extreme intoxication;
- * Emergency room physicians and S.A.N.E. nurses should also be educated about the various date rape drugs and their symptoms;
- * All evidence collection kits should contain urine collection containers and rape investigation protocols should call for immediately obtaining blood and urine samples to test for the “date rape” drugs if there is any possibility that they may have been used;
- * The legislature should consider adopting the GBI’s proposed legislation that would make it a felony offense to possess and distribute GBL and Butanediol for human consumption;
- * There should be widespread community education about the “date rape” drugs and ways to avoid ingesting them; and
- * District Attorneys’ offices should have immediate contact with the victim - either at the police station or immediately after the defendant’s arrest. The contact should occur before the bond motion and charging in order to help the D.A. determine the appropriate charge.

Recommendations for the Pre-Trial Phase

- * The issue of delay in case processing should be addressed through the Council of Superior Court Judges’ Case Management Subcommittee. The Commission suggests that this Subcommittee devise rules on status hearings and time lines for various phases of the prosecution of crimes involving sexual violence;
- * The state legislature should consider that inadequate indigent defense spending may have a negative effect on sexual violence cases. It should note that inadequate representation may cause these cases to move more slowly through the system;
- * O.C.G.A. § 17-17-5, the statute that requires notification of the victim about bond hearings, should be amended to provide for notification via cell phone, pager, fax and e-mail, in addition to land lines. The statute should also specifically identify who is responsible for notifying victims about plea bargains, dismissals or other case outcomes. Whichever government agency is responsible for victim notification under O.C.G.A. § 17-17-5 should be given the resources necessary to help them comply with this statute;

- * The current V.I.N.E. should be enhanced to create a separate automated system that is designed to notify victims of sexually violent crimes about their alleged perpetrator's bond hearing and pre-trial release; and
- * There should be judicial education about a "no contact" special condition of bond, including education about the fact that a special condition of bond must explicitly include a provision that the accused must not ask third parties to contact the victim.

Recommendations for Trial

Voir Dire

- * There should be individual sequestered voir dire in which the judge asks the potential juror sensitive questions such as "were you or a member of your family ever a victim of sexual assault or accused of sexual assault?" or "were you or a member of your family ever accused of a crime of sexual violence?"
- * Judges should allow more in-depth voir dire in sexual assault cases so that attorneys may attempt to determine if potential jurors have ingrained stereotypes or biases about sexual assault cases or about sexual assault victims.

Public Perceptions About Rape

- * Starting in high school, Georgians should be educated about what a rape is. The education should also include information to counteract societal stereotypes so that young people begin to understand that acquaintance rape is rape, and that there is neither a "typical" rapist or rape victim nor is there a way that a rape victims "should act";
- * The State Board of Education should insure compliance with O.C.G.A. 20-2-314 (1996) which requires the State Board of Education to develop a rape prevention and personal safety education program for grades 8 through 12 which is consistent with the core curriculum and encourages local boards to implement the program for any grade level they find appropriate. The rape prevention program should include information designed to counteract stereotypes and misconceptions about what a rape is, who can be a rapist or rape victim and how rape victims should act; education about rape laws and acquaintance rape be added to all college orientation programs; and
- * The Law Related Education Consortium should develop an on-going public education campaign, with public service announcements, aimed at educating the public about sexual assault and counter-acting stereotypes about rapists and rape victims.

The Current Rape Statute

- * The Standing Committee on Pattern Jury Instructions should revise the pattern jury instructions in rape cases to incorporate existing case law that explains terms such as penetration, consent, force, “against the victim’s will”.
- * The revised pattern jury instructions should include language from the case law that notes a victim may be too impaired to be capable of consent;
- * The legislature should make the crime of sexual battery, O.C.G.A. § 16-6-22.1 (1996), a felony. In order to avoid the problems currently created by the mandatory minimum sentence for rape cases, the Commission recommends that felony sexual battery not carry a ten-year mandatory, minimum sentence.
- * The legislature should amend O.C.G.A. § 16-6-5.1 (1996), the statute making sex with a person in custody a crime, so that the statute includes oral sex.

Recommendations for post-trial

- * The Sexual Offenders Registry should be monitored to make sure that registry requirements (e.g. updating addresses, follow-up on reporting change of addresses by offenders) are enforced; and
- * Parole and probation officers should fully enforce any special conditions of probation.

Additional recommendations

- * The Department of Human Resources’ Women’s Health Division should periodically review and update the Georgia Protocol for Responding to Victims of Sexual Assault; and
 - * The Women’s Health Division should provide training for those expected to use the protocol.
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