

**Sexual Assault Prosecution Data
for the District of Columbia**

Submitted to the Executive Office of the Mayor
and
The City Council for the District of Columbia

by

Elisabeth Olds
SAVRAA Independent Expert Consultant

October 25, 2016

Executive Summary

The original SAVRAA Independent Consultant's report¹ evaluating the Metropolitan Police Department Sexual Assault Unit's (SAU) implementation of the Sexual Assault Victims' Rights Amendment Act (SAVRAA) found that while the SAU had changed dramatically since the 2013 Human Rights Watch report² that identified the need for SAVRAA, and continues to make significant strides to investigate reports from a victim-centered perspective, the remaining significant point of survivor and community frustration is targeted at the US Attorney's Office for the District of Columbia, Superior Court Division (USAO). Specifically, the initial report found a lack of transparency about the prosecutorial process, minimal communication or consistency about the reasoning behind decisions of declination made, and some cases being refused due to factors that might make a jury doubt the victim based on common societal myths about sexual assault, or so called "rape myths." However, it would be vastly overreaching to say that there were absolutely no cases in which the USAO went forward with a difficult sets of facts.

Consistent with the interviews conducted for the initial SAVRAA report, the testimony of multiple survivors at the Public Roundtable on the Sexual Assault Victim's Rights Amendment Act (SAVRAA), held before the Committee on the Judiciary on February 25, 2016, indicated the same pattern. There was an enormous disconnect between the survivors' view of their experiences, both of the assault itself as well as their interactions with the USAO, and the USAO's perception of those things. In fact, rather than refute the validity of victims' claims, the USAO's testimony actually gave further credence to the instances described in survivor testimony. This apparent gap led the USAO to implement changes in their process that they felt created more consistency in the warrant decision making process as well as broadening their communications with victims. However, the lack of transparency about case outcomes and communication with survivors within this process remain significant barriers to building survivor and community trust in the system as a whole.

Research about why survivors report cases and what they expect in that process shows that they have two primary concerns: being believed and therefore having their experience validated by the system, and preventing their assailant from harming others.³ In interviews with

¹ SAVRAA Independent Expert Consultant Report: The Metropolitan Police Department's Implementation of the Sexual Assault Victim's Rights Amendment Act of 2014 (SAVRAA)". August 14, 2015. <http://ovsig.dc.gov/page/savraa-independent-expert-consultant-reports>.

² Human Rights Watch, "Capitol Offense: Police Mishandling of Sexual Assault Cases in the District of Columbia," January, 2013. <https://www.hrw.org/report/2013/01/24/capitol-offense/police-mishandling-sexual-assault-cases-district-columbia>

³ Patterson, D. and Campbell, R. (2010). Why rape survivors participate in the criminal justice system.

survivors for the original MPD report, their primary expectations and concerns almost uniformly reflected the research results with 85% (22 of 26) of the survivors interviewed indicating in some that they viewed the system as a verdict on their credibility, and that they were extremely concerned about who else the suspect might harm if not stopped. One survivor expressed the issue in terms of losing their chance to be heard even if a jury ultimately might not convict the defendant, and another expressed it as losing their chance to prove themselves.

The purpose of this report is to provide an objective starting point for a more constructive dialogue about the prosecution process. The lack of transparency and communication by the USAO has contributed to the perception among advocates and survivors that the USAO's prosecution rate is extremely low. Meanwhile, the USAO routinely indicates through one-on-one interviews and in community meetings that they are working tirelessly to aggressively prosecute as many cases as possible. Hopefully, by making this data available, we can pinpoint objective areas for constructive discussion and potential change both in practice with survivors and in the working relationship between community-based advocates and the USAO for the benefit of survivors.

The questions this evaluation seeks to answer and the data this evaluation seeks to illuminate for advocates, survivors, other system actors and the public are the following: how many cases related to sexual assault are prosecuted each year in the District; how many reports of sexual assault are not prosecuted, whether through a declined warrant, a lack of charges ultimately filed after an arrest is made, or a dismissal of charges after they've been filed at any stage in the process; what are the stated reasons warrants are declined or court cases ultimately dismissed; and what can we do to ensure that the system functions in a more victim-centered way regardless of case status. This data is being provided as the best effort using disparate sources and should be viewed as the beginning of a dialogue.

The Sexual Assault Response Team (SART) can use the quantitative data provided here to answer the qualitative questions regarding a need for systemic reform as a group with the USAO's participation. This information can also be used to tailor training for detectives and prosecutors and can help formulate policies to the extent that those are effective in a bifurcated system like the District's where law enforcement, forensic nursing, forensic analysis and advocacy are local entities subject to local democratic processes and the prosecutor's office is under federal jurisdiction.

Findings

The following are a brief summary of the findings contained in this report:

- In 2015, MPD received 1,177 reports of sexual assault or crimes that had a sexual element to them to be investigated by the Sexual Assault Unit. Of those, 506 reports were classified as allegations, meaning they were not reported with enough facts at that time to apply a sexual assault classification yet under the DC Code, but could be upgraded after an investigation. An additional 671 reports were classified as sexual assaults by the SAU and therefore were eligible eventually to be presented to the USAO for prosecution.
- Based on the 671 sexual assault reports filed in 2015, the Metropolitan Police Department's Sexual Assault Unit arrested 189 people (16% of all reports made and 28% of reports made classified as assaults) for sexual assault of some degree, from misdemeanor sexual abuse up to first degree sexual abuse while armed.⁴ Of those arrested either after a warrant was signed or probable cause established on scene according to DC law, 55 (30%) never resulted in charges being filed and 124 (68.4%) cases did result in a case being filed in DC Superior Court.
- Of those 124 cases that were filed, 37 (30%) were dismissed after the defendant was charged⁵, 20 cases (16.3%) went to trial resulting in 14 guilty verdicts and 6 not guilty verdicts. Fifty-two (52) cases (41.8%) were resolved through a plea bargain and 10 cases remain undisposed or ongoing as of this writing.
- The SAU presented 235 warrants stemming from cases reported in 2015. The USAO approved 42 of these warrants and declined 161 of those warrants. The remaining 32 warrants are not traceable using the records available.
- Of 259 Physical Evidence Recovery Kits (PERKs) submitted as evidence linked to a police report in 2015, 166 of those cases were classified as offense reports, or in MPD parlance, assault reports. Of those 166 PERK-related reports, two were cases that went to trial and 14 were cases that ended in a plea bargain.
- Of the 129 cases documented by SANE Nurses in which drug facilitated sexual assault was suspected, 74 were reported to MPD. Of those 74 reports, 34 were classified as

⁴ This does not mean that the other cases will not result in arrests in 2016 or subsequent years, and in fact an additional 15 arrests were made as of July 2016 based on cases reported in previous years. Of those, 8 cases were initiated in 2015.

⁵ There were unusual or extenuating circumstances involved in some of these dismissals that will be discussed below. Therefore, this number should not be taken solely as an indication of the USAO's unwillingness or inability to pursue these cases.

offenses/assaults. Six of those cases were charged in court, and of those one went to trial and one was adjudicated through a plea bargain.⁶

- The most reliable academic estimates of prosecution rates indicate that 14% to 18% of all reported sexual assaults, from misdemeanors to first degree sexual assault or rape are prosecuted,⁷ while 37% of all assaults that would normally be classified as rape are prosecuted nationwide.⁸ Based on all of the above data provided, the District's prosecution rate, sometimes described as the attrition rate, is either 10.3% or 18%, depending on whether we use all reports to MPD as our base number or the 671 assault/offense reports only. If we look at conviction rate instead, using the 189 arrests made for a charge of sexual assault and the 66 cases that resulted in either a guilty plea or guilty verdict, the conviction rate is approximately 35%.
- Although this report is intended to focus almost exclusively on data, the acute anger and frustration described by victims results primarily from warrant declinations. However, the philosophy of the USAO when they communicate these outcomes in individual cases, as communicated through the tone and style of communication with survivors, advocates and other community members and directly in their testimony at a public roundtable on February 25, 2016 is a driving factor. This communication pattern indicates that the survivor, while someone the USAO does care about greatly, is actually a part of *their* case instead of the prosecution being part of the survivor's case. This distinction may not impact the actual legal determinations made as those are legally in the hands of the prosecutor, but the way this posture is communicated to individual survivors, to advocates and other involved community members is palpable and extremely destructive to their ability to communicate an unfavorable outcome to a survivor and to work in partnership with the community to improve survivors' experiences and prosecutions.

Summary of Recommendations

- The USAO should be required to produce the same outcomes presented in this report in some format at least annually and that data should be made publicly available. All other

⁶ The fact that only two DFSA cases were adjudicated that were reported as suspected DFSA to MPD does not mean that there were not cases in which the survivor was intoxicated. Unless it is made an issue in the case explicitly, it would be difficult to determine this factor from the records available.

⁷ Spohn, C., Beichner, D., & Davids-Frenzel, E. (2001). Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the 'Gateway to Justice'. *Social Problems*, 48, 206-235; and Bouffard, J. (2000). Predicting type of sexual assault case closure from victim, suspect, and case characteristics. *Journal of criminal Justice*, 28, 527-542.

⁸ Tjaden, P., & Thoennes, N. (2006). *Extent, nature, and consequences of rape victimization: Findings from National Violence Against Women Survey*. Washington, DC: U.S. Department of Justice.

USAOs other than the USAO for the District of Columbia are required to offer aggregate criminal justice outcome data to the Bureau of Justice Statistics twice a year. The USAO for the District of Columbia should be required to provide this information as well.

- To provide consistency, increase survivor and community trust, and to create a greater dialogue between the USAO and the SAU in terms of warrants and investigations, a closing memo similar to the one provided in homicide cases should be provided when a warrant is declined for a sexual assault case. That memo should reside in the MPD file so that it is available to oversight mechanisms of the District of Columbia, outside of any confusion regarding federal jurisdiction and should enumerate the reasons that a case was declined in specific detail. This practice will help detectives improve warrant writing and investigations where needed, and most importantly, it will highlight inconsistencies in the declination process and bring the needed transparency within the system.
- Detectives and prosecutors should receive training about the language surrounding consent; issues related to on-going consent; establishing use of force and/or reasonable expectations of harm under District law; and building a case against a consent defense.
- Specific discussions should be had within the Sexual Assault Response Team (SART) about how PERKs and toxicology results are used in prosecution, and how the entire response system can work towards better prosecution of delayed reports and communicating realistic expectations of prosecution to the survivor.
- Survivors should have an affirmative right to an independent community-based advocate in prosecutorial interviews. Given the findings regarding current communication issues, this support is essential to all survivors' ability to pursue as much of the criminal justice process as possible and to feel as though they were completely heard regardless of the outcome, with the understanding that some victims may simply wish to opt out of the advocacy process or the criminal justice process for their own reasons.
- The SART Team's periodic discussions regarding expanding access to SANE exams through a broader Jane Doe or anonymous reporting policy should take into consideration the reluctance to pursue cases in which a report was delayed, the very legitimate issue of the loss of evidence over time, and how to mitigate that loss at the time of the SANE exam so that we are not promising survivors access to justice that may not materialize.

This data was difficult to interpret because in many ways, as previously stated by the USAO, each case is different. However, while the findings show that their office prosecutes far more cases than is publicly perceived, when we break those cases down we begin to see

patterns that may need prompt attention. Similarly, the USAO does prosecute cases where the facts are difficult when placed before a judge or a jury, cases in which a report is delayed, the victim was drunk, the victim is a person with a mental illness, or where the victim is a sex worker. However, the data in this report shows that those reports are outliers when compared to cases in which a physical injury and assault accompanied the sexual assault. Finally, the process is sometimes less respectful and meaningful to survivors than the USAO perceives it to be. At the end of the day, many of these issues can be addressed through real transparency and trust building between prosecutors, advocates and survivors, and the community. Ideally, prosecutors will feel confident stretching their definitions of a trial-worthy case while communicating differently with survivors and community members, and advocates will increase their understanding of the dynamics at work in prosecutorial decision making and both parties can extend one another the benefit of the doubt more often. Most importantly, survivors need to receive meaningful dialogue from the USAO as interpersonal equals through a process that avoids labeling a case in a way that dismisses a victim's lived experience, particularly in ways that may sound too close to the defendant's excuses, regardless of the legal outcome. Hopefully this data and these recommendations will produce an environment for this process to begin.

I. **Introduction: Prosecution Metrics and Research**

The original SAVRAA Independent Consultant report⁹ evaluating the Metropolitan Police Department Sexual Assault Unit's (SAU) implementation of the Sexual Assault Victims' Rights Amendment Act (SAVRAA) found that while the SAU had changed dramatically since the 2013 Human Rights Watch report¹⁰ that identified the need for SAVRAA, and continues to make significant strides to investigate reports from a victim-centered perspective, the remaining significant point of survivor and community frustration is targeted at the US Attorney's Office for the District of Columbia, Superior Court Division (USAO). Specifically, the initial report found a lack of transparency about the prosecutorial process, minimal communication or consistency about the reasoning behind decisions, and some cases being refused based on trauma-related contradictions and/or other factors that might make a jury doubt the victim based on common societal myths about sexual assault, or so called "rape myths." However, such is the apparent inconsistency of the process and the standards utilized for review that it would be overreaching to say that there were absolutely no cases in which the USAO went forward with a difficult sets of facts, though this is the perception held by many advocates and survivors.

Consistent with the interviews conducted for the initial SAVRAA report, the testimony of multiple survivors at the Public Roundtable on the Sexual Assault Victim's Rights Amendment Act (SAVRAA), held before the Committee on the Judiciary on February 25, 2016, indicated the same pattern. There was an enormous disconnect between the survivors' view of their experiences both of the assault itself as well as their interactions with the USAO, and the USAO's perception of those things. In fact, the USAO's testimony actually gave further credence to the instances described in survivor testimony. Fortunately, survivor testimony led the USAO to implement changes in their process that they felt created more consistency in the warrant decision making process as well as broadening their communications with victims. However, the lack of transparency about case outcomes and the way in which communication with survivors, advocates and the community as a whole is approached within this process remains a significant barrier to building survivor and community trust in the system. This report provides a first step in making the prosecution process as transparent as possible, though the

⁹ Elisabeth Olds, SAVRAA Independent Expert Consultant Report: The Metropolitan Police Department's Implementation of the Sexual Assault Victim's Rights Amendment Act of 2014 (SAVRAA). August 14, 2015.

¹⁰ Human Rights Watch, "Capitol Offense: Police Mishandling of Sexual Assault Cases in the District of Columbia," January, 2013. <https://www.hrw.org/report/2013/01/24/capitol-offense/police-mishandling-sexual-assault-cases-district-columbia>

information did not come from the USAO itself but rather from the initial SAVRAA report research and available court records.

Looking into these reports from survivors and attempting to move beyond anecdotal evidence to show objective statistics and decision-making patterns was extremely difficult in the initial review. Requests for aggregate data have been contentious over the last three years. A previously filed Freedom of Information Act (FOIA) request to the USAO for aggregate data for purposes of this project was declined for reasons of victim confidentiality, though as the request was for aggregate data no victim-specific information was being sought. Also, a District of Columbia ANC Commissioner and crime victim advocate requested city-wide statistics about all types of crime through a FIOA request. This request was denied because the USAO said that they did not keep aggregate data at all and could not produce it as requested. That advocate has since filed a lawsuit requesting the information sought in her FIOA request. In fact, the SAVRAA Independent Consultant was told the same thing when requesting aggregate data – that it was not possible to produce that data and that information could only be given on a case-by-case basis, which conversely presents a problem for victim confidentiality.

The USAO did very helpfully provided information in 2015 regarding the 39 cases from 2014, and this information was aggregated and published with the initial SAVRAA report. Also to their credit, in receiving this information, it did drive home the USAO's point that there is more information about these cases than one can obtain from a prosecution rate or court docket. However, the entire picture is critically important to build faith in the system, and this was a small subset that did not reflect the entire picture of prosecutions or reported sexual assaults in the District that is needed to inform advocates and victims as to the criminal justice outcomes. While relying on victim interviews and perceptions is a large part of any evaluation of a victim-centered process, objective data allows us to see real patterns where they exist and removes the ability to dismiss all victim concerns as mere outliers. Therefore, a data set reflecting cases from 2015 was provided to the USAO with a request to provide case outcome information for each case on January 14, 2016, but no response has been provided as of this date. It is victim-specific information, so they can very legitimately argue that there is a confidentiality issue present unless they are willing to de-identity information prior to providing it, as they do for FOIA requests by attorneys in specific cases. It should also be prominently noted that the USAO is participating in the SART information sharing process.

The purpose of this more extensive data set is to provide an objective starting point for a more constructive dialogue about the prosecution process. The questions this evaluation seeks to answer and the data this evaluation seeks to illuminate for advocates, survivors, other system

actors and the public are the following:

- How many cases related to sexual assault are prosecuted each year in the District;
- How many reports of sexual assault are not prosecuted, whether through a declined warrant, a lack of charges ultimately filed after an arrest is made, or a dismissal of charges after they've been filed at any stage in the process;
- What are the stated reasons warrants are declined or court cases ultimately dismissed;
- What can we do to ensure that the system functions in a more victim-centered way regardless of case status.

The SART can use the quantitative data provided here to answer the qualitative questions regarding a need for systemic reform as a group with the USAO's participation. This information can also be used to tailor training for detectives and prosecutors, and it can help formulate policies to the extent that those are effective in a bifurcated system like the District's where law enforcement, forensic analysis and advocacy are local entities subject to local control and the prosecutor's office is under federal jurisdiction.

This data is admittedly very difficult to work with because prosecutors do have broad discretion to accept or decline cases, and the fact that while patterns among sexual assault cases do exist, no two cases are entirely alike. Additionally, cases that appear to be the same based on the original charging level when investigated by law enforcement may be very different in the end. By law, prosecutors have an enormous amount of discretion and often weigh what they know to be prevailing defense bar tactics and judge and jury attitudes in making the decision to not go forward with a case. This circular tendency to consider factors unrelated to legally relevant indicators of offender culpability and through the eyes of the opposition is often referred to as a "downstream orientation."¹¹ Defense attorneys are skilled at employing common societal myths about rape to win their cases. Given the stress the court process places on the victim, anticipating this strategy as a primary screening tool may actually be a victim-centered strategy in some limited cases, but if taken too far it leaves the majority of survivors whose cases do not conform to society's idea of sexual assault without the redress they sought when they reported the case to police. Prosecutors also have an ethical obligation to only proceed with cases in which they truly believe there is probable cause that a crime was

¹¹ Cassia Spohn, Dawn Beichner, Erica Davis Frenzel, David Holleran (2002). Prosecutor's Charging Decisions in Sexual Assault Cases: A Multi-Site Study, Final Report, NCJRS. Pg. 5 and Frohmann, L. (1997). Convictability and Discordant Locales: Reproducing Race, Class and Gender Ideologies in Prosecutorial Decision Making." *Law & Society Review* 31:531-55.

committed by the suspect¹² and to avoid the appearance of malicious prosecution, i.e. knowingly prosecuting a case for purposes other than a successful adjudication.¹³

The information contained in this report provides a *prosecution* rate rather than a conviction rate. A prosecution rate is within the prosecutor's control because it is the rate of attrition of cases presented to them rather than the rate at which they win cases. A high conviction rate should *never* be considered a sign of success by itself.¹⁴ Those rates remain high if prosecutors only pursue cases they are absolutely sure they can win, thereby creating a high percentage of cases won out of the cases taken to court. This incentivizes prosecutors to pursue cases that conform to rape myths and may make them disinclined to risk testing the boundaries of a judge or jury's potential willingness to move past or be educated about those myths. If a prosecutor's office were operating from a conviction rate perspective rather than a prosecution rate lens, we would see a clear preference in charging for clear cut first degree sexual assaults by a stranger in which force was obviously used against a socially unassailable victim, a scenario that is relatively rare among sexual assault cases.¹⁵ In fact, in jurisdictions like the District where judges and juries are particularly disinclined to convict, some theorize that this results in higher conviction rates because prosecutors can be more selective about the cases they take.¹⁶

II. Description of Methods

The process for arriving at this data and these conclusions began with a review of the cases investigated by the SAU for the initial report, (*i.e.* investigations of reports of sexual assault against adults in the District). Of those, cases in which arrests were made and/or warrants were filed were isolated and comprised the primary data set. These cases were all cross referenced with cases filed in DC Superior Court and the notations in the court docket were searched for available information such as dismissals, plea bargain terms, and court verdicts and sentences imposed. Declined warrants were reviewed in MPD's case files when

¹² Model Rules of Professional Conduct R.3.8(a) (Special Responsibilities of Prosecutors).

¹³ Pollack, D. (1977). Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process. *The University of Chicago Law Review* Vol. 44, No. 3 (Spring, 1977), pp. 619-640.

¹⁴ AEquitas: The Prosecutors' Resource on Violence Against Women, Valuing Prosecutorial Performance Beyond Conviction Rates in Sexual Assault Cases: Summary of a Roundtable Discussion, 2014.

¹⁵ Beichner, D. (2005). Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit. *Criminal Justice Policy Review*, 16, 461-498; and M. Elaine Nugent-Borakove & Lisa M. Budkilowicz, National District Attorney's Association, Do Lower Conviction Rates Mean Prosecutors' Offices Are Performing Poorly? (2007).

¹⁶ Rasmusen, E., Raghav, M. and Ramseyer, M. (2008). Convictions versus Conviction Rates: The Prosecutor's Choice. <https://kelley.iu.edu/riharbau/RePEc/iuk/wpaper/bepp2008-16-rasmusen-raghav-ramseyer.pdf>.

determining whether the SAU's investigation was fully completed and presented appropriately to the USAO.¹⁷ Notes written on warrants and in MPD's records management system were catalogued for these declined warrants to attempt to determine patterns in decision making which are also discussed below. While ordinarily, multiple meetings and interviews would have been conducted before writing an evaluation of the USAO, those meetings were held prior to the MPD evaluation in 2015 and were coupled with the Public Roundtable and the USAO's testimony provided there. Additionally, while there are some portions of analysis in this report, the bulk of the report provides the data and the context for that data only for purposes of moving the discussion forward.

III. Findings

A. Brief Summary of Data Results

In 2015, MPD received 1,177 reports of sexual assault or crimes that had a sexual element to them to be investigated by the Sexual Assault Unit. Of those, 506 reports were classified as allegations, meaning they were not reported with enough facts to warrant a sexual assault charge yet under the DC Code, but could be upgraded after investigation. An additional 671 reports were classified as sexual assaults by the SAU and therefore were eligible eventually to be presented to the USAO for prosecution. Based on the 671 sexual assault reports filed in 2015, the Metropolitan Police Department's Sexual Assault Unit arrested 189 people (16% of all reports made and 28% of reports made classified as assaults) for sexual assault of some degree, from misdemeanor sexual abuse up to first degree sexual abuse while armed.¹⁸ Of those arrested either after a warrant was signed or probable cause established on scene according to DC law, 55 (30%) never resulted in charges being filed and 122 (68.4%) cases did result in a case being filed in DC Superior Court. Of those 122 cases that were filed, 37 (30%) were dismissed after the defendant was charged¹⁹, 20 cases (16.3%) went to trial resulting in 14 guilty verdicts and 6 not guilty verdicts. Fifty-one (51) cases (41.8%) were resolved through a plea bargain and 10 cases remain undisposed or ongoing as of this writing.

¹⁷ While it is quite relevant to this data whether the warrant presented was sufficient on its face, any issues with the warrant itself was reflected in the MPD Follow Up Report submitted to them to address with detectives. In addition, insufficient warrants can be sent back for further investigation rather than simply declined. This review only contains final reviews of warrants submitted.

¹⁸ This does not mean that the other cases will not result in arrests in 2016 or subsequent years, and in fact an additional 15 arrests were made as of July 2016 based on cases reported in previous years. Of those, 8 cases were initiated in 2015.

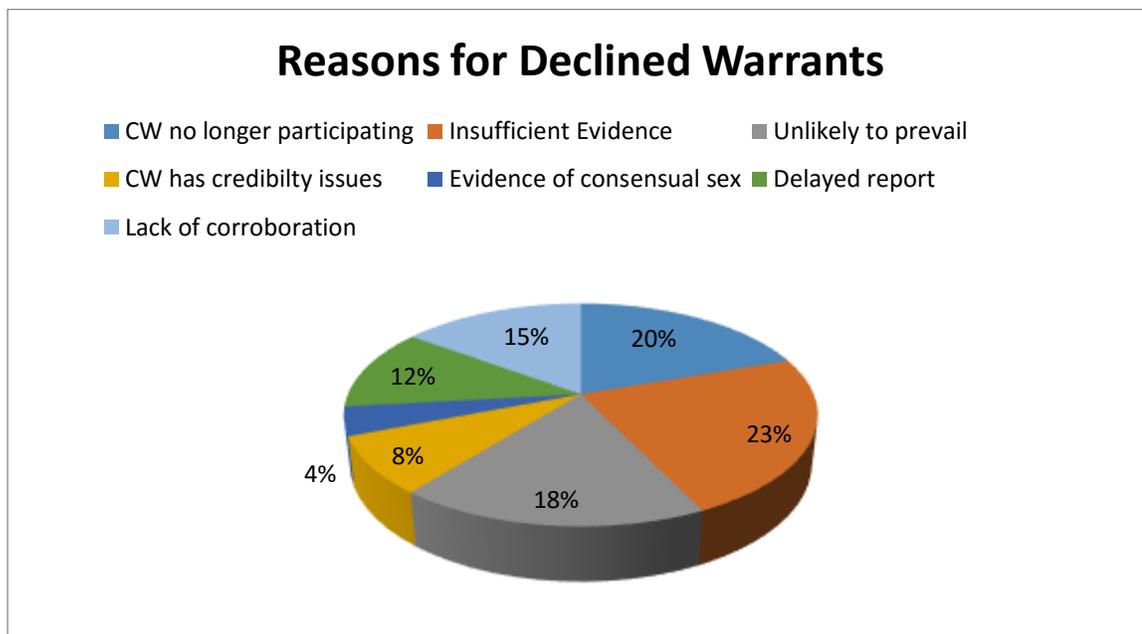
¹⁹ There were unusual or extenuating circumstances involved in some of these dismissals that will be discussed below. Therefore, this number should not be taken solely as an indication of the USAO's unwillingness or inability to pursue these cases.

The SAU presented an additional 235 warrants stemming from cases reported in 2015. The USAO approved 42 of these warrants and declined 161 of those warrants. The remaining 32 warrants are not traceable using the records available. A more in depth analysis of the data is included in the following pages, including an analysis of the reasons warrants were declined.

B. Warrants

1. Data

The available information shows that of the 235 warrants presented by the SAU, the USAO approved 42 and rejected 161.²⁰ Of the warrants declined, a reason for declining the warrant was discernable either on the warrant itself in the paper files or in MPD's records management system in 138 cases. Those reasons are summarized below.²¹



Thirty-three (20%) complaining witnesses no longer wanted to pursue the matter; 39 (23%) cases were declined due to insufficient evidence; 30 (18%) cases were deemed unlikely to

²⁰ Thirty-two warrants could not be discerned using available data. To be clear, this is not because the data is not there, but because the Independent Expert Consultant could not put the pieces together alone with such disparate data sources.

²¹ Note that there can be multiple reasons for declining a single warrant so the total will exceed 138, and that the verbiage used in categories may be nonexclusive such as “lack of corroboration” and “unlikely to prevail on the merits.” If the case is such that corroboration of some kind is actually needed and is not present, then the prosecution is unlikely to prevail on the merits. Because the phrasing listed below is chosen by the prosecutor and sometimes listed separately as multiple reasons for declining one warrant, they’re counted as separate and exclusive reasons.

prevail on the merits;²² 14 complaining witnesses were deemed to have credibility issues due to inconsistencies in their accounts;²³ 7 cases were deemed to be acts of consensual sex or show evidence that it was likely consensual sex instead of an assault; 20 cases were declined due to a delay in reporting the assault, taken in combination with other factors including lack of corroboration and victim credibility issues; and 25 cases were declined due to lack of corroboration for the complaining witness's account of events.

Other reasons given with more randomly stated verbiage were as follows:

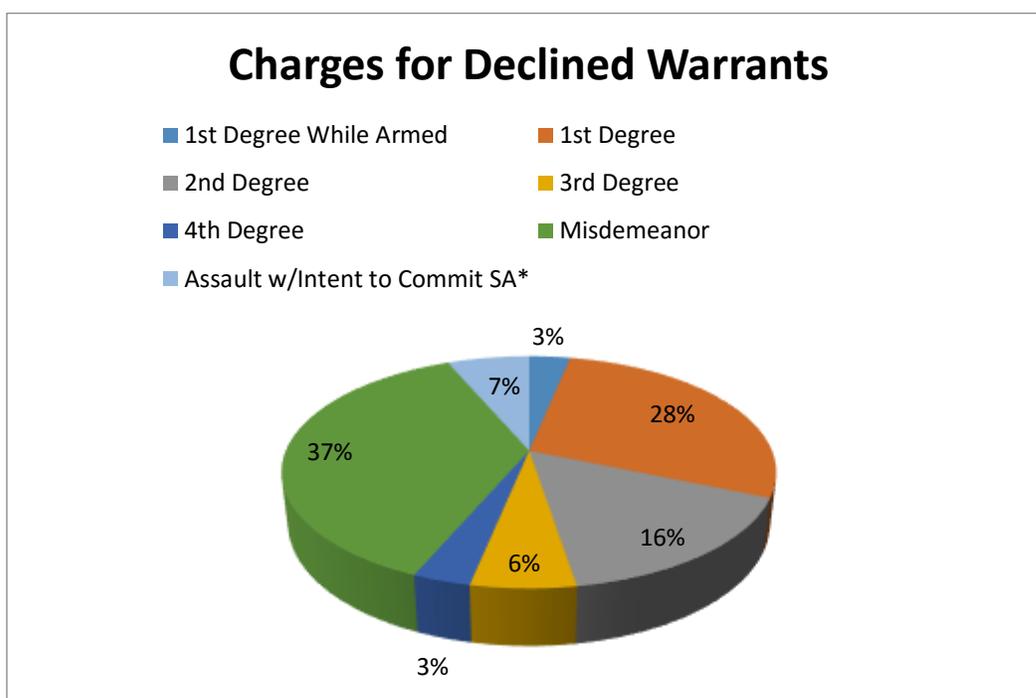
- Both parties were intoxicated: 1
- Video, text messages or other witnesses refute Complaining Witness' story: 4
- Evidence does not support allegation: 5
- Credibility issues stemming from mental health concerns²⁴: 5
- Regardless of forensic results (which had not been produced at the time this warrant was declined), victim credibility issues, inconsistent statements: 1

²² This classification does not mean that evidence was insufficient or that the prosecutor did not believe an assault had occurred but viewed the likelihood that a judge or jury would be convinced by the facts or the strict merits of the case.

²³ Credibility issues could mean a host of things including that the prosecutor simply did not believe the victim, or that there were just too many inconsistencies to overcome or explain away before a judge or jury but that the prosecutor *did* believe that the assault took place. It does not at all mean that these are false reports or that the prosecutor necessarily believed that the victims were lying.

²⁴ Some of these cases were reported by individuals with severe and persistent mental illnesses and there was no evidence that an assault had occurred. In others the issue appeared to be the individual's need for stabilizing treatment overrode their ability to provide a reliable narrative over time.

The charges associated with the declined warrants are²⁵:



*This category includes 8 Assaults with Intent to Commit 1st Degree Sexual Abuse; 1 Assault with Intent to Commit 2nd Degree Sexual Abuse; and 1 Assault with Intent to Commit 3rd Degree Sexual Abuse.

2. Noted Patterns

Three distinct patterns were determined in cases where warrants were declined. First, the prevalence of victims with apparent or explicitly stated mental health issues, and those mental health issues impeding the victim's ability to articulate a coherent narrative was the reason listed for six warrants being declined. These warrants and the corresponding evidence did not necessarily indicate that an assault did not happen, or that there was no credible case. Rather, the narrative was not entirely linear or not linear at all. Conversely, the prevalence of victims with severe and persistent mental illness reporting immediately occurring sexual assaults that were actually the result of mental health crises was also apparent in some warrants, and those warrants necessarily should have been declined. All of these issues will hopefully be addressed in the near future through new collaboration between MPD, the DC SANE Program, Green Door and other mental health providers so that survivors with severe and persistent mental illnesses will be better able to participate in their own cases.

²⁵ See the Appendix on page 33 for definitions of sexual abuse charges in the DC Code.

Second, the fact that the report was delayed was cited as a reason for declining the warrant in 20 cases. These reasons were all accompanied by other reasons: lack of corroboration, victim credibility, and insufficient evidence. Delays ranged from eight months to four years. This is a particularly concerning trend given that the system for reporting sexual assaults nationwide and in the District includes a non-report option that allows victims to obtain a medical and forensic exam and choose to report to police at a later date as is required by the Violence Against Women Act of 2013²⁶. Conversely, it is a legitimate concern that witnesses and other corroborating evidence might be lost. That said, that the victim's credibility was questioned due to the delay in reporting is troubling and the likelihood that a victim's case may be declined ultimately because they took advantage of this delay needs to be closely examined. There are other reasons for encouraging victims to come forward and receive medical care beyond the criminal justice system's response, and delayed reports can also be utilized in catching serial offenders who have gone on to assault others in the meantime.

Third, warrants were declined because the parties had a previous relationship or relatedly, that a consent defense is being asserted by the defendant. The issues cited on declined warrants in this category included a long-time friendship of many years, a situation in which the suspect had previously paid the victim for sex, because the parties had previously had consensual sex the same evening or in previous years, or that the defendant might be able to assert a defense of consensual sex. While these cases are very difficult to prove before a judge or jury, these issues and reasons for declining warrants arose prevalently enough in the cases reviewed that it should be addressed through training for prosecutors, judges and possibly investing in and working with expert witnesses to educate the court or a jury in individual cases.

Finally, there were a surprising number of cases in which the victim simply did not want to go forward. This is usually seen in domestic violence cases in which the stigma of a sexual assault case and potential conviction is more than the victim wishes to pursue against someone with whom she might have children or relies upon for financial support. However, the majority of the warrants declined for this reason do not fit this profile. In one case, the victim was clear with the detective from the beginning that she did not want the suspect to go to jail even though she did want to report it, but the detective worked with her in an appropriate way to pursue the case as far as it was possible to do so until the victim opted out. However, another survivor opted out because the ordeal of participating in the system was not worth the minimal punishment the

²⁶ 42 U.S.C. § 13925 et sec.

suspect was likely going to ultimately get. Still others showed evidence of being very vulnerable to societal judgment such as individuals who are insecurely housed, have substance abuse issues, or where the assault itself may have taken place while other criminal activity was occurring. Though it is an inference only based on their profile and their statements, it may be the case that this group of victims who opted out simply felt no one would believe them or that the idea of having to publicly state their case seemed insurmountable. Some victims were simply not reachable at all and, therefore, the case had no active witness with which to proceed, a factor that is more or less important depending on the facts of the case.

3. Communication with the USAO

While this report is intended to simply share supplemental data to shed light on prosecution of sexual assault cases, an ongoing pattern that cannot be ignored is survivor's dissatisfaction with the communication they receive from the USAO, particularly when a warrant is declined. Survivors and advocates alike have indicated extreme displeasure with the way in which warrant decisions have been communicated in the past, and the USAO has attempted to remedy this problem since the public roundtable. The current process includes the warrant reviewer and the detective attempting to reach out to the victim that day together so that someone the victim knows, *i.e.* the detective, is informing them that their case will not be going forward. They are invited at that time to meet in person with the AUSA to ask questions if they wish to do so. If they are not available at the time the warrant is declined, a letter is sent explaining that their case has been declined. This letter describes the reason for the warrant's rejection as "insufficient evidence" to overcome the standard of reasonable doubt. The letter goes on to explain that the USAO can only ethically and legally proceed with a case if they believe they can win the case beyond a reasonable doubt.²⁷ The letter invites the victim to meet in person with the USAO if they would like to ask questions at that point as well.

These changes are highly commendable, but may be missing the real change needed. The survivors who testified at the roundtable were almost uniformly those whose warrants had been declined. They and those interviewed previously by the SAVRAA Independent Consultant were clear that their frustration stemmed largely from the circularity of the reasoning provided to them as to why their case was not going forward. An overwhelming theme among these

²⁷ The USAO has repeatedly stated that they believe a case must be winnable beyond a reasonable doubt in order for a warrant to be signed, the actual legal standard is probable cause that the defendant did in fact commit the alleged offense, and that the prosecutor is not knowingly proceeding for reasons other than successful adjudication. The remaining portion of the decision is left to prosecutorial discretion regarding with whether a case is likely to be a good candidate for going to trial and therefore a good investment of their office's resources.

interviews was that the survivor felt like they were talking to the offender's attorney given the reasons provided for their case not going forward. Specifically, issues of consent; a circular reasoning involving intoxication and drug facilitated sexual assault; confusion about or a seeming refusal to understand or consider ongoing consent; and a particularity with regard to statements made in text messages or in person before and after an assault that may prove challenging in court, but are not dispositive.

Indeed, prosecutors themselves have indicated that these new meetings are inordinately long and difficult. These lengthy meetings coupled with the content of the letter and victim frustration indicates that victims are still not being given an adequate and direct answer as to why their case is not going forward, and when they are given a direct answer it sounds very much like it is solely from the perspective of the defense, or the prevailing societal view of sexual assault without articulating what, if anything, could be done to overcome it. It may be that victims are challenging the answers they receive as a result because it sounds very much like the prosecutor is actually agreeing with the label that the offender has placed on their experience, i.e. that it was not assault, that they [the survivor] were confused about what actually went on, were too drunk to know the difference, and that if it was assault, there was something that she did wrong. There is nothing in previous or current experiences with the USAO that would indicate at all that the notations on warrants or the experience survivors report in conversations are the prosecutor's actual personal or professional view of the case. Rather, they are a particularly myopic depiction and communication of the downstream analysis that has been conducted and therefore sound like the offender and his attorney's perspective about the event itself has won the day. Legally, they may have, but the way the conversation is approached is paramount in not re-victimizing the survivor.

Survivors seek justice in part to achieve offender accountability but most importantly to validate that what happened to them was in fact wrong, more specifically that *they* were wronged instead of being at fault somehow themselves. This need can best be understood as the social labeling function that the law performs. Someone is guilty or not guilty, or something is a crime or not a crime. By dismissing the case or declining the warrant, the offender's assessment that the victim asked for it, that they really consented when they did not. During the assault, the offender dictates the terms of the experience and in making prosecutorial decisions, survivors often feel that the prosecutor is dictating the terms of that same experience over again by labeling it something that it is not.

While survivors cannot legally dictate the outcome of a case, they must be viewed as co-owners a legal case with the prosecutor and the *only* owner of their experience. Until now the

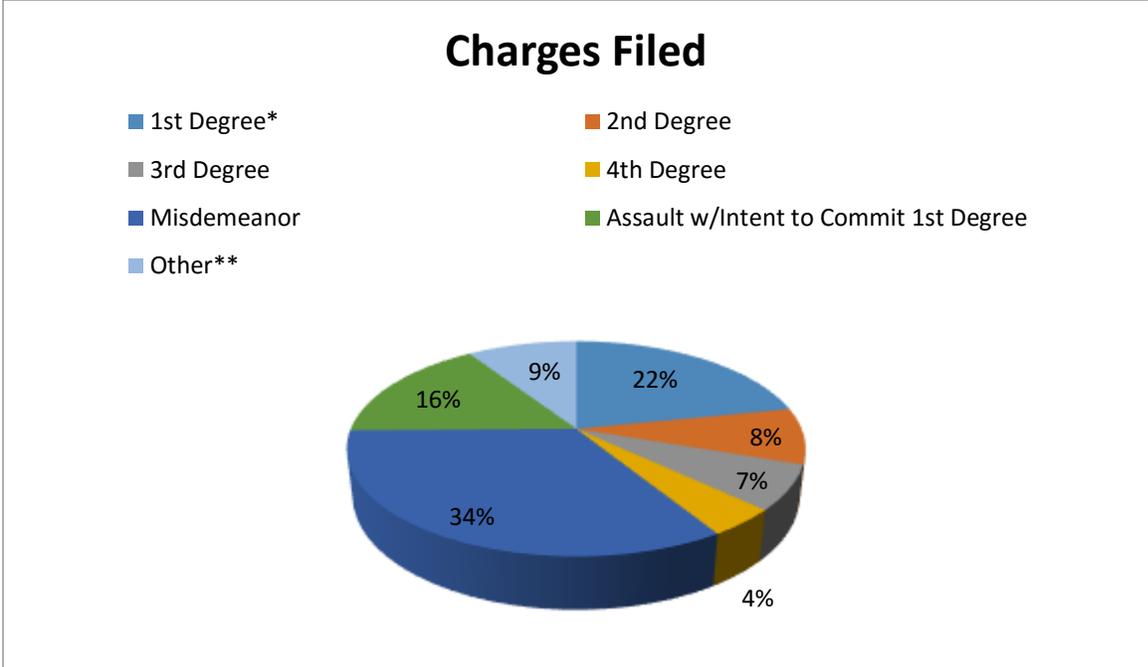
USAO's ongoing strategy is to attempt to educate survivors, advocates and the community about the difficulties and intricacies of their job and the law, sometimes at great length. However well intentioned, this strategy keeps prosecutors in the position of power dictating a label for the survivor's experience and worse yet, may be inadvertently implying that the survivor simply didn't understand their experience properly. The time and energy the USAO takes both with the community, with advocates and with survivors is commendable and very well-intentioned, but a new overall approach that places the survivor on a more equal plane as the expert about his or her own experience with legitimate choices to make, albeit short of dictating legal outcomes, would reduce the negative impact of unfavorable legal decisions.

C. Cases with an Arrest

Although an approved warrant is one step, an arrest has to be made before charges can be brought in court against the defendant, thus creating a prosecution. Of the 671 reports made to MPD's SAU in 2015, 189 arrests (or 28% of total reports made) resulted by the end of that year. Of those arrests, 124 (65.6% of arrests and 18.7% of total reports made) cases were pursued in DC Superior Court by the USAO. Sixty-five defendants (34% of arrests and 9.6% of total reports made) were ultimately not charged at that point thus ending those cases.

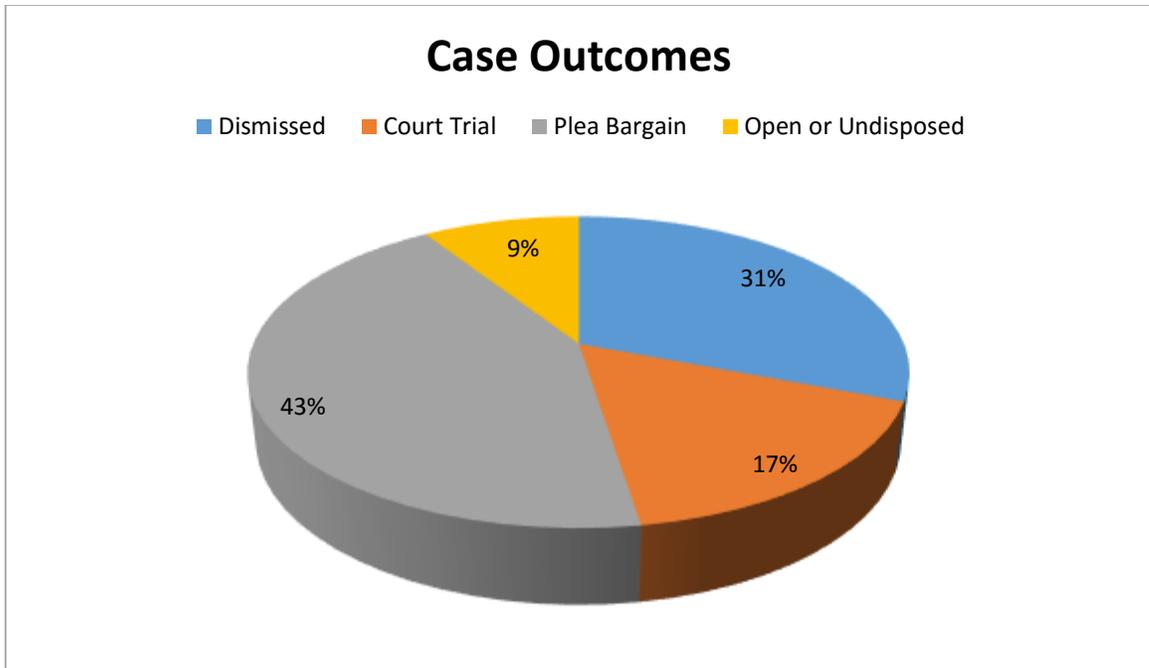
Of the 124 cases that were charged after an arrest was made, Physical Evidence Recovery Kits were collected and submitted as evidence in 27 cases (21.7%). Drug Facilitated Sexual Assault (DFSA) was suspected in six cases (4.8% of cases that were filed in court), while 32 of these cases stemmed from a domestic violence incident or abusive relationship (26.2%). It is also worthy of note that 6 of the cases involved male victims and two of the cases prosecuted involved transgender victims. The relationships between the victim and the defendant in cases that were ultimately charged in court are as follows: 8 (6.4%) brief encounters, meaning a situation where there was no previous significant relationship but the parties met that day/night or shortly prior to the assault taking place; 70 (56%) cases where the defendant was known to the victim prior to the assault, including intimate partner violence cases; and 41 (33%) cases in which the victim and the defendant were strangers.

While some of these cases involved multiple charges including burglary, simple assault, and possession of a prohibited firearm, the primary charges related to sexual assault were as follows:



Of the cases charged in 2015, 26 (22%) were for 1st Degree Sexual Abuse; 10 (8%) were for 2nd Degree Sexual Abuse, of which 2 were committed against a client; 8 (7%) were for 3rd Degree Sexual Abuse, of which 1 was committed using a weapon; 5 (4%) were for 4th Degree Sexual Abuse; and 19 (16%) were for Assault with Intent to Commit 1st Degree Sexual Abuse, of which 1 was committed while armed. Forty cases (34%) were filed as Misdemeanor Sexual Abuse. Of the 1st Degree Sexual Abuse charges, 1 was of a client, 1 was of a ward, and 5 were committed using a weapon. Of those 11 (9%) defendants charged with “Other” offenses, those included simple assault, unlawful possession of a firearm, fugitive from justice, and assault on a police officer.

Once these cases were initially filed in court, there are various paths they can take. Primarily those options include dismissal by the prosecutor for a host of reasons; a plea bargain being agreed upon with the defense; a trial being held and a verdict of guilty or not guilty being rendered; as well as the possibility of suspension of prosecution due to extraordinary circumstances such as the death of the defendant, which happened in two cases from 2015. For this group of cases, the outcomes as of August 31, 2016 are as follows:



Of the 124 cases taken to court based on 2015 cases, 37 (31%) were dismissed at some point before a disposition could take place; 20 (17%) were taken to trial before a judge, of which 14 (70%) resulted in a guilty verdict and 6 (30%) resulted in an acquittal; and 52 (43%) resulted in a plea bargain of some kind. At the time of this report, 11 cases were before the court from this data set and remained undisposed.

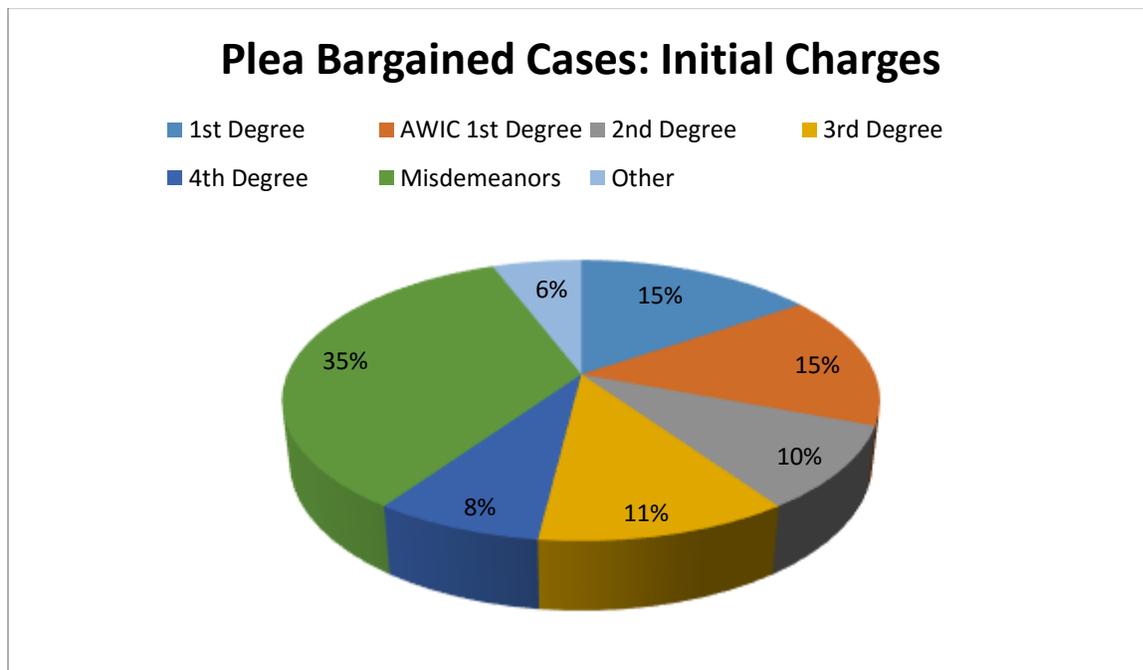
1. Dismissals:

Of the 37 cases that were dismissed, 11 had corresponding Physical Evidence Recovery Kits of the 27 total that were matched with arrested and charged cases; 4 involved suspected Drug Facilitated Sexual Assault (DFSA) leaving 2 DFSA cases adjudicated out of the 6 that were initially charged, 15 were domestic violence cases out of the 32 initially charged, 4 were cases involving male victims leaving two cases in court with male victims, and 1 involved a transgender victim of the 2 cases related to an assault against a transgender victim initially charged. It should be noted that there were extenuating circumstances noted in at least nine of these cases. Three cases had to be dismissed because the defendant died (2 deaths, but there were two cases filed against 1 defendant). Four were dismissed because the defendant was either being remanded to federal prison on parole violation charges, extradited to another state on a felony warrant that would produce far greater penalties, or was pleading guilty to other unrelated charges as part of what is known as a “global plea,” meaning all cases however unrelated against the defendant are on the table in terms of negotiating a plea bargain and once that agreement is made some pending cases are dismissed entirely. One domestic violence

case was dismissed because the victim no longer wished to cooperate and asserted her marital privilege to avoid testifying. Another case was dismissed because the DNA testing had not come back from an outside lab quickly enough to observe the defendant's right to a speedy trial.

2. Plea Bargains:

Plea bargains are often viewed negatively or as a lack of commitment to offender accountability, but often they are the best practical way to obtain some form of justice for the survivor and hold the offender accountable on terms that are at least acceptable if not preferable to the prosecution. The alternative to a plea bargain is to gamble with the possibility of an acquittal at trial. Going to trial is also a process further out of the prosecution's control. Fifty-two cases (43% of cases charged) resulted in a plea bargain of some kind. Of these cases, 10 involved a PERK, 1 case involved DFSA. The charges involved in these cases were as follows:



Of the 52 cases that resulted in plea bargains, 8 began as 1st Degree Sexual Abuse of which two were committed while armed and 1 was committed against a client; 8 began as Assault with Intent to Commit 1st Degree Sexual Abuse; 5 as 2nd Degree Sexual Abuse; 6 as 3rd Degree Sexual Abuse of which one was committed while armed; 4 as 4th Degree Sexual Abuse; 18 were charged as Misdemeanor Sexual Abuse; and 3 were charged with other related crimes such as Simple Assault, Voyeurism and Child Abuse.

While those were the charges initially filed, the nature of a plea bargain is often to reduce the charges the defendant agrees to with a corresponding lesser sentence. This reduction in corresponding sentences is often the objection the public, advocates and victims have to plea bargains, in addition to the tendency to remove the sexual assault element from the case. Therefore, it is useful to also review the charges these defendants plead guilty to and what their sentences ultimately were. While it is difficult to summarize neatly such a wide variety of charges and sentences, defendants in these 52 cases plead guilty to the following:

Of the 8 cases that began as First Degree Sexual Abuse charges of some kind, whether while armed or coupled with other charges like kidnapping or robbery, 5 plead guilty to 1st Degree Sexual Abuse along with other aggravating charges and received sentences that ranged from 8 years to 50 years in prison. All were required to register as sex offenders with varying levels of supervision upon release. One case was dismissed as part of a global plea bargain related to drug charges, and one was ultimately plead out as a failure to register as a sex offender and obstruction of justice charge related to contempt of court, garnering 180 days in jail. One case resulted in plea to 2nd Degree Sexual Abuse resulting in 16 months in jail with 8 of those suspended. In a final case, the defendant pled guilty to attempted 1st Degree Sexual Abuse and burglary and will receive 8 years on each count when sentenced. It should be noted that one defendant is a serial offender who plead guilty to 3 counts of 1st Degree Sexual Abuse and will be sentenced to 40 years on each count in November, 2016.

Of the 8 cases involving Assault with Intent to Commit 1st Degree Sexual Abuse, the plea agreements ranged from defendants pleading guilty to misdemeanor sexual abuse to 4th Degree Sexual Abuse along with other charges such as felony criminal contempt, robbery, burglary, and kidnapping. The sentences ranged from 24 months to 120 days with credit for time served. Upon release these 8 defendants agreed to varying degrees of supervision and community service, and 4 had to register as sex offenders.

Of the 5 2nd Degree Sexual Abuse charges initiated, the plea bargains were to Attempted 2nd Degree Sexual Abuse in 1 case, Misdemeanor Sexual Abuse with other related charges in 2 cases, 4th Degree Sexual Abuse in 1 case, and a plea to 2nd Degree Sexual Abuse in 1 case. The sentences ranged from 180 days suspended to 60 months in prison with varying degrees of supervision upon release. One defendant was required to register as a sex offender and receive treatment based on his parole officer's assessment.

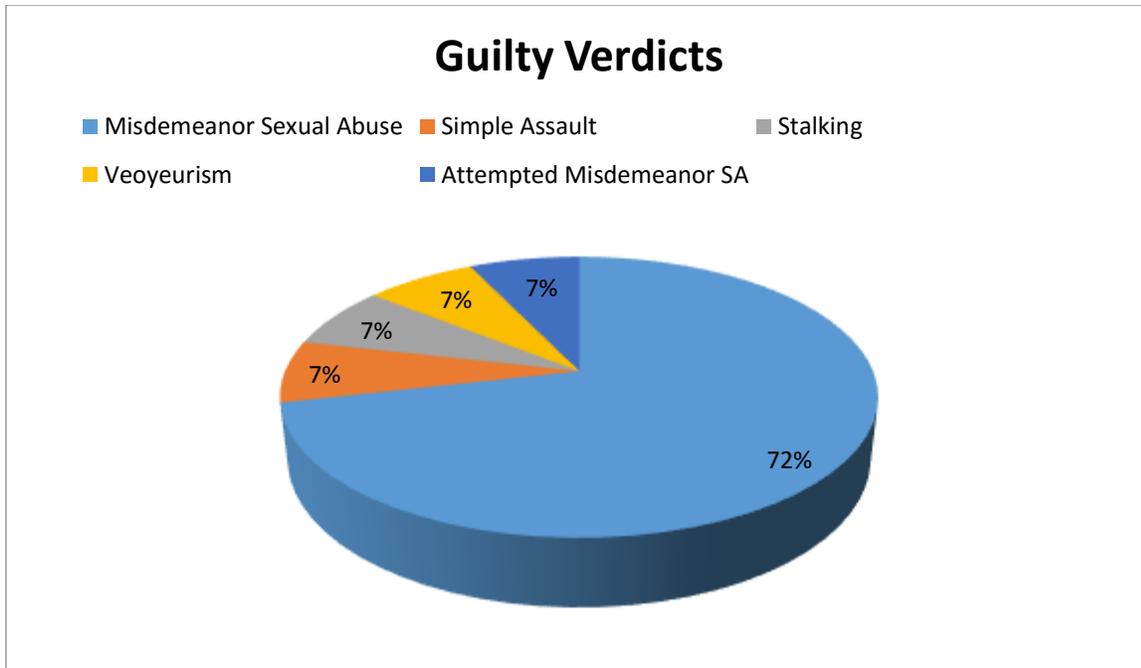
Of the 10 cases in which the initial charges included 4th Degree Sexual Abuse, plea bargains ranged from Attempted 3rd Degree Sexual Abuse to Misdemeanor Sexual Abuse. One defendant pled guilty to simple assault and unlawful entry. Each was given a sentence of 180

days with either credit for time served or a suspended sentence with supervised probation and one was given 60 days in jail with credit for time served.

The Misdemeanor Sexual Abuse category was comprised of a combination of intimate partner violence cases, cases in which a robbery, burglary or kidnapping had also included Misdemeanor Sexual Abuse, as well as cases of chronic repeat offenders who commit Misdemeanor Sexual Abuse on strangers in public. Of the 18 cases that began as Misdemeanor Sexual Abuse, the overwhelming majority plead guilty to that charge and received suspended sentences or credit for time served. As a misdemeanor charge, the longest sentence available to the court is 180 days in jail. Of these 18 cases, 4 cases received jail time ranging from 120 days to 90 days in jail. The remaining pleas to Misdemeanor Sexual Abuse served no jail time and received varying degrees of probation ranging from none to one year. Two defendants agreed to mental health treatment, two agreed to sexual offender treatment, and three agreed to treatment for substance abuse. Other charges to which these defendants plead guilty are assault on a police officer (30 days in jail), simple assault (90 days in jail, all suspended and no probation), receipt of stolen property (time served), violating pre-trial conditions (150 days in jail). It is worthy of note that 5 of these defendants had lengthy records, for grabbing women in public places and had been arrested and either acquitted on similar charges within months of the new charge, or their previous cases had been dismissed for a variety of reasons.

3. Court Trials

Of the 124 cases in which charges were filed, 20 (16%) went to trial. Of those, 14 resulted in a guilty verdict, while 6 resulted in a not guilty verdict. All of these trials were bench trials, meaning they were held before a judge and not before a jury, except for one held before a jury. Of the cases in which the defendant was found guilty, the corresponding charges were:



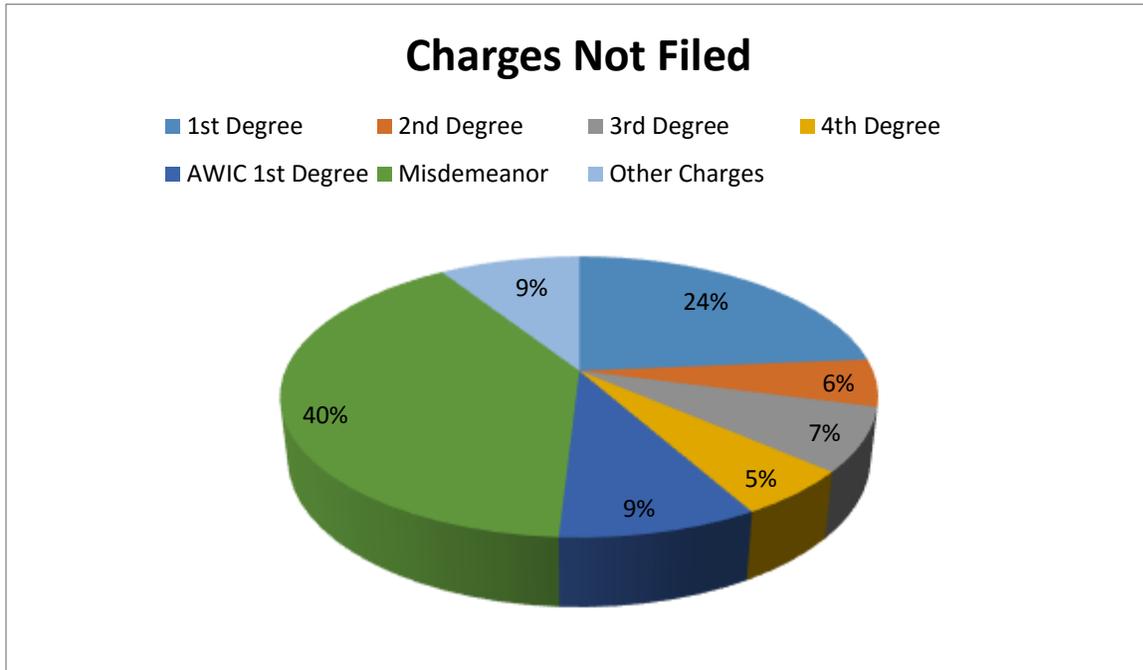
The sentences in cases in which a guilty verdict was handed down ranged from 120 days in jail with 5 years of probation to 10 days in jail all suspended with 6 months of unsupervised probation. The majority of cases involved a suspended sentence, meaning that the sentence won't be imposed as long as the defendant complies with other conditions for a specific period of time, like not getting arrested again or completing drug treatment or domestic violence offender classes. Two of these cases are on appeal.

Of the six cases in which the defendant was acquitted, the charges were: 1st Degree Sexual Abuse (1); Misdemeanor Sexual Abuse (3); Attempted Misdemeanor Sexual Abuse (1); and Simple Assault (1).

D. Cases in Which Charges Were Never Filed

Sixty-five defendants (34% of arrests and 9.6% of the 671 assault reports made) were ultimately not charged after an arrest was made. Those cases involved 3 cases in which the victim was male and 18 cases in which the sexual assault took place as part of an intimate partner violence assault. There were 6 cases in which drug facilitated sexual assault (DFSA) was suspected, and in 11 cases, a PERK had been obtained through a forensic exam of the victim within 96 hours of the assault. The relationships between the parties in these assaults are as follows: 5 were brief encounters; 35 were cases in which the victim and the suspect were previously known to one another, including as ongoing intimate partners or spouses, and 11 were cases in which the defendant was a stranger to the victim. The charges related to these

cases are:



Thirteen of the cases not charged in court after an arrest were cases investigated as 1st Degree Sexual Abuse, one of which was committed while armed; 3 as 2nd Degree Sexual Abuse; 4 as 3rd Degree Sexual Abuse; 3 as 4th Degree Sexual Abuse; 22 as Misdemeanor Sexual Abuse; 5 as Assault with Intent to Commit 1st Degree Sexual Abuse; and 5 cases that prompted an arrest on other charges such as simple assault.

E. Specific Issues

1. Physical Evidence Recovery Kits (PERKs)

Of the 1,177 reports made to MPD in 2015, 259 (22%) had a corresponding PERK. Of the 671 cases reported to MPD that were classified as sexual assaults under the DC Code, 166 (25%) were cases in which a Physical Evidence Recovery Kit (PERK) was submitted as evidence after being collected from the survivor by the DC Forensic Nurse Examiners (DCFNE). Of those 259 cases where an evidence kit was collected, 82 (31%) resulted in a closed case without an arrest, 46 (28% of the cases in which an assault report was filed with a corresponding PERK, and 17% of the total number of PERKs in cases reported to police overall) of which were closed due to a declined warrant. Of the 46 warrants that were declined, 7 of those warrants were declined because the victim decided they did not wish to move forward with the case, 9 were due to insufficient evidence, 2 because of inconsistencies leading to victim credibility issues, 7 were listed as unlikely to prevail on the merits of the case, 7 due to insufficient corroboration, and 3 were declined because the description of the case indicated

consensual sex according to the USAO. Of the warrants that were signed without an arrest or where an arrest was made in a case, i.e. the case proceeded to a potential prosecution, (Y%) had a corresponding PERK submitted as evidence. Thirty-two cases in which there was a corresponding PERK resulted in arrest, and of these cases with a corresponding PERK 27 cases were actually charged and a case pursued in court. Eleven of these 27 cases (41% of cases that were actually charged and had corresponding PERKs) were dismissed at some point before adjudication of any kind leaving 16 cases with PERKs as evidence remaining in court. Of the 20 cases that went to trial, 2 had a corresponding PERK, but it is useful to keep in mind that only one of those cases was a 1st Degree Sexual Abuse case and the remainder were misdemeanors and, therefore, not likely to be cases that a PERK would logically have existed. Of the cases resolved with a plea bargain, 14 had a corresponding PERK.

This means that for the 259 cases in which the survivor had a forensic exam done, 166 (64%) resulted in an assault report documenting a sexual assault offense under the DC Code was filed by MPD, and of those 166 assault reports with a corresponding PERK, 16 (9.6% of cases where an assault report was filed and 6.1% of cases with a PERK reported to MPD overall) resulted in some form of final adjudication. This appears to be an extremely small number compared to the number of PERKs collected and the resources dedicated to that effort. However, when we consider that of the 72 cases that were adjudicated in some way, 22% contained a PERK as necessary and important evidence, this number seems far more significant. Prosecution is also not the only purpose a survivor may want a forensic exam conducted. Some survivors don't know what happened to them with any certainty and the results of the exam may provide validation that something did indeed occur. Beyond those two points, the attrition rate for PERK-related cases and the utility of PERKs in this process hinges upon the USAO's willingness to wait for the results prior to making a decision about the case, such as whether to proceed with a warrant, offer a plea, request an indictment, or to dismiss a case. Whether forensic evidence is material to the case outcome or not is highly case specific, but it is not at all clear that results are being considered as expected by survivors when they agreed to the exam in the first place.

2. Drug Facilitated Sexual Assault (DFSA)

Drug facilitated sexual assault, or DFSA, is notoriously difficult to investigate and prosecute because usually, by definition, the victim cannot remember what happened or their memory of what happened is incredibly altered. That said the role of utilizing a victim-centered and forensically based approach to these cases is all the more important. It is entirely circular, as some victims reported having been told when their warrants were declined, to say that

because a victim was too intoxicated or drugged to affirm or deny having given consent their case cannot be proven, or that the prosecutor's lack of knowledge of the victim's habitual behavior while intoxicated means that they cannot establish that something happened or that the suspect would or should have known that the victim could not give consent. Ideally, this lack of information directly from the victim simply places the onus on the investigator or the prosecutor to establish indicia of the objectively compromised state of the victim that would have or should have told the defendant that consent was not possible. Of 454 PERKs collected by SANE nurses in 2015, 129 contained toxicology specimens due to suspected DFSA. Of those 129 cases, 74 were reported to MPD. Of the 74 cases reported to MPD in 2015 in which DFSA was suspected, 34 (46%) resulted in cases classified by MPD as sexual assaults. Of these 34 cases classified as assaults, 6 ultimately resulted in an arrest. Of those 6 cases, 4 were dismissed after they were charged in court, one resulted in a plea bargain, and one resulted in a guilty verdict at trial. That statistics looks stark, given that it indicates that of all 74 alleged or suspected DFSAs in 2015, two resulted in some form of adjudication.²⁸

F. Attrition, Prosecution and Conviction Rates: How the District Measures Up

Determining a national norm for reporting rates and prosecution rates for sexual assault is incredibly challenging because jurisdictions include different levels of crime in their statistics, and some include assault against minors as well. The disparity between jurisdictions is so prevalent that the Government Accountability Office released a report with recommendations for federal agencies to reconcile their disparate data collection efforts.²⁹ The most reliable academic estimates of prosecution rates indicate that 14% to 18% of all sexual assaults, from misdemeanors to first degree sexual assault or rape are prosecuted,³⁰ while 37% of all assaults that would normally be classified as rape are prosecuted nationwide.³¹ A prosecution rate can also be thought of as an attrition rate, i.e. how many cases were taken out of the system before they reached the point of filing charges in court for prosecution. A conviction rate is the

²⁸ The fact that only two DFSA cases were adjudicated that were reported as suspected DFSA to MPD does not mean that there were not cases in which the survivor was intoxicated. Unless it is made an issue in the case explicitly, it would be difficult to determine this factor from the records available.

²⁹ Sexual Violence Data: Actions Needed to Improve Clarity and Address Differences in Federal Data Collection Efforts, Government Accountability Office, July, 2016.
<http://www.gao.gov/assets/680/678511.pdf>.

³⁰ Spohn, C., Beichner, D., & Davids-Frenzel, E. (2001). Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the 'Gateway to Justice'. *Social Problems*, 48, 206-235; and Bouffard, J. (2000). Predicting type of sexual assault case closure from victim, suspect, and case characteristics. *Journal of criminal Justice*, 28, 527-542.

³¹ Tjaden, P., & Thoennes, N. (2006). Extent, nature, and consequences of rape victimization: Findings from National Violence Against Women Survey. Washington, DC: U.S. Department of Justice.

percentage of cases a prosecutor wins out of the number of arrests made. Based on all of the data provided above, the corresponding statistics for the District of Columbia are as follows:

- If we calculate this number using the total reports of sexual assault received by MPD's SAU, including sexual allegations, meaning cases that did not meet the definition of an assault and could not be upgraded to a sexual assault charge, the prosecution rate is far lower. There were 506 allegations filed in 2015 and 671 sexual assault reports filed, for a total of 1,177 reports filed with MPD. This indicates that the prosecution rate is approximately 10.3%, or far below the national norm.
- Based on 671 sexual assault cases reported to MPD in 2015, 189 resulted in arrest, 122 cases where charges were filed, 71 cases that reached adjudication and 42 served at least some time in jail or prison. This includes both felonies and misdemeanors. This indicates that the District's prosecution rate is approximately 18%, which is on the high end of the national norm.
- Finally, it should be noted that the USAO cannot prosecute cases that have not been presented to them for prosecution by law enforcement. Therefore, of the 189 arrests made, 124 were pursued in court by the USAO and 66 were adjudicated, whether by plea bargain or by guilty verdict with 42 serving some time in jail or prison. Using this measure, the conviction rate would be 35%.

IV. Recommendations

While these recommendations do not take on the very thorny legal issue of whether the District has any leverage at all over the actions of the USAO, the following should be considered and implemented to improve transparency about case outcomes, reduce the reliance on or the appearance of the reliance on societal attitudes about sexual assault in prosecutorial discretion, and survivor trust in the system as a whole. If nothing else, hopefully the data provided can be utilized as a starting point for a clearer discussion than has been possible in the past. To be clear, this report is *not at all* alleging that the USAO agrees with societal perceptions and attitudes about sexual assault. Rather those attitudes come into play when considering the downstream implications of a case as described above. Additionally, the disconnect between survivors and advocates on one hand and the USAO on the other, when there is a disconnect can be attributed first to a lack of transparency overall, and secondly to a difference of opinion about the victim's place in any given case.

To increase transparency and improve the communication process:

- A. The USAO should be required to produce the same outcomes presented in this report in some format at least annually and that data should be made publicly available. All

other USAOs other than the USAO for the District of Columbia are required to offer aggregate criminal justice outcome data to the Bureau of Justice Statistics twice a year. The USAO for the District of Columbia should be required to provide this information as well.

B. To provide consistency, increase survivor and community trust, and to create a greater dialogue between the USAO and the SAU in terms of warrants and investigations, a closing memo similar to the one provided in homicide cases should be provided when a warrant is declined for a sexual assault case. That memo should reside in the MPD file so that it is available to oversight mechanisms of the District of Columbia, outside of any confusion regarding federal jurisdiction. This memo should enumerate the reasons that a case was declined in specific detail, rather than providing a general platitude like the victim notification. This practice will help detectives improve warrant writing and investigations where needed, and most importantly, it will highlight inconsistencies in the declination process and bring the needed transparency within the system, if not publicly available.

C. Training should be provided for detectives and prosecutors in use of language surrounding consent, on-going consent issues, and the existence or lack of use of force; and training for detectives and prosecutors in building a case against a consent defense.

D. The right to an advocate in victim witness interviews, and the need for an advocate regardless of the existence of a SANE exam, is essential to all survivors' ability to pursue as much of the criminal justice process as possible, with the understanding that some victims may simply wish to opt out of the advocacy process or the criminal justice process for their own reasons. The high level of victims who opt out of the criminal justice process is concerning and having a victim advocate available regardless of the case status or the point at which the victim seeks help will help ensure that victims do not opt out due to negative interactions with system actors or due to life generated vulnerabilities. Unlike MPD's logistical challenges presented by the current iteration of SAVRAA cited in the SAVRAA Independent Consultant's report, the USAO normally meets with survivors by appointment only making it far easier for victim advocates and victims' rights attorneys to be offered and called in thereby eliminating the barriers cited in their testimony.

The testimony provided by the USAO on February 25, 2016 indicated that they do not believe that victims should have the right to opt out of their case, or to receive information about their PERK results, and those good or credible victims, *i.e.* victims whom they respect, should

report their assaults promptly and be willing to see the case through.³² While this may have been an overstatement in response to criticism received in the moment, the authoritative, dismissive and highly patronizing tone of the testimony alone when talking about a victim's right to information and the right to make decisions about their participation level, and even their expertise about their own experiences indicated that a community-based advocate is extremely necessary to ensuring a transparent and victim-centered system.³³ The USAO's argument that advocates will discourage victims from proceeding with prosecution or from cooperating with an investigation is entirely circular. First, it is the victim's right to decline to participate, barring a subpoena to testify in a case or being held on a material witness warrant. Second, advocates advise victims of their options and their rights as they currently exist under the Violence Against Women Act³⁴ and the federal Crime Victim's Rights Act³⁵. If the USAO is partnering more explicitly and openly with survivors to avoid labeling what happened to them in ways that survivors find either disrespectful, illogical or simply dismissive of their experience, advocates would not need to manage a survivor's expectations of the process to such a high degree.

The partnership model advocated here does not, as alleged in the USAO's testimony³⁶, hinge on the idea that the only acceptable outcome is the one the victim wants, or that advocates insist that the victim dictate the USAO's decision-making process. Rather it envisions a respectful exchange in which a meaningful and transparent explanation is provided in those instances where a case is not going to move forward and a level of transparency about the reasoning behind those decisions such that the survivor and the advocate can feel confident that the USAO took every opportunity to move the case forward. Currently, the tenor of these explanations and the pattern seen from the outside leaves advocates to infer the opposite: that the USAO is very conservatively looking for ways to screen a case out and survivors reporting that they felt as though they were speaking to the defendant or the defendant's attorney rather than the prosecutor's office. The data presented in this report is intended to begin to bridge this gap and encourage that conversation on more objective and truly transparent terms on both sides.

The Victim Witness Unit at the USAO is staffed with extremely competent, compassionate individuals and is a hugely needed resource for survivors. However, they have

³² Statement of Patricia A. Riley, Assistant United States Attorney for the District of Columbia at the Public Oversight Roundtable on the Implementation of the Sexual Assault Victim's Rights Amendment Act of 2014, Thursday, February 25, 2016, pg. 10.

³³ *Ibid*, pgs. 8-10.

³⁴ 42 U.S.C. § 13925 et seq

³⁵ 18 US Code §3771

³⁶ *Ibid*, pg. 8-9.

limitations due to where they work and the fact that part of their job, though only a part, is in fact to ensure that a victim is a functional witness for the prosecution. This is not an accusation of collusion or of them being utilitarian towards victim's well-being. They have knowledge about the prosecutorial process and about each individual case that community-based advocates do not have. However, their job is limited by a lack of confidentiality in conversations with the victim, and they work for the prosecutor's office so may understandably not share information with the victim that would present a problem for the prosecution. Further, a system-based victim-witness specialist is not assigned unless the case moves forward for prosecution. A community based advocate has the advantage of confidentiality, can remain with a victim throughout the case and beyond regardless of outcome, and can more effectively challenge policies and practices that may not be entirely in the victim's best interests or within her comfort zone. They too are admittedly limited by a need to ideally cultivate and maintain a working relationship with prosecutors in their jurisdiction. Both are essential and have to work together to meet a victim's needs.³⁷

E. Judge and jury education using expert witnesses should be a priority in cases involving tonic immobility, delayed reports, ongoing consent, and deliberate incapacitation of victims through drugs or alcohol, as well as cases in involving more opportunistic perpetration through drugs and alcohol.

F. The SART Team's periodic discussions regarding expanding access to SANE exams through a broader Jane Doe policy should take into consideration the USAO's reluctance to pursue cases in which a report was delayed so that we are not promising survivors' access to justice that does not actually exist under the current philosophy and practice of the USAO.

G. The most significant gap in this data is the grand jury process. While there were four cases in which the court file noted that the case was pending an indictment from the grand jury, the grand jury proceedings are considered almost entirely confidential and the USAO interprets that confidentiality to extend to whether a case is going before the grand jury at all, not just the conventionally agreed upon confidentiality of the contents of the testimony and the questions asked. Information that would shed light on the use of grand juries in this process include which cases are pending before a grand jury, whether the AUSA requested a bill of indictment at all, and whether one was granted if requested. These are procedural steps and not related to the content of the grand jury proceedings. Additional legal research is needed to

³⁷ See Konradi, Amanda. Taking the Stand: Rape Survivors and the Prosecution of Rapists. Praeger (2007).

determine the common legal understanding of the confidentiality of grand jury proceedings and what methods might be available to make the procedural elements more transparent, if at all.

V. Conclusion: Transparency and Communication

The findings show that their office prosecutes far more cases than is publicly perceived, and it is only when we break those cases down into categories that we begin to see patterns than need prompt attention. Their office is not wrong in that they do prosecute cases where the facts are difficult when placed before a judge or a jury, cases in which a report is delayed, the victim was drunk, the victim is a person with a mental illness, the victim is transgendered, or is a sex worker. However, the data in this report shows that those reports may be disproportionate outliers when compared to cases in which a physical injury and assault accompanied the sexual assault, and that the process is vastly less respectful and meaningful than the USAO perceives it to be, particularly when a survivor questions their case being declined for prosecution or dismissed.

At the end of the day, many of these issues can be addressed through real transparency and trust building between prosecutors and survivors, advocates, and the broader community. Ideally, advocates will be able to understand why a case might not have gone forward, and the USAO will stretch their definitions of a winnable case to challenge societal perceptions of sexual assault and will be better able to explain their reasoning when they cannot move forward with a case. Most importantly, survivors need meaningful dialogue from the USAO as interpersonal equals through a process that avoids labeling a case in a way that does not dismiss a victim's lived experience of the event itself regardless of the legal outcome. Hopefully this data and these recommendations will produce an environment for this process to begin.

Appendix

DC Code Sections Related to Sexual Abuse

DC Code §22-3002. First Degree Sexual Abuse. A person shall be imprisoned for any term of years or for life, and in addition, may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person; (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping; (3) After rendering that other person unconscious; or (4) After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.

DC Code §22-3003. Second Degree Sexual Abuse. A person shall be imprisoned for not more than 20 years and may be fined not more than the amount set forth in [§ 22-3571.01](#), if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or (2) Where the person knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual act; or (C) Incapable of communicating unwillingness to engage in that sexual act.

DC Code §22-3004. Third Degree Sexual Abuse. A person shall be imprisoned for not more than 10 years and may be fined not more than the amount set forth in § 22-3571.01, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person; (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping; (3) After rendering that person unconscious; or (4) After administering to that person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.

DC Code §22-3005 Fourth Degree Sexual Abuse. A person shall be imprisoned for not more than 5 years and, in addition, may be fined not more than the amount set forth in [§ 22-3571.01](#), if that person engages in or causes sexual contact with or by another person in the following manner: (1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or (2) Where the person knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual contact; or (C) Incapable of communicating unwillingness to engage in that sexual contact.

DC Code §22-3006 Misdemeanor Sexual Abuse. “Whoever engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission, shall be imprisoned for not more than 180 days and, in addition, may be fined in an amount not more than the amount set forth in [§ 22-3571.01](#).”

§ 22–3013. First degree sexual abuse of a ward, patient, client, or prisoner. Any staff member, employee, contract employee, consultant, or volunteer at a hospital, treatment facility, detention or correctional facility, group home, or other institution; anyone who is an ambulance driver or attendant, a bus driver or attendant, or person who participates in the transportation of a ward, patient, client, or prisoner to and from such institutions; or any official custodian of a ward, patient, client, or prisoner, who engages in a sexual act with a ward, patient, client, or prisoner, or causes a ward, patient, client, or prisoner to engage in or submit to a sexual act shall be imprisoned for not more than 10 years or fined not more than the amount set forth in § [22-3571.01](#), or both.

§ 22–3018. Attempts to commit sexual offenses. Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.

§ 22–3020. Aggravating circumstances. (a) Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon. (b) It is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply under subsection (a)(4) of this section. (c) No person who stands convicted of an offense under this subchapter shall be sentenced to increased punishment (or enhanced penalty) by reason of the aggravating factors set forth in subsection (a) of this section, unless prior to trial or before entry of a plea of guilty, the United States Attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the aggravating factors to be relied upon.

References

- AEquitas: The Prosecutors' Resource on Violence Against Women, Valuing Prosecutorial Performance Beyond Conviction Rates in Sexual Assault Cases: Summary of a Roundtable Discussion, 2014.
- Beichner, D. (2005). Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit. *Criminal Justice Policy Review*, 16, 461-498.
- Bouffard, J. (2000). Predicting type of sexual assault case closure from victim, suspect, and case characteristics. *Journal of Criminal Justice*, 28, 527-542.
- Frohmann, L. (1997). Convictability and Discordant Locales: Reproducing Race, Class and Gender Ideologies in Prosecutorial Decision Making." *Law & Society Review* 31:531-55.
- Government Accountability Office, Sexual Violence Data: Actions Needed to Improve Clarity and Address Differences in Federal Data Collection Efforts, July, 2016. <http://www.gao.gov/assets/680/678511.pdf>.
- Human Rights Watch, "Capitol Offense: Police Mishandling of Sexual Assault Cases in the District of Columbia," January, 2013. <https://www.hrw.org/report/2013/01/24/capitol-offense/police-mishandling-sexual-assault-cases-district-columbia>
- Konradi, Amanda. *Taking the Stand: Rape Survivors and the Prosecution of Rapists*. Praeger (2007).
- Model Rules of Professional Conduct R.3.8(a) (Special Responsibilities of Prosecutors).
- M. Elaine Nugent- Borakove & Lisa M. Budkilowicz, National District Attorney's Association, Do Lower Conviction Rates Mean Prosecutors' Offices Are Performing Poorly? (2007).
- Pollack, D. (1997). Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process. *The University of Chicago Law Review* Vol. 44, No. 3 (Spring, 1997), pp. 619-640.
- Rasmusen, E., Raghav, M. and Ramseyer, M. (2008). Convictions versus Conviction Rates: The Prosecutor's Choice. <https://kelley.iu.edu/riharbau/RePEc/iuk/wpaper/bepp2008-16-rasmusen-raghav-ramseyer.pdf>.
- Patterson, D. and Campbell, R. (2010). Why rape survivors participate in the criminal justice system. *Journal of Community Psychology*, 38(2), 191-205.
- Spohn, C., Beichner, D., & Davids-Frenzel, E. (2001). Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the 'Gateway to Justice'. *Social Problems*, 48, 206-235.
- Spohn, C., Beichner, D., Davis, E. and Holleran D. (2002). Prosecutor's Charging Decisions in Sexual Assault Cases: A Multi-Site Study, Final Report, NCJRS.
- Statement of Patricia A. Riley, Assistant United States Attorney for the District of Columbia at the Public Oversight Roundtable on the Implementation of the Sexual Assault Victim's Rights Amendment Act of 2014, Thursday, February 25, 2016, pg. 10.
- Tjaden, P., & Thoennes, N. (2006). Extent, nature, and consequences of rape victimization: Findings from National Violence Against Women Survey. Washington, DC: U.S. Department of Justice.

