

Just a Prosecutor's Perspective on At-Home Kits

Introduction [00:00:05] Now this is recording, RTI International Center for Forensic Science presents Just Science.

Voiceover [00:00:19] Welcome to Just Science, a podcast for justice professionals and anyone interested in learning more about forensic science, innovative technology, current research and actionable strategies to improve the criminal justice system. In episode seven of our Perspectives on At-Home Sexual Assault Kits season, Just Science sat down with Patti Powers, an attorney advisor at Equitas and a former senior deputy prosecuting attorney in Washington State, to discuss at-home sexual assault kits from a prosecutorial point of view. For many survivors of sexual violence, engaging in prosecution can be an important step in their healing process. As a former prosecutor and nationally recognized leader addressing sexual assault cases, Patti Powers has addressed sexual violence both in and out of the courtroom for more than 30 years. Listen along as she discusses the process of prosecuting sexual assault cases and the impact of at-home sexual assault kits on case resolutions in this episode of Just Science. This season is funded by the National Institute of Justice's Forensic Technology Center of Excellence. Some content in this podcast may be considered sensitive and may evoke emotional responses or may not be appropriate for younger audiences. Here's your host, Tyler Raible.

Tyler Raible [00:01:26] Hello and welcome to Just Science. I'm your host Tyler Raible with the Forensic Technology Center of Excellence, a program of the National Institute of Justice. Today, we'll be discussing at-home sexual assault kits from a legal perspective with our guest Patti Powers, an attorney advisor with Equitas. Patti, welcome. It's great to see you.

Patti Powers [00:01:41] Thank you so much, Tyler. I really look forward to this conversation.

Tyler Raible [00:01:45] Me too. So, Patti, you're a nationally known prosecutor, trainer and expert in addressing sexual assault cases, both cold cases and current cases. Can you tell us a little bit about your career, and you know how you got here?

Patti Powers [00:01:58] Well, first of all, I was a senior deputy prosecuting attorney in Washington State for 27 years where I had the privilege of supervising our sexual assault and domestic violence unit three different times. I also tried a high volume of cases, specifically sexual assault, domestic violence, child abuse and related homicides. I developed an expertise in both current and cold cases. Two of the cold case homicides that I tried were featured on the Paula Zahn case show, and I mention that because it really was an opportunity to show how important multidisciplinary relationships are to advancing justice in both cold and current cases. I also had the opportunity of serving as a subject matter expert, a highly qualified expert, for the United States Army for five years on an intermittent basis and was able to provide not only training but also consult on sexual assault and domestic violence cases. From those 27 years, when I was also presenting nationally, I think that began in 1998, it was a logical and a great next step to join my colleagues at Equitas, and I really love my work also as an attorney advisor.

Tyler Raible [00:03:21] It definitely sounds like you're something of a rock star in the field. So when it comes to prosecuting sexual assault cases, is there any one particular item that's currently on your mind or something that you're passionate about?

Patti Powers [00:03:31] You know, Tyler, in my heart, I'll always be a prosecutor, and there are so many important aspects to that work. It is a privilege to work with victims who have had to overcome so many barriers to making that disclosure. And we know that sexual assault is a vastly underreported crime. It also is similarly important to be in a position to hold offenders accountable and to protect the victim and - as well as our community from potential serial offenders. With that said, it also is critically important for prosecutors to draw upon their experience and expertise to take on the tough cases so that they'll be in a great position along with other multidisciplinary professionals to advance justice for victims, for communities and for offenders.

Tyler Raible [00:04:23] One of the topics that has emerged, possibly due to the pandemic, is this concept of sexual assault evidence collection kit that's publicly available and not associated with a hospital or a medical facility. I'm going to be referring to it as an at-home sexual assault kit. Can you talk a little bit about what this is?

Patti Powers [00:04:38] Sure. And you're correct. There was basically a lot of attention given to this particular facet, beginning with the pandemic, actually. There was a concern on behalf of prosecutors, nursing professionals, as well as other professionals that victims may be concerned about presenting for medical care at a hospital setting, for example, because of their concern with the spread of the virus. And so advocates, as well as medical professionals from around the country, worked really hard to ensure that victims knew that medical care was available and that there were in fact, safe surroundings for medical forensic examinations.

Tyler Raible [00:05:21] What are some of the differences between this kit and what would be available to a sexual assault victim at a hospital?

Patti Powers [00:05:27] If a victim presents for the care of a medical professional at a hospital, first of all, medical professionals are trained and certified to do this work, and they do it very well and they do it in a very victim centered manner. And that means that in doing their work, first and foremost, their care is for their patient. When a nursing professional or another medical professional meets with a patient, a victim in the legal sense, are going to obtain a medical history, which is very important. They're also going to request a history of the event. The reason why the victim presented for care at the hospital. That's a very important facet of their work because it actually helps direct the kind of medical forensic examination that the professional is going to pursue. They'll also obtain the victim's consent for this examination. And you know that consent may be withdrawn at any point. Medical professionals will also perform a head-to-toe examination where they document any apparent injuries or abnormalities that may be important. They'll also conduct an internal medical evaluation and obtain specimens from the victim's body, if the victim has consented to that, to later analyze those for the presence of sperm or semen or other aspects of forensic specimens.

Tyler Raible [00:06:56] I can imagine that after an assault happens, going to the hospital is already terrifying. So you throw in COVID 19 and it might be in some cases insurmountable. But for those that, you know, attempt this collection of evidence at home, what concerns or cautions do you have about that situation with one of these kits?

Patti Powers [00:07:12] There are many concerns associated with self-collection. And first and foremost, it's the concern of medical professionals of prosecutors and other professionals as well that the victim be given appropriate support, regardless of when a victim is able to disclose a sexual assault. There's trauma involved with that. And for a

victim to be able to follow instructions and to do this kind of a self-administered kit could enhance that trauma. Victims don't have the same kind of training that medical professionals do. Also, victims would not necessarily be in a position to document other physical injuries that may be on their body as a nursing professional would be able to. Once the evidence is obtained, then the next step would be to properly package it and to ensure that the integrity of the evidence is preserved. And with that said, the environment where the evidence is collected is also important. It needs to be pristine. It needs to be free from any potential contamination. That's another consideration as well. So after the victim collects the evidence, concern has to be brought to the fact of preserving the integrity of it, keeping evidence separate from other specimens. The next step is how that evidence is going to be packaged and where it's going to be stored. A victim, for example, may decide to hold on to those specimens or that evidence for a period of time. That would call into question where the evidence is located and whether there is any potential contamination in that process as well. The next step would be if the victim decides to proceed would be to determine what, if any, crime laboratory would be willing to take this evidence. So there are a number of different features of concern that are associated with it, but I think the principal concern that we need to focus on is that there really should be trauma informed care for the victim, and that isn't always available when a victim proceeds to utilize an at-home kit.

Tyler Raible [00:09:38] So on the topic of victim centered, trauma informed approaches, do you think that an at-home collection kit might make a survivor less likely to engage with the system?

Patti Powers [00:09:49] That may be variable among survivors, but I would say that the situation of collecting specimens from a person's own body after they have been traumatized by a sexual assault would be very difficult and challenging, and this is being done without training in an attempt to well follow instructions. And I think the facet of needing to obtain specimens from private areas of the body, which is very invasive, would certainly be a traumatic one for victims in this situation.

Tyler Raible [00:10:26] So you mentioned several concerns surrounding the integrity of the evidence, right? So how it's stored, how it's collected, and I would imagine that this would have an impact on the ability to pursue these cases in court when one of them is involved, right? So how would a person even know about this stuff? Are there resources available that they could better understand the topic?

Patti Powers [00:10:44] I think that's an excellent question, and professionals around the country, from the medical community, from law enforcement and from prosecution have been addressing concerns with at-home kits, and the hope is that victims before making this kind of a decision would check with service professionals in their communities to obtain additional information about it so that they can truly make an informed decision in this regard.

Tyler Raible [00:11:12] Given these challenges that we've mentioned, is there no opportunity for them to seek justice after that?

Patti Powers [00:11:17] Every case should be analyzed separately, and there may be a number of different variables among cases that when a victim presents a disclosure in the criminal justice system, brings that disclosure to the attention of law enforcement or to prosecutors, or maybe even through advocacy. I think it's important that all service professionals do everything possible to support the victim in advancing justice. There may

be some difficulties if a kit has been self-administered, whether it was presented to a laboratory that accepted it for testing or whether it was not presented. The next step would be to determine whether it could be tested at a state crime laboratory, for example. But regardless of what the variables are in those cases and the difficulties presented by the self-administration of these at-home kits, I'm certain that professionals, prosecutors and law enforcement and advocates would want to do everything possible to support the victim in the criminal justice system within the requirements of the law.

Tyler Raible [00:12:27] So in your experience, I would see there are a lot of holes that could be poked in a case, right? That uses this at-home kit as its backbone. Do you believe that's the case or is there a way that you could actually go after this and get it to work?

Patti Powers [00:12:42] Our colleagues, who are defense attorneys, could raise a number of issues, and these issues, of course, would be determined after the prosecutor submits argument and then the court, using its discretion and based upon the law, would render a decision. Some of the issues that could be advanced would be the motivation of the victim in doing their own exam. There could be a request, for example, for the defense to view the area where the examination was performed, and even if a court denied that request, this could still be introduced through questioning at trial. The defense is also going to inquire into the packaging of the evidence. The defense could also certainly argue that self-administration of a sexual assault kit is not known as a national best practice and could present expert testimony in that regard. Further, there's going to be inquiry into if the kit was not immediately provided to a crime laboratory, how was it stored? Where is it stored? Did anyone else have any access to it? Some of these issues may affect the admissibility of the evidence or if the court allowed the admissibility, there could still be arguments about all of these different features of concern that I've mentioned. And when you look at all of the concerns, they would be certainly addressed by prosecutors who'd be committed to advancing justice for the victim, but this would still represent something that a victim has to go through and that again takes us right back to where we started, the necessity for a trauma informed approach to caring for victims.

Tyler Raible [00:14:24] Are there other kinds of services that might be available to them if they were to go to a hospital?

Patti Powers [00:14:29] I think in most medical communities, when a patient, a victim, presents for care after a sexual assault, there would certainly be an availability of sexual assault advocates, which is a wonderful resource for victims to have that level of commitment supporting the victim throughout the entire process. If a victim, however, were self-administering the at-home kit, there may or may not be access to advocacy at that particular time. So I think that really is a critical lack. The other thing that should be mentioned is when sexual assault nurses or forensic examiners who are medical professionals, when they conduct these exams, their concern is for their patient. They carefully explain every question that they're going to be asking and every act involved with collecting specimens from the victim's body. Consent is obtained for all of this professional activity. When a victim conducts their own exam, there's not an availability of a trusted medical professional to answer questions or to discuss in detail why specimens are being collected. Sometimes there may be a telehealth component in some jurisdictions, and if there is a telehealth component, there may be access to a medical professional. Sometimes if there is, for example, a videotape of the examination, that could also be subject to a discovery request from the defense. So there really are issues involved in the two basic scenarios that we're addressing.

Tyler Raible [00:16:10] It definitely seems to me that from a legal standpoint, it would be an uphill battle, especially when we get into conversations around, you know, the credibility. And that's one of the beautiful things about having something done at the hospital, right? The person who has professional training would be a little more suited for it, right?

Patti Powers [00:16:25] Yes, that's another excellent point that we should consider. The medical professional has the training and expertise to conduct the examination, and that is guided by the patient, the victim's statement for purpose of the medical diagnosis. They have the training to do that, and in most jurisdictions, this is known as a statement for purpose of medical diagnosis that the medical professional can testify to at trial. If a victim is self-administering their own examination, they don't have the statement for purpose of medical diagnosis. They have their statement. Now in many jurisdictions, a victim's statement does not require corroboration. Still, what we do as prosecutors, we do offer corroboration on every salient point because what we want to do for the jury ultimately is to recreate the reality of this crime. So there's a huge difference between self-administered and what evidence may be available and having this conducted by a medical professional who's trained and certified to do the work. Another issue might become whether or not any trace evidence has been preserved. If the victim is able to more immediately report a sexual assault, whether or not they have the understanding or the ability to preserve any trace evidence that may be contained within their clothing, for example. This is something that medical professionals are trained to do. Documenting physical injuries is important. Medical professionals may photograph these injuries, they may also measure these injuries with reference points. Victims who are self-administering this, may not have that training or that capacity and injuries may dissipate over a period of time, so there may not be another opportunity to preserve this evidence, which could be important.

Tyler Raible [00:18:26] There's one thing that we've been dancing around that I'm interested to hear your perspective on. You mentioned early in your introduction the value of multidisciplinary teams. You know, obviously they're crucial. So it seems to me that the at-home kits kind of makes it difficult to have the multidisciplinary team because you're inadvertently eliminating part of it, right?

Patti Powers [00:18:47] There is a concern in that regard, and I think what best expresses what we're discussing is the reality that the victim is the heart of all of our efforts. It's because of the victim and serving the victim that law enforcement and medical prosecution and advocacy come together to do their best work for the victim. There's a coordination among our efforts to the extent that that's possible given the different professional perspectives. But the victim is at the center of our work. When a victim chooses to self-administer an exam, there really is not the same kind of teamwork, if you will, that is available and certainly supportive of the victim. So another concern really would be not having access to all of the resources that we're able to offer.

Tyler Raible [00:19:41] That's actually a great segue to my next question. So as far as supporting survivors of sexual assault, justice can mean vastly different things to the prosecutor than to the survivor. So how do you align these two perspectives? How can prosecutors support the healing process of survivors and still, you know, get their job done?

Patti Powers [00:20:00] When a survivor chooses or is able to make a disclosure of a sexual assault and is interviewed by law enforcement and is involved with the prosecutor

as well, who's going to determine charges and help prepare a case for trial, our goals are very similar. It's offender accountability. The prosecutors have the honor of giving voice to a victim's concern. The right to be let alone, to be free from unwanted touching. To support that victim throughout the process. So there really is a similarity of goals and in this way, together as a team, as prosecutors, law enforcement professionals, medical professionals and advocacy professionals, we're there to support the victim through every stage of litigation. Offender accountability and affirming the victim's right to be, let alone, are the highest values for those of us that have had the privilege to work with victims and they're very consistent with the victims' goals should they choose to enter the criminal justice system.

Tyler Raible [00:21:10] Patti, the work that you do is incredible, and the passion that you bring to the table is palpable. Are there any final thoughts you'd like to share with our listeners before we wrap up today?

Patti Powers [00:21:19] Well, first of all, Tyler, thank you for the opportunity to answer some really great questions. I'm really hopeful that we'll be able to share this information with other professionals in the field to build stronger, multi-disciplinary relationships so that we're even more empowered to reach out to victims, to give victims the information that's necessary to make informed decisions and to know that all of us together supporting the victim have is our goal, advancing the cause of justice for victims, offenders and for our communities.

Tyler Raible [00:21:56] What a wonderful way to wrap up. I'd like to thank Patti Powers for sitting down with Just Science to discuss at-home sexual assault evidence collection. So thank you, Patti. I sincerely appreciate you being here today.

Patti Powers [00:22:07] Thank you.

Tyler Raible [00:22:07] If you enjoyed today's conversation, be sure to like and follow Just Science on your podcast platform of choice. For more information on today's topic and resources in the forensic field, visit ForensicCOE.org. I'm Tyler Raible, and this has been another episode of Just Science.

Voiceover [00:22:23] Next week Just Science sits down with a panel of experts to discuss at-home kits through a victim centered lens. Opinions or points of views expressed in this podcast represent a consensus of the authors and do not necessarily represent the official position or policies of its funding.