



# Training Key® #574

## Pretext Phone Calls in Sexual Assault Investigations

The “pretext” phone call is an investigative tool that can be used in a wide variety of criminal investigations. It can be especially effective in sexual assault investigations, including drug-facilitated rapes.

### Introduction

In this context, a pretext phone call is simply a tape-recorded telephone call between the victim and the suspect. The call is usually initiated by the victim, under the supervision of a law enforcement officer, preferably the lead investigator or case agent. The suspect is unaware that the call is being recorded. This technique may be referred to by different terms, including “confrontational calls,” “pretext calls,” “taping,” and “consensual taping.”

The purpose of a pretext phone call is to elicit incriminating statements from the suspect. A suspect will frequently talk to the sexual assault victim about the incident if he believes the victim is alone and no one else is listening. The tape recording resulting from an effective pretext call gives the investigator leverage during the subsequent interview of the suspect because the investigator can confront the suspect with the recorded statements the suspect made during the call.

Statements obtained as the result of a pretext call can be powerful evidence in court and are sometimes key evidence linking the suspect to the crime. However, depending on the victim and the circumstances, a pretext call can be traumatic for the victim and the victim may not be able to handle the emotional consequences a pretext call can create. Therefore, when considering its use, officers should pay close attention to the emotional strength of the victim and ensure that she is well aware of the potential effects and reactions such a call may elicit.

Some states prohibit recording phone calls. However, some of these states exempt law enforcement officers from these laws when the officer is acting within the scope of official duties. For example, California Penal Code Section 633 provides such an exemption. Some states require that court authorization be obtained before recording a call. If there is any question about the legality of record-

ing calls in one's jurisdiction, the investigator should check with the department's legal officer, local prosecutor and/or state laws.

Depending on the laws of the jurisdiction and policy of the agency, officers may want to consider asking the victim to sign a consent form prior to making the pretext call. This form can also include language to protect the officers, agency and employing jurisdiction from potential liability in relation to any later claims by the victim, such as claims relating to emotional injury.

No two cases are alike. Some suspects are extremely dangerous and associate with other dangerous people. This *Training Key* provides some suggestions for the investigator to consider. However, the foremost consideration must be the safety of the victim. No set of suggestions could address all the safety issues that might arise in a given case. Therefore, as with any investigative step, the investigator should proceed with caution.

### Necessary Equipment

*Standard audio cassette recorder.* The recorder should have a microphone input jack and an ear plug jack. Handheld recorders work well, as pretext calls are frequently made from locations other than the investigator's office.

*Ear plug.* An ear plug allows the investigator to listen to both parties to the call while the call is in progress.

*A device to connect the tape recorder to the phone for recording purposes.* Specifically, a phone recording control device that connects directly between the phone line and the modular jack on the phone. It also plugs into the microphone/input jack of the tape recorder. This device is simple to use and provides dependable recording and excellent audio pick-up of both parties to the call. It can be purchased at electronic equipment stores for approximately \$20. Avoid using the suction cup devices sometimes used to record calls as they can result in poor quality tapes or worse. For example, in

some cases such devices have only recorded the voice of the witness working with the police and not the suspect's voice.

## **Victim Interview and Related Considerations**

It is imperative that the investigator interview the victim in detail before making a pretext call. Information obtained from the interview will help the investigator formulate questions for the victim to ask the suspect. The information will also help the investigator analyze the statements made by the suspect during the recorded pretext call. The investigator should be familiar with all aspects of the case, including witness statements.

An effective pretext call can only be conducted if the victim is willing to cooperate and prepared to encounter the suspect. Keep in mind that it may be too traumatic or embarrassing for some victims to converse with the suspect effectively. And, as previously noted, when deciding whether to make a pretext call, consider the emotional effect the pretext call might have on the victim. If the victim is willing to make a pretext call, consider having a counselor or victim's advocate available to help the victim deal with emotional concerns prior to and immediately after the call.

## **Undercover Pretext Calls**

Depending on the circumstances, the investigator may consider using an undercover police officer (or a friend of the victim) to pose as the victim for purposes of the pretext call. Obviously, if the suspect knows the victim well, the suspect may detect a difference in the voice and undermine the effectiveness of the call. However, the undercover agent or friend might be able to explain that away. For example, the undercover officer or friend might "explain" that she has been upset, has been crying, and/or has not been sleeping well.

During the undercover pretext call, the suspect may request the victim's phone number so that he can call the victim. In planning the undercover pretext call, consideration must be given to a phone number, if any, to give the suspect in the event this happens.

If someone poses as the victim for the purposes of the pretext call, the implications of this to the victim and the victim's safety must be carefully considered, discussed with the victim, and addressed. For example, after the pretext call, the suspect may attempt to make contact with the actual victim. The victim and investigators must be prepared for this possibility.

## **When to Make the Pretext Call**

The best time to make the call will depend upon the circumstances of the case. A pretext call does not have to be initiated immediately following the crime. Indeed, it can be initiated days, weeks, or even months after the incident. In some instances, a long delay may cause the suspect to think he got away with it, and he might be more willing to talk about the incident. Depending on the circumstances, multiple pretext calls may be appropriate.

In lengthy investigations, one should consider initiating the pretext call on a date which coincides with the anniversary date of the crime or on some other date on which the suspect might be thinking about the victim. For example, if the suspect knows the victim well, the victim might call the suspect on the victim's birthday.

Preferably, a pretext call should be made before the suspect becomes aware of the investigation. However, even if the suspect knows of the investigation, a pretext call may be an appropriate tactic, especially in cases where the evidence is not yet strong enough to provide probable cause for a warrant and to potentially obtain a conviction.

When a suspect is represented by an attorney, the legal principles applicable to contacts with represented persons must be followed. Under such circumstances, no direct or indirect contact with the suspect should be undertaken by law enforcement, or anyone working under the direction or control of law enforcement, without the express authorization of a prosecutor.

If the investigator is concerned that the suspect would immediately think that a phone call from the victim is a trap, initiate the call on a weekend, or late at night, when the suspect might be off guard and less suspicious.

If the resources are available, surveil the suspect's house and learn when the suspect normally returns home from work or other activities. Then, on another day, have the surveillance team in place and the victim ready to place the call. When the surveillance team reports that the suspect is home, direct the victim to initiate the call. This procedure may minimize the stress and inconvenience of making a pretext call, only to learn that the suspect is not at home. Also, calling the suspect the moment he gets home from work might catch the suspect off guard. Finally, by using this procedure, the surveillance agents can testify that the suspect was home at the time of the call and, thereby, provide additional evidence that it is the suspect's voice on the tape.

## **Preparing for the Pretext Call**

In sexual assault cases, the victim frequently knows the suspect. Pretext calls can be effectively used in many cases of this type. If the suspect is a complete stranger to the victim, a pretext call may not be possible, as the suspect may become suspicious about how the victim got his phone number. However, if there is not yet enough evidence to proceed further with the investigation, there is little to lose by making the call and concocting a story to ally this suspicion. Be creative. For example, the victim may tell the suspect that a friend of a friend knows him, and that's how she got his number.

Prepare a list of questions and statements the victim can use to encourage the suspect to talk about the incident. Review this list with the victim. It should be made clear to the victim that the purpose of the call is to obtain incriminating statements by the suspect. Formulate questions and statements in anticipation of what the suspect may say to the victim (for example, admissions, denials, apologies, evasiveness). These questions should be recorded on paper so that, if necessary, the victim can refer to them during the call. This could be critical because many victims become nervous during the call and forget what to say. Remind the victim to let the suspect do most of the talking, and to avoid interrupting him.

To help prepare the victim for possible responses by the suspect, practice or role play the questions and potential responses with the victim. This will help the victim avoid sounding like she is reading from a script during the call. The practice sessions should be as realistic as possible, even to the extent of having the victim call the investigator on a different line and converse with the investigator in a manner that simulates what the actual conversation may sound like. The more the victim practices under realistic conditions, the better prepared the victim will be to effectively conduct the pretext call.

During the pretext call the victim should avoid harsh, accusatory questions like, "Why did you rape me!?" A suspect's usual answer to this type of question is, "I didn't rape you." A suspect may admit he took advantage of the unconscious victim, but he doesn't want to be associated with the likes of a rapist or a criminal. Instead, the victim might ask the suspect something like this:

*“Why did you have sex with me after I pushed you away and told you to stop?”*

or

*“You knew I was out of it and didn’t know what was going on, but you had sex with me anyway. Why?”*

This type of question is more likely to elicit an incriminating statement. Avoid nebulous questions like, “Why did you do it?” Try to be more specific. A lack of denial by the suspect may be as incriminating as an admission. In some jurisdictions, the laws of evidence have a specific term to describe evidence that establishes that someone failed to deny an accusation under circumstances that called for a denial had the person been innocent. The term for that evidence is an “admission by silence.” See, for example, *United States v. Aponte*, 31 F.3d 86, 87 (2d Cir. 1994).

Under the circumstances, it may be in the public interest for the victim to make misrepresentations to the suspect. For example, if the suspect asks the victim if she told the police what happened, she can tell him, “No.” However, the victim should not make threatening statements such as, “If you don’t admit you raped me, I’m going to call the police and have you arrested.”

When planning a pretext call, one should arrange to place the call from a location that is well-suited for that purpose. For example, some law enforcement agencies have automatic answering devices on their nonundercover phone lines, devices that, among other things, inform the caller that he has reached the law enforcement agency. Because some suspects use Caller ID and automatic return calling, such phone lines should not be used. In most cases, the call can be made from the victim’s residence.

Finally, the victim should not be under the influence of alcohol or drugs that could affect her judgment, thought processes, or emotional stability during the pretext call.

## **Making the Pretext Call**

Following is a short checklist to keep in mind when making a pretext call:

- Make sure there is nothing in the room to distract the victim, such as unnecessary persons or ringing phones. Silence all police radios, cellular phones and beepers. Also, make sure that public address systems, fish tank motors, and anything else that can cause noise or electronic interference are turned off.

- Ensure that the victim is prepared for the various possibilities when placing a call. For example:

- The pretext call may be “answered” by an answering machine.
- The line may be busy.
- The suspect may have call waiting and answer the pretext call while placing someone else on hold.
- Someone other than the suspect may answer, and the suspect may or may not be home.
- The suspect may answer, but other persons may be in the room with the suspect or the suspect may have visitors.
- The suspect may answer, and he may be alone.
- The suspect may answer, and he may be alone, but he may report that he doesn’t have the time to talk.

- If the recorder is battery operated, make sure that fresh batteries are installed.

- Attach the recording equipment to the phone, and test it to make sure it is working properly.

- Attach the ear plug to the recorder in order to listen in on the call.

- Record an introduction on the tape to document the date, time, case number, victim’s name, and other necessary information.

- Before placing the call, double-check the recorder to make sure it is turned on and placed in the record mode.

When the victim reaches the suspect, the investigator should listen carefully to both sides of the conversation and assist the victim by pointing to questions on the list that the victim should ask the suspect. The investigator should have a note pad handy to jot down additional questions that the victim can pose to the suspect as the conversation develops.

Usually a pretext call should not last longer than about 30 minutes. The victim should remain focused on talking about the incident. If the conversation drifts too far into other subject areas the tape may be of little evidentiary value.

Once the call is completed, the tape becomes evidence and should be handled with the same care as any other piece of physical evidence.

## **Other Considerations**

In the event that only a pager number is available for the suspect, it may be necessary to wait with the victim by the phone until the suspect calls back. If, within a reasonable period of time, the wait is deemed to be too time consuming or unproductive, consideration should be given to installing recording equipment on the victim’s phone and leaving the equipment with the victim in case the suspect should call her at a later time. In this situation, the victim is acting as an agent of the police. While this procedure is valid in some jurisdictions it may not be in others. Prior to utilizing this procedure, investigators should be assured that it is legally acceptable in their jurisdiction.

If the recorder is attached to the victim’s phone and is left with the victim, responsible officers should do the following.

- Give the victim thorough instructions on how to operate the recorder.

- For evidentiary purposes, carefully test the device, ensure that it is able to record sound, instruct the victim on how to use the device and then document that you performed these steps.

- If the victim has more than one phone, remind the victim of the fact that she will need to remember to pick up only the phone that is connected to the recording device. Otherwise the victim will need to give an excuse to the suspect to explain why she needs to change phones.

- If the victim disconnects all her phones except the one with the recording device, the victim will not have to worry about picking up the wrong phone.

Again, consider the victim’s emotional state when deciding whether she is capable of talking to the suspect without your presence, support, and assistance.

**Leaving a recording device attached to the victim’s phone.** Perpetrators have been known to initiate contacts with their victims. If this is a possibility, consideration should be given to attaching the recorder to the victim’s phone as soon as possible. Likewise, even if the suspect has already been arrested for the rape, consider attaching a recorder to the victim’s phone if there is any reason to believe that the suspect or one of his associates may try to call her. Keep in mind that a defendant, even a defendant in jail, may be both interested in and capable of calling his victim.

If there is a possibility that the suspect or one of his acquaintances may visit the residence of the victim, consideration must be given to hide the recording equipment. This situation could arise in a variety of circumstances, particularly when the victim and the suspect are acquainted, have friends or acquaintances in common, or are members of the same family. The safety of the victim is of particular concern in this regard. It is not meant to suggest that the victim try to record a face-to-face conversation with the suspect, which may present practical, safety and legal issues.

If later the victim is able to complete the pretext call, the tape should be retrieved as soon as possible to prevent loss or accidental destruction and to minimize evidentiary challenges relating to alleged tampering or chain-of-custody issues. Normal chain-of-custody procedures should be followed.

*The following is a transcript of an actual pretext phone call used in a sexual assault investigation.*

#### **POLICE DEPARTMENT INVESTIGATOR'S REPORT**

**Date (occur):**

**Time (occur):**

**Location:**

**Subject: PD Crime Case #**

**Detective's Name:**

Today's date is December 3, 2000, time is 1630 hours. I am with [victim's name] and we will be attempting a pre-text phone call to [suspect's name].

V:denotes victim

S:denotes suspect

V:Hello?

S:Did somebody page?

V:Gerald?

S:Yes.

V:Hi.

S:What up?

V:How are you?

S:Um. Fine. Getting ready to go to work.

V:Oh, you are? Can you talk for like a few seconds or minutes?

S:Okay.

V:Um, you know how you didn't use a condom?

S:Um-hmmm.

V:Um. I'm like worried cause I was supposed to like start my period like last weekend.

S:Well then you go down to Planned Parenthood. And tell them the situation and they can give you something to take care of that if, in fact, you are.

V:Well. I don't like have any money.

S:It doesn't cost you anything.

V:Oh, it doesn't?

S:No.

V:Well, what should I do if I am?

S:You tell them the situation.

V:Uh-huh.

S:What they do...tell them you need the morning after pill and they'll give it to you and you take what you have to take and it'll induce your period. In other words, it'll make you have your period. Within seven days.

V:Oh.

S:But just go in there and you fill out paperwork and tell them you don't have any insurance and you don't want your parents to know about it and if they ask you where can they contact you at, you tell them to contact you on your pager. And then you tell them...fill out all the information...and then you tell them what the situation is, they'll check you out. They'll give you a pregnancy test and then just tell them you need the morning after pill. You take it like you're supposed to and what it does is, it causes you to have your period.

V:Well, um, so...you're saying I should like have an abortion like.

S:Well, it's not necessarily an abortion, but it just prevents you from, your body to accepting it, if, in fact, you are pregnant. It just prevents your body from accepting it.

V:Well, could I go like do that alone? Cause you know I'm only 15 and so...

S:You can do it alone because when I told Ann, like, you know, Ann had the same problem when she went out with this one guy. A different Ann, not the Ann that Nadia knows, a different Ann. And uh, she had a problem, the same thing, and she thought she might have missed her period, but it was somewhat normal and you can miss your period for like a week or two. What she did was, after she missed it, a couple days, she went down to Planned Parenthood and said that she's only 14, I think. Yeah, 14 or 15, something like that. She went down and told them she didn't want her parents knowing because they didn't know she was having sex and so she went down and then she told them she needed the morning after pill because she might, she might be and she can't have it. She said, "I don't want my boyfriend knowing about it. You know the guy I had sex with" and so she went down and they gave her the morning after pill and she took it, like seven pills you have to take, and then you take it. And then what happens is it makes your body start having like your normal period.

V:Then when we had sex, did you pull out when you comed.

S:Yes, I did.

V:Okay.

S:But, it isn't abnormal that you miss your period because she missed hers like by a week. She got worried, she went in and she took this. They're like, there are several pills you take, they give you in a little packet, it doesn't cost you anything. They ask for you to make a donation, but what you do is, you take it. And it starts making you like having your period. And you have them for like seven days. Cause, how long is your normal period?

V:Um, about six days.

S:Six days? Okay. You'll be on it for about seven days, seven to eight days, somewhere around there. And then after you take for...you just read the directions, you take it and once it's gone, it's, that's it.

V:Well, also Ann is kinda worried that she has an STD and she doesn't know if it's from you or Tim, but it could be from you because I'm kind of hurting down there too.

S:Well, it isn't from me because I just got my test results back. They did a physical. And they do a full physical and so and they did a blood test and a urine test and I came with nothing.

V: Did you wear a condom when you had sex with Ann?

S:What?

V:Did you wear a condom when you had sex with Ann?

S:Um, first time yes, second time, no. But the second time was on the same day, I think it was.

V:Yeah?

S:But she said that she...first of all, I don't think she has an STD. First of all, I think it's because, when usually, when somebody has sex with someone who is, well, a lot larger than somebody they had sex with before, it does hurt, because when I had sex with Nadia, she said it hurt for like a couple hours and then like the first time, she said it hurt for a couple days. When I had sex with her, she said it hurt for a couple days. But, I don't have anything because I just got my test results back yesterday. I don't have anything. I gotta go back in on December 8th, to take another physical for my doctor.

V:Uh-huh.

S:That includes also they do blood, they do a blood test.

V:All right. Well, I better...

S:I'm fine. Tim you probably have to worry about. Uh, she told me that she didn't have sex, like she didn't have sex with Tim because he just couldn't get it up. And that day, after that, the day that she had sex with Tim, she had sex after I had sex with her.

V:Um-hmmm.

S:So, if she contracted something, that would be on her.

V:Um-hmmm.

S:Because...is it still hurting?

V:For who?

S:It is?

V:For me?

S:Yeah.

V:Yeah.

S:So like what kind of pain do you feel?

V:Well, like it hurts for me to go pee and like it stings really...

S:...a urinary infection.

V:Hmm.

S:The only thing you can really catch from a guy is like gonorrhea, but it wouldn't affect your urine. That's more of a bladder type of infection. The only thing you can really catch from a guy is like

crabs or um, it is possible to catch like gonorrhea, but girls don't get the same as guys do, it doesn't hurt when you pee, that's a bladder infection.

V:Gerald?

S:What?

V:I gotta go because my parents are gonna be home soon. I'll go to Planned Parenthood and I'll tell you if I am or not. Okay?

S:Okay. And if you don't want to have it, like you don't want to keep it. Then uh, go down to Planned Parenthood and tell them, you know, if you are, in fact, and that pill thing doesn't work.

V:Um-hmmm.

S:Then...I don't see why it wouldn't, but if it doesn't work and you want to have an abortion, go to Planned Parenthood and tell them you want to have an abortion and you can't afford it and they'll take care of it.

V:Okay.

S:But let me know what's going on either way. Okay?

V:All right.

S:I got to get going to work. Okay?

V:Uh-huh.

S:Okay, bye.

V:Bye.

#### Acknowledgement

Detective Harold Eisenga, San Diego, California, Police Department Sex Crimes Unit prepared this *Training Key*.

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# questions

The following questions are based on information in this *Training Key*. Select the one best answer for each question.

1. Which of the following is *false* concerning pretext phone calls?
  - (a) A pretext phone call should be made before the suspect becomes aware of the investigation.
  - (b) The victim has to be present while the pretext phone call is made.
  - (c) The investigator must interview the victim in detail before making a pretext call.
  - (d) Some states prohibit recording phone calls.
2. When is the best time to make a pretext phone call?
  - (a) Between 2-3 days of the reported incident.
  - (b) Between 2-3 months after the reported incident.
  - (c) On the 1 year anniversary that the incident took place.
  - (d) The best time to call will depend on the circumstances of each individual case.
3. Which of the following is the purpose of using a pretext phone call?
  - (a) To determine whether the victim is telling the truth.
  - (b) To determine what other criminal activity the suspect is involved in.
  - (c) To provide an opportunity for the victim to confront the suspect.
  - (d) To elicit incriminating statements from the suspect.

# answers

1. (b) The victim has to be present while the pretext call is made. This is false; a victim does not have to be present, in fact, the pretext phone call can be made by an undercover officer.
2. (d) The best time to call will depend on the circumstances of each individual case.
3. (d) The pretext phone call is used to elicit incriminating statements from the suspect.

# have you read...?

“Investigating Sexual Assaults Part I: Elements of Sexual Assault & Initial Response” International Association of Chiefs of Police, *Training Key #571*, Alexandria, VA 22314 (2004).

This document addresses investigative procedures and best practices for investigating sexual assaults and working with victims of sexual violence.

