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MEMORANDUM

TO: Assistant District Attorneys
FROM: Madeline Singas, Chief Assistant District Attorney
DATE: February 13, 2013
SUBJECT: Condoms as evidence of prostitution-related offenses

In response to the recent debate over whether or not to allow prosecutors to use condoms found in connection with prostitution-related cases as evidence of associated defendants' guilt, the District Attorney has issued the following policy:

Assistant district attorneys are prohibited from using condoms as evidence in prostitution-related cases.

If an ADA needs clarification, or is uncertain about how to apply this policy in a specific case, please contact me for guidance.

For a more thorough explanation of the public policy concerns informing the District Attorney's position, please read the DA's published article on the subject below.

HUFF
POST NEW YORK

A Prosecutor's Long Game: When the Public's Health Becomes the Greater Good

Posted: 10/10/2012 4:08 pm

Prosecutorial discretion is wielded and balanced atop a scale that weighs our measurements of the non-financial public costs and benefits of legal action. In fact, much of what we do -- from granting leniency to co-conspirators assisting the authorities, to deciding whether to hold the line on an offender and take him or her to trial -- is an exercise of a very precarious and subjective cost-benefit analysis aimed at

maximizing the public good.

Such is the case in the recent debate over whether or not to allow prosecutors to use condoms found in the possession of prostitutes as trial evidence of their guilt.

In this case, opponents of the prohibition -- prosecutors, mostly -- are right in their identification of the benefit side of this public safety equation: using such evidence can play a small but tangible role in obtaining a conviction against someone accused of a crime. Advocates of the ban have also deftly distilled the costs of the courtroom tactic: either through police seizure or a prostitute's fear of prosecution, condom use will decrease and more workers and patrons will be infected with deadly diseases as a result.

Prosecutors are typically in the position of evaluating these decisions squarely in the context of the public's safety. But in this instance, that definition must also include the public's health.

Prosecutors have a long history of making decisions based on the long game. We cut deals for less violent co-conspirators to get the killer, to low-level drug dealers to get the king pin, and to small time crooks to get the mastermind. We've made a profession out of leveraging short-term concessions for long-term public gains. That's what we should do here.

Mounting evidence makes clear that police seizures and trial prosecutions using condoms as evidence make sex workers significantly less likely to carry and use condoms when working. Honest prosecutors should also be willing to admit that very few prostitution cases go to trial and that the typical lifespan of these cases make the seized evidence nearly worthless. The evidence's real power is in its enduring and unfortunate ability to deter safer sex in this industry.

Under any reasonable analysis, the seismic public health impact of using condoms as evidence of prostitution dwarfs the limited courtroom gain in the isolated number of cases that make it that far. With this issue, the public good rests in the long game, not the short one.

That, to me, is enough common-sense evidence to take action in my own office. That's why I am prohibiting the nearly 200 prosecutors in my office from using condoms as evidence of prostitution in court.

This decision is made even easier when we think about the "criminals" to whom we are granting such a break. We aren't talking about the more nefarious -- and sometimes violent -- community predators who are typically the beneficiaries of prosecutors' effort to achieve the broader public good. We are talking about men and women sex workers who are frequently abused and almost always exploited. Like any case, when calculating the costs and benefits of our discretion, prosecutors must weigh the danger and the worthiness of the gifted party. Few defendants are more worthy of compassion than sex workers.

With such dire potential consequences for the rest of society hanging in the balance, such a tiny benefit given to such a questionable criminal is an easy break for me to cut and, in my view, it is clearly in the furtherance of maximizing the long-term public good.

Prosecutorial policy can fail when it is undermined by competing public policy from a separate unit of government. In this instance, public policy and governments across the country -- including New York's -- have embraced efforts to make condoms readily available to sex workers. None of these governments condone the sex industry, yet they still wisely choose to play the long game when faced with such a dangerous alternative. It's time for prosecutorial policy to stop offering a competing message to sex workers.

Some of my colleagues are rightly concerned about lawmakers passing legal bans on the use of condoms as evidence. In doing so, these legislators would effectively be playing both lawmaker and prosecutor when it comes to this public safety cost-benefit analysis. This issue aside, that would be a troubling precedent. But it's also one that can be avoided if prosecutors take it upon themselves to act.

Prosecutorial discretion doesn't work best as an absolutist, win-at-all-costs paradigm. It works best as a complex amalgam of human cost and public benefit. In this instance, I believe my action is evidence that prosecutors can do a better job understanding and weighing both sides of this important equation.

A prosecutor's job is often to try to reduce negative behavior, sometimes by sending tough messages to prospective criminals through prosecutions and policy. These tough messages can work and can unquestionably serve the public good. But this issue reminds us that in some instances, it takes a longer view of the public good to realize that the tough message is not always the right one.

Kathleen Rice is the district attorney of Nassau County, New York. She has served as a federal prosecutor for the U.S. Department of Justice and as a homicide prosecutor in New York City.