

Excerpts from Report  
by the Response  
Systems Panel (RSP)  
Pertaining to the  
SVIP Capability

## G. THE MULTIDISCIPLINARY RESPONSE TO INVESTIGATE AND PROSECUTE SEXUAL ASSAULT REPORTS

The best practice to respond to sexual assault reports in both the civilian sector and military community is a multidisciplinary approach, which requires cooperation and communication among law enforcement personnel, medical professionals, victim advocates and victims' counsel, prosecutors, paralegals, and others in the community who provide support to sexual assault victims.

### 1. The Special Victim Capability and Victim-Centric Approach in the Military

In the FY13 NDAA, Congress required DoD and the Services to implement a Special Victim Capability to enhance the investigation and prosecution of sexual assault cases in the military. "The [Special Victim Capability] represents a multidisciplinary, coordinated approach to victim support and offender accountability."<sup>469</sup> DoD policy states that "[a]t a minimum, the [Special Victim Capability] will provide for specially trained prosecutors, victim witness assistance personnel, paralegals, and administrative legal support personnel who will work collaboratively with specially trained MCIO investigators."<sup>470</sup> It also requires that the "[d]esignated Special Victim Capability personnel will collaborate with local Military Department SARCs, SAPR victim advocates, Family Advocacy Program managers and domestic abuse victim advocates during all

stages of the investigative and military justice process to ensure an integrated capability, to the greatest extent possible.”<sup>471</sup>

Figure 8 illustrates the victim-centric nature of the military response to sexual assault. Participants include: (1) the command and unit leadership; (2) the sexual assault response coordinator (SARC) and victim advocate; (3) the special victim counsel and legal assistance counsel provided by the military; (4) medical care and behavioral health services personnel, chaplains, and social services on and off post; and (5) those who are part of the Special Victim Capability—the special victim unit investigator, special victim prosecutor, and the victim witness liaison who works in concert with the staff judge advocate and prosecutor’s office.

FIGURE 8 – THE MILITARY VICTIM-CENTRIC APPROACH<sup>472</sup>



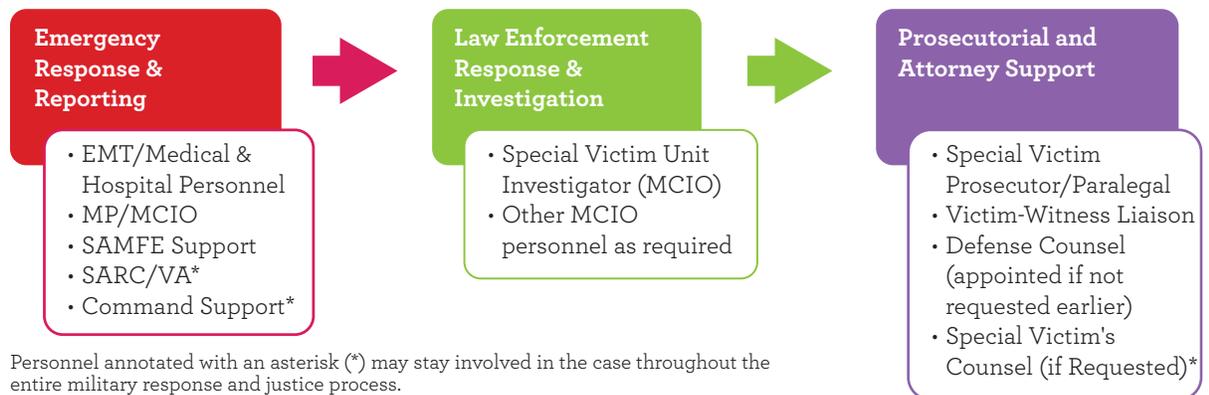
## 2. Comparison of Department of Defense and Civilian Sexual Assault Response Personnel and Resources

Figures 9 and 10 below depict the resources and personnel involved at the different stages of sexual assault response in the civilian sector and the military.

**FIGURE 9 – PRIMARY PERSONNEL RESPONSIBILITIES IN CIVILIAN SEXUAL ASSAULT RESPONSE<sup>473</sup>**



**FIGURE 10 – PRIMARY PERSONNEL RESPONSIBILITIES IN MILITARY SEXUAL ASSAULT RESPONSE**



Support resources are generally similar in the civilian and military systems—with one major exception. As discussed, the military offers specialized counsel to victims who file sexual assault reports to help them navigate through the military justice process, a service available in very few civilian jurisdictions. In most civilian jurisdictions, victims can report sexual assaults through hospitals, police agencies, or non-profit organizations such as rape crisis centers. Some civilian communities create a sexual assault response team composed of various response personnel, including a coordinator for victim support services, non-profit victim advocates, law enforcement representatives, prosecutors (who may also have victim advocates in their offices), and medical personnel to improve communication and centralize the response effort. Victims in the military have several avenues to make a sexual assault report, including civilian resources in the local community. All reports received through military resources are channeled to the SARC.

Naming conventions vary from jurisdiction to jurisdiction in the civilian community and each Service uses differing terms to describe its personnel. Terminology used to describe victim advocate and support personnel, prosecuting attorneys, attorneys who represent victims in the criminal process, police department sexual assault investigators, and in-house investigators should be standardized across DoD to prevent confusion, redundancy, and inefficiency. Therefore, *the Secretary of Defense should require standardization of the duty titles for personnel involved in sexual assault prevention and response to reduce confusion and enable comparability of Service programs, while permitting the Service Secretaries to structure the capability itself in a manner that fits each Service's organizational structure. [RSP Recommendation 108]*

# Chapter Seven:

# INVESTIGATING SEXUAL ASSAULT REPORTS

## A. INVESTIGATION MANDATES

All unrestricted reports of sexual assault must be immediately reported by the receiving party to an MCIO, regardless of the severity of the crime alleged.<sup>474</sup> A commanding officer who receives a report of a sex-related offense involving a Service member in his or her chain of command must immediately report it to the MCIO.<sup>475</sup> A commander of a victim or alleged offender may not ignore a complaint or judge its veracity.<sup>476</sup> Section 1743 of the FY14 NDAA requires the SARC provide written notification to the installation commander and first O-6 and general or flag officers in the chains of command of the victim and alleged offender within eight days of the filing of an unrestricted report of sexual assault.<sup>477</sup>

MCIOs are assigned to an independent chain of command from the accused and his or her special court-martial convening authority and must independently report all sexual assault accusations to their Service Secretary and Chief of Staff.<sup>478</sup> According to DoD policy, investigations of unrestricted reports of sexual assault must be conducted by specially trained MCIO investigators, not the victim's immediate commander or chain of command. MCIOs must initiate investigations for all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation.<sup>479</sup> The lead MCIO investigator must be a trained special victim investigator for all investigations of unrestricted sexual assault reports.<sup>480</sup> Investigators must ensure a SARC is notified as soon as possible to ensure system accountability and the victim's access to services.<sup>481</sup>

Allegations of sexual assault by a Service member are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. Civilian law enforcement must be informed if the reported crime occurred in an area with concurrent Federal (military) and civilian criminal jurisdiction. The investigation may be worked jointly by the MCIO and the civilian agency, or the civilian agency may accept investigative responsibility if the MCIO declines.<sup>482</sup> If a reported crime occurs off a military installation in a location under civilian jurisdiction, civilian law enforcement has primary jurisdiction over the investigation and the MCIO will provide assistance as requested or deemed appropriate.<sup>483</sup>

In sexual assault investigations where the MCIO is the lead investigating agency, DoD policy requires implementation of Special Victim Capabilities, described in more detail in Chapter 9 of this report.<sup>484</sup> MCIOs investigating sexual assault allegations must collaborate with respective Special Victim Capability partners regularly for periodic investigative case reviews and to ensure all aspects of the victim's needs are met.<sup>485</sup> Commanders are provided updates on significant developments in criminal investigations, but may not impede an investigation or the use of investigative techniques.<sup>486</sup> Once an investigation is complete, the case is provided to the appropriate military commander (the initial disposition authority, described below, for the accused) for consideration of "some form of punitive, corrective, or discharge action against an offender."<sup>487</sup>

Historically, Army Criminal Investigation Command (Army CID) investigated all adult sexual assault cases for the Army,<sup>488</sup> while the Naval Criminal Investigative Service (NCIS) and Air Force Office of Special Investigations (AFOSI) often referred some non-penetrative (e.g., unwanted touching) sexual assault offenses

to Marine Corps Criminal Investigation Division (Marine Corps CID) agents and Air Force Security Forces investigators, respectively. Since the January 2013 policy change requiring that all adult sexual assault cases be investigated by the MCIOs, cases previously investigated by Marine Corps CID and Air Force Security Forces investigators have shifted to NCIS and AFOSI, significantly increasing their case loads.<sup>489</sup>

Fully accredited Marine Corps CID agents are trained at the MCIO level and many attend the Special Victim Unit Investigators Course.<sup>490</sup> A representative from Marine Corps CID told the Comparative Systems Subcommittee that its investigators are fully qualified to handle sexual assault investigations, especially the “touching offenses.”<sup>491</sup> AFOSI similarly indicated that Security Forces investigators could effectively continue to investigate these types of offenses, under the supervision of a trained AFOSI agent.<sup>492</sup> AFOSI and NCIS representatives indicated the additional caseload has been detrimental to other felony investigations.<sup>493</sup> As such, *the Panel recommends Marine Corps CID agents, military police investigators, and/or Security Forces investigators should be authorized to assist in the investigation of some non-penetrative sexual assault cases, under the supervision of SVU investigators. [RSP Recommendation 89]*

## B. INVESTIGATIVE PROTOCOLS

The Services have worked to improve their investigative and law enforcement response to sexual assault. The military law enforcement community has developed specialized teams to handle sexual assault investigations and advanced training to prepare investigators. A civilian expert commented that “DoD ha[s] done an incredible amount of work in a short amount of time combating sexual assault and violence against women .... We have never seen that kind of change in a civilian community and I just wish more people would recognize that fact.”<sup>494</sup>

### 1. Special Investigators and Sexual Assault Investigations

In many large civilian and military jurisdictions, SVUs are organized and detailed to investigate sexual assault, domestic violence, and child abuse cases.<sup>495</sup> Currently, NCIS, Army CID, and AFOSI have organized SVUs at installations with large military populations.<sup>496</sup> At smaller installations and in smaller civilian police agencies, there may be too few investigators available to specialize. Smaller locations without an SVU often have a specially trained detective to investigate sexual assaults and the ability to coordinate with larger offices for assistance and guidance,<sup>497</sup> but these investigators may not be as experienced as investigators serving in SVUs at larger, busier jurisdictions. *The Secretary of Defense should direct commanders and directors of the MCIOs to require special victim investigators not assigned to a dedicated SVU to coordinate with a senior SVU agent on all sexual assault cases. [RSP Recommendation 90]* Such oversight will likely increase the accuracy, reliability, and thoroughness of investigations.

Military and civilian systems use differing protocols for the initial police response to a sexual assault report. Historically, in many civilian jurisdictions, a police officer responding to a reported sexual assault would determine how to document the call.<sup>498</sup> If the officer did not believe the individual was a victim of a sexual assault, it was not documented as such and no follow-up occurred.<sup>499</sup> In several major cities, responding officers dismissed a high percentage of incidents reported as sexual assault in 911 calls. In the remaining cases, detectives also often dismissed a large number of incidents referred to them before presenting the cases to the prosecutor.<sup>500</sup>

More recently, several civilian agencies have changed their initial report protocols to reduce mishandling of sexual assault cases.<sup>501</sup> In some jurisdictions, patrol officers still retain some discretion, but a supervising officer generally must review their decisions and officers consult with detectives about how to classify complaints.<sup>502</sup> For example, in Baltimore, Maryland, a patrol officer can no longer dismiss a sexual assault complaint without an SVU detective’s approval.<sup>503</sup> Other civilian agencies have similar, or even more restrictive, protocols.<sup>504</sup>

DoD policy requires military police patrol officers who receive or respond to a sexual assault report to the MCIO.<sup>505</sup> Responding patrols must remain with the victim, ensure evidence is not destroyed, assess the victim's need for immediate medical attention, and obtain enough information to determine the identity and location of the alleged assailant, if the victim can identify him or her.<sup>506</sup>

## 2. Advising Victims of Their Rights when Collateral Misconduct is Suspected

Unlike MCIO agents, investigators in civilian jurisdictions have discretion in deciding whether to advise crime victims, including sexual assault victims, of their rights against self-incrimination under the Fifth Amendment. Rights advisements are only required in civilian jurisdictions during custodial interrogations. Article 31 of the UCMJ affords Service members greater protection from self-incrimination than the U.S. Constitution and civilian case law. Any time an investigator or any other party engaged in a law enforcement or disciplinary investigation reasonably suspects that any person subject to the UCMJ, including a victim being interviewed, committed an offense under the UCMJ, the investigator must stop the interview and advise the victim of his or her rights under Article 31(b), including the right to remain silent.

MCIOs indicated the requirement “to advise victims of their rights for collateral misconduct . . . chill[s] a relationship between the investigator and the victim.”<sup>507</sup> As a result, concerns about collateral misconduct are seen as a complication in the investigative process, as well as a barrier to reporting.<sup>508</sup> Interrupting an interview to advise a victim of his or her rights may negatively impact the investigator's ability to build trust and rapport with the interviewee who may terminate the interview, although special victim counsel – who are often present at the interviews – did not report this occurred.

Although Article 31 warnings are not discretionary, MCIOs do not follow the same practices regarding the legal requirement to advise Service members of their Article 31 rights for minor collateral misconduct during an interview. For example, NCIS investigators told the Comparative Systems Subcommittee that NCIS has an unwritten policy that investigators will not read victims Article 31(b) rights for minor collateral misconduct, regardless of the law's requirements.<sup>509</sup> The NCIS investigators justify this policy by noting that minor offenses, such as drinking and fraternization, are outside the “felony-level” purview of NCIS.<sup>510</sup> Navy investigators noted anecdotally that the policy improves their ability to establish a rapport and more thoroughly investigate cases from victims who have already chosen to report. *DoD procedures regarding the requirement for MCIO investigators to advise victim and witness Service members of their rights under Article 31(b) for minor misconduct uncovered during the investigation of a felony should be standardized to ensure there is a clear process that complies with law. [RSP Recommendation 88]*

## 3. Pretext Phone Calls and Text Messages

Pretext phone calls and texts are an important investigative technique commonly used to corroborate victim complaints and obtain incriminating or exculpatory statements by suspects.<sup>511</sup> Depending on state law, unbeknownst to suspects, investigators can be present with victims during phone calls and typically record them.<sup>512</sup> Civilian detectives indicated they have no difficulty obtaining permission for pretext calls and texts, if permitted by state law.<sup>513</sup>

In contrast, the Services have different procedures to approve recorded pretext phone calls and text messages, based on differing interpretations of legal standards. NCIS has procedures to expedite processing of pretext phone call requests.<sup>514</sup> Army CID and AFOSI agents testified, however, that requirements to obtain approval for pretext phone calls and text messages hampered sexual assault investigations.<sup>515</sup> *The Secretary of Defense should direct a review of the Services' procedures for approving MCIO agent requests to conduct timely pretext phone calls and text messages as well as a standardized procedure to facilitate and expedite MCIOs' use of this investigative technique, in accordance with law. [RSP Recommendation 91]*

#### 4. Forensic Evidence and Examinations

The Defense Forensic Science Center (DFSC) / United States Army Criminal Investigation Laboratory (USACIL) is a fully accredited facility that provides forensic laboratory services to the MCIOs, other DoD investigative agencies, and other Federal law enforcement agencies. In the summer of 2013 and the “government shutdown” in October 2013, MCIO investigators, SARCs, victim advocates, and other sexual assault support personnel were exempt from federal government furloughs. This exemption facilitated continued investigation of sexual assault cases. However, DFSC/USACIL personnel were not exempt from these furloughs, which created backlogs at the lab and increased DNA processing times.<sup>516</sup> *DNA and other DFSC examiners should be exempted from future furloughs, to the extent allowed by law, consistent with the exemption of other critical civilian members of the criminal investigative process from prior furloughs. [RSP Recommendation 100]*

The current Department of Justice protocol for the collection of hair samples from victims and subjects in sexual assault investigations notes that many jurisdictions do not routinely collect plucked head and pubic reference samples as part of SAFEs.<sup>517</sup> Military and civilian laboratory examiners and medical forensic examiners told the Comparative Systems Subcommittee that the taking of plucked hairs was of little probative value.<sup>518</sup> Therefore, *the Panel recommends elimination of the requirement to collect plucked hairs as part of a SAFE. [RSP Recommendation 92]*

#### 5. Oversight and Review of Sexual Assault Investigations

Within civilian police departments, senior investigators or patrol officers typically review case files. This is also true in the military. Each MCIO has an internal inspector general and policies regarding the review of sexual assault cases.<sup>519</sup> Additionally, DoD IG reviews MCIO cases on a periodic basis.<sup>520</sup>

The DoD IG develops policy for the MCIOs to oversee sexual assault investigations and provides oversight of sexual assault training within the DoD investigative community.<sup>521</sup> In July 2013, DoD IG completed an evaluation of MCIO sexual assault investigations, reviewing their adequacy in accordance with DoD, Service, and MCIO policies and procedures.<sup>522</sup> The evaluation did not, however, apply external standards for case quality.

Following criticism of the handling of civilian sexual assault cases in certain cities, external agencies conducted audits of closed case files at several police departments to assess transparency and ensure confidence in the police response.<sup>523</sup> Civilian lawyers and victim advocates participated in audits in Baltimore and Philadelphia and provided results to the mayors and police departments. *The Secretary of Defense should similarly direct an audit of sexual assault investigations by persons or entities outside DoD specifically qualified to conduct such audits. [RSP Recommendation 95]*

### C. DECISIONS TO UNFOUNDED SEXUAL ASSAULT REPORTS

The Department of Defense does not use a standard definition for “founded” or “unfounded” in sexual assault investigations.<sup>524</sup> Department of Defense policy defines an unfounded case as, “a complaint that is determined through investigation to be false or baseless. In other words, no crime occurred. If the investigation shows that no offense occurred, procedures dictate that the reported offense must be coded unfounded.”<sup>525</sup> Determining a report to be “unfounded” because it is false or baseless is the same standard used by the Department of Justice and FBI.<sup>526</sup> The Department of Defense’s 2013 Annual SAPRO Report, however, used a different definition of unfounded: “When an MCIO makes a determination that available evidence indicates the individual accused of sexual assault did not commit the offense, or the offense was improperly reported or recorded as a sexual assault, the allegations against the subject are considered to be unfounded.”<sup>527</sup>

While conceptually the various DoD definitions meet the same intent as the “false or baseless” definition of unfounded used by the UCR Program, the Services apply the term inconsistently or use additional or different definitions. The Air Force, Navy, and Marine Corps use a “false or baseless” standard to unfound allegations, allowing accused Service members’ commanders in the grade of O-6 or above, who are special court-martial convening authorities,<sup>528</sup> in consultation with judge advocates, to make final determinations.<sup>529</sup> The Navy and Marine Corps consider “false or baseless” to include cases where the allegations “do not meet all the legal elements of any of the SAPR sexual assault offenses.”<sup>530</sup> The Army defines an unfounded offense as “a determination, made in consultation with the supported prosecutor that a criminal offense did not occur. A lack of evidence to support a complaint or questioning of certain elements of a complaint is not sufficient to categorize an incident as unfounded.”<sup>531</sup> Conversely, the Army’s definition of a “founded” offense relies on a probable cause determination made by the investigating agent and supporting trial counsel that an offense was committed and the accused committed the offense.<sup>532</sup>

Civilian police agencies follow the Federal Bureau of Investigation (FBI)’s UCR Program incident clearance guidance on unounding a complaint: “Occasionally, an agency will receive a complaint that is determined through investigation to be false or baseless . . . . The recovery of stolen property, the low value of stolen property, the refusal of the victim to cooperate with prosecution, or the failure to make an arrest does not unfound a legitimate offense. Also, the findings of a coroner, court, jury, or prosecutor do not unfound offenses or attempts that law enforcement investigations establish to be legitimate.”<sup>534</sup>

Processes for closing cases vary in civilian police departments.<sup>535</sup> In some jurisdictions, detectives may unfound cases that are not strong enough to support prosecution without review by the prosecutor,<sup>536</sup> with or without approval of a supervisor.<sup>537</sup> Departments may also consider cases closed and investigations complete when referred to the prosecutor,<sup>538</sup> or they may be closed or placed in a suspended status when victims decline to cooperate. Likewise, unsolved cases are usually inactive, but not closed.<sup>539</sup> A best practice among civilian agencies requires the supervisor of the SVU to review all unfounded cases, and if the percentage of cases that are unfounded rises above a certain baseline average, the supervisor reviews patterns and investigative practices to ensure only those cases that are false or baseless are unfounded.<sup>540</sup>

In the Army, commanders do not currently determine whether to unfound cases because Army CID makes the decisions after coordinating with the trial counsel.<sup>541</sup> However, in the Air Force, the Navy, and the Coast Guard, commanders make unounding determinations, not the MCIOs.<sup>542</sup> AFOSI and NCIS indicated they do not make any case determination decisions once a case is initiated, but instead report their investigative findings to the commander.<sup>543</sup>

*The Secretary of Defense should direct the Service Secretaries to standardize the process for determining if a case is unfounded. The decision to unfound reports should apply the UCR Program standard to determine if a case should be unfounded. Only those reports determined to be false or baseless should be unfounded.*<sup>533</sup> [RSP Recommendation 93]

## REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

The table below illustrates the disparity in procedure and application among the Services, as well as the Panel's recommended process:

### COMPARISON OF PROCEDURES TO REVIEW INVESTIGATIONS PRIOR TO DISPOSITION DECISION

	Air Force, Navy, Marines, Coast Guard	Army	Panel Recommendation
<b>Unfounding Determinations</b>	Unfounding determinations not made by investigators.	Unfounding determination made by investigators, in consultation with trial counsel.	DoD standardize the process for determining if a case is unfounded. Unfounded needs to be clearly defined as only those reports which are false or baseless.
<b>MCIO Determination and JAG Coordination</b>	Investigators do not determine if case is founded, substantiated, or that probable cause exists.  No annotation made in case file.	Investigators consult with a trial counsel, who provides opinion whether probable cause exists to believe suspect committed offense, prior to presenting case to commander. Investigators annotate trial counsel's opinion in case file. If probable cause exists, case file is presented to commander for disposition decision.	Trial counsel and investigator should not opine whether probable cause exists. MCIO agents should coordinate with trial counsel to review all evidence, and annotate in case file that trial counsel agrees all investigation has taken place, before presenting case report to commander.
<b>Cases Presented to the Commander for Disposition Decision</b>	In FY12, 100% of cases were presented to commander for case determination and disposition decision.	In FY12, 75% of cases were presented to commander for disposition decision; 25% of cases were not presented to commanders because MCIO/prosecutor determined report lacked probable cause.	Present all cases to commander.

### Probable Cause Assessments in Sexual Assault Investigations

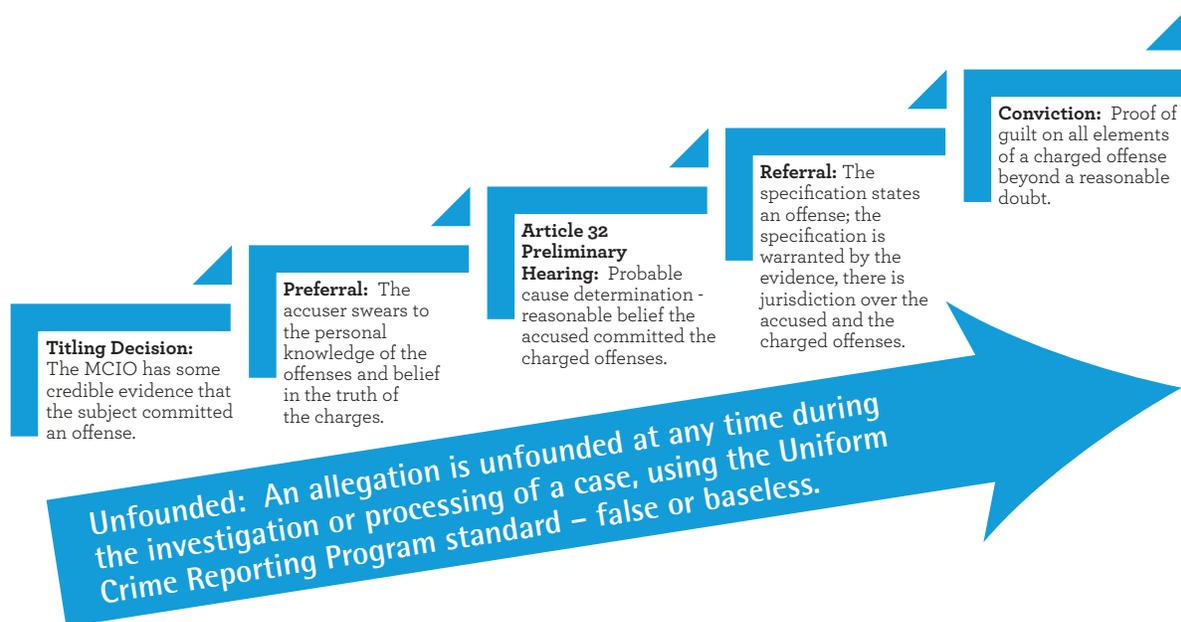
Prosecutors may provide opinions about the existence of probable cause as part of their advice to commanders or investigators. For example, a trial counsel may tell an investigator that further investigation is needed to establish probable cause. Moreover, commanders making disposition decisions may want the trial counsel's opinion on whether probable cause exists in the case. The Navy, Air Force, Marines and Coast Guard do not filter cases for lack of probable cause; instead, all cases are presented to commanders, who consult with the trial counsel to determine case disposition. However, unlike the Army, there is no requirement that agents formally coordinate with trial counsel, obtain an opinion on whether probable cause exists in order to found the offense, or annotate coordination in case files.<sup>544</sup>

Army CID is required to coordinate reports of investigation with the trial counsel to determine whether there is probable cause that an offense was committed, whether the subject committed the offense, and whether there is sufficient evidence to support action.<sup>545</sup> The trial counsel issues an opinion to the investigator or agent, which

is reflected in the case file.<sup>546</sup> To prevent prosecutors from making premature probable cause determinations or MCIOs from closing cases prior to providing them to a commander to review, this opinion should only assess whether the investigation has been exhausted and if the case is ready to present to the commander.

Figure 11 illustrates the progression of proof standards, noting that probable cause determinations are made by investigating officers at Article 32 hearings. Staff judge advocates also advise convening authorities prior to referral whether “there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it.”<sup>547</sup>

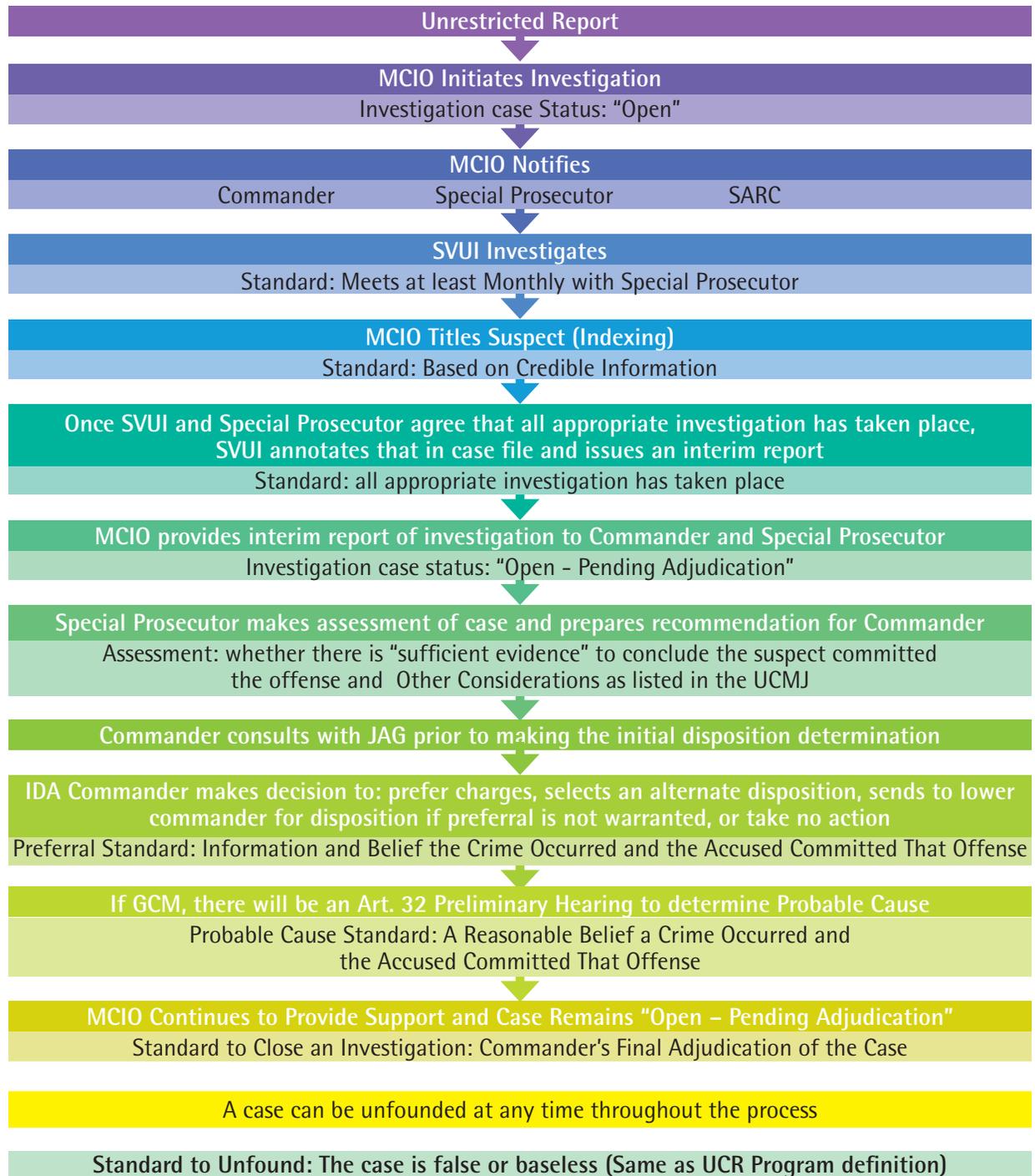
FIGURE 11 – PROGRESSION OF PROOF STANDARDS IN MILITARY CRIMINAL JUSTICE CASES



Where an MCIO is the lead investigative agency, DoD policy states the MCIO may not close a sexual assault investigation without written disposition data from the subject’s commander.<sup>548</sup> According to MCIO agents, investigators complete thorough investigations, following all logical leads prior to reaching any conclusions.<sup>549</sup> Military prosecutors, however, provided mixed reviews of the quality of MCIO investigations and often felt additional investigation was necessary.<sup>550</sup> Military prosecutors also conveyed that investigations are considered closed when they are passed to the commander for review and that it is difficult to “reopen” cases for further investigation.<sup>551</sup>

*The Secretary of Defense should direct MCIOs to standardize their procedures to require that MCIO investigators coordinate with the trial counsel to review all of the evidence, and to annotate in the case file that the trial counsel agrees all appropriate investigation has taken place before providing a report to the appropriate commander for a disposition decision. Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists. [RSP Recommendation 94-A] To ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until final disposition of the case. [RSP Recommendation 94-B]* Figure 12 illustrates recommended investigative processing for unrestricted sexual assault reports.

FIGURE 12 – RECOMMENDED INVESTIGATIVE PROCESSING FOR UNRESTRICTED SEXUAL ASSAULT REPORTS



# Chapter Nine: ORGANIZING, TRAINING, AND RESOURCING INVESTIGATORS, PROSECUTORS, AND DEFENSE COUNSEL

## A. ORGANIZING PROSECUTION RESOURCES

The organizational structure within civilian prosecution offices varies greatly. Some civilian prosecutors specialize in sexual assault for their entire careers<sup>742</sup> or rotate through sex crimes units specializing for a few years,<sup>743</sup> whereas others do not specialize and handle all felony level crimes.<sup>744</sup> Most of the prosecutors in medium size and smaller jurisdictions are assigned cases based on their experience level rather than a specific expertise in sexual assault cases.<sup>745</sup> The organizational structure in civilian prosecution offices depends upon the size of the jurisdiction, the resources available, the caseload, as well as the leadership's philosophy for assigning these complex cases.

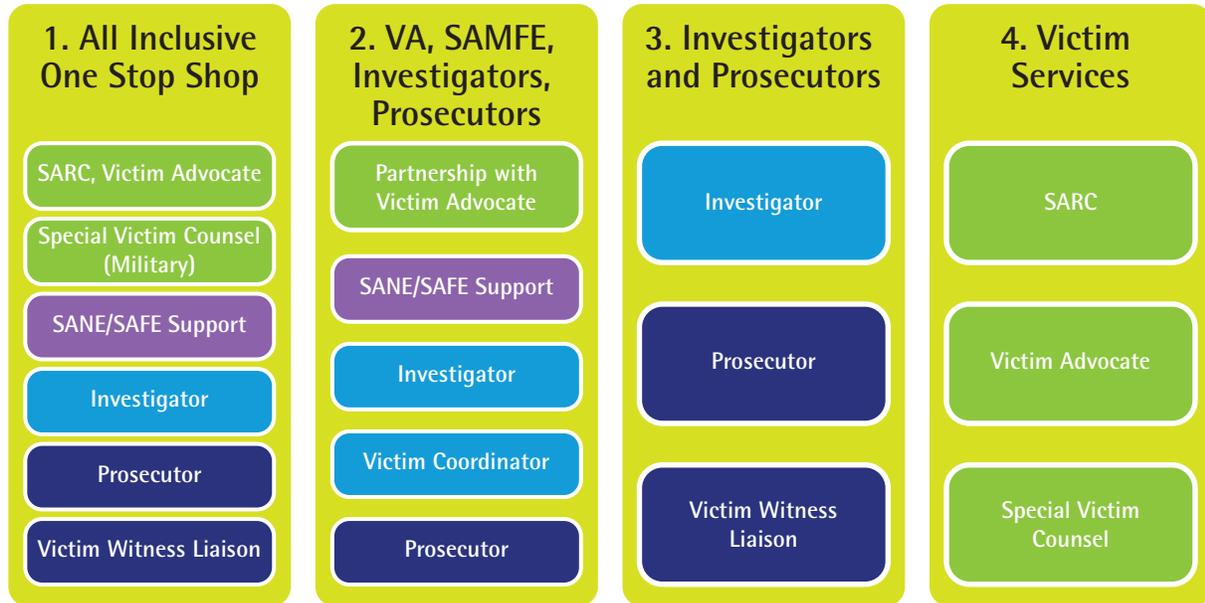
Rather than imposing a specific organizational structure on the Services, as previously noted, Congress required the Services to provide a Special Victim Capability by January 2014 consisting of specially trained investigators, prosecutors, paralegals, and victim witness liaisons.<sup>746</sup> The Services have implemented the Special Victim Capability and the Panel is optimistic about each Service's approach.

*The Service Secretaries need to continue to fully implement the special victim prosecutor programs within the Special Victim Capability and further develop and sustain the expertise of prosecutors, investigators, victim witness liaisons, and paralegals in large jurisdictions or by regions for complex sexual assault cases. [RSP Recommendation 105]* One way to enhance Special Victim Capability may be to co-locate some of the personnel so they could work more effectively together.

### 1. Co-locating Prosecutors, Investigators, and Victim Support Personnel

Civilian jurisdictions and the Services use different organizational structures to maximize the efficiency and effectiveness of coordination among sexual assault response personnel and minimize trauma to the victim. The Panel studied four types of co-location models used in some civilian and military jurisdictions.

FIGURE 14 – CO-LOCATION MODELS



(1) The all-inclusive “one-stop shop” model combines all the personnel who respond to a sexual assault allegation, including victim advocates, mental health personnel, SANEs, investigators, and prosecutors in a single location.<sup>747</sup> The goal is to increase communication among the stakeholders, minimize victim travel, and enhance the multidisciplinary approach in sexual assault cases. One civilian facility, Dawson Place in Everett, Washington, includes SANEs, and/or victim advocate agencies and mental health personnel, investigators, prosecutors and victim witness liaisons to handle child and adult sexual assault cases. The Army recently established a similar facility, the Sexual Assault Response Center, at Joint Base Lewis-McChord (JBLM) in Washington for adult sexual assault cases.<sup>748</sup>

There are potential drawbacks to co-locating all of these services. Co-locating victim services personnel with law enforcement and prosecution officials could create the perception that victim services are aligned with, or a part of, the prosecution team – and do not operate independently – with several potentially deleterious effects: First, although the intent of this consolidation model is to support victims, these arrangements may actually deter reporting if victims perceive victim services are tied to, or working with, investigators or prosecutors. Second, victim services medical personnel who work too closely with prosecutors may not be perceived as independent medical providers, but rather as extensions of law enforcement.<sup>749</sup> And third, the victim advocate-victim privilege, which generally ensures that communications between victims and advocates remain confidential, may be degraded or lost if confidential statements are made in the presence of, or disclosed to prosecutors.<sup>750</sup> Accordingly, if larger military installations adopt this model, any multidisciplinary meetings between victim services personnel, the prosecutor, and investigator should be limited to topics related to victim support and ensuring the victim remains informed and engaged in the process, but should not include discussions about case details.

(2) The second model, seen in the Philadelphia Sexual Assault Response Center (PSARC) in Pennsylvania and the Austin Police Department (PD) Special Victim Unit (SVU) in Texas, integrates the victim advocate, SANE, investigators, and prosecutors. PSARC partnered with Women Organized Against Rape (WOAR) and other local victim advocate agencies to gain victim confidence and encourage victims to utilize their resources.

The PSARC facility's capacity to perform SANE exams is unique in that the exam room is co-located with the Philadelphia PD Special Victim Unit, yet maintains independence with Drexel University providing PSARC's SANE support and other medical assistance to victims, regardless of whether they wish to file a police report.<sup>751</sup> Austin PD provides an office for victim advocates from SafePlace – a local rape crisis center – to work at the SVU. Austin PD works with a SANE Coordinator to arrange for forensic exams from a group of experienced SANEs who respond to a local emergency room.<sup>752</sup>

(3) The third model co-locates prosecutors and investigators. In Arlington, Virginia and at Fort Hood, Texas, the investigators and prosecutors work in the same building.<sup>753</sup> This model is easier for small to medium jurisdictions or installations to adopt because it requires fewer resources, but still yields the positive results associated with investigators and prosecutors working closely together.

(4) The fourth model co-locates all victim services support personnel. At Marine Corps Base Quantico, Virginia, the Marine Corps has collected all of the different services available to victims under one roof, including the SARC, victim advocate, and special victim counsel.<sup>754</sup> This is a positive step, especially when there are so many resources and service providers available to sexual assault victims.

Overall, consolidated facilities can improve communication between prosecutors, investigators, and victims. These facilities may help minimize unnecessary trauma to victims following a sexual assault by locating all of the resources required to respond, support, investigate, and prosecute sexual assault cases in one building. However, these models require substantial resources and the right mix of personnel. Co-locating prosecutors and victim services personnel may also compromise privileges for military victim advocates or cause other perception problems.<sup>755</sup>

*The Secretary of Defense needs to assess the various strengths and weaknesses of different co-location models at locations throughout the Armed Forces in order to continue to improve the efficiency and effectiveness of investigation and prosecution of sexual assault offenses. [RSP Recommendation 107-A] Likewise, the Service Secretaries should direct that each Service's Judge Advocate General Corps and MCIOs work together to co-locate prosecutors and investigators who handle sexual assault cases on installations where sufficient caseloads justify consolidation and resources are available. Additionally, locating a forensic exam room with special victims' prosecutors and investigators, where caseloads justify such an arrangement, can help minimize the travel and trauma to victims while maximizing the speed and effectiveness of investigations. Because of the importance of protecting privileged communication with victims, the SARC, victim advocate, special victim counsel or other victim support personnel should not be merged with the offices of prosecutors and investigators. [RSP Recommendation 107-B]*

## 2. Sexual Assault Nurse Examiners (SANEs)

In civilian jurisdictions, specially trained nurses or other trained health care providers perform SAFEs. Most police departments coordinate with local hospitals; however, not all civilian hospitals have a trained provider on staff. In those locations, victims may be transported to a designated location where forensic exams are routinely performed or a provider will respond to the victim's hospital. Having a pool of designated trained professionals who frequently are called to conduct SAFEs increases the level of expertise of those examiners and improves the quality of the exam.

Many installations coordinate with civilian forensic examiners to provide SAFE services. Depending on the location, many civilian medical facilities serve as the community's center of excellence for SAFEs and have more experienced SANEs than are typically available on a military installation. SANEs in civilian medical facilities typically have more experience in conducting forensic exams because they see more sexual assault victims over the course of a year than SANEs on most military installations.<sup>756</sup> On most, if not all, military installations, a full time SANE is unnecessary because not enough sexual assaults are reported within the first

96 hours of an incident to require a nurse physically located at a consolidated sexual assault center. However, it may be useful to provide appropriate space, supplies and equipment for SANE forensic exams in facilities housing investigators and prosecutors in order to support currently existing arrangements between military installations and civilian forensic examiners. Further, such arrangements would increase communication between prosecutors, investigators, and forensic examiners while easing the burden on victims by limiting the need to travel to a military hospital or off base civilian facility.

The FY14 NDAA Section 1725 requirement that every military installation medical treatment facility (MTF) with an emergency department that operates 24 hours per day, seven days a week to have at least one assigned SANE is overly prescriptive.<sup>757</sup> DoD policy already required timely, accessible, and comprehensive healthcare for victims of sexual assault, including a SAFE Kit.<sup>758</sup> In light of the DoD policy, and actual need for forensic exams in the military, *the Service Secretaries should direct their Surgeons General to: (1) review Section 1725 of the FY14 NDAA, which requires the assignment of at least one full-time SANE to each military medical facility with a 24 hour, seven days a week emergency room, and (2) provide recommendations to amend the legislation so as to permit the most effective way to provide SAFEs at their facilities, given that many civilian medical facilities have more experienced forensic examiners than are typically located on a military installation and those facilities serve as the community's center of excellence for SAFEs. [RSP Recommendation 99]*

### 3. Special Victim Capability Policy and Assessment

The Special Victim Capability strives to provide a level of prosecution expertise through specialization in complex sex-related cases, while recognizing that not every judge advocate is a subject matter expert in sexual assault prosecution. DoD's policy document Directive-Type Memorandum (DTM) 14-003 advances Congress's requirements by including timelines for special prosecutors' involvement in reported sexual assaults, criteria to measure effectiveness, and other standards.<sup>759</sup>

#### a. Terminology

Pursuant to DoD policy, the Special Victim Capability team responds to "covered offenses" which includes "sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ."<sup>760</sup> Accordingly, the prosecutors and investigators of the Special Victim Capability team are required to handle cases beyond Article 120 offenses. *The Secretary of Defense should direct the DTM 14-003 be revised so that definitions of "covered offenses" accurately reflect specific offenses currently listed in the relevant version(s) of Article 120 of the UCMJ. [RSP Recommendation 103]*

In large jurisdictions, prosecutors specializing in sexual assault cases handle felony level offenses, whereas less experienced attorneys handle misdemeanors or contact offenses. Article 120 of the UCMJ covers conduct from contact offenses to penetrative offenses, so a blanket requirement for using Special Victim Capability in all Article 120 cases would not be comparable to such civilian systems. Therefore, *the Secretary of Defense and Service Secretaries should develop policy that does not require special victim prosecutors to handle every sexual assault under Article 120 of the UCMJ. Due to the resources required, the wide range of conduct that falls within current sexual assault offenses in the UCMJ, and the difficulty of providing the capability in remote locations, a blanket requirement for special prosecutors to handle every case undermines effective prevention, investigation, and prosecution. [RSP Recommendation 104]*

#### b. Timelines

DoD established timelines to ensure military prosecutors' early involvement in sexual assault investigations. MCIOs inform the Staff Judge Advocate's legal office within 24 hours of learning of a report; the special victim prosecutor coordinates with the investigator within 48 hours.<sup>761</sup> The DoD policy is supported by studies that concluded when prosecutors become involved in sexual assault cases early, including meeting with the victim,

there is a greater likelihood the victim will cooperate in the investigation and prosecution of the alleged offender.<sup>762</sup> The large urban prosecution offices have programs that include protocols for investigators to notify prosecutors as soon as serious sexual assaults are identified. The protocols also provide for prosecutors to accompany investigators in certain circumstances, and for the coordination between the investigator and prosecutor through much of the process.<sup>763</sup> Military special victim prosecutors are on call and follow similar procedures as their civilian counterparts in large offices with ride-along programs. While the coordination between the military investigator and prosecutor follows the civilian best practice, there is no current requirement for the military prosecutor to meet with the victim as soon as possible.

*The Secretary of Defense should maintain the requirement for an investigator to notify the prosecution section of the staff judge advocate's legal office of an unrestricted sexual assault report within 24 hours, and for the special victim prosecutor to consult with the investigator within 48 hours, and monthly, thereafter. Milestones should be established to insert the prosecutor into the investigation process and to ensure that the special victim prosecutor contacts the victim or the victim's counsel as soon as possible after an unrestricted report. [RSP Recommendation 102]*

### c. Measuring the Effectiveness of the Special Victim Capability

Department of Defense policy complies with the FY13 NDAA requirement for the Secretary of Defense to prescribe common criteria for measuring the effectiveness and impact of the Special Victim Capability from investigative, prosecutorial, and victim perspectives.<sup>764</sup> DoD established five evaluation criteria “to ensure that special victim offense cases are expertly prosecuted, and that victims and witnesses are treated with dignity and respect at all times, have a voice in the process, and that their specific needs are addressed in a competent and sensitive manner by Special Victim Capability personnel.”<sup>765</sup> The DoD and the Services will assess the Special Victim Capability by reviewing the following measures:<sup>766</sup>

- Percentage of Special Victim Capability cases preferred, compared to overall number of courts-martial preferred in each fiscal year;
- Percentage of special victim offense courts-martial tried by, or with the direct advice and assistance of, a specially trained prosecutor;
- Compliance with DoD Victim Witness Assistance Program reporting requirements to ensure Special Victim Capability legal personnel consult with and regularly update victims as required;
- Percentage of specially-trained prosecutors and other legal support personnel who receive additional and advanced training in Special Victim Capability topic areas; and
- Victim feedback on the effectiveness of Special Victim Capability prosecution and legal support services and recommendations for possible improvements.<sup>767</sup>

In addition to the DoD criteria, the Army uses the victim “drop out” rate to measure the effectiveness of the special victim counsel or special victim prosecutor. Evidence indicates that these programs, thus far, have been effective. Since the Army established the Special Victim Prosecutor Program in 2009, only six percent of sexual assault victims “dropped out” or were unable to continue to cooperate in the investigation and prosecution of the case.<sup>768</sup> In contrast, in 2011, prior to implementing the specially trained prosecutors or victims’ counsel programs, the Air Force suffered from a 29 percent victim dropout rate.<sup>769</sup>

Special prosecutors, and now special victim counsel, are trained to prevent victim fatigue and ensure victims remain informed. Considering the correlation between the Special Victim Prosecutor Program’s implementation and a reduced victim dropout rate, it is reasonable to conclude that special victim prosecutors

are making the process less intimidating for victims and are causing victims to have more faith in the process.<sup>770</sup> Nonetheless, to assess the long-term effectiveness of these programs, the Services should track the percentage of cases in which the victim declines to cooperate after filing an unrestricted report and the reasons for the declination. This additional data could reflect the effectiveness of both the special victim prosecutor and special victim counsel.

*The Secretary of Defense should assess the Special Victim Capability annually to determine the effectiveness of the multidisciplinary approach and the resources required to sustain the capability, as well as continue to develop metrics such as the victim “drop-out” rate, rather than conviction rates, as a measure of success. [RSP Recommendation 109]*

## B. DEFENSE COUNSEL ORGANIZATION AND RESOURCE REQUIREMENTS

Defense counsel from across the Services informed the Panel that the mission of the military Defense Services is to provide independent, world-class representation in a zealous, ethical, and professional manner, thereby ensuring the military justice system is both fair and just.<sup>771</sup> While it is important to hold offenders appropriately accountable, it is also crucial that the military justice system remains balanced and respects the rights of the accused, particularly the presumption of innocence.

As required by law and policy, the Services provide military defense counsel, free of charge, to Service members facing potential court-martial, nonjudicial punishment, administrative separation, and similar adverse action.<sup>772</sup> Defense counsel perform a wide range of duties, including:

- representing Service members before tribunals and other administrative bodies – e.g., at courts-martial, Article 32 hearings, lineups and administrative separation boards;
- counseling Service members under investigation or prior to being subject to punitive or negative administrative action – e.g., those suspected of offenses, pending nonjudicial punishment under Article 15 of the UCMJ, subject to Summary Court-martial (where Service members are not entitled to attorney representation), recommended for administrative separation; and
- other legal services as determined by the Services.

All of the Services organize their trial defense services by geographic region.<sup>773</sup> Military defense counsel are assigned to separate and independent organizations, not under the supervision or control of their clients’ commanders. This organizational structure ensures the independence of military defense counsel, both in fact and perception.

Unlike military or civilian special victim prosecutors, neither civilian public defenders offices nor military defense services have attorneys specializing in sexual assault cases;<sup>774</sup> instead both attempt to use the most experienced attorneys to try more complex cases, such as sexual assaults. The Services’ regionally organized trial defense systems meet the demand for competent and independent legal representation of Service members accused of sexual assault. Therefore, rather than developing specialized defense counsel, DoD and the Services should continue to focus on improving defense counsel training and ensuring sufficient resources are provided so that military defense organizations and counsel can perform effectively.

Currently, military defense counsel cannot use the MCIO to conduct additional investigation for the defense, assuming the MCIO would agree to do so, because any information would not be protected by the attorney-client or work-product privileges,<sup>775</sup> and the alternative – military defense counsel conducting his or her own case investigations – is equally unsatisfactory. This places an additional burden on military defense counsel

who may be untrained in investigative techniques and lacking investigative assets. Further, it may place defense counsel in ethically compromising circumstances if he or she becomes the only witness to exculpatory, inconsistent, or other statements.

Unlike public defenders who employ their own investigators, military defense counsel have none. Civilian defense investigators typically assist the defense in locating and interviewing witnesses, finding appropriate experts, and finding services to assist the defense in complying with court ordered treatment or services.<sup>776</sup> The investigators' involvement and contributions permit civilian defense counsel to prepare for trial and may assist in reaching alternate dispositions in cases.<sup>777</sup> Investigators can "give[] attorneys a fighting chance to develop facts and other evidence that is rarely provided to them by the government and is crucial for the proper representation of their clients" and "contribute to the efficient disposition of cases."<sup>778</sup> One public defender from the Washington, D.C. Public Defender's Office told the Panel, "[I]t's surprising to hear about the lack of investigators involved when we're trying to uphold the Constitution here and try to give our clients the utmost in representation and being zealous."<sup>779</sup>

Currently, military defense counsel instead must rely solely on the MCIO investigation and defense counsel and defense paralegals, if available, to conduct any additional investigation. Although defense counsel can request an investigator be detailed to the defense team for a particular case, defense counsel told the Panel that convening authorities and military judges routinely deny their requests.<sup>780</sup> *The Secretary of Defense should direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission in cases and the fair administration of justice.* 781 [RSP Recommendation 81] Many civilian public defender offices have investigators on their staffs and consider them critical.<sup>782</sup>

There are several potential ways DoD could fulfill the requirement to provide defense investigators. One would create MCIO positions within the defense counsel offices<sup>783</sup> and ensure the investigators' evaluation and supervisory chains remain within the military trial defense organizations.<sup>784</sup> Investigators could "unplug" from the parent MCIO for an assignment, "plug" into the defense system, then "unplug" to resume work for the MCIO.<sup>785</sup> This would mirror JAG Corps attorneys who serve as both prosecutors and defense counsel, although always in different assignment tours. Another option is to hire civilian investigators as full time government employees or hire contractors to work for the defense.<sup>786</sup> Some public defender offices hire former law enforcement personnel who get narrow-purpose credentials issued to them to perform the investigative functions for the defense.<sup>787</sup>

Regardless of the way DoD implements this requirement, military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources.

## C. TRAINING INVESTIGATORS, PROSECUTORS, AND DEFENSE COUNSEL

Overall, military trial counsel, defense counsel, and investigators are competently and professionally performing their duties in adult sexual assault cases. Collaboration and standardization of assignments and training across the Services are areas ripe for further improvement.

### 1. Improving Special Victim Unit Investigator Personnel Assignments

Military and civilian agencies with SVUs recognize that detectives assigned to those units should have both the capability and commitment to investigate sexual assaults.<sup>788</sup> Best practices in civilian SVU investigative agencies involve reassigning personnel experiencing "burn out" and careful interviewing and selection of applicants to weed out those investigators with biases or a lack of interest in investigating sexual assault