

THE JUDGE ADVOCATE GENERAL'S SCHOOL
SPECIAL VICTIMS' COUNSEL COURSE 14-B

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**DEPARTMENT OF THE AIR FORCE
THE JUDGE ADVOCATE GENERAL'S SCHOOL**

MAY 1 2014

MEMORANDUM FOR SPECIAL VICTIMS' COUNSEL COURSE (SVCC) 14-B STUDENTS

FROM: The Judge Advocate General's School

SUBJECT: SVCC Narrative Schedule, 19-23 May 2014

This schedule is designed to assist you in preparing for each hour of instruction. All lectures will be conducted at The Judge Advocate General's School (JAG School), building 694, room 105, Kuhfeld Auditorium, unless otherwise indicated. Exercise and breakout rooms will be assigned upon your arrival, and all exercises and breakouts will be held in these rooms unless otherwise indicated. Classes will start promptly at the times indicated. Students must be seated and prepared for each period. Any absences must be reported immediately to the course director, Major Christopher Goewert, or the front office at 334-953-2802.

MONDAY, 19 MAY 2014

- 0730-0800 WELCOME REMARKS AND INTRODUCTION**
Instructors: Colonel Kenneth Theurer, Commandant; Major Christopher Goewert, Course Director; and Mr. Pete Stultz, Assistant Course Director, The Judge Advocate General's School, Maxwell AFB, AL
- 0800-0850 LECTURE – AIR FORCE SVC INTRODUCTION & OVERVIEW**
Instructor: Colonel Dawn Hankins, Chief, Special Victims' Counsel Program, Air Force Legal Operations Agency, Joint Base Andrews, MD
Student Evaluators: 1-10
- 0850-0900 BREAK**
- 0900-0950 LECTURE – LESSONS LEARNED IN THE FIELD**
Instructor: Captain Seth Dilworth, Special Victims' Counsel, Cannon AFB
Student Evaluators: 11-20
- 0950-1000 BREAK**
- 1000-1200 LECTURE – MILITARY RULES OF EVIDENCE FOR THE SVC**
Instructor: Major Rebecca Kleim, Instructor, TJAGLCS, Charlottesville, VA
Student Evaluators: 21-30
- 1200-1300 LUNCH**

1300-1350 **LECTURE – AF SVC RULES OF PRACTICE AND PROCEDURE**
Instructor: Colonel Dawn Hankins
Student Evaluators: 31-40

OR

BREAKOUT SESSIONS – BRANCH SPECIFIC
Location: Seminar rooms as assigned

1350-1400 **BREAK**

1400-1520 **NDAA 2014, ARTICLE 6(b), and VWAP**
Instructor: Lieutenant Colonel Robert Burton, Chief, Justice and Courts Activities,
JAJM, Air Force Legal Operations Agency, Joint Base Andrews, MD
Student Evaluators: 41-50

1520-1530 **BREAK**

1530-1630 **PANEL DISCUSSION – THE SVC EXPERIENCE**
Moderator: Major Christopher Goewert, Military Justice Instructor, The Judge
Advocate General's School, Maxwell AFB, AL
Panelists: Captain Amanda Snipes, Special Victims' Counsel, Peterson AFB, CO;
Captain Lorraine Sult, Special Victims' Counsel, Peterson AFB, CO; and Captain
Aaron Kirk, Special Victims' Counsel, JBSA-Lackland, TX
Student Evaluators: 51-60

1800-2000 **ICEBREAKER AT IRISH BRED PUB (OPTIONAL)**

Bus to depart From Lodging

TUESDAY, 20 MAY 2014

0730-0920 **INVESTIGATIONS OF SEXUAL ASSAULT & OSI/SVC RELATIONSHIPS**
Instructors: Mr. Mark Walker, AFOSI, Special Agent, Investigations Operations
Consultant, 2nd Field Investigations Squadron, Joint Base Andrews, MD; and
Colonel Dawn Hankins
Student Evaluators: 61-70

0920-0930 **BREAK**

0930-1100 **LECTURE – FUNDAMENTALS OF BEING A VICTIM'S ATTORNEY I**
Instructor: Ms. Meg Garvin, Executive Director & Clinical Professor of Law,
National Crime Victim Law Institute, Portland, OR
Student Evaluators: 1-10

- 1100-1110 **BREAK**
- 1110-1230 **LECTURE – FUNDAMENTALS OF BEING A VICTIM’S ATTORNEY II**
Instructor: Ms. Meg Garvin, Executive Director & Clinical Professor of Law,
National Crime Victim Law Institute, Portland, OR
Student Evaluators: 11-20
- 1230-1330 **LUNCH**
- 1330-1420 **BREAKOUT SESSIONS – BRANCH SPECIFIC**
Location: Breakout sessions by branch of service; rooms as assigned
- 1420-1430 **BREAK**
- 1430-1520 **UNDERSTANDING YOUR CLIENT’S DISCIPLINARY INFRACTIONS**
Instructor: Major Alex Rose, Military Justice Instructor, The Judge Advocate
General’s School, Maxwell AFB, AL; and Captain Seth Dilworth
Student Evaluators: 21-30
- 1520-1530 **BREAK**
- 1530-1630 **PANEL DISCUSSION – A VICTIM’S PERSPECTIVE**
Moderator: Major Christopher Goewert
Student Evaluators: 31-40

WEDNESDAY, 21 MAY 2014

- 0730-0820 **LECTURE – POST-TRIAL FOR SVCs – CLEMENCY AND PAROLE**
Instructor: Mr. Bruce Brown, Associate General Counsel, SAF Personnel Council,
Joint Base Andrews, MD
Student Evaluators: 41-50
- 0820-0830 **BREAK**
- 0830-0930 **LECTURE – ETHICS**
Instructor: Major Andrew Barker, Chief, Civil Law Division, The Judge Advocate
General’s School, Maxwell AFB, AL
Student Evaluators: 51-60
- 0930-0940 **BREAK**
- 0940-1230 **LECTURE – PRACTICE OF CIVIL LEGAL ASSISTANCE FOR VICTIMS**
Instructor: Ms. Jessica Mindlin, National Director of Training & Technical
Assistance, Victim Rights Law Center, Portland, OR

Student Evaluators: 61-70

1230-1330 **LUNCH**

1330-1700 **EXERCISE – CLIENT INTAKE AND ADVICE**

Location: Rooms as assigned

THURSDAY, 22 MAY 2014

0730-0820 **LECTURE – TRIAL PROCEDURE AND APPEALS FOR SVCS**

Instructor: Major Mathew Talcott, Military Justice Instructor, The Judge Advocate General's School, Maxwell AFB, AL

Student Evaluators: 1-10

0820-0830 **BREAK**

0830-1200 **LECTURE – NEUROBIOLOGY OF SEXUAL ASSAULT**

Instructor: Dr. Rebecca Campbell, Michigan State University, East Lansing, MI

Student Evaluators: 11-20

1200-1300 **LUNCH**

1300-1420 **LECTURE - MANAGING YOUR OWN OFFICE: ADMINISTRATIVE TECHNIQUES, TRAVEL, PARALEGAL TEAMING, AND PERFORMANCE REPORTS**

Instructor: Major Robert Wilder, Deputy Chief, Community Legal Services Division, Joint Base Andrews, MD

Student Evaluators: 21-30

OR

BREAKOUT SESSIONS – BRANCH SPECIFIC

Location: Breakout sessions by branch of service; rooms as assigned

1420-1430 **BREAK**

1430-1630 **SEXUAL ASSAULT PROSECUTIONS AND SVC RELATIONS**

Instructor: Major Adam Bentz, Military Justice Instructor, The Judge Advocate General's School, Maxwell AFB, AL

Student Evaluators: 31-40

FRIDAY, 23 MAY 2014

0800-1130 **EXERCISE – COURT-MARTIAL ADVOCACY FOR THE SVC**

Location: Rooms as assigned

1130-1200 **CLOSING REMARKS AND END-OF-COURSE CRITIQUES**
Location: Room 105, Kuhfeld Auditorium

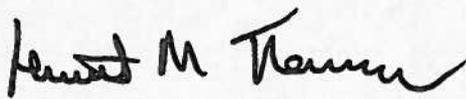
ADVANCED SVC CHILD VICTIM ADVOCACY & REPRESENTATION

THURSDAY, 22 MAY 2014

- 0730-0800 **INTRODUCTION AND COURSE BRIEFING**
Instructors: Mr. Christopher Newlin, Executive Director, National Children's Advocacy Center, Huntsville, AL; Mr. Justin Fitzsimmons, High Tech Crimes Research Specialist, SEARCH, National Consortium for Justice and Information and Statistics, Sacramento, CA
Location: Room 124/126
- 0800-0930 **LECTURE – CHILD MALTREATMENT AN OVERVIEW**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 1-5
- 0930-0940 **BREAK**
- 0940-1030 **LECTURE – INVESTIGATION OF CHILD ABUSE**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 6-10
- 1030-1040 **BREAK**
- 1040-1200 **LECTURE – OVERVIEW OF FORENSIC INTERVIEWING**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 11-15
- 1200-1300 **LUNCH**
- 1300-1430 **LECTURE – BEING AN SVC FOR CHILDREN**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 16-20
- 1430-1440 **BREAK**
- 1440-1640 **SEMINAR – PRACTICAL EXERCISES AND REPORTING**
Locations: Seminar rooms as assigned
Student Evaluators: 21-25
- 1640-1700 **REVIEW OF DAY 1**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons

FRIDAY, 23 MAY 2014

- 0730-0900 **LECTURE – WORKING WITH INVOLVED CAREGIVERS**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Location: Small Auditorium
Student Evaluators: 1-5
- 0910-0920 **BREAK**
- 0920-1040 **LECTURE – UNDERSTANDING THE PROSECUTION OF CHILD SEXUAL ASSAULT CASES**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 6-10
- 1040-1050 **BREAK**
- 1050-1230 **LECTURE – PREPARING THE CHILD FOR COURT AND THE COURT FOR THE CHILD**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 11-15
- 1230-1330 **LUNCH**
- 1330-1430 **LECTURE – MOTIONS PRACTICE FOR THE SVC**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 16-20
- 1430-1440 **BREAK**
- 1440-1615 **EXERCISE – SVC MOTIONS IN CHILD ABUSE CASES**
Locations: Seminar Rooms as Assigned
Student Evaluators: 21-25
- 1615-1630 **Q&A CLOSING REMARKS AND END-OF-COURSE**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons


KENNETH M. THEURER, Colonel, USAF
Commandant

SVCC 14B

	Monday 19-May	Tuesday 20-May	Wednesday 21-May	Thursday 22-May	Friday 23-May	
730	Welcome/Admin Matters	Investigation of Sexual Assault OSI/SVC relations and Cognitive Interviewing SA Mark Walker/Col Hankins	Post-Trial Clemency and Parole Mr. Brown	Trial Procedure and Appeals for SVCs Maj Talcott	Exercise II Trial Advocacy for the SVC Maj Goewert	730
800	SVC Introduction & Overview Col Hankins		Ethics Maj Barker			The Neurobiology of Trauma / Cognitive Interviewing Dr. Rebecca Campbell
830				Lessons Learned in the Field Capt Dilworth		
900	Handling Client's Disciplinary Infractions Capt Dilworth/Maj Rose	End Of Course	900			
930			Military Rules of Evidence for the SVC MAJ Kleim			Lunch
1000	Service Breakout Groups	Lunch		1000		
1030				Lunch		
1100	Panel With Victims Panelists	Lunch				
1130			Fundamental Concepts of Being a Victims' Attorney part I Meg Garvin	Exercise I Client Intake and Advice Maj Goewert		1200
1200	Fundamental Concepts of Being a Victims' Attorney part II Meg Garvin	Sexual Assault Prosecution and SVC Relations Maj Bentz				1200
1230			SVC Rules & Procedure Col Hankins	Running An Office Administrative Affairs, Travel, Paralegal teaming, OPRs/EPRS Etc. Maj Robert Wilder	1230	
1300	NDAA and Article 6(b) /VWAP Lt Col Burton	Sexual Assault Prosecution and SVC Relations Maj Bentz			1300	
1330			Bridging the Gap Q&A with experienced SVCs Panelists	End Of Course	1330	
1400					Icebreaker	1400
1430	Icebreaker	Icebreaker	1430			
1500			Icebreaker	Icebreaker	1500	
1530	Icebreaker	Icebreaker			1530	
1600			Icebreaker	Icebreaker	1600	
1630	Icebreaker	Icebreaker			1630	
1700			Icebreaker	Icebreaker	1700	
1800	Icebreaker	Icebreaker			1800	



**DEPARTMENT OF THE AIR FORCE
THE JUDGE ADVOCATE GENERAL'S SCHOOL**

2 Jun 14

MEMORANDUM FOR COMMANDANT
DEPUTY COMMANDANT
ACADEMIC DIRECTOR
CHIEF, MILITARY JUSTICE DIVISION
IN TURN

FROM: Course Director (Major Goewert)

SUBJECT: End-of-Course Report, Special Victims' Counsel Course 14-B, 19-23 May 14

1. The Special Victims' Counsel Course (SVCC) 14-B ended 23 May 14. The course was divided into two sections, with the basic SVCC running from 19-23 May and an advanced course running concurrently on 22-23 May. There were 64 students registered with 2 observers in total. Approximately 56 attended the basic course and then a portion of that group peeled away to attend the concurrent Advanced Special Victims' Counsel Course. This course focused on the representation of child victims. Approximately 28 students attended the advanced class.¹ The student body was very diverse, with eleven (11) members coming from the National Guard, four (4) Coast Guard, one (1) Navy, nine (9) Army and fifteen (15) Marines.

2. *Key Indicators (Mission and Course Objectives)*

Special Victims' Counsel Course (Basic)

a. **Mission Accomplishment:** The mission of the Special Victims' Counsel Course was to prepare newly assigned Special Victims' Counsel to meet the challenges of transitioning from a legal office serving the needs of the command to an independent office serving the needs of individuals who have been victims of sexual assault. Survey results indicated that 100% of students agreed or strongly agreed that SVCC-14B accomplished its mission. The average response was 4.9 out of 5.

b. **Course Objectives:** Students were asked to rate on a 1 to 5 scale whether stated course objectives were met:

i. **Course Introduction, Administration, and Graduation:**

1. Comprehend the mission and learning objectives for SVCC.
2. Know the administrative, logistical, and academic requirements for SVCC.

¹ Of the 28 total students that attended the advanced course, approximately 16 students began in the basic course and then peeled away to attend the advanced course and another 12 students attended the advanced course only.

3. Characterize attentive, active, and constructive participation in SVCC as important to successful service as a Special Victims' Counsel.

Survey results were that 100% agreed or strongly agreed these objectives were met. The average response was 4.8.

ii. Professional Legal Knowledge for Special Victims' Counsel:

1. Comprehend principles of military criminal law, evidence, and procedure of special interest to crime victims.

2. Comprehend principles of civil law of special interest to crime victims, including information law, victim assistance programs, and adverse administrative actions against offenders.

3. Comprehend ethical issues of special interest to judge advocates serving as Special Victims' Counsel.

4. Apply principles of law, evidence, procedure, and ethics to issues raised by factual scenarios.

5. Value a thorough understanding of applicable law, evidence, procedure, and ethics to successful service as a Special Victims' Counsel.

Survey results show that 100% of students agreed or strongly agreed that SVCC 14-B provided them with necessary professional legal knowledge. The average response was 4.8.

iii. Legal Skill Sets for Special Victims' Counsel:

1. Comprehend techniques for effective communication and positive relations with clients who are victims of sexual assault or other crimes.

2. Apply effective communication techniques in factual scenarios.

3. Value effective communication and positive relationships with crime victim clients as essential to successful service as Special Victims' Counsel.

Survey results show that 100% of students agreed or strongly agreed that SVCC 14-B provided them with the necessary legal skills they will need to practice. The average response was 4.7.

iv. Professional Situational Awareness for Special Victims' Counsel:

1. Comprehend the role of Special Victims' Counsel in the fair and efficient administration of military justice.

2. Comprehend permissible and impermissible activities on behalf of crime victim clients.

3. Comprehend the roles of other Department of Defense offices and programs that provide assistance to victims of sexual assault and other crimes.

4. Respond to assignment as a Special Victims' Counsel as requiring change in judge advocate's relationships with others in the community.

5. Value zealous and ethical advocacy on behalf of crime victims as consistent with the Department of Defense mission.

Survey results show that 100% of students agreed or strongly agreed that SVCC 14-B provided them with the requisite situational awareness of the purpose of their roles. The average response was 4.6.

3. *Other Required Indicators*

a. **Overall Quality of Instruction:** Survey results were that 100% of students rated the instruction as effective or very effective. The average response was 4.8 on a five-point scale.

b. **Course Management:** Survey results were that 100% of students rated the management as effective or very effective. The average response was 4.8 on a five-point scale.

c. **Overall Value of Course:** Survey results were that 100% of students considered SVCC 14-B to be a valuable experience in their professional development. The average response was 4.9 on a five-point scale.

4. **Comparison Data:** The data below compares results with SVCC 14-A ratings.

Indicator	SVCC 14-A	SVCC 14-B
Mission Accomplishment	4.8	4.9
Course Administration	4.7	4.8
Legal Knowledge	4.6	4.8
Legal Skills	4.6	4.7
Professional Situational Awareness	4.5	4.6
Quality of Instruction	4.7	4.8
Course Management	4.8	4.8
Overall Value	4.9	4.9

5. **Student Comments.** We requested student comments in the following specific areas, as well as generally. The comments tended toward a very tight mean with the same recurring likes and dislikes.

a. **Most Effective Blocks of Instruction:** Those blocks taught by MAJ Farrell (visiting instructor from TJAGLCS) who provided the Army perspective on how SVCs approach evidence and the judiciary; Ms. Meg Garvin, who taught the fundamentals of victim representation; Maj Talcott, taught trial and appellate issues for SVCs; and Dr. Campbell, who taught the neurobiology of sexual assault. The students were consistently interested in learning about motions, trial procedure and evidence. I suspect this is because so few of them have much background in military justice and are being asked to advise and represent clients in this arena.

b. **Blocks of Instruction of Little Value:** Ms. Mindlin's lecture on civil legal assistance for victims was considered to be the least valuable as her topics were overlapping and the material presented was considered too remedial. The National Guard breakout, which was managed by

the National Guard, was rated poorly by its attendees. They felt confused by the lack of doctrine and disorganized presentation of the materials. The clemency and parole block was commonly noted as being of limited relevance. The OSI block received a number of comments describing it as of limited value. The students did not appreciate this block and could not connect to its relevance.

c. **Course Strengths:** The Victims Panel, a diverse group of sexual assault victims that had used SVC services, was seen by many as a powerful motivator and brought a sense of reality to the otherwise academic blocks.

d. **Student Recommended Improvements:**

1. The students were very interested in receiving pre-course materials and slides to review so that they had some foundation for the lectures.

2. Several students requested more practical exercises or motions exercises to enhance their understanding of their future roles.

3. Several students suggested adjusting the client intake exercises to make them more realistic. This could be done by removing the audience and monitoring the student's performance on VBRIC. The students could be left in a state of ignorance about whether they are speaking to actors or real victims. They could simply be told that it is time for them to meet and work with "victims." After watching the panel they might be convinced that we have a bevy of victims waiting in the wings to help with the course, facilitating the realism of the exercise.

6. ***Advanced SVCC – Representation of Child Victims***

i. The SVC program has been mandated to represent child victims of sexual assault. The SVC program currently lacks doctrine, policy and rules for this representation. We partnered with the National Children's Advocacy Center (NCAC) to produce an initial training course. The course was aimed at sitting SVCs that had already been to the basic course. NCAC provided two instructors who were solely responsible for curriculum and training. Both instructors taught over 22-23 May. The course focused on the psychological nature of child victims and the experiences of a prosecutor with deep background in handling child sex cases. A great deal of class time was spent debating the solutions to the possible problems the SVCs might face. The feedback forms provided to students were different than those provided to the basic SVC students and did not delineate specific objectives. The hourly management of the course was also delegated to NCAC as the course director was generally involved with the main body of students.

a. **Overall Quality of Instruction:** The average response was 8.35 on a ten-point scale.

b. **Course Management:** The average response was 7.9 on a ten-point scale.

c. **Overall Value of Course:** The average response was 8.1 on a ten-point scale.

ii. **Student Comments:** We requested student comments in the following specific areas, as well as generally.

a. **Most Effective Blocks of Instruction:** The scenario-based and motions exercises were considered very thought provoking.

b. **Blocks of Instruction of Little Value:** There was an overall prosecutorial bent to the instruction. Those sections focusing on prosecution of child cases were rated as of minimal value. The students were continually frustrated by a lack of draft rules of policy and ethics that they could use as a lodestar for the course.

c. **Course Strengths:** The instructors were noted as being very experienced, knowledgeable and engaging in their own domains. They used a dialogue based instruction method which allowed the students to explore uncharted issues.

d. **Student Recommended Improvements:**

1. Bring in a civilian victim's attorney that represents children.

2. Several students noted that it might be beneficial to move the advanced course to the first two days rather than the last two days so that they would have more energy and focus for the advanced learning.

7. **Course Director Comments:**

a. Running a concurrent course was a good way to capitalize on the experiences of the sitting SVCs by comingling them with the junior students. They were utilized as feedback instructors in the exercises. In the next iteration it might be good to continue the overlay, and look for areas where instructors can teach both classes either separately or jointly.

b. It would be good to take a second look at the exercises and consider making them a smooth, continuous problem set so that the client intake fact patterns align with the motions. We should also consider how the client exercises are conducted and brain storm a possible third exercise or seminar problem-solving scenario in order to break up the long blocks of instruction.

c. The icebreaker at Irish Bred pub was attended by only half of the group and though very near, it would be preferable to select a more culinarily appealing location next time.

CHRISTOPHER J. GOEWERT, Maj, USAF
Course Director

Evidentiary Issues:
Kastenberg, MRE 412, 513
and 514

MAJ Rebecca L. Farrell
Professor, TJAGLCS
rebecca.l.farrell7.mil@mail.mil

GOALS

LRM v. Kastenberg - NDAA

MRE 412

MRE 513

MRE 514



•LRM v. Kastenberg, 72 MJ 364 (CAAF July 18, 2013)

- Special Victim Counsel Requests to be Heard
- Denied by Military Judge – finds no standing to present argument
- CAAF disagrees



LRM v. Kastenberg, 72 MJ 364 (CAAF July 18, 2013)

“[R]ights granted to her by the President in duly promulgated rules of evidence”

“A reasonable opportunity to be heard . . . includes the right to present facts and legal argument , and . . . heard through counsel.”



LRM v. Kastenberg, 72 MJ 364 (CAAF July 18, 2013)

Looking to prior case (*Carlson*, 43 MJ 401) law for definition:

“The Court ordered that the victims “will be given an opportunity, *with the assistance of counsel if they so desire*, to present evidence, arguments and legal authority to the military judge”



LRM v. Kastenberg, 72 MJ 364 (CAAF July 18, 2013)

“While [the rule] . . . includ[es] potentially the opportunity to present facts and legal argument . . . the right is not absolute.”

“[Do]es not create a right to legal representation . . . [if] not already represented.”

“[If] . . . entirely aligned with . . . Trial counsel, the opportunity to be heard could reasonably be further curtailed.”

But see NDAA, 2014





**RCM 801(a)(3) - exercise
Reasonable control over
proceedings**

- **Limits for argument**
- **Order for argument and evidence**
- **Order of witnesses**



- Other Sexual Behavior
- Sexual Predisposition

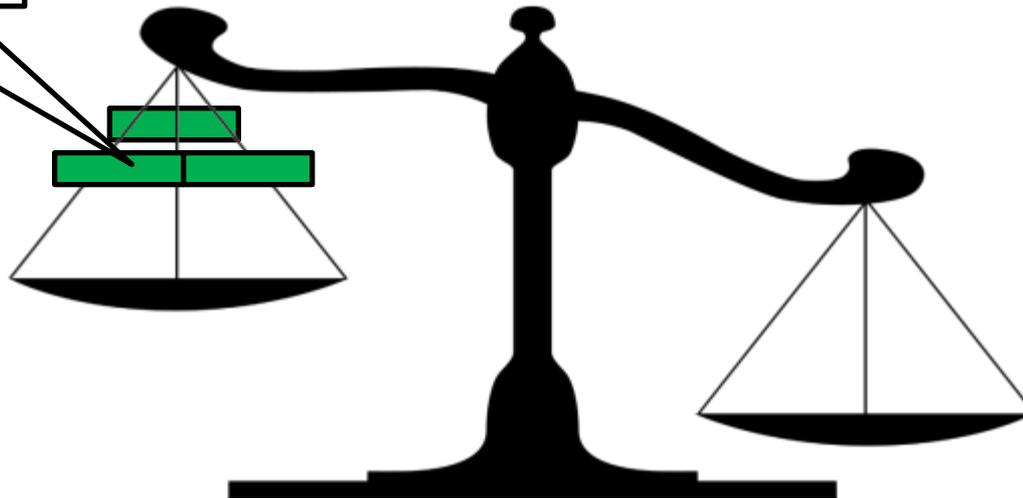
MRE 412

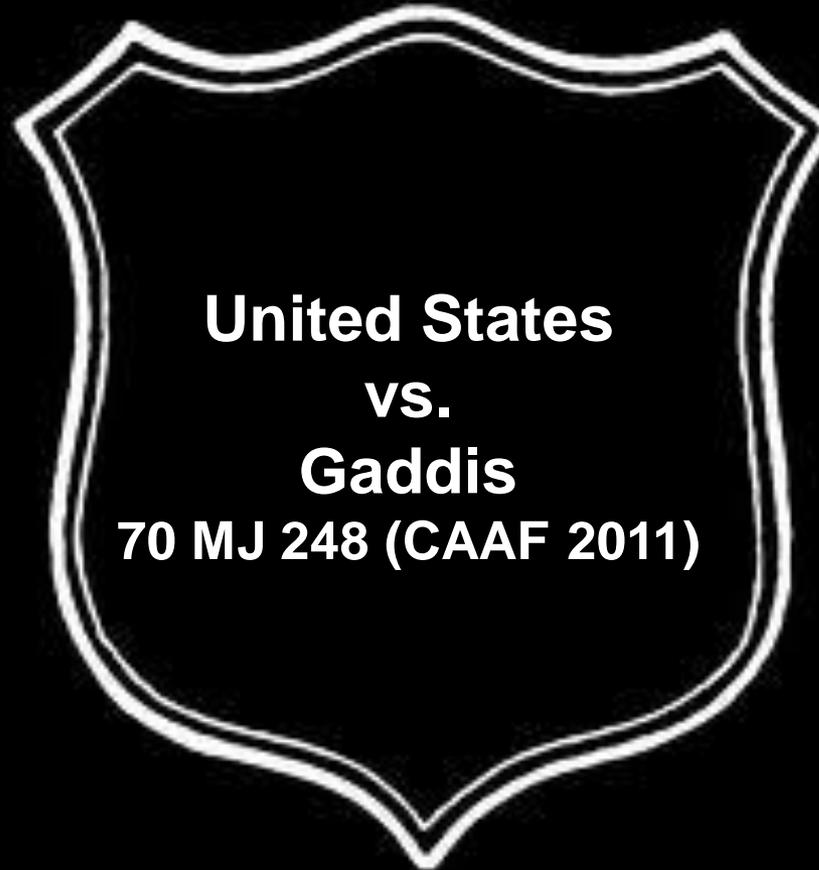
MRE 412

Three exceptions

- Past sexual behavior
- Sexual predisposition

1. Instances of behavior to show someone else was the source of semen, injury, other physical evidence
2. Prior sexual behavior b/n accused and victim *to prove consent or by the prosecution*
3. Constitutionally required





United States

vs.

Gaddis

70 MJ 248 (CAAF 2011)

MRE 412

Built-in balancing

**US v.
Gaddis**

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice ~~to the alleged victim's privacy~~, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

United States v. Gaddis, 70 M. J. 248 (C.A.A.F. 2011)

M.R.E. 412 cannot limit the introduction of evidence required by the Constitution—although the text of the rule seems to permit such a limitation. And the explanation in Banker—**suggesting** that balancing constitutionally required evidence against the privacy interest of the victim before admitting it is necessary to further the purpose of the rule, see Banker, 60 M.J. at 222–23—**is simply wrong.**

- *Gaddis*, 70 M.J. at 256

Evidence of Sexual Behavior and Sexual Predisposition Not Admissible

Except:

- A) Behavior to prove other source of injury, semen or physical evidence;**
- B) Behavior b/tw victim/acc to prove consent or by prosecution**

Test:

- 1) 401: Relevance**
- 2) Probative value outweighs the danger of unfair prejudice**

MRE 403

Except:

- C) Constitutionally Required**

Test:

- 1) 401: Relevance**
- 2) Probative value outweighs the danger of unfair prejudice**

Add'l Test for Const Req Evid:

- 1) Relevant: 401**
- 2) Material: Importance in relation to other issues; extent in dispute; nature of other evidence on this issue**
- 3) Favorable to Acc: exculpatory; undermine credibility of central witness; central to theory**

**US v.
Gaddis**

Meet 403 balancing?

**...it is admissible no matter
how embarrassing it might
be to the alleged victim**



All in?

*Van Arsdall factors...
can impose “reasonable
limits”*

Constitutional Right of Confrontation . . . except



“Judges retain wide latitude to impose reasonable limits on cross-examination”

-*Delaware v. Van Arsdall*, 475 U.S. 673 (1986)

MRE 611

- Harassment
- Undue embarrassment
- Effective truth seeking
- Avoid wasting time



MRE 513

**Psychotherapist
- Patient
Privilege**

Rule 513. Psychotherapist—Patient Privilege

(a) *General Rule.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any State, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

- Psychiatrist
- Psychologist
- Clinical Social Worker
- “reasonably believed by patient to have such . . . credentials”



Types of Evidence

(5) “Evidence of a patient’s records or communications” means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient’s mental or emotional condition.

- “Evidence of a patient’s records or communications”

- Testimony
- Records



MRE 513

Exceptions



(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

MRE 513 Exceptions

- Death
- Child abuse against child of either spouse
- Required by law
- Danger
- Future crime or fraud
- Military safety
- Mental health in defense
- Constitutionally required



(6) when admission or disclosure of a communication is constitutionally required.

Const Req Evid:

- **Relevant: 401**
- **Material: Importance in relation to other issues; extent in dispute; nature of other evidence on this issue**
- **Favorable to Acc: exculpatory; undermine credibility of central witness; central to theory**

MRE 513 Exceptions



**United States v. Bazar, 2012 WL 2505280
(A.F.Ct.Crim.App. 29 June 2012) (unpublished)**

Judge did not allow evidence from mental health records to impeach victim during sentencing; not constitutionally required and excluded by MRE 403.

Procedure

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard at the patient's

- Written motion
- Service
- Hearing (“must conduct”)
- Closed?
- Reasonable Opportunity to Attend and be heard
- *In Camera* (“may . . . if necessary”)
- Protective Order (“may”)
- Sealed (“must”)

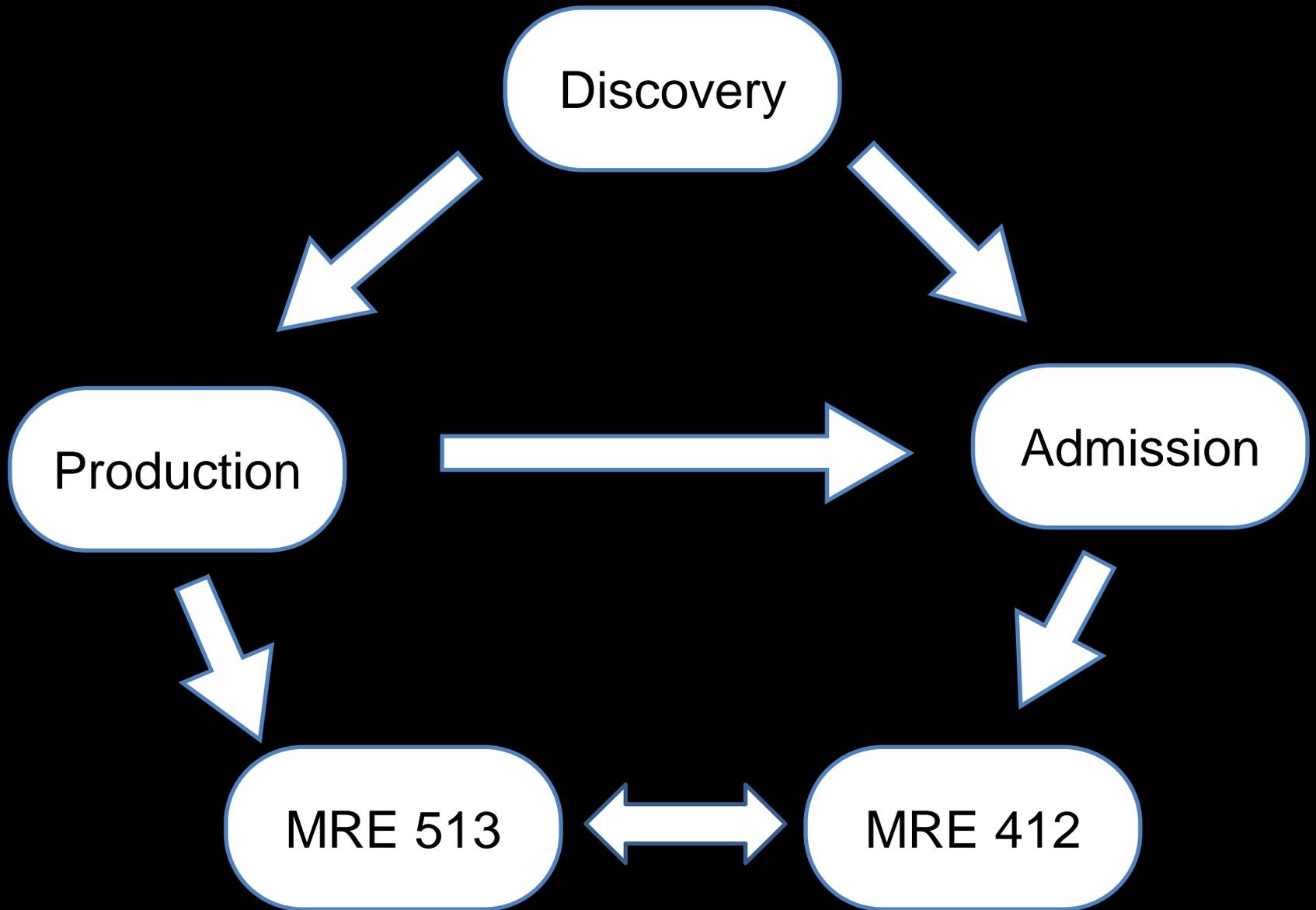


Procedure

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

EVERYTHING
IS
CONNECTED







MRE 514

Victim
Advocate-Victim
Privilege

Rule 514. Victim Advocate—Victim Privilege

(a) *General Rule.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim.

(b) *Definitions.* As used in this rule:

(1) “Victim” means any person who is alleged to have suffered direct physical or emotional harm as the result of a sexual or violent offense.

(2) “Victim advocate” means a person who:

(A) is designated in writing as a victim advocate in accordance with service regulation;

(B) is authorized to perform victim advocate duties in accordance with service regulation and is acting in the performance of those duties; or

(C) is certified as a victim advocate pursuant to federal or state requirements.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the victim is dead;

(2) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(3) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim;

(4) if the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

(5) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or

(6) when admission or disclosure of a communication is constitutionally required.

.Death

- Required by law
- Danger
- Future crime or fraud
- Military safety
- Constitutionally required



*See supra Mil.
R. Evid. 513*

For "how to" and
intent on
exceptions

For procedure



<http://tools.nnedv.org/tipsheets-charts/charts/62-usstatelawsadvocateconfidentiality>

GOALS

LRM v. Kastenberg - NDAA

MRE 412

MRE 513

MRE 514



Evidentiary Issues:
Kastenberg, MRE 412, 513
and 514

MAJ Rebecca F. Kliem
Professor, TJAGLCS
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Air Force Office of Special Investigations

What was OSI thinking...and how do we all get it done while maintaining our sanity



**Col Dawn Hankins
SA Mark Walker**

U.S. AIR FORCE



Overview

- Sufficiency
- Investigation Overview/Expectations
- Lessons learned



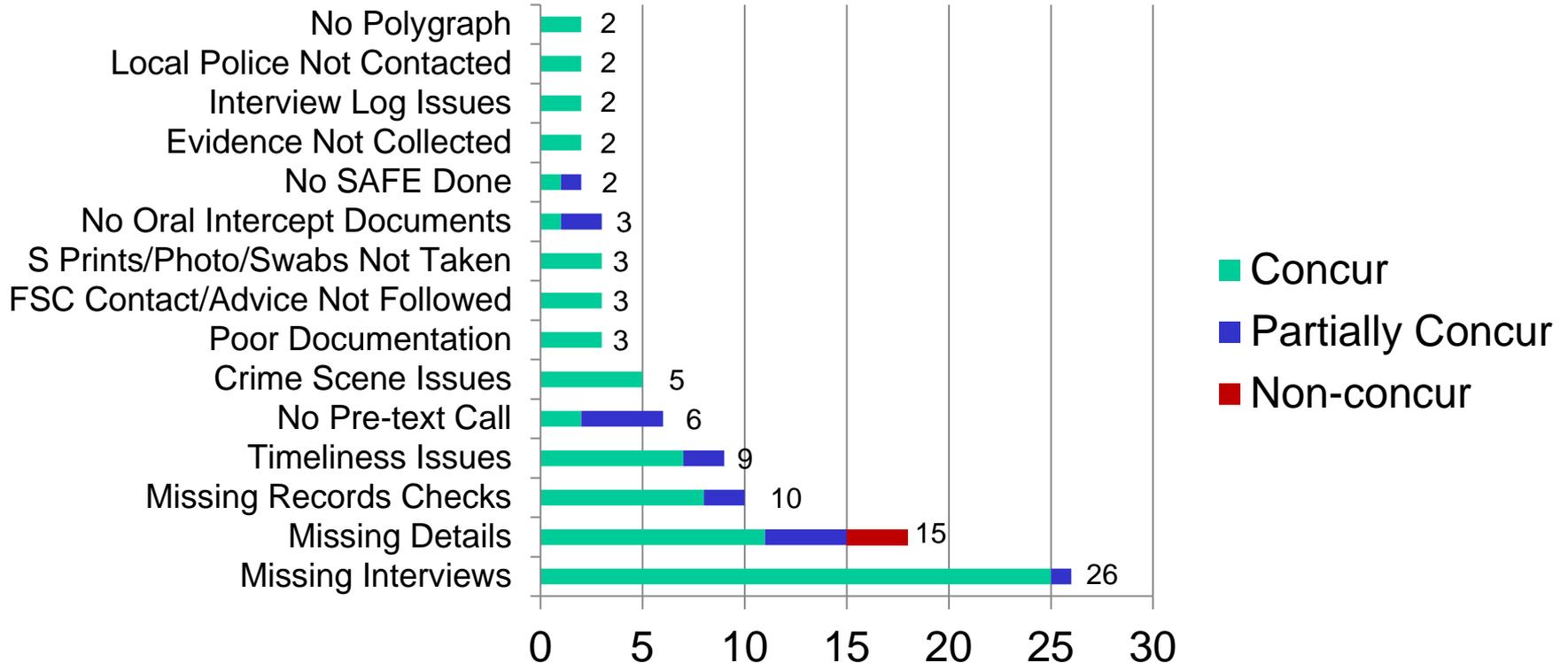
New Oversight

- **DOD IG's new Violent Crime Division**
 - **Three on-going assessment projects**
 - **Sexual assault policy**
 - **Sexual assault training**
 - **Investigative sufficiency**
 - Reviewed 152 CY10 sexual assault cases
 - 17 OSI cases found to be insufficient; 10 of which required re-opening
 - Army & NCIS also assessed



Discrepancies by Category

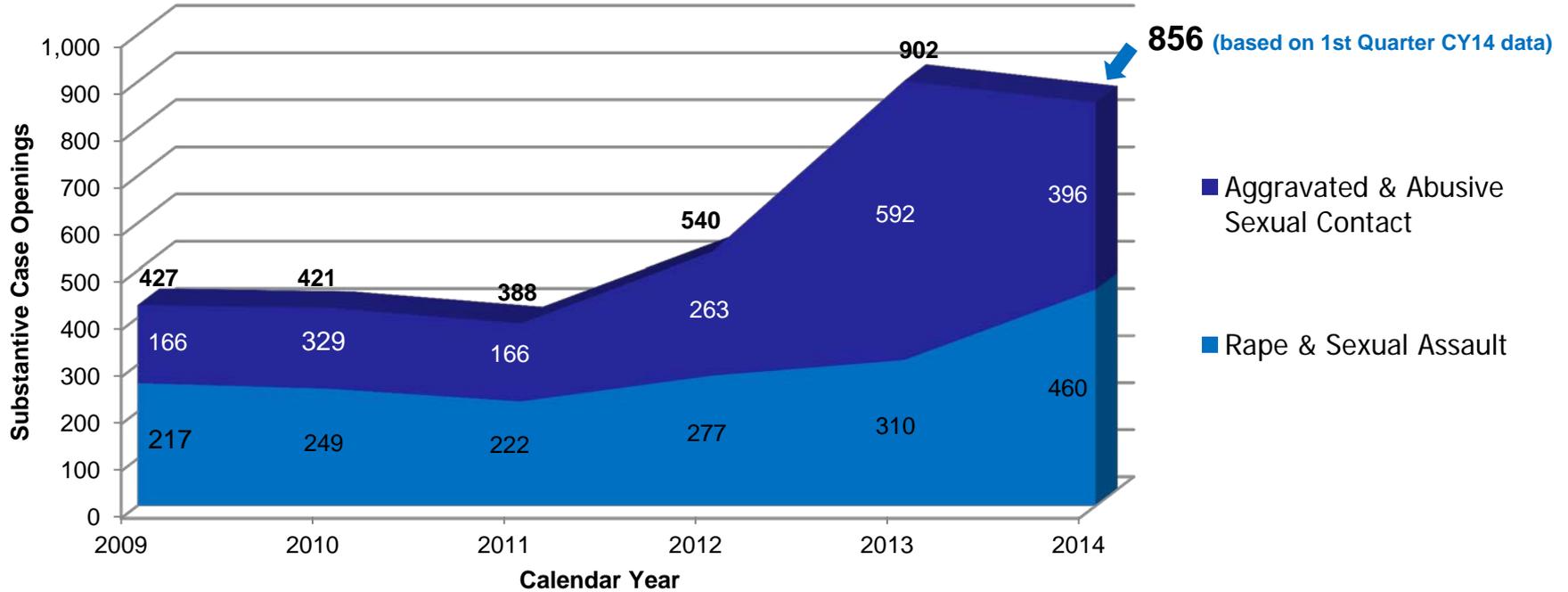
(17 (11%) of 152 Cases)





AFOSI Adult Victim Sexual Offenses

Case Openings by Calendar Year





Notification of Assault-Terms

- **Unrestricted**
- **Independent information**
 - **Subject**
 - **Victim**
 - **Location of evidence**
- **Unintentional Disclosure—not independent information**
 - **AFOSI will NOT open based solely on unintentional disclosure**
 - **SARC**
 - **VA**
 - **Health care provider**



The Investigative Process

Ground Rules

- **No checklist**
 - Every situation is different—ALL sex assaults are complicated
 - Dynamic process
 - Investigation course changes w/new information
 - **Probative investigative activity**
 - Perishable to non-perishable
 - Victim involvement
 - Employment of specialized techniques
 - **New AFOSI/CC, New timeline – 75 Days**
 - Dependent on others' timetables
 - Lab work
 - Witnesses
-



The Investigative Process

Victim Interview

Victim Interview -- Possibly initially interviewed by responding LE

- May be deferred for SAFE or traumatic nature of assault
- Delayed report
 - Concern for operational security more than trace evidence collection
- Detailed interview - who, what, when, where, why, how...
 - Offender data
 - Location of evidence
 - Potential timeline
 - ID Witnesses – Outcry
 - ID potential additional victims
- Concern that Victim's recall has been influenced by other interviews
- Victims may be reluctant to share all information w/others in room

****Notification of VWAP (DD Form 2701) and availability of a SVC**



What is the Cognitive Interview?

- **Geiselman and Fisher (1984)**
 - 20+ years of empirical research
 - Increases the quantity and quality of information
- **Interviewer behaviour important to outcome**
 - Process explained
 - Victim control vs. interviewer control
- **Uses a non-directive conversational approach**
 - No interruptions
 - Open ended questions
- **Promotes memory recall**
 - Context reinstatement
 - Probing techniques--Multiple retrieval attempts
- **Standard guidelines--NOT a checklist**



The Investigative Process

Crime Scene Searches

- **Crime Scene(s) Processing = Collection + Preservation + Documentation**
 - **Dependent**
 - Time/date of the incident
 - Nature of the incident/location
 - Warrant/search authority/consent
 - **Multiple scene consideration**
 - Victim's body, clothes, residence, vehicle...etc
 - Subject's body, clothes.....etc.....etc
 - **Information Technology (Media)**
 - Deletion has repercussions
 - Non-relevant information can have repercussions
 - Data is the evidence...unless
 - Fingerprints
 - DNA



The Investigative Process

Sexual Assault Examination

Victim SAFE—Conducted by SANE or trained Medical Personnel

- 12 hrs blood
- 72 hrs anal or oral collection
- 96 hrs is standard for external swabs/vaginal cavity swab/collection of **urine**
 - DoD SAFE indicates 7 days
 - 10 days cervical swab if penile/vaginal penetration—**Potential for non-motive sperm**
- Consider limited scope SAFE based on nature of incident
- Serves multiple purposes
 - Victim safety/health #1
 - Physical evidence collection

Subject SAFE

- 72 hours for males
- Underutilized by police
- Consider limited scope SAFE – saliva, marks, evidence of Victim
- Will ask for consent or seek warrant/search authority

Must weigh probative benefit against invasive procedure



The Investigative Process

Crime Scene Searches

What is the investigator looking for?

- **DNA**
 - Clothing/bedding--**Underwear worn during & after**
 - Saliva/Sweat
 - Other “icky” things
 - Condoms/packages/new/used
 - Lubricants
 - Other items used in assault
- **Alcohol/drugs/medication**
 - Witting
 - Unwitting
- **Pictures/video/Media**
 - Witting
 - Unwitting
- **Social Networking**
 - Facebook
 - Email
- **Photograph/Sketch scene for recall**





The Investigative Process

Crime Scene Sequence

Observe: recognizing items of evidentiary value

Record: documentation/photography

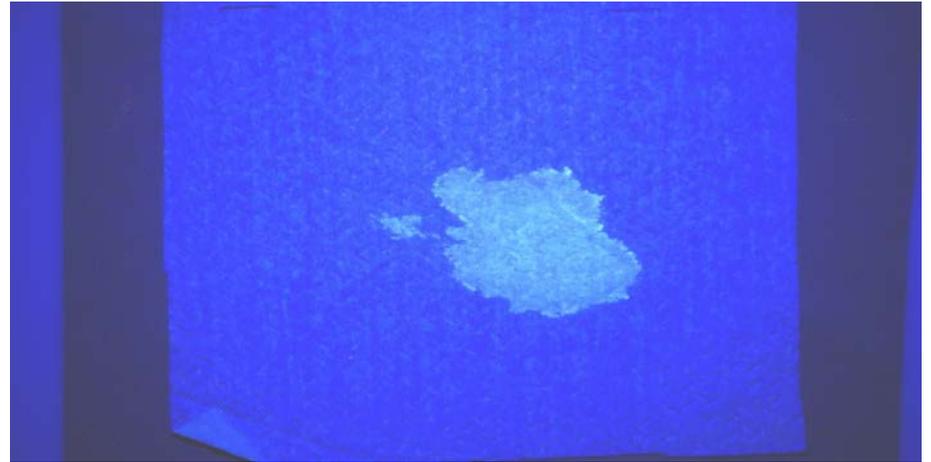
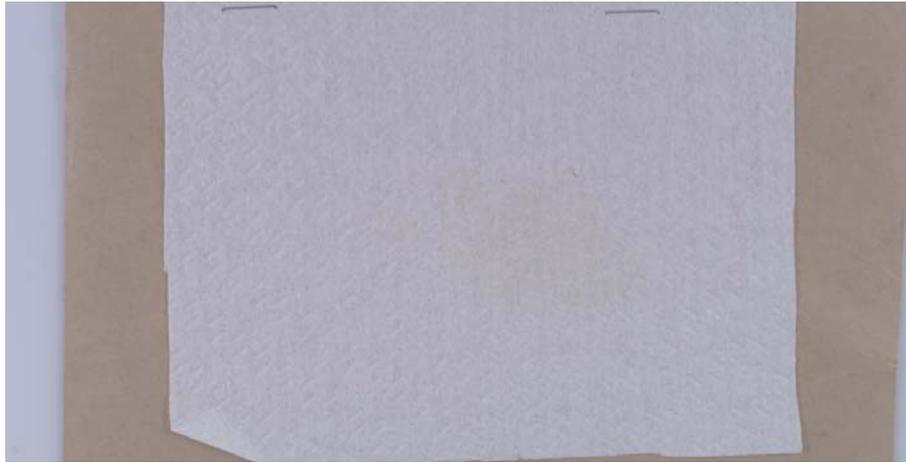
Collect: ensure least destructive means

Preserve: mitigate the obliteration of evidence after collection





The Investigative Process Technology - Alternative Light Sources





The Investigative Process

DNA Analysis

Television

- Match in minutes!



Real World

- Locate samples
- Presumptive testing
- Extract DNA
- Quantify DNA
- Type DNA
- CODIS
- ~ *several days if no backlog*

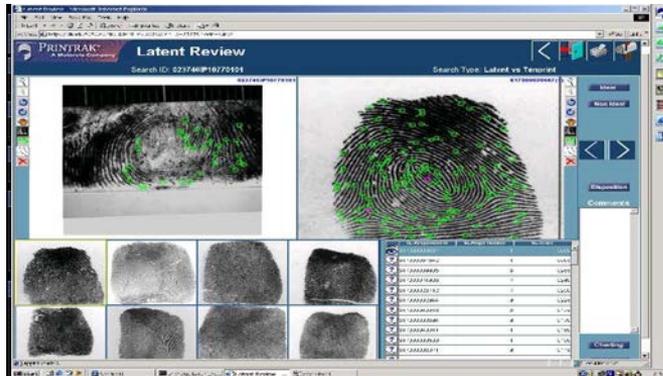


The Investigative Process

Fingerprints

Television

- Person collecting does analysis
- Match in hours/on spot
- Found on every item



Real World

- Locate
- Process
- Lift
- Automated Fingerprint Identification System
- Manually match – 8 points minimum



Investigative Process

Investigative Plan

Probative activities focused on elements of offence

- **Witness Interviews – Outcry – Pattern of behavior**
- **Records checks**
- **Evidence processing**
- **Operational activity**
- **BAC approximations**
- **Area canvas (Surveillance cameras, development of additional witnesses, etc)**

Anticipate defense

- **Investigate all aspects**



Investigative Process

Operational Activities

- **Operational Activities**
 - Pre-text phone calls
 - Wire-intercept calls
 - Body wire
 - Informants
 - Surveillance

**** Operational Security imperative**





Investigative Process

misc

- **Subject's previous relationships**
 - **Pattern of abuse/assault**
- **Victim's sexual history is not relevant – Unless...**
- **Potential victim re-interview/clarification interviews**
 - **Clarify information obtained throughout investigation**
- **Evidence of stalking**



IMAGECHEF.COM

Questions?

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Headquarters U.S. Air Force

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SVCs and Recent/Future Changes to the UCMJ



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Lt Col R. Craig Burton

AFLOA/JAJM

**Chief, Justice & Court Activities (Guy
that does stuff that doesn't fit neatly
into other categories)**



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Overview

- Why is JAJM Talking to You?
- SVC v. VWAP
- Special Victim Capability (FY13 NDAA)
- Special Victims Counsel
- Sexual Assault Related Changes to the UCMJ
- Mental Health Records & FOIA Requests



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JAJM – Who We Are and What We Do

- A selectively manned division of AFLOA and the USAF Judiciary (some roles we perform as part of Air Staff)
- Provide info, opinions & advice to SecAF, CSAF & TJAG
- Support and advise the field
- Draft and implement military justice policy worldwide
- Respond to inquiries regarding military justice actions

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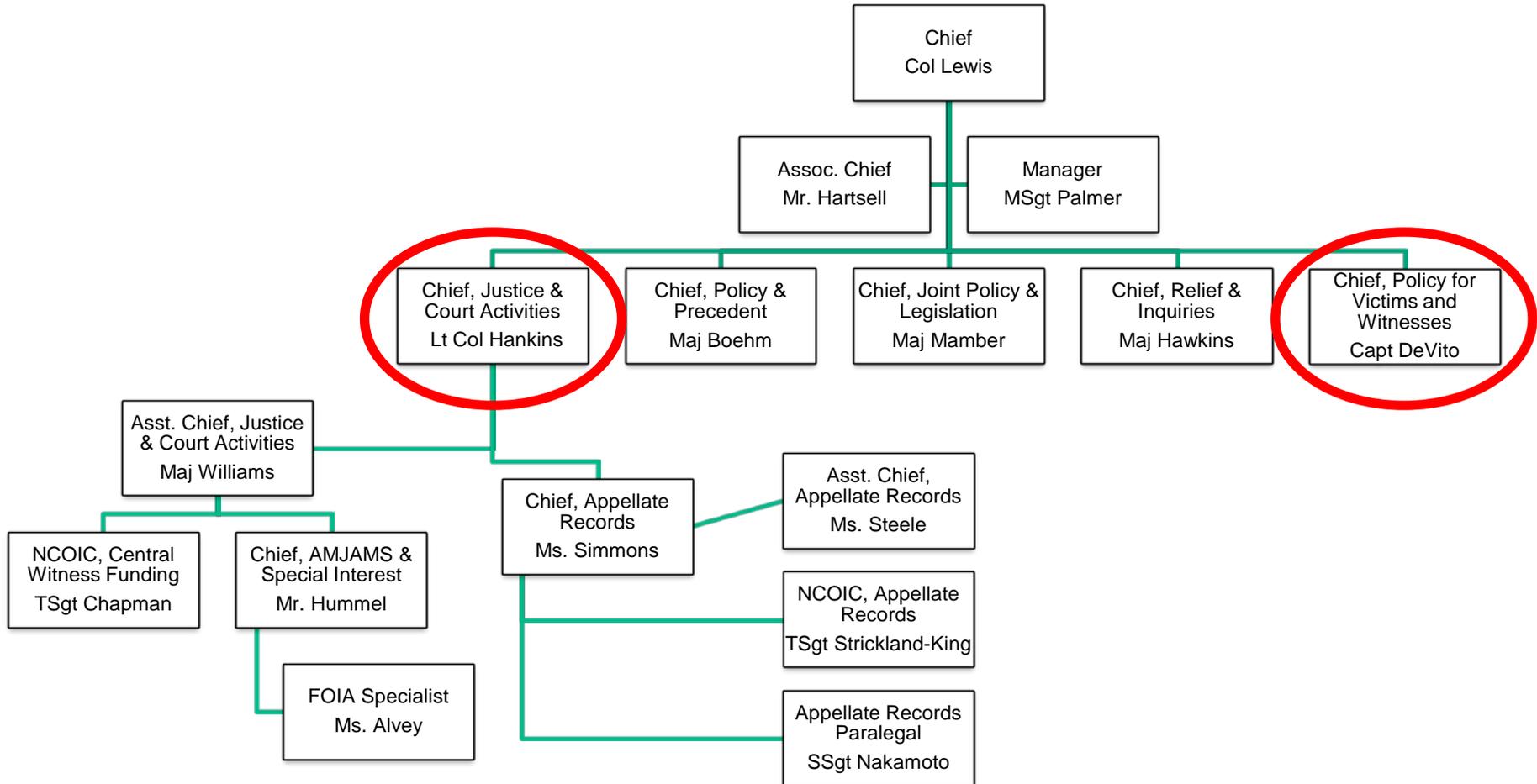
JAJM – Who We Are and What We Do

- Prepare advisory opinions for AF BCMR
- Liaison with the other armed services, DoD & DoJ
- Administer AMJAMS
- Serve as the AF custodian of records of trial
- Process ROTs for review under Articles 66 and 69, UCMJ



U.S. AIR FORCE

JAJM Org Chart



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This powerful wrestler is posing in his recreation clothes.



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SVC v. VWAP



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SVC v. VWAP

- SVC Objectives:
 - Provide support to victims through independent attorney-client privileged representation
 - Build and sustain victim resiliency
 - Empower victims
 - Increase the level of legal assistance provided to victims



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SVC v. VWAP

- **VWAP Objectives:**
 - Mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by USAF authorities
 - Foster cooperation of victims and witnesses within the military criminal justice system
 - Ensure best efforts are made to accord to victims of crime certain enumerated rights



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SVC v. VWAP

- VWAP informs of:
 - emergency medical care
 - social services
 - public and private counseling, treatment and support programs
 - assists victims in accessing these services.
- SVC should discuss the military and civilian support and services available to the particular victim
 - The SVC will have primary responsibility for assisting the victim in accessing these resources



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SVC v. VWAP

- VWAP consults with the victim on:
 - Decisions not to prefer charges;
 - Dismissal of charges;
 - Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement;
 - Plea negotiations;
 - Discharge or resignation in lieu of trial by court-martial; and
 - Scheduling of judicial proceedings where the victim is required or entitled to attend.



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SVC v. VWAP

- VWAP should consult with the victim through the SVC
 - The responsibility lies with both the VWAP and the SVC to ensure this consultation occurs.
 - SVCs are responsible for ensuring the victim has obtained information the victim is entitled to in order to advise the victim and ensure the victim is able to make decisions and provide their views with the best information and understanding of the issue(s) possible



U.S. AIR FORCE

SVC v. VWAP

- SJA is required to provide the victim with written notice inviting the victim to provide a written victim impact statement to the convening authority's SJA, regarding whether or not the convening authority should approve the findings and sentence or grant clemency
- The SVC advises the victim on the post-trial process and assists the victim to submit a victim impact statement (w/in 10 days) if victim desires



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SVC v. VWAP

- VWAP requires victims to be informed of any restitution available and transitional compensation and assists victims in obtaining
- When a victim is represented by an SVC, the SVC is responsible for discussing with the victim the possibility of restitution being included as a condition in the terms of a PTA, as a part of post-trial mitigation, or as a term or condition of parole and clemency



U.S. AIR FORCE

SVC v. VWAP

- VWAP assists in providing reasonable protection from the accused
- VWAP ensures the victim's property/evidence is maintained in good condition
 - SVC advocates for return, when appropriate
- VWAP provides the DD Forms 2702-2704



U.S. AIR FORCE

Victim Consultation under VWAP

- AFI 51-201, para. 7.12.12, “consult with the victim and obtain their view concerning:
 - Decisions not to prefer charges;
 - Dismissal of charges;
 - Pretrial restraint or confinement, particularly an accused’s possible release from any pretrial restraint or confinement;
 - Pretrial agreement negotiations, including PTA terms;
 - Plea negotiations;
 - Discharge or resignation in lieu of trial by court-martial; and
 - Scheduling of judicial proceedings where the victim is required or entitled to attend”



U.S. AIR FORCE

Post-Trial Submission of Victim Impact Statements

- The AF already implements this provision right? Yes, but...
 - Current AF practice requires victims to submit statements prior to receiving the ROT; victim's statement is then served on Accused at the same time as the ROT as an attachment to the SJAR
 - Under the change victims will have 10 days from receiving the ROT and SJAR to submit their victim impact statement
- **Sec 1706: effective 24 Jun 14**



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Post-Trial Submission of Victim Impact Statements

Clarification – Victim will be provided the opportunity to submit a victim impact statement only when the Accused has been convicted of an offense in which the Victim is named

*****NOTE- Not a complete list**

YES	NO
Art 93	Art 92
Art 120	Art 125 Sodomy
Art 120a	Art 134 Adultery
Art 120b	Art 134 Disorderly Conduct
Art 120c	
Art 125 Forcible Sodomy	
Art 128	
Art 134 Indecent Language	

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FY13 NDAA

Special Victim **Capabilities**

SEC. 573. ESTABLISHMENT OF SPECIAL VICTIM **CAPABILITIES** WITHIN THE MILITARY DEPARTMENTS TO RESPOND TO ALLEGATIONS OF CERTAIN SPECIAL VICTIM OFFENSES.

(a) **ESTABLISHMENT REQUIRED.**—Under regulations prescribed by the Secretary of Defense, the Secretary of each military department shall establish special victim **capabilities** for the purposes of—

(1) investigating and prosecuting allegations of child abuse, serious domestic violence, or sexual offenses; and

(2) providing support for the victims of such offenses.

(b) **PERSONNEL.**—The special victim **capabilities** developed under subsection (a) shall include specially trained and selected—

(1) investigators from the Army Criminal Investigative Command, Naval Criminal Investigative Service, or Air Force Office of Special Investigations;

(2) judge advocates;

(3) victim witness assistance personnel; and

(4) administrative paralegal support personnel.



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FY13 NDAA Special Victim Capability

- Expect Screening of JAGs/Paralegals/VWAP (SARCs/VAs)
- Minimum Qualifications: AFGM to 51-201
- One proposal: uncertified JAGs must consult with JA/JG before assuming Special Victim Capability role
- Expect an expansion of current JA/OSI investigation support team concept
- Expect some minimum training requirements
- Expect AMJAMS tracking of Special Victims Capability



FY13 NDAA Special Victim Capability

■ 28 Jan 13 – AF Pilot Program

- Air Force – AD/ARC (if incident occurred while in status)
- The status of the perpetrator (Air Force, other service, civilian)
- Both restricted and unrestricted
- Adult Dependents
- Perpetrator must be an AF member
- Both restricted and unrestricted reports
- Other Services – AD/ARC (if incident occurred while in status)
- Perpetrator must be an AF member

You already know this stuff, but make sure you don't confuse "SV Counsel" with "SV Capability" when reading the laws/policies



Special Victim Capability

■ 28 Jan 13 – AF Pilot Program

- Unrestricted reports only
- Adult Dependents of O+ members
- Perpetrator must be a member
- Unrestricted
- For sexual assault, 125, and 80
- Entry-level status involving physical contact of a sexual nature BMT or TT faculty/staff

You already know this stuff, but make sure you don't confuse "SV Counsel" with "SV Capability" when reading the laws/policies



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FY13 NDAA

Special Victim Capability

- 14 Aug 13 – SecDef Policy Directive
 - All Services must implement initial capability by 1 Nov 13, and fully established by 1 Jan 14
 - Left to the Services’ discretion of what was “best suited for that Service”
- 26 Dec 13 – FY14 NDAA §1716
 - Effective 24 Jun 14, extended SVC to anyone who is
 - eligible for military legal assistance; AND
 - A victim of an alleged sex-related offense (Arts. 120, 120a, 120b, 120c, 125, or attempts thereof)



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Fun with Grammar

- Which is most correct?
 - I was tired, so I went into the room and laid down on the bed.
 - I was tired, so I went into the room and laid on the bed.
 - I was tired, so I went into the room and lay down on the bed.
 - I was tired, so I went into the room and lay on the bed.
 - I was tired, so I went into the room and lain on the bed.

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Sexual Assault Related Changes to the Military Justice System

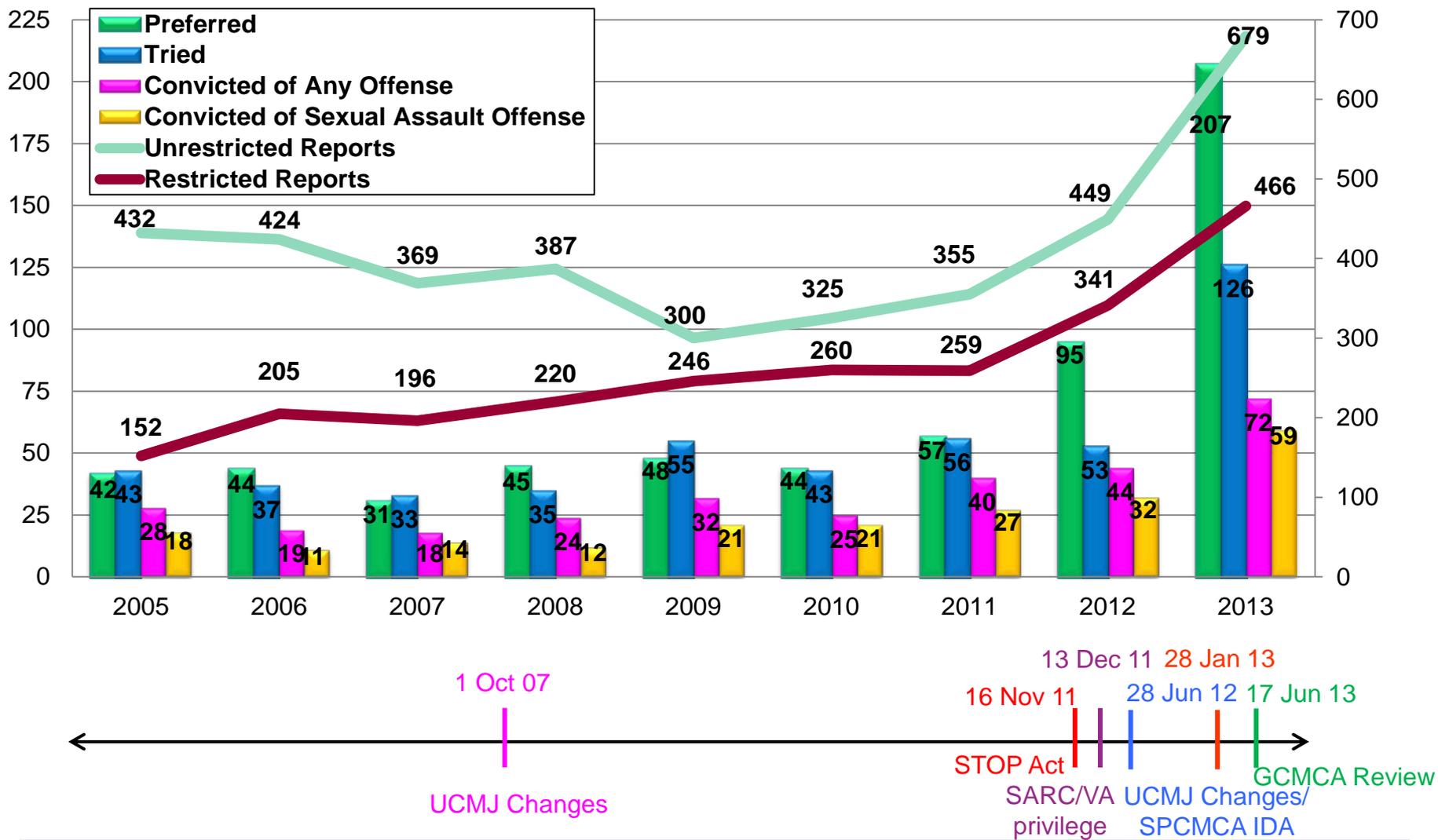


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Adult Sexual Assault (Art 120 and 125) Cases Preferred, Tried, and Convicted by FY SAPR Cases Only

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SVC Program



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Two Major Themes

- Enhanced victims' rights
- Constrained convening authority power and discretion



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Substantive Revisions to Military Justice System

- Some applicable only to sexual offense cases, some applicable to all cases
- Some changes effective immediately, others phased in



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Reforms

1. Enacted mil crime victims' rights article within the UCMJ (Article 6b) (modeled on 18 U.S.C. § 3771) (Sec 1701: rights effective immediately, enforcement mechanism for willful & wanton violations effective Dec 26, 2014)



U.S. AIR FORCE

Victims' Rights

- A victim has the following rights:
 - (1) The right to be reasonably protected from the accused.
 - (2) The right to reasonable, accurate, and timely notice of any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
 - (B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.
 - (C) A court-martial relating to the offense.
 - (D) A public proceeding of the service clemency and parole board relating to the offense.
 - (E) The release or escape of the accused.



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Victims' Rights

- A victim has the following rights:
 - (3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.



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Victims' Rights

- A victim has the following rights:
 - (4) The right to be reasonably heard at any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
 - (B) A sentencing hearing relating to the offense.
 - (C) A public proceeding of the service clemency and parole board relating to the offense.



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Victims' Rights

- A victim has the following rights:
 - (5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).
 - (6) The right to receive restitution as provided in law.
 - (7) The right to proceedings free from unreasonable delay.
 - (8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.



2. Requires military legal assistance programs to represent victims of certain offenses (**Sec 1716: effective June 24, 2014**)
3. Requires services to implement capability to PCA/S the Accused when requested by a sexual assault victim (**Sec 1703: AF implement immediately**)



3. Article 32 investigations transformed into “preliminary hearings” (Sec 1702(a): applies to offenses committed on or after December 26, 2014)
 - Scope of the hearing limited
 - Military victims given option not to testify
 - Hearing must be recorded; upon request, victim will be given access to the recording
 - Preliminary hearing officer usually must be judge advocate and equal to or senior in grade to detailed government and defense counsel
 - Subpoena Duces Tecum from IO or Government Counsel
 - 412 Evidence expressly allowed, with same protections as in trial



U.S. AIR FORCE

Reforms (Pretrial Process)

4. Defense counsel required to seek interview of sexual assault victim through the trial counsel (**Sec 1704: effective immediately**)
 - Obligation attaches upon notice by TC that TC intends to call victim as witness at Art. 32 hearing or C-M.
5. Character and military service of the accused required to be eliminated from Manual for Courts-Martial as factors commanders should consider in disposition decisions (**Sec 1708: implementation required by June 24, 2014**)



U.S. AIR FORCE

Reforms (Pretrial Process)

6. Jurisdiction over charges of rape, sexual assault, forcible sodomy, or attempts to commit those offenses limited to GCMs (Sec 1705(b): applies to offenses committed on or after June 24, 2014)
7. GCM convening authorities' decisions not to refer charges for those offenses subjected to higher-level review (Sec 1744: AF implement immediately)



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Fun with Grammar

- Which is correct?
 - Please give the papers to my client and I.
 - Please give the papers to I and my client.
 - Please give the papers to me and my client.
 - Please give the papers to my client and me.



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Sentencing reform

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Reforms (Sentencing)

8. Punitive discharge (DD (GCM)) required for convictions of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit those offenses (**Sec 1705(a): applies to offenses committed on or after June 24, 2014**)



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Reforms to post-trial process

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Reforms (Post-trial Process)

9. Victim given right to make post-trial submission to the convening authority (Sec 1706(a): AF on 24 Jun 14)
10. Convening authority prohibited from considering information about the victim's character that was not admitted at trial (Sec 1706(b): AF on 24 Jun 14)



U.S. AIR FORCE

Reforms (Post-trial Process)

11. Convening authorities' power to set aside court-martial convictions limited to certain minor offenses
(Sec 1702: applies to offenses committed on or after June 24, 2014)

■ Qualifying offenses:

■ Findings –

- Max confinement <2 yrs
- Adjudged sentence = <6 mos confinement & no punitive discharge
- Never for rape or SA (120), 120b, 125, other offenses specified by SecDef

■ Sentence – Adjudged sentence = <6 mos confinement & no punitive discharge

- Exceptions – “substantial assistance” in investigation/prosecution of another accused
– PTA (but for mandatory minimum, only to reduce DD to BCD)



U.S. AIR FORCE

Reforms to criminal law

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Reforms (Criminal law)

12. Statute of limitations eliminated for sexual assault and sexual assault of a child (**Sec 1703: applies to offenses committed on or after December 26, 2013**)

13. Consensual sodomy repealed as an offense (**Sec 1707: applies to acts committed on or after December 26, 2013**)



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Reforms (Criminal law)

14. Regulations enforceable under Article 92 required to prohibit retaliation against an alleged victim or a non-victim who reports an offense (*Sec 1709: regulations required no later than April 25, 2014*)



U.S. AIR FORCE

Reforms (Criminal law)

15. Service regulations enforceable under UCMJ required to prohibit relationships between those in entry-level processing and training and those who exercise control over them (**Section 1741: 24 Jun 14**)

In this
cinemagraphic
breakthrough,
we learn that
 pools ,
are perfect
for holding
water.



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***SVCs, Mental Health
Records, & FOIA
Requests***



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Mental Health Records

- Victims' #1 concern=privacy
- “My privacy was completely violated. My SVC and I attempted to protect my privacy but it was violated repeatedly throughout the trial. The rapist’s privacy however, was treated as the holy grail.”



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Mental Health Records

- MRE 513 – has defense made any threshold showing that the records should be produced?
- *US v. Klemick* - 65 MJ 576 (NMCCA 2006) - moving party burden:
 - 1) set forth a specific factual basis demonstrating a reasonable likelihood that the requested records would yield evidence admissible under an exception to the patient-psychotherapist privilege;
 - (2) showed that the information sought is not merely cumulative of other information available; and
 - (3) showed that it made reasonable efforts to obtain the same or substantially similar information through nonprivileged sources.



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Mental Health Records

It is NOT AFOSI policy to request a victim's mental health records in every case.

1. AFOSI evaluates on a case by case basis whether VIC mental health records are relevant and material to their investigation.
2. AFOSI submits request to legal office that is specific and limited in scope. Legal review conducted by JAG not assigned to case.
3. AFOSI submits request to mental health with legal review.



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Mental Health Records

It is NOT AFOSI policy to request a victim's mental health records in every case.

4. Mental health “may” disclose VIC’s records.
5. Mental health seals and marks envelope.
6. AFOSI notes in ROI that VIC mental health records were reviewed and sealed. ROI does not include summary of VIC mental health records or the records themselves as an attachment.



Direct Request, or FOIA

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- Asking to protect client's rights?
 - No need to FOIA
- Asking for client's curiosity?
 - Probable FOIA request



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Fun with Grammar

- Which is most correct?
 - Please contact Maj Williams or myself if you have any questions.
 - Please contact Maj Williams or me if you have any questions.
 - Please contact Maj Williams or I if you have any questions.
 - Please contact Maj Williams if you have any questions.



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Integrity - Service - Excellence

Air Force Clemency & Parole Board

Mr. Bruce T. Brown



**Secretary of the Air Force
Personnel Council**

May 21, 2014



U.S. AIR FORCE

SAF Personnel Council



Mission: To balance the needs of the AF with rights of the individual with consistent, fair, timely and unbiased decisions

“Do the right thing”

*Needs
of the
Air Force*



*Rights
of the
Individual*

Consistent, Fair, and Unbiased Decisions

Vision: Right people, right place, right Board action, right force through due process, fairness, equity and justice for all Airmen

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AF C&PB Authorities



- **10 U.S.C., Chapter 48** (*Military Corrections Facilities*) (§§ 951 – 956)
- **10 U.S.C. § 874**, Remission and Suspension (Uniform Code of Military Justice Article 74)
- **DoDD 1325.04**, *Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities*
- **DoDI 1325.07**, *Administration of Military Correctional Facilities and Clemency and Parole Authority*
- **AFI 31-205 (pending revision as AFI 31-105)**, *The Air Force Corrections System*, Chapters 10 and 11



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AF C&PB Snapshot



- **Primary work: risk management on behalf of Secretary**
 - **Conditionally release inmates** from confinement [parole / mandatory supervised release (MSR)] into supervision of US Probation Officers
 - **Grant clemency** (Remit or suspend any unexecuted court-martial punishment)
 - **Monitoring those released on parole and MSR** (Violations reported by US Probation Officers for action by AF C&PB such as Letter of Warning, Revocation of Parole, Return to Confinement)
- **As of 31 Jan 2014, 715 AF inmates were in military prisons in US, Germany, Japan, contract facilities, and in Federal Prisons, on parole, or MSR**
- **Generally, inmates eligible for conditional release after serving 1/3 of minimum 12-month sentence; annually thereafter**
- **Air Force C&P Representative to DoD Corrections Council**



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Basic Board Policies



- **Case file review**
- **Currently no personal appearances by or on behalf of inmates, victims, or third parties, but that will soon change (§ 1701 of FY14 NDAA)**
- **Majority vote decides**
- **Negative clemency and favorable parole decisions are final**
- **Negative parole decisions may be appealed to SAF/MRB (Director, AF Review Boards Agency)**





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Clemency and Parole Factors



- **Nature and circumstances of offense**
- **Impact of the offense on the victim**
- **Protection and welfare of society**
- **Preservation of good order and discipline**
- **Deterrent effect of a decision**
- **Inmate's acceptance of responsibility for confining offense**
- **Inmate's participation in rehabilitation programs**
- **Inmate's personal characteristics (age, education, personal support system and psychological profile)**
- **Feasibility of inmate's proposed release plan**
- **Inmate's efforts to make restitution**
- **Inmate's combat and overseas records**



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Objectives of Parole



- **Assisting the inmate through supervision and guidance in making the transition from a controlled environment to life in the community**
- **Making a focal point available through which community services may contribute to the inmate's positive social adjustment**
- **Protecting the community and the inmate from stresses associated with unsupervised release**



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Personal Appearances



■ **Guidance for Inmates**

- **CURRENT and NEW:** Although the Board does not permit personal appearances by inmates or on behalf of inmates, the Board considers any written, audio, or video material sent by or on behalf of inmates.
- **NEW:** Although inmates may not appear, others, such as family members, friends, professional associates or private attorneys, may at no expense to the Government, appear on behalf of an individual being considered for clemency or parole.
- New anticipated to be effective in Summer 2014.



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Personal Appearances



■ **Guidance for Victims**

- **CURRENT:** Although the Board does not permit personal appearances, the Board considers any written, audio, or video material sent by or on behalf of victims.
- **NEW:** In addition to submitting written, audio, or video material, victims, the victim's family and representatives may also appear at no expense to the Government, to present information concerning the impact of the confining offenses on the victim and the victim's family.
- New anticipated to be effective in Summer 2014.



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Presentations by Victims



■ **Conveying Victim Impact to the Board**

- Inform the board members how the victim has been adversely impacted by the confining offenses.
- Powerful victim statements include
 - Information regarding counseling/therapy the victim has received as a result of the confining offense
 - How confining offenses have changed victim's life
 - Clear statement of victim's recommendation
 - The impact early release would have on the victim
- Video presentations can be as effective as personal presentations.



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AFC&PB Voting Members



■ **At a Minimum the Board will consist of**

- Director, Secretary of the Air Force Personnel Council (former commander / “personnelist” / line officer)
- Director, Clemency, Corrections, and Officer Review Division, AF Legal Operations Agency (TJAG’s Rep.)
- Chief, Corrections Division, AF Security Forces Center (or HAF/A7S Rep.)
- Chair/Exec. Sec., AF Clemency & Parole Board

■ **Senior Legal Advisor, SAFPC**



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CY 2011 – 2014 STATISTICS: AF C&PB Decision Summary



■ PAROLE

2011	32/94	34%
2012	30/103	29%
2013	15/94	16%
2014	22/51	43%

PAROLE RATE FOR SEX OFFENDERS

18/56	32%
19/71	27%
7/62	11%
12/36	33%

■ CLEMENCY

2011	5/170	2.9%
2012	7/183	3.8%
2013	5/157	3.2%
2014	0/60	0.0%

■ MSR

2011	18/46	39%
2012	24/58	41%
2013	26/59	44%
2014	18/43	42%

(as of May 21, 2014)



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AF Clemency and Parole Board Points of Contact



- Mr. Bruce Brown, Chairman, (240) 612-5364 – bruce.t.brown12.civ@mail.mil
- Mr. Thomas Uiselt, Deputy Chairman, (240) 612-5409 – thomas.r.uiselt.civ@mail.mil
- MSgt Carl Herriott, (240) 612-5408 – carl.j.herriott.mil@mail.mil



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DISCUSSION



■ Questions?



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Understanding Your Client's Disciplinary Infractions



**Maj Alex Rose
Capt Seth Dilworth**

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Overview

- **Rules**
- **Working with DC**
- **Preventing Disciplinary Infractions**
- **Responding to Disciplinary Infractions**



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Misconduct

- **Collateral Misconduct**
- **Other Misconduct**
- **Seemingly Unrelated Misconduct**



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Rules

Rule 5. SCOPE OF REPRESENTATION – COLLATERAL MISCONDUCT

An investigation into the facts and circumstances surrounding a sexual assault may produce evidence that the victim engaged in misconduct. Covered collateral misconduct is misconduct that is committed by a victim of a sexual assault that has a direct nexus to the sexual assault. Typical examples of collateral misconduct include underage drinking, adultery, fraternization, and violations of regulations or orders, such as General Order 1 or curfews.



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Rules

Rule 5. SCOPE OF REPRESENTATION – COLLATERAL MISCONDUCT

An investigation into the facts and circumstances surrounding a sexual assault may produce evidence that the victim engaged in misconduct. Covered collateral misconduct is misconduct that is committed by a victim of a sexual assault that has a direct nexus to the sexual assault. Typical examples of collateral misconduct include underage drinking, adultery, fraternization, and violations of regulations or orders, such as General Order 1 or curfews.

Rule 5.1. *Covered Collateral Misconduct.*

Collateral misconduct is misconduct that is committed by a victim of a sexual assault while on Active Duty or a Reserve or Guard member in Title 10 status that has a direct nexus to the sexual assault.



U.S. AIR FORCE

Misconduct

- **Collateral Misconduct**
- **Other Misconduct**
- **Seemingly Unrelated Misconduct**



Rule 5.2. *Referral of Victim to MDC.*

When the SVC becomes aware that the victim has allegedly committed collateral misconduct, the SVC will notify the victim that a MDC will be appointed to represent the victim in the event that administrative action, nonjudicial punishment, administrative discharge, and/or the court-martial process is initiated.

- (a) *Victim Notification.* The SVC will inform the victim of the availability of MDC. The SVC will inform the victim that he or she will not initially serve as the victim's sole or lead counsel for purposes of collateral misconduct.
- (b) *Victim Referral.* In the event that qualifying action is initiated or the victim indicates a desire to meet with MDC, the SVC will contact the servicing Senior Defense Counsel (SDC) or AFLOA/JAJD and provide the victim with the name and contact information for the detailed MDC.



Rule 5.3. SVCs May Support MDC for Collateral Misconduct.

MDC will serve as lead counsel for collateral misconduct committed by the victim. With the victim's consent, SVC may represent victims as secondary counsel for covered collateral misconduct.

(a) *MDC as Lead Counsel.* The MDC will serve as the lead counsel for purposes of matters related to the victim's collateral misconduct, unless victim chooses sole representation by an SVC under Rule 5.3(c) below. For example, the MDC will take the lead in advising the victim on UCMJ proceedings, administrative actions, and making testimonial immunity requests to the government.

(b) *Coordination of Representation.* MDC and SVC will work together to fully inform the victim of courses of action and possible outcomes based on the victim's choices. By definition, the collateral misconduct committed by the victim is intertwined with the sexual assault allegation for which the victim is likely the primary witness in the government's investigation and prosecution. Depending on the case, the victim's primary concern may vary from investigation and prosecution of the accused to mitigating negative consequences from his or her own collateral misconduct. MDC and SVC will provide counsel to the victim regarding collateral misconduct and possible outcomes, make uniform recommendations to the victim, and represent the victim regarding collateral misconduct in accordance with the victim's choices.

(c) *The victim may choose representation by the SVC in lieu of an MDC.*



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Referral

- **“In the event [of] administrative action” vs. at the time of misconduct**



- “In the event [of] administrative action” vs. at the time of misconduct
- Practically, you can refer to a DC when you feel it’s necessary
 - Client commits misconduct
 - Client receives disciplinary action



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Reasons to Involve Defense Counsel

- **They know the commanders**
- **They handle these regularly**
- **You can separate the issues**
- **It helps to have two lawyers**
- **Team approaches are effective**



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Co-Representation

- **Needed on same issue related to sexual assault**
- **Needed on unrelated issue**
- **Needed on seemingly unrelated issues**



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Co-Representation

- Referrals come in two ways:
 - ADC Referral to SVC
 - SVC Referral to ADC



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Communication

- **Client-SVC**
- **Client-ADC**
- **SVC-ADC**

- **All problems we've heard related to co-representation come from communication problems**



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Communication

- **Get permission from client to share information with DC**
- **Outline responsibilities early with DC**
- **When issues arise, think how it will effect DC**
- **Review & let DC review anything that has client's signature**



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Tips from the Field

- **Send anything with client's name on it to ADC first**
- **Some ADCs don't dedicate as much time to clients or have DPs help**
- **Outline early who will handle what issues**
 - **If issues overlap, discuss strategy**
- **Think early if you need a DC**
- **Consider strategy**
 - **Immunity requests, letters to CA, etc.**



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Preventing Disclosure of Misconduct

- **Article 31**
 - **Tension between Prosecution and Article 31**
 - **Immunity**



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Preventing Disclosure of Misconduct

- **Article 31**
 - **Tension between Prosecution and Article 31**
 - **Immunity**
- **Relevance**



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Preventing Disclosure of Misconduct

- **Article 31**
 - **Tension between Prosecution and Article 31**
 - **Immunity**
- **Relevance**
- **Remember Discovery Rules**



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Preventing Disclosure of Misconduct

- **Article 31**
 - **Tension between Prosecution and Article 31**
 - **Immunity**
- **Relevance**
- **Remember Discovery Rules**
- **Check with Legal Office/Commander**



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Thinking Like a Defense Counsel

- **Phones**
- **Written Statements**
- **Interviews**
- **Mental Health Records**



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Client Preparation

- **Advise that others may learn about the misconduct**
- **Weigh pros and cons of immunity**
- **Discuss not committing misconduct in the future**
- **What to do if read their rights**



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Rules: Responding to Misconduct

Rule 5.3. *SVCs May Support MDC for Collateral Misconduct.*

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(c) *The victim may choose representation by the SVC in lieu of an MDC.*



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Responses

- **Get templates from local ADCs**
- **Work with a defense paralegal**
- **Don't explain too many of the facts**
- **Make it personal**



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Questions?

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Lessons Learned



Capt Seth Dilworth
Special Victims' Counsel
Cannon AFB, NM

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Overview

- **Outreach**
- **Phones**
- **Client Participation**
- **Scheduling**
- **Self-Care**



Outreach & Preparation

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■ **Rape Crisis Centers**



Outreach & Preparation

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- **Rape Crisis Centers**
- **Mental Health**



Outreach & Preparation

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- **Rape Crisis Centers**
- **Mental Health**
- **Chaplain**



Outreach & Preparation

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- **Rape Crisis Centers**
- **Mental Health**
- **Chaplain**
- **Family Advocacy**



Outreach & Preparation

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- **Rape Crisis Centers**
- **Mental Health**
- **Chaplain**
- **Family Advocacy**
- **MFLC**



Outreach & Preparation

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- **Rape Crisis Centers**
- **Mental Health**
- **Chaplain**
- **Family Advocacy**
- **MFLC**
- **Defense Counsel**



Outreach & Preparation

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- **Rape Crisis Centers**
- **Mental Health**
- **Chaplain**
- **Family Advocacy**
- **MFLC**
- **Defense Counsel**
- **Trial Counsel/Legal Office**



Outreach & Preparation

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- **Rape Crisis Centers**
- **Mental Health**
- **Chaplain**
- **Family Advocacy**
- **MFLC**
- **Defense Counsel**
- **Trial Counsel/Legal Office**
- **Law Enforcement**

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Phones Matter to Law Enforcement

- **Texts about the assault**
- **Phone calls**
- **Pretext text messages/calls**
- **Facebook**
- **Law enforcement may just ask**



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Phones Matter to Us

- **Personal**
- **Privileged information**
 - **Communications to Victim Advocate**
 - **Communications to SARC**
 - **Phone logs of calling SVC or Chaplain**
- **Irrelevant information**
 - **Pornography**
 - **Texts about drugs**
 - **Texts about sex with others**
 - **Sexting**



How Phones are Searched

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- **Cellebrite**
- **Consent vs. Probable Cause**



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Phone Solutions

If search is not complete

- **Take pictures of relevant texts**
- **Search Accused's phone**
- **Make them get probable cause first**
- **Give law enforcement privileged phone numbers/emails**
- **Allow a different agency to search the phone, you redact it, then turn over relevant info to Trial Counsel**



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Phone Solutions

If the search is complete

- **Motion for an *in camera* review**
- **Revoke consent**
- **P-Claim**
- **Consciousness of guilt: compare Cellebrite report of Client's phone with report from Accused's phone showing Accused had deleted text messages**



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Client Participation

- **Any stage in the process**
 - **Investigation**
 - **Before Article 32 (R.C.M. 405)**
 - **After Article 32**
 - **Discharges in Lieu of Court-Martial**



Client Participation – Article 32

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■ R.C.M. 405

- IO makes an initial determination of availability**
 - “reasonably available” if client is within 100 miles and personal appearance “outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness’ appearance.” R.C.M. 405(g)(1)(A)**



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Client Participation – Article 32

■ R.C.M. 405

- If IO determines witness is available, the immediate commander can determine the witness is unavailable
 - “A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge...” R.C.M. 405(g)(2)



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Client Participation

- **DoDI 6495.02, Enclosure 4, para. 1.c.
(emphasis added)**

“The victim’s decision to decline to participate in an investigation or prosecution *should* be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim’s chain of command...



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Client Participation

- **DoDI 6495.02, Enclosure 4, para. 1.c.
(emphasis added)**

...If at any time the victim who originally chose the Unrestricted Reporting option declines to participate in an investigation or prosecution, that decision *should* be honored in accordance with this subparagraph...



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Client Participation

- **DoDI 6495.02, Enclosure 4, para. 1.c.**

...The victim should be informed by the SARC or SAPR VA that the investigation may continue regardless of whether the victim participates.”



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Client Participation

- **DoDI 6495.02, Enclosure 4, para. 1.c.**

“Should” vs. Shall



Client Participation Solutions

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- **Client memos**
 - **What they want**
 - **Why: specific reasons**
 - **Understand it's the commander's decision**
 - **Cite the DoDI**
 - **“AF can support me now by...”**



Client Participation Solutions

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- **Client Memo**
- **SVC Memo**
- **Advocating to Legal Office**
- **Advocating to Convening Authority**
- **Chapter 4/Discharge in lieu of C-M**



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Client Participation Solutions

- **Client Memo**
- **SVC Memo**
- **Advocating to Legal Office**
- **Advocating to Convening Authority**
- **Chapter 4/Discharge in lieu of C-M**

- **Be conscious of immunity orders**



Scheduling: Article 32 Hearings

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- **Work this out early**
- **2014 Investigating Officer's Guide**
 - **Para. 2.3.2.3.2.1. If the Special Victims' Counsel (SVC) or other witness counsel provides written notice to the IO that he or she is not available to appear at the hearing, or not available to consult with his or her client via other means (e.g., telephone, video teleconference) during the hearing, the hearing should not proceed without the written approval of the represented witness or the convening authority who appointed the IO.**



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Scheduling: Courts

- **Get the legal office your schedule when you know they are preparing referral**
- **Remember your client's availability**
- **Avoid telling them why you're unavailable**
 - **“My client and I are unavailable on the following dates: ”**
 - **“My client is unavailable to testify on the following dates: ”**
- **Docketing Office**
 - **Interest is when witnesses are available**



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Scheduling: What to Do if It Doesn't Work Out

- **Ask another SVC to cover it for you**
 - **Joint Representation**
- **Check with the client**
 - **Going sooner with another SVC vs. Waiting until I'm available**
- **Go to Convening Authority**



- **Avoid “Compassion Fatigue”**
 - Certain cases
 - Certain clients
- **Stay motivated and sane**
 - Find what works for you
 - Working out, volunteering, hobbies, family, etc.
- **Self-Improvement**
 - If you recognize an area where you need improvement, get a book
 - Ask other SVCs



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Questions?

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SVC Rules of Practice and Procedure



**Col Dawn Hankins
Chief, SVC Division
AFLOA/CLSV**

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I



Eligibility for SVC (Rule 1)

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- **BLUF: 2 things to look at**
 - What is the offense?
 - What is the status of the victim?
 - What is the status of the alleged perpetrator?

 - **Air Force – AD/ARC (if incident occurred while in status)**
 - The status of the perpetrator does not matter (Air Force, other service, civilian, or unknown)
 - AF members who are on AD, but were victims of sexual assault prior to enlistment or commissioning are NOT eligible

 - **Adult Dependents of AF Members**
 - Perpetrator must be a military member
 - Must have been a dependent (or otherwise eligible) at the time of the offense
-



Eligibility for SVC (Rule 1)

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- **Other Services** – AD/ARC (if incident occurred while in status)
 - Perpetrator must be a military member
 - Refer to servicemember’s SVC/VLC office
- **Adult Dependents of Other AD Services’ Members**
 - Perpetrator must be a military member subject to the UCMJ
 - Must have been a dependent (or otherwise eligible) at the time of the offense
 - Refer to sponsor’s SVC/VLC office
- For *sexual assaults* under UCMJ Articles 120, 125, and 80
 - **FY14 NDAA expands to include 120a (stalking), 120b (child sexual assault), or 120c (other sexual misconduct)**
- Entry-level status Airmen in UPR involving physical contact of a sexual nature with BMT or TT faculty/staff
- **Chief, CLSV has the final authority on determination of eligibility and may grant exceptions to policy on a case-by-case basis consistent with 10 U.S.C. §§ 1044, 1565b & 1044e**



Referral Process (Rule 2)

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Referral Process	OPR
Step 1 – Victim informed of availability of SVC	SARC, SAPR VA, FAP, investigator, victim liaison, TC
Step 2 – The completed SVC referral form is provided to the legal office by the SARC or FAP (unrestricted cases)	SARC, FAP, legal office
Step 3 – Legal office reviews the referral form for eligibility and adds case status information	legal office
Step 4 – SJA or designee forwards referral form to SVC regional/satellite office (copy CLSV)	legal office
Step 5 – SVC regional/satellite office details SVC to case within 48 hours, providing a courtesy notification to the SJAs of the victim and alleged perpetrator	SVC regional/satellite office



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Referral Responsibilities

(Rule 2)

- Review the referral form for eligibility
 - *Call CLSV with questions or requests for exceptions*
- Follow up with the legal office, SARC, FAP, as necessary to obtain further information
- Select SVC that will be detailed to the case, taking into acct case conflicts, geographic location of SVC, and current workload of SVC
- SVPs should strive to provide each SVC with a mix of clients whose cases are in various stages of the military justice process
- SVCs at satellite offices should forward the request to their regional SVP if they have a conflict of interest or have reached 20-25 clients
- SVPs will alert CLSV when all SVCs in their region are representing 20-25 clients and begin forwarding requests for detailing by CLSV
- CLSV will be responsible for leveling caseloads among the regions



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Rule 2.4 – SVCs Will Not Solicit Clients

Same rule as MDCs



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Duration of Atty-Client Relationship (Rule 3.3)

- It depends!
- Generally when action is complete
- Expedited Transfers



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Functional Relationship with SARC and FAP (Rule 3.4)

- The SARC serves as the installation's single point of contact for integrating and coordinating sexual assault victim care services.
- FAP fulfills this role for sexual assault victims who are in a domestic or intimate partner relationship.
- **The SJA is the legal advisor for the SARC and FAP.**
- SVCs and SVPs are not formal members of CMG, etc but are invited to participate
- Victims cannot make a restricted report to an SVC but can consult with an SVC without filing a report





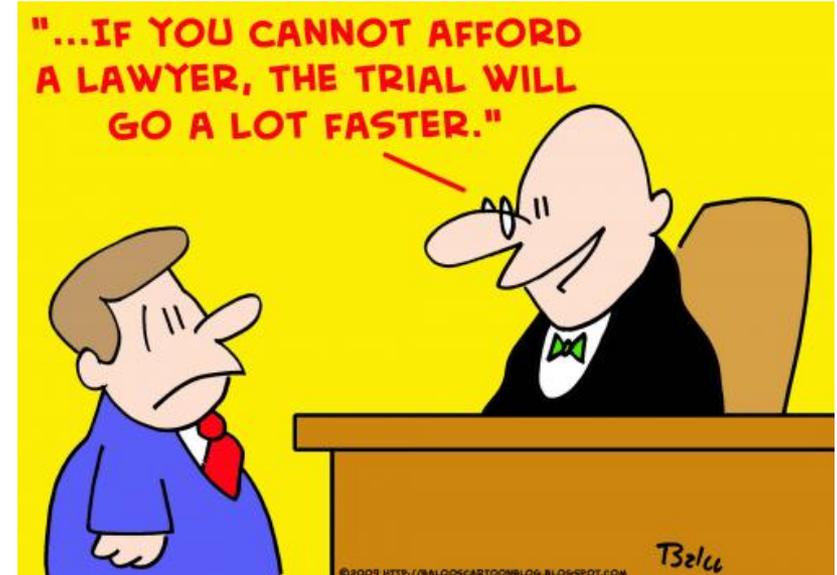
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Functional Relationship with VWAP(Rule 3.5)

VWAP, through the SJA, VWAP Coordinator, and victim liaison, ensures that victims are afforded certain enumerated rights under federal law, such as consultation with TC and notification of all court-martial proceedings.

Don't let the legal office abdicate responsibility to you.

Become very familiar with AFI 51-201, Chapter 7 and Article 6(b), UCMJ





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Advocacy to MJ Actors, AF, and DoD (Rule 4.2)

May advocate to commanders, convening authorities, SJAs, trial counsel, defense counsel and military judges

Assert Article 6(b) rights

Assert privacy interests, including pre-trial practice under MRE 412, 513, 514, 615...and so on

Prepare client for presenting victim impact in sentencing and post-trial submissions





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Notice of Representation (Rule 4.2)

SVCs will serve the SJA, TC, DC, AFOSI, SFOI, the victim's commander, and the SARC/FAP with a copy of the representation letter, with the client's consent, in unrestricted report cases.

For restricted reports, SVCs will only provide the notice of representation to the SARC/FAP, with the client's consent.

Enhanced communications w/
TC



**"We've got to draw the line on unethical behavior.
But draw it in pencil."**



U.S. AIR FORCE

SVC Attendance at Interviews (Rule 4.3)

SVCs are permitted to attend all interviews of the victim with investigators, TC, and DC.

At all interviews, SVCs should ensure that the interviewer has an additional party present to reduce the likelihood that the SVC may be called later as a witness.

More to follow...but, in general, you are not there to conduct the interview, perfect the case, etc. Think about your approach to defense interviews.



U.S. AIR FORCE

Entering an Appearance with Military Judge (Rule 4.5)

When a military judge is detailed to a case, SVC will enter an appearance, notifying the judge of their representation of a witness in the case.



U.S. AIR FORCE

Access to Information (Rule 4.9)

SVCs have a right to records which is no greater than their client's rights.

Obtain 1168 from legal office (not OSI)

System of Records Notice and civilian caselaw may help with access to information

This rule may change soon...



U.S. AIR FORCE

Collateral Misconduct ***(Rule 5)***

Collateral misconduct is misconduct that has a direct nexus to the sexual assault.

SVC will inform the victim of the availability of ADC. Contact the applicable SDC for a referral.

ADC will serve as lead counsel. With the victim's consent, SVC may represent victims as secondary counsel for covered collateral misconduct. Coordination of representation is important!

The victim may choose representation by the SVC in lieu of an MDC.

File a separate notice of representation for misconduct.



“1964, reaching into the cookie jar, your mother confronts you. You lie. Tell us, sir, why the jury should believe you now.”



U.S. AIR FORCE

Advocacy to Civilian Agencies (Rule 6)

6.1 – May **advocate** a victim's interests off base to civilian prosecutors, law enforcement agencies, and other civilian and gov't offices

6.2 – May **NOT represent victims in civilian courts**

6.3 – Ensure victims understand that the victim is the client, not the AF



U.S. AIR FORCE

Interaction with Media (Rule 7)

SVC may advocate a victim's interests to the media consistent with the AF Rules of Professional Conduct, AF Standards for Criminal Justice, the Uniform Rules of Practice, and your state rules of professional conduct.

Restrictions on trial publicity in Rule 3.6 of the AF Rules of Professional Conduct apply to SVC



U.S. AIR FORCE

AF Rules of Professional Conduct Apply (Rule 8)





U.S. AIR FORCE

Questions?

SCENARIO B

What the SVC Knows: Capt Paul(a) Prescott, located at a nearby base was seen by the SARC several hours ago. The SARC tells you only that Capt Prescott woke up with someone's mouth on his/her genitals. The SARC called you and told you that (s)he wants to meet. You are stationed nearby. You drive to the SARC's office and quietly slip through the back door.

For the Victim:

Biography: You are Capt Paul(a) Prescott a pilot in the local squadron. You fly fighter aircraft and are regarded as an up-and-coming officer; a "fastburner." You are highly ranked against your peers and see yourself quickly rising through the ranks to achieve great success. You are not scheduled to PCS for some time. You have several combat campaign medals from Afghanistan. You have no spouse or children.

Factual background: You spent part of last night over the house of a member of a different squadron, a fellow officer. You met this person at a squadron barbeque and thought they seemed friendly. That person is the same gender as you. You had no idea that they were gay. You just thought you might be friends. You had no interest in them sexually. You exchanged a few emails with them and talked on the phone a few times only in passing. You went over their house to hang out as a prelude to meeting mutual friends at a restaurant several hours later. You started drinking with this person and before you know it you were taking shots and mixing liquors. To pass the time you watched a movie on the couch. You must have fallen asleep because you woke up to find this person had partially taken off your pants and was committing oral sex on you without your knowledge. You thought it was a dream for a minute and then when you realized it wasn't, you pushed at her head. They did not stop. You pushed harder and they persisted. You practically had to hit them before they stopped. They looked at you with a nasty, vindictive expression and you quickly and politely excused yourself from the house. In a panic, you called the friends you were going to meet and told them only that you were assaulted in a sexual fashion. They immediately called the command post and before you knew it you were at OSI being interviewed. You began to tell them about the events of the night. When they started asking you questions that you felt were likely to reveal things about you [your secret data] you asked if you could end the interview. They pressed you a little bit but let you leave and welcomed you back at any time. On your way out, they tell you that they're supposed to mention that you can have an SVC now if you choose. They gave you the SARC's number and you called her. You have told the SARC very little, only that you wanted to speak to an attorney.

Psychological demeanor: You are shaken and are initially unsure that what you and the attorney talk about will really be confidential. You need them to strongly reassure you and convince you that this will be confidential because you don't want things to get out more than

they already have and you are worried that the attorney may tell other officers, the SJA, your commander or even the JAG's spouse. Ask questions about confidentiality until you are very comfortable with this concept. Don't reveal anything about your secret data and only reveal limited information about the sex assault until they have convinced you. [This should not be easy for the students as they are being tested on their understanding of confidentiality and their willingness to explain it to you in a professional and warm fashion despite your persistent doubts] Then feel free to open up about the assault. When you get to the part about why you did not want to cooperate with OSI, say only that you didn't want them to find out about certain things. Don't tell her/him right away. Only reveal that you are bisexual if the attorney asks you about why you did not continue to talk to OSI or otherwise ask questions that would cause you to reveal this information, or if you really trust them.

Secret data: You are secretly bi-sexual. You have not "come out" in the squadron and your lifestyle is mainly lived in distant bars. You have not wanted others in the squadron to know you are bisexual as you are afraid it might impact how others see you. You have had sex with at least three other members of the same sex from your base. You stopped answering OSI's questions when they asked you why they thought this person might want to assault you. You had a nagging doubt that somehow this person might have known about your bisexuality and had become interested in you. You did not want to reveal this to the agents.

Possible questions you might want to eventually ask:

1. Do I have to cooperate further with OSI?
2. Can what I have said already to OSI become public?
3. What will happen to me if they find out that I have been bisexual?
4. How do I stop this investigation?
5. Will there automatically be a trial or some other criminal action?
6. Will I have to testify at trial?
7. Will this hurt my career, really?
8. What do you think I should do?
9. I want you to put an end to this right now, what can you do for me? (You should try to get them to commit to a certain favorable result?)

Desired outcome: You believe that ultimately, whether or not your bisexuality becomes known, being sexually assaulted like this is bad for your career. You do not want to go to trial and you just want this hushed up as quietly as possible. Find out what your attorney can do to help hush this up and salvage your career!

For evaluator, possible critique topics:

- a. Was the student able to reassure the victim of confidentiality? "A SVC's primary responsibility is to his or her client." AFSVC Charter, Part A, para 1. The student should assure Capt Prescott that he or she represents Capt Prescott – not the government, the Air

Force or anyone else – and that his or her professional responsibility is to Capt Prescott as the client. The student should explain the scope of their representation and that, regardless of the scope, anything the client divulged (except for possibly information covered by AF Rules of Prof Conduct and Standards for Civility, Rule 1.6(b)) would be kept absolutely confidential. The student should work to assure Capt Prescott of his or her commitment to confidentiality and that any breach could result in significant negative ramifications for him or her as an officer and as an attorney. The student should explain as an SVC, he or she operates “independently from the command and supervision chains that govern the Air Force units”. AFSVC Charter, Part A, para 3; see also SVC Rules of Practice and Procedure, para 9.2 (stating AFLOA/JAJM has functional and policy oversight for SVCs).

- b. Were they perceptive enough to realize and ask about the secret data. They needed as much information as possible to advise properly. Students should proceed with due consideration for Capt Prescott’s mental state, but he or she needs to spend the necessary time to make Capt Prescott comfortable and be forward enough to elicit all relevant information in order to understand Capt Prescott’s position and goals for representation.
- c. Did they understand that this was no longer a restricted report? “Any report of a sexual assault made through normal reporting channels, including the victim’s chain of command, law enforcement, and the AFOSI or other criminal investigative service is considered an unrestricted report.” AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program*, 29 Sep 08, Certified Current 14 Oct 10, para 3.2. Since this has now been reported to OSI, it is now an unrestricted report. Capt Prescott should understand that his/her desires regarding what should happen with the case, while they must be solicited and considered, are not determinative of the disposition of the case. Moreover, Capt Prescott should be made to understand that, although there are controls in place to prevent certain types of disclosures of information within and outside of the government, he/she does not ultimately control the information or what happens to it.
- d. Did they discuss laws protecting information privacy? The student should explain FOIA and the Privacy Act as they relate to law enforcement investigations. Specifically, FOIA generally prevents disclosure to third parties of information gathered for law enforcement purposes (commonly referred to as Exemption 7), and the Privacy Act precludes disclosure of, inter alia, personally identifiable information to third parties. However, neither of these is airtight, improper disclosure does occur sometimes, and non-agency persons (such as the friends to whom Capt Prescott divulged some information) are not covered by either act in their personal capacities.
- e. Did they consider or take any contrary positions about what might ultimately be good for this person in an attempt to fully reason toward a possible outcome? Was it really in this person’s best interests not to go forward? There may be no correct answer but the person should consider and evaluate alternatives. The student should fully inform, to the extent possible, Capt Prescott regarding the possible consequences of trying not to go forward

with the case and the possibility that, despite his/her wishes, the government may choose to proceed anyway. In that case, it is possible that Capt Prescott could be ordered to comply with the investigation and even to give testimony at a hearing or trial.

Alternatively, Capt Prescott should be made aware of difficulties related to going forward with a charge like this, including possible embarrassment and discovery of his/her bisexuality. As always, the SVC informs and advises, but the decision for the course to pursue is up to the client, and the SVC supports the client within the bounds of the law.

- f. Did they explain how they might intervene to prevent any further action in the case? The government is required to consult with and notify the victim at various stages of the military justice process. See, SVC Rules of Practice and Procedure, paras 6.1(a) and (b); see also AFI 51-201, paras 7.11.3 and 7.11.7. After fully informing and advising Capt Prescott, the student should ascertain Capt Prescott's goals and discuss avenues available to work toward the achievement of those goals. Probably the most important step is to make the legal office and the relevant decision authorities aware of Capt Prescott's desire that the case not go forward and be dealt with as discreetly as possible.
- g. Did they make any promises to achieve a specific result? Again, the victim is not a party to the prosecution and is not the disposition authority for the case; no representation of ultimate results or promises of specific outcomes should be made.

SCENARIO C

What the SVC Knows: After you return to your base from the course, you begin setting up your office and you receive a call from your paralegal detailing you to represent a civilian victim, Ms. Laura Pritchard. The legal office told the paralegal that the case has been referred to trial which will occur in about six weeks. Your paralegal calls Ms. Pritchard, discusses the scope of representation generally, and sets up an appointment for you to talk with her. You travel to Ellsworth to meet with Ms. Pritchard in order to meet and advise her.

For the Victim

Biography: You are Ms. Laura Pritchard. You work as a hair dresser in the BX and don't have a large, reliable family or much money. You are a civilian dependent of Staff Sergeant Marcus Pritchard who works here on base at Ellsworth at the Logistics Readiness Squadron. You have a one year old child, Courtney Mae. You have been married to him for about five years. Over the course of this time he has been physically violent to you. Usually when things are bad for him at work. Most of his abuses were continuous and seemed to you to be minor, such as hair pulling or slapping. Once he pushed you down some stairs where you missed work for several days and once he punched you in your stomach. You have never reported these incidents to the doctor or almost anyone else.

Factual background: After you became pregnant you were uninterested in sex. He became extremely emotional about your lack of interest and would become verbally abusive, often threatening you with physical injury if you did not comply. On several occasions he used physical force to bring you to the bed and take off your pants after which you relented only because you feared harm to the fetus. You never regained interest in sex with him after the birth of the child and he would continue to persist and nag for sex and even grab your arms and squeeze until you provided him with sex. You had become numb to the behavior and only contacted his shirt after he kicked the infant and you realized that your child was really in trouble. He stayed home for two days after he kicked the child to make sure that you did not bring him to the medical group or report it. You called his shirt the next day he went to work and reported the physical abuse of the child. During your interview you revealed to security forces that he had been assaulting you. OSI took over the case and they were able to learn from you that he had sexually assaulted you. They removed him from the home and you were seen by family advocacy. You were concerned that they would take your child so you cooperated with family advocacy who referred you to mental health. You had been receiving mental health treatment ever since. You were later interviewed by the legal office who told you that they were charging him with sexual assault among other things. You went to a preliminary hearing and testified against him. He gave you a hateful stare the entire time. Trial is set for six weeks from now and the legal office said that what you talked to mental health about may become an issue in the case.

Psychological demeanor: You are frightened of your husband because of his temper. You are concerned that others will not view what happened to you as rape or sexual assault because you are married to him and married people have a right to have sex with each other, or because you eventually said yes. You are very concerned that you will not have the means to live if he gets convicted and goes to jail because you barely make enough money to pay for babysitting, let alone food and shelter. You need to be assured that you will receive some kind of support or you might be reluctant to continue to trial and alienate him and lose any possibility of reuniting – he might get better after all and change; though the best result in the world would be he goes to jail and you get support. You have been talking with your mental health provider about your private thoughts and feelings and are just beginning to live again.

Desired Outcome: You want to protect your mental health records from disclosure. You want to ensure that your husband goes to jail for as long as possible in order to ensure he doesn't hurt you or your child and you want to try to have some financial security in these troubled times.

Possible questions you might want to eventually ask:

1. Is what my husband did to me rape even though we are married?
2. Will other people view it as sexual assault because I eventually said yes?
3. Why are my mental health records even relevant?
4. How can others get them?
5. What can I do to prevent them from being seen by others?
6. What can I do to prevent them being used against me
7. Would it be better for me to try to drop the case so that he would have a career and be able to provide for us? He might forgive me then but if I go to trial we could never get back together!
8. Are there any options for me to get money to help my child? What are they?
9. What if he is acquitted, where will I get money from?
10. What do you think I should do?

Secret data: [Only talk about what is in the mental health records or your conversations with your therapist if asked]. You have spoken on about twenty occasions with a mental health provider about the abuse and your life. You have given her insight into what happened to you. You told her that your step-father molested you as a child, and you cannot let anyone know about it. Your extended family would be devastated to find out because your step-father and mother have now reconciled. If they find out, it would cause big problems in their marriage and your siblings would be upset. You have only discussed this previous assault with the mental health provider and now your SVC.

Instructor Notes:

1. Is what my husband did to me rape even though we are married?

Did the student correctly identify that marriage is not a defense to sexual assault under the current Article 120 and is not under most of the offenses under the previous Article 120 as well? *See* Art 120(a)-(d), UCMJ (“[a]ny person...” can commit rape, sexual assault, aggravated sexual contact, or abusive sexual contact against “another person,” with no exceptions). If in a pedantic mood, the student might explain that, before 1992, “rape” could only be committed by a male against a female not his wife (which was consistent with the common law crime of “rape”), but the National Defense Authorization Act of 1992 amended Art 120 to do away with those requirements. *See* Pub. L. 102-494 §§ 1066, 1067 (1992).

2. Will other people view it as sexual assault because I eventually said yes?

Student should explain that the crime of rape can occur even when a victim, when put in the position of Ms Pritchard, eventually gives in. That’s because “consent,” to be effective as a defense to rape, must be “freely given” and “lack of verbal or physical resistance or submission resulting from use of force, threat of force, or placing another person in fear does not constitute consent.” Art 120(g)(8), UCMJ. Note that the threat of force, etc., may be targeted against “another person” and not necessarily the target of the sex act. Accordingly, if Ms Pritchard submitted out of fear of harm to her child, the defense of consent is negated.

Notwithstanding, the student should explain the challenges of proving any charge beyond a reasonable doubt and, if charges should be reduced or dropped, or there’s an acquittal at trial, that doesn’t mean the convening authority, prosecutors, military judge, or court members think she is lying or somehow not a victim. A major task for an SVC is to give a victim realistic information and advice about the prosecution process. While the SVC must be sensitive and supportive, counsel doesn’t do the victim-client any favors by sugarcoating the coming ordeal. An SVC should also explain to the victim that, in these respects, the military justice and the civilian justice systems are the same, although no civilian jurisdiction would provide a victim an attorney free of charge.

3. Why are my mental health records even relevant?

4. How can others get them?

5. What can I do to prevent them from being seen by others?

6. What can I do to prevent them being used against me?

Relevance. Student should explain that Ms Pritchard’s mental health records may or may not contain relevant information. The defense counsel will be looking for admissions to the psychotherapist that might impeach her credibility, such as admissions of lying, admissions of

bias against SSgt Pritchard, or statements that might contradict her court testimony. *See* MRE 401, 402 (relevance generally); 608 (a), (b) (impeachment by conduct and bias). If relevant, the information might still be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, and misleading members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

Privilege. That said, the student should be quick to point out that the Military Rules of Evidence establish a privilege for communications between a patient and a psychotherapist for statements made for purposes of diagnosis and treatment. MRE 513(a). Therefore, even information in the records that might be relevant would likely be privileged. There are several exceptions to this privilege but none appear to apply to Ms Pritchard's case based on the facts we know.

Discovery. Student should explain that defense counsel may try to get access to the mental health records before trial through the "discovery" process, that is, the pretrial procedure where both sides get to find out pertinent information that would help their case. *See* RCM 701. If so, the defense would submit a discovery request to the trial counsel (the prosecutor) asking for access to documents that are "material to the preparation of the defense or are intended for use by the trial counsel as evidence . . . at trial." RCM 701(a)(2).

The trial counsel could decline to disclose the mental health records and, if the defense didn't contest that, the matter would end there. The defense, however, could file a motion to compel discovery, which would then put the matter in the hands of the military judge. *See* RCM 701(g) (regulation of discovery). Information that is protected from disclosure by the Military Rules of Evidence (e.g., the psychotherapist privilege under MRE 513) will not be disclosed in the discovery process. RCM 701(f). Accordingly, the student should advise Ms Pritchard that, if the rules are properly applied, her mental health records should be protected from disclosure during discovery.

If, however, there is an issue whether some or all of her mental health records should be released as not privileged, the military judge will hold a hearing that, on request and for good cause shown, would be closed to the public. MRE 513(e)(2). The military judge would examine any records *in camera*, that is, by him/herself without other parties seeing the records. MRE 513(e)(3). The military judge would also order the records sealed and may issue protective orders to prevent parties and counsel from disclosing information learned from the records. MRE 513(e)(4), (5). A victim has a right to notice of the hearing, attend, and "be heard" at such a hearing. MRE 513(e)(2). An SVC is empowered to attend and speak on the victim's behalf at the hearing. *Special Victims' Counsel Rules of Practice and Procedure* Rule 6 (XX Dec 2012) (*SVC Rules*) Rule 6.

But what if the trial counsel grants the defense's discovery request for Ms Pritchard's mental health records? Does a victim and her SVC have a right to intervene to prevent disclosure? MRE 513(e)(1) says a "party" may seek a ruling by the military judge. Similarly, RCM

701(g)(1) says a “party” may seek an order regulating discovery. A victim is not a “party” to the court-martial. “The SVC program does not increase a victim’s standing in court-martial hearings . . . beyond the standing victims are currently afforded under existing laws and rules (e.g., evidentiary hearings under MREs 412, 513, and 514).” *SVC Rules* Rule 6; *see also SVC Rules* Rule 6.4. MRE 513(e)(2) says only that the “patient shall be afforded a reasonable opportunity to attend the hearing . . .” concerning disclosure of mental health records. The rule doesn’t convey a right to the patient to request the hearing. Moreover, an SVC’s right to access of information is no greater than the victim’s, *SVC Rules* Rule 6.7. As attorney for a non-party, an SVC wouldn’t have a right to inspect the discovery requests/responses and wouldn’t be in a position to know if the trial counsel rolls over on the discovery request for the mental health records. It behooves an SVC to maximize communication with trial and defense counsel to find out the status of discovery and be in a position to advocate with the trial counsel concerning discovery issues. *See SVC Rules* Rules 6, 6.1, 6.2.

At Trial. If Ms Pritchard’s mental health records are disclosed, the defense may attempt to use them on cross-examination of her at trial, as extrinsic evidence, or both, depending on their content. Trial counsel may object to their use and admission into evidence. If trial counsel doesn’t object or trial counsel’s objection is overruled, the victim doesn’t have standing to object as she is not a party to the court-martial. As the SVC doesn’t have greater standing than the victim (*SVC Rules* Rules 6, 6.4), the SVC would not have standing to object at trial on her behalf.

If SSgt Pritchard is convicted, the trial counsel may want to use Ms Pritchard’s mental health records at trial as part of the prosecution’s sentencing case, showing victim impact as a matter in aggravation. *See RCM* 1001(b)(4). Ms Pritchard may be OK with this but she should be aware that use of part of her mental health records by trial counsel for this purpose may permit the defense to require the admission of other parts, and perhaps all, of the records. *See MRE* 106 (remainder of or related writings or recorded statements).

An SVC may, and should, advocate with trial counsel to object vigorously to any defense attempt to use a victim’s mental health records at trial or oppose any trial counsel intent to use the records if the victim doesn’t want them disclosed. *See SVC Rules* Rule 6 (An “SVC may represent sexual assault victims throughout the military justice process and advocate their interests to all actors within the system”).

Student should make clear to Ms Pritchard that, within the constraints of the law and rules for SVC conduct, he/she will zealously advocate for her interests at every stage.

7. Would it be better for me to try to drop the case so that he would have a career and be able to provide for us? He might forgive me then but if I go to trial we could never get back together!

Such advice may be outside of an SVC's expertise. Nonetheless, the student should explain that, once court-martial charges are preferred, only the appropriate dispositional authority has the power to drop them and, after referral of charges, that power is solely in the hands of the convening authority. *See generally* RCM 401-404, 407, 601, 604. A victim has no right to demand the charges be dropped. If requested to do so by the victim, however, an SVC has standing to argue for a dismissal of charges to the convening or other appropriate disposition authority. *See SVC Rules* Rule 6 (SVC may advocate victim's interests to "all actors within the [military justice] system").

8. Are there any options for me to get money to help my child? What are they?

9. What if he is acquitted, where will I get money from?

Student should explain the transitional compensation (TC) program set out in 10 USC § 1059, DoDI 1342.24, and AFI 36-3024. This can get complicated and involve procedures Ms Pritchard knows nothing about, so the student needs to describe the program clearly and simply. Key aspects that the student should inform Ms Pritchard about are:

- She is eligible for TC as a victim of a spouse abuse crime by her Air Force husband if he is convicted at court-martial and his approved sentence includes a punitive discharge or forfeiture of all pay and allowances, or, if his sentence doesn't include a punitive discharge or total forfeitures, he is administratively separated on the basis of his spouse abuse crime.

- Effective date of the TC will begin when the court-martial sentence that includes a punitive discharge or total forfeiture is approved by the convening authority (which will usually be within 60 days; how fast will depend on how quickly the court reporter prepares the Record of Trial and gets it authenticated by the military judge) or, in the case of a sentence that doesn't include a punitive discharge or total forfeitures and SSgt Pritchard's commander decides to administratively discharge him, when the commander initiates the discharge action. Regardless, the SVC should argue to appropriate authorities for prompt action to establish TC eligibility. *See SVC Rules* Rule 6 (SVC may advocate victim's interests to "all actors within the [military justice] system").

- Duration of TC is 36 months unless SSgt Pritchard has less than 36 months left on his enlistment contract, in which case the TC duration is that number of months. Student should recognize that he/she needs to find out how much time SSgt Pritchard has left on his current enlistment, as that's not in the facts we know.

- Amount of compensation is the same as if Ms Pritchard were the surviving spouse of a deceased military member under 38 USC § 1311(b). Student shouldn't try to estimate that in the first meeting but tell Ms Pritchard that he/she will research it and tell her the amount later.

- Remarriage or renewed cohabitation with SSgt Pritchard might affect her continued eligibility.

- TC recipients retain commissary and BX privileges and will get a limited privilege ID card for that purpose.

- Ms Pritchard and Courtney Mae will be eligible for medical/dental care for problems associated with SSgt Pritchard's abuse, if Ms Pritchard makes a request that is approved by SECAF. Student should offer to help her with that request when the time comes. Eligibility will be for the duration of TC.

If SSgt Pritchard is found "Not Guilty" of the charges, Ms Pritchard is not eligible for TC based on the alleged abuse that is the basis of the current charges. If there is other abuse of Ms Pritchard or Courtney Mae, that can be the basis of a separate criminal or administrative adjudication that could be the basis of TC eligibility.

Concerning required support for Ms Pritchard and Courtney Mae, Air Force members have a duty to support their dependents so, if an acquitted SSgt Pritchard tries to cut off support to his spouse and child in retaliation, his commander will take appropriate action. SVC will advocate to the commander on Ms Pritchard's behalf. *See SVC Rules* Rule 6.5. For a more long-term solution to the support issue, it's up to Ms Pritchard to file for divorce in a civilian court of competent jurisdiction, request a temporary support order for herself and Courtney Mae, and ask for alimony and child support as part of the final dissolution judgment. SVC may offer advice and information concerning a divorce action, but make clear that he/she is not permitted to represent her in civilian court. *See SVC Rules* Rule 5.

10. What do you think I should do?

Student should emphasize that Ms Pritchard must make the decisions, but the SVC is there to give her the information she needs to make good decisions, and advocate her interests as required and permitted by the SVC rules.

SCENARIO D

What the SVC Knows: A victim advocate notified the legal office that a victim in an upcoming sexual assault trial wishes to be represented by a Special Victims' Counsel. The legal office contacts your SVP, who details you to the case. The victim in the case is Airman First Class Petersberg, stationed at Kirtland AFB, NM. The SVP contacts A1C Petersberg and sets up an appointment for you to meet her. You know only that she wants you to explain the charges to her. The legal office forwarded you a copy of the charges. The accused is charged with Sexual Assault by causing bodily harm and forcible sodomy in violation of Article 125.

CHARGE I: Violation of the UCMJ, Article 120

Specification: In that SENIOR AIRMAN FLYNN L. KIPLINGER, United States Air Force, 55th Operational Squadron, did, at or near Kirtland Air Force Base, New Mexico, on or about 14 September 2013, commit a sexual act upon, Airmen First Class Sasha Petersberg, to wit: penetrating her vagina with his penis by causing bodily harm, which was an offensive touching of her vagina by his penis.

CHARGE II : Violation of the UCMJ, Article 125

Specification: In that SENIOR AIRMAN FLYNN L. KIPLINGER, United States Air Force, 55th Operational Squadron, did, at or near Kirtland Air Force Base, New Mexico, on or about 14 September 2013, commit sodomy with, Airmen First Class Sasha Petersberg, by force and without consent of the said Airmen First Class Sasha Petersberg.

For the Victim

Biography: You are A1C Sasha Petersberg a member of the Communications Squadron at Kirtland AFB, NM. You are quiet and keep generally to yourself. You have a religious family upbringing and attend church several times a week including prayer group. You have few friends outside of church. You have not made many friends at Kirtland AFB and you speak to your parents almost every day. You sometimes rode your bike last winter, but otherwise you don't get out a lot. You had never had a boyfriend until you met SrA Kiplinger this summer.

Factual background: You met SrA Flynn Kiplinger in the dorms. He was very nice to you and seemed like fun. You began to hang out with him regularly and he seemed to bring you out of your shell a bit. He did not share the same religion and so you did not tell your parents, fearing their disapproval. He would take you places to hang out such as Starbucks, New Mexican restaurants serving red and green chili dishes, taught you to play racquetball and took you to some concerts. You were having a good time with him and started to allow him to kiss you and engage in light petting. You had told him on a number of occasions that you wanted to wait for

marriage before having sexual intercourse and that you would have your parent's approval. One day while making out with him in your dorms he went too far. You had your pants off and he put his penis into your anus. You asked him what he was doing and told you it was okay and would feel good. You told him no but he pinned your hips and lay on top of you putting his weight on you. You squirmed but every time you moved he put his elbows deep into your back. At some point he took his penis out and inserted it into your front (the vagina). He continued to have sex with you until he ejaculated. After he finished the two of you watched a movie together and he left. You quietly sobbed to yourself during the whole movie. You took a long hot shower and didn't know what to do. You saw a SARC poster in the hall as you went out to chow to get your only meal that next day and decided to call them for help. Your report was restricted at first. You told the SARC only that he raped you. You ignored Flynn's phone calls and emails and ran into him one day in the hallway. He acted like nothing was wrong and was oblivious to what had happened to you. You dropped hints for him to apologize but he refused and so you made the report unrestricted. You talked to OSI and told them about the sodomy and the rape. Now trial is coming up and you want to know a little more about the charges.

Psychological demeanor: You are very quiet and demurring. You are scared discussing this. You don't make eye contact readily and often look at the ground or at your feet when talking about the rape. Use euphemisms for all of the sexual parts and all of the sexual acts and have some difficulty expressing exactly what happened. Make the attorney ask you lots of questions to find out what happened – it should be a little like “pulling teeth” for them to find out what your facts and biography are. What you really want to know relates to your secret data. If the attorney is able to develop some rapport with you by asking questions in an appropriate tone then ask your secret question.

Desired Outcome: You want to understand what the charges mean and what will happen at trial procedurally so that you can understand the role your testimony will have in the trial. If/when your secret data is revealed then you want to know what your options are.

Possible questions you might want to eventually ask:

1. What does Charge I mean when it says “causing bodily harm?”
2. Why didn't they charge him with rape instead of sexual assault?
3. What does force mean in Charge II? How much force does it take to be guilty of the crime?
4. What do they mean exactly by “without consent”?
5. [Secret data revealed] Why does it matter that I didn't say everything exactly right, he still raped me right?
6. What's going to happen if I tell people what really occurred?
7. It's my right to testify, where does this go if I continue with my story?
8. Are you going to tell anyone if I decide not to change my story?
9. Can you get me in trouble?

10. What will happen if I tell the truth now?
11. What are my options? What should I do?

Secret data: [At some point you will quietly ask the attorney in almost a whisper: “Does everything have to be perfectly true?”] If the attorney asks or presses you about this you will reveal that not everything you told OSI or the legal office was true. You will say that you were raped, but that the first part of that night was not actually the way you told OSI it had. You had reluctantly agreed with Flynn to engage in anal sex as an alternative to vaginal sex which you viewed as forbidden and carried with it the risk of pregnancy. You had never tried this before and then at some point he simply put his penis into your vagina and when you protested and tried to wiggle, everything happened as you said. You are adamant that he raped you otherwise and are very credible about your lack of consent. If asked why you lied about it, explain that you never really wanted to have anal sex anyway, it was his idea and his fault; you haven’t told your parents any of this and never will.

Instructor Notes:

- 1. What does Charge I mean when it says “causing bodily harm?”**
- 2. Why didn’t they charge him with rape instead of sexual assault?**

Student should explain, in non-legalese, the different types of sex crimes covered by Art 120, UCMJ, emphasizing that just because an offense doesn’t carry the “rape” label, doesn’t mean it’s not considered serious.

In A1C Petersberg’s case, Art 120(a) “rape” would have to have involved use of unlawful force or force causing or likely to cause “grievous bodily harm,” that is, fractured bones, deep cuts, serious damage to internal organs, and the like. Student should not try to explain the other possible versions of “rape” under Art 120(a) (rending unconscious, administering drug, threats of grievous bodily harm, etc) as they aren’t put in play by the facts and would likely only confuse A1C Petersberg.

The charge against SrA Kiplinger is “sexual assault” under Art 120(b)(1), which involves a sexual act committed by “causing bodily harm” which, by definition, includes any nonconsensual sexual act. *MANUAL FOR COURTS-MARTIAL, UNITED STATES 9 (MCM) pt IV para 45(g)(3) (2012)*. Again, at this point, the student should not try to explain the other possible versions of “sexual assault” under Art 120(b) because the facts don’t raise them as reasonable possibilities and discussion would be confusing. The student should explain that “sexual assault” under Art 120(b)(1) carries a maximum punishment of a DD, 30 years confinement, total forfeitures, and reduction to AB, so this is a very serious charge.

Although a charge of “rape” might be proved against SrA Kiplinger if the prosecution were able to prove “unlawful force” beyond a reasonable doubt, the offense of “sexual assault” would be far more practical to prove as “bodily harm” would automatically occur if the sexual act were found to be nonconsensual. Almost certainly, that’s the reason behind the charging decision. Student explain this to A1C Petersberg diplomatically and without criticism of the legal office.

3. What does force mean in Charge II? How much force does it take to be guilty of the crime?

4. What do they mean exactly by “without consent?”

Art 125, UCMJ (sodomy) doesn’t define “force” or “consent” within its terms, but the definitions contained in Art 120, UCMJ (rape and sexual assault generally) would apply, as the offense of sodomy, i.e., “unnatural carnal copulation,” under Art 125 is consistent with the definition of “sexual act” that applies in Art 120. *See* Art 120(g)(1); MCM pt IV para 51(c).

For the act to have been done by “force,” there must be either a weapon used; “such physical strength or violence as to overcome, restrain, or injure a person;” or “physical harm sufficient to coerce or compel submission” has been inflicted. Art 120(g)(5), UCMJ. Based on A1C Petersberg’s account, SrA Kiplinger’s actions would constitute “such physical strength...to overcome, restrain, or injure” her.

To be a defense to either charge, “consent” must be “a freely given agreement to the conduct...,” and “an expression of lack of consent through words or conduct means there is no consent.” Art 120(g)(8)(A). According to A1C Petersberg’s account to the OSI, she said “no” and squirmed to try to prevent him entering her anus, thereby expressing lack of consent both by words and conduct.

5. [Secret data revealed] Why does it matter that I didn’t say everything exactly right, he still raped me right?

6. What’s going to happen if I tell people what really occurred?

7. It’s my right to testify, where does this go if I continue with my story?

8. Are you going to tell anyone if I decide not to change my story?

9. Can you get me in trouble?

10. What will happen if I tell the truth now?

11. What are my options? What should I do?

The role player portraying A1C Petersberg will give clues during the interview that she may be hiding something. The student should know the cues to look for. If he/she misses them and

doesn't learn the secret information, the cues should be pointed out during the post exercise feedback.

This admission, of course, changes things at least as far as the forcible sodomy charge and possibly for the sexual assault charge. Student should explain the consequences kindly but directly, and urge a course of action consistent with justice and minimizing the consequences for A1C Petersberg. Student should avoid getting frustrated with A1C Petersberg, as this kind of thing is not unusual for sex crime victims.

A1C Petersberg's agreement to the anal sex as an alternative to vaginal sex is "consent." Accordingly, the accused did not commit a violation of Art 125 because, as set out in the 2012 MCM, a required element of that offense with an adult is force and without consent. MCM pt IV para 51(c). By its terms, Art 125 punishes any unnatural carnal copulation, even with a consenting adult. The President, however, has determined, as a matter of policy, that the crime of sodomy only occurs with an adult by force and without consent.

If A1C Petersberg goes to OSI and revises her account, no doubt the Art 125 sodomy charge will be withdrawn or dismissed. If the Art 120(b) sexual assault charge then goes to trial, however, A1C Petersberg should expect to be confronted with her lie to OSI on cross-examination. *See* MRE 608(b) (misconduct probative for truthfulness). In fact, it's likely the trial counsel would ask her about it on direct examination to minimize its impact. The SVC needs to explain this to A1C Petersberg and help her articulate her reasons for not being truthful at first so that the rest of her testimony may be considered credible.

Student should also explain to A1C Petersberg that, by lying to OSI, she committed the offenses of false official statement and (if she took an oath that the statement was true, which is OSI standard procedure) false swearing. *See* Arts 107, 134, UCMJ; MCM paras 31, 79. The SVC and A1C Petersberg now must decide how to deal with this difficult situation – how can she testify against SrA Kiplinger and prove his crime without exposing herself to punishment?

Student should explore options concerning immunity for A1C Petersberg, specifically, requesting testimonial immunity, that is, a promise from the convening authority that any admissions of lying would not be the basis for any punitive action against her. *See* RCM 704(a)(1). Full transactional immunity is also a possibility (*see* RCM 704(a)(2)) but it's not likely that would be granted, as testimonial immunity is all that is required to protect a witness' right against self-incrimination and force the witness to testify. Testimonial immunity, however, is feasible. If it's granted, there's no question that A1C Petersberg should return to OSI and correct her account. But what if testimonial immunity is denied?

Even without testimonial immunity, the student should urge A1C Petersberg to return to OSI and correct her statement. Not only would this be the right thing to do, it protects A1C Petersberg from the more serious offense of perjury if she repeated the lies at an Art 32 investigation or court-martial trial. *See* Art 131, UCMJ; MCM pt IV para 57. The SVC should accompany her

to the OSI interview and advocate to her commander and the SJA to minimize the consequences. *See Special Victims' Counsel Rules of Practice and Procedure* Rule 6 (XX Dec 2012) (*SVC Rules*) Rule 6 (SVC may represent victims and advocate their interests “to all actors within the system”). It’s important, however, that the SVC ensures A1C Petersberg understands that, without a grant of testimonial immunity, she may be held accountable for lying to OSI.

If A1C Petersberg agrees to go back to OSI and tell the truth, the SVC will want to consider involving the Area Defense Counsel (ADC) as the ADC will have the responsibility to represent A1C Petersberg if there is adverse action against her for the lie to OSI. *See SVC Rules* Rules 4, 4.1, 4.2. If there is adverse action against A1C Petersberg for the lie to OSI, the ADC will be her lead counsel but the SVC will have a supporting role in representing her. *SVC Rules* Rules 4, 4.2, 4.3. If, however, A1C Petersberg doesn’t want the SVC to involve the ADC, the SVC must honor that request. That’s because the knowledge that A1C Petersberg made a false statement to the OSI is a privileged client secret and can’t be disclosed without the client’s consent. AIR FORCE RULES OF PROFESSIONAL CONDUCT (AFRPC) Rule 1.6.

The SVC must continually bear in mind that A1C Petersberg’s admission of lying to OSI is privileged information, even if she is determined to stick to the lie in testimony. Even if she insists upon testifying falsely at an Art 32 hearing or trial, the SVC may not disclose the information. That’s because the exception to the confidentiality requirement for crime prevention only concerns a crime that is likely to result in “imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system....” AFRPC Rule 1.6(b)(1). The SVC may not, of course, suborn perjury. Student should make sure A1C Petersberg understands that he/she will not use her false information in any advocacy on her behalf and, if she insists upon committing perjury, seek to withdraw from her representation.

SCENARIO E

What the SVC Knows: You receive a call from the SARC at Hurlburt Field, FL. She says she has someone in her office who would like to speak with an SVC today. She does not tell you anything else. You drive over there and meet her at the SARC's office.

For the Victim

Biography: You are SrA Victor(ia) Eccelston a member of the 1st Special Operations Medical Group. You work as a medical technician riding on ambulances. You have been at the base for about two years and will soon be promoting to Staff Sergeant. You deployed to Afghanistan for six months and spent most of the time ferrying equipment and the injured from C-17s into the clinic. You are meeting with the attorney at the SARC's office and have not told the SARC anything about your case. When you arrived in her office she told you about your right to counsel and you immediately decided to speak to a Special Victims' Counsel.

Factual background: In the last week of your deployment as you were outprocessing and waiting for your rotator you went into the hut of TSgt Hackworth to say goodbye. You had already turned in your M-9 and M-16. He was not in the hut but instead you saw SSgt Walker. He cordially invited you in to sit down and await TSgt Hackworth's return. While waiting he took out a pornographic magazine and showed you a picture depicting a ménage-a-trois. While not personally interested in pornography per se, in an attempt to be polite and not rock the boat with Walker, you idly flipped through the images and laughed at their cartoonish and fantastic depictions of human relations. As you were engaged, Walker locked the entrance to the hut and sat down next to you. The hairs on the back of your neck began to stand on edge and he put his arm around you. You scooted three inches away from him and set the magazine down. He leaned into your shoulder and started to kiss the nape of your neck. Surprised by his boldness you attempted to dissuade him: "come on Walker stop" and pressed your hand against his chest, believing that this would end his feeble pass at you. Walker appeared only emboldened and quickly had the weight of his upper body on you, pinning you on the bottom bunk bed. You squirmed and tried to maneuver your legs away, but were met with difficulty given his size and strength. He persisted in licking your neck and face and you felt his hand under the elastic of your underpants. His fingers made it to near your genitals. He may have touched your genitals but it was hard to know given the speed and confusion of the events (if you are female victim he may have penetrated your vagina). You remembered next a rap at the door and Walker sprang off of you to answer it. It was TSgt Hackworth who entered the hut. He was surprised to see you and feeling unbalanced and embarrassed you muttered something about saying goodbye and quickly left. He shot you a pained expression as you left, filling you with further anguish.

Psychological demeanor: You feel extremely disgusted by what happened and can't get the assault out of your mind. While it was bad that his fingers were down your pants trying to touch you, you are more sickened by his licking and making you feel objectified and makes you nauseous. You did not report this immediately because you were afraid that it would detain you in Afghanistan, so you came home and agonized for a few weeks about what to do. You want to make a decision one way or the other about reporting this and you will make it today!

Desired Outcome: You want to understand the pros and cons of restricted versus unrestricted reporting? [Once the attorney begins to explain this, you will interject with your secret data]. You want to make a decision today and if the attorney tells you about a military defense counsel and your right to it you will decline the offer because you only want to talk to one attorney and are comfortable with your SVC's advice. You only want to figure out what is ultimately best for you. You adamantly intend to commit to your decision; so if you go restricted you will stay restricted, if you go unrestricted, you will see it through to the end.

Possible questions you should eventually ask:

1. What is restricted versus unrestricted reporting?
2. What triggers it?
3. Who will be notified if it is restricted or unrestricted?
4. [Once your secret data is revealed] How much trouble can I get in for what happened over there?
5. What is likely to happen to me if I go forward and make an unrestricted report?
6. What could happen to me if I don't make the report restricted?
7. What could I be punished for?
8. How might I be punished? What is the likelihood that they will take action against me?
9. What are my options?
10. Are there ways I can go forward in order to seek justice for what he did and limit my risk of getting in trouble?
11. What should I do?

Secret data: While deployed you were having a hard time seeing all the wounded and dead who came through the clinic. You even blamed yourself personally for the loss of several troops. It began to wear on you, and in order to cope with the stress you developed a relationship with TSgt Hackworth, another med troop. He was married at the time. The two of you slept together in his tent which often was occupied by only one other roommate, SSgt Walker. SSgt Walker usually worked a different shift, and this afforded you the opportunity to be with TSgt Hackworth. TSgt Hackworth had gotten a bottle of single malt scotch whisky as a thank you gift from some Australian special forces that he helped patch up in the clinic. He smuggled it into his tent, and the two of you drank it over several days along with his roommate.

For evaluator:

The biggest point of this scenario is to see how the student understands their roles under the charter and that their main concern is their client's best interest, whether that is going forward or not. The student may want to make a mock phone call to a defense counsel to discuss the issue with them.

Possible critique topics:

- a. Was the student able to comprehend restricted versus unrestricted reporting?
 - i. Restricted: No investigation until formally authorized or reported unrestricted by victim.
 1. Must be disclosed to SARC, Victim Advocate (after being assigned a VA by the SARC), Healthcare provider, Others with privilege (i.e. Chaplain, SVCC?).
 2. DoD members can make restricted report in AD status
 - ii. Unrestricted: Investigation into allegations follows report.
 1. Can be made through any channel (SARC, Chain of command, LE, OSI, etc)
 2. SARC will be notified and a VA assigned after report.

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- b. Did the student understand the consequences of restricted versus unrestricted reporting?
 - i. If the student does not report to one of the individuals specifically authorized to receive restricted reporting (SARC, VA assigned by SARC, or other personnel authorized to receive confidential communications (i.e. Chaplain, healthcare provider, SVCC)), then the report is unrestricted and an investigation into the allegations may occur.
 - ii. An unrestricted report will almost certainly lead to an inquiry into the misconduct of the victim herself. It is important the victim understands the consequences of an unrestricted report and has had the opportunity to consult with a military defense counsel in order to fully understand the criminal liability and collateral consequences of her decision.
 - iii. A restricted report will not be investigated and the perpetrator, SSgt Walker, will not be investigated or punished. There will also be no record of this sexual assault allegation in the event a future investigation on an unrelated sexual assault is initiated. MRE 413.

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- c. Did the student offer realistic options for the victim?
 - i. The options available to the member is to report restricted or unrestricted. The main thing for the student to understand is that SrA Eccelston should be fully informed before making her decision. Therefore, the student should at least mention the criminal liability and suggest talking to a military defense counsel. The student should also explain the court-martial process and what it means to initiate a sexual assault investigation.
 - ii. Options given by the student should include making a restricted report, making an unrestricted report, and it should be explained that SrA Eccelston can always decide later to change her report from restricted to unrestricted. However, it is important to explain the potential impact that delayed reporting can have on the outcome of a legal action against SSgt Walker.
- d. Did the student consider or guess at the degree of consequences this person might face? Given this unknown, did they offer the full range of potential outcomes?
 - i. The student should consult with the subject matter expert on the degree of criminal liability SrA Eccelston could face, the SDC. Even after SrA Eccelston says she only wants to talk to one lawyer and trusts the advice of her SVC, the SVC should consult the SDC to ensure his/her understanding of the consequences is sound.
 - ii. The student should discuss the range of potential punishments for SrA Eccelston's actions in Afghanistan which could range from an LOR to a potential (albeit unlikely) court-martial.
- e. Did the student consider the possibility of seeking immunity for the victim or did the student make improper suggestions to hide information or lie?
 - i. In discussing potential options for the victim, the SVC should weight the factors and look for solutions that best fit the interests of the victim. One possible solution would be to request immunity from the government for minor offenses before revealing the identity of the victim. Immunity can only be offered by the General Court-Martial Convening Authority (GCMCA) and the government may require an offer of proof.

RCM 704; AFI 51-201, *Military Justice Administration*, Section 6C.
- f. Did the student understand the delineations between the role of defense counsel and the role of the SVC under the charter? Did they advise the client of their own lack of expertise, the MDC's subject matter expertise and advise them to speak with the MDC?

- i. One of the teaching points for this scenario is to encourage a collaborative relationship between the victim, SVC, and SDC/MDC. While it can often be easy for SVC or the victim to fall into the mistake of thinking defense counsel are the enemy; it is important the student recognize how all three parties can and should work together towards a common goal.

 - g. Did the student consider the best interests of the victim and weigh what might be her long term interests in her potential decisions to either prosecute and endure some fallout to her career or to sweep everything under the rug and simply get therapy?
 - i. One of the reasons to collaborate with defense counsel is that each party has their own expertise. The defense counsel might be focused on avoiding criminal liability at all costs; however, the SVC can balance those competing interests against the victim's interest in seeking justice against the perpetrator.
 - ii. The SVC is also in a unique position to evaluate and consider the mental strength and psychological impact of going through the court-martial process and whether that is truly in the long term best interests of the victim.
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SCENARIO F

What the SVC Knows: The SARC comes to your office and explains that A1C Breanna Wallace wants to speak with you. AFOSI interviewed A1C Wallace twice as part of the investigation of SrA Mark Crowther (Accused), and A1C Wallace would like to speak with you now those interviews are complete. You walk down the hall to the SARC's office, where the SARC leaves you to talk with A1C Wallace.

For the Victim

Biography: You are A1C Breanna Wallace. You are at your first duty station, Dyess AFB, TX. You have been there 2 years. You are now 20 years old (you joined when you were 18). You are single, have no children, and live in the dorms.

Factual background: SrA Crowther lives near you. When you arrived at Dyess, you and some friends from tech school started hanging out with SrA Crowther's friends. You dated SrA Matthews, one of SrA Crowther's friends. This lasted about two months, and the relationship was mostly sexual. When you broke up, you both decided to be friends.

Shortly after the breakup, you got a text from SrA Crowther inviting you and others to a house party off base. You texted him back excited to get away from work. You exchanged a few more texts about it and you drive there alone. You showed up a little late and noticed SrA Crowther and others drinking. You had a couple mixed drinks and began to dance with SrA Crowther. Others were dancing too. In fact, one couple looked really cozy, which surprised you because you have never seen them together. Some of your friends left after the dancing, including the couple dancing closely. The conversation turns to how they were going home to hook up. You decided to stay the night since you've had a couple drinks. Your base has been cracking down on DUIs lately, and you didn't want to get in trouble.

The guys who live at the house offered you the couch. You accepted, and one of the guys gave you a blanket and some gym shorts. You changed into the gym shorts in the hallway and got ready for bed. You fell asleep on the couch wearing the gym shorts and a tank top while SrA Crowther and a few others kept talking. After what felt like several hours, you woke up to someone pulling off your shorts and underwear. Your shirt was pulled up exposing your breasts, and you didn't know who it was. You felt sleepy, but after a moment realized that it was SrA Crowther. After realizing who it was, you pushed him back, and you rolled off the couch. You left the party and made an unrestricted report to the SARC the next day.

While you were in the SARC's office, SrA Crowther texts you and asks if you want to hang out again. You text back that you are busy with work. He texts that you were great last night and

that you should get together again. Hoping that he'll leave you alone, you tell him that you can hang out later but you're busy now.

The SARC took you to AFOSI, and you told them everything. They asked to see the text messages. They took pictures of the text messages and asked if they can plug your phone into a machine that will retrieve all the data. Because of personal conversations on your phone, you politely decline. Following the AFOSI interview, you went back to the SARC office, where the SARC told you about the SVC program. You ask her if you can speak with an SVC.

Psychological demeanor: You are upset that he did this to you and want justice. However, you're nervous about the secret information coming up. You are also nervous about AFOSI searching your phone.

Desired Outcome: You want to know what to do. You want to know whether you have to give your phone to AFOSI because you just want to tell them no. You want to know from your SVC how he/she can help you with your secret data.

Possible questions you should eventually ask:

1. Why did AFOSI want my phone?
2. What problems do you see?
3. So what that I didn't _____, isn't that normal in these situations?
4. Will I get in trouble for underage drinking?
5. Can I keep my secret and still go forward to prosecution?
6. Should I go forward?
7. You're saying that other people might not understand how I reacted. What is a good way to explain this?
8. How can you help me?
9. What do you recommend I do?

Secret data: You made a restricted report one year ago when a previous boyfriend forced you to have anal sex with him. You were drinking heavily at the time and you do not remember a lot of the details. You've texted a victim advocate about that assault, and those conversations are on your phone. You're afraid if AFOSI gets your phone, they'll find out about the restricted report.

For evaluator Possible critique topics:

- a. Did the student handle the victim appropriately and with respect? The student's primary concern should be the client – the client's well being and working to achieve the client's goals. Professionalism and respect are paramount in ascertaining the facts, especially when the information related by the client is difficult to believe.
- b. Did the student explain what the phone search does? Most AFOSI detachments will plug the phone into the Cellbrite machine and extract all cell phone data, including messages, websites visited, and Facebook posts. A way to avoid that is to take pictures of it, but if a judge is convinced there is still data out there, the judge can order a search of the phone. The student can discuss requesting an *in camera* review by the judge if that happens. Another option is to have the legal office subpoena the phone records to show call logs, text logs (not content), and times data were sent.
- c. Did the student recognize that counter intuitive behaviors were at play? To the extent that A1C Wallace is not aware that many people harbor stereotypes about how a victim of a sexual assault would react, the student may choose to inform her that many people, to include prosecutors, commanders, and panel members, have preconceived notions regarding how a victim would behave that might be obstacles to her being believed. For example, many people believe a victim would immediately fight or run to end the assault. Some people have particular attitudes regarding alcohol and partying which might cause them to fault A1C Wallace for putting herself in a compromising situation or even believe that since she was a willing participant in alcohol consumption and partying, she likely consented to sex as well. Some might think that a victim would immediately report to the authorities and submit to medical and forensic examination. They might believe a victim would be so devastated by the assault that he or she would not be able to go along with the crowd and would choose not to even if he or she could. In particular, many people would believe that a victim would not text the perpetrator the following day. Whether these preconceived notions should be addressed (and whether they should be addressed at this time) depends on how the conversation goes and the mental state of the client.
- d. Did the student explain the procedure for MRE 412 evidence and help the student evaluate whether the prior assault would be relevant? Whether it's relevant may not be as important as keeping this information protected so she does not have to disclose it to other parties. A possible procedure is to only disclose the information in a closed MRE 412 hearing. Even if the counsel for either side learns about the information, the victim can request to only disclose it in the MRE 412 hearing. The student should be careful not to guarantee a specific outcome or that the information would be completely protected.

- e. Did the student discuss the potential misconduct of underage drinking? The student should not overpromise or guarantee a specific outcome. The student should discuss advantages and disadvantages to taking a minor punishment now (i.e., effect on cross-examination, knowing that it's over) rather than waiting to see if anything will happen. The student may also discuss requesting assistance from an ADC if the victim receives some kind of punishment.

SCENARIO G

What the SVC Knows: You are informed that your local law enforcement detachment has opened an investigation on TSgt Walter Jones (Accused). TSgt Jones an active duty recruiter in Cleveland, OH. TSgt Jones is suspected of sexual harassment and possibly sexual assault of multiple recruits. A1C Lindsey Washington has come into your office. AFOSI asked to interview A1C Washington as part of that investigation. A1C Washington has come to speak to you prior to her interview with AFOSI.

For the Victim

Biography: You are A1C Lindsey Washington. You are at your first duty station, Luke AFB, AZ. You have been there 2 years. You are now 20 years old (you joined when you were 18). You are single and have no children. You are from Cleveland Heights, OH. You joined the military for the GI Bill so you can pay for college in the future. In addition, your hometown is filled with crime and gang violence. This was an opportunity for you to get away and start new.

Factual background: TSgt Jones was your recruiter. He helped you get into the military. He helped you collect all the necessary documentation and complete all tasks. Sometime prior to leaving for basic training you made an appointment with TSgt Jones for 0800. You showed up a little late. The office door was unlocked so you went in and sat down. Minutes later, TSgt Jones came out of the backroom holding papers and listening to his IPOD. He was completely naked and had an erection. He said “oh shit!”, and you ran outside into the hallway. TSgt Jones begged you to come back in so he could apologize. You returned. He said it was an accident; you interrupted his morning routine, he was so sorry, and begged you not to tell anyone. You were desperate to join the Air Force and believed maybe it could be an accident so you continued the process of joining with TSgt Jones.

A couple of weeks later TSgt Jones asked you to take a pre-ASVAB test. Your Grandma dropped you off and TSgt Jones agreed to give you a ride home. You gave TSgt Jones your IPOD touch (so he could ensure you weren't cheating) and took the test. When you came back someone had been in your IPOD touch and a picture of you in a bathing suit was showing. TSgt Jones said that was his favorite picture of you. He pushed back from the desk. His penis was exposed. His hand was moving up and down. You covered up your face and ignored him. After about 30 seconds he got up and pressed his penis against your right arm. You kept your face covered and did not respond. He stopped what he was doing, went to the backroom, got dressed and drove you home. You were so desperate to join the Air Force that you pretended these incidents didn't happen and continued the military accession process. You successfully joined the Air Force and have been stationed at Luke AFB ever since. You have not spoke to or heard from TSgt Jones since.

Yesterday, AFOSI called you in and began asking questions about TSgt Jones. You have no idea how AFOSI even knows about this. Prior to leaving for basic training you mentioned to a friend that TSgt Jones had “tried to put the moves” on you but you told no one else what happened. Prior to answering questions you asked to speak to a lawyer first and contacted the SVC office.

Psychological demeanor: Although these incidents upset you, you have put this behind you and do not want to relive it. You have a successful career now. You do not want to tell OSI what happened and be involved in an investigation. However, you are conflicted about what to do because you fear he may do it to more recruits.

Desired Outcome: You want to know what to do. You want to know whether you have to submit to an interview with AFOSI because you just want to tell them no. You want to know from your SVC how he/she can help you if you do have to talk.

Possible questions you should eventually ask (please feel free to ask more):

1. How can you help me?
2. Can I just refuse to talk? What if I just tell them nothing happened?
3. What if no one believes me since it has been so long and I never said anything?
4. What is the process if I decide to participate?
5. Can I decide not to participate?
6. What do you recommend I do?

Secret data: At some point during the interview you should take the position that if AFOSI forces you to come in and speak that you are just going to lie to them.

For evaluator Possible critique topics:

- a. Did the student handle the victim appropriately and with respect? The student’s primary concern should be the client – the client’s well being and working to achieve the client’s goals. Professionalism and respect are paramount in ascertaining the facts, especially when the information related by the client is difficult to believe.
- b. Did the student focus on the client’s goals or try to dissuade her/him? The student’s role is to support, inform and advise; ultimately the client determines the goals of representation. The student needs to inform the client of likely difficulties and obstacles in this case but should not be judgmental of the client or dismissive of the case.

- c. Did they recognize that they could help their client explain themselves by helping them with phrasing and presentation versus recommending any unethical approaches? Students should never encourage a client to say anything that is untrue. Explaining stereotypes and preconceived notions can help prepare the client to explain behaviors and reactions that may initially seem counterintuitive. Helping the client think through their feelings and their reactions gives them the opportunity to voice his or her explanations in a setting where his or her words will not be used against them and where perceived inconsistencies can be inquired into without being attacked.
- d. Did they explain the various courses of action the Victim could take or did they just tell her/him what to do? SVC should recognize that they can only advise and the decision ultimately lies with the client. As a military member, the Victim could be ordered to speak to law enforcement. If he/she refuses she could receive disciplinary action. While the SVC may be comfortable opining about the likelihood of giving a sexual assault victim paperwork, the SVC should make clear that it can, and has happened and the SVC cannot make any guarantees that this would not happen. Additionally the client should be advised that lying to military law enforcement could be considered a false official statement under Art 107. Thus refusing to cooperate is a calculated risk that ultimately the client must decide.
- e. Did they explain what the SVC can do if the Victim decides not to participate? Possible courses of action include speaking with AFOSI to say the victim will not be participating further in the investigation. AFOSI will likely ask for a memo from the victim stating this, and the SVC can help with this memo. The SVC can also write a memo advocating to the legal office and convening authority not to go forward, if that is what the victim chooses. The SVC can cite DoDI 6495.02, Enclosure 4, para. 1.c., which states:
- "The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command. If at any time the victim who originally chose the Unrestricted Reporting option declines to participate in an investigation or prosecution, that decision should be honored in accordance with this subparagraph."
- f. If the victim decides to participate, the SVC can explain the court-martial process. The SVC can explain that the SVC will be with the victim at every point in the investigation, including interviews, the Article 32 hearing, and trial.

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA

v.

**SSgt Taylor Johnson
28th Aircraft Maintenance Squadron
Ellsworth AFB, South Dakota
(ACC)**

**RESPONSE TO NOTICE TO REVIEW
MENTAL HEALTH RECORDS AND
VICTIM ADVOCATE RECORDS
PURSUANT TO MRE 513/514**

21 May 2014

COMES NOW SRA RP, by and through counsel, and respectfully requests the Military Judge to prevent inquiry into her mental health and victim advocate records and preclude the admission of certain evidence derived from those records pursuant to Military Rule of Evidence (MRE) 513 and 514.

FACTS

1. The Accused is charged, in part, with abusive sexual contact of SrA RP, 28 MDG, on or about 8 July 2013. *See scenario for other facts*

LAW

2. MRE 513 provides as follows:

Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

3. MRE 513(d) lists 8 exceptions to the privilege. They are:

- 1) The patient is dead;
- 2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
- 3) When federal law, state law, or service regulation imposes a duty to report information;

- 4) When the psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
- 5) If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
- 6) When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
- 7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation
- 8) When admission or disclosure of a communication is constitutionally required.

4. "Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose." MRE 513(e)(2). MRE 514 follows an identical procedure. *See* MRE 514(e)(2).

5. MRE 514 provides as follows:

Rule 514. Victim advocate-victim privilege

(a) *General rule of privilege.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the victim and a victim advocate, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or supportive assistance to the victim.

6. MRE 514(d) lists 6 exceptions to the privilege. They are:

- 1) when the victim is dead;
- 2) when Federal law, State law, or service regulation imposes a duty to report information contained in a communication;
- 3) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

- 4) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or other accomplishment of a military mission;
 - 5) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or
 - 6) when admission or disclosure of a communication is constitutionally required.
7. "A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. This is self-evident in the case of MRE 513, the invocation of which necessarily includes a legal conclusion that a legal privilege applies. Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under MRE 412. and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness." *LRM v. Kastenber*, 72 M.J. 364, 370-71 (C.A.A.F. 2013).

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 513/514 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 21 May 2014.

///IWR 21 May 2014///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA

v.

SSgt Taylor Johnson
28th Aircraft Maintenance Squadron
Ellsworth AFB, South Dakota
(ACC)

**RESPONSE TO NOTICE TO PRESENT
EVIDENCE PURSUANT TO MRE 412**

21 May 2014

COMES NOW SRA RP, by and through counsel, and respectfully requests the Military Judge to preclude the admission of certain evidence under Military Rule of Evidence (MRE) 412.

FACTS

1. The Accused is charged, in part, with abusive sexual contact of SrA RP, 28 MDG, on or about 8 July 2013. *See scenario for other facts*

LAW

2. MRE 412 “is provides as follows:

Rule 412. Nonconsensual sexual offenses; relevance of victim’s behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim’s sexual predisposition.

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) Evidence the exclusion of which would violate the constitutional rights of the accused.

(D) “Sexual behavior” includes any sexual behavior not encompassed by the alleged offense. The term “sexual predisposition” refers to an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

3. “The Drafter’s [of the Military Rules of Evidence] intended the term ‘sexual predisposition’ to have a sweeping definition, excluding all evidence directly related to the victim’s past sexual activities and thought, as well as any behavior that the “accused believes may have a sexual connotation for the finder of fact.” Military Rules of Evidence Manual § 412.02[2], Sixth Edition, Saltzburg, Schinasi, Schlueter (2010). “Questions dealing with the alleged victim’s illegitimate children, sexually transmitted diseases and sexual states of mind are also generally inadmissible.” *Id.*

4. “Sexual behavior includes all activities and states of mind not encompassed by the charged offenses.” *Id.* at § 412.02[7]. “Sexual predisposition concerns thoughts, dreams, lifestyle and any other related behavior or conduct.” *Id.*

5. “The rule “is intended to ‘shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions].” *United States v. Ellerbock*, 70 M.J. 314 (C.A.A.F. 2011) citing, *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). The rule does not seek to balance the privacy of the victim as a factor in whether admission of evidence is unfairly prejudicial or constitutionally required, but exists as a mechanism to protect the privacy interests of victims. *See Gaddis*, 70 M.J. 248.

6. MRE 412 is a rule of exclusion, and thus the burden of admissibility shifts to the proponent of the evidence. *United States v. Greaves*, 40 M.J. 432, 438 (C.M.A. 1994). “In order to overcome the exclusionary purpose of the rule, an accused must demonstrate why the general prohibition in MRE 412 should be lifted to admit evidence of the sexual behavior of the victim.” *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004), citing *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997). “In particular, the proponent must demonstrate how the evidence fits within one of the exceptions to the rule.” *Id.*

7. The third exception of MRE 412, states that the evidence is admissible if “the exclusion of . . . [it] would violate the constitutional rights of the accused.” MRE 412(b)(1)(C). An accused has a constitutional right “to be confronted by the witnesses against him.” U.S. Const. amend. VI. That right necessarily includes the right to cross-examine those witnesses. *Ellerbock*, 70 M.J. 314 citing *Davis v. Alaska*, 415 U.S. 308, 315 (1974)

However, an accused is not simply allowed “cross examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) Indeed, “trial judges retain wide latitude’ to limit reasonably a criminal defendant’s right to cross-examine a witness ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’” *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (quoting *Van Arsdall*, 475 U.S. at 679). But no evidentiary rule can deny an accused of a fair trial or all opportunities for effective cross-examination. See *Van Arsdall*, 475 U.S. at 679.

8. Generally, evidence must be admitted within the ambit of MRE 412(b)(1)(C) when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice. Relevant evidence is any evidence that has “any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.” MRE 401. The evidence must also be material, which is a multi-factored test looking at “the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue.” *Ellerbock*, 70 M.J. 314 citing *United States v. Banker*, 60 M.J. at 222.

9. If evidence is material and relevant, then it must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. See MRE 412(c)(3). This must overcome dangers including concerns about “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Ellerbock* 70 M.J. 314 citing *Van Arsdall*, 475 U.S. at 679.

10. An accused’s right to present evidence of materials that are deemed admissible under the constitutional exception to MRE 412 is not unfettered and may be tempered by a military judge under MRE 403. See *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011); and *United States v. Smith*, 68 M.J. 445(C.A.A.F. 2010)

11. “A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. This is self-evident in the case of MRE 513, the invocation of which necessarily includes a legal conclusion that a legal privilege applies. Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under MRE 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness.” *LRM v. Kastenber*, 72 M.J. 364, 370-71 (C.A.A.F. 2013).

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 412 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 21 May 2014.

///IWR 21 May 2014///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA

v.

Capt John Walters
28th Maintenance Squadron
Ellsworth AFB, South Dakota
(ACC)

RESPONSE TO NOTICE TO REVIEW
MENTAL HEALTH RECORDS PURSUANT
TO MRE 513

21 May 2014

COMES NOW 1ST LT LB, by and through counsel, and respectfully requests the Military Judge to prevent inquiry into her mental health records and preclude the admission of certain evidence derived from those records pursuant to Military Rule of Evidence (M.R.E.) 513.

FACTS

1. The Accused is charged, in part, with the Rape of 1st LT LB, 28 OSS, on or about 17 August 2013. *See scenario for other facts*

LAW

2. MRE 513 provides as follows:

Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

3. MRE 513(d) lists 8 exceptions to the privilege. They are:

- 1) The patient is dead;
- 2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
- 3) When federal law, state law, or service regulation imposes a duty to report information;

- 4) When the psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
- 5) If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
- 6) When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
- 7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation
- 8) When admission or disclosure of a communication is constitutionally required.

4. "Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose." M.R.E. 513(e)(2).

5. When the patient objects to the release of her mental health records, "a threshold showing is required before an *in camera* review of the records subject to the protections of MRE 513 may be ordered." *United States v. Klemick*, 65 M.J. 576, 579 (N.M.C.C.A. 2006). In *Klemick*, the court of appeals relied on a Wisconsin Supreme Court interpretation of the psychotherapist-patient privilege stating the threshold showing could not be established through "mere conjecture or speculation." *Id.* citing *Wisconsin v. Green*, 646 N.W.2d 298, 310 (Wis. 2002).

6. Although not binding, the Air Force Court of Criminal Appeals recently discussed the proposition of conducting an *in camera* review of all records requested by the Defense on the theory that some evidence favorable to the Defense may exist in the records and would be therefore required under *Brady v. Maryland*, 373 U.S. 83 (1963). The court firmly held that "*Brady* does not 'require the trial court to make an *in camera* search of the government files for evidence favorable to the accused.'" *United States v. Nixon*, 2012 WL 5991775 (A.F.Ct.Crim. App. 2012) (quoting *United States v. Michaels*, 796 F.2d 1112, 1116 (9th Cir.1986) and *United States v. Harris*, 409 F.2d 77, 80-81 (4th Cir.1969)).

7. The United States Supreme Court has discussed the standard necessary to accomplish an *in camera* review under a "constitutionally required" exception to the attorney/client privilege. The Court held that there is no "blanket rule allowing *in camera* review as a tool for determining" whether an exception to the attorney-client privilege exists. *United States v. Zolin*, 491 U.S. 554, 571 (1989). To prevent "groundless fishing expeditions," the Court required that the party arguing for review make "'a showing of a factual basis adequate to support a good faith belief by a reasonable person' that an *in camera* review of the materials may reveal evidence to establish

the claim that” an exception applies. *Id.* at 572 (quoting *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)). The threshold showing to obtain an *in camera* review may be made with “any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.” *Id.* at 575. Even if such a showing is made, whether to conduct an *in camera* review is still within the “sound discretion” of the judge. *Id.* at 572.

8. Case law interpreting other areas of military law concerning “constitutionally required” exceptions to rules of privilege/exclusion are instructive. For example, in *United States v Banker*, 60 MJ 216 (C.A.A.F. 2004), the Court considered M.R.E. 412, under which, among other things, evidence of an alleged victim’s prior sexual relationships or predispositions are inadmissible. Under M.R.E. 412(b)(1)(C), as under M.R.E. 513(d)(8), “evidence the exclusion of which would violate the constitutional rights of the accused” is admissible as an exception. The court, in *Banker*, elaborated on the exception stating, it is designed to protect “the accused’s Sixth Amendment right of confrontation and Fifth Amendment right of a fair trial”. *Banker* at 221. This case suggests that, similarly, under M.R.E. 513, a psychotherapist-patient communication retains its privilege unless exclusion would violate either the accused’s right to confront witnesses against him or his due process rights. *See also United States v Gaddis*, 70 MJ 248, 254 (C.A.A.F. 2011) (affirming that the constitutional rights exception in M.R.E. 412 involves whether the exclusion of evidence would violate the defendant’s Sixth Amendment rights).

9. The Sixth Amendment provides that “the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. Amend VI. In general, this right encompasses two protections for the accused: “the right physically to face those who testify against him, and the right to conduct cross-examination.” *See Delaware v. Fensterer*, 474 U.S. 15, 18-19 (1985) (holding that the accused was not denied his right to effectively cross-examine an expert witness based solely on the fact that the witness could not recall the basis of his expert opinion). As to the latter, “the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Id.* at 20 (emphasis in original). The right is usually satisfied by giving the defense “wide latitude” at trial to question witnesses. *Id.* In 1987, a four-Justice plurality relied on this line of reasoning to hold that the prosecution’s refusal to disclose a document that the accused claimed would have allowed him to more effectively cross-examine a witness against him did not violate his right to confront the witness. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-55 (1987).

10. Military appellate courts have relied on *Ritchie* and similar cases in holding that the accused has no constitutional right to unrestricted discovery. *See United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F. 1998).

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 513 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 21 May 2014.

///*IWR 21 May 2014*///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA

v.

Capt John Walters
28th Maintenance Squadron
Ellsworth AFB, South Dakota
(ACC)

**RESPONSE TO NOTICE TO PRESENT
EVIDENCE PURSUANT TO MRE 412**

21 May 2014

COMES NOW 1ST LT LB, by and through counsel, and respectfully requests the Military Judge to preclude the admission of certain evidence under Military Rule of Evidence (MRE) 412.

FACTS

1. The Accused is charged, in part, with the Rape of 1st LT LB, 28 OSS, on or about 17 August 2013. *See scenario for other facts*

LAW

2. MRE 412 “is provides as follows:

Rule 412. Nonconsensual sexual offenses; relevance of victim’s behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim’s sexual predisposition.

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(D) “Sexual behavior” includes any sexual behavior not encompassed by the alleged offense. The term “sexual predisposition” refers to an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

3. “The Drafter’s [of the Military Rules of Evidence] intended the term ‘sexual predisposition’ to have a sweeping definition, excluding all evidence directly related to the victim’s past sexual activities and thought, as well as any behavior that the “accused believes may have a sexual connotation for the finder of fact.” Military Rules of Evidence Manual § 412.02[2], Sixth Edition, Saltzburg, Schinasi, Schlueter (2010). “Questions dealing with the alleged victim’s illegitimate children, sexually transmitted diseases and sexual states of mind are also generally inadmissible.” *Id.*

4. “Sexual behavior includes all activities and states of mind not encompassed by the charged offenses.” *Id.* at § 412.02[7]. “Sexual predisposition concerns thoughts, dreams, lifestyle and any other related behavior or conduct.” *Id.*

5. “The rule “is intended to ‘shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions].” *United States v. Ellerbock*, 70 M.J. 314 (C.A.A.F. 2011) citing, *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). The rule does not seek to balance the privacy of the victim as a factor in whether admission of evidence is unfairly prejudicial or constitutionally required, but exists as a mechanism to protect the privacy interests of victims. *See Gaddis*, 70 M.J. 248.

6. MRE 412 is a rule of exclusion, and thus the burden of admissibility shifts to the proponent of the evidence. *United States v. Greaves*, 40 M.J. 432, 438 (C.M.A. 1994). “In order to overcome the exclusionary purpose of the rule, an accused must demonstrate why the general prohibition in MRE 412 should be lifted to admit evidence of the sexual behavior of the victim.” *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004), citing *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997). “In particular, the proponent must demonstrate how the evidence fits within one of the exceptions to the rule.” *Id.*

7. The third exception of MRE 412, states that the evidence is admissible if “the exclusion of . . . [it] would violate the constitutional rights of the accused.” MRE 412(b)(1)(C). An accused has a constitutional right “to be confronted by the witnesses against him.” U.S. Const. amend. VI. That right necessarily includes the right to cross-examine those witnesses. *Ellerbock*, 70 M.J. 314 citing *Davis v. Alaska*, 415 U.S. 308, 315 (1974)

However, an accused is not simply allowed “cross examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) Indeed, “trial judges retain wide latitude’ to limit reasonably a criminal defendant’s right to cross-examine a witness ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’” *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (quoting *Van Arsdall*, 475 U.S. at 679). But no evidentiary rule can deny an accused of a fair trial or all opportunities for effective cross-examination. See *Van Arsdall*, 475 U.S. at 679.

8. Generally, evidence must be admitted within the ambit of MRE 412(b)(1)(C) when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice. Relevant evidence is any evidence that has “any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.” MRE 401. The evidence must also be material, which is a multi-factored test looking at “the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue.” *Ellerbock*, 70 M.J. 314 citing *United States v. Banker*, 60 M.J. at 222.

9. If evidence is material and relevant, then it must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. See MRE 412(c)(3). This must overcome dangers including concerns about “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Ellerbock* 70 M.J. 314 citing *Van Arsdall*, 475 U.S. at 679.

10. An accused’s right to present evidence of materials that are deemed admissible under the constitutional exception to MRE 412 is not unfettered and may be tempered by a military judge under MRE 403. See *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011); and *United States v. Smith*, 68 M.J. 445(C.A.A.F. 2010)

11. . “A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. This is self-evident in the case of MRE 513, the invocation of which necessarily includes a legal conclusion that a legal privilege applies. Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under MRE 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness.” *LRM v. Kastenber*, 72 M.J. 364, 370-71 (C.A.A.F. 2013).

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 412 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 21 May 2014.

///IWR 21 May 2014///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA

v.

**Cadet Steven Turner
Cadet Squadron 99
United States Air Force Academy, CO**

**RESPONSE TO NOTICE TO REVIEW
MENTAL HEALTH RECORDS AND
VICTIM ADVOCATE RECORDS
PURSUANT TO MRE 513/514**

21 May 2014

COMES NOW CADET LS, by and through counsel, and respectfully requests the Military Judge to prevent inquiry into her mental health and victim advocate records and preclude the admission of certain evidence derived from those records pursuant to Military Rule of Evidence (MRE) 513 and 514.

FACTS

1. The Accused is charged, in part, with abusive sexual contact of Cadet LS, USAFA, on or about 8 June 2013. *See scenario for other facts.*

LAW

2. MRE 513 provides as follows:

Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

3. MRE 513(d) lists 8 exceptions to the privilege. They are:

- 1) The patient is dead;
- 2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;
- 3) When federal law, state law, or service regulation imposes a duty to report information;

- 4) When the psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;
- 5) If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;
- 6) When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;
- 7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation
- 8) When admission or disclosure of a communication is constitutionally required.

4. "Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose." MRE 513(e)(2). MRE 514 follows an identical procedure. *See* MRE 514(e)(2).

5. MRE 514 provides as follows:

Rule 514. Victim advocate-victim privilege

(a) *General rule of privilege.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the victim and a victim advocate, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or supportive assistance to the victim.

6. MRE 514(d) lists 6 exceptions to the privilege. They are:

- 1) when the victim is dead;
- 2) when Federal law, State law, or service regulation imposes a duty to report information contained in a communication;
- 3) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

- 4) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or other accomplishment of a military mission;
 - 5) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or
 - 6) when admission or disclosure of a communication is constitutionally required.
7. "A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. This is self-evident in the case of MRE 513, the invocation of which necessarily includes a legal conclusion that a legal privilege applies. Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under MRE 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness." *LRM v. Kastenber*, 72 M.J. 364, 370-71 (C.A.A.F. 2013).

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 513/514 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 21 May 2014.

///IWR 21 May 2014///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA

v.

**Cadet Steven Turner
Cadet Squadron 99
United States Air Force Academy, CO**

**RESPONSE TO NOTICE TO PRESENT
EVIDENCE PURSUANT TO MRE 412**

21 May 2014

COMES NOW CADET LS, by and through counsel, and respectfully requests the Military Judge to preclude the admission of certain evidence under Military Rule of Evidence (MRE) 412.

FACTS

1. The Accused is charged, in part, with abusive sexual contact of Cadet LS, USAFA, on or about 8 February 2014. *See scenario for other facts*

LAW

2. MRE 412 “is provides as follows:

Rule 412. Nonconsensual sexual offenses; relevance of victim’s behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim’s sexual predisposition.

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(D) “Sexual behavior” includes any sexual behavior not encompassed by the alleged offense. The term “sexual predisposition” refers to an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

3. “The Drafter’s [of the Military Rules of Evidence] intended the term ‘sexual predisposition’ to have a sweeping definition, excluding all evidence directly related to the victim’s past sexual activities and thought, as well as any behavior that the “accused believes may have a sexual connotation for the finder of fact.” Military Rules of Evidence Manual § 412.02[2], Sixth Edition, Saltzburg, Schinasi, Schlueter (2010). “Questions dealing with the alleged victim’s illegitimate children, sexually transmitted diseases and sexual states of mind are also generally inadmissible.” *Id.*

4. “Sexual behavior includes all activities and states of mind not encompassed by the charged offenses.” *Id.* at § 412.02[7]. “Sexual predisposition concerns thoughts, dreams, lifestyle and any other related behavior or conduct.” *Id.*

5. “The rule “is intended to ‘shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to [sexual offense prosecutions].” *United States v. Ellerbock*, 70 M.J. 314 (C.A.A.F. 2011) citing, *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011). The rule does not seek to balance the privacy of the victim as a factor in whether admission of evidence is unfairly prejudicial or constitutionally required, but exists as a mechanism to protect the privacy interests of victims. *See Gaddis*, 70 M.J. 248.

6. MRE 412 is a rule of exclusion, and thus the burden of admissibility shifts to the proponent of the evidence. *United States v. Greaves*, 40 M.J. 432, 438 (C.M.A. 1994). “In order to overcome the exclusionary purpose of the rule, an accused must demonstrate why the general prohibition in MRE 412 should be lifted to admit evidence of the sexual behavior of the victim.” *United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004), citing *United States v. Moulton*, 47 M.J. 227, 228 (C.A.A.F. 1997). “In particular, the proponent must demonstrate how the evidence fits within one of the exceptions to the rule.” *Id.*

7. The third exception of MRE 412, states that the evidence is admissible if “the exclusion of . . . [it] would violate the constitutional rights of the accused.” MRE 412(b)(1)(C). An accused has a constitutional right “to be confronted by the witnesses against him.” U.S. Const. amend. VI. That right necessarily includes the right to cross-examine those witnesses. *Ellerbock*, 70 M.J. 314 citing *Davis v. Alaska*, 415 U.S. 308, 315 (1974)

However, an accused is not simply allowed “cross examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) Indeed, “trial judges retain wide latitude’ to limit reasonably a criminal defendant’s right to cross-examine a witness ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.’” *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (quoting *Van Arsdall*, 475 U.S. at 679). But no evidentiary rule can deny an accused of a fair trial or all opportunities for effective cross-examination. See *Van Arsdall*, 475 U.S. at 679.

8. Generally, evidence must be admitted within the ambit of MRE 412(b)(1)(C) when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice. Relevant evidence is any evidence that has “any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.” MRE 401. The evidence must also be material, which is a multi-factored test looking at “the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue.” *Ellerbock*, 70 M.J. 314 citing *United States v. Banker*, 60 M.J. at 222.

9. If evidence is material and relevant, then it must be admitted when the accused can show that the evidence is more probative than the dangers of unfair prejudice. See MRE 412(c)(3). This must overcome dangers including concerns about “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Ellerbock* 70 M.J. 314 citing *Van Arsdall*, 475 U.S. at 679.

10. An accused’s right to present evidence of materials that are deemed admissible under the constitutional exception to MRE 412 is not unfettered and may be tempered by a military judge under MRE 403. See *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011); and *United States v. Smith*, 68 M.J. 445(C.A.A.F. 2010)

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ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 412 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 21 May 2014.

///IWR 21 May 2014///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel