

SVC Training Spreadsheet

1st SVC Resident Course 23 - 25 October 2013

Component Breakdown:	Air Force	1
	Army Active Duty	39
	Army National Guard	13
	Army Reserve	2
	Marine Corps	4
	Navy	1
	Total Students	60

SVC Distance Learning Course 1 - 16 December 2013

Component Breakdown:	Army Active Duty	20
	Army National Guard	7
	Army Reserve	3
	Total Students	30

2d SVC Resident Course 4 - 7 March 2014

Component Breakdown:	Air Force	14
	Army Active Duty	17
	Army National Guard	51
	Army Reserve	65
	Civilian	3
	Coast Guard	3
	Total Students	153

3d SVC Resident Course 18 - 22 August 2014

Component Breakdown:	Army Active Duty	47
	Army National Guard	8
	Army Reserve	17
	Coast Guard	9
	Marine Corps	1
	Navy	2
	Total Students	84

SVC Training TOTALS

Air Force	15
Army Active Duty	123
Army National Guard	79
Army Reserve	87
Civilian	3
Coast Guard	12
Marine Corps	5
Navy	3
GRAND TOTAL *	327

* The Grand Total of 327 represents personnel trained with TJAGLCS resources. An additional 21 AC JAs and 18 DA civilian attorneys were trained at the initial SVC course hosted in Seattle in September 2013.

Special Victims' Counsel Course (18–22 AUG 2014)

Grp/Individual Preparation

Lecture

Practical Exercise

Small GRP Breakout

Panel Discussion

Demo/Group Activity

TIME	MONDAY – 18AUG14	TUESDAY – 19AUG14	WEDNESDAY – 20AUG14	THURSDAY – 21AUG14	FRIDAY – 22AUG14
0800	Course Welcome & Intro <small>(0800 – 0830)</small>	Sexual Assault Offender Behavior	CID Interviews	SVC and the Victim: Introduction through Post-Trial SVC – TBD <small>(0800 – 0850)</small>	“Hello, my name is PV2 Vance and they told me to call you because I was raped.” <small>(0800 – 0850)</small>
0830	SVCP Background & Overview (SVC Roles, Responsibilities, Scope of Representation, & Resiliency)	Guest Speaker <small>(0800 – 0930)</small>	Special Agent in Charge TBD <small>(0800 – 0850)</small>	SVC Relationship Building CID, TC/DC, SARC Personnel SVC – TBD <small>(0900 – 0950)</small>	CID, TC, DC & You <small>(0900 – 0950)</small>
0900					
0930	Sexual Offenses Under the UCMJ Criminal Law Faculty <small>(1010 – 1100)</small>	Sexual Assault Victim Behavior	MRE 412/513/514 Criminal Law Faculty <small>(1000 – 1050)</small>	Guidance From the Bench	The CDR wants answers; the press wants a story <small>(0950 – 1020)</small>
1000					
1030	NDAAs Changes to the UCMJ & New Developments Criminal Law Faculty <small>(1110 – 1200)</small>	Guest Speaker <small>(0940 – 1030)</small> LECTURE <small>(1030 – 1040)</small> BREAK <small>(1050 – 1130)</small> LECTURE <small>(1130 – 1200)</small> DISCUSSION	Criminal Law Faculty <small>(1000 – 1050)</small>	Chief Trial Judge <small>(1100 – 1200)</small>	Post-Trial: Now what? <small>(1110 – 1200)</small>
1100					
1130	Lunch	Lunch	Lunch	Lunch	Lunch
1200	SVC Professional Responsibility & Potential Conflicts Criminal Law Faculty <small>(1330 – 1420)</small>	Victim Medical Issues in Sexual Crime Cases Legal Assistance <small>(1330 – 1420)</small>	Post-Trial Actions/Appeals Criminal Law Faculty <small>(1330 – 1500)</small>	SVC Round Table SVCs TBD <small>(1330 – 1500)</small>	SVCC Recap Final Questions/Concerns Closing Remarks
1330	SVC Information Sharing: Who Needs to Know What? TBD <small>(1430 – 1520)</small>	Victim Programs Legal Assistance <small>(1430 – 1520)</small>	Corrections, Clemency, and Parole (ACPB) <small>(1500 – 1550)</small>	SVC Client Round Table Clients TBD <small>(1500 – 1630)</small>	Outprocessing <small>(1330 – 1430)</small>
1430	Small Group Breakouts: Discussing SVCP Background, SVC Roles & Responsibilities, NDAAs Changes, Info Sharing, PR & Potential Conflicts	Victim Services Legal Assistance <small>(1530 – 1620)</small>	SPS: Draft Clemency Letter to GCMCA on behalf of Victim Materials to be provided <small>(1600 – 1650)</small>	Review Archie Case File in Preparation for SVC Day in the Life	
1500					
1530	ICE BREAKER (1700 - UTC)		Watch MRE 412 Hearing Video		
1600					
1630					
1700					
1730					



SVC Supervisor Training Schedule: 23-24 September 2014



TIME	TUESDAY 16 September 2014	WEDNESDAY 17 September 2014
0800	DJAG Welcome (DJAG)	Military Judge Expectations (Chief, Trial Judiciary)
0815		
0830		
0845	Overview (LA Policy)	SVP/TC Expectations (SVC Program)
0900		
0915		
0930		
0945	Client Roundtable (Video)	TDS Expectations & Collateral Misconduct (Defense Appellate Division)
1000		
1015		
1030		
1045	NDAAs Changes & New Developments (OTJAG Crim Law)	Child Victim Update (LA Policy)
1100		
1115		
1130		
1145	Lunch (On Your Own)	Lunch (On Your Own)
1200		
1215		
1230		
1245	Professional Responsibility (TJAGLCS Crim Law)	SJA Perspective (Senior Judge Advocate)
1300		
1315		
1330		
1345	MJ Overview (TJAGLCS Crim Law)	SVC Roundtable
1400		
1415		
1430		
1445	MRE 412/513/514 & Motions Practice (TJAGLCS Crim Law)	Chiefs of LA Roundtable/Discussion
1500		
1515		
1530		
1545	New Article 32 (TJAGLCS Crim Law)	Wrap Up / End of Course
1600		
1615		
1630		
1645		
1700		

Special Victims' Counsel CLE (12-14 May 2014)

Travel/
Personal Time

Lecture

Demo/Group
Activity

Breakout/
Panel

Specialized
Training

TIME	MONDAY – 12MAY14	TUESDAY – 13MAY14	WEDNESDAY – 14MAY14	12 – 14MAY14	15- 16MAY14		
0800	<p>Welcome General Officer</p> <p>SVC Program Manager Chief, LA Policy Overview</p> <p>Professional Responsibility TJAGLCS Crim Law</p> <p>Discussion: Policy Issues Facing SVC & Victims' Experience - 3-6 Breakout Groups each memorializing concerns/recommendations</p>	<p>Breakout with GOs/SGM/WO</p> <p>Victim Behavior Guest Speaker</p>	<p>RAND Personnel Conduct SVC BREAKOUT</p>	<p>RAND Personnel Conduct SVC Interviews for SVC Study during the entire conference 12-14 MAY 14</p>			
0830			<p>Lunch</p>			<p>SJA Pointers working with SVC s Senior Judge Advocate Criminal Law, OTJAG</p>	
0900						<p>Trial Judiciary</p>	
0930	<p>Lunch</p>						
1000	<p>Discussion: The MCM, Handbook, and other Authorities SVC Practice - 3-6 Breakout Groups each memorializing concerns/recommendations</p>	<p>MEB/PEB for Victims of Sexual Assault/MST Specifically</p>					
1030	<p>Break to Review Combined Breakout Work Product</p> <p>Large Group Discussion of Small-Group Recommendations: After reading the group reports what don't you like? What needs to be fleshed out more?</p>	<p>OCLL</p>	<p>SHARP: Briefing on program direction and changes + pot. disc. of VA field experiences</p>				
1100		<p>TDS</p>					
1130		<p>CID</p>	<p>Closing Remarks</p>				
1200	<p>ICE BREAKER</p>						

- Professor, Chair, Criminal Law
- Vice Chair/Assoc. Professor, Criminal Law
- Assoc. Professor, Criminal Law
- Chief Justice, Fort Polk, LA
- Assoc. Professor, Criminal Law
- Victim Counsel, USAF/CLSV
- Special Victim Advocate Program Manager
- Assoc. Professor, Criminal Law
- Assoc. Professor, Criminal Law
- Chairman, ACPB and Director, Support Staff, Army Review Boards Agency
- Victim Services Division, Texas Department of Criminal Justice
- Chief, Legal Assistance Policy Division
- SANE, Forensic Examiner
- Deputy Commanding General (Support), United States Army Reserve Command
- Commander, United States Army Reserve Legal Command
- U.S. Army Chief Trial Judge
- Assoc. Professor, Criminal Law
- Special Victim Counsel, XVIII Airborne Corps and Fort Bragg
- Special Victim Counsel for the Military
- District of Washington/National Capitol Region
- Chief, Client Services, OSJA
- Assoc. Professor, Criminal Law
- Assoc. Professor, Criminal Law
- Chief, Behavioral Sciences, Education & Training Division, U. S. Army Military Police School
- Supervisory Special Agent, CID
- Deputy, TCAP
- Director, Advocacy Training Programs, CLD, OTJAG
- Special Victims Counsel, Fort McNair
- Trial Counsel, Fort Huachuca, Arizona
- Special Victim Counsel & Legal Assistance Attorney, Fort Irwin, CA
- Special Victim Counsel & Legal Assistance Attorney, Fort Wainwright, AK
- Assoc. Professor, Criminal Law
- Research Director, End Violence Against Women International
- Special Victim Counsel, Wheeler AAF, HI
- Assoc. Professor, Criminal Law
- Assoc. Professor, Criminal Law
- Chief, TCAP
- Special Victim Counsel, Fort Carson, CO
- Chief, Client Services/Legal Assistance, Fort Stewart, GA
- Deputy, DCAP

THE JUDGE ADVOCATE GENERAL'S SCHOOL, U. S. ARMY
Charlottesville, Virginia 22903-1781

PROGRAM OF INSTRUCTION
For

5F-F35
SPECIAL VICTIMS' COUNSEL COURSE

Classes: 003

Length: Peacetime: 1 Week – 5 Days

Approved in accordance with
AR 350-1 paragraph 2-47c., 18 December 2009;
RAR001, 4 August 2011 by:


JAMES F. GARRETT
COL, JA
Dean

SECTION I - PREFACE

- A. **Course:** Special Victims' Counsel Course (SVCC), 5F-F35.
- B. **Purpose:** This course prepares judge advocates to effectively serve as Special Victims' Counsel (SVC) when appointed. Core instruction provides a program and policy overview before focusing on the roles, relationships, and professional responsibilities of SVCs throughout sexual assault cases, to include post-trial matters. Special emphasis is placed upon substantive military law directly related to Special Victim crimes as well as instruction on victim behavior, services, and medical issues. Guest lecturers discuss counseling techniques and judge advocates offer practical insight into the SVC Program (SVCP). Participation in practical scenario-driven exercises is a substantial portion of the course.
- C. **Prerequisites:** This course is limited to judge advocates selected to become SVCs. Pursuant to TJAG Sends (dated 1 Nov 13), if at all practicable, selected SVCs should have trial experience.
- D. **Security Clearance required:** None.
- E. **Length:** Peacetime Mobilization
 1 Week – 5 Days None
- F. **Training Location:** The Judge Advocate General's Legal Center & School, U. S. Army, Charlottesville, Virginia 22903-1781
- G. **MOS Feeder Patterns:** None.
- H. **Ammunition Requirements:** No ammunition required.
- I. **Selected Training Recapitulation:** Not applicable.
- J. **Standardization of Prefix Digit 5 Training:** Not applicable.

SECTION II - SUMMARY

Course – Special Victims’ Counsel Course (SVCC), 5F-F35

Total Required Hours: 1 Week – 5 Days, 35 hours; Total Academic Hours: 33.5 Hours

	Hours	Annex	Page
A. Academic Subjects			
SVC Overview & Administrative Topics	6.0	A	A-1
SVC & Military Justice Process	17.5	B	B-1
Victim Focus	10.0	C	C-1
Subtotal (required)	33.5		

B. Non-Academic Subjects	
In-Processing & Orientation	1.0
Out-Processing	0.5
Subtotal	1.5
TOTAL (Required)	35.00

		Hours
C. Recapitulation of Academic Subjects		
1. Security Classification		
	Secret	0.0
	Confidential	0.0
	Unclassified	35.0
	TOTAL	
2. Type of Instruction		
	Lecture (LE)	21
	Seminar (SE)	0.0
	Practical Exercise (PE)	1.0
	Panel Discussion	3.0
	Optional Lecture (LE) – PR	0.0
	Small Group Instruction (SG)	6.5
	Self-Study (SS)	0.0
	Critique / After-Action Review (AR)	0.0
	Demonstration (DM)	2.0
	Test Review (TR)	0.0
	Test / Assessment (TE)	0.0
	TOTAL HOURS OFFERED DURING COURSE¹	33.5

¹ This includes all hours taught by our faculty, including ALL required and optional elective offerings.

SECTION III - ANNEXES

ANNEX A - SVC OVERVIEW

Purpose: Students will understand the policies and procedures under which they are appointed to zealously represent the victim's best interests throughout the military process.

INSTRUCTION

Overview	Hours	Classification	Type of Instruction
	4.5	U	Lecture (LE)
	0	U	Seminar (SE)
	0	U	Practical Exercise (PE)
	0	U	Panel Discussion (PD)
	1.5	U	Small Group Instruction (SG)
	0	U	Self-Study (SS)
	0	U	Critique / After-Action Review (AR)
	0	U	Demonstration (DM)
	0	U	Test Review (TR)
	0	U	Test / Assessment (TE)
Totals	6.0	U	

	Hours	Classification	Type of Instruction
SVC Background & Overview	1.5	U	LE

Objective: Students will understand the policy background and subsequent implementation of the SVC Program. Students will also understand the establishment of initial procedural rules and guidelines for the practicing SVC and contained in the SVC Handbook. Additionally, students will learn their roles, responsibilities, scope of representation as SVCs that will enable them to provide legal assistance to victims in order to allow full participation in applicable programs and services and the military justice process.

References: SVC Handbook.

	Hours	Classification	Type of Instruction
NDAA's Changes to the UCMJ & New Developments	1.0	U	LE

Objective: Students will understand the expectations and limitations of the SVC pursuant to the National Defense Authorization Act. Instructors from both Criminal Law and Administrative Law will provide joint guidance on the NDAA's requirements.

References: SVC Handbook; AR 27-26.

	Hours	Classification	Type of Instruction
SVC Professional Responsibility & Potential Conflicts	1.0	U	LE

Objective: Students will understand and identify fundamental professional responsibility, ethical issues, and potential conflicts unique to the SVC Program. Additionally, students will understand that at all times, an SVC must act in accordance with Army Regulation 27-26, Rules of Professional Conduct for

Lawyers, the rules of conduct of their particular State bar, and the high ethical standards of an Army Officer.

References: UCMJ; MCM; selected cases.

	Hours	Classification	Type of Instruction
SVC Information Sharing: Who Needs to Know What?	1.0	U	LE

Objective: Students will understand the SVCs requirement to serve the SJA, Chief of Military Justice, Senior Defense Counsel (SDC), CID, the victim's commander, and SARC/VA/FAP with a notice of representation. Beyond the initial notice of representation, students will understand what information may and/or must be shared and who that information may and/or must be shared with pursuant to Army Regulation 27-26, Rules of Professional Conduct for Lawyers, the rules of conduct of their particular State bar, and the high ethical standards of an Army Officer.

References: SVC Handbook; AR 27-26.

	Hours	Classification	Type of Instruction
SVCP Overview, Scope of Representation, & Professional Responsibility	1.5	U	SG

Objective: Students will participate in small group discussions and Q&A concerning the SVCP background/overview as well as professional responsibility and ethical issues confronting the SVC.

References: SVC Handbook.

ANNEX B – SVC & MILITARY JUSTICE PROCESS

Purpose: To ensure that students understand the military laws and regulations that SVCs must act in accordance with while zealously representing the victim’s best interests.

INSTRUCTION:

Overview	Hours	Classification	Type of Instruction
	8.5	U	Lecture (LE)
	0	U	Seminar (SE)
	1.0	U	Practical Exercise (PE)
	3.0	U	Panel Discussion (PD)
	4.0	U	Small Group Instruction (SG)
	0	U	Self-Study (SS)
	0	U	Critique / After-Action Review (AR)
	1.0	U	Demonstration (DM)
	0	U	Test Review (TR)
	0	U	Test / Assessment (TE)
Totals	17.50	U	

	Hours	Classification	Type of Instruction
Sexual Offenses Under the UCMJ	1.0	U	LE

Objective: Students will understand the punitive articles criminalizing sexual offenses under the UCMJ. Additionally, students will understand that to be eligible for SVC assistance, an individual must be the victim of a sexual assault under the UCMJ, including rape, sexual assault, forcible sodomy, and other unwanted sexual contact that is aggravated, or wrongful, and attempts to commit these offenses, which are crimes in violation of Articles 120, 125, and 80, respectively (including previous versions of UCMJ, Article 120).

References: MCM Part IV (Article 120).

	Hours	Classification	Type of Instruction
MRE 412/513/514	1.0	U	LE

Objective: Students will understand the use and application of Military Rules of Evidence (MRE) 412, 513, and 514 in the litigation process. Students will also understand *U.S. v Kastenberg*, 72 MJ 364 (C.A.A.F. 2013) as it applies to victims, who are represented by a uniformed SVC, being non-parties to a court-martial under RCM 103. MREs 412, 513, and 514 afford victims reasonable opportunity to attend and be heard at hearings where argument and presentation of evidence by their SVC or civilian counsel is permitted.

References: MRE 412, 513, and 514; *U.S. v Kastenberg*.

	Hours	Classification	Type of Instruction
The New Article 32	1.0	U	LE

Objective: Students will understand the impact of the 2014 NDAA’s Article 32 Reform Act, which fundamentally reforms how preliminary hearings are conducted in sexual assault cases. Students will also understand the SVC client’s rights regarding Article 32s and how MREs 412, 513, and 514 apply.

References: NDAA 2014.

	Hours	Classification	Type of Instruction
Post-Trial Actions/Appeals	1.5	U	LE

Objective: Students will understand court-martial sentencing proceedings and authorized punishments under RCM 1001. Students will also understand the basic post-trial process and the appellate process.

References: RCM 1001-1003; RCM 1101-1107.

	Hours	Classification	Type of Instruction
Corrections, Clemency, and Parole	1.0	U	LE

Objective: Students will understand the clemency and parole process. Students will also understand the role of the SVC in assisting the victim with submitting matters relating to the accused’s post-trial requests.

	Hours	Classification	Type of Instruction
Letter to GCMCA	1.0	U	PE

Objective: By drafting a letter to the GCMCA on behalf of the victim relating to clemency matters, students will understand their post-trial roles and responsibilities.

References: Materials to be provided.

	Hours	Classification	Type of Instruction
SVC and the Victim: Intro through Post-Trial	1.0	U	LE

Objective: Students will receive practical and valuable insight from judge advocates, who have served/are serving as SVCs, on their best practices to conduct initial interviews with victims as well as work with them throughout the military justice process.

References: Materials to be provided.

	Hours	Classification	Type of Instruction
SVC Relationship Building	1.0	U	LE

Objective: Students will receive practical and valuable insight from judge advocates, who have served/are serving as SVCs, on their best practices for relationship-building with CID, Trial Counsel, Defense Counsel, OSJA leadership, and the Sexual Assault Response Community

References: Materials to be provided.

	Hours	Classification	Type of Instruction
SVC Interaction	1.0	U	DM

Objective: Students will receive a live demonstration from judge advocates, who have served/are serving as SVCs, on how to interact with victims as well as CID, Trial Counsel, and Defense Counsel.

References: Materials to be provided.

	Hours	Classification	Type of Instruction
Guidance from the Bench	1.0	U	LE

Objective: Students will receive practical and valuable insight about the SVC Program from the chief trial judge's perspective.

References: Selected Materials.

	Hours	Classification	Type of Instruction
SVC Round Table	1.5	U	PD

Objective: Students will engage practicing SVCs in a round table discussion to elicit insights on the SVC Program's successes and needs for improvement.

References: Selected Materials.

	Hours	Classification	Type of Instruction
SVC Client Round Table	1.5	U	PD

Objective: Students will engage former SVC Clients (Sexual Assault Victims) in a round table discussion to elicit insights on the SVC Program's successes and needs for improvement.

References: Selected Materials.

	Hours	Classification	Type of Instruction
SVCs: A Day in the Life	4.0	U	SG

Objective: By physically moving through different phases designed to replicate the representation of a sexual assault victim throughout the post-event process, students will actively participate in small group discussions and Q & A scenarios in order to provide a capstone event to the instruction received during the week.

References: *U.S. v. Archie* case file.

ANNEX C – VICTIM FOCUS

Purpose: To further the student's appreciation of the role and responsibilities of the military judge.

INSTRUCTION:

Overview	Hours	Classification	Type of Instruction
	8.0	U	Lecture (LE)
	0	U	Seminar (SE)
	0	U	Practical Exercise (PE)
	1.0	U	Small Group Instruction (SG)
	0	U	Self-Study (SS)
	0	U	Critique / After-Action Review (AR)
	1.0	U	Demonstration (DM)
	0	U	Test Review (TR)
	0	U	Test / Assessment (TE)
Totals	10.00	U	

	Hours	Classification	Type of Instruction
Victim Behavior and Offender Behavior	4.0	U	LE

Objective: Students will learn the psychology of sexual assault victims and offenders thereby gaining a better understanding of how to communicate with victims and deal with issues such as the victim's reluctance to participate in military justice actions.

References: Selected Materials.

	Hours	Classification	Type of Instruction
Victim Medical Issues in Sexual Crime Cases	1.0	U	LE

Objective: Students will understand the role of the Sexual Assault Forensic Medical Examiner (SAFME) and the medical aspects and terminology related to sexual assault cases. Students will also understand the Sexual Assault Forensic Examination (SAFE) kit and related documentation.

References: Selected Materials.

	Hours	Classification	Type of Instruction
Victim Programs and Services I and II	2.0	U	LE

Objective: Students will understand Sexual Harassment/Assault Response Program (SHARP) policies and procedures. Students will also understand the Victim Witness Assistance Program (VWAP) and Family Advocacy Program (FAP) policies and procedures.

References: Selected materials.

	Hours	Classification	Type of Instruction
SVC Program: More Than Military Justice	1.0	U	SG

Objective: Following multiple lectures relative to providing services to victims of sexual assault outside of the military justice process, students will engage in small group discussions about their role in ensuring their clients receive the full extent of services available to them.

References: Selected materials.

	Hours	Classification	Type of Instruction
CID Interviews	1.0	U	LE

Objective: Students will understand the approaches taken by CID agents when interviewing victims of sexual assault and how the SVC Program has impacted their ability to interact with the victim.

References: Selected Materials.

	Hours	Classification	Type of Instruction
CID Interview Demonstration	1.0	U	DM

Objective: Students will see a live demonstration of a victim being interviewed by CID, which will provide them with a practical understanding of the issues that are presented during this vital part of the military justice process.

References: Selected Materials.

MRE 412-414



Purpose



Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults.

Purpose



In replacing the unusually extensive rule found in Para. 153 b (2)(b), MCM, 1969 (Rev.), which permits evidence of the victim's "unchaste" character regardless of whether he or she has testified, the Rule will significantly change prior military practice and will restrict defense evidence.

Drafter's Analysis



“After hearing all relevant evidence, the military judge should carefully tailor an order that **protects both the alleged victim's privacy** interests and the accused's constitutional rights . . .

bearing

in mind that the alleged victim's privacy interests cannot preclude the admission of constitutionally required evidence.

MRE Comparison

Bias for Admissibility?

Rules of Exclusion	Rules of Limitation	Rules of Inclusion	Rules of Super-Inclusion
Excluding unless...	Limiting purpose...	Favoring admission...	Admitting unless unconstitutional
412	403 (?), 404, 405, 406, 407, 408, 409, 410, 411	401 402 403 (?)	413 414

MRE 412



- Applies to all phases of the proceedings (and to all parties);
- Notice required:
 - 5 days prior to pleas (or whenever the judge says);
 - Sent to MJ, opposing counsel, victim (advocate);
- Offer of proof: closed hearing
- Trumps other rules?
 - Yes (i.e. RCM 1001)
 - see *US v Fox*, 24 MJ 110 (CMA 1987)



Three exceptions

MRE 412

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

U.S. v. Banker, 60 MJ 216 (CAAF, 2004)

- 34 y.o. accused engaged in sexual contact with 14 y.o. babysitter;
- Babysitter testified “I thought it was a consensual relationship.”
- Contact continued for 4 years;
- Victim terminated relationship after seeing movie depicting obsession with “getting [females’] virginity.”
- Accused claimed consensual contact, and that MRE 412 didn’t apply to consensual relationships.

HELD: MRE 412 is not limited to nonconsensual sexual offenses, but applies to proceedings involving alleged sexual misconduct.

U.S. v. Banker, 60 MJ 216 (CAAF, 2004)



As a result, when balancing the probative value of the evidence against the danger of unfair prejudice under M.R.E. 412, the military judge must consider not only the M.R.E. 403 factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, but also prejudice to the victim's legitimate privacy interest.



Send Save Now Discard

To:

Subject:

B I U F T                          

Dear Sally,

Guess what Jimmy and I did last night?

**Hugs,
Victim**

U.S. v. Gaddis, 70 M. J. 248 (CAAF, 2011)

- Accused argues that MRE 412 is unconstitutional on its face “because it presumes the exclusion of evidence which is constitutionally required” under 5A and 6A rights to fair trial and confrontation, respectively.
- Alleges MJ could first find that it’s constitutionally required, then balance it away.

HELD: M.R.E. 412 cannot limit introduction of evidence required by the Constitution—although the text of the rule seems to permit such a limitation.

U.S. v. Gaddis, 70 M. J. 248 (CAAF, 2011)

- If after application of **MRE 403** factors the MJ determines that the probative value of the proffered evidence outweighs the danger of unfair prejudice, it is admissible **no matter how embarrassing it might be to the alleged victim.** (*Gaddis*, at 256)
- “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...—is simply wrong.” (*Gaddis*, 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: see previous box
- 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

**Rule 412: Sex offense cases:
The victim's sexual behavior
or predisposition**

NOT ADMISSIBLE

Unless one of
these exceptions
applies:

1

AND

The proponent
files/serves a written
motion before trial

2

AND

The MJ holds a
hearing

3

AND

The MJ finds
relevance > prejudice
to victim's privacy

4

Rule 412(b)(1)(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;

OR

Rule 412(b)(1)(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;

OR

Rule 412(b)(1)(C): evidence the exclusion of which would violate the constitutional rights of the accused

...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 MRE 403.

U.S. v. Gaddis, 70 M. J. 248
(CAAF, 2011)

Meet 403 balancing?

If so, then it's admissible no matter how embarrassing it might be to the alleged victim





All in?

Van Arsdall factors...
The MJ can impose “reasonable limits”



“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



“Generally speaking, 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.”

Deleware v. Fensterer, 474 U.S. 15, 20 (1985)

MRE 303 – No degrading questions;

MRE 403 – Exclusion of relevant evidence (prejudice, confusion, or waste of time);

MRE 412 – Sexual behavior and predisposition of victims;

MRE 607/8 – Impeachment and limits on forms of proof;

MRE 611 – MJ control over mode and order of interrogation;

MRE 613 – Prior statements of witnesses.



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

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

Individual Interests

**Constitutional
Right to
Confrontation**

State Interests

- Harassment
- Prejudice
- Confusion of Issues
- Witness Safety
- Repetition
- Marginal Relevancy



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

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

Individual Interests

Constitutional
Right to
Confrontation

State Interests

Protecting
anonymity of
juvenile witnesses
Privacy of sexual
assault victims
(M.R.E. 112)



U.S. v. Ellerbrock, 70 M. J. 314 (CAAF, 2011)

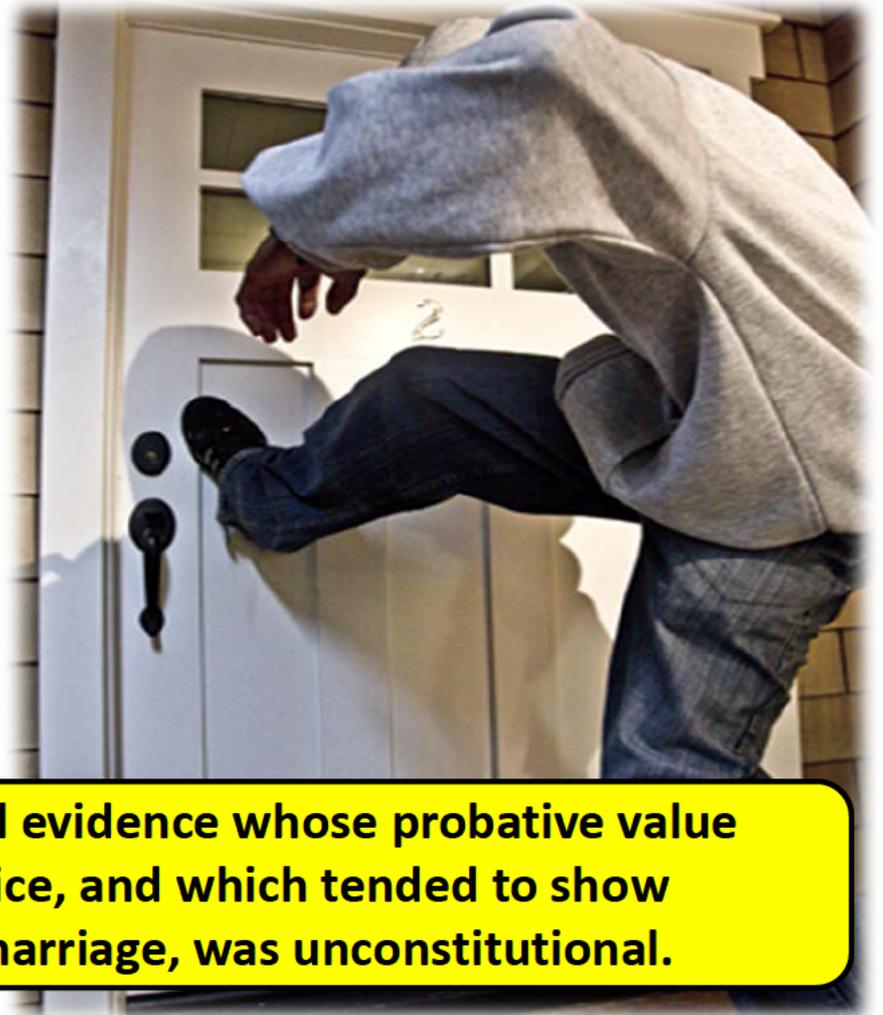
- **Mixed pleas case;**
- **Contested Art's 120 and 125 by force;**
- **Victim had some liquor, Xanax, Effexor;**
- **Eyewitnesses to sex acts differ in estimation of victim's level of intoxication;**
- **"I can't believe I did that," and "I feel horrible."**
- **Accused moved under MRE 412 to include evidence of victim's prior extramarital affair to support theory that victim had motive to lie in order to protect her marriage;**
- **MJ rules evidence is inadmissible.**



U.S. v. Ellerbrock, 70 M. J. 314
(CAAF, 2011)

“It is a fair inference that a second consensual sexual event outside a marriage would be more damaging to a marriage than would a single event”

HELD: Exclusion of relevant and material evidence whose probative value outweighed the danger of unfair prejudice, and which tended to show motive to fabricate in order to protect marriage, was unconstitutional.



U.S. v. Key, 71 MJ 566 (NMCCA, 2012)

- Another SM has sex with highly intoxicated victim, who is “fading” during sex;
- Accused has sex with victim shortly thereafter;
- Victim ultimately passes out;
- Victim has no recollection (BAC=0.285);
- Accused convicted of various offenses based on victim’s incapacitation;
- Alleges on appeal that MJ’s exclusion of victim’s speech while engaged in sex with other SM moments prior, and exclusion of prior affair under MRE 412, were improper.



U.S. v. Key, 71 MJ 566 (NMCCA, 2012)

- CAAF: It was error to exclude specific words spoken by victim to other SM shortly prior to acts with accused;
- Words spoken during sex with SM were “clearly material” to other charged offenses;
- Words also bear directly on victim’s capacity;
- Unlike *Ellerbock*, nothing suggested victim didn’t want her marriage to end—no unfair prejudice to privacy;
- Something in addition to affair must be present to create motive.

“While it may be a fair inference in some cases that a consensual event outside marriage could be damaging, and that a second might be more damaging than one, the record here does not support that fir this victim that inference held true.”
(Key, at 6)

When else might past behavior be admissible?

- When it comprises false allegations-see MCM discussion:

“Evidence of past false complaints of sexual offenses by an alleged victim of a sexual offense is not within the scope of this rule and is not objectionable when otherwise admissible.”

**Rule 412: Sex offense cases:
The victim's sexual behavior
or predisposition**

NOT ADMISSIBLE

1 Unless one of
these exceptions
applies:

AND

2 The proponent
files/serves a written
motion before trial

AND

3 The MJ holds a
hearing

AND

4 The MJ finds
relevance > prejudice
to victim's privacy

OR

Rule 412(b)(1)(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;

OR

Rule 412(b)(1)(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;

Rule 412(b)(1)(C): evidence the exclusion of which would violate the constitutional rights of the accused

...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 MRE 403.

More changes?

Current

(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.

Proposed

(3) Privacy. If the military judge determines that evidence the accused seeks to offer is relevant for a purpose under subdivision (b), ***the military judge must issue an order specifically identifying the evidence that may be offered and the areas about which the alleged victim may be examined or cross-examined.*** Such evidence remains subject to challenge under Mil. R. Evid. 403.



MRE 413

“The Reverse 404b/412 Rule of Super-Inclusion”

Similar Crimes in
Sex Assault Cases

Similar Crimes in
Sex Assault Cases

No conviction necessary

No charge necessary

No 404(b) factors

May be considered for its bearing on any
matter to which it is relevant

Similar Crimes in Sex Assault Cases

MRE 413

Table 1. Recidivism Rate by Type of Offense

Recidivism rate during three-year period

of custody following 1999

N = 1,788



WHY SHOULD AN SVC CARE ABOUT THIS?

Type of 1999 offense	Re-convicted (court)	Re-convicted (DPS)	Remands to custody (DOC)
Violent offenses	60 %	59 %	65 %
Public safety offenses	67	65	70
Sex offenses	39	36	63
Drug offenses	52	48	57
Driving offenses	61	59	73
Other offenses	62	63	66
Overall	59 %	57 %	66 %

MRE 413

Similar crimes in sexual offense cases

- (a) *Permitted Uses.* In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant.
- (b) *Disclosure to the Accused.* If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including any witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.
- (c) *Effect on Other Rules.* This rule does not limit the admission or consideration of evidence under any other rule.

MRE 413

Similar crimes in sexual offense cases

(d) *Definition.* As used in this rule, “sexual offense” means an offense punishable under the [UCMJ], or a crime under federal or state law...involving:

- (1) any conduct prohibited by Article 120;
- (2) any conduct prohibited by 18 U.S.C. chapter 109A;
- (3) contact, without consent, between any part of the accused’s body, or an object held or controlled by the accused, and another person’s genitals or anus;
- (4) contact, without consent, between the accused’s genitals or anus and any part of another person’s body;
- (5) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (6) an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)-(5).

MRE 413

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- (4) contact, without consent, between the accused’s genitals or anus and any part of another person’s body;
- (5) **contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person;** or
- (6) an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)-(5).

Similar Crimes in Child Molestation Cases

MRE 414



MRE 414

Similar crimes in child molestation cases

- (a) *Permitted Uses.* In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation. The evidence may be considered on any matter to which it is relevant.
- (b) *Disclosure to the Accused.* If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.
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MRE 414

Similar crimes in child molestation cases

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- (b) *Disclosure to the Accused.* If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.

- (c) *Effect on Other Rules.* This rule does not limit the admission or consideration of evidence under any other rule.

MRE 414

Similar crimes in child molestation cases

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

(1) “Child” means a person below the age of 16; and

(2) “Child molestation” means an offense punishable under the Uniform Code of Military Justice, or a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513), that involves:

(A) any conduct prohibited by Article 120 and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(C) any conduct prohibited by 18 U.S.C. chapter 110;

(D) contact between any part of the accused’s body, or an object held or controlled by the accused, and a child’s genitals or anus;

(E) contact between the accused’s genitals or anus and any part of a child’s body;

(F) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(G) an attempt or conspiracy to engage in conduct described in subdivisions

(d)(2)(A) (F).

U.S. v. Wright, 53 MJ 476 (CAAF, 2000)

- Accused charged with indecent assaults on separate occasions-pleads G to one, NG to the other;
- Gov't seeks to admit evidence of assault #2 in order to prove up assault #1;
- Defense concedes admissibility under 404(b) to prove *intent*, but TC sought admissibility under 413 because the other offense was charged;
- Accused convicted-argues on appeal that 413 is unconstitutional on its face and as applied.



HELD: Constitutional. 413 still requires 403 balancing; only permits evidence of serious offenses, still requires relevance under 401 and 402; proof by a preponderance; and 413 has internal safeguards.

U.S. v. Solomon, 72 MJ 176 (CAAF 2013)

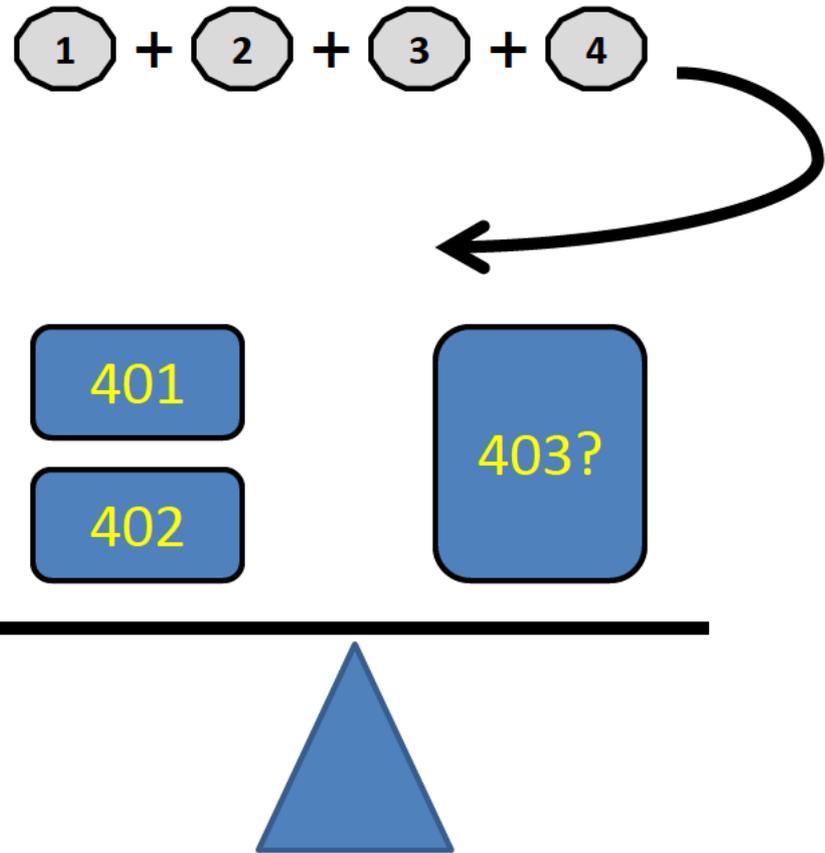
- Another mixed pleas case:
 - ❑ G to orders violation and wrongful use of a controlled substance;
 - ❑ NG (but found G of) abusive sexual contact, indecent conduct, drunk & disorderly, and obstructing justice.
- V awoke to find his pants/underwear around ankles and ACC lying atop him naked. V tells ACC to get off, confronts; ACC has pictures of V's genitals on cell phone.
- G offered evidence of prior incidents under 413 (or, in alternative, under 404(b)) from prior incident for which ACC had alibi, and which resulted in acquittal at GCM;
- NMCCA affirms; sets aside 134 x 2 and reassessed @ 4 years.

HELD: The MJ abused his discretion because the MJ “completely failed” to reconcile alibi evidence and gave little/no weight to the prior acquittal.

U.S. v. Solomon, 72 MJ 176 (CAAF 2013)

Three requirements:

1. The accused must be charged with SA offense;
2. Proffered evidence must relate to accused's commission of another SA offense;
3. Must be relevant under MRE 401 and 402.



U.S. v. Solomon, 72 MJ 176 (CAAF 2013)

“The [MJ] should consider the following non-exhaustive factors to determine whether probative value is substantially outweighed by the danger of unfair prejudice:”

-  1. Strength of proof of prior act
2. Probative weight of evidence
3. Potential for less prejudicial evidence
4. Distraction to the fact finder
5. Time needed for proof of the prior conduct
6. Temporal proximity
7. Frequency of the acts
8. Presence of lack of intervening circumstances
9. Relationship between the parties

U.S. v. Conrady, 69 MJ 714 (A.C.C.A. 2011)

- ACC charged with several sex crimes against nearly every child in the home (2 stepdaughters, 1 biological son, 1 biological daughter).
- ACC had CM conviction for receipt/possession of child pornography. During the post trial phase of the CP case, the molestation victims came forward.
- Gov't sought to admit several items from the previous CM, including sworn statements and images of CP.
- The MJ admitted them under 414 (d)(1)(2) which required physical presence of a child.
- ROT from CP conviction shows ACC says he derived gratification from this image.

U.S. v. Conrady, 69 MJ 714 (A.C.C.A. 2011)

When is child pornography child molestation?

CAAF previously held, under MRE 414 (d)(1) and (2), prior offense must be in the presence of a child to qualify (*Yammine*, 69 MJ at 76)

Right ruling, wrong subsection.

MRE 414 (d)(5) does not include sexual contact, so no presence required; requires gratification/pleasure from infliction of pain on a child.

HELD: Possession of an image of child pornography depicting physical pain may qualify as an offense of child molestation.

MRE Comparison

Bias for Admissibility?

Rules of Exclusion	Rules of Limitation	Rules of Inclusion	Rules of Super-Inclusion
Excluding unless...	Limiting purpose...	Favoring admission...	Admitting unless unconstitutional
412 513 514	403 (?), 404, 405, 406, 407, 408, 409, 410, 411	401 402 403 (?)	413 414

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.

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.

(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.

Constitutionally required?

1.Relevant: (MRE 401);

2.Material: Importance in relation to other issues; extent in dispute; nature of other evidence on this issue.

3.Favorable to Accused: 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 properly excluded by MRE 403.

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

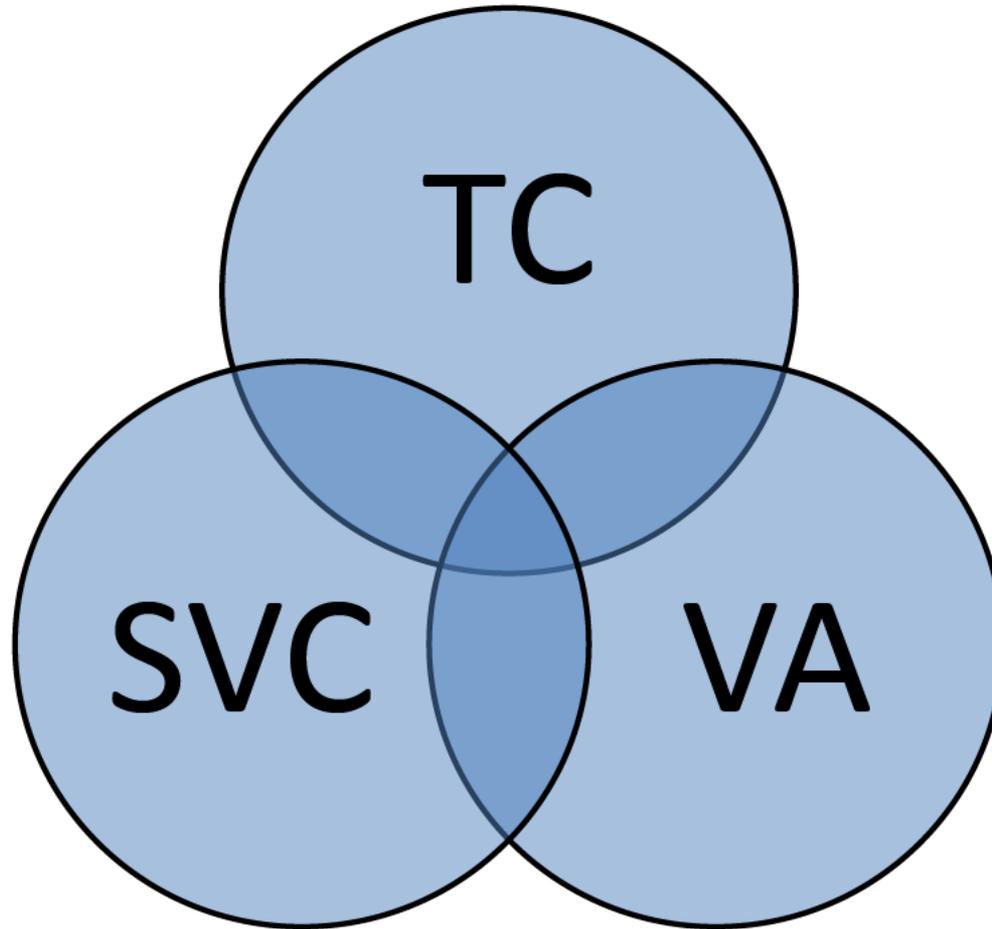
(6) when admission or disclosure of a communication is constitutionally required.

MRE 514 Victim Advocate – Victim Privilege

1. Facilitating advice or supportive assistance
2. Not intended to be disclosed other than . . .
3. Constitutionally Required

Exceptions under MRE 513 and 514 are strikingly similar-look to MRE 513 for procedural guidance, intent on exceptions, and requirements for *in camera* review.

So how do you do this?



Critical Points of Focus for SVC

SVC Handbook, para. 4-1

The Government, through VWL or other representative, will

Consult

1. Preferral decision;
2. Dismissal of charges;
3. Pretrial restraint or confinement, especially potential release;
4. PTA negotiations, including PTA terms;
5. Plea negotiations;
6. Separations and/or resignations in lieu of trial;
7. Schedule of judicial proceedings where victim is required or entitled to attend.

Notify

1. Status of investigation
2. Apprehension of ACC
3. Preferral decision
4. ACC initial appearance at PTC hearing or Art 32
5. Proceedings schedule
6. ACC detention/release
7. Acceptance of plea or verdict after trial
8. Opportunity to consult with TC re: evidence in aggravation
9. Results of trial/disposition
10. Probable date of release
11. General information on corrections, parole, etc.
12. Right to request notice of clemency matters
13. How to submit impact statement to Clemency & Parole Board

Inform

1. Formally inform victim regarding post-trial procedures, and the right to be notified if the offender's confinement or parole status changes, and when the offender will be considered for parole or clemency by providing victim with DD Form 2703
2. Ensure victim's election regarding notification is recorded on DD Form 2704, **in every case, regardless of election.** One copy of DD Form 2704 will be given to the victim; one copy forwarded to Army Corrections Command.

NEW!



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

- **Special Victim Counsel Requests to be Heard**
- **Denied by Military Judge – finds no standing**
- **AFCCA says no jurisdiction**
- **AFTJAG certifies questions to CAAF**



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

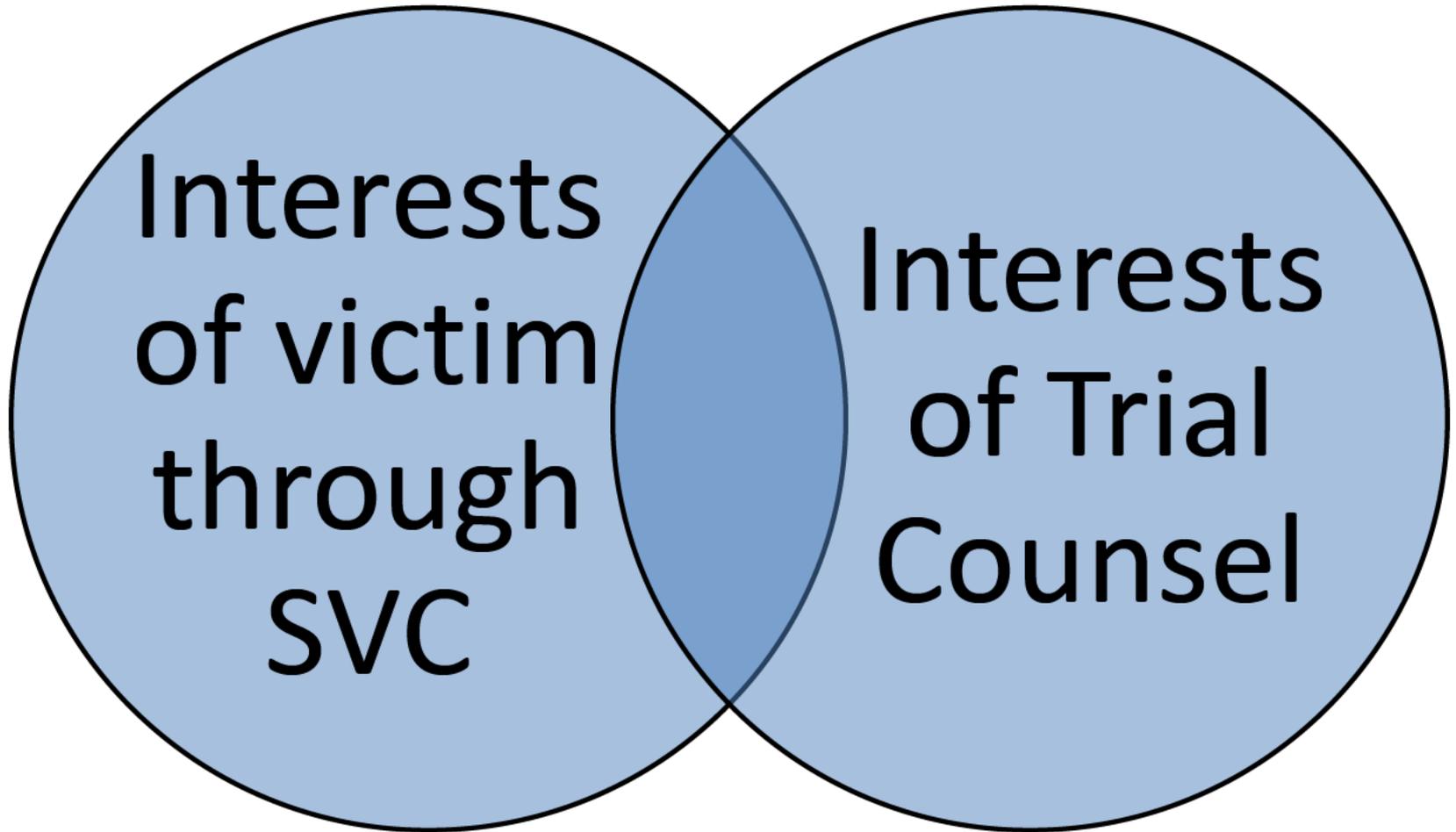
1. CAAF says:

- A. YES to standing
- B. YES to opportunity to be heard
- C. MJ may apply reasonable limitations

2. Limitations:

- A. RCM 801(a)(3) - exercise Reasonable control over proceedings;
- B. Restrict victims and patients to written submissions;
- C. 412 and 513 do not create right to representation for victims not already represented (which means...?)
- D. No right to appeal adverse evidentiary ruling

Alignment



APPENDIX A

UNITED STATES OF AMERICA

v.

NAME,
RANK, U.S. Army
UNIT

)
)
)
)
)
)
)

ELECTRONIC DOCKET REQUEST

(AR 27-10)

SECTION A

(To be completed by Trial Counsel and delivered to Defense Counsel **before 1500 hours on the first duty day after referral** of charges to trial.)

1. Type of court-martial: GCM: BCD: SPCM:

2. Date charges referred to trial:

3. Date referred charges served upon the accused:

4. Accused (has) (has not) been in pretrial confinement since:

5. Date referred charges provided to defense counsel:

6. The prosecution will be ready for trial on and after:

7. The military judge should consider the following matters when setting a trial date: [ANY restraint other than pretrial confinement should be noted.]

8. Companion case(s):

9. Special Victim Counsel (Name, phone, and email address):

10. Trial Counsel (Name, phone, and e-mail address):

11. Date:

RULE 2.3: Special Victim Counsel (SVC) Requirements.

RULE 2.3.1: Applicability. As stated in the Preamble, **the Rules of Court apply to all counsel practicing before Army courts-martial. Accordingly, notwithstanding references to "both parties", "counsel for both sides", "party" or words to that effect, all Rules of Court apply to SVCs** (whether military or civilian counsel representing victims), including but not limited to the rules on motions practice in Rule 3. Upon assuming representation, SVCs will provide contact information to the trial counsel for inclusion on the Electronic Docket Request (Appendix A).

Be Prepared To:

1. Articulate to the MJ an authoritative basis for your requested course of action or remedy;
2. Identify specific and discrete factors which militate in favor of your client's protected privacy interest;
3. Use procedure to further your client's interests (701, etc.);
4. Draft original motions;
5. Collaborate with the MJ and parties on the best approach for getting your representation into the record.

Discussion Questions

PVT Vance is preparing to testify at the Article 32 hearing. She is concerned about questions concerning her boyfriend and PFC Maroney. She asks you whether these questions can be asked and, if so, can you be there to intervene, if necessary?

(i) Military Rules of Evidence. The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, **412(a)** and Section V—shall not apply in pretrial investigations under this rule.

Defense Counsel files a motion under MRE 412. How do you proceed with the court and Government Counsel?

Meet with client. Discuss and determine her position/best interests.

Meet with government counsel and identify which areas your client's interest are aligned with the government and those that are not.

File written submissions with the court (motions).

Seek argument on those where your client's interests are not aligned with the government.

Present evidence on those issues.

Argument and evidence does not preclude your client from being heard

Less limitation under RCM 801 when interests are not aligned.

Your client has information she wants to offer at the MRE 412 hearing. Neither the Defense or Government Counsel has listed her as a witness for the hearing. How do you proceed as her SVA?

Identify what her interests are in the hearing.

Law recognizes difference between testifying and “opportunity to be heard.”

Notify court and parties of your intent to present evidence and/or argument.

Unsworn capacity. Avoid cross-examination.

More limitations under RCM 801 if other interests are aligned with government—will not impact victim’s ability to make a statement.

The courtroom post-*Kastenberg*—what to expect.

Interests are entirely aligned with the government on 412, 513 or 514.

Court may limit SVA to written submissions, using RCM 801 (separate from victim being heard)

Court may ask “do you have anything to add beyond the arguments of trial counsel in relation to other evidence sought to be admitted.”

Court could allow presentation of evidence and argument even if interests are aligned.

The courtroom post-*Kastenberg*—what to expect.

Interests are not entirely aligned with the government on 412, 513 or 514.

Written submissions

Court may ask “do you have anything to add beyond the arguments of trial counsel in relation to other evidence sought to be admitted.” This would begin your presentation of evidence (witnesses).

Court can allow presentation of evidence and argument AND the victim an opportunity to be heard (if she was not a witness).

Questions

**NDAA CHANGES TO THE UCMJ
AND
MILITARY JUSTICE NEW DEVELOPMENTS**

Victim Rights

THE LAW

Reporting

Article 32

Post-Trial Actions

Post-trial

§1711 – Prevention of entry into service of convicted sex offenders	§1722 – Shortened RSP deadline	§1725 – Min. requirements for SAPR personnel
§1746 – Service Academy initial SAPR training	§1731 – Additional RSP duties	§1725 – SANE availability at MTFs
§1741 – Report to Congress on need for specific UCMJ article regarding prohibited relationships with recruits and trainees		§1733 – Review of SAPR training
§1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)		§1726 – Added DOD SAPRO responsibilities
§1734 – SecDef review of retention of, and access to, evidence and records relating to sexual assault	§1721 – Verification of command climate surveys	§1735 – SecDef review of how sexual harassment is handled (EO vs. SAPRO?)
§1701 – Add Crime Victims’ Rights Act to UCMJ	§1704 – DC must go through TC to interview victim	§1716 – Special Victims Counsel requirement
§1701 – Crime Victims’ Rights Act implementing regulations	§1703 – Eliminate SOL for sexual assault and sexual assault of a child	§1707 – Repeal of consensual sodomy
§1724 – NG & Reserve access to SARCs	§1751 – Sense of Congress on command climate free of retaliation for allegations of sexual assault	
§1712 – Expedited transfer for USCG	§1715 – IG investigation of retaliation claims in sexual assault and sexual harassment cases	
§1743 – SecDef policy on use of 8-day incident report for alleged sexual assaults	§1714 – Expanded whistleblower protection (e.g., broadens unfavorable personnel actions and covered communications)	
§1713 – Guidance on transfer of an accused following an allegation of sexual assault	§1709 – Service regulations to prohibit retaliation against members who report a criminal offense	
§1723 – 50 year retention of restricted reports	§1709 – Report due on establishing a new punitive article for retaliation offenses	
§1732 – SecDef review of MCIO investigative practices	§1742 – Immediate referral of sexual assault allegations to MCIO	
§1752 – Sense of Congress on disposition of sex offenses via court-martial	§1753 – Sense of Congress on discharge in lieu of court-martial	
§1708 – Elimination of “character and military service of accused” as a factor in disposition decision	§1702 – Complete revision of Article 32 (now a probable cause “preliminary hearing”)	§1744 – Review of decisions not to refer sexual assaults
§1705 – Mandatory GCM jurisdiction for penetration offenses	§1705 – Mandatory dismissal for DD for penetration offense convictions	
§1702 – Complete revision to commander’s authority to take post-trial action	§1706 – Victim participation in clemency phase	§1745 – Inclusion and command review of records of sex-related offenses

Effective dates

- Immediate
- 25 Apr 14 (120 days)
- 24 Jun14 (180 days)
- June 2014
- 26 Dec 14 (1 year)

Changes to the UCMJ

- *Article 6b: “Rights of the victim of an offense under this chapter”*
 - *Title 10 amended to add new Article*
- **Article 18: “Jurisdiction of general courts-martial”**
- **Article 32: “Preliminary hearing”**
- **Article 43(a): “Statute of limitations”**
- *Article 46(b): “Defense Counsel Interview...”*
- **Article 56: “Maximum and minimum limits”**
- *Article 60: “Action by the convening authority”*
- **Article 125: “Forcible sodomy; bestiality”**

Changes to the UCMJ

- **Article 125 – Amended by §1707**
 - Immediate
- **Article 43(a) – Amended by §1703**
 - Immediate
- **Article 18 and 56 – Amended by §1705**
 - 180 days (24 June 2014)
- **Article 32 – Amended by §1702**
 - 1 year (26 December 2014)

**SEC. 1707. REPEAL OF THE OFFENSE OF CONSENSUAL SODOMY UNDER
THE UNIFORM CODE OF MILITARY JUSTICE.**

§ 925. Art. 125. Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex ~~or with an animal~~ is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

**“Old”
Article 125
One crime:
Sodomy**

“New”

Article 125

Two Crimes:

Forcible Sodomy

Bestiality

“§ 925. Art 125. Forcible sodomy; bestiality”

“(a) FORCIBLE SODOMY.—Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct.

“(b) BESTIALITY.—Any person subject to this chapter who engages in unnatural carnal copulation with an animal is guilty of bestiality and shall be punished as a court-martial may direct.

“(c) SCOPE OF OFFENSES.—Penetration, however slight, is sufficient to complete an offense under subsection (a) or (b).”

Article 125

“§ 925. Art 125. Forcible sodomy; bestiality

“(a) **FORCIBLE SODOMY.**—Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct.

← 2014?

“(b) **BESTIALITY.**—Any person subject to this chapter who engages in unnatural carnal copulation with an animal is guilty of bestiality and shall be punished as a court-martial may direct.

“(c) **SCOPE OF OFFENSES.**—Penetration, however slight, is sufficient to complete an offense under subsection (a) or (b).”

§ 920. Art. 120. Rape and sexual assault generally

(1) Sexual act. The term ‘sexual act’ means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

As of
Pre-June 28,
2012
2012

****NEW** Statute of Limitations**

- **As of 26 December 2013:**

§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, with murder, ~~rape, or rape of a child~~ or with any other offense punishable by death, may be tried and punished at any time without limitation.

SEC. 1703. ELIMINATION OF FIVE-YEAR STATUTE OF LIMITATIONS ON TRIAL BY COURT-MARTIAL FOR ADDITIONAL OFFENSES INVOLVING SEX-RELATED CRIMES.

(a) **INCLUSION OF ADDITIONAL OFFENSES.**—Section 843(a) of title 10, United States Code (article 43(a) of the Uniform Code of Military Justice), is amended by striking “rape, or rape of a child” and inserting “rape or sexual assault, or rape or sexual assault of a child”.

SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-RELATED OFFENSES AND TRIAL OF SUCH OFFENSES BY GENERAL COURTS-MARTIAL.

§ 856. Art. 56. Maximum limits

- (a) → The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

24 June
2014

“§ 856. Art. 56. Maximum and minimum limits”.

“(b)(1) While a person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (article 60).

“(2) Paragraph (1) applies to the following offenses:

“(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)), **(Rape and Sexual Assault)**

“(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

“(C) Forcible sodomy under section 925 of this title (article 125).

“(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).”.

“§ 856. Art. 56. Maximum and minimum limits”.

At Trial: 2-5-21. SENTENCING INSTRUCTIONS

(“REQUIRED”?)

(“MUST”?)

d. (A dishonorable discharge) (A bad-conduct discharge) (dismissal from the service.)

(DISHONORABLE DISCHARGE ALLOWED:) MJ: This court ~~may~~ **must** adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused’s current term of service.) A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less

Delete for crimes listed in Art. 56(b)?

SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-RELATED OFFENSES AND TRIAL OF SUCH OFFENSES BY GENERAL COURTS-MARTIAL.

§ 818. Art. 18. Jurisdiction of general courts-martial

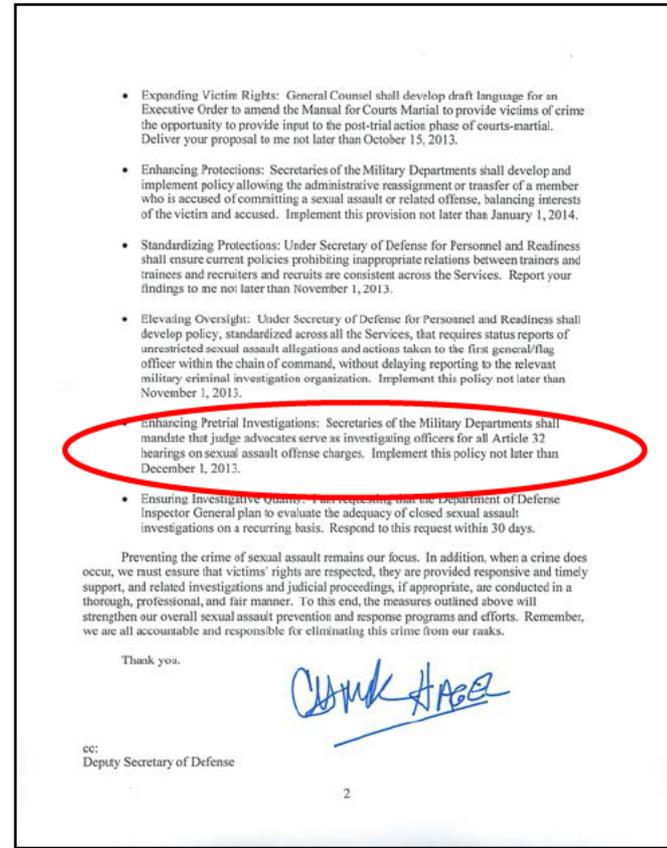
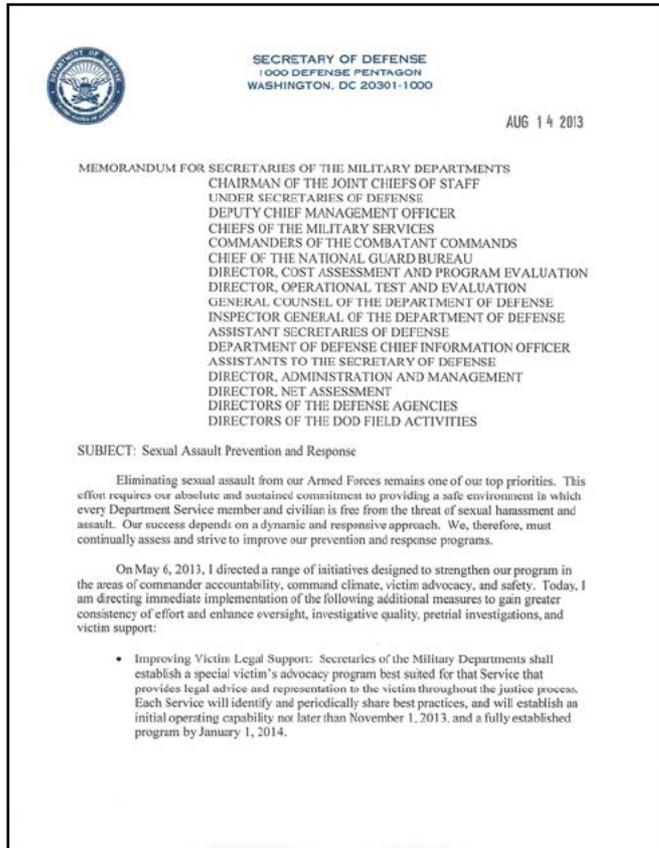
(a) → Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. ~~However, a general court-martial~~ of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

“(b) A general court-martial” →

“(c) Consistent with sections 819, 820, and 856(b) of this title (articles 19, 20, and 56(b)), only general courts-martial have jurisdiction over an offense specified in section 856(b)(2) of this title (article 56(b)(2)).”.

Article 32 Reform

• DOD



- Enhancing Pretrial Investigations: Secretaries of the Military Departments shall mandate that judge advocates serve as investigating officers for all Article 32 hearings on sexual assault offense charges. Implement this policy not later than December 1, 2013.

Changes to Article 32

- **Current Art. 32, UCMJ**

§ 832. Art. 32. Investigation

- **Three (3) enumerated purposes:**
 - **Inquire into the “truth of the matter set forth in the charges”**
 - **Consider “the form of the charges”**
 - **Make “recommendations as to the disposition which should be made in the interest of justice and discipline” (ADVISORY ONLY)**

Changes to Article 32

- **Current Art. 32, UCMJ**

§ 832. Art. 32. Investigation

- **Functional Purposes (R.C.M. 405):**

- **Discovery:**

- R.C.M. 405(a) Discussion (“The investigation also serves as a means of discovery.”)

- **Preservation of Testimony:**

- M.R.E. 801(d)(1)(A) as a prior inconsistent statement
- M.R.E. 804(b)(1) as former testimony, if witness is unavailable

Changes to Article 32

- **For offenses committed on or after 26 December 2014:**

§ 832. Art. 32. Preliminary hearing

“(a) PRELIMINARY HEARING REQUIRED.—

“(2) The purpose of the preliminary hearing shall be limited to the following:

“(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

“(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

“(C) Considering the form of charges.

“(D) Recommending the disposition that should be made of the case.

Changes to Article 32

- **For offenses committed on or after 26 December 2014:**

§ 832. Art. 32. Preliminary hearing

“(b) HEARING OFFICER.—

- **SEC DEF memo of AUG 2013 mandates JAs serve as IOs for “sexual assault offenses”**
- **Reformed Art. 32 requires JAs serve as Hearing Officers in ALL cases**

Changes to Article 32

- **For offenses committed on or after 26 December 2014:**

§ 832. Art. 32. Preliminary hearing

“(d) RIGHTS OF ACCUSED AND VICTIM.—

- **Accused: cross-exam only “relevant to the limited purpose”**
- **Victim: “may not be required to testify”**

Army Review Boards Agency

**Assistant Secretary of the Army
(Manpower and Reserve Affairs)**



U.S. Army Clemency & Parole Board



Clemency, Parole, & Corrections Oversight



(b) (6)

Chairman/Director Support Staff

U.S. Army Clemency and Parole Board





Purpose

To provide an overview of
the DoD Corrections System,
the Army Clemency & Parole Board,
and Victim / Witness involvement



DoD Corrections System

Level III

USDB

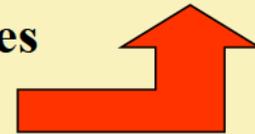
Maximum Security Prison

Level II

Joint Regional Correctional Facilities

Minimum/Medium Security Prison

Pre-trial confinement



Level I

Army Regional Correctional Facilities,

Navy/USMC Brigs,

Air Force Correctional Facilities

Jail Operation

Pre-trial & short term post-trial confinement



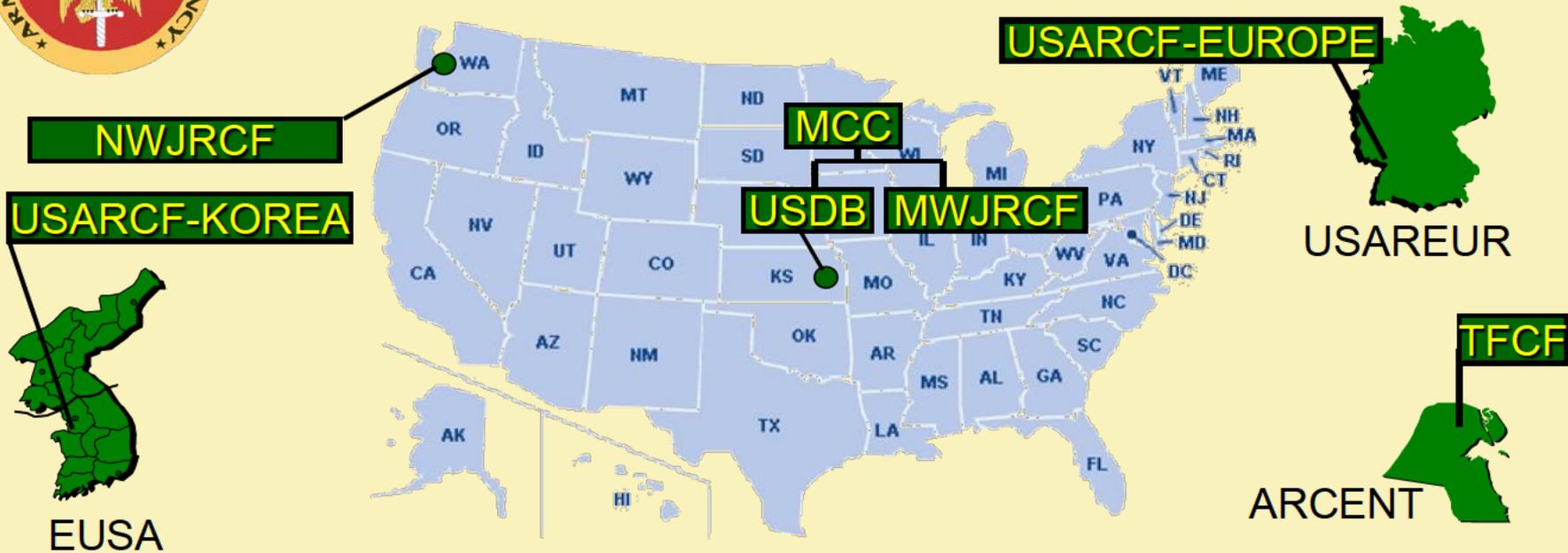


DoD Correctional Facilities





Army Corrections System

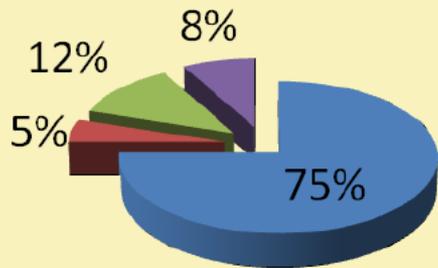


As of 24 July 2014

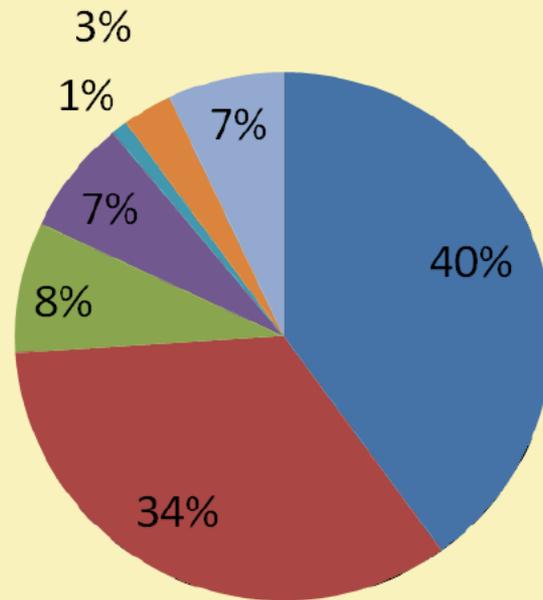
ACS Facility	CAPACITY	PRISONERS ASSIGNED
USDB	460	461
MWJRCF	458	237
NWJRCF – JBLM	150	106
USARCF–Europe	128	13
USARCF–Korea	32	7
TOTAL	1228	824

Other Facility	CAPACITY	PRISONERS ASSIGNED
Federal Bureau of Prisons	500	314
Theater Field Confinement Facility	60	1
Sister Services	n/a	90 (10 Females)
Local Jail Contracts	n/a	30
Parole/MSR	n/a	176/68

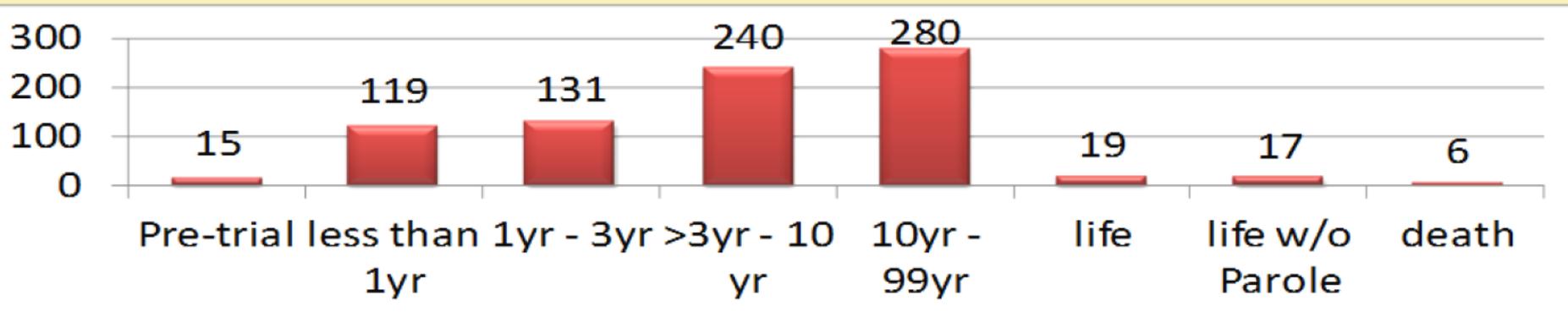
Prisoner Demographics



- Army
- Navy
- Air Force
- USMC



- Sex Offenses
- Violent Offenses
- Property Offenses
- Drugs
- Public Order
- Military Offenses
- Other





Corrections Oversight

- SecArmy -- DoD Executive Agent for Level III
- Keep Secretariat leadership informed
- Assist Army Corrections Command
- Coordinate actions w/Federal Bureau of Prisons
- Coordinate inter-service agreements requiring Secretariat approval
- American Correctional Association accreditation
- Prison Rape Elimination Act implementation



Federal Bureau of Prisons Transfers

- Military personnel transferred because:
 - Incompetent to stand trial
 - Not guilty by reason of insanity
 - Medical/Psychiatric Treatment
 - Permanent Transfer via MOA (314)
- Impact on Victims
 - Military notifies if temporary transfer
 - FBOP notifies if permanent transfer



U.S. Army Clemency & Parole Board

Mission: Make independent, impartial decisions and recommendations for Army prisoners eligible for Parole (10 USC 952), Clemency (10 USC 953), Mandatory Supervised Release (DoDI 1325.07), Restoration to Duty, and transfer to the Federal Bureau of Prisons.

In coordination with Federal, State, and local law enforcement and corrections partners, promote public safety, observe victims' rights, and through judicious administration of release and supervision of Army supervisees, minimize risk while supporting offender reentry.



**1 Civilian Chairman,
3 Colonels/Lt Colonels/Sr Civilians,
1 Legal Advisor**



Army Clemency & Parole Board

- Interfaces with:

- Administrative Offices of U.S. Courts (Probation Division)
- U.S. Parole Commission
- Federal Bureau of Prisons
- U.S. Marshals Service
[National Sex Offender Targeting Center (NSOTC)]
- Army Corrections Command
- DoD Correctional Facilities
- DoD Corrections Council



- American Correctional Association
- Association of Paroling Authorities, International



Does a 10 year sentence to confinement mean the prisoner will serve 10 years?

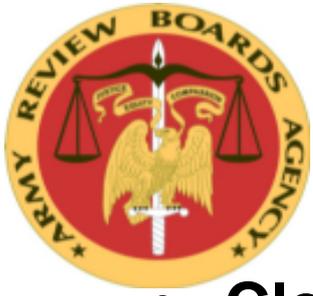
Clemency

Parole

Mandatory Supervised Release

**Minimum
Release Date**

**Maximum
Release Date**



Definitions

- **Clemency** -- an action taken to:
 - 1) remit or suspend the unexecuted part of a court-martial sentence;
 - 2) upgrade a discharge; or
 - 3) direct restoration or reenlistment of an individual convicted by a court-martial
- **Parole** -- the **early release** of a prisoner from a correctional facility to the community under the supervision of a U.S. Probation Officer
- **Mandatory Supervised Release** -- the release of a prisoner from a correctional facility to the community under the supervision of a U.S. Probation Officer **at the prisoner's Minimum Release Date**



How Does a Prisoner Reduce His/Her Sentence?

Prior to 1 October 2004

- Good Conduct Time
 - 5 to 10 days per month based on length of sentence
- Extra Good Conduct Time
 - 1 to 7 days per month
- Special Acts Abatement
 - 2 days per month for special acts

After 1 October 2004

- Good Conduct Time
 - 5 days per month conditioned on acceptable release plan
- Earned Time
 - 1 to 5 days* per month conditioned on acceptable release plan
- Special Acts Abatement
 - 2 days per month for special acts



Release Dates (Offense Prior to 1 October 2004)

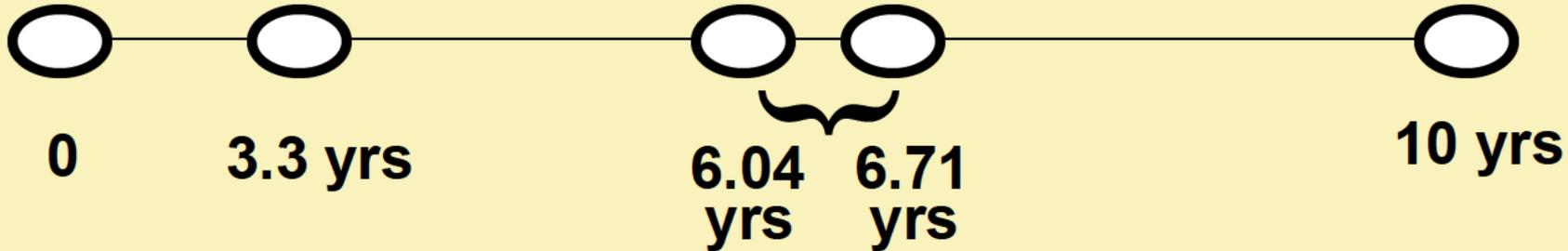
Minimum Release
Date/

Mandatory Supervised
Release

Maximum Release
Date

Court Martial

Parole Eligible





Release Dates (Offense After 1 October 2004)

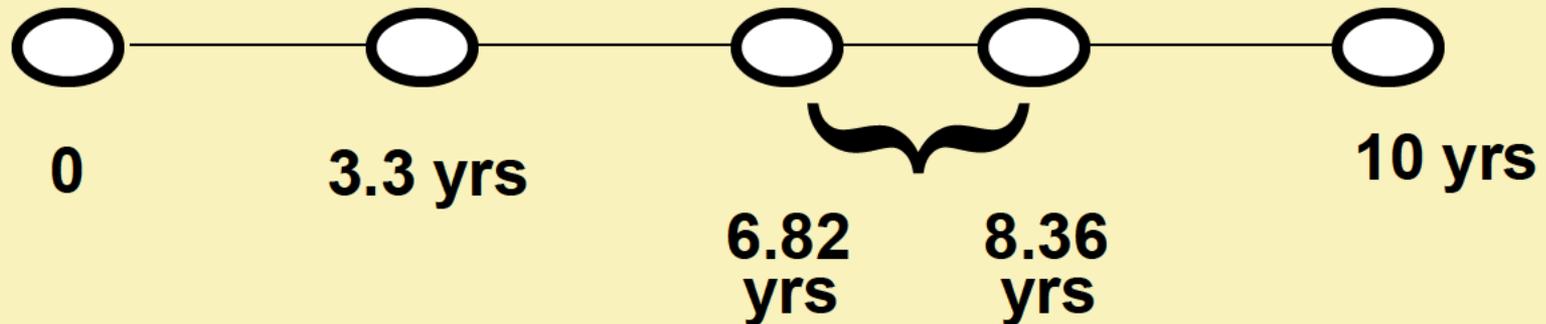
Minimum Release
Date/

Mandatory Supervised
Release

Court Martial

Maximum Release
Date

Parole Eligible





Parole Consideration

Sentence	Date Eligible
<i>12 months to 30 years</i>	<i>1/3 of sentence, NET 6 months</i>
<i>30 years through Life</i>	<i>10 years</i>
<i>Life</i>	<i>20 years*</i>

***If offense(s) occurred at least 30 days after 16 January 2000**

- Prisoners may waive consideration
- Once considered, considered annually
- Federal transferees considered by US Parole Commission, not ARMY
- Life w/out parole--not eligible
- Death sentence—not eligible



Clemency Eligibility

For offense(s) committed before 16 January 2000

Sentence	Date Eligible
<i>12 mo to 20 years</i>	<i>NLT 1 year</i>
<i>20 - 30 years</i>	<i>NLT 3 years</i>
<i>30 years - Life</i>	<i>NLT 5 years</i>

- Once considered, considered **ANNUALLY**
- **ARMY** retains clemency authority for Federal transferees
- **Death Sentence** – not eligible (except POTUS)



Clemency Eligibility

If offense(s) occurred on or after 16 January 2000

Sentence	Date Eligible
<i>12 mo to 20 years</i>	<i>NLT 1 year</i>
<i>20 - 30 years</i>	<i>NLT 3 years</i>
<i>30 years - Life</i>	<i>NLT 10 years</i>
<i>Life w/out parole</i>	<i>NET 20 years</i>

- Once considered, considered ANNUALLY
- ARMY retains clemency authority for Federal transferees
- **Life w/out parole -- SECARMY retains authority for clemency decisions**
- Death Sentence – not eligible (except POTUS)



Clemency Eligibility

For sentences adjudged on or after 10 April 2013

Sentence

Initial Consideration

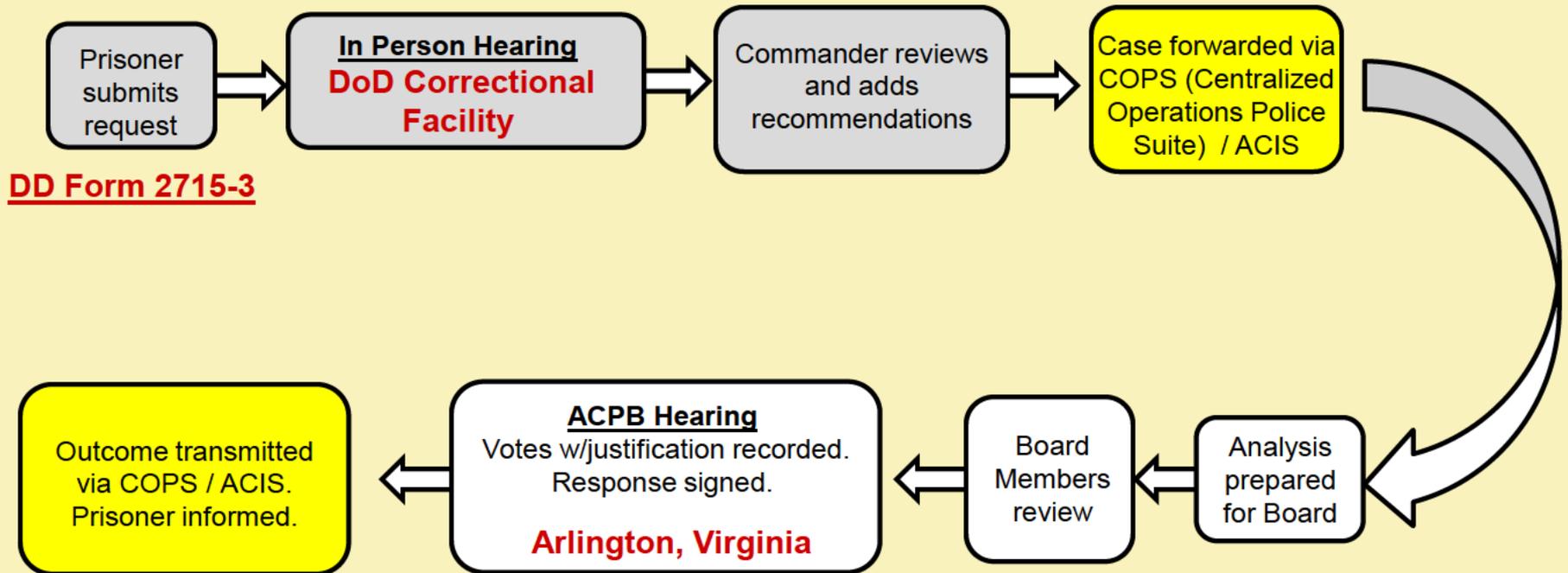
<i>12 months or more but less than 10 years *</i>	<i>No more than 9 months after confinement begins; annually thereafter</i>
<i>10 years or more including Life with parole eligibility **</i>	<i>In conjunction with initial parole eligibility; annually thereafter</i>
<i>Life without parole</i>	<i>20 years after confinement begins; every 3 years thereafter</i>

* Initial consideration no more than 9 months from confinement date or within 90 days after Convening Authority action is received at correctional facility, whichever is later

** Prisoner may request clemency hearing earlier when “extraordinary reasons” exist; Facility Commander may recommend Clemency hearing earlier when “extraordinary reasons” exist; ACPB Chair may direct an initial clemency hearing earlier for “extraordinary reasons”



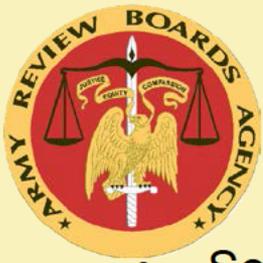
ACPB Process





DASA Clemency and Parole Board Responsibilities

- Clemency approval authority
- Parole approval for following cases
 - Cases of personal interest to SECARMY or designee
 - Cases involving national security matters
 - Cases that are the subject of controversy or substantial press or congressional interest
 - Cases in which the ACPB recommends parole where individual was convicted of an offense where the maximum authorized confinement exceeds 35 years
- Parole appeal approval authority



Management of Supervisees

- Sex offender, mental health, and/or substance abuse supervision and aftercare conditions are incorporated in parole/MSR plans
- Victim safety concerns are shared with USPO
- Board Manager contacts USPO supervising Army sex offender 90-120 days after release to verify sex offender registration and confirm treatment status
- Analysts track supervisees on their caseloads and conduct telephonic surveys with USPO 6-months after release & 6-months after each hearing
- USPOs submit Military Parole/MSR Annual Adjustment Reports with supervisees' elections on Restoration/Clemency Statements
- USPOs are instructed to notify ACPB of any incidents or concerns involving supervisees (technical violations, new crimes, or requests for new supervision conditions)
- Possible ACPB responses: issue new condition(s), letter of warning, suspend parole/MSR pending revocation hearing, issue warrant (when risk indicates it is necessary)
- Chairman responds to queries from USMS (NSOTC)



Army Clemency & Parole Board FY12 Outcomes

- Clemency: **657 considered/13** approved = 2%
- Parole: **156 considered/20** approved = 13%
- Parole Appeals: **57 considered/6** approved = 11%
- MSR: **59 considered/27** approved = 46%
- Parole/MSR Revocations: **4**



Army Clemency & Parole Board FY13 Outcomes

- Clemency: **671 considered/13** approved = 2%
- Parole: **163 considered/26** approved = 16%
- Parole Appeals: **77 considered/7** approved = 10%
- MSR: **45 considered/36** approved = 73%
- Parole/MSR Revocations: **8**



Army Clemency & Parole Board FY14 Outcomes (thru June 2014)

- Clemency: **496 considered/7** approved = 1.4%
- Parole: **130 considered/17** approved = 13%
- Parole Appeals: **50 considered/2** approved = 1%
- MSR: **49 considered/39** approved = 80%
- Parole/MSR Revocations: **1**

- On Parole: 176
- On MSR: 68



Impact of Parole Process on Victims

- Can be an emotional trigger
 - Thinking about the crime
 - Concerns about possibly facing the offender again
 - Stress of going through the process
 - Upset about the thought of the offender getting out early
 - Preparing for possible reentry



Mitigating Victim Trauma and Stress

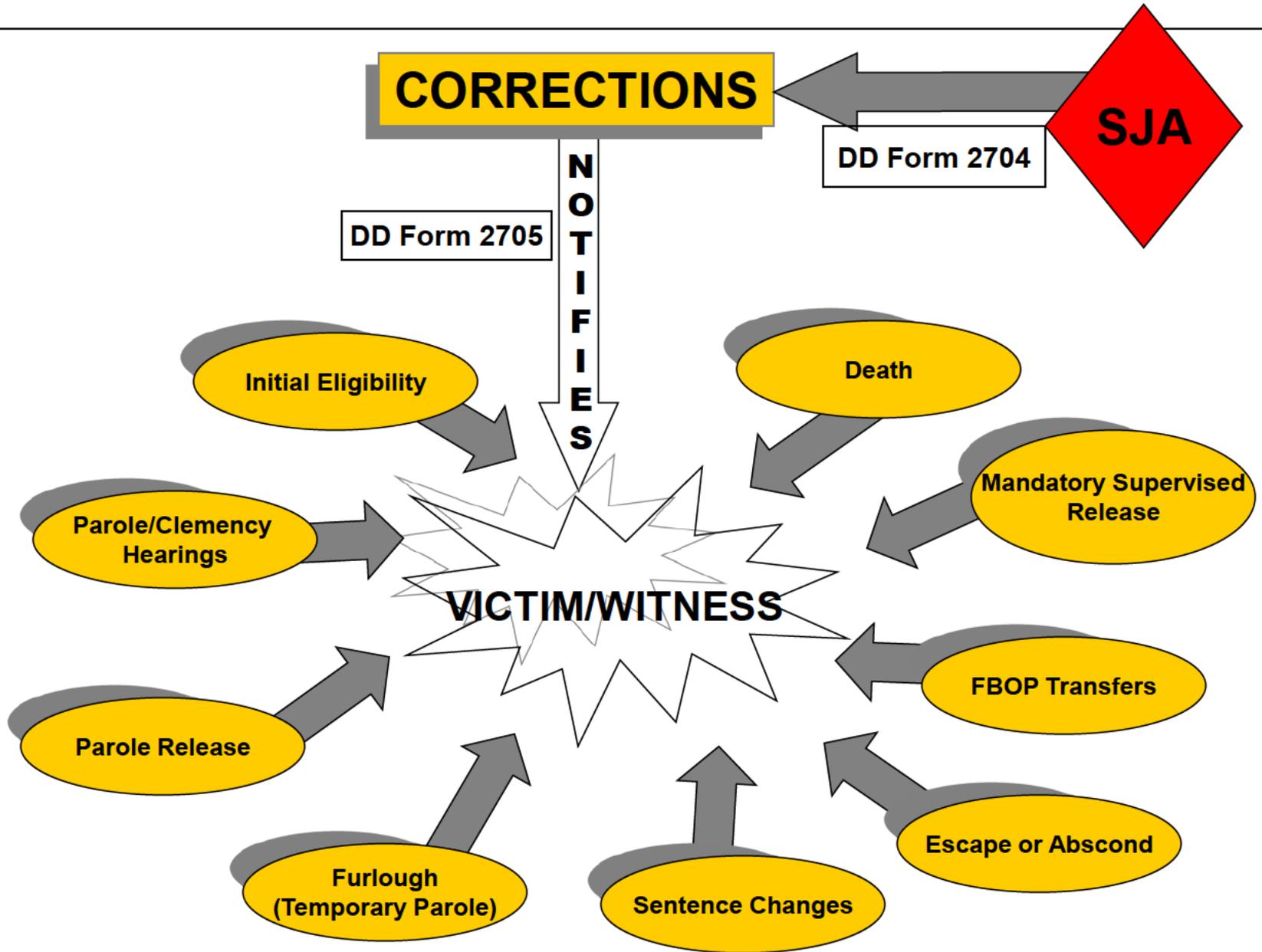
- Explain likelihood that prisoner will not serve entire sentence
- Acknowledge the emotional challenge but encourage their participation and important role in parole process
- Educate them about Army Clemency and Parole Board processes and the ways that they can assert their influence
- Provide written victim impact statement that will not be shared with the offender, or
- If they are willing to appear personally before the ACPB (at their own expense):
 - ACPB will provide details (location, time, describe process)
 - Victims will not come in contact with the offender or the offender's family members or representatives
 - Separate, safe and secure waiting area
 - Victims (or their representatives) testify first



Victim's Role in Notification

- Must register on DD Form 2704
- Keep correctional facility V/W Coordinator informed of current address/phone number
- Inform DoD Correctional Facility Commanders / Parole Boards of:
 - any safety concerns
 - any unwanted contact from the inmate/parolee
 - knowledge of non-compliance with conditions of supervised release

VICTIM/WITNESS NOTIFICATION (POST TRIAL)





Victim Engagement with the DoD Clemency & Parole Boards

- Victim participation is important and desired
- They will be treated with dignity and respect
- Victim impact statements provide Board Members with “the rest of the story”, the lingering impact of the crime, and any safety concerns
- Two options:
 - Provide written statement for consideration at Clemency & Parole Board hearings (Video/Audio formats can be challenging)
 - Personal appearance at Clemency & Parole Board hearings (at own expense)



Army Clemency & Parole Board Contact Information

(b) [Redacted]

❖ Office location: 4th Floor, 251 18th St. South, Arlington, VA 22202



Questions



DoD's Most Notorious Prisoner?



Clayton A. Fountain

- Marine
- Court-martialed in 1974
- Originally sentenced to life in prison
- Murdered Staff Sergeant
- Initially confined at the USDB
- 1975 - Transferred to USP Marion, IL
- 1983 - Transferred to Springfield Medical Center for Federal Prisoners
- 12 July 2004 – Died in Springfield Medical Center
- Had consecutive sentences of life, plus 15 years, plus life, plus life, plus 170 years



DoD's Most Notorious Prisoner?

Clayton Fountain's Confinement History

- On 1-2 September 1975, attempted to escape from USDB; took SGT Cox hostage and obtained weapons; discharged shotgun 3 times; wounded SSgt Spybuck
- Transferred to FBOP's most secure prison at Marion, IL
- 1 Oct 79, Fountain and another prisoner murdered a fellow inmate by stabbing him more than 50 times
- 22 Nov 81, Fountain and another prisoner murdered a fellow inmate by strangling him with a cord
- 27 Sep 82, Fountain and another prisoner murdered a fellow inmate by stabbing him 67 times; threatened guards with death if they interfered
- 27 Oct 83, Fountain stabbed a prison guard to death and wounded 2 others
- 1983 -- Transferred to Springfield (MO) Medical Center for Federal Prisoners
- Isolated from everyone in a no-contact cell (2 adjoining 10'X12' steel boxes)
- Died 12 July 2004 in Federal Medical Center, Springfield, MO



USDB Escapes/Disturbances: How/Why?

- Escapes from USDB
 - 9 Jan 87 (Friday): Yarborough and Davis (craft shop)
 - 17 Aug 88: Newman (wood shop)
 - 1991: Goff (laundry cart)
 - 30 Apr 98: Taylor and Willis (dumpster)
- Disturbances at USDB:
 - 11 May 92 (Initially no reason. Eventually unequal clemency and parole standards; smoking; movies)
 - 2-3 Mar 96 (Saturday/Sunday) – 3 Wing (Assault - PFC Enochs, tier guard, assault/hostage – MSG Ripley, Guard Commander)
 - 12 Aug 10 – SHU (Assault/hostage - PFC Alcott, Correctional Specialist)



Navy & Marine Corps Clemency & Parole Board

In FY 2012:

Clemency: 586 considered/18 approved = 3%

Parole: 133 considered/30 approved = 29%

Parole Appeals: 55 considered/3 approved = 5%

MSR: 46 considered/32 approved = 69%

In FY 2013:

Clemency: 436 considered/13 approved = 3%

Parole: 121 considered/24 approved = 20%

Parole Appeals: 53 considered/2 approved = 4%

MSR: 44 considered/ 30 approved = 68%



Air Force Clemency & Parole Board

In CY 2012, the Board considered:

Clemency: 183 considered/7 approved = 3.8%

Parole: 73 considered/30 approved = 29%

Parole Appeals: 29 considered/0 approved = 0%

MSR: 58 considered/24 approved = 41%

In CY 2013, the Board considered:

Clemency: 85 considered/3 approved = 3.5%

Parole: 59 considered/9 approved = 15%

Parole Appeals: 27 considered/0 approved = 0%

MSR: 36 considered/18 approved = 50%



STOP SEXUAL
ASSAULT
IN THE
MILITARY

Sexual Assault Victim Interviews:

Patience
is a **VIRTUE**

Why Conduct an Interview?

“The role of the rape advocate is to believe a victim’s story, whereas the role of the CID Agent is to prove it.”

By corroborating as many facts as possible, no matter how insignificant they may seem, you can better help establish the validity of the victim’s story and improve her credibility even when there are other problems with the investigation.



The Victim Interview: Essential Evidence

The sexual assault investigation is unlike any other type of criminal investigation due to the uniquely intimate and invasive nature of the crime.

Unlike many other types of cases, the victim interview is the most essential piece of evidence you will have in your case.



Effective Interviewing

First, do no harm...

All possible efforts should be employed to minimize the risk of further traumatizing a sexual assault victim.



The Purpose of this Training

This presentation is designed to provide you with a better understand of the unique challenges victim interviews present and to:

- 1. Change the way you interview sexual assault victims by recognizing the impact of trauma.**
- 2. Recognize the unique aspects of a sexual assault victim interview.**
- 3. Use specific approaches and techniques to interview of victims of sexual assault.**

Conducting Better Victim Interviews

- Begin with a realistic understanding of your role
- Law enforcement must focus on developing at least three hypothesis and prove or disprove each one to attempt to remain unbiased
- We must use an awareness of societal stereotypes regarding victimization to overcome challenges to the victim's credibility
- Engage in finding new and better ways to understand the victims experiences – including initial interviews and follow-up interviews
- There are differences between an interview and an interrogation, we do not interrogate victims

I-Working with trauma victims

- Memories of trauma are particularly durable and accurate (so don't worry if you don't get everything in the ER)
- The content of traumatic memory is usually vivid, detailed and more accurate than ordinary day-to-day memories
- Traumatic events are first organized in memory on a perceptual or sensory level
 - This often depends on the way trauma was first received
 - And is often re-lived through visual images, smells, pain, taste, body positions, sounds, etc...
- For some people recalling sensations is the only way to describe the traumatic event initially
- The narrative emerges over time as the individual tries to explain what happened

II-Working with trauma victims

- While some victims may be able to verbalize and recount what happened, many experience difficulties in:
 - Concentration
 - Sequencing of events, and
 - Memory disturbances
- Retelling of experiences may contain internal inconsistencies, work through them
- Victims may often re-live the event and re-experience all of the emotional and physiological effects
- The victim may not even be able to recall experiencing any pain, or location of the pain due to stress induced analgesia
 - This analgesic effect is caused by the activation of the brains opiate system following a trauma

The Impact

- A sexual assault experience is remembered in fragments and is infused with intense emotions and recollections of sensations such as tastes, smells, and sounds.
 - Some victims may become haunted by feelings and senses they know are related to the trauma, but have difficulty identifying the source of the feeling or sensation
 - How can this effect your investigation?

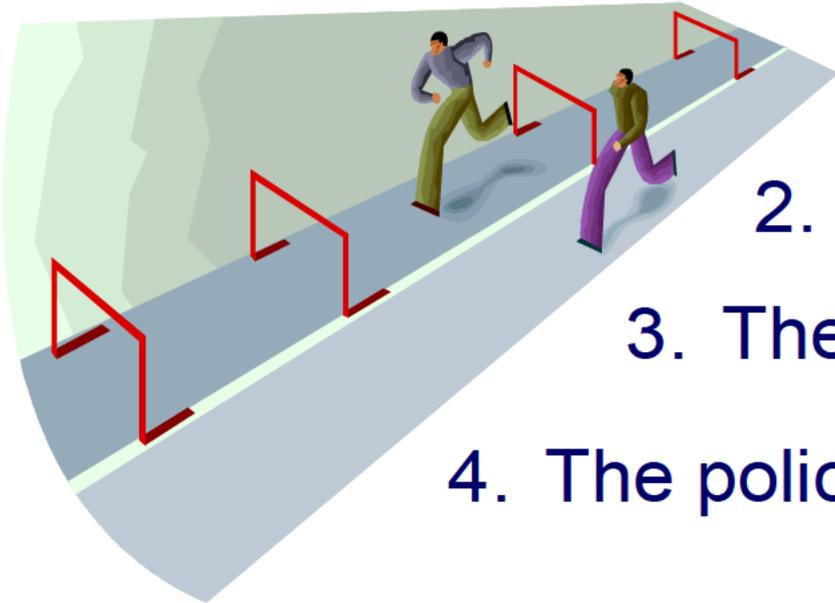
Advanced



- Ask appropriate Open-Ended Questions:
 - What did you do next?
 - Help me understand?
 - Tell me what you were thinking at that point?
 - Tell me what you were feeling when he did that?
 - Tell me more about that?
- This type of questioning will provide the victim an opportunity to talk about thoughts, feelings, and experiences during the assault
- This will help us understand better the reality of the situation and overcome most, if not all, challenges to credibility

Obstacles to Effective Interviewing

Some obstacles intrinsic in the investigative process and/or to the investigator himself serve as hindrances to an effective and accurate interview such as:



1. Asking for “Just the facts”
2. The police personality
3. The tough-guy facade
4. The police career path

Building an Early Prosecution Strategy

Knowing the pitfalls of the judicial process and anticipating a defense strategy can help you to conduct an investigation that will eventually contribute to a successful prosecution.



Expected Defense Strategies:

Stranger Assaults - **Identification**

Non-Stranger Assaults - **Consent**

Setting the Stage-I

There are many ways to “set the stage” for an effective victim interview...

1. Select an appropriate location

- Safe and comfortable for the victim
- Private and free from distraction
- You should maintain an equal or inferior physical position

Setting the Stage-II

2. Ask the victim if she would like anyone to be present during the interview.

- Should be determined privately with the victim
- Potential witnesses must be excluded
- Always include a support person when requested

Setting the Stage III

3. Explain the purpose of the interview and address immediate concerns.

- The purpose is to gather evidence and the victim's statement, not to find fault or blame.
- There will be questions that the victim doesn't have the answers to.
- The victim does not need to make any immediate decisions about prosecution.

Setting the Stage IV

4. Present yourself in an accepting and compassionate manner.

- Acknowledge the gravity of the ordeal
- Allow the victim to vent
- Demonstrate empathy
- Help the victim regain control

Techniques: Creating and Maintaining an Open Interview

1. Explaining the Questions.

- Explaining questions dealing with sensitive issues helps put the victim's fears at ease.
- Use the law to explain why you need specific information.
- Asking about high risk behavior does not mean that you doubt the victim's story. If you pursue this subject, explain why you are asking.

Techniques: Creating and Maintaining an Open Interview

2. Physical Techniques

- Eye contact
- Use inviting body language
- Avoid touching the victim



Techniques: Creating and Maintaining an Open Interview

3. Use of Sexual Language.

- Avoid using police terminology.
- Clarify any slang terms that the victim uses to ensure you understand what they mean.
- Mimic terms used by the victim without acting shocked or embarrassed by them.

Techniques: Creating and Maintaining an Open Interview

4. Engage in Active Listening.

- Without interrupting the flow of the victim's narrative, try to interject comments that indicate you have been listening.
- Encourage the victim to continue talking while knowing that she is being heard.

The Victim's Narrative

The victim's narrative is the most vital part of the investigation.

Begin by asking the victim to tell you what happened to her in her words and at her own pace. You can facilitate the interview while allowing the victim to tell her story (her way) by:

- 1. Using open-ended prompts. (i.e. what happened next)**
- 2. Allowing the victim to control the pace.**
- 3. Avoiding leading questions (it's not your story to tell.)**

The Victim's Narrative

Interruptions: Fatal Flaws



In a recent study, it was found that the average investigative interview had **3 open-ended questions and 26 closed-ended questions** with an average of only **1-second pauses** between questions. Most investigators **interrupted responses to open-ended questions after 7.5 seconds with an average of 4 interruptions per response.** Not one of the interviews studied had a victim that was allowed to complete an uninterrupted response.

After the Initial Narrative

Following completion of the initial narrative, go back and clarify specific points and gather additional details about the victim's experience using open-ended follow-up questions.

i.e. “tell me more about what you meant when you said”



Information You Should Obtain During the Course of the Interview

Essential elements in collecting information from the interview:

- Description of the victim's behavior and relationship with the suspect
- Description of the suspect's behavior
- Documentation of the specific acts committed and whether any acts were repeated
- Description of the suspect's sexual behavior
- Establishing force or threat of force by asking the right questions

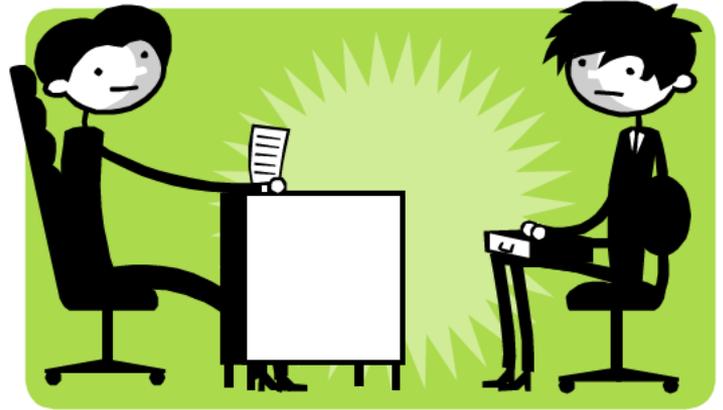


Conclusion of the Interview

- **Always ask the victim if she has additional information she wants to report.**
- **Reassure and thank the victim for her candor and cooperation.**
- **Explain future procedures.**

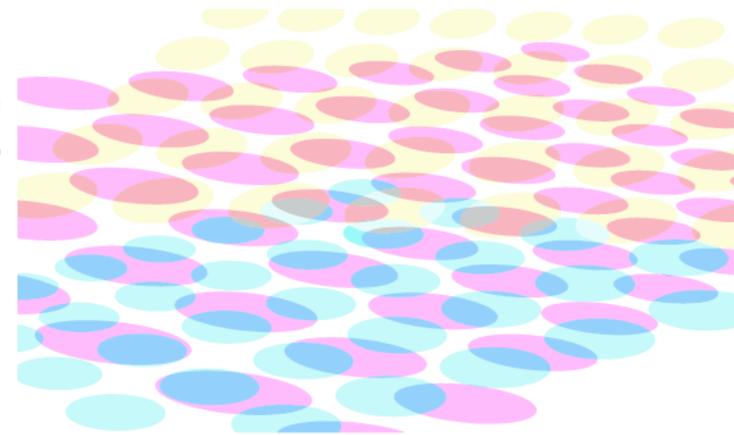
Cognitive Interview Techniques

- Cognitive interview
 - Free flow narrative
 - Backwards/Forwards/Sideways
 - Third person/object
 - Include these Questions
 - What they remember the most
 - What makes them the angriest about what happened to them.



Victim's Experience/Perspective

- Continue to ask questions until you can experience the incident yourself – feelings
- Explore smell – tastes – sounds – feelings (ask questions)
- The truth is in the details!



Therefore...

- Sensitivity & empathy are the keys to understanding and will result in a successful victim interview
- Be patient, silence is o.k., let them process your questions and then answer. Wait For the Answer!!!!
- Be thorough
- Move past “He said, She said” and find out what really happened
- Build an in depth case (details matter)
- Don’t stop asking questions until you can in some way experience what the victim has experienced
- Give the victim time to process and work through the trauma when answering questions
- Provide the victim with a “journal” to record what they recall after the interview, re-interviews are O.K.

Group Exercise

All members of the class please pair off. One Student should play the part of a sexual assault victim while the other plays the role of the interviewer. Practice using the techniques below while the “victim” relates a fictitious story, then switch roles.

- **Open-ended questions**
- **Asking graphic questions in a sensitive, comfortable manner**
- **Making empathetic statements**
- **Maintaining Eye contact**
- **Refraining from interrupting**
- **Using follow-up questions to clarify points**

SVC PRESENTATION

What are your questions



**WAIVER AND DEFERRAL OF
ADJUDGED AND AUTOMATIC FORFEITURES**

TYPE OF FORFEITURE	FIRST 14 DAYS AFTER TRIAL	14 DAYS AFTER TRIAL UNTIL INITIAL ACTION	INITIAL ACTION TO 6 MONTHS AFTER INITIAL ACTION
<p>ADJUDGED</p> <p>(1) By MJ or Panel</p> <p>(2) Maximum Amount:</p> <p style="padding-left: 20px;">(a) GCM: all pay and allowances</p> <p style="padding-left: 20px;">(b) SPCM: 2/3rds pay only</p>	<p>No forfeitures in effect</p>	<p>DEFER: Art. 57(a)(2), RCM 1101(c)</p> <p>(1) Only valid until action or if rescinded earlier</p> <p>(2) Money goes to the accused</p> <p>(3) No <i>sua sponte</i> deferments</p>	<p>RCM 1107(d):</p> <p style="padding-left: 20px;">(1) DISAPPROVE</p> <p style="padding-left: 20px;">(2) COMMUTE/MITIGATE: (e.g., reduce from total to certain dollar amount)</p> <p style="padding-left: 20px;">(3) SUSPEND</p>
<p>AUTOMATIC</p> <p>(1) Applies if:</p> <p style="padding-left: 20px;">(a) Discharge & any confinement*</p> <p style="padding-left: 20px;">(b) Confinement > 6 months</p> <p style="padding-left: 20px;">(c) Death</p> <p>(2) Amount:</p> <p style="padding-left: 20px;">(a) GCM: all pay and allowances</p> <p style="padding-left: 20px;">(b) SPCM: 2/3rds pay only</p> <p>*If only a punitive discharge is adjudged, Article 58b has no effect on pay and allowances. See RCM 1003(b)(2) Discussion</p>	<p>No forfeitures in effect</p>	<p>DEFER: Art. 57(a)(2), Art. 58b(a)(1), RCM 1101(c)</p> <p>(1) Only valid until action or if rescinded earlier</p> <p>(2) Money goes to the accused</p> <p>(3) No <i>sua sponte</i> deferments</p> <p>WAIVE: Art. 58b(a)(2), RCM 1101(d)</p> <p>(1) Goes to dependents only</p> <p>(2) Valid for up to 6 months, duration of confinement, or ETS, whichever comes first.</p> <p>(3) CA can waive <i>sua sponte</i></p>	<p>WAIVE: Art. 58b(a)(2), RCM 1101(d)</p> <p>(1) Goes to dependents only</p> <p>(2) Valid for up to 6 months, duration of confinement, or ETS, whichever comes first</p> <p>(3) CA can waive <i>sua sponte</i></p>

This chart should be read in conjunction with United States v. Emminizer, 56 M.J. 441 (C.A.A.F. 2002).

Note: All entitlement to pay and allowances ceases at ETS.

Summary of Data on Rape Re-Perpetration

LISAK & MILLER (2002)

David Lisak's original study involved a sample 1,882 men with an average age of 26.5 . These men were employed and attending college part-time. They were demographically representative of the diverse American population.

Of these 1,882 men, 120 (6.4%) had committed rapes of women they knew. None of these rapes was ever reported.

Of the 120 rapists, 44 men (36.7%) committed a single act of rape. The remaining 76 men (63.3%) committed multiple rapes; they committed a total of 439 rapes, which translates to an average of nearly six (5.8) rapes per rapist. Altogether, the 120 rapists were responsible for 1,225 separate acts of interpersonal violence, including rape, battery, and child physical and sexual abuse (Lisak & Miller, 2002).

Perhaps most important for police and prosecutors, Lisak and Miller (2002) calculated the percentage of rapes that were committed by these repeat perpetrators – the figure was 91%. In other words, the vast majority of rapes are committed by serial rapists as compared to those perpetrating a single incident.

Methodological note: To be characterized as a rapist, the man had to answer “yes” to one of the following questions:

1. Have you ever been in a situation where you tried, but for various reasons did not succeed, in having sexual intercourse with an adult by using or threatening to use physical force (twisting their arm, holding them down, etc.) if they didn't cooperate?
2. Have you ever had sexual intercourse with someone, even though they did not want to, because they were too intoxicated (on alcohol or drugs) to resist your sexual advances (e.g., removing their clothes)?
3. Have you ever had sexual intercourse with an adult when they didn't want to because you used or threatened to use physical force (twisting their arm, holding them down, etc.) if they didn't cooperate?
4. Have you ever had oral sex with an adult when they didn't want to because you used or threatened to use physical force (twisting their arm, holding them down, etc.) if they didn't cooperate?

“Any participant who responded ‘yes’ to one of these questions was asked a series of follow-up questions regarding their age, the victim's age, the number of times it happened, whether it happened with another person, and if so, the frequency of other instances or the number of other victims” (p. 78). These questions come from the Abuse-Perpetration Inventory (API; Lisak et al., 2000), which was adapted from the Sexual Experiences Survey originally developed by Koss and Oros (1982).

MCWHORTER ET AL. (2009)

These findings were recently replicated by McWhorter and colleagues with a sample of newly enlisted male Navy personnel. Using a very similar instrument to screen for abuse perpetration (slightly modified 10-item version of the Sexual Experiences Survey, Koss et al., 1987), these researchers surveyed 1,146 men who participated in a longitudinal study during the transition from civilian to military life. Their average age was

19.8, and they were rather diverse in race/ethnicity. Most were high school diploma graduates (84%), with only 7% reporting some postsecondary education.

Of these, 144 (13%) committed an act of completed or attempted rape since the age of 14; this is approximately twice the percentage of rapists identified in Lisak and Miller's (2002) sample. Most (11%) committed rapes before entering military service, and 2% only perpetrated after entering the military.

Of the 144 rapists, 71% committed more than one rape (this is very close to the 63% found by Lisak and Miller, 2002). The average number of rapes for each man was 6.4, which is extremely similar to the 5.8 found by Lisak and Miller (2002).

Of the rapes, 75% targeted only an acquaintance, and 7% only a stranger; an additional 18% involved both victims who were strangers and acquaintances. In other words, 93% involved at least one victim who was known; only 7% only involved victims who were strangers.

Most rapes were committed using drugs or alcohol as a tactic (77%). Of all rapes, 61% involved only substances, and an additional 16% involved both substances and force. Only 23% involved only force or threats of force (i.e., no substances); these were all committed against victims who were known to the victim. In other words, there were no rapes committed against a stranger that did not use substances.

Again, the most important point for police and prosecutors may be the percentage of rapes that were committed by serial perpetrators; in this sample the figure was 95%. In other words, almost every single rape was committed by a serial rapist; the percentage of rapes that are committed as a one-time incident by a man constitute only a tiny fraction (5%) of the total number of rapes.

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Research summary compiled by: Dr. Kimberly A. Lonsway, Research Director, EVAW International

OFFENDER BEHAVIORS

Kimberly A. Lonsway, Ph.D.

Research Director

End Violence Against Women International

OFFENDER BEHAVIORS

- How an understanding of common dynamics in sexual assault cases can help you to:
 - Know what to look for (identify key behaviors)
 - Frame the behaviors in a pattern of perpetration
 - Tell an offender-focused story

TIME FOR A STORY...

- ◉ ... in 2 parts

- ◉ Observations?

Thanks to Ben Barrett, J.D. of Barrett & Farahany

VICTIM VS. OFFENDER FOCUS

- Research indicates that people are more likely to attribute responsibility to someone for an event when they:
 - 1) Know more about that person as compared to the other party (e.g., victim vs. suspect)
 - 2) Generate alternative courses of action that the person could have taken (“If only...”)
 - 3) Know the outcome of the event in advance

For a review, see: Temkin, J., & Krahé, B. (2008). *Sexual Assault and the Justice Gap: A Question of Attitude*. Oxford: Hart Publishing.

MORE STORIES

- This time from real life...

REAL LIFE INCIDENTS

**WAS THIS WOMAN
SEXUALLY ASSAULTED?**

An American college student is studying abroad in Europe and she takes the train to the coast for the weekend. She meets a young man who is also traveling and sleeping in his van at night, and she asks if she can spend the night in his van to save money.

A young woman goes out with her girlfriend, and they all drink heavily. She is thrilled when a man she likes shows up at the bar and joins them. Sometime after midnight, he leaves the bar, and when the girlfriends call it a night, the young woman decides to walk over a mile through town to the man's apartment and surprise him.

A female high school student is on a class trip to a foreign country. A male teacher is chaperoning the trip, and one evening he becomes quite drunk. The student takes him to his hotel room, and she goes in with him alone.

A 13-year old girl is staying in a small lake resort with her family. She likes a young man who sometimes drives the boat for families to water ski. He is several years older than she is. One night they arrange to meet in a secluded location halfway around the lake. She doesn't tell her parents where she is going, and heads out in the dark.

A 39-year old woman goes for a jog around 10pm, because she could not find time to exercise during the day. It is very dark in the neighborhood, and no one is on the streets. She wears headphones to listen to music while she jogs.

A young woman is traveling alone and decides to hitchhike to the next town. She puts out her thumb, and an older man stops to pick her up. She climbs into the car with him, and they pull out into the road.

While living in a big city, a young woman regularly goes out to bars and clubs with a small group of friends, to dance and drink. She does not know these friends very well, and they take public transportation, so if they left her she would not know exactly where she was. She trusts they will get her home.

A high school student works at the counter of a fast food restaurant, and she goes to the Christmas party for employees. Although she is only 17, she drinks alcohol and becomes intoxicated. She even smokes a little marijuana. A middle-aged man who works in the kitchen of the restaurant says he wants to step outside the party to talk with her.

A woman goes to a bar with a female friend, and the two drink, dance, and play pool. During the evening, they get to know a man who plays pool with them, although he is not drinking. At closing time, the women plan to walk home, but the man offers them a ride. They accept and climb into his car.

Two young women are out to dinner and a stranger from a neighboring table begins flirting with them. Around midnight, one of the women gets up to leave and the man asks the remaining woman if she would like to go skinny dipping with him. They both leave their clothes in the car and sneak into the outdoor pool of the local hotel.

HOW ABOUT THIS MAN?

**WAS HE SEXUALLY
ASSAULTED?**

A young man goes out drinking with friends, and becomes so intoxicated he is unable to find his way home. He decides to stay the night at a friend's house, even though he does not know exactly who else is staying there or who might have access to the residence.

An 11-year old boy is lost in Las Vegas, and wanders around for a few hours, hoping to find his family.

A young man has been working out at the gym, and decides to take a shower. An older and larger man (approximately 300 pounds) is already in the shower, and the two have spoken to each other on occasion, although the young man has been uncomfortable by the older man's comments about rape.

While visiting a big city, a man goes out drinking alone. He is very drunk when he sets out for his hotel, not knowing exactly where he is, or how to get back. He stumbles through various neighborhoods, looking for familiar landmarks.

A young man is hitchhiking across the desert and picked up by an older man driving a truck. As they drive through the dark, the older man asks the young man repeated questions about the size of his genitalia, whether he will show him, whether he will perform fellatio, etc. The young man is very frightened, because they are miles from civilization.

QUESTION:
How many of
these incidents
resulted in a
sexual assault?

ANSWER:

None

Why not?

Because no one decided
to sexual assault them

Conclusion

- ▣ When we learn about a sexual assault, we know how the incident ends, so it appears as if it was inevitable and tend to focus on the victim's behavior as the cause of the event
- ▣ The reality is we are all vulnerable at times, and even engage in high risk behavior, but usually we are not sexually assaulted
- ▣ Sexual assault happens because someone commits the crime, and a victim is targeted

IF YOU WERE GOING TO SEXUALLY
ASSAULT SOMEONE, WHAT KIND OF
PERSON WOULD YOU TARGET?

IF YOU WERE GOING TO SEXUALLY
ASSAULT SOMEONE, WHAT KIND OF
PERSON WOULD YOU TARGET?

↑ Vulnerability

IF YOU WERE GOING TO SEXUALLY
ASSAULT SOMEONE, WHAT KIND OF
PERSON WOULD YOU TARGET?

↑ Vulnerability

↓ Credibility

IF YOU WERE GOING TO SEXUALLY ASSAULT SOMEONE, WHAT KIND OF PERSON WOULD YOU TARGET?

 Vulnerability

 Credibility

 Alcohol

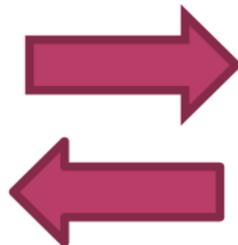
IF YOU WERE GOING TO SEXUALLY ASSAULT SOMEONE, WHAT KIND OF PERSON WOULD YOU TARGET?

 Vulnerability

 Credibility

 Alcohol

GOOD VICTIM



BAD WITNESS

Thanks to Teresa Scalzo, U.S. Navy

ROLE OF ALCOHOL: VICTIMS

↓ Ability to identify risk

↓ Ability to physically resist

✱ Unconsciousness

↓ Credibility

ROLE OF ALCOHOL: PERPETRATORS

 Narrowed perceptions

 Impulse control

 Cognitive distortions

ROLE OF ALCOHOL: REVICTIMIZATION

 History of sexual assault in childhood or adolescence

... leads to ...

 Risk of PTSD

AND

 Risk of substance abuse

... which increase...

 Risk of re-victimization

PROFILE OF A SEX OFFENDER

- ◉ There is none

CHARACTERISTICS ASSOCIATED WITH SEXUAL PERPETRATION

- You *may* see the following:

- Hypersexuality

- Impersonal attitude toward sexual relationships
- Emphasis on frequency, not emotional connection
- Attitude of sex as game, hunt, scoring, or war

- “Hostile masculinity”

- Rigid / stereotypic notion of gender roles
- Suspiciousness / hostility toward women
- Need for dominance over women
- Adversarial gender beliefs (men vs. women)

Rape myth acceptance (she asked for it, wanted it)

CHARACTERISTICS ASSOCIATED WITH SEXUAL PERPETRATION

○ You *may* see the following:

- Heavy alcohol use and/or drug use
- Boundary crossing / testing
- Peer support for attitudes and behavior
- History of childhood, adolescent delinquency
- Childhood abuse, especially sexual abuse
 - In one study, 60% of college men who had perpetrated a sexual assault had been abused as children
 - But this means that 40% were not

Malamuth, N.M., Sockloskie, R.J., Koss, M.P., & Tanaka, J.S. (1991). Characteristics of Aggressors Against Women: Testing a Model Using a National Sample of College Students. *Journal of Consulting and Clinical Psychology*, 59, 4, 670-681.

CHARACTERISTICS ASSOCIATED WITH SEXUAL PERPETRATION

- May be more characteristic of men who sexually assault female victims -- unclear how well this characterizes men who sexually assault males

MEET “BILL”

- Transcript from interview conducted for research by Dr. David Lisak and Dr. Paul Miller

Lisak, D. & Miller, P.M. (2002). Repeat rape and multiple offending among undetected rapists. *Violence and Victims, 17*, 73-84.

KEY CHARACTERISTICS OF MEN WHO PERPETRATE SEXUAL ASSAULT

- **Narcissism**

- **Lack of Empathy**

KEY CHARACTERISTICS OF MEN WHO PERPETRATE SEXUAL ASSAULT

- Narcissism

- Lack of Empathy

➔ anger when needs
are thwarted

My Needs

Everyone Else's

My Needs

Everyone Else's

My Needs

Everyone Else's

My Needs

Everyone Else's

My

Needs

MEET “FRANK”

- Another transcript from interview conducted for research by Dr. David Lisak and Dr. Paul Miller

Lisak, D. & Miller, P.M. (2002). Repeat rape and multiple offending among undetected rapists. *Violence and Victims*, 17, 73-84.

This is a reenactment of an interview conducted by Dr. David Lisak, Associate Professor, Department of Psychology, University of Massachusetts, Boston, as part of a study of men who had raped but were never reported or prosecuted for their crimes.

WHAT DOES FRANK TEACH US?

- ◉ Key characteristics of perpetrators
 - Narcissism / Lack of empathy / Others
- ◉ Pre-planning / Grooming Behaviors
- ◉ Cognitive distortions / Rape myths
 - Denial / Justification

- ◉ What if this was your case? What evidence would you use to prosecute?

WHAT DOES FRANK TEACH US?

✿ Re-perpetration

LISAK & MILLER (2002)

- See handout for methodology
 - 1,882 college men surveyed
 - Asked questions including rape perpetration
- 120 men (6.4%) had committed a rape
 - Of these, 44 men (36.7%) committed only one
 - Most of the rapists (76 men, 63.3%) committed more than one (serial perpetrators)
 - Average of 5.8 rapes per rapist
 - **Of 483 rapes, 91% were part of a series**

Lisak, D. & Miller, P.M. (2002). Repeat rape and multiple offending among undetected rapists. *Violence and Victims*, 17, 73-84.

MCWHORTER ET AL. (2009)

- See handout for methodology
 - 1,146 newly enlisted male Navy personnel
 - Asked same questions about rape perpetration
- Higher percentage committed a rape (13%)
 - More men (71%) committed more than one rape
 - Only 29% of the rapists committed a single rape
 - Similar average of 6.4 rapes per rapist
 - **A whopping 95% were part of a series**

McWhorter, S.K., Stander, V.A., Merrill, L.L., Thomsen, C.J., & Milner, J.S. (2009). Reports of rape perpetration by newly enlisted male Navy personnel. *Violence and Victims*, 24, 204-218.

MCWHORTER ET AL. (2009)

- Men who had committed a rape prior to entering the Navy were 10 times more likely to commit a rape during their 1st year in the service than men who had never before raped.

McWhorter, S.K., Stander, V.A., Merrill, L.L., Thomsen, C.J., & Milner, J.S. (2009). Reports of rape perpetration by newly enlisted male Navy personnel. *Violence and Victims, 24*, 204-218.

RE-PERPETRATION: RAPE

- ◉ When you receive a report of rape or sexual assault your first question should be ...

◉ WHERE ARE THE OTHERS?

Where should you look?

RE-PERPETRATION: VIOLENCE

- Not just re-perpetration of sexual assault, but other forms of interpersonal violence
 - In the same study by Lisak & Miller
 - 120 rapists were responsible for 1,225 separate acts of interpersonal violence, including rape, battery, and child physical and sexual abuse

- What does this mean for you?

Lisak, D. & Miller, P.M. (2002). Repeat rape and multiple offending among undetected rapists. *Violence and Victims*, 17, 73-84.

IMPLICATIONS FOR PROSECUTION

- ◉ Look for key characteristics, common behaviors of offenders
- ◉ Frame them as part of the pattern of sexual assault perpetration ... because they ARE
- ◉ Tell an offender-focused story
 - Contrast with consensual sex
- ◉ Document how non-consent was expressed

A BRIEF FORAY INTO LINGUISTICS

- Or why we don't "just say no" ... to anything
- Research documents that we do not typically say "no" directly to anything - we use a variety of strategies for expressing indirectly
- So look for how non-consent was expressed
 - Verbally, directly, indirectly, non-verbally
- And signs that the message was received
 - He heard the "no," he just didn't care

REMEMBER: MALE VICTIMS

- ⦿ Prevalence rate of male victims lower than for female victims, in the U.S. military as the general population
- ⦿ But disproportionate number of men in the U.S. military means the absolute numbers of male victims and female victims may be comparable

REMEMBER: MALE VICTIMS

- Some of the research findings cited here carry over, unclear if others do
- However, strategy is fundamentally similar
 - Look for key characteristics / common behaviors
 - Frame behaviors in a pattern of perpetration
 - Tell an offender-focused story
 - Re-perpetration: Where are the others?
 - Address credibility challenges head-on

FOR MORE INFORMATION

- Annual conference in New Orleans, LA
 - April 7-9, 2015: Hilton Riverside
 - Plus full day pre-conference training on forensic documentation (April 6, 2015)
- Regional Conferences (TBA)
- More information at: www.evawintl.org
- And email me! Kim@evawintl.org

VICTIM BEHAVIORS

Kimberly A. Lonsway, Ph.D.

Research Director

End Violence Against Women International

Victim behaviors

- ① Understanding common dynamics in sexual assault cases can help you to:
 - Know what to look for in case facts and identify additional information needed
 - Frame the facts in an offender-focused story
 - Provide context for understanding victim behaviors to fill in gaps of knowledge
 - Address credibility challenges head-on

Overcoming Credibility Challenges

Common challenges to the credibility of sexual assault victims

- **Please write down 3**

Realistic dynamics of sexual assault

- ❖ Most SA victims **do not physically resist**
- ❖ Most SA victims either **do not report to authorities** or do so only **after a delay**
- ❖ Most SA victims provide some information that is **incomplete, inconsistent, or untrue**

Importance of victim interview

- Victim interview is perhaps the most important element of a SA investigation
- Common credibility challenges can be overcome with a good interview and evidence-based investigation that addresses these challenges head-on

Credibility challenge #1: Lack of physical resistance

Despite the stereotype of “real rape,” most victims do not physically resist

Why?

Please write down 3 reasons

Credibility challenge #1: Lack of physical resistance

- they are too surprised and confused
 - they doubt their own perceptions or behavior
 - they experience dissociation or frozen fright
 - they fear the assailant's reaction to resistance
 - they fear retaliation by their assailant
 - they fear increasing risk of injury or death
- ◎ This is what you need to document and present

Overcoming credibility challenge #1: Lack of physical resistance

Need to answer the question:

- *Why didn't you fight back?*

WITHOUT ASKING IT THAT WAY

Overcoming credibility challenge #1: Lack of physical resistance

Use open-ended prompts instead:

- *What did you do next?*
- *Tell me what you were thinking at that point.*
- *What were you feeling when he did that?*

Document victim's thoughts and feelings

- Before, during, and after the sexual assault

Overcoming credibility challenge #1: Lack of physical resistance

Document sensory and peripheral details experienced during the sexual assault

- details of sights, sounds, tastes
- smells (suspect, breath, ejaculate, room)
- what things felt like (floor, bed, ground, suspect's body)
- how the victim's and suspect's body parts were placed during the assault

Overcoming credibility challenge #1: Lack of physical resistance

What does this look like? Example #1

All examples taken from the statement of a
15-year old sexual assault victim

He pulled into the alley and shut off his car. He turned to look at me and I thought, he's going to try to kiss me! Why does this always happen to me? He grabbed the back of my head, and forced me down to suck his penis. I resisted and the more I tried to get away, the rougher and more violent he became.

Threats of biting off his dick didn't stop him. His intensity and power grew, and my neck began to hurt so badly that I hardly had the strength to pull away. As I grew weaker, he grew stronger.

I looked at a blurred vision of myself in the mirror, a mixture of tears and alcohol. Looking at myself, I said, "it's okay, you are just going to go home now and take a shower. He said, 'Come on, let's go.' I was so glad that I was going home. He didn't take me home. He stopped the car in the same alley. FUCK, FUCK, FUCK.

I started panicking. Everything happened so fast from there. He kept coming at me. It suddenly hit me what was happening. “Oh my gosh, I am being raped!” I felt completely frozen. Inert. Weak. Like I couldn’t do anything at all. He had a power and force over me that I can’t even describe.

My body felt like it was made of lead. I knew how violent he was. He had shown me that only minutes before, when I didn't cooperate with him. I was scared. So scared that I was paralyzed, unable to think or react. So scared, that all I could do is scream inside my head. But, I showed a helpless, empty, nothingness on the outside.

Overcoming credibility challenge #1: Lack of physical resistance

Is this what your typical report sounds like?

Why not?

How could you get such documentation?

Overcoming credibility challenge #1: Lack of physical resistance

Document exactly what “no” looked like

- If victim verbally protests, note exact wording and tone used – may not be the word “no”
 - Suspect’s words may indicate he understood
 - Other ways victims express “no,” either physically or verbally
- ◎ Remember our foray into linguistics

Overcoming credibility challenge #1: Lack of physical resistance

Documenting how “no” was expressed is especially important if the victim consented to some sexual acts, but not others

What does this look like? Example #2

I couldn't look at him or his face, so I looked out the windshield window at a tree. I stared at its leaves in a total stupor. Disassociating myself from my body, like a daze. I was in shock.

Overcoming credibility challenge #1: Lack of physical resistance

- ⦿ Document post-assault behaviors
 - Describe who the victim is now, and how this is different from before the assault
 - Corroborate with other witness interviews
- ⦿ Especially important for victims who can not articulate these changes themselves

Overcoming credibility challenge #1: Lack of physical resistance

- ⦿ Used to reconstruct the entire context of victim's behavior for others to understand
 - Can use expert witness to explain common reactions of sexual assault victims
 - Contrast with behavior of someone who has engaged in consensual sex
- ⦿ **What does this look like? Example #3**

Nothing could stop the pain and humiliation that I held inside. I couldn't even call my friends to get support. I couldn't even bring myself to walk down two houses to talk to my best friend. I didn't want them to know. I wouldn't let myself visualize any of the day. I didn't know what to do. The next day at school, the reality was settling in. I knew the seriousness of the situation. I am a rape victim. I was raped.

Credibility challenge #2: Delayed reporting

Despite the stereotype of “real rape,” most victims do not report to authorities immediately (or do not report at all)

Why?

Please write down 3 reasons

Credibility challenge #2: Delayed reporting

- they are too surprised and confused
- they haven't made sense of what happened
- they were frozen with fear during the assault
- they feel that they are to blame
- they haven't yet had time to process what happened, let alone label it a "sexual assault"

Credibility challenge #2: Delayed reporting

- they do not see what happened to them as a sexual assault, based on stereotypes
 - they have a relationship with the suspect
 - they are afraid of not being believed or being blamed
 - they fear support people will side with suspect
 - they are afraid of what will happen to them
 - they are afraid of what will happen to the suspect
- ◎ Again, this is what you need to document/present

Credibility challenge #2: Delayed reporting

Delayed reporting is more common when
SA committed by a non-stranger

Overcoming challenge #2: Delayed reporting

- Recognize the realistic dynamics of sexual assault – few victims report immediately
- Reassure victims that this is common and understandable
- Provide victims with open-ended prompts to elicit their thoughts and feelings
- Document these thoughts and actions

Credibility challenge #2: Delayed reporting

- The interesting or important question is not why they delayed ...

...but rather, why DID they report?

- Ask victims what triggered their decision and you will obtain a wealth of information.

Overcoming challenge #2: Delayed reporting

Interview any “outcry witnesses”

- ✓ anyone victim told about the sexual assault
- ✓ especially the first person told
- ✓ can describe the victim’s immediate response
- ✓ often explains why they delayed reporting
- ✓ helps others to understand

Credibility challenge #3:

Incomplete, inconsistent, untrue statements

When interviewed, many if not most SA victims provide some information that is incomplete, inconsistent, or untrue

Why?

Please write down 3 reasons

Credibility challenge #3:

Incomplete, inconsistent, untrue statements

Trauma and disorganization

- We understand this in other contexts (e.g., personal tragedies, accidents, disasters)
- But somehow we don't always expect it when someone has been sexually assaulted

Credibility challenge #3:

Incomplete, inconsistent, untrue statements

Discomfort with sexual (or other) details

- Uncomfortable in the interview context
- Even when interviewer is compassionate
- Think of telling a stranger sexual details
- Victims may be especially reluctant to tell interviewer about humiliating details

Credibility challenge #3: Incomplete, inconsistent, untrue statements

Fear of doubt or blame

- victims are often very concerned about how friends, family members, and others will react
- fear is very well grounded in reality, because
- victims are often doubted or blamed by others
- may omit behaviors that were risky or illegal
- may not cooperate or recant and withdraw

Credibility challenge #3:

Incomplete, inconsistent, untrue statements

Victims may try to make their assault sound more like stereotypic “real rape”

- might say the assailant was a stranger
- he used a weapon
- he was very violent
- victim engaged in no risky or illegal behavior
- victim resisted to the utmost
- victim reported the crime immediately

Credibility challenge #3:

Incomplete, inconsistent, untrue statements

Interviewers can respond by:

- stating they are not there to judge the victim, but to document exactly what happened
- using open-ended prompts to elicit details
- gently reminding victims that information withheld now may be used to discredit them later
- reassuring victims that it is best to be honest, and they will not be doubted or blamed by interviewer

Credibility challenge #3:

Incomplete, inconsistent, untrue statements

Inconsistencies due to documentation

- some inconsistencies due to interviewer's documentation, not victim's statement
- consider taping the victim interview?

Credibility challenge #3:

Incomplete, inconsistent, untrue statements

- Explore the issue gently with victim
 - Create safe/nonjudgmental environment
 - First, ask victim for clarification
 - The mistake may be the interviewer's
- Clarify after complete victim narrative
 - Do not interrupt the victim's narrative
 - Explain negative impact of such problems
 - Emphasize the importance of truthfulness

Credibility challenge #3:

Incomplete, inconsistent, untrue statements

If the question remains,

- Ask victim for help making sense of the issue
- Explain that others will be reading or hearing the victim's description of the sexual assault, and they will need an accurate understanding
- If victim seems to be making the assault sound more like "real rape," address the fear of being doubted or blamed with reassurance

Credibility challenge #3: Incomplete, inconsistent, untrue statements

Seek corroboration of victim's statement

- In addition to clarifying any problem issues, it is also important to corroborate the accuracy of other details in victim's statement
- This bolsters the credibility of the victim and the victim's description of what happened

For More Information

- End Violence Against Women International
 - www.evawintl.org

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2014 Board & Staff

Vision Statement:

We envision a world where gender-based violence is unacceptable; where perpetrators are held accountable, and victims receive the compassion, support, and justice they deserve.

Corporate Partnerships

Building Community Goodwill by



Start by Believing is a public awareness campaign uniquely focused on the public response to sexual assault. The goal is to change



2015 ANNUAL CONFERENCE
Hilton New Orleans Riverside
New Orleans, Louisiana
April 7-9, 2015

OnLine Training Institute

Technical Assistance:

With support from the Office on Violence Against Women (OVW), EVAWI is now able to provide technical assistance in two specific areas:

The **law enforcement** response to sexual assault,

and



News & Updates

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2015 ANNUAL CONFERENCE
Hilton New Orleans Riverside
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Webinar Announcement!

The Neurobiology of Sexual Assault **by Dr. Rebecca Campbell**

Wednesday, October 1, 2014

90 Minutes

10:00 AM PT / 11:00 AM MT / 12:00 PM CT / 1:00 PM ET

While we receive countless requests for training here at EVAWI, the most common request is currently for training on the neurobiology of trauma and the implications for conducting trauma-informed interviews and investigations. We are therefore delighted that Dr. Rebecca Campbell has agreed to provide critically needed training in this FREE 90-minute [webinar](#). We hope you will join us for this exceptional opportunity.

Course Description



This course is designed for law enforcement personnel and others involved in the criminal justice and community response to sexual assault. Participants will learn about the neurobiology of trauma and its application to victims of sexual assault. By exploring how trauma affects victims' emotions and behavior, special attention will be given to examining how



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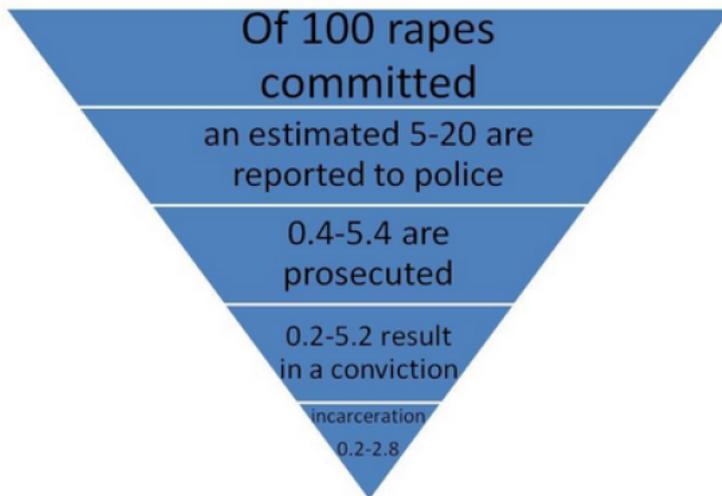


For more information on the *Start by Believing* campaign [visit our website](#) or check us out on [Facebook](#).

Webinars

Understanding DNA: Policy Responses, Assessment, and Recommendations for Practice

In this final installment of our series of training bulletins on *Understanding DNA Evidence*, we would like to continue our application of Problem-Oriented Policing (POP) and the SARA model (Scanning - Analysis - Response - Assessment) to the problems associated with unanalyzed forensic evidence in sexual assault cases. We offer additional recommendations for practice - not only for law enforcement agencies, but also for the many other multidisciplinary professionals involved in the criminal justice and community response system for sexual assault. Our objective is to contribute to the ongoing scanning and analysis of this complex problem, as well as the development of alternative responses and an assessment of their impact. The larger goal is to reduce the funnel of attrition for sexual assault cases within the criminal justice system and improve our responses to victims.



Graph reprinted from Lonsway and Archambault (2012)



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Welcome to the OnLine Training Institute! Below you will find a list of courses that are currently available (you may need to scroll down to see them).

- Because you now have an account, **you can begin immediately** by enrolling in any of the modules.

To view a detailed description of any training module, click on the title in the list below. For information on tracking your status in courses, please see the **How to Enroll** page.

Courses (click on a course name for a full description)

Course	Status	Action	Certificate	PDF	ADA PDF
EVAWI 01 - Effective Report Writing: Using the Language of Non-Consensual Sex	PASSED	Score	View	Download	Download
EVAWI 02 - Dynamics: What Does Sexual Assault Really Look Like?	PASSED	Score	View	Download	Download
EVAWI 03 - Victim Impact: How do Sexual Assault Victims Respond?	ENROLLED	Continue	View	Download	Download
EVAWI 04 - Preliminary Investigation: Guidelines for First Responders	ENROLLED	Start	View	Download	Download
EVAWI 05 - Law and Investigative Strategy: What Kind of Sexual Assault is This?	ENROLLED	Continue	View	Download	Download
EVAWI 06 - Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault	ENROLLED	Continue	View	Download	Download
EVAWI 07-False Reports: Moving Beyond the Issue to Successfully Investigate Sexual Assault	ENROLLED	Continue	View	Download	Download
EVAWI 08 - Sustaining a Coordinated Community Response: Sexual Assault Response and Resource Teams (SARRT)	PASSED	Score	View	Download	Download
EVAWI 09 - Reporting Methods for Sexual Assault Cases	PASSED	Score	View	Download	Download
EVAWI 10 - Clearance Methods for Sexual Assault Cases	PASSED	Score	View	Download	Download
EVAWI 11 - Sexual Assault Response and Resource Teams (SARRT): A	PASSED	Score	View	Download	Download

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[EVAWI](#) > [Resources](#) > Best Practices

For over 10 years, EVAWI has produced training materials and other resources, as well as collecting materials from across the country and around the world – to help professionals improve the criminal justice and community response to violence against women.

BEST PRACTICES: RESOURCES

In this section, you will find a wealth of resources for professionals to guide improvements in the criminal justice and community response to violence against women. This includes sexual assault, domestic violence, and stalking. The goal is to highlight examples of communities striving to achieve the highest standards of victim-centered care and offender accountability. In other words, we are working toward our shared vision of creating a world where gender-based violence is unacceptable; where perpetrators are held accountable, and victims receive the compassion, support, and justice they deserve.

[READ MORE . . .](#)

BEST PRACTICES FAQ's

Here you will find detailed answers to many Frequently Asked Questions regarding the criminal justice and community response to violence against women. This includes sexual assault, domestic violence, and stalking. Questions address topics such as victim dynamics, role of victim advocates, joint interviews, medical forensic exams, law enforcement investigation, victim interviews, and prosecution.

[READ MORE . . .](#)

WEBINARS & ARCHIVE

Our most recent webinar was offered by EVAWI's Executive Director Joanne Archambault and Board President Roger Canaff, on the complex and challenging topic of Victim Interviewing. Other topics included in the Webinar Archive include Forensic Compliance, Medical Mandated Reporting, and Alternative Reporting Methods. Stay tuned for information on upcoming webinars offered by leading professionals in the field, on topics of interest to a broad range of multidisciplinary professionals.

[READ MORE . . .](#)

Technical Assistance:

With support from the Office on Violence Against Women (OVW), EVAWI is now able to provide technical assistance in two specific areas:

The **law enforcement** response to sexual assault,

and

VAWA forensic compliance.

You can also find information in our [Best Practices](#) and [Forensic Compliance](#) sections of the website.

Please contact us if you have questions in either of these areas.

[Technical Assistance](#)

Technical Assistance

Come Join US!

- ⦿ Annual conference in New Orleans, LA
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- ⦿ And email me! Kim@evawintl.org

(E) Disciplinary sanctions for members of the Armed Forces and other personnel of the Department of Defense and Coast Guard who willfully or wantonly fail to comply with requirements relating to such rights.

SEC. 1702. REVISION OF ARTICLE 32 AND ARTICLE 60, UNIFORM CODE OF MILITARY JUSTICE.

(a) USE OF PRELIMINARY HEARINGS.—

(1) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended to read as follows:

“§ 832. Art. 32. Preliminary hearing

“(a) PRELIMINARY HEARING REQUIRED.—(1) No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing.

“(2) The purpose of the preliminary hearing shall be limited to the following:

“(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

“(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

“(C) Considering the form of charges.

“(D) Recommending the disposition that should be made of the case.

“(b) HEARING OFFICER.—(1) A preliminary hearing under subsection (a) shall be conducted by an impartial judge advocate certified under section 827(b) of this title (article 27(b)) whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. If the hearing officer is not a judge advocate, a judge advocate certified under section 827(b) of this title (article 27(b)) shall be available to provide legal advice to the hearing officer.

“(2) Whenever practicable, when the judge advocate or other hearing officer is detailed to conduct the preliminary hearing, the officer shall be equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.

“(c) REPORT OF RESULTS.—After conducting a preliminary hearing under subsection (a), the judge advocate or other officer conducting the preliminary hearing shall prepare a report that addresses the matters specified in subsections (a)(2) and (f).

“(d) RIGHTS OF ACCUSED AND VICTIM.—(1) The accused shall be advised of the charges against the accused and of the accused’s right to be represented by counsel at the preliminary hearing under subsection (a). The accused has the right to be represented at the preliminary hearing as provided in section 838 of this title (article 38) and in regulations prescribed under that section.

“(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2).

“(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

“(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).

“(e) RECORDING OF PRELIMINARY HEARING.—A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.

“(f) EFFECT OF EVIDENCE OF UNCHARGED OFFENSE.—If evidence adduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused—

“(1) is present at the preliminary hearing;

“(2) is informed of the nature of each uncharged offense considered; and

“(3) is afforded the opportunities for representation, cross-examination, and presentation consistent with subsection (d).

“(g) EFFECT OF VIOLATION.—The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error.

“(h) VICTIM DEFINED.—In this section, the term ‘victim’ means a person who—

“(1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and

“(2) is named in one of the specifications.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter VI of chapter 47 of such title is amended by striking the item relating to section 832 and inserting the following new item:

“832. Art 32. Preliminary hearing.”.

(b) ELIMINATION OF UNLIMITED COMMAND PREROGATIVE AND DISCRETION; IMPOSITION OF ADDITIONAL LIMITATIONS.—Subsection (c) of section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended to read as follows:

“(c)(1) Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

“(2)(A) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier.

“(B) Except as provided in paragraph (4), the convening authority or another person authorized to act under this section may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

“(C) If the convening authority or another person authorized to act under this section acts to disapprove, commute, or suspend, in whole or in part, the sentence of the court-martial for an offense (other than a qualifying offense), the convening authority or other

(e) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Discussion

An investigation should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If an investigation of the subject matter already has been conducted, *see* R.C.M. 405(b).

Rule 405. Pretrial investigation

(a) *In general.* Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

Discussion

The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused. The investigation should be limited to the issues raised by the charges and necessary to proper disposition of the case. The investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers. *See* subsection (e) of this rule. Recommendations of the investigating officer are advisory.

If at any time after an investigation under this rule the charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matters alleged.

Failure to comply substantially with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. *See* R.C.M. 905(b)(1) and 906(b)(3) concerning motions for appropriate relief relating to the pretrial investigation.

The accused may waive the pretrial investigation. *See* subsection (k) of this rule. In such case, no investigation need be held. The commander authorized to direct the investigation may direct that it be conducted notwithstanding the waiver.

(b) *Earlier investigation.* If an investigation of the subject matter of an offense has been conducted

before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.

Discussion

An earlier investigation includes courts of inquiry and similar investigations which meet the requirements of this subsection.

(c) *Who may direct investigation.* Unless prohibited by regulations of the Secretary concerned, an investigation may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) *Personnel.*

(1) *Investigating officer.* The commander directing an investigation under this rule shall detail a commissioned officer not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

Discussion

The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training. The investigating officer may seek legal advice concerning the investigating officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party.

(2) *Defense counsel.*

(A) *Detailed counsel.* Except as provided in subsection (d)(2)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel.* The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b). When the accused is represented by individual military counsel, counsel detailed to represent the accused shall ordinarily be excused, unless the authority who detailed the defense counsel, as a matter of discretion, approves a request by the accused for retention of detailed

counsel. The investigating officer shall forward any request by the accused for individual military counsel to the commander who directed the investigation. That commander shall follow the procedures in R.C.M. 506(b).

(C) *Civilian counsel.* The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(2)(A) and (B) of this rule.

Discussion

See R.C.M. 502(d)(6) concerning the duties of defense counsel.

(3) *Others.* The commander who directed the investigation may also, as a matter of discretion, detail or request an appropriate authority to detail:

- (A) Counsel to represent the United States;
- (B) A reporter; and
- (C) An interpreter.

(e) *Scope of investigation.* The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges. If evidence adduced during the investigation indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of such offense and make a recommendation as to its disposition, without the accused first having been charged with the offense. The accused's rights under subsection (f) are the same with regard to investigation of both charged and uncharged offenses.

Discussion

The investigation may properly include such inquiry into issues raised directly by the charges as is necessary to make an appropriate recommendation. For example, inquiry into the legality of a search or the admissibility of a confession may be appropriate. However, the investigating officer is not required to rule on the admissibility of evidence and need not consider such matters except as the investigating officer deems necessary to an informed recommendation. When the investigating officer is aware that evidence may not be admissible, this should be noted in the report. See also subsection (i) of this rule.

In investigating uncharged misconduct identified during the

pretrial investigation, the investigating officer will inform the accused of the general nature of each uncharged offense investigated, and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the investigation of any charge offense.

(f) *Rights of the accused.* At any pretrial investigation under this rule the accused shall have the right to:

- (1) Be informed of the charges under investigation;
- (2) Be informed of the identity of the accuser;
- (3) Except in circumstances described in R.C.M. 804(c)(2), be present throughout the taking of evidence;
- (4) Be represented by counsel;
- (5) Be informed of the witnesses and other evidence then known to the investigating officer;
- (6) Be informed of the purpose of the investigation;
- (7) Be informed of the right against self-incrimination under Article 31;
- (8) Cross-examine witnesses who are produced under subsection (g) of this rule;
- (9) Have witnesses produced as provided for in subsection (g) of this rule;
- (10) Have evidence, including documents or physical evidence, produced as provided under subsection (g) of this rule;
- (11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer; and
- (12) Make a statement in any form.

(g) *Production of witnesses and evidence; alternatives.*

(1) *In general.*

(A) *Witnesses.* Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of

obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1)-(6), is not "reasonably available."

Discussion

A witness located beyond the 100-mile limit is not *per se* unavailable. To determine if a witness beyond 100 miles is reasonably available, the significance of the witness' live testimony must be balanced against the relative difficulty and expense of obtaining the witness' presence at the hearing.

(B) *Evidence.* Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely and in compliance with this rule. As soon as practicable after receipt of a request by the accused for information that may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

Discussion

In preparing for the investigation, the investigating officer should consider what evidence, including evidence that may be obtained by subpoena duces tecum, will be necessary to prepare a thorough and impartial investigation. The investigating officer should consider, as to potential witnesses, whether their personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness's testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call, it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness's personal appearance if the sole reason for the witness's testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the offense, personal appearance would be

required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence, including evidence that may be obtained by subpoena duces tecum.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under Mil. R. Evid. 505 or 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subsection (g)(6), may be required to protect whatever information the government may decide to release to the accused.

(2) *Determination of reasonable availability.*

(A) *Military witnesses.* The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall inform the parties. Otherwise, the immediate commander of the witness shall be requested to make the witness available. 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 under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the immediate commander of the requested witness and with others. If the immediate commander determined that the witness is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(B) *Civilian witnesses.* The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.

Discussion

The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend and, when appropriate, informed that necessary expenses will be paid.

If the witness refuses to testify, the witness is not reasonably available because civilian witnesses may not be compelled to attend a pretrial investigation. Under subsection (g)(3) of this rule, civilian witnesses may be paid for travel and associated expenses to testify at a pretrial investigation. Except for use in support of the deposition of a witness under Article 49, UCMJ, and ordered pursuant to R.C.M. 702(b), the investigating officer and any government representative to an Article 32, UCMJ, proceeding does not possess authority to issue a subpoena to compel against his or her will a civilian witness to appear and provide testimony.

(C) *Evidence generally.* The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties.

(i) *Evidence under the control of the Government.* Upon the investigating officer's determination that evidence is reasonably available, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

Evidence shall include documents and physical evidence that are relevant to the investigation and not cumulative. *See* subsection (g)(1)(B). The investigating officer may discuss factors affecting reasonable availability with the custodian and with others. If the custodian determines that the evidence is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(ii) *Evidence not under the control of the Government.* Evidence not under the control of the Government may be obtained through noncompulsory means or by subpoena duces tecum issued pursuant to procedures set forth in R.C.M. 703(f)(4)(B). A determination by the investigating officer that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

A subpoena duces tecum to produce books, papers, documents, data, electronically stored information, or other objects for a pretrial investigation pursuant to Article 32 may be issued by the investigating officer or counsel representing the United States. *See* R.C.M. 703(f)(4)(B).

The investigating officer may find that evidence is not reasonably available if: the subpoenaed party refuses to comply with the duly issued subpoena duces tecum; the evidence is not subject to compulsory process; or the significance of the evidence is outweighed by the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

(D) *Action when witness or evidence is not reasonably available.* If the defense objects to a determination that a witness or evidence is not reasonably available, the investigating officer shall include a statement of the reasons for the determination in the report of investigation.

(3) *Witness expenses.* Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule according to regulations prescribed by the Secretary of a Department.

Discussion

See Department of Defense Joint Travel Regulations, Vol 2, paragraphs C7055.

(4) *Alternatives to testimony.*

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath;

(iv) Depositions;

(v) Stipulations of fact or expected testimony;

(vi) Unsworn statements; and

(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath; and

(iv) Deposition of that witness; and

(v) In time of war, unsworn statements.

(5) *Alternatives to evidence.*

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;

(iv) A stipulation of fact, document's contents, or expected testimony;

(v) An unsworn statement describing the evidence; or

(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:

- (i) Testimony describing the evidence;
- (ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or
- (iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

(6) *Protective order for release of privileged information.* If, prior to referral, the Government agrees to disclose to the accused information to which the protections afforded by Mil. R. Evid. 505 or 506 may apply, the convening authority, or other person designated by regulation of the Secretary of the service concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(1)(B) through (F) or 506(g)(2) through (5).

(h) *Procedure.*

(1) *Presentation of evidence.*

(A) *Testimony.* All testimony shall be taken under oath, except that the accused may make an unsworn statement. The defense shall be given wide latitude in cross-examining witnesses.

Discussion

The following oath may be given to witnesses:

“Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?”

The investigating officer is required to include in the report of the investigation a summary of the substance of all testimony. *See* subsection (j)(2)(B) of this rule. After the hearing, the investigating officer should, whenever possible, reduce the substance of the testimony of each witness to writing.

If the accused testifies, the investigating officer may invite but not require the accused to swear to the truth of a summary of that testimony. If substantially verbatim notes of a testimony or recordings of testimony were taken during the investigation, they should be preserved until the end of trial.

If it appears that material witnesses for either side will not be available at the time anticipated for trial, the investigating officer should notify the commander who directed the investigation so that depositions may be taken if necessary.

If during the investigation any witness subject to the code is suspected of an offense under the code, the investigating officer should comply with the warning requirements of Mil. R. Evid. 305(c), (d), and, if necessary, (e).

(B) *Other evidence.* The investigating officer shall inform the parties what other evidence will be considered. The parties shall be permitted to examine all other evidence considered by the investigating officer.

(C) *Defense evidence.* The defense shall

have full opportunity to present any matters in defense, extenuation, or mitigation.

(2) *Objections.* Any objection alleging failure to comply with this rule, except subsection (j), shall be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer shall not be required to rule on any objection. An objection shall be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

Discussion

See also subsection (k) of this rule.

Although the investigating officer is not required to rule on objections, the investigating officer may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the investigating officer believes such action is appropriate.

If an objection raises a substantial question about a matter within the authority of the commander who directed the investigation (for example, whether the investigating officer was properly appointed) the investigating officer should promptly inform the commander who directed the investigation.

(3) *Access by spectators.* Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer. Article 32 investigations are public hearings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Commanders or investigating officers must conclude that no lesser methods short of closing the Article 32 investigation can be used to protect the overriding interest in the case. Commanders or investigating officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a commander or investigating officer believes closing the Article 32 investigation is necessary, the commander or investigating officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the Article 32 investigating officer’s report. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.

(4) *Presence of accused.* The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present, whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obli-

gation to be present); or

(B) After being warned by the investigating officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(i) *Military Rules of Evidence*. The Military Rules of Evidence do not apply in pretrial investigations under this rule except as follows:

(1) Military Rules of Evidence 301, 302, 303, 305, and Section V shall apply in their entirety.

(2) Military Rule of Evidence 412 shall apply in any case defined as a sexual offense in Mil. R. Evid. 412(d).

(3) In applying these rules to a pretrial investigation, the term “military judge,” as used in these rules, shall mean the investigating officer, who shall assume the military judge’s powers to exclude evidence from the pretrial investigation, and who shall, in discharging this duty, follow the procedures set forth in the rules cited in paragraphs (1) and (2).

Discussion

With regard to all evidence, the investigating officer should exercise reasonable control over the scope of the inquiry. *See* subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, see subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented. Certain rules relating to the form of testimony that may be considered by the investigating officer appear in subsection (g) of this rule.

Mil. R. Evid. 412 evidence, including closed hearing testimony, must be protected pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a. Evidence deemed admissible by the investigating officer should be made a part of the report of investigation. *See* subsection (j)(2)(C), *infra*. Evidence deemed inadmissible, and the testimony taken during the closed hearing, should not be included in the report of investigation and should be safeguarded. The investigating officer and counsel representing the United States are responsible for careful handling of any such evidence to prevent indiscriminate viewing or disclosure. Although R.C.M. 1103A does not apply, its requirements should be used as a model for safeguarding inadmissible evidence and closed hearing testimony. The convening authority and the appropriate judge advocate are permitted to review such safeguarded evidence and testimony. *See* R.C.M. 601(d)(1).

(j) *Report of investigation*.

(1) *In general*. The investigating officer shall make a timely written report of the investigation to the commander who directed the investigation.

Discussion

If practicable, the charges and the report of investigation should be forwarded to the general court-martial convening authority within 8 days after an accused is ordered into arrest or confinement. Article 33.

(2) *Contents*. The report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

Discussion

See R.C.M. 909 (mental capacity); 916(k) (mental responsibility).

(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer’s conclusion whether the charges and specifications are in proper form;

(H) The investigating officer’s conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.

Discussion

For example, the investigating officer may recommend that the charges and specifications be amended or that additional charges be preferred. *See* R.C.M. 306 and 401 concerning other possible dispositions.

See Appendix 5 for a sample of the Investigating Officer’s Report (DD Form 457).

(3) *Distribution of the report*. The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) *Objections*. Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charges or taking other action within the 5-day period.

(k) *Waiver*. The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

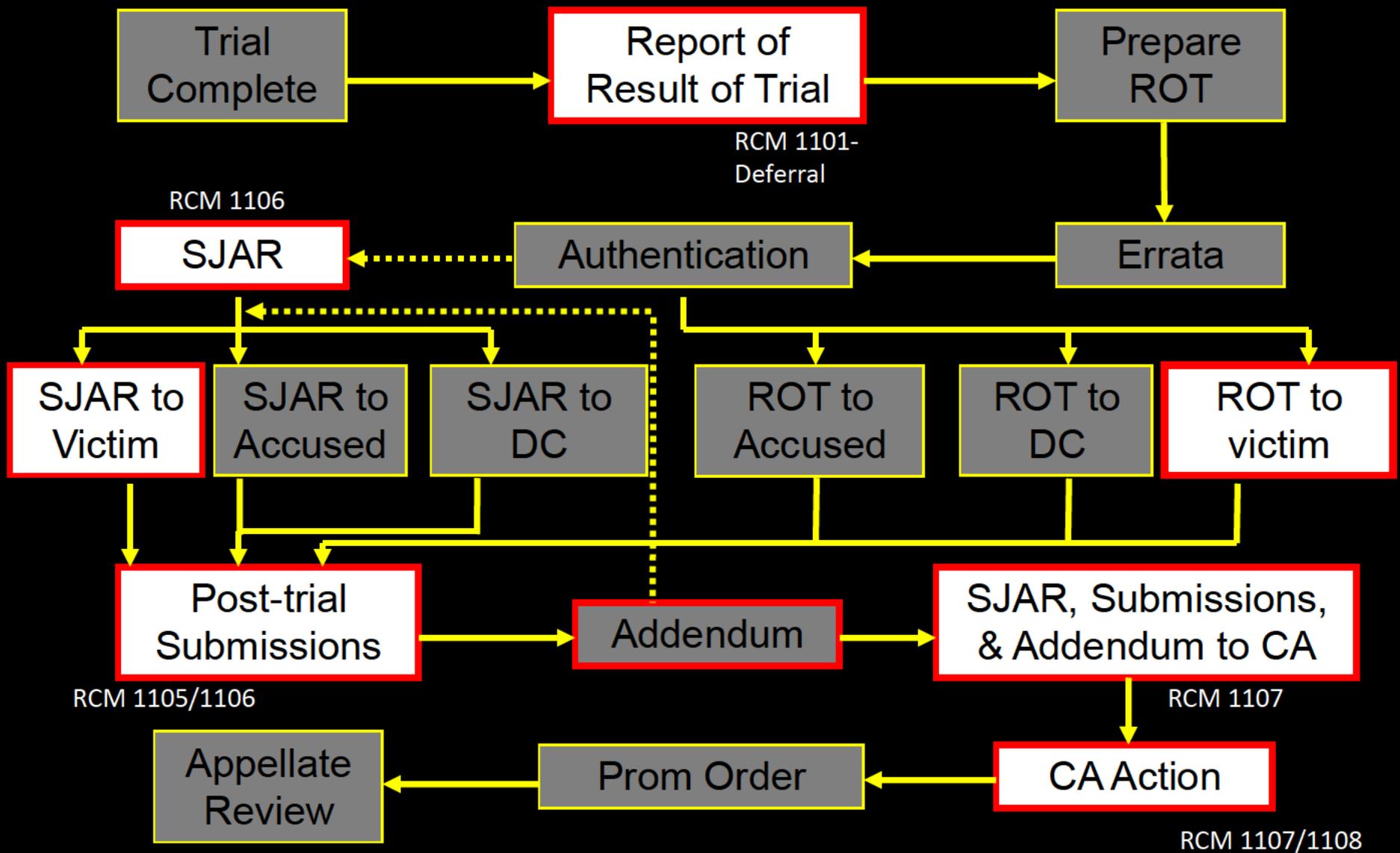
Discussion

See also R.C.M. 905(b)(1); 906(b)(3).

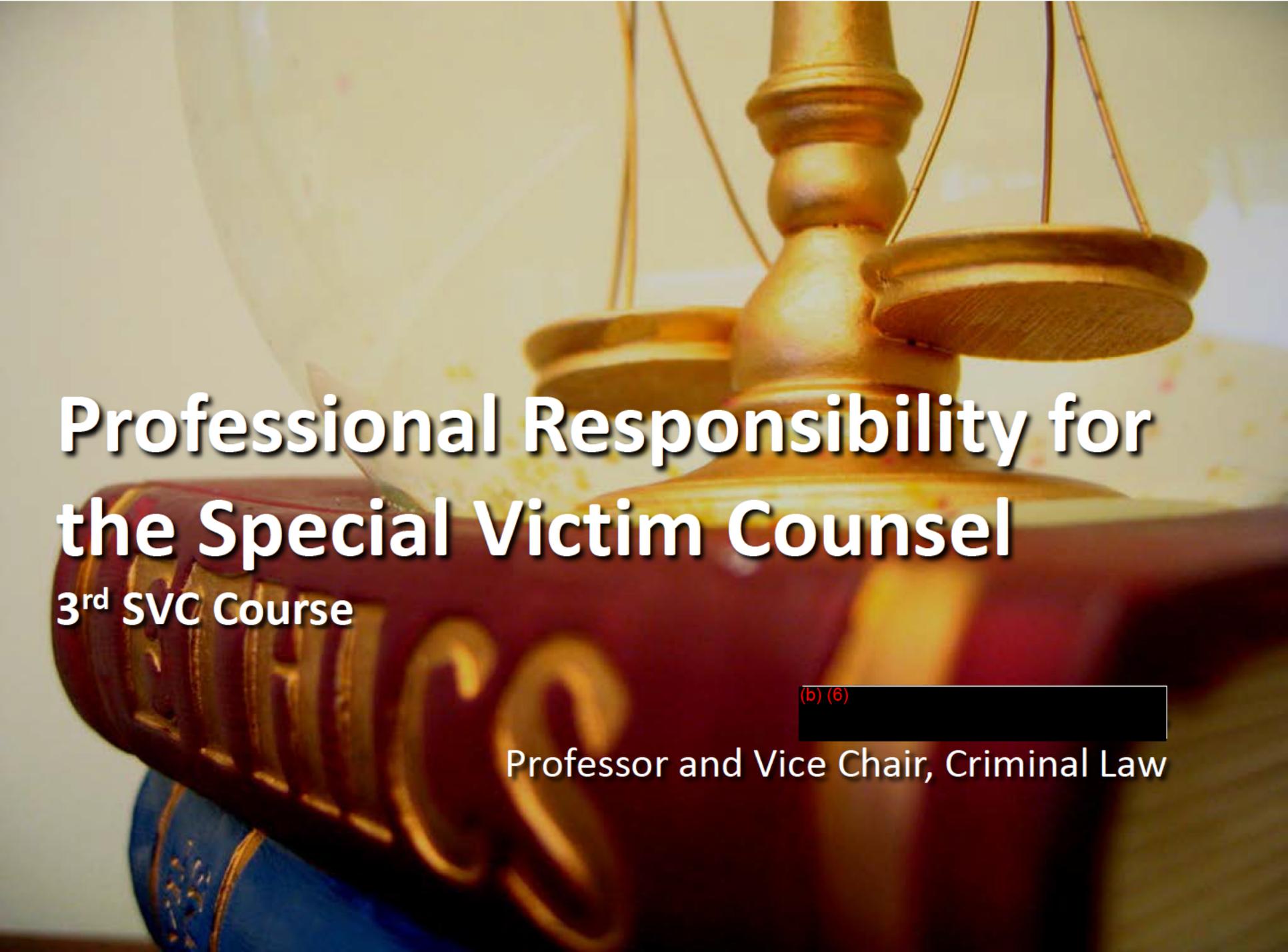
If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver.

The commander who receives an objection may direct that the investigation be reopened or take other action, as appropriate.

Even if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review.



RCM 1107/1108



Professional Responsibility for the Special Victim Counsel

3rd SVC Course

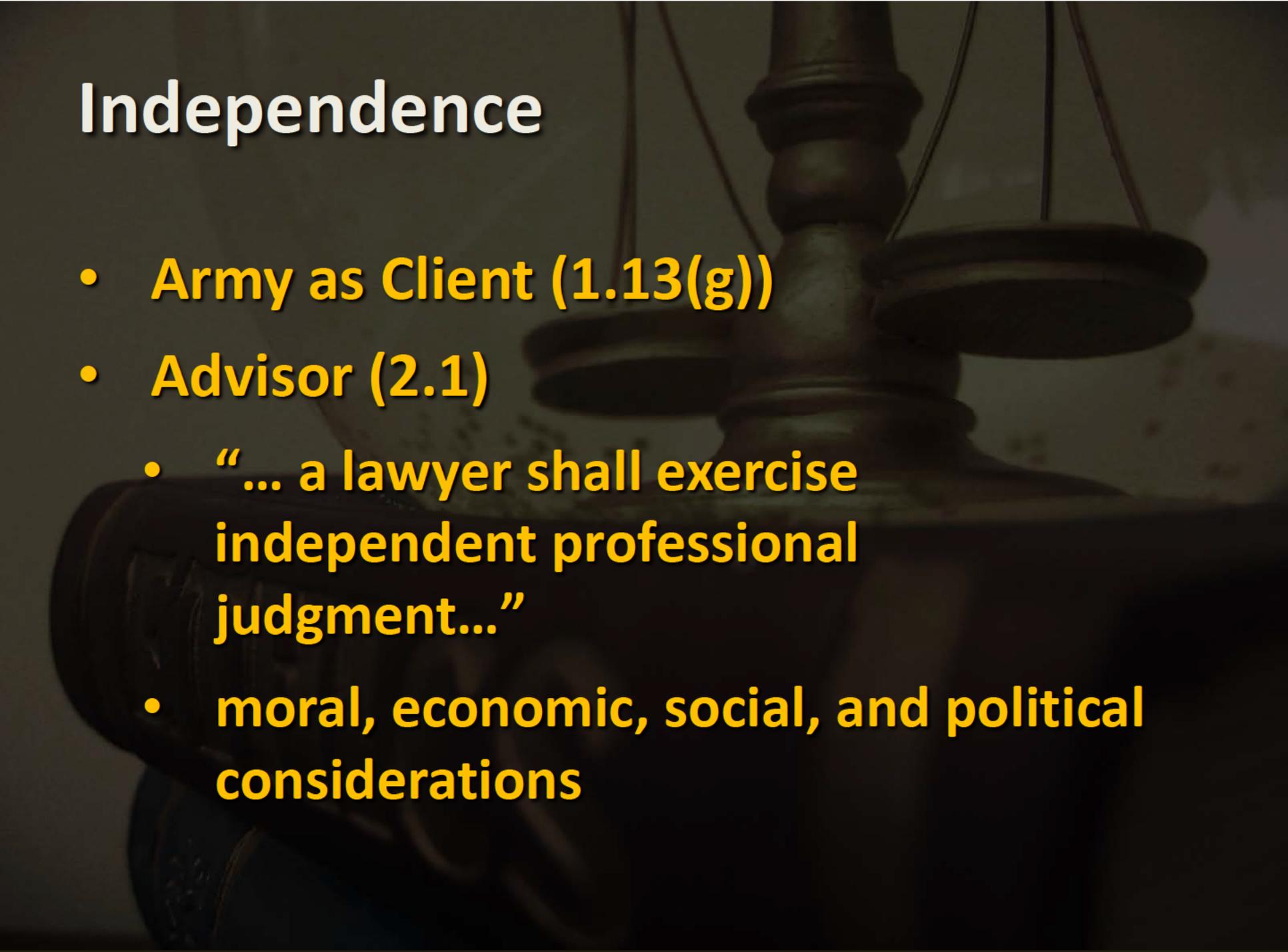
(b) (6)

Professor and Vice Chair, Criminal Law



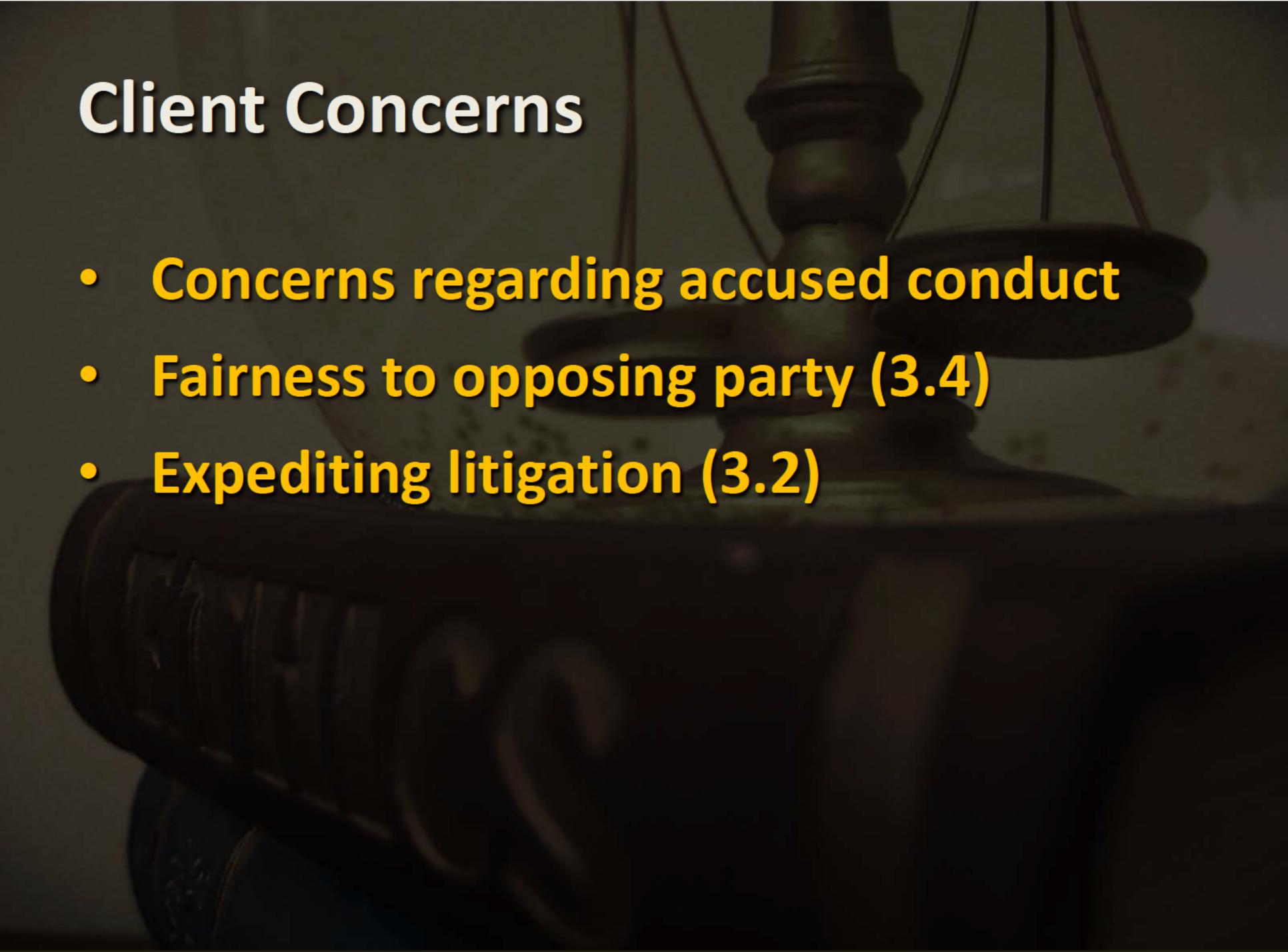
Independence
Client Concerns
SJA Interactions
Self-Care
Miscellaneous Issues

Independence



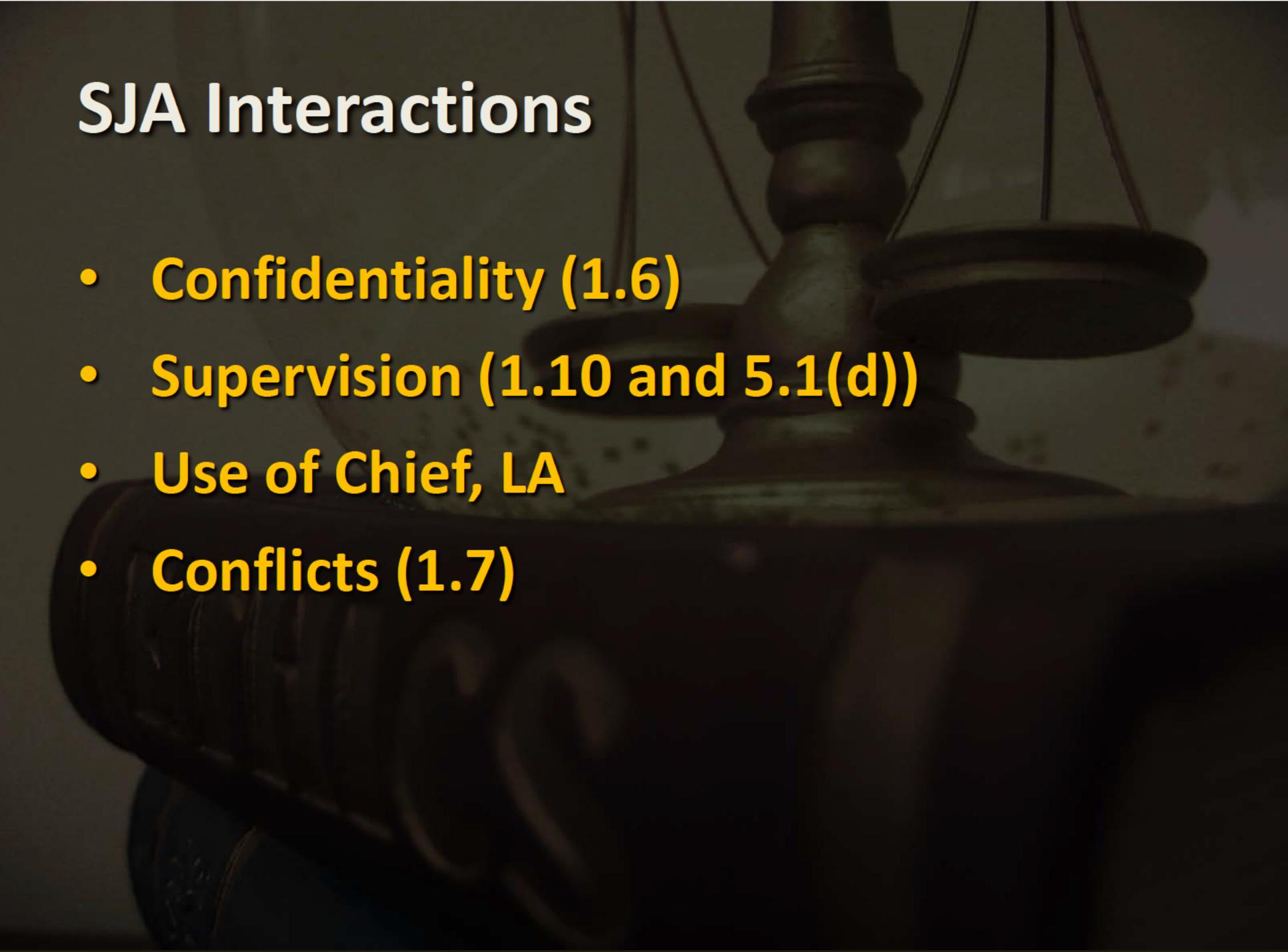
- **Army as Client (1.13(g))**
- **Advisor (2.1)**
 - **“... a lawyer shall exercise independent professional judgment...”**
 - **moral, economic, social, and political considerations**

Client Concerns



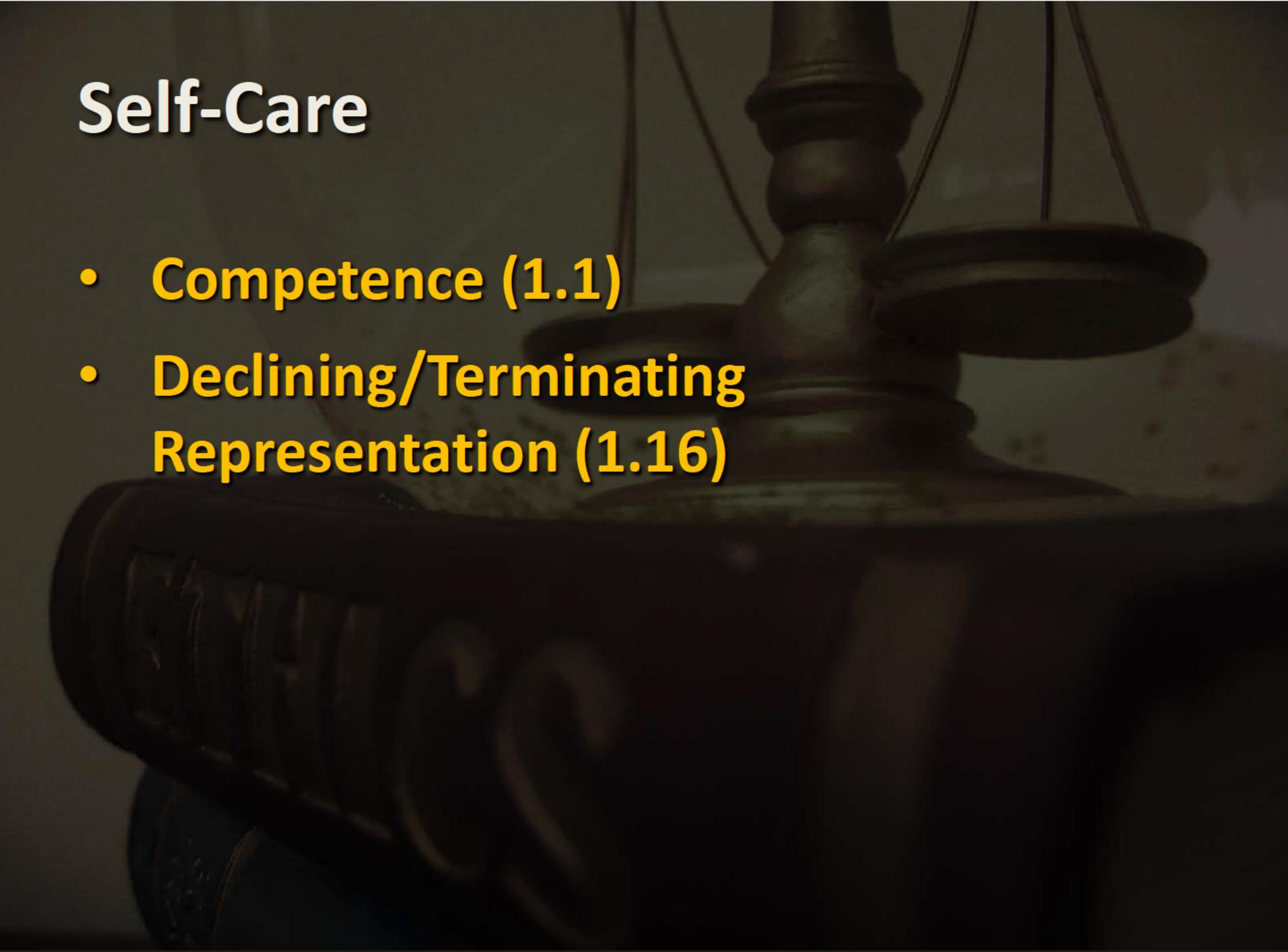
- **Concerns regarding accused conduct**
- **Fairness to opposing party (3.4)**
- **Expediting litigation (3.2)**

SJA Interactions



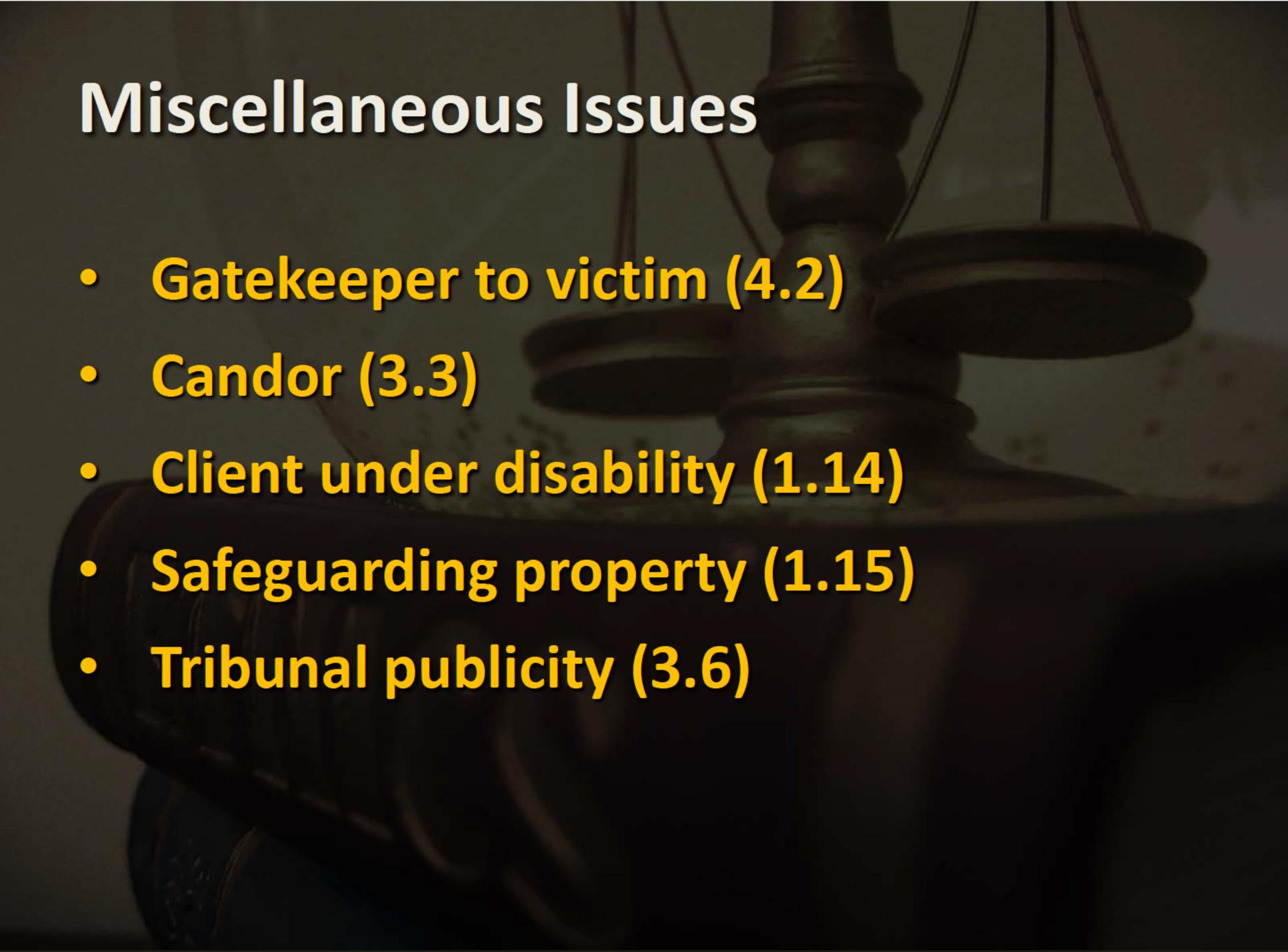
- **Confidentiality (1.6)**
- **Supervision (1.10 and 5.1(d))**
- **Use of Chief, LA**
- **Conflicts (1.7)**

Self-Care



- **Competence (1.1)**
- **Declining/Terminating Representation (1.16)**

Miscellaneous Issues



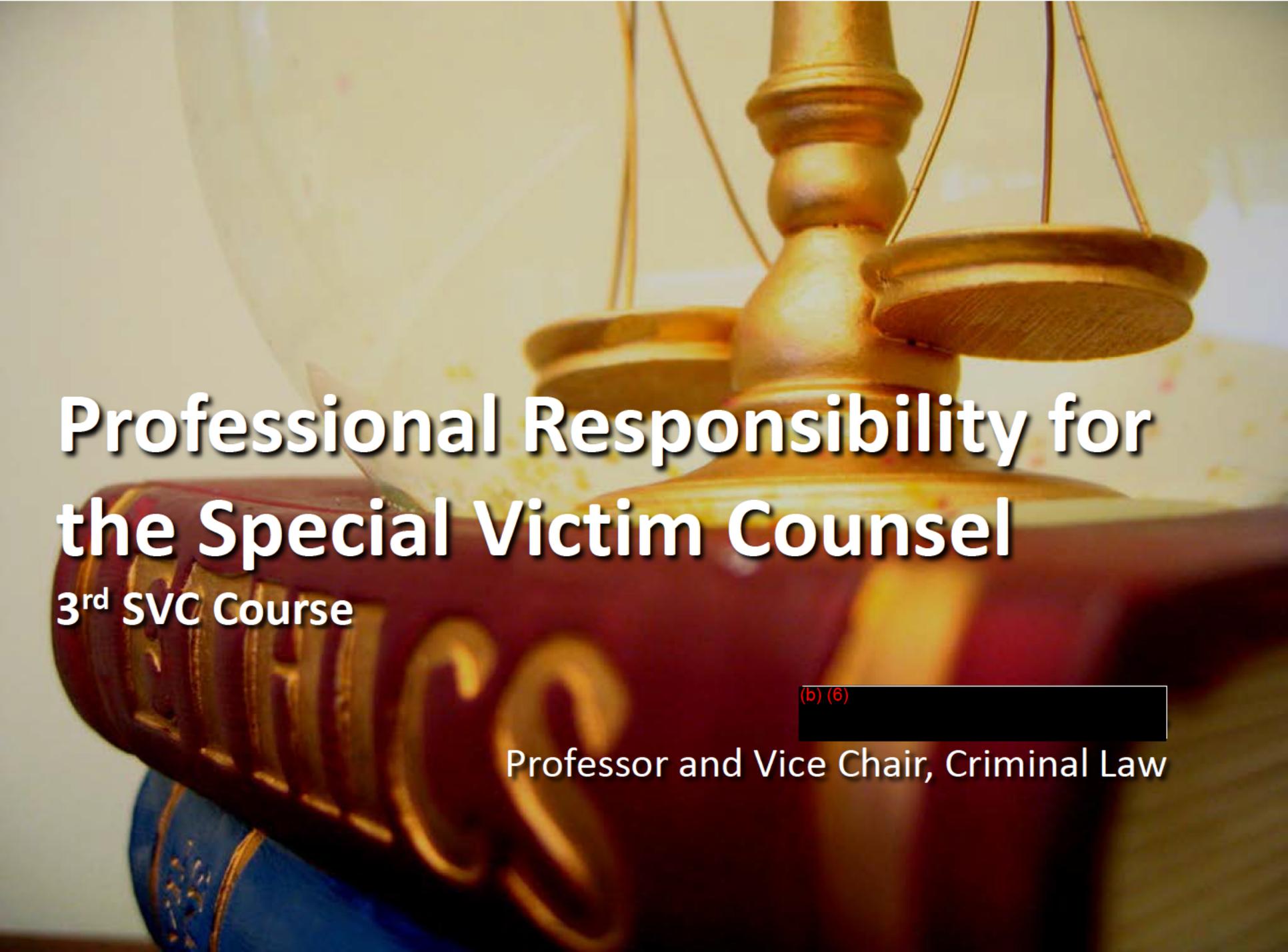
- **Gatekeeper to victim (4.2)**
- **Candor (3.3)**
- **Client under disability (1.14)**
- **Safeguarding property (1.15)**
- **Tribunal publicity (3.6)**

PROFESSIONAL INDEPENDENCE – RULE 5.4

“Notwithstanding a lawyer’s status as a commissioned officer ... a lawyer detailed or assigned to represent an individual [client] is expected to exercise unfettered loyalty and professional independence...”

“[T]he practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties...”

Discussion



Professional Responsibility for the Special Victim Counsel

3rd SVC Course

(b) (6)

Professor and Vice Chair, Criminal Law

Sexual Assault Prevention and Response



SHARP STATISTICS

Annual Report

- FY 14: 1,100 (190 RR/910 UR)
- FY 13: 2,149 (318 RR/1,831 UR)
- FY 12: 1,423 (174 RR/1,249 UR)
- FY 11: 1,695 (301 RR/1,394 UR)

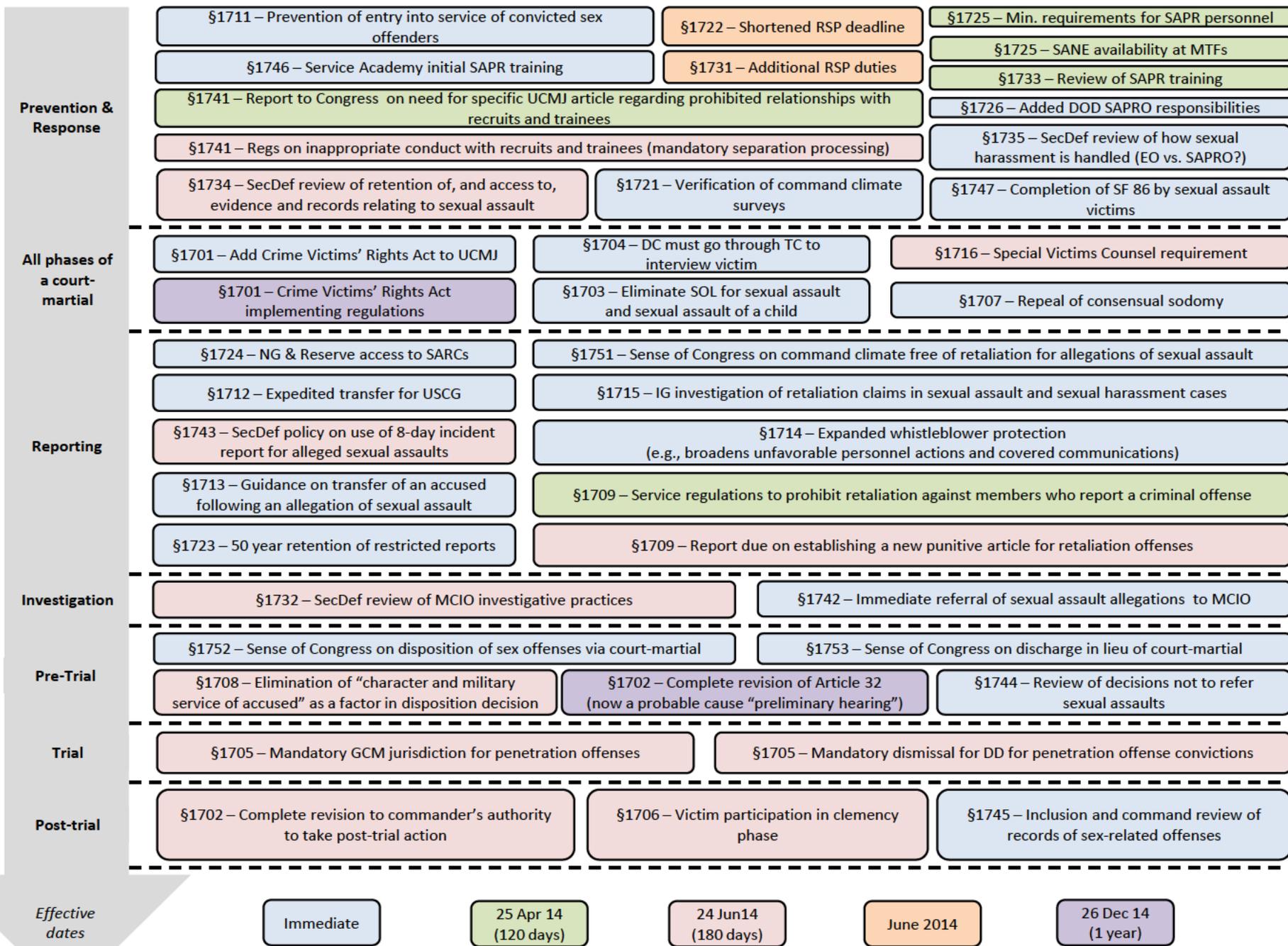
FY 13 Statistics

- 51% increase 2012-2013
- 5.3% occurred prior to service
- 1,831 Unrestricted
 - 1,058 SM on SM
 - 1,164 on post
 - 251 more than a year old
- 318 Restricted
 - 18% males
 - 78% female

Victim Rights







RIGHTS OF A VICTIM OF AN OFFENSE UNDER UCMJ

- (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, unless such notice may endanger the safety of any person.
- (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.
- (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.
- (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.

**any person
who has
suffered
direct,
physical,
emotional,
or
pecuniary
harm**

MILITARY PROTECTIVE ORDER

PRIVACY ACT STATEMENT

In accordance with the Privacy Act of 1974 (Public Law 93-579), this notice informs you of the purpose of the form and how it will be used. Please read it carefully.

AUTHORITY: 5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; and National Defense Authorization Act for Fiscal Year 1995, Sec. 534.

PRINCIPAL PURPOSE(S): To inform the service member and the protected person that the commanding officer is issuing an order to the member prohibiting contact or communication with the protected person or members of the protected person's family or household and directing that the member take specified actions that support, or are in furtherance of, the prohibition.

ROUTINE USE(S): Any release of information outside of the Department of Defense shall be compatible with the purposes for which the information is being collected and shall be in accordance with an established routine use for the record system where the information is maintained.

DISCLOSURE: Voluntary. Failure to disclose/verify information will not delay either the issuance of the order or the enforceability of the order.

1. SERVICE MEMBER				2. PROTECTED PERSON <i>(Important: see NOTE)</i>			
a. RANK	b. LAST NAME	FIRST NAME	MI	a. RANK	b. LAST NAME	FIRST NAME	MI
c. UNIT				c. UNIT			
d. INSTALLATION				d. INSTALLATION			

NOTE: Omit information in Item 2 that, if known to the service member in Item 1, could endanger the protected person.

3. INFORMATION SUPPORTING ISSUANCE OF THIS MILITARY PROTECTIVE ORDER

4. THE PROTECTED PERSON HAS ALSO BEEN ISSUED THE FOLLOWING COURT ORDERS:

a. Civil protection order issued <i>(Date - YYYYMMDD)</i> _____, in _____ Court, _____ County, State of _____			
b. Order issued <i>(Date - YYYYMMDD)</i> _____, in _____ Court, _____ County, State of _____			Property Settlement Custody and/or Visitation

Pretrial Restraint



Article 32

- Purpose – Preliminary Hearing
 - Probable Cause
 - Jurisdiction
 - Form of Charges
 - Recommended Disposition
- Judge Advocate when practicable
- Victim cannot be compelled to testify
- Recording available to victim

Article 60 Changes

- Maximum punishment exceeds two years
- Adjudged sentence includes:
 - Punitive Discharge
 - > six months confinement



Section 1704

- If **requested** by victim of sex-related offense who is subject to interview request, interview with DC shall only occur in presence of TC, SVC, or VA
- Upon **notice** by TC to DC of name of alleged victim of sex-related offense who TC intends to call to **testify** at 32 or CM, DC shall request interview with victim through TC

Section 1705

Rape

Sexual Assault

Rape of a child

Sexual assault of
a child

Forcible sodomy

Attempts thereof

**Require
GCM**

Victim Input - Clemency

8. I did the right thing. I was sexually assaulted, and I reported it. The defense did everything they could to drag my name and character through the mud, and I still went to work and did my job, often working with people who are Mr. and Mrs. Wilkerson's friends. I haven't become defensive. I won't malign anyone in retaliation. I told the truth. The defense did the best with what they had, and the prosecution did as well. I believe in the judicial system and that both Mr. Wilkerson and I received a fair trial, because essentially, I was on trial as well.

Please allow the sentence to stand.

**10 days after authenticated ROT and SJAR
(extension for no more than 20 days)**

Waiver in writing



DoD Guidance



Department of Defense DIRECTIVE

NUMBER 6495.01

January 23, 2012

Incorporating Change 1, April 30, 2013

USD(P&R)

SUBJECT: Sexual Assault Prevention and Response (SAPR) Program

References: See Enclosure 1

1. **PURPOSE.** This Directive reissues DoD Directive (DoDD) 6495.01 (Reference (a)), pursuant to section 113 of title 10, United States Code (U.S.C.) (Reference (b)), to implement DoD policy and assign responsibilities for the SAPR Program on prevention, response, and oversight to sexual assault.

2. **APPLICABILITY.** This Directive:

a. Applies to:

(1) OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Inspector General of the DoD (IG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (hereafter referred to collectively as the "DoD Components").

(2) National Guard and Reserve Component members who are sexually assaulted when performing active service, as defined in section 101(d)(3) of Reference (b), and inactive duty training. Refer to DoD Instruction (DoDI) 6495.02 (Reference (c)) for additional SAPR and medical services provided to such personnel and eligibility criteria for Restricted Reporting.

(3) Military dependents 18 years of age and older who are eligible for treatment in the military healthcare system, at installations in the continental United States (CONUS) and outside of the continental United States (OCONUS), and who were victims of sexual assault perpetrated by someone other than a spouse or intimate partner. The Family Advocacy Program (FAP) (DoDD 6400.1 (Reference (d))) provides the full range of services to victims of domestic violence who are sexually assaulted, in violation of Articles 120 (Rape and Sexual Assault) and 125 (Sodomy) of chapter 47 of Reference (b) (also known as and hereinafter referred to as "The Uniform Code of Military Justice (UCMJ)"), by someone with whom they have or have had an intimate partner relationship. The installation SARC and the installation family advocacy



Department of Defense INSTRUCTION

NUMBER 6495.02

March 28, 2013

Incorporating Change 1, Effective February 12, 2014

USD(P&R)

SUBJECT: Sexual Assault Prevention and Response (SAPR) Program Procedures

References: See Enclosure 1

1. **PURPOSE.** This Instruction reissues DoD Instruction 6495.02 (Reference (am)), in accordance with the authority in DoD Directives (DoDD) 5124.02 and 6495.01 (References (a) and (b)):

- a. Establishes policy and implements Reference (b) and assigns responsibilities and provides guidance and procedures for the SAPR Program (see Glossary in Reference (b)).
- b. Establishes the processes and procedures for the Sexual Assault Forensic Examination (SAFE) Kit.
- c. Establishes the multidisciplinary Case Management Group (CMG) (see Glossary) and provides guidance on how to handle sexual assault.
- d. Establishes SAPR minimum program standards, SAPR training requirements, and SAPR requirements for the DoD Annual Report on Sexual Assault in the Military consistent with the DoD Task Force Report on Care for Victims of Sexual Assault (Reference (c)) and pursuant to References (a) and (b). ~~section 113 and chapter 47 of title 10, United States Code (U.S.C.) (Chapter 47 of Reference (d) is also known and hereafter referred to as "The Uniform Code of Military Justice (UCMJ)"; (chapter 47 of Reference (d))~~ and Public Laws 106-65, 108-375, 109-163, 109-364, 110-417, 111-84, 111-383, ~~and 112-81, and 112-239~~ (References (c) through (l) *and (ao)*).
- e. Incorporates and cancels Directive-Type Memorandum (DTM) 11-063 (Reference (m)) and DTM 11-062 (Reference (n)).

2. **APPLICABILITY.** This Instruction applies to:

a. OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Inspector General of the Department of Defense (IG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (hereinafter referred to collectively as the "DoD Components").



Unrestricted

Restricted

DoDI 6495.02



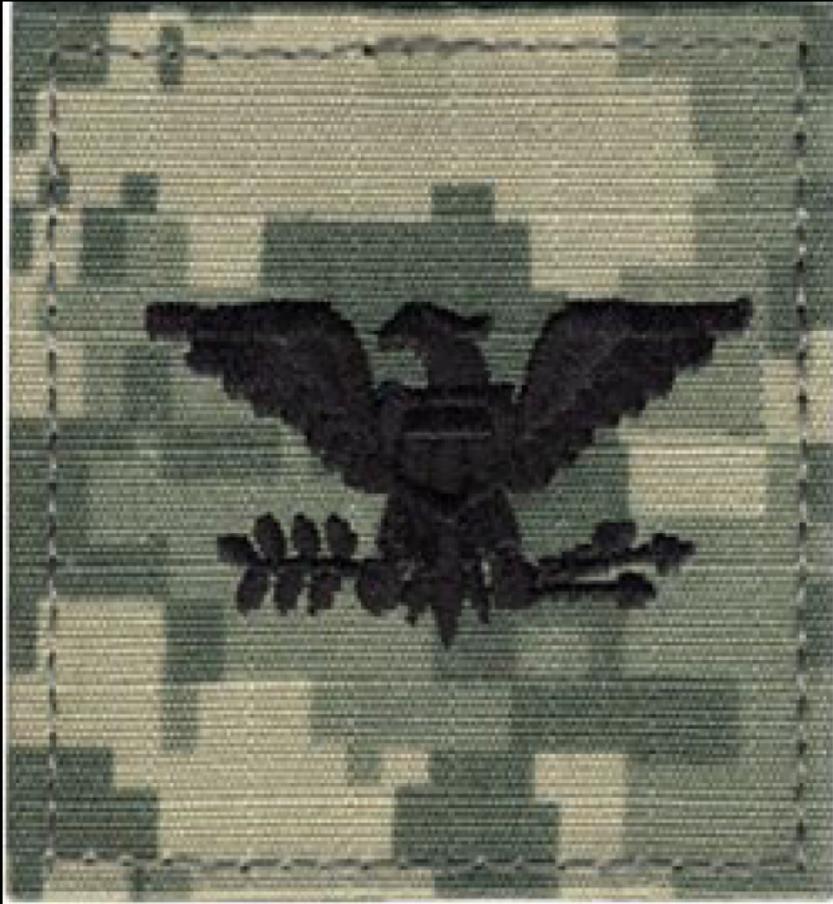
- “A unit **commander** who receives an unrestricted report of a sexual assault shall **immediately** refer the matter to the appropriate MCIO”



Emergency

West Coast

Elevated Commander Involvement



- Initial Disposition
- Collateral Misconduct

AR 600-20

Army Regulation 600-20

Personnel-General

Army Command Policy

Rapid Action Revision (RAR) Issue Date: 20 September 2012

Headquarters
Department of the Army
Washington, DC
18 March 2008

UNCLASSIFIED

- Chapter 8
- Appendix F (SARB)
- Appendix G (SA Victim Assistance Actions)
- Appendix H (Confidentiality/RR)
- Appendix I (Essential Tasks for SA Response)
- Appendix J (SAFE under RR)

AR 27-10

Army Regulation 27-10

Legal Services

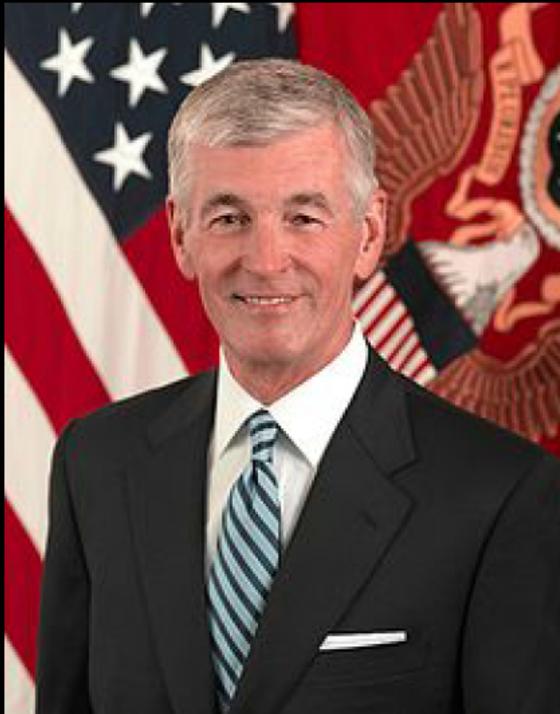
Military Justice

Headquarters
Department of the Army
Washington, DC
8 October 2011

UNCLASSIFIED

- **Para. 17-6**
- **Para 17-14**
- **Para. 17-16**

Army Directive 2014-19



- Referral Decisions
 - Next higher GCMCA is CA and SJA agree not to refer
 - SA if GCMCA and SJA disagree about referral decision

Army Directive 2013-21





SECRETARY OF THE ARMY
WASHINGTON

03 OCT 2011

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Directive 2011-19 (Expedited Transfer or Reassignment Procedures for Victims of Sexual Assault)

1. Reference: Memorandum, Under Secretary of Defense (Personnel and Readiness), Subject: Expedited Transfer Procedures for Victims of Sexual Assault, dated May 6, 2011.
2. It is Army policy that there is a presumption in favor of transferring or reassigning a sexual assault victim, at his/her request, following that victim's credible report of sexual assault. Commanders and civilian leaders shall consider requests for transfer or reassignment in an expedited manner. This policy applies to all Soldiers who report being the victim of a sexual assault. The Sexual Harassment/Assault Response and Prevention (SHARP) Program shall take steps to ensure victims are informed of this policy.

2. It is Army policy that there is a presumption in favor of transferring or reassigning a sexual assault victim, at his/her request, following that victim's credible report of sexual assault. Commanders and civilian leaders shall consider requests for transfer or

4. For the purposes of this policy, a report of sexual assault is credible when the commander (battalion or above), after considering all available evidence and the advice of the supporting legal advisor, concludes that there are reasonable grounds to believe that an offense constituting sexual assault has been committed against the person requesting the transfer or reassignment. For purposes of this policy, a credible report is limited to unrestricted reports of sexual assault.
5. Requests for a transfer or reassignment must be in writing. Victims are encouraged to include any and all of their concerns in the written request to aid the commander in understanding their needs and in making an appropriate decision.
6. In making a decision on a victim's request, the commander shall start with a presumption in favor of transferring or reassigning the victim. A transfer or reassignment includes, but is not limited to, the victim's temporary or permanent movement to a unit within the same battalion or brigade, to a unit within the same division, to a unit on the same installation or to a unit at a different geographic location. For Reserve Component members, a transfer or reassignment might include provisions

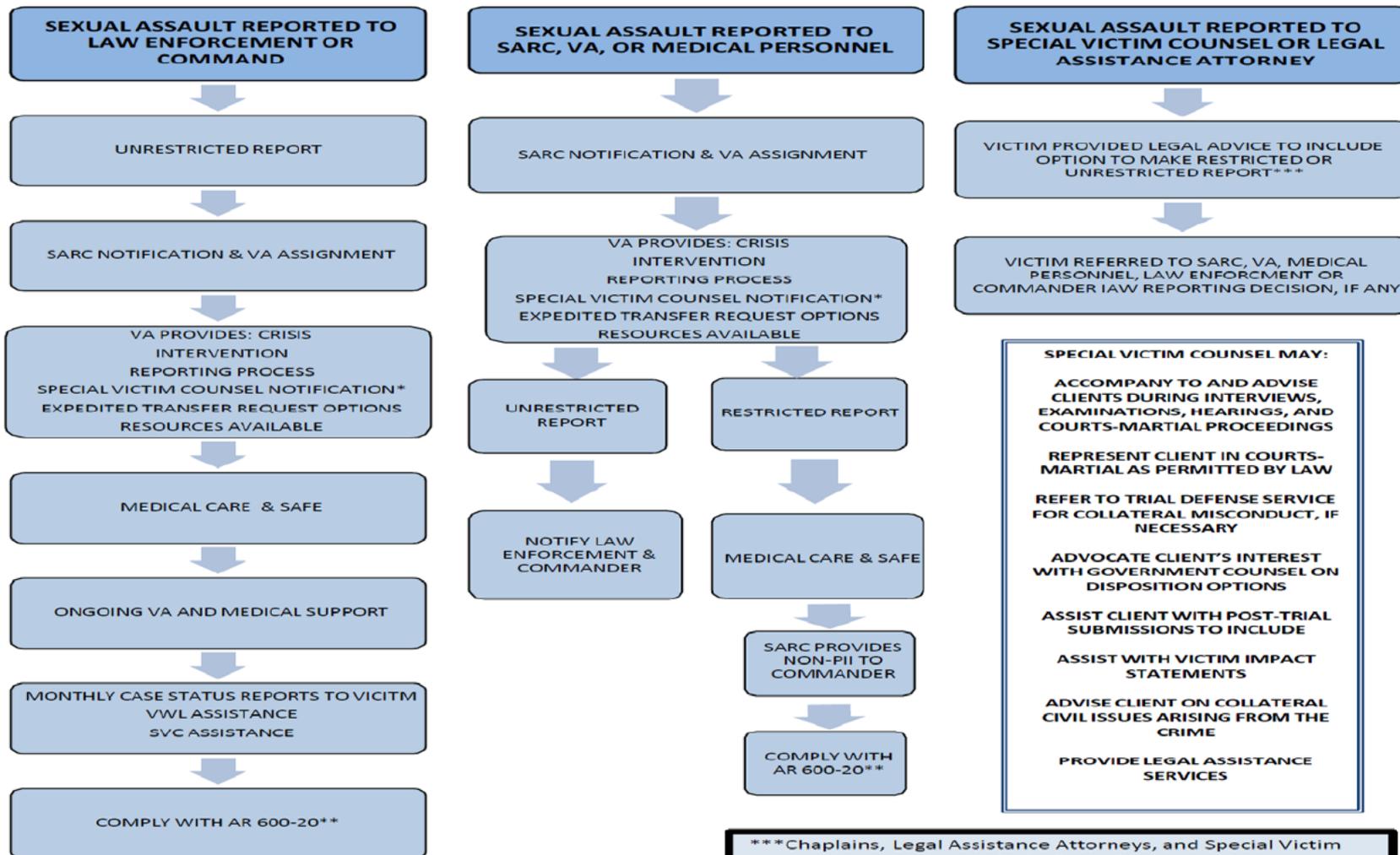
Manual For Courts-Martial

MANUAL FOR
COURTS-MARTIAL
UNITED STATES
(2012 EDITION)



- **MRE 412**
- **MRE 513**
- **MRE 514**
- **MRE 615**

SEXUAL ASSAULT RESPONSE FLOWCHART



*SEE SVC APPOINTMENT CHART

**SEE ALSO DoDD 6495.01 AND 1030.01, DoDI 6495.02 AND 1030.02

***Chaplains, Legal Assistance Attorneys, and Special Victim Counsel have privilege, which allows them to refuse to disclose confidential communications. Victims may disclose sexual assaults to chaplains, legal assistance attorneys, or special victim counsel and those parties do not have to report the assault to the commander, SARC, or law enforcement. Chaplains and counsel as indicated should explain SHARP and the role of SHARP victim advocates. Victims may then choose if they would like to report the sexual assault.

Resources

- <https://jagu.army.mil/bbcswebdav/institution/JAGU%20Institution/webpages/SHARP/index.html>
- <http://armypubs.army.mil/>
- <http://www.dtic.mil/whs/directives/>
- <http://www.sapr.mil/>
- http://www.defense.gov/home/features/2012/0912_sexual-assault/

SVC Course – View from the Bench

- Introduction and Disclaimer
- Path to Success
- The 3 P's

SVC Course – Key to Success in Court

Prepared



Prompt



Professional



CREDIBILITY



1. Educate the Factfinder
2. Persuade the Factfinder



SUCCESS

Sentencing and Post-trial

MAJ Jeremy Stephens
Criminal law department

Objectives

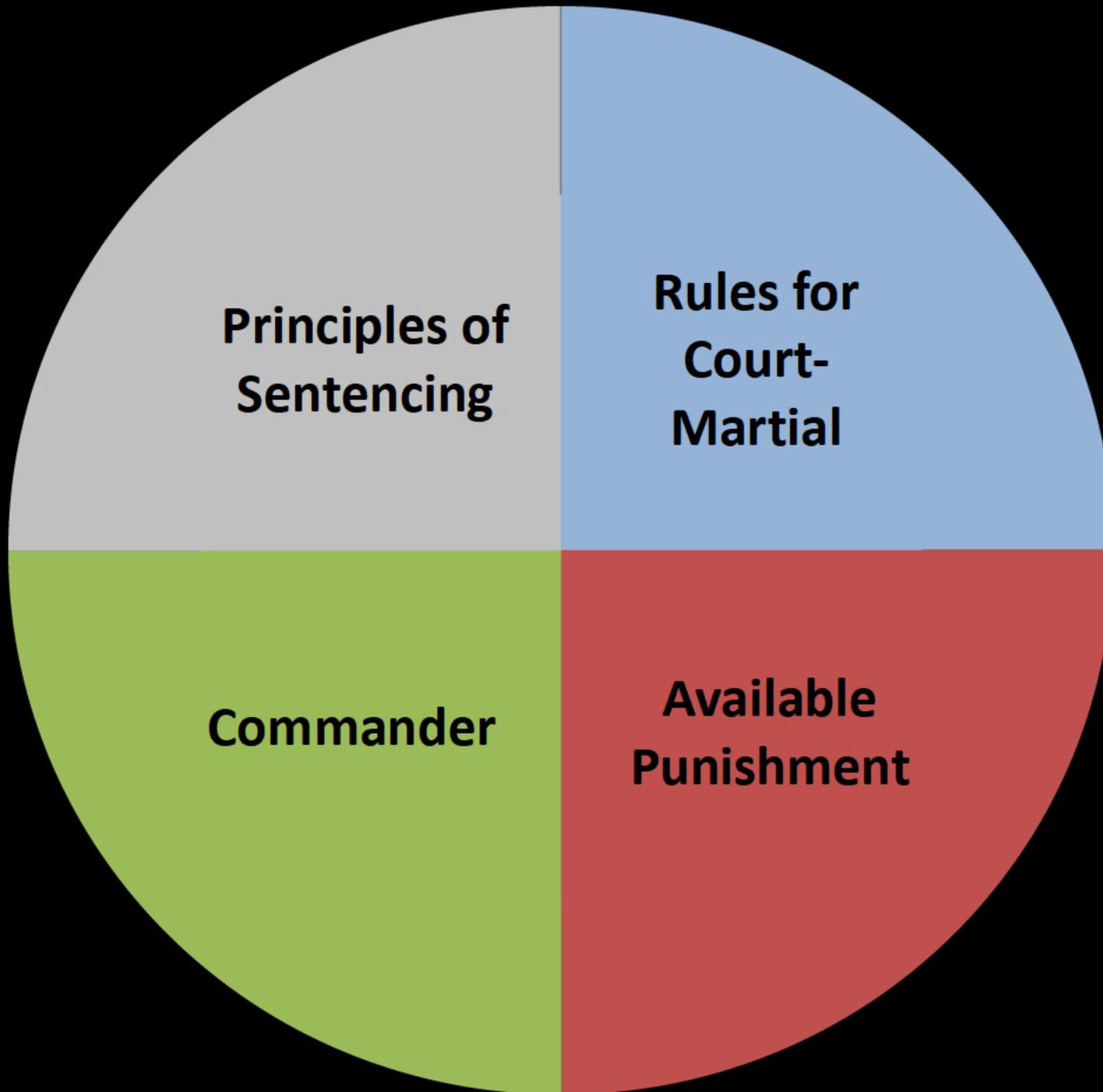
-Pre-sentencing

-Post-trial submission

-Convening authority action

-Appeals

Getting a Sentence



The Principles of Sentencing

Punishment of the wrongdoer

Protection of society from the wrongdoer

Rehabilitation of the wrongdoer

General and specific deterrence

Preservation of good order and discipline

-RCM 1001(g) and DA PAM 27-9

The Sentencing Proceedings

- Government
 - Matters in aggravation
 - Good order and discipline/effect on the unit
 - Victim Impact
 - Rehab potential
- Defense
 - Matters in extenuation
 - Matters in mitigation
 - Sworn/Unsworn testimony of the Accused

The Sentencing Proceedings

“The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused. . . .”

Aggravating?

Must be “directly related” or “resulting from”

Higher standard than mere relevance

Accused not responsible for a never-ending chain of causes and effects

Available Punishment

No Punishment

Reprimand

Forfeiture of Pay

Fine

Reduction of Grade

Restriction

Hard Labor w/o Confinement

Confinement

BCD, DD, Dismissal

Arriving at a Sentence

- Death: Unanimous
- Confinement > 10 years:
3/4
- Confinement ≤ 10 years:
2/3



When Do Punishments Start?

- **Forfeitures (adjudged and automatic)**
 - Earlier of: 14 days or CA Action
- **Reduction (adjudged and automatic)**
 - Earlier of: 14 days or CA Action
- **Restriction and Hard Labor w/o confinement**
 - CA Action
- **Confinement**
 - Immediately
- **Discharge**
 - After appeals

DEPARTMENT OF THE ARMY REPORT OF RESULT OF TRIAL

For use of this form, see AR 27-10; the proponent agency is OTJAG.

TO:

Commander, Headquarters, 54th Infantry Division and Fort Atterbury, Fort Atterbury, Indiana

1. Notification under R.C.M. 1101 and AR 27-10, paragraph 5-30 is hereby given in the case of the United States v _____

SGT Richard M. Archie, 000-11-2222, B Co, BSB, 3rd BDE, 54th ID, Fort Atterbury, IN

2. Trial by General court-martial on 20 June, 2011 at Fort Atterbury, IN

convened by: CMCO Number 11 HQ, 54th Infantry Division and Fort Atterbury, dated 1 May 2011

3. Summary of offenses, pleas, and findings:

CH	ART UCMJ	SPEC	BRIEF DESCRIPTION OF OFFENSE(S) (See Attached Continuation Sheet)	PLEA	FINDING
----	----------	------	--	------	---------

4. SENTENCE:

Reduction to the grade of PVT (E1); total forfeiture of all pay and allowances; confinement thirty (30) months; and to be discharged with a dishonorable discharge.

5. Date sentence adjudged and effective date of any forfeiture or reduction in grade (YYYYMMDD):
(See UCMJ Articles 57-58b and R.C.M. 1101.)

20110620/20110704

6. Contents of pretrial agreement concerning sentence, if any:

N/A

4. SENTENCE:

Reduction to the grade of PVT (E1); total forfeiture of all pay and allowances; confinement thirty (30) months; and to be discharged with a dishonorable discharge.

5. Date sentence adjudged and effective date of any forfeiture or reduction in grade (YYYYMMDD):

20110620/20110704

(See UCMJ Articles 57-58b and R.C.M. 1101.)

6. Contents of pretrial agreement concerning sentence, if any:

N/A

7. Number of days of presentence confinement, if any: three (3) days

8. Number of days of judge-ordered administrative credit for presentence confinement or restriction found tantamount to confinement, if any: N/A

9. Total presentence confinement credit toward post-trial confinement: three (3) days

10. Name(s) and SSN(s) of companion accused or co-accused, if any:

N/A

11. DNA processing is is not required.

12. Conviction(s) does does not require sex offender registration.

CF:

Unit Commander; Commander, Confinement Facility; Fort Atterbury Trial Defense Service; Military Justice Division; Military Judge; SJA, Fort Atterbury; 176th Finance Battalion; 516th Personnel Support Battalion.

TYPED NAME

George Harrison

RANK

Captain

SIGNATURE

BRANCH OF SERVICE

U.S. Army

DEPARTMENT OF THE ARMY REPORT OF RESULT OF TRIAL CONTINUATION SHEET

United States v. SGT Richard M. Archie

B Company, Brigade Support Battalion, 3rd Brigade, 54th Infantry Division

Fort Atterbury, Indiana

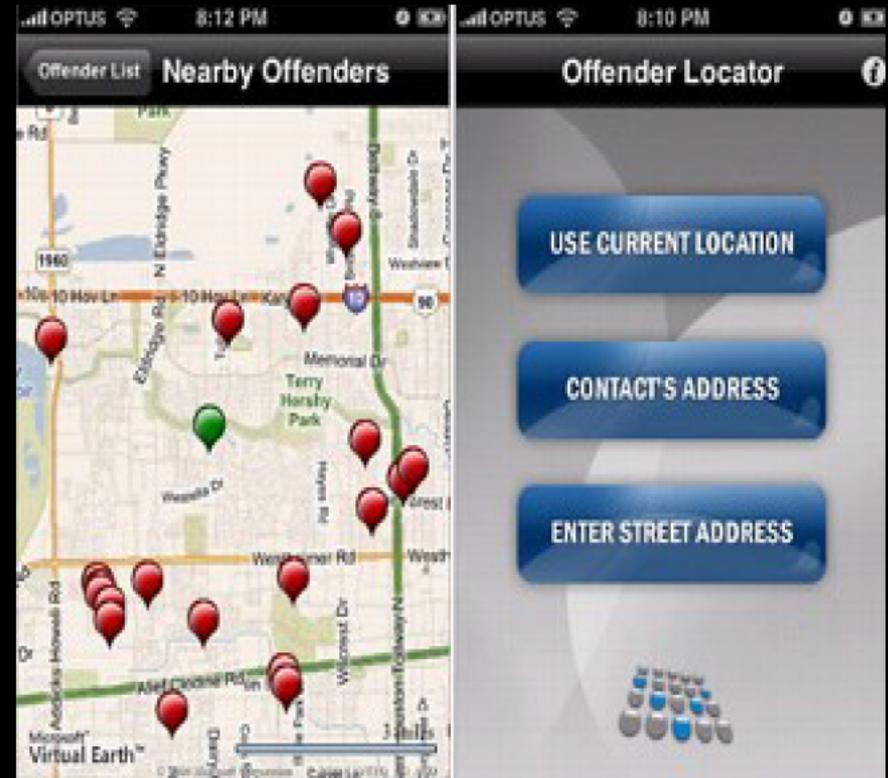
3. Summary of offenses, pleas, and findings:

CH	ART UCMJ	SPEC	BRIEF DESCRIPTION OF OFFENSES	PLEA	FINDING
I	92	The	In that Sergeant Richard M. Archie, U.S. Army, did, at or near Fort Atterbury, Indiana, on or about 25 March 2011, violate a lawful general regulation, to wit: Army Regulation 600-20, paragraph 4-14.b, dated 18 March 2008, by wrongfully engaging in a relationship with Private (E-2) T.V., U.S. Army, that compromised or appeared to compromise the integrity of his supervisory authority, or created an actual or clearly predictable adverse impact on discipline, authority, or morale.	G	G
II	120	The	In that Sergeant Richard M. Archie, U.S. Army, did, at or near Fort Atterbury, Indiana, on or about 25 March 2011, cause Private (E-2) T.V., U.S. Army, to engage in a sexual act, to wit: penetration of her vulva by his penis, by using strength and restraint applied to Private V sufficient that she could not avoid or escape the sexual conduct.	NG	G
III	134	The	In that Sergeant Richard M. Archie, U.S. Army, did, at or near Fort Atterbury, Indiana, on or about 25 March 2011, wrongfully provide alcoholic beverages to another person, to wit: Private (E-2) T.V., U.S. Army, when he	G	G

Sex Offender Registration

AR 27-10, Ch 24-2

DoDI 1325.7



Forfeitures

- Adjudged forfeitures
 - The sentence of the court
- Automatic forfeitures
 - Triggered upon reaching a certain sentence

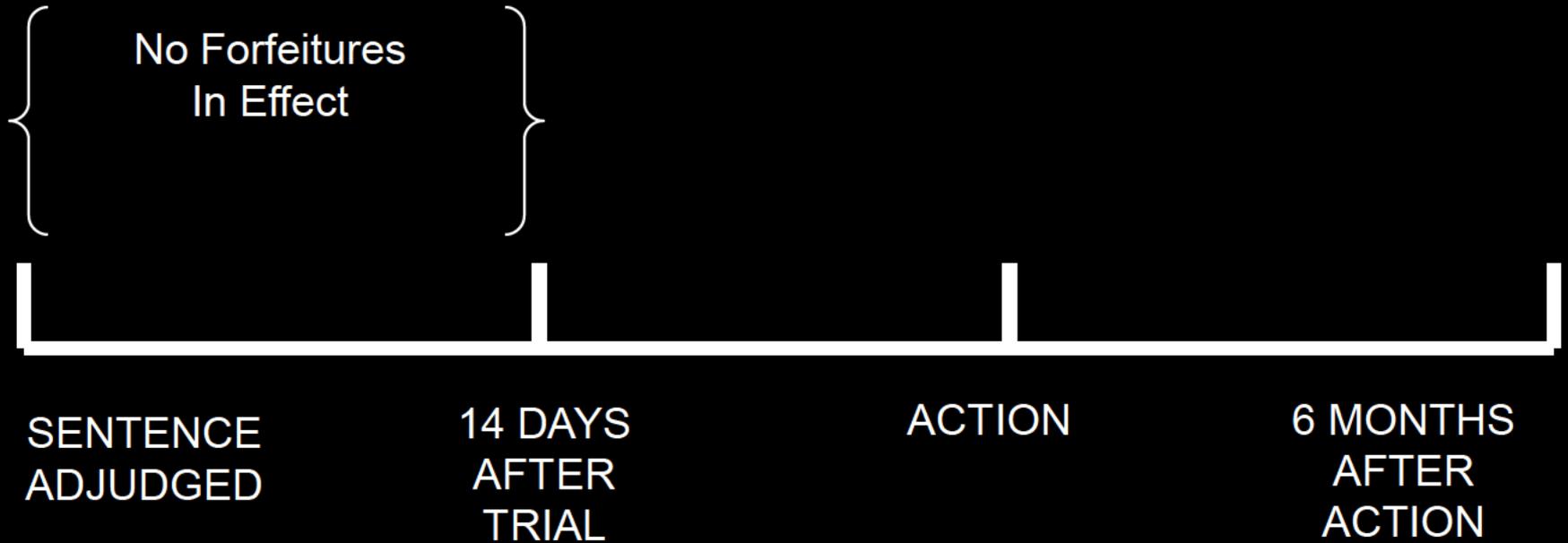
- Deferment
 - Accused gets paid until action
 - Applies to both automatic and adjudged forfeitures
- Waiver
 - Accused's dependents get paid for up to six months at any point after trial
 - Only applies to automatic



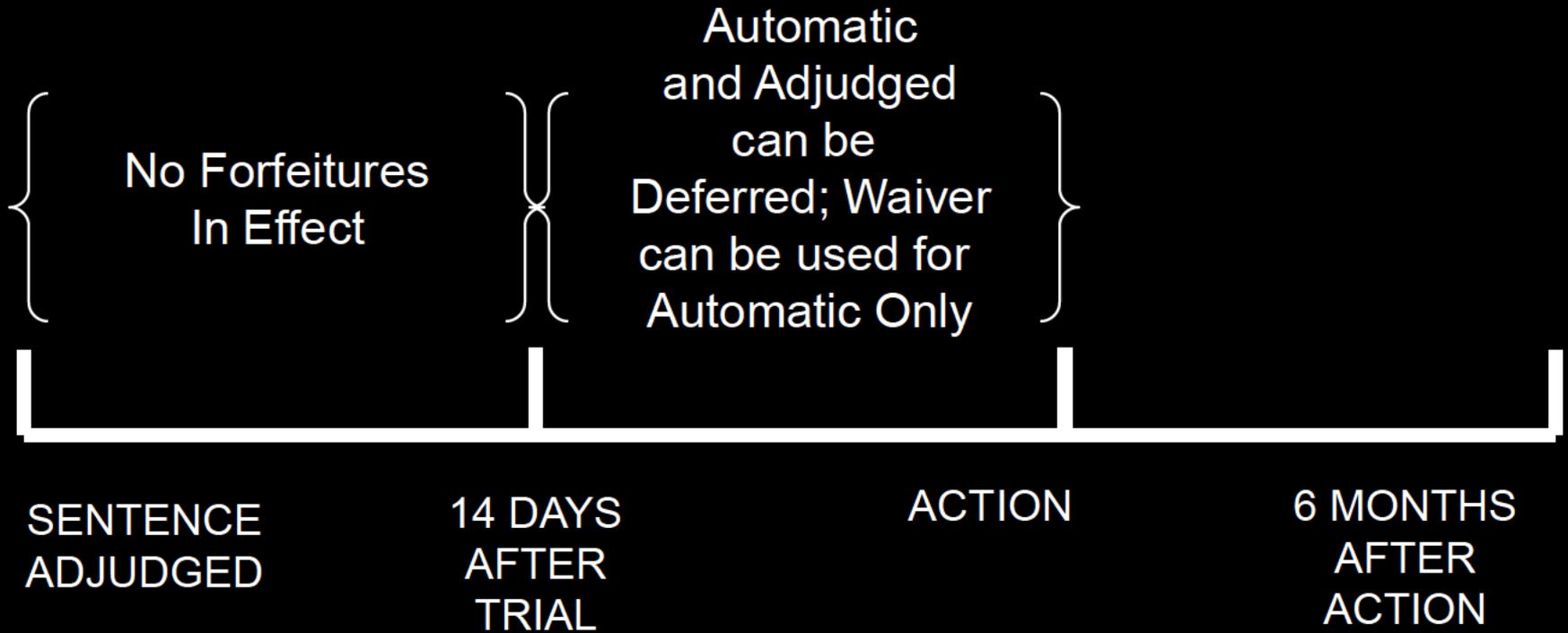
Affecting Forfeitures



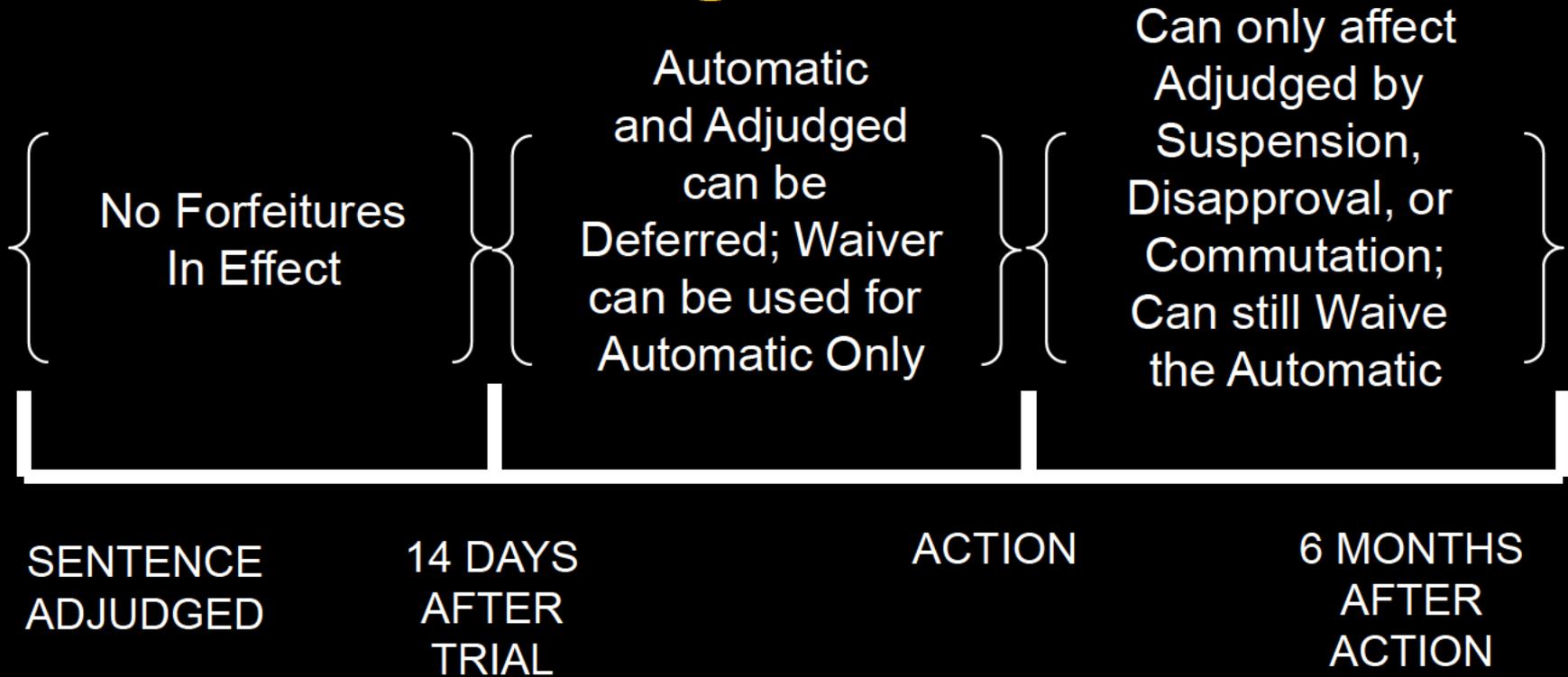
Affecting Forfeitures



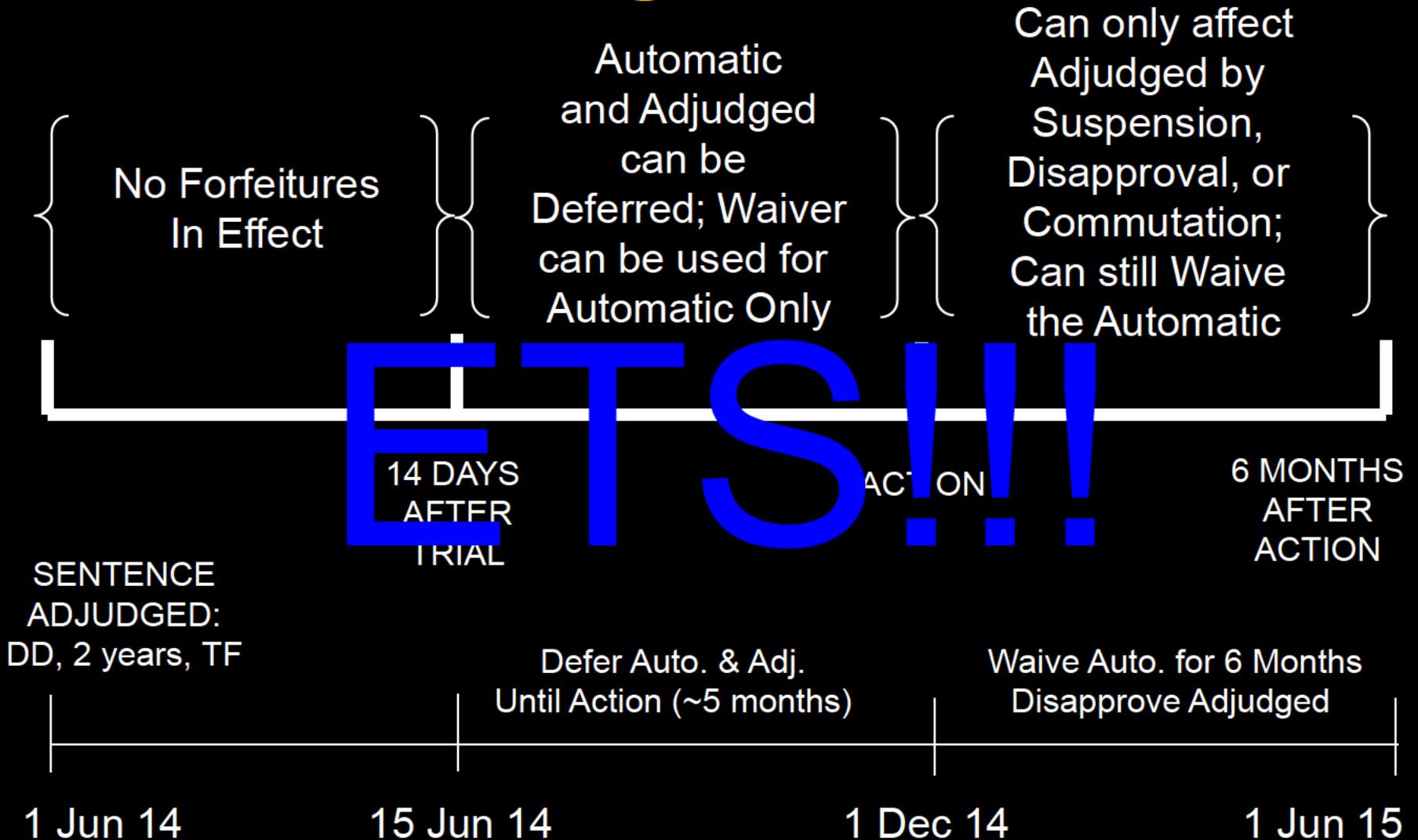
Affecting Forfeitures



Affecting Forfeitures



Affecting Forfeitures

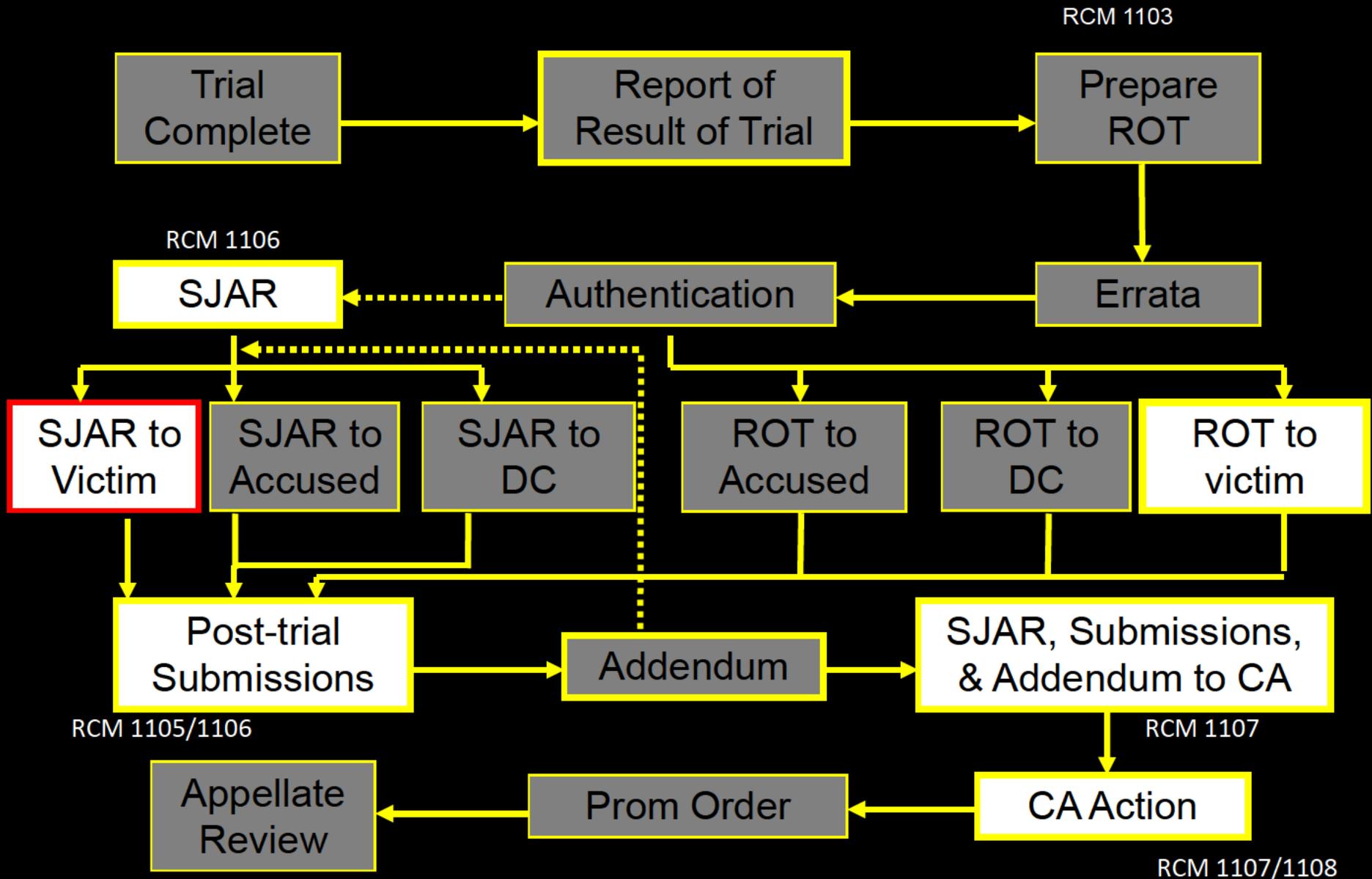


**WAIVER AND DEFERRAL OF
ADJUDGED AND AUTOMATIC FORFEITURES**

TYPE OF FORFEITURE	FIRST 14 DAYS AFTER TRIAL	14 DAYS AFTER TRIAL UNTIL INITIAL ACTION	INITIAL ACTION TO 6 MONTHS AFTER INITIAL ACTION
<p>ADJUDGED</p> <p>(1) By MJ or Panel</p> <p>(2) Maximum Amount:</p> <p style="padding-left: 20px;">(a) GCM: all pay and allowances</p> <p style="padding-left: 20px;">(b) SPCM: 2/3rds pay only</p>	<p>No forfeitures in effect</p>	<p>DEFER: Art. 57(a)(2), RCM 1101(c)</p> <p>(1) Only valid until action or if rescinded earlier</p> <p>(2) Money goes to the accused</p> <p>(3) No <i>sua sponte</i> deferments</p>	<p>RCM 1107(d):</p> <p>(1) DISAPPROVE</p> <p>(2) COMMUTE/MITIGATE: (e.g., reduce from total to certain dollar amount)</p> <p>(3) SUSPEND</p>
<p>AUTOMATIC</p> <p>(1) Applies if:</p> <p style="padding-left: 20px;">(a) Discharge & any confinement*</p> <p style="padding-left: 20px;">(b) Confinement > 6 months</p> <p style="padding-left: 20px;">(c) Death</p> <p>(2) Amount:</p> <p style="padding-left: 20px;">(a) GCM: all pay and allowances</p> <p style="padding-left: 20px;">(b) SPCM: 2/3rds pay only</p> <p>*If only a punitive discharge is adjudged, Article 58b has no effect on pay and allowances. See RCM 1003(b)(2) Discussion</p>	<p>No forfeitures in effect</p>	<p>DEFER: Art. 57(a)(2), Art. 58b(a)(1), RCM 1101(c)</p> <p>(1) Only valid until action or if rescinded earlier</p> <p>(2) Money goes to the accused</p> <p>(3) No <i>sua sponte</i> deferments</p> <p>WAIVE: Art. 58b(a)(2), RCM 1101(d)</p> <p>(1) Goes to dependents only</p> <p>(2) Valid for up to 6 months, duration of confinement, or ETS, whichever comes first.</p> <p>(3) CA can waive <i>sua sponte</i></p>	<p>WAIVE: Art. 58b(a)(2), RCM 1101(d)</p> <p>(1) Goes to dependents only</p> <p>(2) Valid for up to 6 months, duration of confinement, or ETS, whichever comes first</p> <p>(3) CA can waive <i>sua sponte</i></p>

This chart should be read in conjunction with United States v. Emminizer, 56 M.J. 441 (C.A.A.F. 2002).

Note: All entitlement to pay and allowances ceases at ETS.



Calendar

MONDAY

TUESDAY WEDNESDAY THURSDAY

FRIDAY

7

8

9

15

14

6

13

21

5

12

A

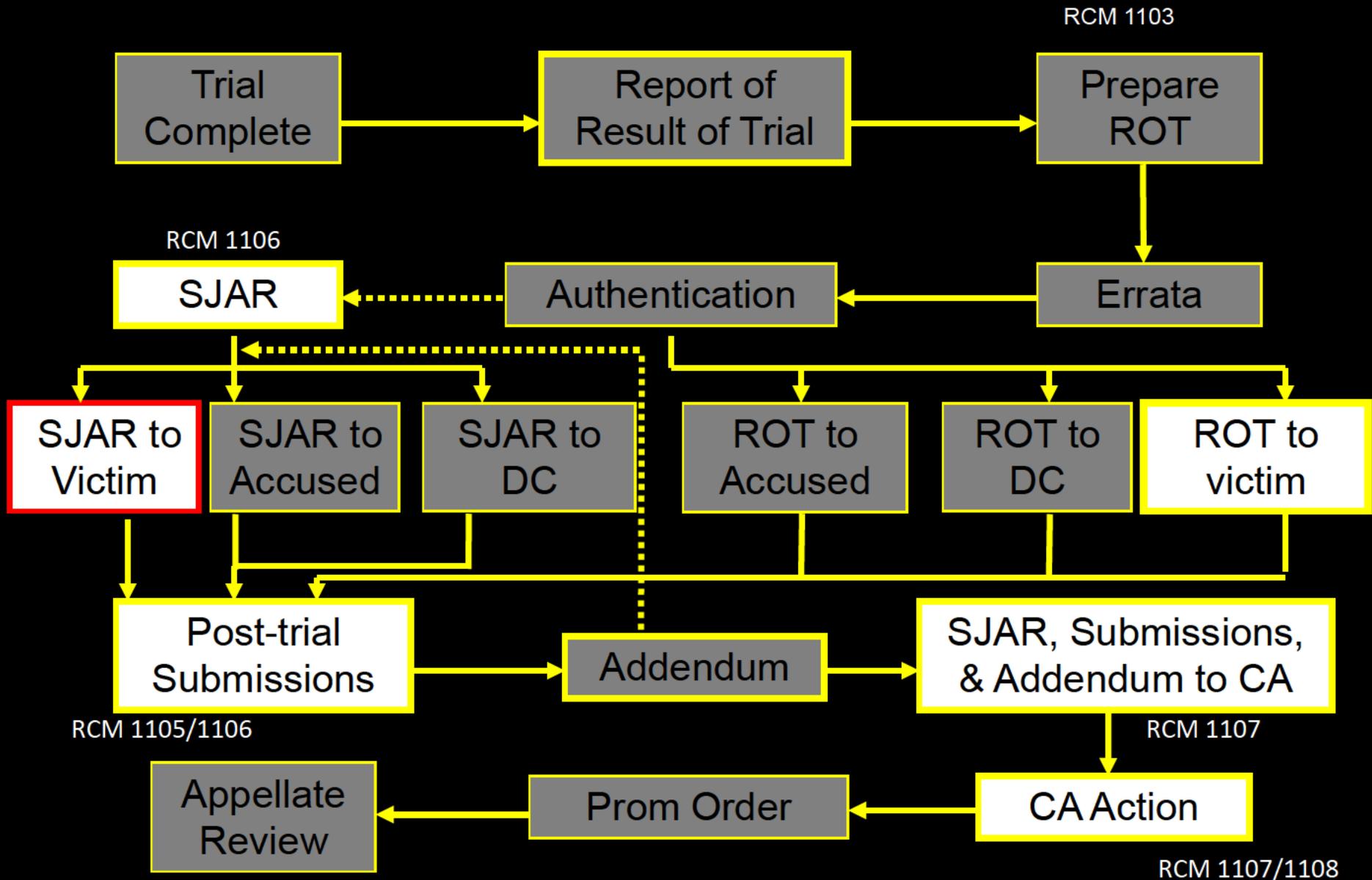
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3

3

4

U.S. v. Moreno, 63 M.J. 129



Staff Judge Advocate's Recommendation

- Report of Result of Trial
- Copy or Summary of the PTA
- Recommendations for clemency by the sentencing authority made in conjunction with the announced sentence
- SJA's concise recommendations
- Copy of victim submission

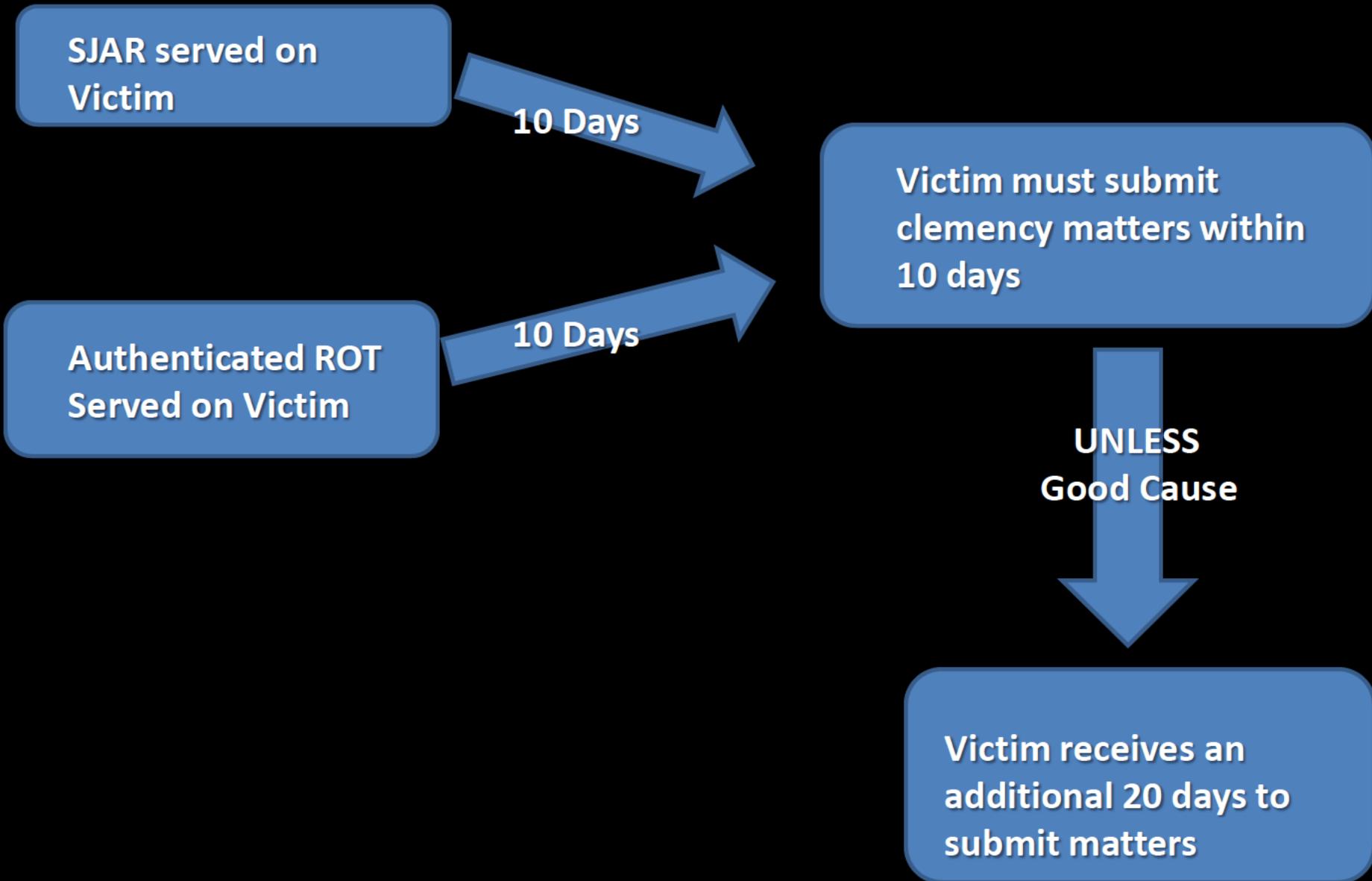
Article 60 changes

Victim role in clemency

“In any case in which findings and sentence have been adjudged for an offense that involved a victim, the victim shall be provided an opportunity to submit matters for consideration by the convening authority or by another person authorized to act under this section before the convening authority or such other person takes action under this subsection.”

R.C.M. 1105A (a)-(d)
Victim role in clemency

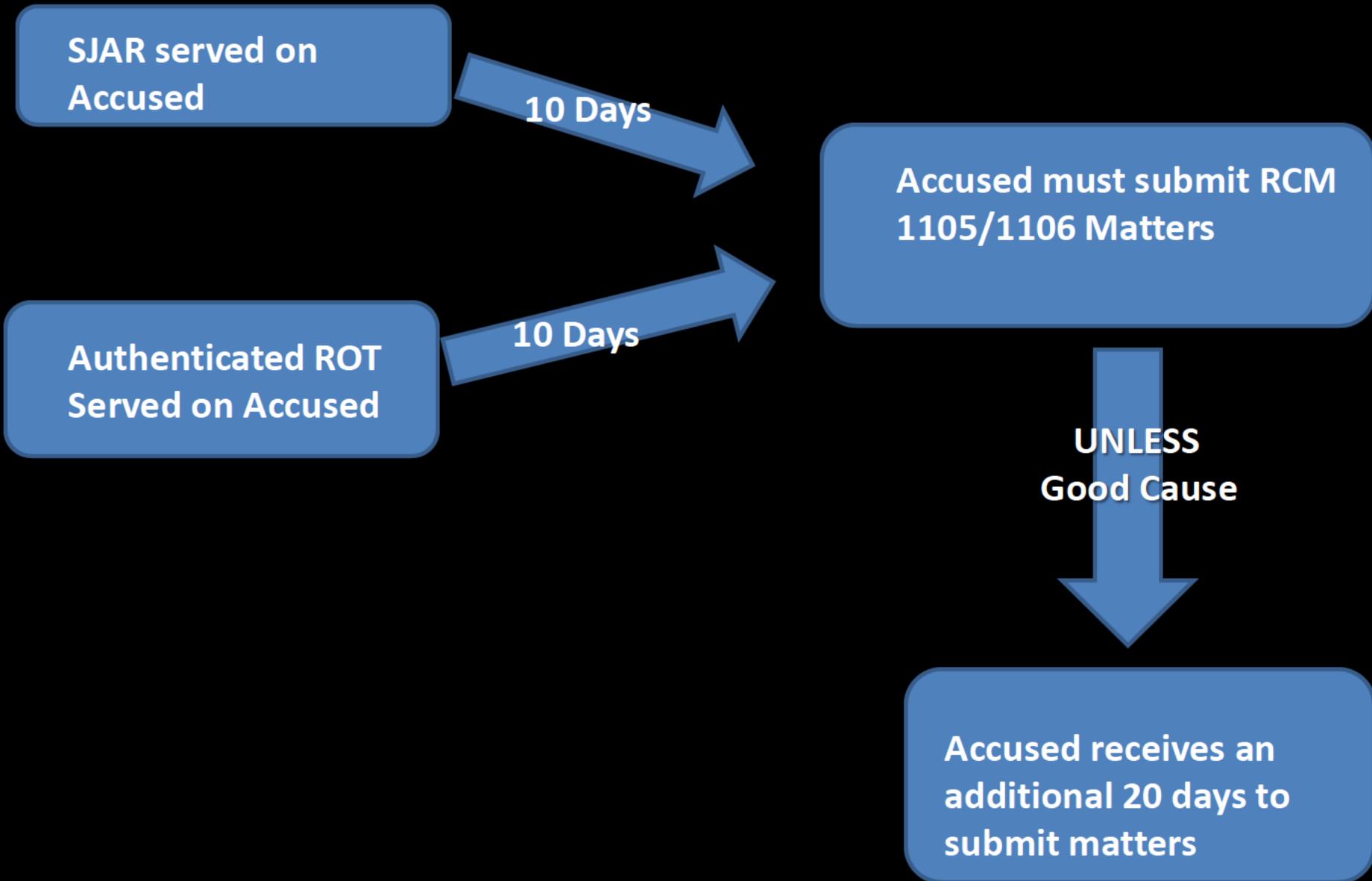
- In writing signed by the victim**
- 10 days after receiving SJAR**
- To the convening authority; through SJA**



Defense submission

- 10-day deadline
- Optional 20-day extension
- Contents:
 - Memo from DC
 - Letter from Accused
 - Clemency matters

1105/1106 Matters



**SJAR served on
Accused**

10 Days

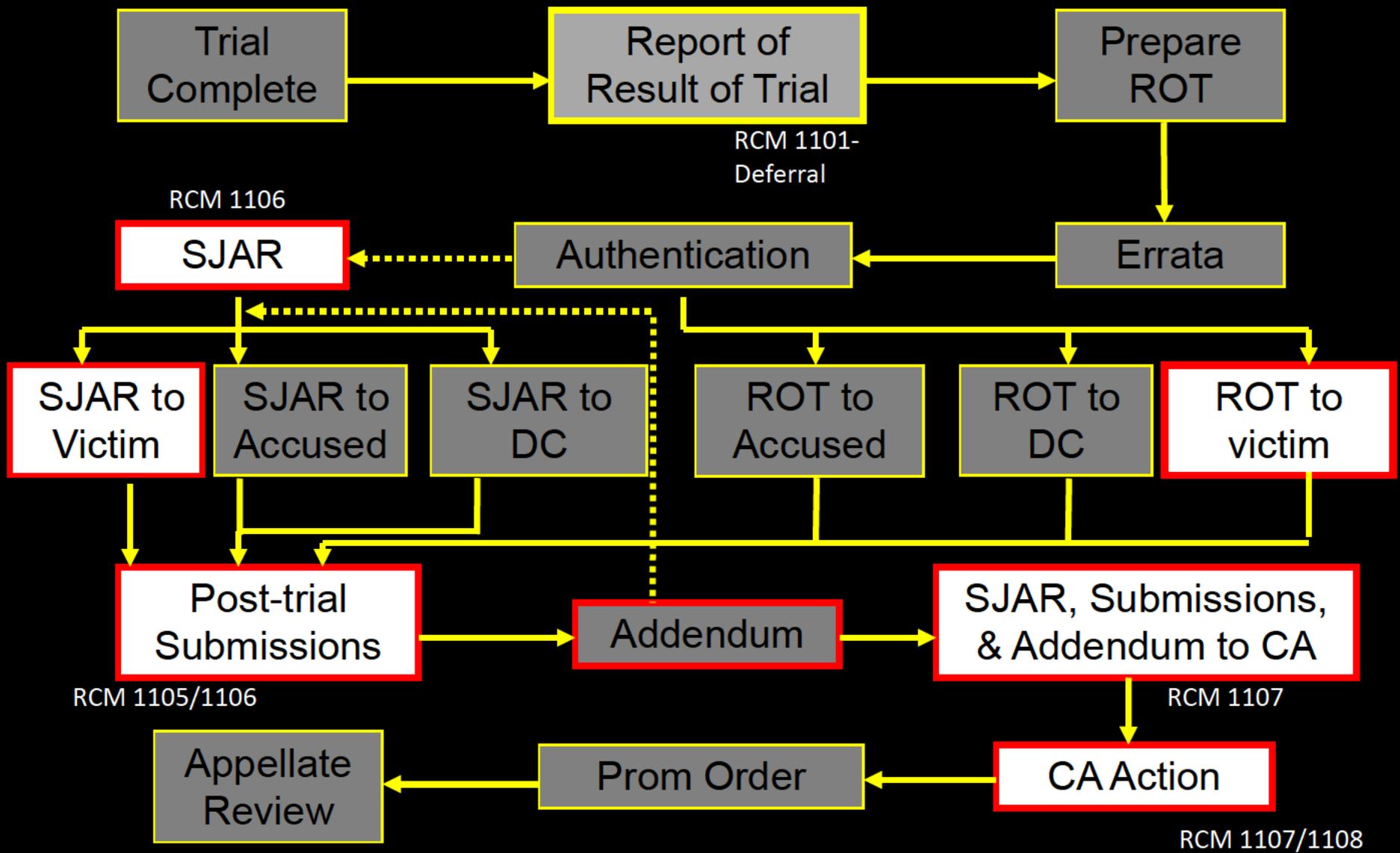
**Accused must submit RCM
1105/1106 Matters**

**Authenticated ROT
Served on Accused**

10 Days

**UNLESS
Good Cause**

**Accused receives an
additional 20 days to
submit matters**



RCM 1107/1108

R.C.M. 1106(f)(7)

“When new matter is introduced after the accused and counsel for the accused have examined the recommendation however, the accused and counsel for the accused must be served with the new matter and given 10 days from service . . . In which to submit comments.”

Convening authority must consider

- Result of trial
- SJA recommendation
- Matters submitted by the accused
- Matters submitted by the victim

Article 60

“(c)(1) . . . The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.”

Article 60

“(c) . . . (3) Action on the *findings* of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may—

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.”

New Article 60

Findings

§ 1702(b)(3)(B)

“(B) If the convening authority or another person authorized to act under this section acts on the findings of a court-martial, the convening authority or other person—

“(i) may not dismiss any charge or specification, other than a charge or specification for a qualifying offense, by setting aside a finding of guilty thereto; or

“(ii) may not change a finding of guilty to a charge or specification, other than a charge or specification for a qualifying offense, to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

Cannot dismiss a finding,
unless a qualifying offense

New Article 60

Findings

§ 1702(b)(3)(C)

“(C) If the convening authority or another person authorized to act under this section acts on the findings to dismiss or change any charge or specification for an offense (other than a qualifying offense), the convening authority or other person shall provide, at that same time, a written explanation of the reasons for such action. The

Can dismiss a non-qualifying, just put in writing

New Article 60

Findings

§ 1702(b)(3)(D)

and action thereon.

“(D)(i) In this subsection, the term ‘qualifying offense’ means, except in the case of an offense excluded pursuant to clause (ii), an offense under this chapter for which—

“(I) the maximum sentence of confinement that may be adjudged does not exceed two years; and

“(II) the sentence adjudged does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

“(ii) Such term does not include any of the following:

“(I) An offense under subsection (a) or (b) of section 920 of this title (article 120).

“(II) An offense under section 920b or 925 of this title (articles 120b and 125).

“(III) Such other offenses as the Secretary of Defense may specify by regulation.

-Maximum sentence does not exceed two years; AND

-Sentence adjudged does not include a dismissal, dishonorable or bad-conduct discharge; or more than six months

-Any offense under Art. 120, Art. 120b; or Art. 125; or other offenses specified by SECDEF

New Article 60

Sentence

§ 1702(b)(4)(A)

specify by regulation.

“(4)(A) Except as provided in subparagraph (B) or (C), the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge.

If the sentence is for more than six months confinement, or a sentence of dismissal, dishonorable discharge or bad-conduct discharge, cannot disapprove, commute etc.

New Article 60

Sentence

§ 1702(b)(4)(B) “*Substantial Assistance*”

Can reduce, including mandatory dishonorable discharge, if trial counsel recommends reduction based on substantial assistance

“(B) Upon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the convening authority or another person authorized to act under this section shall have the authority to disapprove, commute, or suspend the adjudged sentence in whole or in part, even with respect to an offense for which a mandatory minimum sentence exists.

New Article 60

Sentence

§ 1702(b)(4)(C)

“Pre-Trial Agreement”

Can reduce time, pursuant to terms of a pre-trial agreement

Cannot block a discharge, but can make a DD a BCD.

“(C) If a pre-trial agreement has been entered into by the convening authority and the accused, as authorized by Rule for Courts-Martial 705, the convening authority or another person authorized to act under this section shall have the authority to approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the pre-trial agreement, subject to the following limitations for convictions of offenses that involve a mandatory minimum sentence:

“(i) If a mandatory minimum sentence of a dishonorable discharge applies to an offense for which the accused has been convicted, the convening authority or another person authorized to act under this section may commute the dishonorable discharge to a bad conduct discharge pursuant to the terms of the pre-trial agreement.

“(ii) Except as provided in clause (i), if a mandatory minimum sentence applies to an offense for which the accused has been convicted, the convening authority or another person authorized to act under this section may not disapprove, otherwise commute, or suspend the mandatory minimum sentence in whole or in part, unless authorized to do so under subparagraph (B).”



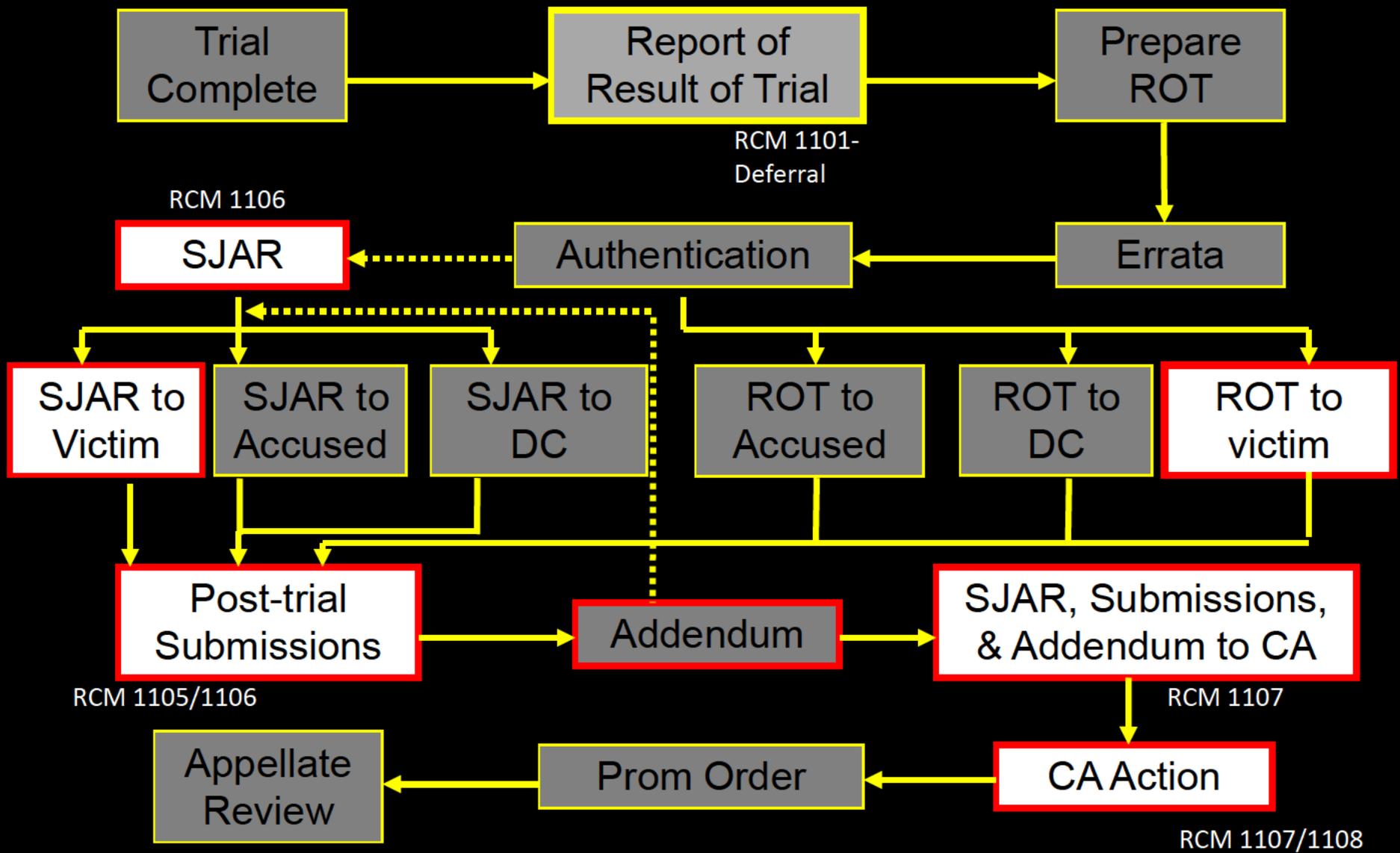
2015 NDAA changes?

House-passed version

- Mandatory two years confinement for rape and sexual assault

Senate-proposed version

- Clarifies convening authority's role post trial



RCM 1107/1108

ACTION

DEPARTMENT OF THE ARMY
Headquarters, 54th Infantry Division and Fort Atterbury
Fort Atterbury, Indiana

3 October 2013

In the case of Sergeant (E-5) Richard Archie, 000-11-2222, U.S. Army, Company B, 1st Brigade Support Battalion, 3rd Brigade, 54th Infantry Division, Fort Atterbury, Indiana, only so much of the sentence as provides for reduction to Private E1, confinement for thirty months, and a Dishonorable Discharge is approved and, except for that part of the sentence extending to Dishonorable Discharge, will be executed. The automatic and adjudged forfeitures of all pay and allowances were deferred effective 24 July 2013 and the deferments are terminated on this date. The automatic forfeiture of all pay and allowances required by Article 58b, UCMJ is waived effective this date for a period of six months with direction that these funds be paid to the daughter of the accused, Miss Taylor Armstrong. The accused will be credited with three days of confinement against the sentence to confinement.

REX LLOYD

DEPARTMENT OF THE ARMY
HEADQUARTERS, 54th INFANTRY DIVISION AND FORT ATTERBURY
FORT ATTERBURY, INDIANA 23801

GENERAL COURT-MARTIAL ORDER
NUMBER 17

3 October 2013

Sergeant (E-5) Richard M. Archie, 000-11-2222, U.S. Army, B Company, 1st Brigade Support Battalion, Fort Atterbury, Indiana, was arraigned at Fort Atterbury, Indiana on the following offenses at a general court-martial convened by Commander, 54th Infantry Division and Fort Atterbury.

Charge I. Article 92. Plea: Guilty. Finding: Guilty.

Specification 1: In that Sergeant Richard M. Archie, U.S. Army, did, at or near Fort Atterbury, Indiana, on or about 22 March 2013, violate a lawful general regulation, to wit: Army Regulation 600-20, paragraph 4-14b, dated 18 March 2008, by wrongfully engaging in a relationship with Private (E-2) T.V., U.S. Army, that compromised or appeared to compromise the integrity of supervisory authority, or created an actual or clearly predictable adverse impact on discipline, authority or morale. Plea: Guilty. Finding: Guilty

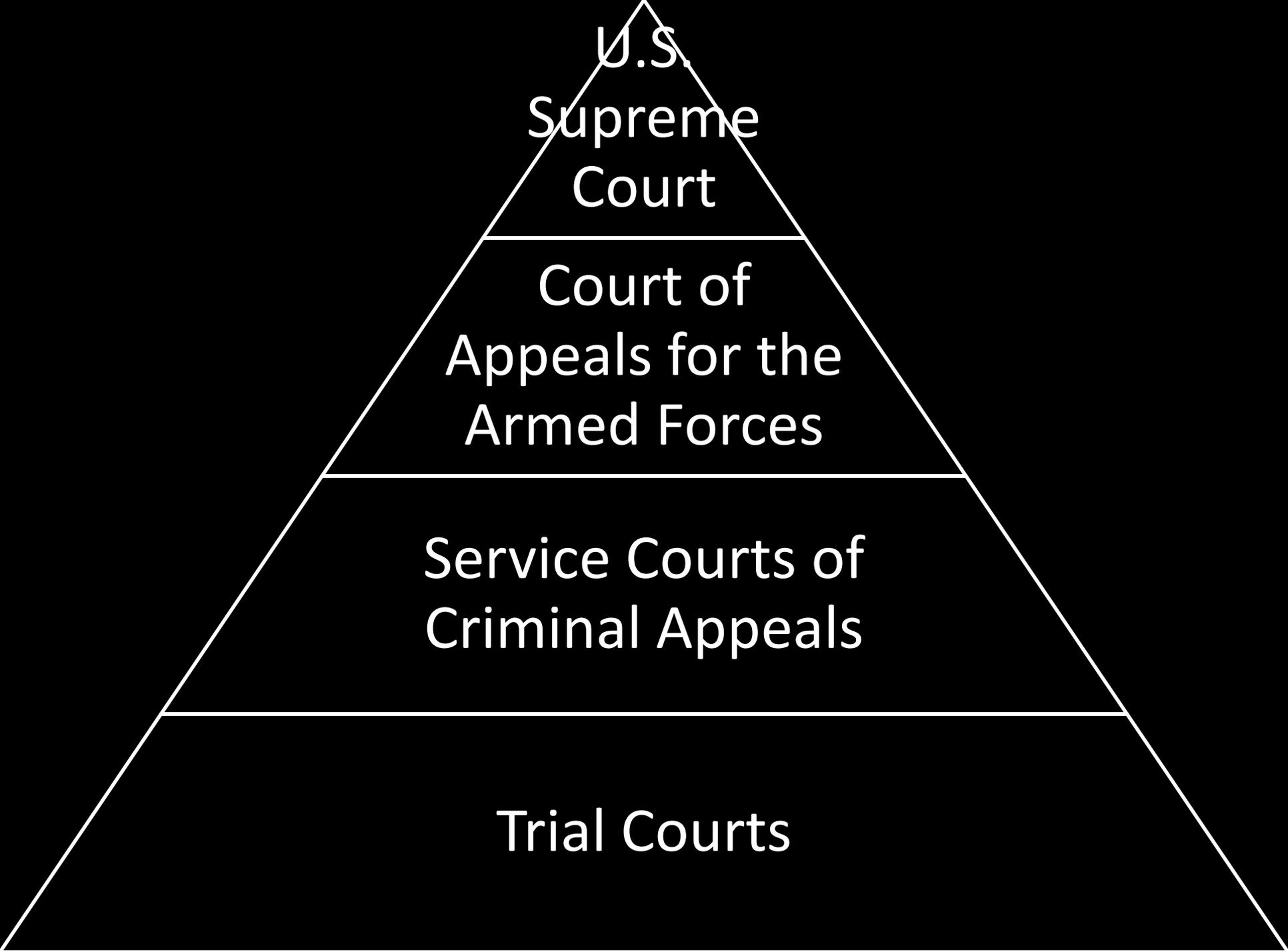
SENTENCE

The sentence was adjudged on 17 June 2013. To be reduced to the grade of Private (E-1), total forfeiture of all pay and allowances, confinement for thirty months, and to be discharged with a dishonorable discharge.

ACTION

In the case of Sergeant (E-5) Richard Archie, 000-11-2222, U.S. Army, B Company, 1st Brigade Support Battalion, Fort Atterbury, Indiana, only so much of the sentence as provides for reduction to Private E1, confinement for thirty months, and a Dishonorable Discharge is approved and except for that part of the sentence extending to Dishonorable Discharge, will be executed. The automatic and adjudged forfeiture of all pay and allowances were deferred effective 24 June 2013 and the deferments are terminated on this date. The automatic forfeiture of all pay and allowances required by Article 58b, UCMJ is waived effective this date for a period of six months with direction that these funds be paid to the daughter of the accused, Miss Taylor Armstrong. The accused will be credited with three days of confinement against the sentence to confinement.

BY COMMAND OF MAJOR GENERAL LLOYD:



U.S.
Supreme
Court

Court of
Appeals for the
Armed Forces

Service Courts of
Criminal Appeals

Trial Courts

What can be appealed

Sentence extends to

- death
- dismissal, dishonorable discharge or bad-conduct discharge
- or more than 1 year in jail

Article 66(b)(1)

What can be appealed

Any case the Judge Advocate General sends to the court

U.S. v. Ali, 71 M.J. 256 (C.A.A.F. 2012)

Article 69(d)

What can be appealed

An accused can always choose to withdraw appeal, except death

Where are appeals heard

Courts of criminal appeals (CCA's)

-Article 66

Court of Appeals for the Armed Forces (CAAF)

-Accused requests; TJAG certifies, death

Supreme Court

Article 66-67a

How is the review conducted

Timelines for decisions

ACCA 6 months from action

CAAF 12-15 months



Government Appeals

Article 62 UCMJ

Government Appeals

1. Qualifying Proceeding

AND

2. Qualifying Ruling

Qualifying proceeding:



CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES THIS IS AN IMPORTANT RECORD. SAFEGUARD IT. ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle)		2. DEPARTMENT, COMPONENT AND BRANCH		3. SOCIAL SECURITY NO.			
4.a. GRADE, RATE OR RANK	4.b. PAY GRADE	5. DATE OF BIRTH (YYMMDD)		6. RESERVE OBLIG. TERM. DATE			
7.a. PLACE OF ENTRY INTO ACTIVE DUTY		7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)					
8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND			8.b. STATION WHERE SEPARATED				
9. COMMAND TO WHICH TRANSFERRED				10. SGLI COVERAGE <input type="checkbox"/> None Amount: \$			
11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)				12. RECORD OF SERVICE			
				a. Date Entered AD This Period	Year(s)	Month(s)	Day(s)
				b. Separation Date This Period			
				c. Net Active Service This Period			
				d. Total Prior Active Service			
				e. Total Prior Inactive Service			
				f. Foreign Service			
				g. Sea Service			
13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)				15.d. HIGH SCHOOL GRADUATE OR EQUIVALENT			
15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM		Yes	No	16. DAYS ACCRUED LEAVE PAID			
17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION <input type="checkbox"/> Yes <input type="checkbox"/> No							
18. REMARKS							
19.a. MAILING ADDRESS AFTER SEPARATION (include Zip Code)				19.b. NEAREST RELATIVE (Name and address - include Zip Code)			
20. MEMBER REQUESTS COPY 6 BE SENT TO <input type="checkbox"/> DIR. OF VET AFFAIRS <input type="checkbox"/> Yes <input type="checkbox"/> No				22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)			
21. SIGNATURE OF MEMBER BEING SEPARATED							

DD Form 214, NOV 88 Previous editions are obsolete. MEMBER - 1

Qualifying Ruling





EVIDENCE
EVIDENCE
EVIDENCE

EVIDENCE
EVIDENCE
EVIDENCE
EVIDENCE

EVIDENCE
EVIDENCE
EVIDENCE
EVIDENCE



TOP SECRET





Continue



Army Regulation 27-10

Legal Services

Military Justice

12-3. Appeals under Article 62

a. A trial counsel will not file a notice of appeal with the Chief, GAD, under RCM 908 unless authorized to do so by the GCMCA or the SJA. Appeals forwarded under RCM 908(b)(6) will be sent to the Chief, Government Appellate Division, JALS-GA, U.S. Army Legal Services Agency, HQDA, 9275 Gunston Road, Fort Belvoir, VA 22060-5546. The Chief, GAD, will, after coordination with the Assistant Judge Advocate General for Military Law and Operations, decide whether to file the appeal with USACCA and will notify the trial counsel of this decision by expeditious means.

b. The trial counsel will serve a certificate of notice of appeal under RCM 908(b)(3) on the military judge. The certificate will reflect the date and time of the military judge's ruling or order from which the appeal is taken, and the time and date of service on the military judge.

c. The matters forwarded under RCM 908(b)(6), including an original and three copies of the verbatim record of trial (only those portions of the record that relate to the issue to be appealed), together with the certificate of notice of appeal, will be forwarded to the Chief, GAD, within 20 days from the date written notice of appeal is filed with the trial court. If the decision is made not to file the appeal with the USACCA, the Chief, GAD, will return all copies of the record to the trial counsel.

d. Following a decision of the USACCA, the Clerk of Court will notify the military judge and the convening authority, who will ensure the accused is notified promptly as required by RCM 908(c)(3). Whether the accused is

Rule 21.

APPEALS BY THE UNITED STATES

(a) Restricted Filing. Only a representative of the government designated by the Judge Advocate General of the respective service may file an appeal by the United States under Article 62.

(b) Counsel. Counsel must be qualified and appointed, and give notice of appearance in accordance with these rules and those of the Judge Advocate General concerned.

(c) Form of Appeal. The appeal must include those documents specified by Rule for Courts-Martial 908 and by applicable regulations of the Secretary concerned. A certificate of the Notice of Appeal described in Rule for Courts-Martial 908(b)(3) must be included. The certificate of service must reflect the date and time of the military judge's ruling or order from which the appeal is taken, and the time and date of service upon the military judge.

The All Writs Act

28 U.S.C. 1651

LRM v. Kastenberg 72 M.J. 364

CCR v. United States (et al.) 72 M.J. 126

U.S. v. McDowell (et al.) ____ M.J. ____

- 1) Is the requested writ, “in aid of” jurisdiction?
- 2) Is the writ necessary or appropriate

Objectives

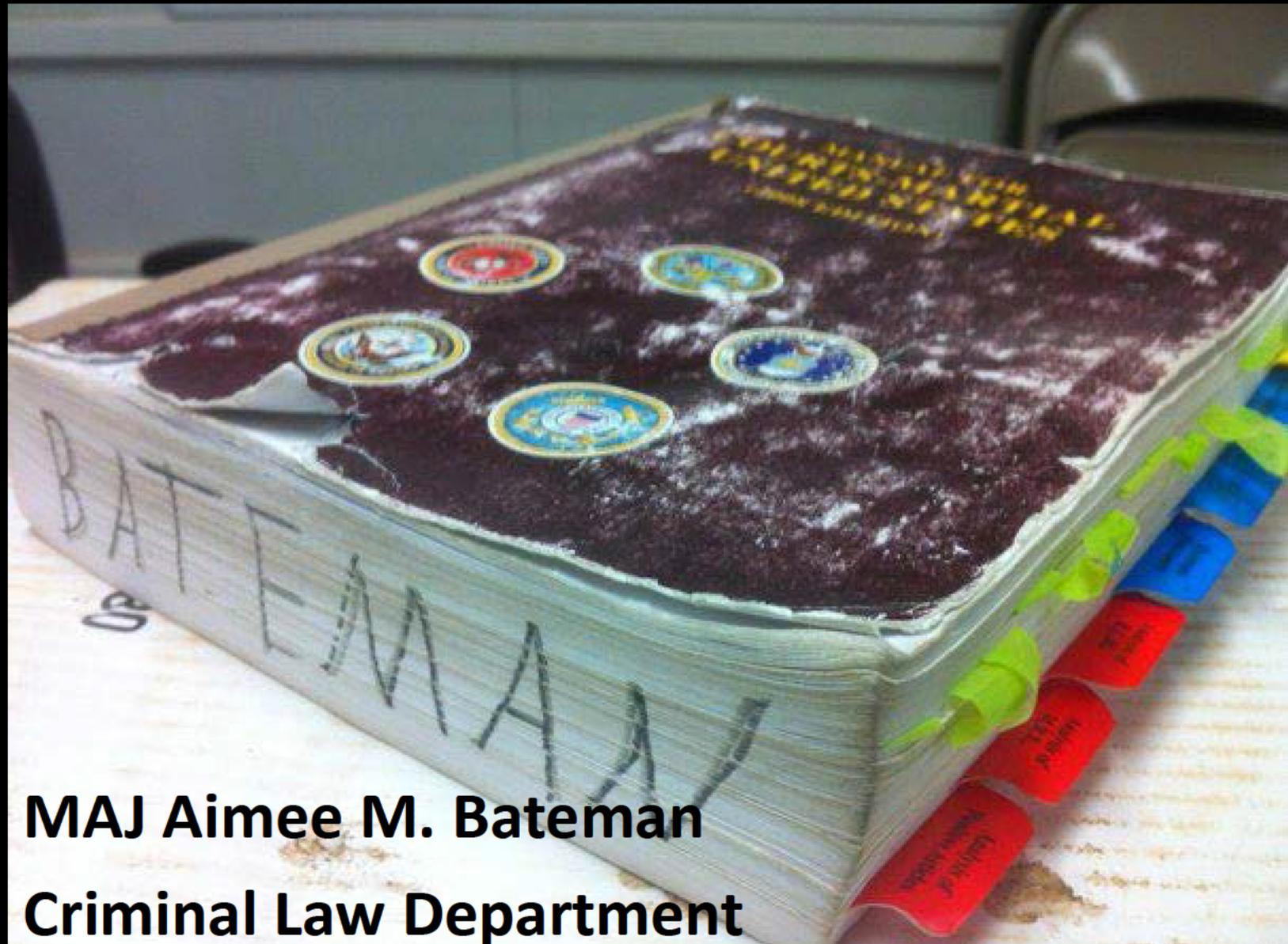
-Pre-sentencing

-Post-trial submission

-Convening authority action

-Appeals

Sexual Offenses under the UCMJ



MAJ Aimee M. Bateman
Criminal Law Department

Article 120

...and 120b, 120c, 134...

- Pre-2007: Appendix 27 (Red Tab)
 - Rape, Carnal Knowledge, “Indecent” crimes
- 2007-2012: Appendix 28 (Red Tab)
 - All sex crimes moved to Article 120
- Post-June 28, 2012 – page IV-68 of the “Punitive Articles”
 - What is missing?

The Stuff That's Missing

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

The Stuff That's Missing (no longer)

Maximum Punishment

- Executive Order 13543 of May 15, 2013

Sec. 2. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

- For Article 120 (Paragraph 45, Part IV, MCM)

“e. *Maximum punishment.*

(1) *Rape.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.”

- Also, see Military Judges' Benchbook

The Stuff That's Missing (still...)

Everything Else

- The remaining subparagraph of Paragraph 45, Part IV (b., c., d., f.)
- In the interim:

Military Judges' Benchmark

UNOFFICIAL

**This version contains all
approved changes as of
12 June 2014
(through Change 14-12).**

Art 120 (and 120a, 120b, 120c) (2012)

ADULT CRIMES (Art 120)

- RAPE
- SEXUAL ASSAULT
- AGGRAVATED SEXUAL CONTACT
- ABUSIVE SEXUAL CONTACT

STALKING (Art 120a)

CHILD CRIMES (Art 120b)

- RAPE OF A CHILD
- SEXUAL ASSAULT OF A CHILD
- SEXUAL ABUSE OF A CHILD

OTHER SEXUAL MISCONDUCT (Art 120c)

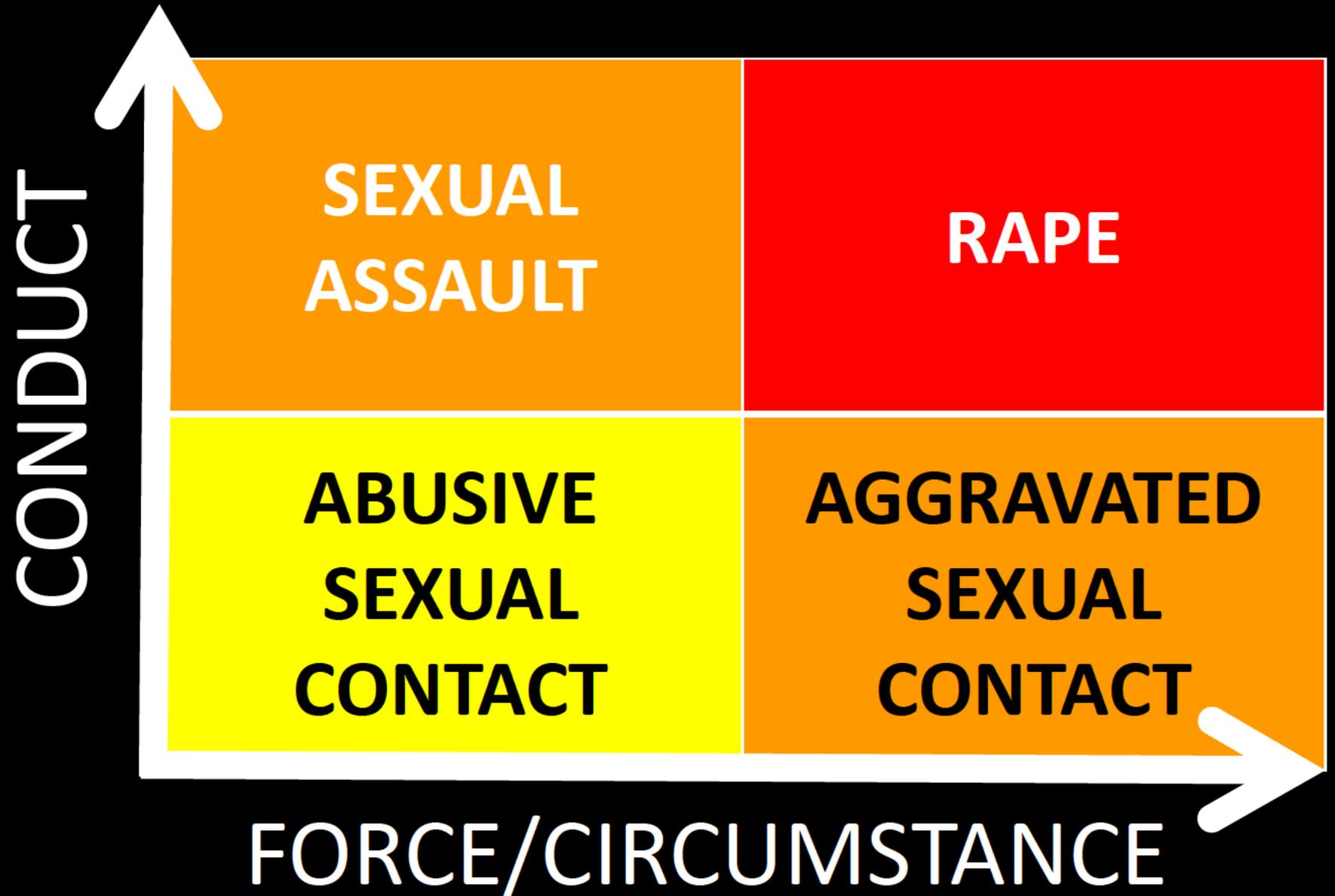
*Forcible Sodomy (Art 125)

- INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING
- FORCIBLE PANDERING
- INDECENT EXPOSURE

Effective 28 June 2012

***Effective 26 December 2014**

ADULT CRIMES



ADULT CRIMES

Sexual Act

SEXUAL
ASSAULT
30

RAPE
LWOP

Sexual Contact

ABUSIVE
SEXUAL
CONTACT
7

AGGRAVATED
SEXUAL
CONTACT
20

Lower degree of force



Higher degree of force

SEXUAL ACT

ARTICLE 120 (2007)

1. Contact* between penis and vulva (*penetration however slight)

OR

1. Penetration* of the genital opening of another

2. By a hand, finger, or any object

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Contact* between penis and vulva **or anus or mouth** (*penetration however slight)

OR

1. Penetration* of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

ARTICLE 120 (2007)

1. Touching (or cause another to touch)
2. Directly or through clothing
3. Genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to:
 - a. Abuse, humiliate, harass, or degrade any person , OR
 - b. Gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Of genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to abuse, humiliate, harass, or degrade any person

OR

1. Touching (or causing another to touch)
2. Directly or through clothing
3. **Any body part by any body part**
4. With intent to gratify the sexual desire of any person.

FORCE/CIRCUMSTANCE

Rape or Aggravated Sexual Contact

1. using **unlawful force** against that other person;
2. using **force** causing or **likely to cause death or grievous bodily harm** to any person;
3. **threatening . . . death, grievous bodily harm, or kidnapping;**
4. first **rendering** that other person **unconscious**; or
5. **administering . . . by force or threat of force, or without the knowledge or consent . . . intoxicant, . . . substantially impairing** the ability of that other person to appraise or control conduct;

Sexual Assault or Abusive Sexual Contact

- **threatening** or placing that other person in **fear**;
- causing **bodily harm** to that other person;
- making a **fraudulent representation** that the sexual act serves a professional purpose;
- inducing a **belief . . .** that the person is **another person**;
- **knows or reasonably should know** that the other person is **asleep, unconscious, or otherwise unaware . . .** or is **incapable of consenting . . .**

Sexual Act

**SEXUAL
ASSAULT**
30 (& DD/D)

RAPE
LWOP (& DD/D)

Sexual Contact

**ABUSIVE
SEXUAL
CONTACT**
7

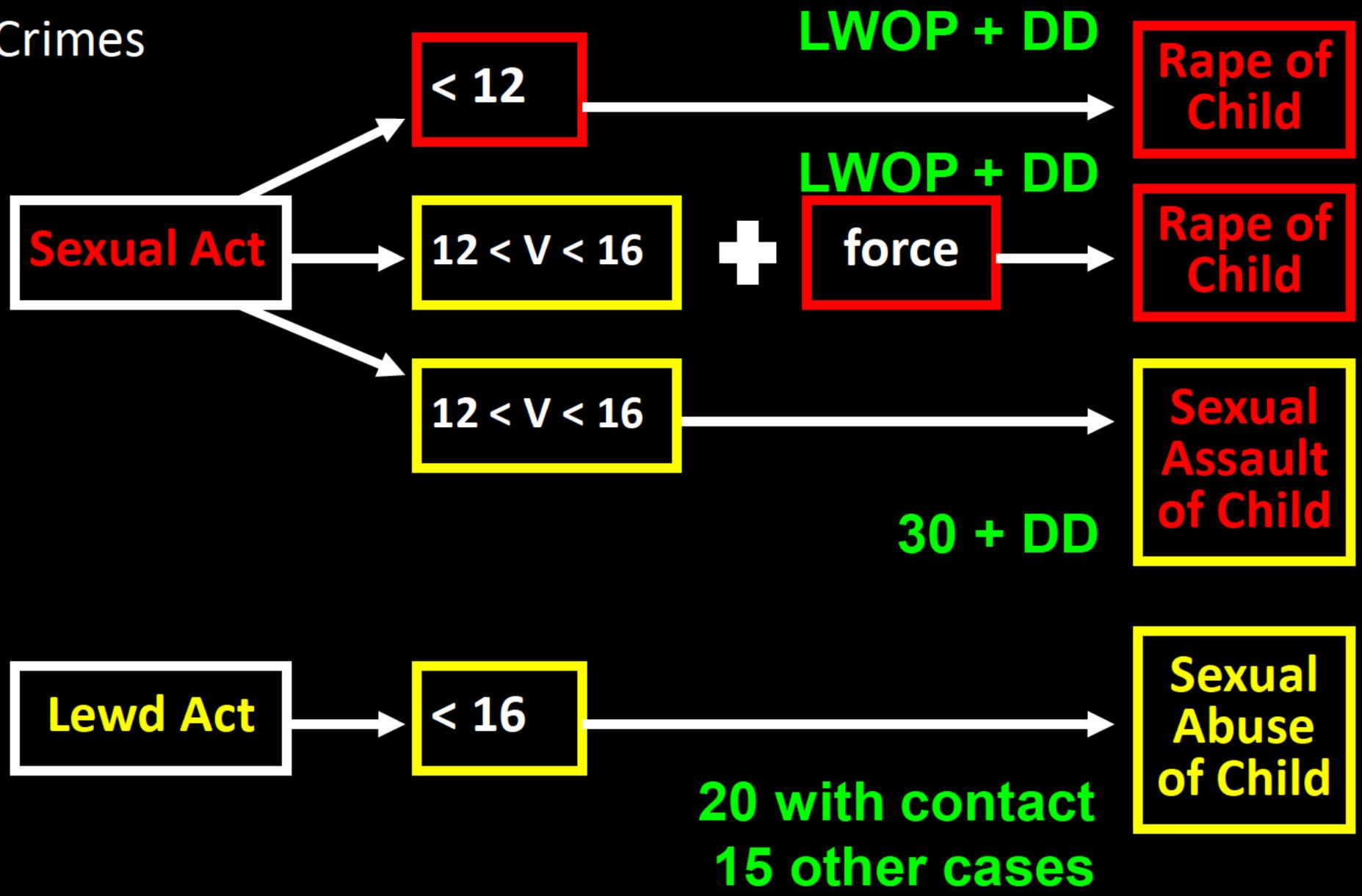
**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

Child Crimes



SEXUAL ACT

1. Contact between penis and vulva **or anus or mouth**

OR

1. Penetration of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

a. Abuse, humiliate, harass, or degrade any person or

b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Of genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to abuse, humiliate, harass, or degrade any person

OR

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Any body part by any body part
4. With intent to gratify the sexual desire of any person.

LEWD ACT

4 TYPES OF LEWD ACTS:

1. Any **sexual contact**
2. Intentionally exposing (with one of two intents)
3. Intentionally communicating indecent language (with one of two intents)
4. Any indecent conduct
 - a. Intentionally done with or in the presence of a child
 - b. Traditional “form of immorality” definition

Physical presence requirement eliminated

FORCE

ARTICLE 120 (2012) – adult crimes

1. The use of a weapon; or
2. The use of such physical strength or violence as is sufficient to overcome, restrain or injure a person; or
3. Inflicting physical harm sufficient to coerce or compel submission by the victim.

ARTICLE 120 (2012) – child crimes

1. The use of a weapon;
2. The use of such physical strength or violence as is sufficient to overcome, restrain or injure a child; or
3. Inflicting physical harm.

In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

Art 120c - Indecent Viewing, Visual Recording, or Broadcasting

Two observation crimes

1. Views (**1 year**)
2. Photographs, videotapes, films, or records (**5 years**)

- Knowingly
- Private area of another
- Without consent
- Other person had a REOP

One broadcasting crime (7 years)

- Knowingly broadcasts or distributes one of above
- Knew or should have known made under circumstances above



***Advanced Topics for
Consideration***

Language use

Rape by administration:

Administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby **substantially** **impairing** the ability of that other person to appraise or control conduct.

Sexual Assault when incapable of consent:

Commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to— **impairment** by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the Accused.

“Known or reasonably should be known”

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

Know = actual

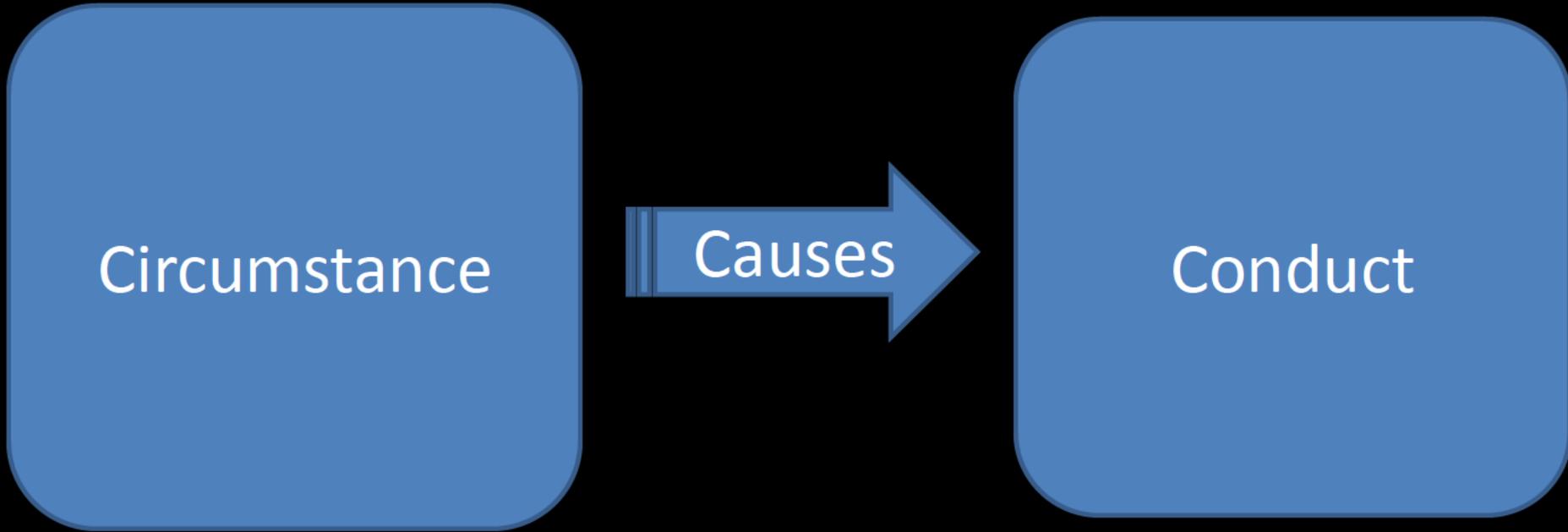
Reasonably should know = objective

Negligence standard

Circumstance

Causes

Conduct



Unlawful force

Force = Death or GBH

Fear of Death, GBH,
or kidnapping

Rendering
unconscious

Administering
substance that
substantially impairs

Causes

Sexual Act

Threat or Fear

Bodily harm

Fraud

Causes

Sexual Act



Sexual Act

When

Condition/
Capacity

Sexual Act

When

Accused
knows/reasonably
should know victim
is:

Asleep/unconscious/
otherwise unaware

Incapable of consent
due to condition

This is what
consent
looks
like



CONSENT

- Lack of consent is not an element (two exceptions).
- “freely given agreement ...by a competent person.”
- Cannot Consent:
 - ✓ Sleeping, unconscious, incompetent
 - ✓ Death/GBH
 - ✓ Render unconscious
 - ✓ Under threat or fear
 - ✓ Fraud

How is consent evidence used?

Sexual Assault by Causing Bodily Harm

1. Sex Act

2. Bodily Harm

Offensive touching

Consent = not offensive

Not a defense

Bodily Harm

“to wit” or not “to wit”

(3) *Bodily harm.* The term ‘bodily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

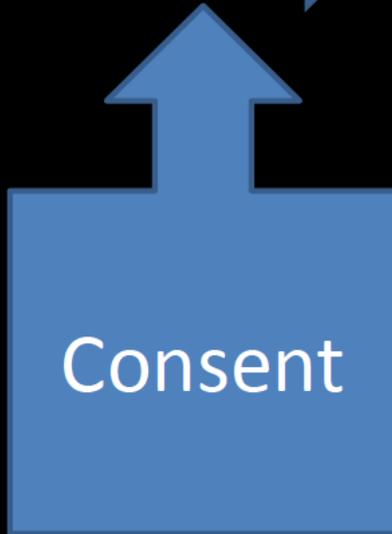
It’s in the pleading:

1. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm, to wit: pushing V to the bed and holding her down with his hands.

Consent ≠ element

2. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm.

Consent = element: the penetration serves as both the sexual act AND the bodily harm IF the Government proves the sexual act was nonconsensual.



Sexual Assault (asleep, unconscious, or otherwise)

1. Sex Act
2. Victim asleep, unconscious, or otherwise unaware the sex act is occurring
3. Accused knew or reasonably should have known victim was asleep, unconscious, or otherwise unaware.

Sexual Assault (incapable of consent)

1. Sex Act
2. Victim incapable of consent due to
 - a. Impairment by drug, intoxicant, similar substance
 - b. Mental disease or defect or physical disability
3. Accused knew or reasonably should have known of the impairment or disease/defect/disability

SVC Roles, Responsibilities & Scope of Representation

Mr. John T. Meixell
Chief, Legal Assistance Policy Division

Special Victim Counsel

Role of SVC

- Provide providing zealous representation to victims of sexual assault:
 - During investigation
 - During Preferral/Referral/Negotiations
 - During the Article 32
 - During Trial
 - Post Trial

SVC Program

- 14 AUG 13: SECDEF Publishes DoD Guidance for Sexual Assault Prevention and Response, including a **“special victim’s advocacy program best suited for that Service”**
- Required to provide **“advice and representation to the victim throughout the justice process”**
- IOC: 1 NOV 13
- FOC: 1 JAN 14
- 2014 NDAA Section

2014 NDAA

- Signed December 26, 2013
- Section 1716 directs establishing a “Special Victims’ Counsel for Victims of Sex-Related Offenses”
 - Effective June 24, 2014
 - Creates a new 10 U.S.C 1044(e) establishing a Special Victim Counsel:
 - For “an individual eligible for military legal assistance under [10 USC 1044] who is the victim of an alleged sex-related offense”
 - Counsel must receive specialized training and be certified by the TJAG
 - Lists 8 areas of services to be provided

8 Services to be Provided

- Legal consultation regarding potential collateral misconduct;
 - Legal consultation regarding the Victim Witness Assistance Program;
 - Legal consultation regarding SARC and VA;
 - Legal consultation regarding 3rd party liability;
 - Legal consultation regarding the military justice system;
 - Accompany the victim to military prosecution proceedings;
 - Legal consultation regarding emotional & mental health services; and
 - Legal consultation & assistance regarding traditional legal assistance, in any military justice proceeding & MPO/CPOs
- Other Legal Assistance as authorized by the Secretary

Other Provisions of the NDAA

- Section 1701 incorporates the Federal Crime Victims' Rights Act into Article 6b UCMJ.
- Section 1701 requires a military judge to “designate a legal guardian...to assume the victim’s rights” on behalf of a minor, incompetent, incapacitated, or deceased victim.
- Section 1706 establishes the right of a victim to submit matters for the consideration by the convening authority prior to taking post-trial action.

Federal Crime Victims' Rights Act

■ 8 Rights

- The right to be reasonably protected from the accused;
- The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or any release or escape of the accused;
- The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at the proceeding;
- The right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing, or any parole proceeding;
- The reasonable right to confer with the attorney for the government in the case
- The right to full and timely restitution as provided in law;
- The right to proceedings free from unreasonable delay; and
- The right to be treated with fairness and with respect for the victim's dignity and privacy.

LRM v. Kastenburg

72 M.J. 364 (C.A.A.F 2013)

Special Victims' Counsel Can Speak for victim and access court filings
A victim of sexual assault has a right to be heard *through counsel* on issues implicating MRE 412 (rape shield) MRE 513 (psychiatrist-patient privilege) and MRE 514 (victim advocate – victim privilege). The right to be heard necessarily involves access to court documents and legal and factual presentation relevant to the issues.

- Take aways:
- (1) Where a statute or rule grants a "right to be heard," it means a right to legal and factual argument either personally or through counsel about that issue.
- (2) Where a statute or rule grants a privilege to an individual, that person has a right to legal and factual defense of that privilege.

Special Victim Counsel Handbook

1 November 2013

SVC Attorneys

- Program will reside in the SJA Legal Assistance Office
- Uniformed JAs will serve as SVCs
- LA Chiefs (Uniformed & Civilian) will provide oversight & guidance to SVCs
- SVC PM is available for conflicts

SVC Attorneys

- Training Required
- TJAG Certifies

Program Management

Duties & Responsibilities

- COL Jay McKee to serve as Special Assistant to AJAG-MLO
- COL McKee will:
 - Develop and implement SVC Policy/Program for the Army
 - Coordinate with other services on program development and best practices
 - Coordinate with internal (CL, LA, PPTO, TCAP, TJ, LCS, SIO) and external (SHARP, OPMG, OCLL, CID) stakeholders
 - Policy development, implementation
 - Training
 - Funding
 - Personnel
 - Metrics
 - Communications
- Handle requests from field
 - Substantive, procedural questions from SVCs
 - Requests from SJAs, LAOs for SVA support

Qualifications for a SVC

- Familiarity with Court-Martial System
- Familiarity with Supporting Resources
- Understanding of Victim Behavior/Impact of Crime on Victims
- Sensitivity & Judgment
- Ability to Listen

Eligible Clients

- Soldier Victims of a Sexual Assault
- Other Servicemembers where accused is a Soldier
- Other Adult Victims eligible for Legal Assistance where accused is a Soldier
- Former Soldiers?

Eligible Clients - RC

- Reserve Component Soldiers sexually assaulted while on (or perpetrator is on):
 - active duty
 - full time national guard duty
 - inactive duty for training, or
 - inactive duty
- Adult Dependant of an RC Soldier sexually assaulted.

Eligible Child Clients

- Representing Child Victims 24 June
- Child is the Client
 - Must gauge Competence/Maturity of Child
- Impact of NDAA Section 1701 GAL
- Must seek approval of SVC PM
- Special Training Course 15-19 Sept

Child Victim Request Slide

Child Victim Request for SVC Services

BACKGROUND:

- **Who:** Mrs. Mother, mother of child victim (A.B.). A.B. is 13yo; 11yo at time of offense. Adoptive father, Soldier is perpetrator.
- **Organization POC:** CPT SVC at phone or email
- **Where:** A.B. still resides on post at FSGA.
- **When:** Requested SVC on 26JUN14. Trial completed 17MAY14. Awaiting record of trial.
- **What:** Mother wants assistance in post-trial matters to help overturn/reduce Soldier's conviction/sentence & avoid sex offender registration. Convicted of Art. 80, attempted 120c, indecent viewing/recording/broadcasting; currently serving 75 days of confinement (expected release ~22JUL14).
- **Additional Facts:**
 - Soldier set up iPhone to record 11yo A.B. changing after shower. A.B. found it & deleted recording. Initially, A.B. also alleged touching but recanted.
 - Mother & A.B. cooperated in prosecution until Art. 32 when Mother started interrupting A.B. during her testimony offering "explanations/clarifications."
 - After referral, Mother refused to allow A.B. to participate and hired CIV atty to keep A.B. out of court.
 - FSGA SVCs conflicted out of representation b/c of previous family law issue. Must either kick to Fort Gordon or hand select SVC to take on case.

CONCERNS:

Mother does not have BIC at heart//ethics
Soldier, currently confined but no kick. Had completed MEB with 80% disability & contractor job set up before allegations.
Post-trial, not much we can do.
Mission creep into TDS and or MEB lane.

RECOMMENDATIONS:

- Appoint SVC to represent A.B.

Date	18 July 2014
Submitted by	CPT SVC
MJ Experience	2 Years

Special Victim Counsel

Notification to Clients

- Initial Notification at time of reporting assault
- Government re-notifies victim at referral

Victims as Clients

- Take your time and build rapport/trust
- Learn to Listen
- Manage expectations
- Military Justice is Foreign to the Client

Delivery of Services

- Push/Pull
 - Notification upon reporting
 - Client must request SVA
 - Reminder upon Referral?

- Restricted vs. Unrestricted Clients
 - Restricted won't have SVP/VWL link
 - Restricted to Unrestricted Reports

Assignment of SVC

- Process
- Conflicts Checks & CIS
- Access to Counsel: Be available - don't use general office call in procedures
- Scope Letter

Challenge w/ Clients not on Post

- PCS after training
- Expedited transfer
- Conflicts
- Build relationships at TDY location

Duration/Termination of Representation

- SVC ETS
- SVC PCS
- SVC Reassignment in the Office
- Must Address in Scope Letter
- Challenges upon transition

Relationships

- SHARP
- VA
- SVP/TC
- TDS
- CID
- VWL
- Military Judge
- Medical Providers

Relations with CLA & SJA

- You are not an “SVC of One”
- Share workload data
- Use the CLA as a Sounding Board

Scope of Services

VWL and SVC Responsibilities

VWL

SVC

-Primary POC through which victims obtain info/assistance in securing victim services at earliest opportunity.

-Acts ICW unit VA responsible for crisis intervention, referral, and ongoing nonclinical support to SA victim.

-Inform and assist with transportation, parking, childcare, lodging, and translators/interpreters.

-Inform of entitlement to reimbursement for expenses of appearing at Art. 32 or court-martial.

-Assist with obtaining payment of witness fees and related costs.

- Provides assistance to non "special victims"

- 1. Inform on reporting options**
- 2. Inform on victim rights**
- 3. Inform on military and VA benefits**
- 4. Inform on expedited transfer requests**
- 5. Inform on MPO and civilian protective orders**
- 6. Inform on the MJ System and victim's rights/duties**

7. Advise victim in collateral civil issues arising from crime
8. Advocate victim's interests with TC on disposition options
9. Referral to TDS, as necessary
10. Advise victim on victim impact statement
11. Accompany victim to all pre-trial interviews, hearings and court-martial proceedings
12. Discovery motions regarding medical records
13. Motions/court appearances/appeals on MRE 412 and 513 issues
14. Assist victim in post-trial submissions
15. Traditional Legal Assistance

Special Victim Counsel

Initial Meeting

- Challenge of repeated retelling of story to strangers
- Scope Letter
- Notice to TC/DC/CID/Command
- Remote/PCSed Victims

Interaction w/ CID/Investigators

- Don't let your role interfere with the investigation
- Victim request for SVC should NOT delay the investigation or collection of evidence.
- Relationships matter

Investigations/Pretrial Role

- What pretrial material do you receive?
- Requests to contact the Victim should go through you
- Role in Victim interviews
- Telephonic interviews/testimony
- Collateral Misconduct
- Negotiations on disposition/PTA
 - Advocate Victim's interests w/ Chain of Command

Dealing with the Military Judge

- Provide notice to MJ through the Electronic Docket Request
- Request to participate in R.C.M 802 Conferences that impact your representation
- Before or Behind the Bar
- Work out plan for objecting

Relationship with Trial Counsel

- You are not a TC – your role is to protect the Victim’s rights and interests, NOT to prosecute the case.
- Challenge for TC to build relationship with Victim
- Let TC prep Victim for Art 32/trial testimony

Role during Other Disposition

- Article 15's
- Letter of Reprimand
- Admin Separation

Post-Trial Role

- Explain Post-Trial Process
- Explain Impact of Sentence
- Explain Appellate Process
- Explain Clemency
- Submit Post-Trial Matter to CA

Off-Post Jurisdiction

- Limited Role
- CANNOT represent the victim in off post civilian criminal investigations/prosecutions
- May help Victim get a Civilian Protective Order

End of Case

- Termination Letter
- MFR to SVC PM

Monthly Reports

- PPTO Manpower statistics
- CIS Stats
 - # of New SVC Clients
 - # of SVCs in the Office
 - # of Legal Counseling
 - # of Interviews/pretrial preps
 - # of Trials
 - # of Post-trial Counselings
- CH LAO/SJA?

Manpower Spreadsheet

	A	B	C	D	E	F	G	H	I
1	Month	# of serving SVCs	# of Clients	General Legal Advice (minutes)	MJ-Related Advice (minutes)	Pre-Trial Activities (minutes)	Trial Activities (minutes)	Post-Trial Activities (minutes)	Training/Outreach (minutes)
2	March								
3	April								
4	May								
5	June								
6	July								
7	August								
8	September								
9	October								
10	November								
11	December								
12	January								
13	February								
14	March								
15	TOTALS:	0	0	0	0	0	0	0	0
16									

•Addition Fields on the right for:

- Travel
- Total Time

•Consolidate Office report submitted w/ the first 5 duty days of the month

Resiliency

- Victims can be Challenging Clients
- Be sensitive to YOU
- You are not an “SVC of One”
- Know who you can talk to

SVC Personnel

(b) (6)

[Redacted]

[Redacted]

[Redacted]

Questions?



~~INVESTIGATION~~

**PRELIMINARY
HEARINGS**

Article 32 ~~Investigations~~ Preliminary Hearings
MAJ Jeremy Steward

GOALS

1. Know the policy

2. Know the rules

3. Know the future





AUG 14 2013

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEFS OF THE MILITARY SERVICES
COMMANDERS OF THE COMBATANT COMMANDS
CHIEF OF THE NATIONAL GUARD BUREAU
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
DIRECTOR, OPERATIONAL TEST AND EVALUATION
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
DEPARTMENT OF DEFENSE CHIEF INFORMATION OFFICER
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Sexual Assault Prevention and Response

Eliminating sexual assault from our Armed Forces remains one of our top priorities. This effort requires our absolute and sustained commitment to providing a safe environment in which every Department Service member and civilian is free from the threat of sexual harassment and assault. Our success depends on a dynamic and responsive approach. We, therefore, must continually assess and strive to improve our prevention and response programs.

On May 6, 2013, I directed a range of initiatives designed to strengthen our program in the areas of commander accountability, command climate, victim advocacy, and safety. Today, I am directing immediate implementation of the following additional measures to gain greater consistency of effort and enhance oversight, investigative quality, pretrial investigations, and victim support:

- Improving Victim Legal Support: Secretaries of the Military Departments shall establish a special victim's advocacy program best suited for that Service that provides legal advice and representation to the victim throughout the justice process. Each Service will identify and periodically share best practices, and will establish an initial operating capability not later than November 1, 2013, and a fully established program by January 1, 2014.

- Expanding Victim Rights: General Counsel shall develop draft language for an Executive Order to amend the Manual for Courts Martial to provide victims of crime the opportunity to provide input to the post-trial action phase of courts-martial. Deliver your proposal to me not later than October 15, 2013.
- Enhancing Protections: Secretaries of the Military Departments shall develop and implement policy allowing the administrative reassignment or transfer of a member who is accused of committing a sexual assault or related offense, balancing interests of the victim and accused. Implement this provision not later than January 1, 2014.
- Standardizing Protections: Under Secretary of Defense for Personnel and Readiness shall ensure current policies prohibiting inappropriate relations between trainers and trainees and recruiters and recruits are consistent across the Services. Report your findings to me not later than November 1, 2013.
- Elevating Oversight: Under Secretary of Defense for Personnel and Readiness shall develop policy, standardized across all the Services, that requires status reports of unrestricted sexual assault allegations and actions taken to the first general/flag officer within the chain of command, without delaying reporting to the relevant military criminal investigation organization. Implement this policy not later than November 1, 2013.
- Enhancing Pretrial Investigations: Secretaries of the Military Departments shall mandate that judge advocates serve as investigating officers for all Article 32 hearings on sexual assault offense charges. Implement this policy not later than December 1, 2013.
- Ensuring Investigative Quality: I am requesting that the Department of Defense Inspector General plan to evaluate the adequacy of closed sexual assault investigations on a recurring basis. Respond to this request within 30 days.

Preventing the crime of sexual assault remains our focus. In addition, when a crime does occur, we must ensure that victims' rights are respected, they are provided responsive and timely support, and related investigations and judicial proceedings, if appropriate, are conducted in a thorough, professional, and fair manner. To this end, the measures outlined above will strengthen our overall sexual assault prevention and response programs and efforts. Remember, we are all accountable and responsible for eliminating this crime from our ranks.

Thank you.

cc:
Deputy Secretary of Defense

- Enhancing Pretrial Investigations: Secretaries of the Military Departments shall mandate that judge advocates serve as investigating officers for all Article 32 hearings on sexual assault offense charges. Implement this policy not later than December 1, 2013.

This is not new....

JA's have been serving as Art. 32 IOs for a long time...



In fact, Marine Judge Advocates serve as IOs all the time...







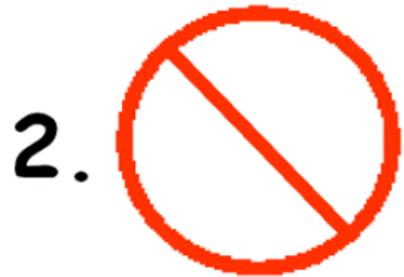




Article 32 Rules



Hitting



Kicking



Pushing



Art. 32(a), UCMJ

- “No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made”



CHECKLIST

Inquire into the “truth of the matter set forth in the charges”

Consider “the form of the charges”

Make “recommendations as to the disposition which should be made in the interest of justice and discipline.” (Advisory Only)

Discovery

- R.C.M. 405(a) Discussion (“The investigation also serves as a means of discovery”)
- R.C.M. 405(f)(8) (providing accused’s right to cross-examine witnesses)
- R.C.M. 405(f)(10) (providing accused’s right to have evidence produced at the hearing)
- R.C.M. 405(g) (discussing production of evidence and witnesses)

Preserve Testimony

At trial, Article 32 testimony may be admissible under:

- M.R.E. 801(d)(1)(A) as a prior inconsistent statement
- M.R.E. 804(b)(1) as former testimony, if witness is unavailable.



Scope of Investigation

Scope of Investigation

- Can (should?) go beyond case file
- May investigate uncharged offenses:
 - Must inform the accused of uncharged misconduct under investigation
 - Give accused the opportunity to present evidence regarding the uncharged offenses
- May consider admissibility of evidence as the IO “deems necessary to an informed recommendation” but IO is not required to rule on admissibility

**Burden of Proof is
reasonable grounds to
believe the accused
committed the offense**



R.C.M. 405

**Bill of
RIGHTS**



12 Listed in R.C.M. 405(f)

- **Informed of charges**
- **Informed of identity of accuser**
- **Present throughout taking of evidence**
- **Representation by counsel**
- **Know witnesses & evidence known to IO**
- **Informed of purpose of investigation**
- **Article 31 rights (self-incrimination)**
- **Cross-examine witnesses**
- **Production of witnesses**
- **Production of evidence**
- **To present “anything” in defense, extenuation or mitigation**
- **Make a statement (in any form)**

RCM 405(i)

- The Military Rules of Evidence do not apply to Article 32, UCMJ, investigations except:
- MRE 301 - Privilege against self-incrimination
- MRE 302 - Privilege concerning any statements made by the accused during a mental examination conducted under RCM 706
- MRE 303 – No degrading questions/comments allowed
- MRE 305 - Warnings about rights/involuntary statements
- Section V – Privileges (Attorney/Client, Clergy, etc..)
- **MRE 412 - Rape Shield Law**

RCM 405(i)

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- **MRE 301 - Privilege against self-incrimination**
- **MRE 302 - Privilege concerning any statements made by the accused during a mental examination conducted under RCM 706**
- **MRE 303 – No degrading questions/comments allowed**
- **MRE 305 - Warnings about rights/involuntary statements**
- **MRE 412 - Rape Shield Law**
- **Section V – Privileges (Attorney/Client, Clergy, etc..)**

Update to R.C.M. 405

405(i)

(i) *Military Rules of Evidence*. The Military Rules of Evidence do not apply in pretrial investigations under this rule except as follows:

(1) Military Rules of Evidence 301, 302, 303, 305, and Section V shall apply in their entirety.

(2) Military Rule of Evidence 412 shall apply in any case defined as a sexual offense in Mil. R. Evid. 412(d).

(3) In applying these rules to a pretrial investigation, the term “military judge,” as used in these rules, shall mean the investigating officer, who shall assume the military judge’s powers to exclude evidence from the pretrial investigation, and who shall, in discharging this duty, follow the procedures set forth in the rules cited in paragraphs (1) and (2).

Discussion

With regard to all evidence, the investigating officer should exercise reasonable control over the scope of the inquiry. *See* subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, see subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented. Certain rules relating to the form of testimony that may be considered by the investigating officer appear in subsection (g) of this rule.

Mil. R. Evid. 412 evidence, including closed hearing testimony, must be protected pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a. Evidence deemed admissible by the investigating officer should be made a part of the report of investigation. *See* subsection (j)(2)(C), *infra*. Evidence deemed inadmissible, and the testimony taken during the closed hearing, should not be included in the report of investigation and should be safeguarded. The investigating officer and counsel representing the United States are responsible for careful handling of any such evidence to prevent indiscriminate viewing or disclosure. Although R.C.M. 1103A does not apply, its requirements should be used as a model for safeguarding inadmissible evidence and closed hearing testimony. The convening authority and the appropriate judge advocate are permitted to review such safeguarded evidence and testimony. *See* R.C.M. 601(d)(1).



New tool for obtaining evidence –

Subpoena Duces Tecum

Update to R.C.M. 405

(ii) *Evidence not under the control of the Government.* Evidence not under the control of the Government may be obtained through noncompulsory means or by subpoena duces tecum issued pursuant to procedures set forth in R.C.M. 703(f)(4)(B). A determination by the investigating officer that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

405(g)(2)(C)

Discussion

A subpoena duces tecum to produce books, papers, documents, data, electronically stored information, or other objects for a pretrial investigation pursuant to Article 32 may be issued by the investigating officer or counsel representing the United States. *See* R.C.M. 703(f)(4)(B).

The investigating officer may find that evidence is not reasonably available if: the subpoenaed party refuses to comply with the duly issued subpoena duces tecum; the evidence is not subject to compulsory process; or the significance of the evidence is outweighed by the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

Open vs. Closed Article 32

- RCM 405(h)(3) and Discussion
 - Article 32 may be closed to the public in discretion of appointing authority or IO, but
 - Ordinarily open.

Open vs. Closed Article 32

Closure must be narrowly tailored to protect the legitimate interest at stake:

- **Protect system's integrity, victims, and accused's due process rights.**
- **Protect classified information.**
- **Protect victim.**

Form of Report

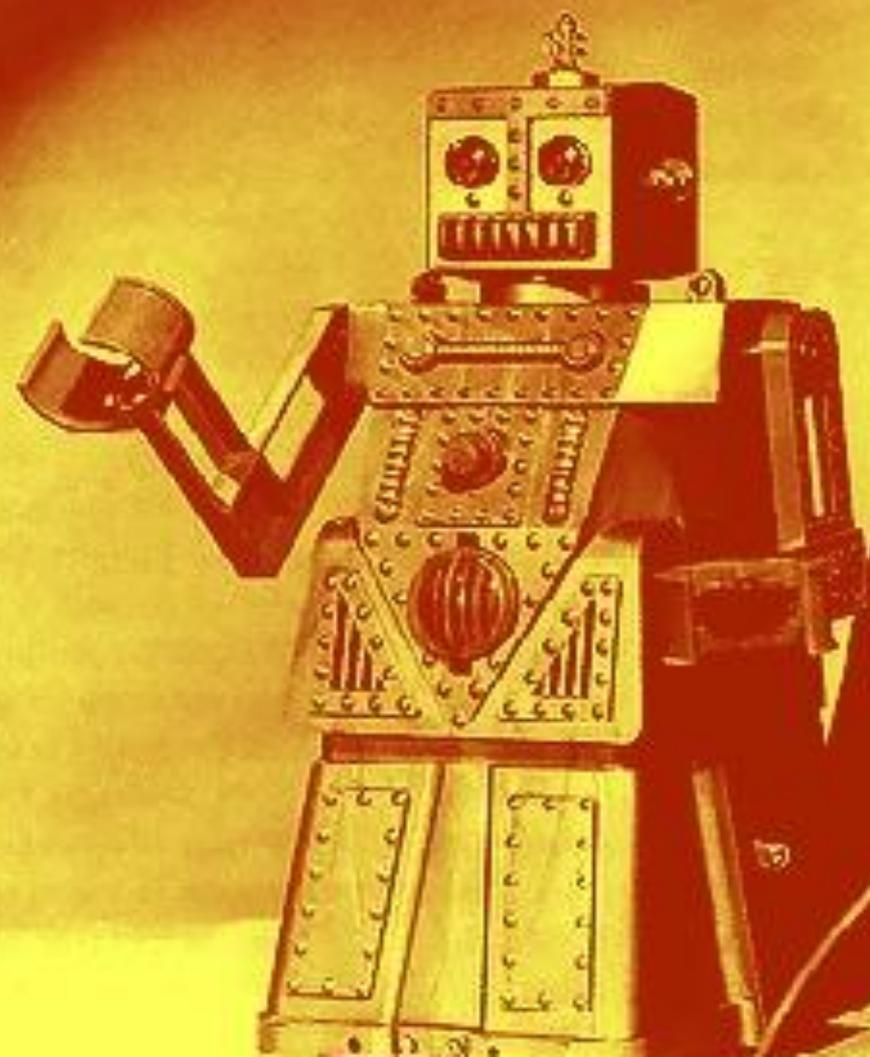
- **DD Form 457**
- ***See* MCM, Appendix 5**
- **Copy to Accused and Convening Authority**

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: <i>(Name of Investigating Officer - Last, First, MI)</i>	b. GRADE	c. ORGANIZATION	d. DATE OF REPORT		
2a. TO: <i>(Name of Officer who directed the investigation - Last, First, MI)</i>	b. TITLE	c. ORGANIZATION			
3a. NAME OF ACCUSED <i>(Last, First, MI)</i>	b. GRADE	c. SSN	d. ORGANIZATION	e. DATE OF CHARGES	
<i>(Check appropriate answer)</i>				YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)					
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)					
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)					
7a. NAME OF DEFENSE COUNSEL <i>(Last, First, MI)</i>	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL (If any)		b. GRADE	
c. ORGANIZATION <i>(If appropriate)</i>		c. ORGANIZATION <i>(If appropriate)</i>			
d. ADDRESS <i>(If appropriate)</i>		d. ADDRESS <i>(If appropriate)</i>			
9. (To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)					
a. PLACE		b. DATE			
I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.					
c. SIGNATURE OF ACCUSED					
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: <i>(Check appropriate answer)</i>				YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION					
b. THE IDENTITY OF THE ACCUSER					
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31					
d. THE PURPOSE OF THE INVESTIGATION					
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE					
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT					
g. THE RIGHT TO CROSS-EXAMINE WITNESSES					
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED					
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION					
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING					
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE (If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)					
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL					
<p>NOTE: If additional space is required for any item, enter the additional material in item 21 or on a separate sheet. Identify such material with the proper numeral and, if appropriate, lettered heading (Example: "7c"). Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."</p>					

The Future Is Now!



Article 32 Reform

- Congressional (NDAA FY 14)

- Changes from investigation to preliminary hearing:

- “No charge or specification may be referred to a general court-martial for trial until completion of preliminary hearing. . . .”

H. R. 3304—283

(E) Disciplinary sanctions for members of the Armed Forces and other personnel of the Department of Defense and Coast Guard who willfully or wantonly fail to comply with requirements relating to such rights.

SEC. 1702. REVISION OF ARTICLE 32 AND ARTICLE 60, UNIFORM CODE OF MILITARY JUSTICE.

(a) USE OF PRELIMINARY HEARINGS.—

(1) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended to read as follows:

“§ 832. Art. 32. Preliminary hearing

“(a) PRELIMINARY HEARING REQUIRED.—(1) No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing.

“(2) The purpose of the preliminary hearing shall be limited to the following:

“(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

“(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

“(C) Considering the form of charges.

“(D) Recommending the disposition that should be made of the case.

“(b) HEARING OFFICER.—(1) A preliminary hearing under subsection (a) shall be conducted by an impartial judge advocate certified under section 827(b) of this title (article 27(b)) whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. If the hearing officer is not a judge advocate, a judge advocate certified under section 827(b) of this title (article 27(b)) shall be available to provide legal advice to the hearing officer.

“(2) Whenever practicable, when the judge advocate or other hearing officer is detailed to conduct the preliminary hearing, the officer shall be equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.

“(c) REPORT OF RESULTS.—After conducting a preliminary hearing under subsection (a), the judge advocate or other officer conducting the preliminary hearing shall prepare a report that addresses the matters specified in subsections (a)(2) and (f).

“(d) RIGHTS OF ACCUSED AND VICTIM.—(1) The accused shall be advised of the charges against the accused and of the accused's right to be represented by counsel at the preliminary hearing under subsection (a). The accused has the right to be represented at the preliminary hearing as provided in section 838 of this title (article 38) and in regulations prescribed under that section.

“(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2).

“(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

H. R. 3304—284

“(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).

“(c) RECORDING OF PRELIMINARY HEARING.—A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.

“(f) EFFECT OF EVIDENCE OF UNCHARGED OFFENSE.—If evidence adduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused—

“(1) is present at the preliminary hearing;

“(2) is informed of the nature of each uncharged offense considered; and

“(3) is afforded the opportunities for representation, cross-examination, and presentation consistent with subsection (d).

“(g) EFFECT OF VIOLATION.—The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error.

“(h) VICTIM DEFINED.—In this section, the term ‘victim’ means a person who—

“(1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and

“(2) is named in one of the specifications.”

“(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter VI of chapter 47 of such title is amended by striking the item relating to section 832 and inserting the following new item:

“§32. Art. 32. Preliminary hearing.”



CHECKLIST

iStockphoto

-
-
-
-

Article 32 Reform

- Congressional (NDAA FY 14)

- Focuses Scope and Purpose:

- Determine whether there is **probable cause** to believe an offense has been committed and the accused committed the offense
- Determine whether the convening authority has court-martial jurisdiction over the offense and the accused
- Consider the form of the charges
- Recommend the disposition that should be made of the case

H. R. 3304—283

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H. R. 3304—284

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“§32. Art. 32. Preliminary hearing.”

Article 32 Reform

- Congressional (NDAA FY 14)

- Victim Rights:

- Victim is not required to testify at the preliminary hearing

- Victim who declines to testify shall be deemed unavailable for the purposes of the preliminary hearing

H. R. 3304—283

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“(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

“(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

“(C) Considering the form of charges.

“(D) Recommending the disposition that should be made of the case.

“(b) HEARING OFFICER.—(1) A preliminary hearing under subsection (a) shall be conducted by an impartial judge advocate certified under section 827(b) of this title (article 27(b)) whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. If the hearing officer is not a judge advocate, a judge advocate certified under section 827(b) of this title (article 27(b)) shall be available to provide legal advice to the hearing officer.

“(2) Whenever practicable, when the judge advocate or other hearing officer is detailed to conduct the preliminary hearing, the officer shall be equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.

“(c) REPORT OF RESULTS.—After conducting a preliminary hearing under subsection (a), the judge advocate or other officer conducting the preliminary hearing shall prepare a report that addresses the matters specified in subsections (a)(2) and (f).

“(d) RIGHTS OF ACCUSED AND VICTIM.—(1) The accused shall be advised of the charges against the accused and of the accused's right to be represented by counsel at the preliminary hearing under subsection (a). The accused has the right to be represented at the preliminary hearing as provided in section 838 of this title (article 38) and in regulations prescribed under that section.

“(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2).

“(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

H. R. 3304—284

“(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).

“(c) RECORDING OF PRELIMINARY HEARING.—A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.

“(f) EFFECT OF EVIDENCE OF UNCHARGED OFFENSE.—If evidence introduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused—

“(1) is present at the preliminary hearing;

“(2) is informed of the nature of each uncharged offense considered; and

“(3) is afforded the opportunities for representation, cross-examination, and presentation consistent with subsection (d).

“(g) EFFECT OF VIOLATION.—The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error.

“(h) VICTIM DEFINED.—In this section, the term ‘victim’ means a person who—

“(1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and

“(2) is named in one of the specifications.”

“(2) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter VI of chapter 47 of such title is amended by striking the item relating to section 832 and inserting the following new item:

“832. Art. 32. Preliminary hearing.”

Article 32 Reform

- Congressional (NDAA FY 14)

- Designates the Hearing Officer as JAs:

- SEC DEF memo of AUG 2013 mandates JAs serve as IOs for “sexual assault offenses”

- Reformed Art. 32 requires JAs serve as Hearing Officers in **ALL** cases

H. R. 3304—283

(E) Disciplinary sanctions for members of the Armed Forces and other personnel of the Department of Defense and Coast Guard who willfully or wantonly fail to comply with requirements relating to such rights.

SEC. 1702. REVISION OF ARTICLE 32 AND ARTICLE 60, UNIFORM CODE OF MILITARY JUSTICE.

(a) USE OF PRELIMINARY HEARINGS.—

(1) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended to read as follows:

“§ 832. Art. 32. Preliminary hearing

“(a) PRELIMINARY HEARING REQUIRED.—(1) No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing.

“(2) The purpose of the preliminary hearing shall be limited to the following:

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H. R. 3304—284

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Department of the Army
Pamphlet 27-17

Legal Services

**Procedural
Guide for
Article 32(b)
Investigating
Officer**

DA PAM 27-17

Headquarters
Department of the Army
Washington, DC
24 July 2014

UNCLASSIFIED

Medical/Forensic Care of the Sexual Assault Patient

Kelly Taylor RN, SANE-A, SAMFE
Forensic Program Manager
Womack Army Medical Center
Ft. Bragg, North Carolina

What is a Forensic Examiner?

-A Sexual Assault Medical Forensic Examiner (SAMFE) is a health care provider (primarily Registered Nurses) who has been specially trained to provide comprehensive care for the sexual assault patient and demonstrates competency in conducting a medical legal forensic exam.

-They have the ability to be an expert or fact witness in court.

-Health Care Providers who can conduct Sexual Assault Exam

Physician

Advanced Practice Nurse

Physician Assistant

RN

Benefits of Sexual Assault Forensic Examiners

- It reduces re-victimization and retelling of the events to multiple providers
- Cost effective
 - A exam can take 2-6 hours to complete
- Ensure trained health care providers perform the medical-forensic exam
 - the waiting period is minimized
 - trauma from the assault is reduced
 - the needs of the patient are attended to
 - evidence is collected in a manner that meets standards and promotes successful prosecution.

Five Purposes of Collecting Forensic Evidence

- To identify the assailant
- To identify any threat the assailant made
- To confirm recent sexual contact
- To establish presence of injury (Non-Genital or Genital)
- To compare/match evidence to the history of the person reporting the assault and/or the history of the suspect.



Components of a Sexual Assault Forensic Exam

- Immediate Medical Care for injuries (Medical before Forensic Always)
- Comprehensive Medical Interview, Forensic Interview
- Collection of Forensic Evidence
- Evaluation/treatment for STD's
- Evaluation/treatment for Pregnancy (Emergency Contraception options if needed)
- Crisis Intervention/referrals (Behavioral Health/Social Work Services)

Assessment of Forensic Evidence

What CAN be concluded:

- recent sexual contact
- recent trauma
- consistency between findings and victim's account of events (DOCUMENT what you see and what you are told)

What CANNOT be concluded:

- validity of the claim
- “diagnosis” of rape
- degree of force
- presence of consent

Interview and Documentation

- **Pre-Assault Related History** - Consensual intercourse within the past 5 days?
 - When? Partner?
 - Oral/Vaginal/Anal?
 - Did intra-vaginal
 - ★ ejaculation occur?
 - Was a condom used?

Alcohol and drug use

- This essential information is required by the crime lab to properly interpret semen findings

Interview and Documentation

- **Assault History –**



- **Date and time of assault:** If assault took place over a space of time, important issues are time of ejaculation and time injuries were inflicted on victim. If victim is unsure, provide the best estimate they can.
- **Surroundings of assault:** location, bed/floor/grass, physical objects in area

- Interpretation of pattern injuries (physical findings)
- Transfer of trace evidence (sand, weeds, carpet fibers, etc) from crime scene to the victim

Interview and Documentation

- ASSAULT HISTORY: Acts described by patient
 - Penetration of vagina
 - Penetration of anus
 - Oral copulation of genitals
 - Oral copulation of anus
 - Non-genital act(s)
 - Record any other act(s)
 - Did ejaculation occur
 - Contraceptive or lubricant products used

Victim Demeanor and the Forensic Examination

- Victims present with a variety of emotions, levels of support and demeanor.
- Self blame
- Embarrassment
- Uncertainty involving medical care and evidence collection
- Fear (command, retaliation, attacker, STIs, pregnancy)
- FEAR OF NOT BEING BELIEVED (events of incident may change as time elapses or incident is reviewed multiple times.....this doesn't mean the victim is lying.)

Neurobiology and Sexual Assault

The Anatomy of Trauma

- Study of how trauma affects memory, cognition and emotion.
- Scientific basis for why victims present the way they do.

Patient/Victim behavioral responses:

Changes in body language

Changes in affect (flat to hysterical)

Delays in reporting

Memory lapse

How Trauma Affects the Brain

- Pre-Frontal Cortex
- cognitive portion of the brain that records the vast majority of information.
- When trauma occurs this will typically shut down.

Hormones and Memory

Hypothalamus and Pituitary: Responsible for hormone release and emotions during stressful events.

Hypothalamus: regulates blood pressure, body temperature and sex hormones

Pituitary: master gland which releases hormones

Amygdala and Hippocampus : Responsible for establishing memories.

Amygdala and Hippocampus: responsible for memory and encoding.

Amygdala: processes emotional memories

Hippocampus: establishes long term memory & encoding = organizing sensory information, processes information into memories.

During a Sexual Assault

- Catecholamine's- Fight or Flight (impairs rational thought) *Increases in Sexual Assault*
- Cortisol- energy available (reduces energy) *Decreases in Sexual Assault*
- Opioids- prevent pain (causes flat affect) *Increases in Sexual Assault* “Natural morphine” can remain in the body for up to 96 hrs post assault.

During a Sexual Assault

Amygdala detects the threat



Activates the hypothalamus



Hormonal Flood



Can trigger a complete shut down

Tonic Immobility AKA: Rape Induced Paralysis

Memory During Sexual Assault

Increased stress hormone

Impaired Functioning in
Hippocampus(flips it off)
(now laying down info with
Amygdala so memories are
fragmented

Memories Fragmented
Memory Fragmentation is now
a documented Neurobiological
Condition

Memory can be slow and
difficult to process

Events of Assault CAN be
recalled accurately. Recall is
just slow and painful
(Alcohol may prevent encoding
which means there may be
nothing to retrieve)

Stress and Our Brain

- Under stress we tend to use our more primitive defensive brain
- More concerned with immediate survival and less tuned into abstract future
- Brain can shut off and block certain events

What does this all mean??

- Victims can be misinterpreted as being cavalier or lying
- Wide range of emotions is normal
- Hormonal soup
- Memories are fragmented because of problems with encoding

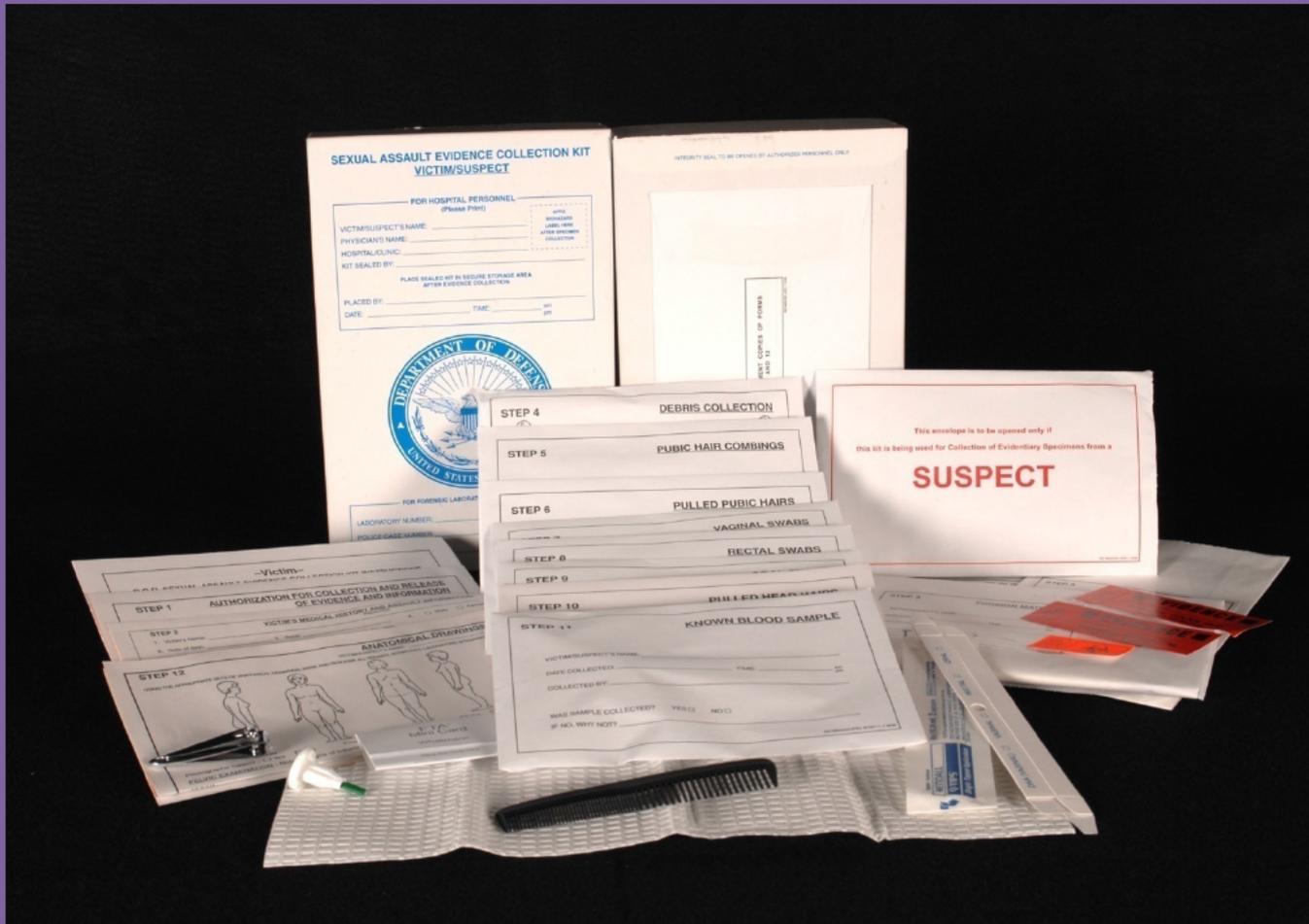
Considerations

- How will victims try to fill in the gaps if they don't understand that this is normal?
 - Witness statements
 - What seems logical or makes sense to them
 - Trying to please nurse or law enforcement by giving them details they want/need

Are we hurting recall? We have to consider how memories are laid down and allow them time to process memories and how they were encoded.

We can really impact healing on someone or aid in stunting it.

DoD Sexual Assault Evidence Collection Kit



Types of Forensic Evidence

- DNA
- Hair
- Seminal Fluid
- Clothing
- Saliva
- Blood
- Urine
- Non-biological evidence/ trace evidence

Evidence Collection Process

- Orientation Photographs
- Collection of outer clothing(if applicable)
- Underwear and Bra
- Alternate light source
- Collection of head hair (combed and pulled)
- Oral Swabs
- Debris
- Hands/Finger swabs and nails
- Collection of Pubic hair (combed and pulled)/swab of pubic mons area
- Genital inspection/swab collection/Use of Toluidine Blue/speculum exam
- Anal/Rectal swab collection and exam

Genital Findings

1. May be normal
2. May be abnormal with normal or known causation
3. May be abnormal with unknown causation

Reasons for Genital Trauma

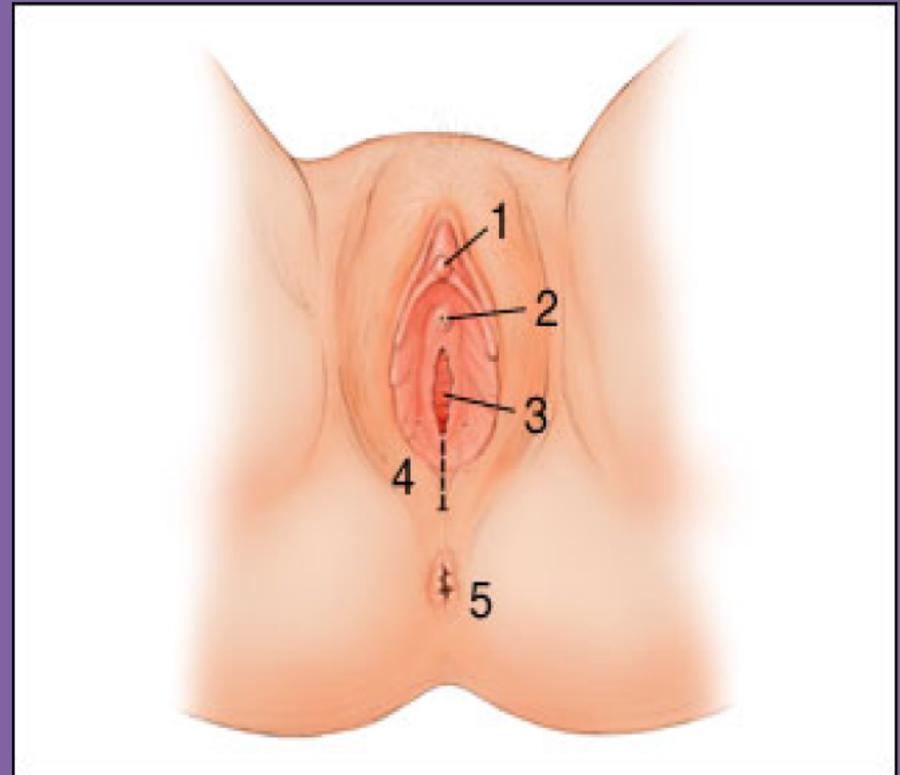
- Lack of (victim) pelvic tilt for penetration (female)
- Lack of partner assistance with penetration (force)
- Lack of lubrication (arousal stage)
- Lack of relaxation (fear)
- Increased force of penetration
- Decreased tissue integrity due to:
 - Presence of genital infection
 - Contact dermatitis
 - Prior genital injury, surgery, piercings, etc.
 - Poor nutrition
 - Menopause

*****Most cases of non-stranger rape do not demonstrate any genital injury.***

*****Presence of injury DOES NOT MEAN A SEXUAL ASSAULT OCCURRED. Remember history.***

Genital Trauma Evidence: Common Sites for Females

- posterior fourchette (70%)
- labia minora (53%)
- hymen (29%)
- fossa navicularis (25%)
- anus (15%)
- cervix (13%)
- vagina (11%)
- perineum (11%)
- periurethral area (9%)
- labia majora (7%)
- rectum (4%)



FACTORS WHICH MINIMIZE INJURY IN SEXUAL ASSAULT

- Human sexual response occurs
- Alcohol or drug intoxication impairs the ability to resist
- Loss of consciousness
- Artificial lubrication
- Cooperation/compliance especially in spousal rape or when victim is under threat

Toluidine Blue

- Use of Toluidine Blue to highlight areas of trauma
 - Toluidine Blue: Nuclear Dye absorbs into tissue if damaged, broken, injured. Intact skin – simply wipes away.
 - Done **BEFORE** speculum exam



**Before
Toluidine Blue**



**After
Toluidine Blue**



Last Items of Patient Care

- Confirm prophylactic treatment against STI's was offered
 - Note: Some STI's are resistant and patient should have follow up testing.
- Confirm Emergency Contraception and Anti-emetics offered
- Offer appropriate referrals to SACC, SACP, Behavioral Health, Social Work Services, etc.
- SACP follow up appointment with for repeat HCG, HIV, STI testing follow up, etc.
- Provide contact information and any available handouts/education material.

Forensic Injury Identification **and Documentation**

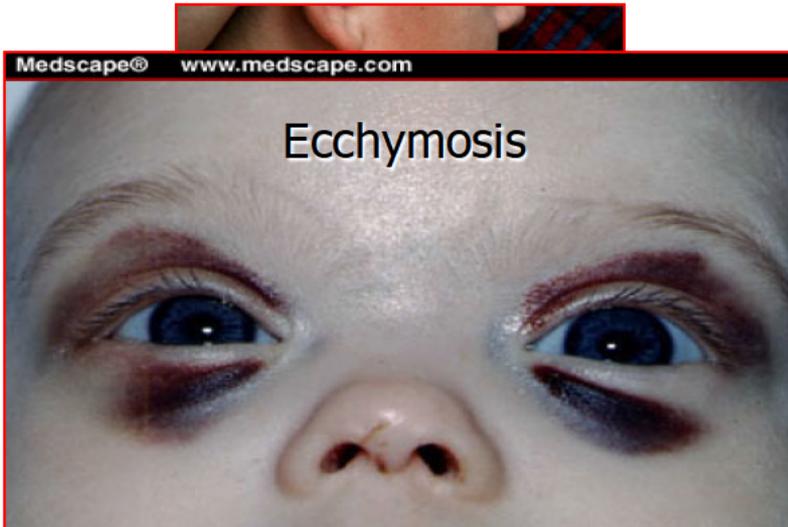
Common Injuries Seen in Sexual **Assault Cases**

Non-Genital Injury Evidence: Common Types

- Upper leg/thigh bruising
- Neck bruising from strangulation
- Punch bruising/contusions to the upper arm
- Defensive posturing injuries to the outer side of the arms
- Whip or cord like injuries to the back
- Punch/bite injuries to the breasts/nipples
- Punch injuries to the abdomen
- Punch/kick injuries to the thighs
- Facial bruising/contusions, abrasions, lacerations

***Male Victims, on average, suffer greater incidence of non-genital injury during an assault.*

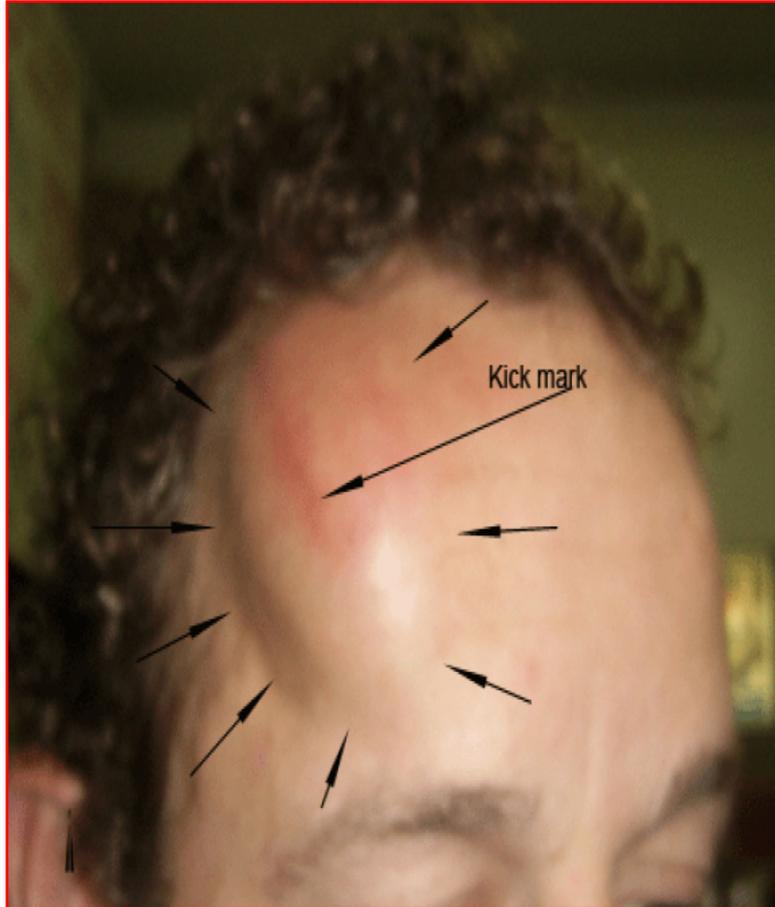
Contusion



Ecchymosis

Petechiae

Hematoma



Strangulation

- Manual (use of bare hands)
 - Fingertip bruising
 - Fingernail marks on the neck
- Ligature (use of object)
 - Creates a mark resembling ligature
 - Pinpoint or larger areas of hemorrhage
 - Can cause hemorrhage to the eyes and face



STRANGULATION SYMPTOMS

- **OBJECTIVE**

- Eye reddening
- Eyelid drooping
- Conjunctival hemorrhage
- Petechia
- Abrasion
- Raspy voice
- Ecchymosis to clavicle

- **SUBJECTIVE**

- Pain in neck
- Throat swelling
- Difficulty breathing/swallowing
- Lightheaded
- Loss of consciousness
- Sore throat
- Headache

DRUG FACILITATED
SEXUAL ASSAULT and
Toxicology



DFSA and the Patient

- DFSA often delays reporting by 24-48 hrs
- Voluntary consumption of drugs and alcohol often lead to self blame and embarrassment
- Patient may be unclear of events of the night or even if assault occurred

Signs of DFSA

- Confusion
- Dizziness
- Drowsiness
- Psychomotor impairment
- Impaired judgment
- Reduced inhibitions
- Slurred speech



Problems WITH DFSA

- Reduced ability to ward off attacker
- Impaired judgment
- Memory loss - anterograde amnesia
(drug temporarily disables ability to store information into memory)
- Victim uncertain of facts
- Unwilling to report the assault

Depressant-type effects of drugs used to incapacitate victim may be very similar to alcohol

Drugs Used to Facilitate Sexual Assault

- Benzodiazepines: Valium, Xanax, Rohypnol, Klonopin
- GHB
- Ketamine
- Ecstasy
- Sleep Aids: Ambien
- Spice/Bath Salts
- Visine
- ALCOHOL is still number one!!

WITNESS STATEMENTS

Although the victim statement is crucial to the investigation, persons who saw the victim, or spoke to the victim, before, during and after the assault are critical witnesses.

Often, it is such witnesses who establish time frames, notice unusual behavior, provide critical facts and can identify potential sources of information.

PHYSICAL EXAMINATION

May have an increase in bruising to the body, Decrease vaginal injuries

Neck: Strangulation signs, blind DNA swabs

Breast: Bite marks, Blind DNA swabs

Extremities: TENDERNESS*, thumb/finger prints, abrasions, ligature marks



**DFSA CASES ARE INCREASING
MANY DIFFERENT DRUGS ARE BEING USED -
NOT JUST THE ONES REPORTED IN THE MEDIA**



**MANY OF THE CHALLENGES OF DFSA CAN BE
OVERCOME**

EDUCATION IS KEY

A THOROUGH INVESTIGATION IS A MUST

TEAMWORK IS VITAL

CONCLUSIONS

Bringing it all Together

- No piece of evidence stands alone
- Statements plus evidence plus toxicology plus injury identification and photographs
- Forensic Evidence collection may end when the kit is handed over but patient/victim care has just begun
- Being familiar with the DD2911 and photographs is vital to the case because the physical affects of the assault will have long been healed by trial....go back to that night. The SAMFE has the rare opportunity to see and document the victim as they present immediately following their assault.
- Use your SAMFEs!!!!



(b) (6)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Sexual Assault Response

Victim Programs

NDAA Section 1716



- Types of legal assistance authorized:
 - Legal consultation regarding collateral misconduct and victim's right to seek DC.
 - Legal consultation regarding VWAP.
 - Legal consultation regarding responsibilities and support provided by SARC and VA including MRE 514.
 - Legal consultation regarding potential for civil litigation against parties other than DoD.
 - Legal consultation regarding the military justice system.
 - Accompanying the victim at any proceedings in connection with the reporting, military investigation, and military prosecution of the offense.
 - Legal consultation regarding eligibility and requirements for services available for medical and mental health services.
 - Legal consultation and assistance in personal civil legal matters, any proceedings of the military justice process in which a victim can participate as a witness or other party, in MPOs and CPOs, in understanding and obtaining any military and veteran benefits, such as transitional compensation.
 - Other legal assistance as SecDef authorizes.
- Nature of relationship between VLC and victim is attorney-client.

VICTIM-SERVICES



- SHARP
- Family Advocacy Program
- Victim Witness Assistance Program



**Medical
Personnel
SANE
CID
MP
SVP
Chaplain
Local &
State Agencies**

What Happened? Alcohol, Memory Blackouts, and the Brain

AARON M. WHITE, PH.D.

Alcohol primarily interferes with the ability to form new long-term memories, leaving intact previously established long-term memories and the ability to keep new information active in memory for brief periods. As the amount of alcohol consumed increases, so does the magnitude of the memory impairments. Large amounts of alcohol, particularly if consumed rapidly, can produce partial (i.e., fragmentary) or complete (i.e., en bloc) blackouts, which are periods of memory loss for events that transpired while a person was drinking. Blackouts are much more common among social drinkers—including college drinkers—than was previously assumed, and have been found to encompass events ranging from conversations to intercourse. Mechanisms underlying alcohol-induced memory impairments include disruption of activity in the hippocampus, a brain region that plays a central role in the formation of new autobiographical memories. KEY WORDS: alcoholic blackout; memory interference; AOD (alcohol and other drug) intoxication; AODE (alcohol and other drug effects); AODR (alcohol and other drug related) mental disorder; long-term memory; short-term memory; state-dependent memory; BAC level; social AOD use; drug interaction; disease susceptibility; hippocampus; frontal cortex; neuroimaging; long-term potentiation

If recreational drugs were tools, alcohol would be a sledgehammer. Few cognitive functions or behaviors escape the impact of alcohol, a fact that has long been recognized in the literature. As Fleming stated nearly 70 years ago, “the striking and inescapable impression one gets from a review of acute alcoholic intoxication is of the almost infinite diversity of symptoms that may ensue from the action of this single toxic agent” (1935) (pp. 94–95). In addition to impairing balance, motor coordination, decisionmaking, and a litany of other functions, alcohol produces detectable memory impairments beginning after just one or two drinks. As the dose increases, so does the magnitude of the memory impairments. Under certain circumstances, alcohol can disrupt or completely block the ability to form

memories for events that transpire while a person is intoxicated, a type of impairment known as a blackout. This article reviews what is currently known regarding the specific features of acute alcohol-induced memory dysfunction, particularly alcohol-induced blackouts, and the pharmacological mechanisms underlying them.

EFFECTS OF ALCOHOL ON MEMORY

To evaluate the effects of alcohol, or any other drug, on memory, one must first identify a model of memory formation and storage to use as a reference. One classic, often-cited model, initially proposed by Atkinson and Shiffrin (1968), posits that memory formation and storage take place in several stages, proceed-

ing from sensory memory (which lasts up to a few seconds) to short-term memory (which lasts from seconds to minutes depending upon whether the information is rehearsed) to long-term storage. This model often is referred to as the *modal model of memory*, as it captures key elements of several other major models. Indeed, elements of this model still can be seen in virtually all models of memory formation.

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This work was supported by National Institute on Alcohol Abuse and Alcoholism grant AA-12478 and the Institute for Medical Research at the VA Medical Center in Durham, North Carolina.

In the modal model of memory, when one attends to sensory information, it is transferred from a sensory memory store to short-term memory. The likelihood that information will be transferred from short-term to long-term storage, or be *encoded* into long-term memory, was once thought to depend primarily on how long the person keeps the information active in short-term memory via rehearsal. Although rehearsal clearly influences the transfer of information into long-term storage, it is important to note that other factors, such as the depth of processing (i.e., the level of true understanding and manipulation of the information), attention, motivation, and arousal also play important roles (Craik and Lockhart 1972; Otten et al. 2001; Eichenbaum 2002).¹

Variability in the use of terms, particularly in operational definitions of short-term memory, makes it difficult to formulate a simple synopsis of the literature on alcohol-induced memory impairments. As Mello (1973) stated three decades ago with regard to the

memory literature in general, “The inconsistent use of descriptive terms has been a recurrent source of confusion in the ‘short-term’ memory literature and ‘short-term’ memory has been variously defined as 5 seconds, 5 minutes, and 30 minutes” (p. 333). In spite of this inconsistency, several conclusions can be drawn from research on alcohol-induced memory impairments. One conclusion is that the impact of alcohol on the formation of new long-term “explicit” memories—that is, memories of facts (e.g., names and phone numbers) and events—is far greater than the drug’s impact on the ability to recall previously established memories or to hold new information in short-term memory (Lister et al. 1991). (See figure 1 for a diagram depicting the stages of memory and where alcohol interferes with memory.) Intoxicated subjects are typically able to repeat new information immediately after its presentation and often can keep it active in short-term storage for up to a few minutes if they are not distracted (for an early review,

see Ryback 1971), though this is not always the case (Nordby et al. 1999). Similarly, subjects normally are capable of retrieving information placed in long-term storage prior to acute intoxication. In contrast, alcohol impairs the ability to store information across delays longer than a few seconds if subjects are distracted between the time they are given the new information and the time they are tested. In a classic study, Parker and colleagues (1976) reported that when intoxicated subjects were presented with “paired associates”—for example, the letter “B” paired with the month “January”—they were impaired when asked to recall the items after delays of a minute or more. However, subjects could recall paired associates that they had learned before becoming intoxicated.

¹ It is well beyond the scope of this review to assess the impact of alcohol on memory utilizing multiple perspectives on information processing and storage. For simplicity, this review will characterize the effects of alcohol on memory using a three-stage process of memory formation akin to the modal model. The interpretation of the effects of alcohol on memory likely would vary somewhat depending on the memory model one uses.

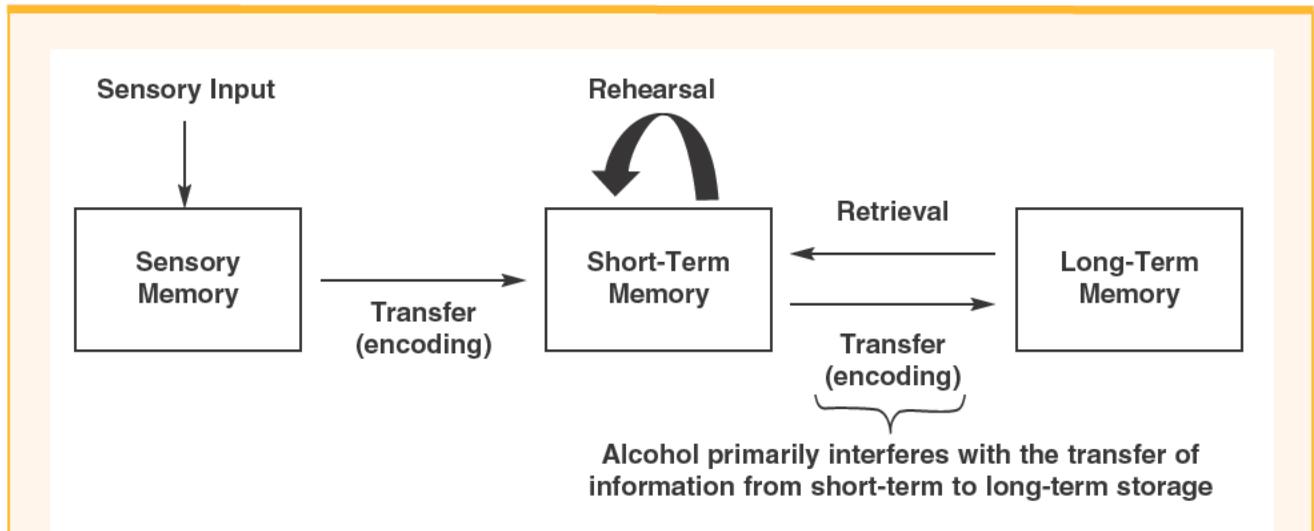


Figure 1 A general model of memory formation, storage, and retrieval based on the *modal model of memory* originally proposed by Atkinson and Shiffrin (1968). Alcohol seems to influence most stages of the process to some degree, but its primary effect appears to be on the transfer of information from short-term to long-term storage. Intoxicated subjects are typically able to recall information immediately after it is presented and even keep it active in short-term memory for 1 minute or more if they are not distracted. Subjects also are normally able to recall long-term memories formed before they became intoxicated; however, beginning with just one or two drinks, subjects begin to show impairments in the ability to transfer information into long-term storage. Under some circumstances, alcohol can impact this process so severely that, once sober again, subjects are unable to recall critical elements of events, or even entire events, that occurred while they were intoxicated. These impairments are known as blackouts.

More recently, Acheson and colleagues (1998) observed that intoxicated subjects could recall items on word lists immediately after the lists were presented but were impaired when asked to recall the items 20 minutes later.

Ryback (1971) characterized the impact of alcohol on memory formation as a dose-related continuum, with minor impairments at one end and large impairments at the other, all impairments representing the same fundamental deficit in the ability to transfer new information from short-term to long-term storage. When doses of alcohol are small to moderate (producing blood alcohol concentrations [BACs] below 0.15 percent), memory impairments tend to be small to moderate as well. At these levels, alcohol produces what Ryback (1971) referred to as cocktail party memory deficits, lapses in memory that people might experience after having a few drinks at a cocktail party, often manifested as problems remembering what another person said or where they were in conversation. Several studies have revealed that alcohol at such levels causes difficulty forming memories for items on word lists or learning to recognize new faces (Westrick et al. 1988; Mintzer and Griffiths 2002). As the dose increases, the resulting memory impairments can become much more profound, sometimes culminating in blackouts—periods for which a person is unable to remember critical elements of events, or even entire events, that occurred while he or she was intoxicated.

Alcohol-Induced Blackouts

Blackouts represent episodes of amnesia, during which subjects are capable of participating even in salient, emotionally charged events—as well as more mundane events—that they later cannot remember (Goodwin 1995). Like milder alcohol-induced memory impairments, these periods of amnesia are primarily “anterograde,” meaning that alcohol impairs the ability to form new memories while the person is intoxicated, but does not typically erase memories formed before intoxication. Formal research into the nature of alcohol-

induced blackouts began in the 1940s with the work of E.M. Jellinek (1946). Jellinek’s initial characterization of blackouts was based on data collected from a survey of Alcoholics Anonymous members. Noting that recovering alcoholics frequently reported having experienced alcohol-induced amnesia while they were drinking, Jellinek concluded that the occurrence of blackouts is a powerful indicator of alcoholism.

In 1969, Goodwin and colleagues published two of the most influential studies in the literature on blackouts (Goodwin et al. 1969*a,b*). Based on interviews with 100 hospitalized alcoholics, 64 of whom had a history of blackouts, the authors posited the existence of two qualitatively different types of blackouts: en bloc and fragmentary blackouts. People experiencing en bloc blackouts are unable to recall any details whatsoever from events that occurred while they were intoxicated, despite all efforts by the drinkers or others to cue recall. Referring back to our general model of memory formation, it is as if the process of transferring information from short-term to long-term storage has been completely blocked. En bloc memory impairments tend to have a distinct onset. It is usually less clear when these blackouts end because people typically fall asleep before they are over.

Interestingly, people appear able to keep information active in short-term memory for at least a few seconds. As a result, they can often carry on conversations, drive automobiles, and engage in other complicated behaviors. Information pertaining to these events is simply not transferred into long-term storage. Ryback (1970) wrote that intoxicated subjects in one of his studies “could carry on conversations during the amnesic state, but could not remember what they said or did 5 minutes earlier. Their immediate and remote memory were intact” (p. 1003). Similarly, in their study of memory impairments in intoxicated alcoholics, Goodwin and colleagues (1970) reported that subjects who experienced blackouts for testing sessions showed intact memory for up to 2 minutes while the sessions were taking place.

Unlike en bloc blackouts, fragmentary blackouts involve partial blocking of memory formation for events that occurred while the person was intoxicated. Goodwin and colleagues (1969*a*) reported that subjects experiencing fragmentary blackouts often become aware that they are missing pieces of events only after being reminded that the events occurred. Interestingly, these reminders trigger at least some recall of the initially missing information. Research suggests that fragmentary blackouts are far more common than those of the en bloc variety (White et al. 2004; Hartzler and Fromme 2003*b*; Goodwin et al. 1969*b*).

Blackouts: State-Dependent Memory Formation?

Early anecdotal evidence suggested that blackouts might actually reflect state-dependent information storage—that is, people might be able to remember events that occurred while they were intoxicated if they returned to that state (e.g., Goodwin et al. 1969*a*). State-dependent memory can be viewed as a special case of a broader category known as context-dependent memory (e.g., White et al. 2002*a*), in which cues that are associated with an event when a memory is formed tend to help trigger recall for that event at a later time. For instance, in a classic study by Godden and Baddeley (1975) divers who learned word lists either on land or under water remembered more words when tested in the same context in which learning took place (i.e., land–land or water–water). Likewise, returning to the same emotional or physiological state that was present when a memory was formed often can facilitate recall of that memory. It is not uncommon to hear stories of drinkers who stash alcohol or money while intoxicated and can locate the hiding places only after becoming intoxicated again (Goodwin 1995). Regardless of how compelling such stories can be, clear evidence of state-dependent learning under the influence of alcohol is lacking. In one recent study, Weissenborn and Duka (2000) examined whether subjects who learned word lists while intoxicated could recall

more items if they were intoxicated again during the testing session. No such state-dependency was observed. Similarly, Lisman (1974) tried unsuccessfully to help subjects resurrect lost information for events occurring during periods of intoxication by getting them intoxicated once again.

Blood Alcohol Concentrations and Blackouts

Drinking large quantities of alcohol often precedes blackouts, but several other factors also appear to play important roles in causing such episodes of memory loss. As Goodwin and colleagues (1969*a*) stated with regard to subjects in one of their studies, "Although blackouts almost always were associated with heavy drinking, this alone seemed insufficient to produce one. On many other occasions, subjects said they had drunk as much or more without memory loss" (p. 195). Among the factors that preceded blackouts were gulping drinks and drinking on an empty stomach, each of which leads to a rapid rise in BAC.

Subsequent research provided additional evidence suggesting a link between blackouts and rapidly rising BACs. Goodwin and colleagues (1970) examined the impact of acute alcohol exposure on memory formation in a laboratory setting. The author recruited 10 male subjects for the project, all but one through the unemployment office in St. Louis, Missouri. Most subjects met diagnostic criteria for alcoholism and half had a history of frequent blackouts. The men were asked to consume roughly 16 to 18 ounces of 86-proof bourbon in approximately 4 hours. Beginning 1 hour after subjects began drinking, memory was tested by presenting subjects with several different stimuli, including a series of children's toys and scenes from erotic films. Subjects were asked to recall details regarding these stimuli 2 minutes, 30 minutes, and 24 hours after the stimuli were shown. Half of the subjects reported no recall for the stimuli or their presentation 30 minutes and 24 hours after the events, though most seemed to recall the stimuli 2 minutes after presentation. Lack of recall for the events 24 hours later,

while sober, represents clear experimental evidence for the occurrence of blackouts. The fact that subjects could remember aspects of the events 2 minutes after they occurred but not 30 minutes or 24 hours afterward provides compelling evidence that the blackouts stemmed from an inability to transfer information from short-term to long-term storage. For all but one subject in the blackout group, memory impairments began during the first few hours of drinking, when BAC levels were still rising. The average peak BAC in this group, which was roughly 0.28 percent, occurred approximately 2.5 hours after the onset of drinking.

In a similar study, Ryback (1970) examined the impact of alcohol on memory in seven hospitalized alcoholics given access to alcohol over the course of several days. All subjects were White males between the ages of 31 and 44. Blackouts occurred in five of the seven subjects, as evidenced by an inability to recall salient events that occurred while drinking the day before (e.g., one subject could not recall preparing to hit another over the head with a chair). Estimates of BAC levels during blackout periods suggested that they often began at levels around 0.20 percent and as low as 0.14 percent. The duration of blackouts ranged from 9 hours to 3 days. Based on his observations, Ryback concluded that a key predictor of blackouts was the rate at which subjects consumed their drinks. He stated, "It is important to note that all the blackout periods occurred after a rapid rise in blood alcohol level" (p. 622). The two subjects who did not blackout, despite becoming extremely intoxicated, experienced slow increases in blood alcohol levels.

Blackouts Among Social Drinkers

Most of the research conducted on blackouts during the past 50 years has involved surveys, interviews, and direct observation of middle-aged, primarily male alcoholics, many of whom were hospitalized. Researchers have largely ignored the occurrence of blackouts among young social drinkers, so the idea that blackouts are an unlikely consequence of heavy drinking in nonalco-

holics has remained deeply entrenched in both the scientific and popular cultures. Yet there is clear evidence that blackouts do occur among social drinkers. Knight and colleagues (1999) observed that 35 percent of trainees in a large pediatric residency program had experienced at least one blackout. Similarly, Goodwin (1995) reported that 33 percent of the first-year medical students he interviewed acknowledged having had at least one blackout. "They were inexperienced," he wrote. "They drank too much too quickly, their blood levels rose extremely quickly, and they experienced amnesia" (p. 315). In a study of 2,076 Finnish males, Poikolainen (1982) found that 35 percent of all males surveyed had had at least one blackout in the year before the survey.

As might be expected given the excessive drinking habits of many college students (Wechsler et al. 2002), this population commonly experiences blackouts. White and colleagues (2002*c*) recently surveyed 772 undergraduates regarding their experiences with blackouts. Respondents who answered yes to the question "Have you ever awoken after a night of drinking not able to remember things that you did or places that you went?" were considered to have experienced blackouts. Fifty-one percent of the students who had ever consumed alcohol reported blacking out at some point in their lives, and 40 percent reported experiencing a blackout in the year before the survey. Of those who had consumed alcohol during the 2 weeks before the survey, 9.4 percent reported blacking out during this period. Students in the study reported that they later learned that they had participated in a wide range of events they did not remember, including such significant activities as vandalism, unprotected intercourse, driving an automobile, and spending money.

During the 2 weeks preceding the survey, an equal percentage of males and females experienced blackouts, despite the fact that males drank significantly more often and more heavily than females. This outcome suggests that at any given level of alcohol consumption, females—a group infrequently studied in the literature on blackouts—are at

greater risk than males for experiencing blackouts. The greater tendency of females to black out likely arises, in part, from well-known gender differences in physiological factors that affect alcohol distribution and metabolism, such as body weight, proportion of body fat, and levels of key enzymes. There also is some evidence that females are more susceptible than males to milder forms of alcohol-induced memory impairments, even when given comparable doses of alcohol (Mumenthaler et al. 1999).

In a subsequent study, White and colleagues (2004) interviewed 50 undergraduate students, all of whom had experienced at least one blackout, to gather more information about the factors related to blackouts. As in the previous study, students reported engaging in a range of risky behaviors during blackouts, including sexual activity with both acquaintances and strangers, vandalism, getting into arguments and fights, and others. During the night of their most recent blackout, most students drank either liquor alone or in combination with beer. Only 1 student out of 50 reported that the most recent blackout occurred after drinking beer alone. On average, students estimated that they consumed roughly 11.5 drinks before the onset of the blackout. Males reported drinking significantly more than females, but they did so over a significantly longer period of time. As a result, estimated peak BACs during the night of the last blackout were similar for males (0.30 percent) and females (0.35 percent). As Goodwin observed in his work with alcoholics (1969*b*), fragmentary blackouts occurred far more often than en bloc blackouts, with four out of five students indicating that they eventually recalled bits and pieces of the events. Roughly half of all students (52 percent) indicated that their first full memory after the onset of the blackout was of waking up in the morning, often in an unfamiliar location. Many students, more females (59 percent) than males (25 percent), were frightened by their last blackout and changed their drinking habits as a result.

Use of Other Drugs During Blackouts

Alcohol interacts with several other drugs, many of which are capable of producing amnesia on their own. For instance, diazepam (Valium[®]) and flunitrazepam (Rohypnol) are benzodiazepine sedatives that can produce severe memory impairments at high doses (White et al. 1997; Saum and Inciardia 1997). Alcohol enhances the effects of benzodiazepines (for a review, see Silvers et al. 2003). Thus, combining these compounds with alcohol could dramatically increase the likelihood of experiencing memory impairments. Similarly, the combination of alcohol and THC, the primary psychoactive compound in marijuana, produces greater memory impairments than when either drug is given alone (Ciccocioppo et al. 2002). Given that many college students use other drugs in combination with alcohol (O'Malley and Johnston 2002), some of the blackouts reported by students may arise from polysubstance use rather than from alcohol alone. Indeed, based on interviews with 136 heavy-drinking young adults (mean age 22), Hartzler and Fromme (2003*b*) concluded that en bloc blackouts often arise from the combined use of alcohol and other drugs. White and colleagues (2004) observed that, among 50 undergraduate students with a history of blackouts, only 3 students reported using other drugs during the night of their most recent blackout, and marijuana was the drug in each case.

Are Some People More Likely Than Others to Experience Blackouts?

In classic studies of hospitalized alcoholics by Goodwin and colleagues (1969*a,b*), 36 out of the 100 patients interviewed indicated that they had never experienced a blackout. In some ways, the patients who did not experience blackouts are as interesting as the patients who did. What was it about these 36 patients that kept them from blacking out, despite the fact that their alcoholism was so severe that it required hospitalization? Although they may actually have experienced blackouts but simply

were unaware of them, there may have been something fundamentally different about these patients that diminished their likelihood of experiencing memory impairments while drinking.

In support of this possibility, a recent study by Hartzler and Fromme (2003*a*) suggests that people with a history of blackouts are more vulnerable to the effects of alcohol on memory than those without a history of blackouts. These authors recruited 108 college students, half of whom had experienced at least one fragmentary blackout in the previous year. While sober, members of the two groups performed comparably in memory tasks. However, when they were mildly intoxicated (0.08 percent BAC) those with a history of fragmentary blackouts performed worse than those without such a history. There are two possible interpretations for these data, both of which support the hypothesis that some people are more susceptible to blackouts than others. One plausible interpretation is that subjects in the fragmentary blackout group always have been more vulnerable to alcohol-induced memory impairments, which is why they performed poorly during testing under alcohol, and why they are members of the blackout group in the first place. A second interpretation is that subjects in the blackout group performed poorly during testing as a result of drinking enough in the past to experience alcohol-induced memory impairments. In other words, perhaps their prior exposure to alcohol damaged the brain in a way that predisposed them to experiencing future memory impairments. This latter possibility is made more likely by recent evidence that students who engage in repeated episodes of heavy, or binge, drinking are more likely than other students to exhibit memory impairments when they are intoxicated (Weissenborn and Duka 2000). Similar results have been observed in animal studies (White et al. 2000*a*).

The argument for an inherent vulnerability to alcohol-induced memory impairments, including blackouts, is strengthened by two recent studies. In an impressive longitudinal study, Baer and colleagues (2003) examined the drinking habits of pregnant women in

1974 and 1975, and then studied alcohol use and related problems in their offspring at seven different time points during the following 21 years. These authors observed that prenatal alcohol exposure was associated with increased rates of experiencing alcohol-related consequences, including blackouts, even after controlling for the offspring's general drinking habits. In addition, a recent report by Nelson and colleagues (2004) suggests that there might actually be a genetic contribution to the susceptibility to blackouts, indicating that some people simply are built in a way that makes them more vulnerable to alcohol-induced amnesia.

As discussed in the section below on the potential brain mechanisms underlying alcohol-induced amnesia, it is easy to imagine that the impact of alcohol on brain circuitry could vary from person to person, rendering some people more sensitive than others to the memory-impairing effects of the drug.

HOW DOES ALCOHOL IMPAIR MEMORY?

During the first half of the 20th century, two theoretical hurdles hampered progress toward an understanding of the mechanisms underlying the effects of alcohol on memory. More recent research has cleared away these hurdles, allowing for tremendous gains in the area during the past 50 years.

The first hurdle concerned scientists' understanding of the functional neuroanatomy of memory. In the 1950s, following observations of an amnesic patient known as H.M., it became clear that different brain regions are involved in the formation, storage, and retrieval of different types of memory. In 1953, large portions of H.M.'s medial temporal lobes, including most of his hippocampus, were removed in an effort to control intractable seizures (Scoville and Milner 1957). Although the frequency and severity of H.M.'s seizures were significantly reduced by the surgery, it soon became clear that H.M. suffered from a dramatic syndrome of memory impairments. He still was able to learn basic motor skills, keep information

active in short-term memory for a few seconds or more if left undistracted, and remember episodes of his life from long ago, but he was unable to form new long-term memories for facts and events. The pattern of H.M.'s impairments also forced a re-examination of models of long-term memory storage. Specifically, although H.M. was able to retrieve long-term memories formed roughly a year or more before his surgery, he could not recall events that transpired within the year preceding his surgery. This strongly suggests that the transfer of information into long-term storage actually takes place over several years, with the hippocampus being necessary for its retrieval for the first year or so.

Subsequent research with other patients confirmed that the hippocampus, an irregularly shaped structure deep in the forebrain, is critically involved in the formation of memories for events (see figure 2 for a depiction of the brain, with the hippocampus and other relevant structures highlighted). Patient R.B. lost a significant amount of blood as a result of heart surgery. He survived but showed memory impairments similar to those exhibited by H.M. Upon his death, histology revealed that the loss of blood to R.B.'s brain damaged a small region of the hippocampus called hippocampal area CA1, which contains

neurons known as pyramidal cells because of the triangular shape of their cell bodies (Zola-Morgan et al. 1986). Hippocampal CA1 pyramidal cells assist the hippocampus in communicating with other areas of the brain. The hippocampus receives information from a wide variety of brain regions, many of them located in the tissue, called the neocortex, that blankets the brain and surrounds other brain structures. (Neocortex literally means "new bark" or "new covering." When one looks at a picture of the human brain, most of what is visible is neocortex.) The hippocampus somehow ties information from other brain regions together to form new autobiographical memories, and CA1 pyramidal cells send the results of this processing back out to the neocortex. As is clear from patient R.B., removing CA1 pyramidal cells from the circuitry prevents the hippocampal memory system from doing its job.

The second barrier to understanding the mechanisms underlying alcohol's effects on memory was an incomplete understanding of how alcohol affects brain function at a cellular level. Until recently, alcohol was assumed to affect the brain in a general way, simply shutting down the activity of all cells with which it came in contact. The

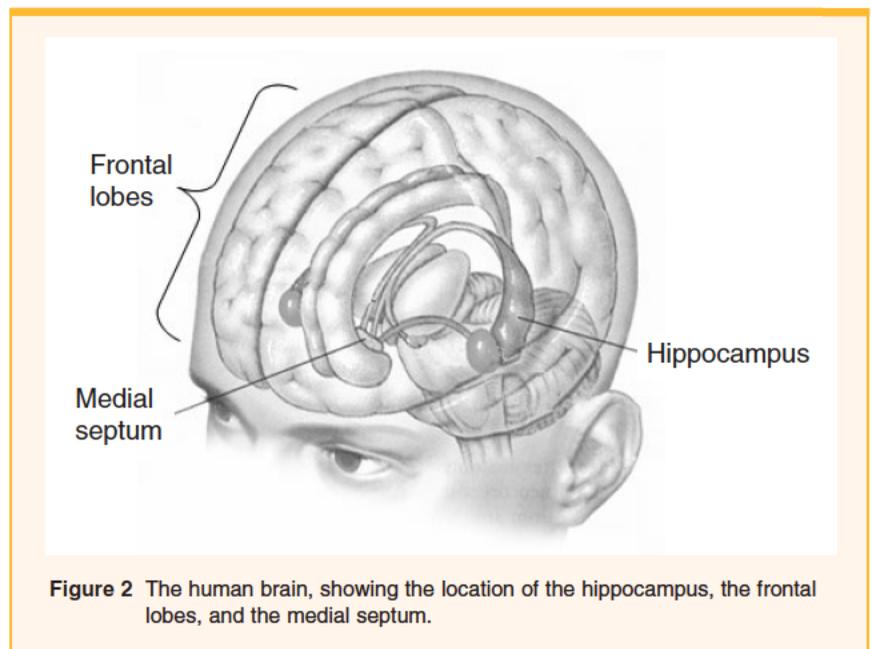


Figure 2 The human brain, showing the location of the hippocampus, the frontal lobes, and the medial septum.

pervasiveness of this assumption is reflected in numerous writings during the early 20th century. For instance, Fleming (1935) wrote, “The prophetic generalization of Schmiedeberg in 1833 that the pharmacological action of alcohol on the cerebrum is purely depressant has been found, most pharmacologists will agree, to characterize its action in general on all tissues” (p. 89). During the 1970s, researchers hypothesized that alcohol depressed neural activity by altering the movement of key molecules (in particular, lipids) in nerve cell membranes. This change then led to alterations in the activity of proteins, including those that influence communication between neurons by controlling the passage of positively or negatively charged atoms (i.e., ions) through cell membranes (e.g., Chin and Goldstein 1977). This view persisted into the late 1980s, at which time the consensus began to shift as evidence mounted that alcohol has selective effects on the brain’s nerve-cell communication (i.e., neurotransmitter) systems, altering activity in some types of receptors but not others (e.g., Criswell et al. 1993). Substantial evidence now indicates that alcohol selec-

tively alters the activity of specific complexes of proteins embedded in the membranes of cells (i.e., receptors) that bind neurotransmitters such as gamma-aminobutyric acid (GABA), glutamate, serotonin, acetylcholine, and glycine (for a review, see Little 1999). In some cases, only a few amino acids appear to distinguish receptors that are sensitive to alcohol from those that are not (Peoples and Stewart 2000). It remains unclear exactly how alcohol interacts with receptors to alter their activity.

Alcohol, Memory, and the Hippocampus

More than 30 years ago, both Ryback (1970) and Goodwin and colleagues (1969a) speculated that alcohol might impair memory formation by disrupting activity in the hippocampus. This speculation was based on the observation that acute alcohol exposure (in humans) produces a syndrome of memory impairments similar in many ways to the impairments produced by hippocampal damage. Specifically, both acute alcohol exposure and hippocampal damage impair the ability to form new long-term, explicit memories but do not affect short-term

memory storage or, in general, the recall of information from long-term storage.

Research conducted in the past few decades using animal models supports the hypothesis that alcohol impairs memory formation, at least in part, by disrupting activity in the hippocampus (for a review, see White et al. 2000b). Such research has included behavioral observation; examination of slices of and brain tissue, neurons in cell culture, and brain activity in anesthetized or freely behaving animals; and a variety of pharmacological techniques.

As mentioned above, damage limited to the CA1 region of the hippocampus dramatically disrupts the ability to form new explicit memories (Zola-Morgan et al. 1986). In rodents, the actions of CA1 pyramidal cells have striking behavioral correlates. Some cells tend to discharge electrical signals that result in one cell communicating with other cells (i.e., action potentials) when the rodent is in a distinct location in its environment. The location differs for each cell. For instance, while a rat searches for food on a plus-shaped maze, one pyramidal cell might generate action potentials primarily when the rat is at the far end of the north arm, while

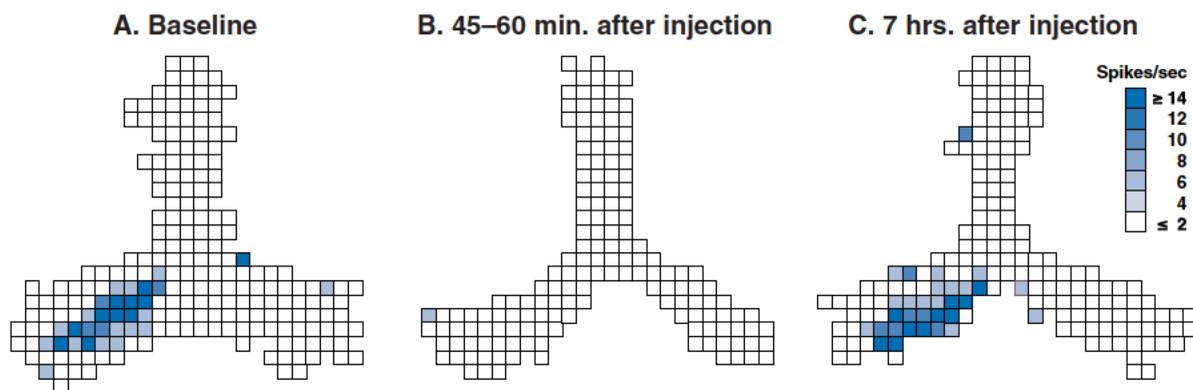


Figure 3 Alcohol suppresses hippocampal pyramidal cell activity in an awake, freely behaving rat. Pyramidal cells often fire when the animal is in discrete regions of its environment, earning them the title “place-cells.” The specific areas of the environment where these cells fire are referred to as place-fields. The figure shows the activity of an individual pyramidal cell before alcohol administration (baseline), 45 to 60 minutes after alcohol administration, and 7 hours after alcohol administration (1.5 g/kg). Each frame in the figure shows the firing rate and firing location of the cell across a 15-minute block of time during which the rat was foraging for food on a symmetric, Y-shaped maze. White pixels are pixels in which the cell fired at very low rates, and darker colors represent higher firing rates (see key to the right of figure). As is clear from a comparison of activity during baseline and 45 to 60 minutes after alcohol administration, the activity of the cell was essentially shut off by alcohol. Neural activity returned to near normal levels within roughly 7 hours after alcohol administration.

another might generate action potentials primarily when the rat is in the middle of the south arm, and so on. Collectively, the cells that are active in that particular environment create a spatial, or contextual map that serves as a framework for event memories created in that environment. Because of the location-specific firing of these cells, they often are referred to as “place-cells,” and the regions of the environment in which they fire are referred to as “place-fields” (for reviews, see Best and White 1998; Best et al. 2001). Given that CA1 pyramidal cells are critically important to the formation of memories for facts and events, and the clear behavioral correlates of their activity in rodents, it is possible to assess the impact of alcohol on hippocampal output in an intact, fully functional brain by studying these cells.

In recent work with awake, freely behaving rats, White and Best (2000) showed that alcohol profoundly suppresses the activity of pyramidal cells in region CA1. The researchers allowed the rats to forage for food for 15 minutes in a symmetric, Y-shaped maze and measured the animals' hippocampal activity using tiny wires (i.e., microelectrodes) implanted in their brains. Figure 3 displays the activity of an individual CA1 pyramidal cell. The activity—which corresponds to the middle portion of the lower left arm of the maze—is shown before alcohol administration (A), 45 to 60 minutes after alcohol administration (B), and 7 hours after alcohol administration (C). The dose of alcohol used in the testing session was 1.5 grams per kilogram of body weight—enough to produce a peak BAC of about 0.16 percent. (A corresponding BAC in humans would be twice the legal driving limit in most States.) As the figure illustrates, the cell's activity was essentially shut off by alcohol. Neural activity returned to near-normal levels within about 7 hours of alcohol administration.

White and Best administered several doses of alcohol in this study, ranging from 0.5 g/kg to 1.5 g/kg. (Only one of the experiments is represented in figure 3.) They found that the dose affected the degree of pyramidal cell suppression. Although 0.5 g/kg did not produce a significant change in the firing of hippocampal pyramidal cells, 1.0 and 1.5

g/kg produced significant suppression of firing during a 1-hour testing session following alcohol administration. The dose-dependent suppression of CA1 pyramidal cells is consistent with the dose-dependent effects of alcohol on episodic memory formation.

Alcohol and Hippocampal Long-Term Potentiation

In addition to suppressing the output from pyramidal cells, alcohol has several other effects on hippocampal function. For instance, alcohol severely disrupts the ability of neurons to establish long-lasting, heightened responsiveness to signals from other cells (Bliss and Collinridge 1993). This heightened responsiveness is known as long-term potentiation (LTP). Because researchers have theorized that something like LTP occurs naturally in the brain during learning (for a review, see Martin and Morris 2002), many investigators have used LTP as a model for studying the neurobiology underlying the effects of drugs, including alcohol, on memory.

In a typical LTP experiment, two electrodes (A and B) are lowered into a slice of hippocampal tissue kept alive by bathing it in oxygenated artificial cerebral spinal fluid (ACSF). A small amount of current is passed through electrode A, causing the neurons in this area to send signals to cells located near electrode B. Electrode B then is used to record how the cells in the area respond to the incoming signals. This response is the baseline response. Next, a specific pattern of stimulation intended to model the pattern of activity that might occur during an actual learning event is delivered through electrode A. When the original stimulus that elicited the baseline response is delivered again through electrode A, the response recorded at electrode B is larger (i.e., potentiated). In other words, as a result of the patterned input, cells at position B now are more responsive to signals sent from cells at position A. The potentiated response often lasts for an extended period of time, hence the term *long-term potentiation*.

Alcohol interferes with the establishment of LTP (Morrisett and Swartzwelder

1993; Givens and McMahon 1995; Pyapali et al. 1999; Schummers and Browning 2001), and this impairment begins at concentrations equivalent to those produced by consuming just one or two standard drinks (e.g., a 12-oz beer, 1.5-oz of liquor in a shot or mixed drink, or a 5-oz glass of wine) (Blitzer et al. 1990). If sufficient alcohol is present in the ACSF bathing the slice of hippocampal tissue when the patterned stimulation is given, the response recorded later at position B will not be larger than it was at baseline (that is, it will not be potentiated). And, just as alcohol tends not to impair recall of memories established before alcohol exposure, alcohol does not disrupt the expression of LTP established before alcohol exposure.

One of the key requirements for the establishment of LTP in the hippocampus is that a type of signal receptor known as the NMDA² receptor becomes activated. Activation of the NMDA receptor allows calcium to enter the cell, which sets off a chain of events leading to long-lasting changes in the cell's structure or function, or both. Alcohol interferes with the activation of the NMDA receptor, thereby preventing the influx of calcium and the changes that follow (Swartzwelder et al. 1995). This is believed to be the primary mechanism underlying the effects of alcohol on LTP, though other transmitter systems probably are also involved (Schummers and Browning 2001).

Indirect Effects of Alcohol on Hippocampal Function

Like other brain regions, the hippocampus does not operate in isolation. Information processing in the hippocampus depends on coordinated input from a variety of other structures, which gives alcohol and other drugs additional opportunities to disrupt hippocampal functioning. One brain region that is central to hippocampal functioning is a small structure in the fore brain known as the medial septum (Givens et al. 2000). The medial septum sends rhythmic

² N-methyl-D-aspartate (NMDA) is a receptor for the neurotransmitter glutamate.

excitatory and inhibitory signals to the hippocampus, causing rhythmic changes in the activity of hippocampal pyramidal cells. In electroencephalograph recordings, this rhythmic activity, referred to as the theta rhythm, occurs within a frequency of roughly 6 to 9 cycles per second (hertz) in actively behaving rats. The theta rhythm is thought to act as a gatekeeper, increasing or decreasing the likelihood that information entering the hippocampus from cortical structures will be processed (Orr et al. 2001). (For more information on the role of electrophysiology in diagnosing alcohol problems, see the article in this issue by Porjesz and Begleiter.) Information entering the hippocampus when pyramidal cells are slightly excited (i.e., slightly depolarized) has a better chance of influencing hippocampal circuitry than signals that arrive when the cells are slightly suppressed (i.e., slightly hyperpolarized).

Manipulations that disrupt the theta rhythm also disrupt the ability to perform tasks that depend on the hippocampus (Givens et al. 2000). Alcohol disrupts the theta rhythm in large part by suppressing the output of signals from medial septal neurons to the hippocampus (Steffensen et al. 1993; Givens et al. 2000). Given the powerful influence that the medial septum has on information processing in the hippocampus, the impact of alcohol on cellular activity in the medial septum is likely to play an important role in the effects of alcohol on memory. Indeed, in rats, putting alcohol directly into the medial septum alone produces memory impairments (Givens and McMahon 1997).

Other Brain Regions Involved in Alcohol-Induced Memory Impairments

The hippocampus is not the only structure involved in memory formation. A host of other brain structures also are involved in memory formation, storage, and retrieval (Eichenbaum 2002). Recent research with humans has yielded compelling evidence that key areas of the frontal lobes play important roles in short-term memory and the formation and retrieval of long-term explicit memories (e.g., Shastri 2002; Curtis

and D'Esposito 2003; Ranganath et al. 2003). Damage to the frontal lobes leads to profound cognitive impairments, one of which is a difficulty forming new memories. Recent evidence suggests that memory processes in the frontal lobes and the hippocampus are coordinated via reciprocal connections (Wall and Messier 2001; Shastri 2002), raising the possibility that dysfunction in one structure could have deleterious effects on the functioning of the other.

Considerable evidence suggests that chronic alcohol use damages the frontal lobes and leads to impaired performance of tasks that rely on frontal lobe functioning (Krill and Halliday 1999; Moselhy et al. 2001). "Shrinkage" in brain volume, changes in gene expression, and disruptions in how performing certain tasks affects blood flow in the brain all have been observed in the frontal lobes of alcohol-dependent subjects (Krill and Halliday 1999; Lewohl et al. 2000; Tapert et al. 2001; Kubota et al. 2001; Desmond et al. 2003).

Although much is known about the effects of chronic (i.e., repeated) use of alcohol on frontal lobe function, little is known about the effects of one-time (i.e., acute) use of alcohol on activity in the frontal lobes, or the relationship of such effects to alcohol-induced memory impairments. Compelling evidence indicates that acute alcohol use impairs the performance of a variety of frontal lobe-mediated tasks, like those that require planning, decisionmaking, and impulse control (Weissenborn and Duka 2003; Burian et al. 2003), but the underlying mechanisms are not known. Research also suggests that baseline blood flow to the frontal lobes increases during acute intoxication (Volkow et al. 1988; Tiihonen et al. 1994), that metabolism in the frontal lobes decreases (Wang et al. 2000), and that alcohol reduces the amount of activity that occurs in the frontal lobes when the frontal lobes are exposed to pulses from a strong magnetic field (Kahkonen et al. 2003). Although the exact meaning of these changes remains unclear, the evidence suggests that acute intoxication alters the normal functioning of the frontal lobes. Future research is needed to shed more light on this important question. In

particular, research in animals will be an important supplement to studies in humans, affording a better understanding of the underlying prefrontal circuitry involved in alcohol-induced memory impairment.

SUMMARY AND CONCLUSIONS

As detailed in this brief review, alcohol can have a dramatic impact on memory. Alcohol primarily disrupts the ability to form new long-term memories; it causes less disruption of recall of previously established long-term memories or of the ability to keep new information active in short-term memory for a few seconds or more. At low doses, the impairments produced by alcohol are often subtle, though they are detectable in controlled conditions. As the amount of alcohol consumed increases, so does the magnitude of the memory impairments. Large quantities of alcohol, particularly if consumed rapidly, can produce a blackout, an interval of time for which the intoxicated person cannot recall key details of events, or even entire events. En bloc blackouts are stretches of time for which the person has no memory whatsoever. Fragmentary blackouts are episodes for which the drinker's memory is spotty, with "islands" of memory providing some insight into what transpired, and for which more recall usually is possible if the drinker is cued by others. Blackouts are much more common among social drinkers than previously assumed and should be viewed as a potential consequence of acute intoxication regardless of age or whether one is clinically dependent upon alcohol.

Tremendous progress has been made toward an understanding of the mechanisms underlying alcohol-induced memory impairments. Alcohol disrupts activity in the hippocampus via several routes—directly, through effects on hippocampal circuitry, and indirectly, by interfering with interactions between the hippocampus and other brain regions. The impact of alcohol on the frontal lobes remains poorly understood, but probably plays an important role in alcohol-induced memory impairments.

Modern neuroimaging techniques, such as positron emission tomography (PET) and functional magnetic resonance imaging (fMRI), provide incredible opportunities for investigating the impact of drugs like alcohol on brain function during the performance of cognitive tasks. The use of these techniques will no doubt yield important information regarding the mechanisms underlying alcohol-induced memory impairments in the coming years. Memory formation and retrieval are highly influenced by factors such as attention and motivation (e.g., Kensinger et al. 2003). With the aid of neuroimaging techniques, researchers may be able to examine the impact of alcohol on brain activity related to these factors, and then determine how alcohol contributes to memory impairments.

Despite advances in human neuroimaging techniques, animal models remain absolutely essential in the study of mechanisms underlying alcohol-induced memory impairments. Hopefully, future work will reveal more regarding the ways in which the effects of alcohol on multiple transmitter systems interact to disrupt memory formation. Similarly, recent advances in electrophysiological recording techniques, which allow for recordings from hundreds of individual cells in several brain regions simultaneously (Kralik et al. 2001), could provide much-needed information regarding the impact of alcohol on the interactions between disparate brain regions involved in the encoding, storage, and retrieval of information. ■

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