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

MEMORANDUM FOR SPECIAL VICTIMS' COUNSEL COURSE (SVCC) 13A ATTENDEES

FROM: The Judge Advocate General's School

SUBJECT: SVCC Narrative Schedule, 10-12 December 2012

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

Prior to the beginning of the course, please familiarize yourselves with: Article 120 UCMJ, (M.C.M. 2012), M.R.E. 412, M.R.E. 513, M.R.E. 514, Air Force Instruction 51-201 Chapter Seven, and Air Force Instruction 36-6001. This will ensure that all students are better prepared to discuss the relevant topics and ask informed questions.

Monday, 10 December 2012

0730-0800 **WELCOME REMARKS AND INTRODUCTION**
Colonel Kenneth Theurer, Commandant, JAG School; Major Christopher Goewert, Course Director, Instructor, Military Justice Division, JAG School

0800-0850 **LECTURE – SPECIAL VICTIMS' COUNSEL (SVC) OVERVIEW AND CHARTER**
Instructor: Colonel Marlesa Scott, Chief, Community Legal Services Division, AFLOA/JACA; Mr. James Russell, Associate Chief, AFLOA/JAJM, Joint Base Andrews, MD

0850-0900 **BREAK**

0900-0950 **LECTURE – VICTIM INTERACTION WITH THE MILTARY JUSTICE PROCESS**
Instructors: Maj Richard D. Younts, Chief, Military Justice Division, JAG School; Maj Matthew Talcott, Instructor, Military Justice Division, JAG School

0950-1000 **BREAK**

1000-1100 **LECTURE – PROFESSIONAL RESPONSIBILITY AND THE SVC**
Instructor: Lt Col Joel England, Air Staff Counsel, AF/JAA-PR, Joint Base Andrews, MD

1100-1110	**BREAK**
1110-1200	**LECTURE – SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM** Instructor: Ms. Deborah Allen, Chief, HQ ACC SAPR Program Manager, Langley AFB VA
1200-1300	**LUNCH**
1300-1350	**LECTURE – VICTIM WITNESS ASSISTANCE PROGRAM** Instructor: Capt Allison Devito, AFLOA/JAJM, Joint Base Andrews, MD
1350-1400	**BREAK**
1400-1450	**LECTURE – OSI VICTIM INTERVIEWS & COOPERATION WITH LAW ENFORCEMENT** Instructor: Mr. Mark Walker, AFOSI, Special Agent, Investigations Operations Consultant, 2nd Field Investigations Squadron, Joint Base Andrews, MD
1450-1500	**BREAK**
1500-1640	**DOCUMENTARY, *INVISIBLE WAR***
1640-1650	**BREAK**
1650-1720	**DOCUMENTARY GUIDED DISCUSSION** Instructor: Mr. Russell
1820-2000	**ICEBREAKER (OPTIONAL)** **LA ZONA ROSA**

Tuesday, 11 December 2012

0730-0820	**LECTURE – ARTICLE 120 FOR THE SVC** Instructor: Maj Jennifer Holmes, Senior Trial Counsel, Special Victims Unit, AFLOA/JAJG, Joint Base Andrews, MD
0820-0830	**BREAK**
0830-0930	**LECTURE – MRE 412 IN APPLICATION** Instructor: Maj Matthew Talcott
0930-0940	**BREAK**

0940-1030 **LECTURE – REPRESENTING AND COORDINATING WITH THE AREA DEFENSE COUNSEL FOR VICTIMS FACING DISCIPLINARY ACTION**
Instructor: Colonel Donna M. Verchio, Chief, AFLOA/JAJD, Joint Base Andrews, MD

1030-1040 **BREAK**

1040-1130 **LECTURE – REPRESENTING AND ADVOCATING FOR VICTIMS OF SEXUAL OFFENSES**
Instructor: Ms. Meg Garvin Executive Director & Clinical Professor of Law, National Crime Victim Law Institute, Lewis and Clark Law School, Portland, OR

1130-1140 **BREAK**

1140-1230 **LECTURE – VICTIMS' RIGHTS UNDER APPLICABLE FEDERAL LAW**
Instructor: Ms. Meg Garvin

1220-1330 **LUNCH**

1330-1520 **LECTURE – UNDERSTANDING THE PSYCHOLOGICAL CONDITIONS OF VICTIMS OF SEXUAL ASSAULT FROM A LEGAL PRACTIONER'S PERSPECTIVE**
Instructor: Ms. Meg Garvin

1520-1530 **BREAK**

1530-1620 **LECTURE – THE INTERPLAY BETWEEN VICTIMS AND ADVOCATES IN THE COURT ROOM**
Instructor: Colonel Don Christensen, Chief, AFLOA/JAJG, Joint Base Andrews, MD

1630-1640 **BREAK**

1640-1730 **LECTURE – SPECIAL VICTIMS' COUNSEL IN PRACTICE**
Instructor: JACA/JAJM

Wednesday, 12 December 2012

0730-0810 **LECTURE – THE ROLE OF THE SPECIAL VICTIMS' COUNSEL**
Speaker: Lieutenant General Richard C. Harding, The Judge Advocate General

0810-0820 **BREAK**

0820-0910	**MRE 513 & 514 IN APPLICATION** Instructor: Maj Christopher Goewert
0910-0920	**BREAK**
0920-1000	**LECTURE – ACCESS TO INFORMATION HIPAA, PRIVACY ACT, FOIA, ETC.** Instructor: Capt Satura Gabriel, Instructor, Civil Law Division, JAG School
1000-1010	**BREAK**
1010-1100	**LECTURE – THE AIR FORCE FAMILY ADVOCACY PROGRAM & SUICIDE PREVENTION** Instructor: Capt John C. Noah, Director of Psychological Health, 42d Medical Group, Mental Health Clinic, Maxwell AFB, AL
1100-1200	**WORKING LUNCH – ROUND TABLE DISCUSSION** Instructors: JACA/JAJM
1200-1600	**SEMINAR – EXERCISES IN INTERFACING WITH AND ADVISING VICTIM-CLIENTS** Instructors: Various AFJAGS, JAJG, JAJM Seminar rooms as assigned
1600-1630	**END OF COURSE CRITIQUES** Large Auditorium

KENNETH M. THEURER, Colonel, USAF
Commandant

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

OCT 10 2013

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

FROM: The Judge Advocate General's School

SUBJECT: SVCC Narrative Schedule, 15 - 18 October 2013

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

TUESDAY, 15 OCTOBER 2013

0730-0800 **WELCOME REMARKS AND INTRODUCTION**
Instructors: Colonel Kenneth Theurer, Commandant; Major Adam Kersey, Course Director; and Mr. Pete Stultz, Assistant Course Director, The Judge Advocate General's School, Maxwell AFB, AL

0800-0850 **LECTURE – AIR FORCE SVC INTRODUCTION & OVERVIEW**
Instructor: Colonel Dawn Hankins, Chief, Special Victims' Counsel Program, Air Force Legal Operations Agency, Joint Base Andrews, MD
Student Evaluators: 1-10

0850-0900 **BREAK**

0900-1030 **LECTURE – LEGAL ASSISTANCE & HOLISTIC INTAKE INTERVIEWS**
Instructor: Laura Mahr, Victims Rights Law Center, Portland, OR
Student Evaluators: 11-20

1030-1040 **BREAK**

1040-1130 **LECTURE – APPELLATE UPDATE – *LRM v. Kastenberg***
Instructor: Colonel Kenneth Theurer, Commandant, The Judge Advocate General's School, Maxwell AFB, AL
Student Evaluators: 21-30

1130-1230 **LUNCH**

1230-1350 **LECTURE – MILITARY RULES OF EVIDENCE**
Instructor: Lieutenant Colonel Brian Thompson, Chief, Senior Trial Counsel - SVU, Air Force Legal Operations Agency, Joint Base Andrews, MD
Student Evaluators: 31-40

1350-1400 **BREAK**

1400-1450 **GUIDED DISCUSSION – LESSONS FROM THE FIELD**
Instructor: Major Robert Wilder, Deputy Chief, Special Victims' Counsel Program, Air Force Legal Operations Agency, Joint Base Andrews, MD
Student Evaluators: 41-50

1450-1500 **BREAK**

1500-1550 **GUIDED DISCUSSION – VWAP / SARC / OSI / TC INTERACTION**
Instructor: Capt Allison Devito, Chief, Policy for Victims and Witnesses, Air Force Legal Operations Agency, Joint Base Andrews, MD
Student Evaluators: 51-60

1550-1600 **BREAK**

1600-1700 **BREAKOUT SESSIONS – BRANCH SPECIFIC**
Location: Breakout sessions by branch of service; rooms as assigned

Bus to depart Bldg 682 @ 1745 for Icebreaker

1800-2000 **ICEBREAKER AT RICHEY CENTER (OPTIONAL)**

Bus to depart Richey Center @ 2000 for Bldg 682

WEDNESDAY, 16 OCTOBER 2013

0730-0850 **LECTURE – BEING A VICTIM'S ATTORNEY I**
Instructor: Ms. Meg Garvin, Executive Director & Clinical Professor of Law, National Crime Victim Law Institute, Portland, OR
Student Evaluators: 61-70

0850-0900 **BREAK**

0900-1020 **LECTURE – BEING A VICTIM'S ATTORNEY II**
Instructor: Ms. Meg Garvin, Executive Director & Clinical Professor of Law, National Crime Victim Law Institute, Portland, OR
Student Evaluators: 1-10

1020-1030 **BREAK**

1030-1150 **PANEL DISCUSSION**
Facilitator: Mr. Tom Becker, Academic Director, The Judge Advocate General's School, Maxwell AFB, AL
Panelists: Ms. Jessica Hinves, Protect Our Defenders; Mr. Peter Coote, Victims' Rights Advocate; Mr. Russell Butler, Maryland Crime Victims' Resource Center
Student Evaluators: 11-20

1150-1300 **LUNCH**

1300-1520 **LECTURE – NEUROBIOLOGY OF SEXUAL ASSAULT**
Instructor: Dr. Rebecca Campbell, Michigan State University, East Lansing, MI
Student Evaluators: 21-30

1520-1530 **BREAK**

1530-1600 **VTC REMARKS**
Instructor: Lieutenant General Richard C. Harding, The Judge Advocate General of the Air Force

1600-1630 **BREAKOUT SESSIONS – BRANCH SPECIFIC**
Location: Breakout sessions by branch of service; rooms as assigned

THURSDAY, 17 OCTOBER 2013

0730-0820 **LECTURE – POST-TRIAL PROCESSING FOR SVCs**
Instructor: Colonel Dawn Hankins, Chief, Special Victims' Counsel Program, Air Force Legal Operations Agency, Joint Base Andrews, MD
Student Evaluators: 31-40

0820-0830 **BREAK**

0830-0920 **LECTURE – ETHICS**
Instructor: Maj Lisa Richard, Chief, Civil Law Division, The Judge Advocate General's School, Maxwell AFB, AL
Student Evaluators: 41-50

0920-0930 **BREAK**

0930-1200 **LECTURE – MENTAL HEALTH, REFERRALS, RESILIENCY**
Instructor: Dr. Nate Galbreath, Senior Executive Advisor, DoD Sexual Assault Prevention and Response Office, Alexandria, VA
Student Evaluators: 51-60

1200-1300 **LUNCH**

1300-1630 **EXERCISE – CLIENT INTAKE AND ADVICE**
Location: Rooms as assigned

FRIDAY, 18 OCTOBER 2013

0730-0920 **LECTURE – VICTIMOLOGY**
Instructor: Dr. Jeanne Lambrecht, Air Force Office of Special Investigations, Joint Base Andrews, MD
Student Evaluators: 61-70

0920-0930	**BREAK**
0930-1100	**EXERCISE – COURT-MARTIAL ADVOCACY FOR THE SVC** Location: Rooms as assigned
1130-1230	**LUNCH**
1230-1430	**EXERCISE – COURT-MARTIAL ADVOCACY FOR THE SVC** Location: Rooms as assigned
1430-1500	**CLOSING REMARKS AND END-OF-COURSE CRITIQUES** Location: Room 105, Kuhfeld Auditorium
1500-1630	**BREAKOUT SESSIONS – BRANCH SPECIFIC (OPTIONAL)** Location: Breakout sessions by branch of service; rooms as assigned

KENNETH M. THEURER, Col, USAF
Commandant

THE JUDGE ADVOCATE GENERAL'S SCHOOL

SPECIAL VICTIMS' COUNSEL COURSE 14-A

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The Judge Advocate General's School Master Curriculum Plan: Special Victims' Counsel Course

Course Code: SVC
Dec 2012

Instructions: *The Master Curriculum Plan is the charter for the course. Course Directors use the Plan to make decisions about curriculum content, including preparation of new lessons and revising existing ones, evaluation methods, identifying support requirements, and constructing course schedules. The Plan is available for review by JAGC members, their supervisors, CLE and other accrediting authorities, and others seeking information about JAG School courses and methods.*

A. General Information

Location: The Judge Advocate General's School, Maxwell AFB AL.

Length of course: 3 days.

Student quota and profile: 60. Judge advocates assigned or likely to be assigned duties as Special Victims' Counsel, providing representational legal assistance to victims of sexual assault and other crimes. The target student is a base-level judge advocate, certified under Art 27(b), UCMJ, and currently serving in a civil law billet thereby reducing the likelihood of conflicts of interest.

B. Strategic Course Direction

Instructions: *Set out the elements of the Strategic Course Direction as provided below. Consider them carefully, as each decision on the course must be consistent with the stated mission, vision, and values.*

TJAG's Intent: The Special Victims' Counsel Course will train judge advocates in providing full spectrum legal services and advocacy to alleged victims of sexual assault and rape.

Mission: To prepare newly assigned Special Victims' Counsel to meet the challenges of transition from an Air Force legal office serving the needs of command to an independent office serving the needs of individuals who have been victims of sexual assault and other crimes. As a bridging mechanism (until billets are provided), base legal office JAGs will be appointed as Special Victims' Counsel.

Vision: Practical instruction in the fundamentals of Special Victims' Counsel duties, tailored to the attorney who is already experienced in legal work on behalf of command, and emphasizing experiential methods, effective communication, problem solving, and critical thinking.

Values: Fostering Air Force Core Values, expertise in military justice, client service and loyalty to crime victims, efficiency, maturity, dependability, good judgment, moral courage, and ethical conduct.

C. Instructional Areas and Strategic Learning Objectives

Instructions: *Determine the broad subject areas (blocks) to be covered by the course. Determine the overall learning objectives for each block, setting out the cognitive level of learning. Include affective objectives, if appropriate. Consider these carefully, as they will your guide in planning the individual lessons within each block.* See *AFM 36-2236,* Guidebook for Air Force Instructors, *and consult the Academics Division.*

1. **Block I: Course Introduction, Administration, and Graduation (series 100)**

   Block objectives:

   Comprehend the mission and learning objectives for the Special Victims' Counsel Course (SVCC).

   Know the administrative, logistical, and academic requirements for students attending SVCC.

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

2. **Block II: Professional Legal Knowledge for Special Victims' Counsel (series 200)**

   Block objectives:

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

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

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

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

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

3. **Block III: Legal Skill Sets for Special Victims' Counsel (series 300)**

   Block objectives:

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

   Apply effective communication techniques in factual scenarios.

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

4. **Block IV: Professional Situational Awareness for Special Victims' Counsel (series 400)**

Block objectives:

Comprehend JAG Corps leaders' and military judges' perspectives on the role of Special Victims' Counsel in the fair and efficient administration of military justice.

Comprehend the chain of command for Special Victims' Counsel.

Comprehend the charter for Special Victims' Counsel, including permissible and impermissible activities on behalf of crime victim clients.

Comprehend the roles of other Air Force offices and programs that provide assistance to victims of sexual assault and other crimes.

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

Value zealous and ethical advocacy on behalf of crime victims as consistent with Air Force Core Values and supportive of the Air Force mission.

D. Methods of Instruction, Faculty, and Evaluation/Assessment

Instructions: *Describe who will teach the course, how they will teach it, and how student performance will be evaluated. If there is no evaluation, so state.* See *AFM 36-2236,* Guidebook for Air Force Instructors, *for information and guidance on selection of teaching methods. Also state any other methods used to assess instructional effectiveness for the course as a whole (e.g., end-of-course critiques, pre- and post-course student self-assessments, diagnostic testing, and graduate assessments of alumni and their supervisors. Consult the Academics Division as needed.*

JAG School resident faculty, adjunct faculty from cognizant JAG Corps activities, and guest speakers provide instruction.

Methods of instruction will be informal lectures, panel discussions, guided discussions, and experiential exercises. Informal lectures and panel discussions will be during plenary sessions. Guided discussions and experiential exercises will occur in small group seminars facilitated by resident or adjunct faculty. Guided discussions and experiential exercises will provide opportunities for application of information provided in prior informal lectures, requiring participants to use critical thinking and problem-solving skills.

There are no academic requirements for VCC graduation. Accordingly, participant performance is not formally evaluated, although seminar facilitators will provide contemporaneous feedback on performance during guided discussions and experiential exercises. Attendees are expected to participate attentively, actively, and constructively.

Assessment of instructional effectiveness will be by diagnostic survey or examination of participants at the start of the course followed by summative survey or examination at the close of the course, an end-of-course participant critique, and alumni surveys approximately six months following graduation.

E. JAG Corps Major Knowledge Areas

Instructions: *This section contains descriptions of the JAGC Corps Major Knowledge Areas identified by TJAG. It remains the same for each Master Curriculum Plan and serves as a reference for completing Sec. F.*

Professional Legal Knowledge. Knowledge of the law and processes involved in JAG Corps fields of practice.

Legal Skill Sets. Knowledge of the lawyering skills that attorneys and paralegals must maintain or be able to support (e.g., advocacy, client services, discovery management, interviewing, investigating, legal and factual research, legal writing, and litigation).

Universal Skills. Skills required by all who (1) lead and work with people and (2) manage and use resources. These skills include communications, information technology, interpersonal skills, leadership, mentoring, office management, and personnel development.

Professional Situational Awareness. Knowledge that provides context on national security issues and on JAG Corps, unit, command, and Air Force history, missions, organizational structures, and perspectives.

F. Lesson Fields

Instructions: *Summarize the subjects addressed in the course and tie them to the appropriate JAG Corps Major Knowledge Areas described in Sec. E, above.*

Professional Legal Knowledge Fields

Military Criminal Law

Court-martial Procedure

Nonjudicial Punishment

Evidence

Ethics and Professional Responsibility

Adverse Administrative Actions

Investigations

Information Law

Victim Assistance Programs

Legal Skill Set Fields

Civility in Practice

Client Relations and Communication, especially with sexual assault victims

Suicide Prevention

Professional Situational Awareness Fields

JAG Corps Leadership Perspectives

Military Judges' Perspectives

Victim Advocate and Sexual Assault Awareness Program Perspectives

G. Student Selection

Student selection will be made by The Judge Advocate General from nominations by Major Commands.

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

OCT 10 2013

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Instructor: Colonel Dawn Hankins, Chief, Special Victims' Counsel Program, Air Force Legal Operations Agency, Joint Base Andrews, MD
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0850-0900 **BREAK**

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Instructor: Laura Mahr, Victims Rights Law Center, Portland, OR
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Panelists: Ms. Jessica Hinves, Protect Our Defenders; Mr. Peter Coote, Victims' Rights Advocate; Mr. Russell Butler, Maryland Crime Victims' Resource Center
Student Evaluators: 11-20

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Instructor: Dr. Rebecca Campbell, Michigan State University, East Lansing, MI
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Instructor: Dr. Nate Galbreath, Senior Executive Advisor, DoD Sexual Assault Prevention and Response Office, Alexandria, VA
Student Evaluators: 51-60

1200-1300 **LUNCH**

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Location: Rooms as assigned

FRIDAY, 18 OCTOBER 2013

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Instructor: Dr. Jeanne Lambrecht, Air Force Office of Special Investigations, Joint Base Andrews, MD
Student Evaluators: 61-70

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0930-1100	**EXERCISE – COURT-MARTIAL ADVOCACY FOR THE SVC** Location: Rooms as assigned
1130-1230	**LUNCH**
1230-1430	**EXERCISE – COURT-MARTIAL ADVOCACY FOR THE SVC** Location: Rooms as assigned
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1500-1630	**BREAKOUT SESSIONS – BRANCH SPECIFIC (OPTIONAL)** Location: Breakout sessions by branch of service; rooms as assigned

KENNETH M. THEURER, Col, USAF
Commandant

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

19 December 2013

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

FROM: Course Director (MAJ Kersey)

SUBJECT: End-of-Course Report, Special Victims' Counsel Course, 14-A, 15-18 October 13

1. The Special Victims' Counsel Course (SVCC) 14-A ended 18 October 2013. There were 53 students registered and all completed the course. The course consisted mostly of uniformed United States Navy and United States Marine Corps attorneys and paralegals with one Marine Corps civilian attorney. One attendee was an Army judge advocate and six were Air National Guard judge advocates. The experience level of the students varied greatly, but the majority of attendees had between three and ten years experience in military justice or related fields.

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

a. Mission Accomplishment: The mission of the SVCC was to prepare newly assigned Special Victims' Counsel to meet the challenges of transition from a legal office serving the needs of command to an independent officer serving the needs of individuals who have been victims of sexual assault and other crimes. The average response was 4.8 on a five-point scale.

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

<u>Phase I</u>: Course Introduction, Administration, and SVC Overview

1. Comprehend the mission and learning objectives for SVCC.
2. Know the administrative, logistical, and academic requirements for SVCC.
3. Characterize attentive, active, and constructive participation in SVCC as important to successful service as a Special Victims' Counsel.

Survey results were that 96% of students agreed or strongly agreed these objectives were met. The average response was 4.7 on a five-point scale.

Phase II: Professional Legal Knowledge for the Special Victims' Counsel

1. Comprehend principles of military criminal law, evidence, and procedure of special interest to crime victims.
2. Comprehend principles of civil law of special interest to crime victims, including information law, victim assistance programs, and adverse administrative actions against offenders.
3. Comprehend ethical issues of special interest to judge advocates serving as Special Victims' Counsel.
4. Apply principles of law, evidence, procedure, and ethics to issues raised by factual scenarios.
5. Value a thorough understanding of applicable law, evidence, procedure, and ethics to successful service as a Special Victims' Counsel.

Survey results were that 83% of students agreed or strongly agreed this objective was met. The average response was 4.4.

Phase III: Legal Skill Sets for Special Victims' Counsel

1. Comprehend techniques for effective communication and positive relations with clients who are victims of sexual assault or other crimes.
2. Apply effective communication techniques in factual scenarios.
3. Value effective communication and positive relationships with crime victim clients as essential to successful service as Special Victims' Counsel.

Survey results were that 92% of students strongly agreed these objectives were met. The average response was 4.6 on a five-point scale.

Phase IV: Professional Situational Awareness for Special Victims' Counsel

1. Comprehend the role of Special Victims' Counsel in the fair and efficient administration of military justice.
2. Comprehend permissible and impermissible activities on behalf of crime victim clients.
3. Comprehend the roles of other Department of Defense offices and programs that provide assistance to victims of sexual assault and other crimes.
4. Respond to assignment as a Special Victims' Counsel as requiring change in judge advocate's relationships with others in the community.
5. Value zealous and ethical advocacy on behalf of crime victims as consistent with the Department of Defense mission.

Survey results were that 91% of students strongly agreed these objectives were met. The average response was 4.5 on a five-point scale.

3. ***Other Required Indicators***

a. Overall Quality of Instruction: Survey results were that 94% of students rated the instruction as effective or very effective. The average response was 4.7 on a five-point scale.

b. Course Management: Survey results were that 100% of students rated the management of SVCC as effective or very effective. The average response was 4.8.

c. Overall Value of Course: Survey results were that 100% of students considered SVCC to be a valuable experience in their professional development. The average response was 4.9.

5. Comparison Data: SVCC 14-A was the second offering of this course. In most circumstances, the chart below would compare ratings between SVCC 13-A and 14-A. However, given the re-organization of the course in order to teach a course immaterial to branch of service, comparison is likely not useful.

*Indicators (*Special Indicators for AALC)*	**SVCC 13-A**	**SVCC 14-A**
Mission Accomplishment	**N/A**	**96%, 4.8**
Phase I	**N/A**	**96%, 4.7**
Phase II	**N/A**	**83%, 4.6**
Phase III	**N/A**	**92%, 4.6**
Phase IV	**N/A**	**91%, 4.5**
Quality of Instruction	**N/A**	**94%, 4.7**
Course Management	**N/A**	**100%, 4.8**
Overall Value	**N/A**	**100%, 4.9**

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

a. Best Blocks of Instruction: The student consensus was that the lectures by Ms. Meg Garvin and Dr. Rebecca Campbell were the best. Both received myriad individual commendations from the student body.

b. Blocks of Instruction of Little Value. By far, the students were most critical of Dr. Nate Galbreath. Dr. Galbreath's block of instruction, though designed to discuss suicidality and Department of Defense programs available to victims of crime, failed to address either adequately. Students found his information to be redundant with that presented by Dr. Campbell. Additionally, some questioned his academic veracity entirely.

c. Course Strengths: The students consistently indicated that the course was well-executed by the school. Additionally, students enjoyed the practical blocks of instruction on lessons learned by the current Special Victims' Counsel. The breadth of information was also well-received by the student body.

d. Student Recommended Improvements: The number one cited improvement for the course would be to decrease the numbers of blocks focused on neurobiology (easily accomplished by deletion of Dr. Galbreath's block of instruction).

e. Other Student Comments: Nothing significant other than those described above. Full comments are available in hard copy only due to the vast majority of students lacking CapSil capability.

7. ***Course Director Comments***: All-in-all, the course went very well. I fully agree with the student comments asking to decrease the number of courses on neurobiology. The blocks receiving the best feedback, the client intake interviews, should potentially be increased. Having the SVCs and the instructors move from room-to-room decreased the amount of time necessary

to reset between each iteration. The school should focus quickly on reworking curriculum. If SVCs are retained for more than a year in that position, the curriculum will need dramatic alteration for them in the future. One possibility is to consider creation of a dual-track SVC course, with new SVCs partaking of the core, established curriculum and schoold SVCs participating in group discussions along with more advanced topics in victims' rights law.

ADAM W. KERSEY, MAJ, USA
Director, Special Victims' Counsel Course

SVCC 14A

	Monday 14-Oct	Tuesday 15-Oct	Wednesday 16-Oct	Thursday 17-Oct	Friday 18- Oct	
730		Welcome/Admin Matters	Fundamental Concepts of Being a Victims' Attorney Part I **Meg Garvin**	Post-Trial Processing For SVCs **Col Hankins**	Cognitive Biases; Behavioral Aspects of Victims; Understanding Sex Offneders **Dr. J. Lambrecht**	**730**
800		Air Force SVC Introduction & Overview **Col Hankins**				**800**
830				Ethics **Maj Richard**		**830**
900		Civil Legal Assistance **Laura Mahr**	Fundamental Concepts of Being a Victims' Attorney Part II **Meg Garvin**			**900**
930				Mental Health Issues/Referrals/ PTSD/Resiliency and Suicide Awareness **Dr. Nate Galbreath**	Exercise II Court Martial Advocacy for the SVC **MAJ Kersey**	**930**
1000						**1000**
1030		Appellate Update - L.R.M. **Colonel Theurer**	Panel With Invitees: **POD / Victim Advocates - Tom Becker**, Moderator			**1030**
1100						**1100**
1130		Lunch			Lunch	**1130**
1200			Lunch	Lunch		**1200**
1230		Military Rules of Evidence **Col Don Christensen**			Exercise II (Cont) Court Martial Advocacy for the SVC **MAJ Kersey**	**1230**
1300			The Neurobiology of Trauma / Cognitive Interviewing **Dr. Rebecca Campbell**	Exercise I Client Intake and Advice **MAJ Kersey**		**1300**
1330						**1330**
1400		Lessons from the Field; Guided Discussion **Maj Wilder**				**1400**
1430					End of Course	**1430**
1500		VWAP / SARC / OSI / TC Interaction **Capt Devito**			Breakout Session	**1500**
1530			Remarks **Lt Gen Harding**			**1530**
1600		Breakout Session	Breakout Session			**1600**
1630						**1630**
1700						**1700**
1800		Icebreaker				**1800**

AIR FORCE SPECIAL VICTIMS' COUNSEL CHARTER

PURPOSE: This Charter, in conjunction with the Special Victims' Counsel Rules of Practice and Procedure, defines the types of services Air Force Special Victims' Counsel (SVC) are responsible for providing and to whom they may be provided.

BACKGROUND: This charter defines SVC responsibilities and services, as authorized under 10 U.S.C. §§ 1044 and 1565b. 10 U.S.C. § 1565b states: "a member of the armed forces, or a dependent of a member, who is a victim of a sexual assault may be provided…[l]egal assistance by military or civilian legal assistance counsel pursuant to section 1044 of this title." On 9 November 2012, OSD/GC issued an information memo addressing "Legal Assistance to Victims of Sexual Assault" (VC Memo). The memo concludes that "in a military justice sexual assault prosecution, to the extent the victim could retain the advice or representation of private counsel, §§ 1044 and 1565b authorizes, and certainly does not prohibit, JAGs from providing the same legal advice and representation, to the same extent." Authority to act as a military defense counsel (MDC) is derived from 10 U.S.C. § 47.

PART A – FUNDAMENTAL PRINCIPLES

1. An SVC's primary responsibility is to his or her client. Constrained only by ethical limits, SVCs are authorized by law to enter into attorney-client relationships and to oppose the government of the United States as appropriate, in order to promote the individual interests of the clients they represent without regard to how their actions might otherwise affect the Air Force as an institution.

2. All SVCs are bound by applicable Air Force Instructions and Manuals, the Air Force Rules of Professional Conduct, the Air Force Standards for Criminal Justice, the Air Force Standards for Civility in Professional Conduct, and the Uniform Rules of Practice before Air Force Courts-Martial. Depending on the circumstances, they may also be bound by other laws, regulations, and instructions as well as the ethics rules of their state bars.

3. All SVCs, while serving in that capacity, are supervised professionally by AFLOA/CLSV, and for purposes of covered collateral misconduct, AFLOA/JAJD. For the purposes of SVC representation, SVCs operate independently from the command and supervision chains that govern the Air Force units and locations that SVCs support.

4. It is essential to the proper operation of this program that all clients receive effective and timely services.

PART B – SVC SERVICES

1. *Priorities.* An SVC's legal representation of a victim takes precedence over all other required services. SVC must ensure that all necessary resources are applied to handling these matters. In view of the importance of providing appropriate and effective victims' counsel services to all eligible clients who have requested such services, SVCs must immediately report to

AFLOA/CLSV any anticipated shortfall in their ability to provide any services and coordinate with AFLOA/CLSV before declining or terminating representation.

2. ***Categories of Services Provided by SVCs.***

a. <u>Advocacy to Military Justice Actors and Air Force and Department of Defense Agencies</u>

Representation Offered to Victim	**Governing Authority**
Civil Legal Matters (may include traditional legal assistance)	AFI 51-504, para. 1.4.16 OSD/GC Memo, "Legal Assistance to Victims of Sexual Assault," 9 Nov 12
General and Special Courts-Martial	UCMJ
Article 32 Pretrial Investigations	Article 32, UCMJ
Pretrial Confinement Hearings	RCM 305
Summary Courts-Martial	AFI 51-201 RCM 1301
Depositions	RCM 702
Courts of Inquiry	Article 135, UCMJ AFI 51-201
Post Trial – Matters Submitted to the Convening Authority	RCM 1107
Clemency and Parole Boards	DoDI 1325.7
Investigations	Includes all investigations, inquiries, etc., in which the client is a victim
Article 138, UCMJ	AFI 51-904 (Note: This AFI does not provide a right to military counsel, but assistance shall be provided on a time-available basis)
Notaries and Administrative Oaths	AFI 51-504

b. <u>Advocacy to Civilian Agencies</u>

Representation Offered to Victim	**Governing Authority**
United States Civilian Criminal Jurisdiction Advice	AFI 51-504, para. 1.4.16 OSD/GC Memo, "Legal Assistance to Victims of Sexual Assault," 9 Nov 12
Foreign Criminal Jurisdiction Advice	AFI 51-703, para. 7
Civil Legal Matters	OSD/GC Memo, "Legal Assistance to Victims of Sexual Assault," 9 Nov 12 AFI 51-504, para. 1.4.16

3. ***Covered Collateral Misconduct, when the Client's Status is "Subject."*** Covered collateral misconduct is misconduct that is committed by a victim of a sexual assault that has a direct nexus to the sexual assault. When collateral misconduct arises, an SVC will continue to represent the victim for categories of services listed above, and may also represent the victim for

covered collateral misconduct IAW the SVC Rules of Practice and Procedure, with the victim's consent.

4. *Referral Services*. If an SVC determines that a person seeking representation needs any of the services listed below, the member should be referred to the office of primary responsibility and/or to the applicable DoD or AF instruction. If the SVC already has an attorney-client relationship with the member, then the SVC must use discretion in determining how to proceed.

An SVC should not assist a member in preparing IG complaints, Military Equal Opportunity Complaints, Congressional Complaints, or similar matters. However, if an SVC is already representing a client, the SVC may advise the client that these and similar avenues exist for addressing a complaint. Further, the SVC may review a client's IG, Congressional, or similar complaint for the purpose of assuring that the contents of the complaint do not jeopardize the client's rights or position with respect to the matter that led to the original representation. When doing so, the SVC will advise the client that the review is for that limited purpose. An SVC may submit a FOIA/Privacy Act request for his or her client in the furtherance of a representation on a matter within the category of services provided.

Referral Service	**Governing Authority**
Board of Correction of Military Records (Representation is prohibited; however, the client may be advised of procedures.)	AFI 36-2603, para. 3.7
Civilian Criminal Matters, where the victim is the subject (Except to explain rights)	AFI 51-504, para. 1.7.1
Claims	AFI 51-501
Discharge Review Board (Representation is prohibited; however, the client may be advised of procedures.)	DoDI 1332.28, E3.2.4
MEO Complaints	AFI 36-2706
IG Complaints	AFI 90-301
OPR and EPR Corrections	AFI 36-2401 (MPF)
Pay Problems	DFAS-DE (AFM 177-108) (AFM 177-373)
Other Official Problems (within jurisdiction of other staff agencies)	AFI 51-504
FOIA/Privacy Act Requests	DoD 5400.7-R, AFI 33-332, Ch. 4
Formal Physical Evaluation Boards, Medical Evaluation Boards	AFI 36-3212 and AFI 44-157

PART C – CATEGORIES OF CLIENTS AND SOURCES OF SPECIAL VICTIMS' COUNSEL SERVICES

1. This chart serves only as a general guide. SVCs should consult with AFLOA/CLSV if they have any questions about representation of a particular member.

2. Reserve personnel do not have to be on active duty status when they are consulting with their SVC.

Victim Status	**Perpetrator Status**	**Representation Related to Status as a Victim**	**Covered Collateral Misconduct – Administrative Action, Administrative Separation, and UCMJ Proceedings**
Active Duty AF	Military	SVC	MDC (SVC in support)
	Civilian	SVC	MDC (SVC in support)
Active Duty, other Services	AF	SVC	No
	Other Services or Civilian	No	No
AF Reserve members (active at time of the offense)	Military	SVC	MDC (SVC in support) See Note 4
	Civilian	SVC	MDC (SVC in support) See Note 4
Air National Guard, Title 10 (Federal) status	Military	SVC	MDC (SVC in support) See Note 5
	Civilian	SVC	MDC (SVC in support) See Note 5
Air National Guard, Title 32 (State) status	Military	No	No
	Civilian	No	No
Reserve and National Guard members from other Services	AF	SVC	No
	Other Services or Civilian	No	No
Retired members	AF	SVC	MDC See Note 6
	Other Services or Civilian	No	No
Adult dependents of	AF	SVC See Note 2	N/A

Active Duty members	Other Services or Civilian	No	N/A
Former members and adult dependents of former members who are entitled to an identification card	AF	SVC	N/A
	Other Services or Civilian	No	N/A
Minor dependents of members and former members	AF	No	N/A
	Other Services of Civilian	No	N/A
DoD civilian employees – deployed	AF	SVC	N/A
	Other Services or Civilian	No	N/A
DoD civilian employees and adult dependents assigned OCONUS	Air Force	SVC	N/A
	Other Services or Civilian	No	N/A
Civilian contractor personnel – deployed	AF	SVC	N/A
	Other Services or Civilian	No	N/A
Foreign military personnel and adult dependents assigned to the United States	AF	SVC	N/A
	Other Services or Civilian	No	N/A
Public Health Service Officers	AF	SVC	No
	Other Services or Civilian	No	No
Civilians (no DoD connection)	AF	No See Note 7	N/A
	Other Services or Civilian	No See Note 7	N/A

Note 1. Provide SVC to all active duty, AF Reserve, and Air National Guard victims who meet two criteria: 1) report they are a victim of sexual assault under the UCMJ, including rape, sexual assault and other unwanted sexual contact that is aggravated, abusive, or wrongful (including unwanted and inappropriate sexual contact), forcible sodomy, 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); and 2) are eligible for legal assistance under AFI 51-504. This means that an SVC will be provided where any military commander may exercise jurisdiction (i.e., the perpetrator is a member of the AF, Army, Navy, Marine Corps, or Coast Guard). The victim must have been in status at the time of the offense to be eligible for an SVC. AF members who are on active duty, but were victims of sexual assault prior to enlistment or commissioning are not eligible for the SVC Program. An SVC will also be provided in a more limited scope when a civilian is the perpetrator or there is an unknown perpetrator.

Note 2. Provide SVC to all adult dependents of Active Duty members who meet three criteria: 1) report they are a victim of sexual assault under the UCMJ, including rape, sexual assault and other unwanted sexual contact that is aggravated, abusive, or wrongful (including unwanted and inappropriate sexual contact), forcible sodomy, 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); 2) were eligible for legal assistance under AFI 51-504 at the time of the offense and the time that an SVC request is made; and 3) an AF commander may exercise jurisdiction. Non-spouse adult dependent is defined as unmarried between the ages of 18 and 20, a full time student between the ages of 18 and 22, or an incapacitated child over the age of 21. Dependents of other services' members are only eligible if they file an unrestricted report.

Note 3. Provide an SVC to all other victims (excluding minor victims) who meet three criteria: 1) file an unrestricted report that they are a victim of sexual assault under the UCMJ, including rape, sexual assault and other unwanted sexual contact that is aggravated, abusive, or wrongful (including unwanted and inappropriate sexual contact), forcible sodomy, 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); 2) are eligible for legal assistance under AFI 51-504 at the time of the offense and the time that an SVC request is made; and 3) an AF commander may exercise jurisdiction.

Note 4. MDC support will be provided to Air Reserve Component members for Title 10 matters that fall within the scope of this Charter and the MDC Charter.

Note 5. Air National Guard (ANG) personnel on Title 10 status may be subject to discharge from the Air Force. However, the discharge action may not affect that member's state status, warranting a separate procedure to discharge that person from the state's National Guard. See AFI 36-3208, para 1.6, and AFI 36-3207; see also AFI 36-3209. An MDC is advised to consult with the ANG Staff Judge Advocate defense representative prior to representing a client facing discharge who is on active duty pursuant to Title 10.

Note 6. AF Retirees may be represented by MDC and SVC for collateral misconduct if all of the following requirements are met: 1) the matter for which the retiree desires representation is related to a matter with a direct nexus to the sexual assault for which the retiree was represented by a defense counsel while the retiree was on active duty; 2) the service to be provided is not otherwise prohibited by the Charter; and 3) JAJD coordination and approval before the MDC or SVC consults with the member requesting representation.

Note 7. An SVC will not be provided to civilian victims without any connection to DoD IAW legal assistance eligibility categories in AFI 51-504.

Approved on 1 July 2013 by Lieutenant General Richard C. Harding, The Judge Advocate General, United States Air Force.

Special Victims' Counsel

Rules of Practice and Procedure

1 July 2013

The Air Force succeeds because of the professionalism and discipline of our Airmen. Sexual assault undermines that professionalism and discipline, harming not only the individuals involved, but also their unit, their mission, and our Service. When a fellow Airman is sexually assaulted, it is devastating. It destroys trust. It demoralizes families. And we're doing it to ourselves. We MUST do more to protect one another from this crime, by…strengthening our support of victims and making a culture of trust and respect a reality for everyone in our Air Force.

- General Mark A. Welsh III, Air Force Chief of Staff, 18 November 2012

BACKGROUND

Sexual assault in the military is a significant concern for the entirety of the Department of Defense. As General Welsh notes, sexual assault causes material harm to the individuals affected, units and their mission, and to the Service as a whole. Sexual assault in the military also erodes the trust placed in the Services by senior government leaders and the American people.

As part of a larger Air Force (AF) program to combat sexual assault, the JAG Corps has worked to find ways to support the goals of the AF in combating sexual assault. This document details our plan to increase support to victims of sexual assault.

On 9 November 2012, OSD/GC issued a memo addressing "Legal Assistance to Victims of Sexual Assault." The issue examined in the memo is the scope of legal assistance that may legally be provided by judge advocates (and supported by paralegals) to the victims of sexual assault. The memo concludes that "to the extent the victim could retain the advice or representation of private counsel, [10 U.S.C.] §§ 1044 and 1565b authorizes, and certainly does not prohibit, JAGs from providing the same legal advice and representation, to the same extent." The memo also states, "when read together, 1044 and 1565b authorize, and certainly do not preclude, legal assistance to a victim of a sexual assault in criminal contexts, including attending interviews of the victim and interfacing with military prosecutors, defense counsel and investigators."

This memo is the direct authority necessary to allow the JAG Corps to create a Special Victims' Counsel (SVC) Program. A manpower request has been made for additional JAG and paralegal billets to stand up a new organization, likely under the Air Force Legal Operations Agency.

The SVC Program does not increase a victim's standing in court-martial hearings and other military justice proceedings beyond the standing victims are currently afforded under existing law and rules (e.g., evidentiary hearings under MREs 412, 513, and 514). The SVC Program will provide organic counsel from the AF JAG Corps, vice limiting victims to hiring private civilian counsel, who often lack experience in military matters and practice under the UCMJ. Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under RCM 103 and do not have the same entitlements as parties under the UCMJ.

TJAG INTENT FOR SVC PROGRAM

The purpose of the SVC Program is to:

- Provide advice: develop victims' understanding of the investigatory and military justice processes; and
- Provide advocacy: protect the rights afforded to victims in the military justice system;
- Empower victims by removing barriers to their full participation in the military justice process.

Strengthening our support to victims in this way will result in a more robust opportunity for victims to be heard, to retain and take advantage of their rights, and enhance the military justice system while neither causing unreasonable delay nor infringing upon the rights of an accused.

SVC PROGRAM OBJECTIVES

1. Provide Support Through Independent Representation. Throughout the military justice process, trial counsel (TC) represents the interests of the government, and accused members are provided military defense counsel (MDC) who defend them and represent their interests. In the past, victims in the court-martial process have not generally been represented by an attorney. While the interests of the government and victims are frequently aligned, this is not always the case. Even when interests coincide, TC are unable to provide legal representation to victims or to provide advice outside the scope of the Victim and Witness Assistance Program (VWAP). An independent SVC will have a duty to represent the interests of the victim – and only the victim. The objective is not for SVC to establish an adversarial relationship with TC or defense counsel, but to provide victims with the peace of mind of having independent representation by a licensed attorney – one eminently capable of communicating their interests throughout the military justice process.

2. Build and Sustain Victim Resiliency. When sexual assault victims make an unrestricted report, it is critical that they commit to cooperating with the prosecution of the alleged perpetrator. However, a sizeable population of victims in the AF elects to opt out and declines to participate in the military justice process before trial is convened (e.g., 29% or 96 victims in FY11). The reasons for this are diverse. An SVC would be obligated to zealously advocate for the client, building and sustaining resilience among sexual assault victims by helping victims to understand the investigatory and military justice processes and advocating for the victim to commanders or the court when necessary.

3. Empower Victims. Victims have several enumerated rights in the military justice process, but are not always aware of these rights or do not feel they have a voice to enforce these rights. An SVC will provide professional and knowledgeable counsel to victims in voicing their concerns and complaints with the process and enforcing these enumerated rights, without infringing upon the rights of the accused.

4. Increase Level of Legal Assistance Provided to Victims. In the 2010 AF Gallup Survey of the Prevalence/Incidence of Sexual Assault in the AF, when asked whether or not they received any type of help after the sexual assault, such as legal counseling, mental health services, or medical care, the vast majority of victims (79.5% of female victims and 92.5% of male victims) reported not receiving any of these forms of help. The AF currently provides legal assistance to victims of crime for personal civil legal matters unconnected to the court-martial process. The SVC Program is an enhancement of this service for victims of sexual assault to support them through the challenges of participating in an investigation and prosecution of the alleged perpetrator and to mitigate their sense of re-victimization by the criminal justice process.

TABLE OF RULES

The Rules in this document are transitional and subject to further revision as the AF JAG Corps experience in fielding SVC dictates.

Non-compliance with the SVC Rules, in and of itself, gives rise to no rights or remedies to the victim or the accused, and the Rules will be interpreted in this context.

These Rules should be read in conjunction with the Air Force Special Victims' Counsel Charter. Both the Rules and the Charter were approved on 1 July 2013 by Lieutenant General Richard C. Harding, The Judge Advocate General, United States Air Force.

Rule

1. **Victims' Eligibility for SVC**
   - 1.1. SVC Eligibility for AF Members
   - 1.2. SVC Eligibility for Adult Dependents of AF Members
   - 1.3. SVC Eligibility for Other Services' Members
   - 1.4. SVC Eligibility for Adult Dependents of Other Services' Members
   - 1.5. SVC Eligibility for Other Categories
   - 1.6. Basic Military Training and Technical Training
   - 1.7. Deployed Members
   - 1.8. Determination of Eligibility

2. **Referral Process**
   - 2.1. Informing Victim of Availability of SVC
   - 2.2. Victims May Contact SVCs Directly
   - 2.3. Victim Referral Process
   - 2.4. Declination of SVC
   - 2.5. Solicitation

3. **Roles and Responsibilities**
   - 3.1. Representation of Victim is SVC's Primary Duty
   - 3.2. Scope of Representation Letter
   - 3.3. Duration of SVC-Client Relationship
   - 3.4. Functional Relationship with SARC and FAP
   - 3.5. Functional Relationship with VWAP

4. **Scope of Representation – Advocacy to Military Justice Actors and Air Force and Department of Defense Agencies**
   - 4.1. Advocacy During Military Justice Process
   - 4.2. Notice of Representation
   - 4.3. SVC Attendance at Interviews
   - 4.4. Notification to Central Docketing Office of SVC Representation
   - 4.5. Entering an Appearance with Military Judge
   - 4.6. Standing under the UCMJ

4.7. Advocacy to Air Force and Department of Defense Agencies
4.8. SVC Notification to Third Parties
4.9. Access to Information

5. Scope of Representation – Collateral Misconduct
5.1. Covered Collateral Misconduct
5.2. Referral of Victim to MDC
5.3. SVCs May Support MDC for Collateral Misconduct
5.4. Notice of Representation for Collateral Misconduct
5.5. Oversight of SVCs for Collateral Misconduct

6. Scope of Representation – Advocacy to Civilian Prosecutors and Agencies
6.1. SVC Advocacy Off Base
6.2. SVC Precluded from Representing Victims in Civilian Courts

7. Scope of Representation – Interaction with Media
7.1. Advocacy to Media
7.2. Trial Publicity

8. Training and Certification Requirements
8.1. TC Certification Required
8.2. SVC Training Course Required
8.3. SVCs are Non-Deployable

9. Independent Command and Reporting Structure
9.1. Professional Oversight of SVCs
9.2. Functional and Policy Oversight of SVC Program
9.3. SVC Communication with Staff Judge Advocates
9.4. Office Space
9.5. Funding

Rule 1. VICTIMS' ELIGIBILITY FOR SPECIAL VICTIMS' COUNSEL

The AF provides legal assistance to eligible beneficiaries as stated in AFI 51-504, para. 1.3, to include active duty, reserve and guard members when in an active status or for mobilization and deployment related assistance, dependents and former members who are entitled to an ID card, civilian employees and contractor personnel who are deploying to or in the AOR, foreign military personnel and their dependents assigned to the United States under official orders, and unique situations.

Legal assistance is not categorically provided under AFI 51-504 to victims of crime without a military nexus (e.g., a civilian who does not fall into any of the categories above).

Currently, the AF provides legal assistance for "personal civil legal affairs" to eligible beneficiaries who are victims of crime, including sexual assault, consistent with the availability of resources, the expertise within the legal office, and the Staff Judge Advocate's (SJA) ability to manage conflicts of interest. AFI 51-504, para. 1.4.16. OSD/GC's opinion states that, "personal civil legal affairs" can include representing a victim in a criminal forum where the victim's assailant is the accused in a court-martial.

In order to be eligible for SVC, a victim of sexual assault must report (in a restricted or unrestricted report) they are a victim of sexual assault under the UCMJ, including rape, sexual assault and other unwanted sexual contact that is aggravated, abusive, or wrongful (including unwanted and inappropriate sexual contact), forcible sodomy, 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).

Rule 1.1. *SVC Eligibility for AF Members.*

All AF Active Duty, AF Reserve, and Air National Guard victims, who are in Title 10 status at the time of the offense, and report they are a victim of sexual assault are eligible for an SVC. In addition to the above crimes under the UCMJ, AF members who report they are a victim of sexual assault under state and federal laws criminalizing sexual assault, when the alleged perpetrator is a civilian or an unknown perpetrator, are eligible for SVC.

> *Prior Service Sexual Assaults.* AF members who are on active duty, but were victims of sexual assault prior to enlistment or commissioning are not eligible for the SVC Program. They are eligible for legal assistance IAW AFI 51-504 and SAPR services, including both unrestricted and restricted reporting options, IAW DoDI 6495.02, para. 2.e.

Rule 1.2. *SVC Eligibility for Adult Dependents of AF Members.*

All adult dependents of Active Duty AF members who are an eligible dependent at the time of the offense and report that they are a victim of sexual assault under the UCMJ are eligible for an SVC when an AF commander may exercise jurisdiction.

> *Non-Spouse Adult Dependents.* For purposes of this rule, the non-spouse dependents, as defined in AFI 36-3026, *Identification Cards for Members of the Uniformed Services, their Eligible Family Members, and Other Eligible Personnel*, must be unmarried between the ages of 18 and 20, a full time student between the ages of 18 and 22, or an incapacitated child over the age of 21.

Rule 1.3. ***SVC Eligibility for Other Services' Members.***

All Army, Navy, Marine Corps, and Coast Guard Active Duty, Reserve, and National Guard victims, who are in Title 10 status at the time of the offense, and file an unrestricted report that they are a victim of sexual assault under the UCMJ are eligible for an SVC when an AF commander may exercise jurisdiction.

(a) *Jurisdiction*. The AF must have a possibility of obtaining jurisdiction in the case, meaning the alleged perpetrator is a member of the AF who committed the crime while in Title 10 status. SVC representation is not authorized to victims in other Services when the alleged perpetrator is a civilian or a member of another Service.

(b) *Courtesy Notification*. The SVC will provide a courtesy notification of representation to the victim's commander.

Rule 1.4. ***SVC Eligibility for Adult Dependents of Other Services' Members.***

All adult dependents of Active Duty members of other Services who are an eligible dependent at the time of the offense and file an unrestricted report that they are a victim of sexual assault under the UCMJ are eligible for an SVC when an AF commander may exercise jurisdiction.

Non-Spouse Adult Dependents. For purposes of this rule, the non-spouse dependents, as defined in AFI 36-3026, *Identification Cards for Members of the Uniformed Services, their Eligible Family Members, and Other Eligible Personnel*, must be unmarried between the ages of 18 and 20, a full time student between the ages of 18 and 22, or an incapacitated child over the age of 21.

Rule 1.5. ***SVC Eligibility for Other Categories of Victims.***

All remaining categories of individuals eligible for legal assistance under AFI 51-504 are eligible for SVC when they file an unrestricted report that they are a victim of sexual assault under the UCMJ and the AF may exercise jurisdiction.

(a) *Jurisdiction*. The AF must have a possibility of obtaining jurisdiction in the case, meaning the alleged perpetrator is a member of the AF who committed the crime while in Title 10 status. SVC representation is not authorized to victims in this category when the alleged perpetrator is a civilian or a member of another Service.

(b) *Minors*. Victims who are minors are not eligible for SVC.

Rule 1.6. ***Basic Military Training and Technical Training***

All entry-level status AF Active Duty, AF Reserve, and Air National Guard members who are alleged to have been involved in an unprofessional relationship (as defined by AETC policy) that involves physical contact of a sexual nature with basic military training or technical training faculty or staff are eligible for SVC.

(a) *Entry-Level Status*. As defined in AFI 36-3208, *Administrative Separation of Airmen*, Airmen are considered to be in entry-level status during the first 180 days of continuous active military service or the first 180 days of continuous active military service after a break of more than 92 days of active service.

(b) *Consent*. Airmen who meet the above criteria are eligible for SVC because it is uncertain in these circumstances whether consent is actually present.

Rule 1.7. *Deployed Victims.*

SVC will be provided to deployed victims as reach back support.

Rule 1.8. *Determination of Eligibility*.

The Chief Special Victims' Counsel Division, AFLOA/CLSV, has the final authority on determination of eligibility and may grant exceptions to policy on a case-by-case basis consistent with 10 U.S.C. §§ 1044 and 1565b.

Rule 2. REFERRAL PROCESS

10 U.S.C. § 1565b requires that servicemembers and their dependents, who are victims of sexual assault, be informed of the availability of legal assistance as soon as the member or dependent seeks assistance from a Sexual Assault Response Coordinator (SARC), Sexual Assault Prevention and Response Victim Advocate (SAPR VA), the Family Advocacy Program (FAP), military criminal investigator, victim liaison, or TC.

Rule 2.1. *Informing Victim of Availability of SVC.*

The first individual to make contact with the victim (e.g., SARC, SAPR VA, FAP, investigator, victim liaison, or TC) will inform the victim of the availability of SVC, as an extension of legal assistance for victims, in accordance with 10 U.S.C. § 1565b, utilizing DD Form 2701, *Initial Information for Victims and Witnesses of Crime*. The contact information for the local SARC or FAP, as determined by the victim's relationship with the alleged perpetrator, will be included on the DD Form 2701.

Rule 2.2. *Victims May Contact SVCs Directly.*

(a) Victims may contact SVC offices directly to request SVC representation.

(b) *Eligibility Review.* The SVC or SVP (Special Victims' Paralegal) who initially meets with the victim will determine if the victim is eligible for the SVC Program. If the victim is not eligible, the SVC or SVP will advise the victim whether or not the victim is eligible for legal assistance. The SVC or SVP will facilitate referrals to other available resources such as the SARC, FAP, or VWAP. The appointment will be recorded as legal assistance in WebLIONS and the victim will not be recorded as a client represented by the SVC Program.

(c) *Legal Assistance Only*. If a victim contacts an SVC office and after meeting with the SVC indicates he or she does not wish to have an SVC detailed, the appointment will be recorded as legal assistance in WebLIONS and the victim will not be recorded as a client represented by the SVC Program.

(d) *Detail SVC.* If the victim requests SVC representation and is eligible for the SVC Program, the SVC or SVP will run a conflict check and detail an SVC to represent the victim. A courtesy notification will be provided to the SJAs of the victim and the alleged perpetrator when an SVC has been detailed. The victim will be recorded as a client represented by the SVC Program.

(e) *SVCs May Not Take Restricted Reports*. IAW DoD policy, service members and military dependents may make restricted reports to the SARC and SAPR VA (and equivalent FAP personnel), or healthcare personnel. SVCs may not receive restricted reports. SVCs may facilitate a victim making a restricted report to one of these specified individuals.

Rule 2.3. *Victim Referral Process.*

(a) *Request for SVC-Unrestricted Reports*. When a victim whose report is unrestricted indicates a desire to request SVC, the individual receiving this request should contact the SARC/FAP as appropriate (i.e., SARC unless the alleged perpetrator is the victim's

spouse or intimate partner). If the request is made to the legal office (e.g. through trial counsel, VWAP, or legal assistance attorney), there is no need to contact the SARC/FAP. The SARC/FAP will provide the completed SVC referral form to the installation SJA (or designee).

(b) *Legal Office Review*. The installation legal office who receives the SVC request, directly from the victim or from the SARC/FAP, will review the referral form for eligibility and add necessary information on the status of the case.

(c) *Forward to SVC Office*. SJAs or their designee will forward the SVC request to an SVC office IAW Attachment 1, copying AFLOA/CLSV at afloa.svc@pentagon.af.mil.

(d) *Multiple Victims*. When the SARC/FAP is making a request for multiple victims from the same case, he or she will make this known, to ensure that different SVCs are assigned to each victim.

(e) *Request for SVC-Restricted Reports*. When a victim whose report is restricted indicates a desire to request an SVC, the individual receiving this request should forward the SVC request to an SVC office IAW Attachment 1, copying AFLOA/CLSV at afloa.svc@pentagon.af.mil. Restricted reports do not need to go through installation legal offices.

(f) *Detail SVC within 48 Hours*. The appropriate SVC office will provide the name and contact information of the detailed SVC to the victim through the installation SJA and SARC/FAP with a goal of providing the SVC contact information to the SARC/FAP (and SJA when it is an unrestricted report) within 48 hours of the initial request. A courtesy notification will be provided to the SJAs of the victim and the alleged perpetrator when an SVC has been detailed.

(g) *SJA Responsibility*. The first SJA to receive the request for SVC is responsible for submitting the SVC referral form to their installation or regional SVC office, while copying AFLOA/CLSV at afloa.svc@pentagon.af.mil.

(h) *Responsibility for Detailing SVC*. All SVCs and Special Victims' Paralegals (SVPs) have detailing authority for their respective Regional and Satellite offices IAW Attachment 1. AFLOA/CLSV maintains oversight over the SVC detailing process.

(i) *Appellate Practice*. The Chief, Special Victims' Counsel Division, AFLOA/CLSV, has the authority to assign appellate SVC representation to a victim when the potential appellate issue is in the interest of the SVC Program.

Rule 2.4. *Declination of SVC.*

While victims do not need to sign an acknowledgment or waiver declining SVC, the SARC/FAP may maintain an internal memo to document the declination. This document is not an indication that the victim has waived the availability of SVC and victims may change their mind and request SVC at any point.

Rule 2.5. *Solicitation.*

SVCs will not solicit clients.

Rule 3. ROLES AND RESPONSIBILITIES

The AF and Department of Defense provide a wide range of services and support to victims of sexual assault through a variety of personnel, agencies and programs, including commanders, the Sexual Assault Prevention and Response Program, Surgeon General, Airman & Family Readiness Center, AF Office of Special Investigations (AFOSI), Security Forces Office of Investigation (SFOI), Chaplains, FAP, and the Judge Advocate General's Corps. While each of these agencies provides distinct and critical support and services to victims, there is also overlap in certain roles and responsibilities, requiring coordination in providing multi-disciplinary support to victims.

It is important to note that while there is overlap in the objectives of the SVC Program and the Victim and Witness Assistance Program (VWAP), the SVC Program does not supplant or augment VWAP, but is a separate program altogether. VWAP implements the Victim and Witness Protection Act, 42 U.S.C. §§ 10601-10605, the Crime Victims' Rights Act, 18 U.S.C. § 3771, DoD Directive 1030.01, *Victim and Witness Assistance*, DoD Instruction 1030.2, *Victim and Witness Assistance Procedure*, and AFI 51-201, *Administration of Military Justice*, Chapter 7. One of the objectives of VWAP is to foster cooperation of victims and witnesses within the military criminal justice system. While one of the objectives of the SVC Program is to build and sustain victim resiliency throughout the military justice process, there may be times when an SVC advises a victim that cooperation with the system is not in his or her best interests, or regardless of SVC's advice, a victim declines to cooperate and the SVC executes the victim's choices. Another objective of VWAP is to ensure best efforts are made to afford to victims of crime certain enumerated rights. In representing victims, SVC will advocate for these rights, strengthening VWAP.

Rule 3.1. *Representation of Victim is SVC's Primary Duty*.

SVC representation of victims is the SVC's primary duty for the duration of representation.

Rule 3.2. *Scope of Representation Letter*.

During the SVC's initial meeting with the victim (either over the phone or in person), the SVC will review the scope of representation letter with the victim, and the victim will sign the letter, acknowledging the scope of the attorney-client relationship.

Rule 3.3. *Duration of SVC-Client Relationship*.

Once an SVC is detailed, that SVC remains the counsel for the victim for all matters relating to the sexual assault, unless released by the victim.

(a) *Transfer of Counsel*. Transfer of counsel due to deployments, expedited transfers, and other unique circumstances will be made through AFLOA/CLSV, with consent of the victim.

(b) *Termination of SVC-Client Relationship*. In general, the SVC-client relationship will terminate when case disposition is complete. For courts-martial, case disposition is considered complete at action or earlier termination of charges.

(c) *Declination or Termination of Representation*. An SVC may decline or terminate representation only IAW AF Rule of Professional Conduct 1.16, the scope of representation letter, and after consultation with AFLOA/CLSV.

Rule 3.4. *Functional Relationship with SARC and FAP*.

The SARC serves as the installation's single point of contact for integrating and coordinating sexual assault victim care services IAW AFI 36-6001, *Sexual Assault Prevention and Response Program*. The FAP fulfills this role for sexual assault victims who are in a domestic or intimate partner relationship. Services may begin at the initial report of sexual assault. As discussed above, the SARC or FAP will notify the installation SJA (or designee) when a victim requests an SVC.

(a) *Notify SARC/FAP of Representation*. Once an attorney-client relationship is formed, SVCs will inform the SARC/FAP of this representation, with the client's permission. This notice is intended to make SARCs and FAP aware that the victim is represented by legal counsel in order to facilitate multi-disciplinary support for the victim.

(b) *Delineation of Responsibilities*. IAW AFI 36-6001, the SARC coordinates victim care services, to include medical care and counseling services, and the FAP fulfills this role for domestic or intimate partner sexual assault victims. In support of the SARC/FAP, SVCs should advise victims of the services available. SVCs may advocate to the responsible agencies when these services are either not being provided, or are not being provided in the manner intended.

(c) *Legal Advisor*. The SJA and base legal office remains the legal advisor for the SARC and commanders.

Rule 3.5. *Functional Relationship with VWAP*.

VWAP, through the SJA, VWAP Coordinator, and victim liaison, ensures that victims are afforded certain enumerated rights under federal law, such as consultation with TC and notification of all court-martial proceedings. These rights are listed in AFI 51-201, Chapter 7.

(a) *Victim Liaison*. Under VWAP, a victim liaison is assigned to each victim. Along with the SJA and TC, the victim liaison is the SVC's point of contact in the legal office for obtaining case updates and communicating questions and concerns from the victim.

(b) *No Cause of Action*. While SVC may advocate for a victim's rights under federal law, there is no cause of action or defense in favor of any person arising out of a failure of the AF to comply with VWAP.

(c) *No Change to VWAP*. Establishment of the SVC Program does not necessitate any change to the scope of VWAP.

Rule 4. SCOPE OF REPRESENTATION – ADVOCACY TO MILITARY JUSTICE ACTORS AND AIR FORCE AND DEPARTMENT OF DEFENSE AGENCIES

The OSD/GC memo states that 10 U.S.C. §§ 1044 and 1565b "authorize, and certainly do not preclude, legal assistance to a victim of a sexual assault in criminal contexts, including attending interviews of the victim and interfacing with military prosecutors, defense counsel, and investigators." The memo clearly envisions that SVC may represent sexual assault victims throughout the military justice process and advocate their interests to all actors within the system.

The SVC Program does not increase a victim's standing in court-martial hearings and other military justice proceedings beyond the standing victims are currently afforded under existing law and rules (e.g., evidentiary hearings under MREs 412, 513, and 514). While MREs 412, 513 and 514 do not discuss an SVC's role in these evidentiary hearings, the MREs do allow for victims to "be heard." For the purposes of these three MREs and future MREs or RCMs giving victims the right to be heard in military justice proceedings, SVCs or civilian victims' counsel may be allowed to speak on their clients' behalf, as permitted by the presiding military judge.

TC and the accused's MDC need to obtain consent from SVC prior to communicating with represented victims under AF Rule of Professional Conduct 4.2, which states that "in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Rule 4.1. *Advocacy During Military Justice Process*

SVC may advocate a victim's interests to any actor in the military justice process, including, but not limited to, commanders, convening authorities, the SJA, TC, the accused's MDC, and, to the extent authorized by the MCM, military judges. This includes matters in which the government is required to consult with the victim under federal law and areas delineated in the SVC Charter.

(a) *Victims' Right to Consultation.* IAW AFI 51-201, para. 7.12.12, the government will consult with victims and obtain their views concerning:

i. Decisions not to prefer charges;
ii. Dismissal of charges;
iii. Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement;
iv. Pretrial agreement negotiations, including PTA terms;
v. Plea negotiations;
vi. Discharge or resignation in lieu of trial by court-martial; and
vii. Scheduling of judicial proceedings where the victim is required or entitled to attend.

(b) *Victims' Right to Notification of all Court-Martial Proceedings.* IAW AFI 51-201, para. 7.12.8, the government will provide the victim with the earliest possible notice of:

i. The status of the investigation of the crime, to the extent it will not interfere with the investigation and is appropriate;

ii. The accused's pretrial status and any subsequent change in that status, including, but not limited to, the accused being placed in pretrial confinement, being released from pretrial confinement, or escaping from pretrial confinement;
iii. Preferral and referral of charges or a decision not to pursue prosecution;
iv. A pretrial confinement hearing and/or Article 32 investigation;
v. Notification of the scheduling, including changes and delays, of each court-martial proceeding the victim is entitled to or required to attend;
vi. The acceptance of a guilty plea or announcement of findings; and
vii. The sentence imposed, including the date on which the accused becomes eligible for release from confinement, or parole, if applicable.

(c) *Communication with TC.* SVC will communicate his or her schedule to TC, which TC will consider when scheduling Article 32 hearings, docketing courts-martial, and other military justice proceedings where the victim's presence is required IAW the victim's desire for the SVC to be present.

Rule 4.2. ***Notice of Representation***

Once an attorney-client relationship is formed, SVCs will serve the SJA, TC, DC, AFOSI, SFOI, the victim's commander, and the SARC/FAP with a copy of the representation letter, with the client's consent, in cases where victim has made an unrestricted report. For restricted reports, SVCs will only provide the notice of representation to the SARC/FAP, with the client's consent.

Enhanced Communication. Once a notice of representation letter is served on an office, the SVC will discuss with the office (e.g., TC) the matters about which the SVC's client may be contacted directly, without first going through the SVC.

Rule 4.3. ***SVC Attendance at Interviews.***

SVCs are permitted to attend all interviews of the victim with investigators, TC, and DC. At all interviews, SVCs should ensure that the interviewer has an additional party present to reduce the likelihood that the SVC may be called later as a witness.

Rule 4.4. ***Notification to Central Docketing Office of SVC Representation.***

When a victim is represented by an SVC, TC or the base Chief of Military Justice will notify the Central Docketing Office (CDO) of the SVC's name. This notice will be in writing and submitted prior to the docketing conference using the standard template that provides the CDO notice of referral and identification of counsel.

Rule 4.5. ***Entering an Appearance with Military Judge.***

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

Rule 4.6. ***Standing under the UCMJ.***

Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under RCM 103 and do not have the same entitlements as litigation parties under the UCMJ.

UCMJ Proceedings. MREs 412, 513, and 514 afford victims a reasonable opportunity to attend these evidentiary hearings and be heard. SVCs may represent victims in these and other UCMJ proceedings where victims are afforded standing, as permitted by the presiding military judge, and may obtain copies of motions and other relevant information necessary in order for the victim's opportunity to be heard to be meaningful.

Rule 4.7. ***Advocacy to AF and Department of Defense Agencies.***

SVCs may advocate a victim's interests to agencies and offices within the AF and Department of Defense where there is a nexus to the client's status as a victim, consistent with the SVC Charter.

Rule 4.8. ***SVC Notification to Third Parties.***

SVCs will ensure that third parties understand that the victim is their client, and not the AF.

Rule 4.9. ***Access to Information.***

SVCs have a right to records which is no greater than their client's rights. SVCs should consult with victims and advise them that other information may be obtained with the victim's consent that may assist the SVC in representing the victim. The victim's right to notifications of other information is discussed above in Rule 4.1(b).

Rule 5. SCOPE OF REPRESENTATION – COLLATERAL MISCONDUCT

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

The OSD/GC memo states that "criminal proceedings against the perpetrator of a sexual assault can be said to involve the 'personal civil legal affairs' of the victim, who faces no criminal liability." The OSD/GC memo addresses the issue of whether 10 U.S.C. §§ 1044 and 1565b prohibits representational legal assistance. The OSD/GC memo does not address whether the scope of SVC may include collateral misconduct. Although such representation may not be provided under these statutes, TJAG has the authority under Article 27, UCMJ, to authorize SVC to provide defense services.

Rule 5.1. *Covered Collateral Misconduct.*

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

(a) *Eligible Victims*. Only victims that are members of the AF are eligible for representation for collateral misconduct. Victims that are members of other Services may seek representation IAW their Service's MDC programs.

(b) *MDC Charter*. Counsel for collateral misconduct prosecuted under the UCMJ will be provided within the scope of the MDC Charter.

(c) *Civilian Victims*. Representation for collateral misconduct is generally not authorized for civilian victims, except for the limited exception provided in the MDC Charter.

Rule 5.2. *Referral of Victim to MDC.*

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

(a) *Victim Notification*. The SVC will inform the victim of the availability of MDC. The SVC will inform the victim that he or she will not initially serve as the victim's sole or lead counsel for purposes of collateral misconduct.

(b) *Victim Referral*. In the event that qualifying action is initiated or the victim indicates a desire to meet with MDC, the SVC will contact the servicing Senior Defense Counsel (SDC) or AFLOA/JAJD and provide the victim with the name and contact information for the detailed MDC.

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

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

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

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

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

Rule 5.4. ***Notice of Representation for Misconduct***

When an SVC is representing a victim for collateral misconduct, the SVC will serve the SJA, TC, DC, AFOSI, SFOI, and the victim's commander with a notification that the SVC is also serving as a defense counsel. Such notification may be included in the initial notice of representation under Rule 4.2 or in a subsequent notice.

Rule 5.5. ***SVC Oversight for Collateral Misconduct.***

Oversight of SVC for purposes of collateral misconduct will be provided by AFLOA/JAJD, through an SDC.

Rule 6. SCOPE OF REPRESENTATION – ADVOCACY TO CIVILIAN PROSECUTORS AND AGENCIES

Representation in civilian court is not authorized under this program. In addition, most SVCs will be precluded from representing victims in civilian courts by state licensing requirements.

SVCs may have the opportunity to advocate to local prosecutors and civilian agencies. For instance, when a crime is committed off base and the alleged perpetrator is subject to the UCMJ, both the AF and civilian prosecuting agency will have jurisdiction. AF policy is to maximize jurisdiction over military members whenever possible. However, there may be instances where charges are brought by civilian authorities instead of the AF. It is appropriate to allow SVC to advocate their client's interests to civilian prosecutors.

SVC may provide assistance to a victim with respect to state and federal victim compensation and restitution programs.

AFI 51-504, para. 1.6.4, states that when contacting third parties, legal assistance attorneys must avoid creating the impression that they represent the AF interests in resolving the client's concerns or that the AF has an interest in the outcome of the matter.

Rule 6.1. ***SVC Advocacy Off Base.***

SVC may generally advocate a victim's interests off base to civilian prosecutors, law enforcement agencies, and other civilian and government agencies.

> *Department of Veterans Affairs*. SVC may not advocate a victim's interests to the Department of Veterans Affairs or represent a victim in the disability evaluation system. SVC's representation in VA matters is limited to providing advice in the scope of traditional legal assistance.

Rule 6.2. ***SVC Precluded from Representing Victims in Civilian Courts.*** As a matter of policy, SVCs are precluded from representing victims in civilian courts. SVCs will explain this limitation to the scope of representation to their client.

Rule 6.3. ***SVC Notification to Third Parties.*** SVCs will ensure that third parties understand that the victim is their client, and not the AF.

Rule 7. SCOPE OF REPRESENTATION – INTERACTION WITH MEDIA

A lawyer, who is participating or has participated in the investigation or litigation of a matter, shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. AF Rule of Professional Conduct 3.6. Although SVCs are not a "party" under this Rule, SVCs will comply as a matter of policy.

MDC should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding. AF Standards for Criminal Justice 4-1.3. This Standard is expanded upon in AF Standards for Criminal Justice 8-1.1. This standard will also apply to SVCs.

A lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made shall be limited to such information as is necessary to mitigate or correct information that is the subject of recent publicity. AF Rule of Professional Conduct 3.6. This Rule will enable SVC to defend a client's interests in the media.

AF Rule of Professional Conduct 3.6 outlines other statements lawyers may make to the media, including stating the claim, offense or defense involved, the scheduling or results of any step in the process, and information contained in the public record.

Rule 7.1. *Advocacy to Media.*

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

Rule 7.2. *Trial Publicity.*

As a matter of policy, the restrictions on trial publicity in Rule 3.6 of the AF Rules of Professional Conduct apply to SVC.

Rule 8. TRAINING AND CERTIFICATION REQUIREMENTS

All AF JAGs are licensed and competent to practice law and receive specialized instruction on the specific areas of law in which they practice. The AF Rules of Professional Conduct apply to all military and civilian lawyers and paralegals, to include SVCs and SVPs. AF JAGs follow AF Rules of Professional Conduct, Rule 1.1, to "provide competent representation…using legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation."

Rule 8.1. *Trial Counsel Certification Required.*

Only JAGs who are certified as trial counsel under Article 27(b), UCMJ, are authorized to serve as SVC.

Rule 8.2. *SVC Training Course Required.*

JAGs and paralegals who are selected to serve as SVCs and SVPs must successfully complete a TJAG-approved SVC course as soon as practicable.

Rule 8.3. *SVCs are Non-Deployable.*

SVCs will be in a non-deployable (enabler) status while serving as SVC.

Rule 9. INDEPENDENT COMMAND AND REPORTING STRUCTURE

18 U.S.C. § 205(a) prohibits an attorney from acting against the United States "other than in the proper discharge of his official duties." As such, like military defense counsel, SVC would not be acting in violation of 18 U.S.C. 205 because they have been detailed to represent victims within a defined scope. Those defined duties are the SVC's official duty. Additionally, AF senior leadership has determined that it is in the AF's best interest to provide sexual assault victims with legal representation; therefore, 18 U.S.C. § 205(a) would not be violated when an SVC performs his/her primary function as directed by the AF TJAG.

Rule 9.1. ***Professional Oversight of SVCs.***

Installation level SJAs will provide professional oversight of part-time SVCs while performing non-SVC duties.

Rule 9.2. ***Functional and Policy Oversight of SVC Program.***

Functional and policy oversight of SVCs will be provided by AFLOA/CLSV.

(a) *Detailing Responsibility*. AFLOA/CLSV has oversight over the detailing process. In general, SVC Regional and Satellite offices will detail SVCs to victims who request an SVC IAW Attachment 1 and internal AFLOA/CLSV guidance.

(b) *Oversight of SVCs for SVC Duties.* AFLOA/CLSV will provide professional oversight of SVCs while performing SVC duties.

(c) *Oversight of SVCs for Collateral Misconduct.* AFLOA/JAJD will provide professional oversight of SVCs while performing duties for purposes of collateral misconduct.

(d) *Tracking System.* A tracking system will be used to track SVCs and their workload.

Rule 9.3. ***SVC Communication with SJAs.***

Part-time SVCs will communicate their workload and schedule pertaining to SVC matters to their installation SJAs without violating attorney-client confidences. Additional discussions about the representation will comply with Rule 1.6 of the AF Rules of Professional Conduct.

Rule 9.4. ***Office Space.***

Installation SJAs that host SVCs (usually the installation where the alleged perpetrator's court-martial will be convened) will work with their installation commanders to provide appropriate office space for the SVC to meet with victims and fulfill their duties outside of the base legal office.

Rule 9.5. ***Funding.***

Until requested funding is provided in FY14, centralized funding through an AFLOA fund cite will be used to pay associated travel and other costs using a code that will allow for tracking and future reimbursement sought from Sexual Assault Prevention and Response funds.

ATTACHMENT 1

The following base legal offices should contact the SVC office located on their base to request an SVC:

SVC Regional and Satellite Office	SVCs and SVPs*
JB Andrews	Capt Dustin Kouba TSgt Alan Salmones
Cannon	Capt Seth Dilworth
Dover	Capt Benjamin DeYoung
Dyess	Capt Tyler Hiipakka
JB Elmendorf-Richardson	Capt Jennifer Lake MSgt Laurie Holman
Fairchild	Capt Sarabeth Moore
Hurlburt	Capt Eric Selke Capt Luke Spencer TSgt Brian Meeker
Kadena	Capt Chad Evans SSgt Larra Stewart
Keesler	Capt Aaron Buzawa
JBSA-Lackland	Capt Aaron Kirk TSgt Isabel Brooks
RAF Lakenheath	Capt Micah Smith TSgt Tiana Martel
Little Rock	Capt Lauren Rosenblatt
Moody	Capt Kristen Beck
JB McGuire-Dix-Lakehurst	Capt Natasha Clay
Nellis	Capt Ryan Richter TSgt Vanessa Pichon
Offutt	Capt Michael O'Brien
Peterson	Capt Lorraine Sult TSgt Kristy Smart
Ramstein	Capt Kelly Adams Capt Maribel Jarzabek TSgt Jacmaily Gibbs
Scott	Capt Amanda Snipes
Travis	Capt Jed Wangsgard SSgt Jennifer Bingham
Vandenberg	Capt Meghan McCauley
Yokota	Capt Brad Mumford

***Note: Future changes to assigned SVCs/SVPs will be available in Roster under AFLOA/CLSV.**

The following base legal offices should contact their SVC regional office as listed below to request an SVC:

Base Legal Office	SVC Regional Office	SVCs In Region
Arnold JB Anacostia-Bolling JB Charleston Ft Meade Hanscom JB Langley-Eustice Niagara Falls Pope Seymour-Johnson Shaw Rome Labs Westover	**JB Andrews** Capt Dustin Kouba TSgt Alan Salmones afloa.svc.andrews@pentagon.af.mil	Capt Dustin Kouba (Andrews) Capt Natasha Clay (McGuire) Capt Benjamin DeYoung (Dover)
Eielson JB Lewis-McChord JB Pearl Harbor-Hickam	**JB Elmendorf-Richardson** Capt Jennifer Lake MSgt Laurie Holman afloa.svc.jber@us.af.mil	Capt Jennifer Lake (Elmendorf)
Barksdale Columbus Dobbins Duke Field Eglin Homestead MacDill Maxwell Patrick Robins Tyndall	**Hurlburt** Capt Eric Selke Capt Luke Spencer TSgt Brian Meeker afloa.svc.hurlburt@hurlburt.af.mil	Capt Eric Selke (Hurlburt) Capt Luke Spencer (Hurlburt) Capt Kristen Beck (Moody)
Andersen Kunsan Misawa Osan	**Kadena** Capt Chad Evans SSgt Larra Stewart afloa.svc.kadena@us.af.mil	Capt Chad Evans (Kadena) Capt Brad Mumford (Yokota)
Altus Goodfellow (POM-Travis) Laughlin McConnell NAS JRB Ft Worth JBSA-Randolph JBSA-Ft Sam Houston Sheppard Tinker Vance	**JBSA-Lackland** Capt Aaron Kirk TSgt Isabel Brooks	Capt Aaron Kirk (Lackland) Capt Tyler Hiipakka (Dyess) Capt Aaron Buzawa (Keesler) Capt Lauren Rosenblatt (Little Rock)

Whiteman		
RAF Alconbury RAF Croughton Lajes Field RAF Menwith Hill RAF Mildenhall Stavanger	**RAF Lakenheath** Capt Micah Smith TSgt Tiana Martel afloa.svc.lakenheath@us.af.mil	Capt Micah Smith (Lakenheath)
Davis-Monthan Edwards Holloman Kirtland Los Angeles Luke March	**Nellis** Capt Ryan Richter TSgt Vanessa Pichon afloa.svc.nellis@nellis.af.mil	Capt Ryan Richter (Nellis) Capt Seth Dilworth (Cannon)
Buckley Ellsworth FE Warren Grand Forks Grissom Malmstrom Minneapolis-St Paul Minot Schriever USAFA Wright-Patterson	**Peterson** Capt Lorraine Sult TSgt Kristy Smart afloa.svc.peterson@us.af.mil	Capt Lorraine Sult (Peterson) Capt Amanda Snipes (Scott) Capt Michael O'Brien (Offutt)
Al Udeid AEWs Aviano Geilenkirchen Incirlik Spangdahlem	**Ramstein** Capt Kelly Adams Capt Maribel Jarzabek TSgt Jacmaily Gibbs afloa.svc.ramstein@us.af.mil	Capt Kelly Adams (Ramstein) Capt Maribel Jarzabeck (Ramstein)
Beale Hill Mountain Home Presidio of Monterey	**Travis** Capt Jed Wangsgard SSgt Jennifer Bingham	Capt Jed Wangsgard (Travis) Capt Meghan McCauley (Vandenberg) Capt Sarabeth Moore (Fairchild)

Headquarters U.S. Air Force

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Victims' Counsel Program Overview

Col Dawn Hankins
Chief, SVC Division
AFLOA/CLSV
dawn.hankins@pentagon.af.mil

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Overview

- Why?
- What?
- Wow!

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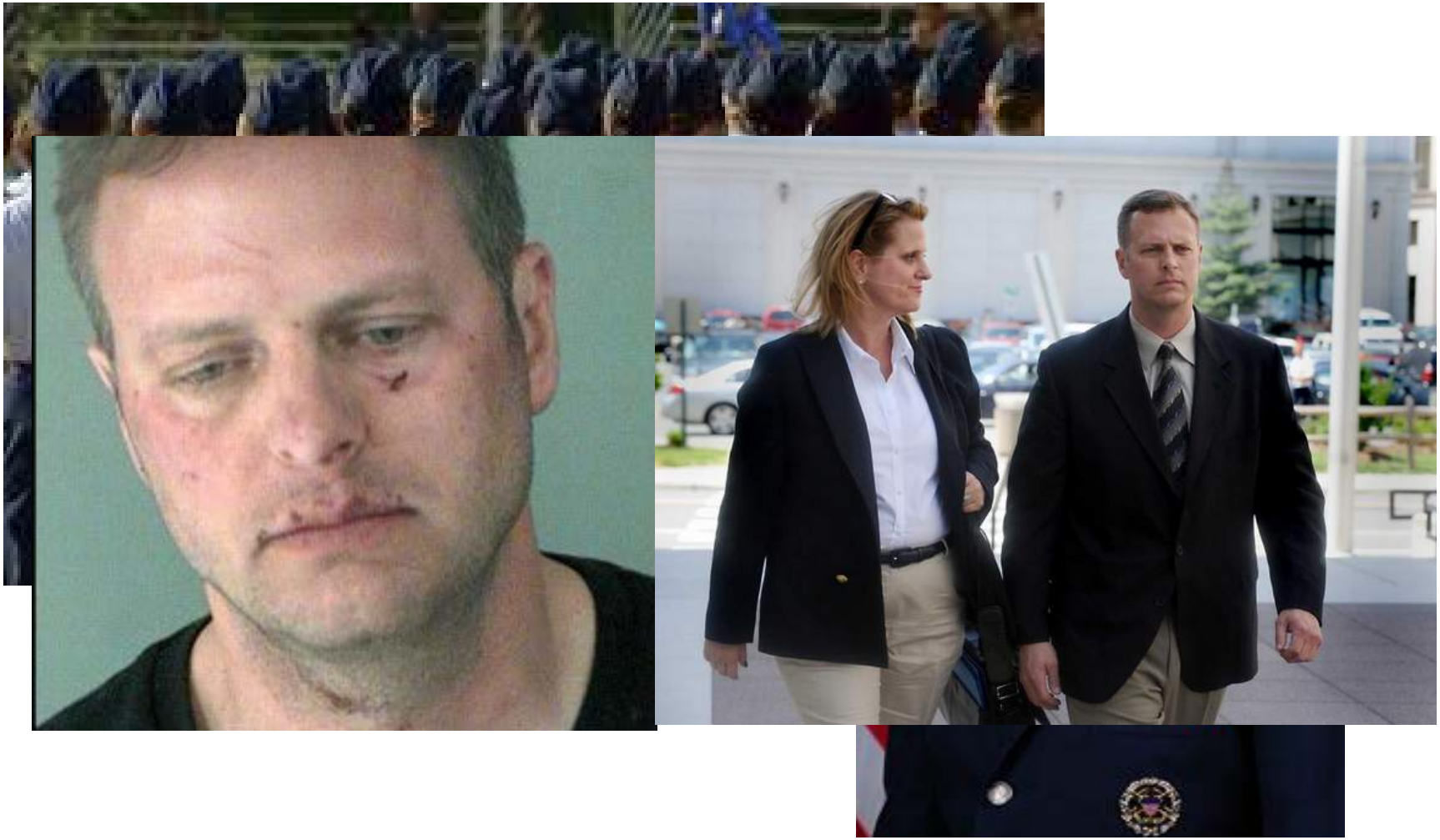
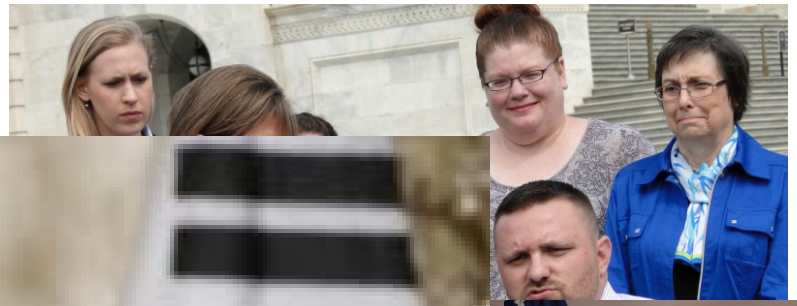
Current Issues



Potential Legislative Response

- *Possible strict liability sexual assault offense for MTIs/trainees*
- *Changes*
- *STOP Ac*
- *SVC Pro*



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The heat is on…

- **How do we increase trust and confidence of victims in the military?**
- **How do we increase reports, keep victims in the system, and take care of our people?**

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One solution?

- ***Secretary of Defense directed all the Services to implement victims' advocacy programs that provide legal advice/representation by 1 Jan 14***

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9 months ago…

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SVC Program Background

- Existing Programs: VWAP, SAPR & Legal Assistance
- Legal assistance in the military – 10 U.S.C. § 1044
- 2012 NDAA – 10 U.S.C. § 1565b
  - "A member of the armed forces, or a dependent member, who is the victim of a sexual assault may be provided…legal assistance provided by military or civilian legal counsel pursuant to section 1044 of this title"
  - Representational legal assistance not provided
- DoD Policy Memo on Legal Assistance to Victims of Crime, 17 October 2011

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SVC Program Background

- **OSD/GC Memo, Legal Assistance to Victims of Sexual Assault, 9 Nov 12**
  - **" …in a military justice sexual assault prosecution, to the extent the victim could retain the advice or representation of a private counsel, §§ 1044 and 1565b [2012 NDAA] authorizes, and certainly does not prohibit, JAGs from providing the same legal advice and representation, to the same extent."**
- **This memo is the direct authority that allowed the AF JAG Corps to establish the SVC Program**
  - **SecDEF Memo, dated 14 Aug 13**

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SVC Program Timeline

- Nov 12 – Jan 13
  - SVC Rules of Practice/Procedure and SVC Charter developed
  - Agreement SVC Program would be a “pilot program” for DoD
- 10-12 Dec – 60 JAGs trained at AF JAG School
- 28 Jan 13 – SVC Program implemented
  - SVCs initially served “part time” out of base legal offices
  - Interim program housed in HQ Military Justice Division
- 10-24 May – 34 JAGs and 10 paralegals trained at AFJAGS
- 1 Jun 13 – Independent program under AFLOA/CLSV – Special Victims’ Counsel Division
  - 24 JAGs, 10 paralegals at 22 regional and satellite offices
  - Serving as full-time SVCs and SVPs

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Purpose of the SVC Program

- **Provide advocacy: protect the rights afforded to victims in the military justice system**
- **Provide advice: develop victims' understanding of the investigatory and military justice processes**
- **Empower victims by removing barriers to their full participation in the military justice process**

Providing this service to victims will result in a more robust opportunity for victims to be heard, to retain and take advantage of their rights, and enhance the military justice system while neither causing unreasonable delay, nor infringing upon the rights of an accused.

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Why an SVC Program?

- **Provide support through independent representation**
- **Build and sustain victim resiliency**
- **Empower victims**
- **Increase level of legal assistance provided to victims**

SVC Program Eligibility

- Air Force – AD/ARC (if incident occurred while in status)
  - The status of the perpetrator does not matter (Air Force, other service, civilian, or unknown)
  - Both restricted and unrestricted reports
- Adult Dependents of AF Members
  - Perpetrator must be an AF member
  - Both restricted and unrestricted reports
- Other Services – AD/ARC (if incident occurred while in status)
  - Perpetrator must be an AF member
  - Unrestricted reports only
- Adult Dependents of Other Services' Members
  - Perpetrator must be an AF member
  - Unrestricted reports only
- For *sexual assaults* under UCMJ Articles 120, 125, and 80
- Entry-level status Airmen in UPR involving physical contact of a sexual nature with BMT or TT faculty/staff

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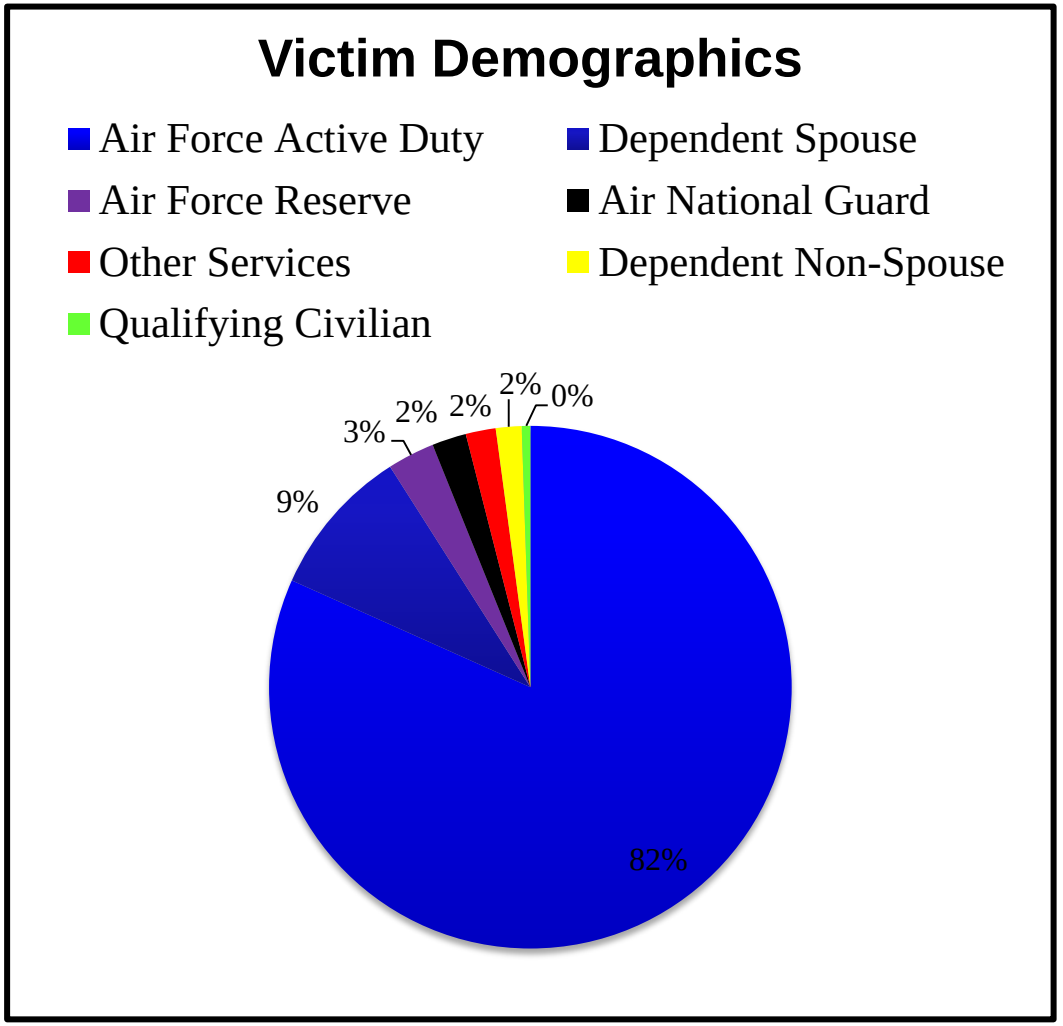
SVC Role

- Advocacy to military justice actors, including commanders, convening authorities, investigators, trial counsel, and defense counsel
  - May attend interviews
- May include in-court representation
  - Rape shield hearing/mental health records
  - Assert rights under the CVRA
- Advocacy to AF and DoD agencies/offices
- Advocacy to civilian prosecutors/agencies
  - May NOT represent victims in civilian courts
- Collateral misconduct

SVC Clientele

- ***82% of clients are AF Active Duty***
- ***91% of clients are female***



***Data current a/o 26 July 13**

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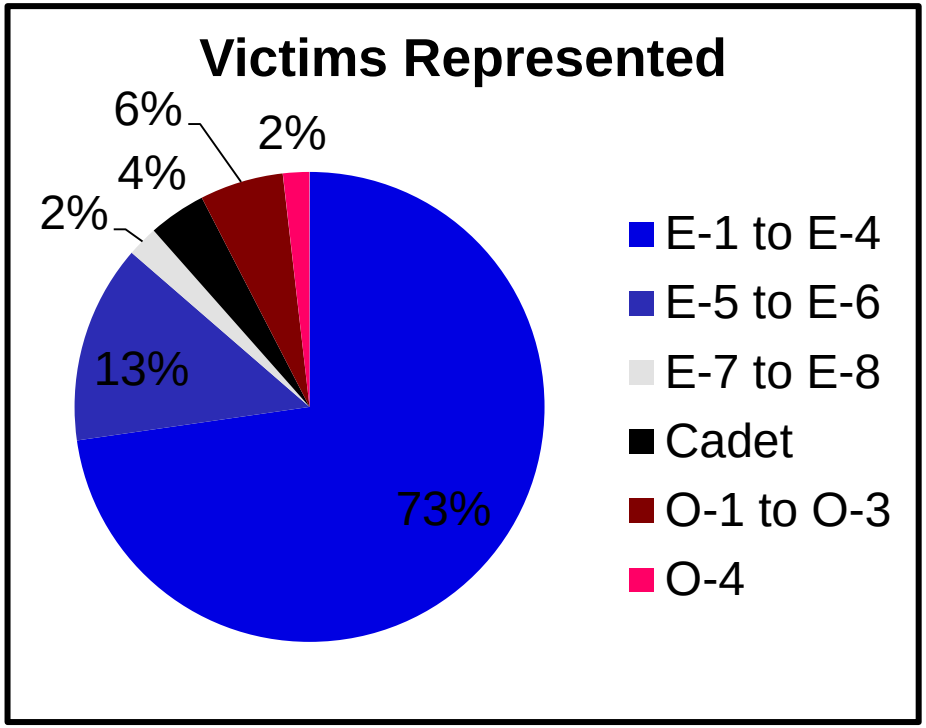
SVC Clientele

- *73% of military clients are E-1 to E-4*
- *91% of clients had made an unrestricted report by the time they requested an SVC*
- *7% of clients – allegations include UPR*
  - *In only 1/3 of those cases is the UPR the only allegation – the rest also include a sexual assault allegation*
- *5% of clients indicated their assault occurred at a deployed location*
  - *.7% of requests were received from deployed locations*



**Data current a/o 26 July 13*

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SVC Items of Interest

- **Represented 512 victims over life of program; 397 current caseload**
- **Attended 89 courts-martial and 87 Article 32 hearings**
- ***Attended over 600 interviews with investigators, defense counsel and trial counsel***

While SVCs are providing in-court representation to victims, their mandate is to provide full spectrum legal support and they are showing the wide range of their talents, dedication, and effectiveness in addressing issues for their clients ranging from workplace concerns, to access to mental health services, to traditional legal assistance issues.

** data current a/o 11 Oct 13*

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Measuring Effectiveness

47% (27/58) of clients whose case is closed have taken the Victim Impact Survey

- **91% “extremely satisfied” with the advice and support SVC provided during the Article 32 hearing and court-martial**
- **97% would recommend other victims request an SVC**
- **92% indicated their SVC advocated effectively on their behalf**
- **95% indicated their SVC helped them understand the investigation and court-martial processes**

a/o 11 Oct 13

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Common Issues

- **Privacy Concerns (top issue SVCs are assisting clients with – 77%)**
- **Respectful Treatment**
- **Feeling Alone**
- **Civil legal matters as a result of their assault**
- **Issues unique to the military*:***
  - **Collateral misconduct**
  - **Unit impact**
  - **Military orders – to participate/testify**

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What do our clients think about SVCs?

I highly recommend an SVC because not everyone fully understands the legal process and not only is the emotional support important, the legal support is too. I would have been lost without the help of my SVC during trial.

When you're a victim you don't know who to trust. The SVC gave me that trust I needed. Also everything with her was confidential and that made me feel more safe. It was nice having someone to speak for me and to help me.

I cannot imagine how difficult the court process would be without an SVC. The SVC is there for you and you only. They do a great job at keeping your privacy. I felt like I understood the court process a lot better.

If it were not for my SVC I would not have been able to handle myself in the professional manner that is expected of me. His knowledge, support and diligence of the case made it a million times easier for me to take the stand and make it through the days.

What do our clients think about military justice?

Communication could be stronger with victims/witnesses. A lot of questions were diverted and there was no clear idea about what to expect during the court.

The process for a victim that is unrepresented is very unorganized and not fair to victims on account of they are re-victimized hundreds of times and also victimized just by not knowing the proceedings of the case they are left in the dark almost the entire time.

My mental health records were released to OSI/Defense counsel without my permission. I am not sure where the issue was but I think investigators should be more aware of what the procedures are for requesting mental health records.

I am upset because if I had known that sexual assault had to be able to be proven beyond a reasonable doubt then I would have never come forward. I told the OSI investigators that there wasn't enough evidence.

What does the dissonance of this feedback mean for you?

Senior Leader Interest Items

1. ***Restricted to unrestricted conversion rate***
2. ***Percentage of victims declining to participate***
3. ***Anything else that pops up…***

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Things to think about…

- **Data Collection / Reports**
- **Identifying seams in the process**
- **Educating other stakeholders**
- **Expansion to other victims of crime**
- **Overlap/division of responsibilities b/t SVC, VWAP, legal assistance & SAPR**
- **Ideal org structure and manning**
- **Access to information**
- **Scheduling conflicts**

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Conclusion

"The feedback from the victims who have used [Special Victims' Counsel] is exceptional so far...I think that's one program that is one of those potential game changers."

General Mark A. Welsh, III, Air Force Chief of Staff

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Questions?

Headquarters U.S. Air Force

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Lessons from the Field

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SVC Course – October 2013

This document contains internal matters that are deliberative in nature and/or are part of the agency decision-making process, both of which are protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

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Overview

- ***Victim Interviews***
- ***Geographically Separated From Client***
- ***Working with Victims***
- ***Restricted Report Clients***
- ***Article 32/Courts-Martial***
- ***Collateral Misconduct***
- ***Outreach***
- ***Success Stories***

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Victim Interviews

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Geographically Separated From Client

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Working with Victims

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Restricted Report Clients

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Article 32 Hearings & Courts-Martial

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Collateral Misconduct

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Outreach

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Success Stories

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Questions?

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Administrative Challenges

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Post-trial Processing

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This document contains internal matters that are deliberative in nature and/or are part of the agency decision-making process, both of which are protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

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- **Am I at the Military Justice Administration Course???**
- **What does post-trial processing have to do with me?**
- **Think about the Wilkerson case…**

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Post-Trial Delay Test

- **Barker v. Wingo, 407 U.S. 514 (1972)**
  - **Length and reason for delay**
  - **Assertion of right to timely review, prejudice**
- **U.S. v. Moreno, 63 M.J. 129 (CAAF 2006)**
  - **Reaffirmed that convicted members have due process right to timely review and appeal of court-martial convictions**
  - **Utilized Barker v. Wingo test to evaluate claims**
- **Presume unreasonable delay and trigger Barker test where:**
  - **> 120 days from trial to CA action**
  - **> 30 days from action to docketing with CCA**
  - **> 18 months from docketing to CCA decision**

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After the trial is over…

- **Report of Result of Trial**
- **Sealed exhibits – RCM 1103A**
- **Transcription**
- **Authentication – RCM 1104**
- **Service of ROT**
- **All of this takes time…**

SJA Recommendation

- RCM 1106 and AFI 51-201, Figure 9.6
- Required for:
  - All GCMs with guilty findings
  - BCD SPCMs
  - SPCMs with 1 year confinement
- Persons authorized to sign:
  - SJA/Acting SJA
  - Art. 32 IO and TC disqualified

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SJAR - Contents

- **Copy of report of result of trial (AF 1359) showing findings, sentence, and confinement credit to be applied**
- **A copy or summary of any pretrial agreement**
- **Any recommendation for clemency by sentencing authority, made in conjunction w/ announced sentence**
- **Summary of accused's service (AFI 51-201)**
  - **SJA's opinion**
  - **PDS *admitted at trial* w/ length of accused's service, awards and decs, Art 15s/previous convictions**

SJAR - Contents

- SJA's concise recommendation (of action to be taken on sentence)
  - Including any recommendation to waive forfeitures
- Response to allegations of error raised by accused under RCM 1105 (usually comes later)
- CA action on deferment or waiver of FF and SJA's legal advice to CA on the deferment or waivers
- Optional matters:
  - "Outside the record"
  - Victim Impact Statement???

RCM 1105 - Clemency

- Accused submission of clemency matters
  - Due to CA SJA 10 days after receipt of authenticated ROT or receipt of SJAR (whichever is later)
  - Up to 20 additional days can be granted to submit matters, upon good cause shown

RCM 1106 – Response to SJAR

- Defense Counsel's response to the SJAR
  - Due to CA SJA 10 days after receipt of authenticated ROT or receipt of SJAR (which ever is later)
  - Up to 20 additional days can be granted to submit matters, upon good cause shown
- RCM 1105 and 1106 matters are usually submitted to the CA at the same time

SJAR Addendum

- RCM 1106, AF 51-201, Figure 9.7 & 9.8
- Must list all defense submissions and attach them
- Must tell CA he or she <u>must</u> consider the attached post-trial matters
- Must serve accused and DC and give 10 days if new matter raised in addendum
  - Legal offices don't want to raise new matters if it can be avoided!
- Must respond to DC allegations of error – e.g., "without merit"

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Victim Impact Statements

AFI 51-201 Re-Write – Section 9D – Matters Submitted by Victims

- Letter served on the victim/counsel inviting input in the form of a victim impact statement (sample letter in AFI)
- Victim has 10 calendar days to submit the statement
- Eligible victims may consult with a legal assistance attorney or SVC

Amendments to RCMs 1105, 1106, and 1107 in next Executive Order

- 1105- Accused matters may not include, enclose, or refer to any evidence that was excluded at trial under MRE 412, or to any evidence subject to privilege under MREs 500-514
- 1105A- Matters submitted by a crime victim- Victim may submit matters related to an offense of which accused was found guilty
- 1106- The victim's statement will be attached to the SJAR. The SJA will note for the CA the matters that may be considered.

Convening Authority Action

- Action is a non-delegable duty of CA
  - CA has discretion on taking action on findings (RCM 1107(a))
  - CA not required to review the case for legal errors or factual sufficiency (RCM 1107(b))
- Action can only be taken after the required clemency time periods have run or been waived (AFI 51-201, para 9.19)
- Acquittals: No action; only a CMO (AFI 51-201, para 9.19.2 & 10.8.1.1)

Convening Authority Action Cont.

- Matters Considered
  - Result of Trial
  - SJAR
  - Clemency matters submitted under RCM 1105/1106
  - Additional matters (optional)
  - CA may consider ROT or personnel records of accused

Convening Authority Action Cont.

- Action on findings (RCM 1107(c)) - not required, but CA may:
  - Change a finding of guilty of a charge or specification that is an LIO of the charge
  - Set aside any finding of guilty, dismiss any charge or specification and order a rehearing
- Action on sentence (RCM 1107(d))
  - CA may for any or no reason disapprove or mitigate a legal sentence in whole or in part
  - When mitigating, new sentence cannot be greater than adjudged sentence

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After action…

- **Disposition is now complete**
- **Victim Impact Survey – for AF SVCs**
- **Wind down representation**

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QUESTIONS?

Victim Support

Nate Galbreath, PhD, MFS

Senior Executive Advisor,
Assessment and Accountability

Licensed Clinical Psychologist

Lt Col, USAF (Retired)

Overview

- **What Could Be Wrong?** ***How to Ask***
- **Getting Help:** ***Making it Happen***
- **Relevant Research:** ***Military Sexual Assault***

What Could Be Wrong? And How to Ask

Army PFC Details Sexual Assualt by Drill Sergeant During Basic Training

Army PFC Natasha Woodruff talks about being sexually assaulted by a drill sergeant during basic training at Fort Jackson and what happened after reporting the crime.

http://bcove.me/ynipnfmv

Impact of Sexual Assault

- Physical
- Psychological

Physical Impact of Sexual Assault

- Genital Injury
- Other Injury
- Pregnancy
- Sexually Transmitted Infection
  - HIV
  - Gonorrhea
  - Syphilis
  - HPV
  - Herpes

Psychological Impact of Trauma

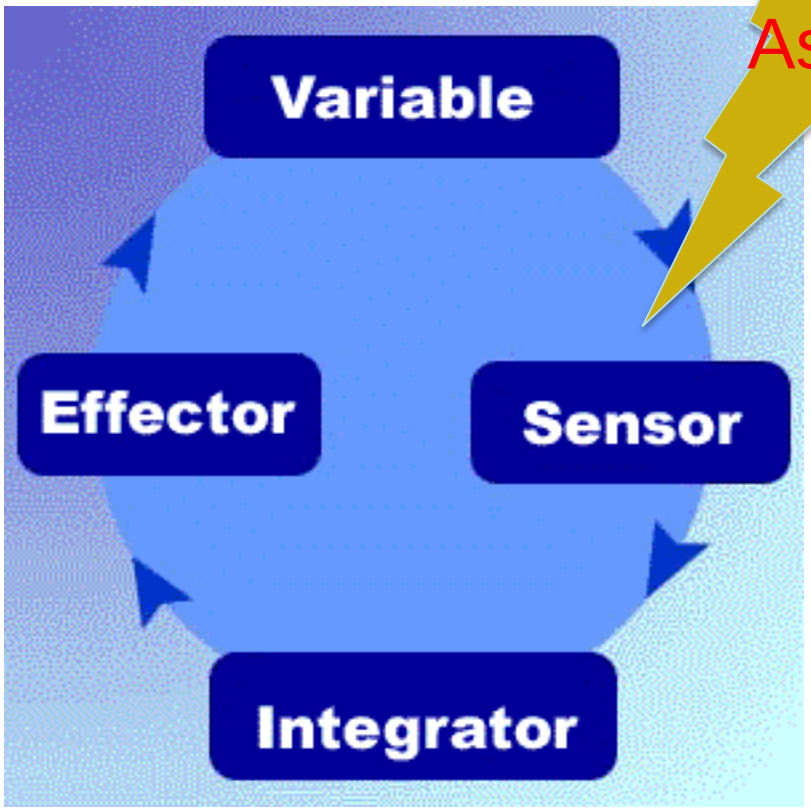
- Comes from a variety of sources:
  - *Physical impact of sexual assault and…*
  - Victim's physiological response during incident
  - Victim's prior history of assault
  - Victim's fund of coping skills/resilience
  - Reaction of friends and family members
  - Reaction of unit leadership, unit members, and response

Sexual Assault Disrupts "Homeostasis"

Well Being

Sexual Assault

Coping Mechanisms



Victim

Victim Reaction/Interpretation

Victim's Physiological Response to Sexual Assault

- Stress/Threat Response
  - Fight
  - Run Away
  - Freeze
- Tonic Immobility
- Dissociation

Body's Reaction to Trauma

- "Fight, Flight or Freeze"
  - Adaptive (helpful) reaction of the body to a threat
    - Adrenalin (epinephrine) stimulates the sympathetic nervous system to prepare to react
    - Cortisol release increases blood glucose to provide energy
    - Opiates (released by brain)
- Body changes:

  + Heart rate
  + Respiration rate
  + Blood flow to muscles
  - Blood flow to other system (digestive, reproductive, etc)
  + Attention/focus on the threat
  + Glucose into blood stream

Tonic Immobility

- Definition:
  - Involuntary component of the fear response that is characterized by in ability to move in situations involving extreme fear coupled with physical restraint
    - Different from “freeze” in “flight, fight or freeze”
- Details:
  - Autonomic response: Not controllable
  - Muscular Paralysis
  - 12% to 50% of victims experience
  - May occur more in victims with history of childhood sexual abuse

Dissociation

- Definition: Disconnection from full awareness of self, time, and/or external circumstances.
- Everyday examples:
  - Highway hypnosis
  - Getting lost in a good book/movie
  - Daydreaming
- Sexual assault examples:
  - Poor recall of offender data and offender's behavior
  - Focus on environment

How is Homeostasis Restored?

- Getting back to "normal"
  - Many people need no help
  - Some people need a little help
  - A few people need a great deal of help
- Everyone should consider medical attention
- Everyone needs to be informed of support services
  - Everyone *should* be allowed a choice of services to use
  - Needs are different

A Word About Resilience…

- Resilience:
  - The ability to cope with stress and adversity
- Resilience level is unique to the individual
  - There is no “normal” level across the population
- Individual resilience impacted by:*
  - Perceived severity of incident
  - Past history of trauma exposure
  - Continued exposure to trauma
  - Individual coping style and method
  - World view
  - Problem solving skills
  - Social support

**Not an exhaustive list*

What Could Be Wrong?

- **Self Image Changes**
- **Relationship Changes**
- **Work Changes**
- **Life Outlook**
- **Re-traumatization**
- **Psychological Disorders**
  - ***Post Traumatic Stress***
  - ***Depression***
  - ***Substance Use/Abuse/Dependence***

Self Image Changes

Evidence:

- **"Damaged Goods"**
  - **"I'm not the person I was."**
- **Self Blame**
  - **"If I had only ____, this wouldn't have happened."**
- **Shame/Stigma**
  - **"People think I'm a whore/idiot/problem child."**
- **Anger**
  - **"I got victimized, and that guy's getting away with it."**
- **Fear**
  - **"That guy or his friends could come back and do it again – or something worse."**
- **Helplessness**
  - **"No one is taking my side"**
- **Confusion**
  - **"How can someone I trusted do that?"**

Relationship Changes

Evidence:

- **Estranged loved ones and friendships**
- **Withdrawal from social events**
- **Increased feelings of hostility**
  - **Externally expressed**
  - **Internally expressed**
- **Decreased physical intimacy**

Work Changes

Evidence:

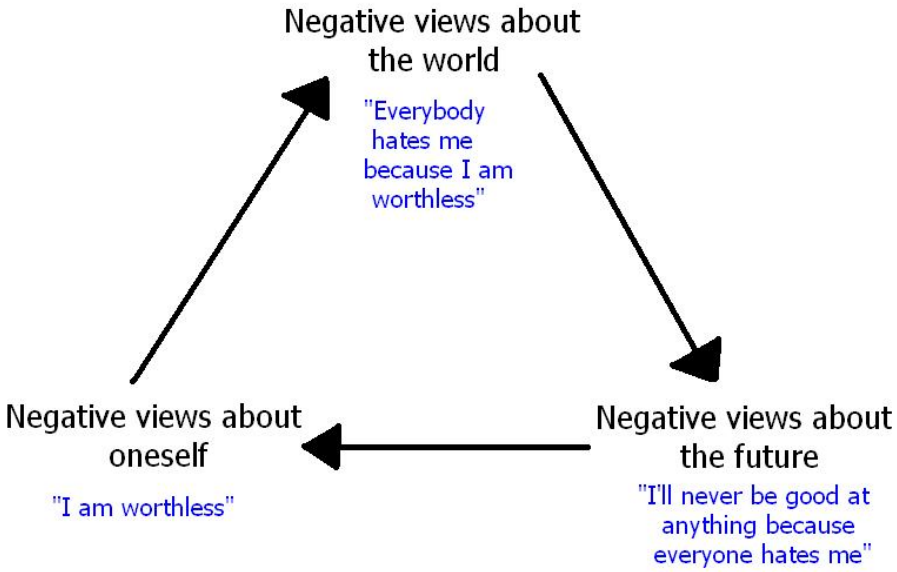
- **Co-worker disagreements**
- **Marginalization by unit members**
- **Duty performance degradation**
- **Punishment for other matters**
- **Leadership scrutiny**
- **Offender harassment**

Life Outlook Changes

Evidence:

- **Views about self**
- **Views about the world**
- **Views about the future**

The Depressive Triad



Just World Hypothesis

Re-Traumatization

Evidence:

- **Experiences with:**
  - **Law Enforcement**
  - **Medical Providers**
  - **Attorneys**
  - **Chain of Command**
  - **Co-workers**
  - **Chaplains**
  - **Friends and Family**
  - **Justice Proceedings**

- **"But why didn't you….."**

Re-Traumatization

- **Set clients up for success with the legal system**
  - **Be supportive**
    - **No: "I can't see how that could have happened"**
    - **Yes: "They might challenge you on ____; how should we respond?"**
  - **Be honest – but gentle**
    - **No: "There's no way they'll accept your story"**
    - **Yes: "We have some significant legal challenges, but we'll do everything we can to make sure the court hears your side."**
  - **Set appropriate expectations from the start**
    - **The justice system should not be seen as a source of validation.**
      - **Too many variables outside the individual's control impact the verdict**
    - **Other, more personal sources of validation and reward are more important:**
      - **Restoring your health and life**
      - **Maintaining important social relationships**
      - **Investing in your family**
      - **Focusing and achieving personal goals**

Post Traumatic Stress Disorder

- An anxiety disorder that some experience following trauma.
  - Many people experience physiological changes associated with seeing or experiencing something traumatic. These are normal and usually fade away after two weeks.
  - For people who experience PTSD, the physiological arousal associated with the trauma becomes changed and does not disappear over time. These symptoms remain and interfere with family, work, and social functioning.

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Psychological Disorders

Post Traumatic Stress Disorder

- Traumatic event: Experienced or Witnessed
- Response involved intense fear, helplessness, or horror
- Re-experiencing (one or more):
  - Recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions.
  - Recurrent distressing dreams of the event.
  - Acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated).
  - Intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
  - Physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

PTSD - continued

- Increased arousal (two or more):
  - difficulty sleeping, irritability, poor concentration, hypervigilance, exaggerated startle response, motor restlessness
- Avoidance and Numbing (3 or more):
  - Efforts to avoid thoughts, feelings, or conversations associated with the trauma
  - Efforts to avoid activities, places, or people that arouse recollections of the trauma
  - Inability to recall an important aspect of the trauma
  - Significantly diminished interest or participation in significant activities
  - Feeling of detachment or estrangement from others
  - Restricted range of affect (e.g., unable to have loving feelings)
  - Sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)
- Interference in social or occupational functioning
- Symptoms last more than four weeks

Re-experiencing

- Intrusive, upsetting memories of the event
- Flashbacks (acting or feeling like the event is happening again)
- Nightmares (either of the event or of other frightening things)
- Feelings of intense distress when reminded of the trauma
- Intense physical reactions to reminders of the event (e.g. pounding heart, rapid breathing, nausea, muscle tension, sweating)

Avoidance and Numbing

- Avoiding activities, places, thoughts, or feelings that remind you of the trauma
- Inability to remember important aspects of the trauma
- Loss of interest in activities and life in general
- Feeling detached from others and emotionally numb
- Sense of a limited future (you don't expect to live a normal life span, get married, have a career)

Increased Arousal

- Difficulty falling or staying asleep
- Irritability or outbursts of anger
- Difficulty concentrating
- Hypervigilance (on constant “red alert”)
- Feeling jumpy and easily startled

Primary Care PTSD Screen

In your life, have you ever had any experience that was so frightening, horrible, or upsetting that, in the past month, you:

- Have had nightmares about it or thought about it when you did not want to? YES / NO
- Tried hard not to think about it or went out of your way to avoid situations that reminded you of it? YES / NO
- Were constantly on guard, watchful, or easily startled? YES / NO
- Felt numb or detached from others, activities, or your surroundings? YES / NO

Current research suggests that the results of the PC-PTSD should be considered "positive" if a patient answers "yes" to any three items.

NOTE: This is a screening tool ONLY. A client who does not answer "yes" to three or more items may still have a condition that may need to be assessed and treated by a licensed medical provider.

PTSD Treatments Examples

- Common Psychological Treatments
  - Prolonged Exposure Therapy
  - Cognitive Processing Therapy
  - EMDR
- Medications
  - Selective Serotonin Reuptake Inhibitors (SSRIs)
    - Prozac, Celexa, Lexapro, etc.
  - Benzodiazepines (given for some anxiety symptoms)
    - Xanax
    - Valium

Depression

- Persistent sadness or irritability that persists all day nearly every day for two weeks or more.
- Can take several forms:
  - Major Depressive Disorder
  - Dysthymia
  - Bipolar Disorder
- A serious mental illness that is more than just “the blues.”

Depressive Symptoms

- Persistent sad, anxious, or "empty" feelings
- Feelings of hopelessness or pessimism
- Feelings of guilt, worthlessness, or helplessness
- Irritability, restlessness
- Loss of interest in activities or hobbies once pleasurable, including sex
- Fatigue and decreased energy
- Difficulty concentrating, remembering details, and making decisions
- Insomnia, early-morning wakefulness, or excessive sleeping
- Overeating, or appetite loss
- Thoughts of suicide, suicide attempts
- Aches or pains, headaches, cramps, or digestive problems that do not ease even with treatment.

Depression Screener

- https://www.myhealth.va.gov/mhv-portal-web/anonymous.portal?_nfpb=true&_pageLabel=mentalHealth&contentPage=mh_screening_tools/PHQ_SCREENING.HTML#noJavascript

Depression Treatment Examples

- Psychological Treatments
  - Cognitive Behavioral Therapy
  - Interpersonal Therapy
  - Mindfulness Cognitive Therapy
- Medical Treatments
  - Anti-Depressants
    - SSRIs: Prozac, Celexa, Lexapro, etc.
    - SNRIs and others: Wellbutrin, Cymbalta

Suicidal Ideation

- Many victims admit to suicidal thoughts following a sexual assault
  - Attempted or completed suicide is not a common reaction to most forms of trauma, including sexual assault
- If symptoms persist over time, a person's outlook on their condition becomes important
- "Hopelessness" has been identified as an important warning sign for suicide

Suicidal Ideation Assessment

- **It is important to assess:**
  - Suicidal or homicidal ideation
  - The lethality of any plan for how they would harm themselves or others
  - Any history of previous attempts
  - Medical/psychiatric co-occurring problems

Suicidal Ideation Assessment

- **Assessment of dangerousness can include questions such as:**
  - Have you had any concerns about possibly harming yourself because life doesn't seem worth living right now?
  - Have you ever thought about acting on these feelings?
  - Are there times when you are afraid that you will act on these feelings?
  - Have you ever tried to act on feelings like this in the past?
  - Do you have a plan for how you would harm yourself or someone?
  - Do you have access to weapons?

Suicidal Ideation Assessment

- **Assessment of dangerousness can include questions such as:**
  - Have you had any concerns about possibly harming yourself because life doesn't seem worth living right now?
  - Have you ever thought about acting on these feelings?
  - Are there times when you are afraid that you will act on these feelings?
  - Have you ever tried to act on feelings like this in the past?
  - Do you have a plan for how you would harm yourself or someone?
  - Do you have access to weapons?

Suicidal Ideation Treatment Examples

- **Medical and Psychological Treatments are similar to those for Depression**
- **Also Considered:**
  - **Hospitalization for serious suicidal ideation**
    - **Plan + Intent**

Substance Abuse

- Self medication
  - Substances, especially alcohol, are used to help temporarily reduce anxiety symptoms (physiological arousal)
  - Tolerance (increasing amounts of the substance are used to achieve the same effect) makes use of substances a losing battle
  - Substance abuse and eventual dependence lead to
    - Slowed or stagnated recovery from trauma
    - Additional life complications
    - Physical illnesses

Alcohol Abuse

"CAGE" Screening Tool

- **C** Have you ever felt you should ***cut down*** on your drinking?
- **A** Have people ***annoyed*** you by criticizing your drinking?
- **G** Have you ever felt bad or ***guilty*** about your drinking?
- **E** ***Eye opener:*** Have you ever had a drink first thing in the morning to steady your nerves or to get rid of a hangover?

The CAGE can identify alcohol problems over the lifetime. **Two** positive responses are considered a positive test and indicate further assessment is warranted.

Alcohol Treatment Examples

Psychological Treatments:

- Group Treatment
- Partial Hospitalization (8 to 10 hrs per day)
- In-Patient Treatment (28 day)

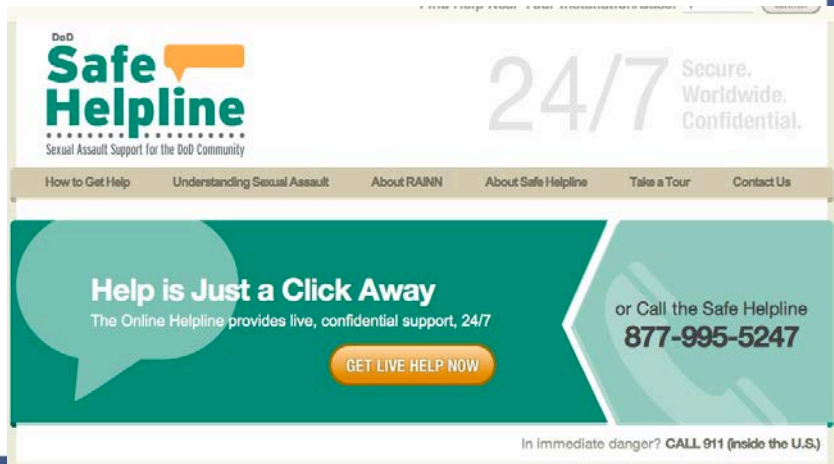
Medical Treatments

- Antabuse

Getting Help: Making it Happen

Safe Helpline

- www.safehelpline.org
- DoD's Hotline for DoD sexual assault victims
- Run by RAINN (Rape, Abuse, & Incest National Network)
- **Completely anonymous**
- Call, click or text for help
  - Base Resources
  - Local Area Resources
- Phone & Chat
- Safe Help Room
  - Moderated chat room



Military OneSource

- Users must identify themselves
- Cannot take a Restricted Report of Sexual Assault
  - Will be referred to SARC/DoD Resource
- Can make referrals for non-medical counseling to providers in the local area
  - Up to twelve sessions are authorized
    - http://www.militaryonesource.mil/counseling?content_id=267023
  - OneSource and providers must report:
    - experiences of ongoing child, spouse or elder abuse
    - threats of harm to self or others
  - OneSource does not release identities of counseling users to command
- "Medical" counseling for active duty must be referred to installation mental health

USAF Behavioral Health Optimization Program

- Mental health provider in Primary Care Clinic
- Referred by PCM or another provider
- Short (30 min), focused appointments; 3 to 4 sessions
- Visits documented in Outpatient Record
  - No mental health record created
- May take/preserve a Restricted Report of Sexual Assault
- May not be available in all locations

USAF Mental Health

- Most clinics require active duty to be seen by a MH clinic provider
- Downtown care may be authorized through Tricare
  - Tricare providers must provide a summary of treatment and mental health records back to the Air Force
- May take/preserve a Restricted Report of Sexual Assault
- Creates a local mental health record
  - Visits are also documented in Outpatient Record/AHLTA
- Services available:
  - Assessment
  - Psychological Testing
  - Treatment (Individual and Group)
  - Medication (if there is a psychiatrist in the clinic)
  - Primary care consultation (for medications)

An Approach to Consider

Step by Step*

After introductions, explanations of SVC program, and other required matters:

1. Ask: How has your life changed since the sexual assault?
   Make sure you cover:
   - Safety (from offender? Offender's friends? Assessed by Investigators, SARC, others?)
   - General health (Injuries? Other symptoms?)
   - Mental health (Sleeping, eating, mood, anxiety, alcohol use, etc.)
   - Relationships (Significant other, friends, family members)
   - Work (co-workers, supervisor, leadership)
2. Ask: After the sexual assault, did you seek help from:
   - Physician or nurse (including Sexual Assault Forensic Exam)?
   - A counselor (mental health?)
   - Anyone else?
3. Ask:
   - If they got help/are getting help: Is the care you're receiving meeting your needs?
   - If they are not currently getting help: Would medical care or counseling be helpful to you?
4. If care or a greater level of care is desired, discuss Pros and Cons:
   1. Anonymous help (Safe Helpline)
   2. Community Based Help (Includes Civilian Rape Crisis Centers, Military OneSource)
   3. Military Help Resources (Medical Treatment Facility, Mental Health Clinic)
5. If the victim indicates self harm is likely (Plan + Intent), intervention is required. Contact military mental health professional ASAP.

* This is an example and has not been fully vetted by policy for use in each Service. If this approach is used, ensure that your specific Service requirements and legal responsibilities are considered as well.

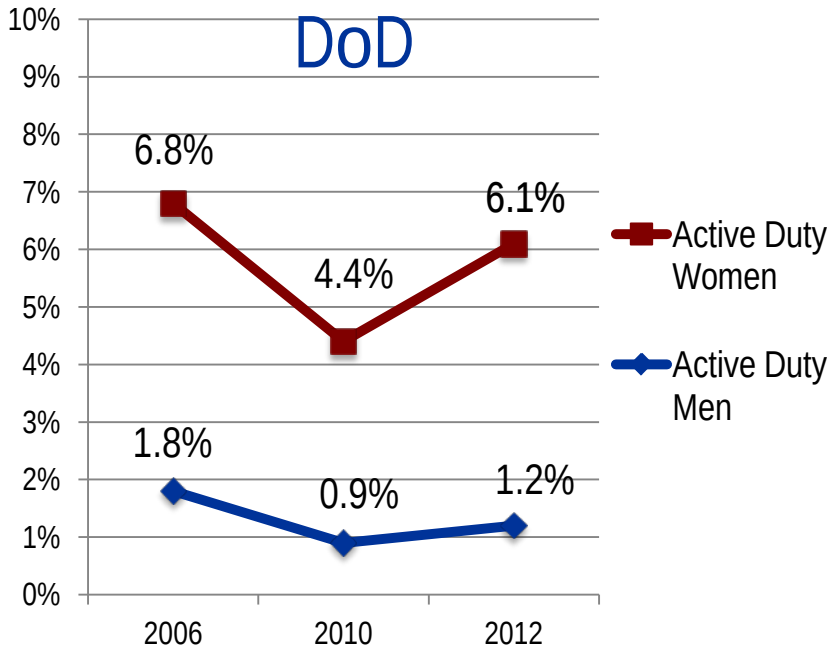
Relevant Research: Military Sexual Assault

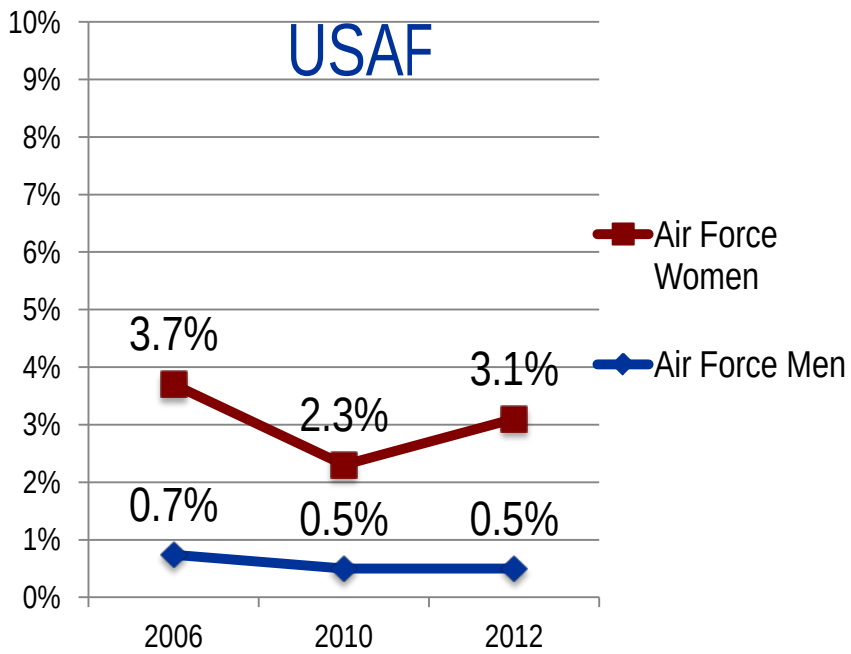
Determining the extent and visibility of a condition

- **Prevalence**
  - **What: How often does a condition occur in a given population**
  - **Why: Understand the impact of the condition on a population**
  - **How: Anonymous or Confidential Survey**
  - **When: Can be measured at any interval**
    - **Past Year**
    - **Career**
    - **Lifetime**
- **Reporting**
  - **What: How often a condition comes to the attention of an authority**
  - **Why: Understand the impact of a condition on population resources**
  - **How: Self-identification to an authority**
  - **When: Often captured in yearly intervals**

Past-Year Prevalence of Unwanted Sexual Contact

Percent of Active Duty Members, by Gender





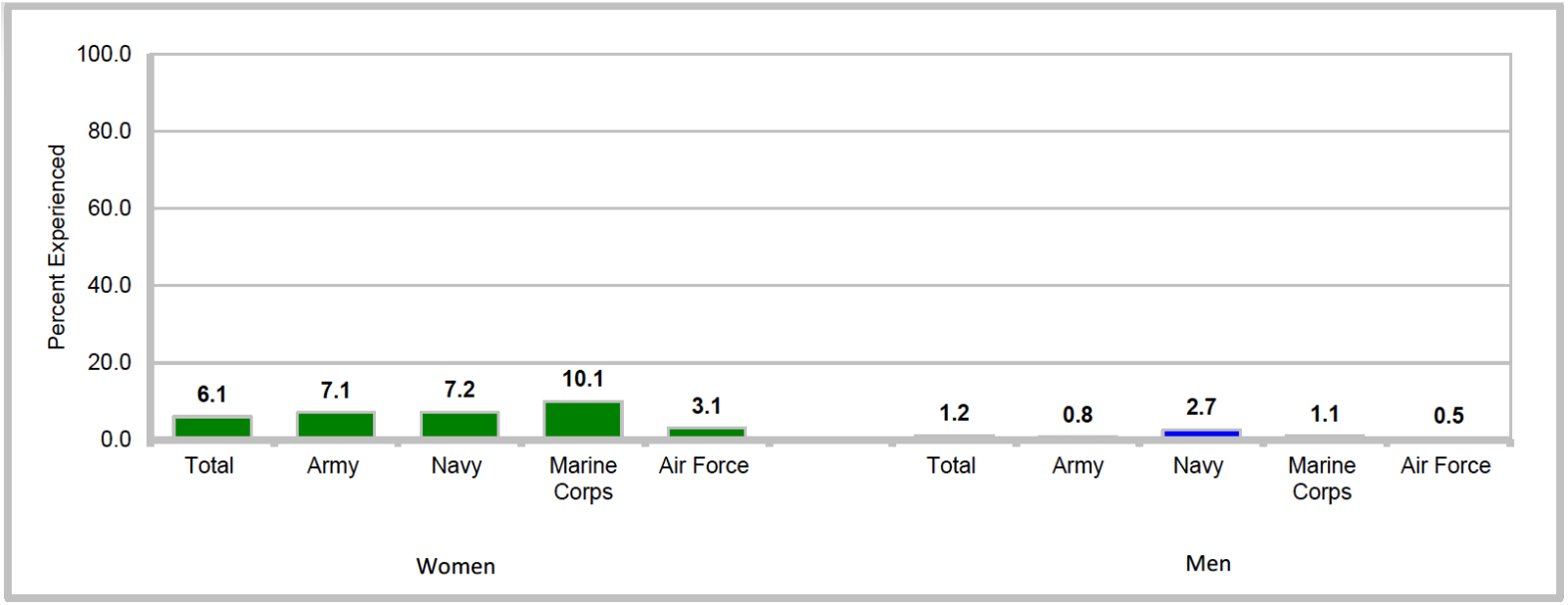
DMDC Workplace and Gender Relations Survey

Key findings:

- In 2012, 6.1% of women and 1.2% of men indicated experiencing USC
- For women, the 2012 percentage is statistically significantly higher than 2010; there are no statistically significant differences for men between 2012 and 2010
- **Of the women and men who experienced USC in the past 12 months, 45% of these women and 19% of these men also experienced USC prior to entering the military**
- Respondents indicated the majority of offenders were primarily military members or DoD civilians/contractors

Past-Year Prevalence of Unwanted Sexual Contact

Percent of Active Duty Women and Men, by Service



Key findings:

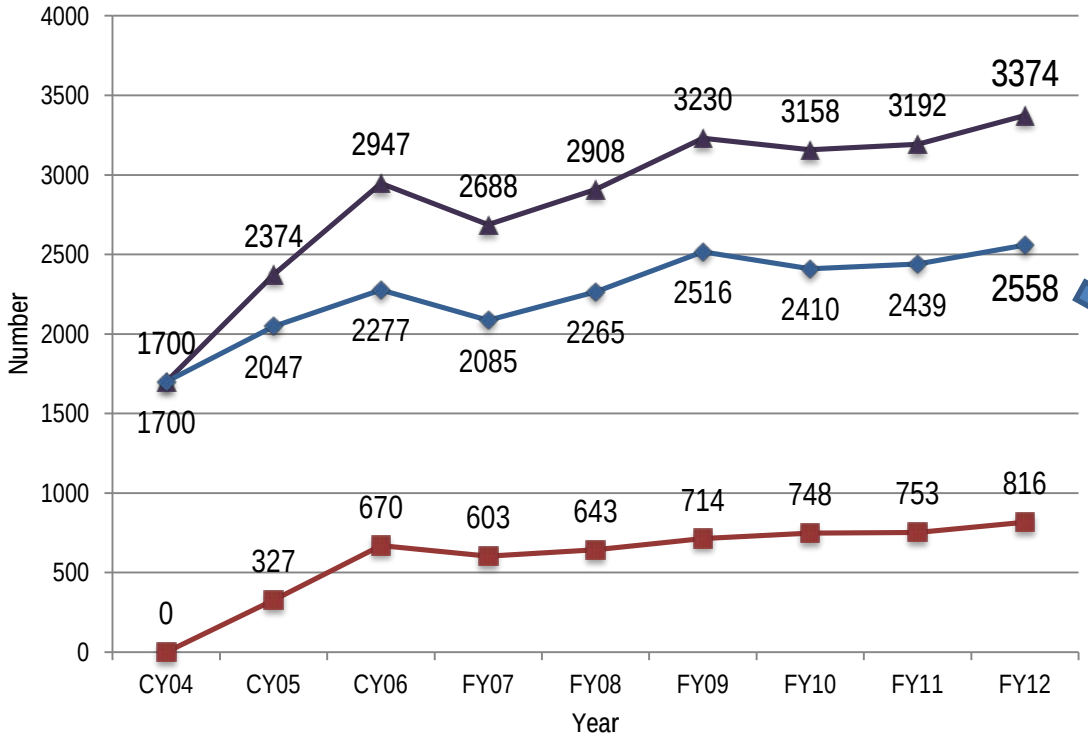
- Marine Corps women were more likely than women in the other Services to indicate experiencing USC
- **Air Force women were less likely than women in the other Services to indicate experiencing USC**
- For Navy and Marine Corps women, the 2012 percentages are statistically significantly higher than 2010 (7.2% vs. 4.4% and 10.1% vs. 6.6%, respectively); there are no statistically significant differences for men between 2012 and 2010

Civilian Sector Comparisons: Prevalence

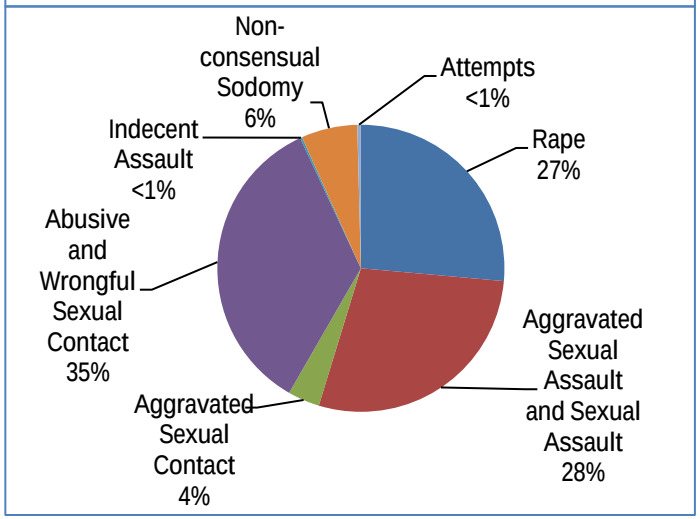
- **2010 National Intimate Partner and Sexual Violence Survey** – Centers for Disease Control and Prevention (2013) – *Gold Standard*
  - Risk for contact sexual violence (oral, anal, vaginal penetration or sexual contact without consent) is the same for women in the military and civilian sector, after adjusting for differences in age and marital status
    - Risk is the same for past year, past three years, and lifetime prevalence measures
- **Campus Sexual Assault Study** – Krebs, et. al. (2007)
  - 19% of college women experienced a sexual assault (attempted or completed oral, anal, vaginal penetration or sexual contact without consent) at some point in their 4 year college career
  - 21% of active duty women (ages 18-24) experienced USC (attempted or completed oral, anal, vaginal penetration or sexual contact without consent) at some point in their military career (DMDC, 2012)
- **Drug-facilitated, Incapacitated, and Forcible Rape: A National Study** – Kilpatrick, et. al. (2007)
  - 0.9% of U.S. women (all ages) and 5.2% of U.S. college women experienced a sexual assault (attempted or completed oral, anal or vaginal penetration without consent) in the 12 months prior to the survey
  - About 3.5% of active duty women experienced a sexual assault (attempted or completed oral, anal or vaginal penetration without consent) in the 12 months prior to the survey (DMDC, 2012)

Overall, most studies indicate the risk for sexual assault is about the same for women in the military and civilian sectors of U.S. society.

Reports of Sexual Assault: CY04-FY12



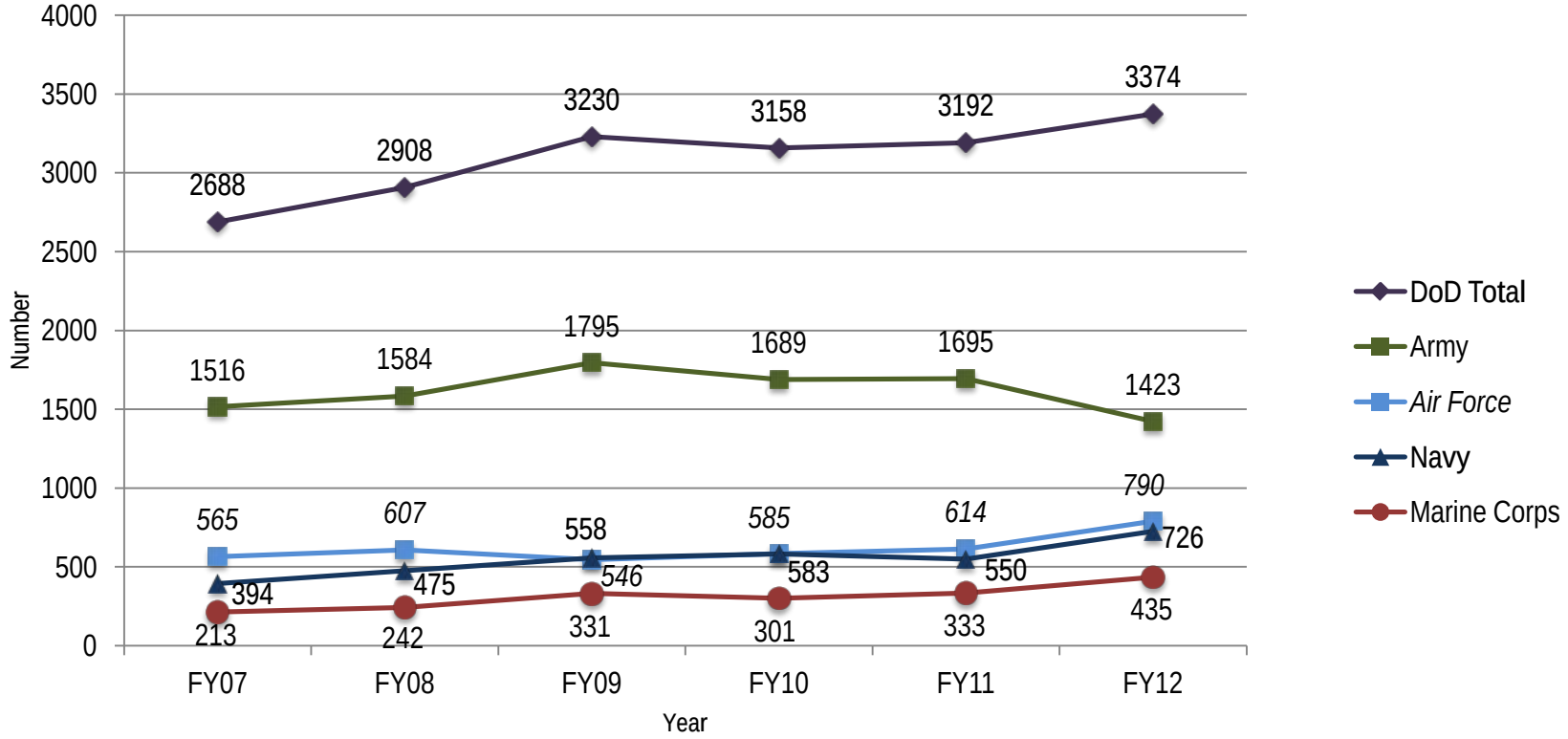
FY12 Unrestricted Reports: Most Serious Crime Alleged



- Overall reporting increased 6% from FY11
  - Unrestricted Reporting increased by 5%
  - Reports remaining Restricted increased by 8%
- 121 Reports in FY12 were for an incident occurring prior to service
- Restricted Report Conversions increased from 14.1% in FY11 to 16.8% in FY12

Increased reporting leads to greater opportunities for victim care and accountability.

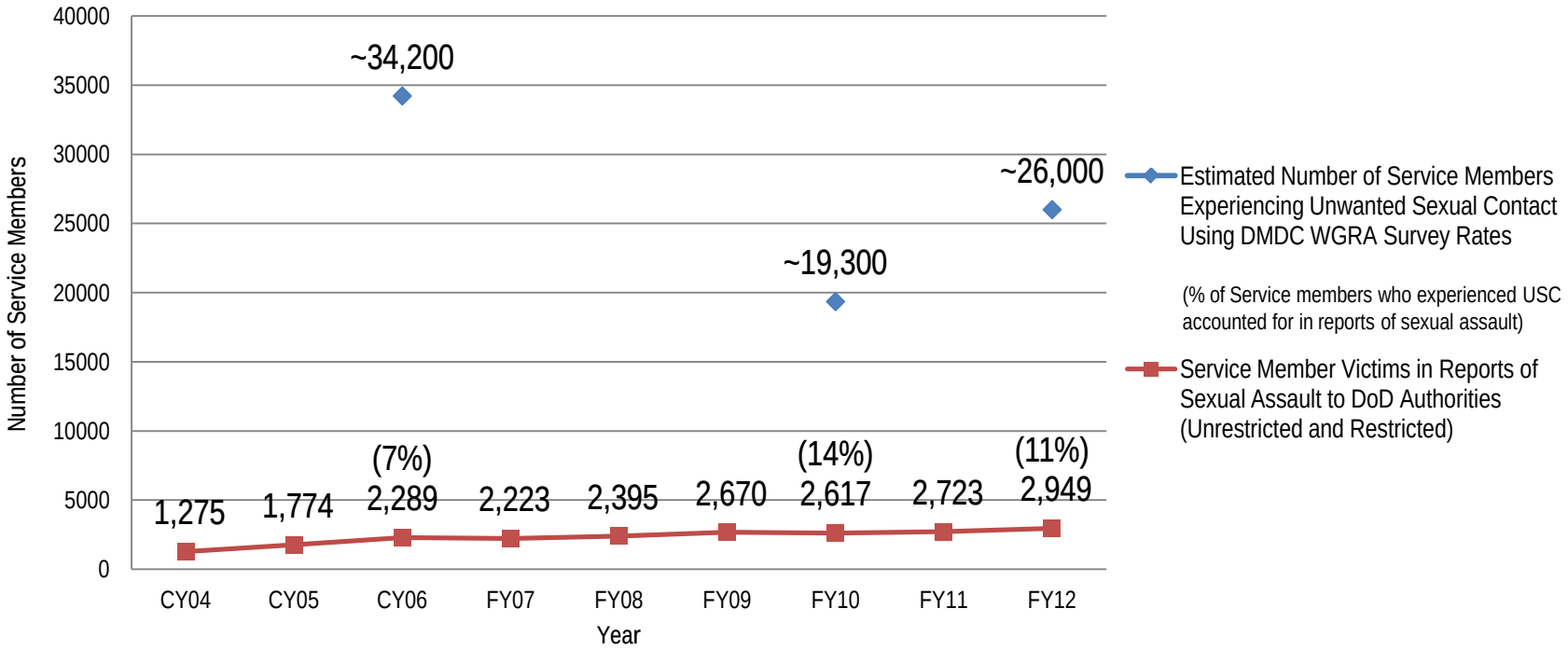
Sexual Assault Reports by Service, FY07-12



Three of four Services showed an approximate 30% increase in reporting in FY12.

DoD Prevalence versus Reporting

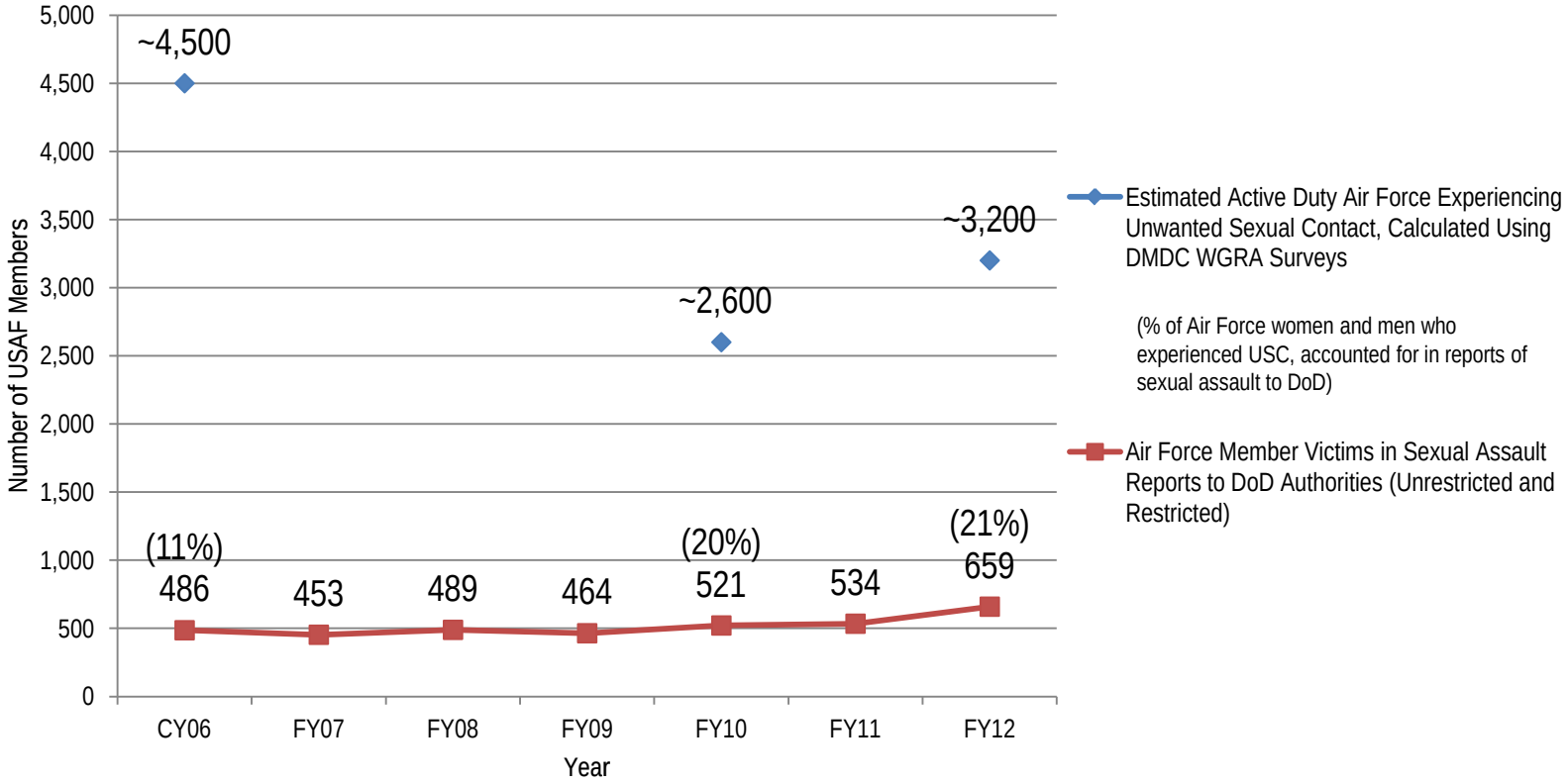
Service Member Victims in Reports of Sexual Assault to DoD vs. Estimates of Service Members Experiencing USC, CY04–FY12



- In FY12, the gap between estimated prevalence and reporting of sexual assault widened compared to FY10, using identical methodologies
- Increased prevalence estimate is most likely attributable to increased USC experienced by active duty women
- Estimates indicate that in 2012 about 89% of Service members who experienced USC did not report it to a DoD authority.

Air Force Prevalence versus Reporting

Air Force Victims in DoD Reports of Sexual Assault vs. Estimates of Air Force Members Experiencing USC, CY04–FY12



Psychological Injury Due to Trauma

- **National Prevalence of PTSD[1]:**
  - **3 to 4%**
- **National Lifetime Incidence of PTSD[2]:**
  - **10% of women**
  - **5% of men**

1. Narrow WE, Rae DS, Robins LN, Regier DA. Revised prevalence estimates of mental disorders in the United States: using a clinical significance criterion to reconcile 2 surveys' estimates. Arch Gen Psychiatry 2002; 59:115-23.
2. Kessler RC, Sonnega A, Bromet E, et al. Posttraumatic stress disorder in the national comorbidity survey. *Arch Gen Psychiatry* 1995;52:1048–1060

Psychological Injury Due to Trauma

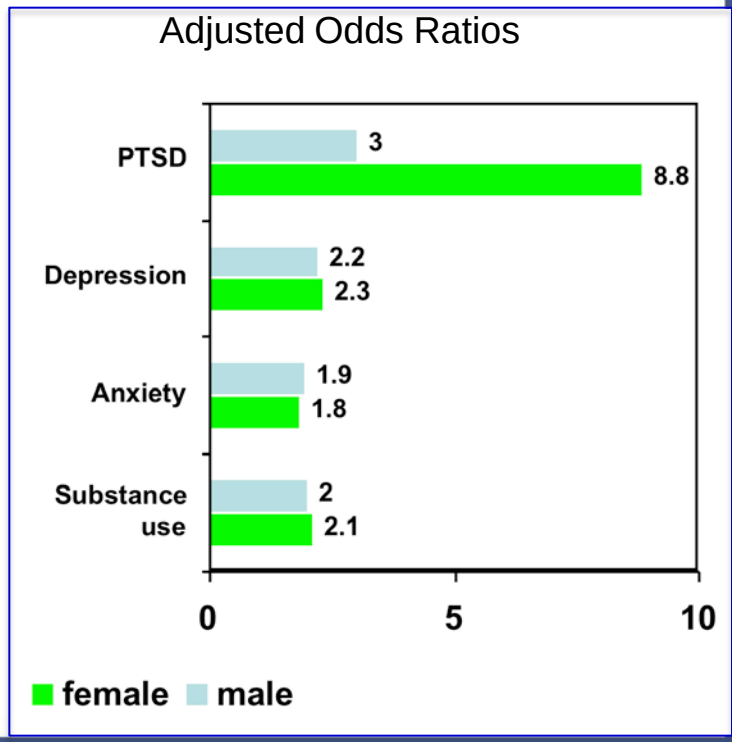
- **2004: PTSD prevalence in 4 OIF ground combat units[1]**
  - **Pre-combat rate: 5%**
  - **Post-deployment rate: ~12%**
- **2007: Potential for psychological injury[2]**
  - **Needing MH treatment per PDHRA:**
    - **20.3% of Active Duty**
    - **42.4% of Reserve**
  - **Over 65% reported exposure to potentially traumatic incident(s)**
- **2010: Prevalence of PTSD with "Some Functional Impairment" [3]**
  - **20.7% of Active Duty Soldiers (3 months post deployment)**
  - **21.4% of Guard Component Soldiers (3 months post deployment)**

1. Hoge, C.W., Castro, C.A., Messer, S.C., McGurk, D., Cotting, D.I., & Koffman, R.L. (2004). Combat duty in Iraq and Afghanistan, mental health problems, and barriers to care. *New England Journal of Medicine, 351*, 13-22.
2. Milliken, Auchterlonie, & Hoge (2007), Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning From the Iraq War, JAMA, 2141
3. Thomas, Wilk, Riviere, McGurk, Castro & Hoge. (2010). Functional impairment among active component and National Guard soldiers 3 and 12 months following combat in Iraq. *Archives of General Psychiatry, 67*, 614-623.

Sexual Assault and PTSD

- **Well established relationship in civilian population:**
  - **About 1/3 of female rape victims develop PTSD[1]**

- **Veteran relative risk for disorders from military sexual trauma (MST)[2]**
  - **Female veterans who screen positive for MST are 9 times more likely to develop PTSD** (than those who don't report MST)
  - **Male veterans who screen positive for MST are 3 times more likely to develop PTSD** (than those who don't report MST)



NOTE: In the VA, MST = Sexual Harassment AND Sexual Assault; DoD statistics track Sexual Assaults only, and do not include Sexual Harassment.

1. Kilpatrick, (1992) National Center for Victims of Crime and Crime Victims Research & Treatment Center
2. Kimerling, et al., (2007) American Journal of Public Health, 12.

Developing PTSD from Sexual Assault

- **National Comorbidity Survey:**
  - **Rape most strongly associated with PTSD in men and women**
  - **65% of men and 46% of women who indicated rape was their most upsetting trauma developed PTSD**

Most Upsetting Trauma →	Rape	Combat	Molestation	Physical Abuse
Women	**45.9%**	**--**	**26.5%**	**48.5%**
Men	**65.0%**	**38.8%**	**12.2%**	**22.3%**

Kessler, Sonnega, Bromet, et al, (1995) National Comorbidity Survey

Developing PTSD from Sexual Assault

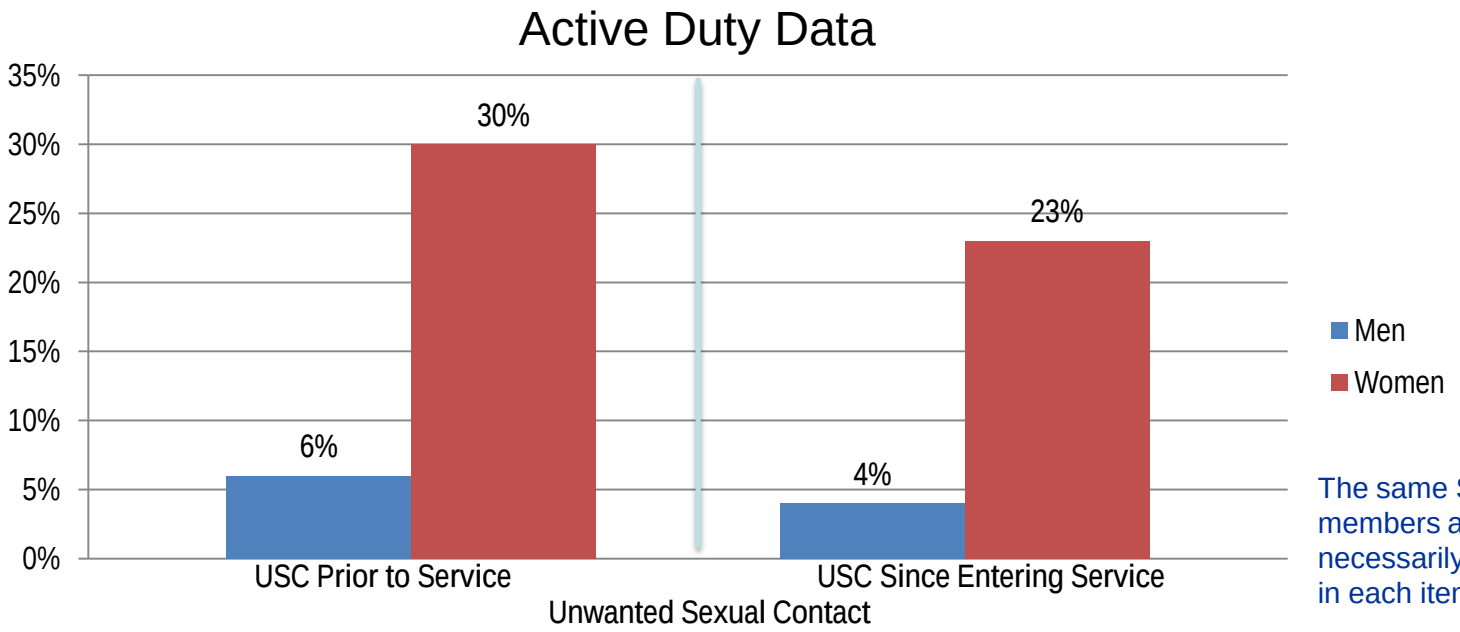
- **Gulf War Veterans**
  - **Probability of Developing PTSD**
    - **Veterans were more likely to develop PTSD from sexual assault than from high combat exposure**

Adjusted Odds Ratios:

	Sexual Assault	Combat
Women	5.41	4.0
Men	6.21	4.45

Kang, et al., (2005) Role of Sexual Assault on Risk of PTSD among Gulf War Veterans, Annals of Epidemiology, 15

Unwanted Sexual Contact: Prior to Service and Since Entering Service



The same Service members are not necessarily represented in each item.

Key Findings:

- WGRA results indicate that a considerable proportion of the female active duty force has experienced USC at some point, either before joining the service or since joining the service
- WGRA results confirm civilian research that a history of sexual assault is a significant risk factor for future sexual assault
- WGRA results align with similar measures on the *2011 Health Related Behaviors Survey* (Tri-care Management Authority, 2013)

Sexual Assault History Prior to Military Service

- **Women enter military duty with relatively high rates of sexual trauma, compared to general civilian population[1,2,3]**
  - Pre-service sexual assault rates vary by study, but a 2008 Naval recruit study found that:
    - 39% of women reported being sexual assaulted since age 14, prior to service[4]
    - 13% of men reported behaviors consistent with perpetrating a sexual assault since age 14, prior to service[4]

1 Merrill, et al., (1998), *Military Medicine, 163*
2 Merrill, et al., (1999), *Journal of Traumatic Stress, 12*
3 Bostock & Daley (2007), *Violence Against Women, 13*
4 Stander, Merrill, et al, (2008), *Journal of Interpersonal Violence*

Sexual Assault History and Military Service

- **Any prior assault (including sexual or violent physical assault) <u>doubles</u> the chance of developing post-deployment PTSD symptoms after combat exposure[1]**
  - **Women reporting new PTSD symptoms or diagnosis:**
    22% (prior assault history) vs. 10% (no prior assault)
  - **Men reporting new PTSD symptoms or diagnosis**
    12% (prior assault history) vs. 6% (no prior assault)

[1] Smith, et al., (2008), *Epidemiology, 19*

Warfighter Implications

- **Warfighters have injuries that must be assessed behaviorally:**
  - **Avoidance Behaviors**
  - **Alcohol Abuse**
  - **Aggressive Behaviors**

- **Aspects of military culture may compound problem:**
  - **Sexual assault occurs where victim lives and works**
  - **Victims experience feelings of entrapment, powerlessness, and greater risk of re-victimization**
  - **Victims may need to rely on perpetrators for basic needs**
  - **Victims often encounter disruption of career goals**
  - **Unit focus on readiness/health**
    - **Most members avoid "Problem Person" stigma**

Questions?

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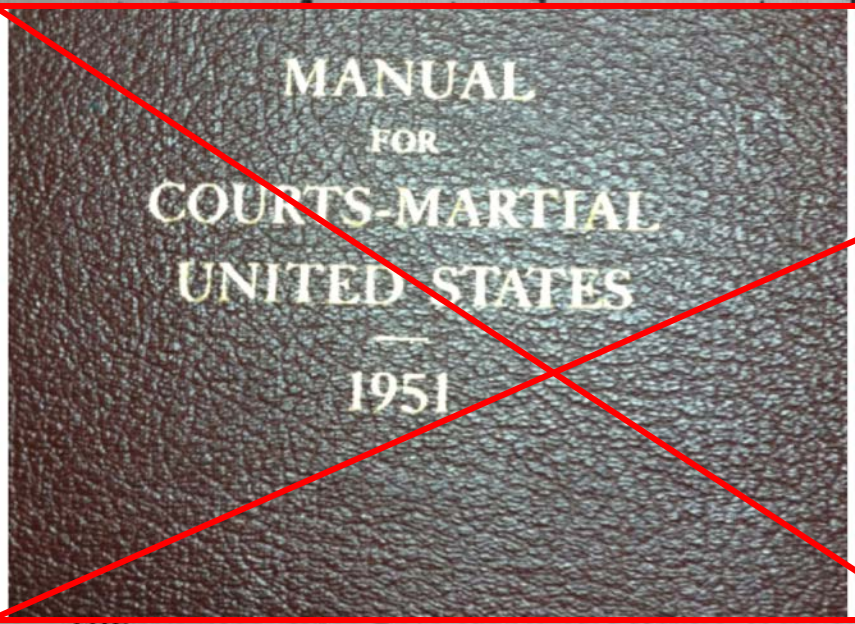
www.sapr.mil
www.safehelpline.org

MILITARY RULES OF EVIDENCE

Lt Col Brian Thompson

- MRE 412 (Rule, exceptions, law)
- MRE 412 & Article 32
  - Current status
  - MRE 303
  - Persuasion
- A Dramatic Reading …
- BREAK
- MRE 608
- MRE 413-14
- MRE 615
- MRE 513-14
- Whatever …

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."



the force involved in the act of penetration will suffice if there is no consent. Any penetration, however slight, is sufficient to complete the offense (Art. 120c).

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be

The Procedure

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

his rule does not require the exclusion
f insurance against liability when of-
her purpose, such as proof of agency,
control, or bias or prejudice of a

ex offense cases; relevance of
im's sexual behavior or sexual
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generally inadmissible. The following
t admissible in any proceeding involv-
l sexual offense except as provided in
b) and (c):

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vant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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

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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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

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

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

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

fense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

The Rule

vant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

havior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged of-

fense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

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different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer rele-

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(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

(b) *Exceptions.*

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

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

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

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

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consent or by the prosecution;
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(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

The THREE Exceptions

Exception A – Source of injury, semen, physical evidence

Exception B – Conduct w/ the Accused to show consent

Exception C – Constitutionally Required

(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 al-leged victim's privacy,~~ such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

United States v. Gaddis, 70 M.J. 248, 253 (CAAF 2011)

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(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

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(b) In a court-martial in which the Government in-

"Evidence must be admitted within the ambit of MRE **412(b)(1)(C)** when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." United States v. Ellerbrock, 70 M.J. 314, 318 (CAAF 2011).

Those dangers include "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."

Material is a multi-factored test looking at "the importance of the issue in relation to the other evidence in the case" & "the extent to which the issue is in dispute"

Relevant means MRE 401.

United States v. Gaddis, 70 M.J. 248, 253 (CAAF 2011)(overrules U.S. v. Banker, 60 M.J. 216 (CAAF 2004))

D: Rumors in emails that Victim sexually active
D: Victim's mom confronts Victim and requests medical exam
D: Victim fabricates rape allegations
J: You can cross on confrontation of email & threat of medical exam, BUT you cannot reference sex, sex rumors, or contents of emails. You can argue reasonable inferences.

"once the defendant has been allowed to expose a witness's motivation to testify, it is peripheral concern to the Sixth Amendment how much opportunity defense counsel gets"

Military Judge specifies

leged 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

wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412. Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in

the accused to prove consent or by the prosecution; and

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

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

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(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

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(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

MRE 412 & the Article 32 Investigation

- Does MRE 412 apply at an Article 32?
- Can the IO consider MRE 412 evidence?
- Can a MJ acting as IO close the Article 32 and conduct a MRE 412 hearing?

Then What Do You Do When the IO Answers YES, YES, & YES

MRE 412 & the Article 32 Investigation

- Current “health” of Article 32, UCMJ
  - Congress
  - OSD/GC & JSC

- So What To DO … How to Persuade
  - RCMs
  - MRE 303
  - 2012 JSC Failed Effort
  - STC approach

THE GREAT AMERICAN NOVEL

A One-Act Play

[Based on a true story]

- MRE 608
  - (a) Character for Truthfulness
  - (c) Motive to Fabricate

- MRE 413-14

- MRE 615: no exclusion … “(4) a person authorized by statute to be present at courts-martial, or (5) any victim of an offense from the trial of an accused for that offense because such a victim may testify or present any information in relation to sentence or that offense during the presentencing proceedings.”

- MRE 513

What? Protects "a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."

Exception: Constitutionally required.

How? 5-day notice, closed hearing, victim right to attend, in camera review, protective orders

What's Released?
- conditions that affect the ability of the witness to perceive, recall, or relate
- bias or motive to fabricate
- inconsistent statements

U.S. v. Briggs, 48 MJ 143, 145 (C.A.A.F. 1998)

- MRE 514

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

Exception: Constitutionally required →

"This relatively high standard for release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless."

Procedure: See MRE 513

- Whatever …

- MRE 412 (Rule, exceptions, law)
- MRE 412 & Article 32
  - Current status
  - MRE 303
  - Persuasion
- A Dramatic Reading …
- BREAK
- MRE 608
- MRE 413-14
- MRE 615
- MRE 513-14
- Whatever …

Professional Responsibility for SVCs

Major Lisa Richard
The Judge Advocate General's School

Professional Responsibility for SVCs

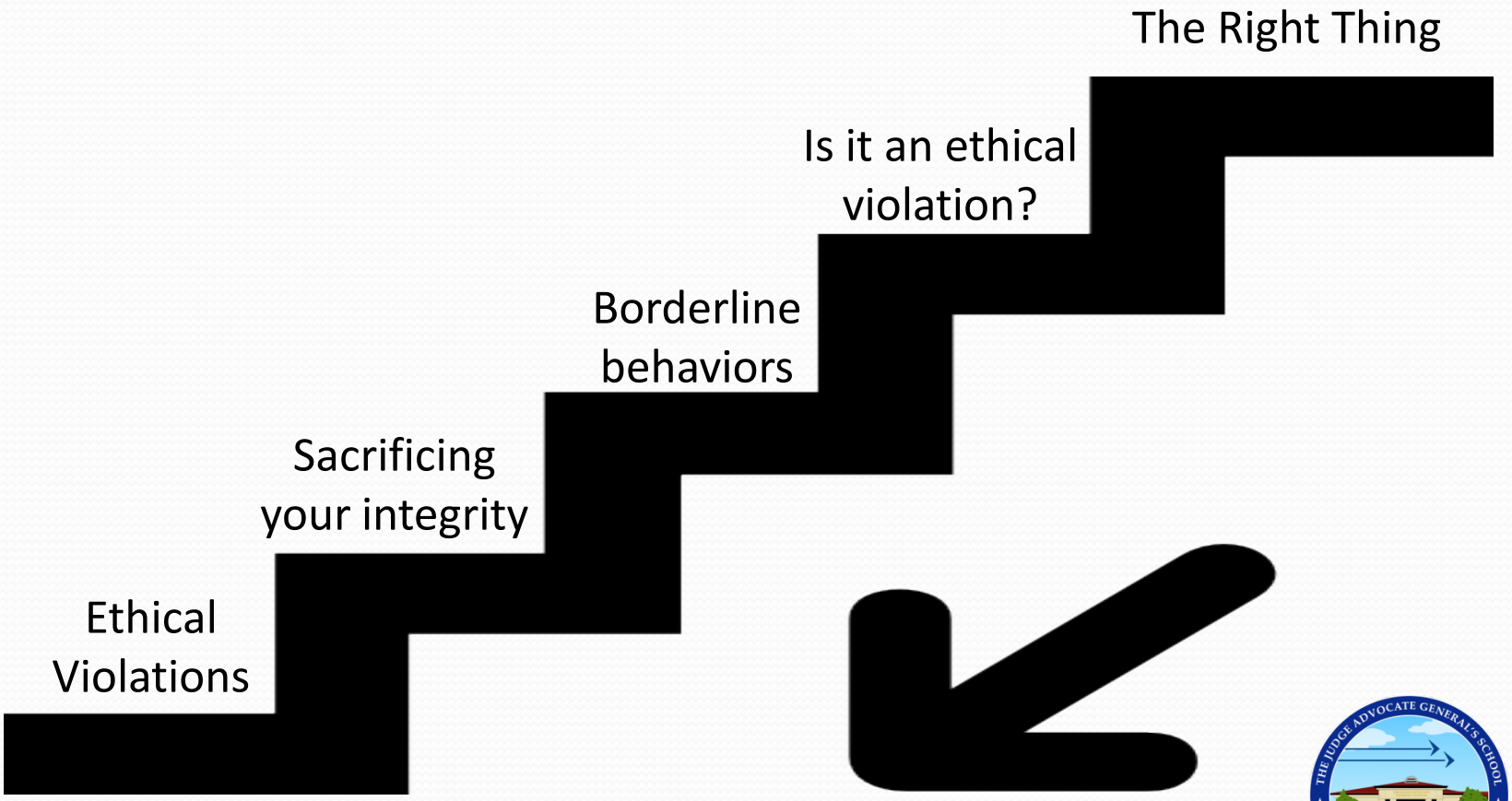
Major Lisa Richard
The Judge Advocate General's School

Lawyer as Leader

"'To merely render advice without leadership is an abdication of professional responsibility. Lawyering by its very nature is leading.' . . . . Lawyer leaders must learn to master their leadership skills without losing sight of the professional conduct rules."

Brig Gen Edward F. Rodriguez, Jr., USAFR, *Lawyering is Leading*, The Reporter, 2005 Keystone Edition

Leadership vs. Professional Responsibility



Road Map

- The Rules
  - Examples
- Trial Publicity
- Scenarios

Our Rules

- Air Force
  - TJS-2: *Rules* of Professional Conduct and *Standard* for Civility in Professional Conduct
  - TJS-3: *Standards* for Criminal Justice
    - Atch 2: Uniform Rules of Practice before AF Courts
  - ARC-1: Rules and Standards of Professional Conduct for ARC
  - **SVC Rules of Practice & Procedure 1 Jul 13**
- Army
  - AR 27-26
- Navy
  - JAGINST 5803.1C
  - Uniform Rules Of Practice For U.S. Navy-marine Corps Trial Judiciary
- State Rules

SVC Program

"All SVCs are bound by applicable Air Force Instructions and Manuals, the Air Force Rules of Professional Conduct, the Air Force Standards for Criminal Justice, the Air Force Standards for Civility in Professional Conduct, and the Uniform Rules of Practice before Air Force Courts-Martial." Part A SVC Charter

State Rules or AF Rules?

- Counsel are still obligated to their licensing bar authorities
- When there is a difference between state rules and the Air Force Rules, the **Air Force provisions will control**

"All **SVCs** are bound by applicable Air Force Instructions and Manuals, the Air Force Rules of Professional Conduct, the Air Force Standards for Criminal Justice, the Air Force Standards for Civility in Professional Conduct, and the Uniform Rules of Practice before Air Force Courts-Martial. Depending on the circumstances, they may also be bound by other laws, regulations, and instructions as well as the ethics rules of their state bars." Air Force Special Victim's Counsel Charter

Rule 1.1 Competence

- " lawyer shall provide competent legal representation to a client…requires legal knowledge, skill, thoroughness, and preparation…"
- The AF Rules of Professional Conduct apply to all military and civilian lawyers and paralegals, to include **SVCs and SVPs**. Rule 8, SVC Rules of Practice & Procedure
- **Trial Counsel Cert Required**
- **SVCs and SVPs** will attend SVC training ASAP

Army AR 27-16 – Rule 1.1

Navy JAGINST 5803.1C – Rule 1.1

Rule 1.2
Establishment and Scope of Representation…TC

- Represent interests of the AF
  - Not the Squadron CC
  - Not the victim
  - Not the witnesses
- Make sure you and your people remember who you work for…
  - SFS Sq CC example
  - UA CC issue

Army AR 27-16 – Rule 1.2

Navy JAGINST 5803.1C – Rule 1.2

Rule 1.2
Establishment and Scope of Representation…as DC

- Client's decisions
  - Counsel
  - Pleas
  - Forum
  - Testify or not
    - Findings
    - Sentencing (allocution)

But client consultation is critical!

- Attorney's decisions
  - Witnesses
  - Cross
  - Motions
  - Strategy
  - Challenge Court Members

Army AR 27-16 – Rule 1.2

Navy JAGINST 5803.1C – Rule 1.2

Rule 1.2
Establishment and Scope of Representation…SVC

- SVC may represent sexual assault victims throughout the military justice process and advocate their interests to all actors within the system.
- SVC may advocate a victim's interests to any actor in the military justice process, including, but not limited to, commanders, convening authorities, the SJA, TC, the accused's MDC, and, to the extent authorized by the MCM, military judges.

Army AR 27-16 – Rule 1.2

Navy JAGINST 5803.1C – Rule 1.2

Scope of Representation Rule 1.2

Victim client tells you that she lied to investigators when first questioned abut the sexual assault. She was asked whether she ever had sex with the accused before. She didn't want to look bad and panicked. So she told investigators no but she actually had previously had consensual sex with the accused several months before the assault. She is worried that if she changes her story now, people won't believe that she was actually assaulted, even though she was. She is getting ready to interview with the trial counsel. What do you advise?

Rule 1.2
Establishment and Scope of Representation…SVC

- *LRM v. Kastenberg*. CAAF ruled that a **"reasonable opportunity to be heard"** at a hearing [under MREs 412 and 513] includes the right to present facts and legal argument, and that a victim who is represented by an SVC may be heard through counsel (SVC)."
- CAAF also stated:
  - The right to be heard through counsel is not absolute.
  - MJ may apply reasonable limitations, including restricting to written submissions if reasonable.
  - If SVC or TC indicates that the victim's interests are entirely aligned with those of TC, the opportunity to be heard could "reasonably be further curtailed"

Army AR 27-16 – Rule 1.2

Navy JAGINST 5803.1C – Rule 1.2

Rule 1.13

The Army as Client

- Who is the client?
- Usually, the Air Force Acting through authorized officials
  - But you don't represent the individual official
    - US v. Rust , 41 M.J. 472 (1995).
- Exceptions
  - Defense Counsel
  - Special Victim's Counsel
  - Legal Assistance
    - But not in matters adverse to USAF

Army AR 27-16 – Rule 1.13

Navy JAGINST 5803.1C – Rule 1.13

Do Others Know Who You Represent?

- **SVC Counsel Rule 6.3**: ensure third parties understand that the victim is your client
- AFI 51-504, para. 1.6.4, states that when contacting third parties, attorneys must avoid creating the impression that they represent the AF interests in resolving the client's concerns or that the AF has an interest in the outcome of the matter.
- Calling local DA to discuss jurisdiction over victim's case… "This is Capt X from the Air Force and I would like to talk to you about jurisdiction…"
  - Make sure DA knows you represent victim and not AF

Rule 1.4 Communication

- " lawyer shall keep a client reasonable informed about the status of a matter…"
- "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation"
  - w/ CCs – not your case
  - Acc calls legal

Army AR 27-16 – Rule 1.4

Navy JAGINST 5803.1C – Rule 1.4

When You Must Communicate…

1. When you need client's decision (Take the deal? Appeal?)
2. When seeking waiver (confidentiality, conflict of interest)
3. For When strategy/approach (enter stip of fact? stip of expected testimony?)
4. When client should be updated on status of a matter (lawyer is ill, separating/PCSing, etc.)
5. **When client asks!**
6. When client wants you to do something you can't do

Rule 1.6 Confidentiality

- " lawyer shall not reveal information relating to representation of a client unless the client consents after consultation…"
- "lawyer may reveal information…to prevent client from committing criminal act…likely to result in imminent death…or to establish a defense…"

Army AR 27-16 – Rule 1.6

Navy JAGINST 5803.1C – Rule 1.6

Rule 1.6 Confidentiality …re: SVCs

- Brady violation is the wrongful withholding of favorable evidence from the defense by the prosecution…is the SVC the prosecution?
- Gov't & SVC should argue that SVC is a completely separate entity, wholly independent from the prosecution.
  - Gov't should rely on 10 USC 1044 and 1565b (Victims of sexual assault: access to legal assistance and services of Sexual Assault Response Coordinators and Sexual Assault Victim Advocates) as evidence of separate prosecution function

Army AR 27-16 – Rule 1.13

Navy JAGINST 5803.1C – Rule 1.6

Confidentiality

- "Because of the substantial risk of third party access to (EMAIL) communications, some courts have held that there is no reasonable expectation of privacy or confidentiality in order to regard them as privileged communications…"
  - Warn client…when at risk
  - Work computer
  - Public Computer

Rule 1.6 - Confidentiality

Your client comes to talk with you about her case with a friend. You explain the limits of the attorney-client privilege when a third-party is present but your client insists on the presence of her friend at this first meeting. Later the TC calls you and said she talked with the friend and wants to verify a few things your client said during the initial meeting. The TC says there is no issue with you confirming a few facts since the conversation wasn't privileged. Is the TC correct?

Any Issues?

Uniform Rules of Practice before AF Courts–

Rule 5.5 Avoid Undue Familiarity.

Rule 3.3 Candor Toward the Tribunal

- Shall not knowingly…
  - Make false statements of material fact or law to a tribunal
  - Fail to disclose material facts to a tribunal to avoid crime or fraud
  - Fail to disclose to a tribunal known legal authority adverse to client's position
  - Offer false evidence
    - Examples: ski trip, ADC as CC, Fake Discharge

Army AR 27-16 – Rule 3.3

Navy JAGINST 5803.1C – Rule 3.3

Rule 3.3 Continued

Before taking the stand in a sexual assault case, the victim tells the SVC that she intends to change her testimony so that "we can be sure [the accused] goes to jail for what he did" What should the SVC do?

AF Discovery: "Exculpatory+" (*Standard 3-3.11*)

- R.C.M. 701(a)(6): "The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:
  - (A) **Negate** guilt…
  - (B) **Reduce** the degree of guilt…
  - (C) **Reduce** the **punishment**."
- What TC views as irrelevant may be "**GOLD**" to DC

Remember…

- Brady violation is the wrongful withholding of favorable evidence from the defense by the prosecution…is the SVC the prosecution?
- **Gov't & SVC should argue that SVC is a completely separate entity, wholly independent from the prosecution.**
  - Gov't should rely on 10 USC 1044 and 1565b (Victims of sexual assault: access to legal assistance and services of Sexual Assault Response Coordinators and Sexual Assault Victim Advocates) as evidence of separate prosecution function

Rule 3.4
Fairness to Opposing Party and Counsel

- AF Rule 3.4(d): A lawyer shall not "fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party"
- R.C.M. 701 "Discovery"
  - Full discovery…
  - …even rebuttal evidence
  - Avoid the label "trial by ambush"

Army AR 27-16 – Rule 1.13

Navy JAGINST 5803.1C – Rule 3.4

Rule 3.4 Continued

In a sexual assault prosecution, a judge excludes the victim from the courtroom under MRE 615 so she does not hear a witness testify. The judge does not exclude the SVC. Can the SVC discuss the witness's testimony with the victim?

Rule 4.2
Communication with Person Represented by Counsel

- General Rule:
  - May not communicate
  - About the subject of the representation
  - With a person known to be represented
  - Unless consent or authorized by law

Army AR 27-16 – Rule 4.2

Navy JAGINST 5803.1C – Rule 4.2

- TC and the accused's MDC need to obtain consent from SVC prior to communicating with represented victims under AF Rule of Professional Conduct 4.2, which states that "in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

Accountability Rules (Rules 5.1-5.3 & 8.5)

- **Supervisory Attorneys**:
  - Ensure subordinates comply with rules
  - May be held responsible for subs violations if:
    - **Orders conduct**
    - **Knowingly ratifies**
    - **Knows of violation and fails to remedy**
      - **Examples: rehearing, clerks**

Army AR 27-16 – Rules 5.1-5.3

Navy JAGINST 5803.1C – Rules 5.1-5.3

Rule 3.6 Publicity
Standard 3-1.3 (TC); 4-1.3 (DC)

- Prohibits **extrajudicial statements** that a **reasonable person** would expect to be **disseminated by means of public communication** "if the lawyer knows or reasonably should know that it will have a substantial likelihood of **materially prejudicing** an adjudicative proceeding in the matter." **This standard will also apply to SVCs.**
- Although SVCs are not a "party" under this Rule, **SVCs will comply as a matter of policy.**

Navy JAGINST 5803.1C –
Rule 3.6 Extra-Tribunal Statements

Army AR 27-16 –
Rule 3.6 Tribunal Publicity

Rule 7: Scope/Interaction w/ Media

SVC Rules Practice & Procedure

- SVC may make a statement that a reasonable lawyer would believe is **required** to protect a client from the **substantial undue prejudicial effect** of recent publicity not initiated by the lawyer or the lawyer's client.
- Statement shall be limited to such information as is necessary to mitigate or correct information that is the subject of recent publicity. AFRPC 3.6.
- **This Rule will enable SVC to defend a client's interests in the media.**

AirForceTimes

25 February 2008 www.airforcetimes.com

Education bill House backs new benefits for families, vets 27

20-year plan *Cyberwarfare central to Moseley's strategy* 19

The budget $59 million to promote the Air Force 'brand' 10

COLONEL CHARGED WITH RAPE

Prosecutors say group commander also guilty of fraud, indecent a...

3 patients 3 deaths & the captai... charged wi... murde...

Lackland trainer on trial for abuse charges

BY SIG CHRISTENSON : APRIL 15, 2013 : Updated: April 16, 2013 12:12am

HONOR BETRAYED

Attacked at 19 by an Air Force Trainer, and Speaking Out

Lackland Rape Victim Talks of Ordeal: Virginia Messick was raped by her training instructor at Lackland Air Force Base in 2011. She is the first Lackland victim to speak publicly, in this exclusive interview with the reporter James Risen.

Lackland Air Force Base Sex Scandal: Court Martial Begins Over Serious Charges

Even After Lackland Scandal, Military Still Isn't Fixing Its Sexual Abuse Epidemic

Prejudicial Statements to Avoid AFI 51-201, para. 13.6.2

- Prior criminal record of accused
- Character or reputation of accused
- Opinion of lawyer on guilt of the accused
- Opinion of lawyer on merits of the case
- Credibility of prospective witnesses
- Existence or contents of any confession
- References to examinations or tests, e.g. fingerprint, ballistics, DNA

Navy JAGINST 5803.1C – Rule 3.6: States what you can say not what you can't say

Army AR 27-16 – Rules 3.6

Responding to Recent Publicity Initiated by Others

- Rule 3.6(c) allows a lawyer to make a statement that a reasonable lawyer would believe
  - Is required to protect a client from substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client
  - **Limited** to such information **necessary to mitigate or correct information** that is the subject of recent publicity

Navy JAGINST 5803.1C – Rule 3.6 (f)

High Interest Cases & PA

- PA Guidance: AFI 35-101 (29 Nov 05)
- Paragraph 6.9 directs PA personnel to consult with SJA before releasing information
- Develop and maintain close relationship with PA prior to any incidents

Things to Remember

- Doesn’t matter if the case ever goes to trial
- No actual prejudice to defendant need be proven, e.g. change of venue was necessitated by extrajudicial statements
- In an AF matter, people will look to JA to determine what can be released to media

Duty To Report (Rule 8.3)

- Must report violations of AF Rules of Professional Conduct
- Don't use "E" word lightly -- "Better be sure"
- May request advisory opinions from JAA-PR

Army AR 27-16 – Rule 8.3

Navy JAGINST 5803.1C – Rule 8.3

And what happens if you violate the rules….

Just plain dumb…

In re M

Lawyer called the judge a f---idiot…

…on the record

facebook
DON'T WORRY
WE'RE FROM
THE INTERNET
twitter
Tweet
Beware!
facebook
YouTube
flickr
facebook
twitter
LinkedIn
Undo

The Age of Electronic Discovery
U.S. v. Philip Morris

- 1,723 paragraph discovery request
- Required search of 20 million e-mails
- 200,000 e-mails found “relevant”
- Required 25 lawyers/archivists six months to assess for disclosure

Social Networking

- Requesting/reviewing/turning over e-mails
  - 90% of all collaboration happening electronically
  - Once there's a case, "routine destruction" doesn't seem so routine...
- Requesting/reviewing/turning over ALL electronic communication (social network) info

E-Mail Pitfalls

- **Confidentiality nightmare**: Don't press send unless you're OK if message is forwarded
- Use of e-mail **disclaimers**—when a good idea?
- **Distinguish** between "end product" (discoverable & not confidential) and "work product" (not discoverable & confidential)

Case Study

A judge “friends” two defense attorneys who have been long-time friends and now practice before her in court.

The judge uses FB to discuss a case with a lawyer involved and “Googles” the accused.

AFRPC 8.4

In the news…

Prosecutors in One Texas County Will Use Courtroom WiFi to Search Potential Jurors on Facebook

Case Study

Lawyer sanctioned by judge after posting photos on FB about his wild weekend… after the judge granted him a continuance because of a family death.

Case Study

A public defender wrote the following on a blog:

#127300 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.

AFRPC 1.6

Case Study

A San Diego lawyer discussed details from his service as a juror on his blog and caused a criminal case to be overturned. The lawyer insisted that orders not to discuss the case did not expressly include references to a blog. He received a 45-day suspension, paid $14,000 in legal fees and lost his job.

And… no kidding

A juror in a criminal case recently posted a message on Facebook stating that she believed the defendant was guilty, and that it would be fun to convict him. This happened before the prosecution and defense had rested their cases.

The juror had to be removed from the case, and replaced with an alternate juror. The defendant was ultimately convicted.

QUESTIONS?

AFLOA/JAJG BULLETT BACKGROUND PAPER

ON

THE USE OF M.R.E. 412 AT ARTICLE 32 INVESTIGATIONS

Purpose:

To discuss the application and use of Military Rule of Evidence (M.R.E.) 412 to determine the admissibility of an alleged victim's sexual behavior or sexual predisposition at Article 32, UCMJ, investigations. **BLUF**: Investigating Officers have no authority to hold hearings under M.R.E. 412 and thus an IO cannot consider evidence that is excludable under M.R.E. 412, regardless of whether an exception to such rule may exist.

Discussion:

Applicable UCMJ, RCM, and MRE Provisions

- Article 32(a), UCMJ, provides that "[n]o 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. This investigation *shall include* inquiry as to the truth of the matter set forth in the charges…." (emphasis added).

- Article 32(b), UCMJ, states that "full opportunity shall be given to the accused to cross-examine witnesses against him…and to present anything he may desire in his own behalf, either in defense or mitigation…."

- Article 32(e), UCMJ, states that "the requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error."

- Rule for Courts-Martial (R.C.M.) 405 governs pretrial investigations conducted pursuant to Art. 32, UCMJ. R.C.M. 405(a) provides that "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."

> -- The Discussion following R.C.M. 405(a) states that "[t]he function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations …." *Manual for Courts-Martial*, 2012 Edition, II-34.

- R.C.M. 405(e) limits the scope of the Art. 32, UCMJ, inquiry to "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.

- R.C.M. 405(i) states that "[t]he Military Rules of Evidence—other than Mil. R. Evid. 301[Privilege concerning compulsory self-incrimination], 302 [Privilege concerning mental examination of an accused], 303 [Degrading questions], 305 [Warnings about rights], 412 [Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition] and Section V [Privileges]—shall not apply in pretrial investigations under this rule."

- M.R.E. 1101(d) reiterates that the Military Rules of Evidence "(other than with respect to privileges and Mil. R. Evid. 412) do not apply in investigative hearings pursuant to Article 32 …."

- M.R.E. 412(a) states that "[t]he following evidence is not admissible *in any proceeding* involving an alleged sexual offense except as provided in subdivisions (b) and (c):

> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> (2) Evidence offered to prove any alleged victim's sexual predisposition. (emphasis added).
>
> -- M.R.E. 412(d) states that "the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged

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victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder."

- M.R.E. 412(b) provides the following exceptions to M.R.E. 412(a): "(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (C) evidence the exclusion of which would violate the constitutional rights of the accused.

- M.R.E. 412(c) states the procedure used to determine whether such evidence is admissible. Specifically, M.R.E. 412(c)(2) states that "[b]efore admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed." Further, this subsection states that evidence and papers offered pursuant to this rule as well as the record of this hearing "must be sealed and remain under seal unless the court orders otherwise." Moreover, M.R.E. 412(c)(3) states that the "military judge determines on the basis of the hearing" whether the evidence offered pursuant to this rule is relevant and admissible. Finally, M.R.E. 412(c)(3) provides that "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."

- M.R.E. 412 provides that only a military judge can conduct the closed hearing and that only a military judge can rule on the admissibility of evidence subject to M.R.E. 412. There is no M.R.E. or R.C.M. which equates an investigating officer to a military judge. In fact, the "definition" of an "Investigating Officer" under R.C.M. 405(d)(1) does not provide the power of an investigating officer to exercise the power of a military judge (even if the investigating officer is otherwise qualified and certified as a military judge).

- R.C.M. 405 provides no mechanism or authority whereby an investigating officer may seal any evidence offered or record produced during any portion of an investigation conducted pursuant to Art. 32, UCMJ. In fact, R.C.M. 405(j)(2) governs the contents of the investigating officer's report and states that the evidence admitted and record produced from witness testimony "shall" be included in that report. Pursuant to R.C.M. 405(j)(3), this report is then distributed to the commander who directed the investigation and to each accused.

- M.R.E. 303, the rule regarding degrading questions, states that "[n]o person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person."

- The analysis of M.R.E. 303 notes that, even before the 1993 amendment to the *Manual for Courts-Martial*, M.R.E. 303 was "the means by which the substance of Rule 412 applies to Article 32 proceedings, and no person may be compelled to answer a question that would be prohibited by Rule 412." *Manual for Courts-Martial*, 2012 Edition, App. 22-9.

- Drafters of the Analysis section to M.R.E. 303 particularly addressed that a "specific application of Rule 303 is in the area of sexual offenses." *Manual for Courts-Martial*, 2012 Edition, App. 22-9.

> -- "Congress found the information now safeguarded by Rule 412 to be degrading. See e.g., Cong. Rec. H119944-45 (Daily ed. Oct. 10, 1978) (Remarks of Rep. Mann). As the material within the constitutional scope of Rule 412 is inadmissible at trial, it is thus not relevant let alone "material." Consequently that data within the lawful coverage of Rule 412 is both immaterial and degrading and thus is within the ambit of Rule 303 (Article 31(c))." *Id.*
>
> -- "As Rule 412 permits a victim to refuse to supply irrelevant and misleading sexual information at trial, so too does the substance of Rule 412 through Rule 303 permit the victim to refuse to supply such degrading information at an Article 32 for use by the defense or the convening authority. <u>See</u> <u>generally</u> Rule 412 and the Analysis thereto. It should also be noted that it would clearly be unreasonable to suggest that Congress in protecting the victims of sexual offenses from the degrading and irrelevant cross-examination formerly typical of sexual cases would have intended to permit the identical examination at a military preliminary hearing …." *Id.*

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- In the 1993 Amendment to the Manual for Courts-Martial, R.C.M. 405(i) and M.R.E. 1101(d) "were amended to make the provisions of Mil. R. Evid. 412 applicable at pretrial investigations. These changes ensure that the same protections afforded victims of nonconsensual sex offenses at trial are available at pretrial hearings. See Criminal Justice Subcommittee of House Judiciary Committee Report, 94th Cong., 2d Session, July 29, 1976. Pursuant to these amendments, Mil. R. Evid. 412 should be applied in conjunction with Mil. R. Evid. 303. As such, no witness may be compelled to answer a question calling for a personally degrading response prohibited by Rule 303." *Manual for Courts-Martial*, 2012 Edition, App. 22-9.

- The analysis is clear to point out that M.R.E. 412 applies at Art. 32 hearings even if the victim does not testify. M.R.E. 412 "protects the victim even if the victim does not testify. Accordingly, Rule 412 will prevent questioning of the victim or other witness if the questions call for responses prohibited by Rule 412." *Manual for Courts-Martial*, 2012 Edition, App. 22-9.

- Without discussing whether an investigating officer not otherwise qualified and serving as a Military Judge can conduct the procedural requirements of M.R.E. 412, U.S. v. Seldes, 2009 WL 4110770 (A.F.C.C.A.), addresses the fact that M.R.E. 412 clearly applies at Article 32 hearings. In Seldes, the accused was convicted of rape, conduct unbecoming an officer and adultery for an inappropriate and ongoing sexual relationship with the victim, culminating in the accused raping the victim while she was incapacitated. On appeal, the accused argued that he was entitled to a new Art. 32 hearing because the victim refused to answer questions about a prior affair she had with another officer which ended just a few weeks before she began her relationship with the accused. *Id.* at *10. At trial, the appellant attempted to offer evidence of this affair under two theories of admissibility: (1) to rebut any claim that the victim made that she would not consent to intercourse with the accused because he was married (a claim the victim never made), and (2) that the other relationship gave the victim a motive to fabricate the allegations against the accused. *Id.* at *3. The Military Judge ruled that the proffered evidence was inadmissible in accordance with M.R.E. 412. *Id.*

> -- In addition to arguing that the Military Judge abused his discretion in ruling that the evidence was inadmissible (a ruling that the Air Force Court affirmed), the accused argued that he was entitled to a new Art. 32 hearing to obtain additional discovery regarding this affair. *Id.* at *10.
>
> -- The Air Force Court found that while Art. 32 hearings are a useful discovery tool, and that discovery is not limited to evidence admissible at trial, "discovery is not a prime object of the pretrial investigation. United States v. Arrusa, 26 M.J. 234, 236 (C.M.A. 1988)(quoting United States v. Eggers, 11 C.M.R. 191, 194 (C.M.A. 1953)). The primary object of an Article 32, UCMJ, hearing is "to inquire into the truth of the matters set forth in the charges, and to secure information on which to determine what disposition should be made of the case." R.C.M. 405(a), Discussion. *Moreover, this does not change the fact that, as the appellee notes, Mil. R. Evid. 412 does apply to Article 32, UCMJ, hearings*. R.C.M. 405(i). Therefore, as we concluded the military judge correctly ruled the disputed evidence was inadmissible, *we also conclude the appellant would not be able to obtain this evidence at a new Article 32, UMCJ, hearing*." (Emphasis added).

Joint Services Committee Efforts

- The failure of efforts to expand the power of Investigating Officers to conduct M.R.E. 412 hearings and rule on the admissibility of evidence subject to M.R.E. 412 also weighs in favor of finding that investigating officers do not currently have this power. In October 2012, the Joint Services Committee requested that Congress change R.C.M. 405(i) to give power to an investigating officer to make rulings under M.R.E. 412. The JSC offered the following changes:

> R.C.M. 405(i) is amended as follows: "(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 subsections (a) and (b) shall apply in any case defined as a sexual offense in Mil. R. Evid. 412(d). (A) Evidence generally inadmissible.

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Evidence described in Mil. R. Evid. 412(a) offered under any theory other than one enumerated in Mil. R. Evid. 412(b) is inadmissible. The investigating officer must note the exclusion of such evidence and the basis upon which it was offered in the investigating officer's report. An investigating officer who is not a judge advocate must seek legal advice from an impartial source concerning the admissibility, handling, and reporting of any such evidence. (B) Procedure to determine admissibility.

With respect to any evidence offered under a theory described in Mil. R. Evid. 412(b), the investigating officer must make a determination as to admissibility, as follows:

(i) Notice. A party intending to offer evidence under Mil. R. Evid. 412(b) must serve written notice on counsel representing the United States and the investigating officer at least 5 days prior to the date of the pretrial investigation that specifically describes the evidence and states the Mil. R. Evid. 412(b) purpose for which it is to be offered, unless the investigating officer, for good cause shown, sets a different time.

(ii) Victim notice. The investigating officer must notify the victim or, when appropriate, the victim's guardian or representative, or ensure that the notification is accomplished by the counsel representing the United States.

(iii) Hearing. Before admitting evidence under this rule, the investigating officer must conduct a closed hearing. The hearing must not take place prior to the accused's R.C.M. 405(f) rights advisement, but may otherwise occur during the normal course of the investigation. At the hearing, the parties may call witnesses, including the victim, and offer relevant evidence. R.C.M. 405(g) continues to apply during this hearing. The victim must be afforded a reasonable opportunity to attend and be heard. If the victim is unavailable within the meaning of R.C.M. 405(g)(1), the alternatives to testimony enumerated in R.C.M. 405(g)(4)(B) are available, including a sworn statement created for the purpose of the hearing.

(iv) Order. If the investigating officer determines on the basis of the hearing described in subsection (2)(B)(iii) that the evidence the accused seeks to offer is relevant for a purpose under Mil. R. Evid. 412(b), and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the pretrial investigation. The investigating officer must specify the evidence that may be offered and the areas with respect to which the victim or witness may be questioned."

These proposed changes to R.C.M. 405 expanding the power of the IO were rejected, in toto, by the White House. Similar efforts this year have been abandoned in light of on-going discussion about changes to the Article 32 process.

Recommendation:

- M.R.E. 412 prohibits an investigating officer at an Article 32 investigation from the following: (1) questioning victims regarding matters covered by M.R.E. 412(b) over an objection by the alleged victim, (2) allowing trial or defense counsel to question victims regarding matters covered by M.R.E. 412(b) over an objection by the alleged victim, and (3) determining the admissibility of evidence under M.R.E. 412 due to the limitations on an investigating officer’s ability to comply with the procedural requirements of M.R.E. 412(c).

-- This would apply even if the investigating officer is otherwise qualified and certified as a military judge as there is still no ability to seal evidence generated by an Article 32 investigation or to seal any record created during any hearing conducted pursuant to M.R.E. 412(c) during such an investigation.

Attachment: Recommended Approach for Government Representatives (2 pp.)

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RECOMMENDED APPROACH FOR GOVERNMENT REPRESENTATIVES

1. Ensure your Investigating Officer (IO) Appointment Letter includes the following language:

> In conducting your investigation, you will comply with the provisions of Articles 31 and 32, U.C.M.J., R.C.M. 405 and AFI 51-201, Chapter 4, Section A. <u>This includes as well the requirements of M.R.E. 412, which I am explicitly directing prohibits you from considering evidence falling under that rule or holding any closed hearing to consider the admissibility of such evidence.</u> You should review each of these references before beginning your investigation. You are expected to prepare a summary of testimony as soon as practicable after a witness has testified. A verbatim transcript of the testimony of a witness may only be prepared if approved by my Staff Judge Advocate.

2. Discuss the requirements of M.R.E. 412 and R.C.M. 405 with the IO before the investigation begins. This step is critical to ensure that there is no disagreement between the Convening Authority and the appointed IO on these matters before the hearing convenes, before witnesses are traveled and before an alleged victim is harassed by unlawful consideration of prohibited evidence in the pretrial investigation.

3. Identify potential M.R.E. 412 evidence before the investigation begins through review of the evidence and interviews with both the alleged victim(s) and other witnesses. Ensure all documents intended to be offered have that evidence redacted and that the alleged victim(s) and other witnesses understand the requirements of M.R.E. 412 during the actual hearing. At the same time, ensure the defense is provided full and complete discovery and that every witness is encouraged to cooperate during defense interviews by answering all <u>relevant</u> questions without regard to whether the IO will be permitted to consider such evidence. If anyone is represented by counsel (either an ADC or SVC), coordinate the above through their representative.

4. Throughout the hearing, stay alert to the inadvertent or deliberate production of M.R.E. 412 evidence. Should any witness mention matters properly excluded under that rule, or any proposed document do the same, object immediately for procedural noncompliance. For instance:

> M.R.E. 412 and R.C.M. 405 do not allow for the admission of other sexual behavior or predisposition evidence at this investigation. R.C.M. 405(i) states unambiguously the applicability of M.R.E. 412 at pretrial investigations, operating through M.R.E. 303 and Article 31(c), as does the analysis to each of these rules and statute. While the rule against degrading questions generally notes a witness will not be "compelled" to answer these types of inquiries, M.R.E. 412 sets out procedures that cannot be complied with by any IO. This includes particularly M.R.E. 412(a) and (c), from the rule explicitly set out in your appointment letter.
>
> Additionally, in 2012 the Joint Services Committee on Military Justice requested that Congress change R.C.M. 405(i) to allow IOs to make rulings in compliance with M.R.E. 412(c), which reserves this role for a military judge. The request, along with proposed language that would have allowed these determinations at Article 32 investigations through equivalent safeguards for the privacy rights of alleged victims, was rejected in its entirety by the White House.
>
> Accordingly, the Government objects to the proposed question, any answer and your consideration of this evidence.

5. If the IO grants your objection, continue the investigation and ensure the report does not include this evidence. If the IO overrules your objection, request a break before proceeding and consult with your SJA on the way ahead. Our advice is to take the following steps as necessary:

a. Recommend the IO consult with the SJA for legal advice and reconsideration of his ruling. *See* para. 2.3.2.2 of the Article 32 Investigating Officer's Guide.
b. If your objection is still overruled and the evidence is included in a document, state that the government's objection is continuing and request that no witness be permitted to testify about those matters. File a written

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objection restating your position as directed by the IO and in accordance with R.C.M. 405(h)(2). Otherwise, continue the hearing as planned and without further reference to the improperly admitted evidence.

c. If the evidence comes from an alleged victim or witness or the IO intends to permit testimony on prohibited matters based on a document admitted over your objection, state that the government's objection is continuing and consider the following options:

   i. Allow the SVC to talk to their client about whether he or she will answer the objectionable questions. At this point (prior to the defense cross examination) you should have elicited all the relevant evidence the IO needs to complete his or her report. [If the witness does not have a SVC, then he or she is likely a civilian and it would be unusual for a civilian sexual assault victim to have testified at an Art 32 anyhow].
   ii. Ending the investigation with regard to the present witness or document and requesting that the IO accomplish his or her report based on the evidence already produced. In this event, ensure that all relevant and permissible questions that can be asked of a given witness are finished and that all relevant and permissible portions of a document are produced if possible. Also, make certain that all unrelated matters – including other offenses, evidence produced by the defense and legal issues – are still produced and investigated. Your goal should be to narrow the contested evidence as much as possible while preserving the remainder of the investigation.
   iii. Ending the investigation altogether, asking the CA to substitute the IO and proceeding at another time. This is your last option, of course, and is unlikely given your work in Steps 1 and 2 above.

6. If the STC assigned to your case will not be present at the investigation, discuss these concerns in advance and attempt to reach them should problems arise. If he or she is unavailable, contact any STC you can reach, the Chief STC, Lt Col Brian Thompson (brianm.thompson@pentagon.af.mil) or the Chief of Policy and Coordination, Special Victims Unit, Maj Jennifer Holmes (jennifer.holmes@pentagon.af.mil) for additional direction and support.

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SVC Client Intake Scenarios

Below are your room and scenario assignments for the intake exercise. You will be assigned to the same room for the duration of the exercise. You will perform an intake interview with the client. The letter after your name corresponds with the scenario you will be performing. Each scenario will take 25 minutes followed by a 5 minute break. Victims and SVC faculty will rotate rooms. Once everyone in your room has had their turn your room is then released for the day.

Alpha Group - Rm 118	Bravo Group - Rm 119	Charlie Group- Rm 120	Delta Group- Rm 121
CDR Abramson (A)	CDR Janssen (B)	LT Carina Podgorski (C)	Capt Alcantara (D)
Lt Cara Addison (B)	LCDR Kaneyuki (C)	LT Redmond (D)	CPL Barbas (E)
Lt Albright (C)	LCDR Korody (D)	LT Schaffer (E)	Capt Barikbin (F)
LCDR Call (D)	LT Lawrence (E)	CDR Shook (F)	Capt Braithwaite (G)
LCDR De Groot (E)	LCDR Myyoung (F)	LCDR Speakman (G)	Sgt Diaz (H)
LT Deangelo (F)	CDR Jeffery McCray (G)	LT Leann Yang (H)	Maj Cloniger (A)
Capt Fischer-Anderson (G)	LT Steven Meredith (H)	LCDR Amy Perry (A)	Maj Olson (faculty)
CDR House (H)			

Echo Group - Large Court (Rm 110)	Foxtrot Group- Small Court (Rm 108)	Golf Group- Rm 128	Hotel Group- Rm 130
CPL Haynes (E)	SSgt Robinson (F)	CPL Vest (G)	Col Barron (H)
Sgt Hernandez (F)	Capt Russell (G)	Capt Whetsel (H)	Capt White (A)
Maj Higgins (G)	Capt Serbaroli (H)	Capt Mills (A)	Maj Adams (B)
Maj Ivins (H)	Capt Sood (A)	Capt Douglass (B)	Capt Lin (C)
Capt Larripa (A)	Capt Tilney (B)	Sgt Evangelista (C)	Lt Col Grayson (D)
CPL Louis (B)	CPL Trail (C)	CPT Stransky (D)	Maj Gruenes (E)
MSgt Sears (faculty)	Col Joyce (faculty)		SQN LDR Lovett (F)

Scenario A: SrA Regina Ellis is the victim in a case that is under investigation and headed for an Article 32 hearing. You are contacted when the legal office informs her of her right to counsel under the new program. She accepts and wants to talk to you before she is interviewed further. They only tell you that the accused is charged with committing sexual assault while she was substantially incapacitated under Article 120 (2008) and indecent acts for recording her lying partly naked in bed while she was writhing in a drunken monologue. You fly out to meet her several days before the Article 32 is set to commence.

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

Scenario C: After you return to your base from the course, the Special Victims' Counsel Program is initiated and you receive a call from your MAJCOM detailing you to represent a civilian victim, Ms. Laura Pritchard. The legal office lets you know that the case has been referred to trial which will occur in about six weeks. You travel to Ellsworth to meet with Ms. Pritchard in order to meet and advise her.

Scenario D: A victim advocate notified the legal office that a victim in an upcoming sexual assault trial wishes to be represented by a Special Victims' Counsel. You a given the case. The victim in the case is Airman First Class Petersberg, stationed at Kirtland AFB, NM. You know only that she wants you to explain the charges to her. The accused is charged with Sexual Assault by causing bodily harm and forcible sodomy in violation of Article 125. The legal office forwarded you a copy of the charges:

CHARGE I: Violation of the UCMJ, Article 120

Specification: In that SENIOR AIRMAN FLYNN L. KIPLINGER, United States Air Force, 55th Operational Squadron, did, at or near Kirtland Air Force Base, New Mexico, on or about 14 September 2012, commit a sexual act upon, Airmen First Class Sasha Petersberg, to wit: penetraing her vagina with his penis by causing bodily harm, which was an offensive touching of her vagina by his penis.

CHARGE II : Violation of the UCMJ, Article 125

Specification: In that SENIOR AIRMAN FLYNN L. KIPLINGER, United States Air Force, 55th Operational Squadron, did, at or near Kirtland Air Force Base, New Mexico, on or about 14 September 2012, commit sodomy with, Airmen First Class Sasha Petersberg, by force and without consent of the said Airmen First Class Sasha Petersberg.

Scenario E: You receive a call from your SJA saying that your MAJCOM has detailed you to represent a client from Hurlburt Field, FL. They do not know the identity of the person. You drive over there and meet her at the SARC's office.

Scenario F: You have been directed to travel to Seymour Johnson AFB and represent a victim in an upcoming case. You were told she is Ms. Luna Delphino, the wife of the 4th Maintenance Operation Squadron First Sergeant SMSgt Osborne Delphino. You are told only that an Article 32 hearing is occurring soon and she wishes to meet in person. You meet her at the SARC's office.

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

Scenario H: You are the SVC at Maxwell AFB. You gave a briefing to the current Squadron Officer School (SOS). After class you are approached by a student in the hallway that wishes to speak to you. You make an appointment and she comes to see you.

1300-1325	Session	1455-1500	Break
1325-1330	Break	1500-1525	Session
1330-1355	Session	1525-1530	Break
1355-1400	Break	1530-1555	Session
1400-1425	Session	1555-1600	Break
1425-1430	Break	1600-1625	Session
1430-1455	Session	1625-1630	Break
		1630-1655	Session

SCENARIO A

What the SVC Knows: SrA Regina Ellis is the victim in a case that is under investigation and headed for an Article 32 hearing. You are contacted when the legal office informs her of her right to counsel under the new program. She accepts and wants to talk to you before she is interviewed further. They only tell you that the accused is charged with committing sexual assault while she was substantially incapacitated under Article 120 (2008) and indecent acts for recording her lying partly naked in bed while she was writhing in a drunken monologue. You fly out to meet her several days before the Article 32 is set to commence.

For the Victim

Biography: You are SrA Regina Ellis, a member of the base maintenance squadron. You are an average troop and enjoy scary horror movies and are a runner. You have been at the base for three years and have a regular group of dorm buddies that you hang out with every Saturday night. The principle activity is drinking. You met the accused in a hash running club known as the "Base-X Roadsters." Your hash name is "Hustle-butt." You are one of only two females in the group. You have only known this group of friends for a while. You met them all during a base run and they invited you to run with them. You never learned their real names until the case started and the legal office told you their names. Otherwise you knew them only by their hash names. The accused's hash-name is "Trojan" because his previous girlfriend once gave him a used condom with which to have sex with her. Your other hash friends are named "Choady" and "The Special Mole." After a hash run you would meet at one of their houses and drink until you were blacked out. You remember having sex one night with Choady outside on a reclining lawn chair. You also remember giving oral sex and manual stimulation to the Special Mole and receiving reciprocal oral sex in a laundry room. You remember these events in fragments, bits and pieces.

Factual background: After one hash run recently you were with Trojan in his house and were drinking Capt Morgan Rum and diet coke. You became extremely drunk and remember nothing except that you woke up and your vagina was sore and felt like you had had sex. You told a friend the next night while drinking about what you felt and she advised you to call the first sergeant. You were administered an exam by a sexual assault nurse and told OSI everything that you remembered, which was only the running and then the drinking. The legal office told you that they searched Trojan's room and found a DVD with you in it naked, though you haven't seen it. It does not show him touching you, only you wiggling around drunk, muttering things. They also told you that they might also have found his DNA in your Vagina. You are angry with Trojan for taking advantage of you and want to see him punished. When speaking with the legal office they asked you about having sex with Choady and the Special Mole. You don't see what that has to do with Trojan's assault of you. The legal office told you a little bit about something

called “410[sic] - the rape shield rule” and your Article 32 testimony. That prompted your interest in the SVC.

Psychological demeanor: This person is very blunt and graphic and has no problem using words that make ordinary people wince. Use foul language matter-of-factly. [The purpose of the rough language is to demonstrate that these situations are often uncomfortable topics and frequently involve collateral sexual acts. Everyone has their own comfort level when talking about these matters and we want to prepare some of these attorneys for people who might have a more cavalier attitude towards sex and help them interact and deal with it appropriately. This is not a joke and you should suppress any humor as you bluntly talk about the events. If the attorney laughs, chuckle politely a little bit, if too much, look at them as if they are insulting you.] Remember, you are ultimately very serious about what you believe happened to you.

Desired Outcome:

You are very concerned about not coming off as too slutty. What you heard about the law doesn’t make much sense and you have questions and want to avoid mentioning the other hash runners if possible though you will go through with this if it means holding Trojan responsible. The legal office already told you they would have to talk about this but you don’t know if they are on your side and think they are caving without a fight.

Possible questions you might want to eventually ask:

1. What exactly is 410 [sic] “the rape shield rule”?
2. How does it work?
3. Why does it matter what I did with Choady or The Special Mole, didn’t Trojan still rape me?
4. What does it matter that I was drunk with Choady or the Special Mole?
5. Why is my right to privacy compromised just because he raped me?
6. Does the law actually protect victims of sexual assault or am I on trial also?
7. How can the legal office fight for me to keep this out?
8. What can I do? What can you do to keep this out?
9. What do you advise I do?
10. I had also heard that if I got assaulted I might get to PCS so I could get away from these guys? Is that true? How does it work?

Secret data: […Oh by the way, if the meeting goes too smoothly or is going too fast you forgot to mention that…] You and Trojan had been sending each other Yahoo! Messages before and after the night of the assault. Your conversation was typical hash talk, somewhat flirtatious and dirty, though mostly about other people. You printed out a copy and then deleted the messages from your account in order to make space for communications with other friends. You have a copy with you. You are thinking about recycling it because it is mostly about the others and

doesn't really say much about the assault. You never provided it to the legal office or OSI. You ask, do you want to see them? What should I do with these?

For evaluator possible critique topics:

a. Did the student behave appropriately with the victim when she was telling her story? Students should be understanding, professional and not judgmental.
b. Did the student make a sincere effort to explain the legal process to the victim? Students need to be able to make complex areas of the law comprehensible by explaining legal concepts in natural language. Providing information is essential to helping victims understand the process and their rights, but students should not pile on irrelevant information which may overwhelm and confuse victims.
c. Did the student recognize that blackout was in play in the case and it constituted a potential defense in the case? Explain what blackouts are and, if necessary, distinguish between blacking out and passing out as a result of alcohol consumption. If someone passes out due to alcohol consumption, he/she has lost consciousness and is unable either to act or to remember what happened during that period of time. If someone blacks out, that person may be able to speak and act in ways that appear unimpaired but is not able to recall all or, more often, parts of that period of time. Since SrA Ellis does not remember what happened between when she drank and when she woke up and it sounds like she was moving and speaking, she may have been blacked out. It is important you present this as a possibility rather than a certainty because you lack the expertise either to diagnose a blackout or to provide treatment for SrA Ellis in dealing with a realization that she might have done things she does not remember. You do, however, need to explain the legal importance of this possibility, which is that she may have acted in a way that would lead a reasonable observer to believe she was consenting to sexual acts. See MCM, Appendix 28, para 45(t)(15), *Mistake of fact as to consent*; see also Benchbook Instructions on mistake of fact as to consent in 3-45 and its subsections. This would be a good time to ensure SrA Ellis is familiar with the support resources available to her.
d. Was MRE 412 explained correctly? MRE 412, sometimes referred to as the military's rape shield rule, prevents admission of evidence offered to prove sexual behavior other than that which is the subject of the charge or that is related to the victim's sexual predisposition. There are three exceptions to the rule, and the existence of the rule does not mean the victim will not have to talk about other instances of behavior that is of a sexual nature because attorneys for both sides should enquire into them to determine if they are relevant. Therefore, the victim may have to discuss uncomfortable topics even though they are inadmissible and may have to do so in repeated interviews, at the Article 32 and during motion practice. If there is evidence that fits into one of the three

exceptions, the victim may also be required to testify about it during the trial. The three exceptions listed in MRE 412 are evidence offered to show someone other than the accused is the source of physical evidence (e.g., semen or injury), specific instances of sexual behavior with the accused offered to show consent, or any evidence constitutionally required. The last exception is the most complex and requires individualized research into the facts and law on a case-by-case basis.

e. Did the student explain the balancing test? MRE 412(c) lays out the process for determining admissibility of evidence offered under 412(b). Written notice must be filed with the court, and a hearing will be held. At the hearing, the victim will probably be called to testify. Before evidence can be admitted under this rule, a military judge must determine that the offered evidence fits into one of the three exceptions discussed above and "that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy". In addition, the judge is required to apply MRE 403 (determining whether the probative value of the offered evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

f. Did the student explain the purpose behind the right and importance of a fair trial for the accused in a way that made sense to the victim? The SVC should remind SrA Ellis of the importance of fair trials and their place in our system of justice without becoming overly didactic. One way to do this is to explain how important it is to avoid reversible error which could result in a conviction being vacated, allowing Trojan to go free, or requiring a re-trial, meaning she could have to go through the process all over again. This can help her understand why a fair trial, including adherence to the MREs, is important from her point of view.

g. Did the student malign the legal office or handle the situation diplomatically? The student should be professional and civil in his or her discussion of the legal office. The student should explain that the legal office represents the government and its interests and that, while those interests may align with the victim's, they may not always be the same. That is why we have SVC.

h. Did the student explain the victim's rights under 412 and did the student explain the victim's right to be heard and the SVC's presumed right to make the case for her? As explained in the introductions to the SVC Charter and the SVC Rules of Practice and Procedure, victims are afforded military counsel to represent them and their rights. SrA Ellis must understand that although she is not a party to the prosecution, she does have privacy rights that can be asserted by the SVC. SVC Rules of Practice and Procedure, para 6.4, provides:

Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under RCM 103 and do not have the same entitlements as litigation parties under the UCMJ.

(a) *UCMJ Proceedings*. MREs 412, 513, and 514 afford victims a reasonable opportunity to attend and be heard. SVCs may represent victims in these and other UCMJ proceedings where victims are afforded standing.

The SVC should explain to the victim that standing is not automatic and there is scarce precedent for it at this point but that the SVC will be looking out for the victim's interests in any way he or she can leading up to court and, if permitted, during the MRE 412 hearing.

i. Did the SVC reason with the victim about the pros and cons of the facts and put MRE 412 into context so as to meet the client's ultimate objective of bringing Trojan to account? The student should not seek to dissuade SrA Ellis from cooperating in the process but should be honest and frank about what she can expect regarding interviews with investigators, the legal office and the defense as well as providing testimony. Provide legal information in an understandable way. The level of detail provided depends on the victim's level of understanding and desire to know as well as on his or her mental state.
j. If the chats came into play did the student advise the victim against committing obstruction of justice? SrA Ellis needs to be advised that, given her knowledge of a pending case and depending on her intent, destroying the records could constitute obstruction of justice under Article 134 of the UCMJ.
k. Was the advice regarding the chat logs handled correctly? In addition to being advised regarding the potential criminality of destroying the chats, SrA Ellis should further be advised of the negative effect such a course of action could have on the prosecution of Trojan. Destroying what he may assert is potentially exculpatory evidence could negatively affect both the government's desire and ability to prosecute Trojan.
l. If expedited transfer was discussed, the student should reference the victims' ability to be transferred based on a credible allegation of sexual assault.

SCENARIO A CHATS

Trojan!man@yahoo.com: Wazup? You've been away from yre phone?

HustleGForAll@yahoo.com: Iwas just watching TV. Why?

Trojan!man@yahoo.com: You'l nevr bleive what I saw yesterday.

HustleGForAll@yahoo.com: MMmmm?

Trojan!man@yahoo.com: After paintball I watched Choady lick'n on some dragon.

HustleGForAll@yahoo.com: Seriously, I'll bet it was the girl from the club

Trojan!man@yahoo.com: No not her, it was the girl from the cab. His door was open and 3 of us watched him lick her

HustleGForAll@yahoo.com: You watched…!!!!? That's wrong on so many different levels.

Trojan!man@yahoo.com: He licker every piece of her, & she didn't do anything back to him. No return favros.

HustleGForAll@yahoo.com: What a greedy B.! I'd of given it back.

Trojan!man@yahoo.com: Yeah, so would I.

Trojan!man@yahoo.com: We felt bad for him so SM and I bought him the first round at the Capitol Bar.

Trojan!man@yahoo.com: Hay are you coming out with us tomorrow night. It would be good to see you.

HustleGForAll@yahoo.com: I want to, if my foot isn't too sore. I need to drikn a lot not to notice LOL. Prop it up if I pass out. LOLx2.

* * *

Trojan!man@yahoo.com: Hey, you seen Strike Back tonight? I watched the preview on Youtube. It's the bomb.

HustleGForAll@yahoo.com: No, been dealin' with some things today and didn't have time.

Trojan!man@yahoo.com: If you get to it, let me know and we can talk about it over chow.

HustleGForAll@yahoo.com: maybe next week.

SCENARIO B

What the SVC Knows:

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

For the Victim:

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

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

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

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

Possible questions you might want to eventually ask:

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

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

For evaluator, possible critique topics:

a. Was the student able to reassure the victim of confidentiality. "A SVC's primary responsibility is to his or her client." AFSVC Charter, Part A, para 1. The student should assure Capt Prescott that he or she represents Capt Prescott – not the government, the Air Force or anyone else – and that his or her professional responsibility is to Capt Prescott as the client. The student should explain the scope of their representation and that, regardless of the scope, anything the client divulged (except for possibly information covered by AF Rules of Prof Conduct and Standards for Civility, Rule 1.6(b)) would be kept absolutely confidential. The student should work to assure Capt Prescott of his or her commitment to confidentiality and that any breach could result in significant negative ramifications for him or her as an officer and as an attorney. The student should explain as an SVC, he or she operates "independently from the command and supervision chains that govern the Air Force units". AFSVC Charter, Part A, para 3; see also SVC Rules of Practice and Procedure, para 9.2 (stating AFLOA/JAJM has functional and policy oversight for SVCs).
b. Were they perceptive enough to realize and ask about the secret data. They needed as much information as possible to advise properly. Students should proceed with due consideration for Capt Prescott's mental state, but he or she needs to spend the necessary time to make Capt Prescott comfortable and be forward enough to elicit all relevant information in order to understand Capt Prescott's position and goals for representation.
c. Did they understand that this was no longer a restricted report? "Any report of a sexual assault made through normal reporting channels, including the victim's chain of command, law enforcement, and the AFOSI or other criminal investigative service is considered an unrestricted report." AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program*, 29 Sep 08, Certified Current 14 Oct 10, para 3.2. Since this has now been reported to OSI, it is now an unrestricted report. Capt Prescott should understand that his/her desires regarding what should happen with the case, while they must be solicited and considered, are not determinative of the disposition of the case. Moreover, Capt Prescott should be made to understand that, although there are controls in place to prevent certain types of disclosures of information within and outside of the government, he/she does not ultimately control the information or what happens to it.
d. Did they discuss laws protecting information privacy? The student should explain FOIA and the Privacy Act as they relate to law enforcement investigations. Specifically, FOIA generally prevents disclosure to third parties of information gathered for law enforcement purposes (commonly referred to as Exemption 7), and the Privacy Act precludes disclosure of, inter alia, personally identifiable information to third parties. However, neither of these is airtight, improper disclosure does occur sometimes, and non-agency

persons (such as the friends to whom Capt Prescott divulged some information) are not covered by either act in their personal capacities.

e. Did they consider or take any contrary positions about what might ultimately be good for this person in an attempt to fully reason toward a possible outcome? Was it really in this person's best interests not to go forward? There may be no correct answer but the person should consider and evaluate alternatives. The student should fully inform, to the extent possible, Capt Prescott regarding the possible consequences of trying not to go forward with the case and the possibility that, despite his/her wishes, the government may choose to proceed anyway. In that case, it is possible that Capt Prescott could be ordered to comply with the investigation and even to give testimony at a hearing or trial. Alternatively, Capt Prescott should be made aware of difficulties related to going forward with a charge like this, including possible embarrassment and discovery of his/her bisexuality. As always, the SVC informs and advises, but the decision for the course to pursue is up to the client, and the SVC supports the client within the bounds of the law.

f. Did they explain how they might intervene to prevent any further action in the case? The government is required to consult with and notify the victim at various stages of the military justice process. See, SVC Rules of Practice and Procedure, paras 6.1(a) and (b); see also AFI 51-201, paras 7.11.3 and 7.11.7. After fully informing and advising Capt Prescott, the student should ascertain Capt Prescott's goals and discuss avenues available to work toward the achievement of those goals. Probably the most important step is to make the legal office and the relevant decision authorities aware of Capt Prescott's desire that the case not go forward and be dealt with as discreetly as possible.

g. Did they make any promises to achieve a specific result? Again, the victim is not a party to the prosecution and is not the disposition authority for the case; no representation of ultimate results or promises of specific outcomes should be made.

SCENARIO C

What the SVC Knows: After you return to your base from the course, the Special Victims' Counsel Program is initiated and you receive a call from your MAJCOM detailing you to represent a civilian victim, Ms. Laura Pritchard. The legal office lets you know that the case has been referred to trial which will occur in about six weeks. You travel to Ellsworth to meet with Ms. Pritchard in order to meet and advise her.

For the Victim

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

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

DRAFT

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

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

Possible questions you might want to eventually ask:

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

Secret data: [Only talk about what is in the mental health records or your conversations with your therapist if asked]. You have spoken on about twenty occasions with a mental health provider about the abuse and your life. You have given her insight into what happened to you. You told her that you had a nice neighbor and that while your husband would have sex with you, often against your will, you would imagine it was him. You told her that you would often talk to the neighbor in passing and wished that you had married him instead because he was caring and treated you well. You would pretend the neighbor was the father of your child and almost believed it yourself at times because knowing Marcus was the father made you disgusted.

DRAFT

Instructor Notes:

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

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

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

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

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

3. Why are my mental health records even relevant?

4. How can others get them?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. What do you think I should do?

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

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SCENARIO D

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

CHARGE I: Violation of the UCMJ, Article 120

Specification: In that SENIOR AIRMAN FLYNN L. KIPLINGER, United States Air Force, 55th Operational Squadron, did, at or near Kirtland Air Force Base, New Mexico, on or about 14 September 2012, commit a sexual act upon, Airmen First Class Sasha Petersberg, to wit: penetraing her vagina with his penis by causing bodily harm, which was an offensive touching of her vagina by his penis.

CHARGE II : Violation of the UCMJ, Article 125

Specification: In that SENIOR AIRMAN FLYNN L. KIPLINGER, United States Air Force, 55th Operational Squadron, did, at or near Kirtland Air Force Base, New Mexico, on or about 14 September 2012, commit sodomy with, Airmen First Class Sasha Petersberg, by force and without consent of the said Airmen First Class Sasha Petersberg.

For the Victim

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

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

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

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

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

Possible questions you might want to eventually ask:

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

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

Instructor Notes:

1. What does Charge I mean when it says "causing bodily harm?"

2. Why didn't they charge him with rape instead of sexual assault?

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

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

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

Although a charge of "rape" might be proved against SrA Kiplinger if the prosecution were able to prove "unlawful force" beyond a reasonable doubt, the offense of "sexual assault" would be far more practical to prove as "bodily harm" would automatically occur if the sexual act were

found to be nonconsensual. Almost certainly, that's the reason behind the charging decision. Student explain this to A1C Petersberg diplomatically and without criticism of the legal office.

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

4. What do they mean exactly by "without consent?"

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

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

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

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

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

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

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

9. Can you get me in trouble?

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

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

The role player portraying A1C Petersberg will give clues during the interview that she may be hiding something. The student should know the cues to look for. If he/she misses them and doesn't learn the secret information, the cues should be pointed out during the post exercise feedback.

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

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

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

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

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

Even without testimonial immunity, the student should urge A1C Petersberg to return to OSI and correct her statement. Not only would this be the right thing to do, it protects A1C Petersberg from the more serious offense of perjury if she repeated the lies at an Art 32 investigation or court-martial trial. *See* Art 131, UCMJ; MCM pt IV para 57. The SVC should accompany her to the OSI interview and advocate to her commander and the SJA to minimize the consequences. *See Special Victims' Counsel Rules of Practice and Procedure* Rule 6 (XX Dec 2012) (*SVC*

Rules) Rule 6 (SVC may represent victims and advocate their interests "to all actors within the system"). It's important, however, that the SVC ensures A1C Petersberg understands that, without a grant of testimonial immunity, she may be held accountable for lying to OSI.

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

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

SCENARIO E

What the SVC Knows: You receive a call from the chief SVC saying that you are detailed to represent a client from Hurlburt Field, FL. They do not know the identity of the person. You drive over there and meet her at the SARC's office.

For the Victim

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

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

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

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

Possible questions you should eventually ask:

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

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

For evaluator:

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

Possible critique topics:

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

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

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c. Did the student offer realistic options for the victim?
   i. The options available to the member is to report restricted or unrestricted. The main thing for the student to understand is that SrA Eccelston should be fully informed before making her decision. Therefore, the student should at least mention the criminal liability and suggest talking to a military defense counsel. The student should also explain the court-martial process and what it means to initiate a sexual assault investigation.
   ii. Options given by the student should include making a restricted report, making an unrestricted report, and it should be explained that SrA Eccelston can always decide later to change her report from restricted to unrestricted. However, it is important to explain the potential impact that delayed reporting can have on the outcome of a legal action against SSgt Walker.

d. Did the student consider or guess at the degree of consequences this person might face? Given this unknown, did they offer the full range of potential outcomes?
   i. The student should consult with the subject matter expert on the degree of criminal liability SrA Eccelston could face, the SDC. Even after SrA Eccelston says she only wants to talk to one lawyer and trusts the advice of her SVC, the SVC should consult the SDC to ensure his/her understanding of the consequences is sound.
   ii. The student should discuss the range of potential punishments for SrA Eccelston's actions in Afghanistan which could range from an LOR to a potential (albeit unlikely) court-martial.

e. Did the student consider the possibility of seeking immunity for the victim or did the student make improper suggestions to hide information or lie?
   i. In discussing potential options for the victim, the SVC should weight the factors and look for solutions that best fit the interests of the victim. One possible solution would be to request immunity from the government for minor offenses before revealing the identity of the victim. Immunity can only be offered by the General Court-Martial Convening Authority (GCMCA) and the government may require an offer of proof.

RCM 704; AFI 51-201, *Military Justice Administration*, Section 6C.

f. Did the student understand the delineations between the role of defense counsel and the role of the SVC under the charter? Did they advise the client of their own

lack of expertise, the MDC's subject matter expertise and advise them to speak with the MDC?

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

g. Did the student consider the best interests of the victim and weigh what might be her long term interests in her potential decisions to either prosecute and endure some fallout to her career or to sweep everything under the rug and simply get therapy?

i. One of the reasons to collaborate with defense counsel is that each party has their own expertise. The defense counsel might be focused on avoiding criminal liability at all costs; however, the SVC can balance those competing interests against the victim's interest in seeking justice against the perpetrator.

ii. The SVC is also in a unique position to evaluate and consider the mental strength and psychological impact of going through the court-martial process and whether that is truly in the long term best interests of the victim.

SCENARIO F

What the SVC Knows: You have been directed to travel to Seymour Johnson AFB and represent a victim in an upcoming case. You were told she is Ms. Luna Delphino, the wife of the 4th Maintenance Operation Squadron First Sergeant SMSgt Osborne Delphino. You are told only that an Article 32 hearing is occurring soon and she wishes to meet in person. You meet her at the SARC's office.

For the Victim

Biography: You are Ms. Luna Delphino, the wife of the 4th Maintenance Operation Squadron First Sergeant SMSgt Osborne Delphino. Your family is stationed at Seymour-Johnson AFB. You have three children, two of whom are teenagers away in college and one a senior in high school. You are a dutiful wife and mother and work part time. You drink alcohol in moderation, with meals. One weekend last fall, your high-school student was away at swim camp and your husband was TDY for the week to training. Your girlfriends had been planning a bachelorette party for a mutual girlfriend and knowing that your family was away, you agreed to go in order to keep an eye on your four friends and have a bit of a good time yourself.

Factual background: The bachelorette party occurred in Charleston, SC. Your group drove to Charleston and enjoyed the hospitality of several adjoined suites at the Marriot. The girls started pre-gaming (drinking) early and then went out for gourmet low country food. While waiting for a table at the restaurant bar, the ladies met three attractive and friendly men who turned out to be Air Force personnel, TDY to Charleston for a conference. When the hostess arrived to take you to your table, two of the single girls in the group invited the guys to meet up after dinner in the hotel lobby to continue the conversations. Dinner ended and your group returned to the hotel lobby and it's attached bar where the group closed bar. Everyone was having such a nice time that the party was continued upstairs to the common room that connected your hotel suites. The group continued to drink and eventually one of the girls brought out some of the bachelorette party games that she had brought with her. Everyone played until the wee drunken hour of the morning. The party was still in full swing but you adjourned for the evening to your connected bedroom and barely made it into bed before falling fast asleep. You remember waking up feeling another person's presence in bed and realized a man was in bed with you, naked, having sexual intercourse with you. Before you could even collect yourself, he had finished and was getting up to dressed. You turned on the lights and recognized him as a man that the group met at dinner. He gave you a few cursory parting words and left. The girls went out again the next night and you joined them. You told no one about what happened the night before. You tried to pretend nothing happened and kept joking and laughing. While out, your group ran into the same three men, and you even sat next to your assailant and pretended like nothing had happened.

During the return car ride you never mentioned it. What occurred had begun to gnaw at you and made it difficult for you to be intimate with your husband. Five weeks later you were on the phone with another girlfriend and you confided in her about the rape. She betrayed your confidences to her husband, a fellow first sergeant, and he reported to law enforcement. You were interviewed by the legal office, and the very junior and unconfident looking trial counsel, who had only three ribbons on his uniform. He told you that someone called an STC looked at the case file and thought it wasn't a very good case. The case is scheduled for an Article 32 hearing, and you are supposed to meet with the defense.

Psychological demeanor: After he left your room, you did not want to believe it had happened. You were frightened your husband and children would find out and feel you had betrayed them. You didn't know what other people would think, and you were conflicted about what to do. In order to be strong, you pretended like nothing had happened and planned on just keeping it to yourself. After it got out, you felt humiliated, scandalized, and uncertain. You have no interest in being emotionally manipulated and having your words twisted by his slick defense attorney, and you don't want to spend your time meeting with them. You think it's more than sufficient that they get to ask you questions in court. You don't particularly trust the legal office because the prosecutor seems very junior and weak. You feel duty bound to continue the case because otherwise your family will disbelieve you. You know in your in heart you were assaulted, and want justice so that he doesn't do this to another person. To that end, you want to do everything you can to perfect your case.

Desired Outcome: You want the SVC to explain to you what the problems with the case are. You want to know whether you have to submit to an interview with the defense at this point and how much you would have to cooperate with them in the future. You want to know from your SVC how he/she can improve your case and help you do a good job testifying so this rapist goes to jail.

Possible questions you should eventually ask:

1. Why did the Lieutenant say my case was bad?
2. What problems do you see?
3. So what that I didn't _____, isn't that normal in these situations?
4. Can you explain to the legal office my case and help them prosecute it better?
5. You're saying that other people might not understand how I reacted. What is a good way to explain this?
6. What can I do to help my case now?
7. Give me some tips on testifying?
8. Do I have to meet with the defense prior to the Article 32 hearing? What happens if I don't?
9. Do I have to meet with them at all during this process? Isn't it enough that they get to question me at trial and at the hearing?

10. If he is acquitted at trial can I continue this and go to the media? Can you help with that?
11. How can you help me?
12. What do you recommend I do?

Secret data: Your attorney should address your post-incident and reporting behaviors and diplomatically explain that other people might view them with reservation. If she herself appears skeptical or not committed to your case then you should become agitated, look at her in an exasperated fashion and convey: "you just don't get it, I was assaulted, period dot!" You should have an explanation in your mind for everything that happened and if the attorney is diplomatic then you should become cooperative and listen to what he or she has to say.

For evaluator Possible critique topics:

a. Did the student handle the victim appropriately and with respect? The student's primary concern should be the client – the client's well being and working to achieve the client's goals. Professionalism and respect are paramount in ascertaining the facts, especially when the information related by the client is difficult to believe.
b. Did the student focus on the client's goals or try to dissuade her? The student's role is to support, inform and advise; ultimately the client determines the goals of representation. The student needs to inform the client of likely difficulties and obstacles in this case but should not be judgmental of the client or dismissive of the case. Since Mrs. Delphino wants to pursue the case, the purpose of discussing the difficulties of the case should be to explain the obstacles and begin planning how to overcome them rather than to try to dissuade Mrs. Delphino from trying to go forward with the case.
c. Did the student recognize that counter intuitive behaviors were at play? To the extent that Mrs. Delphino is not aware that many people harbor stereotypes about how a victim of a sexual assault would react, the student may choose to inform her that many people, to include prosecutors, commanders, and panel members, have preconceived notions regarding how a victim would behave that might be obstacles to her being believed. For example, many people believe a victim would immediately fight or run to end the assault. Some people have particular attitudes regarding alcohol and partying which might cause them to fault Mrs. Delphino for putting herself in a compromising situation or even believe that since she was a willing participant in alcohol consumption and partying, she likely consented to sex as well. Some might think that a victim would immediately report to the authorities and submit to medical and forensic examination. They might believe a victim would be so devastated by the assault that he or she would not be able to go along

with the crowd and would choose not to even if he or she could. In particular, many people would believe that a victim would not voluntarily sit with the perpetrator in a social setting the following day. Also, some people believe only young women are targeted by perpetrators of sexual assault and might have difficulty believing that a mother of three with two children in college would be the target of a sexual assault. Whether any or all of these preconceived notions should be addressed (and whether they should be addressed at this time) depends on how the conversation goes and the mental state of the client.

d. Did they recognize that they could help their client explain themselves by helping them with phrasing and presentation versus recommending any unethical approaches? Students should never encourage a client to say anything that is untrue. Explaining stereotypes and preconceived notions can help prepare the client to explain behaviors and reactions that may initially seem counterintuitive. Helping the client think through their feelings and their reactions gives them the opportunity to voice his or her explanations in a setting where his or her words will not be used against them and where perceived inconsistencies can be inquired into without being attacked.

e. Did the SVC knock the legal office or did they explain the legal offices position in a way that the victim could understand? The student should not attack the legal office. The student should take time to explain the process and the various steps necessary to prosecution. In discussing the process and the stereotypes discussed above, the student can explain the prosecution's job in a way that will help Mrs. Delphino understand the process and the challenges the prosecution faces.

f. Did they offer to become the "shadow prosecutor" or did they suggest ways they might influence the process that would be to their clients benefit without overstepping their bounds? The student should not write checks that only the prosecution could cash and certainly should not make representations regarding the final outcome. However, it would be appropriate to make Mrs. Delphino aware of her rights regarding consultation and notification (see, e.g., SVC Rules of Practice and Procedure, paras 6.1(a) and (b); see also AFI 51-201, paras 7.11.3 and 7.11.7) as well as ways in which the SVC can help work with and explain things to the legal office and commanders which can make it more likely that the case will go forward. Foremost among these is making her desire that the case proceed known.

g. Did they take a position on cooperation with the defense counsel? Whether to cooperate with the defense at this point is up to Mrs. Delphino. She should be made aware that failure to do so may be perceived as an unwillingness to participate in the military justice process and may make the legal office and/or commanders less willing to move the case forward.

h. Did they recognize that there is no way to compel a civilian to consent to a defense interview at an Article 32? While not cooperating with defense may create concerns for the prosecution, Mrs. Delphino is not subject either to military authority or to process at

this stage in the proceedings. IOs do not have subpoena power. AFI 51-201, para 4.1.6.2.2. Trial counsel does not have subpoena power until a case is referred to a SPCM or GCM. See, RCM 703(e)(2)(C).

i. Did the student articulate potential remedies available to an MJ if the victim-witness does not cooperate and provide a defense interview at trial? The procedure for enforcing a subpoena on an unwilling civilian witness can be found in AFI 51-201, para 6.4.3 and its subparagraphs. Basically, if the witness refuses to comply with the subpoena, a warrant of attachment is issued and, usually, the US Marshals get involved. See, generally, Article 46-48, UCMJ and RCM 703(e)(2)(G). Complicity becomes mandatory, and failure to appear or testify is a federal offense. See Article 47, UCMJ.

j. Did the student understand the limits of their role regarding involvement with the media? To the extent that there is any media interest in this case, an SVC may represent the victim in a limited capacity in the media. Any interaction with the media by the SVC must comply with the AF Rules of Professional Conduct, specifically Rule 3.6. See SVC Rules of Practice and Procedure, para 7.2. Thus, if any information about the case is released, it should be limited to the specific information approved for disclosure in that rule. Specifically, no information may be released if it is reasonable to believe that it would "have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Rule 3.6(a). Information that may be released includes the offense, the identity of persons involved (except when otherwise prohibited by law), information in public records, that an investigation is ongoing, procedural information and limited information about the accused. See Rule 3.6(b).

SCENARIO G

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

For the Victim

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

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

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

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

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

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

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

1. How can you help me?
2. Do I have to talk to OSI?
3. Can I just refuse to talk? What if I just tell them nothing happened?
4. What if no one believes me since it has been so long and I never said anything?
5. What do you recommend I do?

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

For evaluator Possible critique topics:

a. Did the student handle the victim appropriately and with respect? The student's primary concern should be the client – the client's well being and working to achieve the client's goals. Professionalism and respect are paramount in ascertaining the facts, especially when the information related by the client is difficult to believe.

b. Did the student focus on the client's goals or try to dissuade her/him? The student's role is to support, inform and advise; ultimately the client determines the goals of representation. The student needs to inform the client of likely difficulties and obstacles in this case but should not be judgmental of the client or dismissive of the case.

c. Did they recognize that they could help their client explain themselves by helping them with phrasing and presentation versus recommending any unethical approaches? Students should never encourage a client to say anything that is untrue. Explaining stereotypes and preconceived notions can help prepare the client to explain behaviors and reactions that may initially seem counterintuitive. Helping the client think through their feelings and their reactions gives them the opportunity to voice his or her explanations in a setting where his or her words will not be used against them and where perceived inconsistencies can be inquired into without being attacked.

d. Did they explain the various courses of action the Victim could take or did they just tell her/him what to do? SVC should recognize that they can only advise and the decision ultimately lies with the client. As a military member, the Victim could be ordered to speak to law enforcement. If he/she refuses she could receive disciplinary action. While the SVC may be comfortable opining about the likelihood of giving a sexual assault victim paperwork, the SVC should make clear that it can, and has happened and the SVC cannot make any guarantees that this would not happen. Additionally the client should be advised that lying to military law enforcement could be considered a false official statement under Art 107. Thus refusing to cooperate is a calculated risk that ultimately the client must decide.

SCENARIO H

What the SVC Knows: You are the SVC at Maxwell AFB. You gave a briefing to the current Squadron Officer School (SOS). After class you are approached by a student in the hallway that wishes to speak to you. You make an appointment and she comes to see you.

For the Victim

Biography: You are Capt Sally Whitaker. You are currently an SOS student. You are TDY here from 49 Maintenance Squadron (MXS) at Holloman AFB, NM. You have been here 4 weeks. You recently broke up with your boyfriend of 2 years. He is an F-22 pilot stationed at Tyndall AFB, FL. You both met while you were both cadets at the United States Air Force Academy (USAFA).

Factual background: You met the Accused (Capt Russell Bell) the first day of class. You immediately struck up a friendship. You began flirting with him. You all would go to the chow hall together and started hanging out outside of class. About 2 weeks into the course you had consensual oral sex with him in his billeting room. You were all hiding this from the rest of your class members. It felt like an adventure and you got a rush sneaking around and hiding it from people. One time during a lunch break you hid in the supply room and performed oral sex. However, you began to feel more and more guilty and decided you should stop because you were still technically dating your boyfriend. Also, you never asked but Capt Bell wears a wedding ring so you think he might be married. You began to avoid him and ignore his advances. He asked to talk but you declined.

Last weekend you were in the library studying and you saw him. You tried to avoid him but he kept asking to talk. He kept texting you saying he needs to talk. You finally think maybe it isn't for sex, maybe he does need to talk. He finds a spare room that the students use to study in or for storage and asks you to meet him there. You go. He is sitting at a table with lights off but shades are open so you can still see him. He gets up and locks the door. You have an awkward conversation about nothing (so how's it going? Etc…). Finally, you say "if we aren't going to talk about anything I'm leaving." He tries to kiss you. You turn your head to avoid. He is groping you, touching you. You are pushing his hands away. You are shuffling towards the door. He follows continuing to grab you. You don't get to the door. He forces you against a desk with his body weight. You try to go around him. He pushes you back towards the room (not forcefully) and you fall into a chair. You start communicating no. He puts his hand down your pants and tries to stimulate your clitoris. You can't remember if any actual penetration occurred. You see his penis is out. You try to slide down underneath him but don't make it. His crotch is in front of your face. He puts a hand around your throat. It is painful but you don't lose your breath. He puts his penis against your cheek and forces it in. He thrusts a couple times.

You are gagging. He is grabbing the back of your head and forcing you down. The other hand is still on your throat. He is being mean and aggressive sometimes and then trying to be nice. Finally he is like “please for me”. You say “no” again. He says “fuck this” and stands in the corner and pouts. You get up and leave.

The next day you report to another student whose room is next to yours. You both see marks on your neck. However, you did not take pictures and they are not visible anymore.

Psychological demeanor: You are ashamed about what happened. You blame yourself for what happened and fear no one will believe you. You are very hesitant to report anything because you fear you may hurt your own career and you hope you can get back together with your ex-boyfriend. You are terrified that your secret data might come out.

Possible questions you might want to eventually ask:

1. I only want to go unrestricted if they are going to prosecute him - - will he go to jail if I come forward?
2. [Secret data] Will they ask about my dad? Will that come up in court? I am going to tell them nothing happened with my dad if they ask, can I get in trouble for that?
3. He might have been married; he’s in trouble for that, not me, right?
4. Will it come out that we had consensual oral sex before? Doesn’t that make me look like a slut? What if no one believes me?
5. Will this hurt my career?
6. What do you think I should do?
7. I want you to put an end to this right now, what can you do for me? (You should try to get them to commit to a certain favorable result?)

Secret data: You were molested by your biological father when you were 11 years old. You saw a therapist for 3 years after the incident. It is a very sensitive topic for you. Under no circumstances will you allow this to come out. If you are asked about it by defense counsel or anyone else you will lie about it. That is not negotiable for you. You are very worried that if you report this could come out.

Instructor Notes:

a. Was the student able to comprehend restricted versus unrestricted reporting?
    i. Restricted: No investigation until formally authorized or reported unrestricted by victim.

1. Must be disclosed to SARC, Victim Advocate (after being assigned a VA by the SARC), Healthcare provider, Others with privilege (i.e. Chaplain, SVCC?).
2. DoD members can make restricted report in AD status

ii. Unrestricted: Investigation into allegations follows report.

1. Can be made through any channel (SARC, Chain of command, LE, OSI, etc)
2. SARC will be notified and a VA assigned after report.

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b. Did the student understand the consequences of restricted versus unrestricted reporting?

i. If the student does not report to one of the individuals specifically authorized to receive restricted reporting (SARC, VA assigned by SARC, or other personnel authorized to receive confidential communications (i.e. Chaplain, healthcare provider, SVCC)), then the report is unrestricted an investigation into the allegations may occur.

ii. An unrestricted report will almost certainly lead to an inquiry into the misconduct of the victim herself. It is important the victim understands the consequences of an unrestricted report and has had the opportunity to consult with a military defense counsel in order to fully understand the criminal liability and collateral consequences of her decision.

iii. A restricted report will not be investigated and the perpetrator will not be investigated or punished. There will also be no record of this sexual assault allegation in the event a future investigation on an unrelated sexual assault is initiated. MRE 413.

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c. Did the student offer realistic options for the victim?

i. The options available to the member is to report restricted or unrestricted. The main thing for the student to understand is that Capt Whitaker should be fully informed before making her decision. Therefore, the student should at least mention the criminal liability (adultery and possibly for having consensual oral sex in a public place) and suggest talking to a military defense counsel. The student should also explain the court-martial process and what it means to initiate a sexual assault investigation.

ii. Options given by the student should include making a restricted report, making an unrestricted report, and it should be explained that Capt Whitaker can always decide later to change her report from restricted to

unrestricted. However, it is important to explain the potential impact that delayed reporting can have on the outcome of a legal action against the perpetrator.

d. Did the student consider the possibility of seeking immunity for the victim or did the student make improper suggestions to hide information or lie? In discussing potential options for the victim, the SVC should weight the factors and look for solutions that best fit the interests of the victim. One possible solution would be to request immunity from the government for minor offenses before revealing the identity of the victim. Immunity can only be offered by the General Court-Martial Convening Authority (GCMCA) and the government may require an offer of proof.

Mental Health records. If the secret data comes up the SVC should discuss MRE 513/514. They should avoid promising that the topic will not revealed or come up during pretrial interviews. The SVC can, and should talk about what they can do to help avoid/minimize this but it should be clear that this information could become relevant or the subject of defense motions in the future. Lastly, the SVC should be sure to address the potential consequences of lying about the incidents with her father (or anything else for that matter).

What do you think I should do?

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

SVCC Courtroom Exercise – Scenario 1

1. SrA Riley Porter (Victim) works for 28 Medical Group (MDG) at Ellsworth AFB. Victim has dated members of the opposite sex in the past and has a 13 year old daughter but has been dating members of the same sex exclusively for several years. SSgt Taylor Johnson (Accused) is friends with Victim. They regularly hang out in the same core group of 5 friends.

2. At the time of the sexual assault, Victim was dating someone of the same sex. However, the relationship was not exclusive. Several weeks prior to the assault, Victim got into an argument with their significant other on the phone while hanging out in Accused's off-base apartment. Accused was in the room during the conversation and heard one side of the argument. After discussing the argument with Victim, Accused ends up kissing Victim on the neck and bare chest. These acts were consensual. At this point Victim puts a stop to it and Accused complies. Accused continues to flirt with Victim and makes sexual advances towards victim on multiple other occasions. Victim had previously asked Accused to stop calling Victim "baby" because Victim didn't like it.

3. On the night in question the group of 5 friends goes to a comedy show at the enlisted club on base. All are drinking. Victim has a glass of wine, a shot of unknown liquor, a Hennessey and sprite and perhaps several others drinks (Victim can't remember). One of the friends is asked to leave for being too loud and gets in an argument with the comedian. All leave. Accused drives Victim. The rest of the group gets in another vehicle.

4. Witnesses in the parking lot describe Victim as "intoxicated". Victim is talking loud and erratically. Victim is talking about being gay which is something Victim normally keeps private. Victim is also talking about Accused making sexual advances but stated "it isn't going to happen". It is unclear whether the Accused was overhearing these comments. Everyone goes back to a friend's house (on base) and continues drinking. No one sees any flirting or physical contact between the two of them that evening. Victim lies down on the couch and says "I'm exhausted". Accused comes in and says "tell [Victim] to move this is my spot" and sits on the couch near Victim's feet. A mutual friend tells Accused to leave Victim alone.

5. Victim fell asleep but later wakes up on couch with Accused. Accused's face is hovering over Victim. Victim's clothes are on and in order. Victim tells Accused to get off and goes to the bathroom. Victim doesn't feel right. It feels like Victim had sex. It burns when Victim pees. Victim starts to fear something has happened. Victim confronts the Accused saying "what did you do to me?" over and over. Accused says "nothing" (but does not clarify if that means literally nothing or just nothing wrong). The mutual friend wakes up, sees it's about to get physical and removes Victim from the situation. They drive to Victim's house. After placing a couple of phone calls Victim makes a restricted report.

6. Victim meets with the base SARC. Victim is examined at a hospital but no evidence is collected. The Doctor notes several signs of injury to the genitals (but would agree those injuries could be caused by consensual or non-consensual sex). The next day Victim calls Accused and asks what happened. Accused says they "had sex" but that Victim was an active participant. This angers Victim and Victim decides to change the report to unrestricted. Another exam is done and Victim's clothes are collected. A match for the Accused's DNA is found on the inside crotch of Victim's underwear.

7. As a result of the assault, the Victim begins to see a mental health provider at the base clinic. Victim saw the provider approximately 4 times as a direct result of this assault.

8. Defense counsel has filed a motion to compel the victim's mental health records under MRE 513 and SARC records under MRE 514. Defense also gave notice that they intend to admit evidence under MRE 412 that: 1) Victim engaged in consensual acts with the Accused on a prior occasion, 2) Victim engaged in sexual acts with Victim's current significant other (giving Victim a motive to lie) and 3) Victim engaged with sexual acts with members of the opposite sex in the past. Trial counsel does not oppose any of Defense Counsel's requests.

9. You have filed the following responses. The MJ wants to hear oral argument.

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **SSgt Taylor Johnson** **28th Aircraft Maintenance Squadron** **Ellsworth AFB, South Dakota** **(ACC)**	**RESPONSE TO NOTICE TO PRESENT EVIDENCE PURSUANT TO MRE 412** **16 October 2013**

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

FACTS

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

LAW

2. MRE 412 "is provides as follows:

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

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

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

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

(b) *Exceptions.*

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

these rules:

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

* * *

Respectfully submitted this 16th day of October 2013.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 412 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 16 October 2013.

////IWR 16 Oct 2013///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **SSgt Taylor Johnson** **28th Aircraft Maintenance Squadron** **Ellsworth AFB, South Dakota** **(ACC)**	**RESPONSE TO NOTICE TO REVIEW MENTAL HEALTH RECORDS AND VICTIM ADVOCATE RECORDS PURSUANT TO MRE 513/514** **16 October 2013**

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

FACTS

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

LAW

2. MRE 513 provides as follows:

> Rule 513. Psychotherapist-patient privilege
>
> (a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.
>
> ***

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

1) The patient is dead;

2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

3) When federal law, state law, or service regulation imposes a duty to report information;

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

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

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

7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation

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

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

5. MRE 514 provides as follows:

Rule 514. Victim advocate-victim privilege

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

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

1) when the victim is dead;

2) when Federal law, State law, or service regulation imposes a duty to report information contained in a communication;

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

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

5) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or

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

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

ARGUMENT

* * *

Respectfully submitted this 16th day of October 2013.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 513/514 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 16 October 2013.

////IWR 16 October 2013///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

SVCC Courtroom Exercise – Scenario 2

1. In August 2013, Capt John Walters (the Accused), 28 Maintenance Squadron (MXS), met 1st LT Lindsey Brown (Victim), 28th Operations Support Squadron (OSS), at an off-base party of a mutual friend. At the party, Victim and Accused exchanged numbers. Several weeks later they got together for an outing in the Black Hills. They went for a hike. After the hike, the two returned to Accused's home and watched a movie. During that evening the two became romantic and had a consensual encounter. During this encounter the Accused's rubbed his penis near Victim's anus but never penetrated it. She did not respond or comment to this.

2. A week later the two agreed to spend time together again. Accused made multiple attempts to have sex with Victim. Victim was hesitant but finally relented. The two went to his bedroom where they engaged in "doggy-style" sexual intercourse. During this session, Accused tried to insert his penis into Victim's anus. She swatted his hand away and he stopped.

3. Afterwards, Victim took a shower. While she was toweling off, Accused asked to have sex again. Victim agreed. Accused brought her back to his bed and placed her over the bed in the "doggy-style" position as before. He began to have vaginal intercourse. He ceased vaginal intercourse, pausing for a moment, and then penetrated Victim's anus. She noted that his penis seemed to have been lubricated with some sort of artificial lubricant. She said "no" and asked him to stop several times. He continued to anally penetrate her despite her repeated statements to him to desist. Finally, she began to sob, and he relented.

4. She angrily flailed at him and said: "What were you doing, I told you no, I didn't want that." He replied: "sorry I thought you might like it," and went about getting dressed. She left the house a few minutes later under the pretext of a newly-remembered engagement with a friend.

5. She contacted the same friend, 2nd LT Ned Plimpton and then confided in him about what had happened. He suggested to her that the event was personal and to talk to the chaplain or seek mental health counseling. She spoke to a mental health counselor the next week and related what had happened. Based on discussions with her counselor she reported the offense. She has regularly met with that counselor since the incident.

6. Air Force Office of Special Investigations (OSI) began an inquiry into the offense. During the interview they asked her about her interest in anal sex. Regarding the act, she related "I don't do it." They interviewed Accused who stated that the events were consensual and were an experiment between the two "to explore the boundaries of their new relationship" and to "help out a girl who was clearly very inexperienced figure out what she wanted sex to be like."

7. Based on the Accused's statement, OSI recalled her for a follow-up interview. They inquired further and asked her if she had ever done it in the past. She informed OSI that she had in fact had anal sex with a prior boyfriend with whom she had a serious relationship. The relationship occurred three or four years prior to her military service, near her hometown of Wilkes-Barre, PA. She indicated that he had a penchant for anal sex and she allowed him to indulge in the act with her despite her aversion to it. She allowed him to have anal sex with her three to seven

times, until during one episode she felt injured after the act. Her injuries prompted her to visit an urgent care outpatient facility. She went to a doctor where she was treated for minor abrasions to the anus and some tenderness in the rectum. He prescribed her medicated pads and ointment and sent her home to recuperate; which she did within 24-48 hours later. She refused to continue to have anal sex with her then boyfriend and the relationship quickly dissolved.

8. OSI attempted to track down several rumors in the dormitories about her interest in anal sex, but they went unsubstantiated. OSI and trial counsel attempted to locate the medical records of the urgent care clinic, but have been unable to find any records of her visiting any urgent medical care clinic four to five years prior to the event.

9. During the defense interview, defense counsel asked her if she was interested in anal sex, to which she again replied: "I don't do that."

10. Defense counsel has filed notice under 412 to admit evidence of her interest in anal sex, including her activities with her previous boyfriend, her statements to OSI and defense counsel that "she doesn't do it" and the existence of rumors that she had an interest in anal sex, which they intend to offer as reputation evidence of her character for interest in anal sex. Defense counsel has also filed a motion to compel the victim's mental health records under MRE 513.

11. Government counsel has not provided a formal response to the Court on either issue, except via email, in which they indicate a belief that some matters are admissible and others not, leaving the matter to the "sound judgment of the Honorable Court."

12. You have filed the following responses. The MJ wants to hear oral argument.

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **Capt John Walters** **28th Maintenance Squadron** **Ellsworth AFB, South Dakota** **(ACC)**	**RESPONSE TO NOTICE TO PRESENT EVIDENCE PURSUANT TO MRE 412** **16 October 2013**

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

FACTS

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

LAW

2. MRE 412 "is provides as follows:

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

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

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

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

(b) *Exceptions.*

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

these rules:

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

* * *

Respectfully submitted this 16th day of October 2013.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 412 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 16 October 2013.

////IWR 16 Oct 2013///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **Capt John Walters** **28th Maintenance Squadron** **Ellsworth AFB, South Dakota** **(ACC)**	**RESPONSE TO NOTICE TO REVIEW MENTAL HEALTH RECORDS PURSUANT TO MRE 513** **16 October 2013**

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

FACTS

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

LAW

2. MRE 513 provides as follows:

Rule 513. Psychotherapist-patient privilege

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

***

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

1) The patient is dead;

2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

3) When federal law, state law, or service regulation imposes a duty to report information;

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

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

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

7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation

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

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

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

ARGUMENT

* * *

Respectfully submitted this 16th day of October 2013.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 513 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 16 October 2013.

////IWR 16 October 2013///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

SVCC Courtroom Exercise – Scenario 3

1. In June 2013, several cadets at the United States Air Force Academy through a party at an off-base hotel. The cadets rented 3 hotel rooms. They bought 3 kegs of beer and placed one in each room. Approximately 30 people attended the party. The attendees consisted of both civilians and cadets. Patrons would wander from room to room, drinking beer and socializing.

2. Cadet 4th Class (C4C) Lisa Sanders (Victim) attended the party. Before arriving at the party she drank a bottle of red wine. At the party she drank 3 beers and did a keg stand for 30 seconds. After doing this she had consensual vaginal sex with a cadet in one of the hotel bathrooms. She then returned to the party and had 3 more beers. After this she performed oral sex on a civilian in a car in the parking lot. She again returned to the party and had 3 more beers and 2 shots of Jack Daniels. As the night went on, her level of intoxication continued to rise. As the night went on she began slurring her words and having difficulty walking.

3. Cadet 2nd Class (C2C) Steven Turner (Accused) was one of the cadets that organized the party. He knew Victim from History class but did not have any prior contact with her outside of the classroom. He was aware of her reputation throughout the academy of being promiscuous. He observed the Victim at the party but did not interact with her until much later.

4. At 0130, the Accused and Cadet John Lincoln went outside to smoke in the designated area. When they got outside they saw Victim sitting on the ground, propped up against the wall. She could only mumble and the cadets couldn't understand her. Cadet Lincoln and the Accused performed a two man carry, carried her up the stairs, and put her in one of the hotel rooms. They cleared the room. She did not respond in any way while she was carried. Cadet Lincoln went down the hall to find friends of the Victim. As he was walking down the hall he heard the door shut and lock. He became concerned. He banged on the door until the Accused opened. The Accused tried to shut it again but Cadet Lincoln put his foot in the door and forced himself into the room. Cadet Lincoln saw Victim on the bed with her shirt hiked up to her breast area, and her pants unbuttoned exposing her underwear. She was not moving and was not responsive.

5. Cadet Lincoln was upset and tried to punch the Accused. A struggle ensued. Two civilians walking by the room saw what was happening and broke up the fight. No one saw Victim move during this scuffle. An ambulance was called. The medics revived her and then took her to the hospital. She has no memory of anything after taking the 2 shots of whiskey.

6. The next morning Victim woke up in a hospital bed. After returning to base she went to see the SARC. She filed a restricted report. She visited the SARC office on approximately 5 other occasions. On the 5th occasion she decided to change her report to unrestricted.

7. The victim began to see an off base mental health provider. She met with the doctor on approximately 8 occasions. Also, pre-trial investigation by the defense has revealed that the Victim claimed to be sexually assaulted by her stepfather when she was 13 years old. She briefly saw a mental health provider when she was 16 but did not seek further treatment after 3 sessions.

8. Defense counsel has filed notice under MRE 412 to admit the 2 sexual encounters from earlier that night as well as their intent to offer reputation evidence concerning the victim's reputation for promiscuity. Defense counsel has also filed a motion to compel the victim's mental health records from the current incident as well as the incident when she was 13 years old under MRE 513. Defense has also asked for SARC records under MRE 514.

9. Government counsel has not provided a formal response to the Court on either issue, except via email, in which they indicate a belief that some matters are admissible and others not, leaving the matter to the "sound judgment of the Honorable Court."

10. You have filed the following responses. The MJ wants to hear oral argument.

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **Cadet Steven Turner** **Cadet Squadron 99** **United States Air Force Academy, CO**	**RESPONSE TO NOTICE TO PRESENT EVIDENCE PURSUANT TO MRE 412** **16 October 2013**

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

FACTS

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

LAW

2. MRE 412 "is provides as follows:

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

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

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

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

(b) *Exceptions.*

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

these rules:

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

* * *

Respectfully submitted this 16th day of October 2013.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 412 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 16 October 2013.

////IWR 16 Oct 2013///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **Cadet Steven Turner** **Cadet Squadron 99** **United States Air Force Academy, CO**	**RESPONSE TO NOTICE TO REVIEW MENTAL HEALTH RECORDS AND VICTIM ADVOCATE RECORDS PURSUANT TO MRE 513/514** **16 October 2013**

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

FACTS

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

LAW

2. MRE 513 provides as follows:

Rule 513. Psychotherapist-patient privilege

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

***

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

1) The patient is dead;

2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

3) When federal law, state law, or service regulation imposes a duty to report information;

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

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

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

7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation

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

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

5. MRE 514 provides as follows:

Rule 514. Victim advocate-victim privilege

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

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

1) when the victim is dead;

2) when Federal law, State law, or service regulation imposes a duty to report information contained in a communication;

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

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

5) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or

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

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

ARGUMENT

* * *

Respectfully submitted this 16th day of October 2013.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

I certify that a copy of the Response to Notice under MRE 513/514 was served upon the Military Judge, Trial Counsel and Defense Counsel via electronic mail on 16 October 2013.

////IWR 16 October 2013///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Petitioner*	)	BRIEF ON BEHALF OF A1C LRM
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent*	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	USCA Dkt. No. _____/AF Crim. App. Misc Dkt. No. 2013-05

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Petitioner*	)	BRIEF ON BEHALF OF A1C LRM
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent*	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	USCA Dkt. No. _____/AF Crim. App. Misc Dkt. No. 2013-05

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS

II. WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION

III. WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

STATEMENT OF STATUTORY JURISDICTION

This Court has jurisdiction to review the decision of the Air Force Court of Criminal Appeals (hereinafter AFCCA) under Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2), and authority to grant the relief sought under the All Writs Act, 28 U.S.C. § 1651.

STATEMENT OF THE CASE

On 16 October 2012, Airman First Class (A1C) Nicholas Daniels was charged with raping and sexually assaulting A1C LRM in violation of Article 120, UCMJ, 10 U.S.C. § 920. Arraignment in the case of *U.S. v. Daniels* was held on 29 January 2013. (J.A. at 89-96). At the hearing, the military judge held that Airman LRM's attorney would not be permitted to make any arguments before him nor would he be permitted to speak on behalf of A1C LRM in hearings pursuant to Military Rule of Evidence (MRE) 412 and MRE 513. (*See* J.A. at 177). The military judge reconsidered his decision, but he denied all relief requested on 9 February 2013. (*See* J.A. at 215).

On 12 February 2013, A1C LRM filed a petition for extraordinary relief in the form of a writ of mandamus and a stay. She sought relief from the military judge's erroneous determination regarding the procedures mandated in MRE 412 and 513. On 2 April 2013, AFCCA issued an order

denying A1C LRM's request for a writ of mandamus and vacating the stay. (J.A. at 1). The order held that AFCCA lacked jurisdiction to review the Air Force trial court's decisions regarding interpretation of the procedural rules of MRE 412 and 513.

On 10 April 2013, the petitioner filed a motion for reconsideration en banc. As a result of the stay being lifted, the trial is now set to proceed on 22 July 2013. On 18 April 2013, AFCCA denied petitioner's motion for reconsideration en banc and her request for a stay of the proceedings. (J.A. at 11).

STATEMENT OF FACTS

Airman LRM, 627 LRS, McChord AFB, Washington, reported to authorities that on 13 August 2012, A1C Nicholas Daniels, 49 CES, Holloman AFB, New Mexico, penetrated her vagina and anus with his finger and penis despite her repeated statements to him to stop, that he was hurting her, and that she was done having sex. This allegation led to two specifications of a violation of UCMJ Article 120 being preferred against him on 16 October 2012 and then being referred to trial by General Court-Martial on 28 November 2012. (J.A. at 13-14).

On 23 January 2013, Capt Seth Dilworth, 27 SOW/JA, Cannon AFB, New Mexico, was detailed to be A1C LRM's Special Victims' Counsel. Captain Dilworth provided notice of representation to the trial court via email. (J.A. at 189). The military judge, Lt Col Kastenberg, requested that Capt Dilworth provide formal notice of his appearance along with any information supporting his detailing. (J.A. at 15). Captain Dilworth provided formal notice on 24 January 2013, including his request for standing to receive documents related to his representation and to represent A1C LRM in pretrial motions under the Military Rules of Evidence. (J.A. at 17). Captain Dilworth's request for standing was opposed in part by the trial counsel and completely by defense counsel. (J.A. at 81, 85).

Arraignment in the case of *U.S. v. Daniels* was held on 29 January 2013. Prior to the arraignment, defense counsel submitted a motion under MRE 412 and 513 seeking to admit evidence involving A1C LRM. (*See* J.A. at 81). After arraignment, the military judge took up the issue of Capt Dilworth's representation of A1C LRM. (J.A. at 101). During oral argument, Capt Dilworth initially indicated that he did not need to be heard on any pretrial motions under MRE 412 but eventually indicated to the court that his role would be to protect her privacy interests and asked the trial court to allow

him to reserve the right to represent her under MRE 412 should the need arise. (J.A. at 103, 149). The military judge treated his motion to reserve the right to be heard later under MRE 412 as "a motion in fact," that is, as a motion to represent A1C LRM at any MRE 412 hearing by making arguments on her behalf. (J.A. at 62). The trial judge held that Capt Dilworth would not be permitted to make any arguments before him nor would he be permitted to speak on behalf of A1C LRM in hearings pursuant to MRE 412 and 513. (J.A. at 177). Airman LRM's attorney subsequently filed a motion to reconsider in which he clarified his position and demanded A1C LRM be permitted to be heard through counsel and to be provided documents and court filings related to MRE 412 and 513. (J.A. at 195). The military judge reconsidered the motion, but denied all relief requested on 9 February 2013. (J.A. at 215).

SUMMARY OF ARGUMENT

The military judge deprived A1C LRM of the opportunity to be heard through her counsel during evidentiary hearings in violation of the Military Rules of Evidence. During the course of the proceedings, this discrete issue has been obfuscated. Four distinct distracters have served to divert attention from the primary issue.

First, A1C LRM is not seeking to expand the jurisdiction of military appellate courts through misapplication of the All Writs Act. Her complaint is not a collateral civil issue; the review of a military judge's application of the rules of evidence is core to an appellate court's jurisdiction. In this case, the trial judge misapplied MRE 412 and 513 in violation of existing law – the military judge arbitrarily prevented A1C LRM's lawyer from advocating on her behalf. A right to be heard has the potential to affect the admission of evidence that directly impacts the findings and sentence of a court-martial proceeding.

Second, A1C LRM is not requesting this Court allow her to control the prosecution or to take action intended to harm the accused. She seeks to assert her rights in evidentiary proceedings outside the presence of court members. She is not a "stranger to the court," she asserts her rights in a process specifically designed to promote victim and patient participation on issues that primarily affect their right to privacy – hearings under MRE 412 and 513.

Third, A1C LRM is not claiming she has a right to counsel – she is simply stating that the military judge should not deprive her of the full use of her own lawyer in hearings where she has a right to be heard. Any victim or witness that desires to be heard through counsel under MRE 412 and 513 who happens to procure civilian counsel would face the same legal predicament as A1C LRM.

Because A1C LRM has appointed military counsel, she should not be placed at a disadvantage as compared to numerous circumstances where military courts have allowed limited participants to be represented by civilian counsel in court-martial proceedings affecting their rights.

Fourth, A1C LRM is not seeking a referendum on the Air Force Special Victims' Counsel (SVC) Program. The SVC pilot program does not create jurisdiction, remove jurisdiction, provide standing, or remove standing. The rights of victims exist independent of the program; the rights existed before the SVC pilot program and will continue regardless of whether the program continues. Any consideration of the program either negative or positive in the analysis of this issue is simply not germane.

Setting these distractions aside, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 3 *William Blackstone, Commentaries* 23. Despite this bedrock principle of American jurisprudence, the military judge in *United States v. Daniels* denied A1C LRM, a victim of a crime in a military court-martial, the reasonable opportunity to be heard through counsel during proceedings specifically designed to protect her right to privacy. Further, AFCCA declined to remedy this error, claiming they lacked jurisdiction over a military judge's application of Military

Rules of Evidence in a court-martial proceeding. This Honorable Court should reverse the AFCCA's decision that they lack jurisdiction and issue the writ of mandamus that A1C LRM seeks.

STANDARD OF REVIEW

"Jurisdiction is a question of law that we review de novo." *United States v. Daly,* 69 M.J. 485, 486 (C.A.A.F. 2010). Construction of a military rule of evidence is a question of law reviewed de novo. *United States v. Matthews*, 68 M.J. 29, 35 (C.A.A.F. 2008.) Interpretation of statutes, the UCMJ, and Rules for Courts-Martial (hereinafter RCM) are questions of law reviewed de novo. *See United States v. Lopez Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008); *United States v. St. Blanc,* 70 M.J. 424, 427 (C.A.A.F. 2011).

ARGUMENT

ISSUE I: WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED BY DENYING THEY HAD JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS[1]

Core to AFCCA's jurisdiction is the ability to act on findings and sentence. The findings and sentence rest upon only those facts that the military judge admits pursuant to the Military Rules of Evidence. To preclude error, the rules,

[1] This Honorable Court has jurisdiction to review the AFCCA decision pursuant to UCMJ, Article 67(a)(2). *See, U.S. v. Curtin,* 44 M.J. 439, 440 (C.A.A.F. 1996)(Art 67(a)(2) authorizes jurisdiction over the action by an intermediate appellate court in a petition for extraordinary relief).

including MRE 412 and 513, contain required procedures to enable a military judge to properly assess evidentiary issues. Failure to apply these required procedures invites error that directly affects findings and sentence. By declining jurisdiction in this case, the AFCCA has abdicated its supervisory responsibility under Article 66 and the All Writs Act.

The Air Force Court of Criminal Appeals erred when it determined that it lacked jurisdiction to grant A1C LRM the relief requested. Airman LRM sought review under the All Writs Act, 28 U.S.C. § 1651, of the military judge's ruling that she lacked standing to assert her right to be heard through counsel during evidentiary hearings. Contrary to this Court's reasoning in another case, A1C LRM is not "a stranger to the court." *Compare, Center for Constitutional Rights et al. v. United States and Colonel Denise Lind, Military Judge United States*, (*CCR*), __ M.J. __, No. 12-8027/AR, slip op. at 8 (C.A.A.F. Apr. 16, 2013). She is not asking for the adjudication of "what amounts to a civil action" and, if being granted a reasonable opportunity to be heard under the rules of evidence means anything – it means the opportunity to influence the admissibility of evidence that would have a direct bearing "on any finding and sentence that may eventually be adjudged." *Id.*

a. The Air Force Court of Criminal Appeal's jurisdiction to hear A1C LRM's petition under the All Writs Act flows directly from Article 66

The All Writs Act grants the power to "all courts established by act of Congress to issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The United States Supreme Court has recognized that "military courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act". *United States v. Denedo*, 556 U.S. 904, 911 (2009); *see also CCR,* slip op. at 6. Extraordinary writs are used by appellate courts "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Banker's Life & Casualty v. Holland*, 346 U.S. 379, 382 (1953).

The All Writs Act does not expand this Court's existing jurisdiction. Instead, it requires two determinations: (1) whether the requested writ is "in aid of" the court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008). In the context of military justice, "in aid of" includes cases where a petitioner seeks "to modify an action that was taken within the subject matter jurisdiction of the military justice system." *Id*. at 120.

The All Writs Act still requires subject matter jurisdiction, which flows directly from the appellate court's statutory jurisdiction. Article 66(c), UCMJ, 10 U.S.C. § 866(c)(2006)(statutory jurisdiction for service courts of criminal appeals); Article 67(c), UCMJ, 10 U.S.C. § 866(c)(2006)(statutory jurisdiction for Court of Appeals for the Armed Forces); *CCR,* slip op. at 9 ("any potential jurisdiction we may have in this case must turn on the extent of our own statutory jurisdiction"). However, the jurisdiction to act on findings and sentence includes the ability to act on interlocutory matters where no finding or sentence has been entered in the court-martial. As the United States Supreme Court determined in *Roche v. Evaporated Milk Association,* the authority "is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal, but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." 319 U.S. 21, 25 (1943).

In denying jurisdiction, AFCCA's reliance on *Clinton v. Goldsmith* was misplaced. 526 U.S. 529, 535 (1999). *Goldsmith* did not deal with a case, a court-martial, an Article 32, or even a rule of evidence. *Id.* *Goldsmith* involved an officer who was "dropped from the rolls" in an

administrative action subsequent to his court-martial. *See Goldsmith*, 526 U.S. at 531. In finding the military court lacked jurisdiction, the Supreme Court instructed military appellate courts on the scope of their authority when dealing with actors outside of the court-martial system. *Id.* However, the Supreme Court did not speak to supervisory jurisdiction - the jurisdiction of a superior court to confine an inferior court to act within the law. *Id*. The present case is an ongoing court-martial, and the issue before this Court is the application of rules of evidence in an actual Air Force courtroom.

While neither A1C LRM nor AFCCA had the benefit of this Court's decision in *Center for Constitutional Rights,* that case clarifies what subject matter jurisdiction entails. The petitioner in that case was a coalition of journalists seeking access to court documents in *United States v. Manning*. *CCR,* slip op. at fn 1. This Court reasoned that it lacked jurisdiction to hear the case because it "amount[ed] to a civil action, maintained by strangers to the courts-martial, asking for relief – expedited access to certain documents – that [had] no bearing on any finding and sentence that may eventually be adjudged by the court-martial." *Id.* at 8. In essence, the *CCR* petitioner was using the court-martial process to litigate what

amounts to a Freedom of Information Act request. Release or non-release of those records could not potentially affect the findings or sentence in Private Manning's court-martial.

In contrast, the present petition involves a required hearing under the Military Rules of Evidence — not a civil action – and how those hearings are to be conducted in accordance with the rules. While A1C LRM is not a party to the court-martial, she is certainly no stranger. As the named victim in a case brought under UCMJ Article 120, she is an essential, though limited, participant. Her presence and participation may even be compelled against her will. The rules of evidence through which she desires to be heard were created for her benefit. Finally, and most certainly, regardless of how the military judge rules on the admissibility of evidence admitted, that ruling has the potential to affect the finding and sentence.

b. The Air Force Court of Criminal Appeals erred when it limited its supervisory jurisdiction to issues directly involving "a finding or sentence"

This Court recently held that jurisdiction is appropriate when the harm alleged by the petitioner has "the **potential** to directly affect the findings or sentence." *CCR,* slip op. at 8 (citing to *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012). In

denying jurisdiction to hear A1C LRM's petition, AFCCA concluded that the military judge's ruling **did not directly** involve a finding or sentence. The Air Force Court of Criminal Appeals' conclusion that the military judge's ruling "does not directly involve a finding or sentence that was or potentially could be imposed in a court proceeding" confuses this Court's jurisdiction analysis. (*See*, J.A. at 7). It is generally impossible to tell whether any particular decision of a military judge will directly impact the findings or sentence in a particular case. Applying AFCCA's logic, decisions regarding delays, experts, counsel qualifications, bias of judges and members, investigative support, and evidentiary rulings, (just to name a few) would rarely if ever be reviewable.

Airman LRM's meaningful opportunity to be heard on a rule of evidence potentially affects the finding or sentence. Evidence is only relevant and admissible if it has the potential to make a fact of consequence more or less probable – thereby potentially affecting the finding or sentence. MIL. R. EVID. 401. More specifically, MRE 412 requires a military judge to conduct a hearing and to balance the victim's right to privacy against the probative value of the evidence to be admitted. *See* MIL. R. EVID. 412(c)(3). Parties are permitted to call witnesses, including the victim. *See* MIL. R. EVID. 412(c)(2). The victim must be afforded the independent right to attend and the

"opportunity to be heard." *Id.* An opportunity to be heard would be rendered meaningless if it did not have at least the potential to influence the military judge's evidentiary ruling.

c. Appellate courts may exercise jurisdiction over petitions brought by limited participants

This Court has exercised its supervisory jurisdiction in assessing the application of procedural issues – even when the application of those rules was to benefit limited trial participants.[2] Specifically, in *Carlson and Ryan-Jones v. Smith*, this Court explicitly told trial courts how to handle rules of evidence when enforcing the rights of limited participants. 43 M.J. 401, 402 (C.A.A.F 1995)(summary disposition). *Carlson and Ryan-Jones v. Smith* involved the subpoena of Equal Employment Opportunity records. This Court granted a writ of mandamus and ordered the military judge to examine the records *in camera*, in order to scrub them of matters related to MRE 412 and other

[2] Victims, as limited participants in the criminal justice process, have been permitted access to federal appellate courts in petitions for extraordinary relief and interlocutory appeals. In *F. Doe v. United States*, the Fourth Circuit specifically permitted a victim to file an interlocutory appeal of a federal judge's ruling that the past sexual behavior and habits of that victim were admissible in a rape trial. 666 F.2d 43 (4th Cir. 1981). The court opined that Federal Rule of Evidence (F.R.E.) 412 "makes no reference to the right of a victim to appeal an adverse ruling. Nevertheless, this remedy is implicit as a necessary corollary of the rule's explicit protection of the privacy interests Congress sought to safeguard." 666 F.2d at 46. Victims have also been permitted the opportunity to seek a writ of mandamus in various appellate courts when trial courts have deprived them of specific rights under various crime victims' rights statutes. In fact, the Crime Victims' Rights Act, 18 U.S.C. § 3771 (2009) (CVRA) specifically contains a provision that a victim "may petition the court of appeals for a writ of mandamus." 18 U.S.C. § 3771(d)(3).

privileges. *Id*. The hearing was to be conducted in the manner prescribed under MRE 412. *Id*. To protect the victim-petitioners' interests in the release of the materials, the court noted that the victims will "be given an opportunity, ***with the assistance of counsel*** if they so desire, to present evidence, argument and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." *Id* (emphasis added). Although the summary disposition lacks detail, in order to hear the writ, this Court would have necessarily concluded that it had jurisdiction over a writ brought by limited–participants seeking to vindicate their rights to privacy. This Court concluded that a writ was "in aid" of its jurisdiction, in order to prevent the court from otherwise disclosing materials that might have fallen under MRE 412 and other privileges.

In *Carlson and Ryan-Jones v. Smith*, this Court did precisely what we are asking today, namely, to instruct a lower court on the proper procedures to allow a limited-participant the ability to protect her right to privacy by hearing from her counsel on matters relating to the release of her private sexual history and mental health matters.

d. The Air Force Court of Criminal Appeals erred when it confused subject matter jurisdiction with standing

Subject matter jurisdiction is determined by the subject of the matter to be addressed. It is not determined by the identity of the participant raising the issue — it is standing that addresses an individual's ability to seek relief in court. If the AFCCA's rationale for finding lack of jurisdiction is, as suggested by its dicta, that the court lacks jurisdiction to hear a writ brought by a non-party because of their status as a non-party, such a rationale must fail. (*See* J.A. at 8.)

In the final paragraphs of its order, the AFCCA noted that to grant jurisdiction to hear A1C LRM's petition would be an invitation to "open-ended jurisdiction to entertain every challenge brought by interested parties regarding aspects of the court-martial." (J.A. at 9). Such a fear is misplaced, as only participants with standing could seek review of these issues. Historically and practically, standing is a demanding legal test that can only be met by those closest and most directly tied to a case.

As a result of conflating subject matter jurisdiction and standing, the AFCCA failed to conduct any standing analysis. *See United States v. Wuterich,* 67 M.J. 63, 69-70 (C.A.A.F. 2008)(applying the *Lujan* test in courts-martial). An individual has standing to assert rights in court if: 1) the litigant has

suffered an “injury in fact”; 2) there is a causal connection between the injury and the conduct complained of; and 3) the injury is redressable by a favorable decision of the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *see also, Rakas v. Illinois,* 439 U.S. 128, 134–40 (1978)(“[t]he issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged “injury in fact,” and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.”).

Had AFCCA conducted the proper standing analysis, that court would have determined that A1C LRM had standing under MRE 412 and 513 to be heard by the military judge, the denial constituted an injury, and the injury was redressable by both AFCCA and this Court. Airman LRM was thus situated no differently than members of the press or individuals battling the propriety of subpoenas. *See*, *e.g.*, *CCR,* No. 12-8027 (C.A.A.F. 2013)(assumes that CCR had trial level standing to make request); *United States v. Wuterich,* 67 M.J. 63 (C.A.A.F. 2008); *United States v. Johnson,* 53 M.J. 459, 461 (C.A.A.F. 2000); *ABC Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F 1995); *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). Airman LRM’s standing gave

her the right to bring an issue to AFCCA's attention via an extraordinary writ in a case that potentially could come to it through Article 66.

ISSUE II: WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION

Military Rules of Evidence 412 and 513 require that A1C LRM be given the opportunity "to be heard" at a "hearing." MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(c)(2). The military judge deprived her of that right by redefining "to be heard" into merely "to testify" – thereby disallowing A1C LRM the ability to make legal arguments. He further nullified her right to be heard by depriving her of her counsel's services. Fundamental due process entitles one with a "right to be heard" to address a court with facts and legal argument and to do so through counsel, if represented. The Supreme Court has described that a "hearing" must include the opportunity to make argument through counsel, if represented. Further, the phrase "to be heard" has a consistent meaning when used in the UCMJ and in the Military Rules of Evidence. Last, the exact phrase "to be heard" has been interpreted to mean legal argument through victim's counsel in federal courts.

The military judge erred by ruling A1C LRM lacks standing to assert her rights. Even if there were no explicit language from Congress or the President guaranteeing A1C LRM a "hearing" and a "right to be heard," due process requires that an individual be given notice and an opportunity to be heard before the Government takes action injuring her rights.

Airman LRM's rights are established from three separate sources of authority. First, as a patient and victim, her right to the privacy of her mental health history and prior sexual history are established by MREs 412 and 513. Second, A1C LRM has a right to privacy and dignity that is created by the CVRA. Finally, A1C LRM has a right to informational privacy flowing from the Constitution. Each of these three separate authorities establishes standing for A1C LRM "to be heard" through counsel prior to the court's injury to her rights.

a. Airman LRM has a right "to be heard" at a hearing" provided by MRE 412 and 513

The military judge failed to comply with the requirements of MRE 412 and 513. The Military Rules of Evidence require the military judge to hold an evidentiary "hearing" at which A1C LRM has a right to be "heard." MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(c)(2). A "hearing" and a right "to be heard" require at a minimum the ability to argue one's position, and that argument can be through counsel, if represented.

1. **The Supreme Court has established what a hearing must include, namely, the opportunity to make argument through counsel if provided**

Over eighty years ago, the Supreme Court held that the denial of the requirement of a hearing was a denial of constitutional due process rights:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932).[3]

The Supreme Court has further defined what a hearing, such as that described in MRE 412[4] and 513, requires:

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[3] While this bedrock maxim stressing representation by counsel as integral to the judicial process now seems obvious, it was not at the time. Indeed, at the time of *Powell*, the Sixth Amendment requirement for attorneys in criminal trials did not yet apply to the states under the then unincorporated Fourteenth Amendment. *Id.* Accordingly, the holding of *Powell* is regarding a Fifth Amendment right to the assistance of counsel and cannot be limited to criminal accused's right to counsel under the Sixth Amendment. *Id.*

[4] Commenting on the procedures and rights of victims the authors note "pretty clearly the motion should lead to a hearing where the parties and the complaining witness have a right to attend and to be heard, or where guardians or representatives ***(such as lawyers)*** can be heard." (emphasis added) *See,* MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, § 4:8 (3d Edition, 2012). Not surprisingly, with such explicit language and purpose, the Fourth Circuit in *F. Doe v. United States*, 666 F.2d 43 at 45, had no difficulty holding that a victim of sexual assault had standing to appeal (in the middle of trial) an evidentiary ruling under F.R.E. 412. In *Doe*, the holding was based on the

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has nearly always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman[5] has small and sometimes no skill in the science of law.

Id. at 69

Almost forty years later the Supreme Court reiterated and magnified what is required by a hearing. *Goldberg v. Kelly,* 397 U.S. 254 (1970). In *Goldberg*, welfare recipients sought relief in federal court for Constitutional violations of their due process rights. *Id.* at 255. They claimed they were being denied welfare payments without adequate due process, namely a

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recognition that sexual assault victims have legally cognizable rights under F.R.E. 412 and necessarily have standing to asset those rights. *Id.*

[5] The Court's acknowledgment that "even the intelligent and educated layman has small and sometimes no skill in the science of law" is all the more powerful in the context of people victimized by sexual assault or suffering from a mental disease or defect. Any rule precluding victims or patients from being heard through their counsel will effectively silence those victims and patients most in need of the assistance of counsel. Those victims with injuries either psychological or otherwise, or patients whose mental defect or disease are most egregious, will be the exact victims and patients most injured by the creation of such an unconstitutional and historically absurd rule. The very victims and patients most traumatized, most disabled, most afraid, and most physically injured, would be the most silenced.

hearing. *Id.* The Supreme Court held that the welfare recipients were entitled to an evidentiary hearing prior to their welfare payments being terminated. *Id.* at 266-71. The Supreme Court then defined what such a hearing must include at a minimum: cross-examination, presentation of evidence, and argument by counsel when provided. *Id.*

Just as in *Powell* and *Goldberg*, A1C LRM is entitled "to be heard" at a "hearing." *Powell*, 287 U.S. at 69; *Goldberg,* 397 U.S. at 254. Congress and the President provided those rights to victims and patients through MREs 412 and 513. The military judge erred when he redefined those entitlements as just the ability to provide facts and deprived A1C LRM the ability to make legal arguments through her counsel.

2. The phrase "to be heard" has a consistent meaning when used in the UCMJ and in the military rules of evidence

The phrase "to be heard" is used in both the Military Rules of Evidence and the Rules for Court-Martial(RCM). Each and every time it is used it refers to an occasion when the parties (through counsel) can provide argument to the military judge on a legal issue. It never refers to an occasion when a witness must or should testify.[6] *See, e.g.,* R.C.M. 806(d), Discussion,

[6] By limiting A1C LRM to "factual matters," the military judge effectively ignored the language used by Congress and only permitted A1C LRM the right to testify. Testify means "to give evidence as a witness." BLACK'S LAW DICTIONARY 1476(6th ed. 1990).

(parties have an opportunity to be heard before issuing a protective order); R.C.M. 917(c)(parties have an opportunity to be heard regarding a motion for finding of not guilty); R.C.M. 920(c)(parties have an opportunity to be heard on the findings instructions); R.C.M. 920(f)(parties have an opportunity to be heard on objections to instructions); R.C.M. 1005(c)(parties have an opportunity to be heard on sentencing instructions); R.C.M. 1102(b)(2)(parties have an opportunity to be heard at post-trial 39a sessions); MIL. R. EVID. 201(e)(parties have an opportunity to be heard regarding judicial notice).

Accordingly, there are several discrete events in every trial at which point parties in the case have a right "to be heard" through their counsel. *See, e.g.,* R.C.M. 806(d); R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); MIL. R. EVID. 201(e). The effect of these rights is that the Accused can be heard at several keys points without having to testify. His attorney is permitted to make legal arguments and advocate on his behalf based on his right "to be heard."

In addition to those examples, Congress and the President sought to provide victims and patients the same rights as parties in at least three hearings. In MRE 412, 513, and 514, Congress and the President deliberately chose to provide victims and patients the same rights as parties in those hearings by

using the identical language they used at other places within the MREs and the RCMs. The effect of Congress's and the President's language is to give victims and patients the right to have their attorneys make legal arguments and advocate on their behalf.

Beside Congress and the President's deliberate choice of the legal term of art "to be heard," the statutory construction of MRE 412 and 513 also reveals the military judge's error. One need look no further than the text of MRE 412 or 513 to realize that the President and Congress intended far more rights for victims and patients than merely being able to testify. Both rules permit the parties to "call witnesses, including the patient [and or victim]." MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(e)(2). However, both rules also state in separate provisions that the victim and patient have an opportunity to "be heard." The military judge's determination that victims and patients can only provide testimony ignores the statutory construction of both rules and does not give effect to the extra provisions. MIL. R. EVID. 412(c)(2); MIL. R. EVID. 513(e)(2). "To be heard" must mean something more than being a witness, otherwise the rule is redundant. The phrase "to be heard" at a "hearing" are terms of art both Congress and the President have repeatedly used throughout the MREs and RCMs to permit legal argument – argument that is generally made through counsel.

3. The phrase "to be heard" has been interpreted to mean legal argument through counsel in federal courts

The federal district and circuit courts of appeal have been hearing legal arguments from victim's counsel for decades now. *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). District and circuit courts of appeal have consistently held that "to be heard" includes the right to be heard through counsel and to make legal arguments. *In re Dean*, 527 F.3d 391 (5th Cir. 2008), is illustrative of this point. In *Dean*, the victims exercised their right to be "reasonably heard" regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." *Id.* "The attorneys reiterated the victim's requests" and "supplemented their appearance at the hearing with "substantial post-hearing submissions." *Id.* In similar fashion, the Fourth Circuit determined that the "right to be heard" "accords [victims] standing to vindicate their rights." *Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011). In *Brandt* the victim wished to prevent the Accused from being released at a habeas hearing. *Id.* The court held that motions from attorneys were "fully commensurate" with the victim's "right to be heard." *Id*.[7]

[7] *See also, Pann v. Warren*, 2010 WL 2836879 (E.D. Mich. 2010)(permitting victims to be "reasonably heard" by written "arguments" regarding a habeas hearing).

b. Limited participants have standing in a trial by court-martial to vindicate their rights

In this case, A1C LRM has satisfied the requirements for standing: "(1) an injury in fact; (2) causation; and (3) redressability." *Sprint Commun'ns Co. v. APCC Servs., Inc.*, 554 U.S. at 273 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561 (1992)).

Airman LRM has standing to assert her rights as a limited participant. Airman LRM is not a party to this case. Indeed, she is a witness in the case. However, unlike strangers to the court, she is not free to walk away. Before the Government is permitted to injure one of her rights she is permitted to be heard by the military judge through counsel. Airman LRM's request is not remarkable. Indeed, a basic principle of constitutional law is that rights may be asserted by their holder and must have a remedy. *See Marbury v. Madison,* 5 U.S. 137, 163 (1803)("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (quoting, 3 *William Blackstone, Commentaries* 23)).

Limited participant standing has been recognized by military courts, federal courts, and the Supreme Court. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)

(standing created by First Amendment right); *Church of Scientology v. United States*, 506 U.S. 9 (1992) (standing created by attorney-client privilege); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(standing for victims created to avoid "unwarranted invasions of privacy," "violations of MRE 412," and "breach[es] of privilege[s]")(summary disposition); *ABC, Inc. v. Powell,* 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008) (assuming standing for CBS in part under RCM 703); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for *victim*'s mental health provider).

The test for standing in a military court is no different than the test generally applied in federal district courts. See *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(citing *Sprint Commun'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269 (2008). Military courts, although Article I courts, have adopted the same constitutional standards as Article III courts for determining standing. *Id.* (citing *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003)).

c. Airman LRM's rights arise from the Military Rules of Evidence, the CVRA, and the Constitution

1. The Military Rules of Evidence provide A1C LRM procedural rights

Airman LRM's rights under MRE 412 and 513 are indistinguishable from rights commonly recognized to bestow standing. These rights recognize the unique role that victims and patients play in the court-martial process.[8] In criminal cases and hearings, privileges have repeatedly been found sufficient to justify limited participant standing. See, *Church of Scientology v. United States*, 506 U.S. 9 (1992)(non-subpoenaed party granted standing base on attorney-client privilege); *In re Grand Jury Impaneled v. Freeman*, 541 F.2d 373, 377 (3d Cir. 1976)(standing created by prothonotary "Local Rule 202"); *United States v. Nixon*, 418 U.S. 683 (1974)(non-

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[8] The legislative history to Federal Rule of Evidence (FRE) 412 states Congress's purpose: "to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives." 124 Cong. Rec. at H 11945 (1978). This purpose is echoed in the advisory comments to MRE 412, which state that the purpose is to "safeguard the alleged victim against the invasion of privacy." Manual for Court-Martial, Appendix 22, Mil. R. Evid. 412. Similarly, the advisory comments to the 1994 amendment to FRE 412 reiterate the victim-focused purpose of the rule as well. The FRE 412 advisory committee's notes:

> The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process.

Not only did Congress and the President create these rules for the special protection of the privacy interests of victims and patients, they had another purpose in mind as well. "By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute *and to participate in* **legal proceedings** against alleged offenders." *Id* (emphasis added).

subpoenaed party permitted standing under executive privilege); *See also, In re Grand Jury John Doe*, 705 F.3d 133, (3d Cir 2012). The decision in *Freeman* is illustrative. In *Freeman*, the Grand Jury sought a subpoena of the Honorable Americo V. Cortese,[9] the Philadelphia County Prothonotary, for certain documents. Although Mr. Freeman was not subpoenaed and not a party to any case, the court held that Mr. Freeman had limited participant standing to be heard "on the basis of his claim of privilege." *Freeman*, 541 F.2d at 377.

The existence of a right alone can establish standing to seek a remedy. The Fourth Circuit Court of Appeals found a victim had a trial and interlocutory appellate remedy based on F.R.E. 412.[10] *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981). There is no meaningful difference between FRE 412 and MRE 412. Importantly, neither rule use the term "standing," and neither explicitly permit appeals. However, this Court, like the Fourth Circuit, should apply the Supreme Court's unambiguous direction that "this remedy is implicit as a 'necessary corollary of the rule's explicit protection of the privacy

[9] The court in *Freeman* found standing for both the Prothonotary and Mr. Freeman to challenge the subpoena. Both were permitted standing even though their positions on the issue were identical, namely, Local Rule 202 provided a privilege. *Freeman*, 541 F.2d at 377.

[10] All courts are required to evaluate standing at all stages of a proceeding because standing is a jurisdictional issue. *FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215 (1990). The Court's resolution of the issue on appeal can only be interpreted one way -- the court must have also found trial level standing for the assertion of the rights. *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981).

interests Congress sought to safeguard.'" *Id.* (*citing Cort v. Ash*, 422 U.S. 66 (1975)).

The owner of a privilege has standing to defend that privilege when it is imperiled. *See United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(assuming trial standing for the lawyer of a victim's doctor to assert MRE 513 privilege); *see also generally, Church of Scientology v. United States*, 506 U.S. 9 (1992)(non-subpoenaed party granted standing under attorney-client privilege); *In re Grand Jury Impaneled v. Freeman*, 541 F.2d 373, 377 (3d Cir. 197); *In re Grand Jury John Doe*, 705 F.3d 133 (3d Cir 2012)(standing based on attorney-client privilege).

Perhaps no case demonstrates the simplicity of this issue better than this Court's decision in *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995). In *Carlson*, two sexual assault victims filed a petition for extraordinary relief to protect their rights. *Id.* Specifically, they sought to protect their rights that were in jeopardy in the trial of CDR Reeves. *Id.* They asserted standing to defend their rights under MRE 412, Article 31 of the UCMJ, generalized "invasions of privacy," and their "privileges." *Id.* This Court granted relief and ordered the military judge to review the records sought *in camera*. *Id*. This Court further ordered that, "in addition to trial and defense counsel in the *Reeves* case, petitioners will be given an

opportunity, **with the assistance of counsel** if they so desire, to present evidence, **arguments and legal authority** to the military judge regarding the propriety and legality of disclosing any of the covered documents." *Id.* (emphasis added). Airman LRM's request is no different. She wishes only the "opportunity, with the assistance of counsel...to present evidence, arguments and legal authority to the military judge." *Id.*

2. Airman LRM has rights that arise from the Crime Victims' Rights Act (CVRA)

Independent of rights flowing from the rules of evidence, A1C LRM has a right to privacy protected by the CVRA.[11] The CVRA protects the rights of all victims of federal offenses, including those within the military justice system. Airman LRM has an explicit right to "dignity and privacy" under the CVRA. 18 U.S.C. 3771(a)(8). This is the same right often at issue under MRE 412 and 513. This right provides A1C LRM standing to defend this right, including the right to make arguments through counsel.

Although this Court has yet to address the applicability of the Crime Victims's Rights Act to military members, this Court's

[11] Obviously, if this Court determines that A1C LRM has the right to make legal arguments through counsel at the MRE 412 and 513 hearings, it need proceed no further. This Court could determine that A1C LRM independently has standing and the right to be heard based on the rights to privacy created by the CVRA and the Constitution, but that determination is not necessary.

precedent supports a finding that it does. *See United States v. Dowty*, 48 M.J. 102, 107 (C.A.A.F. 1998). The CVRA is meant to be a broad right-creating statute applicable to all U.S. citizens and there is no facet of the UCMJ or military law that is contrary to the CVRA.

The passage of the broad-sweeping CVRA by Congress marked a turning point for all victims in the United States. Victims' advocates received nearly universal congressional support for a "broad and encompassing" statutory victims "bill of rights." 150 Cong. Rec. S4261 (daily ed. 22 April 2004)(statement of Sen. Feinstein).

As this Court and the Supreme Court have acknowledged, "Congress has plenary control over ***rights***, duties, and responsibilities within the framework of the Military Establishment, including regulations, procedures, and remedies". *United States v. Dowty*, 48 M.J. at 106 (emphasis added, quoting *Weiss v. United States*, 510 U.S. 163 (1994). In making the CVRA applicable to "any court" and for all "federal offenses," Congress ensured that victims who are sexually assaulted by military members would be treated with no less "privacy" and "dignity" than all other citizens of the United States. Victims, military or civilian, hauled into military courts should not have to suffer the further indignity of being told

they are the only victims of a federal offense in the United States without the right of privacy or dignity.

Absent an explicit and clear military necessity, military members are afforded the same statutory and constitutional rights as civilians. *See Dowty*, 48 M.J. at 107 ("in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members"). As this Court has recognized, absent clear inconsistency or contrary purpose, there is a "general direction to apply civilian procedures." *Dowty*, 48 M.J. at 107.

Not only are there no contrary provisions or inconsistent purposes in the Manual for Court-Martial, the existing provisions are entirely consistent with the robust recognition and protection of victim's rights. *See generally* MIL. R. EVID. 303; MIL. R. EVID. 502; MIL. R. EVID. 503; MIL. R. EVID. 513; MIL. R. EVID. 514, discussion of R.C.M. 806 (recognizing prohibitions on degrading questions, various privileges and accordant rights therewith, and the ability to close the courtroom to avoid "embarrassment or extreme nervousness"). Further, the now defunct version of MRE 615, which in 1999 appeared contrary to federally created victim's rights, was repealed and superseded by an amendment to the Military Rules of Evidence. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002); Crime Victims' Rights Act, 18 U.S.C. § 3771 (2004). In 2002, the President

corrected and ensured the fullest protection of victims' rights in courts-martial by amending MRE 615 to include two additional rights for victims. *Id.*

The purpose and language of the CVRA is wholly aligned and consistent with current military law. The rights provided by the CVRA are not alien to those currently provided to victims within the Department of Defense. For eight years, the Department of Defense has expressly instructed, *inter alia*, that a victim has the right to "[b]e treated with fairness and respect for the victim's dignity and privacy." DoDD 1030.01 page 2. That directive and its accompanying instruction, DoDI 1030.2, implemented 42 U.S.C. § 10606, the predecessor to the CVRA. Virtually all of the rights provided by the CVRA are included in this DoD Directive and Instruction and were further implemented in Air Force Instruction (AFI) 51-201 Chapter Seven, which states unequivocally that a victim has the right to "[b]e treated with fairness and respect for the victim's dignity and privacy." (J.A. at 221)

Before applying a federal statute to court-martial practice, *Dowty* directed that courts consider as factors (1) whether the statute interfered with a fundamental principle of military law and whether or not the military had implemented any of the rights contained in the legislation. 48 M.J. at 110-11. The Department of Defense has for eight years instructed its

trial counsel and law enforcement officials that a victim's rights to privacy and dignity are paramount. A victim's rights to privacy and dignity have themselves become a fundamental principle, having been included in instructions and directives for eight years with little reverberation in the greater body of military law. While the current Department of Defense and Air Force Instructions reference the implementation of 42 U.S.C. § 10606, that statute was superseded in 2004 by the CVRA. Hence, current DoD Directives and Instructions, Air Force Instructions, and Military Rules of Evidence should be read to incorporate the CVRA.

The plain meaning of the words in the CVRA speak volumes—"in ***any court*** proceeding involving an offense against a crime victim." 18 U.S.C. § 3771 (emphasis added). Crime victim is defined to include any person directly or even proximately harmed as a result of any "federal offense."[12] *Id.* Further, in addition to the mandate for all courts to apply these rights, all "**departments** and agencies of the **United States** engaged in the detection, investigation, or prosecution of crime" are assigned this task as well. *Id.* (emphasis added).

The conclusion that the CVRA provides rights that can be exercised in military court is consistent with current law and

[12] All military offenses under the UCMJ are federal offenses. *See* 10 U.S.C. § 877 et. seq.

controlling precedent. *See Dowty,* 48 M.J. at 102. In *Dowty,* the Court was forced to address the applicability of the Right to Financial Privacy, 12 U.S.C. § 3401-3422 (RFPA). *See Dowty*, 48 M.J. at 102. The RFPA was created by Congress in response to a Supreme Court decision denying the Fourth Amendment protection to certain types of searches and seizure of bank records. *Id.* at 106. In response, Congress created the RFPA which provided privacy rights with regard to their banking records. *Id.* Just like the RFPA the CVRA was created by Congress to provide rights in response to Congress's perceived need for additional protection.

The argument for the application of the CVRA to military courts is much stronger than the argument which prevailed in applying the RFPA to military courts. Unlike the CVRA the RFPA was directly inconsistent with the UCMJ. Accordingly, this Court, in *Dowty*, was cautious in holding that the RFPA was applicable. *See Dowty*, 48 M.J. at 105 (noting conflict between RFPA and UCMJ Art. 43). Ultimately, this Court correctly decided that RFPA did apply to trials by court-martial. *Id.* at 108. In overcoming the dilemma raised by the inconsistency, thia Court first noted that the RFPA created actionable rights for all service members. *Id.* at 108. This Court in *Dowty* relied on the language from the act extolling its application by "any agency or **department** of the United States." *Id.* at 108

(emphasis added). This is similar to language Congress used in the CVRA. *See* 18 U.S.C. § 3771(c)(1)("Officers and employees of the Department of Justice *and other departments and agencies of the United States* engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)"). This Court further noted that, although Congress could have excluded the Department of Defense, the Act "provides **no exemption** for the Department of Defense in general or **military disciplinary matters** in particular"[13] (emphasis added). 48 M.J. at 109. Likewise, there is no military disciplinary exemption in the CVRA. 18 U.S.C. § 3771.

After finding the RFPA created rights for service members, the Court had to determine if it would also incorporate the Act's contradictory provisions regarding the statute of limitations — UCMJ Art 43 was directly contrary to the RFPA. *Dowty,* 48 M.J. at 110-11. The RFPA mandated that the tolling provision apply to "any applicable statute of limitations." Accordingly, the Court found with "no reservations" that the RFPA was applicable to the military's statute of limitations.

[13] In applying a rule of evidence, the presumption that federal statutes and regulations apply to trial by court-martial is even stronger. *See* MIL. R. EVID. 1102 (requiring the President to affirmatively opt out of the existent Federal Rules of Evidence before they are automatically applied to Military Rules of Evidence).

Id. at 110. The CVRA uses similar sweeping language; it applies in "any court proceeding." *See* 18 U.S.C. § 3771.

In *Dowty*, this Court explicitly rejected the argument that Congress was required to use any specific language when passing legislation that had the effect of modifying prior legislation. *See Dowty,* 48 M.J. at 109 ("Congress is not required to use specific language"). Further, the Court rejected an argument that an intervening amendment to UCMJ Art. 43 had any effect on their analysis. *Id*. at 110. After the passage of the RFPA, Congress amended UCMJ Art. 43--extending the statute of limitations from 3 to 5 years and modifying some of the exceptions. *Id.* Congress did not in those amendments acknowledge, embrace, reference, or codify the tolling exception from the RFPA. *Id.* In *Dowty*, the appellant argued that Congress's inaction or silence with regard to the RFPA's application to UCMJ Art. 43 suggested their intent. *Id.* This Court rejected this "repeal by implication" argument. *Id.* at 110.

In finding the RFPA applicable, significant to this Court was the absurdity of ruling otherwise — that active duty military members would have recognizable privacy rights in civilian courts, but military courts would be forbidden from enforcing the corollary response to the exercise of those

rights. *Id*. at 111. No such absurdity was tolerated in *Dowty*, nor should it be in the present case.

Two other decisions from this Court are similarly instructive on this issue. See *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999); *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). In *McElhaney,* this Court addressed an issue similar to *Dowty*, namely, whether to enforce a federal law that was inconsistent with existing military law. 54 M.J. at 120. Unlike in *Dowty*, *McElhaney* did not deal with the creation of broad encompassing federal rights. *McElhaney,* 54 M.J. at 120; *Dowty*, 48 M.J. at 106. Instead, *McElhaney* addressed the narrower issue of the congressional update to federal child abuse laws. 54 M.J. at 120. Congress extended the statute of limitations for child abuse cases. *Id.* The military already had crimes for child abuse victims and already had a statute of limitations. *See* UCMJ Art. 128; Art. 134; Art. 43. Additionally, this Court noted that the law appeared to only apply to crimes "prosecuted by the Department of Justice" as opposed to the language of the RFPA and CVRA, applicable to "any agency or department of the United States." *McElhaney,* 54 M.J. at 125-6; *Dowty*, 48 M.J. at 106. Not surprisingly, this Court ultimately held that the new contrary and inconsistent statute of limitations did not repeal *sub silentio* the existing UCMJ Art. 43. *McElhaney,* 54 M.J. at 120. *McElhaney* and *Dowty,* when

read together, reveal only what *Dowty* actually stated: absent clear inconsistency or contrary purposes, there is a "general direction to apply civilian procedures," and "in the absence of a valid military purpose requiring a different result, generally applicable statutes are normally available to protect service members." *Dowty*, 48 M.J. at 106-7.

The decision in *Spann* now serves as a historical marker and turning point for victims' rights in the military justice system. In *Spann*, this Court addressed whether the Victim's Rights and Restitution Act, 42 U.S.C. § 10606, repealed by implication the then existing MRE 615. 51 M.J. 89. At the time of *Spann*, the military's existing evidentiary rule of sequestering witnesses was entirely inconsistent with the rights putatively created by the new law. *See* Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002). In 1999, there were only three existing exceptions to the general rule of sequestration at the behest of either party: (1) the accused, (2) a representative of the United States designated by trial counsel, and (3) a person whose presence is shown by a party to be essential to the presentation of the party's case. *See Spann*, 51 M.J. at 90. In addition to the inconsistency, it was unclear if the Victim's Rights and Restitution Act--which purported to create a host of new rights for victims--actually created any rights. *United States v. McVeigh*, 106 F.3d 325 (10th Cir.

1997)(holding that victims had no appellate standing because the act did not create legally recognizable rights). Indeed, this Court in *Spann* was "primar[ily] concern[ed with] the lack of clarity as to the effect of 42 U.S.C. § 10606 in federal civilian criminal trials." *Spann*, 51 M.J. at 92. It was the ambiguities of the language, legislative history and judicial interpretation that kept this Court from applying the statute. *Id*.

Faced with an ambiguous provision that was inconsistent with military law and not apparently creating any federally recognizable rights, this Court, for good reason, found that MRE 615 was not "repealed by implication" by 42 U.S.C. § 10606. The landscape of victims' rights could not be more different now. The CVRA's language is clear, and the rights therein are unambiguous.[14]

This Court's decision in *Spann* prompted both congressional and presidential action to correct the apparent inconsistency between MRE 615 and their desire for the broadest recognition of victim's rights. See Exec. Order No. 13,262, 67 Fed. Reg. 18773

[14] The CVRA has been successfully applied by counsel for victims in the 5th Circuit Court of Appeals, 4th Circuit Court of Appeals, 10th Circuit Court of Appeals, 2d Circuit Court of Appeals, and the 9th Circuit Court of Appeals. *See Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011);*In re Dean*, 527 F.3d 391 (5th Cir. 2008); *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008); *Kenna v. United States,* 435 F.3d 1011 (9th Cir. 2006);*In re Huff Asset Mgmt. Co.,* 409 F.3d 555 (2d Cir. 2005). Indeed, in the decade of victims exercising their rights, we are aware of no federal district or circuit court of appeals that failed to enforce the rights created by the CVRA.

(Apr. 11, 2002); Crime Victims' Rights Act, § 3771. First, the President fixed MRE 615. Exec. Order No. 13,262, 67 Fed. Reg. 18773 (Apr. 11, 2002). Federal Rule of Evidence (FRE) 615 and subsequently MRE 615 were both amended to add a fourth exception forbidding automatic sequestering of "a person authorized by statute to be present." *See* Mil. R. Evid. 615(4). Both federal cases and the analysis of the amendments of Rule 615 make clear that "a person authorized by statute to be present" refers to victims protected by victims' rights legislation.[15] *United States v. Edwards,* 526 F.3d 747 (11th Cir. 2008)(holding that CVRA is a statute under the fourth exception of FRE 615 and that the accused has no Constitutional right to exclude witnesses).

Next, Congress, in response to the *McVeigh* decision passed the CVRA. *McVeigh*, 106 F.3d at 325. The CVRA superseded the earlier victims' rights legislation "mov[ing]" and "amplify[ing] the current rights." H.R. REP. 108-711, pt. A, at pg 2. The newly drafted legislation worked. The CVRA ushered in a renaissance in federal courts where victims were afforded limited participant standing through counsel to exercise their rights. *See, e.g., In re Dean*, 527 F.3d 391 (5th Cir. 2008); *Brandt v. Gooding*, 636 F.3d 124, 136 (4th Cir. 2011); *Kenna v. United States*, 435 F.3d 1011 (9th Cir. 2006); *Pann v. Warren*,

[15] *See*, MIL. R. EVID. 101, which directs a court-martial to apply federal district court interpretation of rules of evidence.

2010 WL 2836879 (E.D. Mich. 2010); *United States v. Mahon*, 2010 WL 94247 (D. Ariz. 2010). Federal courts throughout the country have uniformly recognized that victim's now have standing to assert their rights created by the CVRA. *Id.*

This Court's decision in *Spann* was based on the existing landscape of victim's rights. 51 M.J. at 89. At the time, they were inconsistent with military law and it was uncertain whether they even existed as drafted. *Id.* The current landscape could not be more certain. Since the time *Spann* was decided, Congress has passed new legislation, the President has updated the Military Rules of Evidence, and the Department of Defense and military departments have updated regulations and instructions. All of these provide significant rights for victims. Accordingly, this Court should recognize the applicability of the CVRA and permit A1C LRM standing to assert her rights.

3. Airman LRM has rights that arise from the United States Constitution

The right to privacy is a Constitutional right sufficient to provide standing for A1C LRM to defend her privacy in regard to her prior sexual history and mental health history.[16]

The Supreme Court has recognized that the Constitutional right to privacy would be sufficient to provide standing for more than thirty years. *See United States v. Nixon,* 433 U.S. 425, 457 (1977)(*quoting Whalen v. Roe,* 429 U.S. 589, 599-600 (1977)). Indeed, the Constitutional right to privacy, insofar as it is a right that creates standing, was used as support for the media's standing to demand a right to an open trial. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Richmond*, the accused moved the Court for closure and the state joined. The trial judge closed the trial. The press appealed citing to a "First Amendment" right to a public trial. *Id.* at 559. At the Supreme Court, the state argued that, although the Accused has a 6th Amendment right to a public trial, the press

[16] Although there can be little serious debate remaining as to whether there is a Constitutional right to privacy, this truth says little about what evidence will ultimately be admitted at trial. In an Accused's criminal trial, his constitutional right to fair trial cannot be subordinated to a victim's right to privacy. However this acknowledgment says nothing about standing. The victim and patient still have legally cognizable rights to privacy, and accordingly, have the right to a hearing and argument through their counsel to demonstrate for example that prior sexual history or mental health history are not relevant or material in a particular case. The Accused's right to a fair trial does not include a right to admit irrelevant evidence; when appropriate, a victim must be permitted to point this out.

has no independent right to a public trial. *Id.* at 579. The State argued that the text of the Constitution does not mention anything about the press's right to a public trial. The Supreme Court dismissed the state's argument, noting that many "recognized" and "important" Constitutional rights are not included in the text of the Constitution. *Id.* In noting the Constitutional rights that provide standing, the Supreme Court listed the right "of privacy." *Id.*

Airman LRM has a constitutional right to privacy with regard to her past sexual relationships based on established Supreme Court case law. In *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992), the Supreme Court reaffirmed the substantive force of the liberty interests protected by the Due Process Clause. The *Casey* decision confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* at 851. In discussing the respect the Constitution demands for personal privacy, dignity, and autonomy, the Supreme Court stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the

> Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id.

Even before the *Casey* decision, the Supreme Court in *Whalen* and *Nixon,* while upholding the constitutionality of the statutes at issue in those cases, noted that an element of constitutionally protected privacy rights includes, "the individual interest in avoiding disclosure of personal matters...." *United States v. Nixon,* 433 U.S. 425, 457 (1977) (*quoting Whalen v. Roe,* 429 U.S. 589, 599-600 (1977)). Assessing an individual's legitimate expectation of privacy is part of the constitutional analysis that must occur before information is disclosed to the public by government action. "When information is inherently private, it is entitled to protection." *Fraternal Order of Police, Lodge 5 v. City of Philadelphia,* 812 F.2d 105, 116 (3d Cir.1987); *see also, York v. Story,* 324 F.2d 450, 455 (9th Cir.1963)("We cannot conceive of a more basic subject of privacy than the naked body.").

The privacy interests that are protected from disclosure by the Constitution include the highly personal and "intimate aspects of human affairs" that are at issue in the present case. *See, Eagle v. Morgan,* 88 F.3d 620, 625 (8th Cir. 1996)(quoting, *Wade v. Goodwin,* 843 F.2d 1150, 1153 (8th Cir.) *cert. denied,* 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988)). Intimate details of a person's sexual history fall squarely within that protected sphere. Airman LRM has a constitutionally protected right to privacy that is at issue in the present case.

ISSUE III: WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

As set out above, this Court, like the AFCCA below, has the jurisdiction to grant extraordinary relief and issue a writ of mandamus in an appropriate case.[17] The next question is whether this Court should issue a writ of mandamus.[18] Issuance of a writ

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[17] Although the CVRA also provides for enforcement in federal district and circuit courts, this Court should consider ACCA's reasoning in examining its own authority to issue an extraordinary writ. In agreeing to hear a petition for extraordinary relief, ACCA concluded that "we will not force soldiers to bring collateral attacks of their courts-martial in the civilian federal courts or the U.S. Court of Appeals for the Armed Forces." *Dew v. United States*, 48 M.J. 639, 647 (A.C.C.A. 1998).

[18] At least two federal circuit courts would interpret the CVRA's enforcement mechanism as lowering the hurdle for a crime victim seeking a writ of mandamus in federal circuit court. In *Kenna v. United States,* the Ninth Circuit held that "we must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error." 435 F.3d 1011, 1017 (9th Cir. 2006). In similar fashion, in *In re Huff Asset Mgmt. Co.,* the Second Circuit held "a petitioner seeking relief pursuant to the mandamus provision set forth in § 3771(d)(3) need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus." 409 F.3d 555, 562 (2d Cir. 2005).

of mandamus is discretionary on the part of this Court and is "a drastic remedy ... [that] should be invoked only in truly extraordinary situations, and we pointed out that to justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even 'gross error;' it must amount to a judicial 'usurpation of power,' or be 'characteristic of an erroneous practice which is likely to recur.'" *Murray v. Haldeman,* 16 M.J. 74, 76 (C.M.A. 1983) (quoting *United States v. Labella,* 15 M.J. 228, 229 (C.M.A. 1983), *United States v. DiStefano,* 464 F.2d 845, 850 (2d Cir.1972)) (internal quotations removed). Without the benefit of guidance from this Court, the erroneous practice of the military judge and others presented with a similar issue is certain to recur.

The Army Court of Criminal Appeals borrowed a useful framework for determining whether a writ of mandamus should be issued in *Dew v. United States,* 48 M.J. 639, 648-49 (A. Ct. Crim. App. 1998). The Army Court of Criminal Appeals used guidelines synthesized from the Sixth and Ninth Circuits, referred to as "*Bauman*" factors "to frame the boundaries of their mandamus power." *Id.* at 648 (citing to *In re American Medical Systems, Inc.,* 75 F.3d 1069, 1078 (6th Cir.1996); *Bauman*

v. United States District Court, 557 F.2d 650, 654–55 (9th Cir.1977)). The guidelines are as follows:

> (1) The party seeking relief has no other adequate means, such as direct appeal, to attain the relief desired;
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal;
>
> (3) The lower court's order is clearly erroneous as a matter of law;
>
> (4) The lower court's order is an oft-repeated error, or manifests a persistent disregard of federal rules;
>
> (5) The lower court's order raises new and important problems, or issues of law of first impression.

Id. at 648-49.

In applying the framework, ACCA cautioned that a petitioner need not satisfy all of the factors and not all will be relevant in every case, and "rarely will they all point to the same conclusion." *Id.* However, the current case is the rare case where all five of the *Bauman* factors are present, and all point to the same direction – a writ of mandamus is appropriate. First, A1C LRM has no other adequate means of challenging the

military judge's ruling through the appellate process. While a federal *habeas petition* is available through the enforcement section of the CVRA, such courts lack expertise in the field of military justice and military courts have expressed a reluctance to force military members to seek relief in civilian federal courts. *See,* 18 U.S.C. § 3771(d)(3); *Dew v. United States*, 48 M.J. at 647. Second, A1C LRM will be damaged or prejudiced in a way not correctable on appeal. In this case, the right to be heard on A1C LRM's issues relating to her privacy and dignity cannot be corrected on subsequent appeal. No possible ruling of this Court at a later point in time can redress the error. Third, the military judge's ruling in this case is plainly erroneous. As discussed below, the military judge denied the victim's right to be heard, through counsel, prior to depriving her of constitutional, statutory, and regulatory rights. Fourth, absent any guidance from this Court, the military judge's ruling, and those of military judges with a similar mindset, will be "oft-repeated." With no other meaningful way for these issues to reach appellate review, every military judge will be free to determine the scope and extent of a victim's rights with neither guidance nor oversight. Such a result will create a judicial landscape where a victim's rights vary from courtroom to courtroom with no clear guiding principles. *See, e.g.,* Douglas E. Beloof, *The Third Wave of Crime Victims'*

Rights: Standing, Remedy, and Review, 2005 BYU L. Rev. 255 (2005). Finally, the military judge's ruling raises new and important problems, and also issues of law of first impression. There is no precedent in military law addressing these issues.

It is appropriate for this Court to grant extraordinary relief at this stage rather then returning the case to AFCCA for further review. Both the accused and petitioner have a common interest in a speedy resolution of this matter that would be thwarted by further appellate delay. *See ABC, Inc. v. Powell* M.J. at 364.

CONCLUSION

To allow AFCCA to claim they lack jurisdiction to review a military judge's interpretation of a rule of evidence is to allow them to abdicate their supervisory responsibility. To deny A1C LRM a writ of mandamus that ensures that she has a meaningful way to voice her position is to deny justice to a victim and a patient. "It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court [is] bound to grant it. They can refuse justice to no man." *Marbury v. Madison,* 5 U.S. at 153. For the reasons set out above, we respectfully request this Court

reverse AFCCA's decision that they lack jurisdiction and to issue on behalf of A1C LRM the writ of mandamus that she seeks.

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CERTIFICATION OF FILING

I certify that a copy of the foregoing was delivered to the Court, the Respondent, Government Trial and Appellate Division, and the Appellate Defense Division

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CERTIFICATION OF COMPLIANCE WITH RULE 24(D)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 12,254 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief was prepared using Microsoft Word Version 2007 with Courier New 12-point font, a monospaced font.

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	USCA Dkt. No. 13-5006/AF Crim. App. Misc Dkt. No. 2013-05
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Appellee*	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	Dated: 20 May 2013

REPLY BRIEF ON BEHALF OF APPELLANT AIRMAN FIRST CLASS LRM

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Appellee*	)	USCA Dkt. No. 13-5006/AF Crim. App. Misc Dkt. No. 2013-05
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party In Interest*	)	Dated: 20 May 2013

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Argument

A. Subject-matter jurisdiction is not dependent on the identity of the individual seeking relief.

Both Appellee and the Real Party in Interest misread *Center for Constitution Rights et al. v. United States and Colonel Denise Lind, Military Judge (CCR),* 72 M.J 126 (C.A.A.F. 2013), for the proposition that subject-matter jurisdiction depends on the identity of the individual seeking relief. (*See* Real Party Br. at 10 ("This Court based its ruling in *CCR* on a lack of jurisdiction to grant the relief requested by a non-party").) This argument ignores the distinction between subject-matter jurisdiction and standing. This Court, after oral argument in

CCR specified three issues for the parties to brief: "(1) whether this Court and the CCA have subject-matter jurisdiction over Appellants' request for extraordinary relief; (2) whether Appellants, as non-parties, have standing to file a request for extraordinary relief in this Court or the CCA; and (3) assuming jurisdiction, which officials are lawfully authorized to direct release of the records and to what extent Appellants must first demonstrate that they requested release from an appropriate release official." *Id.* at 127. This Court then proceeded to decide CCR on jurisdictional grounds – whether the ruling of the military judge "had the potential to directly affect the findings or sentence." *Id*. at 129. This Court did not hold, or even address, whether a non-party participant has standing to file a request for extraordinary relief.

Both the Appellee and Real Party in Interest appear confused by the portion of the *CCR* opinion that attempts to distinguish *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997). In dicta, this Court noted that in *Powell* the accused "joined the media as a party in seeking a writ of mandamus to vindicate his constitutional right to a public trial — something which had immediate relevance to the potential findings and sentence of his court-martial." *CCR,* 72 M.J. at 129-30. This Court did not elaborate on why the accused's joining of the same issue would

make a difference.[1] Regardless, in the present case, how the military judge conducts a hearing to admit evidence under Military Rule of Evidence (MRE) 412 or MRE 513 necessarily must have the potential to affect the findings and sentence. If it does not have that potential, one must question whether the victim was given a reasonable "opportunity to be heard" at the very hearing designed to protect her privacy interests as a victim and patient.

Even if non-party status is germane to the analysis of subject-matter jurisdiction in *CCR* – it is only because it was indicative of how tangential and unrelated the media's claim was to the findings and sentence in Private Manning's court-martial. *CCR,* 72 M.J. at 129. *CCR*, like *Clinton v. Goldsmith,* stands only for the proposition that under the All Writs Act this Court is limited to issuing writs "in aid of" its existing jurisdiction under Article 67. *CCR,* 72 MJ at 128-29 (discussing *Clinton v. Goldsmith,* 526 U.S. 529 (1999)). The validity of this argument is borne out by the fact that the petitioner in *Goldsmith* was in fact a party, the accused, to the underlying court-martial. *See* 526 U.S. at 531-32. Both cases dictate that subject-matter jurisdiction limits the availability of extraordinary relief

[1] The accused's Sixth Amendment right to an open trial ensures a fair trial and therefore directly affects the findings and sentence, whereas the First Amendment right to an open trial enjoyed by the media is more generalized and cannot potentially affect the findings or sentence. *See Richmond Newspapers, inc. v. Virginia,* 448 U.S. 555, 580 (1980)(discussing both First and Sixth Amendment rights to an open trial).

under circumstances that have no potential to affect the findings or sentence. Neither case stands for the proposition that an individual who demonstrates subject-matter jurisdiction is precluded from seeking extraordinary relief by virtue of their party status.

Implicit in the *CCR* majority opinion, and explicit in the dissent, is that a non-party may have *standing* to seek relief when that individual's rights are threatened. *CCR,* 72 M.J. at 130 (dissent)("It is well settled that the media have standing to complain if access to courts has been denied or unconstitutionally restricted. *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 7 (1986); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603 (1982); *ABC, Inc. v. Powell,* 47 M.J. 363, 365 (C.A.A.F.1997); *see also Washington Post v. Robinson,* 935 F.2d 282, 288–290 (D.C.Cir.1991")(internal quotations omitted)). Standing in military courts, just as in Article III courts, depends upon three factors "an injury in fact, causation, and redressability." *See United States v. Wuterich,* 67 M.J. 63, 69 (C.A.A.F. 2008)(quoting *Sprint Communc'ns Co. v. APCC Servs., Inc.,* 554 U.S. 269, 128 (2008)). Nothing about *CCR*, or *Goldsmith,* limits a non-party's ability to seek relief provided that they demonstrate standing and subject-matter jurisdiction. Airman LRM has demonstrated standing and seeks review of a military judge's decision that goes to the very core

of subject-matter jurisdiction – the procedure for determining the admissibility of evidence.

Appellee, in a lengthy footnote, states that A1C LRM has previously argued to the military judge and Air Force Court of Criminal Appeals that granting standing could not possibly affect the findings or sentence. (App. Br. at fn. 18.) This is simply a misconstruction of A1C LRM's argument that the accused could not be impermissibly harmed by granting her an opportunity to be heard. Any harm to judicial economy from a military judge taking additional time to listen to argument or read a motion "is surely outweighed by the benefit of being more accurately briefed on the issues by the best qualified advocate." (J.A. at 202.) No participant, party or non-party, is harmed in a legal sense when a military judge is fully briefed by well-prepared advocates prior to making a decision that impacts their individual rights. Advocates arguing the positions of those whose rights are being impacted provide a judge with the tools to make an informed, well-reasoned ruling. It is the military judge's evidentiary ruling that will directly affect the findings or sentence. The military justice system presumes that it is the advocacy of attorneys that allows military judges to arrive at correct findings of fact and conclusions of law – especially in the context of the admissibility of evidence that will form the very basis of any finding or sentence.

B. Airman LRM's request for standing and the right to be heard through counsel at any hearing under MRE 412 or MRE 513 is ripe.

The Real Party in Interest claims that this Court should defer exercising jurisdiction in this case because the issue is not yet ripe.[2] (Real Party Br. at 17.) During the trial level Article 39(a) session, A1C LRM's counsel requested standing to make argument in any MRE 412 or 513 hearing. The request was treated by the military judge as a "motion in fact." (J.A. at 150.) Airman LRM's attorney did indicate that he did not yet know if he would need to argue. (J.A. at 196.) This caveat is not surprising; he could not know in advance what the arguments of the parties or evidence might show. This is especially so given the failure of the parties or the court to provide Airman LRM with any documents, discovery, or court filings with respect to any hearings under MRE 513. (J.A. at 196.) Further, A1C LRM asked the military judge to reconsider his first ruling which denied her standing and asked very specifically for the following relief:

[2] In his initial judicial ruling, the military judge concedes that the issue is ripe and even opines that the appellate courts have jurisdiction by inviting A1C LRM to seek a writ of mandamus if she believes that her rights have been violated. "Mandamus is a permissible writ in military law. Should A1C LRM seek relief through mandamus, this court will honor her right to do so." (citations omitted)(J.A. at 10-22.)

1. Order the Government and the Defense to produce and provide to A1C LRM through her counsel all documents, discovery materials, court filings and motions related to any proceedings, objections or rulings related to M.R.E. 412.
2. Order the Government and the Defense to produce and provide to A1C LRM through her counsel all documents, discovery materials, court filings and motions related to any proceedings, objections or rulings related to M.R.E. 513.
3. Grant A1C LRM limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, CVRA, and the United States Constitution."

(J.A. at 203(victim's name redacted).) The military judge reconsidered his ruling and held that the "the SVC motion for reconsideration is denied in full." (J.A. at 218.) The ruling of the military judge is both crystal clear and final, A1C LRM will not be permitted standing to present her views through counsel consistent with her "right to be heard" in any hearing in the upcoming trial of the accused. The issue is ripe.

C. The "opportunity to be heard" does not equate to the possibility of testifying.

Both Appellee and the Real Party in Interest pay no heed to the decisions of Congress and the President to provide victims and patients a "reasonable opportunity to be heard." Mil. R.

Evid. 412; Mil. R. Evid. 513. Although the Supreme Court, this Court, and the federal district courts have all uniformly interpreted that phrase in a myriad of decisions to allow a participant to make legal arguments through counsel, both Appellee and the Real Party in Interest urge a new definition. [3] (App. Br. at 11; Real Party Br. at 14-15.) The notion that a victim and patient may not vindicate her interests through her own attorney or even by making her own legal arguments is deeply troubling. The even worse suggestion advocated in the Appellee brief, is that the victim must hope for the possibility that the Government may call the victim as a witness and/or may advocate her position.[4] (App. Br. at 11.) Congress' and the President's decision – that a victim and patient have legally cognizable privacy interests and must be permitted a reasonable opportunity to be heard to defend those rights – is a decision that must be given extreme deference. *See United States v. Vazquez*, 72 M.J.

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[3] *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995); *See, e.g.,* R.C.M. 806(d); R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); MIL. R. EVID. 201(e); *In re Dean*, 527 F.3d 391 (5th Cir. 2008); *Brandt v. Gooding,* 636 F.3d 124, 136 (4th Cir. 2011).

[4] Appellee argues that the victim has been offered an opportunity to be heard because she can be "personally heard through trial counsel." (App. Br. at 11). This is a curious position because as a member of the prosecution team the trial counsel is specifically not the victim's attorney and may even be ethically forbidden from advocating the interests of the victim. Air Force Standards of Criminal Justice, Standard 3-1.1; Standard 3-1.2. Congress and the President did not give victims and patients the "opportunity to be heard" only to have trial judges strip that right and reinterpret their plain language to limit victims and patients to the possibility of advocacy by someone ethically bound not to represent their interests.

13 (C.A.A.F. 2013)(citing *Weiss v. United States*, 510 U.S. 163 (1994)).

Without case law or citation both Appellee and Real Party in Interest claim that "reasonable opportunity to be heard" should be given a new, novel, and severely restricted interpretation by this Court. They urge that for victims and patients the "opportunity to be heard" is limited to permission to testify. (J.A. at 216-17.) To support this novel definition of a well-known legal term of art, both rely on sweeping and unsupported generalizations about the history of military law and criminal justice. This "alleged" history is at odds with this Court's precedent.[5] This Court has previously ordered that

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[5] Appellee claims that it will be "a significant departure from courts-martial jurisprudence or, for that matter, American criminal law jurisprudence, to permit a third party to advance a legal interest against an accused or defendant at trial." (App. Br. at 12). *c.f. United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(victim's doctor permitted to advance legal argument against accused); *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(victims and patients permitted through counsel to advance legal argument against accused); *United States v. Klemick,* 65 M.J. 576 (N.M. Ct. Crim. App. 2006)(patient represented by counsel in MRE 513 hearing); *F. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981)(rape victim permitted to advance legal argument against accused) (Appellant's Brief at 30)(summarizing federal cases where non-party participants were permitted to advance legal arguments against the accused or defendant).

Appellee goes on to claim that the right to the advocacy of counsel is a "right which has never been recognized in military courts." (Appellee Brief at 19). C.f. *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995)(permitted advocacy of counsel to advance legal argument); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(permitted advocacy of legal counsel); *ABC, Inc. v. Powell,* 47 M.J. 363 (C.A.A.F. 1997)(permitted advocacy of legal counsel); *Center for Constitutional Rights v. Lind,* 72 M.J 126 (C.A.A.F. 2013)(permitted advocacy of legal counsel); *San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996)(permitted advocacy of legal counsel).

Finally, Appellee claims that the "right of a non-party to have counsel appear on her behalf in another's court-martial" has not been "heard of." (App. Br. at 21-22). C.f. *United States v. Harding*, 63 M.J. 65 (C.A.A.F. 2006)(non-party's counsel appeared at trial); *Carlson and Ryan-Jones v.*

victims and patients "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge." *Carlson and Ryan-Jones v. Smith*, 43 M.J. 401, 402 (C.A.A.F. 1995).[6] Far from being "previously unknown — A1C LRM's request is only that this Court order the military judge to comply with existing precedent.

Although Appellee and Real Party in Interest claim A1C LRM's request to use her attorney is novel, the only novelty is the military judge's holding. Indeed, in the last 200 years it has been unheard of and would be a significant departure from American jurisprudence for a trial judge to deprive a trial participant who can articulate standing the advocacy of their

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Smith, 43 M.J. 401, 402 (C.A.A.F. 1995)(non-party's counsel appeared at trial); *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008)(non party's counsel appeared at trial); *ABC, Inc. v. Powell,* 47 M.J. 363 (C.A.A.F. 1997)(non party's counsel appeared at trial); *Center for Constitutional Rights v. Lind,* 72 M.J 126 (C.A.A.F. 2013)(non-party's counsel appeared at trial); *San Antonio Express-News v. Morrow,* 44 M.J. 706 (A.F. Ct. Crim. App. 1996)(non party's counsel appeared at trial).

The Real Party in Interest makes similar sweeping historical claims such as "previously unknown right," "200 years without counsel for complaining witnesses permitted to argue," and "complaining witnesses . . . have never had the due process right to be heard through counsel." (Real Party Br. at 17-19). This version of history is confusing given the Real Party in Interest's own citation to *Carlson,* 43 M.J. at 403, in which this court ordered "victims and patients 'will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge.'" (Real Party Br. at 11).

[6] To the extent *Clinton v. Goldsmith*, 526 U.S. 529 (1999) limited *Carlson's*, precedential value on the issue of jurisdiction, it could not and did not affect the precedential value of *Carlson's* recognition of a victim's rights to privacy and advocacy of counsel. *Carlson,* 43 M.J. at 402. *Goldsmith*, 526 U.S. at 529, said nothing about victim's rights or the advocacy of counsel.

counsel.[7] Our research found no similar ruling by any judge in any jurisdiction. Quite to the contrary, this Court and others have repeatedly (and without known exception) permitted witnesses and limited participants the advocacy of their counsel.

D. Allowing A1C LRM the right to be heard does not affect the impartiality of the military judge in fact or appearance.

The Appellee urges this Court to find that allowing A1C LRM the right to be heard would transform the military judge into an advocate "for the prosecution, a victim, an accused, or a policy." (App. Br. at 15-16.) Airman LRM is not asking the military judge to advocate her position, merely to apply a correct rule of law. Appellee cites to a number of cases that stand for the proposition that a military judge must remain impartial. (App. Br. at 15 (citing *United States v. Martinez,* 70 M.J. 154, 157 (C.A.A.F, 2011); *United States v. Butcher,* 56 M.J. 87, 90 (C.A.A.F. 2010); *United States v. Conley,* 4 M.J. 327 (C.M.A. 1978)).) However, the requirement for judicial impartiality applies to the interests of all individuals directly affected by the rulings of a judge. After all, as the Supreme Court has stated "justice, though due to the accused, is

[7] *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see also* (Appellant's Brief at 27-39)(discussing numerous examples in military courts and federal courts where standing permits advocacy by counsel).

due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament." *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934). Airman LRM shares the Appellee's concern that the military judge remains impartial to the prosecution, the accused, and the victim alike.

Appellee lacks a plausible argument concerning how allowing an attorney to advocate for the individual rights of a victim in a closed hearing, outside the presence of members, in any way affects the impartiality of a military judge. Military judges can, must, and do hear from attorneys arguing varying positions. Based on those arguments, military judges make rulings. Those rulings "almost never constitute a valid basis for a [judicial] bias or partiality motion." *Liteky v. United States,* 510 U.S. 540, 554 (1994). There is simply no legal basis for the argument that hearing from the victim of a crime, through an attorney, prior to depriving her of her right to privacy in an MRE 412 or MRE 513 hearing, renders a military judge impartial in fact or appearance. On the other hand, denying A1C LRM a reasonable "opportunity to be heard" certainly may create the perception that the military judge does not consider her right to privacy important – and thereby deter victim and patient participation in the very hearings designed to promote participation.

E. No prudential concerns are furthered by remanding issues II and III to the Air Force Court of Criminal Appeals.

This Court should resolve certified issues II and III for three reasons. First, the Air Force Court did address all three certified issues. Second, this Court necessarily must address certified issues II and III in order to resolve the certified application for extraordinary relief. Finally, any prudential concerns in this case are outweighed by the need for speedy resolution of these issues.

The Air Force Court has already erroneously addressed all three certified issues.[8] The Air Force Court purported to not address what it called the "substantive issues." (J.A. at 5.) However, as a result of the AFCCA's failure to distinguish standing and subject-matter jurisdiction the Court reached all three certified issues.

First, the AFCCA appears to believe that it is the constitutional nature of an allegation by a non-party that gives rise to jurisdiction. (*See* J.A. at 8.) Airman LRM has a constitutional due process right to be heard through counsel under MRE 412 and MRE 513 and she has a constitutional right to

[8] As noted by the Appellee, the factual issues have already been "salted" and all of the legal issues are "within the purview of this Court pursuant to Article 67(c), UCMJ." (App. Br. at 18-19, fn 19). There is "no requirement" the review be sought by a lower service court "'as a prerequisite to this Court's consideration of a matter.' *Gray v. Mahoney*, 39 M.J. 299, 303 (C.M.A. 1994)."*Id*.

privacy. Despite these arguments the AFCCA held that the military judge's "ruling did not implicate constitutionally based rights." (J.A. at 8.) They have in fact ruled that A1C LRM has no constitutionally based right to due process or privacy. This holding was in error.

After addressing the Military Rules of Evidence and the right to privacy, the Air Force Court addressed the CVRA.[9] A1C LRM has a right to "privacy" and "dignity" provided by the CVRA. The Air Force Court rejected this argument and held that the CVRA had no application in military courts: "the CVRA's provision that states it applies to 'any court proceeding'" does not include military courts. (J.A. at 8.) This holding was in error.

Finally, the Air Force Court analyzed A1C LRM's standing at trial. The Air Force Court's discussion of non-party versus party participation at trial is standing analysis not subject-matter jurisdiction analysis. (J.A. 8-9.) In this standing analysis, the Court held that finding jurisdiction "would, in effect, be granting a non-party to the court-martial judicially

[9] The Appellee, the Air Force Court of Criminal Appeals, and the Real Party suggest the CVRA, even if applicable to trial by court-martial, does not grant the victim a right to be heard in the circumstances suggested by A1C LRM. (*See* J.A. at 8, 217; Real Party Br. at 21-22.) The CVRA specifically states that the victim has a right to dignity and privacy. 18 U.S.C. § 3771(a)(7). The CVRA further directs that "the court shall ensure that the victim is afforded the rights described in subsection (a). 18 U.S.C. § 3771(b). It is the constitutional test for standing; "an injury in fact, causation, and redressability" which provide A1C LRM a "right to be heard." *See United States v. Wuterich,* 67 M.J. 63, 69 (C.A.A.F. 2008).

recognized rights equal to those of party participants." (J.A. at 8.) Courts lack jurisdiction "to entertain every challenge brought by interested entities." *Id.* As a limited participant who was injured, with causation, and redressabiliy, A1C LRM is not merely an "interested entity." Yet, the Air Force Court erroneously held that she was. (J.A. at 9.) This determination was in error; it can and should be reviewed.

The Air Force Court's holdings that A1C LRM does not have constitutional due process rights under the Military Rules of Evidence, that she does not have a constitutional right to privacy, that the CVRA does not apply in military courts, and that A1C LRM lacked standing were each made in error; those holdings can and should be reviewed.

If this Court concludes that the Air Force Court did not address the "substantive issues," there are prudential concerns in doing so now.[10] This Court has the discretion and authority to do so, and should in this case. CAAF's Rules of Practice and Procedure, Rule 4(b)(1). First, the case is scheduled to commence on 22 July 2013. (Appellant's Br. at 3.) This trial date is the result of several delays--arraignment occurred on 29 January 2013. (Appellant's Br. at 2.) All parties, to include

[10] To the extent this Court would ordinarily avoid issues out of deference for the Air Force or the Air Force justice system those concerns seem to be nullified by the fact that the Air Force's Judge Advocate General has explicitly requested resolution of all three issues.

the Accused, have an interest in the speedy resolution of these issues.[11] The virtue of a speedy resolution has previously been sufficient to overcome prudential concerns. ABC, Inc. v. Powell, 47 M.J. 363,364 (C.A.A.F. 1997).

CONCLUSION

WHEREFORE, Appellant respectfully requests that this Honorable Court find for the Appellant on the three certified issues and issue a writ of mandamus ordering the military judge to provide an opportunity for A1C LRM to be heard through counsel at hearings conducted pursuant to MRE 412 and MRE 513, and to receive any motions or accompanying papers reasonably related to her rights as those may be implicated in hearings under MRE 412 and MRE 513.

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[11] Both Appellee and the Real Party in Interest have indicated a desire for the speedy resolution of this extraordinary writ. (App. Br. at 18; Real Party Br. at 17.)

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CERTIFICATION OF FILING

I certify that a copy of the foregoing was delivered to the Court, Judge Kastenberg, Appellee's Counsel, Government Trial and Appellate Division, the Appellate Defense Division, counsel for amicus National Crime Victim Law Institute, and counsel for amicus Protect Our Defenders on May 20, 2013.

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CERTIFICATION OF COMPLIANCE WITH RULE 24(D)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 4282 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief was prepared using Microsoft Word Version 2007 with Courier New 12-point font, a monospaced font.

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, Military Judge, *Appellee*	)	Crim. App. No. 2013-05 USCA Dkt. No. 13-5006/AF
and	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party in Interest*	)	

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) LRM, USAF, *Appellant*	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, Military Judge, *Appellee*	)	Crim. App. No. 2013-05 USCA Dkt. No. 13-5006/AF
and	)	
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF *Real Party in Interest*	)	

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS

II.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION

III.

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

STATEMENT OF STATUTORY JURISDICTION

This Honorable Court has jurisdiction to review the decision of the Air Force Court of Criminal Appeals under Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2). This Honorable Court also has authority to grant relief under the All Writs Act, 28 U.S.C. § 1651.

STATEMENT OF THE CASE

Appellant's statement of the case is accepted with the following exceptions. A1C LRM's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Petition for Stay of Proceedings was filed with the Air Force Court of Criminal Appeals on 14 February 2013. (J.A. at 4.) Exception is also taken with the characterization that the military judge's ruling was "erroneous."

STATEMENT OF FACTS

Appellant's statement of facts is accepted with the following exceptions. Capt Seth Dilworth, 27 SOW/JA, Cannon AFB, New Mexico, was detailed to be A1C LRM's Special Victims' Counsel on 22 January 2013. (J.A. at 21.) Additionally, to the extent that Appellant's statement of facts implies that A1C LRM's allegation or appointment of a Special Victims' Counsel transforms her into a "victim" as opposed to an "alleged victim" or "complaining witness", Appellee would disagree given the

preliminary stage of the court-martial and A1C Daniels' fundamental right of innocence until the Government proves his guilt by legal and competent evidence beyond a reasonable doubt.

Summary of Argument[1]

Fourteen days prior to this Honorable Court's opinion in Center for Constitutional Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013), the Air Force Court of Criminal Appeals correctly determined it did not have jurisdiction to consider the Appellant's extraordinary writ. Assuming, *arguendo*, that the Air Force Court of Criminal Appeals was in error regarding its jurisdictional limits, in the absence of clear statutory language or case law, the military judge correctly ruled no right existed for A1C LRM to be heard through a third party. Finally, the drastic instrument of a writ of mandamus is unwarranted in this case where there has been no judicial usurpation of power and no characteristic of an erroneous practice which is likely to recur.

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[1] Appellee notes this Honorable Court's docketing notice in the case *sub judice* directed that "the Judge Advocate General of the Air Force shall appoint counsel for Appellee" and that the Appellee "shall file" an answer on or before May 13, 2013. In accordance with that direction, Appellee hereby complies with that order by filing this brief. Compare Center for Constitution Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013) (Government filed brief on behalf of military judge); Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2013) (Government filed brief on behalf of military judge).

ARGUMENT

I.

THIS HONORABLE COURT LACKS JURISDICTION TO GRANT APPELLANT'S REQUESTED RELIEF.

Standard of Review

Jurisdiction is a question of law that is reviewed de novo. United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2010) (citing United States v. Davis, 63 MJ 171, 173 (C.A.A.F. 2006)).

Analysis

Appellant argues the Air Force Court of Criminal Appeals "abdicated its supervisory responsibility under Article 66 and the All Writs Act" by declining jurisdiction. (Appellant's Brief at 9.) Appellant further argues that the alleged victim, A1C LRM, is not "a stranger to the court." (Id.) Whether one characterizes A1C LRM as a "stranger", "alleged victim"[2], or simply a "witness", the fact remains that she is not a "party" to A1C Daniels' court-martial.[3] Moreover, A1C Daniels has not

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[2] Pursuant to Military Rule of Evidence 412, the most appropriate term appears to be "alleged victim."

[3] Rule for Courts-Martial (RCM) 103(16) defines "party" as follows:

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and

(B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

joined in the litigation to vindicate his rights; rather, at the trial level and on appeal he has opposed Appellant's attempts to intervene into his court-martial.

Federal courts, as courts of limited jurisdiction, "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)(citations omitted). There is a presumption "that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting the jurisdiction." Id. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction." Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900).

A court's power to issue any form of relief under the All Writs Act "is contingent on that court's subject matter jurisdiction over the case and controversy." United States v. Denedo, 556 U.S. 904, 911 (2009). As Clinton v. Goldsmith helped clarify, the All Writs Act is not a jurisdiction granting statute. 526 U.S. 529, 534 (1999). Nor does the All Writs Act grant authority to military appellate courts "to oversee all matters arguably related to military justice." Id. at 536.

As correctly noted in the lower court's order, the jurisdictional boundary of the Air Force Court of Criminal Appeals is set out in four separate Articles of the UCMJ. (J.A.

at 6-7.) First, under Article 62, UCMJ, 10 U.S.C. § 862, the court is authorized review of certain kinds of interlocutory Government appeals. (Id. at 6.) Second, under Article 66, UCMJ, 10 U.S.C. § 866, the court can act with respect to the findings and sentence as approved by the convening authority in cases which the sentence, as approved, includes death, a punitive discharge, or confinement for at least one year. (Id. at 6-7.) Third, under Article 69, UCMJ, 10 U.S.C. § 869, the court is authorized to review under Article 66 cases in which The Judge Advocate General has taken certain actions. (Id. at 7.) Finally, under Article 73, UCMJ, 10 U.S.C. § 873, the court is authorized to consider petitions for new trials based upon newly discovered evidence or fraud on the court. (Id.)

The jurisdictional limit of this Honorable Court is found in Article 67, UCMJ. In this regard, this Honorable Court "may act only with respect to findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. Article 67(c), UCMJ, 10 U.S.C. § 867(c). The All Writs Act "does not increase the areas of this Court's jurisdiction beyond the limitations set out in [Article 67], UCMJ." Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 7.

While the Air Force Court of Criminal Appeals did not have the benefit of this Honorable Court's decision in Center for Constitutional Rights v. United States, the legal correctness of the Air Force Court's order is all the more sound when considered in light of that decision issued fourteen days later. In Center for Constitutional Rights v. United States this Honorable Court held the appellants, journalists seeking access to documents in an on-going court-martial, failed to meet their burden of establishing that this Court or the Army Court of Criminal Appeals had jurisdiction to grant appellants relief in the form of writs of mandamus and prohibition. Id. at 2, 10.

This Court found it vital to distinguish Center for Constitutional Rights v. United States from other cases interpreting this Court's jurisdictional limits. Id. at 7-8. Of note, in each of the cases discussed the accused played a leading role in the proceeding. First, this Court noted the case was unlike United States v. Lopez de Victoria, 66 M.J. 67 (C.A.A.F. 2008), where, in a case involving a Government appeal of a military judge's decision to find the accused's convictions for indecent acts and liberties were barred by the statute of limitations, this Court held it had statutory authority to exercise jurisdiction over decisions of the courts of criminal appeals rendered pursuant to Article 62, UCMJ, 10 U.S.C. § 862. Center for Constitutional Rights v. United States, 72 M.J. 126,

___, slip op. at 7-8. Next, this Court distinguished Denedo v. United States, 66 M.J. 114 (C.A.A.F. 2008), aff'd., 556 U.S. 904 (2009), wherein an accused sought collateral review of his court-martial for alleged ineffective assistance of counsel and issuance of a writ of error coram nobis. Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8. Thereafter, this Court distinguished Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012), wherein the harm raised by the accused regarding the bias of the military judge had the potential to directly affect the findings and sentence. Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8. Finally, this Court distinguished ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997), where an accused joined in the proceedings brought by various news agencies "in order to vindicate ***his*** right to a public trial." Center for Constitutional Rights v. United States, 72 M.J. 126, ___, slip op. at 8 (double emphasis added).

In the case *sub judice*, as the Appellant concedes, "A1C LRM is not a party to the court-martial." (Appellant's Brief at 13.)[4] Moreover, the Accused has not joined Appellant's petition to vindicate his rights. Instead, at the trial level and on appeal he has opposed Appellant's attempts to intervene into his

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[4] See also Rule for Courts-Martial 103 (16) (definition of "party").

court-martial. A court-martial where he alone faces two specifications in violation of Article 120, UCMJ, that, if convicted as charged, carries the potential punishments of a reprimand, reduction in grade, monetary penalties, restraint, and/or a punitive discharge.[5]

Appellant incorrectly overgeneralizes that this Court "recently held that jurisdiction is appropriate when the harm alleged by the petitioner has 'the **potential** to directly affect the findings or sentence.'" (Appellant's Brief at 13.) Appellant simply conflates the petitioner in Hasan v. Gross, the accused, with themselves in this case, a non-party witness.[6] Appellant goes on to cite Carlson and Ryan-Jones v. Smith, 43 M.J. 401 (C.A.A.F. 1995)(summary disposition), for the notion that this Court has exercised its supervisory jurisdiction to benefit "limited trial participants." (Appellant's Brief at

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[5] These authorized punishments are, of course, distinctly separate and apart from the potential lifelong collateral consequences of a federal conviction and sex offender registration requirements.

[6] Appellant's reliance on Hasan v. Gross is ironic. In that case this Court determined a military judge's actions could lead an objective observer to conclude that he was not impartial to the accused. Certainly if the military judge in the case *sub judice* had permitted a counsel for the complaining witness to provide both factual evidence and legal arguments against the accused, his impartiality would similarly be in question. Moreover, any such potential to directly affect the findings or sentence in this case is directly at the expense of the accused.

15.) Yet Carlson and Ryan-Jones v. Smith[7] predates Goldsmith by over three and a half years. Importantly in Goldsmith, the Supreme Court took this Court very much to task on its expansive overreaching in the jurisdictional area.[8] Appellant encourages this Court to make the same error it did in Goldsmith.

II.

IN THE ABSENCE OF CLEAR STATUTORY LANGUAGE OR CASE LAW, THE MILITARY JUDGE CORRECTLY RULED NO RIGHT EXISTED FOR A1C LRM TO BE HEARD THROUGH A THIRD PARTY.[9]

Standard of Review

Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and Rules for Courts-

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[7] In addition, the amicus curiae brief of the Air Force's Appellate Government Division, filed without a motion for leave to file under Rule 26(a) of this Court's Rules of Practice and Procedure, relies on this case to support its position that the President has provided victims in military courts-martial a limited right to be heard under Military Rules of Evidence 412 and 513 and that such a right reasonably includes a right to be heard through counsel to present facts and legal argument. (Amicus Curiae Brief of Air Force Appellate Government Division at 21.) Such argument fails given Goldsmith.

[8] Should this Court find it has jurisdiction, as a court established under Article III of the Constitution prohibited from issuing advisory opinions, it must also find the issue ripe for consideration. See United States v. Chisholm, 59 M.J. 151, 153 (C.A.A.F. 2003)(holding in the absence of a challenge by a party to a concrete ruling by a military judge in an adversarial setting it would be premature to decide an issue certified by The Judge Advocate General of the Army)

[9] The military judge's rulings speak for themselves. (J.A. at 177-187, 215-218.) As this Court must consider the record before it, to include the military judge's rulings as contained therein, argument on Issue II is offered to emphasize the more pertinent points made by the military judge.

Martial, are questions of law reviewed de novo. United States v. Matthews, 68 M.J. 29, 35 (C.A.A.F. 2008); Lopez de Victoria, 66 M.J. at 73.

Analysis

The military judge never denied A1C LRM "the right to be heard at any hearing under the applicable Military Rules of Evidence." (J.A. at 217.) He specifically ruled that she had the right to be personally heard in pretrial hearings conducted pursuant to Military Rules of Evidence 412 and 513. (J.A. at 216.) He noted that she had the right to be personally heard in such hearing through trial counsel. (Id.) Similarly he acknowledged if A1C LRM was determined incompetent for reasons of minority of age or invalidity, that she would have the right to be heard through a guardian, representative, or conservator. (Id.) In sum, he simply ruled that, in the absence of clear statutory language or case law, A1C LRM's first-person singular right to be heard did not include the right to be heard at an evidentiary hearing through some other third party.

Non-constitutional privileges are to be narrowly construed. See United States v. Curtis, 65 M.J. 366, 369 (C.A.A.F. 2005)(citing Trammel v. United States, 445 U.S. 40, 50-51 (1980)); In re Grand Jury Subpoena, 662 F.3d 65 (1st Cir. 2011); United States v. Banks, 556 F.3d 967 (9th Cir. 2009). Neither Military Rules of Evidence 412 nor 513 provide that the "right

to be heard" includes the right to be heard through third parties, or by legal counsel. As noted by the military judge, "[i]t would be a significant departure from courts-martial jurisprudence or, for that matter, American criminal law jurisprudence, to permit a third party to advance a legal interest against an accused or defendant at trial." (J.A. at 180.)[10]

The Appellant's reliance on the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, as authority for her to be heard through counsel is unfounded. (Appellant's Brief at 32-44.) While no military court of appeal has considered the application of the CVRA to courts-martial[11], the CVRA "does not explicitly provide a victim the right to be represented by counsel at any pretrial hearing." (J.A. at 180, 217.) Even assuming the CVRA applies beyond the district courts, it provides the victim the

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[10] Appellant's attempt to read Military Rules of Evidence 412(c)(2) and 513(e)(2) as proof Congress and the President intended counsel for a patient or alleged victim to be permitted to present evidence and legal arguments through counsel is misguided. (Appellant's Brief at 23-25.) With both rules, a party, either the Government or the accused, may offer relevant evidence by calling witnesses, to include the patient or alleged victim. Affording the patient or alleged victim a reasonable opportunity to attend and be heard, simply acknowledges that neither party may choose to call the patient or alleged victim. In such an instance, the patient or alleged victim is simply authorized by the applicable rules to present "relevant evidence" of their own choosing without the necessity that a party be the proponent.

[11] Additionally, only in Walsh v. Hagee, ___ F.Supp.2d ___, 2012 WL 5285133 (D. D.C. 2012), has a United States District Court even inferred that the CVRA applies to the military. (J.A. at 180.)

"right to be reasonably heard at any public proceeding…involving release, plea, sentencing, or any parole proceeding." (Id.) Appellant selectively cites portions of the CVRA to this Court when it states the rights afforded crime victims apply in "any court proceeding involving an offense against a crime victim." (Appellant's Brief at 36.) The full sentence found in section (b)(1) of the CVRA is "In any court proceeding involving an offense against a crime victim, *the court shall ensure that the crime victim is afforded the rights described in subsection (a).*" 18 U.S.C. § 3771(b)(1)(emphasis added). The applicable right to this issue is that found in subsection (a)(4), which was cited by the military judge and concerns a crime victim's right "to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." (J.A. at 180, 217.) Plainly a pretrial motion hearing does not fall within the public proceedings in which the CVRA contemplates a crime victim's right to be reasonably heard, whether in person or through counsel.

While the military judge noted A1C LRM possessed privacy rights, he further noted "when necessary to ensure a fair trial, those rights must give way to the accused's right to a trial which complies with the rights enumerated" in United States v. Romano, 46 M.J. 269, 274 (C.A.A.F. 1997), which include "the Constitution, followed by the Uniform Code of Military Justice,

the Manual for Courts-Martial, departmental regulations, service regulations, and the common law." (J.A. at 178, 217.)[12] The Accused's right to a fair trial is enumerated in the Sixth Amendment[13] which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(J.A. at 178.)[14]

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[12] This Court has held that the "'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused." United States v. Gaddis, 70 M.J. 248, 250 (C.A.A.F. 2011).

[13] Of note, Appellant cites to the Sixth Amendment only twice in her brief. (Appellant's Brief at 21, 45.) Neither time Appellant cites to the Sixth Amendment, does she do so to discuss how the rights she seeks do not infringe on the Accused's constitutionally protected right to a fair trial.

[14] Several federal courts have expressed concern that rape shield laws may result in a denial of due process under the Sixth Amendment. See, e.g., Barbe v. McBride, 521 F.3d 443, 458 (4th Cir. 2008); White v. Coplan, 399 F.3d 18, 24 (1st Cir. 2005). Although not directly addressed by the military judge, if A1C LRM were to prevail on the jurisdictional issue before this Court, then this Court should consider that the ability for a complaining witness to shield information from the Court through an attorney not subject to the full array of discovery rules or rules of professional responsibility, under the aegis "right to be heard" in either Military Rule of Evidence 412 or 513, could constitute a denial of the full right to confrontation.

Similarly, as in the cases of United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011) and United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001), the military judge identified his concerns about the right to an impartial military judge, both in appearance and actuality. (J.A. at 179.)[15] As generally expressed in United States v. Conley, 4 M.J. 327 (C.M.A. 1978), judges cannot exist as advocates "for the prosecution, a victim,

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[15] The military judge's discussion of the necessity of impartiality on the part of a military judge echoes the following:

> A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.
>
> The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible. The role of courts of justice in our society has been the theme of statesmen and historians and constitution makers. It is perhaps best expressed in the Massachusetts Declaration of Rights: 'It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.'

Bridges v. State of California, 314 U.S. 252, 283 (1941)(Frankfurter, J., dissenting).

an accused, or a policy." (J.A. at 179.)[16] Moreover, the potential for an accused to face prosecutor(s) and counsel for an alleged victim representing similar interests is "sufficiently antithetical to courts-martial jurisprudence" which, if permitted, would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial." (J.A. at 186, 217-18.)[17]

The military judge recognized the important goal of ensuring and protecting the rights and dignity of victims of sexual assault, especially those perpetrated by uniformed service-members and Departmental personnel. (J.A. at 186.) The

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[16] Appellee notes the irony of filing an advocacy brief, as directed, before this Honorable Court. However, this brief is not advocating on behalf of "the prosecution, a victim, an accused, or a policy", rather it advocates for the correctness of the trial level ruling and the order subsequently issued by the military judge's immediate superior court.

[17] Such a potential "stacking of the deck" against an accused, is all the more troubling when the Special Victims' Counsel Rules of Practice and Procedure and the Air Force Special Victims' Counsel Charter create no apparent duty for Special Victims' Counsel to provide exculpatory evidence to the Government or an accused's counsel and exempts them from the most basic and fundamental duties of doing justice. (J.A. at 49-79.) Moreover, at least in appearance alone, there are fundamental fairness questions raised by the number of counsel representing each party and A1C LRM. A1C LRM has received the benefit of one counsel at trial and four counsel on appeal. (J.A. at 17-21; Appellant's Brief at 53-54.) The Government has enjoyed the benefit of two counsel at trial and three counsel on appeal. (J.A. at 90-91; Amicus Curiae Brief of Air Force Appellate Government Division at 33.) Meanwhile, against the backdrop of those ten counsel presumptively aligned against him, the Accused has had the assistance of two counsel at trial and two counsel currently on appeal. (J.A. at Cover Page, 93.)

Air Force Court likewise acknowledged the important objectives of the Special Victims' Counsel Program. (J.A. at 9.) Regardless of how unpopular a decision it might be for a military judge to find no standing for a Special Victims' Counsel at a court-martial, especially given the near daily bad press, increased Congressional oversight on sexual assaults within the military, and the Department of Defense's leaders' focus on sexual assault prevention and response, the aforementioned goals and objectives remain "subject to the legal limits on third-party standing." (J.A. at 186.)[18]

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[18] The difficulty a military judge faces in attempting to balance the competing interests of this novel issue is evident from this court-martial when it was unclear where the Special Victims' Counsel should sit. (J.A. at 131.) Additionally, the Government's positions are reminiscent of Justice Jackson's comment of parties changing positions "as nimbly as if dancing a quadrille." Orloff v. Willoughby, 345 U.S. 83, 87 (1953). For example, the Government asserted to the military judge at trial that it held no objection to A1C LRM and her Special Victims' Counsel being heard during hearings on Military Rules of Evidence 412, 513, and 514 "if such hearing is limited to factual matters bearing on the admissibility of evidence and a statement of [A1C LRM]'s wishes, so long as it does not encompass an opportunity to present legal argument on admissibility of evidence." (J.A. at 212.) Now on appeal, the Government asserts to this Court that A1C LRM's right to be heard under Military Rules of Evidence 412 and 513 "reasonably included the right to be heard through counsel to present facts *and legal argument*." (Amicus Curiae Brief of Air Force Appellate Government Division at 21 (emphasis added).) Similarly, Appellant essentially argued before the military judge and the Air Force Court of Criminal Appeals, that there was no possibility of affecting the findings and sentence and the only harm, if any, from the participation of the Special Victims' Counsel was the possibility of the judge spending more time on evidentiary issues. (J.A. at 202-03; Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, LRM v. Kastenberg, Misc. Dkt. No. 2013-05 (A.F. Ct. Crim. App. 2013).) Now Appellant argues the Special Victims' Counsel should be given "the opportunity to influence the admissibility of evidence that would have a direct bearing 'on any finding and sentence that may

III.

THE DRASTIC INSTRUMENT OF A WRIT OF MANDAMUS IS UNWARRANTED IN THIS CASE WHERE THERE HAS BEEN NO JUDICIAL USURPATION OF POWER AND NO CHARACTERISTIC OF AN ERRONEOUS PRACTICE WHICH IS LIKELY TO RECUR.

Standard of Review

"The writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983); see also Denedo, 556 U.S. at 917 (quoting Nken v. Holder, 556 U.S. 418, 437 (2009)). Appellant "must establish a clear and indisputable right to the requested relief." Denedo, 66 M.J. at 126 (citing Cheney v. United States District Court, 542 U.S. 367, 381 (2004)).

Analysis

While there should be no need for this Court to reach Issue III, or Issue II for that matter, should it do so, the drastic instrument of a writ of mandamus is unwarranted.[19] Appellant

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eventually be adjudged.'" (Appellant's Brief at 9.) Although this Court may find that the Appellant is not bound to arguments raised below, there is an incongruity to their two positions. Moreover, in no law does a witness (victim or otherwise) possess a right to influence the outcome of a trial.

[19] The Government states this Honorable Court's "review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to [the Air Force Court of Criminal Appeals] for a decision on the matters of law raised by [Appellant]." (Amicus Curiae Brief of Air Force Appellate Government Division at 10-11.) Any facts necessary to the resolution of the substantive issues have been sufficiently salted down in the Air Force Court's order.

encourages this Court to use the Army Court of Criminal Appeals framework for issuance of a writ of mandamus announced in Dew v. United States, 48 M.J. 639, 648-49 (A. Ct. Crim. App. 1998). (Appellant's Brief at 49-51.) Even if this Court were to conduct its analysis using a framework incorporating Bauman[20] factors, Appellant's request must fail.

First, A1C LRM is not a party, so whether or not she has any other adequate means to attain the relief desired is not material. Second, A1C LRM's claim that denial of her "right" to be heard through counsel results in her damage and prejudice in a way not correctable on appeal invents an injury from a fictional "right", a "right" which has never been recognized in military courts. Third, for all of the reasons stated in Issue

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(J.A. at 1-9.) Only matters of law remain, which are certainly within the purview of this Court pursuant to Article 67(c), UCMJ. The Government's challenge to this Court proceeding is easily dismissed as "no requirement that a petition for extraordinary relief be filed in a Court of Military Review as a prerequisite to this Court's consideration of a matter." Gray v. Mahoney, 39 M.J. 299, 303 (C.M.A. 1994); see also McPhail v. United States, 1 M.J. 457 (C.M.A. 1976)(the Court granted relief in a case finally reviewed by the Judge Advocate General of the Air Force under Article 69, UCMJ). Rule 4(c) of this Court's Rules of Practice and Procedure provides that the rules "shall not be construed to extend or to limit the jurisdiction" of this Court. Should this Court reach the remaining substantive issues, deciding them now, as a purely discretionary matter, would be consistent with this Court's "considerable responsibility for maintaining the independence, integrity, and fairness of the military justice system." United States Navy Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 330 (C.M.A. 1988).

[20] Bauman v. United States District Court, 557 F.2d 650, 654-55 (9th Cir. 1977); See also In Re American Medical Systems, Inc., 75 F.3d 1069, 1078 (6th Cir. 1996).

II, the military judge's decision is not clearly erroneous as a matter of law. Fourth, there is no evidence in the record which suggests the military judge's ruling is an oft-repeated error. A trial level court's decision cannot create binding precedent on another trial level court. United States v. Pereira, 13 M.J. 632, 635 (A.F.C.M.R. 1982)(stating military judges are only bound by decisions of the applicable service Court of Criminal Appeals, this Court, and the United States Supreme Court). Lastly, the military judge's ruling does address new and important problems created by the Special Victims' Counsel pilot program[21] instituted by the Air Force and there is no precedent in military law addressing these issues. However, this factor resoundingly weighs against Appellant. If this Court were to issue the writ as requested it would not solve the problems the Special Victims' Counsel program has created in A1C Daniels' court-martial, problems the military judge's ruling has already resolved to ensure a fair trial for the Accused both in

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[21] A pilot program championed by The Judge Advocate General of the Air Force who exercised his unique Article 67(a)(2) power to certify this case to this Honorable Court. See Special Victims' Counsel Rules of Practice and Procedure and Air Force Special Victims' Counsel Charter (J.A. at 49-71, 73-79.) A program at least in intent, while perhaps not in practice, designed to "enhance the military justice system while neither causing unreasonable delays nor infringing upon the rights of an accused." Special Victims' Counsel Rules of Practice and Procedure (J.A. at 51.); see also Brief for Air Force Trial Defense Division as Amicus Curiae, LRM v. Kastenberg, Misc. Dkt. No. 2013-05 (A.F. Ct. Crim. App. 2013).

appearance and actuality. Rather, issuance of such a writ would revive fundamental fairness issues in A1C Daniels' court-martial and generate them in untold court-martials *ad infinitum*.

In order for issuance of a writ of mandamus on the military judge's discretionary decision, this Court's case law requires that decision to "amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power,' or be 'characteristic of an erroneous practice which is likely to recur.'" Labella, 15 M.J. at 229 (citations omitted). The military judge's correct ruling that, in the absence of clear statutory language or case law, no right existed for A1C LRM to be heard through a third party can hardly be considered "gross error." Nor can one consider his decision a judicial usurpation of power especially given the Manual for Courts-Martial's emphasis on "the importance of an impartial judiciary, advising military judges that when carrying out their duties in a court-martial, they 'must avoid undue interference with the parties' presentations or the appearance of partiality.'" United States v. Quintanilla, 56 M.J. 37, 43 (C.A.A.F. 2001)(citing Rule for Courts-Martial 801(a)(3)(discussion)). As in this case, "[t]he military judge must exert his authority with care, so as not to give even the appearance of bias for or against either party." Id. Similarly, in a case where Appellant seeks recognition of an unheard of right for a non-party to have counsel appear on

her behalf in another's court-martial, there can be no "erroneous practice which is likely to recur", unless the writ of mandamus to grant that "right" is actually issued.

CONCLUSION

WHEREFORE, Appellee requests this Honorable Court hold, like the Air Force Court of Criminal Appeals correctly found, that it lacks jurisdiction to hear Appellant's petition for a writ of mandamus. If this Court determines the Air Force Court of Criminal Appeals erred regarding its jurisdictional limits, Appellee requests this Court uphold the military judge's ruling that A1C LRM held no right to be heard through a third party.

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I certify that a copy of the foregoing was delivered to the Court, Mr. Dwight Sullivan and Capt Christopher James (Counsel for Real Party in Interest), and Colonel Kenneth Theurer, Major Christopher Goewert, Major Matthew Talcott, and Major R. Davis Younts (Counsel for Appellant), on 13 May 2013.

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/s/
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Dated: 13 May 2013

8 May 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF, *Petitioner,*	)	AMICUS CURIAE BRIEF OF THE AIR FORCE APPELLATE GOVERNMENT DIVISION
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent,*	)	USCA Dkt. No. 13-5006/AF Crim. App. No. 2013-05
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party in Interest.*	)	

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8 May 2013

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Airman First Class (E-3) L.R.M., USAF, *Petitioner,*	)	AMICUS CURIAE BRIEF OF THE AIR FORCE APPELLATE GOVERNMENT DIVISION
v.	)	
Lieutenant Colonel (O-5) JOSHUA E. KASTENBERG, USAF, *Respondent,*	)	USCA Dkt. No. 13-5006/AF Crim. App. No. 2013-05
Airman First Class (E-3) NICHOLAS E. DANIELS, USAF, *Real Party in Interest.*	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II.

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III.

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) determined that it lacked jurisdiction under the All Writs Act, 28 U.S.C. §

1651, to reach the substantive issues raised in Petitioner's request for extraordinary relief in the form of a petition for writ of mandamus. The Air Force Appellate Government Division asserts that jurisdiction exists for this Honorable Court to review the jurisdictional issue raised in this case under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2), and the All Writs Act, 28 U.S.C. § 1651.

Statement of the Case

Petitioner's Statement of the Case is accepted.

Statement of Facts

Petitioner's Statement of the Facts is accepted.

Summary of Argument

The military judge's restrictive reading of Mil. R. Evid. 412 and 513 has the potential to influence the findings and sentence in this case. Therefore, AFCCA's review of Petitioner's writ of mandamus was in aid of its subject matter jurisdiction and it erred by holding that jurisdiction did not exist.

If this Court finds that jurisdiction exists over Petitioner's request for extraordinary relief, reading Article 67, UCMJ, as an integrated whole, this Court's review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to AFCCA for a decision on the matters of law raised by Petitioner.

Finally, Mil. R. Evid. 412 and 513 confer a regulatory right for a victim to be heard through counsel during these limited evidentiary hearings. For this reason only, the writ should issue.

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO REACH THE SUBSTANTIVE ISSUES RAISED IN THE PETITION FOR A WRIT OF MANDAMUS.

Standard of Review

Jurisdiction is a legal question which this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

Law and Analysis

1. AFCCA erred by holding that it lacked jurisdiction to reach the substantive issues.

The Air Force Appellate Government Division generally agrees with Petitioner's legal analysis contained in Issue I, subsections a.-b. (Pet. Br. at 8-15.) At its core, the substantive issues raised below required AFCCA to review a specific ruling interpreting specific Military Rules of Evidence in a specific ongoing court-martial. Therefore, AFCCA's review of Petitioner's writ of mandamus was in aid of its subject matter jurisdiction, and it erred by holding that jurisdiction did not exist.

This Court's jurisdiction is "narrowly circumscribed." Clinton v. Goldsmith, 526 U.S. 529, 535 (1999). This Court is empowered to issue writs pursuant to the All Writs Act. Center for Constitutional Rights et al. v. United States, 72 M.J. 126, No. 12-8027/AR, slip op. at 6 (C.A.A.F. 2013) (internal citations omitted) (hereinafter CCR). The All Writs Act is not an independent grant of jurisdiction, nor does it enlarge this Court's existing statutory jurisdiction. Goldsmith, 526 U.S. at 535 (internal citations omitted). Rather, the Act provides that "all courts established by Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Id. The Act requires two separate determinations: first, whether the requested writ is "in aid of" the court's existing jurisdiction; and second, whether the requested writ is "necessary or appropriate." Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008); Goldsmith, 526 U.S. at 534-35.

The precise contours of the phrase "in aid of" have not been well-defined by the courts. In Denedo, however, this Court stated that a petition for extraordinary relief is "in aid of" the Court's jurisdiction when the petitioner seeks to "modify an action that was taken within the subject matter jurisdiction of the military justice system." Denedo, 66 M.J. at 120. The Supreme Court subsequently affirmed that portion of Denedo: "As

the text of the All Writs Act recognizes, a court's power to issue any form of relief--extraordinary or otherwise--is contingent on that court's subject-matter jurisdiction over the case or controversy." United States v. Denedo, 556 U.S. 904, 911 (2009).

A writ petition may be "in aid of" AFCCA's statutory jurisdiction even though it addresses an interlocutory matter, where no finding or sentence has yet been entered in the court-martial. *See, e.g.,* Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012); Courtney v. Williams, 1 M.J. 267, n.2 (C.M.A. 1976); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

Although Petitioner is not a party to the criminal action as defined by R.C.M. 103(16), the President has afforded her a procedural right to attend and be heard during limited evidentiary hearings to evaluate whether evidence regarding her prior sexual behavior or sexual predisposition under Mil. R. Evid. 412 and privileged communications under Mil. R. Evid. 513 should be admitted or excluded during trial.[1] Mil. R. Evid.

[1] The Air Force Appellate Government Division disagrees with Petitioner's assertion that "MRE 412 requires a military judge to conduct a hearing and to balance the victim's right to privacy against the probative value of the evidence to be admitted" as stated in lines 19-21 on page 14 of her brief. As emphasized by this Court in United States v. Gaddis, 70 M.J. 248, 250 (C.A.A.F. 2011), the "'alleged victim's privacy' interests cannot preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the accused.'" Instead, "whether evidence is constitutionally required--so as to meet the M.R.E. 412(b)(1)(C) exception to M.R.E. 412's general prohibition of sexual behavior or predisposition evidence--demands the ordinary contextual inquiry and balancing of countervailing interests, e.g., probative value and the right to expose a

412(c)(2) and 513(e)(2). The substantive legal issues presented in this appeal--whether Petitioner has standing, whether she can be heard through her counsel during these limited evidentiary hearings, and whether the writ should issue--invited AFCCA to evaluate the military judge's application of Mil. R. Evid. 412 and 513 during an ongoing general court-martial, which potentially impacted Petitioner's privacy interest, the accused's right to present a complete defense, and ultimately the outcome of the trial. AFCCA was not being asked to adjudicate "what amounts to a civil action, maintained by persons who are strangers to the court-martial." *See* CCR, slip op. at 8. Instead, the Court was asked to interpret the legal contours of specific evidentiary rules; rules governing evidentiary matters deemed so meaningful to the findings and sentence of a court-martial that an erroneous interpretation or application of them can rise to the level of constitutional error. *See, e.g.* United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006) (demonstrating the military judge's broad authority to abate court-martial proceedings when the government could not provide the victim's mental health records in a sexual assault case).

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witness's motivation in testifying versus the danger of 'harassment, prejudice, confusion of the issues, the witness' safety, or [evidence] that is repetitive or only marginally relevant.'" Id. at 252.

In many respects, this case is similar to Hasan. Just as this Court found in Hasan, 71 M.J. at 419, that the military judge's perceived bias against the petitioner had the "potential" to impact the findings and sentence, the military judge's restrictive reading of Mil. R. Evid. 412 and 513 similarly has the potential to influence the findings and sentence in this case. No one is better situated to assist Petitioner in understanding the relevance of her sexual history or mental health treatment to the proceeding than her detailed attorney. Assistance from her attorney in this area may promote victim cooperation in the court-martial process because her attorney is best situated to explain her rights and fully explore her background in relation to these evidentiary rules in a privileged setting. *See* United States v. Gaddis, 70 M.J. 248, 254 (C.A.A.F. 2011) (citing United States v. Banker, 60 M.J. 216, 219 (C.A.A.F. 2004) (noting that Mil. R. Evid. 412 was intended to encourage victim cooperation in courts-martial and to prevent embarrassment, invasion of privacy, and the infusion of sexual innuendo into the factfinding process). Moreover, her attorney can assist in the presentation of this information so it can be placed in proper context for the court. During the proceeding, Petitioner's attorney could also advocate points of law so that the military judge is fully apprised of the legal issues before weighing the countervailing considerations

involved in Mil. R. Evid. 412 and 513 proceedings, such as balancing the probative value of the evidence and the right to expose a witness' motivation in testifying versus the danger of harassment, prejudice, confusion of the issues, repetitiveness, or marginal relevance.

As explained by this Court in CCR, the question is not whether Petitioner's right to be heard through counsel "directly involved a finding or sentence that was--or potentially could be--imposed by a court-martial proceeding," L.R.M. v. Kastenberg, Misc. Dkt. No. 2013-05, slip op. at 7 (A.F. Ct. Crim. App. 2 April 2013) (unpub. op.); the question is whether the "harm alleged by [the Petitioner] . . . [has] the potential to directly affect the findings and sentence." CCR, slip op. at 9 (citing Hasan, *supra*). By fettering Petitioner's limited right to be heard, the jurisdictional threshold was exceeded and this Honorable Court should reverse AFCCA's decision and find that the lower Court erred by holding that jurisdiction did not exist to review the merits of Petitioner's request for extraordinary relief.

2. Because AFCCA determined that jurisdiction did not exist, it did not err by failing to conduct a standing analysis.

Similar to CCR, this case presented two threshold issues. First, did AFCCA have jurisdiction to hear Petitioner's extraordinary writ petition? Second, did Petitioner, as a

nonparty to the court-martial, have standing to assert a right to be heard through counsel in proceedings under Mil. R. Evid. 412 and 513? Subject matter jurisdiction concerns the "classes of cases . . . falling within a court's adjudicatory authority." Bowles v. Russell, 551 U.S. 205, 212-13 (2007). Standing concerns a person's right to complain of an injury and seek relief. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The former focuses on the power of the court-martial; the latter focuses on the position of the complainant. Both involve separate inquiries.

In subsection d. of Issue I, Petitioner alleges that "AFCCA failed to conduct any standing analysis" as a result of conflating subject matter jurisdiction and standing. (Pet. Br. at 17.) Because jurisdiction and standing are separate threshold issues, AFCCA was not required to analyze Petitioner's standing. Once it concluded that jurisdiction did not exist, it had no duty to continue its analysis. To the extent that the last two paragraphs of AFCCA's decision can be read to conflate the concepts of jurisdiction and standing, this was error.

II.

THIS HONORABLE COURT LACKS JURISDICTION UNDER ARTICLE 67(a)(2)&(c), UCMJ, TO DECIDE THE SUBSTANTIVE ISSUES IN THIS CASE. EVEN IF THIS COURT IS AUTHORIZED TO EXERCISE JURISDICTION OVER THE SUBSTANTIVE ISSUES, AS A PRUDENTIAL MATTER, THIS COURT SHOULD

REMAND THE CASE TO AFCCA TO DECIDE THE SUBSTANTIVE ISSUES.

Standard of Review

Jurisdiction is a legal question which this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

Law and Argument

Congress has constrained this Court's authority by statute. CCR, slip op. at 6. Article 67(a)(2), UCMJ, provides that "[this Court] shall review the record in--all *cases reviewed by a Court of Criminal Appeals* which the Judge Advocate General orders sent to [this Court] for review . . . ." (Emphasis added). Article 67(c), UCMJ, provides in part, "[this Court] may act only with respect to the findings and sentence as approved by the convening authority and *as affirmed or set aside as incorrect in law by the Court of Criminal Appeals*." (Emphasis added.) Reading Article 67, UCMJ, as an integrated whole,[2] this Court's review cannot extend beyond the jurisdictional question and the remaining substantive issues must be remanded back to AFCCA for a decision on the matters of law raised by Petitioner; namely, Petitioner's standing, her

[2] Since the beginning of jurisprudence under the UCMJ, this Court has read the statutes governing jurisdiction as an integrated whole, with the purpose of carrying out the intent of Congress in enacting them. United States v. Lopez de Victoria, 66 M.J. 67, 69 (C.A.A.F. 2008).

right to be heard through counsel, and whether the writ should issue.[3]

Even though The Judge Advocate General has ordered this case to be reviewed by this Court, the "case" was not "reviewed" by AFCCA as required by Article 67(a)(2), UCMJ, because the lower Court did not transcend the jurisdictional threshold. Furthermore, AFCCA did not render a final decision determining whether the military judge's ruling on the substantive issues was correct or incorrect in law as required by Article 67(c), UCMJ. Nothing in Article 67, UCMJ, authorizes this Court to act with respect to matters of law when the lower court has not acted with respect to the same matters of law.[4]

Petitioner whistles past this second jurisdictional question. If this Court were to render a decision on the

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[3] Unlike when reviewing matters under Article 62(b), UCMJ, where the lower court may act only with respect to matters of law, *see* United States v. Baker, 70 M.J. 283, 287-88 (C.A.A.F. 2011), AFCCA is authorized to exercise factfinding power and rule on matters of law when reviewing Petitioner's request for extraordinary relief. Unlike AFCCA, this Honorable Court is not a fact-finding body. United States v. Gray, 40 M.J. 25 (C.A.A.F. 1994) (citing Article 67(c), UCMJ)).

[4] The Air Force Appellate Government Division is mindful that this Court may, in its discretion, entertain original petitions for extraordinary relief when filed by a petitioner. *See* CAAF's Rules of Practice and Procedure, Rule 4(b)(1); *see also* McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976) (finding that this Court's authority to issue an appropriate writ in aid of its jurisdiction is not limited to the appellate jurisdiction defined in Article 67, UCMJ). Rule 4(b)(1) emphasizes that such writs rarely will be granted. Id. Although this Court is authorized to consider original petitions for extraordinary relief, this case presents a unique twist on this Court's statutory authority because this case was certified under Article 67(a)(2), UCMJ, and is not being reviewed as an original writ. Even if Petitioner would have filed a writ-appeal petition with this Court, vice TJAG certification, as a prudential matter, this Court would be limited to reviewing the decision of the Court of Criminal Appeals, i.e., the jurisdictional question, and would not review the substantive issues, which remained unresolved by the lower Court.

substantive issues in this case, its action would be analogous to granting interlocutory review of a decision of a Court of Criminal Appeals resulting from an Article 62 appeal and rendering a decision on the substantive issues even though the lower court's decision only addressed the government's failure to satisfy the jurisdictional requirements of Article 62 and R.C.M. 908, without deciding the substantive issues of the interlocutory appeal. Under this hypothetical, this Court would not have jurisdiction to analyze the merits of the Article 62 appeal via TJAG certification because the merits of the "case" had not been reviewed by the Court of Criminal Appeals. Under that circumstance, this Honorable Court would be compelled to remand the case to the lower court to comply with its statutory jurisdiction.[5] This case requires the same result.

Even if this Court finds that it has jurisdiction to review the substantive issues based on its authority under the All Writs Act, as a prudential matter, it should remand the case to the lower Court to decide the substantive issues.

III.

EVEN IF THIS COURT IS AUTHORIZED TO REVIEW THE SUBSTANTIVE ISSUES, PETITIONER'S RIGHT TO BE HEARD THROUGH COUNSEL IS DERIVED FROM THE MILITARY RULES OF EVIDENCE; NOT THE CONSTITUTION OR THE CVRA, 18 U.S.C. § 3771.

[5] *See also* United States v. Humphries, 69 M.J. 491 (C.A.A.F. 2011) (remanding the certified case to AFCCA because the lower Court had not acted on the findings; therefore, review of the case was not complete as required by Article 67(c), UCMJ).

Standard of Review

The interpretation of a statute or regulation is a question of law reviewed by this Court de novo. United States v. Faulk, 50 M.J. 385, 390 (C.A.A.F. 1999).

1. Mil. R. Evid. 412 and 513 provide Petitioner standing and the opportunity to be heard through counsel during these limited evidentiary hearings.

The President has provided victims in military courts-martial a limited right to be heard under Mil. R. Evid. 412 and 513; a right which reasonably includes the right to be heard through counsel to present facts and legal argument.

In Carlson and Ryan-Jones v. Smith, 43 M.J. 401 (C.A.A.F. 1995), this Court previously provided extraordinary relief to two sexual assault victims who had sought to protect their rights under Mil. R. Evid. 412, Article 31, UCMJ, generalized "invasions of privacy," and other privileges recognized by law. Although a detailed description of the circumstances of this case are not outlined in the summary disposition, this Court ordered that the victims "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." Id. The Petitioner's request in this case is no different. Under the authority in 10 U.S.C. §§ 1044 and 1565(b), Congress has authorized victims of sexual assault to be

provided legal representation as part of the Department of Defense Legal Assistance Program. The Judge Advocate General of the Air Force has created the Special Victims' Counsel Program to provide legal representation to victims of sexual assault consistent with Congress' intent. Petitioner requested legal counsel under this Program and expressed a desire to be heard through her detailed counsel during limited evidentiary hearings as permitted by the Military Rules of Evidence. She should not be denied this right.

In a similar context, military law recognizes a nonparty's right to object to a subpoena compelling witness testimony or production of evidence when compliance is unreasonable or oppressive. *See* United States v. Wuterich, 66 M.J. 685 (N.M. Ct. Crim. App. 2008) (Wuterich I) *overruled by* United States v. Wuterich, 67 M.J. 63 (C.A.A.F. 2008) (Wuterich II); United States v. Wuterich, 68 M.J. 511 (N.M. Ct. Crim. App. 2009); R.C.M. 703(e)(2)(F). As demonstrated by Wuterich I and Wuterich II, the right of limited intervention in the motion to quash context encompasses the right to be represented by counsel and advocate legal arguments to demonstrate why compliance with the subpoena should not be required. These cases also demonstrate the nonparty's right to seek a writ of mandamus with military appellate courts to resolve such question of law. Similar to R.C.M. 703(e)(2)(F) in providing a right to challenge a

subpoena, the President has expressly stated the victim/patient has a right to attend and be heard in evidentiary hearings under Mil. R. Evid. 412 and 513.

The term "to be heard" is a legal term of art within the MCM. Throughout the MCM, the President has provided the parties an opportunity "to be heard" before a military judge rules on legal issues, which includes making arguments orally and in writing. *See* R.C.M. 806(d), Discussion (the military judge should not issue a protective order without first providing the parties an opportunity to be heard); R.C.M. 917(c) (requiring the military judge to give each party an opportunity to be heard on a motion for finding of not guilty); R.C.M. 920(c) (providing the parties an opportunity to be heard on the proposed findings instructions); R.C.M. 920(f) (giving the parties the right to be heard on an objection on instructions outside of the presence of the members); R.C.M. 1005(c) (authorizing the parties a right to be heard on proposed sentencing instructions); R.C.M. 1102(b)(2) (requiring each party have an opportunity to be heard before ruling on legal issues raised in post-trial hearings); Mil. R. Evid. 201(e) (providing the parties a right to be heard on the propriety of taking judicial notice).[6] The foregoing provisions

[6] *See also* R.C.M. 905(h): "upon request, either party is entitled to an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions;" United States v. Savard, 69 M.J. 211 (C.A.A.F. 2010) (although harmless under Article 59(a), UCMJ, and

provide the right to be heard, which in practice includes the right to be heard through counsel, but more importantly, the right to argue points of law. The President decidedly chose to use the term, "to be heard," which in all other contexts within military justice practice includes the right to have an attorney speak on the party's behalf and argue points of law. The intentional use of this phrase demonstrates an awareness by the President that crime victims have a right to be heard through counsel.

Therefore, the Air Force Appellate Government Division agrees that, if this Court reviews the substantive issues in this case, Petitioner has demonstrated the extraordinary circumstance where the writ should issue for this limited purpose. The Air Force Appellate Government Division only interprets Mil. R. Evid. 412 and 513 as conferring a regulatory right for a victim to be heard through counsel during these limited evidentiary hearings. Nothing in the plain language of the Rules authorize a victim to seek reconsideration of a military judge's ruling, appeal the ruling, or petition an appellate court to challenge the correctness of the judge's substantive decision concerning Mil. R. Evid. 412 and 513. If the President or others involved in the administration of military justice desire to implement such rights in courts-

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the facts of the case, it was error for the military judge to fail to hold a requested hearing on a motion.)

martial, the appropriate route is through amendments to the MCM or, if necessary, legislative changes.

2. Petitioner's right to privacy regarding her past sexual behavior and right to protect privileged communications to her mental health provider are not grounded in the Constitution.

Petitioner's rights under Mil. R. Evid. 412 and 513 are derived directly from the Military Rules of Evidence, not the Constitution. In fact, the congressional history of the CVRA serves as the best evidence to demonstrate that victims' rights do not involve constitutional implications.

In 1995, victims' rights advocates made an effort to enact a federal constitutional amendment to the Sixth Amendment designed to place victims' rights on a firm foundation. *See* Paul G. Cassell, In Defense of Victim Impact Statements, 6 Ohio St. J. Crim. L. 611, 614-15 (2009). To place victims' rights in the Constitution, victims' advocates approached the President and Congress with a proposed amendment. Id. at 615. As a result of the discussions, Senators Jon Kyl, Orrin Hatch, and Dianne Feinstein, with the backing of President Bill Clinton, introduced a federal victims' rights amendment. *See* 142 Cong. Rec. S3792 (Daily ed. 22 April 1996) (statement of Sen. Kyl). Although the proposed amendment was well received by Congress, it never succeeded in attracting the required two-thirds support. As a result, in 2004, the victims' rights movement instead pressed for a far-reaching federal statute designed to

protect victims' rights in the civilian federal criminal justice system. In exchange for setting aside the federal amendment in the short term, victims' advocates received nearly universal congressional support for a "broad and encompassing" statutory victims' bill of rights. 150 Cong. Rec. S4261 (daily ed. 22 April 2004) (statement of Sen. Feinstein). Consequently, on 30 October 2004, the 108th Congress passed the Justice for All Act, Pub. L. 108-405, 118 Stat 2260, which encompassed the Crime Victims' Rights Act codified in 18 U.S.C. § 3771. The congressional history of the CVRA demonstrates that victims' rights are not embedded in the Constitution.

In contrast, a military victim's right to be heard at evidentiary hearings stems from the Military Rules of Evidence. Although the Supreme Court of the United States has created a class of cases creating fundamental liberty interests involving the right to privacy,[7] no federal criminal court has extended this zone of protection to include victims' rights, nor has Petitioner cited to any mandatory authority. Even though the Supreme Court has carved out a narrow class of protected liberty interests, these interests are not absolute. As illustrated by

[7] *See, e.g.,* Loving v. Virginia, 399 U.S. 1 (1967) (fundamental right to marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (fundamental right to procreation); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (fundamental right for a woman to choose to have an abortion before fetal viability); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the fundamental right to use contraceptive devices); Lawrence v. Texas, 539 U.S. 558 (2003) (fundamental right to private consensual sexual conduct).

United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004) (finding the accused's conduct fell outside the liberty interest in private, consensual sexual activity between adults because of the compelling military interest), constitutionally protected liberty interests and privileges can appropriately yield to countervailing concerns. Likewise, the constitutional right of an accused to present a complete defense may bow to accommodate other legitimate interests in the criminal trial process. Rock v. Arkansas, 483 U.S. 44 (1987); *see also* Ogden v. Kentucky, 488 U.S. 227 (1988); Delaware v. Van Arsdall, 475 U.S. 673 (1987); Holmes v. South Carolina, 547 U.S. 319 (2006). This measured balancing of rights between the trial participants is conducted on a routine basis. Mil. R. Evid. 412 and 513 were specifically designed to promote the balance between the witness' privacy interest and the accused's overriding interest in accessing constitutionally required evidence. *See* Gaddis, *supra*; Harding, *supra*. Mil. R. Evid. 412 and 513 strike an appropriate balance between shielding victims from the unnecessary exposure of their sexual history and the disclosure of privileged communications, and providing a fair mechanism for the accused to prepare and present a complete defense. Petitioner's position goes too far in this regard.

3. The CVRA, 18 U.S.C. § 3771, does not apply to military courts-martial without Congressional or Presidential action.

The CVRA, 18 U.S.C. § 3771, is not controlling law in the military justice system. Congress exercises control over discipline in the military through the UCMJ, and although military courts frequently look to civilian statutes for guidance, the military and civilian justice systems are separate as a matter of law. United States v. McElhaney, 54 M.J. 120, 124 (C.A.A.F. 2000). Title 18 of the United States Code, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence do not directly affect proceedings under the UCMJ except to the extent that the UCMJ or MCM specifically provides for incorporation of such provisions. Id. Congressional intent to separate military justice from the civilian federal criminal system requires military appellate courts to exercise great caution in overlaying a generally applicable statute specifically onto the military justice system. Id. Congress intended the deliberative process of amending the MCM to prevail over uncritical application of statutes outside the UCMJ. Id.; *see, e.g.,* Articles 36 and 134 (clause 3), UCMJ, 10 U.S.C. §§ 836 and 934; Mil. R. Evid. 101(b)(1), Manual for Courts-Martial, United States (2012 ed.) (MCM).

This Court has previously declined to apply § 502 of the Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10606,

to courts-martial (expressing a preference for a victim's presence in the courtroom at trial) in United States v. Spann, 51 M.J. 89 (C.A.A.F. 1999). The Court observed that the essentially civilian nature of the federal statute was in conflict with Mil. R. Evid. 615 (which has since been amended by the President to reflect the rejected statute), and added that the President had not amended the rule to address whether, or how, the civilian procedures should apply in military proceedings under Article 36, UCMJ. The Court emphasized that Congress intended the deliberative process of amending the MCM to prevail over "uncritical application of statutes outside the UCMJ." Spann, 51 M.J. at 93.

The CVRA does not contain language expressly extending its applicability to military courts-martial. It is commonly accepted that when a statute's language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms. United States v. Watson, 71 M.J. 54 (C.A.A.F. 2011). The Air Force Appellate Government Division acknowledges that many of the rights contained in the CVRA have been adopted by the Department of Defense in DoDD 1030.1, Victim and Witness Assistance, and DoDI 1030.2, Victim and Witness Assistance Procedures; however, the plain language of the CVRA envisions application and enforcement of its provisions in the federal

civilian criminal justice system. *See* 18 U.S.C. § 3771(b)(2) (describing the application of victims' rights in the context of federal habeas proceedings); 18 U.S.C. § 3771(c)(1) (establishing an aspirational policy that all departments and agencies of the United States provide the same victims' rights listed in subsection (a) of the statute without mandating these departments follow the same procedural framework); 18 U.S.C. § 3771 (d)(3) (establishing the procedural process for seeking a writ of mandamus in the federal court system if a victim has been denied rights listed in the statute); 18 U.S.C. § 3771(d)(4) (authorizing the government to assert as error the federal district court's denial of a victim's rights on appeal); 18 U.S.C. § 3771(b)(6) (noting that nothing in the statute shall be construed to impair the prosecutorial discretion of the Attorney General); and 18 U.S.C. § 3771(f) (mandating the implantation of procedures by the Attorney General to promote compliance with the statute).

The CVRA, located in Title 18 of the Code, is only applicable under military law if the text of the statute clearly indicates it is plainly applicable in the military context. The CVRA does not contain such plain language, and a close reading of the statute demonstrates that its enforcement mechanisms and procedures to promote compliance are unworkable in the military context without further guidance from Congress or the President.

Additionally, the President has not acted to incorporate the CVRA into military law through his delegated powers under Article 36, UCMJ. Given the detailed construct of the CVRA, it is imperative for the President or Congress to decide which CVRA rights will be applied in the military context and how those rights will be enforced through the trial and appellate construct. Furthermore, the victim's "right to be heard" cannot reasonably be said to have derived from CVRA considering that the versions of Mil. R. Evid. 412 and 513 instituting the victim's right to be heard significantly predates the CVRA.[8] The President's inaction to adopt the CVRA is even more compelling considering that he took swift action to amend Mil. R. Evid. 615 after this Court's holding in Spann to specifically adopt provisions of the Victim Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997. *See* Drafter's Analysis of Mil. R. Evid. 615, MCM A22-51 (2012 ed.). However, no action has been taken yet by the President or Congress to incorporate the CVRA into military court-martial practice despite having over eight years to adopt a workable framework.[9]

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[8] *Compare* Mil. R. Evid. 412, MCM 1995, and Mil. R. Evid. 513, adopted on 6 October 1999,[8] *with* 18 U.S.C. 3771, effective 30 October 2004, Pub.L. 108-405, Title I, § 101.

[9] DoDI 1030.2, para. 4.2, and DoDD 1030.1, para. 4.3, expressly state, "[t]his [Instruction/Directive] is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord to a victim or a witness the assistance outlined in this [Instruction/Directive]." Even though the DoD has adopted many of the rights provided by the CVRA, the DoD has expressly renounced that the

Accordingly, we are compelled to find that Petitioner's right to be heard through counsel is not derived from the CVRA without further action from the President or Congress. However, we are mindful of Congress' overwhelming support for the CVRA and the important rights it has created for crime victims, and, thus, we recommend that the Joint Service Committee on Military Justice strongly consider amending the MCM to incorporate appropriate rights into the UCMJ or the RCMs given the undeniable need to place victims' rights in the military on equal footing with the rights afforded to victims in the civilian justice system.

CONCLUSION

WHEREFORE, the Air Force Appellate Government Division respectfully requests that this Honorable Court reverse AFCCA's jurisdiction decision and remand this case for further review of the substantive issues raised by Petitioner's request for extraordinary relief. If this Court decides the substantive issues, Petitioner has demonstrated that the writ should issue for the limited purpose of providing her a right to be heard through counsel under Mil. R. Evid. 412 and 513.

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implementation of these rights creates an enforceable legal cause of action. This is in direct conflict with the CVRA and Petitioner's argument.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and counsel for Petitioner, Respondent, and the Real Party in Interest on 8 May 2013.

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Date: 8 May 2013

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Airman First Class (E-3)	**)**	**Misc. Dkt. No. 2013-05**
LRM,	**)**	
USAF,	**)**	
Petitioner	**)**	
	)	
v.	**)**	
	)	
Lieutenant Colonel (O-5)	**)**	**ORDER**
JOSHUA E. KASTENBERG,	**)**	
USAF,	**)**	
Respondent	**)**	
	)	
Airman First Class (E-3)	**)**	
NICHOLAS E. DANIELS,	**)**	
USAF,	**)**	
Real Party in Interest	**)**	**Panel No. 2**

Procedural Background

On 16 October 2012, Airman First Class (A1C) Nicholas Daniels was charged with raping and sexually assaulting A1C LRM, a female Airman, on 13 August 2012, in violation of Article 120, UCMJ, 10 U.S.C. § 920. After the charges were referred, Lieutenant Colonel (Lt Col) Joshua Kastenberg was detailed to the case as military judge on 28 December 2012. A month later, the appellant was arraigned at Holloman Air Force Base, New Mexico, and elected trial by enlisted and officer members.

On 22 January 2013, Captain (Capt) Seth Dilworth was appointed as special victims' counsel (SVC) for A1C LRM.[1] The next day, he notified the military judge of his appointment via e-mail and asked the military judge to direct the trial counsel to provide him with "informational copies of all motions and responses to motions where

[1] In January 2013, as part of a larger Air Force program to combat sexual assault, the Air Force JAG Corps implemented the special victims' counsel (SVC) program as a way to increase the support provided to victims of sexual assault. Through this program, Air Force judge advocates are appointed to represent certain adult victims of sexual crimes allegedly committed by Air Force members. SVC R. PRAC. AND PROC. 1 (2013) [hereinafter SVC Rules]. The stated purposes of the SVC program is to provide advice (by developing victims' understanding of the investigatory and military justice processes), provide advocacy (by protecting the rights afforded to victims in the military justice system) and empower victims (by removing barriers to their full participation in the military justice process). ''Strengthening our support to victims in this way will result in a more robust opportunity for victims to be heard, to retain and take advantage of their rights, and enhance the military justice system while neither causing unreasonable delay nor infringing upon the rights of an accused.'' SVC Rules at page 2.

A1C [LRM] has an interest, including any motions under [Mil. R. Evid.] 412." The military judge ordered the SVC to enter a formal appearance with the court-martial and to "provide the statutory and/or regulatory basis for motioning [the] court-martial, as a third party." His order also noted the trial and defense counsel would have an opportunity to object to the production of these materials to the SVC.

In his formal notice of appearance, Capt Dilworth, as SVC for A1C LRM, advised the military judge that his "formal involvement in [the court-martial] will be limited to asserting A1C [LRM]'s enumerated rights as a victim of crime under federal law and [Mil. R. Evid.] 412, 513 and 514." He further stated his intention to observe the trial as her counsel and discuss the proceedings with her outside the courtroom. He asked the military judge to direct the parties to provide him with copies of motions filed under those Military Rules of Evidence.[2] In making this request, Capt Dilworth acknowledged A1C LRM is not a party to the case as defined by Mil. R. Evid. 103,[3] but contended she had standing in the proceeding regarding any issues involving her that arose under Mil. R. Evid. 412, 513 and 514.[4]

Contending these Military Rules of Evidence expressly give A1C LRM the "right to be heard," Capt Dilworth argued she must be provided with informational copies of the defense's recently-filed motions under Mil. R. Evid. 412 and 513, so she can understand the arguments being made regarding her privacy interests and thereby receive a "meaningful opportunity" to respond and be heard.[5] Although he argued that, as A1C LRM's counsel, he is entitled to speak on her behalf during hearings under those

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[2] "When a military judge is detailed to a case, SVC will enter an appearance, notifying the judge of their representation of a witness in the case and requesting that the judge direct that the SVC be provided with informational copies of motions filed where the victim has an interest (e.g., [Mil. R. Evid.] 412, 513, and 514 motions)." SVC Rule 4.5.

[3] ''The SVC program does not increase a victim's standing in court-martial hearings . . . beyond the standing victims are currently afforded under existing laws and rules (e.g. evidentiary hearings under [Mil. R. Evid.] 412, 513, and 514)." SVC Rule 4. "Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under [Rule for Courts-Martial (R.C.M.)] 103 and do not have the same entitlements as litigation parties under the UCMJ.'' SVC Rule 4.6.

[4] The accused must notify the alleged victim (or, when appropriate, the alleged victim's guardian or representative) when the accused intends to offer evidence of the victim's ''sexual behavior" or "sexual predisposition'' under Mil. R. Evid. 412, and the victim must be provided a reasonable opportunity to attend and be heard at a closed hearing to determine its admissibility. Mil. R. Evid. 412(a), (c). The in-camera hearing provision was designed to "serve as a check on questionable proffers [by the accused about such evidence] in order to protect victims." *United States v. Sanchez*, 44 M.J. 174, 177, 180 (C.A.A.F. 1996). Similar notice and opportunity to be heard must be provided to the alleged victim if a party seeks the production of that victim's confidential mental health records or communications with a victim advocate. Mil. R. Evid. 513(e) and 514(e).

[5] The trial counsel provided Captain Dilworth with a copy of the defense's Mil. R. Evid. 412 motion regarding Airman First Class (A1C) LRM and the Government's response, but did not provide him with the defense's motion to admit evidence about A1C LRM pursuant to Mil. R. Evid. 513. The SVC was also given a copy of the memorandum signed by A1C LRM, on 6 December 2012, regarding her consultation with the trial counsel pursuant to the Crime Victims' Rights Act, 18 U.S.C. § 3771, as well as the input the trial counsel had obtained from A1C LRM regarding Mil. R. Evid. 412, 513 and 514.

rules,[6] Capt Dilworth informed the military judge that he did not intend to make such a statement or argument on A1C LRM's behalf during any Mil. R. Evid. 412 or 513 hearing. He claimed that her interests were aligned with the Government's interests on those matters, but he did ask to sit in the gallery during those hearings.[7] Capt Dilworth stated he was not asking to receive "full judicial participation" as he claimed was authorized by the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. Instead, he asked the military judge to "recognize the standing [A1C LRM] has through her counsel to request informational copies of … any motions in which she has an interest including … [Mil. R. Evid.] 412, 513 and 514," and "in the interest of judicial economy," to authorize him to make an argument for her at one of the motions hearing on those Military Rules of Evidence in the event he changed his mind and elected to do so.

The trial counsel had no objection to A1C LRM's SVC receiving the discovery materials previously provided to the defense and any motions filed pursuant to Mil. R. Evid. 412 513 and 514.[8] The Government also did not object to A1C LRM being heard, either personally or through the SVC, on factual matters during hearings on these Military Rules of Evidence, but they argued neither A1C LRM nor the SVC had a right to file motions or make legal arguments before the court on those matters.

Through his counsel, A1C Daniels did not object to A1C LRM receiving copies of motions filed under Mil. R. Evid. 412, 513 or 514 or her being present and/or heard during hearings under those rules. However, the defense opposed any third party, including the SVC, being present or heard during these hearings, because those third parties lacked standing. In addition to arguing a lack of authority for such an SVC role, the defense counsel argued that having to prepare and defend against arguments from potentially two government attorneys, an SVC and a prosecutor, unfairly added a burden on the defense and created an appearance problem, especially if the interests of the victim and prosecution are not aligned.

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[6] ''While [Mil. R. Evid.] 412, 513 and 514 do not discuss an SVC's role in these evidentiary hearings, the [Military Rules of Evidence] do [afford] victims [a reasonable opportunity to attend and] to 'be heard.' For the purposes of these three [Military Rules of Evidence] and future [Military Rules of Evidence] or [R.C.M.]s giving victims the right to be heard in military justice proceedings, SVCs or civilian victims' counsel may be allowed to speak on their clients' behalf, as permitted by the presiding military judge.'' SVC Rules 4 and 4.6. ''SVCs may represent victims in these [evidentiary hearings] and other UCMJ proceedings where victims are afforded standing, as permitted by the presiding military judge.'' SVC Rule 4.6. ''SVCs may advocate a victim's interests to any actor in the military justice process . . . to the extent authorized by the [Manual for Courts-Martial (*Manual*)], military judges.'' SVC Rule 4.1.

[7] Recognizing that the interests of the Government—as represented through the actions of prosecutors at courts-martial—are frequently, but not always aligned with the interests of victims, the SVC program notes ''An independent SVC [has] a duty to represent the interests of the victim—and only the victim. The objective is not for SVC to establish an adversarial relationship with [trial counsel] or the defense counsel, but to provide victims with the peace of mind of having independent representation by a licensed attorney—one eminently capable of communicating their interests throughout the military justice process.'' SVC Rules at page 2.

[8] ''SVCs have a right to records which is no greater than their client's rights.'' SVC Rule 4.9.

At the conclusion of the 29 January 2013 session and through a second ruling following A1C LRM's request for reconsideration, the military judge issued detailed findings of fact and conclusions of law. The military judge observed:

> Standing . . . denotes the right to present an argument of law before a court, which is fundamentally different than the opportunity to be heard. An argument of law encompasses motioning the court to compel the [G]overnment to produce documents. . . . [T]he general principle of standing is far narrower than the right to be heard; it is the right to advance a legal argument.

The military judge then found A1C LRM had no standing (1) to move the court, through her SVC or otherwise, for copies of any documents related to Mil. R. Evid. 412 and 513; (2) to be heard "through counsel of her choosing" in any hearing before the court-martial; or (3) to seek any exclusionary remedy, through her counsel, during any portion of the trial. Finding the "right to be heard" in the Military Rules of Evidence does not denote the right to be heard through a personal legal representative, the military judge found A1C LRM was only authorized to be heard personally; through trial counsel in pretrial hearings under Mil. R. Evid. 412 and 513; and, in the event she became incompetent, through a guardian, representative or conservator. In the military judge's view, to hold otherwise would make A1C LRM a "de facto party" to the court-martial, with a degree of influence over the proceedings akin to a private prosecution, which is antithetical to American criminal law jurisprudence. The military judge then held she received the required opportunity to assert her privacy rights when he authorized her to speak personally to him or through the trial counsel during the hearings.

In his ruling, the military judge "readily recognize[d the importance of] ensuring that the rights and dignity of victims of sexual assault, perpetrated by uniformed services-members and Departmental personal, are protected." The military judge continued, "Nonetheless, the achievement of these goals remains subject to the legal limits on third-party standing." Even if there was such third-party standing, and thus it was permissible to allow a witness's counsel to address the court-martial, the military judge stated he would exercise his discretion and not grant Capt Dillworth's request, as he believed such an event would undermine the appearance of an impartial judiciary charged with the duty of maintaining a fair trial.

On 14 February 2013, attorneys serving as appellate SVC on behalf of A1C LRM filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Petition for Stay of Proceedings. Lt Col Kastenberg was named as the respondent in the petition, and A1C Daniels was named as the "real party in interest." In the petition, A1C LRM asked our Court to issue a writ of mandamus, directing the military judge "to provide an opportunity for A1C [LRM] to be heard through counsel at hearings conducted pursuant to [Mil. R. Evid.] 412 and 513, and to receive any motions or accompanying papers

reasonably related to her rights as those may be implicated in hearings under [Mil. R. Evid.] 412 and 513." According to A1C LRM, the military judge's actions have "curtailed her rights under [Mil. R. Evid. 412 and 513, the CVRA] and the United States Constitution." Arguing that *United States v. Daniels* is a case that may later be subject to our appellate jurisdiction, A1C LRM contends the All Writs Act, 28 U.S.C. § 1651, therefore gives us jurisdiction to consider her petition as a named victim in that case.

The Government filed an answer to this Court's Order to Show Cause on 22 February 2013, arguing we have jurisdiction under the All Writs Act to entertain A1C LRM's petition. Taking a somewhat different position than it had at trial, the Government urges us to find in A1C LRM's favor and order the military judge to permit A1C LRM to be heard through her SVC counsel, both orally and in writing.

A1C Daniels, as the real party in interest, filed a response on 4 March 2013. He argued we have no jurisdiction to consider A1C LRM's request for extraordinary relief and that, even if we do, we should deny her request as the circumstances of this situation do not meet the high standards for issuing a writ of mandamus.

Additionally, we received amicus curiae briefs from: (1) the National Crime Victim Law Institute, in support of A1C LRM; (2) the Air Force Trial Defense Division, in support of A1C Daniels; (3) the Navy-Marine Corps and Coast Guard Appellate Defense divisions, opposing the petition; and (4) the Army Appellate Defense Division, opposing the petition.

On 11 March 2013, we heard oral argument from counsel for A1C LRM, A1C Daniels and the Government. On 13 March 2013, we ordered a stay in the court-martial proceedings pending our decision on the SVC issue. [9]

Jurisdiction

Before reaching the substantive issue raised in this writ-petition, we must first determine whether the jurisdiction of our Court—created by Congress pursuant to Article I of the Constitution[10]—extends to the review of a sexual assault victim's complaint about a military judge's ruling at an ongoing court-martial proceeding. We find that it does not.

Through the UCMJ, Congress conferred upon the military courts jurisdiction to conduct criminal proceedings via courts-martial. As "courts established by Act of Congress," the military courts of appeals are thereby authorized, by the All Writs Act to

[9] That same day, A1C Daniels filed a petition for extraordinary relief in the nature of a writ of prohibition, asking the Court of Appeals for the Armed Forces (CAAF) to dissolve this stay. On 19 March 2013, CAAF denied that petition without prejudice.
[10] U.S. CONST. amend. I.

"issue all writs[11] necessary or appropriate in aid of [their respective] jurisdiction and agreeable to the usages and principles of law." *Denedo v. United States*, 556 U.S. 904, 911 (2009) (citations and internal quotation marks omitted); Rule for Courts-Martial 1203(b), Discussion. *See also Noyd v. Bond*, 395 U.S. 683, 695, n. 7 (1969). This does not serve as "an independent grant of appellate jurisdiction" or enlarge our jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (citations omitted); *Denedo*, 556 U.S. at 912, 914 ("The authority to issue a writ under the All Writs Act is not a font of jurisdiction."). The All Writs Act is a mechanism for us to exercise power we already have, and therefore we can only invoke the All Writs Act when doing so is in aid of our existing jurisdiction.

Our power to issue any form of relief under the All Writs Act "is contingent on [us having] subject-matter jurisdiction over the case or controversy." *Denedo*, 556 U.S. at 911. "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). "Assuming no constraints or limitations grounded in the Constitution are implicated, it is for Congress to determine the subject-matter jurisdiction of federal courts. . . . *This rule applies with added force to Article I tribunals* . . . which owe their existence to Congress' authority to enact legislation pursuant to Art. I, § 8 of the Constitution." *Denedo* 556 U.S. at 912 (emphasis added) (citing *Goldsmith*, 526 U.S. at 533-34)).

As federal courts established under Article I of the Constitution, military appellate courts are courts of limited jurisdiction. *United States v. Wuterich*, 67 M.J. 63, 70 (C.A.A.F. 2008); *United States v. Lopez de Victoria*, 66 M.J. 67, 69 (C.A.A.F. 2008) (noting that such jurisdiction is "conferred ultimately by the Constitution, and immediately by statute"). Congress conferred our appellate jurisdiction in Articles 62, 66, 69, and 73 UCMJ, 10 U.S.C. §§ 862, 866, 869, 873, and the All Writs Act explicitly recognizes our authority to grant extraordinary relief "in aid of" that statutory jurisdiction. Article 62, UCMJ, authorizes us to review certain kinds of interlocutory Government appeals. Article 66, UCMJ, provides the framework for our Court's direct, record-based review of a specified subset of court-martial cases, namely those referred to us by The Judge Advocate General, which includes all cases in which the sentence, as

[11] One such writ is the writ of mandamus, whose purpose is ''to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'' *Roche v. Evaporated Milk Association*, 319 U.S. 21, 26 (1943). The issuance of such a writ is ''a drastic remedy that should be used only in truly extraordinary situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983). "Mandamus . . . does not 'run the gauntlet of reversible errors.' . . . Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104 (1967) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382, 383 (1953)). "To justify reversal of a discretionary decision by mandamus, the judicial decision must amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power,' or be 'characteristic of an erroneous practice which is likely to recur.'" *Labella*, 15 M.J. at 229 (citations and internal quotation marks omitted). "To prevail . . . [a petitioner] must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012).

approved, includes death, a punitive discharge or confinement for at least one year. Article 66(b), UCMJ. When such a case is referred to us, we can act only with respect to the findings and sentence as approved by the convening authority. Article 66(c), UCMJ. Article 69, UCMJ gives military appellate courts jurisdiction to review cases in which The Judge Advocate General has taken certain actions. Article 73, UCMJ, permits this Court to review petitions for a new trial based upon newly discovered evidence or fraud on the court.

We find the All Writs Act does not give us the authority to issue a writ of mandamus regarding this particular, collateral, civil/administrative issue involving a non-party to the court-martial. The military judge's ruling obviously occurred during a pending court-martial, but that fact alone cannot bring the issue within our jurisdictional ambit. The military judge's ruling about the scope of the SVC's role or the alleged victim's access to motions does not directly involve a finding or sentence that was—or potentially could be—imposed in a court-martial proceeding, nor does it involve a Government interlocutory appeal under Article 62, UCMJ, or amount to a request for a new trial. *Goldsmith*, 526 U.S. at 535 ("Since the Air Force's action . . . was an executive action, not a 'findin[g]' or 'sentence,' . . . that was (or could have been) imposed in a court-martial proceeding, the [action] appears straightforwardly to have been beyond the [Court of Appeals for the Armed Forces (CAAF)]'s jurisdiction to review and hence beyond the 'aid' of the All Writs Act in reviewing it."). The fact that his ruling may affect the procedures used in a future hearing designed to determine the admissibility of evidence under the Military Rules of Evidence does not mean our jurisdiction extends to the adjudication of complaints from the alleged victim regarding those procedures. The Manual for Courts-Martial (*Manual*)[12] provisions regarding Mil. R. Evid. 412, 513 and 514 do not provide for any appellate or collateral review of the military judge's decisions or how to conduct the hearings required by those rules, and we decline to create one through the All Writs Act under these circumstances. [13]

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[12] *Manual for Courts-Martial, United States* (*MCM*) (2012 ed.)

[13] Such caution is consistent with language within the *Manual*. "Each [R.C.M.] states binding requirements, except when the text of the rule expressly provides otherwise." *MCM*, A21-2. It goes on to state:

> In this *Manual*, if matter is included in a rule or paragraph, it is intended that the matter be binding, unless it is clearly expressed as precatory. . . [I]f the drafters did not choose to 'codify' a principle or requirement derived from a judicial decision or other source of law, but considered it sufficiently significant that users should be aware of it in the *Manual*, such matter is addressed in the Discussion. The Discussion will be revised from time to time as warranted by changes in applicable law.
>
> . . . .
>
> [T]he user is reminded that the amendment of the *Manual* is the province of the President. Developments in the civilian sector that affect the underlying rationale for a rule do not affect the validity of the rule except to the extent otherwise required as a matter of statutory or constitutional law.

MCM, A21-3 (emphasis added). *See also* SVC Rules at page 4 ("Non-compliance with the SVC Rules, in and of itself, gives rise to no rights or remedies to the victim or the accused, and the Rules will be interpreted in this context.").

Furthermore, his ruling does not implicate constitutionally-based rights in a pending court-martial, which has led military appellate courts to exercise jurisdiction in petitions brought by non-parties prior to the entering of findings and sentence. *See ABC v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (noting the press has standing to complain if public access to an Article 32, UCMJ, hearing is denied because the media enjoys the same right to a public hearing as the accused); *San Antonio Express-News v. Morrow*, 44 M.J. 706, (A.F. Ct. Crim. App. 1996) (finding jurisdiction to consider writ—petition brought by media after an Article 32, UCMJ, investigation was closed by the investigating officer, as the press and the public have a recognizable interest in being informed of the workings of the court-martial process).

Lastly, we disagree with A1C LRM's contention that the CVRA's provision that states it applies to "any court proceeding involving an offense against a crime victim" includes military courts-martial and thus gives us the authority to issue a writ of mandamus granting her the requested relief. *See* 18 U.S.C. § 3771(b)(1). We find this statute does not enlarge our existing jurisdiction. *See United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998) (Military courts must "exercise great caution in overlaying a generally applicable [victim rights] statute . . . onto the military system."); *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) (Although they have many similarities, "the military and civilian justice systems are separate as a matter of law" and changes to the latter do not directly affect the former.).

We note Department of Defense Instruction (DoDI) 1030.01, *Victim and Witness Assistance*, ¶ 4.4 (23 April 2007, interim change), provides victims of crimes under the UCMJ with generally the same rights found in 18 U.S.C. § 3771(a)(1)-(8), but it does **not** include the CVRA's language authorizing a crime victim to seek a writ of mandamus if the victim believes the trial judge has denied her any of those rights. *See id.* at ¶ 4.3 ("This directive is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord to a victim . . . the assistance outlined in this Directive."). We find the decision of Congress, the President, and the Department to not apply the CVRA to the victims within the UCMJ system and to not adopt a mandamus provision during the years since the CVRA was enacted to be intentional. We also note that, even under the CVRA, A1C LRM would not be entitled to the relief she seeks from this court. *See* 18 U.S.C. § 3771(a)(2) and (4) (A crime victim has the right to receive reasonable notice and "to be reasonably heard at any *public proceeding* . . . involving the defendant's release, plea, sentencing, or any parole proceeding." (Emphasis added.)).

If we were to find jurisdiction in the scenario before us, we would, in effect, be granting a non-party to the court-martial judicially-recognized rights equal to those of party participants —albeit for a limited issue—in a fashion specifically granted nowhere in the UCMJ, the *Manual*, federal statutes, governing precedent, or even the SVC program guidance itself. That we decline to do. *Goldsmith*, 526 U.S. at 534 (A military

court "is not given authority, by the All Writs Act or any other source, to oversee all matters arguably related to military justice.").

Nothing in the UCMJ vests the service courts with open-ended jurisdiction to entertain every challenge brought by interested entities regarding aspects of the court-martial proceedings. Because issuing this writ of mandamus would not be necessarily or appropriately in aid of our statutorily-limited jurisdiction, we conclude we do not have the authority to consider the Petitioner's mandamus petition.

Conclusion

We, like the military judge, readily acknowledge the important objectives of the SVC program. However, against the backdrop of authority underscoring the specific jurisdictional boundaries of military courts under Article I of the Constitution, and specifically considering the nature of the relief sought by petitioner in the case before us, we conclude we do not have jurisdiction to consider the petitioner's extraordinary writ.[14]

Therefore, it is by the Court on this 2nd day of April, 2013,

ORDERED:

That A1C LRM's Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is **DENIED**; and our stay of the court-martial proceedings in *United States v. Daniels* is hereby **VACATED.**

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[14] Having found no jurisdiction to rule on the petition, we decline to address the remaining substantive determinations sought in the issues presented. We believe issues relating to the SVC program would benefit greatly from review by the services' military justice officials, as well as the Joint Service Committee on Military Justice, to consider potential modifications to the *Manual* or instructions to trial judges regarding the implementation of the SVC program in the court-martial system.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In Re Airman First Class (E-3) LRM, USAF, Petitioner	*AMICUS CURIAE* BRIEF OF THE ARMY DEFENSE APPELLATE DIVISION
v.	Crim. App. No. 2013-05
Lieutenant Colonel **JOSHUA E. KASTENBURG,** Respondent	USCA Dkt. No. 13-5006/AF
Airman First Class (E-3) NICHOLAS E. DANIELS, Real Party In Interest	

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	USCA Dkt. No. 13-5006/AF
Lieutenant Colonel JOSHUA E. KASTENBURG, Respondent	
Airman First Class (E-3) NICHOLAS E. DANIELS, Real Party in Interest	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Certified Issues

I

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

Pursuant to Rule 26(a) of this Court's Rules of Practice and Procedure, United States Army Defense Appellate Division submits the following *amicus* brief.

Statement of Statutory Jurisdiction

This Honorable Court has jurisdiction to address the Certified Issues, pursuant to Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2). However, as explained in the real party in interest's brief and in appellee's brief, this Honorable Court does not have jurisdiction to issue the requested relief.

Summary of Proceedings and Statement of Facts

Amicus adopts the Summary of Proceedings and Statement of Facts as presented in the real party in interest's brief. *Amicus* writes to establish that 18 U.S.C. § 3771 has no applicability to courts-martial, nor do the Military Rules of Evidence provide Petitioner the relief she seeks, nor does any amorphous claim to "due process."

Argument

THE CRIME VICTIMS' RIGHTS ACT, THE MILITARY RULES OF EVIDENCE, AND THE DUE PROCESS CLAUSE DO NOT AFFORD PETITIONER THE "RIGHTS" SHE SEEKS.

The Air Force Court of Criminal Appeals correctly determined it had no jurisdiction to issue a writ of mandamus on behalf of Airman First Class (E-3) LRM. Petitioner LRM seeks to

establish jurisdiction via a statute, 18 U.S.C. § 3771, that has no applicability to courts-martial. Even if this Court determines 18 U.S.C. § 3771 is in some way applicable, the statute does not afford Petitioner the remedy she seeks. Nor did the Air Force Court of Criminal Appeals deny LRM "due process," as LRM was afforded all those rights she was entitled pursuant to the Constitution, the UCMJ, and the Manual for Courts-Martial. *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013).

In criminal proceedings in United States district courts, 18 U.S.C. § 3771 affords a "crime victim" the following:

> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) 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 that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely 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 victim's dignity and privacy.

18 U.S.C. § 3771(a)(1-8). If a crime victim is denied these enumerated rights in U.S. district court, the victim may petition a U.S. court of appeals for a writ of mandamus. *Id.* at (d)(3). Petitioner's claim of jurisdiction rests upon this statute in asserting a right to be represented and participate as a party-equivalent in Airman Daniels' court-martial.

Petitioner maintains courts-martial must comply with 18 U.S.C. § 3771. However, the statute, as was true with its predecessors, is a statute of general applicability, and thus, has no applicability to courts-martial.

In *United States v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), this Court examined whether 42 U.S.C. § 10606, a predecessor statute to the one at issue here, applied to courts-martial. That statute, in pertinent part, gave crime victims "the right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial." *Id.* at (b)(4). The military judge in *Spann* determined the federal statute prohibited him from sequestering the victim and her mother from Spann's court-martial. 51 M.J. at 90. On appeal, Spann claimed 42 U.S.C. § 10606 should not apply to courts-martial. *Id.*

This Court agreed with Spann, expressing "great caution" in overlaying generally applicable statutes onto the military justice system. *Id.* at 92, quoting *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998). This Court refused to apply 42 U.S.C. § 10606 to courts-martial for two reasons. First, this Court found the effect of application of the federal statute in U.S. district courts anything but clear, specifically in its effect on Federal Rule of Evidence (Fed.R.Evid.) 615. 51 M.J. at 92. Because of that ambiguity, this Court refused to apply the statute to courts-martial.

Second, this Court found significant the President had not amended Military Rule of Evidence 615 since passage of the two renditions of the applicable statute. *Id.* at 92-93. This Court identified two possible reasons for the President's inaction -- he was at yet undecided whether the federal statute should apply, and if so, whether it should be modified to fit military practice. *Id.* at 93. This Court emphasized Congress established a system by which the Manual for Courts-Martial would be amended through a deliberative process, and not through the application of statutes outside the UCMJ. *Id.* "If government counsel or others involved in the administration of military justice believe such rules should apply in courts-martial, the appropriate route is not through litigation involving statutes outside the UCMJ that are subject to

interpretive uncertainties, but through amendments to the Manual for Courts-Martial or, if necessary, through legislative changes." *Id.*

Similarly, this Court found the statute of limitations in the Victims of Child Abuse Act (VCAA), applicable in federal district courts, inapplicable to courts-martial. *United States v. McElhaney*, 54 M.J. 120 (C.A.A.F. 2000). That statute of limitations stated:

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

54 M.J. at 125, quoting 18 U.S.C. § 3283. This Court noted the "military and civilian justice systems are separate as a matter of law." 54 M.J. at 124. This Court observed Congressional intent was to "separate military justice from the military justice system. 54 M.J. at 124, quoting *United States v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998).

This Court found the VCAA inapplicable in part because the text of the statute indicated it applied to federal courts, and not courts-martial. 54 M.J. at 125. The statute referred to the Department of Justice and used terms familiar to federal district courts, not courts-martial, such as "jury," "guardian *ad litem*, and "clerk of court." *Id.* "None of the foregoing

terms apply in the military justice system, where courts-martial are convened by military officers for the trial of a single case, the prosecution function is performed by judge advocates appointed as trial counsel, verdicts are rendered by the members of the court-martial, and the proceedings are governed by the Military Rules of Evidence." 54 M.J. at 126.

For the same reasons, 18 U.S.C. § 3771 does not apply to courts-martial. The terms employed in the statute indicate its application to federal district courts, and not courts-martial. A motion for relief must be filed "in the district court in the district in which the crime occurred," and the "district court" must decide the motion. *Id.* at (d)(3). Additionally, the "court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure." *Id.* This and other terms in the statute establish the statute applies in U.S. district courts, not courts-martial. *McElhaney*, 54 M.J. at 126.

Additionally, the applicability of the statute to federal district court cases is unclear (*see Spann*, 51 M.J. at 92), although it is clear none have afforded a victim the right to participate in the proceedings that Petitioner seeks. Additionally, the President has not amended procedural or evidentiary rules to allow the non-party participation Petitioner seeks. *Id.* at 93.

18 U.S.C. § 3771 has no applicability to courts-martial. Because that statute appears to be the thin reed on which Petitioner relies for the jurisdictional hook for her writ, *amicus* submit her Petition must be denied.

Even if 18 U.S.C. § 3771 had applicability to courts-martial, the rights afforded to crime victims by the statute do not entitle Petitioner to be accorded the equivalence of party status at Airman Daniels court-martial. The statute affords crime victims a number of rights, but these rights appear geared toward post-conviction and attendance, sentencing, protection, and restitution. The victim has a right to be "reasonably heard," but that right is limited to proceedings "involv[ing] release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(3). As the Second Circuit Court of Appeals determined, "the CVRA does not grant victims any rights against individuals who have not been convicted of a crime." *In re Huff*, 409 F.3d 555, 564 (2d Cir. 2005). Thus, Petitioner's attempt to intervene in appellant's court-martial before findings is simply not contemplated by 18 U.S.C. §3771.

Further, a victim has a right to notice of proceedings, but may be excluded if the trial court determines the victim's attendance would materially alter the victim's testimony. *Id.* at (a)(2) & (3). Additionally, a victim has a right to be "reasonably protected," and a "reasonable right to confer with

the attorney for the government." It is *amicus'* understanding none of these rights, if the statute were applied, have been violated in this case.

Nonetheless, Petitioner, cobbling together the victims' rights afforded by 18 U.S.C. § 3771 with certain phrases in Mil. R. Evid. 412 and 513, claims she has a right to be heard through counsel during appellant's court-martial. However, Petitioner presents no support from either the U.S. district courts hearing cases applying Fed. R. Evid. 412 or 513 for that proposition, nor has *amicus'* research revealed such support. Indeed, the Department of Defense Instruction (DoDI) 1030.01, *Victim and Witness* Assistance, ¶ 4.4 (23 April 2007) provides UCMJ victims approximately the same protections as those found in 18 U.S.C. § 3771(a)(1-8). However, the instruction explicitly limits exactly the type of cause of action Petitioner seeks. "This Directive is not intended to, and does not, create any entitlement, cause of action, or defense in favor of any person arising out of the failure to accord to a victim or a witness the assistance outlined in this Directive." *Id.* at ¶ 4.3. Furthermore, the language employed in those Rules of Evidence do not support Petitioner's claim.

Mil. Rule Evid. 412 provides that a party seeking to admit evidence pursuant to that rule must file a motion and serve the motion on the court and opposing party "and notify the alleged

victim or, when appropriate, the alleged victim's representative." Mil. R. Evid. 412(c)(1)(B). Thus, the purported victim is given notice, but has no "right" to service of the motion, but must be notified. *Id.* Additionally, the term "representative" is undefined, and is absent from the remainder of Rule 412. While the rule affords the purported victim "a reasonable opportunity to attend and be heard," the term representative is significantly absent. Thus, the plain language of the Rule does not contemplate legal representation for the purported victim at the hearing, and only contemplates notification to a legal representative in "appropriate" cases, most likely in the event of minority or disability. "Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result." *U.S. v. King,* 71 M.J. 50, 52 (C.A.A.F. 2012), *citing* United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F.2007); *see* generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-75 (2012) (if possible every word and provision should be given effect).

Nor can Petitioner, despite her claim to the contrary, find solace in Mil. R. Evid. 513 or 514. Pursuant to Rule 513, the production or admission of a patient record or communication, if the patient is not the accused, requires service of a motion on the military judge and opposing party, "and, if practicable, notif[ication to] the patient or patient's guardian,

conservator, or representative and that the patient has an opportunity to be heard as set forth" by the Rule. Mil. R. Evid. 513(e)(1). And what is that opportunity to be heard? "The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing." *Id.* at (e)(2).

Similarly, Mil. R. Evid. 514, which directs a limited privilege for victim-victim advocates, requires, upon admission or production of victim-victim advocate communication, the same service on the opposing party and military judge, and "and, if practicable, notif[ication to] the victim or victim's guardian, conservator, or representative and that the victim has an opportunity to be heard as set forth" by the Rule. Mil. R. Evid. 514(e)1)(B). The victim is afforded the same right at the hearing, "a reasonable opportunity to attend the hearing and be heard at the victim's own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing." *Id.* at (e)(2).

The plain language of the applicable Rules simply does not provide the "rights" Petitioner claims she is entitled to, and the DoDI 1030.01 specifically states Petitioner has no right to mandamus review. Petitioner is seeking a quasi-party status that no other United States court affords purported victims, nor

should this Court. Instead this Court should maintain traditional notions of party status and military justice. This Court can find support for that stand in the Manual. The Manual defines "Party" as:

> (A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and
> (B) Any trial or assistant trial counsel representing the United States and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

Rule for Courts-Martial [hereinafter R.C.M.] 103(16).

Nor does Petitioner's claim she has some "due process" constitutional right make it so. Petitioner claims "due process" requires she be afforded a hearing, and as an extension, provided counsel to represent her at this constitutionally required hearing. However, in so asserting, Petitioner relies upon *Goldberg v. Kelly*, 397 U.S. 254 (1970), which found Kelly had a due process right pursuant to the Fourteenth Amendment, because an entitlement, a <u>property interest</u>, was at stake as a result of a governmental decision. In order to prevail in a due process claim, appellant must show "(1) a cognizable <u>liberty</u> or <u>property interest</u>; (2) the deprivation of that interest by some form of state action; and

(3) that the procedures employed were constitutionally inadequate." *Kendall v. Balcerzak,* 650 F.3d 515, 528 (4th Cir.2011) (emphasis added). Petitioner can make no such showing here. Her interests do not implicate constitutional due process, and Petitioner has only those rights provided by the UCMJ and the Manual for Courts-Martial, which, as established above and by the real-party-in-interest and appellee, do not violate due process. *See Vazquez*, 72 M.J. at 19. Indeed, the only person who can claim a risk to due process is the real-party-in-interest, Airman Daniels. "Due process" simply does not afford Petitioner relief.

Conclusion

WHEREFORE, the Air Force Court of Criminal Appeals correctly found that it lacked jurisdiction to hear Petitioner's petition for a writ of mandamus. Even if this Court determined the Air Force Court erred regarding its jurisdictional limitation, this Court should affirm the military judge's determination Petitioner had no right to intervene in appellant's court martial.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Kastenburg,* Crim.App.Dkt.No. 2013-05, USCA Dkt. No. 13-5006/AF, was electronically filed with both the Court and Government Appellate Division on May 23, 2013.

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LRM, Airman First Class,
U.S. Air Force, Appellant

v.

Joshua E. KASTENBERG, Lieutenant Colonel,
U.S. Air Force, Military Judge, Appellee

and

Nicholas E. DANIELS,
Airman First Class, U.S. Air Force, Real Party in Interest

No. 13-5006
App. Misc. Dkt. No. 2013-05

United States Court of Appeals for the Armed Forces

Argued June 11, 2013

Decided July 18, 2013

BAKER, C.J., delivered the opinion of the Court, in which ERDMANN, J., and EFFRON, S.J., joined. STUCKY, J., filed a separate opinion, concurring in part and dissenting in part and in the result. RYAN, J., filed a dissenting opinion, in which STUCKY, J., joined as to Part A.

Counsel

For Appellant: Colonel Kenneth M. Theurer, (argued); Major Christopher J. Goewert, Major Matthew D. Talcott, and Major R. Davis Younts (on brief).

For Appellee: Major Ryan N. Hoback (argued).

For Real Party in Interest: Dwight H. Sullivan, Esq. (argued); Captain Christopher D. James and Captain Danko Princip (on brief).

Amici Curiae:

For the United States: Major Tyson D. Kindness (argued); Colonel Don M. Christensen and Gerald R. Bruce, Esq. (on brief).

For the Army Defense Appellate Division: Colonel Patricia A. Ham, Lieutenant Colonel Jonathan F. Potter, and Captain Matthew M. Jones.

For the Navy-Marine Corps Appellate Defense Division: Captain Paul C. LeBlanc, JAGC, USN, and Captain Jason R. Wareham, USMC.

For the National Crime Victim Law Institute: Margaret Garvin, Esq., Rebecca S. T. Khalil, Esq., and Sarah LeClair, Esq.

For the U.S. Marine Corps Defense Services Organization: Colonel John G. Baker, USMC.

For the Air Force Trial Defense Division: Colonel Donna Marie Verchio.

For Protect Our Defenders: Peter Coote, Esq.

Military Judge: Joshua E. Kastenberg

THIS OPINION IS SUBJECT TO REVISION BEFORE FINAL PUBLICATION.

Chief Judge BAKER delivered the opinion of the Court.

The Air Force Judge Advocate General (JAG) certified three issues for review by this Court:

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II. WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III. WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

BACKGROUND

On October 16, 2012, Airman First Class (A1C) Nicholas Daniels (Real Party in Interest) was charged with raping and sexually assaulting A1C LRM in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2006). Lieutenant Colonel (Lt Col) Joshua E. Kastenberg (Appellee) was detailed to the case as military judge. The Real Party in Interest was arraigned at Holloman Air Force Base, New Mexico, and elected trial by enlisted and officer members.

Captain (Capt) Seth Dilworth was appointed as special victims' counsel for LRM. In his formal notice of appearance, Capt Dilworth stated that LRM had "standing involving any issues arising under [Military Rules of Evidence (M.R.E.)] 412, 513, and 514 in which she is the patient or witness as the subject of

the motion." Capt Dilworth noted that his formal involvement in the court-martial would "be limited to asserting A1C [LRM]'s enumerated rights as a victim of crime under federal law and [M.R.E.] 412, 513, and 514." He requested that the court direct counsel to provide LRM with copies of related motions. Trial counsel and trial defense counsel did not object to LRM receiving copies of the motions, but trial defense counsel opposed Capt Dilworth's presence or participation at the evidentiary hearings. Before the arraignment hearing, LRM received copies of defense motions to admit evidence under M.R.E. 412 and 513.

Initially during the arraignment hearing, Capt Dilworth indicated that he did not intend to argue at any future M.R.E. 412 or 513 motions hearings. Later during the same hearing, Capt Dilworth argued that there may be instances where LRM's interests in the motions hearings were not aligned with the Government, in which case Capt Dilworth asked the court to reserve LRM's right to present an argument. The military judge treated this request as a "motion in fact."

In a judicial ruling, the military judge limited LRM's right to be heard to factual matters, finding that standing "denotes the right to present an argument of law before a court, which is fundamentally different than the opportunity to be heard." The military judge then found that LRM had no standing,

through counsel or otherwise, to motion the court for relief in the production of documents, and that Capt Dilworth could not argue evidentiary matters in LRM's interest. The military judge concluded that "the prospect of an accused having to face two attorneys representing two similar interests [is] sufficiently antithetical to courts-martial jurisprudence" and would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial."

LRM filed a motion to reconsider, asking for relief in the form of production and provision of documents, and that the military judge grant LRM "limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, [Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)], and the United States Constitution." The military judge denied the motion for reconsideration in full.

LRM filed a petition for extraordinary relief in the nature of a writ of mandamus and petition for stay of proceedings, but the CCA concluded that it lacked jurisdiction to review LRM's petition for extraordinary relief. After the United States Air Force Criminal Court of Appeals (CCA) denied LRM's motion for reconsideration en banc, the Air Force JAG certified three issues for review by this Court.

JURISDICTION

Jurisdiction is a question of law that this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

As a preliminary matter, this Court has statutory jurisdiction to review the decision of the CCA under Article 67, UCMJ, 10 U.S.C. § 867 (2006). Article 67(a)(2), UCMJ, provides that this Court shall review the record in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

In United States v. Curtin, this Court considered the definition of a "case" as used in Article 67(a)(2), UCMJ. 44 M.J. 439 (C.A.A.F. 1996), cited with approval in United States v. Dowty, 48 M.J. 102, 107 (C.A.A.F. 1998). In Curtin, the military judge ruled that trial counsel's subpoenas duces tecum for the financial statements of the accused's wife and her father were administrative, and that the appropriate United States district court was the proper forum for challenging the subpoenas. Id. at 440. The Air Force JAG filed a certificate for review of a CCA decision denying the government's petition for extraordinary relief in the form of a writ of mandamus. Id. This Court held that it had jurisdiction, and determined that the "definition of 'case' as used within that statute includes a

'final action' by an intermediate appellate court on a petition for extraordinary relief." Id. (citing United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981)).

Similarly, in this case the CCA took a final action on a petition for extraordinary relief when it denied LRM's writ-appeal petition. Thus, as in Curtin, this Court has jurisdiction over the certificate submitted by the JAG pursuant to Article 67(a)(2), UCMJ, as we would in the case of a writ-appeal.

Subject-Matter Jurisdiction

The CCA erred by holding that it lacked jurisdiction to hear LRM's petition for a writ of mandamus. The All Writs Act, 28 U.S.C. § 1651 (2006), and Article 66, UCMJ, 10 U.S.C. § 866 (2006), establish the CCA's jurisdiction. The All Writs Act grants the power to "all courts established by act of Congress to issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Extraordinary writs serve "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953). "[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act." United States v. Denedo, 556 U.S. 904, 911 (2009).

The All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction. Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999). Rather, the All Writs Act requires two determinations: (1) whether the requested writ is "in aid of" the court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotation marks omitted). In the context of military justice, "in aid of" includes cases where a petitioner seeks "to modify an action that was taken within the subject matter jurisdiction of the military justice system." Id. at 120. A writ petition may be "in aid of" a court's jurisdiction even on interlocutory matters where no finding or sentence has been entered in the court-martial. See, e.g., Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

To establish subject-matter jurisdiction, the harm alleged must have had "the potential to directly affect the findings and sentence." Ctr. for Constitutional Rights v. United States (CCR), 72 M.J. 126, 129 (C.A.A.F. 2013) (citing Hasan, 71 M.J. 416). There is no jurisdiction to "adjudicate what amounts to a civil action, maintained by persons who are strangers to the courts-martial, asking for relief . . . that has no bearing on any findings and sentence that may eventually be adjudged by the

court-martial." Id. The CCA's holding that the present case "does not directly involve a finding or sentence that was –– or potentially could be imposed –– in a court-martial proceeding," does not accurately reflect this analysis.

Under the appropriate analysis, LRM prevails. The petition invited the CCA to evaluate whether the military judge can limit the right to be heard under M.R.E. 412 and 513 by precluding LRM from presenting the basis for a claim of privilege or exclusion, with or without counsel, during an ongoing general court-martial. The military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence -- which will form the very foundation of a finding and sentence. Furthermore, unlike "strangers to the courts-martial," CCR, 72 M.J. at 129, LRM is the named victim in a court-martial seeking to protect the rights granted to her by the President in duly promulgated rules of evidence, namely to a claim of privilege under M.R.E. 513 and a right to a reasonable opportunity to be heard under M.R.E. 412(c)(2) and 513(e)(2). Indeed, this Court has reversed court-martial convictions based on erroneous M.R.E. 412 evidentiary rulings. See, e.g., United States v. Ellerbrock, 70 M.J. 314, 321 (C.A.A.F. 2011) (reversing rape conviction after finding that evidence of the

victim's prior extramarital affair was improperly excluded under M.R.E. 412). LRM is not seeking any civil or administrative relief. Cf. Goldsmith, 526 U.S. at 533 (challenging an administrative separation proceeding, rather than a court-martial). Rather, she is seeking her right to be heard pursuant to the M.R.E. Thus, the harm alleged has "the potential to directly affect the findings and sentence," and the CCA erred by holding that it lacked jurisdiction. See CCR, 72 M.J. at 129.

Standing

LRM's position as a nonparty to the courts-martial, see Rule for Courts-Martial (R.C.M.) 103(16), does not preclude standing. There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege. See, e.g., CCR, 72 M.J. 126 (assuming that CCR had trial level standing to make request); United States v. Wuterich, 67 M.J. 63, 66-69 (C.A.A.F. 2008) (assuming standing for CBS in part under R.C.M. 703); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for victim's mental health provider); United States v. Johnson, 53 M.J. 459, 461 (C.A.A.F. 2000) (standing for nonparty challenge to a subpoena duces tecum or a subpoena ad testificandum during an Article 32, UCMJ, 10 U.S.C. § 832 (2006), pretrial investigation); ABC, Inc. v. Powell, 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); Carlson v. Smith, 43 M.J. 401 (C.A.A.F 1995)

(summary disposition) (granting a writ of mandamus where the real party in interest did not join petitioners, but rather was added by this Court as a respondent).

Limited participant standing has also been recognized by the Supreme Court and other federal courts. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (standing created by First Amendment right); Church of Scientology v. United States, 506 U.S. 9, 11, 17 (1992) (standing created by attorney-client privilege). In particular, "[f]ederal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed." United States v. Hubbard, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980); see, e.g., United States v. Antar, 38 F.3d 1348, 1350 (3d Cir. 1994); In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1561 (11th Cir. 1989); Doe v. United States, 666 F.2d 43, 45 (4th Cir. 1981); Anthony v. United States, 667 F.2d 870, 872-73 (10th Cir. 1981); In re Smith, 656 F.2d 1101, 1102-05, 1107 (5th Cir. 1981); United States v. Briggs, 514 F.2d 794, 796, 799 (5th Cir. 1975).

Ripeness

Finally, this issue is ripe for review. The military judge's ruling limits LRM's right to be heard to factual

matters, preventing her from making legal arguments while invoking her legal privilege under M.R.E. 513.

Furthermore, while LRM's counsel initially indicated at the arraignment hearing that he did not intend to argue at a future motions hearing, noting that LRM had not received any documents, discovery, or court filings with respect to such hearings, counsel asked the military judge to reserve that right. The military judge treated this request as a "motion in fact." In the judicial ruling, the military judge specified whether counsel had standing to represent LRM during applicable hearings arising from the M.R.E. at trial as one of the issues before the court-martial, and ultimately denied the motion to grant standing. Accordingly, LRM interpreted the military judge's ruling as finding that she "does not have standing to be represented by counsel during applicable hearings arising from the military rules of evidence at trial." In the motion to reconsider, LRM asked for relief in the form of production and provision of documents, and that the military judge grant LRM "limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, CVRA, and the United States Constitution." The military judge denied the motion for reconsideration in full.

Thus, the issue of whether LRM has limited standing to be heard through counsel in hearings related to M.R.E. 412 and 513

comes to this Court in the form of a challenge by a limited participant to a concrete ruling by a military judge in an adversarial setting. See United States v. Chisholm, 59 M.J. 151, 153 (C.A.A.F. 2003) ("In the absence of a challenge by a party to a concrete ruling by a military judge in an adversarial setting, we conclude that consideration of Issue I under the circumstances of the present case would be premature."). The parties have argued, and the military judge has addressed, the relevant legal issues. The issue is ripe for review by this Court.

SUBSTANTIVE ISSUES

Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and the R.C.M., are questions of law reviewed de novo. United States v. Matthews, 68 M.J. 29, 35-36 (C.A.A.F. 2009); United States v. Lopez de Victoria, 66 M.J. 67, 73 (C.A.A.F. 2008).

The military judge erred by determining at the outset of the court-martial, during arraignment proceedings and before any M.R.E. 412 or 513 evidentiary hearings, that LRM would not have standing to be represented through counsel during applicable hearings arising from the M.R.E. The President has expressly stated the victim or patient has a right to a reasonable opportunity to attend and be heard in evidentiary hearings under M.R.E. 412 and 513. M.R.E. 412(c)(2) provides that, before

admitting evidence under the rule, the military judge must conduct a hearing where the "alleged victim must be afforded a reasonable opportunity to attend and be heard." See also M.R.E. 513(e)(2) ("The patient shall be afforded a reasonable opportunity to attend the hearing and be heard . . . ."). M.R.E. 513(a) also provides that a patient has the privilege to refuse to disclose confidential communications covered by the psychotherapist-patient privilege. A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. This is self-evident in the case of M.R.E. 513, the invocation of which necessarily includes a legal conclusion that a legal privilege applies.

Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness. Both M.R.E. 412 and 513 permit the parties to "call witnesses, including the alleged victim [or patient]." M.R.E. 412(c)(2); M.R.E. 513(e)(2). However, in addition to providing that the victim or patient may be called to testify as a witness on factual matters, the rules also grant the victim or patient the opportunity to "be heard." Id. Furthermore, every time that the M.R.E. and the R.C.M. use

the term "to be heard," it refers to occasions when the parties can provide argument through counsel to the military judge on a legal issue, rather than an occasion when a witness testifies. See, e.g., R.C.M. 806(d) Discussion; R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); M.R.E. 201(e).

This interpretation of a reasonable opportunity to be heard at a hearing is consistent with the case law of this Court and other federal courts. In Carlson, for example, this Court provided extraordinary relief to two sexual assault victims who had sought to prevent "unwarranted invasions of privacy" and to protect their rights under M.R.E. 412, Article 31, UCMJ, 10 U.S.C. § 831, and other privileges recognized by law. 43 M.J. 401. The Court ordered that the victims "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." Id. (emphasis added). While Carlson is a summary disposition, this Court "has profited from guidance offered in prior summary dispositions." United States v. Diaz, 40 M.J. 335, 339-40 (C.M.A. 1994); see also Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) (holding that "lower courts are bound by summary decisions by" the Supreme Court); United States v. Sanchez, 44 M.J. 174, 177 (C.A.A.F.

1996) (citing Carlson). Similarly, in United States v. Klemick, the Navy-Marine Corps CCA found that the military judge did not abuse his discretion in rulings on M.R.E. 513 matters. 65 M.J. 576, 581 (N-M. Ct. Crim. App. 2006). During the evidentiary hearing, the patient opposed trial counsel's motion "through counsel who entered an appearance in the court-martial on her behalf for this limited purpose," and the military judge considered the patient's brief and argument. Id. at 578.

Furthermore, while the military judge suggests that LRM's request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings. Although not precedent binding on this Court, in the United States Court of Appeals for the Fifth Circuit, for example, victims have exercised their right to be reasonably heard regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." In re Dean, 527 F.3d 391, 393 (5th Cir. 2008). The victims' "attorneys reiterated the victims' requests" and "supplemented their appearances at the hearing with substantial post-hearing submissions." Id.; see also Brandt v. Gooding, 636 F.3d 124, 136-37 (4th Cir. 2011) (motions from attorneys were "fully commensurate" with the victim's "right to be heard."). Similarly, in United States v. Saunders, at a pretrial Fed. R. Evid. 412(c)(1) hearing, "all counsel, including the alleged

victim's counsel, presented arguments." 736 F. Supp. 698, 700 (E.D. Va. 1990). In United States v. Stamper, the district court went further and, in a pretrial evidentiary hearing, allowed counsel for "all three parties," including the prosecution, defense, and victim's counsel, to examine witnesses, including the victim. 766 F. Supp. 1396, 1396 (W.D.N.C. 1991).

While M.R.E. 412(c)(2) or 513(e)(2) provides a "reasonable opportunity . . . [to] be heard," including potentially the opportunity to present facts and legal argument, and allows a victim or patient who is represented by counsel to be heard through counsel, this right is not absolute. A military judge has discretion under R.C.M. 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context. Furthermore, M.R.E. 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel, or any right to appeal an adverse evidentiary ruling. If counsel indicates at a M.R.E. 412 or 513 hearing that the victim or patient's interests are entirely aligned with those of trial counsel, the opportunity to be heard could reasonably be further curtailed.

Based on the foregoing discussion, the military judge's ruling in the present case runs counter to the M.R.E., and is in

error for three reasons. First, by prohibiting LRM from making legal arguments, the military judge improperly limited LRM's right to be heard on the basis for the claim of privilege or admissibility. M.R.E. 513(a) creates a privilege to refuse to disclose confidential communications, which necessarily involves a legal judgment of whether the privilege applies, as well at the opportunity for argument so that a patient may argue for or against the privilege. Neither M.R.E. 412 nor 513 preclude the victim or patient from arguing the law.

Second, the military judge's ruling, made during the arraignment hearing process and prior to any M.R.E. 412 or 513 proceedings, is a blanket prohibition precluding LRM from being heard in M.R.E. 412 or 513 proceedings through counsel without first determining whether it would be unreasonable under the circumstances. Instead, the military judge based his ruling on his flawed conclusion that LRM was precluded from making legal argument. While LRM's right to be heard through counsel is not absolute, LRM has a right to have the military judge exercise his discretion on the manner in which her argument is presented based on a correct view of the law.

Third, the military judge cast the question as a matter of judicial impartiality. It is not a matter of judicial partiality to allow a victim or a patient to be represented by counsel in the limited context of M.R.E. 412 or 513 before a

military judge, anymore than it is to allow a party to have a lawyer. The military judge's ruling was thus taken on an incorrect view of the law, and is in error.

REMEDY

As a threshold matter, the Government argues that, even though the Judge Advocate General has certified three issues to this Court, this Court is not authorized to act with respect to matters of law when the CCA has not acted with respect to the same matters of law. The relevant text of Article 67, UCMJ, states:

> (a) The Court of Appeals for the Armed Forces shall review the record in --
>
> . . . .
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review;
>
> . . . .
>
> (c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. <u>In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him</u>. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

Emphasis added. The first clause of Article 67(c), UCMJ, does not confine the second clause in the way the Government proposes. In United States v. Leak, for example, this Court considered that:

> One possible reading of the language in subsection (c) of the statute is that because the lower court did not affirm the finding with respect to Appellant's rape charge, or set it aside as incorrect in law, this Court is without authority to "act." Under this reading, this Court would be obliged to "review" the Judge Advocate General's certified question, but we would have no statutory authority to "act."

61 M.J. 234, 239 (C.A.A.F. 2005). The Court concluded that "Article 67 does not preclude review of questions of law certified by Judge Advocates General where the courts of criminal appeals have set aside a finding on the ground of factual insufficiency." Id. at 242. Similarly, in the present case, even though the CCA did not reach the substantive issues, this Court may still take action with respect to all of the certified issues, including whether this Court should issue a writ of mandamus.

Furthermore, prudential concerns, such as the impending court-martial start date, the parties' interest in the speedy resolution of these issues, and the JAG's certification of all three issues, counsel the Court to reach all the substantive issues and proceed to grant relief at this time, if appropriate. In addition, the military judge's ruling raises issues of law of

first impression which could apply in all M.R.E. 412 and M.R.E. 513 hearings. Absent any guidance from this Court and with no other meaningful way for these issues to reach appellate review, every military judge could interpret the scope and extent of a victim's rights differently, so that a victim or patient's rights vary from courtroom to courtroom. Under these circumstances, this Court should not decline to address substantive issues which are properly before it, and which present a novel legal question regarding the interpretation of the M.R.E. affecting an ongoing court-martial. As in Wuterich, "[i]n view of the pending court-martial proceedings, and because this case involves an issue of law that does not pertain to the unique factfinding powers of the Court of Criminal Appeals, we [should] review directly the decision of the military judge without remanding the case to the lower court." 67 M.J. at 70. "[N]either justice nor judicial economy would be served by delaying the [court-martial] pending remand to the Court of Criminal Appeals." Powell, 47 M.J. at 364.

However, while this Court may appropriately take action at this time, a writ of mandamus is not the appropriate remedy. At the lower court, LRM petitioned for a writ of mandamus directing the military judge "to provide an opportunity for [LRM] to be heard through counsel at hearings conducted pursuant to [M.R.E.] 412 and 513, and to receive any motions or accompanying papers

reasonably related to her rights as those may be implicated in hearings under [M.R.E.] 412 and 513." The military judge's ruling must be based on a correct view of the law. M.R.E. 412 and M.R.E. 513 create certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801, and the law does not dictate the particular outcome that LRM requests.

CONCLUSION

Certified questions I and II are answered in the affirmative. Certified question III is answered in the negative. The current record is returned to the Judge Advocate General of the Air Force for remand to the military judge for action not inconsistent with this opinion.

STUCKY, Judge (concurring in part and dissenting in part and in the result):

While I agree with the majority that we have subject matter jurisdiction in this case, I nonetheless agree with the discussion of standing in Part A of Judge Ryan's dissent. I would therefore dismiss the petition for lack of standing and would not reach either the second or the third certified issues.

RYAN, Judge, with whom Stucky, J., joins as to Part A (dissenting):

A.

Whether it is more irregular that the Judge Advocate General of the Air Force (TJAG) "certified" these issues or that the Court chooses to answer them is a close call, particularly in light of the Supreme Court's recent decision in Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1155 (2013) (holding that the respondents lacked standing "because they cannot demonstrate that the future injury they purportedly fear is certainly impending," and, therefore, cannot establish a sufficient injury-in-fact), and the plain language of Article 67(a)(2) and Article 69, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 867(a)(2), 869 (2006).

The putative victim in this pending court-martial, LRM, through her attorney, asked the military judge to order that she be provided copies of motions related to the admission of evidence under Military Rules of Evidence (M.R.E.) 412, 513, and 514, and that the court reserve to her attorney the right to argue on those motions, although, at that point, her attorney admitted that he "[did] not intend to do so." Trial and defense counsel did not object to LRM receiving informational copies of any motions filed

pursuant to those rules. While the military judge found that LRM lacked standing to motion the court for production of documents or be heard through counsel, the Government avers that trial counsel provided LRM, through her attorney, with (1) copies of defense motions to admit evidence pursuant to M.R.E. 412 and 513, (2) the Government's response to the defense motion to admit evidence under M.R.E. 412, and (3) other trial-related documents.[1]

Based on the foregoing, at this point in the proceedings, LRM -- having no intention to speak or legal arguments to raise -- has not suffered any actual harm. She alleges no "certainly impending" harm, Clapper, 133 S. Ct. at 1155, and does not allege any divergence between her interests and those of the Government, or that such a divergence in interests is likely, let alone certain, to occur at a later stage in the proceedings. The absence of any actual or imminent injury to LRM, a nonparty to the pending court-martial below, makes TJAG's unprecedented use of his certification power to certify interlocutory issues to this Court all the more perplexing.

[1] In the Government's Response to Judicial Order –- Special Victims' Counsel, the Government avers that it did not provide LRM with a copy of its response to defense motion to admit evidence under M.R.E. 513.

While we are assuredly not an Article III court, we have, up until now, understood ourselves to be bound by the requirement that we act only when deciding a "case" or "controversy." See U.S. Const. art. III, §2; United States v. Johnson, 53 M.J. 459, 462 (C.A.A.F. 2000) (holding that the appellant lacked standing to object to an unlawful subpoena issued to secure the attendance of his wife as a witness at an Article 32, UCMJ, 10 U.S.C. § 832 (2006), hearing where the appellant "was neither deprived of a right nor hindered in presenting his case"); United States v. Jones, 52 M.J. 60, 63-64 (C.A.A.F. 1999) (holding that the appellant lacked standing to challenge the violation of a witness's Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2006), or Fifth Amendment rights and explaining that "[t]he requirement is designed to allow a moving party with a personal stake in the outcome to enforce his or her rights" (quotation marks and citations omitted)). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quotation marks and citations omitted). And paramount to enforcing that jurisdictional threshold is

the requirement that, inter alia, a party have standing. See Raines v. Byrd, 521 U.S. 811, 818 (1997).

Integral to standing is a showing of injury-in-fact; "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" Clapper, 133 S. Ct. at 1147 (citing Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2752 (2010)). This requirement ensures that federal courts resolve only actual disputes where people are being harmed in fact, leaving hypothetical issues of law to be resolved where they should be, by the coordinate executive and legislative branches of government. See Hollingsworth v. Perry, 133 S. Ct. 2652, __ (2013), slip op. at 6 ("The doctrine of standing . . . 'serves to prevent the judicial process from being used to usurp the powers of the political branches.'" (quoting Clapper, 133 S. Ct. at 1146)); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea -- the idea of separation of powers.").

The issues before us are not justiciable because LRM has not been presently harmed and any future injury "is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" Clapper, 133 S. Ct. at 1143. Per the representations of

both parties, LRM either has or will be permitted to have the documents she requested, and her attorney stated that he does not intend to speak on LRM's behalf, as LRM's interests are aligned with the Government's. Which begs the question: at this point, what, if any, injury would be redressed by a favorable decision from this Court? On these facts, I can see no injury to be remedied, rendering any decision from this Court purely advisory and outside the "judicial Power" of Article III federal courts. See U.S. Const. art. III, §2. On this ground alone the certification should be dismissed.

B.

Additional grounds exist for dismissal of this certification. By acting on the present certificate, the majority approves a road map for evading the ordinary limitations on our review of interlocutory issues. LRM, a nonparty to the litigation who has not suffered any actual injury or even a reasonable likelihood of future injury, had interlocutory issues involving hypothetical future harm to her rights certified by TJAG to this Court via Article 67(a)(2), UCMJ. This unprecedented use of Article 67(a)(2) was made despite the fact that to have its interlocutory issues considered, the Government would have to meet the stringent requirements of Article 62, UCMJ, 10 U.S.C. § 862

(2006), and an accused would have to satisfy both the jurisdictional requirements of Article 67, UCMJ, in order to invoke the power of the All Writs Act, 28 U.S.C. § 1651(a) (2006) (allowing this Court to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction"), and the extraordinary burdens needed to meet the criteria for an extraordinary writ. See, e.g., Hasan v. Gross, 71 M.J. 416, 416-17 (C.A.A.F. 2012) ("Applying the heightened standard required for mandamus relief, [and] conclud[ing] that based on a combination of factors, a reasonable person, knowing all the relevant facts, would harbor doubts about the military judge's impartiality.").

Further exacerbating the impropriety of the situation is that the instant certification was made in the early stages of a criminal case; TJAG's actions having ground the accused's proceedings to a halt ostensibly to determine the contours of a right of a witness who has identified no injury-in-fact and no divergence between her interests and those of the Government. Considering that "[t]he exercise of prosecutorial discretion is a prerogative of the executive branch of government," United States v. O'Neill, 437 F.3d 654, 660 (7th Cir. 2006) (citing Wayte v. United States, 470 U.S. 598, 607 (1985)), and the ordinary state

of affairs in our adversarial system where the government, not TJAG, is the accused's adversary, TJAG's decision to certify the question whether this nonparty should be allowed to effectively intervene in this criminal proceeding is all the more remarkable.

Nor is the certification proper under any provision of the UCMJ. As relevant to this issue, Article 69(d), UCMJ, provides that a Court of Criminal Appeals (CCA) may review (1) "any court-martial case which (A) is subject to action by [TJAG] under this section, and (B) is sent to the [CCA] by order of [TJAG]; and, (2) any action taken by [TJAG] under this section in such case." Article 69(a)-(c), UCMJ, provides the circumstances in which TJAG may modify or set aside the findings and sentence in a court-martial case. Nowhere do these sections provide TJAG with authority to intermeddle on an interlocutory issue that is not case dispositive, let alone the authority to certify an interlocutory issue to this Court.

Yet despite the lack of statutory authority to intrude at this juncture of the case, TJAG "certified" the issues before this Court pursuant to Article 67(a)(2), UCMJ, which presents yet another problem. Article 67(a)(2), UCMJ, provides that "[this Court] shall review the record in all cases reviewed by a [CCA] which [TJAG] orders sent to [this

Court] for review." In reviewing such "cases," this Court may "act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the [CCA]." Article 67(c), UCMJ; see also Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 128-30 (C.A.A.F. 2013).

But there have been no findings or sentence entered here, and in requesting review of this particular interlocutory ruling, TJAG has not properly certified a "case" under Article 67(a)(2), UCMJ. In United States v. Redding, 11 M.J. 100, 102-04 (C.M.A. 1981), the Court clearly and fully considered whether TJAG had properly certified a "case" when he requested review of a trial judge's ruling "which rejected a command determination that a military lawyer requested by the accused . . . was unavailable" and where review of that ruling had been initiated directly in the Court of Military Review by a petition for extraordinary relief after the trial judge effectively dismissed the case for failure to make the requested military lawyer available.

The Court directly addressed whether the proceedings before it constituted a "case," and, therefore, were properly certifiable, and explicitly distinguished the military judge's ruling from "an intermediate or

interlocutory order" solely because "[the ruling] end[ed] court-martial proceedings on the charges; it is, therefore, not an intermediate or interlocutory order but a final decree." Id. at 104. The Court reasoned that because "the posture of the proceedings . . . was tantamount to a final disposition of the case," TJAG had properly certified a "case" within the meaning of Article 67(b)(2), UCMJ (now Article 67(a)(2), UCMJ). Id. (internal quotation marks and citation omitted).

Given the plain language of Articles 67 and 69, UCMJ, Redding at best expresses the outermost limits of TJAG's certification power, allowing him to certify an interlocutory issue only where it is "tantamount to a final disposition" of a case. Id. The majority, however, ignores both the plain statutory language and this precedent and instead, in cursory fashion, relies on United States v. Curtin, 44 M.J. 439 (C.A.A.F. 1996), a case which cited Redding to hold, without discussion, and contrary to both the plain language of Article 67, UCMJ, itself and the actual holding in Redding, that a "case" within Article 67(a)(2) "includes a 'final action' by an intermediate appellate court on a petition for extraordinary relief," quoting Redding, 11 M.J. at 104. See Curtin, 44 M.J. at 440; LRM v. Kastenberg, __ M.J. __, __ (6-7) (C.A.A.F.

2013). Redding narrowly held that "proceedings of the kind in issue are certifiable" and distinguished between action by a military judge that amounts to a "final decree," which could be certified because "[s]uch action ends court-martial proceedings on the charges," from a ruling that is "interlocutory in nature," which could not be certified. Redding, 11 M.J. at 104 (internal quotation marks and citation omitted).[2]

Where, as here, an interlocutory ruling is not "tantamount to a final disposition of the case," id., the proper channels of review of the issue include (1) review in the ordinary course of appellate review by the CCA under Article 66, UCMJ, (2) an appeal by the Government subject

[2] Moreover, in responding to the Government's argument that "this Court is not authorized to act with respect to matters of law when the CCA has not acted with respect to the same matters of law," LRM, __ M.J. at __ (19), the majority misapplies United States v. Leak, 61 M.J. 234 (C.A.A.F. 2005), in holding that, here, as in Leak, this Court may act on the substantive issues "even though the CCA did not reach [them]." LRM, __ M.J. at __ (20). Leak, however, more narrowly held that this Court could review "a lower court's determination of factual insufficiency for application of correct legal principles," Leak, 61 M.J. at 241, and the majority's passing extension of that holding to the present case is unwarranted. See United States v. Nerad, 69 M.J. 138, 147 (C.A.A.F. 2010) ("[T]he power to review a case under Article 67(a)(2), UCMJ, includes the power to order remedial proceedings . . . to ensure that the lower court reviews the findings and sentence approved by the convening authority in a manner consistent with a 'correct view of the law.'" (quoting Leak, 61 M.J. at 242)).

to the limitations of Article 62, UCMJ, or (3) a petition for extraordinary relief from the interlocutory ruling requested by a person with standing to challenge the ruling. See Article 66, UCMJ; Article 62, UCMJ; 28 U.S.C. § 1651(a).

It is entirely unclear why this Court would adopt a more expansive interpretation of "case" in this context, contrary to the plain language of the statute and unsupported by legislative history. The Supreme Court, in those limited instances where its jurisdiction is mandatory, see, e.g., 15 U.S.C. § 29 (particular class of civil antitrust cases), has been most exacting in requiring that the case is actually one it must decide. See Heckler v. Edwards, 465 U.S. 870, 876 (1984) (interpreting 28 U.S.C. § 1252 (repealed 1988), to provide mandatory jurisdiction in the Supreme Court only where "the holding of federal statutory unconstitutionality is in issue"); Palmore v. United States, 411 U.S. 389, 395-96 (1973) (holding that an appeal as of right would not lie to the Supreme Court under 28 U.S.C. § 1257 (amended 1988), in the context of a District of Columbia court's upholding a local statute against constitutional attack, and noting that "[j]urisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress

has expressed its wishes; and we are particularly prone to accord strict construction of statutes authorizing appeals to this Court") (internal quotation marks and citations omitted).

What the instant certification amounts to is an improper attempt by TJAG to shortcut proper procedure without statutory authority to do so at this juncture and force this Court to review an interlocutory ruling that (1) does not come before us in the form of a petition for extraordinary relief, (2) is neither case dispositive nor an adjudged finding or sentence, and (3) does not involve an injury-in-fact to anyone (other than perhaps the accused's right to a speedy trial). This is not an effort that should be rewarded. Article 67(a)(2), UCMJ, which requires us to decide certified issues in "cases," should be strictly construed to require just that, and all interlocutory routes to this Court should require parties with standing and issues that qualify for review under either Article 62, UCMJ, or the All Writs Act and Article 67, UCMJ. By presently certifying issues pursuant to Article 67(a)(2), UCMJ, TJAG circumvented (1) the specific requirements for a Government appeal under Article 62, UCMJ; (2) the heightened scrutiny required for an extraordinary writ by either LRM or the accused; and (3)

this Court's discretion over whether to grant review of this issue if, in the future, LRM suffers or is reasonably certain to suffer injury-in-fact and seeks a writ appeal.

TJAG may employ both congressional and executive routes to answer interlocutory questions definitively where his curiosity cannot await resolution of a particular case and where those claiming a right have no injury-in-fact such that they could seek a writ themselves. Permitting certification of interlocutory issues that are neither justiciable nor case dispositive in any sense distorts the limited role of both TJAG and this Court within the military justice system. For these additional reasons, I would dismiss the certification as improper, and I respectfully dissent.

THE JUDGE ADVOCATE GENERAL'S SCHOOL

SPECIAL VICTIMS' COUNSEL COURSE 13-A

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

MEMORANDUM FOR SPECIAL VICTIMS' COUNSEL COURSE (SVCC) 13A ATTENDEES

FROM: The Judge Advocate General's School

SUBJECT: SVCC Narrative Schedule, 10-12 December 2012

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

Prior to the beginning of the course, please familiarize yourselves with: Article 120 UCMJ, (M.C.M. 2012), M.R.E. 412, M.R.E. 513, M.R.E. 514, Air Force Instruction 51-201 Chapter Seven, and Air Force Instruction 36-6001. This will ensure that all students are better prepared to discuss the relevant topics and ask informed questions.

Monday, 10 December 2012

0730-0800 **WELCOME REMARKS AND INTRODUCTION**
Colonel Kenneth Theurer, Commandant, JAG School; Major Christopher Goewert, Course Director, Instructor, Military Justice Division, JAG School

0800-0850 **LECTURE – SPECIAL VICTIMS' COUNSEL (SVC) OVERVIEW AND CHARTER**
Instructor: Colonel Marlesa Scott, Chief, Community Legal Services Division, AFLOA/JACA; Mr. James Russell, Associate Chief, AFLOA/JAJM, Joint Base Andrews, MD

0850-0900 **BREAK**

0900-0950 **LECTURE – VICTIM INTERACTION WITH THE MILTARY JUSTICE PROCESS**
Instructors: Maj Richard D. Younts, Chief, Military Justice Division, JAG School; Maj Matthew Talcott, Instructor, Military Justice Division, JAG School

0950-1000 **BREAK**

1000-1100 **LECTURE – PROFESSIONAL RESPONSIBILITY AND THE SVC**
Instructor: Lt Col Joel England, Air Staff Counsel, AF/JAA-PR, Joint Base Andrews, MD

1100-1110	**BREAK**
1110-1200	**LECTURE – SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM** Instructor: Ms. Deborah Allen, Chief, HQ ACC SAPR Program Manager, Langley AFB VA
1200-1300	**LUNCH**
1300-1350	**LECTURE – VICTIM WITNESS ASSISTANCE PROGRAM** Instructor: Capt Allison Devito, AFLOA/JAJM, Joint Base Andrews, MD
1350-1400	**BREAK**
1400-1450	**LECTURE – OSI VICTIM INTERVIEWS & COOPERATION WITH LAW ENFORCEMENT** Instructor: Mr. Mark Walker, AFOSI, Special Agent, Investigations Operations Consultant, 2nd Field Investigations Squadron, Joint Base Andrews, MD
1450-1500	**BREAK**
1500-1640	**DOCUMENTARY, *INVISIBLE WAR***
1640-1650	**BREAK**
1650-1720	**DOCUMENTARY GUIDED DISCUSSION** Instructor: Mr. Russell
1820-2000	**ICEBREAKER (OPTIONAL)** **LA ZONA ROSA**

Tuesday, 11 December 2012

0730-0820	**LECTURE – ARTICLE 120 FOR THE SVC** Instructor: Maj Jennifer Holmes, Senior Trial Counsel, Special Victims Unit, AFLOA/JAJG, Joint Base Andrews, MD
0820-0830	**BREAK**
0830-0930	**LECTURE – MRE 412 IN APPLICATION** Instructor: Maj Matthew Talcott
0930-0940	**BREAK**

0940-1030	**LECTURE – REPRESENTING AND COORDINATING WITH THE AREA DEFENSE COUNSEL FOR VICTIMS FACING DISCIPLINARY ACTION** Instructor: Colonel Donna M. Verchio, Chief, AFLOA/JAJD, Joint Base Andrews, MD
1030-1040	**BREAK**
1040-1130	**LECTURE – REPRESENTING AND ADVOCATING FOR VICTIMS OF SEXUAL OFFENSES** Instructor: Ms. Meg Garvin Executive Director & Clinical Professor of Law, National Crime Victim Law Institute, Lewis and Clark Law School, Portland, OR
1130-1140	**BREAK**
1140-1230	**LECTURE – VICTIMS' RIGHTS UNDER APPLICABLE FEDERAL LAW** Instructor: Ms. Meg Garvin
1220-1330	**LUNCH**
1330-1520	**LECTURE – UNDERSTANDING THE PSYCHOLOGICAL CONDITIONS OF VICTIMS OF SEXUAL ASSAULT FROM A LEGAL PRACTIONER'S PERSPECTIVE** Instructor: Ms. Meg Garvin
1520-1530	**BREAK**
1530-1620	**LECTURE – THE INTERPLAY BETWEEN VICTIMS AND ADVOCATES IN THE COURT ROOM** Instructor: Colonel Don Christensen, Chief, AFLOA/JAJG, Joint Base Andrews, MD
1630-1640	**BREAK**
1640-1730	**LECTURE – SPECIAL VICTIMS' COUNSEL IN PRACTICE** Instructor: JACA/JAJM

Wednesday, 12 December 2012

0730-0810	**LECTURE – THE ROLE OF THE SPECIAL VICTIMS' COUNSEL** Speaker: Lieutenant General Richard C. Harding, The Judge Advocate General
0810-0820	**BREAK**

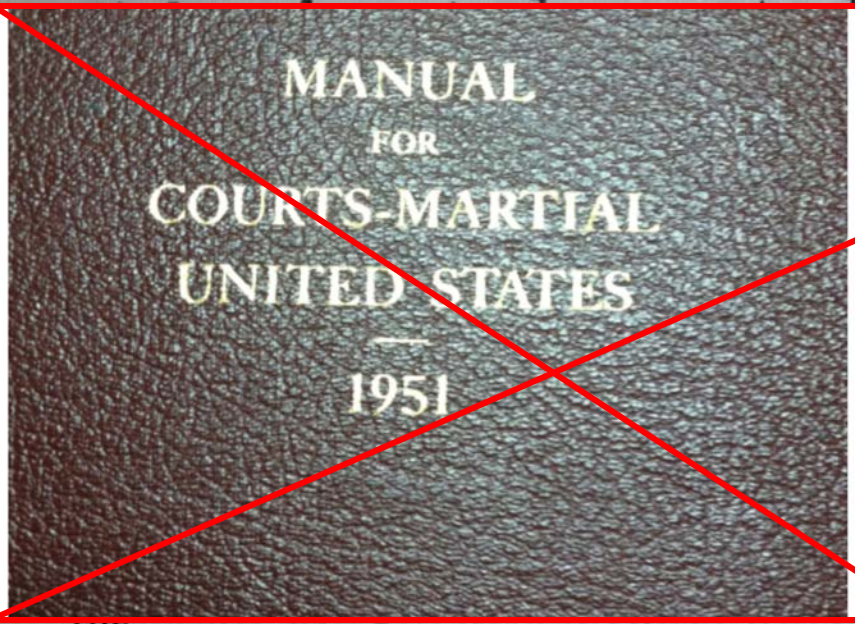
0820-0910	**MRE 513 & 514 IN APPLICATION** Instructor: Maj Christopher Goewert
0910-0920	**BREAK**
0920-1000	**LECTURE – ACCESS TO INFORMATION HIPAA, PRIVACY ACT, FOIA, ETC.** Instructor: Capt Satura Gabriel, Instructor, Civil Law Division, JAG School
1000-1010	**BREAK**
1010-1100	**LECTURE – THE AIR FORCE FAMILY ADVOCACY PROGRAM & SUICIDE PREVENTION** Instructor: Capt John C. Noah, Director of Psychological Health, 42d Medical Group, Mental Health Clinic, Maxwell AFB, AL
1100-1200	**WORKING LUNCH – ROUND TABLE DISCUSSION** Instructors: JACA/JAJM
1200-1600	**SEMINAR – EXERCISES IN INTERFACING WITH AND ADVISING VICTIM-CLIENTS** Instructors: Various AFJAGS, JAJG, JAJM Seminar rooms as assigned
1600-1630	**END OF COURSE CRITIQUES** Large Auditorium

KENNETH M. THEURER, Colonel, USAF
Commandant

MRE 412

Maj Matt Talcott

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."



the force involved in the act of penetration will suffice if there is no consent. Any penetration, however slight, is sufficient to complete the offense (Art. 120c).

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be

“I don’t remember guiding him?”

The procedure

The rule “generally”

The three exceptions

Constitutionally required

Some brief practical considerations

The Procedure

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

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(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

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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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

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

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

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

fense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

The Rule

vant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

havior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged of-

fense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer rele-

Rule 413. Evidence of similar crimes in sexual assault cases

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(b) In a court-martial in which the Government in-

(b) *Exceptions.*

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

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

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

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

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

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

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(b) In a court-martial in which the Government in-

The THREE Exceptions

Exception A – Source of injury, semen, physical evidence

Exception B – Conduct w/ the Accused to show consent

Exception C – Constitutionally Required

(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 al-leged victim's privacy,~~ such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

United States v. Gaddis, 70 M.J. 248, 253 (CAAF 2011)

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(b) In a court-martial in which the Government in-

"Evidence must be admitted within the ambit of MRE **412(b)(1)(C)** when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." United States v. Ellerbrock, 70 M.J. 314, 318 (CAAF 2011).

Those dangers include "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."

Material is a multi-factored test looking at "the importance of the issue in relation to the other evidence in the case" & "the extent to which the issue is in dispute"

Relevant means MRE 401.

United States v. Gaddis, 70 M.J. 248, 253 (CAAF 2011)(overrules U.S. v. Banker, 60 M.J. 216 (CAAF 2004))

D: Rumors in emails that Victim sexually active
D: Victim's mom confronts Victim and requests medical exam
D: Victim fabricates rape allegations
J: You can cross on confrontation of email & threat of medical exam, BUT you cannot reference sex, sex rumors, or contents of emails. You can argue reasonable inferences.

"once the defendant has been allowed to expose a witness's motivation to testify, it is a peripheral concern to the Sixth Amendment how much opportunity defense counsel gets"

Military Judge specifies

leged 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

wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412. Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in

the accused to prove consent or by the prosecution; and

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

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

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(b) In a court-martial in which the Government in-

Why does the defense need to ask about “sex”?

Avoid 412 traps (1) bragging Dorm studs & (2) overly prude victims

Does my client know how to avoid opening the door?

Is there “hidden” 412 evidence? (kisses, butt grabs, clothing, sex jokes, etc.)

Is the evidence otherwise admissible?

Can my client “close the door?”

Why did you testify that the intimacy with your wife is worse now?

Questions

Victim Interaction with the Military Justice Process

Maj Davis Younts
Maj Matt Talcott

“I am actually starting to learn about why certain things happened in my case”

- SVC’s Authority
- Initial meeting
- Categories of Services Provided
- Investigation
- Trial
- SVCs and MDCs

“A SVC’s primary responsibility is to his or her client. Constrained only by ethical limits, SVCs are authorized by law to enter into attorney-client relationships and to oppose the government of the United States as appropriate…without regard to how their actions might otherwise affect the Air Force as an institution.”

Air Force Special Victim’s Charter
Fundamental Principle #1

“An SVC would be obligated to zealously advocate for their clients, building and sustaining resilience among sexual assault victims by helping victims to understand the investigatory and military justice process and advocating for the victim to command or the court when necessary.”

Objective 2
Special Victim’s Counsel Rules of Practice and Procedure

“SVC may advocate a victim’s interest to any actor in the military justice process, including commanders, convening authorities, the SJA, the Accused’s MDC, and to the extent authorized by the MCM, military judges.”

Rule 6.1
Special Victim’s Counsel Rules of Practice and Procedure

Rule 6. SCOPE OF REPRESENTATION – ADVOCACY TO MILITARY JUSTICE ACTORS AND AIR FORCE AND DEPARTMENT OF DEFENSE AGENCIES

The OSD/GC memo states that 10 U.S.C. §§ 1044 and 1565b "authorize, and certainly do not preclude, legal assistance to a victim of a sexual assault in criminal contexts, including attending interviews of the victim and interfacing with military prosecutors, defense counsel, and investigators." The memo clearly envisions that SVC may represent sexual assault victims throughout the military justice process and advocate their interests to all actors within the system.

The SVC program does not increase a victim's standing in court-martial hearings and other military justice proceedings beyond the standing victims are currently afforded under existing law and rules (e.g., evidentiary hearings under MREs 412, 513, and 514). While MREs 412, 513 and 514 do not contemplate SVC, the MREs do allow for victim to "be heard." For the purposes of these three MREs and future MREs or RCMs giving victims the right to be heard in military justice, SVCs or civilian victims' counsel may be allowed to speak on their clients' behalf.

Trial counsel (TC) and the accused's MDC need to obtain consent from SVC prior to

The SVC program does not increase a victim's standing in court-martial hearings and other military justice proceedings beyond the standing victims are currently afforded under existing law and rules (e.g., evidentiary hearings under MREs 412, 513, and 514). The SVC program

commanders, convening authorities, the SJA, the accused's MDC, and, to the extent authorized by the MCM, military judges. This includes matters in which the government is required to consult with the victim under federal law and areas delineated in the SVC Charter.

(a) *Victims' Right to Consultation.* IAW AFI 51-201, para. 7.12.12, the government will consult with victims and obtain their views concerning:

i. Decisions not to prefer charges
ii. Dismissal of charges
iii. Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement
iv. Pretrial agreement negotiations, including PTA terms
v. Plea negotiations
vi. Discharge or resignation in lieu of trial by court-martial
vii. Scheduling of judicial proceedings where the victim is required or entitled to attend.

(b) *Victims' Right to Notification of all Court-Martial Proceedings.* IAW AFI 51-201, para. 7.12.8, the government will provide the victim with the earliest possible notice of:

i. The status of the investigation of the crime, to the extent it will not interfere with the investigation and is appropriate

This document contains internal matters that are deliberative in nature and/or are part of the agency decision-making process, both of which are protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

The SVC program does not increase a victim's standing in court-martial hearings and other military justice proceedings.

ii. The accused's pretrial status and any subsequent change in that status, including

Rule 6.2 ***Serve Representation Letter on Trial Counsel,Defense Counsel, AFOSI, Security Forces, and the SARC.*** Once an attorney-client relationship is formed, SVCs will serve trial counsel,defense counsel, AFOSI, Security Forces Office of Investigations, and the SARC with a copy of the representation letter.

TC, which TC will consider when scheduling Article 32 hearings, docketing courts-martial, and other military justice proceedings where the victim's presence is required.

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Rule 6.3 ***SVC Attendance at Interviews.*** SVCs are permitted to attend interviews with investigators, trial counsel, and defense counsel. At all interviews, SVCs should ensure that the interviewer has an additional party present to reduce the likelihood that the SVC would be called later as a witness.

Rule 6.4 ***Standing under the UCMJ.***

Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under RCM 103 and do not have the same entitlements as litigation parties under the UCMJ.

(a) *UCMJ Proceedings.* MREs 412, 513, and 514 afford victims a reasonable opportunity to attend and be heard. SVCs may represent victims in these and other UCMJ proceedings where victims are afforded standing.

Rule 6.5 ***Advocacy to Air Force and Department of Defense Agencies.*** SVCs may advocate a victim's interests to agencies and offices within the Air Force and Department of Defense where there is a nexus to the client's status as a victim, consistent with the SVC Charter.

Rule 6.6 ***SVC Notification to Third Parties.*** SVCs will ensure that third parties understand that the victim is their client, and not the Air Force.

Rule 6.7 ***Access to Information.*** SVC have a right to records which is no greater than their client's rights. SVCs should consult with victims and advise them that other information may be obtained with the victim's consent that may assist the SVC in representing the victim. Victim's right to notifications of other information is discussed above in Rule 6.1(b)

This document contains internal matters that are deliberative in nature and/or are part of the agency decision-making process, both of which are protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

Initial meeting

Categories of Services Provided

a. **Advocacy to Military Justice Actors and Air Force and Department of Defense Agencies – Client's Status is Victim**

Civil Legal Matters	AFI 51-504, para. 1.4.16 DOD/GC Memo, "Legal Assistance to Victims of Sexual Assault," 9 Nov 12
General and Special Courts-Martial	UCMJ
Article 32 Pretrial Investigations	Article 32, UCMJ
Pretrial Confinement Hearings	RCM 305
Summary Courts-Martial	AFI 51-201 RCM 1301
Depositions	RCM 702
Courts of Inquiry	Article 135, UCMJ AFI 51-201
Post Trial – Matters Submitted to the Convening Authority	RCM 1107
Clemency and Parole Boards	DoDI 1325.7
Investigations	Includes all investigations, inquiries, etc., in which the client is a victim
Article 138, UCMJ	AFI 51-904 (Note: This AFI does not provide a right to military counsel, but assistance shall be provided on a time-available basis)
Notaries and Administrative Oaths	AFI 51-504

Air Force Special Victim's Charter, 2.a.

Rule 6.3 *SVC Attendance at Interviews.* SVCs are permitted to attend interviews with investigators, trial counsel, and defense counsel. At all interviews, SVCs should ensure that the interviewer has an additional party present to reduce the likelihood that the SVC would be called later as a witness.

Investigation

- Wh
- I
- Wh
- Is
- My
- OS

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(c) *Communication with Trial Counsel.* SVC will communicate his or her schedule to TC, which TC will consider when scheduling Article 32 hearings, docketing courts-martial, and other military justice proceedings where the victim's presence is required.

Rule 6.2 *Serve Representation Letter on Trial Counsel, Defense Counsel, AFOSI, Security Forces, and the SARC.* Once an attorney-client relationship is formed, SVCs will serve trial counsel, defense counsel, AFOSI, Security Forces Office of Investigations, and the SARC with a copy of the representation letter.

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Rule 6.4 *Standing under the UCMJ.*

Victims, whether represented by SVC or civilian counsel, are not parties to a court-martial under RCM 103 and do not have the same entitlements as litigation parties under the UCMJ.

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Victims’ Rights to Consultation from Government

- Decision to prefer
- Decision to dismiss charges
- Decisions regarding pretrial confinement
- Decisions regarding PTAs including terms
- Plea negotiations
- Decisions regarding RILOs & Chapter 4s
- Decisions regarding scheduling
  (must also consider the SVC’s schedule)

Victims’ Rights to Notification from Government

- Status of investigation
- The Accused’s pretrial status
- Preferral or Referral or a decision to stop
- A pretrial confinement hearing
- Scheduling of trial or hearings
- Acceptance of plea or findings
- Sentence imposed and confinement dates

“Do I get my own attorney for this before I go to jail?”

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(a) *UCMJ Proceedings*. MREs 412, 513, and 514 afford victims a reasonable opportunity to attend and be heard. SVCs may represent victims in these and other UCMJ proceedings where victims are afforded standing.

Trial

MRE 303?
MRE 504?
MRE 615?
Victim's Rights and Restitution Act?
RCM 701,702,703?
RCM 806?

copy of the representation letter.

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iii. Preferral and ref
iv. A pretrial confi
v. Notification of t
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vi. The acceptance
vii. The sentence im
for release from

(c) *Communication wi*
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The Mr. Plude Rule

SVCs and MDCs

Special Victim's Counsel Rules of Practice and Procedure

Rule 4.2
Referral of Victim to Military Defense Counsel. ***(Yes)***

Rule 4.3
SVCs May Support MDC for Collateral Misconduct. ***(Yes)***

Rule 4.4
SVC Oversight for Collateral Misconduct. ***(JAJD)***

“I am just too stressed to go to work today”

Questions

Recognizing Airmen in Distress

Capt John Noah
42 MDOS/SGOW

12 December 2012

Reinforcement

	Positive	Negative
Internal	Adding something desirable (“To feel something, even if it is pain”)	Reducing tension or negative affect (“To stop bad feelings”)
External	Gaining something from others (“To get attention or let others know how I feel”)	Escape interpersonal task demands (“To avoid punishment from others or avoid doing something undesirable”)

Common Terms: Be Familiar

- Suicide
- Suicide Attempt with injury
- Suicide attempt without injury
- Suicide threat
- Suicidal ideation
- Morbid ideation

Static variables: Baseline Risk

- Predispositions
- Male
- Same sex orientation
- Recent discharge from inpatient unit
- Family hx of suicide
- Legal troubles
- History of physical, emotional, or sexual abuse
- Previous suicide attempts
- Impulsivity

Questions to Ask Self:

- Why do people die by suicide?
- What are your spiritual or moral beliefs about suicide?
- What have you learned about suicide during your life?
- What type of person kills themselves?
- Who do you know that has died by suicide ?

Warning Signs

- Anxious or relieved
- Withdrawn or impulsive
- Eating too much or eating too little
- Lack of emotion or extreme anger/depression/guilt
- Writing a will

Common Reactions

- Fear
  - Helplessness: “I can’t do anything to help”
  - Hopelessness: “Nothing I do matters”
- Anxiety
  - Over-protectiveness: Reduce autonomy
  - Under-protectiveness: Casual avoidance
- Anger
  - Lack of compassion: Inability to care
  - Criticism: Blaming

Managing Your Reactions

- **Accept** we will have emotional reactions to the problems our Airmen bring to us
- Take some time to **explore** our beliefs about the issues we will commonly face
- Keep in mind it is not **our** problem or perspective that matters, but the Airman's
- **Recognize** you **do not have to agree** with an Airman's beliefs, perspectives or behavior in order to help them

Reducing Airmen's Anxiety

- **Be direct**
  - "Are you thinking about suicide?"
  - "Do you know how you might do it?"
- Notice hesitancy and **body language**
  - "It looks like this is difficult to talk about."
- Do not accept the **first "no"**
  - Ask in slightly different ways
- Remain **relaxed** and **unhurried**
  - "I know this can be tough, so take your time."

Helping Agencies

- Mental Health Clinic
  - LPSP
- Chaplain
- Primary Care
- Military Onesource
- Military/Family Life Consultant

Contact Information

- Capt John Noah
  - John.noah@maxwell.af.mil
  - 953-5430
- LCDR Tenaya Chambers
  - Tenaya.chambers@maxwell.af.mil
  - 953-5430
- Dr. Ardis Cecil
  - Ardis.cecil@maxwell.af.mil
  - 953-8815

Family Advocacy Program (FAP)

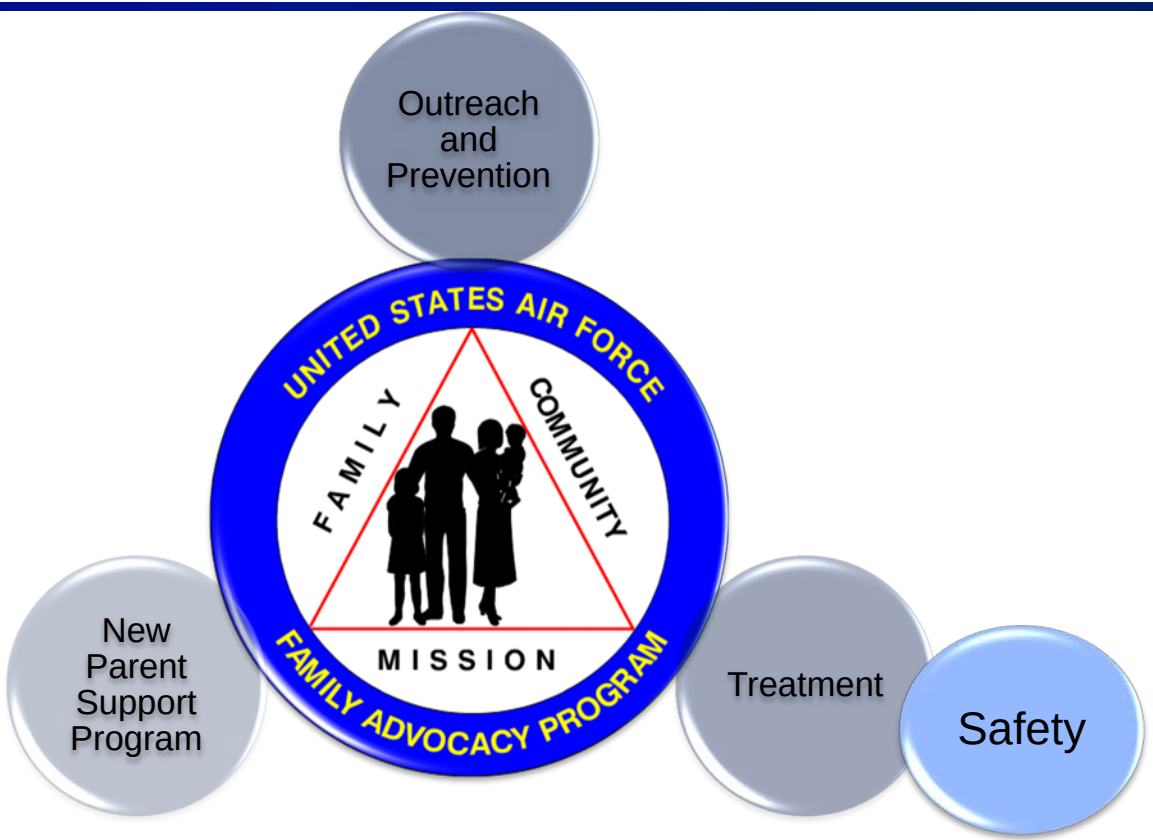
Beverly S. Lesyea
42 MDOS/SGOW

This Briefing is:
Unclassified

Overview

- Family Advocacy Program (FAP)
  - AF FAP Numbers
- What is Domestic Violence
- FAP Process
  - Definitions of Abuse
  - Unrestricted Reports
  - Restricted Reports

FAP


Outreach and Prevention
UNITED STATES AIR FORCE
FAMILY
COMMUNITY
MISSION
FAMILY ADVOCACY PROGRAM
New Parent Support Program
Treatment
Safety

Treatment

- Provides individual, family, and group therapy for victims and offenders

- Focused on offenders and victims—but also provides prevention services

Outreach and Prevention

- Informs and Educates
  - *Maximize knowledge, skill, ability*
- Fosters Community Empowerment
  - *Advocacy, sustainability and resilience*
- Forges Connections
  - *Promote and build collaboration, teamwork and partnership*
- Facilitates Community Capacity Building

New Parent Support Program

- Provides direct support to families with children from 0 to 3 years of age
- Home visitation is offered for families who identify as high needs at screening
- All families with young children are offered in office consultation and advice

Domestic Abuse Victim Advocate

A DAVA assists a victim with

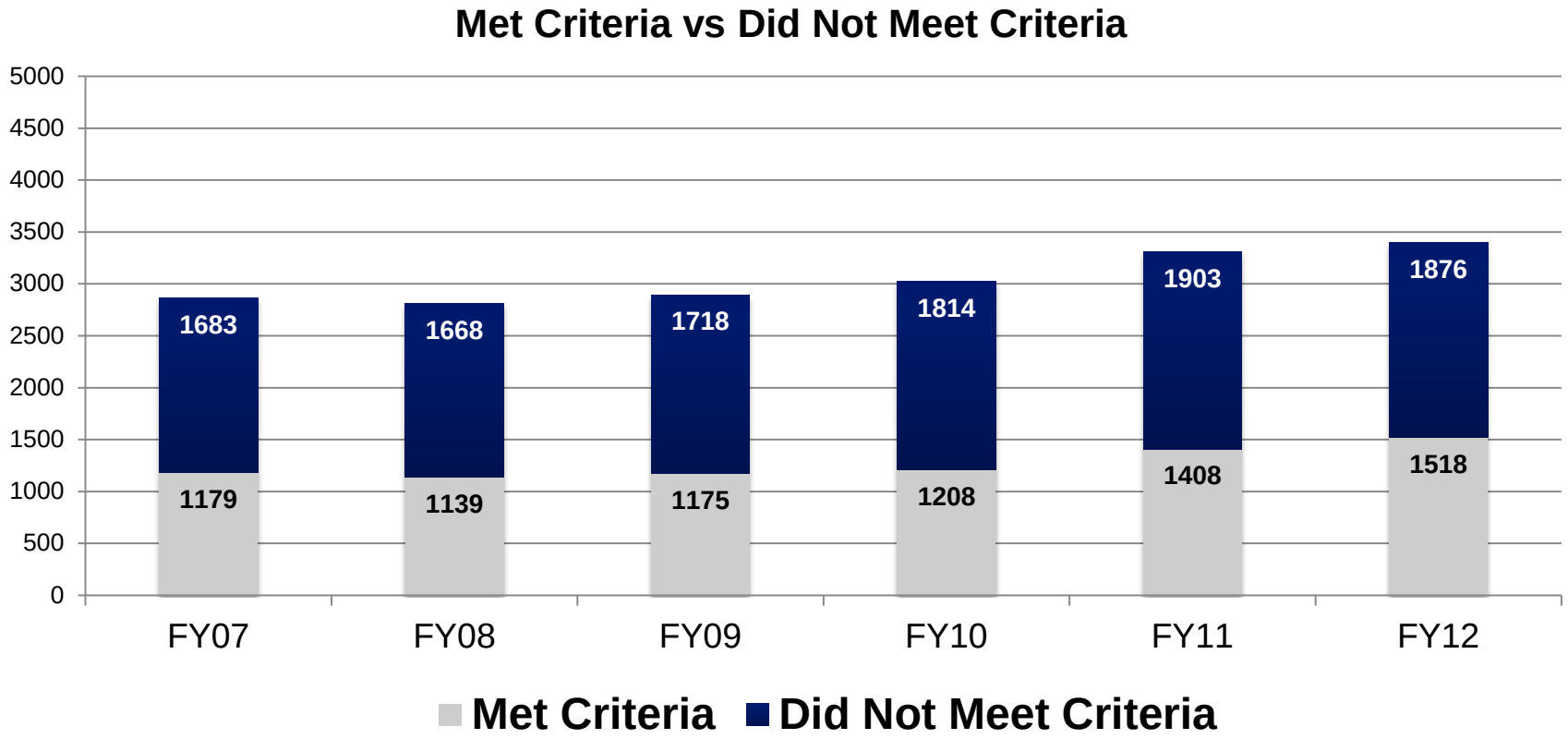
- Safety Planning
- Escape Planning
- Order of Protection
- Divorce

Victim Advocacy in the Military

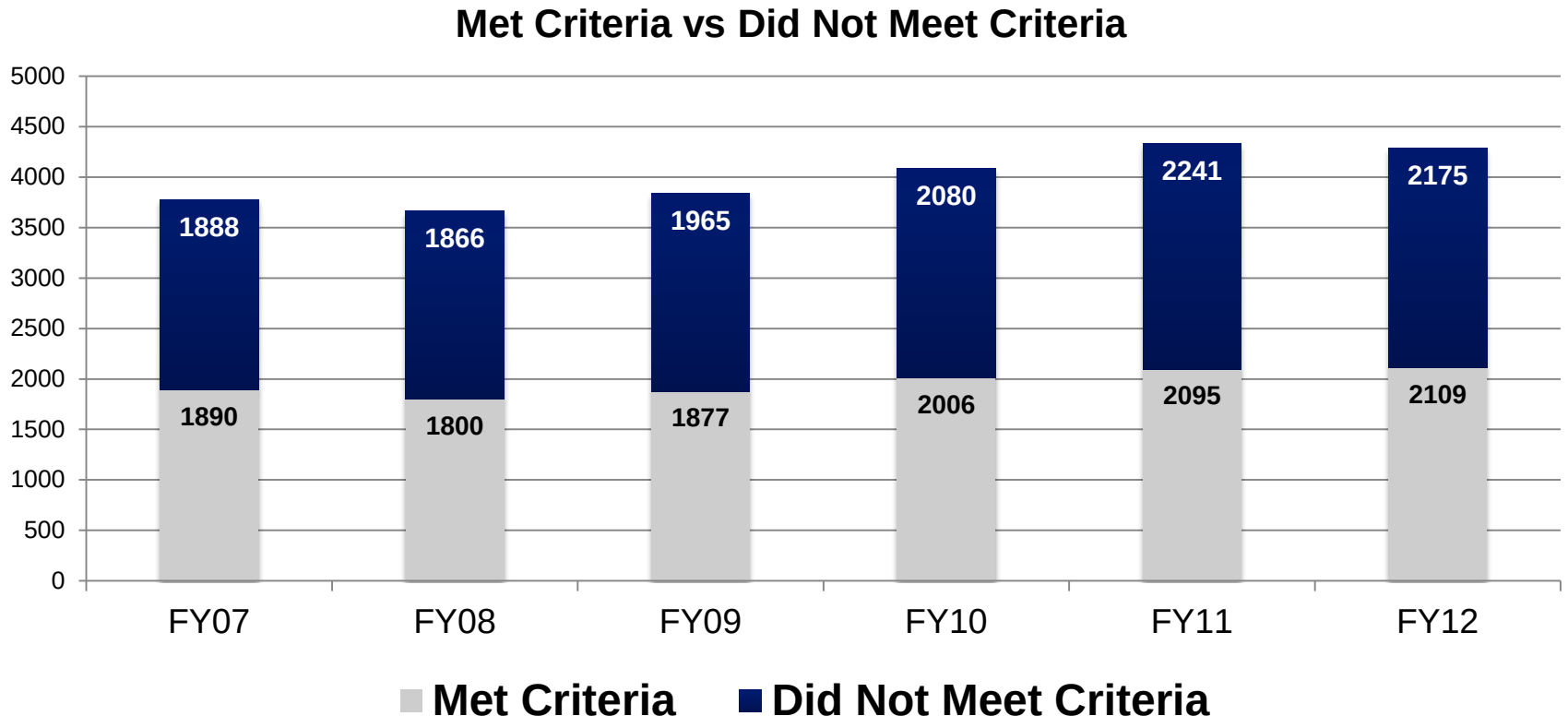
Andrews AFB
Barksdale AFB
Beale AFB
Buckley AFB
Charleston AFB
Davis-Monthan AFB
Dover AFB
Dyess AFB
Eglin AFB
Ellsworth AFB
JB Elmendorf-Richardson (2)
Fairchild AFB
FE Warren AFB
Hill AFB
Hurlburt Fld
Keesler AFB
JB San Antonio (2)
JB Langley-Eustis (2)
Little Rock AFB
Luke AFB
MacDill AFB
Malmstrom AFB
Maxwell AFB
McConnell AFB
McGuire AFB
Minot AFB
Moody AFB
Mountain Home AFB
Nellis AFB
Offutt AFB
Peterson AFB
Robins AFB
Scott AFB
Seymour-Johnson AFB
Shaw AFB
Tinker AFB
Travis AFB
Tyndall AFB
Vandenburg AFB
Whiteman AFB
Wright-Patterson AFB

Current as of: Apr 12

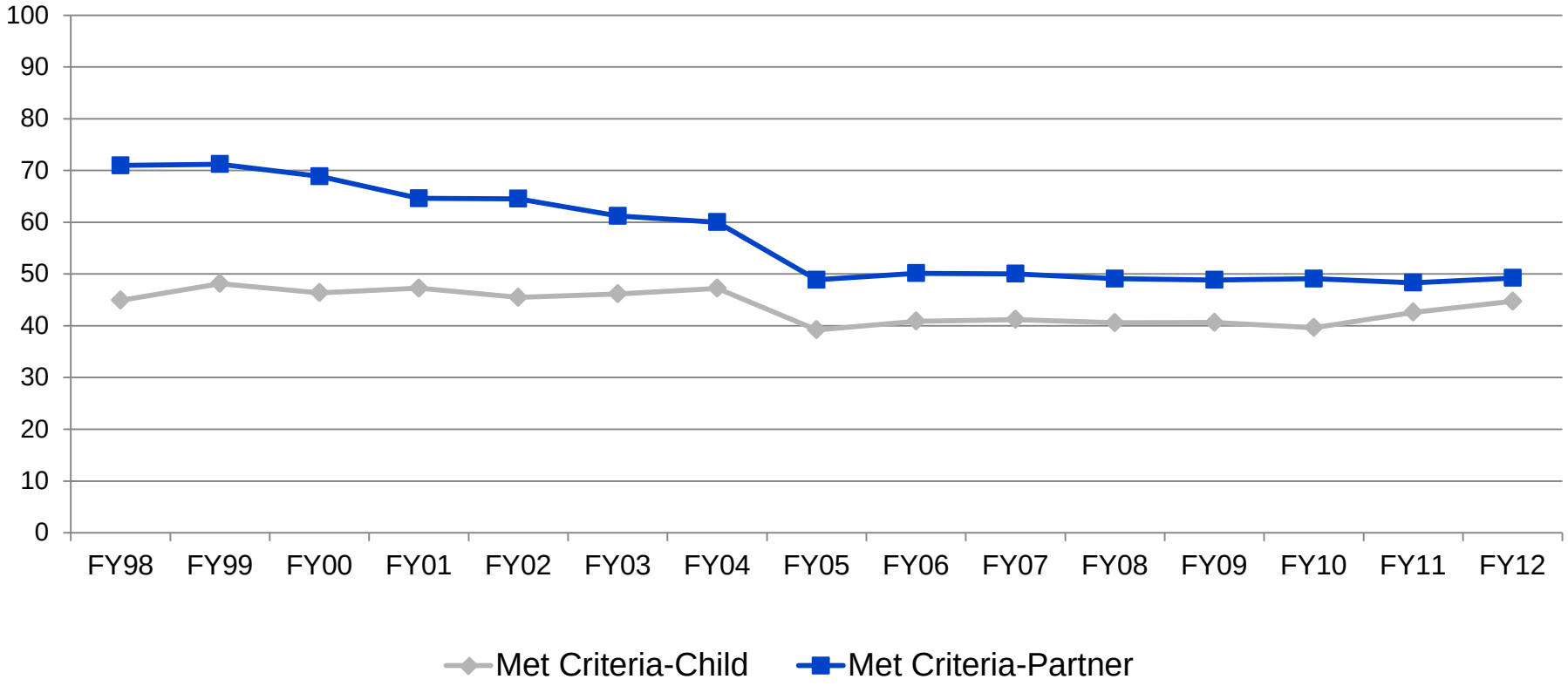
Air Force Child Maltreatment



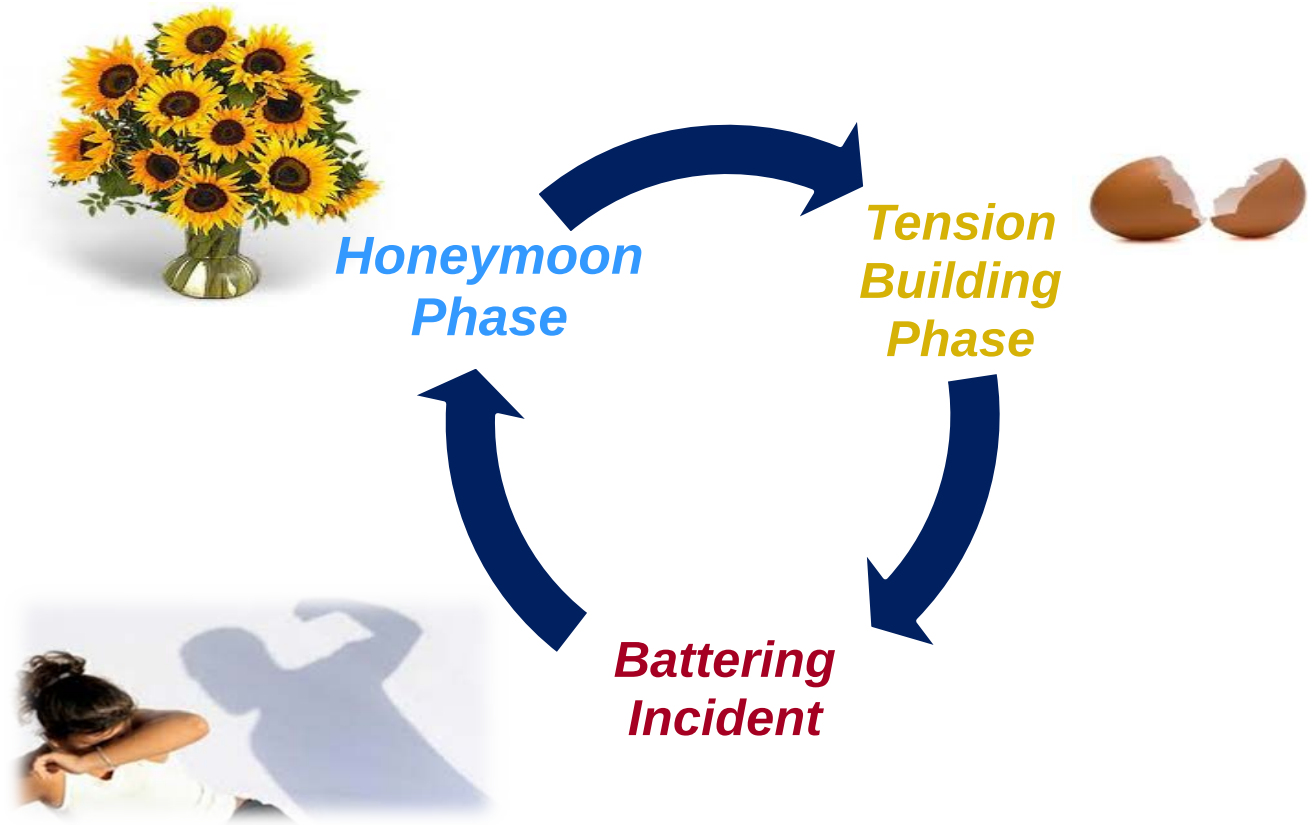
Air Force Adult Partner Abuse



Percentage of Met Criteria Incidents



Cycle of Violence



DOMESTIC ABUSE INTERVENTION PROJECT
202 East Superior Street
Duluth, Minnesota 55802
218-722-2781
www.duluth-model.org

Definitions of Domestic Abuse

DoD Definition of Domestic Abuse

Domestic Abuse:

Domestic violence or a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person who is:

(a) A current or former spouse

(b) A person with whom the abuser shares a child in common

(c) A current or former intimate partner with whom the abuser shares or has shared a common domicile

DoD Definition of Domestic Violence

Domestic Violence:

Domestic Violence is an offense under the United States Code of Military Justice, or State law that involves the use, attempted use, or threatened use of force or violence against a person, or a violation of a lawful order issued for the protection of a person, who is:

(a) A current or former spouse

(b) A person with whom the abuser shares a child in common

(c) A current or former intimate partner with whom the abuser shares or has shared a common domicile

Partner Sexual Abuse

A sexual act with spouse or intimate partner, without the consent of the spouse or intimate partner, or physical contact of a sexual nature against the expressed wishes of the spouse or intimate partner. Corroboration of the report of the spouse or intimate partner is NOT required.

A1. The use of physical force to compel the spouse to engage in a sex act against his/her will, whether or not the sex act is completed

A2. The use of a physically aggressive act, or use of one's body, size, or strength, or an emotionally aggressive act to coerce the partner to engage in a sexual act (attempted or completed)

A3. An attempted or completed sexual act involving a partner who is unable to provide consent. The victim is unable to understand the nature or conditions of the act, to decline participation, or to communicate unwillingness to engage in the sexual act because of illness, disability, being asleep, being under the influence of alcohol or other drugs, or other reasons

AF FAP Family Maltreatment Definitions 3 Aug 12

Partner Physical Abuse

Non-accidental use of physical force against a spouse or intimate Partner

- Physical force includes but is not limited to at least one of the following: hitting with open hand or slapping, including spanking, dropping, pushing or shoving; grabbing or yanking limbs or body, poking; hair-pulling; scratching; pinching; restraining; squeezing, shaking; throwing; biting; kicking; hitting with fist; hitting with a stick, strap, belt or electrical cord or other object; scalding; burning; poisoning; stabbing; applying force to throat; strangling or cutting off air supply; holding under water; brandishing or using a weapon.
- Impact:
  - Any physical injury
  - Reasonable potential for physical injury
  - Fear reaction

AF FAP Family Maltreatment Definitions 3 Aug 12

Partner Emotional Abuse

Non-accidental act or acts, excluding physical or sexual abuse, or threat adversely affecting the psychological well-being of the partner, such as:

- Berating, disparaging, degrading, humiliating victim (or other similar behavior)
- Interrogating victim
- Restricting victim's ability to come and go freely
- Obstructing victim's access to assistance (including but not limited to: law enforcement, legal, protective, or medical resources, including FAP, a victim advocate, military command or DV Shelter)
- Threatening victim
- Harming, or indicating that alleged abuser will harm, people/things that victim cares about, such as children, self, other people, pets, property
- Restricting victim's access to or use of economic resources
- Stalking victim
- Trying to make victim think that s/he is crazy (or make others think that spouse is crazy)

Partner Emotional Abuse Cont.

Impact:

1. Psychological harm including any of the following:
   a. More than inconsequential fear
   b. Psychological distress
   c. Victim's fear of emotionally abusive act(s) that significantly interfere(s) with the victim's ability to carry out normal activities; i.e., work, education, religion, medical/MH services, contact with family friends
2. Stress related somatic symptoms that significantly interfere with normal functioning

AF FAP Family Maltreatment Definitions 3 Aug 12

FAP Reporting Options for Domestic Violence

Who must report?

AFI 40-301, *Family Advocacy*, 30 November 2009:

1.14. AF Members and Civilian Employees Mandatory Reporting. Active duty AF members and civilian employees (including contract employees) will report all incidents of known or suspected family maltreatment Immediately to the FAP.

FAP Unrestricted Reporting Process

- **<u>Unrestricted Report</u>** – What happens next?
  - Referral Received
  - Initial Risk Assessment
  - Notifications Made by FAP
  - Initial Assessment (within 3 duty days)
  - Case Status Determination (within 60 days)
  - Treatment and Follow-up
  - Case Closure

Required Notifications

- Active Duty Member's Commander/First Sergeant
- Office of Special Investigations
- Security Forces
- Child Protective Services
  - Child abuse cases
  - Where required by state law for domestic violence
- Staff Judge Advocate
  - Child sexual abuse cases

FAP Restricted Reporting Process

AFI 40-301, 30 November 2009:

- **4.7 Domestic Abuse Reporting Options.**
  - Unrestricted Reporting and Restricted for **Adult Victims** of **domestic abuse/violence**
- **4.7.1. Unrestricted Reporting for Domestic Abuse.**
  - Allows adult victim of domestic abuse to report an incident using the chain-of-command, law enforcement and FAP for intervention
- **4.7.2. Restricted Reporting (RR) for Domestic Abuse.**
  - Allows adult victim of domestic abuse the opportunity of reporting an incident and receiving service **without** involving the chain-of-command or triggering the investigative process

Restricted Reporting Specifics

- **4.7.2. Restricted Reporting (RR) for Domestic Abuse.**
  - When sexual assault occurs between spouses or unmarried intimates it is domestic violence and will be managed by FAP
  - Once FAP assumes case management of domestic abuse sexual assault cases, no information about the case is shared with the SARC without the client's consent
  - Victims who make a domestic abuse RR inquiry to Military One Source, NPSP staff or the SARC will be referred to a FAP provider who will assist the victim with the reporting process
  - If the victim discloses a domestic abuse allegation in the presence of the alleged offender, the RR option does not apply
  - FAP reports non-identifying information to leadership at the quarterly Family Advocacy Committee (FAC)

FAP Restricted Report Eligibility

- Who is Eligible for Restricted Reporting:
  - Adult (ADM or FM)
  - Victim of domestic abuse/violence (ADM or FM)
  - Eligible to receive services in the medical treatment facility
  - Has a viable safety plan in place

- **Restricted Reporting does not apply** to **Child Abuse** Reports (emotional, neglect, physical, sexual)

Restricted Report Knowledge

- Who may have knowledge of the abuse and maintain the Restricted Reporting option?
  - All health care providers and their support staff
  - All FAP staff
  - Domestic Abuse Victim Advocate
  - Mental Health Providers
  - SARC
  - Military One Source

Questions?

Recognizing Airmen in Distress

Capt John Noah
42 MDOS/SGOW

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- Chaplain
- Primary Care
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Contact Information

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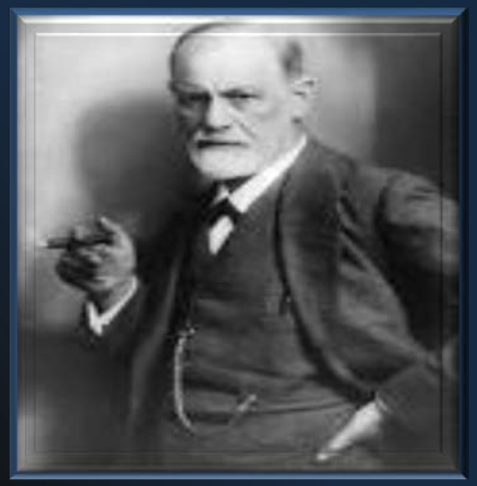
- LCDR Tenaya Chambers
  - Tenaya.chambers@us.af.mil 953-5430
- Dr. Ardis Cecil
  - Ardis.cecil@us.af.mil 953-8815

Questions?

MRE 513 & 514
JASOC 13A
Maj Christopher Goewert



513 & 514

- Time machine: SVC, I need you back in 2011
- 513 Overview
- 513 Practically
- 514 Overview

M.R.E. 513

- Codifies federal common law privilege recognized in *Jaffe v. Redmond*
- Two step process, discovery versus admissibility
- No longer include spousal abuse exception
- "Constitutionally required exception":
  - Usually relates to conditions that affect the ability of the witness to perceive, recall or relate
  - Bias or motive to fabricate
  - Inconsistent statements

M.R.E. 513 Practically

- Sparse case law - Only 8 cases that even mention it in Westlaw
    - All of your arguments will be analogs from other privileges and federal and state cases
- Should be able to argue privacy when weighing "constitutionally required disclosure"
- Must still be relevant, material and admissible

M.R.E. 513 Practically

- Trial judges have broad discretion to impose reasonable limitations on cross-examination, ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.’ “ *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F.2000)

M.R.E. 513 Practically

- Advocate for only narrowly tailored release if at all
- Viewing clients records
- Limited release – R.CM. 701 right to inspect may not include entitlement to a copy
- Advise client not to discuss the matters with TC/DC
- If client testifies at hearing talk in generalities and about potential harm to their therapy if released
- Could be useful for sentencing

M.R.E. 514

- Overview
- Recent Buckley AFB Case

MRE 514 Analysis

In drafting the "constitutionally required" exception the Committee intended that the communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of a constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that renders the privilege meaningless…special care should be taken to narrowly tailor the release of privileged communications to only those statements which are relevant and whose probative value outweighs the danger of Unfair prejudice.

Questions?

U.S. AIR FORCE

Professional Responsibility

Special Victims' Counsel Course

This Briefing is UNCLASSIFIED

Lt Col Joel England
AF/JAA-PR

Overview

- Around the States
- Selected Rules and Scenarios
- Complaint Process

Some Headlines from Around the States

- Prosecutor's CLE-Entry Typo Leads to Mistrial Request in Child-Murder Case
- Ex-Navy Lawyer is Disbarred for Sending Secret Names of Gitmo Detainees to Legal Group
- "Deth to Meth DA" Accused of Taking $6K Loan from Defense Attorney to Pay for Hair Transplants
- Suit by Jobless Harvard Law Grad Says False Plagiarism Accusation Caused BigLaw Disinterest

Sources of Guidance

- TJAG Standards-2
  - Air Force Rules of Professional Conduct
  - Air Force Rules for Civility in Professional Conduct
- TJAG Standards-3
  - Air Force Standards for Criminal Justice
  - Uniform Rules of Practice Before Air Force Courts-Martial
- TJAG Standards-5, Professional Responsibility Program
- ARC-1
  - Standards of Professional Conduct for Air Force Reserve JAGs
  - Rules of Professional Conduct for ANG JAGs

Who do you represent?

- Rule 1.13, *The Air Force as Client*:
  - (a) *Except when authorized to represent an individual client* or the government of the United States, an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force acting through its authorized officials
  - (f) A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual, has, for those purposes, a lawyer client relationship with that individual
- As SVC you represent the victim

Do Others Know Who You Represent?

- SVC Counsel Rule 6.6: ensure third parties understand that the victim is your client
- Calling local DA to discuss jurisdiction over victim's case… "This is Capt X from the Air Force and I would like to talk to you about jurisdiction…"
  - Make sure DA knows you represent victim and not AF

Competence – Rule 1.1

- A lawyer shall provide competent representation to a client. Competent representation requires:
  - Legal knowledge
  - Skill
  - Thoroughness
  - Preparation
- Cmt 2 to ABA Model Rule: "A lawyer can provide adequate representation in a novel field through necessary study."
  - Use knowledge from this course as a launching point for further self-study

Competence – Rule 1.1

You represent a sexual assault victim in Texas. The assault occurred in the victim's off-base home. The victim mentions that she no longer feels safe in her home and would like to move, but can't afford it. What advice do you give?

See: https://www.oag.state.tx.us/victims/expenses.shtml

Scope of Representation – Rule 1.2

- Lawyer shall abide by client's decisions concerning objectives of representation but:
  - Lawyer may limit objectives of representation if client consents after consultation
    - ABA Model Rule Cmt. 6: "The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client."
  - Explain scope up front!

Scope of Representation – Rule 1.2

- Further limits on representation:
  - Lawyer will not counsel a client to engage in, or assist a client in conduct lawyer knows criminal or fraudulent but may discuss legal consequences of COA
  - When lawyer knows client expects assistance not permitted by the AFRPC or other law…consult client as to limits

Scope of Representation – Rule 1.2

- Lawyer may not assist:
  - *People v. Theodore,* 926 P.2d 1237 (Colo. 1996) – lawyer drove client to family home in violation of restraining order issued against client
  - *Attorney Grievance Comm'n v. Protokowicz*, 619 A.2d 100 (Md. 1993) – lawyer helped former client with breaking into client's wife's home, killing pet cat in microwave oven, and intending to steal evidentiary documents for use in proceeding.
- Lawyer may not counsel:
  - *In re Werme's Case,* 839 A.2d 1 (N.H. 2003) – lawyer reprimanded for advising client to disclose confidential court records to newspaper

Scope of Representation – Rule 1.2

Victim client tells you that she lied to investigators when first questioned abut the sexual assault. She was asked whether she ever had sex with the accused before. She didn't want to look bad and panicked. So she told investigators no but she actually had previously had consensual sex with the accused several months before the assault. She is worried that if she changes her story now, people won't believe that she was actually assaulted, even though she was. She is getting ready to interview with the trial counsel. What do you advise?

Hypothetical Continued

Suppose your client decides to continue the lie. What recourse do you have?

Withdrawal

- Rule 1.16
  - Mandatory
    - Representation will violate AFRPC or law
    - Lawyer's physical/mental condition materially impairs representation
    - Lawyer is discharged by client
  - May
    - Client persists in COA involving lawyer's services reasonably believed to be fraudulent/criminal
    - Client used lawyer's services to perpetrate crime/fraud
    - Client insists on pursuing repugnant/imprudent objective
  - Need to go to appointing authority to get permission
  - If granted, duty to take steps to extent reasonably practical to protect client's interests.

Communication – Rule 1.4

- A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

- Common concern among clients…not knowing what is going on

- In victim counsel context, what is next step in case, who are the various actors, what is victim's role...

Confidentiality – Rule 1.6

- A lawyer shall not reveal information related to representation of a client unless the client gives informed consent or is implicitly authorized in representation
- Exceptions:
  - Prevent client from committing criminal act…likely to result in imminent death, substantial bodily harm, or substantial impairment to Nat'l security or military readiness…
  - Establish claim/defense btw lawyer & client

Rule 1.6 - Confidentiality

The TC, someone you went to JASOC with, calls you to set up an interview with your client who is the victim of a sexual assault. During the conversation, the TC raises some concerns about the victim's credibility. She asks for your thoughts.

- Assume you also have concerns.

- Assume you don't.

- How do you respond?

Rule 1.6 - Confidentiality

Your client comes to talk with you about her case with a friend. You explain the limits of the attorney-client privilege when a third-party is present but your client insists on the presence of her friend at this first meeting. Later the TC calls you and said she talked with the friend and wants to verify a few things your client said during the initial meeting. The TC says there is no issue with you confirming a few facts since the conversation wasn't privileged. Is the TC correct?

Conflicts of Interest

- Rule 1.7 – Lawyer shall not represent a client if:
  - the representation of that client will be directly adverse to another client; or
  - the representation of that client may be materially limited by lawyer's responsibilities to another client, third person, or own interest;
  - unless lawyer reasonably believes the rep will not adversely affect relationship and get client consent
    - Caveat – can't consent to some conflicts (i.e. directly adverse clients in litigation)
- Rule 1.8 – addresses specific, prohibited transactions
  - 1.8(b) a lawyer shall not use info relating to representation of a client to the disadvantage of the client unless client consents except as permitted/required under Rule 1.6/Rule 3.3

Conflicts of Interest

- Rule 1.9, *Conflict of Interest: Former Client*
  - Continuing duty to former client
  - Can’t represent another in the same or a substantially related matter in which that person interests are materially adverse to the interests of the former client, unless former client consents or
  - Use information related to the representation to the disadvantage of the former client except as permitted by Rule 1.6/Rule 3.3 or when information generally known

Conflicts of Interest

You are representing a sexual assault victim. Your client has been informed about a PTA and does not agree with the limitations on punishment. She asks you to engage the convening authority directly and advocate that he reject the PTA.

You do not think this is the best course of action.

What are some underlying reasons for your position that could suggest a conflict of interest?

What are some underlying reasons for your position that would not suggest a conflict of interest?

Publicity

- Rule 3.6: no extrajudicial statements…knows/ reasonably should know will have substantial likelihood of materially prejudicing the proceeding
  - Ok to make statement that reasonable lawyer would believe required to protect client from substantial undue prejudicial effect of recent publicity not initiated by lawyer or lawyer's client. Limited to that necessary to mitigate or correct record.
- AF Standard for Criminal Justice 8-1.1 provides examples of statements ordinarily prejudicial and ones that are acceptable
- Guidance geared towards TCs and DCs but, as matter of policy, applicable to SVCs as well

Publicity

Scenario 1: Your client is frustrated by the process and the number of interviews she has had to go through. The investigation took 8 months and charges have just been preferred. She asks if you will engage the media and get her story out there. She wants you to tell them what happened to her and what kind of guy he truly is. How do you respond?

Scenario 2: A family member of the accused did a press interview and called the victim a liar. The victim is upset and asks if you would respond on her behalf. How do you respond?

Social Media

- Word of warning regarding social media use:
  - FL attorney reprimanded for criticizing Judge on blog for depriving criminal defendants of their right to speedy trial. Called judge an “evil, unfair witch,” “seemingly mentally ill”
  - NC judge reprimanded because facebook friend with attny appearing before him and exchanged comments
  - Illinois public defender disciplined for blogging about clients
  - Pretexting…dishonesty, fraud, misrepresentation…

Social Media

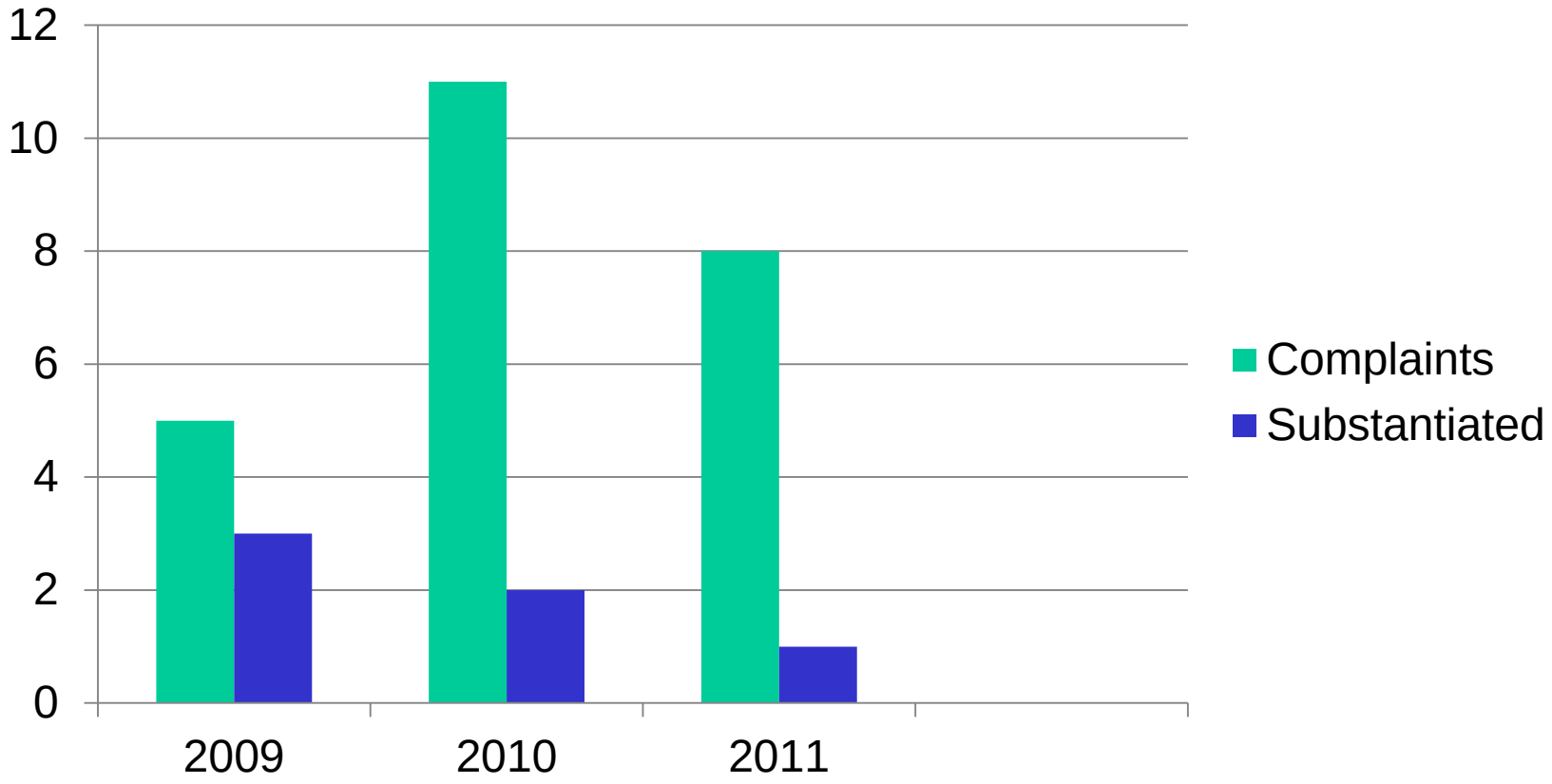
- Depending on what you are doing, many PR Rules potentially implicated:
  - Confidentiality
  - Inadvertent Creation of Attorney-Client relationship
  - Ex Parte Communications
  - Misconduct
    - Conduct prejudicial to administration of justice
    - Misrepresentation, dishonesty

Complaint Process

- Initial Review or Inquiry (as directed by MAJCOM SJA, AFLOA/CC or TJAG)
- AF/JAA-PR Review
- Then to Advisory Committee (JAJ/JAC/JAZ) for recommendation to TJAG as appropriate
- TJAG action

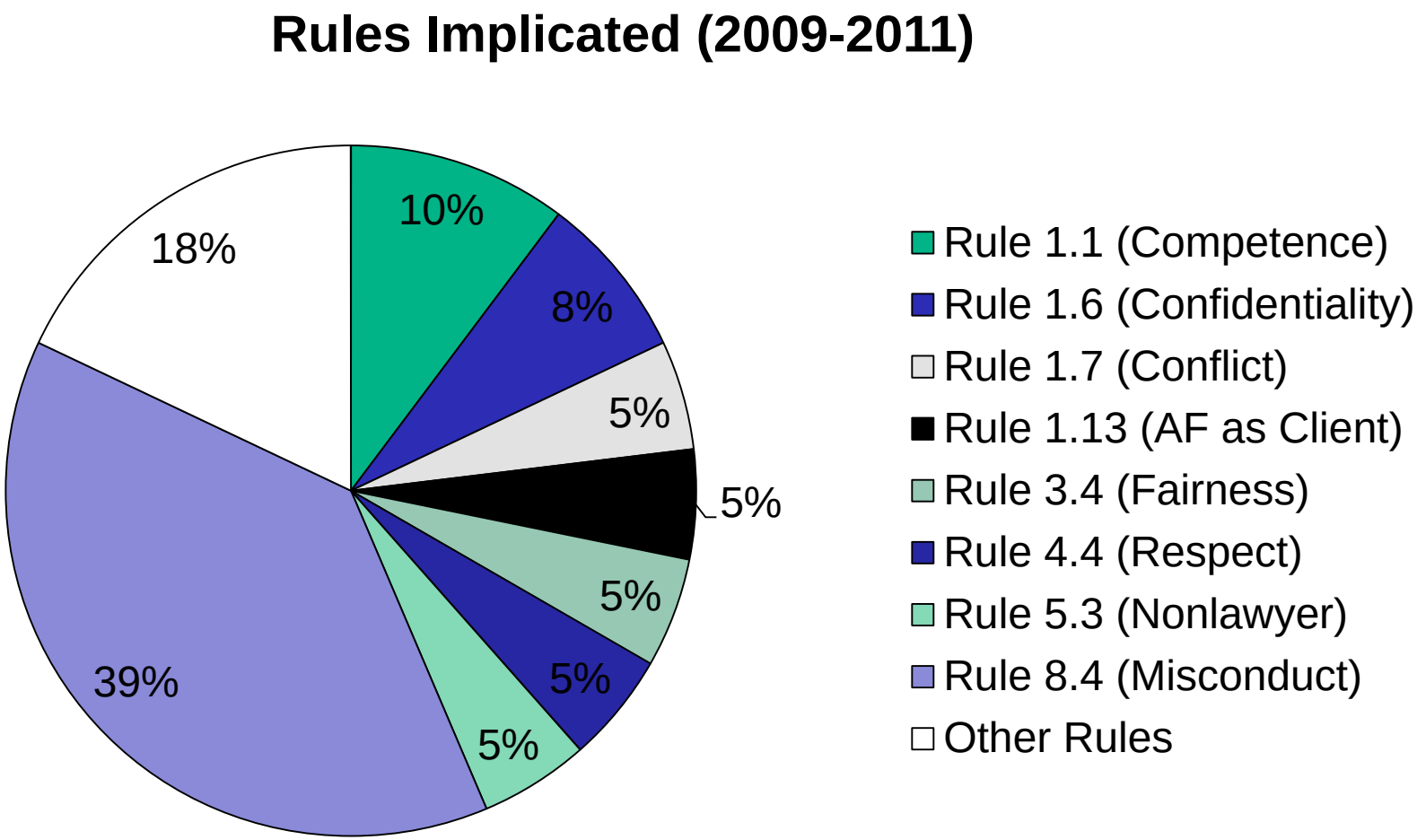
Complaints

PR Complaints 2009-2011



**** note - 10 complaints filed thus far in 2012**

What are the Complaints About?



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DO YOUR PR CERT!!

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"We do not act rightly because we have virtue or excellence, but we rather have those because we have acted rightly."

- Aristotle

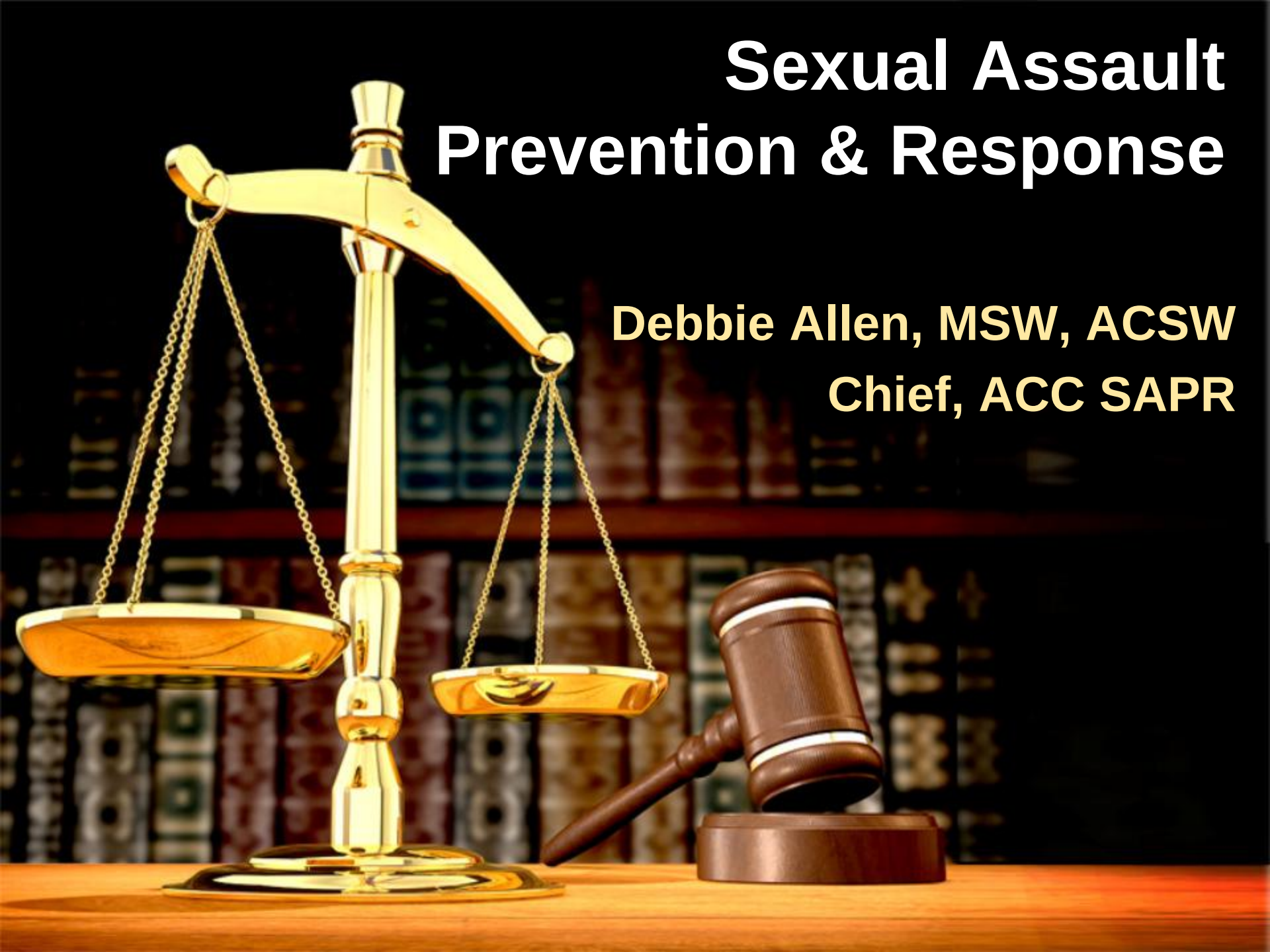
Questions or Comments?

HQ AF/JAA-PR

(240) 612-5069/DSN: 612-5069

Sexual Assault Prevention & Response

Debbie Allen, MSW, ACSW
Chief, ACC SAPR



EOD tech at Eglin charged with rape, burglary… 7 Dec 12

"Tech. Sgt. Adam Blake Meredith, 34, faces charges of armed burglary and sexual battery with a deadly Weapon…"

Academy student jailed after new allegations… 4 DEC 2012

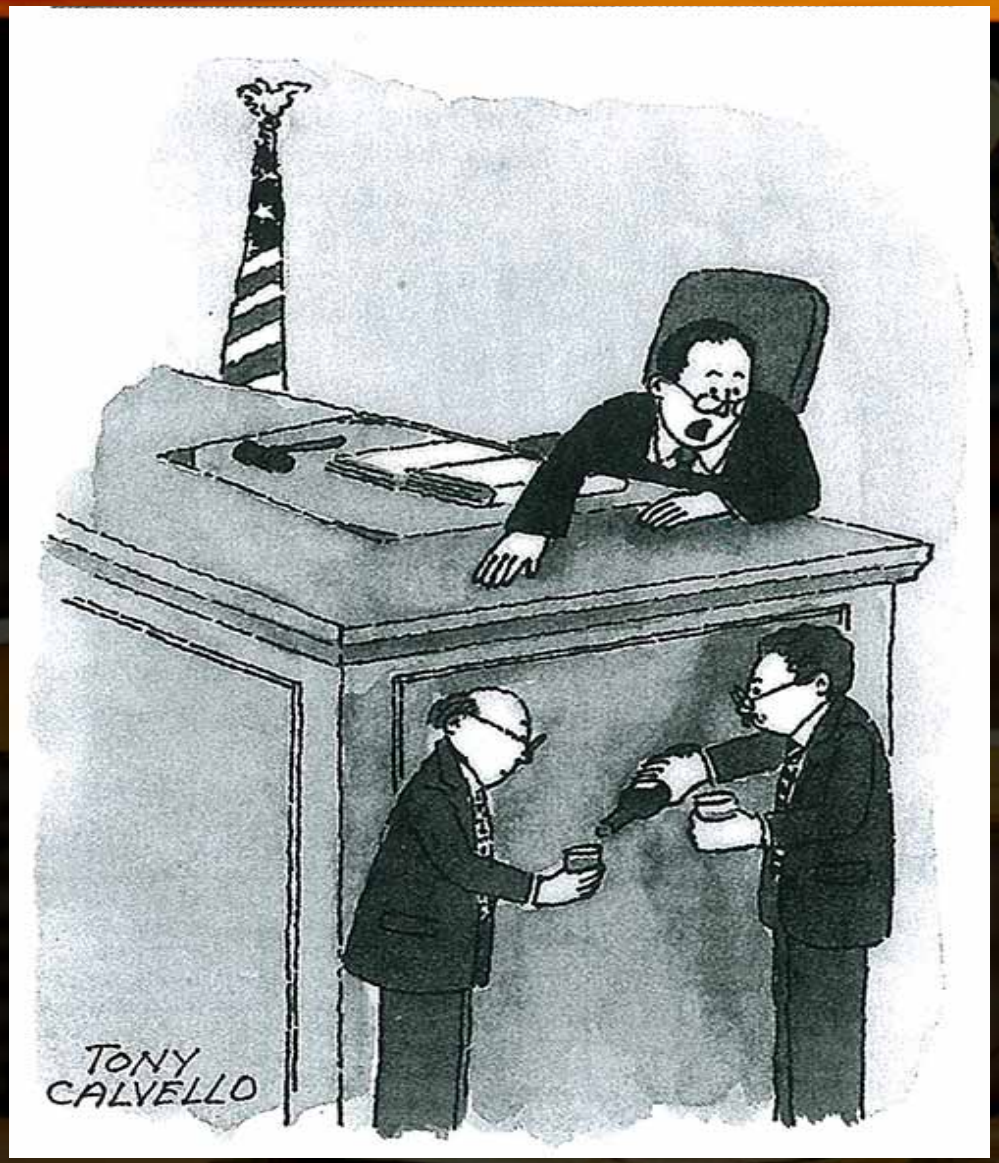
Air Force-wide inspections begin today… 5 Dec 2012

12th MTI named in Lackland training scandal (5 Dec 12)

OVERVIEW

- SARC and VA Role, Responsibilities & Training
- SARC/VA Eligibility
- Reporting Options - What Influences Choice
- Victims- What's Their Story
- Case Scenarios
- Legal Concerns Victims May Bring
- Growing Healthy Victim-centered Relationships
- Medical /Mental Care for Management
- Resources for Continuing Education

CAN YOU SPEAK “VICTIM ADVOCACY” ?



"Counsel, this isn't exactly what the court's definition of a 'sidebar' is."

Sexual Assault Response Coordinator (SARC)

- Role and Responsibilities (IAW DODI 6495.02; AFI 36-6001)
  - Subject matter expert and key advisor to commander
  - Provide seamless 24/7 victim response and continuity of care
  - Recruits, interviews , screens, trains, selects and monitors certification of volunteer victim advocates
  - Provides training and develops prevention initiatives
  - Creates and implements awareness and marketing strategies

Sexual Assault Response Coordinator (SARC)

- Role and Responsibilities (Cont)
  - Assess installation's need to establish/modify procedures
  - Acts as unit liaison to assure on-going victim support
  - Co-chairs the Case Management Group (CMG) and tracks status of case
  - Uploads case data into the Defense Sexual Assault Incidence Database (DSAID)
  - Collaborates with on and off base agencies and first responders to assess available resources for victim care

VICTIM ADVOCATE

- Serves under direct supervision of SARC
- Must complete initial 40 hrs training and refresher training
- On- call for victim response
- Assigned to victim by SARC only

VICTIM ADVOCATE

- May accompany victim to appointments when requested
- Are not counselors
- Are not the victim's friend
- Do not make decisions for the victim
- Must report all activity with victim to SARC

SARC/VA - Eligibility

- SARC
  - **AF Officer (Capt>) and deployable**
  - **DoD Civilian (GS 12)**

VA
- Active Duty Military
- DoD Civilian
- Not rank specific

WHO MAY NOT SERVE
- Individuals on G-Series Orders
- 1st Sergeants; Chiefs
- Investigators; Law Enforcement;
- MTF Personnel or SJA
- EO; Chaplains or IG

PARTNERING WITH SARC & VA

What We Do

- Provide 24/7 victim response (adults **NOT** children)
- Explain reporting options, benefits and services
- Encourage victim to protect evidence
- Encourage victim to seek medical care
- Secure only enough info to determine referrals
- Assign an Advocate , unless victim declines
- Support and advocate for needs of victims
- Assist victim with Expedited Transfer requests
- Can accompany **sexual assault** victim to court hearing
- Can travel with victim but should not transport in POV
- **Stay in our lane**

REPORTING OPTIONS - Restricted

- Report made on a “confidential” basis
- Covered communication will not be disclosed to law enforcement , investigators or commander
- Victim may not report to chain-of-command
- Received by SARC, VA Healthcare Personnel
- For a report to be considered Restricted it must be forwarded to SARC for determination
- Healthcare personnel must notify the SARC
- Notify CV within 24 hrs (non-identifying info)

DISCLOSURE OF RR PROHIBITED

- Exceptions
  - Victim authorizes disclosure to command in writing
  - There is a need to prevent a serious or imminent threat to safety and health of victim or others
  - Retirement Board when required for fitness for duty for disability determination
  - To SARC, VA Healthcare Personnel to coordinate and supervise victim care
  - Civilian or military court when ordered by military, federal or state judge
  - To officials or entities as required by a Federal or State statute

REPORTING OPTIONS -Unrestricted

- A process a victim uses to disclose, without requesting confidentiality or restricted reporting,
- Under these circumstances, the victim's disclosures are reportable to law enforcement
- Meeting scheduled to initiate the official investigation process
- Victim may have already notified chain- of-command
- Notification made only to those who have a need to know

VICTIMS – WHAT IS THEIR STORY?

VICTIM

LOST
She said...she said, she would never be the same
No matter how hard she tried forgetting the nightmare still remained
Every time that she closed her eyes, she could still feel the pain
Constant blame on herself...what was it that she could've changed??
Her friends would say: "maybe you shouldn't have dressed that way"
Or they would say: "you had no business going to his place"
Then they would say: "if only you would've listened and paid attention...
You wouldn't have found yourself in such a helpless position"
She was the victim! And by her own friends she was tried and convicted
When all she wanted when she cried out was somebody to listen
This story further proves the existence of society's sickness
It's sad when a rape victim has to prove they're a victim
Artwork by Emmery Williams
Poetry by: J-INC

THEIR STORY

They :

- are men and women
- are embarrassed and ashamed
- blame themselves
- worry about what their leadership think
- are blamed by family, friends and co-workers
- don’t trust their ability to make good decisions
- are confused
- want to be heard and believed

THEIR STORY

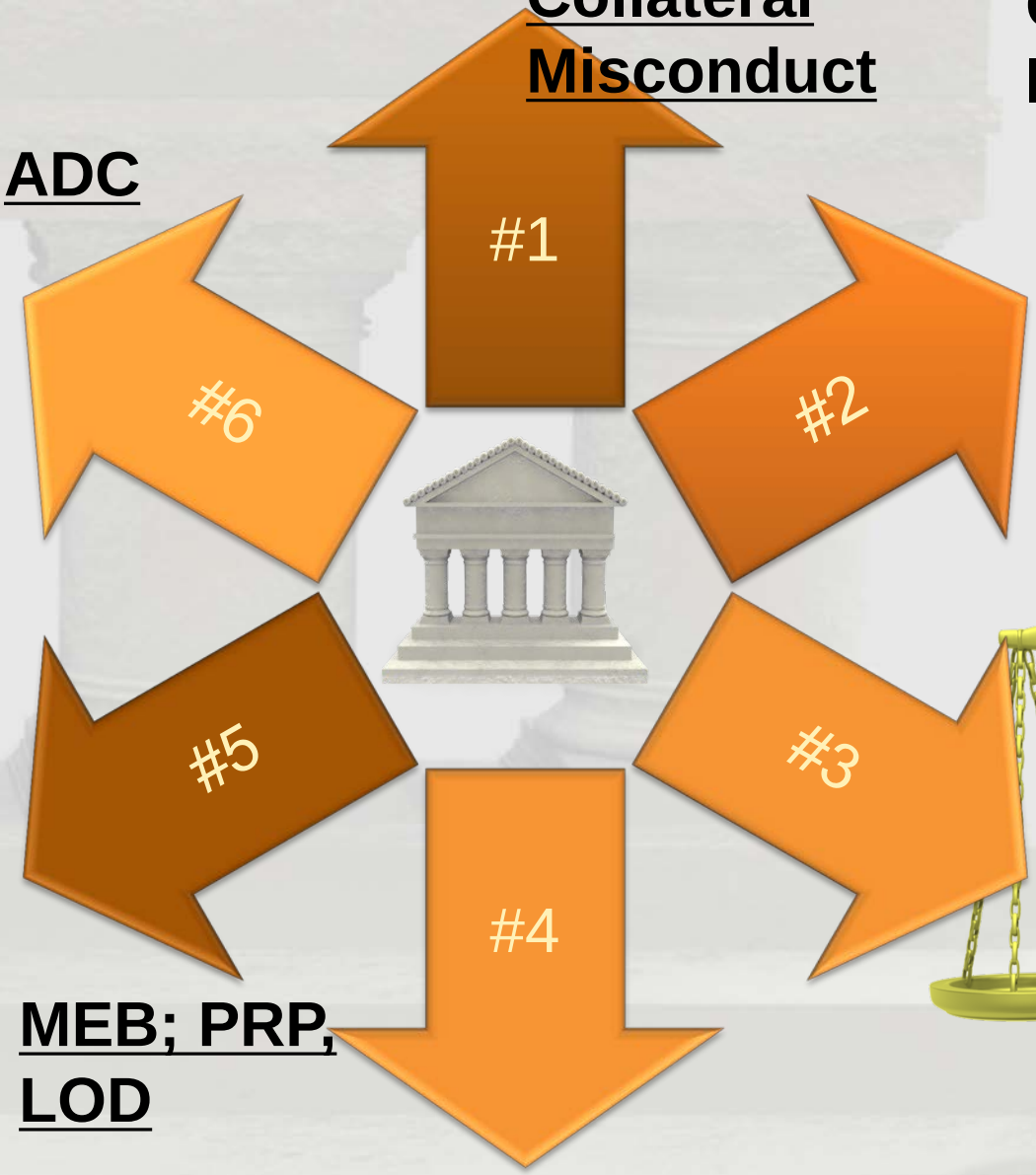
They :

- are ambivalent
- may be survivors with prior history of assault
- may engage in risky behaviors after assault
- want to forget, but can’t
- want to understand why it happened to them
- want to know if they were right to report
- want to hold offender accountable, or not
- feel LOST

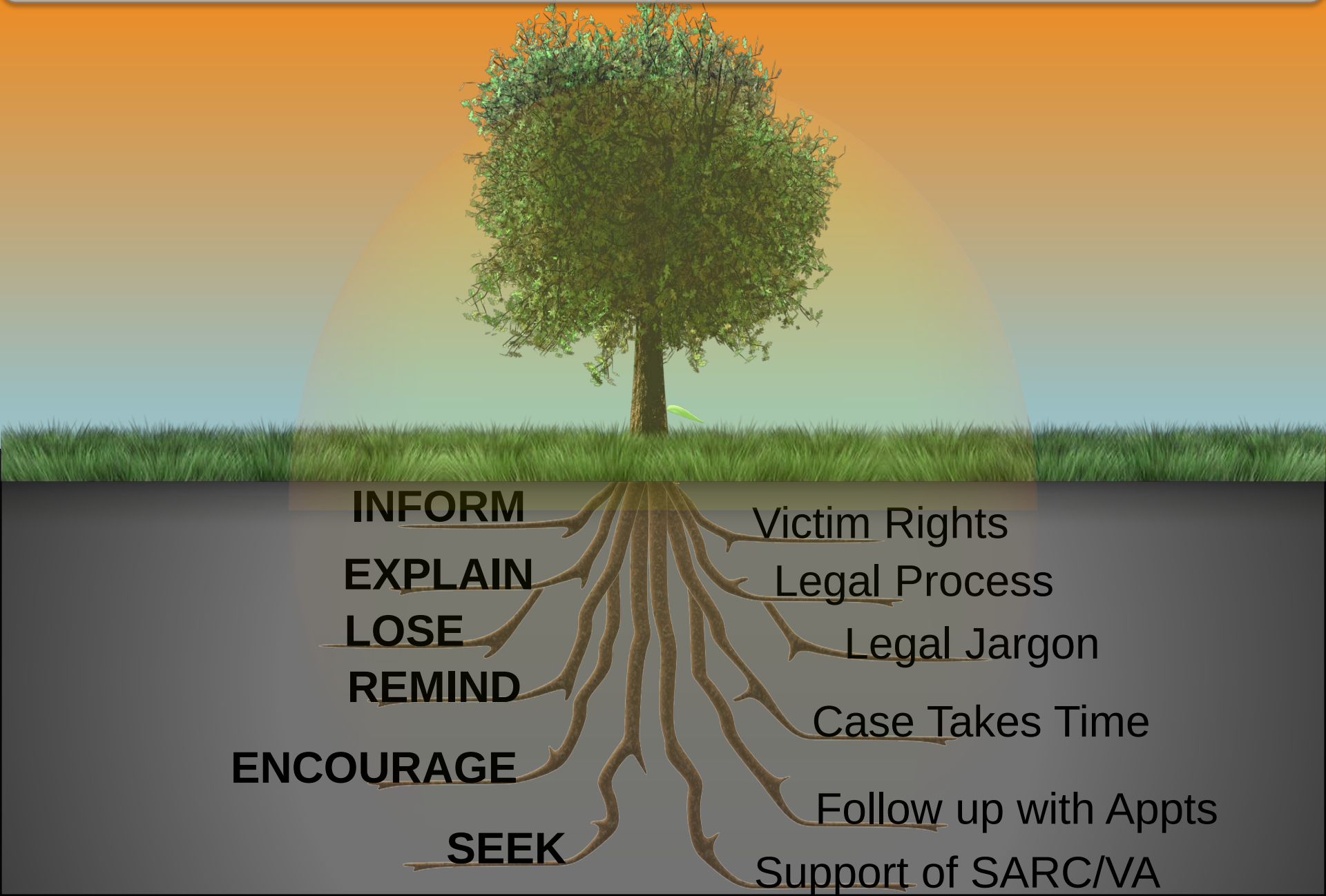
CASE SCENARIOS

- 22 y/o female victim rape d by husband's best friend away going a party. Husband deploying in 24 hrs, wife has not told him. When she reports to ER with friend she advises SAFE will reveal two specimen. She had intercourse with husband an hour after rape.
- 25 y/o male victim being medically boarded due to MH diagnosis (Dissociative Identity Disorder). Section commander performed oral sex while victim slept off drinking and attempted to sodomize (previous hx 2 suicidal gestures)

COMMON LEGAL ISSUES VICTIMS BRING



Growing Healthy Victim-centered Relationships



MEDICAL/ MENTAL CARE MANAGEMENT (AFI 44-102; 109; 172)

- SARC must be notified of all sexual assaults
- MTF must have written gender sensitive plan describing medical response
- Medical record documentation under restricted reporting must have special protection to avoid unauthorized release of information.
- **"Restricted from disclosure unless and until determined to be releasable by the MTF Commander or designee. Do not release without specific patient authorization or as specifically authorized by DOD or AF policy.**
- MTFs that do not provide SAE must have a Memorandum of Understanding (MOU) or Memorandum of Agreement (MOA) with a local medical facility **"**

Frequently Asked Questions (FAQ)

Q1: Do dependents get a restricted reporting option?
Answer: Yes, adult victims now have the same option for reporting sexual assault as active duty personnel (REF: DoDD 6495.01. January 23, 201)

Q2: Does OSI keep the evidence kit as they would for the AD restricted report?
Answer: Yes, the forensic evidence will be treated the same and stored according to your guidance.

Q3: Are we reporting sexual assault of spouses to the Domestic Violence Victim Advocate (DVVA)?
Answer: Yes; when they are available. They are contracted by the Family Advocacy Program (FAP) so you should seek their guidance about how to handle these reports. Sexual assault of spouses (when assaulted by a spouse or intimate partner) should NOT be reported to the SARC. FAP can receive restricted reports for spouse on spouse **(AFI 40-3-1, para 1.11.2)**

Frequently Asked Questions (FAQ)

Q4: What additional new guidance and references have come out recently re sexual assault?

a. **Directive-Type Memorandum (DTM) 11-062** – Document Retention in Cases of Restricted and Unrestricted Reports (50 years)

b. **Directive-Type Memorandum (DTM) 11-063** – Expedited Transfer of Military Service Members Who File Unrestricted Reports of Sexual Assault

c. **Military Rule of Evidence 514** SARC, Victim Advocate Privilege

d. **SARC, VA Credentialing (by Oct 2013)**

CONTINUING EDUCATION

Resources

Book

- **Talking About Sexual Assault: Society's Response to Survivors (Dr S Ullman)**

Website:

- **www.civicresearch.com**
- **WWW.ovc.com**

Journals

- **The Sex Offender**
- **Sexual Assault Report**
- **Criminal Justice Research**

AUTHORS:

- Dr David Lisak
- Dr Jackson Katz

HOW TO PREVENT SEXUAL ASSAULT

#1: Don’t sexually assault **ANYONE**

#2: Repeat #1

#3: **DON’T SEXUALLY ASSAULT** anyone!

OTHER QUESTIONS ?

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Headquarters U.S. Air Force

Integrity - Service - Excellence

Defense Services & Special Victims' Counsel

The View From JAJD

Colonel Donna Marie Verchio
Chief, Trial Defense Division
SVC Course, 11 Dec 12

U.S. AIR FORCE

U.S. AIR FORCE

Overview

- **Defense Mission & Organization**
- **Guiding Principles of Defense Representation**
- **SVC, MDC & Victim's Collateral Misconduct**
- **Practical Strategic & Tactical Advice**
- **Questions**

Mission/Organization

Trial Defense Mission

Advance Air Force mission by vigorously providing world-class legal defense services for Air Force members

Why a Robust Independent Defense?

- **Promotes credible military justice system**
- **Strengthens reality/perception of fairness & justice**
- **Promotes good order/discipline thus Air Force mission accomplishment**
- **Air Force members deserve it!**

U.S. AIR FORCE

Our People

- JAJD
  - 1 Chief
  - 1 Deputy Chief, Policy & Training
  - 1 Superintendent
  - 3 CSDCs & 3 DPMs
- 19 SDCs
- 84 ADCs & 76 DPs

- Office of Airmen's Counsel/W2s & Airmen in DES
  - 11 attys/8 paralegals

- Total: 207 personnel at 68 bases

Chain of Command/Supervision

U.S. AIR FORCE

AFDW/CC
11 WG/CC
JBA(GCMCA & SpCMCA)

TJAG

AFLOA/CC

DIRECTOR, USAF JUDICIARY (JAJ)

CHIEF, TRIAL DEFENSE DIVISION (JAJD)

SENIOR DEFENSE COUNSEL

AREA DEFENSE COUNSEL

DEFENSE PARALEGAL

Senior Defense Counsel Regions

Senior Defense Counsel Regions

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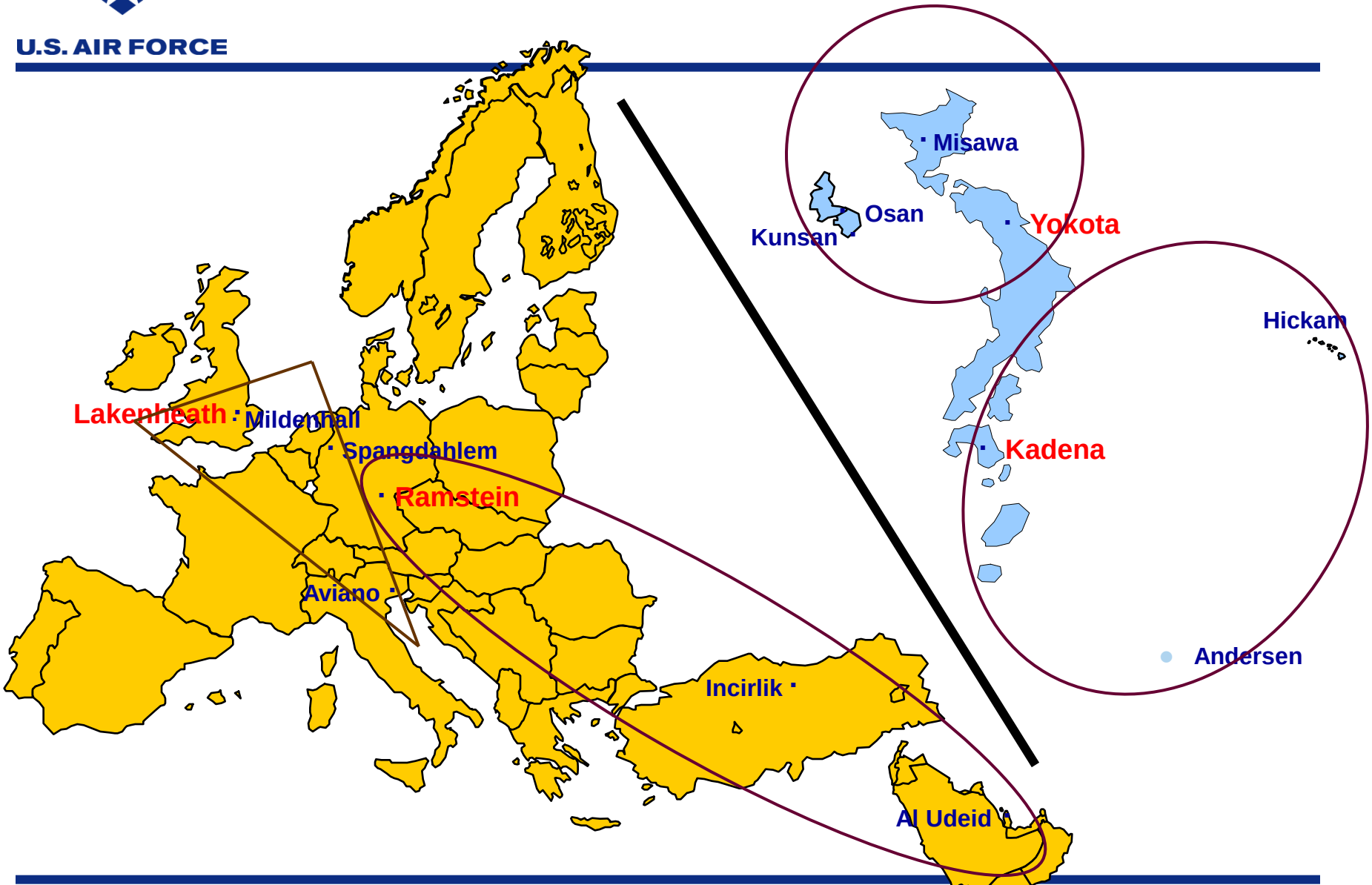

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Guiding Principles to Defense Representation

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Guiding Principles…

- **Loyalty to client* (no kool-aid)**
- **Fully informed decision-making**
- **Keeping faith w/ our system of justice**
- **Vigorous representation**
- **Professional competence**
- **Ethical conduct**

Guiding Principles *continued*

- Leadership
- Perception & reality of independence
- Civility
- Good officership
- Diligence
- Exemplary personal conduct

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SVC, MDC & Victim’s Collateral Misconduct

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Victim's Collateral Misconduct

- **Inform Victim**
  - **MDCs are available to defend any misconduct**
  - **SVC initially will not be sole or lead counsel for misconduct**
- **Refer Victim to MDC**
  - **If CC initiates action for collateral misconduct**
  - **SVC will contact servicing SDC* for representation**
  - **SDC*/CSDC will detail conflict-free counsel**
  - **Using Area Defense Electronic Reporting (ADER)**

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Victim's Collateral Misconduct

- **SVC May Support MDC**
  - **If victim consents, SVC may represent as 2nd counsel**
  - **(Not necessarily a good idea)***
  - **Nonetheless, MDC remains lead counsel, unless…**
- **Victim Chooses SVC in lieu of MDC (Beware)**
  - **Most SVCs have no prior defense experience**
  - **Unprepared for the complexities & nuances involved**
  - **Unfamiliar with how to manage client expectations**
  - **Dual role distracts SVC from primary purpose**

U.S. AIR FORCE

Practical Advice at the Strategic Level

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Safety First: Protect Yourself

- **Be aware! Some clients, family members, and witnesses are plain angry and/or emotionally unstable**
- **Don’t see clients in questionable surroundings or at peculiar hours**
- **Think safety all of the time—in the office and elsewhere (courtroom, etc.)**
- **Get suicide prevention training from Life Skills**

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Practical Advice at the Tactical Level

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Client Interaction: Be Professional

- **Don't get personally/emotionally involved w/ client**
- **Show professional concern**
- **Communicate w/ client regularly**
- **Document/MFR your work & advice**
- **Be sensitive to real/apparent conflicts**
- **Perceptions are reality**
- **Keep expectations reasonable**
- **Do your best, but remember some clients are never satisfied**

U.S. AIR FORCE

Questions?

Access To Information:

HIPAA, Privacy Act, FOIA, & Other Rules

Capt Satura Gabriel
Instructor, Civil Law

Overview

- HIPAA
- Privacy Act
- Freedom of Information Act
- Scenarios

Access to Information

- What information is accessible?...it depends
  - Medical Records
  - Mental Health Records
  - Pretrial Documents
  - Post-trial Documents
- Special Victims' Counsel Rules of Practice & Procedure Rule 6.9

HIPAA Overview
Who & What is Covered?

- **Who? Covered Entities (CEs)**
  - **Health Plans, e.g., TRICARE**
  - **The Military Health System (MTFs and healthcare providers) or the Veterans Health Administration**
  - **Health care clearinghouses (e.g., companies that perform electronic billing on behalf of MTFs)**
  - **Business associates**

- **What? Protected Health Information (PHI)**
  - **Individually identifiable health information (which relates to past, present, or future physical or mental health in electronic, paper or other medium) that is transmitted by electronic or any other form**

HIPAA
General Rule

<u>Rule</u>: PHI shall not be used or disclosed except as specifically permitted by the Privacy Rule

When can PHI be disclosed?

- **Treatment, Payment and Healthcare Operations (TPO)**
  - **Treatment - provision, coordination, consultation and referral**
  - **Payment - billing, reimbursement, eligibility, utilization review**
  - **Healthcare Operations - QA, credentialing, *legal*, medical review, auditing and regular business and management**
- **To the individual**
- **Pursuant to an authorization**
  - **Authorization must be specific**
  - **Can't condition TPO on authorization**
- **As specifically permitted by the Privacy Rule**

AUTHORIZATION FOR DISCLOSURE OF MEDICAL OR DENTAL INFORMATION

PRIVACY ACT STATEMENT

In accordance with the Privacy Act of 1974 (Public Law 93-579), the notice informs you of the purpose of the form and how it will be used. Please read it carefully.
AUTHORITY: Public Law 104-191; E.O. 9397 (SSAN); DoD 6025.18-R.
PRINCIPAL PURPOSE(S): This form is to provide the Military Treatment Facility/Dental Treatment Facility/TRICARE Health Plan with a [illegible] sclosure of an individual's protected health information.
ROUTIN [illegible] he individual upon authorization for the disclosure from the individual for: personal use; Ins [illegible] chool; legal; retirement/separation; or other reasons.
DISCLO [illegible] the authorization form will result in the non-release of the protected health informa [illegible]
This fo [illegible] ation to disclose alcohol or drug abuse patient information from medical records or for auth [illegible] om records of an alcohol or drug abuse treatment program. In addition, any use as an auth [illegible] therapy notes may not be combined with another authorization except [illegible] disclos [illegible]

Individual/ Facility to rec'v PHI #6 (a)

Patient Data Section I

SECTION I - PATIENT DATA

1. NAME *(Last, First, Middle Initial)*	2. DATE OF BIRTH *(YYYYMMDD)* [illegible] SECU [illegible]
4. PERIOD OF TREATME [illegible] FROM - TO *(YYYYMMDD)*	5. TYPE OF TREATMENT *(X one)* ☐ OUTPATIENT ☐ INPATIENT ☐ E [illegible]

SECTION II - DISCLOSURE

6. I AUTHORIZE _____ TO RELEASE MY PATIENT INF [illegible] TO:
(Name of Facility/TRICARE Health Plan)

a. NAME OF PHYSICIAN, FACILITY, OR TRICARE HEALTH PLAN	b. ADDRESS *(Street, City, State and ZIP Code)*
c. TELEPHONE *(Include Area Code)*	d. FAX *(Include Area Code)*

7. REASON FOR REQUEST/USE OF MEDICAL INFORMATION *(X as applicable)*
☐ PERSONAL USE ☐ CONTINUED MEDICAL CARE ☐ SCHOOL ☐ OTHER *(Specify)*
☐ INSURANCE ☐ RETIREMENT/SEPARATION ☐ LEGA [illegible]

Information to be released #8

8. INFORMATION TO BE RELEASED

9. AU [illegible] YYYMMDD) | 10. AUTHORIZATION EX [illegible] ☐ DATE *(YYYYMMDD)* [illegible] ☐ ACTION COMPLETED

Patient's Signature #11

SECTION III - RELEASE AU [illegible]

I unde [illegible]
a. I h [illegible] authorization at any time. My revoc [illegible] ovided to the facility where [illegible] t or to the TMA Privacy Officer if th [illegible] nation possessed by the TRIC [illegible] n MTF or DTF. I am aware that if I later revoke this authorization, the person(s) I herein name [illegible] sed my protected information on the basis of this authorization.
b. If [illegible] lth information to be disclosed to someone who is not required to comply with federal priva [illegible] n such information may be re-disclosed and would no longer be protected.
c. I have a right to inspect and receive a copy of my own protected health information to be used or disclosed, in accordance with the requirements of the federal privacy protection regulations found in the Privacy Act and 45 CFR §164.524.
d. The Military Health System (which includes the TRICARE Health Plan) may not condition treatment in MTFs/DTFs, payment by the TRICARE [illegible] lth Plan, enrollment in the TRICARE Health Plan or eligibility for TRICARE Health Plan benefits on failure to obtain this autho [illegible] tion.
I request and aut [illegible] ze the named provider/treatment facility/TRICARE Health Plan to release the information described above to the named in [illegible] l/organization indicated.

11. SIGNATURE O [illegible] TIENT/PARENT/LEGAL REPRESENTATIVE	12. RELATIONSHIP TO PATIENT *(If applicable)*	13. DATE *(YYYYMMDD)*

SECTION IV - FOR STAFF USE ONLY *(To be completed only upon receipt of written revocation)*

14. X IF APPLICABLE: ☐ AUTHORIZATION REVOKED	15. REVOCATION COMPLETED BY	16. DATE *(YYYYMMDD)*

17. IMPRINT OF PATIENT IDENTIFICATION PLATE WHEN AVAILABLE	SPONSOR NAME: SPONSOR RANK: FMP/SPONSOR SSN: BRANCH OF SERVICE: PHONE NUMBER:

Adobe Professional 8.0

Standard Uses & Disclosures Under the Privacy Rule

- For the standard uses and disclosures listed below, a patient's opportunity to agree or object is not required
  - as required by law
  - public health activities
  - victims of abuse, neglect or domestic violence
  - health oversight activities
  - **judicial and administrative proceedings**
  - **law enforcement purposes**
  - about decedents
  - cadaver organ, eye or tissue donation purposes
  - research involving minimal risk
  - avert serious threat to health or safety
  - **specialized government functions**
  - worker's compensation

Specific Exemptions: "For Judicial & Administrative Proceedings"

- In response to an order of a court or administrative tribunal
- In response to a subpoena, discovery request, or other lawful process not accompanied by court order if:
  - Satisfactory assurance individual has been given notice of the request; OR
  - Satisfactory assurance from requestor that reasonable efforts have been made to seek a qualified protective order

Specific Exemptions: "For Law Enforcement Purposes"

- "For law enforcement purposes"
  - Pursuant to process and as otherwise required by law
  - For identification and location of suspect, witness or missing person
  - About victims or suspected victims of crime
  - To alert about death if suspicion of crime
  - If evidence of criminal conduct on covered entity's premises
  - If needed to alert about a crime

Specific Exemptions: "For Victims of a Crime"

- **Victim's PHI is releasable to Law Enforcement**
  - **Minimum Amount Necessary (no fishing expeditions)**
  - **Individual agrees to the release or**
  - **If unable to obtain individual's agreement because of <u>incapacity</u> or <u>emergency</u> circumstance:**
    - **LE official represents the following: such information is not intended to be used against the victim; LE activities would be materially and adversely affected by waiting for individual to agree; and disclosure is in the best interest of the individual (as determined by MTF)**
- **DoD 6025.18-R, para. C7.6.3**

Specific Exemptions:
"For Specialized Government Functions"

- **Armed Forces Personnel**
  - **A covered entity may use/disclose PHI of Armed Forces personnel for activities deemed necessary by the appropriate military command authorities to assure proper execution of the military mission**
  - **Purposes: to determine fitness for duty, fitness to perform a particular assignment, to carry out Joint Medical Surveillance activities, to report on casualties, to carry out any activity necessary to the proper execution of the mission of the Armed Forces**
  - **This exception DOES NOT authorize use or disclosure of PHI of reservists or dependents for activities related to their civilian employment.**
  - **See DoD 6025.18-R, para C7.11.1 for a complete list of "Specialized Government Functions"**

Minimum Necessary Rule

- An MTF must make "reasonable efforts to limit the use, disclosure, or request. . . to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request." DOD 6028.18-R, para C8.2.1.
- According to HHS, the minimum necessary rule is "a reasonableness standard that calls for an approach consistent with the best practices and guidelines already used by many providers and plans today."
- "It is intended to reflect and be consistent with, not override, professional judgment and standards."

Minimum Necessary Rule

- The minimum necessary rule does not apply to disclosures made:
  - for treatment,
  - pursuant to an authorization
  - to the patient, or
  - that are required by law

Accounting Provisions

- **Right to an accounting of disclosures of PHI, <u>except</u> for disclosures:**
  - **to carry out TPO**
  - **to the patient**
  - **pursuant to an authorization**
- **Temporary suspension of accounting of disclosures upon request from LE**

***See DoD 6025.18-R, C13.1.1 for a complete list of accounting of disclosures exceptions**

Privacy Act of 1974

- **Key Terms:**
  - **Record:** Any item or collection of information about an individual which is maintained by an agency and which contains that person's name or other identifying particulars.
  - **System of Records:** A group of records under the control of an agency from which information is retrieved by the name of the individual or by some personal identifier.

Privacy Act: What can be released?

- <u>General Rule</u>: The subject of the PA record gets a complete record under the PA, unless a PA exemption is claimed.
- If a PA exemption is claimed, the request is processed under FOIA.
- Common Exemptions:
  - (j)(2) Investigatory material compiled for LE (Principal Function)
  - (k)(1) Classified
  - (k)(2) Investigatory material complied for LE
  - (k)(5) Investigatory material for determining suitability for employment including security clearances

Privacy Act: What can be released? (cont'd)

- <u>General Rule</u>: Third party requestors can't have access to an individual's record under the PA without the subject's consent…*unless* an exception applies.

- If a record is not releasable in full under PA, then FOIA analysis is conducted.

12 EXCEPTIONS TO PA "CONSENT" RULE

- Need to know within the DoD
- Required to be released under FOIA
- Routine Use (found in the SORN)
- Census Bureau
- Statistical Research
- National Archives
- Law Enforcement
- Health or Safety
- Congress
- GAO
- Court Order
- Consumer Reporting Agency

FOIA Enacted

- The Freedom of Information Act (FOIA) was passed in 1966 to require the federal Government to release its records to the public – 9 specific exemptions provide the sole authority to withhold records from release under the FOIA.

- The FOIA has been amended numerous times, usually to make it easier for the public to obtain records.

FOIA Exemptions

- 1 - Classified
- 2 - Internal Agency Matters
- 3 - Contained in other Federal Statutes
- 4 - Trade Secrets/Commercial Information
- 5 - Privileged Documents
- 6 - Personal Privacy Information
- 7 - Records Created for a LE Purpose
- 8 - Financial Institutions
- 9 - Geological Information

FOIA – Exemption 6

- **"Personnel and medical files and similar files the disclosure of which would constitute a <u>clearly unwarranted invasion of personal privacy</u>"**

- **Balancing Test:**
  - **An unwarranted invasion of personal privacy exists when an individual's privacy interests outweigh the public's interest in disclosure of the information"**

FOIA – Exemption 7

Created/Compiled for a law enforcement purpose – very broad – but only to the extent production

- **7(A) "could reasonably be expected to interfere with enforcement proceedings" [pending or prospective]**
- **7(B) "would deprive an individual of the right to a fair trial or impartial adjudication"**
- **7(C) "could reasonably be expected to constitute an unwarranted invasion of privacy"**
- **7(D) "could reasonably be expected to disclose the identity of a confidential source …"**
- **7(E) "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law"**
- **7(F) "could reasonably be expected to endanger the life or physical safety of any individual"**

Balancing Tests: Privacy Factors

Is there an expectation of privacy (concerning alleged misconduct investigations)?

Factors to consider…

- **Rank**
- **Duties**
- **Alleged Offense**
- **Existing Publicity**
- **Stage of Proceeding**
- **Forum**

ce Freedom of Information Act - Home_.pdf - Adobe Reader

t View Document Tools Window Help

1 / 1 139% Find

Air Force Freedom of Information Act

U.S. AIR FORCE

HOME OFFICES READING ROOM HANDBOOK ANNUAL REPORTS RESOURCES QUESTIONS PRIVACY ACT JOIN THE AIR FORCE

How to make a FOIA request?

For submitting Freedom of Information reques
Requester Service Centers (RSC) click on the
Public Access Link (PAL):
https://www.efoia.af.mil/palMain.aspx. Review
the left side as they have been designed to pro
guidance.

FOIA Introduction

The Freedom of Information Act (FOIA) generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions, or by one of three special law enforcement reco

The principles of government

How to Make a FOIA Request

To submit a FOIA inquiry online click here. For mailing/faxing contact the FOIA Requester Service Center where the record is located, describe the records you want as specifically as possible, and let the office know how much you are willing to pay. Furnish any facts or clues about the time, place, persons, events, subjects, or other details of the information or records you want. That will help the office decide where to search and determine what records pertain to your request. It can also save you and the government time and money, and you may get what you want faster. There is no special form to complete. Mark your request and envelope "FOIA."

How to Make a Privacy Request

How to make a PA request?

For Submitting Privacy Requests

If you are seeking records on yourself, this is a Privacy Act re
will need to provide proof of identity. At this time, all Privacy Act request must be submitted by mail directly to the appropriate Requester Service Center.

NOTE: Air Force-affiliated requesters, to include military and civilian employees, should not use government equipment, supplies, stationery, postage, telephones, or official mail channels to make FOIA requests. Requests should be made through personal e-mail or postal service.

This is the information required on an identity verification form:

Inside FOIA

Search

search FOIA Find it!

General Images Video

View All RSS

inks

iew
OIA Regulation
- Guide to FOIA Exemptions
- Major Information Systems
- Quality of Information Program Overview
- Air Force Link

Other FOIA Sites

- Department of Defense
- Army

es

SAF FOIA website: http://www.foia.af.mil

Access to Civilian Law Enforcement Reports

- Access to civilian LE reports is governed by state law
- "General" Procedures:
  - Contact LE Records Department
  - Confirm the following:
    - ✓ Whether the entire report is releasable
    - ✓ When the report is available
    - ✓ Procedure for requesting a copy
    - ✓ Cost & method of payment

Access to Information Scenarios

- A1C Doe is a victim of SA.
  - Are A1C Doe's releasable to her SVC?
  - Are A1C Doe's medical records releasable to OSI?
  - Are A1C Doe's medical records releasable to the accused's commander?
  - Are the accused's medical records releasable to A1C Doe?

Access to Information Scenarios

- SSgt Snuffy is arrested off-base for SA. The AF obtained jurisdiction and OSI has completed their investigation.

- What is releasable to the victim/SVC?
  - local police report
  - ROI

QUESTIONS?

Headquarters U.S. Air Force

Integrity - Service - Excellence

Special Victims' Counsel Overview and Charter

Colonel Marlesa Scott
Community Legal Services Division

Jim Russell
Military Justice Division

U.S. AIR FORCE

Overview

- Why?
- What?

U.S. AIR FORCE

[redacted]

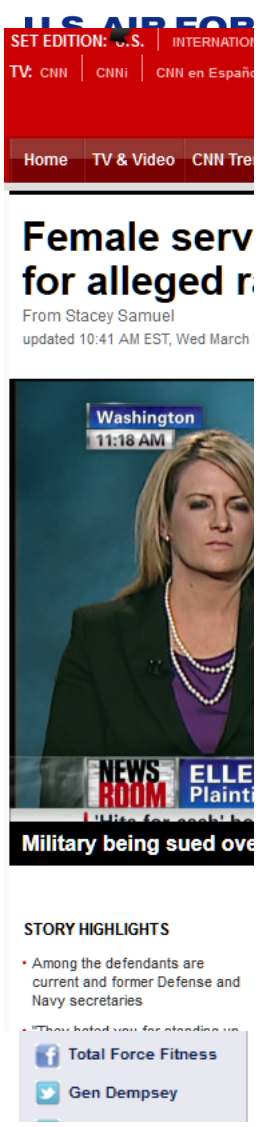
U.S. AIR FORCE

SAPR Future – White Water

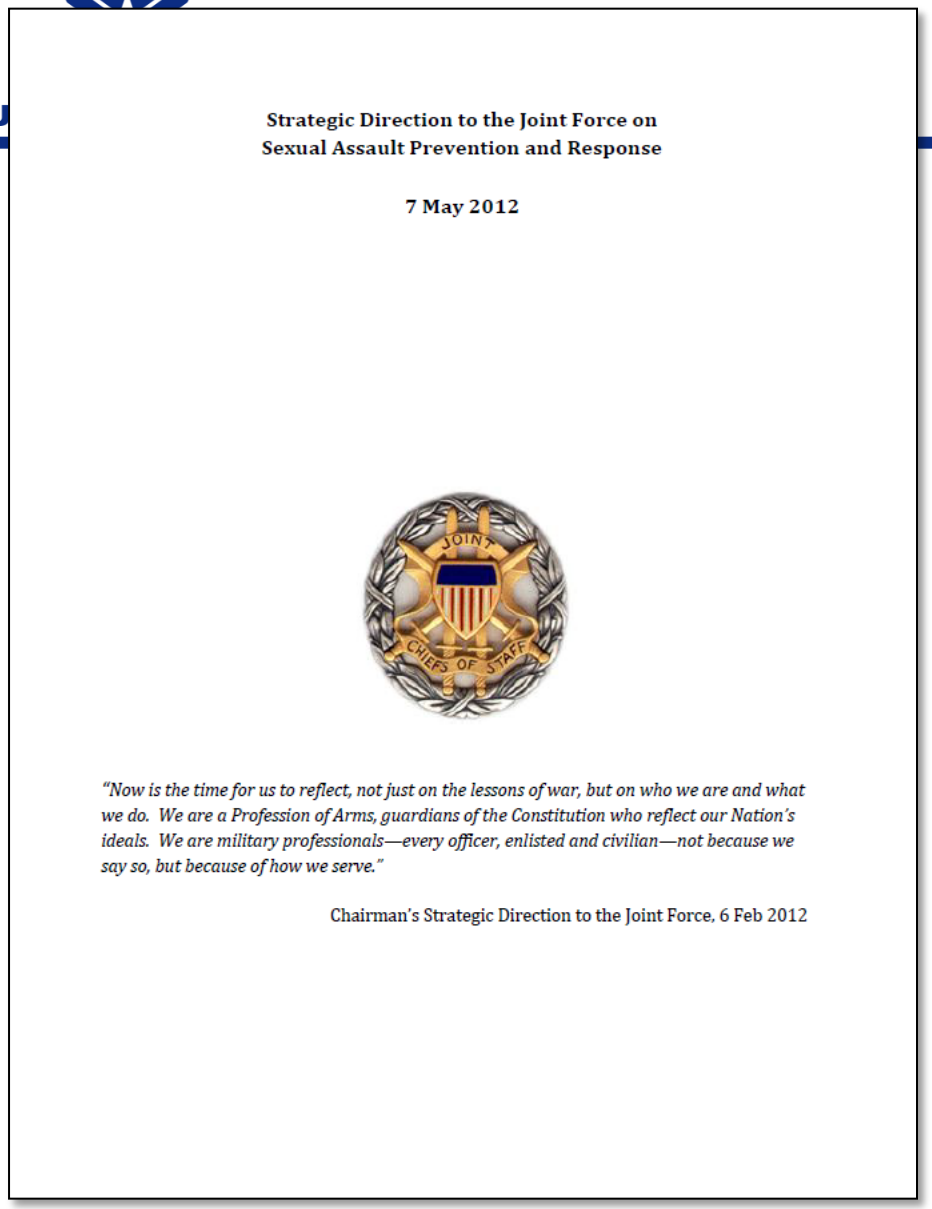
U.S. AIR FORCE

GEORGE
CLOONEY
MARK
WAHLBERG
In the fall of 1991,
the *Andrea Gail* left Gloucester, Mass.
and headed for the fishing grounds
of the North Atlantic.
Two weeks later, an event
took place that had never occurred
in recorded history.
THE
PERFECT STORM
OWN IT ON VIDEOCASSETTE & DVD

Addressing Sexual Assault



Integrity - Service - Excellence



Strategic Direction to the Joint Force on
Sexual Assault Prevention and Response

7 May 2012

"Now is the time for us to reflect, not just on the lessons of war, but on who we are and what we do. We are a Profession of Arms, guardians of the Constitution who reflect our Nation's ideals. We are military professionals—every officer, enlisted and civilian—not because we say so, but because of how we serve."

Chairman's Strategic Direction to the Joint Force, 6 Feb 2012

Strategic Direction to the Joint Force on Sexual Assault Prevention and Response

U.S. AIR FORCE

Strategic Direction to the Joint Force on Sexual Assault Prevention and Response

As we look across the Force, the Joint Chiefs, Commandant of the Coast Guard and I are dissatisfied—despite our years of concerted effort—with the progress we have made in reducing sexual assault across our formations. Evidence clearly indicates that gaps remain between the *precepts of the DoD Sexual Assault Prevention and Response (SAPR) Program* and its full *implementation at command and unit levels. Commanders must close these* gaps by exercising the full measure of their authorities, options and resources to imbue a culture and cultivate a climate/ environment that is resilient to the risks and vulnerabilities associated with sexual assault. This will require us to enhance unit sexual assault awareness, reinvigorate efforts to encourage open communication and timely reporting, appropriately hold offenders accountable and provide responsive victim services—all this, reinforced and insulated by a culture that will not tolerate sexual assault.

U.S. AIR FORCE

General Welsh

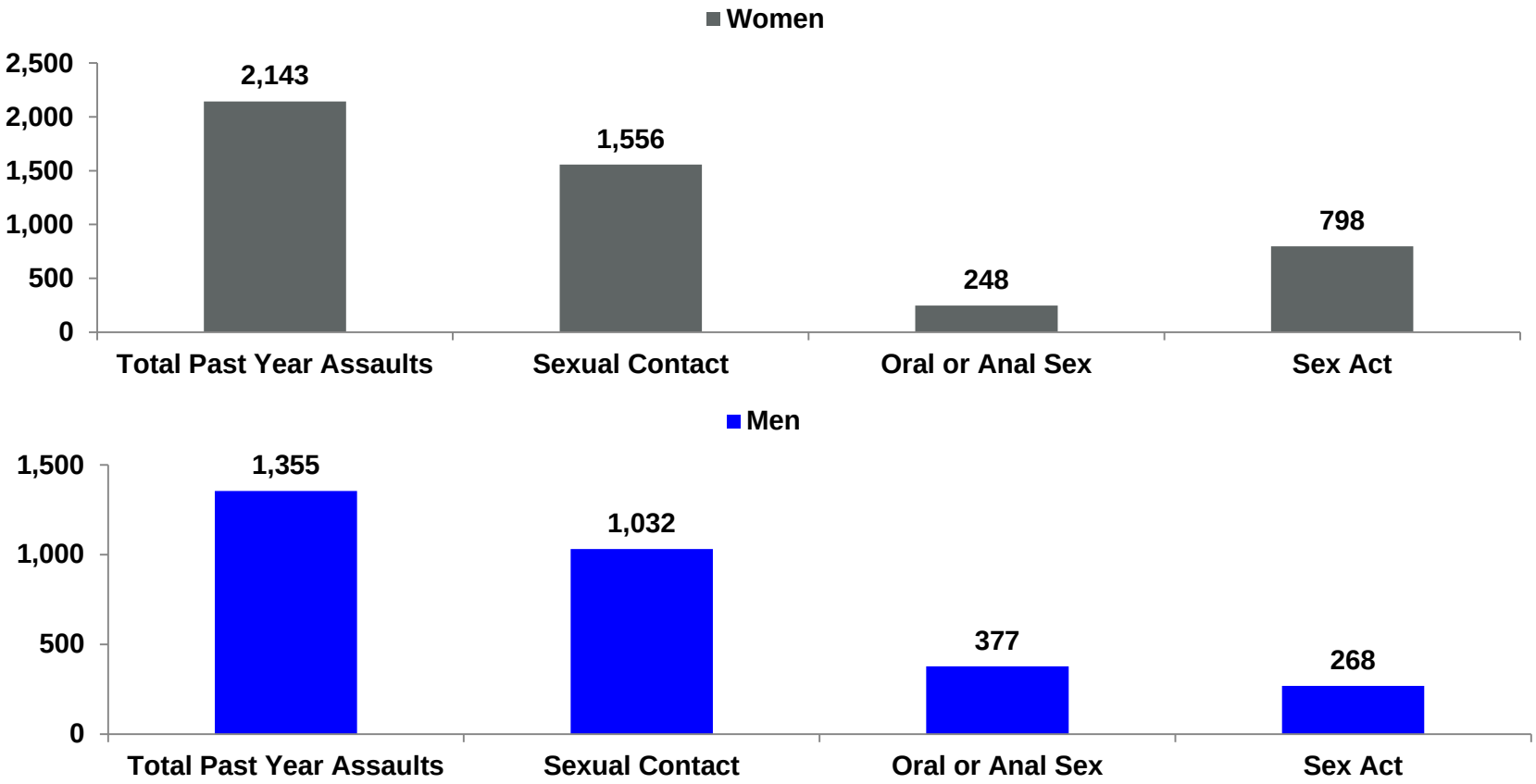
[redacted]

We MUST do more to protect one another from this crime, by…strengthening our support of victims and making a culture of trust and respect a reality for everyone in our Air Force.

General Mark A. Welsh III, Air Force Chief of Staff
18 November 2012

Projected Incidence

Projected Past Year Incidence* of Sexual Assault by Gender and Type of Act



Reporting

- National
  - General population reporting rate for rape/SA: 46%
  - College population: rape 5%
  - Between 1992 and 2000: Only 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults
- Air Force: 17% of women and 6% of men

U.S. AIR FORCE

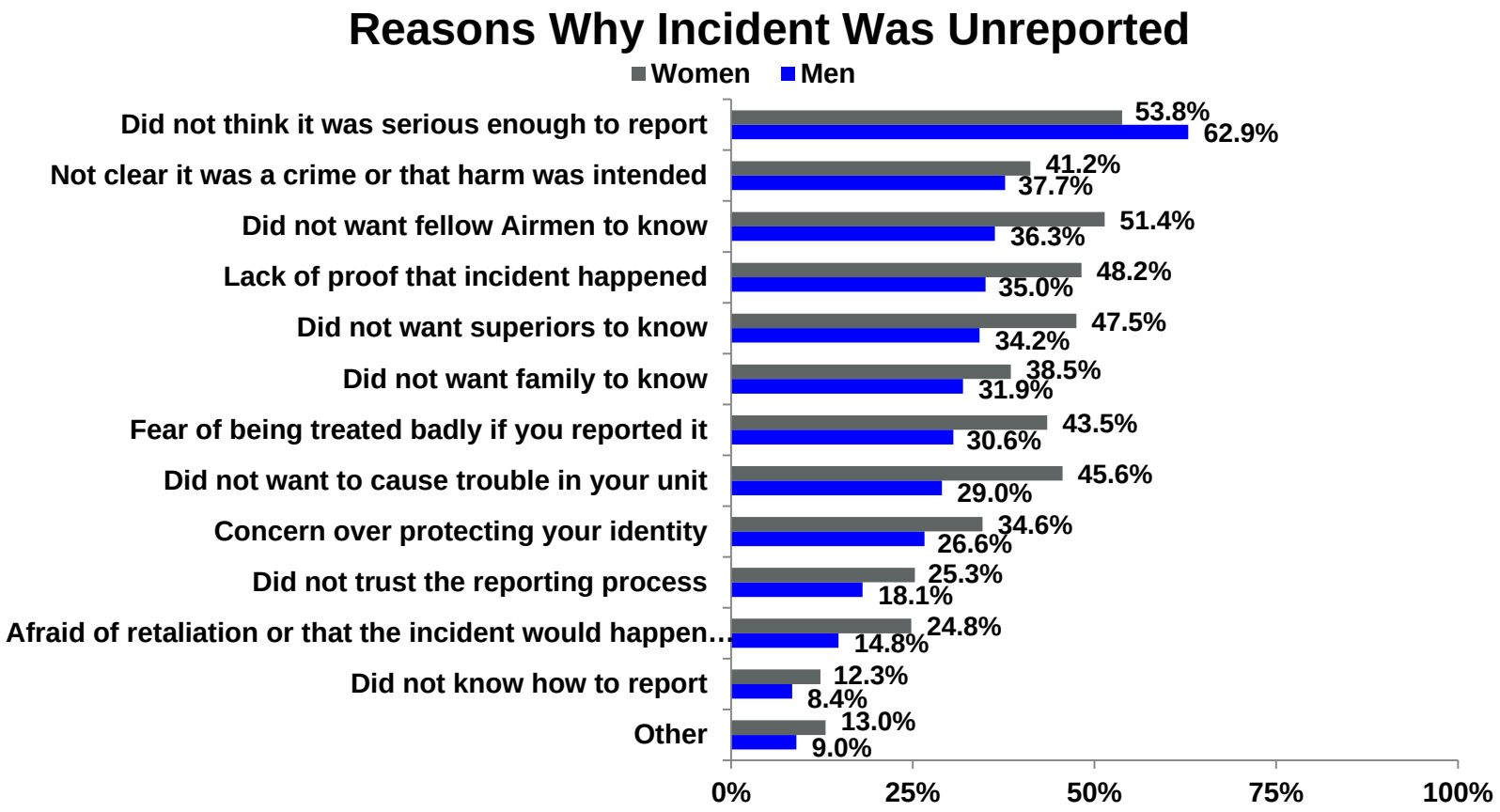
Barriers

- 2004 AF Report on Sexual Assault
  - Stigma, shame, fear
  - Fear of being reduced in the eyes of one's commander or colleagues
  - Fear of disciplinary action due to a victim's misconduct
  - Fear of re-victimization
  - Fear of operational impacts on training, security clearances, and overseas deployment

U.S. AIR FORCE

Gallup

Most recent sexual assault reported by only 16.7% of women / 5.8% of men



U.S. AIR FORCE

Barriers

- Recent Unit Climate Assessments
  - 74% AF females, 57% males perceived barriers
  - Most frequent perceived barrier = stigma, shame, and/or fear
  - Concerned by lack of privacy/confidentiality
  - Officer/Junior Officer perceived fewer barriers
- What happens after victim's report?

Disposition of 522 Subjects

(Action taken in FY11)

Number of subjects	522
Subjects awaiting command action	-68
Any Command Action Precluded	-92
SUBTOTAL	362

Cases presented to Commanders for Action 362 (69%)

Commander took non SA action	*249*
Action on non SA Offense	98
Insuff Evid of any Offense	81
Unfounded by Command	5
Commander declined action	0
V declined to Participate	65
Unfounded by Invest Agency	0

Commander took Action for SA	*113*
CM Preferred (Initiated)	79
Nonjudicial Punishment	33
Admin Discharge	0
Other Admin Action	1

U.S. AIR FORCE

So What's the Fix?

- **Goals:**
- **Increase reports**
- **Keep victims in the system**

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Current Programs

- **VWAP**
- **SAPR**
- **DoD Policy Memo on Legal Assistance to Victims of Crime, 17 October 2011**
- **2012 NDAA, Section 1565b**

What Assistance is Available under 10 USC § 1044?

“ …in a military justice sexual assault prosecution, to the extent the victim could retain the advice or representation of a private counsel, §§ 1044 and 1565b [2012 NDAA] authorizes, and certainly does not prohibit, JAGs from providing the same legal advice and representation, to the same extent.”

The Honorable Jeh C. Johnson
General Counsel of the Department of Defense
9 November 2012

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Purpose of the SVC Program

- **Provide advocacy: protect the rights afforded to victims in the military justice system**
- **Provide advice: develop victims' understanding of the investigatory and military justice processes**
- **Empower victims by removing barriers to their full participation in the military justice process**

Providing this service to victims will result in a more robust opportunity for victims to be heard, to retain and take advantage of their rights, and enhance the military justice system while neither causing unreasonable delay, nor infringing upon the rights of an accused.

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Why an SVC Program?

- **Provide support through independent representation**
- **Build and sustain victim resiliency**
- **Empower victims**
- **Increase level of legal assistance provided to victims**

Fundamental Principles

- **A SVC's primary responsibility is to his or her client**
- **SVCs are bound by applicable Air Force Instructions and Manuals, Professional Standards, and Rules of Practice for Courts-Martial**
- **SVCs are supervised professionally by SJAs, by AFLOA/JAJD for issues involving collateral misconduct, and by AFLOA/JAJM with respect to representation of clients under the SVC program**

Special Victims' Counsel Charter

Services

- Will be offered to eligible beneficiaries: active duty members, ARC Members (if incident occurred while member entitled to LA), dependents who are not minors
- For sexual assaults under UCMJ Articles 120, 125, and 80
- For restricted and unrestricted reports
- May include in-court representation of victims' interests as permitted by applicable MREs

U.S. AIR FORCE

Bottom Line

The Special Victims' Counsel Program is About

TAKING CARE OF OUR PEOPLE

Increasing Professionalism and Discipline

Improving Circumstances of Individual, Unit, Mission and our Service

U.S. AIR FORCE

Questions?

Our Journey

We are in battle for trust and confidence.

STOP Act

14 trips to Congress

Caucus rooms full of victims

FY11: Of 362 actionable cases, 96 (29%) victims walked away

Why?

Were they all lying?

Reasons for pulling out:

1. Fatigue …6-8 months for investigation

12 months before trial

2. Loss of trust and confidence in Air Force

Feeling of loss of control
Feeling revictimized (e.g., Invisible War)

3. “No one on my side”

Murder boarded victim

Prosecutor represents victim, really?

Do I have to release my MH records?

Do I have to be interviewed by DC again?

Conclusion: We need SVC because:

Build resiliency

Prevent victim anger about the process

Will increase prosecution … not main reason

How to build Victim Resiliency?

1. Explain to victim the process

   Ex: Why do they keep asking me about … ?

2. Advocate victim's interests where possible

   (MRE 412, 513/4)

Conclusion:

Sometimes you get lucky

We all joined for the same reason … make a difference

Important to make a difference here because:

1. Blue on blue.

Our Airmen. Depending on your age, they are like our sisters and our daughters.

2. Our Air Force is the also a victim. The casualty is our morale, our good order, and our espirt d 'corps.

It attacks our beliefs....our values... our very soul as an institution.

<u>Concl: This is family business.</u>

We declare war on hopelessness.
We declare war on despair.
We declare war on abuse of Airman.

It stops today. In this place. At this time!

I have time for some of your questions

Air Force Office of Special Investigations

OSI Mission

Victims' Counsel Course

SA Mark Walker
Sexual Assault
Investigations & Operations Consultant

10 Dec 12

U.S. AIR FORCE

Overview

- AFOSI Overview
- Directives/Instructions
- Organization/Structure
- Mission
- Personnel Strength & Experience
- Trends
- Historical Events
- Current Events

Directives/Instructions

Mission Directive 39

- Criminal Investigations
- Counterintelligence
- Specialized Services

AF Policy Directive 71-1, *Criminal Investigations & Counterintelligence*

- Implements DoD Instructions

AFI 71-101V1, *Criminal Investigations Program*

- Responsibilities
- OSI/SF Investigative Matrix

AFOSII 71-122V1, *Criminal Investigations*

- Internal guidance
- Investigative considerations

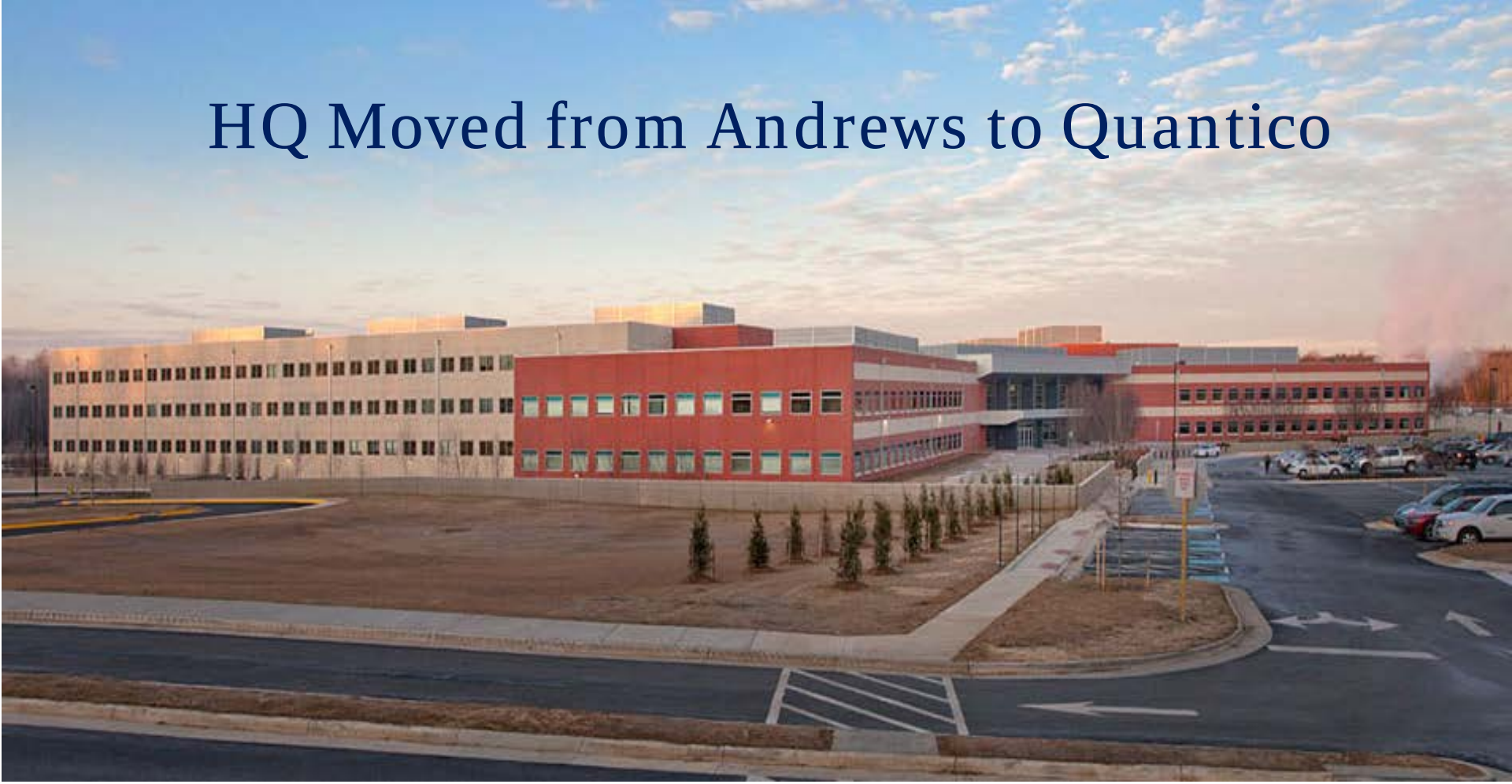
Who We Are

AFOSI is…

- **A "Field Operating Agency" of the Air Force**
  - Accountable to Secretary of the Air Force
  - Under Guidance/Direction of the SAF Inspector General

- **Responsible for:**
  - Criminal Investigations
  - Counterintelligence
  - Specialized Services

HQ Moved from Andrews to Quantico



Organization & Structure: Regions

FIR1
WPAFB, OH

FIR2
Langley AFB, VA

FIR3
Scott AFB, IL

FIR4
RAFB, TX

FIR5
Ramstein AB, GE

FIR6
JB Pearl Harbor-Hickam , HI

FIR7
JB Andrews, MD

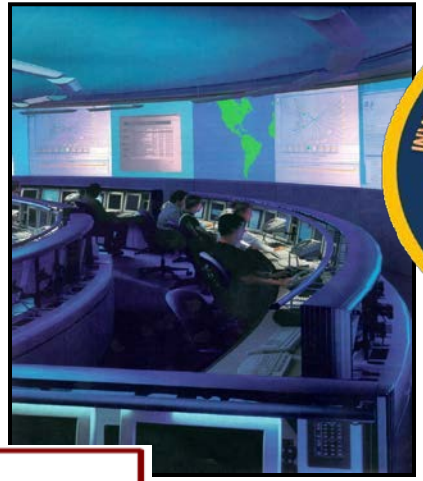
FIR8
Peterson AFB, CO

USAFSIA
Georgia

Special Projects
JB Anacostia Bolling DC

Organization & Structure: ICON

Global Situational Awareness



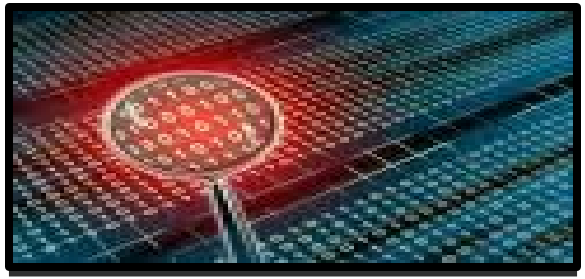
INVESTIGATIONS COLLECTIONS AND OPERATIONS NEXUS

Pursuing Excellence Through Expertise

ICON

Specialized Investigative Services

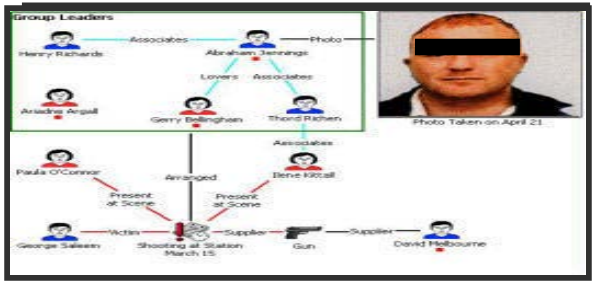
Forensic Sciences



Cyber Operations

Polygraph

Technical Services



Analysis

Counterespionage Operations

What We Do

We are a federal law enforcement and investigative agency operating throughout the full spectrum of warfare

AFOSI CAPABILITIES

- Protect Secrets
- Detect Threats
- Specialized Services
- Conduct Investigations
- Engage Foreign Threats

EFFECTS

- Neutralized Criminal Activity
- Acquisition Integrity
- Secured Technologies & Information

- A Protected Force
- Developed Partnerships
- Enable Force Engagement
- Global Situational Awareness

How We Do It

Organization & Structure

3,325 Personnel Authorized:

- 2,166 Special Agents
- 788 Professional Staff
- 371 Contractors

AFOSI Regions

- 10 Wing equivalents
- 200+ units worldwide

7 MAJCOM aligned
1 Specialist aligned
1 SAP aligned
1 Training Academy

Joint Terrorism TFs

- Criminal task forces jointly investigating and coordinating on terrorism matters
- 14 CONUS locations

FP Detachments

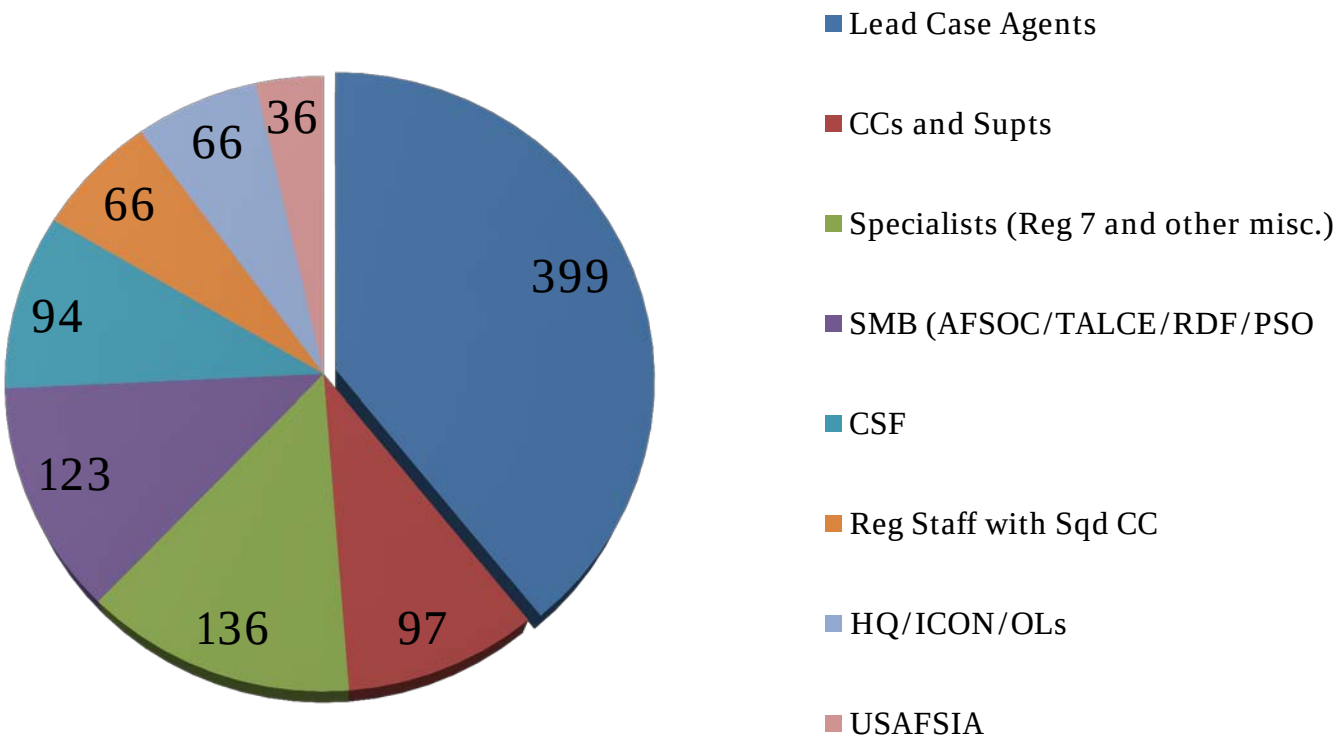
- CI support to FP for in-transit forces at locations with no permanent US military presence
- 38 locations worldwide
- Exec Agency for 9 locations

Our headquarters located at Quantico carries Organize, Train & Equip functions

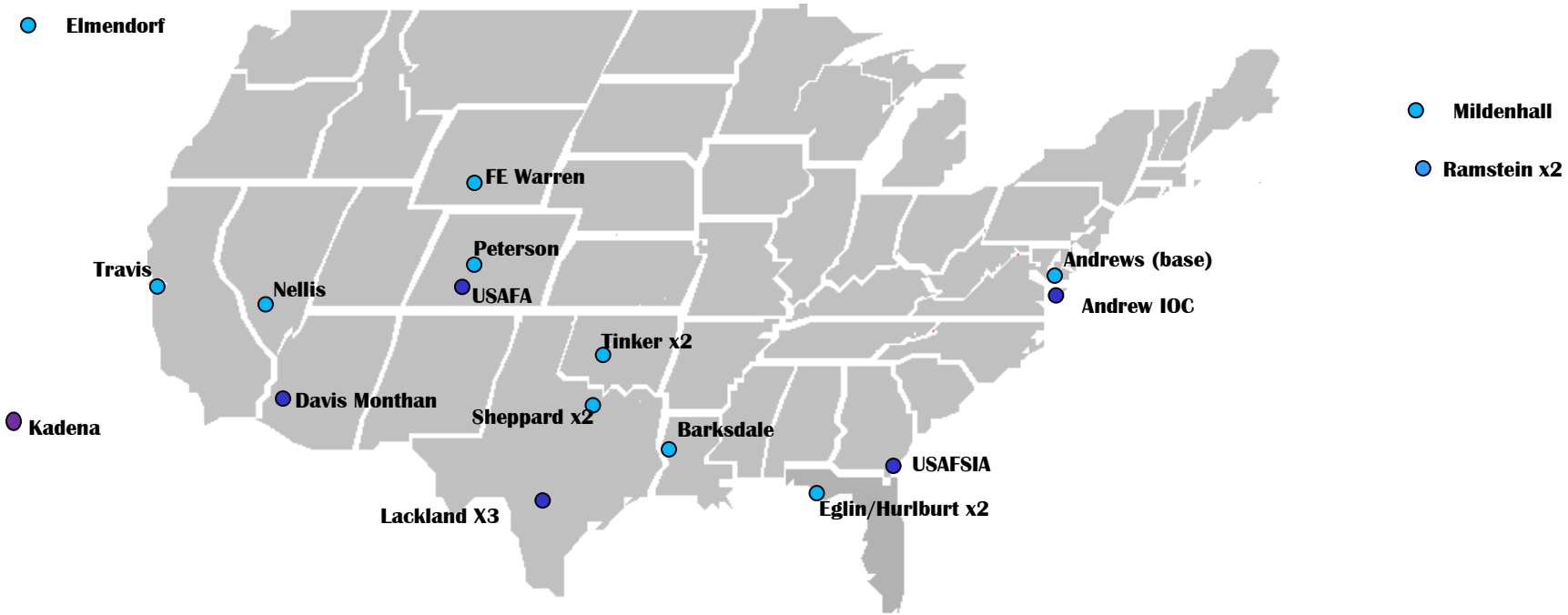
"I believe the JTTFs are the reason there has not been another 911"
- Gen Renuart, former NORTHCOM/CC

FPD agents work with US Embassies and foreign law enforcement to protect DoD people

Criminal Manning: 128/969/738 (1,017 total)



Manning: Units with Sexual Assault Billets



Inside Your Local Detachment

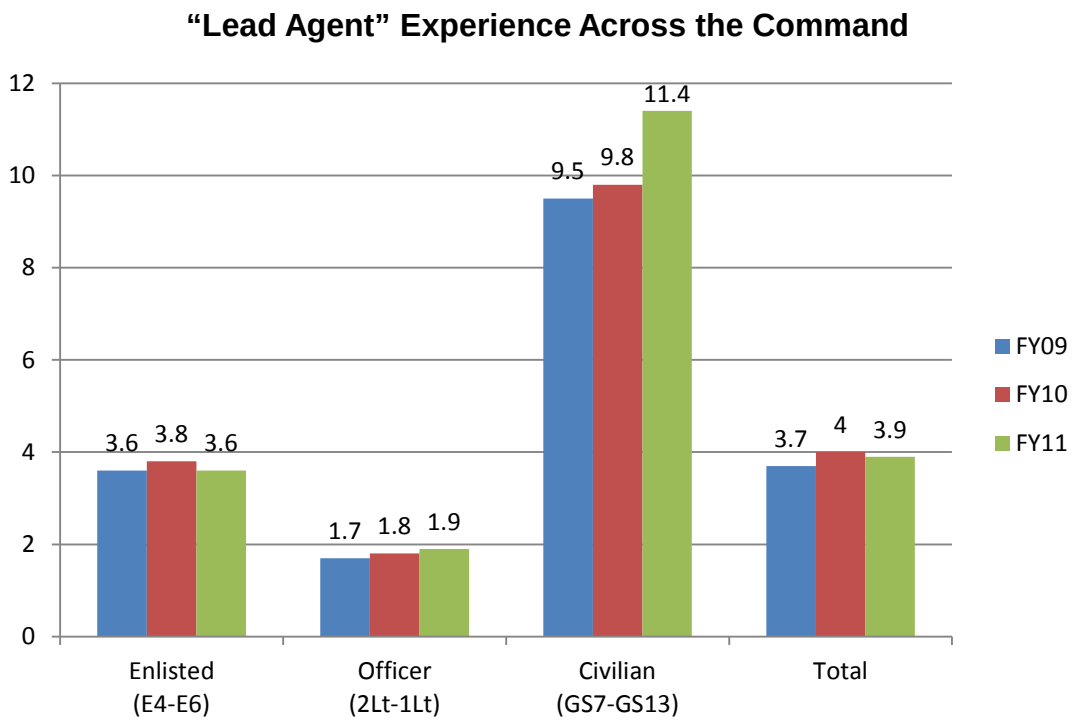
Detachment Commander

or

Special Agent in Charge

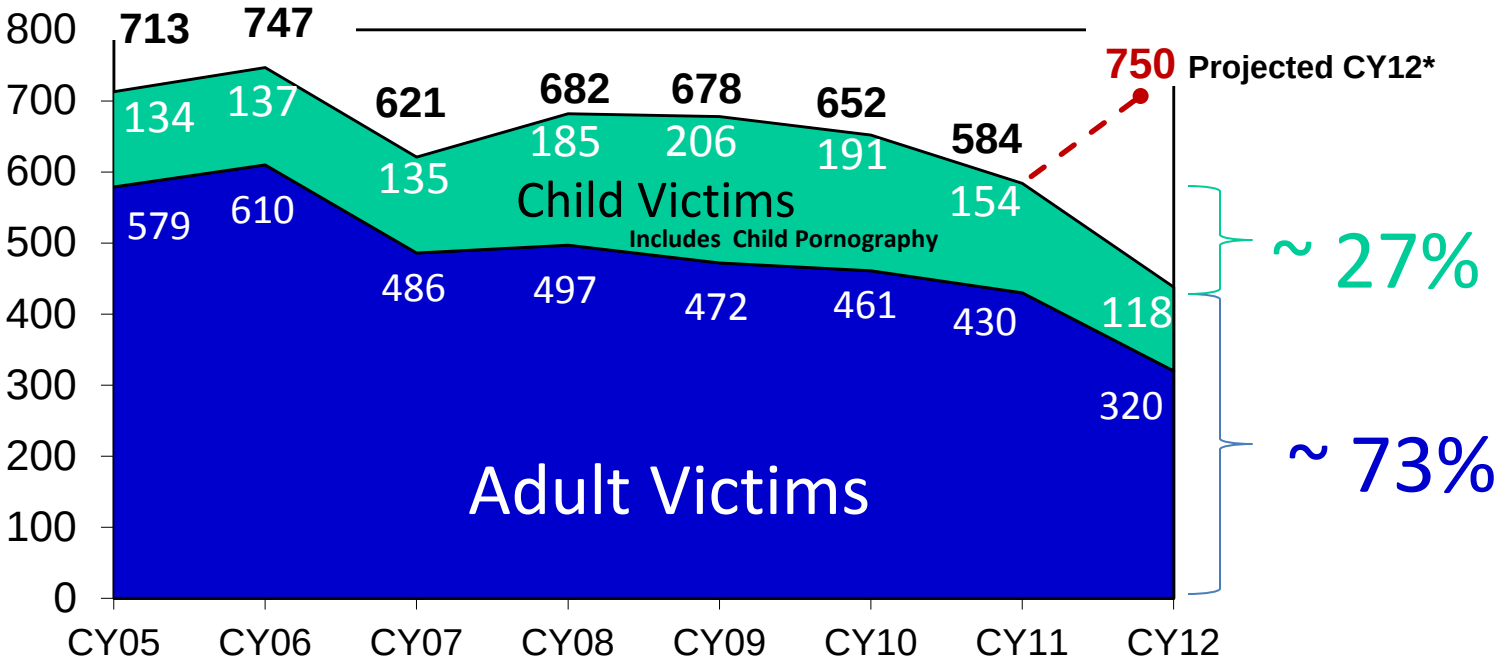
- Street Agent
- Street Agent
- Superintendent
- Street Agent
- Street Agent

People: recruiting, experience, continuity/retention, career path



Sex Offense Investigations

Case Openings CYs 2005-12



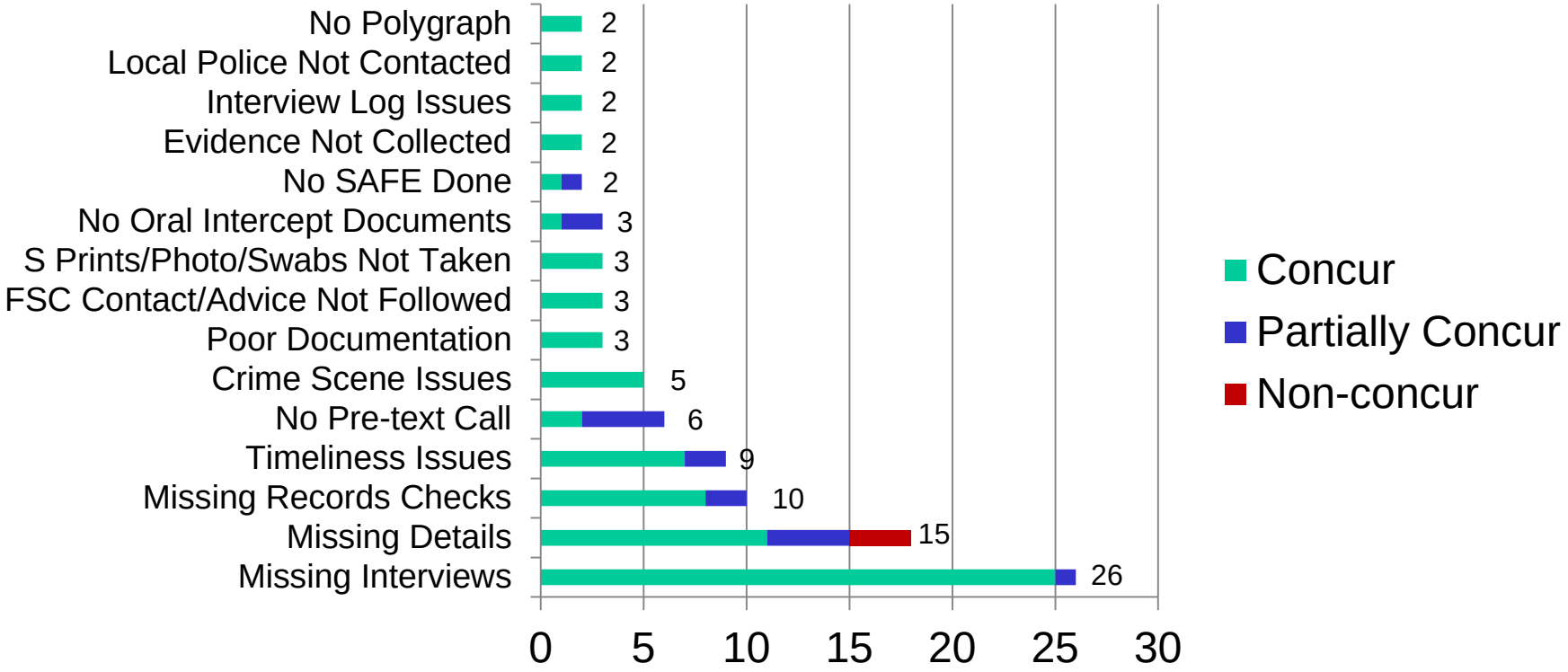
* Projection Base on Jan-Jul Data

Since 2003…

- **Various Commissions & Task Forces**
  - **AF Working Group Report**, 215 pages (June 2003)
  - **Fowler Commission Report,** 141 pages (September 2003)
  - **AETC Special Review Team Findings** (2004)
  - **Defense TF on Sexual Assaults in the Mil Svcs**, 167 pages (Dec 2009)
  - **Government Accountability Office**, 42 pages (June 2011)
  - **DoD IG, Pre-draft Rpt on AFOSI Case Reviews**, 10 pages, April 2012

Discrepancies by Category

(17 (11%) of 152 Cases)



New Initiatives

- Investigative and Operations Consultants
- Sexual Assault Investigators
- Sexual Assault course
- Codified JA-OSI collaboration
  - Collaborate early and often; share info
  - "Hot wash" significant cases
- Sexual Assault Investigative Plan Worksheet
  - Proofing sheet
  - Probative activities focused on elements of offence

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What We Must Do

- **Encourage a corporate (OSI, AF & DoD) understanding**
- **Adjust attitudes; AF needs OSI to “do the right things”**
- **Follow policy guidance**
- **Send our people to sexual assault training**
- **Ensure cases are <u>investigatively</u> sufficient**
  - **Use new tool to develop IP and guide case**

Questions?

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Air Force Office of Special Investigations

Sexual Assault Investigation

SA Mark Walker
Sexual Assault
Investigations & Operations Consultant
10 Dec 12

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Overview

Criminal investigative responsibility

Notification / Response

Investigative process

The interview

How you can help

Criminal Investigative Responsibility

Criminal cases

- Homicide, suicide, aggravated assault, narcotics, large-scale larceny, etc
- Rape, sexual assault, child sexual assault, child pornography
- Wrongful sexual contact

Military Nexus

- Active Duty subject or victim
- Reserve, National Guard on Title 10

Military Criminal Investigative Organization MOU

- Investigative responsibility goes to who owns subject then victim

Location - Exclusive, Concurrent, Proprietary jurisdiction

- AD duty Subject/victim
- NG/Reserve

Notification of Non-restricted Allegation

- **Initial Notification**
  - **Victim reports to SARC / SF/ Local LE / Medical / Unit**

    OR
  - **Victim relates to a witness who reports to one of the above**

LE Response-No delay

- 1st Responder - Security Forces or civilian law enforcement
  - Responds to incident and makes preliminary assessment whether a crime has occurred
    - Interviews Victim
  - Ensures safety of all personnel involved
  - Secures the crime scene/evidence
  - Identifies witnesses at the scene
  - Potentially apprehends/arrests subject
  - Notifies appropriate investigative agency
- Investigator – AFOSI or civilian detectives
  - Respond to scene and assume control of investigation

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The Investigative Process

No checklist
- Every situation is different
- Dynamic process

Probative investigative activity
- Perishable to non-perishable
- Employment of specialized techniques

No timeline
- Investigative activity min every 4 days
- Reliant on others' timetables
  - Laboratory
  - Witnesses

The Investigative Process

Victim Interview -- Possibly initially interviewed by responding SF

- Details of event
  - Offender data
  - Location of evidence – multiple locations
  - Potential timeline
- ID Witnesses – Outcry
- ID potential additional victims

** Concern that Victim's recall has been influenced by interviews
** May be embarrassing or uncomfortable; Victims may be reluctant to share all information with others in the room

The *who; what; when; where; why & how* of the assault in as much detail as possible.

Investigative Process:
Crime Scene Searches

- **Crime Scene(s) Processed – Evidence Collected**
  - **Dependent**
    - **Time/date of the incident**
    - **Nature of the incident**
  - **Multiple scene consideration**
    - **Victim's body, clothes, residence, vehicle…etc**
    - **Subject's body, clothes…..etc….etc**
    - **Information Technology (Media) – *Preservation letters***

Investigative Process:
Sexual Assault Examination

Victim SAFE

- 72 hrs: blood/urine/external swabs/cavity swab
- 21 dys: cervical swab if penile to vaginal penetration
- Consider limited scope SAFE based on nature of incident
- Serves multiple purposes
    - Victim safety/health
    - Physical evidence collection

Subject SAFE

- Underutilized by police
- Consider limited scope SAFE – saliva, marks, evidence of Victim
- Will ask for consent or search authority

Must weigh probative benefit against invasive procedure.

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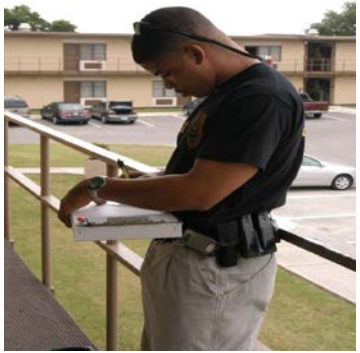
Investigative Process:
Crime Scene Searches

What are we looking for?

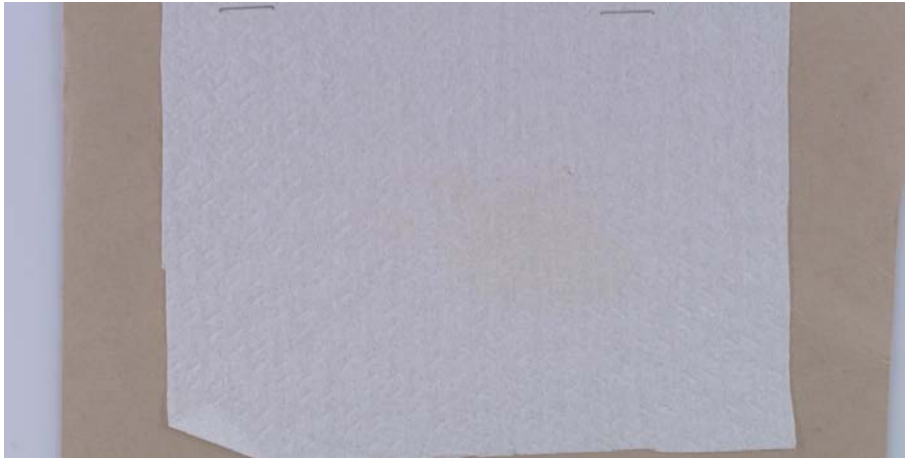
- **DNA**
  - **Clothing/bedding**
  - **Saliva/Sweat**
  - **Other "icky" things**
    - **Condoms/packages/new/used**
    - **Lubricants**
    - **Other items used in assault**
- **Alcohol/drugs/medication**
  - **Witting**
  - **Unwitting**
- **Pictures/video/Media**
  - **Witting**
  - **Unwitting**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

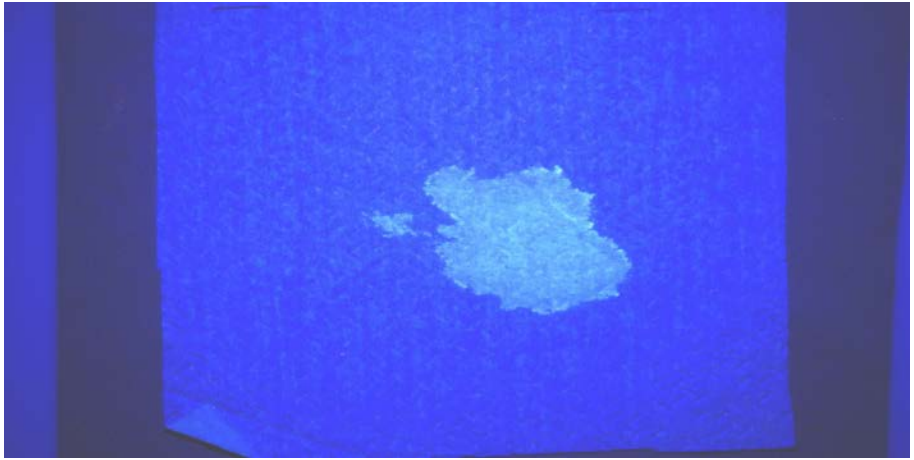
Crime Scene Sequence

Observe: recognizing items of evidentiary value
Record: documentation/photography
Collect: ensure least destructive means
Preserve: mitigate the obliteration of evidence after collection



Technology in Investigations:
Alternative Light Sources





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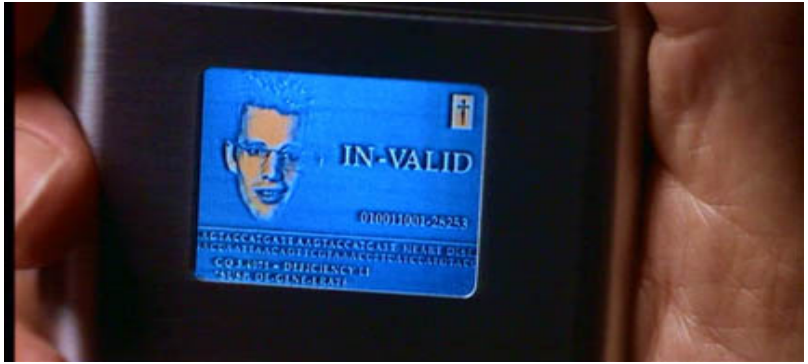
Technology in Investigations:
DNA Analysis

Television

- Match in minutes!



Real World

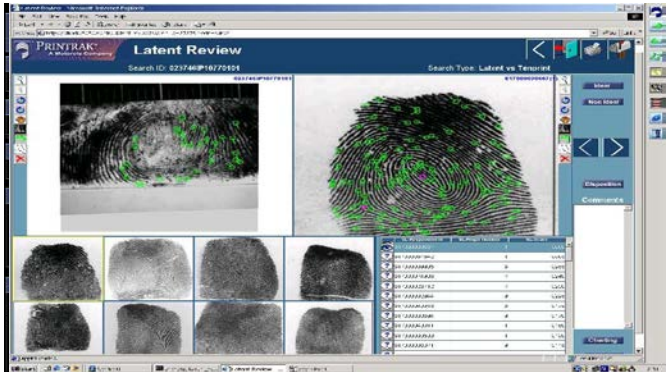
- Locate samples
- Presumptive testing
- Extract DNA
- Quantify DNA
- Type DNA
- CODIS

~ several days if no backlog

Technology in Investigations:
Fingerprints

Television

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



Real World

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

Investigative Process:
Investigative Plan

S/A Investigative Plan/Sufficiency Worksheet/Assessment Tool

~ within 2 days of notification

- **Probative activities focused on elements of offence**
  - **Interviews**
  - **Records checks**
  - **Evidence processing**
  - **Operational activity**
  - **BAC approximations**
  - **Area canvas (Surveillance cameras, development of additional witnesses, etc)**
- **Anticipate defense**
  - **Investigate all aspects**
- **Proofing sheet**
  - **Coordinated early and often with JA**

Investigative plans change with case development and are intended to answer prosecution and defense questions.

Investigative Process:
Operational Activities

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

Investigative Process:
Subject Interview

- Subject interview
  - Taped interview
  - Possible Polygraph
    - Requires consent
    - Based on nature of event

A confession is always sought but not always achieved. The more data we have going into the interview the better our chances.

Investigative Process: misc

- Remaining witnesses identified / interviewed
  - ID/interview outcry witness
- Subject's previous relationships
  - Pattern of abuse/assault
- Forensic analysis of physical evidence
- Potential victim re-interview/clarification interviews
  - Clarify information obtained throughout investigation
- Referral of case to Action Authority / SJA

The Interview:

Conventional interviewing techniques concerns

- Leading questions
- Overwriting memory—asking same question repeatedly
- Interruption of recall
- Filling gaps w/what they think investigator wants to hear

Cognitive interview techniques

- Increased trust via empathy
- Fewer interruptions to recall
- Various memory jogging/facilitation techniques
- Studies indicate significant increase of recalled information
- Added benefit of obtaining emotional/physical process during event

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How you can help

- Informing the Victim
  - Explaining Victim's role
  - Explaining Investigator's role
- Maintain awareness between investigator's role vs. counsel's role
  - investigator will seek out all facts
- Avoid promises/conclusions related to outcome of an investigation

Questions?

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Headquarters U.S. Air Force

Integrity - Service - Excellence

Victim and Witness Assistance Program

2012 Special Victims' Counsel Course

Capt Allison DeVito

Chief, Victim Issues & Policy Branch, AFLOA/JAJM

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Overview

- **History of Victims' Rights**
- **Crime Victims' Rights Act**
- **SVC Interaction with VWAP**
- **If We Have Time…**
  - **Transitional Compensation**
  - **Expedited Transfer**

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History of Victims' Rights

History of Victims' Rights

- **Colonial America – Victim responsible for arrest, investigation, and prosecution**

- **Post-Revolution/19th Century – Declining role of victim; unable to have input into prosecution and punishment**

**** Victims In Criminal Procedure, Douglas Beloof, Paul Cassell, and Steven Twist***

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History of Victims' Rights

- **1970s forward – Resurgence in victims' involvement**
  - **Victims' needs systematically neglected throughout the system**
  - **Tendency to blame victims for facilitating or even provoking crimes**
  - **Standards of fair treatment were required to protect the interests of complainants and prosecution witnesses**
  - **People who suffered injuries/losses inflicted by criminals ought to receive reimbursement**
  - **Best way to protect victims' interests was by granting them formal rights within the criminal justice system**

Victims In Criminal Procedure, Douglas Beloof, Paul Cassell, and Steven Twist

Crux of the Problem: The Victim's Contradictory Role

- **On the one hand – Victims are allies of the government in the effort to suppress lawbreaking**
- **On the other hand – Victims are independent actors – in defense of their own interests, they may advocate course of action that are rejected by law enforcement, prosecutors, and judges. What victims define as their own best interests sometimes diverges with or directly clashes with the role of the government.**

Victims In Criminal Procedure, Douglas Beloof, Paul Cassell, and Steven Twist

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Statement on Victims' Rights

"Many people have strong interests in the functioning of the criminal justice system: victims of crime, witnesses, those accused of committing crimes, and society at large, which requries the fair and effective administration of justice. In recent decades, both internationally and inside the United States, there has been a growing demand that greater attention be paid to the interests and rights of victims of crime as well as to ensuring their access to justice.

Unfortunately, the public debate on this topic too often casts the rights and interests of victims and defendants as a zero-sum game in which safeguards for defendants' rights – such as the presumption of innocence and the right to a fair trial – come at the expense of victims, and improvements in the treatment of victims impinge on defendants' rights. While there can be tensions between the legitimate interests of victims and defendants, a criminal justice system based on human rights standards can safeguard the rights of both while advancing justice and the rule of law."

Human Rights Watch, Mixed Results: U.S. Policy and International Standards on the Rights and Interests of Victims of Crime, 23 Sep 2008, www.hrw.org

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Crime Victims' Rights Act

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Crime Victims' Rights Act
18 U.S.C. § 3771

1. The **right to be reasonably protected** from the accused
2. The **right to reasonable, accurate, and timely notice** of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused
3. 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 that proceeding
4. The **right to be reasonably heard** at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding
5. The **reasonable right to confer** with the attorney for the Government in the case
6. The **right to full and timely 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 victim's dignity and privacy

SVC Interaction with VWAP

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SVC Rules, Rule 3

It is important to note that while there is overlap in the objectives of the SVC program and the Victim and Witness Assistance Program (VWAP), the SVC program does not supplant or augment VWAP, but is a separate program altogether. VWAP implements the Victim and Witness Protection Act, 42 U.S.C. §§ 10601-10605, and the Victims' Rights and Restitution Act, 42 U.S.C. §§ 10606, 10607. One of the objectives of VWAP is to foster cooperation of victims and witnesses within the military criminal justice system. While one of the objectives of the SVC program is to build and sustain victim resiliency throughout the military justice process, there may be times when an SVC advises a victim that cooperation with the system is not in his or her best interests, or regardless of SVC's advice, a victim declines to cooperate and the SVC executes the victim's choices. Another objective of VWAP is to ensure best efforts are made to accord to victims of crime certain enumerated rights. In representing victims, SVC will advocate for these rights, strengthening VWAP.

SVC Rules, Rule 3.5

Rule 3.5 ***Functional Relationship with VWAP.***

VWAP, through the SJA, VWAP Coordinator, and victim liaison, ensures that victims are afforded certain enumerated rights under federal law, such as consultation with trial counsel and notification of all court-martial proceedings. These rights are listed in AFI 51-201, Chapter 7.

(a) *Victim Liaison.* Under VWAP, a victim liaison is assigned to each victim. Along with the SJA and trial counsel, the victim liaison is the SVC's point of contact in the legal office for obtaining case updates and communicating questions and concerns from the victim.

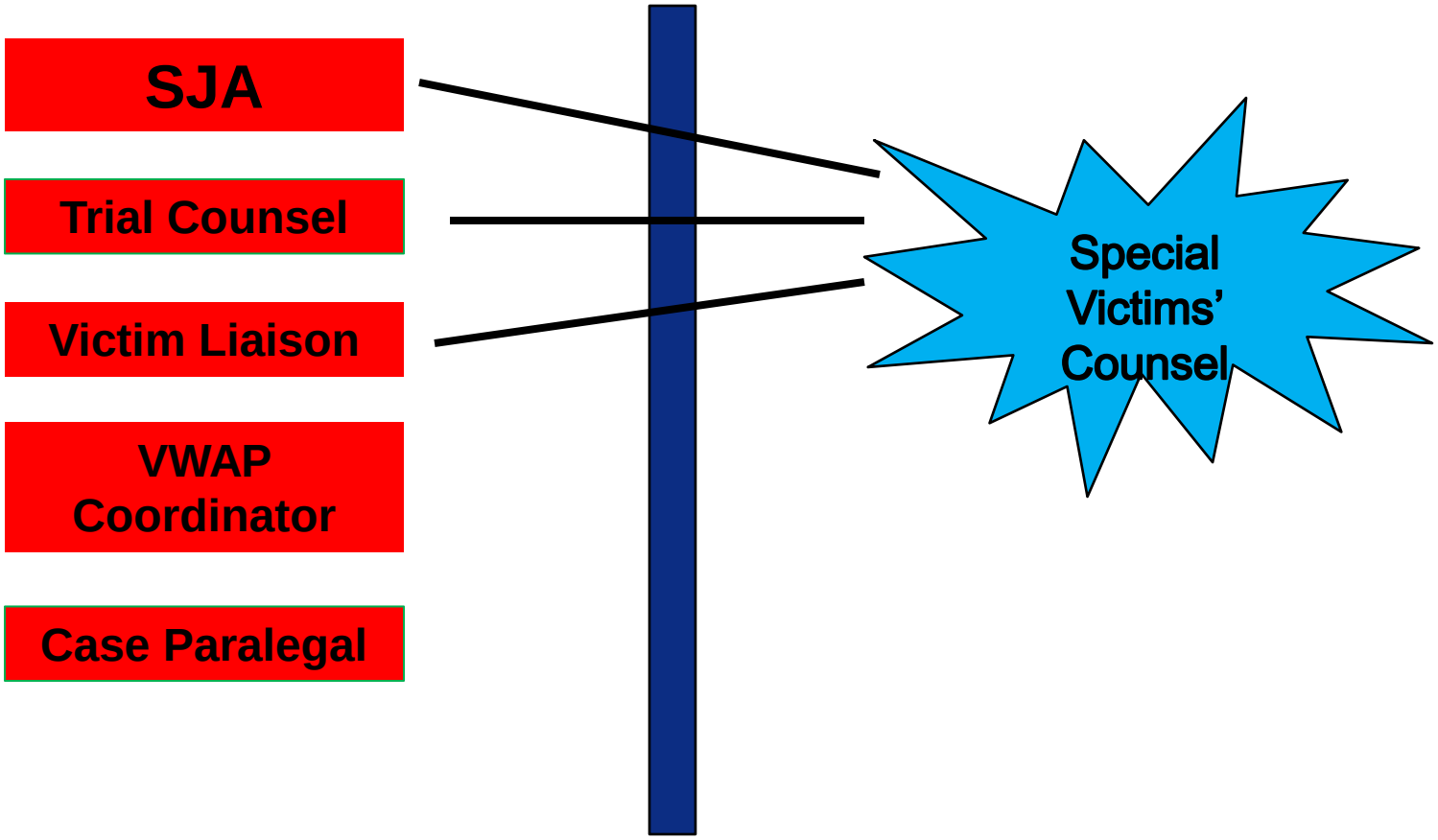
(b) *No Cause of Action.* While SVC may advocate for a victim's rights under federal law, the VWAP provisions in AFI 51-201, Chapter 7, do not create a cause of action or defense in favor of any person arising out of a failure of the Air Force to comply with VWAP.

(c) *No Change to VWAP.* Establishment of the SVC program does not necessitate any change to the scope of VWAP.

VWAP and SVC – Division of Responsibilities

Ensures Victims Are Afforded Certain Enumerated Rights

Advocate for Victims' Rights



VWAP and SVC – Overlapping Objectives

VWAP Objectives

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

SVC Objectives

- Provide support to victims through independent representation
- Build and sustain victim resiliency
- Empower victims
- Increase the level of legal assistance provided to victims

Emotional Responses to Being a Victim of Sexual Assault

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- Anxiety
- Shock
- Guilt or Self-Blame
- Apprehension
- Preoccupation With Safety
- Depression
- Numbness
- Embarrassment
- Loss of Trust
- Irritability
- Fear
- Grief
- Loss of Control
- Anger
- Indecision
- Denial
- Suicidal Thoughts

Sexual Assault, A Recovery Guide for Survivors
www.safehorizon.org

The right to be reasonably protected from the accused

VWAP Responsibility

- **Inform the victim about protection and to report any intimidation, harassment or similar conduct to military authorities**
  - **Restraining Orders or other similar protections (Military Protective Orders)**

SVC Role

- **Same!**
- **Expedited transfer**
- **Pretrial confinement**

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The right to reasonable, accurate, and timely notice …

Rule 6.1

(b) *Victims' Right to Notification of all Court-Martial Proceedings.* IAW AFI 51-201, para. 7.12.8, the government will provide the victim with the earliest possible notice of:

i. The status of the investigation of the crime, to the extent it will not interfere with the investigation and is appropriate

ii. The accused's pretrial status and any subsequent change in that status, including, but not limited to, the accused being placed in pretrial confinement, being released from pretrial confinement, or escaping from pretrial confinement

iii. Preferral and referral of charges or a decision not to pursue prosecution

iv. A pretrial confinement hearing and/or Article 32 investigation

v. Notification of the scheduling, including changes and delays, of each court-martial proceeding the victim is entitled to or required to attend

vi. The acceptance of a guilty plea or announcement of findings

vii. The sentence imposed, including the date on which the accused becomes eligible for release from confinement, or parole, if applicable

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How Notice Is Provided

- DD Form 2701, Initial Information for Victim and Witnesses of Crime (AFOSI, SFOI)
- DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime (TC/Vic Liaison)
- DD Form 2703, Post Trial Information for Victims and Witnesses of Crime (TC/Vic Liaison)
- DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status (TC/Vic Liaison)
- DD Form 2705, Victim and Witness Notification of Inmate Status (Confinement Facility)

DD Form 2701

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increased concern for their personal safety and that of their family, trouble concentrating on the job, difficulty handling everyday problems, feeling overwhelmed, and thinking of the crime repeatedly.

Some or all of these behaviors may occur and will ease with time. They are normal reactions but you may wish to see a counselor. State compensation funds may be available to reimburse you for such counseling. The Victim/Witness Assistance Responsible Official will have further information.

Your Rights As A Victim.

As a Federal crime victim, you have the following rights:

- The right to be treated with fairness and with respect for your dignity and privacy;
- The right to be reasonably protected from the accused offender;
- The right to be notified of court proceedings;
- The right to be present at all public court proceedings related to the offense, unless the court determines that your testimony would be materially affected if you as the victim heard other testimony at trial;
- The right to confer with the attorney for the government in the case;
- The right to available restitution;
- The right to information about the conviction, sentencing, imprisonment, and release of the offender.
- If you are a victim of sexual assault who is otherwise eligible to receive military legal assistance, contact _____ for legal assistance.

If You Need Additional Assistance:

In regard to the status of the investigation, contact the investigator below:

_____
(Name)

_____
(Telephone Number)

In regard to other assistance available, contact the command Victim/Witness Responsible Official, or the person identified below:

_____
(Name)

_____
(Telephone Number)

In regard to the prosecution, contact the legal office below:

_____
(Name)

_____
(Telephone Number)

In regard to compensation for medical or other expenses, contact the state office for Crime Victim Compensation:

_____
(Name)

_____
(Telephone Number)

Please notify these offices of any changes of address or telephone number.

For further information on crime issues, see the DoD Victim and Witness Assistance Council web page at:
http://dod.mil/vwac

DEPARTMENT OF DEFENSE

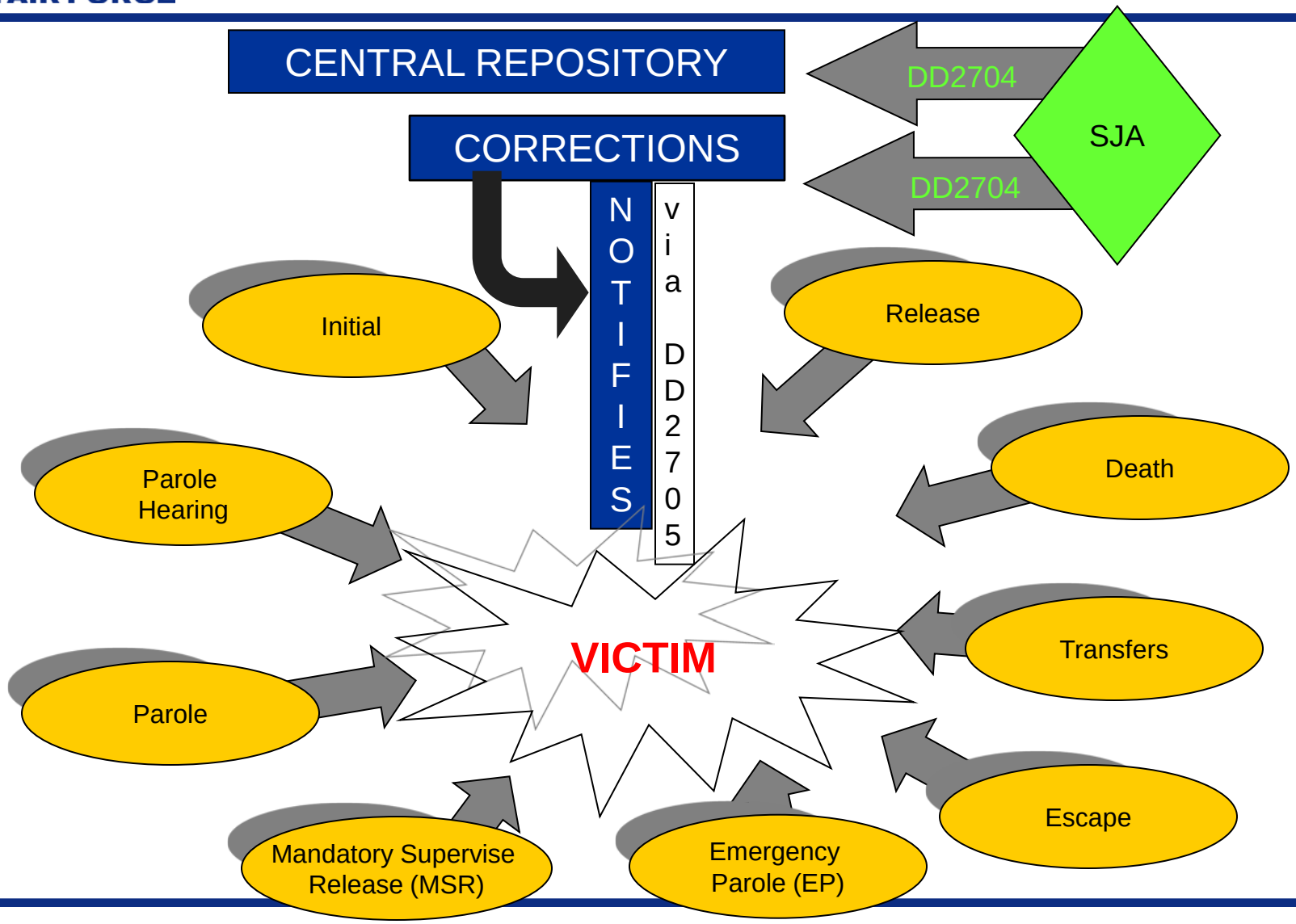
INITIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME

DD FORM 2701, MAY 2004

Previous edition is obsolete.
Adobe Professional 7.0

This will be updated!

Post Trial Notification Process



The reasonable right to confer with the attorney for the Government in the case

Rule 6.1

(a) *Victims' Right to Consultation.* IAW AFI 51-201, para. 7.12.12, the government will consult with victims and obtain their views concerning:

i. Decisions not to prefer charges
ii. Dismissal of charges
iii. Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement
iv. Pretrial agreement negotiations, including PTA terms
v. Plea negotiations
vi. Discharge or resignation in lieu of trial by court-martial
vii. Scheduling of judicial proceedings where the victim is required or entitled to attend.

The reasonable right to confer with the attorney for the Government in the case

VWAP Responsibility

- **Consult and obtain the victim's view – BUT victim's opinion is not the final word…decision belongs to the appropriate official**

SVC Role

- **Discuss courses of action with victim**
- **Advocate for victim's choice**

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The right to full and timely restitution

as provided in law

VWAP Responsibility

- **Inform victims of intra-familial abuse of the availability of limited transitional compensation benefits, waiver of mandatory forfeitures, and possible entitlement to a portion of the active duty member's retirement benefits**

SVC Role

- **Assist victim with transitional compensation and other restitution programs**
- **Advocate for waiver of forfeitures**

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The right to be treated with fairness and with respect for the victim's dignity and privacy

VWAP Responsibility

- **Protect victim's privacy interests (Privacy Act, need to know)**
- **Safeguard victim's property held as evidence and return to the victim as soon as possible**
- **During trial proceedings, provide victim with a waiting area removed from and out of sight and hearing of the accused and defense witnesses**

SVC Role

- **Same!**
- **Rule 9.4 – appropriate office space**

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VWAP Program Guidance

- **AFI 51-201, Administration of Military Justice, Chapter 7**
- **Victim and Witness Protection Act of 1982 (42 U.S.C. §§ 10601-10605)**
- **Crime Victims' Rights Act (18 U.S.C. § 3771)**
- **DoD Directive 1030.1, Victim and Witness Assistance**
- **DoD Instruction 1030.2, Victim and Witness Assistance Procedures**

VWAP – Related Guidance

- DoD Instruction 1325.7, Administration of Military Correctional Facilities and Clemency & Parole Authority
- AFI 31-205, The Air Force Corrections System
- AFI 36-3024, Transitional Compensation for Abused Dependents

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VWAP RESOURCES

- **AF Corrections Division**: https://afsfmil.lackland.af.mil/
- **DoD Victim Witness Assistance Council**: http://vwac.defense.gov/
- **DOJ - Office for Victims of Crime**: http://www.ojp.usdoj.gov/ovc/
- **National Center for Victims of Crime**: http://www.victimsofcrime.org/
- **National Association of Crime Victim Compensation Boards**: http://www.nacvcb.org/

I Will Now
Take Your
Questions

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Back Up Slides

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Transitional Compensation

Transitional Compensation – Eligibility

AFI 36-3024, *Transitional Compensation for Abused Dependants*

- Dependents of members who have been on active duty for **more than 30 days**
- Separated from active duty under a court-martial sentence resulting from a dependant-abuse offense
- Administratively separated from active duty if the basis for separation includes a dependent-abuse offense
- Sentenced to forfeiture of all pay and allowances by a court-martial which has convicted the member of dependent-abuse offense.

Transitional Compensation – Definitions

Dependant-abuse offense: 10 U.S.C. § § 801-940 (Examples include crimes such as sexual assault, rape, sodomy, battery, murder, and manslaughter)

Dependent Child: An unmarried child, including an adopted child or a stepchild, who was **residing with the military member** at the time of the abuse offense

Spouse: The term “spouse” means a dependent spouse and, where appropriate, includes “former spouse”

NOTE: Dependents are ineligible to receive any transitional compensation if they remarry, cohabitate with the member, or are found to have been an active participant in the dependent abuse.

Transitional Compensation – Benefits

Types of Benefits

- Monthly monetary compensation
  - Monthly payments to a spouse will be at the rate in effect for the payment of dependency and indemnity compensation under 38 U.S.C. §1311(a)(1) (currently $1,154)
- Commissary and exchange benefits
- Medical and dental care

Duration of Benefits:

- 36 months except, if as of the starting date of payment, the unserved portion of the member's obligated active duty service is less than 36 months, the duration of payment will be the greater of the unserved portion or 12 months

DD Form 2698

APPLICATION FOR TRANSITIONAL COMPENSATION

All information except Item 12 is to be entered by Service representative from Service records.

SECTION I - PAYEE INFORMATION
(If more than one eligible dependent, use the Remarks section on back to enter applicable information for each payee.)

1. PAYEE NAME *(Last, First, Middle Initial)*
2. SOCIAL SECURITY NUMBER
3. DATE OF BIRTH *(YYYYMMDD)*
4. SEX *(X one)* ☐ MALE ☐ FEMALE

5. ADDRESS
a. STREET *(Include apartment number)*
b. CITY
c. STATE
d. ZIP CODE

6. RELATIONSHIP TO MEMBER *(X one)*
☐ SPOUSE ☐ FORMER SPOUSE ☐ CHILD ☐ ADOPTED CHILD ☐ STEPCHILD

7. CUSTODY *(If payee is spouse or former spouse, enter names of dependent children from Item 23 who are in payee's custody. If all, enter "ALL")*

8. INCAPACITATION *(X Yes or No for each item)*
YES NO
a. IS PAYEE INCAPACITATED? *(If Yes, complete Items 8.b. and c., and Item 9)*
b. IS PAYEE INCAPABLE OF HANDLING FINANCIAL AFFAIRS? *(If Yes, complete Item 10)*
c. IS PAYEE INCAPABLE OF SELF SUPPORT?

9. IS INCAPACITY: *(X one) (If applicable)* ☐ PERMANENT ☐ TEMPORARY

10. LEGAL REPRESENTATIVE *(Complete only if legal representative is not the payee.)*
a. NAME *(Last, First, Middle Initial)*
b. STREET ADDRESS *(Include apartment/suite no.)*
c. CITY
d. STATE
e. ZIP CODE

11. IF PAYEE IS A CHILD: *(X Yes or No for each item.) (NOTE: Age of majority for a child is 18 in all states except the following: Alabama, Nebraska and Wyoming: age of majority is 19; Mississippi, West Virginia and Puerto Rico: age of majority is 21.)*
YES NO
a. WAS INCAPACITY INCURRED BEFORE AGE 18?
b. IF INCAPACITY WAS INCURRED BETWEEN AGES 18 AND 23, WAS THE CHILD A FULL-TIME STUDENT?
c. IS CHILD UNDER THE AGE OF MAJORITY? *(See NOTE. If Yes, complete Item 10.)*
d. WAS CHILD DEPENDENT ON FORMER MEMBER FOR OVER ONE-HALF OF SUPPORT?

12. PAYEE CERTIFICATION *(Payee must sign and date to certify that the statements below are correct. Lines (2)-(4) apply only to spouse or former spouse.)*
(1) I am not cohabiting with the former member. If status changes, I will notify DFAS within 30 days.
(2) I have not remarried. If status changes, I will notify DFAS within 30 days.
(3) I have custody of the dependent children listed in Item 7.
(4) I was married to the member in Item 14 at the time of the dependent abuse offense resulting in his conviction/administrative separation.
(5) I claim payment of transitional compensation under Section 1059, Title 10, U.S.C.
(6) I understand that I may not receive payments under both Section 1059 and Section 1408(h) of Title 10, U.S.C., and that, if eligible for both, I must elect which to receive. I elect payment of transitional compensation under Section 1059.

a. SIGNATURE *(Applicant acknowledges that acceptance of payments if she/he/her spouse/household is punishable under the law.)*
b. DATE SIGNED *(YYYYMMDD)*

SECTION II - MEMBER IDENTIFICATION

13. BRANCH OF SERVICE *(X one)* ☐ AIR FORCE ☐ MARINE CORPS ☐ ARMY ☐ NAVY
14. MEMBER NAME *(Last, First, Middle Initial)*
15. PAY GRADE *(Prior to conviction or separation)*
16. SOCIAL SECURITY NUMBER
17. DATE OF BIRTH *(YYYYMMDD)*
18. SEX *(X one)* ☐ MALE ☐ FEMALE

19. OBLIGATED SERVICE DATES *(YYYYMMDD)*
a. ACTIVE DUTY SERVICE ENTRY DATE
b. EXPIRATION OF ACTIVE OBLIGATED SERVICE *(Enlisted only)*
c. ESTABLISHED DATE OF SEPARATION AT TIME OF CONVICTION/ADMINISTRATIVE SEPARATION *(Officer only (If none, so state))*

20. DATE OF APPROVAL OF THE COURT-MARTIAL SENTENCE/ ADMINISTRATIVE SEPARATION *(YYYYMMDD) (If court-martial, verify date with appointing official. If administrative separation, use date of initiation of separation.)*

21. PAYMENT DATES *(YYYYMMDD) (Start date is date in Item 20. Length of payment is 36 months except as follows: Subtract date in Item 19.b or 19.c. from the date in Item 20. If less than 36 months, length of payment is that period or 12 months, whichever is greater.)*
a. START
b. STOP

22. APPROVING OFFICIAL CERTIFICATION.
I certify that the offense resulting in court-martial conviction or involved in administrative separation is a dependent-abuse offense in accordance with DoD regulations. If married, the spouse was not a participant in the abuse offense.

a. SIGNATURE
b. DATE SIGNED *(YYYYMMDD)*
c. TITLE
d. TELEPHONE *(Include area code)*
e. STREET ADDRESS *(Include apartment or suite number)*
f. CITY
g. STATE
h. ZIP CODE

DD FORM 2698, JAN 96

Adobe Professional 8.0

- Installation commander is approval authority (may be delegated to group commanders)
- Work closely with FSS!

U.S. AIR FORCE

Expedited Transfer

U.S. AIR FORCE

Expedited Transfer

- **BLUF: Talk to the SARC!**
- **DTM 11-063**

http://www.sapr.mil/media/pdf/policy/DTM-11-063.pdf

- **Unrestricted Reports ONLY**
- **Can request temporary or permanent PCA or PCS**
- **A presumption shall be established in favor of transferring a service member (who initiated the transfer request) following a credible report of sexual assault**
- **Commander must approve/disapprove request within 72 hrs**

U.S. AIR FORCE

Expedited Transfer

1. Member applies for Humanitarian reassignment for the purpose of Expedited Transfer via vMPF and includes the required documentation per AFI 36-6001. (right now that includes a letter on official letterhead from the member's squadron commander and vice wing commander approving such action)

2. The application is defaulted in the system to the member's commander (who is on G-series orders) for coordination. (note: should the commander be TDY/Leave and does not coordinate within 7 days, the application is automatically forwarded to the Total Force Service Center (TFSC) here at AFPC. There they perform a quick review to ensure everything is in order and then forwards the application/request to the Humanitarian staff for processing.

U.S. AIR FORCE

Expedited Transfer

3. The approximate processing time for Humanitarian requests is 2-4 weeks barring any showstoppers (UIF, MEB or other administrative actions). AFPC does their very best to push these type requests through much quicker. However, based on the situation, the severity and nature of all Humanitarian requests, they may at times have to prioritize the requests i.e. life expectancies of loved ones, dependents with serious illness.

4. Once the Humanitarian section processes the action, a message is sent via vMPF back to the member, to the member's commander and the relocations office at the member's base with PCS instructions.

U.S. AIR FORCE

Expedited Transfer

- **Application goes to Unit CC**
- **Unit CC Recommends in writing Approval/Disapproval to Wing CV; Unit CC should consider:**
  - Victim's reason for the request
  - Nature and circumstances of the offense
  - Whether a temporary transfer would meet the victim's needs and operational needs of the unit
  - Training status of victim requesting transfer
  - Availability of positions within other units on the installation
  - Status of the investigation and potential impact on the investigation and future disposition of the offense, after consultation with AFOSI. AFOSI will only provide factual information pertaining to information and evidence collected to that point in the investigation. AFOSI personnel will not be asked to provide their opinion regarding the credibility of the report.
  - Location of the alleged offender
  - Potential transfer or confinement of the alleged offender
  - Alleged offender's status (service member or civilian)
  - Other pertinent circumstances/facts

U.S. AIR FORCE

Expedited Transfer

- If Disapproved, member may request decision be reviewed by First GO in Chain of Commanc
- If Approved, Wing CV provides Unit CC & member a letter with approval
- Member uploads approval letter in Virtual MPF
- Humanitarian Assignments then works new assignment

U.S. AIR FORCE

Expedited Transfer

virtualMPF
Air Force Personnel Center • Randolph AFB, Texas

Message Center

Suspenses (0)
0 new suspenses
0 overdue suspenses

Navigation

CPT Allison Anne Devito

The following areas of the vMPF are available to you:

Self-Service Actions

Self Service Application Status

- My Stuff

Most Popular Applications

- Initial Assignment Briefing
- Out Processing
- Awards and Decorations
- Data Verification Brief
- Duty History
- Evaluation Appeals
- Record Review/Update

AIR EXPEDITIONARY FORCE (AEF) INFORMATION

AEF INDICATOR	AEF DESCRIPTION/ROTATION PERIOD	DATE ASSIGNED TO THIS AEF
********	**Please contact your UDM for AEF assignment.**	********

INDIVIDUAL DWELL TIME (IDT) INFORMATION

IDT	IDT EXPIRATION DATE	IDT COUNTER
199 DAYS	04 JAN 2013	172 DAYS

vMPF Introduction

- Glossary
- Known Prob
- Case Manag

System Ar

- Pop-up Block
- This Site Las November 20
- Address or p

Help

- Civilian-Emp
- My Pay (For
- My Pay (For
- Rec. of Eme
- Accrual Trav
- Total Force S Antonio
- Air Reserve
- Air National
- IDEA Progra
- vFinance

U.S. AIR FORCE

Expedited Transfer

vMPF Self-Service Actions

vMPF Home · Self-Service Actions Home · Sitemap · Glossary · Help

Welcome, CPT Allison Anne Devito. You are in the Virtual Military Personnel Flight, or the vMPF. You can find many service modules in th
navigate this site, you can either follow the links provided on the page, or you can use the Site Contents pull-down menu located in the top-
above will provide you with a complete list of all applications available to you at this time.

Self-Service Actions

- Assignments
- Correction of Military Records (BCMR)
- Miscellaneous
- Personal Data
- Promotions
- Retirements
- Retraining
- Separations

Expedited Transfer

U.S. AIR FORCE

vMPF Home · Self-Service Actions Home · Sitemap · Glossary · Help

vMPF Home · Individual Actions · Assignments

Assignments Applications

- Assignment Selection Information
- Circuitous Travel
- CONUS Isolated Assignment Application
- Dependents Remaining Overseas Application
- Designated Location Move Application (DLM)
- Early Return of Dependents Application (ERD)
- Exceptional Family Member Program Application
- High School Senior Assignment Deferment
- Home-Basing/Follow-On Assignment Application
- Humanitarian Assignment Application
- Initial Assignment Briefing

U.S. AIR FORCE

Expedited Transfer

AIR FORCE
PERSONNEL CENTER

- Introduction
- Policy and Eligibility Criteria
- Explanation of Terms
- When to Apply
- Reasons for Approval
- Reasons for Disapproval
- General Information and Processing Guidelines
- Required Support Documents
- Apply for Humanitarian Reassignment/Deferment
- Logout

Humanitarian Reassignment or Deferment Program

Introduction

Welcome to the Humanitarian Reassignment and Deferment module. This modu
duty Air Force enlisted personnel (except those attending initial technical training) a
colonel and below. The governing Air Force Instruction for this program is A
Attachment 24, Humanitarian Reassignment and Deferment.

To find out if you are eligible and what your responsibilities are, click the link
information. If you believe you are eligible and decide to submit an applic
Humanitarian Reassignment/Deferment" link on the left. Fill out the applica
documentation, and submit it by clicking the "Submit" link at the end of the appli
comply with the instructions provided in this module.

Print This Page

I Will Now
Take Your
Questions

THE JUDGE ADVOCATE GENERAL'S SCHOOL

SPECIAL VICTIMS' COUNSEL COURSE 13-B

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Training Materials – Slide Decks	p. 6
SVC Client Intake Scenarios	Scenarios A through F in SVCC 14-A materials
SVC Advocacy Exercises	Scenarios 1 through 3 in SVCC 14-A materials

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

MAY 1 6 2013

MEMORANDUM FOR SPECIAL VICTIMS' COUNSEL COURSE (SVCC) 13-B ATTENDEES

FROM: The Judge Advocate General's School

SUBJECT: SVCC 13-B Narrative Schedule, 20-24 May 2013

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

If you have not already done so, prior to the beginning of the course, please familiarize yourselves with: Article 120 UCMJ, (M.C.M. 2012), M.R.E. 412, M.R.E. 513, M.R.E. 514, the Special Victims' Counsel Charter, and the Special Victims' Counsel Rules of Practice and Procedure. This will ensure that all students are better prepared to discuss the relevant topics and ask informed questions.

Monday, 20 May 2013

0730-0800 **WELCOME REMARKS AND INTRODUCTION**
Colonel Kenneth Theurer, Commandant, JAG School; Maj Christopher Goewert, Course Director, Instructor, Military Justice Division, JAG School

0800-0850 **LECTURE – SPECIAL VICTIMS' COUNSEL (SVC) INTRODUTION AND OVERVIEW**
Instructor: Lt Col Dawn Hankins, Chief Special Victims' Counsel Program, AFLOA/JAJM, Joint Base Andrews, MD
Student Evaluators: 1-5

0850-0900 **BREAK**

0900-0950 **LECTURE – FUNDAMENTAL CONCEPTS OF BEING A VICTIMS' ATTORNEY**
Instructor: Ms. Meg Garvin, Executive Director & Clinical Professor of Law, National Crime Victim Law Institute, Lewis and Clark Law School, Portland, OR
Student Evaluators: 6-10

0950-1000 **BREAK**

1000-1050 **LECTURE – REPRESENTING AND ADVOCATING FOR VICTIMS OF SEXUAL OFFENSES**
Instructor: Ms. Meg Garvin
Student Evaluators: 11-15

1050-1100 **BREAK**

1100-1150 **LECTURE – VICTIMS' RIGHTS UNDER APPLICABLE FEDERAL LAW**
Instructor: Ms. Meg Garvin
Student Evaluators: 16-20

1150-1300 **LUNCH**

1300-1350 **LECTURE – UNDERSTANDING THE PSYCHOLOGICAL CONDITIONS OF VICTIMS OF SEXUAL ASSAULT FROM A LEGAL PRACTIONER'S PERSPECTIVE**
Instructor: Ms. Meg Garvin
Student Evaluators: 21-25

1350-1400 **BREAK**

1400-1450 **LECTURE – SVC WAY AHEAD**
Instructor: Capt Allison Devito, AFLOA/JAJM, Joint Base Andrews, MD
Student Evaluators: 26-30

1450-1500 **BREAK**

1500-1700 **GUIDED DISCUSION – LESSONS LEARNED IN THE FIELD**
Instructor: Maj Christopher Goewert
Student Evaluators: 31-35

Bus to depart JAG School @ 1745 for Icebreaker

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

Bus to depart @ 2000 for JAG School

Tuesday, 21 May 2013

0730-0920 **LECTURE – COGNITIVE VICTIM INTERVIEWS & COOPERATION WITH LAW ENFORCEMENT**
Instructor: Mr. Mark Walker, AFOSI, Investigations Operations Consultant
2nd Field Investigations Squadron, Joint Base Andrews, MD
Student Evaluators: 36-40

0920-0930 **BREAK**

0930-1120 **LECTURE – CIVIL LEGAL ASSISTANCE FOR VICTIMS, CURRENT PRACTICE**
Instructor: Ms. Jessica Mindlin, National Director of Training & Technical Assistance, Victim Rights Law Center, Portland, OR
Student Evaluators: 41-45

1120-1230 **LUNCH**

1230-1320 **LECTURE – STC PERSPECTIVE AND COORDINATION**
Instructor: Maj Jennifer Holmes, Senior Trial Counsel, Special Victims Unit, AFLOA/JAJG, Joint Base Andrews, MD

(PARALEGAL BREAKOUT SESSION)
LECTURE - SVC DETAILING AND PROGRAM DATA ENTRY
Instructor: TSgt Charles Zaldivar, NCOIC, Community Legal Services Division, Joint Base Andrews, MD
Location: Compter Lab

1320-1520 **ROUNDTABLE DISCUSSION – AFTER THE TRIAL: THE LIVES, EXPERIENCES AND LEGAL QUANDRIES FACED BY VICTIMS OF SEXUAL ASSUALT**
Guest Speakers: Mr. Greg Jacob, Policy Director, Service Women's Action Network; Ms. Miranda Petersen, Program Director, Protect Our Defenders; Ms. Jessica Mindlin; and Ms. Meg Garvin
Student Evaluators: 1-5

1520-1530 **BREAK**

1530-1620 **LECTURE – SVC RULES OF PRACTICE AND PROCEDUE**
Instructor: Capt Allison Devito
Student Evaluators: 6-10

1620-1630 **BREAK**

1630-1700 **LECTURE – SVC PERSONNEL ASSIGNMENTS**
Instructor: Maj Gary Osborne, Government Appellate Counsel, Joint Base Andrews, Washington, MD
Student Evaluators: 11-15

Wednesday, 22 May 2013

0730-0820 **LECTURE – MILITARY LEGAL ASSISTANCE FOR VICTIMS**
Instructor: Colonel Marlesa Scott, Chief, Community Legal Services Division, AFLOA/JACA, Joint Base Andrews, MD
Student Evaluators: 16-20

0820-0830 **BREAK**

0830-0920 **LECTURE – ROLE OF THE SPECIAL VICTIMS' COUNSEL**
Speaker: Lieutenant General Richard C. Harding, The Judge Advocate General
Student Evaluators: 21-25

0920-0930 **BREAK**

0930-1020 **LECTURE – SVC'S ROLE IN THE COURT-MARTIAL: OVERVIEW**
Instructors: Colonel Don Christensen, Chief, AFLOA/JAJG, Joint Base Andrews, MD; Maj Matthew Talcott, Instructor, Military Justice Division, JAG School
Student Evaluators: 26-30

1020-1030 **BREAK**

1030-1130 **LECTURE – SVC'S ROLE IN THE COURT-MARTIAL: MRE 412 & 513**
Instructors: Colonel Don Christensen; Maj Matthew Talcott
Student Evaluators: 31-35

1130-1140 **BREAK**

1140-1220 **LECTURE – SVC'S ROLE IN THE COURT-MARTIAL: THE INTERPLAY BETWEEN VICTIMS AND ADVOCATES IN THE COURT ROOM**
Instructors: Colonel Don Christensen; Maj Matthew Talcott
Student Evaluators: 36-40

1220-1330 **LUNCH**

1330-1630 **EXERCISE I - INTERFACING WITH AND ADVISING VICTIM-CLIENTS**
Instructors: Various AFJAGS, JAJG, JAJM
Location: Seminar rooms as assigned

Thursday, 23 May 2013

0730-0820 **LECTURE –POST-TRIAL PROCESSING FOR THE SPECIAL VICTIMS' COUNSEL**
Instructor: Lt Col Dawn Hankins
Student Evaluators: 41-45

0820-0830 **BREAK**

0830-0930 **LECTURE – SVC ETHICS**
Instructor: Major Andrew Barker, Instructor, Professional Outreach Division, JAG School
Student Evaluators: 1-5

0930-0940 **BREAK**

0940-1200 **LECTURE – UNDERSTANDING THE MENTAL HEALTH OF A SEXUAL ASSAULT VICTIM: REFERRALS FOR TREATMENT, PTSD, RESILIENCY, AND SUICIDE AWARENESS**
Instructor: Dr. Nate Galbreath; Senior Executive Advisor, Accountability and Assessment, DoD SAPRO, Alexandria, VA
Student Evaluators: 6-10

1200-1300 **LUNCH**

1300-1450 **MANAGING YOUR OWN OFFICE: ADMINISTRATIVE TECHNIQUES, TRAVEL, PARALEGAL TEAMING, AND PERFORMANCE REPORTS**
Instructors: Maj Robert Wilder, Deputy Chief, Community Legal Services Division, Joint Base Andrews, MD; TSgt Charles Zaldivar
Student Evaluators: 11-15

1450-1630 **INDIVIDUAL PREP TIME FOR EXERCISE II**

Friday, 24 May 2013

0800-1130 **EXERCISE II - COURT MARTIAL ADVOCAY FOR THE SVC**
Instructors: Various AFJAGS, JAJG, JAJM
Location: Seminar rooms as assigned

1130-1140 **BREAK**

1140-1210 **CONCLUDING REMARKS AND END OF COURSE**

KENNETH M. THEURER, Colonel, USAF
Commandant

Headquarters U.S. Air Force

Integrity - Service - Excellence

Special Victims' Counsel Program Overview

Lt Col Dawn Hankins
Chief, SVC Division
AFLOA/CLSV
dawn.hankins@pentagon.af.mil

U.S. AIR FORCE

Overview

- Why?
- What?
- Wow!

U.S. AIR FORCE

Reporting

- National
  - General population reporting rate for rape/SA: 46%
  - College population: rape 5%
  - Between 1992 and 2000: Only 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults
- Air Force
  - 17% of women and 6% of men

U.S. AIR FORCE

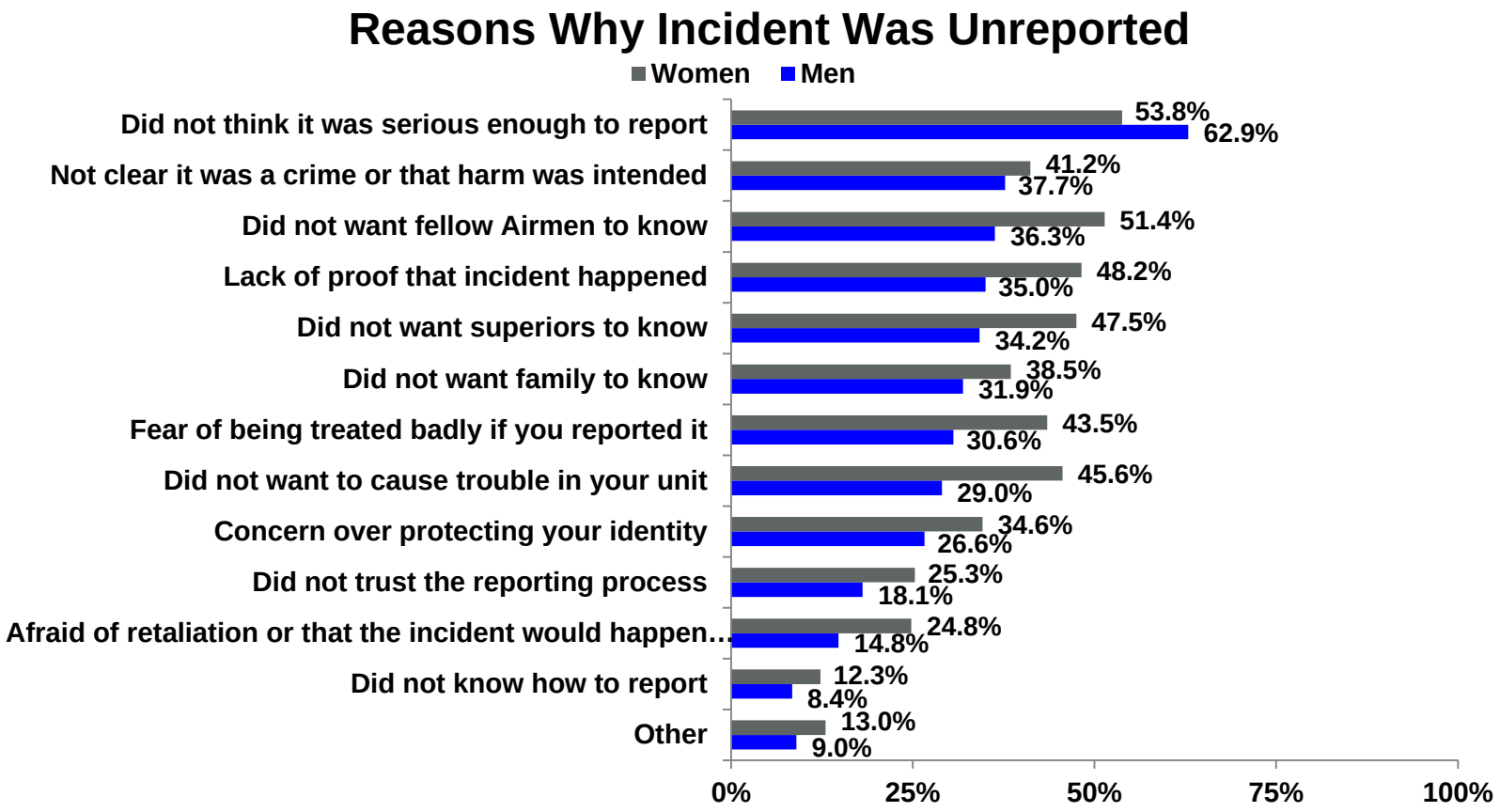
Barriers

- 2004 AF Report on Sexual Assault
  - Stigma, shame, fear
  - Fear of being reduced in the eyes of one's commander or colleagues
  - Fear of disciplinary action due to a victim's misconduct
  - Fear of re-victimization
  - Fear of operational impacts on training, security clearances, and overseas deployment

U.S. AIR FORCE

Gallup

Most recent sexual assault reported by only 16.7% of women / 5.8% of men



U.S. AIR FORCE

Barriers

- Recent Unit Climate Assessments
  - 74% AF females, 57% males perceived barriers
  - Most frequent perceived barrier = stigma, shame, and/or fear
  - Concerned by lack of privacy/confidentiality
  - Officer/Junior Officer perceived fewer barriers
- What happens after victim's report?

Disposition of 522 Subjects

(Action taken in FY11)

Number of subjects	522
Subjects awaiting command action	-68
Any Command Action Precluded	-92
SUBTOTAL	362

Cases presented to Commanders for Action 362 (69%)

Commander took non SA action	*249*
Action on non SA Offense	98
Insuff Evid of any Offense	81
Unfounded by Command	5
Commander declined action	0
V declined to Participate	65
Unfounded by Invest Agency	0

Commander took Action for SA	*113*
CM Preferred (Initiated)	79
Nonjudicial Punishment	33
Admin Discharge	0
Other Admin Action	1

U.S. AIR FORCE

Disposition of 399 Sexual Assault Subjects (FY12)

Number of subjects	399
Subjects awaiting command action	-179
Any command action precluded	-43
SUBTOTAL	177

Civ/Foreign Prosecution	12
Subj is Civ/Foreign Nat'l	13
Offender Unknown	17
Subj Died/Deserted	1

Cases presented to Commanders for Action 177 (44%)

Cmd Action Precluded/Declined for SA -- 121	
Prob cause only for non-SA offense	54
Insufficient evidence of any offense	32
Victim declined to participate	24
Unfounded by command	11
Commander declined action	0
Unfounded by invest agency	0

Commander took Action for SA -- 56	
CM Preferred (Initiated)	42
Nonjudicial Punishment	14
Admin Discharge	0
Other Admin Action	0

U.S. AIR FORCE

So What's the Fix?

- **Goals:**
  - **Increase reports**
  - **Keep victims in the system**
  - **Take care of our people**

We MUST do more to protect one another from this crime, by…strengthening our support of victims and making a culture of trust and respect a reality for everyone in our Air Force.

General Mark A. Welsh III, Air Force Chief of Staff
18 November 2012

U.S. AIR FORCE

Current Programs

- **VWAP**
- **SAPR**
- **DoD Policy Memo on Legal Assistance to Victims of Crime, 17 October 2011**
- **2012 NDAA, Section 1565b**
  - **Legal assistance for victims of sexual assault**
  - **Implemented through traditional legal assistance**

What Assistance is Available under 10 USC § 1044?

“ …in a military justice sexual assault prosecution, to the extent the victim could retain the advice or representation of a private counsel, §§ 1044 and 1565b [2012 NDAA] authorizes, and certainly does not prohibit, JAGs from providing the same legal advice and representation, to the same extent.”

The Honorable Jeh C. Johnson
General Counsel of the Department of Defense
9 November 2012

U.S. AIR FORCE

Purpose of the SVC Program

- **Provide advocacy: protect the rights afforded to victims in the military justice system**
- **Provide advice: develop victims' understanding of the investigatory and military justice processes**
- **Empower victims by removing barriers to their full participation in the military justice process**

Providing this service to victims will result in a more robust opportunity for victims to be heard, to retain and take advantage of their rights, and enhance the military justice system while neither causing unreasonable delay, nor infringing upon the rights of an accused.

U.S. AIR FORCE

SVC Program Objectives

- Provide support through independent representation
- Build and sustain victim resiliency
- Empower victims
- Increase level of legal assistance provided to victims

U.S. AIR FORCE

SVC Role

- Advocacy to military justice actors, including commanders, convening authorities, investigators, trial counsel, and defense counsel
  - May attend interviews
- May include in-court representation
  - Rape shield hearing/mental health records
  - Assert rights under the CVRA
- Advocacy to AF and DoD agencies/offices
- Advocacy to civilian prosecutors/agencies
  - May NOT represent victims in civilian courts
- Collateral misconduct

U.S. AIR FORCE

SVC Program Overview

- Implementation date: 28 Jan 13
- 60 part-time SVCs serving world-wide
- 305 eligible requests over life of program
- Supported 47 courts-martial & 40 Article 32 hearings
- Attended over 200 interviews
- Traditional legal assistance program and Victim/Witness Assistance Program STILL exists for victims of crime not eligible for SVC

U.S. AIR FORCE

Interim Structure

- **SVC Program Office – AFLOA/JAJM**
- **Assign SVCs to Cases**
  - **Initial cadre of 60 trained SVCs worldwide**
  - **Majority assigned to wing-level legal offices**
- **Professional oversight for SVC duties**
- **SVC's primary responsibility is to his/her client**
  - **Representation will be their primary duty**
  - **Will continue to hold current positions in base legal offices**

U.S. AIR FORCE

Full-time Structure

- **Summer 13 – independent organization in AFLOA/CLSV**
- **24 JAGs and 10 paralegals full-time**
- **10 “regional” locations; 22 locations overall**
  - **Full-time SVCs assigned**
- **After completion of pilot program, may regionalize into 10 locations**
- **Report due to OSD 1 Sep 13**

U.S. AIR FORCE

Phased Approach

- **SVCs PCA into AFLOA; SVCs stay at current base but move out of legal office to regional/satellite office**
- **After Phase 1, Phases triggered by FTE requirements for caseload**
- **FTE calculation (from current SVC workload): 10 clients per SVC**
  - Prior to each Phase, FTE calculation will be re-validated based on updated survey of SVC hours/client/week
- **SVC Manpower by Phase**
  - Phase 1: 24 JAGs, 10 paralegals to PCA NLT 31 May 13
  - Phase 2: 300 clients sustained – add 6 JAGs (30 total)
  - Phase 3: 350 clients sustained – add 5 JAGs (35 total)
  - Phase 4: 400 clients sustained – add 5 JAGs (40 total)
  - Phase 5: 450 clients sustained – add 5 JAGs (45 total)
  - Phase 6: 500 clients sustained – return to AF Council
- **SVC Training Course for Phases 1-3 (20-24 May 13)**

SVC Manning: Phase 1

- **2 JAGs, 1 Paralegal for HQ AFLOA/CSLV w/RNLTD of 31 May 13**
- **SVC Regional Office Makeup (24 JAGs, 10 Paralegals)**
  - RNLTD of 31 May 13
- **Satellite offices are now components of original regional approach**

Andrews: 1 JAG, 1 Paralegal	**Peterson: 1 JAG, 1 Paralegal**
• **McGuire Satellite Office**	• **Scott Satellite Office**
• **Dover Satellite Office**	• **Offutt Satellite Office**
Hurlburt: 2 JAGs, 1 Paralegal	**Nellis: 1 JAG, 1 Paralegal**
• **Moody Satellite Office**	• **Cannon Satellite Office**
JBSA: 1JAG, 1 Paralegal	**Travis: 1 JAG, 1 Paralegal**
• **Dyess Satellite Office**	• **Vandenberg Satellite Office**
• **Little Rock Satellite Office**	• **Fairchild Satellite Office**
• **Keesler Satellite Office**	**Elmendorf: 1 JAG, 1 Paralegal**
Lakenheath: 1 JAG, 1 Paralegal	**Kadena: 1 JAG, 1 Paralegal**
Ramstein: 2 JAGs, 1 Paralegal	• **Yokota Satellite Office**

U.S. AIR FORCE

AFLOA/CLS Organization Chart

CLS Director
Col Kijek
MSgt Quarterman (dual hatted as Superintendent & CLSL NCOIC)

Col Fred Davies, USAFR

CLSV
Col Hankins
GS-14 TBD, filled by Maj Wilder (will work 75/25 split w/CLSL)
O-4 TBD (resp for training)
MSgt Zaldivar

Various SVC regional and satellite offices across the Air Force

CLSA/Office of Airmen's Counsel
Maj Villena, Chief
Mr. Becker, Sr Atty-Advisor
17 attys & paralegals, 1 reserve atty
(Current manning a/o April 13)

CLSL
Lt Col Collick
O-4 TBD, filled by Maj Wilder (will work 25/75 split w/CLSV)
MSgt Quarterman (dual hatted as Directorate Superintendent)

U.S. AIR FORCE

SVC Division

- **Chief, CLSV – Lt Col Hankins**
  - **Responsible for overall management of SVC Program, including supervising SVCs**
  - **Primary liaison with JAJM, AF SAPR, DoD SAPRO**
- **Deputy Chief, CLSV – Maj Wilder**
  - **Day-to-day management/reach-back support**
- **CLSV Superintendent – TSgt Zaldivar**
  - **Manage budget, training, enlisted personnel issues**

JAJM:

- **Chief, Victims Issues and Policies – Capt DeVito**
  - **Support DoD-directed JSC study of SVC Program**
  - **Collaborate on policy/outreach programs**

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Standards of Conduct

- **Caring & compassionate support – must also keep professional distance**
  - **Review client communication policy**
- **Live in a glass house**
  - **ZERO tolerance for sexual misconduct, including unprofessional relationships with clients or co-workers!**
- **Must meet AF standards**
- **Utilize your region for support!**

U.S. AIR FORCE

Bottom Line

"It takes a strong team to succeed in our mission to protect and defend the nation, and sexual assault undermines that. It's devastating to those involved…[T]his program embodies what the Air Force is all about -- taking care of our people."

General Mark A. Welsh, III, Air Force Chief of Staff

5 January 2013

U.S. AIR FORCE

Questions?

Headquarters U.S. Air Force

Integrity - Service - Excellence

SVC Office Management

Maj Robert Wilder
Deputy Chief, SVC Division
robert.wilder@pentagon.af.mil

TSgt Charles Zaldivar
Special Victims' Paralegal Manager
charles.zaldivar@pentagon.af.mil

This document contains internal matters that are deliberative in nature and/or are part of the agency decision-making process, both of which are protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

Overview

- In-processing
- SVC Requests/Detailing
- Budget
- Important Dates
- Miscellaneous
- Resources & Outreach
- Tips for Success

U.S. AIR FORCE

AFLOA/CLSV In-Processing

Time to In-Process

- AFLOA In-Processing Checklist
- CLSV In-Processing Checklist
- DTS Statement of Understanding
- DTS Transfer

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SVC Requests/Detailing

U.S. AIR FORCE

SVC Requests/Detailing

- Victim Referral Process
  - SARC/DAVA Forward Request to SJA
  - SJA Forwards Request to Base or Regional SVC Office
- Review for Eligibility
  - Active Duty, USAFR/ANG (Title 10)
  - Adult Dependents
  - VICs Eligible for LA Under AFI 51-504
  - Basic Military Training & Technical Training
  - Qualifying Offense

SVC Requests/Detailing

- Follow up with legal office or SARC
- Questions About Eligibility/Exceptions to Policy
- Handling Conflicts
- Walk-in Requests

U.S. AIR FORCE

SVC Requests/Detailing

AFLOA > JAJ > JAJM > SVC > Case Tracking > New Item

Case Tracking: New Item

The content of this item will be sent as an e-mail message to the person or group assigned to the item.

OK | Cancel

Attach File | Spelling... * indicates a required field

Date SVC Request Received	
Victim Name *	
SVC Assigned To Case	Enter users separated with semicolons.
SVC Coord	
SVC Region	
SJA of SVC	
SJA Coord	
SJA of Office Handling Case	
SJA of Victim	
Date SVC Assigned	

SVC Requests/Detailing

- Detailing Notices – Unrestricted Case

SPECIAL VICTIMS' C
AIR FORCE LEGAL OPERA
JOINT BASE ANDREWS,

MEMORANDUM FOR (Accused's Legal Office Sy
(Victim's Legal Office Sym

FROM: AFLOA/CLSV

SUBJECT: Special Victims' Counsel – (Victim's Ra

1. I am detailed as Special Victims' Counsel for (Vict
(Installation). (Victim's Rank/Last Name) is identifie
Counsel in the case of (Subject's Rank/Name)(U.S. v.
perpetrator).

2. You will receive a notice of representation letter or
formed.

3. Please direct any questions regarding this detailing
email address.

NAME, I
Special V

SPECIAL VICTIMS' COUNSEL
AIR FORCE LEGAL OPERATIONS AGENCY
JOINT BASE ANDREWS, MARYLAND

Date

MEMORANDUM FOR (Accused's Legal Office Symbol)/JA
(Victim's Legal Office Symbol)/JA

FROM: AFLOA/CLSV

SUBJECT: Special Victims' Counsel – (Victim's Rank/Name)

1. (SVC Rank/Name) assigned to (Installation) is detailed as Special Victims' Counsel for (Victim's Rank/Name), (Victim's Unit), (Installation). (Victim's Rank/Last Name) is identified as qualifying for Special Victims' Counsel in the case of (Subject's Rank/Name)(U.S. v. Accused's Rank/Name)(an unknown perpetrator).

2. You will receive a notice of representation letter once an attorney-client relationship has been formed.

3. Please direct any questions regarding this detailing notification to me at DSN XXX-XXXX, org box address.

NAME, Rank, USAF
Special Victims' Paralegal

SVC Requests/Detailing

- Detailing Notices – Restricted Case

AI

SPECIAL VICTIMS' COUNSEL
AIR FORCE LEGAL OPERATIONS AGENCY
JOINT BASE ANDREWS, MARYLAND

Date

MEMORANDUM FOR (Vic

FROM: AFLOA/CLSV

SUBJECT: Special Victims' (

1. I am detailed as Special Vi
if known) at (Victim's Installa

2. Please direct any questions
email address.

MEMORANDUM FOR (Victim's Legal Office Symbol)/JA

FROM: AFLOA/CLSV

SUBJECT: Special Victims' Counsel – Restricted Report

1. (SVC Rank/Name) assigned to (Installation), is detailed as Special Victims' Counsel for a restricted report case (include DSAID number if known) at (Victim's Installation).

2. Please direct any questions regarding this detailing notification to me at DSN XXX-XXXX, org box email address.

NAME, Rank, USAF
Special Victims' Paralegal

U.S. AIR FORCE

Notice of Representation

SPECIAL VICTIMS' COUNSEL
AIR FORCE LEGAL OPERATIONS AGENCY
JOINT BASE ANDREWS, MARYLAND

Date

MEMORANDUM FOR JA
ADC
AFOSI
SFOI

FROM: Name

SUBJECT: Notice of Legal Representation – _____

1. This notice is to inform you that I currently represent, and have an attorney-client relationship with _____, a member assigned to _____.

2. My client requests that all contacts (including if any party desires to interview or question my client) be directed to me. Please contact me to discuss any communications that can be made directly with my client. If you have any questions, please contact me at DSN XXX-XXXX, commercial XXX-XXX-XXXX or via email at XXXXXXX@us.af.mil.

NAME, Capt, USAF
Special Victims' Counsel

U.S. AIR FORCE

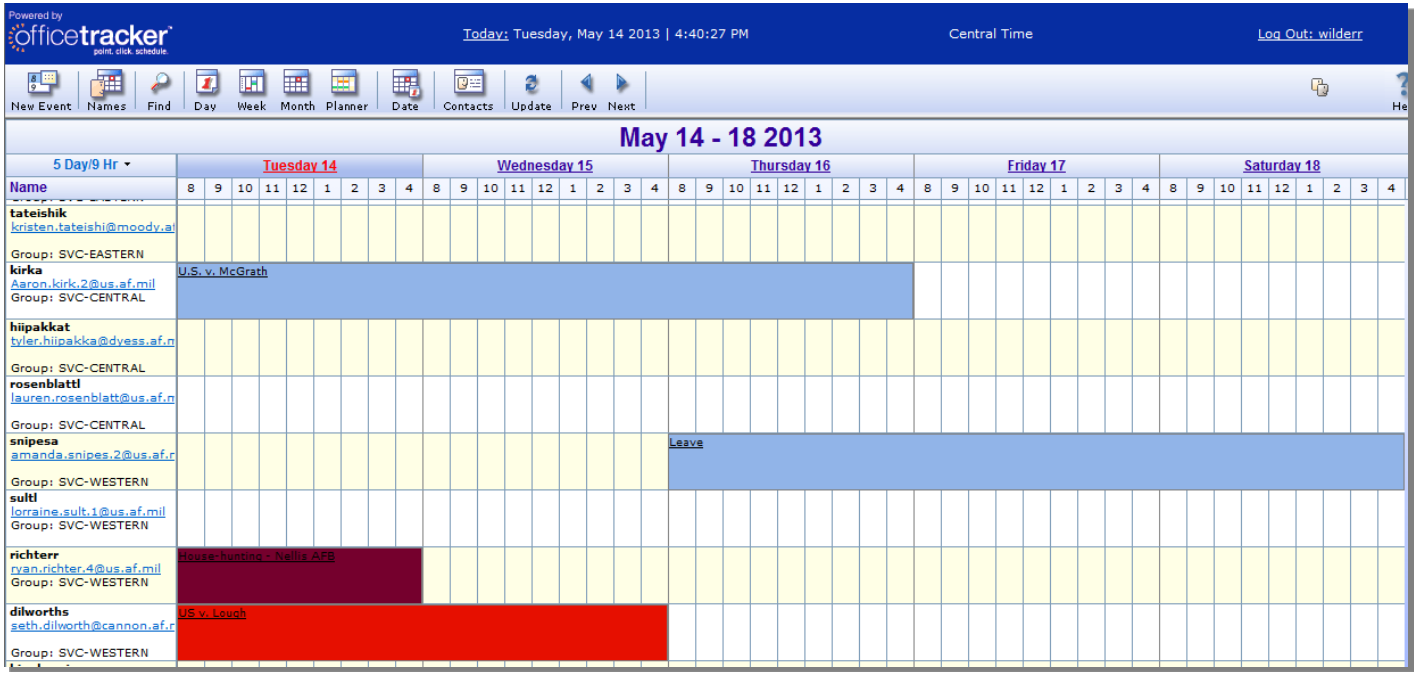
Updates

- Everyone Must Use SharePoint
- Same Day Inputs
- Contact Us With Updates During Art 32/CM; Not Just Afterwards
  - Let Us Know CM Results
  - Let Us Know How Your Client is Doing
- Weekly Report Inputs Due by 1200 hrs (EST) on Fridays

U.S. AIR FORCE

Scheduling

- Everyone Must Use JDS
- Input Art 32/CM Dates
- No Attorney/Client Information in JDS
- Leave Dates

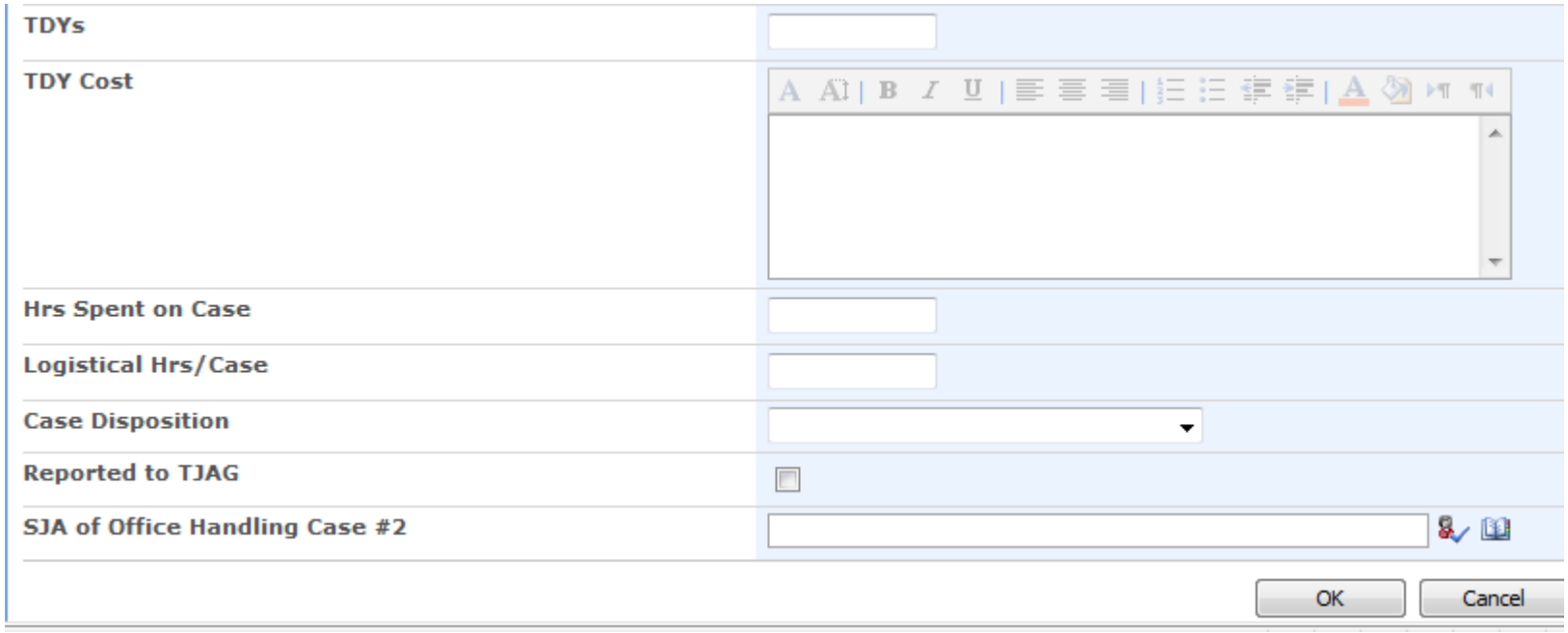


U.S. AIR FORCE

Budget

Budget (cont)

- No more Cross-Org Letters
- Upload Travel Approval e-mail and upload to DTS
- Once travel is complete update travel cost in SharePoint



Budget (cont)

- Travel
  - DTS Alternate Means Statement
    - Included in “Other Auths.”
  - "Alternate means, such as Secure Video Teleconference (SVTC) or other web based communications are not sufficient to accomplish travel objectives. (Insert Specific Justification).”
  - Per Diem
    - Use AFMAN 34-102c
      - Located at e-publishing.af.mil

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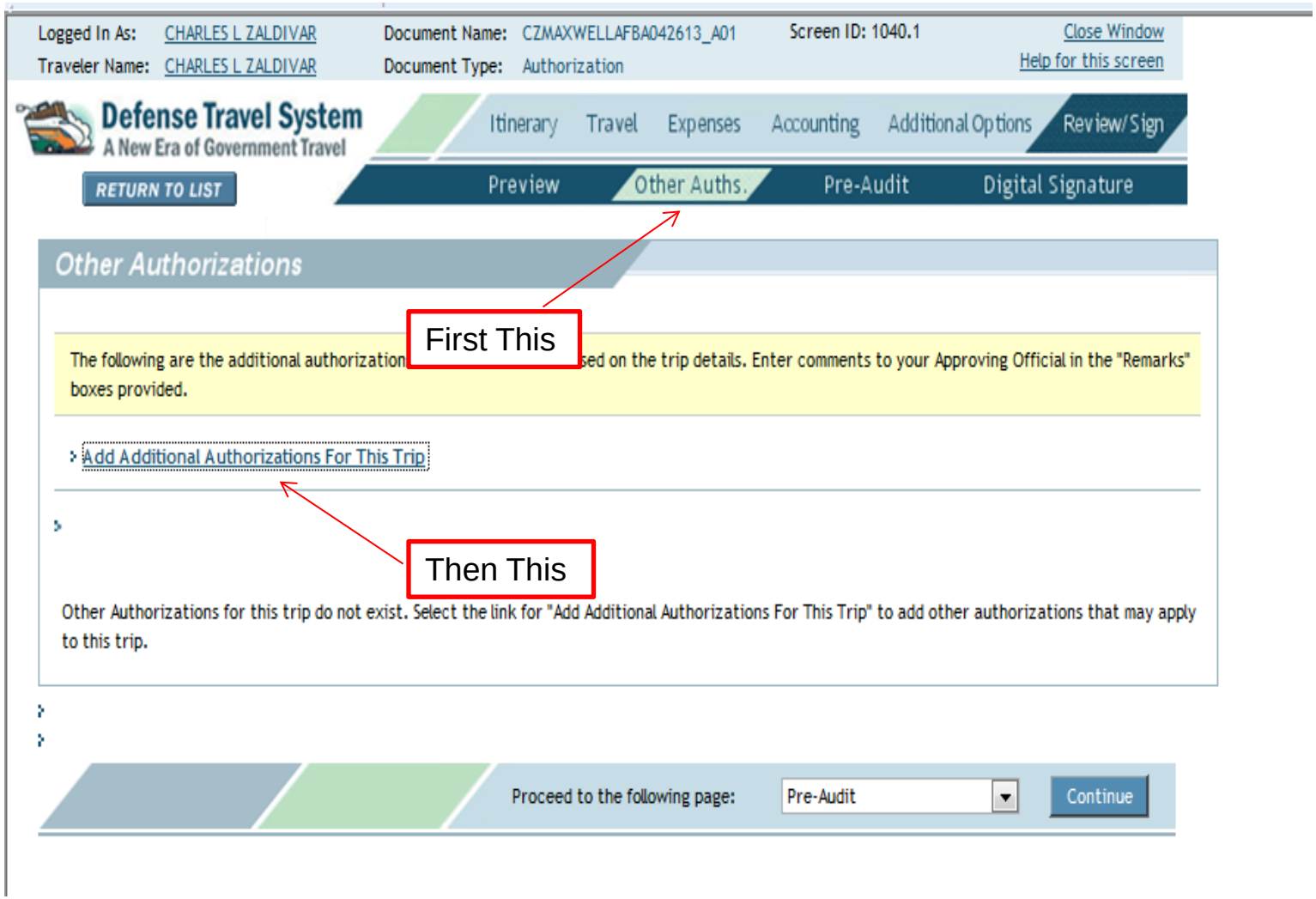
Logged In As: CHARLES L ZALDIVAR
Traveler Name: CHARLES L ZALDIVAR
Document Name: CZMAXWELLAFBA042613_A01
Document Type: Authorization
Screen ID: 1040.1
Close Window
Help for this screen
Defense Travel System
A New Era of Government Travel
Itinerary
Travel
Expenses
Accounting
Additional Options
Review/Sign
RETURN TO LIST
Preview
Other Auths.
Pre-Audit
Digital Signature
Other Authorizations
First This
The following are the additional authorization
sed on the trip details. Enter comments to your Approving Official in the "Remarks" boxes provided.
Add Additional Authorizations For This Trip
Then This
Other Authorizations for this trip do not exist. Select the link for "Add Additional Authorizations For This Trip" to add other authorizations that may apply to this trip.
Proceed to the following page:
Pre-Audit
Continue

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	Non-Govt Funded Permissive TDY (selection not allowed, requires permissive trip)
☐	OFFICIAL CTO NOT USED
☐	OTHER (See remarks below)
☐	OTHER PRIVATELY-OWNED VEHICLE
☐	PER DIEM LOCATION FOOTNOTES
☐	PERSONAL DEVIATION-ITINERARY/TRANS MODE
☐	PERSTEMPO CODE A (Operation)
☐	PERSTEMPO CODE B (Exercise)
☐	PERSTEMPO CODE C (Unit Trng)
☐	PERSTEMPO CODE D (Mission Support TDY)
☐	PERSTEMPO CODE E (Individual Trng)
☐	PERSTEMPO CODE F (Home Station Trng)
☐	PERSTEMPO CODE G (Duty in Garrison)
☐	PERSTEMPO CODE H (Hosp in area of POS)
☐	PERSTEMPO CODE I (Disciplinary Event)
☐	PERSTEMPO CODE J (Inactive Duty Trng)
☐	PERSTEMPO CODE K (Muster Duty)
☐	PERSTEMPO CODE L (Funeral Honors Duty)
☐	PERSTEMPO CODE Z (Unknown)
☐	POV USE NOT ADVANTAGEOUS TO GOVERNMENT
☐	RAT TRAVEL IS FOR A DEPENDENT
☐	RENEWAL AGREEMENT TRAVEL
☐	TRAVEL IS FOR A FAMILY MEMBER
☐	TRAVEL IS FOR A FAMILY MEMBER (TRANS)
☐	VARIATIONS AUTHORIZED

Cancel Add

Proceed to the following page:

Click on the “OTHER (See remarks below)”

Click Add

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Logged In As: CHARLES L ZALDIVAR
Traveler Name: CHARLES L ZALDIVAR
Document Name: CZMAXWELLAFBA042613_A01
Document Type: Authorization
Screen ID: 1040.1
Close Window
Help for this screen

Defense Travel System
A New Era of Government Travel

Itinerary | Travel | Expenses | Accounting | Additional Options | Review/Sign

RETURN TO LIST

Preview | Other Auths. | Pre-Audit | Digital Signature

Other Authorizations

The following are the additional authorizations that were selected based on the trip details. Enter comments to your Approving Official in the "Remarks" boxes provided.

Add Additional Authorizations For This Trip

Other Authorizations

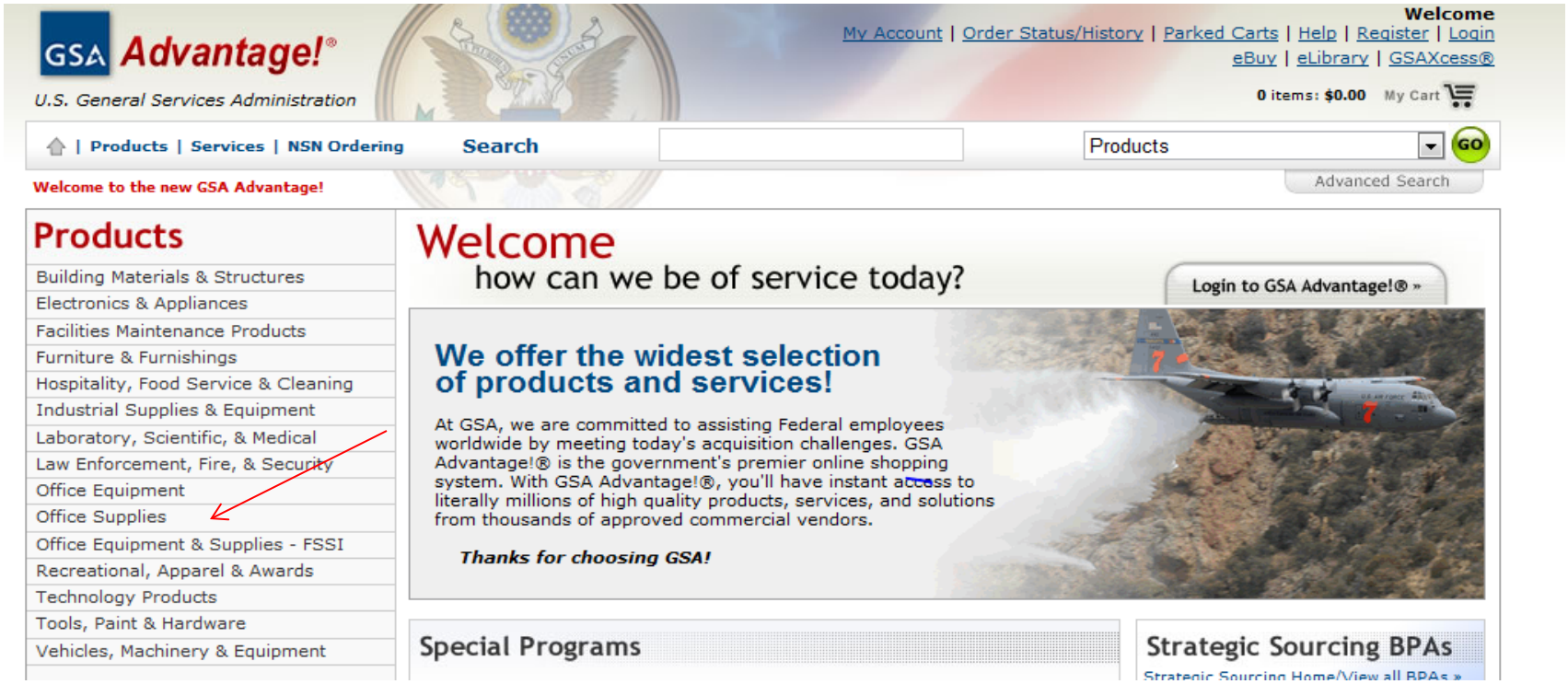
	Other Authorization	Remarks	Remove
1	OTHER (See remarks below)	OTHER (See remarks below) Type Alternate Means Statement Here	remove

Save and Proceed to Pre-Audits

Proceed to the following page: Pre-Audit Continue

Budget (cont)

- Visit GSA Advantage
  - https://www.gsaadvantage.gov



U.S. AIR FORCE

Important Dates

U.S. AIR FORCE

31 May 2013

- CLS officially stands up
  - For most 31 May 13 is Effective Date of Assignment

U.S. AIR FORCE

14 June 2013

- Local Office Budgets
  - Travel Budgets Managed at CLSV
  - GPC Located at AFLOA
- Send Office Supplies Request to CLSV
  - Supplies found at GSA Advantage

U.S. AIR FORCE

14 June 2013 (cont.)

- Send CLSV your shopping cart with your mailing address

Shopping Cart

NOTES:

BPA-1 BPA pricing is available for product PIL28844. Click the Mfr.Part.No. to view pricing and terms of the BPA; otherwise Checkout.

3-1 The items from STEC-STEADFAST TECHNICS GS-02F-0099T fall below the Contract Minimum Order of $75.00. You must increase the quantity of the listed items/services or shop for additional items/services from this contract.

Continue Shopping | Update Cart | Park Cart | Checkout

Notes	NSN/Part #	Name	Vendor	Details	Qty	Unit Price	Total Price	Get a Quote (eBuy)
3-1,BPA-1	PIL28844	PEN,PRECISE GRIP 4/PK,AST	STEC-STEADFAST TECHNICS	Direct Delivery 5 days delivered ARO	1	$4.83 PK reduce price	$4.83	
						Cart Total:	$4.83	

Shopping Cart Notes

Removing Items

- Enter "0" in the Qty box for the items you want to remove and click "Update Cart".

Changing the Unit Price

- Customers are encouraged to negotiate a lower price with MAS contractors (if the volume warrants). To reduce the unit price, click [reduce price]. You will be asked to provide an authorization.

Payment Methods

- GSA Advantage accepts Government Purchase Card or AAC/DoDAAC. Restrictions may apply. For state and local organizations, GSA accepts state or local issued credit cards (VISA, MC, AMEX only).

Shipping

- Shipping is included on all prices except when "FOB Origin".
- Orders may be shipped to any valid US post office address. Orders may also be shipped to any APO/FPO or overseas address (excludes state or local government orders). Additional instructions will follow at Checkout.

Saving your Shopping Cart

- If you would like to save your cart for later or forward your cart to someone, click the "Park Cart" button.
- Please note that prices are subject to change, and may be different when retrieved.

U.S. AIR FORCE

July 2013

- Fall Out Fund Requests
  - Not likely but essential for FY14 projections
- Initial Feedbacks due 60 days from assignment (31 July 2013)
  - CLSV ⟶ SVC
  - SVC ⟶ SVP
    - AF Form 931 (AB thru TSgt)
    - AF Form 932 (MSgt thru CMSgt)
    - AF Form 724 (Lt – Col)
    - Forms Located at www.e-publishing.af.mil

U.S. AIR FORCE

PERFORMANCE FEEDBACK WORKSHEET *(AB thru TSgt)*

I. PERSONAL INFORMATION

NAME	GRADE	UNIT

II. TYPES OF FEEDBACK: ☐ INITIAL ☐ MID-TERM ☐ RATEE REQUESTED ☐ RATER DIRECTED

III. PRIMARY DUTIES

IV. PERFORMANCE FEEDBACK

1. PRIMARY/ADDITIONAL DUTIES. Consider Adapting, Learning, Quality, Timeliness, Professional Growth, Communication Skills. (For SSgt/TSgt also consider Supervisory, Leadership and Technical Ability.)

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

2. STANDARDS, CONDUCT, CHARACTER & MILITARY BEARING. Consider Dress & Appearance, Personal/Professional Conduct On/Off Duty. (For SSgt/TSgt also consider Enforcement of Standards and Customs & Courtesies.)

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

3. FITNESS. Maintains Air Force Physical Fitness Standards.

☐ Does Not Meet ☐ Meets ☐ Exempt

4. TRAINING REQUIREMENTS. Consider Upgrade, Ancillary, OJT, & Readiness. (For SSgt/TSgt also consider PME, Off-duty Education, Technical Growth, and Upgrade Training.)

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

5. TEAMWORK/FOLLOWERSHIP. Consider Team Building, Support of Team & Followership. (For SSgt/TSgt also consider Leadership, Team Accomplishments, Recognition/Reward Others.)

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

6. OTHER COMMENTS. Consider Promotion, Future Duty/Assignment/Education Recommendations and Safety, Security & Human Relations.

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

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PERFORMANCE FEEDBACK WORKSHEET *(MSgt thru CMSgt)*

I. PERSONAL INFORMATION

NAME	GRADE	UNIT

II. TYPES OF FEEDBACK: ☐ INITIAL ☐ MID-TERM ☐ RATEE REQUESTED ☐ RATER DIRECTED

III. PRIMARY DUTIES

IV. PERFORMANCE FEEDBACK

1. PRIMARY DUTIES. Consider Quality, Quantity, Timeliness, Technical Knowledge, Leading, Managing & Supervising

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

2. STANDARDS: ENFORCEMENT AND PERSONAL ADHERENCE, CONDUCT, CHARACTER, MILITARY BEARING, CUSTOMS AND COURTESIES. Consider Dress & Appearance and Personal/Professional Conduct On/Off Duty

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

3. FITNESS. Maintains Air Force Physical Fitness Standards.

☐ Does Not Meet ☐ Meets ☐ Exempt

4. RESOURCE MANAGEMENT AND DECISION MAKING. Consider Efficiency, Judgment, Setting and Meeting Goals

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

5. TRAINING, EDUCATION, OFF-DUTY EDUCATION, PME, PROFESSIONAL ENHANCEMENT AND COMMUNICATION. Consider Providing, Supporting and Personal Growth

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

6. LEADERSHIP/TEAM BUILDING/FOLLWERSHIP. Consider Team Accomplishments, Leveraging Personal Experiences, Community Support and Recognition/ Reward for Others

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

7. OTHER COMMENTS. Consider Promotion, Future Duty/Assignment/Education Recommendations and Safety, Security & Human Relations.

☐ N/A Initial Feedback ☐ Does Not Meet ☐ Meets ☐ Above Average ☐ Clearly Exceeds

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30 September 2013

- Quarterly Awards Packages Due to CLSV
  - See AFLOA Awards OI (2011)
  - Accomplished on AF 1206 (www.e-publishing.af.mil)
    - 12 Bullets Total
    - Must Submit AFFMS Printout
- Categories
  - CGO
  - Senior Enlisted (E-7 – E-8)
  - Junior Enlisted (E-1 – E-6)

30 September 2013 (cont)

- CGO Award Headings
  - Demonstrated Excellence
  - Initiative
  - Devotion to Duty
  - Attorney/Paralegal Teaming

30 September 2013 (cont)

- Senior Enlisted Award
  - Demonstrated Excellence
  - Superior Initiative
  - Leadership
  - Management Skills
  - Professionalism
  - Attorney/Paralegal Teaming

30 September 2013 (cont)

- Junior Enlisted Award
  - Demonstrated Superior Initiative
  - Technical Skill
  - Leadership Ability
  - Devotion to Duty
  - Attorney Paralegal Teaming

23 November 2013

- Midterm Feedback Due
  - Occurs halfway between initial and projected closeout of performance report
  - Accomplished on AF Form 724/931/932

Additional Awards

- 27 December 2013
  - Quarterly Awards Packages Due to CLSV
- ?? Feb 14
  - TJAG Annual Awards Packages Due to CLSV

Performance Reports

- 16 April 2014
  - Performance Report inputs due to raters (45 Days prior to closeout)
- 1 May 2014
  - Performance Reports Due to CLSV (30 Days prior to closeout)
  - Must include:
    - OPR/EPR Rip (Request from your Local MPS)
    - AF Fitness Management Score Sheet (AF Portal)
    - Last Two OPRs/EPRs (ARMS)

Records Management

- Must have a Records Custodian Appointed
- Must have an approved File Plan
- Contact your local Base Records Manager to ensure you receive the required training

U.S. AIR FORCE

Miscellaneous

Miscellaneous

- Office Hours
- Down/Family Days
- Office Coverage

U.S. AIR FORCE

Resources & Outreach

U.S. AIR FORCE

Resources

HEADQUARTERS UNITED STATES AIR FORCE SEXUAL ASSAULT PREVENTION RESPONSE PROGRAM SARC

APSIL C3P PORTFOLIO

NCVLI

VICTIM RIGHTS LAW CENTER

Military OneSource

NSVRC national sexual violence resource center

RAINN RAPE, ABUSE & INCEST NATIONAL NETWORK

NACVCB

THE NATIONAL CENTER FOR Victims of Crime

U.S. AIR FORCE

Outreach

HEADQUARTERS UNITED STATES AIR FORCE
SARC
SEXUAL ASSAULT PREVENTION RESPONSE PROGRAM

mcasa
Maryland Coalition Against Sexual Assault
Working to end sexual violence in Maryland

Domestic Abuse & Sexual Assault Crisis Center of Warren County©

Houston Area Women's Center
Ending Domestic and Sexual Violence

The Women's Crisis & Family Outreach Center

RAPECRISIS
ENGLAND AND WALES

CENTER SOUTHERN ARIZONA AGAINST SEXUAL ASSAULT
A Member of Arizona's Children Association Family of Agencies

King County Sexual Assault Resource Center

MID-VALLEY WOMEN'S CRISIS SERVICE

STATE OF OREGON 1859
Oregon Department of Justice
Crime Victims' Services Division
Empowering Victims, Honoring Rights, Rebuilding Lives

U.S. AIR FORCE

Tips for Success

U.S. AIR FORCE

Office Professionalism

- Casual Email Can Be Dangerous
- Good Housekeeping
- Returning Phone Calls
- Be Prompt When Meeting With Clients
- Minimize Interruptions When Meeting With Clients
- Meeting Locations
- Maintain Professionalism at All Times

U.S. AIR FORCE

Tips for Success

- Reasonable Expectations
- Keep Your Promises
- Become a Better SVC
- Office Efficiencies
- Don’t Get Personal
- Your Reputation is Your Best Friend
- Survey Clients on How You Are Doing
- Get Outta Here
- Schedule Exercise

U.S. AIR FORCE

Questions?

SVC Court-Martial in a Box

Maj Talcott
w/ Col Christensen

“a whole stack of ‘em”

Preview

1. Overarching Considerations
2. The L.R.M. v. Kastenberg Case
3. Extraordinary Writs
4. MRE 412
5. MRE 513/514
6. Other Interest Items

Remember, each of you is an SVC ambassador

R.C.M. 103(16)

Remember, prior to meeting you—most SJAs, Trial Counsel, and ADCs may have never met an SVC before

L.R.M. v. Kastenberg & the Extraordinary Writ Process

SVC Course:	05 Dec 2012
Capt Dilworth Detailed:	22 Jan 2013
Notice of Appearance:	23 Jan 2013
SVC Program Initiated	28 Jan 2013
Hearing on Standing:	29 Jan 2013
Judicial Ruling [no standing]:	29 Jan 2013
Reconsideration Requested:	01 Feb 2013
2d Judicial Rule [no standing]:	09 Feb 2013
Pet. for Extraordinary Relief:	14 Feb 2013
Oral Argument:	11 Mar 2013
AFCCA Opinion [no jurisdiction]:	02 Apr 2013
Reconsideration Req.:	10 Apr 2013
CAAF Issues C.C.R.:	16 Apr 2013
Reconsideration Denied:	19 Apr 2013
TJAG Cert. Appeal Filed:	29 Apr 2013
CAAF Oral Argument:	11 Jun 2013

So what was that “three part” test?

II

WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION

1. 513 & 412 actually say "opportunity to be heard"

2. Even if they didn't, the Victim has standing

   i. Privacy rights protected by the MREs
   ii. Privacy rights under the CVRA
   iii. Privacy rights under the Constitution

Under MRE 412 & MRE 513:

1. The rule actually says so
2. The underlying privacy right creates standing

Under the Constitution

1. The underlying privacy right creates standing

Under the CVRA

1. The CVRA applies to the military
   i. *Spann*, 51 M.J. 89--has been fixed
   ii. The CVRA is more like *Dowty*, 48 M.J. 102 than *McEllhaney,* 54 M.J. 120
2. The privacy right from (a)(8) creates standing re privacy

I

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS

1. Standing and appellate subject matter jurisdiction are different issues (though occasionally confused)

2. Evidentiary hearings "potentially impact findings and/or sentence"

III

WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS

Issuance of a writ of mandamus is discretionary on the part of this Court and is “a drastic remedy ... more than even ‘gross error’; it must amount to a judicial **‘usurpation of power,’** or be ‘characteristic of an erroneous practice which is **likely to recur.**’” *Murray v. Haldeman,* 16 M.J. 74, 76 (C.M.A. 1983)

If we win…

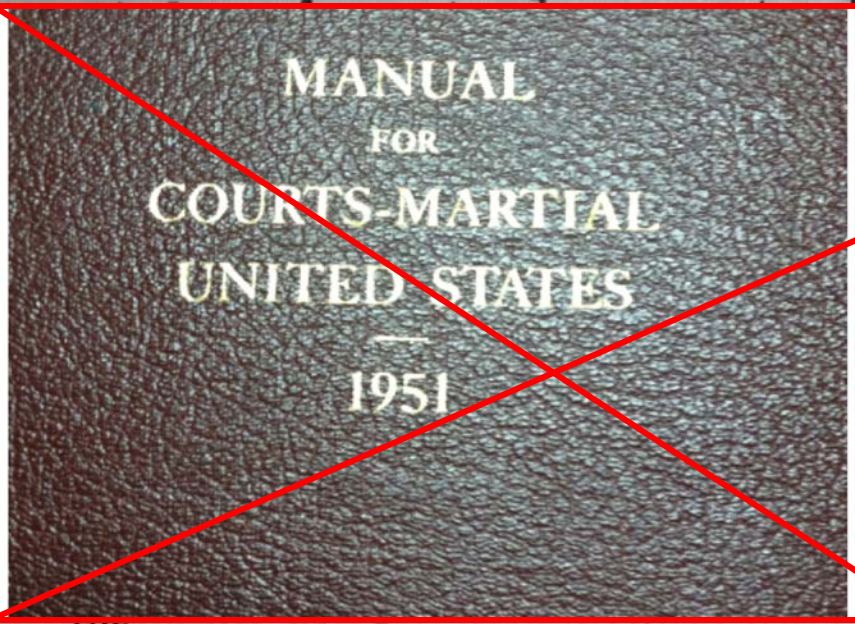
1. File motions and requests early—make your position clear
2. Request written denials
3. Encourage bifurcated proceedings
4. If you think you may have a Writ worthy issue—alert us immediately.

If we lose…

1. File motions and requests early—make your position clear
2. Request written denials
3. Encourage bifurcated proceedings
4. If you think you may have a Writ worthy issue—alert us immediately.

MRE 412

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."



the force involved in the act of penetration will suffice if there is no consent. Any penetration, however slight, is sufficient to complete the offense (Art. 120c).

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be drawn that she did in fact consent. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.

It has been said of this offense, "It is true that rape is a most detestable crime . . .; but it must be remembered that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."

Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and if a woman fails to take such measures to frustrate the execution of a man's design as she is able to take and are called for by the circumstances, the inference may be

“I don’t remember guiding him?”

200 years of history?, unheard of?, unprecedented?, never before done?

Carlson and Ryan-Jones v. Smith, 43 M.J. 401, 402 (C.A.A.F. 1995)

Victims asserted standing to defend their rights under MRE 412, Article 31 of the UCMJ, generalized “invasions of privacy,” and their “privileges.”

CAAF granted jurisdiction and specifically held that the victims be given the “opportunity, **with the assistance of counsel** if they so desire, to present evidence, **arguments and legal authority** to the military judge regarding the propriety and legality of disclosing any of the covered documents.”

F. Doe v. United States, 666 F.2d 43, (4th Cir. 1981)

The Procedure

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

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(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

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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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

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

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

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

fense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

The Rule

vant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

havior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged of-

fense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer rele-

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

(b) *Exceptions.*

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

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

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

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

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

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

The THREE Exceptions

Exception A – Source of injury, semen, physical evidence

Exception B – Conduct w/ the Accused to show consent

Exception C – Constitutionally Required

(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 al-leged victim's privacy,~~ such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

United States v. Gaddis, 70 M.J. 248, 253 (CAAF 2011)

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(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

"Evidence must be admitted within the ambit of MRE **412(b)(1)(C)** when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." United States v. Ellerbrock, 70 M.J. 314, 318 (CAAF 2011).

Those dangers include "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."

Material is a multi-factored test looking at "the importance of the issue in relation to the other evidence in the case" & "the extent to which the issue is in dispute"

Relevant means MRE 401.

United States v. Gaddis, 70 M.J. 248, 253 (CAAF 2011)(overrules U.S. v. Banker, 60 M.J. 216 (CAAF 2004))

D: Rumors in emails that Victim sexually active
D: Victim's mom confronts Victim and requests medical exam
D: Victim fabricates rape allegations
J: You can cross on confrontation of email & threat of medical exam, BUT you cannot reference sex, sex rumors, or contents of emails. You can argue reasonable inferences.

"once the defendant has been allowed to expose a witness's motivation to testify, it is peripheral concern to the Sixth Amendment how much opportunity defense counsel gets"

Military Judge specifies

leged 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

wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412. Sex offense cases; relevance of alleged victim's sexual behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in

the accused to prove consent or by the prosecution; and

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

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer rele-

vant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(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.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Evidence of similar crimes in sexual assault cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government in-

Why does the defense need to ask about “sex”?

Avoid 412 traps

Does my client know how to avoid opening the door?

Is there “hidden” 412 evidence? (kisses, butt grabs, clothing, sex jokes, crude facebook posts, or text messages, etc.)

Is the 412 evidence otherwise admissible?

Why did you testify that the intimacy with your wife is worse now?

United States v. Klemick, 65 M.J. 576 (N.M.C.C.A 2006)

United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006)

MRE 513 & 514

The Rule

M.R.E. 512(b)

This subdivision does not apply to a special court-martial without a military judge.

(c) *Instruction.* Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom except as provided in subdivision (a)(2).

Rule 513. Psychotherapist-patient privilege

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

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

(1) A "patient" is 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) A "psychotherapist" is 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.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is 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.

III-34

(c) *Who may claim the privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the

tary 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.

(e) *Procedure to determine admissibility of patient records or communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may

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

513 & 514

513 & 514 Procedure

It's basically the same as 412

seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

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

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

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

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

Rule 514. Victim advocate-victim privilege

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

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

(1) A "victim" is any person who suffered direct physical or emotional harm as the result of a sexual or violent offense.

(2) A "victim advocate" is a person who is:

(A) designated in writing as a victim advocate;

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

(C) certified as a victim advocate pursuant to Federal or State requirements.

(3) A communication is "confidential" if made to a victim advocate acting in the capacity of a victim advocate and if not intended to be disclosed to third persons other than:

(A) those to whom disclosure is made in furtherance of the rendition of advice or assistance to the victim or

(B) an assistant to a victim advocate reasonably necessary for such transmission of the communication.

(4) An "assistant to a victim advocate" is a person directed by or assigned to assist a victim advocate in providing victim advocate services, or is reasonably believed by the victim to be such.

(5) "Evidence of a victim's records or communications" is testimony of a victim advocate, or records that pertain to communications by a victim to a victim advocate, for the purposes of advising or providing supportive assistance to the victim.

(c) *Who may claim the privilege.* The privilege may be claimed by the victim or any guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a defense counsel representing the victim to claim the privilege on his or her behalf. The victim advocate who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, guardian, conservator, or a defense counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary.

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

(1) when the victim is dead;

(2) when Federal law, State law, or service regu-

Exceptions

Exception to the privilege	MRE 513	MRE 514
Person dead	Yes	Yes
Law requires disclosure/child abuse	Yes	Yes
Danger to others or self	Yes	Yes
Crime/fraud	Yes	Yes
Military safety/security	Yes	Yes
Defense “opens the door”	Yes	N/A
Constitutionally required	Yes	Yes

U.S. v. Klemick, 65 M.J. 576 (N.M.C.C.A 2006)

A threshold showing is required before an *in camera* review of records may be ordered.

Air Force Court and CAAAF have no case law on this issue

MRE 615

She was so scared

Rule 615. Exclusion of witnesses

At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order *sua sponte*. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case, or (4) a person authorized by statute to be present at courts-martial, or (5) any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings.

1990

42 U.S.C. 10606
Victim's Rights and Restitution Act

"(a) Best efforts to accord rights Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b) of this section. (b) Rights of crime victims A crime victim has the following rights: . . .(4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.. . .

Mil. R. Evid. 615
3 Exceptions

No Exceptions for Victims

Exception 4

1997

United States v. McVeigh decision (holding no *real* victim's rights)

18 U.S.C. 3510
Victim's Rights Clarification Act

"Notwithstanding any statute, rule, or other provision of , a United States district court shall not order any victim of an offense excluded from trial of a defendant accused of that offense because such victim may , during the sentencing hearing , make a statement or present any information in relation to the sentence"

Exception 5

1999

United States v. Spann decision
(holding 10606 & 3510 unclear or inapplicable w/o further action)

2002

Exec. Order No. 13,262, 67 Fed. Reg. 18773

", or (4) a person authorized by statute to be present at courts-martial, or (5) any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings.".

18 U.S.C. 3771
Crime Victim's Rights Act

2004

Superseding 42 U.S.C. 10606 – "moving" and "amplifying" the rights; adding "after receiving clear and convincing evidence" that "testimony by the victim would be materially altered"

Edwards and *In re Mikhel* decisions holding that the CVRA became the "statute" referenced in exception 4 of the Rule 615

Mil. R. Evid. 615
with 2 "Victim" exceptions

United States v. Spann, 51 M.J. 89 (C.A.A.F. **<u>1999</u>**)

Rights and Restitution act regarding victim attendance does not apply to military courts

United States v. Lofton, 69 M.J. 386 (C.A.A.F. 2011)

"Court-martial spectators should not provide summaries of testimony to sequestered witnesses, and the parties and the military judge should be vigilant in preventing such incidents"

MRE 502

Zolin, 491 U.S. 554, 562 (1989)
Attorney client privilege "the oldest of the privileges known to the common law"

Before in camera review there must be some factual basis adequate to support a good faith belief by a reasonable person that in camera review may reveal evidence that the crime-fraud exception applies

Factual basis must be independent of privileged materials

Wheeler, 65 M.J. 919, 925 (C.A.A.F. 2002)
"Once the attorney-client relationship has been shown to exist, no court—Federal or state—has been more zealous in safeguarding and strengthening the privilege arising there from."

RCM 701(f) & (g)

RCM 703(f)

RCM 701(f)&(g)

(f) *Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure

(2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(f) *Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure

RCM 703(f)

(C) *Relief.* If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena or order of production be withdrawn or modified. Subject to Mil. R. Evid. 505 and 506, the military judge may direct that the evidence be submitted to the military judge for an in camera inspection in order to determine whether such relief should be granted.

(4) *Procedures for production of evidence.*

under the control of the Govern-
der the control of the Government
by notifying the custodian of the
me, place, and date the evidence is
nesting the custodian to send or
nce.

not under the control of the Gov-
not under the control of the Gov-
obtained by subpoena issued in
subsection (e)(2) of this rule.

the person having custody of evi-
lief on grounds that compliance
or order of production is unrea-
ssive, the convening authority or,
after referral, the military judge may direct that the
subpoena or order of production be withdrawn or
modified. Subject to Mil. R. Evid. 505 and 506, the
military judge may direct that the evidence be sub-
mitted to the military judge for an in camera inspec-
tion in order to determine whether such relief should
be granted.

United States v. Wuterich, 67 M.J. 63 (C.A.A.F. 2008)

SVC ≠ Ewald

Rule 3.1 - Meritorious Claims and Contentions “You can't make frivolous arguments"

Rule 3.3 - Candor Toward the Tribunal “You cannot make false statements; You must disclose material facts when it is necessary to avoid assisting a criminal or fraudulent act by the client--but see Rule 1.6; You cannot offer false evidence and must take remedial measures if you knows evidence is false"

Rule 3.4 - Fairness to Opposing Party and Counsel “You cannot unlawfully obstruct another party's access to evidence, unlawfully alter evidence, destroy or conceal evidence, and cannot encourage your client to do so; you cannot assist a witness to testify falsely; and, you cannot offer an inducement that is prohibited by law"

Rule 4.1 - “You cannot make false statements to third persons; You must disclose material facts to third persons if it is necessary to avoid assisting a crime but see Rule 1.6"

Rule 8.4 - “You cannot engage in conduct that is prejudicial to the administration of justice; you cannot engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"

Questions

CYBER LAW 2013

THE JAJG-DCFL PARTNERSHIP

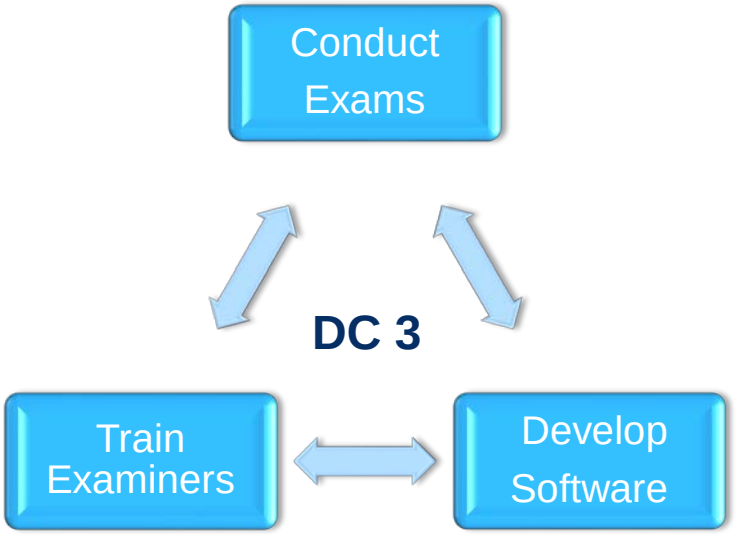
Maj Joe Kubler
JAJG-DCFL Liaison
AFLOA/ JAJG

U.S. AIR FORCE

DC3 OVERVIEW

U.S. AIR FORCE

- Defense Computer Forensics Laboratory (DCFL)
  - Accredited Digital Forensics Laboratory; deep-dive capabilities; all classification levels. FY11: 681tb processed.
- Defense Cyber Investigations Training Academy (DCITA)
  - Cyber Investigative Training & Certification: cyber investigations, incident response, digital forensics; 25 courses, 5 specialty tracks. FY11: 3,259 students trained.
- Defense Cyber Crime Institute (DCCI)
  - Digital forensics research, development, test & evaluation of forensic hardware/software for functionality; cyber tool developer & repository; technology exploration



TWO CASES

- PARKER
  - “I don’t want daddy to come home. . .”
  - Daughters 3 and 5

- ESCOBAR
  - Cybertipline
  - Animals

- What do we need at the lab?
  - Foreign / Deployed
  - Authority for Computers
  - Consent

PICTURE IS WORTH . . .

- PARKER
  - Molest + Addiction to CP = Production?
  - Cameras

- ESCOBAR
  - Unallocated Space
  - “For Pedobook”

SOMETHING TO HIDE

- PARKER
  - Location, location, location
  - Hidden Folders
- ESCOBAR
  - The Onion Router
  - Cache
- Looking behind the curtain?

SOMETHING TO HIDE

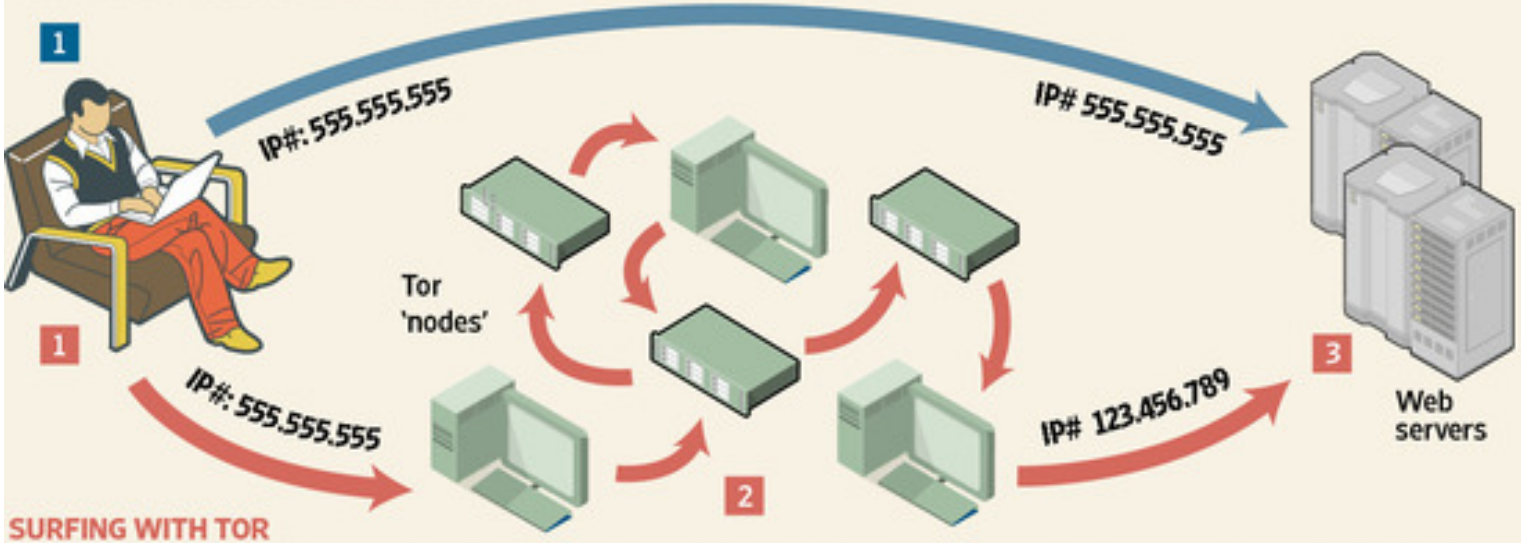
U.S. AIR FORCE

How Tor's 'Onion Routing' Works

Non-profit Tor makes free software that hides users' internet addresses and encrypts the content of what they're looking at. People use the software for privacy, as well as in countries that censor the Internet.

ORDINARY INTERNET TRAFFIC

1: A user's computer requests to download data from Web servers, which can log the user's IP address. Firewalls can also block these connections.



SURFING WITH TOR

1: A user runs the free Tor software on his computer

2: The user's data request takes a roundabout trip, passing between randomly-selected other volunteer 'node' computers on the network.

3: The server receiving the request thinks it came from the last computer in the chain. Tracking the original user is virtually impossible.

Source: the company

The Wall Street Journal

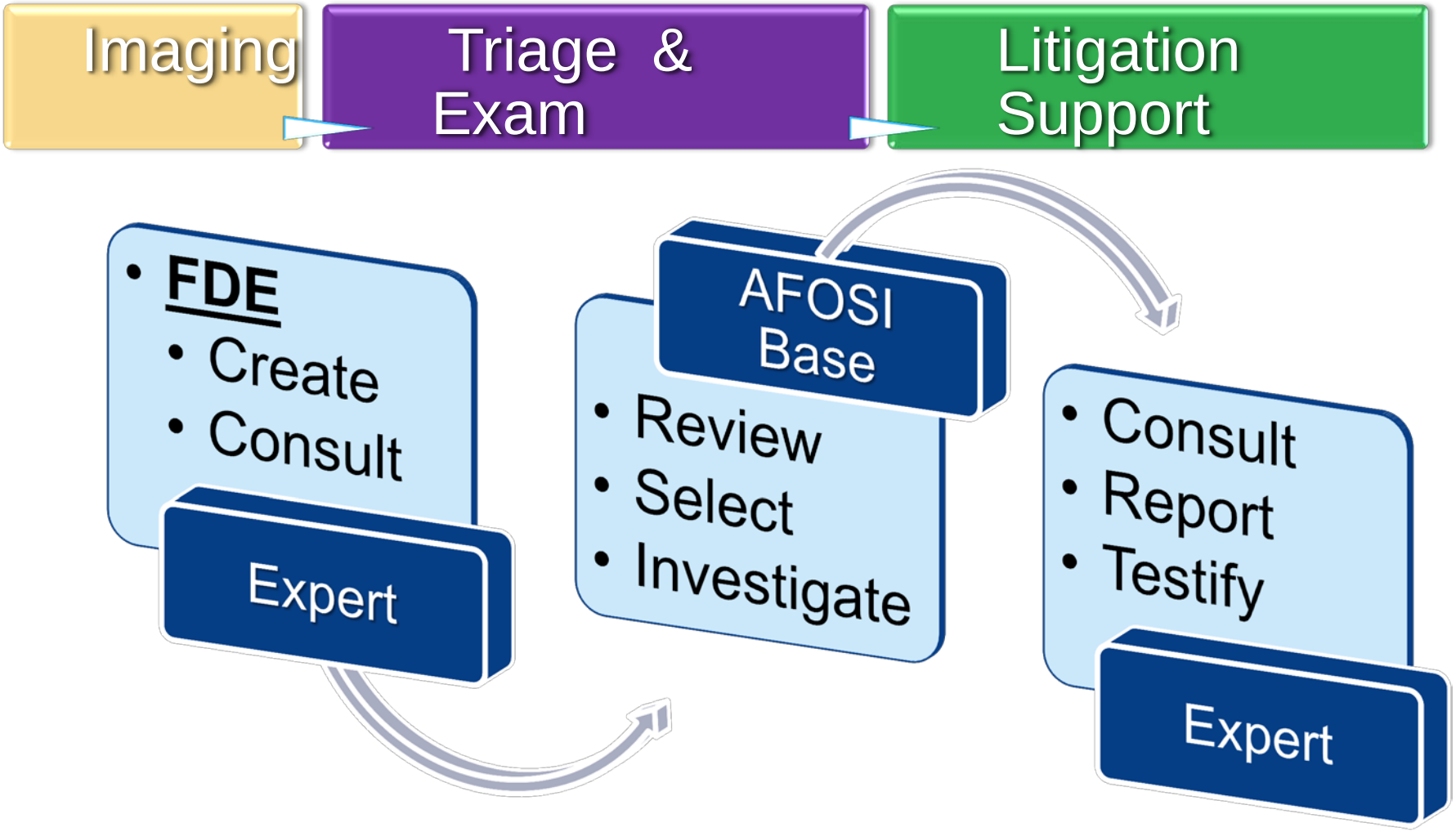
TIMELINES

- “Do the right thing”
  - GOOGLE searches
    - How to beat a lie detector.
    - Child molestation Jail time
  - Wiping files

TIME IS ON *YOUR??* SIDE

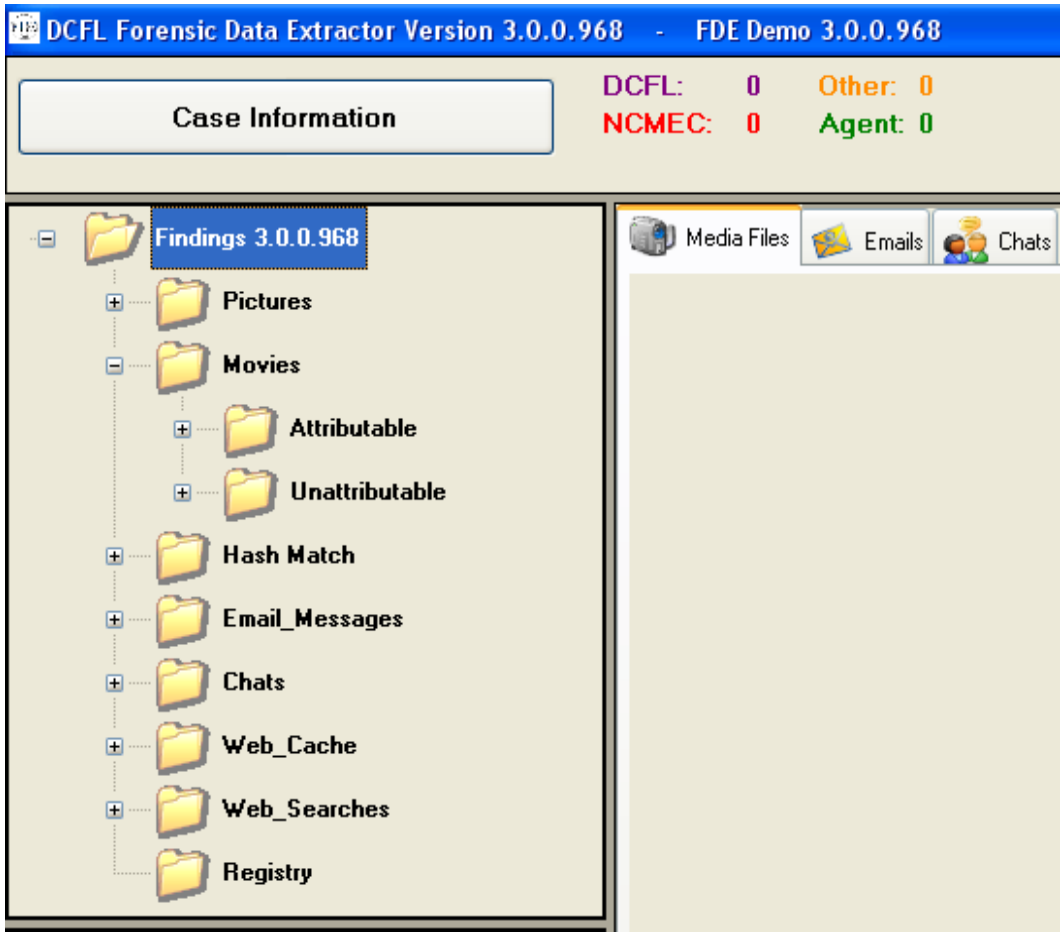
- Parker
  - Priority case
  - Damaged drives
  - Pretrial Confinement
- Escobar
  - Priority case
  - Charged Before exam
    - PTA in place
    - Trial date set
    - New information

CURRENT PROCESS



FORENSIC DATA EXTRACTION

- Provides
  - Videos Images
  - Hash Matches
  - Emails Chat
- Limitations
  - Hash Duplication
  - Hidden Encrypted



EXPAND TO EXPLORE

U.S. AIR FORCE

DCFL Forensic Data Extractor Version 3.0.0.968 - FDE Demo 3.0.0.968

Case Information

DCFL: 0 Other: 0
NCMEC: 0 Agent: 0

Show Broken Images

Sort By: Human Score

Thumbnail Size

Findings 3.0.0.968
- Pictures
  - Attributable
    - 001 (3423)
    - 002 (3976)
    - 003 (2357)
    - 004 (1675)
    - 005 (2266)
    - 006 (1530)
    - 007 (2550)
    - 008 (1879)

Selected
- DCFL (4)
- NCMEC (16)
- Other (0)
- Agent (0)

Property Name	Property Value
Filename:	00000826.jpg
Size:	3,582 bytes
Created:	1/14/2009 9:24:55 PM
Modified:	1/9/2009 8:14:06 PM
Accessed:	1/14/2009 9:24:55 PM
Deleted:	N/A
Full path in drive image:	sda\C\Documents and ...
MD5 hash:	300FCF5556613E978FE...
DCFL Description:	File, Archive
Hash Set:	
Local path:	D:\FDE\Demo 3.0\FDE ...
Human Score:	0.508
Real Score:	0.3212

1 of 2 with same hash

Media Files | Emails | Chats | Web Cache | Web Searches | Registry

Full path: "sda\C\Documents and Settings\Administrator\My Documents\ICQ\440602305\ReceivedFiles\421916757 Joe\osama.jpg"

start | 2 Microsoft Office P... | DCFL Forensic Data E... | 3:31 PM

U.S. AIR FORCE

FINDING THE DETAILS

EXPAND TO EXPLORE

U.S. AIR FORCE

DCFL Forensic Data Extractor Version 3.0.0.968 - FDE Demo 3.0.0.968

Case Information

DCFL: 0 Other: 0
NCMEC: 0 Agent: 0

Show Broken Images

Sort By: Human Score

Thumbnail Size

Findings 3.0.0.968
- Pictures
  - Attributable
    - 001 (3423)
    - 002 (3976)
    - 003 (2357)
    - 004 (1675)
    - 005 (2266)
    - 006 (1530)
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Selected
- DCFL (4)
- NCMEC (16)
- Other (0)
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Property Name	Property Value
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Accessed:	1/14/2009 9:24:55 PM
Deleted:	N/A
Full path in drive image:	sda\C\Documents and ...
MD5 hash:	300FCF5556613E978FE...
DCFL Description:	File, Archive
Hash Set:	
Local path:	D:\FDE\Demo 3.0\FDE ...
Human Score:	0.508
Real Score:	0.3212

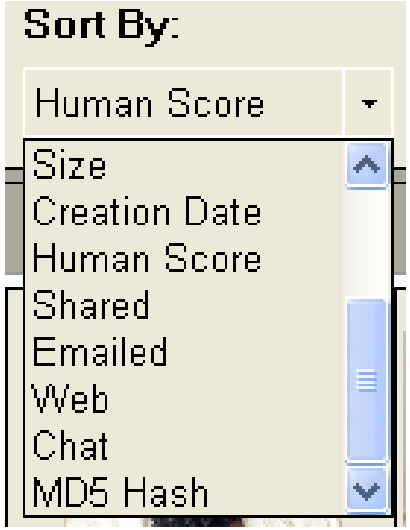
1 of 2 with same hash

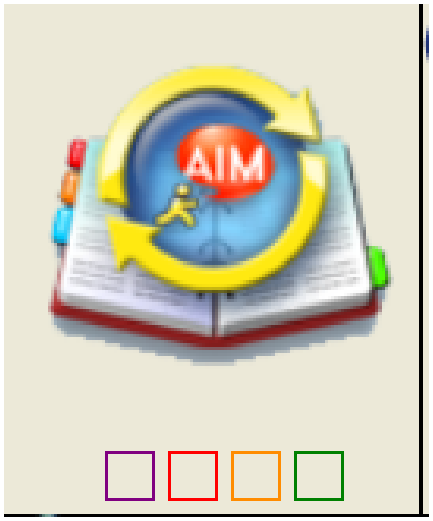
Media Files | Emails | Chats | Web Cache | Web Searches | Registry

Full path: "sda\C\Documents and Settings\Administrator\My Documents\ICQ\440602305\ReceivedFiles\421916757 Joe\osama.jpg"

start | 2 Microsoft Office P... | DCFL Forensic Data E... | 3:31 PM

SORTING AND SELECTING





Purple - a full exam on

Red - NCMEC

Orange - Other agencies for review

Green - Files of interest of the agent

U.S. AIR FORCE

EMAILS

DCFL Forensic Data Extractor Version 3.0.0.968 - FDE Demo 3.0.0.968

Case Information

DCFL: 2 Other: 0
NCMEC: 0 Agent: 0

Show Broken Images

Sort By: Human Score

Thumbnail Size

003 (0)
004 (0)
005 (4)
006 (0)
007 (2)
008 (1)
009 (2)
010 (12)
011 (2)
012 (12)
013 (1)

Selected
DCFL (4)
NCMEC (16)
Other (0)
Agent (0)

Property Name | Property Value

1 of 1 with same hash

Media Files | Emails | Chats | Web Cache | Web Searches | Registry

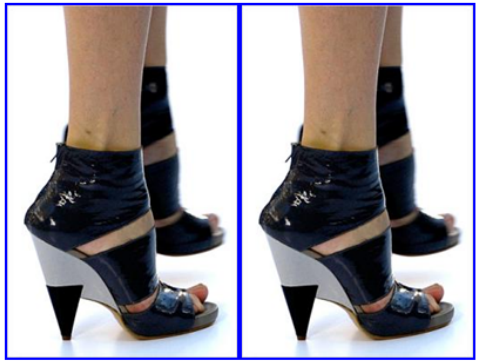
DCFL	From	To	Subject	Sent	Size
	Cece LNoir <cecelnoir@ya...	Cece L'Noir <hotchocacula...	Outlook Setup	09/17/08 03:17:14PM	325
	Cece L'Noir <hotchocacula...	cecelnoir@aol.com <cecel...	Reminder	10/15/08 05:19:25PM	63
	Cece L'Noir <HotChocaCU...	logan <johnreynolds247@g...	Order	09/17/08 02:26:09PM	1632
	Cece L'Noir <HotChocaCU...	Logan Reynolds (jamesrey...	FW: Order	09/17/08 02:28:37PM	3288
	Cece L'Noir <HotChocaCU...	James Reynolds <jamesrey...	RE: test message	09/18/08 02:04:21PM	3040
	Cece L'Noir <HotChocaCU...		Get back to Logan on Bazookas	09/17/08 02:22:11PM	1428
	Cece L'Noir <HotChocaCU...		My Birthday!!!	09/17/08 02:22:45PM	1546
	Cece L'Noir <HotChocaCU...		Logan Reynolds	09/17/08 02:21:39PM	2380
☑	Cece L'Noir <hotchocacula...	hotchocaculater@gmail.co...	Reminder	10/20/08 03:39:52PM	507
☑	CeceLnoir@aol.com <Cec...	hotchocaculater@gmail.co...	Shoes	10/15/08 05:21:12PM	828
	James Reynolds <jamesrey...	hotchocaculater@gmail.co...	test message	09/18/08 02:56:58PM	326

From: Cece L'Noir *(hotchocaculater@hotmail.com)*

To:
hotchocaculater@gmail.com, *(hotchocaculater@gmail.com)*

Subject: Reminder

Date Sent: 10/20/08 03:39:52PM



start | 2 Microsoft Office P... | DCFL Forensic Data E... | untitled - Paint | 3:36 PM

CHAT

U.S. AIR FORCE

DCFL Forensic Data Extractor Version 3.0.0.968 - FDE Demo 3.0.0.968

Case Information

DCFL: 1 Other: 0
NCMEC: 0 Agent: 0

Show Broken Images

Sort By:

Thumbnail Size

- Hash Match
- Email_Messages
- Chats
  - 001 (5)
  - 002 (1)
  - 003 (1)
  - 004 (0)
  - 005 (1)
  - 006 (1)
  - 007 (0)
- Web_Cache

Selected

Property Name | Property Value

0 of 0 with same hash

Media Files | Emails | Chats | Web Cache | Web Searches | Registry

DCFL	Chat Program	Chat Log Name	Local User ID	Remote User ID	Size
☑	AOL Instant Messenger	Chats\006\00043868.html	hotchocaculater	jrey123abc	4698

IM History with buddy Jrey123abc

Thursday, September 18, 2008

HotChocaCULater (11:44:45 AM): Hey there! What's the good word?
Jrey123abc (11:45:11 AM): nothin. tomorrow's my birthday.
HotChocaCULater (11:45:51 AM): no bull? How old, old man
Jrey123abc (11:46:07 AM): 32... I am old.
HotChocaCULater (11:46:27 AM): yikes...
HotChocaCULater (11:46:34 AM): :-)
Jrey123abc (11:46:47 AM): i know it. how old are you? :-P
HotChocaCULater (11:47:03 AM): Can't you tell by my screen name?
Jrey123abc (11:47:13 AM): no?
HotChocaCULater (11:47:37 AM): i thought you were sposed to get smarter as you get older
Jrey123abc (11:48:24 AM): no, just less good looking
HotChocaCULater (11:48:37 AM): true dat
Jrey123abc (11:48:55 AM): you got my money honey?
HotChocaCULater (11:49:12 AM): yeah, how did you wnat that
Jrey123abc (11:49:25 AM): cash... always.
HotChocaCULater (11:49:36 AM): quarters alright?
Jrey123abc (11:49:53 AM): nickels and dimes... they're prettier.
HotChocaCULater (11:50:21 AM): how hsould I get it to ya
Jrey123abc (11:50:41 AM): i"ll call you this weekend to finalize plans.
Jrey123abc (11:50:51 AM): gotta go... peace.
Jrey123abc signed off at 11:54:18 AM

start | Thur_HanoverCD44_... | DCFL Forensic Data E... | 12:05 AM

CHAT

U.S. AIR FORCE

IM History with buddy Jrey123abc

Thursday, September 18, 2008

HotChocaCULater (11:44:45 AM): Hey there! What's the good word?
Jrey123abc (11:45:11 AM): nothin. tomorrow's my birthday.
HotChocaCULater (11:45:51 AM): no bull? How old, old man
Jrey123abc (11:46:07 AM): 32... I am old.
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Jrey123abc (11:50:41 AM): i"ll call you this weekend to finalize plans.
Jrey123abc (11:50:51 AM): gotta go... peace.
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USING INTERNET HISTORY

U.S. AIR FORCE

DCFL Forensic Data Extractor Version 3.0.0.968 - FDE Demo 3.0.0.968

Case Information

DCFL: 0 Other: 0
NCMEC: 0 Agent: 0

Show Broken Images

Sort By: Human Score

Thumbnail Size

- Findings 3.0.0.968
  - Pictures
  - Movies
  - Hash Match
  - Email_Messages
  - Chats
  - Web_Cache
  - Web_Searches
    - 01 (330)
  - Registry
- Selected
  - DCFL (4)
  - NCMEC (16)
  - Other (0)
  - Agent (0)

Property Name | Property Value

1 of 1 with same hash

Media Files | Emails | Chats | Web Cache | Web Searches | Registry

DCFL	User Profile	Search Type	TimeStamp	URL	Query
	Administrator	Cache\HTML	22-Apr-2009 02:48:59	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=100&...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:00	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=80&n...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:00	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=80&n...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:02	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=60&n...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:02	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=60&n...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:05	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=40&n...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:05	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=40&n...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:07	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=20&n...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:08	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=0&nd...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:14	http://images.google.com/images?hl=en&safe=off&q=parade+source:life&sa=N&start=0&nd...	parade source:life
	Administrator	Cache\HTML	22-Apr-2009 02:49:13	http://images.google.com/hosted/life/l?imgurl=216159a1fd120dd8&q=parade source:life&...	parade source:life
	Administrator	Cache\HTML	28-Oct-2009 03:51:01	http://www.google.com/search?hl=en&source=hp&q=how+to+make+thermite&aq=f&oq=&a...	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:51:02	http://www.google.com/search?hl=en&source=hp&q=how+to+make+thermite&aq=f&oq=&a...	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:51:11	http://www.google.com/search?hl=en&safe=off&q=how+to+make+thermite&start=10&sa=N	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:51:11	http://www.google.com/search?hl=en&safe=off&q=how+to+make+thermite&start=10&sa=N	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:51:29	http://www.google.com/search?hl=en&safe=off&q=how+to+make+thermite&start=70&sa=N	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:51:29	http://www.google.com/search?hl=en&safe=off&q=how+to+make+thermite&start=70&sa=N	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:51:43	http://www.google.com/search?hl=en&safe=off&q=how+to+make+thermite&start=160&sa=N	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:53:26	http://www.google.com/search?hl=en&safe=off&q=how+to+make+thermite&start=160&sa=N	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:53:30	http://www.google.com/search?hl=en&safe=off&q=how+to+make+thermite&start=60&sa=N	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:54:02	http://www.google.com/search?hl=en&safe=off&q=how+to+make+thermite&start=60&sa=N	how to make thermite
	Administrator	Cache\HTML	28-Oct-2009 03:54:08	http://www.google.com/search?hl=en&safe=off&q=anarchist+cookbook&aq=0e&oq=anar&...	anarchist cookbook
	Administrator	Cache\HTML	28-Oct-2009 03:54:29	http://www.google.com/search?hl=en&safe=off&q=anarchist+cookbook&aq=0e&oq=anar&...	anarchist cookbook
	Administrator	Cache		http://images.google.com/setprefs?sig=0_A7sGDYyD3O2iZY3IgApgeJZZxYo=&hl=en&lan...	
	Administrator	Cache		http://images.google.com/setprefs?sig=0_A7sGDYyD3O2iZY3IgApgeJZZxYo=&hl=en&lan...	ballerinas source:life
	Cece	Cache\HTML	18-Sep-2008 16:22:13	http://search.live.com/results.aspx?q=luinissinfes&src=IE-SearchBox	luinissinfes
	Cece	Cache\HTML	18-Sep-2008 16:22:13	http://search.live.com/results.aspx?q=luinissinfes+lyric&form=QBRE	luinissinfes lyric
	Cece	Cache\HTML	18-Sep-2008 16:22:06	http://search.live.com/results.aspx?q=luinissinfes+lyric&first=11&FORM=PORE	luinissinfes lyric
	Cece	Cache\HTML	15-Oct-2008 20:17:56	http://search.aol.com/aol/search?invocationType=wscreen-searchboxhtml&query=bazook...	bazooka
	Cece	Cache		http://search.aol.com/aol/redir?src=websearch&s_req=8d8c1cd8e90d8481&s_cr=8&s_cq...	bazooka
	Cece	History\Weekly	15-Oct-2008 16:17:57	http://search.aol.com/aol/search?invocationType=wscreen-searchboxhtml&query=bazook...	bazooka
	Cece	History\Weekly	15-Oct-2008 16:18:11	http://search.aol.com/aol/redir?src=websearch&s_req=8d8c1cd8e90d8481&s_cr=8&s_cq...	bazooka
	Cece	History\Visited Link	15-Oct-2008 20:17:57	http://search.aol.com/aol/search?invocationType=wscreen-searchboxhtml&query=bazook...	bazooka
	Cece	History\Visited Link	15-Oct-2008 20:18:11	http://search.aol.com/aol/redir?src=websearch&s_req=8d8c1cd8e90d8481&s_cr=8&s_cq...	bazooka
	Cece	History\Visited Link	18-Sep-2008 16:22:14	http://search.live.com/results.aspx?q=luinissinfes&src=IE-SearchBox	luinissinfes
	Cece	History\Visited Link	18-Sep-2008 16:22:13	http://search.live.com/results.aspx?q=luinissinfes&src=IE-SearchBox&format=rss	luinissinfes
	Cece	History\Visited Link	18-Sep-2008 16:22:13	http://search.live.com/results.aspx?q=luinissinfes+lyric&form=QBRE&format=rss	luinissinfes lyric
	Cece	History\Visited Link	18-Sep-2008 16:22:06	http://search.live.com/results.aspx?q=luinissinfes+lyric&first=11&FORM=PORE&format=rss	luinissinfes lyric
	Cece	History\Visited Link	18-Sep-2008 16:22:06	http://search.live.com/results.aspx?q=luinissinfes+lyric&first=11&FORM=PORE	luinissinfes lyric
	Cece	History\Visited Link	18-Sep-2008 16:22:13	http://search.live.com/results.aspx?q=luinissinfes+lyric&form=QBRE	luinissinfes lyric
	Cece	History\Visited Link	18-Sep-2008 16:22:13	http://search.live.com/results.aspx?q=luinissinfes+lyric&form=QBRE	luinissinfes lyric

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START GETTING ELECTRONIC RECORDS

- Get IP logs Financials and Content when relevant
    - Secure transactions close in time
    - Social Networking sites // IP logs
- Subpoena Power before Art 32

  NCMEC liaison
  SA Tim Picard DOD rep to NCMEC
  699 Alexandria, VA 22314
  703-778-6480

Useful URLs

- www.spokeo.com
- http://www.Search.org/programs/hightech/isp/

USING FDE RESULTS

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Immediate Review

- Assess Case
- Address threats
- Follow-on Request to DCFL

Investigate More

- Electronic Records
- Interviews & Schedules
- Live victims

Final Report

- Review e-records
- Review interviews
- Draft Charges Post Forensic Exam

FDE PROCESS

- Sexual Maturity Ratings (SMR)
  - Rarely add value
  - Finder of Fact can determine it’s a minor
  - Most cases involve clear cut minors
  - Big investment of Time with No real return

- NCMEC
  - Submit request to DCFL before NCMEC
  - Submit all suspected images

CURRENT ISSUES

- Errors in Requests
- Complexity of Information
- Mistaking Triage Tool for Forensic Exam

HOW TO IMPROVE: INITIAL REQUEST

- Shipping
  - Search Authority Chain of Custody
  - Packaging and Hard Drive Repair
  - Shipping times
- Expectations
  - FDE in 28 days
- Tell DCFL if special circumstances
  - Live victims
  - Pre-Trial Confinement
  - Consent

HOW TO IMPROVE: "RIGHT" SELECTS - FOLLOW ON REQUEST

- Which 24 exhibits?
  - Allocated v. Unallocated
  - Across folders and devices
  - DCFL Intake Team
  - Folders as exhibits

- Additional Streamlined Exhibit
  - Larger Selection
  - Provides Context
  - Built in Flexibility for Exam

HOW TO IMPROVE: UNDERSTAND WHEN TO REQUEST AN EXAM

- Send images to NCMEC
  - Not a Prerequisite to a follow on exam
  - Submit to verify and build
  - Don’t wait to get further analysis
- Sexual Maturity Ratings
  - Members can decide
  - Not a prerequisite to a follow on exam
- FDE is not a Charging tool
  - Guilty plea offers
  - Don’t Forego a Forensic exam
  - Automated process

TRIAGE TOOL

- The 80% solution
  - Limitations
    - Where they should be hidden
    - Are you the 15%
    - Technical Challenges
  - Use of FDE Charging/ Litigation
    - Guilty Plea / Litigated
    - How Many NCMEC hits?
- Follow on investigation
  - Real world / ISP Connections
  - Computer follow on request

HOW TO IMPROVE: TIPS WHEN SENDING THE REQUEST

- Include Documentation
  - Confessions / Statements
  - Timelines / Account numbers

- Confirmation Email
  - Follow-up
  - Investigate FDE material
  - Subpoena Electronic records

HOW TO IMPROVE: REDUCE LITIGATION TIMELINES

- Litigation Support
  - Expert availability
  - Defense Expert Appointment
  - **<u>Request defense Images</u>**

- Trial Readiness
  - Request additional exams
  - Never requested an exam
  - Go slow to go fast
  - **Digital**

TRAINING GOALS

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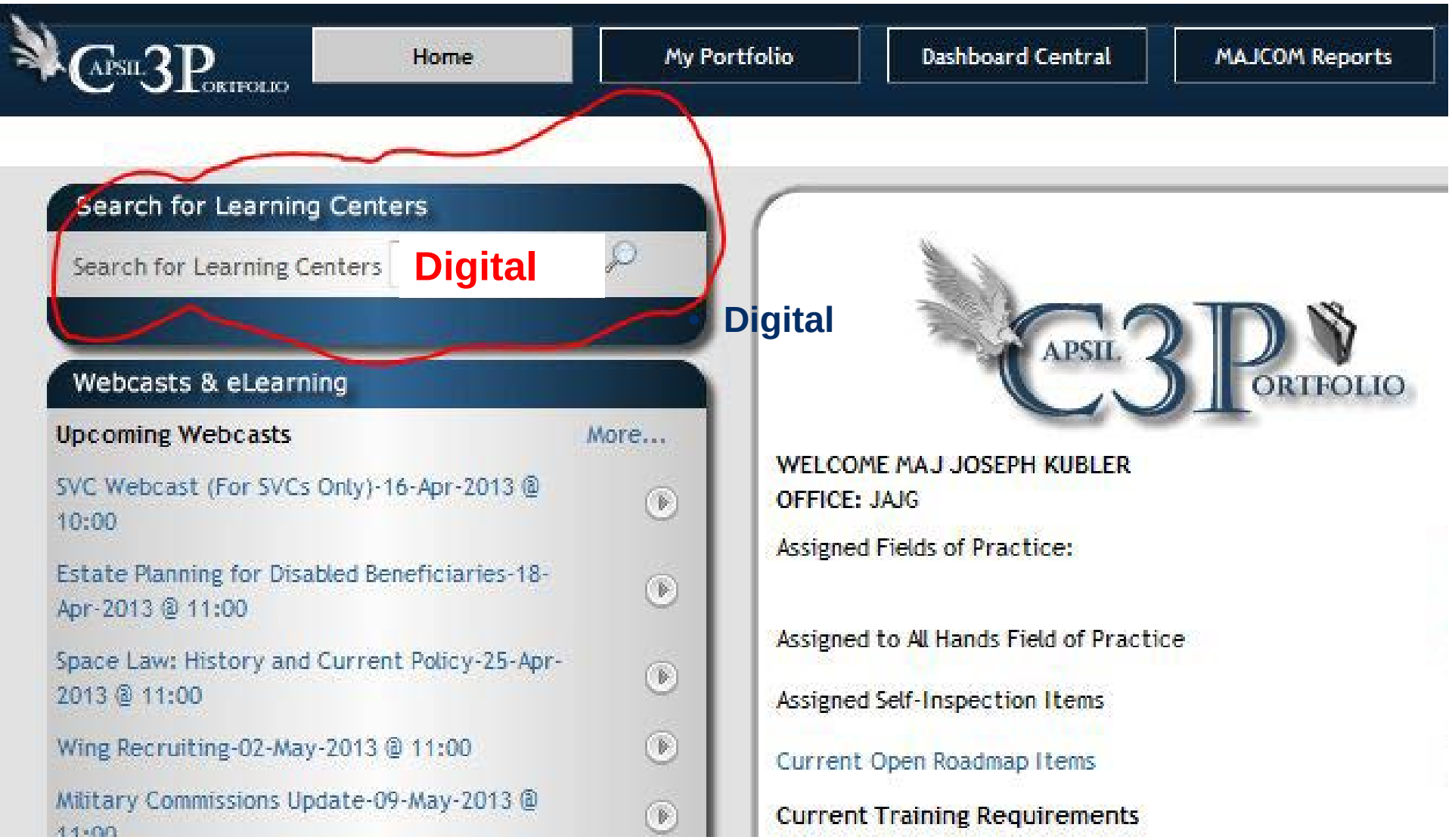

- Digital

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TRAINING GOALS

National Center for Missing and Exploited Children (NCMEC)

1. Military Liaison - SA Tim Picard TPicard@ncmec.org
2. Child Exploitation Legal Resources

SOCIAL FORUM - LATEST TOPICS UNSUBSCRIBE FROM THIS FORUM

Add a new discussion topic

Charging Specific files

BY MAJ JOSEPH KUBLER - WEDNESDAY, 20 MARCH 2013, 01:50 PM

CAAF reversed a child pornography conviction stating they could not "know which images formed the basis for the finding of guilt to the possession of child pornography specification." US v Barberi, 71 MJ 127, 133 CAAF 2012.

Including images in a specification provides specificity at trial and on appeal, avoids the need for a bill of particulars, and ensures the evidence is actually reviewed by whomever is deciding guilt or innocence and the sentence appropriate for the crime.

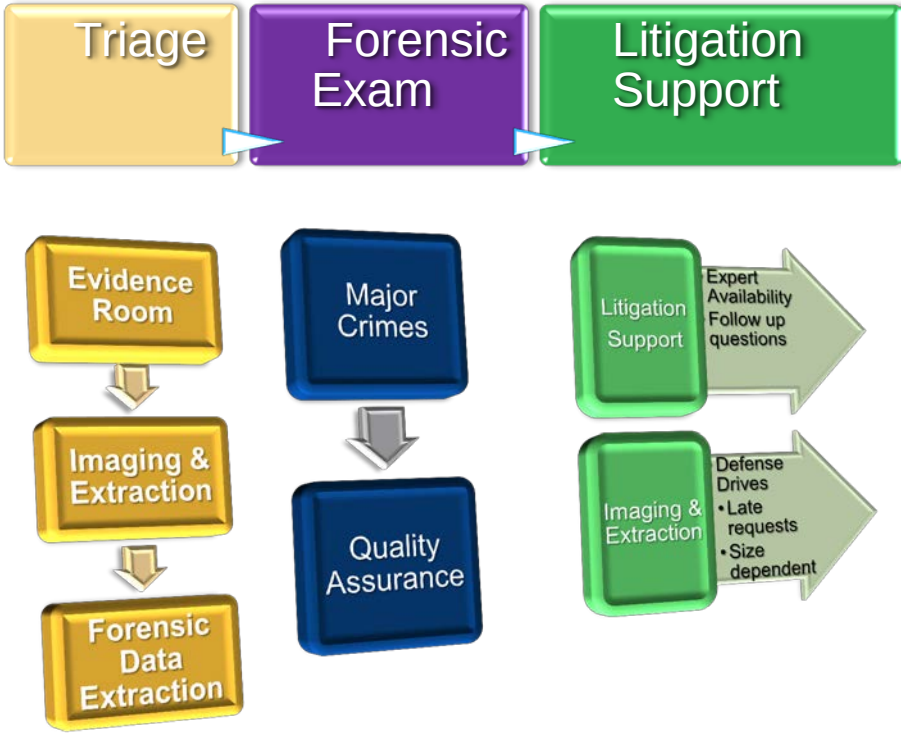
Including images in the specification should be seriuously considered in Child Pornography cases.

Edit | Delete

Discuss this topic (0 replies so far)

COMPLETED DCFL INITIATIVES

- DCFL Streamlined Exam
  - Establish content and amount
  - Limited Attribution
  - Valuable in most cases
- Streamlined Exhibit
  - Context and flexibility
  - Limited effort
- Examiner Testimony
  - Larger examiner pool
  - Reduce preparation time



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- Intake team
  - SA Eric Blaine - eric.blaine@dc3.mil
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- Litigation Support
  - Ruth Cowell ruth.cowell@dc3.mil
- DC3 Attorney Advisor
  - Donald Flynn don.flynn@dc3.mil
- DOD Rep to NCMEC
  - SA Tim Picard (703) 778-6480

DCFL JAJG PARTNERSHIP

Questions?

Headquarters U.S. Air Force

Integrity - Service - Excellence

Post-trial Processing

Lt Col Dawn Hankins
Former Chief, Justice and Courts Activities
AFLOA/JAJM

This document contains internal matters that are deliberative in nature and/or are part of the agency decision-making process, both of which are protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

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- **Am I at MJAC???**
- **What does post-trial processing have to do with me?**

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Post-Trial Delay Test

- **Barker v. Wingo, 407 U.S. 514 (1972)**
  - **Length and reason for delay**
  - **Assertion of right to timely review, prejudice**
- **U.S. v. Moreno, 63 M.J. 129 (CAAF 2006)**
  - **Reaffirmed that convicted members have due process right to timely review and appeal of court-martial convictions**
  - **Utilized Barker v. Wingo test to evaluate claims**
- **Presume unreasonable delay and trigger Barker test where:**
  - **> 120 days from trial to CA action**
  - **> 30 days from action to docketing with CCA**
  - **> 18 months from docketing to CCA decision**

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After the trial is over…

- **Report of Result of Trial**
- **Sealed exhibits – RCM 1103A**
- **Transcription**
- **Authentication – RCM 1104**
- **Service of ROT**
- **All of this takes time…**

SJA Recommendation

- RCM 1106 and 51-201, Figure 9.6
- Required for:
  - All GCMs with guilty findings
  - BCD SPCMs
  - SPCMs with 1 year confinement
- Persons authorized to sign:
  - SJA/Acting SJA
  - Art. 32 IO and TC disqualified

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SJAR - Contents

- **Copy of report of result of trial (AF 1359) showing findings, sentence, and confinement credit to be applied**
- **A copy or summary of any pretrial agreement**
- **Any recommendation for clemency by sentencing authority, made in conjunction w/ announced sentence**
- **Summary of accused's service (AFI 51-201)**
  - **SJA's opinion**
  - **PDS *admitted at trial* w/ length of accused's service, awards and decs, Art 15s/previous convictions**

SJAR - Contents

- SJA's concise recommendation (of action to be taken on sentence)
  - Including any recommendation to waive forfeitures
- Response to allegations of error raised by accused under RCM 1105 (usually comes later)
- CA action on deferment or waiver of FF and SJA's legal advice to CA on the deferment or waivers
- Optional matters:
  - "Outside the record"
  - Victim Impact Statement???

RCM 1105 - Clemency

- Accused submission of clemency matters
  - Due to CA SJA 10 days after receipt of authenticated ROT or receipt of SJAR (whichever is later)
  - Up to 20 additional days can be granted to submit matters, upon good cause shown

RCM 1106 – Response to SJAR

- Defense Counsel's response to the SJAR
  - Due to CA SJA 10 days after receipt of authenticated ROT or receipt of SJAR (which ever is later)
  - Up to 20 additional days can be granted to submit matters, upon good cause shown
- RCM 1105 and 1106 matters are usually submitted to the CA at the same time

SJAR Addendum

- RCM 1106, AF 51-201, Figure 9.7 & 9.8
- Must list all defense submissions and attach them
- Must tell CA he or she <u>must</u> consider the attached post-trial matters
- Must serve accused and DC and give 10 days if new matter raised in addendum
  - Legal offices don't want to raise new matters if it can be avoided!
- Must respond to DC allegations of error – e.g., "without merit"

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Victim Impact Statements

AFI 51-201 Re-Write – Section 9D – Matters Submitted by Victims

- Letter served on the victim/counsel inviting input in the form of a victim impact statement (sample letter in AFI)
- Victim has 10 calendar days to submit the statement
- Eligible victims may consult with a legal assistance attorney or SVC

Amendments to RCMs 1105, 1106, and 1107 in next Executive Order

- 1105- Accused matters may not include, enclose, or refer to any evidence that was excluded at trial under MRE 412, or to any evidence subject to privilege under MREs 500-514
- 1105A- Matters submitted by a crime victim- Victim may submit matters related to an offense of which accused was found guilty
- 1106- The victim's statement will be attached to the SJAR. The SJA will note for the CA the matters that may be considered.

Convening Authority Action

- Action is a non-delegable duty of CA
  - CA has discretion on taking action on findings (RCM 1107(a))
  - CA not required to review the case for legal errors or factual sufficiency (RCM 1107(b))
- Action can only be taken after the required clemency time periods have run or been waived (AFI 51-201, para 9.19)
- Acquittals: No action; only a CMO (AFI 51-201, para 9.19.2 & 10.8.1.1)

Convening Authority Action Cont.

- Matters Considered
  - Result of Trial
  - SJAR
  - Clemency matters submitted under RCM 1105/1106
  - Additional matters (optional)
  - CA may consider ROT or personnel records of accused

Convening Authority Action Cont.

- Action on findings (RCM 1107(c)) - not required, but CA may:
  - Change a finding of guilty of a charge or specification that is an LIO of the charge
  - Set aside any finding of guilty, dismiss any charge or specification and order a rehearing
- Action on sentence (RCM 1107(d))
  - CA may for any or no reason disapprove or mitigate a legal sentence in whole or in part
  - When mitigating, new sentence cannot be greater than adjudged sentence

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After action…

- **Disposition is now complete**
- **Victim Impact Survey**
- **Wind down representation**

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QUESTIONS?

Victim Support

Nate Galbreath, PhD, MFS

Senior Executive Advisor,
Assessment and Accountability

Licensed Clinical Psychologist

Lt Col, USAF (Retired)

Overview

- **Relevant Research:** ***Military Sexual Assault***
- **What Could Be Wrong?** ***How to Ask***
- **Getting Help:** ***Making it Happen***

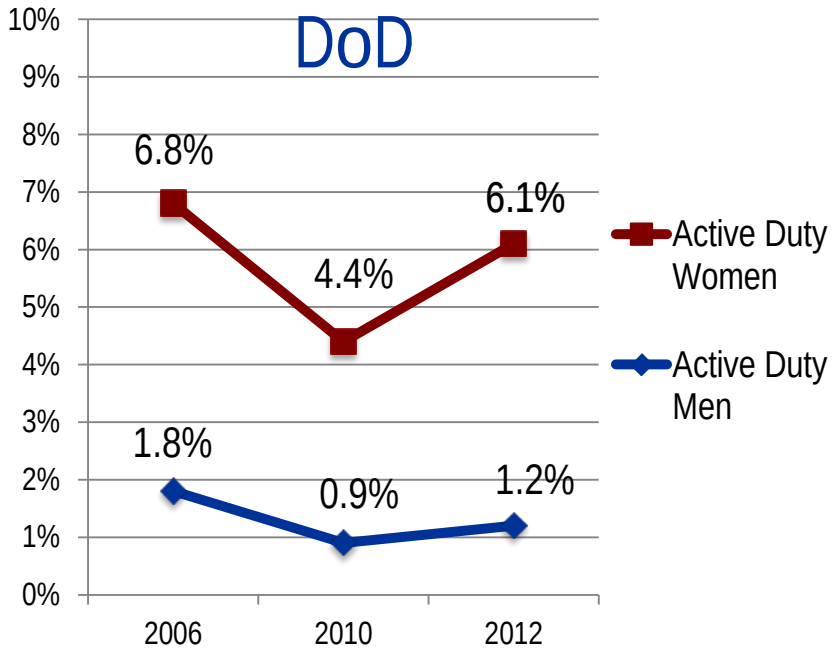
Relevant Research: Military Sexual Assault

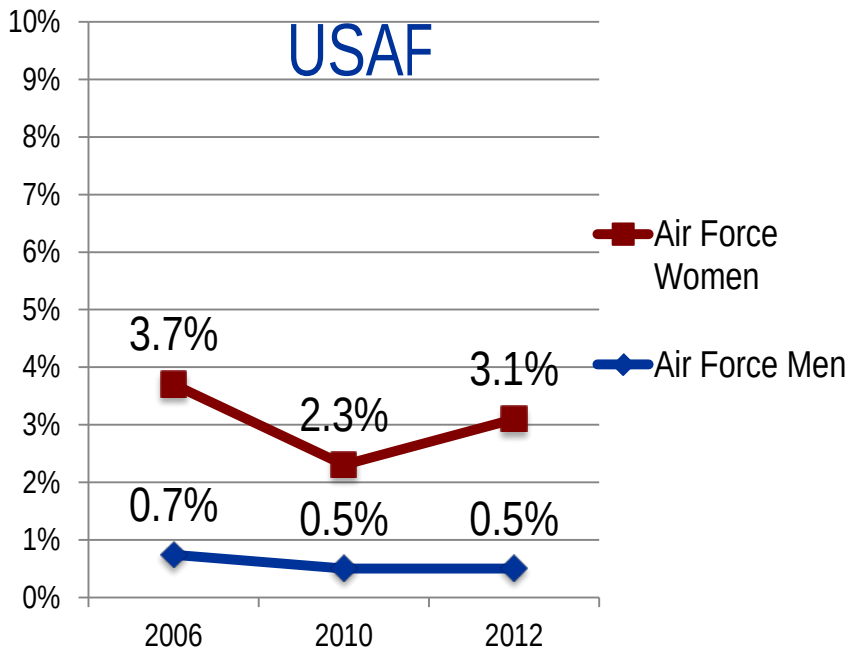
Determining the extent and visibility of a condition

- **Prevalence**
  - **What: How often does a condition occur in a given population**
  - **Why: Understand the impact of the condition on a population**
  - **How: Anonymous or Confidential Survey**
  - **When: Can be measured at any interval**
    - **Past Year**
    - **Career**
    - **Lifetime**
- **Reporting**
  - **What: How often a condition comes to the attention of an authority**
  - **Why: Understand the impact of a condition on population resources**
  - **How: Self-identification to an authority**
  - **When: Often captured in yearly intervals**

Past-Year Prevalence of Unwanted Sexual Contact

Percent of Active Duty Members, by Gender





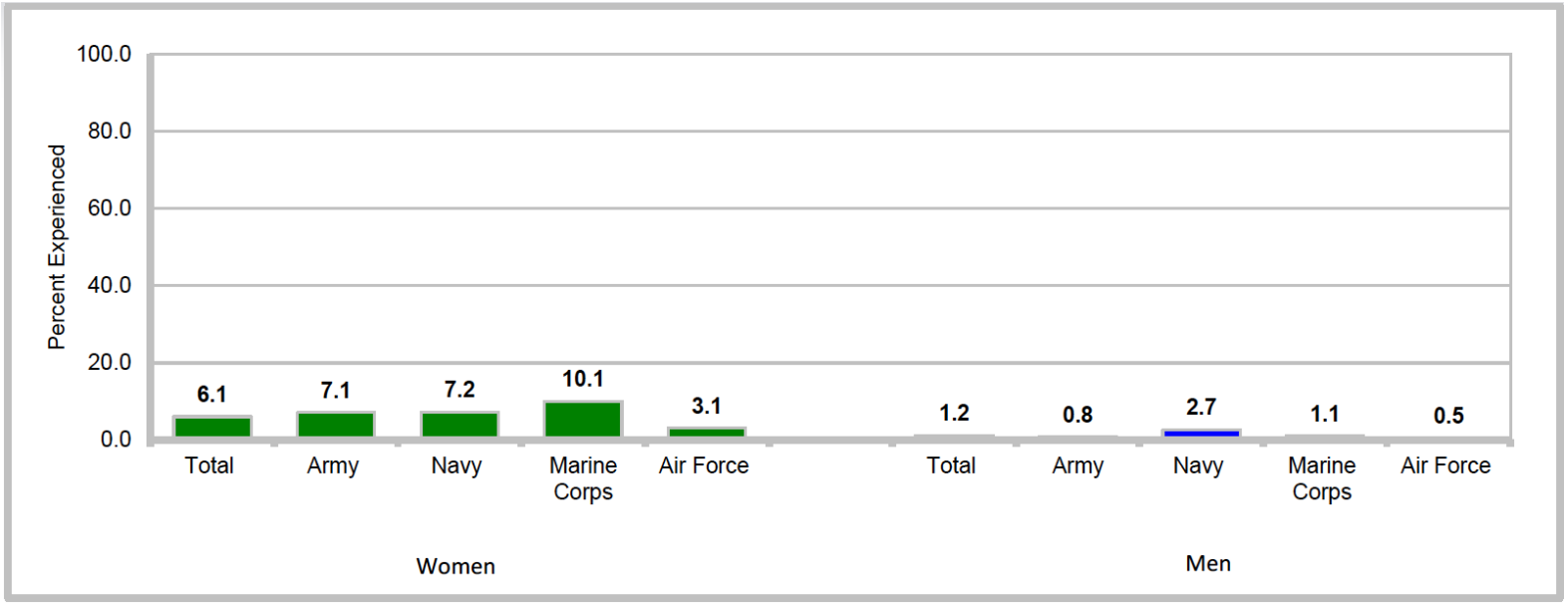
DMDC Workplace and Gender Relations Survey

Key findings:

- In 2012, 6.1% of women and 1.2% of men indicated experiencing USC
- For women, the 2012 percentage is statistically significantly higher than 2010; there are no statistically significant differences for men between 2012 and 2010
- **Of the women and men who experienced USC in the past 12 months, 45% of these women and 19% of these men also experienced USC prior to entering the military**
- Respondents indicated the majority of offenders were primarily military members or DoD civilians/contractors

Past-Year Prevalence of Unwanted Sexual Contact

Percent of Active Duty Women and Men, by Service



Key findings:

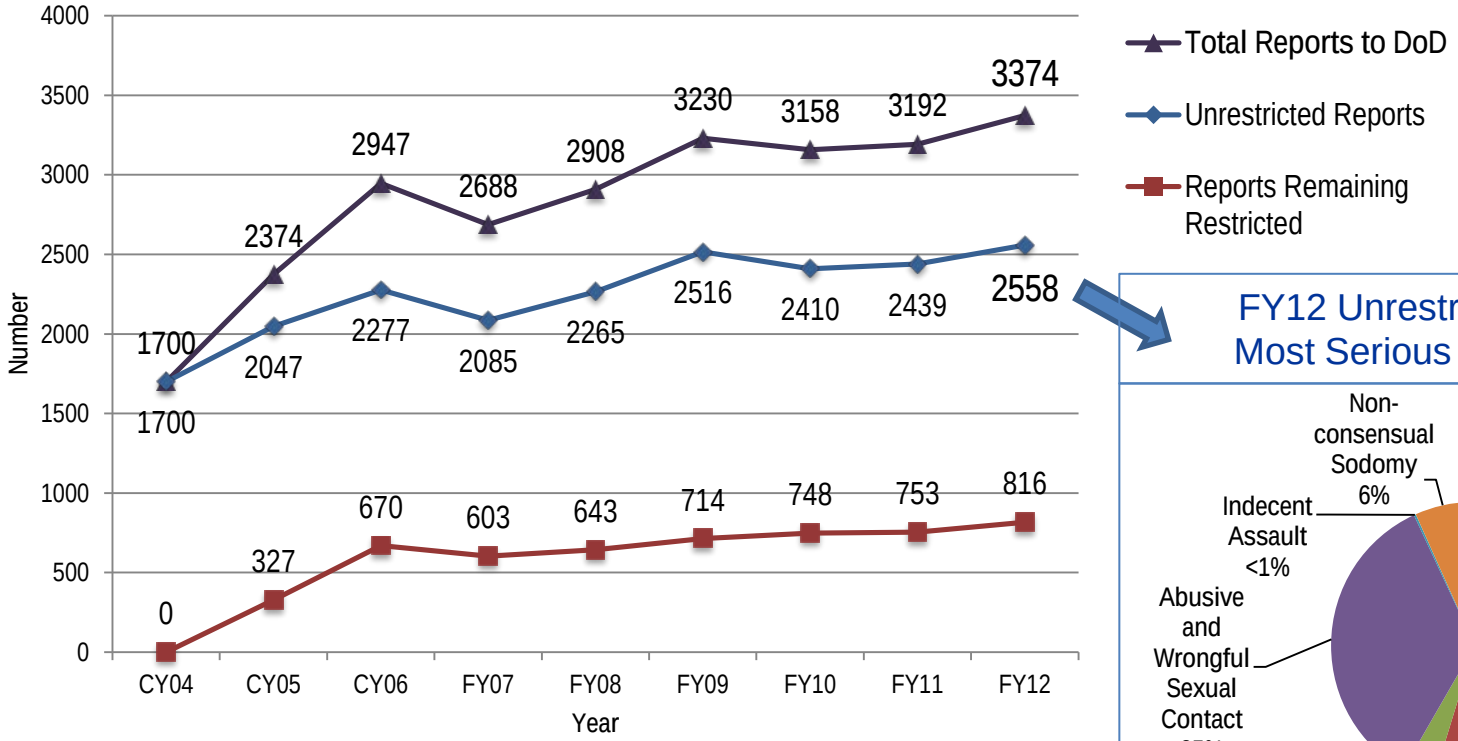
- Marine Corps women were more likely than women in the other Services to indicate experiencing USC
- **Air Force women were less likely than women in the other Services to indicate experiencing USC**
- For Navy and Marine Corps women, the 2012 percentages are statistically significantly higher than 2010 (7.2% vs. 4.4% and 10.1% vs. 6.6%, respectively); there are no statistically significant differences for men between 2012 and 2010

Civilian Sector Comparisons: Prevalence

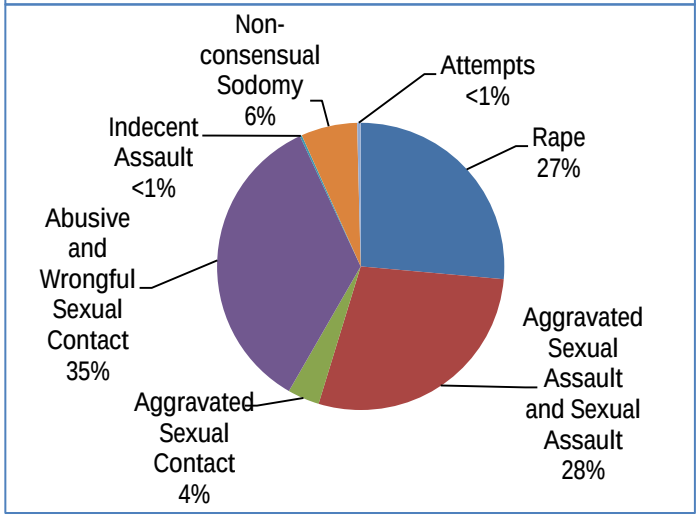
- **2010 National Intimate Partner and Sexual Violence Survey** – Centers for Disease Control and Prevention (2013) – *Gold Standard*
  - Risk for contact sexual violence (oral, anal, vaginal penetration or sexual contact without consent) is the same for women in the military and civilian sector, after adjusting for differences in age and marital status
    - Risk is the same for past year, past three years, and lifetime prevalence measures
- **Campus Sexual Assault Study** – Krebs, et. al. (2007)
  - 19% of college women experienced a sexual assault (attempted or completed oral, anal, vaginal penetration or sexual contact without consent) at some point in their 4 year college career
  - 21% of active duty women (ages 18-24) experienced USC (attempted or completed oral, anal, vaginal penetration or sexual contact without consent) at some point in their military career (DMDC, 2012)
- **Drug-facilitated, Incapacitated, and Forcible Rape: A National Study** – Kilpatrick, et. al. (2007)
  - 0.9% of U.S. women (all ages) and 5.2% of U.S. college women experienced a sexual assault (attempted or completed oral, anal or vaginal penetration without consent) in the 12 months prior to the survey
  - About 3.5% of active duty women experienced a sexual assault (attempted or completed oral, anal or vaginal penetration without consent) in the 12 months prior to the survey (DMDC, 2012)

Overall, most studies indicate the risk for sexual assault is about the same for women in the military and civilian sectors of U.S. society.

Reports of Sexual Assault: CY04-FY12



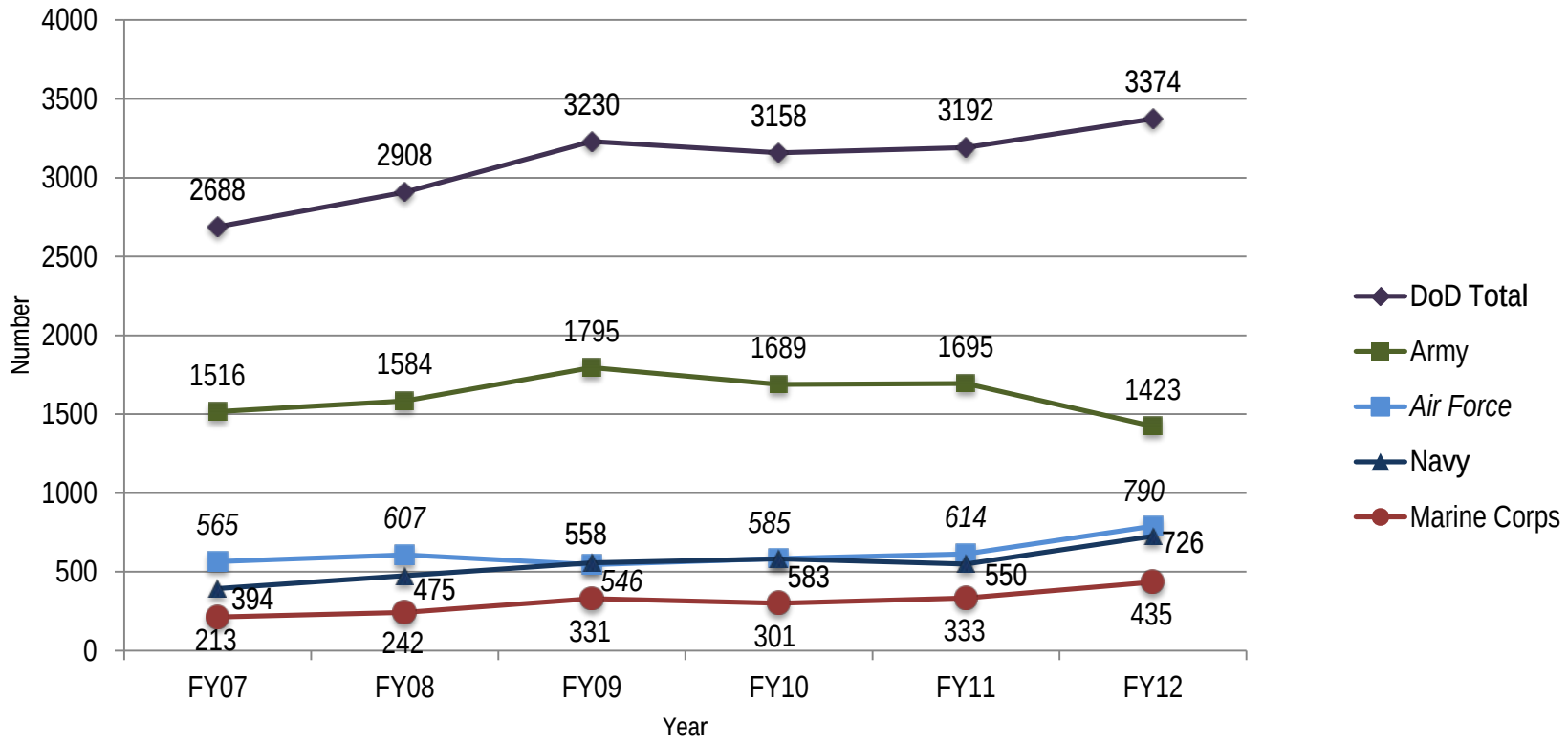
FY12 Unrestricted Reports: Most Serious Crime Alleged



- Overall reporting increased 6% from FY11
  - Unrestricted Reporting increased by 5%
  - Reports remaining Restricted increased by 8%
- 121 Reports in FY12 were for an incident occurring prior to service
- Restricted Report Conversions increased from 14.1% in FY11 to 16.8% in FY12

Increased reporting leads to greater opportunities for victim care and accountability.

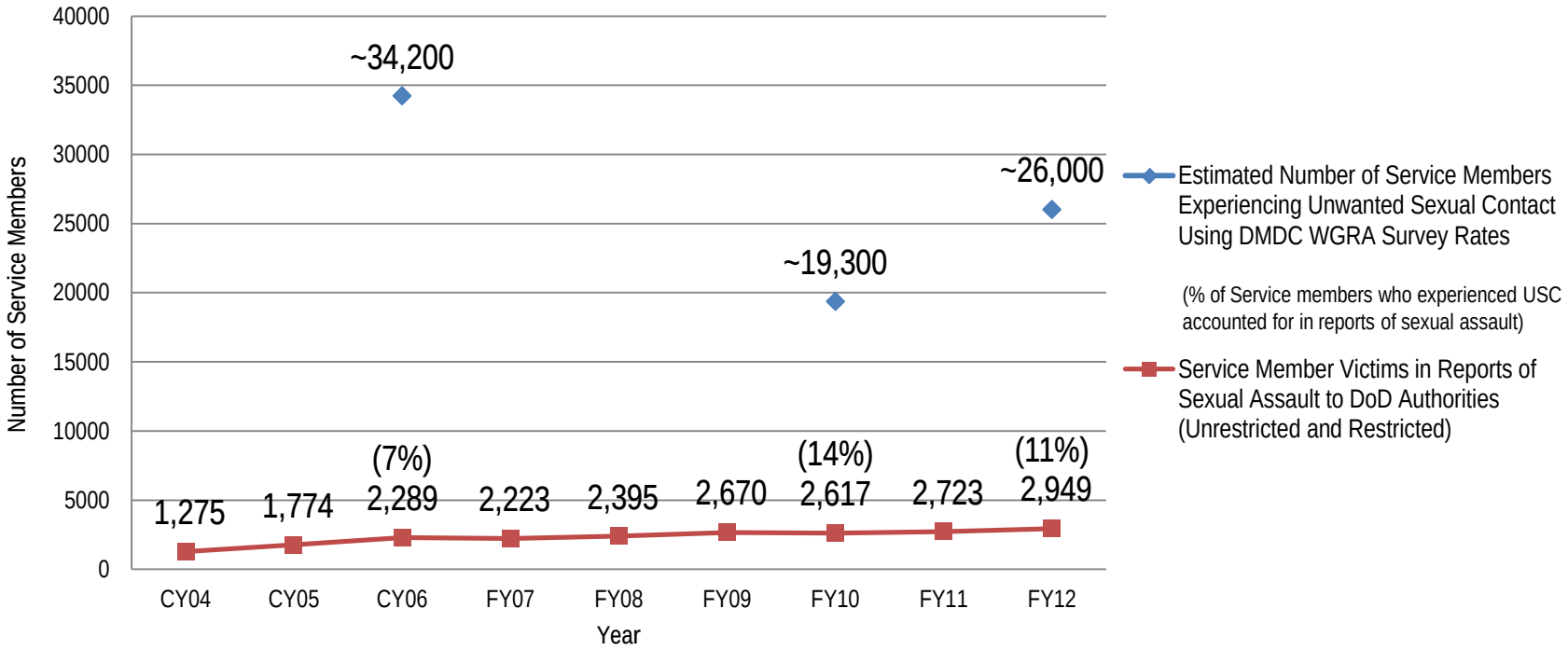
Sexual Assault Reports by Service, FY07-12



Three of four Services showed an approximate 30% increase in reporting in FY12.

DoD Prevalence versus Reporting

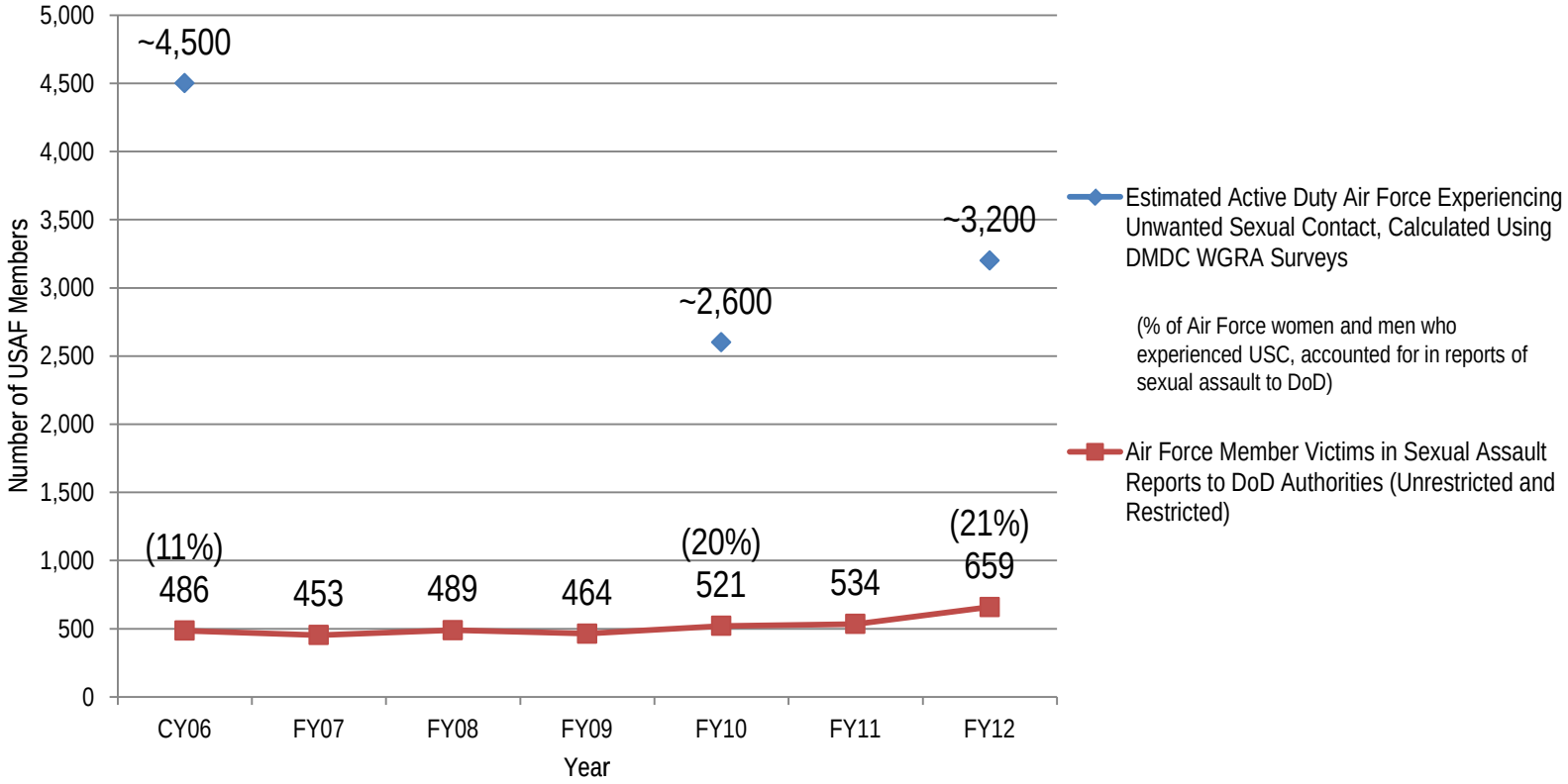
Service Member Victims in Reports of Sexual Assault to DoD vs. Estimates of Service Members Experiencing USC, CY04–FY12



- In FY12, the gap between estimated prevalence and reporting of sexual assault widened compared to FY10, using identical methodologies
- Increased prevalence estimate is most likely attributable to increased USC experienced by active duty women
- Estimates indicate that in 2012 about 89% of Service members who experienced USC did not report it to a DoD authority.

Air Force Prevalence versus Reporting

Air Force Victims in DoD Reports of Sexual Assault vs. Estimates of Air Force Members Experiencing USC, CY04–FY12



Psychological Injury Due to Trauma

- **National Prevalence of PTSD[1]:**
  - **3 to 4%**
- **National Lifetime Incidence of PTSD[2]:**
  - **10% of women**
  - **5% of men**

1. Narrow WE, Rae DS, Robins LN, Regier DA. Revised prevalence estimates of mental disorders in the United States: using a clinical significance criterion to reconcile 2 surveys' estimates. Arch Gen Psychiatry 2002; 59:115-23.
2. Kessler RC, Sonnega A, Bromet E, et al. Posttraumatic stress disorder in the national comorbidity survey. *Arch Gen Psychiatry* 1995;52:1048–1060

Psychological Injury Due to Trauma

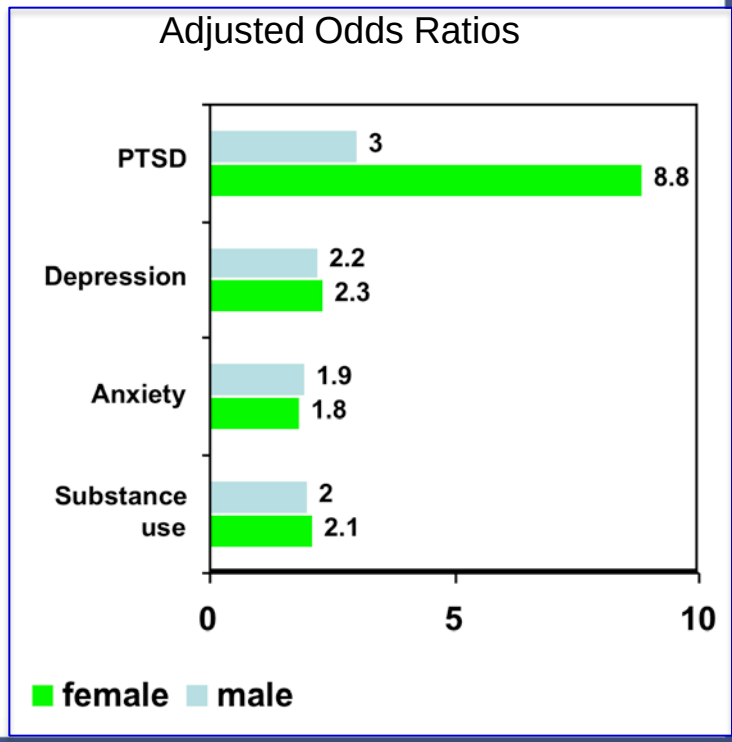
- **2004: PTSD prevalence in 4 OIF ground combat units[1]**
  - **Pre-combat rate: 5%**
  - **Post-deployment rate: ~12%**
- **2007: Potential for psychological injury[2]**
  - **Needing MH treatment per PDHRA:**
    - **20.3% of Active Duty**
    - **42.4% of Reserve**
  - **Over 65% reported exposure to potentially traumatic incident(s)**
- **2010: Prevalence of PTSD with "Some Functional Impairment" [3]**
  - **20.7% of Active Duty Soldiers (3 months post deployment)**
  - **21.4% of Guard Component Soldiers (3 months post deployment)**

1. Hoge, C.W., Castro, C.A., Messer, S.C., McGurk, D., Cotting, D.I., & Koffman, R.L. (2004). Combat duty in Iraq and Afghanistan, mental health problems, and barriers to care. *New England Journal of Medicine, 351*, 13-22.
2. Milliken, Auchterlonie, & Hoge (2007), Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning From the Iraq War, JAMA, 2141
3. Thomas, Wilk, Riviere, McGurk, Castro & Hoge. (2010). Functional impairment among active component and National Guard soldiers 3 and 12 months following combat in Iraq. *Archives of General Psychiatry, 67*, 614-623.

Sexual Assault and PTSD

- **Well established relationship in civilian population:**
  - **About 1/3 of female rape victims develop PTSD[1]**

- **Veteran relative risk for disorders from military sexual trauma (MST)[2]**
  - **Female veterans who screen positive for MST are 9 times more likely to develop PTSD** (than those who don't report MST)
  - **Male veterans who screen positive for MST are 3 times more likely to develop PTSD** (than those who don't report MST)



NOTE: In the VA, MST = Sexual Harassment AND Sexual Assault; DoD statistics track Sexual Assaults only, and do not include Sexual Harassment.

1. Kilpatrick, (1992) National Center for Victims of Crime and Crime Victims Research & Treatment Center
2. Kimerling, et al., (2007) American Journal of Public Health, 12.

Developing PTSD from Sexual Assault

- **National Comorbidity Survey:**
  - **Rape most strongly associated with PTSD in men and women**
  - **65% of men and 46% of women who indicated rape was their most upsetting trauma developed PTSD**

Most Upsetting Trauma →	Rape	Combat	Molestation	Physical Abuse
Women	**45.9%**	**--**	**26.5%**	**48.5%**
Men	**65.0%**	**38.8%**	**12.2%**	**22.3%**

Kessler, Sonnega, Bromet, et al, (1995) National Comorbidity Survey

Developing PTSD from Sexual Assault

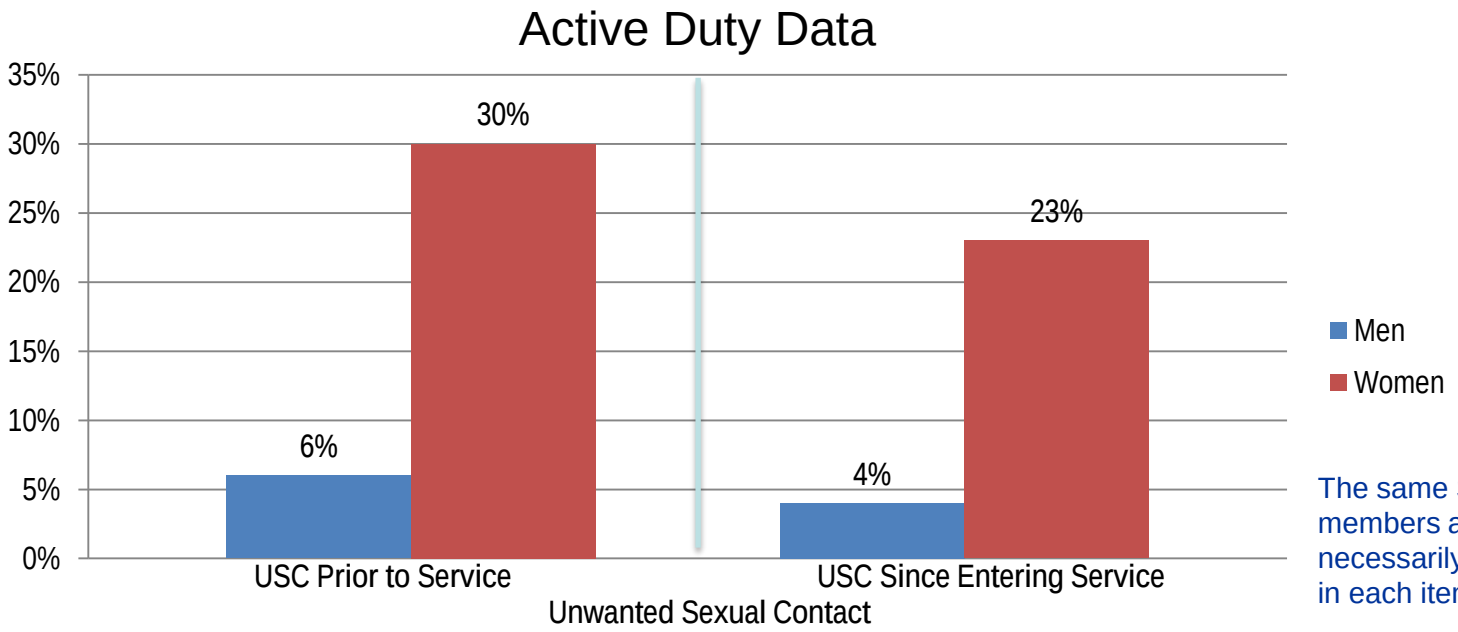
- **Gulf War Veterans**
  - **Probability of Developing PTSD**
    - **Veterans were more likely to develop PTSD from sexual assault than from high combat exposure**

Adjusted Odds Ratios:

	Sexual Assault	Combat
Women	5.41	4.0
Men	6.21	4.45

Kang, et al., (2005) Role of Sexual Assault on Risk of PTSD among Gulf War Veterans, Annals of Epidemiology, 15

Unwanted Sexual Contact: Prior to Service and Since Entering Service



The same Service members are not necessarily represented in each item.

Key Findings:

- WGRA results indicate that a considerable proportion of the female active duty force has experienced USC at some point, either before joining the service or since joining the service
- WGRA results confirm civilian research that a history of sexual assault is a significant risk factor for future sexual assault
- WGRA results align with similar measures on the *2011 Health Related Behaviors Survey* (Tri-care Management Authority, 2013)

Sexual Assault History Prior to Military Service

- **Women enter military duty with relatively high rates of sexual trauma, compared to general civilian population[1,2,3]**
  - Pre-service sexual assault rates vary by study, but a 2008 Naval recruit study found that:
    - 39% of women reported being sexual assaulted since age 14, prior to service[4]
    - 13% of men reported behaviors consistent with perpetrating a sexual assault since age 14, prior to service[4]

1 Merrill, et al., (1998), *Military Medicine, 163*
2 Merrill, et al., (1999), *Journal of Traumatic Stress, 12*
3 Bostock & Daley (2007), *Violence Against Women, 13*
4 Stander, Merrill, et al, (2008), *Journal of Interpersonal Violence*

Sexual Assault History and Military Service

- **Any prior assault (including sexual or violent physical assault) <u>doubles</u> the chance of developing post-deployment PTSD symptoms after combat exposure[1]**
  - **Women reporting new PTSD symptoms or diagnosis:**
    22% (prior assault history) vs. 10% (no prior assault)
  - **Men reporting new PTSD symptoms or diagnosis**
    12% (prior assault history) vs. 6% (no prior assault)

[1] Smith, et al., (2008), *Epidemiology, 19*

Warfighter Implications

- **Warfighters have injuries that must be assessed behaviorally:**
  - **Avoidance Behaviors**
  - **Alcohol Abuse**
  - **Aggressive Behaviors**

- **Aspects of military culture may compound problem:**
  - **Sexual assault occurs where victim lives and works**
  - **Victims experience feelings of entrapment, powerlessness, and greater risk of re-victimization**
  - **Victims may need to rely on perpetrators for basic needs**
  - **Victims often encounter disruption of career goals**
  - **Unit focus on readiness/health**
    - **Most members avoid "Problem Person" stigma**

What Could Be Wrong? And How to Ask

Army PFC Details Sexual Assualt by Drill Sergeant During Basic Training

Army PFC Natasha Woodruff talks about being sexually assaulted by a drill sergeant during basic training at Fort Jackson and what happened after reporting the crime.

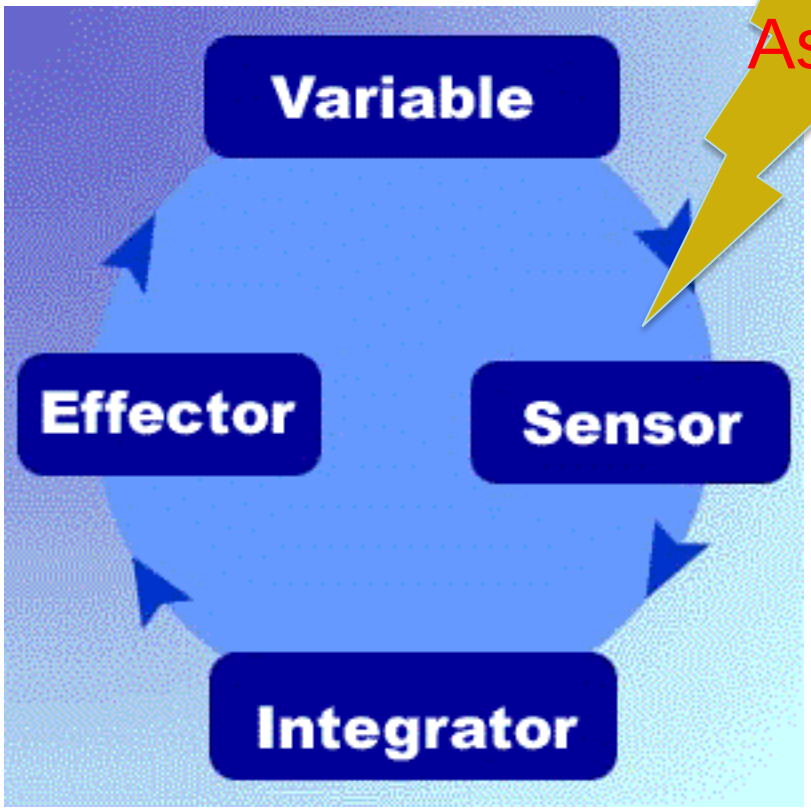
http://bcove.me/ynipnfmv

Homeostasis Disrupted

Well Being

Sexual Assault

Coping Mechanisms



Victim

Victim Reaction

Effects of Trauma

- Physical
- Psychological

Physical Impact

- Genital Injury
- Other Injury
- Pregnancy
- Sexually Transmitted Infection
  - HIV
  - Gonorrhea
  - Syphilis
  - HPV
  - Herpes

Physiological Reaction to Sexual Assault

- Victim's Reaction during an attack
  - Fight
  - Run Away
  - Freeze
  - Tonic Immobility
  - Dissociation

Fight or Flight Response

- http://cmhc.utexas.edu/stressrecess/Level_One/fof.html

Body's Reaction to Trauma

- "Fight, Flight or Freeze"
  - Adaptive (helpful) reaction of the body to a threat
  - Adrenalin (epinephrine) stimulates the sympathetic nervous system to prepare to react
- Body changes:
  - + Heart rate
  - + Respiration rate
  - + Blood flow to muscles
  - - Blood flow to other system (digestive, reproductive, etc)
  - + Attention/focus on the threat
  - + Glucose into blood stream

Tonic Immobility

- Definition:
  - Involuntary component of the fear response that is characterized by freezing or immobility in situations involving extreme fear coupled with physical restraint
- Details:
  - Autonomic response: Not controllable
  - Muscular Paralysis
  - 12% to 50% of victims experience
  - May occur more in victims with history of childhood sexual abuse

Dissociation

- Definition: Disconnection from full awareness of self, time, and/or external circumstances.
- Everyday examples:
  - Highway hypnosis
  - Getting lost in a good book/movie
  - Daydreaming

How is Homeostasis Restored?

- Getting back to "normal"
  - Many people need no help
  - Some people need a little help
  - A few people need a great deal of help
- Everyone needs medical attention
- Everyone needs to be informed of support services
  - Everyone *should* be allowed a choice of services to use
  - Needs are different

A Word About Resilience…

- **Resilience:**
  - **The ability to cope with stress and adversity**
- **Resilience level is unique to the individual**
  - **There is no "normal"**
- **Individual resilience impacted by:***
  - **Perceived severity of incident**
  - **Past history of trauma exposure**
  - **Continued exposure to trauma**
  - **Individual coping style and method**
  - **World view**
  - **Problem solving skills**
  - **Social support**

**Not an exhaustive list*

What Could Be Wrong?

- **Self Image Challenges**
- **Relationship Challenges**
- **Work Challenges**
- **Life Outlook**
- **Re-traumatization**
- ***Post Traumatic Stress***
- ***Depression***
- ***Substance Use/Abuse/Dependence***

Self Image Challenges

Evidence:

- **"Damaged Goods"**
  - **"I'm not the person I was."**
- **Self Blame**
  - **"If I had only ____, this wouldn't have happened."**
- **Shame/Stigma**
  - **"People think I'm a whore/idiot/problem child."**
- **Anger**
  - **"I got victimized, and that guy's getting away with it."**
- **Fear**
  - **"That guy or his friends could come back and do it again – or something worse."**
- **Helplessness**
  - **"No one is taking my side"**
- **Confusion**
  - **"How can someone I trusted do that?"**

Relationship Challenges

Evidence:

- **Estranged loved ones and friendships**
- **Withdrawal from social events**
- **Increased feelings of hostility**
  - **Externally expressed**
  - **Internally expressed**
- **Decreased physical intimacy**

Work Challenges

Evidence:

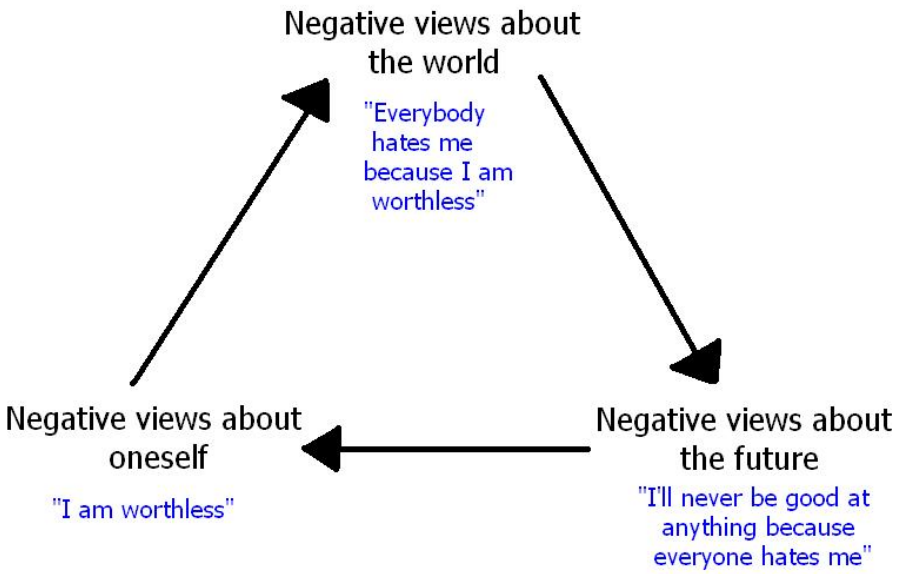
- **Co-worker disagreements**
- **Marginalization by unit members**
- **Duty performance degradation**
- **Punishment for other matters**
- **Leadership scrutiny**
- **Offender harassment**

Life Outlook

Evidence:

- **Views about self**
- **Views about the world**
- **Views about the future**

The Depressive Triad



Just World Hypothesis

Re-Traumatization

Evidence:

- **Experiences with:**
  - **Law Enforcement**
  - **Medical Providers**
  - **Attorneys**
  - **Chain of Command**
  - **Co-workers**
  - **Chaplains**
  - **Friends and Family**
  - **Justice Proceedings**

- **"But why didn't you….."**

Re-Traumatization

- **Set clients up for success with the legal system**
  - **Be supportive**
    - **No: "I can't see how that could have happened"**
    - **Yes: "They might challenge you on ____; how should we respond?"**
  - **Be honest – but gentle**
    - **No: "There's no way they'll accept your story"**
    - **Yes: "We have some significant legal challenges, but we'll do everything we can to make sure the court hears your side."**
  - **Set appropriate expectations from the start**
    - **The justice system should not be seen as a source of validation.**
      - **Too many variables outside the individual's control impact the verdict**
    - **Other, more personal sources of validation and reward are more important:**
      - **Restoring your health and life**
      - **Maintaining important social relationships**
      - **Investing in your family**
      - **Focusing and achieving personal goals**

Post Traumatic Stress Disorder

- An anxiety disorder that some experience following trauma.
  - Many people experience physiological changes associated with seeing or experiencing something traumatic. These are normal and usually fade away after two weeks.
  - For people who experience PTSD, the physiological arousal associated with the trauma becomes changed and does not disappear over time. These symptoms remain and interfere with family, work, and social functioning.

Post Traumatic Stress Disorder

- Traumatic event: Experienced or Witnessed
- Response involved intense fear, helplessness, or horror
- Re-experiencing (one or more):
  - Recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions.
  - Recurrent distressing dreams of the event.
  - Acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated).
  - Intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event
  - Physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

PTSD - continued

- Increased arousal (two or more):
  - difficulty sleeping, irritability, poor concentration, hypervigilance, exaggerated startle response, motor restlessness
- Avoidance and Numbing (3 or more):
  - Efforts to avoid thoughts, feelings, or conversations associated with the trauma
  - Efforts to avoid activities, places, or people that arouse recollections of the trauma
  - Inability to recall an important aspect of the trauma
  - Significantly diminished interest or participation in significant activities
  - Feeling of detachment or estrangement from others
  - Restricted range of affect (e.g., unable to have loving feelings)
  - Sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span)
- Interference in social or occupational functioning
- Symptoms last more than four weeks

Re-experiencing

- Intrusive, upsetting memories of the event
- Flashbacks (acting or feeling like the event is happening again)
- Nightmares (either of the event or of other frightening things)
- Feelings of intense distress when reminded of the trauma
- Intense physical reactions to reminders of the event (e.g. pounding heart, rapid breathing, nausea, muscle tension, sweating)

Avoidance and Numbing

- Avoiding activities, places, thoughts, or feelings that remind you of the trauma
- Inability to remember important aspects of the trauma
- Loss of interest in activities and life in general
- Feeling detached from others and emotionally numb
- Sense of a limited future (you don't expect to live a normal life span, get married, have a career)

Increased Arousal

- Difficulty falling or staying asleep
- Irritability or outbursts of anger
- Difficulty concentrating
- Hypervigilance (on constant “red alert”)
- Feeling jumpy and easily startled

Primary Care PTSD Screen

In your life, have you ever had any experience that was so frightening, horrible, or upsetting that, in the past month, you:

- Have had nightmares about it or thought about it when you did not want to? YES / NO
- Tried hard not to think about it or went out of your way to avoid situations that reminded you of it? YES / NO
- Were constantly on guard, watchful, or easily startled? YES / NO
- Felt numb or detached from others, activities, or your surroundings? YES / NO

Current research suggests that the results of the PC-PTSD should be considered "positive" if a patient answers "yes" to any three items.

NOTE: This is a screening tool ONLY. A client who does not answer "yes" to three or more items may still have a condition that should be assessed and treated by a licensed medical provider.

Depression

- Persistent sadness or irritability that persists all day nearly every day for two weeks or more.
- Can take several forms:
  - Major Depressive Disorder
  - Dysthymia
  - Bipolar Disorder
- A serious mental illness that is more than just “the blues.”

Depressive Symptoms

- Persistent sad, anxious, or "empty" feelings
- Feelings of hopelessness or pessimism
- Feelings of guilt, worthlessness, or helplessness
- Irritability, restlessness
- Loss of interest in activities or hobbies once pleasurable, including sex
- Fatigue and decreased energy
- Difficulty concentrating, remembering details, and making decisions
- Insomnia, early-morning wakefulness, or excessive sleeping
- Overeating, or appetite loss
- Thoughts of suicide, suicide attempts
- Aches or pains, headaches, cramps, or digestive problems that do not ease even with treatment.

Depression Screener

- https://www.myhealth.va.gov/mhv-portal-web/anonymous.portal?_nfpb=true&_pageLabel=mentalHealth&contentPage=mh_screening_tools/PHQ_SCREENING.HTML#noJavascript

Suicidal Ideation

- Many victims admit to suicidal thoughts following a sexual assault
  - Attempted or completed suicide is not a common reaction to most forms of trauma, including sexual assault
- If symptoms persist over time, a person's outlook on their condition becomes important
- "Hopelessness" has been identified as an important warning sign for

Suicidal Ideation Assessment

- **It is important to assess:**
  - Suicidal or homicidal ideation
  - The lethality of any plan for how they would harm themselves or others
  - Any history of previous attempts
  - Medical/psychiatric comorbidities.

Suicidal Ideation Assessment

- **Assessment of dangerousness can include questions such as:**
  - Have you had any concerns about possibly harming yourself because life doesn't seem worth living right now?
  - Have you ever thought about acting on these feelings?
  - Are there times when you are afraid that you will act on these feelings?
  - Have you ever tried to act on feelings like this in the past?
  - Do you have a plan for how you would harm yourself or someone?
  - Do you have access to weapons?

Suicidal Ideation Assessment

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  - Do you have access to weapons?

Substance Abuse

- Self medication
  - Substances, especially alcohol, are used to help temporarily reduce anxiety symptoms (physiological arousal)
  - Tolerance (increasing amounts of the substance are used to achieve the same effect) makes use of substances a losing battle
  - Substance abuse and eventual dependence lead to
    - Slowed or stagnated recovery from trauma
    - Additional life complications
    - Physical illnesses

Alcohol Abuse

"CAGE" Screening Tool

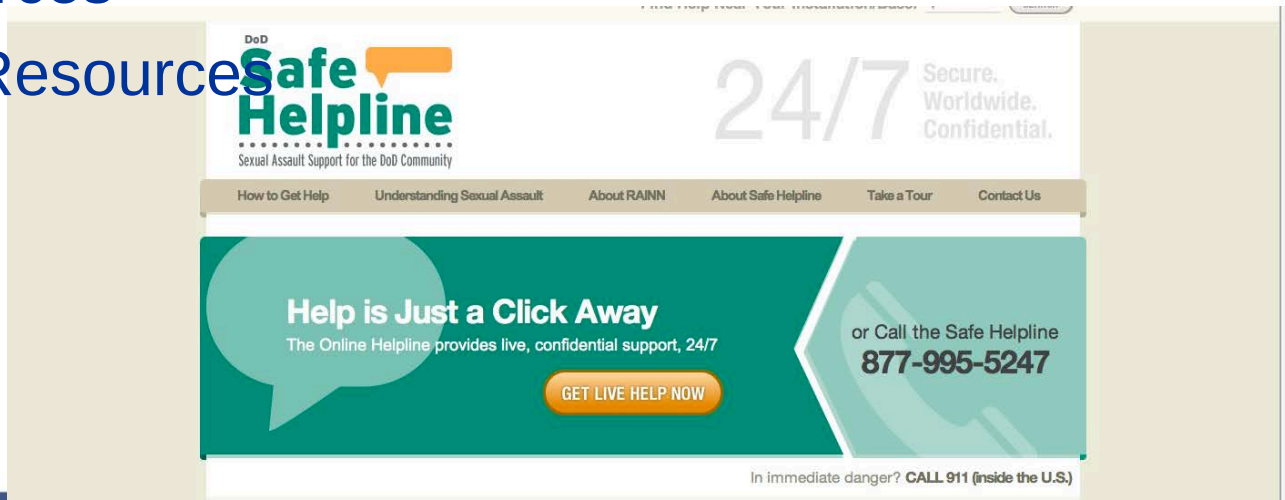
- **C** Have you ever felt you should ***cut down*** on your drinking?
- **A** Have people ***annoyed*** you by criticizing your drinking?
- **G** Have you ever felt bad or ***guilty*** about your drinking?
- **E** ***Eye opener:*** Have you ever had a drink first thing in the morning to steady your nerves or to get rid of a hangover?

The CAGE can identify alcohol problems over the lifetime. **Two** positive responses are considered a positive test and indicate further assessment is warranted.

Getting Help: Making it Happen

Safe Helpline

- www.safehelpline.org
- DoD's Hotline for DoD sexual assault victims
- Run by RAINN (Rape, Abuse, & Incest National Network)
- Completely anonymous
- Call, click or text for help
  - Base Resources
  - Local Area Resources



Military OneSource

- Users must identify themselves
- Cannot take a Restricted Report of Sexual Assault
  - Will be referred to
- Can make referrals for non-medical counseling to providers in the local area
  - Up to twelve sessions are authorized
    - http://www.militaryonesource.mil/counseling?content_id=267023
  - OneSource and providers must report:
    - experiences of ongoing child, spouse or elder abuse must be reported
    - threats of harm to self or others
  - OneSource does not release identities of counseling users to command
- "Medical" counseling for active duty must be referred to installation mental health

USAF Behavioral Health Optimization Program

- Mental health provider in Primary Care Clinic
- Referred by PCM or another provider
- Short (30 min), focused appointments; 3 to 4 sessions
- Visits documented in Outpatient Record
  - No mental health record created
- May take/preserve a Restricted Report of Sexual Assault
- May not be available in all locations

USAF Mental Health

- Most clinics require active duty to be seen by a MH clinic provider
- Downtown care may be authorized through Tricare
  - Tricare providers must provide a summary of treatment and mental health records back to the Air Force
- May take/preserve a Restricted Report of Sexual Assault
- Creates a local mental health record
  - Visits are also documented in Outpatient Record/AHLTA
- Services available:
  - Assessment
  - Psychological Testing
  - Treatment (Individual and Group)
  - Medication (if there is a psychiatrist in the clinic)

Questions?

Nate Galbreath PhD, MFS
Senior Executive Advisor, Accountability and Assessment
DoD SAPRO
1401 Wilson Blvd, Ste 402
Arlington, VA 22209
703-696-9422
www.sapr.mil
www.safehelpline.org

Headquarters U.S. Air Force

Integrity - Service - Excellence

Legal Assistance for Victims of Crime

Colonel Marlesa Scott
Community Legal Services Division
(AFLOA/JACA)

U.S. AIR FORCE

New Organizational Structure a/o Summer 2013

CLS Director
Col Kijek
MSgt Quarterman (dual hatted as Superintendent & CLSL NCOIC)

Col Fred Davies, USAFR

CLSV
Col Hankins
GS-14 TBD, filled by Maj Wilder (will work 75/25 split w/CLSL)
MSgt Zaldivar

Various SVC regional and satellite offices across the Air Force

CLSA/Office of Airmen's Counsel
Maj Villena, Chief
Mr. Becker, Sr Atty-Advisor
17 attys & paralegals, 1 reserve atty
(Current manning a/o May13)

CLSL
Lt Col Collick
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U.S. AIR FORCE

Overview

- **Legal & policy authority for legal assistance to victims of crime**
- **Common legal assistance issues likely to face victims of sexual assault**
- **Legal and community referral resources**
- **CAPSIL**
- **WebLIONS**
- **Training Requirements & Portfolio**

U.S. AIR FORCE

Authority and Purpose

- **10 USC 1044 authorizes the provision of legal assistance in connection with one's personal civil legal affairs**
- **AFI 51-504 provides, "Legal offices provide legal assistance…to support and sustain command effectiveness and readiness…"**
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ID the Legal Assistance Issues

Scenario: A1C Brown is a young single member living in the dorms. She reported to the SARC that she was sexually assaulted. A1C Brown asks you about PCSing.

Mem **Restricted** **.pproved.**

or

Leg **Unrestricted** **Issues?**

??

SCRA § 535a

Servicemember may terminate telephone service contract if:

- **Member has a contract for service**
- **Subsequently receives orders to a location that does not support the contract**
- **Notice by written or electronic notice, accompanied by copy of orders, together w/ date on which service is to be terminated**

No early termination charges permitted!

U.S. AIR FORCE

SCRA § 535

Servicemember may terminate residential lease if:

- **Leased premises occupied by servicemember**
- **Receives military PCS orders**
- **Servicemember provides written notice, accompanied by copy of orders, together w/ date on which service is to be terminated**

Termination is effective 30 days after next rental payment is due

No early termination charges permitted!

U.S. AIR FORCE

ID the Legal Assistance Issues

Scenario: Capt Brown (active duty), who has reported domestic violence in the past, reports her civilian husband has raped her.

TRO

Legal Assistance Issues?

Family Home

Expedited Transfer

Lease Termination

Home Loan/Mortgage

Divorce

Cell Phone Termination

4

The Military Justice System

MJ Overview Handout

5

Mental Health and Other Medical Services Available

This handout in particular will need to be tailored to include the contact information for the resources that are available in your local area.

Health Services Handout Template

6

Temporary Restraining Orders and Military Protective Orders

TRO and MPO Handout

DoDI 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel

7

Transitional Compensation

Trans Comp Handout

U.S. AIR FORCE

Divorce

What issues?

POAs

Debt

Spousal Support

SGLI

Child Custody

Dependent Care Package

Bank Accounts

Military Retirement

Credit Cards

Property Division

CAPSIL LA Learning Centers

Family Law - Divorce
Course Director / Learning Center Manager: Robert WILDER
Course Director / Learning Center Manager: Marlesa SCOTT

Support of Dependents
Course Director / Learning Center Manager: Robert WILDER
Course Director / Learning Center Manager: Marlesa SCOTT

Child Custody and Family Care Plan Issues
Course Director / Learning Center Manager: Robert WILDER
Course Director / Learning Center Manager: Marlesa SCOTT

Family Law - State Surveys
Course Director / Learning Center Manager: Robert WILDER
Course Director / Learning Center Manager: Marlesa SCOTT

Homeowner's Assistance Learning Center

9

SCRA Stay:

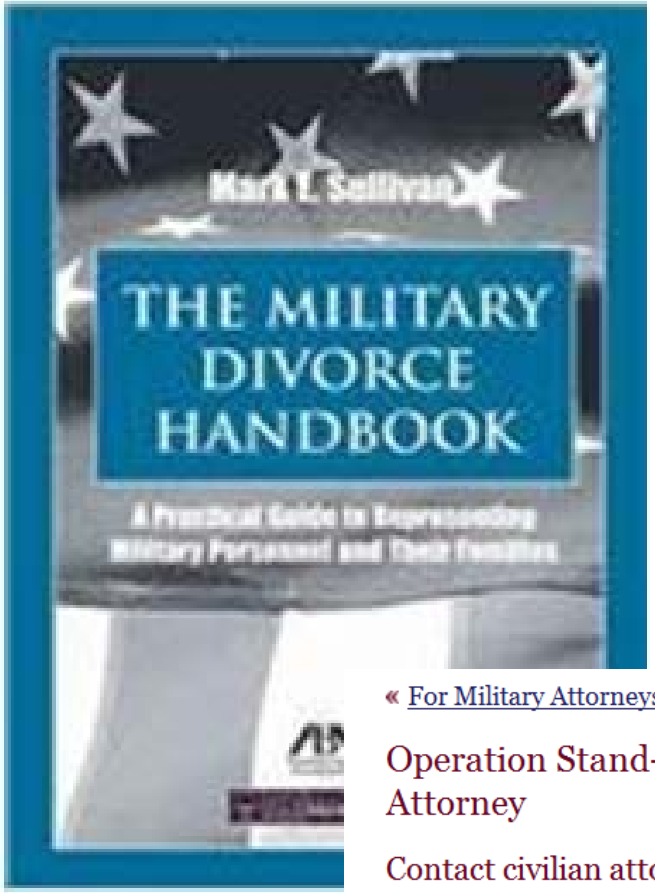
SCRA (50 USC Appx.) Sect. 522 provides that when a a plaintiff or defendant is in the military service they may request a stay of civil proceedings. If the member submits a request explaining how current military duty materially affects his/her ability to appear and when he/she will be available, as well as communication from his/her commander stating that military duty prevents appearance and leave is not authorized, the court must grant a stay of at least 90 days. A sample member letter and commander letter are linked below.

The SCRA stay is a powerful tool, but be aware of its limitations. The stay will NOT prevent a court from issuing a temporary order. You will most often see this in the family law arena. If a court denies a stay request that complies with the statute, and issues a final order, please contact AFLOA/JACA.

SCRA Stay Sample -- Member's Ltr
SCRA Stay Sample -- CC's Ltr
In the Matter of the Marriage of Cecil T. Herridge and Stacey A. Herridge

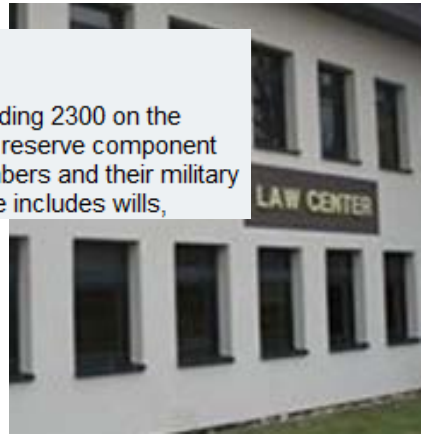
U.S. AIR FORCE

Resources



Legal Office

The Office of the Staff Judge Advocate, located at Building 2300 on the second floor, provides legal assistance to active-duty, reserve component on orders or pending deployment, retired military members and their military identification card-eligible dependents. This assistance includes wills,



ABA MILITARY PRO BONO PROJECT

Home | Events | News | Library | For Military Attorneys

« For Military Attorneys

Operation Stand-By: Seek Attorney-to-Attorney Advice from a Civilian Attorney

Contact civilian attorneys registered with Operation Stand-By with legal questions relating to their geographic areas and substantive areas of expertise for attorney-to-attorney advice, so you can receive guidance that will allow you to further assist your servicemember clients.

Volunteer Attorneys List

ID the Legal Assistance Issues

Scenario: ~~Capt~~ Mrs. Brown who has reported domestic violence in the past, reports her ~~civilian~~ husband, Maj Brown has raped her.

MPO

Living Arrangements

Transitional Compensation

Support

U.S. AIR FORCE

Resources

Airman & Family Readiness Flight

Family Support Centers across the Air Force were renamed Airman & Family Readiness Centers to reflect their importance to mission accomplishment. The Airman & Family Readiness Center supports individuals, families, and leadership with programs and services to strengthen communities, encourage self-sufficiency, enhance mission readiness and ease adaptation to the Air Force way of life. The center serves singles, couples and families alike. Services are provided to military members of all branches of service, DOD employees and their families. Most services are provided on a walk-in basis or just a phone call away.

rning Centers | Training Cata

PIC OUTLINE

R

Sun

5

VICTIMS OF CRIME

VWAP

SARC

Civilian Resources

6

Temporary Restraining Orders and Military Protective Orders

TRO and MPO Handout

DoDI 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel

7

Transitional Compensation

Trans Comp Handout

U.S. AIR FORCE

Scenario: ~~Mrs.~~ SSgt Brown who has reported domestic violence in the past, reports her husband, ~~Maj~~ TSgt Brown has raped her.

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Resources Recap

- Military Resources
  - CAPSIL
  - LAWS
  - Legal Assistance Office
  - VWAP
  - SARC
  - Airmen and Family Readiness Centers
- Civilian Resources
  - Pro Bono Projects
  - Civilian VWAP Resources
  - Legal Aid Clinics

U.S. AIR FORCE

WebLIONS

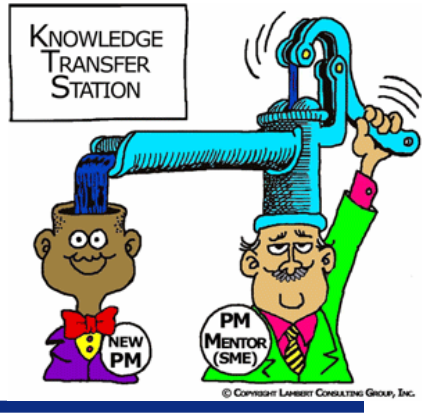
Sexual Assault - Scott AFB (AMC)
Total AF (1-May-2012 thru 15-May-2013)

Subject Category	Sexual Assault Victim Restricted Reporting	Sexual Assault Victim Unrestricted Reporting	Victim of Crime Other than Sexual Assault
1. Adoption/Change of Name	0	0	0
2. Automobile/Personalty	0	0	0
3. Child Custody	0	0	1
4. Consumer Affairs	1	0	2
5. Dependent Non-Support	0	0	0
6. Domestic Relations	1	0	12
7. Identity Theft	0	0	1
8. Landlord-Tenant	0	1	0
9. Negligence/Torts	0	0	0
10. Paternity	0	0	0
11. Personal Finance/Debts	0	0	0
12. Real Estate	0	0	0
13. Residence/Domicile	0	0	0
14. Special Needs/EFMP	0	0	0
15. SSCRA	0	0	0
16. Taxation	0	0	0
17. USERRA	0	0	0
18. Wills and Estates	0	1	1
19. Other	0	1	8
Total # Of Cases Handled	2	3	25
Total # Of Client Handled	2	3	23

Legal Assistance Training Requirements

AFI 51-504, paragraph 1.14 requires *all* JAGs to complete 4 credit hours of MCLE annually

- **1 hour must consist of Annual Refresher**
- **Can be accomplished via webcasts, in-residence courses, military sponsored/co-sponsored CLE**
- **ACT DE modules count towards annual requirement**
- **Must certify once PR/MCLE Cert opens**



U.S. AIR FORCE

Portfolio

CAPSIL 3P PORTFOLIO | Home | My Portfolio | Dashboard Central | MAJCOM Reports | Learning Centers | Training Catalog

NOTE: If you find errors in the primary courses and developmental education sections below. Please verify your ROSTER data.

Primary Courses			Developmental Education			Certifications		
JASOC	Gateway	SJAC	BDE	IDE	SDE	TC-DC	LA	PR
1993	NE	2008	1997	2001	2008		4 4	

TRAINING HISTORY

ONLINE EDUCATION

TITLE	FIELD OF PRACTICE	TYPE	COMPLETED
After the Repeal: Post DADT Issues and Repercussions	All Hands Training	Online Video/Recorded Webcast	22-Feb-2011
TJAG's Corps Update	Leadership	Online Video/Recorded Webcast	02-Jun-2011
Exceptional Family Member Program (EFMP) Family Legal Issues	Legal Assistance	Online Video/Recorded Webcast	14-Jun-2011
Landlord Tenant Law	Legal Assistance	Online Video/Recorded Webcast	04-Aug-2011
Legal Assistance Learning Centers in CAPSIL	Legal Assistance	Online Video/Recorded Webcast	22-Sep-2011

U.S. AIR FORCE

Questions???

Headquarters U.S. Air Force

Integrity - Service - Excellence

Legal Assistance for Victims of Crime

Colonel Marlesa Scott
Community Legal Services Division
(AFLOA/JACA)

U.S. AIR FORCE

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Leg **Unrestricted** **Issues?**

??

SCRA § 535a

Servicemember may terminate telephone service contract if:

- **Member has a contract for service**
- **Subsequently receives orders to a location that does not support the contract**
- **Notice by written or electronic notice, accompanied by copy of orders, together w/ date on which service is to be terminated**

No early termination charges permitted!

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SCRA § 535

Servicemember may terminate residential lease if:

- **Leased premises occupied by servicemember**
- **Receives military PCS orders**
- **Servicemember provides written notice, accompanied by copy of orders, together w/ date on which service is to be terminated**

Termination is effective 30 days after next rental payment is due

No early termination charges permitted!

U.S. AIR FORCE

ID the Legal Assistance Issues

Scenario: Capt Brown (active duty), who has reported domestic violence in the past, reports her civilian husband has raped her.

TRO

Legal Assistance Issues?

Family Home

Expedited Transfer

Lease Termination

Home Loan/Mortgage

Divorce

Cell Phone Termination

4

The Military Justice System

MJ Overview Handout

5

Mental Health and Other Medical Services Available

This handout in particular will need to be tailored to include the contact information for the resources that are available in your local area.

Health Services Handout Template

6

Temporary Restraining Orders and Military Protective Orders

TRO and MPO Handout

DoDI 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel

7

Transitional Compensation

Trans Comp Handout

U.S. AIR FORCE

Divorce

What issues?

POAs

Debt

Spousal Support

SGLI

Child Custody

Dependent Care Package

Bank Accounts

Military Retirement

Credit Cards

Property Division

CAPSIL LA Learning Centers

Family Law - Divorce
Course Director / Learning Center Manager: Robert WILDER
Course Director / Learning Center Manager: Marlesa SCOTT

Support of Dependents
Course Director / Learning Center Manager: Robert WILDER
Course Director / Learning Center Manager: Marlesa SCOTT

Child Custody and Family Care Plan Issues
Course Director / Learning Center Manager: Robert WILDER
Course Director / Learning Center Manager: Marlesa SCOTT

Family Law - State Surveys
Course Director / Learning Center Manager: Robert WILDER
Course Director / Learning Center Manager: Marlesa SCOTT

Homeowner's Assistance Learning Center

9

SCRA Stay:

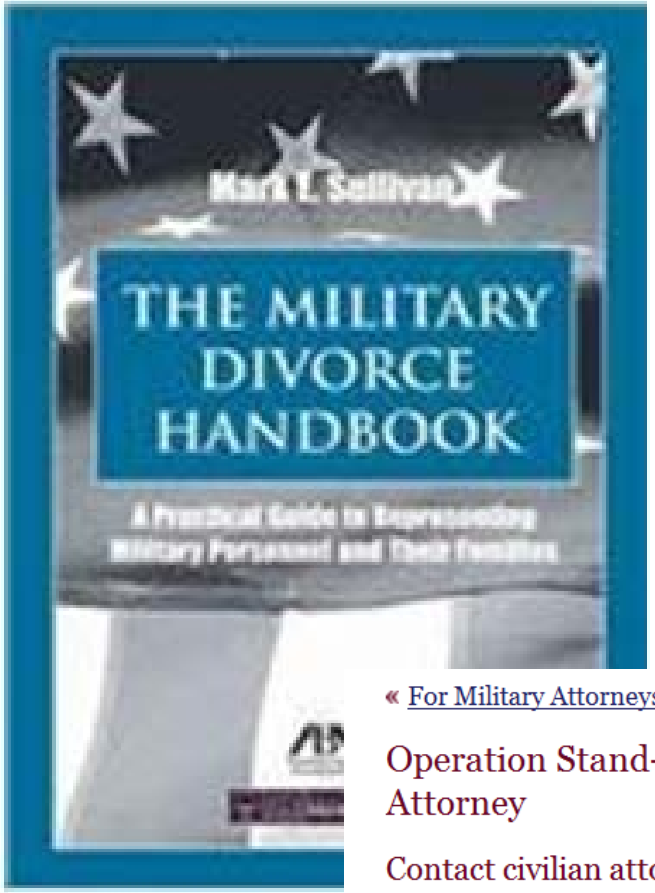
SCRA (50 USC Appx.) Sect. 522 provides that when a a plaintiff or defendant is in the military service they may request a stay of civil proceedings. If the member submits a request explaining how current military duty materially affects his/her ability to appear and when he/she will be available, as well as communication from his/her commander stating that military duty prevents appearance and leave is not authorized, the court must grant a stay of at least 90 days. A sample member letter and commander letter are linked below.

The SCRA stay is a powerful tool, but be aware of its limitations. The stay will NOT prevent a court from issuing a temporary order. You will most often see this in the family law arena. If a court denies a stay request that complies with the statute, and issues a final order, please contact AFLOA/JACA.

SCRA Stay Sample -- Member's Ltr
SCRA Stay Sample -- CC's Ltr
In the Matter of the Marriage of Cecil T. Herridge and Stacey A. Herridge

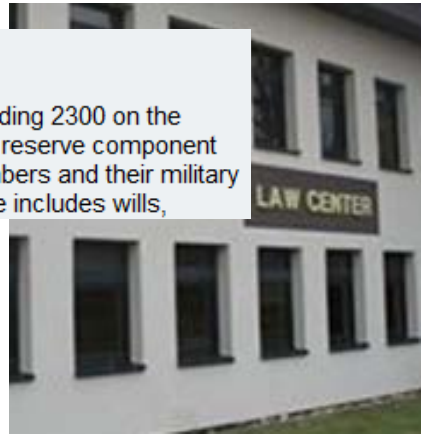
U.S. AIR FORCE

Resources



Legal Office

The Office of the Staff Judge Advocate, located at Building 2300 on the second floor, provides legal assistance to active-duty, reserve component on orders or pending deployment, retired military members and their military identification card-eligible dependents. This assistance includes wills,



ABA MILITARY PRO BONO PROJECT

Home | Events | News | Library | For Military Attorneys

« For Military Attorneys

Operation Stand-By: Seek Attorney-to-Attorney Advice from a Civilian Attorney

Contact civilian attorneys registered with Operation Stand-By with legal questions relating to their geographic areas and substantive areas of expertise for attorney-to-attorney advice, so you can receive guidance that will allow you to further assist your servicemember clients.

Volunteer Attorneys List

ID the Legal Assistance Issues

Scenario: ~~Capt~~ Mrs. Brown who has reported domestic violence in the past, reports her ~~civilian~~ husband, Maj Brown has raped her.

MPO

Living Arrangements

Transitional Compensation

Support

U.S. AIR FORCE

Resources

Airman & Family Readiness Flight

Family Support Centers across the Air Force were renamed Airman & Family Readiness Centers to reflect their importance to mission accomplishment. The Airman & Family Readiness Center supports individuals, families, and leadership with programs and services to strengthen communities, encourage self-sufficiency, enhance mission readiness and ease adaptation to the Air Force way of life. The center serves singles, couples and families alike. Services are provided to military members of all branches of service, DOD employees and their families. Most services are provided on a walk-in basis or just a phone call away.

rning Centers | Training Cata

PIC OUTLINE

R

Sun

5

VICTIMS OF CRIME

VWAP

SARC

Civilian Resources

6

Temporary Restraining Orders and Military Protective Orders

TRO and MPO Handout

DoDI 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel

7

Transitional Compensation

Trans Comp Handout

U.S. AIR FORCE

Scenario: ~~Mrs.~~ SSgt Brown who has reported domestic violence in the past, reports her husband, ~~Maj~~ TSgt Brown has raped her.

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Resources Recap

- Military Resources
  - CAPSIL
  - LAWS
  - Legal Assistance Office
  - VWAP
  - SARC
  - Airmen and Family Readiness Centers
- Civilian Resources
  - Pro Bono Projects
  - Civilian VWAP Resources
  - Legal Aid Clinics

U.S. AIR FORCE

WebLIONS

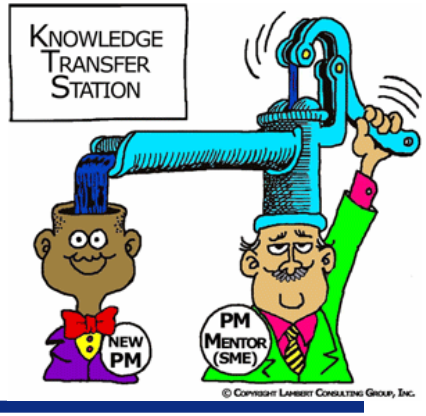
Sexual Assault - Scott AFB (AMC)
Total AF (1-May-2012 thru 15-May-2013)

Subject Category	Sexual Assault Victim Restricted Reporting	Sexual Assault Victim Unrestricted Reporting	Victim of Crime Other than Sexual Assault
1. Adoption/Change of Name	0	0	0
2. Automobile/Personalty	0	0	0
3. Child Custody	0	0	1
4. Consumer Affairs	1	0	2
5. Dependent Non-Support	0	0	0
6. Domestic Relations	1	0	12
7. Identity Theft	0	0	1
8. Landlord-Tenant	0	1	0
9. Negligence/Torts	0	0	0
10. Paternity	0	0	0
11. Personal Finance/Debts	0	0	0
12. Real Estate	0	0	0
13. Residence/Domicile	0	0	0
14. Special Needs/EFMP	0	0	0
15. SSCRA	0	0	0
16. Taxation	0	0	0
17. USERRA	0	0	0
18. Wills and Estates	0	1	1
19. Other	0	1	8
Total # Of Cases Handled	2	3	25
Total # Of Client Handled	2	3	23

Legal Assistance Training Requirements

AFI 51-504, paragraph 1.14 requires *all* JAGs to complete 4 credit hours of MCLE annually

- **1 hour must consist of Annual Refresher**
- **Can be accomplished via webcasts, in-residence courses, military sponsored/co-sponsored CLE**
- **ACT DE modules count towards annual requirement**
- **Must certify once PR/MCLE Cert opens**



U.S. AIR FORCE

Portfolio

CAPSIL 3P PORTFOLIO | Home | My Portfolio | Dashboard Central | MAJCOM Reports | Learning Centers | Training Catalog

NOTE: If you find errors in the primary courses and developmental education sections below. Please verify your ROSTER data.

Primary Courses			Developmental Education			Certifications		
JASOC	Gateway	SJAC	BDE	IDE	SDE	TC-DC	LA	PR
1993	NE	2008	1997	2001	2008		4 4	

TRAINING HISTORY

ONLINE EDUCATION

TITLE	FIELD OF PRACTICE	TYPE	COMPLETED
After the Repeal: Post DADT Issues and Repercussions	All Hands Training	Online Video/Recorded Webcast	22-Feb-2011
TJAG's Corps Update	Leadership	Online Video/Recorded Webcast	02-Jun-2011
Exceptional Family Member Program (EFMP) Family Legal Issues	Legal Assistance	Online Video/Recorded Webcast	14-Jun-2011
Landlord Tenant Law	Legal Assistance	Online Video/Recorded Webcast	04-Aug-2011
Legal Assistance Learning Centers in CAPSIL	Legal Assistance	Online Video/Recorded Webcast	22-Sep-2011

U.S. AIR FORCE

Questions???

Air Force Office of Special Investigations

Eyes of the Eagle

Victim Interview

SA Mark Walker
Sexual Assault
Investigations & Operations Consultant

U.S. AIR FORCE

Overview

- When to Conduct
- Setting
- Victim Interview considerations
- Cognitive Interview

When to Conduct the Interview

- **ASAP after an event has occurred unless…**
  - SAFE--Could be >4 hours
  - Traumatic nature of the event
    - Is Victim reasonably calm?
    - Can Victim follow directions?
    - Can Victim perform intensive memory retrieval?
    - Basic needs met?

** Need to assess Safety, Security & evidence

- **Effects of delay**
  - Memory usually degrades with time
  - Research on 2 sleep cycle
- **Delayed report**
  - Concern for operational security more than evidence collection

Interview Setting

- **Male vs Female interviewer**
  - OSI policy to ask/determine victim's preference
    - Will not delay if same is not available
  - No substitution for empathy
  - Currie & MacLean, 1977 – Women may disclose more to men
- **Reluctance to share information w/others in room**
  - VA
  - SARC
  - SVC
  - Friend
- **Interview room vs conference room**
  - Recording
  - Standard process/less distractions
  - Empathy by the interviewer overcomes bare walls

Victim Interview considerations

- **First impressions set the tone -- Remain non-judgmental**
  - Body language
  - Facial expression
  - Tone of voice
- **Re-Victimization**
  - Victims who confront their emotions are more likely to recover
  - Sketch artists' experience with rape victims
  - Process-can be similar to the crime Hill, 2005
    - Lack of control
    - Humiliation
    - Enforced Submission
- **Intimate details of sexual activity**
  - Must clarify the ambiguous
    - "Blow job", "Forced", "inner thigh"—Identify action, specific body part

What is the Cognitive Interview?

- **Geiselman and Fisher (1984)**
  - Worked with police departments
  - 20+ years of empirical
  - General agreement in scientific community to effectiveness
- **Uses a non-directive conversational approach**
- **Promotes memory recall and social interactions**
- **Interviewer behaviour important to outcome**
- **Increases the quantity and quality of information**
- **Standard guidelines, NOT intended as a recipe/checklist**
- **Must have willing participant!**
  - Witnesses or Victims who intentionally withhold info will not be provide
  - Can be used with any cooperative person
- **Becoming standard interviewing technique used by civilian LE**

Cognitive Interview

- **Phase I: Greet & Rapport**
- **Phase II: Context Reinstatement**
  Free Recall
- **Phase III: Follow-up Questions**
- **Phase IV: Review**
- **Phase V: Closing the Interview**

Phase I: Greet & Rapport

- **Determines how well the interview proceeds**
  - Social dynamics
  - Convey general guidelines to maximize memory and communication
- **How to accomplish**
  - Developing rapport and communicating empathy
  - Address VICTIM's Anxiety
  - Establishing the centrality of VICTIM's role
  - Promoting focused concentration

What does Rapport look like?

- **Use VICTIM's name**
- **Interact meaningful as an interested party**
- **Principle of Synchrony**
  - Sit in a relaxed manner; turn you body towards the interviewee
- **Meet VICTIM's basic needs**
- **Start with neutral questions which can be answered in a positive manner**
- **Allow VICTIM to vent their concerns**
- **Frequent eye contact but do not stare**
- **Listen actively – nodding, "mhm"**
  - Repeat victims words back followed by relevant comment
- **Don't interrupt and allow for pauses**

Communicating Empathy

- **Empathy**
  - “standing in their shoes”
- **To engage the VICTIM’s trust, the interviewee must view the event from their perspective**
- **For the VICTIM to reveal the story, they must be made aware that the investigator understands their feelings**
  - Provide some type of feedback to indicate understanding
  - “I can understand how difficult this must be for you.”
  - Repeat back information they disclosed and ask further details
- **Avoid making judgmental comments and asking confrontational questions**
  - “Why did you…”
  - Do not act Surprised/Shocked

Dealing with VICTIM's Anxiety

- **Everyone has memory problems in new/ anxiety causing situations**
  - Compounded impact in victim interviews
    - Fear—Loss of control over emotional and mental activity
      - Incident
      - LE interview
    - Decreased self-confidence in ability to describe events
      - May only recall a few details initially
- **Explain the interview process--Demystify**
- **Suggest that the victim try to relax and just take a few deep breaths, inhaling slowly and deeply**
- **Save the most stressful questions for later in the interview**

What is VICTIM's Role?

- **Victim may expect to be passive during the interview**
  - Victim should do most of the talking
  - Encourage victim to participate actively
    - "You are the one who was there, not me, so I am depending on you to tell me what happened."
    - "Do not wait for me to ask you a lot of questions; instead just tell me whatever you can remember"
    - "I want to hear whatever you have to tell me about the event, so I'm just going to listen as you talk"
  - "It is acceptable to say I don't know or I don't understand"
- **Instruct victim to tell the truth**
  - Talk about the impact of "little lies" on the case
  - Address the importance of accuracy

Phase II: Context Reinstatement

- **Goal is to activate memory**
- **Memory retrieval requires concentration**
  - No Distractions
- **Cuing interviewee to re-experience as many aspects of the event as possible**
- **Focused retrieval techniques:**
  - Encourage victim to focus attention
  - Explicitly state need for detailed information
  - May close eyes or focus on a spot on the wall
  - Imagine scene, incident, face…

Context Reinstatement

- **Explicit instructions: Slowly…**
  - "Close your eyes and try to imagine yourself back in the {event}. Think about where you were, what you were seeing and hearing, and what you were doing. Did you smell or taste anything? Think about how you felt as everything was going on. I will sit here quietly while you take a few moments to re-experience the event."
- **What were you thinking about, what were you feeling, where were you standing, what did the room look like? The questions should be asked one at a time.**
  - **"**Try to put yourself back into the same situation as when the incident occurred."
  - "Before we start, I'd like you to tell me a little bit about where you were in the room and what you were thinking right before…"
- **Be careful to avoid directing the interviewee to focus on any one particular sensory experience, w/out including others**

Free Recall

- **Gain victim's mental record of the event**
  - To develop a strategy for the remainder of the interview
  - Identifies gaps where additional focus needed
- **Do not interrupt or ask questions about details**
  - **Use silence, head nods verbal queues like "mhm"**
- **Report everything instruction –Key Step!**
  - Even if it seems unimportant
  - But Do Not Guess
  - Do not ask for chronological order

Free Recall

- **Ask the interviewee to provide a detailed description of the event.**
- **Remind the interviewee to report what they saw, heard, smelled, and felt.**
- **Remind the interviewee to report details about the actions that took place, the environment, and the people who were there.**
  - "Report all the information you remember. No detail is too small or unimportant to report. You should say whatever comes to mind, but do not guess or make things up."
  - "Please tell me in your own words everything you can remember about {event}. Tell me everything you can, in as much detail as possible, but don't guess or make things up if you don't recall."
  - "What are you able to tell me about what happened?"

Diverting problems…

- **Off topic – wait for a pause**
  - “you’re reporting a lot of useful information, and that’s great; but I wonder if we can go back to what you said about {critical topic} in more detail.”
- **Down the wrong road…**
  - “I’m going to interrupt you here for a moment. You’re reporting exactly how I want you to report, but I’d like you to tell me specifically about {critical topic}.”
  - If necessary reinstate context again here

Phase III: Follow-up Questions

- **Begin with Open-ended questions that follow directly from interviewee's free recall narrative**
- **Prompt for elaboration on specific portions of the narrative by first cueing their memory for that moment in the event and asking for a detailed description**

Follow-up Questions to Probe Memory

- **“You mentioned that {insert phrase}. Please tell me more about that.”**
- **“Help me understand…..”**
- **“You mentioned that {insert phrase}. Close your eyes and think about that moment. Now, describe that part in as much detail as possible.” (Reinstate context of image)**
- **“You mentioned {activity} and provided a lot of good information about what you saw. Think back to that moment and describe what you heard/experienced/were thinking in that moment.”**

Probing Questions

- **Funnel Approach**
  - Stay on topic until all issues are exhausted
- **Open-ended questions/requests**
  - Open, unrestricted answer
  - Facilitate memory without interviewer knowledge
    - “Describe the weapon in as much detail as you can
- **Closed questions/requests**
  - Relatively narrow range of responses: one word or short phrase
  - Should come at end of interview
    - “Was the gun black?”
    - Better: “What color was the gun?”

Stay Away From….

- **Leading questions**
  - Suggest an answer that may contaminate interviewees' actual memories of events
  - Provide answers to interviewees who are unsure about the information tin their memory or to those who are lying about the information
  - "Did he have blue eyes?"
  - Better – "What color was his eyes?"
  - Best – "You mentioned the man looked at you, think back to that moment and tell me all you can about what that man looked like."

Techniques to enhance memory

- **The more retrieval attempts = more recall**
  - Probing senses
    - Sight, smell, hearing, taste, touch
  - Probing Image
    - Concentrate on image w/detail recall
  - Probing Concept
    - “what/who does that remind you of ” “What were you feeling”
  - Varied retrieval strategies
    - Change perspective—Do not report what others told you
    - First memory description, second memory description, etc.
    - Memorable aspect of the event
    - Draw Sketches

**** We want victim to understand we are trying to increase details, it is not that we don’t believe victim**

Phase IV: Reviewing The Interview

- **Summarize all relevant information**
- **Use interviewee's words**
  - Interviewee can check accuracy
  - Another opportunity to provide additional information
- **Inform interviewee to interrupt**
- **If new information is provided – immediately probe for further details**

Phase V: Closing the Interview

- **Return victim to a positive frame of mind**
  - Neutral topics
- **Open the door for re-contact**
  - Additional memories
  - Physical evidence
  - Potential Clarification at later date
- **Answer questions**
- **Leave positive last impression**
- **Thank interviewee**

Questions?

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THE JUDGE ADVOCATE GENERAL'S SCHOOL

SPECIAL VICTIMS' COUNSEL COURSE 14-B

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

MAY 1 2014

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

FROM: The Judge Advocate General's School

SUBJECT: SVCC Narrative Schedule, 19-23 May 2014

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

MONDAY, 19 MAY 2014

0730-0800 **WELCOME REMARKS AND INTRODUCTION**
Instructors: Colonel Kenneth Theurer, Commandant; Major Christopher Goewert, Course Director; and Mr. Pete Stultz, Assistant Course Director, The Judge Advocate General's School, Maxwell AFB, AL

0800-0850 **LECTURE – AIR FORCE SVC INTRODUCTION & OVERVIEW**
Instructor: Colonel Dawn Hankins, Chief, Special Victims' Counsel Program, Air Force Legal Operations Agency, Joint Base Andrews, MD
Student Evaluators: 1-10

0850-0900 **BREAK**

0900-0950 **LECTURE – LESSONS LEARNED IN THE FIELD**
Instructor: Captain Seth Dilworth, Special Victims' Counsel, Cannon AFB
Student Evaluators: 11-20

0950-1000 **BREAK**

1000-1200 **LECTURE – MILITARY RULES OF EVIDENCE FOR THE SVC**
Instructor: Major Rebecca Kleim, Instructor, TJAGLCS, Charlottesville, VA
Student Evaluators: 21-30

1200-1300 **LUNCH**

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

OR

BREAKOUT SESSIONS – BRANCH SPECIFIC
Location: Seminar rooms as assigned

1350-1400 **BREAK**

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

1520-1530 **BREAK**

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

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

Bus to depart From Lodging

TUESDAY, 20 MAY 2014

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

0920-0930 **BREAK**

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

1100-1110 **BREAK**

1110-1230 **LECTURE – FUNDAMENTALS OF BEING A VICTIM'S ATTORNEY II**
Instructor: Ms. Meg Garvin, Executive Director & Clinical Professor of Law, National Crime Victim Law Institute, Portland, OR
Student Evaluators: 11-20

1230-1330 **LUNCH**

1330-1420 **BREAKOUT SESSIONS – BRANCH SPECIFIC**
Location: Breakout sessions by branch of service; rooms as assigned

1420-1430 **BREAK**

1430-1520 **UNDERSTANDING YOUR CLIENT'S DISCIPLINARY INFRACTIONS**
Instructor: Major Alex Rose, Military Justice Instructor, The Judge Advocate General's School, Maxwell AFB, AL; and Captain Seth Dilworth
Student Evaluators: 21-30

1520-1530 **BREAK**

1530-1630 **PANEL DISCUSSION – A VICTIM'S PERSPECTIVE**
Moderator: Major Christopher Goewert
Student Evaluators: 31-40

WEDNESDAY, 21 MAY 2014

0730-0820 **LECTURE – POST-TRIAL FOR SVCs – CLEMENCY AND PAROLE**
Instructor: Mr. Bruce Brown, Asscociate General Counsel, SAF Personnel Council, Joint Base Andrews, MD
Student Evaluators: 41-50

0820-0830 **BREAK**

0830-0930 **LECTURE – ETHICS**
Instructor: Major Andrew Barker, Chief, Civil Law Division, The Judge Advocate General's School, Maxwell AFB, AL
Student Evaluators: 51-60

0930-0940 **BREAK**

0940-1230 **LECTURE – PRACTICE OF CIVIL LEGAL ASSISTANCE FOR VICTIMS**
Instructor: Ms. Jessica Mindlin, National Director of Training & Technical Assistance, Victim Rights Law Center, Portland, OR

Student Evaluators: 61-70

1230-1330 **LUNCH**

1330-1700 **EXERCISE – CLIENT INTAKE AND ADVICE**
Location: Rooms as assigned

THURSDAY, 22 MAY 2014

0730-0820 **LECTURE – TRIAL PROCEDURE AND APPEALS FOR SVCS**
Instructor: Major Mathew Talcott, Military Justice Instructor, The Judge Advocate General's School, Maxwell AFB, AL
Student Evaluators: 1-10

0820-0830 **BREAK**

0830-1200 **LECTURE – NEUROBIOLOGY OF SEXUAL ASSAULT**
Instructor: Dr. Rebecca Campbell, Michigan State University, East Lansing, MI
Student Evaluators: 11-20

1200-1300 **LUNCH**

1300-1420 **LECTURE - MANAGING YOUR OWN OFFICE: ADMINISTRATIVE TECHNIQUES, TRAVEL, PARALEGAL TEAMING, AND PERFORMANCE REPORTS**
Instructor: Major Robert Wilder, Deputy Chief, Community Legal Services Division, Joint Base Andrews, MD
Student Evaluators: 21-30

OR

BREAKOUT SESSIONS – BRANCH SPECIFIC
Location: Breakout sessions by branch of service; rooms as assigned

1420-1430 **BREAK**

1430-1630 **SEXUAL ASSUALT PROSECUTIONS AND SVC RELATIONS**
Instructor: Major Adam Bentz, Military Justice Instructor, The Judge Advocate General's School, Maxwell AFB, AL
Student Evaluators: 31-40

FRIDAY, 23 MAY 2014

0800-1130 **EXERCISE – COURT-MARTIAL ADVOCACY FOR THE SVC**
Location: Rooms as assigned

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

ADVANCED SVC CHILD VICTIM ADVOCACY & REPRESENTATION

THURSDAY, 22 MAY 2014

0730-0800 **INTRODUCTION AND COURSE BRIEFING**
Instructors: Mr. Christopher Newlin, Executive Director, National Children's Advocacy Center, Huntsville, AL; Mr. Justin Fitzsimmons, High Tech Crimes Research Specialist, SEARCH, National Consortium for Justice and Information and Statistics, Sacramento, CA
Location: Room 124/126

0800-0930 **LECTURE – CHILD MALTREATMENT AN OVERVIEW**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 1-5

0930-0940 **BREAK**

0940-1030 **LECTURE – INVESTIGATION OF CHILD ABUSE**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 6-10

1030-1040 **BREAK**

1040-1200 **LECTURE – OVERVIEW OF FORENSIC INTERVIEWING**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 11-15

1200-1300 **LUNCH**

1300-1430 **LECTURE – BEING AN SVC FOR CHILDREN**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 16-20

1430-1440 **BREAK**

1440-1640 **SEMINAR – PRACTICAL EXERCISES AND REPORTING**
Locations: Seminar rooms as assigned
Student Evaluators: 21-25

1640-1700 **REVIEW OF DAY 1**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons

FRIDAY, 23 MAY 2014

0730-0900 **LECTURE – WORKING WITH INVOLVED CAREGIVERS**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Location: Small Auditorium
Student Evaluators: 1-5

0910-0920 **BREAK**

0920-1040 **LECTURE – UNDERSTANDING THE PROSECUTION OF CHILD SEXUAL ASSAULT CASES**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 6-10

1040-1050 **BREAK**

1050-1230 **LECTURE – PREPARING THE CHILD FOR COURT AND THE COURT FOR THE CHILD**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 11-15

1230-1330 **LUNCH**

1330-1430 **LECTURE – MOTIONS PRACTICE FOR THE SVC**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons
Student Evaluators: 16-20

1430-1440 **BREAK**

1440-1615 **EXERCISE – SVC MOTIONS IN CHILD ABUSE CASES**
Locations: Seminar Rooms as Assigned
Student Evaluators: 21-25

1615-1630 **Q&A CLOSING REMARKS AND END-OF-COURSE**
Instructors: Mr. Christopher Newlin; and Mr. Justin Fitzsimmons

KENNETH M. THEURER, Colonel, USAF
Commandant

SVCC 14B

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

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

2 Jun 14

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

FROM: Course Director (Major Goewert)

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

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

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

Special Victims' Counsel Course (Basic)

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

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

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

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

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

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

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

ii. **Professional Legal Knowledge for Special Victims' Counsel**:

1. Comprehend principles of military criminal law, evidence, and procedure of special interest to crime victims.
2. Comprehend principles of civil law of special interest to crime victims, including information law, victim assistance programs, and adverse administrative actions against offenders.
3. Comprehend ethical issues of special interest to judge advocates serving as Special Victims' Counsel.
4. Apply principles of law, evidence, procedure, and ethics to issues raised by factual scenarios.
5. Value a thorough understanding of applicable law, evidence, procedure, and ethics to successful service as a Special Victims' Counsel.

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

iii. **Legal Skill Sets for Special Victims' Counsel**:

1. Comprehend techniques for effective communication and positive relations with clients who are victims of sexual assault or other crimes.
2. Apply effective communication techniques in factual scenarios.
3. Value effective communication and positive relationships with crime victim clients as essential to successful service as Special Victims' Counsel.

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

iv. **Professional Situational Awareness for Special Victims' Counsel:**

.

1. Comprehend the role of Special Victims' Counsel in the fair and efficient administration of military justice.
2. Comprehend permissible and impermissible activities on behalf of crime victim clients.
3. Comprehend the roles of other Department of Defense offices and programs that provide assistance to victims of sexual assault and other crimes.
4. Respond to assignment as a Special Victims' Counsel as requiring change in judge advocate's relationships with others in the community.
5. Value zealous and ethical advocacy on behalf of crime victims as consistent with the Department of Defense mission.

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

3. ***Other Required Indicators***

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

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

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

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

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

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

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

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

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

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

d. **Student Recommended Improvements**:

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

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

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

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

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

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

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

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

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

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

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

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

d. **Student Recommended Improvements:**

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

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

7. **Course Director Comments**:

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

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

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

CHRISTOPHER J. GOEWERT, Maj, USAF
Course Director

Evidentiary Issues: Kastenberg, MRE 412, 513 and 514

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

GOALS

LRM v. Kastenberg - NDAA

MRE 412

MRE 513

MRE 514

- **LRM v. Kastenberg, 72 MJ 364 (CAAF July 18, 2013)**
  - Special Victim Counsel Requests to be Heard
  - Denied by Military Judge – finds no standing to present argument
  - CAAF disagrees

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

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

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

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

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

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

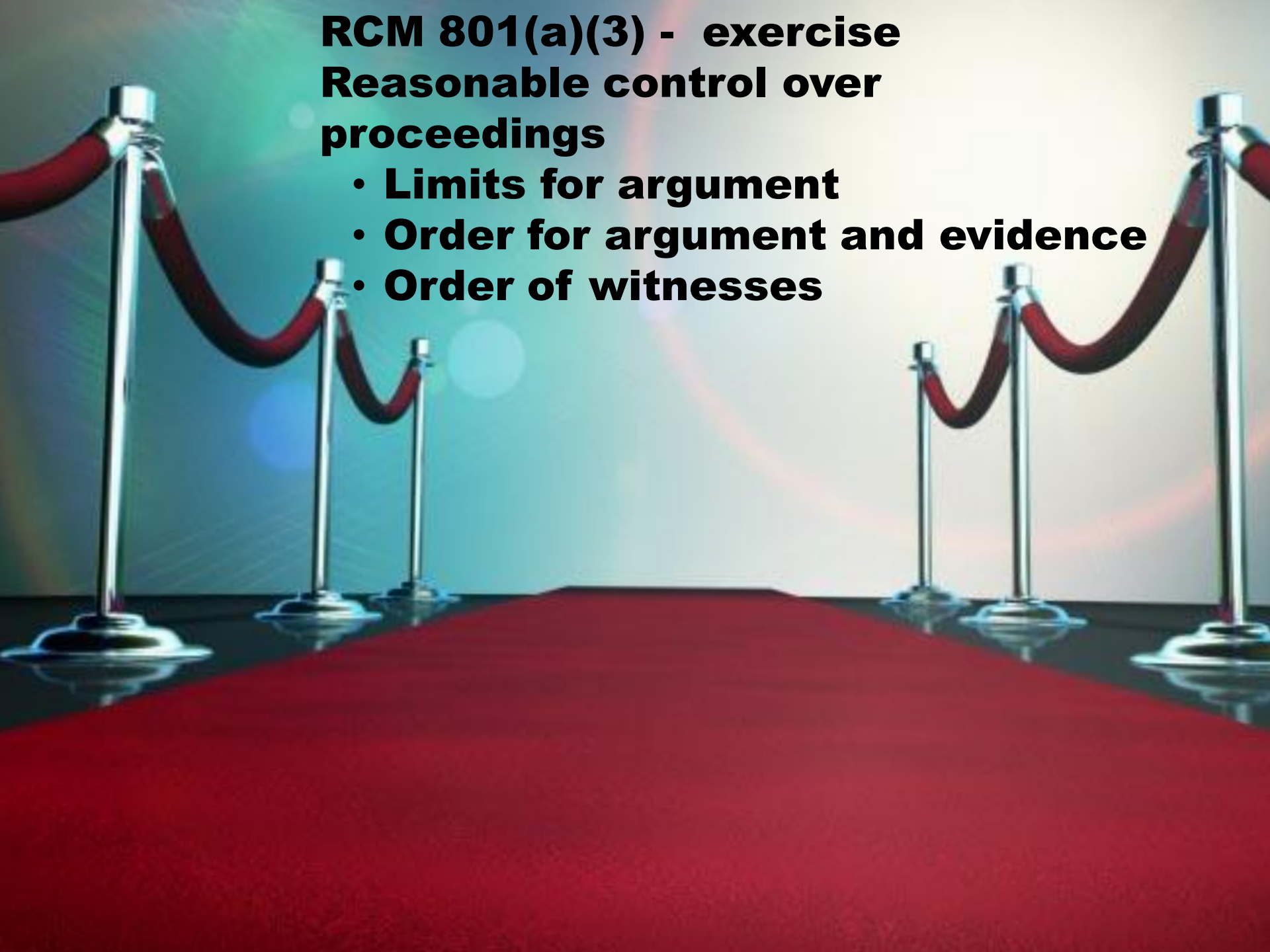
LRM v. Kastenberg, 72 MJ 364 (CAAF July 18, 2013)

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

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

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

But see NDAA, 2014



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

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

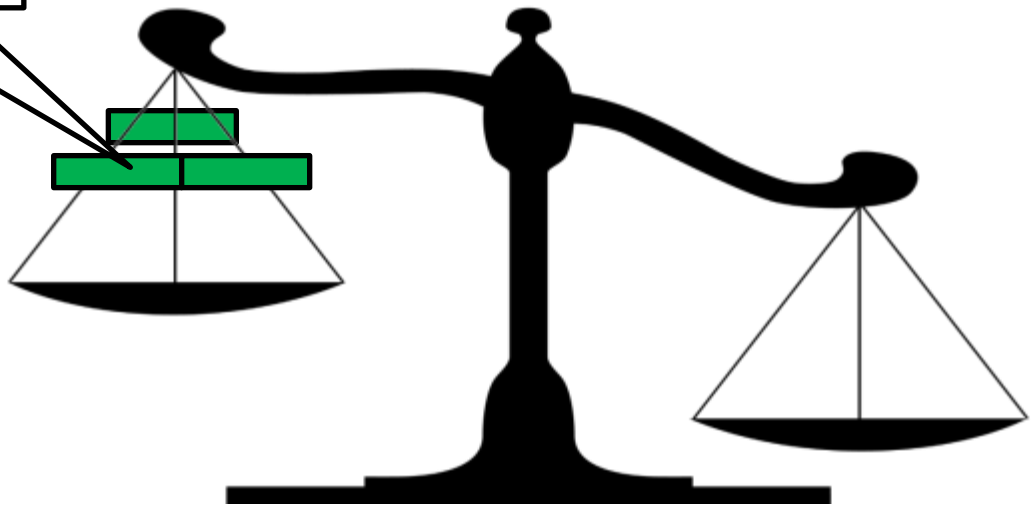
- Other Sexual Behavior
- Sexual Predisposition

MRE 412

MRE 412
Three exceptions

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

- Past sexual behavior
- Sexual predisposition



United States
vs.
Gaddis
70 MJ 248 (CAAF 2011)

MRE 412

Built-in balancing

US v. Gaddis

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

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

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

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

Evidence of Sexual Behavior and Sexual Predisposition Not Admissible

Except:

A) Behavior to prove other source of injury, semen or physical evidence;

B) Behavior b/tw victim/acc to prove consent or by prosecution

Test:

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

Except:

C) Constitutionally Required

Test:

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

Add'l Test for Const Req Evid:

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

MRE 403

US v. Gaddis

Meet 403 balancing?

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

All in?

Van Arsdall factors…
can impose "reasonable limits"

Constitutional Right of Confrontation . . . except

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

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

MRE 611

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

MRE 513

Psychotherapist - Patient Privilege

Rule 513. Psychotherapist—Patient Privilege

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

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

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

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

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

Types of Evidence

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

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

MRE 513
Exceptions

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

(1) when the patient is dead;

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

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

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

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

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

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

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

MRE 513 Exceptions

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

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

Const Req Evid:

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

MRE 513 Exceptions

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

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

Procedure

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

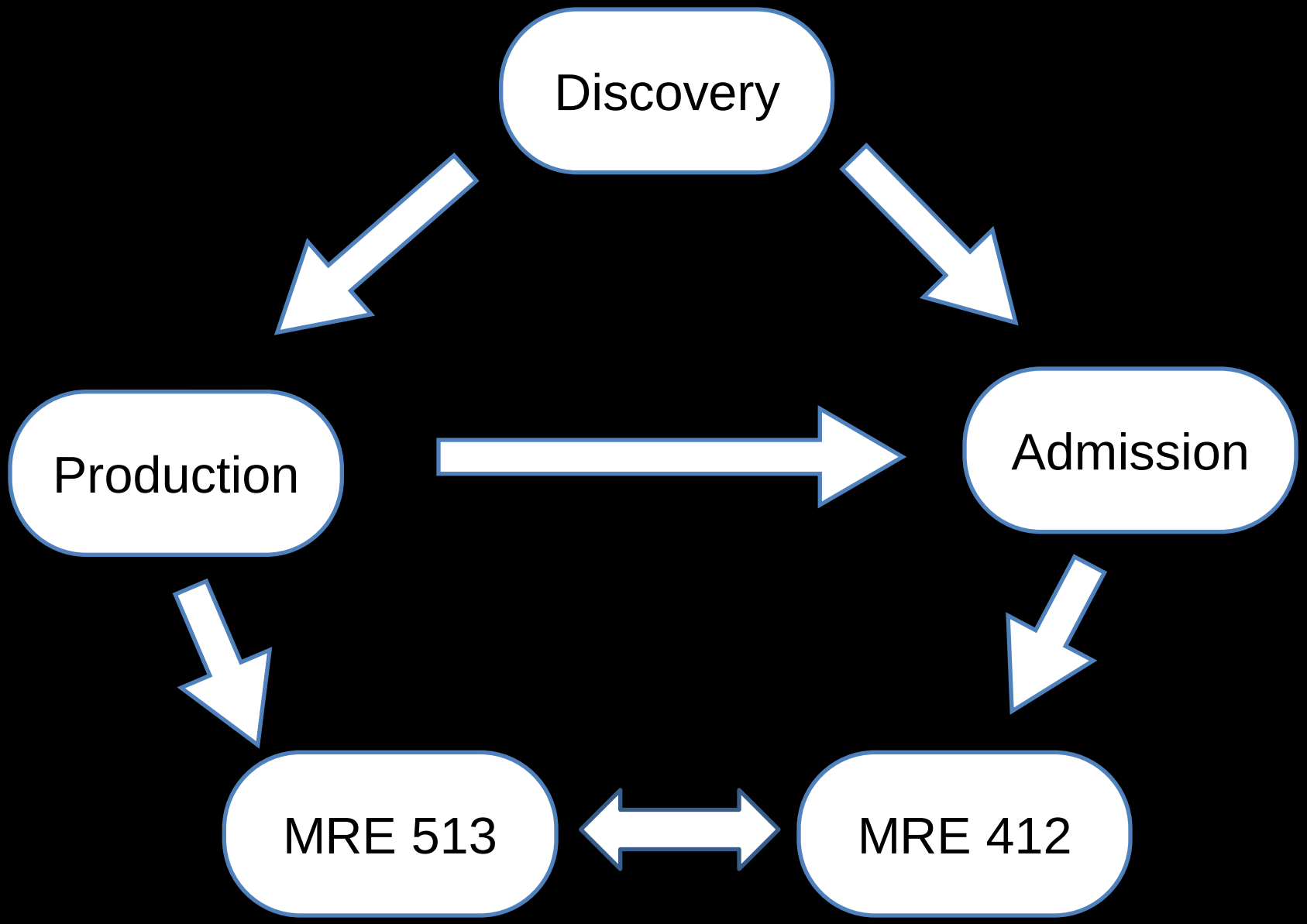
(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call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

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

Procedure

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

EVERYTHING
IS
CONNECTED


Discovery
Production
Admission
MRE 513
MRE 412

MRE 514

Victim Advocate-Victim Privilege

Rule 514. Victim Advocate—Victim Privilege

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

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

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

(2) "Victim advocate" means a person who:

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

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

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

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

(1) when the victim is dead;

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

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

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

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

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

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

See supra Mil. R. Evid. 513

For "how to" and intent on exceptions

For procedure

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

GOALS

LRM v. Kastenberg - NDAA

MRE 412

MRE 513

MRE 514

Evidentiary Issues: Kastenberg, MRE 412, 513 and 514

MAJ Rebecca F. Kliem
Professor, TJAGLCS
rebecca.f.kliem.mil@mail.mil

Air Force Office of Special Investigations

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

Col Dawn Hankins
SA Mark Walker

U.S. AIR FORCE

Overview

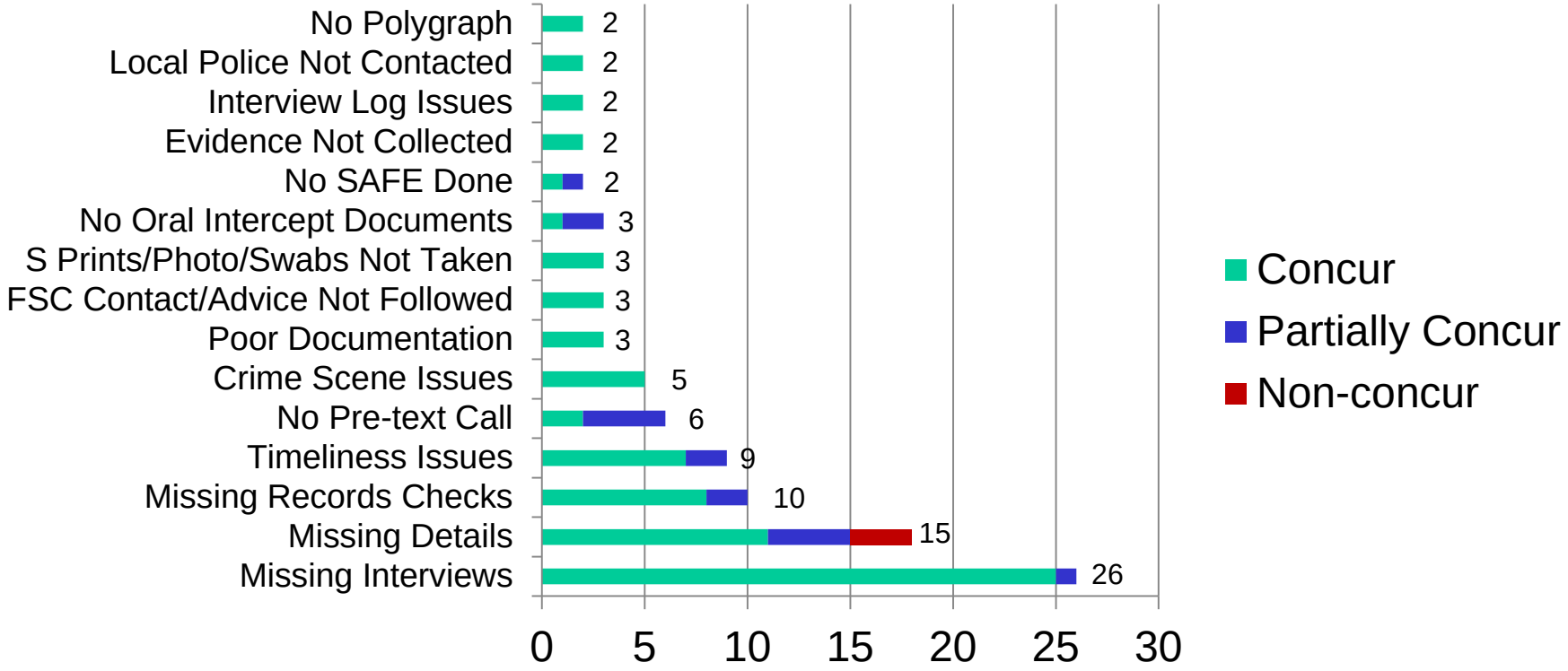
- Sufficiency
- Investigation Overview/Expectations
- Lessons learned

New Oversight

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

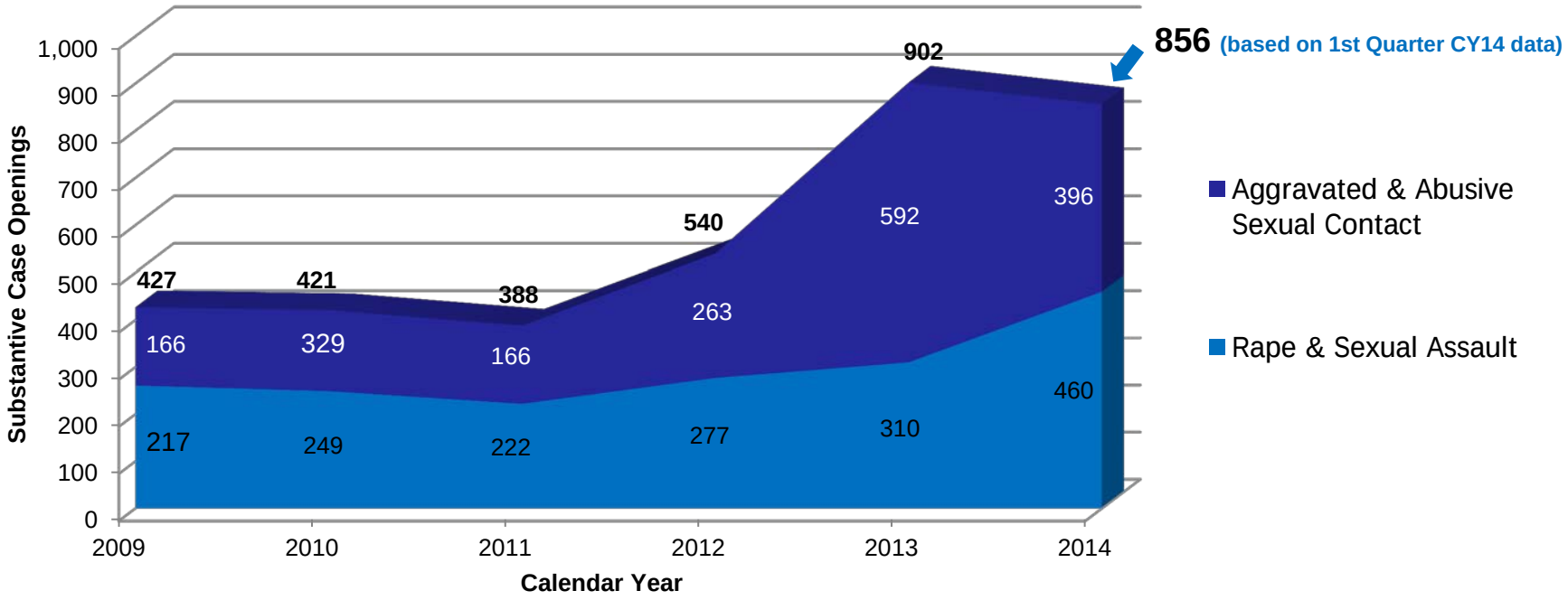
Discrepancies by Category

(17 (11%) of 152 Cases)



AFOSI Adult Victim Sexual Offenses

Case Openings by Calendar Year



Notification of Assault-Terms

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

The Investigative Process
Ground Rules

- No checklist
  - Every situation is different—ALL sex assaults are complicated
  - Dynamic process
    - Investigation course changes w/new information

- Probative investigative activity
  - Perishable to non-perishable
  - Victim involvement
  - Employment of specialized techniques

- New AFOSI/CC, New timeline – 75 Days
  - Dependent on others' timetables
    - Lab work
    - Witnesses

UNCLASSIFIED//FOUO

The Investigative Process
Victim Interview

Victim Interview -- Possibly initially interviewed by responding LE

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

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

What is the Cognitive Interview?

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

The Investigative Process

Crime Scene Searches

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

The Investigative Process
Sexual Assault Examination

Victim SAFE—Conducted by SANE or trained Medical Personnel

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

Subject SAFE

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

Must weigh probative benefit against invasive procedure

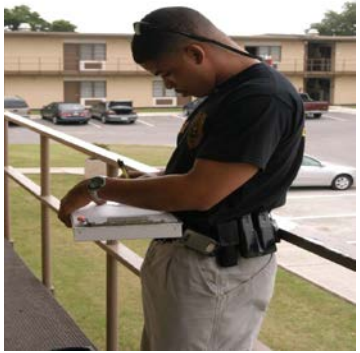
The Investigative Process
Crime Scene Searches

What is the investigator looking for?

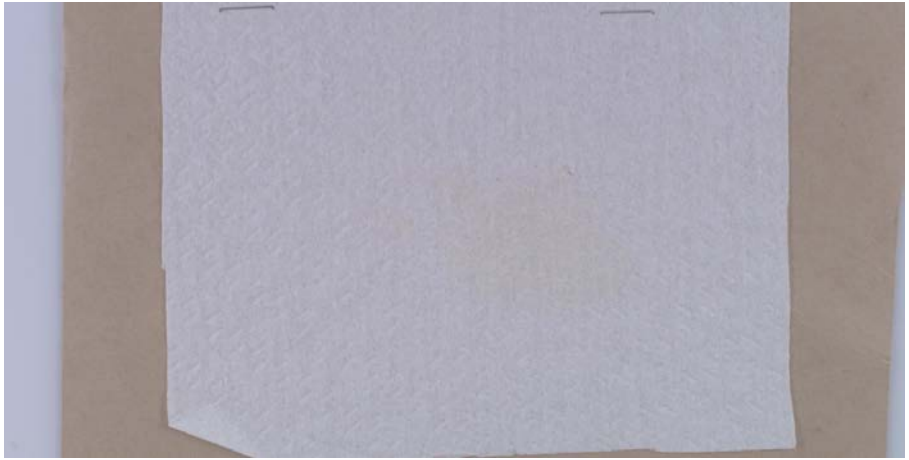
- **DNA**
  - **Clothing/bedding--Underwear worn during & after**
  - **Saliva/Sweat**
  - **Other "icky" things**
    - **Condoms/packages/new/used**
    - **Lubricants**
    - **Other items used in assault**
- **Alcohol/drugs/medication**
  - **Witting**
  - **Unwitting**
- **Pictures/video/Media**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

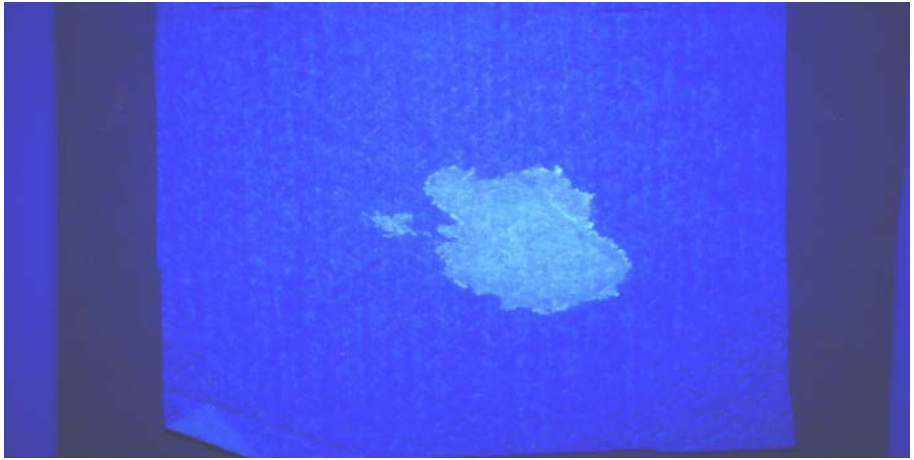
The Investigative Process
Crime Scene Sequence

Observe: recognizing items of evidentiary value
Record: documentation/photography
Collect: ensure least destructive means
Preserve: mitigate the obliteration of evidence after collection



The Investigative Process
Technology - Alternative Light Sources



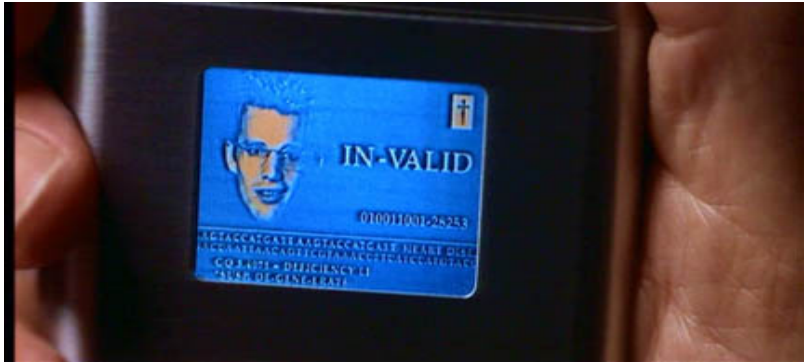


UNCLASSIFIED//FOUO

The Investigative Process
DNA Analysis

Television

- Match in minutes!



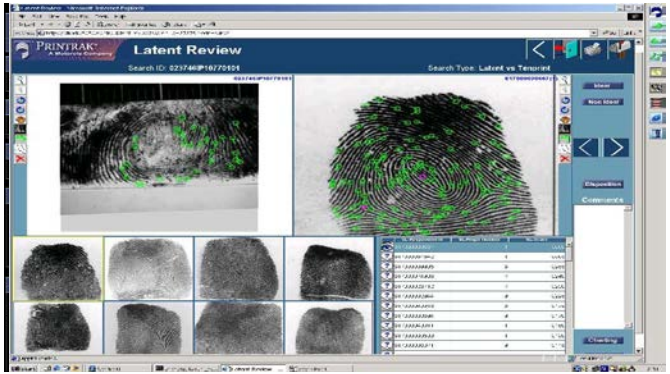
Real World

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

The Investigative Process
Fingerprints

Television

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



Real World

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

Investigative Process
Investigative Plan

Probative activities focused on elements of offence

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

Anticipate defense

- **Investigate all aspects**

Investigative Process

Operational Activities

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

**** Operational Security imperative**

Investigative Process
misc

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

Questions?

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Headquarters U.S. Air Force

Integrity - Service - Excellence

SVCs and Recent/Future Changes to the UCMJ

Lt Col R. Craig Burton

AFLOA/JAJM

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

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Overview

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

JAJM – Who We Are and What We Do

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

JAJM – Who We Are and What We Do

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

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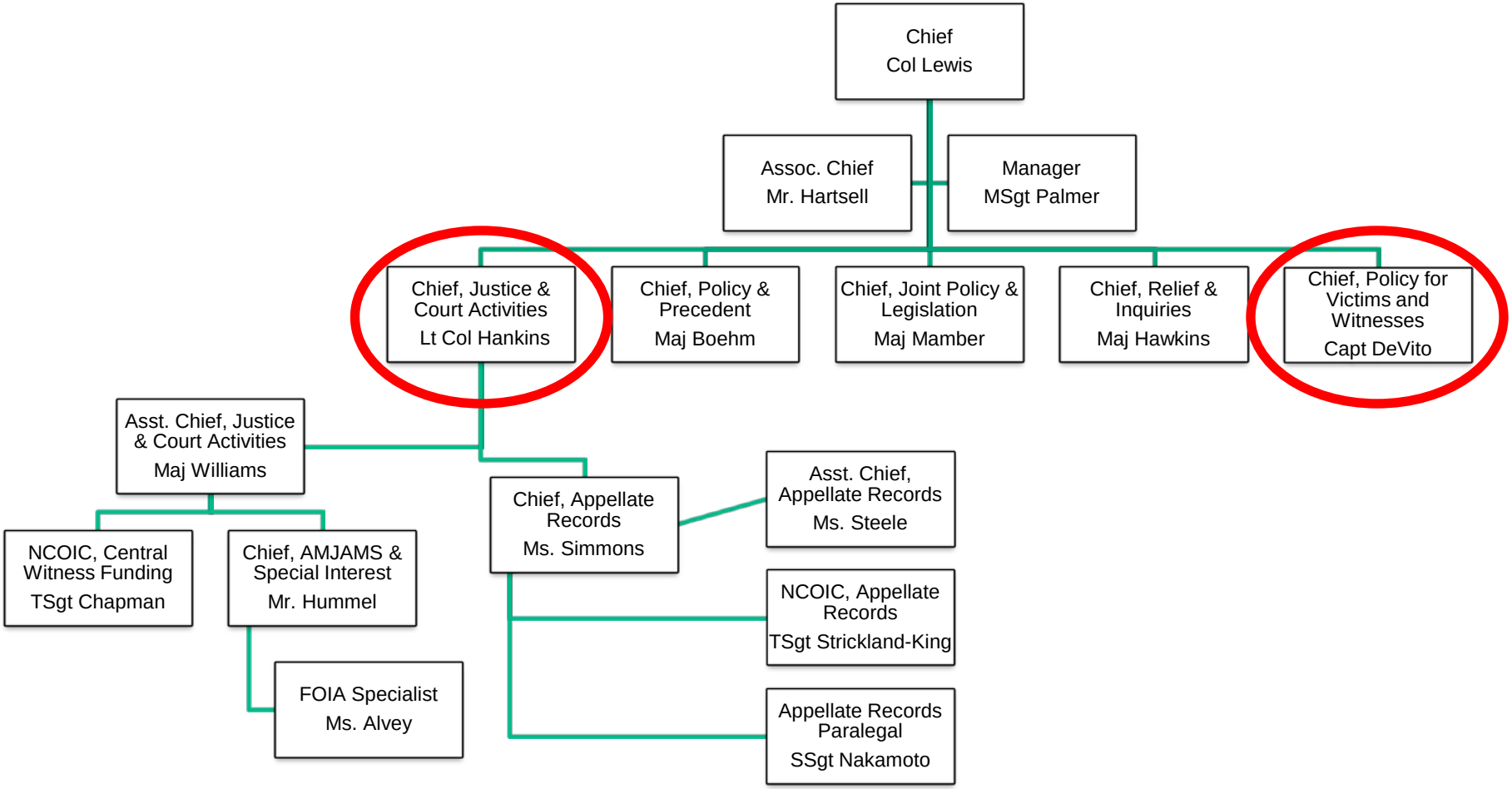
JAJM Org Chart



This powerful wrestler is posing in his _____recreation_____ clothes.

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SVC v. VWAP

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SVC v. VWAP

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

SVC v. VWAP

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

SVC v. VWAP

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

SVC v. VWAP

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

SVC v. VWAP

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

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SVC v. VWAP

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

SVC v. VWAP

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

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SVC v. VWAP

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

Victim Consultation under VWAP

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

Post-Trial Submission of Victim Impact Statements

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

Post-Trial Submission of Victim Impact Statements

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

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

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

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FY13 NDAA
Special Victim Capability

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

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

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

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

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

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

(2) judge advocates;

(3) victim witness assistance personnel; and

(4) administrative paralegal support personnel.

FY13 NDAA
Special Victim Capability

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

FY13 NDAA
Special Victim Capability

- 28 Jan 13 – AF Pilot Program
  - Air Force – AD/ARC (if incide ed while in status)
  - The status of the perpet er (Air Force, other service, civi
  - Both restrict
  - Adult Depend
  - Perpetrator mus
  - Both restricted an reports
  - Other Services – A RC (if incident occurred while in status)
  - Perpetrator must be an AF member

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

FY13 NDAA
Special Victim Capability

- 28 Jan 13 – AF Pilot Program
  - Unrestricted reports only
  - Adult Dependents of Oth nbers
  - Perpetrator must
  - Unrestricted
  - For sexual ass , 125, and 80
  - Entry-level statu olving physical contact of a sexua BMT or TT faculty/staff

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

FY13 NDAA
Special Victim Capability

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

Fun with Grammar

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

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Sexual Assault Related Changes to the Military Justice System

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

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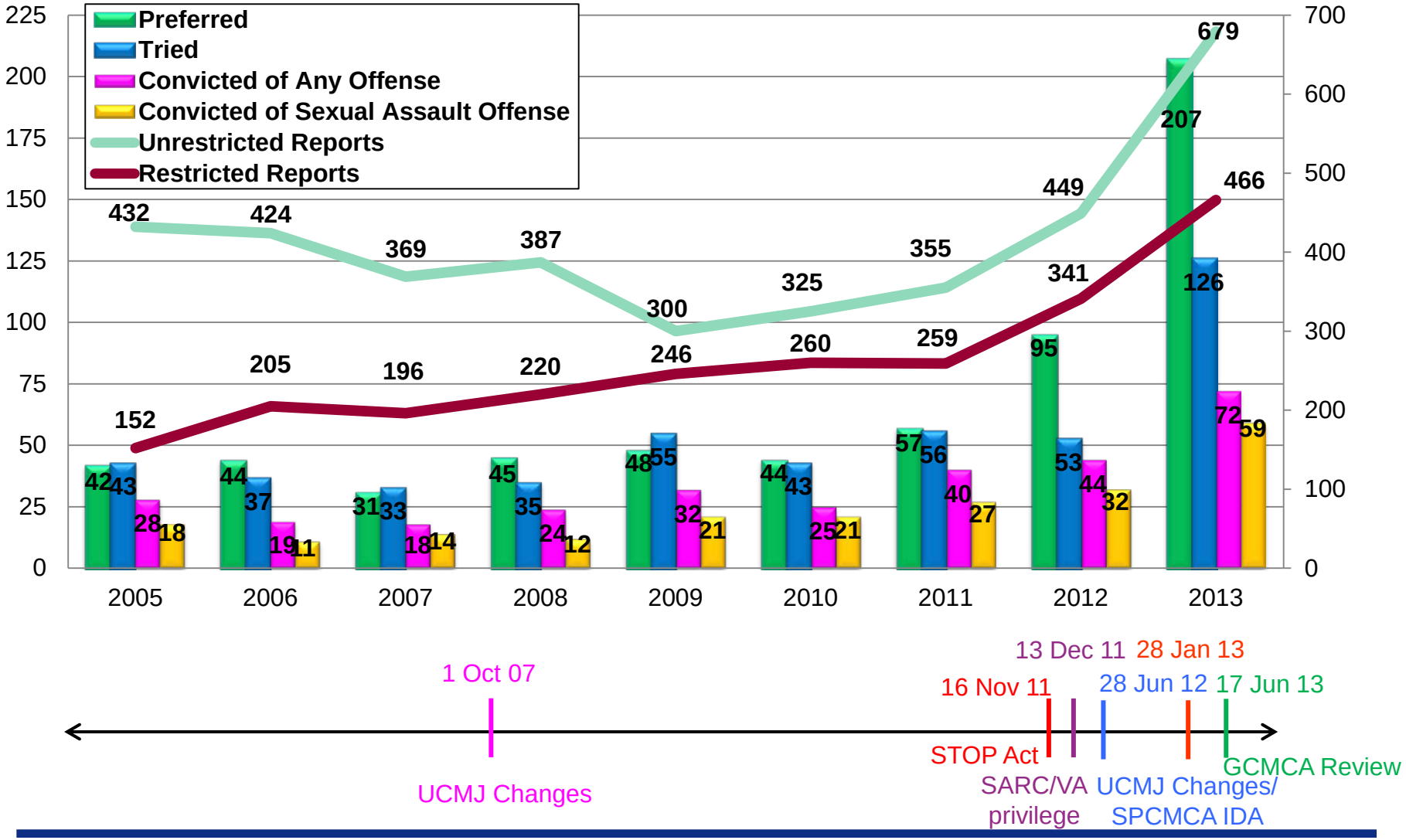

Two Major Themes

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

Substantive Revisions to Military Justice System

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

Reforms

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

Victims' Rights

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

Victims' Rights

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

Victims' Rights

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

Victims' Rights

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

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Reforms

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

Reforms

3. Article 32 investigations transformed into "preliminary hearings" (Sec 1702(a): applies to offenses committed on or after December 26, 2014)

- Scope of the hearing limited
- Military victims given option not to testify
- Hearing must be recorded; upon request, victim will be given access to the recording
- Preliminary hearing officer usually must be judge advocate and equal to or senior in grade to detailed government and defense counsel
- Subpoena Duces Tecum from IO or Government Counsel
- 412 Evidence expressly allowed, with same protections as in trial

Reforms (Pretrial Process)

4. Defense counsel required to seek interview of sexual assault victim through the trial counsel (Sec 1704: effective immediately)

   - Obligation attaches upon notice by TC that TC intends to call victim as witness at Art. 32 hearing or C-M.

5. Character and military service of the accused required to be eliminated from Manual for Courts-Martial as factors commanders should consider in disposition decisions (Sec 1708: implementation required by June 24, 2014)

Reforms (Pretrial Process)

6. Jurisdiction over charges of rape, sexual assault, forcible sodomy, or attempts to commit those offenses limited to GCMs (Sec 1705(b): applies to offenses committed on or after June 24, 2014)

7. GCM convening authorities' decisions not to refer charges for those offenses subjected to higher-level review (Sec 1744: AF implement immediately)

Fun with Grammar

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

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Sentencing reform

Reforms (Sentencing)

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

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Reforms to post-trial process

Reforms (Post-trial Process)

9. Victim given right to make post-trial submission to the convening authority (Sec 1706(a): AF on 24 Jun 14)

10. Convening authority prohibited from considering information about the victim's character that was not admitted at trial (Sec 1706(b): AF on 24 Jun 14)

Reforms (Post-trial Process)

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

- Qualifying offenses:
  - Findings –
    - Max confinement <2 yrs
    - Adjudged sentence = <6 mos confinement & no punitive discharge
    - Never for rape or SA (120), 120b, 125, other offenses specified by SecDef
  - Sentence – Adjudged sentence = <6 mos confinement & no punitive discharge
    - Exceptions – "substantial assistance" in investigation/prosecution of another accused
      – PTA (but for mandatory minimum, only to reduce DD to BCD)

Reforms to criminal law

Reforms (Criminal law)

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

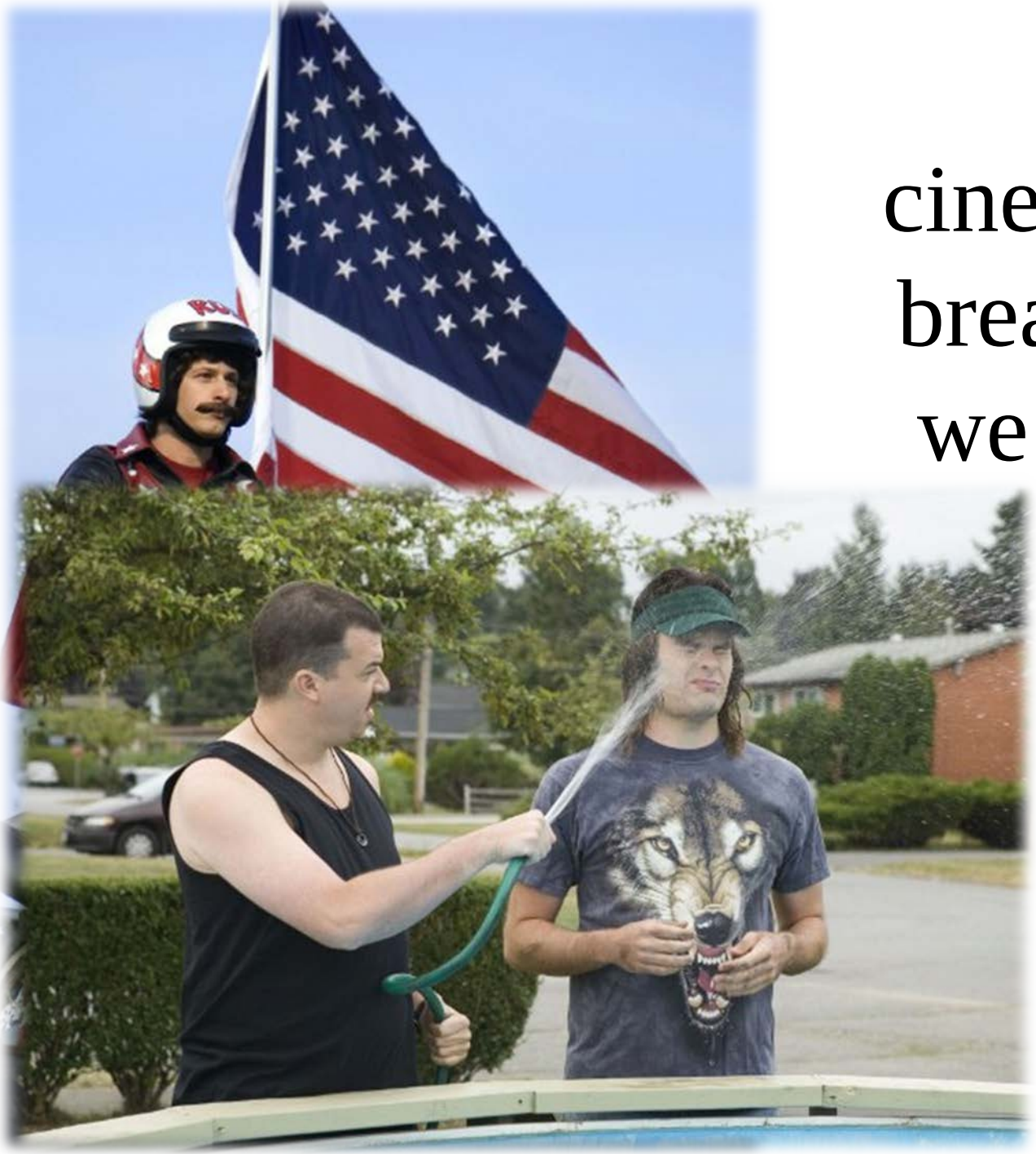
13. Consensual sodomy repealed as an offense (Sec 1707: applies to acts committed on or after December 26, 2013)

Reforms (Criminal law)

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

Reforms (Criminal law)

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



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

Headquarters U.S. Air Force

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SVCs, Mental Health Records, & FOIA Requests

U.S. AIR FORCE

Mental Health Records

- Victims' #1 concern=privacy

- "My privacy was completely violated. My SVC and I attempted to protect my privacy but it was violated repeatedly throughout the trial. The rapist's privacy however, was treated as the holy grail."

Mental Health Records

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

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Mental Health Records

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

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

Mental Health Records

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

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

Direct Request, or FOIA

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

Fun with Grammar

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

Headquarters U.S. Air Force

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Air Force Clemency & Parole Board

Mr. Bruce T. Brown

Secretary of the Air Force Personnel Council

May 21, 2014

SAF Personnel Council

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

"Do the right thing"

Needs of the Air Force

Rights of the Individual

Consistent, Fair, and Unbiased Decisions

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

AF C&PB Authorities

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

AF C&PB Snapshot

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

Basic Board Policies

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

Clemency and Parole Factors

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

Objectives of Parole

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

Personal Appearances

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

Personal Appearances

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

Presentations by Victims

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

AFC&PB Voting Members

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

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

- **PAROLE**

			PAROLE RATE FOR SEX OFFENDERS	
2011	32/94	34%	18/56	32%
2012	30/103	29%	19/71	27%
2013	15/94	16%	7/62	11%
2014	22/51	43%	12/36	33%

- **CLEMENCY**

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

- **MSR**

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

(as of May 21, 2014)

AF Clemency and Parole Board Points of Contact

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

DISCUSSION

- **Questions?**

Headquarters U.S. Air Force

Integrity - Service - Excellence

Understanding Your Client's Disciplinary Infractions

Maj Alex Rose

Capt Seth Dilworth

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Overview

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

Misconduct

- Collateral Misconduct
- Other Misconduct
- Seemingly Unrelated Misconduct

Rules

Rule 5. SCOPE OF REPRESENTATION – COLLATERAL MISCONDUCT

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

Rules

Rule 5. SCOPE OF REPRESENTATION – COLLATERAL MISCONDUCT

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

Rule 5.1. *Covered Collateral Misconduct.*

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

Misconduct

- Collateral Misconduct
- Other Misconduct
- Seemingly Unrelated Misconduct

Rules

Rule 5.2. *Referral of Victim to MDC.*

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

(a) *Victim Notification.* The SVC will inform the victim of the availability of MDC. The SVC will inform the victim that he or she will not initially serve as the victim's sole or lead counsel for purposes of collateral misconduct.

(b) *Victim Referral.* In the event that qualifying action is initiated or the victim indicates a desire to meet with MDC, the SVC will contact the servicing Senior Defense Counsel (SDC) or AFLOA/JAJD and provide the victim with the name and contact information for the detailed MDC.

Rules

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

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

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

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

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

Referral

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

Referral

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

Reasons to Involve Defense Counsel

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

Co-Representation

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

Co-Representation

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

Communication

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

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

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Communication

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

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Tips from the Field

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

Preventing Disclosure of Misconduct

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

Preventing Disclosure of Misconduct

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

Preventing Disclosure of Misconduct

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

Preventing Disclosure of Misconduct

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

Thinking Like a Defense Counsel

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

Client Preparation

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

Rules: Responding to Misconduct

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

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

Responses

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

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Questions?

Headquarters U.S. Air Force

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Lessons Learned

Capt Seth Dilworth

Special Victims' Counsel

Cannon AFB, NM

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Overview

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

Outreach & Preparation

- **Rape Crisis Centers**

Outreach & Preparation

- Rape Crisis Centers
- Mental Health

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Outreach & Preparation

- Rape Crisis Centers
- Mental Health
- Chaplain

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Outreach & Preparation

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

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Outreach & Preparation

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

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Outreach & Preparation

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

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Outreach & Preparation

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

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Outreach & Preparation

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

Phones Matter to Law Enforcement

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

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Phones Matter to Us

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

How Phones are Searched

- Cellebrite
- Consent vs. Probable Cause

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Phone Solutions

If search is not complete

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

Phone Solutions

If the search is complete

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

Client Participation

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

Client Participation – Article 32

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

Client Participation – Article 32

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

Client Participation

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

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

Client Participation

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

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

Client Participation

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

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

Client Participation

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

“Should” vs. Shall

Client Participation Solutions

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

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Client Participation Solutions

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

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Client Participation Solutions

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

- **Be conscious of immunity orders**

Scheduling: Article 32 Hearings

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

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Scheduling: Courts

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

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

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

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Self-Care

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

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Questions?

Headquarters U.S. Air Force

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SVC Rules of Practice and Procedure

Col Dawn Hankins
Chief, SVC Division
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I

This document contains internal matters that are deliberative in nature and/or are part of the agency decision-making process, both of which are protected from disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

Eligibility for SVC (Rule 1)

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

- **Air Force – AD/ARC (if incident occurred while in status)**
  - **The status of the perpetrator does not matter (Air Force, other service, civilian, or unknown)**
  - **AF members who are on AD, but were victims of sexual assault prior to enlistment or commissioning are NOT eligible**
- **Adult Dependents of AF Members**
  - **Perpetrator must be a military member**
  - **Must have been a dependent (or otherwise eligible) at the time of the offense**

Eligibility for SVC (Rule 1)

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

Referral Process (Rule 2)

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

Referral Responsibilities (Rule 2)

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

Rule 2.4 – SVCs Will Not Solicit Clients

Same rule as MDCs

Duration of Atty-Client Relationship (Rule 3.3)

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

Functional Relationship with SARC and FAP (Rule 3.4)

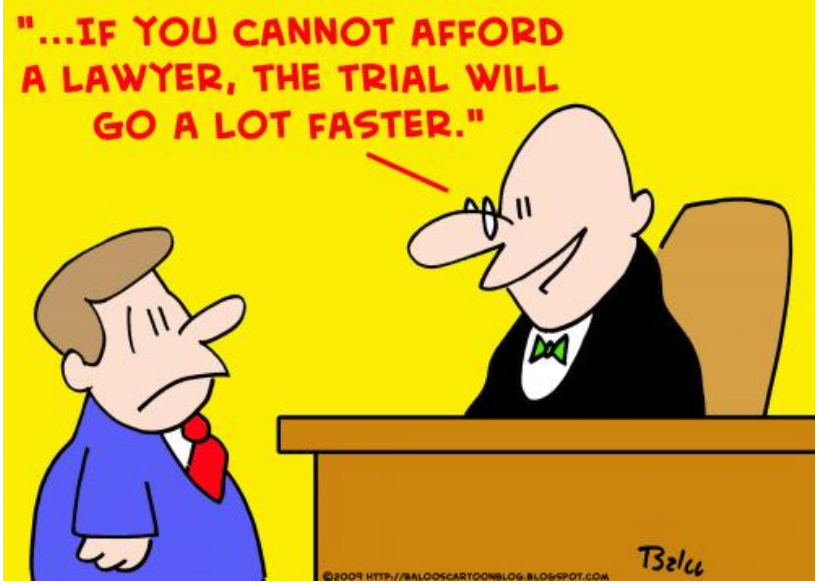
- The SARC serves as the installation's single point of contact for integrating and coordinating sexual assault victim care services.
- FAP fulfills this role for sexual assault victims who are in a domestic or intimate partner relationship.
- **The SJA is the legal advisor for the SARC and FAP.**
-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

Functional Relationship with VWAP(Rule 3.5)

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

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

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



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

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

Assert Article 6(b) rights

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

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

Notice of Representation (Rule 4.2)

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

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

Enhanced communications w/ TC

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

SVC Attendance at Interviews (Rule 4.3)

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

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

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

Entering an Appearance with Military Judge (Rule 4.5)

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

Access to Information (Rule 4.9)

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

Obtain 1168 from legal office (not OSI)

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

This rule may change soon…

Collateral Misconduct (Rule 5)

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

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

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

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

File a separate notice of representation for misconduct.

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

Advocacy to Civilian Agencies (Rule 6)

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

6.2 – May NOT represent victims in civilian courts

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

Interaction with Media (Rule 7)

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

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

AF Rules of Professional Conduct Apply (Rule 8)

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Questions?

SCENARIO B

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

For the Victim:

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

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

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

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

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

Possible questions you might want to eventually ask:

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

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

For evaluator, possible critique topics:

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

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

b. Were they perceptive enough to realize and ask about the secret data. They needed as much information as possible to advise properly. Students should proceed with due consideration for Capt Prescott's mental state, but he or she needs to spend the necessary time to make Capt Prescott comfortable and be forward enough to elicit all relevant information in order to understand Capt Prescott's position and goals for representation.

c. Did they understand that this was no longer a restricted report? "Any report of a sexual assault made through normal reporting channels, including the victim's chain of command, law enforcement, and the AFOSI or other criminal investigative service is considered an unrestricted report." AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program*, 29 Sep 08, Certified Current 14 Oct 10, para 3.2. Since this has now been reported to OSI, it is now an unrestricted report. Capt Prescott should understand that his/her desires regarding what should happen with the case, while they must be solicited and considered, are not determinative of the disposition of the case. Moreover, Capt Prescott should be made to understand that, although there are controls in place to prevent certain types of disclosures of information within and outside of the government, he/she does not ultimately control the information or what happens to it.

d. Did they discuss laws protecting information privacy? The student should explain FOIA and the Privacy Act as they relate to law enforcement investigations. Specifically, FOIA generally prevents disclosure to third parties of information gathered for law enforcement purposes (commonly referred to as Exemption 7), and the Privacy Act precludes disclosure of, inter alia, personally identifiable information to third parties. However, neither of these is airtight, improper disclosure does occur sometimes, and non-agency persons (such as the friends to whom Capt Prescott divulged some information) are not covered by either act in their personal capacities.

e. Did they consider or take any contrary positions about what might ultimately be good for this person in an attempt to fully reason toward a possible outcome? Was it really in this person's best interests not to go forward? There may be no correct answer but the person should consider and evaluate alternatives. The student should fully inform, to the extent possible, Capt Prescott regarding the possible consequences of trying not to go forward

with the case and the possibility that, despite his/her wishes, the government may choose to proceed anyway. In that case, it is possible that Capt Prescott could be ordered to comply with the investigation and even to give testimony at a hearing or trial. Alternatively, Capt Prescott should be made aware of difficulties related to going forward with a charge like this, including possible embarrassment and discovery of his/her bisexuality. As always, the SVC informs and advises, but the decision for the course to pursue is up to the client, and the SVC supports the client within the bounds of the law.

f. Did they explain how they might intervene to prevent any further action in the case? The government is required to consult with and notify the victim at various stages of the military justice process. See, SVC Rules of Practice and Procedure, paras 6.1(a) and (b); see also AFI 51-201, paras 7.11.3 and 7.11.7. After fully informing and advising Capt Prescott, the student should ascertain Capt Prescott's goals and discuss avenues available to work toward the achievement of those goals. Probably the most important step is to make the legal office and the relevant decision authorities aware of Capt Prescott's desire that the case not go forward and be dealt with as discreetly as possible.

g. Did they make any promises to achieve a specific result? Again, the victim is not a party to the prosecution and is not the disposition authority for the case; no representation of ultimate results or promises of specific outcomes should be made.

SCENARIO C

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

For the Victim

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

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

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

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

Possible questions you might want to eventually ask:

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

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

Instructor Notes:

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

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

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

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

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

3. Why are my mental health records even relevant?

4. How can others get them?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. What do you think I should do?

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

SCENARIO D

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

CHARGE I: Violation of the UCMJ, Article 120

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

CHARGE II : Violation of the UCMJ, Article 125

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

For the Victim

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

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

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

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

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

Possible questions you might want to eventually ask:

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

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

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

Instructor Notes:

1. What does Charge I mean when it says "causing bodily harm?"

2. Why didn't they charge him with rape instead of sexual assault?

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

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

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

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

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

4. What do they mean exactly by "without consent?"

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

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

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

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

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

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

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

9. Can you get me in trouble?

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

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

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

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

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

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

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

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

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

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

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

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

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

SCENARIO E

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

For the Victim

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

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

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

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

Possible questions you should eventually ask:

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

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

For evaluator:

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

Possible critique topics:

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

AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program*

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

AFI 36-6001, *Sexual Assault Prevention and Response (SAPR) Program*

c. Did the student offer realistic options for the victim?
    i. The options available to the member is to report restricted or unrestricted. The main thing for the student to understand is that SrA Eccelston should be fully informed before making her decision. Therefore, the student should at least mention the criminal liability and suggest talking to a military defense counsel. The student should also explain the court-martial process and what it means to initiate a sexual assault investigation.
    ii. Options given by the student should include making a restricted report, making an unrestricted report, and it should be explained that SrA Eccelston can always decide later to change her report from restricted to unrestricted. However, it is important to explain the potential impact that delayed reporting can have on the outcome of a legal action against SSgt Walker.

d. Did the student consider or guess at the degree of consequences this person might face? Given this unknown, did they offer the full range of potential outcomes?
    i. The student should consult with the subject matter expert on the degree of criminal liability SrA Eccelston could face, the SDC. Even after SrA Eccelston says she only wants to talk to one lawyer and trusts the advice of her SVC, the SVC should consult the SDC to ensure his/her understanding of the consequences is sound.
    ii. The student should discuss the range of potential punishments for SrA Eccelston's actions in Afghanistan which could range from an LOR to a potential (albeit unlikely) court-martial.

e. Did the student consider the possibility of seeking immunity for the victim or did the student make improper suggestions to hide information or lie?
    i. In discussing potential options for the victim, the SVC should weight the factors and look for solutions that best fit the interests of the victim. One possible solution would be to request immunity from the government for minor offenses before revealing the identity of the victim. Immunity can only be offered by the General Court-Martial Convening Authority (GCMCA) and the government may require an offer of proof.

RCM 704; AFI 51-201, *Military Justice Administration*, Section 6C.

f. Did the student understand the delineations between the role of defense counsel and the role of the SVC under the charter? Did they advise the client of their own lack of expertise, the MDC's subject matter expertise and advise them to speak with the MDC?

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

g. Did the student consider the best interests of the victim and weigh what might be her long term interests in her potential decisions to either prosecute and endure some fallout to her career or to sweep everything under the rug and simply get therapy?

   i. One of the reasons to collaborate with defense counsel is that each party has their own expertise. The defense counsel might be focused on avoiding criminal liability at all costs; however, the SVC can balance those competing interests against the victim's interest in seeking justice against the perpetrator.

   ii. The SVC is also in a unique position to evaluate and consider the mental strength and psychological impact of going through the court-martial process and whether that is truly in the long term best interests of the victim.

SCENARIO F

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

For the Victim

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

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

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

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

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

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

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

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

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

Possible questions you should eventually ask:

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

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

For evaluator Possible critique topics:

a. Did the student handle the victim appropriately and with respect? The student's primary concern should be the client – the client's well being and working to achieve the client's goals. Professionalism and respect are paramount in ascertaining the facts, especially when the information related by the client is difficult to believe.

b. Did the student explain what the phone search does? Most AFOSI detachments will plug the phone into the Cellbrite machine and extract all cell phone data, including messages, websites visited, and Facebook posts. A way to avoid that is to take pictures of it, but if a judge is convinced there is still data out there, the judge can order a search of the phone. The student can discuss requesting an *in camera* review by the judge if that happens. Another option is to have the legal office subpoena the phone records to show call logs, text logs (not content), and times data were sent.

c. Did the student recognize that counter intuitive behaviors were at play? To the extent that A1C Wallace is not aware that many people harbor stereotypes about how a victim of a sexual assault would react, the student may choose to inform her that many people, to include prosecutors, commanders, and panel members, have preconceived notions regarding how a victim would behave that might be obstacles to her being believed. For example, many people believe a victim would immediately fight or run to end the assault. Some people have particular attitudes regarding alcohol and partying which might cause them to fault A1C Wallace for putting herself in a compromising situation or even believe that since she was a willing participant in alcohol consumption and partying, she likely consented to sex as well. Some might think that a victim would immediately report to the authorities and submit to medical and forensic examination. They might believe a victim would be so devastated by the assault that he or she would not be able to go along with the crowd and would choose not to even if he or she could. In particular, many people would believe that a victim would not text the perpetrator the following day. Whether these preconceived notions should be addressed (and whether they should be addressed at this time) depends on how the conversation goes and the mental state of the client.

d. Did the student explain the procedure for MRE 412 evidence and help the student evaluate whether the prior assault would be relevant? Whether it's relevant may not be as important as keeping this information protected so she does not have to disclose it to other parties. A possible procedure is to only disclose the information in a closed MRE 412 hearing. Even if the counsel for either side learns about the information, the victim can request to only disclose it in the MRE 412 hearing. The student should be careful not to guarantee a specific outcome or that the information would be completely protected.

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

SCENARIO G

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

For the Victim

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

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

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

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

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

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

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

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

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

For evaluator Possible critique topics:

a. Did the student handle the victim appropriately and with respect? The student's primary concern should be the client – the client's well being and working to achieve the client's goals. Professionalism and respect are paramount in ascertaining the facts, especially when the information related by the client is difficult to believe.

b. Did the student focus on the client's goals or try to dissuade her/him? The student's role is to support, inform and advise; ultimately the client determines the goals of representation. The student needs to inform the client of likely difficulties and obstacles in this case but should not be judgmental of the client or dismissive of the case.

c. Did they recognize that they could help their client explain themselves by helping them with phrasing and presentation versus recommending any unethical approaches? Students should never encourage a client to say anything that is untrue. Explaining stereotypes and preconceived notions can help prepare the client to explain behaviors and reactions that may initially seem counterintuitive. Helping the client think through their feelings and their reactions gives them the opportunity to voice his or her explanations in a setting where his or her words will not be used against them and where perceived inconsistencies can be inquired into without being attacked.

d. Did they explain the various courses of action the Victim could take or did they just tell her/him what to do? SVC should recognize that they can only advise and the decision ultimately lies with the client. As a military member, the Victim could be ordered to speak to law enforcement. If he/she refuses she could receive disciplinary action. While the SVC may be comfortable opining about the likelihood of giving a sexual assault victim paperwork, the SVC should make clear that it can, and has happened and the SVC cannot make any guarantees that this would not happen. Additionally the client should be advised that lying to military law enforcement could be considered a false official statement under Art 107. Thus refusing to cooperate is a calculated risk that ultimately the client must decide.

e. Did they explain what the SVC can do if the Victim decides not to participate? Possible courses of action include speaking with AFOSI to say the victim will not be participating further in the investigation. AFOSI will likely ask for a memo from the victim stating this, and the SVC can help with this memo. The SVC can also write a memo advocating to the legal office and convening authority not to go forward, if that is what the victim chooses. The SVC can cite DoDI 6495.02, Enclosure 4, para. 1.c., which states:

   "The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command. If at any time the victim who originally chose the Unrestricted Reporting option declines to participate in an investigation or prosecution, that decision should be honored in accordance with this subparagraph."

f. If the victim decides to participate, the SVC can explain the court-martial process. The SVC can explain that the SVC will be with the victim at every point in the investigation, including interviews, the Article 32 hearing, and trial.

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **SSgt Taylor Johnson** **28th Aircraft Maintenance Squadron** **Ellsworth AFB, South Dakota** **(ACC)**	**RESPONSE TO NOTICE TO REVIEW MENTAL HEALTH RECORDS AND VICTIM ADVOCATE RECORDS PURSUANT TO MRE 513/514** **21 May 2014**

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

FACTS

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

LAW

2. MRE 513 provides as follows:

Rule 513. Psychotherapist-patient privilege

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

***

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

1) The patient is dead;

2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

3) When federal law, state law, or service regulation imposes a duty to report information;

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

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

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

7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation

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

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

5. MRE 514 provides as follows:

Rule 514. Victim advocate-victim privilege

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

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

1) when the victim is dead;

2) when Federal law, State law, or service regulation imposes a duty to report information contained in a communication;

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

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

5) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or

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

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

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

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

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

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **SSgt Taylor Johnson** **28th Aircraft Maintenance Squadron** **Ellsworth AFB, South Dakota** **(ACC)**	**RESPONSE TO NOTICE TO PRESENT EVIDENCE PURSUANT TO MRE 412** **21 May 2014**

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

FACTS

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

LAW

2. MRE 412 "is provides as follows:

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

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

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

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

(b) *Exceptions.*

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

these rules:

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

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

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

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **Capt John Walters** **28th Maintenance Squadron** **Ellsworth AFB, South Dakota** **(ACC)**	**RESPONSE TO NOTICE TO REVIEW MENTAL HEALTH RECORDS PURSUANT TO MRE 513** **21 May 2014**

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

FACTS

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

LAW

2. MRE 513 provides as follows:

> Rule 513. Psychotherapist-patient privilege
>
> (a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.
>
> ***

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

1) The patient is dead;

2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

3) When federal law, state law, or service regulation imposes a duty to report information;

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

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

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

7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation

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

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

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

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

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

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

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

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

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

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

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

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

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **Capt John Walters** **28th Maintenance Squadron** **Ellsworth AFB, South Dakota** **(ACC)**	**RESPONSE TO NOTICE TO PRESENT EVIDENCE PURSUANT TO MRE 412** **21 May 2014**

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

FACTS

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

LAW

2. MRE 412 "is provides as follows:

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

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

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

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

(b) *Exceptions.*

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

these rules:

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

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

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

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **Cadet Steven Turner** **Cadet Squadron 99** **United States Air Force Academy, CO**	**RESPONSE TO NOTICE TO REVIEW MENTAL HEALTH RECORDS AND VICTIM ADVOCATE RECORDS PURSUANT TO MRE 513/514** **21 May 2014**

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

FACTS

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

LAW

2. MRE 513 provides as follows:

> Rule 513. Psychotherapist-patient privilege
>
> (a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.
>
> ***

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

1) The patient is dead;

2) Evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

3) When federal law, state law, or service regulation imposes a duty to report information;

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

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

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

7) When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation

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

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

5. MRE 514 provides as follows:

Rule 514. Victim advocate-victim privilege

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

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

1) when the victim is dead;

2) when Federal law, State law, or service regulation imposes a duty to report information contained in a communication;

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

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

5) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or

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

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

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

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

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

UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA **v.** **Cadet Steven Turner** **Cadet Squadron 99** **United States Air Force Academy, CO**	**RESPONSE TO NOTICE TO PRESENT EVIDENCE PURSUANT TO MRE 412** **21 May 2014**

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

FACTS

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

LAW

2. MRE 412 "is provides as follows:

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

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

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

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

(b) *Exceptions.*

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

these rules:

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

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

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

***

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

* * *

Respectfully submitted this 21st day of May 2014.

IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

CERTIFICATE OF SERVICE

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

////IWR 21 May 2014///
IWANNA REPRESENT, Capt, USAF
Special Victims' Counsel

THE JUDGE ADVOCATE GENERAL'S SCHOOL

INTERMEDIATE SEXUAL ASSAULT LITIGATION COURSE (ISALC)

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Maj Mark Rosenow
SVU, Chief of Policy & Coordination
Senior Trial Counsel
AFLOA/JAJG

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Victim Advocates and Counsel

Victim Advocates and Counsel

- **<u>LRM v. Kastenberg</u>, 72 M.J. 364 (C.A.A.F. 2013)**
  - **Alleged victim represented by SVC.**
  - **At arraignment, SVC attempted to reserve alleged victim's right to present argument through counsel at a later 412 or 513 hearing.**
  - **MJ limited alleged victim's right to be heard to factual matters, finding no standing to move the court for relief.**
  - **Alleged victim filed an extraordinary writ.**
  - **AFCCA denied on jurisdictional grounds. TJAG certified the issue to CAAF for review.**
  - **<u>Holding</u>: CAAF reversed AFCCA and held that "to be heard" means through counsel. MJ can place "reasonable" restrictions on role of the SVC.**

Victim Advocates and Counsel

- U.S. v. Brown, 72 M.J. 359 (C.A.A.F. 2013)
  - Appellant was convicted of multiple 120 specs against a child.
  - MJ allowed a victim advocate to sit next to the 17 year-old alleged victim during testimony.
  - The ADC objected.
  - NMCCA affirmed the findings and sentence.
  - Holding: CAAF affirmed, finding that the MJ did not abuse his discretion under MRE 611(a).

Victim Advocates and Counsel

- **<u>Take-Aways</u>:**
  - **M.R.E. 412 and M.R.E. 513 (M.R.E. 514) give an alleged victim the right to be heard.**
  - **The right to be heard includes the right to be heard through counsel.**
  - **SVCs can represent their clients in court and make legal arguments to the MJ.**
  - **The MJ can place "reasonable" limits on the role of the SVC.**
  - **M.R.E. 412 and M.R.E. 513 (M.R.E. 514) do not create a right to legal representation or the right to appeal an adverse evidentiary ruling.**

Lesser Included Offenses (LIOs)

LIOs

- **"Strict" elements test – MCM listing of LIOs is persuasive only, elements control.**
- **U.S. v. Jones, 68 M.J. 465 (C.A.A.F. 2010)**
  - **Charged with rape (Article 120) but convicted of indecent act (Article 134).**
  - **CAAF says they are returning to strict elements test to determine if a crime is a lesser included offense.**
  - **Holding: Indecent acts is not LIO of rape because they have different elements.**

LIOs

- U.S. v. Alston, 69 M.J. 214 (C.A.A.F. 2010)
  - What we meant in Jones is that we really don't have a strict elements test.
  - Accused charged with rape by force by "using strength sufficient she could not escape sexual conduct".
  - The MJ instructed on LIO of aggravated sexual assault over an ADC objection.
  - Holding: Aggravated sexual assault IS a proper LIO of rape…
    - Even though not listed as LIO in MCM.
    - Court applied common and ordinary understanding of words in statute to reach conclusion.
    - Indictment elements test – Court looked at both charge sheet and statutory elements.

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LIOs

- U.S. v. Jones, 68 M.J. 465 (C.A.A.F. 2010)
  Indecent acts is not an LIO of rape.
- U.S. v. Alston, 69 M.J. 214 (C.A.A.F. 2010)
  Aggravated sexual assault is an LIO of rape.
- U.S. v. Aguilar, 70 M.J. 563 (A.F. Ct. Crim. App. 2011)
  Assault consummated by a battery is an LIO of rape.
- U.S. v. Bonner, 70 M.J. 1 (C.A.A.F. 2011)
  Assault consummated by battery is an LIO of wrongful sexual contact.
- U.S. v. Pittman, 2011 WL 6010897 (A.F. Ct. Crim. App.)
  Wrongful sexual contact is an LIO of Aggravated sexual contact.

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LIOs

- U.S. v. McLean, 70 M.J. 573 (A.F. Ct. Crim. App. 2011) Aggravated assault is an LIO of maiming.
- U.S. v. Arriaga, 70 M.J. 51 (C.A.A.F. 2012) Housebreaking is an LIO of burglary.
- U.S. v. Daulton, 72 M.J. 83 (C.A.A.F. 2013) Involuntary manslaughter is an LIO of unpremeditated murder.

LIOs

- **Take-Aways:**
  - **Charge all reasonably raised and necessary crimes.**
  - **Additional crimes are NOT alternative crimes.**
  - **Article 134 offenses are NEVER LIOs of enumerated crimes.**
  - **The MJ has a duty to instruct on all LIO's:**
    - **Even if you don't want them…**
    - **Unless Accused affirmatively waives the instruction.**
    - **Before trial, search for possible LIOs of all charged offenses to make sure the MJ instructs properly.**

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Article 134

Article 134

- **U.S. v. Fosler, 70 M.J. 225 (C.A.A.F. 2011)**
  - **Appellant was JROTC instructor who had sex with a 16 year-old female high school student.**
  - **Charged with adultery under Article 134. Specification failed to allege the terminal element.**
  - **Appellant pled not guilty.**
  - **ADC objected to the form of the 134 specification.**
  - **Objection was overruled.**
  - **Convicted as charged.**
  - **Holding: It was reversible error to fail to allege all the elements of the offense, including the terminal element.**

Article 134

- **U.S. v. Ballan, 71 M.J. 28 (C.A.A.F. 2012)**
  - **Appellant engaged in a variety of sexual misconduct with his 3 biological children, all under 12 years old.**
  - **Charged with multiple Article 120, 125, and 134 (indecent acts and indecent liberties) offenses.**
  - **The Article 134 offenses failed to allege the terminal element.**
  - **Appellant pled guilty pursuant to PTA.**
  - **Holding: It was error to fail to allege the terminal element, but harmless because it was a guilty plea and it was covered during the Care inquiry.**

Article 134

- **U.S. v. Humphries, 71 M.J. 209 (C.A.A.F. 2011)**
  - **Appellant had sex with a woman while her husband was deployed.**
  - **Charged with rape, forcible sodomy, communicating threat, and adultery. The Article 134 offenses did not allege the terminal element.**
  - **Appellant pled not guilty.**
  - **ADC did not object to the form of the Article 134 offenses.**
  - **Convicted of consensual sodomy and adultery.**
  - **Holding: It was error to fail to allege the terminal element. The error was prejudicial because there was no evidence in the record that Appellant was on notice of the elements.**
  - **Dissent: What about the 32 report?**

Article 134

- **<u>Take-Aways</u>:**
  - **Expressly charge the terminal element.**
  - **Realize that sample specifications may be legally insufficient under current case law.**
  - **Actually look at your evidence and choose either “service discrediting” or “prejudicial to good order and discipline”.**
  - **If you can’t decide which part of the terminal element to charge, use “and” instead of “or”.**
  - **Really, expressly charge the terminal element.**

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Charging State Law Crimes

Charging State Law Crimes

- **U.S. v. Hayes, 71 M.J. 112 (C.A.A.F. 2012)**
  - **Add-on charge of "Underage Drinking" (under Article 92) in drug case did not allege the source of duty to "refrain from drinking alcohol while under the age of 21".**
  - **At trial, government presented to evidence of the duty to obey the state (Nevada) drinking law.**
  - **Holding: "Article 92(3) requires proof of certain military duties, it does not assume such duties." In other words, without proof, the military duty to follow state law is not presumed.**

Charging State Law Crimes

- **Take-Aways:**
  - **Know the state law at issue.**
  - **If there is a military duty to obey the state law, prove it.**
  - **Consider charging violations of state law via Article 134. *But see* United States v. Merritt, 72 M.J. 483 (C.A.A.F. 2013) (multiple state laws—but not a majority– making viewing child pornography illegal was insufficient to establish notice for a general Art. 134 offense)**

U.S. AIR FORCE

False Official Statements

False Official Statements

- **U.S. v. Spicer, 71 M.J. 470 (C.A.A.F. 2013)**
  - **Article 107 applies to "statements affecting *military functions.*"**
    - **The speaker is making the statement in the line of duty.**
    - **The speaker makes a statement to civilian law enforcement that bears "a clear and direct relationship" to the speaker's official duties.**
    - **The hearer is a military member "carrying out a military duty".**
    - **The hearer is a civilian who is performing a military function at the time the speaker makes the statement.**
  - **Holding: False exculpatory statement by active duty father to civilian police officers about child abuse allegations were false, but not official.**

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False Official Statements

- **U.S. v. Capel, 71 M.J. 485 (C.A.A.F. 2013)**
  - **Decided shortly after Spicer and used the same methodology.**
  - **Holding: False exculpatory statement to civilian police officer about using a stolen debit card was not made "pursuant to any specific military duties".**
- **Take-Aways:**
  - **What is an official statement involving civilians is a fact-sensitive inquiry.**
  - **Most statements to civilian authorities are not false "official" statements under Article 107.**
  - **Potential exceptions:**
    - **AAFES employees.**
    - **Joint investigations.**

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False Official Statements

- **U.S. v. Passut, 73 M.J. 27 (C.A.A.F. 2013)**
  - **While attempting to cash checks at an AAFES shoppette, Accused made false statements to a civilian AAFES employee about his social security number and damage to his CAC card**
  - **The hearer, an AAFES employee cashing checks, qualified as a civilian necessarily performing a military function because AAFES is a joint, nonappropriated fund instrumentality of DoD, whose profits are fed back into service-related MWR programs**
  - **Holding: Statements made to a civilian AAFES employee responsible for cashing checks were official for the purposes of Article 107**

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Multiplicity and Unreasonable Multiplication of Charges (UMOC)

Multiplicity and UMOC

- **U.S. v. Campbell, 71 M.J. 19 (C.A.A.F. 2012)**
  - **Appellant stole meds from the medical clinic where he worked by inputting incorrect information into the dispensing machine.**
  - **He was charged with making a false official statement, possession of controlled substances, and larceny of military property.**
  - **The ADC challenged the charges based on multiplicity and UMOC.**
  - **The MJ did not dismiss or merge any charges in findings.**
  - **Appellant was found guilty of all charges.**
  - **In sentencing, the MJ merged the charges and capped the sentence.**
  - **Holding: The MJ did not abuse his discretion.**

Multiplicity and UMOC

- **Multiplicity**
  - **Aimed at protecting against double-jeopardy.**
  - **Use the <u>Blockburger/Teeters</u> elements-test:**
    - **Has Congress expressly stated that one offense is multiplicious with another offense?**
    - **If not, Congress's intent can be inferred from the elements of the offenses themselves**
  - **Exists only in findings.**
  - **The remedy for multiplicity is dismissal.**

Multiplicity and UMOC

- **Unreasonable Multiplication of Charges**
  - **Rooted in R.C.M. 307(c)(4).**
  - **Based on "reasonableness".**
  - **Use the Quiroz factors:**
    - **Did the Accused object at trial?**
    - **Is each charge aimed at distinctly separate criminal acts?**
    - **Does the number of charges misrepresent the Accused's criminality?**
    - **Does the number of charges unreasonable increase the punitive exposure?**
  - **Can exist in findings and sentencing.**
    - **Dismissal is a remedy in findings.**
    - **Merging is a remedy in sentencing.**

Multiplicity and UMOC

- **Take-Aways:**
  - **This area of the law has been fraught with confusion.**
  - **The Court is not unanimous in its clarification of multiplicity and unreasonable multiplication of charges (see Stucky's dissent).**
  - **The MJ has wide discretion in applying Blockburger/ Teeters and Quiroz.**
  - **Know what you are charging and WHY you are charging it.**
  - **Be able to articulate why each charge and specification is important.**
  - **Be prepared for charges to survive but sentences to merge.**

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Searches

Searches

- **U.S. v. Dease, 71 M.J. 116 (C.A.A.F. 2012)**
  - **Facts:**
    - **16 June: Accused consented to UA.**
    - **21 June: ADC revokes consent via form letter.**
    - **26 July: Government shipped urine specimen for testing.**
    - **11 Aug: Government learned that Accused's urine specimen tested positive for cocaine.**
    - **26 Aug: Accused informed of results of 1st UA. He consented to a second UA, gave consent to search his dorm, and made a statement.**
  - **At trial:**
    - **ADC filed motion to suppress the 1st UA and all derivative evidence.**
    - **The MJ granted the motion.**
  - **Holding: There is a continued privacy interest in urine that is voluntarily surrendered for analysis, and consent to search can be revoked at any time. All evidence was excluded.**

Searches

- **U.S. v. Wicks, 73 M.J. 93 (C.A.A.F. 2014)**
  - **Facts:**
    - **MTI case: Girlfriend of ACC stole ACC's iPhone and searched through his messages; saw inappropriate texts between ACC and trainees; notified SFS (but did not mention that she stole the iPhone)**
    - **SFS investigator browsed through messages on iPhone, discovered messages between ACC and trainees**
    - **Legal office repeatedly advised SFS not to obtain a search authorization**
  - **Holding: ACC maintained a reasonable expectation of privacy in his phone. SFS improperly exceeded scope of girlfriend's initial private search (absent information as to the extent of the initial search). *But see* United States v. Jacobsen, 466 U.S. 109 (1984).**

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Searches

- **Take-Aways:**
  - **Get OSI to send stuff to the lab ASAP.**
  - **If you get a revocation of consent letter, memorialize what evidence you have at that time.**
  - **Continue to aggressively work investigation AFTER consent to build record for probable cause/inevitable discovery:**
    - **UA: Toxicology screen by base clinic.**
    - **DRUGS: Field testing by OSI.**
    - **Electronic Media: Mirror the drive.**
    - **DNA: Build investigation to establish probable cause.**
  - **If you have probable cause to search, go get a search authorization or a warrant.**

Confrontation Clause

Confrontation Clause

- **U.S. v. Blazier II, 69 M.J. 218 (C.A.A.F. 2010)**
  - **Experts May**
    - **Rely on and repeat admissible non-hearsay machine-generated data.**
    - **Rely on work of others at lab, but must form own independent expert opinion.**
  - **Experts May Not**
    - **Repeat inadmissible testimonial hearsay.**
    - **Convey the expert testimonial hearsay of others.**
  - **Holding: Machine-generated printouts and documents are non-testimonial statements.**

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Confrontation Clause

- **U.S. v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011)**
  - **DD Form 2624 (specimen custody document) contains a certification from a lab official verifying the lab procedures and test results.**
  - **Holding: Admission of the certification of the DD Form 2624 violated the Confrontation Clause because it is like an affidavit.**
- **U.S. v. Tearman, 72 M.J. 54 (C.A.A.F. 2013)**
  - **Chain-of-custody documents and internal worksheets:**
    - **Are substantially different from certification statements.**
    - **Lack certified "substantive information;" they contain only routine and objective cataloguing of unambiguous factual matters.**
    - **Lacked sufficient "formality".**
  - **Holding: Documents were non-testimonial and therefore admissible.**

Confrontation Clause

- **U.S. v. Katso, __ M.J. __ (A.F. Ct. Crim. App. 2014)***
  - **DNA testimony (non-UA case): "Surrogate" expert, who did not personally perform the initial portions of a DNA test, testified about the processes involved in the DNA test used against the ACC**
  - **DNA expert's testimony mixed fact testimony (what another expert from the lab accomplished), with opinion testimony (the testifying expert's own independent statistical testing and conclusions)**
  - **Holding: Expert could not form an independent conclusion that the known DNA in the analysis he reviewed came from ACC, and it was improper for expert to repeat testimonial statements contained within another expert's report—namely, that the DNA profile found on the evidentiary samples from VIC came from ACC**

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Confrontation Clause

- **Take-Aways for UA Cases:**
  - **DTR cover page (Blazier I)**
  - **DD Form 2624 certification (Sweeney)**
  - **Machine generated data (Blazier II)**
  - **Chain-of-custody/internal worksheets (Tearman)**
  - **Mixing factual information not independently known by the testifying expert with expert opinion (Katso)**
  - **Strip down your DTR to just machine-generated data, chain of custody documents, and internal worksheets. Have expert use that data to form an independent opinion.**
- **Note that substituting expert testimony in DNA and other forensic testing cases may create confrontation concerns that do not exist in UA cases.**

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***Bickel* Testing**

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Bickel Testing

- U.S. v. Ayala, 69 M.J. 63 (C.A.A.F. 2010)
  - SJA memo to WG/CC had litigation rationale for instituting Bickel policy (SJA wanted to avoid naked UA cases and increase convictions).
  - WG/CC policy letter stated all the "right" M.R.E. 313 reasons (security, military fitness, good order & discipline).
  - Bickel policy challenged at trial.
  - WG/CC provided affidavit reciting appropriate M.R.E. 313 principles.
  - Holding: CAAF found clear and convincing evidence that purpose for the Bickel policy was valid (e.g. not litigation).
- Take-Away: Primary purpose of Bickel policy must be M.R.E. 313, not securing convictions at trial.

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M.R.E. 412
&
M.R.E. 413

M.R.E. 412

- **U.S. v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011)**
  - **ADC wanted to use emails to show that the alleged victim was sexually active and had reason to lie.**
  - **MJ allowed ADC to cross-examine the alleged victim about the connection between the emails and a medical examination, but did not permit questioning on the substance of the emails.**
  - **Holding: M.R.E. 412 cannot limit "constitutionally required" evidence, but MJ did not abuse his discretion.**
- **U.S. v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011)**
  - **ADC wanted to cross-examine alleged victim about a previous extra-marital affair she had.**
  - **MJ would not allow that line of questioning.**
  - **Holding: MJ abused his discretion. Findings were set aside.**

M.R.E. 412

- **Take-Away:**
  - **The analysis under M.R.E. 412(b)(3) has been streamlined:**
    - **Is the evidence relevant?**
    - **Is the evidence material?**
    - **Does the probative value outweigh the danger of unfair prejudice?**
  - **Current M.R.E. 412 analysis eliminates the concern for the alleged victim's privacy. Constitutionally required evidence "is admissible no matter how embarrassing it might be."**

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M.R.E. 413

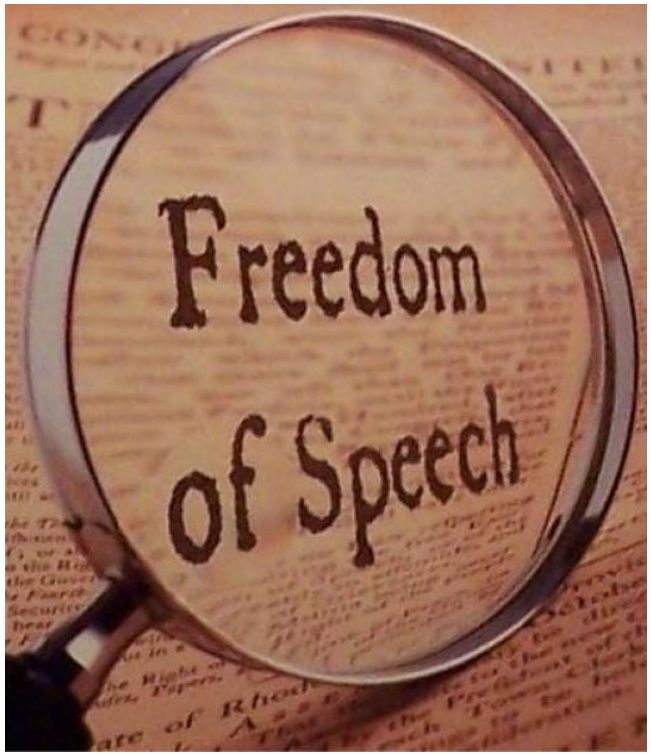
- United States v. Solomon, 72 M.J. 176 (C.A.A.F. 2013)
  - Government sought to introduce evidence of prior incidents under M.R.E. 413. Accused presented evidence that he had been acquitted of charges relating to the previous incident, and he also presented alibi evidence relating to the prior situation.
  - Three threshold requirements for admitting evidence under M.R.E. 413

    (1) Accused must be charged with an offense of a sexual assault

    (2) Proffered evidence must be evidence of the accused's commission of another offense of sexual assault

    (3) The evidence must be relevant under M.R.E. 401 and 402
  - If threshold is met, MJ must then apply a balancing test under M.R.E. 403
  - Holding: MJ abused his discretion by admitting evidence under M.R.E. 413 of prior sexual assaults, of which Accused was acquitted, without applying or articulating a balancing test under M.R.E. 403

Child Pornography



Child Pornography

- U.S. v. Barberi, 71 M.J. 127 (C.A.A.F. 2012)
  - Government alleged possession of "child pornography" under Article 134 (clauses 1 and 2).
  - MJ instructed the members based on the federal statute definitions and the Dost factors.
  - Members delivered general verdict of guilt based on 6 images of Accused's 12 year-old step-daughter emerging nude from a shower.
  - Holding:
    - Using the language of the charge and the MJ's instructions, 4 of 6 images were "constitutionally protected" because they were not "lascivious".
    - The general verdict of guilt could not survive because a basis for deciding guilt was constitutionally protected speech.
  - Under certain circumstances, constitutionally protected conduct could still be punished under Article 134.

Child Pornography

- U.S. v. Piolunek, 2013 WL 5878614 (A.F. Ct. Crim. App.)*
  - Government alleged receipt and possession of "visual depictions of a sexually explicit nature of a minor child" under Article 134 (clauses 1 and 2).
  - MJ *said* he was taking the elements from the specification, but he *actually* instructed based largely on the federal statute.
  - Members delivered general verdict of guilt based on 22 images of a 14 year-old girl topless, nude, and masturbating with a hairbrush.
  - Holding:
    - Using the language of the charge and the MJ's instructions, 3 of the 22 images were "constitutionally protected" because they were not "lascivious".
    - Although error for MJ to admit the 3 "constitutionally protected" images, general verdict of guilt could stand based on quantity of the remaining images, the quality of the images, and the surrounding circumstances.

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Child Pornography

- **Take-Aways:**
  - **Know the difference between CP and "child erotica."** *See, e.g.*, **United States v. Warner, 73 M.J. 1 (C.A.A.F. 2013) (ACC did not have fair notice under state or federal law that possession of images depicting minors as sexual objects or in sexually suggestive way, without depicting nudity, was subject to criminal sanction--charging under Art. 134(1) or (2) improper).**
  - **Actually review all of your evidence and make conservative charging decisions based on what is actually CP.**
  - **List the charged images in the specification so that:**
    - **The members or the judge can make findings by exceptions.**
    - **The appellate courts know what images formed the basis of the conviction.**
  - **Try to use non-CP images as M.R.E. 404(b) evidence.**

U.S. AIR FORCE

Demeanor Evidence

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Demeanor Evidence

- **Salinas v. Texas, 133 S. Ct. 2174 (2013)**
  - **Accused was being investigated for murder. During a noncustodial interrogation, Accused answered questions.**
  - **When asked, "Will the ballistics test show that the shells match your gun?" the Accused did not answer.**
  - **At trial, government introduced evidence of Accused's demeanor as evidence of guilt:**
    - **Looked down at the floor.**
    - **Shuffled his feet.**
    - **Bit his bottom lip.**
    - **Began to "tighten up".**
  - **Holding: Where an accused does not invoke his right to silence, his silence (demeanor) can be used against him as evidence of guilt.**

Demeanor Evidence

- **Take-Aways:**
  - **May have limited applicability in the military due to the stricter requirements of Article 31 versus Miranda.**
  - **Is limited to cases where there was no invocation of rights.**
  - **Does not open the door to generally excludable "human lie detector" testimony. *See* U.S. v. Knapp, 73 M.J. 33 (C.A.A.F. 2014).**
  - **Can be a powerful tool in the right case.**

Unlawful Command Influence (UCI)

UCI

- 7 May 13: “I have no tolerance for this. … I expect consequences. . . . If we find out somebody is engaging in this stuff, they've got to be held accountable – prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.” – President Obama
- 6 Aug 13: “Central to military justice is the trust that those involved in the process base their decisions on their independent judgment. . . . There are no expected or required dispositions, outcomes, or sentences in any military justice case.” – Secretary Hagel

UCI

- UCI: The "mortal enemy" of military justice.
- Article 37 prohibits convening authorities and anybody subject to the UCMJ from wrongfully influencing the outcome of a court-martial.
  - Accusatory UCI: Accuser disqualification, coercion in preferral, unlawful pressure to make certain recommendations in transmittal process.
  - Adjudicative UCI: Unlawful influence in the trial process, such as tampering with members, witnesses, or evidence.
- Were the President's comments UCI? Open question yet to be answered. In the meantime…

UCI

- Actual UCI: Literal efforts to influence a proceeding.
- Apparent UCI: Perception of fairness in the military justice system as viewed by a reasonable member of the public.
- Defense initial threshold (some evidence):
  - Certain facts, if true, constitute UCI, and;
  - Alleged UCI has a potential to cause unfairness in the proceedings.
- Government burden (beyond a reasonable doubt):
  - The facts do not exist, or;
  - The facts do not constitute UCI, or;
  - The UCI will not prejudice the proceedings, findings, or sentence.

UCI

- **Trial procedure:**
  - **The ADC has opportunity to meet the initial UCI threshold .**
  - **If the ADC meets the initial UCI threshold, the government should then be given the opportunity to meet its burden.**
- **Curative options:**
  - **Independent Article 32 I.O.s with thorough reports.**
  - ***Specific* affidavits from the preferral and referral authorities. *See* U.S. v. Mobley, 2013 WL 6913318 (A.F. Ct. Crim. App. 2013)**
  - **Voir dire the MJ and the court-members.**
- **Take-Aways:**
  - **Do not let the ADC disqualify members or witnesses by introducing UCI.**
  - **Fight for the opportunity to rebut the ADC's evidence.**

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Collateral Consequences

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Collateral Consequences

- **U.S. v. Talkington, 73 M.J. 212 (C.A.A.F. 2013)**
  - **Appellant touched the victim's breasts and penetrated her vagina while he believed that she was sleeping, and thus substantially incapable of declining participation.**
  - **At the court-martial, in his unsworn statement during sentencing, Appellant stated: "I will have to register as a sex offender for life… I am not very sure what sort of work I can find."**
  - **Holding: The collateral consequences of a court-martial do not constitute R.C.M. 1001 material, and while they may be referenced in an unsworn statement, they should not be considered for sentencing.**
  - **Take-Aways:**
    - **Extending the holding to convictions and limiting argument**

Collateral Consequences

- **U.S. v. Talkington, 73 M.J. 212 (C.A.A.F. 2013)**
  - **The objected to instruction:**
  - **"However, as a general evidentiary matter, evidence regarding possible registration as a sex offender or the potential of an administrative discharge, and the consequences thereof, would be characterized as a collateral consequences [sic], and thus inadmissible outside of the context of an unsworn statement. This is so because your duty in sentencing is to adjudge an appropriate sentence for this accused, under these facts, in accordance with my instructions. Possible collateral consequences of the sentence, beyond those upon which you are instructed, should not be a part of your deliberations other than as I have earlier discussed."**

U.S. AIR FORCE

Collateral Consequences

- **U.S. v. Talkington, 73 M.J. 212 (C.A.A.F. 2013)**
  - **The objected to instruction (cont.):**
  - **"As to sex offender registration requirements, they may differ between jurisdictions such that registration requirements, and the consequences thereof, are not necessarily predictable with any degree of accuracy. Even if such requirements were predictable, whether or not the accused will be or should be registered as a sex offender and whether he will be or should be administratively discharged is not a matter before you. Rather, determining an appropriate sentence for this accused, in accordance with my instructions, is your charge. In short, use of this limited information is fraught with problems. Therefore, after due consideration of the unsworn statement and my prior instructions [on] the nature of an unsworn statement, the consideration and weight you give."**

U.S. AIR FORCE

Appellate Posture at Trial

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Appellate Posture at Trial

- **Place reasons for objections on the record.**
- **If you have multiple viable theories of admissibility, litigate them on the record.**
- **Proffers are NOT evidence. Evidence is evidence.**
- **Request written findings of fact after the MJ has ruled.**
- **Make sure the MJ conducts M.R.E. 403 balancing tests on the record.**
- **Capture R.C.M. 802 conferences on the record.**
- **When the ADC waives a right, try to get that waiver on the record.**
- **It is <u>your job</u> to protect the record. When in doubt, speak up.**

U.S. AIR FORCE

Conclusion

- **Victim Advocates and Counsel**
- **Lesser Included Offenses**
- **Article 134**
- **Charging State Law Crimes**
- **False Official Statements**
- **Multiplicity and Unreasonable Multiplication of Charges**
- **Searches**

U.S. AIR FORCE

Conclusion

- **Confrontation Clause**
- **Bickel Testing**
- **M.R.E. 412 and M.R.E. 413**
- **Child Pornography**
- **Demeanor Evidence**
- **Unlawful Command Influence**
- **Collateral Consequences**
- **Appellate Posture at Trial**

Headquarters U.S. Air Force

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Questions?

Call JAJG at
DSN 612.4800
Comm 240.612.4800

THE JUDGE ADVOCATE GENERAL'S SCHOOL

INTERMEDIATE SEXUAL ASSAULT LITIGATION COURSE (ISALC)

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DEPARTMENT OF THE AIR FORCE
THE AIR FORCE JUDGE ADVOCATE GENERAL'S SCHOOL

MEMORANDUM FOR INTERMEDIATE SEXUAL ASSAULT LITIGATION COURSE, EAST, 14-A ATTENDEES

FROM: The Judge Advocate General's School

SUBJECT: Course Narrative Schedule, 3 – 5 February 2014

This schedule is designed to assist you in preparing for each hour of instruction. All lectures will be conducted at The Judge Advocate General's (JAG) School, Bldg 694, Room 111, Cheney Auditorium unless otherwise indicated. Advocacy Exercises will be conducted in the courtrooms. During advocacy exercises you will play the role of trial or defense counsel as assigned. ***It is essential that you prepare in advance for all exercises***. Duty uniform for the course is ABUs. Classes will start promptly at the times indicated. Students must be seated and prepared for each period. Any absences must be reported immediately to the course director or the JAG School front office at 334-953-2802.

MONDAY, 3 FEBRUARY 2014

0800-0830 **WELCOME REMARKS AND ADMINISTRATIVE MATTERS**
Col Kenneth M. Theurer, Commandant, JAG School
Capt Alex J. Rose, Course Director, Military Justice Division, JAG School
Capt Adam D. Bentz, Co-Course Director, Military Justice Division, JAG School

0830-0920 **JAJG/WASHINGTON DC PERSPECTIVE; STC – SVU INFRASTRUCTURE AND PROCEDURES (TC/SVC) (Large Courtroom)**
Lieutenant Colonel Brian Thompson, Chief, Senior Trial Counsel - SVU, Government Trial and Appellate Counsel Division JAJG, Joint Base Andrews, MD
Maj Jennifer Holmes, Senior Trial Counsel – Special Victims Unit, Chief of Policy and Coordination, Joint Base Andrews, MD

0830-0920 **JAJD PERSPECTIVE; CURRENT ISSUES IN SEXUAL ASSAULT CASES (DC)**
Col Daniel J. Higgins, Chief, Trial Defense Division, Joint Base Andrews, MD
Lt Col Julie Pitvorec, Chief, Senior Defense Counsel, Joint Base Andrews, MD

0920-0930 **BREAK**

0930-1015 **VICTIM INTERVIEW (TC/SVC) (Large Courtroom)**
Maj Holmes and OSI Agent

1015-1050 **ADVOCACY EXERCISE (TC/SVC) – FETI INTERVIEW OF VICTIM (Courtrooms)**
Maj Holmes, Capt Jacob Ramer and Capt Dane Horne, Senior Trial Counsel, Maxwell AFB, AL

0930-1020 **COMPLAINING WITNESS INTERVIEWS (DC)**
Maj Will Babor, Senior Defense Counsel, Joint Base Andrews, MD

1020-1050 **TRIAGING CASES AND WORKLOAD (DC)**
Maj Babor

1050-1100 **BREAK**

1100-1200 **WORKING WITH OSI (TC/SVC) (Large Courtroom)**
Maj Homes and OSI Agent

1100-1200 **VOIR DIRE AND UCI IN SEXUAL ASSAULT CASES (DC)**
Capt Andrew Norton, Senior Defense Counsel, Joint Base Langley-Eustis, VA

1200-1300 **LUNCH (TC/DC)**

1300-1345 **CHARGING ARTICLE 120 CRIMES (TC) (Large Courtroom)**
Maj Holmes

1345-1420 **CHARGING EXERCISE (TC) (Large Courtroom)**
Maj Holmes, Capt Ramer, and Capt Horne

1300-1420 **DISCOVERY – OVERVIEW OF BRADY/GIGLIO/JENCKS ACT (SVC) (Small Courtroom)**
Capt Luke Spencer, Special Victims' Counsel, Hurlburt Field, FL

1300-1350 **COLLATERAL CONSEQUENCES (DC)**
Maj Babor

1350-1420 **POST TRIAL ISSUES IN SEXUAL ASSAULT CASES (DC)**
Maj Dominic S. Angiollo, Senior Defense Counsel, Joint Base Charleston, SC

1420-1430 **BREAK**

1430-1500 **MOTION PRACTICE IN SEXUAL ASSAULT CASES (TC/SVC) (Large Courtroom)**
Capt Horne

1430-1500 **MOTION PRACTICE IN SEXUAL ASSAULT CASES (DC)**
Maj Angiollo

1500-1510 **BREAK**

1510-1620 **LITIGATING MRE 412-413 ISSUES (TC/SVC) (Large Courtroom)**
Capt Ramer

1510-1620 **LITIGATING MRE 412-413 ISSUES (DC)**
Maj Angiollo & Capt Vicki Marcus, Senior Defense Counsel, Hurlburt Field, FL

1800-2000 **ICEBREAKER** (PAY AS YOU GO)
La Zona Rosa Mexican Restaurant
2838 Zelda Rd
Montgomery, AL

TUESDAY, 4 FEBRUARY 2014

0750-0800 **ADMINISTRATIVE UPDATE (TC/DC/SVC)**
Capt Rose

0800-0850 **MRE 413 MOTION EXERCISE FROM MANCINI CASE (TC/SVC)**
Assigned Rooms and Faculty

0800-0850 **SPEEDY TRIALS & PLEAS (DC)**
Capt Marcus

0850-0900 **BREAK**

0900-0950 **CHARACTER EVIDENCE (TC/DC/SVC)**
Capt Rose

0950-1000 **BREAK**

1000-1050 **CHARACTER EVIDENCE DRILLS (TC/DC/SVC)**
Assigned Rooms and Faculty

1050-1100 **BREAK**

1100-1130 **AIR FORCE CLEMENCY & PAROLE (TC) (Large Courtroom)**
Capt Rose and Capt Bentz

1100-1130 **TECHNOLOGY IN THE COURTROOM (DC)**
Capt Norton

1100-1200 **INTERACTING WITH THE MEDIA (SVC) (Small Courtroom)**
Col Dawn Hankins, Chief, Special Victims' Counsel Program,
Joint Base Andrews, MD
Major Robert Wilder, Deputy Chief, Special Victims' Counsel Program,
Joint Base Andrews, MD

1130-1200 **WORKING WITH SENIOR TRIAL COUNSEL (TC) (Large Courtroom)**
Capt Ramer and Capt Horne

1130-1200 **WORKING WITH SENIOR DEFENSE COUNSEL (DC)**
Col Higgins and SDC Panel

1200-1300 **LUNCH**

1300-1430 **THEME BUILDING IN SEXUAL ASSAULT CASES (TC/SVC) (Large Courtroom)**
Lt Col Thompson, Maj Holmes, Capt Ramer, and Capt Horne

1300-1430 **OPENING/CLOSING IN SEXUAL ASSAULT CASES (DC)**
Lt Col Pitvorec, and Capt Mike O'Mara, Senior Defense Counsel, Maxwell AFB, AL

1430-1440 **BREAK**

1440-1540 **EFFECTIVE CROSS EXAMINATION (TC/SVC) (Large Courtroom)**
Lt Col Thompson

1440-1540 **EFFECTIVE CROSS EXAMINATION (DC)**
Lt Col Pitvorec, Capt Marcus, and Capt O'Mara

1540-1550 **BREAK**

1550-1630 **SEXUAL ASSAULT LAW APPELLATE UPDATE (TC/DC/SVC)**
Capt Horne

WEDNESDAY, 5 FEBRUARY 2014

0750-0800 **ADMINISTRATIVE UPDATE (TC/DC/SVC)**
Capt Rose

0800-0850 **EXPERTS IN SEXUAL ASSAULT CASES (TC/SVC) (Large Courtroom)**
Dr. Nancy Slicner, Forensic Psychologist

0800-0825 **WORKING WITH SPECIAL VICTIM'S COUNSEL (DC)**
Capt Norton and Capt Benjamin H. DeYoung, Special Victims' Counsel,
Dover AFB, DE

0825-0850	**SENTENCING IN SEXUAL ASSAULT CASES (DC)** Capt Norton
0850-0900	**BREAK**
0900-0950	**EXPERTS IN SEXUAL ASSAULT CASES (DC)** Dr. Slicner
0900-0950	**WORKING WITH SPECIAL VICTIMS' COUNSEL (TC/SVC) (Large Courtroom)** Capt Bentz and Capt Natasha Fitzsimmons, Special Victims' Counsel, Joint Base McGuire-Dix-Lakehurst, NJ
0950-1000	**BREAK**
1000-1050	**ENHANCING THE SENTENCING CASE (TC/SVC) (Large Courtroom)** Capt Horne
1000-1050	**EXPERTS IN SEXUAL ASSAULT CASES WORKSHOP (DC)** Dr. Slicner & SDCs
1050-1100	**BREAK**
1100-1200	**PROFESSIONAL RESPONSIBILITY AND THE LITIGATOR (TC/DC/SVC)** Maj Tracy Park, Professional Outreach Division, JAG School
1200-1215	**END OF COURSE CRITIQUE**

KENNETH M. THEURER, Colonel, USAF
Commandant

DEPARTMENT OF THE AIR FORCE

THE AIR FORCE JUDGE ADVOCATE GENERAL'S SCHOOL

MEMORANDUM FOR INTERMEDIATE SEXUAL ASSAULT LITIGATION COURSE, EUROPE, 14-B ATTENDEES

FROM: The Judge Advocate General's School

SUBJECT: Course Narrative Schedule, 28 – 30 April 2014

This schedule is designed to assist you in preparing for each hour of instruction. All lectures will be conducted at The USAFE Conference Center (UCC), building 306A, Ramstein AB, Germany. Room assignments for all instruction and exercises will be posted at the UCC. During advocacy exercises you will play the role of trial or defense counsel as assigned. ***It is essential that you prepare in advance for all exercises***. Duty uniform for the course is ABUs. Classes will start promptly at the times indicated. Students must be seated and prepared for each period. Any absences must be reported immediately to the course directors, Maj Alex Rose or MAJ Adam Kersey.

MONDAY, 28 APRIL 2014

0800-0830 **WELCOME REMARKS AND ADMINISTRATIVE MATTERS**
Maj Alex J. Rose, Course Director, Military Justice Division, JAG School
MAJ Adam W. Kersey, Course Director, Military Justice Division, JAG School

0830-0920 **JAJG/WASHINGTON DC PERSPECTIVE; STC – SVU INFRASTRUCTURE AND PROCEDURES (TC/SVC)**
Instructors: Col Don Christensen, Chief, Government Trial and Appellate Counsel Division (JAJG), Joint Base Andrews, MD and Lt Col Brian Thompson, Chief, Senior Trial Counsel – SVU (JAJG), Joint Base Andrews, MD

0830-0920 **JAJD PERSPECTIVE; CURRENT ISSUES IN SEXUAL ASSAULT CASES (DC)**
Instructors: Col Daniel J. Higgins, Chief, Trial Defense Division, Joint Base Andrews, MD and Lt Col Julie Pitvorec, Chief, Senior Defense Counsel, Joint Base Andrews, MD

0920-0930 **BREAK**

0930-1015 **VICTIM INTERVIEW (TC/SVC)**
Instructor: Lt Col Thompson

1015-1050 **ADVOCACY EXERCISE (TC/SVC) – FETI INTERVIEW OF VICTIM**
Instructors: Col Christensen, Lt Col Thompson, Maj Benjamin A. Beliles and Capt Jeremey D. Gehman, Senior Trial Counsel, Ramstein AB, Germany

0930-1050 **COMPLAINING WITNESS INTERVIEWS AND FETI INTERVIEW TECHNIQUES (DC)**
Instructors: Maj Shane A. McCammon, Senior Defense Counsel, Lakenheath AB, United Kingdom (lead instructor), with Maj Reggie D. Yager, Senior Defense Counsel, Ramstein AB, Germany, and Maj Andrew Norton, Senior Defense Counsel, Joint Base Langley-Eustis, VA

1050-1100 **BREAK**

1100-1200 **WORKING WITH OSI (TC/SVC)**
Instructors: Maj Beliles and Capt Gehman

1100-1130 **OVERVIEW OF SEXUAL ASSAULT CASES (DC)**
Instructors: Col Higgins and Lt Col Pitvorec

1130-1200 **REVERSE ENGINEERING THE SEXUAL ASSAULT CASE (DC)**
Instructor: Lt Col Pitvorec

1200-1300 **LUNCH (TC/DC/SVC)**

1300-1345 **CHARGING ARTICLE 120 CRIMES (TC)**
Instructor: Lt Col Thompson

1345-1420 **CHARGING EXERCISE (TC)**
Instructors: Lt Col Thompson, Maj Beliles and Capt Gehman

1300-1420 **DISCOVERY – OVERVIEW OF BRADY/GIGLIO/JENCKS ACT (SVC)**
Instructor: Col Dawn Hankins, Chief, Special Victims' Counsel Program, Joint Base Andrews, MD

1420-1430 **BREAK (TC/SVC)**

1430-1500 **MOTION PRACTICE IN SEXUAL ASSAULT CASES (TC/SVC)**
Instructor: Capt Gehman

1300-1450 **MOTION PRACTICE IN SEXUAL ASSAULT CASES: UCI; MREs 412, 413, AND 513 (DC)**
Instructor: Maj Yager

1450-1500 **BREAK (DC)**

1500-1530 **VOIR DIRE IN SEXUAL ASSAULT CASES (DC)**
Instructors: Maj Norton (lead), with Maj Yager and Maj McCammon

1500-1510 **BREAK (TC/SVC)**

1510-1620 **LITIGATING MRE 412-413 ISSUES (TC/SVC)**
Instructor: Maj Beliles

1530-1600 **OPENING STATEMENTS IN SEXUAL ASSAULT CASES (DC)**
Instructor: Maj Norton

1600-1610 **BREAK (DC)**

1610-1700 **SPEEDY TRIALS AND PLEAS (DC)**
Instructor: Maj Yager

1620-1630 **BREAK (SVC)**

1630-1700 **COMMUNICATING WITH CONVENING AUTHORITIES, SJAs AND AFOSI (SVC)**
Instructor: Col Hankins

1830-2030 **ICEBREAKER**
Deutches Haus Restaurant
Ramstein AB, Germany

TUESDAY, 29 APRIL 2014

0750-0800 **ADMINISTRATIVE UPDATE (TC/DC/SVC)**
Maj Rose

0800-0850 **MRE 413 MOTION EXERCISE FROM MANCINI CASE (TC/SVC)**
Assigned Rooms and Faculty

0800-0850 **EFFECTIVE CROSS EXAMINATIONS (DC)**
Instructors: Maj McCammon (lead), with Maj Yager and Maj Norton

0850-0900 **BREAK**

0900-0930 **CHARACTER EVIDENCE (TC/DC/SVC)**
Instructor: Maj Rose

0930-0940 **BREAK**

0940-1030 **CHARACTER EVIDENCE DRILLS (TC/DC/SVC)**
Assigned Rooms and Faculty

1030-1040 **BREAK**

1040-1110 **AIR FORCE CLEMENCY & PAROLE (TC/SVC)**
Instructor: Ms. Paula McCarron, Chief, Clemency, Corrections and Officer Review Division, Joint Base Andrews, MD

1040-1200 **CLOSING ARGUMENT AND USE OF TECHNOLOGY IN THE COURTROOM (DC)**
Instructors: Maj Norton (lead), with Maj Yager and Maj McCammon

1110-1200 **INTERACTING WITH THE MEDIA (SVC)**
Instructor: Col Hankins

1110-1200 **WORKING WITH SENIOR TRIAL COUNSEL (TC)**
Instructors: Maj Beliles and Capt Gehman

1200-1300 **LUNCH**

1300-1430 **THEME BUILDING IN SEXUAL ASSAULT CASES (TC)**
Instructors: Col Christensen, Lt Col Thompson, Maj Beliles and Capt Gehman

1300-1430 **CASE MANAGEMENT, REGIONAL RESPONSIBILITES, CASE DEBRIEFS AND UTILIZING THE REGIONAL SVP (SVC)**
Instructor: Col Hankins

1300-1345 **COLLATERAL CONSEQUENCES (DC)**
Instructor: Lt Col Pitvorec

1345-1430 **POST TRIAL ISSUES (DC)**
Instructor: Maj Yager

1430-1440 **BREAK**

1440-1530 **SEXUAL ASSAULT LAW APPELLATE UPDATE (TC/DC/SVC)**
Instructor: Col Christensen

1530-1540 **BREAK (TC/DC/SVC)**

1540-1630 **EFFECTIVE CROSS EXAMINATION (TC/SVC)**
Instructor: Col Christensen

1540-1630 **AIR FORCE CLEMENCY AND PAROLE (DC)**
Instructor: Ms. McCarron

WEDNESDAY, 30 APRIL 2014

0750-0800 **ADMINISTRATIVE UPDATE (TC/DC/SVC)**
Maj Rose

0800-0920 **EXPERTS IN SEXUAL ASSAULT CASES (DC)**
Instructor: Dr. James Meredith, Forensic Psychologist

0800-0850 **WORKING WITH SPECIAL VICTIMS' COUNSEL (TC/SVC)**
Instructors: Maj Belilies and Capt Micah L. Smith, Special Victims' Counsel, RAF Lakenheath, United Kingdom

0850-0900 **BREAK (TC/SVC)**

0900-0950 **ENHANCING THE SENTENCING CASE (TC/SVC)**
Instructor: Capt Gehman

0920-0930 **BREAK (DC)**

0930-1020 **WORKING WITH SPECIAL VICTIM'S COUNSEL (DC)**
Instructors: Maj Yager and Capt Kelly J. Adams, Special Victims' Counsel, Ramstein AB, Germany

0950-1000 **BREAK (TC/SVC)**

1000-1050 **EXPERTS IN SEXUAL ASSAULT CASES (TC/SVC)**
Instructor: Dr. Meredith

1020-1050 **SENTENCING (DC)**
Instructor: Maj McCammon

1050-1100 **BREAK**

1100-1200 **PROFESSIONAL RESPONSIBILITY AND THE LITIGATOR (TC/DC/SVC)**
Instructor: Maj Rose

1200-1215 **END OF COURSE CRITIQUE**

KENNETH M. THEURER, Colonel, USAF
Commandant

DEPARTMENT OF THE AIR FORCE
THE JUDGE ADVOCATE GENERAL'S SCHOOL

APR 29 2014

MEMORANDUM FOR INTERMEDIATE SEXUAL ASSAULT LITIGATION COURSE, 14-C ATTENDEES

FROM: The Judge Advocate General's School

SUBJECT: Course Narrative Schedule, 12 – 14 May 2014

This schedule is designed to assist you in preparing for each hour of instruction. All lectures will be conducted at the Bob Hope Theater at JBSA-Lackland AFB, TX. During advocacy exercises you will play the role of trial or defense counsel as assigned. ***It is essential that you prepare in advance for all exercises***. Duty uniform for the course is ABUs. Classes will start promptly at the times indicated. Students must be seated and prepared for each period. Any absences must be reported immediately to the course directors, Maj Matt Talcott or Capt Alexander Lowry.

MONDAY, 12 MAY 2014

0800-0830 **WELCOME REMARKS AND ADMINISTRATIVE MATTERS**
Maj Matt D. Talcott, Course Director, Military Justice Division, JAG School
Capt Alexander L. Lowry, Course Director, Military Justice Division, JAG School

0830-0920 **JAJG/JAJD PERSPECTIVE: CURRENT ISSUES IN SEXUAL ASSAULT (TC/SVC)**
Instructors: Maj Jennifer Holmes, Special Victims Unit—Chief of Policy & Coordination, Government Trial and Appellate Counsel Division (JAJG), JB-Andrews, MD and Maj Mark Rosenow, Senior Trial Counsel – SVU (JAJG), JBSA-Randolph Air Force Base, TX

0830-0920 **JAJD PERSPECTIVE: CURRENT ISSUES IN SEXUAL ASSAULT CASES (DC)**
Instructors: Col Daniel J. Higgins, Chief, Trial Defense Division, JB-Andrews, MD and Lt Col Tobin Griffeth, Chief Senior Defense Counsel, JBSA-Randolph Air Force Base, TX

0920-0930 **BREAK (TC/DC/SVC)**

0930-1015 **VICTIM INTERVIEW (TC/SVC)**
Instructor: Maj Holmes

0930-1050 **COMPLAINING WITNESS INTERVIEWS AND FETI INTERVIEW TECHNIQUES (DC)**
Instructors: Maj Antoinette Quinn, Senior Defense Counsel, Sheppard Air Force Base, TX and Maj Elizabeth Hernandez, Senior Defense Counsel, Barksdale Air Force Base, LA

1015-1050 **ADVOCACY EXERCISE (TC/SVC) – FETI INTERVIEW OF VICTIM**
Instructors: Maj Holmes, Maj Rosenow and Capt Jason E. Gammons, Senior Trial Counsel – SVU (JAJG) JBSA-Randolph Air Force Base, TX

1050-1100 **BREAK (TC /DC/ SVC)**

1100-1200 **WORKING WITH OSI (TC/SVC)**
Instructors: Maj Rosenow and Capt Gammons

1100-1130 **OVERVIEW OF SEXUAL ASSAULT CASES (DC)**
Instructor: Maj Ja-Rai Williams, Senior Defense Counsel, Peterson Air Force Base, CO

1130-1200 **TRIAGING CASES AND WORKLOAD (DC)**
Instructor: Maj Sabala, Senior Defense Counsel, JBSA-Lackland Air Force Base, TX

1200-1300 **LUNCH (TC/DC/SVC)**

1300-1345 **CHARGING ARTICLE 120 CRIMES (TC)**
Instructor: Maj Holmes

1345-1420 **CHARGING EXERCISE (TC)**
Instructors: Major Holmes, Maj Rosenow and Capt Gammons

1300-1420 **DISCOVERY – OVERVIEW OF BRADY/GIGLIO/JENCKS ACT (SVC)**
Instructor: Capt Lauren Rosenblatt, Special Victims' Counsel, JBSA-Lackland Air Force Base, TX

1420-1430 **BREAK (TC/SVC)**

1430-1500 **MOTION PRACTICE IN SEXUAL ASSAULT CASES (TC/SVC)**
Instructor: Capt Gammons

1300-1450 **MOTION PRACTICE IN SEXUAL ASSAULT CASES: UCI, MREs 412, 413, AND 513 (DC)**
Instructors: Maj Jerrold R. Black, Senior Defense Counsel, Offutt Air Force Base, NE and Maj Rick Colaw, Senior Defense Counsel, Tinker Air Force Base, OK

1450-1500 **BREAK (DC)**

1500-1530 **VOIR DIRE IN SEXUAL ASSAULT CASES (DC)**
Instructor: Maj Hernandez

1500-1510 **BREAK (TC/SVC)**

1510-1620 **LITIGATING MREs 412-413 ISSUES (TC/SVC)**
Instructor: Maj Rosenow

1530-1600 **OPENING STATEMENTS IN SEXUAL ASSAULT CASES (DC)**
Instructor: Maj Black

1600-1610 **BREAK (DC)**

1610-1700 **SPEEDY TRIALS AND PLEAS (DC)**
Instructor: Maj Ja-Rai Williams

1620-1630 **BREAK (SVC)**

1630-1700 **COMMUNICATING WITH CONVENING AUTHORITIES, SJAs AND AFOSI (SVC)**
Instructor: Col Dawn Hankins, Chief, Special Victims' Counsel Program, JB-Andews, MD

1830-2030 **ICEBREAKER**

TUESDAY, 13 MAY 2014

0750-0800 **ADMINISTRATIVE UPDATE (TC/DC/SVC)**
Instructor: Maj Talcott

0800-0850 **MRE 413 MOTION EXERCISE FROM MANCINI CASE (TC/SVC)**
Assigned Rooms and Faculty

0800-0850 **EFFECTIVE CROSS EXAMINATIONS (DC)**
Instructor: Lt Col Griffeth and Maj Hernandez

0850-0900 **BREAK (TC/DC/SVC)**

0900-0930 **CHARACTER EVIDENCE (TC/DC/SVC)**
Instructor: Maj Talcott

0930-0940 **BREAK (TC/DC/SVC)**

0940-1030	**CHARACTER EVIDENCE DRILLS (TC/DC/SVC)** Assigned Rooms and Faculty
1030-1040	**BREAK (TC/DC/SVC)**
1040-1110	**AIR FORCE CLEMENCY & PAROLE (TC/SVC)** Instructor: Ms. Paula McCarron, Chief, Clemency, Corrections and Officer Review Division, JB-Andrews Air Force Base, MD
1040-1200	**CLOSING ARGUMENT AND USE OF TECHNOLOGY IN THE COURTROOM (DC)** Instructors: Maj Quinn and Maj Williams
1110-1200	**INTERACTING WITH THE MEDIA (SVC)** Instructor: Col Hankins
1110-1200	**WORKING WITH SENIOR TRIAL COUNSEL (TC)** Instructors: Maj Holmes, Maj Rosenow, and Capt Gammons
1200-1300	**LUNCH (TC/DC/SVC)**
1300-1430	**THEME BUILDING IN SEXUAL ASSAULT CASES (TC)** Instructors: Maj Holmes, Maj Rosenow, and Capt Gammons
1300-1430	**CASE MANAGEMENT, REGIONAL RESPONSIBILITES, CASE DEBRIEFS AND UTILIZING THE REGIONAL SVP (SVC)** Instructors: Col Hankins, Capt Aaron Kirk, Special Victims' Counsel, JBSA-Lackland Air Force Base, TX, and TSgt Isabel Brooks, Special Victims' Counsel Paralegal, JBSA-Lackland Air Force Base, TX
1300-1345	**COLLATERAL CONSEQUENCES (DC)** Instructor: Ms. McCarron
1345-1430	**POST TRIAL ISSUES (DC)** Instructor: Maj Sabala
1430-1440	**BREAK (TC/DC/SVC)**
1440-1530	**SEXUAL ASSAULT LAW APPELLATE UPDATE (TC/DC/SVC)** Instructor: Capt Gammons
1530-1540	**BREAK (TC/DC/SVC)**
1540-1630	**EFFECTIVE CROSS EXAMINATION (TC/SVC)** Instructor: Maj Rosenow

1540-1630 **AIR FORCE CLEMENCY AND PAROLE (DC)**
Instructor: Ms. McCarron

WEDNESDAY, 14 MAY 2014

0750-0800 **ADMINISTRATIVE UPDATE (TC/DC/SVC)**
Instructor: Maj Talcott

0800-0920 **EXPERTS IN SEXUAL ASSAULT CASES (DC)**
Instructor: Dr. Nancy Slicner, Forensic Psychologist and Major Colaw

0800-0850 **WORKING WITH SPECIAL VICTIMS' COUNSEL (TC/SVC)**
Instructors: Maj Holmes and Capt Lorraine M. Sult, Special Victims' Counsel, Peterson Air Force Base, CO

0850-0900 **BREAK (TC/SVC)**

0900-0950 **ENHANCING THE SENTENCING CASE (TC/SVC)**
Instructor: Maj Rosenow

0920-0930 **BREAK (DC)**

0930-1020 **WORKING WITH SPECIAL VICTIM'S COUNSEL (DC)**
Instructors: Maj Sabala and Capt Amanda K. Snipes, Special Victims' Counsel, Peterson Air Force Base, CO

0950-1000 **BREAK (TC/SVC)**

1000-1050 **EXPERTS IN SEXUAL ASSAULT CASES (TC/SVC)**
Instructor: Dr. Slicner

1020-1050 **SENTENCING (DC)**
Instructor: Maj Black

1050-1100 **BREAK (TC/DC/SVC)**

1100-1200 **PROFESSIONAL RESPONSIBILITY AND THE LITIGATOR (TC/DC/SVC)**
Instructor: Capt Lowry

1200-1215 **END OF COURSE CRITIQUE**

KENNETH M. THEURER, Colonel, USAF
Commandant

DEPARTMENT OF THE AIR FORCE
THE AIR FORCE JUDGE ADVOCATE GENERAL'S SCHOOL

22 MAY 2014

MEMORANDUM FOR INTERMEDIATE SEXUAL ASSAULT LITIGATION COURSE, CONUS WEST, 14-D ATTENDEES

FROM: The Judge Advocate General's School

SUBJECT: Course Narrative Schedule, 2-4 June 2014

This schedule is designed to assist you in preparing for each hour of instruction. All lectures will be conducted at Nellis AFB Officer's Club, Nellis AFB, NV. Room assignments for all instruction and exercises will be provided on the first day of class, Monday, 2 June. During advocacy exercises you will play the role of trial or defense counsel as assigned. ***It is essential that you prepare in advance for all exercises***. Duty uniform for the course is ABUs. Classes will start promptly at the times indicated. Students must be seated and prepared for each period. Any absences must be reported immediately to the course directors, Maj Adam Bentz or MAJ Adam Kersey.

MONDAY, 2 JUNE 2014

0800-0830 **WELCOME REMARKS AND ADMINISTRATIVE MATTERS**
MAJ Adam Kersey, Course Director, Military Justice Division, JAG School and Maj Adam Bentz, Course Directors, Military Justice Division, JAG School

0830-0910 **JAJG PERSPECTIVE: CURRENT ISSUES IN SEXUAL ASSAULT (TC/SVC)**
Col Don Christensen, Chief, Government Trial and Appellate Counsel Division (JAJG) and Lt Col Brian Thompson, Chief, Senior Trial Counsel – SVU (JAJG), JB Andrews, MD

0910-0920 **CLSV PERSPECTIVE: CURRENT ISSUES IN SEXUAL ASSAULT (TC/SVC)**
Colonel Dawn Hankins, Chief, Special Victims' Counsel Program – AFLOA/CLSV, JB-Andrews, MD

0830-0920 **JAJD PERSPECTIVE: CURRENT ISSUES IN SEXUAL ASSAULT CASES (DC)**
Col Daniel J. Higgins, Chief, Trial Defense Division, JB Andrews, MD and Lt Col Thomas M. Rodrigues, Chief, Senior Defense Counsel, Travis AFB, CA

0920-0930 **BREAK**

0930-1015 **VICTIM INTERVIEW (TC/SVC)**

Maj Jennifer Holmes, Special Victims Unit-Chief of Policy & Coordination, Government Trial and Appellate Counsel Division (JAJG), JB-Andrews, MD

1015-1050 **ADVOCACY EXERCISE (TC/SVC) – FETI INTERVIEW OF VICTIM**
Lt Col Thompson, Maj Holmes, Capt Havern and Capt Gunnell, Senior Trial Counsel, Nellis AFB, NV

0930-1050 **PREPPING AN ART 120 CASE & ARTICLE 32 HEARINGS (DC)**
Maj Andrea Hall, Senior Defense Counsel, JB-Lewis-McChord, WA and Maj Nicholas McCue, Senior Defense Counsel, Travis AFB

1050-1100 **BREAK**

1100-1200 **WORKING WITH OSI (TC/SVC)**
Capt Havern and Capt Gunnell

1100-1130 **OVERVIEW OF SEXUAL ASSAULT CASES (DC)**
Col Higgins and Lt Col Rodrigues

1130-1200 **TRIAGING CASES AND WORKLOAD (DC)**
Maj Antoinette Quinn, Senior Defense Counsel, Sheppard AFB, TX

1200-1300 **LUNCH (TC/DC/SVC)**

1300-1345 **CHARGING ARTICLE 120 CRIMES (TC)**
Maj Holmes

1345-1420 **CHARGING EXERCISE (TC)**
Maj Holmes, Capt Havern, and Capt Gunnell

1300-1340 **DISCOVERY – OVERVIEW OF BRADY/GIGLIO/JENCKS ACT (SVC)**
Capt Aaron Buzawa, Special Victims' Counsel, Keesler AFB, MS

1340-1420 **GROUP DISCUSSION – ARTICLE 32 STRATEGIES / FY14 NDAA (SVC)**
Col Hankins

1300-1450 **MOTION PRACTICE IN SEXUAL ASSAULT CASES: UCI, MRE 412, 413, AND 513 (DC)**
Maj Shad Kidd, Senior Defense Counsel, Nellis AFB, NV

1420-1430 **BREAK (TC/SVC)**

1430-1500 **MOTION PRACTICE IN SEXUAL ASSAULT CASES (TC/SVC)**
Capt Havern

1450-1500	**BREAK (DC)**
1500-1530	**ALTERNATE RESOLUTION OF ARTICLE 120 CASES (DC)** Maj Hall
1500-1510	**BREAK (TC/SVC)**
1510-1620	**LITIGATING MRE 412-413 ISSUES (TC/SVC)** Capt Gunnell
1530-1600	**METHODS OF IMPEACHING THE COMPLAINING WITNESS (DC)** Maj McCue
1600-1610	**BREAK (DC)**
1610-1700	**SPEEDY TRIALS AND PLEAS (DC)** Maj Quinn
1620-1630	**BREAK (SVC)**
1630-1700	**COMMUNICATING WITH CONVENING AUTHORITIES, SJAs AND AFOSI (SVC)** Col Hankins
1830-2030	**ICEBREAKER (TBD)**

TUESDAY, 3 JUNE 2014

0750-0800	**ADMINISTRATIVE UPDATE (TC/DC/SVC)** MAJ Kersey
0800-0850	**MRE 413 MOTION EXERCISE FROM MANCINI CASE (TC/SVC)** Assigned Rooms and Faculty
0800-0850	**EFFECTIVE CROSS EXAMINATIONS (DC)** Maj Quinn
0850-0900	**BREAK**
0900-0930	**CHARACTER EVIDENCE (TC/DC/SVC)** Maj Bentz

0930-0940	**BREAK**
0940-1030	**CHARACTER EVIDENCE DRILLS (TC/DC/SVC)** Assigned Rooms and Faculty
1030-1040	**BREAK**
1040-1200	**MAXIMIZING DEFENSE PARALEGAL UTILIZATION IN SEXUAL ASSAULT CASES (DC)** Maj McCue
1040-1110	**AIR FORCE CLEMENCY & PAROLE (TC/SVC)** Maj Bentz
1110-1200	**INTERACTING WITH THE MEDIA (SVC)** Maj Wilder
1110-1200	**WORKING WITH SENIOR TRIAL COUNSEL (TC)** Maj Holmes, Capt Havern, and Capt Gunnell
1200-1300	**LUNCH**
1300-1430	**THEME BUILDING IN SEXUAL ASSAULT CASES (TC)** Maj Holmes, Capt Havern, and Capt Gunnell
1300-1430	**CASE MANAGEMENT, REGIONAL RESPONSIBILITES, CASE DEBRIEFS AND UTILIZING THE REGIONAL SVP (SVC)** Col Hankins
1300-1345	**COLLATERAL CONSEQUENCES (DC)** Maj Kidd
1345-1430	**POST TRIAL ISSUES (DC)** Maj McCue
1430-1440	**BREAK**
1440-1530	**SEXUAL ASSAULT LAW APPELLATE UPDATE (TC/SVC)** Col Christensen
1440-1530	**SEXUAL ASSAULT LAW APPELLATE UPDATE (DC)** Maj McCue
1530-1540	**BREAK (TC/DC/SVC)**

1540-1630 **EFFECTIVE CROSS EXAMINATION (TC/SVC)**
Col Christensen

1540-1630 **THEME BUILDING FOR DEFENSE ATTORNEYS (DC)**
Maj Hall

WEDNESDAY, 4 JUNE 2014

0750-0800 **ADMINISTRATIVE UPDATE (TC/DC/SVC)**
MAJ Kersey

0800-0920 **EXPERTS IN SEXUAL ASSAULT CASES (DC)**
Dr. Nancy Slicner, Forensic Psychologist

0920-0930 **BREAK (DC)**

0800-0850 **WORKING WITH SPECIAL VICTIMS' COUNSEL (TC/SVC)**
Maj Holmes and Capt Sarabeth Moore, Special Victims' Counsel, Fairchild AFB, WA

0850-0900 **BREAK (TC/SVC)**

0900-0950 **ENHANCING THE SENTENCING CASE (TC/SVC)**
Capt Havern

0930-1020 **WORKING WITH SPECIAL VICTIMS' COUNSEL (DC)**
Maj Kidd and Capt Seth Dilworth, Special Victims' Counsel, Cannon AFB, NM

0950-1000 **BREAK (TC/SVC)**

1000-1050 **EXPERTS IN SEXUAL ASSAULT CASES (TC/SVC)**
Dr. Slicner

1020-1050 **SENTENCING (DC)**
Maj Quinn

1050-1100 **BREAK (DC/SVC/TC)**

1100-1200 **PROFESSIONAL RESPONSIBILITY AND THE LITIGATOR (TC/DC/SVC)**
MAJ Kersey

1200-1215 **END OF COURSE CRITIQUE**

KENNETH M. THEURER, Colonel, USAF
Commandant

DEPARTMENT OF THE AIR FORCE
THE AIR FORCE JUDGE ADVOCATE GENERAL'S SCHOOL

20 AUG 2014

MEMORANDUM FOR INTERMEDIATE SEXUAL ASSAULT LITIGATION COURSE, PACIFIC, 14-E ATTENDEES

FROM: The Judge Advocate General's School

SUBJECT: Course Narrative Schedule, 22-24 September 2014

This schedule is designed to assist you in preparing for each hour of instruction. All lectures will be conducted at the Osan AB Community Center, Osan AB, Korea. Room assignments for all instruction and exercises will be provided on the first day of class, Monday, 22 September. During advocacy exercises you will play the role of trial or defense counsel as assigned. ***It is essential that you prepare in advance for all exercises.*** Duty uniform for the course is ABUs. Classes will start promptly at the times indicated. Students must be seated and prepared for each period. Any absences must be reported immediately to the course directors, Lt Col Bryon Gleisner or Maj Adam Bentz.

MONDAY, 22 SEPTEMBER 2014

0800-0830 **WELCOME REMARKS AND ADMINISTRATIVE MATTERS**
Lt Col Bryon Gleisner, Course Director, Military Justice Division, JAG School
Maj Adam Bentz, Course Director, Military Justice Division, JAG School

0830-0910 **JAJG PERSPECTIVE: CURRENT ISSUES IN SEXUAL ASSAULT (TC/SVC)**
Col Don Christensen, Former Chief, Government Trial and Appellate Counsel Division (JAJG)

0910-0920 **CLSV PERSPECTIVE: CURRENT ISSUES IN SEXUAL ASSAULT (TC/SVC)**
Lt Col Andrea Decamara, Chief, Special Victims' Counsel Program – AFLOA/CLSV, JB-Andrews, MD

0830-0920 **JAJD PERSPECTIVE: CURRENT ISSUES IN SEXUAL ASSAULT CASES (DC)**
Col Daniel J. Higgins, Chief, Trial Defense Division, JB Andrews, MD
Lt Col Michael D. Carson, Chief, Senior Defense Counsel, Travis AFB, CA

0920-0930 **BREAK (TC/DC/SVC)**

0930-1015 **VICTIM INTERVIEW (TC/SVC)**
Maj Mark Rosenow, Special Victims Unit-Chief of Policy & Coordination, Government Trial and Appellate Counsel Division (JAJG), JB-Andrews, MD

1015-1050	**ADVOCACY EXERCISE (TC/SVC) – FETI INTERVIEW OF VICTIM** Moderator: Maj Mark Rosenow
0930-1050	**PREPPING AN ART 120 CASE & ARTICLE 32 HEARINGS (DC)** Maj Jennifer Sanchez, Senior Defense Counsel, Yokota AB, Japan
1050-1100	**BREAK (TC/DC/SVC)**
1100-1200	**WORKING WITH OSI (TC/SVC)** Maj Rosenow and Capt Jeffrey Starnes, Senior Trial Counsel – Kadena AB, Japan
1100-1130	**OVERVIEW OF SEXUAL ASSAULT CASES (DC)** Maj Lance Smith, Senior Defense Counsel, Kadena AB, Japan
1130-1200	**TRIAGING CASES AND WORKLOAD (DC)** Maj Sanchez
1200-1300	**LUNCH (TC/DC/SVC)**
1300-1345	**CHARGING ARTICLE 120 CRIMES (TC)** Maj Rosenow and Capt Starnes
1345-1420	**CHARGING EXERCISE (TC)** Maj Rosenow and Capt Starnes
1300-1340	**DISCOVERY – OVERVIEW OF BRADY/GIGLIO/JENCKS ACT (SVC)** TBD
1340-1420	**GROUP DISCUSSION – ARTICLE 32 STRATEGIES / FY14 NDAA (SVC)** TBD
1300-1450	**MOTION PRACTICE IN SEXUAL ASSAULT CASES: UCI, MRE 412, 413, AND 513 (DC)** Maj Sanchez
1420-1430	**BREAK (TC/SVC)**
1430-1500	**MOTION PRACTICE IN SEXUAL ASSAULT CASES (TC/SVC)** Capt Starnes
1450-1500	**BREAK (DC)**
1500-1530	**ALTERNATE RESOLUTION OF ARTICLE 120 CASES (DC)** Maj Sanchez

1500-1510	**BREAK (TC/SVC)**
1510-1620	**LITIGATING MRE 412-413 ISSUES (TC/SVC)** Maj Rosenow and Capt Starnes
1530-1600	**METHODS OF IMPEACHING THE COMPLAINING WITNESS (DC)** Maj Smith
1600-1610	**BREAK (DC)**
1610-1700	**SPEEDY TRIALS AND PLEAS (DC)** Maj Smith
1620-1630	**BREAK (SVC)**
1630-1700	**COMMUNICATING WITH CONVENING AUTHORITIES, SJAs AND AFOSI (SVC)** TBD
1830-2030	**ICEBREAKER (TBD)**

TUESDAY, 23 SEPTEMBER 2014

0750-0800	**ADMINISTRATIVE UPDATE (TC/DC/SVC)** Lt Col Gleisner/Maj Bentz
0800-0850	**MRE 413 MOTION EXERCISE FROM MANCINI CASE (TC/SVC)** Assigned Rooms and Faculty
0800-0850	**EFFECTIVE CROSS EXAMINATIONS (DC)** Maj Sanchez
0850-0900	**BREAK (TC/DC/SVC)**
0900-0930	**CHARACTER EVIDENCE (TC/DC/SVC)** Maj Bentz
0930-0940	**BREAK(TC/DC/SVC)**
0940-1030	**CHARACTER EVIDENCE DRILLS (TC/DC/SVC)** Assigned Rooms and Faculty
1030-1040	**BREAK (TC/DC/SVC)**

1040-1200	**MAXIMIZING DEFENSE PARALEGAL UTILIZATION IN SEXUAL ASSAULT CASES (DC)** Maj Smith
1040-1110	**AIR FORCE CLEMENCY & PAROLE (TC/SVC)** Col Paula McCarron, Chief, Clemency, Corrections and Officer Review Division (JAJR)
1110-1200	**INTERACTING WITH THE MEDIA (SVC)** TBD
1110-1200	**WORKING WITH SENIOR TRIAL COUNSEL (TC)** Col Christensen, Lt Col Oler, Maj Rosenow, and Capt Starnes
1200-1300	**LUNCH (TC/DC/SVC)**
1300-1430	**THEME BUILDING IN SEXUAL ASSAULT CASES (TC)** Col Christensen, Lt Col Oler, Maj Rosenow, and Capt Starnes
1300-1430	**CASE MANAGEMENT, REGIONAL RESPONSIBILITES, CASE DEBRIEFS AND UTILIZING THE REGIONAL SVP (SVC)** Lt Col Decamara
1300-1430	**CLEMENCY, COLLATERAL CONSEQUENCES, and POST-TRIAL ISSUES (DC)** Col McCarron and Maj Smith
1430-1440	**BREAK (TC/DC/SVC)**
1440-1530	**SEXUAL ASSAULT LAW APPELLATE UPDATE (TC/SVC)** Col Christensen and Maj Rosenow
1440-1530	**SEXUAL ASSAULT LAW APPELLATE UPDATE (DC)** Maj Smith
1530-1540	**BREAK (TC/DC/SVC)**
1540-1630	**EFFECTIVE CROSS EXAMINATION (TC/SVC)** Col Christensen
1540-1630	**THEME BUILDING FOR DEFENSE ATTORNEYS (DC)** Maj Smith and Lt Col Carson

WEDNESDAY, 24 SEPTEMBER 2014

0750-0800	**ADMINISTRATIVE UPDATE (TC/DC/SVC)** Lt Col Gleisner/Maj Bentz
0800-0920	**EXPERTS IN SEXUAL ASSAULT CASES (DC)** Dr. James Meredith, Forensic Psychologist
0920-0930	**BREAK (DC)**
0800-0850	**WORKING WITH SPECIAL VICTIMS' COUNSEL (TC/SVC)** Capt Starnes and TBD
0850-0900	**BREAK (TC/SVC)**
0900-0950	**ENHANCING THE SENTENCING CASE (TC/SVC)** Col Christensen and Major Rosenow
0930-1020	**WORKING WITH SPECIAL VICTIMS' COUNSEL (DC)** Maj Kidd and TBD
0950-1000	**BREAK (TC/SVC)**
1000-1050	**EXPERTS IN SEXUAL ASSAULT CASES (TC/SVC)** Dr. Meredith
1020-1050	**SENTENCING (DC)** Maj Sanchez
1050-1100	**BREAK (TD/DC/SVC)**
1100-1200	**PROFESSIONAL RESPONSIBILITY AND THE LITIGATOR (TC/DC/SVC)** Lt Col Gleisner
1200-1215	**END OF COURSE CRITIQUE**

Kirk L. Davies

KIRK L. DAVIES, Colonel, USAF
Commandant

Air Force Legal Operations Agency

Government Trial and Appellate Counsel Division (AFLOA/JAJG)

Integrity - Service - Excellence

JAJG Perspective & Introduction

Col Don Christensen
Lt Col Brian Thompson
Maj Mark Rosenow
Capt Jeff Starnes

U.S. AIR FORCE

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Overview

- Who we are
- What we do for you
  - Reach back and look forward
- An approach for this week
  - Interactive and open-ended

Prevention & Response

- §1711 – Prevention of entry into service of convicted sex offenders
- §1722 – Shortened RSP deadline
- §1725 – Min. requirements for SAPR personnel
- §1725 – SANE availability at MTFs
- §1746 – Service Academy initial SAPR training
- §1731 – Additional RSP duties
- §1733 – Review of SAPR training
- §1741 – Report to Congress on need for specific UCMJ article regarding prohibited relationships with recruits and trainees
- §1726 – Added DOD SAPRO responsibilities
- §1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)
- §1735 – SecDef review of how sexual harassment is handled (EO vs. SAPRO?)
- §1734 – SecDef review of retention of, and access to, evidence and records relating to sexual assault
- §1721 – Verification of command climate surveys
- §1747 – Completion of SF 86 by sexual assault victims

All phases of a court-martial

- **§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**

Reporting

- **§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

Investigation

- §1732 – SecDef review of MCIO investigative practices
- §1742 – Immediate referral of sexual assault allegations to MCIO

Pre-Trial

- §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**

Trial

- **§1705 – Mandatory GCM jurisdiction for penetration offenses**
- **§1705 – Mandatory dismissal for DD for penetration offense convictions**

Post-trial

- **§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)

U.S. AIR FORCE

The Week

- Victim interviews (today)
- Working with OSI (today)
- Charging decisions (today)
- Motion practice (today)
- Litigating M.R.E. 412 & 413 (today)
- Working with STCs (tomorrow)
- Theme building (tomorrow)
- Appellate update (tomorrow)
- Effective Cross-examination (tomorrow)
- Working with SVCs (Wednesday)
- Enhancing Sentencing (Wednesday)

U.S. AIR FORCE

Questions

Headquarters U.S. Air Force

Integrity - Service - Excellence

FY14 NDAA Update

AFLOA/JAJM

Lt Col Mike Lewis

Maj Dan Mamber

Capt Allison DeVito

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Overview

- 33 total sections of NDAA
  - Focus of webcast – Top 19 provisions – split discussion of Section 1702 (Art 32 and Art 60).
  - Two slides at end for less relevant provisions for this webcast
- Three presenters…divide and conquer the provisions
  - Round 1 – consensual sodomy, retaliation, SecAF/GCMCA reviews, and Art 32
  - Round 2 – Capt DeVito – provisions related to victims
  - Round 3 – Maj Mamber – Investigators, interviews, Art 60
- Slides complement prior JAJM NDAA products done by implementation date and by section #

Section 1707
Modify Article 125

Immediately (26 Dec 13)

- BLUF: Repeal Consensual Sodomy Offense
- What will change eventually
  - Pt IV, MCM
- Issues being addressed now
  - How to handle consensual sodomy offenses before 26 Dec 13
- Future Issues
  - Animal Abuse – proposed new offense under Art 134 to cover bestiality
  - Perhaps a push for a full repeal of Art 125 (as Art 120 rape can cover forcible sodomy)

Sections 1714, 1715 Retaliation

Immediately (26 Dec 13)

- BLUF: Retaliation protections increased across the board
- 1714
  - New prohibited personnel action – significant change in mbr's duties
  - New protected communication – when member "perceived" as making a communication
  - Mbr has 1 year to file, up from 60 days
  - BCMR legal assistance: "unusually complex" to member "benefits"
- 1715 – IG must investigate related to Art 120 and 120a/b/c
- What may change eventually:
  - AFI 51-504; AFI 36-2603; AFI 90-301, DoDD 7050.06

Section 1709
Retaliation Part 2

120 Days (25 Apr 14)

- BLUF – New regulations making retaliation punishable Art 92
- What may change eventually:
  - AFI 90-301, DoDD 7050.06

Section 1744
Review of Non-Referral of SA

Immediately (26 Dec 13)

- BLUF: New SecAF, GCMCA review - SA cases not referred
- Penetration offenses rape/sex assault/forcible sodomy/attempts
- SecAF review – ***rare*** – Art 34 advice recommends referral, GCMCA declines – route like a RILO for now
- Superior GCMCA review – ***often*** – both Art 34 advice and GCMCA agree that referral should not happen
  - Don't dismiss specs without coordinating with reviewing office SJA
  - Watch the speedy trial clock
  - Be sensitive to UCI concerns
  - Sample letters coming to Virtual MJ Deskbook
- What may change eventually
  - RCM 306, 407, AFI 51-201

Section 1702 (Part I)
Article 32

1 Year (26 Dec 14)

- BLUF: Preliminary hearing vs. thorough, impartial investigation
- Hearing Scope: probable cause, jurisdiction, form of charges, recommendation as to disposition
- Recorded (not transcribed), shall be made available to victim on request
- Victim (mil or civ) cannot be compelled to testify…shall be declared unavailable
- DC presentation of evidence/cross – limited…relevant to purpose of hearing
- Hearing officer (no longer an IO): JAG, senior to GR/DC whenever practicable
- What may change eventually
  - RCM 405, AFI 51-201, AFLOA JAJM Art. 32 Guide
- Future issues: Depositions; How "scope" really changes hearings

Headquarters U.S. Air Force

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FY14 NDAA Victim Issues

AFLOA/JAJM

Capt Allison DeVito

Chief, Policy for Victims and Witnesses

U.S. AIR FORCE

Section 1701
Victims' Rights

Immediately (26 Dec 13)

- BLUF: Incorporates all 8 Crime Victims' Rights Act rights into UCMJ as Article 6b
- Applies to ALL victims of crime
- Which of the rights are "new"?
  - The right to be reasonably heard at pretrial confinement, sentencing, and clemency/parole proceedings
  - The right to proceedings free from unreasonable delay

Section 1701
Victims' Rights

1 Year (26 Dec 14)

- Implementation guidance (MCM changes) and the establishment of an enforcement mechanism are not due until 26 Dec 14
- Rather than an enforcement mechanism through a military court, SecDef will establish an enforcement mechanism
  - Designation of an authority in each service to receive and investigate complaints
  - Availability of disciplinary sanctions for "willful or wanton" failure to comply with requirements related to victims' rights

Section 1706
Participation by Victim at Clemency

180 Days (24 Jun 14)

- BLUF: Victim has a right to submit written matters to Convening Authority for consideration
- Applies to ALL victims of crime for any case in which findings and sentence have been adjudged for an offense that involved the victim
- The AF already implements this provision right? Yes, but…
  - Current AF practice requires victims to submit statements prior to receiving the ROT; victim's statement is then served on ACC at the same time as the ROT as an attachment to the SJAR.
  - Under the change victims will have 10 days from receiving the ROT and SJAR to submit their victim impact statement.
- What will change?
  - Executive Order to add new RCM 1105A

Section 1716
Special Victims' Counsel

180 Days (24 Jun 14)

- BLUF: Expands qualifying offenses from current AF SVC Program (victims of 120, 125, and attempts thereof) to victims of Articles 120a - *Stalking*, 120b - *Rape and sexual assault of a child*, and 120c – *Other sexual misconduct*. Biggest change is representing child victims.
- Eligibility remains tied to 10 U.S.C. § 1044 (eligibility for legal assistance). Pure civilians without any military affiliation are NOT eligible.
- New substantive areas for AF SVCs include advising victims on civil litigation against parties other than DoD and potentially assisting with applications for veterans' benefits.
- What will change?
  - AFI 51-504 and AFI 51-201

Section 1713
Reassignment of Accused

Immediately (26 Dec 13)

- BLUF: SecDef may provide guidance for CCs regarding their authority to reassign alleged offenders of Arts. 120, 120a, 120b, 120c, 125, and attempts thereof
- No new authority for CCs (they already had the ability to PCA or PCS an ACC).
- What's being done?
  - 14 Aug 13 – SecDef directed services to implement policy on administrative reassignment/transfer of ACC by 1 Jan 14
  - AFGM to AFI 36-2110, *Assignments*, expected soon
  - AFI 36-6001, *Sexual Assault Prevention and Response Program*, will also be revised

Section 1723
Retention of DD Forms 2910 and 2911

Immediately (26 Dec 13)

- BLUF: DD Form 2910, *Victim Reporting Preference Statement*, and DD Form 2911, *DoD Sexual Assault Forensic Examination Report*, must be retained for 50 years for both Unrestricted and Restricted Reports.
- What's new?
  - Under current DoD policy, the DD Forms 2910 and 2911 are retained for 50 years for Unrestricted Reports and victims who made a Restricted Report had to *request* for it to be retained for 50 years (otherwise it was retained for 5 years).
  - The provision standardizes retention to 50 years for both types of reporting.
- What's being done?
  - Revisions to DoDI 6495.02, *Sexual Assault Prevention and Response Program Procedures* and AFI 36-6001, *Sexual Assault Prevention and Response Program*

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Section 1747
SF 86

Immediately (26 Dec 13)

- BLUF: Members completing SF 86 shall be instructed to answer "no" to question 21 with respect to consultation with a healthcare professional if the member is a victim of a sexual assault and the consultation occurred with respect to an emotional or mental health condition strictly in relation to the sexual assault.
- What's new?
  - Nothing. This change was implemented in 2013 and this instruction to personnel has been updated

21.1 In the last seven (7) years, have you consulted with a health care professional regarding an emotional or mental health condition or were you hospitalized for such a condition? Answer 'No' if the counseling was for any of the following reasons and was not court-ordered:

- strictly marital, family, grief not related to violence by you; or
- strictly related to adjustments from service in a military combat environment

Please respond to this question with the following additional instruction: Victims of sexual assault who have consulted with the health care professional regarding an emotional or mental health condition during this period strictly in relation to the sexual assault are instructed to answer No.

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FY14 NDAA Round 3

AFLOA/JAJM
Maj Dan Mamber
Chief, Joint Service Policy and Legislation

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Section 1703
Modify Article 43(a)

Immediately (26 Dec 13)

- BLUF: Eliminate SOL for
  - Sexual assault (120(b)), and
  - Sexual assault of a child (Art. 120b(b))

- No additional implementation required

Section 1732
MCIO Response to Allegations

180 Days (24 Jun 14)

- BLUF: SecDef review of & uniform policy for MCIO response to allegations of UCMJ violations
- Review
  - Include MCIO's ability to make recommendations regarding whether an allegation appears founded or unfounded
- Policy
  - Implement uniform policy (once SecDef review is complete), to extent practicable, regarding use of case determinations to record the results of investigations
- Likely no effect to legal AFIs

Section 1742
Forward SA Report to MCIO

Immediately (26 Dec 13)

- BLUF: Upon report of a "sex-related offense" against a CC's troop, CC must immediately forward the report to MCIO
- DoDI 6495.02, encl 5, para 3.h(1) already requires CCs immediately refer all allegations to MCIO
  - Implemented in AFI 36-6001, para 2.12.1
  - Existing instructions refer to "sexual assaults"
    - May need to modify Instructions to reflect "sex-related offense" language

Section 1704
Modify Article 46

Immediately (26 Dec 13)

- BLUF:
  - DC must request to interview victims of “sex-related offenses” through TC
  - If requested, SA victims have the right to have SVC/VA/TC present during interview
- Applies to victims of Arts. 120, 120a, 120b, 120c, 125, 80
- Obligation attaches upon notice by TC that TC intends to call victim as witness at Art. 32 hearing or C-M.
- What may eventually change:
  - RCM 701, 703, 405; AFI 51-201

Section 1708
Character of Accused

180 Days (24 Jun 14)

- BLUF: Strike factor (J) from discussion under RCM 306(b)
- Doesn't actually change anything
- What may eventually change:
  - Discussion to RCM 306(b) – factor (J), (K)?

Section 1705
Modify Article 56

180 Days (24 Jun 14)

- BLUF:
  - Mandatory DD for certain SA convictions
  - Mandatory GCM for certain SA charges

- Applies to Rape or SA (Art. 120), Rape or SA of child (Art. 120b), Forcible sodomy (Art. 125), Attempts (Art. 80)

- What may eventually change:
  - Punishment - Pt IV, paras. 45(e), 45b(e), 51(e)
  - Jurisdiction - RCM 201(f)(1,2); AFI 51-201

Section 1702 (Part II) Modify Article 60

180 Days (24 Jun 14)

- BLUF:
  - Restrict CA authority to affect findings and sentence at clemency
  - CA required to include written justification of any changes in ROT
- Qualifying offenses:
  - Findings –
    - Max confinement <2 yrs
    - Adjudged sentence = <6 mos confinement & no punitive discharge
    - Never for rape or SA (120), 120b, 125, other offenses specified by SecDef
  - Sentence – Adjudged sentence = <6 mos confinement & no punitive discharge
    - Exceptions – "substantial assistance" in investigation/prosecution of another accused
      – PTA (but for mandatory minimum, only to reduce DD to BCD)
- What may eventually change:
  - RCM, Chap. XI, AFI 51-201

Section 1745
Notation in Personnel Records

Immediately (26 Dec 13)

- BLUF: Information of CM conviction, NJP, admin action for "sex-related offense" must be noted in a member's personnel record
- "Sex-related offense" remains undefined
- What may eventually change:
  - AFI 36-2907 (UIF)

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FY14 NDAA Reports/Misc

AFLOA/JAJM

Lt Col Mike Lewis

Chief, Military Justice Division

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Reporting

- HASC/SASC Reports
  - 1709(c) - retaliation punitive article - 24 Apr 14
  - 1725(c) – trg/qualifications of SAPR positions – 24 Apr 14
  - 1733(c) – review adequacy of SAPR trg/education – 25 Apr 14
  - 1734(b) – retention/access to SA evidence as required by FY12 NDAA Sec 586 – 24 Jun 14
  - 1741(d) – punitive article UPR – training/recruiting/MEPS – 24 Jun 14

- Command Reporting
  - 1743 – 8 day incident report – First O-6 and GO of victim/ offender; adds mandatory post-incident actions – 24 Jun 14

Miscellaneous Provisions

- 1711 – no commission/enlistment if civilian SA conviction
- 1712 – expand expedited transfer pgm to Coast Guard victims
- 1721 – track climate assessments initial and annual
- 1722 – Response System Panel (RSP) – 12 mos to report
- 1724 – ANG/Reserves timely access to SARCs
- 1725 – Min Qual SARCs/VAs/SANEs; SANE assigned/avail
- 1731 – RSP and follow-on Judicial Panel study new areas (remove CC, restr rpt database, clemency process after appeal)
- 1735 – Review EO role in sexual harassment cases
- 1741 – Mandatory admin D/C – UPR recruiter/training CM/NJP
- 1746 – Trg at service academies – initial; annual

Other JAJM NDAA Products

- Virtual Military Justice Deskbook
  - Section 1 – Military Justice Basics
  - FY14 NDAA Implementation Schedule – ordered by implementation date
  - BBP – FY14 NDAA – ordered by Section #

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Questions?

Virtual MJ Deskbook

https://aflsa.jag.af.mil/apps/jade/collaborate/course/view.php?id=1142

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Victim Interviews

Col Don Christensen
Lt Col Brian Thompson
Maj Mark Rosenow
Capt Jeff Starnes

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Overview

- Understanding victims
- Initial meeting
- Preparing for the interview
- Conducting the interview
  - Let the victim talk
- Follow up

FETI

- Forensic Experiential Trauma Interview
  - The goal
  - The handout
- EXERCISE

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Questions

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Working with OSI

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Lt Col Brian Thompson
Maj Mark Rosenow
Capt Jeff Starnes

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Overview

- Our combined purpose
- Day to day
- In a given case
- Preparing for testimony
  - Keep them in the pretrial preparation loop
- The view from HQ

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Questions

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Policy Guidelines

AFI 51-201

- **13.11.2 Coordination with AFOSI. SJAs should develop local procedures with their servicing AFOSI detachment commander to coordinate with agents as early as possible in the investigative stages of a case.**
- **13.26. General Provision. An effective military justice process starts with a timely, thorough, and accurate investigation. JA and investigative personnel, particularly AFOSI, must develop a collaborative relationship focused on integrating investigative efforts and the legal process. The goal is thorough, case-ready Reports of Investigation (ROIs), robust litigation preparation, and timely resolution of military justice cases. Although the remainder of this Section applies primarily to AFOSI and JA procedures, SJAs will establish local procedures to implement these goals for all investigations.**
- **13.27. Initial Process. An effective team approach starts at the beginning of the military justice process. In matters involving alleged violations of the UCMJ or where MEJA may apply, the AFOSI detachment will notify the local JA when substantive criminal investigations are initiated. At a minimum, the SJA will designate an attorney to provide initial counsel to the AFOSI case agent on the new investigation.**
- **13.28. Investigative Support Team. The SJA will designate an investigative support team as early as practicable in the investigative process. The investigative support team will be composed of judge advocate(s), as well as civilian attorney(s) and paralegal(s) when appropriate, who will work with the AFOSI case agent(s) during the investigation to provide legal support. Members of the investigative support team are not investigators and they must be careful not to depart from their role. The team should properly safeguard all attorney work-product material. *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997); *United States v. Vanderwier*, 25 M.J. 263, (C.M.A. 1987).**
- **13.29. Investigative Plan Development. The attorney designated by the SJA and/or the investigative support team will receive a briefing on the initial investigative steps. The designated attorney or the investigative support team will continue the collaborative process during the development of the Investigative Plan and work with the AFOSI case agent in identifying potential criminal offenses for investigation, comparing the evidence in the case with the elements of proof for a given offense. JA will coordinate with the AFOSI case agent on subject interviews.**
- **13.30. Case Development.**
- **13.30.1. The investigative support team and AFOSI case agents will continue their collaborative efforts as the investigation proceeds. As appropriate, designated investigative support team members or JA staff members will attend AFOSI case review meetings. Likewise, AFOSI personnel are encouraged to attend relevant JA military justice meetings.**
- **13.30.2. The investigative support team will review and update the initial proof analysis crafted by trial counsel to address the elements, evidence, anticipated objections, and potential defenses for each specification as appropriate, but at least on a monthly basis, for JA use. JA will discuss the results of the analysis with AFOSI. A final proof analysis is typically attorney work-product material, and will be completed contemporaneously with the publication of the ROI. This will also assist in pre-trial preparation efforts.**

Synchronized Steps: Perfecting a Proper Investigation

- Day to Day
  - Get to know AFOSI
  - Trust them to do their job…
    - …But verify
- Case Specific
  - Tell them what you <u>need</u> and <u>want</u>
    - (e.g. Acc + DNA + facebook + phone +misconduct)
  - Look at evidence early…another pair of eyes and another brain can change things (e.g. parking garage)
  - Talk, explain, and get & give feedback
    - (e.g. record pre-text; cell phone text cut-off;
- If AFOSI needs to testify - prepare them
  - [Testimony + Preparation = Potential]
  - [Testimony + No Prep = Crap]

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Charging Decisions

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Lt Col Brian Thompson
Maj Mark Rosenow
Capt Jeff Starnes

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Overview

- Reach back to us
- Knowing the offense
- Knowing the trial process
  - What evidence will prove the offense?
  - Peripheral crimes
- Substantial impairment v. Bodily harm
- EXERCISE

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Questions

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Motion Practice

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Capt Jeff Starnes

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Overview

- Reach back to us or your STC
- This stuff matters
  - So do the details
- New Military Rules of Evidence
- Requesting & delivering argument
- Typical motions

M.R.E. 513/514

- **Threshold for an *in camera* review**
- **Process for avoiding delay**
- **The accused's records**

Motion to Compel Discovery

- **RCM 701 - evidence "within the possession, custody, or control of *military authorities*, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, *and* which are *material* to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial."**
- **RCM 703(f)(3) - "any defense request for evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence."**

Motion to Compel Discovery (cont.)

- **Need, want and entitlement**
  - **Does America want this evidence?**
- **Discovery responses matter**

UCI

- UCI: the “mortal enemy” of military justice
- Art. 37 prohibits convening authorities and anybody subject to the U.C.M.J. from wrongfully influencing the outcome of a court-martial
  - Accusatory UCI: accuser disqualification, coercion in preferral, unlawful pressure to make certain recommendations in transmittal process
  - Adjudicative UCI: unlawful influence in the trial process, such as tampering with members, witnesses, or evidence
- Were the President’s comments UCI? Open question yet to be answered. In the meantime…

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UCI (cont.)

- Actual UCI: literal efforts to influence a proceeding
- Apparent UCI: perception of fairness in the military justice system as viewed by a reasonable member of the public, who is aware of all the facts
- Defense initial threshold (some evidence):
  - Certain facts, if true, constitute UCI, and;
  - Alleged UCI has a potential to cause unfairness in the proceedings
- Government burden (beyond a reasonable doubt):
  - The facts do not exist as alleged, or;
  - The facts do not constitute UCI, or;
  - The UCI will not prejudice the proceedings, findings, or sentence

Miscellanea

- M.R.E. 404(b)
- M.R.E. 801(d)(1)(B)
- Child cases
  - Residual hearsay
  - Remote live testimony
  - Designation of a legal guardian

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Questions

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M.R.E. 412 & 413

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Overview

- Reach back to us or your STC
- This stuff matters
  - So do the details
- New Military Rules of Evidence
- Requesting & delivering argument
- Sex is different

M.R.E. 412 and Art. 32 Hearings

- **R.C.M. 405(i) – Military Rules of Evidence – other than M.R.E. 301, 302, 303, 305, 412 and Section V – shall not apply in pretrial investigations under this rule.**

- **M.R.E. 412(c)(2) – Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. [NO MENTION OF IO!]**

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M.R.E. 412 and Art. 32 Hearings

- **Object to any consideration of M.R.E. 412 evidence (IO is not a MJ)**
- **Don't let Defense ask "So had you had sex with anyone else in the last 5 months/since you began dating your boyfriend?"**
- **DO NOT LET DEFENSE ASK VICTIM, "SO DO YOU THINK IT'S POSSIBLE ACCUSED THOUGHT YOU WERE CONSENTING?"**

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Defense's Motion

- **Read it and read all case law cited**
- **Demand 412 notice at 32**
- **Look for contrary case law – there is a lot of very fact dependent 412 case law**
- **Do as much as you can in court (goes for 513)**
- **Prepare the victim for 412 questions prior to first meeting with defense counsel**
- **Tell the truth always, work with SVC to prep**

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Government Response

- **In your response, state whether you agree with the Defense's facts [don't just list all your facts]**
- **Back up your facts with evidence**
  - **Live witness testimony**
  - **Other attachments**
- **Distinguish the Defense's case law**
- **Cite and argue your own case law**

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Strategy in Prepping

- **Get the victim to be honest and tell the truth and if it conforms with the statements of others, it's likely going to be inadmissible in many cases**
- **Preclude the defense from asking questions directly addressing the sex "romantic relationships, etc"**
- **Rebut motives to fabricate**

Is the evidence covered under M.R.E. 412?

1. Evidence offered to prove that any alleged victim engaged in other sexual behavior

2. Evidence offered to prove any alleged victim's sexual predisposition [speech, dress, lifestyle, piercings – with sexual connotation]

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Is there an Exception?

1. A person other than the Accused was the source of semen, injury or other physical evidence.

2. Sexual behavior between Accused and Victim offered by the Accused to prove consent or by the prosecution.

3. Evidence that is constitutionally required.

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Motion Response

In your motion response you must address:

1. **Is evidence covered by M.R.E. 412**
2. **Does it fall under an exception to M.R.E. 412?**
3. **If falling under Exception (3)**

Is the evidence relevant?

Is the evidence constitutionally required?

Address 403 Balancing Test (US v. Gaddis)

Read *United States v. Sousa*, 72 MJ 643 (AFCCA 2013)

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Is it Relevant?

- **Is the evidence relevant?**
- **M.R.E. 401: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.**

Is it Constitutionally Required?

- **Not all relevant evidence is constitutionally required.**
- **To determine if evidence is constitutionally required: MJ performs 403 balancing test**

Determining whether evidence is constitutionally required demands a contextual analysis and balancing of interests such as the probative value; the right to expose a witness' motive to testify; the danger of harassment, prejudice, or confusion of the issues; the witness' safety; and whether the evidence may be only marginally relevant. United States v. Gaddis, 70 MJ 248, 255 (CAAF 2011) (citing Delaware v. Van Arsdall, 475 US 673, 679.)

Results of 403 Balancing Test

If the military judge finds the probative value of the evidence outweighs the danger of unfair prejudice, "it is admissible no matter how embarrassing it might be to the alleged victim."

If a military judge determines that evidence is not constitutionally required, the military judge *must* exclude it under MRE 412 – regardless of how minimal the alleged victim's privacy interest might be.

Common Defense Tactics

- Asking “have you done _____ with anyone else during X time period” and having some witness who can contradict that.
- Slipping things in during trial that are actually covered under M.R.E. 412
- Hold the defense feet to the fire

M.R.E. 413

- Must give notice – at least 5 days prior to entry of pleas OR in accordance with MJ's scheduling order

- If Accused is charged with multiple Art. 120 offenses, give 413 notice that you are going to use each Art. 120 offense as evidence that the other Art. 120 offense occurred

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Wright Factors

- **(1) strength of proof of the prior act,**
- **(2) probative weight of the evidence,**
- **(3) potential for less prejudicial evidence,**
- **(4) distraction of the fact finder,**
- **(5) time needed for proof of prior conduct,**
- **(6) temporal proximity,**
- **(7) frequency of the acts,**
- **(8) presence or lack of intervening circumstances, and**
- **(9) relationship between the parties**

***United States v. Wright,* 53 M.J. 476 (C.A.A.F.2000)**

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403 Balance Test

- **Address 403 Balancing Test in your motion**
- **The probative value is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.**
- **Make sure MJ performs 403 balancing test on the record**

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Questions

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Working with STCs & Theme Building

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Lt Col Brian Thompson
Maj Mark Rosenow
Capt Jeff Starnes

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An Approach

Prepare like a lawyer; (mostly) present like you're not.

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Overview

- **Preparing your case**
- **Preparing yourself**
- **Presenting your case (Theme Building)**

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Preparing Your Case

- **Review everything as it comes in**
- **Interview the investigators**
  - **IDPs always exist – get them**
- **Interview every witness and follow up on leads**
  - **The ROI is a starting point (if it exists at all)**
  - **Take notes – paralegals, get read in**
  - **Get additional discovery – FB, pictures**
  - **Framing and rapport building; "Be honest."**

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Preparing Your Case

- **Discovery**
  - **My introductory email**
  - **Example: phone records early v. late**
- **Visiting the scene & reviewing real evidence**
- **Thinking about admissibility**
  - **Example: text messages & phone records**
- **Coordinating with OSI**

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Preparing Your Case

- **Charging**
  - **Call JAJG or an STC**
    - **Press if pressing**
  - **For Art. 120, U.C.M.J., call Maj Mark Rosenow (SVU Chief of Policy and Coordination)**
  - **Comm. 202.630.1254, 240.612.4808 or DSN 612.4808**
- **Proof analyses**

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Preparing Your Case

- **The STC arrives or you're a week out**
  - **Everyone has to be interviewed again**
- **Taking notes**
- **Theme and theory are important**
- **Talking about the case is preparing to try it**
- **No such thing as a "naked UA"**
  - **Email, FB, cell phone, bank records, friends & family, rectovaginal fistula repair**

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Preparing Yourself

- **Have fun**
- **You can laugh in trial but not at the trial**
- **No “crap” cases**
- **You’re in control of everything – the courtroom, the 802 & the emails before**
- **Read other things & reference them**
  - **But at least follow our decisions & CAAF’s**

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Presenting Your Case

- **Exhibits**
  - **Have everything in mind already**
  - **Try to order intelligently**
  - **Making copies**
- **Witness folders**
  - **Two copies of every previous statement, marked as an Appellate Exhibit**
  - **Notes and direct or cross-examinations**

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Questions

Presenting Your Case

- You are building two themes
  - What the case is about
  - What the trial is about

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Presenting Your Case

- **Use a trial plan, for your sanity & your team's**
- **Always have a paralegal in the courtroom**
  - **In blues and with a trial plan**
  - **It is "our" case in every sense**
    - **Guard it but ask for help as needed**

Presenting Your Case

- Voir Dire
  - You're essentially selling yourself
  - No one knows what they're doing
    - Be brief & watch the members
  - Play the numbers (unless you don't)
    - End up with two over a number evenly divisible by three going into peremptory challenges (or one)

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Presenting Your Case

- **During trial**
  - **Taking notes on everything**
  - **Highlighting important points**
- **Swearing in & the oath**
- **Be quick in front of the members**
- **Witnesses – save your last questions**
- **Rebuttal arguments – always say something**
  - **Tell them up front it'll be brief**

Presenting Your Case

- Ordering witnesses and evidence
  - This is entirely in the paralegal's control and can make an absolute difference
  - Examples: publishing videos or recordings
- Organizing the table & member questions
- Standing up first & sitting down last
- We're "The United States" not "The Government"

Theme Building

- Oral presentations
  - Be honest & confront problems
  - Make it like a movie
    - Points in threes & modulation (volume and cadence, staying with a member)
    - Painting a picture & using silence
  - You're comfortable when you know the case
  - Know your audience – MJ or members

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Questions

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Government Trial and Appellate Counsel Division (AFLOA/JAJG)

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Cross-Examination

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Lt Col Brian Thompson
Maj Mark Rosenow
Capt Jeff Starnes

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Cross Objectives

Lubet's Objectives of Cross-Examination:

1. **Repair or minimize damage**
2. **Enhance your case**
3. **Detract from their case**
4. **Establish foundation**
5. **Discredit direct testimony**
6. **Reflect on the credibility of another**

CX the Accused:

1. **Convince panel he is lying and guilty**

CX Fundamentals – Leading Questions

a. The question suggests the answer
b. Only one new fact per question as much as possible
c. Your tone should suggest the answer too
d. Not vague or argumentative
e. No compound questions
f. **A well crafted leading question is your single best tool for controlling the witness**

CX Fundamentals – Prior Inconsistent Statements

I. First, **C**onfirm/**A**ccuse regarding in court statements
II. Second, **C**redit/**B**olster out of court statement
III. Third, **C**onfront with inconsistency

CCC or ABCs

a) Don't ask the witness to explain the inconsistency
b) Don't rush through it
c) Don't impeach on minor inconsistencies
d) Practice, Practice, Practice
e) Sometimes you DO already know an inconsistency

CX Fundamentals – Progression of Questions

a) Use leading questions
b) Force the witness to make small admissions to avoid looking unreasonable
c) Each question builds on the one before
d) Eventually the witness is admitting or conceding far more than he /she should or would have otherwise

Notes about Style and Perceptions

a) **Four times to testify…you want to be the best witness**

b) **Be fair**

c) **You are smarter, more powerful, and a lawyer**

d) **People don't like a@# holes**

Don’t Dos of CX

a) Don’t go too fast for yourself…***go slower than feels comfortable***
b) <u>Do NOT repeat DX</u>
c) Don’t ask open ended questions
d) Generally, don’t ask questions you don’t know the answer to
e) Don’t ask for help from the judge or co-counsel
f) Do not question anybody about their invocation of rights or privileges

Constructive CX

Eliminate nearly all elements, all disputes, all holes

a) **Confront with real and testimonial evidence**

b) **Fix authenticity issues…**

c) **Knock out Defense's other theories**

d) **Bolster/corroborate other witnesses**

Deconstructive CX

a) **Testify for the Accused**

b) **Present full theme and theory of case**

c) **<u>You never know what you are going to get?</u>**

Preparing a CX

a) Start with the Constructive CX

b) Go ahead and prepare the Deconstructive CX too (if it is the Accused)

c) Move on to logical progression, inconsistencies, other stuff

d) Organization of your CX is HUGE

   a) Must end BIG

   b) Very good to begin BIG too

Closing Tips

You never know when the Accused will testify

If you can avoid being mean or suggesting the witness is a liar do THAT

Do no repeat the direct examination

Either you are wrong or the Accused is wrong

U.S. v. Chappell-Denzer

- Travis AFB (4/18, 6/4-5 and 8/20-23 2013)
- Rape (x 2), aggravated sexual assault (x 2), abusive sexual contact (divers) (x 1), forcible oral sodomy (divers) (x 1), forcible anal sodomy (x 1) and assault/battery (x 1)
- DD, 10 years confinement, E-1 and TF
- The accused's mental health (autism spectrum disorder, posttraumatic stress disorder and major depressive disorder)

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What I Know, What He Doesn't

- **Dr. Fabian never reviewed the accused's interrogation video**
- **The members hadn't seen the accused's interrogation video**
- **The defense was fundamentally flawed and the accused's mom proved it**

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The Transcript

Air Force Legal Operations Agency

Government Trial and Appellate Counsel Division (AFLOA/JAJG)

Integrity - Service - Excellence

Enhancing the Sentencing Case

Col Don Christensen
Lt Col Brian Thompson
Maj Mark Rosenow
Capt Jeff Starnes

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Overview

- **It matters**
- **Focus on the victim & the accused**
- **Types of evidence**
- **The defense case**
- **Rebuttal**

The Argument & Recommendation

- Punishment
- Protection of society
- Rehabilitation
- Preservation of GOAD
- Deterrence

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Questions

Character and Impeachment

Capt Alex Rose

Overview

- Character Evidence
  - Admissibility
  - Uncharged Misconduct
  - Habit
  - Propensity
- Impeachment
  - Bias
  - Conviction
  - Prior Statements

What a Good Guy…

- "I'm just not that type!" (404a)
  - Pertinent character trait
  - Examples
    - Peacefulness
    - Truthfulness
    - Good Military Character
- Admitted through: (405)
  - Reputation/Opinion
  - Affidavits

Sample Line of Questioning

- How do you know the accused?
  - Length of relationship
  - Frequency of contacts
  - Nature of relationship
- Have you had a chance to form an opinion as to his military character?
- What is that opinion?

But Did You Know…

- Impeach opinion
  - Have you heard…?
  - Did you know…?
- Reputation/opinion
- Specific acts…?
  - Entrapment/Insanity

In front of the jury…

Evidence of the accused's good military character may be sufficient to cause a reasonable doubt as to his guilt.

Uncharged Misconduct

- MRE 404(b)
  - Prohibits evidence introduced for the purpose of showing the accused acted in conformity in this case
  - Uncharged misconduct must be specifically tailored to show relevance/proper purpose

Proper Purpose

- Motive
- Opportunity
- Intent
- Preparation
- Plan
- Knowledge
- Identity
- Absence of Mistake/Accident

MRE 404(b)

- US v. Reynolds, 29 M.J. 105 (1989)
- 3 Part test
  - Could the jury find he committed the prior misconduct by a prep. of the evidence?
  - Why is it relevant (i.e. proper purpose)?
  - 403 Balancing

Notice requirement!

MRE 406—Habit Evidence

- Allows you to admit evidence and argue that the person acted in conformity with past behavior
- Habit v. Predisposition
  - Automatic v. discretionary
  - "invariable regularity"

Impeachment

- Challenging competence as a witness
- Either party may impeach a witness – regardless of who called the witness

Competence MREs 601-603

- Perception
- Recollection
- Communication
- Oath

Tactfully saying: "LIAR!"

- MRE 608(a): Opinion/Reputation
  - 4 Questions, ending with…
  - *"Do you have an opinion regarding his character for (un)truthfulness?"*
- Cannot bolster—Opposing counsel must first attack truthfulness
- Remember: Opinion on character, NOT testimony!

Tactfully showing: "LIAR!"

- MRE 608(b): Specific Acts
  - Must relate to (un)truthfulness
  - Argument: Goes to witness' credibility
  - Can be used to impeach opinion
  - Conduct, not consequences
- Stuck with the answer (no extrinsic evidence allowed)
- DETAILS!

The Catch-All

- MRE 608(c): Bias, prejudice, motive to misrepresent
  - Timing of Bias v. Motive to lie
  - Can be shown through extrinsic evidence
  - Always relevant if threshold met
- When evidence falls into two categories, choose the best one

MRE 609: Convictions

- Within 10 years
- Different balancing test
- Either:
  - Max punishment was > 1 year, or
  - Elements involved dishonesty

Inconsistent Statements

- MRE 613(b)
- Advocacy at its finest…
- 3 C's of Impeachment
  - Commit
  - Credit
  - Confront

MRE 613(b): The good stuff

- Just now, on direct, you testified the attacker was a black male?
- You spoke to OSI two days after this incident?
- Your recollection was probably more clear at that point?
- You understood it was important to tell the truth during that interview?
- In fact, they had you make a written statement?
- You were placed under oath and sworn to the truth of that statement?
- Understood the importance of that oath, and of being honest with OSI?
- Yet, during that interview, and in your written statement, you indicated the attacker was a white male?

Inconsistent Statements

- Arguing Prior Inconsistent Statement
  - Did witness adopt prior statement as truth?
    - If yes, then argue as truth
    - If no, then goes to only to witness credibility unless MRE 801(d)(1) is met

Questions?

Headquarters U.S. Air Force

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Appellate Update

Don Christensen, Col, USAF
Chief, Trial and Appellate Counsel Division
AFLOA/JAJG

U.S. AIR FORCE

Introduction

- **Victim Advocates and Counsel**
- **Lesser Included Offenses**
- **Article 134**
- **Charging State Law Crimes**
- **False Official Statements**
- **Multiplicity and Unreasonable Multiplication of Charges**
- **Searches**

U.S. AIR FORCE

Introduction

- **Confrontation Clause**
- **Bickel Testing**
- **M.R.E. 412 and M.R.E. 413**
- **Child Pornography**
- **Demeanor Evidence**
- **Unlawful Command Influence**
- **Appellate Posture at Trial**

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Victim Advocates and Counsel

Victim Advocates and Counsel

- **<u>LRM v. Kastenberg</u>, 72 M.J. 364 (C.A.A.F. 2013)**
  - **Alleged victim represented by SVC.**
  - **At arraignment, SVC attempted to reserve alleged victim's right to present argument through counsel at a later 412 or 513 hearing.**
  - **MJ limited alleged victim's right to be heard to factual matters, finding no standing to move the court for relief.**
  - **Alleged victim filed an extraordinary writ.**
  - **AFCCA denied on jurisdictional grounds. TJAG certified the issue to CAAF for review.**
  - **<u>Holding</u>: CAAF reversed AFCCA and held that "to be heard" means through counsel. MJ can place "reasonable" restrictions on role of the SVC.**

Victim Advocates and Counsel

- U.S. v. Brown, 72 M.J. 359 (C.A.A.F. 2013)
  - Appellant was convicted of multiple 120 specs against a child.
  - MJ allowed a victim advocate to sit next to the 17 year-old alleged victim during testimony.
  - The ADC objected.
  - NMCCA affirmed the findings and sentence.
  - Holding: CAAF affirmed, finding that the MJ did not abuse his discretion under MRE 611(a).

Victim Advocates and Counsel

- **<u>Take-Aways</u>:**
  - **M.R.E. 412 and M.R.E. 513 (M.R.E. 514) give an alleged victim the right to be heard.**
  - **The right to be heard includes the right to be heard through counsel.**
  - **SVCs can represent their clients in court and make legal arguments to the MJ.**
  - **The MJ can place "reasonable" limits on the role of the SVC.**
  - **M.R.E. 412 and M.R.E. 513 (M.R.E. 514) do not create a right to legal representation or the right to appeal an adverse evidentiary ruling.**

Lesser Included Offenses (LIOs)

LIOs

- **"Strict" elements test – MCM listing of LIOs is persuasive only, elements control.**
- **U.S. v. Jones, 68 M.J. 465 (C.A.A.F. 2010)**
  - **Charged with rape (Article 120) but convicted of indecent act (Article 134).**
  - **CAAF says they are returning to strict elements test to determine if a crime is a lesser included offense.**
  - **Holding: Indecent acts is not LIO of rape because they have different elements.**

LIOs

- U.S. v. Alston, 69 M.J. 214 (C.A.A.F. 2010)
  - What we meant in Jones is that we really don't have a strict elements test.
  - Accused charged with rape by force by "using strength sufficient she could not escape sexual conduct".
  - The MJ instructed on LIO of aggravated sexual assault over an ADC objection.
  - Holding: Aggravated sexual assault IS a proper LIO of rape…
    - Even though not listed as LIO in MCM.
    - Court applied common and ordinary understanding of words in statute to reach conclusion.
    - Indictment elements test – Court looked at both charge sheet and statutory elements.

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LIOs

- U.S. v. Jones, 68 M.J. 465 (C.A.A.F. 2010)
  Indecent acts is not an LIO of rape.
- U.S. v. Alston, 69 M.J. 214 (C.A.A.F. 2010)
  Aggravated sexual assault is an LIO of rape.
- U.S. v. Aguilar, 70 M.J. 563 (A.F. Ct. Crim. App. 2011)
  Assault consummated by a battery is an LIO of rape.
- U.S. v. Bonner, 70 M.J. 1 (C.A.A.F. 2011)
  Assault consummated by battery is an LIO of wrongful sexual contact.
- U.S. v. Pittman, 2011 WL 6010897 (A.F. Ct. Crim. App.)
  Wrongful sexual contact is an LIO of Aggravated sexual contact.

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LIOs

- U.S. v. McLean, 70 M.J. 573 (A.F. Ct. Crim. App. 2011) Aggravated assault is an LIO of maiming.
- U.S. v. Arriaga, 70 M.J. 51 (C.A.A.F. 2012) Housebreaking is an LIO of burglary.
- U.S. v. Daulton, 72 M.J. 83 (C.A.A.F. 2013) Involuntary manslaughter is an LIO of unpremeditated murder.

LIOs

- **Take-Aways:**
  - **Charge all reasonably raised and necessary crimes.**
  - **Additional crimes are NOT alternative crimes.**
  - **Article 134 offenses are NEVER LIOs of enumerated crimes.**
  - **The MJ has a duty to instruct on all LIO's:**
    - **Even if you don't want them…**
    - **Unless Accused affirmatively waives the instruction.**
    - **Before trial, search for possible LIOs of all charged offenses to make sure the MJ instructs properly.**

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Article 134

Article 134

- **U.S. v. Fosler, 70 M.J. 225 (C.A.A.F. 2011)**
  - **Appellant was JROTC instructor who had sex with a 16 year-old female high school student.**
  - **Charged with adultery under Article 134. Specification failed to allege the terminal element.**
  - **Appellant pled not guilty.**
  - **ADC objected to the form of the 134 specification.**
  - **Objection was overruled.**
  - **Convicted as charged.**
  - **Holding: It was reversible error to fail to allege all the elements of the offense, including the terminal element.**

Article 134

- **U.S. v. Ballan, 71 M.J. 28 (C.A.A.F. 2012)**
  - **Appellant engaged in a variety of sexual misconduct with his 3 biological children, all under 12 years old.**
  - **Charged with multiple Article 120, 125, and 134 (indecent acts and indecent liberties) offenses.**
  - **The Article 134 offenses failed to allege the terminal element.**
  - **Appellant pled guilty pursuant to PTA.**
  - **Holding: It was error to fail to allege the terminal element, but harmless because it was a guilty plea and it was covered during the Care inquiry.**

Article 134

- **U.S. v. Humphries, 71 M.J. 209 (C.A.A.F. 2011)**
  - **Appellant had sex with a woman while her husband was deployed.**
  - **Charged with rape, forcible sodomy, communicating threat, and adultery. The Article 134 offenses did not allege the terminal element.**
  - **Appellant pled not guilty.**
  - **ADC did not object to the form of the Article 134 offenses.**
  - **Convicted of consensual sodomy and adultery.**
  - **Holding: It was error to fail to allege the terminal element. The error was prejudicial because there was no evidence in the record that Appellant was on notice of the elements.**
  - **Dissent: What about the 32 report?**

Article 134

- **<u>Take-Aways</u>:**
  - **Expressly charge the terminal element.**
  - **Realize that sample specifications may be legally insufficient under current case law.**
  - **Actually look at your evidence and choose either “service discrediting” or “prejudicial to good order and discipline”.**
  - **If you can’t decide which part of the terminal element to charge, use “and” instead of “or”.**
  - **Really, expressly charge the terminal element.**

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Charging State Law Crimes

Charging State Law Crimes

- **U.S. v. Hayes, 71 M.J. 112 (C.A.A.F. 2012)**
  - **Add-on charge of "Underage Drinking" (under Article 92) in drug case did not allege the source of duty to "refrain from drinking alcohol while under the age of 21".**
  - **At trial, government presented to evidence of the duty to obey the state (Nevada) drinking law.**
  - **Holding: "Article 92(3) requires proof of certain military duties, it does not assume such duties." In other words, without proof, the military duty to follow state law is not presumed.**

Charging State Law Crimes

- **Take-Aways:**
  - **Know the state law at issue.**
  - **If there is a military duty to obey the state law, prove it.**
  - **Consider charging violations of state law via Article 134. *But see* United States v. Merritt, 72 M.J. 483 (C.A.A.F. 2013) (multiple state laws—but not a majority– making viewing child pornography illegal was insufficient to establish notice for a general Art. 134 offense)**

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False Official Statements

False Official Statements

- **U.S. v. Spicer, 71 M.J. 470 (C.A.A.F. 2013)**
  - **Article 107 applies to "statements affecting *military functions.*"**
    - **The speaker is making the statement in the line of duty.**
    - **The speaker makes a statement to civilian law enforcement that bears "a clear and direct relationship" to the speaker's official duties.**
    - **The hearer is a military member "carrying out a military duty".**
    - **The hearer is a civilian who is performing a military function at the time the speaker makes the statement.**
  - **Holding: False exculpatory statement by active duty father to civilian police officers about child abuse allegations were false, but not official.**

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False Official Statements

- **U.S. v. Capel, 71 M.J. 485 (C.A.A.F. 2013)**
  - **Decided shortly after Spicer and used the same methodology.**
  - **Holding: False exculpatory statement to civilian police officer about using a stolen debit card was not made "pursuant to any specific military duties".**
- **Take-Aways:**
  - **What is an official statement involving civilians is a fact-sensitive inquiry.**
  - **Most statements to civilian authorities are not false "official" statements under Article 107.**
  - **Potential exceptions:**
    - **AAFES employees.**
    - **Joint investigations.**

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False Official Statements

- **U.S. v. Passut, 73 M.J. 27 (C.A.A.F. 2013)**
  - **While attempting to cash checks at an AAFES shoppette, Accused made false statements to a civilian AAFES employee about his social security number and damage to his CAC card**
  - **The hearer, an AAFES employee cashing checks, qualified as a civilian necessarily performing a military function because AAFES is a joint, nonappropriated fund instrumentality of DoD, whose profits are fed back into service-related MWR programs**
  - **Holding: Statements made to a civilian AAFES employee responsible for cashing checks were official for the purposes of Article 107**

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Multiplicity and Unreasonable Multiplication of Charges (UMOC)

Multiplicity and UMOC

- **U.S. v. Campbell, 71 M.J. 19 (C.A.A.F. 2012)**
  - **Appellant stole meds from the medical clinic where he worked by inputting incorrect information into the dispensing machine.**
  - **He was charged with making a false official statement, possession of controlled substances, and larceny of military property.**
  - **The ADC challenged the charges based on multiplicity and UMOC.**
  - **The MJ did not dismiss or merge any charges in findings.**
  - **Appellant was found guilty of all charges.**
  - **In sentencing, the MJ merged the charges and capped the sentence.**
  - **Holding: The MJ did not abuse his discretion.**

Multiplicity and UMOC

- **Multiplicity**
  - **Aimed at protecting against double-jeopardy.**
  - **Use the <u>Blockburger/Teeters</u> elements-test:**
    - **Has Congress expressly stated that one offense is multiplicious with another offense?**
    - **If not, Congress's intent can be inferred from the elements of the offenses themselves**
  - **Exists only in findings.**
  - **The remedy for multiplicity is dismissal.**

Multiplicity and UMOC

- **Unreasonable Multiplication of Charges**
  - **Rooted in R.C.M. 307(c)(4).**
  - **Based on "reasonableness".**
  - **Use the Quiroz factors:**
    - **Did the Accused object at trial?**
    - **Is each charge aimed at distinctly separate criminal acts?**
    - **Does the number of charges misrepresent the Accused's criminality?**
    - **Does the number of charges unreasonable increase the punitive exposure?**
  - **Can exist in findings and sentencing.**
    - **Dismissal is a remedy in findings.**
    - **Merging is a remedy in sentencing.**

Multiplicity and UMOC

- **Take-Aways:**
  - **This area of the law has been fraught with confusion.**
  - **The Court is not unanimous in its clarification of multiplicity and unreasonable multiplication of charges (see Stucky's dissent).**
  - **The MJ has wide discretion in applying Blockburger/ Teeters and Quiroz.**
  - **Know what you are charging and WHY you are charging it.**
  - **Be able to articulate why each charge and specification is important.**
  - **Be prepared for charges to survive but sentences to merge.**

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Searches

Searches

- **U.S. v. Dease, 71 M.J. 116 (C.A.A.F. 2012)**
  - **Facts:**
    - **16 June: Accused consented to UA.**
    - **21 June: ADC revokes consent via form letter.**
    - **26 July: Government shipped urine specimen for testing.**
    - **11 Aug: Government learned that Accused's urine specimen tested positive for cocaine.**
    - **26 Aug: Accused informed of results of 1st UA. He consented to a second UA, gave consent to search his dorm, and made a statement.**
  - **At trial:**
    - **ADC filed motion to suppress the 1st UA and all derivative evidence.**
    - **The MJ granted the motion.**
  - **Holding: There is a continued privacy interest in urine that is voluntarily surrendered for analysis, and consent to search can be revoked at any time. All evidence was excluded.**

Searches

- **U.S. v. Wicks, 73 M.J. 93 (C.A.A.F. 2014)**
  - **Facts:**
    - **MTI case: Girlfriend of ACC stole ACC's iPhone and searched through his messages; saw inappropriate texts between ACC and trainees; notified SFS (but did not mention that she stole the iPhone)**
    - **SFS investigator browsed through messages on iPhone, discovered messages between ACC and trainees**
    - **Legal office repeatedly advised SFS not to obtain a search authorization**
  - **Holding: ACC maintained a reasonable expectation of privacy in his phone. SFS improperly exceeded scope of girlfriend's initial private search (absent information as to the extent of the initial search). *But see* United States v. Jacobsen, 466 U.S. 109 (1984).**

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Searches

- **Take-Aways:**
  - **Get OSI to send stuff to the lab ASAP.**
  - **If you get a revocation of consent letter, memorialize what evidence you have at that time.**
  - **Continue to aggressively work investigation AFTER consent to build record for probable cause/inevitable discovery:**
    - **UA: Toxicology screen by base clinic.**
    - **DRUGS: Field testing by OSI.**
    - **Electronic Media: Mirror the drive.**
    - **DNA: Build investigation to establish probable cause.**
  - **If you have probable cause to search, go get a search authorization or a warrant.**

Confrontation Clause

Confrontation Clause

- **U.S. v. Blazier II, 69 M.J. 218 (C.A.A.F. 2010)**
  - **Experts May**
    - **Rely on and repeat admissible non-hearsay machine-generated data.**
    - **Rely on work of others at lab, but must form own independent expert opinion.**
  - **Experts May Not**
    - **Repeat inadmissible testimonial hearsay.**
    - **Convey the expert testimonial hearsay of others.**
  - **Holding: Machine-generated printouts and documents are non-testimonial statements.**

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Confrontation Clause

- **U.S. v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011)**
  - **DD Form 2624 (specimen custody document) contains a certification from a lab official verifying the lab procedures and test results.**
  - **Holding: Admission of the certification of the DD Form 2624 violated the Confrontation Clause because it is like an affidavit.**
- **U.S. v. Tearman, 72 M.J. 54 (C.A.A.F. 2013)**
  - **Chain-of-custody documents and internal worksheets:**
    - **Are substantially different from certification statements.**
    - **Lack certified "substantive information;" they contain only routine and objective cataloguing of unambiguous factual matters.**
    - **Lacked sufficient "formality".**
  - **Holding: Documents were non-testimonial and therefore admissible.**

Confrontation Clause

- **U.S. v. Katso, __ M.J. __ (A.F. Ct. Crim. App. 2014)***
  - **DNA testimony (non-UA case): "Surrogate" expert, who did not personally perform the initial portions of a DNA test, testified about the processes involved in the DNA test used against the ACC**
  - **DNA expert's testimony mixed fact testimony (what another expert from the lab accomplished), with opinion testimony (the testifying expert's own independent statistical testing and conclusions)**
  - **Holding: Expert could not form an independent conclusion that the known DNA in the analysis he reviewed came from ACC, and it was improper for expert to repeat testimonial statements contained within another expert's report—namely, that the DNA profile found on the evidentiary samples from VIC came from ACC**

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Confrontation Clause

- **Take-Aways for UA Cases:**
  - **DTR cover page (Blazier I)**
  - **DD Form 2624 certification (Sweeney)**
  - **Machine generated data (Blazier II)**
  - **Chain-of-custody/internal worksheets (Tearman)**
  - **Mixing factual information not independently known by the testifying expert with expert opinion (Katso)**
  - **Strip down your DTR to just machine-generated data, chain of custody documents, and internal worksheets. Have expert use that data to form an independent opinion.**
- **Note that substituting expert testimony in DNA and other forensic testing cases may create confrontation concerns that do not exist in UA cases.**

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***Bickel* Testing**

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Bickel Testing

- U.S. v. Ayala, 69 M.J. 63 (C.A.A.F. 2010)
  - SJA memo to WG/CC had litigation rationale for instituting Bickel policy (SJA wanted to avoid naked UA cases and increase convictions).
  - WG/CC policy letter stated all the "right" M.R.E. 313 reasons (security, military fitness, good order & discipline).
  - Bickel policy challenged at trial.
  - WG/CC provided affidavit reciting appropriate M.R.E. 313 principles.
  - Holding: CAAF found clear and convincing evidence that purpose for the Bickel policy was valid (e.g. not litigation).
- Take-Away: Primary purpose of Bickel policy must be M.R.E. 313, not securing convictions at trial.

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M.R.E. 412
&
M.R.E. 413

M.R.E. 412

- **U.S. v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011)**
  - **ADC wanted to use emails to show that the alleged victim was sexually active and had reason to lie.**
  - **MJ allowed ADC to cross-examine the alleged victim about the connection between the emails and a medical examination, but did not permit questioning on the substance of the emails.**
  - **Holding: M.R.E. 412 cannot limit "constitutionally required" evidence, but MJ did not abuse his discretion.**
- **U.S. v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011)**
  - **ADC wanted to cross-examine alleged victim about a previous extra-marital affair she had.**
  - **MJ would not allow that line of questioning.**
  - **Holding: MJ abused his discretion. Findings were set aside.**

M.R.E. 412

- **Take-Away:**
  - **The analysis under M.R.E. 412(b)(3) has been streamlined:**
    - **Is the evidence relevant?**
    - **Is the evidence material?**
    - **Does the probative value outweigh the danger of unfair prejudice?**
  - **Current M.R.E. 412 analysis eliminates the concern for the alleged victim's privacy. Constitutionally required evidence "is admissible no matter how embarrassing it might be."**

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M.R.E. 413

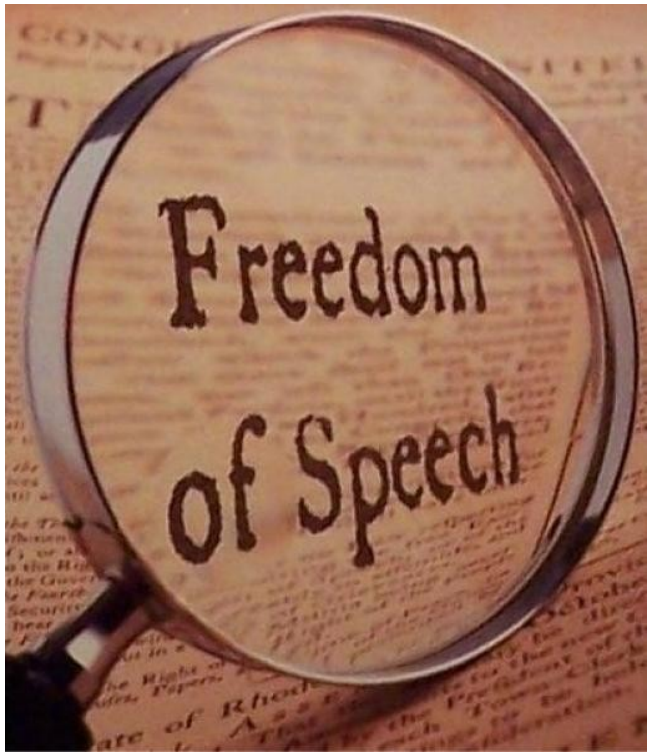
- United States v. Solomon, 72 M.J. 176 (C.A.A.F. 2013)
  - Government sought to introduce evidence of prior incidents under M.R.E. 413. Accused presented evidence that he had been acquitted of charges relating to the previous incident, and he also presented alibi evidence relating to the prior situation.
  - Three threshold requirements for admitting evidence under M.R.E. 413

    (1) Accused must be charged with an offense of a sexual assault

    (2) Proffered evidence must be evidence of the accused's commission of another offense of sexual assault

    (3) The evidence must be relevant under M.R.E. 401 and 402
  - If threshold is met, MJ must then apply a balancing test under M.R.E. 403
  - Holding: MJ abused his discretion by admitting evidence under M.R.E. 413 of prior sexual assaults, of which Accused was acquitted, without applying or articulating a balancing test under M.R.E. 403

Child Pornography



Child Pornography

- U.S. v. Barberi, 71 M.J. 127 (C.A.A.F. 2012)
  - Government alleged possession of "child pornography" under Article 134 (clauses 1 and 2).
  - MJ instructed the members based on the federal statute definitions and the Dost factors.
  - Members delivered general verdict of guilt based on 6 images of Accused's 12 year-old step-daughter emerging nude from a shower.
  - Holding:
    - Using the language of the charge and the MJ's instructions, 4 of 6 images were "constitutionally protected" because they were not "lascivious".
    - The general verdict of guilt could not survive because a basis for deciding guilt was constitutionally protected speech.
  - Under certain circumstances, constitutionally protected conduct could still be punished under Article 134.

Child Pornography

- U.S. v. Piolunek, 2013 WL 5878614 (A.F. Ct. Crim. App.)*
  - Government alleged receipt and possession of "visual depictions of a sexually explicit nature of a minor child" under Article 134 (clauses 1 and 2).
  - MJ *said* he was taking the elements from the specification, but he *actually* instructed based largely on the federal statute.
  - Members delivered general verdict of guilt based on 22 images of a 14 year-old girl topless, nude, and masturbating with a hairbrush.
  - Holding:
    - Using the language of the charge and the MJ's instructions, 3 of the 22 images were "constitutionally protected" because they were not "lascivious".
    - Although error for MJ to admit the 3 "constitutionally protected" images, general verdict of guilt could stand based on quantity of the remaining images, the quality of the images, and the surrounding circumstances.

U.S. AIR FORCE

Child Pornography

- **Take-Aways:**
  - **Know the difference between CP and "child erotica."** *See, e.g.*, **United States v. Warner, 73 M.J. 1 (C.A.A.F. 2013) (ACC did not have fair notice under state or federal law that possession of images depicting minors as sexual objects or in sexually suggestive way, without depicting nudity, was subject to criminal sanction--charging under Art. 134(1) or (2) improper).**
  - **Actually review all of your evidence and make conservative charging decisions based on what is actually CP.**
  - **List the charged images in the specification so that:**
    - **The members or the judge can make findings by exceptions.**
    - **The appellate courts know what images formed the basis of the conviction.**
  - **Try to use non-CP images as M.R.E. 404(b) evidence.**

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Demeanor Evidence

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Demeanor Evidence

- **Salinas v. Texas, 133 S. Ct. 2174 (2013)**
  - **Accused was being investigated for murder. During a noncustodial interrogation, Accused answered questions.**
  - **When asked, "Will the ballistics test show that the shells match your gun?" the Accused did not answer.**
  - **At trial, government introduced evidence of Accused's demeanor as evidence of guilt:**
    - **Looked down at the floor.**
    - **Shuffled his feet.**
    - **Bit his bottom lip.**
    - **Began to "tighten up".**
  - **Holding: Where an accused does not invoke his right to silence, his silence (demeanor) can be used against him as evidence of guilt.**

Demeanor Evidence

- **Take-Aways:**
  - **May have limited applicability in the military due to the stricter requirements of Article 31 versus Miranda.**
  - **Is limited to cases where there was no invocation of rights.**
  - **Does not open the door to generally excludable "human lie detector" testimony. *See* U.S. v. Knapp, 73 M.J. 33 (C.A.A.F. 2014).**
  - **Can be a powerful tool in the right case.**

Unlawful Command Influence (UCI)

UCI

- 7 May 13: “I have no tolerance for this. … I expect consequences. . . . If we find out somebody is engaging in this stuff, they've got to be held accountable – prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period.” – President Obama
- 6 Aug 13: “Central to military justice is the trust that those involved in the process base their decisions on their independent judgment. . . . There are no expected or required dispositions, outcomes, or sentences in any military justice case.” – Secretary Hagel

UCI

- UCI: The "mortal enemy" of military justice.
- Article 37 prohibits convening authorities and anybody subject to the UCMJ from wrongfully influencing the outcome of a court-martial.
  - Accusatory UCI: Accuser disqualification, coercion in preferral, unlawful pressure to make certain recommendations in transmittal process.
  - Adjudicative UCI: Unlawful influence in the trial process, such as tampering with members, witnesses, or evidence.
- Were the President's comments UCI? Open question yet to be answered. In the meantime…

UCI

- Actual UCI: Literal efforts to influence a proceeding.
- Apparent UCI: Perception of fairness in the military justice system as viewed by a reasonable member of the public.
- Defense initial threshold (some evidence):
  - Certain facts, if true, constitute UCI, and;
  - Alleged UCI has a potential to cause unfairness in the proceedings.
- Government burden (beyond a reasonable doubt):
  - The facts do not exist, or;
  - The facts do not constitute UCI, or;
  - The UCI will not prejudice the proceedings, findings, or sentence.

UCI

- **Trial procedure:**
  - **The ADC has opportunity to meet the initial UCI threshold .**
  - **If the ADC meets the initial UCI threshold, the government should then be given the opportunity to meet its burden.**
- **Curative options:**
  - **Independent Article 32 I.O.s with thorough reports.**
  - ***Specific* affidavits from the preferral and referral authorities. *See* U.S. v. Mobley, 2013 WL 6913318 (A.F. Ct. Crim. App. 2013)**
  - **Voir dire the MJ and the court-members.**
- **Take-Aways:**
  - **Do not let the ADC disqualify members or witnesses by introducing UCI.**
  - **Fight for the opportunity to rebut the ADC's evidence.**

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Appellate Posture at Trial

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Appellate Posture at Trial

- **Place reasons for objections on the record.**
- **If you have multiple viable theories of admissibility, litigate them on the record.**
- **Proffers are NOT evidence. Evidence is evidence.**
- **Request written findings of fact after the MJ has ruled.**
- **Make sure the MJ conducts M.R.E. 403 balancing tests on the record.**
- **Capture R.C.M. 802 conferences on the record.**
- **When the ADC waives a right, try to get that waiver on the record.**
- **It is <u>your job</u> to protect the record. When in doubt, speak up.**

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Conclusion

- **Victim Advocates and Counsel**
- **Lesser Included Offenses**
- **Article 134**
- **Charging State Law Crimes**
- **False Official Statements**
- **Multiplicity and Unreasonable Multiplication of Charges**
- **Searches**

U.S. AIR FORCE

Conclusion

- **Confrontation Clause**
- **Bickel Testing**
- **M.R.E. 412 and M.R.E. 413**
- **Child Pornography**
- **Demeanor Evidence**
- **Unlawful Command Influence**
- **Appellate Posture at Trial**

Headquarters U.S. Air Force

Integrity - Service - Excellence

Questions?

Call JAJG:
DSN 612-4800
Comm (240) 612-4800

Character Evidence Drills

Fact Scenario

Capt Greg Potter is charged with assaulting Technical Sergeant Robert Stevens. The alleged assault took place on 22 February, at 2200, in base housing at Ellsworth Air Force Base. According to Technical Sergeant Stevens, Captain Potter accused him of having an affair with his wife, Ms. Glenda Potter, while he was away on a recent deployment to Iraq. Technical Sergeant Stevens says he denied the affair and then Captain Potter picked up a garden rake and began to beat him with it. Technical Sergeant Stevens managed to get away and called Security Forces from a neighbor"s house. Technical Sergeant Stevens had seven gashes on his chest. Security Forces responded and found Captain Potter. Captain Potter denied that he had assaulted Technical Sergeant Stevens. Instead, he says that the Technical Sergeant Stevens assaulted him and he was only defending himself with the garden rake. Captain Potter is prosecuted for assault at a general court-martial.
Colonel Phillip Sazmo, the 28th Mission Support Group commander, has been in the Air Force for 22 years. He served in Iraq for six months in 2004 at the 506th Air Expeditionary Group commander at Kirkuk AB. In 2006, he served for four months on a NATO assignment in Afghanistan. Colonel Sazmo has been Captain Potter"s supervisor for 24 months. He has seen Captain Potter on a daily basis except for the four months in which Captain Potter was deployed to Iraq. Captain Potter is his executive officer so Colonel Sazmo has worked with very closely with Captain Potter. Colonel Sazmo does socialize with Captain Potter, and his wife Glenda, at wing and holiday events. Colonel Sazmo is of the opinion that the accused, Captain Potter, is an outstanding officer with exemplary military character.
The government calls Mrs. Glenn Bryson to testify. Mrs. Bryson, the wife of Master Sergeant Bryson, has lived on Ellsworth Air Force Base for three years. She and her husband are next door neighbors of Technical Sergeant Stevens. She has known him for the last three years and talks with him on a daily basis about their shared vegetable garden. The families in their neighborhood block are highly social and take turns hosting parties for the families who live there. Technical Sergeant Stevens, a volunteer T-ball coach and assistant Boy Scout leader, has a reputation in the neighborhood for being a peaceful person. He is known for being very calm and level headed. Technical Sergeant Stevens often mediates disputes among neighbors over yard care, street parking, and pet annoyances.
Captain Linus Drew has known Captain Potter for 12 years. They were in ROTC together at University of North Carolina. They were roommates for the last two years in college and have remained in close contact since then. They were assigned together at Langley for two years and have both been assigned here at Ellsworth AFB for 24 months. Captain Drew is the executive officer for the Wing Commander so he and Captain Potter work together on a daily basis. Captain Potter is known for being meticulous, honest and detail-oriented in his staff work among the other executive officers and the Wing leadership. They also both belong to the Mount Olive Baptist Church; a church with 150 members. Both are on the finance and building fund committee where Captain Potter serves as the assistant treasurer. During the church election for members to be on the finance and building fund committee, open discussions were held discussing the merits, honesty and moral fiber of all candidates for the committee. Capt Drew and Capt Potter are also members of the Company Grade Officers Council (CGOC) on Ellsworth 19

Air Force Base. However, Captain Drew rarely attends meetings. Captain Potter is treasurer of the CGOC.

Drill 1 – Good Military Character

Defense Counsel, you have Colonel Sazmo on the stand. Lay the foundation for and elicit his opinion as to the military character of Captain Potter. Trial Counsel be prepared to cross-examine this witness.

Drill 2 – Reputation for Peacefulness

During the court-martial, the government calls Technical Sergeant Stevens to the stand. During a blistering cross-examination, the defense suggests that he, Technical Sergeant Stevens, was the aggressor; not the victim.
Trial Counsel, you have Mrs. Bryson On the stand. Lay the foundation for and elicit her opinion as to Technical Sergeant Steven"s reputation for peacefulness. Defense counsel, be prepared to cross-examine this witness.

Drill 3 – Opinion and Reputation for Truthfulness

Captain Potter testifies during the defense case at his court-martial. During cross examination, as you would expect, the prosecution challenges Captain Potter"s truthfulness.
Defense Counsel, you have Captain Drew on the stand. Lay the foundation for and elicit his opinion as to Captain Potter"s truthfulness and his reputation for truthfulness. Trial Counsel, be prepared to cross.

Impeachment Drills

Drill 1 - Impeachment by Bias, Prejudice & Motive

Fact Scenario: The accused, SrA Savage, is charged with aggravated assault for beating A1C Bronson with a crescent wrench one night at work. The accused claims self-defense and has testified as such. The accused has also produced a number of witnesses who testify as to his character for truthfulness and peacefulness.
SrA LeBlanc, who works with the accused, testified on direct that the accused is a truthful and peaceful person. Counsel's thorough pretrial investigation uncovered that the witness and the accused are on the same unit soccer team, which won the post championship last year. The witness is the star goalie, and the accused is his center fullback. There are also rumors that the witness and the accused belong to a local skinhead club.
SrA LeBlanc has just finished testifying on direct. Impeach the witness.

Drill 2: Impeachment by Prior Conviction

Peter Burns has just finished her testimony in *US v. Mancini*. Impeach him using the Commonwealth of Virginia Certified Copy of Criminal Conviction from the case file.

Drill 3: Impeachment Prior Inconsistent Statement

Fact Scenario: The prior statement: OSI reports that the alleged rape occurred at approximately 0500 on 4 July. At about 0630 on 4 July, the witness was transported to OSI and made a sworn statement on AF Form 1168 (see attached document). The witness stated that his mind was very clear after the incident, and that he got a good look at the victim and the assailant. The OSI office is about a mile from the dormitory where the alleged rape occurred. The witness was sworn to his statement, had a chance to read it over before signing it, initialed each page, and then signed it.

Testimony: "On 3 July I was in the hallway of dormitory number 3. It was about 0500. I had been very thirsty that evening because my smoking is getting worse. I've smoked for several years now and I've increased to the point of three packs a day. Anyway, I was standing in the hallway, at the vending machine. I couldn't decide which kind of soda to get. As usual, the only two kinds in the machine were cherry cola and orange soda. I like the sweetness of cherry cola, but I also like the bouncy vitality of the orange soda. I couldn't make up my mind whether I was in a cherry-mood or an orange-mood. But I wanted something. As I fished in my pocket for fifty cents I heard a sound, like a muffled yell, come from the room behind me. I heard something like a thump. As I turned to face the door, it burst open, and a naked woman ran past me, screaming „he's trying to kill me." As she rushed by me, a naked man followed her out of the room. He was white and very large, with dark brown hair. He seemed to be all shiny. I lunged at him, and we fell to the ground, grappling. We wrestled, and I tried to get a hold of him but I couldn"t – he seemed to be covered in some type of body oil. It smelled like perfume. But I noticed he had a strange, funky odor, emanating from himself. He did not have any type of weapon. He was completely naked. He managed to break free from me. I initially tried to follow him but he ran

up the stairs at the end of the hall. I decided to follow the victim, who had run outside. I guess I decided to stay with her and protect her. I walked with her over to the First Sergeant's house, and turned her over to him and told him to call 911. Then I rousted some of my buddies and we began a door-to door search for the rapist. After about an hour, we spotted a guy coming from the area near the dumpsters. We ran over to him and stopped him. He was black, about medium build. He was dressed in PT clothes. As we got near to him, I noticed that weird, funky smell again, and I shouted "that's the guy!" and we piled on top of him. Then the SFS came and said "he's the guy." That's the accused sitting in the courtroom today.
Impeach the witness.

Drill 4: Impeachment Untruthful Acts

Fact Scenario: The witness is A1C Lars N. Eboy. He is a witness in a dormitory larceny case. He testified for the government. Through dogged investigation, you have found the attached Record of Individual Counseling Form (AF IMT 174) in the witness's unit file.

STATEMENT OF SUSPECT/WITNESS/COMPLAINANT

	SUSPECT
X	WITNESS/COMPLAINANT

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 8013; 44 U.S.C. 3101; and EO 9397
PRINCIPAL PURPOSES: Used to record information and details of criminal activity which may require investigative action by commanders, supervisors, security police, AFOSI special agents, etc.; and to provide information to appropriate individuals within DoD organizations who ensure proper legal and administrative action is taken.
ROUTINE USES: Information may be disclosed to local, county, state and federal law enforcement/investigative authorities for investigation and possible criminal prosecution or civil court action. Information extracted from this form may be used in other related criminal and/or civil proceedings.
DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual making the statement.

I. STATEMENT INFORMATION

DATE (YYYY MM DD)	TIME	LOCATION AND INSTALLATION (Building No)	UNIT TAKING STATEMENT	REPORT OF (Check one)
2005 07 04	0630	Bldg 3, Maxwell AFB	OSI	OFFENSE / X COMPLAINT

II. PERSONAL IDENTIFICATION *(Print or Type)*

NAME (Last, First, Middle Initial)	SSN	STATUS/GRADE
Gyro, Morris A.	456-78-9012	AD/E-4

LOCAL ADDRESS (Include Zip Code)	DATE AND PLACE OF BIRTH (If required)	TELEPHONE HOME	TELEPHONE DUTY
Bldg 3, Room 224 Maxwell AFB AL	17 Sep 20XX-23	X-XXXX	X-XXXX

PERMANENT ADDRESS OR HOME OF RECORD (Include Zip Code)	MILITARY ORGANIZATION/MFLIT/TER	OFFICE
137 Scapigot Lane Gunnison, CO 81235	42 Supply Squadron	

SPONSOR INFORMATION

NAME (Last, First, Middle Initial)	GRADE	SSN	ORGANIZATION	DUTY PHONE

III. ACKNOWLEDGEMENT OF OFFENSES AND 5TH AMENDMENT/ARTICLE 31 RIGHTS ADVISEMENT *(Suspect Only)*

I have been advised that I am suspected of the following offenses:

ADVISED BY (Full Name and Rank)	OFFICIAL IDENTIFIED HIMSELF/HERSELF AS A (OSI, security police, etc.)

SUSPECT INITIALS	*and advised me that I have the following rights according to the 5th Amendment of the U.S. Constitution/Article 31 of the Uniform Code of Military Justice.*
	I have the right to remain silent - that is to say nothing at all.
	Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial, non-judicial, or administrative proceedings.
	I have the right to consult with a lawyer.
	I have the right to have a lawyer present during the interview.
	I may obtain a civilian lawyer of my own choice at no expense to the government.
	I may request a lawyer any time during this interview.
	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.
	MILITARY ONLY: If I want a military lawyer, one will be appointed for me free of charge.
	CIVILIANS ONLY: If I cannot afford a lawyer and want one, a lawyer will be appointed for me by civilian authorities.

SUSPECT INITIALS	*I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me.* *I make the following choice. (Initial One)*
	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offense(s) under investigation.
	I do not want a lawyer and I do not wish to make a statement or answer any questions.
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.

I fully understand my rights and that my signature does not constitute an admission of guilt.

SIGNATURE OF SUSPECT	SIGNATURE OF WITNESS/INTERVIEWER

IV. STATEMENT

On 4 July, I was standing at the soda machine. It was early in the morning. I was tired but alert. I was about to get a coke from the machine when I heard a noise behind me. It sounded like someone screaming. I whirled around, going into a crouch-type fighting position (I'm a blackbelt in karate). A woman burst out of the room which I'd been standing in front of. She was naked and looked very frightened. She screamed "he raped me!" or something like that, then ran past me. A naked man followed her out of the room at a fast pace. He was black, of approximately medium build. I dove at him and hit him in the waist area with my shoulder. I drove him to the ground and we wrestled. I noticed he was wearing pants and he had a knife sheath attached to his belt. I remember that because I remember seeing that and thinking instinctively "he's got a knife." I also saw him holding something shiny. We wrestled for a few seconds, but then he slipped out of my grasp and ran up the stairs at the end of the hallway. I ran after the victim, thinking I should stay with her. I called 911. Then I rousted my First Sergeant and, after we got some of my buddies, we started a room to room search looking for the rapist. After a while, we saw a guy by the dumpster. We ran over to him. He said he'd been doing PT. We questioned him for a few minutes, then let him go. As he walked past us, it struck me that he looked vaguely familiar. About ten minutes later, I saw him under a street light. I then recognized him as the rapist and I shouted "that's him!"

V. OATH/SIGNATURE

"I hereby voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful inducement. I swear (or affirm) I have read this statement, initialed all pages and corrections, and it is true and correct to the best of my knowledge."

SIGNATURE OF PERSON MAKING STATEMENT	SIGNATURE OF WITNESS/INTERVIEWER
Maria A. Lyra	Matthew W. Everett

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 4th *day of* July, 20XX *(year).*

SIGNATURE OF PERSON ADMINISTERING OATH

Matthew W. Everett

VI. INSTRUCTIONS FOR CONTINUATION PAGE(S)

Use plain bond paper (front sides optional). At the top right of each page, print or type "Last name of individual making the Statement) on (Date)." At the bottom of each page, print or type: "Page ___ of ___ Pages." The individual must initial the top and bottom entries and sign his/her name at the bottom of each page.

RECORD OF INDIVIDUAL COUNSELING

I. COUNSELING TIPS

1. Determine the objective of the counseling before the session begins.
2. Hear the individual out.
3. Treat the member as having worth and dignity.
4. Show sincerity, courtesy, and personal interest in the individual.
5. Give the individual the facts, whether they are pleasant or unpleasant.
6. Don't brush off any problem as being too trivial.
7. Don't make snap decisions.
8. Don't make promises if you can't keep them.
9. Don't force decisions on the person - there may be other equally good and acceptable solutions.
10. Refer to other agencies.
11. Make contact for the individual with the referral agency.
12. Follow up referrals to make sure there is a continuity of action and that referrals are completed as soon as possible.

II. PERSONAL DATA

1. NAME (Last, First, MI)	2. GRADE	3. SSN	4. AFSC	5. DUTY PHONE
Eboy, Lars N.	A1C	111-12-1111		3-5656

6. UNIT/OFFICE SYMBOL	7. REASON FOR COUNSELING	8. OTHER INFORMATION (i.e., marital status, course graduation date, date assigned, etc.)
45 SW/MSS	Failure to Go	

III. COUNSELING

9. SUMMARY OF COUNSELING (Give details, facts, specific dates, times, names, sequence of events, etc.)

On 10 Jan 20XX, A1C Eboy was released from the 0630 PT formation and given a sick call slip after he complained of stomach pains. He was ordered to report directly to sick call. At about 0800, TSgt Jones went to the Shoppette and saw A1C Eboy eating donuts and a sausage, egg and cheese biscuit. When asked why he was not at work, A1C Eboy told TSgt Jones that he was on his way to sick call. TSgt Jones then read A1C Eboy's sick slip and noted that it said "stomach pains." TSgt Jones then asked A1C Eboy why he was stuffing his face if he had a stomach ache. A1C Eboy then admitted that he never had stomach pains that morning.

10. RECOMMENDATIONS AND ADVICE OF COUNSELOR

11. NAME, GRADE AND DUTY TITLE OF COUNSELOR	12. SIGNATURE	13. DATE
LeBron James, MSgt, 1st Sgt	LeBron James	15 Jan XX

AF IMT 174, 19861201, V1

IV. ACKNOWLEDGMENT OF COUNSELING		
14. SUMMARY OF COUNSELEE'S COMMENTS *(Indicate if none)*		
15. NAME AND GRADE OF COUNSELEE Lars, N. Eboy, A1C	16. SIGNATURE Lars N. Eboy	17. DATE 15 Jan XX
V. REFERRAL/FOLLOW-UP		
18. REFERRAL AGENCIES RECOMMENDED *(Personal Affairs, Chaplain, Legal Assistance, Medical, Social Actions, Red Cross, etc.)*		
VI. COMMANDER'S COMMENTS		
19. NAME AND GRADE OF COMMANDER	20. SIGNATURE	21. DATE

ISALC
Clemency and Corrections

"What's on Your Mind?"

2014

"I have always found that mercy bears richer fruits than strict justice."

- Abraham Lincoln

Inmates Transfer

- If > 90 days remaining on sentence after action, HQ SFC will move inmate.
- Use checklist to consider:
  - Offense (e.g., sex offenders to Miramar)
  - MCF bed space
  - Length of confinement
  - Cost of travel
- BOP

Inmates
Classification

- **Pre-trial = maximum**
- **Post – trial:**
  - **Transition period 72 – 96 hrs after arrival = maximum**
  - **Confinement NCO & CC determine classification DD Forms 2710 – Prisoner Background Summary/2711 – Initial Custody Classification (length of sentence, time in confinement, mental health, criminal Hx, previous institutional adjustment)**
- **Inmates reclassified at Brigs/DB**
  - **Orientation housing unit for transition period**

Inmates Classification

	Risk of Escape	Violence	Mental/Emotional
MAXIMUM	Conduct that indicates high probability of escape, history of escape or escape attempts. Specialized training (Escape & Evasion).	Recent history of violent crimes and/or violent conduct. Active member gang/group advocating violence or recent assault on staff.	Highly unpredictable. History of serious mental instability Or extremely violent behavior. Record of suicide gestures or attempts.
MEDIUM-IN	Escape history involves flight from custody or attempts. Conduct indicates probability of escape.	History of violent behavior involving weapons or history of serious injury to victims.	Major emotional disorder. Record of instability or Suicide gestures or attempts.
MEDIUM-OUT	Poses minimal escape risk. No history of escape or attempts.	Limited history of violent behavior not involving weapons.	Stable personality and record of suicide gesture or attempts.
MINIMUM	No history of escape or attempts.	No history of violent behavior.	Stable personality and No record of suicide gesture or attempts.
COMMUNITY (TRUSTEE) *Not used in AF Level 1	No history of escape or escape attempts and requires minimal supervision.	No history of violence.	Stable personality. No record of suicide gesture or attempts.

Inmates Classification

ACTIVITY	MINIMUM	MEDIUM	MAXIMUM
Observation by staff	Occasional by staff; appropriate to situation	Frequent and direct	Always supervised when outside cell
Day movement inside facility	Unrestricted	Observed periodically by staff	Restricted; directly observed or escorted when outside cell
Movement after dark	Intermittent observation	Restricted, with direct supervision	Out of cell only for emergencies. In restraints when outside cell or as approved by confinement officer.
After evening lockdown	Intermittent observation	Escorted and only on order of confinement officer	Out of cell only for emergencies. In restraints when outside cell or as approved by confinement officer.
Meal periods	Intermittent observation	Supervised	Directly supervised or in cell
Access to jobs	Eligible for all, both inside and outside perimeter	Inside perimeter only	Only selected day jobs inside perimeter, or Directly supervised within the housing unit
Visits	Contact; periodic supervision, indoor and/or outdoor	Contact, supervised	Non-contact or closely supervised (1-1)
Leave the Facility	Escorted	Direct staff escort, handcuffs with chains and leg irons (optional); armed escort (optional)	Minimum of two escorts with one armed, full restraints, strip search prior to departure and on return

Inmates

What are they doing there?

- **Work Programs**
  - **Vocational Training**
  - **Work Detail**
- **Treatment Programs**
  - **Assessment**
  - **Mental Health**
  - **Rehabilitation**
- **Education Programs**

- **Opportunities for short-term inmates limited. Local installation still responsible for medical, mental health & family support.**

Art 60 Changes Coming

FY14 NDAA

- Accused still has right to submit matters
- Findings:
  - CA can only dismiss/change to LIO "qualifying offenses"
  - "qualifying offense" = max sentence <2 years AND adjudged sentence does not include punitive discharge or confinement for > 6 months
  - Can never dismiss/change SA offenses

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Section 1702 (Part II)
Modify Article 60

180 Days (24 Jun 14)

- BLUF:
  - Restrict CA authority to affect findings and sentence at clemency
  - CA required to include written justification of any changes in ROT
- Qualifying offenses:
  - Findings –
    - Max confinement <2 yrs
    - Adjudged sentence = <6 mos confinement & no punitive discharge
    - Never for rape or SA (120), 120b, 125, other offenses specified by SecDef
  - Sentence – Adjudged sentence = <6 mos confinement & no punitive discharge
    - Exceptions – "substantial assistance" in investigation/prosecution of another accused
      – PTA (but for mandatory minimum, only to reduce DD to BCD)
- What may eventually change:
  - RCM, Chap. XI, AFI 51-201

Integrity - Service - Excellence

Art 60 Changes Coming

FY14 NDAA

- Sentence
  - CA can disapprove, commute or suspend adjudged sentence of confinement < 6 months and no punitive discharge
  - Exceptions: upon recommendation of TC if "substantial assistance" or in order to honor PTA

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Section 1702 (Part II)
Modify Article 60

180 Days (24 Jun 14)

- BLUF:
  - Restrict CA authority to affect findings and sentence at clemency
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      – PTA (but for mandatory minimum, only to reduce DD to BCD)
- What may eventually change:
  - RCM, Chap. XI, AFI 51-201

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Discussion: Should you even bother?

"Program" Formerly Known As

- AFGM to AFI 31-205 outlines new "program"
- Same basic requirements:
  - Enlisted only w/exceptional potential
  - No executed discharge or retirement eligible
  - No violent or sex offenders
  - Accept responsibility
- In residence "re-bluing" gone, instead:
  - Opportunity for clemency concerning characterization of discharge and possible reenlistment/RTD

"Program" Formerly Known As

- **Process:**
  - **Still need mental health eval**
  - **Submit letter & attachments to CA or TJAG requesting a recommendation (concur/nonconcur) for RTDP**
    - **After CA action, but not > 1 yr after sentence**
  - **Forward application & CA/TJAG rec to AF C&PB**

"Program" Formerly Known As

- **If approved, AF C &PB can:**
  - **With/without confinement & punitive discharge – upgrade discharge to general or honorable, and if honorable, DD Form 214 coded to allow reenlistment**
  - **Confinement but no punitive discharge – prevents execution of admin discharge to allow upgrade to general or honorable, and if honorable, DD Form 214 coded to allow reenlistment**

AF Clemency & Parole Board

- **Lengthy confinement--1 year or more**
  - **Periodic clemency review for all prisoners**
  - **Parole review for prisoners in DOD system**
    - **BCD/DD, approved admin discharge, or retirement**
    - **Served 1/3 confinement term, but no less than 6 mos; or 10 yrs on sentence of 30 yrs to life; or 20 yrs on life sentences**

AF Clemency & Parole Board

- How to prepare your client for parole
  - Residence
  - Offer of employment/education
  - Follow the rules!
  - Participate in offense specific treatment
- Vote sheet

How to find us:

JAJR web site: https://aflsa.jag.af.mil/AF/lynx/jajr/

and

240-612-4840

ISALC Scenario [MRE 413]

During pre-trial interviews for U.S. v. SrA Michael Mancini, you discover that SrA Mancini was alleged to have committed sexual assault about one week before he arrived for Basic Training (he was 17 years old at the time of the alleged offense, and turned 18 years old the day he arrived for Basic). The charge was investigated by local authorities in Plano Texas, but no charges ever resulted as the victim elected not to cooperate. You located the victim, Amanda Scott, who on learning that SrA Mancini has been charged with another sexual assault, wants to cooperate with the prosecution. She tells you that the following occurred:

Amanda was 15 years old at the time of the incident and attended the same high school as now-SrA Mancini. She was a sophomore and the Accused was a senior. Their families were friends and she had known the Accused since they were kids. Though they never "dated," they did "mess around" off-n-on: kissing, touch over the clothes, but never any skin-to-skin sexual contact (beside the kissing of course). She and the Accused had not had any such intimate contact for 2-years before the incident.

The incident occurred at a party after a football game. A group of people were at another student's home whose parents were not home (out of town). Amanda says the Accused was focused on her as soon as he arrived. She had not be drinking, but the Accused pushed her to play "beer pong" and drink and after 3-4 8-oz cups of beer, he started to feed her mixed drinks, vodka and orange juice. Amanda says she was "flirting" with the Accused, but there was no intimate contact between them, nor any discussion of "hooking up." Amanda says she became very drunk, the last thing she remembers is rushing to the bathroom to vomit, and then waking up in a bedroom, naked, with the Accused on top of her, holding her arms down, penetrating her vagina with his penis. She remembers trying to move, being unable to, and then nothing until waking up again in the morning (the light was shining through a window). She got dressed, found a friend sleeping on a couch, woke her and they left.

The next week rumors of Amanda "hooking up" with a couple of football players at the party started to circulate, including rumors that there was a video of the Accused and two other individuals violating her (one penetrating her while one of the others held the camera and the other fondled her breasts). School officials learned of the rumors and contacted law enforcement. During the investigation, five of students at the party generally reported (not under oath), that Amanda did not appear intoxicated, had told her friends that she intended to "hook up" with a couple "football" players that night (the Accused and the other individuals were on the football team), and that the next day told her friends she had "helped the football team celebrate their win." These witnesses also described Amanda as "untrustworthy" in the sense that she has had sexual relationships with many athletes at the high school.

In an interview with law enforcement and in a sworn written statement, Amanda denied these assertions, said that these students simply did not like her and were out to get her, and gave the

names of other students who would back up her recitation of events that night. Law enforcement talked to three additional witnesses from the party who general corroborated Amanda's version of events, characterizing her as very drunk, having been taken advantage of by the Accused, and as a truthful person. Neither the Accused nor any of the football players made any statements about events that night, other than a flat denial through counsel.

The case quickly gained media attention, split the school into pro-Amanda and pro-football team camps … due to threats aimed at Amanda and her family, they moved from the local area and elected not to cooperate with authorities (who they believed were supporters of the championship football team and its players). Amanda has been in intense counseling since the event, continuing to today.

TYPICAL "LAW" SECTION FROM MJ MRE 413 FINDINGS & CONCLUSIONS

- Ordinarily, propensity evidence is not admissible in a court-martial. MRE 413 is an enumerated exception to that general prohibition. MRE 413(a) holds,

> "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant."

- During Congressional debate, "Representative Susan Molinari, the Rules' primary sponsor, said it was Congress' specific intention that the courts 'must liberally construe' [MRE 413] so that finders of fact can accurately assess a defendant's criminal propensities in light of his past conduct." S. Saltzburg, L. Schinasi, and D. Schlueter, Military Rules of Evidence Manual, (Vol 1, 4-214) (6th Ed. 2006), *citing*, Cong. Rec. H8991-92, August 21, 1994.

- Under the Rule, the term "sexual assault" includes any offense punishable under the Uniform Code of Military Justice that involves any sexual contact, without consent, proscribed by the UCMJ. MRE 413(d)(1).

- For purposes of MRE 413, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the groin of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. MRE 413(f).

- MRE 413 is constitutional and does not violate Equal Protection or Due Process. Before admitting evidence under MRE 413, three findings are required: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of the accused's commission of another offense of sexual assault; and (3) the evidence is relevant. US v. Wright, 53 MJ 476 (CAAF 2000).

- Before admitting evidence under MRE 413, the military judge must apply a balancing test (MRE 403) and consider the following non-exclusive factors:

> (1) strength of proof of prior acts;

(2) probative weight of evidence;
(3) potential for less prejudicial evidence;
(4) distraction of factfinder;
(5) time needed for proof of prior conduct;
(6) temporal proximity;
(7) frequency of the acts;
(8) presence or lack of intervening circumstances; and
(9) the relationship between the parties.

US v. Wright, 53 MJ 476 (CAAF 2000) *See also* US v. Dewrell, 52 MJ 601 (AFCCA 1999), and US v. Bailey, 52 MJ 786 (AFCCA 1999). *Compare* US v. Baumann, 54 MJ 100 (CAAF 2000) (probative value outweighed) with US v. Tanksley, 54 MJ 169 (CAAF 2000).

- The analysis of MRE 413 states in relevant part as follows: "When 'weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences.'" (*citing* Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases).

- There is no requirement that the acts admitted under MRE 413/414 be the exact same acts of molestation as the charged offenses. U.S. v. Ediger, 68 M.J. 243 (C.A.A.F. 2010).

Corrections and Parole

ISALC

2014

DOD Corrections System

- DOD maintains state-of-the-art facilities
  - ACA accredited
  - Commitment to offense-specific programs
  - Fewer locations (5)
    - Issues w/civilian facilities (e.g., Art 12/13)
- Abatement available for all inmates
- Active victim/witness programs
- Federal Bureau of Prisons for long, long term inmates

Inmates

What are they doing there?

- Work Programs
  - Vocational Training
  - Work Detail
- Treatment Programs
  - Assessment
  - Mental Health
  - Rehabilitation
- Education Programs

Inmates

How are they getting out and when?

- Returned to duty
- At their “minimum release date”
- On Parole
- Transfer to the FBOP
- On Mandatory Supervised Release
- At their “maximum release date”

Abatement

- Incentivized
- 5 days per month off the top, then
  - Up to 8 days/month for work, rehab programs, education, but
    - Only max of 5 additional days/month if not in rehab
  - Up to an additional 2 days/month for 12 months for extraordinary acts
- Held in abeyance for life, life w/o parole, or death

Parole Eligibility

- Inmates with 1 year or more of confinement
- Inmates with an approved discharge or retirement
- At 1/3 of sentence (but at least 6 months)
  - 30+ years sentences – after 10 years
  - Life – after 20 years
  - Each year thereafter
- Ineligible – inmates w/death or life w/o parole
- MSR

“Program” Formerly Known As

- AFGM to AFI 31-205 outlines new “program”
- Same basic requirements:
  - Enlisted only w/exceptional potential
  - No executed discharge or retirement eligible
  - No violent or sex offenders
  - Accept responsibility
- In residence “re-bluing” gone, instead:
  - Opportunity for clemency concerning characterization of discharge and possible reenlistment/RTD

“Program” Formerly Known As

- Process:
  - Still need mental health eval
  - Submit letter & attachments to CA or TJAG requesting a recommendation (concur/nonconcur) for RTDP
    - After CA action, but not > 1 yr after sentence
  - Forward application & CA/TJAG rec to AF C&PB

"Program" Formerly Known As

- If approved, AF C &PB can:
  - With/without confinement & punitive discharge – upgrade discharge to general or honorable, and if honorable, DD Form 214 coded to allow reenlistment
  - Confinement but no punitive discharge – prevents execution of admin discharge to allow upgrade to general or honorable, and if honorable, DD Form 214 coded to allow reenlistment

How to find us:

JAJR web site: https://aflsa.jag.af.mil/AF/lynx/jajr/

and

240-612-4840

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA v. SrA MICHAEL D. MANCINI 633d Force Support Squadron (ACC) Joint Base Langley-Eustis, Virginia	STUDENT NOTES

Case Summary

The accused, a senior airman in the 1st Force Support Squadron, is charged with abusive sexual contact. On 5 August 20XX-1, the accused, alleged victim, and other friends went camping over a long weekend. The alleged victim claimed that while at the camp site, the accused indecently assaulted her in a cabin. The accused provided a statement to OSI admitting that he and the victim did engage in sexual activity but claimed that the activities were consensual. Several additional witnesses possess knowledge that may be relevant to either the prosecution or defense.

Students using this scenario will be called upon to litigate a motion, conduct voir dire of court members, and participate in all phases of a fully-litigated general court-martial. Trial and defense counsel will each conduct direct and cross-examination of witnesses; mark, introduce, and use evidence; and deliver opening statements, closing arguments, and sentencing arguments.

WARNING

Before reading further, please ensure that you have the correct case file for your program. There are *two* cases captioned *United States v. SrA Michael D. Mancini*. One case involves an allegation of abusive sexual contact and the other involves an allegation of a drug offense. This is the abusive sexual contact case file. If you are unsure which file you should be preparing, please verify with your SJA or the TRIALS team chief.

Use of the Scenario

Students will use the factual scenario contained in this package to prepare for, and conduct, a simulated fully-litigated general court-martial. The following specific instructions apply to the exercises listed below:

1. Motion practice exercise. The case file contains portions of a sample defense motion and prosecution response. During the motion practice exercise, both parties shall argue their position to the military judge. In preparing the motion argument, counsel may, but are not required to, do additional legal research and incorporate their additional research into their argument. The purpose of this exercise is to enable participants to practice and refine their oral argument skills, not their legal research and writing skills. The motion and response are merely examples; they should not be considered the only correct (or even the best) approach to take in defending or prosecuting this case, nor should counsel assume that the sample motion/response contains citations to all of the cases that arguably address the issue.

2. Voir dire exercise. Both parties shall submit to the military judge, at the time prescribed in the TRIALS program welcome letter, proposed voir dire questions to be asked of the members. The parties should assume that the military judge will have asked those standard questions contained in the Military Judge's Benchbook (DA Pamphlet 27-9) and ensure that their proposed questions do not duplicate any questions asked by the judge. Counsel should assume that all of their proposed voir dire questions have been approved unless otherwise informed by the military judge at the beginning of the exercise. Counsel will conduct group or individual voir dire, as directed by the TRIALS faculty.

3. Opening statement exercise. Counsel will deliver five to six minutes of their opening statement and may assume that any exhibit(s) authorized under the Military Rules of Evidence have been previously admitted and are available for use.

4. Direct and cross-examination exercise. Trial and defense counsel will each conduct five to six minutes of direct and cross-examination.

Trial counsel: will prepare a direct examination for either Amn Parker or Amn Woodward. Assignment will be made by the TRIALS team chief.

Defense counsel: will prepare a cross-examination for Amn Parker or Amn Woodward. Defense counsel will cross-examine the witness assigned to their trial counsel.

Defense counsel: will prepare a direct examination for the accused or Mr Burns. Assignment will be made by the TRIALS team chief.

Trial counsel: will prepare a cross-examination for the accused or Mr Burns. Trial counsel will cross-examine the witness assigned to their defense counsel.

Remember that your examination will only last 5-6 minutes and cross-examination will not be limited to those matters raised on direct (in other words, the cross-

examiner may assume that the witness testified on direct about all the matters contained in the case file that would otherwise be admissible).

5. Evidentiary foundations exercise. Trial and defense counsel will each be required to lay the foundation for at least one item of evidence. TRIALS faculty will either select the item of evidence to be introduced by each counsel or may allow counsel to elect which item of evidence to introduce. This is a foundation exercise, so counsel may be asked to introduce evidence that may be favorable to the opposing side. Counsel should be prepared to lay the foundation for the following items of evidence:

(a) accused's statement to OSI
(b) note from Amn Parker to SrA Fielding
(c) Amn Parker's Facebook page
(d) campground map
(e) diagram of cabin
(f) photograph of bunk beds
(g) Amn Parker's clothes
(h) accused's clothes

6. Closing argument exercise. Both trial and defense counsel shall deliver a portion of their closing argument. At least one exhibit – whether introduced during the findings portion of the trial or created specifically for the closing argument – *shall* be used.

7. Sentencing argument exercise. Both trial and defense counsel shall deliver a portion of their sentencing argument. Counsel shall assume that the accused has been convicted of indecent assault, as charged. Counsel are strongly encouraged to use at least one exhibit in the sentencing argument.

RULES OF ENGAGEMENT

1. Treat this program as you would a real general court-martial.

2. This is your opportunity to try out new styles, presentation theories, etc. The more you "think outside of the box" and try new approaches, the more you are likely to get from the program.

3. Unless told otherwise, assume all of the information provided in the case file is admitted at trial unless there is no reasonably plausible theory of admissibility.

4. TRIALS faculty members or local legal office volunteers will play the roles of Amn Allison Parker, Amn Amanda Woodward, Mr Burns, and the accused. If asked a question the answer to which is not contained in the case file, the witness will provide a response consistent with the witness' persona.

5. As with most trials, only a portion of the available witnesses provided statements to Security Forces/OSI and/or testified at the Article 32 hearing. SrA Matt Fielding was deployed at the time of the Article 32 and was deemed unavailable. You may assume that any witness who would logically testify at trial did testify.

6. The "all object" rule applies throughout the course. If something occurs to which a <u>valid</u> objection can be lodged, we expect you to object as you would at trial.

7. When conducting witness examinations (either direct or cross), you may begin at any point within the examination. If you elect to start somewhere other than the "beginning" of the examination, please advise the instructors accordingly so the examination can be understood in context.

8. The case file contains no administrative errors. That means that if you see any discrepancies between statements, times, dates, etc., you should assume that any such discrepancies were intentional and use them as you see fit for impeachment and/or argument.

9. Instructors occasionally recommend different techniques to address the same issue and occasionally those recommendations may appear to conflict with each other. Different litigators use different styles and trial tactics in trying their cases. You may independently reflect on the different recommendations and determine which works best with your style.

10. Do not argue with the instructor(s). If you have questions about a critique, feel free to ask an instructor about it during the video review or a break.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED *(Last, First, MI)*	2. SSN	3. GRADE OR RANK	4. PAY GRADE
MANCINI, MICHAEL D.	123-45-6789	Senior Airman	E-4

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
1st Force Support Squadron (ACC) Langley AFB, VA	30 August 20XX-4	6 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	C.TOTAL		
$1,935.90	$0.00	$1,935.90	None	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE: Violation of the UCMJ, Article 120

Specification: In that SENIOR AIRMAN MICHAEL D. MANCINI, United States Air Force, 1st Force Support Squadron, Langley Air Force Base, Virginia, did, at or near Cape Charles, Virginia, on or about 5 August 20XX-1, engage in sexual contact, to wit: fondling of the breast, thighs, and ejaculating on clothing, with Airman Allison A. Parker by causing bodily harm upon her, to wit: by touching her breast and her thighs with his hands and ejaculating on her clothing.

III. PREFERRAL

11a. NAME OF ACCUSER *(Last, First, MI)*	b. GRADE	c. ORGANIZATION OF ACCUSER
BLAKE, HENRY R.	Lt Col	1st Force Support Squadron

d. SIGNATURE OF ACCUSER	e. DATE
	1 October 20XX-1

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 24 day of July, 2003, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

ABBIE A. CARMICHAEL *Typed Name of Officer*	1 FW/JA *Organization of Officer*
Captain *Grade*	Assistant Staff Judge Advocate *Official Capacity to Administer Oath* *(See R.C.M. 307(b)(1) – must be commissioned officer)*
Abbie Carmichael *Signature*	

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE

12.

On 1 October, 20 XX-1, the accused was informed of the charges against him/her and of the names(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

HENRY R. BLAKE
Type Name of Immediate Commander

1st Force Support Squadron
Organization of Immediate Commander

Lieutenant Colonel
Grade

Signature

IV. RECEIPT BY SUMMARY COURT MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1600 hours, 1 October, 20 XX-1, at 1 FW
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE [1] COMMANDER

JACK McCOY
Type Name of Officer

Staff Judge Advocate
Official Capacity of Officer Signing

Colonel
Grade

Signature

V. REFERRAL, SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
HQ NINTH AIR FORCE (ACC)	SHAW AFB, SC	15 December 20XX-1

Referred for trial to the general court-martial board convened by Special Order AB-11, this headquarters

dated, 15 December 20 XX-1, subject to the following instructions: [2] none

By FOR THE COMMANDER of
Command or Order

ADAM SCHIFF
Typed Name of Office

Staff Judge Advocate
Official Capacity of Office Signing

Colonel
Grade

Signature

15.

On 17 December, 20 XX-1, I (caused to be) served a copy hereof on (~~each of~~) the above named accused.

DOUG BRACHMAN
Typed Name of Trial Counsel

Captain
Grade or Rank of Trial Counsel

Signature

FOOTNOTES: 1 – When an appropriate commander signs personally, inapplicable words are stricken.
2 – See R.C.M. 601(e) concerning instructions. If none, so state.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS NINTH AIR FORCE (ACC)
SHAW AIR FORCE BASE, SC

Special Order 15 December 20XX-1
AB-11

A general court-martial is hereby convened. It may proceed at Langley Air Force Base, Virginia, to try such persons as may be properly brought before it. The court will be constituted as follows:

COLONEL JOHN J. BENSON	1 MDG	ACC	LANGLEY AFB, VA
COLONEL JAMES RAWLS	1 CONS	ACC	LANGLEY AFB, VA
LIEUTENANT COLONEL CAREY FELTS	1 MDOS	ACC	LANGLEY AFB, VA
LIEUTENANT COLONEL RAMON FARNELL	1 CES	ACC	LANGLEY AFB, VA
MAJOR CINDRA D. WEBBER	1 AMXS	ACC	LANGLEY AFB, VA
CAPTAIN BARRY S. OTTINGER	71 FS	ACC	LANGLEY AFB, VA
CAPTAIN SANDRA P. GREER	94 FS	ACC	LANGLEY AFB, VA

Hap Arnold

H. ARNOLD, Lt Gen, USAF
Commander

FOR THE COMMANDER

Adam Schiff
ADAM SCHIFF, Colonel, USAF
Staff Judge Advocate

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DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE JUDICIARY

UNITED STATES **V.** **SRA MICHAEL D. MANCINI** 633D FORCE SUPPORT SQUADRON (ACC) JOINT BASE LANGLEY-EUSTIS, VA		**DEFENSE MOTION IN LIMINE TO ADMIT EVIDENCE UNDER M.R.E. 412(B)(1)(C)** **DATE: TODAY'S DATE – 14 DAYS**

COMES NOW the Defense pursuant to Military Rule of Evidence (M.R.E.) 402, M.R.E. 403 and M.R.E. 412 and moves this Honorable Court to admit evidence of Airman (Amn) Allison Parker's prior sexual activity with Senior Airman (SrA) Matt Fielding.

I. FACTS

1. In early August 20XX-1, Amn Parker invited Amn Amanda Woodward and SrA Michael D. Mancini to go on a camping trip with her. SrA Mancini accepted the invitation and told Amn Parker that he wanted to invite two other friends, Mr. Peter Burns and Mr. William Campbell. Amn Parker planned the trip and reserved a cabin for the group.

2. SrA Mancini also called his friend, SrA Matt Fielding, about attending the camping trip. SrA Fielding informed SrA Mancini that it would not be a good idea for him to go because he and Amn Parker "hooked up" a few times. SrA Fielding told SrA Mancini that Amn Parker was into "hooking up." However, she would only masturbate guys (until they climaxed) since she had a boyfriend back home. SrA Fielding stated Amn Parker's belief was that she was not really cheating because she was not having sexual intercourse.

3. On 5 August 20XX-1, SrA Mancini, Amn Parker and Amn Woodward departed the base around 1030 for the camping trip, arriving at their cabin around 1300. Around 1400, SrA Mancini, Amn Parker and Amn Woodward purchased two cases of beer and started drinking. The group started playing drinking games after Mr. Burns and Mr. Campbell arrived around 1600.

4. Around 1800, Amn Parker had to use the bathroom. SrA Mancini asked if she would like him to walk with her. She agreed, and the two walked to the bathroom together. On the walk, Amn Parker stated that she would want to hang out with SrA Mancini if she did not have a boyfriend back home. SrA Mancini responded with, "What happens in Virginia stays in Virginia."

5. Around 2100, Amn Woodward, Mr. Burns and Mr. Campbell left the cabin to go swimming at the pool. SrA Mancini and Amn Parker stayed behind. The group was away from the cabin for approximately an hour and a half. After the group left, Amn Parker went to her bunk and SrA Mancini sat on the porch of the cabin. About fifteen minutes later, Amn Parker returned from her bunk and asked SrA Mancini to walk to the bathroom with her. SrA Mancini accepted the offer.

6. When SrA Mancini and Amn Parker returned from the bathroom, Amn Parker grabbed SrA Mancini's hand and told him to come to her bunk. When SrA Mancini asked about her boyfriend, Amn Parker replied "Aren't you the one who said what happens in Virginia stays in Virginia?" Amn Parker led SrA Mancini to her bunk.

7. While lying on Amn Parker's bunk, SrA Mancini touched Amn Parker's breast. Amn Parker said nothing and laid there. She then touched SrA Mancini through his clothes and slid his shorts down. After SrA Mancini got on top of Amn Parker, she took his penis in her hand and told him, "This will have to be good enough for now." Amn Parker then masturbated SrA Mancini until he ejaculated.

8. Just after SrA Mancini ejaculated, Amn Woodward, Mr. Burns and Mr. Campbell returned from the pool. Amn Woodward heard some noises coming from the bedroom and busted in on Amn Parker and SrA Mancini. Amn Woodward said, "What the hell is going on?" As soon as the lights came on in the backroom, Amn Parker yelled "Get off me!" Amn Woodward then told Amn Parker she could not believe SrA Mancini would do that to her because he knew she had a boyfriend. Amn Woodward continued stating how horrible SrA Mancini was for doing that to Amn Parker. She repeatedly attempted to persuade Amn Parker to call the police, but Amn Parker said she did not want to. Amn Parker said she just wanted to go to sleep and deal with it in the morning.

9. The group left the cabin the next day. During the drive, Amn Woodward talked non-stop about what a jerk SrA Mancini was for taking advantage of Amn Parker. When they returned to base, Amn Parker told Amn Woodward she was fine. However, Amn Woodward continued to try to persuade Amn Parker to call the Office of Special Investigations (OSI). Amn Parker told Amn Woodward she did not want to report it. Additionally, Amn Parker stated she was fine and Amn Woodward should just let it go. Later that night, Amn Woodward called OSI to report the event.

II. <u>LAW</u>

10. Generally, evidence of a victim's sexual behavior is inadmissible. M.R.E. 412. However, "the so-called 'rape shield' rule is not an absolute bar to the admission of such evidence at court," and "[it] should not be applied in derogation of a criminal accused's constitutional rights." *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983). Such evidence is admissible if it falls into one of three exceptions: (i) it is offered to prove a person other than the accused was the source of the injuries; (ii) it is offered to prove the victim consented to the actions of the accused; or (iii) if its exclusion would violate the constitutional rights of the accused. *See* M.R.E. 412(b)(1)(C).

11. In analyzing admissibility of M.R.E. 412 evidence, the judge must first determine whether the evidence is relevant and then whether the probative value of the evidence outweighs the danger of unfair prejudice. M.R.E. 412(c)(3). If the military judge determines the evidence is relevant and that the probative value outweighs the danger of unfair prejudice, the evidence *shall* be admissible in trial. *Id.*

12. Under the Military Rules of Evidence, in order to be admissible, evidence must be relevant. M.R.E. 402. "Relevant evidence" means evidence tending to make the existence of any fact of consequence to the determination of the matter more or less probable than it would be without the evidence. M.R.E. 401.

13. While evidence offered under M.R.E. 412 must meet the two-part relevance-balancing test, evidence offered under M.R.E. 412(b)(1)(C) is "subject to distinct analysis." *United States v. Zak*, 65 M.J. 786, 792 (Army Ct. Crim. App. 2007). "Under M.R.E. 412(b)(1)(C), the accused has the right to present evidence that is 'relevant, material, and favorable to his defense.'" *United States v. Banker*, 60 M.J. 216, 222 (2004) (quoting *Dorsey*, 16 M.J. at 5).

14. If the evidence is found to be relevant, the decision turns to whether the evidence is material and favorable to the defense, essentially whether the evidence is necessary. *Banker*, 60 M.J. at 222. "In determining whether evidence [offered under M.R.E. 412(b)(1)(C)] is material, the military judge looks at 'the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to this issue." *United States v. Colon-Angueira*, 16 M.J. 20, 26 (C.M.A. 1983) (quoting *Dorsey*, 16 M.J. at 6).

15. In *Dorsey*, the appellant contended the victim fabricated the alleged rape due to anger over a comment, made by the appellant, concerning the victim's sexual activity on the night of the alleged rape. The defense sought to introduce evidence that the victim had sexual intercourse with the appellant's roommate and fabricated the alleged rape when the appellant called her a whore. The lower court judge did not allow extrinsic evidence of the victim's prior sexual conduct. The Court of Military Appeals overturned the appellant's rape conviction, holding that the evidence was constitutionally required to be admitted. *Id.* at 8. The court held the evidence was vital to the appellant's defense since the "critical issue in the case was the credibility of [the victim] and appellant." *Id.* at 7. *See also Colon-Angueira*, 16 M.J. at 24-27 (holding that M.R.E. 412 evidence may be admitted even though its relevancy is based on other evidence to be admitted and a series of evidentiary inferences which could be drawn from the totality of the evidence).

16. In *Zak*, the appellant argued evidence of a full body, mostly nude massage between him and the victim should have been allowed to prove the defense's theory of consensual sexual intercourse on the night in question. The court held exclusion of the offered evidence was clear error and an abuse of discretion. *Id.* at 793-794. In its opinion, the court stated, "In applying M.R.E. 412, the judge is *not* asked to determine if the proferred evidence is *true; it is for the members to weigh the evidence and determine its veracity*." *Id.* at 793 (emphasis in original) (quoting *United States v. Platero*, 72 F.3d 806, 813 (10th Cir. 1995). *See also United States v.*

Williams, 37 M.J. 352, 360 (C.M.A. 1993) (holding that M.R.E. 412 evidence is constitutionally required where it would undermine the victim's credibility, affect the judgment, assist the trier of fact, and is favorable to the defense).

III. ANALYSIS

(YOUR ARGUMENT HERE)

CONCLUSION

The Defense respectfully requests that this Honorable Court grant the Defense's Motion to admit evidence concerning Amn Allison Parker's prior sexual activity with SrA Matt Fielding.

The Defense requests an Article 39(a) hearing on this motion.

Respectfully submitted this (date), 20XX.

//Signed//
BILL BROWN, Capt, USAF
Defense Counsel

CERTIFICATE OF SERVICE

I certify that I have delivered a copy of this motion via e-mail to the military judge and trial counsel this (date), 20XX.

//Signed//
BILL BROWN, Capt, USAF
Defense Counsel

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE JUDICIARY

UNITED STATES **V.** **SENIOR AIRMAN MICHAEL D. MANCINI** 633D FORCE SUPPORT SQUADRON JOINT BASE LANGLEY-EUSTIS, VA	**GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE TO ADMIT EVIDENCE UNDER MRE 412(B)(1)(C)** **DATE: TODAY'S DATE – 10 DAYS**

RELIEF REQUESTED

The government respectfully requests this Honorable Court deny the defense's motion to admit any evidence concerning Airman (Amn) Allison Parker's prior sexual activity with Senior Airman (SrA) Matt Fielding, and grant the Government's motion to exclude any evidence concerning Amn Parker's alleged prior sexual activity with SrA Fielding five months prior to the alleged incident pursuant to Military Rules of Evidence (M.R.E.) 403 and 412.

I. BURDEN

1. The moving party must prove any factual issues by a preponderance of the evidence. R.C.M. 905(c)(1). Furthermore, defense has the burden of demonstrating why the general prohibition in M.R.E. 412 should be lifted to admit evidence of the victim's sexual behavior with persons other than the accused. *United States v. Carter*, 47 M.J. 395, 396 (1998).

II. FACTS

2. Amn Parker planned a camping trip and invited her friends, Amn Amanda Woodward and Senior Airman (SrA) Michael Mancini, the Accused. The Accused also invited two of his civilian friends, Mr. William Campbell and Mr. Peter Burns. Before the trip, the Accused told Mr. Burns that the camping trip would include two single girls and a lot of beer. The Accused also told Mr. Burns that the girls had long-distance boyfriends, but the Accused said, "If I get a shot, you'd better not cock-block me."[1]

3. On 5 August 20XX-1, the Accused drove Amn Parker and Amn Woodward to the campground, arriving about 1300 to the rented cabin. They purchased snacks and alcohol and played drinking games until the others arrived. Mr. Campbell and Mr. Burns arrived about 1600. At about 1800, Amn Parker had to use the restroom, which was located at the bathhouse. The Accused asked if he could escort her and walked with her to the bathhouse.

[1] The term "cock-block" is a colloquialism that means to hinder or impede a male's attempt to have sexual relations with a female.

4. Around 2130, Amn Woodward, Mr. Burns, and Mr. Campbell decided to go swimming. Amn Parker was feeling tired and wanted to go to sleep. She asked Amn Woodward to stay back with her, but Amn Woodward wanted to go swimming. Mr. Campbell nodded at SrA Mancini as if to say, "Stay here with her, Dude." The Accused decided to stay behind with Amn Parker. The Accused later said he was not really tired.

5. Amn Parker went to bed in the back room where the girls were going to be sleeping, while the Accused stayed up and drank beer. The swimmers were gone for 1-2 hours. After Amn Parker fell asleep, and about 1-2 hours after the others had left for the pool, the Accused went into the back bedroom and climbed onto Amn Parker's bunk bed. Amn Parker was wearing panties, shorts and a t-shirt, but no bra. The Accused started rubbing her bare thighs and stuck his hands up her t-shirt and rubbed her breasts. Amn Parker woke up when he was touching her breasts and thighs, and then saw the Accused slide off his shorts and masturbate himself as he ejaculated all over Amn Parker's t-shirt. The Accused's story was that it was a consensual act and that Amn Parker masturbated him [the Accused] until he climaxed.

6. Just then, the others were returning from swimming and flipped on the light. Amn Woodward yelled at SrA Mancini to get off of Amn Parker and she ordered the guys to sleep outside. Amn Woodward wanted Amn Parker to report the attempted rape to prevent SrA Mancini from sexually assaulting or raping future victims. Amn Parker said that she was OK since she was not raped, and she did not want to report. The next day they all drove home and later that night on 6 August 20XX-1, Amn Woodward called OSI and Amn Parker gave a statement that she woke up to SrA Mancini rubbing her thighs, rubbing her breasts, masturbating himself and ejaculating all over her t-shirt.

7. A few days before the camping trip, SrA Fielding, the Accused's friend, told the Accused that he [SrA Fielding] had sexual relations with Amn Parker about five months earlier. SrA Fielding claimed that Amn Parker stroked his penis a couple times per week for about three weeks. SrA Fielding then broke off the relationship because he got a girlfriend. SrA Fielding claimed that Amn Parker would only stroke his penis, as opposed to have sexual intercourse, because she had a boyfriend at the time. According to SrA Fielding, anything more would have been considered cheating on her boyfriend.

III. LAW

8. M.R.E. 412(a) generally prohibits reputation or opinion evidence of a victim of a nonconsensual sexual offense. Manual for Courts-Martial (M.C.M.) 2008, A22-35, (Analysis of, M.R.E. 412). Evidence of reputation and opinion explicitly includes evidence of the victim's "sexual predisposition" under M.R.E 412(a)(2). As designed, the rule excludes evidence that does not directly refer to sexual activities or thoughts but that the Accused believes may have sexual connotations for the factfinder. The intent is to shield the victim from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. As a result, unless an exception applies, evidence such as that

relating to the victim's *"mode of dress, speech, or lifestyle" is inadmissible*. M.C.M. 2008, A22-36, (Analysis of, M.RE. 412) (emphasis added).

9. M.R.E. 412 contains three important exceptions to the principle of exclusion of evidence going to other sexual behavior of the victim in a sexual offense case. The third exception is the relevant one, that is, "evidence the exclusion of which would violate the constitutional rights of the Accused." M.R.E. 412(b)(1)(C). In this regard, as the then-U.S. Court of Military Appeals re-stated in *United States v. Greaves*, 40 M.J. at 438 (C.M.A. 1994), "[w]hen the defense seeks to present evidence which is subject to the exclusionary provision of M.R.E. 412, it must clearly demonstrate that the proffered evidence is relevant, material, and favorable to its case…Furthermore, the probative value of the evidence must outweigh the danger of unfair prejudice." M.R.E 412(c)(3); *United States v. Fox*, 24 M.J. 110,112 (C.M.A. 1987).

10. "Evidence of a rape victim's unchastity, whether in the form of testimony concerning her general reputation or direct or cross-examination testimony concerning specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion charged to outweigh its highly prejudicial effect…." *United States v. Kasto*, 584 F.2d 268, 271-72 (8th Cir. 1978) (footnote and citations omitted). Both Federal Rule of Evidence 412 and Military Rule of Evidence 412 embody this rationale.

11. "Whatever type of evidence may be offered as to past sexual behavior of an alleged victim, the underlying analysis is the same; and, as we have made clear in other cases, it centers on the relevancy, materiality, and favorability to the defense of such evidence." *United States v. Holliman*, 16 M.J. 164, 165 (C.M.A. 1983) citing *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983). "Proof that a woman had sexual intercourse in her room with one male has little tendency to establish that she would also have intercourse willingly in her room with some other male—especially when, as here, there is no indication that … [appellant's] encounter with the victim was under circumstances similar to those under which she had previously engaged in sexual activity with others." *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987), *cert. denied*, 484 U.S. 827 (1987) citing *Holliman*, supra.

12. M.R.E. 412 is primarily a rule of relevance. On the question of whether a reasonable person would have believed that a rape victim was awake and capable of consent, her sexual history is clearly irrelevant. Similarly, on the question of whether an alleged rape victim actually did consent, her sexual history is clearly irrelevant. On the question of whether a reasonable person would believe a rape victim was manifesting consent, the relevance of proffered evidence about the rape victim's sexual history must be analyzed from two aspects: (1) Would a reasonable person believe, based on the quality and quantity of their knowledge about the victim's past, that she was so indiscriminately promiscuous that she would consent to sex with him *under the circumstances he described* *(emphasis added)*; and (2) Assuming *arguendo* that a reasonable person could so conclude, could a reasonable person then conclude that her behavior at the moment in question meant "yes"? *Greaves* at 438.

13. An Accused generally has the right, under the Fifth and Sixth Amendment to the Constitution, to introduce relevant, probative evidence in his defense. This includes the right to cross-examine witnesses fully. *United States v. Lauture*, 46 M.J. 794 (Army Ct. Crim. App. 1997). These rights are not absolute, however. "The right to confront and cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). To be constitutionally required, evidence must be relevant. Even if the evidence meets the threshold for relevance, it may be excluded unless its importance outweighs the policies, which support exclusion. *Lauture* at 798. Moreover, simply stating a valid purpose or theory of relevance is not sufficient to make evidence admissible. The proponent must demonstrate that the proffered evidence rationally supports the theory, and that the theory is significant to the outcome of the case. *United States v. Pagel*, 45 M.J. 64, 69-70 (1996). Thus the proponent must show, first, that the logical link between the proffered evidence and the conclusion the proponent wants the factfinder to draw is more than remote or speculative. Second, the proponent must show that this conclusion could affect a significant issue in the case. *Lauture* at 799.

14. As a result, courts will exclude evidence of the victim's past sexual misconduct and unchaste character under M.R.E. 412 because such evidence is offered only to "establish the victim's sexual reputation." *United States v. Pickens*, 17 M.J. 391 (C.M.A. 1984).

IV. ARGUMENT

(YOUR ARGUMENT HERE)

V. CONCLUSION

Any evidence concerning Amn Allison Parker's prior sexual activity with SrA Matt Fielding should be excluded under M.R.E. 403, 412, and under applicable case law interpreting the same. M.R.E. 412 was adopted to encourage the victims of sexual assault to come forward, regardless of their sexual background. To permit the defense to delve into the victim's sexual background is both improper and barred under M.R.E. 412. The government respectfully requests this Honorable Court deny the defense's motion. The government requested an Article 39(a) session to address this matter.

Respectfully submitted this _____day of _____, 20XX.

//Signed//
SUE JONES, Capt, USAF
Trial Counsel

Attachments:
1. AF IMT 1168, Amn Allison Parker, dated 7 Aug 09 (2 pages)
2. AF IMT 1168, Amn Amanda Woodward, dated 7 Aug 09 (2 pages)
3. AF IMT 1168, Mr. Peter Burns, dated 8 Aug 09 (2 pages)
4. AF IMT 1168, Mr. William Campbell, dated 8 Aug 09 (2 pages)
5. AF IMT 1168, SrA Michael D. Mancini, dated 7 Aug 09 (3 pages)

CERTIFICATE OF SERVICE

I certify that I have delivered to the military judge and defense counsel a copy of this motion via e-mail, this (date), 20XX.

//Signed//
SUE JONES, Capt, USAF
Trial Counsel

Court/Board Member Data Sheet (Base: Langley AFB, VA)			Current as of: 3 Jan 20XX		
Name (Last, First, MI) BENSON, JOHN J.			Grade O-6	Duty Title Deputy Commander, 1 MDG	
Organization (Unit/Office Symbol) 1 MDG/CD			Duty Phone 5-9876	Fax No. 5-9865	Date of Birth 6 August 20XX-51
Date of Rank 1 June 20XX-2	TAFMSD 15 September 20XX-27		Date Assigned Station 15 June 20XX-2	DEROS N/A	
Rater Col Sherman Potter			Rater's Position 1 MDG/CC		

Awards and Decorations

☒ Meritorious Service Medal	(with 4 OLC)	☐ AF Good Conduct Medal	(with OLC)
☒ Joint Service Commendation Medal	(with OLC)	☒ National Defense Service Medal	(with 1 device)
☒ AF Commendation Medal	(with 1 OLC)	☐ AF Overseas Ribbon--Short	(with OLC)
☐ Joint Service Achievement Medal	(with OLC)	☒ AF Overseas Ribbon--Long	(with OLC)
☒ AF Achievement Medal	(with OLC)	☒ AF Longevity Service Awd Ribbon	(with 4 OLC)
☐ Joint Meritorious Unit Award	(with OLC)	☐ AF NCO PME Graduate Ribbon	(with OLC)
☒ AF Outstanding Unit Award	(with OLC)	☒ Small Arms Exp Mksmnshp Ribbon	(with device)
☒ AF Organizational Excellence Awd	(with OLC)	☒ AF Training Ribbon	(with OLC)

Others Not Listed Above: Global War on Terrorism Service Medal, Air Force Expeditionary Service Ribbon

Gender	Race	Marital Status	No. of Children	Gender/Age of Children	Home of Record
Male	White	Married	2	M-24, F-21	Alabama

Duty History - Last 3 assignments (include base and duty title)
1. Maxwell AFB, AWC Student
2. Keesler AFB, MS, Commander, 81st Medical Operations Squadron
3. Fairchild AFB, WA, Flight Surgeon, 92d Medical Operations Squadron

Number of Other Assignments Providing Command Experience: 0

Post-Secondary Education (include name of institution, type of degree and major)
1. Harvard Medical School
2. University of Arizona, B.S., Chemistry

Professional Military Education (include type and how completed)
1. Air War College (residence)
2. Air Command and Staff College (seminar)
3. Squadron Officer School (correspondence)

Previous Courts-Martial Experience (Number of Cases)
1. General Courts-Martial: 0 2. Special Courts-Martial: 1

Previous Administrative Board Experience (Number of Cases)
1. Administrative Discharge Boards: 0 2. Flying Evaluation Boards: 0

Pending TDYs/PCS/Leave/Retirement Plans and Dates (projected for 3 months):
None

Any specific tasks or duties which may interfere with your ability to sit as a court/board member:

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 825, E.O. 11476, AFI 51-201, AFI 36-3608, and AFI 36-3206. PRINCIPAL PURPOSES: To collect information to determine who are best qualified to serve as members of a court-martial by reason of age, education, training, experience, length of service, and judicial temperament. Use of social security number is for the positive identification of the individual. ROUTINE USES: Convening authorities will use the information to select those best qualified to serve on courts-martial/administrative boards. Trial and defense counsel may use information as basis for challenge for cause or for peremptory challenge. DISCLOSURE: Disclosure is voluntary. We request your cooperation in providing this information to expedite the selection of court members.

Court/Board Member Data Sheet (Base: Langley AFB, VA)		Current as of: 3 Jan 20XX		
Name (Last, First, MI) RAWLS, JAMES		Grade O-6	Duty Title Commander	
Organization (Unit/Office Symbol) 1 CONS/CC		Duty Phone Ext 5-2020	Fax No. 5-2021	Date of Birth 3 Mar 20XX-47
Date of Rank 1 December 20XX-3	TAFMSD 3 June 20XX-25	Date Assigned Station 3 July 20XX-1	DEROS N/A	
Rater Col Stephen Austin		Rater's Position: 1 MSG/CC		

Awards and Decorations

☒ Meritorious Service Medal	(with 4 OLC)	☐ AF Good Conduct Medal	(with OLC)
☒ Joint Service Commendation Medal	(with OLC)	☒ National Defense Service Medal	(with 1 device)
☒ AF Commendation Medal	(with OLC)	☐ AF Overseas Ribbon--Short	(with OLC)
☐ Joint Service Achievement Medal	(with OLC)	☒ AF Overseas Ribbon--Long	(with OLC)
☒ AF Achievement Medal	(with OLC)	☒ AF Longevity Service Awd Ribbon	(with 3 OLC)
☐ Joint Meritorious Unit Award	(with OLC)	☐ AF NCO PME Graduate Ribbon	(with OLC)
☒ AF Outstanding Unit Award	(with OLC)	☒ Small Arms Expt Mksmnshp Ribbon	(with device)
☐ AF Organizational Excellence Awd	(with OLC)	☒ AF Training Ribbon	(with OLC)

Others Not Listed Above: Global War on Terrorism Expeditionary Medal, Global War on Terrorism Service Medal
Air Force Expeditionary Service Medal with Gold Border

Gender	Race	Marital Status	No. of Children	Gender/Age of Children	Home of Record
Male	White	Married	2	Female (23), Male (21)	Topeka, KS

Duty History - Last 3 assignments (include base and duty title)
1. Ramstein AB, Germany, Commander, Contracting Squadron
2. Wright Patterson AFB, Ohio, Staff Officer, Aeronautical Systems Center, Engineering Directorate
3. Los Angeles AFB, CA, Commander, Contracting Squadron

Number of Other Assignments Providing Command Experience: 0

Post-Secondary Education (include name of institution, type of degree and major)
1. Penn. State. University, M.B.A.
2. Massachusetts Institute of Technology, B.S., Aeronautics/Astronautics

Professional Military Education (include type and how completed)
1. AWC (correspondence)
2. ACSC (correspondence)
3. SOS (correspondence)

Previous Courts-Martial Experience (Number of Cases)
1. General Courts-Martial: 0 2. Special Courts-Martial: 1

Previous Administrative Board Experience (Number of Cases)
1. Administrative Discharge Boards: 0 2. Flying Evaluation Boards: 0

Pending TDYs/PCS/Leave/Retirement Plans and Dates (projected for 3 months):
None

Any specific tasks or duties which may interfere with your ability to sit as a court/board member:

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 825, E.O. 11476, AFI 51-201, AFI 36-3608, and AFI 36-3206. PRINCIPAL PURPOSES: To collect information to determine who are best qualified to serve as members of a court-martial by reason of age, education, training, experience, length of service, and judicial temperament. Use of social security number is for the positive identification of the individual. ROUTINE USES: Convening authorities will use the information to select those best qualified to serve on courts-martial/administrative boards. Trial and defense counsel may use information as basis for challenge for cause or for peremptory challenge. DISCLOSURE: Disclosure is voluntary. We request your cooperation in providing this information to expedite the selection of court members.

Court/Board Member Data Sheet (Base: Langley AFB, VA)			Current as of: 3 Jan 20XX		
Name (Last, First, MI) FELTS, CAREY			Grade O-5	Duty Title Commander	
Organization (Unit/Office Symbol) 1 MDOS/CC			Duty Phone 5-9876	Fax No. 5-9865	Date of Birth 7 September 20XX-42
Date of Rank 1 June 20XX-3	TAFMSD 11 May 20XX-18		Date Assigned Station 15 August 20XX-1	DEROS N/A	
Rater Col Sherman Potter			Rater's Position 1 MDG/CC		

Awards and Decorations

☒ Meritorious Service Medal	(with 2 OLC)	☐ AF Good Conduct Medal	(with OLC)
☐ Joint Service Commendation Medal	(with OLC)	☒ National Defense Service Medal	(with 1 device)
☒ AF Commendation Medal	(with 3 OLC)	☐ AF Overseas Ribbon--Short	(with OLC)
☐ Joint Service Achievement Medal	(with OLC)	☒ AF Overseas Ribbon--Long	(with OLC)
☒ AF Achievement Medal	(with OLC)	☒ AF Longevity Service Awd Ribbon	(with OLC)
☐ Joint Meritorious Unit Award	(with OLC)	☐ AF NCO PME Graduate Ribbon	(with OLC)
☒ AF Outstanding Unit Award	(with OLC)	☒ Small Arms Exp Mksmnshp Ribbon	(with device)
☒ AF Organizational Excellence Awd	(with OLC)	☒ AF Training Ribbon	(with OLC)

Others Not Listed Above: Global War on Terrorism Service Medal, Air Force Expeditionary Service Ribbon

Gender	Race	Marital Status	No. of Children	Gender/Age of Children	Home of Record
Female	White	Single	0	0	California

Duty History - Last 3 assignments (include base and duty title)
1. Langley AFB, VA, 1st Medical Ops Sqdn, Deputy Commander
2. Sheppard AFB, TX, 82d Medical Ops Sqdn, Flight Surgeon
3. Spangdahlem AB, Germany, 52d Medical Ops Sqdn, Flight Surgeon

Number of Other Assignments Providing Command Experience: 0

Post-Secondary Education (include name of institution, type of degree and major)
1.USUHS, M.D.
2.Cornell Univ., B.S., Biology

Professional Military Education (include type and how completed)
1 Air Command and Staff College - Correspondence
2. Squadron Officer School - Correspondence

Previous Courts-Martial Experience (Number of Cases)
1. General Courts-Martial: 2 2. Special Courts-Martial: 1

Previous Administrative Board Experience (Number of Cases)
1. Administrative Discharge Boards: 0 2. Flying Evaluation Boards: 0

Pending TDYs/PCS/Leave/Retirement Plans and Dates (projected for 3 months):
None

Any specific tasks or duties which may interfere with your ability to sit as a court/board member:

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 825, E.O. 11476, AFI 51-201, AFI 36-3608, and AFI 36-3206. PRINCIPAL PURPOSES: To collect information to determine who are best qualified to serve as members of a court-martial by reason of age, education, training, experience, length of service, and judicial temperament. Use of social security number is for the positive identification of the individual. ROUTINE USES: Convening authorities will use the information to select those best qualified to serve on courts-martial/administrative boards. Trial and defense counsel may use information as basis for challenge for cause or for peremptory challenge. DISCLOSURE: Disclosure is voluntary. We request your cooperation in providing this information to expedite the selection of court members.

Court/Board Member Data Sheet (Base: Langley AFB, VA)		Current as of: 3 Jan 20XX		
Name (Last, First, MI) FARNELL, RAMON		Grade O-5	Duty Title Commander	
Organization (Unit/Office Symbol) 1 CES/CC		Duty Phone 5-2244	Fax No. 5-2245	Date of Birth 15 June 20XX-39
Date of Rank 1 December 200X-3	TAFMSD 10 June 20XX-17	Date Assigned Station 25 June 20XX-2	DEROS	
Rater Col Stephen Austin		Rater's Position 1 MSG/CC		

Awards and Decorations

☒ Meritorious Service Medal	(with 2 OLC)	☐ AF Good Conduct Medal	(with OLC)
☒ Joint Service Commendation Medal	(with OLC)	☒ National Defense Service Medal	(with 1device)
☒ AF Commendation Medal	(with 1 OLC)	☐ AF Overseas Ribbon--Short	(with OLC)
☐ Joint Service Achievement Medal	(with OLC)	☒ AF Overseas Ribbon--Long	(with OLC)
☒ AF Achievement Medal	(with 1 OLC)	☒ AF Longevity Service Awd Ribbon	(with OLC)
☐ Joint Meritorious Unit Award	(with OLC)	☐ AF NCO PME Graduate Ribbon	(with OLC)
☒ AF Outstanding Unit Award	(with OLC)	☒ Small Arms Expt Mksmnshp Ribbon	(with device)
☐ AF Organizational Excellence Awd	(with OLC)	☒ AF Training Ribbon	(with OLC)

Others Not Listed Above: Armed Forces Expeditionary Medal, GWOTE, GWOTS

Gender	Race	Marital Status	No. of Children	Gender/Age of Children	Home of Record
Male	White	Married	2	F-10, F-5	Florida

Duty History - Last 3 assignments (include base and duty title)
1. Davis-Monthan AFB AZ, Commander, 355 CES
2. Fairchild AFB, WA, Commander, 92d CES
3. AFIT student

Number of Other Assignments Providing Command Experience: 0

Post-Secondary Education (include name of institution, type of degree and major)
1. Troy State University, MS, Mechanical Engineering
2. University of Arkansas, BS, Mechanical Engineering

Professional Military Education (include type and how completed)
1. ACSC (Correspondence)
2. SOS (Residence)
3. SOS (Correspondence)

Previous Courts-Martial Experience (Number of Cases)
1. General Courts-Martial: 0 2. Special Courts-Martial: 1

Previous Administrative Board Experience (Number of Cases)
1. Administrative Discharge Boards: 1 2. Flying Evaluation Boards: 0

Pending TDYs/PCS/Leave/Retirement Plans and Dates (projected for 3 months):
None

Any specific tasks or duties which may interfere with your ability to sit as a court/board member:

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 825, E.O. 11476, AFI 51-201, AFI 36-3608, and AFI 36-3206. PRINCIPAL PURPOSES: To collect information to determine who are best qualified to serve as members of a court-martial by reason of age, education, training, experience, length of service, and judicial temperament. Use of social security number is for the positive identification of the individual. ROUTINE USES: Convening authorities will use the information to select those best qualified to serve on courts-martial/administrative boards. Trial and defense counsel may use information as basis for challenge for cause or for peremptory challenge. DISCLOSURE: Disclosure is voluntary. We request your cooperation in providing this information to expedite the selection of court members.

Court/Board Member Data Sheet (Base: Langley AFB, VA)		Current as of: 3 Jan 20XX		
Name (Last, First, MI) WEBBER, CINDRA D.		Grade O-4	Duty Title Commander	
Organization (Unit/Office Symbol) 1 AMXS/CC		Duty Phone 5-1212	Fax No. 5-7543	Date of Birth 14 August 20XX-35
Date of Rank 1 December 20XX-3	TAFMSD 12 June 20XX-14	Date Assigned Station 17 March 20XX-2	DEROS	
Rater Col James Bond		Rater's Position 1 MXG/CC		

Awards and Decorations

☒ Meritorious Service Medal	(with OLC)	☐ AF Good Conduct Medal	(with OLC)
☐ Joint Service Commendation Medal	(with OLC)	☒ National Defense Service Medal	(with 1 device)
☒ AF Commendation Medal	(with 2 OLC)	☐ AF Overseas Ribbon--Short	(with OLC)
☐ Joint Service Achievement Medal	(with OLC)	☒ AF Overseas Ribbon--Long	(with OLC)
☒ AF Achievement Medal	(with 2 OLC)	☒ AF Longevity Service Awd Ribbon	(with OLC)
☐ Joint Meritorious Unit Award	(with OLC)	☐ AF NCO PME Graduate Ribbon	(with OLC)
☒ AF Outstanding Unit Award	(with 2 OLC)	☐ Small Arms Exp Mksmnshp Ribbon	(with device)
☐ AF Organizational Excellence Awd	(with OLC)	☒ AF Training Ribbon	(with OLC)

Others Not Listed Above: GWOTS

Gender	Race	Marital Status	No. of Children	Gender/Age of Children	Home of Record
Female	Black	Married	3	M-10, M-10, F-5	Mississippi

Duty History - Last 3 assignments (include base and duty title)
1. Maxwell AFB, AL – ACSC Student, in-residence
2. Yokota AB Japan – Chief, Sortie Generation Flight
3. Peterson AFB CO – Executive Officer, Wing Commander

Number of Other Assignments Providing Command Experience: 0

Post-Secondary Education (include name of institution, type of degree and major)
1. Duke University, M.A. Public Administration
2. University of Mississippi, B.A. Mechanical Engineering

Professional Military Education (include type and how completed)
1. Air Command and Staff College - residence
2. Squadron Officer School - Correspondence

Previous Courts-Martial Experience (Number of Cases)
1. General Courts-Martial: 1 2. Special Courts-Martial: 0

Previous Administrative Board Experience (Number of Cases)
1. Administrative Discharge Boards: 1 2. Flying Evaluation Boards: 0

Pending TDYs/PCS/Leave/Retirement Plans and Dates (projected for 3 months):
None

Any specific tasks or duties which may interfere with your ability to sit as a court/board member:

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 825, E.O. 11476, AFI 51-201, AFI 36-3608, and AFI 36-3206. PRINCIPAL PURPOSES: To collect information to determine who are best qualified to serve as members of a court-martial by reason of age, education, training, experience, length of service, and judicial temperament. Use of social security number is for the positive identification of the individual. ROUTINE USES: Convening authorities will use the information to select those best qualified to serve on courts-martial/administrative boards. Trial and defense counsel may use information as basis for challenge for cause or for peremptory challenge. DISCLOSURE: Disclosure is voluntary. We request your cooperation in providing this information to expedite the selection of court members.

Court/Board Member Data Sheet (Base: Langley AFB, VA)			Current as of: 3 Jan 20XX		
Name (Last, First, MI) OTTINGER, BARRY S.			Grade O-3	Duty Title Pilot	
Organization (Unit/Office Symbol) 71 FS			Duty Phone Ext 5-2345	Fax No. Ext 5-2357	Date of Birth 25 December 20XX-27
Date of Rank 1 July 20XX-1	TAFMSD 12 June 20XX-5		Date Assigned Station 27 June 20XX-3	DEROS	
Rater Lt Col James L. Cardoso			Rater's Position 71 FS/CC		

Awards and Decorations

- ☐ Meritorious Service Medal (with OLC)
- ☐ Joint Service Commendation Medal (with OLC)
- ☒ AF Commendation Medal (with OLC)
- ☐ Joint Service Achievement Medal (with OLC)
- ☒ AF Achievement Medal (with OLC)
- ☐ Joint Meritorious Unit Award (with OLC)
- ☒ AF Outstanding Unit Award (with OLC)
- ☒ AF Organizational Excellence Awd (with OLC)
- ☐ AF Good Conduct Medal (with OLC)
- ☒ National Defense Service Medal (with 1 device)
- ☐ AF Overseas Ribbon--Short (with OLC)
- ☐ AF Overseas Ribbon--Long (with OLC)
- ☒ AF Longevity Service Awd Ribbon (with OLC)
- ☐ AF NCO PME Graduate Ribbon (with OLC)
- ☒ Small Arms Exp Mksmnshp Ribbon (with device)
- ☒ AF Training Ribbon (with OLC)

Others Not Listed Above:

Gender	Race	Marital Status	No. of Children	Gender/Age of Children	Home of Record
Male	White	Married	0	N/A	Maine

Duty History - Last 3 assignments (include base and duty title)
1. Tyndall AFB – airframe training
2. Columbus AFB, UPT

Number of Other Assignments Providing Command Experience: 0

Post-Secondary Education (include name of institution, type of degree and major)
1. University of North Dakota, B.A. English Literature

Professional Military Education (include type and how completed)
1. Squadron Officer School – Correspondence (enrolled)

Previous Courts-Martial Experience (Number of Cases)
1. General Courts-Martial: 0 2. Special Courts-Martial: 0

Previous Administrative Board Experience (Number of Cases)
1. Administrative Discharge Boards: 1 2. Flying Evaluation Boards: 0

Pending TDYs/PCS/Leave/Retirement Plans and Dates (projected for 3 months):
None

Any specific tasks or duties which may interfere with your ability to sit as a court/board member: Short notice TDY due to national security.

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 825, E.O. 11476, AFI 51-201, AFI 36-3608, and AFI 36-3206. PRINCIPAL PURPOSES: To collect information to determine who are best qualified to serve as members of a court-martial by reason of age, education, training, experience, length of service, and judicial temperament. Use of social security number is for the positive identification of the individual. ROUTINE USES: Convening authorities will use the information to select those best qualified to serve on courts-martial/administrative boards. Trial and defense counsel may use information as basis for challenge for cause or for peremptory challenge. DISCLOSURE: Disclosure is voluntary. We request your cooperation in providing this information to expedite the selection of court members.

Court/Board Member Data Sheet (Base: Langley AFB, VA)			Current as of: 3 Jan 20XX		
Name (Last, First, MI) GREER, SANDRA P.			Grade O-3	Duty Title Pilot	
Organization (Unit/Office Symbol) 94 FS			Duty Phone Ext 5-2345	Fax No. Ext 5-2357	Date of Birth 17 April 20XX-26
Date of Rank 1 July 20XX-1	TAFMSD 11 May 20XX-5		Date Assigned Station 27 June 20XX-3	DEROS	
Rater Lt Col Rhonda R. Crawford			Rater's Position 94 FS/CC		

Awards and Decorations

- ☐ Meritorious Service Medal (with OLC)
- ☐ Joint Service Commendation Medal (with OLC)
- ☒ AF Commendation Medal (with OLC)
- ☐ Joint Service Achievement Medal (with OLC)
- ☒ AF Achievement Medal (with OLC)
- ☐ Joint Meritorious Unit Award (with OLC)
- ☒ AF Outstanding Unit Award (with OLC)
- ☒ AF Organizational Excellence Awd (with OLC)
- ☐ AF Good Conduct Medal (with OLC)
- ☒ National Defense Service Medal (with 1 device)
- ☐ AF Overseas Ribbon--Short (with OLC)
- ☐ AF Overseas Ribbon--Long (with OLC)
- ☒ AF Longevity Service Awd Ribbon (with OLC)
- ☐ AF NCO PME Graduate Ribbon (with OLC)
- ☒ Small Arms Exp Mksmnshp Ribbon (with device)
- ☒ AF Training Ribbon (with OLC)

Others Not Listed Above:

Gender	Race	Marital Status	No. of Children	Gender/Age of Children	Home of Record
Female	White	Single	0	N/A	North Dakota

Duty History - Last 3 assignments (include base and duty title)
1. Tyndall AFB, airframe training
2. Columbus AFB, UPT

Number of Other Assignments Providing Command Experience: 0

Post-Secondary Education (include name of institution, type of degree and major)
1. Boston University, B.A., Mathematics

Professional Military Education (include type and how completed)
1. Squadron Officer School – Correspondence (enrolled)

Previous Courts-Martial Experience (Number of Cases)
1. General Courts-Martial: 0 2. Special Courts-Martial: 0

Previous Administrative Board Experience (Number of Cases)
1. Administrative Discharge Boards: 0 2. Flying Evaluation Boards: 0

Pending TDYs/PCS/Leave/Retirement Plans and Dates (projected for 3 months):
None

Any specific tasks or duties which may interfere with your ability to sit as a court/board member:

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 825, E.O. 11476, AFI 51-201, AFI 36-3608, and AFI 36-3206. PRINCIPAL PURPOSES: To collect information to determine who are best qualified to serve as members of a court-martial by reason of age, education, training, experience, length of service, and judicial temperament. Use of social security number is for the positive identification of the individual. ROUTINE USES: Convening authorities will use the information to select those best qualified to serve on courts-martial/administrative boards. Trial and defense counsel may use information as basis for challenge for cause or for peremptory challenge. DISCLOSURE: Disclosure is voluntary. We request your cooperation in providing this information to expedite the selection of court members.

STATEMENT OF SUSPECT/WITNESS/COMPLAINANT

	SUSPECT
X	WITNESS/COMPLAINANT

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 8013; 44 U.S.C. 3101; and EO 9397
PRINCIPAL PURPOSES: Used to record information and details of criminal activity which may require investigative action by commanders, supervisors, security police, AFOSI special agents, etc.; and to provide information to appropriate individuals within DoD organizations who ensure proper legal and administrative action is taken.
ROUTINE USES: Information may be disclosed to local, county, state,and federal law enforcement/investigative authorities for investigation and possible criminal prosecution or civil court action. Information extracted from this form may be used in other related criminal and/or civil proceedings.
DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual making the statement.

I. STATEMENT INFORMATION

DATE *(YYYYMMDD)*	TIME	LOCATION AND INSTALLATION *(Bldg/Room No)*	UNIT TAKING STATEMENT	REPEAT *(If known)*
20XX-1 08 07	0400	AFOSI Detachment 201	AFOSI Det 201	OFFENSE / COMPLAINT

II. PERSONAL IDENTIFICATION *(Print or Type)*

NAME *(Last, First, Middle Initial)*	SSN	STATUS/GRADE	
PARKER, ALLISON A.	987-65-4321	ADAF / Amn	
LOCAL ADDRESS *(Include Zip Code)*	DATE AND PLACE OF BIRTH *(If required)*	TELEPHONE	
Building 302, Room 174 Langley AFB, VA	23 Jan 20XX-19 / NV	HOME 757-555-8227	DUTY 757-327-5253
PERMANENT ADDRESS OR HOME OF RECORD *(Include Zip Code)*	MILITARY ORGANIZATION/EMPLOYER		DEROS
Las Vegas, NV	1 AMXS		

SPONSOR INFORMATION

NAME *(Last, First, Middle Initial)*	GRADE	SSN	ORGANIZATION	DUTY PHONE

III. ACKNOWLEDGEMENT OF OFFENSES AND 5TH AMENDMENT/ARTICLE 31 RIGHTS ADVISEMENT *(Suspect Only)*

I have been advised that I am suspected of the following offenses:

ADVISED BY *(Full Name and Rank)*	INDIVIDUAL IDENTIFIED HIMSELF/HERSELF AS A *(SF, special agent, etc.)*

SUSPECT INITIALS	***and advised me that I have the following rights according to the 5th Amendment of the U.S. Constitution/Article 31 of the Uniform Code of Military Justice.***
	I have the right to remain silent - that is to say nothing at all.
	Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial, non-judicial, or administrative proceedings.
	I have the right to consult with a lawyer.
	I have the right to have a lawyer present during this interview.
	I may obtain a civilian lawyer of my own choice at no expense to the government.
	I may request a lawyer any time during this interview.
	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.
	MILITARY ONLY: If I want a military lawyer, one will be appointed for me free of charge.
	CIVILIANS ONLY: If I cannot afford a lawyer and want one, a lawyer will be appointed for me by civilian authorities.

SUSPECT INITIALS	***I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me.*** ***I make the following choice. (Initial One)***
	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offense(s) under investigation.
	I do not want a lawyer and I do not wish to make a statement or answer any questions.
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.

I fully understand my rights and that my signature does not constitute an admission of guilt.

SIGNATURE OF SUSPECT	SIGNATURE OF WITNESS/INTERVIEWER

IV. STATEMENT

I thought it would be cool to go camping over the long weekend. I asked Amanda and Michael if they wanted to go. They said sure and Michael said he wanted to invite his two other friends Peter and Billy. I had known this place called Cherrystone over in Cape Charles so I checked out their web site (www.cherrystoneva.com) for prices. They seemed reasonable so I booked us a cabin that could hold 6 people. AAP

We left Langley around 1000 or 1030, I think. I went with Amanda and Michael in Michael's car. The ride was fine. We got to the campground and unpacked. Then we started drinking while we waited for the other car to arrive. The guys took a really long time to get there but when they showed up, we all started playing drinking games. Other than going to the store to buy drinks and snacks, I didn't leave the cabin area all night. AAP

We just kept drinking and talking and playing games most of the afternoon and night. Around 9 or 10, a couple of the guys said they wanted to go to the pool. I had probably had maybe 4-5 beers during the night. I was ready to sleep so I said I was going to stay back. After I said I didn't want to go, Michael said he didn't want to go either and he'd stay with me. Billy, Peter, and Amanda got their stuff and said they'd be back in a while. AAP

I got on my bunk and went to sleep. I was exhausted. The next thing I know, I wake up and Michael is on top of me. He's touching me under my shirt and on my legs. I was wearing shorts and a t-shirt. I had panties on but no bra. I am just laying there. Then he slides his shorts off and starts touching himself. I was too shocked to say anything. A few seconds later he came all over my shirt. That's when Amanda, Billy, and Peter walked in and saw what was going on. AAP

Amanda got real angry and kicked the guys out. The first thing Amanda said was, "I can't believe he would do that to you. Doesn't he know you have a boyfriend?" She just kept going on and on about how horrible Michael was for doing that to me. She asked me if I wanted her to call the cops. I told her no. She kept trying but I said let's just go to sleep and deal with it in the morning. Eventually she said okay. I think I heard her tell the guys they had to sleep outside. I just went back to sleep. AAP

My conversations with Michael all night had been normal. There was no discussion about hooking up, or him being into me, or anything personal like that. All we talked about was basically work and the squadron and the long weekend. AAP

The next morning, Amanda woke me up and said we're going back to base. I packed up my stuff. When I went out to the cars, Amanda told me that she and I were going back with Billy and Michael and Peter were going to ride together. That was fine. I didn't say anything to anybody. I just got into Billy's car and was quiet for the whole ride back to base. Amanda was basically talking non-stop about what a jerk Michael was for taking advantage of me. AAP

When we got back to base, Amanda came to my room (she lives in the same dorm). I told her I was fine but she insisted on staying with me. We watched TV and talked. Amanda was trying to convince me to call the OSI to report Michael. I said I didn't want to. I said I was fine and we should just let it go. AAP

Since we still had the next day off, we started drinking. I had a couple of beers but Amanda was having tequila. Eventually I fell asleep in the chair while I was watching TV. The next thing I know, Amanda is waking me up and two OSI agents are in my room. I guess she had called to report it. They asked me what happened, so I told them, and they had me write out this statement. AAP

— END OF STATEMENT —

V. OATH/SIGNATURE

"I hereby voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful inducement. I swear (or affirm) I have read this statement, initialed all pages and corrections, and it is true and correct to the best of my knowledge."

SIGNATURE OF PERSON MAKING STATEMENT	SIGNATURE OF WITNESS/INTERVIEWER
Allison Parker	

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 7th *day of* AUGUST, 2001 *(year).*

SIGNATURE OF PERSON ADMINISTERING OATH

Joe Rich

VI. INSTRUCTIONS FOR CONTINUATION PAGE(S)

Use plain bond paper (both sides optional). At the top right of each page, print or type "(Last name of individual making the Statement) on (Date)." At the bottom of each page, print or type: "Page ____ of ____ Pages." The individual must initial the top and bottom entries and sign his/her name at the bottom of each page.

STATEMENT OF SUSPECT/WITNESS/COMPLAINANT

	SUSPECT
	WITNESS/COMPLAINANT

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 8013; 44 U.S.C. 3101; and EO 9397
PRINCIPAL PURPOSES: Used to record information and details of criminal activity which may require investigative action by commanders, supervisors, security police, AFOSI special agents, etc.; and to provide information to appropriate individuals within DoD organizations who ensure proper legal and administrative action is taken.
ROUTINE USES: Information may be disclosed to local, county, state,and federal law enforcement/investigative authorities for investigation and possible criminal prosecution or civil court action. Information extracted from this form may be used in other related criminal and/or civil proceedings.
DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual making the statement.

I. STATEMENT INFORMATION

DATE *(YYYYMMDD)*	TIME	LOCATION AND INSTALLATION *(Bldg/Room No)*	UNIT TAKING STATEMENT	REPEAT *(If known)*
20XX-1 08 07	0430	AFOSI Detachment 201	AFOSI Det 201	OFFENSE / COMPLAINT

II. PERSONAL IDENTIFICATION *(Print or Type)*

NAME *(Last, First, Middle Initial)*	SSN	STATUS/GRADE	
WOODWARD, AMANDA L.	835-37-8483	ADAF / Amn	
LOCAL ADDRESS *(Include Zip Code)*	DATE AND PLACE OF BIRTH *(If required)*	TELEPHONE	
Building 302, Room 125 Langley AFB, VA	7 Nov 20XX-19 / FL	HOME 757-555-3474	DUTY 757-327-2382
PERMANENT ADDRESS OR HOME OF RECORD *(Include Zip Code)*	MILITARY ORGANIZATION/EMPLOYER		DEROS
Niceville, FL	1 AMXS		

SPONSOR INFORMATION

NAME *(Last, First, Middle Initial)*	GRADE	SSN	ORGANIZATION	DUTY PHONE

III. ACKNOWLEDGEMENT OF OFFENSES AND 5TH AMENDMENT/ARTICLE 31 RIGHTS ADVISEMENT *(Suspect Only)*

I have been advised that I am suspected of the following offenses:

ADVISED BY *(Full Name and Rank)*	INDIVIDUAL IDENTIFIED HIMSELF/HERSELF AS A *(SF, special agent, etc.)*

SUSPECT INITIALS	***and advised me that I have the following rights according to the 5th Amendment of the U.S. Constitution/Article 31 of the Uniform Code of Military Justice.***
	I have the right to remain silent - that is to say nothing at all.
	Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial, non-judicial, or administrative proceedings.
	I have the right to consult with a lawyer.
	I have the right to have a lawyer present during this interview.
	I may obtain a civilian lawyer of my own choice at no expense to the government.
	I may request a lawyer any time during this interview.
	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.
	MILITARY ONLY: If I want a military lawyer, one will be appointed for me free of charge.
	CIVILIANS ONLY: If I cannot afford a lawyer and want one, a lawyer will be appointed for me by civilian authorities.

SUSPECT INITIALS	***I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me.*** ***I make the following choice. (Initial One)***
	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offense(s) under investigation.
	I do not want a lawyer and I do not wish to make a statement or answer any questions.
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.

I fully understand my rights and that my signature does not constitute an admission of guilt.

SIGNATURE OF SUSPECT	SIGNATURE OF WITNESS/INTERVIEWER

IV. STATEMENT

alw A bunch of us (Allison, Billy, Michael, Peter, and me) decided to go camping for our 3-day pass weekend. Allison reserved the cabin and we all shared the cost. I was thinking it was going to be fun because Allison and I get along great but we haven't had much of a chance to do anything fun together. We knew Michael from around base and had heard Michael talk about Peter and Billy before and they seemed like they were good friends, so we figured it would be a good group. alw

alw We got up to the place and got settled in. Allison, Michael, and I got there first so we started drinking and chilling while we waited for the other guys to arrive. We got 2 cases of beer from the convenience store at the campground. We also got some ice and snacks. Basically, we just hung out all that day. alw

alw Just after it got dark one of the guys suggested we go to the pool. We were all going to go until Allison said she thought she'd rather just go to sleep. Then Michael chimed in and said he was tired too so he wanted to stay with Allison. That seemed weird to me but Allison was a big girl and I figured she'd be fine. I should have known better. alw

alw So me, Billy, and Peter went to the pool. We went to the adults only pool near the water. We were there about two hours and probably got back right before midnight. As soon as we walked in the door of the cabin, we heard noises coming from the back bedroom. I followed Peter over there. When I walked in, I saw Michael on top of Allison. Allison was fighting to get him off. I took a couple of steps in and saw that Michael had his penis in his hand it looked like semen all over Allison's shirt. I told him to get the f*ck off her and started yelling at all of the guys to get out. alw

alw I sat with Allison for a while to make sure she was okay. She said he didn't rape her so I was relieved but still pissed that he'd done this to her. I told Allison that people like him should be reported to the cops so they can't do this to anyone else. She said she just wanted to forget about it and go to sleep. I said okay, but we could talk about it in the morning. alw

alw The next morning she still didn't want to report it. I didn't think it was safe for us all to stay there so I asked the guys to drive us all back to base. Allison and I drove back with Billy. Peter took Michael. alw

alw I hung out with Allison pretty much the whole day when we got back. We started drinking. She had a couple of beers and I had some tequila. I probably had about half the bottle. As it got later at night and we were talking more, Allison seemed to be coming around to reporting what had happened. Around 11pm, I called Security Forces. They called the OSI and sent two agents over to Allison's room. alw

END OF STATEMENT

V. OATH/SIGNATURE

"I hereby voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful inducement. I swear (or affirm) I have read this statement, initialed all pages and corrections, and it is true and correct to the best of my knowledge."

SIGNATURE OF PERSON MAKING STATEMENT	SIGNATURE OF WITNESS/INTERVIEWER
Amanda Woodlen	

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 7th *day of* AUGUST, 20XX-1 *(year).*

SIGNATURE OF PERSON ADMINISTERING OATH

Joe Friday

VI. INSTRUCTIONS FOR CONTINUATION PAGE(S)

Use plain bond paper (both sides optional). At the top right of each page, print or type "(Last name of individual making the Statement) on (Date)." At the bottom of each page, print or type: "Page ____ of ____ Pages." The individual must initial the top and bottom entries and sign his/her name at the bottom of each page.

STATEMENT OF SUSPECT/WITNESS/COMPLAINANT

	SUSPECT
	WITNESS/COMPLAINANT

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 8013; 44 U.S.C. 3101; and EO 9397
PRINCIPAL PURPOSES: Used to record information and details of criminal activity which may require investigative action by commanders, supervisors, security police, AFOSI special agents, etc.; and to provide information to appropriate individuals within DoD organizations who ensure proper legal and administrative action is taken.
ROUTINE USES: Information may be disclosed to local, county, state,and federal law enforcement/investigative authorities for investigation and possible criminal prosecution or civil court action. Information extracted from this form may be used in other related criminal and/or civil proceedings.
DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual making the statement.

I. STATEMENT INFORMATION

DATE *(YYYYMMDD)*	TIME	LOCATION AND INSTALLATION *(Bldg/Room No)*	UNIT TAKING STATEMENT	REPEAT *(If known)*
20XX-1 08 08	1000	AFOSI Detachment 201	AFOSI Det 201	OFFENSE / COMPLAINT

II. PERSONAL IDENTIFICATION *(Print or Type)*

NAME *(Last, First, Middle Initial)*	SSN	STATUS/GRADE	
BURNS, PETER M.	274-62-9847	Civ	
LOCAL ADDRESS *(Include Zip Code)*	DATE AND PLACE OF BIRTH *(If required)*	TELEPHONE	
2600 Omohundro Avenue Norfolk, VA	25 Sep 20XX-22	HOME 757-474-2387	DUTY
PERMANENT ADDRESS OR HOME OF RECORD *(Include Zip Code)*	MILITARY ORGANIZATION/EMPLOYER		DEROS

SPONSOR INFORMATION

NAME *(Last, First, Middle Initial)*	GRADE	SSN	ORGANIZATION	DUTY PHONE

III. ACKNOWLEDGEMENT OF OFFENSES AND 5TH AMENDMENT/ARTICLE 31 RIGHTS ADVISEMENT *(Suspect Only)*

I have been advised that I am suspected of the following offenses:

ADVISED BY *(Full Name and Rank)*	INDIVIDUAL IDENTIFIED HIMSELF/HERSELF AS A *(SF, special agent, etc.)*

SUSPECT INITIALS	***and advised me that I have the following rights according to the 5th Amendment of the U.S. Constitution/Article 31 of the Uniform Code of Military Justice.***
	I have the right to remain silent - that is to say nothing at all.
	Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial, non-judicial, or administrative proceedings.
	I have the right to consult with a lawyer.
	I have the right to have a lawyer present during this interview.
	I may obtain a civilian lawyer of my own choice at no expense to the government.
	I may request a lawyer any time during this interview.
	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.
	MILITARY ONLY: If I want a military lawyer, one will be appointed for me free of charge.
	CIVILIANS ONLY: If I cannot afford a lawyer and want one, a lawyer will be appointed for me by civilian authorities.

SUSPECT INITIALS	***I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me.*** ***I make the following choice. (Initial One)***
	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offense(s) under investigation.
	I do not want a lawyer and I do not wish to make a statement or answer any questions.
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.

I fully understand my rights and that my signature does not constitute an admission of guilt.

SIGNATURE OF SUSPECT	SIGNATURE OF WITNESS/INTERVIEWER

IV. STATEMENT

PB Mike, me, Billy, and two girls from the Air Force went camping last weekend. Mike called me a few days before and asked if Billy and I wanted to go with them. He said it was going to be the three of us, two single girls, and lots of beer and sun. I said he needed to find another girl because the ratio was off. He said he didn't think it would matter because he thought both of the girls had long-distance boyfriends. I told him that wouldn't stop us because Virginia is for lovers, and what happens in VA stays in VA. He laughed and said something like "well, if I get a shot, you'd better not cock-block me." PB

PB So the day we left, Billy and me drove in one car and all the people from the base drove in Mike's car. When we got to the camp we were all just hanging out and drinking. I just met Amanda, but I knew Allison. We've hung out before in the past. Amanda was really cool. She must have had at least 6 beers. Allison was more mellow. I think she only had three or four. She seemed to be having more fun just playing games and talking, mostly to Mike. I started watching more closely when they went to the bathroom building together. I started to think Mike might actually have a chance! PB

PB After the sun went down, we talked about going over to the pool. Everyone was into it but Allison. She said she wanted to stay back. I was sitting next to Mike and I looked at him and sort of gave a nod of my head saying like, stay here with her, dude! I think he figured out what I meant because then he said he wasn't feeling the pool and he wanted to stay back too. PB

PB The three of us grabbed up our stuff and some beers and went to the pool. PB

PB We went back to the cabin about an hour or two later. I walked in the door first and heard noises coming from the back bedroom. Amanda came in behind me. When I opened the bedroom door I saw Mike on top of Allison. They were on her bunk. Mike had his shorts off and it looked like his hands were under Allison's shirt. Allison's hands were in between her and Mike but I couldn't see what she was doing. The first thing I thought was, "Go, Mike!" The instant we walked in, it looked like Mike came all over Allison's shirt. PB

PB All at the same time, Amanda pushed past me and started pitching a fit. She was screaming at Mike. Mike grabbed his shorts and went outside. Allison was telling Amanda not to worry about it but Amanda kept yelling. Amanda threated to call the cops if all of the guys didn't sleep outside and then she threatened to call the cops again the next day if we didn't all go home. Billy and I told Mike he should ignore Amanda, but he said we should just end the drama and go home. So we did. PB

PB On the way back, we didn't talk too much. It was just Mike and me in the car. He kept saying he couldn't figure out why Amanda was making such a big deal of walking in on them while they were hooking up. From Mike's perspective, it sounded like everything was consensual between him and Allison. PB

END OF STATEMENT

V. OATH/SIGNATURE

"I hereby voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful inducement. I swear (or affirm) I have read this statement, initialed all pages and corrections, and it is true and correct to the best of my knowledge."

SIGNATURE OF PERSON MAKING STATEMENT	SIGNATURE OF WITNESS/INTERVIEWER
Peter Bu	

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 8th *day of* AUGUST, 20XX-1 *(year).*

SIGNATURE OF PERSON ADMINISTERING OATH

Joe Friday

VI. INSTRUCTIONS FOR CONTINUATION PAGE(S)

Use plain bond paper (both sides optional). At the top right of each page, print or type "(Last name of individual making the Statement) on (Date)." At the bottom of each page, print or type: "Page ____ of ____Pages." The individual must initial the top and bottom entries and sign his/her name at the bottom of each page.

STATEMENT OF SUSPECT/WITNESS/COMPLAINANT

	SUSPECT
	WITNESS/COMPLAINANT

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 8013; 44 U.S.C. 3101; and EO 9397
PRINCIPAL PURPOSES: Used to record information and details of criminal activity which may require investigative action by commanders, supervisors, security police, AFOSI special agents, etc.; and to provide information to appropriate individuals within DoD organizations who ensure proper legal and administrative action is taken.
ROUTINE USES: Information may be disclosed to local, county, state,and federal law enforcement/investigative authorities for investigation and possible criminal prosecution or civil court action. Information extracted from this form may be used in other related criminal and/or civil proceedings.
DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual making the statement.

I. STATEMENT INFORMATION

DATE *(YYYYMMDD)*	TIME	LOCATION AND INSTALLATION *(Bldg/Room No)*	UNIT TAKING STATEMENT	REPEAT *(If known)*
20XX-1 08 08	1500	AFOSI Detachment 201	AFOSI Det 201	OFFENSE / COMPLAINT

II. PERSONAL IDENTIFICATION *(Print or Type)*

NAME *(Last, First, Middle Initial)*	SSN	STATUS/GRADE	
CAMPBELL, WILLIAM	239-73-4782	Civ	
LOCAL ADDRESS *(Include Zip Code)*	DATE AND PLACE OF BIRTH *(If required)*	TELEPHONE	
2600 Omohundro Avenue Norfolk, VA	30 Dec 20XX-22	HOME n/a	DUTY
PERMANENT ADDRESS OR HOME OF RECORD *(Include Zip Code)*	MILITARY ORGANIZATION/EMPLOYER		DEROS

SPONSOR INFORMATION

NAME *(Last, First, Middle Initial)*	GRADE	SSN	ORGANIZATION	DUTY PHONE

III. ACKNOWLEDGEMENT OF OFFENSES AND 5TH AMENDMENT/ARTICLE 31 RIGHTS ADVISEMENT *(Suspect Only)*

I have been advised that I am suspected of the following offenses:

ADVISED BY *(Full Name and Rank)*	INDIVIDUAL IDENTIFIED HIMSELF/HERSELF AS A *(SF, special agent, etc.)*

SUSPECT INITIALS	***and advised me that I have the following rights according to the 5th Amendment of the U.S. Constitution/Article 31 of the Uniform Code of Military Justice.***
	I have the right to remain silent - that is to say nothing at all.
	Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial, non-judicial, or administrative proceedings.
	I have the right to consult with a lawyer.
	I have the right to have a lawyer present during this interview.
	I may obtain a civilian lawyer of my own choice at no expense to the government.
	I may request a lawyer any time during this interview.
	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.
	MILITARY ONLY: If I want a military lawyer, one will be appointed for me free of charge.
	CIVILIANS ONLY: If I cannot afford a lawyer and want one, a lawyer will be appointed for me by civilian authorities.

SUSPECT INITIALS	***I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me.*** ***I make the following choice. (Initial One)***
	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offense(s) under investigation.
	I do not want a lawyer and I do not wish to make a statement or answer any questions.
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.

I fully understand my rights and that my signature does not constitute an admission of guilt.

SIGNATURE OF SUSPECT	SIGNATURE OF WITNESS/INTERVIEWER

IV. STATEMENT

BC Last Wednesday Peter told me Mike had called and asked if we wanted to go camping this weekend. I said sure. So Peter and I drove up and met them all at the campground. It was me, Mike, Peter, and Amanda and Allison from the base. Peter told me Mike told him that both girls had long-distance boyfriends but he was gonna take a shot with one of them. BC

BC Me and Pete drove up in his car. The guys from the base got there first and they were already drinking when we pulled in. After we put our stuff in the cabin we basically spent the afternoon and night drinking and talking and smoking. We played a few drinking games. At one point when Mike and I were at the cooler at the same time, I asked him which girl he was going to take a shot at. He gave me a strange look, like "what do you mean?" I told him Peter told me he was into one of them. He laughed and said it was Allison, but she had a boyfriend so unless she got drunk, he was out of luck. BC

BC Later that night Peter, Amanda, and I decided to go to the pool. Mike and Allison decided to stay behind. We were gone for like an hour and a half. When we got back, Peter went into the cabin first, then Amanda, then me. Before I even made it in I heard Amanda start yelling "get off her!" By the time I got inside to see what was going on, Mike had grabbed his shorts and was walking out of the cabin in his boxers. Amanda was really angry and kept yelling. She made us all sleep outside that night and said she'd call the cops and report Mike as a rapist unless we all went back home the next morning. BC

BC That night after Amanda kicked us out Mike was trying to figure out why she was so mad. He kept saying that Allison and he had just hooked up and that it was none of Amanda's business. BC

BC The girls made me drive them back to the base in my car. On the way back Amanda kept calling Mike a bastard and saying men can't be trusted. I dropped them off at the visitor's center and they walked from there. BC

END OF STATEMENT

V. OATH/SIGNATURE

"I hereby voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful inducement. I swear (or affirm) I have read this statement, initialed all pages and corrections, and it is true and correct to the best of my knowledge."

SIGNATURE OF PERSON MAKING STATEMENT	SIGNATURE OF WITNESS/INTERVIEWER
WILLIAM CATHRELL	

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 8th *day of* AUGUST, 20XX-1 *(year).*

SIGNATURE OF PERSON ADMINISTERING OATH

VI. INSTRUCTIONS FOR CONTINUATION PAGE(S)

Use plain bond paper (both sides optional). At the top right of each page, print or type "(Last name of individual making the Statement) on (Date)." At the bottom of each page, print or type: "Page ____ of ____ Pages." The individual must initial the top and bottom entries and sign his/her name at the bottom of each page.

STATEMENT OF SUSPECT/WITNESS/COMPLAINANT

X	SUSPECT
	WITNESS/COMPLAINANT

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 8013; 44 U.S.C. 3101; and EO 9397
PRINCIPAL PURPOSES: Used to record information and details of criminal activity which may require investigative action by commanders, supervisors, security police, AFOSI special agents, etc.; and to provide information to appropriate individuals within DoD organizations who ensure proper legal and administrative action is taken.
ROUTINE USES: Information may be disclosed to local, county, state,and federal law enforcement/investigative authorities for investigation and possible criminal prosecution or civil court action. Information extracted from this form may be used in other related criminal and/or civil proceedings.
DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual making the statement.

I. STATEMENT INFORMATION

DATE *(YYYYMMDD)*	TIME	LOCATION AND INSTALLATION *(Bldg/Room No)*	UNIT TAKING STATEMENT	REPEAT *(If known)*
20XX-1 08 07	0747	AFOSI Detachment 201	AFOSI Det 201	OFFENSE / COMPLAINT

II. PERSONAL IDENTIFICATION *(Print or Type)*

NAME *(Last, First, Middle Initial)*	SSN	STATUS/GRADE
MANCINI, MICHAEL D.	123-45-6789	ADAF / SrA

LOCAL ADDRESS *(Include Zip Code)*	DATE AND PLACE OF BIRTH *(If required)*	TELEPHONE HOME	TELEPHONE DUTY
Building 201, Room 204 Langley AFB, VA	23 Jan 20XX-22 / CA	757-555-1212	757-327-1234

PERMANENT ADDRESS OR HOME OF RECORD *(Include Zip Code)*	MILITARY ORGANIZATION/EMPLOYER	DEROS
Los Angeles, CA	1 FSS	

SPONSOR INFORMATION

NAME *(Last, First, Middle Initial)*	GRADE	SSN	ORGANIZATION	DUTY PHONE

III. ACKNOWLEDGEMENT OF OFFENSES AND 5TH AMENDMENT/ARTICLE 31 RIGHTS ADVISEMENT *(Suspect Only)*

I have been advised that I am suspected of the following offenses:
Art 120, Indecent Assault

ADVISED BY *(Full Name and Rank)*	INDIVIDUAL IDENTIFIED HIMSELF/HERSELF AS A *(SF, special agent, etc.)*
SA Joseph Friday	Special Agent, AFOSI

SUSPECT INITIALS	***and advised me that I have the following rights according to the 5th Amendment of the U.S. Constitution/Article 31 of the Uniform Code of Military Justice.***
MDM	I have the right to remain silent - that is to say nothing at all.
MDM	Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial, non-judicial, or administrative proceedings.
MDM	I have the right to consult with a lawyer.
MDM	I have the right to have a lawyer present during this interview.
MDM	I may obtain a civilian lawyer of my own choice at no expense to the government.
MDM	I may request a lawyer any time during this interview.
MDM	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.
MDM	MILITARY ONLY: If I want a military lawyer, one will be appointed for me free of charge.
	CIVILIANS ONLY: If I cannot afford a lawyer and want one, a lawyer will be appointed for me by civilian authorities.

SUSPECT INITIALS	***I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me.*** ***I make the following choice. (Initial One)***
MDM	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offense(s) under investigation.
	I do not want a lawyer and I do not wish to make a statement or answer any questions.
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.

I fully understand my rights and that my signature does not constitute an admission of guilt.

SIGNATURE OF SUSPECT	SIGNATURE OF WITNESS/INTERVIEWER
M Mancini	Joe Friday

IV. STATEMENT

Me and my friends Billy Campbell, Peter Burns, Amanda Woodward, and Allison decided to go camping for the weekend since last Friday was a goal day at the base for there not being any DUIs for three months in a row. Allison first came up with the idea and she made all of the arrangements. We had a cabin at Cherrystone in Cape Charles. I had never been there before but I think Allison had. We split the cost of the cabin equally. MM

Peter and Billy are civilians and could go pretty much whenever. I had also called to invite another friend, Matt Fielding. When I called Matt he told me he didn't think it would be a good idea if he went. He said that he and Allison had hooked up a few times in the past but that he had broken it off with her when he got a serious girlfriend a few months back. He told me that Allison was into hooking up, but that her thing was that since she had a boyfriend back home, all she would do is jack guys off since she said that wasn't really sex and so she wasn't cheating. Matt said she called it "giving him a hand" and that she'd done it with at least 4 guys he knew about. He laughed and said that if I played my cards right, she might give me a hand, too. I didn't tell Allison that I'd talked to Matt or that I'd invited him. MM

So the day we left, 5 Aug 20XX-1, we packed up all of our gear in the morning. We took two cars. I drove and Billy drove. Amanda and Allison rode with me and since they both live downtown, Peter rode with Billy. I suggested that we stop along the way to get some beer and ice to bring with us, but the girls said that there was a place right at the campground that would have everything, and then we could buy it cold and not worry about it. That sounded good to me. We all left around 1030. MM

Amanda, Allison, and I got to the campground around 1300. We stopped along the way at McDonalds for lunch, but other than that we kept driving. We checked in and got assigned to cabin 4401. Since we were checking in so early in the afternoon the staff person actually let us pick our cabin. Allison picked that one because she said it looked like it was out of the way and more private than the other ones. We probably got our stuff unpacked by around 1400. Peter and Billy still hadn't showed up so the girls and me went to the general store. We bought beer, ice, and some munchies. I think we had about 2 cases of beer. The guys still hadn't showed up so we just kicked back on the porch and started drinking. Everything seemed cool. I called Billy's cell phone to see where they were but he didn't answer. I didn't try Peter's because I didn't have his number programmed into my phone and I didn't know it. Peter and Billy drove in at around 1600. I started giving them a hard time and kept asking what took them so long. They said they had to make a couple of stops along the way but they didn't say where. When they pulled in, though, they each had an open can of Bud so I assumed they'd gotten some beer along the way and had already started drinking. MM

Basically, after Peter and Billy put their stuff away, we all just chilled. We played some drinking games (all of us) and after a while Allison said she had to use the bathroom. Our cabin didn't have a bathroom so you had to walk down the street to the bathhouse. She tried to get Amanda to go with her, but Amanda wanted to keep playing and told Allison just to go by herself. I needed to pee too so I asked Allison if she wanted me to go with her. She said okay. Her and me walked down to the bathroom. She was definitely buzzing. I think she'd had like 4 or 5 beers by now (it was around 1800). She told me that she was glad I was walking with her to the bathroom and said that if she didn't still have her boyfriend back at home, she'd want to hang out with me. I just laughed and said something like, "What happens in VA stays in VA." In the back of my mind I was wondering whether she was trying to send me some kind of signal. MM

CONTINUED

V. OATH/SIGNATURE

"I hereby voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful inducement. I swear (or affirm) I have read this statement, initialed all pages and corrections, and it is true and correct to the best of my knowledge."

SIGNATURE OF PERSON MAKING STATEMENT	SIGNATURE OF WITNESS/INTERVIEWER
[signature]	

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 7th *day of* AUGUST, 20XX-1 *(year).*

SIGNATURE OF PERSON ADMINISTERING OATH

[signature]

VI. INSTRUCTIONS FOR CONTINUATION PAGE(S)

Use plain bond paper (both sides optional). At the top right of each page, print or type "(Last name of individual making the Statement) on (Date)." At the bottom of each page, print or type: "Page ____ of ____ Pages." The individual must initial the top and bottom entries and sign his/her name at the bottom of each page.

Continuation, AF Form 1168, SrA Michael D. Mancini

We had been out in the sun and drinking all day, but we weren't really that tired. Around 2200, Peter and Billy said they wanted to go to the pool. They talked Amanda into going but I didn't want to go. Allison was the only one of us who seemed ready to sleep so she decided to stay back with me. The other three left and said they'd be back in an hour or two. Allison got into her bunk. I stayed up drinking. She had been asleep only like 15 minutes when she got up and said she needed to go to the bathroom and asked me to go with her again. I said okay. We went down and came back pretty quick. She still seemed to be buzzing and tired but she didn't seem like all that drunk. When we got back to the cabin, she grabbed my hand and told me to come to her bunk with her. I said, "what about your boyfriend?" She said, "aren't you the one who said what happens in VA stays in VA?" She led me to her bunk and put my hands up under her t-shirt.

I got on the bunk next to her and started touching her breasts under her shirt. I could tell she really liked that. She started touching me through my clothes. I started rubbing her legs while she slid my shorts down. I sort of got on top of her and straddled her. She was on her back. She had my penis in her hands and was stroking me. I was still touching her breasts under her t-shirt and rubbing her legs. I started to move myself lower on her but she told me just to stay where I was. She said this would have to be good enough for now. She started moving her hands faster and I started to lose it and came all over her t-shirt.

Not five seconds later, Amanda, Peter, and Billy came into the cabin. Amanda said "what the hell is going on?" Then Allison yelled "get off me!" I couldn't believe it. The guys grabbed me and pulled me out of the room. Someone got my shorts from Allison's bunk and threw them at me. I put them back on and went to sit on the porch. Amanda stayed inside with Allison and the guys sat down outside with me. Peter looked back to make sure the girls couldn't hear us and then he laughed and said "dude, couldn't you have at least gone somewhere else?" I told them it was all her idea. They said "yeah, whatever."

Then Amanda comes out of the cabin. She tells me that all of the guys have to sleep outside tonight and she and Allison will stay in the cabin. We all started to argue but when she said she would call the cops if we didn't, we basically decided it wasn't worth the hassle and said fine. I told Amanda I needed to get my stuff out of the cabin. She wouldn't let me in, but she went inside and got my stuff. I walked to the door to get it and when I did, I looked at Allison. She gave me this look that said "I'm sorry."

The next morning, Amanda comes out of the cabin again and says we're all going home. I said like hell we are. I had paid for 3 nights and I was going to stay out there. I told her that if she wanted to go home, that was fine. But I wasn't going to drive her. Peter and Billy also wanted to stay. Amanda started getting mad that she wasn't getting her way. She said she would call the cops if we didn't go back to base. It wasn't worth the hassle so we all gave in.

On the drive back, I drove with Peter. Billy drove Amanda and Allison in his car. I dropped Peter off then came back on base and went to my room.

CONTINUED

The next thing I know, OSI is knocking on my door this morning and here I am. Everything that happened between Allison and me was her idea.

Special Agent Friday typed this statement for me but the words are my own.

END OF STATEMENT

CONSENT FOR SEARCH AND SEIZURE

PRIVACY ACT STATEMENT

AUTHORITY: 10 U.S.C. 8013; 44 U.S.C. 3101; and EO 9397
PRINCIPAL PURPOSE(S): To record personal information on an individual who consents to a search and seizure.
ROUTINE USE(S): Information may be disclosed to local, county, state, and federal law enforcement/investigative authorities for investigation and possible criminal prosecution or civil court action. Information extracted from this form may be used in other related criminal and/or civil proceedings.
DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual consenting to the search and seizure.

NAME *(Print or type)*	GRADE	SSN
MANCINI, MICHAEL D.	Senior Airman	123-45-6789

ADDRESS *(Organization and station. Include ZIP Code)*
1st Force Support Squadron
Langley AFB, VA

I, Michael D. Mancini, state that Joseph Friday[1] was identified to me as a Special Agent, AFOSI and advised me that the nature of the offense(s) of which I am suspected *(matters concerning which I may have knowledge)* is / as follows:

Article 120, Indecent Assault

I know that I have the legal right to either consent to a search, or to refuse to give my consent. I understand that if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative procedure. I also understand that if I do not consent, a search cannot be made without a warrant or other authorization recognized in law.

With knowledge of the foregoing, I have decided to allow the person identified above and whomever may be designated to assist, to search the following place(s) in the day time/~~XXXXX~~[2]

my body, for a sample of my blood for DNA testing.

Before deciding to give my consent, I carefully considered this matter. I am giving my consent voluntarily and of my own free will, without having been subjected to any coercion, unlawful influence or unlawful inducement and without any promise of reward, benefit, or immunity having been made to me. The investigators have my permission to take any letters, papers, materials, articles or other property they consider to be evidence of an offense, including contraband for use as evidence in any criminal prosecution hereafter initiated. I have read and understand this entire acknowledgment of my rights and grant of my consent for search and seizure.

Dated this 7th day of August 20XX-1, at 0822 hours

SIGNATURE

WITNESS | WITNESS

1 Insert "Security Policy Investigator, USAF," "AFPSI Special Agent," or other appropriate designation.
2 Insert my person; my dwelling; my apartment and storage area; my room; my footlocker; the premises; etc. Describe in detail the property or area to be searched and its location for proper identification.

INTERVIEW RECORD	DATE 20XX-1 08 07	FILE NUMBER

PRIVACY ACT NOTICE: WHEN FILLED IN, THIS FORM MAY CONTAIN INFORMATION THAT MUST BE PROTECTED BY THE PRIVACY ACT OF 1974 AND THEREFORE MUST BE PROTECTED IN ACCORDANCE WITH DOD DIRECTIVE 5400.11.

I. ADMINISTRATIVE DATA

NAME OF INTERVIEWEE *(Last, First, Middle Initial)*	PRINCIPAL INTERVIEWER	PLACE OF INTERVIEW
MANCINI, MICHAEL D.	SA Joseph Friday	AFOSI Det 201, LAFB VA

OTHER PEOPLE PRESENT

NAME	STATUS	TIME PRESENT
SA William Gannon	Special Agent, Assistant Interviewer	

II. CHRONOLOGICAL DATA

(Initial appropriate blocks) *1. Use these items only when required by law. 2. Strike out words or items not applicable*

JF	1. Time interview began. 6.39
JF [1]	2. At 6.53 hours, SA Friday read the suspect his or her rights according to (Article 31, UCMJ) (~~Fifth amendment to the Constitution~~)[2] and advised the suspect that the alleged (offense) (~~matter~~) being investigated was:[2] Art 120, Indecent Assault
JF [1]	3. At 6.54 hours interviewee stated he ~~or she~~ understood his ~~or her~~ rights.
JF [1]	4. At 6.54 hours, interviewee stated he or ~~she (did)~~ (did not)[2] desire to consult with a lawyer . *(If lawyer was requested state in "Remarks" the specific action taken.)*
JF [1]	5. At 6.54 hours interviewee stated he ~~or she~~ wished (to waive the rights explained to him or her) (~~to remain silent~~).[2]
JF	6. At 7.45 hours interviewee stated he ~~or she~~ (was willing) (~~was not willing~~)[2] to make a written statement.
JF	7. Preparation of the written statement began at 7.47 hours and ended at 8.15 hours.
JF	8. (Interviewee stated that he ~~or she~~ read the statement and)[2] interviewee signed the statement at 8.21 hours.
JF	9. At 9.05 hours interview ended.
JF	10. At 9.15 hours interviewee was photographed (front and profile)(copy to be maintained in AF Form 3986). (Add remark if not photographed)
JF	11. At 9.15 hours interviewee was fingerprinted (copy to be maintained in AF Form 3986). (Add remark if not fingerprinted)
JF	12. At 11.35 hours interviewee departed ~~(unescorted)~~ (escorted by).[2] SMSgt Smith

III. PERTINENT DETAILS AND SPECIFIC REQUESTS

(List below other pertinent details of the interview, including significant requests made by interviewee to see counsel, chaplain, commander, doctor, etc., personal relief, refreshment breaks, visitors, etc.)

EVENTS	TIME	ACTION TAKEN
Subj offered a drink/snack	6.39	Subject accepts a coke/cookies
Videotape of interview begins	6.39	
SAs Friday and Gannon depart room/videotape stops	7.47	Subj begins written statement
SAs Friday and Gannon re-enter	8.15	Agents review statement
Subj signs AF Form 1364 for blood	8.22	
SA Gannon takes fingerprints and photograph	8.24	

III. PERTINENT DETAILS AND SPECIFIC REQUESTS *(Continued)*

(List below other pertinent details of the interview, including significant requests made by interviewee to see counsel, chaplain, commander, doctor, etc., personal relief, refreshment breaks, visitors, etc.)

EVENTS	TIME	ACTION TAKEN
Blood drawn at 1 MDG	10.29	
Subj released to first sergeant	10.45	

IV. SECURITY CONSIDERATIONS

1. If the interviewee has access to sensitive information or areas, has admitted committing a substantive offense, or there is substantial evidence that he or she committed a substantive offense, he or she was asked the following questions:

(a) Has anyone asked you to obtain or furnish defense information or aid any activity whose interests are contrary to the US under threat of exposure, blackmail, or any form of pressure?

(b) Has anyone enticed or attempted to entice you into participating in some activity which may have been for the purpose of threatening to expose you, blackmail you, or subject you to pressure to furnish defense information contrary to the interests of the US?

2. If classified information was involved in the case, the interviewee was cautioned that he or she may not disclose classified information to a lawyer who does not have proper security clearance.

REMARKS

I CERTIFY THE ENTRIES IN THIS RECORD ARE A TRUE AND ACCURATE ACCOUNT OF THE EVENTS AS THEY OCCURRED.

INTERVIEW RECORD COMPLETED AT		TIME
AFOSI Detachment 201, Langley AFB, VA		11.10
DATE	TYPE OR PRINTED NAME	SIGNATURE
20XX-1 08 07	SA JOSEPH FRIDAY	

AF Form 3985, 20080709

OSI Agent Notes
SA Joseph Friday
7 Aug 200X-1

Suspect Interview

- 5 for weekend - (V)'s idea - Amanda, Burns, (V), Δ, + Campbell.
- (V) made all arrangements - Cherrystone in Cape Charles
- Talked to Matt Fielding - didn't want to go - joked about (V)
  - - issues w/ (V) - no sex w/ her; just hand-jobs
  - - broke off w/ (V) when Fielding got girlfriend
  - - 4 other guys - FaceBook pg - told Δ about it
- Δ looked at (V)'s FaceBook pg before weekend -

* Get FaceBook Page

5 Aug 0X-1 - 2 cars - Δ + Campbell drove - (V) + Amanda drove w/ Δ. Left ~1030 ; Arrived ~1300
- Bought 2 cases beer - knew they were < 21
- All 3 started drinking before Burns/Campbell got there
- B/C arrived + all 5 drank.

1800 - went w/ (V) to bath house
(V) buzzing - 4-5 beers - said she'd hang out if it weren't for her BF
Δ: "What happens in VA stays in VA" Signals?
2200 - All but (V) + Δ to pool - back in 1-2 hrs
- (V) to sleep but woke up - to bath house again - when back in room, (V) [redacted] initiates - led Δ to bunk - put Δ's hands up her shirt
- Δ touching breasts - she grabbed him thru clothes
- Δ rubbing legs - she slid his shorts down
- Δ straddled (V) - she grabbed Δ's penis + stroked - Δ then ejaculated on (V)'s shirt.

Then other 3 come in - (V): Get off me!
Amanda kicked all 3 guys out - Burns laughing about Δ coming on (V)'s shirt. Argued w/ Amanda - stayed out to avoid drama. Amanda threatened to call LE/PD
(V) looked at Δ like she was sorry.
Next morning, Amanda wants to go home - 3 guys didn't want to go but left to avoid PD involvement again.
Δ drove Burns; Campbell drove (V) + Amanda.
Δ: All (V)'s Idea!

STATEMENT OF SUSPECT/WITNESS/COMPLAINANT

	SUSPECT
X	WITNESS/COMPLAINANT

PRIVACY ACT STATEMENT

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DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual making the statement.

I. STATEMENT INFORMATION

DATE *(YYYYMMDD)*	TIME	LOCATION AND INSTALLATION *(Bldg/Room No)*	UNIT TAKING STATEMENT	REPEAT *(If known)*
20XX-1 08 09	1030	AFOSI Detachment 201	AFOSI Det 201	OFFENSE / COMPLAINT

II. PERSONAL IDENTIFICATION *(Print or Type)*

NAME *(Last, First, Middle Initial)*	SSN	STATUS/GRADE
FIELDING, MATTHEW U.	346-32-7451	ADAF / SrA

LOCAL ADDRESS *(Include Zip Code)*	DATE AND PLACE OF BIRTH *(If required)*	TELEPHONE HOME	TELEPHONE DUTY
Building 201, Room 208 Langley AFB, VA	14 Feb 20XX-22 / OH	757-555-9273	757-327-1234

PERMANENT ADDRESS OR HOME OF RECORD *(Include Zip Code)*	MILITARY ORGANIZATION/EMPLOYER	DEROS
Dayton, OH	1 FSS	

SPONSOR INFORMATION

NAME *(Last, First, Middle Initial)*	GRADE	SSN	ORGANIZATION	DUTY PHONE

III. ACKNOWLEDGEMENT OF OFFENSES AND 5TH AMENDMENT/ARTICLE 31 RIGHTS ADVISEMENT *(Suspect Only)*

I have been advised that I am suspected of the following offenses:

ADVISED BY *(Full Name and Rank)*	INDIVIDUAL IDENTIFIED HIMSELF/HERSELF AS A *(SF, special agent, etc.)*
SA Joseph Friday	Special Agent, AFOSI

SUSPECT INITIALS	***and advised me that I have the following rights according to the 5th Amendment of the U.S. Constitution/Article 31 of the Uniform Code of Military Justice.***
	I have the right to remain silent - that is to say nothing at all.
	Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial, non-judicial, or administrative proceedings.
	I have the right to consult with a lawyer.
	I have the right to have a lawyer present during this interview.
	I may obtain a civilian lawyer of my own choice at no expense to the government.
	I may request a lawyer any time during this interview.
	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.
	MILITARY ONLY: If I want a military lawyer, one will be appointed for me free of charge.
	CIVILIANS ONLY: If I cannot afford a lawyer and want one, a lawyer will be appointed for me by civilian authorities.

SUSPECT INITIALS	***I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me.*** ***I make the following choice. (Initial One)***
	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offense(s) under investigation.
	I do not want a lawyer and I do not wish to make a statement or answer any questions.
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.

I fully understand my rights and that my signature does not constitute an admission of guilt.

SIGNATURE OF SUSPECT	SIGNATURE OF WITNESS/INTERVIEWER

IV. STATEMENT

Last week Michael called me and asked if I wanted to go camping for the long weekend. He said it was gonna be him, Allison Parker, Amanda Woodward, and a couple guys Michael knew from downtown. I started laughing when he told me Allison was going. I told him I'd have to take a pass because Allison was pissed at me. She and I had hooked up like five months ago. All we did was mess around a little bit because she said she had a boyfriend back home. Eventually she let me feel her up and she jacked me off. I think this happened maybe like 2 or 3 times within about three weeks. Allison seemed to still want to mess around after I got my girlfriend. I told her that wasn't right, but she said that hooking up and just touching each other wasn't having sex, so it wasn't cheating, and she couldn't understand why I didn't want to be with her. She got mad when I kept saying no.

I told Michael all of this and told him that she was a piece of work and that being with her wasn't worth the aggravation. I also told him that I'd heard around base that she'd hooked up with a couple of other guys in our squadron but that they were trying to keep it quiet. I also told Michael he should have a look at Allison's Facebook page.

The day they all got back from the campground, Michael came to my room. It was around 1800 or so. He didn't seem like himself. At first I couldn't tell whether he was drunk or tired or depressed or angry or what. He came into my room and said, "man, you were so right. Allison was SO not worth it." It took me a minute to figure out what he was talking about, but then it hit me. I asked if he hooked up with her. He said he did, and that she was all into it, until Amanda walked in and busted them. He didn't seem to want to say anything else about it so I let it go. It was the next day I heard that he got charged with raping Allison. I obviously wasn't there at the campground, but I'd be shocked if he did anything to her that wasn't totally consenting.

I gave OSI the note that Allison sent me right around the time I broke up with her.

Q: DID ALLISON REFER TO "HOOKING UP" BY ANY OTHER PHRASES?

A: not that I recall

END OF STATEMENT

V. OATH/SIGNATURE

"I hereby voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful inducement. I swear (or affirm) I have read this statement, initialed all pages and corrections, and it is true and correct to the best of my knowledge."

SIGNATURE OF PERSON MAKING STATEMENT	SIGNATURE OF WITNESS/INTERVIEWER
Matt Friedel	

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 9th *day of* August, 2011 *(year).*

SIGNATURE OF PERSON ADMINISTERING OATH

Joe Friday

VI. INSTRUCTIONS FOR CONTINUATION PAGE(S)

Use plain bond paper (both sides optional). At the top right of each page, print or type "(Last name of individual making the Statement) on (Date)." At the bottom of each page, print or type: "Page ____ of ____Pages." The individual must initial the top and bottom entries and sign his/her name at the bottom of each page.

Yo, jerkoff (ha!)

I didn't appreciate you taking that attitude with me. So what if you have a girlfriend? I have a boyfriend. We didn't do anything wrong and we didn't cheat on them and I think it sucks that you tried to make me feel all slutty just because I said we should still be friends.

Well, when you break up with little miss whats-her-name (and you know you will!!!!), don't be coming back here trying to make up. I am not going to hang out with you again and you'd better not come trying to find me.

Too bad for you…. You had it good while it lasted!!!!

SUMMARIZED TESTIMONY

OF

AIRMAN ALLISON PARKER

Airman Allison Parker appeared at the investigation, was sworn, and testified substantially as follows:

I am Allison Parker. I am the victim in this case. I adopt my previous statement to AFOSI as part of my testimony today. It is true and accurate.

When I went into the cabin to go to sleep, I went into the back bedroom and got on the bottom bunk in the triple bunk bed. I don't remember whether the TV was on or off. The accused was sitting outside on the deck when I went inside.

The sleeping arrangements were going to be that the girls got the private room in the back, even though it was a triple bunk and had a couch. The guys were going to stay in the main room because they wanted the TV. It wasn't going to be a big deal because all of us had brought sleeping bags just in case we needed them. I assume two guys were going to use the bed and the third would just use his sleeping bag.

I did have a boyfriend back at home in Las Vegas. His name was John Johnson. I had been seeing him off and on before I went into the Air Force. He came and visited me at my graduation from Basic. I didn't see him at all during tech school but he has been to Langley twice since I've been stationed here. He has met Amanda. He has not met the accused. Amanda told me she thought he was a good guy. I broke it off with John by e-mail about a month ago.

That day at the camp Michael and I were getting along pretty good. I do remember walking to the bath house with him to use the restroom. I remember telling Michael about my boyfriend and how much I missed him.

I must have had at least 8 or 9 beers that night, maybe a little more. I was drunk and tired. I didn't do or say anything to make Michael think I wanted to have sex with him. Before this happened, I did think he was a cool guy and I had fun spending time with him.

I got an Article 15 for underage drinking when it came out that we were all drinking up at the cabin. This is the only discipline I've had in my whole Air Force career. I know I was wrong and that's why I didn't challenge the Article 15 or appeal.

IO Exhibit 4 is my Facebook page. I created it about two years ago but really haven't updated it or used it much since. I started using MySpace and Twitter instead. Yes, I did create that Facebook page and did put those pictures up there and did post that text. It was just harmless fun. Lots of people post stuff on the Internet that they don't mean for people to take seriously.

I know Senior Airman Matt Fielding. He and I were friends for a while but we aren't any more. We stopped hanging out together around the time he got a new girlfriend. He thought that he couldn't have any more female friends because he was seeing someone. I thought that was B.S. and told him so. I wrote a note and left it under his door. IO Exhibit 5 is the note I wrote. I did not have sex with Matt. I did not do anything sexual with Matt. All we did was mess around a little.

Right before I came into the Air Force, I was molested by my cousin. I was 17. He was staying at our house because his parents were on vacation. He was 16. One night he came into my room in the middle of the night and started touching me between my legs. I woke up and yelled at him. He stopped as soon as I yelled, but my mother came into the room like immediately. She saw him in the room but she didn't see what he had been doing to me. I told her what he'd done. She told me I must have imagined it or had a bad dream or something and that I should just forget about it. It was never reported to the police and I don't think anyone in the family ever said or did anything. I never told anyone because it was obvious my mother didn't believe me. Right after that is when I decided to join the Air Force to get away from the whole family situation.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Langley Air Force Base, Virginia, on 5 October 20XX-1.

Allison Parker

ALLISON A. PARKER, Amn, USAF

I declare under penalty of perjury that the foregoing is a true and correct summary of the testimony given by the witness. Executed at Langley AFB, Virginia, on 5 October 20XX-1.

Lenny Briscoe

LEONARD J. BRISCOE, Maj, USAF
Investigating Officer

Allison ("Hottie") Parker

Wall Info Photos

Edit Information

I am totally hot and looking 4 U!

Information

Relationship Status:
Single

Birthday:
January 23

Friends

0 friends

Find people you know

Basic Information

Sex:	Female
Birthday:	January 23
Hometown:	Las Vegas, NV
Relationship Status:	Single
Interested In:	Men
Looking For:	Friendship Dating A Relationship

Personal Information

Activities:	Shopping, Naked Sunbathing, Naked Cuddles In Bed, Outdoor Adventures
Interests:	Listening To Music, Chillin With Good Friends, Smoking Hookah, Sexsex More Sex
Favorite Music:	Rolling Stones
Favorite TV Shows:	Melrose Place
Favorite Movies:	Allison Does Dallas! (Well, they haven't made that one yet....)
Favorite Books:	Yeah, right.
Favorite Quotations:	Bite me! Ooooh, but not right there!
About Me:	I'm a fun-lovin' girl who's always up for a good time. Click on me and maybe I'll click you! If you're lucky, that is... :-p

Contact Information

Email:	lookin4love@yahoo.com

Education and Work

High School:	Palo Verde High School
Employer:	U. S. Air Force
Position:	Aircraft Maintenance Tech.
Location:	Hampton, VA

Create an Ad

Eat Out Cheap In DC

1 DC restaurant coupon (50% off +) each day. Sign up to receive the daily via email free.

Like

He's single. Are you?

Meet someone new at Match.com today! View photos and check out profiles of single men in your area. It's free!

Like

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Like

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SUMMARIZED TESTIMONY

OF

AIRMAN AMANDA WOODWARD

Airman Amanda Woodward appeared at the investigation, was sworn, and testified substantially as follows:

I am Airman Amanda Woodward. I adopt my previous statement to AFOSI as part of my testimony today. It is true and accurate.

On the drive up, Michael seemed to be more interested in talking to Allison than to me. He made sure she sat in the front seat with him. I sat in back. I started getting a vibe from him that he might be trying to make a play for her. Later, when we got to the campground and were setting up the beer and ice, I said to him, "you do know she has a boyfriend back home, right?" He didn't say anything. He just kept setting up the drinks.

Later, when we came back from the pool and went into the cabin, I heard Allison yelling from the back bedroom. That's when I went back there to see what was going on. I couldn't make out exactly what she was saying but it was a mix between fear and anger. That's what I meant in my OSI statement when I said I heard noises.

I don't remember whether the lights were on or off. The cabin had overhead light bulbs that stuck down from the beams on the ceiling.

That night Allison and I probably had about the same amount to drink. I'd guess around 5-6 beers total.

It's true that I encouraged her to report what happened. Allison is one of my best friends. She was there for me when my fiancé cheated on me and we broke up. I feel I could tell her anything and I think she feels the same way. I know she was totally committed to her boyfriend and I knew she would never do anything to risk losing him. She won't even look at another guy on base because of John. I've met him and he's a great catch.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Langley Air Force Base, Virginia, on 5 October 20XX-1.

Amanda Woodward

AMANDA L. WOODWARD, Amn, USAF

I declare under penalty of perjury that the foregoing is a true and correct summary of the testimony given by the witness. Executed at Langley AFB, Virginia, on 5 October 20XX-1.

Lenny Briscoe

LEONARD J. BRISCOE, Maj, USAF
Investigating Officer

SUMMARIZED TESTIMONY

OF

SPECIAL AGENT JOSEPH FRIDAY

Special Agent Joseph Friday appeared at the investigation, was sworn, and testified substantially as follows:

I am Special Agent Joe Friday. I am presently assigned as the superintendent of AFOSI Detachment 201, Langley AFB, VA. I have been an OSI agent since 20XX-14. I also have additional law enforcement experience as a reserve Los Angeles police officer during my assignment to Los Angeles AFB between 20XX-8 and 20XX-12.

I was the case agent on the case involving Senior Airman Michael Mancini. OSI originally became involved on late Saturday night/early Sunday morning, 6-7 Aug 20XX-1 when I received a call from the Security Forces LE desk advising me of an off-base attempted rape involving two military members from Langley. The call was made by the victim's friend and both were apparently in the victim's dorm room. I called SA William Gannon to assist and we both responded to Building 302, Room 174, the victim's room.

When we arrived we met with Airmen Amanda Woodward, the complainant, and Allison Parker, the victim. Both had been drinking. Woodward appeared obviously intoxicated and said she'd been drinking tequila. Parker seemed more tired than drunk. Woodward told us that she, Parker, the accused, and two of the accused's civilian friends had gone camping for the weekend. While there, the accused allegedly tried to rape the victim.

We asked the victim to tell us what happened. She said that the group had gone camping. She said everything was going fine, they were drinking and playing games. The victim said she was drinking beer and probably had 4-6 beers between the early afternoon and around 2130, when she decided to go to sleep. She and the accused were alone at the cabin and the other three went to the swimming pool area. The victim said she wasn't really paying attention to how much the others had to drink, but if she had to guess, she said she'd guess the accused had about 6-8 beers during roughly the same time period.

The victim said she went inside the cabin to go to sleep. She was wearing a t-shirt, panties, and shorts. She said she got into the bed to go to sleep but then the accused came in after her. She said he got on top of her, was touching her breasts under her shirt and rubbing her bare legs. She said she did not give him permission to do any of that. She saw his shorts come off and the next thing she knew, he ejaculated onto her shirt. Just about that time, Woodward and the two civilians returned from the pool, saw the accused on top of the victim, and yelled at him to get out of the cabin.

We brought the victim and Amn Woodward back to the Detachment to take written statements. We also asked the victim to show us the clothes she was wearing. We seized what she said were

the t-shirt, shorts, and panties she wore during the assault and stored them as evidence. (We later sent the clothes for testing. The lab reported the presence of the accused's semen on both the outside and inside of the victim's t-shirt. There was no evidence of the accused's semen or DNA on the shorts or panties.) We also asked the victim to provide a blood sample for DNA testing/exclusion purposes. She agreed and another agent drove her to the med group.

By the time we finished taking those two statements, it was getting close to 0530. We made the decision to interview the subject and possibly seize any potential evidence. We went to the accused's room in Building 201. We knocked on the door, identified ourselves, and he let us in. It appeared that he had been sleeping right before we knocked.

We told him we were there investigating what had happened at the campground. The first thing he said was, "I bet Amanda called you, didn't she?" I told him that who called didn't matter and that we just needed to find out what happened. He said that the victim had asked him to go into the cabin with her and that they had been "fooling around" when the other three returned. He said that everything that happened was consensual and the victim's idea.

He gave us consent to take the clothes he said he was wearing during the incident. We seized shorts, a t-shirt, and boxers. (We later sent the clothes for testing. The lab reported that there was no evidence of the victim's DNA on any of the clothes.)

We brought the accused back to the Detachment and did a longer interview. After the interview, he wrote a statement, which is IO Exhibit 7. The written statement is consistent with his answers during the oral interview. We did not get into the issue of who bought the alcohol because that was not the subject of our investigation at that point. Like the victim, we asked the accused for consent to draw blood for DNA testing. He agreed and signed the consent form that is IO Exhibit 8.

We did videotape the interview in accordance with OSI policy. When the legal office asked for a copy of the video, we were unable to locate it. We have searched everywhere for it but it appears to have been inadvertently lost or destroyed.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Langley Air Force Base, Virginia, on 5 October 20XX-1.

Joe Friday

_____

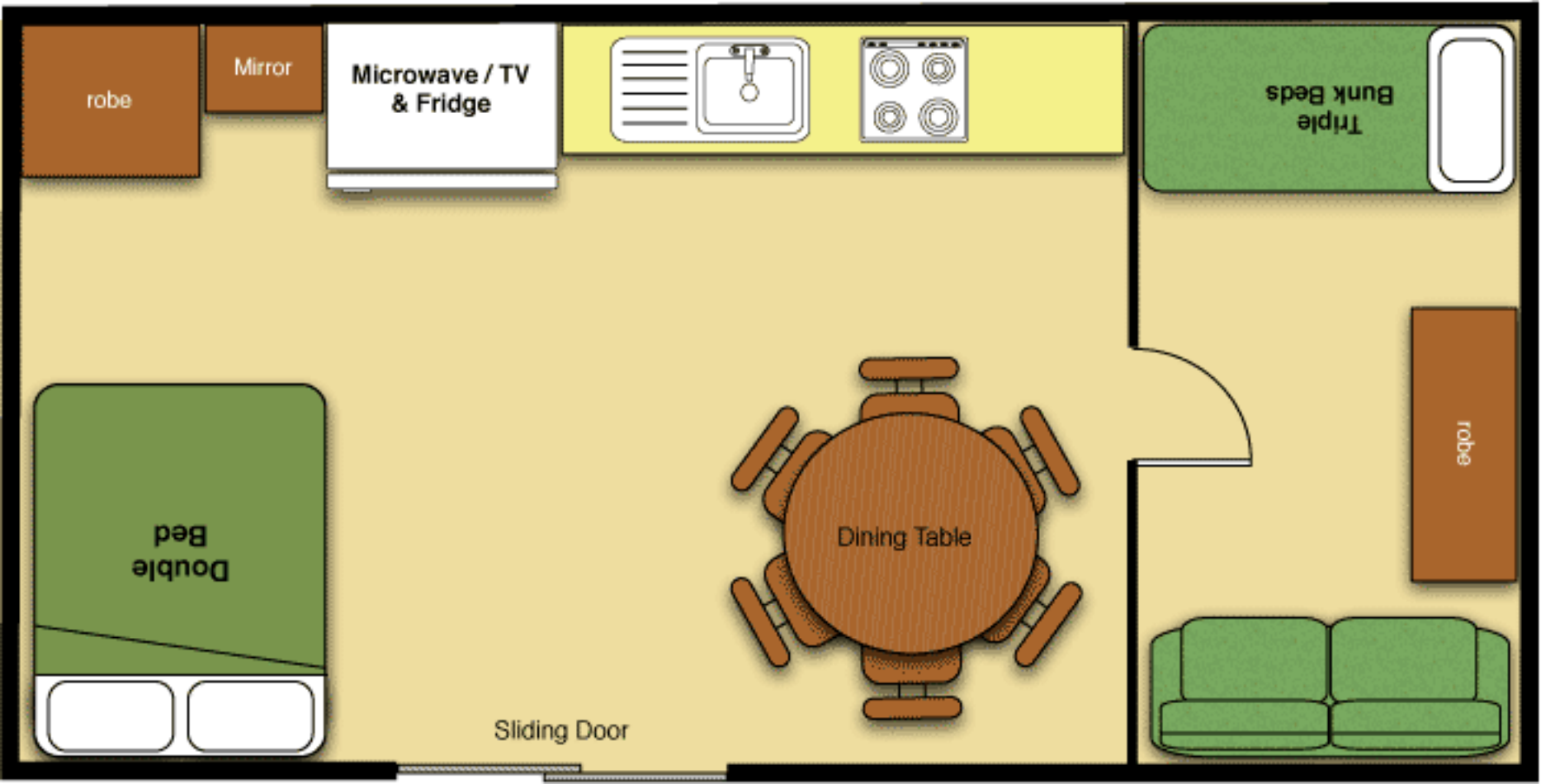
JOSEPH FRIDAY, SA, USAF

I declare under penalty of perjury that the foregoing is a true and correct summary of the testimony given by the witness. Executed at Langley AFB, Virginia, on 5 October 20XX-1.

Lenny Briscoe

LEONARD J. BRISCOE, Maj, USAF
Investigating Officer

N
Chesapeake Bay
NO WAKE ZONE
Crabbing & Clamming
Pier 1
Boat Rental
Fishing Equipment
Golf Cart Rentals
Wood
Bait & Tackle
Shop
Adults Only Swimming Pool
Playground
Shuffleboard
Horseshoes
Pedal Boats
Pier 2
Pier 3
Pier 4
Tidal Boat Harbor
SEAFORD STREET
PENNSVILLE STREET
DELMAR STREET
KENT STREET
BOWIE ST.
YORK ST.
LAKEVIEW STREET
EDISON STREET
LANCASTER STREET
BAYVIEW STREET
UNIVERSITY CIRLE
UNIVERSITY CIRCLE
SALEM ST
EASTON ST.
TOWSON STREET
TRENTON STREET
NORFOLK STREET
HOPEWELL STREET
RICHMOND STREET
ROCKVILLE STREET
TEAL STREET
SUNSET CIRCLE
CRAB LANE
CLAM LANE
SCALLOP LANE
WELK LANE
OYSTER LANE
CHERRYSTONE BOULEVARD
PINE STREET
HEMLOCK STREET
POPLAR STREET
MAPLE STREET
OAK STREET
ELM STREET
HICKORY STREET
CEDAR STREET
HOLLY STREET
SPRUCE STREET
LOCUST STREET
DOGWOOD STREET
Picnic Shelters
Horseshoes
Splash Park
Beach Entry Swimming Pool
Water Wars
Swimming Pool
Swimming Pool
Mini Golf
Pet Walk Area
Dump Stations
Bathhouse No. 1
Farm Stand
Playground
General Store
Tennis Court
Craft House
Parking Lot
Cafe
Dish Washing Station
Dump Station
Bathhouse No. 3
Fish Cleaning Station
Laundry
Arcade
Propane
Pet Walk Area
Dump Station
Horseshoes
Bathhouse No. 2
Pavilion
Playground
Ball Field
Volleyball
Ball Field
Pet Walk Area
Ranger Station
Extended Day Parking
Pet Walk Area
To Boat Ramp
Jet Ski Launch
and Charter Boat
Boat Trailer Parking
Welcome Center
Legend
Water & Electric
Water, Electric & Sewer
Water, Electric, Sewer & Waterview
Water, Electric & Waterview
No Hookups
Pay Phone
Handicap Access
Trash Dumpster
Cabins
Picnic


robe
Mirror
Microwave / TV
& Fridge
Triple
Bunk Beds
robe
Double
Bed
Dining Table
Sliding Door

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA v. SrA MICHAEL D. MANCINI 1st Force Support Squadron (ACC) Langley AFB, Virginia	STIPULATION OF FACT (today's date)

The prosecution and defense, with the express consent of the accused, agree that the following are facts and may be admitted at any phase of the above-captioned court-martial for any purpose.

Facts

1. Agents of the Air Force Office of Special Investigations sent for DNA testing the clothing items provided to them by the alleged victim and by the accused that each said they were wearing at the time of the incident giving rise to this case. The OSI also sent blood samples from both the alleged victim and the accused for comparison purposes.

2. The United States Army Criminal Investigation Laboratory (USACIL) tested the alleged victim's t-shirt, her panties, and her shorts. Those tests indicated that the accused's semen was present on both the inside and outside of the alleged victim's t-shirt. There were no other bodily fluids detected on the t-shirt. Test results indicated that the alleged victim's DNA and apparent vaginal fluids were found on the inside crotch area of the panties. There were no other bodily fluids detected on the panties. There were no bodily fluids or other evidence detected on the alleged victim's shorts.

3. USACIL also tested the accused's t-shirt, boxer shorts, and shorts. Tests did not reveal the presence of any bodily fluid or DNA material on any of these items.

Your Name Here

(today)
Date

_____
YOUR NAME HERE, Capt, USAF
Trial Counsel

Your Other Name Here

(today)
Date

_____
YOUR OTHER NAME HERE, Capt, USAF
Defense Counsel

Michael D. Mancini

(today)
Date

_____
MICHAEL D. MANCINI, SrA, USAF
Accused

RECORD OF NONJUDICIAL PUNISHMENT PROCEEDINGS *(AB thru TSgt)*

TO *(Name, Rank, Organization, SSN, and Major Command of Service Member)*	ATTACH *(S)*
ALLISON A. PARKER, Airman, USAF 987-65-4321 1st Aircraft Maintenance Squadron (ACC), Langley AFB, VA	

1. Offer of Nonjudicial Punishment.

a. *(Commander initials one block)*:

(1) [cdw] I am considering whether I should punish you under Article 15, Uniform Code of Military Justice (UCMJ).

(2) [ ] I am considering whether I should recommend that _____ punish you under Article 15, UCMJ *(See Note 1)*

b. Your alleged misconduct is in violation of the punitive Article(s) of the UCMJ as listed in item 14.

c. You have the rights listed on Page 2 under "Rights of Member," including the right to consult a lawyer before making any decision. and to have a lawyer assist you throughout the proceedings. You have an appointment scheduled with the Area Defense Counsel, in bldg. 666, room 124, at 1300 *(time)*, on 12 Nov XX-1 *(date)*. ADC consultation is not mandatory and if you choose not to consult Defense Counsel, you should cancel the scheduled appointment.

d. If you accept nonjudicial punishment proceedings and are found to have committed one or more of the offenses alleged, the maximum punishment the commander taking action may impose on you is listed on Page 3.

e. You will notify me of your decision by 1630 *(Time)*, 16 Nox XX-1 *(Date)* unless I grant you an extension of time *(See Note 2)*.

NAME/RANK/ORGANIZATION OF COMMANDER	SIGNATURE	DATE
CINDRA D. WEBBER, Maj, USAF, 1st AMXS	Cindra Webber	11 Nov XX-1

2. Service.

NAME/RANK/ORGANIZATION PERSON SERVING MEMBER *(See Note 3)*	SIGNATURE	TIME SERVED	DATE SERVED
CINDRA D. WEBBER, Maj, USAF, 1st AMXS	Cindra Webber	~~1030~~	11 Nov XX-1

3. Member's Acknowledgement and Elections. *(Member initials one block on each line)*:

I understand the rights listed on Page 2 of this form and acknowledge the recoupment statement in Page 3.

a. _____ I have consulted a lawyer.		aap I have not consulted a lawyer.
b. aap I waive my right to court-martial and accept nonjudicial punishment		_____ I demand trial by court-martial in lieu of nonjudicial punishment.
c. _____ I have attached a written presentation.		aap I have not attached a written presentation
d. aap I request a personal appearance before you and that it not be public.	_____ I request a personal appearance before you and that it be public.	_____ I do not request a personal appearance before you.

NAME/RANK OF SERVICE MEMBER	SIGNATURE	TIME	DATE
ALLISON A. PARKER, Airman, USAF	Allison Parker	1030	13 Nov XX-1

4. Commander's Decision.

a. I have considered the evidence, including any matters you have presented, and find that: *(Commander initials one block)*

(1) _____ Nonjudicial punishment is not appropriate or you did not commit the offense *(s)* alleged. I hereby terminate these proceedings.

(2) cdw You committed one or more of the offenses alleged. I lined out and initialed the offense(s), if any, for which I determined nonjudicial punishment is not appropriate or which you did not commit. I hereby impose punishment as listed in item 14.

b. Reductions in grade, forfeitures in pay, and suspensions of any punishment are effective immediately. All other punishments take effect when you are notified of the punishment, unless otherwise stated.

c. You must notify me by 1100 *(Time)* 17 Nov XX-1 *(Date)* whether you appeal, unless I grant you an extension of time. You are entitled to advice of counsel in making this decision. You must notify me of your appeal decision and submit any matters you wish considered within the time provided or your right to appeal is waived. Any documents supporting your appeal must be submitted at the same time you make your appeal decision. A decision not to appeal is final. *(See Note 4)*

NAME/RANK/ORGANIZATION OF COMMANDER *(See Note 5)*	SIGNATURE	DATE
CINDRA D. WEBBER, Maj, USAF 1st AMXS	Cindra Webber	13 Nov XX-1

5. Member's Acknowledgement. I acknowledge receipt of the punishment and my right to appeal.

NAME/RANK OF SERVICE MEMBER	SIGNATURE	TIME	DATE
ALLISON A. PARKER, Airman, USAF	Allison Parker	1100	13 Nov XX-1

6. Member's Appeal Decision *(member initials only one block)*. Member's decision ends the time limit to appeal.

a. aap I do not appeal.

b. _____ I appeal and submit matters in writing.

c. _____ I appeal and do not submit matters in writing.

NAME/RANK OF SERVICE MEMBER	SIGNATURE	TIME	DATE
ALLISON A. PARKER, Airman, USAF	Allison Parker	1110	13 Nov XX-1

7. Commander Action on Appeal *(Commander initials one block).* After considering all matters presented in your appeal, I hereby _____ deny your appeal. _____ grant your appeal, as shown in item 14. *(See Note 6)*

NAME/RANK/ORGANIZATION OF COMMANDER	SIGNATURE	DATE

8. Appellate Authority Action on Appeal *(appellate authority initials one block)* . After considering all matters presented in your appeal, I hereby _____ deny your appeal. _____ grant your appeal, as shown in item 14.

NAME/RANK/ORGANIZATION OF APPELLATE AUTHORITY	SIGNATURE	DATE

9. Unfavorable Information File ***(UIF)*** **Action.** *(Commander initials one block).*

This action ~~cdw~~ will be filed in the Member's UIF. _____ will not be filed in the Member's UIF. *(See Note 7)*

NAME/RANK/ORGANIZATION OF COMMANDER	SIGNATURE	DATE
CINDRA D. WEBBER, Maj, USAF 1st AMXS	Cindra Webber	13 Nov XX-1

10. Member's Acknowledgement. I have been informed of the UIF decision. I have seen the action taken on any appeal.

NAME/RANK OF SERVICE MEMBER	SIGNATURE	DATE
ALLISON A. PARKER, Airman, USAF	Allison A. Parker	13 Nov XX-1

11. Servicing SJA Legal Record is legally sufficient and the action is final.

NAME/RANK/ORGANIZATION OF REVIEWING ATTORNEY	SIGNATURE	DATE
SHARP E. PENCIL, Major, USAF 1 FW/JA		17 Nov XX-1

12. MPF and AFO Distribution. Copy received by MPF on 17 Nov XX-1 wje *(Date/Initials)* and AFO on 18 Nov XX-1 jsf *(Date/Initials)*.

13. GCMCA SJA Administrative Supervisory Review. Record is in compliance with AFI 51-202 and MCM, Part V.

NAME/RANK/ORGANIZATION OF REVIEWING ATTORNEY	SIGNATURE	DATE
MICRO D. MANAGER, Maj, USAF 9 AF/JA		23 Nov XX-1

14. *(See Note 7)*

Block 1(b):
VIOLATION OF ARTICLE 92, UCMJ
You, who knew of your duties at or near Cape Charles, Virginia, on or about 5 August 20XX-1, were derelict in the performance of those duties in what you willfully failed to refrain from consuming alcohol while under the legal drinking age of 21 years, as it was your duty to do.

Block 4:
Punishment: Reduction to the grade of Airman Basic, suspended until 1 May 20XX, after which time it will be remitted without further action unless sooner vacated. Forfeiture of $200 pay per month for two months. That portion of forfeitures in excess of $100 pay per month for two months is suspended until 1 May 20XX, after which time it will be remitted without further action unless sooner vacated.

SERVICE MEMBER'S LAST NAME & SSN:		DATE OF COMMANDER'S OFFER:
PARKER	987-65-4321	11 Nov XX-1

RIGHTS OF MEMBER

1. You have all the rights specified in Article 15 of the Uniform Code of Military Justice (UCMJ), in Part V of the Manual for Courts-Martial (MCM) and in Air Force Instruction (AFI) 51-202, *Nonjudicial Punishment*. These rights are summarized below:

   a. You have the right to consult a lawyer before making any decisions, and a lawyer may assist you throughout the proceedings. A military defense counsel is available to advise you, free of charge, or you may retain civilian counsel at your own expense.

   b. You have the right (1) to accept nonjudicial proceedings under Article 15, UCMJ, in which case your commander *(or the commander to whom this action is sent)* will decide whether you committed the alleged offense, or (2) to demand trial by court-martial which requires proof of guilt beyond a reasonable doubt. You have 3 duty days to make this decision, unless you request an extension of time and the commander grants the extension.

   Your acceptance of nonjudicial punishment proceedings is not an admission that you committed the alleged misconduct. The commander will make that decision only after you present your evidence or statement in defense, if you choose to do so.

   c. If you demand trial by court-martial, charges could be referred for trial by summary, special or general court-martial. You have a right to be represented by counsel at a court-martial. You may not be tried by summary court-martial over your objection. You have additional rights at a trial by court-martial which you should ask your lawyer to explain.

   d. You have the right to examine the evidence against you before you make any decisions. Your lawyer may assist you in making a statement and/or obtaining evidence in your defense, and for use in extenuation and mitigation.

   e. If you accept nonjudicial punishment proceedings, you have the right (1) to make a full oral and/or written presentation to the commander *(or a designee, in some cases)* who will decide your punishment, (2) to present witnesses who are reasonably available, and (3) to be accompanied by someone to speak on your behalf. You may request the proceeding be open or closed to the public, but the commander makes the decision.

   f. You do not have to make any oral or written statement regarding the offense(s) of which you are accused and any statement made may be used as evidence against you in a later proceeding. See Article 31b, UCMJ.

2. If the commander imposes punishment, you have 5 calendar days to appeal to the next superior commander. You have the right to consult with a lawyer before deciding whether to appeal and to assist you in your appeal. In your appeal, you may present additional written matters.

Note 1: If a personal appearance is made to someone other than the commander who will impose punishment, that person sends, by separate indorsement, a summary of the appearance and copies of all documents presented, to the imposing commander.

Note 2: The date and time in item 1e must be a minimum of 3 duty days (including weekends and holidays if normally scheduled duty days for the member) from the date and time the member is notified in item 2.

Note 3: The initiating commander may direct a subordinate, senior to the member, when practicable, to notify and serve the member. The person serving the member, whether the commander or subordinate, signs and annotates the date and time of service.

Note 4: The date and time in item 4c must be a minimum of 5 calendar days from the date and time the member is notified in item 5.

Note 5: If the imposing commander grants less than the full relief requested, the commander must forward the appeal to the appellate authority through the servicing Staff Judge Advocate. See AFI 51-202, paragraph 4.6, for further guidance.

Note 6: See AFI 36-2907, *Unfavorable Information File (UIF) Program*, for further guidance.

Note 7: A continuation page may be used if necessary. Identify the information by the item number.

MAXIMUM PERMISSIBLE PUNISHMENTS

1. If the commander imposing punishment is a:

   a. Lieutenant Colonel or above, and you are enlisted: Forfeiture of one-half month's pay per month for two months, 60 days restriction, 45 days extra duty, 30 days correctional custody, a reprimand, and reduction of one grade, E-4 and below may be reduced to E-1;

   b. Major and you are in grade E-1 through E-7: Forfeiture of one-half month's pay per month for two months, 60 days restriction, 45 days extra duty, 30 days correctional custody, a reprimand, and reduction of one grade for E-5 and E-6; E-4 and below may be reduced to E-1.

   c. Lieutenant or Captain, and you are in grade E-1 through E-7: Forfeiture of 7 days pay, 14 days restriction, 14 days extra duty, 7 days correctional custody, a reprimand, and reduction of one grade for E-5 and below only.

2. Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties. Correctional custody may not be imposed in combination with restriction or extra duties. If reduction is imposed, forfeiture of pay is based on the grade to which the member was reduced, even if the reduction was suspended. See Part V, MCM, for additional guidance.

STATEMENT OF UNDERSTANDING REGARDING RECOUPMENT OF EDUCATION ASSISTANCE, SPECIAL PAY, OR BONUSES:

I understand that the Air Force may be entitled to recoup a portion of education assistance, special pay, or bonus money which I received, if any, if I separate before completing the period of active duty I agreed to serve. I understand this recoupment applies regardless whether I voluntarily separate or I am involuntarily discharged. I further understand: (1) the recoupment in all cases is an amount that bears the same ratio to the total amount or cost provided to me, as the unserved portion of active duty bears to the total period of active duty I agreed to serve; and (2) that if I dispute that I am indebted for educational assistance, a board or other authority will make findings and recommendations concerning the validity of the indebtedness.

RECORD OF NONJUDICIAL PUNISHMENT PROCEEDINGS *(AB thru TSgt)*

TO *(Name, Rank, Organization, SSN, and Major Command of Service Member)*	ATTACH *(S)*
AMANDA L. WOODWARD, Airman, USAF 835-37-8483 1st Aircraft Maintenance Squadron (ACC), Langley AFB, VA ,	

1. Offer of Nonjudicial Punishment.

a. *(Commander initials one block)*:

(1) [cdw] I am considering whether I should punish you under Article 15, Uniform Code of Military Justice (UCMJ).

(2) [ ] I am considering whether I should recommend that _____ punish you under Article 15, UCMJ *(See Note 1)*

b. Your alleged misconduct is in violation of the punitive Article(s) of the UCMJ as listed in item 14.

c. You have the rights listed on Page 2 under "Rights of Member," including the right to consult a lawyer before making any decision, and to have a lawyer assist you throughout the proceedings. You have an appointment scheduled with the Area Defense Counsel, in bldg. 666, room 124, at 1500 *(time)*, on 12 Nov XX-1 *(date)*. ADC consultation is not mandatory and if you choose not to consult Defense Counsel, you should cancel the scheduled appointment.

d. If you accept nonjudicial punishment proceedings and are found to have committed one or more of the offenses alleged, the maximum punishment the commander taking action may impose on you is listed on Page 3.

e. You will notify me of your decision by 1630 *(Time)*, 16 Nox XX-1 *(Date)* unless I grant you an extension of time *(See Note 2)*.

NAME/RANK/ORGANIZATION OF COMMANDER	SIGNATURE	DATE
CINDRA D. WEBBER, Maj, USAF, 1st AMXS		11 Nov XX-1

2. Service.

NAME/RANK/ORGANIZATION PERSON SERVING MEMBER *(See Note 3)*	SIGNATURE	TIME SERVED	DATE SERVED
CINDRA D. WEBBER, Maj, USAF, 1st AMXS		1030	11 Nov XX-1

3. Member's Acknowledgement and Elections. *(Member initials one block on each line)*.

I understand the rights listed on Page 2 of this form and acknowledge the recoupment statement in Page 3.

a. _____ I have consulted a lawyer. alw I have not consulted a lawyer.

b. alw I waive my right to court-martial and accept nonjudicial punishment _____ I demand trial by court-martial in lieu of nonjudicial punishment.

c. _____ I have attached a written presentation. alw I have not attached a written presentation

d. alw I request a personal appearance before you and that it not be public. _____ I request a personal appearance before you and that it be public. _____ I do not request a personal appearance before you.

NAME/RANK OF SERVICE MEMBER	SIGNATURE	TIME	DATE
AMANDA L. WOODWARD, Airman, USAF		1400	13 Nov XX-1

4. Commander's Decision.

a. I have considered the evidence, including any matters you have presented, and find that: *(Commander initials one block)*

(1) _____ Nonjudicial punishment is not appropriate or you did not commit the offense *(s)* alleged. I hereby terminate these proceedings.

(2) cdw You committed one or more of the offenses alleged. I lined out and initialed the offense(s), if any, for which I determined nonjudicial punishment is not appropriate or which you did not commit. I hereby impose punishment as listed in item 14.

b. Reductions in grade, forfeitures in pay, and suspensions of any punishment are effective immediately. All other punishments take effect when you are notified of the punishment, unless otherwise stated.

c. You must notify me by 1100 *(Time)* 17 Nov XX-1 *(Date)* whether you appeal, unless I grant you an extension of time. You are entitled to advice of counsel in making this decision. You must notify me of your appeal decision and submit any matters you wish considered within the time provided or your right to appeal is waived. Any documents supporting your appeal must be submitted at the same time you make your appeal decision. A decision not to appeal is final. *(See Note 4)*

NAME/RANK/ORGANIZATION OF COMMANDER *(See Note 5)*	SIGNATURE	DATE
CINDRA D. WEBBER, Maj, USAF 1st AMXS		13 Nov XX-1

5. Member's Acknowledgement. I acknowledge receipt of the punishment and my right to appeal.

NAME/RANK OF SERVICE MEMBER	SIGNATURE	TIME	DATE
AMANDA L. WOODWARD, Airman, USAF		1500	13 Nov XX-1

6. Member's Appeal Decision *(member initials only one block)*. Member's decision ends the time limit to appeal.

a. alw I do not appeal.

b. _____ I appeal and submit matters in writing.

c. _____ I appeal and do not submit matters in writing.

NAME/RANK OF SERVICE MEMBER	SIGNATURE	TIME	DATE
AMANDA L. WOODWARD, Airman, USAF		1500	13 Nov XX-1

7. Commander Action on Appeal *(Commander initials one block).* After considering all matters presented in your appeal, I hereby _____ deny your appeal. _____ grant your appeal, as shown in item 14. *(See Note 6)*

NAME/RANK/ORGANIZATION OF COMMANDER	SIGNATURE	DATE

8. Appellate Authority Action on Appeal *(appellate authority initials one block)* . After considering all matters presented in your appeal, I hereby _____ deny your appeal. _____ grant your appeal, as shown in item 14.

NAME/RANK/ORGANIZATION OF APPELLATE AUTHORITY	SIGNATURE	DATE

9. Unfavorable Information File ***(UIF)*** **Action.** *(Commander initials one block).*

This action ~~cdw~~ will be filed in the Member's UIF. _____ will not be filed in the Member's UIF. *(See Note 7)*

NAME/RANK/ORGANIZATION OF COMMANDER	SIGNATURE	DATE
CINDRA D. WEBBER, Maj, USAF 1st AMXS	Cindra Webber	13 Nov XX-1

10. Member's Acknowledgement. I have been informed of the UIF decision. I have seen the action taken on any appeal.

NAME/RANK OF SERVICE MEMBER	SIGNATURE	DATE
AMANDA L. WOODWARD, Airman, USAF	Amanda Woodward	13 Nov XX-1

11. Servicing SJA Legal Record is legally sufficient and the action is final.

NAME/RANK/ORGANIZATION OF REVIEWING ATTORNEY	SIGNATURE	DATE
SHARP E. PENCIL, Major, USAF 1 FW/JA		17 Nov XX-1

12. MPF and AFO Distribution. Copy received by MPF on 17 Nov XX-1 wje *(Date/Initials)* and AFO on 18 Nov XX-1 jsf *(Date/Initials)*.

13. GCMCA SJA Administrative Supervisory Review. Record is in compliance with AFI 51-202 and MCM, Part V.

NAME/RANK/ORGANIZATION OF REVIEWING ATTORNEY	SIGNATURE	DATE
MICRO D. MANAGER, Maj, USAF 9 AF/JA		23 Nov XX-1

14. *(See Note 7)*

Block 1(b):
VIOLATION OF ARTICLE 92, UCMJ
You, who knew of your duties at or near Cape Charles, Virginia, on or about 5 August 20XX-1, were derelict in the performance of those duties in what you willfully failed to refrain from consuming alcohol while under the legal drinking age of 21 years, as it was your duty to do.

Block 4:
Punishment: Reduction to the grade of Airman Basic, suspended until 1 May 20XX, after which time it will be remitted without further action unless sooner vacated. Forfeiture of $200 pay per month for two months. That portion of forfeitures in excess of $100 pay per month for two months is suspended until 1 May 20XX, after which time it will be remitted without further action unless sooner vacated.

SERVICE MEMBER'S LAST NAME & SSN:		DATE OF COMMANDER'S OFFER:
WOODWARD	835-37-8483	11 Nov XX-1

RIGHTS OF MEMBER

1. You have all the rights specified in Article 15 of the Uniform Code of Military Justice (UCMJ), in Part V of the Manual for Courts-Martial (MCM) and in Air Force Instruction (AFI) 51-202, *Nonjudicial Punishment.* These rights are summarized below:

   a. You have the right to consult a lawyer before making any decisions, and a lawyer may assist you throughout the proceedings. A military defense counsel is available to advise you, free of charge, or you may retain civilian counsel at your own expense.

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   Your acceptance of nonjudicial punishment proceedings is not an admission that you committed the alleged misconduct. The commander will make that decision only after you present your evidence or statement in defense, if you choose to do so.

   c. If you demand trial by court-martial, charges could be referred for trial by summary, special or general court-martial. You have a right to be represented by counsel at a court-martial. You may not be tried by summary court-martial over your objection. You have additional rights at a trial by court-martial which you should ask your lawyer to explain.

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   e. If you accept nonjudicial punishment proceedings, you have the right (1) to make a full oral and/or written presentation to the commander *(or a designee, in some cases)* who will decide your punishment, (2) to present witnesses who are reasonably available, and (3) to be accompanied by someone to speak on your behalf. You may request the proceeding be open or closed to the public, but the commander makes the decision.

   f. You do not have to make any oral or written statement regarding the offense(s) of which you are accused and any statement made may be used as evidence against you in a later proceeding. See Article 31b, UCMJ.

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Note 3: The initiating commander may direct a subordinate, senior to the member, when practicable, to notify and serve the member. The person serving the member, whether the commander or subordinate, signs and annotates the date and time of service.

Note 4: The date and time in item 4c must be a minimum of 5 calendar days from the date and time the member is notified in item 5.

Note 5: If the imposing commander grants less than the full relief requested, the commander must forward the appeal to the appellate authority through the servicing Staff Judge Advocate. See AFI 51-202, paragraph 4.6, for further guidance.

Note 6: See AFI 36-2907, *Unfavorable Information File (UIF) Program,* for further guidance.

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MAXIMUM PERMISSIBLE PUNISHMENTS

1. If the commander imposing punishment is a:

   a. Lieutenant Colonel or above, and you are enlisted: Forfeiture of one-half month's pay per month for two months, 60 days restriction, 45 days extra duty, 30 days correctional custody, a reprimand, and reduction of one grade; E-4 and below may be reduced to E-1;

   b. Major and you are in grade E-1 through E-7: Forfeiture of one-half month's pay per month for two months, 60 days restriction, 45 days extra duty, 30 days correctional custody, a reprimand, and reduction of one grade for E-5 and E-6; E-4 and below may be reduced to E-1.

   c. Lieutenant or Captain, and you are in grade E-1 through E-7: Forfeiture of 7 days pay, 14 days restriction, 14 days extra duty, 7 days correctional custody, a reprimand, and reduction of one grade for E-5 and below only.

2. Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties. Correctional custody may not be imposed in combination with restriction or extra duties. If reduction is imposed, forfeiture of pay is based on the grade to which the member was reduced, even if the reduction was suspended. See Part V, MCM, for additional guidance.

STATEMENT OF UNDERSTANDING REGARDING RECOUPMENT OF EDUCATION ASSISTANCE, SPECIAL PAY, OR BONUSES:

I understand that the Air Force may be entitled to recoup a portion of education assistance, special pay, or bonus money which I received, if any, if I separate before completing the period of active duty I agreed to serve. I understand this recoupment applies regardless whether I voluntarily separate or I am involuntarily discharged. I further understand: (1) the recoupment in all cases is an amount that bears the same ratio to the total amount or cost provided to me, as the unserved portion of active duty bears to the total period of active duty I agreed to serve; and (2) that if I dispute that I am indebted for educational assistance, a board or other authority will make findings and recommendations concerning the validity of the indebtedness.

RECORD OF INDIVIDUAL COUNSELING

I. COUNSELING TIPS

1. Determine the objective of the counseling before the session begins.
2. Hear the individual out.
3. Treat the member as having worth and dignity.
4. Show sincerity, courtesy, and personal interest in the individual.
5. Give the individual the facts, whether they are pleasant or unpleasant.
6. Don't brush off any problem as being too trivial.
7. Don't make snap decisions.
8. Don't make promises if you can't keep them.
9. Don't force decisions on the person - there may be other equally good and acceptable solutions.
10. Refer to other agencies.
11. Make contact for the individual with the referral agency.
12. Follow up referrals to make sure there is a continuity of action and that referrals are completed as soon as possible.

II. PERSONAL DATA

1. NAME *(Last, First, MI)*	2. GRADE	3. SSN	4. AFSC	5. DUTY PHONE
WOODWARD, AMANDA L	Airman	835-37-8483	2A333	7-1827

6. UNIT/OFFICE SYMBOL	7. REASON FOR COUNSELING	8. OTHER INFORMATION *(i.e., marital status, course graduation date, date assigned, etc.)*
1 AMXS	Failure to go	

III. COUNSELING

9. SUMMARY OF COUNSELING *(Give details, facts, specific dates, times, names, sequence of events, etc.)*

On 12 June 20XX-1, you were scheduled to work 0700-1500. You failed to appear at your appointed place of duty. You did not call your supervisor or any other squadron personnel before your shift was scheduled to begin. When you did not answer your phone after multiple calls in a 30-minute period, the flight chief sent me, your supervisor, to your dorm room to try to locate you. When I got to your room it took several knocks before you finally opened the door. I found you in civilian clothes. You were crying. When I asked why you weren't at work, you said that you'd just found out the night before that your boyfriend back home wanted to break up with you and you were devastated.

10. RECOMMENDATIONS AND ADVICE OF COUNSELOR

We all have personal situations to deal with. You were scheduled to work, a military duty, and you failed to show up at work or speak to someone before showtime. This behavior is completely unacceptable in the USAF. Your squadron is here to help you if you have a personal problem but we can't help you if you don't talk to us. Failure to go is an offense under the UCMJ and you can be punished with an Article 15 or a court-martial for future violations. I trust this will not happen again!

11. NAME, GRADE AND DUTY TITLE OF COUNSELOR	12. SIGNATURE	13. DATE
B. F. GOODWRENCH, SSgt, USAF Crew Chief, 1 AMXS	BFG	13 June 20XX-1

AF IMT 174, 19861201, V1

IV.	ACKNOWLEDGMENT OF COUNSELING	
14. SUMMARY OF COUNSELEE'S COMMENTS *(Indicate if none)*		
I am sorry. I have never missed work before for anything, not even for being sick. I found out that my boyfriend had cheated on me with one of my friends and it killed me. We had talked about getting married. I know I should have called someone and said I couldn't come to work. This was my first real boyfriend and I took it hard. This won't happen again.		
15. NAME AND GRADE OF COUNSELEE AMANDA L. WOODWARD, Amn, USAF	16. SIGNATURE Amanda L. Woodward	17. DATE 13 June 20XX-1
V.	REFERRAL/FOLLOW-UP	
18. REFERRAL AGENCIES RECOMMENDED *(Personal Affairs, Chaplain, Legal Assistance, Medical, Social Actions, Red Cross, etc.)*		
VI.	COMMANDER'S COMMENTS	
19. NAME AND GRADE OF COMMANDER	20. SIGNATURE	21. DATE

COMMONWEALTH OF VIRGINIA

9TH JUDICIAL CIRCUIT
NORFOLK, VA

CERTIFIED COPY OF CRIMINAL CONVICTION

BE IT REMEMBERED, that on the 17th of June, 20XX-2, in open court before a Judge of this Commonwealth and while represented by counsel, the below-named individual entered the recited plea and the court entered findings and imposed sentence in accordance therewith, as described below. The period for appeal having run or no appeal having been filed, this conviction is final under the laws of the Commonwealth of Virginia.

DEFENDANT NAME:	BURNS, PETER M. DOB: 25 Sep 20XX-22
STATUTORY CITATION:	18.2-250 Possession of controlled substances unlawful (cocaine)
OFFENSE DATE:	4/20/20XX-2
OFFENSE LEVEL:	Felony (class 5)
PLEA:	Guilty
FINDING:	Guilty
SENTENCE IMPOSED:	Incarceration for 6 months, suspended for 3 years Fine of $500, payable forthwith

Mac Robinson

MAC ROBINSON
Clerk of Court

PERSONAL DATA SHEET

DATE PREPARED: 2 January 20XX

NAME OF ACCUSED: MICHAEL D. MANCINI

ORGANIZATION: 1st Force Support Squadron

SSAN: 123-45-6789 **GRADE**: Senior Airman

PAY GRADE: E-4 **DATE OF BIRTH**: 23 Jan 20XX-22

TAFMSD: 30 Aug 20XX-4 **LENGTH OF SERVICE**: 3 years, 4 months

AFSC: 3M051 **MILITARY TEST SCORES**: ADMIN: 75
ELECT: 47
GEN: 68
MECH: 51

BASIC PAY: (correct for today) **HARDSHIP DUTY PAY**: n/a

INITIAL DATE OF CURRENT SERVICE: 30 Aug 20XX-4

TERM OF CURRENT SERVICE: 6 years

PRIOR SERVICE: n/a

OVERSEAS SERVICE (OCONUS): n/a

COMBAT SERVICE: n/a

NATURE OF PRETRIAL RESTRAINT: none

MARITAL STATUS: Single **NO. OF DEPENDENTS**: 0

NO. OF PREVIOUS COURT-MARTIAL CONVICTIONS: 0

NO. OF PREVIOUS ARTICLE 15 ACTIONS: 0

AWARDS AND DECORATIONS: National Defense Service Medal, BMT Honor Graduate, Air Force Training Ribbon

ENLISTED PERFORMANCE REPORT *(AB thru TSgt)*

I. RATEE IDENTIFICATION DATA *(Refer to AFI 36-2406 for instructions on completing this form)*

1. NAME *(Last, First, Middle Initial)*	2. SSN	3. GRADE	4. DAFSC
MANCINI, MICHAEL D	123-45-6789	SrA	3M051

5. ORGANIZATION, COMMAND, LOCATION, AND COMPONENT	6. PAS CODE	7. SRID
1st Force Support Squadron Langley Air Force Base, Virginia	1LG12892	23913

8. PERIOD OF REPORT	9. NO. DAYS SUPERVISION	10. REASON FOR REPORT
From: 1 June 20XX-2 Thru: 31 May 20XX-1	365	Annual

II. JOB DESCRIPTION

1. DUTY TITLE	2. SIGNIFICANT ADDITIONAL DUTY(S)
Lodging Clerk	Base Honor Guard

3. KEY DUTIES, TASKS, AND RESPONSIBILITIES *(Limit text to 4 lines)*

- checks guests in and out; ensures reservation accuracy; handles switchboard operations for 253-bed facility
- performs routine maintenance and security functions; oversees lodging IT systems; oversees lodging equipment
- performing lodging admin duties, including proper handling of cash/charge transactions, billing, receivables
- supervises and trains more junior clerks; shift leader for civilian housekeeping staff in 4 buildings

III. PERFORMANCE ASSESSMENT

1. PRIMARY/ADDITIONAL DUTIES *(For SSgt/TSgt also consider Supervisory, Leadership and Technical Abilities)*

Consider Adapting, Learning, Quality, Timeliness, Professional Growth and Communication Skills *(Limit text to 4 lines)*

☐ Does Not Meet ☐ Meets ☐ Above Average ☒ Clearly Exceeds

- quickly mastered the nuances of all facets of lodging operations - dove in deep from day #1
- consistently rated #1 in customer service feedback forms across all shifts in AF's premiere lodging facility
- my go-to Airman for last-minute assignments: always puts service before self and never says no to extra duty
- mature beyond his years - he compares favorably with more senior and seasoned NCOs in all AFSCs

2. STANDARDS, CONDUCT, CHARACTER & MILITARY BEARING *(For SSgt/TSgt also consider Enforcement of Standards and Customs & Courtesies)*

Consider Dress & Appearance, Personal/Professional Conduct On/Off Duty *(Limit text to 2 lines)*

☐ Does Not Meet ☐ Meets ☐ Above Average ☒ Clearly Exceeds

- member of base Honor Guard; meticulous compliance with dress and appearance; sets the standards!
- positive impact on military and civilian community: volunteer little league and soccer coach - mentor to dozens

3. FITNESS *(Maintains Air Force Physical Fitness Standards)* *(For referrals, limit text to 1 line)*

☐ Does Not Meet ☒ Meets ☐ Exempt

4. TRAINING REQUIREMENTS *(For SSgt/TSgt also consider PME, Off-duty Education, Technical Growth, Upgrade Training)*

Consider Upgrade, Ancillary, OJT and Readiness *(Limit text to 2 lines)*

☐ Does Not Meet ☐ Meets ☐ Above Average ☒ Clearly Exceeds

- made remarkable growth and achieved his 5-level in minimum possible time; quick and effective study!
- his attention to detail led commander to select him as unit readiness manager - unit had dramatic improvements

5. TEAMWORK/FOLLOWERSHIP *(For SSgt/TSgt also consider Leadership, Team Accomplishments, Recognition/Reward Others)*

Consider Team Building, Support of Team, Followership *(Limit text to 2 lines)*

☐ Does Not Meet ☐ Meets ☐ Above Average ☒ Clearly Exceeds

- relied on for advice/guidance by subordinates, peers, and supervisors alike: a true team player and leader
- spearheaded squadron PT program; developed program from nothing into the envy of the base

6. OTHER COMMENTS

Consider Promotion, Future Duty/Assignment/Education Recommendations and Safety, Security & Human Relations *(Limit text to 2 lines)*

- this rising star will quickly master lodging operations; next assignment should challenge him with new areas
- capable now of handling all but the toughest assignments solo: increase ops tempo and watch him shine!

IV. RATER INFORMATION

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
CHRISTOPHER HARRISON, TSgt, USAF 1st Force Support Squadron (ACC) Langley AFB, VA	NCOIC, Lodging Operations	
	SSN: 8273	SIGNATURE

PRIVACY ACT INFORMATION: The information in this form is FOR OFFICIAL USE ONLY. Protect IAW the Privacy Act of 1974.

V. OVERALL PERFORMANCE ASSESSMENT Overall Performance During Reporting Period			RATEE NAME: MANCINI, MICHAEL D		
ASSESSMENT	POOR (1)	NEEDS IMPROVEMENT (2)	AVERAGE (3)	ABOVE AVERAGE (4)	TRULY AMONG THE BEST (5)
RATER'S ASSESSMENT	☐	☐	☐	☐	☒
ADDITIONAL RATER'S ASSESSMENT	☐	☐	☐	☐	☒

Last feedback was performed on: 2 Nov 20XX-2 If feedback was not accomplished in accordance with AFI 36-2406, state the reason.

VI. ADDITIONAL RATER'S COMMENTS *(Limit text to 3 lines)* ☒ CONCUR ☐ NON-CONCUR

- first among his peers in maturity, ability, training, education; sets the standards for others to follow
- off-duty contributions exemplify the best of the AF: community sees him as their local USAF representative
- no doubt this Airman is a future DG from NCO Academy - promote ASAP!

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
JULIE R. CHEN, MSgt, USAF 1st Force Support Squadron (ACC) Langley AFB, VA	Superintendent, Lodging Operations	
	SSN: 2123	SIGNATURE

VII. FUNCTIONAL EXAMINER/AIR FORCE ADVISOR
(Indicate applicable review by marking the appropriate box.) ☐ FUNCTIONAL EXAMINER ☐ AIR FORCE ADVISOR

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
	SSN	SIGNATURE

VIII. UNIT COMMANDER/CIVILIAN DIRECTOR/OTHER AUTHORIZED REVIEWER ☒ CONCUR ☐ NON-CONCUR

NAME, GRADE, BR OF SVC, ORGN, COMMAND AND LOCATION	DUTY TITLE	DATE
HENRY R. BLAKE, Lt Col, USAF 1st Force Support Squadron (ACC) Langley AFB, VA	Commander	
	SSN: 3553	SIGNATURE

IX. RATEE'S ACKNOWLEDGEMENT

I understand my signature does not constitute agreement or disagreement. I acknowledge all required feedback was accomplished during the reporting period and upon receipt of this report. ☒ Yes ☐ No

SIGNATURE	DATE

INSTRUCTIONS

Complete this report IAW AFI 36-2406. Reports written by Colonels or civilians (GS-15 or higher, or Supervisory Pay Band 3), do not require an additional rater; however, endorsement by the rater's rater is permitted unless the report is written by a senior rater or the Chief Master Sergeant of the Air Force. When the rater's rater is not at least a MSgt or civilian (GS-07 or higher, or Supervisory Pay Band 1), the additional rater is the next official in the rating chain meeting grade requirements. An overall rating of 2 or negative comments require the EPR to be referred IAW AFI 36-2406. Rationale for any additional evaluator nonconcurring with an overall rating must be included. Section VIII Reviewer nonconcurrence must be included on an AF Form 77, Letter of Evaluation. If ratee is deployed, provide copy and feedback via e-mail/telecon.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 United States Code, Section 8013 and Executive Order 9397, 22 November 1943.

PURPOSE: Information is needed for verification of the individual's name and Social Security Number (SSN) as captured on the form at the time of rating.

ROUTINE USES: May specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3).

DISCLOSURE: Disclosure is mandatory; SSN is used for positive identification.

DEPARTMENT OF THE AIR FORCE
633d AIR BASE WING
JOINT BASE LANGLEY-EUSTIS, VIRGINIA

today – 2 weeks

MEMORANDUM FOR WHOM IT MAY CONCERN

FROM: TSGT MARIO RIZZO

SUBJECT: Character statement – SrA Michael D. Mancini

1. I am TSgt Mario Rizzo, the NCOIC of Lodging Operations for the 633d Force Support Squadron. I have been in the Air Force for 19 years and assigned at Joint Base Langley-Eustis for the last seven. During my military service I have known, worked for, or supervised over 200 Airmen.

2. I have known SrA Mancini since he arrived at JBLE after tech school. I was more a co-worker than a supervisor until I became NCOIC, but now that I am NCOIC I am his first-line supervisor. I see him daily at work and quite frequently off duty as well at squadron functions, friendly get-togethers, and around the base. I would say that I probably know him better than any other NCO on base.

3. I would definitely put SrA Mancini in the top 5% in terms of work ethic, integrity, and honesty. I hold his character above reproach. If he tells me something, I would believe it without question. I know that if you are reading this letter, he has been convicted of something relating to the weekend at the campground. All I can say is that knowing the person he is, I am sure that SrA Mancini has learned and will learn from this experience and will become an even better Airman and (hopefully) NCO if you give him another chance. Please look at all the good he has done for the Air Force and not just this one incident. Although I have not had a chance to do an EPR for him, I would definitely still rate him a firewall 5 in terms of his knowledge, devotion to duty, and potential for more responsibility.

Mario F. Rizzo

MARIO F. RIZZO, TSgt, USAF
NCOIC, Lodging Operations

DEPARTMENT OF THE AIR FORCE

633d AIR BASE WING

JOINT BASE LANGLEY-EUSTIS, VIRGINIA

today – 2 weeks

MEMORANDUM FOR WHOM IT MAY CONCERN

FROM: SSGT PHILLIP McGRAW

SUBJECT: Character statement – SrA Michael D. Mancini

1. I, SSgt Phil McGraw, work at the 633d Medical Operations Squadron. I have known SrA Michael D. Mancini since he arrived at Langley. He and I are friends and have spent a lot of time together at Air Force functions and at off-duty events.

2. Senior Airman Mancini is one of the nicest guys you would ever want to meet. We go to the same church and he volunteers to work with the teenagers who are lacking a support system. He plays sports with them, takes them to movies, and is there to be an older brother to them. I know he really cares a lot about working with people who don't have the opportunities he did growing up.

3. I know that if this letter is used it means that he has been convicted. If he did it, it was definitely out of character for him and I'm sure a one-time thing. I know that SrA Mancini will be a great asset to the Air Force and he should be given another chance to show the Air Force how valuable a contributer he can be.

Phillip D. McGraw

PHILLIP D. MCGRAW, SSgt, USAF