



DEVELOPING AND EXECUTING A STRATEGY FOR PROSECUTING ALCOHOL FACILITATED SEXUAL ASSAULT





OR . . .

WHO NEEDS FORCE
WHEN YOU HAVE
ALCOHOL???

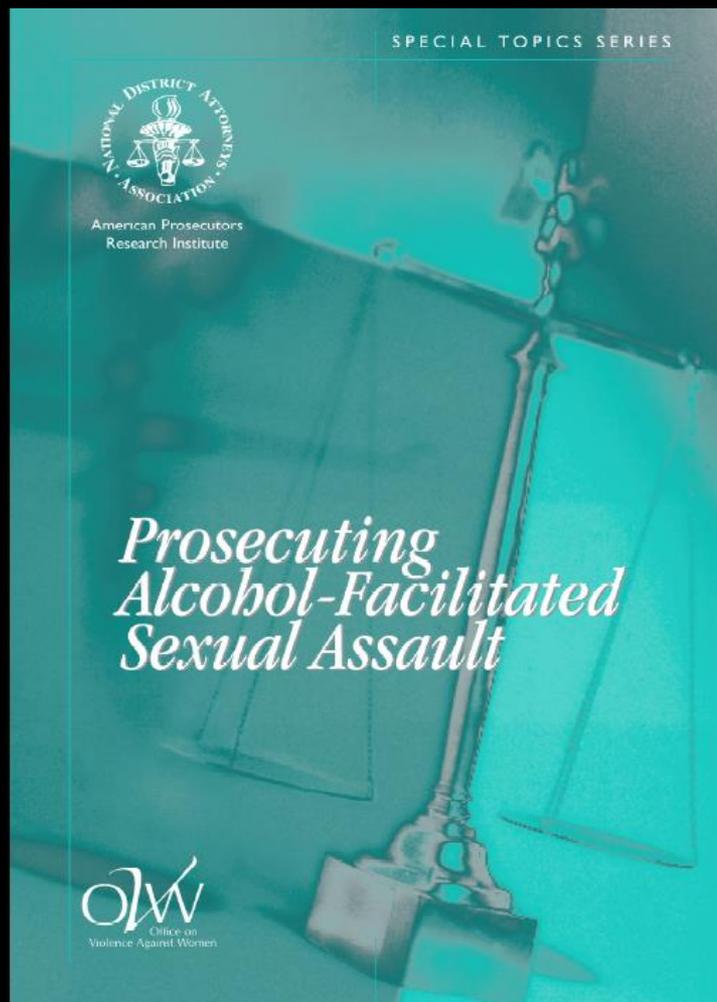


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TOPICS



- Offender focused prosecution
- Corroborate victim credibility
- Demonstrative evidence
- Proving substantially incapacitated / incapable of consent
- Myths, prejudice and reasonable doubt



http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf

INCIDENCE

- 46% of unrestricted reports of sexual assault involved alcohol (FY10 Navy Annual Report to Congress on Sexual Assault)
- But is this really accurate?
 - Sexual assault is the most underreported violent crime in society
 - Victims of drug-facilitated or incapacitated rape were less likely than victims of forcible rape to report to authorities

Kilpatrick, Dean, PhD, et al, Drug-facilitated, Incapacitated and Forcible Rape: A National Study (2007)



WHY SHOULD WE CARE?

- Of the study participants, victims of incapacitated rape were comparable to victims of forcible rape with regard to risk for PTSD and depression but were nearly twice as likely as victims of forcible rape to have past-year substance abuse problems

Kilpatrick, Dean, PhD, et al, Drug-facilitated, Incapacitated and Forcible Rape: A National Study (2007)



MST AND MENTAL HEALTH

- 15.1% of women and 0.7% of men reported Military Sexual Trauma (MST) when screened by the VHA. *Kimmerling, Rachel, PhD, et al, "Military-Related Sexual Trauma Among Veterans Health Administration Patients Returning from Iraq and Afghanistan," American Journal of Public Health (June 17, 2010)*

	Women		Men	
	+ MST	-MST	+ MST	- MST
Any mental health condition	75.7	46.6	76.5	51.5
Depressive disorders	56.2	30.3	46.6	25.9
PTSD	51.1	21.5	52.5	31.8
Other anxiety disorders	29.1	16.6	28.3	16.1
Alcohol / substance use disorders	13.9	5.2	22.0	12.7
Adjustment disorders	20.6	13.4	20.9	13.4

OFFENDER FOCUSED PROSECUTION



**GOOD TARGET
FOR
PREDATOR**



**GOOD WITNESS
FOR
PROSECUTION**

OFFENDER FOCUSED PROSECUTION



- Offender focused theme
- Re-frame things to be offender focused:
 - The defendant chose to have sex with an unconscious young woman, a woman who had no ability to choose whether to say yes or no.
- Make the case about what the accused saw, knew, decided as opposed to apologizing for the victim
 - Who had the choices?
 - Who had the power?
 - What did he know about her condition or status?

THEMES



- Who needs force when you have alcohol?
- A predator picks his prey.
- The accused committed the perfect crime.
- A man with a plan.
- He picked a victim with no ability to choose / easy victim / “victim with no memory.”
- Lions vs. leopards

KEEP THE FOCUS ON THE OFFENDER



- Show behavior that proves consciousness of guilt
- Show changes in the defendant's behavior
- Other bad acts under MRE 404(b)
 - Think outside the box
 - Is there evidence that demonstrates intent, manipulation, or attempts to isolate potential victims?

VICTIM CREDIBILITY



VICTIM CREDIBILITY

- The believability of each witness's testimony should be your guide in evaluating testimony, not the number of witnesses called.
 - Consider intelligence, ability to observe and accurately remember, sincerity, conduct in court, friendships, prejudices and character for truthfulness
 - Extent to which witness is supported / contradicted by evidence
 - How witness might be affected by verdict
 - Innocent mistake vs. deliberate lie
 - Probability of testimony and inclination of witness to tell the truth
- Military Judges Benchbook, 7-7-1





CREDIBILITY

PROVABILITY



CORROBORATE FROM THE INSIDE OUT



- I tried to get up from the bed but I fell over. It was really hard to stand and I felt so sick. I made my way into the bathroom and I dry heaved into the toilet but there was nothing coming up. I noticed some of the toiletries were knocked over on the counter and one of my contact cases was open. But I found one contact on the floor and the other one stuck to the wall. I don't remember taking them out the night before but I must not have done it very gracefully if they did not end up in the case.*

CREDIBILITY





Look for corroboration of
credibility in addition to
corroboration of the incident



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Room A317/RZFP2
Arrival Date 6/21/2009 2:37:00PM
Departure Date 7/3/2009
Adult/Child 1/0
Room Rate 177.00

RATE PLAN L-GV

HH#
AL:
BONUS AL: CAR:

CONFIRMATION NUMBER : 3354228721

7/2/2009 PAGE 2

DATE	DESCRIPTION	Q	REF. NO	CHARGES	CREDITS	BALANCE
6/27/2009	GUEST ROOM	TLIENHAR	19581804	\$177.00		
6/27/2009	ROOM TAX	TLIENHAR	19581804	\$12.83		
6/27/2009	GENERAL EXCISE TAX	TLIENHAR	19581804	\$8.34		
6/28/2009	SELF PARKING	TLIENHAR	19592053	\$24.00		
6/28/2009	GUEST ROOM	TLIENHAR	19592054	\$177.00		
6/28/2009	ROOM TAX	TLIENHAR	19592054	\$12.83		
6/28/2009	GENERAL EXCISE TAX	TLIENHAR	19592054	\$8.34		
6/29/2009	SELF PARKING	CKUDO	19600766	\$24.00		
6/29/2009	GUEST ROOM	CKUDO	19600787	\$177.00		
6/29/2009	ROOM TAX	CKUDO	19600787	\$12.83		
6/29/2009	GENERAL EXCISE TAX	CKUDO	19600787	\$8.34		
6/30/2009	SELF PARKING	CKUDO	19810017	\$24.00		
6/30/2009	GUEST ROOM	CKUDO	19810018	\$177.00		
6/30/2009	ROOM TAX	CKUDO	19810018	\$12.83		
6/30/2009	GENERAL EXCISE TAX	CKUDO	19810018	\$8.34		
7/1/2009	SELF PARKING	TLIENHAR	19619805	\$24.00		
7/1/2009	GUEST ROOM	TLIENHAR	19619806	\$177.00		
7/1/2009	ROOM TAX	TLIENHAR	19619806	\$14.60		
7/1/2009	GENERAL EXCISE TAX	TLIENHAR	19619806	\$8.34		
7/2/2009	GUEST ROOM	LMERIN	19627632	\$177.00		
7/2/2009	ROOM TAX	LMERIN	19627632	\$14.80		
7/2/2009	GENERAL EXCISE TAX	LMERIN	19627632	\$8.34		
7/2/2009	SELF PARKING JUL 2	LMERIN	19627633	\$24.00		
	BALANCE					\$2,715.58

The Hilton Family

Hilton

COMBAT

DOUBLE TREE

WALDORF ASTORIA

Waldorf Astoria

Waldorf Astoria

Waldorf Astoria

Waldorf Astoria

USA

Official Sponsor

ACCOUNT NO

CARD MEMBER NAME

ESTABLISHMENT NO. & LOCATION

MAHALO FOR CHOOSING THE HILTON HAWAIIAN VILLAGE BEACH RESORT & SPA. WE LOOK FORWARD TO YOUR RETURN! VISIT US AT HILTONHAWAIIANVILLAGE.COM FOR INFORMATION AND RESERVATIONS. ALOHA, AND MAHALO!

DATE OF CHARGE FOLIO NO / CHECK NO.
2258946 A

AUTHORIZATION INITIAL

PURCHASES & SERVICES

TAXES

TIPS & MISC.

TOTAL AMOUNT

PAYMENT DUE UPON RECEIPT

Receipt shows what accused drunk driver bought before crash

Posted: Jan 25, 2012 6:21 PM by Michael Shingleton

Updated: Jan 25, 2012 6:42 PM

Source: WBRZ

A A A

CHECK #: 596119/1
Tab: 9516 Server: BAR 1
Guests: 1

3	JACK DANIELS 14oz	25.50
3	RUMPLE MINZE 9oz	15.00
2	VEGAS BOMB	14.00
1	VEGAS BOMB	7.00
	RED BULL	3.00

SUB TOTAL	64.50
Gratuity	0.00
Sales Tax	0.00

TOTAL: 64.50

CIRCUMSTANTIAL EVIDENCE



- Evidence that tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

– Military Judges Benchbook 7-3

DEMONSTRATIVE EVIDENCE



- House diagram
- House photos
- Urine stained pants
- 1 glass for each drink
- Medical diagrams (vagina and other injuries)
- Speculum
- SAFE kit



Herty





INCAPABLE OF CONSENT





LOOK AT TOTALITY OF
CIRCUMSTANCES
IN DETERMINING
IF VICTIM WAS
INCAPACITATED!!!

RECREATING INTOXICATION

- Key to good decision making
- Investigation must provide sufficient information about the victim's state of intoxication



RECREATING INTOXICATION

- BAC is good to know, if possible
 - Can corroborate / contradict victim's version of events
 - Helpful questions:
 - What did you drink? (number of drinks, type, size, etc.)
 - When did you last eat?
 - What did you eat?
 - Did you take tranquilizers, pills or medicines of any kind (include prescription and over the counter)?
 - When did you last sleep? How much sleep did you have?
 - See, DD Form 1920 – Alcohol Incident Report



RECREATING INTOXICATION



- If they were at a bar, can we:
 - Get receipts?
 - Find witnesses?
 - Get surveillance tapes?
 - Find out how does the bartender pour (measure vs. count; heavy vs. light)?
 - Size of the drinks – grab the cups and bottles if you can!

RECREATING INTOXICATION



- What are the outward manifestations of intoxication for victim and suspect?
- Focus on both physical and cognitive impairment

RECREATING INTOXICATION

- What are the outward manifestations of intoxication for victim and suspect?
 - Did they:
 - Vomit?
 - Urinate?
 - Defecate?
 - Could they:
 - Walk?
 - Talk?
 - Did they have to be helped with physical tasks?
 - Balance and coordination



RECREATING INTOXICATION



- What are the **outward manifestations** of intoxication for victim and suspect?
 - Appearance / clothing
 - Dirty?
 - Disheveled?
 - Bloodshot eyes?
 - Did they behave out of character?
 - Where they conscious / responsive / disoriented / confused?
 - What was speech like?

DUI EXERCISE



- What do police look for in DUIs?
- How can we convert what we know into AFSA investigations?
 - Describe the outward manifestations of intoxication

RECREATING INTOXICATION



- What do the facts of the assault tell us about the victim and subject's relative levels of intoxication?
 - Location of assault
 - Was victim conscious?
 - Sexual acts and position
 - Degree of coordination involved
 - Who undressed who?
 - Did defendant:
 - Carry victim?
 - Follow victim?

RECREATING INTOXICATION



- What do the facts of the assault tell us about the victim and subject's relative levels of intoxication?
 - Was there grooming of the:
 - Victim
 - Witnesses
 - Environment
 - Who gave her the drinks or drugs?
 - Was it the accused?
 - Did accused encourage her to drink or use more drugs?
 - Were there attempts to mask the crime?





Thanks to LT Courtney Scheff
for creating the next series of
slides

Aggravated Sexual Assault – Charge III, Specification 1



Sexual Act



Substantial Incapacitation

Aggravated Sexual Assault – Charge III, Specification 1

– Substantial incapacitation

- "Substantially incapacitated" means that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.

Substantial Incapacitation

- **Drinks:**
 - **Rum and coke**
 - **Rum and coke**
 - **Rum and coke**
 - **Blue Adios Mother Fucker**
 - **Mike' s Hard Lemonade**
 - ...
- **BH's testimony**
- **ETSN M' s testimony**
- **ETSN L' s testimony**
- **ETSN N' s testimony**

Substantial Incapacitation

ICFA Wylie's statement:

[REDACTED] I told her we could go to the Sleep Inn or go back to the base. Lupe seemed to be pretty drunk then because she could not make a decision on where she wanted to go. Lupe was being indecisive. [REDACTED]

LDW [REDACTED] had about four (4) drinks, two (2) Long Island Ice Teas and two (2) Jagerbomb shots. I think Lupe had around four (4) drinks as well, all rum and cokes. During the night Vanessa LACROSSE (female), Ashley MASHAE (female), SHERMAN, FNU (female), DAVIS, FNU (female), COLEMAN, FNU (male), YORK, FNU (female) all showed up at the Savannah House. Around 1:00 am HECKROTTE, HOLMES, and an unknown hispanic male show up to hang out with us. Lupe seemed to be jittery and appeared to be intoxicated. I could see that she had a low tolerance for alcohol. LDW

LDW After the Savannah House closed, we went to the Full Moon restaurant in North Chicago. Lupe seemed half drunk while we were there. Lupe was falling asleep in the chair and was hanging on everyone. We stayed at the Full Moon until around 3:00 am. I thought about taking myself and Lupe back to the base because it was late and we were tired. I took Lupe out into the breezeway of the Full Moon to ask her where she wanted to go. I told her we could go to the Sleep Inn or go back to the base. Lupe seemed to be pretty drunk then because she could not make a decision on where she wanted to go. Lupe was being indecisive. Eventually someone said we should go to the Sleep Inn across the street and get a room. LDW

LDW I went around the back of hotel with Lupe, HOLMES, HECKROTT and Joe and the unknown hispanic male paid for room. Joe came down and let us into the back door of the hotel. We all went up the stairwell to either the second or third floor. When we entered the room, I went to the closest bed to the door and laid down. Lupe came to the bed and sat down. HOLMES, Joe, HECKROTT and the unknown hispanic male were spread around the room. LDW

LDW HOLMES came over to the bed where Lupe and I were and sat down next to her on the edge of the bed. Lupe was still sitting up. HOLMES and Lupe began to kiss. I was tired, so I moved over to the other bed in the hotel room. I put my head down and fell asleep for an unknown amount of time. When I awoke, I looked over onto the other bed and saw HOLMES having sex with Lupe. Lupe was [REDACTED].



Substantial Incapacitation

ICFA Wylie's Statement:

Her eyes were open, but she was not really responsive.

Continuation of voluntary sworn statement of
ICFA Lucas Dante WYLIE, USN
on January 31, 2011

LDW positioned to the side of HOLMES and then I saw HOLMES on top of Lupe. I closed my eyes and must have fell asleep again for an unknown amount of time. LDW

LDW I began to get turned on and started to get undressed. During that time, HECKROTT had began to have sex with Lupe too. He was on top of her. After HECKROTT was finished, I went up to the bed and got on it. I looked at Lupe. Her eyes were open, but she was not really responsive. I said her name, and she responded with "Huh." I put my penis into her vagina and began to have vaginal intercourse with her. I was on top of her and had sex with her for about ten (10) to twelve (12) minutes. I noticed a light in the room was shinning on me and people were laughing. At that point, I pulled my penis out of Lupe. I removed my condom and placed it into one of the garbage cans in the room. I walked into the bathroom. When I came out, Joe had his penis into Lupe's mouth. After that, Joe got on top of Lupe and began to have sex with her. LDW

LDW After we were done, Lupe was asleep on the bed naked and someone had covered her with a blanket. While Lupe was sleeping, HOLMES, Joe, HECKROTT, the unknown Hispanic male, and I had a discussion not to talk about the events of the evening. LDW

LDW The next morning, we all got up and got dressed. I watched Lupe pull her pants up, while I was getting dressed. We all went back to the Navy base. Lupe gave me a hug when we got back to the ship. Then around 10:00 am, Lupe called me and asked what had happened during the night because she could not remember and that her vagina was sore. I was still asleep and do not recall what I said. The next time I heard from Lupe was when she texted me cursing me and everyone else out. LDW

LDW I realize now that what I did was wrong. Lupe had been intoxicated and really didn't know what was happening to her. HOLMES, HECKROTT, Joe, the Hispanic male, and I took advantage of her by having sex with her while she was in that state. I tried to contact Lupe to talk to her, but I never got a chance to. Lupe never picked up the phone or she called me when I was busy. I have never really had a

I realize now that what I did was wrong. Lupe had been intoxicated and really didn't know what was happening to her. HOLMES, HECKROTT, Joe, the Hispanic male, and I took advantage of her by having sex with her while she was in that state.

Substantial Incapacitation



Substantial Incapacitation



Aggravated Sexual Assault – Charge III, Specification 1



Sexual Act



Substantial Incapacitation

ARTICLE 120

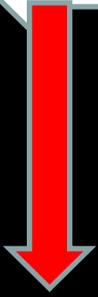
(28 Jun 12)



- Any person subject to this chapter who . . .
.commits a sexual act upon another person when
the other person is **incapable of consenting** to the
sexual act due to **...impairment** by any drug,
intoxicant, or other similar substance, and that
condition is known or reasonably should be
known by the person...
- **“Consent”** means a freely given agreement to the
conduct at issue by a **competent person**.

**INCAPABLE OF
CONSENT**

**CAPABLE OF
CONSENT**



Unconscious



What is the line?



Sober

WHERE HAVE WE SEEN THIS BEFORE?



- Sodomy and rape (pre-2007)
 - When a victim is incapable of consenting because she/he is asleep, unconscious, or intoxicated to the extent that she/he lacks the mental capacity to consent, no greater force is required than that necessary to achieve penetration.
 - Military Judges Benchbook, 3-51-2, note 11.

WHERE HAVE WE SEEN THIS BEFORE?

- If (state the name of the alleged victim) was incapable, due to lack of mental or physical faculties, of giving consent, then the act was done by force and without consent. A person is capable of consenting to an act of sodomy unless she/he is incapable of understanding the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had consented to the sodomy you should consider all the evidence in the case, (including but not limited to: ((the degree of the alleged victim's) (intoxication, if any,) (and) (or) (consciousness or unconsciousness) (and) (or) (mental alertness)) ((the ability or inability of the alleged victim) (to walk) (and) (or) (to communicate coherently)) ((whether the alleged victim may have consented to the act of sodomy prior) (to lapsing into unconsciousness) (and) (or) (falling asleep)) (the military judge may state any other evidence tending to show the alleged victim may have been acquiescing to the act rather than actually being asleep, unconscious, or otherwise unable to consent)).)

– Sodomy, Military Judges Benchbook, 3-51-2, note 11.



COMPETENCE

- RCM 706(c)(2)(D) – Inquiry into the **mental capacity** or mental responsibility of the accused.
 - Is the accused presently suffering from a mental disease or defect rendering the accused **unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?**



COMPTENCE

- RCM 601 – General rule of competency
 - Every person is competent to be a witness except as otherwise provided in these rules.



COMPETENCE



- To prove that a witness was competent under common law, the proponent must show that the person possesses the following abilities:
 - To observe (the testimonial quality of **perception**)
 - To **remember**
 - To relate
 - To recognize the duty to tell the truth
- Would have to show the witness suffers from a psychosis that interferes with one or more of the witness' testimonial qualities such as **perception** or **memory**.
- Schlueter and Saltzburg, *Military Evidentiary Foundations*, § 3-4[4]

COMPETENCE



- *“[T]here is no reason to permit an intoxicated or drugged witness to testify while under the influence. It is not adequate to say that intoxication affects only weight because the witness’ intoxicated state may make cross-examination difficult, if not impossible. Moreover there is something offensive about a court’s acceptance of a drugged or drunk witness in its search for truth.”*
 - Schlueter and Saltzburg, *Military Evidentiary Foundations*, § 601.02[2]

1. **Nature of Motion.** The Defense moves *in limine* to preclude the government from arguing that the level of competence required for consenting to sexual activity is the same level needed to execute a will.

The government has been manipulating this lack of clarity by drawing analogy between competence to consent to sexual activity and competence to execute a will. This analogy is disingenuous.

COMPETENCE

- From NDAA's Trial Technique Predicate Questions:
 - Ability to understand nature and extent of charges
 - Ability to aid and assist attorney in preparation of defense
 - Understand nature and purpose of proceedings
 - Understand own position as accused
 - Understand role of others in proceedings
 - Ability to cooperate with and advise attorney rationally
 - Capability to disclose pertinent facts surrounding the offense
 - Understand gravity of charges
 - Understand possible outcomes or verdicts
 - Understand range and penalties of punishment
 - Ability to understand legal rights



COMPETENCE TO CONSENT TO SEX

- MENTALLY DISABLED
- ELDERLY
- CHILD



EXPERT TESTIMONY - AFSA

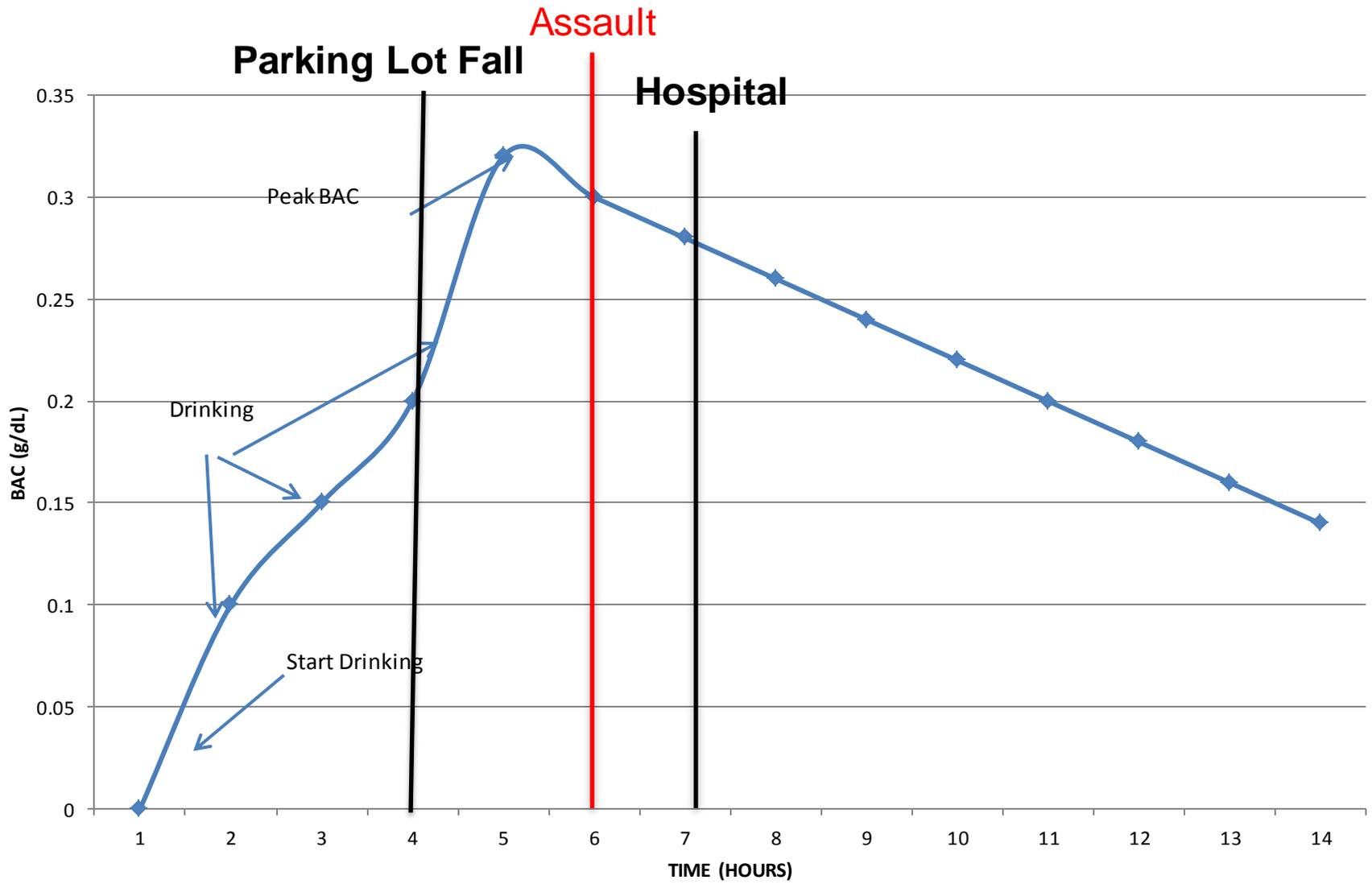


- What do you need an expert to testify about?
- Can / should you establish a BAC?
- To evaluate or not?
- What type of expert do you want?
 - Forensic psychiatrist?
 - Forensic psychologist?
 - Toxicologist?
 - Emergency doctor?

PSYCH DIFFERENCES



- **Forensic psychiatrist** – “Forensic psychiatry is a medical subspecialty that includes research and clinical practice in the many areas in which psychiatry is applied to legal issues.” Psychiatrists are medical doctors with a specialization in psychiatry. Typically, they have completed a fellowship in forensic psychiatry that involved working with the court system on psychiatric issues.
 - American Academy of Psychiatry and the Law. <http://www.aapl.org/org.htm>.
- **Forensic psychologist** – “Forensic psychology is the application of the science and profession of psychology to questions and issues relating to law and the legal system.” Typically psychologists have a masters or doctorate in clinical psychology.
 - American Board of Forensic Psychology. <http://www.abfp.com/>.





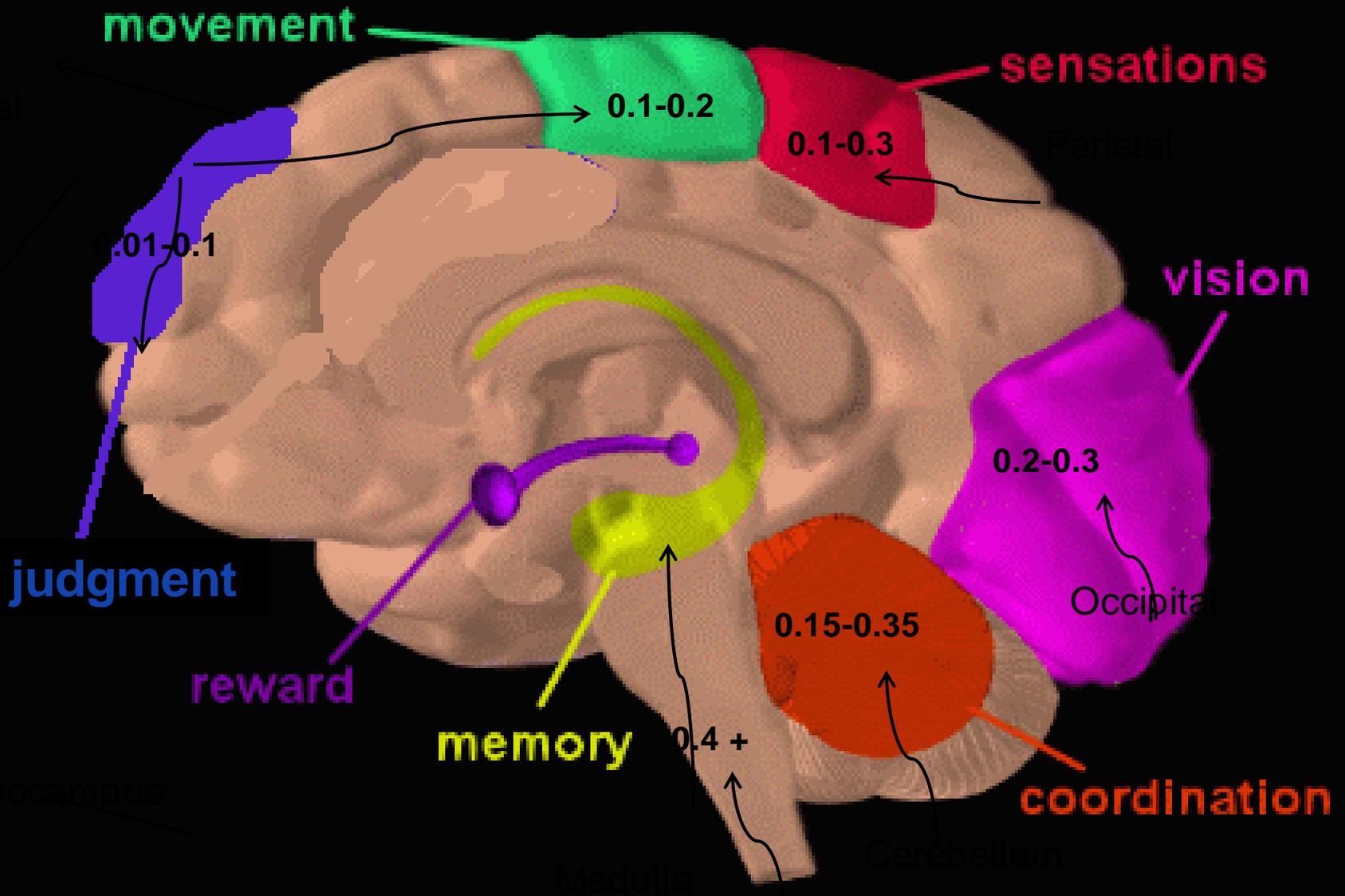
STAGES OF ACUTE ALCOHOLIC INFLUENCE/INTOXICATION

BLOOD-ALCOHOL CONCENTRATION grams/100 mL	STAGE OF ALCOHOLIC INFLUENCE	CLINICAL SIGNS/SYMPTOMS
0.01-0.05	Subclinical	Behavior nearly normal by ordinary observation Influence/effects usually not apparent or obvious Impairment detectable by special tests
0.03-0.12	Euphoria	Mild euphoria, sociability, talkativeness Increased self-confidence; decreased inhibitions Diminished attention, judgment and control Some sensory-motor impairment Slowed information processing Loss of efficiency in critical performance tests
0.09-0.25	Excitement	Emotional instability; loss of critical judgment Impairment of perception, memory and comprehension Decreased sensory response; increased reaction time Reduced visual acuity and peripheral vision and slow glare recovery Sensory-motor incoordination; impaired balance; slurred speech Vomiting; drowsiness
0.18-0.30	Confusion	Disorientation, mental confusion; vertigo; dysphoria Exaggerated emotional states (fear, rage, grief, etc.) Disturbances of vision (diplopia, etc.) and of perception of color, form, motion, dimensions Increased pain threshold Increased muscular incoordination; staggering gait; ataxia Memory loss Apathy; progressive lethargy
0.25-0.40	Stupor	General inertia; approaching loss of motor functions Markedly decreased response to stimuli Marked muscular incoordination; inability to stand or walk Vomiting; incontinence of urine and feces Impaired consciousness; sleep or stupor; deep snoring
0.35-0.50	Coma	Complete unconsciousness; coma; anesthesia Depressed or abolished reflexes Subnormal temperature Impairment/irregularities of circulation and respiration Possible death
Mean, Median=0.36 90%=0.21-0.50	Death	Death from respiratory or cardiac arrest

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Modified: Effects of Alcohol on CNS Functioning at Various BACs: SR Gerber, MD in JC Garriott (see references)

GLASGOW COMA SCALE



Response	Score
Eye opening	
Opens eyes spontaneously	4
Opens eyes in response to speech	3
Open eyes in response to painful stimulation (eg, endotracheal suctioning)	2
Does not open eyes in response to any stimulation	1
Motor response	
Follows commands	6
Makes localized movement in response to painful stimulation	5
Makes nonpurposeful movement in response to noxious stimulation	4
Flexes upper extremities/extends lower extremities in response to pain	3
Extends all extremities in response to pain	2
Makes no response to noxious stimuli	1
Verbal response	
Is oriented to person, place, and time	5
Converses, may be confused	4
Replies with inappropriate words	3
Makes incomprehensible sounds	2
Makes no response	1

VOLUNTARY INTOXICATION



IF SUSPECT WAS DRINKING

- Voluntary intoxication is not a defense but it may be raised as to the existence of actual knowledge, specific intent or willfulness
 - RCM 916(C)(2)
- What does this mean in AFSA cases?



IF SUSPECT WAS DRINKING...



- Was behavior **predatory, knowing or intentional?**
- Consider the following when deciding:
 - Accused's intent
 - Degree of intoxication
 - Capacity to do other things
 - Did the accused use planning, manipulation, grooming, deception, or isolation?
 - Did accused prey on victim's vulnerabilities?
 - Did accused do anything to wear down the victim's resistance?
 - Attempts to mask the crime
 - Prior incidents

ANALYSIS – PREDATORY, KNOWING OR INTENTIONAL BEHAVIOR BY ACCUSED



- Accused' s intent and knowledge
 - Degree of intoxication
 - Capacity to do other things
- Did the accused use planning, manipulation, grooming, deception, or isolation?
- Did accused prey on victim' s vulnerabilities?
- Did accused do anything to wear down the victim' s resistance?
- Attempts to mask the crime
- Victim selection process
- Prior incidents



Did accused turn
a blind eye
to victim's attempts to
communicate
non-consent or
outward manifestations of
intoxication?

MYTHS, PREJUDICE AND REASONABLE DOUBT



ALCOHOL



- 82% of people 12 and older have used alcohol at least once in their lifetimes
- Nearly 1/2 of all Americans (12 and older) have used alcohol in the past month (approximately 109 million people)
- 42% of drug-related ED visits for 12 to 20 year olds involve alcohol

Substance Abuse in Brief, April 2003, Volume 2, Issue 1, National Clearinghouse for Alcohol & Drug Information, Substance Abuse and Mental Health Services Administration, US Dept. of Health and Human Services ; SAMHSA, Jan / Feb. 06

THE CHALLENGE

- Many people look at victims as assuming the risk of SA
 - Canadian Women's Foundation survey (2013):
 - 19% of respondents said that if a woman is drunk, that can encourage or provoke sexual assault. Of those people, 23% were aged 18 to 35.
 - 15% also believed that flirting can encourage or provoke sexual assault.
 - 11% said that wearing a short skirt can also encourage or provoke sexual assault.



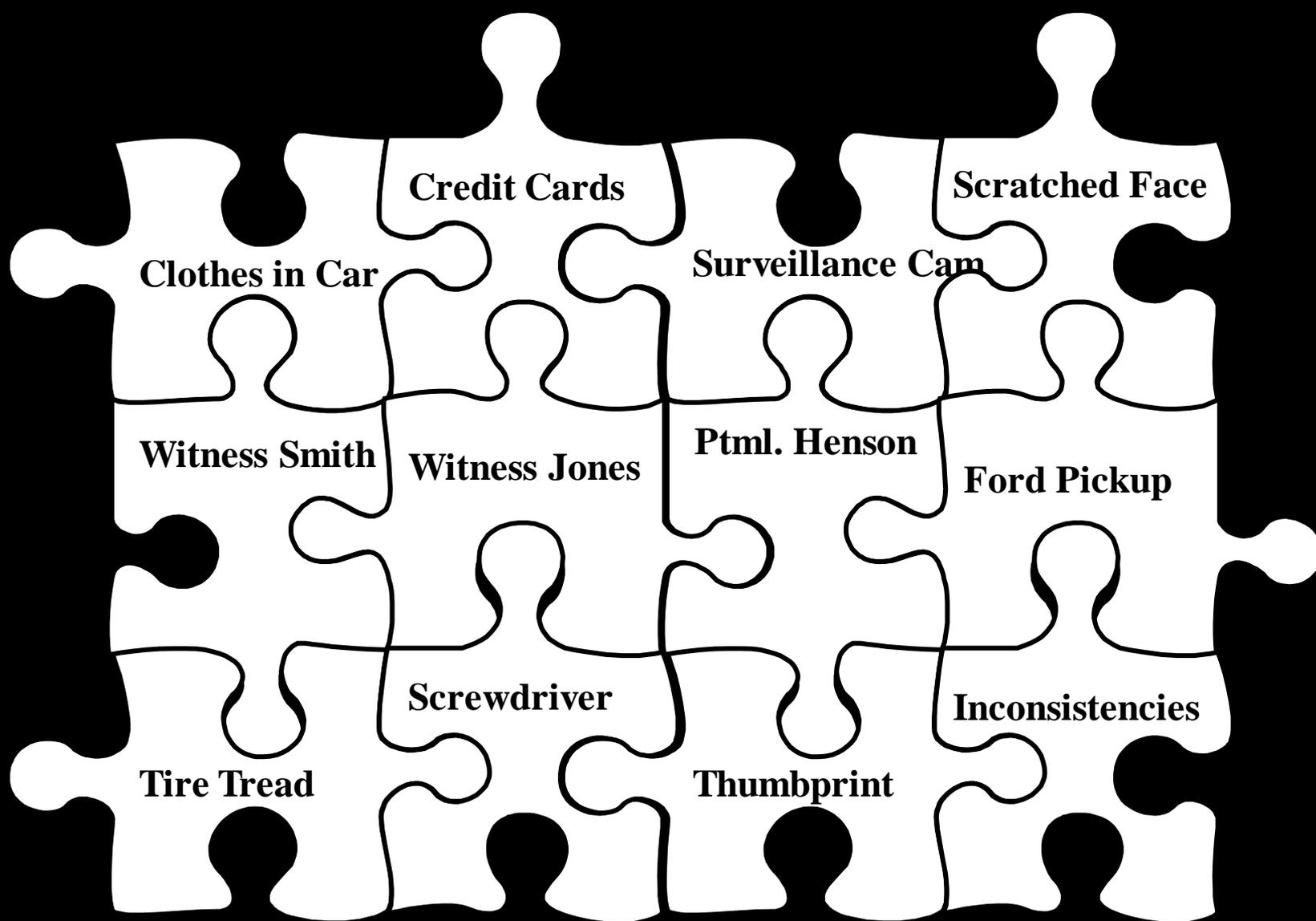
DRUNK SEX

SEXUAL ASSAULT









TRIAL STRATEGY



- Voir dire questions?
- Witnesses?
 - Order?
 - Experts?
- Will you introduce accused' s statement?
- Defenses?

Contact Info

Deputy Director, Navy TCAP



The 3 Pillars of Sexual Assault Prosecution

3 Pillars of *Successful Prosecution*

1. Corroboration
2. Victim Management
3. Advocacy

Understand These Cases are Different

1. Inconsistencies are to be EXPECTED.

Why? Nature of trauma, multiple interviews by different people with different goals.

Do not make assumptions but commit to exploring the reasons why: fear, trauma, fatigue, short-cuts taken by the report writer.

Understand These Cases are Different

Inconsistencies are to be EXPECTED -
UNDERSTOOD and EXPLORED BUT NOT
FEARED.

*Fear when the statements are void
of inconsistency.*

Understand These Cases are Different

2. Victim management = Investment in the outcome.

Getting and keeping the victim on board means you will get to your destination much easier.

Understand These Cases are Different

3. Sexual assault requires an ADVOCATE, not a mere a lawyer.

Lawyering is not enough. To the fact finder, sexual assault is about morality, personal beliefs/ethics, culture. There are generational, educational, religious divides. SA has *huge baggage...*

Understand These Cases are Different

3. Sexual assault requires an **ADVOCATE**, not a mere a lawyer.

Lawyers apply facts to the law. Advocates apply facts to the law **AND** unpack all the baggage keeping the jury from finding guilt.

Corroboration

Why? Make your victim a truth teller. If she is telling the truth about the little things, the fact finder will give her the benefit of the doubt on the big ones.

Elements + non-elemental portions of the assault.

Corroboration

1. SART – injury (genital and non), affect/demeanor, chain of custody, prior statements, to satisfy the CSI effect.
2. DNA – corroborates # and type of acts even in a consent case, to satisfy CSI effect.
3. Scene – easy corroboration on detail and can show unreasonableness of consent.
4. Clothes – be careful of creating an OJ issue or biasing your jury against victim for fashion choices.

Corroboration

5. Other witnesses: neighbors, bartenders, friends
6. MySpace/Facebook
7. Cell phones: repole data, text messages, pictures corroborate; call logs establish a time line. Absence of activity is as powerful.
8. Receipts – shows quantity of alcohol or scheming/planning/knowledge by and of accused.
9. Security video
10. Google Earth/MapQuest













Corroboration

Two other *EASY* ways to corroborate:

1. Put victims affect on the record -
ex. “Jane Doe, you cried as you were being
questioned by defense,

Why?

Need a break?”

Captures powerful, non-tangible evidence
that is present in most in SA cases.

Corroboration

Two other EASY ways to corroborate:

2. Witness order –

Put corroborating witnesses *before* the victim: first responders, fresh complaint, DNA, LEO to establish a timeline.

Makes victim a truth teller BEFORE the jury has a reason to think otherwise.

Corroboration

This same theory works for closing argument. Front loading your close will undermine and diminish defense counsel's argument before it is made. Do not give the defense a chance, make them stand up handicapped.

Victim Management

What do victims want?

To be HEARD

Justice is a process, not an outcome.

Victim Management

How something is said is
AS IMPORTANT as what is said...

Work to preserve affect and prevent the creation
of inconsistencies.

Victim Management

Manage your victim throughout the entire case:

1. Limit contact people and evidence gathering interviews. Having to repeat embarrassing/shameful events creates affect issues, inconsistent statements, and disinvests victim in process

Victim Management

Manage your victim throughout the entire case:

2. Victim trial prep – Do not rehearse. Give victim a roadmap so they know where you are going and where the bumps are but do NOT Q&A. It will preserve affect and the taint of victim coaching/tampering. Do NOT play audio for vic before trial – save affect for fact finder.

Victim Management

Manage your victim throughout the entire case:

3. In limine – Be creative and thorough. Letting the judge know the entirety of the evidence will make for better calls and puts defense on notice. Objections during trial can have a chilling effect on the victim. Again, don't give the defense a chance...

Victim Management

Manage your victim throughout the entire case:

3. In limine cont. – *Limiting* the use of evidence is as important as excluding it: drugs, alcohol, cell phone records, 412 issues. We know this stuff comes in, manage the damage beforehand.

Victim Management

Manage your victim throughout the entire case:

4. Testimony – OBJECT to questions that are vague, confusing or argumentative. SA victim's shut down very fast if not protected. This shut down is then held against them by the jury who interprets it as deceit or deception.

Advocacy

What does it look like?

1. Candor

Being candid and open about what is really happening in the trial. The defense argues the baggage because we *let* them.

Advocacy

What does it look like?

2. *Vigilance*

Being vigilant and stopping what is really happening in the trial. The defense argues the baggage because we don't *stop* them.

Advocacy

What does it look like?

3. *Ownership*

Owning and incorporating the good, the bad, and the ugly into the case. We don't script it, we work it. Victim was drunk and making out with all the girls/boys at the party? She is the *perfect target* (not a slut undeserving of protection).

Advocacy

What does it look like?

4. *Epiphany*

The realization that a guilty requires unpacking the fact finder's baggage and not just applying the facts to the law.

Questions?

Call Me

My office #:

My cell #:

INSPIRING GUILTY

(How to really close a 120 case)

How many more times do
we need to lose good cases?

We need to start arguing WHY
our juries need to do the right and
legal thing.

120 cases are fought in the gray. Proving every element is not enough for justice.

Toss law school and moot court away. We have to learn to argue from a different place.

We need to inspire.

Closing Fundamentals

What *must* be included in every single closing:

1. The elements of the charged crimes (first closing).
2. Inapplicability of raised defenses (usually rebuttal).

All else is a matter of effective advocacy.

Effective Closing Fundamentals

What *should* be included in closing:

1. What the law does NOT require and WHY:
 - *Physical resistance*: we don't require someone to be more imperiled, more injured before their attacker is held accountable. A victim does not have to grab the gun from a robber to be robbed in the eyes of the law. Sex crimes are no different.

Effective Closing Fundamentals

- *Immediate disclosure*: in the 21st century, we have recognized that victims of SA have as much to fear after the assault as during the assault. Shame, judgment, being treated differently at work/home. We recognize that the decision to report and accept “all this” (NCIS, SART, the defense attorney, the panel) may take time.

Effective Closing Fundamentals

- *Impairment to unconsciousness*: the law is a commonsense recognition that ability to asses the situation, make reasoned choices, defend against unwanted touching, comprehend what is happening in time to stop it, happens at a point well before passing out. We don't require drivers to be passed out behind the wheel before we know they are physically and mentally impaired.

Effective Closing Fundamentals

- *Forensics*: crimes were solved and trials held for hundreds of years prior to the advent of CSI. Fictionalized science on television does not rob ourselves of our basic commonsense.

Effective Closing Fundamentals

- *Other witnesses*: commonsense recognition that sex crimes are not committed in public or in front of witnesses. That is not just the nature of crime, it is the nature of the act. We don't require a car theft victim to produce a witness to the theft of their car at 3am from their driveway. No different standard for sex crime victims. They no less protection of the law.

Effective Closing Fundamentals

2. What is NOT on trial:

- The victim
- NCIS, DNA, investigative teams
- Any element that is not truly in dispute
- Any side issue the defense repeated: FB, text messages, who the vic told first, whether the vic had 3 or 30 prior sex partners

Effective Closing Fundamentals

2. What is NOT on trial:

- The law: we may debate about whether or not the law is a good one. Not at issue. You have promised to and are sworn to uphold the law in this CM. Following the law is the basis of orderly society. Disagreement is for Congress not the courtroom.

Effective Closing Fundamentals

3. CONFRONT and EXPLAIN common 120 issues *whether or not the defense brings them up* (because the jury is thinking them anyway):

- *Inconsistencies* or 'I don't remember': sex crimes are not scripted, no one taking notes. SA victims interviewed more times in first few hours/days than any other crime victim – first responder, med personnel, SART, NCIS (NCIS, NCIS), TCs. Often tired, UI, scared and in shock. Too expect more than what we get is folly.

Effective Closing Fundamentals

3. CONFRONT and EXPLAIN common 120 issues *whether or not* the defense brings them up (because the jury is thinking them anyway):

- *Inconsistencies and 'I don't remember'*: sex crimes are not scripted, no one taking notes. SA victims interviewed more times in first few hours/days than any other crime victim – first responder, med personnel, SART, NCIS (NCIS, NCIS), TCs. Often tired, UI, scared and in shock. Too expect more than what we get is folly. Inconsistencies are how we know it is the truth.

Effective Closing Fundamentals

- Ex # 2: Inconsistencies are human. It is the nature of trauma. We remember things in bits and pieces and in context. As time goes by and we process the event we tell things differently as we replay the trauma to different audiences and are asked different questions. The fact that a bride remembers only 50 of the 150 guests that came to her wedding, doesn't make the ring on her finger any less real.

Effective Closing Fundamentals

- Ex # 3: DC will likely argue that the victim's "I DON'T REMEMBER" are proof of deceit. But shutting down and not remembering is human. It is the nature of emotional trauma. When you are hurt on the inside, don't go to a doctor to fix it; don't get to where a cast; don't get to the point where you can almost laugh when you replay it. With emotional trauma, you bury it. You have to if you want to move on. Victim was still Marine, still had to go to work and PT and formation and the chow hall and she chose to move on. I don't remember is survival, not deceit.

Effective Closing Fundamentals

- *Lack of affect from victim*: ask victim on direct why/how she can describe something so traumatizing and show so little emotion. Argue explanation. Also argue that victim has replayed the assault over and over again and it is unreasonable to expect anything but numb. Also argue the 'moving on' argument above.

Effective Closing Fundamentals

- *Post assault behavior that is not how “real” rape victims act: No template, no standard for real rape victim. No evidence has been presented about how a real rape victim acts. Instead, heard worn and inaccurate stereotypes, tone and insinuation. That is not evidence. Commonsense in the 21st c tells us there is no such ideal. And if we actually saw it (give type A facts) we wouldn't believe it.*

Effective Closing Fundamentals

4. Inspire the panel to find guilty – to do the right thing. Sell the panel an Ipod.

JUSTICE

Effective Closing Fundamentals

What is justice?

- Equal protection: the law governs and protects us all the same no matter who you are or the choices you make. One courthouse for all.
- We don't need the law to tell us (xyz) is a crime. We need the law to enforce it.
- Law and order means that in here we hold people accountable for their crimes, even when the victim cannot.

Effective Closing Fundamentals

What is justice?

- Blind justice is a fundamental concept in our system. It means no matter who you are, where you are, or what choices you make, you are protected. Justice is only as blind as the eyes it sees with. We each have a powerful roll in making sure the cornerstones of our justice system are intact and upheld.
- A trial is a search for the truth not RD. Justice is about truth seeking not gamesmanship.

Effective Closing Fundamentals

Don't sell the victim and her vulnerability.
Don't sell the predation of the accused. Sell
JUSTICE and guilty will follow.

Go forth and set the world
on fire...

Guidance for Judge Advocates on Processing Sexual Assault Cases



LtCol [REDACTED]

Sexual Assault Response Policies

- “Sexual assault is a crime that is completely incompatible with our core values of honor, courage, and commitment.”
- All Judge Advocates must receive initial and periodic refresher training for essential SA tasks.
- References: DoDD 6495.01, DoDI 6495.02, and MCO 1752.5A. Additionally, be on the lookout for MCO 1752.5B, which is expected in 2013.

Key Elements of Proper Processing of Allegations of Sexual Assault

- Reporting Requirements
- Expedited Transfers and the SJA's Role
- Sexual Assault Initial Disposition Authorities and the Withhold Policy
- Article 34 and the SJA's Advisory Role
- JAGMAN 137b: Pre-Trial Agreements and Victim Consultation
- Pre-Trial/Trial VWAP Responsibilities for JAs
- MRE 514: Victim Advocate-Victim Privilege
- Recantations and False Information
- Article 120
- Standards for Expert Testimony and Scientific Evidence
- Post-Trial VWAP Victim Consultation
- Article 54e ROT Requirements

Reporting Options for Incidents of Sexual Assault: Restricted and Unrestricted Reports

- Service members and their dependents who are 18 years of age or older and are sexually assaulted have two reporting options:
 - Unrestricted Reporting
 - Restricted Reporting
- Following a sexual assault, victims can contact a SARC, UVA, VA, or HCP for restricted reporting. Otherwise, it's unrestricted.
- The victim's preference for type of reporting is established via their entries on DD Form 2910.

Restricted Reporting

- To whom?: SARC, VA, UVA, or healthcare personnel ONLY
- Restricted reporting allows SA victim to confidentially disclose details to specified individuals and receive medical treatment and counseling, without triggering official investigative process.
- Information reported to healthcare personnel, SARCs, VAs , or UVAs is not reported to law enforcement or the victim's command.
- Reports to chaplains and legal assistance attorneys are confidential, but are not restricted reports.
- HOWEVER, victims can *later* consent to making unrestricted report.
- Established exceptions:
 - To command/law enforcement to prevent or lessen serious and imminent threat to health or safety of victim or another;
 - To command/law enforcement when authorized by victim in writing;
 - To DRBs and officials for fitness for duty for disability retirement determinations;
 - To SARC, victim advocates, or healthcare providers when required for direct supervision of victim services; and
 - To military or civilian courts when ordered or required by Federal or state statute.

Unrestricted Reporting

- Complete, unrestricted reporting is favored by the DoD.
- Unrestricted reporting allows a victim of sexual assault to access medical treatment/counseling and request an official investigation of the allegation using existing reporting channels.
- Existing reporting channels include the chain of command, law enforcement, healthcare personnel, and the SARC.
- Once reported? Notify SARC ASAP; SARC will assign a VA/UVA and offer victim medical care and a SAFE, if appropriate.
- Unrestricted report cannot later become restricted.

What is the process for Expedited Transfer of a victim?

- Expedited Transfer is available ONLY for unrestricted reports.
- Upon filing of unrestricted report, SARC (or CO) informs victim of option to request permanent or temporary transfer.
- A presumption exists in favor of transferring a Marine who submits request for transfer following a credible unrestricted sexual assault report.
- CO makes determination of credibility, *after* considering evidence and consulting with supporting JA or other legal advisor.
- CO must approve or disapprove requested transfer within 72 hours of receipt.

Expedited Transfer

- Considerations for CO's decision:
 - Victim's reasons for request.
 - Potential transfer of alleged offender instead.
 - Nature and circumstances of offense.
 - Victim's needs and operational needs of unit.
 - Training status of victim.
 - Availability of positions within other units.
 - Status of and impact on investigation.
 - Location of alleged offender.
 - Alleged offender's status.

The Withhold Policy of June 2012 and Disposition Authority for SA Cases

- SECDEF and CMC have directed the withholding of authority to dispose of certain sexual assault offenses.
- Disposition authority is instead given to a Sexual Assault Initial Disposition Authority (SA-IDA), an O-6 SPCMCA.
- SECDEF/CMC Intent? Ensure consistent, DoD-wide, O-6-level disposition in all SA cases.
- Despite the name, it's not just "initial" authority, and SA-IDA's disposition authority cannot be delegated back down to immediate commanders.
- SA-IDAs *must* consult with the SJA, and the disposition decision *must* be documented.

Crimes Covered by the Withhold Policy

- Covered crimes against adults: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (art. 125), and attempts of these crimes (art. 80).
- Covered crimes against children: rape of a child, sexual assault of a child, sexual abuse of a child, and attempts of these crimes (art. 80).
- Additionally, collateral misconduct by victims or the accused must be handled by SA-IDA.
- For additional guidance, see references MARADMIN 372/12 and SECDEF's memo of April 20, 2012.

Effect of the Withhold Policy

- Commanders who are not O-6 SPCMCA's must forward the matter to the appropriate O-6 SA-IDA/SPCMCA, and may not make an initial disposition determination in cases involving these specified sexual offenses.
- However, subordinate commanders are encouraged to provide their own recommendations regarding initial disposition.
- Additionally, immediate commanders can take necessary and discretionary actions related to case, even if the SA-IDA is making the disposition decision.
- These actions include ordering pretrial restraint or confinement; issuing military protective orders; making probable cause search authorizations; providing investigation coordination; providing and/or coordinating victim support and advocacy; and processing victim requests for transfer.

The SJA's Advisory Role Under Article 34

- Before convening a GCM, CAs shall refer the matter to their SJAs for consideration and advice.
- The CA may not refer a specification to a GCM unless the SJA advises that:
 - (1) The specification alleges an offense under the UCMJ.
 - (2) The specification is warranted by evidence indicated in the Article 32 hearing.
 - (3) A court martial would have jurisdiction over the accused and the offense.
- Art. 34b: SJA's advice "shall include a written and signed statement by the staff judge advocate--
 - (1) expressing his conclusions with respect to each matter set forth [above]; and
 - (2) recommending action that the convening authority take regarding the specification. If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification."

Pre-trial Consultation Requirements for PTAs

- JAGMAN 137b.
- Convening authorities should consult with the SJA or TC before acting on an offer to enter into a pre-trial agreement.
- Convening authorities should also consider input from victims. TCs are charged with informing victims of their rights at trial, including their rights of consultation.
- If victims do consult with the CA and subsequently testify at trial, TCs must keep aware of RCM 914, and the DC's ability to request any statement of a witness relating to the subject matter about which the witness testified.

The Victim-Witness Assistance Program: A General Overview

- SAPRO supervises and has cognizance over all programs and services relating to adult SA.
- However, the VWAP must also be complied with.
- VWAP is an overarching assistance program for victims and witnesses of crimes.
- Goal: Ensure that victims/witnesses receive appropriate response/assistance .
- Goal: Protect victims from further harm/hardship .
- Goal: Ensure all victims are aware of their rights and are provided services they need.

TC Pre-Trial and Trial Obligations

- Once assigned to a case, TCs must:
 - Identify victims and witnesses.
 - Ensure victims/witnesses are provided information about MJ process, including what to expect from the system, what the system expects from them, and the stages of the MJ process.
 - Comply with notification requirements.
 - Comply with consultation requirement.

MRE 514: Victim Advocate – Victim 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.” (emphasis added)
- Privilege can be claimed by victim or guardian/conservator.
- Victims or guardian/conservator may authorize TC or DC to claim on their behalf
- VA who received communication may claim on victim’s behalf.

What does MRE 514 cover?

- Confidential Communications :
 - Made to a VA acting in the capacity of a VA.
 - Not intended to be disclosed to third persons, other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the victim or an assistant to a VA.
 - Must be a case arising under UCMJ.
 - Must be made for the purpose of facilitating advice or supportive assistance to the victim.

MRE 514 Exceptions

- Exceptions:
 - The victim is dead.
 - ***Federal/state law or a Service regulation imposes duty to report (but be aware of potential distinctions between SA and domestic violence).
 - Future crime/fraud commission.
 - Services 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.
 - When necessary to ensure safety & security of military personnel, military dependants, military property, classified, or accomplishment of a military mission.
 - When necessary to ensure safety of any other person (including the victim), given victim's mental or emotional condition.
 - When admission or disclosure is constitutionally required.

MRE 514 Practical Effects

- Privilege will operate similarly to MRE 513 (Psychotherapist-Patient Privilege).
- Privilege is not absolute . . . but it's no longer a "free for all" WRT victim's records and testimony by SARC or UVA/VA at trial.
- For unrestricted reporting: NCIS, law enforcement, JAs, and the chain of command are not VAs and are *not* covered by the MRE 514 privilege.
- Privilege does not protect all communication, such as: exculpatory information, information about future crimes or for the safety of victim, military personnel, dependents, or property (MRE 514 (d) (2), (3) and (4)).

Victim Recantation and False Information

- **Victim Recantation:** A retraction or withdrawal of a reported sexual assault.
- Recantations may be an attempt by SA victims to disengage from the criminal justice system.
- Therefore, recantation (by itself) is not necessarily indicative of a false report, and additional investigation may be necessary.

Child Recantation

- Recantation can be especially common with child victims.
- External factors: anger from siblings and other family members; actual threats from suspect; disbelief by non-offending parent; lack of support from extended family members.
- Internal causal factors: feelings of disloyalty to family; fear of threats from suspect; feelings of concern for suspect; fear of loss of love or family; self-blame for abuse; fear of the unknown.
- NOTE: Many of these internal and external factors are similar to pressures faced by military victims.

New Organization of Sexual Offenses Under Article 120 (after 28 June 2012)

- 120: Adult Crimes:
 - Rape
 - Sexual Assault
 - Aggravated Sexual Contact
 - Abusive Sexual Contact
- 120b: Child Crimes:
 - Rape of a child
 - Sexual Assault of a child
 - Sexual Abuse of a child
- 120c: Other Sexual Misconduct
 - Indecent Viewing, Visual Recording, or Broadcasting

Art. 120 Adult Crimes: A Two-Factor Matrix

	<u>High degree of force</u> (unlawful force, GBH, fear of GBH, render unconscious, administering drugs...)	<u>Low degree of force</u> (fear, bodily harm, fraud, “knew or should have known”)
<u>Sex Act</u> (penetration of vulva/anus/mouth by any object) (intent to: abuse, humiliate, harass, or degrade any person; or arouse or gratify the sexual desire of any person)	RAPE	SEXUAL ASSAULT
<u>Sexual Contact</u> (touch any body part with any body part) (intent to: abuse, humiliate, harass, or degrade any person; or arouse or gratify the sexual desire of any person)	AGGRAVATED SEXUAL CONTACT	ABUSIVE SEXUAL CONTACT

“Force” Under the “New” 120

- New, simplified concept.
- What is “Force”?:
 - The use of a weapon;
 - The use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or
 - Inflicting physical harm sufficient to coerce or compel submission by the victim.
- Note that in cases of parent-child or similar relationships, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

New Crimes Under Article 120b and 120c

- Sexual abuse of a child – “commits a lewd act upon a child.”
 - “Lewd act” includes “via any communication technology” for exposing, indecent language, and indecent conduct.
 - Physical presence not required.

Evidentiary Reliability: MRE 702

- “Scientific, technical, or other specialized knowledge”
- Must assist trier of fact in understanding evidence or determining a fact in issue
- Expertise can come from knowledge, skill, experience, training, or education
- Testimony must:
 - Be based on sufficient facts or data
 - Be the product of reliable principles and methods
 - Be the result of applying those principles and methods to the facts of the case

702 in practice: *Daubert*

- CAAF has cited both the *Daubert* factors and *Houser* factors as bases for decisions about admitting expert testimony.
- *Daubert*: Judges serve as “gatekeepers,” controlling the information that reaches the finder of fact, and may use discretion.
- *Daubert* factors
 - 1: Has the theory been tested?;
 - 2: What is the known or expected error rate of the theory?;
 - 3: Has the theory been subject to peer review and publication?;
 - 4: Is the theory generally accepted in the relevant community?
- *Daubert* factors are not definitive, and the test is “flexible”
 - Judges may take other factors into account, depending upon the type of testimony and the circumstances of the case.
 - “The gatekeeping inquiry must be tied to the facts of a particular case.”
- Following *Kumho Tire Co.*, the factors from *Daubert* apply to all expert testimony, and for the purposes of the test there is “no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized knowledge.’”

MRE 702 in practice: *Houser*

- CAAF has cited both the *Daubert* factors and *Houser* factors as bases for decisions about admitting expert testimony.
- Houser factors:
 - (1) the qualifications of the expert;
 - (2) the subject matter of the expert testimony;
 - (3) the basis for the expert testimony;
 - (4) the legal relevance of the evidence;
 - (5) the reliability of the evidence;
 - (6) that the probative value of the expert's testimony outweighs the other considerations outlined in Mil. R. Evid. 403.
- Ultimately, JAs can cite factors in *Daubert* or *Houser*, but neither test is required.
- What is required: judges must meet their gatekeeping responsibility, and ensure that any expert, "whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

Post-Trial VWAP Consultation with the Victim

- Must inform victims of the opportunity to present evidence to the court at sentencing, including statement concerning the impact of the accused's crime.
- Must provide DD 2703 to victims and witnesses to inform them of post-trial process.
- In cases involving confinement, must prepare a DD 2704 allowing victims and witnesses to request notification of changes in offender's confinement status.
- If trial results in confinement, must provide brig with DD Form 2704 at finish of trial.

Article 54e Record of Trial Responsibility

- Under article 54(e), legal offices must provide victims a copy of the ROT at Authentication for all article 120 GCMs and SPCMs where victim testified.
- A victim must be notified of the right to receive this record.
 - If they decline – TC must record the declination in writing.
- Provide the CAA at a later date.
- All legal offices must fully record and document compliance with Art 54(e).
- Normal Redaction.
- Standard of completeness for ROT under Article 54(c) is the same as for defendants.

Fact Pattern Analysis and Application



The Facts

A male SSgt and female Cpl are stationed together. Upon the request of the Cpl, the SSgt visits her barrack's room to discuss recent disciplinary problems. The SSgt proceeds to use his arm to hold the Cpl down while removing her clothing and vaginally penetrating her with his penis. Fourteen days later, the Cpl tells a Sgt in her chain of command about the incident.

Issues for Processing this Case?

- Reporting: What type of SA report has the Cpl made?
- 514e: Are the Cpl's statements to the Sgt privileged?
- Withholding: Who is the initial disposition authority?
- Art. 120: What crime(s) can the SSgt be charged with?
What if the SSgt had groped the Cpl, rather than penetrating her?
- VWAP: What are the TC's pre-trial and trial obligations to the victim Cpl?
- Post-Trial: What are the victim Cpl's post-trial notification, consultation, and ROT rights?

Discussion

- REPORTING: The Cpl's report of the incident of sexual assault was made to a Sgt within her chain of command. Restricted reports may be made only to a Marine's SARC, SAPR, VA, or to healthcare personnel. As a result, she has made an unrestricted report.
- 514e: The Cpl's statements were made to a Sgt within her chain of command. The privilege under 514e applies to communications between victims and victim advocates. The privilege can be claimed by a victim, guardian/conservator, TCs, DCs, or VAs. The Sgt does not fit into these categories. Therefore, the communication is not privileged under 514e.
- WITHHOLDING: Since the misconduct involved in this scenario involves a wrongful sex act or wrongful sexual contact, the disposition authority, per SECDEF and CMC withholding decisions, would be a SA-IDA (O-6). While the initial commander may not make an initial disposition determination in cases involving these specified sexual offenses and must forward the matter to the appropriate O-6 SPCMCA, he/she may nonetheless take other necessary and discretionary actions related to the case.

Discussion

- Art. 120: The SSgt's act of penetration combines a high degree of force with a sex act. The SSgt may therefore be charged under article 120 with rape. If the SSgt instead had groped the Cpl, the act would combine a high degree of force with sexual contact. The SSgt would therefore be charged under article 120 with Aggravated Sexual Contact.
- VWAP: TCs bear a large number of responsibilities under the VWAP program, and these responsibilities are particularly significant in cases of sexual assault. These obligations include identifying victims and witnesses, providing documents (including DD 2701 (if no investigation) and 2702), and ensuring victims/witnesses are provided information about MJ process (including what to expect from the system, what the system expects from them, and the stages of the MJ process). As noted in earlier slides, individual cases may impose additional VWAP requirements upon TCs. TCs should therefore carefully consider the requirements of VWAP and be sure to document their compliance with the program.

Discussion

- Post-Trial: TCs must satisfy the post-trial VWAP obligation to provide necessary information to both witnesses and victims. Victims should be informed of their right to provide consultation and present evidence at sentencing. Both victims and witnesses should be provided with DD 2703s to inform them of post-trial process. Both victims and witnesses may require DD 2704s, which allow them to request notification of changes in offender's confinement status; if a DD 2704 is completed, a copy should be provided to the brig. Additionally, per article 54e, TCs should provide a copy of the record of trial to victims for all article 120 GCMs and SPCMs where victim testified, and adherence to this requirement should be documented.

Proving your Intoxication Case

Detective [REDACTED]

San Diego Police Department

What Makes a Case Difficult?

- Credibility vic/wit/sus
- “Who” is your vic/wit/sus
- Late disclosure
- Illegal activity (Drugs/Alcohol)
- Lies big and small
- Inconsistent statements
- Bad/sloppy police work



What Makes a Case Difficult?

- No physical evidence
- No biological evidence
- Identifying the suspect/s
- Unconscious victims
- The consent defense
- “Bizarre” story
- No jury appeal
- Actions of victim before, during and after S/A



It's "Real" Rape/Sexual Assault if?

- Suspect is a stranger
- Victim was alone
- Victim fought back/screamed/tried to run away
- Had not been drinking
- Did not lie to the police/investigator
- Reported assault immediately
- You know like on television

Intox cases are not the same

- Suspect is know to victim on some level (98%)
- Victim was at social event/bar/nightclub...
- Victim did not fight back/scream/run away
- Had been drinking...a lot!
- Lied to the police or refused to cooperate
- Late disclosure (5-10 days)
- This can't be "real" sexual assault, it must be something else!
- Don't see this on television

The Perfect Victim?

- 28 Year Old Female
- Assaulted in own home by a stranger
- Sober/No medications
- Hard worker
- No prior arrest/assaults
- Immediately disclosed to law enforcement
- Victim cooperative
- 18 Year Old Female
- Assaulted in suspect's home by co-worker
- Intoxicated/Drunk
- Unconscious
- On depression medicine
- Been in trouble at work
- Late disclosure
- Victim uncooperative

The Panel

- Jurors want to put themselves in the victim's shoes
- “I wouldn't have done that...”
- Look at the panel they are older, mostly male who may have had sex with a drunk female in their past



What does the Jury/Panel think?

- You can't be sexually assaulted if you are simply intoxicated.
- This is about regrettable sex.
- Victim wants to be transferred or trying to get an early separation from the service.
- Revenge
- Victim must have some kind of motive for coming forward. (Yes, it's call justice)
- This case doesn't make sense

The Reality of Intoxication Cases

1. Jurors walk into a courtroom with very different ideas and beliefs about sex, drugs and alcohol.
2. Jurors have stereotypes about women, men, and sex (even when they say they don't).
3. Jurors expect more evidence than just testimony from the victim.
4. Jurors will assign blame to victims who made bad choices that lead to their victimization.

Goal - Corroboration

1. Corroboration of criminal and non criminal elements. If the victim told the truth on the non criminal elements (number of drinks, activities at the wedding etc), she is more likely telling the truth on the criminal elements. Corroboration makes your victim a truth teller. Think of an intoxication rape like a homicide case.

Goal – Demonstrate Intoxication

2. What did the defendant perceive/what should he have reasonably perceived of the victim's intoxication level?

Best evidence is from other witnesses, video, cell records, photographs, credit card receipts.

Was the victim vomiting, stumbling, slurring her words, walking without help, talking on the phone/texting?

How was her behavior different from her non-intoxicated behavior?

Reconstructing a BAL

- We rarely have a blood alcohol level
- We are rarely able to accurately estimate a blood alcohol level.
- “Black out vs Passed out”
- What is amount of alcohol sufficient for “blackout” It’s different for everyone!
- What is the amount of alcohol sufficient for “passed out” “unconsciousness.” It’s different for everyone! But we know when it’s reached!

Battling Character

- The victim's character will be attacked. She will be portrayed as a promiscuous, aggressive whore.
- The defendant will offer 3 types of character witnesses.
 - Defendant is honest.
 - Defendant is a good guy with a normal lifestyle.
 - Defendant has not raped before, nor is sexually aggressive (prior girlfriend testimonials)

Weaknesses

- Always ask yourself, how is a “bad” fact consistent with a theory of guilt?
- How is a “bad” fact consistent with rational behavior? (If you’re drinking you’re not thinking)
- False reporting = always the boogie man, not a known suspect
- Delayed Disclosure = gaps in memory means investigation

Using Forensics to Your Advantage

- SART injuries
- Look for bumps and bruises for clues about sexual positioning, corroboration for bruising after coordination problems and sexual acts.
- Use DNA to determine what sexual acts occurred.
- Explain lack of forensics evidence, not every case has it.

The Prosecutor



- Must not only prove a crime occurred and the accused is the person who committed it, but also you have a “real” victim.
- “Educate” the panel, it will take time because this type of S/A is so alien to them.
- If they don’t understand it, it’s always easier/safer to say Not Guilty.

How to Approach

- Open minded
- Believe any “story” your victim tells you until you find out otherwise
- Look for the inconsistencies and address them or the defense will use them against you
- Clean up any bad/sloppy police/investigator’s work
- Don’t be scared to take a chance!



Victim's Inconsistent Statements

- They are in every case so get over it!!!
- The victim makes statements to at least six different people (911 call taker, patrol officer, forensic nurse, witnesses, family members, investigator and the Prosecuting attorney).
- Clarify all inconsistent statements or it looks like you are hiding something.
- Remember your victim is under a lot of pressure and feeling several different emotions.

How do we get inconsistencies?

■ Victim

- Does not think police would believe the truth
- Is not asked the right questions

■ First Responder

- Doesn't believe victim's story (Bizarre)
- Bad or little note taking
- Does not write report immediately
- Late disclosure equals false report

How do we get inconsistencies?

- Witnesses
 - Victim does not want to get into details
 - Embarrassed/Ashamed
- 911/Dispatch call information
 - Victim gives and call taker ask for limited information/details
- Forensic Nurse
 - Does not ask “investigative” questions

Suspect's Inconsistent Statements

- We always hear about inconsistent statements by the victim (Because the victim told her story six different times!)
- Why do we only speak with the suspect once or not at all?
- Try pre-text call, then phone interview, then face to face interview, then arrest interrogation, statements to family, friends and co-workers.

Corroborate Statements

- Victim/Witnesses and Suspect
- Through cell phone/E-mail traffic.
- First disclosure witness
- Photos from the night. (Camera/Cell phone)
- Surveillance video
- Bar/Credit card receipts
- Face Book/Social media accounts

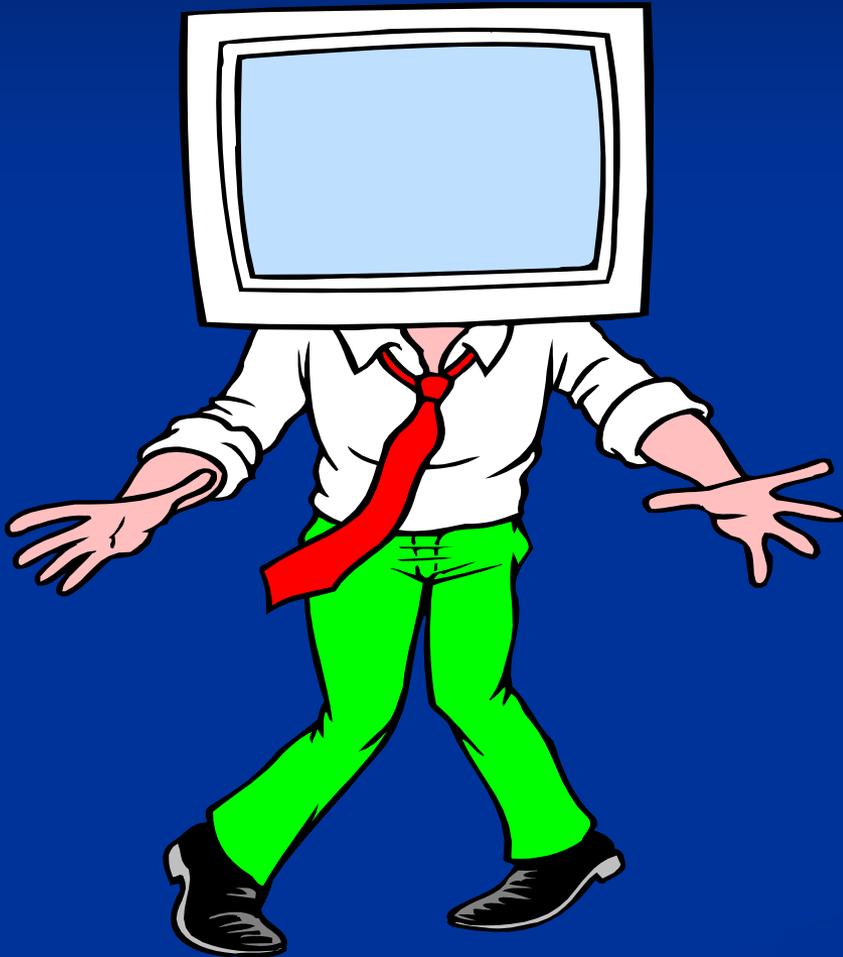
Suspect's Background

- High School/College/Military record
- Ex-girlfriend(s)/Ex-wife(s)
- Friend(s)/Ex-friend(s)
- Employment/Co-worker(s)
- Law enforcement in hometown
- Law enforcement agencies where suspect has lived in the past
- Sexual experiences
- FIND THAT SECOND VICTIM!!!
- Discredit him

EVIDENCE

- Victim's testimony
- Victim/witness & suspect's statements
- SART/Forensic examination
- Forensic results
- Law enforcement reports
- Photos/video
- Pre-text call/text/emails

Face Book/Social Media



- Victim/Witnesses & Suspect
- Information dealing with your case
- Pictures
- Do not need warrant
- Check ASAP!
- Find new witnesses

Pre-Text Phone Call



- Victim vs. Suspect
- Whoever vs. Suspect
- Out of State
- Try, Try, Try again
- False Apologies
- Ask straight forward ?'s
- Cover story
- Texting, Letters, E-Mails

Pre-Text Call

- Bread and butter of your case
- Jury/Panel gets to hear suspect's voice
- Suspect uses profanity
- Makes incriminating statements
 - “Yeah, you were drunk off your ass!”
- Suspect is stuck with this story
- Could fill in some of the blanks from the night of the assault.

What No BAL Results?

- Ask Victim/Suspect
 - Sick?
 - Don't ask scale 1-10
- Witnesses
- Pre-text call
- Photos from cell phones from all involved
- Missed work/class
- Security video



Five Beers

- Not the same for everyone
- “Five beers doesn’t make me drunk.”
- “I wouldn’t pass out after five beers.”
- Explain why everyone is not the same



“Blacked Out” vs “Passed Out”

- “Blacked out” means
 - Can still walk and talk
 - You look normal, but you are really drunk
 - Can drive a vehicle
 - Will have some memory loss
 - Could give consent, but not “legal” consent
- “Passed out” means
 - Cannot walk or talk
 - You don’t look normal, you are unconscious
 - Will have no memory
 - Could not give any kind of consent

“Intoxicated” vs “Drunk”

- “Intoxicated” means
 - Not drunk, but feeling good
 - You can walk and talk
 - There are different levels of intoxication
 - People might not know your level of intoxication
 - Can make decisions

- “Drunk” means
 - Surpassed intoxication, not feeling good
 - You can’t walk and talk normally
 - This is the highest level of intoxication
 - People will know you’re drunk
 - Cannot make decisions

Use the word “Drunk”

- When you use the word “drunk” everyone knows and understands what you mean
- The drunk person is passed the “good time” phase
- Being “intoxicated” means several different things, has several different “levels” and often is confused with a scale or point system like in DUI cases.

“Drunk” vs “Unconscious”

■ “Drunk” means

- Still can semi walk and talk with help
- Tries to give appearance she is okay
- Will argue with friends
- Bad behavior
- People will have bad impression of victim

■ “Unconscious” means

- Cannot walk or talk
- Passed out not blacked out
- Victim is helpless
- People will know you’re unconscious
- Cannot make any decisions
- Most vulnerable

Can anyone be that drunk?

- One photo can speak a 1,000 words
- Could this person be sexually assaulted?
- Drunk or unconscious? (Both)
- Would this person be onboard with consensual sex?



Just having a good time



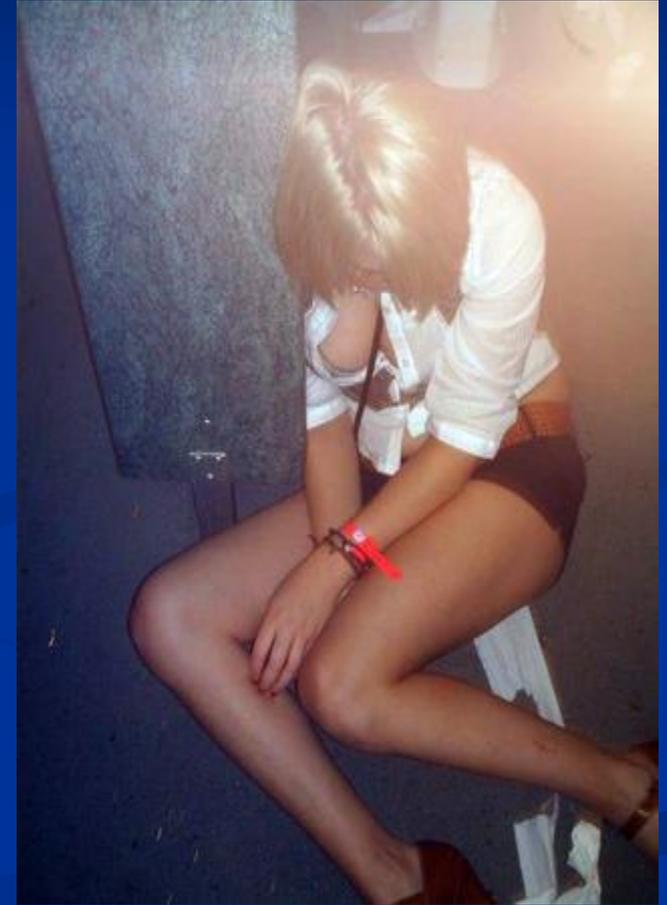
Intoxicated



Drunk



Unconscious



Which is easiest to prove?

■ Intoxicated

- What level was the victim. What's the scale?

■ Drunk

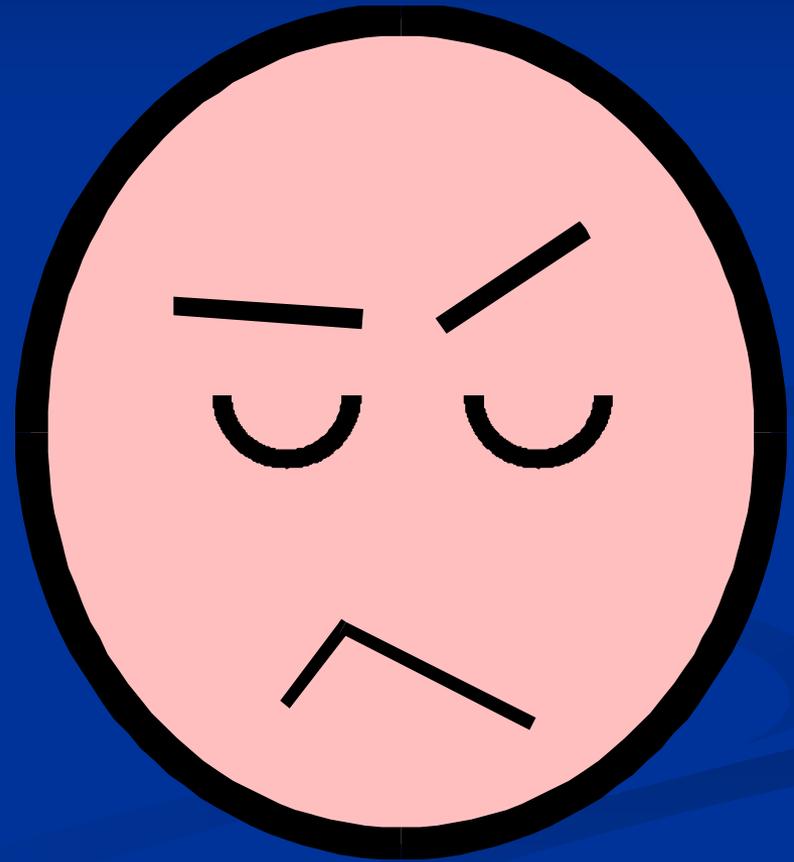
- Behavior change (good & bad)
- Witnesses/suspect/photos/pre-text
- Blacked out or passed out?

■ Unconscious

- Ask the victim/friends/photos/pre-text
- Only passed out! There is no question what she is

What Victims Lie About

- Drugs used
legal/Illegal
- Amount of alcohol
consumed
- Bad behavior
- What sex acts
occurred
- Who they were with
- Location of assault



False Reports

- Two types of false reports, one with a known suspect and one without a known suspect.
- Both are false reports, however, each are motivated by two separate goals.
- Is the victim giving exact details? (Thought she was drunk?)
- Can you corroborate her statements?
- Does the crime scene match/if you have one?
- Does she have a motive to lie?
- Only 7% of my first 650 cases were false reports. (45)

Unknown Suspect

- 5% of false reported cases were of an unknown suspect
- Most victims involved were underage and not intoxicated
- If the victim is under age, then the motivation usually is someone trying to get out of trouble with parents, school or law enforcement.
- The victim's statements about the assault will be over the top, such as being kidnapped, tied up and multiple attackers.
- The victim maybe looking for attention from family, friends or boyfriend.
- Victim must explain being pregnant or STD.
- At one point, victim will refuse police intervention.

Named Suspect

- 20% of the false reports I received was a real person who was named (13 cases)
- Only seven were intoxicated cases
- The females and in one case male wanted revenge
- I noticed the victims had an answer for every single question I asked. This is a red flag in intoxicated cases.

The Investigator/DA

- If you don't know, understand or haven't got a clue, then find out!
- Find training, we all need it no matter how much you think you know.
- These cases are the hardest you will work.
- We don't get paid to lose.



Questions

Detective [REDACTED]

San Diego Police Department

[REDACTED]