

STATEMENT

OF

MAJGEN VAUGHN ARY

U.S. MARINE CORPS

STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

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US SENATE

Chairman Gillibrand, Ranking Member Graham, and Members of the Subcommittee, thank you for the opportunity to testify here today.

The Department of Defense (DoD), and specifically the Marine Corps, has made significant changes to the process of litigating sexual assault cases, and continues to make tremendous progress in providing services and care vital for victims of sexual assault. We have taken a holistic approach to combating sexual assault in the Marine Corps, by implementing a number of initiatives to improve our ability to respond to allegations across the entire spectrum of a case, from initial reporting through trial and post-trial matters. We continue to support Congress's effort to study the progress that has been made through the independent reviews and assessments directed by the Fiscal Year 2013 (FY13) National Defense Authorization Act (NDAA).

My testimony will address two major topics. The first major topic is the progress of the military's initiatives to combat sexual assault. Our military leaders are constructively focused on the important issue of sexual assault. As a result, our provision of victim services has improved and our provision of legal services has undergone significant change. In the Marine Corps, the Commandant's Sexual Assault Campaign Plan, including a complete reorganization of the Marine Corps legal community, highlights the proactive stance we have taken in addressing this matter. The independent reviews and assessments directed by the FY13 NDAA provide an opportunity for us to evaluate these changes and determine where additional reform is needed. The second topic of this testimony is an overview of the military justice process as it exists today following the many changes that have been made over the past few years. This overview will highlight the success we are having in four areas essential to reducing the incidence of sexual assault: prevention, investigation, victim services, and prosecution. It will also detail the ongoing efforts to make constant improvements in each of these areas.

The Progress of Current Sexual Assault Initiatives in the Military

In the area of sexual assault, the Marine Corps today is significantly different than it was just one year ago, and one year from now it will look significantly different simply based on our implementation of current initiatives and legislative requirements. We anticipate that these changes will have positive effects on the prevention of and response to sexual assault, to include more professional investigation, prosecution, and defense of sexual assault cases.. Initial feedback, whether empirical or anecdotal, indicates that we have improved the legal processes related to the prosecution and defense of sexual assault cases, and we are expecting continued improvement. Prior to discussing the specific improvements to the litigation of Marine Corps sexual assault cases, it is important to first analyze the recent legislative and policy changes affecting this area.

Legislative changes

The FY12 NDAA made several changes to the area of sexual assault. Most notable are the reform of offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice; the addition of 10 U.S.C. § 1565b providing victims of sexual assault access to legal assistance and the services of Sexual Assault Response Coordinators

(SARC) and Sexual Assault Victim Advocates (VA); the addition of 10 U.S.C. § 673 providing for the consideration of applications for permanent change of station or unit transfer for members on active duty who are the victim of a sexual assault or related offense; and four other sections on sexual assault prevention and response.

On June 28, 2012, a new version of the Uniform Code of Military Justice (UCMJ) sexual assault statute, Article 120, took effect. The statute it replaced was the 2007 version of Article 120, which completely rewrote the original Article 120 statute to model it on the federal scheme for sexual assault. Among other things, the 2007 statute made it very difficult to prosecute alcohol-facilitated sexual assaults, one of the most common types of sexual assaults found in the military. The 2012 statute adopted an “offender-centric” scheme that focuses on offenders’ actions, and not the behavior of the victim, to determine culpability. Military trial and appellate courts are just beginning to use the new statute, and it will take time to acquire measures of effectiveness for the new statute.

The FY13 NDAA contains twelve specific sections related to sexual assault,. The provisions cover all aspects of sexual assault, to include training, prevention, investigation, and prosecution. Most notably, the FY13 NDAA directs the Secretary of Defense to establish two independent panels to review and assess the UCMJ and judicial proceedings related to sexual assault cases.

One of the most important parts of the FY13 NDAA is the Act’s acknowledgement, in creating these two independent panels, that changes to military justice involving just one subset of crimes, or changes that significantly alter the role of the commander in military justice, should be carefully studied. I cannot overstate my agreement with this principle. I believe a thoughtful and well-researched comparison of military and civilian jurisdictions will provide valuable information for you to make decisions about the efficacy and viability of the military justice system and the role of the commander. I believe the role of the commander in all aspects of military justice is best addressed through deliberate study by the FY13 NDAA-mandated panels.

Section 576 of the FY13 NDAA creates two panels that will “conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses.” Both panels will specifically address the role of the commander in military justice. The first panel, the Response Systems Panel (RSP), may last for up to eighteen months and will contain five members selected by the Secretary of Defense, and two members selected by both the Senate and House Armed Services Committees. Specific tasks for the RSP include: an assessment of the strengths and weaknesses of the UCMJ in prosecuting sexual assaults; a comparison of military and civilian systems, to include best practices for victim support; the assessment of advisory sentencing guidelines for sexual assaults; a comparison of the training level of military prosecutors and defense counsel compared to Federal and State court systems; an assessment of military court-martial conviction rates with Federal and State courts; an assessment of the roles and effectiveness of commanders at all levels in preventing and responding to sexual assaults; an assessment of the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice; and an assessment of the adequacy of systems to support and protect victims. The second panel, the Judicial Proceedings Panel (JPP) will convene upon completion of the

RSP and last for up to six months. It will contain five members, two of whom must have served on the RSP. The JPP will use the information collected and analyzed by the RSP to complete the following tasks: make recommendations regarding proposed reforms to the UCMJ; review and evaluate the adjudication of sexual assault offenses by the military in criminal and administrative fora, including the punishments determined; identify trends in punishment by courts-martial compared to Federal and State courts; review and evaluate sexual assault court-martial convictions that were reduced or set aside on appeal; review instances when prior sexual conduct of an alleged victim was considered at an Article 32 hearing; review instances when the prior sexual conduct of an alleged victim was introduced by the defense at a court-martial; assess trends in training of military prosecutors and defense counsel; monitor the implementation of the FY13 NDAA requirement for a special victim prosecution capability; and monitor the recent Secretary of Defense decision to withhold initial disposition authority to a higher level of command for certain sexual assault offenses.

Department of Defense changes

Independent of Congressional action in the area of sexual assault, the Secretary of Defense has made numerous changes in the areas of sexual assault reporting, investigation, and disposition. On April 20, 2012, the Secretary of Defense issued a memorandum withholding initial disposition authority for certain sexual assault offenses to the O-6 Special Court-Martial Convening Authority (SPCMCA) level (a disposition authority that previously could have been exercised by O-5 SPCMCAs). On October 1, 2012, the Defense Sexual Assault Incident Database (DSAID) became fully operational. DSAID originated from an FY09 NDAA requirement for a centralized, case-level database that collected and maintained information regarding sexual assaults involving members of the Armed Forces. On January 22, 2013, the DoD Inspector General (IG) informed the services' senior judge advocates that he intended to issue a survey of sexual assault victims to better understand the effectiveness of current support programs and to help guide improvements to them. On January 25, 2013, Department of Defense Instruction (DoDI) 5505.18 "Investigation of Adult Sexual Assault in the Department of the Defense" was published. DoDI 5500.18 specifically requires Military Criminal Investigative Organizations (MCIO) to investigate all adult sexual assaults. On February 28, 2013, the DoD IG released its Investigative Oversight Report "Evaluation of the Military Criminal Investigative Organizations' Sexual Assault Investigation Training." This report recommended an MCIO working group to review the continuum of sexual assault investigation training at the entry, refresher, and advanced levels.

Service-level changes

Internal to the Marine Corps, there have been four major developments in the last year that will improve the administration of military justice. The first development began in June 2012, when the Commandant issued his Sexual Assault Prevention and Response Campaign Plan, a three-phase strategy developed by an Operational Planning Team (OPT) whose members the Commandant personally selected. Chaired by a general officer and comprised of highly respected senior officers and enlisted Marines, the OPT used the same planning techniques and processes we use to engage the enemy on the battlefield. The OPT aggressively analyzed the problem of sexual assault in our ranks, looking for solutions across the wide spectrum of

prevention and response. The resulting Campaign Plan is a commander-led, holistic approach that improves our ability to prevent and respond to sexual assaults. Our goal is to change behaviors—the behavior of Marines who might commit sexual assault, bystanders who can intervene and prevent sexual assault, and commanders, leaders, and professionals who respond to sexual assault. In a November 2012 interview, the Commandant said, “Classes are being held, not by a 21-year-old corporal, but the General Officer, the Colonel, and the Sergeant Major. So this is a fight. It won’t be won this year or next. Will we get there? We’re part of society. But, we are determined to eradicate sexual assault in the Marine Corps. It’s a personal thing with me.”

To personally deliver the message of the Campaign Plan and ensure that Marines truly understand the need to change our culture regarding the prevention of and response to sexual assault, the Commandant traveled around the world speaking to his leaders in a series of Heritage Speeches. In these speeches, the Commandant discussed the special trust and respect that Marines have earned from the nation, and the vast responsibility Marines of today have in maintaining that trust and respect. The Commandant emphasized no matter how successful we are on the battlefield against our nation’s enemies, the Marine Corps could lose all of that respect if we as Marines did not take care of our fellow Marines – America’s brothers and sisters, sons and daughters, fathers and mothers. The Commandant made it clear that sexual assault is not acceptable and that he would not tolerate it. He directed his Marines to learn more about the situations that may lead to sexual assault, prevent those situations from occurring, and if a sexual assault did occur, to embrace the victim and provide that Marine the support they needed. Attachment A contains a summary of the Commandant’s Campaign Plan initiatives and requirements.

The second development was the Commandant’s complete reorganization of the Marine Corps legal community. Previously, legal centers were decentralized and operated independently of each other. They were also limited to their own organic capability to address cases in their geographic location, regardless of complexity. Based on an analysis of the growing complexity of case types on the court-martial docket, to include sexual assaults, the Commandant directed a regionalized model that could better leverage training and experience to provide the proper level of expertise on the most complex courts-martial, regardless of location. This reorganization had an immediate and tremendously positive impact on the ability of judge advocates to prosecute complex cases and is discussed in more depth below in the section on courts-martial.

The third development in the last year involved two statutory modifications of the authority of Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC). The first statutory change involved the supervisory authority of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC). The FY13 NDAA modified 10 U.S.C. § 5046 to codify the SJA to CMC’s authority to provide legal advice to the Commandant and supervise the Marine legal community. Prior to this statutory change, the SJA to CMC exercised this authority as delegated to him by regulation. In the second statutory change, 10 U.S.C. § 806 was modified to grant the SJA to CMC inspection and supervisory authority over the administration of military justice within the Marine Corps. These statutory changes recognize the unique nature of the Marine Corps as a second service within the Department of the Navy

and make the SJA to CMC accountable for ensuring military justice services are meted out efficiently, professionally, and effectively.

The fourth development of the last year involved improvements in the ability to provide transparency and visibility of courts-martial cases to all levels of command. During FY12, the Marine Corps began a Case Management System (CMS) pilot program with the U.S. Navy. The Judge Advocate General of the Navy (JAG) determined that CMS presented the best way forward in order to meet a Congressionally-mandated requirement for the entire department to use a single case tracking system. Based on the JAG's input, the Secretary of the Navy selected CMS as the departmental case tracking system. At the close of FY12, the Marine Corps and the Navy were working hand-in-hand to ensure that the CMS expansion will be completed by July 2013, the deadline set by Congress.

Overview of the Marine Corps' Military Justice Process for Sexual Assaults

An allegation of sexual assault

When a Marine alleges that he or she is a victim of sexual assault, that allegation triggers a comprehensive system of required victim and legal responses. Commanders, law enforcement, victim advocates, and judge advocates are all required to comply with their statutory and regulatory responsibilities in order to respond to victims' needs and determine appropriate offender accountability.

Victim Response. In accordance with Marine Corps Order (MCO) 1752.5A, "Sexual Assault Prevention and Response (SAPR) Program," a sexual assault victim has the option of filing a restricted or unrestricted report. A restricted report affords military victims of sexual assault the option to make a confidential report to specified individuals (SARC, VA, Uniformed Victim Advocate (UVA), counselors, and healthcare providers) without requiring those officials to report the matter to law enforcement or initiate an official investigation. Individuals making restricted reports can also utilize the full-range of victim services received by victims who make unrestricted reports. Filing an unrestricted report requires that all suspected, alleged, or actual sexual assaults made known to command or law enforcement be submitted for formal investigation. An unrestricted report is the first "trigger" for a variety of victim and legal responses.

Following an unrestricted report, a Commander is required by MCO 1752.5A to take a number of initial steps. These steps include ensuring the physical safety and emotional security of the victim; determining if the victim desires/needs any emergency medical care; notifying the appropriate MCIO, as soon as the victim's immediate safety is ensured and medical treatment is provided; to the extent practicable, strictly limiting knowledge of the facts or details regarding the incident; taking action to safeguard the victim from any formal or informal investigative interviews or inquiries, except those conducted by the appropriate MCIO; ensuring the SARC is notified immediately; collecting only the necessary information (e.g. victim's identity, location and time of the incident, name and/or description of offender(s)); advising the victim of the need to preserve evidence (by not bathing, showering, washing garments, etc.) while waiting for the arrival of representatives of the MCIO; ensuring the victim understands the availability of victim

advocacy and the benefits of accepting advocacy and support; asking if the victim needs a support person, which can be a personal friend or family member, to immediately join him or her; immediately notifying a VA for the victim; asking if the victim would like a Chaplain to be notified and notify accordingly; determining if the victim desires/needs a “no contact” order or a Military Protective Order, DD Form 2873, to be issued, particularly if the victim and the accused are assigned to the same command, unit, duty location, or living quarters; ensuring the victim understands the availability of other referral organizations staffed with personnel who can explain the medical, investigative, and legal processes and advise the victim of his or her victim support rights; and listening/engaging in quiet support of the victim to assure the victim that she/he can rely on the commander’s support.

After making an unrestricted report, a Marine can request an expedited transfer. In accordance with the Commandant’s Letter of Instruction on submitting and processing these expedited transfer requests, commanding officers “shall... expeditiously process a request for transfer of a Marine who files an unrestricted report of sexual assault. Every reasonable effort shall be made to minimize disruption to the normal career progression of Marines who seek transfer...” The letter further mandates expedited processing timelines, establishes a presumption in favor of transferring the Marine requesting transfer, and establishes a process to appeal a denial of that request to a general officer. This process allows a victim to request assignment to a different unit for his or her physical and/or mental well-being. Since February 28, 2012, 57 Marines have requested expedited transfer and all but one of the requests have been approved. The one Marine who was denied an expedited transfer was temporarily assigned to a service school when she requested the expedited transfer. The commander was able to return the Marine to her parent unit, which effectively accomplished the goal of separating her from the alleged offender.

At this early stage of the process, the Marine Corps also requires commanders of victims to submit an “8-day brief” to the first general officer in their chain of command, which provides general officers with valuable data about any trends in sexual assaults in their command and ensures all relevant victim services are being provided.

This past year, the Marine Corps also implemented 10 U.S.C. §1565b, which makes legal assistance, assistance by a SARC, and assistance by a sexual assault victim advocate available to victims of sexual assault. Additionally, 10 U.S.C. §1565b requires that victims of sexual assault be informed of the availability of such services as soon as practicable after the victim reports the sexual assault. The Marine Corps uses legal assistance attorneys to provide victims information about the following areas: (1) the Victim and Witness Assistance Program (VWAP), including the rights and benefits afforded the victim, such as the victim advocate privilege; (2) the differences between the two types of reporting in sexual assault cases (restricted and unrestricted); (3) the military justice system, including the roles and responsibilities of the prosecutor, defense counsel, and investigators; (4) services available from appropriate agencies or offices for emotional and mental health counseling and other medical services; (5) the availability of and protections offered by civilian and military protective orders; and (6) eligibility for and benefits potentially available as part of the transitional compensation program. Additionally, prosecutors will explain to victims how their privacy is protected under the military rape shield rule, Military Rule of Evidence (M.R.E.) 412.

In addition to the new counseling provided by legal assistance attorneys, the Marine Corps is also increasing the quality and professionalism of victim advocate services available to victims of sexual assault. Per the FY12 NDAA, all SARCs, VAs, and UVAs are mandated to complete 40 hours of specialized victim advocacy training, as part of the new credentialing requirements for Sexual Assault Prevention and Response (SAPR) personnel. This initiative reinforces the Marine Corps ability to ensure that SAPR personnel remain well equipped to establish a close and supportive relationship with victims, and to help victims understand their legal and privacy rights.

In response to another FY12 NDAA requirement, in FY13, the Marine Corps will hire 47 full-time civilian SARC and VA billets (25 SARCs and 22 VAs). The 25 new SARCs will greatly augment our current staff of 17, giving us a total of 42 full-time SARCs by the end of FY13. The 22 new VAs will be exclusive to the SAPR branch, and will augment the existing 42 VAs who are supported by the Family Advocacy Program. In addition, there are currently 67 Command SARCs and 813 UVAs across the Marine Corps. These new SARC and VA positions represent a move from part-time collateral duty billet holders to a professionalized cadre of victim service providers. The Marine Corps will also establish Sexual Assault Response Teams (SART), which is a collaboration with the Naval Criminal Investigative Service (NCIS), legal, medical, and other entities, designed to facilitate a multi-disciplinary approach to victim care, reduce re-victimization, and to provide a holistic response that extends beyond the boundaries of any one response service. The SARTs will also conduct quarterly reviews of regional trends in victim services.

Determining Offender Accountability. DoD Instruction 5505.18, dated 25 January 2013, directs MCIOs, including NCIS, to initiate investigations of all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. When NCIS initiates a sexual assault investigation, it will also investigate threats against the sexual assault victim, to include minor physical assaults and damage to property. If an adult sexual assault allegation is referred to another agency (e.g., local law enforcement or the Marine Corps Criminal Investigative Division), the reason for the referral must be fully documented in an investigative report that identifies the agency and states whether the MCIO will be involved in either a joint investigative or monitoring capacity. This Instruction also provides minimum training standards for the primary MCIO investigator assigned to conduct an investigation of sexual assault and provides standards for records maintenance.

The Marine Corps is working with the Navy to increase Sexual Assault Forensic Examination (SAFE) accessibility and the Sexual Assault Nurse Examiner capability. In addition, NCIS is utilizing the Adult Sexual Assault Program (ASAP), a surge team response to adult sexual assault cases to increase efficiency and expedite the handling of cases. Members of ASAP will receive comprehensive sexual assault training.

Investigation referred to a colonel commander for a disposition decision

On April 20, 2012 the Secretary of Defense (SecDef) issued a memorandum withholding initial disposition authority (IDA) in certain sexual assault offenses to the colonel, O-6, SPCMCA level. The SecDef withheld the authority to make a disposition decision for penetration offenses, forcible sodomy, and attempts to commit those crimes. This withholding of IDA to a Sexual Assault Initial Disposition Authority (SA-IDA) also applies to all other alleged offenses arising from or relating to the same incident, whether committed by the alleged offender or the alleged victim (i.e., collateral misconduct). On June 20, 2012, the Commandant expanded this withholding to include not just penetration and forcible sodomy offenses, but all contact sex offenses, child sex offenses, and any attempts to commit those offenses. The Marine Corps also made it clear that in no circumstance could the SA-IDA forward a case down to a subordinate authority for disposition. For example, if a Marine was initially accused of a non-consensual sex offense, along with orders violations and adultery, but the NCIS investigation did not substantiate the non-consensual sex offense, the SA-IDA would still be required to make the disposition decision on the remaining non-sexual assault offenses, even if those types of offenses were of the type normally handled at lower levels of command. The result is that the USMC now has a smaller group of more senior and experienced officers making disposition decisions for all sexual offense allegations and any related misconduct.

In accordance with Rule for Court-Martial (RCM) 306(c), prior to trial, a convening authority (the SA-IDA for sexual assaults) may dispose of charged or suspected offenses through various means: “Within the limits of the commander’s authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense,” by taking (1) no action, (2) administrative action, (3) imposing nonjudicial punishment, (4) disposing of charges through dismissal, (5) forwarding charges to a superior authority for disposition, or (6) referring charges to a court-martial.

Before making a decision regarding the initial disposition of charges, the convening authority must confer with his or her staff judge advocate (SJA), whose primary duties are to provide legal advice to commanders. In the Marine Corps model for providing legal services, the provision of legal services support (i.e. trial and defense services, review, civil law, legal assistance) is completely divorced from the provision of command legal advice. Practically, this means the commander’s SJA is not affiliated with the prosecutors who evaluate the evidence in the case and recommend whether to take a case to trial. Effectively, this ensures the commander and his SJA receive impartial advice (in addition to information from NCIS) in order to make an appropriate and well-informed disposition decision in accordance with RCM 306.

If a commander decides to proceed with charges against an alleged offender, the commander will file a request for legal services with the Legal Services Support Section (LSSS) or Legal Services Support Team (LSST) that services his or her command. Before a case can go to a felony-level trial, a general court-martial, the commander must first send the case to an Article 32 investigation.

According to Article 32, UCMJ, “[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 have been made.” A general court-martial may not proceed unless an Article 32 investigation has occurred (or the accused has waived it). Unlike a grand jury under Federal

Rule of Criminal Procedure 6, the proceeding is not secret and the military accused has the right to cross-examine witnesses against him or her.

RCM 405 governs the conduct of the Article 32 investigation and states in its discussion that “the investigating officer should be an officer in the grade of major... or higher or one with legal training... and may seek legal advice concerning the investigating officer’s responsibilities from an impartial source.” As a matter of regulation in the Marine Corps, for a case alleging a sexual assault, the Article 32 investigating officer (IO) must be a judge advocate who meets specific rank and experience requirements, in accordance with Marine Corps Bulletin (MCBul) 5813, “Detailing of Trial Counsel, Defense Counsel, and Article 32, UCMJ, Investigating Officers.” MCBul 5813 was published on 2 July 2012 and ensures that judge advocates who are detailed as trial counsel (TC), defense counsel (DC), and Article 32 IOs possess the appropriate expertise to perform their duties.

Once the Article 32 investigation is complete, the IO makes a report to the convening authority that addresses matters such as the sufficiency and availability of evidence; and that more importantly, contains the IO’s conclusions whether reasonable grounds exist to believe that the accused committed the offenses alleged and recommendations, including disposition. Although the rules of evidence generally do not apply at an Article 32 investigation, it is important to note that the evidentiary rape shield and all rules on privileges do apply, providing a level of protection for the victim.

The convening authority again receives advice from his or her staff judge advocate, and then decides how to dispose of the charges and allegations. Prior to making a disposition decision, convening authorities take the victim’s preference into consideration. If the commander decides to move forward, he or she may refer the charges to a general court-martial or a lesser forum.

Court-martial

Alcohol facilitated acquaintance sexual assaults are one of the most difficult criminal offenses to prosecute, regardless of jurisdiction. Within the military, they are also the most common type of sexual assaults that our investigators and prosecutors confront. Our analysis of ways to improve sexual assault prosecutions uncovered a broader overall trend in military justice. We noticed an increase in complex and contested cases as a percentage of our total trial docket. We realized that our historical model of providing trial services needed to be revised to better handle these complex cases, many of which involve sexual assault. The Commandant, as an example of the importance of the commander in the administration of military justice, therefore directed us to reorganize our legal community into a regional model that gives us the flexibility to better utilize the skills of our more experienced prosecutors. Practically speaking, our new regional model, which became fully operational on October 1, 2012, allows us to place the right prosecutor, with the appropriate training, expertise, supervision, and support staff, on the right case, regardless of location.

The legal reorganization greatly increases the legal expertise (based on experience, education, and innate ability) available for prosecuting complex cases. The reorganization

divided the legal community into four geographic regions — National Capital Region, East, West, and Pacific. These regions are designated Legal Service Support Areas (LSSA) and are aligned with the structure of our regional installation commands. Each LSSA contains a LSSS that is supervised by a colonel judge advocate officer-in-charge. Each LSSS contains a Regional Trial Counsel (RTC) office that is led by an experienced lieutenant colonel litigator whose extensive experience provides effective regional supervision over the prosecution of courts-martial cases. This new construct provides for improved allocation of resources throughout the legal community and ensures that complex cases, such as sexual assaults, are assigned to experienced counsel who are better suited to handle them.

While the Marine Corps does not specifically identify “special victim prosecutors,” this capability resides in the RTC offices through the use of Complex Trial Teams (CTT). The CTT is assembled for specific cases and may contain any or all of the following: a civilian Highly Qualified Expert (HQE), experienced military prosecutors, military criminal investigators, a legal administrative officer, and a paralegal. The civilian HQE has an additional role training and mentoring all prosecutors in the region. The HQEs are assigned to the RTCs and work directly with prosecutors, where they will have the most impact. HQEs report directly to the RTC and provide expertise on criminal justice litigation with a focus on the prosecution of complex cases. In addition to their principal functions of training and mentoring prosecutors, the HQEs also consult on the prosecution of complex cases, develop and implement training, and create standard operating procedures for the investigation and prosecution of sexual assault and similarly complex cases. The criminal investigators and the legal administrative officer in the RTC office provide a key support role in complex prosecutions. Historically, a prosecutor was individually burdened with the coordination of witnesses and experts, the gathering of evidence, background investigations, and finding additional evidence for rebuttal, sentencing, or other aspects of the trial. These logistical elements of a trial are even more demanding in a complex trial; the presence of criminal investigators and the legal administrative officer allow Marine Corps prosecutors to focus on preparing their case.

To support our prosecutors further, we created a Trial Counsel Assistance Program (TCAP) at our Judge Advocate Division Headquarters. Our TCAP consolidates lessons learned from throughout the Marine Corps and provides training and advice to our prosecutors in each region. The TCAP provides specialized training through regional conferences focused on the prosecution of sexual assaults. These training events include speakers on law enforcement techniques, victim and offender typology, expert witnesses, forensics, and the art of persuasion. Our reserve judge advocates, who are experienced criminal prosecutors, are made available to mentor our active duty judge advocates either during trainings or on specific cases.. Our TCAP also coordinates on a regular basis with the DoD Sexual Assault and Prevention Office to ensure Marine Corps initiatives meet DoD requirements. To ensure an adequate level of experience and supervision not only at the headquarters level, but also in each LSSS and LSST, we more than doubled the number of field grade prosecutors we are authorized to have on our rolls from 11 to 25. We also specifically classified certain key military justice billets to require a Master of Laws degree in Criminal Law.

As I mentioned earlier, any change I recommend to the Marine Corps’ system of dealing with sexual assault must carefully balance our ability to prosecute sexual assaults with our ability

to defend Marines accused of sexual assault. As concerned as I am that I have well-trained and competent prosecutors, I am equally concerned that each Marine accused receives a constitutionally fair trial that will withstand the scrutiny of appeal. To that end, last year we established the Marine Corps Defense Services Organization (DSO), which placed all trial defense counsel under the centralized supervision and operational control of the Chief Defense Counsel (CDC) of the Marine Corps. This change was designed to enhance the independence of the Marine Corps DSO and the counsel assigned to it, while enhancing the efficiency and effectiveness of available services. The DSO also established a Defense Counsel Assistance Program (DCAP) to provide assistance and training to the DSO on sexual assault and other cases.

During the court-martial process, special care is taken to ensure that the rights and interests of victims continue to be protected. The M.R.E. provides the same protections as our Federal and State courts against the humiliation, degradation and intimidation of victims. Under MRE 611, a military judge can control the questioning of a witness to protect a witness from harassment or undue embarrassment. More specifically for sexual assault cases, the military's "rape shield" in MRE 412 ensures that the sexual predisposition and/or behavior of a victim is not admissible absent a small set of well-defined exceptions that have survived extensive appellate scrutiny in federal and military courts (the exceptions listed in MRE 412 are identical to the exceptions listed in Federal Rule of Evidence 412). In addition, victims also have the protection of two special rules on privileges. Under MRE 513, a patient (victim) has the privilege to refuse to disclose, and prevent another person from disclosing, a confidential communication between the patient and a psychotherapist. Under MRE 514, the military has created a "Victim advocate-victim privilege" that allows a victim to refuse to disclose, and prevent another person from disclosing, a confidential communication between the victim and a victim advocate in a case arising under the UCMJ. These two evidentiary privilege rules ensure that victims have a support network they are comfortable using and that they do not have to fear that their efforts to improve their mental well-being will be used against them at a court-martial.

Convening Authority's Clemency Power

I am aware that the discretion of a convening authority under Article 60 is an issue of extreme importance to you based on the recent Air Force case. In that case, the convening authority dismissed a sexual assault offense after setting aside a guilty finding that was voted on by a panel of officer members. A commander setting aside a finding is atypical, and even rarer in cases involving sexual assault offenses. In order to assess the manner in which today's convening authorities exercise their clemency power, a 2007 Naval Law Review article examined 807 Navy and Marine Corps special and general courts-martial convened between 1999 and 2004. The author found that Convening Authorities exercised clemency in only about 4% of the cases, and in only about 2% of the cases that were convened in 2003 and 2004. A review of the Marine Corps cases over the past two fiscal years revealed similar results. Of the 967 general and special courts-martial cases in FY11 and FY12 that resulted in convictions, findings of guilty were disapproved in only 5 cases—less than 1% of the total amount of cases. None of the findings of guilty were disapproved for sexual assault offenses. More specifically, in FY12, for 115 general courts-martial (GCM) and 285 SPCMs, no guilty findings were set

aside for GCMs and 1 guilty finding was set aside for a SPCM. In FY11, for 154 GCMs and 413 SPCMs, findings were set aside in 3 GCMs and 1 SPCM.

A key reason for the Article 60 clemency authority involves situations where an accused faces multiple offenses at a general court-martial, and the most serious offense results in an acquittal. For example, an accused might face a general court-martial for the offenses of sexual assault, adultery, and violating an order on underage drinking. If the accused is acquitted of the sexual assault, he is left with a felony conviction for adultery and underage drinking. Standing alone, those two offenses are often handled at a lower misdemeanor forum, a special court-martial, or with administrative measures. In this type of situation, the convening authority may use his authority under Article 60 to dispose of the lower-level offenses in a more appropriate forum.

The Article 60 clemency authority is also closely linked to the sentencing aspect of a court-martial. Article 60 provides the authority to modify the sentence of a court-martial, which is a key component of the guilty plea process. In our military justice system, an accused can submit a pre-trial agreement asking for sentencing protection in exchange for his or her plea of guilty. However, even if the plea agreement is approved, the military judge or members are unaware of the protection contained in the agreement and will sentence the accused in a manner they feel appropriate based on the relevant evidence and facts and circumstances of the case. After the sentence is announced in court, the sentencing limitations agreed to by the convening authority will be honored in the post-trial process, pursuant to the convening authority's clemency power under Article 60. If the convening authority lacked this power, there would be no incentive for an accused to plead guilty, which would greatly hinder judicial economy and slow down the adjudication of the entire court-martial docket.

Article 60 interfaces with key aspects of the UCMJ and serves an important role in maintaining a commander's ability to ensure a fair court-martial process. It is not a stand-alone section of the UCMJ that can be easily severed without significant effects on other key portions of the military justice system. Therefore, modifications to Article 60 should involve a thorough analysis by the RSP and JPP.

Conclusion

The Marine Corps' ability to successfully prosecute and defend sexual assaults has never been stronger. We are succeeding in carefully balancing the commander's responsibility to maintain good order and discipline, the constitutional rights of the accused, and our obligation to protect and care for victims. Congress plays an important role in overseeing the proficiency and fairness of our military justice process. To this end, we are implementing many of the institutional changes Congress directed in the past two years. As you consider potential additional action in the area of sexual assault, I believe your establishment of the RSP and the JPP in the FY13 NDAA provides us the best chance to work together to make well-reasoned assessments and recommendations for any future reforms.

Attachment A

Sexual Assault Campaign Plan Summary

When we talk about preventing sexual assault, the Commandant uses the phrase “get to the left of the problem.” That means using training, policies, and initiatives to help us stop sexual assault before it takes place. In step with the Campaign Plan, our Sexual Assault Prevention & Response (SAPR) Office implemented large-scale Corps-wide training initiatives, utilizing a top-down leadership model. The dominant message in SAPR’s training model is for leaders to foster a climate where misconduct or crime—especially sexual assault—is not tolerated. SAPR training remains unequivocal in its assertion, however, that the inherent duty of preventing sexual assault belongs ultimately to Marines of every rank. The Campaign Plan was executed in three Phases, each with different goals.

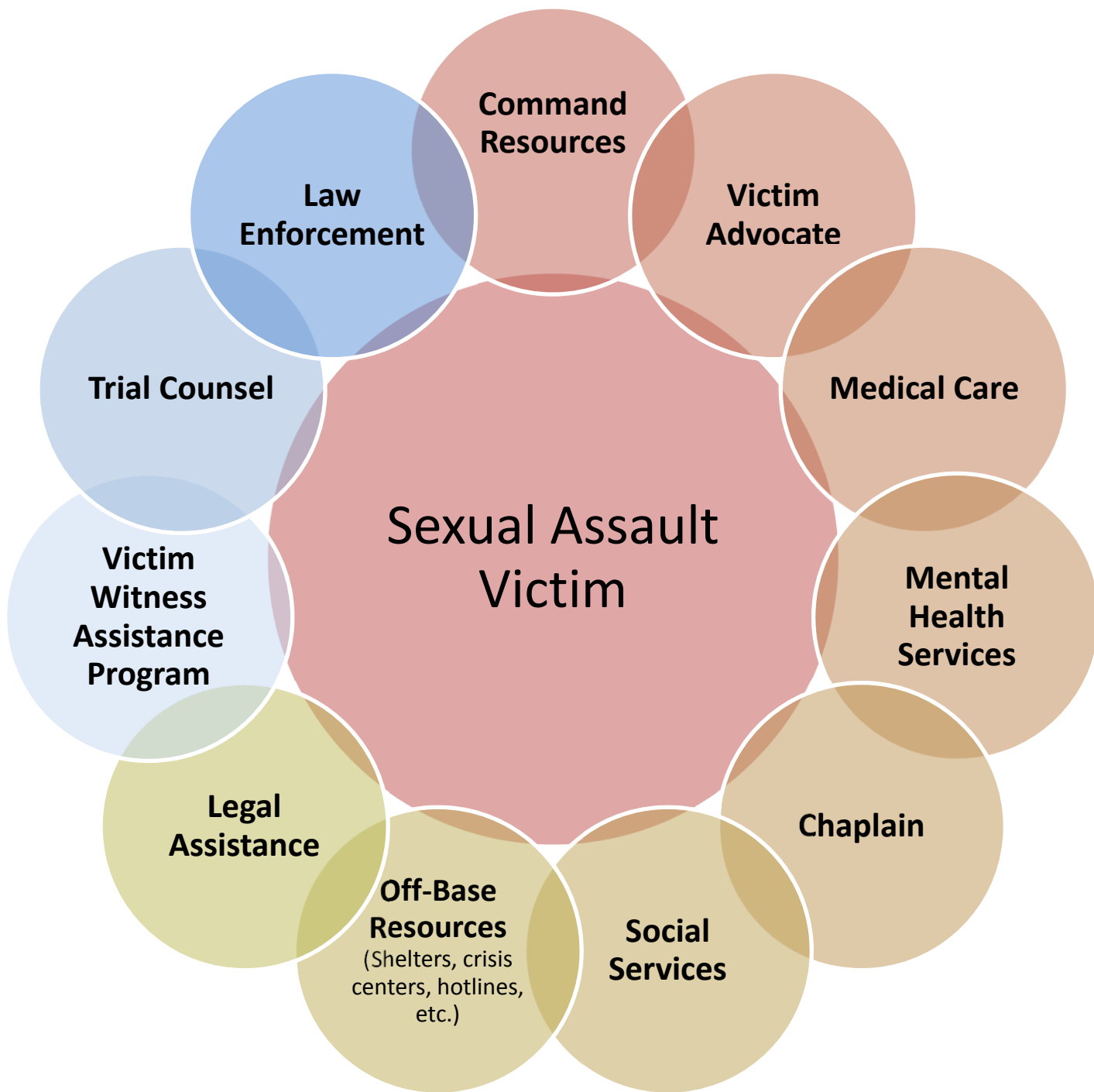
Phase I of the Campaign Plan, the “Strike” phase, focused on significantly increasing the quality and quantity of prevention-based training. It began with the publication of a CMC White Letter (a personal communication from the Commandant reserved for important issues) in May 2012. This White Letter was addressed to all Marines and charged them with creating an environment and command climate in which every Marine is treated with dignity and respect, and all Marines—whether victims or witnesses—are encouraged to report allegations of sexual assault. In July 2012, the Commandant directed every Marine general officer to attend a two-day SAPR General Officer Symposium (GOS), at Marine Corps Base Quantico. This two-day training event included subject matter experts who spoke on topics relevant to prevention, the use of alcohol as a weapon, inadvertent victim blaming, and dispelling myths. A similar symposium was held in August 2012 for all Marine Sergeants Major. Building on the momentum of these personal interactions with his leaders, the Commandant also directed three focused training initiatives on sexual assault. The first initiative was Command Team Training for commanders and their senior staff. This consisted of one and one-half days of training presented in the form of guided discussion, case studies, Ethical Decision Games (EDGs), and SAPR Engaged Leadership Training. The second initiative was “Take a Stand” training for all non-commissioned officers. Comprised of videos, mini-lectures, guided group discussions, and activities, this training was geared toward establishing a positive command climate that encourages Marines to intervene, to “step up and step in,” to prevent sexual assault among fellow Marines. The third training initiative was “All Hands Training,” required for all Marines and attached Navy personnel in the form of informal lectures, guided discussions, and EDGs. Presented by Commanding Officers, Sergeants Major and leaders across the Corps, “All Hands Training” relayed the Commandant’s message that he “expects Commanding Officers, Officers-in-Charge, and senior enlisted to spare no effort in changing the prevailing conditions and attitudes that are allowing this crime to happen among our ranks.” The Commandant also traveled around the world between the spring and fall of 2012 speaking to Marine leaders about “who we are” as Marines and what it means to uphold the integrity of the title “Marine.” Although these “Heritage” speeches discussed a variety of issues, a main focus was the Commandant’s personal interest in changing behavior so that we prevent sexual assaults from occurring, and if they do occur, that Marines are comfortable and confident enough in their leadership and the military justice system to report an allegation of sexual assault.

Phase II of the Campaign Plan, the “implementation” phase, focuses on customizing the Phase I SAPR training, along with improving the Marine Corps’ response capability. Phase II began on November 10, 2012 and will last for six to twelve months. Training is being developed that is specific to different phases of military education, such as delayed entry accession programs, Recruit Depots, entry-level schools, Primary Military Education (PME) schools, Commanders and Senior Enlisted Courses, officer PME schools, and the pre-deployment environment. Annual training requirements are also being customized in a manner specific to grade. This building block approach will ensure training remains fresh and in accord with a Marine’s knowledge and experience. Phase II also implemented changes in how to respond to sexual assaults, which I will discuss in the next section.

Phase III of the Campaign Plan is conditions-based. Most notable among these conditions is the assessed success of Phases I and II, and the integration of other programs into a holistic, truly sustainable effort.

Attachment B

AGENCIES, ENTITIES, AND INDIVIDUALS WHO INTERACT WITH A SEXUAL ASSAULT VICTIM OVER THE DURATION OF A SEXUAL ASSAULT CASE



The entities in blue (Law Enforcement, TC, and VWAP) do not provide victim services; however, they are tasked by statute and regulation with providing information to victims over various stages of a case.

Attachment B

- Commanders (MCO 1752.5B(draft); MCO 1754.11; MCO 5800.14(draft); Sexual Assault Campaign Plan 2012; MCO 3504.2; MARADMIN 317/09; MARADMIN 372/12; MARADMIN 624/12; HQMC Letter of Instruction, dtd 28 Feb 2012)
 - Appoints at least two SAPR UVAs at each battalion, squadron, or equivalent level command; appoints a VWAC.
 - Ensures unrestricted reports of sexual assault are responded to promptly and professionally, with due care for each victim's welfare.
 - Establishes clear standards for personal behavior, and holds offenders appropriately accountable.
 - Just after an allegation: Ensures the physical safety and emotional security of the victim; determines if the victim desires/needs any emergency medical care; notifies the appropriate military criminal investigative organization (MCIO), as soon as the victim's immediate safety is assured and medical treatment is provided; to the extent practicable, strictly limits knowledge of the facts or details regarding the incident to only those personnel who have a legitimate need to know; takes action to safeguard the victim from any formal or informal investigative interviews or inquiries, except those conducted by the authorities who have a legitimate need-to-know; ensures the SARC is notified immediately; collects only the necessary information (e.g. victim's identity, location and time of the incident, name and/or description of offender(s)); advises the victim of the need to preserve evidence (by not bathing, showering, washing garments, etc.) while waiting for the arrival of representatives of the MCIO; ensures the victim understands the availability of victim advocacy and the benefits of accepting advocacy and support; asking if the victim needs a support person, which can be a personal friend or family member, to immediately join him or her; immediately notifying a Victim Advocate for the victim; asks if the victim would like a Chaplain to be notified and notify accordingly; determines if the victim desires/needs a "no contact" order or a Military Protective Order, DD Form 2873, to be issued, particularly if the victim and the accused are assigned to the same command, unit, duty location, or living quarters; ensures the victim understands the availability of other referral organizations staffed with personnel who can explain the medical, investigative, and legal processes and advise the victim of his or her victim support rights; and listens/engages in quiet support of the victim to assure the victim that she/he can rely on the commander's support
 - Quickly processes requests for expedited transfer.
 - Submit an Operations Event/Serious Incident Report (OPREP-3) to higher headquarters when appropriate.
 - Submit SAPR 8 Day Brief no later than the 8th day after the report of sexual assault to the first general officer in the victim's chain of command.
 - After consulting with staff judge advocate, O-6 level Sexual Assault Initial Disposition Authority documents initial disposition decision.
 - Attend monthly Case Management Group meetings.
 - Convening Authorities should consider victims' views, when offered, prior to acting on a pretrial agreement.
 - Process offenders for administrative discharge if no discharge awarded at court-martial after conviction for a sexual assault offense.

Attachment B

- Sexual Assault Response Coordinator (SARC), Victim Advocate (MCO 1752.5B(draft); MCO 1754.11)Victim Advocate
 - Sexual Assault Prevention and Response (SAPR) Victim Advocate provides integrated response capability & system accountability for awareness, prevention and response training, and care for adult sexual assault victims. Facilitates victim care by coordinating medical treatment, including emergency care, & tracking the services provided to victims of sexual assault from initial report through final disposition and resolution. Serves as central point of contact within a command.
 - Family Advocacy Program (FAP) Victim Advocates and Clinical Counselors provide short-term clinical treatment services to eligible beneficiaries who are involved in child abuse and domestic abuse. Provide comprehensive victim advocate assistance and support to victims of domestic abuse and sexual assault, to include the development of a safety plan, and other services similar to SAPR.
SARC submits a report into the Defense Sexual Assault Incident Database (DSAID).
- Medical (BUMEDINST 6310.11; MCO 1752.5 B(draft))
 - Provides medical treatment, including emergency care, in a timely manner. Emergency care shall consist of emergency medical care and the offer of a sexual assault forensic examination (SAFE) consistent with the DoJ protocol and should refer to DD Form 2911, “DOD Sexual Assault Medical Forensic Examination Report” and accompanying instructions; and medical intervention to prevent loss of life or undue suffering resulting from physical injuries internal or external, sexually transmitted infections, pregnancy, or psychological distress.
 - Provides follow-on medical care, to include psychological counseling.
- Chaplain (SECNAVINST 1730.9; SECNAVINST 1730.10; MCO 1752.5B(draft))
 - Facilitates access to the SAPR program at the individual’s location.
 - Provides faith-based counseling, mentoring and spiritual direction based on theologically derived truths. They also deliver relational counseling which is based on the trust gained through a shared experience of military service and characterized by confidentiality and mutual respect.
 - Commanders and chaplains are required to honor the confidential relationship between service personnel and chaplains.
- Law Enforcement (DoDI 5500.18; DoDD 6495.01; DoDD 6400.1; SECNAVINST 5430.107)
 - Military criminal investigative organizations (MCIOs) will initiate investigations of all offenses of sexual assault of which they become aware.
 - When an MCIO initiates a sexual assault investigation, it will also initiate and conduct subsequent investigations relating to suspected threats against the sexual assault victim, to include minor physical assaults and damage to property.
 - In cases of child sexual assault, coordinates with Child Protective Services.

Attachment B

- Trial Counsel/Support Staff (MCO 1752.5B(draft); MCO 1754.11; MCO 5800.14(draft); JAGAINST 5800.7F)
 - Identifies victims in a case prior to preferring charges and ensures each individual receives a DD Forms 2701-2704.
 - Ensures that victims are notified of their rights and provided information concerning the criminal justice process. Contacts the applicable VWACs to ensure that proper support and resources are provided.
 - Ensures notification to the victim of various stages and milestones throughout the military justice process.
 - Ensures victim's views concerning prosecution and plea negotiations are obtained and forwarded to the convening authority prior to the signing of any pretrial agreement.
 - Informs victims of the opportunity to present evidence to the court at sentencing.
 - Informs victims and witnesses of basic information about the post-trial process.
 - Confers with victim to determine whether he/she wants to receive information about confinement status of accused.
 - Consults with convening authority and staff judge advocate and provides military justice advice, including the likelihood of prevailing in a prosecution at court-martial.
 - Ensures results of trial are forwarded to chain of command, SJA, VA, SARC, NCIS.
- VWAP (MCO 5800.14(draft))
 - Reduces the trauma, frustration and inconvenience experienced by victims and witnesses of crime; informs victims of their statutory rights; and, assists victim and witness understanding of the military justice process.
- Legal Assistance Attorney (10 USC 1565b; DoD (P&R) Memo on Legal Assistance for Victims of Crime)
 - Provides legal assistance support as authorized by law and regulation.
 - Provides victims information regarding their rights under the VWAP and applicable law and regulation, such as:
 - The rights and benefits afforded a victim; the military justice system; the ability of the government to compel cooperation and testimony; the contempt power of the court; protections offered by civilian and military restraining and protective orders.
 - When requested by a victim, contacts the creditor of a victim who is subjected to serious financial strain caused by the crime(s) or by cooperation in the investigation or prosecution of an offense.
- Off-Base Resources
 - Shelters, crisis centers, hotlines, etc.
- Social Services
 - Workplace safety, childcare, house, etc.