

UNITED STATES DEPARTMENT OF DEFENSE  
WASHINGTON HEADQUARTERS SERVICE  
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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT  
CRIMES PANEL

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COMPARING SYSTEMS FOR INVESTIGATION,  
PROSECUTION, AND DEFENSE OF  
SEXUAL ASSAULT CASES

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THURSDAY  
DECEMBER 12, 2013

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The panel convened in the  
Multipurpose Room in San Jacinto Residence  
Hall at the University of Texas at Austin, 309  
East 21st Street, Austin, Texas, at 8:00 a.m.,  
The Honorable Barbara Jones, Panel Chair,  
presiding.

PANEL MEMBERS PRESENT:

THE HONORABLE BARBARA JONES, Chair  
THE HONORABLE ELIZABETH HOLTZMAN  
VICE ADMIRAL (RETIRED) JAMES HOUCK\*  
BRIGADIER GENERAL (RETIRED) COLLEEN McGUIRE  
BRIGADIER GENERAL (RETIRED) MALINDA DUNN  
COLONEL (RETIRED) HOLLY COOK  
PROFESSOR ELIZABETH HILLMAN  
HARVEY BRYANT

STAFF PRESENT:

WILLIAM SPRANCE, Designated Federal Officer  
COLONEL PATRICIA HAM, Staff Director  
DILLON FISHMAN

\*Participating via teleconference

**SPEAKERS:**

MARTHA BASHFORD, Chief, Sex Crimes Unit,  
New York County District Attorney's  
Office

LANE BORG, Executive Director,  
Metropolitan Public Defenders, Portland,  
Oregon

CAPTAIN JASON BROWN, Military Justice Officer,  
Military Justice Branch (JAM), Judge  
Advocate Division, Headquarters Marine  
Corps, U.S. Marine Corps

COLONEL DON CHRISTENSEN, Chief, Government  
Trial and Appellate Counsel Division,  
Air Force Legal Operations Agency, U.S.  
Air Force

LIEUTENANT COLONEL ERIK COYNE, Special Counsel  
to The Judge Advocate General

CAPTAIN ROBERT CROW, Director, Criminal Law  
Division (Code 20), U.S. Navy

KELLY HIGASHI, Assistant United States  
Attorney, Chief, Sex Offense and  
Domestic Violence Section, U.S.  
Attorney's Office, District of Columbia

LAURIE ROSE KEPROS, Director of Sexual  
Litigation, Colorado Office of the State  
Public Defender

COMMANDER DON KING, Director, Defense Counsel  
Assistance Program, U.S. Navy

LIEUTENANT COLONEL FANSU KU, Chief, Defense  
Counsel Assistance Program, U.S. Army  
Trial Defense Service, U.S. Army

LIEUTENANT COLONEL MIKE LEWIS, Chief, Military  
Justice Division, U.S. Air Force

JANET MANSFIELD, Attorney, Sexual Assault  
Policy, Office of The Judge Advocate  
General, U.S. Army

CAPTAIN STEPHEN MCCLEARY, Chief, Office of  
Legal Policy and Program Development,  
U.S. Coast Guard

BILL MONTGOMERY, Maricopa County Attorney,  
Maricopa County, Arizona

LIEUTENANT COLONEL JAY MORSE, Chief, U.S. Army  
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New Mexico Public Defender Department

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Trial Counsel Assistance Program, U.S.  
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MAJOR MARK SAMEIT, Branch Head, Trial Counsel  
Assistance Program, U.S. Marine Corps

CAPTAIN SCOTT (RUSS) SHINN, Officer-in-Charge,  
Defense Counsel Assistance Program,  
Marine Corps Defense Services  
Organization, U.S. Marine Corps

DR. CASSIA SPOHN, Foundation Professor and  
Director of Graduate Programs, School of  
Criminology and Criminal Justice,  
Arizona State University

JAMES WHITEHEAD, Supervising Attorney, Trial  
Division, Public Defender Service for  
the District of Columbia

LIEUTENANT COLONEL DEVIN WINKLOSKY, Vice Chair  
and Professor, Criminal Law Department,  
The U.S. Army Judge Advocate General's  
Legal Center and School, U.S. Marine  
Corps

T-A-B-L-E O-F C-O-N-T-E-N-T-S

	PAGE
Comments - Panel Chair . . . . .	5
The Unnamed Conspirator in Sexual Assault Cases. . . . .	5
Overview of Article 120, Uniform Code of Military Justice . . . . .	.98
Disposition of Subjects Under DOD Jurisdiction ("Waterfall Slides") . . . . .	171
Statistical Analysis of "Waterfall Slides". . . . .	256
Training, Experience and Best Practices: Comparison of Military and Civilian Defense Counsel. . . . .	304
Training, Experience and Best Practices: Comparison of Military and Civilian Prosecutors. . . . .	404
Panel Deliberation . . . . .	501

1 P-R-O-C-E-E-D-I-N-G-S

2 (8:32 a.m.)

3 COLONEL HAM: Good morning and  
4 welcome to the continuation of this Public  
5 Meeting of the Response Systems Panel, Judge  
6 Jones.

7 CHAIR JONES: Thank you. We have  
8 a full day today and I'm very pleased to  
9 announce that our very first presenter will be  
10 Ms. Anne Munch, who's written a wonderful  
11 article named "The Unnamed Conspirator," and  
12 without any additional commentary on my part,  
13 Ms. Munch, we'd love to hear from you.

14 MS. MUNCH: Good morning.

15 (Multiple good mornings)

16 MS. MUNCH: Thank you very much  
17 for the invitation to come and talk with you  
18 and present a little bit of information to you  
19 this morning.

20 I am just -- it's really an honor  
21 to get to educate at any level, and I wanted  
22 to express appreciation for that. Also to let

1           you let know that this a presentation that I  
2           provide for civilian audiences, military  
3           audiences, I work a lot of with the Department  
4           of Defense and with all of the branches of the  
5           military.

6                        I'm a consultant and I am paid for  
7           that work, just in full disclosure, as well as  
8           by colleges, universities, and civilian folks.  
9           So this is just, I get to just kind of present  
10          to you as I would to any other group and I  
11          appreciate that opportunity to do that.

12                       So I'll get started with that and  
13          what I'd like to do is talk a little bit about  
14          the issue of sexual assault from my  
15          perspective.

16                       So I was a career prosecutor in  
17          Colorado for about 13 years and went to law  
18          school, understood and digested the concepts  
19          around what justice kind of looks like, how  
20          justice is administered in the civilian world,  
21          and I thought that I understood all of that.

22                       And what I noticed when I stepped

1           into prosecuting cases and especially cases of  
2           sexual assault after about a year in County  
3           Court where you can't do too much damage, you  
4           know, they move you up into District Court to  
5           do the felonies, and I had a steady diet in  
6           the Domestic Violence and Sexual Assault Unit  
7           in Denver, in the Denver D.A.'s Office, of  
8           these kinds of cases.

9                           And what I realized was that while  
10           I had made an assumption in my practice and in  
11           my legal education that basically when you had  
12           a sexual assault you had two parties to that  
13           sexual assault, you have the victim and you  
14           have the offender.

15                           And that justice was determined  
16           based on what happened between those two  
17           parties. I took that assumption with me up  
18           into that specialized unit and I realized that  
19           I was wrong.

20                           As I started doing cases of sexual  
21           assault, and specifically sexual assault that  
22           involved adult victims, I realized that this

1 assumption that I had made and what I had seen  
2 in other kinds of cases where this seemed to  
3 be true, in robbery cases, and other kinds of  
4 cases, it wasn't true in sexual assault cases.

5 As I started looking and examining  
6 I understood that there was indeed another  
7 influence, there was another party that was  
8 involved in these cases.

9 Now this party was not listed in  
10 the police reports, not listed in the charging  
11 document, didn't come into court, raise a hand  
12 and testify, and didn't go back and to  
13 actually deliberate in the jury room, but as  
14 I saw this third party, the involvement of  
15 this third party in these cases, I started to  
16 kind of scratch my head as it was providing me  
17 with what I thought were some interesting, if  
18 not challenging, results.

19 And so I decided, you know, I need  
20 to understand this a little bit more because  
21 the third party was influencing the outcome of  
22 the cases, more than either of those two

1 entities on the board, more than the evidence  
2 itself.

3 It was having the lion's share of  
4 outcome, or of influence over the outcome of  
5 these cases and I decided it was important to  
6 really try to get to know and understand that  
7 influence.

8 And so what do you do when you're  
9 trying to understand something, we either  
10 learn its name or if it doesn't have a name  
11 you give it a name. I gave it a name, and  
12 this is something that I call the Unnamed  
13 Conspirator.

14 And so this is going to be kind of  
15 a tour, a birds-eye view through concepts that  
16 I think are really important that undermine  
17 how we approach these cases and what we bring  
18 to the cases and the influence of the Unnamed  
19 Conspirator in these cases, day in, day out,  
20 in every jurisdiction that I've ever, ever  
21 come to know.

22 So that's what I'm going to do.

1 I'll take you on a tour with this Unnamed  
2 Conspirator concept. The truth is to see or  
3 understand the influence of the Unnamed  
4 Conspirator you actually don't have to look  
5 too far.

6 You will see examples, and I will  
7 give you examples from a day in the life of  
8 myself or from court cases and that kind of  
9 thing to help try to demonstrate this.

10 And my first example just comes  
11 from a morning in my world, in Denver,  
12 Colorado, when I was trying to relax, a  
13 Saturday morning, had a stressful week, you  
14 know, they tell you it's a good idea to get  
15 away from your work so I was creating a day  
16 like that for myself, coffee brewing, you  
17 know, Labrador Retriever runs out to go get  
18 the newspaper for me, I'm pretending I don't  
19 have a job.

20 And she brings the paper in and  
21 all was well in my world in terms of trying to  
22 create a day of, you know, relaxation for

1 myself until I opened up the newspaper and on  
2 the front page of the Denver Post was this  
3 picture with an accompanying story.

4 Now what this is, this is a  
5 breakout banner that was painted by the  
6 Chatfield High School Cheerleading Team in  
7 order to basically cheer on their team to  
8 victory in this football game that they had  
9 and, General Dunn, that was kind of what my  
10 eyes did, too.

11 I looked at this and I read this,  
12 what it says is "Mighty Chatfield High School  
13 Men Rape the Raptors," all right. Now I don't  
14 know where the adults were when the  
15 cheerleaders in high school decided this was  
16 a great idea, apparently they weren't present  
17 when the banner was painted.

18 But this is what they came up  
19 with, right, and so it surprised everybody,  
20 including the football players who were  
21 running to this banner thinking boy, I was  
22 here to play football today and somebody has

1 a different kind of idea, I'm sure it was  
2 confusing for them.

3 And so the cheerleaders made  
4 apologies to everyone concerned, to the other  
5 cheerleaders, to the football players, they  
6 got them some education, some folks stepped in  
7 and said, you know, that's really a kind of  
8 startling thing that you came up with so let's  
9 get you some education.

10 That's all fine and I appreciated  
11 that, other people kind of let the issue go,  
12 but I did not because this was compelling to  
13 me as I looked at this and I understood, you  
14 know, this is the influence of the Unnamed  
15 Conspirator.

16 As I was beginning to develop or  
17 understand this concept this is what I saw  
18 here and the reason is because I found myself  
19 staring at this picture that morning in my  
20 living room going, what is it that inspires  
21 high school aged girls to think that wishing  
22 rape on anyone is okay?

1                   What is it that helps them  
2                   understand or what do they get from their  
3                   world that says if you really want to win, if  
4                   you really want to dominate, if you really  
5                   want to make a showing to the other side, what  
6                   do you do to other side, you rape the other  
7                   side, right?

8                   And I thought, I mean that just  
9                   was startling for everyone, but to me it was  
10                  more than startling it was concerning because  
11                  I started thinking about high school aged  
12                  girls, right.

13                  I started thinking about girls or  
14                  young women in that age group and I just ask  
15                  you as a Panel, you know, if any of you have  
16                  a high school aged daughter or anyone in the  
17                  audience has a high school aged daughter, she  
18                  comes home to you, she says, you have been  
19                  teaching me all my life to be independent and  
20                  so here's the acceptance letter to the college  
21                  or the university that I have chosen.

22                  And I've done all the work and

1 I've got the scholarships lined up and she  
2 hands you this, and you do your homework as a  
3 good parent and you find out that if she  
4 chooses that particular college or university  
5 she has a one in four, maybe a one in five  
6 change of being the victim of a violent  
7 robbery because she chose that school.

8 And the question that I ask you or  
9 would ask myself is are we going to let, we're  
10 going to send our daughters to a school like  
11 that? No. We're going to be asking  
12 questions.

13 What's going on at this college or  
14 university? Why is this happening and who's  
15 doing something about it? How is that this is  
16 happening to such a large population of these  
17 students and why don't we know about it,  
18 right? We'd be asking questions.

19 And yet what I find is that if we  
20 just switch our focus, and that's what this  
21 lecture will mostly be about, is switching our  
22 focus to look at kind of things in other

1 realms, we see perhaps some startling  
2 information.

3 And that is, you know, so in a  
4 large study of colleges and universities, 32  
5 of them, where 6000 students were surveyed,  
6 they were given a survey like so many of us  
7 have taken that asked them, you know, about  
8 their lives, about their study habits, their  
9 work habits, et cetera.

10 And in that survey was a question  
11 that what basically, you know these surveys  
12 contain behavior-based questions, so I want to  
13 give you an idea of what the question was so  
14 that we can understand a little bit about our  
15 concepts and how the Unnamed Conspirator  
16 influences how we see this problem.

17 So the question would be posed,  
18 for example, has anybody ever forced you to  
19 have sexual intercourse when you didn't want  
20 to by holding you down or twisting your arm,  
21 et cetera, right?

22 A behavior-based question that is

1 written in a way to see whether or not  
2 somebody's behavior or something they've  
3 experienced has matched up with a violation of  
4 the law.

5 And so if anybody answers yes to  
6 that question that clearly meets the legal  
7 definition of sexual assault, rape, that kind  
8 of genre, pretty much anywhere around the  
9 Country or under the UCMJ.

10 When you ask that behavior-based  
11 question you find out that, in this survey,  
12 one in four had been the victim during their  
13 college years of a rape or an attempted rape.

14 And yet when you look at the next  
15 portion of this slide only 27 percent of them  
16 considered themselves to actually have been  
17 victims of rape even though what they  
18 described happened to them clearly met the  
19 legal definition.

20 So there's a big discrepancy,  
21 right. They are saying yes, somebody held me  
22 down, forced me, penetrated me, and I didn't

1 want it to happen. Clearly meets the legal  
2 definition of rape, and yet you ask them to  
3 self reflect on what that was and only 27  
4 percent of them identify themselves as having  
5 been sexually assaulted or raped.

6 So then the question is why?  
7 There's a disconnect there, right? I'm pretty  
8 sure that most folks that are the victims of  
9 bank robberies or of other kinds of violent  
10 crime get that and they understand.

11 We don't have the majority of them  
12 not identifying themselves as victims. So  
13 then that begs the question, why? Why is  
14 that? And, of course, part of it is that  
15 they've been coached up and schooled up in our  
16 culture, what we see in the media, what is  
17 popular, to understand "what a real rapist  
18 looks like," you know.

19 And so we all kind of rely on or  
20 we go back to that image often that we've seen  
21 in the media, which is, of course, the  
22 stranger who jumps out of the bushes and has

1 the knife and wears a mask and everybody knows  
2 that person, he probably smells bad, too.

3 And he is the one that we kind of  
4 maybe understand is a rapist. It's easier for  
5 us as a culture to see that person as a  
6 rapist, and it is for these college-aged women  
7 as well.

8 And so part of the thinking, I  
9 surmise, is well, I knew him, 84 percent of  
10 these victims knew their attacker. That's not  
11 rape, right? Not only that, but 57 percent of  
12 these assaults happen on a date.

13 And so then you have this young  
14 college-aged woman who is in a position of  
15 well, let's see, you know, my parents taught  
16 me, hopefully, about trusting, about having  
17 good boundaries, all those kinds of things,  
18 and just like you and I make decisions around  
19 whether it's okay to be alone in a situation  
20 with a person, whoever it is, whether it's a  
21 cab driver, or whether it's a friend, or  
22 whether it's somebody that we work with, or

1           whether it's a coach, you name it.

2                       We make decisions based on what we  
3 believe we see and understand on whether it's  
4 okay to be alone with someone. They make that  
5 same decision. They meet someone, they trust  
6 them, to the outside appearance they are kind,  
7 they're well spoken, maybe they're a good  
8 athlete or a good debate, you know, team  
9 member, whatever it is.

10                   They make a decision that they  
11 trust that person, just like you and I do,  
12 right? Any of us who have sweat peas or any  
13 significant others in our lives, we made  
14 decisions to be alone with these people at  
15 some point.

16                   They make that same decision and  
17 then, very sadly, because the hard part of  
18 this is that we really can't tell who the  
19 rapist is and that's the disturbing news of  
20 this because it makes it a difficult problem  
21 to treat.

22                   But because you can't tell any

1 better than I can nor than they could most of  
2 the time, they make a decision to be alone and  
3 then that person takes that opportunity,  
4 forces a rape on that person and then here  
5 they are, right, in their college experience.

6 Perhaps part of the study that  
7 bothered me the most around this was that 42  
8 percent of them didn't tell anybody and only  
9 5 percent of that particular study reported to  
10 the police, right, so again this is one study.

11 But I think it's important because  
12 we learn so much from it and it underscores so  
13 much of what I have come to learn and  
14 understand about victim dynamics.

15 So that is I think important and  
16 significant for us to see, wow, you know,  
17 there's plenty of them who are experiencing  
18 this, very few of them are identifying what  
19 happened to them as rape and then they're  
20 really not talking about it, and only 5  
21 percent of them are saying ah, this is  
22 criminal and I need to call the police.

1                   In a college setting, again,  
2                   different study, but, you know, we get a  
3                   little bit more information. We understand in  
4                   the later study 20 percent of college-aged  
5                   women experienced this, 6 percent of college-  
6                   aged men were experiencing this kind of  
7                   conduct.

8                   About half of the women were  
9                   incapacitated by drugs or alcohol and the  
10                  majority of these assaults happened in the  
11                  first four semesters, which tells us a lot of  
12                  information in my opinion.

13                  And that is because, you know,  
14                  when you think about a person, a student, a  
15                  college-aged student in their first four  
16                  semesters, of course they're not as practiced,  
17                  knowledgeable, aware, et cetera, as the people  
18                  in their last four semesters.

19                  And it is not a coincidence nor is  
20                  it just a, you know, a mistake that the  
21                  majority of these rapes happened and are  
22                  directed toward that more vulnerable

1 population.

2 In the Air Force, again, just to  
3 kind of round this out a little bit to provide  
4 some information around, from the Gallup study  
5 that was done, they learned an awful lot of  
6 very direct information in this survey that  
7 they did.

8 And what we learned, you know,  
9 are, unfortunately, very similar kinds of  
10 problems, if you will, that there are high  
11 numbers of women and men that are experiencing  
12 this and that the reporting is very, very low.

13 That most of these are happening  
14 or being committed, I should say, against the  
15 victims in their first two to three years of  
16 service, same thing, right?

17 So what this tells us is this is a  
18 cultural problem, that this happens across  
19 communities, whether they're military or  
20 civilian in very similar ways and that part of  
21 the reason for these numbers I'm submitting to  
22 you is the influence of the Unnamed

1           Conspirator, who we'll get back to now.

2                       Okay. So as we develop this  
3           concept of the Unnamed Conspirator what I'd  
4           like to do is take a pause here and there's  
5           really, the easiest way for me to help you  
6           understand what I'm trying to describe is to  
7           let you hear the influence of the Unnamed  
8           Conspirator in the actual voice of a victim.

9                       And so what I'd like to do, and  
10          I'd like to just give a heads up to people,  
11          I'm going to play a part of a 911 tape, all  
12          right, and in this 911 tape this victim  
13          describes a sexual assault.

14                      And I say that partly because  
15          there are often survivors in the room. I want  
16          to be, I'm always sensitive to that, and if  
17          I'm going to play something that can be a  
18          little bit difficult to listen to or something  
19          like that I like to give a heads up before I  
20          do that.

21                      What I'd like you to do when you  
22          listen to this is to listen specifically, you

1 know, listen to what she reports or what she  
2 says, but please listen specifically for the  
3 influence of this character that I'm trying to  
4 create for you called the Unnamed Conspirator  
5 and then we'll talk about the tape.

6 (Audio playback)

7 OPERATOR: Police.

8 CALLER: Yes, I need to speak with  
9 somebody.

10 OPERATOR: Okay, How can I help  
11 you ma'am?

12 CALLER: I was raped earlier --

13 OPERATOR: Yes.

14 CALLER: -- or at least I felt  
15 like I was.

16 OPERATOR: Okay. Where are you  
17 right now?

18 CALLER: I'm at home.

19 OPERATOR: When did the incident  
20 occur?

21 CALLER: At home.

22 OPERATOR: At home?

1 CALLER: Yes.

2 OPERATOR: By who, ma'am? Who did  
3 this to you? Ma'am?

4 CALLER: A guy.

5 OPERATOR: Is he your boyfriend?

6 CALLER: No.

7 OPERATOR: Is he a friend of  
8 yours?

9 CALLER: No.

10 OPERATOR: Who is he?

11 CALLER: This guy that I met at a  
12 bar.

13 OPERATOR: Did you give him  
14 consent, ma'am?

15 CALLER: No.

16 OPERATOR: No. How long ago did  
17 this happen? About 20 minutes, half an hour?

18 CALLER: About three hours.

19 OPERATOR: Three hours ago. Is he  
20 still there, ma'am?

21 CALLER: No.

22 OPERATOR: No. He left?

1 CALLER: No. Yes, he left.

2 OPERATOR: He left, okay.

3 CALLER: I'm sorry. I wasn't  
4 going to call this in.

5 OPERATOR: No, it's better that  
6 you do.

7 CALLER: But my doctor referred me  
8 to a hospital who also referred me and said,  
9 you know, you have to make a police report  
10 before we'll do anything.

11 OPERATOR: Okay, but you didn't go  
12 to the hospital yet?

13 CALLER: No, they won't let me go  
14 until I make a police report that's I why I  
15 called you back.

16 OPERATOR: Okay. Did he hit you?

17 CALLER: Yes.

18 OPERATOR: He did hit you?

19 CALLER: Yes.

20 OPERATOR: Okay.

21 CALLER: My head hurts.

22 OPERATOR: He hit you with what,

1 ma'am?

2 CALLER: I don't know.

3 OPERATOR: Hit you with his hand

4 or --

5 CALLER: With his fist.

6 OPERATOR: With his fist?

7 CALLER: Yes.

8 OPERATOR: Okay. And you just met  
9 him at the bar?

10 CALLER: Yes. It's my fault.

11 OPERATOR: No, it's not.

12 CALLER: Well kind of it was. I  
13 was drinking.

14 OPERATOR: No, but that doesn't  
15 give him the right to violate you, ma'am.

16 CALLER: I said no.

17 OPERATOR: Okay. What's his name,  
18 do you know?

19 CALLER: No.

20 OPERATOR: Okay. Was he black,  
21 white, Hispanic?

22 CALLER: White.

1 OPERATOR: White male. Do you  
2 know about how old he was?

3 CALLER: Twenty-eight.

4 OPERATOR: Twenty-eight, about how  
5 tall? About how tall, ma'am?

6 CALLER: 6' 1".

7 OPERATOR: Six foot, six feet, or  
8 6' 1"? Okay. How much do you think he  
9 weighed? Was he pretty --

10 CALLER: 180.

11 OPERATOR: 180, okay. And did he  
12 have a beard or a mustache?

13 CALLER: No.

14 OPERATOR: No.

15 CALLER: No facial hair.

16 OPERATOR: Clean shaven, okay.

17 What kind of clothing was he wearing?

18 CALLER: A white t-shirt and blue  
19 jeans with a vest, a jean vest. Why am I  
20 doing this?

21 OPERATOR: Are you there by  
22 yourself?

1 CALLER: No. My friend is here.

2 OPERATOR: Okay. It's better that  
3 you report it, like I said, he doesn't have  
4 the right to violate you.

5 CALLER: I think it's my fault.

6 OPERATOR: It doesn't matter,  
7 ma'am --

8 CALLER: I was drinking.

9 OPERATOR: No. That doesn't  
10 matter.

11 CALLER: I told him to come over,  
12 but then I said no leave me --

13 OPERATOR: Okay. So it's not your  
14 fault. You told him no, so it's not your  
15 fault, okay?

16 CALLER: He wasn't --

17 OPERATOR: He left in a car or on  
18 foot?

19 CALLER: I don't know.

20 OPERATOR: You have no idea? How  
21 did he --

22 CALLER: He left in a car.

1 OPERATOR: Okay. So he followed  
2 you from the bar?

3 CALLER: No. He came with me in  
4 my car.

5 OPERATOR: Oh, he came with you in  
6 your car?

7 CALLER: Yes. It's my fault, see.

8 OPERATOR: No, it's not.

9 CALLER: I brought him over to my  
10 house. It's totally my fault.

11 OPERATOR: Okay.

12 MS. MUNCH: Okay. So I'd like to  
13 talk a little bit about what you just heard in  
14 this tape before we move on. One thing I'll  
15 just point out, obviously she got some bad  
16 medical advice, right?

17 Somebody told her you can't even  
18 come to see us to get medical care unless you  
19 report this to the police and that was,  
20 somebody missed the boat somewhere because  
21 that's, of course, not how it works.

22 But otherwise would she have

1 called? She tells us no. She would not have  
2 called otherwise. She was calling to try to  
3 get medical attention.

4 I have a tendency to think of some  
5 of these things that I use by their theme,  
6 right? I name the tapes in my own mind or on  
7 my computer by the theme. Do you have an idea  
8 what I might call this tape?

9 FEMALE PARTICIPANT: It's my  
10 fault.

11 MS. MUNCH: It's my fault, right.  
12 This is the "it's my fault" tape, right. And  
13 you can hear very clearly that she has  
14 ingested the blame for this and she is even  
15 trying to convince the dispatcher that this is  
16 her fault.

17 So let's talk a little bit about  
18 that because I think this is really key and  
19 important and this is one of the places where  
20 sexual assault cases fall out very differently  
21 than some other cases.

22 So what are some of the reasons?

1 Give me just a few reasons that she might be  
2 blaming herself? Why is she doing that? If  
3 you can, would you, sir?

4 MEMBER BRYANT: Because society  
5 has taught females, and it is a stereotypical  
6 approach that if you got drunk and you invited  
7 a stranger to your house that you in fact got  
8 what you deserved or you asked for it.

9 MS. MUNCH: Right.

10 MEMBER BRYANT: And that's where  
11 that whole it's my fault guilt trip, there's  
12 more aspects to it, but that's one of the  
13 reasons.

14 MS. MUNCH: Sure. Sure, she meets  
15 him at bar, right? She didn't meet him at  
16 church. I mean she meets him at a bar, they  
17 drink together, and then she brings him home,  
18 right.

19 And so in her mind you can very  
20 clearly hear, if you picture your internal  
21 grandmother for a second, if you will, I mean,  
22 you know, or someone who is wagging a finger,

1           you can almost hear that, exactly what you  
2           just articulated.

3                         And you can hear that she has  
4           ingested that. Now what's interesting to me,  
5           especially about this particular case is that,  
6           all right, so she's got herself, you know,  
7           she's understood the rule book, the rule book  
8           that is provided to potential victims of crime  
9           which says don't do stupid things and if you  
10          do, you know, this is pretty much your fault.

11                        And that is, I will tell you, in  
12          my experience, a lot of what keeps victims  
13          from ever coming forward either for help or a  
14          formal report is because they have ingested  
15          that message just like she did.

16                        But what else do we know about the  
17          issue of consent or non consent in this  
18          particular case? What did we hear verbally?  
19          What was said? What did she tell him?

20                        MEMBER BRYANT: Well he hit her.  
21          So there was a force involved.

22                        MS. MUNCH: Right.

1                   MEMBER BRYANT: I thought it was  
2 interesting, at the very, very beginning when  
3 she first starts to speak she says "I was  
4 raped, or at least I think I was."

5                   MS. MUNCH: Right. Very good.

6                   MEMBER BRYANT: Yes.

7                   MS. MUNCH: Yes. And so, yes, so  
8 he, and she --

9                   MEMBER BRYANT: And with that same  
10 intonation, "at least I think I was" --

11                   MS. MUNCH: "At least I think I  
12 was" --

13                   MEMBER BRYANT: Yes.

14                   MS. MUNCH: That's right. Now she  
15 also tells him a word that we're pretty  
16 familiar with. What was that word?

17                   FEMALE PARTICIPANT: No.

18                   MS. MUNCH: No, right. She tells  
19 him no. She also asks him to do something,  
20 which was what? Did you hear that? Leave.  
21 And he refuses to leave.

22                   So in terms of verbally, because

1 when you're looking at consent we know that  
2 that is either words or actions, or a  
3 combination of those kinds of things.

4 She tells him no. She asked him  
5 to leave and he refuses to leave. Then, and  
6 I'll just say, you know, just to pose a  
7 question, because again this is more based in  
8 common sense than anything, but the last time  
9 anyone in this room decided that, you know,  
10 they were interested in a sexual act with  
11 their spouse or partner or whoever, and their  
12 spouse or partner didn't want to and uttered  
13 that word, you know, my question to my  
14 teaching audiences is, is typically how much  
15 sex follows that word, right, in any of our  
16 lives, is none.

17 You know, we understand what that  
18 means and the rules are not different just  
19 because this person is in this particular  
20 category, meaning, you know, she tells him no,  
21 she asked him to leave, he refuses, and then  
22 he hits her in the face as you noted.

1                   I cut the tape off a little early,  
2                   but it sounds like he may have broken her  
3                   nose. The doctor is concerned that her nose  
4                   might be broken and he is trying to get her in  
5                   for medical attention.

6                   So even under circumstances like  
7                   that, where you have that kind of physical  
8                   force and you have no and please leave and a  
9                   refusal for a person to leave your home, she  
10                  is convinced that this is her fault.

11                  That is the influence that we're  
12                  dealing with that I think needs to be named  
13                  before really any of us in any kind of the  
14                  circles that we work on on this issue can  
15                  really understand what progress looks like.

16                  All right, let's switch the field  
17                  for a second. We've talked about those  
18                  college-aged women, military-aged women, and  
19                  some men. You know, when we look at the guys  
20                  and we kind of give them those similar kinds  
21                  of surveys, whether it's in the civilian  
22                  population or whether it's in the military

1 population, it's a similar stage, right.

2 So Dr. David Lisak, who did the,  
3 you know, groundbreaking research on the  
4 undetected rapist, he has surveyed about 2000  
5 college-aged men, gives them a survey, asks  
6 them about all kinds of things. One of the  
7 things specifically that he asks about, of  
8 course, are their sex habits, because he's  
9 trying to get information about what are they  
10 up to.

11 In those surveys is a typical  
12 question that reads as follows, "have you ever  
13 forced anyone to have sexual intercourse when  
14 they didn't want to, by holding them down or  
15 twisting their arm," et cetera. Right, again,  
16 a behavior-based question.

17 To that behavior-based question 6  
18 percent of his population said yes, I have  
19 done that. In a similar set of studies that  
20 they have done, McWhorter, and other folks at  
21 the Naval Recruiting Center in Great Lakes,  
22 Michigan, they learn similar information, but

1 the number is about, in the latest study, the  
2 number is about 13 percent of the Naval  
3 recruits who had been there one year or were  
4 just coming in had done that, all right.

5 So if we ask the question instead  
6 "have you ever raped anybody" in that survey,  
7 what do you think the answer would be? No,  
8 right? Because, again, the Unnamed  
9 Conspirator's influence here is that, you  
10 know, while they admit to doing the conduct  
11 they are adamant, when you ask them to self  
12 reflect about this, they are adamant that what  
13 they did was not rape.

14 Yes, maybe I did that, but I'm not  
15 a rapist. Okay, sure, I held her down or I  
16 did this, but I'm not a rapist. Why is that?  
17 Part of that is because, who do they think is  
18 the real rapist. They are thinking about the  
19 same person that the college-aged women are  
20 thinking about. It is the stinky, smelly guy  
21 who jumps out of the bush, you know, and  
22 commits a stranger assault.

1                   And please hear me, those are very  
2                   real rapes and I am not undermining the  
3                   importance or the significance of a rape by a  
4                   stranger, but it has a tendency to kind of be  
5                   the default, where as you see even in the  
6                   research when you look at Cassia Spohn's  
7                   research, or any other research around, how  
8                   juries decide cases and how prosecutors decide  
9                   whether to even bring charges.

10                   They have a tendency to give a lot  
11                   of weight to cases where a person is raped  
12                   under circumstances where they report right  
13                   away, and perhaps are assaulted by a stranger.  
14                   Okay, so that has all informed, both our  
15                   victim population and our offender population  
16                   and it's something that we really need to be  
17                   aware of. Probably the most frightening thing  
18                   for me is that from Dr. Lisak's research, of  
19                   the 6 percent of the men who admitted to doing  
20                   this once, 63 percent of them were serial  
21                   rapists averaging four rapes per rapist.

22                   And in the military survey, 71

1           percent of them were serial rapists, averaging  
2           seven rapes per rapists, by the time they take  
3           this survey.

4                        So what we know about these cases  
5           is typically it is not he said-she said or he  
6           said-he said, it is almost always he said-they  
7           said, and that is part of the problem, is that  
8           in opinion we don't see the problem, because  
9           the Unnamed Conspirator along with a lot of  
10          other influence is very much at work and that  
11          is part of the challenge that we have in any  
12          community.

13                      MEMBER BRYANT:   May I ask a  
14          question at this point?

15                      MS. MUNCH:    Please.

16                      MEMBER BRYANT:   That the 88  
17          percent who don't consider that that was rape,  
18          do you think that that has to do with the low  
19          reporting rates at all, in other words, it  
20          must not have been rape because she didn't  
21          call the police?

22                      MS. MUNCH:    I would say, well I

1 don't have a specific answer to that, I would  
2 say, of course, factors such as that one would  
3 play into a mind set, that and many other  
4 kinds of things that could justify "why I'm  
5 different."

6 And clearly when we have this  
7 repetitively going on and no reports coming  
8 from that kind of conduct, and you have a  
9 serial rapist who will tell you well, sure, I  
10 did this on this occasion and this on that  
11 occasion and almost the identical thing on  
12 another occasion, and none of those victims  
13 will come forward.

14 That has influence on their, you  
15 know, self-perception. Okay, so we brought up  
16 the subject of alcohol, I'm going to take you  
17 a little bit further into this concept. And,  
18 again, these are just ways to get you to think  
19 differently. So we've talked about and you  
20 heard in the 911 tape, alcohol is a factor,  
21 right. Probably 70 percent of our cases,  
22 alcohol is a factor on one or both sides, so

1 let's look at that because this is one of the  
2 great tools that the Unnamed Conspirator uses.

3 And so to do this, this is just a  
4 little exercise where I would ask the audience  
5 to, you know, picture yourself at the end of  
6 a stressful week. I'm assuming that you're  
7 responsible drinkers, if you drink at all.  
8 And let's just say at the end of this week you  
9 decide to get together with friends, family,  
10 whoever is here with you and, you know, you're  
11 going to relax a little bit.

12 You're going to have, share a  
13 beer, you know, if you have hair, you're going  
14 to let your hair down, you know, kind of an  
15 evening. I mean you just need to chill out  
16 for a little bit. And so you get together  
17 with your friends and while in that setting  
18 and you have a designated driver, the whole  
19 thing, you know, you drink a couple of beers,  
20 all right. You drink a couple of beers.

21 Now most people that I ask about  
22 this say oh, yes, and I want you to, this is

1 a visualization for you, so just picture  
2 yourself in that situation, end of the week,  
3 you've had a couple beers. How does that  
4 feel? If you drink responsibly, you've had a  
5 couple beers at the end of a stressful week,  
6 let's be honest, what is the feeling around  
7 that? Collective, anybody, tell me, ah, or  
8 something, you know.

9 I mean if that's a responsible  
10 thing that you can do most people it's like  
11 okay, that's nice. And had you gone home at  
12 about that period of time, probably would've  
13 been a great decision, but let's say it was a  
14 really stressful week and so you actually  
15 follow those two beers up with three  
16 margaritas, all right.

17 And so you have now, at this  
18 setting, had a couple of beers and three  
19 margaritas. This is your visualization not  
20 mine, but I'm assuming that people are feeling  
21 kind of drunk and that nobody's driving a car,  
22 et cetera. And when you picture this it can

1           become a little uncomfortable as you think  
2           about the queasiness in your stomach or the  
3           spinning room or whatever it is. You probably  
4           should've gone home, but you didn't, you stuck  
5           around and you followed that up with four  
6           jello shots, okay.

7                         So in this one night this is what  
8           you've consumed with your friends, all right.  
9           And, your visualization not mine, but  
10          typically, when I ask the audience they will  
11          say, I have a toilet in my visualization, I am  
12          passed out in my visualization, I'm sick as a  
13          dog, whatever it is, that's a lot of alcohol,  
14          is that fair to say?

15                        That's a lot of alcohol. All  
16          right, so let's juxtapose that with, you know,  
17          how we would think that your friends and your  
18          peers and your family would treat you, under  
19          a circumstance like that. I mean I have 16  
20          nieces and nephews and they all call me when  
21          there's a problem in their lives. I just have  
22          that whatever it is, I'm the one that gets

1           those phone calls.

2                           And one of my nephews called me  
3           his freshman of college and reported to me  
4           basically, you know, I took my first midterm,  
5           we went out with a bunch of friends, I got  
6           really drunk. He got like this drunk that  
7           we're talking about. And he said and my  
8           friends got really worried about me, because  
9           I was throwing up and kind of passed out, so  
10          they took me across campus to the infirmary  
11          and, you know, a police officer showed up on  
12          their way while they were trying to stumble my  
13          nephew across the campus to get to the  
14          infirmary and said hey, what's going on?

15                           And they said well, you know, he's  
16          really sick, we're trying to get him over to  
17          get some help, and the officer said that's a  
18          really good idea. You're taking good care of  
19          him. And they said well would you put him in  
20          your car and drive him because he's heavy, and  
21          the officer said no, I really don't want you  
22          throwing up in my car, but I will call you an

1 ambulance.

2 And so he called an ambulance for  
3 my nephew, who went by ambulance across campus  
4 to the infirmary where he stopped getting  
5 sick, they gave him liquids, they brought his  
6 blood alcohol content down, right, he spent  
7 the night.

8 The next morning he went directly  
9 from there to take his second midterm, he  
10 tells me on the phone, and then he called me.  
11 And as we talked about this, other than his  
12 being terribly hungover, you know, I was  
13 listening and paying attention to how, what  
14 his, kind of his friends did for him. He was,  
15 you know, calling me because he didn't know  
16 how to explain the \$734.00 charge for the  
17 ambulance that was coming on his tuition bill  
18 two weeks later when he was coming home for  
19 Thanksgiving, and I did a little intervention  
20 so his mother didn't kill him.

21 But, nonetheless, you know, he  
22 called me, and he reached out that way. But

1 the point was, look at how he was treated, all  
2 right, look at how he was treated.

3 And I want you to juxtapose that  
4 to, let's enter the Unnamed Conspirator into  
5 this realm, where alcohol really lives and  
6 exists and shapes our thinking to another day  
7 in my life when I was on the 16th Street Mall  
8 in Denver, killing some time before we all  
9 went to a play, went into a tourist shop,  
10 looked around the tourist shop, looked up at  
11 the t-shirts on the walls and found this one  
12 which reads, "two beers \$7.00, three  
13 margaritas \$15.00, four jello shots \$20.00,  
14 taking home the girl who drank all of the  
15 above, priceless," all right.

16 So I see a very different  
17 packaging of the same amount of information  
18 that you just visualized yourself, having  
19 consumed that much alcohol. We look at this,  
20 and I'm bothered by these kinds of t-shirts  
21 that are marching around all over the place.  
22 I see them on college campuses, people, you

1 know, think that this is a good idea somehow.  
2 This is really just an advertisement to how to  
3 commit a rape, really. That's what this is  
4 and how to kind of successfully do that.

5 And it is bothersome to me and it  
6 bothered me that day, so I had someone go back  
7 and get the t-shirt so that I can just talk  
8 about it in that context, because the truth  
9 is, for you or me or anybody who decides and  
10 makes the decision to drink that much alcohol,  
11 you're vulnerable, right?

12 Maybe you make yourself, if you  
13 will, vulnerable. But the point is, we have  
14 a tendency to focus on the vulnerability and  
15 sometimes not on other things. The  
16 vulnerability itself has no meaning unless  
17 someone decides to take advantage of it. And  
18 that is a place I think sometimes where we get  
19 stuck, you know, that the alcohol question,  
20 you know, the truth is my nephew was fine,  
21 because his friends saw his vulnerability and  
22 they took care of him.

1           That's where sometimes, or that is  
2           where, I will say, the rapist sees an  
3           opportunity as opposed to a potential  
4           emergency. Anybody who has ever had a surgery  
5           understands that before, you know, because  
6           there are lawyers in the world, you know, we  
7           have to sign consent forms and that kind of  
8           thing before anybody cuts into us, but we sign  
9           those forms not at this point, we sign them  
10          earlier, right?

11           Nobody can consent to anything  
12          when they are basically passed out or under  
13          the influence of ethanol or any other kinds of  
14          those things, and yet I will tell you, we have  
15          a double standard in our culture that says oh,  
16          no, that's actually okay. It's okay to, you  
17          know, if this doctor decided to, you know,  
18          repair the ACL and then go operate on the  
19          brain or take out the appendix, without  
20          permission that would not be okay, right?

21           And yet it's important for us to  
22          force our thinking, to see, do we have a

1 double standard? And that's the point of  
2 this, because the logical consequences of  
3 drinking too much alcohol is a hangover.  
4 We tend to get mad at victims who drink. You  
5 know, we see this all over in the literature,  
6 and we certainly see this with panelists and  
7 jurors, they don't like it.

8 And, you know, the truth is, this  
9 is what any person who drinks too much alcohol  
10 deserves. We see the evidence of the Unnamed  
11 Conspirator as well on the general public, I  
12 just throw Jerry Springer up there because he  
13 reminds me of kind of getting opinions out of  
14 the general public.

15 There has been some, and this is a  
16 condensed version that I'm giving you, but,  
17 you know, we get some information by polls or  
18 by talking with folks. A time CNN did a poll  
19 a long time ago, but they don't do them very  
20 often, what we found, or what they found was  
21 that in asking about the subject matter, that  
22 a whole lot of people said that a raped woman

1 is partly to blame is she dresses  
2 provocatively, all right.

3 And that is an opinion, I can tell  
4 you, that is alive and well in our culture and  
5 in the military. I have this conversation all  
6 the time with airmen, sailors, marines, you  
7 know, Army and commanders. I want to  
8 challenge the thinking around this by telling  
9 you again a story, another true story, just  
10 out of the day of the life of Anne Munch where  
11 I went to a wedding reception, I was seated at  
12 a beautiful white linen tablecloth for a  
13 friend of mine's wedding, next to a guy that  
14 reminded me of the person on the screen.

15 It wasn't this person, I don't  
16 know who this is, really, but he reminded me  
17 of this, and what I mean by that is that he  
18 was very wealthy and he was really good  
19 looking and he was beautifully coiffed, nails  
20 nicer than mine, gorgeous, you know, Italian  
21 suit, the whole thing. I'm seated next to  
22 him, he was an elderly gentleman, and I

1 thought well, you know, this is nice, I'll  
2 just try not to spill on him though because  
3 he, you know, I can't afford the cleaning bill  
4 for this guy.

5 So he strikes up a conversation  
6 with me and he simply asked me a question,  
7 which is a very nice social question that most  
8 people ask, which is so, Anne, tell me what  
9 you do for a living, right? Now that should  
10 be a warning sign to me, honestly, and then  
11 sometimes I avoid that question because this  
12 is exactly what happens when I answer that  
13 question. I said well, I said at the time,  
14 I'm a prosecutor and an educator in the area  
15 of domestic violence and sexual assault, and  
16 it stopped the conversation.

17 And he said to me, sexual assault?  
18 And I said, yes. And he said rape. And I  
19 said yes, you know, and he got this kind of  
20 very serious, stern, kind of grandfatherish,  
21 look on his face and he said to me the  
22 following, and I quote, because I'll never

1 forget it, quote "You know, we wouldn't have  
2 that problem if those women would just stop  
3 wearing those floozy clothes."

4 And I though oh, man. I just  
5 wanted a piece of cake, but I've got to stop  
6 and educate a 65-year-old, you know, first,  
7 because I can't leave that one just sit out  
8 there. So I asked him, I said wow, I said,  
9 "So you feel that way?" He said, "I do." I  
10 said, "Well, can we talk about it, you know?"  
11 and so what I did was I pulled something from  
12 jury selection, actually, because prosecutors  
13 are good at trying to come up with different  
14 kinds of questions to try to get through the  
15 mire of some of these ideas that people hold.

16 And so I just pulled something out  
17 and I had a conversation that sounded much  
18 like the following. I said, "Okay, sir, I  
19 said let's say that you leave this wedding  
20 dressed exactly like you're dressed, and you  
21 drive off in your beautiful car, with your  
22 Rolex watch and you realize on your way away

1 from the wedding reception that you are short  
2 on cash.

3 And so you see an ATM sign in the  
4 distance, and so you pull your car over and  
5 you hop out of your car looking just like  
6 you're, you know, like you do, and you flash  
7 your watch and you pull out your big, fat,  
8 thick wallet from your back pants pocket, and  
9 you walk up to the ATM terminal and you put  
10 that plastic card in there and you start  
11 getting cash, all is good."

12 "At the same time," I said,  
13 "there's another person, he goes up to the  
14 other ATM terminal. He's wearing blue jeans  
15 and a t-shirt and flip flops and he drives a  
16 rusted out Toyota Corolla, but he has that  
17 same plastic debit card.

18 So he puts his debit card into the  
19 other machine and he's getting money, too.  
20 It's like Vegas, you know, everybody is  
21 winning and the scene is happy until a robber  
22 comes from around the corner and he sizes up

1 the situation, I said, and he picks you and he  
2 takes your money, takes your wallet, takes the  
3 card, loves your watch, grabs your keys, takes  
4 the cash, and off he goes driving away in your  
5 car and he leaves you standing there with your  
6 chin on the ground."

7 I said, "What just happened to  
8 you?" He said well, "I was robbed." I said  
9 "Yes, what are you going to do?" He said,  
10 "I'm going to call the police." I said,  
11 "Great idea." So you call the police and you  
12 have the witness wait there and the police  
13 come, and they get out of the car and they  
14 look at your companion and they look at you  
15 and they look you up and down.

16 And you say, "Help, help, I was  
17 robbed." And they say, "I just have one  
18 question for you. Is this what you were  
19 wearing at the time that this happened? Like  
20 you can't dress like that and come to an ATM  
21 store, you're practically advertising that  
22 you're available, you know, for this

1 particular kind of crime. I mean what were  
2 you thinking? You can't wear those clothes.  
3 I mean people will take from you if you do."  
4 And he looked at me and I said, "But wait,  
5 there's more." I said, "So you call the  
6 police and the police decide to do an  
7 investigation, but," I said, "Guess what, they  
8 investigate you."

9 So they call you back, and they  
10 say, "Sir, we found out that you give money  
11 away all the time to your wife, to your kids,  
12 to your grandkids, to the United Way, every  
13 week, \$200 out of your paycheck.

14 You're really a philanthropist and  
15 yet, you're expecting us to believe that you  
16 were robbed, when you're in this habit of  
17 giving money away. We don't think that, we  
18 think you have credibility issues, plus we saw  
19 what you were wearing, so please don't waste  
20 our time."

21 And he looked at me, and I  
22 silenced him, which was not, and it's not a

1 good thing to do at dinner party, but he  
2 looked at me and his comment was, "You know  
3 what, Anne," he said, "I never really thought  
4 of it that way."

5 And I counted that as win and I  
6 went and I got my cake and we moved on, right.  
7 But part of the point was he was iterating a  
8 rule out of the rule book around clothing.  
9 And the truth, is I'm bothered by that because  
10 if you stop and really examine your thinking  
11 about what's beneath that kind of thinking,  
12 that if she dresses really hot he can't help  
13 himself, he can't control himself. That is  
14 such an offense to men. For us to tell you,  
15 well, we're sorry, but you just can't help  
16 yourself. And so you're at fault if he gets  
17 aroused.

18 I mean it's a concept, I'm not  
19 sure where it came from, other than some  
20 ancient time and yet we do drag this forward  
21 and we do drag it, I mean women and men will  
22 dress for sexual attention, clearly. And

1 people on beaches wear swimsuits, right, and  
2 they have very little covering them, and yet  
3 it is within this context that we begin to  
4 assign blame if a person takes advantage of  
5 another person under circumstances such as  
6 that.

7 So thanks for listening, that's a  
8 floozy. In case you want to know what he was,  
9 I wondered, and so if it's a rule, don't dress  
10 like a floozy then just get rid of this and  
11 hopefully we're all fine.

12 All right. The influence is also  
13 seen on children. When we look at or talk to  
14 children, we learned very interesting things  
15 from middle schoolers when we asked them about  
16 their attitudes in this area. Sixty-two  
17 percent of the boys and 58 percent of the  
18 girls said it's okay to force a woman to have  
19 sex, if the couple's been dating for more than  
20 six months, which is a little bit like the,  
21 you know, what's he supposed to do if you get  
22 him aroused rule, but it's a 6-month time

1 period.

2 And that's kind of scary. They  
3 also tell us, half and half tell us that  
4 girls, or a woman, who is walking alone is  
5 actually asking to be raped. That is  
6 disturbing, and brings up a case in a  
7 jurisdiction where I was a prosecutor, these  
8 are the mountains of Telluride, Colorado,  
9 which was a wonderful, a hard duty, really, to  
10 have to work there, but I did.

11 And, you know, Telluride's a  
12 really safe town. I mean I moved there from  
13 the Denver D.A.'s Office where it was, you  
14 know, the knife and gun club and very violent  
15 stuff. I move here to where it literally, I  
16 have everything from illegal possession of elk  
17 to homicide, you know, over a very large kind  
18 of rural jurisdiction and it was a nice breath  
19 of fresh air in many ways.

20 But it was a safe town. I will  
21 tell you the truth I didn't even, I wasn't  
22 always diligent even about locking my doors.

1 A young woman goes out at nine o'clock at  
2 night in this town to go get something to eat.

3 There's not a lot open around  
4 9:00. She goes to a bakery in Telluride which  
5 is called Baked in Telluride, to get a slice  
6 of pizza. Unfortunately for her on her way  
7 down to that bakery, she was abducted off the  
8 street by a stranger, stuck into a car, driven  
9 outside of Telluride up onto one of the high  
10 mountain mesas in the area, where she's  
11 dragged back out of the car through a barbed  
12 wire fence, she's raped in a field, this man  
13 drags her back through the fence, puts her  
14 back in the car and drives her back into  
15 basically the heart of town here and releases  
16 her and then he flees, okay.

17 First question, do you think she  
18 recognized what happened to her as rape?  
19 Sure, right. This is the guy we all love to  
20 hate, you know, so she called the police.  
21 They did a great investigation. There are  
22 only two ways into and out of Telluride, you

1 got to really want to get there, it's in a  
2 boxed canyon, you know. So they set up blocks  
3 on each of the exits out of Telluride.

4 Down the road a ways they  
5 apprehended this person, they brought him  
6 back, she picked him out of a show up, they  
7 did a photo lineup, she picked him out of a  
8 lineup, they did a, you know, they collected  
9 the forensic evidence, she took them to the  
10 crime scene, they found her clothing fibers in  
11 the barbed wire fence.

12 Great case, put it together, you  
13 know, boxed and packaged, sent it to the  
14 prosecutor's office, the prosecutor's office  
15 accepted the case for charges, the defendant  
16 pled not guilty and the case went to trial.

17 Of course, in a civilian  
18 jurisdiction, on these kinds of felony  
19 matters, almost without exception you need a  
20 unanimous verdict of 12 jurors, for either  
21 guilt or innocence. And on the facts of the  
22 case that I just told you, this is a jury that

1           hung, all right. This is a jury that was a  
2           hung jury. They couldn't decide on a verdict.

3                       Now as it turns out, because we  
4           are allowed to talk to jurors after the fact  
5           and that kind of thing, and find out about  
6           their deliberations and their thoughts, it  
7           turns out that there were three holdout jurors  
8           that didn't, you know, want to convict the  
9           defendant. So there were nine jurors that did  
10          and there were three that didn't. I can also  
11          tell you that that jury broke down along  
12          gender lines, and what I mean by that is that  
13          there were, the three holdout jurors were of  
14          the same gender.

15                      My question is, do you think that  
16          they were men or do you think that they were  
17          women? They were women, all right. They were  
18          women. So what do you think that this women  
19          were "hung up on," if you will?

20                      MEMBER COOK: The fact that he  
21          brought her back to town.

22                      MS. MUNCH: Yes, that and what

1           else, do you think? You brought her back into  
2           town, but they were also hung up on something  
3           that she had done. She walked alone at night.  
4           Part of their question was, what was this  
5           young woman doing walking by herself at 9  
6           o'clock at night, right?

7                         And the point is, I think it's  
8           interesting, because when you think about  
9           sometimes, what we all carry into this realm  
10          of trying to understand sexual assault, the  
11          point of this is that, we all have baggage,  
12          all right, we all have baggage, and sometimes  
13          this baggage lines up along gender lines kind  
14          of specifically.

15                        And what I would say, and this is  
16          my speculation, this is how I tried to  
17          understand what their decision was, or what  
18          they struggled with. You know, women are  
19          raised from the time they're this big, to  
20          understand that we can be, you know, we're  
21          very vulnerable to this crime.

22                        I mean, very well-meaning fathers,

1       brothers, boyfriends, mothers, tell us, honey,  
2       it's a bad world, do this, don't do that,  
3       right, they kind of tell us, don't walk alone,  
4       get a German Shepherd, you know, whatever it  
5       is, here's the things that you want to do to  
6       avoid this crime.

7                   And I think what happened is these  
8       three jurors went in, they went into their  
9       safe town of Telluride, they sat down in the  
10      panel area for the jury, they found out what  
11      the charge was. And my guess is that it was  
12      like, oh my gosh that's terrifying. I don't  
13      ever want to think that that can happen to me,  
14      right?

15                   And so sometimes the typical  
16      thinking, we know this, around when we study  
17      victim blaming, or we study, you know, a kind  
18      of attrition of responsibility, or attribution  
19      of responsibility, I think their thinking was,  
20      I want to know what she did, because I want  
21      something I can control. What did she do?  
22      Oh, she walked alone at night, well, that's

1           why it happened. And if I can do that then  
2           I'm safe, because all I have to do is not walk  
3           alone at night and I can go on into my life  
4           and feel and believe that I am safe, okay?

5                       And it's a very, very common thing  
6           that we see in this area, and I think it's  
7           what informed this case. But it scares me, as  
8           well, that even the kids who are coming up  
9           believe that somebody walking alone, perhaps,  
10          is asking for this.

11                      You'll learn more specifically  
12          about this later, but what I will say is, just  
13          in one slide, when you look at actual research  
14          that has been done on actual jurors who decide  
15          these cases, not mock jurors, but Calvin and  
16          Zeisel and Gary LaFree, who have talked to  
17          deliberating jurors on actual simple rape  
18          cases, meaning, no knife, no gun, you know,  
19          one assailant, one victim, et cetera, they  
20          have some very strong opinions around how they  
21          make their decisions, including, in the later  
22          research at the University of New Mexico by

1 LaFree, admitting to disregarding the evidence  
2 and making their decisions on a rape case,  
3 based on their perceptions of the victim's  
4 character and lifestyle.

5 That is concerning, right? That  
6 is concerning. Because, if we're making  
7 decisions based on a victim's character and  
8 lifestyle, we're really not concentrating on  
9 offender behavior.

10 To illustrate that, real quickly,  
11 this is the Chief of Police from Burlington,  
12 Vermont, past Chief of Police is a guy named  
13 Tom Tremblay, who I work with in the work that  
14 I do, great Police Chief, fantastic  
15 investigator, started a specialized unit in  
16 Burlington, Vermont, to deal with these kinds  
17 of cases.

18 He investigated a case that  
19 involved a medical student who had met and had  
20 a one-time casual, kind of, sexual  
21 relationship for one night with a college-aged  
22 freshman.

1                   She left that encounter feeling  
2                   used and like she didn't want to continue that  
3                   liaison at all. About a month later, he found  
4                   her, he went to her fraternity party, which  
5                   also tells you something, right, what's a  
6                   medical student doing at a fraternity party  
7                   with freshmen?

8                   But he went there, he found her  
9                   again, wanted to have sex again, she said I'm  
10                  not interested and I didn't like, you know, I  
11                  didn't like being with you.

12                  He's trying to convince her, talk  
13                  to her, cajole her around this, tells her,  
14                  she's trying to leave him, she goes outside  
15                  and he follows her.

16                  And he's trying to convince her  
17                  that it's okay, they could just have sex in  
18                  the shadows of the pine trees, you know, on  
19                  the side of fraternity house and that nobody  
20                  would know and it would be okay. She's  
21                  telling him no.

22                  He gets her isolated, and he uses

1           some force against her. He pushes her down,  
2           he begins to rape her, she resists, cries out  
3           for help.

4                       There are three ear witnesses, who  
5           hear her crying and screaming, and also hear  
6           him hitting her, they hear the sound of a hand  
7           slapping flesh. They intervene.

8                       He stops in the middle of the  
9           rape, pulls his pants up, runs away. She's  
10          hysterical, has a split lip and a black eye  
11          from what had just immediately happened to  
12          her. They take her for hospital care. The  
13          case is tried, you know, put together and goes  
14          to trial.

15                      At the trial the defendant  
16          actually testified from his transcript, "I  
17          only slapped her after she became skittish  
18          about having sex. She raised her voice, I  
19          tried to calm her down and convince her it was  
20          all right, but she raised her voice again and  
21          I told her to be quiet and I slapped her  
22          face." So he admitted that conduct and was

1 acquitted.

2 And about one or two months later,  
3 the Police Chief was in a grocery store, or  
4 somewhere in Burlington, and was approached,  
5 physically approached by one of the female  
6 jurors, who came out of her way to tell him  
7 that he had arrested an innocent man, because  
8 they had had sex before, she was drunk, and  
9 just looking for sex again. All right?

10 So you see how reality is  
11 completely outside of the facts, sometimes,  
12 and that is because of what we bring with us.  
13 And when I say we, I mean, collectively, in  
14 this culture, sometimes individually in the  
15 life of a juror, or whatever, that can give us  
16 what I would call surprising results.

17 The bottom line is that if you  
18 think about sexual assault as a compass, if  
19 sexual assault is a compass, then north would  
20 be victim behavior.

21 It's where we orient some of our  
22 first questions. And this is what we're

1           trying to change, right, some of our first  
2           questions. Why did she, why didn't she, what  
3           was she, if it is a female victim,  
4           particularly.

5                         And any victim, you know, they  
6           blame themselves and we blame them, and that  
7           is something that has us, in my opinion, in a  
8           bind.

9                         Because the other side of that  
10          coin of victim blaming is that we, nobody  
11          wants to believe it, it's also really tough  
12          for our world view to think that there are  
13          offenders around us and we can't pick them  
14          out.

15                        And so the sex offender in this  
16          picture, you know, kind of jumps out at us,  
17          but it's a hard thing for us to admit and to  
18          grapple with.

19                        You and I are the unnamed  
20          conspirator, right? It's our culture, it's  
21          our attitude, it's what we've grown up with,  
22          it's the stew that we've kind of baked in, and

1           it's what we bring to this problem.

2                       This is what I educate on,  
3           because, you know, I've been doing this for  
4           decades, with police officers and prosecutors  
5           and military people and victim advocates, you  
6           name it, fill in the blank.

7                       And it is always the starting  
8           place for us to first begin to look at  
9           ourselves, because if we don't, in essence  
10          we've created a Petri dish for this and we  
11          have to claim our own baggage.

12                      We are raised in a culture that  
13          tends to blame victims, at least in part, for  
14          this crime. We just are. And so what I tell  
15          people, who are going to do the work, is  
16          please be aware of that. Please be aware of  
17          your baggage, examine it, through a process  
18          such as this, and make sure you don't bring  
19          that baggage into the room where you're  
20          dealing with this particular crime, or with  
21          these victims, because it's simply not fair.

22                      And when we change our focus on

1           these cases, we find again that sometimes the  
2           thinking, the thinking -- that we have double  
3           standards.

4                       And so I want to give you a couple  
5           of examples of that, and then I'll take any  
6           questions. But this is how I want to wrap  
7           this up, is by kind of showing maybe how the  
8           unnamed conspirator has perhaps influenced me  
9           or you.

10                      And so part of the problem that we  
11           have with these cases often is that we find  
12           out that, you know, the victim had consented  
13           to at least part of what went on and then  
14           later reports a rape, right?

15                      People, maybe witnesses, see her  
16           on the dance floor with him, or see her  
17           sitting on his lap and kissing him and all  
18           that kind of stuff, they seem to be fine  
19           there, and then there's a report the next day.  
20           People struggle with that, because she  
21           consented to part of it.

22                      And so as a way to unpack this,

1           what I would do, and I'm actually going to  
2           turn, if it's okay, I'm going to turn to one  
3           of the subcommittees for a little bit of help  
4           on this.

5                        So assuming that you all know each  
6           other, at least to one degree or another, let  
7           me ask, what's your first name, sir?

8                        MR. SPRANCE:   It's Bill.

9                        MS. MUNCH:   Bill and Terri.  Do  
10          you know each other?

11                       (Off microphone discussion)

12                       MS. MUNCH:   All right.  Let's say,  
13          Bill, that Terri comes to you on a break and  
14          she asks you if she can borrow \$10 because,  
15          you know, she left her wallet on the white  
16          van, or something like that, she needs to  
17          borrow a little bit of money.  Bill, do you  
18          think that you would loan Terri \$10?

19                       MR. SPRANCE:   Yes.

20                       MS. MUNCH:   Sure.  And of course,  
21          Terri, you would pay him back.  So at the next  
22          meeting where you are, the same kind of thing,

1 Terri, your kids cleaned you out and you  
2 thought you had money and you didn't, you find  
3 your friend, Bill, you're like Bill, I need to  
4 borrow \$10, Bill, do you think that you would  
5 loan Terri \$10, based on what you know about  
6 her?

7 MR. SPRANCE: I'd charge interest  
8 this time.

9 MS. MUNCH: With interest, loans  
10 you money, and of course, Terri, you would pay  
11 him back.

12 (Off microphone discussion)

13 MS. MUNCH: Six months from now  
14 you're somewhere else. Terri spent a little  
15 bit too much money. And, Bill, so did you,  
16 but she comes up to you and she's like, wow,  
17 Bill, I really need to borrow \$20 this time.

18 Now, so she is asking you for  
19 twice as much as she asked you for last time,  
20 all right? Let's say, Bill, that you are  
21 like, you know what, Terri, you look at Terri  
22 and you say, you know what, Terri, here's \$10,

1           that's what I'm comfortable giving you.

2                         Now Terri would never do this,  
3           because she's a fine upstanding person, but in  
4           a moment of weakness, Terri, let's say that  
5           Bill shows you a \$10 spot, but right behind it  
6           he has a \$20 bill. And rather than taking the  
7           \$10, because you want \$20, you take \$20. So  
8           Bill offers her \$10, Terri takes \$20, would  
9           that be a crime?

10                        (Off microphone discussion)

11                        MS. MUNCH: What's it called?  
12           This is the test. Theft, right, larceny? And  
13           --

14                        (Off microphone discussion)

15                        MS. MUNCH: Larceny, right. And  
16           if Terri takes it with a little of this,  
17           what's it called?

18                        (Off microphone discussion)

19                        MS. MUNCH: Robbery, right? And  
20           if she takes it with this, what's it called?  
21           Really bad robbery, right, don't do it  
22           robbery, but it is --

1 (Off microphone discussion)

2 MS. MUNCH: Yes, that's right, the  
3 gun comes out. But clearly, we would all  
4 recognize this as a crime. So if instead, of  
5 kind of going after Terri for doing this, what  
6 if I go after Bill a little bit, and I say,  
7 Bill, we need to talk.

8 You know, you're telling me that  
9 she robbed you, or you're telling me that she  
10 stole from you. But the truth is, I know you  
11 gave her money on two other occasions, you  
12 didn't complain about that.

13 And I also know, on this occasion,  
14 you offered her half of what she wanted. You  
15 offered her \$10, what's the big deal that she  
16 took \$20, what's the big deal that she took  
17 the other half?

18 If I treated you that way, as a  
19 crime victim, I would be in trouble and I  
20 should be. But how is that different perhaps  
21 than the 911 call that you heard?

22 How is that different than the person who

1        says, you know what, I like you, come home  
2        with me, I'm attracted to you. I'll have some  
3        limited sexual contact with you, but I don't  
4        have sex on the first date, or I don't feel  
5        like having sex tonight, and they draw a line.

6                    How is it different, for that  
7        victim, who then has that sex taken from them,  
8        if you will? And I would say, it's between  
9        our ears, all right, it is an example of the  
10       Unnamed Conspirator at work in the way that we  
11       see sex versus how we see other things.

12                   Similar with drinking. You know,  
13       we need to understand drinking as the tool for  
14       the problem. If you have a robber in your  
15       community and your robber is looking at this  
16       screen and deciding who to rob, right? On the  
17       left, you've got a person who's drunk as a  
18       skunk, passed out from alcohol, but happens to  
19       have money. And on your right you have some  
20       sober guy sitting on a box, you know, in an  
21       alley, who's the robber going to choose?

22                   The robber's going to choose the

1 drunk person, why? Because they're  
2 vulnerable, because they can't fight back,  
3 because they might not remember, because  
4 they're less likely report, if they report  
5 they're less likely to be believed. This is  
6 not rocket science, or I would not do it. But  
7 for the very same reason that the robber is  
8 going to choose the drunk victim, so will the  
9 rapist choose the drunk victim.

10 And yes, finally, this is your  
11 definition, or part of your definition of  
12 consent, which is a fair definition. It's a  
13 good definition. It's one that we need to  
14 understand, and bring life to for all of the  
15 folks in the military culture and for similar  
16 definitions in the civilian culture, because  
17 there's no room for fear in consent. If fear  
18 is in the room, consent is not in the room.

19 It talks about freely agreeing.  
20 It talks about the things that we all know  
21 consent means, because we consent to things  
22 every day of our lives, and it's not different

1           just because it's sexual assault.  
2           So, that's a quick run through of that  
3           concept, by which I am privileged to educate  
4           different people in different circles, and I'm  
5           really appreciative of the opportunity to do  
6           that with you. And I'm happy to answer  
7           questions on that, or anything else that you  
8           might have for me.

9                           CHAIR JONES: Mr. Bryant?

10                          MEMBER BRYANT: May I ask, just as  
11           a background, because the most shocking thing  
12           that I saw in your presentation, which I very  
13           much appreciated, thank you, was that survey  
14           of the Rhode Island school children, six  
15           through what grade, eighth or ninth?

16                          MS. MUNCH: Sixth through ninth  
17           graders.

18                          MEMBER BRYANT: Can you tell us  
19           how old that survey was, and was it from a  
20           particular part of town, was there any  
21           demographics that maybe drove that opinion  
22           from that aged child?

1 MS. MUNCH: Well, they did those,  
2 they did two, at least two of those surveys,  
3 they didn't do a third one, but they did them  
4 ten years apart, so they did a survey, I want  
5 to say, in 1998, and then they did one a  
6 decade apart from that.

7 And the opinions, if anything,  
8 were similar, if not a little bit worse, okay,  
9 the attitudes that were expressed by these  
10 middle-aged kids. It was at a school, this  
11 Rhode Island Middle School kind of decided to  
12 take this research project on. So it is  
13 somewhat dated, in terms of when they did that  
14 last survey.

15 I still think it's very relevant.  
16 And what I would suggest to you, this is just  
17 my opinion, but when I look at the influence  
18 on kids, as it differs and as it changes year  
19 to year, decade to decade, I think it's worse.  
20 Just my opinion. That is only anecdotal.

21 MEMBER BRYANT: Do you think  
22 that's because of the media, and the music

1           they listen to, that sort of thing?

2                       MS. MUNCH:  Yes.

3                       MEMBER BRYANT:  Because, that  
4           survey is also scary about what's going on in  
5           the homes in which they come from.

6                       MS. MUNCH:  Sure.

7                       MEMBER BRYANT:  Yes.

8                       MS. MUNCH:  I mean, I think it's  
9           all of the above.  But it's clearly what they  
10          get, you know, from the internet, from the  
11          media, from the influences in their lives,  
12          which are very similar to the things that we  
13          are also exposed to.  They are vulnerable and  
14          they are shaped by their ideas and their  
15          opinions.  And I think that, of course, the  
16          Unnamed Conspirator loves the media around  
17          some of this.  And there is a high influence,  
18          that younger people are very challenged to  
19          figure out how to make sense of, and what to  
20          do and how to deal with that.

21                      MEMBER BRYANT:  The other thing  
22          that was offensive, obviously, was the t-shirt

1           that you saw, but it also made me think how  
2           ingrained this is, and I'm asking this as a  
3           question, because that's what we're supposed  
4           to do, do you think, how ingrained it is in  
5           our society? Because we all sort of giggle at  
6           the Ogden Nash little poem, candy is dandy but  
7           liquor is quicker.

8                       MS. MUNCH: Right.

9                       MEMBER BRYANT: And it's the same  
10           message as that t-shirt.

11                      MS. MUNCH: It is the same  
12           message. It is because it is such a part of  
13           our historical, cultural belief system, if you  
14           will. I mean, it's where we don't even know  
15           it, we're so close to it. It's a little bit  
16           like water for the fish.

17                      But it is absolutely alive and  
18           well. And what I notice, of course, because  
19           kids are drinking younger and younger, using  
20           drugs younger and younger, having sex younger  
21           and younger, if you will, that just in that  
22           entire realm, I think we are seeing much more

1 of the influence of ideas and attitudes  
2 attached to alcohol and what it means to  
3 drink, if you're a man, or a woman, or a  
4 student, or whatever, perhaps than we did when  
5 I was younger.

6 MEMBER BRYANT: Thank you.

7 MS. MUNCH: You're welcome.

8 CHAIR JONES: Is there any  
9 compared --

10 MEMBER HOUCK: This is Admiral  
11 Houck, Judge Jones --

12 CHAIR JONES: Oh yes.

13 MEMBER HOUCK: -- may I ask a  
14 question?

15 CHAIR JONES: Thank you, Admiral,  
16 go ahead.

17 MEMBER HOUCK: Ms. Munch, thank  
18 you for your presentation. And I'm in  
19 Pennsylvania trying to do this, so this is  
20 difficult. But I've heard you before and have  
21 tremendous respect for your work in the  
22 concept of the Unnamed Conspirator, which I

1 think is exactly right.

2 I was heartened toward the end  
3 just by your example of the person who picks  
4 on a drunk, versus the person who picks on a  
5 sober person, and as well as the discussion  
6 with you and Mr. Bryant about the t-shirt.  
7 Because I'm very, and I'm nervous about what  
8 I'm going to say, because I fear that it can  
9 be misconstrued, and I hope that it isn't.

10 Understanding that the Unnamed  
11 Conspirator phenomenon is real, and  
12 understanding that no one deserves to be  
13 raped, much like the 911 operator was trying  
14 to reassure the woman in that very powerful  
15 example that you played for us.  
16 I worry, though, that there are still messages  
17 that are sent, and I worry that they're  
18 aiming, to use the word you used, ingested, in  
19 our military and in our prevention efforts by  
20 our unwillingness to confront alcohol as an  
21 Unnamed Conspirator.

22 And what I'm about to point out,

1           and I do with great respect, but that's  
2           because I want to explore your point of view  
3           on this, but when you were describing it, you  
4           talked about a young woman weeping to the  
5           voice of her maternal grandmother, and that  
6           she had ingested a belief system, and that the  
7           logical consequence of too much alcohol is a  
8           hangover.

9                           And that describing your nephew's  
10           situation. I'll leave your nephew out of it.  
11           I'll insert my college-aged daughter in there.  
12           That the vulnerability, it comes from too much  
13           alcohol consumption has no meaning. I think  
14           those are, I want to understand how you see  
15           those. I wanted to give you an opportunity to  
16           talk about those statements, because I think  
17           I completely understand the context in which  
18           you're raising them, in terms of blaming the  
19           victim. And this is not about blaming the  
20           victim, but it is for me, a lot about our  
21           military and getting more serious about  
22           prevention on the front end. And I just want

1 to give you a chance to talk about that some.

2 MS. MUNCH: Sure. Yes, thank you.

3 And I understand the, you know, the nuances  
4 around these kinds of discussions, I  
5 appreciate your question. What I would say,  
6 there are a couple of things I think that need  
7 to be considered when we talk about alcohol,  
8 and its role, and prevention.

9 First of all, you know, the  
10 vulnerability is meaningless unless someone  
11 decides to take advantage of it. If you  
12 would, for a second, you know, picture a  
13 context where somebody is as drunk as perhaps,  
14 my nephew, or your daughter, might be. And it  
15 is being evaluated by bystanders for whether  
16 or not this is an opportunity for  
17 intervention, or whether this is something  
18 that we don't even, you know, she kind of  
19 deserves it, or he kind of deserves it, so  
20 we're stepping out.

21 The vulnerability of a person who  
22 drinks too much alcohol shouldn't be at play,

1           and it wouldn't be at play in the issue of  
2           sexual assault, if we didn't have people that  
3           were practiced at taking advantage of that  
4           very person. And so because we know that is  
5           the case, and because we are all interested in  
6           keeping people safe, what I would suggest to  
7           you is that there are several conversations  
8           that are necessary.

9                           And the first one that I'm going  
10           to suggest, and it's the one that we don't  
11           hear in prevention programs very often, I  
12           would like to hear the question and have the,  
13           you know, start initiating and fostering  
14           discussions around, what do you think of a  
15           person who drinks that much alcohol?

16                           How do you see that person? Do  
17           they cease to be a fellow soldier, or a buddy,  
18           or a wingman, because of that? What do you  
19           think of women who drink too much?  
20           What do you think of, you know, of men who  
21           drink too much? Because if we don't start  
22           having the conversation and allowing the folks

1           that are the bystanders to the people that  
2           take advantage of the climate where alcohol is  
3           a part of it, if we don't allow them the  
4           conversation around what that means and, you  
5           know, how they will perhaps be witnesses to  
6           the objectification of a human being and, you  
7           know, somebody causing great harm to them in  
8           their presence, then we're really not  
9           preventing.

10                           Or our prevention efforts have  
11           historically just been aimed at potential  
12           victims, and what we tell them is be aware of  
13           alcohol, you know, don't drink, or have a  
14           buddy, and all of those kinds of things that  
15           we give those messages. I got those messages  
16           and you probably did too. I'm not saying  
17           those messages aren't important, but they are  
18           not the answer in and of themselves. And so  
19           what I would suggest is that what we need to  
20           get at is the culture that endorses the  
21           t-shirt.

22                           We need to get at the culture and

1 allow people who would walk by a t-shirt like  
2 that and chuckle, instead of really pondering  
3 it and going wow, what if that was my little  
4 sister, or what if that was me, or my brother,  
5 would that be okay? That's, I think, the  
6 piece of the prevention model that we don't  
7 focus enough on.

8 MEMBER HOUCK: I think you're  
9 exactly right. And I would hope, and I think  
10 it's only because I know how influential you  
11 are within the Department of Defense, and I  
12 was hoping, as we go forward that, that would  
13 be a future target of what we're doing. But  
14 also, we will focus, in addition, we'll ask,  
15 what do you think of men and women who don't  
16 drink? And that we not associate it with  
17 people who choose not to drink, or make a  
18 conscience choice to avoid it? That we don't  
19 associate them with grandmothers.

20 MS. MUNCH: Absolutely. Right.

21 MEMBER HOUCK: And making, and  
22 constantly working on finding a way to make it

1 more acceptable to avoid these situations in  
2 the first place. But thank you for the work  
3 that you do.

4 MS. MUNCH: Thank you, very much.  
5 Yes, ma'am?

6 CHAIR JONES: Yes.

7 MEMBER HOLTZMAN: Well, I want to  
8 put a good word in for grandmothers. We don't  
9 buy it.

10 (Off microphone discussion)

11 MEMBER HOLTZMAN: I appreciated  
12 very much your presentation. I have a  
13 question about how this pertains to sexual  
14 assault of men, and what information do we  
15 have, with regard to the circumstances in  
16 which those attacks take place? And does the  
17 Unnamed Coconspirator, or Conspirator, play a  
18 role there too? To what extent do they -- I  
19 mean, because I can see one of the things that  
20 is deeper, even than some of what you've  
21 talked about, is the attitudes about women in  
22 the society.

1                   That at some point, women become  
2                   property. And for different people,  
3                   apparently, it comes at different times, and  
4                   there's a signal. And women are accepting  
5                   that signal just the way men are, it's not,  
6                   that's what the high school, or the middle  
7                   school approach showed.

8                   But what do we see, with regard to  
9                   sexual assault against men? Because even  
10                  though the figures suggest the percentage  
11                  isn't as high, the numbers are enormous, and  
12                  how do we approach that problem?

13                  MS. MUNCH: That is a great  
14                  question and I'm glad that you asked it. I do  
15                  think that the Unnamed Conspirator is alive  
16                  and well in that side of the equation, as  
17                  well. What we don't have yet, and what we're  
18                  working on are more longitudinal studies and  
19                  surveys to help us understand that realm, as  
20                  much as we understand, you know, some of the  
21                  sexual assaults that are committed against  
22                  young women.

1                   But here's what I believe, is part  
2                   of the system that keeps the men from  
3                   reporting and perhaps from even identifying  
4                   themselves as having been victimized. And it  
5                   has to do with our view, as a culture, of  
6                   masculinity.

7                   It has to do with how we see men,  
8                   the expectations that we put on them. They  
9                   are supposed to be, and fill in the blanks,  
10                  strong, providers, always on.

11                  You know, they are supposed to be  
12                  able to, you know, they handle, you know,  
13                  relationships really well. They're, you know,  
14                  perhaps sexual, and have women, and all kinds  
15                  of things that we kind of say that they are,  
16                  they're strong, they're hard, you know,  
17                  they're that kind of thing.

18                  And I think that's part of why  
19                  they don't perceive, like women do, that they  
20                  are at risk. You know, we're trained from the  
21                  time we're this big, right? Men are typically  
22                  not getting that kind of education, because of

1           what it means to be strong and that this  
2           doesn't happen to strong men.

3                           And so some of the underlying  
4           messages that I think we need to really look  
5           at and deal with are, there's an assumption by  
6           a lot of male victims that if somebody  
7           assaults them, because most offenders are men,  
8           you know, and the last DoD large survey, I  
9           think 95 percent of the offenders were men,  
10          four percent were both women and men and one  
11          percent were women, if I recall that  
12          correctly, so we're looking at typically male  
13          on male assaults.

14                          What that means to them, right, is  
15          depending on how they've been raised, it is  
16          perhaps an affront to their masculinity, their  
17          questioning of themselves. And, of course,  
18          for those that are straight, and they are  
19          wondering, does this mean that I am gay? That  
20          is not necessarily something that is popular  
21          in our day and age, despite the progress that  
22          the military and others have made around

1 homophobia and trying to understand that.

2 And so I think that those kinds of  
3 things, and in the military, you know, these  
4 are the strongest of the strong, right, these  
5 are men that are really dedicated, not just to  
6 physical strength, but to courage, and et  
7 cetera. If we don't make room for the fact  
8 that even under circumstances like that,  
9 vulnerability is at issue, it is at play, and  
10 you're being affected, we're going to continue  
11 to see half of the number of men being willing  
12 to make reports, as we do show women, and  
13 neither number is good, right?

14 But I think the other thing, and  
15 I'm starting to see this, in fact, I was at  
16 Andrews Air Force Base yesterday, for the Air  
17 Force Leader Summit on Sexual Assault.  
18 And they had a male survivor and a female  
19 survivor address the group toward the end of  
20 the day. And his story was very much like  
21 what Russ and I have seen in a lot of the Army  
22 cases that we have examined, where someone,

1            basically, in a kind of a bullying situation,  
2            if you will, exposed his genitals, tried to  
3            place his genitals in this victim's face.

4                            The victim was able to prevent  
5            that part from happening, but reported. And  
6            I'll tell you what, caught a lot of grief for  
7            reporting. Was called a snitch.  
8            And people giggled when he said what had just  
9            happened to him, you know, there was  
10           minimization and denial around his experience.

11                           But the more these courageous, you  
12           know, young men join in that voice and begin  
13           their experience with us, whether it's on  
14           survey, but I like it more when it's  
15           face-to-face. We start to see that picture,  
16           we start to see what happens beneath the  
17           surface of some of these kind of more, quieter  
18           secretive communities within the military.

19                           And so it is evolving and it is  
20           critically important that men understand that  
21           they, not only are vulnerable to this, but  
22           they are responsible to become educated and

1           become supportive within their climates of  
2           other men who are experiencing this and not  
3           telling us. So we have some distance to go.  
4           We have some distance to go, but I think that  
5           the things most at play by the Unnamed  
6           Conspirator are homophobia and masculinity.  
7           And the combination of those two things, as  
8           perceived by men, as we coach them up,  
9           sometimes keep them from talking.

10                   MEMBER HOLTZMAN: Right. That  
11           keeps them from talking, but what triggers the  
12           perpetrator in those circumstances?

13                   MS. MUNCH: Then I would switch to  
14           the field of study that we have around  
15           offenders, whether they are convicted sex  
16           offenders, or more importantly, in my opinion,  
17           undetected rapists, if you will.

18           You know, there is crossover. There is a lot  
19           of crossover between an offender who will  
20           offend against a woman and may offend against  
21           a peer, or a child, or something like that.

22                   You know, interpersonal violence

1 to them is pretty normal. And it is a method  
2 of power. It is a method of, it is an extreme  
3 form of bullying, right? And if what I want  
4 to do is really put you in your place or  
5 demean you, you can talk to any domestic  
6 violence victim, a male or female, who will  
7 say that being physically assaulted is  
8 horrible, but then perhaps in their experience  
9 is nothing more demeaning or degrading than a  
10 sexual act that is committed against them  
11 against their will.

12 And so I think the principles of  
13 power and control are what are at play. It is  
14 very much less about sexuality, than it is  
15 about this is a method to control another  
16 person and humiliate another person and  
17 degrade another person. And we're beginning  
18 to see what it looks like in the military, but  
19 I'll just say that a lot of what I've seen or  
20 read, have to do with similar situations to  
21 the one that I just provided.

22 MEMBER HOLTZMAN: Thank you.

1 CHAIR JONES: Any further comment  
2 or questions? Thank you, so much, Ms. Munch,  
3 this is really very, very important for us to  
4 hear and I appreciate the way you did it.

5 MS. MUNCH: Thank you for having  
6 me.

7 CHAIR JONES: Okay. I think we'll  
8 take a five minute break at this point.

9 (Whereupon, the foregoing matter  
10 went off the record at 9:47 a.m. and went back  
11 on the record at 10:00 a.m.)

12 CHAIR JONES: All right, ladies and  
13 gentlemen, I think we should get started. I  
14 don't know -- he may have left. Oh, no, are  
15 those his glasses?

16 All right. Good morning, Colonel  
17 Winklosky. We're now going to have an overview  
18 of Article 120 of the UCMJ, and we thank you  
19 in advance for providing this to us. Go ahead.

20 COL. WINKLOSKY: Thank you, ma'am.  
21 Good morning, members of the panel. My name is  
22 Lieutenant Colonel Devin Winklosky. I work at

1 the Army Judge Advocate General's Legal Center  
2 and School, where I'm the Vice Chair of the  
3 Criminal Law Department, and what I'm going to  
4 be doing is talk with you about Article 120,  
5 which is the military's Rape and Sexual  
6 Assault Statute.

7 I'm an academic, I teach, so as  
8 those of you who are in the academic world  
9 know, I ask a lot of questions. There may be  
10 areas where I don't exactly have answers  
11 because we're still questioning the evolution  
12 of the law.

13 What we're going to be doing  
14 today, and I've broken it down into really  
15 four areas, is: I want to give you a brief  
16 history of Article 120, and then I want to  
17 focus on our current version of Article 120,  
18 its structure, its definitions, and then some  
19 of the legal issues that are challenges for  
20 practitioners in the field that we've talked  
21 to. So, let's talk a little bit about the  
22 history of Article 120 briefly.

1 I show you this picture because I  
2 think it is, first, an iconic picture. Second,  
3 just a few years older than the UCMJ itself,  
4 and it's the VJ Day picture of the sailor  
5 kissing the nurse. And I show it to you for a  
6 couple of reasons: because what used to be  
7 culturally acceptable may not necessarily be  
8 acceptable now, as the law evolves. And the  
9 law can force a re-examination of social and  
10 cultural norms. And I think, as we go through  
11 the history of Article 120, and as we discuss  
12 Article 120's evolution, I will show you this  
13 picture again after we've seen the  
14 definitions, and we can talk a little bit  
15 about whether the law has forced a change in  
16 cultural norms. So, let's talk a little bit  
17 about where Article 120 came from.

18 Prior to 2007, our law, our rape  
19 law under Article 120 had two elements: it was  
20 sexual intercourse by force and without  
21 consent, and that was it. And that was, since  
22 the inception of the UCMJ, how we prosecuted

1 rapes.

2 That caused some difficulties. The  
3 law, of course, case law attempted to  
4 compensate for various scenarios that arose  
5 with respect to this pre-2007 law, but it was  
6 still these two elements. Which, of course,  
7 the second element has without consent, which  
8 required the victim to manifest at some level  
9 a lack of consent. And that resulted in many  
10 cases in acquittals, because of mistake of  
11 facts as to consent, defenses as affirmative  
12 defenses. It also required some level of force  
13 to be involved with these cases.

14 Anecdotally, I will tell you when  
15 I was a defense counsel, I had a client who  
16 was acquitted. We talked to the jury, much  
17 like Ms. Munch explained to you in one of her  
18 cases, and it was a rape case. And it was a  
19 rape case that involved alcohol consumption.  
20 The jury acquitted, and when we talked to the  
21 jury afterwards they said, "Well, your client  
22 was guilty of something, it just wasn't rape."

1           So, as the law developed it was  
2           analyzed, and the first real comprehensive  
3           review of the UCMJ and, specifically, of the  
4           pre-2007 Article 120 was from the Cox  
5           Commission. Chief Judge Cox, among other  
6           things, looked at -- his panel looked at  
7           Article 120. And one of the recommendations  
8           that came out of the Cox Commission Report was  
9           that Article 120 needs to be updated, and it  
10          needs to conform and be more consistent with  
11          evolving state laws, as well as the federal  
12          statute.

13                 So, what happened as a result of  
14          the Cox Commission recommendations back in  
15          2001 was some action, some recognition of  
16          this. One of the places where this was  
17          recognized was from the Court of Appeals for  
18          the Armed Forces in the case of United States  
19          versus Lake, where it recognized -- and this  
20          is Chief Judge Baker writing this opinion,  
21          that Article 120 was antiquated in its  
22          approach to sexual offenses, it was dated.

1           And, as recognized in that second portion of  
2           the quote, "Traditional military rape elements  
3           were applied in conducts for which the  
4           elements were not initially contemplated, and  
5           case law, as opposed to statutory law was  
6           evolving to address this reality."

7                        So, the push was really for  
8           Congress to do something about this to update  
9           Article 120. So, what happened is, in the  
10          fiscal year `05 NDAA, Congress mandated the  
11          Secretary of Defense to take a look at the  
12          UCMJ and the manual, and update Article 120 to  
13          conform more closely with other federal laws,  
14          and using 18 USC as the model for the new  
15          Article 120.

16                       In what I've provided, and  
17          what, if you haven't received yet, you will,  
18          as handouts is a comparison between the  
19          federal law, federal sexual assault statute,  
20          the DC Code, and then the various versions of  
21          Article 120 that really the update and reform  
22          of Article 120 came from.

1                   So, what happened as a result of  
2                   this study was a very comprehensive review and  
3                   recommendation from the Department of Defense,  
4                   an analysis of all the state laws, and various  
5                   courses of action for Congress to take.  
6                   Congress then passed a reformed Article 120 in  
7                   the FY 06 NDAA, the President signed it into  
8                   law in September 2007, and that became,  
9                   really, a radical change in our approaches to  
10                  rape and sexual assault in the military. It  
11                  was effective for all offenses on or after 1  
12                  October 2007.

13                   And, two, -- and I say it's a  
14                   radical change because two of the major  
15                   changes that took place with this new Article  
16                   120 were, number one, lack of consent was, by  
17                   and large, removed from the statute. And,  
18                   second, it was a clear shift towards a more  
19                   offender-centric prosecution of rape and  
20                   sexual assault. And I will walk through some  
21                   of this with you to show you where that is  
22                   highlighted.

1                   So, what happened, though, is that  
2                   this new version of Article 120, the 2007  
3                   version of Article 120 had some scrutiny  
4                   placed on it by the courts, not in the area of  
5                   the reform with respect to the actual crimes  
6                   or the offenses themselves, but more in the  
7                   way Congress had fashioned the Affirmative  
8                   Defenses within the punitive Article itself.  
9                   In other words, Congress had built in  
10                  Affirmative Defenses to Article 120, and that  
11                  was causing some problems with respect to  
12                  placing a burden on the defense that was  
13                  unconstitutional, and that was the challenge  
14                  to the law.

15                  Nonetheless, some of the court  
16                  decisions that came out after the 2007 version  
17                  referred to this version of Article 120 as  
18                  poorly written, confusing, absurdly structured  
19                  with vague and undefined verbiage, a troubled  
20                  statute, hopelessly incomplete and confusing.  
21                  And Judge Ryan of CAAF called it "not a model  
22                  of clarity."

1                   So, they went back -- Congress  
2                   went back, took a look at Article 120, the  
3                   2007 version, amended it and now we have our  
4                   current version of Article 120, which was just  
5                   a result of the fiscal year 2012 NDAA. And it  
6                   is applicable to offenses that occur on or  
7                   after 28 June 2012.

8                   So, what does this leave us with?  
9                   This leaves us with three versions of Article  
10                  120. And as a result of the lack of ex post  
11                  facto law, any or all three of these statutes  
12                  could apply in any particular case. So, if you  
13                  have reports of conduct or crimes taking place  
14                  that span these three time frames, then all  
15                  three versions could apply at any particular  
16                  case.

17                  The other interesting thing that  
18                  occurred as a result of this involves Article  
19                  43, which is the Statute of Limitations. For  
20                  offenses occurring prior to 1 October 2007,  
21                  they are all referred to as rape because it's  
22                  a rape statute, and there is no statute of

1 limitations on prosecution for rape under the  
2 UCMJ. However, once the language changed in 1  
3 October 2007, and there was a division between  
4 rape and aggravated sexual assault at that  
5 time, Article 43 was not commensurately  
6 amended to reflect that, which meant that  
7 there was a five-year statute of limitations  
8 on aggravated sexual assaults. And that  
9 statute, that is, the Article 43 Statute of  
10 Limitations on those crimes is being amended  
11 in the FY 14 NDAA that was recently agreed to  
12 by Congress just this week. So, that gap in  
13 the law is being fixed, but it was not fixed  
14 at the time, so there is a window of time  
15 under the UCMJ where sexual assault and  
16 aggravated sexual assault, the statute of  
17 limitations has passed on prosecutions for  
18 some of those crimes.

19 MEMBER COOK: But just to clarify,  
20 what you said, what's been agreed to by  
21 Congress this week in Fiscal Year 14, Fiscal  
22 Year 14 NDAA, what you mean is it's come out

1 of the Senate. It's still got to go to the  
2 House, but it has not yet been approved. The  
3 language is still in play.

4 COL. WINKLOSKY: That's exactly  
5 right, ma'am. So, the clock is ticking on  
6 whether or not -- we still have to wait for  
7 Presidential signature on Article 43's  
8 amendment.

9 MEMBER COOK: I think you still  
10 have to wait for the House's vote on the  
11 amendment, as well. I just want to make sure  
12 that -- so today's truth is still you can have  
13 all three and the statute of limitations on  
14 the post-2007 offenses still apply today.

15 COL. WINKLOSKY: Today. Yes, ma'am.

16 MEMBER COOK: Yes.

17 COL. WINKLOSKY: That's right. So,  
18 we're still waiting for the change to take  
19 place. Yes, ma'am.

20 CHAIR JONES: Yes, go ahead.

21 MEMBER HOLTZMAN: Just on the  
22 applicability of the new statute of

1 limitations, assuming this legislation is  
2 passed, won't it go into effect, the new  
3 statute abolishing the statute of limitations  
4 for all offenses taking place -- well, when  
5 does it go into effect for? Tell me --

6 COL. WINKLOSKY: Yes, ma'am. The  
7 way it's written right now is that it will be  
8 effective upon signature, and it will be  
9 applied prospectively.

10 MEMBER HOLTZMAN: There's no  
11 retroactive application?

12 COL. WINKLOSKY: That's not the way  
13 it's written right now. No, ma'am.

14 MEMBER HOLTZMAN: Okay.

15 COL. WINKLOSKY: Okay. So,  
16 practitioners, obviously, that's one area, and  
17 I will talk more about some of the other areas  
18 where it is an interplay between what Congress  
19 passes as the legislative body; what the  
20 President then under Article 36 powers can do  
21 to implement the law, and that is by writing  
22 regulations that are embodied in the Manual

1           for Courts-Martial to put these things -- to  
2           put the law into practice; and then what the  
3           courts, ultimately, decide all of these things  
4           mean. And it's an interesting interplay with  
5           respect to some of the definitions and so  
6           forth, which I'll talk about in a moment. So,  
7           I want to focus on our current version of  
8           Article 120, and some of the issues that have  
9           arisen.

10                       As I mentioned, we have a Manual  
11           for Courts-Martial. It's a 2012 version.  
12           Unfortunately, the only thing that's in the  
13           2012 version of the manual is the statutory  
14           text of Article 120. Usually, the President  
15           fills in the elements, and definitions, and  
16           other items that practitioners need in order  
17           to prosecute this crime. That has not taken  
18           place yet. We are still waiting for the  
19           Executive Order to come out, to allow  
20           practitioners to understand how to implement  
21           this law, so what we have is raw statutory  
22           text at this point.

1                   However, the judges -- obviously,  
2                   we still have cases being prosecuted under  
3                   this article, and the judges have to put bench  
4                   book instructions together. They have their  
5                   best guess at what the language ought to be,  
6                   in order to be able to instruct members on how  
7                   to decide these cases.

8                   CHAIR JONES: Devin, can you please  
9                   explain -- excuse me. Lieutenant Colonel  
10                  Winklosky, explain what a bench book is.

11                  COL. WINKLOSKY: Oh, yes, ma'am,  
12                  I'm sorry. Our bench book is -- they are  
13                  comprehensive instructions that the military  
14                  judges put together for use in all the  
15                  services that are jury charges, basically.  
16                  They are pre-formed jury charges that are  
17                  instructed to jury members, the panel, on how  
18                  to apply the law, what definitions apply, and  
19                  then what they need to do when they go back  
20                  into their deliberations.

21                  Usually, they mirror what is in  
22                  the Manual for Courts-Martial, the language

1           that the President has put in the manual.  
2           Without that language, the judges had to  
3           derive on their own what that language might  
4           be. We do have an Executive Order that was  
5           signed updating our Manual for Courts-Martial,  
6           and the President provided maximum punishments  
7           for Article 120.

8                         The way Congress writes the law  
9           under the UCMJ is, normally, they'll say that  
10          if a person violates a particular crime under  
11          the UCMJ, they may be punished as a court-  
12          martial may direct. And they do not provide  
13          specific statutory limitations on what the  
14          maximum punishment would be. They leave that  
15          to the President, because the President has  
16          the authority to do that under the UCMJ.

17                        We had a gap in time from 28 June  
18          2012 to 15 May 2013 where the President had  
19          not acted to provide maximum punishments, so  
20          the Judiciary was left with deriving what the  
21          maximum punishments for the offense would be.  
22          There is some case law, and there is some

1 language in the Manual for Courts-Martial that  
2 talks about how to do that, and you look at a  
3 closely related offense to be able to do that.  
4 But, nonetheless, we didn't have any  
5 Presidential action on it until 15 May 2013.

6 The other thing that is currently  
7 pending, and as I mentioned, we're waiting for  
8 the President to sign an Executive Order which  
9 has already been through the public comment  
10 period in the Federal Register to give the  
11 practitioners the rest of Part 4 of the Manual  
12 for Courts-Martial, which is all of the  
13 information practitioners generally rely on to  
14 prosecute these kinds of cases. It has not  
15 been signed yet, so we are waiting -- and once  
16 it is signed, it will be incorporated into a  
17 2014 version, hopefully, of the Manual for  
18 Courts-Martial.

19 So, what does this mean? It means  
20 from 28 June 2012 when the statute was  
21 effective until 30 days after the Executive  
22 Order is signed, we are dealing only with raw

1 statutory language and some judicial  
2 interpretation via the bench book that  
3 practitioners are using to incorporate this  
4 right now.

5 This is the language that appears  
6 in the Manual for Courts-Martial right after  
7 the statutory text talking about -- giving  
8 practitioners a guide on how to pursue  
9 prosecutions under the current version of  
10 Article 120.

11 Okay, so that's the history of  
12 Article 120. That's where it stands right now.  
13 What I'd like to do is talk a little bit more  
14 in detail about the current version of Article  
15 120, how it's set up, what some of the  
16 definitions are, and then some of the  
17 challenges practitioners have had with respect  
18 to prosecuting these kinds of crimes.

19 So, the way it is now structured  
20 is there are three categories of crimes, and  
21 I say three because Article 120A had  
22 previously been incorporated into the UCMJ as

1           stalking. So, now we have Article 120, which  
2           is adult crimes, 120B which deals with child  
3           sexual crimes, and 120C which addresses other  
4           sexual misconduct.

5                        The other thing that is important  
6           to note with respect to the current version of  
7           Article 120 is, number one, it is gender  
8           neutral now. And, number two, marriage has  
9           been eliminated as a defense to all offenses.  
10          The 2007 version had retained marriage as a  
11          defense to some offenses; that defense was  
12          eliminated in the revision in 2012.

13                       So, this is the 2007 version of  
14          Article 120. That changed from what it used to  
15          be, rape by force and without consent, to this  
16          change in 2007, so we have five adult crimes,  
17          six child crimes, and three forms of other  
18          sexual crimes.

19                       We had crimes under the UCMJ like  
20          indecent assault, indecent acts or liberties  
21          with a child, indecent exposure, and indecent  
22          acts with another. Those crimes were

1 consolidated and put into Article 120, and  
2 fall under Article 120 in some way.

3 In 2012 it was reformed, and this  
4 is what it looks like today. There are four  
5 adult crimes, three child crimes, and then  
6 three categories of other sexual misconduct.

7 It is interesting to note, and  
8 when you look at the comparison between the  
9 various statutes, that is, the federal  
10 statute, the DC statute, and the UCMJ, the  
11 retention of the word "rape" in the statute.  
12 The other two statutes upon which Article 120  
13 is modeled dispense with the word "rape." The  
14 UCMJ Congress when amending the UCMJ opted to  
15 retain the use of the word "rape." I don't  
16 know if that's going to continue into the  
17 future, but it is an interesting distinction  
18 to make between the various statutes.

19 Okay. So, how do the adult crimes  
20 under Article 120 work? I think this is a  
21 pretty good illustration, one, because it's  
22 simple and it puts things in perspective. And,

1 two, because I created it.

2 (Laughter.)

3 COL. WINKLOSKY: But really when  
4 you look at Article 120, you're looking at two  
5 axes, you're looking at the actus reus of  
6 the offender, what did the offender do? And  
7 then under what circumstances did it take  
8 place? And then you get into the varying  
9 degrees. And I'd like to walk through this a  
10 little bit with you.

11 So, if you're talking about the  
12 circumstances under which the conduct takes  
13 place you're talking about things like a high  
14 level of force, force that involves death or  
15 grievous bodily harm, fear of death or  
16 grievous bodily harm, or kidnaping, or  
17 affirmative conduct on the part of the accused  
18 that is rendering someone unconscious, or  
19 affirmatively administering a substance to  
20 someone that substantially impairs their  
21 ability to consent to the activity at hand.  
22 So, you're going to be in a more severe area

1 of criminal conduct; that is, either you're  
2 going to be in rape or aggravated sexual  
3 contact area.

4 Now, if you're talking about  
5 lesser severe circumstances, such as fear for  
6 bodily harm, fraud, or where the accused knew  
7 or reasonably should have known the victim was  
8 incapable of consenting, that's going to be  
9 sexual assault or abusive sexual contact. So,  
10 those are the two types of circumstances under  
11 which the conduct could take place. And then  
12 you have the actual conduct itself.

13 If you have a lesser form of  
14 conduct; that is, sexual contact, and I will  
15 talk a little bit more about the sexual -- the  
16 definition of sexual contact, but you can see  
17 it up there, as well. You're going to be in  
18 the area of abusive sexual contact or  
19 aggravated sexual contact.

20 If you have more egregious conduct  
21 committed by the accused that is a sexual act  
22 and, generally, the difference between sex act

1           and sex contact is a sexual act is a  
2           penetrative crime, sexual contact is something  
3           short of a penetrative act. If you have a  
4           sexual act, you're going to be in the area of  
5           sexual assault or rape.

6                        So, the quadrant that you're in  
7           depends, again, on the circumstances and the  
8           conduct, and then the numbers in green reflect  
9           the punishments associated -- the maximum  
10          punishments associated with each of those  
11          crimes. So, rape is life without parole as a  
12          maximum punishment, sexual assault is 30 years  
13          maximum punishment, aggravated sexual contact  
14          is 20 years, and abusive sexual contact is  
15          seven years.

16                      When we look at child crimes under  
17          Article 120B, it is a very similar scheme with  
18          respect to figuring out what crime applies  
19          under what circumstances. You still have that  
20          same conduct which is sexual act, but now the  
21          circumstances involve the age of the child.

22                      If the child is under the age of

1           12 and there's a sexual act, that's going to  
2           automatically be rape of a child. If you have  
3           a child between the age of 12 and 16, and it  
4           occurs with force, that will also be rape of  
5           a child, and both of those carry with them  
6           life without the possibility of parole.

7                        If the accused commits a sexual  
8           act on a child between the age of 12 and 16  
9           and there's no force involved, that crime is  
10          sexual assault of a child which carries a 30-  
11          year maximum.

12                       The other category of crime  
13          involves lewd acts. And lewd acts include  
14          sexual contact which I referred to earlier,  
15          plus three other types of conduct which I'll  
16          talk about, but it's a broader type of conduct  
17          that the accused could commit.

18                       A lewd act on a child under the  
19          age of 16 will be sexual abuse of a child, and  
20          there are two types of sexual abuse of a child  
21          under the UCMJ. The first involves contact,  
22          actual physical contact with the child, that's

1 a 20-year maximum. And the other is no contact  
2 with the child, and that is a 15-year maximum.

3 The other crime that is new under  
4 the 2012 Article 120 is indecent viewing,  
5 visual recording or broadcasting. I refer to  
6 these as a peeping Tom, a peeping Tom with an  
7 iPhone camera, and a peeping Tom with a camera  
8 and an internet or YouTube connection. That's  
9 really what this is driving at.

10 So, there are two observation  
11 crimes, a person who views another, knowingly  
12 views the private area of another without  
13 their consent, and an area where that person  
14 has a reasonable expectation of privacy.  
15 That's a one-year maximum. If they take a  
16 picture, or videotape, or film, or record that  
17 in some way, that's another crime with a five-  
18 year maximum. And then if they broadcast that,  
19 that is a seven-year maximum.

20 I bring this up because this has  
21 been an increasing crime recently. Rolling  
22 Stone did a discussion of this a few weeks ago

1           in their magazine, the Steubenville rape  
2           highlights this issue, that there are  
3           bystanders who may not actually be engaging in  
4           the sexual conduct itself, but they are taking  
5           pictures of it for some reason. This crime  
6           covers that conduct, and I think there's also  
7           a good argument to be made that under the UCMJ  
8           they could also be charged as principals to  
9           the crime, as well. So, there are options out  
10          there for addressing that kind of conduct, in  
11          addition to sexual assault and rape.

12                        The interesting thing about this  
13          crime is that a private area is defined as a  
14          naked or underwear-clad genitalia, anus,  
15          buttocks, or female areola or nipple, so it's  
16          a broader definition.

17                        Additionally, reasonable  
18          expectation of privacy is not your normal  
19          Fourth Amendment jurisprudence reasonable  
20          expectation of privacy. Reasonable expectation  
21          of privacy under this crime is, could a  
22          reasonable person disrobe in privacy without

1 being concerned their image is being captured,  
2 or that the private area of your person would  
3 not be visible to the public. So, it's a  
4 privacy interest with respect to vis a vis  
5 another person or the public versus a Fourth  
6 Amendment kind of analysis with respect to it.  
7 So, that's the statutory definition.

8 Under Article 120C, forcible  
9 pandering and indecent exposure remain under  
10 Article 120C, so you have those two crimes,  
11 plus this additional crime under Article 120C.

12 So, that's the structure of  
13 Article 120. What I'd like to do is talk about  
14 some of the definitions, because Congress has  
15 provided statutory definitions of certain  
16 things. Practitioners have struggled in this  
17 area to attempt to figure out what some of  
18 these definitions mean. And really at the end  
19 of the day what it's come down to is the  
20 judges are instructing members and the members  
21 have to apply their own knowledge of what they  
22 believe these terms mean if there's no

1 specific definition provided to them. And I'll  
2 point out some of those areas.

3 First, let's talk about sexual  
4 act. Under the 2007 version of Article 120,  
5 this was the definition of a sexual act. You  
6 had contact between the penis and vulva, or  
7 penetration by hand, finger, or any object  
8 with a specific intent. And the intent was  
9 abuse, humiliate, harass, or degrade, or rouse  
10 the sexual desires.

11 Article 120 looks like this now.  
12 Sexual act now encompasses not only the  
13 traditional sexual intercourse, but it  
14 encompasses what would have otherwise been  
15 called sodomy. So, now it's for anus, anus or  
16 mouth is involved with respect to the first  
17 part of the definition that involves a penis.  
18 The second is any penetration of the vulva,  
19 anus, or mouth by any body part or object with  
20 one of those two intents.

21 I think what is interesting about  
22 this is how broad this definition is with

1           respect to the conduct we're talking about  
2           here. And it can sweep underneath its  
3           definition that conduct which may not have a  
4           sexual connotation to it. In other words, it  
5           could have an abusive connotation to it,  
6           someone putting their finger in someone's  
7           mouth, what's referred to as a fish hook. They  
8           place their -- they've penetrated the mouth of  
9           another with any body part, their finger, with  
10          the intent to abuse. And under this  
11          definition, that would be called a sexual act  
12          even though it may not have any sexual  
13          connotations whatsoever to it. It has abusive  
14          or humiliation connotations to it, but it may  
15          not have a sexual connotation to it. So,  
16          that's something that is struggled with when  
17          you have a definition that is broadened like  
18          this.

19                           MEMBER HILLMAN: Just a question.  
20          Article 125 has survived the Supreme Court's  
21          Lawrence versus Texas decision. Does this not  
22          make Article 125, sodomy, entirely redundant?

1 COL. WINKLOSKY: I think it does.  
2 Yes, ma'am. And I think the reason Article 120  
3 survives is because of some issues with  
4 respect to animal abuse. But for the most  
5 part, practitioners have been charging conduct  
6 of sodomy under Article 120 instead. So, yes,  
7 ma'am.

8 Sexual contact, likewise, has  
9 changed. This is the definition under Article  
10 120 2007 version. This is the definition under  
11 112, excuse me, under the 2012 version. What's  
12 the difference here? Really, what happened was  
13 Congress broke up the definition into two  
14 things. The first group up there deals with  
15 genitalia, anus, groin, breast, inner thigh,  
16 or buttocks, what I refer to as kind of  
17 erogenous zones in the law, but you have to  
18 have one of those areas with an intent to  
19 abuse, humiliate, harass, or degrade, which  
20 gives it a sexual connotation. The actual area  
21 of the body gives it a sexual connotation;  
22 whereas, the intent does not.

1                   In the second grouping you have  
2                   any body part but you have a sexual intent,  
3                   and that is where the sexual portion comes  
4                   from there. So, you have a sexual body part  
5                   with an intent to abuse, humiliate, harass, or  
6                   degrade, or you have any body part but with a  
7                   sexual intent.

8                   The last definition that involves  
9                   the conduct of the accused is lewd act. As I  
10                  alluded to earlier, it's broader than sexual  
11                  contact, so it includes sexual contact as I  
12                  just described, but it also includes three  
13                  other types of conduct on the part of the  
14                  accused. And recall, lewd act applies to child  
15                  crimes, so intentionally exposing one's self  
16                  with one of two intents, and when I say one of  
17                  two intents what I'm referring to is the  
18                  intent to abuse, humiliate, harass, degrade,  
19                  or incite lust or sexual desire. So, exposing,  
20                  communicating indecent language, or any  
21                  indecent conduct intentionally done with or in  
22                  the presence of a child.

1           This has been a positive change in  
2           the sense that it used to be under military  
3           case law this type of conduct had to be done  
4           physically in the presence of the child. This  
5           version of Article 120 eliminates the physical  
6           presence requirement. So, what does that do?  
7           That means that this type of conduct that  
8           occurs over a phone, over a Skype connection,  
9           that a picture is sent over some sort of Smart  
10          phone is criminalized by this definition.

11          Force, the definition of force has  
12          also changed. Some of the crimes under Article  
13          120 require force to get into one of the  
14          quadrants under the Article 120, and also in  
15          the child crimes under Article 120B. So, you  
16          can see how the definition of force has  
17          changed.

18          What is interesting to note here  
19          is that when you look at Article 120, 2012  
20          version, and you look at the second and third  
21          definitions of force, you look at the second  
22          definition and it says, "Sufficient to

1 overcome, restrain, or injure a person." When  
2 you look at the third definition, "it is  
3 sufficient to coerce or compel submission by  
4 the victim."

5 We assume Congress used that  
6 differing language for a reason, which in our  
7 estimation is because the second part of that  
8 definition is a reasonable person standard, an  
9 objective standard. And the third part of that  
10 definition, because it refers to the victim is  
11 a subjective standard seen from the victim's  
12 point of view.

13 And here is force with respect to  
14 the child crimes under Article 120B. It's the  
15 same definition with the addition of  
16 constructive force. So, when you have a  
17 parent-child or similar relationship, abuse of  
18 that relationship can be sufficient to  
19 constitute the use of force.

20 So, what I'd like to do, now that  
21 you have some -- you're armed with some  
22 knowledge on definitions and how the law is

1           structured under the current version of  
2           Article 120, I'll revisit this picture again,  
3           and ask if the change in the law from what it  
4           used to be pre-2007 to what it is today forces  
5           us to revisit this kind of conduct, which we  
6           normally would have seen as acceptable. Is it  
7           now something that perhaps we still see as  
8           acceptable, but now at least we're taking a  
9           better look at it to see if it is something  
10          that falls within our cultural norms.

11                        Is there force being used here? Is  
12          there -- are there circumstances -- is this a  
13          circumstance under which we think this is  
14          criminal conduct? Is the accused engaged in  
15          some type of conduct and under circumstances  
16          for which we think there ought to be criminal  
17          liability attached? I don't know. All I can  
18          tell is what the law says now as opposed to  
19          what the law said then.

20                        Another interesting clip that we  
21          use which you might find interesting with our  
22          students when we teach this is a clip from

1 "Gone With The Wind," where Rhett Butler takes  
2 Scarlett O'Hara up the stairs and says, "This  
3 is one night you're not putting me out,  
4 Scarlett." While at the time, perhaps that was  
5 culturally something that was seen as  
6 acceptable, part of a movie, I think this  
7 forces -- our law is forcing a re-examination  
8 of cultural norms through Congressional  
9 action.

10 Okay. For this last part, I think  
11 it's interesting to analyze some of the  
12 challenges to implementing the law that  
13 practitioners have shown us, and that we've  
14 analyzed at the school, as well. One is bodily  
15 harm, and I say to wit or not to wit because  
16 when we charge crimes in our specifications,  
17 in our charging documents we use language like  
18 "to wit," to specify certain factual elements  
19 within our charges. So, this is the definition  
20 of bodily harm under the current version of  
21 Article 120.

22 "It's an offensive touching of

1 another however slight." Now, it includes, and  
2 Congress included this last bit, "including  
3 any non-consensual sexual act or non-  
4 consensual sexual conduct, or contact," excuse  
5 me. So, what does that mean?

6 Well, what we believe it means is  
7 that if a crime is charged in this way, that  
8 the accused sexually assaulted the victim by  
9 committing a sexual act with the victim, and  
10 that is penetration of the victim's vulva by  
11 his penis, by causing bodily harm, and then we  
12 say "to wit, pushing the victim to the bed and  
13 holding her down with his hands," then that is  
14 the specified bodily harm that the government  
15 has to prove, pushing the victim to the bed  
16 and holding her down with his hands. "And,  
17 therefore, consent is not an element."

18 In other words, as I mentioned in  
19 the beginning, consent by and large has been  
20 removed from the statute, or lack of consent.  
21 The only thing the government would have to  
22 prove here is that the sexual act took place,

1 and it was done with bodily harm. They do not  
2 have to prove the victim manifested a lack of  
3 consent.

4 Now, if it is charged in this  
5 manner, that is, it does not specify the  
6 actual bodily harm of holding her down and  
7 pushing -- or him down and pushing the victim  
8 to the bed, then what we have is a  
9 reintroduction of consent as an element. And  
10 Congress contemplated that the bodily harm,  
11 that is, the sexual act could serve as the  
12 bodily harm itself. And you might wonder well,  
13 what circumstance would this ever arise? Well,  
14 we believe it would arise in such a  
15 circumstance where there is a great deal of,  
16 or maybe some consensual activity, consensual  
17 sexual contact, but not to the point of  
18 penetration. In other words, there's a -- the  
19 people engaged in the conduct, it's all  
20 consensual but up to the point of the  
21 penetration. The penetration is not  
22 consensual. So, this is where this type of

1 charging would take place, where the bodily  
2 harm is the sexual act itself. The reason I  
3 bring it up is because it reintroduces lack of  
4 consent in this particular circumstance.

5 Another area that is challenging  
6 for practitioners is committing sexual acts  
7 where the accused commits a sexual act and  
8 they know, reasonably should know that the  
9 victim is impaired in some way, either by  
10 alcohol or drug, or other similar substance.  
11 So, the accused commits a sex act on a person  
12 who is incapable of consenting, and that's  
13 because the accused knows or reasonably should  
14 know that the victim is impaired. This is not  
15 a case of consent, it is a case of capacity to  
16 consent. But where this arises, and where the  
17 challenge comes in is with respect to the  
18 knowledge prong.

19 If the government charges the  
20 person with knowing that the other person--  
21 that the victim is incapable of consent, then  
22 they have to prove actual consent. If they

1 charge it as that the accused reasonably  
2 should have known, then it's introduced into  
3 a reasonable person standard, an objective  
4 standard. Should the accused reasonably have  
5 known that the victim was impaired to the  
6 point where he or she could not consent?

7 What's interesting about this is,  
8 it hinges criminal liability on a simple  
9 negligence standard, which is an unusual thing  
10 to see in the criminal law, is that the  
11 absence of due care; that is, reasonably  
12 should have known that that person was  
13 intoxicated or impaired, is now the standard  
14 for criminal liability under the second  
15 element.

16 And, finally, there are a couple  
17 of places, and I'll point one out where  
18 Congress used varying language but we can't  
19 really figure out the reason why other than  
20 maybe it was just the drafting.

21 Rape by administration, this is  
22 rape, and it's an affirmative conduct by the

1           accused to provide someone with an  
2           incapacitating substance, drug, intoxicant, or  
3           other substance thereby substantially  
4           impairing the ability of that other person to  
5           control their conduct. So, that's rape.

6                       Whereas, if you look at sexual  
7           assault when incapable of consent, it's simple  
8           impairment. So, if the other person is  
9           incapable of consent to the sexual act due to  
10          impairment by any drug, intoxicant, or other  
11          similar substance. So, sexual assault does not  
12          require the accused to commit any affirmative  
13          act against the victim as far as impairing the  
14          victim. Rape does, because it requires the  
15          accused to actually administer the drug or  
16          other substance. But if the accused is  
17          administering the drug, it has to be to the  
18          point of substantial impairment. But if the  
19          accused comes across a victim and did not  
20          actually cause the impairment, then it is  
21          simple impairment. So, there's a distinction  
22          between the two in the definitions.

1                   Just a few other examples I think  
2                   that are interesting, and this is what the  
3                   statute struggles with, and what practitioners  
4                   have struggled with in their implementation of  
5                   the statute. Consent which has been removed as  
6                   an element in the statute, but yet there are  
7                   still issues of force and capacity, and the  
8                   interplay between what is the level of force,  
9                   is there force applied, is this a capacity  
10                  case, and whether or not consent is even  
11                  relevant at all because it's been -- Congress  
12                  has attempted to write out consent, but they  
13                  can't write out capacity or force, or haven't  
14                  written out capacity or force.

15                  So, as mentioned by Ms. Munch,  
16                  consent is a freely given agreement by a  
17                  competent person to the conduct at issue. You  
18                  cannot consent if you're sleeping,  
19                  unconscious, incompetent, under threat of  
20                  death or grievous bodily harm, if you've been  
21                  rendered unconscious, you're under threat, or  
22                  fear, or fraud. So, legally under the statute

1 a person cannot consent in those  
2 circumstances.

3 So, then is consent relevant? How  
4 is consent used? How has Congress attempted to  
5 write it out? Well, a couple of examples.  
6 Here's the one I referred to earlier, sexual  
7 assault by causing bodily harm. Two elements  
8 to this, a sexual act and bodily harm. And you  
9 can see the government does not have to prove  
10 lack of consent on the part of the victim.  
11 They have to prove a sexual act occurred, and  
12 that it was done -- caused by bodily harm. But  
13 that doesn't mean consent evidence isn't  
14 relevant.

15 Recall that the definition of  
16 bodily harm is an offensive touching however  
17 slight. So, certainly evidence that the victim  
18 consented to the conduct would diminish the  
19 government's evidence that this was an  
20 offensive touching. So, it's negative  
21 evidence, it eliminates the government's  
22 evidence with respect to whether or not the

1       conduct is offensive, but it is not in and of  
2       itself an affirmative defense. So, it goes to  
3       the definition of bodily harm, it reduces the  
4       elements -- the government's evidence on that  
5       element, but it's not a separate defense which  
6       it had been in the past.

7               Likewise, here's another example.  
8       Sexual assault on a victim who is asleep,  
9       unconscious, or otherwise. Again, the  
10       government proves there was a sex act, that  
11       the victim was asleep, unconscious, or  
12       otherwise unaware, and the accused knew or  
13       reasonably should have known of that  
14       circumstance. So, this is not about consent,  
15       it's about the capacity of the victim to  
16       actually consent, so it's a step removed from  
17       actual consent. So, is consent evidence  
18       relevant? It might be to prove that the victim  
19       was not asleep, was not unconscious, or was  
20       not otherwise unaware.

21               And I'll just point out one more,  
22       and that is a sex act on a victim incapable of

1 consent due to impairment. And I mentioned  
2 this earlier. The interesting part of this is  
3 that if the members; that is, if the jury  
4 determines that the victim is capable of  
5 consent, then this should result in acquittal  
6 without them ever reaching the factual issue  
7 of whether the victim did, in fact, consent or  
8 not. That's the flip side of removing consent  
9 from the law here, is that this particular  
10 crime is about the capacity of the victim to  
11 consent. And if the members applying the law  
12 determine that the victim is capable of  
13 consent, they never really ask the question as  
14 to whether or not the victim did or did not,  
15 in fact, consent.

16 Now, that doesn't mean that the  
17 government couldn't compensate for that by  
18 charging the crime differently, it just means  
19 that it's an anomaly with respect to -- it's  
20 an interesting factual issue or legal issue  
21 with respect to this particular crime.

22 A couple of other issues that

1           arise with respect to consent. And I linger on  
2           consent because it is such a monumental change  
3           to remove it, lack of consent, from the  
4           statute completely, but it also reflects a  
5           progressive move in the law under the UCMJ.

6                        So, I will just set up this  
7           scenario where let's say you have two people  
8           who are -- have agreed under the definition of  
9           consent to engage in some sort of sexual  
10          activity, so there's actual consent earlier in  
11          the evening, but then there is the element of  
12          alcohol that's involved that you've already  
13          heard is involved in many of these cases.

14                      So, between the time that these  
15          two people consent to the sexual conduct that  
16          they're going to engage in, obviously, that  
17          consent is still valid up until the time they  
18          start consuming the alcohol. But at some  
19          point, let's assume one of them becomes  
20          legally impaired under whatever that  
21          definition is. We don't have a definition, a  
22          statutory definition of impairment, but that

1 particular person becomes impaired. Well, does  
2 that consent follow from the time that they  
3 actually agreed and consented up and to the  
4 time that that person is legally impaired.  
5 Probably.

6 The question then is let's say  
7 that at some point the victim falls asleep or  
8 becomes unconscious due to this alcohol  
9 consumption. Well, between the time that the  
10 victim is legally impaired and the time that  
11 he or she falls asleep, does that consent  
12 carry over?

13 Well, we know from the statutory  
14 language that a person who is impaired cannot  
15 consent. We know that a person who is asleep  
16 or unconscious cannot consent, so what happens  
17 not when they say yes or no, but when they say  
18 yes, at the very beginning, but then are  
19 silent about it for the rest of the time? And  
20 the statute doesn't really tell us a lot about  
21 that.

22 If we think and we agree that

1       asleep and unconscious, and impairment are the  
2       same because people cannot consent under  
3       either of those circumstances, then the  
4       consent is invalid at the moment of  
5       impairment. In other words, it dissipates, or  
6       if we say that no, even though the person is  
7       impaired and the accused knows that they are  
8       impaired, the accused needs to re-validate the  
9       consent to determine whether or not there is  
10      consent, or maybe the consent dissipates at  
11      that point.

12                   The problem is that we don't have  
13      any language or definitions that provide us  
14      with guidance on this issue, so the question  
15      is does prior consent apply in these type of  
16      circumstances?

17                   MEMBER HILLMAN: Madam Chair, may I  
18      ask a question?

19                   CHAIR JONES: Sure.

20                   MEMBER HILLMAN: Colonel Winklosky,  
21      this is a dense area that you're giving us a  
22      detailed tour of, and I'm grateful for that,

1 but I'm confused on this. The statute actually  
2 does say that this would be a sexual assault,  
3 but it doesn't say anything -- so the prior  
4 consent according to the letter of the statute  
5 is irrelevant.

6 COL. WINKLOSKY: Yes, ma'am. The  
7 statutory language says that. The question  
8 that arises is when does the consent -- when  
9 does the capacity to consent, and when does  
10 the consent -- how do they interplay with each  
11 other? In other words, when the victim has the  
12 capacity to consent and does give affirmative  
13 consent, is that enough, or does the consent  
14 have to be renewed at some point later when  
15 there's a question of legal impairment?

16 MEMBER HILLMAN: But as you've  
17 pointed out, there's just nothing about  
18 consent in this, so there's -- it's just left  
19 out, because the specific sexual assault  
20 offense simply does not make that an element.  
21 Right? So, why are we inquiring into that?

22 COL. WINKLOSKY: That's the issue

1 is, can a person -- and that's exactly it. Is  
2 it even relevant, should we even be discussing  
3 this because the issue is moot because consent  
4 is not an element. But there might be issues  
5 of whether consent evidence would come in at  
6 all to determine if a person is impaired or  
7 not. It's an interesting discussion.

8 I think the issue that arises,  
9 ma'am, is that when a person has the capacity,  
10 it's an issue of capacity really, and how the  
11 statute handles capacity. Can a person provide  
12 affirmative consent and when do we analyze  
13 when that person provides that affirmative  
14 consent?

15 MEMBER HILLMAN: So, may I ask one  
16 other question.

17 COL. WINKLOSKY: Yes, ma'am.

18 MEMBER HILLMAN: It's related to  
19 how the -- the sort of typical sexual assault  
20 would be charged and what we've come to  
21 understand is the ordinary case, of which  
22 you've seen plenty.

1                   The amount of force that is  
2                   required would be the force required for  
3                   penetration in a classic situation of lack of  
4                   consent between a perpetrator and a victim.  
5                   Right? So, essentially, that's how the statute  
6                   is being interpreted on the ground, so that  
7                   our prosecutors can apply what you've pointed  
8                   out is a difficult statute to apply  
9                   effectively both because of the changes that  
10                  have been made to it, and because of the  
11                  attempts to separate out these different  
12                  pieces. Is that correct, the way I described  
13                  that? That would be --

14                   COL. WINKLOSKY: It's the force to  
15                   achieve penetration or --

16                   MEMBER HILLMAN: Causing bodily  
17                   harm, in other words, would be interpreted to  
18                   be that -- to be --

19                   COL. WINKLOSKY: If they do not  
20                   specify the bodily harm, then there's no force  
21                   required. It's an offensive touching, however  
22                   slight.

1                   MEMBER HILLMAN: And which part of  
2                   the statute would that get charged under? So,  
3                   what's that -- there's great capacity for  
4                   different charges here, I realize that. And  
5                   it's an art or craft for the prosecutor to  
6                   come up with the right charging here. But in  
7                   that essential non-stranger rape situation,  
8                   what would the -- the charge would be a sexual  
9                   assault under -- and there's not force  
10                  required? That's what I'm asking you, what's  
11                  the ordinary way this gets charged?

12                  COL. WINKLOSKY: Well, sexual  
13                  assault by causing bodily harm, because  
14                  normally there is going to be some form of  
15                  offensive touching that goes along with the  
16                  actual penetration itself. So, through  
17                  investigation, through marshaling of the facts  
18                  you're likely to have in most scenarios some  
19                  offensive touching that goes along with the  
20                  actual sexual act itself.

21                  And that also avoids some of these  
22                  other issues that arise with respect to

1           impairment, level of impairment, and  
2           incomplete definitions within the statute.

3                   CHAIR JONES: Yes, Mr. Bryant?

4                   MEMBER BRYANT: Going back to this  
5           consent issue, the way I'm looking at it on  
6           this first blush look that you've presented to  
7           us so well, is while Congress may have taken  
8           the word "consent" out of the statute so it's  
9           no longer an element the government has to  
10          prove, it's still a defense, it could be  
11          raised as a defense. It's not there, you don't  
12          have to prove it, but they can raise no, this  
13          was consent. She wasn't asleep, she wasn't  
14          unconscious, or whatever the conditions may  
15          be. And that's the conundrum, I would think,  
16          for the lawyers on both sides.

17                   COL. WINKLOSKY: That's a good  
18          point, sir. And really what has happened is,  
19          we've taken consent away as an affirmative  
20          defense. And what we've done is -- what  
21          Congress has done is they have couched the  
22          elements in terms of consent evidence may

1 still be relevant to diminish the government's  
2 evidence on a particular element to defeat  
3 proof beyond a reasonable doubt.

4 MEMBER BRYANT: Right.

5 COL. WINKLOSKY: And the difference  
6 is that what used to happen was the military  
7 judges would instruct members that consent was  
8 an affirmative defense. And if they found that  
9 the victim consented, that it was a complete  
10 defense, that they would acquit.

11 What happens now in the  
12 instructions is that consent is considered as  
13 relevant evidence along with everything else,  
14 and not a separate affirmative defense. So, it  
15 may be relevant evidence to diminish the  
16 offensiveness of bodily harm, but it's not a  
17 separate defense in and of itself.

18 MEMBER COOK: Okay. Going on that  
19 comment, so if that's true does that mean that  
20 the -- for cases between the 2007-2012 period  
21 it probably still is an affirmative defense.  
22 Is that -- I mean, that period of when Article

1           120 under its old language, those affirmative  
2           defenses would still exist in that way, but  
3           does the mistake of fact defense still even  
4           exist for post-2012 offenses? The accused who  
5           believed they were consenting, that whatever  
6           the circumstances were, does that still exist,  
7           mistake of fact?

8                       COL. WINKLOSKY: It is in extremely  
9           limited circumstances where mistake of fact as  
10          to consent would exist in my estimation under  
11          the current 2012 version. You are correct that  
12          the affirmative defense still would apply from  
13          2007 to 2012, under the 2007 version, but --  
14          and there are varying interpretations as to  
15          whether or not mistake of fact as to consent  
16          might apply. And there's a distinction to be  
17          made here between mistake of fact as a  
18          defense, mistake of fact as to other issues,  
19          and mistake of fact as to consent. I think  
20          mistake of fact as to consent has all but been  
21          eliminated in Article 120 in its current  
22          version.

1                   MEMBER COOK: Okay. While you're  
2                   talking, and I know it's not in the  
3                   presentation, but that we've had some  
4                   testimony and some questions that have come up  
5                   during other public hearings in terms of  
6                   another defense to an allegation of an Article  
7                   120 offense, rape, sexual assault, whatever it  
8                   is. Can you briefly tell the panel to what  
9                   extent, if at all, does a good soldier, good  
10                  airman, good service member defense apply to  
11                  rape, sexual assault type of process?

12                  COL. WINKLOSKY: I think the good  
13                  soldier defense is an available defense in  
14                  just about every case. The defense is going to  
15                  be able to present evidence not only because  
16                  the rule allows it, but because case law has  
17                  developed it to the point where currently the  
18                  accused can present that kind of evidence to  
19                  generate reasonable doubt about whether or not  
20                  the accused committed the crime. In other  
21                  words, it's almost like what I would refer to  
22                  as reverse propensity evidence. Because this

1 person is of a certain quality or character,  
2 they are less likely to have committed an  
3 offense. I think that's the way it has been  
4 applied at courts-martial, as well.

5 I believe that that's going to go  
6 away. As we discussed earlier, that we have  
7 pending legislation that is probably going to  
8 eliminate that, the availability of that  
9 defense to an accused.

10 MEMBER COOK: Is that language to  
11 do away with that defense, is that in the  
12 current language of the Senate or the House  
13 bill, do you know?

14 COL. WINKLOSKY: It is. Yes, ma'am.

15 MEMBER COOK: That's what you're  
16 saying.

17 COL. WINKLOSKY: Yes, ma'am.

18 MEMBER COOK: Okay. And the only  
19 point -- the other point I would just clarify  
20 is earlier when Professor Hillman had asked  
21 you about Article 125, which is sodomy, the  
22 fact of whether or not that has -- is that

1 moot? It is, but only in terms of if the  
2 offense occurred after the 2012 statute. It is  
3 still a relevant and a necessary charge  
4 depending on the circumstances for any  
5 offenses in that gap between 2007 and 2012.

6 COL. WINKLOSKY: Yes, ma'am, that's  
7 correct. And I neglected to say that because  
8 as we have these various versions of Article  
9 120, there's also an interplay with what other  
10 statutes were available for the particular  
11 conduct at the time, as well.

12 MEMBER COOK: And you didn't  
13 neglect anything. You've done a good job  
14 explaining a very complicated area of the law.  
15 Thank you for doing it this morning.

16 COL. WINKLOSKY: Thank you, ma'am.  
17 I just have a few other things  
18 that I think are important to cover, and that  
19 is general and specific intent. You know, we  
20 have varying types of intent under this law,  
21 and the question really is why do you care?  
22 Why do practitioners care?

1           We have recently some new case law  
2           in the military that involves how we determine  
3           what is a lesser included offense under the  
4           offenses that we actually charge. So, just  
5           like in many jurisdictions, in the military  
6           you can charge a greater offense. If the  
7           lesser offense is included in it, you don't  
8           have to put it on the charge sheet.

9           Well, now there's a case, United  
10          States versus Jones that we now apply a strict  
11          elements test to determine what is a lesser  
12          included offense. And if you recall, when we  
13          have a sexual act that involves contact  
14          between the penis and vulva, mouth, or anus,  
15          that is a general intent crime. There's no  
16          specific intent to abuse, humiliate, harass,  
17          or degrade, or excite lust or sexual desires.

18          So, if you charge that as the  
19          greater offense and you have a specific intent  
20          crime that you think is a lesser included  
21          offense, you're actually adding an element of  
22          specific intent, and you're probably --

1 practitioners are probably going to have to  
2 charge it separately. So, the interplay  
3 between mental states with respect to these  
4 varying crimes can make the matters a little  
5 bit more complex.

6 The other issue is, and this was  
7 brought up with respect to mistake of fact, I  
8 just want to touch on it. This is our mistake  
9 of fact language in the Manual for Courts-  
10 Martial. It's a monster, it's dense, so I will  
11 break it down for you because I needed it  
12 broken down.

13 There are four sentences in it.  
14 The first is an introductory sentence. The  
15 second is, I think you may recognize, which is  
16 if you have an element of crime which requires  
17 premeditation, specific intent, willfulness,  
18 or knowledge, then you have a mistake of fact  
19 that just exists in the mind of the accused.  
20 Just an honest mistake. If you have an element  
21 that requires general intent or knowledge,  
22 then it has to be an honest and reasonable

1 mistake of fact.

2 And then the last sentence says  
3 that if the accused intent or knowledge is  
4 immaterial to an element, then ignorance or  
5 mistake is not an excuse. So, this is -- and  
6 what we teach judges, and how I talk to  
7 practitioners about this is you have to go  
8 into each crime that's charged, analyze each  
9 element and determine whether or not there is  
10 a mistake of fact. Not mistake of fact as to  
11 consent, but mistake of fact as to some other  
12 portion with respect to that particular  
13 element. And if it doesn't involve the accused  
14 knowledge or intent, then there will not be a  
15 mistake of fact defense applied to it.

16 The reason I bring this up is  
17 because this is somewhat different than the  
18 2007 version. The 2007 version built in  
19 affirmative defenses to the punitive language,  
20 the statute itself. The 2012 version points to  
21 this language as defenses. All defenses are  
22 available that would otherwise be available,

1 and mistake of fact is one of them. And this  
2 is our mistake of fact language.

3 One other interesting anomaly of  
4 the statute which I will bring out is the --  
5 what I think is an unintended consequence,  
6 and I'll end with this. And that is, here's  
7 the elements of sexual assault where the  
8 victim is incapable of consent. And it's  
9 interesting because the question I have in my  
10 mind at the end of this is, do we have two  
11 victims, or do we have two accused? Because  
12 you can see that a sex act is the first  
13 element, but then second element is, was the  
14 victim incapable of consent due to impairment  
15 by drug, intoxicant, or similar substance? So,  
16 essentially, was the victim impaired  
17 potentially by alcohol to the point where they  
18 didn't have the capacity to consent? And  
19 should the accused reasonably have known that?  
20 So, we apply an objective standard, the  
21 reasonable standard, and voluntary  
22 intoxication on the part of the accused does

1 not apply. We apply a reasonably sober person  
2 standard. Would a reasonably sober person have  
3 believed the victim was incapable or known the  
4 victim was incapable of consent due to  
5 impairment by an intoxicant?

6 Well, what if both people engaging  
7 in this conduct are incapable of consent with  
8 respect to their level of impairment? The law  
9 then, you could have one person who reports  
10 it, and then shortly thereafter the other  
11 person reports it, and the law would allow all  
12 those attendant rights and other policies to  
13 kick in for both people because you may have  
14 either two victims or two accused in these  
15 types of situations.

16 It's just something that the --  
17 that I think is an unanticipated consequence  
18 of this. And as Professor Hillman brought up  
19 earlier, I think the way to avoid this is to  
20 not charge this crime, but probably charge it  
21 under a separate crime which would be sexual  
22 assault by causing bodily harm, perhaps. But

1           it highlights a bigger point, which is  
2           practitioners are forced to go through that  
3           art of charging because some of the  
4           definitions, and some of the scenarios that  
5           arise force them to do that, which is no  
6           different than perhaps other prosecutors or  
7           practitioners. But in this particular case, it  
8           does create a strange anomaly.

9                         MEMBER COOK: The prosecutors go  
10           through the art of charging this, but it's  
11           ultimately the commanders currently who decide  
12           whether or not these cases go to court. So, to  
13           what extent are commanders -- I mean, the  
14           charging decision is with the trial counsel  
15           regardless of the service. To what extent does  
16           trial counsel have to go through this level of  
17           detail explaining to that convening authority  
18           why they're charging it in the way that they  
19           are, or the impacts of the various charges  
20           that are out there?

21                         COL. WINKLOSKY: I think commanders  
22           are -- I can speak from my experience, and

1 from people who have talked to me about this.  
2 I think commanders are very interested in what  
3 the legal process is, and what is happening  
4 with respect to the people that are members of  
5 their command. And they have experts who  
6 advise them on that. They have the  
7 prosecutors, the trial counsel who are  
8 actually in the courtroom doing the job of  
9 prosecuting and charging these cases.

10 They have supervisors who are  
11 looking at that, and then they have staff  
12 judge advocates who are direct advisors to the  
13 commanders, so you have a lot of lawyers  
14 involved in the process who are advising the  
15 commander on what action to take. They  
16 normally do not get into this level of detail  
17 unless they're asked. Having been on staffs,  
18 I don't think that that's unusual for other  
19 staff members, as well. You might have a  
20 communications officer who doesn't get into  
21 the level of detail about data com, or a  
22 transportation officer who doesn't get into

1 the level of detail with respect to engine  
2 maintenance, but that doesn't mean that the  
3 commander is abdicating his responsibilities,  
4 or her responsibilities with respect to the  
5 system itself.

6 MEMBER COOK: The way I probably  
7 should have worded it is there's some -- there  
8 is a proposal in Congress. Some people have  
9 told us that commanders should be taken out of  
10 that decision, sending the cases to court.  
11 What role -- what's your view on that  
12 particular piece? I won't ask it more specific  
13 than that.

14 COL. WINKLOSKY: As I said in the  
15 beginning, ma'am, I'm an academic who's at the  
16 schoolhouse, so my job is to ask a lot of  
17 questions and analyze the law. I avoid policy  
18 decisions.

19 I'm in Charlottesville, Virginia  
20 which is nicely tucked outside of the Beltway,  
21 and so I think there are strong arguments on  
22 both sides for that decision. I can tell you

1           that my look at the Manual for Courts-Martial  
2           and the preamble is that the manual is  
3           designed to both look at justice and  
4           discipline. And I think that is a very  
5           difficult balancing to do, and I think  
6           commanders are in the position where they're  
7           the ones that have to do it, at least right  
8           now. So, how is that for a lawyerly answer for  
9           you, ma'am?

10                         MEMBER COOK: That's a pretty good  
11           lawyerly answer. Thank you.

12                                 (Laughter.)

13                         COL. WINKLOSKY: But I really --  
14           that particular subject is something that we  
15           at the schoolhouse talk about, but really  
16           don't take a position on as far as that. We  
17           leave that up to the folks who are making the  
18           policy.

19                         CHAIR JONES: Yes.

20                         MEMBER HOLTZMAN: Thank you for  
21           your explanation. I guess what I'd like to  
22           know is do you have a list of the terms that

1           you would like to see defined in an Executive  
2           Order?

3                       COL. WINKLOSKY: We have some terms  
4           -- I don't have them for you right now, ma'am.  
5           I know there are some terms we have discussed  
6           that would be nice to have more detailed  
7           explanation on as far as statutory language,  
8           or language in the manual.

9                       The problem we have from our  
10          perspective is that when you -- when Congress  
11          or the President provides a more detailed  
12          explanation of something there's always the  
13          law of unintended consequences that kicks in,  
14          and that statutory language becomes analyzed  
15          to death. So, to answer your question, there  
16          are some. I can provide you with that list of  
17          things we think would be good to define, and  
18          why we think so, and some of the reservations  
19          we might have with respect to that. But I  
20          don't have that with me right now, ma'am.

21                      MEMBER HOLTZMAN: Okay. I think it  
22          would be useful, but how does this process

1 normally work with the White House when it  
2 prepares an Executive Order explaining or  
3 further elaborating on a statute? Does it get  
4 proposed language from the Department of  
5 Defense? Is that how it works, or does the  
6 White House just dream this up on its own --

7 COL. WINKLOSKY: No, ma'am --

8 (Simultaneous speech.)

9 MEMBER HOLTZMAN: -- like Athena  
10 coming out of Zeus' head.

11 COL. WINKLOSKY: There's a working  
12 group, the Joint Service Committee is the  
13 committee within the Department of Defense  
14 that has a working group of members from each  
15 of the services that provides input on what  
16 they believe the language of the Manual for  
17 Courts-Martial should be. That is then placed  
18 into draft form in the Federal Register for  
19 public comment, and then it becomes the draft  
20 Executive Order that goes over and through the  
21 process.

22 MEMBER HOLTZMAN: Has that

1           happened?

2                   COL. WINKLOSKY: It has, yes.

3                   MEMBER HOLTZMAN: So, the draft  
4           Executive Order has gone to the White House.

5                   COL. WINKLOSKY: Yes, ma'am. It is  
6           pending signature, and that's why we're kind  
7           of flying solo right now, is we're waiting for  
8           that additional language in the manual to be  
9           signed by the President, and it's been pending  
10          for a little over a year now.

11                  MEMBER HOLTZMAN: Okay, thank you.

12                  COL. WINKLOSKY: Yes, ma'am.

13                  MEMBER HOLTZMAN: But if you could  
14          give us a copy of the draft order, that would  
15          be helpful, and a list of the --

16                  COL. WINKLOSKY: Yes, ma'am, I have  
17          it here, and I can leave it.

18                  MEMBER HOLTZMAN: Thank you. And a  
19          list of the terms --

20                  COL. WINKLOSKY: Yes, ma'am.

21                  MEMBER HOLTZMAN: -- that need to  
22          be elaborated. Thank you.

1                   MEMBER HILLMAN: Recognizing that  
2                   additional change would have unintended  
3                   consequences, and that attempts to clarify and  
4                   progress in this statutory revision process  
5                   have not always succeeded, I wonder if you'd  
6                   counsel -- how should we understand this  
7                   statute? Is it a hindrance to effective  
8                   prosecution of sexual assault at court-  
9                   martial, and is it being effectively used  
10                  right now? I mean, what's -- I've read much of  
11                  the criticism of it and we understand that.  
12                  And you've been muted, actually, in your  
13                  representation of some of that really  
14                  vociferous criticism of the statute.

15                   CHAIR JONES: Although I like your  
16                   slide a lot.

17   (Laughter.)

18                   MEMBER HILLMAN: But if it really  
19                   should be changed I, at least, would like to  
20                   know. So, does this -- should this look  
21                   different in order to make this a more  
22                   reasonable process for prosecutors to deal

1 with, and commanders, and everybody else?

2 COL. WINKLOSKY: I don't think we  
3 have the answer to that right now because it  
4 hasn't been in practice long enough for us to  
5 produce an empirical study with respect to  
6 cases of court-martial, and appellate review,  
7 and so forth. So, I understand what you're  
8 asking, ma'am. I just think that it's  
9 premature to say one way or the other right  
10 now because all I can do is -- I have  
11 anecdotal evidence on both sides, and without  
12 more empirical data and a look at the  
13 appellate review process over the next couple  
14 of years, I can't really say for sure.

15 MEMBER HOLTZMAN: Can I just  
16 follow-up on that? Do you mind?

17 CHAIR JONES: Of course.

18 MEMBER HOLTZMAN: Well, what do  
19 prosecutors tell you? Are they happy with the  
20 statute?

21 COL. WINKLOSKY: They are happy --

22 (Simultaneous speech.)

1                   MEMBER HOLTZMAN:  -- looking at  
2                   it.

3                   COL. WINKLOSKY:  They -- happy -- I  
4                   think they are -- they have a lot more tools  
5                   to use to prosecute these cases.  In other  
6                   words, it's not just by force and without  
7                   consent anymore.  They have a menu of crimes  
8                   that they can capture the criminal conduct  
9                   with.

10                   The flip side of that, however, is  
11                   that it becomes complex and complicated to do  
12                   that type of calculus.  What ought I charge in  
13                   this particular case, and how -- and what am  
14                   I -- what are my anticipated results if I do  
15                   this particular way?  And it's just a new way  
16                   of doing business.  I don't think it's -- I  
17                   don't think that over time it's going to be a  
18                   hindrance.  I think it's just a matter of  
19                   getting used to the way this statute is  
20                   written, that it's a little bit more complex,  
21                   it has some additional challenges.  But once  
22                   our prosecutors are able to navigate it over

1 time, there won't be any further issues with  
2 it. So, that will work out over time. I hope  
3 that answers your question, ma'am.

4 MEMBER HOLTZMAN: Well, I was going  
5 to -- my next question is, are defense counsel  
6 happy with it?

7 COL. WINKLOSKY: Right now they  
8 are.

9 (Laughter.)

10 COL. WINKLOSKY: But I think their  
11 concern is over-criminalizing conduct is what  
12 I hear. Is this -- is our pendulum swinging  
13 the opposite direction, and are we sweeping  
14 too much conduct into what otherwise would be  
15 lawful in the past? And that's -- they just  
16 don't want their clients exposed to any  
17 further criminal liability than they believe  
18 they ought to. So, I think there is a healthy  
19 discussion about how to apply this law by  
20 practitioners on both sides.

21 MEMBER COOK: Just one comment.  
22 Hopefully, there is a healthy discussion on

1           how you train all the service members who are  
2           now subject. They don't need to know all this  
3           detail, but understanding where the lines of  
4           conduct are drawn would be an interesting  
5           challenge these days.

6                       COL. WINKLOSKY: Yes, ma'am. This  
7           particular class I have given at least maybe  
8           two or three times per month to practitioners  
9           in the field from all services whether in  
10          person or via our Distance Learning course.  
11          And I ask them for feedback, and we have a  
12          good discussion, academic discussion about  
13          these things. So, thank you, ma'am.

14                      CHAIR JONES: Thank you very much,  
15          Colonel. Interesting, difficult topic, very  
16          nice job. Thank you.

17                      COL. WINKLOSKY: You're welcome,  
18          ma'am.

19                      CHAIR JONES: All right. Our next  
20          panel is going to show us waterfall slides. I  
21          love that name. And I'd like them to come up  
22          now. This will show for us the dispositions of

1 cases under DOD jurisdiction.

2 All right. With respect to these  
3 slides and statistics on disposition of sexual  
4 assault subjects, we'll begin with Colonel  
5 Lewis for the Air Force. And to the extent  
6 that we may have some of this detail before us  
7 already, Colonel, if you could give us the  
8 trends and the detail where necessary, but we  
9 have received a lot of this information  
10 before. Thanks.

11 COL. LEWIS: Good morning again,  
12 Judge Jones, panel members. As you know from  
13 yesterday, I'm the Chief of the Military  
14 Justice Division for the Air Force, and I'm  
15 joined by Lieutenant Colonel Eric Coyne, who  
16 is special counsel to the Judge Advocate  
17 General. And Colonel Coyne advises General  
18 Hardy directly, and serves as an action  
19 officer for many different areas.

20 First, I wanted to cover just a  
21 few things, and then I'm going to turn it over  
22 to Colonel Coyne to go through the rest of the

1 slides. But when we're talking about our  
2 waterfall slides and disposition of offenses,  
3 we are talking about substantiated reports.  
4 And that's our unrestricted reports of sexual  
5 assault, and the ones that have been provided  
6 to command for some form of punitive,  
7 corrective, or discharge action against an  
8 offender. So, that definition comes directly  
9 out of DOD's SAPRO policy, that's DOD  
10 Instruction 6495.02, Enclosure 12. So, when  
11 you see some of this terminology on this  
12 slide, you will understand that's the source  
13 where it's coming from.

14 You heard yesterday from Mr.  
15 Poorman that all unrestricted reports since  
16 March of 2013 are opened up for an  
17 investigation by the Air Force Office of  
18 Special Investigation. One point is that the  
19 Air Force does not have our investigative  
20 agency substantiate or unsubstantiated  
21 allegations of sexual assault. They do not  
22 determine whether they are unfounded or not.

1           They forward all of them with their  
2           investigation reports to the commanders for  
3           action, where the commander with the advice of  
4           the Staff Judge Advocate is able to make that  
5           determination.

6                       There are a couple of areas in our  
7           slides where the Air Force shows information  
8           that might be slightly different than the  
9           information that you would see on the DOD  
10          SAPRO report, and we're going to highlight a  
11          few of those things because they're specific  
12          to Air Force policy.

13                      First of all, on this slide you  
14          can see that all penetration cases, and that  
15          includes attempts, as well, are forwarded to  
16          the General Court-Martial Convening Authority  
17          for review at least twice. Now, this is an Air  
18          Force-specific policy.

19                      The first time that's done is  
20          within 30 days after initial disposition by  
21          the Special Court-Martial Convening Authority  
22          06, so we're all familiar with the Department

1 of Defense Withhold Letter, which requires the  
2 Special Court-Martial Convening Authority 06  
3 to look at these cases. The Air Force has gone  
4 one step on policy further to say that the  
5 Special Court-Martial Convening Authority has  
6 to tell the General Court-Martial Convening  
7 Authority what happened within 30 days. And  
8 what that allows the General Court-Martial  
9 Convening Authority to do is if he or she  
10 determines that that action was inappropriate,  
11 that individual might have the ability to pull  
12 a case up to their level.

13 Second, after the OSI  
14 investigation is closed, OSI is always looking  
15 for what was the disposition? Was it a court-  
16 martial? What was the punishment? Was it a  
17 non-judicial punishment, so on and so forth.  
18 What we're requiring in the Air Force only is  
19 the General Court-Martial Convening Authority  
20 to sign out that disposition to the Air Force  
21 OSI. This, again, insures that our General  
22 Court-Martial Convening Authorities know

1 exactly what action was taken in a particular  
2 case.

3 I'm now going to turn it over to  
4 Colonel Coyne to go through our Air Force  
5 version of our waterfall slides.

6 COL. COYNE: Thank you. Good  
7 morning.

8 CHAIR JONES: Good morning.

9 COL. COYNE: Ma'am, this first  
10 slide -- this will be the same slide that  
11 you'll see throughout the presentation. The  
12 red circle will jump around to explain which  
13 area I'm discussing.

14 This first slide is 399 sexual  
15 assault subjects that were presented in FY 12.  
16 This is 271 subjects that were identified in  
17 FY 12, and 128 subjects that were identified  
18 from prior years, and so giving you a total of  
19 399.

20 PARTICIPANT: Could you give those  
21 numbers again, please, sir?

22 COL. COYNE: Yes, ma'am. There was

1           271 subjects identified in FY 12, and 128  
2           subjects identified prior to FY 12. Now, I  
3           should note there were 449 unrestricted  
4           reports of sexual assault in FY 12, and that  
5           -- OSI opened 449 investigations, but only 253  
6           investigations had closed by the end of Fiscal  
7           Year 12, and of that, 271 subjects were  
8           identified. So, there's a little bit of a gap  
9           between switching from reports to subjects,  
10          and that takes place after the investigations  
11          are completed.

12                        Of the investigations -- excuse  
13          me, of the subjects that were identified, the  
14          399, 179 cases were still pending command  
15          action at the end of FY 12, so there was 179  
16          cases that had been presented to commanders,  
17          but commanders have not yet acted on. And I  
18          would suspect that the vast majority of those  
19          will appear in the FY 13 slides that come out  
20          later this -- excuse me, the beginning of next  
21          year.

22                        The next slide, 43 cases command

1           action is precluded, so commander would not  
2           have an opportunity to act on those 43 cases.  
3           And they're divided into those four  
4           categories. Civilian -- one I'd like to  
5           discuss is civilian foreign prosecution. Those  
6           were -- the Air Force has a policy to maximize  
7           jurisdiction, so we will generally request  
8           jurisdiction over a case in every case  
9           regardless of the offense.

10          Air Force policy is to request jurisdiction  
11          from the local authorities, so be it overseas  
12          or downtown, local authorities oftentimes have  
13          the first right of refusal, if you will, if  
14          the case occurred -- the offense occurred in  
15          a civilian jurisdiction. And we'll approach  
16          the local District Attorney and ask for  
17          jurisdiction in that case. Sometimes we get  
18          it, sometimes we don't. I won't get into too  
19          much detail on that. I know you've heard on  
20          that matter before, but those cases go away.

21                           The reason I bring that up is  
22          because as we go through this, cases only get

1       binned, if you will, in one category. So, 12  
2       cases were prosecuted say in civilian or  
3       jurisdictions. In those 12 cases, that doesn't  
4       necessarily mean nothing happened to the  
5       offender on the military side. But the way the  
6       slides are calculated, they only get binned in  
7       one category, so that category is the civilian  
8       foreign prosecution. It may very well be that  
9       the offender received an administrative  
10      discharge as a result of the offense that  
11      occurred downtown, but those are not captured  
12      on these slides.

13                So, as a result we had 177 cases  
14      presented to commanders for action, and we use  
15      that as our denominator, if you will, in  
16      determining our prosecution rate, which is  
17      unique, which is slightly different in how you  
18      could calculate the prosecution rate. And I'll  
19      discuss that shortly.

20                Of those 177 cases presented to  
21      commanders, 54 probable cause only for a non-  
22      sexual assault offense. And, again, that

1 doesn't mean nothing happened to those people  
2 or those offenders, that's just not captured  
3 on this slide because you're only binned in  
4 one category.

5 In 32 cases there was insufficient  
6 evidence of any offense, and those cases are  
7 defined as although the allegations made meet  
8 the required elements of at least one criminal  
9 offense listed in the SAPRO definition of  
10 sexual assault, there was insufficient  
11 evidence to legally prove those elements  
12 beyond a reasonable doubt and proceed with the  
13 case.

14 For example, if the allegation is  
15 a touching or a groping allegation, meaning it  
16 might be an aggravated sexual contact case,  
17 there may be sufficient evidence to prove the  
18 contact occurred but not the intent element  
19 that it was done for the sexual desire. So,  
20 that would be one that might get binned into  
21 the insufficient evidence of any offense.

22 In 24 cases, the victim declined

1 to participate. And this is one that we -- a  
2 category we believe is ripe for improvement,  
3 and some of the initiatives that have  
4 undertaken in the last year to include Special  
5 Victims Counsel Program, we hope will promote  
6 ways -- promote an avenue to better explain  
7 the process, and to allow victims to  
8 participate in the military justice process.

9 We understand there's a myriad of  
10 reasons a victim may not want to participate,  
11 but we are -- we believe through the Special  
12 Victims Counsel Program and other programs  
13 that we've initiated we're trying to break  
14 down some of those barriers, and hope to  
15 improve this number.

16 Eleven were unfounded by command,  
17 and those are allegations that reflect a  
18 determination by the commander with the advice  
19 of the Staff Judge Advocate that the  
20 allegation made did not occur and was not  
21 attempted. And, again -- excuse me. And then  
22 the commander declined action, we had no cases

1           this year or last year where a commander did  
2           -- was presented with a case and did nothing  
3           with that case. They took action in all cases  
4           in one of these categories. And we do not --  
5           our investigative agencies do not unfound any  
6           cases. Air Force OSI, for example, would not  
7           unfound a case, so that's always going to be  
8           zero for the Air Force.

9                        So, that left 56 cases where  
10           commanders did take action, and 42 of those  
11           cases -- commander preferred charges. And  
12           that's where we, as discussed previously,  
13           that's where we would derive our prosecution  
14           rate from, 24 percent down below is 42 out of  
15           177 cases. An alternate way to calculate that  
16           would be 42 out of 56 cases; however, that's  
17           not how we calculate it.

18                       Fourteen cases were non-judicial  
19           punishment, and the last two cases -- excuse  
20           me, the last two rows, admin discharge and  
21           other admin action reflect the reality that  
22           you can only bin a case in one area. So,

1           that's not to mean that no one was  
2           administratively discharged, or no other admin  
3           action was taken. Generally, for an admin  
4           discharge you have to have some other action,  
5           so that case would have been binned in another  
6           row.

7                            Again, there's our prosecution  
8           rate discussed. Just comparing it to some of  
9           the civilian rates, as you know, there is no  
10          good civilian comparison on this data, so we  
11          have looked to RAINN and asked -- and looked  
12          at their data, and how they calculated their  
13          data.

14                           And using the number of  
15          prosecutions in the numerator, reports made to  
16          police as the denominator, RAINN comes up with  
17          a 20 percent prosecution rate, so nine out of  
18          46 cases. And a civilian arrest has some  
19          parallels to preferral of charges. And using  
20          that number for the numerator results in a 26  
21          percent prosecution rate. However, because  
22          RAINN pulls these numbers from mixed data,

1 mixed time frames, they're not very reliable,  
2 but it's the best we have as we look to  
3 comparable data, leaving our conviction rate  
4 of 57 percent.

5 Now, that was the conviction rate  
6 of just sexual assault offenses. If you look  
7 at all offenses, so a conviction at court-  
8 martial for any offense, 20 of the 23 cases  
9 actually resulted in a conviction, and that's  
10 an 87 percent conviction rate.

11 MEMBER HOLTZMAN: Do you have any  
12 comparable figures? Are you going to give them  
13 with regard to other crimes so we can put this  
14 in some sort of context?

15 COL. COYNE: Ma'am, do you mean,  
16 for example, drug cases, or --

17 MEMBER HOLTZMAN: Robbery,  
18 burglary, homicide.

19 COL. COYNE: I do not, but we could  
20 get those.

21 MEMBER HOLTZMAN: Yes, it would be  
22 nice to see what this looks like in the larger

1 universe. Thank you.

2 COL. COYNE: Yes, ma'am. And,  
3 again, as we look to the civilian rates in the  
4 civilian comparison, the RAINN conviction rate  
5 is about 56 percent, five of nine cases end up  
6 in conviction.

7 And I'm having a hard time  
8 figuring out which direction to go with the  
9 clicker, but this is our FY 11 slide. I'm not  
10 going to go through it. It's the same  
11 analysis; however, for comparison sake you can  
12 see where our FY 11 rates -- prosecution rate  
13 and conviction rate are relatively comparable  
14 to our FY 12 rates.

15 MEMBER HILLMAN: Colonel Coyne,  
16 since you put that up --

17 COL. COYNE: Yes, ma'am.

18 MEMBER HILLMAN: -- why does it go  
19 down from 522 to 399? We're looking for  
20 increased -- whenever there's a drop it seems  
21 like a flag to me. What do you think that's  
22 about?

1 COL. COYNE: Yes, ma'am. We've  
2 talked about that quite a bit, not really  
3 sure. Reports did not -- reports went up,  
4 investigations were the same. The thought was  
5 perhaps if you look back, more cases were --  
6 hadn't finished with their investigation yet,  
7 so you end up with a subtotal of 399 -- excuse  
8 me, 177 instead of 362, more were in the  
9 pipeline. It could be a difference in how `11  
10 and `12 data were calculated. Because these  
11 are so -- when you pull a case, the way cases  
12 have been pulled, aggregated from the bases,  
13 you rely on a certain element of getting the  
14 right cases and calculating. That could  
15 account for some small percentage but,  
16 otherwise, there's no -- I don't have a good  
17 answer.

18 MEMBER BRYANT: Judge Jones?

19 CHAIR JONES: Sure.

20 MEMBER BRYANT: The prosecution  
21 rate and conviction rate, what -- is my math  
22 just that poor, or what am I missing here?

1           Seventy-nine were prosecuted, a conviction  
2           rate of 48 which was, I assume, a conviction  
3           of 21 versus 44, but that doesn't total the  
4           79, that only totals the 65. So, what happened  
5           to those -- you know, 79 were prosecuted but  
6           the conviction rate shows the -- it looks to  
7           me like it's showing 65 cases, a total of 65.

8                       COL. LEWIS: Mr. Bryant, let me  
9           take that.

10                      MEMBER BRYANT: Yes.

11                      COL. LEWIS: It's a great question,  
12           and usually what that's representing is cases  
13           where the commander preferred charges, they  
14           were sent to an Article 32 investigation. That  
15           investigation was done, and then those charges  
16           were not referred to trial so that we never  
17           actually got to trial. So, if you see the 79  
18           number on this Fiscal Year 11 slide, that  
19           shows 79 preferrals, but only 44 of those  
20           would have been referred to trial and actually  
21           made it to that date where we would be  
22           arraigning the accused.

1                   MEMBER BRYANT: So, after an  
2           Article 32, the commander --

3                   COL. LEWIS: The General --

4                   MEMBER BRYANT: -- did his or her  
5           thing.

6                   COL. LEWIS: The General Court-  
7           Martial Convening Authority, once he or she  
8           has that investigation, is going to look and  
9           determine whether it meets the evidentiary  
10          standard for referral.

11                   MEMBER BRYANT: All right. And I  
12          just picked that one because it's a similar  
13          math on all -- each fiscal year you've shown  
14          us. When you add up under prosecution rate how  
15          many were convicted versus how many went to  
16          trial, it's a different number from those that  
17          are on the slide as prosecution rate. All  
18          right, I understand.

19                   COL. LEWIS: Okay.

20                   MEMBER BRYANT: Thank you.

21                   CHAIR JONES: So, what you're  
22          telling us is that there's an enormous

1 attrition rate between the time that it goes  
2 -- during this Article 32, is that what it is,  
3 32 process. And almost half of the cases get  
4 dumped at that point.

5 COL. LEWIS: And there's certainly  
6 a rate of cases that do not go to trial. Those  
7 could be two different things. One, they could  
8 be attrition. There could be that the victim  
9 declines to participate at some point after  
10 preferral of charges. And we certainly have  
11 that happen. And our DOD policy is that we're  
12 going to respect that decision. And sometimes  
13 that means that a case that we would be very  
14 happy to take to trial, ultimately cannot make  
15 its way into the courtroom.

16 And then sometimes it's the case  
17 where there was enough probable cause for  
18 preferral of charges. That commander felt that  
19 there was truth to the nature of those  
20 charges, preferred the charges, but when the  
21 Article 32 investigation was held, that  
22 Article 32 officer made a recommendation, and

1           that recommendation was followed by the  
2           Convening Authority, and the case was  
3           dismissed and went away.

4                       MEMBER HOLTZMAN: So, do you have  
5           any figures that break that down?

6                       COL. LEWIS: Not for Fiscal Year 12  
7           or 13.

8                       MEMBER HOLTZMAN: Or 11?

9                       COL. LEWIS: Yes, ma'am.

10                      MEMBER HOLTZMAN: May I just  
11           follow-up on that?

12                      CHAIR JONES: Sure.

13                      MEMBER HOLTZMAN: Then that line  
14           that says "victim declined to participate,"  
15           that means victim declined to participate  
16           early, but the victim also declined to  
17           participate late, then that also appears in  
18           that difference between the conviction and  
19           prosecution numbers.

20                      COL. LEWIS: Yes, ma'am. And it  
21           goes back to the binning of cases. So, the  
22           victim declined to participate, that 65 number

1           you see on the Fiscal Year 11 slide is usually  
2           individuals that decline to participate in the  
3           investigation or prior to preferral of charges  
4           said that they didn't want to participate.  
5           There's certainly an element later after  
6           preferral of charges where some will fall out  
7           and have fallen out. And Colonel Coyne may  
8           have some specifics on that number.

9                         MEMBER HILLMAN: This term you're  
10           using, "binning." I'm sorry, can you help me  
11           with that?

12                        COL. LEWIS: It's my term for  
13           describing how a case needs to fit into the  
14           slides here and into DOD's SAPRO system, such  
15           that the numbers add up when they're counted.  
16           It's the best I can describe it. Perhaps my  
17           colleagues may have a better term for it.

18                        MEMBER DUNN: May I ask --

19                        CHAIR JONES: Sure.

20                        MEMBER DUNN: So, to clarify, each  
21           case is only in one category.

22                        COL. LEWIS: That is correct.

1                   MEMBER DUNN: So, all of your  
2 victims who fall out before a referral are in  
3 that 65. Yes, your victims who decline to  
4 participate before referral are in that --

5                   COL. LEWIS: No, ma'am.

6                   MEMBER DUNN: -- 65.

7                   COL. LEWIS: That 65 `victim  
8 declined to participate' would be prior to  
9 preferral of charges.

10                  MEMBER DUNN: To preferral. That's  
11 -- prior to preferral. And then the ones that  
12 fall out after preferral are not in that 65.  
13 They're just not -- there's no number for  
14 them.

15                  COL. LEWIS: There's no specific  
16 number for them.

17                  (Simultaneous speech.)

18                  COL. LEWIS: But we know that it's  
19 the difference between -- it's 33 total cases  
20 that did not go to trial. A percentage of them  
21 the victim declined to participate. And we may  
22 have the specifics, I just don't have it in

1 front of me.

2 MEMBER DUNN: So, you're saying  
3 when we get down to this 79 out of 362, that  
4 there are 33 more victims who declined to  
5 participate somewhere in that process?

6 COL. LEWIS: It may be that of that  
7 33, a percentage of those are victims --

8 (Simultaneous speech.)

9 COL. LEWIS: -- who declined --

10 MEMBER DUNN: The other percentage  
11 is commanders who based on the evidence and  
12 the Article 32 investigation report decided  
13 not to refer the case to trial.

14 MEMBER DUNN: Right.

15 MEMBER HOLTZMAN: Okay. Just, Madam  
16 Chair, just to follow that up. So, you're  
17 going to -- you may have figures as --

18 COL. COYNE: Yes, ma'am, for FY 12  
19 I do.

20 MEMBER HOLTZMAN: -- on that  
21 issue, but are there instances in which --  
22 because I see the commander has the right to

1           intervene after there's the Article 32  
2           hearing, are there instances in which the  
3           Article 32 hearing examiner believes the case  
4           should go forward, and the commander has said  
5           no? Do you track that in your numbers?

6                   COL. LEWIS: Those numbers aren't  
7           tracked particularly for these slides that we  
8           have in the Air Force. We have looked at that  
9           and determined when, in fact, commanders and  
10          their Judge Advocates disagree on referral.  
11          And the numbers that the Air Force came up  
12          with, and we looked at all cases, was less  
13          than 1 percent of the time did we have that  
14          sort of disagreement between the commander and  
15          the Judge advocate who's providing the  
16          pretrial advice.

17                   MEMBER HOLTZMAN: Well, that's one  
18          -- but that's not my question. My question was  
19          suppose both of them disagree. Okay? With the  
20          trial -- the person handling the Article 32  
21          wants to prefer charges at that point. The  
22          commander and the counselor, the lawyer, say

1 no, we're not going ahead. Do we have any  
2 numbers on that?

3 COL. LEWIS: Ma'am, I think I have  
4 to back up into the question a little bit. I  
5 mean --

6 MEMBER HOLTZMAN: Okay. Maybe I'm  
7 phrasing it incorrectly, and so I apologize  
8 for that.

9 COL. LEWIS: The preferral of  
10 charges in the Air Force is normally at the  
11 squadron commander level. And that is usually  
12 done with the advice of the Wing Staff Judge  
13 Advocate. And that's based on the truth of the  
14 nature of the charges, and that's what starts  
15 our process in terms of our prosecution rate  
16 number.

17 Most of these cases are general  
18 courts-martial, and in order to have a general  
19 court-martial you have to have an Article 32  
20 investigation, or the accused has to waive it.  
21 That Article 32 investigating officer provides  
22 an independent recommendation to the Convening

1 Authority. That goes first to the Special  
2 Court-Martial Convening Authority, and then if  
3 the Special Court-Martial Convening Authority  
4 thinks the case should go forward, it gets  
5 forwarded to the General Court-Martial  
6 Convening Authority. So, it's not the  
7 commander who preferred the charges who is  
8 making the decision on referral in the Air  
9 Force. It's just a different individual. And  
10 it's, many times in the Air Force, a different  
11 Judge Advocate that is providing the advice.

12 MEMBER HOLTZMAN: Okay. Whoever it  
13 is, okay, can we just -- I just want to know  
14 what that process is between the decision of  
15 the person who's handling the Article 32, that  
16 decision to prefer and whether there's  
17 something that tracks that decision, whether  
18 it's the initial Convening Authority, or it's  
19 a new Convening Authority, whether it's a  
20 Special Court-Martial Authority, or a General  
21 Court-Martial Authority, there's this process  
22 that's taking place after the Article 32

1 hearing in which the Convening Authority, the  
2 commander, has some opportunity to say no.

3 My question is, once the -- do you  
4 have any statistics on any incidents in which  
5 the trial -- the person trying Article 32  
6 case, says I think this case should go  
7 forward, and those authorities say no.

8 COL. LEWIS: Ma'am, I would say no,  
9 because the government representative at an  
10 Article 32 hearing does not provide pretrial  
11 advice to the General Court-Martial Convening  
12 Authority. It is that General Court-Martial -

13 MEMBER COOK: No. Just to make it  
14 clear, the question is if an investigating  
15 officer in charge of the Article 32, whether  
16 that's a lawyer, whether that's anybody, if  
17 that person says I just heard all the -- I  
18 just heard the evidence presented. That's not  
19 the complete case, but I, as an investigating  
20 officer, recommend, because it's only a  
21 recommendation, recommend not proceeding with  
22 the court-martial.



1 MEMBER HOLTZMAN: Okay, that's  
2 fine.

3 COL. LEWIS: We'll look and see --

4 MEMBER HOLTZMAN: But I still want  
5 to know if that happens.

6 COL. LEWIS: We'll take for the  
7 record, ma'am.

8 MEMBER HOLTZMAN: Thank you.

9 MEMBER COOK: I'll add to that. As  
10 you're looking at that, my guess is an  
11 investigating officer might say no, don't send  
12 the case forward. But are there cases where,  
13 if you're looking at the statistic anyway, are  
14 there cases where that Judge Advocate and the  
15 commander instead decide to send the case  
16 forward anyway, overruling the investigating  
17 officer's recommendation. So, I know you don't  
18 have the answer to that, but when you're  
19 looking at the one where the investigating  
20 officer says go to court, look also at when  
21 the investigating officer says no, but they go  
22 anyway.

1 COL. LEWIS: Yes, ma'am.

2 MEMBER COOK: Thank you.

3 CHAIR JONES: How are you doing,  
4 Colonel?

5 (Laughter.)

6 COL. MULLIGAN: If I could break  
7 protocol, I can answer that question. In 25  
8 years I've never had a case where the  
9 investigating officer said go forward, and the  
10 commanding general said no. My only experience  
11 has been the investigating officer said no,  
12 and the commanding general said yes.

13 CAPTAIN McCLEARY: Ma'am, just --  
14 and I realize with the Coast Guard you're  
15 dealing with a lot fewer numbers, but that's  
16 been my experience. I have never seen anything  
17 other than the Convening Authority deciding to  
18 proceed where an IO recommended against it,  
19 not the opposite.

20 MEMBER HOLTZMAN: Well, I  
21 appreciate that clarification but we'd like it  
22 from the other services if they could get it

1           for us. Thank you.

2                       CHAIR JONES: Anyone else want to  
3           comment on that before we go on to -- I think  
4           we're going to the Navy next, Captain Crow.

5                       CAPTAIN CROW: I'll comment on it,  
6           and then I'll just jump in. I would say  
7           there's a caveat to that a little bit, because  
8           the IO has a determination to make as to  
9           reasonable grounds which we would consider to  
10          be probable cause, which does not necessarily  
11          mean proof beyond a reasonable doubt. So, they  
12          could find probable cause just based on an  
13          allegation, and then say therefore recommend  
14          trial by General Court-Martial. But then  
15          within their analysis and recommendations say,  
16          however, this doesn't even rise to  
17          preponderance much less proof beyond a  
18          reasonable doubt. And the commander could say  
19          based on that, there's insufficient evidence  
20          to get a conviction, and not go forward.

21                      Now, we don't track whether or not  
22          that happens on a systemic measure. We just

1           have to go back and look at individual  
2           reports. And to Colonel Cook, we actually for  
3           the benefit of Congress this last year, I  
4           think all answered RFIs, and similar to  
5           Colonel Mulligan and Captain McCleary's  
6           comments, where if the Staff Judge Advocate  
7           recommended going forward, has a commander  
8           ever gone against that recommendation? In the  
9           Navy, we pulled data for the last three years  
10          and not an instance where that took place, so  
11          it's -- I agree completely. Typically, it's  
12          been commanders. There's been testimony in  
13          other bodies where commanders have said to  
14          them it's more about the process than getting  
15          the conviction; therefore, sometimes they go  
16          forward against the advice, not from the  
17          lawyers not to take a case forward. And we've  
18          made that public before Congress earlier this  
19          year.

20                           Ma'am, very similar to the Air  
21                           Force as far as methodology, but I'll read  
22                           kind of what the Navy's rates are, but

1           understanding that there is no uniform way on  
2           how we measure prosecution rate. There is no  
3           uniform way on how we measure conviction rate.  
4           What you have from the Navy is just our  
5           waterfall slides from DOD SAPRO. And even  
6           within that, within the DOD SAPRO report, the  
7           actual waterfall slides are combined for all  
8           services. Within that, we've asked DOD SAPRO  
9           to break out the individual Navy waterfall  
10          slides, and I've provided you FY 12 and FY 11.  
11          But, candidly, I mean, it's mind numbing, so  
12          I didn't do a separate breakout for this  
13          specific purpose. This is our official report  
14          to Congress, and I've spent a significant  
15          amount of time trying to understand this. And  
16          each time you look at it, it's tough. So, I  
17          raise that really to raise the discussion  
18          issues.

19                           This one actually is different  
20                           than the ones I previously provided that are  
21                           in the waterfall format, so I wasn't going to  
22                           go with this particular slide here, though.

1           It's a bit of a snapshot, but that's fine. We  
2           can use that.

3                       And I say that, and it goes back  
4           to Colonel Lewis' comments on binning a case.  
5           We go through and individually take every  
6           case, so I sort of refer to it as once they go  
7           into a bin they fall off, so they don't keep  
8           dropping down. So, if you go through the  
9           slides all the way -- or all the bins all the  
10          way down, when you get to the end, the numbers  
11          have to add up. So, once we put it in that  
12          category and victim declination is a perfect  
13          example of that, that once it goes in there,  
14          it stays in there.

15                      And I'll use another example here  
16          in a moment between unfounded and victim  
17          declination, and which way we may actually put  
18          that in. So, I'm really more going to raise  
19          some issues, because I think this is an area  
20          worth examining because we are compared. And  
21          I will say within the DOD SAPRO report, we  
22          capture a whole lot of data, all the way down

1           into NJPs and administrative separations.

2                         In FY 12, the Navy had 726  
3 reports. Now, going back to Colonel Coyne's  
4 comments earlier, all of this data is a  
5 snapshot in time, so we've got reports from  
6 previous fiscal years that we carry forward.  
7 Once a case falls out on adjudication, we've  
8 got investigations and prosecutions that cross  
9 fiscal years, so it is a snapshot in time up  
10 through 30 September of that fiscal year on  
11 where that case falls out, is the best way I  
12 can explain it on when it falls out, and  
13 others are carried forward on the following  
14 year. So, a report in a given year won't  
15 necessarily match up to an adjudication in a  
16 given year, but we had 726 reports.

17                         If you go forward, the Navy  
18 preferred charges in FY 12 in 99 sexual  
19 assault cases, compared to FY 11 where charges  
20 were preferred in 67 cases. That's a 48  
21 percent increase, Professor Hillman, to your  
22 point earlier of cases being taken forward to

1 an Article 32 pretrial investigation and/or  
2 courts-martial. And, again, that's preferral,  
3 that's not referral to actual court.

4 The Navy, the question that was  
5 raised earlier, of the 99 cases in which  
6 charges were preferred, many of which went  
7 into an Article 32, some may have actually  
8 been then referred to a special court-martial,  
9 or later referred to a general court-martial.  
10 But of those 99 cases, they were out of 137  
11 sexual assault cases where commander's action  
12 could be taken. That's one of the categories  
13 within the waterfall charts on commander's  
14 action could be taken on sexual assault  
15 charges.

16 This also is an increase over FY  
17 11 where 121 cases permitted commander's  
18 action on sexual assault charges, and 67  
19 resulted in preferral of charges. So, the  
20 Navy's overall prosecution rate for FY 12 was  
21 72 percent, and it's calculated by preferral  
22 of charges in 99 out of 137 cases. So, out of

1 137 where action could be taken, preferral in  
2 99.

3 Now, you see the number on that  
4 where it actually says commander action taken  
5 176. If you remove the bottom category of the  
6 slide below that where it says probable cause  
7 for non-sexual offense only, so you reduce  
8 that, and then we're back to just sexual  
9 assault. So, it may have been investigated as  
10 a sexual assault, but there's only probable  
11 cause for non-sexual assault defenses, which  
12 begs the question of why is that not unfounded  
13 over on the other side by command, as opposed  
14 to probable cause for separate offenses? And  
15 it goes back to once it goes into a bin, it's  
16 complicated, and it's a judgment call in  
17 putting these cases in the bins. Yes, ma'am?

18 MEMBER HILLMAN: Do you guys talk  
19 to each other about the bins?

20 (Laughter.)

21 COL. MULLIGAN: No, ma'am.

22 MS. MANSFIELD: I can answer that.

1           The guidance comes from DOD SAPRO on how to  
2           bin cases, so the services provide -- there's  
3           a set of instructions, and the services then  
4           coordinate with DOD SAPRO with guidance from  
5           SAPRO on how we're supposed to bin cases in  
6           order to make it consistent.

7                         MEMBER HILLMAN: So, then -- but  
8           these slides are different than what we have  
9           from SAPRO. Are they exactly the same thing?  
10          I thought that -- like, for instance, I  
11          thought that the Air Force prosecution rate is  
12          somewhat different than what it looked like in  
13          the SAPRO report. Is that not correct?

14                        COL. COYNE: The rate we show is  
15          lower than what the DOD SAPRO report would  
16          reflect, because we believe you should take  
17          out the non-sexual assault cases and just  
18          report the sexual assault cases, because this  
19          is a sexual assault report. So, we just look  
20          at that; hence, our numbers reflect a lower  
21          prosecution rate, and a lower -- excuse me,  
22          conviction rate for just the sexual assault

1 offenses.

2 MEMBER HILLMAN: Is that the only  
3 difference between what you do and what  
4 everybody else does? And does everybody else  
5 do anything else different than what SAPRO did  
6 on this?

7 COL. COYNE: One of the other  
8 unique differences, I think most of us, the  
9 investigating -- so the MCIO, Air Force OSI  
10 does not unsubstantiate any of our cases. So,  
11 before -- so, our commanders get all of our  
12 cases to adjudicate, which I think it gets  
13 factored in when you look at -- and I use this  
14 very subjectively, but the quality, the type  
15 of case that is presented. If you have an  
16 investigative agency that said no, we  
17 unsubstantiate this, so you're only being  
18 presented with substantiated cases, I think  
19 you get a different type of case. So, that's  
20 one difference that we don't -- our MCIO does  
21 not substantiate or unsubstantiate any case.  
22 And then how we calculate our prosecution and

1 conviction rates, I believe is another  
2 difference.

3 CAPTAIN McCLEARY: Ma'am, one thing  
4 I will say, and I'll wait and take my turn,  
5 but we did ours fairly differently, because we  
6 don't -- we're not required to participate in  
7 the DOD SAPRO, and we broke things up somewhat  
8 differently when we did our waterfall.

9 CAPTAIN BROWN: And just to make  
10 one more point. I'm sorry to jump in,  
11 gentlemen. The issue with binning is  
12 difficult, and I think the services do it a  
13 little bit differently. And to illustrate that  
14 point, I'd just like to go over a brief  
15 hypothetical about how one case can be binned  
16 different ways, and each service might be  
17 doing it a little bit differently.

18 So, take the example of a Marine,  
19 and there's an allegation of a sexual assault  
20 out in town, so there's concurrent  
21 jurisdiction with the civilian jurisdiction.  
22 At the beginning, the civilian jurisdiction

1           decides to take that case, and over the course  
2           of their investigation the victim then decides  
3           to decline or participate in that  
4           investigation. So, even right there you have  
5           two possible bins, civilian jurisdiction  
6           taking the case, or victim declined to  
7           participate. So, then after the civilians  
8           decide we don't want this case any more, the  
9           commander can then say well, you might not  
10          want it, but I want it.

11                        So, then the commander will do his  
12          investigation, it may go to an Article 32  
13          hearing. And then at some point along the way,  
14          the victim again decides to -- declines to  
15          participate in the military action. So, then  
16          in that case I think you have -- and the  
17          commander says well, based on that, I'm going  
18          to unfound this case. I don't think this  
19          happened. So, in that case you have four  
20          possible bins that that case could have gone  
21          into.

22                                First it could have gone into

1 subject -- civilian or foreign authorities  
2 prosecuting the service member. In that case  
3 it would have fallen out early. Victim  
4 declined to participate, or then the action,  
5 charges were preferred because it went to an  
6 Article 32, so it could have gone in that bin.  
7 But then afterwards, the commander said I'm  
8 going to unfound this case because I don't  
9 believe it happened. So, four different bins  
10 for the same case, and we all might be doing  
11 it a little bit differently, which is part of  
12 the reason why this is not the model of  
13 clarity either, and to the extent that you are  
14 a panel that's going to make recommendations,  
15 I think this is ripe for recommendations.

16 COL. COYNE: And I would agree with  
17 that. The other problem is regardless of where  
18 you bin the cases -- somebody once told me  
19 every not everything you can count counts. And  
20 I think as you look at this, I would -- what  
21 are we counting, and what are we getting  
22 after? We are counting a lot of stuff, and I

1           -- the more I look at it, I -- like Captain  
2           Crow alluded to, every time I look, and I've  
3           got tons of fancy spreadsheets, and I've  
4           compared and contrasted, and I look at it, and  
5           at the end of the day, I'm always left with -  
6           - and I don't mean this negatively, but I'm  
7           left with somewhat of a so what? What does  
8           this tell me? Is this good, is this bad? Is it  
9           going in the right direction? And I think  
10          that's one of the things we grapple with, as  
11          does the civilian prosecutors, I would  
12          suspect. What is a good rate?

13                        I know General Harding has  
14          mentioned before, you know, is 100 percent  
15          conviction rate a good rate? Well, I think  
16          most prosecutors would say no, that it's a  
17          broken system. Zero percent, probably the same  
18          answer. So, as we struggle with this, I think  
19          that is -- where you bin it is somewhat --  
20          somewhat clouds the real question of what are  
21          we getting after? And just because we can  
22          count it, does it really count? And how do we

1 find the statistics that really help us  
2 understand where we're going, and where we can  
3 make improvements?

4 COL. MULLIGAN: Colonel Mulligan  
5 for the Army. Ma'am, if you -- when we get to  
6 our slides, our slides are completely  
7 different because this is how we look at  
8 ourselves. This is not -- the numbers come  
9 originally from SAPRO, which aren't  
10 necessarily helpful to looking at yourself.  
11 How do you improve yourself? Where are things  
12 going? So, what we did as a level of fidelity,  
13 every case that I'm going to give you, every  
14 number has a case attached to it. I can go  
15 back with fidelity and tell you exactly what  
16 happened. The bins to us were unimportant.  
17 What we wanted to know is where are we? What  
18 are we doing?

19 And even in things like sex  
20 assault is not sex assault across the board,  
21 there's a difference between rape and a touch.  
22 And if you bin them all together, the numbers

1 get skewed. And if the panel is looking at  
2 rape, penetrative sex assault versus the  
3 touching offenses, those should be broken out.  
4 And if you start with a number that has all  
5 founded offenses, but there's 100 unknown  
6 perpetrators, then certainly the prosecutor  
7 shouldn't be held accountable for 100 people  
8 that are unknown perpetrators that you can't  
9 prosecute. And, at the same time, we shouldn't  
10 be held accountable for the 100 cases that are  
11 downtown, because a civilian District Attorney  
12 had a greater interest in prosecuting those  
13 cases. So, if I start with 500 and I have 100  
14 unknown perpetrators, and 100 cases downtown,  
15 but you want to give me my denominator of 500,  
16 I'm 200 short before I ever get to prefer all  
17 the charges.

18 So, that's why -- I spent most of  
19 my career as a litigator. I want to know where  
20 I am. I don't get better if I don't know where  
21 I am. So, binning all that stuff together for  
22 me, that may be great for someone who has a



1           one of the methodology for the Navy. I did  
2           follow the DOD methodology just going down  
3           that waterfall, so prosecution rate, again,  
4           preferral of the cases, and then the  
5           prosecution rate, or conviction rate of those  
6           cases that went to trial, you know, what the  
7           results were.

8                         But I think just for purposes  
9           here, and we can provide that in writing, as  
10          well. I may have a couple of other comments to  
11          just raise to the panel, in general, but let  
12          the Army walk through theirs.

13                        CHAIR JONES: Yes, go ahead.

14                        MEMBER HOLTZMAN: Have you  
15          explained what unfounded means? Is there a  
16          general definition of --

17                        COL. MULLIGAN: Ma'am, that's my  
18          first slide.

19                        MEMBER HOLTZMAN: Okay.

20                        COL. MULLIGAN: Thank you very  
21          much.

22                        MEMBER HILLMAN: And is it

1 different for all the services?

2 COL. MULLIGAN: Yes, ma'am, it is  
3 different for the services. I can only speak  
4 to --

5 PANELIST: We don't use it at all.

6 COL. MULLIGAN: Ma'am, I apologize  
7 for seizing the reins. However, thank you  
8 very much for this opportunity to address you  
9 today, and I am joined by Janet Mansfield, a  
10 staff attorney with the Office of the Judge  
11 Advocate General, who has devoted a  
12 substantial amount of time to this, and will  
13 help keep me straight.

14 First of all, some of our critics  
15 have -- I have prepared remarks that I will  
16 also give to the panel members, and our slides  
17 have already been made available.

18 I'll jump right down to -- the DOD  
19 method of tracking is flawed. It's flawed for  
20 four reasons, and I'll follow-up with that.  
21 It's first flawed because the DOD annual  
22 report is a snapshot in time. The total

1 figures report include those made throughout  
2 the fiscal year, so necessarily reports that  
3 have not yet even been investigated or  
4 disposed of by a commander are, in fact,  
5 included.

6 In fact, at any given time,  
7 approximately half the reports are still  
8 pending investigation and disposition. There's  
9 been no meaningful prosecution rate that could  
10 ever include allegations that haven't even yet  
11 been investigated.

12 Second, the total reports figure  
13 includes reports in which a soldier is a  
14 victim but the offender is a civilian. It does  
15 not even fall within the jurisdiction of the  
16 Army, and certainly no prosecution rate for  
17 the Army can include allegations over which we  
18 have no jurisdiction.

19 Third, the total reports include  
20 restricted reports which the victim has  
21 elected not to have the allegation reported to  
22 law enforcement; therefore, there's been no

1 investigation, and there's been no disposition  
2 by the command. Certainly, no meaningful  
3 prosecution rate can include those  
4 allegations.

5 Fourth, and most importantly, the  
6 total report figure covers a wide spectrum of  
7 eight separate offenses. It ranges from rape  
8 to an unwanted touch over the clothing.

9 The grouping together of the  
10 disposition data collectively across that  
11 spectrum does not accurately measure the  
12 disposition decisions. At one end of the  
13 spectrum, rape, commanders should be  
14 considering general courts-martial, while at  
15 the other end of the spectrum an unwanted  
16 touch over clothing, perhaps non-judicial  
17 punishment or administrative action is more  
18 likely appropriate.

19 No meaningful prosecution rate  
20 would ever group all of those offenses  
21 together. Therefore, in order to accurately  
22 study the disposition of the decisions Army

1 commanders have taken, the Army has broken  
2 this data down to examine offenses separately  
3 in which there's jurisdiction over the  
4 offender, a completed investigation, and a  
5 disposition decision made by a commander.

6 So, with your permission I'll walk  
7 you through eight slides clarifying Army  
8 commander's disposition of the allegations of  
9 rape, and aggravated sexual assault, the two  
10 most serious penetrative offenses covered in  
11 the annual report.

12 My first four slides will address  
13 rape allegations, slides 5-8 will address  
14 aggravated sexual assault allegations, and I  
15 believe this will give you a fidelity to  
16 understand our efforts.

17 COLONEL HAM: Colonel Mulligan,  
18 when you say aggravated sexual assault, you're  
19 talking about the pre 28 June 2012 version of  
20 Article 120. Is that correct?

21 COL. MULLIGAN: Yes, ma'am. We've  
22 actually grouped together for `12 both

1 offenses that were in play at the time, so the  
2 incapacitated sleeping victim is included in  
3 there, as well.

4 Slide 1. Now, what you have up  
5 there right now answers Judge Holtzman's  
6 question on a definition of founding.

7 (Simultaneous speech.)

8 COL. MULLIGAN: I apologize, ma'am.  
9 Founding is a probable cause determination, so  
10 when you look at the total subjects in  
11 completed rape investigations from FY 12, and  
12 preceding, the ones that were carried forward,  
13 you get 476. That's merely rape, so right away  
14 you'll notice from the other numbers reported  
15 the Army by size has a much bigger number when  
16 it comes to our sex crimes, in general, but  
17 certainly regarding rape.

18 Founding is the probable cause  
19 determination. The commander does not have a  
20 role in a founding or unfounding of a case.  
21 Lawyers in coordination with investigating  
22 agencies, CID for the Army, make that

1           determination. And it is a permanent law  
2           enforcement record.

3                        Unfounding would be -- unfounding  
4           does not equal false reports. Unfounding means  
5           that there is a missing element of the crime  
6           that does not allow you to found it. It does  
7           not mean something didn't happen, it means you  
8           lack probable cause. So, of 476 allegations  
9           358 were founded, 118 were unfounded. Again,  
10          it does not mean they were false reports.

11                      So, now let's look at the founded  
12          cases. On Slide 2, 358 subjects were founded  
13          allegations at the top, so now we start  
14          subtracting out as we come down to get to what  
15          we can actually action. So, we first subtract  
16          the 66 subjects who were civilians or unknown  
17          perpetrators because the Army didn't have  
18          jurisdiction over them. You then take out --  
19          now, we'll come back to the civilian  
20          jurisdictions. So, 68 soldier offenders,  
21          civilian jurisdiction was retained, and then  
22          in that box it's broken out further what

1           happened to those.

2                       Just because the civilians took  
3           them, we didn't forget about them. We tracked  
4           those. Commanders had an interest in what  
5           happened. So, 224 remaining Army reports, 38  
6           are still pending, and they'll be carried  
7           forward.

8                       This leaves us with 186 subjects  
9           in which there was jurisdiction over the  
10          offender, and a final disposition. Army  
11          commanders preferred court-martial charges  
12          against 104 subjects of those that were ready  
13          for disposition, so if charging is your  
14          prosecution rate, then it's 56 percent.

15                      On the same slide, if you look to  
16          the box to the right of the 68 soldiers  
17          subject to prosecution by civilian  
18          jurisdiction, those are the results, 22 were  
19          dismissed, seven were prosecuted, 11 were  
20          prosecuted for non-sex assault offenses, 28  
21          are still pending. So, if you use 40 as your  
22          denominator it was a 17 percent prosecution

1 rate.

2 slide 3, please. So, we look at  
3 the 104 cases who were -- charges were  
4 preferred. The charges were indicted, brought  
5 by information, whatever your system brings.  
6 Thirty-eight are still pending, so 66 cases  
7 were completed by the end of the FY. Of those  
8 66 cases, 16 resulted in dismissals for  
9 evidentiary issues. And this is something a  
10 little different in the military system versus  
11 my experience in Tulsa, Oklahoma, 10 cases  
12 there was admin separations. RILO is a  
13 Resignation in Lieu of Court-Martial, that's  
14 an officer. So, 10 accused accepted punitive  
15 discharges rather than face court-martial. In  
16 those cases, a prosecutor would have been  
17 presented with sort of like a plea bargain.  
18 The defense will come and say in those cases  
19 the person has to admit guilt, and they are  
20 dismissed. They relinquish all benefits of  
21 their military service, and they receive a  
22 punitive discharge, something that was not

1 available to me or to Mr. Bryant in his  
2 practice as a civilian, so I can eliminate  
3 someone from the service, I can strip them of  
4 all benefits and rank, but I don't get a  
5 conviction. Forty cases were tried to  
6 findings, that means a verdict. Of the 40  
7 cases tried to findings, 31 were convicted,  
8 nine were acquitted, 78 percent conviction  
9 rate for those cases that were tried to  
10 findings.

11 Next slide. So, I want to go back  
12 to the 82 subjects in the founded allegations  
13 that did not go to court-martial. That doesn't  
14 mean nothing happened to them. We, again,  
15 tracked each one of those individually. Two  
16 soldiers were administratively separated for  
17 rape after the victim declined to cooperate,  
18 so they were still -- action was still taken  
19 against them even though the victim declined  
20 to cooperate. Seventeen soldiers were given  
21 non-judicial punishment for a non-sex assault  
22 offense, four soldiers were given some type of

1           adverse action for a non-sex assault offense.  
2           Thirty soldiers were given no punishment  
3           because there was insufficient evidence of any  
4           offense to prosecute, and 23 soldiers were  
5           given no punishment because the victim  
6           declined to cooperate in the investigation or  
7           prosecution, and there was no other available  
8           information. We do go forth in cases where the  
9           victim declines to participate if we can  
10          through other means prove the offense.

11                        So, what I've tried to do with  
12          these four slides in contrast to SAPRO's  
13          waterfall slides is to give you some fidelity  
14          how the Army accounts for every allegation of  
15          rape in Fiscal Year 12 to a level of detail  
16          that I think you require.

17                        Each allegation can be traced to  
18          the name of a victim and a subject in our  
19          database. A description of each of these  
20          offenses and the exact punishment imposed is  
21          publicly available on the DOD SAPRO website,  
22          and we think this level of transparency is

1 important to the services and understanding of  
2 our system.

3 Slides 5 through 8 do the same  
4 thing, the same analysis that I've just taken  
5 you through for sex assault, aggravated sex  
6 assault involving a sleeping or intoxicated  
7 victim. Next slide.

8 On slide 6 you'll see in cases  
9 which there was jurisdiction over the offender  
10 and a final disposition, the Army commanders  
11 had a prosecution rate of 59 percent. Of the  
12 37 cases that the civilians took, they had a  
13 prosecution rate of 14 percent.

14 Again like before in the rape  
15 cases, we start with 379 suspects and founded  
16 allegations. We first subtract the 23 subjects  
17 who are civilians or unknown perpetrators.  
18 Again, we can't be held accountable for our  
19 inability to prosecute them.

20 Next, we subtract the 37 subjects  
21 who were soldier offenders over which there  
22 was concurrent jurisdiction, but the soldier

1           and the civilian authorities elected to have  
2           the case tried by the civilians.

3                       Finally, we subtract the 53  
4           subjects who had a completed investigation and  
5           were still pending disposition. And on this  
6           same slide if you look to the box to the  
7           right, 37 soldiers subject to prosecution by  
8           civilian jurisdiction, the Army also tracked  
9           the results of those. Of the 37 subjects, four  
10          were prosecuted for sex assault, 10 were  
11          prosecuted for lesser offenses, 14 subjects  
12          had charges dismissed, and it results in a 14  
13          percent prosecution rate. Next slide.

14                      Of the 157 cases preferred, 55 are  
15          still pending. You have 102 cases completed by  
16          the end of FY, 102 cases completed, 13 were  
17          dismissed, 20 admin separations, 69 cases  
18          tried to findings for a 78 percent conviction  
19          rate. Next slide.

20                      Coming back to the 109 founded  
21          allegations that did not result in court-  
22          martial, there's a breakdown individually of

1           action taken against each and every one of  
2           those soldiers. In some cases there was no  
3           punishment because there was insufficient  
4           evidence. Next slide.

5                        So, of the 272 founded allegations  
6           of wrongful sexual contact now, now we're down  
7           to the touching where you would not -- even in  
8           those cases, 68 soldiers were court-martialed,  
9           33 soldiers were administratively separated,  
10          91 received non-judicial punishment, 46  
11          received other adverse action, and only in 34  
12          cases was there no action taken. Next slide.

13                       Again, I was an English major, not  
14          a math major, so I had to have Janet explain  
15          this to me three times to include this morning  
16          at breakfast.

17                                       (Laughter.)

18                       COL. MULLIGAN: So, what is  
19          important here is when you look SVP Program  
20          2009, and as I appeared before you yesterday,  
21          that is when the Army initiated the Special  
22          Victim Prosecutor Program. When we took our

1 best litigators and we put them in special  
2 billets, specially trained. They did OJT with  
3 civilian jurisdictions, and they were brought  
4 on board. And what you see is a dramatic  
5 increase both in the number of courts-martial  
6 from 2009 to present, the number of  
7 convictions, and the number of discharges of  
8 court-martial results, almost 100 percent.

9 So, the Army in 2009 recognized  
10 through our TJAG and our other senior leaders  
11 that we needed to do a better job in the  
12 prosecution of these cases, so we dedicated  
13 our best litigators into this fight, and it's  
14 paid pretty significant dividends.

15 This is my final slide. It shows  
16 what I believe is the success of the SVP  
17 Program, and it also shows that working with  
18 commanders at every level, these hand-selected  
19 professionals have developed an expertise in  
20 sex assault cases that's unprecedented.

21 Since these efforts started, the  
22 Army has seen an over 100 percent increase in

1 prosecutions, convictions, and sentences. The  
2 program now is being expanded. It will now  
3 include dedicated paralegal and Special Victim  
4 Witness Liaisons to these prosecutors to  
5 better resource them, and these efforts  
6 demonstrates that Army is taking the issue of  
7 sex assault accountability very seriously.

8 I thank you for your patience, and  
9 I'm happy to answer any questions.

10 CHAIR JONES: Thank you, Colonel.  
11 Any questions?

12 MEMBER BRYANT: I have a question,  
13 whether it's service-wide or maybe this has  
14 come up in some of our other hearings, and I  
15 just missed it.

16 Is there a time frame in which the  
17 Convening Authority has to make the decision?  
18 And, if so, what is that time frame? Once  
19 you've been through the Article 32 and it's  
20 referred up, is there a time frame, a  
21 prescribed time frame for that Convening  
22 Authority to make that decision?

1 COL. MULLIGAN: He's the -- we have  
2 a speedy trial, 120-day speedy trial clock.  
3 You have to get to arraignment within 120 days  
4 of preferral excluding defense delay. So, the  
5 Convening Authority has to get those charges  
6 referred to court-martial in time to do an  
7 arraignment. For a general court-martial it's  
8 five days, so the accused gets the charge --  
9 he can waive service, but he gets the charges  
10 five days prior to what we know as civilian  
11 arraignment. So, in my experience, you see the  
12 Convening Authority about once or twice --  
13 once a week, maybe twice a week. And as soon  
14 as a investigation comes in, it's the next  
15 appointment.

16 MEMBER BRYANT: Is that 120 days,  
17 whether the defendant, I'll call him the  
18 defendant at this point, is in custody, or out  
19 of custody?

20 COL. MULLIGAN: There's additional  
21 requirements for speedy trial if he's in  
22 custody. And you can still have an Article 10

1 violation for not moving forward. You can't  
2 sit on something. The defense -- we have  
3 aggressive defense counsel, so even though  
4 you're within your 120 days, if your case is  
5 not moved for a period of time, they can file  
6 dismissal.

7 MEMBER BRYANT: All right, thank  
8 you.

9 CAPTAIN BROWN: Sir, the 120 days  
10 starts either from the date of preferral or  
11 the date that the accused entered pretrial  
12 confinement. So, usually when he's in pre-  
13 trial comment, that's prior to preferral.

14 MEMBER BRYANT: All right.

15 COL. MULLIGAN: Sir, my experience,  
16 every staff Judge Advocate has a pretrial  
17 confinement report. That's like your redline.  
18 If someone is in pretrial confinement, you  
19 know exactly what day 120 is, and you are  
20 moving significantly faster in those cases. It  
21 would be relief for a trial counsel to have a  
22 case break 120. You would not want to go back

1 to the office if you just had a case  
2 dismissed.

3 MEMBER BRYANT: Well, that's --  
4 yes, civilian prosecutor's offices track it  
5 the same way, that same way, and it will be  
6 the -- it's a job ender to miss one.

7 COL. MULLIGAN: Right.

8 MEMBER BRYANT: Yes. Thank you.

9 MEMBER HOLTZMAN: Might I just ask  
10 a question? First of all, thank you for the  
11 clarity of the figures. And it just raised one  
12 question in my mind. And it may be just -- I  
13 didn't quite understand how you were  
14 presenting it. You said that these are founded  
15 cases, when you went through the numbers you  
16 had founded cases, which means probable cause  
17 --

18 COL. MULLIGAN: Yes, ma'am.

19 MEMBER HOLTZMAN: -- to proceed.

20 COL. MULLIGAN: Yes, ma'am.

21 MEMBER HOLTZMAN: Then you say in  
22 the reasons for not having a conviction, that

1           there was insufficient evidence. Can you --

2                   COL. MULLIGAN: Yes, ma'am.

3                   MEMBER HOLTZMAN: Is there an  
4           inconsistency between those? I don't want to  
5           call them bins because you're not doing bins.  
6           But is there inconsistency, or could you  
7           explain that for me?

8                   COL. MULLIGAN: No, ma'am. I think  
9           in your experience you would believe there are  
10          cases where there's probable cause to believe  
11          a crime has been committed, and the offender  
12          has been identified, and in an analysis of  
13          whether there is beyond a reasonable doubt in  
14          the ability to get a conviction.

15                  MEMBER HOLTZMAN: Okay. So, that's  
16          what you're referring to.

17                  COL. MULLIGAN: Yes, ma'am.

18                  MEMBER HOLTZMAN: Because you say  
19          insufficient evidence to prosecute, but if you  
20          have probable cause you do have sufficient  
21          evidence to prosecute, so there's a little bit  
22          of lack of clarity in those numbers.

1 COL. MULLIGAN: Yes, ma'am, but it  
2 could be you went to the Article 32 and  
3 realized you have search issues, you have  
4 search and seizure issues, you have witness  
5 availability issues other than the victim. So,  
6 what you have, you remain with probable cause,  
7 it remains as a founded offense, but your  
8 ability to action that through trial to get to  
9 beyond a reasonable doubt, you've made the  
10 determination --

11 MEMBER HOLTZMAN: Do you have the  
12 ability to access the analysis for the  
13 insufficient evidence, and then -- I mean, in  
14 other words, to drill down and then analyze  
15 it, and then say well, we need to work on this  
16 issue, we need to work on that issue?

17 COL. MULLIGAN: Yes, ma'am.

18 MEMBER HOLTZMAN: Okay, thank you.

19 CHAIR JONES: Because am I right  
20 that cases are never unfounded by a commander.  
21 They're unfounded by the investigative --

22 COL. MULLIGAN: In the Army, yes,

1 ma'am.

2 CHAIR JONES: In the Army.

3 COL. MULLIGAN: Yes, ma'am.

4 CHAIR JONES: CID.

5 COL. MULLIGAN: Yes, ma'am.

6 CHAIR JONES: Okay.

7 COL. MULLIGAN: Ma'am, my  
8 experience with CID is they never unfound  
9 anything.

10 (Laughter.)

11 CHAIR JONES: Okay.

12 COLONEL HAM: Do they have to seek  
13 the advice of prosecutor/trial counsel for  
14 that decision?

15 COL. MULLIGAN: Yes, ma'am.

16 COLONEL HAM: Is it binding on  
17 them? This is the probable cause decision, the  
18 founding or unfounding, is it binding on them?

19 COL. MULLIGAN: I have had  
20 disagreements in my career with founding and  
21 unfounding. They've always been -- CID was  
22 more likely to found than I was as the

1       prosecutor, but I'll have to get back. I know  
2       -- I'd have to go back into the regulation. I  
3       believe it is --

4               MS. MANSFIELD: An unfounding is  
5       not binding on the decision to then later  
6       prosecute that case. So, for example, we will  
7       open a case with a new victim, sometimes look  
8       backward, find another victim of that same  
9       offender where that offense might have been  
10      unfounded and that doesn't prohibit us from  
11      then prosecuting that case. So, if further  
12      evidence developed, new victims, that type of  
13      thing then the Army commander could take an  
14      unfounded case to trial.

15              COL. MULLIGAN: And, anecdotally,  
16      we just had that happen yesterday.  
17      Anecdotally, we had a case prosecuted and a  
18      15-year conviction in a sex assault case for  
19      a case that was originally unfounded.

20              MEMBER COOK: Just one question. We  
21      have -- as part of the materials that were  
22      provided to the panel for read-aheads were a

1 couple of articles, one of which talked about  
2 the UCMJ system only being -- even in a  
3 deployed environment all the cases -- the hard  
4 cases are generally brought back, and then  
5 there's a reply to that that talks about no,  
6 some of them are there. Do you know for your  
7 cases during the statistics that you've given,  
8 some of those cases, were they tried in the  
9 deployed environments versus returning them  
10 back to home station?

11 COL. MULLIGAN: Cases are tried in  
12 the deployed environment. In fact, we have  
13 judges do regular rotations to theater. There  
14 is a vigorous debate within the JAG community  
15 about deployed justice, whether you can do  
16 justice in theater. I firmly believe you can.  
17 We have SVPs that were actually in theater  
18 doing Article 32s.

19 Cases that are brought back, are  
20 usually brought back for logistical reasons.  
21 Cases can be tried forward.

22 MEMBER COOK: Can and are.

1 COL. MULLIGAN: Can and are tried  
2 forward. Cases are brought back for logistical  
3 reasons. They're not brought back because you  
4 can't do them. They just may be hard.

5 MEMBER COOK: Thanks.

6 MEMBER HILLMAN: Okay. I think  
7 we'll move on to the remaining bins. So, shall  
8 we do the Marine Corps first? Captain Brown.

9 CAPTAIN BROWN: Yes, ma'am. And  
10 I'll report FY 12 numbers, and I'll go through  
11 this relatively quickly because I know we're  
12 well over time. But before I do, I'd just like  
13 to mention that the legal reorganization of  
14 the Marine Corps, the old community, started  
15 at the beginning of FY13, so we really feel  
16 like those numbers are going to be more  
17 indicative of the current state of affairs in  
18 the Marine Corps. That said, I'll go through  
19 the FY 12 numbers.

20 In FY 12, the Marine Corps had 435  
21 reports of sexual assault, 102 of those are  
22 restricted, and then 333 of those were

1           unrestricted. So, as you can see here of those  
2           -- when we go from reports to subjects  
3           including pre-FY 12 subjects, there are 387.  
4           Of those 387 subjects, 288 had a disposition  
5           for reporting in FY 12, so the remaining ones  
6           -- the remaining subjects were still pending  
7           at the time this report was created.

8                        So, like previous members  
9           mentioned, this is a snapshot in time, so the  
10          extent that these numbers offer any fidelity  
11          it's that one snapshot in time.

12                      So, if you move on to J, which is  
13          the next page. So, J includes every subject  
14          who had a disposition for reporting. Of the  
15          288, 93 subjects were outside of the DOD legal  
16          authority, and just to issue spot one more  
17          problem with the way this data is reported,  
18          included in subject outside of DOD legal  
19          authority, are those subjects where the  
20          civilian or the foreign authority is  
21          prosecuting the case. And in that case,  
22          they're not necessarily outside of DOD's legal

1 authority because the commander can also take  
2 case either after the civilian prosecution or  
3 concurrently.

4 So, once you drop the 93 out who  
5 are outside of the DOD's legal authority, the  
6 Marine Corps had 195 subjects in FY 12 who had  
7 a disposition, or the commander considered  
8 possible action, 85 of those subjects the  
9 command action was not possible.

10 Additional issue spotting with  
11 that, it's titled, "Command action not  
12 possible," however, it includes the victim  
13 declining to participate in the military  
14 action and insufficient evidence. So, command  
15 action in those cases is possible, but that's  
16 a policy decision; we do not go forward with  
17 those cases. So, that leaves 89 subjects where  
18 evidence supported commander action. Thirty of  
19 those subjects had sexual assault charges that  
20 were substantiated, and 59 of those subjects  
21 had other misconduct charges substantiated.

22 Of the 29 subjects where sexual

1 assault charges were preferred, 24 of those  
2 proceeded to trial, 83 percent, and then 16 of  
3 those subjects were convicted for 66 percent  
4 conviction rate.

5 Now, there's obviously a lot of  
6 different ways to calculate conviction rates,  
7 prosecution rates depending on your agenda,  
8 and at what point you want to start. This is  
9 how the Marine Corps calculates its conviction  
10 rates.

11 The other slides show dispositions  
12 for NJPs and non-sexual assault offenses. But  
13 barring any questions, that's the Marine  
14 Corps' data that it has to present.

15 MEMBER HILLMAN: Thank you, Captain  
16 Brown. Do we have any questions for the --  
17 okay, let's hit the Coast Guard, Captain  
18 McCleary.

19 CAPTAIN McCLEARY: There are some  
20 hazards to going last. And, also part of it  
21 being that in Fiscal Year 13 we had a total  
22 service-wide of 11 cases go to trial, so our

1 numbers end up being a lot smaller, so rather  
2 than kind of walk you through what all of our  
3 numbers are. I wanted to talk a little bit  
4 about some of ways -- we ended up doing our  
5 waterfall that differs slightly from how DOD  
6 SAPRO puts them together. As we were engaging  
7 in this exercise, there was some information  
8 that we thought would be useful for us to know  
9 that we just weren't getting. So we made the  
10 decision to measure not only what the  
11 disposition was by subject, but then also to  
12 measure the disposition based on the victim  
13 and what the allegations involving specific  
14 victims were, because the numbers don't match  
15 up. We have subjects who were involved with  
16 several different victims, so we measured it  
17 both ways. And then we did break out how we  
18 measure between what we characterize as  
19 serious sex crimes: rape, forcible sodomy,  
20 aggravated sexual assault, and aggravated  
21 sexual contact. And we did lump them together  
22 because, again, our numbers are fairly small.

1           And then cases where it was more of the sexual  
2           contact events.

3                           And the way that we made the  
4           decision for which way they ended up was based  
5           on what the initial allegation was. So, this  
6           involves on of our attorneys and the CGIS  
7           Sexual Assault Program Managers going through  
8           every single file and looking for what  
9           information was in there about what the  
10          victims had alleged. And based on that, that's  
11          how we decided whether it fit into one of the  
12          -- either the serious or the contact crimes.

13                           The other thing I'd just very  
14          quickly point out is, we don't use any form of  
15          founded or unsubstantiated in our assessment  
16          of cases. Basically, if CGIS conducts an  
17          investigation, the legal office that serves  
18          the Convening Authority gets involved in all  
19          of those, are presented in some form to the  
20          Convening Authority. And we don't use any  
21          method by which they don't make it there  
22          because we don't think there's probable cause.

1                   Again, we somewhat have a luxury  
2                   in that we don't have that many cases, but we  
3                   don't use that process at all, nor use those  
4                   terms. And CGIS is extremely careful about --  
5                   their reports of investigation never make an  
6                   assessment as to whether or not they think  
7                   there's probable cause or likelihood of  
8                   conviction. So, rather than drag you through  
9                   yet more numbers, I'd be happy to take any  
10                  questions.

11                  MEMBER COOK: I have one. On page -  
12                  - on your complete investigations where you  
13                  also looked at what allegations the victim may  
14                  have made, on page 5 of your submission it  
15                  talks about how -- you have 11 cases, in two  
16                  of your cases there was -- the investigation  
17                  revealed the allegation was fabricated by the  
18                  victims, and that -- and on your chart it then  
19                  says that command action was inadvisable. Can  
20                  you mention whether or not -- I mean, if it  
21                  was completely fabricated what, if any, action  
22                  was taken against the person who made a false

1 allegation against another service member or  
2 a civilian?

3 CAPTAIN McCLEARY: There's two  
4 cases. I'm familiar with the facts of one of  
5 them. I don't know the facts of the other one.  
6 The one that I'm familiar with was basically  
7 a ship had made a port call. There were  
8 allegations that there was a sexual assault  
9 that took place in a Navy lodge at Guantanamo  
10 Bay, and the person alleged that they had been  
11 drinking and were assaulted by three crew  
12 members.

13 In the course of the investigation  
14 there were two other people in the room at the  
15 time the assault took place besides the three  
16 alleged attackers. There was someone that  
17 walked in the room while there was activity  
18 going on, and the drapes were open so there  
19 were actually three other people that stood by  
20 the window and watched what was going on. And  
21 those nine people all agreed that the person  
22 that made the allegation was actively

1 participating in what was going on.

2 The other instance I'm not  
3 familiar with. And that person was -- that  
4 individual was later court-martialed but not  
5 for the allegation, it was for drug use that  
6 the person engaged in after the incident that  
7 resulted in the initial charges against the  
8 three individuals. And those three individuals  
9 were also prosecuted, but they were prosecuted  
10 for indecent acts, basically because they were  
11 doing certain things in front of an audience.

12 MEMBER HILLMAN: Thank you, Captain  
13 McCleary. I wonder if you or others have  
14 general comments. I know, Captain Crow, you  
15 had mentioned you might have a sort of general  
16 comment about the numbers. You were a little  
17 bit cut short there in your presentation of  
18 the statistics. As we think about what we  
19 ought to take away from these, and what sort  
20 of guidance we might consider, if you have  
21 general comments, and then we'll see if  
22 there's other questions before we close.

1 Captain Crow?

2 CAPTAIN CROW: Not as to the  
3 numbers overall other than I would say each  
4 individual case is evaluated on its own  
5 merits, and so it's really hard -- you know,  
6 we track them all the way through, but not  
7 every invest -- or every report is a true  
8 allegation, not every allegation is a true  
9 crime.

10 And the one comment I did want to  
11 talk -- and the other thing I'll say, probably  
12 have seen more of a trend over the last year,  
13 at least. And I know Admiral Buck testified  
14 previously that maybe for this Fiscal Year 13  
15 our numbers aren't final yet, and we haven't  
16 released them, but probably expecting around  
17 a 40-45 percent increase. So, three different  
18 trends, Representative Holtzman, going to your  
19 question on the trending.

20 But I wanted to comment just  
21 briefly on victim declinations, and I talked  
22 about that as an example of putting it in two

1 different, you can call it a bin or category,  
2 but labeling what that was. And I kind of  
3 throw it out as food for thought in the sense  
4 that if you've got a case that the commander  
5 is going to unfound, and that -- within the  
6 Navy, just like the other services, except  
7 Army, NCIS does not make that judgment call.  
8 That goes -- all those cases go to the  
9 command, and the command then makes the  
10 determination with all the legal advice that's  
11 been described earlier. But when you've got a  
12 case that just doesn't meet the elements, so  
13 really it's going to be unfounded. But if you  
14 talk to the victim and you explain that, and  
15 the victim says okay, I don't want to go  
16 forward, you know, which category do you put  
17 that in?

18 If you put victim declination,  
19 then they have buy-in to that process as  
20 opposed to what most state jurisdictions would  
21 do, is just evaluate it, write the one-page  
22 letter and say, "Declined to prosecute due to

1       insufficient evidence." So, getting the victim  
2       buy-in into that decision on declination, we  
3       then call it a victim declination as opposed  
4       to unfounded.

5                   Now, you could go the other  
6       direction on that, but I raise that in the  
7       sense of there's been a fair amount of  
8       discussion of victim declinations is because  
9       they were unsatisfied in the process. And  
10      that's not necessarily the case. In fact,  
11      sometimes they're given everything and then  
12      they make that decision, and that's just the  
13      category we put that in. So, I just wanted to  
14      raise that as not every victim declination  
15      means they're unsatisfied with the  
16      investigation, they're unsatisfied with the  
17      prosecution.

18                   In fact, the two years that I  
19      headed the Trial Counsel Assistance Program,  
20      you know, we actively educated the victims on  
21      the different challenges within the cases, and  
22      would take the declination statements. I know

1           it was raised yesterday, and I'll kind of  
2           finish with that, on do we follow victim's  
3           preferences. And it is in DOD policy, and I'll  
4           quote it. "The victim's decision to decline to  
5           participate in an investigation or prosecution  
6           should be honored by all personnel charged  
7           with the investigation or prosecution." So,  
8           that is our policy.

9                         Does that mean that you cannot  
10           order or subpoena if it's a civilian victim to  
11           testify? No, but do we give great deference to  
12           an adult sexual assault victim's preference on  
13           cooperating? Yes. And, again, all these  
14           numbers we've talked about here today are all  
15           adult cases. These aren't the child cases, as  
16           well. Child cases, I submit, you know, is  
17           probably quite the opposite. Even if the  
18           family does not want the offender prosecuted,  
19           especially if it's in her family, we give no  
20           deference to that decision and go forward on  
21           prosecution.

22                         So, I leave that as just a couple

1 of other thoughts out there when we're looking  
2 at some of these different reasons that some  
3 of these cases, I called it fall off, but  
4 don't get all the way into prosecution or to  
5 verdict.

6 MEMBER HILLMAN: Thank you, Captain  
7 Crow.

8 COL. COYNE: Ma'am, just to follow-  
9 up on the FY 13 data. I think it's important  
10 to evaluate that, as well, when it comes out  
11 later next -- early next year because of so  
12 many things that occurred at the end of FY 12,  
13 for example, the SECDEFs initial disposition  
14 memo came out the 28th of June, 2012,  
15 elevating the initial disposition to the first  
16 06 Special Court-Martial Convening Authority  
17 on all penetration offenses, other programs  
18 for the Air Force we instituted this Special  
19 Victims Counsel in early 2013, so those -- a  
20 lot of the statistics, a lot of those  
21 initiatives that took place will be reflected,  
22 at least in part in the FY 13 data. So, I

1 think as we look through, I think most folks  
2 have mentioned that the FY 13 data will be  
3 very important for trend analysis.

4 Again, I go back to what I  
5 mentioned earlier. I'm not sure what trends  
6 are important an what aren't, but it's -- I  
7 think it will be informative.

8 MEMBER HILLMAN: We look forward to  
9 having you all to help us figure this out,  
10 what's important and what's not.

11 MEMBER HOLTZMAN: Also, I don't  
12 know if you're prepared to do this now, but if  
13 you could give us your own individual  
14 assessment of how this data should be  
15 reported, that would be more accurate,  
16 clearer, and more acceptable to you, we would  
17 -- I, at least, would be very grateful to  
18 receive it. I know the Army is totally  
19 satisfied with what it's doing, but the rest  
20 of you seem to be quite frustrated. I don't  
21 want to put words in your mouth, but -- by the  
22 present system. So, we would welcome your

1 explicit suggestions on how it should be  
2 changed.

3 MEMBER HILLMAN: I do appreciate  
4 Colonel Mulligan and Ms. Manfield's focus on  
5 the individual, identifying the data behind  
6 them. I mean, these are stale numbers as they  
7 come before us, and we realize they represent  
8 individuals. And to have a victim-centered,  
9 offender-focused process, we have to realize  
10 that there are people that are behind this.  
11 And the way that the Army has broken that out  
12 does help with that.

13 It does make me worry, though,  
14 about the say 53 in the rape cases of persons,  
15 or in the -- there are more than 100 persons  
16 on that list who no action was taken against  
17 because of -- for different reasons. So, the  
18 offender-focused part of that, your slides  
19 actually highlight what we're concerned about  
20 with the soldiers who are out there who, at  
21 least, might be -- pose potential risk to  
22 other service members. So, focusing on those

1 individuals, I know, helps me.

2 So, thank you all. Any other  
3 questions from the panel? Okay. I think then  
4 for Judge Jones we should take a break for  
5 lunch, so thank you for your time. We'll get  
6 back in half an hour.

7 (Whereupon, the proceedings went  
8 off the record at 12:49 p.m., and went back on  
9 the record at 1:34 p.m.)

10 COLONEL HAM: If everyone could  
11 please get seated, we're going to get started  
12 again. Thank you.

13 CHAIR JONES: Good afternoon,  
14 everybody. We have and I mentioned this  
15 yesterday, we're very lucky to have Dr. Spohn  
16 who is the Foundation Professor and Director  
17 of Graduate Programs School of Criminology and  
18 Criminal Justice at Arizona State University.  
19 And we'd be delighted to hear from you now,  
20 Doctor.

21 DR. SPOHN: Good afternoon. Thank  
22 you for inviting me here today and for asking

1 me to talk about this critically important  
2 issue. First by way of introduction, I've  
3 spent probably the last two and a half decades  
4 doing research on case processing decisions in  
5 sexual assault cases. Most, but not all of my  
6 work has focused on prosecutorial charging  
7 decisions in these cases, but I recently  
8 completed a study for the National Institute  
9 of Justice on policing and prosecuting  
10 decisions in sexual assault cases in Los  
11 Angeles County.

12 Before I begin, let me just say  
13 that the title of my presentation is a little  
14 bit of a misnomer. It indicates that I'm  
15 going to be doing a statistical analysis of  
16 waterfall slides. In reality, I do not have  
17 the data that these slides were based on and  
18 so my assessment is more of an assessment of  
19 the slides themselves and not a statistical  
20 analysis in the typical meaning of that term.

21 So I've been asked to review the  
22 material prepared by the various branches of

1 the military service and to compare and  
2 contrast outcomes in the military justice  
3 system with those in the civilian justice  
4 system. I'm going to begin my presentation by  
5 talking about some of the challenges that are  
6 inherent in making those comparisons and then  
7 with these very important caveats in mind,  
8 I'll talk about three outcomes, unfounding  
9 prosecution and conviction.

10 So one of the challenges and we've  
11 already heard some about this today and  
12 yesterday, is that the definitions that  
13 civilian law enforcement agencies use and  
14 those used by the Department of Defense are  
15 different. For most of its existence, the  
16 Uniform Crime Reporting Program used the  
17 definition of forcible rape that was very  
18 similar to the pre-2007 definition used by the  
19 Department of Defense, that is carnal  
20 knowledge of a female forcibly and against her  
21 will. This definition which was changed by  
22 Attorney General Holder in January of 2012,

1 did not include oral copulation, sodomy,  
2 penetration with an object, offenses against  
3 men or female on female offenses. And all of  
4 that changed then with the change in the  
5 definition that was implemented, as I said, in  
6 2012.

7 The problem with making  
8 comparisons across civilian and military  
9 jurisdictions is that the Department of  
10 Justice uses a much more all-encompassing term  
11 that is sexual assault that as we just heard  
12 from the presenter this morning encompasses a  
13 range of sexual offenses prohibited by our  
14 Article 20 and it includes both penetration  
15 and contact offenses. And what this means, of  
16 course, is that comparing numbers across these  
17 two systems and more importantly comparing  
18 changes over time is difficult and the results  
19 of those comparisons may be misleading.

20 Another difference and a challenge  
21 is that the data that was presented in the  
22 waterfall slides includes both the restricted

1 and the unrestricted reports and that causes  
2 some challenges in terms of knowing what the  
3 denominator of these rates should be and I'll  
4 talk about that in a moment.

5 A third challenge is, as you know,  
6 that jurisdictional issues limit the cases  
7 that can be investigated by the military  
8 services and it's limited to service members  
9 who are subject to the Uniform Code of  
10 Military Justice. The civilian authorities  
11 can also prosecute service members if they  
12 commit an offense within the jurisdiction of  
13 the municipality or county or state and the  
14 military cannot take the case away.

15 Again, this complicates the  
16 situation in that data for the military  
17 services, but not data for civilian  
18 authorities must account for cases that fall  
19 outside the jurisdiction of the military  
20 services. Although there may be some cases  
21 that are reported to civilian authorities that  
22 involve crimes that are committed outside the

1 jurisdiction of that agency, these cases are  
2 rare. When this occurs, typically the law  
3 enforcement agency to whom the report was made  
4 will unfound the report and refer the case to  
5 the appropriate jurisdiction. As I said,  
6 however, these kinds of cases are rare. And  
7 in contrast in Fiscal Year 2012, cases that  
8 fell outside the jurisdiction of the military  
9 services accounted for 16 percent of all  
10 unrestricted reports of sexual assaults.

11 In addition, the military services  
12 data is much more comprehensive than the  
13 civilian data. The military services have  
14 detailed data on outcomes of allegations for  
15 each of the military services and by contrast  
16 there is no national data on outcomes of  
17 civilian cases that resulted in an arrest.  
18 The national data we do have are on offenses  
19 known to the police and on cases that were  
20 cleared by the police. And that clearance  
21 category has its own problems.

22 This is complicated, however, by

1           the fact that the military services use  
2           different definitions of outcomes, especially  
3           unfounding, and they calculate prosecution and  
4           conviction rates differently as we just saw in  
5           the presentation just prior to this. So  
6           again, this raises issues about trying to make  
7           comparisons, not only between the civilian and  
8           the military systems, but among the different  
9           military services and so I'll have a  
10          recommendation at the end of my presentation  
11          regarding this.

12                            Another challenge that I  
13          encountered in trying to make some sense out  
14          of all of this data is that the outcomes are  
15          not directly comparable. If we look at the  
16          Uniform Crime Reporting Program, we know that  
17          the FBI does not distinguish between offenses  
18          that are cleared by arrests and offenses that  
19          are cleared by exceptional means. And so --  
20          and I can talk about the difference between  
21          those categories if you would like, but what  
22          this means basically is that clearance rates

1 are not the same as arrest rates. Although  
2 they are sometimes interpreted the same, they  
3 do not mean the same thing.

4 And by contrast, the military  
5 services report the results of subjects who  
6 were investigated for sexual assault, who were  
7 service members under the authority of the  
8 Department of Justice. And each agency  
9 provides the ultimate disposition of each case  
10 as they just referred to it as the bin in  
11 which each case falls and the action, if any,  
12 that was taken against each subject.

13 Let's start with the decision to  
14 unfound the case. One of the most important  
15 and highlighted criticized decisions made by  
16 law enforcement officials is the decision  
17 whether to unfound the crime or the charges.  
18 In the civilian system, if the official  
19 investigating the crime determines -- believes  
20 the victim's account of what happened and  
21 determines that the incident constitutes a  
22 crime, the case becomes one of the offenses

1 known to the police that will be included in  
2 the jurisdiction's crime statistics and  
3 reported to the Uniform Crime Reporting  
4 Program. If on the other hand the officer  
5 does not believe the victim's story and  
6 therefore concludes that a crime did not  
7 occur, the case is unfounded.

8 Now in the civilian system,  
9 technically cases can be unfounded only if the  
10 police determine following an investigation  
11 that a crime did not occur. In reality, we  
12 know that the unbounding decision is used in  
13 different ways and it's interpreted in  
14 different ways by different law enforcement  
15 agencies. Research has documented that  
16 unbounding can be used to clear or in the  
17 words of one researcher, erase cases in which  
18 the police are convinced that a crime did  
19 occur, but also believe that the likelihood of  
20 conviction and prosecution is low.

21 This was apparently the case in  
22 Baltimore in 2010. The Baltimore Sun reported

1           that about a third of all rape cases were  
2           unfounded by the Baltimore Police Department.  
3           They have since changed their unfounding  
4           policies and procedures and I believe that  
5           their unfounding rate is now down to about  
6           nine percent. So the FBI guidelines on  
7           clearing cases for Uniform Crime Reporting  
8           purposes state that a case can be unfounded  
9           only if it is determined through an  
10          investigation to be false or baseless.

11                        The handbook also stresses that  
12          police are not to unfound a case simply  
13          because the complainant refuses to prosecute  
14          or they are unable to make an arrest.  
15          Similarly, the International Association of  
16          Chiefs of Police on investigating sexual  
17          assault cases states that "the determination  
18          that a report of sexual assault is false can  
19          be made only if the evidence establishes that  
20          no crime was committed or attempted and that  
21          this determination can be made only after a  
22          thorough investigation." Both the Uniform

1 Crime Report's handbook and the IACP policies  
2 and procedures guidelines, in other words,  
3 stress that unfounding is possible only after  
4 the police have conducted a thorough  
5 investigation and they must conclude that a  
6 crime did not occur.

7 The baseless category is a little  
8 bit -- it's not the same as a false report.  
9 An example of a baseless complaint would be a  
10 situation in which a victim is perhaps  
11 unconscious as a result of drinking too much  
12 and wakes up in somebody else's bed and  
13 suspects that something happened to her, but  
14 isn't sure. She reports the crime to the  
15 police and the forensic medical exam reveals  
16 that there's no evidence that a sexual assault  
17 did, in fact, occur. This case would be  
18 baseless, but not false in the sense that it  
19 was not deliberately fabricated.

20 The problem, of course, is that  
21 these are decisions made by individual law  
22 enforcement agencies which may not interpret

1 the FBI guidelines in the same way. For  
2 example, in the study that I recently  
3 conducted in Los Angeles, we found that the  
4 Los Angeles Police Department generally was  
5 making unfounding decisions that were  
6 consistent with the FBI guidelines. By  
7 contrast, the detectives with the Los Angeles  
8 County Sheriff's Department unfounded very few  
9 cases, about one percent of their cases. If  
10 they believe that the allegations were false,  
11 many of the detectives in the Sheriff's  
12 Department cleared the case by exceptional  
13 means which is a misuse of the exceptional  
14 clearance.

15 So in contrast, the Department of  
16 Defense Annual Report on Sexual Assault in the  
17 Military defines unfounding in the following  
18 way. "When an MCIO makes a determination that  
19 available evidence indicates the individual  
20 accused of sexual assault did not commit the  
21 offense or the offense was improperly reported  
22 or recorded as a sexual assault, the

1           allegations against the subject are considered  
2           to be unfounded." Although the report also  
3           refers to allegations that are false or  
4           baseless, there are subtle differences in the  
5           definitions that the two systems use in  
6           defining unfounding.

7                         Another difference is that the  
8           decision to unfound the crime is made by the  
9           police in the civilian system and it is made  
10          either by prosecutors in the case of the Army  
11          or by commanders in the case of the other  
12          military services. And so not only are the  
13          definitions of unfounding different, but the  
14          procedures that are used to unfound cases are  
15          different as well.

16                        So it appears from the data and  
17          the accompanying material that I was provided  
18          with that both the definitions of unfounding  
19          and the procedures by which cases are  
20          unfounded vary among the military services and  
21          I think we just saw evidence of that in the  
22          presentations that preceded mine. In the



1           statistics --

2                           MEMBER HOLTZMAN:   Excuse me,  
3           perhaps I misunderstood the testimony, but you  
4           say here that in the Army the decision to  
5           unfound is made by the prosecutor.  It was my  
6           understanding from the prior testimony that it  
7           was made by the investigative agencies.

8                           DR. SPOHN:   No.

9                           MEMBER HOLTZMAN:   Okay.

10                          DR. SPOHN:   No, their first slide  
11           indicated that founding is a probable cause  
12           determination made by the prosecutor.

13                          MEMBER HOLTZMAN:   I thought it was  
14           by the CID.

15                          MEMBER McGUIRE:   The CID -- they  
16           work together.

17                          MEMBER HOLTZMAN:   Okay.

18                          DR. SPOHN:   So again, this makes  
19           comparing data on unfounding across the  
20           military services problematic if they're using  
21           different definitions and different  
22           procedures.  But in reality, it's not unlike

1 the civilian system where in reality the  
2 different law enforcement agencies also may be  
3 using somewhat different interpretations of  
4 the Uniform Crime Reporting Guidelines with  
5 respect to unfounding.

6 So let's look at some statistics  
7 on unfounding in the civilian system. And  
8 again, this is problematic in that the Uniform  
9 Crime Reports includes data on offenses known  
10 to the police. Cases that are unfounded are  
11 not included in these statistics. However, in  
12 the 1990s, we do have data from the FBI in  
13 which they estimated that about eight percent  
14 of all rape complaints were unfounded.

15 The study that Katharine Tellis  
16 and I conducted in Los Angeles found a fairly  
17 similar rate in that 10.9 percent of the cases  
18 reported to the LAPD over a 5-year period were  
19 unfounded. And this rate varied a bit  
20 depending upon whether the case involves  
21 strangers or non-strangers. It was somewhat  
22 higher in cases involving strangers than those

1 involving non-strangers.

2                   What we lack to some extent is  
3 solid data on false allegations of rape. Kim  
4 Lonsway referred to this yesterday as the  
5 elephant in the living room. We know from  
6 research that's been conducted that the  
7 estimates range from a low of two percent to  
8 highs of 30 or 40 percent or higher. Noting  
9 that those who work in the field of sexual  
10 violence are continually asked to comment on  
11 the rate of false reports of rape, Lonsway  
12 stated in 2010 that recent research findings  
13 from methodologically rigorous research that  
14 uses appropriate definitions of false  
15 reporting finds that the rates are within  
16 about two to eight percent within that general  
17 range.

18                   Again, the study that I conducted  
19 in Los Angeles, we reviewed the cases that  
20 were unfounded by the Los Angeles Police  
21 Department in 2008. We found that most, but  
22 not all of these cases were, in fact, false or

1 baseless and we estimated the proportion of  
2 false reports in Los Angeles to be 4.5 percent  
3 of all the sexual assaults that were reported  
4 to the LAPD in 2008. So this is consistent  
5 with that two to eight percent range that is  
6 found in other research.

7 So in calculating the rate of  
8 unfounding the military, one must first  
9 determine what the denominator should be.  
10 Should it be the total number of allegations  
11 in any particular year, the total number of  
12 allegations investigated in a particular year  
13 that had a disposition by the end of that  
14 year, or the total number of allegations that  
15 had a disposition in a particular year and  
16 also involved the subject who fell within the  
17 Department of Defense legal authority?

18 If we use the latter as the  
19 denominator, as the appropriate denominator  
20 for calculating the rate of unfounding, there  
21 were 594 subjects, excuse me, there were 2,661  
22 subjects of investigation with a disposition

1 by the end of Fiscal Year 2012. If we  
2 subtract from that the 594, who were subjects  
3 outside the Department of Defense's legal  
4 authority, this yields 2,067 subjects. Three  
5 hundred sixty-three or 17.6 percent involved  
6 allegations that were unfounded by MCIO and  
7 therefore no action was taken against the  
8 subject. And an additional 81 or 4.8 percent  
9 involved allegations that were unfounded by  
10 commanders. Thus, the overall unfounding rate  
11 for the Department of Defense was 22.4  
12 percent.

13 This is substantially higher than  
14 the eight percent rate reported by the FBI for  
15 forcible rape during the 1990s, but we have to  
16 keep in mind that the term sexual assault as  
17 used by the military includes offenses other  
18 than forcible rape. Thus, the rates are not  
19 directly comparable since they do include  
20 these touching offenses as well as the  
21 penetration offenses.

22 So moving on to the different

1 military services and again, this was  
2 challenging trying to come up with a  
3 consistent way of thinking about unfounding.  
4 In the material that was provided to me, each  
5 agency did calculate an unfounding rate, but  
6 they also included in their bins cases in  
7 which there was insufficient evidence of any  
8 offense to prosecute which raises the question  
9 of whether these are also cases that should  
10 have been, could have been unfounded.

11 Nonetheless, starting with the  
12 Army, we can see that of the 476 completed  
13 rape investigations in Fiscal Year 2010, 25  
14 percent were unfounded. Now this rate is  
15 high, but we have to keep in mind that this is  
16 not a determination that the allegations are  
17 false or baseless. This is a determination  
18 that there was not probable cause to move  
19 forward in the case. And so it's not  
20 surprising then that this rate is higher  
21 because the definition of unfounding is  
22 different. There were an additional 30 cases

1           in which there was insufficient evidence of  
2           any offense to prosecute.

3                       For the Air Force, there were 177  
4           cases that were presented to commanders for  
5           action and 11 or 6.2 percent of these were  
6           unfounded.     And there were an additional 32  
7           cases where there was insufficient evidence of  
8           any offense.

9                       For the Coast Guard, there were 69  
10          completed investigations in 2012 in which  
11          command action was possible.   There were no  
12          cases in which the investigation revealed that  
13          the allegations were fabricated.   But again,  
14          there were 22 cases that were not pursued due  
15          to insufficient evidence and the Coast Report  
16          indicates that this also includes cases that  
17          may have been fabricated which suggests that  
18          there was not a thorough investigation that  
19          determined whether the cases were, in fact,  
20          fabricated.   But again, that's not at all  
21          clear.

22                       So for the Marine Corps, again,

1           there were no cases in which the allegations  
2           were unfounded. But there were 41 subjects in  
3           which action was not taken due to insufficient  
4           evidence of any offense and 21 subjects in  
5           which action was declined by the commander and  
6           no reason was given on the chart for that  
7           declination. So it's not clear why action was  
8           not taken in those cases.

9                         And finally, with the Navy, there  
10           were 377 subjects who were presented -- in  
11           cases presented to commanders for action. And  
12           13 percent were subjects in cases that were  
13           unfounded by command. And there was an  
14           additional 84 subjects in which action was not  
15           taken due to insufficient evidence of any  
16           offense.

17                         So what can we make of these  
18           statistics given that the civilian and the  
19           military systems include different offenses,  
20           forcible rape versus the broader category of  
21           sexual assault, define unfounding in different  
22           ways, and have different policies and

1 procedures for making unbounding decisions.

2 If we look at the overall rate for  
3 the Department of Defense, it appears to be  
4 substantially higher than the rate for the  
5 civilian justice system, but again the  
6 nationwide data we have are not current.  
7 These are data from the 1990s and the  
8 definition of sexual assault is broader than  
9 the definition of forcible rape used by the  
10 FBI and by Dr. Tellis and myself in our study  
11 in Los Angeles.

12 I also am not sure what  
13 conclusions we can draw based on the fact that  
14 the rates for the various military services  
15 range from zero to -- for the Coast Guard and  
16 the Marine Corps, to 25 percent for the Army.  
17 Both the Army and to a lesser extent the Navy,  
18 have substantially higher rates than the other  
19 military services. I think the high rate for  
20 the Army can be explained by the fact that  
21 it's -- the definition of unbounding is very  
22 different and I'm not quite sure how one would

1 explain the higher rate for the Navy.

2 Finally, it's not clear to me  
3 whether cases in which the commander took no  
4 action because there was insufficient evidence  
5 of any crime whether these cases should or  
6 should not be included in the unfounding rates  
7 and I think that's an empirical question. Are  
8 these cases that were, in fact, false or  
9 baseless or are these cases different in some  
10 way? Are these more the probable cause types  
11 of cases that are included in the Army's rate  
12 of 25 percent?

13 So moving on to the rates of  
14 prosecution, again, we encounter a problem  
15 with respect to the appropriate denominator  
16 for calculating these rates. This is true of  
17 both systems, but I think it's particularly  
18 true of the military where we could calculate  
19 prosecution rates based on all unrestricted  
20 reports, all reports involving cases that were  
21 presented to commanders for action, or only  
22 reports in which the evidence supported

1           command action for sexual assault.

2                           And just to illustrate, if we take  
3           the data that were provided by the Air Force,  
4           if we divide preferred cases, that is cases  
5           that were submitted or preferred for court-  
6           martial and we divide those by all  
7           unrestricted reports, we would get a  
8           prosecution rate of 10.5 percent. And this  
9           would be analogous to taking cases that were  
10          reported to a law enforcement agency and then  
11          dividing that by cases in which prosecutors  
12          filed charges. And obviously, that's not the  
13          appropriate way to do it because prosecutors  
14          can't file charges if an arrest is not made.

15                          A second way would be to divide  
16          preferred cases by reports that were presented  
17          to command for some type of action. In doing  
18          this, we come up with a prosecution rate of  
19          23.7 percent. And it seems to me that this is  
20          probably the most analogous denominator to use  
21          with respect to the way that prosecution rates  
22          are calculated in the civilian justice system

1           which I'll talk about in a minute.

2                       A third way which I think again is  
3           probably not the appropriate way to think  
4           about prosecution rates is to divide reports  
5           with evidence, excuse me, divide preferred  
6           cases by reports with evidence that supported  
7           command action for sexual assault. And doing  
8           that would yield a prosecution of 75 percent.  
9           So again, depending upon the denominator, the  
10          conclusion that one would reach with respect  
11          to the prosecution rate would be very  
12          different.

13                      So there are similar problems with  
14          calculating prosecution rates for the civilian  
15          justice system. Do we determine the odds of  
16          prosecution based on all cases reported? I  
17          think most prosecutors would say no. On all  
18          cases that were closed or cleared? Again, I  
19          think most prosecutors would say no because  
20          this would include cases that were cleared by  
21          exceptional means which may or may not have  
22          been presented to the prosecutor for a

1 charging decision. All cases that resulted in  
2 an arrest? This is the denominator that is  
3 typically used by researchers? Or all cases  
4 screened by the prosecutor before or after an  
5 arrest or all cases screened by the prosecutor  
6 only after an arrest was made.

7 And again, depending upon how we  
8 calculate the prosecution rate, you can see  
9 that the odds of prosecution would vary pretty  
10 dramatically. I'm using the data from the Los  
11 Angeles Police Department from 2005 to 2009  
12 and these are all rapes and attempted rapes.  
13 There were 5,031 during that 5-year time  
14 period. If we calculate prosecution based on  
15 reports, we come up with a prosecution rate of  
16 9.7 percent. If we calculate it based on all  
17 closed cases, the rate of prosecution would be  
18 just over 20 percent. But if we use the more  
19 appropriate charges filed by all cases  
20 screened after arrest, we come up with a  
21 prosecution rate of 82.2 percent. This figure  
22 is a little bit misleading for Los Angeles

1           because as we discovered in doing our study  
2           there, detectives from both the Police  
3           Department and the Sheriff's Department  
4           present cases to the prosecutor before an  
5           arrest is made and the prosecutors make  
6           charging decisions in those cases. And so the  
7           data that we had from 2005 to 2009 did not  
8           allow us to determine the cases that were  
9           screened by the prosecutor before an arrest  
10          was made. But I'll come back to that data in  
11          a minute.

12                        So if we assume that the  
13           appropriate denominator for calculating the  
14           prosecution rate is the total number of  
15           subjects who can be considered for possible  
16           Department of Defense action during a  
17           particular fiscal year, for 2012, that number  
18           was 1,714. However, even making this  
19           assumption does not eliminate the challenge of  
20           determining the prosecution rate as there are  
21           different ways of calculating the rate,  
22           depending upon how the numerator is defined.

1           If we consider only cases in which  
2           court-martial charges for sexual assault were  
3           initiated, and this again is data for the  
4           Department of Defense in 2012, we find that  
5           there were 594 cases which yields a  
6           prosecution rate of 34.7 percent. If on the  
7           other hand our numerator is court-martial  
8           charges for any offense initiated, the  
9           prosecution rate increases somewhat to 36.8  
10          percent. If we consider only sexual assault  
11          charges that were substantiated, but court-  
12          martial charges were not necessarily initiated  
13          in those cases, the prosecution rate increases  
14          to about one out of every two. And if we  
15          consider that the evidence supported some type  
16          of commander action, the prosecution rate  
17          increases to about two thirds.

18                 So the question is which of these  
19                 is the appropriate way to calculate the  
20                 prosecution rate? So in the civilian courts,  
21                 most prior research defines the prosecution  
22                 rate as the proportion of cases presented to

1           the prosecutor for a charging decision that  
2           result in the filing of charges. We do not  
3           have data on the prosecution rate for cases  
4           for the United States as a whole, but we do  
5           have data for individual jurisdictions and  
6           this data seems to hover around a mean of  
7           about 50 percent. For example, in Detroit,  
8           charges were filed against 66 percent of all  
9           criminal sexual conduct suspects. In Kansas  
10          City and Miami, charges were filed in 57.5  
11          percent of the cases in Kansas City and 56.8  
12          percent of the cases in Miami.

13                   A six-city study of rape law  
14          reform that a colleague and I did back in the  
15          early 1990s found that prosecution rates  
16          ranged from 37 percent in Washington, D.C. to  
17          62 percent in Houston with the other  
18          jurisdictions particularly Philadelphia,  
19          Detroit, and Atlanta with rates about 50  
20          percent. In the study that I conducted in Los  
21          Angeles most recently, charges were filed  
22          against 50.2 percent of all the suspects who

1           were arrested by the LAPD and the Sheriff's  
2           Department in 2008.

3                       So considering all of this data  
4           from individual jurisdictions, it appears that  
5           prosecution rates defined in this way hover  
6           around a mean of about 50 percent. So there  
7           are some outliers, obviously. Detroit with 66  
8           percent and Washington, D.C. and Chicago with  
9           rates only in the 30s, but again 50 percent  
10          seems to be a reasonable mean prosecution  
11          rates.

12                      So in an attempt to sort of  
13          summarize what all of this means, there are  
14          problems with determining both the denominator  
15          and the numerator and this makes calculating  
16          rates particularly for the military services  
17          difficult and it makes making comparison  
18          across systems somewhat problematic. With  
19          these important caveats in mind, the rates  
20          appear to be somewhat lower for the military  
21          system. The overall military rate is 36.8  
22          percent if we think of prosecution as court-

1 martial charges divided by subjects in cases  
2 in which DoD action is possible. The civilian  
3 rate again is about 50 percent.

4 MEMBER DUNN: May I ask a  
5 question?

6 DR. SPOHN: Yes, please.

7 MEMBER DUNN: Dr. Spohn, I'm  
8 sorry, I might have missed this at the very  
9 beginning, but when you're doing the DoD  
10 numbers, you're doing all offenses, all sexual  
11 assault offenses reported.

12 DR. SPOHN: Correct.

13 MEMBER DUNN: Which could be a pat  
14 on the butt to all-out rape.

15 DR. SPOHN: And I did emphasize  
16 that that was a problem with those data.

17 MEMBER DUNN: Okay, so you didn't  
18 control the military data for just the rape  
19 and --

20 DR. SPOHN: I didn't have the  
21 military data.

22 MEMBER DUNN: Okay.

1 DR. SPOHN: I only had the --

2 MEMBER DUNN: But the civilian  
3 data is rapes.

4 DR. SPOHN: Yes.

5 MEMBER DUNN: Okay, so there's a -  
6 -

7 DR. SPOHN: It's apples and  
8 oranges.

9 MEMBER DUNN: Okay.

10 DR. SPOHN: It is.

11 MEMBER DUNN: Okay, because you  
12 have in that 36.8 percent number, you've got  
13 then --

14 DR. SPOHN: The touching offenses  
15 as well as penetration --

16 MEMBER DUNN: -- that would never  
17 go to a trial in a civilian community and most  
18 of them don't go to a trial in the military  
19 community, although other action is taken  
20 based on other evidence that's been given to  
21 the panel.

22 DR. SPOHN: Exactly. And if one

1 had the data, one could reach those kinds of  
2 conclusions based on the rape and sexual  
3 assault cases only, taking out the aggravated  
4 sexual contact and sexual contact offenses.

5 MEMBER DUNN: Okay, thank you.

6 DR. SPOHN: Again, if we calculate  
7 prosecution rates for the various services as  
8 the number of cases preferred for court-  
9 martial divided by cases presented to  
10 commanders for action for the Air Force, the  
11 rate would be 24 percent; for the Army, these  
12 are rape cases only, so perhaps this is a more  
13 accurate reflection, the rate was 56 percent.  
14 But the problem with this number is that cases  
15 that were unfounded due to a lack of probable  
16 cause are not included in the denominator for  
17 the Army, whereas they are included for the  
18 other services.

19 For the Navy, again, using this  
20 consistent definition, one would arrive at a  
21 prosecution rate of 26 percent. The Navy  
22 presentation indicated that their rate was 56

1           percent, but this was based on cases in which  
2           commander action was taken, not on cases that  
3           were presented to the commander for action.

4                       For the Marine Corps, the rate was  
5           15 percent and for the Coast Guard, it was 34  
6           percent. Again, these rates appear to be  
7           lower than the rates for the civilian system,  
8           but I would hesitate to put too much stock in  
9           them in that they really are -- we really are  
10          comparing apples and oranges with rapes versus  
11          all sexual assaults.

12                      So moving on to conviction rates.  
13          I think there are fewer problems inherent in  
14          calculating conviction rates, especially for  
15          the civilian system. Again, I'll use the data  
16          for the Los Angeles Police Department to  
17          begin. Charges were filed in 486 of the rapes  
18          and attempted rape cases from 2005 to 2009.  
19          And of these 486 cases, just over 80 percent  
20          of the defendants were convicted. Very few,  
21          one percent were acquitted. Charges were  
22          dismissed in just about 10 percent of the

1 cases and in another 9 percent, the cases were  
2 still pending.

3 If we calculate the conviction  
4 rate based on cases that had dispositions,  
5 that is, if we subtract those cases that were  
6 pending, we would come up with a conviction  
7 rate of 88.2 percent. And if we only look at  
8 cases that proceeded to trial, the conviction  
9 rate would be a whopping 98.7 percent.

10 These data, I don't think are  
11 necessarily representative of outcomes in the  
12 civil justice system overall. And in part, I  
13 think that reflects the fact that the Los  
14 Angeles County District Attorney files charges  
15 only if there is evidence that meets the  
16 standard of proof beyond a reasonable doubt  
17 and if there is corroboration of the victim's  
18 allegations. In other words, they file  
19 charges only if they believe that they can  
20 take the case to trial and win. And the  
21 conviction rate in Los Angeles confirms that  
22 that is, in fact, what is happening there.

1                   But we do have data from other  
2                   jurisdictions that also calculates convictions  
3                   rates and the SCPS data is probably the most  
4                   comprehensive source of data on conviction  
5                   rates in the United States. These are data  
6                   that come from 75 large, urban counties. The  
7                   data are collected every two years and it's a  
8                   sample of cases that were filed in May of the  
9                   year in which the data are collected. So the  
10                  SCPS data, the problem with that data is that  
11                  it begins with charges being filed and so we  
12                  cannot calculate prosecution rates using these  
13                  data. But we do know that the conviction rate  
14                  for these large, urban jurisdictions was 62  
15                  percent with about half of the defendants  
16                  being convicted of felonies and an additional  
17                  12 percent being convicted of misdemeanors.  
18                  All of these defendants were charged with  
19                  felony rape. Two percent were acquitted which  
20                  is similar to the one percent rate in Los  
21                  Angeles. Thirty-two percent were dismissed.  
22                  So the conviction rate for these 75 large,

1 urban counties is lower. The dismissal rate  
2 is higher than what was found in Los Angeles  
3 County.

4 In the six-city study that Julie  
5 Horney and I conducted in the early 1990s, we  
6 found conviction rates that were about 50  
7 percent in Philadelphia and Houston; 66  
8 percent in Chicago; 67 percent in Detroit; and  
9 in the 70 percents in Atlanta and Washington,  
10 D.C. So the rates are a little bit all over  
11 the map, but I would say that they're  
12 generally in the area of about two thirds,  
13 half to thirds of all cases result in  
14 convictions.

15 So in the Department of Defense  
16 there were 594 subjects against whom sexual  
17 assault courts-martial charges were initiated  
18 according to the 2012 report. And of those,  
19 40 percent were convicted of the charges; 10  
20 percent were acquitted. The acquittal rate is  
21 higher than the rate that one would see in the  
22 civilian jurisdictions which was one percent

1 to two percent. Charges were dismissed in  
2 14.8 percent of the cases. Now I think the  
3 lower conviction rate for the Department of  
4 Defense reflects the fact that there are  
5 options other than conviction, acquittal, and  
6 dismissal in the military system. And these  
7 are reflected in the discharge/resignation  
8 category which includes about 12 percent of  
9 all of these cases.

10 So if we calculate the conviction  
11 rate for the 594 subjects with dispositions,  
12 that is, we subtract out those 134 cases that  
13 were still pending, the conviction rate is  
14 very similar to the rate for the civilian  
15 jurisdictions, at about 51.7 percent. The  
16 conviction rate for cases that proceeded to  
17 trial is obviously higher for the Department  
18 of Defense as a whole at 79 percent. In the  
19 interest of time, I did not calculate  
20 conviction rates for each of the military  
21 services, but one certainly could do that.

22 So I have a couple of

1            recommendations and then some thoughts about  
2            where future research might go. One  
3            recommendation is I think that the military  
4            services should use a consistent definition of  
5            unfounding and consistent procedures for  
6            determining whether a case should be unfounded  
7            or not. The fact that the definitions and the  
8            procedures are different means that the  
9            overall data for the Department of Defense is  
10           in many ways meaningless because it includes  
11           cases that for the Army were unfounded because  
12           of a lack of probable cause and cases for the  
13           other services that were fabricated, false, or  
14           baseless. So I think that's sort of a first  
15           step is that the military services should use  
16           a consistent definition and consistent  
17           procedures.

18                            I also think the data I was  
19           provided was to say to put it mildly confusing  
20           because of the agencies presented their data  
21           in a slightly different way so that the case  
22           attrition or the case flow slides are not

1 consistent and so I think there should be a  
2 consistent methodology for characterizing case  
3 flow or case attrition and for calculating  
4 prosecution and conviction rates. I tried to  
5 go back and use a consistent methodology for  
6 calculating prosecution rates, but if you look  
7 through the slides that were presented, the  
8 data that were presented by the various  
9 military services, you'll see that they have  
10 different ways of calculating those rates.  
11 And so again, it makes comparing the data  
12 across services difficult, if not impossible.

13 So some conclusions -- I think  
14 I'll skip this. I think I've already talked  
15 about this. Let me just talk about what I see  
16 as the research agenda for the future. I  
17 think that one thing that should be done is  
18 there should be some kind of analysis to  
19 determine why the unfounding rate is higher  
20 for the Department of Defense than for  
21 civilian jurisdictions. And this would  
22 involve a case file review that would be

1           designed to determine if cases that are  
2           unfounded are, in fact, false or baseless or  
3           if unfounding is being used to dispose of what  
4           might be referred to as problematic cases.  
5           And this is what Dr. Tellis and I did in Los  
6           Angeles and we have a paper coming out in Law  
7           and Society Review, I think in January or  
8           February, that uses this approach and really  
9           tries to tease out what these unfounding  
10          decisions involve and whether in fact, in this  
11          case Los Angeles Police Department was making  
12          unfounding decisions consistent with the  
13          Uniform Crime Reporting Handbook guidelines.

14                   I think a second research priority  
15          should be to identify the correlates of cases  
16          that are not prosecuted and that result in  
17          dismissal or acquittal and questions that  
18          might be asked, what role does victim  
19          cooperation or lack of victim cooperation  
20          play? Research in the civilian justice system  
21          reveals that this is a key factor in cases  
22          handled by the civilian court system. But I

1 would argue that a related research question  
2 would be why do victims decide not to  
3 cooperate with the prosecution of the case?  
4 So there ought to be some attention paid to  
5 that as well.

6 And then I think that based on the  
7 results of these studies this panel or another  
8 panel might be able to make recommendations  
9 for changes in policies and procedures that  
10 might produce lower rates of unfounding and  
11 higher rates of prosecution and conviction.  
12 But I think that there is some research that  
13 needs to be done before these kinds of  
14 conclusions about policies and practices can  
15 be reached and I also want to emphasize again  
16 that there needs to be some consistency in  
17 definitions and in policies and procedures  
18 across the military services. Thank you and  
19 I'd be happy to take any questions that you  
20 might have.

21 CHAIR JONES: Any questions?

22 MEMBER HILLMAN: Hi. I don't

1 really have a question, but just a comment  
2 that I'm relieved that we weren't unreasonably  
3 confused by the data and I appreciate your  
4 guidance for how we might be able to push in  
5 the right direction.

6 I guess I do have a question then  
7 if I might. Is there more consensus in  
8 civilian communities about these definitions?  
9 In other words, can we just graft consensus  
10 that already exists out there and perhaps take  
11 advantage of that?

12 DR. SPOHN: There would be  
13 consensus if I were convinced that the  
14 agencies were interpreting the guidelines they  
15 have in a similar way. The Uniform Crime  
16 Reports Handbook is very clear on what  
17 constitutes unproven, that the case must be  
18 false or baseless and those terms are defined.  
19 Now whether individual agencies are  
20 interpreted those in the same way, I think is  
21 questionable. With respect to prosecution and  
22 conviction, I think there's more consistency

1 across the civilian jurisdictions that  
2 prosecution rates should be calculated based  
3 on the cases that are presented to the  
4 prosecutor for a filing decision. But the  
5 question is what is the analogous stage in the  
6 process for the military? And conviction  
7 rates, I think that's fairly clear, cases that  
8 either result in a guilty plea or a conviction  
9 at trial, but again, it's complicated in the  
10 Department of Defense by the fact that there  
11 are these other outcomes that are possible.  
12 But I think some consistent guidelines from  
13 the Department of Defense would make making  
14 these kinds of comparisons substantially  
15 easier.

16 MEMBER HOLTZMAN: Thank you very  
17 much for your very clear testimony. I just  
18 have a couple of questions. One is I notice  
19 that you identified earlier on a point that I  
20 had raised in prior presentation which was the  
21 category of insufficient evidence and how that  
22 relates back and what does it consist of? And

1           so I was just wondering whether that ought to  
2           be part of your research agenda for the future  
3           which is a clearer analysis of what that is.  
4           I mean I asked the question and was told well  
5           that could conclude, for example, issues of  
6           fourth amendment searches which would exclude  
7           the evidence and so forth. Who knows what  
8           that means and so I think that's a big  
9           category out there that in my view should be  
10          looked at.

11                         DR. SPOHN: Yes.

12                         MEMBER HOLTZMAN: I see you agree.  
13           The second question has to do with analyzing  
14           why victims cooperate and here there's a  
15           problem and I would really appreciate your  
16           guidance. How does that get done when you  
17           have -- well, I guess it wouldn't be included  
18           at all, a victim restricted report. We're not  
19           including restricted reports in this.

20                         DR. SPOHN: No.

21                         MEMBER HOLTZMAN: So how would you  
22           go about doing an analysis of the victim's

1 refusal to cooperate? Have you done that in  
2 other jurisdictions?

3 DR. SPOHN: Yes. In other  
4 jurisdictions, if the victim refuses to  
5 cooperate there would typically be some  
6 indication in the case notes from the  
7 prosecutor or from the police agency  
8 indicating why the victim refused to  
9 cooperate. Now sometimes it is something  
10 ambiguous. A victim could not be found, for  
11 example. Or victim refused -- victim did not  
12 return telephone calls. But other times there  
13 would be something more detailed written  
14 either by the detective investigating or by  
15 the prosecutor to whom the case was assigned  
16 so that one could go back, if that is  
17 documented in case files, one would be able to  
18 then do some analysis on what types of victims  
19 are less likely to cooperate and what are the  
20 reasons that they give for their failure or  
21 for their unwillingness to cooperate, but that  
22 would have to be documented in the case files

1           because obviously you wouldn't have access to  
2           victims to ask them those questions.

3                       MEMBER HOLTZMAN:   But I think  
4           that's a really important area for research,  
5           not only in terms of being able to assess the  
6           conviction or prosecution rate, but to figure  
7           out how better job could be done if at all  
8           possible in securing victim cooperation.

9                       DR. SPOHN:   One of the  
10          allegations, not allegations, but one of the  
11          findings of research on victim cooperation or  
12          lack thereof is that -- and this is from  
13          studies in which victims were interviewed  
14          after the fact.  Victims get subtle and  
15          sometimes not so subtle hints from law  
16          enforcement or from prosecutors that this is  
17          going to be very difficult and it's unlikely  
18          that this case is going to move forward and  
19          you would be better off if you would simply  
20          let this case disappear, go away.  Victims who  
21          -- we did some focus group interviews with  
22          victims and we found that they were actually

1 told by law enforcement in some cases that  
2 they should just simply drop the charges or  
3 decline to prosecute or refuse to cooperate,  
4 whatever the terminology is.

5 MEMBER HOLTZMAN: So that's just a  
6 way of law enforcement putting the blame for  
7 non-prosecution?

8 DR. SPOHN: Exactly.

9 MEMBER HOLTZMAN: Thank you very  
10 much.

11 CHAIR JONES: Thank you very much.  
12 All right, we'll have our next panel and this  
13 is a continuation of our comparisons of the  
14 military and civilian fields and this relates  
15 to defense counsel.

16 CHAIR JONES: Ok. I want to  
17 welcome our next panel. We will start with  
18 Commander Donald King, U.S. Navy Director of  
19 Navy Defense Counsel Assistance Program.  
20 Commander.

21 CMDR KING: Thank you, Madame  
22 Chair. Thanks for having me here today. I am

1           Commander Donald King. I have been an active  
2           duty Navy Judge Advocate since 1995. I will  
3           provide background information on the Navy's  
4           Defense Service Office, Navy defense counsel,  
5           DCAP, as well as discuss the training and  
6           experience level of Navy defense counsel in  
7           that regard, including attachments that will  
8           show you what those training classes entail.

9                         But just to sum that up, the  
10           training that our defense counsel gets starts  
11           as soon as they're commissioned as a JAG  
12           officer within the Navy.

13                        The first thing they do is they go  
14           to what we call the basic lawyer course which  
15           is about an eight to ten week course on being  
16           a basic JAG within the military. Significant  
17           amounts of time are devoted during that to  
18           trial advocacy and military justice.

19                        So they get the basics of military  
20           justice, courts-martial, criminal law,  
21           military criminal law, at the basic lawyer  
22           course.

1                   Once they leave the basic lawyer  
2                   course, they go to what we call a RLSO, a  
3                   region legal service office. That houses most  
4                   of our Counsel for SJAs and prosecutors. And  
5                   they also now do our legal assistance.

6                   The counsel, right out of basic  
7                   lawyer course, will go to that 24 month tour  
8                   and cycle through the different kinds of  
9                   things that we do in the Navy, including trial  
10                  and defense counsel work. However, they're  
11                  not assigned cases. They can help, they can  
12                  help write motions, they can do those types of  
13                  things. But they're not assigned cases.

14                 During that first 24 months,  
15                 however, they do do some advocacy. They  
16                 represent our Sailors and Marines, Coast Guard  
17                 at admin boards, where the Government is  
18                 trying to forcibly separate them from the  
19                 service. So they do get some advocacy.

20                 Once they're done with that 24  
21                 month tour, then they're eligible to be  
22                 assigned to a DSO, Defense Service Office,

1           which is the office that houses our Defense  
2           Counsel.

3                         We have four of those, one in DC,  
4           one in Norfolk, one in San Diego and one in  
5           Yokosuka, Japan, and then DETs of those places  
6           spread out all over the world.

7                         So once they get to a DSO, then  
8           they receive additional training. The first  
9           six months, they'll get what's called defense  
10          counsel orientation. And that's just what it  
11          sounds like.

12                        Within six months after that,  
13          they'll get basic trial advocacy training  
14          which is a week long program that focuses on  
15          their abilities to argue to members, voir  
16          dire, openings, closings, et cetera.

17                        Also within their first year, we  
18          send our defense counsel to what we call the  
19          defending sexual assault cases class which is  
20          a very intense one week course where we bring  
21          in experts from forensics and psychology as  
22          well as very experienced civilian defense

1           counsel. And that lasts a week long. So  
2           that's usually their first year of training.

3                         Also within that period of time,  
4           my office, DCAP, provides training to them,  
5           both over the Web, lots of on the spot  
6           training over the phone. Our counsel call us  
7           quite often, five, ten, 15 calls a day where  
8           we'll provide training and answers to their  
9           questions.

10                        And there are also, after their  
11           first year, some continuing education that's  
12           set forth in the packet that I've provided  
13           you. Resources permitting, we also attend  
14           civilian courses, NACDL, Gerry Spence College,  
15           there's a bunch of them out there that we also  
16           attend for CLEs. So that's a little bit about  
17           training. The rest of it is in the package.

18                        As far as experience, we have  
19           counsel who will show up at the DSO with  
20           anywhere from zero experience, absolutely  
21           never having tried a case before in their  
22           lives, all the way up to counsel who've been

1 doing it for 20 years and are designated as an  
2 expert in the military justice track.

3 So the experience varies greatly.  
4 To offset any experience gaps, we have  
5 military justice qualified officers stationed  
6 in all of our headquarters and some of our  
7 DETs.

8 And then we also, when it's  
9 appropriate, we second seat counsel on sexual  
10 assault cases when we can. So that's a little  
11 bit about the experience level. And I'm going  
12 to close it at that and happy to answer any  
13 questions you might have at the end of this.  
14 Thank you.

15 CHAIR JONES: Thank you. And for  
16 the Army, is that Colonel Ku?

17 LT COL KU: Yes, ma'am. Good  
18 afternoon, members of the panel. My name is  
19 Lieutenant Colonel Fansu Ku. And I am Chief  
20 of the United States Army's Defense Counsel  
21 Assistance Program. I have served in this  
22 position since June of 2013.

1                   Today I will just highlight a few  
2                   areas from the written statement that I have  
3                   previously submitted to this panel.

4                   First, I'll highlight the mission  
5                   of our Trial Defense Service, or TDS, and  
6                   Defense Counsel Assistance Program, or DCAP  
7                   for short, two, the training and resources  
8                   that DCAP provides to defense counsel at the  
9                   trial level and, three, the general procedures  
10                  that are followed when detailing defense  
11                  counsel to cases to include cases involving  
12                  sexual assault.

13                  Our TDS mission is to provide  
14                  independence, competence and ethical defense  
15                  legal services to Soldiers. To that end, DCAP  
16                  provides training, resources and assistance  
17                  for defense, trial defense counsel worldwide.

18                  Established in 2007, DCAP is  
19                  staffed by five experienced trial  
20                  practitioners, military and civilian, to  
21                  include two civilian highly qualified experts,  
22                  or HQEs. Both of our HQEs are former military

1 judges and experienced trial practitioners  
2 with over 40 years of combined military  
3 justice experience.

4 The majority of defense counsel  
5 come to TDS with prior military justice  
6 experience to include time in the courtroom.  
7 At a minimum, they're graduates of the Judge  
8 Advocate Officer Basic Course, where they have  
9 been trained to serve as the second chair in  
10 all phases of a court-martial.

11 Once assigned to a TDS, defense  
12 counsel undergo further training from  
13 introductory courses, like Defense Counsel  
14 101, to advanced trial advocacy courses, like  
15 the Sexual Assault Training Advocacy Course.

16 Besides formal training, the  
17 training status of each defense counsel is  
18 continuously monitored by their supervisors  
19 and adjusted based on individual development.

20 In addition, defense counsel  
21 routinely reach back to DCAP for advice on  
22 individual cases. As the Chief of DCAP, I

1 personally view this capability as important  
2 as, if not more important than classroom  
3 training. As such, a member of DCAP is  
4 available around the clock for case  
5 consultation.

6 During Fiscal Year 2013, DCAP  
7 received over 2,000 inquiries from defense  
8 counsel in the form of emails, phone calls and  
9 in-person inquiries during training events.

10 When court-martial charges to  
11 include sexual assault allegations are  
12 preferred against a soldier, the senior  
13 defense counsel reviews the charges and  
14 assigns the case to a qualified counsel.  
15 Where appropriate, the senior defense counsel  
16 may assign a second counsel to assist on the  
17 case.

18 In sexual assault and other  
19 complex cases, a second counsel is always  
20 assigned. Every complex case requires and  
21 receives an individual assessment of what is  
22 the best pair of defense counsel for that

1 given case.

2 In conclusion, each of our defense  
3 counsel, regardless of their individual  
4 experience level, takes to heart our mission  
5 to provide independence, professional and  
6 ethical defense services to all Soldier  
7 clients.

8 The majority of them are young,  
9 company-grade officers, some of them in their  
10 very first tour as judge advocates and  
11 military justice practitioner, as Colonel  
12 Colin, Chief of Army's TDS, previously stated  
13 before this panel.

14 With more and more resources  
15 dedicated to the prosecution of sexual assault  
16 cases, it may become increasingly challenging  
17 to attract and retain defense counsel with the  
18 experience who can go on to serve as senior  
19 and regional defense counsel.

20 We currently make up for this  
21 inexperience with a strong training program  
22 and reachback capability. Moreover, while

1           many judge advocates start their tours as  
2           defense counsel with limited military justice  
3           experience, they make up for that lack of  
4           experience with a tremendous work ethic and a  
5           desire to provide each of their clients with  
6           the highest quality representation.

7                         They are supported in their  
8           efforts by their peers, supervisors and DCAP.  
9           With that, I thank you for the opportunity to  
10          address this panel. And I stand ready to  
11          answer your questions.

12                        CHAIR JONES: Thank you, Colonel.  
13          All right. Is that Colonel Pitvorec?

14                        LT COL PITVOREC: Yes, ma'am.  
15          Thank you, good afternoon. I am Lieutenant  
16          Colonel Julie Pitvorec. I'm the Air Force  
17          Chief Senior Defense Counsel for the Eastern  
18          and European Regions, and this is my third  
19          assignment as an Air Force defense counsel.

20                        Unfortunately, the Air Force  
21          currently does not have a defense counsel  
22          assistance program. However, setting up this

1           capability is currently our number one  
2           priority within the trial defense division.

3                       We've seen what all the other  
4           services are able to do with this program.  
5           And we are working very hard to get to that  
6           capability as well.

7                       The Air Force criminal defense  
8           network is broadly divided into three regions  
9           worldwide. In total, there are 187 attorneys  
10          and paralegals assigned, serving at 69  
11          operating locations worldwide with 85 area  
12          defense counsel or base level counsel and 19  
13          senior defense counsel.

14                      Together, we are responsible for  
15          providing defense services to the active duty  
16          Air Force members worldwide. The vast  
17          majority of our operating locations have only  
18          one attorney and one paralegal assigned. And  
19          they are responsible for defense services at  
20          that installation.

21                      The Air Force is unique in that  
22          their defense counsel are selected in a very

1 competitive best qualified standard by the Air  
2 Force Judge Advocate General.

3 Usually, our first time defense  
4 counsel have two to five years of experience  
5 working in a base legal office where acting as  
6 a trial counsel in court-martial is among  
7 their various duties.

8 Our new defense counsel have  
9 somewhere between eight to ten courts before  
10 starting as a defense counsel. But even with  
11 that experience level of new defense counsel,  
12 one of our biggest challenges that we face,  
13 with the defense counsel networks spread  
14 geographically all over the world, is  
15 training.

16 For our formalized training, we  
17 rely heavily upon the Judge Advocate General  
18 School. In order to be a defense counsel,  
19 they have already gone through, obviously, the  
20 basic course.

21 However, in addition to that, we  
22 have our basic course for defense counsel

1 called the defense orientation course. It is  
2 primarily taught by the trial defense division  
3 at our Judge Advocate General School.

4 This course is unique to defense  
5 counsel and is a combined course with defense  
6 counsel and defense paralegal which focus  
7 primarily on how to run a defense office and  
8 the minor legal issues which they can  
9 anticipate encountering during their tenure.

10 The defense orientation course is  
11 held twice a year in an attempt to catch the  
12 incoming defense counsel and defense  
13 paralegals as they're coming into the job.

14 Subsequent training includes  
15 advocacy courses at our JAG School. But at  
16 the end of the day, we rely heavily on OJT.  
17 Likewise, the difficult, for on-the-job  
18 training for geographically separated counsel  
19 proves complicated.

20 Out of the 19 SDC regions, only  
21 three, San Antonio, Colorado Springs and the  
22 National Capitol region have the majority of

1           their bases in close proximity where driving  
2           in for a group training is possible.

3                       It is a constant struggle to  
4           maintain a specialized training regimen  
5           because of the limited time that defenders  
6           remain in the position, usually, only 18 to 24  
7           months for an area defense counsel and 24 to  
8           36 months for a senior defense counsel.

9                       This year, for the first time, the  
10          Air Force has initiated a litigation training  
11          course specific to prosecuting and defending  
12          sexual assault cases.

13                      Air Force defense counsel  
14          participated in two different levels of  
15          courses, the intermediate sexual assault  
16          litigation course and the advanced sexual  
17          assault litigation course. Both of these  
18          courses were successful and are being reviewed  
19          based on feedback for ways to improve.

20                      In closing, let me say that I'm  
21          very grateful to be here today. As a judge  
22          advocate, I am very concerned about some of

1 the proposals being considered to modify the  
2 Uniform Code of Military Justice, the Manual  
3 for Courts-Martial and our Military justice  
4 system, more generally.

5 I appreciate this opportunity to  
6 discuss these concerns and the topic of sexual  
7 assault in our Armed Forces with all of you.  
8 And I look forward to your questions.

9 CHAIR JONES: Thank you very much,  
10 Colonel. Captain Shinn?

11 CAPTAIN SHINN: Good afternoon,  
12 esteemed panel. Thank you for the opportunity  
13 to discuss the training of Marine defense  
14 counsel as a tack on the issue of representing  
15 our clients accused of sexual assault.

16 My name is Captain Russell Shinn.  
17 And I am the Officer in Charge of the Defense  
18 Counsel Assistance Program, DCAP, for the  
19 Marine Corps Defense Services Organization.  
20 I've been in this position since October of  
21 2011.

22 The views that I express today are

1 my own. For context to my remarks, I've spent  
2 my entire adult life in the Marine Corps. I  
3 enlisted when I was 18. And I spent 11 years  
4 as an enlisted infantryman and over eight  
5 years as an officer and judge advocate.

6 The vast majority of my billets as  
7 an attorney have been in litigation, I've  
8 spent both in the defense and Government from  
9 Okinawa, to Guantanamo, to DC.

10 I have been in non-litigation  
11 billets as well, Company Commander and  
12 Infantry Platoon Sergeant, and led Marines in  
13 direct combat in Iraq. I am also a sexual  
14 assault survivor.

15 I say this not to make the  
16 testimony about me, personally, but to  
17 highlight that when I talk about justice my  
18 comments come from both an individual and  
19 professional position.

20 During your thoughtful  
21 deliberations today, I urge this panel to look  
22 at our clients as people, some of whom stand

1           falsely accused. Our clients, like victims of  
2           sexual assault and other crimes, are real  
3           people, impacted by decisions and  
4           recommendations that this panel will make.

5                        You've heard pejorative terms like  
6           predator and master manipulator. There is a  
7           place for terms like those, at sentencing when  
8           the facts support the use of them. But the  
9           wild abandoned applying them, writ large to  
10          accuse service members, is not only incorrect,  
11          but it cheapens the overall message by  
12          reducing its efficacy. I ask that you keep  
13          the message but lose the rhetoric.

14                      The vast majority of our 72  
15          defense counsel, our first two are judge  
16          advocates with less than three years  
17          experience as an attorney. They typically  
18          serve 18 months as a defense counsel before  
19          moving on to another assignment.

20                      Right now, the average litigation  
21          experience of both senior defense counsel and  
22          defense counsel in DSO is a mere 14 months.

1 That includes both prosecution and defense  
2 time.

3 Despite this unique challenge, the  
4 DSO has consistently provided superior  
5 representation to our clients owing to the  
6 dedication of the individual attorneys and  
7 the mentorship provided by the DSO.

8 Our entry level requirements to  
9 become a judge advocate are similar to our  
10 sister services and almost identical to the  
11 outline provided by Commander King earlier.  
12 After a judge advocate joins the DSO, our  
13 leadership provides additional training,  
14 resources and assistance for defense counsel  
15 worldwide.

16 Part of that piece is my office,  
17 DCAP, established in 2011, which is staffed by  
18 only two people, me and Ms. Kate Coyne, the  
19 DSO's highly qualified expert. She's a  
20 retired civilian, public defender from San  
21 Diego, with over 30 years experience. And she  
22 brings a lot to the table. But at the end of

1 the day, it's just her and me.

2 Earlier, the Army Colonel, I  
3 forget his name, I apologize, but he talked  
4 about fidelity in data. And I'd like to talk  
5 about that when addressing challenges facing  
6 the DSO.

7 Last year, Fiscal Year 2013, we  
8 tracked data according to cases, because we  
9 have clients. We have real people. We have  
10 427 general courts-martial and special courts-  
11 martial that went to findings. Of those 427,  
12 108 of those were 120 cases, sexual assault  
13 cases. That's a quarter, a quarter of our  
14 cases that went to trial were sexual assault.  
15 Two hundred and nine of the 427 were  
16 contested, half, give or take. So 218 were  
17 guilty pleas.

18 In each one of those sexual  
19 assault cases, the defense counsel is faced  
20 with the vast resources of the United States  
21 Government. In addition, it's often a fight  
22 for defense counsel to obtain access to

1 witnesses, evidence and resources needed to  
2 ensure a fair trial.

3 I'll discuss this fight a bit more  
4 later. But combined with the challenges faced  
5 at trial, Marines accused of sexual assault  
6 are frequently shunned at their unit and on  
7 occasion subjected to unlawful pre-trial  
8 punishment and unlawful command influence.

9 While a client who is found guilty  
10 may get some relief during sentencing, the  
11 innocent client is left with no recourse for  
12 the months squandered in the brig, the  
13 ridicule suffered and often a career left in  
14 shambles.

15 This is not a non-trivial number  
16 of people. Almost 30 percent of the contested  
17 cases last year from the DSO resulted in full  
18 acquittals.

19 We must not forget that these  
20 Marines and Sailors are also victims. They  
21 are victims of the very justice system  
22 designed to protect us all. And experience by

1 the defense counsel to get justice at trial is  
2 only part of the battle.

3 So ours is a practice dealing with  
4 constant turnover. We normally start at zero,  
5 training young defense counsel for 15 months  
6 or so only to start ratcheting a caseload back  
7 at 15 months, since cases detailed after that  
8 point will not be finished at the point where  
9 the attorney is expected to transfer to his or  
10 her next assignment. Many times this transfer  
11 is to a non-litigation assignment.

12 Placing greater institutional  
13 value on high quality litigation is key. Our  
14 sister services advocate an exclusive career  
15 litigation track to solve this issue.  
16 However, the Marine Corps is a much smaller  
17 force which presents challenges to adopting  
18 this within our system.

19 You heard yesterday about  
20 promotion and retention precepts to discuss  
21 the importance of litigation experience, and  
22 that is a possible solution within the Marine

1 Corps. I would ask that this panel consider  
2 that for recommendations.

3 The DSO fights for access to  
4 witnesses, evidence and resources daily. And  
5 the effective delivery of litigation services  
6 within the Marine Corps is hampered by the  
7 lack of dedicated defense investigative  
8 resources. So in addition to the lack of  
9 experience, we don't have the people on the  
10 deck to get things done on a case-by-case  
11 basis.

12 Congress has provided  
13 investigators for the adequate representation  
14 of Federal indigent defendants. And virtually  
15 every state and Federal public defender's  
16 office has in-house investigators.

17 For example, in the central branch  
18 of the San Diego Public Defender's Office, 80  
19 attorneys are supported by 16 investigators.  
20 In the DSO, we have 72 defense counsel, but  
21 not a single defense investigator.

22 Based on my and the DSO HQE's

1           experience, the most efficient and cost  
2           effective way to provide this service is to  
3           create a DSO criminal investigative division  
4           or CID billet as a normal progression in duty  
5           assignments for CID agents.

6                        If each of the four DSO regions  
7           had just two assigned investigators, that's  
8           half the number of comparable to civilian  
9           public defenders, the efficiency and  
10          effectiveness of the DSO mission and the fair  
11          administration of justice would be enhanced by  
12          an order of magnitude.

13                       The next thing that is lacking is  
14          subpoena power. At the 8 November hearing  
15          before this panel, you heard testimony about  
16          the subpoena power, so I won't go into depth  
17          on that. But suffice it to say that the  
18          Defense Board does not have that authority.  
19          We have to request it.

20                       All that information goes through  
21          the prosecutor, who gets to review all that  
22          information before we get it. And they can

1           summarily deny it. That is an area that is  
2           ripe for this panel's inquiry as well.

3                       And that gap can be easily fixed  
4           by giving the defense, who are both officers  
5           of the Court and commissioned officers, and so  
6           when the argument comes forth about abuse of  
7           the system, I ask this panel to evaluate who  
8           the person is who is asking for the  
9           information. These are people who are  
10          commissioned officers, who have sworn to  
11          protect and defend the Constitution, not  
12          someone who is trying to attack the  
13          Constitution.

14                      Moving to training, each year the  
15          Chief Defense Counsel of the Marine Corps  
16          publishes a DSO training plan which outlines  
17          the priorities and responsibilities of the  
18          leaders and members of our DSO provided in our  
19          written statement, an outline of all the  
20          courses that the DSO provides and also the on-  
21          the-job training that our senior defense  
22          counsel and regional defense counsel provide

1 at the branch offices within the regions.

2 In addition to those training  
3 events, our counsel can also attend our sister  
4 services courses and non-DOD training.

5 My office provides reachback  
6 globally. We are on the phone and on email  
7 24/7. We provide a SharePoint site, a Web  
8 site that's an online database of motions,  
9 discussion boards, you name it. We try to  
10 provide that to our defense counsel.

11 But a discussion of training would  
12 be insufficient without describing how the DSO  
13 pays for it. And the DSO's budget has taken  
14 significant hits over the past few years, as  
15 has the entire DOD's budget.

16 But in Fiscal Year 2011 when I  
17 came onboard, our budget was \$80,000. It  
18 dropped to \$64,000 in Fiscal Year 2012, to  
19 \$60,000 in Fiscal Year 2013 and then again to  
20 \$36,000 this Fiscal Year, \$36,000 for 72  
21 attorneys for training.

22 Put simply, we cannot train our

1 defense counsel on this amount. We can't. We  
2 have to ask other agencies, the LSSSs to help  
3 support us, I'm sorry, the Legal Services  
4 Support Section.

5 And there's a mechanism to ask for  
6 that assistance. But it's a situation where  
7 we have to beg, borrow and not steal, but beg,  
8 and borrow and scrounge to get our counsel to  
9 training. We've been able to do that.

10 Last year we were able to get  
11 significant assistance through Department of  
12 Navy SAPRO. But without that, it would have  
13 been mission failure. And hope is not a  
14 strategy.

15 So I cannot hope that SAPRO is  
16 going to give us money so that we can train.  
17 But that's where we're at.

18 COLONEL HAM: For comparison,  
19 Captain, do you know how much was allocated to  
20 your prosecution counterparts for training?

21 CAPTAIN SHINN: No, I don't have  
22 that. I do have those numbers. I do not have

1           them in my head, ma'am. What I do know is  
2           last year we spent over 30, I'm sorry,  
3           \$300,000 in training for the DSO.

4                        So we were able to cobble together  
5           enough money within to get \$300,000 worth of  
6           training for our attorneys, despite having  
7           only our meager budget. But again, that was  
8           cobbled. I don't have that information.

9                        Now, this isn't through some  
10          nefarious intent by the Government to withhold  
11          training from us, as I just alluded to.  
12          They're giving us money, but it's not fenced  
13          off, as was earlier described.

14                       But the prosecution is getting the  
15          lion's share of the resources. They have four  
16          HQEs, whereas we only have one. They have  
17          complex trial teams with a dedicated  
18          investigator and a legal administrative  
19          officer.

20                       Put more simply, getting serious  
21          about sexual assault and complex litigation  
22          requires as a necessary component, getting

1           serious about funding training for both  
2           counsel about staff.

3                         Now, I've had the privilege of  
4           serving with hundreds of defense counsel  
5           during my 19 plus years of service. And  
6           regardless of their experience level, each  
7           defense counsel takes to heart the DSO motto  
8           of Marines Defending Marines.

9                         Despite the dedication, our  
10          mission is not without significant challenges,  
11          as I mentioned above and in-depth in my  
12          written comments. The right to counsel comes  
13          with it the right to effective counsel. And  
14          we owe it to our service members to make their  
15          counsel effective.

16                        Dr. Martin Luther King, Jr.  
17          famously said, "We shall overcome because the  
18          arc of a moral universe is long, but it bends  
19          towards justice."

20                        And it's up to each of us to  
21          continue to push that arc towards justice,  
22          both for victims which has been the push for

1 most of the testimony, but also for the  
2 accuseds.

3 And it's relatively easy to stand  
4 up for beliefs when it's the popular thing or  
5 the in vogue thing. It's relatively easy to  
6 be pro-victim or anti-crime. But it can be  
7 quite another to be against the injustice done  
8 to accuseds, especially when they are already  
9 considered guilty by society, by the media, by  
10 their unit and by their commander, all prior  
11 to trial.

12 Accused, the tone and tenor of  
13 that word being hurtled at you, and stuck on  
14 you, and immovable as a label, is powerful.  
15 And that rush to judgement, the pre-judging of  
16 individual guilt, causes us, as a society, to  
17 lose sight of what our founders sought to  
18 protect.

19 Through recent violent revolution  
20 from the British Crown, no less, they  
21 established in the sixth amendment, they  
22 enshrined our right to a speedy and fair

1 trial.

2 A hundred and eighteen years ago,  
3 the Supreme Court held that the principle that  
4 there is a presumption of innocence in favor  
5 of the accused is the undoubted law, undoubted  
6 law, there's a presumption of innocence. But  
7 118 years later, we still struggle with that  
8 fact.

9 And too often, the court of public  
10 opinion rushes to judgement, people without  
11 all the facts, sometimes facilitated by  
12 advocacy groups, or those with an axe to grind  
13 or even with a wallet to pad.

14 But trial at any allegation, even  
15 one as serious as sexual assault, can never be  
16 merely an inconvenience on the way to  
17 conviction and punishment. If the innocent  
18 accused are convicted for a lack of defense  
19 training, investigation or resources, justice  
20 is not served.

21 And without public faith that the  
22 justice system is fair, the system itself will

1 crumble. And it is up to us as concerned  
2 citizens to help ensure that this is remedied.  
3 Thank you for your time, and I look forward to  
4 your questions.

5 CHAIR JONES: Thank you, Captain  
6 Shinn. There were a lot of issues raised by,  
7 for a lot of representatives from each of the  
8 services. But I'd like to continue and hear  
9 from our civilian defenders.

10 And as we hear from you, I wonder  
11 if you'd begin to talk about things like how  
12 many years do you need to be a defender and  
13 your own resource issues in training. All  
14 right, Mr. Borg.

15 MR. BORG: Thank you.

16 CHAIR JONES: Could we start with  
17 you?

18 MR. BORG: Yes, I have to follow  
19 that. That's really amazing. I feel like I  
20 should invoke Monty Python, but now for  
21 something completely different.

22 My name is Lane Borg. I'm the

1 executive director of Metropolitan Public  
2 Defenders in Portland, Oregon. We're a  
3 private nonprofit, but we're the primary  
4 defenders in two of the three metropolitan  
5 counties in Portland.

6 I have a staff of 60 lawyers, 135  
7 staff total, and it's no match to Captain  
8 Shinn, I have 20 in-house investigators for  
9 that. We do everything you can get a court-  
10 appointed lawyer for except appellate work.  
11 So we do everything from civil commitments and  
12 juvenile work up to capital crimes.

13 We don't divide ourselves in terms  
14 of like a sexual crimes unit. We divide among  
15 major felonies, minor felonies and  
16 misdemeanors. And you work your way up based  
17 on state guidelines for experience.

18 So if you have a bar card and  
19 you're alive you can do misdemeanors, but  
20 beyond that you need to have demonstrated  
21 experience. So years and trials will get you  
22 into minor felonies and then up into major

1 felonies where a lot of the sex crimes are.

2 But one of the reasons I was kind  
3 of interested in this, thinking about this and  
4 when I was invited here, is to really, you  
5 know, why isn't that? I did private practice  
6 for 13 years and did a lot of retained work in  
7 sex crimes.

8 I suspect there's, in the civilian  
9 world, more percentage or a higher percentage  
10 of retained work in sex crimes, but in  
11 Multnomah County we have about 1,500 pending  
12 cases, as of last week, adult crimes. And of  
13 those, 54 sex crimes. So only about three and  
14 a half percent of the crimes. It's not a big,  
15 huge percentage of our caseload.

16 And so we tend to focus more in  
17 terms of the training. I mean, first of all,  
18 and I counsel my friends in the prosecution,  
19 I don't why they organize themselves that way.  
20 I think it does damage and trauma to people to  
21 make them only prosecute sex crimes or only  
22 defend sex crimes. I think it's good to get

1 to do other things.

2 But as I said, we focus more on  
3 training on specific things. And we've  
4 actually conspired a little bit in our  
5 discussions, and Mr. Porter's going to talk  
6 about some training stuff. It's very similar  
7 between the states.

8 So I'm going to talk about, and in  
9 preparation for this was talking about some  
10 trends, some new practices we're looking at in  
11 our state for resolution, not just of major  
12 crimes but particularly sex crimes, and that  
13 is risk assessment, and trying to incorporate  
14 risk assessment into dispositions.

15 So I'm going to start by telling  
16 you I am not an expert in risk assessment, but  
17 I think after about 18 months I'm an expert in  
18 attending briefings on risk assessment and  
19 what I've learned that is going to be  
20 important to defense.

21 And I think this is also relevant  
22 and important as I've listened today to your

1 charge, as the military has expanded sex  
2 crimes into the boundary issues, the touching,  
3 not just a rape or a violent assault, but it's  
4 a much broader definition of what's going to  
5 be brought up. That's very similar to the  
6 states. The states have been dealing with  
7 that and sort of sweeping up different people  
8 and deciding what's going to be a sex crime  
9 and then what's going to be labeled, as I'll  
10 get to, I'll talk about later, sex offenders.

11 And what I've learned is that  
12 we've got three, so it'll be three levels of  
13 risk assessment that we've applied. Historic  
14 is unstructured judgment, the sociologists  
15 will tell us, which is what we've just talked  
16 about. It's a gut feeling. A judge will have  
17 a gut feeling about what to do or how to  
18 sentence it. And that turns out to be the  
19 worst risk assessment. It doesn't pan out to  
20 be very well.

21 Then the next that comes in, and  
22 what we're using a lot of in Oregon right now

1 is what will be considered straight actuarial.  
2 So a public safety checklist, the Static-99,  
3 these are validated risk assessment to predict  
4 whether or not a particular person is going to  
5 reoffend in a predictable period of time. One  
6 year, three years, five years, I think is the  
7 longest that I've seen.

8 And then what we're getting to in  
9 Oregon and what we're really trying to push is  
10 the concept of structured judgment. So you  
11 look at the actuarial assessment and then you,  
12 taking the factors that went into developing  
13 that you have a discretionary authority  
14 exercising judgment to deviate from that when  
15 it may be warranted because one particular  
16 factor may be driving the risk assessment.

17 We've noticed recently as we've  
18 endeavored in this that we have a way you can  
19 charge if you're 15 or older you can be  
20 charged with a major felony in adult court in  
21 Oregon.

22 And we've got a way -- so we

1           looked at that and we went to the public  
2           safety checklist, we're seeing that they're  
3           kind of off the charts. They're high risk-  
4           high risk because we tend to think youth are  
5           high risk. And so we've got to figure out a  
6           way to account for that in the analysis.

7                         But a lot of people have asked,  
8           well, why would a defense attorney be  
9           interested in risk assessment? Why would we  
10          be talking about that? And I'll admit, I've  
11          drunk the Kool-Aid a little bit. I believe  
12          there's something to this. I've been to  
13          enough demonstrations and sort of  
14          presentations on it that I think that risk  
15          assessment is something we should be looking  
16          at.

17                        But I also, as I said before, I've  
18          never had in 30 years the experience, in  
19          absence of information, a judge or a  
20          prosecutor assumed that my client is low risk.  
21          So if there's something that can talk to that  
22          I want to engage that.

1                   Also, more and more and  
2                   particularly in sex offenses, and I'm hearing  
3                   that in this presentation today that this is  
4                   where the military may be going or thinking  
5                   about going, it's the charge that determines  
6                   the outcome that determines everything else.

7                   So what the person is convicted of  
8                   is going to determine what their incarceration  
9                   is going to be, what their conditions of  
10                  probation are going to be, the length of the  
11                  requirement to register as a sex offender and  
12                  the length of that. And if the prosecutor or  
13                  the judge is going to be interested in what  
14                  the level of risk is in order to be  
15                  comfortable with a lower level of disposition  
16                  we've got to pull that into the pre-  
17                  adjudication time period. We've got to get  
18                  that before we decide what the charges  
19                  ultimately are.

20                  And I want to again emphasize,  
21                  this is not about someone who's asserted  
22                  innocence. When someone has asserted

1           innocence there's a whole process, and some of  
2           the other presenters are going to talk about  
3           that about how you fight that and what needs  
4           to be done and what the standards are.

5                         But I'm talking about using risk  
6           assessment to try to change this concept of  
7           just throw everybody in incarceration and make  
8           them a registered sex offender for the rest of  
9           their life. Because in Oregon we tried that  
10          and we overshot the mark, and we've got a  
11          whole class of people that cannot get jobs,  
12          cannot live anywhere, and they are now going  
13          to be taken care of financially and everything  
14          by society. They're never really going to be  
15          contributors again because they're never going  
16          to have meaningful employment and those types  
17          of things, or they're going to have big  
18          challenges on that.

19                        And the other thing that I've  
20          learned in my journey through this risk  
21          assessment and corrections theory is that  
22          dosage matters. If you overreact to somebody

1           you can turn a low-risk offender into a high-  
2           risk offender.

3                       So if you react in a way to  
4           overincarcerate, to oversupervise, you can  
5           take someone who may have been, made a mistake  
6           with some boundary issues, and after three  
7           years that person's no longer going to be a  
8           low risk to commit a new crime in the next  
9           three years, they're going to be high risk.

10                      And I was talking about one of, I  
11           employ, we have a VA assistance program and so  
12           I employ a former JAG officer as my VA  
13           assistant and he was talking about some of  
14           these ideas. And we recognized that, you  
15           know, you really have that third option that  
16           people have been talking about the civilian  
17           doesn't have, the civilian process doesn't  
18           have banishment. You know, you can be out,  
19           you're not around anymore. We don't have that  
20           in the civilian world. They're going to be  
21           here.

22                      So I keep hearing 99 percent of

1 offenders are released from prison back into  
2 society. And so it really does matter, if  
3 you're taking people that were low risk and  
4 turning them into high risk you're doing harm.  
5 You're not fixing the system, you're creating  
6 a risk to an offender down the road or a  
7 victimization down the road.

8 So I've become a believer in that,  
9 you know, we need to do this. This is  
10 happening, and finally, I guess, if no other  
11 reason, Oregon has made it statutory. All  
12 offenders going into supervision will go  
13 through a risk assessment and then that  
14 probation officer can change their conditions  
15 of supervision based upon that.

16 So we've got to learn how to do  
17 this. So what I've learned and what I'm  
18 trying to get and we're engaging in, in Oregon  
19 with defense counsel, is really teaching the  
20 defense counsel what these risk assessments  
21 are about. What they do and what they don't  
22 do. For instance, they're very good

1 predictors for low-risk offenders at  
2 predicting at who's not going to recidivate.

3 If you look at low-risk offenders  
4 it's pretty high, 85 percent correct, 90  
5 percent correct in some areas of who's going  
6 to be, who's going to not recidivate. Not so  
7 good on the medium and high-risk offenders.

8 If you look at the numbers they  
9 will predict, they have false positives.  
10 They'll predict that the person is going to  
11 reoffend as a high-risk offender, and about 60  
12 percent of the time that person does not  
13 reoffend.

14 And so we've incarcerated them,  
15 we've done a bunch of things to them and yet  
16 when you track the history that person in fact  
17 did not go out and reoffend. Risk assessment  
18 is not a validated tool for length of stay.

19 That's the other thing that we get  
20 concerned about is that prosecutors will say,  
21 well, this person's a high-risk offender so  
22 you should max them out. You should give them

1 the maximum amount of time. There's no  
2 studies that support that at all. All you're  
3 going to do is make them a higher risk  
4 offender and keep them in prison longer and  
5 spend a lot more resources. And if you think  
6 you're making it better because they're given  
7 a longer sentence that's a misuse of it.

8 And then as I have learned in  
9 going into it, the factors like the Static-99  
10 which is the most common, widely spread in  
11 North America anyway, most of the validation's  
12 been done in Canada, a tool for sex offenders  
13 is that there's only about ten or 11 factors  
14 that go into it.

15 Well, one of the factors is have  
16 you lived in a stable, domestic relationship  
17 for two years? Well, look around at 22-year-  
18 olds, look around at folks in the military,  
19 look around at, you know, with the changing  
20 and emerging issues on gay marriage, look at  
21 gay couples, you know, they're not going to be  
22 able to score probably well on that factor,

1           and we as defense counsel in advocating for  
2           that structured judgment need to know that and  
3           need to understand these so that we can get  
4           behind the test, look at it and say, well, was  
5           that an outlier? Did that person score higher  
6           on the test because of something that is not  
7           really a risk factor in this person's  
8           situation or is controllable, something we can  
9           meet a needs on or change?

10                         And so that's one of the big  
11           training challenges we're engaging in as we go  
12           down this road of using risk assessment to try  
13           to determine who really is somebody we need to  
14           be worried about and somebody who really  
15           needs, you know, with some addressed needs and  
16           supervision can live safely in society and not  
17           be reoffending on that.

18                         And I'll be glad to answer any  
19           questions. Thank you.

20                         CHAIR JONES: Thank you, Mr. Borg.  
21           Is it Ms. Kepros?

22                         MS. KEPROS: Kepros.

1 CHAIR JONES: Kepros? I see you  
2 are the director of sexual litigation, so you  
3 do specialize in your office, is that right?

4 MS. KEPROS: I do. My name is  
5 Laurie Rose Kepros. I work for the Colorado  
6 Office of the State Public Defender. We have  
7 a statewide agency. Our office is in charge  
8 of all the public defense through the State of  
9 Colorado. We have 21 regional offices. As of  
10 the 1st of January we will have over 600  
11 attorneys. We are expecting to handle 134,000  
12 cases in this fiscal year.

13 Just to give you some points of  
14 reference to some of the military numbers, I  
15 investigated overnight how many felony sex  
16 cases were filed in Colorado. It looks like  
17 in the last fiscal year there were about  
18 2,200. So again, it's a small percentage of  
19 cases, but these are cases that take a grossly  
20 disproportionate share of resources. And  
21 frankly, I can tell you that my prison system  
22 would say the same. We have over 25 percent

1 of our prison population is there for sex  
2 crimes. My probation agencies would say the  
3 same. We have something like a third of their  
4 resources going to supervising those people  
5 who are convicted of sex crimes. So it's a  
6 very complicated world when sex crimes are  
7 involved, no question about it.

8 Of the cases that my agency  
9 handles I can tell you that my job did not  
10 exist until 2010. There was no such thing.  
11 In terms of general training we have what we  
12 call a boot camp program that our attorneys go  
13 into. It's a seven-day intensive bring-your-  
14 own-case-work-shopping-kind of a program.  
15 They get that at about a year. There are  
16 other shorter trainings delivered by the  
17 agency on court trial skills. So they get  
18 general litigation skills.

19 Similar to some of the other  
20 people you're hearing from right now, we have  
21 a lot of turnover. We're a public defender's  
22 office. That is where people go to get some

1           experience, and sometimes unfortunately they  
2           move on. So we are constantly training new  
3           people and so we're very sensitive to those  
4           challenges.

5                           What largely drove the creation of  
6           my position I believe was the State of  
7           Colorado's decision in 1998 to pass something  
8           called the Lifetime Supervision Act, which  
9           means that for almost all felony contact sex  
10          crimes the defendant is facing a life sentence  
11          either on probation or in prison, depending on  
12          the charge. We became very concerned about  
13          the quality of representation that we were  
14          providing to these defendants whose lives were  
15          literally at stake and my position was created  
16          to provide support, not just to people who are  
17          charged with those crimes, but representation  
18          on sex cases across the board.

19                          I provide a service that I think  
20          is most similar to the military model of  
21          highly qualified expert. I no longer carry a  
22          caseload. I did serve as a trial attorney for

1 over 10 years in the public defender's office.  
2 I am the only public defender that I know of  
3 in my state who ever had a sex offense  
4 caseload. In the years 2005 and 2006 I  
5 personally represented five percent of the  
6 defendants in the state who were charged with  
7 one of these lifetime crimes.

8 So I've spent a lot of time  
9 looking at these issues, but we end up with  
10 these cases being geographically disseminated  
11 throughout the state. Some of our offices  
12 have two or three attorneys in them. Some of  
13 them have more than 50 attorneys in them. So  
14 what's available in terms of support and  
15 resources varies a lot. So I consult on a lot  
16 of cases. I threw out that number for one  
17 fiscal year of approximately 2,200 felonies.  
18 I should actually correct that. It was 1,750  
19 felonies. It was 2,200 total adult sex  
20 filings. So that included misdemeanors that  
21 were more like 400 or 500.

22 In the last three years that my

1           job has existed I have consulted on  
2           approximately 1,600 cases. So I think you can  
3           say I have touched 20 to 25 percent of the sex  
4           cases that have been filed in the State of  
5           Colorado personally. And so that is a  
6           resource that I provide among the special  
7           issues that I feel arise in the context of  
8           sexual offense representation. And I do  
9           regional training. I go out to these offices.  
10          I give them a lot of this information.

11                   A particular area of concern that  
12          I have has to do with the use of experts in  
13          these cases. We are the Government. We don't  
14          just give people money because they say they  
15          want to hire an expert. We expect our defense  
16          counsel to understand why they would need an  
17          expert. We require of them justification for  
18          spending that money.

19                   The difficulty is if you have  
20          naïve defense counsel, they will not identify  
21          those needs. They will not be able to justify  
22          the appropriate resources and support for

1           their cases. I think some of the issues that  
2           Mr. Borg brought up are a great example. You  
3           know, we have in my state also a mandatory  
4           psychosexual evaluation process for anybody  
5           who is convicted of a sex crime. Well, you  
6           know, knowing how to make sense of that is an  
7           important skill to have and it takes a lot of  
8           reading and research and training to be able  
9           to do that. And knowing the nuances of  
10          instruments like the static 99, it takes  
11          skill.

12                            Things have come up in the course  
13          of other testimony before this Panel over the  
14          last couple days, frankly, that I can tell you  
15          as somebody who's done a lot of reading and  
16          research, I disagree with some of the claims  
17          that have been made about crossover, some of  
18          the claims that have been made about the  
19          average number of victims for whatever this  
20          thing is, quote, "sex offender," close quote,  
21          because it's not a homogenous thing. But, you  
22          know, you need to have a lot of education and

1 training to appreciate these are even issues.

2 Certainly we have tons of cases  
3 where there is no physical evidence, and that  
4 can make the social science issues even more  
5 complicated to tease out as people come in and  
6 say, well, is this behavior consistent with  
7 someone who's been sexually assaulted? And,  
8 you know, boy, I really need to know a lot to  
9 do an effective cross-examination on that kind  
10 of topic.

11 If somebody is in a case where  
12 there's physical evidence, I better know how  
13 to cross-examine a SANE nurse. I better know  
14 something about gynecology. I've had to learn  
15 about abortion. I've had to learn about  
16 hysterectomy. I'm just throwing out some, you  
17 know, things that come up in practice that you  
18 have to go get educated about to be effective  
19 at representing your clients.

20 Above and beyond that, there are  
21 the realities of things like plea bargaining,  
22 sentencing, what is appropriate? One issue

1           that is really concerning to me is the  
2           collateral consequences that may flow from  
3           even being accused of a sex crime. In the  
4           last I think just two years the United States  
5           Supreme Court has recognized a specific duty  
6           of defense counsel to advise clients of  
7           collateral consequences, including I would  
8           submit to you things like registration as a  
9           sex offender, things like all the other things  
10          that will happen in your life if you are  
11          adjudicated for this kind of offense. In my  
12          state we do include military dispositions  
13          among the things that will trigger  
14          registration.

15                        Across the country you will find  
16          from state to state to state all kinds of  
17          rules, rules about whether you can photograph  
18          children, rules about whether or not you can  
19          go into a public library, rules about whether  
20          or not people can trick or treat at your house  
21          that may be triggered by some sort of contact  
22          with a sexual assault allegation.

1 I can tell you if somebody were  
2 accused through the military process of a sex  
3 crime, even if they were never adjudicated,  
4 even if there was never a court-martial, if  
5 there's some record of that floating out there  
6 and it is learned about by my prison system,  
7 if you come into my prison for a non-sex  
8 crime, for a crime like let's say theft, if  
9 that's out there, it may be enough to create  
10 a situation where you'll be treated as a sex  
11 offender subject to mandatory sex offender  
12 treatment, required to submit to full sex  
13 offender conditions on parole which tend to  
14 include things like absolutely no contact with  
15 anyone under age 18, including your own  
16 children, restrictions on access to the  
17 Internet, restrictions on where you may live.  
18 You know, it's a very serious consequence,  
19 even aside from incarceration consequences.  
20 And that could flow from something that is  
21 never adjudicated even by the military.

22 So I'm very concerned about

1 defense counsel being aware of these things.

2 The other major concern I have is  
3 that we see because of the desire to prosecute  
4 these cases, a desire that legislators I think  
5 often understandably share -- we see the  
6 constitutional protections that generally are  
7 made available to defendants have exceptions  
8 cut into them when it comes to sexual assault  
9 cases. We see rape shield laws. We see laws  
10 that allow certain kinds of hearsay to come in  
11 that might otherwise not in another case.

12 So we take a case that is among  
13 the most serious kind of accusations that  
14 someone can face and we take away some of the  
15 protections that might otherwise be present  
16 for them. So you need defense counsel who are  
17 effectively constitutional experts who have  
18 the skill and knowledge and legal ability to  
19 bring constitutional challenges to some of  
20 these rules that are peeling back some of the  
21 protections that we are accustomed to having  
22 in normal criminal defense practice. And, you

1 know, these are not minor things. These take  
2 a lot of knowledge. These take a lot of hard  
3 work.

4 The other thing is you've heard  
5 about FETI. You heard about some of the  
6 different interview techniques that have come  
7 up during this panel. Those techniques change  
8 all the time. I hope they're changing for the  
9 better. That's a great thing if they are,  
10 right? We want evidence-based practices. But  
11 it also means now I have to go learn about  
12 that, and I have to train my staff about that.  
13 And so it's not that, oh, we've trained up  
14 somebody one time and now we're done. It's  
15 here's the next hot thing or here's the next  
16 trend and suddenly we all need to go learn  
17 about it.

18 Risk needs responsivity, which is  
19 sort of the short term for what Mr. Borg was  
20 talking about. Don't over-supervise low-risk  
21 people. That's become kind of a buzz word in  
22 the policy world that I'm in right now. And

1 so you need to go read the literature and know  
2 about these things and being some  
3 sophistication to the process.

4 Because one of the other realities  
5 is at the end of the day well-meaning  
6 prosecutors, well-meaning judges, well-meaning  
7 probation officers, they may not have all the  
8 relevant information themselves. And  
9 especially if we are looking at systems, model  
10 systems where investigators are going into the  
11 process saying we are going to believe the  
12 victim no matter what, well, somebody else  
13 needs to be investigating what else may be  
14 going on. Somebody else needs to be figuring  
15 out what other concerns or considerations need  
16 to be brought to bear in this situation to  
17 have any shot at any kind of just results.

18 CHAIR JONES: Thank you very much,  
19 Ms. Kepros.

20 Is that Ms. Muth?

21 MS. MUTH: Muth, Your Honor.

22 CHAIR JONES: Muth?

1 MS. MUTH: Thank you. My name is  
2 Amy Muth. I'm from Seattle, Washington. I'm  
3 in private practice, different from my  
4 colleagues, but I was a public defender for  
5 seven years and very proudly still identify  
6 myself as being a public defender.

7 We do things differently in  
8 Washington in terms of how we administer  
9 public defense services. We don't have a  
10 statewide agency. Rather, it sort of goes  
11 county by county and there are a couple of  
12 larger counties like the Spokane County Public  
13 Defender's Office, Pierce County, Snohomish  
14 County, Whatcom County which all have agencies  
15 that contract with their county government.  
16 King County, which is where Seattle is, is a  
17 little bit different in that we have four non-  
18 profits which contract with the government.  
19 And that of course is being consolidated into  
20 one or two different agencies. It's kind of  
21 a mess right now. But the main way in which  
22 public defense services are administered

1 throughout Washington State is through public  
2 defense contracts.

3 So individuals can apply for and  
4 receive a public defense contract by  
5 submitting a request for proposal when the  
6 appropriate times comes up with either the  
7 statewide Office of Public Defense or with the  
8 local county agency. In Washington we now  
9 have standards that counsel needs to certify  
10 and has to sign off on; every public defender  
11 in the state needs to do this, which indicated  
12 they're going to abide by certain standards of  
13 representation. I submitted those in my  
14 materials.

15 Specific to sex crime cases there  
16 are minimum standards of qualifications. You  
17 need to have been a lawyer for at least a  
18 year. You need to have done at least one  
19 felony trial and another trial with the  
20 assistance of another attorney. What I would  
21 say about that standard -- and I want to talk  
22 more about my experience having worked for the

1 largest agency in the state, the Defender  
2 Association in Seattle, what my experience was  
3 in practice in terms of what the expectations  
4 were for counsel. That standard is a floor.  
5 It's not a ceiling.

6 My experience, both having worked  
7 for a small public defense firm and having  
8 worked in Seattle is that at most agencies  
9 it's the typical you'll start out in district  
10 court, you know, doing misdemeanors for about  
11 two years, eventually move up to doing  
12 felonies. And you'll start off with low-level  
13 felonies. And most people usually don't start  
14 taking on sex offenses until they've been in  
15 practice for some time. And there are a  
16 variety of reasons for that.

17 A big one is what has been touched  
18 upon by this panel already. If there's one  
19 thing we can drive home to you it is that the  
20 consequences for these offenses are severe if  
21 you are convicted. In Washington State we  
22 have the Indeterminate Sentencing Review

1 Board, basically a parole board that was  
2 formed by the legislature in 2006. And an  
3 individual who was convicted of a sex offense  
4 that is eligible for the ISRB has a minimum  
5 sentencing term set by a judge. And then when  
6 that person goes to prison, the Indeterminate  
7 Sentencing Review Board can either parole them  
8 at the time that they've served their minimum  
9 term or they can have another five years set  
10 and another five years up until they've served  
11 the statutory maximum, which for many of these  
12 cases is life. So it has resulted in a lot of  
13 cases now being viewed as potential life  
14 sentences.

15 So when we do trainings for this  
16 and when I do trainings -- and I've spoken at  
17 a number of facilities. I've done trainings  
18 for a lot of the agencies throughout the  
19 state. That's one thing that we need to drive  
20 home to them. And I certainly echo Ms.  
21 Kepros' remarks regarding how difficult and  
22 the level of expertise that it takes to do

1           these cases properly.

2                           It was a sex offense case, a  
3           juvenile case, but the principles are the  
4           same, that really led to the development of  
5           having even these model indigent standards  
6           that counsel needs to abide by in these cases.  
7           And I think it touches very nicely upon  
8           Captain Shinn's remarks regarding the duty to  
9           investigate these offenses properly. And that  
10          case is State v. A & J.

11                          And in this case a 15-year-old kid  
12          accused of a sex offense spent, according to  
13          the opinion by the Washington Supreme Court in  
14          its findings, defense counsel spent 55 minutes  
15          total with the client before his plea hearing,  
16          did no independent investigation including  
17          interviewing witnesses that the client had  
18          produced, made on discovery requests, filed no  
19          motions, did not even review the plea  
20          agreement, did not consult with experts, did  
21          not inform the child that his school would  
22          learn that he was a sex offender, did not

1       inform the child of the mandatory minimum  
2       sentencing term and had not even used an  
3       investigator during the prior contract term.

4                   And I'm not at all suggesting that  
5       this is the standard of practice in the  
6       military, but I say this to point out the need  
7       to rigorously defend and enforce the duty of  
8       counsel to investigate these cases properly  
9       and to make certain that they are given the  
10      tools to properly investigate these cases.  
11      That means having investigators available.  
12      That means having training with counsel. And  
13      in fact our supreme court said that even  
14      counsel believed that his client was guilty,  
15      he still had a duty to do some investigation  
16      in this case so as to properly advise the  
17      individual of the consequences of pleading  
18      guilty or whether it was a good idea to do  
19      that.

20                   And I would also point out that  
21      doing a proper investigation often has the  
22      impact of reducing prosecutions because cases

1           resolve. I cannot tell you how many times I  
2           have gone into a witness interview with a  
3           client who has said, you know, Ms. Muth, Amy,  
4           you know, I'm not guilty. I didn't do this.  
5           I didn't do this. I interview the witness.  
6           I have a tape recording. I play it for the  
7           client. And the client hears how that witness  
8           sounds and the client now has a different  
9           assessment of what his case should look like.  
10          Or conversely, I produce a witness for the  
11          prosecution to interview and I just say, you  
12          know, you've got to listen to this witness.  
13          You've got some problems with your case. And  
14          the prosecutor will listen and will say, you  
15          know, you're right, Amy. I need to make a  
16          different decision about what I need to do  
17          with this case.

18                        So investigating it's not only  
19          what is required under the 6th Amendment. It  
20          is what makes certain that justice happens in  
21          these cases. These are cases that carry  
22          serious consequences for individuals. There

1           are a number of competing difficult interests  
2           to balance against and I just urge that based  
3           on our experience in Washington this rather  
4           unfortunate experience that we all learn from  
5           that and that we rigorously protect and defend  
6           the duty of counsel to investigate these cases  
7           properly. Thank you for your remarks.

8                         CHAIR JONES: Thank you.

9                         MS. MUTH: Or -- sorry. Oh, yes.

10                        CHAIR JONES: Mr. Porter, you're a  
11           statewide trainer in New Mexico?

12                        MR. PORTER: Yes, Madam Chair,  
13           good afternoon, and distinguished members of  
14           the Panel. I first want to say I am just  
15           honored to be sitting at this table with these  
16           men and women in our military service that are  
17           providing blood, sweat and tears for people  
18           that are accused of crime within our military  
19           justice system.

20                        I am the training director for the  
21           State of New Mexico Public Defender  
22           Department. We have 200 in-house attorneys

1           and about 120 contract attorneys and I'm  
2           basically responsible that when they go in to  
3           defend one of our citizens in New Mexico that  
4           they are able to do that very competently.  
5           And I kind of look at your role here, too,  
6           because you're to be coming up with a system  
7           and developing a system that is for our  
8           military members. And I find it a little  
9           tragically ironic that the folks that defend  
10          our Constitution day in and day out, they  
11          actually in the military justice system have  
12          much less rights than someone would if they  
13          are a civilian.

14                        You know, in New Mexico if you're  
15          charged with one of these crimes, you're going  
16          to get 12 jurors. The prosecution has the  
17          burden of proof to prove it beyond a  
18          reasonable doubt to all 12 unanimously. And  
19          in a military court of justice it's much less  
20          and it's actually just a fraction thereof has  
21          to find you responsible for something. So I  
22          think what I would do is echo the concerns of

1 my counsel here is that these cases have dire  
2 consequences and they have dire consequences  
3 that last well after the military service,  
4 especially the sex offender registration.  
5 Throughout I think every state now has a  
6 lifetime registration system in place or will  
7 soon have one in place.

8 So as they have in Colorado, in  
9 New Mexico we have seen that these cases,  
10 they're the toughest cases that land on our  
11 desk, right? And we have a mantra where we  
12 say give me a homicide any day. Just don't  
13 give me one of those sex cases, right? And of  
14 course the most difficult ones are the  
15 children sex cases.

16 And so we have stepped up our  
17 training. And I talked to Commander King  
18 earlier about the military's training, at  
19 least in the Navy, and I was very impressed  
20 that they do a lot of training. And just like  
21 all public defense systems throughout this  
22 country, there is a turnover issue, right?

1           And there is always going to be a turnover  
2           issue. It's something that we have to live  
3           with. I practiced in the Public Defender  
4           Department in Hawaii for 10 years and now in  
5           New Mexico for 10 years, and that's just part  
6           of what we have to deal with.

7                        So what you folks have to deal  
8           with is creating a system that addresses that  
9           as well. And it's really about training,  
10          about setting limits of how much experience  
11          and how much training counsel should have  
12          before they handle these cases, because we  
13          know the consequences are so great.

14                       In the New Mexico Public Defender  
15          Department we have very similar training to  
16          what the Navy has. We have a one-week-type  
17          boot camp. Then we have a year later a one-  
18          week advanced trial skills workshop, two to  
19          four weeks of mentoring in court before  
20          anybody actually does anything on the record.  
21          And then we have in-service trainings every  
22          Thursday that are broadcast over the Internet

1 to all of our regional offices. And I think  
2 that would be something that the Armed Forces  
3 who are spread out throughout the world could  
4 certainly take advantage of as well.

5 To answer your question, Madam  
6 Chair, about the level of experience and my  
7 experience in doing these cases for 20 years  
8 now, minimally three years, and they shouldn't  
9 be doing it alone for threes. And optimally  
10 somebody should have five years of criminal  
11 law litigation experience.

12 And then along with that  
13 experience -- and we don't have to look very  
14 far -- and I know maybe all of you are  
15 lawyers, but I know a couple of you are. We  
16 don't have to look very far for good  
17 professional guidelines. The American Bar  
18 Association, right? And what the military has  
19 is a lot like a public defense system. That's  
20 basically what it is. They have the 10 key  
21 components to a successful public defense  
22 system. And so I just want to kind of cover

1           what some of those are.

2                       One of them is training. The  
3           other one is independence. And I think that's  
4           a real problem that maybe you folks can  
5           address. I've learned from military counsel  
6           here they don't have the subpoena power and in  
7           order to actually get a subpoena you have to  
8           go seek it through the government. That's not  
9           the case in I think most states and in New  
10          Mexico an individual attorney has the subpoena  
11          power. They don't even have to go to the  
12          court to issue a subpoena.

13                      The other thing is the use of  
14          experts and the training or experts, because  
15          this is such a particularized field. This is  
16          just one of the books that we have in our  
17          library that we maintain, the "Atlas of Sexual  
18          Assault." Anybody doing these cases needs to  
19          know this book inside and out, right? Another  
20          book that I didn't want to bring because it's  
21          so good is "Forensic Nursing" by Virginia  
22          Lynch. They need to have regular forensic

1 training about sexual assault injuries, about  
2 all the studies that have been done about say  
3 a SANE nurse, and I know you've probably heard  
4 some testimony about SANE nurses. And most of  
5 these cases now are involving SANE-type  
6 testimony. Well, we have to be able to look  
7 at it analytically and provide the jury with  
8 a rebuttal basically to a SANE nurse's  
9 testimony.

10 And getting back to the  
11 independence that the military does not have  
12 right now, if they want to hire an expert,  
13 they have to go up a chain of command and it  
14 can be denied pretty readily. If I want to  
15 hire an expert in New Mexico, I hire him,  
16 right? And I don't see any reason why  
17 somebody who's charged with one of these  
18 crimes in our military branches should have  
19 any less protection and representation.

20 Let's see. The other thing I  
21 would echo is the use of risk assessments.  
22 And one thing that Mr. Lang said is that

1 dosage matters. And I think you may be able  
2 to address mandatory sentences. And I know  
3 some of you have experience in federal court  
4 and how mandatory sentences really hamstring  
5 judges and don't allow them to actually dose  
6 out the right kind of punishment so that we  
7 keep recidivism rates as low as we possibly  
8 can.

9 And then the other thing is I  
10 watched on the Web some of the testimony, and  
11 there was a request for specialized units.  
12 And we heard this morning that there's a  
13 Special Victims Program within the Army  
14 branch. The other branches don't have that.  
15 And at first blush I think, oh, if you're  
16 going to do that in the branches, then you  
17 should also do it for the defense. There  
18 should be specialized units for the defense.  
19 But then on hindsight, we've thought about  
20 doing that. And our offices have done it from  
21 time to time; Colorado is doing it, but we  
22 find that attorneys burn out on these cases

1           because they're so emotionally driven and the  
2           impact on our clients.

3                         Lastly, that brings up the issue  
4           of vicarious trauma that we do trainings on  
5           and that I would encourage you folks to  
6           include for all of the prosecutors and all of  
7           the defense counsel that deal with these cases  
8           that are so emotionally charged that they need  
9           training on vicarious trauma and the impact  
10          that it has on their lives and what they take  
11          back to their families.

12                        That's all the comments I have for  
13          now.

14                        CHAIR JONES: Thank you, Mr.  
15          Porter.

16                        We'll hear now from Mr. Whitehead.  
17          And you're in the Public Defender's in D.C.?

18                        MR. WHITEHEAD: Yes. Yes, ma'am.  
19          Good afternoon to everybody.

20                        I certainly will echo everything  
21          that has been already said, but I don't want  
22          to retread a lot of those things. But as far

1 as the D.C. Public Defender Service is  
2 involved, I'm a supervising attorney there.  
3 I've been there for nine years. We have a lot  
4 of training. I think we end up training a lot  
5 of the Criminal Justice Act attorneys that are  
6 also in D.C. that take court-appointed cases  
7 and we train across the country sometimes.

8 As far as how we progress, we  
9 start out as juvenile lawyers. Typically our  
10 attorneys are straight out of law school, or  
11 had just clerked from local or federal judges,  
12 or have very little litigation experience. We  
13 don't have a lot of laterals that come  
14 through. So when we do have lawyers, they  
15 have a lot of energy. We put them through a  
16 10-week training involving substantive  
17 training as well as skills that culminates in  
18 kind of a mock trial with judges at the end.  
19 And then they start picking up juvenile cases.

20 With the juvenile cases you range  
21 from having your misdemeanors all the way up  
22 to your juvenile homicides and sexual assault

1 cases. And all of this kind of progresses  
2 because of the consequences involved or lack  
3 thereof, because with juvenile cases they're  
4 bench trials with rehabilitation being in mind  
5 sort of where the most that you could get is  
6 commitment to the age of 21.

7 After that year of juvenile court  
8 that attorney will then go into adult court  
9 handling felonies, mostly guns and drugs, kind  
10 of your minor felony cases. Once you've done  
11 that for about a year or so, at least getting  
12 -- I think they want at least a couple of  
13 trials, solo jury trials, some co-counsels,  
14 then you'll progress to the more serious  
15 felonies involving mandatory minimum  
16 sentencings; your armed robberies, your armed  
17 car jackings, things of that nature.

18 And after around five years,  
19 mostly about six or seven years, then you'll  
20 go into your felony 1 practice, which we don't  
21 have a specific practice for sex offenses, but  
22 where I'm at we do sex offenses; your rape

1 cases, your assaults with intent to kill and  
2 your homicides. So those three are the three  
3 specific types of cases that you'll handle as  
4 your most senior lawyers there.

5 I mean we train more generally and  
6 try to raise a lawyer that can practice pretty  
7 much any type of case, so we don't  
8 specifically have kind of a week-long sex  
9 offense training like some of the other places  
10 may have or a specific sex offense director.  
11 But what we will have are trial practice  
12 groups, where we're a pretty tight knit, I  
13 would say, family of lawyers there.

14 And right now we have around 47  
15 trial lawyers, 16 or which are in the felony  
16 1 group. And we're all in the same office, so  
17 we're not a statewide. We're a district where  
18 we're in one particular place. And so we're  
19 in constant communication with each other so  
20 that we could talk about our specific cases  
21 with other lawyers that may have information  
22 that we may not as a single person. So what

1 makes us unique I think is the fact that we  
2 have all these resources in one base place.  
3 So we have our trial lawyers.

4 And we're not the smartest in the  
5 world, so we have an appellate division. We  
6 have our special litigation division that will  
7 deal with overarching themes such as Brady  
8 information or withholding of exculpatory  
9 information from the defense. We have a  
10 parole division, community defender division  
11 that deal with institutional issues, whether  
12 or not it's with BOP or within the Department  
13 of Corrections with our specific clients. We  
14 have social workers that will help out and  
15 kind of deal with this risk assessment and  
16 help out with the different things that our  
17 clients are going through to present  
18 mitigation at the end of the day.

19 And of course we have  
20 investigations. I mean it's surprising to  
21 hear about the lack of investigators involved  
22 when we're trying to uphold the Constitution

1 here and try to give our clients the utmost in  
2 representation and being zealous. But as far  
3 as investigators are concerned, some lawyers  
4 share an investigator with just one other  
5 lawyer or some have their own specific  
6 investigator. And I was lucky enough to have  
7 my own specific investigator for awhile. I  
8 share one now.

9 But it makes it much easier in  
10 terms of being able to defend our clients  
11 finding out that you could throw away all your  
12 kind of subjective beliefs about your client's  
13 guilt or innocence and then you do  
14 investigation and you investigate no matter  
15 how much bad evidence there seemingly is. You  
16 find out that there are some things --  
17 sometimes complainants do not tell the truth.

18 So, you know, one word I kind of  
19 bristle at when I hear it all the time from I  
20 guess panels that are supposedly objective is  
21 the word "victim." When we talk about pre-  
22 trial matters that have not resulted in

1 conviction or that have not resulted in the  
2 guilty plea, we deal with complainants,  
3 because a lot of times we understand that  
4 alleged victims aren't victims at all when we  
5 investigate and even the government finds out  
6 before we do that things have been made up.  
7 So I think that just reemphasizes the  
8 importance of having investigators and having  
9 all the different aspects of the case, whether  
10 or not it's legal or on the field, done in  
11 order to have a decent -- not only a decent,  
12 but a zealous defense.

13 I mean I think the rest of the  
14 things that I have to say would pretty much  
15 echo what the other counsel -- whether or not  
16 it's having access to experts with DNA, with  
17 SANE nurses. Our office has those resources  
18 so that we don't have to talk to other  
19 individuals in order to justify or get  
20 vouchers from the court. We just do that in  
21 house. And if the particular lawyer does not  
22 know how to talk about getting an expert, we

1           have other lawyers that are there that can  
2           figure out why we would need one. So I think  
3           that the fact that we have such a close-knit  
4           group of people that have resources so readily  
5           available is one thing that helps us stand out  
6           and help our clients to the utmost. Thank  
7           you.

8                           CHAIR JONES: Thank you very much,  
9           Mr. Whitehead.

10                          Do we have any additional  
11           questions or comments from the Panel? Beth?

12                          MEMBER HILLMAN: Just a question  
13           first. Thank you all for bringing this  
14           perspective to us. We get pulled in many  
15           directions and it's very compelling to have  
16           that many of you in front of us right now all  
17           the way across, and I appreciate everybody's  
18           comments.

19                          You reminded me, Mr. Whitehead, of  
20           a question I wanted to ask those of you who  
21           have a perspective on this, and that's about  
22           the limits of appellate review for those

1 convicted at court-martial.

2 For our judge advocates, your  
3 perspectives on that, and if you find that's  
4 a significant limit on your ability or the  
5 appellate division's ability to represent your  
6 clients down the road. And your reaction to  
7 it, too.

8 CAPTAIN SHINN: I always have an  
9 opinion.

10 (Laughter.)

11 CAPTAIN SHINN: First my personal  
12 opinion, ma'am, to answer your question, is I  
13 think that much like our civilian accused,  
14 right to appeal to the supreme court should be  
15 available to our service members.

16 Second, the non-jurisdictional  
17 cases, the cases that don't trigger Article 66  
18 appeal, those are silent.

19 MEMBER HILLMAN: Which can you  
20 just explain for us?

21 CAPTAIN SHINN: Oh, absolutely.

22 MEMBER HILLMAN: I don't know if

1 all our civilian counsel know.

2 CAPTAIN SHINN: Yes. So within  
3 the cases there's a subset of cases that don't  
4 trigger automatic appellate review. Those  
5 cases are ones that do not receive a  
6 discharge or do not receive a sentence of a  
7 year or more confinement.

8 So if your client does not receive  
9 that, then your case does not go up on appeal.  
10 You have a limited review by a judge advocate  
11 there within the local shop.

12 What this does is if you are  
13 accused of a 120 and you get six months  
14 confinement, or let's say 30 days confinement,  
15 which is within the range of possible  
16 punishments, and you serve your confinement  
17 and you're administratively discharged, that  
18 conviction now triggers sex offender  
19 registration, all the collateral consequences,  
20 but does not trigger appellate review. And  
21 that is a huge gap for Lance Corporal Smith,  
22 PFC Jones, Sergeant Whomever. And it

1 desperately needs to be fixed.

2 MR. BORG: I guess the comment I'd  
3 make is a corollary we have in Oregon is that  
4 the Department of Justice does the appeals,  
5 and the state would love to just eliminate  
6 appeals. Let's not have any appeals at all.  
7 And we did this determinate sentencing. We  
8 call it Measure 11. So 15 years and up on  
9 certain crimes. You get automatically an  
10 adult court, long determinate sentences. And  
11 one of the effects it's had on it is that it's  
12 really put all the discretion in the  
13 prosecutor's office. And so if you plead  
14 guilty, you eliminate the right to appeal say  
15 bad police conduct or any challenge to what  
16 brought your case about.

17 And on the other end of it; and I  
18 believe in treatment, we embrace treatment  
19 courts, drug courts, all these other things,  
20 but we're really lowering the bar to police  
21 conduct. We're really, you know -- you know,  
22 cynically one of my colleagues at the state

1 office is saying, you know, at what point are  
2 we just going to start rounding people up  
3 because we got seats in drug court, you know?  
4 We only have 150 and we have 200 places.  
5 Let's start arresting people to get them into  
6 drug court.

7 But that's the concern I guess  
8 that I would have. And it is a limiting of  
9 appeal because you don't get to challenge it  
10 to get these benefits either of treatment  
11 court or on the other end, if they threaten  
12 you with such a huge hammer that you don't  
13 want to risk, you know, the 15 years or 20  
14 years and you'll take a plea deal to something  
15 else.

16 We've tried to correct for that in  
17 Oregon by really having a concept of a  
18 conditional plea where you can raise and file  
19 your motions, challenge the 4th Amendment  
20 issues and then enter a conditional plea that,  
21 you know, doesn't require a fact trial but  
22 preserves your right to appeal the search

1 issues.

2 CAPTAIN SHINN: Ma'am, if I could  
3 respond just -- I missed a section of that.  
4 Another piece of that puzzle, especially with  
5 recent proposed legislation removing the  
6 Article 60 power from the convening  
7 authority's action, without having a robust  
8 appellate review, if we're going to remove the  
9 convening authority's ability to set aside the  
10 findings, that removes now some of the  
11 protection that those lower-level offenses had  
12 by having just a judge advocate review.

13 And the analogy is a stack of  
14 cards. And the military justice system has  
15 been set up over the past -- the number  
16 escapes me, but over the years, 50 or 60  
17 years, carefully and through a process of  
18 trial and error. And it's interwoven. And so  
19 by removing the convening authority's power  
20 through Article 60, there needs to be a  
21 separate balance put on the scale through  
22 appellate reviews. Thank you, ma'am.

1 CHAIR JONES: Liz?

2 MEMBER HOLTZMAN: I want to thank  
3 all the panel members for very important  
4 testimony. It's a perspective that we need to  
5 have and appreciate the travel and the  
6 articulateness of what we've heard.

7 I want to turn to the military and  
8 try to explore this issue a little bit more  
9 about expert witnesses and subpoenas.

10 Can you explain to me who is  
11 reviewing your request for the subpoena and  
12 what does this do in terms of revealing  
13 defense strategy, confidential information?  
14 I'm not familiar with this system. I'm  
15 getting a little bit more information now, but  
16 I'm still relatively ignorant about it. So  
17 I'd like to understand from your point of view  
18 how it works and what the problems are with  
19 the injustices, if there is one, and what the  
20 difficulties are that you see in terms of  
21 providing proper defense.

22 LIEUTENANT COLONEL PITVOREC: Yes,

1 ma'am. For the defense if you were to request  
2 an expert witness, you have to make a written  
3 request that goes through the trial counsel,  
4 so the prosecutor in this case, that includes  
5 in detail why you need the expert. You don't  
6 necessarily have to reveal the theory of your  
7 case, but if you do not, it is likely that  
8 your request will not be approved. So it goes  
9 through the trial counsel to the convening  
10 authority.

11 MEMBER HOLTZMAN: Wait. Does the  
12 trial counsel have to approve it?

13 LIEUTENANT COLONEL PITVOREC: No.  
14 No, ma'am. The trial counsel then forwards  
15 that request through the staff judge advocate  
16 to the convening authority for approval.

17 MEMBER HOLTZMAN: Yes.

18 LIEUTENANT COLONEL PITVOREC:  
19 However, in practice if you do not lay out  
20 your theory of the case which requires the  
21 expert, it is unlikely that it would be  
22 approved, and often is not approved anyway.

1 Often we have go to the military judge in  
2 order to have the expert appointed, because  
3 the military judge can do that.

4 MEMBER HOLTZMAN: Okay. So you  
5 have an alternative if you don't use this  
6 system going through the --

7 LIEUTENANT COLONEL PITVOREC: No,  
8 ma'am.

9 MEMBER HOLTZMAN: -- trial  
10 counsel?

11 LIEUTENANT COLONEL PITVOREC: No,  
12 ma'am.

13 MEMBER HOLTZMAN: The prosecutor?

14 LIEUTENANT COLONEL PITVOREC: Your  
15 request has to be denied first by the  
16 convening authority --

17 MEMBER HOLTZMAN: Oh, okay.

18 LIEUTENANT COLONEL PITVOREC: --  
19 before you can go to the military judge to ask  
20 for a motion to compel the appointment of an  
21 expert.

22 MEMBER HOLTZMAN: And what's the

1 point of having this go through the trial  
2 prosecutor? Is there a reason for this?

3 COMMANDER KING: That's a great  
4 question, ma'am.

5 (Laughter.)

6 COMMANDER KING: That's a great  
7 question.

8 MEMBER HILLMAN: There is no  
9 court. There's, as yet, no court yet to be  
10 petitioned. This is a part of the ad-hoc  
11 nature of the --

12 MEMBER HOLTZMAN: I understand  
13 that, but it could go directly to the staff  
14 advocate, couldn't it, without going to the  
15 trial counsel?

16 LIEUTENANT COLONEL PITVOREC:  
17 Well, generally speaking, ma'am, the trial  
18 counsel works for the staff judge advocate.  
19 So while the staff judge advocate is supposed  
20 to be --

21 MEMBER HOLTZMAN: Neutral.

22 LIEUTENANT COLONEL PITVOREC: --

1 neutral. Often that is not the case.

2 COMMANDER KING: And, ma'am,  
3 there's no requirement that it go to the trial  
4 counsel first under the rules for court-  
5 martial, but practically, effectively, what  
6 will happen is if you send it straight up to  
7 the SJA, the SJA will say, what does the  
8 Government think about this request? So it  
9 will have to go back to the trial counsel  
10 before most SJAs will even advise the  
11 convening authority on whether or not they  
12 should do it.

13 And I should point out, ma'am,  
14 that that also applies to just our basic  
15 witnesses, not just expert consultant and  
16 expert witnesses. But if we have alibi  
17 witnesses, or any other type of basic fact  
18 witness that we want to bring to a court-  
19 martial and they need to be provided funds to  
20 travel, we have to submit that request to the  
21 trial counsel and tell the trial counsel why  
22 we want that witness to testify, a synopsis of

1           that witness' testimony. And the trial  
2           counsel does approve or deny that. And then  
3           if they disapprove it, we go up to the  
4           military judge and ask the military judge to  
5           order that those witnesses be provided.

6                       MEMBER HOLTZMAN: Okay. Just to  
7           clarify something, in response to my question,  
8           I was told that the trial counsel, trial  
9           counsel prosecutor doesn't have to make a  
10          recommendation. But I just heard from you  
11          that the staff judge advocate is going to say,  
12          well, what does the Government think about  
13          this?

14                      COMMANDER KING: Yes, ma'am.

15                      MEMBER HOLTZMAN: Which means that  
16          they are going to ask for his or her opinion.

17                      COMMANDER KING: In practice,  
18          absolutely, every time.

19                      MEMBER HOLTZMAN: In practice  
20          that's the case?

21                      COMMANDER KING: Yes, ma'am.

22                      MEMBER HOLTZMAN: Do you think

1           that's a fair system?

2                           COMMANDER KING:  I don't.  And I  
3           don't think --

4                           MEMBER HOLTZMAN:  Can you give any  
5           examples of how you think it's affected your  
6           ability to provide an adequate defense?

7                           CAPTAIN SHINN:  I can.

8                           (Laughter.)

9                           CAPTAIN SHINN:  I just finished up  
10          a case at Parris Island; and this is an  
11          anecdotal evidence, but I requested witnesses  
12          that I had interviewed.  I had spent  
13          significant time doing witness interviews,  
14          submitted a witness request for each one of  
15          these witnesses that was relevant, necessary  
16          and material to the defense of my client.  I  
17          submitted that witness request in accordance  
18          with the trial guidelines and whatnot.  All  
19          but three were denied.  Then went through the  
20          motions practice and then got some more  
21          approved, but not all of them.

22                           MEMBER HOLTZMAN:  From whom, the

1 judge?

2 CAPTAIN SHINN: By the judge.  
3 Then coming up on -- I get the witness list  
4 from the Government. And so I call the  
5 witness list, doing my due diligence. One of  
6 them was a sergeant major. I talked to the  
7 sergeant major, Sergeant Major Brown. She had  
8 never spoken to the trial counsel. She had  
9 already gotten orders. She had already been  
10 approved and gotten funding to travel down for  
11 the trial, but had never spoken to the trial  
12 counsel. So I had to go through all of this  
13 rigmarole, for lack of a better word. I can  
14 think of much better words actually.

15 (Laughter.)

16 CAPTAIN SHINN: And yet the trial  
17 counsel can just make a request without  
18 actually ever speaking to the witness and  
19 getting approved.

20 COMMANDER KING: And they  
21 certainly don't tell us why they want their  
22 witnesses to show up for trial.

1                   CAPTAIN SHINN: Right. Absolutely  
2 right.

3                   MEMBER HOLTZMAN: Okay. But your  
4 example didn't really tell me how this  
5 inhibited your ability to defend your client.

6                   CAPTAIN SHINN: Well, in this  
7 situation --

8                   MEMBER HOLTZMAN: That's what I  
9 was asking about.

10                  CAPTAIN SHINN: -- I was not able  
11 -- I had four witnesses that paid their own  
12 way from Bronx, New York to South Carolina and  
13 whatnot. They were able to fund their own  
14 travel to come down to testify on my client's  
15 behalf. Had they not been financially stable  
16 enough to do that, they would not have been  
17 able to do that.

18                  MEMBER HOLTZMAN: And would that  
19 have affected your case?

20                  CAPTAIN SHINN: We would not have  
21 been able to put on that testimony and my  
22 client would not have gotten the outcome that

1 he did.

2 MEMBER HOLTZMAN: Which was? An  
3 acquittal?

4 CAPTAIN SHINN: Well, I --

5 CAPTAIN HOLTZMAN: No? Okay.

6 Well, if you can't --

7 CAPTAIN SHINN: We got a very good  
8 outcome, ma'am.

9 MEMBER HOLTZMAN: Okay. Does  
10 anybody else want to talk about this problem  
11 with --

12 COMMANDER KING: Ma'am, I had --

13 MEMBER HOLTZMAN: -- subpoenas  
14 or --

15 COMMANDER KING: Yes.

16 MEMBER HOLTZMAN: -- expert  
17 witnesses? Please?

18 COMMANDER KING: There's been a  
19 few occasions in my career where I've wanted  
20 witnesses, and oftentimes when you go through  
21 the process that we have available to us that  
22 we're mandated to use, the information gets to

1 the potential witness through the Government.  
2 And it will go through the Government and it  
3 will be handed down that this witness needs to  
4 testify at trial. So it will be handed down  
5 through the chain of command. Once the trial  
6 counsel received the witness requests in the  
7 case that I'm thinking of, he then went out to  
8 the witness' chain of command, informed the  
9 witness' chain of command that this witness  
10 was going to be requested by the defense.

11 The chain of command -- and  
12 certainly I don't allege the trial counsel was  
13 involved in this, but the chain of command --  
14 after I had talked to the witness, the chain  
15 of command had leaned on the witness and said,  
16 look, we're going to sea. We need you here.  
17 Do you really need to testify, et cetera? And  
18 then the next thing I heard back, the witness  
19 didn't want to come, didn't want to testify.  
20 So we had to litigate that, force the judge to  
21 force the witness to come, litigate the  
22 unlawful command influence of that whole

1 situation.

2                   Whereas, if I would have just had  
3 my own budget and my own -- the ability to  
4 bring that witness without all of that, I  
5 would have gone through the chain of command  
6 to make sure that they understood that their  
7 sailor was going to be gone for a little  
8 while. But it wouldn't have been a matter of  
9 the chain of command talking to the witness  
10 about do you want to testify, do you want to  
11 go do this, because they would never have  
12 known about it until I was ready to give them  
13 money to fly that individual out to testify at  
14 my trial.

15                   So that's an area where -- in that  
16 case, as well, we won and it didn't impact our  
17 defense, but the fight that we had to go  
18 through to do that could have turned out very  
19 differently and could have impacted the  
20 defense.

21                   LIEUTENANT COLONEL KU: Ma'am, if  
22 I can add an additional aspect, it's the -- a

1 lot of them have mentioned that we can go to  
2 the judge and ask the judge to force the  
3 Government to give us the expert that we want  
4 and the witnesses that we want. But an  
5 important aspect of preparation, it's the  
6 pretrial preparation before a case gets  
7 referred to trial. And the judge doesn't step  
8 in until a case has been referred to trial.

9 And some of the -- and I'm sorry,  
10 I can't remember your name. She mentioned the  
11 sexual assault in terms of all the importance  
12 of a SANE -- how do we cross-examine a SANE  
13 nurse? And all of that the defense counsel  
14 can't approach a witness, an expert witness to  
15 even discuss that pretrial. Because at that  
16 point we don't have a judge to go to, to say,  
17 Your Honor, I need a witness for these  
18 reasons. We have to go to the convening  
19 authority and then we have to go through of  
20 course experience of problems that you have  
21 already heard. So that's another -- it's an  
22 example of just a waste of traditional

1 resources that we can't -- we don't even have  
2 the ability to go to a judge until the court  
3 has been convened.

4 COLONEL HAM: You served as a  
5 military judge, Lieutenant Colonel Ku?

6 LIEUTENANT COLONEL KU: Yes,  
7 ma'am. Yes, ma'am.

8 COMMANDER KING: Which impacts the  
9 speedy trial, I would argue. The Government  
10 is able to use consultant and expert  
11 witnesses, essentially from preferral. But if  
12 the defense asks for an expert consultant, as  
13 the colonel just pointed out, we have to wait  
14 until it's referred to trial and there's a  
15 judge. We can't use a consultant prior to  
16 that unless we can convince the convening  
17 authority to give us one.

18 If the convening authority says no  
19 to that consultant, then we have to either go  
20 to the family, to seek the family to fund that  
21 expert, which we often do, or we have to wait  
22 until the military judge is assigned, the case

1 is referred and the military judge takes  
2 control of the case. Well guess what? Now  
3 the clock's ticking and now all of the delay  
4 from that point on has to be taken as defense  
5 delay, which is subtracted from the 120-day  
6 clock you heard the colonel talk about  
7 earlier, because now we've got to wait so we  
8 can do our consulting and our investigation  
9 because we have to wait for a judge.

10 MEMBER HOLTZMAN: Okay. Thank you  
11 very much.

12 CHAIR JONES: Anything further?

13 (No audible response.)

14 CHAIR JONES: Thanks very, very  
15 much. It was terrific. Very important for us  
16 to know. Thank you.

17 All right, ladies and gentlemen.  
18 I think we're going to move right to our next  
19 panel. Ladies and gentlemen, could I have our  
20 next panel come up?

21 (Whereupon, at 4:12 p.m., the  
22 above-entitled matter went off the record

1           until 4:23 p.m.)

2                       MEMBER HILLMAN:   Maybe we'll go  
3           ahead and get started.   Thanks to everybody  
4           for your tenacity in addressing these issues  
5           over the course of these two days and for  
6           everybody on our final panel of the day to  
7           compare --

8                       COLONEL HAM:   Please take your  
9           seats.

10                      MEMBER HILLMAN:   -- thank you --  
11           military and civilian prosecutors.   I imagine  
12           we'll just go from left to right here.   So,  
13           Colonel Christensen, if you want to kick it  
14           off for us.

15                      COLONEL CHRISTENSEN:   Sure.   Thank  
16           you.   I'd like to first say that General  
17           Harding has been very dedicated to making sure  
18           that we have the resources and manning to  
19           properly prosecute cases in the Air Force.  
20           Last April of 2012 he established a special  
21           victim's unit within our Senior Trial Counsel  
22           Program, and since its inception we've had a

1           75 percent conviction rate in Article 120  
2           cases with special victims prosecutors.

3                   He has made sure that we reach  
4           out to local and civilian communities to get  
5           their best practices. Approximately three  
6           weeks ago, my deputy and I spent a week with  
7           the Boulder County DA's office. They have a  
8           reputation as being very good at prosecuting  
9           sexual assaults to see what works, what  
10          they're doing well and what we can incorporate  
11          in our system.

12                   I think one of the great things  
13          that they have is a continuity among their  
14          prosecutors. They'll have a long time at the  
15          DA's office, and a long time in their special  
16          victims prosecution, something that General  
17          Harding has been supporting. We have been  
18          able to keep our prosecutors longer. I'm  
19          going into my fourth year as the Chief  
20          Prosecutor of the Air Force. We also make  
21          sure we get the training that we need within  
22          the military, within Air Force courses and

1 within our sister services' courses.

2 My special victim unit is made up  
3 of 10 very dedicated prosecutors who have  
4 demonstrated that they have the ability to try  
5 our toughest cases. All of them have come  
6 from at least one assignment prior to becoming  
7 special victims prosecutors. And once they  
8 become a senior trial counsel, they have to  
9 demonstrate that they can excel for at least  
10 a year before they're entitled to become  
11 special victims prosecutors.

12 The feedback I get from the  
13 victims of cases that our special victims  
14 prosecutors work on is very positive. They  
15 feel like they have someone that's advocating  
16 for them, who believes in them and believes in  
17 seeking justice. And having talked to each  
18 one of my special victims prosecutors, they  
19 really are seeking justice. They see it as a  
20 badge of honor to be a special victims  
21 prosecutor. Those who are not yet on it start  
22 to wonder what's wrong with them because they

1 haven't been picked yet. It is something that  
2 is seen as a very big positive for them in  
3 their career. General Harding has, I think,  
4 done everything he can as the Judge Advocate  
5 General to ensure that we have the resources  
6 for training to make sure that they are the  
7 best that they can be.

8 The training established a  
9 specific special victims prosecutor course  
10 held each year at Maxwell, in July, in which  
11 we bring in six of my senior trial counsel  
12 that are not yet a special victims prosecutors  
13 to give them the advance training they need  
14 for sexual assault cases.

15 Now obviously, it is always best  
16 if we have people with experience, and I think  
17 General Harding has looked at the possibility  
18 of coming up with a career track so that we  
19 can get more litigation experience in there,  
20 something I personally support very much. In  
21 my career I've done over 250 courts as a  
22 defense counsel, trial counsel and a military

1 judge. And I think experience is invaluable,  
2 making sure you have the right people  
3 prosecuting sexual assault cases.

4 As you all know, sexual assault  
5 cases are unique. Dealing with the victim  
6 dynamics is unique, and the ability to do that  
7 can only come from experience. So I know that  
8 General Harding and the entire Air Force is  
9 dedicated to making sure we have the right  
10 people in those positions.

11 Each one of my special victims prosecutors and  
12 senior trial counsel is handpicked from a pool  
13 of hundreds. It is a very elite unit and I  
14 believe we're doing a great job at prosecuting  
15 sexual assault.

16 CHAIR JONES: Thank you. Captain  
17 McCleary?

18 CAPTAIN MCCLEARY: Good afternoon,  
19 ma'am. Yes, my name is Steve McCleary. I'm  
20 currently the executive assistant to our Judge  
21 Advocate General, but part of my duties are:  
22 I oversee the training of both our military

1 and civilian lawyers, and in a previous  
2 assignment I was the chief of our Office of  
3 Military Justice.

4 And I think maybe the easiest  
5 civilian analogy for, like the Coast Guard  
6 sitting here with the other services is if you  
7 kind of view the other services, particularly  
8 like the Army, the Navy and the Air Force as  
9 large metropolitan jurisdictions, we're kind  
10 of a small rural one, just because we're very  
11 small. We have a relatively small number of  
12 cases. We train with the other services,  
13 particularly the Navy. We get a lot of  
14 support from them from the programs that they  
15 develop.

16 We rely very heavily on the Navy  
17 and the Army Trial Counsel Assistance Program  
18 to assist our folks. But one of the big  
19 challenges that we face is experience. When  
20 you only put on 11 trials, service-wide, in a  
21 year, you're not going to have very many  
22 people with an extensive amount of trial

1           experience.

2                           And then another challenge that we  
3           face that is somewhat different, other than  
4           perhaps, in the Marine Corps, is that we are  
5           expected to serve line assignments. I've  
6           spent about half my career in line  
7           assignments, including command cadre  
8           assignments. And so most of us are always in  
9           and out of legal assignments. So we're not  
10          constantly practicing law, which also then  
11          diminishes the opportunity that a lot of us  
12          have to develop trial experience. You know,  
13          how do we deal with that? Mostly by trying to  
14          take advantage of what opportunities there are  
15          with the other Armed Forces and to take  
16          advantage of what opportunities there are to  
17          train with civilians.

18                          We regularly send folks through  
19          the NDAA courses dealing with sexual assault  
20          and we have -- particularly where we have  
21          legal offices around the country several of  
22          them have established relationships with local

1 prosecutors so that they can get some  
2 interaction and learn some, you know, trial  
3 skills and particularly specific trial skills  
4 associated with sexual assault that we would  
5 have a hard time generating on our own, simply  
6 because we don't have the volume in order to  
7 generate a high level of expertise.

8 CHAIR JONES: Thank you.

9 LIEUTENANT COLONEL MORSE:

10 Honorable Jones, members of the Panel, good  
11 afternoon. Thank you for the opportunity to  
12 share with you today, hopefully about seven-  
13 and-a-half minutes.

14 My name is Lieutenant Colonel Jay  
15 Morse. I'm the chief of the Army's Trial  
16 Counsel Assistance Program. We're based at  
17 Fort Belvoir, Virginia. TCAP is composed of  
18 five captain training officers, a lieutenant  
19 colonel deputy, and myself. We also have two  
20 highly-qualified experts. They're two  
21 civilians who have more than 30 years of  
22 prosecution experience between the two of

1           them.  Additionally, I supervise the Army's 23  
2           special victim prosecutors.  I'll speak more  
3           about them later, but they focus specifically  
4           on prosecuting cases involving sexual assault,  
5           domestic violence, and those cases where  
6           children are victims.

7                         This afternoon I want to speak on  
8           four topics.  One is how we train prosecutors,  
9           or trial counsel, as we call them, the Special  
10          Victim Prosecutor Program, the development of  
11          complex cases and then challenges and how  
12          we've overcome them.

13                        First on training trial counsel.  
14          Where the basic course provides basic  
15          instruction to all new judge advocates, TCAP  
16          provides focused instruction once a judge  
17          advocate is appointed as a prosecutor or  
18          trial counsel.  Within the first six months of  
19          that officer assuming duties he's to attend  
20          the five-day new prosecutor course.  The first  
21          two-and-a-half of those days are spent on  
22          basic prosecution, basic instruction.  The

1 second two-and-a-half days are called  
2 essential strategies for sexual assault  
3 prosecution where we focus on the nuanced  
4 aspects of prosecuting sexual assault.

5 TCAP continues throughout that  
6 prosecutor's tenure to provide assistance. We  
7 have a 24-hour-a-day, 7-day-a-week help line  
8 that at any given time all 5 of my training  
9 officers, the deputy, myself and the two HQEs  
10 are responsive to. We have training  
11 opportunities throughout the year on diverse  
12 topics. We have outreaches to individual  
13 installations where we provide in-depth  
14 personalized experience to individual trial  
15 counsel and actually help out on specific  
16 cases. And we do provide direct assistance  
17 where I will actually provide a counsel to an  
18 installation to be detailed to a specific case  
19 when requested by a staff judge advocate.

20 Our training is nested with the  
21 instruction provided by the legal center and  
22 school. We augment our instruction using

1 experts from the civilian community. We do  
2 that on a regular basis. The overall training  
3 plan is designed to build on both the  
4 experience of the individual attorney and the  
5 expertise found throughout the JAG Corps. Our  
6 goal is that we build expert practitioners.  
7 So those new trial counsel we have, the goal  
8 is that we will go on to be experienced and  
9 capable defense counsel, chiefs of military  
10 justice, hopefully future special victim  
11 prosecutors, deputy staff judge advocates and  
12 staff judge advocates.

13 I'll talk for a minute about the  
14 Special Victim Prosecutor Program. SVPs are  
15 experienced hand selected litigators who again  
16 focus on those cases involving special  
17 victims. They're selected at the Department  
18 of the Army level by our Personnel Plans and  
19 Training Office, and that's done in  
20 conjunction with me personally for each SVP.

21 The program has been in place  
22 since 2009. We have 23 SVPs that are

1           currently located at 21 installations  
2           throughout the world. They have regional  
3           jurisdiction so they may have more than one  
4           installation that falls within their purview,  
5           but I also have the authority from the TJAG to  
6           shift those resources wherever they're needed.  
7           So if I have a particularly challenging case,  
8           or an SVP who has a lighter case load, or one  
9           is simply better, I can shift him or her to  
10          help out in another region.

11                        They have a secondary mission to  
12          assist in the development of a Sexual Assault  
13          and Family Violence Training Program that's  
14          both for investigators and for junior trial  
15          counsel within the region. This is done with  
16          the support of the local commander and there's  
17          actual training that involves commanders,  
18          first-line supervisors, mental health  
19          professionals, victim care advocates and  
20          frequently civilian professionals in all  
21          facets of service.

22                        The litigation experience is

1           essentially in assessing these new SVPs. I've  
2           found that it's crucial that the SVPs have  
3           really advanced interpersonal skills as well.  
4           They have to be able to expertly train and  
5           mentor a young attorney, direct investigators,  
6           coordinate victim care with a victim advocate,  
7           advise the staff judge advocate, work with the  
8           chief of military justice while simultaneously  
9           preparing for trial. On top of that, what we  
10          really have them focus on is developing a  
11          trusting relationship with the victim so that  
12          she not only understands, or he understands  
13          the significant emotional event that is a  
14          court-martial, but is an able participant to  
15          achieve justice.

16                        Within the first six months of  
17          assuming duties an SVP spends two weeks with  
18          a civilian special victim unit. My preference  
19          is that they get a meaningful experience, so  
20          we've sent them everywhere from Dallas to  
21          Manhattan to Honolulu to even jurisdictions  
22          that abut military installations. They attend

1 a two-week sexual assault trial advocacy  
2 course. They attend a three-day training  
3 event with all the other 22 special victim  
4 prosecutors and with my officers at TCAP.

5 They attend that five-day training  
6 course I spoke about that's designed for our  
7 junior prosecutors. In addition, they can  
8 attend a career prosecutor course run by the  
9 National District Attorneys Association.  
10 Throughout their tenure they do attend  
11 recurring both civilian and military training,  
12 frankly, as they request it. I'd rather have  
13 them get more training than less.

14 I next want to talk about the  
15 development of a complex case. Though we  
16 don't have a specific definition of what makes  
17 a case complex, I am confident when I say that  
18 just about every case these guys touch is  
19 absolutely within the definition of that term.

20 Most of our cases include both  
21 young offenders and young victims, both of  
22 whom are junior in rank. The offender and

1 victim typically know one another. They often  
2 even have a preexisting sexual relationship.  
3 Alcohol is routinely involved. Victims are  
4 frequently reluctant to report, not because of  
5 fear of reprisal from commanders or fear that  
6 the command won't do something, but out of a  
7 concern for their loss of privacy and I  
8 believe how reporting that sexual assault will  
9 affect their ability to interact with his or  
10 her peers on a daily basis.

11 I think it's important to  
12 understand the social dynamic at play in our  
13 cases as opposed to a case that might happen  
14 in the civilian contract. A victim, an  
15 offender, witnesses, they all frequently know  
16 one another. They even work together. All of  
17 this can contribute to a victim's reluctance  
18 to immediately report. So as a result there's  
19 often limited, sometimes no physical evidence.  
20 Clothes and bedding are washed. Memories are  
21 clouded. Time has eliminated the usefulness  
22 of blood or urine samples. So oftentimes the

1           pivotal issue at trial boils down to simply  
2           whether or not there was consent in a  
3           particular case.

4                        So this is a significant  
5           challenge. The way we overcome it is through  
6           a multi-disciplinary approach. I want to talk  
7           briefly about the SVP's relationship with CID  
8           or our detectives, with the victim care  
9           professionals, with my office at TCAP and our  
10          highly-qualified experts, and even the other  
11          22 special victim prosecutors.

12                      So first, each SVP has a close  
13          working relationship with his local or her  
14          local sexual assault investigator. In many  
15          cases they're actually located in the very  
16          same office. TJAG's guidance to ever staff  
17          judge advocate is that you will immediately  
18          report any sexual assault offense to the  
19          special victim prosecutor. Because of that  
20          close working relationship with the prosecutor  
21          and the detectives frequently, almost always,  
22          the SVP knows about it even before the staff

1 judge advocate does.

2 Second, each SVP has a close  
3 working relationship with the local victim  
4 care professionals. We instruct each SVP and  
5 each SVP instructs each trial counsel that  
6 your initial meeting with any victim is simply  
7 to inform them of the process and ensure that  
8 they understand the resources that are  
9 available to him or her.

10 Third, each SVP has a close  
11 relationship with TCAP. I talk to them,  
12 either email or over a shared website,  
13 frankly, almost weekly for sure, and also with  
14 our highly-qualified experts. Last year each  
15 of those HQEs spent more than 80 percent of  
16 their time of the calendar year, not the work  
17 year, the calendar year away from their home  
18 at a specific installation working with  
19 specific SVPs on individual cases.

20 Fourth, the SVPs communicate with  
21 each other on a daily basis. We use a common  
22 website where SVPs post questions and other

1 requests for assistance. They share  
2 successful motions and tactics both in  
3 preparation for and actually at trial,  
4 recommend experts for use in cases with  
5 similar issues. Or if they see that there's  
6 an expert on a defense witness list, they'll  
7 see if anyone else has experience with that  
8 expert, and then share lessons learned and  
9 best practices after each court-martial.

10 Lastly, the Judge Advocate General  
11 has recently directed the implementation of 23  
12 special victim non-commissioned officers,  
13 trained paralegals who will be assigned to  
14 work personally for each one of those special  
15 victim prosecutors. They're actually  
16 undergoing initial training right now from my  
17 office at Fort Belvoir, Virginia.

18 In summation, preventing sexual  
19 assault and domestic violence and prosecuting  
20 these complex crimes, whether they occur in  
21 the civilian or in the military community, is  
22 a difficult task requiring time, resources and

1 expertise, but the SVP Program has proven over  
2 the last four years to be a significant step  
3 towards success.

4 Thank you for this opportunity to  
5 share how proud I am of both TCAP and the  
6 special victim prosecutors and I look forward  
7 to answering any questions. Thank you.

8 CHAIR JONES: Thank you, Colonel  
9 Morse.

10 Commander -- is it Rugh?

11 COMMANDER RUGH: Yes, ma'am, Rugh.  
12 Everyone, good afternoon. Again, my name is  
13 Commander Aaron Rugh. I'm the current  
14 director of the Navy TCAP. I'm also a member  
15 of the Military Justice Litigation Career  
16 Track, which means that the majority of my  
17 last 16 years have been in litigation billets.  
18 Before this job I was a military judge.  
19 Before that I was a defense counsel. I'll  
20 leave this job and move onto some other kind  
21 of litigation job.

22 I feel a little bit like I'm the

1 last kid on Santa's lap. All the really good  
2 stuff today has already been mentioned, so  
3 I'll keep my comments relatively short.

4 The training of effective  
5 litigators takes both actual training and  
6 experience. We are a young law firm. Most of  
7 us can retire 20. All of us most retire by  
8 30. More than half of our members will be in  
9 the first 10 years of their lives as a lawyer.  
10 And so just by the nature of our businesses  
11 we'll always be on the short end when it comes  
12 to experience. We make up for that in  
13 training. We probably do more training than  
14 any other group of lawyers on the planet.

15 And that's I guess my plug for  
16 right now. If I were to ask for something for  
17 Christmas, cash is always nice. Training is  
18 expensive. It costs a lot of money for us to  
19 substitute experience with training. It costs  
20 money for us to send our defense counsel and  
21 prosecutors out to exceptional courses. It  
22 costs a lot to bring outside instructors and

1 experts in to teach our courses. We try to  
2 send nearly all of our litigation track  
3 specialists to get their LL.M.s for civilian  
4 institutions and litigation or trial advocacy.  
5 And that all costs money.

6 And so in a time when money is  
7 particularly tight, it is my opinion that the  
8 tooth you get for the tail on spending money  
9 for training for our prosecutors and defense  
10 counsel is exceptionally worth the value.

11 COLONEL HAM: Commander, could you  
12 tell us what your training budget is for TCAP,  
13 and is it a separate budget for all other  
14 prosecutors? Does TCAP have its own?

15 COMMANDER RUGH: Yes, ma'am.  
16 Well, we don't --

17 COLONEL HAM: And each of the  
18 services is the same?

19 COMMANDER RUGH: Yes, ma'am. We  
20 don't personally have a budget. TCAP doesn't  
21 have a budget by itself. So and our budgets  
22 actually come from lots of different budgets.

1           The Marine TCAP, Navy TCAP, Navy DCAP And  
2           Marine DCAP get together quarterly with  
3           Captain Crow and some of our assistant Judge  
4           Advocate Generals to talk about the litigation  
5           training for the quarter and for the coming  
6           year. We work really hard to try to divide  
7           the money that we do have equally amongst the  
8           defense and prosecution in the Marine and the  
9           Navy.

10                         Some of that money comes from  
11           centrally-managed funds at our Naval Justice  
12           School, our central school house. Some of  
13           that money comes -- in the past has come from  
14           DoD SAPRO or DoN SAPRO, although this last  
15           year we didn't any of that. To try to offset  
16           that we beg, borrow and steal; we do steal I  
17           guess, from here and there to try to put  
18           together budgets.

19                         It's surprising though how far  
20           just a little bit of money could go. I think  
21           with just \$300,000 in a year you can do a lot  
22           of training. You can do a lot of valuable

1 training.

2 COLONEL HAM: So you don't have  
3 fenced off sexual assault prosecution training  
4 funds?

5 COMMANDER RUGH: What's that,  
6 ma'am?

7 COLONEL HAM: You don't have  
8 fenced off sexual assault prosecution training  
9 funds?

10 COMMANDER RUGH: We do not, ma'am.

11 COLONEL HAM: Do you, Colonel  
12 Morse?

13 LIEUTENANT COLONEL MORSE: Ma'am,  
14 we do. It's not purely a TCAP budget. We  
15 have a budget of about \$3 million a year.  
16 That includes civilian pay for our HQEs. It  
17 pays for all training for every prosecutor at  
18 whatever installation. So the cost of the  
19 individual unit at Fort Bragg, North Carolina  
20 is nothing. We pay to bring those officers to  
21 us to train them. That does include some  
22 joint training with the Defense Counsel

1 Assistance Program as well.

2 COMMANDER RUGH: All right. So my  
3 summation of my one point here is that as you  
4 develop your recommendations, don't forget the  
5 strength or the importance of training to  
6 offset the lack of experience within our  
7 divisions. Thank you very much.

8 CHAIR JONES: Thank you. Major  
9 Sameit?

10 MAJOR SAMEIT: Yes, ma'am. Panel  
11 members, thank you for giving me this  
12 opportunity to speak. Major Mark Sameit. I  
13 am the branch head for Trial Counsel  
14 Assistance Program. We fall within Judge  
15 Advocate Division working for General Ary, the  
16 SJA, the commandant of the Marine Corps.

17 We're viewed as an augment to the  
18 2012 reorganization of the legal services  
19 within the Marine Corps. Being the Marine  
20 Corps model, we've pushed the majority of our  
21 assets down to the four L triple Ss. We have  
22 two HQEs, one on the East Coast, one of the

1 West Coast. We currently don't have an HQE  
2 within TCAP. It is manned by myself and my  
3 deputy, Captain Brian Magee. We are a  
4 Reachback Act resource and we frequently  
5 receive phone calls, approximately 5 to 10 a  
6 week, from prosecutors in the field.

7 Additionally, that's our primary  
8 mission along with receiving inquiries and  
9 maintaining a website for prosecutors, sharing  
10 motions and best practices throughout the  
11 Marine Corps.

12 Our secondary mission is to  
13 actually go out and do the training. In  
14 conjunction with Commander Rugh, we put on two  
15 trial counsel orientation courses every year  
16 trying to get every prosecutor within their  
17 first six months to a trial counsel  
18 orientation course.

19 Additionally, we put on three  
20 prosecuting sexual assault courses. Two are  
21 put on specifically just for the Marine Corps.  
22 And we put every single Marine trial counsel

1 through these prosecuting sexual assault  
2 courses including a mix of experts,  
3 toxicologists, DNA, forensic psychologists.  
4 With the turnover at the Marine Corps, even if  
5 you run this course every single year, you're  
6 going to have 60 percent new trial counsel in  
7 this course every single year with as quickly  
8 as we turn over.

9 It's also taught by the regional  
10 trial counsel and the senior trial counsel who  
11 are going to be instructing courses to ensure  
12 that those students are putting their best  
13 practices, their best effort forward when it  
14 gets to the advocacy part of that course.

15 Additionally, we run monthly  
16 conference calls with all those regional trial  
17 counsel to talk about best practices within  
18 the Marine Corps and share it and push down  
19 these best practices throughout.

20 And finally, we do work with NDAA,  
21 as well as fellow TCAPs to find best practices  
22 throughout the services and share them

1 throughout the Marine Corps. And I'll keep my  
2 comments brief at that.

3 CHAIR JONES: Thank you very much.  
4 It's my pleasure now to introduce Martha  
5 Bashford, and it's my pleasure because we  
6 served together, worked together in the  
7 Manhattan District Attorney's Office. I was  
8 there nine years. But, Ms. Bashford, I think  
9 you'll tell us you were there a lot longer and  
10 are still in the sex crimes unit. So we'd be  
11 delighted to hear from you.

12 MS. BASHFORD: Thank you. I'm  
13 Martha Bashford. I'm Chief of the Manhattan  
14 Sex Crimes Unit. I've been in the office 34  
15 years since graduating from law school, and  
16 have been prosecuting sex crimes for 30 of  
17 those 34 years.

18 I want to preface my remarks by  
19 saying all I have to do is prosecute sex  
20 crimes in Manhattan. I don't have to field a  
21 cohesive, worldwide fighting force as the  
22 military has to, and do everything else at the

1 same time.

2 My office had the first Sex Crimes  
3 Unit in the country formed about 40 years ago.  
4 Talking about continuity, I am only the fourth  
5 chief of that unit.

6 People stay in it a long time.  
7 Yesterday I heard, and again today that the  
8 Air Force has ten, I may have the terminology  
9 wrong, senior trial counsel devoted to  
10 prosecuting sex crimes, and the Army has 23.  
11 That's worldwide.

12 I have 60, just for Manhattan, and  
13 I could add ten more when I get home tomorrow,  
14 but I simply cannot supervise that many people  
15 effectively. People are lined up wanting to  
16 come to sex crimes. I don't see them burning  
17 out.

18 Our Sex Crimes DAs do also handle  
19 other felony types of cases, but nobody who's  
20 not in sex crime handles sex crimes. To get  
21 in, you have to interview with me and my two  
22 deputies. You have to bring a portfolio of

1           what trials you have done.

2                       The very, very minimal amount of  
3           experience is three years, and normally our  
4           entry level is at five or six years of  
5           prosecuting statements.

6                       I want to know how many statements  
7           you've taken from defendants, how many search  
8           warrants have you done, how many DNA cases  
9           have you put on, how many fingerprint experts  
10          have you put on, how many defendants have you  
11          cross-examined, how many jury trials have you  
12          had, how many judge trials you've had.

13                      We provide ongoing substantive  
14          training. For our new people, we do the  
15          sexual assault laws, evidentiary rules  
16          specific to sex crimes. But we also continue  
17          to train our most senior people. We bring in  
18          outside speakers. We just did a training on  
19          adolescent interview techniques.

20                      We require an attempt to take a  
21          videotaped statement from every defendant in  
22          a sex crime, no matter how serious the crime

1 is or how minor. Which means we try to take  
2 videotaped statements from defendants accused  
3 of forcible touching, grabbing somebody  
4 through the clothing out on the street. We  
5 will try to take a statement from that.

6 Many of those statements are done  
7 in our own office post-arrest. Sometimes we  
8 go up to the precinct to take statements. I  
9 did one two weeks ago at three o'clock in the  
10 morning. ADAs must be at all lineups. I want  
11 to make sure that they are conducted with  
12 adherence to the highest structures.

13 When a new person starts in Sex  
14 Crimes, all of their initial witness  
15 interviews are supervised by me or one of my  
16 deputies. If they go into the grand jury and  
17 we have a non-hearsay grand jury state. So in  
18 order to get an indictment, the complainant  
19 must testify in front of a grand jury.

20 We will go in on the first of  
21 those, first few of those presentations. No  
22 matter how long you've been in Sex Crimes, and

1 I have people who have been in Sex Crimes for  
2 20 years, if a defendant is testifying in the  
3 grand jury, one of us will go in and accompany  
4 them at that point.

5 One of us will sit in on every  
6 single felony trial, no matter how senior the  
7 person is. We have another rule that if you  
8 are conducting an interview of a complainant,  
9 you must have another witness present. You  
10 can't do that alone.

11 We have a very close working  
12 relationship with our police department, and  
13 we're notified pretty much immediately of  
14 every stranger sexual assault in Manhattan.  
15 Either I or one of my two deputies gets a  
16 phone call from the supervising commander.

17 We also get notified, probably not  
18 as immediately, on all intimate partner cases  
19 and acquaintance cases. I just want to take  
20 a moment. I hate the term "acquaintance  
21 cases," because it covers such a gamut. So if  
22 the superintendent that you've known for 25

1 years sexually assaults you, that's an  
2 acquaintance.

3 If you met the guy this night at  
4 the club and you think his name is Ty, that's  
5 an acquaintance case. I think those are very  
6 different. So I've started trying to break  
7 that down into acquaintance and what I call  
8 semi-strangers, because I think to say an  
9 acquaintance covers too much ground.

10 We start with our cases pre-arrest  
11 wherever possible, interviewing witnesses,  
12 interviewing complainants before an arrest has  
13 even been made. One of the techniques we use  
14 extensively in acquaintance cases, intimate  
15 partner cases and sometimes semi-stranger  
16 cases, if there's contact information, is a  
17 controlled call.

18 It can be arranged by the police  
19 department, or it can be arranged by my  
20 office. By the way, I have six full-time  
21 investigators assigned just to Sex Crimes.  
22 Some of them are retired police department

1 from Special Victims; some of them are not.

2 A controlled call is invaluable in  
3 prosecuting these cases, and it's not just  
4 invaluable for prosecuting the cases.  
5 Sometimes, by listening to the controlled  
6 call, we actually wind up exonerating the  
7 party who's been accused.

8 We try to do this as very open-  
9 ended as possible. We do not want somebody on  
10 the phone saying "Why did you rape me last  
11 night?" That's going to get a hangup. What  
12 we try to do is, "What happened?", "I was so  
13 out of it", "I don't really remember much.",  
14 "Why do I have all these bruises, you know?",  
15 "Did you wear a condom?" "How come everything  
16 changed so quickly?", things of that nature,  
17 and we listen to what people say.

18 But we have to be aware, because  
19 I'm old, the way people communicate is  
20 changing, and I'm sure you see that with the  
21 younger members of the military. People don't  
22 talk on the phone.

1                   They text. They text, they IM,  
2                   they do chats, and although I much prefer a  
3                   phone call because I get to hear the tenor of  
4                   the voices, people say I've never talked to  
5                   this person in my life on the telephone. So  
6                   we monitor and take pictures of every text  
7                   that goes by, or we monitor the chats.

8                   The importance of having our own  
9                   investigators is not only can we supplement  
10                  the work that the police department does, but  
11                  we can completely supplant it if necessary.  
12                  That's rarely necessary. But we do have a  
13                  hotline. We do take calls directly, where  
14                  somebody for whatever reason doesn't want the  
15                  police to know about their complaint.

16                  We can do the entire  
17                  investigation, including an arrest, with our  
18                  investigators. They're also very important to  
19                  supplant the police investigation when an  
20                  arrest has been made on the street by patrol,  
21                  and we haven't had the benefit of using  
22                  detectives to thoroughly investigate.

1                   If it's a right there on the  
2                   street arrest, our investigators will go out,  
3                   pull such things as pull video, interview  
4                   witnesses, canvass and take over, because a  
5                   patrol officer, after he's made the arrest and  
6                   filed the paper work, is going back out on  
7                   patrol, and not going to be around to do the  
8                   work that needs to be done.

9                   I personally, we call it  
10                  "scrubbing." I scrub every case that comes  
11                  through my office, whether it's a misdemeanor  
12                  or a felony. Which means on a daily basis, I  
13                  review every single arrest, one to make sure  
14                  that the case has not been misclassified as a  
15                  misdemeanor when it's really a felony.

16                 Sometimes, I hate to say it, but  
17                 there is a push to keep your numbers low, and  
18                 when there's a push to keep numbers low,  
19                 occasionally things that really should be  
20                 felonies get characterized as misdemeanors.  
21                 Sometimes it's done because the person making  
22                 the arrest doesn't have the knowledge of the

1 penal code.

2 So I look at every single case. I  
3 make sure they're assigned to the appropriate  
4 person, and I will establish an investigative  
5 plan on everything that comes through.

6 In addition to our investigators,  
7 we have four paralegals assigned to our unit.  
8 They are right out of college, and it's a two-  
9 year commitment, and at the moment we have two  
10 from Harvard, one from Georgetown, one from  
11 Columbia. They're amazing. They do the work  
12 of several attorneys.

13 Every plea offer on every case is  
14 set by me or my deputies to ensure consistency  
15 across the office. I want to make sure that  
16 if you are similarly situated and charged with  
17 a similar crime, that you get similar  
18 treatment.

19 If there's going to be any  
20 deviation from that offer, if circumstances  
21 change, the assistant has to come back to me  
22 or my deputy for approval to change the offer.

1 We have a computer system that allows us to  
2 track our cases, not necessarily the most  
3 efficient way.

4 But I can tell you year-to-date,  
5 as of yesterday, we have 584 cases that have  
6 been referred to us. It's a little hard,  
7 because once a case has pled guilty or been  
8 convicted, it pops out of our system. So I  
9 can only tell you as of today, we have 132  
10 pending indictments. Those are felony  
11 charges.

12 We have 88 felonies awaiting grand  
13 jury action, disposition or possible  
14 dismissal, depending on how the investigation  
15 proceeds, and we have 262 misdemeanors. I  
16 want to say a brief word about colleges,  
17 because that came up yesterday.

18 We have a lot of colleges in  
19 Manhattan, from very small institutions to  
20 worldwide institutions, and they are not  
21 reporting sexual assaults to the police  
22 department. They are not reporting them to

1           our office.

2                           Yesterday, the New York Post ran  
3           an exposé about one university's 100 percent  
4           non-reporting rate in 2003. Do we get cases  
5           where the complainant is a college student?  
6           Yes, of course we do. But that status is  
7           usually incidental to the crime. It does not  
8           usually happen on a university campus.

9                           Anecdotally, we have heard that  
10          students are actively discouraged from going  
11          to the police by the advocates, the campus-  
12          based advocates, or they think that reporting  
13          to the campus police engenders a police  
14          report. No disrespect to campus police, NYPD  
15          can do a much better job of investigating.  
16          They have more resources.

17                          The other thing that's hugely  
18          important, without a police report or without  
19          a report to my office, well of course you can  
20          get medical treatment and a sexual assault kit  
21          done. Our lab will not analyze it. They  
22          cannot analyze a kit that does not have some

1 sort of report to authorities.

2 Next month, my office is  
3 inaugurating a Family Justice Center which, if  
4 you're not familiar with the term "under one  
5 roof," we will have a variety of social  
6 service providers on one half of the floor.  
7 On the other half, we will have sex crimes,  
8 DV, child abuse, human trafficking, which is  
9 under my supervision in Sex Crimes, which is  
10 most places have that in Rackets. We keep it  
11 in Sex Crimes. We think it's sex crimes-  
12 related, and elder abuse, all in contiguous  
13 offices.

14 What we find is somebody comes in  
15 with a domestic violence complaint, and we  
16 find out that they've been -- it's an intimate  
17 partner sexual assault case as well. Somebody  
18 comes in with a black eye and says "My  
19 boyfriend hit me," we find out that they're  
20 really being trafficked, and the boyfriend is  
21 really a pimp.

22 Child abuse is interrelated with

1 all of these things, and we think having this  
2 altogether will really facilitate working in  
3 a much more efficient way, and making  
4 prosecutions easier.

5 We also handle child pornography  
6 cases, because child pornography cases can  
7 often lead to child victims. I was very  
8 heartened by the statistic I heard yesterday,  
9 that 52 percent of lawyers report hands-on  
10 female child molestation, because we also  
11 handle what is colloquially referred to as  
12 "upskirting cases," unlawful surveillance.

13 In the summer, there's a epidemic  
14 of people on subway escalators or subway  
15 stairs filming under women's skirts. It's a  
16 felony, and we take those very seriously.

17 I just want to briefly touch on  
18 another theme I heard yesterday, what to do  
19 with the reluctant complainant, and my answer  
20 is it depends. It depends what the crime is,  
21 it depends the status of the case. If on DV  
22 case, did the victim have a twisted arm or was

1 she knifed in the stomach? It makes a  
2 difference in what we're going to do if  
3 somebody doesn't want to go forward.

4 Is there a danger to the wider  
5 community? Has the defendant been  
6 incarcerated for a year awaiting trial? And  
7 statutory rape. I know Rebecca Campbell,  
8 who's been mentioned from Michigan, believes  
9 that you do more harm to people who don't want  
10 to prosecute than by prosecuting.

11 I disagree with her on that, on  
12 statutory cases, because I can't allow a 13 or  
13 a 14 year-old to make these decisions. We  
14 don't allow them to consent to sexual  
15 intercourse. I can't allow them to say I  
16 don't want to prosecute my boyfriend who's 32  
17 years old.

18 What we do do in those cases is  
19 say why don't you go into the grand jury and  
20 tell the grand jury how much you love this  
21 guy, and how much you really want to be with  
22 him, and that seems to be fairly effective.

1           They go in and say "I really, really love  
2           him," you know, and you bring out, you know,  
3           what's the nature of your relationship?

4                         Has he ever taken you to a movie?  
5           No. Has he ever taken you out to dinner? No.  
6           But they've had a chance to say how much they  
7           love him.

8                         We started out in human  
9           trafficking and domestic violence cases with  
10          the assumption that our victim is not going to  
11          be around at the time of the trial. Maybe  
12          we'll be pleasantly surprised. But we start  
13          from day one with that assumption.

14                        So with human trafficking, we've  
15          moved into wire tapping; we've moved into  
16          tracking the money. I now find myself  
17          approving money laundering indictments, of  
18          which I knew nothing until about six months  
19          ago. But that's been very effective.

20                        On the DV front, we have a  
21          professional photographer who takes  
22          professional photographs. We're not left with

1 -- it's probably not Polaroids anymore, but  
2 even blurry Instagram camera things from the  
3 hospital that never -- you can never tell what  
4 is this. It's supposed to be a bruise. It  
5 looks like absolutely nothing.

6 Manhattan is blessed or cursed,  
7 depending on your civil liberties take, I  
8 guess, with lots and lots of video  
9 surveillance, both private and government. We  
10 track that, and that is often very key to  
11 either solving, proving a case or exonerating  
12 a suspect.

13 Our lab, I know I'm jumping around  
14 a little bit, but different things that came  
15 up. Our lab analyzes every single kit that  
16 has been released to law enforcement, which I  
17 think is very are across the country. We  
18 don't care if it's an intimate partner. We  
19 don't care if it's an acquaintance. We will  
20 analyze every single one of them, not just  
21 stranger cases.

22 We work in collaboration with the

1 wider community, which I think is something  
2 that the military could benefit from doing.  
3 I help -- host a monthly sexual assault task  
4 force meeting, in which I bring my senior  
5 people, senior PD, Special Victims people,  
6 advocates, hospital personnel and external  
7 advocacy organizations around a large table,  
8 and we talk for about two hours.

9 That way, we can nip any problems  
10 in the bud. If police are being rude to  
11 victims in the hospital, we can deal with it  
12 on a monthly basis. The other person that we  
13 have invited is the head of New York City's  
14 Nightlife Association, dealing with night  
15 clubs, and that's very important.

16 Alcohol is a huge problem. I just  
17 can't stress that enough, and the nature of  
18 drinking has changed, certainly since I was  
19 young and used to go out and have some fun.  
20 It's categorically different than it used to  
21 be.

22 People are binge drinking, bars

1        have bottle service, so there's nobody  
2        monitoring, once you sell the bottle, how much  
3        any individual is consuming. People are pre-  
4        gaming, getting halfway drunk before they go  
5        out.

6                    It's not unusual for us to  
7        interview a young woman who says she had 11 or  
8        12 vodka sodas in one night, and then move to  
9        -- what's that's green stuff, Jagermeister  
10       shots.

11                   It's inconceivable. If you walk  
12       around a college campus on a Monday morning,  
13       you'll listen to the men and the women talking  
14       about how they got wasted, how they blacked  
15       out. People report multiple alcoholic  
16       blackouts, and this is while they're still in  
17       college.

18                   We have to change that culture.  
19       We just have to do something about changing  
20       that culture, and I want to say this is not  
21       blaming the victim. Nobody should be  
22       victimized when they're incapacitated.

1                   But we do tell people watch out  
2                   for your purse. We tell people watch out for  
3                   your -- don't leave your phone on a bar. We  
4                   tell people if you're jogging, don't have  
5                   headphones blasting really loud, because you  
6                   can't hear something.

7                   I think we should be saying you've  
8                   got to be careful about overdrinking, because  
9                   it makes you vulnerable to falling on the  
10                  subway tracks. It makes you vulnerable to  
11                  being hit by a car. It makes you vulnerable  
12                  to being robbed, and it makes you vulnerable  
13                  to being sexually assaulted.

14                 So we have rolled out, just last  
15                 month, a new training program with Nightlife,  
16                 and we're going to the nightclubs. We're  
17                 going to the bars with this program, and we're  
18                 trying to train the security and the bouncers  
19                 of various things to do.

20                 We have found that friends put  
21                 somebody in a car, a cab to take somebody home  
22                 who's incapacitated, and they think they're

1           doing them a service. Well, the cab driver,  
2           we have found, is the attacker.

3                       So we're encouraging the bouncers  
4           and the security, if you put somebody in a  
5           car, take a picture of the license plate.  
6           Take a picture of the guy.

7                       We're encouraging, training them  
8           what do you do if somebody comes up and says  
9           "I was just sexually assaulted in the bathroom  
10          downstairs." How do you establish a minimal  
11          crime scene? How do you get help, and we're  
12          hoping that that will make a big difference.

13                      One of our big problems, though,  
14          is I wish I had the rules that the Army has  
15          about incapacitation, because under New York  
16          law, you are only incapacitated if you  
17          involuntarily, involuntarily ingest alcohol or  
18          drugs. That's not our problem.

19                      People are voluntarily ingesting  
20          huge amounts of it, and we have a typical case  
21          will be the last thing I remember was walking  
22          into the club, and then I woke up with my

1 clothes off in a strange place the next day.

2 I don't remember anything.

3 We have to show, in order to go  
4 forward, that they were either unconscious or  
5 asleep. If they don't remember anything from  
6 walking into the club, but we have video that  
7 shows them dancing in the club, walking out on  
8 the street, walking up the stairs with  
9 somebody, some stranger, I cannot prosecute  
10 that case.

11 I cannot show, because they can't  
12 remember whether they were simply in an  
13 alcoholic blackout or unconscious or asleep.  
14 I cannot prove that, and I have to turn these  
15 cases away. It doesn't fit our laws.

16 The last thing I just want to say  
17 is when we decline a case, when we investigate  
18 a case and decide we do not have enough  
19 evidence to go forward, we try always to bring  
20 the complainant in for a face-to-face  
21 interview, where we explain the results of our  
22 investigation. We explain the relevant

1 statutes, and we try to explain why we can't  
2 go forward.

3 Many times, people agree with our  
4 assessment. Sometimes they do not. We do  
5 have counselors on staff who partly are  
6 trained for dealing with people's  
7 disappointment in the system, that they may  
8 feel that the system has failed them, and  
9 given the status of some of our laws,  
10 sometimes we do fail them.

11 But we try to be as transparent  
12 about it as possible, and explain our thinking  
13 process and explain the statutes, which I  
14 think is very valuable to people to understand  
15 what really happened to their case.

16 I could talk about this for hours,  
17 but it is late. I thank you very much for  
18 inviting me here, and if I can ever be of any  
19 service to anybody, I would be more than happy  
20 to. Thank you so much.

21 JUDGE JONES: Thank you, Ms.  
22 Bashford. Ms. Higashi, one of the few U.S.

1 Attorney's offices that because you're in D.C.  
2 actually has a Sex Crimes docket. We'd be  
3 pleased to hear from you.

4 MS. HIGASHI: That's right. Thank  
5 you very much. Thanks for inviting me. I'm  
6 happy to share my experience with you all.

7 I am chief of the Sex Offense and  
8 Domestic Violence Section at the U.S.  
9 Attorney's Office, and as Her Honor just  
10 pointed out, we are very unique in the U.S.  
11 Attorney's Office in D.C., by serving not only  
12 as the U.S. Attorney, but we also serve as the  
13 local DA.

14 My section is also unique among  
15 the criminal prosecutor's sections in the  
16 office, because it is a hybrid section. My  
17 section prosecutes, investigates and  
18 prosecutes all cases involving sexual assault,  
19 domestic violence, child abuse, stalking,  
20 human trafficking, child exploitation, like  
21 online child exploitation, and violations of  
22 the local and the federal sex offender

1 registration laws.

2 We prosecute cases wherever they  
3 are best prosecuted, whether it's in the local  
4 Superior Court or the federal court. So we  
5 don't have to shop a local case to another  
6 prosecutor. If we believe it would make a  
7 good federal prosecution, it stays with the  
8 same prosecutor, and charges just get filed in  
9 federal court.

10 So I have been with the U.S.  
11 Attorney's Office for over 19 years, and I  
12 have spent most of those 19 years prosecuting  
13 sexual assaults and domestic violence. If I  
14 could leave you with two concrete pieces of  
15 advice about how to structure what I think is  
16 the ideal sexual assault unit in a  
17 prosecutor's office, the first piece of advice  
18 would be to treat sexual assaults as the  
19 highly specialized and continually evolving  
20 field that I believe that it is.

21 The second concrete piece of  
22 advice is to co-locate your prosecutors with

1 victim advocates. The victim advocates that  
2 we have in my section are not victim witness  
3 coordinators, who are common to other U.S.  
4 Attorney's Offices.

5 They are social workers. They  
6 come into our office with sometimes decades of  
7 experience working with domestic violence  
8 victims or sexual assault victims, running  
9 shelters. They are really, really invaluable.  
10 They're co-located with us and they are fully  
11 a part of the prosecution team, and they are  
12 some of the people who have taught us, as  
13 prosecutors, the most about working with  
14 vulnerable victims.

15 The Sex Offense and Domestic  
16 Violence Section, my section in the office,  
17 has about 60 people in it. 35 of them are  
18 prosecutors. Then we have 12 specialized  
19 advocates who are dedicated just to these type  
20 of cases, domestic violence, child abuse,  
21 sexual assault, and then we have 12 to 13  
22 support staff members.

1                   My section, in terms of the  
2                   prosecutors, is a three-tiered section. So we  
3                   handle all of those specialized types of  
4                   cases, from the most minor misdemeanors, all  
5                   the way to the most serious cases. In my  
6                   office, when you start out as a prosecutor,  
7                   you're required to spend your first few years  
8                   going through various rotations, to develop  
9                   different skills, and to learn how to  
10                  investigate and prosecute different types of  
11                  cases.

12                  Your training in the office  
13                  usually starts out with a stint of between six  
14                  and nine months in the appellate division.  
15                  After that, you're sent to one of the  
16                  misdemeanor sections, and my section is one of  
17                  the misdemeanor sections.

18                  We have a group of anywhere  
19                  between 12 and 16 misdemeanor level domestic  
20                  violence prosecutors. So we start early on,  
21                  and even at that early level, we will only  
22                  take people who express an interest in working

1           these types of cases.

2                       If someone does not have an  
3           interest or for some reason feels that they  
4           cannot work on domestic violence cases, they  
5           get sent to the General Misdemeanor section,  
6           where they prosecute misdemeanor theft cases,  
7           misdemeanor simple assault cases, shoplifting  
8           cases, things like that.

9                       The Misdemeanor Section in my --  
10          the misdemeanor unit of my section is a very  
11          important training ground. Like I said, I  
12          have about 12 to 16 prosecutors, and they  
13          start out in the general three-week basic  
14          training program. It's a basic trial advocacy  
15          training program, and then after that, they  
16          get section-specific training for domestic  
17          violence.

18                      After those people have about four  
19          to six months of experience trying misdemeanor  
20          domestic violence bench trials, we chose two  
21          who -- out of the people who express an  
22          interest, I always get more people who are

1 interested than we can take.

2 But out of the people who express  
3 an interest in staying an additional anywhere  
4 between two to six months in my section doing  
5 misdemeanor sexual assaults and misdemeanor  
6 child abuse, we interview those people, and  
7 choose two of them.

8 So after getting about maybe 30  
9 bench trials doing domestic violence cases, we  
10 choose two people to handle a smaller caseload  
11 of misdemeanor sexual assault cases, and those  
12 people have a reduced caseload of between 50  
13 and 75 cases, and they end up getting  
14 approximately 15 to 20 bench trials, sexual  
15 assault bench trials.

16 In D.C., there are a number of  
17 cases that we prosecute at the misdemeanor  
18 level, that are not just sexual touching  
19 cases. So there are cases that we will  
20 prosecute that involve much more serious  
21 behavior, but there are cases that we evaluate  
22 as cases that will have a better chance of

1 getting a conviction, charging a sexual act  
2 where the defendant knew or should have known  
3 he engaged in the sexual act with the victim,  
4 without her permission, and there's no right  
5 to a jury trial because the maximum penalty  
6 for those offenses is 180 days.

7 So our misdemeanor sexual abuse  
8 prosecutors get a good amount of experience.  
9 After that, they do have to go on and they  
10 rotate into other sections of the office,  
11 where they learn how to conduct jury trials,  
12 and they start out with the easier ones, the  
13 drug possession, gun possession cases where  
14 the majority of their witnesses are law  
15 enforcement witnesses.

16 They go through other rotations  
17 and then they can elect to make a preference  
18 to come back to my section in the mid-level,  
19 and that mid-level of prosecutors I have seven  
20 of them, and they do the most serious domestic  
21 violence felony cases and felony child abuse  
22 case, with the exception of infant abuse

1 cases, which are handled by my most senior  
2 AUSAs.

3 So I get some of those people who  
4 got experience working with vulnerable  
5 victims, with a lot of bench trials in  
6 domestic violence and sexual assault cases  
7 coming back, doing felony domestic violence  
8 cases, felony child abuse cases.

9 They then go on and do other  
10 rotations in the office. My senior level of  
11 prosecutors, I have 15 of them, and those are  
12 the people who do the felony sexual assaults  
13 in Superior Court, and they also prosecute the  
14 child exploitation cases in federal court.

15 Similar to what Martha just said,  
16 we have the same type of system where in order  
17 to get into that unit, people have to wait for  
18 a vacancy. They have to apply. We review  
19 their experience, we review their experience  
20 similar to what Martha said with DNA, with  
21 vulnerable victims. How many children have  
22 you put on the stand? How many sexual assault

1 victims have you worked with?

2 And we interview them also,  
3 though, to make sure that they really  
4 understand what prosecuting sexual assaults is  
5 all about. We are able to weed out people who  
6 say they want to be a sex offense prosecutor  
7 because they're really moved by a trial that  
8 they saw, that another AUSA tried, where it  
9 involved an abduction at gunpoint and a  
10 violent rape by a convicted sex offender of a  
11 woman walking home from work.

12 We are looking for people who are  
13 suited for what most, what we know most sexual  
14 assaults involve, which are a defendant and a  
15 victim who are acquainted with each other in  
16 some way. Whether it's someone, workplace  
17 acquaintances, as Martha mentioned, or we call  
18 them brief encounters, semi-strangers, brief  
19 encounters.

20 So we really need people who -- so  
21 that goes back to the specialized unit. You  
22 need to get people who are suited for the

1 work. Not just people who volunteer for it,  
2 but people who are really suited for it.  
3 There are some people who are fabulous  
4 homicide prosecutors in our office, who we  
5 have not chosen for senior sex offense  
6 prosecutors, because we believe they're not  
7 the best suited for it.

8 So we want people to understand  
9 what the work is about. We want people who  
10 are committed to the continual learning  
11 process, especially with scientific subject  
12 matter that a lot of lawyers tend to shy away  
13 from. So DNA, the medical aspects of sexual  
14 assault, the neurobiology of trauma, computer  
15 and cell phone forensics, which is now present  
16 in almost every one of our cases.

17 And most of all, we need people  
18 who are committed to doing the extremely  
19 challenging work of day-in and day-out working  
20 with victims in cases that are very, very  
21 challenging, and people who are going to be  
22 just as satisfied and just as rewarded,

1           putting the same amount of time and energy  
2           into a case that may end up, after an  
3           exhaustive investigation, not in a  
4           prosecution.

5                         For a lot of prosecutors, they  
6           don't want to do that. They want to work on  
7           cases that are all going to be prosecuted,  
8           that are all going to go to trial, and to be  
9           a successful and fulfilled sex offense  
10          prosecutor, you have to be committed to  
11          victims in cases that look weak initially and  
12          turn out to be weak, or cases that look weak  
13          initially and turn out to be great, strong  
14          cases, and then cases that look strong  
15          initially and end up being strong.

16                        So I can't stress enough about why  
17          this three-tiered structure is so important to  
18          us, because learning to work with vulnerable  
19          victims and developing the skill that you need  
20          in order to earn a victim's trust, to get a  
21          full disclosure, and we know that most  
22          disclosures in sexual assaults are

1 progressive, and they take a long time and it  
2 takes a huge investment of mental energy and  
3 physical time, to develop that relationship  
4 with the victim.

5 It takes a lot of skill to get a  
6 full, complete and truthful disclosure, such  
7 that you have a strong prosecutable case, and  
8 that you can gather all of the corroborating  
9 evidence that you need. It's more than a  
10 matter of being personable; it's more than a  
11 matter of having a canned speech, that the  
12 truth is important; I'm not going to judge  
13 you.

14 It's a skill that takes a long  
15 time to develop. So that's why we so believe  
16 in this. My division chief, my supervisor,  
17 calls it "the farm team system" that we have  
18 in my section. So the senior sex offense  
19 prosecutors generally have about three or more  
20 years by the time they apply.

21 They also have to make a  
22 commitment to stay in the section for at least

1 two years. They won't be considered for the  
2 Federal White Collar Section or whatever, or  
3 National Security, if they are within the two  
4 years in my section, and I really don't have  
5 a problem with that though.

6 I have, as Martha said, people  
7 that are lining up waiting for people to  
8 retire or whatever. So, and I would, of  
9 course, love more people. But our office has  
10 the same kinds of resource restraints that a  
11 lot of prosecutors' offices have.

12 As for training, we have a lot of  
13 in-house training. We have outside  
14 conferences. It's really important that our  
15 office maintain its commitment, and it's been  
16 increasingly difficult with sequestration and  
17 reduced budget.

18 But it's really important to me  
19 that our office maintain our commitment to  
20 sending people from my section, and we are  
21 more fortunate than the other sections, to get  
22 people sent to some national conferences every

1 year.

2 Another great way that we have  
3 found to get high quality training for our  
4 people is to partner up with the other members  
5 of the Sexual Assault Response Team. So it  
6 sounds like it's similar to your task force  
7 that you have. We have a Sexual Assault  
8 Response Team, and it's all the different  
9 agencies, the SANE Program and the NGOs that  
10 provide the advocates, the police departments,  
11 my office and the Mayor's Office of Victim  
12 Services is part of that.

13 So through that office, we have  
14 been able to bring in very high quality  
15 training. So some of the types of trainings  
16 that I think are essential for a good sex  
17 offense unit in a prosecutor's office, of  
18 course, are multidisciplinary training, really  
19 understanding disclosures in sexual assaults,  
20 interviewing victims.

21 This year, we were able to bring  
22 Dr. Campbell from Michigan to our SARC for a

1 two-day training conference, and she repeated  
2 her training, her multi-hour training.

3 She repeated it twice, so that  
4 police and prosecutors working different  
5 shifts, or prosecutors who had to be in court  
6 during one session, would be able to go to the  
7 other session. She had one in the morning and  
8 one that started late in the afternoon and  
9 went into the evening.

10 That's mandatory. It was  
11 mandatory for all the sex detectives. It's  
12 mandatory for AUSAs in my office. The SARC is  
13 bringing in Russ Strand to train people on the  
14 FETI interviewing methods. It's important  
15 that all sexual assault attorneys get  
16 training, continual training from the sexual  
17 assault nurses, and we have a wonderful doctor  
18 who is the medical director for the sexual  
19 assault nurses.

20 The Sexual Assault Nurse Program  
21 offers very frequent training for us, training  
22 on DNA evidence, training on digital evidence.

1 That is critical, as Martha mentioned, and in  
2 terms of resources, our office has  
3 investigators, in-house investigators. We  
4 fought for years to get these investigators,  
5 who supplement the work of the MPD detectives.  
6 There are eight of them who are devoted just  
7 to the street crimes or the Superior Court  
8 Division cases in my office.

9 There are none of them that are  
10 exclusively assigned to my section, but they  
11 do get a lot of work from my section. There's  
12 also one investigator in our office who is  
13 solely a computer forensic examiner. That's  
14 critical, because otherwise we would be  
15 relying on the FBI, which has limited  
16 resources and violent crimes are not as high  
17 a priority these days. So that's real  
18 critical.

19 What else? Secondary trauma is  
20 very, very important. We definitely want  
21 people to remain healthy. We don't want  
22 burnout. Luckily, we don't have burnout

1 problems, but it is very important to train on  
2 secondary trauma.

3 Sex offender registration, DNA  
4 collection, specialized supervised release,  
5 crime victims rights laws, and then we have  
6 all sorts of different types of special cases  
7 that we have small trainings on like cold hit  
8 cases, doctor-patient cases, jail cases, human  
9 traffickings, things like that.

10 As far as supervision, it's also,  
11 of course, critical, because a lot of the  
12 skill development, as I keep saying over and  
13 over, really takes a lot of time. So I'm the  
14 chief of the section. There are two deputy  
15 chiefs who have a tremendous amount of  
16 experience.

17 We conduct a pre-trial conference  
18 before every felony trial, and we observe  
19 every felony trial and give support during the  
20 trial, and then feedback after the trial. All  
21 plea offers must be approved by supervisors,  
22 and all counteroffers.

1                   One thing that Martha said about  
2                   college students that made me think about our  
3                   SARC. One of the things that -- really  
4                   wonderful things that came out of the SARC  
5                   this year, we've had similar problems with the  
6                   colleges in our area, instructing the students  
7                   to report sexual assault first to the campus  
8                   police and then they will, in certain cases --  
9                   it seems to happen faster when the offender is  
10                  not part of the campus community, they will  
11                  facilitate a 911 call.

12                  But one of the grants that came  
13                  out of the Mayor's Office of Victim Services  
14                  funded the development of an app that they  
15                  call U, capital "U Ask." So it's available to  
16                  anyone; anyone can download it. But it's  
17                  geared towards college students, and it's an  
18                  app that provides not only tremendous  
19                  information on sexual assault awareness and  
20                  resources, but it also has very practical  
21                  applications.

22                  So there is a direct link. You

1           can just press one button if you want to go to  
2           the hospital and get a sexual assault exam,  
3           and you want a free ride. Press one button  
4           and a car will show up.

5                         JUDGE JONES: Ms. Higashi, I'm  
6           totally overwhelmed by the amount of programs  
7           and the wonderful things you're doing in your  
8           office. I'd like to move on to Mr. Montgomery  
9           now, if I could. Mr. Montgomery. You're the  
10          county attorney in Maricopa County?

11                        MR. MONTGOMERY: That's correct.  
12          I'm the elected county attorney. They're  
13          known as the district attorney in other  
14          jurisdictions.

15                        Well good evening. Based on what  
16          I have heard over the entirety of the day and  
17          from my fellow prosecutors in and out of  
18          uniform, I'm going to jettison my prepared  
19          remarks, though I understand they'll be  
20          available for you, and I want to hit on a few  
21          areas.

22                        I also want to take advantage of

1 the fact that because I'm not in uniform and  
2 I'm an elected official, I have a little bit  
3 more freedom in what I can say.

4 To start with, a little bit more  
5 about my background. I serve four million  
6 people in Maricopa County, and we have over  
7 9,200 square miles. So we're the fourth  
8 largest in population, 15th largest in size.

9 I've worked in the office as a  
10 line prosecutor before leading it, starting in  
11 November of 2010. But before going to law  
12 school, after working in Silicon Valley a  
13 couple of years, and even preceding that, I  
14 was an active duty Army officer for six and a  
15 half years.

16 I received my commission from West  
17 Point in 1989. My first duty station was at  
18 Fort Hood, meaning I am very familiar with 6th  
19 Street and Trinity here in Austin. I was a  
20 tank platoon leader. I deployed with the 1st  
21 Cavalry Division in support of Operations  
22 Desert Shield and Desert Storm, during which

1 I got to be an Article 32 investigator.

2 Subsequent to that, returning  
3 stateside, I later testified at a court-  
4 martial on behalf of a soldier who had  
5 previously been in my platoon. Later on, my  
6 second assignment at Fort Bliss in El Paso, I  
7 was a cavalry troop commander with the 3rd  
8 ACR, where I had responsibility for imposing  
9 non-judicial punishment, as well as  
10 participating in administrative separations  
11 and the court-martial of one of my soldiers.

12 So some of what I'll share is also  
13 going to be informed by that military  
14 experience. Now admittedly, I left active  
15 duty in 1995. But again, after sitting  
16 through what I've seen here today, it's nice  
17 to know that some things never change.

18 With respect to what it is that I  
19 think the panel's looking at in general, and  
20 what we try to do in the civilian community  
21 with respect to responding to sex assault  
22 defenses in general, we want to encourage

1 reporting.

2 Much as the military has tried to  
3 deal with the differences between a survey on  
4 victimization and the numbers that they  
5 actually have of reports, I deal with the same  
6 thing in my office.

7 I have UCR reports that give me a  
8 view of what I know we're dealing with in  
9 terms of reported crime, but then I'll read a  
10 victimization survey that would suggest that  
11 I have three times as many offenses, sexual  
12 assault or otherwise, as what I'm dealing  
13 with.

14 But in carrying out the  
15 prosecution function, I can only prosecute the  
16 crimes that law enforcement submits to me,  
17 that results from somebody reporting them. So  
18 we want to improve that reporting.

19 We want to improve awareness  
20 generally among potential victims, as well as  
21 among potential offenders about the nature of  
22 the crimes that we have in statute in Arizona,

1 to try to preclude people from being victims  
2 or perpetrators in the first place.

3 We want to improve the scope and  
4 thoroughness of investigations, so that we can  
5 make better decisions at the prosecution end  
6 for charging, and that goes to whether to  
7 clear somebody or to go forward with a charge  
8 and the appropriate one.

9 It's at that point too where, you  
10 know, I got to hear some of the standard  
11 defense shibboleth about prosecutors. It's  
12 our job to make sure that we seek justice in  
13 each and every case. I love the quote from  
14 the 1935 case of Berger v. United States, in  
15 which it specifically states that prosecutors  
16 are in a peculiar and very definite sense the  
17 servant of the law, the twofold aim of which  
18 is that guilt shall not escape or innocence  
19 suffer, because we want to have successful  
20 prosecutions with just outcomes, where that's  
21 what is called for.

22 In order to do that in my office,

1 I'm organized with a specific Sex Crimes  
2 Bureau, as some of my fellow prosecutors have  
3 already discussed, and prosecutors in that  
4 unit average anywhere from three to 17 years.  
5 At any given time, we may have upwards of 20  
6 prosecutors, including a supervisor, about  
7 four to five paralegals with a similar number  
8 of legal support specialists.

9 On an annual average over the last  
10 three years, they're handling about 230 sex  
11 assault cases and they're handling about 400  
12 sex abuse cases, sex assault being the  
13 penetrative crimes, and sex abuse being the  
14 non-penetrative crimes.

15 We have about a 90 percent average  
16 conviction rate for the sex assault cases,  
17 about an 86 percent conviction rate for sex  
18 abuse. Here's how I define my conviction  
19 rate. Those are the number of guilty  
20 resolutions by trial or by plea, divided by  
21 the number of charged cases.

22 I never want to be in a position

1       where I feel, and I certainly hope this panel  
2       never makes a recommendation that puts  
3       military prosecutors in a position where they  
4       feel they must charge, they must prosecute,  
5       because the number of submittals is going to  
6       be the overall denominator.

7                   There are times when people report  
8       that the evidence just isn't there. Overall  
9       office wide, our conviction rates exceed 93  
10      percent. Our charging rate overall is 75  
11      percent, and then focusing on that, and not  
12      every case that gets submitted can be charged,  
13      our charging rate for sex assault cases is  
14      about 45 percent. Sex abuse cases is about  
15      the same.

16                   The reason for that is we  
17      encourage our police departments that wherever  
18      they have evidence that there was a sexual  
19      act, submit it.

20                   We'll review it. It's up to us to  
21      look at the evidence that may relate to issues  
22      involving consent or with respect to any of

1 the other evidentiary issues, that I think  
2 Colonel Morse from the Army mentioned earlier.

3 We see a lot of the same thing  
4 within my County, and I should point out too,  
5 we have Arizona State University in Tempe. So  
6 we have that environment. I also have Luke  
7 Air Force Base out in Glendale. We work a lot  
8 with the Judge Advocate General officers  
9 there.

10 And as quick note too, I will  
11 generally retain cases for prosecution if I  
12 have a civilian victim. Why? Victims in  
13 Arizona have constitutional rights. They  
14 don't have the same thing within the military  
15 justice system, let alone within the federal  
16 criminal justice system.

17 So if I'm concerned about the  
18 nature of the harm caused and I want to make  
19 sure those rights are protected, I'll  
20 prosecute in my system. Additionally, what I  
21 have to work with, because victims in Arizona  
22 have constitutional rights, I have a Victims

1 Services Division staffed with about 50 victim  
2 advocates, all of whom are required to have a  
3 Bachelor's degree, many with a social services  
4 background.

5 They assist prosecutors in making  
6 sure that victims stay informed, court dates,  
7 what's the status of the case, what's the next  
8 hearing going to be, answering questions in  
9 general about the criminal justice system, and  
10 then relaying information from the victim to  
11 the prosecutor and back and forth.

12 I also have within my Appeals  
13 Bureau an attorney specifically assigned to  
14 deal with victims rights litigation issues.  
15 They will train my prosecutors in victims  
16 rights issues, they will appear in court and  
17 advocate for specific issues addressing  
18 victims rights, and they will also then take  
19 up appellate action if they need to.

20 Victims in Arizona, in order to  
21 enforce their rights, have standing in court  
22 and have standing to challenge issues that

1           affect their rights in courts of appeal.

2                       As far as special programs go that  
3           address the area of sex assault cases, my  
4           prosecutors in the Sex Crimes Bureau over  
5           their first year must go through a standard  
6           protocol of training. The same too for  
7           investigators within Maricopa County and any  
8           one of the 26 different municipal agencies,  
9           and what I've done lately is we conduct joint  
10          training for them. Same basic subject matter  
11          that they have to go through, in order to make  
12          sure that everybody is on the same page, so we  
13          don't have different standards and we don't  
14          have different vernacular.

15                      That also helps to give me a good  
16          audience when I bring in national experts. We  
17          cover a number of different areas, as has  
18          already been mentioned. I'll highlight a few.  
19          Forensic interviews, confrontation calls, the  
20          dealing with forensic analysis of evidence, in  
21          particular DNA. But that also goes for social  
22          media, texts, Facebook, offender profiles and

1           victimology.

2                         Prosecutors need to learn up front  
3           that there is as many different responses to  
4           the trauma of a sexual assault as there are  
5           victims. The one person who presents with a  
6           stereotypical stress-related trauma may not be  
7           the same as the next person, who is rather  
8           stoic.

9                         Neither one of those responses is  
10           necessarily indicative of how successful that  
11           case might ultimately be. We also utilize  
12           Family Advocacy Centers. There are six within  
13           Maricopa County alone, where multi-  
14           disciplinary teams will come together to help  
15           investigate, provide medical care, counseling  
16           services and service referrals for victims of  
17           sexual assault.

18                        Now mind you, I'm focusing on sex  
19           assault, but this really encompasses both  
20           adult and child victims, and the whole gamut  
21           of sex offenses.

22                        Additionally, we have a peer

1 support program for prosecutors. I want my  
2 prosecutors to have 20 year careers, and to be  
3 healthy and happy inside and outside of the  
4 office, and we found for some prosecutors,  
5 based upon the subject matter of sex offenses  
6 that they've prosecuted for a number of years,  
7 they start to burn out.

8 I don't want them to do that.  
9 I've even utilized the national expert Dr. Gil  
10 Martin, who deals a lot with law enforcement  
11 agencies for officers having to deal with the  
12 stress of being in that environment day-in and  
13 day-out. Prosecutors are in that environment  
14 too, and so we've begun that.

15 I would make one, a couple of  
16 particular recommendations on behalf of our  
17 nation's military. One, I would ask the panel  
18 to recommend specific rights for victims of  
19 crime in military justice proceedings, that  
20 would ensure, just as in Arizona, that they  
21 would have a right to be free from  
22 intimidation, harassment or abuse.

1                   We have rape shield laws, because  
2                   some defense attorneys abused the ability to  
3                   advocate zealously for their clients, and used  
4                   it as an excuse for unethical conduct.  
5                   Victims should also be treated with fairness,  
6                   dignity and respect throughout criminal  
7                   justice proceedings.

8                   They should have a right to be  
9                   heard on release conditions at the time of  
10                  entry of a plea, and at sentencing. They  
11                  should have a right to be present whenever a  
12                  defendant has a right to be present, and there  
13                  are many more rights within Arizona's  
14                  constitution that should be considered.

15                  Having said that though, here's an  
16                  important caveat. Do not civilianize the  
17                  military's justice system. It's different for  
18                  a reason. You do not have a right to be in  
19                  the military. It is an honor to serve. But  
20                  if you cannot conform your conduct to  
21                  contribute to the mission of your unit, and to  
22                  support fellow soldiers, airmen, sailors,

1 marines, Coastguardsmen, then you should not  
2 be there.

3 How you wind up being sent from  
4 that service assignment can differ based upon  
5 what your conduct was. But not every right  
6 that a civilian defendant has within the  
7 civilian justice system is necessarily  
8 something that needs to be present within the  
9 military's justice system.

10 The fact that cases involving  
11 sexual assault need to be focused on doesn't  
12 reflect that the military's justice system  
13 overall is broken. Are there areas to  
14 improve? Certainly.

15 One other specific recommendation  
16 I would make too is do not remove commanders  
17 from their responsibility to ensure that  
18 justice and discipline are being served in  
19 these cases. Commanders are responsible for  
20 everything that happens and does not happen  
21 within their area of responsibility,  
22 regardless of whether they're a company

1 commander or a theater commander.

2 If they do not perform their  
3 duties and responsibilities the way our  
4 civilian control of the military wants that to  
5 be done, then relieve them, if they don't  
6 follow through, if they don't allow cases to  
7 go to courts-martial that should.

8 If they're overturning decision of  
9 courts-martial where they shouldn't, relieve  
10 them. But don't relieve them of their  
11 responsibility in the first place. I'd be  
12 happy to take any of your questions.

13 JUDGE JONES: Thank you, Mr.  
14 Montgomery. Ms. Patrick. You're San Diego  
15 District Attorney's Office?

16 MS. PATRICK: Yes. Thank you very  
17 much. Yes, I have the distinction, I believe,  
18 of being the last speaker of the day.

19 JUDGE JONES: I was going to say  
20 that but --

21 MS. PATRICK: But as my colleague  
22 Bill Montgomery reminds me, prosecutors like

1 to have the last word. So I'm right at home.

2 I am a prosecutor in San Diego  
3 County, a sex crimes prosecutor. However, I  
4 began my career as a deputy public defender.  
5 So I very much sympathize with much of the  
6 sentiments I've heard expressed by the last  
7 panel.

8 I also, for my doctoral  
9 dissertation for my Ph.D., I chose the topic  
10 of how sexual predators use the psychology of  
11 attraction to lure victims. So with all of  
12 the years of research I did in preparing that,  
13 I also got myself up to speed on the  
14 investigative arm, and how we can prevent and,  
15 as the saying goes, to catch a predator when  
16 we're out in the community.

17 So it's a training issue that I  
18 also bring to my combined 20 years of  
19 experience trying cases on both sides.  
20 Currently in San Diego County, I am in charge  
21 of the SVP unit. However, unlike what it  
22 stands for in my colleague's jurisdiction,

1           it's not Special Victim Prosecutors; it's  
2           Sexually Violent Predators.

3                         And in San Diego County, we have  
4           three million people, 300 prosecutors, and  
5           most of my time is spent on these kinds of  
6           cases. The ones that we seek to civilly  
7           commit after they've served their prison term,  
8           because they have a qualifying mental disorder  
9           that renders them, and I'm paraphrasing, too  
10          dangerous to be out in the community, too high  
11          of a risk, too not in control of their  
12          behavior.

13                        So because it's late in the day,  
14          I've really streamlined my remarks, and I'm  
15          going to hit upon some of what we have found  
16          have been the best practices in a couple of  
17          different areas.

18                        What I think distinguishes my  
19          jurisdiction in several interesting points  
20          relevant to both investigating, detecting and  
21          prosecuting sexual assault cases, the first  
22          thing is that we are a convention city. Like

1           some of the other jurisdictions that are  
2           represented, we have a lot of people that  
3           travel there on business trips.

4                        So we have a lot of -- and I also  
5           dislike the term "acquaintance rape." What  
6           does that mean? I will say rape by known  
7           perpetrators, sexual assault by known  
8           perpetrators, that occur during convention  
9           business. Thankfully, we also have a lot of  
10          surveillance footage in all the bars and  
11          restaurants in the areas of San Diego County.

12                       But that also puts us as  
13          prosecutors in the often untenable position of  
14          confronting a victim with, or a complaining  
15          witness, someone who is now stating that she's  
16          been sexually assaulted, confronting her with  
17          what we have on tape.

18                       We have cameras not only in  
19          establishments, but also even between  
20          buildings. So we're also able to catch  
21          portions of some of the stranger rapes.

22                       So we're also distinguished by our

1           proximity to the Mexican border. That  
2           requires us to move very quickly when an  
3           assault is committed. We don't have a lot of  
4           time before we worry about people fleeing the  
5           jurisdiction. That's not only the suspects,  
6           but also the complaining witnesses and also  
7           the other witnesses.

8                         We try to get, you know, cell  
9           phones as quickly as we can, so when we're  
10          looking at all those selfies that have been  
11          taken the night in question, we're able to  
12          identify who else may have been there, and may  
13          have -- may be able to provide good testimony  
14          for us. So we have to move very quickly  
15          because of our proximity to Mexico.

16                        We also have lots of universities  
17          like New York, so we have a large presence on  
18          college campuses, of people that are very  
19          interested in doing what we can to identify  
20          how we can stop these assaults to begin with,  
21          and that's an educational component that I'll  
22          talk about in just a minute.

1                   Our crimes are very victim-  
2                   focused, and so when we talk about training to  
3                   be in the unit or even to be part of law  
4                   enforcement, it's got to contain that sort of  
5                   factor of why are these cases so different?  
6                   You know, we've got a lot of different crimes  
7                   that focus on what did the suspect do?

8                   But unfortunately, it's  
9                   challenging that a lot of our cases focus on  
10                  what did the complaining witness do, and  
11                  they're focused on that from the beginning.  
12                  You know, I've heard for 20 years my victims  
13                  say well, I feel like I'm the one on trial.

14                  And in a lot of cases, she is in  
15                  some facets of the law that allow everyone to  
16                  look at, you know, what led up to the crime.  
17                  All of what's been discussed both today and  
18                  yesterday actually is a big part of the case.

19                  But another part of it is we also,  
20                  right from the beginning, have found it to be  
21                  a best practice to look at what category of  
22                  offender are we dealing with, right from the

1           beginning. Are we dealing with a true  
2           predator that is hiding out between two  
3           buildings down, you know, in what we call the  
4           "Gas Lamp Quarter," if any of you have ever  
5           been to San Diego, a highly populated string  
6           of bars and restaurants.

7                           Do we have one category of  
8           offender that really is a predator and is  
9           going to wait there and try to find someone  
10          vulnerable with her headphones on or too much  
11          to drink and attack? Or is it somebody who  
12          we'll call an opportunistic kind of offender,  
13          the kind that can be rehabilitated?

14                          Maybe somebody that's watched, you  
15          know, too many of these movies, where they  
16          talk about well just wait 'til she has too  
17          many drinks and then maybe you can get  
18          together. Is it one of these kinds of people  
19          that maybe is, you know, guilty of an  
20          intoxication rape, that could be prevented by  
21          best practices, maybe you know, messages  
22          getting out there by peers.

1                    Maybe not so much by supervisors,  
2                    but by one of the things we've really found  
3                    has caught on in college campuses is having a  
4                    message come from within. You know, maybe  
5                    having sexual assaults be on the way to being  
6                    viewed as a shameful act, as we view drunk  
7                    driving in a lot of our jurisdictions, not as  
8                    something cool, not as something to brag about  
9                    the next day, but something to be ashamed of.

10                    So there's this big educational  
11                    component that maybe is present in a type of  
12                    opportunistic offender, that isn't present in  
13                    a predatory offender. So this is something  
14                    else that we try to look at right from the  
15                    beginning.

16                    And along those lines, we also,  
17                    you know, victims advocates has been discussed  
18                    by my colleague, Ms. Higashi, and that is one  
19                    of the things we talk about a lot, because  
20                    sometimes we find, and this is certainly not  
21                    unique to my jurisdiction, that we might be  
22                    working at cross-purposes with victim

1 advocates, who have a role that's very  
2 different to ours.

3 In California, and I know this is  
4 again, other jurisdictions deal with this as  
5 well, if we use internal victim advocates and  
6 they talk too much about the case with the  
7 complaining witnesses, we're generating  
8 statements that then have to be disclosed to  
9 the other side.

10 Whereas with external victim  
11 advocates, they're protected by evidentiary  
12 privileges. So they can have totally separate  
13 conversations that don't then become a part of  
14 the prosecution team.

15 But regardless of which category  
16 our victim advocates fall under, we have found  
17 that it is so much easier to conduct an  
18 investigation when we really think those  
19 issues through before we even have anybody  
20 speak to the victim, to see who is going to  
21 have a better chance at giving her the support  
22 that she needs, and also not accidentally

1           creating and generating statements that we're  
2           going to have to turn over.

3                       So these are all things to think  
4           about quickly. Because we're so close to  
5           Mexico, we try to act as quick as we can, in  
6           order to get the evidence we need before we  
7           lose anything. That includes, by the way,  
8           those valuable text messages that we all know  
9           how quickly those are erased, if we don't get  
10          the phone right away.

11                      And that's if we can even get the  
12          cooperation of the phone companies. So as  
13          quickly -- we even sometimes need to take  
14          screen shots if we have to, to have a law  
15          enforcement officer testify before we lose  
16          that kind of evidence.

17                      So the investigative arm of it is  
18          what I'm going to talk about next, and I  
19          really am going to be brief in my remarks  
20          here. I'm going to hit on what I've not heard  
21          discussed, in order to not corroborate  
22          anything that's already been so eloquently

1           stated.

2                           We, as with every other  
3           jurisdiction, are short. We're short  
4           investigators. That's both internally and  
5           externally, and we have the same kind of  
6           issues that I know other agencies face, where  
7           different arms of law enforcement are pointing  
8           fingers and saying "Well, I think that's your  
9           job, because we're short-staffed," and of  
10          course the direction the finger's pointing,  
11          they're short-staffed too.

12                          What we don't want to have is the  
13          complaining witnesses suffer because everyone  
14          is short-staffed, because a lot of these both  
15          young women and men that are victims in our  
16          cases, they rely very heavily on us and on law  
17          enforcement.

18                          Sometimes they even feel far more  
19          comfortable disclosing to us than they do  
20          maybe to victim advocates and agencies that  
21          they're not connected with. And that sort of  
22          bleeds into the next issue, is do we draw

1 internally from -- and I know that's something  
2 that's very near and dear to the heart of the  
3 military, is do we draw and do these  
4 investigations all internally?

5 What we have found as just some of  
6 the challenges that are involved, is our  
7 agency, to use it as an example, is like a  
8 family. It's not only a career; it's also a  
9 family.

10 So when we have a crime where the  
11 victim is somebody in the DA's office, we  
12 choose to have another agency review it,  
13 because a lot of our victims have stated not  
14 only are they afraid that whatever they say  
15 might be used against them, might embarrass  
16 them, they may not be as forthcoming, but they  
17 also worry about getting another member of the  
18 family in trouble.

19 And it's a close-knit community.  
20 I know we've got three million people in my  
21 jurisdiction, but you'd be amazed how close-  
22 knit the legal community is and the law

1 enforcement community is. So we have the  
2 attorney general's office prosecute.

3 Even then, you know, we still have  
4 the issue of we're just so close, it seems  
5 like that there's a candor issue, there's an  
6 embarrassment factor and there's a guilt  
7 factor. The 911 tape we heard earlier today  
8 is just an excellent example of even though  
9 you of course know the victim knows she's not  
10 to blame, there's still this reluctance that  
11 might come about when you're prosecuting  
12 somebody, or complaining about the conduct of  
13 somebody that's in the same community.

14 I'm going to sort of end with jury  
15 selection and technology, just very briefly.  
16 I could talk all day on technology.  
17 Obviously, I won't. I'm last and I know, you  
18 know, it is evening now, right? It's no  
19 longer good afternoon but good evening.

20 Let me just say technology has  
21 raised some challenges in the last year that  
22 are changing daily. They change daily in

1 terms of how do we use what we can get.  
2 Facebook is a great example. That has changed  
3 the face -- no pun intended -- of  
4 investigations, hasn't it?

5 You know, we want to not only use  
6 it as the great investigative tool that it is,  
7 but we want to do it without violating ethics  
8 rules. One of the other distinctions I've had  
9 in California is I'm the immediate past chair  
10 of the California State Bar Ethics Committee,  
11 Legal Ethics Committee.

12 So we are on the front burner of  
13 investigating. How can we use this great new  
14 technology in a fashion that doesn't result in  
15 us losing the evidence, because we've cut  
16 corners ethically, or putting ourselves at  
17 risk at being prosecuted for doing something  
18 that's unethical.

19 So for example, we know that we  
20 can't misrepresent our identity online. We  
21 know that we can't friend people that are  
22 represented parties, even if they're

1 witnesses.

2 And when we're picking a jury,  
3 there's a new New York opinion that just came  
4 out last year that says when we're  
5 investigating potential jurors, which we can  
6 do if it is, you know, public record, public  
7 knowledge, we now, according to one ethics  
8 opinion, should not be using technology that  
9 will let the prospective know that we've  
10 looked.

11 Which the whole point of all of  
12 this is not to say that we have all the  
13 answers to the questions, but that we need to  
14 be savvy and aware and on the cutting edge of  
15 all of the ethical rules as law enforcement  
16 and as prosecutors that apply to us, that by  
17 the way those rules apply to the defense bar  
18 as well.

19 We just have to make sure that we  
20 use technology as the great tool that it is,  
21 without stepping in these land mines that it  
22 is now exposed, because we may not even know

1           how easy it is to make accidental contact with  
2           others in the system.

3                         And really in summation, I know  
4           the panel may have some questions, you know,  
5           let me just say that, you know, these last two  
6           days we've heard of so many new ways that we  
7           can consider technology has also made it  
8           incumbent upon us, that as we consider all of  
9           these new ideas, technology has given us a way  
10          to do it faster and more efficiently, but also  
11          has created just some issues to be aware of,  
12          to make sure that we also do these things  
13          ethically.

14                        So these are some of the best  
15          practices from sunny San Diego. I couldn't  
16          bring the weather, but hopefully I can share  
17          some of the wisdom. Thank you so much.

18                        JUDGE JONES: Thank you. Any  
19          questions? Any questions?

20                        (No response.)

21                        JUDGE JONES: Well, I think we've  
22          had an abundance of riches, particularly in

1           our last panel tonight. So thank you very,  
2           very much for waiting all day.

3                       I know some of you have been here  
4           both days, so we thank you for your interest  
5           as well, in addition to your contribution. So  
6           I will say good evening. Thanks a lot.

7                       (Whereupon, the above-entitled  
8           matter went off the record at 5:56 p.m. and  
9           resumed at 6:23 p.m.)

10                      JUDGE JONES: So the panel members  
11           have reviewed a summary of today's proceedings  
12           and we've agreed that it's accurate, and Mr.  
13           Sprance, would you close the meeting now?

14                      MR. SPRANCE: Yes ma'am. This  
15           meeting of the Response Systems Panel is  
16           closed.

17                      (Whereupon, at 6:24 p.m., the  
18           meeting was adjourned.)

19  
20  
21  
22

<b>A</b>	467:6 488:20 489:11,13	260:18 263:20 341:6	<b>acquit</b> 149:10	279:4,21 280:1,17
<b>\$10</b> 73:14,18 74:4,5 74:22 75:5,7,8 76:15	<b>abolishing</b> 109:3	<b>accountability</b> 231:7	<b>acquittal</b> 140:5 293:20 294:5 297:17 398:3	281:7 283:16 284:16 287:2 288:19 289:10 290:2,3 388:7 440:13 479:19
<b>\$15.00</b> 47:13	<b>abortion</b> 355:15	<b>accountable</b> 214:7 214:10 227:18	<b>acquittals</b> 101:10 324:18	290:2,3 388:7 440:13 479:19
<b>\$20</b> 74:17 75:6,7,7 75:8 76:16	<b>above-entitled</b> 403:22 501:7	<b>accounted</b> 261:9	<b>acquitted</b> 69:1 101:16,20 225:8 290:21 292:19 293:20	<b>actions</b> 35:2
<b>\$20.00</b> 47:13	<b>absence</b> 135:11 341:19	<b>accounts</b> 226:14	<b>ACR</b> 473:8	<b>active</b> 305:1 315:15 472:14 473:14
<b>\$200</b> 56:13	<b>absolutely</b> 82:17 89:20 308:20	<b>accurate</b> 254:15 289:13 501:12	<b>act</b> 35:10 97:10	<b>actively</b> 247:22 251:20 441:10
<b>\$3</b> 426:15	357:14 384:21 394:18 397:1 417:19 446:5	<b>accurately</b> 219:11 219:21	<b>act 35:10</b> 97:10 118:21,22 119:1,3 119:4,20 120:1,8 120:18 124:4,5,12 125:11 127:9,14 132:3,9,22 133:11 134:2,7,11 136:9 136:13 138:8,11 139:10,22 147:20 154:13 157:12 177:2 351:8 377:5 428:4 459:1,3 477:19 492:6 494:5	<b>activity</b> 117:21 133:16 141:10 247:17
<b>\$300,000</b> 331:3,5 425:21	<b>absurdly</b> 105:18	<b>accusations</b> 358:13	<b>acted</b> 112:19 176:17	<b>acts</b> 115:20,22 120:13,13 134:6 248:10
<b>\$36,000</b> 329:20,20	<b>abundance</b> 500:22	<b>accuse</b> 321:10	<b>acting</b> 316:5	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>\$60,000</b> 329:19	<b>abuse</b> 120:19,20 124:9 125:10	<b>accused</b> 117:17 118:6,21 120:7,17 127:9,14 130:14 132:8 134:7,11,13 135:1,4 136:1,12 136:15,16,19 139:12 143:7,8 150:4 151:18,20 152:9 155:19 156:3,13 157:11 157:19,22 158:14 186:22 194:20 224:14 232:8 233:11 267:20 319:15 321:1 324:5 333:12 334:5,18 356:3 357:2 365:12 368:18 384:13 385:13 433:2 436:7	<b>action</b> 102:15 104:5 113:5 131:9 160:15 171:18 172:7 173:3 174:10 175:1 176:15 177:1 178:14 180:22 181:3,10,21 182:3 182:4 205:11,14 205:18 206:1,4 210:15 211:4 219:17 222:15 225:18 226:1 229:1,11,12 236:8 242:8,9,11,14,15 242:18 246:19,21 255:16 263:11 274:7 276:5,11 277:3,5,7,11,14	<b>activity</b> 117:21 133:16 141:10 247:17
<b>\$64,000</b> 329:18	<b>abused</b> 120:19,20 124:9 125:10	<b>accuseds</b> 333:2,8	<b>acted</b> 112:19 176:17	<b>acts</b> 115:20,22 120:13,13 134:6 248:10
<b>\$7.00</b> 47:12	126:4,19 127:5,18 129:17 154:16 328:6 442:8,12,22 453:19 455:20 458:6 459:7,21,22 460:8 476:12,13 476:18 477:14 482:22	<b>accustomed</b> 358:21	<b>acting</b> 316:5	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>\$734.00</b> 46:16	<b>abusing</b> 118:9,18 119:14 125:5,13	<b>achieve</b> 146:15 416:15	<b>action</b> 102:15 104:5 113:5 131:9 160:15 171:18 172:7 173:3 174:10 175:1 176:15 177:1 178:14 180:22 181:3,10,21 182:3 182:4 205:11,14 205:18 206:1,4 210:15 211:4 219:17 222:15 225:18 226:1 229:1,11,12 236:8 242:8,9,11,14,15 242:18 246:19,21 255:16 263:11 274:7 276:5,11 277:3,5,7,11,14	<b>acts</b> 115:20,22 120:13,13 134:6 248:10
<b>\$80,000</b> 329:17	<b>abut</b> 416:22	<b>ACL</b> 49:18	<b>acted</b> 112:19 176:17	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>a.m</b> 1:13 5:2 98:10 98:11	<b>academic</b> 99:7,8 161:15 170:12	<b>acquaintance</b> 434:19,20 435:2,5 435:7,9,14 446:19 488:5	<b>acting</b> 316:5	<b>acts</b> 115:20,22 120:13,13 134:6 248:10
<b>Aaron</b> 3:7 422:13	<b>acceptable</b> 90:1 100:7,8 130:6,8 131:6 254:16	<b>acquaintances</b> 461:17	<b>action</b> 102:15 104:5 113:5 131:9 160:15 171:18 172:7 173:3 174:10 175:1 176:15 177:1 178:14 180:22 181:3,10,21 182:3 182:4 205:11,14 205:18 206:1,4 210:15 211:4 219:17 222:15 225:18 226:1 229:1,11,12 236:8 242:8,9,11,14,15 242:18 246:19,21 255:16 263:11 274:7 276:5,11 277:3,5,7,11,14	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>abandoned</b> 321:9	<b>acceptance</b> 13:20	<b>acquainted</b> 461:15	<b>acted</b> 112:19 176:17	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>abdicated</b> 161:3	<b>accepted</b> 61:15 224:14		<b>acting</b> 316:5	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>abducted</b> 60:7	<b>accepting</b> 91:4		<b>action</b> 102:15 104:5 113:5 131:9 160:15 171:18 172:7 173:3 174:10 175:1 176:15 177:1 178:14 180:22 181:3,10,21 182:3 182:4 205:11,14 205:18 206:1,4 210:15 211:4 219:17 222:15 225:18 226:1 229:1,11,12 236:8 242:8,9,11,14,15 242:18 246:19,21 255:16 263:11 274:7 276:5,11 277:3,5,7,11,14	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>abduction</b> 461:9	<b>access</b> 236:12 303:1 323:22 326:3 357:16 382:16		<b>acted</b> 112:19 176:17	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>abide</b> 362:12 365:6	<b>accidental</b> 500:1		<b>action</b> 102:15 104:5 113:5 131:9 160:15 171:18 172:7 173:3 174:10 175:1 176:15 177:1 178:14 180:22 181:3,10,21 182:3 182:4 205:11,14 205:18 206:1,4 210:15 211:4 219:17 222:15 225:18 226:1 229:1,11,12 236:8 242:8,9,11,14,15 242:18 246:19,21 255:16 263:11 274:7 276:5,11 277:3,5,7,11,14	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>abilities</b> 307:15	<b>accidentally</b> 493:22		<b>acted</b> 112:19 176:17	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>ability</b> 117:21 136:4 174:11 235:14 236:8,12 358:18 384:4,5 388:9 395:6 397:5 400:3 402:2 406:4 408:6 418:9 483:2	<b>accompany</b> 434:3		<b>action</b> 102:15 104:5 113:5 131:9 160:15 171:18 172:7 173:3 174:10 175:1 176:15 177:1 178:14 180:22 181:3,10,21 182:3 182:4 205:11,14 205:18 206:1,4 210:15 211:4 219:17 222:15 225:18 226:1 229:1,11,12 236:8 242:8,9,11,14,15 242:18 246:19,21 255:16 263:11 274:7 276:5,11 277:3,5,7,11,14	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
<b>able</b> 92:12 95:4 111:6 113:3 151:15 168:22 173:4 298:8 299:4 302:17 303:5 315:4 330:9,10 331:4 347:22 353:21 354:8 369:4 374:6 375:1 381:10 397:10,13 397:17,21 402:10 405:18 416:4,14 461:5 466:14,21	<b>accompanying</b> 11:3 268:17		<b>acted</b> 112:19 176:17	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5
	<b>account</b> 185:15		<b>action</b> 102:15 104:5 113:5 131:9 160:15 171:18 172:7 173:3 174:10 175:1 176:15 177:1 178:14 180:22 181:3,10,21 182:3 182:4 205:11,14 205:18 206:1,4 210:15 211:4 219:17 222:15 225:18 226:1 229:1,11,12 236:8 242:8,9,11,14,15 242:18 246:19,21 255:16 263:11 274:7 276:5,11 277:3,5,7,11,14	<b>actual</b> 23:8 65:13 65:14,17 105:5 118:12 120:22 126:20 133:6 134:22 139:17 141:10 147:16,20 202:7 205:3 415:17 423:5

292:16 307:8	<b>admit</b> 38:10 70:17	481:12	<b>afraid</b> 496:14	201:11 211:16
322:13 383:10	224:19 341:10	<b>advocate</b> 2:5,9,18	<b>afternoon</b> 256:13	301:12 452:3
400:22 458:3	<b>admitted</b> 39:19	3:1,16 99:1	256:21 309:18	<b>agreed</b> 107:11,20
<b>Additionally</b>	68:22	171:16 173:4	314:15 319:11	141:8 142:3
122:17 412:1	<b>admittedly</b> 473:14	180:19 193:15	368:13 376:19	247:21 501:12
428:7,19 429:15	<b>admitting</b> 66:1	194:13 195:11	408:18 411:11	<b>agreeing</b> 78:19
478:20 481:22	<b>adolescent</b> 432:19	197:2,22 198:14	412:7 422:12	<b>agreement</b> 137:16
<b>address</b> 94:19	<b>adopting</b> 325:17	201:6 217:11	467:8 497:19	365:20
103:6 217:8	<b>adult</b> 1:4 7:22	233:16 305:2	<b>age</b> 13:14 93:21	<b>ah</b> 20:21 43:7
220:12,13 314:10	115:2,16 116:5,19	311:8 316:2,17	119:21,22 120:3,8	<b>ahead</b> 83:16 98:19
373:5 375:2 480:3	252:12,15 320:2	317:3 318:22	120:19 357:15	108:20 194:1
<b>addressed</b> 348:15	337:12 340:20	320:5 322:9,12	378:6	216:13 404:3
<b>addresses</b> 115:3	352:19 378:8	325:14 385:10	<b>aged</b> 12:21 13:11	<b>aim</b> 475:17
371:8	386:10 481:20	388:12 390:15	13:16,17 21:6	<b>aimed</b> 88:11
<b>addressing</b> 122:10	<b>adults</b> 11:14	392:14,18,19	79:22	<b>aiming</b> 84:18
323:5 404:4	<b>advance</b> 98:19	394:11 407:4	<b>agencies</b> 181:5	<b>air</b> 2:7,8,17 3:6
479:17	407:13	408:21 412:17	221:22 258:13	22:2 59:19 94:16
<b>adequate</b> 326:13	<b>advanced</b> 311:14	413:19 416:6,7	264:15 266:22	94:16 171:5,14
395:6	318:16 371:18	419:17 420:1	269:8 270:7 271:2	172:17,19 173:7
<b>adherence</b> 433:12	416:3	421:10 425:4	295:20 299:14,19	173:12,17 174:3
<b>adjourned</b> 501:18	<b>advantage</b> 48:17	427:15 478:8	330:2 350:2	174:18,20 175:4
<b>adjudicate</b> 208:12	58:4 86:11 87:3	479:17 483:3	361:14,20 363:8	177:6,10 181:6,8
<b>adjudicated</b> 356:11	88:2 299:11 372:4	<b>advocates</b> 71:5	364:18 466:9	193:8,11 194:10
357:3,21	410:14,16 471:22	160:12 193:10	480:8 482:11	195:8,10 201:20
<b>adjudication</b> 204:7	<b>adverse</b> 226:1	313:10 314:1	495:6,20	207:11 208:9
204:15 342:17	229:11	321:16 384:2	<b>agency</b> 2:7 172:20	253:18 269:7,12
<b>adjusted</b> 311:19	<b>advertisement</b> 48:2	412:15 414:11,12	208:16 261:1,3	276:3 280:3
<b>admin</b> 181:20,21	<b>advertising</b> 55:21	415:19 441:11,12	263:8 275:5	289:10 314:16,19
182:2,3 224:12	<b>advice</b> 30:16 173:3	447:6 455:1,1,19	280:10 302:7	314:20 315:7,16
228:17 306:17	180:18 193:16	466:10 479:2	349:7 350:8,17	315:21 316:1
<b>administer</b> 136:15	194:12 195:11	492:17 493:1,5,11	361:10 362:8	318:10,13 404:19
361:8	196:11 197:20	493:16 495:20	363:1 496:7,12	405:20,22 408:8
<b>administered</b> 6:20	201:16 237:13	<b>advocating</b> 348:1	<b>agenda</b> 243:7	409:8 431:8 478:7
361:22	250:10 311:21	406:15	296:16 301:2	<b>airman</b> 151:10
<b>administering</b>	454:15,17,22	<b>affairs</b> 240:17	<b>agents</b> 327:5	<b>airmen</b> 51:6 483:22
117:19 136:17	<b>advise</b> 160:6 356:6	<b>affect</b> 418:9 480:1	<b>aggravated</b> 107:4,8	<b>alcohol</b> 21:9 41:16
<b>administration</b>	366:16 393:10	<b>affirmative</b> 101:11	107:16 118:2,19	41:20,22 44:13,15
135:21 327:11	416:7	105:7,10 117:17	119:13 179:16	46:6 47:5,19
<b>administrative</b>	<b>advises</b> 171:17	135:22 136:12	220:9,14,18 227:5	48:10,19 50:3,9
178:9 204:1	<b>advising</b> 160:14	139:2 144:12	244:20,20 289:3	77:18 83:2 84:20
219:17 331:18	<b>advisors</b> 160:12	145:12,13 148:19	<b>aggregated</b> 185:12	85:7,13 86:7,22
473:10	<b>advocacy</b> 305:18	149:8,14,21 150:1	<b>aggressive</b> 233:3	87:15 88:2,13
<b>administratively</b>	306:15,19 307:13	150:12 156:19	<b>ago</b> 25:16,19 50:19	101:19 134:10
182:2 225:16	311:14,15 317:15	<b>affirmatively</b>	121:22 334:2	141:12,18 142:8
229:9 385:17	334:12 417:1	117:19	405:6 431:3 433:9	157:17 418:3
<b>Admiral</b> 1:17 83:10	424:4 429:14	<b>afford</b> 52:3	445:19	447:16 450:17
83:15 249:13	447:7 457:14	<b>affront</b> 93:16	<b>agree</b> 142:22	<b>alcoholic</b> 448:15

451:13	<b>alternate</b> 181:15	<b>analyzed</b> 102:2 131:14 163:14	<b>antiquated</b> 102:21	108:22
<b>alibi</b> 393:16	<b>alternative</b> 391:5	<b>analyzes</b> 446:15	<b>Antonio</b> 317:21	<b>applicable</b> 106:6
<b>alive</b> 51:4 82:17 91:15 336:19	<b>altogether</b> 443:2	<b>analyzing</b> 301:13	<b>anus</b> 122:14 124:15 124:15,19 126:15 154:14	<b>application</b> 109:11
<b>all-encompassing</b> 259:10	<b>amazed</b> 496:21	<b>ancient</b> 57:20	<b>anybody</b> 15:18 16:5 20:8 38:6 43:7 48:9 49:4,8 196:16 354:4 371:20 373:18 398:10 452:19 493:19	<b>applications</b> 470:21
<b>all-out</b> 287:14	<b>amazing</b> 335:19 439:11	<b>and-a-half</b> 411:13	<b>and/or</b> 205:1	<b>applied</b> 103:3 109:9 137:9 152:4 156:15 339:13
<b>allegation</b> 151:6 179:14,15 180:20 200:13 209:19 218:21 226:14,17 245:5 246:17 247:1,22 248:5 249:8,8 269:16 334:14 356:22	<b>ambiguous</b> 302:10	<b>Andrews</b> 94:16	<b>anecdotal</b> 80:20 167:11 395:11	<b>applies</b> 119:18 127:14 393:14
<b>allegations</b> 172:21 179:7 180:17 218:10,17 219:4 220:8,13,14 222:8 222:13 225:12 227:16 228:21 229:5 244:13 246:13 247:8 261:14 267:10 268:1,3 272:3 273:10,12,14 274:6,9 275:16 276:13 277:1 291:18 303:10,10 312:11	<b>ambulance</b> 46:1,2,3 46:17	<b>anecdotaly</b> 101:14 238:15,17 441:9	<b>anymore</b> 168:7 344:19 446:1	<b>apply</b> 106:12,15 108:14 111:18,18 123:21 143:15 146:7,8 150:12,16 151:10 154:10 157:20 158:1,1 169:19 362:3 460:18 464:20 499:16,17
<b>allege</b> 399:12	<b>amending</b> 116:14	<b>Angeles</b> 257:11 267:3,4,7 271:16 272:19,20 273:2 278:11 282:11,22 285:21 290:16 291:14,21 292:21 293:2 297:6,11	<b>anyway</b> 198:13,16 198:22 347:11 390:22	<b>applying</b> 140:11 321:9
<b>alleged</b> 245:10 247:10,16 382:4	<b>amendment</b> 108:8 108:11 122:19 123:6 301:6 333:21 367:19 387:19	<b>animal</b> 126:4	<b>apart</b> 80:4,6	<b>appointed</b> 336:10 391:2 412:17
<b>alley</b> 77:21	<b>amount</b> 47:17 146:1 202:15 217:12 251:7 330:1 347:1 409:22 432:2 459:8 463:1 469:15 471:6	<b>announce</b> 5:9	<b>apologies</b> 12:4	<b>appointment</b> 232:15 391:20
<b>allocated</b> 330:19	<b>America</b> 347:11	<b>annual</b> 217:21 220:11 267:16 476:9	<b>apologize</b> 194:7 217:6 221:8 323:3	<b>appreciate</b> 6:11 86:5 98:4 199:21 255:3 299:3 301:15 319:5 355:1 383:17 389:5
<b>allow</b> 88:3 89:1 110:19 158:11 180:7 222:6 283:8 358:10 375:5 444:12,14,15 485:6 490:15	<b>American</b> 372:17	<b>answer</b> 38:7 41:1 52:12 79:6 88:18 162:8,11 163:15 167:3 185:17 198:18 199:7 206:22 212:18 231:9 309:12 314:11 348:18 372:5 384:12 443:19	<b>appeal</b> 384:14,18 385:9 386:14 387:9,22 480:1	<b>appreciated</b> 12:10 79:13 90:11
<b>allowed</b> 62:4	<b>amounts</b> 305:17 450:20	<b>anomaly</b> 140:19 157:3 159:8	<b>appeals</b> 102:17 386:4,6,6 479:12	<b>appreciation</b> 5:22
<b>allowing</b> 87:22	<b>Amy</b> 3:3,3 361:2 367:3,15	<b>answered</b> 201:4	<b>appear</b> 176:19 286:20 290:6 479:16	<b>appreciative</b> 79:5
<b>allows</b> 151:16 174:8 440:1	<b>analogous</b> 280:9,20 300:5	<b>answering</b> 422:7 479:8	<b>appearance</b> 19:6	<b>apprehended</b> 61:5
<b>alluded</b> 127:10 212:2 331:11	<b>analogy</b> 388:13 409:5	<b>answers</b> 16:5 99:10 169:3 221:5 308:8 499:13	<b>appeared</b> 229:20	<b>approach</b> 9:17 32:6 91:7,12 102:22 177:15 297:8 401:14 419:6
	<b>analysis</b> 4:8 104:4 123:6 184:11 200:15 227:4 235:12 236:12 254:3 257:15,20 296:18 301:3,22 302:18 341:6 480:20	<b>anticipated</b> 168:14	<b>appears</b> 114:5 189:17 268:16 278:3 286:4	<b>approaches</b> 104:9
	<b>analytically</b> 374:7		<b>appellate</b> 2:7 167:6 167:13 336:10 380:5 383:22 384:5 385:4,20 388:8,22 456:14 479:19	<b>appropriate</b> 219:18 261:5 272:14 273:19 279:15 280:13 281:3 282:19 283:13 284:19 309:9

312:15 353:22	<b>arises</b> 134:16 144:8	435:19	259:14 384:17	144:19 145:19
355:22 362:6	145:8	<b>arrest</b> 182:18	388:6,20 405:1	147:9,13 151:7,11
439:3 475:8	<b>Arizona</b> 2:21 3:13	261:17 263:1	473:1	157:7 158:22
<b>approval</b> 390:16	256:18 474:22	265:14 280:14	<b>articles</b> 239:1	166:8 171:4 172:5
439:22	478:5,13,21	282:2,5,6,20	<b>articulated</b> 33:2	172:21 175:15
<b>approve</b> 390:12	479:20 482:20	283:5,9 435:12	<b>articulateness</b>	176:4 178:22
394:2	<b>Arizona's</b> 483:13	437:17,20 438:2,5	389:6	179:10 183:6
<b>approved</b> 108:2	<b>arm</b> 15:20 37:15	438:13,22	<b>Ary</b> 427:15	204:19 205:11,14
390:8,22,22	443:22 486:14	<b>arrested</b> 69:7 286:1	<b>ashamed</b> 492:9	205:18 206:9,10
395:21 396:10,19	494:17	<b>arresting</b> 387:5	<b>aside</b> 357:19 388:9	206:11 207:17,18
469:21	<b>armed</b> 102:18	<b>arrests</b> 262:18	<b>asked</b> 15:7 32:8	207:19,22 209:19
<b>approving</b> 445:17	129:21 319:7	<b>arrive</b> 289:20	35:4,21 52:6 53:8	213:20,20 214:2
<b>approximately</b>	372:2 378:16,16	<b>art</b> 147:5 159:3,10	58:15 74:19 91:14	220:9,14,18
218:7 352:17	410:15	<b>article</b> 4:5 5:11	152:20 160:17	223:20 225:21
353:2 405:5 428:5	<b>arms</b> 495:7	98:18 99:4,16,17	182:11 202:8	226:1 227:5,6
458:14	<b>Army</b> 2:15,16,18	99:22 100:11,12	257:21 272:10	228:10 230:20
<b>April</b> 404:20	2:21,22 3:2,16	100:17,19 102:4,7	297:18 301:4	231:7 238:18
<b>arc</b> 332:18,21	51:7 94:21 99:1	102:9,21 103:9,12	341:7	240:21 242:19
<b>area</b> 52:14 58:16	213:5 215:13	103:15,21,22	<b>asking</b> 14:11,18	243:1,12 244:20
60:10 64:10 65:6	216:12 218:16,17	104:6,15 105:2,3	50:21 59:5 65:10	245:7 247:8,15
105:4 109:16	219:22 220:1,7	105:8,10,17 106:2	74:18 82:2 147:10	252:12 257:5,10
117:22 118:3,18	221:15,22 222:17	106:4,9,18 107:5	167:8 256:22	259:11 263:6
119:4 121:12,13	223:5,10 226:14	107:9 108:7	328:8 397:9	265:17,18 266:16
122:13 123:2,17	227:10 228:8	109:20 110:8,14	<b>asks</b> 34:19 37:5,7	267:16,20,22
126:20 134:5	229:21 230:9,22	111:3 112:7	73:14 402:12	274:16 277:21
143:21 153:14	231:6 236:22	114:10,12,14,21	<b>asleep</b> 139:8,11,19	278:8 280:1 281:7
175:13 181:22	237:2 238:13	115:1,7,14 116:1	142:7,11,15 143:1	284:2,10 287:11
203:19 293:12	250:7 254:18	116:2,12,20 117:4	148:13 451:5,13	289:3 293:17
303:4 315:11	255:11 268:10	119:17 121:4	<b>aspect</b> 400:22	307:19 309:10
318:7 328:1	269:1,5 270:4	123:8,10,11,13	401:5	310:12 311:15
353:11 400:15	275:12 278:16,17	124:4,11 125:20	<b>aspects</b> 32:12 382:9	312:11,18 313:15
470:6 480:3	278:20 289:11,17	125:22 126:2,6,9	413:4 462:13	318:12,15,17
484:21	295:11 309:16	128:5,12,14,15,19	<b>assailant</b> 65:19	319:7,15 320:14
<b>areas</b> 99:10,15	323:2 375:13	129:14 130:2	<b>assault</b> 1:4,7 2:17	321:2 323:12,14
109:17 124:2	409:8,17 414:18	131:21 149:22	4:4 6:14 7:2,6,12	323:19 324:5
126:18 171:19	431:10 450:14	150:21 151:6	7:13,21,21 8:4	331:21 334:15
173:6 310:2 346:5	472:14 478:2	152:21 153:8	16:7 23:13 31:20	339:3 356:22
471:21 480:17	<b>Army's</b> 279:11	186:14 187:2	38:22 52:15,17	358:8 373:18
484:13 487:17	309:20 313:12	188:2,21,22	63:10 69:18,19	374:1 377:22
488:11	411:15 412:1	192:12 193:1,3,20	79:1 87:2 90:14	401:11 407:14
<b>areola</b> 122:15	<b>arose</b> 101:4	194:19,21 195:15	91:9 94:17 99:6	408:3,4,15 410:19
<b>argue</b> 298:1 307:15	<b>aroused</b> 57:17	195:22 196:5,10	103:19 104:10,20	411:4 412:4 413:2
402:9	58:22	196:15 197:17	107:4,15,16	413:4 415:12
<b>argument</b> 122:7	<b>arraigning</b> 186:22	205:1,7 210:12	115:20 118:9	417:1 418:8
328:6	<b>arraignment</b> 232:3	211:6 220:20	119:5,12 120:10	419:14,18 421:19
<b>arguments</b> 161:21	232:7,11	231:19 232:22	122:11 136:7,11	426:3,8 428:20
<b>arisen</b> 110:9	<b>arranged</b> 435:18	236:2 239:18	138:7 139:8 144:2	429:1 432:15

434:14 441:20 442:17 447:3 453:18 454:16 455:8,21 457:7 458:11,15 460:6 460:22 462:14 466:5,7 467:15,17 467:19,20 470:7 470:19 471:2 473:21 474:12 476:11,12,16 477:13 480:3 481:4,17,19 484:11 487:21 488:7 489:3 <b>assaulted</b> 17:5 39:13 97:7 132:8 247:11 355:7 449:13 450:9 488:16 <b>assaults</b> 18:12 21:10 91:21 93:7 93:13 107:8 261:10 273:3 290:11 379:1 405:9 435:1 440:21 454:13,18 458:5 460:12 461:4,14 463:22 466:19 489:20 492:5 <b>asserted</b> 342:21,22 <b>assess</b> 303:5 <b>assessing</b> 416:1 <b>assessment</b> 245:15 246:6 254:14 257:18,18 312:21 338:13,14,16,18 339:13,19 340:3 340:11,16 341:9 341:15 343:6,21 345:13 346:17 348:12 367:9 380:15 452:4 <b>assessments</b> 345:20 374:21 <b>assets</b> 427:21	<b>assign</b> 58:4 312:16 <b>assigned</b> 302:15 306:11,13,22 311:11 312:20 315:10,18 327:7 402:22 421:13 435:21 439:3,7 468:10 479:13 <b>assignment</b> 314:19 321:19 325:10,11 406:6 409:2 473:6 484:4 <b>assignments</b> 327:5 410:5,7,8,9 <b>assigns</b> 312:14 <b>assist</b> 312:16 409:18 415:12 479:5 <b>assistance</b> 2:14,15 2:22 3:8,9,10 251:19 304:19 306:5 309:21 310:6,16 314:22 319:18 322:14 330:6,11 344:11 362:20 409:17 411:16 413:6,16 421:1 427:1,14 <b>assistant</b> 2:10 344:13 408:20 425:3 439:21 <b>associate</b> 89:16,19 <b>associated</b> 119:9,10 411:4 <b>Association</b> 265:15 363:2 372:18 417:9 447:14 <b>assume</b> 129:5 141:19 186:2 283:12 <b>assumed</b> 341:20 <b>assuming</b> 42:6 43:20 73:5 109:1 412:19 416:17 <b>assumption</b> 7:10,17 8:1 93:5 283:19 445:10,13	<b>Athena</b> 164:9 <b>athlete</b> 19:8 <b>Atlanta</b> 285:19 293:9 <b>Atlas</b> 373:17 <b>ATM</b> 54:3,9,14 55:20 <b>attached</b> 83:2 130:17 213:14 <b>attachments</b> 305:7 <b>attack</b> 328:12 491:11 <b>attacker</b> 18:10 450:2 <b>attackers</b> 247:16 <b>attacks</b> 90:16 <b>attempt</b> 123:17 286:12 317:11 432:20 <b>attempted</b> 16:13 101:3 137:12 138:4 180:21 265:20 282:12 290:18 <b>attempts</b> 146:11 166:3 173:15 <b>attend</b> 308:13,16 329:3 412:19 416:22 417:2,5,8 417:10 <b>attendant</b> 158:12 <b>attending</b> 338:18 <b>attention</b> 31:3 36:5 46:13 57:22 298:4 <b>attitude</b> 70:21 <b>attitudes</b> 58:16 80:9 83:1 90:21 <b>attorney</b> 2:11,17,20 3:4,6,14 177:16 214:11 217:10 258:22 291:14 315:18 320:7 321:17 325:9 341:8 351:22 362:20 373:10 377:2 378:8 414:4 416:5 453:12	471:10,12,13 479:13 497:2 <b>Attorney's</b> 2:2,12 3:5 430:7 453:1,9 453:11 454:11 455:4 485:15 <b>Attorney-at-Law</b> 3:3 <b>attorneys</b> 245:6 315:9 322:6 326:19 329:21 331:6 349:11 350:12 352:12,13 368:22 369:1 375:22 377:5,10 417:9 439:12 467:15 483:2 <b>attract</b> 313:17 <b>attracted</b> 77:2 <b>attraction</b> 486:11 <b>attribution</b> 64:18 <b>attrition</b> 64:18 188:1,8 295:22 296:3 <b>audible</b> 403:13 <b>audience</b> 13:17 42:4 44:10 248:11 480:16 <b>audiences</b> 6:2,3 35:14 <b>Audio</b> 24:6 <b>augment</b> 413:22 427:17 <b>AUSA</b> 461:8 <b>AUSAs</b> 460:2 467:12 <b>Austin</b> 1:13,13 472:19 <b>authorities</b> 174:22 177:11,12 196:7 211:1 228:1 260:10,18,21 442:1 <b>authority</b> 112:16 159:17 173:16,21 174:2,5,7,9,19 187:7 189:2 195:1	195:2,3,6,18,19 195:20,21 196:1 196:12 197:18,21 199:17 231:17,22 232:5,12 241:16 241:19,20 242:1,5 245:18,20 253:16 263:7 273:17 274:4 327:18 340:13 390:10,16 391:16 393:11 401:19 402:17,18 415:5 <b>authority's</b> 388:7,9 388:19 <b>automatic</b> 385:4 <b>automatically</b> 120:2 386:9 <b>availability</b> 152:8 236:5 <b>available</b> 55:22 151:13 153:10 156:22,22 217:17 225:1 226:7,21 267:19 312:4 352:14 358:7 366:11 383:5 384:15 398:21 420:9 470:15 471:20 <b>avenue</b> 180:6 <b>average</b> 321:20 354:19 476:4,9,15 <b>averaging</b> 39:21 40:1 <b>avoid</b> 52:11 64:6 89:18 90:1 158:19 161:17 <b>avoids</b> 147:21 <b>awaiting</b> 440:12 444:6 <b>aware</b> 21:17 39:17 71:16,16 88:12 358:1 436:18 499:14 500:11 <b>awareness</b> 470:19 474:19
---	--	--	---	---

<b>awful</b> 22:5	388:21	430:8,12,13	<b>behalf</b> 397:15	225:4 387:10
<b>awhile</b> 381:7	<b>balancing</b> 162:5	452:22	473:4 482:16	<b>Berger</b> 475:14
<b>axe</b> 334:12	<b>Baltimore</b> 264:22	<b>basic</b> 305:14,16,21	<b>behavior</b> 16:2 66:9	<b>best</b> 4:11,15 111:5
<b>axes</b> 117:5	264:22 265:2	306:1,6 307:13	69:20 355:6	183:2 190:16
<b>B</b>	<b>banishment</b> 344:18	311:8 316:20,22	458:21 487:12	204:11 230:1,13
<b>Bachelor's</b> 479:3	<b>bank</b> 17:9	393:14,17 412:14	<b>behavior-based</b>	312:22 316:1
<b>back</b> 8:12 17:20	<b>banner</b> 11:5,17,21	412:14,22,22	15:12,22 16:10	405:5 407:7,15
23:1 26:15 48:6	<b>bar</b> 25:12 27:9 30:2	457:13,14 480:10	37:16,17	421:9 428:10
54:8 56:9 60:11	32:15,16 336:18	<b>basically</b> 7:11 11:7	<b>belief</b> 82:13 85:6	429:12,13,17,19
60:13,14,14 61:6	372:17 386:20	15:11 45:4 49:12	<b>beliefs</b> 333:4	429:21 454:3
62:21 63:1 73:21	449:3 498:10	60:15 95:1 111:15	381:12	462:7 487:16
74:11 78:2 98:10	499:17	245:16 247:6	<b>believe</b> 19:3 56:15	490:21 491:21
102:14 106:1,2	<b>Barbara</b> 1:14,16	248:10 262:22	65:4,9 70:11 92:1	500:14
111:19 148:4	<b>barbed</b> 60:11 61:11	364:1 369:2	123:22 132:6	<b>Beth</b> 383:11
185:5 189:21	<b>bargain</b> 224:17	372:20 374:8	133:14 152:5	<b>better</b> 20:1 26:5
194:4 201:1 203:3	<b>bargaining</b> 355:21	<b>basics</b> 305:19	164:16 169:17	29:2 130:9 180:6
204:3 206:8,15	<b>barriers</b> 180:14	<b>basis</b> 326:11 414:2	180:2,11 207:16	190:17 214:20
213:15 222:19	<b>barring</b> 243:13	418:10 420:21	209:1 211:9	230:11 231:5
225:11 228:20	<b>BARRY</b> 3:6	438:12 447:12	220:15 230:16	303:7,19 347:6
233:22 238:1,2	<b>bars</b> 447:22 449:17	<b>bathroom</b> 450:9	235:9,10 238:3	355:12,13 359:9
239:4,10,19,20	488:10 491:6	<b>battle</b> 325:2	239:16 264:5,19	396:13,14 415:9
240:2,3 254:4	<b>base</b> 94:16 315:12	<b>Bay</b> 247:10	265:4 267:10	441:15 458:22
256:6,8 283:10	316:5 380:2 478:7	<b>beaches</b> 58:1	291:19 341:11	475:5 493:21
285:14 296:5	<b>based</b> 7:16 19:2	<b>bear</b> 360:16	351:6 360:11	<b>beyond</b> 149:3
300:22 302:16	35:7 66:3,7 74:5	<b>beard</b> 28:12	386:18 408:14	179:12 200:11,17
311:21 325:6	192:11 194:13	<b>beautiful</b> 51:12	418:8 454:6,20	235:13 236:9
345:1 358:20	200:12,19 210:17	53:21	462:6 464:15	291:16 336:20
374:10 376:11	244:12 245:4,10	<b>beautifully</b> 51:19	485:17	355:20 369:17
393:9 399:18	257:17 278:13	<b>becoming</b> 406:6	<b>believed</b> 78:5 150:5	<b>big</b> 16:20 54:7
438:6 439:21	279:19 281:16	<b>bed</b> 132:12,15	158:3 366:14	63:19 76:15,16
459:18 460:7	282:14,16 288:20	133:8 266:12	<b>believer</b> 345:8	92:21 301:8
461:21 479:11	289:2 290:1 291:4	<b>bedding</b> 418:20	<b>believes</b> 193:3	337:14 343:17
<b>background</b> 79:11	298:6 300:2	<b>beer</b> 42:13	263:19 406:16,16	348:10 363:17
215:1 305:3 472:5	311:19 318:19	<b>beers</b> 42:19,20 43:3	444:8	407:2 409:18
479:4	326:22 336:16	43:5,15,18 47:12	<b>Beltway</b> 161:20	450:12,13 490:18
<b>backward</b> 238:8	345:15 368:2	<b>beg</b> 330:7,7 425:16	<b>Belvoir</b> 411:17	492:10
<b>bad</b> 18:2 30:15 64:2	411:16 441:12	<b>began</b> 486:4	421:17	<b>bigger</b> 159:1
75:21 212:8	471:15 482:5	<b>beginning</b> 12:16	<b>bench</b> 111:3,10,12	221:15
381:15 386:15	484:4	34:2 97:17 132:19	114:2 378:4	<b>biggest</b> 316:12
<b>badge</b> 406:20	<b>baseless</b> 265:10	142:18 161:15	457:20 458:9,14	<b>bill</b> 2:20 46:17 52:3
<b>baggage</b> 63:11,12	266:7,9,18 268:4	176:20 209:22	458:15 460:5	73:8,9,13,17 74:3
63:13 71:11,17,19	269:7,13,17 273:1	240:15 287:9	<b>bends</b> 332:18	74:3,4,15,17,20
<b>baked</b> 60:5 70:22	275:17 279:9	490:11,20 491:1	<b>beneath</b> 57:11	75:5,6,8 76:6,7
<b>Baker</b> 102:20	295:14 297:2	492:15	95:16	152:13 485:22
<b>bakery</b> 60:4,7	299:18	<b>begins</b> 68:2 292:11	<b>benefit</b> 201:3	<b>billet</b> 327:4
<b>balance</b> 368:2	<b>bases</b> 185:12 318:1	<b>begs</b> 17:13 206:12	437:21 447:2	<b>billets</b> 230:2 320:6
	<b>Bashford</b> 2:1 430:5	<b>begun</b> 482:14	<b>benefits</b> 224:20	320:11 422:17

<b>bin</b> 181:22 203:7 206:15 207:2,5 211:6,18 212:19 213:22 250:1 263:10	<b>blackout</b> 451:13 <b>blackouts</b> 448:16 <b>blame</b> 31:14 51:1 58:4 70:6,6 71:13 304:6 497:10	335:18,22 348:20 354:2 359:19 386:2	<b>Brian</b> 428:3 <b>brief</b> 99:15 209:14 430:2 440:16 461:18,18 494:19	212:17 214:3 215:6 220:1 222:22 255:11 484:13
<b>bind</b> 70:8 <b>binding</b> 237:16,18 238:5	<b>blaming</b> 32:2 64:17 70:10 85:18,19 448:21	<b>borrow</b> 73:14,17 74:4,17 330:7,8 425:16	<b>briefings</b> 338:18 <b>briefly</b> 99:22 151:8 249:21 419:7 443:17 497:15	<b>Bronx</b> 397:12 <b>brother</b> 89:4 <b>brothers</b> 64:1
<b>binge</b> 447:22 <b>binned</b> 178:1,6 179:3,20 182:5 209:15	<b>blank</b> 71:6 <b>blanks</b> 92:9 <b>blasting</b> 449:5 <b>bleeds</b> 495:22 <b>blessed</b> 446:6 <b>Bliss</b> 473:6	<b>bothered</b> 20:7 47:20 48:6 57:9	<b>brig</b> 324:12 <b>BRIGADIER</b> 1:17 1:18	<b>brought</b> 30:9 41:15 46:5 61:5 62:21 63:1 155:7 158:18 224:4 230:3 239:4 239:19,20 240:2,3 339:5 354:2 360:16 386:16
<b>binning</b> 189:21 190:10 203:4 209:11 214:21	<b>blocks</b> 61:2 <b>blood</b> 46:6 368:17 418:22	<b>bothersome</b> 48:5 <b>bottle</b> 448:1,2 <b>bottom</b> 69:17 206:5 <b>Boulder</b> 405:7 <b>bouncers</b> 449:18 450:3	<b>bring</b> 9:17 39:9 69:12 71:1,18 78:14 121:20 134:3 156:16 157:4 177:21 307:20 358:19 373:20 393:18 400:4 407:11 423:22 426:20 431:22 432:17 445:2 447:4 451:19 466:14,21 480:16 486:18 500:16	<b>Brown</b> 2:4 209:9 233:9 240:8,9 243:16 396:7
<b>bins</b> 203:9 206:17 206:19 210:5,20 211:9 213:16 235:5,5 240:7 275:6	<b>bluish</b> 446:2 <b>blush</b> 148:6 375:15 <b>board</b> 9:1 213:20 230:4 327:18 351:18 364:1,1,7	<b>boundaries</b> 18:17 <b>boundary</b> 339:2 344:6 <b>box</b> 77:20 222:22 223:16 228:6 <b>boxed</b> 61:2,13 <b>boy</b> 11:21 355:8 <b>boyfriend</b> 25:5 442:19,20 444:16	<b>BRIGADIER</b> 1:17 1:18	<b>bruise</b> 446:4 <b>bruises</b> 436:14 <b>Bryant</b> 1:19 32:4 32:10 33:20 34:1 34:6,9,13 40:13 40:16 79:9,10,18 80:21 81:3,7,21 82:9 83:6 84:6 148:3,4 149:4 185:18,20 186:8 186:10 187:1,4,11 187:20 225:1 231:12 232:16 233:7,14 234:3,8
<b>birds-eye</b> 9:15 <b>bit</b> 5:18 6:13 8:20 15:14 21:3 22:3 23:18 30:13 31:17 41:17 42:11,16 58:20 73:3,17 74:15 76:6 80:8 82:15 99:21 100:14,16 114:13 117:10 118:15 132:2 155:5 168:20 176:8 185:2 194:4 200:7 203:1 209:13,17 211:11 235:21 244:3 248:17 257:14 266:8 271:19 282:22 293:10 308:16 309:11 324:3 338:4 341:11 361:17 389:8,15 422:22 425:20 446:14 472:2,4	<b>boards</b> 306:17 329:9 <b>boat</b> 30:20 <b>bodies</b> 201:13 <b>bodily</b> 117:15,16 118:6 131:14,20 132:11,14 133:1,6 133:10,12 134:1 137:20 138:7,8,12 138:16 139:3 146:16,20 147:13 149:16 158:22 <b>body</b> 109:19 124:19 125:9 126:21 127:2,4,6 <b>boils</b> 419:1 <b>book</b> 33:7,7 57:8 111:4,10,12 114:2 373:19,20 <b>books</b> 373:16 <b>boot</b> 350:12 371:17 <b>BOP</b> 380:12 <b>border</b> 489:1 <b>Borg</b> 2:3 335:14,15	<b>boxed</b> 61:2,13 <b>boy</b> 11:21 355:8 <b>boyfriend</b> 25:5 442:19,20 444:16 <b>boyfriends</b> 64:1 <b>boys</b> 58:17 <b>Brady</b> 380:7 <b>brag</b> 492:8 <b>Bragg</b> 426:19 <b>brain</b> 49:19 <b>branch</b> 2:5 3:9 326:17 329:1 375:14 427:13 <b>branches</b> 6:4 257:22 374:18 375:14,16 <b>break</b> 73:13 98:8 155:11 180:13 189:5 199:6 202:9 233:22 244:17 256:4 435:6 <b>breakdown</b> 228:22 <b>breakfast</b> 229:16 <b>breakout</b> 11:5 202:12 <b>breast</b> 126:15 <b>breath</b> 59:18 <b>brewing</b> 10:16	<b>bring</b> 9:17 39:9 69:12 71:1,18 78:14 121:20 134:3 156:16 157:4 177:21 307:20 358:19 373:20 393:18 400:4 407:11 423:22 426:20 431:22 432:17 445:2 447:4 451:19 466:14,21 480:16 486:18 500:16 <b>bring-your</b> 350:13 <b>bringing</b> 383:13 467:13 <b>brings</b> 10:20 32:17 59:6 224:5 322:22 376:3 <b>bristle</b> 381:19 <b>British</b> 333:20 <b>broad</b> 124:22 <b>broadcast</b> 121:18 371:22 <b>broadcasting</b> 121:5 <b>broadened</b> 125:17 <b>broader</b> 120:16 122:16 127:10 277:20 278:8 339:4 <b>broadly</b> 315:8 <b>broke</b> 62:11 126:13 209:7 <b>broken</b> 36:2,4 99:14 155:12	<b>bruise</b> 446:4 <b>bruises</b> 436:14 <b>Bryant</b> 1:19 32:4 32:10 33:20 34:1 34:6,9,13 40:13 40:16 79:9,10,18 80:21 81:3,7,21 82:9 83:6 84:6 148:3,4 149:4 185:18,20 186:8 186:10 187:1,4,11 187:20 225:1 231:12 232:16 233:7,14 234:3,8 <b>Buck</b> 249:13 <b>bud</b> 447:10 <b>buddy</b> 87:17 88:14 <b>budget</b> 329:13,15 329:17 331:7 400:3 424:12,13 424:20,21 426:14 426:15 465:17 <b>budgets</b> 424:21,22 425:18 <b>build</b> 414:3,6 <b>buildings</b> 488:20 491:3 <b>built</b> 105:9 156:18 <b>bullying</b> 95:1 97:3 <b>bunch</b> 45:5 308:15
<b>black</b> 27:20 68:10 442:18 <b>blacked</b> 448:14				

346:15	205:21 280:22	<b>calling</b> 31:2 46:15	253:6 319:10,11	<b>carrying</b> 474:14
<b>burden</b> 105:12	300:2	<b>calls</b> 45:1 302:12	319:16 330:19,21	<b>case</b> 33:5,18 58:8
369:17	<b>calculates</b> 243:9	308:7 312:8 428:5	335:5 336:7 365:8	59:6 61:12,15,16
<b>Bureau</b> 476:2	292:2	429:16 437:13	384:8,11,21 385:2	61:22 65:7 66:2
479:13 480:4	<b>calculating</b> 185:14	464:17 480:19	388:2 395:7,9	66:18 68:13 87:5
<b>burglary</b> 183:18	273:7,20 279:16	<b>calm</b> 68:19	396:2,16 397:1,6	101:3,18,19
<b>Burlington</b> 66:11	281:14 283:13,21	<b>camera</b> 121:7,7	397:10,20 398:4,5	102:18 103:5
66:16 69:4	286:15 290:14	446:2	398:7 408:16,18	106:12,16 112:22
<b>burn</b> 375:22 482:7	296:3,6,10	<b>cameras</b> 488:18	411:18 425:3	128:3 134:15,15
<b>burner</b> 498:12	<b>calculus</b> 168:12	<b>camp</b> 350:12	428:3	137:10 145:21
<b>burning</b> 431:16	<b>calendar</b> 420:16,17	371:17	<b>capture</b> 168:8	151:14,16 154:1,9
<b>burnout</b> 468:22,22	<b>California</b> 493:3	<b>Campbell</b> 444:7	203:22	159:7 168:13
<b>bush</b> 38:21	498:9,10	466:22	<b>captured</b> 123:1	174:12 175:2
<b>bushes</b> 17:22	<b>call</b> 9:12 20:22 26:4	<b>campus</b> 45:10,13	178:11 179:2	177:8,8,14,17
<b>business</b> 168:16	31:8 40:21 44:20	46:3 441:8,11,13	<b>car</b> 29:17,22 30:4,6	179:13,16 181:2,3
488:3,9	45:22 55:10,11	441:14 448:12	43:21 45:20,22	181:7,22 182:5
<b>businesses</b> 423:10	56:5,9 69:16	470:7,10	53:21 54:4,5 55:5	185:11 188:13,16
<b>Butler</b> 131:1	76:21 206:16	<b>campuses</b> 47:22	55:13 60:8,11,14	189:2 190:13,21
<b>butt</b> 287:14	232:17 235:5	489:18 492:3	378:17 449:11,21	192:13 193:3
<b>buttocks</b> 122:15	247:7 250:1,7	<b>Canada</b> 347:12	450:5 471:4	195:4 196:6,6,19
126:16	251:3 305:14	<b>candidly</b> 202:11	<b>card</b> 54:10,17,18	197:17,19 198:12
<b>button</b> 471:1,3	306:2 307:18	<b>candor</b> 497:5	55:3 336:18	198:15 199:8
<b>buy</b> 90:9	308:6 350:12	<b>candy</b> 82:6	<b>cards</b> 388:14	201:17 203:4,6
<b>buy-in</b> 250:19	386:8 396:4 412:9	<b>canned</b> 464:11	<b>care</b> 30:18 45:18	204:7,11 208:15
251:2	434:16 435:7,17	<b>canvass</b> 438:4	48:22 68:12	208:19,21 209:15
<b>buzz</b> 359:21	436:2,6 437:3	<b>canyon</b> 61:2	135:11 153:21,22	210:1,6,8,16,18
<b>bystanders</b> 86:15	438:9 461:17	<b>capability</b> 312:1	343:13 415:19	210:19,20 211:2,8
88:1 122:3	470:11,15 491:3	313:22 315:1,6	416:6 419:8 420:4	211:10 213:13,14
	491:12	<b>capable</b> 140:4,12	446:18,19 481:15	221:20 228:2
<b>C</b>	<b>called</b> 24:4 26:15	414:9	<b>career</b> 6:16 214:19	233:4,22 234:1
<b>C-O-N-T-E-N-T-S</b>	31:1,2 45:2 46:2	<b>capacity</b> 134:15	237:20 324:13	238:6,7,11,14,17
4:1	46:10,22 60:5,20	137:7,9,13,14	325:14 398:19	238:18,19 241:21
<b>CAAF</b> 105:21	75:11,17,20 95:7	139:15 140:10	407:3,18,21 410:6	241:21 242:2
<b>cab</b> 18:21 449:21	105:21 124:15	144:9,12 145:9,10	417:8 422:15	249:4 250:4,12
450:1	125:11 253:3	145:11 147:3	486:4 496:8	251:10 257:4
<b>cadre</b> 410:7	307:9 317:1 351:8	157:18	<b>careers</b> 482:2	260:14 261:4
<b>cajole</b> 67:13	413:1 475:21	<b>capital</b> 336:12	<b>careful</b> 246:4 449:8	263:9,11,14,22
<b>cake</b> 53:5 57:6	<b>CALLER</b> 24:8,12	470:15	<b>carefully</b> 388:17	264:7,21 265:8,12
<b>calculate</b> 178:18	24:14,18,21 25:1	<b>Capitol</b> 317:22	<b>carnal</b> 258:19	266:17 267:12
181:15,17 208:22	25:4,6,9,11,15,18	<b>captain</b> 2:4,9,19	<b>Carolina</b> 397:12	268:10,11 269:7
243:6 262:3 275:5	25:21 26:1,3,7,13	3:10 199:13 200:4	426:19	271:20 275:19
279:18 282:8,14	26:17,19,21 27:2	200:5 201:5 209:3	<b>carried</b> 204:13	291:20 295:6,21
282:16 284:19	27:5,7,10,12,16	209:9 212:1	221:12 223:6	295:22 296:2,3,22
289:6 291:3	27:19,22 28:3,6	215:17,20 233:9	<b>carries</b> 120:10	297:11 298:3
292:12 294:10,19	28:10,13,15,18	240:8,9 243:15,17	<b>carry</b> 63:9 120:5	299:17 302:6,15
<b>calculated</b> 178:6	29:1,5,8,11,16,19	243:19 247:3	142:12 204:6	302:17,22 303:18
182:12 185:10	29:22 30:3,7,9	248:12,14 249:1,2	351:21 367:21	303:20 308:21

312:4,14,17,20	177:2,20,22 178:2	282:1,3,5,17,19	446:21 451:15	234:16 235:10,20
313:1 355:11	178:3,13,20 179:5	283:4,6,8 284:1,5	453:18 454:2	236:6 237:17
358:11,12 365:2,3	179:6,22 180:22	284:13,22 285:3	455:20 456:4,5,11	245:22 246:7
365:10,11 366:16	181:3,6,9,11,15	285:11,12 287:1	457:1,4,6,7,8	269:6 270:11
367:9,13,17 373:9	181:16,18,19	289:3,8,9,12,14	458:9,11,13,17,19	275:18 279:10
379:7 382:9 385:9	182:18 183:8,16	290:1,2,18,19	458:19,21,22	289:16 295:12
386:16 390:4,7,20	184:5 185:5,11,14	291:1,1,4,5,8	459:13,21 460:1,6	<b>caused</b> 101:2
393:1 394:20	186:7,12 188:3,6	292:8 293:13	460:8,8,14 462:16	138:12 478:18
395:10 397:19	189:21 191:19	294:2,9,12,16	462:20 463:7,11	<b>causes</b> 260:1
399:7 400:16	193:12 194:17	295:11,12 297:1,4	463:12,14,14	333:16
401:6,8 402:22	197:5 198:12,14	297:15,21 300:3,7	468:8 469:6,8,8,8	<b>causing</b> 88:7
403:2 413:18	204:19,20,22	304:1 306:11,13	470:8 476:11,12	105:11 132:11
415:7,8 417:15,17	205:5,10,11,17,22	307:19 309:10	476:16,21 477:13	138:7 146:16
417:18 418:13	206:17 207:2,5,17	310:11,11 311:22	477:14 478:11	147:13 158:22
419:3 435:5	207:18 208:10,12	312:19 313:16	480:3 484:10,19	<b>cavalry</b> 472:21
438:10,14 439:2	208:18 211:18	318:12 323:8,12	485:6 486:19	473:7
439:13 440:7	214:10,13,14	323:13,14,19	487:6,21 490:5,9	<b>caveat</b> 200:7
442:17 443:21,22	216:4,6 222:12	324:17 325:7	490:14 495:16	483:16
446:11 450:20	224:3,6,8,11,16	337:12 349:12,16	<b>cash</b> 54:2,11 55:4	<b>caveats</b> 258:7
451:10,17,18	224:18 225:5,7,9	349:19,19 350:8	423:17	286:19
452:15 454:5	226:8 227:8,12,15	351:18 352:10,16	<b>Cassia</b> 3:12 39:6	<b>cease</b> 87:17
459:22 463:2	228:14,15,16,17	353:2,4,13 354:1	<b>casual</b> 66:20	<b>ceiling</b> 363:5
464:7 475:13,14	229:2,8,12 230:12	355:2 358:4,9	<b>catch</b> 317:11	<b>cell</b> 462:15 489:8
477:12 479:7	230:20 233:20	362:15 364:12,13	486:15 488:20	<b>center</b> 3:17 37:21
481:11 490:18	234:15,16 235:10	365:1,6 366:8,10	<b>categorically</b>	99:1 413:21 442:3
493:6	236:20 239:3,4,7	366:22 367:21,21	447:20	<b>Centers</b> 481:12
<b>case-by-case</b>	239:8,11,19,21	368:6 370:1,9,10	<b>categories</b> 114:20	<b>central</b> 326:17
326:10	240:2 242:15,17	370:13,15 371:12	116:6 177:4 181:4	425:12
<b>caseload</b> 325:6	243:22 245:1,16	372:7 373:18	205:12 262:21	<b>centrally-managed</b>
337:15 351:22	246:2,15,16 247:4	374:5 375:22	<b>categorizes</b> 269:14	425:11
352:4 458:10,12	250:8 251:21	376:7 377:6,19,20	<b>category</b> 35:20	<b>certain</b> 123:15
<b>cases</b> 1:7 4:4 7:1,1	252:15,15,16	378:1,3,10 379:1	120:12 178:1,7,7	131:18 152:1
7:8,20 8:2,3,4,4,8	253:3 255:14	379:3,20 384:17	179:4 180:2	185:13 248:11
8:15,22 9:5,17,18	257:5,7,10 260:6	384:17 385:3,3,5	190:21 197:5	358:10 362:12
9:19 10:8 31:20	260:18,20 261:1,6	404:19 405:2	203:12 206:5	366:9 367:20
31:21 39:8,11	261:7,17,19 264:9	406:5,13 407:14	250:1,16 251:13	386:9 470:8
40:4 41:21 65:15	264:17 265:1,7,17	408:3,5 409:12	261:21 266:7	<b>certainly</b> 50:6
65:18 66:17 72:1	267:9,9 268:14,19	412:4,5,11 413:16	277:20 294:8	138:17 188:5,10
72:11 94:22	269:3,9,13,14	414:16 417:20	300:21 301:9	190:5 214:6
101:10,13,18	271:10,17,22	418:13 419:15	490:21 491:7	218:16 219:2
111:2,7 113:14	272:19,22 275:6,9	420:19 421:4	493:15	221:17 294:21
141:13 149:20	275:22 276:4,7,12	431:19 432:8	<b>caught</b> 95:6 492:3	355:2 364:20
159:12 160:9	276:14,16,19	434:18,19,21	<b>cause</b> 136:20	372:4 376:20
161:10 167:6	277:1,8,11,12	435:10,14,15,16	178:21 188:17	396:21 399:12
168:5 171:1	279:3,5,8,9,11,20	436:3,4 440:2,5	200:10,12 206:6	447:18 477:1
173:14 174:3	280:4,4,9,11,16	441:4 443:6,6,12	206:11,14 221:9	484:14 492:20
176:14,16,22	281:6,16,18,20	444:12,18 445:9	221:18 222:8	<b>certify</b> 362:9

<b>cetera</b> 15:9,21 21:17 37:15 43:22 65:19 94:7 307:16 399:17 <b>CGIS</b> 245:6,16 246:4 <b>chain</b> 374:13 399:5 399:8,9,11,13,14 400:5,9 <b>chair</b> 1:14,16 3:15 4:3 5:7 79:9 83:8 83:12,15 90:6 98:1,7,12 99:2 108:20 111:8 143:17,19 148:3 162:19 166:15 167:17 170:14,19 175:8 185:19 187:21 189:12 190:19 192:16 199:3 200:2 215:12,17 216:13 231:10 236:19 237:2,4,6,11 256:13 298:21 304:11,16,22 309:15 311:9 314:12 319:9 335:5,16 348:20 349:1 360:18,22 368:8,10,12 372:6 376:14 383:8 389:1 403:12,14 408:16 411:8 422:8 427:8 430:3 498:9 <b>challenge</b> 40:11 51:8 105:13 134:17 170:5 259:20 260:5 262:12 283:19 322:3 386:15 387:9,19 410:2 419:5 479:22 <b>challenged</b> 81:18 <b>challenges</b> 99:19 114:17 131:12	168:21 251:21 258:5,10 260:2 316:12 323:5 324:4 325:17 332:10 343:18 348:11 351:4 358:19 409:19 412:11 496:6 497:21 <b>challenging</b> 8:18 134:5 275:2 313:16 415:7 462:19,21 490:9 <b>chance</b> 86:1 445:6 458:22 493:21 <b>change</b> 14:6 70:1 71:22 100:15 104:9,14 108:18 115:16 128:1 130:3 141:2 166:2 259:4 343:6 345:14 348:9 359:7 439:21,22 448:18 473:17 497:22 <b>changed</b> 107:2 115:14 126:9 128:12,17 166:19 255:2 258:21 259:4 265:3 436:16 447:18 498:2 <b>changes</b> 80:18 104:15 146:9 259:18 298:9 <b>changing</b> 347:19 359:8 436:20 448:19 497:22 <b>character</b> 24:3 66:4 66:7 152:1 <b>characterize</b> 244:18 <b>characterized</b> 438:20 <b>characterizing</b> 296:2 <b>charge</b> 46:16 64:11	74:7 131:16 135:1 147:8 153:3 154:4 154:6,8,18 155:2 158:20,20 168:12 196:15 232:8 319:17 339:1 340:19 342:5 349:7 351:12 475:7 477:4 486:20 <b>charged</b> 122:8 132:7 133:4 145:20 147:2,11 156:8 252:6 292:18 340:20 351:17 352:6 369:15 374:17 376:8 439:16 476:21 477:12 <b>charges</b> 39:9 61:15 111:15,16 131:19 134:19 147:4 159:19 181:11 182:19 186:13,15 188:10,18,20,20 190:3,6 191:9 193:21 194:10,14 195:7 204:18,19 205:6,15,18,19,22 211:5 214:17 223:11 224:3,4 228:12 232:5,9 242:19,21 243:1 248:7 263:17 280:12,14 282:19 284:2,8,11,12 285:2,8,10,21 287:1 290:17,21 291:14,19 292:11 293:17,19 294:1 304:2 312:10,13 342:18 440:11 454:8 <b>charging</b> 8:10 126:5 131:17 134:1 140:18 147:6 159:3,10,14	159:18 160:9 223:13 257:6 282:1 283:6 285:1 459:1 475:6 477:10,13 <b>Charlottesville</b> 161:19 <b>chart</b> 246:18 277:6 <b>charts</b> 205:13 341:3 <b>Chatfield</b> 11:6,12 <b>chats</b> 437:2,7 <b>cheapens</b> 321:11 <b>checklist</b> 340:2 341:2 <b>cheer</b> 11:7 <b>cheerleaders</b> 11:15 12:3,5 <b>Cheerleading</b> 11:6 <b>Chicago</b> 286:8 293:8 <b>chief</b> 2:1,6,11,15,16 2:19,21 3:1,5 66:11,12,14 69:3 102:5,20 171:13 309:19 311:22 313:12 314:17 328:15 405:19 409:2 411:15 416:8 430:13 431:5 453:7 464:16 469:14 <b>chiefs</b> 265:16 414:9 469:15 <b>child</b> 79:22 96:21 115:2,17,21 116:5 119:16,21,22 120:2,3,5,8,10,18 120:19,20,22 121:2 127:14,22 128:4,15 129:14 252:15,16 365:21 366:1 442:8,22 443:5,6,7,10 453:19,20,21 455:20 458:6 459:21 460:8,14	481:20 <b>children</b> 58:13,14 79:14 356:18 357:16 370:15 412:6 460:21 <b>chill</b> 42:15 <b>chin</b> 55:6 <b>choice</b> 89:18 <b>choose</b> 77:21,22 78:8,9 89:17 458:7,10 496:12 <b>chooses</b> 14:4 <b>chose</b> 14:7 457:20 486:9 <b>chosen</b> 13:21 462:5 <b>Christensen</b> 2:6 404:13,15 <b>Christmas</b> 423:17 <b>chuckle</b> 89:2 <b>church</b> 32:16 <b>CID</b> 221:22 237:4,8 237:21 270:14,15 327:4,5 419:7 <b>circle</b> 175:12 <b>circles</b> 36:14 79:4 <b>circumstance</b> 44:19 130:13 133:13,15 134:4 139:14 <b>circumstances</b> 36:6 39:12 58:5 90:15 94:8 96:12 117:7 117:12 118:5,10 119:7,19,21 130:12,15 138:2 143:3,16 150:6,9 153:4 439:20 <b>citizens</b> 335:2 369:3 <b>city</b> 285:10,11 487:22 <b>City's</b> 447:13 <b>civil</b> 291:12 336:11 446:7 <b>civilian</b> 4:12,16 6:2 6:8,20 22:20 36:21 61:17 78:16 177:4,5,15 178:2
---	---	--	--	--

178:7 182:9,10,18 184:3,4 209:21,22 210:5 211:1 212:11 214:11 218:14 222:19,21 223:17 225:2 228:1,8 230:3 232:10 234:4 241:20 242:2 247:2 252:10 258:3,13 259:8 260:10,17,21 261:13,17 262:7 263:18 264:8 268:9 271:1,7 277:18 278:5 280:22 281:14 284:20 287:2 288:2,17 290:7,15 293:22 294:14 296:21 297:20,22 299:8 300:1 304:14 307:22 308:14 310:20,21 322:20 327:8 335:9 337:8 344:16,17,20 369:13 384:13 385:1 404:11 405:4 409:1,5 414:1 415:20 416:18 417:11 418:14 421:21 424:3 426:16 473:20 478:12 484:6,7 485:4 <b>civilianize</b> 483:16 <b>civilians</b> 210:7 222:16 223:2 227:12,17 228:2 410:17 411:21 <b>civily</b> 487:6 <b>claim</b> 71:11 <b>claims</b> 354:16,18 <b>clarification</b> 199:21 <b>clarify</b> 107:19 152:19 166:3	190:20 394:7 <b>clarifying</b> 220:7 <b>clarity</b> 105:22 211:13 234:11 235:22 <b>class</b> 170:7 307:19 343:11 <b>classes</b> 305:8 <b>classic</b> 146:3 <b>classroom</b> 312:2 <b>Clean</b> 28:16 <b>cleaned</b> 74:1 <b>cleaning</b> 52:3 <b>clear</b> 104:18 196:14 264:16 276:21 277:7 279:2 299:16 300:7,17 475:7 <b>clearance</b> 261:20 262:22 267:14 <b>cleared</b> 261:20 262:18,19 267:12 281:18,20 <b>clearer</b> 254:16 301:3 <b>clearing</b> 265:7 <b>clearly</b> 16:6,18 17:1 31:13 32:20 41:6 57:22 76:3 81:9 <b>clerked</b> 377:11 <b>CLEs</b> 308:16 <b>clicker</b> 184:9 <b>client</b> 101:15,21 324:9,11 341:20 365:15,17 366:14 367:3,7,8 385:8 395:16 397:5,22 <b>client's</b> 381:12 397:14 <b>clients</b> 169:16 313:7 314:5 319:15 320:22 321:1 322:5 323:9 355:19 356:6 376:2 380:13,17 381:1,10 383:6 384:6 483:3	<b>climate</b> 88:2 <b>climates</b> 96:1 <b>clip</b> 130:20,22 <b>clock</b> 108:5 232:2 312:4 403:6 <b>clock's</b> 403:3 <b>close</b> 82:15 248:22 309:12 318:1 354:20 419:12,20 420:2,10 434:11 494:4 496:21 497:4 501:13 <b>close-knit</b> 383:3 496:19 <b>closed</b> 174:14 176:6 281:18 282:17 501:16 <b>closely</b> 103:13 113:3 <b>closing</b> 318:20 <b>closings</b> 307:16 <b>clothes</b> 53:3 56:2 418:20 451:1 <b>clothing</b> 28:17 57:8 61:10 219:8,16 433:4 <b>clouded</b> 418:21 <b>clouds</b> 212:20 <b>club</b> 59:14 435:4 450:22 451:6,7 <b>clubs</b> 447:15 <b>CMDR</b> 304:21 <b>CNN</b> 50:18 <b>co-counsels</b> 378:13 <b>co-locate</b> 454:22 <b>co-located</b> 455:10 <b>coach</b> 19:1 96:8 <b>coached</b> 17:15 <b>Coast</b> 2:20 199:14 243:17 269:14 276:9,15 278:15 290:5 306:16 409:5 427:22 428:1 <b>Coastguardsmen</b> 484:1 <b>cobble</b> 331:4	<b>cobbled</b> 331:8 <b>Coconspirator</b> 90:17 <b>code</b> 2:10 4:5 103:20 260:9 319:2 439:1 <b>coerce</b> 129:3 <b>coffee</b> 10:16 <b>cohesive</b> 430:21 <b>coiffed</b> 51:19 <b>coin</b> 70:10 <b>coincidence</b> 21:19 <b>COL</b> 98:20 108:4 108:15,17 109:6 109:12,15 111:11 117:3 126:1 144:6 144:22 145:17 146:14,19 147:12 148:17 149:5 150:8 151:12 152:14,17 153:6 153:16 159:21 161:14 162:13 163:3 164:7,11 165:2,5,12,16,20 167:2,21 168:3 169:7,10 170:6,17 171:11 175:6,9,22 183:15,19 184:2 184:17 185:1 186:8,11 187:3,6 187:19 188:5 189:6,9,20 190:12 190:22 191:5,7,15 191:18 192:6,9,18 193:6 194:3,9 196:8 197:15 198:3,6 199:1,6 206:21 207:14 208:7 211:16 213:4 215:4 216:17,20 217:2,6 220:21 221:8 229:18 232:1,20 233:15 234:7,18 234:20 235:2,8,17 236:1,17,22 237:3	237:5,7,15,19 238:15 239:11 240:1 253:8 309:17 314:14 <b>cold</b> 469:7 <b>Colin</b> 313:12 <b>collaboration</b> 446:22 <b>Collar</b> 465:2 <b>collateral</b> 356:2,7 385:19 <b>colleague</b> 285:14 485:21 492:18 <b>colleague's</b> 486:22 <b>colleagues</b> 190:17 361:4 386:22 <b>collected</b> 61:8 292:7,9 <b>collection</b> 469:4 <b>Collective</b> 43:7 <b>collectively</b> 69:13 219:10 <b>COLLEEN</b> 1:17 <b>college</b> 13:20 14:4 14:13 16:13 20:5 21:1,5 45:3 47:22 308:14 439:8 441:5 448:12,17 470:2,17 489:18 492:3 <b>college-aged</b> 18:6 18:14 21:4,15 36:18 37:5 38:19 66:21 85:11 <b>colleges</b> 6:8 15:4 440:16,18 470:6 <b>colloquially</b> 443:11 <b>colonel</b> 1:18,21 2:6 2:8,15,16,21 3:1,5 3:15 5:3 98:16,22 111:9 143:20 170:15 171:4,7,15 171:17,22 175:4 184:15 190:7 199:4 201:2,5 203:4 204:3 213:4 215:15 220:17,17
--	---	--	--	---

231:10 237:12,16 255:4 256:10 309:16,19 313:11 314:12,13,16 319:10 323:2 330:18 389:22 390:13,18 391:7 391:11,14,18 392:16,22 400:21 402:4,5,6,13 403:6 404:8,13,15 411:9,14,19 422:8 424:11,17 426:2,7 426:11,11,13 478:2 <b>Colorado</b> 2:13 6:17 10:12 59:8 317:21 349:5,9,16 353:5 370:8 375:21 <b>Colorado's</b> 351:7 <b>Columbia</b> 2:12 3:15 439:11 <b>com</b> 160:21 <b>combat</b> 320:13 <b>combination</b> 35:3 96:7 <b>combined</b> 202:7 311:2 317:5 324:4 486:18 <b>come</b> 5:17 8:11 9:21 20:13 29:11 30:18 41:13 53:13 55:13,20 77:1 81:5 107:22 110:19 123:19 145:5,20 147:6 151:4 170:21 176:19 213:8 222:14,19 224:18 231:14 255:7 275:2 280:18 282:15,20 283:10 291:6 292:6 311:5 320:18 354:12 355:5,17 357:7 358:10 359:6 377:13 397:14	399:19,21 403:20 406:5 408:7 424:22 425:13 431:16 436:15 439:21 455:6 459:18 481:14 492:4 497:11 <b>comes</b> 10:10 13:18 54:22 73:13 74:16 76:3 85:12 91:3 127:3 134:17 136:19 172:8 182:16 207:1 221:16 232:14 253:10 328:6 332:12 339:21 358:8 362:6 423:11 425:10,13 438:10 439:5 442:14,18 450:8 <b>comfortable</b> 75:1 342:15 495:19 <b>coming</b> 33:13 38:4 41:7 46:17,18 65:8 164:10 172:13 228:20 297:6 317:13 369:6 396:3 407:18 425:5 460:7 <b>command</b> 160:5 172:6 176:14,22 180:16 206:13 219:2 242:9,11,14 246:19 250:9,9 276:11 277:13 280:1,17 281:7 324:8 374:13 399:5,8,9,11,13 399:15,22 400:5,9 410:7 418:6 <b>commandant</b> 427:16 <b>commander</b> 2:14 3:7 160:15 161:3 173:3 177:1 180:18,22 181:1	181:11 186:13 187:2 188:18 192:22 193:4,14 193:22 194:11 195:7 196:2 197:2 198:15 200:18 201:7 206:4 210:9 210:11,17 211:7 218:4 220:5 221:19 236:20 238:13 242:1,7,18 250:4 277:5 279:3 284:16 290:2,3 304:18,20 305:1 320:11 322:11 333:10 370:17 392:3,6 393:2 394:14,17,21 395:2 396:20 398:12,15,18 402:8 415:16 422:10,11,13 424:11,15,19 426:5,10 427:2 428:14 434:16 473:7 485:1,1 <b>commander's</b> 205:11,13,17 220:8 <b>commanders</b> 51:7 159:11,13,21 160:2,13 161:9 162:6 167:1 173:2 176:16,17 178:14 178:21 181:10 192:11 193:9 201:12,13 208:11 219:13 220:1 223:4,11 227:10 230:18 268:11 269:2,4,10 274:10 276:4 277:11 279:21 289:10 415:17 418:5 484:16,19 <b>commanding</b> 199:10,12	<b>commensurately</b> 107:5 <b>comment</b> 57:2 98:1 113:9 149:19 164:19 169:21 200:3,5 233:13 248:16 249:10,20 272:10 299:1 386:2 <b>commentary</b> 5:12 <b>comments</b> 4:3 201:6 203:4 204:4 216:10 248:14,21 320:18 332:12 376:12 383:11,18 423:3 430:2 <b>commission</b> 102:5 102:8,14 472:16 <b>commissioned</b> 305:11 328:5,10 <b>commit</b> 48:3 120:17 136:12 260:12 267:20 344:8 487:7 <b>commitment</b> 378:6 439:9 464:22 465:15,19 <b>commitments</b> 336:11 <b>commits</b> 38:22 120:7 134:7,11 <b>committed</b> 22:14 91:21 97:10 118:21 151:20 152:2 235:11 260:22 265:20 462:10,18 463:10 489:3 <b>committee</b> 164:12 164:13 498:10,11 <b>committing</b> 132:9 134:6 <b>common</b> 35:8 65:5 347:10 420:21 455:3 <b>communicate</b> 420:20 436:19	<b>communicating</b> 127:20 <b>communication</b> 379:19 <b>communications</b> 160:20 <b>communities</b> 22:19 95:18 299:8 405:4 <b>community</b> 40:12 77:15 239:14 240:14 288:17,19 380:10 414:1 421:21 444:5 447:1 470:10 473:20 486:16 487:10 496:19,22 497:1,13 <b>companies</b> 494:12 <b>companion</b> 55:14 <b>company</b> 320:11 484:22 <b>company-grade</b> 313:9 <b>comparable</b> 183:3 183:12 184:13 262:15 274:19 327:8 <b>compare</b> 258:1 404:7 <b>compared</b> 83:9 203:20 204:19 212:4 <b>comparing</b> 1:6 182:8 259:16,17 269:22 270:19 290:10 296:11 <b>comparison</b> 4:12 4:16 103:18 116:8 182:10 184:4,11 286:17 330:18 <b>comparisons</b> 258:6 259:8,19 262:7 300:14 304:13 <b>compass</b> 69:18,19 <b>compel</b> 129:3 391:20 <b>compelling</b> 12:12
--	--	---	--	---

383:15	<b>complicates</b> 260:15	<b>conditions</b> 148:14	488:16	139:14,16,17,17
<b>compensate</b> 101:4	<b>component</b> 331:22	342:9 345:14	<b>confused</b> 144:1	140:1,5,7,8,11,13
140:17	489:21 492:11	357:13 483:9	299:3	140:15 141:1,2,3
<b>competence</b> 310:14	<b>components</b> 372:21	<b>condom</b> 436:15	<b>confusing</b> 12:2	141:9,10,15,17
<b>competent</b> 137:17	<b>composed</b> 411:17	<b>conduct</b> 21:7 38:10	105:18,20 295:19	142:2,11,15,16
<b>competently</b> 369:4	<b>comprehensive</b>	41:8 68:22 106:13	<b>Congress</b> 103:8,10	143:2,4,9,10,10
<b>competing</b> 368:1	102:2 104:2	117:12,17 118:1	104:5,6 105:7,9	143:15 144:4,8,9
<b>competitive</b> 316:1	111:13 261:12	118:11,12,14,20	106:1 107:12,21	144:10,12,13,13
<b>complain</b> 76:12	292:4	119:8,20 120:15	109:18 112:8	144:18 145:3,5,12
<b>complainant</b>	<b>computer</b> 31:7	120:16 122:4,6,10	116:14 123:14	145:14 146:4
265:13 433:18	440:1 462:14	125:1,3 126:5	126:13 129:5	148:5,8,13,19,22
434:8 441:5	468:13	127:9,13,21 128:3	132:2 133:10	149:7,12 150:10
443:19 451:20	<b>concentrating</b> 66:8	128:7 130:5,14,15	135:18 137:11	150:15,19,20
<b>complainants</b>	<b>concept</b> 10:2 12:17	132:4 133:19	138:4 148:7,21	156:11 157:8,14
381:17 382:2	23:3 41:17 57:18	135:22 136:5	161:8 163:10	157:18 158:4,7
435:12	79:3 83:22 340:10	137:17 138:18	201:3,18 202:14	168:7 419:2
<b>complaining</b>	343:6 387:17	139:1 141:15	326:12	444:14 477:22
488:14 489:6	<b>concepts</b> 6:18 9:15	153:11 158:7	<b>Congressional</b>	<b>consented</b> 72:12,21
490:10 493:7	15:15	168:8 169:11,14	131:8	138:18 142:3
495:13 497:12	<b>concern</b> 169:11	170:4 285:9	<b>conjunction</b> 414:20	149:9
<b>complaint</b> 266:9	353:11 358:2	386:15,21 459:11	428:14	<b>consenting</b> 118:8
437:15 442:15	387:7 418:7	469:17 480:9	<b>connected</b> 495:21	134:12 150:5
<b>complaints</b> 269:17	<b>concerned</b> 12:4	483:4,20 484:5	<b>connection</b> 121:8	<b>consequence</b> 85:7
271:14	36:3 123:1 255:19	493:17 497:12	128:8	157:5 158:17
<b>complete</b> 149:9	318:22 335:1	<b>conducted</b> 266:4	<b>connotation</b> 125:4	357:18
196:19 246:12	346:20 351:12	267:3 271:16	125:5,15 126:20	<b>consequences</b> 50:2
464:6	357:22 381:3	272:6,18 285:20	126:21	163:13 166:3
<b>completed</b> 176:11	478:17	293:5 433:11	<b>connotations</b>	356:2,7 357:19
220:4 221:11	<b>concerning</b> 13:10	<b>conducting</b> 434:8	125:13,14	363:20 366:17
224:7 228:4,15,16	66:5,6 356:1	<b>conducts</b> 103:3	<b>conscience</b> 89:18	367:22 370:2,2
257:8 275:12	<b>concerns</b> 319:6	245:16	<b>consensual</b> 132:4	371:13 378:2
276:10	360:15 369:22	<b>conference</b> 429:16	133:16,16,20,22	385:19
<b>completely</b> 69:11	<b>conclude</b> 266:5	467:1 469:17	<b>consensus</b> 299:7,9	<b>consider</b> 40:17
85:17 141:4	301:5	<b>conferences</b> 465:14	299:13	200:9 248:20
201:11 213:6	<b>concludes</b> 264:6	465:22	<b>consent</b> 25:14	284:1,10,15 326:1
246:21 335:21	<b>conclusion</b> 281:10	<b>confident</b> 417:17	33:17,17 35:1	500:7,8
437:11	313:2	<b>confidential</b> 389:13	49:7,11 78:12,17	<b>considerations</b>
<b>complex</b> 155:5	<b>conclusions</b> 278:13	<b>confinement</b>	78:18,21,21	360:15
168:11,20 312:19	289:2 296:13	233:12,17,18	100:21 101:7,9,11	<b>considered</b> 16:16
312:20 331:17,21	298:14	385:7,14,14,16	104:16 115:15	86:7 149:12 242:7
412:11 417:15,17	<b>concrete</b> 454:14,21	<b>confirms</b> 291:21	117:21 121:13	268:1 283:15
421:20	<b>concurrent</b> 209:20	<b>conform</b> 102:10	132:17,19,20	319:1 333:9 340:1
<b>complicated</b> 153:14	227:22	103:13 483:20	133:3,9 134:4,15	465:1 483:14
168:11 206:16	<b>concurrently</b> 242:3	<b>confront</b> 84:20	134:16,21,22	<b>considering</b> 219:14
261:22 300:9	<b>condensed</b> 50:16	<b>confrontation</b>	135:6 136:7,9	286:3
317:19 350:6	<b>conditional</b> 387:18	480:19	137:5,10,12,16,18	<b>consist</b> 300:22
355:5	387:20	<b>confronting</b> 488:14	138:1,3,4,10,13	<b>consistency</b> 298:16

299:22 439:14	<b>consuming</b> 141:18	418:14	292:16,17 293:19	246:11
<b>consistent</b> 102:10	448:3	<b>contracts</b> 362:2	334:18 342:7	<b>cool</b> 492:8
207:6 267:6 273:4	<b>consumption</b> 85:13	<b>contrast</b> 226:12	350:5 354:5	<b>cooperate</b> 225:17
275:3 289:20	101:19 142:9	258:2 261:7,15	363:21 364:3	225:20 226:6
295:4,5,16,16	<b>contact</b> 77:3 118:3	263:4 267:7,15	384:1 440:8	298:3 301:14
296:1,2,5 297:12	118:9,14,16,18,19	<b>contrasted</b> 212:4	461:10	302:1,5,9,19,21
300:12 355:6	119:1,2,13,14	<b>contribute</b> 418:17	<b>conviction</b> 183:3,5	304:3
<b>consistently</b> 322:4	120:14,21,22	483:21	183:7,9,10 184:4	<b>cooperating</b> 252:13
<b>consolidated</b> 116:1	121:1 124:6 126:8	<b>contribution</b> 501:5	184:6,13 185:21	<b>cooperation</b> 297:19
361:19	127:11,11 132:4	<b>contributors</b>	186:1,2,6 189:18	297:19 303:8,11
<b>conspirator</b> 4:4	133:17 154:13	343:15	200:20 201:15	494:12
5:11 9:13,19 10:2	179:16,18 229:6	<b>control</b> 57:13 64:21	202:3 207:22	<b>coordinate</b> 207:4
10:4 12:15 15:15	244:21 245:2,12	97:13,15 136:5	209:1 212:15	416:6
23:1,3,8 24:4 40:9	259:15 289:4,4	287:18 403:2	215:22 216:5	<b>coordination</b>
42:2 47:4 50:11	351:9 356:21	485:4 487:11	225:5,8 228:18	221:21
70:20 72:8 77:10	357:14 435:16	<b>controllable</b> 348:8	234:22 235:14	<b>coordinators</b> 455:3
81:16 83:22 84:11	500:1	<b>controlled</b> 435:17	238:18 243:4,6,9	<b>copulation</b> 259:1
84:21 90:17 91:15	<b>contain</b> 15:12	436:2,5	246:8 258:9 262:4	<b>copy</b> 165:14
96:6	490:4	<b>conundrum</b> 148:15	264:20 290:12,14	<b>corner</b> 54:22
<b>Conspirator's</b> 38:9	<b>contemplated</b>	<b>convened</b> 1:12	291:3,6,8,21	<b>corners</b> 498:16
<b>conspired</b> 338:4	103:4 133:10	402:3	292:4,13,22 293:6	<b>Corolla</b> 54:16
<b>constant</b> 318:3	<b>content</b> 46:6	<b>convening</b> 159:17	294:3,5,10,13,16	<b>corollary</b> 386:3
325:4 379:19	<b>contested</b> 323:16	173:16,21 174:2,5	294:20 296:4	<b>Corporal</b> 385:21
<b>constantly</b> 89:22	324:16	174:6,9,19,22	298:11 299:22	<b>Corps</b> 2:6,6 3:9,11
351:2 410:10	<b>context</b> 48:8 58:3	187:7 189:2	300:6,8 303:6	3:11,17 240:8,14
<b>constitute</b> 129:19	85:17 86:13	194:22 195:2,3,6	334:17 382:1	240:18,20 242:6
<b>constitutes</b> 263:21	183:14 320:1	195:18,19 196:1	385:18 405:1	243:9,14 269:18
269:11 299:17	353:7	196:11 197:18,21	459:1 476:16,17	276:22 278:16
<b>constitution</b> 328:11	<b>contiguous</b> 442:12	199:17 231:17,21	476:18 477:9	290:4 319:19
328:13 369:10	<b>continual</b> 462:10	232:5,12 245:18	<b>convictions</b> 230:7	320:2 325:16
380:22 483:14	467:16	245:20 253:16	231:1 292:2	326:1,6 328:15
<b>constitutional</b>	<b>continually</b> 272:10	388:6,9,19 390:9	293:14	410:4 414:5
358:6,17,19	454:19	390:16 391:16	<b>convince</b> 31:15	427:16,19,20
478:13,22	<b>continuation</b> 5:4	393:11 401:18	67:12,16 68:19	428:11,21 429:4
<b>constructive</b>	304:13	402:16,18	402:16	429:18 430:1
129:16	<b>continue</b> 67:2	<b>convention</b> 487:22	<b>convinced</b> 36:10	<b>correct</b> 146:12
<b>consult</b> 352:15	94:10 116:16	488:8	264:18 299:13	150:11 153:7
365:20	332:21 335:8	<b>conversation</b> 51:5	<b>Cook</b> 1:18 62:20	190:22 207:13
<b>consultant</b> 6:6	432:16	52:5,16 53:17	107:19 108:9,16	220:20 287:12
393:15 402:10,12	<b>continues</b> 413:5	87:22 88:4	149:18 151:1	346:4,5 352:18
402:15,19	<b>continuing</b> 308:11	<b>conversations</b> 87:7	152:10,15,18	387:16 471:11
<b>consultation</b> 312:5	<b>continuity</b> 405:13	493:13	153:12 159:9	<b>corrections</b> 343:21
<b>consulted</b> 353:1	431:4	<b>conversely</b> 367:10	161:6 162:10	380:13
<b>consulting</b> 3:2	<b>continuously</b>	<b>convict</b> 62:8	169:21 196:13	<b>corrective</b> 172:7
403:8	311:18	<b>convicted</b> 96:15	198:9 199:2 201:2	<b>correctly</b> 93:12
<b>consumed</b> 44:8	<b>contract</b> 361:15,18	187:15 225:7	215:15 238:20	<b>correlates</b> 297:15
47:19	362:4 366:3 369:1	243:3 290:20	239:22 240:5	<b>corroborate</b> 494:21

<b>corroborating</b> 464:8	382:15 385:1 390:3,9,12,14	471:12 472:6 478:4 480:7	410:19 423:21 424:1 428:15,20	229:8 248:4
<b>corroboration</b> 291:17	391:10 392:15,18 393:4,9,21,21	481:13 486:3,20 487:3 488:11	429:2,11 <b>court</b> 7:3,4 8:11	<b>courtroom</b> 160:8 188:15 311:6
<b>cost</b> 327:1 426:18	394:2,8,9 396:8 396:12,17 399:6	<b>couple</b> 42:19,20 43:3,5,18 72:4	10:8 102:17 105:15 112:11	<b>courts</b> 105:4 110:3 155:9 284:20
<b>costs</b> 423:18,19,22 424:5	399:12 401:13 404:21 406:8	86:6 100:6 135:16 138:5 140:22	159:12 161:10 166:8 174:15	316:9 323:10 386:19,19 407:21
<b>couched</b> 148:21	407:11,22,22 408:12 409:17	167:13 173:6 216:10 239:1	183:7 187:6 197:10,18,19	480:1
<b>counsel</b> 2:7,8,14,15 2:22 3:6,8,9,10	411:16 412:9,13 412:18 413:15,17	252:22 294:22 300:18 354:14	198:20 205:3 228:21 280:5	<b>courts-martial</b> 110:1,11 111:22
4:13 101:15 159:14,16 160:7	414:7,9 415:15 420:5 422:19	361:11 372:15 378:12 472:13	284:11 286:22 289:8 297:22	112:5 113:1,12,18 114:6 152:4 162:1
166:6 169:5 171:16 180:5,12	423:20 424:10 426:22 427:13	482:15 487:16 <b>couple's</b> 58:19	328:5 334:3,9 336:9 340:20	164:17 194:18 205:2 219:14
233:3,21 237:13 251:19 253:19	428:15,17,22 429:6,10,10,17	<b>couples</b> 347:21 <b>courage</b> 94:6	350:17 356:5 363:10 365:13	230:5 293:17 305:20 319:3
304:15,19 305:4,6 305:10 306:4,6,10	431:9 <b>counseling</b> 481:15	<b>courageous</b> 95:11 <b>course</b> 17:14,21	366:13 369:19 371:19 373:12	323:10 485:7,9
307:2,10,18 308:1 308:6,19,22 309:9	<b>counselor</b> 193:22 <b>counselors</b> 452:5	21:16 30:21 37:8 41:2 61:17 73:20	375:3 378:7,8 382:20 384:14	<b>cover</b> 153:18 171:20 372:22
309:20 310:6,8,11 310:17 311:4,12	<b>count</b> 211:19 212:22,22	74:10 81:15 82:18 93:17 101:3,6	386:10 387:3,6,11 392:9,9 393:4,18	480:17
311:13,17,20 312:8,13,14,15,16	<b>counted</b> 57:5 190:15	167:17 170:10 210:1 247:13	402:2 454:4,4,9 460:13,14 467:5	<b>covered</b> 220:10 <b>covering</b> 58:2
312:19,22 313:3 313:17,19 314:2	<b>counteroffers</b> 469:22	259:16 266:20 305:14,15,22	468:7 473:3 479:6 479:16,21	<b>covers</b> 122:6 219:6 434:21 435:9
314:17,19,21 315:12,12,13,22	<b>counterparts</b> 330:20	306:2,7 307:20 311:8,15 316:20	<b>Court's</b> 125:20 <b>court-appointed</b>	<b>Cox</b> 102:4,5,8,14 <b>Coyne</b> 2:8 171:15
316:4,6,8,10,11 316:13,18,22	<b>counties</b> 292:6 293:1 336:5	316:22 317:1,4,5 317:10 318:11,16	377:6 <b>court-martial</b>	171:17,22 175:4,6 175:9,22 183:15
317:5,6,12,18 318:7,8,13 319:14	361:12 <b>counting</b> 211:21,22	318:17 354:12 361:19 370:14	167:6 173:16,21 174:2,5,6,8,19,22	183:19 184:2,15 184:17 185:1
319:18 321:15,18 321:21,22 322:14	<b>country</b> 16:9 356:15 370:22	380:19 401:20 404:5 407:9	194:19 195:2,3,5 195:20,21 196:11	190:7 192:18 207:14 208:7
323:19,22 325:1,5 326:20 328:15,22	377:7 410:21 431:3 446:17	412:14,20 417:2,6 417:8 428:18	196:12,22 197:21 200:14 205:8,9	211:16 253:8 322:18
328:22 329:3,10 330:1,8 332:2,4,7	<b>counts</b> 211:19 <b>county</b> 2:2,20,21	429:5,7,14 441:6 441:19 465:9	223:11 224:13,15 225:13 230:8	<b>Coyne's</b> 204:3 <b>craft</b> 147:5
332:12,13,15 337:18 345:19,20	3:5 7:2 257:11 260:13 267:8	466:18 469:11 495:10 497:9	232:6,7 253:16 284:2,7 311:10	<b>create</b> 10:22 24:4 159:8 327:3 357:9
348:1 353:16,20 356:6 358:1,16	291:14 293:3 337:11 361:11,11	<b>courses</b> 104:5 308:14 311:13,14	312:10 316:6 357:4 384:1	<b>created</b> 71:10 117:1 241:7
362:9 363:4 365:6 365:14 366:8,12	361:12,13,14,14 361:15,16 362:8	317:15 318:15,18 328:20 329:4	416:14 421:9 473:11	351:15 500:11 <b>creating</b> 10:15
366:14 368:6 370:1 371:11	405:7 471:10,10	405:22 406:1	<b>court-martialed</b>	345:5 371:8 494:1 <b>creation</b> 351:5
373:5 376:7				<b>credibility</b> 56:18 197:9 <b>crew</b> 247:11

<b>cries</b> 68:2	338:12,12 339:2	<b>Crow</b> 2:9 200:4,5	458:16	<b>daughter</b> 13:16,17
<b>crime</b> 17:10 33:8	350:2,5,6 351:10	212:2 215:18,20	<b>DA</b> 453:13	85:11 86:14
56:1 61:10 63:21	351:17 352:7	248:14 249:1,2	<b>DA's</b> 405:7,15	<b>daughters</b> 14:10
64:6 71:14,20	369:15 374:18	253:7 425:3	496:11	<b>David</b> 37:2
75:9 76:4,19	386:9 421:20	<b>Crown</b> 333:20	<b>daily</b> 326:4 418:10	<b>day</b> 5:8 9:19,19
110:17 112:10	430:10,14,16,20	<b>crucial</b> 416:2	420:21 438:12	10:7,15,22 47:6
119:2,18 120:9,12	431:2,10,16,18,20	<b>crumble</b> 335:1	497:22,22	48:6 51:10 72:19
121:3,17,21 122:5	432:16 433:14,22	<b>crying</b> 68:5	<b>Dallas</b> 416:20	78:22 93:21 94:20
122:9,13,21	434:1 435:21	<b>culminates</b> 377:17	<b>damage</b> 7:3 337:20	100:4 123:19
123:11 132:7	442:7,9,11,11	<b>cultural</b> 22:18	<b>dance</b> 72:16	212:5 233:19
140:10,18,21	453:2 468:7,16	82:13 100:10,16	<b>dancing</b> 451:7	308:7 317:16
151:20 154:15,20	474:16,22 476:1	130:10 131:8	<b>dandy</b> 82:6	323:1 360:5
155:16 156:8	476:13,14 480:4	<b>culturally</b> 100:7	<b>danger</b> 444:4	369:10,10 370:12
158:20,21 222:5	486:3 490:1,6	131:5	<b>dangerous</b> 487:10	380:18 404:6
235:11 249:9	<b>criminal</b> 2:9 3:1,13	<b>culture</b> 17:16 18:5	<b>DAs</b> 431:18	445:13 451:1
258:16 262:16	3:16 20:22 99:3	49:15 51:4 69:14	<b>data</b> 160:21 167:12	471:16 485:18
263:17,19,22	118:1 130:14,16	70:20 71:12 78:15	182:10,12,13,22	487:13 492:9
264:2,3,6,11,18	135:8,10,14 168:8	78:16 88:20,22	183:3 185:10	497:16 501:2
265:7,20 266:1,6	169:17 179:8	92:5 448:18,20	201:9 203:22	<b>day-in</b> 462:19
266:14 268:8	256:18 285:9	<b>current</b> 99:17	204:4 215:6	482:12
271:4,9 279:5	305:20,21 315:7	106:4 110:7 114:9	219:10 220:2	<b>day-out</b> 462:19
297:13 299:15	327:3 358:22	114:14 115:6	241:17 243:14	482:13
339:8 344:8 354:5	372:10 377:5	130:1 131:20	253:9,22 254:2,14	<b>days</b> 113:21 170:5
356:3 357:3,8,8	453:15 478:16	150:11,21 152:12	255:5 257:17	173:20 174:7
362:15 368:18	479:9 483:6	240:17 278:6	259:21 260:16,17	232:3,8,10,16
431:20 432:22,22	<b>criminalized</b>	422:13	261:12,13,14,16	233:4,9 354:14
439:17 441:7	128:10	<b>currently</b> 113:6	261:18 262:14	385:14 404:5
443:20 450:11	<b>Criminology</b> 3:13	151:17 159:11	268:16 270:19	412:21 413:1
469:5 474:9	256:17	313:20 314:21	271:9,12 272:3	459:6 468:17
482:19 490:16	<b>critical</b> 468:1,14,18	315:1 408:20	278:6,7 280:3	500:6 501:4
496:10	469:11	415:1 428:1	282:10 283:7,10	<b>DC</b> 103:20 116:10
<b>crimes</b> 1:4 2:1 3:4	<b>critically</b> 95:20	486:20	284:3 285:3,5,6	307:3 320:9
105:5 106:13	257:1	<b>cursed</b> 446:6	286:3 287:16,18	<b>DCAP</b> 305:5 308:4
107:10,18 114:18	<b>criticism</b> 166:11,14	<b>custody</b> 232:18,19	287:21 288:3	310:6,8,15,18
114:20 115:2,3,16	<b>criticized</b> 263:15	232:22	289:1 290:15	311:21,22 312:3,6
115:17,18,19,22	<b>critics</b> 217:14	<b>cut</b> 36:1 248:17	291:10 292:1,3,4	314:8 319:18
116:5,5,19 119:11	<b>cross</b> 204:8	358:8 498:15	292:5,7,9,10,10	322:17 425:1,2
119:16 121:11	<b>cross-examination</b>	<b>cuts</b> 49:8	292:13 295:9,18	<b>deal</b> 66:16 76:15,16
123:10 127:15	355:9	<b>cutting</b> 499:14	295:20 296:8,11	81:20 93:5 133:15
128:12,15 129:14	<b>cross-examine</b>	<b>cycle</b> 306:8	299:3 323:4,8	166:22 371:6,7
131:16 155:4	355:13 401:12	<b>cynically</b> 386:22	<b>database</b> 226:19	376:7 380:7,11,15
168:7 183:13	<b>cross-examined</b>		329:8	382:2 387:14
221:16 244:19	432:11	<b>D</b>	<b>date</b> 18:12 77:4	410:13 447:11
245:12 260:22	<b>cross-purposes</b>	<b>D.A</b> 7:7 59:13	186:21 233:10,11	474:3,5 479:14
321:2 336:12,14	492:22	<b>D.C</b> 285:16 286:8	<b>dated</b> 80:13 102:22	482:11 493:4
337:1,7,10,12,13	<b>crossover</b> 96:18,19	293:10 376:17	<b>dates</b> 479:6	<b>dealing</b> 36:12 71:20
337:14,21,22	354:17	377:1,6 453:1,11	<b>dating</b> 58:19	113:22 199:15

325:3 339:6 408:5 410:19 447:14 452:6 474:8,12 480:20 490:22 491:1 <b>deals</b> 115:2 126:14 482:10 <b>dear</b> 496:2 <b>death</b> 117:14,15 137:20 163:15 <b>debate</b> 19:8 239:14 <b>debit</b> 54:17,18 <b>decade</b> 80:6,19,19 <b>decades</b> 71:4 257:3 455:6 <b>DECEMBER</b> 1:10 <b>decent</b> 382:11,11 <b>decide</b> 39:8,8 42:9 56:6 62:2 65:14 110:3 111:7 159:11 198:15 210:8 298:2 342:18 451:18 <b>decided</b> 8:19 9:5 11:15 35:9 49:17 80:11 192:12 245:11 <b>decides</b> 48:9,17 86:11 210:1,2,14 <b>deciding</b> 77:16 199:17 339:8 <b>decision</b> 19:5,10,16 20:2 43:13 48:10 63:17 125:21 159:14 161:10,22 188:12 195:8,14 195:16,17 220:5 231:17,22 237:14 237:17 238:5 242:16 244:10 245:4 251:2,12 252:4,20 263:13 263:16 264:12 268:8 269:1 270:4 282:1 285:1 300:4 351:7 367:16 485:8	<b>decisions</b> 18:18 19:2,14 65:21 66:2,7 105:16 161:18 219:12,22 257:4,7,10 263:15 266:21 267:5 278:1 283:6 297:10,12 321:3 444:13 475:5 <b>deck</b> 326:10 <b>declination</b> 203:12 203:17 250:18 251:2,3,14,22 277:7 <b>declinations</b> 249:21 251:8 <b>decline</b> 190:2 191:3 210:3 252:4 304:3 451:17 <b>declined</b> 179:22 180:22 189:14,15 189:16,22 191:8 191:21 192:4,9 210:6 211:4 225:17,19 226:6 250:22 277:5 <b>declines</b> 188:9 210:14 226:9 <b>declining</b> 242:13 <b>dedicated</b> 94:5 230:12 231:3 313:15 326:7 331:17 404:17 406:3 408:9 455:19 <b>dedication</b> 322:6 332:9 <b>deemed</b> 269:3 <b>deeper</b> 90:20 <b>default</b> 39:5 <b>defeat</b> 149:2 <b>defend</b> 328:11 337:22 366:7 368:5 369:3,9 381:10 397:5 <b>defendant</b> 61:15 62:9 68:15 232:17	232:18 351:10 432:21 434:2 444:5 459:2 461:14 483:12 484:6 <b>defendants</b> 290:20 292:15,18 326:14 351:14 352:6 358:7 432:7,10 433:2 <b>defender</b> 2:13 3:7 3:14 322:20 335:12 349:6 352:2 361:4,6 362:10 363:1 368:21 371:3,14 377:1 380:10 486:4 <b>defender's</b> 326:15 326:18 350:21 352:1 361:13 376:17 <b>defenders</b> 2:3 318:5 327:9 335:9 336:2,4 <b>defending</b> 307:19 318:11 332:8 <b>defense</b> 1:1,7 2:14 2:15,16 3:6,10,11 4:12 6:4 89:11 101:15 103:11 104:3 105:12 115:9,11,11 139:2 139:5 148:10,11 148:20 149:8,10 149:14,17,21 150:3,12,18 151:6 151:10,13,13,14 152:9,11 156:15 164:5,13 169:5 174:1 224:18 232:4 233:2,3 258:14,19 267:16 273:17 274:11 278:3 283:16 284:4 293:15 294:4,18 295:9	296:20 300:10,13 304:15,19 305:4,4 305:6,10 306:10 306:22 307:1,9,18 307:22 309:20 310:5,6,8,10,14 310:17,17 311:4 311:11,13,17,20 312:7,13,15,22 313:2,6,17,19 314:2,17,19,21 315:2,7,12,13,15 315:19,22 316:3,8 316:10,11,13,18 316:22 317:1,2,4 317:5,6,7,10,12 317:12 318:7,8,13 319:13,17,19 320:8 321:15,18 321:21,22 322:1 322:14 323:19,22 325:1,5 326:7,20 326:21 327:18 328:4,15,21,22 329:10 330:1 332:4,7 334:18 338:20 341:8 345:19,20 348:1 349:8 353:15,20 356:6 358:1,16,22 361:9,22 362:2,4 362:7 363:7 365:14 370:21 372:19,21 375:17 375:18 376:7 380:9 382:12 389:13,21 390:1 395:6,16 399:10 400:17,20 401:13 402:12 403:4 407:22 414:9 421:6 422:19 423:20 424:9 425:8 426:22 475:11 483:2 499:17 <b>Defense's</b> 274:3	<b>defenses</b> 101:11,12 105:8,10 150:2 156:19,21,21 206:11 473:22 <b>deference</b> 252:11 252:20 <b>define</b> 163:17 277:21 476:18 <b>defined</b> 122:13 163:1 179:7 283:22 286:5 299:18 <b>defines</b> 267:17 284:21 <b>defining</b> 268:6 269:21 <b>definite</b> 475:16 <b>definitely</b> 468:20 <b>definition</b> 16:7,19 17:2 78:11,11,12 78:13 118:16 122:16 123:7 124:1,5,17,22 125:3,11,17 126:9 126:10,13 127:8 128:10,11,16,22 129:2,8,10,15 131:19 138:15 139:3 141:8,21,21 141:22 172:8 179:9 216:16 221:6 258:17,18 258:21 259:5 275:21 278:8,9,21 289:20 295:4,16 339:4 417:16,19 <b>definitions</b> 78:16 99:18 100:14 110:5,15 111:18 114:16 123:14,15 123:18 128:21 129:22 136:22 143:13 148:2 159:4 258:12 262:2 268:5,13,18 269:10 270:21 272:14 295:7
--	---	--	--	---

298:17 299:8	3:16 6:3 89:11	250:11 331:13	270:12 275:16,17	485:14 486:2,20
<b>degrade</b> 97:17	99:3 104:3 164:4	<b>describes</b> 23:13	<b>determinations</b>	487:3 488:11
124:9 126:19	164:13 173:22	<b>describing</b> 85:3,9	269:8	491:5 500:15
127:6,18 154:17	258:14,19 259:9	190:13 329:12	<b>determine</b> 140:12	<b>diet</b> 7:5
<b>degrading</b> 97:9	263:8 265:2 267:4	<b>description</b> 226:19	143:9 145:6 154:2	<b>differ</b> 484:4
<b>degree</b> 73:6 479:3	267:8,12,15	<b>Desert</b> 472:22,22	154:11 156:9	<b>difference</b> 118:22
<b>degrees</b> 117:9	272:21 273:17	<b>deserved</b> 32:8	172:22 187:9	126:12 149:5
<b>delay</b> 232:4 403:3,5	274:3,11 278:3	<b>deserves</b> 50:10	264:10 273:9	185:9 189:18
<b>deliberate</b> 8:13	282:11 283:3,3,16	84:12 86:19,19	281:15 283:8	191:19 208:3,20
<b>deliberately</b> 266:19	284:4 286:2	<b>designated</b> 1:21	296:19 297:1	209:2 213:21
<b>deliberating</b> 65:17	290:16 293:15	42:18 309:1	342:8 348:13	259:20 262:20
<b>Deliberation</b> 4:19	294:3,17 295:9	<b>designed</b> 162:3	<b>determined</b> 7:15	268:7 444:2
<b>deliberations</b> 62:6	296:20 297:11	297:1 324:22	193:9 265:9	450:12
111:20 320:21	300:10,13 330:11	414:3 417:6	276:19	<b>differences</b> 208:8
<b>delighted</b> 256:19	368:22 371:4,15	<b>desire</b> 127:19	<b>determines</b> 140:4	268:4 474:3
430:11	380:12 386:4	179:19 314:5	174:10 263:19,21	<b>different</b> 12:1 21:2
<b>delivered</b> 350:16	414:17 434:12	358:3,4	342:5,6	35:18 41:5 47:16
<b>delivery</b> 326:5	435:19,22 437:10	<b>desires</b> 124:10	<b>determining</b>	53:13 76:20,22
<b>demean</b> 97:5	440:22	154:17	178:16 283:20	77:6 78:22 79:4,4
<b>demeaning</b> 97:9	<b>departments</b>	<b>desk</b> 370:11	286:14 295:6	91:2,3 146:11
<b>demographics</b>	466:10 477:17	<b>desperately</b> 386:1	<b>Detroit</b> 285:7,19	147:4 156:17
79:21	<b>depending</b> 93:15	<b>despite</b> 93:21 322:3	286:7 293:8	159:6 166:21
<b>demonstrate</b> 10:9	153:4 243:7	331:6 332:9	<b>DETs</b> 307:5 309:7	171:19 173:8
406:9	271:20 281:9	<b>detail</b> 114:14	<b>develop</b> 12:16 23:2	178:17 187:16
<b>demonstrated</b>	282:7 283:22	159:17 160:16,21	409:15 410:12	188:7 195:9,10
336:20 406:4	351:11 440:14	161:1 170:3 171:6	427:4 456:8 464:3	202:19 207:8,12
<b>demonstrates</b>	446:7	171:8 177:19	464:15	208:5,19 209:16
231:6	<b>depends</b> 119:7	226:15 390:5	<b>developed</b> 102:1	211:9 213:7 217:1
<b>demonstrations</b>	443:20,20,21	<b>detailed</b> 143:22	151:17 230:19	217:3 224:10
341:13	<b>deployed</b> 239:3,9	163:6,11 261:14	238:12	243:6 244:16
<b>denial</b> 95:10	239:12,15 472:20	302:13 325:7	<b>developing</b> 340:12	249:17 250:1
<b>denied</b> 374:14	<b>depth</b> 327:16	413:18	369:7 416:10	251:21 253:2
391:15 395:19	<b>deputies</b> 431:22	<b>detailing</b> 310:10	463:19	255:17 258:15
<b>denominator</b>	433:16 434:15	<b>detecting</b> 487:20	<b>development</b> 2:19	262:2,8 264:13,14
178:15 182:16	439:14	<b>detective</b> 302:14	311:19 365:4	264:14 268:13,15
214:15 223:22	<b>deputy</b> 3:4 405:6	<b>detectives</b> 267:7,11	412:10 415:12	270:21,21 271:2,3
260:3 273:9,19,19	411:19 413:9	283:2 419:8,21	417:15 469:12	274:22 275:22
279:15 280:20	414:11 428:3	437:22 467:11	470:14	277:19,21,22
281:9 282:2	439:22 469:14	468:5	<b>deviate</b> 340:14	278:22 279:9
283:13 286:14	486:4	<b>determinate</b> 386:7	<b>deviation</b> 439:20	281:12 283:21
289:16 477:6	<b>derive</b> 112:3	386:10	<b>Devin</b> 3:15 98:22	295:8,21 296:10
<b>dense</b> 143:21	181:13	<b>determination</b>	111:8	306:8 318:14
155:10	<b>deriving</b> 112:20	173:5 180:18	<b>devoted</b> 217:11	335:21 339:7
<b>Denver</b> 7:7,7 10:11	<b>describe</b> 23:6	200:8 221:9,19	305:17 431:9	359:6 361:3,17,20
11:2 47:8 59:13	190:16	222:1 236:10	468:6	367:8,16 380:16
<b>deny</b> 328:1 394:2	<b>described</b> 16:18	250:10 265:17,21	<b>Diego</b> 3:4 307:4	382:9 410:3
<b>department</b> 1:1 3:7	127:12 146:12	267:18 269:6,6	322:21 326:18	424:22 435:6

446:14 447:20	<b>directly</b> 46:8	340:13	273:13,15,22	380:6,10,10
456:9,10 466:8	171:18 172:8	<b>discuss</b> 100:11	342:15 440:13	427:15 456:14
467:4 469:6 480:8	262:15 274:19	177:5 178:19	<b>dispositions</b> 170:22	464:16 468:8
480:13,14,17	392:13 421:11	305:5 319:6,13	243:11 291:4	472:21 479:1
481:3 483:17	437:13	324:3 325:20	294:11 338:14	<b>division's</b> 384:5
487:17 490:5,6	<b>director</b> 1:21 2:3,9	401:15	356:12	<b>divisions</b> 427:7
493:2 495:7	2:12,14 3:7,12	<b>discussed</b> 152:6	<b>disproportionate</b>	<b>DNA</b> 382:16 429:3
<b>differently</b> 31:20	256:16 304:18	163:5 181:12	349:20	432:8 460:20
41:19 140:18	336:1 349:2	182:8 476:3	<b>disregarding</b> 66:1	462:13 467:22
209:5,8,13,17	368:20 379:10	490:17 492:17	<b>disrespect</b> 441:14	469:3 480:21
211:11 262:4	422:14 467:18	494:21	<b>disrobe</b> 122:22	<b>docket</b> 453:2
361:7 400:19	<b>disagree</b> 193:10,19	<b>discussing</b> 145:2	<b>disseminated</b>	<b>doctor</b> 26:7 36:3
<b>differing</b> 129:6	354:16 444:11	175:13	352:10	49:17 256:20
<b>differs</b> 80:18 244:5	<b>disagreement</b>	<b>discussion</b> 73:11	<b>dissertation</b> 486:9	467:17
269:11	193:14 197:7	74:12 75:10,14,18	<b>dissipates</b> 143:5,10	<b>doctor-patient</b>
<b>difficult</b> 19:20	<b>disagreements</b>	76:1 84:5 90:10	<b>distance</b> 54:4 96:3	469:8
23:18 83:20 146:8	237:20	121:22 145:7	96:4 170:10	<b>doctoral</b> 486:8
162:5 170:15	<b>disappear</b> 303:20	169:19,22 170:12	<b>distinction</b> 116:17	<b>document</b> 8:11
209:12 259:18	<b>disappointment</b>	170:12 202:17	136:21 150:16	<b>documented</b>
286:17 296:12	452:7	251:8 329:9,11	485:17	264:15 302:17,22
303:17 317:17	<b>disapprove</b> 394:3	<b>discussions</b> 86:4	<b>distinctions</b> 498:8	<b>documents</b> 131:17
364:21 368:1	<b>discharge</b> 172:7	87:14 338:5	<b>distinguish</b> 262:17	<b>DoD</b> 4:7 93:8 171:1
370:14 421:22	178:10 181:20	<b>dish</b> 71:10	<b>distinguished</b>	172:9 173:9
465:16	182:4 224:22	<b>dislike</b> 488:5	368:13 488:22	188:11 202:5,6,8
<b>difficulties</b> 101:2	385:6	<b>dismissal</b> 233:6	<b>distinguishes</b>	203:21 207:1,4,15
389:20	<b>discharge/resign...</b>	293:1 294:6	487:18	209:7 216:2
<b>difficulty</b> 353:19	294:7	297:17 440:14	<b>district</b> 2:2,12 3:4,5	217:18,21 226:21
<b>digested</b> 6:18	<b>discharged</b> 182:2	<b>dismissals</b> 224:8	3:15 7:4 177:16	241:15,18 244:5
<b>digital</b> 467:22	385:17	<b>dismissed</b> 189:3	214:11 291:14	252:3 287:2,9
<b>dignity</b> 483:6	<b>discharges</b> 224:15	223:19 224:20	363:9 379:17	425:14
<b>diligence</b> 396:5	230:7	228:12,17 234:2	417:9 430:7	<b>DOD's</b> 172:9
<b>diligent</b> 59:22	<b>disciplinary</b> 481:14	290:22 292:21	471:13 485:15	190:14 241:22
<b>DILLON</b> 1:22	<b>discipline</b> 162:4	294:1	<b>disturbing</b> 19:19	242:5 329:15
<b>diminish</b> 138:18	484:18	<b>disorder</b> 487:8	59:6	<b>dog</b> 44:13
149:1,15	<b>disclosed</b> 493:8	<b>dispatcher</b> 31:15	<b>diverse</b> 413:11	<b>doing</b> 7:20 14:15
<b>diminishes</b> 410:11	<b>disclosing</b> 495:19	<b>dispense</b> 116:13	<b>divide</b> 280:4,6,15	28:20 32:2 38:10
<b>dinner</b> 57:1 445:5	<b>disclosure</b> 6:7	<b>dispose</b> 297:3	281:4,5 336:13,14	39:19 63:5 67:6
<b>dire</b> 307:16 370:1,2	463:21 464:6	<b>disposed</b> 218:4	425:6	71:3 76:5 89:13
<b>direct</b> 22:6 112:12	<b>disclosures</b> 463:22	<b>disposition</b> 4:7	<b>divided</b> 177:3	99:4,13 153:15
160:12 320:13	466:19	171:3 172:2	287:1 289:9 315:8	160:8 168:16
413:16 416:5	<b>disconnect</b> 17:7	173:20 174:15,20	476:20	199:3 209:17
470:22	<b>discouraged</b> 441:10	218:8 219:1,10,12	<b>dividends</b> 230:14	211:10 213:18
<b>directed</b> 21:22	<b>discovered</b> 283:1	219:22 220:5,8	<b>dividing</b> 280:11	235:5 239:18
<b>direction</b> 169:13	<b>discovery</b> 365:18	223:10,13 227:10	<b>division</b> 2:5,7,10,17	244:4 248:11
184:8 212:9 251:6	<b>discrepancy</b> 16:20	228:5 241:4,14	3:1,4,14 107:3	254:19 257:4,15
299:5 495:10	<b>discretion</b> 386:12	242:7 244:11,12	171:14 315:2	280:17 281:7
<b>directions</b> 383:15	<b>discretionary</b>	253:13,15 263:9	317:2 327:3 380:5	283:1 287:9,10

301:22 309:1	482:9	<b>dropping</b> 203:8	<b>dynamic</b> 418:12	<b>effective</b> 104:11
345:4 363:10,11	<b>draft</b> 164:18,19	<b>drove</b> 79:21 351:5	<b>dynamics</b> 20:14	109:8 113:21
366:21 372:7,9	165:3,14	<b>drug</b> 134:10 136:2	408:6	166:7 326:5 327:2
373:18 375:20,21	<b>drafting</b> 135:20	136:10,15,17		332:13,15 355:9
395:13 396:5	<b>drag</b> 57:20,21	157:15 183:16	<b>E</b>	355:18 423:4
405:10 408:14	246:8	248:5 386:19	<b>ear</b> 68:4	444:22 445:19
447:2 450:1 458:4	<b>dragged</b> 60:11	387:3,6 459:13	<b>earlier</b> 24:12 49:10	<b>effectively</b> 146:9
458:9 460:7	<b>drags</b> 60:13	<b>drugs</b> 21:9 82:20	120:14 127:10	166:9 358:17
462:18 471:7	<b>dramatic</b> 230:4	378:9 450:18	138:6 140:2	393:5 431:15
489:19 498:17	<b>dramatically</b>	<b>drunk</b> 32:6 43:21	141:10 152:6,20	<b>effectiveness</b>
<b>domestic</b> 2:11 7:6	282:10	45:6,6 69:8 77:17	158:19 201:18	327:10
52:15 97:5 347:16	<b>drank</b> 47:14	78:1,8,9 84:4	204:4,22 205:5	<b>effects</b> 386:11
412:5 421:19	<b>drapes</b> 247:18	86:13 341:11	250:11 254:5	<b>efficacy</b> 321:12
442:15 445:9	<b>draw</b> 77:5 278:13	448:4 492:6	300:19 322:11	<b>efficiency</b> 327:9
453:8,19 454:13	495:22 496:3	<b>DSO</b> 306:22 307:7	323:2 331:13	<b>efficient</b> 327:1
455:7,15,20	<b>drawn</b> 170:4	308:19 321:22	370:18 403:7	440:3 443:3
456:19 457:4,16	<b>dream</b> 164:6	322:4,7,12 323:6	478:2 497:7	<b>efficiently</b> 500:10
457:20 458:9	<b>dress</b> 55:20 57:22	324:17 326:3,20	<b>early</b> 36:1 189:16	<b>effort</b> 429:13
459:20 460:6,7	58:9	326:22 327:3,6,10	211:3 253:11,19	<b>efforts</b> 84:19 88:10
<b>dominate</b> 13:4	<b>dressed</b> 53:20,20	328:16,18,20	285:15 293:5	220:16 230:21
<b>DoN</b> 2:6,14 425:14	<b>dresses</b> 51:1 57:12	329:12 331:3	456:20,21	231:5 314:8
<b>Donald</b> 304:18	<b>drill</b> 236:14	332:7	<b>earn</b> 463:20	<b>egregious</b> 118:20
305:1	<b>drink</b> 32:17 42:7,19	<b>DSO's</b> 322:19	<b>ears</b> 77:9	<b>eight</b> 219:7 220:7
<b>doors</b> 59:22	42:20 43:4 48:10	329:13	<b>easier</b> 18:4 300:15	271:13 272:16
<b>dosage</b> 343:22	50:4 83:3 87:19	<b>due</b> 135:11 136:9	381:9 443:4	273:5 274:14
375:1	87:21 88:13 89:16	140:1 142:8	459:12 493:17	305:15 316:9
<b>dose</b> 375:5	89:17 491:11	157:14 158:4	<b>easiest</b> 23:5 409:4	320:4 468:6
<b>double</b> 49:15 50:1	<b>drinkers</b> 42:7	250:22 276:14	<b>easily</b> 328:3	<b>eighteen</b> 334:2
72:2	<b>drinking</b> 27:13	277:3,15 289:15	<b>East</b> 1:13 427:22	<b>eighth</b> 79:15
<b>doubt</b> 149:3 151:19	29:8 50:3 77:12	396:5	<b>Eastern</b> 314:17	<b>either</b> 8:22 9:9
179:12 200:11,18	77:13 82:19	<b>dumped</b> 188:4	<b>easy</b> 333:3,5 500:1	33:13 35:2 61:20
235:13 236:9	247:11 266:11	<b>Dunn</b> 1:18 11:9	<b>eat</b> 60:2	118:1 134:9 143:3
291:16 369:18	447:18,22	190:18,20 191:1,6	<b>echo</b> 364:20 369:22	158:14 211:13
<b>download</b> 470:16	<b>drinks</b> 50:9 86:22	191:10 192:2,10	374:21 376:20	233:10 242:2
<b>downstairs</b> 450:10	87:15 491:17	192:14 287:4,7,13	382:15	245:12 268:10
<b>downtown</b> 177:12	<b>drive</b> 45:20 53:21	287:17,22 288:2,5	<b>edge</b> 499:14	300:8 302:14
178:11 214:11,14	363:19 364:19	288:9,11,16 289:5	<b>educate</b> 5:21 53:6	351:11 362:6
<b>Dr</b> 3:12 37:2 39:18	<b>driven</b> 60:8 376:1	<b>duties</b> 316:7 408:21	71:2 79:3	364:7 387:10
256:15,21 270:8	<b>driver</b> 18:21 42:18	412:19 416:17	<b>educated</b> 95:22	402:19 420:12
270:10,18 278:10	450:1	485:3	251:20 355:18	434:15 446:11
287:6,7,12,15,20	<b>drives</b> 54:15 60:14	<b>duty</b> 59:9 305:2	<b>education</b> 7:11	451:4
288:1,4,7,10,14	<b>driving</b> 43:21 55:4	315:15 327:4	12:6,9 92:22	<b>El</b> 473:6
288:22 289:6	121:9 318:1	356:5 365:8 366:7	308:11 354:22	<b>elaborated</b> 165:22
297:5 299:12	340:16 492:7	366:15 368:6	<b>educational</b> 489:21	<b>elaborating</b> 164:3
301:11,20 302:3	<b>drop</b> 184:20 242:4	472:14,17 473:15	492:10	<b>elder</b> 442:12
303:9 304:8	304:2	<b>DV</b> 442:8 443:21	<b>educator</b> 52:14	<b>elderly</b> 51:22
332:16 466:22	<b>dropped</b> 329:18	445:20	<b>effect</b> 109:2,5	<b>elect</b> 459:17

<b>elected</b> 218:21 228:1 471:12 472:2	<b>emergency</b> 49:4	<b>engage</b> 141:9,16 341:22	<b>error</b> 388:18	249:4
<b>element</b> 101:7 132:17 133:9 135:15 137:6 139:5 141:11 144:20 145:4 148:9 149:2 154:21 155:16,20 156:4,9,13 157:13 157:13 179:18 185:13 190:5 222:5	<b>emerging</b> 347:20	<b>engaged</b> 130:14 133:19 248:6 459:3	<b>escalators</b> 443:14	<b>evaluation</b> 354:4
<b>elements</b> 100:19 101:6 103:2,4 110:15 131:18 138:7 139:4 148:22 154:11 157:7 179:8,11 250:12	<b>emotionally</b> 376:1 376:8	<b>engaging</b> 122:3 158:6 244:6 345:18 348:11	<b>escape</b> 475:18	<b>evening</b> 42:15 141:11 467:9 471:15 497:18,19 501:6
<b>elephant</b> 272:5	<b>emphasize</b> 287:15 298:15 342:20	<b>engenders</b> 441:13	<b>escapes</b> 388:16	<b>event</b> 416:13 417:3
<b>elevating</b> 253:15	<b>empirical</b> 167:5,12 279:7	<b>engine</b> 161:1	<b>especially</b> 7:1 33:5 252:19 262:2 290:14 333:8 360:9 370:4 388:4 462:11	<b>events</b> 245:2 312:9 329:3
<b>Eleven</b> 180:16	<b>employ</b> 344:11,12	<b>English</b> 215:1 229:13	<b>essence</b> 71:9	<b>eventually</b> 363:11
<b>eligible</b> 306:21 364:4	<b>employment</b> 343:16	<b>enhanced</b> 327:11	<b>essential</b> 147:7 413:2 466:16	<b>everybody</b> 11:19 18:1 54:20 167:1 208:4,4 256:14 343:7 376:19 404:3,6 480:12
<b>eliminate</b> 152:8 225:2 283:19 386:5,14	<b>encloses</b> 124:12,14 259:12 481:19	<b>enlisted</b> 320:3,4	<b>essentially</b> 146:5 157:16 402:11 416:1	<b>everybody's</b> 383:17
<b>eliminated</b> 115:9 115:12 150:21 418:21	<b>encounter</b> 67:1 279:14	<b>enormous</b> 91:11 187:22	<b>establish</b> 439:4 450:10	<b>evidence</b> 9:1 50:10 61:9 66:1 138:13 138:17,19,21,22 139:4,17 145:5 148:22 149:2,13 149:15 151:15,18 151:22 167:11 179:6,11,17,21 192:11 196:18 200:19 226:3 229:4 235:1,19,21 236:13 238:12 242:14,18 251:1 265:19 266:16 267:19 268:21 275:7 276:1,7,15 277:4,15 279:4,22 281:5,6 284:15 288:20 291:15 300:21 301:7 324:1 326:4 355:3 355:12 381:15 395:11 418:19 451:19 464:9 467:22,22 477:8 477:18,21 480:20 494:6,16 498:15
<b>eliminates</b> 128:5 138:21	<b>encountered</b> 262:13	<b>entail</b> 305:8	<b>established</b> 310:18 322:17 333:21 404:20 407:8 410:22	<b>evidence-based</b> 359:10
<b>elite</b> 408:13	<b>encountering</b> 317:9	<b>enter</b> 47:4 387:20	<b>establishes</b> 265:19	<b>evidentiary</b> 187:9 224:9 432:15
<b>ELIZABETH</b> 1:16 1:19	<b>encounters</b> 461:18 461:19	<b>entered</b> 233:11	<b>establishments</b> 488:19	
<b>elk</b> 59:16	<b>encourage</b> 376:5 473:22 477:17	<b>entire</b> 82:22 269:15 320:2 329:15 408:8 437:16	<b>esteemed</b> 319:12	
<b>eloquently</b> 494:22	<b>encouraging</b> 450:3 450:7	<b>entirely</b> 125:22	<b>estimated</b> 271:13 273:1	
<b>else's</b> 266:12	<b>endeavored</b> 340:18	<b>entirety</b> 471:16	<b>estimates</b> 272:7	
<b>email</b> 329:6 420:12	<b>ended</b> 244:4 245:4 436:9	<b>entities</b> 9:1	<b>estimation</b> 129:7 150:10	
<b>emails</b> 312:8	<b>ender</b> 234:6	<b>entitled</b> 406:10	<b>et</b> 15:9,21 21:17 37:15 43:22 65:19 94:6 307:16 399:17	
<b>embarrass</b> 496:15	<b>endorses</b> 88:20	<b>entry</b> 322:8 432:4 483:10	<b>ethanol</b> 49:13	
<b>embarrassment</b> 497:6	<b>energy</b> 377:15 463:1 464:2	<b>environment</b> 239:3 239:12 478:6 482:12,13	<b>ethic</b> 314:4	
<b>embodied</b> 109:22	<b>enforce</b> 366:7 479:21	<b>environments</b> 239:9	<b>ethical</b> 310:14 313:6 499:15	
<b>embrace</b> 386:18	<b>enforcement</b> 218:22 222:2 258:13 261:3 263:16 264:14 266:22 271:2 280:10 303:16 304:1,6 446:16 459:15 474:16 482:10 490:4 494:15 495:7,17 497:1 499:15	<b>epidemic</b> 443:13	<b>ethically</b> 498:16 500:13	
		<b>equal</b> 222:4	<b>ethics</b> 498:7,10,11 499:7	
		<b>equally</b> 425:7	<b>European</b> 314:18	
		<b>equation</b> 91:16	<b>evaluate</b> 250:21 253:10 328:7 458:21	
		<b>erase</b> 264:17	<b>evaluated</b> 86:15	
		<b>erased</b> 494:9		
		<b>Eric</b> 171:15		
		<b>ERIK</b> 2:8		
		<b>erogenous</b> 126:17		

478:1 493:11 <b>evolution</b> 99:11 100:12 <b>evolves</b> 100:8 <b>evolving</b> 95:19 102:11 103:6 454:19 <b>ex</b> 106:10 <b>exact</b> 226:20 <b>exactly</b> 33:1 52:12 53:20 84:1 89:9 99:10 108:4 145:1 175:1 207:9 213:15 233:19 288:22 304:8 <b>exam</b> 266:15 471:2 <b>examine</b> 57:10 71:17 220:2 <b>examined</b> 94:22 <b>examiner</b> 193:3 468:13 <b>examining</b> 8:5 203:20 <b>example</b> 10:10 15:18 77:9 84:3 84:15 139:7 179:14 181:6 183:16 203:13,15 209:18 238:6 249:22 253:13 266:9 267:2 285:7 301:5 302:11 326:17 354:2 397:4 401:22 496:7 497:8 498:2 498:19 <b>examples</b> 10:6,7 72:5 137:1 138:5 395:5 <b>exceed</b> 477:9 <b>excel</b> 406:9 <b>excellent</b> 497:8 <b>exception</b> 61:19 459:22 <b>exceptional</b> 262:19 267:12,13 281:21 423:21	<b>exceptionally</b> 424:10 <b>exceptions</b> 358:7 <b>excite</b> 154:17 <b>exclude</b> 301:6 <b>excluding</b> 232:4 <b>exclusive</b> 325:14 <b>exclusively</b> 468:10 <b>exculpatory</b> 380:8 <b>excuse</b> 111:9 126:11 132:4 156:5 176:12,20 180:21 181:19 185:7 207:21 270:2 273:21 281:5 483:4 <b>executive</b> 2:3 110:19 112:4 113:8,21 163:1 164:2,20 165:4 336:1 408:20 <b>exercise</b> 42:4 244:7 <b>exercising</b> 340:14 <b>exhaustive</b> 463:3 <b>exist</b> 150:2,4,6,10 350:10 <b>existed</b> 353:1 <b>existence</b> 258:15 <b>exists</b> 47:6 155:19 299:10 <b>exits</b> 61:3 <b>exonerating</b> 436:6 446:11 <b>expanded</b> 231:2 339:1 <b>expect</b> 353:15 <b>expectation</b> 121:14 122:18,20,20 <b>expectations</b> 92:8 363:3 <b>expected</b> 325:9 410:5 <b>expecting</b> 56:15 249:16 349:11 <b>expensive</b> 423:18 <b>experience</b> 4:11,15 20:5 33:12 95:10	95:13 97:8 159:22 199:10,16 224:11 232:11 233:15 235:9 237:8 305:6 308:18,20 309:3,4 309:11 311:3,6 313:4,18 314:3,4 316:4,11 321:17 321:21 322:21 324:22 325:21 326:9 327:1 332:6 336:17,21 341:18 351:1 362:22 363:2,6 368:3,4 371:10 372:6,7,11 372:13 375:3 377:12 401:20 407:16,19 408:1,7 409:19 410:1,12 411:22 413:14 414:4 415:22 416:19 421:7 423:6,12,19 427:6 432:3 453:6 455:7 457:19 459:8 460:4,19,19 469:16 473:14 486:19 <b>experienced</b> 16:3 21:5 307:22 310:19 311:1 414:8,15 <b>experiencing</b> 20:17 21:6 22:11 96:2 <b>expert</b> 309:2 322:19 338:16,17 351:21 353:15,17 374:12,15 382:22 389:9 390:2,5,21 391:2,21 393:15 393:16 398:16 401:3,14 402:10 402:12,21 414:6 421:6,8 482:9 <b>expertise</b> 230:19 364:22 411:7 414:5 422:1	<b>expertly</b> 416:4 <b>experts</b> 160:5 307:21 310:21 353:12 358:17 365:20 373:14,14 382:16 411:20 414:1 419:10 420:14 421:4 424:1 429:2 432:9 480:16 <b>explain</b> 46:16 111:9 111:10 175:12 180:6 204:12 229:14 235:7 250:14 279:1 384:20 389:10 451:21,22 452:1 452:12,13 <b>explained</b> 101:17 216:15 278:20 <b>explaining</b> 153:14 159:17 164:2 <b>explanation</b> 162:21 163:7,12 <b>explicit</b> 255:1 <b>exploitation</b> 453:20 453:21 460:14 <b>explore</b> 85:2 389:8 <b>exposé</b> 441:3 <b>exposed</b> 81:13 95:2 169:16 499:22 <b>exposing</b> 127:15,19 <b>exposure</b> 115:21 123:9 <b>express</b> 5:22 319:22 456:22 457:21 458:2 <b>expressed</b> 80:9 486:6 <b>extensive</b> 409:22 <b>extensively</b> 435:14 <b>extent</b> 90:18 151:9 159:13,15 171:5 211:13 241:10 272:2 278:17 <b>external</b> 447:6 493:10	<b>externally</b> 495:5 <b>extreme</b> 97:2 <b>extremely</b> 150:8 246:4 462:18 <b>eye</b> 68:10 442:18 <b>eyes</b> 11:10
<b>F</b>				
				<b>fabricated</b> 246:17 246:21 266:19 269:16 276:13,17 276:20 295:13 <b>fabulous</b> 462:3 <b>face</b> 35:22 52:21 68:22 95:3 224:15 316:12 358:14 409:19 410:3 495:6 498:3 <b>face-to-face</b> 95:15 451:20 <b>Facebook</b> 480:22 498:2 <b>faced</b> 323:19 324:4 <b>facets</b> 415:21 490:15 <b>facial</b> 28:15 <b>facilitate</b> 443:2 470:11 <b>facilitated</b> 334:11 <b>facilities</b> 364:17 <b>facing</b> 323:5 351:10 <b>fact</b> 32:7 62:4,20 94:7,15 140:7,15 150:3,7,9,15,17 150:18,19,20 152:22 155:7,9,18 156:1,10,10,11,15 157:1,2 193:9 218:4,6 239:12 251:10,18 262:1 266:17 272:22 276:19 278:13,20 279:8 291:13,22 294:4 295:7 297:2 297:10 300:10 303:14 334:8 346:16 366:13

380:1 383:3	279:8 295:13	103:13,19,19	61:11	<b>film</b> 121:16
387:21 393:17	297:2 299:18	113:10 116:9	<b>fenced</b> 331:12	<b>filming</b> 443:15
472:1 484:10	346:9	164:18 326:14,15	426:3,8	<b>final</b> 223:10 227:10
<b>facto</b> 106:11	<b>falsely</b> 321:1	375:3 377:11	<b>FETI</b> 359:5 467:14	230:15 249:15
<b>factor</b> 41:20,22	<b>familiar</b> 34:16	453:22 454:4,7,9	<b>fewer</b> 199:15	404:6
297:21 340:16	173:22 247:4,6	460:14 465:2	290:13	<b>finally</b> 78:10
347:22 348:7	248:3 389:14	478:15	<b>fibers</b> 61:10	135:16 228:3
490:5 497:6,7	442:4 472:18	<b>feedback</b> 170:11	<b>fidelity</b> 213:12,15	277:9 279:2
<b>factored</b> 208:13	<b>families</b> 376:11	318:19 406:12	220:15 226:13	345:10 429:20
<b>factors</b> 41:2 340:12	<b>family</b> 42:9 44:18	469:20	241:10 323:4	<b>financially</b> 343:13
347:9,13,15	252:18,19 379:13	<b>feel</b> 43:4 53:9 65:4	<b>field</b> 36:16 60:12	397:15
<b>facts</b> 61:21 69:11	402:20,20 415:13	77:4 240:15	96:14 99:20 170:9	<b>find</b> 14:3,19 16:11
101:11 147:17	442:3 481:12	335:19 353:7	272:9 373:15	62:5 72:1,11 74:2
247:4,5 321:8	496:8,9,18	406:15 422:22	382:10 428:6	130:21 200:12
334:11	<b>famously</b> 332:17	452:8 477:1,4	430:20 454:20	213:1 238:8 284:4
<b>factual</b> 131:18	<b>fancy</b> 212:3	490:13 495:18	<b>fields</b> 304:14	356:15 369:8,21
140:6,20	<b>Fansu</b> 2:15 309:19	<b>feeling</b> 43:6,20 67:1	<b>fight</b> 78:2 230:13	375:22 381:16
<b>fail</b> 452:10	<b>fantastic</b> 66:14	339:16,17	323:21 324:3	384:3 429:21
<b>failed</b> 452:8	<b>far</b> 10:5 136:13	<b>feels</b> 457:3	343:3 400:17	442:14,16,19
<b>failure</b> 302:20	162:16 163:7	<b>feet</b> 28:7	<b>fighting</b> 430:21	445:16 491:9
330:13	201:21 308:18	<b>fell</b> 261:8 273:16	<b>figh</b> ts 326:3	492:20
<b>fair</b> 44:14 71:21	372:14,16 376:22	<b>fellow</b> 87:17 429:21	<b>figure</b> 81:19 123:17	<b>finding</b> 89:22
78:12 251:7 324:2	377:8 381:2	471:17 476:2	135:19 215:10	381:11
327:10 333:22	425:19 469:10	483:22	218:12 219:6	<b>findings</b> 225:6,7,10
334:22 395:1	480:2 495:18	<b>felonies</b> 7:5 292:16	254:9 282:21	228:18 272:12
<b>fairly</b> 209:5 244:22	<b>farm</b> 464:17	336:15,15,22	303:6 341:5 383:2	303:11 323:11
271:16 300:7	<b>fashion</b> 498:14	337:1 352:17,19	<b>figures</b> 91:10	365:14 388:10
444:22	<b>fashioned</b> 105:7	363:12,13 378:9	183:12 189:5	<b>finds</b> 272:15 382:5
<b>fairness</b> 483:5	<b>faster</b> 233:20 470:9	378:15 438:20	192:17 218:1	<b>fine</b> 12:10 48:20
<b>faith</b> 334:21	500:10	440:12	234:11	58:11 72:18 75:3
<b>fall</b> 31:20 116:2	<b>fat</b> 54:7	<b>felony</b> 61:18 292:19	<b>figuring</b> 119:18	198:2 203:1
190:6 191:2,12	<b>fathers</b> 63:22	340:20 349:15	184:8 360:14	<b>finger</b> 32:22 124:7
203:7 218:15	<b>fault</b> 27:10 29:5,14	351:9 362:19	<b>file</b> 233:5 245:8	125:6,9
253:3 260:18	29:15 30:7,10	378:10,20 379:15	280:14 291:18	<b>finger's</b> 495:10
427:14 493:16	31:10,11,12,16	431:19 434:6	296:22 387:18	<b>fingerprint</b> 432:9
<b>fallen</b> 190:7 211:3	32:11 33:10 36:10	438:12,15 440:10	<b>filed</b> 280:12 282:19	<b>fingers</b> 495:8
<b>falling</b> 449:9	57:16	443:16 459:21,21	285:8,10,21	<b>finish</b> 252:2
<b>falls</b> 130:10 142:7	<b>favor</b> 334:4	460:7,8,12 469:18	290:17 292:8,11	<b>finished</b> 185:6
142:11 204:7,11	<b>FBI</b> 262:17 265:6	469:19	349:16 353:4	325:8 395:9
204:12 263:11	267:1,6 271:12	<b>felt</b> 24:14 188:18	365:18 438:6	<b>firm</b> 363:7 423:6
415:4	274:14 278:10	69:5 70:3 94:18	454:8	<b>firmly</b> 239:16
<b>false</b> 222:4,10	468:15	<b>female</b> 31:9 34:17	<b>files</b> 291:14 302:17	<b>first</b> 5:9 10:10
246:22 265:10,18	<b>fear</b> 78:17,17 84:8	97:6 122:15	302:22	21:11,15 22:15
266:8,18 267:10	117:15 118:5	258:20 259:3,3	<b>filing</b> 285:2 300:4	34:3 45:4 53:6
268:3 269:7,13	137:22 418:5,5	443:10	<b>filings</b> 352:20	60:17 69:22 70:1
272:3,11,14,22	<b>February</b> 297:8	<b>females</b> 32:5	<b>fill</b> 71:6 92:9	71:8 73:7 77:4
273:2 275:17	<b>federal</b> 1:21 102:11	<b>fence</b> 60:12,13	<b>fills</b> 110:15	86:9 87:9 90:2

100:2 102:2	451:15	<b>folks</b> 6:8 12:6 17:8	314:20 315:7,16	115:17
120:21 124:3,16	<b>five</b> 14:5 98:8	37:20 50:18 78:15	315:21 316:2	<b>Fort</b> 411:17 421:17
126:14 148:6	115:16 121:17	87:22 162:17	318:10,13 325:17	426:19 472:18
155:14 157:12	184:5 232:8,10	254:1 347:18	399:20,21 401:2	473:6
171:20 173:13,19	308:7 310:19	369:9 371:7 373:4	404:19 405:20,22	<b>forth</b> 110:6 167:7
175:9,14 177:13	316:4 340:6 352:5	376:5 409:18	408:8 409:8	174:17 226:8
195:1 210:22	364:9,10 372:10	410:18	430:21 431:8	301:7 308:12
216:18 217:14,21	378:18 411:18	<b>follow</b> 43:15 142:2	447:4 466:6 478:7	328:6 479:11
220:12 222:15	432:4 476:7	192:16 216:2	<b>Force-specific</b>	<b>forthcoming</b>
227:16 234:10	<b>five-day</b> 412:20	252:2 253:8	173:18	496:16
240:8 253:15	417:5	335:18 485:6	<b>forced</b> 15:18 16:22	<b>fortunate</b> 465:21
257:2 270:10	<b>five-year</b> 107:7	<b>follow-up</b> 167:16	37:13 100:15	<b>Forty</b> 225:5
273:8 295:14	<b>fixed</b> 107:13,13	189:11 217:20	159:2	<b>forward</b> 33:13
305:13 306:14	328:3 386:1	<b>followed</b> 30:1 44:5	<b>forces</b> 20:4 102:18	41:13 57:20 89:12
307:8,17 308:2,11	<b>fixing</b> 345:5	189:1 310:10	130:4 131:7 319:7	173:1 193:4 195:4
310:4 313:10	<b>flag</b> 184:21	<b>following</b> 52:22	372:2 410:15	196:7 198:12,16
316:3 318:9	<b>flash</b> 54:6	53:18 204:13	<b>forcible</b> 123:8	199:9 200:20
321:15 337:17	<b>flawed</b> 217:19,19	264:10 267:17	244:19 258:17	201:7,16,17 204:6
368:14 375:15	217:21	<b>follows</b> 35:15 37:12	274:15,18 277:20	204:13,17,22
383:13 384:11	<b>fleeing</b> 489:4	67:15 269:12	278:9 433:3	221:12 223:7
391:15 393:4	<b>flees</b> 60:16	<b>food</b> 250:3	<b>forcibly</b> 258:20	233:1 239:21
404:16 412:13,18	<b>flesh</b> 68:7	<b>foot</b> 28:7 29:18	306:18	240:2 242:16
412:20 416:16	<b>flip</b> 54:15 140:8	<b>footage</b> 488:10	<b>forcing</b> 131:7	250:16 252:20
419:12 423:9	168:10	<b>football</b> 11:8,20,22	<b>foregoing</b> 98:9	254:8 275:19
428:17 431:2	<b>floating</b> 357:5	12:5	<b>foreign</b> 177:5 178:8	303:18 319:8
433:20,21 454:17	<b>floor</b> 72:16 363:4	<b>force</b> 2:7,8,17 3:6	211:1 241:20	335:3 422:6
456:7 470:7	442:6	22:2 33:21 36:8	<b>forensic</b> 61:9	429:13 444:3
472:17 475:2	<b>floozy</b> 53:3 58:8,10	49:22 58:18 68:1	266:15 373:21,22	451:4,19 452:2
480:5 485:11	<b>flops</b> 54:15	94:16,17 100:9,20	429:3 468:13	475:7
487:21	<b>flow</b> 295:22 296:3	101:12 115:15	480:19,20	<b>forwarded</b> 173:15
<b>first-line</b> 415:18	356:2 357:20	117:14,14 120:4,9	<b>forensics</b> 307:21	195:5
<b>fiscal</b> 103:10 106:5	<b>fly</b> 400:13	128:11,11,13,16	462:15	<b>forwards</b> 390:14
107:21,21 176:6	<b>flying</b> 165:7	128:21 129:13,16	<b>forget</b> 53:1 223:3	<b>fostering</b> 87:13
186:18 187:13	<b>focus</b> 14:20,22	129:19 130:11	323:3 324:19	<b>fought</b> 468:4
189:6 190:1 204:6	48:14 71:22 89:7	137:7,8,9,13,14	427:4	<b>found</b> 12:18 47:11
204:9,10 218:2	89:14 99:17 110:7	146:1,2,14,20	<b>form</b> 97:3 118:13	50:20,20 56:10
226:15 243:21	255:4 303:21	147:9 159:5 168:6	147:14 164:18	61:10 64:10 67:3
249:14 261:7	317:6 337:16	171:5,14 172:17	172:6 245:14,19	67:8 149:8 222:6
274:1 275:13	338:2 412:3 413:3	172:19 173:7,12	312:8	237:22 267:3
283:17 312:6	414:16 416:10	174:3,18,20 175:4	<b>formal</b> 33:14	271:16 272:21
323:7 329:16,18	490:7,9	177:6,10 181:6,8	311:16	273:6 285:15
329:19,20 349:12	<b>focused</b> 257:6	193:8,11 194:10	<b>formalized</b> 316:16	293:2,6 302:10
349:17 352:17	412:16 484:11	195:9,10 201:21	<b>format</b> 202:21	303:22 324:9
<b>fish</b> 82:16 125:7	490:2,11	207:11 208:9	<b>formed</b> 364:2 431:3	414:5 416:2
<b>FISHMAN</b> 1:22	<b>focuses</b> 307:14	253:18 269:7,12	<b>former</b> 310:22	449:20 450:2
<b>fist</b> 27:5,6	<b>focusing</b> 255:22	276:3 280:3	344:12	466:3 482:4
<b>fit</b> 190:13 245:11	477:11 481:18	289:10 314:16,19	<b>forms</b> 49:7,9	487:15 490:20

492:2 493:16 496:5 <b>Foundation</b> 3:12 256:16 <b>founded</b> 214:5 222:9,11,12 225:12 227:15 228:20 229:5 234:14,16 236:7 245:15 269:3 <b>founders</b> 333:17 <b>founding</b> 221:6,9 221:18,20 237:18 237:20 269:5 270:11 <b>four</b> 14:5 16:12 21:11,15,18 39:21 44:5 47:13 93:10 99:15 116:4 155:13 177:3 210:19 211:9 217:20 220:12 225:22 226:12 228:9 307:3 327:6 331:15 361:17 371:19 397:11 412:8 422:2 427:21 439:7 457:18 472:5 476:7 <b>Fourteen</b> 181:18 <b>fourth</b> 122:19 123:5 219:5 301:6 405:19 420:20 431:4 472:7 <b>fraction</b> 369:20 <b>frame</b> 231:16,18,20 231:21 <b>frames</b> 106:14 183:1 <b>frankly</b> 349:21 354:14 417:12 420:13 <b>fraternity</b> 67:4,6,19 <b>fraud</b> 118:6 137:22 <b>free</b> 471:3 482:21 <b>freedom</b> 472:3	<b>freely</b> 78:19 137:16 <b>frequent</b> 467:21 <b>frequently</b> 324:6 415:20 418:4,15 419:21 428:4 <b>fresh</b> 59:19 <b>freshman</b> 45:3 66:22 <b>freshmen</b> 67:7 <b>friend</b> 18:21 25:7 29:1 51:13 74:3 498:21 <b>friends</b> 42:9,17 44:8,17 45:5,8 46:14 48:21 337:18 449:20 <b>frightening</b> 39:17 <b>front</b> 11:2 85:22 192:1 197:16 215:8 248:11 383:16 433:19 445:20 481:2 498:12 <b>frustrated</b> 254:20 <b>frustration</b> 215:7,9 <b>fulfilled</b> 463:9 <b>full</b> 5:8 6:7 324:17 357:12 463:21 464:6 <b>full-time</b> 435:20 <b>fully</b> 455:10 <b>fun</b> 447:19 <b>function</b> 474:15 <b>fund</b> 397:13 402:20 <b>funded</b> 470:14 <b>funding</b> 332:1 396:10 <b>funds</b> 393:19 425:11 426:4,9 <b>further</b> 41:17 98:1 164:3 169:1,17 174:4 222:22 238:11 311:12 403:12 <b>future</b> 89:13 116:17 295:2 296:16 301:2	414:10 <b>FY</b> 104:7 107:11 175:15,17 176:1,2 176:4,15,19 184:9 184:12,14 192:18 202:10,10 204:2 204:18,19 205:16 205:20 221:11 224:7 228:16 240:10,19,20 241:5 242:6 253:9 253:12,22 254:2 <b>FY13</b> 240:15 <hr/> <b>G</b> <hr/> <b>G</b> 3:6 <b>Gallup</b> 22:4 <b>game</b> 11:8 <b>gaming</b> 448:4 <b>gamut</b> 434:21 481:20 <b>gap</b> 107:12 112:17 153:5 176:8 328:3 385:21 <b>gaps</b> 309:4 <b>Gary</b> 65:16 <b>Gas</b> 491:4 <b>gather</b> 464:8 <b>gay</b> 93:19 347:20 347:21 <b>geared</b> 470:17 <b>gender</b> 62:12,14 63:13 115:7 <b>general</b> 1:17,18 2:9 2:18 3:2 11:9 50:11,14 153:19 154:15 155:21 171:17,17 173:16 174:6,8,19,21 187:3,6 194:17,18 195:5,20 196:11 196:12 197:21 199:10,12 200:14 205:9 212:13 216:11,16 217:11 219:14 221:16 232:7 248:14,15	248:21 258:22 272:16 310:9 316:2,17 317:3 323:10 350:11,18 404:16 405:16 407:3,5,17 408:8 408:21 421:10 427:15 457:5,13 473:19,22 478:8 479:9 <b>general's</b> 3:16 99:1 497:2 <b>generally</b> 113:13 118:22 177:7 182:3 239:4 267:4 293:12 319:4 358:6 379:5 392:17 464:19 474:20 478:11 <b>Generals</b> 425:4 <b>generate</b> 151:19 411:7 <b>generating</b> 411:5 493:7 494:1 <b>genitalia</b> 122:14 126:15 <b>genitals</b> 95:2,3 <b>genre</b> 16:8 <b>gentleman</b> 51:22 <b>gentlemen</b> 98:13 209:11 403:17,19 <b>geographically</b> 316:14 317:18 352:10 <b>Georgetown</b> 439:10 <b>German</b> 64:4 <b>Gerry</b> 308:14 <b>getting</b> 46:4 50:13 54:11,19 85:21 92:22 168:19 185:13 201:14 211:21 212:21 244:9 251:1 331:14,20,22 340:8 374:10 378:11 382:22	389:15 396:19 448:4 458:8,13 459:1 491:22 496:17 <b>giggle</b> 82:5 <b>giggled</b> 95:8 <b>Gil</b> 482:9 <b>girl</b> 47:14 <b>girls</b> 12:21 13:12,13 58:18 59:4 <b>give</b> 9:11 10:7 15:13 23:10,19 25:13 27:15 32:1 36:20 39:10 56:10 69:15 72:4 85:15 86:1 88:15 99:15 113:10 144:12 165:14 171:7 175:20 183:12 213:13 214:15 215:21,21 217:16 220:15 226:13 252:11,19 254:13 302:20 323:16 330:16 346:22 349:13 353:10,14 370:12,13 381:1 395:4 400:12 401:3 402:17 407:13 469:19 474:7 480:15 <b>given</b> 15:6 137:16 170:7 204:14,16 218:6 225:20,22 226:2,5 239:7 251:11 277:6,18 288:20 313:1 347:6 366:9 413:8 452:9 476:5 500:9 <b>gives</b> 37:5 126:20 126:21 <b>giving</b> 50:16 56:17 75:1 114:7 143:21 175:18 328:4 331:12 427:11 493:21 <b>glad</b> 91:14 348:18
---	--	--	---	---

<b>glasses</b> 98:15	402:2,19 404:2,12	200:4 201:7	122:7 148:17	<b>graft</b> 299:9
<b>Glendale</b> 478:7	414:8 425:20	202:21 203:18	151:9,9,10,12	<b>grand</b> 433:16,17,19
<b>globally</b> 329:6	428:13 433:8,16	204:3 210:17	153:13 162:10	434:3 440:12
<b>go</b> 8:12 10:17 12:11	433:20 434:3	211:8,14 212:9	163:17 170:12	444:19,20
17:20 26:11,13	438:2 444:3,19	213:2,12,13 216:2	171:11 175:6,8	<b>grandfatherish</b>
48:6 49:18 60:2	445:1 447:19	240:16 243:20	182:10 185:16	52:20
65:3 76:6 83:16	448:4 451:3,19	245:7 247:18,20	212:8,12,15	<b>grandkids</b> 56:12
89:12 96:3,4	452:2 459:9,16	248:1 249:18	256:13,21 309:17	<b>grandmother</b> 32:21
98:19 100:10	460:9 463:8 467:6	250:5,13 256:11	314:15 319:11	85:5
108:1,20 109:2,5	471:1 475:7 480:2	257:15 258:4	337:22 345:22	<b>grandmothers</b>
111:19 152:5	480:5,11 485:7	303:17,18 309:11	346:7 366:18	89:19 90:8
156:7 159:2,9,12	<b>goal</b> 414:6,7	330:16 338:5,8,15	368:13 372:16	<b>grants</b> 470:12
159:16 171:22	<b>goes</b> 54:13 55:4	338:19 339:4,8,9	373:21 376:19	<b>grapple</b> 70:18
175:4 177:20,22	60:1,4 67:14	340:4 342:4,5,8,9	398:7 405:8	212:10
184:8,10,18 188:6	68:13 139:2	342:10,13 343:2	408:18 411:10	<b>grateful</b> 143:22
191:20 193:4	147:15,19 164:20	343:12,14,15,17	422:12 423:1	254:17 318:21
195:4 196:6 197:9	188:1 189:21	344:7,9,20 345:12	454:7 459:8	<b>great</b> 11:16 37:21
197:17 198:20,21	195:1 203:3,13	346:2,5,6,10	466:16 471:15	42:2 43:13 55:11
199:9 200:3,20	206:15,15 250:8	347:3,9,21 350:4	480:15 489:13	60:21 61:12 66:14
201:1,15 202:22	327:20 361:10	360:10,11,14	497:19,19 501:6	85:1 88:7 91:13
203:5,6,8 204:17	364:6 390:3,8	362:12 369:15	<b>gorgeous</b> 51:20	133:15 147:3
209:14 210:12	437:7 461:21	371:1 375:16	<b>gosh</b> 64:12	186:11 214:22
213:14 215:12	475:6 480:21	380:17 387:2	<b>gotten</b> 396:9,10	252:11 354:2
216:13 225:11,13	486:15	388:8 391:6	397:22	359:9 371:13
226:8 233:22	<b>going</b> 9:14,22 12:20	392:14 394:11,16	<b>government</b> 2:6	392:3,6 405:12
238:2 240:10,18	14:9,10,11,13	399:10,16 400:7	132:14,21 134:19	408:14 463:13
241:2 242:16	23:11,17 26:4	403:18 405:19	138:9 139:10	466:2 498:2,6,13
243:22 250:8,15	41:7,16 42:11,12	409:21 429:6,11	140:17 148:9	499:20
251:5 252:20	42:13 45:14 55:9	436:11 438:6,7	196:9 306:17	<b>greater</b> 154:6,19
254:4 288:17,18	55:10 71:15 73:1	439:19 441:10	320:8 323:21	214:12 325:12
295:2 296:5	73:2 76:5 77:21	444:2 445:10	331:10 353:13	<b>greatly</b> 309:3
301:22 302:16	77:22 78:8 81:4	449:16,17 456:8	361:15,18 373:8	<b>green</b> 119:8 448:9
303:20 305:13	84:8 87:9 89:3	462:21 463:7,8	382:5 393:8	<b>grief</b> 95:6
306:2,7 313:18	94:10 98:17 99:3	464:12 471:18	394:12 396:4	<b>grievous</b> 117:15,16
327:16 345:12	99:13 116:16	472:11 473:13	399:1,2 401:3	137:20
346:17 347:14	117:22 118:2,8,17	477:5 479:8	402:9 446:9	<b>grind</b> 334:12
348:11 350:12,22	119:4 120:1	485:19 487:15	<b>government's</b>	<b>grocery</b> 69:3
353:9 355:18	141:16 147:14	491:9 493:20	138:19,21 139:4	<b>groin</b> 126:15
356:19 359:11,16	148:4 149:18	494:2,18,19,20	149:1	<b>groping</b> 179:15
360:1 369:2 373:8	151:14 152:5,7	497:14	<b>grabbing</b> 433:3	<b>grossly</b> 349:19
373:11 374:13	155:1 168:17	<b>good</b> 5:3,14,15	<b>grabs</b> 55:3	<b>ground</b> 55:6 146:6
378:8,20 385:9	169:4 170:20	10:14 14:3 18:17	<b>grade</b> 79:15	435:9 457:11
391:1,19 392:1,13	171:21 173:10	19:7,8 34:5 45:18	<b>graders</b> 79:17	<b>groundbreaking</b>
393:3,9 394:3	175:3 181:7	45:18 48:1 51:18	<b>Graduate</b> 3:12	37:3
396:12 398:20	183:12 184:10	53:13 54:11 57:1	256:17	<b>grounds</b> 200:9
399:2 400:11,17	187:8 188:12	78:13 90:8 94:13	<b>graduates</b> 311:7	<b>group</b> 6:10 13:14
401:1,16,18,19	192:17 194:1	98:16,21 116:21	<b>graduating</b> 430:15	94:19 126:14

164:12,14 219:20 303:21 318:2 379:16 383:4 423:14 456:18 <b>grouped</b> 220:22 <b>grouping</b> 127:1 219:9 <b>groups</b> 334:12 379:12 <b>grown</b> 70:21 <b>Guantanamo</b> 247:9 320:9 <b>Guard</b> 2:20 199:14 243:17 269:14 276:9 278:15 290:5 306:16 409:5 <b>guess</b> 56:7 64:11 111:5 162:21 198:10 299:6 301:17 345:10 381:20 386:2 387:7 403:2 423:15 425:17 446:8 <b>guidance</b> 143:14 207:1,4 248:20 299:4 301:16 419:16 <b>guide</b> 114:8 <b>guidelines</b> 265:6 266:2 267:1,6 269:12 271:4 297:13 299:14 300:12 336:17 372:17 395:18 <b>guilt</b> 32:11 61:21 224:19 333:16 381:13 475:18 497:6 <b>guilty</b> 61:16 101:22 300:8 323:17 324:9 333:9 366:14,18 367:4 382:2 386:14 440:7 476:19 491:19	<b>gun</b> 59:14 65:18 76:3 459:13 <b>gunpoint</b> 461:9 <b>guns</b> 378:9 <b>gut</b> 339:16,17 <b>guy</b> 25:4,11 38:20 51:13 52:4 60:19 66:12 77:20 435:3 444:21 450:6 <b>guys</b> 36:19 206:18 417:18 <b>gynecology</b> 355:14 <hr/> <b>H</b> <hr/> <b>habit</b> 56:16 <b>habits</b> 15:8,9 37:8 <b>hair</b> 28:15 42:13,14 <b>half</b> 21:8 25:17 59:3,3 76:14,17 94:11 188:3 218:7 256:6 257:3 292:15 293:13 323:16 327:8 337:14 410:6 423:8 442:6,7 472:15 <b>halfway</b> 448:4 <b>Hall</b> 1:13 <b>HAM</b> 1:21 5:3 220:17 237:12,16 256:10 330:18 402:4 404:8 424:11,17 426:2,7 426:11 <b>hammer</b> 387:12 <b>hampered</b> 326:6 <b>hamstring</b> 375:4 <b>hand</b> 8:11 27:3 68:6 117:21 124:7 264:4 284:7 414:15 <b>hand-selected</b> 230:18 <b>handbook</b> 265:11 266:1 297:13 299:16 <b>handed</b> 399:3,4	<b>handle</b> 92:12 349:11 371:12 379:3 431:18 443:5,11 456:3 458:10 <b>handled</b> 297:22 460:1 <b>handles</b> 145:11 350:9 431:20 <b>handling</b> 193:20 195:15 378:9 476:10,11 <b>handouts</b> 103:18 <b>handpicked</b> 408:12 <b>hands</b> 14:2 132:13 132:16 <b>hands-on</b> 443:9 <b>hangover</b> 50:3 85:8 <b>hangup</b> 436:11 <b>happen</b> 17:1 18:12 25:17 64:13 93:2 149:6 188:11 222:7 238:16 356:10 393:6 418:13 441:8 470:9 484:20 <b>happened</b> 7:16 16:18 20:19 21:10 21:21 55:7,19 60:18 64:7 65:1 68:11 95:9 102:13 103:9 104:1 105:1 126:12 148:18 165:1 174:7 178:4 179:1 186:4 210:19 211:9 213:16 223:1,5 225:14 263:20 266:13 436:12 452:15 <b>happening</b> 14:14 14:16 22:13 95:5 160:3 291:22 345:10 <b>happens</b> 22:18 52:12 77:18 95:16 142:16 149:11	197:7 198:5 200:22 367:20 484:20 <b>happy</b> 54:21 79:6 167:19,21 168:3 169:6 188:14 231:9 246:9 298:19 309:12 452:19 453:6 482:3 485:12 <b>harass</b> 124:9 126:19 127:5,18 154:16 <b>harassment</b> 482:22 <b>hard</b> 19:17 59:9 70:17 92:16 184:7 239:3 240:4 249:5 315:5 359:2 411:5 425:6 440:6 <b>Harding</b> 212:13 404:17 405:17 407:3,17 408:8 <b>Hardy</b> 171:18 <b>harm</b> 88:7 117:15 117:16 118:6 131:15,20 132:11 132:14 133:1,6,10 133:12 134:2 137:20 138:7,8,12 138:16 139:3 146:17,20 147:13 149:16 158:22 345:4 444:9 478:18 <b>Harvard</b> 439:10 <b>HARVEY</b> 1:19 <b>hate</b> 60:20 434:20 438:16 <b>Hawaii</b> 371:4 <b>hazards</b> 243:20 <b>head</b> 3:9 8:16 26:21 164:10 331:1 427:13 447:13 <b>headed</b> 251:19 <b>headphones</b> 449:5 491:10 <b>headquarters</b> 1:2	2:5 309:6 <b>heads</b> 23:10,19 <b>health</b> 415:18 <b>healthy</b> 169:18,22 468:21 482:3 <b>hear</b> 5:13 23:7 31:13 32:20 33:1 33:3,18 34:20 39:1 68:5,5,6 87:11,12 98:4 169:12 256:19 335:8,10 376:16 380:21 381:19 407:10 430:11 437:3 449:6 453:3 475:10 <b>heard</b> 30:13 41:20 76:21 83:20 141:13 172:14 177:19 196:17,18 258:11 259:11 321:5 325:19 327:15 359:4,5 374:3 375:12 389:6 394:10 399:18 401:21 403:6 431:7 441:9 443:8,18 471:16 483:9 486:6 490:12 494:20 497:7 500:6 <b>hearing</b> 193:2,3 196:1,10 210:13 327:14 342:2 344:22 350:20 365:15 479:8 <b>hearings</b> 151:5 231:14 <b>hears</b> 367:7 <b>hearsay</b> 358:10 <b>heart</b> 60:15 313:4 332:7 496:2 <b>heartened</b> 84:2 443:8 <b>heavily</b> 316:17 317:16 409:16 495:16
---	--	--	--	---

<b>heavy</b> 45:20	<b>highest</b> 314:6	442:19 449:11	431:13 449:21	<b>Houck</b> 1:17 83:10
<b>held</b> 16:21 38:15	433:12	469:7 471:20	461:11 486:1	83:11,13,17 89:8
188:21 214:7,10	<b>highlight</b> 173:10	487:15 494:20	<b>homes</b> 81:5	89:21
227:18 317:11	255:19 310:1,4	<b>hits</b> 35:22 329:14	<b>homework</b> 14:2	<b>hour</b> 25:17 256:6
334:3 407:10	320:17 480:18	<b>hitting</b> 68:6	<b>homicide</b> 59:17	<b>hours</b> 25:18,19
<b>help</b> 10:9 23:5	<b>highlighted</b> 104:22	<b>hold</b> 53:15	183:18 370:12	447:8 452:16
24:10 33:13 45:17	263:15	<b>Holder</b> 258:22	462:4	<b>house</b> 30:10 32:7
55:16,16 57:12,15	<b>highlights</b> 122:2	<b>holding</b> 15:20	<b>homicides</b> 377:22	67:19 108:2
68:3 73:3 91:19	159:1	37:14 132:13,16	379:2	152:12 164:1,6
190:10 213:1	<b>highly</b> 310:21	133:6	<b>homogenous</b>	165:4 356:20
217:13 254:9	322:19 351:21	<b>holdout</b> 62:7,13	354:21	382:21 425:12
255:12 306:11,12	454:19 491:5	<b>HOLLY</b> 1:18	<b>homophobia</b> 94:1	<b>House's</b> 108:10
330:2 335:2	<b>highly-qualified</b>	<b>Holtzman</b> 1:16	96:6	<b>houses</b> 306:3 307:1
380:14,16 383:6	411:20 419:10	90:7,11 96:10	<b>honest</b> 43:6 155:20	<b>Houston</b> 285:17
413:7,15 415:10	420:14	97:22 108:21	155:22	293:7
447:3 450:11	<b>highs</b> 272:8	109:10,14 162:20	<b>honestly</b> 52:10	<b>hover</b> 285:6 286:5
481:14	<b>Hillman</b> 1:19	163:21 164:9,22	<b>honey</b> 64:1	<b>HQE</b> 428:1
<b>helpful</b> 165:15	125:19 143:17,20	165:3,11,13,18,21	<b>Honolulu</b> 416:21	<b>HQE's</b> 326:22
213:10	144:16 145:15,18	167:15,18 168:1	<b>honor</b> 5:20 360:21	<b>HQEs</b> 310:22,22
<b>helps</b> 13:1 256:1	146:16 147:1	169:4 183:11,17	401:17 406:20	331:16 413:9
383:5 480:15	152:20 158:18	183:21 189:4,8,10	453:9 483:19	420:15 426:16
<b>hesitate</b> 290:8	166:1,18 184:15	189:13 192:15,20	<b>Honorable</b> 1:14,16	427:22
<b>hey</b> 45:14	184:18 190:9	193:17 194:6	1:16 411:10	<b>huge</b> 337:15 385:21
<b>Hi</b> 298:22	204:21 206:18	195:12 197:11,13	<b>honored</b> 252:6	387:12 447:16
<b>hiding</b> 491:2	207:7 208:2	198:1,4,8 199:20	368:15	450:20 464:2
<b>Higashi</b> 2:10	216:22 240:6	216:14,19 234:9	<b>Hood</b> 472:18	<b>hugely</b> 441:17
452:22 453:4	243:15 248:12	234:19,21 235:3	<b>hook</b> 125:7	<b>human</b> 88:6 442:8
471:5 492:18	253:6 254:8 255:3	235:15,18 236:11	<b>hop</b> 54:5	445:8,14 453:20
<b>high</b> 11:6,12,15	298:22 383:12	236:18 249:18	<b>hope</b> 84:9 89:9	469:8
12:21 13:11,16,17	384:19,22 392:8	254:11 270:2,9,13	169:2 180:5,14	<b>humiliate</b> 97:16
22:10 60:9 81:17	404:2,10	270:17 300:16	330:13,15 359:8	124:9 126:19
91:6,11 117:13	<b>hindrance</b> 166:7	301:12,21 303:3	477:1	127:5,18 154:16
275:15 278:19	168:18	304:5,9 389:2	<b>hopefully</b> 18:16	<b>humiliation</b> 125:14
325:13 341:3,4,5	<b>hindsight</b> 375:19	390:11,17 391:4,9	58:11 113:17	<b>hundred</b> 274:5
344:1,9 345:4	<b>hinges</b> 135:8	391:13,17,22	169:22 411:12	323:15 334:2
346:4 411:7 466:3	<b>hints</b> 303:15	392:12,21 394:6	414:10 500:16	<b>hundreds</b> 332:4
466:14 468:16	<b>hire</b> 353:15 374:12	394:15,19,22	<b>hopelessly</b> 105:20	408:13
487:10	374:15,15	395:4,22 397:3,8	<b>hoping</b> 89:12	<b>hung</b> 62:1,2,19
<b>high-risk</b> 346:7,11	<b>Hispanic</b> 27:21	397:18 398:2,5,9	450:12	63:2
346:21	<b>Historic</b> 339:13	398:13,16 403:10	<b>Horney</b> 293:5	<b>hungover</b> 46:12
<b>higher</b> 271:22	<b>Historic</b> 339:13	<b>Holtzman's</b> 221:5	<b>horrible</b> 97:8	<b>hurtled</b> 333:13
272:8 274:13	<b>historical</b> 82:13	<b>home</b> 13:18 24:18	<b>hospital</b> 26:8,12	<b>hurts</b> 26:21
275:20 278:4,18	<b>historically</b> 88:11	24:21,22 32:17	68:12 446:3 447:6	<b>hybrid</b> 453:16
279:1 293:2,21	<b>history</b> 99:16,22	36:9 43:11 44:4	447:11 471:2	<b>hypothetical</b>
294:17 296:19	100:11 114:11	46:18 47:14 77:1	<b>host</b> 447:3	209:15
298:11 337:9	346:16	239:10 363:19	<b>hot</b> 57:12 359:15	<b>hysterectomy</b>
347:3 348:5	<b>hit</b> 26:16,18,22	364:20 420:17	<b>hotline</b> 437:13	355:16
	27:3 33:20 243:17			

<b>hysterical</b> 68:10	142:1,4,10,14 143:7,8 145:6 157:16	<b>improve</b> 180:15 213:11 318:19 474:18,19 475:3 484:14	259:1 274:19 277:19 281:20 310:11,21 311:6 312:11 356:12 357:14 376:6 417:20 426:21	<b>increase</b> 204:21 205:16 230:5,22 249:17 <b>increased</b> 184:20 <b>increases</b> 284:9,13 284:17 <b>increasing</b> 121:21 <b>increasingly</b> 313:16 465:16 <b>incumbent</b> 500:8 <b>indecent</b> 115:20,20 115:21,21 121:4 123:9 127:20,21 248:10
<b>I</b>		<b>improvement</b> 180:2 <b>improvements</b> 213:3 <b>in-depth</b> 332:11 413:13 <b>in-house</b> 326:16 336:8 368:22 465:13 468:3 <b>in-person</b> 312:9 <b>in-service</b> 371:21 <b>inability</b> 227:19 <b>inadvisable</b> 246:19 <b>inappropriate</b> 174:10 <b>inaugurating</b> 442:3 <b>incapable</b> 118:8 134:12,21 136:7,9 139:22 157:8,14 158:3,4,7 <b>incapacitated</b> 21:9 221:2 448:22 449:22 450:16 <b>incapacitating</b> 136:2 <b>incapacitation</b> 450:15 <b>incarcerated</b> 346:14 444:6 <b>incarceration</b> 342:8 343:7 357:19 <b>inception</b> 100:22 404:22 <b>incident</b> 24:19 248:6 263:21 <b>incidental</b> 441:7 <b>incidents</b> 196:4 <b>incite</b> 127:19 <b>include</b> 120:13 180:4 218:1,10,17 218:19 219:3 229:15 231:3	<b>included</b> 132:2 154:3,7,12,20 218:5 221:2 241:18 264:1 271:11 275:6 279:6,11 289:16 289:17 301:17 352:20 <b>includes</b> 127:11,12 132:1 173:15 218:13 241:13 242:12 259:14,22 271:9 274:17 276:16 294:8 295:10 317:14 322:1 390:4 426:16 494:7 <b>including</b> 11:20 65:21 132:2 241:3 301:19 305:7 306:9 356:7 357:15 365:16 410:7 429:2 437:17 476:6 <b>incoming</b> 317:12 <b>incompetent</b> 137:19 <b>incomplete</b> 105:20 148:2 <b>inconceivable</b> 448:11 <b>inconsistency</b> 235:4 235:6 <b>inconvenience</b> 334:16 <b>incorporate</b> 114:3 338:13 405:10 <b>incorporated</b> 113:16 114:22 <b>incorrect</b> 321:10 <b>incorrectly</b> 194:7	<b>indecent</b> 115:20,20 115:21,21 121:4 123:9 127:20,21 248:10 <b>independence</b> 310:14 313:5 373:3 374:11 <b>independent</b> 13:19 194:22 365:16 <b>Indeterminate</b> 363:22 364:6 <b>indicated</b> 270:11 289:22 362:11 <b>indicates</b> 257:14 267:19 276:16 <b>indicating</b> 302:8 <b>indication</b> 302:6 <b>indicative</b> 240:17 481:10 <b>indicted</b> 224:4 <b>indictment</b> 433:18 <b>indictments</b> 440:10 445:17 <b>indigent</b> 326:14 365:5 <b>individual</b> 174:11 195:9 201:1 202:9 248:4 249:4 254:13 255:5 266:21 267:19 285:5 286:4 299:19 311:19,22 312:21 313:3 320:18 322:6 333:16 364:3 366:17 373:10 400:13 413:12,14
<b>ideas</b> 53:15 81:14 83:1 344:14 500:9 <b>identical</b> 41:11 322:10 <b>identified</b> 175:16 175:17 176:1,2,8 176:13 235:12 300:19 <b>identify</b> 17:4 297:15 353:20 361:5 489:12,19 <b>identifying</b> 17:12 20:18 92:3 255:5 <b>identity</b> 498:20 <b>ignorance</b> 156:4 <b>ignorant</b> 389:16 <b>illegal</b> 59:16 <b>illustrate</b> 66:10 209:13 280:2 <b>illustration</b> 116:21 <b>IM</b> 437:1 <b>image</b> 17:20 123:1 <b>imagine</b> 404:11 <b>immaterial</b> 156:4 <b>immediate</b> 498:9 <b>immediately</b> 68:11 418:18 419:17 434:13,18 <b>immovable</b> 333:14 <b>impact</b> 366:22 376:2,9 400:16 <b>impacted</b> 321:3 400:19 <b>impacts</b> 159:19 402:8 <b>impaired</b> 134:9,14 135:5,13 141:20	<b>impairing</b> 136:4,13 <b>impairment</b> 136:8 136:10,18,20,21 140:1 141:22 143:1,5 144:15 148:1,1 157:14 158:5,8 <b>impairs</b> 117:20 <b>implement</b> 109:21 110:20 <b>implementation</b> 137:4 421:11 <b>implemented</b> 259:5 <b>implementing</b> 131:12 <b>importance</b> 39:3 325:21 382:8 401:11 427:5 437:8 <b>important</b> 9:5,16 20:11,15 31:19 49:21 88:17 95:20 98:3 115:5 153:18 227:1 229:19 253:9 254:3,6,10 257:1 258:7 263:14 286:19 303:4 312:1,2 338:20,22 354:7 389:3 401:5 403:15 418:11 437:18 441:18 447:15 457:11 463:17 464:12 465:14,18 467:14 468:20 469:1 483:16 <b>importantly</b> 96:16 219:5 259:17 <b>imposed</b> 226:20 <b>imposing</b> 473:8 <b>impossible</b> 296:12 <b>impressed</b> 370:19 <b>improperly</b> 267:21	<b>improvements</b> 213:3 <b>in-depth</b> 332:11 413:13 <b>in-house</b> 326:16 336:8 368:22 465:13 468:3 <b>in-person</b> 312:9 <b>in-service</b> 371:21 <b>inability</b> 227:19 <b>inadvisable</b> 246:19 <b>inappropriate</b> 174:10 <b>inaugurating</b> 442:3 <b>incapable</b> 118:8 134:12,21 136:7,9 139:22 157:8,14 158:3,4,7 <b>incapacitated</b> 21:9 221:2 448:22 449:22 450:16 <b>incapacitating</b> 136:2 <b>incapacitation</b> 450:15 <b>incarcerated</b> 346:14 444:6 <b>incarceration</b> 342:8 343:7 357:19 <b>inception</b> 100:22 404:22 <b>incident</b> 24:19 248:6 263:21 <b>incidental</b> 441:7 <b>incidents</b> 196:4 <b>incite</b> 127:19 <b>include</b> 120:13 180:4 218:1,10,17 218:19 219:3 229:15 231:3	<b>includes</b> 127:11,12 132:1 173:15 218:13 241:13 242:12 259:14,22 271:9 274:17 276:16 294:8 295:10 317:14 322:1 390:4 426:16 494:7 <b>including</b> 11:20 65:21 132:2 241:3 301:19 305:7 306:9 356:7 357:15 365:16 410:7 429:2 437:17 476:6 <b>incoming</b> 317:12 <b>incompetent</b> 137:19 <b>incomplete</b> 105:20 148:2 <b>inconceivable</b> 448:11 <b>inconsistency</b> 235:4 235:6 <b>inconvenience</b> 334:16 <b>incorporate</b> 114:3 338:13 405:10 <b>incorporated</b> 113:16 114:22 <b>incorrect</b> 321:10 <b>incorrectly</b> 194:7	<b>indecent</b> 115:20,20 115:21,21 121:4 123:9 127:20,21 248:10 <b>independence</b> 310:14 313:5 373:3 374:11 <b>independent</b> 13:19 194:22 365:16 <b>Indeterminate</b> 363:22 364:6 <b>indicated</b> 270:11 289:22 362:11 <b>indicates</b> 257:14 267:19 276:16 <b>indicating</b> 302:8 <b>indication</b> 302:6 <b>indicative</b> 240:17 481:10 <b>indicted</b> 224:4 <b>indictment</b> 433:18 <b>indictments</b> 440:10 445:17 <b>indigent</b> 326:14 365:5 <b>individual</b> 174:11 195:9 201:1 202:9 248:4 249:4 254:13 255:5 266:21 267:19 285:5 286:4 299:19 311:19,22 312:21 313:3 320:18 322:6 333:16 364:3 366:17 373:10 400:13 413:12,14

414:4 420:19 426:19 448:3 <b>individually</b> 69:14 203:5 225:15 228:22 <b>individuals</b> 190:2 248:8,8 255:8 256:1 362:3 367:22 382:19 <b>inexperience</b> 313:21 <b>infant</b> 459:22 <b>Infantry</b> 320:12 <b>infantryman</b> 320:4 <b>infirmary</b> 45:10,14 46:4 <b>influence</b> 8:7 9:4,7 9:18 10:3 12:14 22:22 23:7 24:3 36:11 38:9 40:10 41:14 49:13 58:12 80:17 81:17 83:1 324:8 399:22 <b>influenced</b> 72:8 <b>influences</b> 15:16 81:11 <b>influencing</b> 8:21 <b>influential</b> 89:10 <b>inform</b> 365:21 366:1 420:7 <b>information</b> 5:18 15:2 21:3,12 22:4 22:6 37:9,22 47:17 50:17 90:14 113:13 171:9 173:7,9 224:5 226:8 244:7 245:9 305:3 327:20,22 328:9 331:8 341:19 353:10 360:8 379:21 380:8,9 389:13,15 398:22 435:16 470:19 479:10 <b>informative</b> 254:7 <b>informed</b> 39:14 65:7 399:8 473:13	479:6 <b>ingest</b> 450:17 <b>ingested</b> 31:14 33:4 33:14 84:18 85:6 <b>ingesting</b> 450:19 <b>ingrained</b> 82:2,4 <b>inherent</b> 258:6 290:13 <b>inhibited</b> 397:5 <b>initial</b> 173:20 195:18 245:5 248:7 253:13,15 420:6 421:16 433:14 <b>initially</b> 103:4 463:11,13,15 <b>initiated</b> 180:13 229:21 284:3,8,12 293:17 318:10 <b>initiating</b> 87:13 <b>initiatives</b> 180:3 253:21 <b>injure</b> 129:1 <b>injuries</b> 374:1 <b>injustice</b> 333:7 <b>injustices</b> 389:19 <b>inner</b> 126:15 <b>innocence</b> 61:21 334:4,6 342:22 343:1 381:13 475:18 <b>innocent</b> 69:7 324:11 334:17 <b>input</b> 164:15 <b>inquiries</b> 312:7,9 428:8 <b>inquiring</b> 144:21 <b>inquiry</b> 328:2 <b>insert</b> 85:11 <b>inside</b> 373:19 482:3 <b>inspires</b> 12:20 <b>Instagram</b> 446:2 <b>installation</b> 315:20 413:18 415:4 420:18 426:18 <b>installations</b> 413:13 415:1 416:22	<b>instance</b> 201:10 207:10 248:2 345:22 <b>instances</b> 192:21 193:2 <b>Institute</b> 257:8 <b>instituted</b> 253:18 <b>institutional</b> 325:12 380:11 <b>institutions</b> 424:4 440:19,20 <b>instruct</b> 111:6 149:7 420:4 <b>instructed</b> 111:17 <b>instructing</b> 123:20 429:11 470:6 <b>instruction</b> 172:10 412:15,16,22 413:21,22 <b>instructions</b> 111:4 111:13 149:12 207:3 <b>instructors</b> 423:22 <b>instructs</b> 420:5 <b>instruments</b> 354:10 <b>insufficient</b> 179:5 179:10,21 200:19 226:3 229:3 235:1 235:19 236:13 242:14 251:1 275:7 276:1,7,15 277:3,15 279:4 300:21 329:12 <b>insures</b> 174:21 <b>intended</b> 498:3 <b>intense</b> 307:20 <b>intensive</b> 350:13 <b>intent</b> 124:8,8 125:10 126:18,22 127:2,5,7,18 153:19,20 154:15 154:16,19,22 155:17,21 156:3 156:14 179:18 331:10 379:1 <b>intentionally</b> 127:15,21	<b>intents</b> 124:20 127:16,17 <b>interact</b> 418:9 <b>interaction</b> 411:2 <b>intercourse</b> 15:19 37:13 100:20 124:13 444:15 <b>interest</b> 74:7,9 123:4 214:12 223:4 294:19 456:22 457:3,22 458:3 501:4 <b>interested</b> 35:10 67:10 87:5 160:2 337:3 341:9 342:13 458:1 489:19 <b>interesting</b> 8:17 33:4 34:2 58:14 63:8 106:17 110:4 116:7,17 122:12 124:21 128:18 130:20,21 131:11 135:7 137:2 140:2 140:20 145:7 157:3,9 170:4,15 487:19 <b>interests</b> 368:1 <b>intermediate</b> 318:15 <b>internal</b> 32:20 493:5 <b>internally</b> 495:4 496:1,4 <b>International</b> 265:15 <b>internet</b> 81:10 121:8 357:17 371:22 <b>interpersonal</b> 96:22 416:3 <b>interplay</b> 109:18 110:4 137:8 144:10 153:9 155:2 <b>interpret</b> 215:5 266:22	<b>interpretation</b> 114:2 <b>interpretations</b> 150:14 271:3 <b>interpreted</b> 146:6 146:17 263:2 264:13 299:20 <b>interpreting</b> 299:14 <b>interrelated</b> 442:22 <b>intervene</b> 68:7 193:1 <b>intervention</b> 46:19 86:17 <b>interview</b> 359:6 367:2,5,11 431:21 432:19 434:8 438:3 448:7 451:21 458:6 461:2 <b>interviewed</b> 303:13 395:12 <b>interviewing</b> 365:17 435:11,12 466:20 467:14 <b>interviews</b> 303:21 395:13 433:15 480:19 <b>interwoven</b> 388:18 <b>intimate</b> 434:18 435:14 442:16 446:18 <b>intimidation</b> 482:22 <b>intonation</b> 34:10 <b>intoxicant</b> 136:2,10 157:15 158:5 <b>intoxicated</b> 135:13 227:6 <b>intoxication</b> 157:22 491:20 <b>introduce</b> 430:4 <b>introduced</b> 135:2 <b>introduction</b> 257:2 <b>introductory</b> 155:14 311:13 <b>invalid</b> 143:4 <b>invaluable</b> 408:1
--	---	---	--	--

436:2,4 455:9	221:11 246:12	418:3 461:9 496:6	262:6 301:5 317:8	495:9
<b>invest</b> 249:7	275:13 276:10	<b>involvement</b> 8:14	335:6,13 339:2	<b>jobs</b> 343:11
<b>investigate</b> 56:8	380:20 475:4	<b>involves</b> 106:18	344:6 347:20	<b>jogging</b> 449:4
269:4 365:9 366:8	496:4 498:4	117:14 120:13,21	352:9 353:7 354:1	<b>join</b> 95:12
366:10 368:6	<b>investigative</b>	124:17 127:8	355:1,4 380:11	<b>joined</b> 171:15
381:14 382:5	172:19 181:5	154:2,13 245:6	387:20 388:1	217:9
437:22 451:17	208:16 236:21	271:20 415:17	404:4 421:5	<b>joins</b> 322:12
456:10 481:15	270:7 326:7 327:3	<b>involving</b> 227:6	477:21 478:1	<b>joint</b> 164:12 426:22
<b>investigated</b> 66:18	439:4 486:14	244:13 271:22	479:14,16,17,22	480:9
206:9 218:3,11	494:17 498:6	272:1 279:20	493:19 495:6	<b>Jones</b> 1:14,16 5:6,7
260:7 263:6	<b>investigator</b> 66:15	310:11 374:5	500:11	79:9 83:8,11,12
273:12 349:15	326:21 331:18	377:16 378:15	<b>it'll</b> 339:12	83:15 90:6 98:1,7
<b>investigates</b> 453:17	366:3 381:4,6,7	412:4 414:16	<b>Italian</b> 51:20	98:12 108:20
<b>investigating</b>	419:14 468:12	453:18 477:22	<b>items</b> 110:16	111:8 143:19
194:21 196:14,19	473:1	484:10	<b>iterating</b> 57:7	148:3 154:10
197:4,8 198:11,16	<b>investigators</b>	<b>IO</b> 199:18 200:8		162:19 166:15
198:19,21 199:9	326:13,16,19	<b>iPhone</b> 121:7	<b>J</b>	167:17 170:14,19
199:11 208:9	327:7 336:8	<b>Iraq</b> 320:13	<b>J</b> 241:12,13 365:10	171:12 175:8
221:21 263:19	360:10 366:11	<b>ironic</b> 369:9	<b>Jacinto</b> 1:12	185:18,19 187:21
265:16 302:14	380:21 381:3	<b>irrelevant</b> 144:5	<b>jackings</b> 378:17	189:12 190:19
360:13 367:18	382:8 415:14	<b>Island</b> 79:14 80:11	<b>JAG</b> 239:14 305:11	199:3 200:2
441:15 487:20	416:5 435:21	395:10	305:16 317:15	215:12,17 216:13
498:13 499:5	437:9,18 438:2	<b>isolated</b> 67:22	344:12 414:5	231:10 236:19
<b>investigation</b> 1:6	439:6 468:3,3,4	<b>ISRB</b> 364:4	<b>Jagermeister</b> 448:9	237:2,4,6,11
56:7 60:21 147:17	480:7 495:4	<b>issue</b> 6:14 12:11	<b>jail</b> 469:8	256:4,13 298:21
172:17,18 173:2	<b>investment</b> 464:2	33:17 36:14 87:1	<b>JAM</b> 2:5	304:11,16 309:15
174:14 185:6	<b>invitation</b> 5:17	94:9 122:2 137:17	<b>JAMES</b> 1:17 3:14	314:12 319:9
186:14,15 187:8	<b>invited</b> 32:6 337:4	140:6,20,20	<b>Janet</b> 2:17 217:9	335:5,16 348:20
188:21 190:3	447:13	143:14 144:22	229:14	349:1 360:18,22
192:12 194:20	<b>inviting</b> 256:22	145:3,8,10 148:5	<b>January</b> 258:22	368:8,10 376:14
205:1 210:2,4,12	452:18 453:5	155:6 192:21	297:7 349:10	383:8 385:22
218:8 219:1 220:4	<b>invoke</b> 335:20	209:11 231:6	<b>Japan</b> 307:5	389:1 403:12,14
226:6 228:4	<b>involuntarily</b>	236:16,16 241:16	<b>JASON</b> 2:4	408:16 411:8,10
232:14 245:17	450:17,17	242:10 257:2	<b>Jay</b> 2:21 411:14	422:8 427:8 430:3
246:5,16 247:13	<b>involve</b> 119:21	319:14 325:15	<b>jean</b> 28:19	452:21 471:5
251:16 252:5,7	156:13 260:22	355:22 370:22	<b>jeans</b> 28:19 54:14	485:13,19 500:18
264:10 265:10,22	296:22 297:10	371:2 373:12	<b>jello</b> 44:6 47:13	500:21 501:10
266:5 269:15	458:20 461:14	376:3 389:8 419:1	<b>Jerry</b> 50:12	<b>journey</b> 343:20
273:22 276:12,18	<b>involved</b> 7:22 8:8	486:17 495:22	<b>jettison</b> 471:18	<b>Jr</b> 332:16
334:19 365:16	33:21 66:19	497:4,5	<b>job</b> 10:19 153:13	<b>judge</b> 2:5,9,18 3:1
366:15,21 381:14	101:13,19 120:9	<b>issues</b> 56:18 99:19	160:8 161:16	3:16 5:5 83:11
403:8 437:17,19	124:16 141:12,13	110:8 126:3 137:7	170:16 230:11	99:1 102:5,20
440:14 451:22	160:14 244:15	140:22 145:4	234:6 303:7	105:21 160:12
463:3 493:18	245:18 273:16	147:22 150:18	317:13 350:9	171:12,16 173:4
<b>investigations</b>	274:5,9 350:7	169:1 202:18	353:1 408:14	180:19 185:18
176:5,6,10,12	377:2 378:2	203:19 224:9	422:18,20,21	193:10,15 194:12
185:4 204:8	380:21 399:13	236:3,4,5 260:6	441:15 475:12	195:11 197:2,22

198:14 201:6 217:10 221:5 233:16 256:4 305:2 311:7 313:10 314:1 316:2,17 317:3 318:21 320:5 321:15 322:9,12 339:16 341:19 342:13 364:5 384:2 385:10 388:12 390:15 391:1,3,19 392:18 392:19 394:4,4,11 396:1,2 399:20 401:2,2,7,16 402:2,5,15,22 403:1,9 407:4 408:1,20 412:15 412:16 413:19 414:11,12 416:7 419:17 420:1 421:10 422:18 425:3 427:14 432:12 452:21 464:12 471:5 478:8 485:13,19 500:18,21 501:10	<b>jumps</b> 17:22 38:21 70:16 <b>June</b> 106:7 112:17 113:20 220:19 253:14 309:22 <b>junior</b> 415:14 417:7,22 <b>juries</b> 39:8 <b>jurisdiction</b> 4:7 9:20 59:7,18 61:18 171:1 177:7 177:8,10,15,17 209:21,21,22 210:5 218:15,18 220:3 222:18,21 223:9,18 227:9,22 228:8 260:12,19 261:1,5,8 415:3 486:22 487:19 489:5 492:21 495:3 496:21 <b>jurisdiction's</b> 264:2 <b>jurisdictional</b> 260:6 <b>jurisdictions</b> 154:5 178:3 222:20 230:3 250:20 259:9 285:5,18 286:4 292:2,14 293:22 294:15 296:21 300:1 302:2,4 409:9 416:21 471:14 488:1 492:7 493:4 <b>jurisprudence</b> 122:19 <b>juror</b> 69:15 <b>jurors</b> 50:7 61:20 62:4,7,9,13 64:8 65:14,15,17 69:6 369:16 499:5 <b>jury</b> 8:13 53:12 61:22 62:1,2,11 64:10 101:16,20 101:21 111:15,16 111:17 140:3 374:7 378:13	432:11 433:16,17 433:19 434:3 440:13 444:19,20 459:5,11 497:14 499:2 <b>justice</b> 2:4,5,17 3:13 4:6 6:19,20 7:15 162:3 171:14 180:8 239:15,16 256:18 257:9 258:2,3 259:10 260:10 263:8 278:5 280:22 281:15 291:12 297:20 305:18,20 309:2,5 311:3,5 313:11 314:2 319:2,3 320:17 324:21 325:1 327:11 332:19,21 334:19,22 367:20 368:19 369:11,19 377:5 386:4 388:14 406:17,19 409:3 414:10 416:8,15 422:15 425:11 442:3 475:12 478:15,16 479:9 482:19 483:7,17 484:7,9 484:12,18 <b>justification</b> 353:17 <b>justify</b> 41:4 353:21 382:19 <b>juvenile</b> 336:12 365:3 377:9,19,20 377:22 378:3,7 <b>juxtapose</b> 44:16 47:3	275:15 321:12 344:22 347:4 375:7 405:18 423:3 430:1 438:17,18 442:10 469:12 <b>keeping</b> 87:6 <b>keeps</b> 33:12 92:2 96:11 <b>KELLY</b> 2:10 <b>Kepros</b> 2:12 348:21 348:22,22 349:1,4 349:5 360:19 364:21 <b>key</b> 31:18 297:21 325:13 372:20 446:10 <b>keys</b> 55:3 <b>kick</b> 158:13 404:13 <b>kicks</b> 163:13 <b>kid</b> 365:11 423:1 <b>kidnaping</b> 117:16 <b>kids</b> 56:11 65:8 74:1 80:10,18 82:19 <b>kill</b> 46:20 379:1 <b>killing</b> 47:8 <b>Kim</b> 272:3 <b>kind</b> 6:9,19 8:16 9:14 10:8 11:9 12:1,7,11 14:22 16:7 17:19 18:3 19:6 21:6 22:3 27:12 28:17 36:7 36:13,20 39:4 41:8 42:14 43:21 45:9 46:14 48:4 49:7 50:13 52:19 52:20 56:1 57:11 59:2,17 62:5 63:13 64:3,17 66:20 70:16,22 72:7,18 73:22 76:5 80:11 86:18 86:19 92:15,17,22 95:1,17 122:10 123:6 126:16	130:5 151:18 165:6 201:22 244:2 250:2 252:1 296:18 337:2 341:3 355:9 356:11 358:13 359:21 360:17 361:20 369:5 372:22 375:6 377:18 378:1,9 379:8 380:15 381:12,18 409:7,9 422:20 491:12,13 494:16 495:5 <b>kinds</b> 7:8 8:2,3 17:9 18:17 22:9 35:3 36:20 37:6 41:4 47:20 49:13 53:14 61:18 66:16 86:4 88:14 92:14 94:2 113:14 114:18 261:6 289:1 298:13 300:14 306:8 356:16 358:10 465:10 487:5 491:18 <b>King</b> 2:14 304:18 304:21 305:1 322:11 332:16 361:16 370:17 392:3,6 393:2 394:14,17,21 395:2 396:20 398:12,15,18 402:8 <b>kissing</b> 72:17 100:5 <b>kit</b> 441:20,22 446:15 <b>knew</b> 18:9,10 118:6 139:12 445:18 459:2 <b>knife</b> 18:1 59:14 65:18 <b>knifed</b> 444:1 <b>knit</b> 379:12 496:22 <b>know</b> 6:1 7:4 8:19 9:6,21 10:14,17
<b>K</b>				
<b>Kalvin</b> 65:15 <b>Kansas</b> 285:9,11 <b>Kate</b> 322:18 <b>Katharine</b> 271:15 <b>keep</b> 96:9 203:7 217:13 274:16				

10:22 11:14 12:7 12:14 13:15 14:17 15:3,7,11 17:18 18:15 19:8 20:16 21:2,13,20 22:8 24:1 26:9 27:2,18 28:2 29:19 32:22 33:6,10,16 35:1,6 35:9,13,17,20 36:19 37:3 38:10 38:21 40:4 41:15 42:5,10,13,14,19 43:8 44:16 45:4 45:11,15 46:12,15 46:15,21 48:1,19 48:20 49:5,6,17 49:17 50:5,8,17 51:7,16,20 52:1,3 52:19 53:1,6,10 54:6,20 55:22 57:2 58:8,21 59:11,14,17 60:20 61:2,8,13 62:8 63:18,20 64:4,16 64:17,20 65:18 67:10,18,20 68:13 70:5,16 71:3 72:12 73:5,10,15 74:5,21,22 76:8 76:10,13 77:1,12 77:20 78:20 81:10 82:14 86:3,9,12 86:18 87:4,13,20 88:5,7,13 89:10 91:20 92:11,12,12 92:13,16,20 93:8 94:3 95:9,12 96:18,22 98:14 99:9 116:16 130:17 134:8,8,14 142:13,15 151:2 152:13 153:19 162:22 163:5 166:20 170:2 171:12 174:22 177:19 182:9 186:5 191:18	195:13 198:5,17 212:13,14 213:17 214:19,20 216:6 232:10 233:19 238:1 239:6 240:11 244:8 247:5 248:14 249:5,13 250:16 251:20,22 252:16 254:12,18 256:1 260:5 262:16 264:12 272:5 292:13 330:19 331:1 337:5 344:15,18 345:9 347:19,21 348:2 348:15 352:2 354:3,6,22 355:8 355:8,12,13,17 357:18 359:1 360:1 363:10 367:3,4,12,15 369:14 371:13 372:14,15 373:19 374:3 375:2 381:18 382:22 384:22 385:1 386:21,21 387:1,3 387:13,21 403:16 408:4,7 410:12 411:2 418:1,15 432:6 436:14 437:15 444:7 445:2,2 446:13 461:13 463:21 473:17 474:8 475:10 489:8 490:6,12,16 491:3 491:15,19,21 492:4,17 493:3 494:8 495:6 496:1 496:20 497:3,9,17 497:18 498:5,19 498:21 499:6,9,22 500:3,4,5 501:3 <b>knowing</b> 134:20 260:2 354:6,9	<b>knowingly</b> 121:11 <b>knowledge</b> 123:21 129:22 134:18 155:18,21 156:3 156:14 258:20 358:18 359:2 438:22 499:7 <b>knowledgeable</b> 21:17 <b>known</b> 118:7 135:2 135:5,12 139:13 157:19 158:3 261:19 264:1 271:9 400:12 434:22 459:2 471:13 488:6,7 <b>knows</b> 18:1 134:13 143:7 301:7 419:22 497:9 <b>Kool-Aid</b> 341:11 <b>Ku</b> 2:15 309:16,17 309:19 400:21 402:5,6 <hr/> <b>L</b> <hr/> <b>L</b> 427:21 <b>lab</b> 441:21 446:13 446:15 <b>label</b> 333:14 <b>labeled</b> 339:9 <b>labeling</b> 250:2 <b>Labrador</b> 10:17 <b>lack</b> 101:9 104:16 106:10 132:20 133:2 134:3 138:10 141:3 146:3 222:8 235:22 272:2 289:15 295:12 297:19 303:12 314:3 326:7,8 334:18 378:2 380:21 396:13 427:6 <b>lacking</b> 327:13 <b>ladies</b> 98:12 403:17 403:19	<b>LaFree</b> 65:16 66:1 <b>Lake</b> 102:19 <b>Lakes</b> 37:21 <b>Lamp</b> 491:4 <b>Lance</b> 385:21 <b>land</b> 370:10 499:21 <b>Lane</b> 2:3 335:22 <b>Lang</b> 374:22 <b>language</b> 107:2 108:3 111:5,22 112:2,3 113:1 114:1,5 127:20 129:6 131:17 135:18 142:14 143:13 144:7 150:1 152:10,12 155:9 156:19,21 157:2 163:7,8,14 164:4,16 165:8 <b>lap</b> 72:17 423:1 <b>LAPD</b> 271:18 273:4 286:1 <b>larceny</b> 75:12,15 <b>large</b> 14:16 15:4 59:17 93:8 104:17 132:19 292:6,14 292:22 321:9 409:9 447:7 489:17 <b>largely</b> 351:5 <b>larger</b> 183:22 361:12 <b>largest</b> 363:1 472:8 472:8 <b>Lastly</b> 376:3 421:10 <b>lasts</b> 308:1 <b>late</b> 189:17 452:17 467:8 487:13 <b>lately</b> 480:9 <b>laterals</b> 377:13 <b>latest</b> 38:1 <b>Laughter</b> 117:2 162:12 166:17 169:9 197:12 199:5 206:20 215:3,14 229:17	237:10 384:10 392:5 395:8 396:15 <b>laundering</b> 445:17 <b>Laurie</b> 2:12 349:5 <b>law</b> 2:9 3:1,3,16 6:17 16:4 99:3,12 100:8,9,15,18,19 101:3,3,5 102:1 103:5,5,19 104:8 105:14 106:11 107:13 109:21 110:2,21 111:18 112:8,22 126:17 128:3 129:22 130:3,18,19 131:7 131:12 135:10 140:9,11 141:5 151:16 153:14,20 154:1 158:8,11 161:17 163:13 169:19 218:22 222:1 258:13 261:2 263:16 264:14 266:21 271:2 280:10 285:13 297:6 303:15 304:1,6 305:20,21 334:5,6 372:11 377:10 410:10 423:6 430:15 446:16 450:16 459:14 472:11 474:16 475:17 482:10 490:3,15 494:14 495:7,16 496:22 499:15 <b>lawful</b> 169:15 <b>Lawrence</b> 125:21 <b>laws</b> 102:11 103:13 104:4 358:9,9 432:15 451:15 452:9 454:1 469:5 483:1 <b>lawyer</b> 193:22 196:16 305:14,21
---	--	--	---	---

306:1,7 336:10	<b>leaving</b> 183:3	142:6 222:11	<b>lieutenant</b> 2:8,15	<b>lining</b> 465:7
362:17 379:6	<b>lecture</b> 14:21	243:17 263:13	2:16,21 3:5,15	<b>link</b> 470:22
381:5 382:21	<b>led</b> 320:12 365:4	271:6 357:8	98:22 111:9	<b>lion's</b> 9:3 331:15
423:9	490:16	374:20 385:14	171:15 309:19	<b>lip</b> 68:10
<b>lawyerly</b> 162:8,11	<b>left</b> 25:22 26:1,2	386:6 387:5	314:15 389:22	<b>liquids</b> 46:5
<b>lawyers</b> 49:6	29:17,22 67:1	<b>letter</b> 13:20 144:4	390:13,18 391:7	<b>liquor</b> 82:7
148:16 160:13	73:15 77:17 98:14	174:1 250:22	391:11,14,18	<b>Lisak</b> 37:2
201:17 221:21	112:20 144:18	<b>level</b> 5:21 101:8,12	392:16,22 400:21	<b>Lisak's</b> 39:18
336:6 372:15	181:9 212:5,7	117:14 137:8	402:5,6 411:9,14	<b>list</b> 162:22 163:16
377:9,14 379:4,13	324:11,13 404:12	148:1 158:8	411:18 426:13	165:15,19 255:16
379:15,21 380:3	445:22 473:14	159:16 160:16,21	<b>life</b> 10:7 13:19 47:7	396:3,5 421:6
381:3 383:1 409:1	<b>legal</b> 2:7,19 3:17	161:1 174:12	51:10 65:3 69:15	<b>listed</b> 8:9,10 179:9
423:14 443:9	7:11 16:6,19 17:1	194:11 197:2	78:14 119:11	<b>listen</b> 23:18,22,22
462:12	99:1,19 140:20	213:12 226:15,22	120:6 320:2 343:9	24:1,2 81:1
<b>lay</b> 390:19	144:15 160:3	230:18 305:6	351:10 356:10	367:12,14 436:17
<b>lead</b> 443:7	240:13 241:15,18	309:11 310:9	364:12,13 437:5	448:13
<b>leader</b> 94:17	241:22 242:5	313:4 315:12	<b>lifestyle</b> 66:4,8	<b>listened</b> 338:22
472:20	245:17 250:10	316:11 322:8	<b>lifetime</b> 351:8	<b>listening</b> 46:13 58:7
<b>leaders</b> 230:10	273:17 274:3	332:6 342:14,15	352:7 370:6	436:5
328:18	306:3,5 310:15	364:22 372:6	<b>lighter</b> 415:8	<b>literally</b> 59:15
<b>leadership</b> 322:13	316:5 317:8 330:3	411:7 414:18	<b>likelihood</b> 246:7	351:15
<b>leading</b> 472:10	331:18 358:18	432:4 456:19,21	264:19	<b>literature</b> 50:5
<b>leaned</b> 399:15	382:10 410:9,21	458:18 460:10	<b>likewise</b> 126:8	360:1
<b>learn</b> 9:10 20:12,13	413:21 427:18	<b>levels</b> 318:14	139:7 317:17	<b>litigate</b> 399:20,21
37:22 65:11	476:8 496:22	339:12	<b>limit</b> 260:6 384:4	<b>litigation</b> 2:13
345:16 355:14,15	498:11	<b>lewd</b> 120:13,13,18	<b>limitations</b> 106:19	318:10,16,17
359:11,16 365:22	<b>legally</b> 137:22	127:9,14	107:1,7,10,17	320:7 321:20
368:4 411:2 456:9	141:20 142:4,10	<b>Lewis</b> 2:16 171:5	108:13 109:1,3	325:13,15,21
459:11 481:2	179:11	171:11 186:8,11	112:13	326:5 331:21
<b>learned</b> 22:5,8	<b>legislation</b> 109:1	187:3,6,19 188:5	<b>limited</b> 77:3 150:9	349:2 350:18
58:14 338:19	152:7 388:5	189:6,9,20 190:12	260:8 314:2 318:5	372:11 377:12
339:11 343:20	<b>legislative</b> 109:19	190:22 191:5,7,15	385:10 418:19	380:6 407:19
345:17 347:8	<b>legislators</b> 358:4	191:18 192:6,9	468:15	415:22 422:15,17
357:6 373:5 421:8	<b>legislature</b> 364:2	193:6 194:3,9	<b>limiting</b> 387:8	422:21 424:2,4
<b>learning</b> 170:10	<b>length</b> 342:10,12	196:8 197:15	<b>limits</b> 371:10	425:4 479:14
462:10 463:18	346:18	198:3,6 199:1	383:22	<b>litigator</b> 214:19
<b>leave</b> 29:12 34:20	<b>lesser</b> 118:5,13	203:4	<b>line</b> 69:17 77:5	<b>litigators</b> 230:1,13
34:21 35:5,5,21	154:3,7,11,20	<b>liability</b> 130:17	189:13 410:5,6	414:15 423:5
36:8,9 53:7,19	228:11 278:17	135:8,14 169:17	413:7 472:10	<b>little</b> 5:18 6:13 8:20
67:14 85:10 106:8	<b>lessons</b> 421:8	<b>liaison</b> 67:3	<b>lined</b> 14:1 431:15	15:14 21:3 22:3
112:14 162:17	<b>let's</b> 12:8 18:15	<b>Liaisons</b> 231:4	<b>linen</b> 51:12	23:18 30:13 31:17
165:17 252:22	31:17 36:16 42:1	<b>liberties</b> 115:20	<b>lines</b> 62:12 63:13	36:1 41:17 42:4
269:17 306:1	42:8 43:6,13	446:7	63:13 170:3	42:11,16 44:1
422:20 449:3	44:16 47:4 53:19	<b>library</b> 356:19	492:16	46:19 58:2,20
454:14	73:12 74:20 75:4	373:17	<b>lineup</b> 61:7,8	73:3,17 74:14
<b>leaves</b> 55:5 106:9	99:21 100:16	<b>license</b> 450:5	<b>lineups</b> 433:10	75:16 76:6 80:8
223:8 242:17	124:3 141:7,19	<b>Lieu</b> 224:13	<b>linger</b> 141:1	82:6,15 89:3

99:21 100:14,16 114:13 117:10 118:15 155:4 165:10 168:20 176:8 194:4 200:7 209:13,17 211:11 224:10 235:21 244:3 248:16 257:13 266:7 282:22 293:10 308:16 309:10 338:4 341:11 361:17 369:8 377:12 389:8,15 400:7 422:22 425:20 440:6 446:14 472:2,4 <b>live</b> 343:12 348:16 357:17 371:2 <b>lived</b> 347:16 <b>lives</b> 15:8 19:13 35:16 44:21 47:5 78:22 81:11 308:22 351:14 376:10 423:9 <b>living</b> 12:20 52:9 272:5 <b>Liz</b> 389:1 <b>LL.M.s</b> 424:3 <b>load</b> 415:8 <b>loan</b> 73:18 74:5 <b>loans</b> 74:9 <b>local</b> 177:11,12,16 362:8 377:11 385:11 405:4 410:22 415:16 419:13,14 420:3 453:13,22 454:3,5 <b>located</b> 415:1 419:15 <b>locations</b> 315:11,17 <b>locking</b> 59:22 <b>lodge</b> 247:9 <b>logical</b> 50:2 85:7 <b>logistical</b> 239:20 240:2 <b>long</b> 25:16 50:19	167:4 307:14 308:1 332:18 386:10 405:14,15 431:6 433:22 464:1,14 <b>longer</b> 148:9 344:7 347:4,7 351:21 405:18 430:9 497:19 <b>longest</b> 340:7 <b>longitudinal</b> 91:18 <b>Lonsway</b> 272:4,11 <b>look</b> 10:4 14:22 16:14 36:19 39:6 42:1 47:1,2,19 52:21 55:14,14,15 58:13 65:13 71:8 74:21 80:17 93:4 103:11 106:2 113:2 116:8 117:4 119:16 128:19,20 128:21 129:2 130:9 136:6 148:6 162:1,3 166:20 167:12 174:3 183:2,6 184:3 185:5 187:8 198:3 198:20 201:1 202:16 207:19 208:13 211:20 212:1,2,4 213:7 215:9 221:10 222:11 223:15 224:2 228:6 229:19 238:7 254:1,8 262:15 271:6 278:2 291:7 296:6 319:8 320:21 335:3 340:11 346:3,8 347:17,18,19,20 348:4 367:9 369:5 372:13,16 374:6 399:16 422:6 439:2 463:11,12 463:14 477:21 490:16,21 492:14	<b>looked</b> 11:11 12:13 47:10,10 56:4,21 57:2 102:6,6 182:11,11 193:8 193:12 207:12 246:13 301:10 341:1 407:17 499:10 <b>looking</b> 8:5 35:1 51:19 54:5 69:9 77:15 93:12 117:4 117:5 148:5 160:11 168:1 174:14 184:19 198:10,13,19 213:10 214:1 245:8 253:1 338:10 341:15 352:9 360:9 461:12 473:19 489:10 <b>looks</b> 6:19 17:18 36:15 97:18 116:4 124:11 183:22 186:6 349:16 446:5 <b>Los</b> 257:10 267:3,4 267:7 271:16 272:19,20 273:2 278:11 282:10,22 285:20 290:16 291:13,21 292:20 293:2 297:5,11 <b>lose</b> 321:13 333:17 494:7,15 <b>losing</b> 498:15 <b>loss</b> 418:7 <b>lot</b> 6:3 21:11 22:5 33:12 39:10 40:9 44:13,15 50:22 60:3 85:20 93:6 94:21 95:6 96:18 97:19 99:9 142:20 160:13 161:16 166:16 168:4 171:9 199:15 203:22 211:22	243:5 244:1 253:20,20 322:22 335:6,7 337:1,6 339:22 341:7 347:5 350:21 352:8,15,15 353:10 354:7,15 354:22 355:8 359:2,2 364:12,18 370:20 372:19 376:22 377:3,4,13 377:15 382:3 401:1 409:13 410:11 423:18,22 425:21,22 430:9 440:18 460:5 462:12 463:5 464:5 465:11,12 468:11 469:11,13 478:3,7 482:10 488:2,4,9 489:3 490:6,9,14 492:7 492:19 495:14 496:13 501:6 <b>lots</b> 308:5 424:22 446:8,8 489:16 <b>loud</b> 449:5 <b>love</b> 5:13 60:19 170:21 386:5 444:20 445:1,7 465:9 475:13 <b>loves</b> 55:3 81:16 <b>low</b> 22:12 40:18 264:20 272:7 341:20 344:8 345:3 375:7 438:17,18 <b>low-level</b> 363:12 <b>low-risk</b> 344:1 346:1,3 359:20 <b>lower</b> 207:15,20,21 286:20 290:7 293:1 294:3 298:10 342:15 <b>lower-level</b> 388:11 <b>lowering</b> 386:20 <b>LSSs</b> 330:2	<b>LT</b> 309:17 314:14 <b>Luckily</b> 468:22 <b>lucky</b> 256:15 381:6 <b>Luke</b> 478:6 <b>lump</b> 244:21 <b>lunch</b> 256:5 <b>lure</b> 486:11 <b>lust</b> 127:19 154:17 <b>Luther</b> 332:16 <b>luxury</b> 246:1 <b>Lynch</b> 373:22 <hr/> <b>M</b> <hr/> <b>ma'am</b> 24:11 25:2 25:3,14,20 27:1 27:15 28:5 29:7 90:5 98:20 108:5 108:15,19 109:6 109:13 111:11 126:2,7 144:6 145:9,17 152:14 152:17 153:6,16 161:15 162:9 163:4,20 164:7 165:5,12,16,20 167:8 169:3 170:6 170:13,18 175:9 175:22 183:15 184:2,17 185:1 189:9,20 191:5 192:18 194:3 196:8 198:7 199:1 199:13 201:20 206:17,21 209:3 213:5 216:17 217:2,6 220:21 221:8 234:18,20 235:2,8,17 236:1 236:17 237:1,3,5 237:7,15 240:9 253:8 309:17 314:14 331:1 376:18 384:12 388:2,22 390:1,14 391:8,12 392:4,17 393:2,13 394:14 394:21 398:8,12
---	--	---	--	--

400:21 402:7,7 408:19 422:11 424:15,19 426:6 426:10,13 427:10 501:14 <b>machine</b> 54:19 <b>mad</b> 50:4 <b>Madam</b> 143:17 192:15 368:12 372:5 <b>Madame</b> 304:21 <b>magazine</b> 122:1 <b>Magee</b> 428:3 <b>magnitude</b> 327:12 <b>main</b> 361:21 <b>maintain</b> 318:4 373:17 465:15,19 <b>maintaining</b> 428:9 <b>maintenance</b> 161:2 <b>major</b> 3:9 104:14 215:2 229:13,14 336:15,22 338:11 340:20 358:2 396:6,7,7 427:8 427:10,12 <b>majority</b> 17:11 21:10,21 176:18 311:4 313:8 315:17 317:22 320:6 321:14 422:16 427:20 459:14 <b>making</b> 66:2,6 89:21 162:17 195:8 258:6 259:7 267:5 278:1 283:18 286:17 297:11 300:13 347:6 404:17 408:2,9 438:21 443:3 479:5 <b>male</b> 28:1 93:6,12 93:13 94:18 97:6 <b>MALINDA</b> 1:18 <b>Mall</b> 47:7 <b>man</b> 53:4 60:12 69:7 83:3	<b>Managers</b> 245:7 <b>mandated</b> 103:10 398:22 <b>mandatory</b> 354:3 357:11 366:1 375:2,4 378:15 467:10,11,12 <b>Manfield's</b> 255:4 <b>Manhattan</b> 416:21 430:7,13,20 431:12 434:14 440:19 446:6 <b>manifest</b> 101:8 <b>manifested</b> 133:2 <b>manipulator</b> 321:6 <b>manned</b> 428:2 <b>manner</b> 133:5 <b>manning</b> 404:18 <b>Mansfield</b> 2:17 206:22 217:9 238:4 <b>mantra</b> 370:11 <b>manual</b> 103:12 109:22 110:10,13 111:22 112:1,5 113:1,11,17 114:6 155:9 162:1,2 163:8 164:16 165:8 319:2 <b>map</b> 293:11 <b>March</b> 172:16 <b>marching</b> 47:21 <b>margaritas</b> 43:16 43:19 47:13 <b>Maricopa</b> 2:20,21 471:10 472:6 480:7 481:13 <b>Marine</b> 2:5,6 3:9 3:11,11,17 209:18 240:8,14,18,20 242:6 243:9,13 269:18 276:22 278:16 290:4 319:13,19 320:2 325:16,22 326:6 328:15 410:4 425:1,2,8 427:16	427:19,19 428:11 428:21,22 429:4 429:18 430:1 <b>marines</b> 51:6 306:16 320:12 324:5,20 332:8,8 484:1 <b>mark</b> 3:9 343:10 427:12 <b>marriage</b> 115:8,10 347:20 <b>marshaling</b> 147:17 <b>Martha</b> 2:1 430:4 430:13 460:15,20 461:17 465:6 468:1 470:1 <b>martial</b> 112:12 155:10 166:9 174:16 183:8 187:7 228:22 280:6 284:12 287:1 289:9 323:11 393:5,19 473:4 <b>Martin</b> 332:16 482:10 <b>masculinity</b> 92:6 93:16 96:6 <b>mask</b> 18:1 <b>master</b> 321:6 <b>match</b> 204:15 244:14 336:7 <b>matched</b> 16:3 <b>material</b> 257:22 268:17 275:4 395:16 <b>materials</b> 238:21 269:19 362:14 <b>maternal</b> 85:5 <b>math</b> 185:21 187:13 229:14 <b>matter</b> 29:6,10 50:21 98:9 168:18 177:20 345:2 360:12 381:14 400:8 403:22 432:22 433:22	434:6 462:12 464:10,11 480:10 482:5 501:8 <b>matters</b> 61:19 155:4 343:22 375:1 381:22 <b>max</b> 346:22 <b>maximize</b> 177:6 <b>maximum</b> 112:6,14 112:19,21 119:9 119:12,13 120:11 121:1,2,15,18,19 347:1 364:11 459:5 <b>Maxwell</b> 407:10 <b>Mayor's</b> 466:11 470:13 <b>McCLEARY</b> 2:19 199:13 209:3 243:18,19 247:3 248:13 408:17,18 408:19 <b>McCleary's</b> 201:5 <b>McGUIRE</b> 1:17 270:15 <b>MCIO</b> 208:9,20 267:18 274:6 <b>McWhorter</b> 37:20 <b>meager</b> 331:7 <b>mean</b> 13:8 32:16,21 42:15 43:9 44:19 51:17 56:1,3 57:18,21 59:12 62:12 63:22 69:13 81:8 82:14 90:19 93:19 107:22 110:4 113:19 123:18,22 132:5 138:13 140:16 149:19,22 159:13 161:2 166:10 178:4 179:1 182:1 183:15 194:5 200:11 202:11 212:6 215:11,20 222:7,10 225:14 236:13 246:20	252:9 255:6 263:3 285:6 286:6,10 301:4 337:17 379:5 380:20 382:13 488:6 <b>meaning</b> 35:20 48:16 65:18 85:13 179:15 257:20 472:18 <b>meaningful</b> 218:9 219:2,19 343:16 416:19 <b>meaningless</b> 86:10 295:10 <b>means</b> 35:18 78:21 83:2 88:4 93:1,14 113:19 128:7 132:6 140:18 188:13 189:15 216:15 222:4,7 225:6 226:10 234:16 251:15 259:15 262:19,22 267:13 281:21 286:13 295:8 301:8 351:9 359:11 366:11,12 394:15 422:16 433:1 438:12 <b>meant</b> 107:6 <b>measure</b> 200:22 202:2,3 219:11 244:10,12,18 386:8 <b>measured</b> 244:16 <b>mechanism</b> 330:5 <b>media</b> 17:16,21 80:22 81:11,16 333:9 480:22 <b>medical</b> 30:16,18 31:3 36:5 66:19 67:6 266:15 441:20 462:13 467:18 481:15 <b>medium</b> 346:7 <b>meet</b> 19:5 32:15 179:7 250:12
--	--	---	---	--

348:9	234:3,8,9,19,21	39:19 57:14,21	296:2,5	277:19 278:14,19
<b>meeting</b> 5:5 73:22	235:3,15,18	62:16 87:20 89:15	<b>methods</b> 467:14	279:18 286:16,20
420:6 447:4	236:11,18 238:20	90:14 91:5,9 92:2	<b>metropolitan</b> 2:3	286:21 287:18,21
501:13,15,18	239:22 240:5,6	92:7,21 93:2,7,9	336:1,4 409:9	288:18 294:6,20
<b>meets</b> 16:6 17:1	243:15 246:11	93:10 94:5,11	<b>Mexican</b> 489:1	295:3,15 296:9
32:14,16 187:9	247:1 248:12	95:12,20 96:2,8	<b>Mexico</b> 3:7 65:22	298:18 300:6
291:15	253:6 254:8,11	259:3 368:16	368:11,21 369:3	304:14 305:16,18
<b>member</b> 19:9 32:4	255:3 270:2,9,13	448:13 495:15	369:14 370:9	305:19,21 309:2,5
32:10 33:20 34:1	270:15,17 287:4,7	<b>mental</b> 155:3	371:5,14 373:10	310:20,22 311:2,5
34:6,9,13 40:13	287:13,17,22	415:18 464:2	374:15 489:15	313:11 314:2
40:16 62:20 79:10	288:2,5,9,11,16	487:8	494:5	319:2,3 339:1
79:18 80:21 81:3	289:5 298:22	<b>mention</b> 240:13	<b>Miami</b> 285:10,12	342:4 347:18
81:7,21 82:9 83:6	300:16 301:12,21	246:20	<b>MICHAEL</b> 3:1	349:14 351:20
83:10,13,17 89:8	303:3 304:5,9	<b>mentioned</b> 110:10	<b>Michigan</b> 37:22	356:12 357:2,21
89:21 90:7,11	312:3 383:12	113:7 132:18	444:8 466:22	366:6 368:16,18
96:10 97:22	384:19,22 389:2	137:15 140:1	<b>microphone</b> 73:11	369:8,11,19 370:3
107:19 108:9,16	390:11,17 391:4,9	212:14 241:9	74:12 75:10,14,18	372:18 373:5
108:21 109:10,14	391:13,17,22	248:15 254:2,5	76:1 90:10	374:11,18 388:14
125:19 143:17,20	392:8,12,21 394:6	256:14 332:11	<b>mid-level</b> 459:18	389:7 391:1,3,19
144:16 145:15,18	394:15,19,22	401:1,10 423:2	459:19	394:4,4 402:5,22
146:16 147:1	395:4,22 397:3,8	444:8 461:17	<b>middle</b> 58:15 68:8	403:1 404:11
148:4 149:4,18	397:18 398:2,9,13	468:1 478:2	80:11 91:6	405:22 407:22
151:1,10 152:10	398:16 403:10	480:18	<b>middle-aged</b> 80:10	408:22 409:3
152:15,18 153:12	404:2,10 422:14	<b>mentor</b> 416:5	<b>midterm</b> 45:4 46:9	414:9 416:8,22
159:9 161:6	496:17	<b>mentoring</b> 371:19	<b>Mighty</b> 11:12	417:11 421:21
162:10,20 163:21	<b>members</b> 1:15	<b>mentorship</b> 322:7	<b>MIKE</b> 2:16	422:15,18 430:22
164:9,22 165:3,11	98:21 111:6,17	<b>menu</b> 168:7	<b>mildly</b> 295:19	436:21 447:2
165:13,18,21	123:20,20 140:3	<b>mere</b> 321:22	<b>miles</b> 472:7	473:13 474:2
166:1,18 167:15	140:11 149:7	<b>merely</b> 221:13	<b>military</b> 2:4,5,16	477:3 478:14
167:18 168:1	160:4,19 164:14	334:16	4:6,12,16 6:2,5	482:17,19 483:19
169:4,21 183:11	170:1 171:12	<b>merits</b> 249:5	22:19 36:22 39:22	485:4 496:3
183:17,21 184:15	217:16 241:8	<b>mesas</b> 60:10	51:5 71:5 78:15	<b>military's</b> 99:5
184:18 185:18,20	247:12 255:22	<b>mess</b> 361:21	84:19 85:21 93:22	370:18 483:17
186:10 187:1,4,11	260:8,11 263:7	<b>message</b> 33:15	94:3 95:18 97:18	484:9,12
187:20 189:4,8,10	307:15 309:18	82:10,12 321:11	103:2 104:10	<b>military-aged</b>
189:13 190:9,18	315:16 321:10	321:13 492:4	111:13 128:2	36:18
190:20 191:1,6,10	328:18 332:14	<b>messages</b> 84:16	149:6 154:2,5	<b>million</b> 426:15
192:2,10,14,15,20	368:13 369:8	88:15,15,17 93:4	171:13 178:5	472:5 487:4
193:17 194:6	384:15 389:3	491:21 494:8	180:8 210:15	496:20
195:12 196:13	411:10 423:8	<b>met</b> 16:18 25:11	224:10,21 242:13	<b>mind</b> 31:6 32:19
197:11,13 198:1,4	427:11 436:21	27:8 66:19 435:3	258:1,2 259:8	41:3 155:19
198:8,9 199:2,20	455:22 466:4	<b>method</b> 97:1,2,15	260:7,10,14,16,19	157:10 167:16
206:18 207:7	501:10	217:19 245:21	261:8,11,13,15	202:11 234:12
208:2 211:2 215:5	<b>memo</b> 253:14	<b>methodologically</b>	262:1,8,9 263:4	258:7 274:16
215:15 216:14,19	<b>Memories</b> 418:20	272:13	267:17 268:12,20	275:15 286:19
216:22 231:12	<b>men</b> 11:13 21:6	<b>methodology</b>	270:20 273:8	378:4 481:18
232:16 233:7,14	22:11 36:19 37:5	201:21 216:1,2	274:17 275:1	<b>mine</b> 43:20 44:9

51:20 268:22	<b>mission</b> 310:4,13	485:22	303:18 351:2	90:4 91:13 96:13
<b>mine's</b> 51:13	313:4 327:10	<b>month</b> 67:3 170:8	363:11 403:18	98:2,5 101:17
<b>mines</b> 499:21	330:13 332:10	306:7,21 442:2	422:20 448:8	137:15
<b>minimal</b> 432:2	415:11 428:8,12	449:15	471:8 489:2,14	<b>municipal</b> 480:8
450:10	483:21	<b>monthly</b> 429:15	<b>moved</b> 57:6 59:12	<b>municipality</b>
<b>minimally</b> 372:8	<b>mistake</b> 21:20	447:3,12	233:5 445:15,15	260:13
<b>minimization</b> 95:10	101:10 150:3,7,9	<b>months</b> 58:20 69:2	461:7	<b>music</b> 80:22
<b>minimum</b> 311:7	150:15,17,18,19	74:13 306:14	<b>movie</b> 131:6 445:4	<b>mustache</b> 28:12
362:16 364:4,8	150:20 155:7,8,18	307:9,12 318:7,8	<b>movies</b> 491:15	<b>muted</b> 166:12
366:1 378:15	155:20 156:1,5,10	321:18,22 324:12	<b>moving</b> 233:1,20	<b>Muth</b> 3:3,3 360:20
<b>minor</b> 317:8 336:15	156:10,11,15	325:5,7 338:17	274:22 279:13	360:21,21,22
336:22 359:1	157:1,2 344:5	385:13 412:18	290:12 321:19	361:1,2 367:3
378:10 433:1	<b>misunderstood</b>	416:16 428:17	328:14	368:9
456:4	270:3	445:18 456:14	<b>MPD</b> 468:5	<b>myriad</b> 180:9
<b>minute</b> 98:8 281:1	<b>misuse</b> 267:13	457:19 458:4	<b>Mulligan</b> 3:1 199:6	
283:11 414:13	347:7	<b>Monty</b> 335:20	201:5 206:21	<b>N</b>
489:22	<b>mitigation</b> 380:18	<b>monumental</b> 141:2	213:4,4 215:4,16	<b>NACDL</b> 308:14
<b>minutes</b> 25:17	<b>mix</b> 429:2	<b>moot</b> 145:3 153:1	216:17,20 217:2,6	<b>nails</b> 51:19
365:14 411:13	<b>mixed</b> 182:22 183:1	<b>moral</b> 332:18	220:17,21 221:8	<b>naïve</b> 353:20
<b>mire</b> 53:15	<b>mock</b> 65:15 377:18	<b>morning</b> 5:3,14,19	229:18 232:1,20	<b>naked</b> 122:14
<b>mirror</b> 111:21	<b>model</b> 89:6 103:14	10:11,13 12:19	233:15 234:7,18	<b>name</b> 9:10,10,11,11
<b>misclassified</b>	105:21 211:12	46:8 98:16,21	234:20 235:2,8,17	19:1 27:17 31:6
438:14	351:20 360:9	153:15 171:11	236:1,17,22 237:3	71:6 73:7 98:21
<b>misconduct</b> 115:4	365:5 427:20	175:7,8 229:15	237:5,7,15,19	170:21 226:18
116:6 242:21	<b>modeled</b> 116:13	259:12 375:12	238:15 239:11	309:18 319:16
<b>misconstrued</b> 84:9	<b>modify</b> 319:1	433:10 448:12	240:1 255:4	323:3 329:9
<b>misdemeanor</b>	<b>molestation</b> 443:10	467:7	<b>multi</b> 481:13	335:22 349:4
438:11,15 456:16	<b>moment</b> 75:4 110:6	<b>mornings</b> 5:15	<b>multi-disciplinary</b>	361:1 401:10
456:17,19 457:5,6	143:4 203:16	<b>Morse</b> 2:21 411:9	419:6	408:19 411:14
457:7,9,10,19	260:4 434:20	411:15 422:9	<b>multi-hour</b> 467:2	422:12 435:4
458:5,5,11,17	439:9	426:12,13 478:2	<b>multidisciplinary</b>	<b>named</b> 5:11 36:12
459:7	<b>Monday</b> 448:12	<b>mother</b> 46:20	466:18	66:12
<b>misdemeanors</b>	<b>money</b> 54:19 55:2	<b>mothers</b> 64:1	<b>multiple</b> 5:15	<b>Nash</b> 82:6
292:17 336:16,19	56:10,17 73:17	<b>motion</b> 391:20	448:15	<b>nation's</b> 482:17
352:20 363:10	74:2,10,15 76:11	<b>motions</b> 306:12	<b>Multipurpose</b> 1:12	<b>national</b> 257:8
377:21 438:20	77:19 330:16	329:8 365:19	<b>Multnomah</b> 337:11	261:16,18 317:22
440:15 456:4	331:5,12 353:14	387:19 395:20	<b>Munch</b> 3:2,2 5:10	417:9 465:3,22
<b>misleading</b> 259:19	353:18 400:13	421:2 428:10	5:13,14,16 30:12	480:16 482:9
282:22	423:18,20 424:5,6	<b>motto</b> 332:7	31:11 32:9,14	<b>nationwide</b> 278:6
<b>misnomer</b> 257:14	424:8 425:7,10,13	<b>mountain</b> 60:10	33:22 34:5,7,11	<b>nature</b> 188:19
<b>misrepresent</b>	425:20 445:16,17	<b>mountains</b> 59:8	34:14,18 40:15,22	194:14 378:17
498:20	<b>monitor</b> 437:6,7	<b>mouth</b> 124:16,19	51:10 62:22 73:9	392:11 423:10
<b>missed</b> 30:20	<b>monitored</b> 311:18	125:7,8 154:14	73:12,20 74:9,13	436:16 445:3
231:15 287:8	<b>monitoring</b> 448:2	254:21	75:11,15,19 76:2	447:17 474:21
388:3	<b>monster</b> 155:10	<b>move</b> 7:4 30:14	79:16 80:1 81:2,6	478:18
<b>missing</b> 185:22	<b>Montgomery</b> 2:20	59:15 141:5 240:7	81:8 82:8,11 83:7	<b>Naval</b> 37:21 38:2
222:5	471:8,9,11 485:14	241:12 275:18	83:17 86:2 89:20	425:11

<b>navigate</b> 168:22	358:16 359:16	<b>never</b> 52:22 57:3	<b>nightclubs</b> 449:16	<b>nonprofit</b> 336:3
<b>Navy</b> 2:10,14 3:7,8	360:1,15 362:17	75:2 140:13	<b>Nightlife</b> 447:14	<b>Norfolk</b> 307:4
200:4 201:9 202:4	362:18 364:19	186:16 199:8,16	449:15	<b>normal</b> 97:1 122:18
202:9 204:2,17	366:6 367:15,16	236:20 237:8	<b>nine</b> 60:1 62:9	327:4 358:22
205:4 216:1 247:9	373:22 376:8	246:5 288:16	182:17 184:5	<b>normally</b> 112:9
250:6 269:18	383:2 389:4 390:5	308:21 334:15	225:8 247:21	130:6 147:14
277:9 278:17	393:19 399:16,17	341:18 343:14,15	265:6 323:15	160:16 164:1
279:1 289:19,21	401:17 405:21	357:3,4,21 396:8	377:3 430:8	194:10 325:4
304:18,19 305:2,4	407:13 461:20,22	396:11 400:11	456:14	432:3
305:6,12 306:9	462:17 463:19	437:4 446:3,3	<b>ninth</b> 79:15,16	<b>norms</b> 100:10,16
330:12 370:19	464:9 479:19	473:17 476:22	<b>nip</b> 447:9	130:10 131:8
371:16 409:8,13	481:2 484:11	477:2	<b>nipple</b> 122:15	<b>north</b> 69:19 347:11
409:16 422:14	494:6,13 499:13	<b>new</b> 2:2 3:7 65:22	<b>NJPs</b> 204:1 243:12	426:19
425:1,1,9	<b>needed</b> 155:11	103:14 104:15	<b>nobody's</b> 43:21	<b>nose</b> 36:3,3
<b>Navy's</b> 201:22	230:11 324:1	105:2 108:22	<b>non</b> 33:17 132:3	<b>note</b> 115:6 116:7
205:20 305:3	415:6	109:2 121:3 154:1	178:21 361:17	128:18 176:3
<b>NCIS</b> 250:7	<b>needs</b> 36:12 73:16	168:15 195:19	<b>non-commissioned</b>	478:10
<b>NDAA</b> 103:10	102:9,10 143:8	238:7,12 316:8,11	421:12	<b>noted</b> 35:22
104:7 106:5	190:13 298:13,16	338:10 344:8	<b>non-consensual</b>	<b>notes</b> 302:6
107:11,22 410:19	343:3 348:9,15,15	351:2 368:11,21	132:3	<b>notice</b> 82:18 221:14
429:20	353:21 359:18	369:3,14 370:9	<b>non-DOD</b> 329:4	300:18
<b>near</b> 496:2	360:13,14 362:9	371:5,14 373:9	<b>non-hearsay</b>	<b>noticed</b> 6:22 340:17
<b>nearly</b> 424:2	362:11 365:6	374:15 397:12	433:17	<b>notified</b> 434:13,17
<b>necessarily</b> 93:20	373:18 386:1	412:15,20 414:7	<b>non-judicial</b> 174:17	<b>Noting</b> 272:8
100:7 178:4	388:20 399:3	416:1 429:6	181:18 219:16	<b>November</b> 327:14
200:10 204:15	438:8 484:8	432:14 433:13	225:21 229:10	472:11
213:10 218:2	493:22	441:2 447:13	473:9	<b>nuanced</b> 413:3
241:22 251:10	<b>nefarious</b> 331:10	449:15 450:15	<b>non-jurisdictional</b>	<b>nuances</b> 86:3 354:9
284:12 291:11	<b>negative</b> 138:20	489:17 498:13	384:16	<b>number</b> 38:1,2
390:6 440:2	<b>negatively</b> 212:6	499:3,3 500:6,9	<b>non-litigation</b>	94:11,13 104:16
481:10 484:7	<b>neglect</b> 153:13	<b>news</b> 19:19	320:10 325:11	115:7,8 180:15
<b>necessary</b> 87:8	<b>neglected</b> 153:7	<b>newspaper</b> 10:18	<b>non-penetrative</b>	182:14,20 186:18
153:3 171:8	<b>negligence</b> 135:9	11:1	476:14	187:16 189:22
331:22 395:15	<b>neither</b> 94:13 481:9	<b>NGOs</b> 466:9	<b>non-prosecution</b>	190:8 191:13,16
437:11,12	<b>nephew</b> 45:13 46:3	<b>nice</b> 43:11 52:1,7	304:7	194:16 206:3
<b>need</b> 8:19 20:22	48:20 85:10 86:14	59:18 163:6	<b>non-reporting</b>	213:14 214:4
24:8 39:16 42:15	<b>nephew's</b> 85:9	170:16 183:22	441:4	221:15 230:5,6,7
61:19 74:3,17	<b>nephews</b> 44:20	423:17 473:16	<b>non-sex</b> 223:20	273:10,11,14
76:7 77:13 78:13	45:2	<b>nicely</b> 161:20 365:7	225:21 226:1	283:14,17 288:12
86:6 88:19,22	<b>nervous</b> 84:7	<b>nicer</b> 51:20	357:7	289:8,14 315:1
93:4 110:16	<b>nested</b> 413:20	<b>nieces</b> 44:20	<b>non-sexual</b> 206:7	324:15 327:8
111:19 165:21	<b>network</b> 315:8	<b>night</b> 44:7 46:7	206:11 207:17	352:16 354:19
170:2 215:4	<b>networks</b> 316:13	60:2 63:3,6 64:22	243:12	364:17 368:1
236:15,16 335:12	<b>neurobiology</b>	65:3 66:21 131:3	<b>non-stranger</b> 147:7	388:15 409:11
336:20 345:9	462:14	435:3 436:11	<b>non-strangers</b>	458:16 476:7,19
348:2,3,13 353:16	<b>neutral</b> 115:8	447:14 448:8	271:21 272:1	476:21 477:5
354:22 355:8	392:21 393:1	489:11	<b>non-trivial</b> 324:15	480:17 482:6

<b>numbers</b> 22:11,21 91:11 119:8 175:21 182:22 189:19 190:15 193:5,6,11 194:2 199:15 203:10 207:20 213:8,22 221:14 234:15 235:22 240:10,16 240:19 241:10 244:1,3,14,22 246:9 248:16 249:3,15 252:14 255:6 259:16 287:10 330:22 346:8 349:14 438:17,18 474:4	243:5 280:12 286:7 294:17 303:1 316:19 407:15 497:17 <b>occasion</b> 41:10,11 41:12 76:13 324:7 <b>occasionally</b> 438:19 <b>occasions</b> 76:11 398:19 <b>occur</b> 24:20 106:6 180:20 264:7,11 264:19 266:6,17 421:20 488:8 <b>occurred</b> 106:18 138:11 153:2 177:14,14 178:11 179:18 253:12 <b>occurring</b> 106:20 <b>occurs</b> 120:4 128:8 261:2 <b>October</b> 104:12 106:20 107:3 319:20 <b>odds</b> 281:15 282:9 <b>offend</b> 96:20,20 <b>offender</b> 7:14 39:15 66:9 70:15 96:19 117:6,6 172:8 178:5,9 218:14 220:4 223:10 227:9 235:11 238:9 252:18 342:11 343:8 344:1,2 345:6 346:11,21 347:4 354:20 356:9 357:11,11,13 365:22 370:4 385:18 417:22 418:15 453:22 461:10 469:3 470:9 480:22 490:22 491:8,12 492:12,13 <b>offender-centric</b> 104:19 <b>offender-focused</b>	255:9,18 <b>offenders</b> 70:13 93:7,9 96:15,16 179:2 222:20 227:21 339:10 345:1,12 346:1,3 346:7 347:12 417:21 474:21 <b>offense</b> 2:11 57:14 112:21 113:3 144:20 151:7 152:3 153:2 154:3 154:6,7,12,19,21 177:9,14 178:10 178:22 179:6,9,21 183:8 206:7 225:22 226:1,4,10 236:7 238:9 260:12 267:21,21 275:8 276:2,8 277:4,16 284:8 352:3 353:8 356:11 364:3 365:2,12 379:9,10 419:18 453:7 455:15 461:6 462:5 463:9 464:18 466:17 <b>offenses</b> 102:22 104:11 105:6 106:6,20 108:14 109:4 115:9,11 150:4 153:5 154:4 172:2 183:6,7 206:14 208:1 214:3,5 219:7,20 220:2,10 221:1 223:20 226:20 228:11 243:12 253:17 259:2,3,13 259:15 261:18 262:17,18 263:22 271:9 274:17,20 274:21 277:19 287:10,11 288:14 289:4 342:2 363:14,20 365:9	378:21,22 388:11 459:6 474:11 481:21 482:5 <b>offensive</b> 81:22 131:22 138:16,20 139:1 146:21 147:15,19 <b>offensiveness</b> 149:16 <b>offer</b> 241:10 439:13 439:20,22 <b>offered</b> 76:14,15 <b>offers</b> 75:8 467:21 469:21 <b>office</b> 2:2,12,13,18 2:19 3:1,3,5 7:7 59:13 61:14,14 172:17 217:10 234:1 245:17 305:4 306:3,22 307:1 308:4 316:5 317:7 322:16 326:16,18 329:5 349:3,6,7 350:22 352:1 361:13 362:7 379:16 382:17 386:13 387:1 405:7,15 409:2 414:19 419:9,16 421:17 430:7,14 431:2 433:7 435:20 438:11 439:15 441:1,19 442:2 453:9,11,16 454:11,17 455:6 455:16 456:6,12 459:10 460:10 462:4 465:9,15,19 466:11,11,13,17 467:12 468:2,8,12 470:13 471:8 472:9 474:6 475:22 477:9 482:4 485:15 496:11 497:2 <b>officer</b> 1:21 2:4	45:11,17,21 160:20,22 171:19 188:22 194:21 196:15,20 197:4,8 197:17 198:11,20 198:21 199:9,11 224:14 264:4 305:12 311:8 319:17 320:5 331:19 344:12 345:14 412:19 438:5 472:14 494:15 <b>officer's</b> 198:17 <b>Officer-in-Charge</b> 3:10 <b>officers</b> 71:4 309:5 313:9 328:4,5,10 360:7 411:18 413:9 417:4 421:12 426:20 478:8 482:11 <b>offices</b> 234:4 329:1 349:9 352:11 353:9 372:1 375:20 410:21 442:13 453:1 455:4 465:11 <b>official</b> 202:13 263:18 472:2 <b>officials</b> 263:16 <b>offset</b> 309:4 425:15 427:6 <b>oftentimes</b> 177:12 398:20 418:22 <b>Ogden</b> 82:6 <b>oh</b> 30:5 42:22 49:15 53:4 64:12,22 83:12 98:14 111:11 359:13 368:9 375:15 384:21 391:17 <b>OJT</b> 230:2 317:16 <b>Ok</b> 304:16 <b>okay</b> 12:22 18:19 19:4 23:2 24:10 24:16 26:2,11,16
<b>O</b>				
<b>o'clock</b> 60:1 63:6 433:9 <b>O'Hara</b> 131:2 <b>O-F</b> 4:1 <b>object</b> 124:7,19 259:2 <b>objectification</b> 88:6 <b>objective</b> 129:9 135:3 157:20 381:20 <b>observation</b> 121:10 <b>observe</b> 469:18 <b>obtain</b> 323:22 <b>obviously</b> 30:15 81:22 109:16 111:1 141:16				

26:20 27:8,17,20 28:8,11,16 29:2 29:13,15 30:1,11 30:12 38:15 39:14 41:15 43:11 44:6 49:16,16,20 53:18 58:18 60:16 65:4 67:17,20 73:2 80:8 89:5 98:7 109:14,15 114:11 116:19 131:10 149:18 151:1 152:18 163:21 165:11 187:19 192:15 193:19 194:6 195:12,13 198:1 216:19 235:15 236:18 237:6,11 240:6 243:17 250:15 256:3 270:9,17 287:17,22 288:5,9 288:11 289:5 391:4,17 394:6 397:3 398:5,9 403:10 <b>Okinawa</b> 320:9 <b>Oklahoma</b> 224:11 <b>old</b> 28:2 79:19 150:1 240:14 436:19 444:17 <b>older</b> 100:3 340:19 <b>olds</b> 347:18 <b>on-the-job</b> 317:17 <b>onboard</b> 329:17 <b>once</b> 39:20 107:2 113:15 168:21 187:7 196:3 203:6 203:11,13 204:7 206:15 211:18 231:18 232:12,13 242:4 306:1,20 307:7 311:11 378:10 399:5 406:7 412:16 440:7 448:2 <b>one's</b> 127:15	<b>one-page</b> 250:21 <b>one-time</b> 66:20 <b>one-week-type</b> 371:16 <b>one-year</b> 121:15 <b>ones</b> 162:7 172:5 191:11 202:20 221:12 241:5 370:14 385:5 459:12 487:6 <b>ongoing</b> 432:13 <b>online</b> 329:8 453:21 498:20 <b>open</b> 60:3 238:7 247:18 436:8 <b>opened</b> 11:1 172:16 176:5 <b>openings</b> 307:16 <b>operate</b> 49:18 <b>operating</b> 315:11 315:17 <b>Operations</b> 2:7 472:21 <b>operator</b> 24:7,10 24:13,16,19,22 25:2,5,7,10,13,16 25:19,22 26:2,5 26:11,16,18,20,22 27:3,6,8,11,14,17 27:20 28:1,4,7,11 28:14,16,21 29:2 29:6,9,13,17,20 30:1,5,8,11 84:13 <b>opinion</b> 21:12 40:8 51:3 70:7 79:21 80:17,20 96:16 102:20 334:10 365:13 384:9,12 394:16 424:7 499:3,8 <b>opinions</b> 50:13 65:20 80:7 81:15 <b>opportunistic</b> 491:12 492:12 <b>opportunities</b> 410:14,16 413:11 <b>opportunity</b> 6:11	20:3 49:3 79:5 85:15 86:16 177:2 196:2 217:8 314:9 319:5,12 410:11 411:11 422:4 427:12 <b>opposed</b> 49:3 103:5 130:18 206:13 250:20 251:3 418:13 <b>opposite</b> 169:13 199:19 252:17 <b>opted</b> 116:14 <b>optimally</b> 372:9 <b>option</b> 344:15 <b>options</b> 122:9 294:5 <b>oral</b> 259:1 <b>oranges</b> 288:8 290:10 <b>order</b> 11:7 110:16 110:19 111:6 112:4 113:8,22 163:2 164:2,20 165:4,14 166:21 194:18 207:6 219:21 252:10 316:18 327:12 342:14 373:7 382:11,19 391:2 394:5 411:6 433:18 451:3 460:16 463:20 475:22 479:20 480:11 494:6,21 <b>orders</b> 396:9 <b>ordinary</b> 145:21 147:11 <b>Oregon</b> 2:4 336:2 339:22 340:9,21 343:9 345:11,18 386:3 387:17 <b>Organization</b> 3:11 319:19 <b>organizations</b> 447:7 <b>organize</b> 337:19 <b>organized</b> 476:1	<b>orient</b> 69:21 <b>orientation</b> 307:10 317:1,10 428:15 428:18 <b>originally</b> 213:9 238:19 <b>OSI</b> 174:13,14,21 176:5 181:6 208:9 <b>ought</b> 111:5 130:16 168:12 169:18 248:19 298:4 301:1 <b>outcome</b> 8:21 9:4,4 342:6 397:22 398:8 <b>outcomes</b> 258:2,8 261:14,16 262:2 262:14 291:11 300:11 475:20 <b>outlier</b> 348:5 <b>outliers</b> 286:7 <b>outline</b> 322:11 328:19 <b>outlines</b> 328:16 <b>outreaches</b> 413:12 <b>outside</b> 19:6 60:9 67:14 69:11 161:20 241:15,18 241:22 242:5 260:19,22 261:8 274:3 423:22 432:18 465:13 482:3 <b>over-criminalizing</b> 169:11 <b>over-supervise</b> 359:20 <b>overall</b> 205:20 249:3 274:10 278:2 286:21 291:12 295:9 321:11 414:2 477:6,8,10 484:13 <b>overarching</b> 380:7 <b>overcome</b> 129:1 332:17 412:12 419:5	<b>overdrinking</b> 449:8 <b>overincarcerate</b> 344:4 <b>overnight</b> 349:15 <b>overreact</b> 343:22 <b>overruling</b> 198:16 <b>overseas</b> 177:11 <b>oversee</b> 408:22 <b>overshot</b> 343:10 <b>oversupervise</b> 344:4 <b>overturning</b> 485:8 <b>overview</b> 4:5 98:17 <b>overwhelmed</b> 471:6 <b>owe</b> 332:14 <b>owing</b> 322:5 <b>own-case-work-s...</b> 350:14 <b>Owner</b> 3:2 <hr/> <b>P</b> <hr/> <b>P-R-O-C-E-E-D...</b> 5:1 <b>p.m</b> 256:8,9 403:21 404:1 501:8,9,17 <b>package</b> 308:17 <b>packaged</b> 61:13 <b>packaging</b> 47:17 <b>packet</b> 308:12 <b>pad</b> 334:13 <b>page</b> 4:2 11:2 241:13 246:11,14 480:12 <b>paid</b> 6:6 230:14 298:4 397:11 <b>painted</b> 11:5,17 <b>pair</b> 312:22 <b>pan</b> 339:19 <b>pandering</b> 123:9 <b>panel</b> 1:4,12,14,15 4:3,19 5:5 13:15 64:10 98:21 102:6 111:17 151:8 170:20 171:12 211:14 214:1 216:11 217:16
--	--	---	--	--

238:22 256:3	124:17,19 125:9	373:15	<b>penal</b> 439:1	351:16 353:14
288:21 298:7,8	126:5 127:2,4,6	<b>particularly</b> 70:4	<b>penalty</b> 459:5	355:5 356:20
304:12,17 309:18	127:13 129:7,9	193:7 279:17	<b>pending</b> 113:7	359:21 363:13
310:3 313:13	131:6,10 138:10	285:18 286:16	152:7 165:6,9	368:17 383:4
314:10 319:12	140:2 147:1	338:12 342:2	176:14 218:8	387:2,5 407:16
320:21 321:4	157:22 211:11	409:7,13 410:20	223:6,21 224:6	408:2,10 409:22
326:1 327:15	238:21 243:20	411:3 415:7 424:7	228:5,15 241:6	431:6,14,15
328:7 354:13	253:22 255:18	500:22	291:2,6 294:13	432:14,17 434:1
359:7 363:18	291:12 301:2	<b>parties</b> 7:12,17	337:11 440:10	436:17,19,21
368:14 383:11	322:16 325:2	498:22	<b>pendulum</b> 169:12	437:4 443:14
389:3 403:19,20	371:5 392:10	<b>partly</b> 23:14 51:1	<b>penetrated</b> 16:22	444:9 447:5,5,22
404:6 411:10	408:21 429:14	452:5	125:8	448:3,15 449:1,2
427:10 477:1	455:11 466:12	<b>partner</b> 35:11,12	<b>penetration</b> 124:7	449:4 450:19
482:17 486:7	470:10 490:3,18	434:18 435:15	124:18 132:10	452:3,14 455:12
500:4 501:1,10,15	490:19 493:13	442:17 446:18	133:18,21,21	455:17 456:22
<b>panel's</b> 328:2	<b>participant</b> 31:9	466:4	146:3,15 147:16	457:18,21,22
473:19	34:17 175:20	<b>party</b> 8:7,9,14,15	173:14 253:17	458:2,6,10,12
<b>PANELIST</b> 217:5	416:14	8:21 57:1 67:4,6	259:2,14 274:21	460:3,12,17 461:5
<b>panelists</b> 50:6	<b>participate</b> 180:1,8	436:7	288:15	461:12,20,22
<b>panels</b> 381:20	180:10 188:9	<b>Paso</b> 473:6	<b>penetrative</b> 119:2,3	462:1,2,3,8,9,17
<b>pants</b> 54:8 68:9	189:14,15,17,22	<b>pass</b> 351:7	214:2 220:10	462:21 465:6,7,9
<b>paper</b> 10:20 297:6	190:2,4 191:4,8	<b>passed</b> 44:12 45:9	476:13	465:20,22 466:4
438:6	191:21 192:5	49:12 77:18 104:6	<b>penis</b> 124:6,17	467:13 468:21
<b>paralegal</b> 231:3	209:6 210:3,7,15	107:17 109:2	132:11 154:14	472:6 475:1 477:7
315:18 317:6	211:4 226:9	<b>passes</b> 109:19	<b>Pennsylvania</b> 83:19	487:4 488:2 489:4
<b>paralegals</b> 315:10	242:13 252:5	<b>pat</b> 287:13	<b>people</b> 12:11 19:14	489:18 491:18
317:13 421:13	<b>participated</b>	<b>patience</b> 231:8	21:17 23:10 42:21	496:20 498:21
439:7 476:7	318:14	<b>PATRICIA</b> 1:21	43:10,20 47:22	<b>people's</b> 452:6
<b>parallels</b> 182:19	<b>participating</b> 1:22	<b>Patrick</b> 3:4 485:14	50:22 52:8 53:15	<b>perceive</b> 92:19
<b>paraphrasing</b>	248:1 473:10	485:16,21	56:3 58:1 71:5,15	<b>perceived</b> 96:8
487:9	<b>particular</b> 14:4	<b>patrol</b> 437:20 438:5	72:15,20 79:4	<b>percent</b> 16:15 17:4
<b>parent</b> 14:3	20:9 33:5,18	438:7	81:18 87:2,6 88:1	18:9,11 20:8,9,21
<b>parent-child</b>	35:19 56:1 71:20	<b>pause</b> 23:4	89:1,17 91:2 95:8	21:4,5 37:18 38:2
129:17	79:20 106:12,15	<b>pay</b> 73:21 74:10	133:19 141:7,15	39:19,20 40:1,17
<b>parents</b> 18:15	112:10 134:4	426:16,20	143:2 158:6,13	41:21 58:17,17
<b>parole</b> 119:11	140:9,21 142:1	<b>paycheck</b> 56:13	160:1,4 161:8	93:9,10,11 181:14
120:6 357:13	149:2 153:10	<b>paying</b> 46:13	179:1 197:9 214:7	182:17,21 183:4
364:1,7 380:10	156:12 159:7	<b>pays</b> 329:13 426:17	215:7 247:14,19	183:10 184:5
<b>Parris</b> 395:10	161:12 162:14	<b>PD</b> 447:5	247:21 255:10	193:13 204:21
<b>part</b> 5:12 17:14	168:13,15 170:7	<b>peas</b> 19:12	320:22 321:3	205:21 212:14,17
18:8 19:17 20:6	175:1 202:22	<b>peculiar</b> 475:16	322:18 323:9	223:14,22 225:8
22:20 23:11 38:17	273:11,12,15	<b>peeling</b> 358:20	324:16 326:9	227:11,13 228:13
40:7,11 57:7 63:4	283:17 340:4,15	<b>peeping</b> 121:6,6,7	328:9 334:10	228:18 230:8,22
71:13 72:10,13,21	353:11 379:18	<b>peer</b> 96:21 481:22	337:20 339:7	243:2,3 249:17
78:11 79:20 82:12	382:21 419:3	<b>peers</b> 44:18 314:8	341:7 343:11	261:9 265:6 267:9
88:3 92:1,18 95:5	480:21 482:16	418:10 491:22	344:16 345:3	271:13,17 272:7,8
113:11 117:17	<b>particularized</b>	<b>pejorative</b> 321:5	350:4,20,22 351:3	272:16 273:2,5

274:5,8,12,14	227:17 475:2	116:22 163:10	<b>pictures</b> 122:5	472:20 473:5
275:14 276:5	488:7,8	383:14,21 389:4	437:6	<b>play</b> 11:22 23:11,17
277:12 278:16	<b>person</b> 18:2,5,20	<b>perspectives</b> 384:3	<b>piece</b> 53:5 89:6	41:3 47:9 86:22
279:12 280:8,19	19:11 20:3,4	<b>pertains</b> 90:13	161:12 322:16	87:1 90:17 94:9
281:8 282:16,18	21:14 35:19 36:9	<b>petitioned</b> 392:10	388:4 454:17,21	96:5 97:13 108:3
282:21 284:6,10	38:19 39:11 50:9	<b>Petri</b> 71:10	<b>pieces</b> 146:12	221:1 297:20
285:7,8,11,12,16	51:14,15 54:13	<b>PFC</b> 385:22	454:14	367:6 418:12
285:17,20,22	58:4,5 61:5 75:3	<b>Ph.D</b> 486:9	<b>Pierce</b> 361:13	<b>playback</b> 24:6
286:6,8,9,22	76:22 77:17 78:1	<b>phases</b> 311:10	<b>pimp</b> 442:21	<b>played</b> 84:15
287:3 288:12	84:3,4,5 86:21	<b>phenomenon</b> 84:11	<b>pine</b> 67:18	<b>players</b> 11:20 12:5
289:11,13,21	87:4,15,16 97:16	<b>Philadelphia</b>	<b>pipeline</b> 185:9	<b>plea</b> 224:17 300:8
290:1,5,6,19,21	97:16,17 112:10	285:18 293:7	<b>Pitvorec</b> 3:5 314:13	355:21 365:15,19
290:22 291:1,7,9	121:11,13 122:22	<b>philanthropist</b>	314:14,16 389:22	382:2 387:14,18
292:15,17,19,20	123:2,5 129:1,8	56:14	390:13,18 391:7	387:20 439:13
292:21 293:7,8,8	134:11,20,20	<b>phone</b> 45:1 46:10	391:11,14,18	469:21 476:20
293:19,20,22	135:3,12 136:4,8	128:8,10 308:6	392:16,22	483:10
294:1,2,8,15,18	137:17 138:1	312:8 329:6 428:5	<b>pivotal</b> 419:1	<b>plead</b> 386:13
324:16 337:14	142:1,4,14,15	434:16 436:10,22	<b>pizza</b> 60:6	<b>pleading</b> 366:17
344:22 346:4,5,12	143:6 145:1,6,9	437:3 449:3	<b>place</b> 47:21 48:18	<b>pleas</b> 323:17
349:22 352:5	145:11,13 152:1	462:15 494:10,12	71:8 90:2,16 95:3	<b>pleasantly</b> 445:12
353:3 405:1	158:1,2,9,11	<b>phones</b> 489:9	97:4 104:15	<b>please</b> 24:2 36:8
420:15 429:6	170:10 193:20	<b>photo</b> 61:7	106:13 108:19	39:1 40:15 56:19
441:3 443:9	195:15 196:5,17	<b>photograph</b> 356:17	109:4 110:18	71:16,16 111:8
476:15,17 477:10	224:19 246:22	<b>photographer</b>	117:8,13 118:11	175:21 224:2
477:11,14	247:10,21 248:3,6	445:21	125:8 132:22	256:11 287:6
<b>percentage</b> 91:10	328:8 340:4 342:7	<b>photographs</b>	134:1 176:10	398:17 404:8
185:15 191:20	346:10,12,16	445:22	195:22 201:10	<b>pleased</b> 5:8 453:3
192:7,10 337:9,9	348:5 364:6	<b>phrasing</b> 194:7	247:9,15 253:21	<b>pleasure</b> 430:4,5
337:15 349:18	379:22 433:13	<b>physical</b> 36:7 94:6	321:7 370:6,7	<b>pled</b> 61:16 440:7
<b>percents</b> 293:9	434:7 437:5	120:22 128:5	379:18 380:2	<b>plenty</b> 20:17
<b>perceptions</b> 66:3	438:21 439:4	355:3,12 418:19	414:21 451:1	145:22
<b>perfect</b> 203:12	447:12 481:5,7	464:3	475:2 485:11	<b>plug</b> 423:15
<b>perform</b> 485:2	<b>person's</b> 344:7	<b>physically</b> 69:5	<b>placed</b> 105:4	<b>plus</b> 56:18 120:15
<b>period</b> 43:12 59:1	346:21 348:7	97:7 128:4	164:17	123:11 332:5
113:10 149:20,22	<b>personable</b> 464:10	<b>pick</b> 70:13	<b>places</b> 31:19 102:16	<b>pocket</b> 54:8
233:5 271:18	<b>personal</b> 384:11	<b>picked</b> 61:6,7	135:17 307:5	<b>poem</b> 82:6
282:14 308:3	<b>personalized</b>	187:12 407:1	379:9 387:4	<b>point</b> 19:15 30:15
340:5 342:17	413:14	<b>picking</b> 377:19	442:10	40:14 47:1 48:13
<b>permanent</b> 222:1	<b>personally</b> 312:1	499:2	<b>placing</b> 105:12	49:9 50:1 57:7
<b>permission</b> 49:20	320:16 352:5	<b>picks</b> 55:1 84:3,4	325:12	63:7,11 84:22
220:6 459:4	353:5 407:20	<b>picture</b> 11:3 12:19	<b>plan</b> 328:16 414:3	85:2 91:1 98:8
<b>permitted</b> 205:17	414:20 421:14	32:20 42:5 43:1	439:5	110:22 124:2
<b>permitting</b> 308:13	424:20 438:9	43:22 70:16 86:12	<b>planet</b> 423:14	129:12 133:17,20
<b>perpetrator</b> 96:12	<b>personnel</b> 252:6	95:15 100:1,2,4	<b>Plans</b> 414:18	135:6,17 136:18
146:4	414:18 447:6	100:13 121:16	<b>plastic</b> 54:10,17	139:21 141:19
<b>perpetrators</b> 214:6	<b>persons</b> 255:14,15	128:9 130:2 450:5	<b>plate</b> 450:5	142:7 143:11
214:8,14 222:17	<b>perspective</b> 6:15	450:6	<b>platoon</b> 320:12	144:14 148:18

151:17 152:19,19 157:17 159:1 172:18 188:4,9 193:21 204:22 209:10,14 210:13 232:18 243:8 245:14 300:19 325:8,8 366:6,20 387:1 389:17 392:1 393:13 401:16 403:4 427:3 434:4 472:17 475:9 478:4 499:11	<b>policing</b> 257:9 <b>policy</b> 2:18,19 161:17 162:18 172:9 173:12,18 174:4 177:6,10 188:11 242:16 252:3,8 359:22 <b>poll</b> 50:18 <b>polls</b> 50:17 <b>pondering</b> 89:2 <b>pool</b> 408:12 <b>poor</b> 185:22 <b>poorly</b> 105:18 <b>Poorman</b> 172:15 <b>pops</b> 440:8 <b>popular</b> 17:17 93:20 333:4 <b>populated</b> 491:5 <b>population</b> 14:16 22:1 36:22 37:1 37:18 39:15,15 350:1 472:8 <b>pornography</b> 443:5 443:6 <b>port</b> 247:7 <b>Porter</b> 3:6 368:10 368:12 376:15 <b>Porter's</b> 338:5 <b>portfolio</b> 431:22 <b>portion</b> 16:15 103:1 127:3 156:12 <b>portions</b> 488:21 <b>Portland</b> 2:3 336:2 336:5 <b>pose</b> 35:6 255:21 <b>posed</b> 15:17 <b>position</b> 18:14 162:6,16 309:22 318:6 319:20 320:19 351:6,15 476:22 477:3 488:13 <b>positions</b> 408:10 <b>positive</b> 128:1 406:14 407:2 <b>positives</b> 346:9	<b>possession</b> 59:16 459:13,13 <b>possibility</b> 120:6 407:17 <b>possible</b> 210:5,20 242:8,9,12,15 266:3 276:11 283:15 287:2 300:11 303:8 318:2 325:22 385:15 435:11 436:9 440:13 452:12 <b>possibly</b> 375:7 <b>post</b> 11:2 106:10 420:22 441:2 <b>post-2007</b> 108:14 <b>post-2012</b> 150:4 <b>post-arrest</b> 433:7 <b>potential</b> 33:8 49:3 88:11 255:21 364:13 399:1 474:20,21 499:5 <b>potentially</b> 157:17 <b>power</b> 97:2,13 327:14,16 373:6 373:11 388:6,19 <b>powerful</b> 84:14 333:14 <b>powers</b> 109:20 <b>practical</b> 470:20 <b>practically</b> 55:21 393:5 <b>practice</b> 7:10 110:2 167:4 225:2 325:3 337:5 355:17 358:22 361:3 363:3,15 366:5 378:20,21 379:6 379:11 390:19 394:17,19 395:20 490:21 <b>practiced</b> 21:16 87:3 371:3 <b>practices</b> 4:11,15 298:14 338:10 359:10 405:5	421:9 428:10 429:13,17,19,21 487:16 491:21 500:15 <b>practicing</b> 410:10 <b>practitioner</b> 313:11 <b>practitioners</b> 99:20 109:16 110:16,20 113:11,13 114:3,8 114:17 123:16 126:5 131:13 134:6 137:3 153:22 155:1 156:7 159:2,7 169:20 170:8 310:20 311:1 414:6 <b>pre</b> 220:19 233:12 342:16 381:21 448:3 <b>pre-2007</b> 101:5 102:4 130:4 258:18 <b>pre-arrest</b> 435:10 <b>pre-formed</b> 111:16 <b>pre-FY</b> 241:3 <b>pre-judging</b> 333:15 <b>pre-trail</b> 324:7 <b>pre-trial</b> 469:17 <b>preamble</b> 162:2 <b>preceded</b> 268:22 <b>preceding</b> 221:12 472:13 <b>precepts</b> 325:20 <b>precinct</b> 433:8 <b>preclude</b> 475:1 <b>precluded</b> 177:1 <b>predator</b> 321:6 486:15 491:2,8 <b>predators</b> 486:10 487:2 <b>predatory</b> 492:13 <b>predict</b> 340:3 346:9 346:10 <b>predictable</b> 340:5 <b>predicting</b> 346:2 <b>predictors</b> 346:1	<b>preexisting</b> 418:2 <b>preface</b> 430:18 <b>prefer</b> 193:21 195:16 214:16 437:2 <b>preference</b> 252:12 416:18 459:17 <b>preferences</b> 252:3 <b>preferral</b> 182:19 188:10,18 190:3,6 191:9,10,11,12 194:9 205:2,19,21 206:1 216:4 232:4 233:10,13 402:11 <b>preferrals</b> 186:19 <b>preferred</b> 181:11 186:13 188:20 195:7 204:18,20 205:6 211:5 223:11 224:4 228:14 243:1 280:4,5,16 281:5 289:8 312:12 <b>premature</b> 167:9 <b>premeditation</b> 155:17 <b>preparation</b> 338:9 401:5,6 421:3 <b>prepared</b> 217:15 254:12 257:22 471:18 <b>prepares</b> 164:2 <b>preparing</b> 416:9 486:12 <b>preponderance</b> 200:17 <b>prescribed</b> 231:21 <b>presence</b> 88:8 127:22 128:4,6 489:17 <b>present</b> 1:15,20 5:18 6:9 11:16 151:15,18 230:6 243:14 254:22 283:4 358:15 380:17 434:9 462:15 483:11,12
---	---	--	--	---

484:8 492:11,12	28:9 33:10 34:15	123:4 418:7	<b>problematic</b> 270:20	230:19 415:19,20
<b>presentation</b> 6:1	97:1 116:21	<b>private</b> 121:12	271:8 286:18	419:9 420:4
79:12 83:18 90:12	162:10 230:14	122:13 123:2	297:4	<b>Professor</b> 1:19 3:12
151:3 175:11	282:9 346:4	336:3 337:5 361:3	<b>problems</b> 22:10	3:16 152:20
248:17 257:13	374:14 379:6,12	446:9	105:11 261:21	158:18 204:21
258:4 262:5,10	382:14 434:13	<b>privilege</b> 332:3	281:13 286:14	256:16
289:22 300:20	<b>prevent</b> 95:4	<b>privileged</b> 79:3	290:13 367:13	<b>profiles</b> 480:22
342:3	486:14	<b>privileges</b> 493:12	389:18 401:20	<b>profits</b> 361:18
<b>presentations</b>	<b>prevented</b> 491:20	<b>pro-victim</b> 333:6	447:9 450:13	<b>program</b> 2:14,15
268:22 341:14	<b>preventing</b> 88:9	<b>probable</b> 178:21	469:1 470:5	2:19,22 3:8,9,10
433:21	421:18	188:17 200:10,12	<b>procedures</b> 265:4	180:5,12 229:19
<b>presented</b> 148:6	<b>prevention</b> 84:19	206:6,10,14 221:9	266:2 268:14,19	229:22 230:17
175:15 176:16	85:22 86:8 87:11	221:18 222:8	270:22 278:1	231:2 245:7
178:14,20 181:2	88:10 89:6	234:16 235:10,20	295:5,8,17 298:9	251:19 258:16
196:18 208:15,18	<b>previous</b> 204:6	236:6 237:17	298:17 310:9	262:16 264:4
224:17 245:19	241:8 409:1	245:22 246:7	<b>proceed</b> 179:12	304:19 307:14
259:21 269:4,19	<b>previously</b> 114:22	269:5 270:11	199:18 234:19	309:21 310:6
276:4 277:10,11	181:12 202:20	275:18 279:10	<b>proceeded</b> 243:2	313:21 314:22
279:21 280:16	249:14 310:3	289:15 295:12	291:8 294:16	315:4 319:18
281:22 284:22	313:12 473:5	<b>probably</b> 18:2	<b>proceeding</b> 196:21	344:11 350:12,14
289:9 290:3	<b>priceless</b> 47:15	39:17 41:21 43:12	<b>proceedings</b> 256:7	375:13 404:22
295:20 296:7,8	<b>primarily</b> 317:2,7	44:3 88:16 142:5	482:19 483:7	409:17 411:16
300:3	<b>primary</b> 336:3	149:21 152:7	501:11	412:10 414:14,21
<b>presenter</b> 5:9	428:7	154:22 155:1	<b>proceeds</b> 440:15	415:13 422:1
259:12	<b>principals</b> 122:8	158:20 161:6	<b>process</b> 71:17	427:1,14 449:15
<b>presenters</b> 343:2	<b>principle</b> 334:3	212:17 249:11,16	151:11 160:3,14	449:17 457:14,15
<b>presenting</b> 234:14	<b>principles</b> 97:12	252:17 257:3	163:22 164:21	466:9 467:20
<b>presents</b> 325:17	365:3	280:20 281:3	166:4,22 167:13	482:1
481:5	<b>prior</b> 100:18	292:3 347:22	180:7,8 188:3	<b>programs</b> 3:12
<b>preserves</b> 387:22	106:20 143:15	374:3 423:13	192:5 194:15	87:11 180:12
<b>President</b> 104:7	144:3 175:18	434:17 446:1	195:14,21 197:3	253:17 256:17
109:20 110:14	176:2 190:3 191:8	<b>probation</b> 342:10	201:14 246:3	409:14 471:6
112:1,6,15,15,18	191:11 232:10	345:14 350:2	250:19 251:9	480:2
113:8 163:11	233:13 262:5	351:11 360:7	255:9 300:6 343:1	<b>progress</b> 36:15
165:9	270:6 284:21	<b>problem</b> 15:16	344:17 354:4	93:21 166:4 377:8
<b>Presidential</b> 108:7	300:20 311:5	19:20 22:18 40:7	357:2 360:3,11	378:14
113:5	333:10 366:3	40:8 44:21 53:2	388:17 398:21	<b>progresses</b> 378:1
<b>presiding</b> 1:14	402:15 406:6	71:1 72:10 77:14	420:7 452:13	<b>progression</b> 327:4
<b>press</b> 471:1,3	<b>priorities</b> 328:17	91:12 143:12	462:11	<b>progressive</b> 141:5
<b>presumption</b> 334:4	297:14	163:9 211:17	<b>processing</b> 257:4	464:1
334:6	315:2 468:17	241:17 259:7	<b>produce</b> 167:5	<b>prohibit</b> 238:10
<b>pretending</b> 10:18	<b>prison</b> 345:1 347:4	266:20 279:14	298:10 367:10	<b>prohibited</b> 259:13
<b>pretrial</b> 193:16	349:21 350:1	287:16 289:14	<b>produced</b> 365:18	<b>project</b> 80:12
196:10 205:1	351:11 357:6,7	292:10 301:15	<b>professional</b> 313:5	<b>promote</b> 180:5,6
233:11,16,18	364:6 487:7	373:4 398:10	320:19 372:17	<b>promotion</b> 325:20
401:6,15	<b>privacy</b> 121:14	447:16 450:18	445:21,22	<b>prong</b> 134:18
<b>pretty</b> 16:8 17:7	122:18,20,21,22	465:5	<b>professionals</b>	<b>proof</b> 149:3 200:11

200:17 291:16 369:17 <b>propensity</b> 151:22 <b>proper</b> 366:21 389:21 <b>properly</b> 365:1,9 366:8,10,16 368:7 404:19 <b>property</b> 91:2 <b>proportion</b> 273:1 284:22 <b>proposal</b> 161:8 362:5 <b>proposals</b> 319:1 <b>proposed</b> 164:4 388:5 <b>prosecutable</b> 464:7 <b>prosecute</b> 110:17 113:14 168:5 214:9 226:4 227:19 235:19,21 238:6 250:22 260:11 265:13 275:8 276:2 304:3 337:21 358:3 404:19 430:19 444:10,16 451:9 454:2 456:10 457:6 458:17,20 460:13 474:15 477:4 478:20 497:2 <b>prosecuted</b> 100:22 111:2 178:2 186:1 186:5 223:19,20 228:10,11 238:17 248:9,9 252:18 297:16 454:3 463:7 482:6 498:17 <b>prosecutes</b> 453:17 453:18 <b>prosecuting</b> 7:1 114:18 160:9 211:2 214:12 238:11 241:21 257:9 318:11	405:8 408:3,14 412:4 413:4 421:19 428:20 429:1 430:16 431:10 432:5 436:3,4 444:10 454:12 461:4 487:21 497:11 <b>prosecution</b> 1:7 104:19 107:1 166:8 177:5 178:8 178:16,18 181:13 182:7,17,21 184:12 185:20 187:14,17 189:19 194:15 202:2 205:20 207:11,21 208:22 215:21 216:3,5 218:9,16 219:3,19 223:14 223:17,22 226:7 227:11,13 228:7 228:13 230:12 242:2 243:7 251:17 252:5,7,21 253:4 258:9 262:3 264:20 279:14,19 280:8,18,21 281:4 281:8,11,14,16 282:8,9,14,15,17 282:21 283:14,20 284:6,9,13,16,20 284:21 285:3,15 286:5,10,22 289:7 289:21 292:12 296:4,6 298:3,11 299:21 300:2 303:6 313:15 322:1 330:20 331:14 337:18 367:11 369:16 405:16 411:22 412:22 413:3 425:8 426:3,8 454:7 455:11 463:4 474:15 475:5 478:11	493:14 <b>prosecutions</b> 107:17 114:9 182:15 204:8 231:1 366:22 443:4 475:20 <b>prosecutor</b> 6:16 52:14 59:7 147:5 214:6 224:16 229:22 238:1 269:2 270:5,12 281:22 282:4,5 283:4,9 285:1 300:4 302:7,15 327:21 341:20 342:12 367:14 390:4 391:13 392:2 394:9 405:20 406:21 407:9 412:10,17 412:20 414:14 417:8 419:19,20 426:17 428:16 454:6,8 456:6 461:6 463:10 472:10 479:11 486:2,3 <b>prosecutor's</b> 61:14 61:14 234:4 386:13 413:6 453:15 454:17 466:17 <b>prosecutor/trial</b> 237:13 <b>prosecutorial</b> 257:6 <b>prosecutors</b> 4:17 39:8 53:12 71:4 146:7 159:6,9 160:7 166:22 167:19 168:22 212:11,16 231:4 268:10 280:11,13 281:17,19 283:5 303:16 306:4 346:20 360:6 376:6 404:11 405:2,14,18 406:3	406:7,11,14,18 407:12 408:11 411:1 412:2,8 414:11 417:4,7 419:11 421:15 422:6 423:21 424:9,14 428:6,9 454:22 455:13,18 456:2,20 457:12 459:8,19 460:11 462:4,6 463:5 464:19 465:11 467:4,5 471:17 475:11,15 476:2,3 476:6 477:3 479:5 479:15 480:4 481:2 482:1,2,4 482:13 485:22 487:1,4 488:13 499:16 <b>prospective</b> 499:9 <b>prospectively</b> 109:9 <b>protect</b> 324:22 328:11 333:18 368:5 <b>protected</b> 478:19 493:11 <b>protection</b> 374:19 388:11 <b>protections</b> 358:6 358:15,21 <b>protocol</b> 199:7 480:6 <b>proud</b> 422:5 <b>proudly</b> 361:5 <b>prove</b> 132:15,22 133:2 134:22 138:9,11 139:18 148:10,12 179:11 179:17 226:10 369:17 451:14 <b>proven</b> 422:1 <b>proves</b> 139:10 317:19 <b>provide</b> 6:2 22:3 112:12,19 136:1 143:13 145:11	163:16 196:10 207:2 216:9 305:3 308:8 310:13 313:5 314:5 327:2 328:22 329:7,10 351:16,19 353:6 374:7 395:6 413:6 413:13,16,17 432:13 466:10 481:15 489:13 <b>provided</b> 33:8 97:21 103:16 112:6 123:15 124:1 172:5 202:10,20 238:22 268:17 275:4 280:3 295:19 308:12 322:4,7,11 326:12 328:18 393:19 394:5 413:21 <b>providers</b> 92:10 442:6 <b>provides</b> 145:13 163:11 164:15 194:21 263:9 308:4 310:8,16 322:13 328:20 329:5 412:14,16 470:18 <b>providing</b> 8:16 98:19 193:15 195:11 315:15 351:14 368:17 389:21 <b>proving</b> 446:11 <b>provocatively</b> 51:2 <b>proximity</b> 318:1 489:1,15 <b>psychologists</b> 429:3 <b>psychology</b> 307:21 486:10 <b>psychosexual</b> 354:4 <b>public</b> 2:3,13 3:7 3:14 5:4 50:11,14 113:9 123:3,5 151:5 164:19
--	--	--	---	---

201:18 322:20 326:15,18 327:9 334:9,21 336:1 340:2 341:1 349:6 349:8 350:21 352:1,2 356:19 361:4,6,9,12,22 362:1,4,7,10 363:7 368:21 370:21 371:3,14 372:19,21 376:17 377:1 486:4 499:6 499:6	332:21,22 340:9 429:18 438:17,18 <b>pushed</b> 427:20 <b>pushes</b> 68:1 <b>pushing</b> 132:12,15 133:7,7 <b>put</b> 45:19 54:9 61:12 68:13 90:8 92:8 97:4 110:1,2 111:3,14 112:1 116:1 154:8 183:13 184:16 203:11,17 230:1 250:16,18 251:13 254:21 290:8 295:19 329:22 331:20 377:15 386:12 388:21 397:21 409:20 425:17 428:14,19 428:21,22 432:9 432:10 449:20 450:4 460:22 <b>puts</b> 54:18 60:13 116:22 244:6 477:2 488:12 <b>putting</b> 125:6 131:3 206:17 249:22 304:6 429:12 463:1 498:16 <b>puzzle</b> 388:4 <b>Python</b> 335:20	<b>quarter</b> 323:13,13 425:5 491:4 <b>quarterly</b> 425:2 <b>queasiness</b> 44:2 <b>question</b> 14:8 15:10 15:13,17,22 16:6 16:11 17:6,13 35:7,13 37:12,16 37:17 38:5 40:14 48:19 52:6,7,11 52:13 55:18 60:17 62:15 63:4 82:3 83:14 86:5 87:12 90:13 91:14 125:19 140:13 142:6 143:14,18 144:7,15 145:16 153:21 157:9 163:15 169:3,5 186:11 193:18,18 194:4 196:3,14 197:1 199:7 205:4 206:12 212:20 221:6 231:12 234:10,12 238:20 249:19 275:8 279:7 284:18 287:5 298:1 299:1 299:6 300:5 301:4 301:13 350:7 372:5 383:12,20 384:12 392:4,7 394:7 489:11	314:11 319:8 335:4 348:19 383:11 420:22 422:7 479:8 485:12 499:13 500:4,19,19 <b>quick</b> 79:2 478:10 494:5 <b>quicker</b> 82:7 <b>quickly</b> 66:10 240:11 245:14 429:7 436:16 489:2,9,14 494:4 494:9,13 <b>quiet</b> 68:21 <b>quieter</b> 95:17 <b>quite</b> 185:2 234:13 252:17 254:20 278:22 308:7 333:7 <b>quote</b> 52:22 53:1 103:2 252:4 354:20,20 475:13	<b>ranges</b> 219:7 <b>rank</b> 225:4 417:22 <b>rape</b> 11:13 12:22 13:6 16:7,13,13 16:17 17:2 18:11 20:4,19 38:13 39:3 40:17,20 48:3 52:18 60:18 65:17 66:2 68:2,9 72:14 99:5 100:18 101:18,19,22 103:2 104:10,19 106:21,22 107:1,4 115:15 116:11,13 116:15 118:2 119:5,11 120:2,4 122:1,11 135:21 135:22 136:5,14 147:7 151:7,11 213:21 214:2 219:7,13 220:9,13 221:11,13,17 225:17 226:15 227:14 244:19 255:14 258:17 265:1 271:14 272:3,11 274:15 274:18 275:13 277:20 278:9 285:13 287:14,18 289:2,12 290:18 292:19 339:3 358:9 378:22 436:10 444:7 461:10 483:1 488:5,6 491:20 <b>raped</b> 17:5 24:12 34:4 38:6 39:11 50:22 59:5 60:12 84:13 <b>rapes</b> 21:21 39:2,21 40:2 101:1 282:12 282:12 288:3 290:10,17 488:21 <b>rapist</b> 17:17 18:4,6 19:19 37:4 38:15 38:16,18 39:21
<b>publicly</b> 226:21 <b>publishes</b> 328:16 <b>pull</b> 54:4,7 174:11 185:11 342:16 438:3,3 <b>pulled</b> 53:11,16 185:12 201:9 383:14 <b>pulls</b> 68:9 182:22 <b>pun</b> 498:3 <b>punished</b> 112:11 <b>punishment</b> 112:14 119:12,13 174:16 174:17 181:19 219:17 225:21 226:2,5,20 229:3 229:10 324:8 334:17 375:6 473:9 <b>punishments</b> 112:6 112:19,21 119:9 119:10 385:16 <b>punitive</b> 105:8 156:19 172:6 224:14,22 <b>purely</b> 426:14 <b>purpose</b> 202:13 <b>purposes</b> 216:8 265:8 <b>purse</b> 449:2 <b>pursue</b> 114:8 <b>pursued</b> 276:14 <b>purview</b> 415:4 <b>push</b> 103:7 299:4	<b>Q</b> <b>quadrant</b> 119:6 <b>quadrants</b> 128:14 <b>qualifications</b> 362:16 <b>qualified</b> 309:5 310:21 312:14 316:1 322:19 351:21 <b>qualifying</b> 487:8 <b>quality</b> 152:1 208:14 314:6 325:13 351:13 466:3,14	<b>questionable</b> 299:21 <b>questioning</b> 93:17 99:11 <b>questions</b> 14:12,18 15:12 53:14 69:22 70:2 72:6 79:7 98:2 99:9 151:4 161:17 231:9,11 243:13,16 246:10 248:22 256:3 297:17 298:19,21 300:18 303:2 308:9 309:13	<b>R</b> <b>Rackets</b> 442:10 <b>radical</b> 104:9,14 <b>RAINN</b> 182:11,16 182:22 184:4 <b>raise</b> 8:11 148:12 202:17,17 203:18 216:11 251:6,14 379:6 387:18 <b>raised</b> 63:19 68:18 68:20 71:12 93:15 148:11 205:5 234:11 252:1 300:20 335:6 497:21 <b>raises</b> 262:6 275:8 <b>raising</b> 85:18 <b>ran</b> 441:2 <b>range</b> 259:13 272:7 272:17 273:5 278:15 377:20 385:15 <b>ranged</b> 285:16	

41:9 49:2 78:9	243:10 260:3	264:11 270:22	444:21 445:1,1	138:15 154:12
<b>rapists</b> 39:21 40:1,2	262:4,22 263:1	271:1	449:5 452:15	<b>receive</b> 224:21
96:17	272:15 274:18	<b>realize</b> 53:22 147:4	455:9,9 461:3,7	254:18 307:8
<b>Raptors</b> 11:13	278:14,18 279:6	199:14 255:7,9	461:20 462:2	362:4 385:5,6,8
<b>rare</b> 261:2,6	279:13,16,19	<b>realized</b> 7:9,18,22	465:4,14,18	428:5
<b>rarely</b> 437:12	280:21 281:4,14	236:3	466:18 469:13	<b>received</b> 103:17
<b>ratcheting</b> 325:6	285:15,19 286:5,9	<b>really</b> 5:20 9:6,16	470:3 481:19	171:9 178:9
<b>rate</b> 178:16,18	286:11,16,19	12:7 13:3,4,4	487:14 491:8	229:10,11 312:7
181:14 182:8,17	289:7 290:6,7,12	19:18 20:20 23:5	492:2 493:18	399:6 472:16
182:21 183:3,5,10	290:14 292:3,5,12	31:18 36:13,15	494:19 500:3	<b>receives</b> 312:21
184:4,12,13	293:6,10 294:20	39:16 43:14 45:6	<b>realm</b> 47:5 63:9	<b>receiving</b> 428:8
185:21,21 186:2,6	296:4,6,10 298:10	45:8,16,18,21	82:22 91:19	<b>reception</b> 51:11
187:14,17 188:1,6	298:11 300:2,7	47:5 48:2,3 51:16	<b>realms</b> 15:1	54:1
194:15 202:2,3	375:7 477:9	51:18 56:14 57:3	<b>reason</b> 12:18 22:21	<b>recidivate</b> 346:2,6
205:20 207:11,14	<b>raw</b> 110:21 113:22	57:10,12 59:9,12	78:7 122:5 126:2	<b>recidivism</b> 375:7
207:21,22 212:12	<b>re-examination</b>	61:1 66:8 70:11	129:6 134:2	<b>recognition</b> 102:15
212:15,15 216:3,5	100:9 131:7	74:17 75:21 79:5	135:19 156:16	<b>recognize</b> 76:4
216:5 218:9,16	<b>re-validate</b> 143:8	88:8 89:2 92:13	177:21 211:12	155:15
219:3,19 223:14	<b>reach</b> 281:10 289:1	93:4 94:5 97:4	277:6 345:11	<b>recognized</b> 60:18
224:1 225:9	311:21 405:3	98:3 99:14 103:7	374:16 392:2	102:17,19 103:1
227:11,13 228:13	<b>reachback</b> 313:22	103:21 104:9	437:14 457:3	230:9 344:14
228:19 243:4	329:5 428:4	117:3 121:9	477:16 483:18	356:5
265:5 271:17,19	<b>reached</b> 46:22	123:18 126:12	<b>reasonable</b> 121:14	<b>Recognizing</b> 166:1
272:11 273:7,20	298:15	135:19 140:13	122:17,19,20,22	<b>recommend</b> 196:20
274:10,14 275:5	<b>reaching</b> 140:6	142:20 145:10	129:8 135:3 149:3	196:21 200:13
275:14,20 278:2,4	<b>react</b> 344:3	148:18 153:21	151:19 155:22	421:4 482:18
278:19 279:1,11	<b>reaction</b> 384:6	162:13,15 166:13	157:21 166:22	<b>recommendation</b>
280:8,18 281:11	<b>read</b> 11:11 97:20	166:18 167:14	179:12 200:9,11	104:3 188:22
282:8,15,17,21	166:10 201:21	185:2 202:17	200:18 235:13	189:1 194:22
283:14,20,21	360:1 474:9	203:18 212:22	236:9 286:10	196:21 198:17
284:6,9,13,16,20	<b>read-aheads</b>	213:1 240:15	291:16 369:18	201:8 262:10
284:22 285:3	238:22	249:5 250:13	<b>reasonably</b> 118:7	295:3 394:10
286:21 287:3	<b>readily</b> 374:14	269:20 290:9,9	134:8,13 135:1,4	477:2 484:15
289:11,13,21,22	383:4	297:8 299:1	135:11 139:13	<b>recommendations</b>
290:4 291:4,7,9	<b>reading</b> 354:8,15	301:15 303:4	157:19 158:1,2	102:7,14 200:15
291:21 292:13,20	<b>reads</b> 37:12 47:12	335:19 337:4	<b>reasons</b> 31:22 32:1	211:14,15 295:1
292:22 293:1,20	<b>ready</b> 223:12	340:9 343:14	32:13 100:6	298:8 321:4 326:2
293:21 294:3,11	314:10 400:12	344:15 345:2,19	180:10 217:20	427:4 482:16
294:13,14,16	<b>real</b> 17:17 38:18	348:7,13,14 355:8	234:22 239:20	<b>recommended</b>
296:19 303:6	39:2 66:10 84:11	356:1 365:4 371:9	240:3 253:2	199:18 201:7
405:1 441:4	102:2 212:20	375:4 386:12,20	255:17 302:20	<b>recommends</b>
476:16,17,19	321:2 323:9 373:4	386:21 387:17	337:2 363:16	197:17
477:10,13	468:17	397:4 399:17	401:18	<b>record</b> 98:10,11
<b>rates</b> 40:19 182:9	<b>realities</b> 355:21	406:19 416:3,10	<b>reassure</b> 84:14	121:16 198:7
184:3,12,14	360:4	423:1 425:6	<b>Rebecca</b> 444:7	222:2 256:8,9
201:22 209:1	<b>reality</b> 69:10 103:6	436:13 438:15,19	<b>rebuttal</b> 374:8	357:5 371:20
215:21,22 243:6,7	181:21 257:16	442:20,21 443:2	<b>recall</b> 93:11 127:14	403:22 499:6

501:8	<b>reflection</b> 289:13	<b>rehabilitation</b>	443:19	30:19 33:14 39:12
<b>recorded</b> 267:22	<b>reflects</b> 141:4	378:4	<b>rely</b> 17:19 113:13	72:19 78:4,4
<b>recording</b> 121:5	291:13 294:4	<b>reigns</b> 217:7	185:13 316:17	102:8 173:10
367:6	<b>reform</b> 103:21	<b>reintroduces</b> 134:3	317:16 409:16	192:12 202:6,13
<b>recourse</b> 324:11	105:5 285:14	<b>reintroduction</b>	495:16	203:21 204:14
<b>Recruiting</b> 37:21	<b>reformed</b> 104:6	133:9	<b>relying</b> 468:15	207:13,15,18,19
<b>recruits</b> 38:3	116:3	<b>relate</b> 477:21	<b>remain</b> 123:9 236:6	217:22 218:1
<b>recurring</b> 417:11	<b>refusal</b> 36:9 177:13	<b>related</b> 113:3	318:6 468:21	219:6 220:11
<b>red</b> 175:12	302:1	145:18 298:1	<b>remaining</b> 223:5	233:17 240:10
<b>redline</b> 233:17	<b>refuse</b> 304:3	442:12	240:7 241:5,6	241:7 249:7 261:3
<b>reduce</b> 206:7	<b>refused</b> 302:8,11	<b>relates</b> 300:22	<b>remains</b> 236:7	261:4 263:5
<b>reduced</b> 458:12	<b>refuses</b> 34:21 35:5	304:14	<b>remarks</b> 217:15	265:18 266:8
465:17	35:21 265:13	<b>relationship</b> 66:21	320:1 364:21	267:16 268:2
<b>reduces</b> 139:3	302:4	129:17,18 347:16	365:8 368:7	276:15 293:18
<b>reducing</b> 321:12	<b>regard</b> 90:15 91:8	416:11 418:2	430:18 471:19	301:18 418:4,18
366:22	183:13 305:7	419:7,13,20 420:3	487:14 494:19	419:18 441:14,18
<b>redundant</b> 125:22	<b>regarding</b> 221:17	420:11 434:12	<b>remedied</b> 335:2	441:19 442:1
<b>reemphasizes</b>	262:11 364:21	445:3 464:3	<b>remember</b> 78:3	443:9 448:15
382:7	365:8	<b>relationships</b> 92:13	401:10 436:13	470:7 477:7
<b>refer</b> 121:5 126:16	<b>regardless</b> 159:15	410:22	450:21 451:2,5,12	<b>Report's</b> 266:1
151:21 192:13	177:9 211:17	<b>relatively</b> 184:13	<b>reminded</b> 51:14,16	<b>reported</b> 20:9 45:3
203:6 261:4	313:3 332:6	240:11 333:3,5	383:19	95:5 218:21
<b>reference</b> 349:14	484:22 493:15	389:16 409:11	<b>reminds</b> 50:13	221:14 241:17
<b>referencing</b> 269:13	<b>regimen</b> 318:4	423:3	485:22	254:15 260:21
<b>referral</b> 187:10	<b>region</b> 306:3	<b>relax</b> 10:12 42:11	<b>remove</b> 141:3	264:3,22 267:21
191:2,4 193:10	317:22 415:10,15	<b>relaxation</b> 10:22	206:5 388:8	271:18 273:3
195:8 205:3	<b>regional</b> 313:19	<b>relaying</b> 479:10	484:16	274:14 280:10
<b>referrals</b> 481:16	328:22 349:9	<b>release</b> 469:4 483:9	<b>removed</b> 104:17	281:16 287:11
<b>referred</b> 26:7,8	353:9 372:1 415:2	<b>released</b> 249:16	132:20 137:5	474:9
105:17 106:21	429:9,16	345:1 446:16	139:16	<b>reporting</b> 22:12
120:14 125:7	<b>regions</b> 314:18	<b>releases</b> 60:15	<b>removes</b> 388:10	40:19 92:3 95:7
138:6 186:16,20	315:8 317:20	<b>relevant</b> 80:15	<b>removing</b> 140:8	241:5,14 258:16
205:8,9 231:20	327:6 329:1	137:11 138:3,14	388:5,19	262:16 264:3
232:6 263:10	<b>register</b> 113:10	139:18 145:2	<b>rendered</b> 137:21	265:7 271:4
272:4 297:4 401:7	164:18 342:11	149:1,13,15 153:3	<b>rendering</b> 117:18	272:15 297:13
401:8 402:14	<b>registered</b> 343:8	338:21 360:8	<b>renders</b> 487:9	418:8 440:21,22
403:1 440:6	<b>registration</b> 356:8	395:15 451:22	<b>renewed</b> 144:14	441:12 474:1,17
443:11	356:14 370:4,6	487:20	<b>reoffend</b> 340:5	474:18
<b>referring</b> 127:17	385:19 454:1	<b>reliable</b> 183:1	346:11,13,17	<b>reports</b> 8:10 24:1
197:19 235:16	469:3	<b>relief</b> 233:21	<b>reoffending</b> 348:17	41:7 72:14 94:12
<b>refers</b> 129:10 268:3	<b>regular</b> 239:13	324:10	<b>reorganization</b>	106:13 158:9,11
<b>reflect</b> 17:3 38:12	373:22 414:2	<b>relieve</b> 485:5,9,10	240:13 427:18	172:3,4,15 173:2
107:6 119:8	<b>regularly</b> 410:18	<b>relieved</b> 299:2	<b>repair</b> 49:18	176:4,9 182:15
180:17 181:21	<b>regulation</b> 238:2	<b>relinquish</b> 224:20	<b>repeated</b> 467:1,3	185:3,3 201:2
207:16,20 484:12	<b>regulations</b> 109:22	<b>reluctance</b> 418:17	<b>repetitively</b> 41:7	204:3,5,16 218:2
<b>reflected</b> 253:21	<b>rehabilitated</b>	497:10	<b>reply</b> 239:5	218:7,12,13,19,20
294:7	491:13	<b>reluctant</b> 418:4	<b>report</b> 26:9,14 29:3	222:4,10 223:5

240:21 241:2	357:12 367:19	468:2,16 470:20	<b>restricted</b> 218:20	<b>reveals</b> 266:15
246:5 260:1	456:7 479:2	<b>respect</b> 83:21 85:1	240:22 259:22	297:21
261:10 266:14	<b>requirement</b> 128:6	101:5 105:5,11	301:18,19	<b>reverse</b> 151:22
271:9 272:11	342:11 393:3	110:5 114:17	<b>restrictions</b> 357:16	<b>review</b> 102:3 104:2
273:2 279:20,20	<b>requirements</b>	115:6 119:18	357:17	167:6,13 173:17
279:22 280:7,16	232:21 322:8	123:4,6 124:16	<b>result</b> 102:13 104:1	257:21 296:22
281:4,6 282:15	<b>requires</b> 136:14	125:1 126:4	106:5,10,18 140:5	297:7 327:21
299:16 301:19	155:16,21 174:1	129:13 134:17	178:10,13 228:21	363:22 364:7
474:5,7	312:20 331:22	138:22 140:19,21	266:11 285:2	365:19 383:22
<b>represent</b> 255:7	390:20 489:2	141:1 147:22	293:13 297:16	385:4,10,20 388:8
306:16 384:5	<b>requiring</b> 174:18	155:3,7 156:12	300:8 418:18	388:12 438:13
<b>representation</b>	421:22	158:8 160:4 161:1	498:14	460:18,19 477:20
166:13 314:6	<b>research</b> 37:3 39:6	161:4 163:19	<b>resulted</b> 101:9	496:12
322:5 326:13	39:7,7,18 65:13	167:5 171:2	183:9 205:19	<b>reviewed</b> 272:19
351:13,17 353:8	65:22 80:12 257:4	188:12 271:5	224:8 248:7	318:18 501:11
362:13 374:19	264:15 272:6,12	279:15 280:21	261:17 282:1	<b>reviewing</b> 389:11
381:2	272:13 273:6	281:10 299:21	324:17 364:12	<b>reviews</b> 312:13
<b>representative</b>	284:21 295:2	473:18,21 477:22	381:22 382:1	388:22
196:9 249:18	296:16 297:14,20	483:6	<b>results</b> 8:18 69:16	<b>revision</b> 115:12
291:11	298:1,12 301:2	<b>respond</b> 388:3	168:14 182:20	166:4
<b>representatives</b>	303:4,11 354:8,16	<b>responding</b> 473:21	216:7 223:18	<b>revisit</b> 130:2,5
335:7	486:12	<b>response</b> 1:4 5:5	228:9,12 230:8	<b>revolution</b> 333:19
<b>represented</b> 352:5	<b>researcher</b> 264:17	394:7 403:13	259:18 263:5	<b>rewarded</b> 462:22
488:2 498:22	<b>researchers</b> 282:3	466:5,8 500:20	298:7 360:17	<b>RFIs</b> 201:4
<b>representing</b>	<b>reservations</b>	501:15	451:21 474:17	<b>rhetoric</b> 321:13
186:12 319:14	163:18	<b>responses</b> 481:3,9	<b>resumed</b> 501:9	<b>Rhett</b> 131:1
355:19	<b>Residence</b> 1:12	<b>responsibilities</b>	<b>retain</b> 116:15	<b>Rhode</b> 79:14 80:11
<b>reprisal</b> 418:5	<b>Resignation</b> 224:13	161:3,4 328:17	313:17 478:11	<b>riches</b> 500:22
<b>reputation</b> 405:8	<b>resists</b> 68:2	485:3	<b>retained</b> 115:10	<b>rid</b> 58:10
<b>request</b> 177:7,10	<b>resolution</b> 338:11	<b>responsibility</b>	222:21 337:6,10	<b>ride</b> 471:3
327:19 362:5	<b>resolutions</b> 476:20	64:18,19 473:8	<b>retention</b> 116:11	<b>ridicule</b> 324:13
375:11 389:11	<b>resolve</b> 367:1	484:17,21 485:11	325:20	<b>right</b> 11:13,19 13:7
390:1,3,8,15	<b>resource</b> 231:5	<b>responsible</b> 42:7	<b>retire</b> 423:7,7 465:8	13:12 14:18 15:21
391:15 393:8,20	335:13 353:6	43:9 95:22 315:14	<b>retired</b> 1:17,17,18	16:21 17:7 18:11
395:14,17 396:17	428:4 465:10	315:19 369:2,21	1:18 322:20	19:12 20:5,10
417:12	<b>resources</b> 308:13	484:19	435:22	22:16 23:12 24:17
<b>requested</b> 395:11	310:7,16 313:14	<b>responsibly</b> 43:4	<b>retread</b> 376:22	27:15 29:4 30:16
399:10 413:19	322:14 323:20	<b>responsive</b> 413:10	<b>Retriever</b> 10:17	31:6,11,12 32:9
<b>requests</b> 365:18	324:1 326:4,8	<b>responsivity</b> 359:18	<b>retroactive</b> 109:11	32:15,18 33:6,22
399:6 421:1	331:15 334:19	<b>rest</b> 113:11 142:19	<b>return</b> 302:12	34:5,14,18 35:15
<b>require</b> 128:13	347:5 349:20	171:22 254:19	<b>returning</b> 239:9	36:16 37:1,15
136:12 226:16	350:4 352:15	308:17 343:8	473:2	38:4,8 39:12
353:17 387:21	353:22 380:2	382:13	<b>reus</b> 117:5	41:21 42:20 43:16
432:20	382:17 383:4	<b>restaurants</b> 488:11	<b>reveal</b> 390:6	44:8,16 46:6 47:2
<b>required</b> 101:8,12	402:1 404:18	491:6	<b>revealed</b> 246:17	47:15 48:11 49:10
146:2,2,21 147:10	407:5 415:6 420:8	<b>restrain</b> 129:1	269:15 276:12	49:20 51:2 52:9
179:8 209:6	421:22 441:16	<b>restraints</b> 465:10	<b>revealing</b> 389:12	57:6 58:1,12

60:19 62:1,17  
 63:6,12 64:3,14  
 66:5 67:5 68:20  
 69:9 70:1,20  
 72:14 73:12 74:20  
 75:5,12,15,19,21  
 76:2 77:9,16,19  
 82:8 84:1 89:9,20  
 92:21 93:14 94:4  
 94:13 96:10 97:3  
 98:12,16 108:5,17  
 109:7,13 114:4,6  
 114:12 144:21  
 146:5 147:6 149:4  
 162:7 163:4,20  
 165:7 166:10  
 167:3,9 169:7  
 170:19 171:2  
 177:13 185:14  
 187:11,18 192:14  
 192:22 210:4  
 212:9 215:17  
 217:18 221:5,13  
 223:16 228:7  
 233:7,14 234:7  
 236:19 299:5  
 304:12 306:6  
 314:13 321:20  
 332:12,13 333:22  
 335:14 339:22  
 349:3 350:20  
 359:10,22 361:21  
 367:15 370:11,13  
 370:22 372:18  
 373:19 374:12,16  
 375:6 379:14  
 383:16 384:14  
 386:14 387:22  
 397:1,2 403:17,18  
 404:12 408:2,9  
 421:16 423:16  
 427:2 438:1 439:8  
 453:4 459:4  
 482:21 483:8,11  
 483:12,18 484:5  
 486:1 490:20,22  
 492:14 494:10

497:18  
**rights** 158:12  
 369:12 469:5  
 478:13,19,22  
 479:14,16,18,21  
 480:1 482:18  
 483:13  
**rigmarole** 396:13  
**rigorous** 272:13  
**rigorously** 366:7  
 368:5  
**RILO** 224:12  
**ripe** 180:2 211:15  
 328:2  
**rise** 200:16  
**risk** 92:20 255:21  
 338:13,14,16,18  
 339:13,19 340:3  
 340:16 341:3,4,5  
 341:9,14,20  
 342:14 343:5,20  
 344:2,8,9 345:3,4  
 345:6,13,20  
 346:17 347:3  
 348:7,12 359:18  
 374:21 380:15  
 387:13 487:11  
 498:17  
**RLSO** 306:2  
**road** 61:4 345:6,7  
 348:12 384:6  
**rob** 77:16  
**robbed** 55:8,17  
 56:16 76:9 449:12  
**robber** 54:21 77:14  
 77:15,21 78:7  
**robber's** 77:22  
**robberies** 17:9  
 378:16  
**robbery** 8:3 14:7  
 75:19,21,22  
 183:17  
**ROBERT** 2:9  
**robust** 388:7  
**rocket** 78:6  
**role** 86:8 90:18  
 161:11 221:20

297:18 369:5  
 493:1  
**Rolex** 53:22  
**rolled** 449:14  
**Rolling** 121:21  
**roof** 442:5  
**room** 1:12 8:13  
 12:20 23:15 35:9  
 44:3 71:19 78:17  
 78:18,18 94:7  
 197:9 247:14,17  
 272:5  
**Rose** 2:12 349:5  
**rotate** 459:10  
**rotations** 239:13  
 456:8 459:16  
 460:10  
**round** 22:3  
**rounding** 387:2  
**rouse** 124:9  
**routinely** 311:21  
 418:3  
**row** 182:6  
**rows** 181:20  
**rude** 447:10  
**Rugh** 3:7 422:10,11  
 422:11,13 424:15  
 424:19 426:5,10  
 427:2 428:14  
**rule** 33:7,7 57:8,8  
 58:9,22 151:16  
 434:7  
**rules** 35:18 356:17  
 356:17,18,19  
 358:20 393:4  
 432:15 450:14  
 498:8 499:15,17  
**run** 79:2 317:7  
 417:8 429:5,15  
**running** 11:21  
 455:8  
**runs** 10:17 68:9  
**rural** 59:18 409:10  
**rush** 333:15  
**rushes** 334:10  
**Russ** 3:10 94:21  
 467:13

**Russell** 319:16  
**rusted** 54:16  
**Ryan** 105:21

---

**S**

---

**s** 7:7 59:13  
**sadly** 19:17  
**safe** 59:12,20 64:9  
 65:2,4 87:6  
**safely** 348:16  
**safety** 340:2 341:2  
**said-he** 40:6  
**said-she** 40:5  
**said-they** 40:6  
**sailor** 100:4 400:7  
**sailors** 51:6 306:16  
 324:20 483:22  
**sake** 184:11  
**Sameit** 3:9 427:9  
 427:10,12  
**sample** 292:8  
**samples** 418:22  
**San** 1:12 3:4 307:4  
 317:21 322:20  
 326:18 485:14  
 486:2,20 487:3  
 488:11 491:5  
 500:15  
**SANE** 355:13  
 374:3,4,8 382:17  
 401:12,12 466:9  
**SANE-type** 374:5  
**Santa's** 423:1  
**SAPRO** 172:9  
 173:10 179:9  
 190:14 202:5,6,8  
 203:21 207:1,4,5  
 207:9,13,15 208:5  
 209:7 213:9  
 226:21 244:6  
 330:12,15 425:14  
 425:14  
**SAPRO's** 226:12  
**SARC** 466:22  
 467:12 470:3,4  
**sat** 64:9  
**satisfied** 254:19

462:22  
**Saturday** 10:13  
**savvy** 499:14  
**saw** 8:14 12:17  
 48:21 56:18 79:12  
 82:1 262:4 268:21  
 461:8  
**saying** 16:21 20:21  
 88:16 152:16  
 192:2 360:11  
 387:1 430:19  
 436:10 449:7  
 469:12 486:15  
 495:8  
**says** 11:12 13:3,18  
 24:2 33:9 34:3  
 49:15 77:1 128:22  
 130:18 131:2  
 144:7 156:2  
 189:14 196:6,17  
 197:10,18 198:20  
 198:21 206:4,6  
 210:17 246:19  
 250:15 402:18  
 442:18 448:7  
 450:8 499:4  
**scale** 388:21  
**scares** 65:7  
**Scarlett** 131:2,4  
**scary** 59:2 81:4  
**scenario** 141:7  
**scenarios** 101:4  
 147:18 159:4  
**scene** 54:21 61:10  
 450:11  
**scheme** 119:17  
**scholarships** 14:1  
**school** 3:12,17 6:18  
 11:6,12,15 12:21  
 13:11,16,17 14:7  
 14:10 79:14 80:10  
 80:11 91:6,7 99:2  
 131:14 256:17  
 316:18 317:3,15  
 365:21 377:10  
 413:22 425:12,12  
 430:15 472:12

<b>schooled</b> 17:15	428:12 468:19	405:9 406:19	314:17 315:13	<b>September</b> 104:8
<b>schoolers</b> 58:15	469:2	421:5,7 431:16	318:8 321:21	204:10
<b>schoolhouse</b> 161:16	<b>Secretary</b> 103:11	436:20 478:3	328:21 379:4	<b>sequestration</b>
162:15	<b>secretive</b> 95:18	493:20	404:21 406:8	465:16
<b>science</b> 78:6 355:4	<b>section</b> 2:11 330:4	<b>seeing</b> 82:22 341:2	407:11 408:12	<b>sergeant</b> 320:12
<b>scientific</b> 462:11	388:3 453:8,14,16	<b>seek</b> 237:12 373:8	429:10 431:9	385:22 396:6,7,7
<b>scope</b> 475:3	453:17 455:2,16	402:20 475:12	432:17 434:6	<b>serial</b> 39:20 40:1
<b>score</b> 347:22 348:5	455:16 456:1,2,16	487:6	447:4,5 460:1,10	41:9
<b>SCOTT</b> 3:10	457:5,9,10 458:4	<b>seeking</b> 406:17,19	462:5 464:18	<b>serious</b> 52:20 85:21
<b>SCPS</b> 292:3,10	459:18 464:18,22	<b>seemingly</b> 381:15	<b>sense</b> 35:8 81:19	220:10 244:19
<b>scratch</b> 8:16	465:2,4,20 468:10	<b>seen</b> 8:1 17:20	128:2 250:3 251:7	245:12 331:20
<b>screaming</b> 68:5	468:11 469:14	58:13 94:21 97:19	262:13 266:18	332:1 334:15
<b>screen</b> 51:14 77:16	<b>section-specific</b>	100:13 129:11	354:6 475:16	357:18 358:13
494:14	457:16	130:6 131:5	<b>sensitive</b> 23:16	367:22 378:14
<b>screened</b> 282:4,5	<b>sections</b> 453:15	145:22 199:16	351:3	432:22 456:5
282:20 283:9	456:16,17 459:10	230:22 249:12	<b>sent</b> 61:13 84:17	458:20 459:20
<b>scrounge</b> 330:8	465:21	315:3 340:7 370:9	128:9 186:14	<b>seriously</b> 231:7
<b>scrub</b> 438:10	<b>securing</b> 303:8	407:2 473:16	416:20 456:15	443:16
<b>scrubbing</b> 438:10	<b>security</b> 449:18	<b>sees</b> 49:2	457:5 465:22	<b>servant</b> 475:17
<b>scrutiny</b> 105:3	450:4 465:3	<b>seizing</b> 217:7	484:3	<b>serve</b> 133:11 311:9
<b>SDC</b> 317:20	<b>see</b> 10:2,6 15:1,16	<b>seizure</b> 236:4	<b>sentence</b> 155:14	313:18 321:18
<b>sea</b> 399:16	16:1 17:16 18:5	<b>selected</b> 315:22	156:2 339:18	351:22 385:16
<b>search</b> 236:3,4	18:15 19:3 20:16	414:15,17	347:7 351:10	410:5 453:12
387:22 432:7	30:7,18 39:5 40:8	<b>selection</b> 53:12	385:6	472:5 483:19
<b>searches</b> 301:6	47:16,22 49:22	497:15	<b>sentences</b> 155:13	<b>served</b> 309:21
<b>seat</b> 309:9	50:5,6,10 54:3	<b>self</b> 17:3 38:11	231:1 364:14	334:20 364:8,10
<b>seated</b> 51:11,21	65:6 69:10 72:15	127:15	375:2,4 386:10	402:4 430:6
256:11	72:16 77:11,11	<b>self-perception</b>	<b>sentencing</b> 321:7	484:18 487:7
<b>seats</b> 387:3 404:9	85:14 87:16 90:19	41:15	324:10 355:22	<b>serves</b> 171:18
<b>Seattle</b> 361:2,16	91:8 92:7 94:11	<b>selfies</b> 489:10	363:22 364:5,7	245:17
363:2,8	94:15 95:15,16	<b>sell</b> 448:2	366:2 386:7	<b>service</b> 1:2 2:16
<b>SECDEFs</b> 253:13	97:18 118:16	<b>semesters</b> 21:11,16	483:10	3:14 22:16 151:10
<b>second</b> 32:21 36:17	128:16 130:7,9	21:18	<b>sentencings</b> 378:16	159:15 164:12
46:9 86:12 100:2	135:10 138:9	<b>semi-stranger</b>	<b>sentiments</b> 486:6	170:1 209:16
101:7 103:1	157:12 163:1	435:15	<b>separate</b> 139:5	211:2 224:21
104:18 124:18	172:11 173:9,14	<b>semi-strangers</b>	146:11 149:14,17	225:3 232:9 247:1
127:1 128:20,21	175:11 183:22	435:8 461:18	158:21 202:12	255:22 258:1
129:7 135:14	184:12 186:17	<b>Senate</b> 108:1	206:14 219:7	260:8,11 263:7
155:15 157:13	190:1 192:22	152:12	306:18 388:21	305:4 306:3,19,22
174:13 218:12	198:3 206:3 227:8	<b>send</b> 14:10 198:11	424:13 493:12	310:5 321:10
280:15 297:14	230:4 232:11	198:15 307:18	<b>separated</b> 225:16	327:2 332:5,14
301:13 309:9	241:1 248:21	393:6 410:18	229:9 317:18	351:19 368:16
311:9 312:16,19	275:12 282:8	423:20 424:2	<b>separately</b> 155:2	370:3 377:1
384:16 413:1	293:21 296:9,15	<b>sending</b> 161:10	220:2	384:15 415:21
420:2 454:21	301:12 349:1	465:20	<b>separations</b> 204:1	442:6 448:1 450:1
473:6	358:3,5,9,9	<b>senior</b> 3:6 230:10	224:12 228:17	452:19 481:16
<b>secondary</b> 415:11	374:16,20 389:20	312:12,15 313:18	473:10	484:4

<b>service-wide</b>	118:5 363:20	23:13 31:20 35:10	273:3 274:16	<b>shadows</b> 67:18
231:13 243:22	<b>sex</b> 2:1,11 3:4 35:15	37:13 52:15,17	277:21 278:8	<b>shambles</b> 324:14
409:20	37:8 58:19 67:9	57:22 63:10 66:20	280:1 281:7 284:2	<b>shameful</b> 492:6
<b>services</b> 3:11	67:17 68:18 69:8	69:18,19 77:3	284:10 285:9	<b>shaped</b> 81:14
111:15 164:15	69:9 70:15 77:4,5	79:1 87:2 90:13	287:10 289:2,4,4	<b>shapes</b> 47:6
170:9 199:22	77:7,11 82:20	91:9,21 92:14	290:11 293:16	<b>share</b> 9:3 42:12
202:8 207:2,3	96:15 118:22	94:17 97:10 99:5	307:19 309:9	331:15 349:20
209:12 217:1,3	119:1 134:11	100:20 102:22	310:12 311:15	358:5 381:4,8
227:1 250:6 260:8	139:10,22 157:12	103:19 104:10,20	312:11,18 313:15	411:12 421:1,8
260:17,20 261:9	213:19,20 214:2	107:4,8,15,16	318:12,15,16	422:5 429:18,22
261:11,13,15	221:16 227:5,5	115:3,4,18 116:6	319:6,15 320:13	453:6 473:12
262:1,9 263:5	228:10 230:20	118:2,9,9,14,15	321:2 323:12,14	500:16
268:12,20 270:20	231:7 238:18	118:16,18,19,21	323:18 324:5	<b>shared</b> 420:12
275:1 278:14,19	244:19 337:1,7,10	119:1,2,4,5,12,13	331:21 334:15	<b>SharePoint</b> 329:7
286:16 289:7,18	337:13,21,22	119:14,20 120:1,7	336:14 349:2	<b>sharing</b> 428:9
294:21 295:4,13	338:12 339:1,8,10	120:10,14,19,20	353:8 356:22	<b>shaven</b> 28:16
295:15 296:9,12	342:2,11 343:8	122:4,11 124:3,5	358:8 373:17	<b>sheet</b> 154:8
298:18 310:15	347:12 349:15	124:10,12,13	374:1 377:22	<b>shelters</b> 455:9
313:6 315:4,15,19	350:1,5,6 351:9	125:4,11,12,15	401:11 405:9	<b>Shepherd</b> 64:4
319:19 322:10	351:18 352:3,19	126:8,20,21 127:2	407:14 408:3,4,15	<b>Sheriff's</b> 267:8,11
325:14 326:5	353:3 354:5,20	127:3,4,7,10,11	410:19 411:4	283:3 286:1
329:4 330:3 335:8	356:3,9 357:2,10	127:19 132:3,4,9	412:4 413:2,4	<b>shibboleth</b> 475:11
361:9,22 406:1	357:11,12 362:15	132:22 133:11,17	415:12 417:1	<b>shield</b> 358:9 472:22
409:6,7,12 424:18	363:14 364:3	134:2,6,7 136:6,9	418:2,8 419:14,18	483:1
427:18 429:22	365:2,12,22 370:4	136:11 138:6,8,11	421:18 426:3,8	<b>shift</b> 104:18 415:6,9
466:12 470:13	370:13,15 378:21	139:8 141:9,15	428:20 429:1	<b>shifts</b> 467:5
479:1,3 481:16	378:22 379:8,10	144:2,19 145:19	432:15 434:14	<b>Shinn</b> 3:10 319:10
<b>servicing</b> 315:10	385:18 430:10,14	147:8,12,20 151:7	440:21 441:20	319:11,16 330:21
332:4 453:11	430:16,19 431:2	151:11 154:13,17	442:17 444:14	335:6 336:8 384:8
<b>session</b> 467:6,7	431:10,16,18,20	157:7 158:21	447:3 453:18	384:11,21 385:2
<b>set</b> 37:19 41:3 61:2	431:20 432:16,22	166:8 171:3 172:4	454:13,16,18	388:2 395:7,9
114:15 141:6	433:13,22 434:1	172:21 175:14	455:8,21 458:5,11	396:2,16 397:1,6
207:3 308:12	435:21 442:7,9,11	176:4 178:22	458:14,18 459:1,3	397:10,20 398:4,7
364:5,9 388:9,15	442:11 453:2,7,22	179:10,16,19	459:7 460:6,12,22	<b>Shinn's</b> 365:8
439:14	455:15 461:6,10	183:6 204:18	461:4,13 462:13	<b>ship</b> 247:7
<b>setting</b> 21:1 42:17	462:5 463:9	205:11,14,18	463:22 466:5,7,19	<b>shocking</b> 79:11
43:18 314:22	464:18 466:16	206:8,10 207:18	467:15,16,18,20	<b>shop</b> 47:9,10
371:10	467:11 469:3	207:19,22 209:19	470:7,19 471:2	385:11 454:5
<b>seven</b> 40:2 119:15	473:21 476:1,10	220:9,14,18 229:6	474:11 477:18	<b>shoplifting</b> 457:7
223:19 361:5	476:12,12,13,16	240:21 242:19,22	481:4,17 484:11	<b>short</b> 54:1 119:3
378:19 411:12	476:17 477:13,14	244:20,21 245:1,7	486:10 487:21	214:16 248:17
459:19	480:3,4 481:18,21	247:8 252:12	488:7 492:5	310:7 359:19
<b>seven-day</b> 350:13	482:5 486:3	257:5,10 259:11	<b>sexuality</b> 97:14	423:3,11 495:3,3
<b>seven-year</b> 121:19	<b>sexual</b> 1:4,7 2:12	259:13 261:10	<b>sexually</b> 17:5 132:8	<b>short-staffed</b> 495:9
<b>Seventeen</b> 225:20	2:17 4:4 6:14 7:2	263:6 265:16,18	355:7 435:1	495:11,14
<b>Seventy-nine</b> 186:1	7:6,12,13,20,21	266:16 267:16,20	449:13 450:9	<b>shorter</b> 350:16
<b>severe</b> 117:22	8:4 15:19 16:7	267:22 272:9	487:2 488:16	<b>shortly</b> 158:10

178:19	419:4 422:2	446:15,20	371:18 377:17	363:7 409:10,11
<b>shot</b> 360:17	<b>significantly</b>	<b>sir</b> 32:3 53:18 56:10	411:3,3 416:3	409:11 440:19
<b>shots</b> 44:6 47:13	233:20	73:7 148:18	456:9	469:7
448:10 494:14	<b>silenced</b> 56:22	175:21 233:9,15	<b>skip</b> 296:14	<b>smaller</b> 244:1
<b>should've</b> 44:4	<b>silent</b> 142:19	<b>sister</b> 89:4 322:10	<b>skirts</b> 443:15	325:16 458:10
<b>show</b> 61:6 94:12	384:18	325:14 329:3	<b>skittish</b> 68:17	<b>Smart</b> 128:9
100:1,5,12 104:21	<b>Silicon</b> 472:12	406:1	<b>skunk</b> 77:18	<b>smartest</b> 380:4
170:20,22 207:14	<b>similar</b> 22:9,20	<b>sit</b> 53:7 215:5 233:2	<b>Skype</b> 128:8	<b>smells</b> 18:2
243:11 305:8	36:20 37:1,19,22	434:5	<b>slapped</b> 68:17,21	<b>smelly</b> 38:20
308:19 396:22	77:12 78:15 80:8	<b>site</b> 329:7,8	<b>slapping</b> 68:7	<b>Smith</b> 385:21
451:3,11 471:4	81:12 97:20	<b>sitting</b> 72:17 77:20	<b>sleeping</b> 137:18	<b>snapshot</b> 203:1
<b>showed</b> 45:11 91:7	119:17 129:17	215:8 368:15	221:2 227:6	204:5,9 217:22
<b>showing</b> 13:5 72:7	134:10 136:11	409:6 473:15	<b>slice</b> 60:5	241:9,11
186:7	157:15 187:12	<b>situated</b> 439:16	<b>slide</b> 16:15 65:13	<b>snitch</b> 95:7
<b>shown</b> 131:13	201:4,20 258:18	<b>situation</b> 18:19	166:16 172:12	<b>Snohomish</b> 361:13
187:13	271:17 281:13	43:2 55:1 85:10	173:13 175:10,10	<b>sober</b> 77:20 84:5
<b>shows</b> 75:5 173:7	292:20 294:14	95:1 146:3 147:7	175:14 176:22	158:1,2
186:6,19 230:15	299:15 322:9	260:16 266:10	179:3 184:9	<b>social</b> 52:7 100:9
230:17 451:7	338:6 339:5	330:6 348:8	186:18 187:17	355:4 380:14
<b>shunned</b> 324:6	350:19 351:20	357:10 360:16	190:1 202:22	418:12 442:5
<b>shy</b> 462:12	371:15 421:5	397:7 400:1	206:6 215:10	455:5 479:3
<b>sick</b> 44:12 45:16	439:17,17 460:15	<b>situations</b> 90:1	216:18 221:4	480:21
46:5	460:20 466:6	97:20 158:15	222:12 223:15	<b>society</b> 32:4 82:5
<b>side</b> 13:5,6,7 67:19	470:5 476:7	<b>six</b> 28:7,7 58:20	224:2 225:11	90:22 297:7 333:9
70:9 91:16 140:8	<b>similarly</b> 265:15	74:13 79:14	227:7,8 228:6,13	333:16 343:14
168:10 178:5	439:16	115:17 307:9,12	228:19 229:4,12	345:2 348:16
206:13 493:9	<b>simple</b> 65:17	378:19 385:13	230:15 270:10	<b>sociologists</b> 339:14
<b>sides</b> 41:22 148:16	116:22 135:8	407:11 412:18	<b>slides</b> 4:7,9 170:20	<b>sodas</b> 448:8
161:22 167:11	136:7,21 457:7	416:16 428:17	171:3 172:1,2	<b>sodomy</b> 124:15
169:20 486:19	<b>simply</b> 52:6 71:21	432:4 435:20	173:7 175:5	125:22 126:6
<b>sight</b> 333:17	144:20 215:6	445:18 456:13	176:19 178:6,12	152:21 244:19
<b>sign</b> 49:7,8,9 52:10	265:12 269:18,20	457:19 458:4	190:14 193:7	259:1
54:3 113:8 174:20	303:19 304:2	472:14 481:12	202:5,7,10 203:9	<b>soldier</b> 87:17 151:9
362:10	329:22 331:20	<b>six-city</b> 285:13	207:8 213:6,6	151:13 218:13
<b>signal</b> 91:4,5	411:5 415:9 419:1	293:4	217:16 220:7,12	222:20 227:21,22
<b>signature</b> 108:7	420:6 431:14	<b>sixth</b> 79:16 333:21	220:13 226:12,13	312:12 313:6
109:8 165:6	451:12	<b>sixty-three</b> 274:5	227:3 243:11	473:4
<b>signed</b> 104:7 112:5	<b>Simultaneous</b>	<b>Sixty-two</b> 58:16	255:18 257:16,17	<b>soldiers</b> 223:16
113:15,16,22	164:8 167:22	<b>size</b> 221:15 472:8	257:19 259:22	225:16,20,22
165:9	191:17 192:8	<b>sizes</b> 54:22	295:22 296:7	226:2,4 228:7
<b>significance</b> 39:3	221:7	<b>SJA</b> 393:7,7 427:16	<b>slight</b> 132:1 138:17	229:2,8,9 255:20
<b>significant</b> 19:13	<b>simultaneously</b>	<b>SJAs</b> 306:4 393:10	146:22	310:15 473:11
20:16 202:14	416:8	<b>skewed</b> 214:1	<b>slightly</b> 173:8	483:22
230:14 305:16	<b>single</b> 245:8 326:21	<b>skill</b> 354:7,11	178:17 244:5	<b>solely</b> 468:13
329:14 330:11	379:22 428:22	358:18 463:19	295:21	<b>solid</b> 272:3
332:10 384:4	429:5,7 434:6	464:5,14 469:12	<b>small</b> 185:15	<b>solo</b> 165:7 378:13
395:13 416:13	438:13 439:2	<b>skills</b> 350:17,18	244:22 349:18	<b>solution</b> 325:22

<b>solve</b> 325:15	<b>sorts</b> 469:6	112:13 124:1,8	331:2 352:8	336:6,7 359:12
<b>solving</b> 446:11	<b>sought</b> 333:17	144:19 153:19	365:12,14 395:12	390:15 392:13,18
<b>somebody</b> 11:22	<b>sound</b> 68:6	154:16,19,22	405:6 410:6	392:19 394:11
16:21 18:22 24:9	<b>sounded</b> 53:17	155:17 161:12	412:21 420:15	413:19 414:11,12
30:17,20 65:9	<b>sounds</b> 36:2 307:11	173:11 191:15	454:12 487:5	416:7 419:16,22
86:13 88:7 93:6	367:8 466:6	202:13 244:13	<b>spill</b> 52:2	452:5 455:22
197:10 211:18	<b>source</b> 172:12	318:11 338:3	<b>spinning</b> 44:3	<b>staffed</b> 310:19
266:12 343:22	292:4	356:5 362:15	<b>split</b> 68:10	322:17 479:1
348:13,14 354:15	<b>South</b> 397:12	378:21 379:3,10	<b>Spohn</b> 3:12 256:15	<b>staffs</b> 160:17
355:11 357:1	<b>span</b> 106:14	379:20 380:13	256:21 270:8,10	<b>stage</b> 37:1 300:5
359:14 360:12,14	<b>speak</b> 24:8 34:3	381:5,7 407:9	270:18 287:6,7,12	<b>stairs</b> 131:2 443:15
372:10 374:17	159:22 217:3	411:3 413:15,18	287:15,20 288:1,4	451:8
433:3 436:9	412:2,7 427:12	417:16 420:18,19	288:7,10,14,22	<b>stake</b> 351:15
437:14 442:14,17	493:20	432:16 476:1	289:6 299:12	<b>stale</b> 255:6
444:3 449:21,21	<b>speaker</b> 485:18	479:17 482:18	301:11,20 302:3	<b>stalking</b> 3:4 115:1
450:4,8 451:9	<b>speakers</b> 2:1	484:15	303:9 304:8	453:19
474:17 475:7	432:18	<b>specifically</b> 7:21	<b>Spohn's</b> 39:6	<b>stand</b> 314:10
491:11,14 496:11	<b>speaking</b> 392:17	23:22 24:2 37:7	<b>Spokane</b> 361:12	320:22 333:3
497:12,13	396:18	63:14 65:11 102:3	<b>spoke</b> 417:6	383:5 460:22
<b>somebody's</b> 16:2	<b>special</b> 2:8 171:16	379:8 412:3	<b>spoken</b> 19:7 364:16	<b>standard</b> 49:15
<b>someone's</b> 125:6	172:18 173:21	428:21 475:15	396:8,11	50:1 129:8,9,11
<b>somewhat</b> 80:13	174:2,5 180:4,11	479:13	<b>spot</b> 75:5 241:16	135:3,4,9,13
156:17 207:12	195:1,3,20 205:8	<b>specifications</b>	308:5	157:20,21 158:2
209:7 212:7,19,20	229:21 230:1	131:16	<b>spotting</b> 242:10	187:10 291:16
246:1 269:11	231:3 253:16,18	<b>specifics</b> 190:8	<b>spouse</b> 35:11,12	316:1 362:21
271:3,21 284:9	323:10 353:6	191:22	<b>Sprance</b> 1:21 73:8	363:4 366:5
286:18,20 410:3	375:13 380:6	<b>specified</b> 132:14	73:19 74:7 501:13	475:10 480:5
<b>soon</b> 232:13 305:11	404:20 405:2,15	<b>specify</b> 131:18	501:14	<b>standards</b> 72:3
370:7	406:2,7,11,13,18	133:5 146:20	<b>spread</b> 307:6	343:4 362:9,12,16
<b>sophistication</b>	406:20 407:9,12	<b>spectrum</b> 219:6,11	316:13 347:10	365:5 480:13
360:3	408:11 412:2,9	219:13,15	372:3	<b>standing</b> 55:5
<b>sorry</b> 26:3 57:15	414:10,14,16	<b>speculation</b> 63:16	<b>spreadsheets</b> 212:3	479:21,22
111:12 190:10	416:18 417:3	<b>speech</b> 164:8	<b>Springer</b> 50:12	<b>stands</b> 114:12
209:10 287:8	419:11,19 421:12	167:22 191:17	<b>Springs</b> 317:21	486:22
330:3 331:2 368:9	421:14 422:6	192:8 221:7	<b>squadron</b> 194:11	<b>staring</b> 12:19
401:9	436:1 447:5 469:6	464:11	<b>squandered</b> 324:12	<b>start</b> 54:10 87:13
<b>sort</b> 81:1 82:5	480:2 487:1	<b>speed</b> 486:13	<b>square</b> 472:7	87:21 95:15,16
128:9 141:9	<b>specialists</b> 424:3	<b>speedy</b> 232:2,2,21	<b>Ss</b> 427:21	141:18 214:4,13
145:19 183:14	476:8	333:22 402:9	<b>stable</b> 347:16	222:13 227:15
193:14 203:6	<b>specialize</b> 349:3	<b>Spence</b> 308:14	397:15	243:8 263:13
224:17 248:15,19	<b>specialized</b> 7:18	<b>spend</b> 347:5 456:7	<b>stack</b> 388:13	304:17 314:1
286:12 295:14	66:15 318:4	<b>spending</b> 353:18	<b>staff</b> 1:20,21 160:11	325:4,6 335:16
339:7 341:13	375:11,18 454:19	424:8	160:19 173:4	338:15 363:9,12
356:21 359:19	455:18 456:3	<b>spends</b> 416:17	180:19 194:12	363:13 377:9,19
361:10 378:5	461:21 469:4	<b>spent</b> 46:6 74:14	197:22 201:6	387:2,5 406:21
442:1 490:4	<b>specially</b> 230:2	202:14 214:18	215:5 217:10	435:10 445:12
495:21 497:14	<b>specific</b> 41:1	257:3 320:1,3,8	233:16 332:2	456:6,20 457:13

459:12 472:4 482:7 <b>started</b> 6:12 7:20 8:5,15 13:11,13 66:15 98:13 230:21 240:14 256:11 404:3 435:6 445:8 467:8 <b>starting</b> 71:7 94:15 275:11 316:10 472:10 <b>startling</b> 12:8 13:9 13:10 15:1 <b>starts</b> 34:3 194:14 233:10 305:10 433:13 456:13 <b>state</b> 2:13 3:13 102:11 104:4 240:17 250:20 256:18 260:13 265:8 326:15 336:17 338:11 349:6,8 351:6 352:3,6,11 353:4 354:3 356:12,16 356:16,16 362:1 362:11 363:1,21 364:19 365:10 368:21 370:5 386:5,22 433:17 478:5 498:10 <b>stated</b> 272:12 313:12 495:1 496:13 <b>statement</b> 310:2 328:19 432:21 433:5 <b>statements</b> 85:16 251:22 432:5,6 433:2,6,8 493:8 494:1 <b>states</b> 1:1 2:10 102:18 154:10 155:3 265:17 285:4 292:5 309:20 323:20 338:7 339:6,6	356:4 373:9 475:14,15 <b>stateside</b> 473:3 <b>statewide</b> 3:6 349:7 361:10 362:7 368:11 379:17 <b>static</b> 354:10 <b>Static-99</b> 340:2 347:9 <b>stating</b> 488:15 <b>station</b> 239:10 472:17 <b>stationed</b> 309:5 <b>statistic</b> 198:13 443:8 <b>statistical</b> 4:8 215:1 257:15,19 <b>statistics</b> 171:3 196:4 197:6,16 213:1 239:7 248:18 253:20 264:2 270:1 271:6 271:11 277:18 <b>status</b> 311:17 441:6 443:21 452:9 479:7 <b>statute</b> 99:6 102:12 103:19 104:17 105:20 106:19,22 106:22 107:7,9,9 107:16 108:13,22 109:3,3 113:20 116:10,10,11 132:20 137:3,5,6 137:22 141:4 142:20 144:1,4 145:11 146:5,8 147:2 148:2,8 153:2 156:20 157:4 164:3 166:7 166:14 167:20 168:19 474:22 <b>statutes</b> 106:11 116:9,12,18 153:10 452:1,13 <b>statutory</b> 103:5 110:13,21 112:13	114:1,7 123:7,15 141:22 142:13 144:7 163:7,14 166:4 345:11 364:11 444:7,12 <b>stay</b> 346:18 431:6 464:22 479:6 <b>staying</b> 458:3 <b>stays</b> 203:14 454:7 <b>steady</b> 7:5 <b>steal</b> 330:7 425:16 425:16 <b>step</b> 139:16 174:4 295:15 401:7 422:2 <b>STEPHEN</b> 2:19 <b>stepped</b> 6:22 12:6 370:16 <b>stepping</b> 86:20 499:21 <b>stereotypical</b> 32:5 481:6 <b>stern</b> 52:20 <b>Steubenville</b> 122:1 <b>Steve</b> 408:19 <b>stew</b> 70:22 <b>stinky</b> 38:20 <b>stint</b> 456:13 <b>stock</b> 290:8 <b>stoic</b> 481:8 <b>stole</b> 76:10 <b>stomach</b> 44:2 444:1 <b>Stone</b> 121:22 <b>stood</b> 247:19 <b>stop</b> 53:2,5 57:10 489:20 <b>stopped</b> 46:4 52:16 <b>stops</b> 68:8 <b>store</b> 55:21 69:3 <b>Storm</b> 472:22 <b>story</b> 11:3 51:9,9 94:20 264:5 <b>straight</b> 93:18 217:13 340:1 377:10 393:6 <b>Strand</b> 467:13 <b>strange</b> 159:8	451:1 <b>stranger</b> 17:22 32:7 38:22 39:4,13 60:8 434:14 446:21 451:9 488:21 <b>strangers</b> 271:21 271:22 <b>strategies</b> 413:2 <b>strategy</b> 330:14 389:13 <b>streamlined</b> 487:14 <b>street</b> 1:13 47:7 60:8 433:4 437:20 438:2 451:8 468:7 472:19 <b>strength</b> 94:6 427:5 <b>stress</b> 266:3 447:17 463:16 482:12 <b>stress-related</b> 481:6 <b>stresses</b> 265:11 <b>stressful</b> 10:13 42:6 43:5,14 <b>strict</b> 154:10 <b>strikes</b> 52:5 <b>string</b> 491:5 <b>strip</b> 225:3 <b>strong</b> 65:20 92:10 92:16 93:1,2 94:4 161:21 313:21 463:13,14,15 464:7 <b>strongest</b> 94:4 <b>structure</b> 99:18 123:12 454:15 463:17 <b>structured</b> 105:18 114:19 130:1 340:10 348:2 <b>structures</b> 433:12 <b>struggle</b> 72:20 212:18 318:3 334:7 <b>struggled</b> 63:18 123:16 125:16 137:4	<b>struggles</b> 137:3 <b>stuck</b> 44:4 48:19 60:8 333:13 <b>student</b> 21:14,15 66:19 67:6 83:4 441:5 <b>students</b> 14:17 15:5 130:22 429:12 441:10 470:2,6,17 <b>studies</b> 37:19 91:18 298:7 303:13 347:2 374:2 <b>study</b> 15:4,8 20:6,9 20:10 21:2,4 22:4 38:1 64:16,17 96:14 104:2 167:5 219:22 257:8 267:2 271:15 272:18 278:10 283:1 285:13,20 293:4 <b>stuff</b> 59:15 72:18 211:22 214:21 338:6 423:2 448:9 <b>stumble</b> 45:12 <b>stupid</b> 33:9 <b>subcommittees</b> 73:3 <b>subject</b> 41:16 50:21 162:14 170:2 211:1 223:17 226:18 228:7 241:13,18 244:11 260:9 263:12 268:1 273:16 274:8 357:11 462:11 480:10 482:5 <b>subjected</b> 324:7 <b>subjective</b> 129:11 381:12 <b>subjectively</b> 208:14 <b>subjects</b> 4:7 171:4 175:15,16,17 176:1,2,7,9,13 221:10 222:12,16 223:8,12 225:12
---	--	--	--	--

227:16,20 228:4,9 228:11 241:2,3,4 241:6,15,19 242:6 242:8,17,19,20,22 243:3 244:15 263:5 273:21,22 274:2,4 277:2,4 277:10,12,14 283:15 287:1 293:16 294:11 <b>submission</b> 129:3 246:14 <b>submit</b> 252:16 356:8 357:12 393:20 477:19 <b>submits</b> 474:16 <b>submittals</b> 477:5 <b>submitted</b> 280:5 310:3 362:13 395:14,17 477:12 <b>submitting</b> 22:21 362:5 <b>subpoena</b> 252:10 327:14,16 373:6,7 373:10,12 389:11 <b>subpoenas</b> 389:9 398:13 <b>Subsequent</b> 317:14 473:2 <b>subset</b> 385:3 <b>substance</b> 117:19 134:10 136:2,3,11 136:16 157:15 <b>substantial</b> 136:18 217:12 <b>substantially</b> 117:20 136:3 274:13 278:4,18 300:14 <b>substantiate</b> 172:20 208:21 <b>substantiated</b> 172:3 208:18 242:20,21 284:11 <b>substantive</b> 377:16 432:13 <b>substitute</b> 423:19	<b>subtle</b> 268:4 303:14 303:15 <b>subtotal</b> 185:7 <b>subtract</b> 222:15 227:16,20 228:3 274:2 291:5 294:12 <b>subtracted</b> 403:5 <b>subtracting</b> 222:14 <b>subway</b> 443:14,14 449:10 <b>succeeded</b> 166:5 <b>success</b> 230:16 422:3 <b>successful</b> 318:18 372:21 421:2 463:9 475:19 481:10 <b>successfully</b> 48:4 <b>suddenly</b> 359:16 <b>suffer</b> 475:19 495:13 <b>suffered</b> 324:13 <b>suffice</b> 327:17 <b>sufficient</b> 128:22 129:3,18 179:17 235:20 <b>suggest</b> 80:16 87:6 87:10 88:19 91:10 474:10 <b>suggesting</b> 366:4 <b>suggestions</b> 255:1 <b>suggests</b> 276:17 <b>suit</b> 51:21 <b>suited</b> 461:13,22 462:2,7 <b>sum</b> 305:9 <b>summarily</b> 328:1 <b>summarize</b> 286:13 <b>summary</b> 501:11 <b>summation</b> 421:18 427:3 500:3 <b>summer</b> 443:13 <b>Summit</b> 94:17 <b>Sun</b> 264:22 <b>sunny</b> 500:15 <b>superintendent</b>	434:22 <b>superior</b> 322:4 454:4 460:13 468:7 <b>supervise</b> 412:1 431:14 <b>supervised</b> 433:15 469:4 <b>supervising</b> 3:14 350:4 377:2 434:16 <b>supervision</b> 345:12 345:15 348:16 351:8 442:9 469:10 <b>supervisor</b> 464:16 476:6 <b>supervisors</b> 160:10 311:18 314:8 415:18 469:21 492:1 <b>supplant</b> 437:11,19 <b>supplement</b> 437:9 468:5 <b>support</b> 321:8 330:3,4 347:2 351:16 352:14 353:22 407:20 409:14 415:16 455:22 469:19 472:21 476:8 482:1 483:22 493:21 <b>supported</b> 242:18 279:22 281:6 284:15 314:7 326:19 <b>supporting</b> 405:17 <b>supportive</b> 96:1 <b>suppose</b> 193:19 <b>supposed</b> 58:21 82:3 92:9,11 207:5 392:19 446:4 <b>supposedly</b> 381:20 <b>supreme</b> 125:20 334:3 356:5	365:13 366:13 384:14 <b>sure</b> 12:1 17:8 32:14,14 38:15 41:9 57:19 60:19 71:18 73:20 81:6 86:2 108:11 143:19 167:14 185:3,19 189:12 190:19 254:5 266:14 278:12,22 400:6 404:15,17 405:3,21 407:6 408:2,9 420:13 433:11 436:20 438:13 439:3,15 461:3 475:12 478:19 479:6 480:12 499:19 500:12 <b>surface</b> 95:17 <b>surgery</b> 49:4 <b>surmise</b> 18:9 <b>surprised</b> 11:19 445:12 <b>surprising</b> 69:16 275:20 380:20 425:19 <b>surveillance</b> 443:12 446:9 488:10 <b>survey</b> 15:6,10 16:11 22:6 37:5 38:6 39:22 40:3 79:13,19 80:4,14 81:4 93:8 95:14 474:3,10 <b>surveyed</b> 15:5 37:4 <b>surveys</b> 15:11 36:21 37:11 80:2 91:19 <b>survived</b> 125:20 <b>survives</b> 126:3 <b>survivor</b> 94:18,19 320:14 <b>survivors</b> 23:15 <b>suspect</b> 176:18 212:12 337:8	446:12 490:7 <b>suspects</b> 227:15 266:13 285:9,22 489:5 <b>SVP</b> 229:19 230:16 414:20 415:8 416:17 419:12,22 420:2,4,5,10 422:1 486:21 <b>SVP's</b> 419:7 <b>SVPs</b> 239:17 414:14,22 416:1,2 420:19,20,22 <b>sweat</b> 19:12 368:17 <b>sweep</b> 125:2 <b>sweeping</b> 169:13 339:7 <b>swimsuits</b> 58:1 <b>swinging</b> 169:12 <b>switch</b> 14:20 36:16 96:13 <b>switching</b> 14:21 176:9 <b>sworn</b> 328:10 <b>sympathize</b> 486:5 <b>synopsis</b> 393:22 <b>system</b> 82:13 85:6 92:2 161:5 190:14 212:17 224:5,10 227:2 239:2 254:22 258:3,4 263:18 264:8 268:9 271:1,7 278:5 280:22 281:15 286:21 290:7,15 291:12 294:6 297:20,22 319:4 324:21 325:18 328:7 334:22,22 345:5 349:21 357:6 368:19 369:6,7,11 370:6 371:8 372:19,22 388:14 389:14 391:6 395:1 405:11 440:1,8 452:7,8
---	--	--	---	--

460:16 464:17	376:10 377:6	262:20 281:1	<b>target</b> 89:13	197:16 212:8
478:15,16,20	387:14 404:8	296:15 320:17	<b>task</b> 421:22 447:3	213:15 339:15
479:9 483:17	410:14,15 432:20	323:4 335:11	466:6	349:21 350:9
484:7,9,12 500:2	433:1,5,8 434:19	338:5,8 339:10	<b>taught</b> 18:15 32:5	354:14 357:1
<b>systemic</b> 200:22	437:6,13 438:4	341:21 343:2	317:2 429:9	367:1 381:17
<b>systems</b> 1:4,6 5:5	443:16 446:7	362:21 379:20	455:12	393:21 396:21
259:17 262:8	449:21 450:5,6	381:21 382:18,22	<b>TCAP</b> 411:17	397:4 424:12
268:5 277:19	456:22 458:1	398:10 403:6	412:15 413:5	430:9 440:4,9
279:17 286:18	464:1 471:22	414:13 417:14	417:4 419:9	444:20 446:3
360:9,10 370:21	479:18 485:12	419:6 420:11	420:11 422:5,14	449:1,2,4
501:15	494:13	425:4 429:17	424:12,14,20	<b>telling</b> 51:8 67:21
	<b>taken</b> 15:7 77:7	436:22 447:8	425:1,1 426:14	76:8,9 96:3
	110:17 148:7,19	452:16 489:22	428:2	187:22 338:15
<b>T</b>	161:9 175:1 182:3	490:2 491:16	<b>TCAPs</b> 429:21	<b>Tellis</b> 271:15
<b>T-A-B-L-E</b> 4:1	204:22 205:12,14	492:19 493:6	<b>TDS</b> 310:5,13	278:10 297:5
<b>t-shirt</b> 28:18 48:7	206:1,4 220:1	494:18 497:16	311:5,11 313:12	<b>tells</b> 21:11 22:17
54:15 81:22 82:10	225:18 227:4	<b>talked</b> 36:17 41:19	<b>teach</b> 99:7 130:22	31:1 34:15,18
84:6 88:21 89:1	229:1,12 246:22	46:11 65:16 85:4	156:6 424:1	35:4,20 46:10
<b>t-shirts</b> 47:11,20	255:16 263:12	90:21 99:20	<b>teaching</b> 13:19	67:5,13
<b>table</b> 322:22 368:15	274:7 277:3,8,15	101:16,20 160:1	35:14 345:19	<b>Telluride</b> 59:8 60:4
447:7	288:19 290:2	185:2 239:1	<b>team</b> 11:6,7 19:8	60:5,9,22 61:3
<b>tablecloth</b> 51:12	329:13 343:13	249:21 252:14	455:11 464:17	64:9
<b>tack</b> 319:14	403:4 432:7 445:4	296:14 323:3	466:5,8 493:14	<b>Telluride's</b> 59:11
<b>tactics</b> 421:2	445:5 489:11	339:15 370:17	<b>teams</b> 331:17	<b>Tempe</b> 478:5
<b>tail</b> 424:8	<b>takes</b> 20:3 55:2,2,2	396:6 399:14	481:14	<b>ten</b> 80:4 305:15
<b>take</b> 10:1 23:4 40:2	55:3 58:4 75:8,16	406:17 437:4	<b>tears</b> 368:17	308:7 316:9
41:16 46:9 48:17	75:20 117:12	<b>talking</b> 20:20 45:7	<b>tease</b> 297:9 355:5	347:13 431:8,13
49:19 56:3 68:12	131:1 176:10	50:18 96:9,11	<b>technically</b> 264:9	<b>tenacity</b> 404:4
72:5 75:7 80:12	313:4 332:7 354:7	114:7 117:11,13	<b>techniques</b> 359:6,7	<b>tend</b> 50:4 337:16
86:11 88:2 90:16	354:10 364:22	118:4 125:1 151:2	432:19 435:13	341:4 357:13
98:8 103:11 104:5	403:1 423:5	172:1,3 220:19	<b>technology</b> 497:15	462:12
108:18 117:7	445:21 464:2,5,14	258:5 338:9	497:16,20 498:14	<b>tendency</b> 31:4 39:4
118:11 121:15	469:13	341:10 343:5	499:8,20 500:7,9	39:10 48:14
134:1 160:15	<b>talk</b> 5:17 6:13 24:5	344:10,13,16	<b>teleconference</b> 1:22	<b>tends</b> 71:13
162:16 181:10	30:13 31:17 48:7	359:20 400:9	<b>telephone</b> 302:12	<b>tenor</b> 333:12 437:3
186:9 188:14	53:10 58:13 62:4	431:4 448:13	437:5	<b>tenure</b> 317:9 413:6
198:6 201:17	67:12 76:7 85:16	<b>talks</b> 78:19,20	<b>tell</b> 10:14 19:18,22	417:10
203:5 207:16	86:1,7 97:5 99:4	113:2 239:5	20:8 33:11,19	<b>term</b> 190:9,12,17
209:4,18 210:1	99:21 100:14,16	246:15	41:9 43:7 49:14	257:20 259:10
222:18 238:13	109:17 110:6	<b>tall</b> 28:5,5	51:3 52:8 57:14	269:20 274:16
242:1 246:9	114:13 118:15	<b>tank</b> 472:20	59:3,3,21 62:11	359:19 364:5,9
248:19 251:22	120:16 123:13	<b>tape</b> 23:11,12 24:5	64:1,3 69:6 71:14	366:2,3 417:19
256:4 260:14	124:3 156:6	30:14 31:8,12	79:18 88:12 95:6	434:20 442:4
280:2 291:20	162:15 206:18	36:1 41:20 367:6	101:14 109:5	487:7 488:5
298:19 299:10	244:3 249:11	488:17 497:7	130:18 142:20	<b>terminal</b> 54:9,14
323:16 344:5	250:14 257:1	<b>tapes</b> 31:6	151:8 161:22	<b>terminology</b> 172:11
349:19 358:12,14	258:8 260:4	<b>tapping</b> 445:15	167:19 174:6	304:4 431:8
359:1,2 372:4				

<b>terms</b> 10:21 34:22 80:13 85:18 123:22 148:22 151:5 153:1 162:22 163:3,5 165:19 194:15 246:4 260:2 299:18 303:5 321:5,7 336:13 337:17 350:11 352:14 361:8 363:3 381:10 389:12,20 401:11 456:1 468:2 474:9 498:1	83:6,15,17 86:2 90:2,4 97:22 98:2 98:5,18,20 153:15 153:16 162:11,20 165:11,18,22 170:13,14,16 175:6 184:1 187:20 197:11 198:8 199:2 200:1 216:20 217:7 231:8,10 233:7 234:8,10 236:18 243:15 248:12 253:6 256:2,5,12 256:21 289:5 298:18 300:16 304:9,11,21 309:14,15 314:9 314:12,15 319:9 319:12 335:3,5,15 348:19,20 360:18 361:1 368:7,8 376:14 383:6,8,13 388:22 389:2 403:10,16 404:10 404:15 408:16 411:8,11 422:4,7 422:8 427:7,8,11 430:3,12 452:17 452:20,21 453:4 485:13,16 500:17 500:18 501:1,4	<b>themes</b> 380:7 <b>theory</b> 343:21 390:6,20 <b>thereof</b> 303:12 369:20 378:3 <b>thick</b> 54:8 <b>thigh</b> 126:15 <b>thing</b> 10:9 12:8 22:16 30:14 39:17 41:11 42:19 43:10 49:8 51:21 57:1 62:5 65:5 70:17 73:22 79:11 81:1 81:21 92:17 94:14 106:17 110:12 113:6 115:5 122:12 132:21 135:9 187:5 207:9 209:3 227:4 238:13 245:13 249:11 263:3 296:17 305:13 327:13 333:4,5 343:19 346:19 350:10 354:20,21 359:4,9,15 363:19 364:19 373:13 374:20,22 375:9 383:5 399:18 441:17 450:21 451:16 470:1 474:6 478:3,14 487:22	212:10 213:11,19 248:11 253:12 306:9,13 326:10 335:11 338:1,3 343:17 346:15 354:12 355:17,21 356:8,9,9,13 357:14 358:1 359:1 360:2 361:7 376:22 378:17 380:16 381:16 382:6,14 386:19 405:12 436:16 438:3,19 443:1 446:2,14 449:19 457:8 469:9 470:3 470:4 471:7 473:17 492:2,19 494:3 500:12	158:17,19 159:21 160:2,18 161:21 162:4,5 163:17,18 163:21 167:2,8 168:4,16,17,18 169:10,18 184:21 194:3 196:6 197:1 200:3 201:4 203:19 208:8,12 208:18 209:12 210:16,18 211:15 211:20 212:9,15 212:18 215:7 216:8 226:16,22 235:8 240:6 245:22 246:6 248:18 253:9 254:1,1,7 256:3 268:21 278:19 279:7,17 281:2,3 281:17,19 286:22 290:13 291:10,13 294:2 295:3,14,18 296:1,13,14,17 297:7,14 298:6,12 299:20,22 300:7 300:12 301:8 303:3 337:20,22 338:17,21 340:6 341:4,14 347:5 351:19 353:2 354:1 356:4 358:4 365:7 369:22 370:5 372:1 373:3 373:9 375:1,15 377:4 378:12 380:1 382:7,13 383:2 384:13 393:8 394:12,22 395:3,5 396:14 403:18 405:12 407:3,16 408:1 409:4 418:11 425:20 430:8 435:4,5,8 441:12 442:11 443:1 446:17 447:1
<b>Terri</b> 73:9,13,18,21 74:1,5,10,14,21 74:21,22 75:2,4,8 75:16 76:5	298:18 300:16 304:9,11,21 309:14,15 314:9 314:12,15 319:9 319:12 335:3,5,15 348:19,20 360:18 361:1 368:7,8 376:14 383:6,8,13 388:22 389:2 403:10,16 404:10 404:15 408:16 411:8,11 422:4,7 422:8 427:7,8,11 430:3,12 452:17 452:20,21 453:4 485:13,16 500:17 500:18 501:1,4	113:6 115:5 122:12 132:21 135:9 187:5 207:9 209:3 227:4 238:13 245:13 249:11 263:3 296:17 305:13 327:13 333:4,5 343:19 346:19 350:10 354:20,21 359:4,9,15 363:19 364:19 373:13 374:20,22 375:9 383:5 399:18 441:17 450:21 451:16 470:1 474:6 478:3,14 487:22	<b>think</b> 9:16 12:21 20:11,15 21:14 28:8 29:5 31:4,18 34:4,10,11 36:12 38:7,17 40:18 41:18 44:1,17 48:1,18 56:17,18 60:17 62:15,16,18 63:1,7,8 64:7,13 64:19 65:6 69:18 70:12 73:18 74:4 80:15,19,21 81:8 81:15 82:1,4,22 84:1 85:13,16 86:6 87:14,19,20 89:5,8,9,15 91:15 92:18 93:4,9 94:2 94:14 96:4 97:12 98:7,13 100:2,10 108:9 116:20 122:6 124:21 126:1,2 130:13,16 131:6,10 137:1 142:22 145:8 148:15 150:19 151:12 152:3 153:18 154:20 155:15 157:5	279:7,17 281:2,3 281:17,19 286:22 290:13 291:10,13 294:2 295:3,14,18 296:1,13,14,17 297:7,14 298:6,12 299:20,22 300:7 300:12 301:8 303:3 337:20,22 338:17,21 340:6 341:4,14 347:5 351:19 353:2 354:1 356:4 358:4 365:7 369:22 370:5 372:1 373:3 373:9 375:1,15 377:4 378:12 380:1 382:7,13 383:2 384:13 393:8 394:12,22 395:3,5 396:14 403:18 405:12 407:3,16 408:1 409:4 418:11 425:20 430:8 435:4,5,8 441:12 442:11 443:1 446:17 447:1
<b>terribly</b> 46:12 <b>terrific</b> 403:15 <b>terrifying</b> 64:12 <b>test</b> 75:12 154:11 348:4,6 <b>testified</b> 68:16 249:13 473:3 <b>testify</b> 8:12 252:11 393:22 397:14 399:4,17,19 400:10,13 433:19 494:15 <b>testifying</b> 434:2 <b>testimony</b> 151:4 201:12 270:3,6 300:17 320:16 327:15 333:1 354:13 374:4,6,9 375:10 389:4 394:1 397:21 489:13 <b>Texas</b> 1:13,13 125:21 <b>text</b> 110:14,22 114:7 437:1,1,6 494:8 <b>texts</b> 480:22 <b>thank</b> 5:7,16 79:13	<b>Thankfully</b> 488:9 <b>thanks</b> 58:7 171:10 240:5 304:22 403:14 404:3 453:5 501:6 <b>Thanksgiving</b> 46:19 <b>the-job</b> 328:21 <b>theater</b> 239:13,16 239:17 485:1 <b>theft</b> 75:12 357:8 457:6 <b>theirs</b> 216:12 <b>theme</b> 31:5,7 443:18	<b>things</b> 14:22 18:17 31:5 33:9 35:3 37:6,7 41:4 48:15 49:14 58:14 64:5 77:11 78:20,21 81:12 86:6 88:14 90:19 92:15 94:3 96:5,7 102:6 110:1,3 116:22 117:13 123:16 126:14 153:17 163:17 170:13 171:21 173:11 188:7 209:7	<b>think</b> 9:16 12:21 20:11,15 21:14 28:8 29:5 31:4,18 34:4,10,11 36:12 38:7,17 40:18 41:18 44:1,17 48:1,18 56:17,18 60:17 62:15,16,18 63:1,7,8 64:7,13 64:19 65:6 69:18 70:12 73:18 74:4 80:15,19,21 81:8 81:15 82:1,4,22 84:1 85:13,16 86:6 87:14,19,20 89:5,8,9,15 91:15 92:18 93:4,9 94:2 94:14 96:4 97:12 98:7,13 100:2,10 108:9 116:20 122:6 124:21 126:1,2 130:13,16 131:6,10 137:1 142:22 145:8 148:15 150:19 151:12 152:3 153:18 154:20 155:15 157:5	158:17,19 159:21 160:2,18 161:21 162:4,5 163:17,18 163:21 167:2,8 168:4,16,17,18 169:10,18 184:21 194:3 196:6 197:1 200:3 201:4 203:19 208:8,12 208:18 209:12 210:16,18 211:15 211:20 212:9,15 212:18 215:7 216:8 226:16,22 235:8 240:6 245:22 246:6 248:18 253:9 254:1,1,7 256:3 268:21 278:19 279:7,17 281:2,3 281:17,19 286:22 290:13 291:10,13 294:2 295:3,14,18 296:1,13,14,17 297:7,14 298:6,12 299:20,22 300:7 300:12 301:8 303:3 337:20,22 338:17,21 340:6 341:4,14 347:5 351:19 353:2 354:1 356:4 358:4 365:7 369:22 370:5 372:1 373:3 373:9 375:1,15 377:4 378:12 380:1 382:7,13 383:2 384:13 393:8 394:12,22 395:3,5 396:14 403:18 405:12 407:3,16 408:1 409:4 418:11 425:20 430:8 435:4,5,8 441:12 442:11 443:1 446:17 447:1

449:7,22 452:14	106:11,14,15	193:13 202:15,16	431:7 440:9	214:3 229:7
454:15 466:16	108:13 114:20,21	204:5,9 212:2	473:16 490:17	274:20 288:14
470:2 473:19	115:17 116:5,6	214:9 217:12,22	497:7	339:2 433:3
478:1 487:18	120:15 127:12	218:6 221:1	<b>today's</b> 108:12	458:18
493:18 494:3	170:8 201:9	231:16,18,20,21	501:11	<b>tough</b> 70:11 202:16
495:8 500:21	229:15 247:11,15	232:6 233:5	<b>toilet</b> 44:11	<b>toughest</b> 370:10
<b>thinking</b> 11:21	247:19 248:8,8	240:12 241:7,9,11	<b>told</b> 29:11,14 30:17	406:5
13:11,13 18:8	249:17 258:8	247:15 256:5	61:22 68:21 161:9	<b>tour</b> 9:15 10:1
38:18,20 47:6	274:4 310:9 315:8	259:18 282:13	211:18 301:4	143:22 306:7,21
49:22 51:8 56:2	317:21 321:16	294:19 305:17	304:1 394:8	313:10
57:10,11 64:16,19	336:4 337:13	308:3 311:6 316:3	<b>Tom</b> 66:13 121:6,6	<b>tourist</b> 47:9,10
72:2,2 275:3	339:12,12 340:6	318:5,9 322:2	121:7	<b>tours</b> 314:1
337:3 342:4 399:7	344:6,9 352:12,22	335:3 340:5	<b>tomorrow</b> 431:13	<b>town</b> 59:12,20 60:2
452:12	372:8 379:2,2	342:17 346:12	<b>tone</b> 333:12	60:15 62:21 63:2
<b>thinks</b> 195:4	395:19 405:5	347:1 352:8 359:8	<b>tonight</b> 77:5 501:1	64:9 79:20 209:20
<b>third</b> 8:14,15,21	428:19 432:3	359:14 363:15	<b>tons</b> 212:3 355:2	<b>toxicologists</b> 429:3
80:3 128:20 129:2	433:9 464:19	364:8 375:21,21	<b>tool</b> 77:13 346:18	<b>Toyota</b> 54:16
129:9 218:19	474:11 476:4,10	381:19 394:18	347:12 498:6	<b>traced</b> 226:17
260:5 265:1 281:2	487:4 496:20	395:13 405:14,15	499:20	<b>track</b> 193:5 197:6
314:18 344:15	<b>three-day</b> 417:2	411:5 413:8	<b>tools</b> 42:2 168:4	200:21 234:4
350:3 420:10	<b>three-tiered</b> 456:2	418:21 420:16	366:10	249:6 309:2
<b>thirds</b> 284:17	463:17	421:22 424:6	<b>tooth</b> 424:8	325:15 346:16
293:12,13	<b>three-week</b> 457:13	431:1,6 445:11	<b>top</b> 222:13 416:9	407:18 422:16
<b>Thirty</b> 226:2	<b>threes</b> 372:9	463:1 464:1,3,15	<b>topic</b> 170:15 319:6	424:2 440:2
242:18	<b>threw</b> 352:16	464:20 469:13	355:10 486:9	446:10
<b>Thirty-eight</b> 224:6	<b>throw</b> 50:12 250:3	476:5 483:9 487:5	<b>topics</b> 412:8 413:12	<b>tracked</b> 193:7
<b>Thirty-two</b> 292:21	343:7 381:11	489:4	<b>total</b> 175:18 186:3	223:3 225:15
<b>thorough</b> 265:22	<b>throwing</b> 45:9,22	<b>times</b> 91:3 170:8	186:7 191:19	228:8 323:8
266:4 276:18	355:16	195:10 229:15	217:22 218:12,19	<b>tracking</b> 217:19
<b>thoroughly</b> 437:22	<b>Thursday</b> 1:9	302:12 325:10	219:6 221:10	445:16
<b>thoroughness</b>	371:22	362:6 367:1 382:3	243:21 273:10,11	<b>tracks</b> 195:17
475:4	<b>ticking</b> 108:5 403:3	452:3 474:11	273:14 283:14	449:10
<b>thought</b> 6:21 8:17	<b>tight</b> 379:12 424:7	477:7	315:9 336:7	<b>traditional</b> 103:2
13:8 34:1 52:1	<b>time</b> 20:2 35:8 40:2	<b>title</b> 257:13	352:19 365:15	124:13 401:22
57:3 74:2 185:4	43:12 47:8 50:18	<b>titled</b> 242:11	<b>totally</b> 30:10	<b>trafficked</b> 442:20
197:13 207:10,11	50:19 51:6 52:13	<b>TJAG</b> 230:10	254:18 471:6	<b>trafficking</b> 442:8
244:8 250:3	54:12 55:19 56:11	415:5	493:12	445:9,14 453:20
270:13 375:19	56:20 57:20 58:22	<b>TJAG's</b> 419:16	<b>totals</b> 186:4	<b>traffickings</b> 469:9
<b>thoughtful</b> 320:20	63:19 74:8,17,19	<b>today</b> 5:8 11:22	<b>touch</b> 155:8 213:21	<b>tragically</b> 369:9
<b>thoughts</b> 62:6	92:21 106:14	99:14 108:14,15	219:8,16 417:18	<b>train</b> 170:1 329:22
253:1 295:1	107:5,14,14	116:4 130:4 217:9	443:17	330:16 359:12
<b>threat</b> 137:19,21	112:17 131:4	252:14 256:22	<b>touched</b> 353:3	377:7 379:5
<b>threaten</b> 387:11	141:14,17 142:2,4	258:11 304:22	363:17	409:12 410:17
<b>three</b> 22:15 25:18	142:9,10,19	310:1 318:21	<b>touches</b> 365:7	412:8 416:4
25:19 43:15,18	153:11 168:17	319:22 320:21	<b>touching</b> 131:22	426:21 432:17
47:12 62:7,10,13	169:1,2 173:19	338:22 342:3	138:16,20 146:21	449:18 467:13
64:8 68:4 106:9	183:1 184:7 188:1	411:12 423:2	147:15,19 179:15	469:1 479:15

<b>trained</b> 92:20 230:2 311:9 359:13 421:13 452:6	364:15,16,17 371:21 376:4 466:15 469:7	251:19 288:17,18 291:8,20 294:17 300:9 305:18 306:9 307:13 310:5,9,17,19 311:1,14 315:2 316:6 317:2 323:14 324:2,5 325:1 331:17 333:11 334:1,14 350:17 351:22 362:19,19 371:18 377:18 379:11,15 380:3 381:22 387:21 388:18 390:3,9,12,14 391:9 392:1,15,17 393:3,9,21,21 394:1,8,8 395:18 396:8,11,11,16,22 399:4,5,12 400:14 401:7,8 402:9,14 404:21 406:8 407:11,22 408:12 409:17,22 410:12 411:2,3,15 412:9 412:13,18 413:14 414:7 415:14 416:9 417:1 419:1 420:5 421:3 424:4 427:13 428:15,17 428:22 429:6,10 429:10,16 431:9 434:6 444:6 445:11 457:14 459:5 461:7 463:8 469:18,19,20,20 476:20 490:13	<b>transcript</b> 68:16 <b>transfer</b> 325:9,10 <b>transparency</b> 226:22 <b>transparent</b> 452:11 <b>transportation</b> 160:22 <b>trauma</b> 337:20 376:4,9 462:14 468:19 469:2 481:4,6 <b>travel</b> 389:5 393:20 396:10 397:14 488:3 <b>treat</b> 19:21 44:18 356:20 454:18 <b>treated</b> 47:1,2 76:18 357:10 483:5 <b>treatment</b> 357:12 386:18,18 387:10 439:18 441:20 <b>trees</b> 67:18 <b>Tremblay</b> 66:13 <b>tremendous</b> 83:21 314:4 469:15 470:18 <b>trend</b> 249:12 254:3 359:16 <b>trending</b> 249:19 <b>trends</b> 171:8 249:18 254:5 338:10 <b>trial</b> 2:7,16,22 3:8,9 3:14 61:16 68:14 68:15 159:14,16 160:7 186:16,17 186:20 187:16 188:6,14 191:20 192:13 193:20 196:5 200:14 216:6 232:2,2,21 233:13,21 236:8 238:14 243:2,22	225:7,9 226:11 228:2,18 239:8,11 239:21 240:1 296:4 308:21 343:9 387:16 461:8 474:2 <b>tries</b> 297:9 <b>trigger</b> 356:13 384:17 385:4,20 <b>triggered</b> 356:21 <b>triggers</b> 96:11 385:18 <b>Trinity</b> 472:19 <b>trip</b> 32:11 <b>triple</b> 427:21 <b>trips</b> 488:3 <b>troop</b> 473:7 <b>trouble</b> 76:19 496:18 <b>troubled</b> 105:19 <b>true</b> 8:3,4 51:9 149:19 249:7,8 279:16,18 491:1 <b>trust</b> 19:5,11 463:20 <b>trusting</b> 18:16 416:11 <b>truth</b> 10:2 48:8,20 50:8 57:9 59:21 76:10 108:12 188:19 194:13 381:17 464:12 <b>truthful</b> 464:6 <b>try</b> 9:6 10:9 31:2 52:2 53:14 215:9 329:9 343:6 348:12 379:6 381:1 389:8 406:4 424:1 425:6,15,17 433:1,5 436:8,12 451:19 452:1,11 473:20 475:1 489:8 491:9 492:14 494:5 <b>trying</b> 9:9 10:12,21 23:6 24:3 31:15 36:4 37:9 45:12	45:16 53:13 63:10 67:12,14,16 70:1 83:19 84:13 94:1 180:13 196:5 202:15 262:6,13 275:2 306:18 328:12 338:13 340:9 345:18 380:22 410:13 428:16 435:6 449:18 457:19 486:19 <b>tucked</b> 161:20 <b>tuition</b> 46:17 <b>Tulsa</b> 224:11 <b>turn</b> 73:2,2 171:21 175:3 209:4 344:1 389:7 429:8 451:14 463:12,13 494:2 <b>turned</b> 400:18 <b>turning</b> 345:4 <b>turnover</b> 325:4 350:21 370:22 371:1 429:4 <b>turns</b> 62:3,7 339:18 <b>Twenty-eight</b> 28:3 28:4 <b>twice</b> 74:19 173:17 232:12,13 317:11 467:3 <b>twisted</b> 443:22 <b>twisting</b> 15:20 37:15 <b>two</b> 7:12,16 8:22 22:15 43:15 46:18 47:12 60:22 69:2 76:11 80:2,2 96:7 100:19 101:6 104:13,14 115:8 116:12 117:1,4 118:10 120:20 121:10 123:10 124:20 126:13 127:16,17 136:22 138:7 141:7,15 157:10,11 158:14
--	--	--	---	--	---

158:14 170:8	379:3 431:19	142:16 143:1	122:14	260:9 262:16
181:19,20 188:7	456:3,10 457:1	148:14 266:11	<b>undetected</b> 37:4	264:3 265:7,22
210:5 220:9	466:15 469:6	451:4,13	96:17	271:4,8 297:13
225:15 246:15	<b>typical</b> 37:11 64:15	<b>unconstitutional</b>	<b>undoubted</b> 334:5,5	299:15 319:2
247:3,14 249:22	145:19 257:20	105:13	<b>unethical</b> 483:4	471:18 472:1
251:18 257:3	363:9 450:20	<b>undefined</b> 105:19	498:18	<b>unimportant</b>
259:17 268:5	<b>typically</b> 35:14	<b>undergo</b> 311:12	<b>unfortunate</b> 368:4	213:16
272:7,16 273:5	40:5 44:10 92:21	<b>undergoing</b> 421:16	<b>unfortunately</b> 22:9	<b>unintended</b> 157:5
284:14,17 292:7	93:12 201:11	<b>underlying</b> 93:3	60:6 110:12	163:13 166:2
292:19 293:12	261:2 282:3 302:5	<b>undermine</b> 9:16	314:20 351:1	<b>unique</b> 178:17
294:1 310:7,21	321:17 377:9	<b>undermining</b> 39:2	490:8	208:8 315:21
316:4 318:14	418:1	<b>underneath</b> 125:2	<b>unfound</b> 181:5,7	317:4 322:3 380:1
321:15 322:18		<b>underscores</b> 20:12	210:18 211:8	408:5,6 453:10,14
323:15 327:7	<b>U</b>	<b>understand</b> 8:20	237:8 250:5 261:4	492:21
336:4 347:17	<b>U</b> 470:15,15	9:6,9 10:3 12:17	263:14,17 265:12	<b>unit</b> 2:1 7:6,18
352:12 356:4	<b>U.S</b> 2:6,7,10,11,14	13:2 15:14 17:10	268:8,14 269:1	66:15 324:6
361:20 363:11	2:15,16,17,18,20	17:17 18:4 19:3	270:5	333:10 336:14
371:18 404:5	2:21,22 3:2,6,7,8	20:14 21:3 23:6	<b>unfounded</b> 172:22	404:21 406:2
411:19,20,22	3:9,11,16,17	35:17 36:15 63:10	180:16 203:16	408:13 416:18
413:9 416:17	304:18 452:22	63:17,20 77:13	206:12 216:15	426:19 430:10,14
427:22 428:14,20	453:8,10,12	78:14 85:14,17	222:9 236:20,21	431:3,5 439:7
431:21 433:9	454:10 455:3	86:3 91:19,20	238:10,14,19	454:16 457:10
434:15 439:8,9	<b>UCMJ</b> 16:9 98:18	94:1 95:20 110:20	250:13 251:4	460:17 461:21
447:8 454:14	100:3,22 102:3	145:21 166:6,11	264:7,9 265:2,8	466:17 476:4
457:20 458:4,7,10	103:12 107:2,15	167:7 172:12	267:8 268:2,20	483:21 486:21
465:1,3 469:14	112:9,11,16	180:9 187:18	269:9,14,20	490:3
491:2 500:5	114:22 115:19	202:15 213:2	271:10,14,19	<b>United</b> 1:1 2:10
<b>two-and-a-half</b>	116:10,14,14	220:16 234:13	272:20 274:6,9	56:12 102:18
412:21 413:1	120:21 122:7	348:3 353:16	275:10,14 276:6	154:9 285:4 292:5
<b>two-day</b> 467:1	141:5 239:2	382:3 389:17	277:2,13 289:15	309:20 323:20
<b>two-week</b> 417:1	<b>UCR</b> 269:12 474:7	392:12 418:12	295:6,11 297:2	356:4 475:14
<b>twofold</b> 475:17	<b>ultimate</b> 263:9	420:8 452:14	<b>unfounding</b> 221:20	<b>units</b> 375:11,18
<b>Ty</b> 435:4	<b>ultimately</b> 110:3	461:4 462:8	222:3,3,4 237:18	<b>universe</b> 184:1
<b>type</b> 120:16 128:3,7	159:11 188:14	471:19	237:21 238:4	332:18
130:15 133:22	342:19 481:11	<b>understandably</b>	258:8 262:3	<b>universities</b> 6:8
143:15 151:11	<b>unable</b> 265:14	358:5	264:12,16 265:3,5	15:4 489:16
168:12 208:14,19	<b>unanimous</b> 61:20	<b>understanding</b>	266:3 267:5,17	<b>university</b> 1:13
225:22 238:12	<b>unanimously</b>	84:10,12 170:3	268:6,13,18	3:13 13:21 14:4
280:17 284:15	369:18	202:1 227:1 270:6	269:11 270:19	14:14 65:22
379:7 393:17	<b>unanticipated</b>	466:19	271:5,7 273:8,20	256:18 441:8
455:19 460:16	158:17	<b>understands</b> 49:5	274:10 275:3,5,21	478:5
492:11	<b>unaware</b> 139:12,20	416:12,12	277:21 278:1,21	<b>university's</b> 441:3
<b>types</b> 118:10	<b>uncomfortable</b>	<b>understood</b> 6:18,21	279:6 295:5	<b>unknown</b> 214:5,8
120:15,20 127:13	44:1	8:6 12:13 33:7	296:19 297:3,9,12	214:14 222:16
153:20 158:15	<b>unconscious</b> 117:18	400:6	298:10 299:17	227:17
279:10 302:18	137:19,21 139:9	<b>undertaken</b> 180:4	<b>uniform</b> 4:5 202:1	<b>unlawful</b> 324:7,8
306:12 343:16	139:11,19 142:8	<b>underwear-clad</b>	202:3 258:16	399:22 443:12

<b>unnamed</b> 4:4 5:11 9:12,18 10:1,3 12:14 15:15 22:22 23:3,7 24:4 38:8 40:9 42:2 47:4 50:10 70:19 72:8 77:10 81:16 83:22 84:10,21 90:17 91:15 96:5	129:19 130:21 131:17 168:5 178:14 203:2,15 208:13 217:5 223:21 245:14,20 246:3,3 248:5 258:13 262:1 268:5 269:20 273:18 280:20 282:18 290:15 295:4,15 296:5 321:8 353:12 373:13 374:21 391:5 398:22 402:10,15 420:21 421:4 435:13 486:10 493:5 496:7 498:1,5,13 499:20	452:14 494:8 <b>value</b> 325:13 424:10 <b>van</b> 73:16 <b>varied</b> 271:19 <b>varies</b> 309:3 352:15 <b>variety</b> 363:16 442:5 <b>various</b> 101:4 103:20 104:4 116:9,18 153:8 159:19 257:22 278:14 289:7 296:8 316:7 449:19 456:8 <b>vary</b> 268:20 282:9 <b>varying</b> 117:8 135:18 150:14 153:20 155:4 <b>vast</b> 176:18 315:16 320:6 321:14 323:20 <b>Vegas</b> 54:20 <b>verbally</b> 33:18 34:22 <b>verbiage</b> 105:19 <b>verdict</b> 61:20 62:2 225:6 253:5 <b>Vermont</b> 66:12,16 <b>vernacular</b> 480:14 <b>version</b> 50:16 99:17 105:2,3,16,17 106:3,4 110:7,11 110:13 113:17 114:9,14 115:6,10 115:13 124:4 126:10,11 128:5 128:20 130:1 131:20 150:11,13 150:22 156:18,18 156:20 175:5 220:19	186:3 187:15 214:2 224:10 239:9 277:20 290:10 <b>vest</b> 28:19,19 <b>vicarious</b> 376:4,9 <b>Vice</b> 1:17 3:15 99:2 <b>victim</b> 7:13 14:6 16:12 20:14 23:8 23:12 39:15 64:17 65:19 69:20 70:3 70:5,10 71:5 72:12 76:19 77:7 78:8,9 85:19,20 95:4 97:6 101:8 118:7 129:4,10 132:8,9,12,15 133:2,7 134:9,14 134:21 135:5 136:13,14,19 138:10,17 139:8 139:11,15,18,22 140:4,7,10,12,14 142:7,10 144:11 146:4 149:9 157:8 157:14,16 158:3,4 179:22 180:10 188:8 189:14,15 189:16,22 191:7 191:21 203:12,16 210:2,6,14 211:3 218:14,20 221:2 225:17,19 226:5,9 226:18 227:7 229:22 231:3 236:5 238:7,8 242:12 244:12 246:13 249:21 250:14,15,18 251:1,3,8,14 252:10 266:10 297:18,19 301:18 302:4,8,10,11,11 303:8,11 360:12 381:21 406:2 408:5 412:2,10 414:10,14 415:19	416:6,6,11,18 417:3 418:1,14 419:8,11,19 420:3 420:6 421:12,15 422:6 443:22 445:10 448:21 455:1,1,2 459:3 461:15 464:4 466:11 470:13 478:12 479:1,10 487:1 488:14 490:1 492:22 493:5,10,16,20 495:20 496:11 497:9 <b>victim's</b> 66:3,7 95:3 129:11 132:10 252:2,4,12 263:20 264:5 291:17 301:22 404:21 418:17 463:20 <b>victim-centered</b> 255:8 <b>victimization</b> 345:7 474:4,10 <b>victimized</b> 92:4 448:22 <b>victimology</b> 481:1 <b>victims</b> 7:22 16:17 17:8,12 18:10 22:15 33:8,12 41:12 50:4 71:13 71:21 88:12 93:6 157:11 158:14 180:5,7,12 191:2 191:3 192:4,7 238:12 244:14,16 245:10 246:18 251:20 253:19 298:2 301:14 302:18 303:2,13 303:14,20,22 321:1 324:20,21 332:22 354:19 375:13 382:4,4 405:2,16 406:7,11 406:13,13,18,20
<b>unpack</b> 72:22 <b>unprecedented</b> 230:20 <b>unreasonably</b> 299:2 <b>unrestricted</b> 172:4 172:15 176:3 241:1 260:1 261:10 279:19 280:7 <b>unsatisfied</b> 251:9 251:15,16 <b>unstructured</b> 339:14 <b>unsubstantiate</b> 208:10,17,21 <b>unsubstantiated</b> 172:20 245:15 <b>untenable</b> 488:13 <b>unusual</b> 135:9 160:18 448:6 <b>unwanted</b> 219:8,15 <b>unwillingness</b> 84:20 302:21 <b>update</b> 103:8,12,21 <b>updated</b> 102:9 <b>updating</b> 112:5 <b>uphold</b> 380:22 <b>upskirting</b> 443:12 <b>upstanding</b> 75:3 <b>upwards</b> 476:5 <b>urban</b> 292:6,14 293:1 <b>urge</b> 320:21 368:2 <b>urine</b> 418:22 <b>USC</b> 103:14 <b>use</b> 31:5 84:18 111:14 116:15	<b>useful</b> 163:22 244:8 <b>usefulness</b> 418:21 <b>uses</b> 42:2 67:22 259:10 272:14 297:8 <b>usually</b> 110:14 111:21 186:12 190:1 194:11 233:12 239:20 308:2 316:3 318:6 363:13 441:7,8 456:13 <b>utilize</b> 481:11 <b>utilized</b> 482:9 <b>utmost</b> 381:1 383:6 <b>uttered</b> 35:12	<hr/> <b>V</b> <hr/> <b>v</b> 365:10 475:14 <b>VA</b> 344:11,12 <b>vacancy</b> 460:18 <b>vague</b> 105:19 <b>valid</b> 141:17 <b>validated</b> 340:3 346:18 <b>validation's</b> 347:11 <b>Valley</b> 472:12 <b>valuable</b> 425:22	102:19 123:5 125:21 154:10 <b>versions</b> 103:20 106:9,15 153:8 <b>versus</b> 77:11 84:4	

407:9,12 408:11	457:20 458:9	403:7,9 460:17	398:10 399:19,19	<b>waterfall</b> 4:7,8
412:6 414:17	459:21 460:6,7	491:9,16	400:10,10 401:3,4	170:20 172:2
417:21 418:3	<b>violent</b> 14:6 17:9	<b>waiting</b> 108:18	404:13 412:7	175:5 202:5,7,9
436:1 443:7 447:5	59:14 333:19	110:18 113:7,15	417:14 419:6	202:21 205:13
447:11 455:8,8,14	339:3 461:10	165:7 465:7 501:2	430:18 432:6	209:8 215:10
460:5,21 461:1	468:16 487:2	<b>waive</b> 194:20 232:9	433:10 434:19	216:3 226:13
462:20 463:11,19	<b>Virginia</b> 161:19	<b>wakes</b> 266:12	436:9 437:14	244:5 257:16
466:20 469:5	373:21 411:17	<b>walk</b> 54:9 64:3 65:2	439:15 440:16	259:22
474:20 475:1	421:17	89:1 104:20 117:9	443:17 444:3,9,16	<b>way</b> 16:1 23:5
478:12,21,22	<b>virtually</b> 326:14	216:12 220:6	444:21 448:20	45:12 46:22 53:9
479:6,14,15,18,20	<b>vis</b> 123:4,4	244:2 448:11	451:16 461:6	53:22 56:12 57:4
481:5,16,20	<b>visible</b> 123:3	<b>walked</b> 63:3 64:22	462:8,9 463:6,6	60:6 69:6 72:22
482:18 483:5	<b>visual</b> 121:5	247:17	468:20,21 471:1,3	76:18 77:10 89:22
486:11 490:12	<b>visualization</b> 43:1	<b>walking</b> 59:4 63:5	471:20,22 473:22	91:5 98:4 105:7
492:17 495:15	43:19 44:9,11,12	65:9 450:21 451:6	474:18,19 475:3	109:7,12 112:8
496:13	<b>visualized</b> 47:18	451:7,8 461:11	475:19 476:22	114:19 116:2
<b>victory</b> 11:8	<b>VJ</b> 100:4	<b>wallet</b> 54:8 55:2	478:18 482:1,8	121:17 132:7
<b>video</b> 438:3 446:8	<b>vociferous</b> 166:14	73:15 334:13	495:12 498:5,7	134:9 146:12
451:6	<b>vodka</b> 448:8	<b>walls</b> 47:11	<b>wanted</b> 5:21 53:5	147:11 148:5
<b>videotape</b> 121:16	<b>vogue</b> 333:5	<b>want</b> 13:3,4,5 15:12	67:9 76:14 85:15	150:2 152:3
<b>videotaped</b> 432:21	<b>voice</b> 23:8 68:18,20	15:19 17:1 23:15	171:20 213:17	158:19 159:18
433:2	85:5 95:12	35:12 37:14 42:22	215:18 244:3	161:6 167:9
<b>view</b> 9:15 70:12	<b>voices</b> 437:4	45:21 47:3 51:7	249:20 251:13	168:15,15,19
85:2 92:5 129:12	<b>voir</b> 307:15	58:8 61:1 62:8	383:20 398:19	178:5 181:15
161:11 301:9	<b>volume</b> 411:6	64:5,13,20,20	<b>wanting</b> 431:15	185:11 188:15
312:1 389:17	<b>voluntarily</b> 450:19	67:2 72:4,6 75:7	<b>wants</b> 70:11 193:21	202:1,3 203:9,10
409:7 474:8 492:6	<b>voluntary</b> 157:21	80:4 85:2,14,22	485:4	203:17,22 204:11
<b>viewed</b> 364:13	<b>volunteer</b> 462:1	90:7 97:3 99:15	<b>warning</b> 52:10	210:13 234:5,5
427:17 492:6	<b>vote</b> 108:10	99:16 108:11	<b>warranted</b> 340:15	241:17 245:3,4
<b>viewing</b> 121:4	<b>vouchers</b> 382:20	110:7 155:8	<b>warrants</b> 432:8	249:6 253:4
<b>views</b> 121:11,12	<b>vulnerability</b> 48:14	169:16 180:10	<b>washed</b> 418:20	255:11 257:2
319:22	48:16,21 85:12	190:4 195:13	<b>Washington</b> 1:2	267:1,18 275:3
<b>vigorous</b> 239:14	86:10,21 94:9	198:4 200:2 210:8	285:16 286:8	279:10 280:13,15
<b>violate</b> 27:15 29:4	<b>vulnerable</b> 21:22	210:10,10 214:15	293:9 361:2,8	280:21 281:2,3
<b>violates</b> 112:10	48:11,13 63:21	214:19 225:11	362:1,8 363:21	284:19 286:5
<b>violating</b> 498:7	78:2 81:13 95:21	233:22 235:4	365:13 368:3	295:21 299:15,20
<b>violation</b> 16:3	449:9,10,11,12	243:8 249:10	<b>wasn't</b> 8:4 26:3	304:6 308:22
233:1	455:14 460:4,21	250:15 252:18	29:16 51:15 59:21	327:2 334:16
<b>violations</b> 453:21	463:18 491:10	254:21 298:15	101:22 148:13,13	336:16 337:19
<b>violence</b> 2:11 7:6	<b>vulva</b> 124:6,18	304:16 341:22	202:21	340:18,22 341:6
52:15 96:22 97:6	132:10 154:14	342:20 353:15	<b>waste</b> 56:19 401:22	344:3 361:21
272:10 412:5		359:10 362:21	<b>wasted</b> 448:14	377:21 383:17
415:13 421:19	<b>W</b>	368:14 372:22	<b>watch</b> 53:22 54:7	397:12 419:5
442:15 445:9	<b>wagging</b> 32:22	373:20 374:12,14	55:3 449:1,2	435:20 436:19
453:8,19 454:13	<b>wait</b> 55:12 56:4	376:21 378:12	<b>watched</b> 247:20	440:3 443:3 447:9
455:7,16,20	108:6,10 209:4	387:13 389:2,7	375:10 491:14	456:5 461:16
456:20 457:4,17	390:11 402:13,21	393:18,22 396:21	<b>water</b> 82:16	466:2 485:3 492:5

494:7 499:17 500:9 <b>ways</b> 22:20 41:18 59:19 60:22 61:4 180:6 209:16 243:6 244:4,17 264:13,14 277:22 283:21 295:10 296:10 318:19 500:6 <b>we'll</b> 23:1 24:5 26:10 89:14 98:7 171:4 177:15 198:3,6 222:19 240:7 248:21 256:5 304:12 308:8 376:16 404:2,12 423:11 445:12 477:20 491:12 <b>we're</b> 14:9,11 34:15 36:11 45:7,16 57:15 58:11 63:20 66:6,8 69:22 82:3 82:15 86:20 88:8 89:13 91:17 92:20 92:21 93:12 94:10 97:17 98:17 99:11 99:13 108:18 113:7 125:1 130:8 165:6,7 172:1 173:10,22 174:18 180:13 184:19 188:11 194:1 200:4 206:8 207:5 209:6 213:2 229:6 240:11 253:1 255:19 256:11,15 301:18 330:17 336:2,3 338:10 339:22 340:8,9 341:2 345:18 348:11 350:21 351:3 359:14 379:12,16,17,17 379:18,18 380:4 380:22 386:20,21	388:8 398:22 399:16 403:18 408:14 409:9,10 410:9 411:16 427:17 434:13 444:2 445:22 449:16,16,17 450:3,7,11 472:7 474:8 486:16 488:20,22 489:9 489:11 493:7 494:1,4 495:3,9 497:4 499:2,4 <b>we've</b> 17:20 36:17 41:19 70:21,22 71:10 99:20 100:13 131:13 145:20 148:19,20 151:3 180:13 185:1 201:17 202:8 204:5,7 220:21 252:14 258:10 315:3 330:9 338:3 339:12,13,15 340:17,17,22 341:5 342:16,17 343:10 345:16 346:14,15 359:13 375:19 387:16 389:6 403:7 404:22 412:12 416:20 427:20 445:14,15 470:5 482:14 490:6 492:2 496:20 498:15 499:9 500:6,21 501:12 <b>weak</b> 463:11,12,12 <b>weakness</b> 75:4 <b>wealthy</b> 51:18 <b>wear</b> 56:2 58:1 436:15 <b>wearing</b> 28:17 53:3 54:14 55:19 56:19 <b>wears</b> 18:1 <b>weather</b> 500:16	<b>Web</b> 308:5 329:7 375:10 <b>website</b> 226:21 420:12,22 428:9 <b>wedding</b> 51:11,13 53:19 54:1 <b>weed</b> 461:5 <b>week</b> 10:13 42:6,8 43:2,5,14 56:13 107:12,21 232:13 232:13 305:15 307:14,20 308:1 337:12 371:18 405:6 428:6 <b>week-long</b> 379:8 <b>weekly</b> 420:13 <b>weeks</b> 46:18 121:22 371:19 405:6 416:17 433:9 <b>weeping</b> 85:4 <b>weighed</b> 28:9 <b>weight</b> 39:11 <b>welcome</b> 5:4 83:7 170:17 254:22 304:17 <b>well-meaning</b> 63:22 360:5,6,6 <b>WENDY</b> 3:4 <b>went</b> 6:17 45:5 46:3 46:8 47:9,9 51:11 57:6 61:16 64:8,8 67:4,8 72:13 98:10,10 106:1,2 185:3 187:15 189:3 205:6 211:5 216:6 234:15 236:2 256:7,8 323:11,14 340:12 341:1 395:19 399:7 403:22 467:9 501:8 <b>weren't</b> 11:16 244:9 299:2 <b>West</b> 428:1 472:16 <b>Whatcom</b> 361:14 <b>whatnot</b> 395:18 397:13	<b>whatsoever</b> 125:13 <b>white</b> 27:21,22 28:1 28:18 51:12 73:15 164:1,6 165:4 465:2 <b>Whitehead</b> 3:14 376:16,18 383:9 383:19 <b>who've</b> 308:22 <b>whopping</b> 291:9 <b>wide</b> 219:6 477:9 <b>widely</b> 347:10 <b>wider</b> 444:4 447:1 <b>wife</b> 56:11 <b>wild</b> 321:9 <b>willfulness</b> 155:17 <b>WILLIAM</b> 1:21 <b>willing</b> 94:11 <b>win</b> 13:3 57:5 291:20 <b>wind</b> 131:1 436:6 484:3 <b>window</b> 107:14 247:20 <b>Wing</b> 194:12 <b>wingman</b> 87:18 <b>Winklosky</b> 3:15 98:17,20,22 108:4 108:15,17 109:6 109:12,15 111:10 111:11 117:3 126:1 143:20 144:6,22 145:17 146:14,19 147:12 148:17 149:5 150:8 151:12 152:14,17 153:6 153:16 159:21 161:14 162:13 163:3 164:7,11 165:2,5,12,16,20 167:2,21 168:3 169:7,10 170:6,17 <b>winning</b> 54:21 <b>wire</b> 60:12 61:11 445:15 <b>wisdom</b> 500:17	<b>wish</b> 450:14 <b>wishing</b> 12:21 <b>wit</b> 131:15,15,18 132:12 <b>withhold</b> 174:1 331:10 <b>withholding</b> 380:8 <b>witness</b> 55:12 231:4 236:4 367:2,5,7 367:10,12 390:2 393:18,22 394:1 395:13,14,17 396:3,5,18 399:1 399:3,6,8,9,9,14 399:15,18,21 400:4,9 401:14,14 401:17 421:6 433:14 434:9 455:2 488:15 490:10 <b>witnesses</b> 68:4 72:15 88:5 324:1 326:4 365:17 389:9 393:15,16 393:17 394:5 395:11,15 396:22 397:11 398:17,20 401:4 402:11 418:15 435:11 438:4 459:14,15 489:6,7 493:7 495:13 499:1 <b>woke</b> 450:22 <b>woman</b> 18:14 50:22 58:18 59:4 60:1 63:5 83:3 84:14 85:4 96:20 448:7 461:11 <b>women</b> 13:14 18:6 21:5,8 22:11 36:18,18 38:19 53:2 57:21 62:17 62:17,18,18 63:18 87:19 89:15 90:21 91:1,4,22 92:14 92:19 93:10,11 94:12 368:16
--	--	---	--	---

448:13 495:15  
**women's** 443:15  
**won** 400:16  
**wonder** 133:12  
 166:5 248:13  
 335:10 406:22  
**wondered** 58:9  
**wonderful** 5:10  
 59:9 467:17 470:4  
 471:7  
**wondering** 93:19  
 301:1  
**word** 34:15,16  
 35:13,15 84:18  
 90:8 116:11,13,15  
 148:8 333:13  
 359:21 381:18,21  
 396:13 440:16  
 486:1  
**worded** 161:7  
**words** 35:2 40:19  
 105:9 125:4  
 132:18 133:18  
 143:5 144:11  
 146:17 151:21  
 168:6 236:14  
 254:21 264:17  
 266:2 291:18  
 299:9 396:14  
**work** 6:3,7 10:15  
 13:22 15:9 18:22  
 36:14 40:10 59:10  
 66:13,13 71:15  
 77:10 83:21 90:2  
 98:22 116:20  
 164:1 169:2  
 236:15,16 257:6  
 270:16 272:9  
 306:10 314:4  
 336:10,12,16  
 337:6,10 349:5  
 359:3 406:14  
 416:7 418:16  
 420:16 421:14  
 425:6 429:20  
 437:10 438:6,8  
 439:11 446:22

457:4 461:11  
 462:1,9,19 463:6  
 463:18 468:5,11  
 478:7,21  
**worked** 362:22  
 363:6,8 430:6  
 461:1 472:9  
**workers** 380:14  
 455:5  
**working** 89:22  
 91:18 164:11,14  
 230:17 315:5  
 316:5 419:13,20  
 420:3,18 427:15  
 434:11 443:2  
 455:7,13 456:22  
 460:4 462:19  
 467:4 472:12  
 492:22  
**workplace** 461:16  
**works** 30:21 164:5  
 389:18 392:18  
 405:9  
**workshop** 371:18  
**world** 6:20 10:11  
 10:21 13:3 49:6  
 64:2 70:12 99:8  
 307:6 316:14  
 337:9 344:20  
 350:6 359:22  
 372:3 380:5 415:2  
**worldwide** 310:17  
 315:9,11,16  
 322:15 430:21  
 431:11 440:20  
**worried** 45:8  
 348:14  
**worry** 84:16,17  
 255:13 489:4  
 496:17  
**worse** 80:8,19  
**worst** 339:19  
**worth** 203:20 331:5  
 424:10  
**would've** 43:12  
**wouldn't** 53:1 87:1  
 301:17 303:1

400:8  
**wow** 20:16 53:8  
 74:16 89:3  
**wrap** 72:6  
**writ** 321:9  
**write** 137:12,13  
 138:5 250:21  
 306:12  
**writes** 112:8  
**writing** 102:20  
 109:21 216:9  
**written** 5:10 16:1  
 105:18 109:7,13  
 137:14 168:20  
 302:13 310:2  
 328:19 332:12  
 390:2  
**wrong** 7:19 406:22  
 431:9  
**wrongful** 229:6

---

**X**

---

**Y**

---

**year** 7:2 38:3 80:18  
 80:19 103:10  
 106:5 107:21,22  
 120:11 121:18  
 165:10 176:7,21  
 180:4 181:1,1  
 186:18 187:13  
 189:6 190:1 201:3  
 201:19 204:10,14  
 204:14,16 218:2  
 226:15 243:21  
 249:12,14 253:11  
 261:7 273:11,12  
 273:14,15 274:1  
 275:13 283:17  
 292:9 307:17  
 308:2,11 312:6  
 317:11 318:9  
 323:7,7 324:17  
 328:14 329:16,18  
 329:19,20 330:10  
 331:2 340:6  
 349:12,17 350:15  
 352:17 362:18

371:17 378:7,11  
 385:7 405:19  
 406:10 409:21  
 413:11 420:14,16  
 420:17,17 425:6  
 425:15,21 426:15  
 428:15 429:5,7  
 439:9 444:6 466:1  
 466:21 470:5  
 480:5 482:2  
 497:21 499:4  
**year-old** 444:13  
**year-to-date** 440:4  
**years** 6:17 16:13  
 22:15 80:4 100:3  
 119:12,14,15  
 167:14 175:18  
 199:8 201:9 204:6  
 204:9 251:18  
 292:7 309:1 311:2  
 316:4 320:3,5  
 321:16 322:21  
 329:14 332:5  
 334:2,7 335:12  
 336:21 337:6  
 340:6,6 341:18  
 344:7,9 347:17  
 352:1,4,22 356:4  
 361:5 363:11  
 364:9,10 371:4,5  
 372:7,8,10 377:3  
 378:18,19 386:8  
 387:13,14 388:16  
 388:17 411:21  
 422:2,17 423:9  
 430:8,15,17 431:3  
 432:3,4 434:2  
 435:1 444:17  
 454:11,12 456:7  
 464:20 465:1,4  
 468:4 472:13,15  
 476:4,10 482:6  
 486:12,18 490:12  
**yesterday** 94:16  
 171:13 172:14  
 229:20 238:16  
 252:1 256:15

258:12 272:4  
 325:19 431:7  
 440:5,17 441:2  
 443:8,18 490:18  
**yield** 281:8  
**yields** 274:4 284:5  
**Yokosuka** 307:5  
**York** 2:2 397:12  
 441:2 447:13  
 450:15 489:17  
 499:3  
**young** 13:14 18:13  
 60:1 63:5 85:4  
 91:22 95:12 313:8  
 325:5 416:5  
 417:21,21 423:6  
 447:19 448:7  
 495:15  
**younger** 81:18  
 82:19,19,20,20,20  
 82:21 83:5 436:21  
**youth** 341:4  
**YouTube** 121:8

---

**Z**

---

**zealous** 381:2  
 382:12  
**zealously** 483:3  
**Zeisel** 65:16  
**zero** 181:8 212:17  
 278:15 308:20  
 325:4  
**Zeus** 164:10  
**zones** 126:17

---

**0**

---

**05** 103:10  
**06** 104:7 173:22  
 174:2 253:16

---

**1**

---

**1** 28:6,8 104:11  
 106:20 107:2  
 193:13 221:4  
 378:20 379:16  
**1,500** 337:11  
**1,600** 353:2  
**1,714** 283:18

<b>1,750</b> 352:18	455:18,21 456:19	<b>137</b> 205:10,22	<b>1st</b> 349:10 472:20	<b>2012</b> 106:5,7
<b>1:34</b> 256:9	457:12	206:1		110:11,13 112:18
<b>10</b> 224:11,14	<b>12:49</b> 256:8	<b>14</b> 107:11,21,22	<u>2</u>	113:20 115:12
228:10 232:22	<b>120</b> 4:5 98:18 99:4	227:13 228:11,12	<b>2</b> 222:12	116:3 121:4
290:22 293:19	99:16,17,22	321:22 444:13	<b>2,000</b> 312:7	126:11 128:19
352:1 371:4,5	100:11,17,19	<b>14.8</b> 294:2	<b>2,067</b> 274:4	150:11,13 153:2,5
372:20 406:3	102:4,7,9,21	<b>15</b> 112:18 113:5	<b>2,200</b> 349:18	156:20 220:19
423:9 428:5	103:9,12,15,21,22	290:5 308:7 325:5	352:17,19	253:14 258:22
<b>10-week</b> 377:16	104:6,16 105:2,3	325:7 340:19	<b>2,661</b> 273:21	259:6 261:7 274:1
<b>10.5</b> 280:8	105:10,17 106:2,4	386:8 387:13	<b>20</b> 2:10 21:4 25:17	276:10 283:17
<b>10.9</b> 271:17	106:10 110:8,14	458:14 460:11	119:14 182:17	284:4 293:18
<b>10:00</b> 98:11	112:7 114:10,12	<b>15-year</b> 121:2	183:8 228:17	329:18 404:20
<b>100</b> 212:14 214:5,7	114:15 115:1,7,14	238:18	259:14 282:18	427:18
214:10,13,14	116:1,2,12,20	<b>15-year-old</b> 365:11	309:1 336:8 353:3	<b>2013</b> 1:10 112:18
230:8,22 255:15	117:4 121:4	<b>150</b> 387:4	372:7 387:13	113:5 172:16
441:3	123:13 124:4,11	<b>157</b> 228:14	423:7 434:2	253:19 309:22
<b>101</b> 311:14	126:2,6,10 128:5	<b>15th</b> 472:8	458:14 476:5	312:6 323:7
<b>102</b> 228:15,16	128:13,14,19	<b>16</b> 44:19 120:3,8,19	482:2 486:18	329:19
240:21	130:2 131:21	224:8 243:2 261:9	490:12	<b>2014</b> 113:17
<b>104</b> 223:12 224:3	150:1,21 151:7	326:19 379:15	<b>20-year</b> 121:1	<b>21</b> 186:3 277:4
<b>108</b> 323:12	153:9 220:20	422:17 456:19	<b>200</b> 214:16 368:22	349:9 378:6 415:1
<b>109</b> 228:20	232:3,16 233:4,9	457:12	387:4	<b>218</b> 323:16
<b>11</b> 184:9,12 185:9	233:19,22 323:12	<b>16th</b> 47:7	<b>2000</b> 37:4	<b>21st</b> 1:13
186:18 189:8	369:1 385:13	<b>17</b> 223:22 476:4	<b>2001</b> 102:15	<b>22</b> 223:18 276:14
190:1 202:10	405:1	<b>17.6</b> 274:5	<b>2003</b> 441:4	417:3 419:11
204:19 205:17	<b>120's</b> 100:12	<b>171</b> 4:7	<b>2005</b> 282:11 283:7	<b>22-year</b> 347:17
223:19 243:22	<b>120-day</b> 232:2	<b>176</b> 206:5	290:18 352:4	<b>22.4</b> 274:11
246:15 276:5	403:5	<b>177</b> 178:13,20	<b>2006</b> 352:4 364:2	<b>224</b> 223:5
320:3 347:13	<b>120A</b> 114:21	181:15 185:8	<b>2007</b> 100:18 104:8	<b>23</b> 183:8 226:4
386:8 409:20	<b>120B</b> 115:2 119:17	276:3	104:12 105:2,16	227:16 412:1
448:7	128:15 129:14	<b>179</b> 176:14,15	106:3,20 107:3	414:22 421:11
<b>112</b> 126:11	<b>120C</b> 115:3 123:8	<b>18</b> 103:14 318:6	115:10,13,16	431:10
<b>118</b> 222:9 334:7	123:10,11	320:3 321:18	124:4 126:10	<b>23.7</b> 280:19
<b>12</b> 1:10 61:20 120:1	<b>121</b> 205:17	338:17 357:15	150:13,13 153:5	<b>230</b> 476:10
120:3,8 172:10	<b>125</b> 125:20,22	<b>180</b> 28:10,11 459:6	156:18,18 310:18	<b>24</b> 179:22 181:14
175:15,17 176:1,2	152:21	<b>186</b> 223:8	<b>2007-2012</b> 149:20	243:1 289:11
176:4,7,15 178:1	<b>128</b> 175:17 176:1	<b>187</b> 315:9	<b>2008</b> 272:21 273:4	306:7,14,20 318:6
178:3 184:14	<b>13</b> 6:17 38:2 176:19	<b>19</b> 315:12 317:20	286:2	318:7
185:10 189:6	189:7 228:16	332:5 454:11,12	<b>2009</b> 229:20 230:6	<b>24-hour-a-day</b>
192:18 202:10	243:21 249:14	<b>1935</b> 475:14	230:9 282:11	413:7
204:2,18 205:20	253:9,22 254:2	<b>195</b> 242:6	283:7 290:18	<b>24/7</b> 329:7
220:22 221:11	277:12 337:6	<b>1989</b> 472:17	414:22	<b>25</b> 199:7 275:13
226:15 240:10,19	444:12 455:21	<b>1990s</b> 271:12	<b>2010</b> 264:22 272:12	278:16 279:12
240:20 241:3,5	<b>132</b> 440:9	274:15 278:7	275:13 350:10	349:22 353:3
242:6 253:12	<b>134</b> 294:12	285:15 293:5	472:11	434:22
292:17 294:8	<b>134,000</b> 349:11	<b>1995</b> 305:2 473:15	<b>2011</b> 319:21 322:17	<b>250</b> 407:21
369:16,18 448:8	<b>135</b> 336:6	<b>1998</b> 80:5 351:7	329:16	<b>253</b> 176:5

<b>256</b> 4:9	<b>34.7</b> 284:6	<b>4th</b> 387:19	<b>6000</b> 15:5	<b>88</b> 40:16 440:12
<b>26</b> 182:20 289:21 480:8	<b>35</b> 455:17		<b>62</b> 285:17 292:14	<b>88.2</b> 291:7
<b>262</b> 440:15	<b>358</b> 222:9,12	<b>5</b>	<b>63</b> 39:20	<b>89</b> 242:17
<b>27</b> 16:15 17:3	<b>36</b> 109:20 318:8	<b>5</b> 4:3,4 20:9,20 227:3 246:14 413:8 428:5	<b>6495.02</b> 172:10	<b>9</b>
<b>271</b> 175:16 176:1,7	<b>36.8</b> 284:9 286:21 288:12	<b>5-8</b> 220:13	<b>65</b> 186:4,7,7 189:22 191:3,6,7,12	<b>9</b> 63:5 291:1
<b>272</b> 229:5	<b>362</b> 185:8 192:3	<b>5-year</b> 271:18 282:13	<b>65-year-old</b> 53:6	<b>9,200</b> 472:7
<b>28</b> 106:7 112:17 113:20 220:19 223:20	<b>37</b> 227:12,20 228:7 228:9 285:16	<b>5,031</b> 282:13	<b>66</b> 222:16 224:6,8 243:3 285:8 286:7 293:7 384:17	<b>9.7</b> 282:16
<b>288</b> 241:4,15	<b>377</b> 277:10	<b>5,56</b> 501:8	<b>67</b> 204:20 205:18 293:8	<b>9:00</b> 60:4
<b>28th</b> 253:14	<b>379</b> 227:15	<b>50</b> 285:7,19 286:6,9 287:3 293:6 352:13 388:16 458:12 479:1	<b>68</b> 222:20 223:16 229:8	<b>9:47</b> 98:10
<b>29</b> 242:22	<b>38</b> 223:5	<b>50.2</b> 285:22	<b>69</b> 228:17 276:9 315:10	<b>90</b> 346:4 476:15
<b>3</b>	<b>387</b> 241:3,4	<b>500</b> 214:13,15 352:21	<b>6th</b> 367:19 472:18	<b>91</b> 229:10
<b>3</b> 224:2	<b>399</b> 175:14,19 176:14 184:19 185:7	<b>501</b> 4:19	<b>7</b>	<b>911</b> 23:11,12 41:20 76:21 84:13 470:11 497:7
<b>30</b> 113:21 119:12 120:10 173:20 174:7 204:10 272:8 275:22 322:21 324:16 331:2 341:18 385:14 411:21 423:8 430:16 458:8	<b>3rd</b> 473:7	<b>51.7</b> 294:15	<b>7-day-a-week</b> 413:7	<b>93</b> 241:15 242:4 477:9
<b>300</b> 487:4	<b>4</b>	<b>52</b> 443:9	<b>70</b> 41:21 293:9	<b>95</b> 93:9
<b>304</b> 4:13	<b>4</b> 113:11	<b>522</b> 184:19	<b>71</b> 39:22	<b>98</b> 4:6
<b>309</b> 1:13	<b>4.5</b> 273:2	<b>53</b> 228:3 255:14	<b>72</b> 205:21 321:14 326:20 329:20	<b>98.7</b> 291:9
<b>30s</b> 286:9	<b>4.8</b> 274:8	<b>54</b> 178:21 337:13	<b>75</b> 281:8 292:6,22 405:1 458:13 477:10	<b>99</b> 204:18 205:5,10 205:22 206:2 344:22 354:10
<b>31</b> 225:7	<b>4:12</b> 403:21	<b>55</b> 228:14 365:14	<b>78</b> 225:8 228:18	
<b>32</b> 15:4 179:5 186:14 187:2 188:2,3,21,22 192:12 193:1,3,20 194:19,21 195:15 195:22 196:5,10 196:15 197:17 205:1,7 210:12 211:6 231:19 236:2 276:6 444:16 473:1	<b>4:23</b> 404:1	<b>56</b> 181:9,16 184:5 223:14 289:13,22	<b>79</b> 186:4,5,17,19 192:3 294:18	
<b>32s</b> 239:18	<b>40</b> 223:21 225:6 272:8 293:19 311:2 431:3	<b>56.8</b> 285:11		
<b>33</b> 191:19 192:4,7 229:9	<b>40-45</b> 249:17	<b>57</b> 18:11 183:4	<b>8</b>	
<b>333</b> 240:22	<b>400</b> 352:21 476:11	<b>57.5</b> 285:10	<b>8</b> 227:3 327:14	
<b>34</b> 229:11 290:5 430:14,17	<b>404</b> 4:17	<b>58</b> 58:17	<b>8:00</b> 1:13	
	<b>41</b> 277:2	<b>584</b> 440:5	<b>8:32</b> 5:2	
	<b>42</b> 20:7 181:10,14 181:16	<b>59</b> 227:11 242:20	<b>80</b> 290:19 326:18 420:15	
	<b>427</b> 323:10,11,15	<b>594</b> 273:21 274:2 284:5 293:16 294:11	<b>81</b> 274:8	
	<b>43</b> 106:19 107:5,9 176:22 177:2	<b>6</b>	<b>82</b> 225:12	
	<b>43's</b> 108:7	<b>6</b> 21:5 28:6,8 37:17 39:19 227:8	<b>82.2</b> 282:21	
	<b>435</b> 240:20	<b>6-month</b> 58:22	<b>83</b> 243:2	
	<b>44</b> 186:3,19	<b>6.2</b> 276:5	<b>84</b> 18:9 277:14	
	<b>449</b> 176:3,5	<b>6:23</b> 501:9	<b>85</b> 242:8 315:11 346:4	
	<b>45</b> 477:14	<b>6:24</b> 501:17	<b>86</b> 476:17	
	<b>46</b> 182:18 229:10	<b>60</b> 336:6 346:11 388:6,16,20 429:6 431:12 455:17	<b>87</b> 183:10	
	<b>47</b> 379:14	<b>600</b> 349:10		
	<b>476</b> 221:13 222:8 275:12			
	<b>48</b> 186:2 204:20			
	<b>486</b> 290:17,19			

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This is to certify that the foregoing transcript

In the matter of: Response Systems to Adult Sexual  
Assault Crimes Panel Meeting

Before: US DOD

Date: 12-12-13

Place: Austin, TX

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