



Advancing Justice: Interviewing and Presenting Testimony of Witnesses to Violent Crimes

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This project was supported by Grant No. 2019-MU-BX-K011 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the U.S. Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.



Patricia D. Powers

Patti Powers joined AEquitas after serving as a Senior Deputy Prosecuting Attorney in Washington State for 27 years, bringing extensive litigation expertise as a well-respected trial attorney. She supervised the Sexual Assault-Domestic Violence Unit and prosecuted and tried a high volume of violent crimes—specializing in adult sexual assault, child sexual assault and abuse, sexual exploitation of minors, domestic violence, and related homicides (including complex litigation of high-profile, as well as cold and current cases). Patti served on the domestic violence and child fatality review committees and was a member of the Washington State Technical Assistance Committee for Child Death Review Guidelines. For five years, she was appointed as a Highly Qualified Expert for the United States Army, Criminal Investigation Division; in this role, she provided training for army criminal investigation agents and prosecutors at Fort Leonard Wood, Missouri, and in Germany. Patti is the lead Attorney Advisor on the SAKI project.



Rebecca Campbell, Ph.D.

Dr. Rebecca Campbell is a Professor of Psychology and Presidential Advisor on Relationship Violence & Sexual Misconduct at Michigan State University. Dr. Campbell's research examines how contact with the legal and medical systems affects adult, adolescent, and pediatric victims' psychological and physical health. She was the lead researcher for the National Institute of Justice-funded Detroit Sexual Assault Kit Action Research Project, which was designated as an Exemplary Project by the Association of Public & Land Grant Universities (APLU) and the W.K. Kellogg Foundation. Dr. Campbell received the 2015 Crime Victim Research Award from the U.S. Department of Justice. Dr. Campbell also conducts training on sexual assault for law enforcement and multidisciplinary practitioners in civilian, military, and campus community settings.



Objectives



Identify the probative value of direct and circumstantial evidence derived from witness statements.

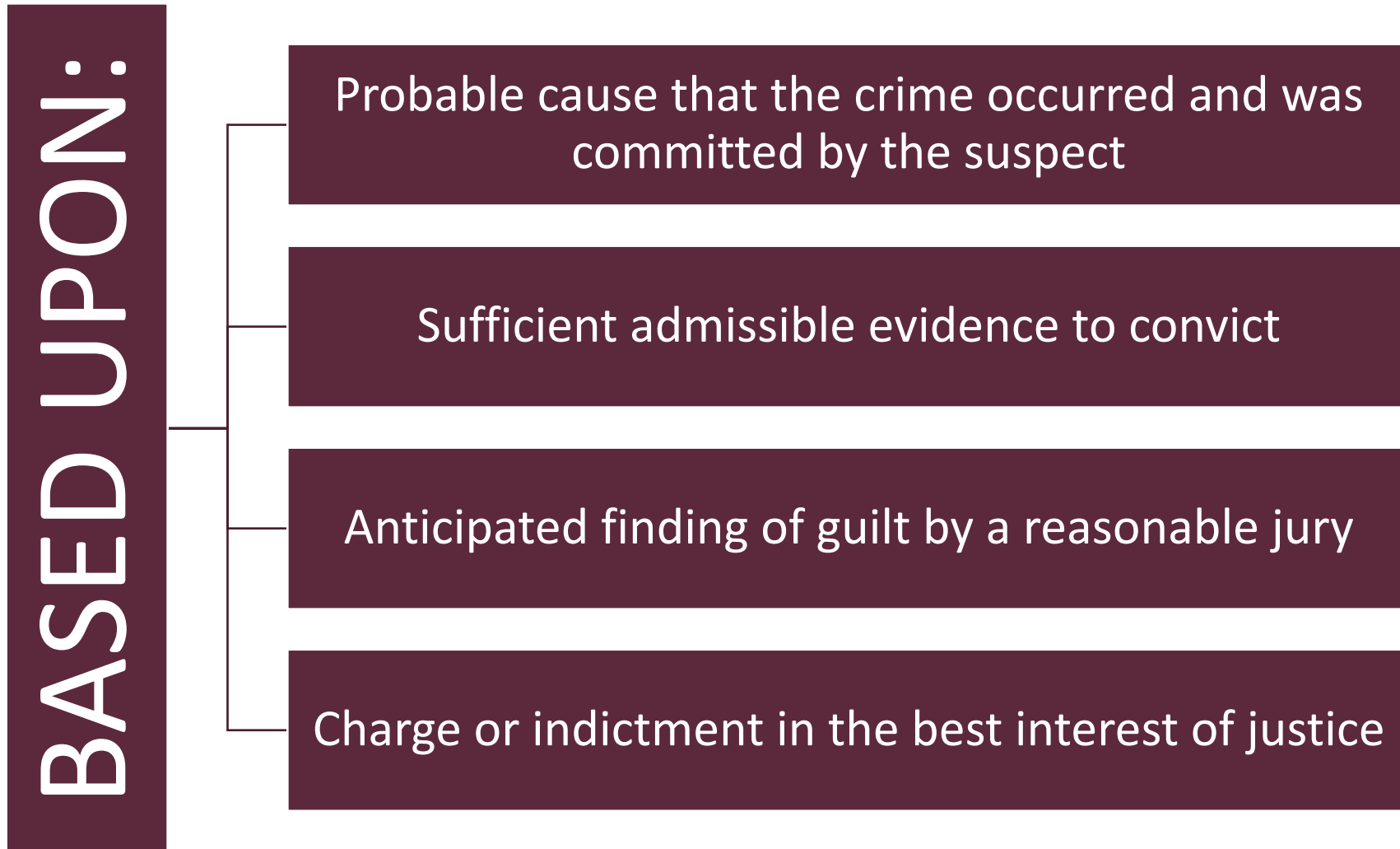
Conduct interviews that give the witness the opportunity to provide accurate information, and that allow investigators and prosecutors to assess the viability of the witness's memory in connection with other evidence.

Effectively present testimonial evidence at trial by establishing a foundation for the witnesses' memories and the impact of the event in the context of other supporting evidence.

DIVING INTO THE EVIDENCE

Case Assessment and Probative Evidence

Assessing Viability of Charges / Indictment



Test for Relevant Evidence

FRE 401

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Direct, Circumstantial, and Lay Opinion Evidence

Direct evidence

- Establishes a fact and directly links a person to a crime.
- *E.g.*, eyewitness statements, confessions, ballistics test showing bullet fired from a particular firearm, security footage.

Circumstantial evidence

- Requires that a judge and/or jury make an indirect judgment, or inference, about what happened.

Lay opinion evidence

- Witness testifies to opinion based upon observation.

Weight of Direct and Circumstantial Evidence

Washington Pattern Jury Instruction 5.01: Direct and Circumstantial Evidence

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

Overview of Testimonial Evidence

Victim

Direct witness

Secondary
witnesses

Offender
statement

FRE 404(b)
witnesses

Chain of
custody
witnesses

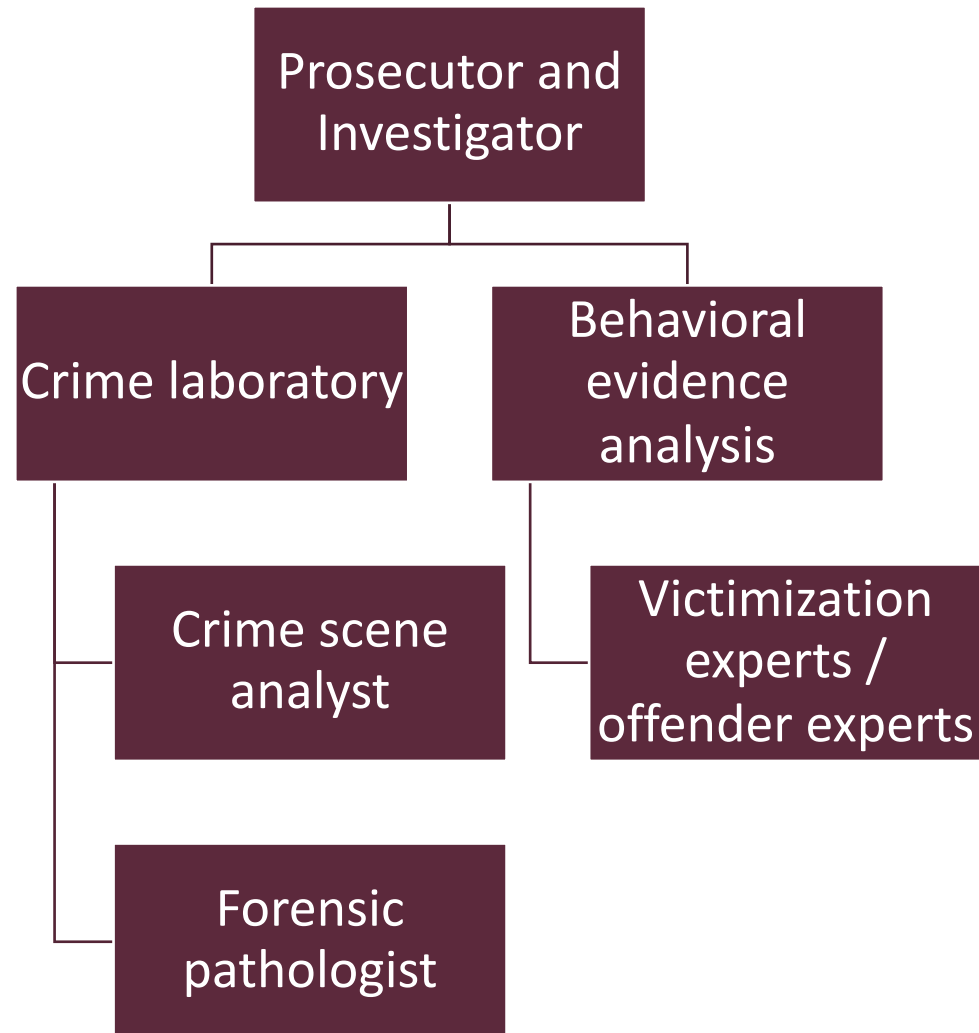
Cold and Current Case Considerations

Not all witnesses may have been previously identified/interviewed.

Witness contact summaries may contain leads for additional witness contacts.

Non-assertive conduct or statements not offered to prove the truth of the matter may be admissible.

Cold and Current Case Review: Multidisciplinary Engagement



True Collaboration

Demonstrates systematic engagement

Improves communication

Identifies gaps

Augments participation

Educates experts about each other's roles and expertise

Encourages mutual respect

Enhances the pursuit of justice

Preparing Witness List for Interviews and Trial

Witness list needs to be complete with direct witnesses and secondary witnesses with consideration of corroboration for both.

There may be additional secondary witnesses corroborating other secondary witness without being cumulative.

The key is to review all available witness statements for probative evidence of elements of the crime as well as FRE 404 motive, opportunity, intent, common scheme or plan and potentially other bases.

WITNESSES' MEMORIES OVER TIME

Understanding the Factors that Affect Memory Recall



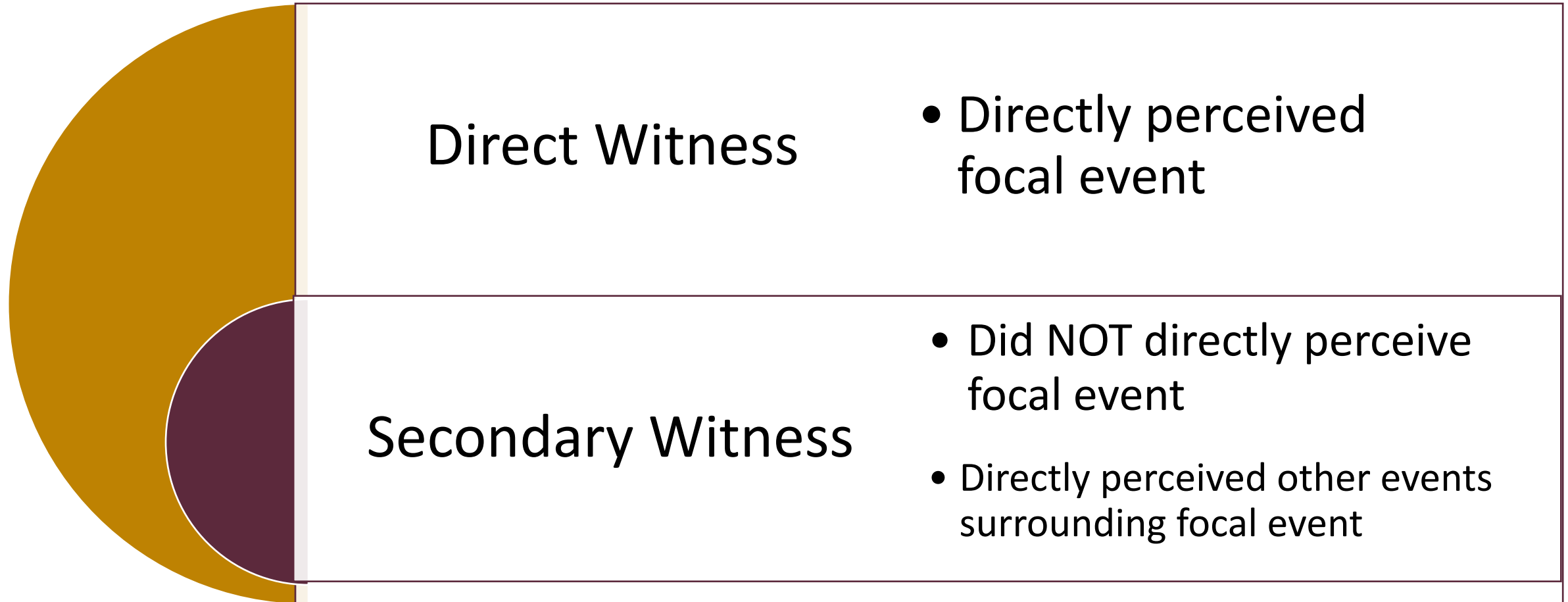
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What Do Witnesses Remember Over Time?

It Depends.

What Did They Witness?

Direct and Secondary Witnesses



Direct Witnesses: What Did They Witness?

TRAUMATIC

- Focal event threatened the safety/survival of the direct witness
- *Or* direct witness had reason to believe their safety/survival was in jeopardy

STRESSFUL

- Focal event did not threaten safety/survival of direct witness (*or* witness did not believe safety was in jeopardy)
- But focal event was troubling, upsetting, and/or unusual

Seemingly Ordinary

- Focal event seemed like routine, ordinary event
- Circumstances surrounding focal event did not clearly convey criminal activity

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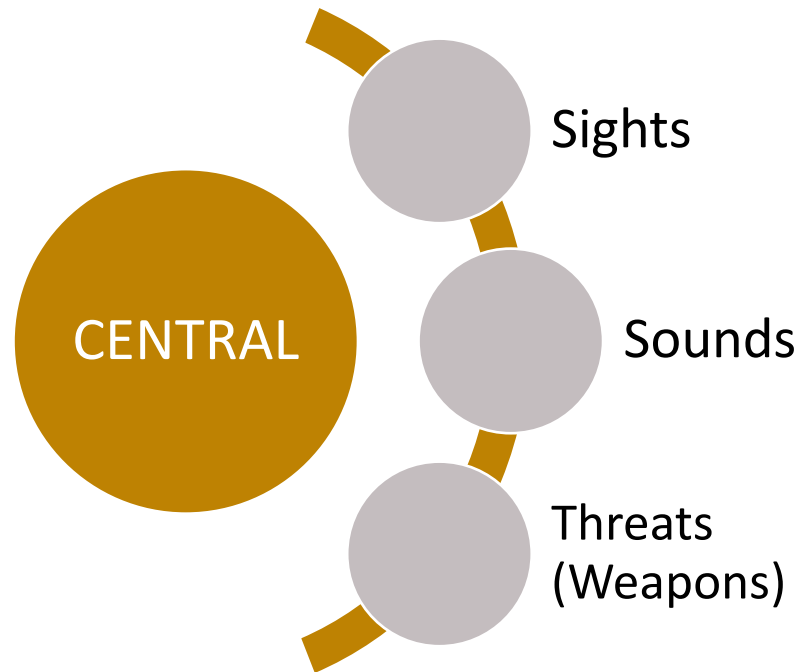
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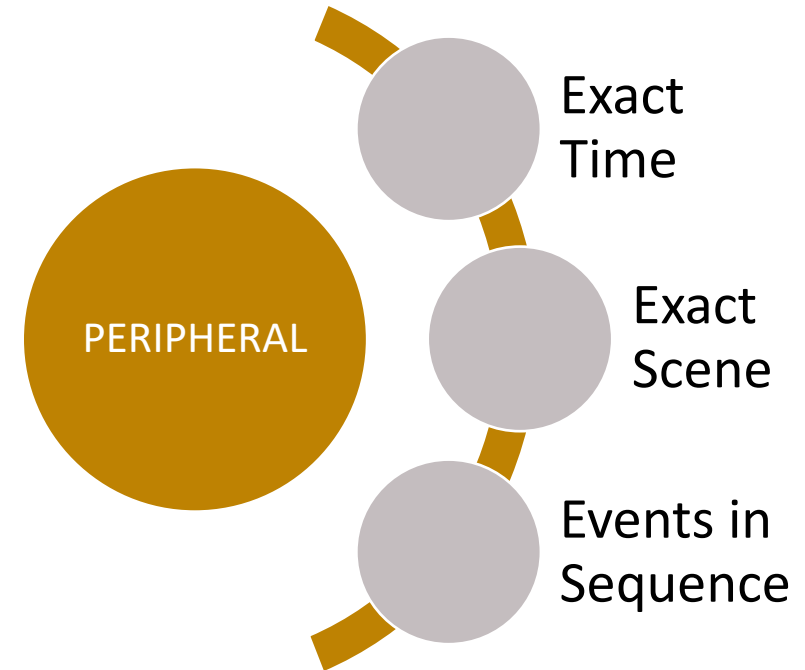
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**THESE MEMORIES TEND TO BE ACCURATE & STABLE
OVER TIMEWITH SOME IMPORTANT CAVEATS**

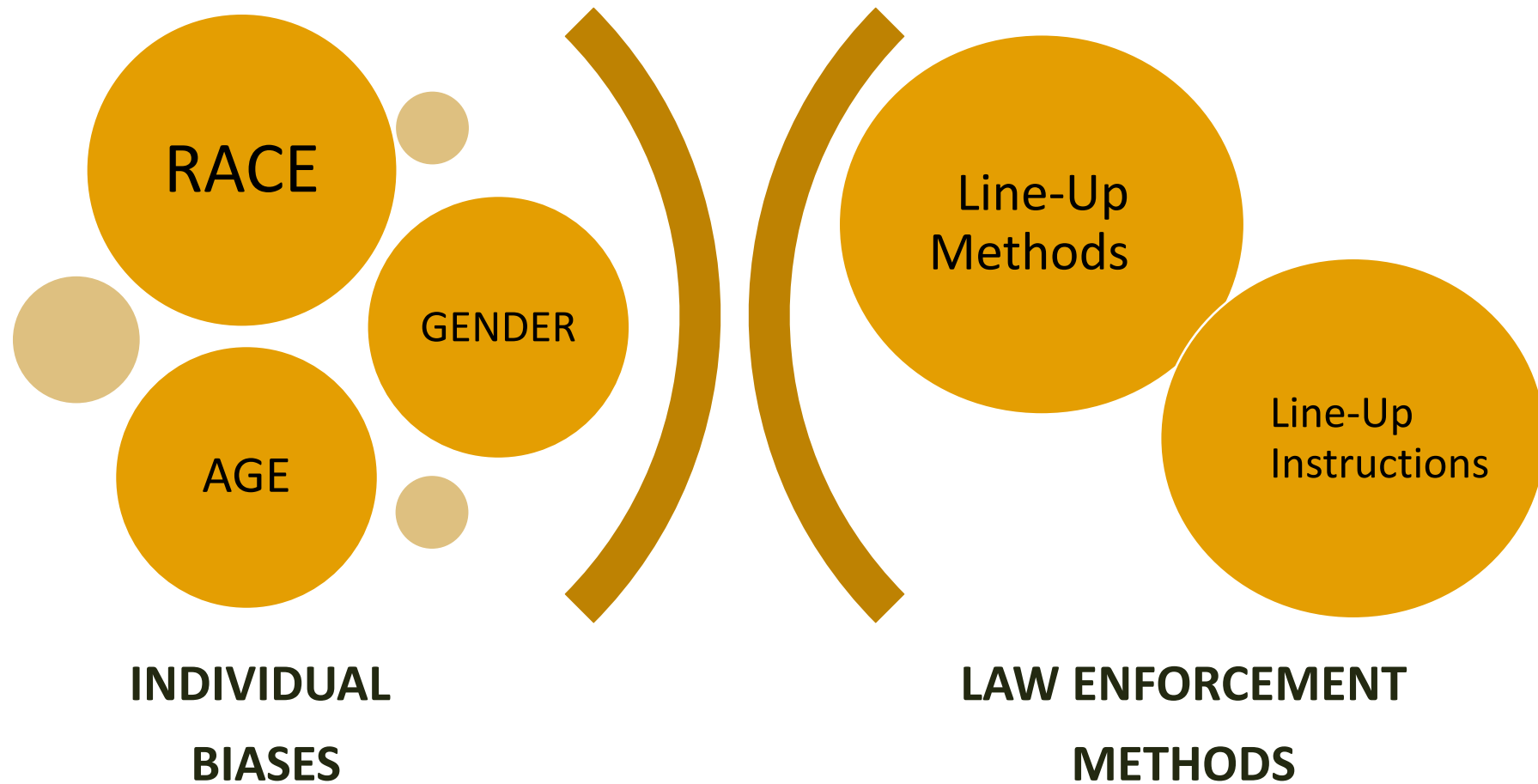
Direct Witness Memories: Central v. Peripheral Information



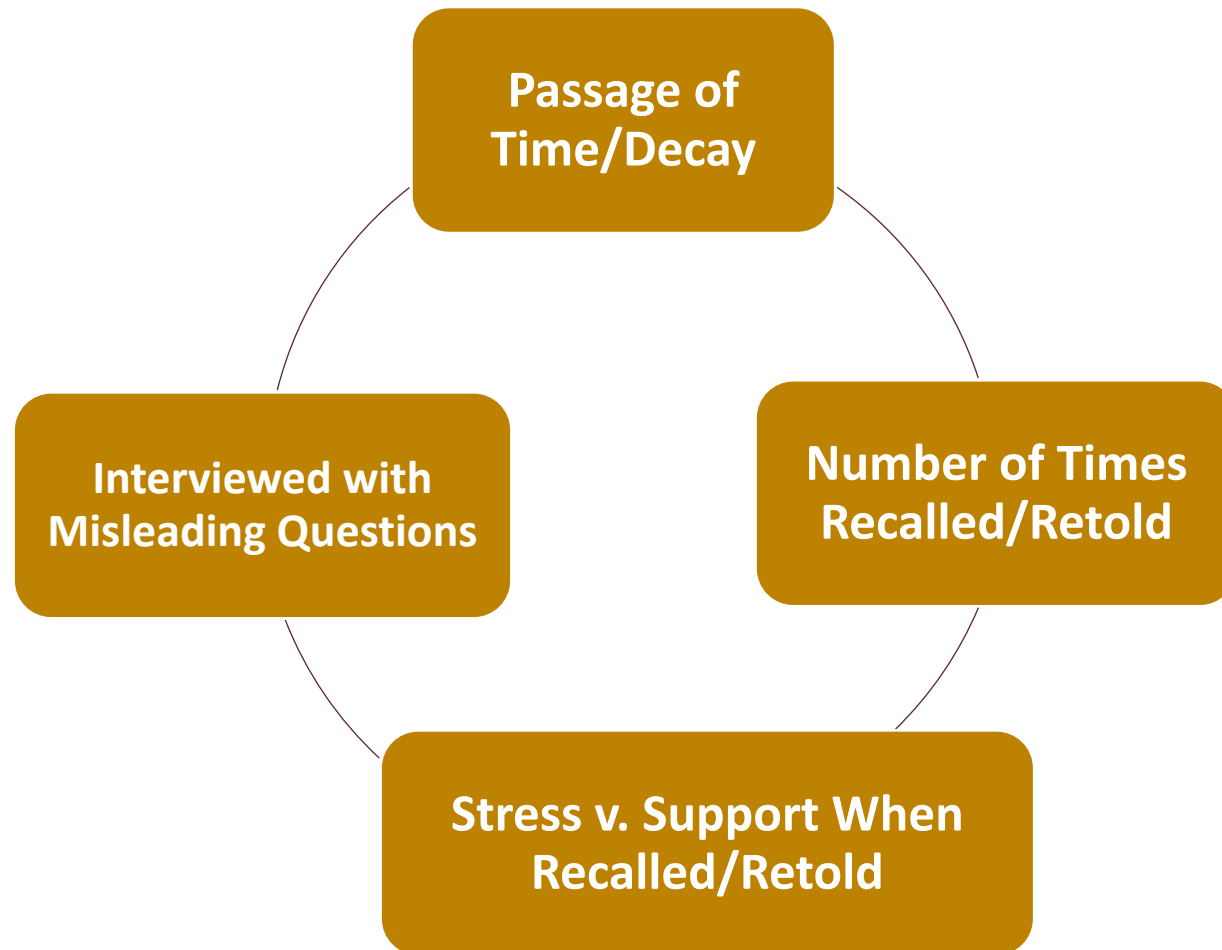
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Direct Witness Memories: Eyewitness Identification Accuracy



Direct Witness Memories: Recall Experiences Affect Accuracy



Direct Witnesses: What Did They Witness?

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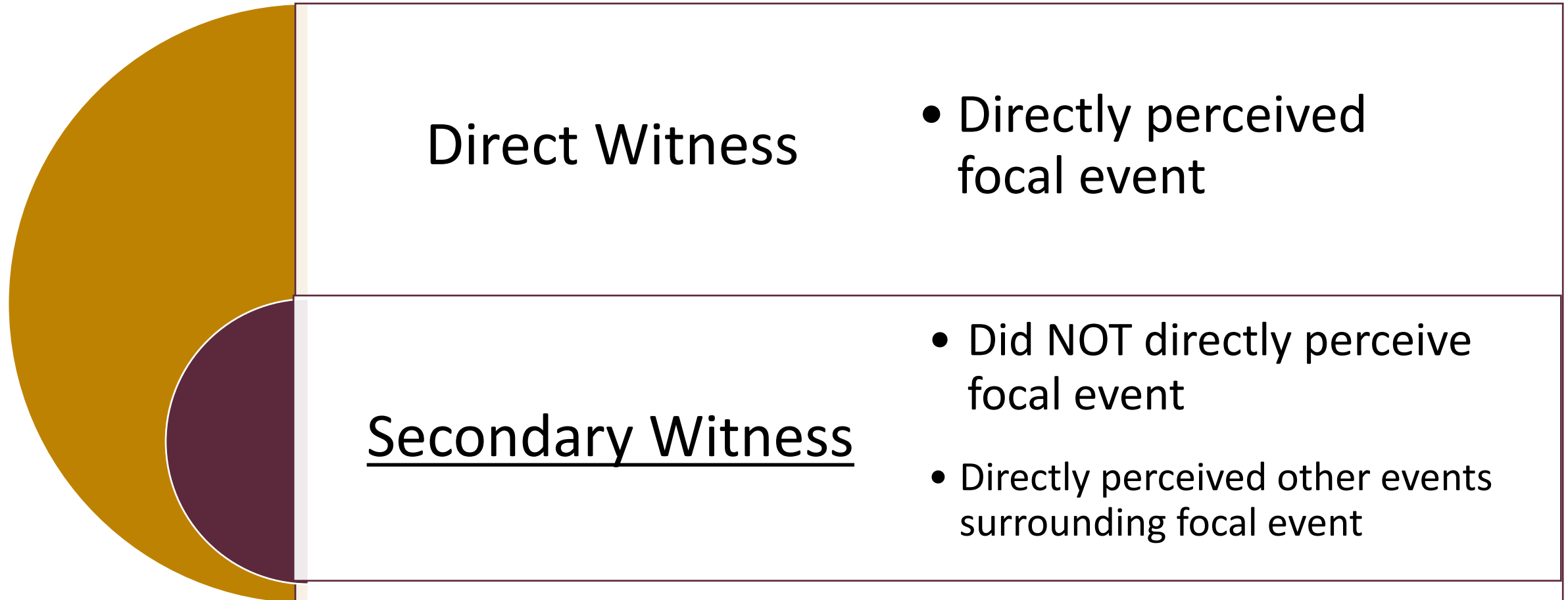
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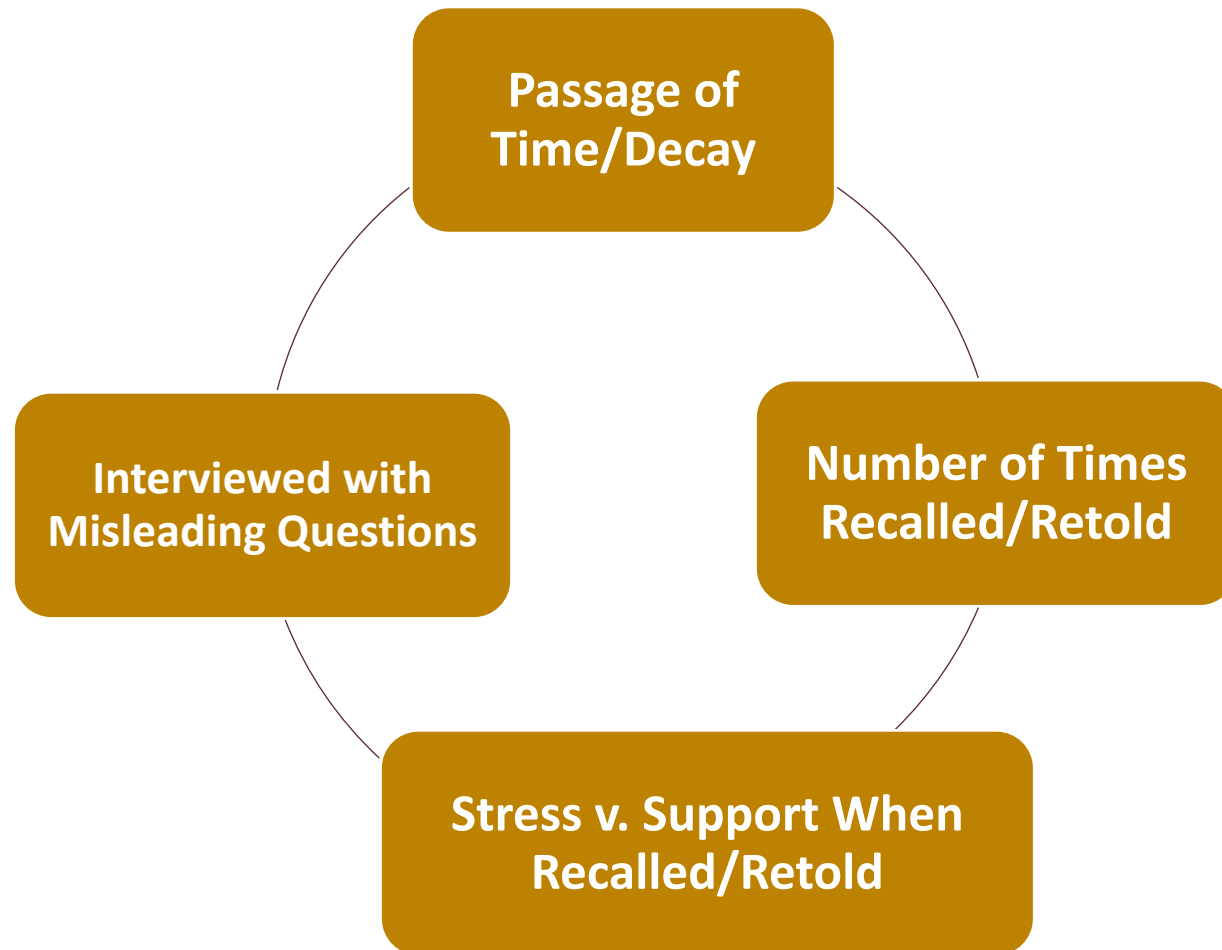
**UNCLEAR HOW ACCURATE
& STABLE OVER TIME**

... ALSO LESS COMMON IN LEGAL CONTEXT

Direct and Secondary Witnesses



Secondary Witness Memories: Recall Experiences Affect Accuracy



Both Direct & Secondary Witnesses: Facilitating Recall

LOGISTICS

- Lack of engagement often due to life stresses.
- Stress and trauma compromise problem-solving skills.
- Address childcare, transportation, technology needs.
- Make it easy to meet with you.

EXPECTATIONS

- What will this be like?
- What will you ask about?
- Why will you ask about those topics?
- What is the purpose of this interview?
- What will you do with this information?
- What will happen next and when?

SAFETY

- Physical safety needs related to where and when you conduct the interview.
- Emotional safety needs during and after the interview.
- Engage witness in pre-planning for support during and after the interview.
- Engage advocacy services.

Both Direct & Secondary Witnesses: Facilitating Recall

OPEN-ENDED

- Memories might be fragmented.
- Create a calm, safe space for finding all the fragments.
- Open-ended questions allow victims to provide context and details.
- Open-ended questions help establish trust and rapport.

GO WITH THE FLOW

- Allow witnesses to tell story in their own order.
- Later, you can prepare order of questions at trial.
- Do not interrupt.
- Make a note of follow-up questions to cycle back to later.
- Pay attention to details and experiences witnesses repeat during their narrative.
- Pay attention to places where they seem to 'stall' and use sensory cues to prompt.

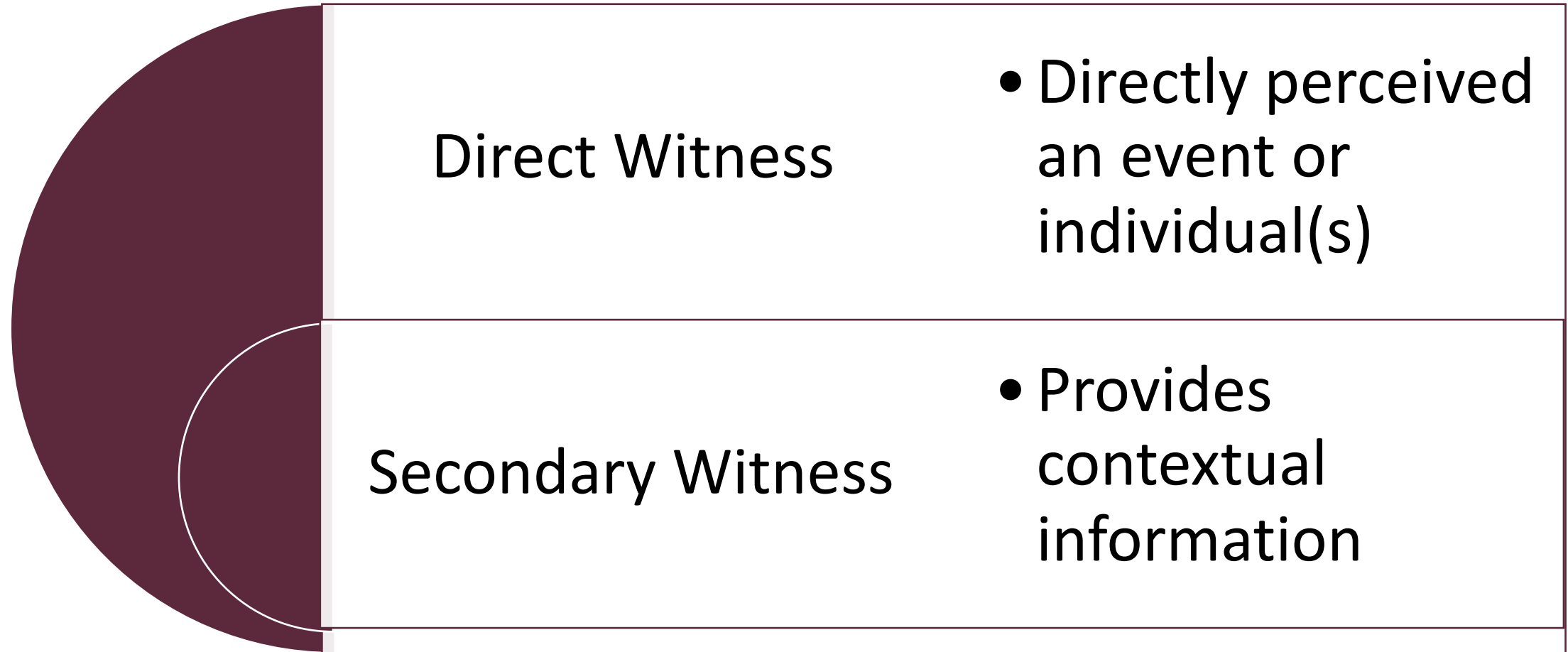
SENSORY CUES

- What did you see?
- What did you hear?
- What did you smell?
- What did you feel?
- What did you taste?

DIRECT AND SECONDARY WITNESSES

Analysis and Preparation for Trial

Direct and Secondary Witnesses



Direct and Secondary Witnesses

Direct Witness

- Describes sensory details of event: saw, heard, smelled, tasted, touched
- E.g., “I saw her run out of the party and heard her crying and while she did this, a man emerged from the room”
- May be probative of victim’s disclosure, identity or presence of the offender

Secondary Witness

- Describes inference or foundation for inference from an observed fact
- E.g., “When I saw her a week later, she seemed different—her attire and demeanor had drastically changed. I knew something bad had happened to her”
- May be probative of victim’s disclosure, traumatic response to sexual assault, timeline

Analyzing Corroboration



Analyze Witness Corroboration

Fact at issue: elements of the crime, context

Direct witness

Secondary
Witness

Corroboration

Corroboration

Corroboration

Opinion Testimony by Lay Witnesses

FRE 701

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- a) rationally based on the witness's perception;
- b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Character Evidence; Other Crimes, Wrongs, or Acts FRE 404(b)

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

FRE 404(b) in Sexual Assault and Homicide Cases

Interview victim(s) or
homicide witnesses

Consider joinder; cross-
admissibility of FRE
404(b) evidence

Corroboration/cross-
corroboration

Issues: confession or
admissions to one
crime, strength of
individual case,
cautionary instruction

Preparing with Witness

- Discuss pre-trial testimony if applicable or any pre-trial rulings that have been made
- Clarify that many witnesses are testifying to different aspects of information and how their testimony fits in
- If permissible, allow witness the opportunity to review prior statement
- Prepare witness with possibility that defense may ask them questions regarding answers in prior statement
- Advise witness that “ I don’t know” or “I don’t remember” are valid answers

Witness Preparation

- Ensure victim-witness professionals provide support to witnesses, update witnesses on testimony schedules, and address transportation concerns
- Advise witness to not discuss testimony with other persons
- Proactively discuss presence of media, if applicable, and precautions undertaken by the Court
- Review questions that will be asked during trial

Central Questions

Time or time frame of event: Date or time frame if possible with reference point

Vantage point: Where were you when you saw or heard the event?

Distance from event: obstructed or not

Circumstances of presence: Is this a usual or frequent location; what is the context for presence

Focus of attention: What drew your attention?

Length of time: Do you have a sense of how long you were there?

Elicit Description of Experiential Details

What did you
see hear, smell,
taste, touch

Sensory

How did you
feel?

Emotional

Physiological

Witness Identification Issues

- Carefully review all witness statements, including transcription and video, if available
- Review law enforcement narrative for context of interview
- Determine if line-up, photographs, or DNA phenotype image shown to witness earlier for identification
- If there is evidence of identification procedures, review photographic array or montage or line-up composition to determine if there is any issue of suggestibility
- Review instructions given to the witness to determine any issue of suggestibility

Determining Identification Issues

- Examine law enforcement narratives and discuss with investigator: Were there any statements to witness beyond instructions prior to, during, or after identification procedure?
- Did the witness make any statements to law enforcement during this period of time?
- Identify period of time between witness's view of identification material and view of suspect.

Preparing with Witness: Identification Issues

- Inquire about witness recollection of appearance of suspect, timing of view of suspect, and context
- Ask witness about prior identification with law enforcement procedure, including instructions, signature, and identification
- Were any statements made apart from instructions?
- Ask witness if they are able to remember and identify person
- Be prepared to address change in appearance, especially in cold cases, but also in current cases

Follow-up Questions

Did you discuss this experience with anyone?

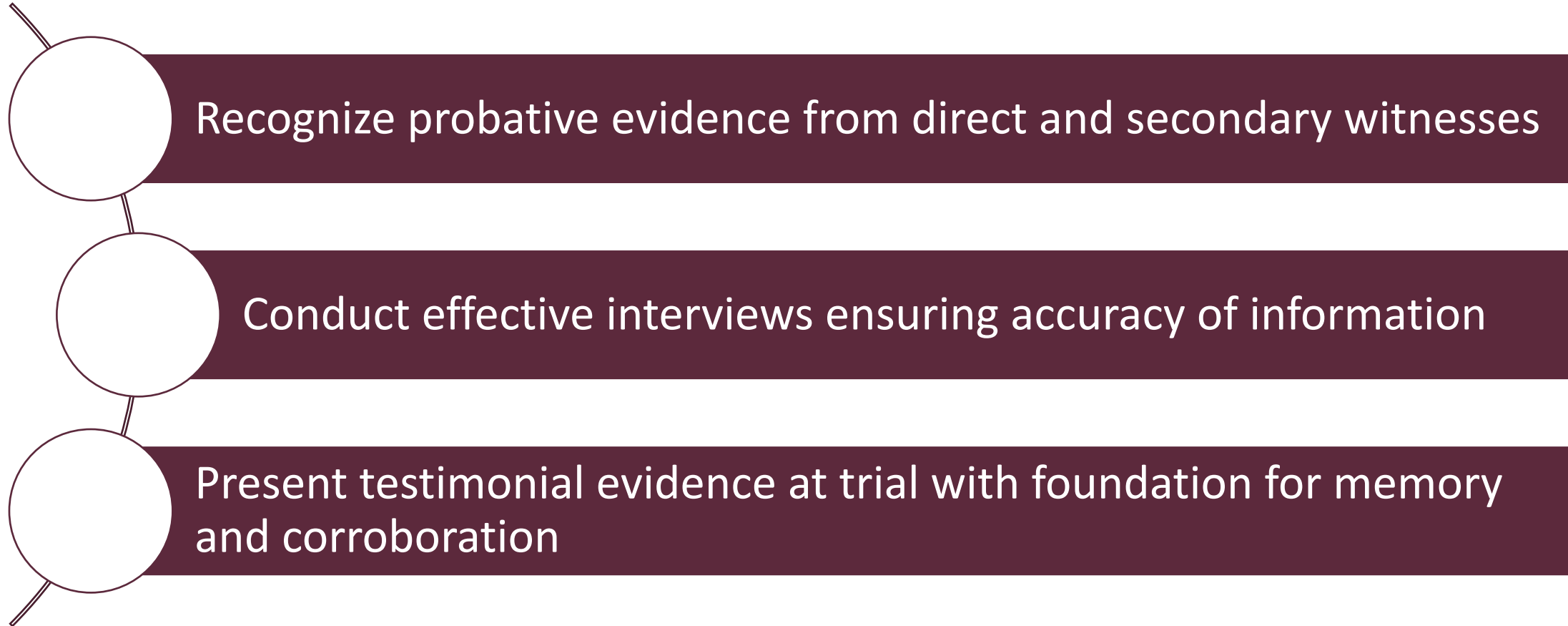
Did you come forward with information after crime occurred?

Were you contacted by an investigator? When?

Have you thought about this incident since it occurred?

Have you learned of any additional information?

Going Forward

- 
- Recognize probative evidence from direct and secondary witnesses
 - Conduct effective interviews ensuring accuracy of information
 - Present testimonial evidence at trial with foundation for memory and corroboration

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