



# Achieving Justice at Trial: Direct Examination of Victims of Violent Crime

Patricia D. Powers, JD, AEquitas

Rebecca Campbell, Ph.D., Michigan State University

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# 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.

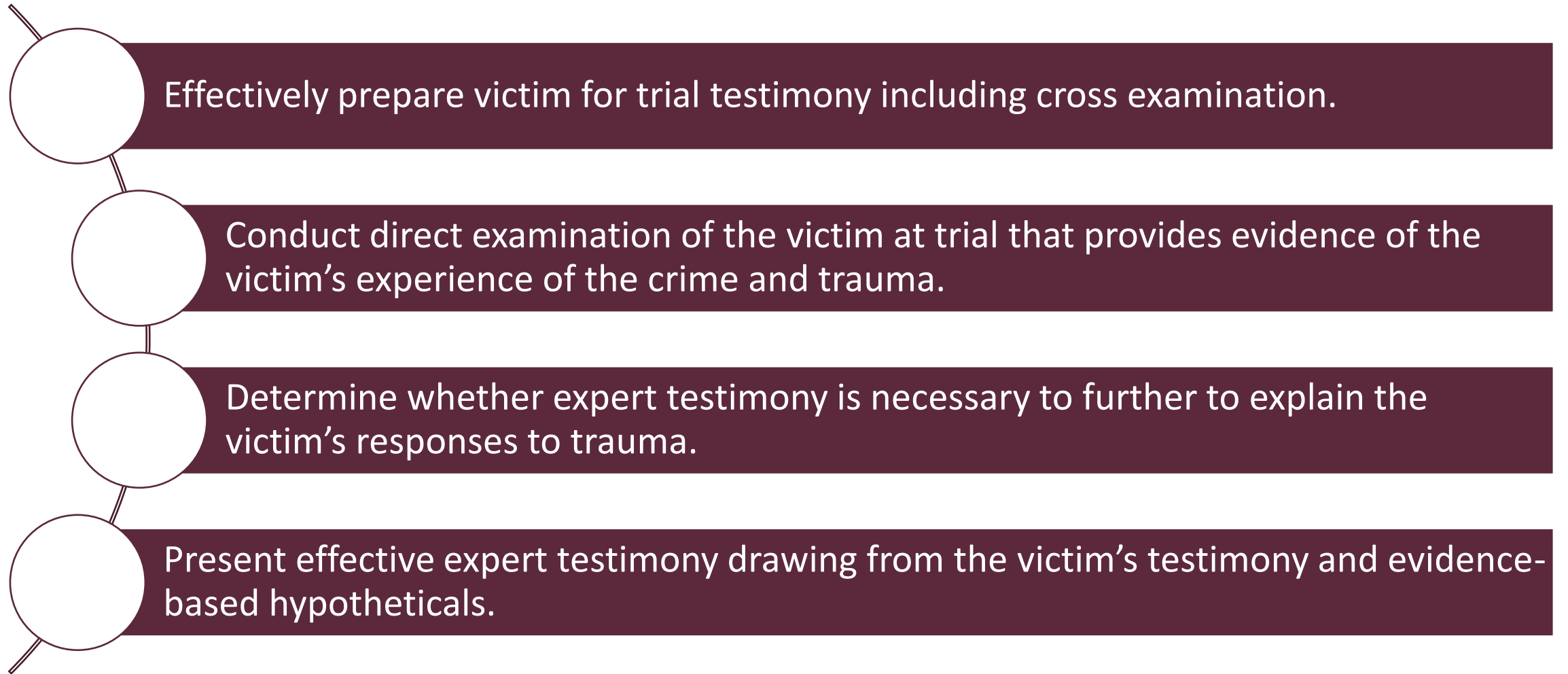


## Rebecca Campbell, Ph.D.

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

- 
- Effectively prepare victim for trial testimony including cross examination.
  - Conduct direct examination of the victim at trial that provides evidence of the victim's experience of the crime and trauma.
  - Determine whether expert testimony is necessary to further to explain the victim's responses to trauma.
  - Present effective expert testimony drawing from the victim's testimony and evidence-based hypotheticals.

# Preparing for Trial with the Victim

## Let's Begin By Understanding the Victim's Point of View

- What are they experiencing?
- Why do they choose to participate in the prosecution process?
- What are their concerns?

# What Has Happened Since the Assault?

## Mental Health

- Triggers & flashbacks
- Depression
- Anxiety
- PTSD
- Suicidality
- Self harm behaviors

## Physical Health

- Ulcers & other stress-related health problems
- Chronic headaches
- Other chronic pain
- Gynecological health problems
- Substance use & addiction

## Social Support

- Initial support providers might have disengaged
- Conflicted relationships with support providers
- May have withheld information from support providers

## Life Changes

- Other traumas
- Major illnesses and injuries
- Major negative life transitions (housing, income, employment)
- Major positive life transitions



# What Has Happened Since the Assault?

Mental Health	Physical Health	Social Support	Life Changes
<ul style="list-style-type: none"><li>• Triggers &amp; flashbacks</li><li>• Depression</li><li>• Anxiety</li><li>• PTSD</li><li>• Suicidality</li><li>• Self harm behaviors</li></ul>	<ul style="list-style-type: none"><li>• Ulcers &amp; other stress-related health problems</li><li>• Chronic headaches</li><li>• Other chronic pain</li><li>• Gynecological health problems</li><li>• Substance use &amp; addiction</li></ul>	<ul style="list-style-type: none"><li>• Initial support providers might have disengaged</li><li>• Conflicted relationships with support providers</li><li>• May have withheld information from support providers</li></ul>	<ul style="list-style-type: none"><li>• Other traumas</li><li>• Major illnesses and injuries</li><li>• Major negative life transitions (housing, income, employment)</li><li>• Major positive life transitions</li></ul>

- Marked health disparities in the U.S., so negative life events are more likely for some populations.
- Many are unable to obtain mental health treatment.
- Health disparities affect quality of health care.
- Support networks have own stresses & strains.
- COVID-19 pandemic exacerbated health disparities.

# What Has Happened Since the Assault? MEMORIES

## Central Memories

- Tend to be stable over time
- Triggers & flashbacks

## Peripheral Memories

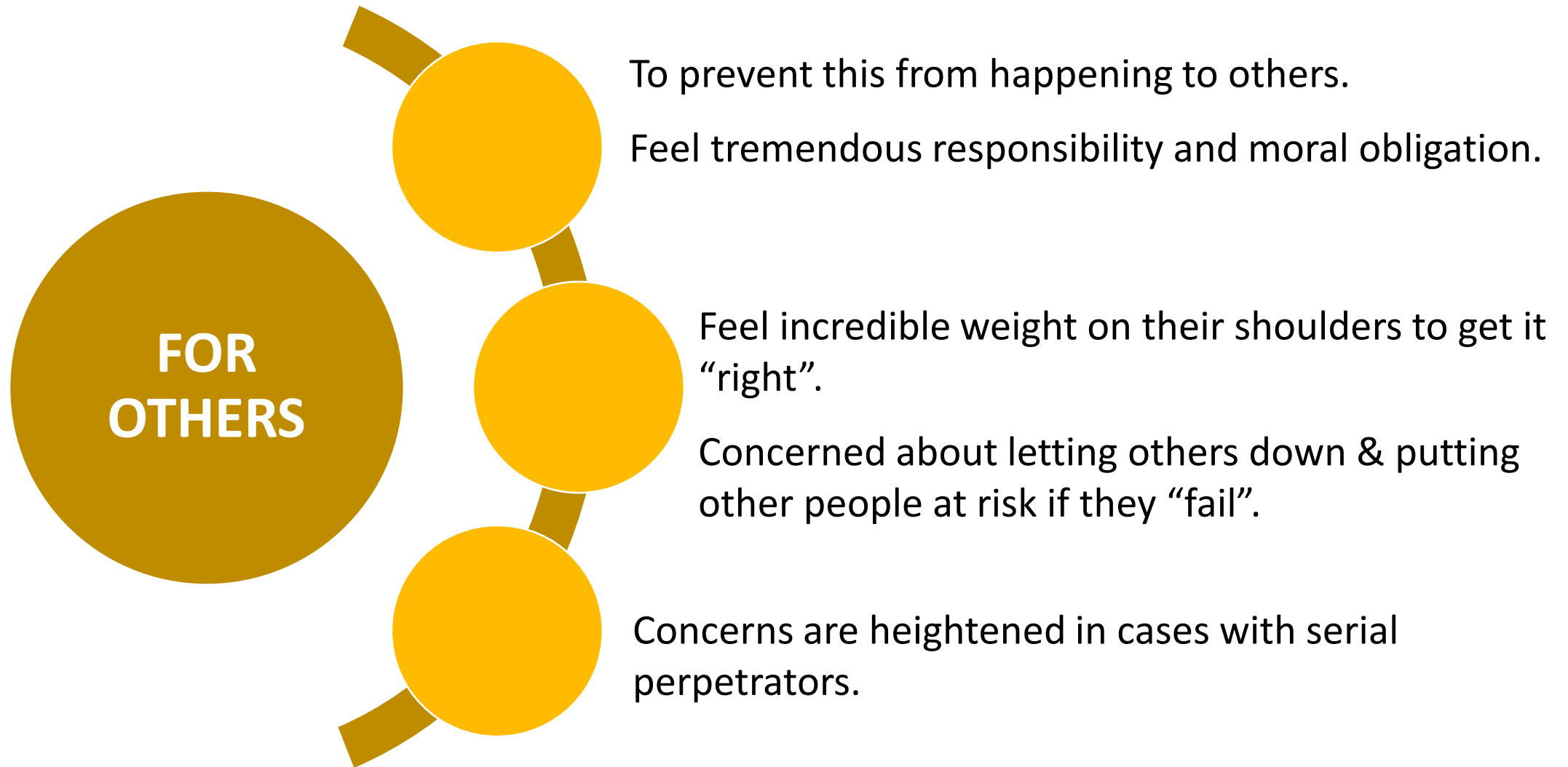
- Some are stable over time
- Some less stable over time
- Triggers & flashbacks

## Recall & Disclosure

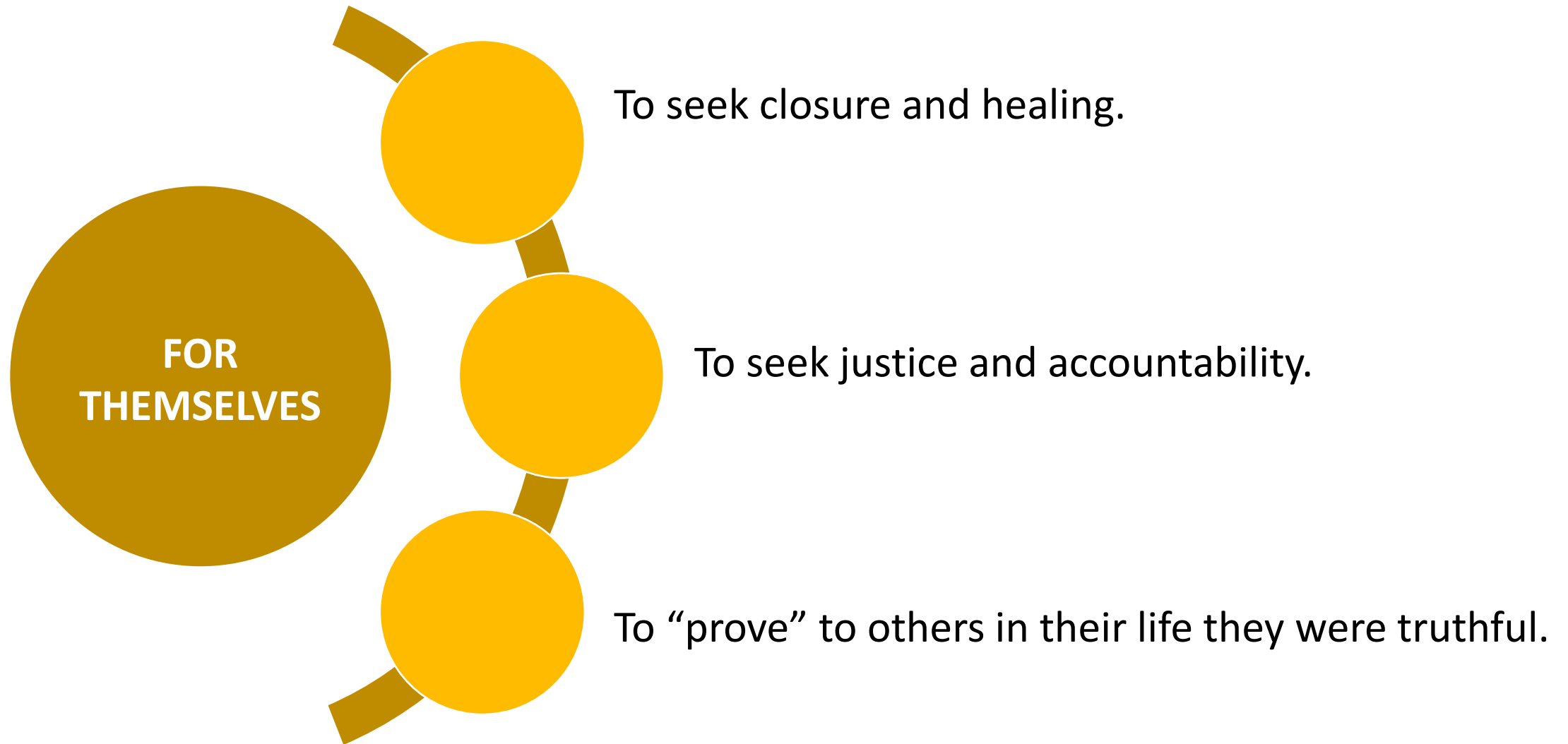
- What they recall can change over time
- What they disclose can change over time

**Remember, participating in the prosecution process is a tremendous “ask” of victims.**

# Why Do Victims Participate in Prosecution?



# Why Do Victims Participate in Prosecution?



**Remember, participating in the prosecution process is a tremendous risk for victims.**

# What Are Victims' Concerns About Participating?



Re-telling the assault, over and over again.

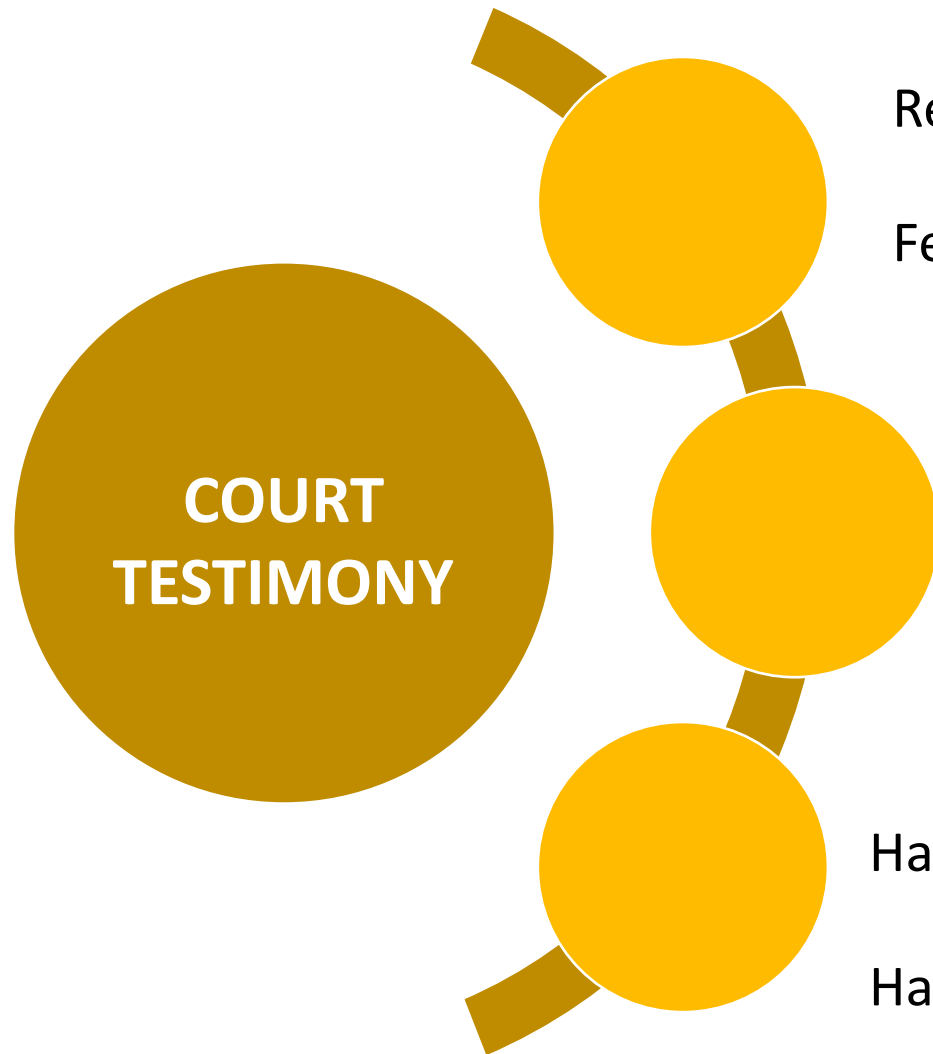
Re-activating mental and physical health struggles, substance abuse relapse, re-starting self harm behaviors.

Able to “go back” to their lives after meetings, hearings.

Seeing the perpetrator.

Seeing law enforcement personnel.

# What Are Victims' Concerns About Participating?



Re-telling the assault, over and over again.

Feeling shame, stigma, embarrassment in public.

Being able to remember & recall information.

Being able to answer all questions.

Having credibility and character attacked.

Have behavior and decisions questioned and criticized.



# What Are Victims' Concerns About Participating?



Will there be justice? Will they get closure?

Will the process be fair for them? For the perpetrator?

In cold cases, some victims may be concerned about whether it is fair to up-end everyone's life (including those who love/depend on the perpetrator).

# What Are Victims' Concerns About Participating?



**Victims have different needs and experiences  
coming into the prosecution process...**

**...and they see things differently than prosecutors.**

## Victims

- Out-of-the-Ordinary Experience
- Stress & Trauma
- Feeling Vulnerable
- Personal Disclosure
- Each Appointment is a Major Event
- Public Speaking is Scary
- Public Record is Scary

## Prosecutors

- Ordinary, Routine Experience
- Stress & Vicarious Trauma
- Feeling Competent
- No Personal Disclosure
- This is Your 2pm Appointment
- Public Speaking is Routine
- Public Record is Routine

## Trauma-Informed Trial Preparation Process

- Preparation is a process beginning with the initial meeting with the victim and prosecutor.
- Advocacy support should be offered and encouraged.
- Prosecutors should maintain contact with victims and be available for questions and concerns.
- Preparation for direct exam should be scheduled to accommodate victim's and advocate's availability.

# Provide Regular Updates to Victims

In Cold and Current Cases

Status of suspect

Hearing dates and scheduling

Notice about requests for delay (oppose delay when necessary)

Protective orders and extent of protection

Status of investigation and new efforts

Length of time anticipated for charging

# The Reality: Offenders

Commonly know their victims

Typically, do not use deadly weapons

Typically, do not physically injure their victims

May have multiple victims

May commit crimes against victims they know and victims they don't know

Plan the crimes and employ tactics to facilitate their commission

# Nontraditional Weapons and Tactics

Alcohol and  
drugs

Coercion

Isolation

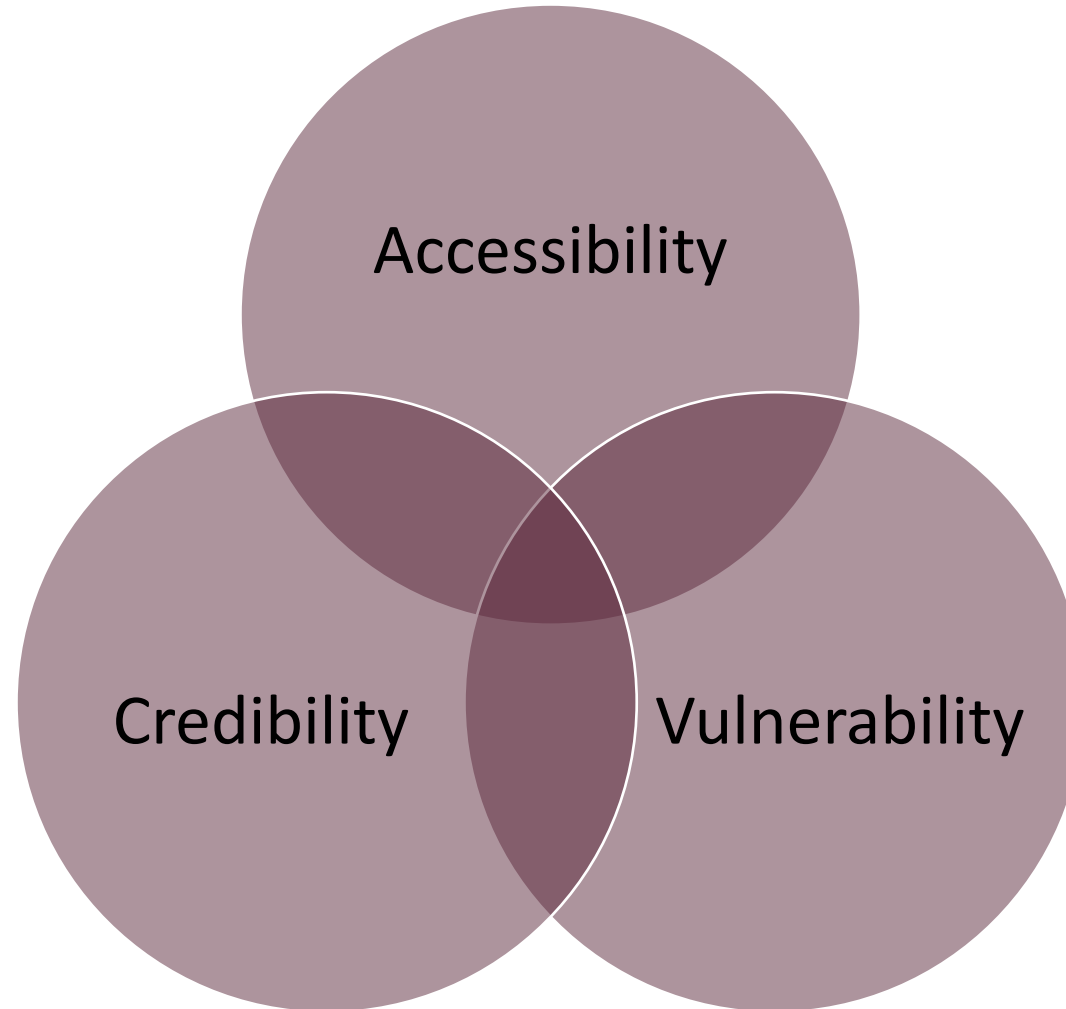
Manipulation

Deception

Intimidation



# Offender's Perspective



## Offender Focus

### Delayed disclosure

- Who is responsible?

### Prior relationship

- He knew her, but she didn't know him.

### Voluntary intoxication

- Who needs force when you have alcohol?

## Questions and Answers

Why did this  
take so long?

Are there other  
victims?

Will I have to  
see him again?

What if I don't  
recognize him?

What if I can't  
remember  
everything?

After all this  
time, do we  
have a chance?

# Impact of Trauma: Considerations

- Both known and unknown offenders cause trauma.
- Trauma may be primary inhibiting factor for disclosure and/or providing sensitive information.
- Trauma may recur when memories are accessed.
- Victims frequently disclose in layers and over time.
- Chronological recall of memory may not be possible.

## Preparing for Trial Testimony

- Anticipate and be open to discussing victim's concerns: security, presence of offender and associated persons, media involvement, public attention, concern with questions to be asked.
- Recognize that the experience may be traumatic, but the victim can be effectively supported, and concerns can be addressed.
- Discuss safety precautions related to the offender and current pandemic conditions.

# Protective Orders

## Protective Identity of Victim

Use initials

Redact any  
“identifying  
information”

## Guard Against Disclosure of Privileged Information

Counseling  
records

SANE  
photographs

## Privacy Concerns of Victims and Witnesses

Social Media

Cell phones

# Pre-Trial Motions

## Protect the Victim

Rape Shield

Motions to quash

## Offender-Focused

Other Crimes or  
Wrongs Evidence

Evidence of flight  
/ consciousness  
of guilt

## Preview the Evidence

Motions in  
limine to limit or  
exclude evidence

# Trauma-Informed Pre-Trial Preparation

- Allow victim time to answer questions that are difficult and painful.
- Thoroughly prepare to ask victim questions about information not initially disclosed:
  - When she remembered.
  - How she was impacted by memory.
  - Whether she was asked for this information.
- Ask questions following lead of victim and avoid inquiry calling for specific order.



# Preparation for Testimony: Considerations

Timing of trial preparation

Convenience of victim and advocate

Review of questions to be asked

Absorb relevant cross-examination questions into discussion

Arrange visit to courtroom

Anticipate and discuss: security, media involvement

## Trial Preparation: Questions

- Questions should be trauma-informed and encourage narrative.
- Listening is an acquired art and is critical to preparation of testimony.
- Follow-up questions should be based upon the victim's responses.
- Inquiry about sensory, psychological, and physiological details should be woven throughout the victim's description of their experience of the crime.

## *“Are you able to tell me/us...”*

- Acknowledges and conveys our understanding of trauma.
- Allows for victim to say, “I don’t remember”.
- Gives victim an opportunity to share what they are able to.
- Helps avoid perception of judgment “When were you able to discuss what happened?”
- At trial, communicates to the jury that the victim has been traumatized and may not be able to remember or recall some details.

# Trauma-Informed

## Recognize

- Trauma affects victim perception and responses to events.
- Trauma may impact victim participation.
- Trauma influences victim memory.
- Offender is responsible for trauma.

## Strategies

- Adapt practices to accommodate trauma and its effects.
- Collaborate with allied professionals to ensure broad implementation of trauma-informed practices.
- Provide individualized responses.

# Conducting Direct Examination of the Victim

# Direct Examination: Heartbeat of the Case

Introduction of the victim

Context of the crime

Reference to any  
secondary witnesses

Sensory details of  
the experience

Psychological details

Physiological details

# Trauma-Informed Questioning

## Sensory Details

Sight

Sound

Touch

Taste

Smell

## Emotional Response

How did you  
feel? What did  
you think then?

## Physiological Effects

How did that  
affect you?

# Direct Examination of Victim

Introduce victim

Begin with questions about context: what happened before the assault?

Ask questions through an offender-focused lens

Recreate the reality of the crime to the jury through experiential detail

Use trauma-informed interview techniques



# Expect Inconsistencies

## May result from:

- The way questions are asked and the context.
- How the victim felt during this time.
- What questions were asked and not asked.
- Victim's fear to disclose certain details.
- Nature of disclosure (details frequently disclosed in layers).

## What to do:

- Recognize *Brady* obligation.
- Analyze materiality of inconsistencies.
- Disclose to defense.
- Consider evidence of trauma.
- Call witness (*e.g.*, law enforcement) to provide context, emotional impact on victim, questions asked and/or not asked.

## Victim's Foundation Testimony

- Establish that victim presented for medical care and provided information to the SANE for purposes of treatment or medical diagnosis.
- Responses about reactions to the crime and subsequent activity may serve as basis for evidence-based hypotheticals for an expert.
- Potentially necessary for admission of certain hearsay exceptions.

# Exceptions to the Rule Against Hearsay

FRE 803

**(1) *Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

**(2) *Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

**(4) *Statement Made for Medical Diagnosis or Treatment.*** A statement that:

- (A)** is made for — and is reasonably pertinent to — medical diagnosis or treatment; and
- (B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.

# Determining Whether Expert Testimony Is Necessary

**Let's Begin By  
Examining Why You  
Might Consider An  
Expert Witness**

- What are the issues that need to be explained?
- Who can explain those issues?
- What is the state of the science on these issues?

# What Might Need to be Explained to Judge/Jury?

Freeze response/  
tonic immobility

Lack of resistance

Post-assault  
behaviors

Continued  
contact with  
perpetrator

Dissociation

Incomplete  
memory

Inconsistent  
statements

Recanting

Delayed  
reporting

“False  
memories”

Time distortion

Sequencing of  
events

“Counter-  
intuitive”  
behavior

“Counter-  
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emotions/affect

Self-blame/  
minimization

# Who Can Explain These Issues?

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**THE VICTIM**

Regarding

Delayed  
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# Who Can Explain These Issues?

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**AN EXPERT?**

Repeating

Delayed  
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“False  
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Time distortion

Sequencing of  
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# What Is the State of the Science?

- Science evolves over time
  - Older findings can be replicated & supported
  - Older findings can be refuted & discredited
  - New findings and discoveries can emerge

Freeze response/ tonic immobility	Lack of resistance	Post-assault behaviors	Continued contact with perpetrator	Dissociation
Incomplete memory	Inconsistent statements	Recanting	Delayed reporting	"False memories"
Time distortion	Sequencing of events	"Counter- intuitive" behavior	"Counter- intuitive" emotions/affect	Self-blame/ minimization

- There are published papers that can support or refute nearly any position
- There is robust science on trauma and good agreement/replication on core issues
- But rarely will there be "THE" paper, "THE" expert, "THE" silver bullet

## Considerations for Expert Testimony

- Is an expert necessary?
- If so, who can serve as an expert?
- What would be the subject matter of their testimony?

# Testimony by Expert Witnesses

FRE 702

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b)** the testimony is based on sufficient facts or data;
- (c)** the testimony is the product of reliable principles and methods; and
- (d)** the expert has reliably applied the principles and methods to the facts of the case.

# Analyzing Need for Expert Testimony

Identify responses  
that need  
explaining

Consider all  
strategies to  
educate the fact  
finder from voir  
dire to closing

Consider available  
experts

Qualifications

# Expert Testimony

## Provides context

- Places victim's behavior in context of history and events

## Supports victim credibility

- Enables jury to understand victim's perceptions/response

## Dispels misconceptions

- Left unexplained, jurors may rely on myths/misconceptions

# Direct Examination of Expert

FRE 702

Establish qualifications

FRE 703

Use general questions specific to response(s) to trauma

Anticipate questions jury will have or defense will raise

Use evidence-based hypotheticals

# Bases of an Expert

## FRE 703

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.



Establish the victim's experience of the crime with focus on experiential detail

Corroborate victim's disclosure

GOAL:

Recreating the Reality of the Crime

Argue the importance of truth

Educate the judge and jury

## Going Forward

Effectively prepare victim for trial testimony, including cross-examination.

Conduct direct examination of the victim at trial that provides evidence of the victim's experience of the crime and trauma.

Determine whether expert testimony is necessary to further to explain the victim's responses to trauma.

Present effective expert testimony drawing from the victim's testimony and evidence-based hypotheticals.

# Contact Information



Patricia D. Powers, Attorney Advisor



[ppowers@aequitasresource.org](mailto:ppowers@aequitasresource.org)



(202) 569-4230



AEquitas  
1000 Vermont Ave  
Suite 1010  
Washington, DC 20005

Rebecca Campbell, Ph.D.



[rmc@msu.edu](mailto:rmc@msu.edu)



(517) 432-8390



Department of Psychology  
Michigan State University  
316 Physics Road  
East Lansing, MI 48823