



ENHANCING
CONVICTION
INTEGRITY

Achieving Justice at Trial: Direct Examination of Witnesses to Violent Crimes

Patricia D. Powers, JD, AEquitas

Rebecca Campbell, Ph.D., Michigan State University

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, JD

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.

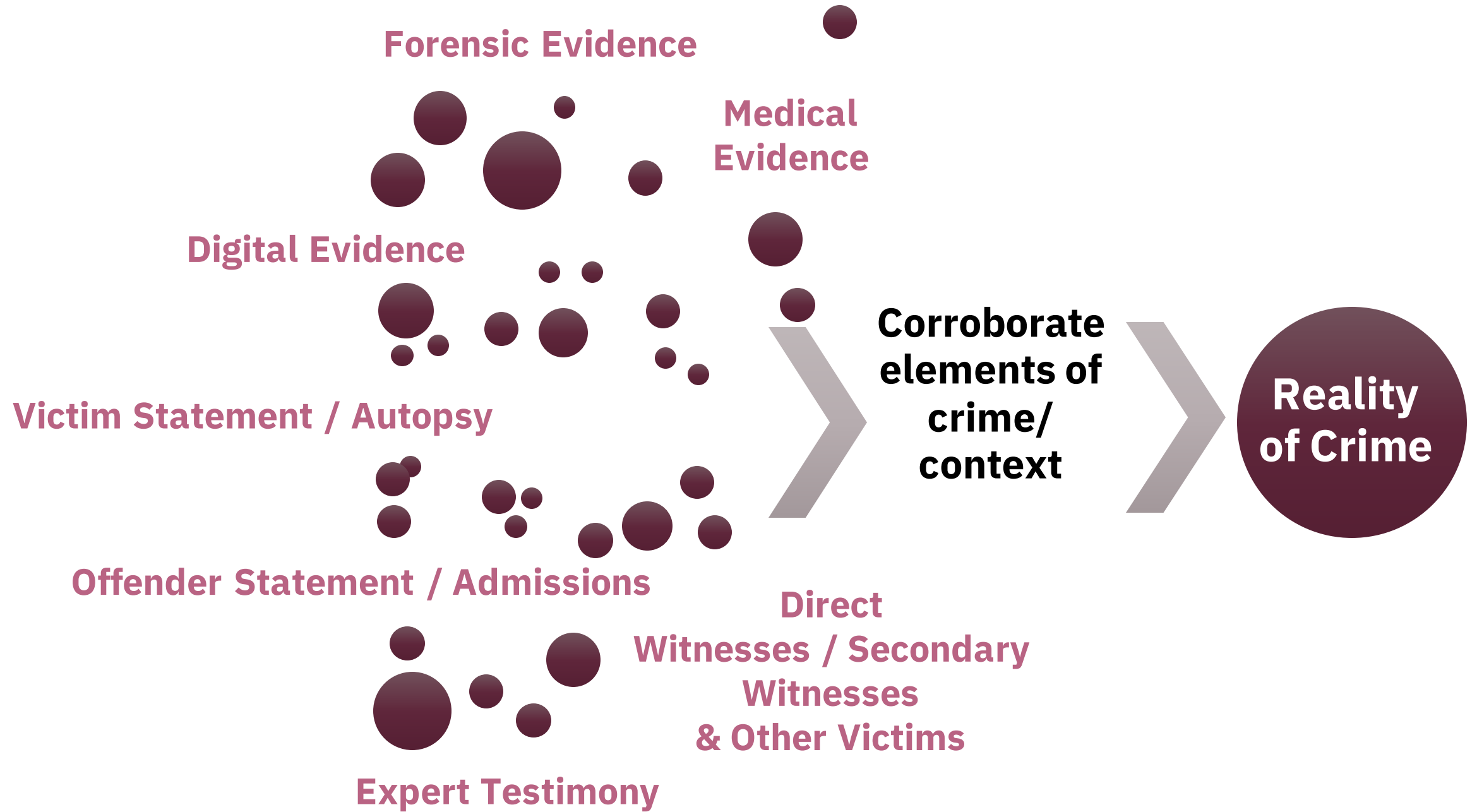
Dr. Rebecca Campbell is a Professor of Psychology and Presidential Advisor on Relationship Violence & Sexual Misconduct at Michigan State University. Dr. Campbell's research examines how contact with the legal and medical systems affects adult, adolescent, and pediatric victims' psychological and physical 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.



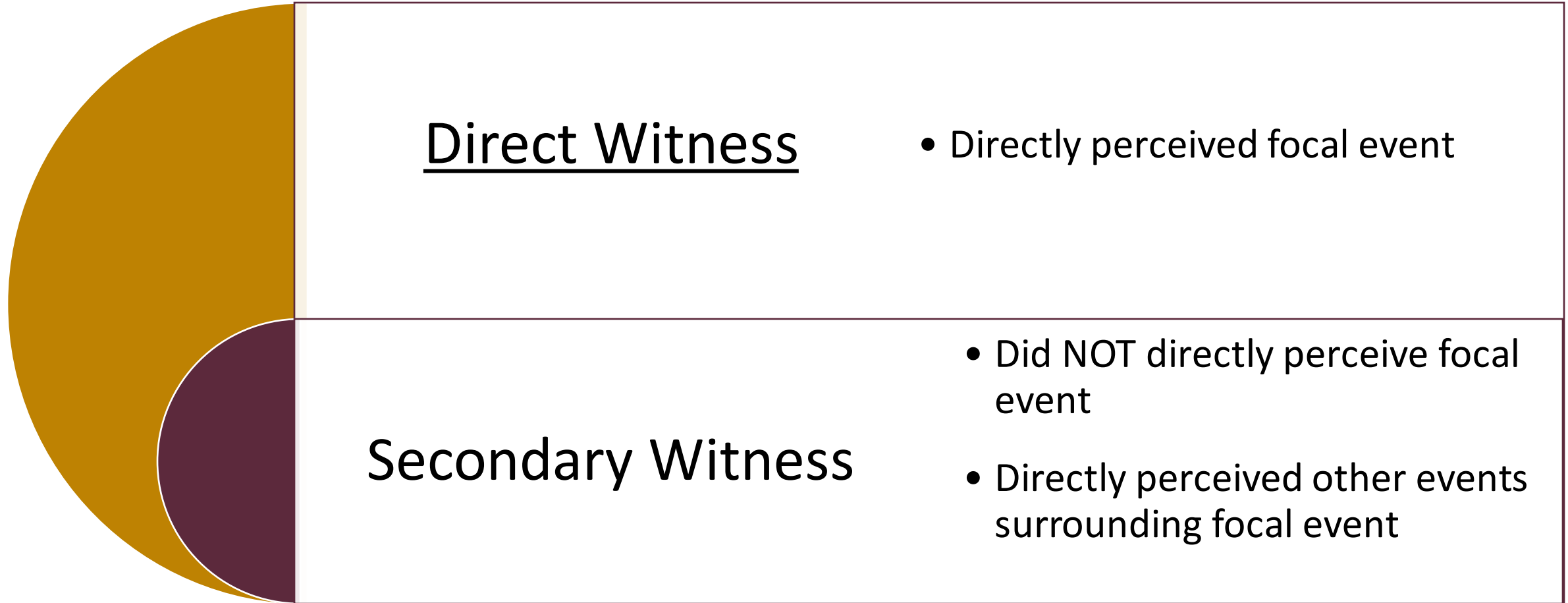
Objectives

- Identify direct and secondary witnesses with relevant information and prepare for their testimony.
- Recognize the importance and sensitivity of preparation and testimony of FRE 404(b) victim-witnesses.
- Conduct direct examination with experience-based questions relevant to the elements and context of the crime.
- Provide trauma-informed support to witnesses throughout proceedings.

Identify Direct & Secondary Witnesses
and Prepare for Testimony



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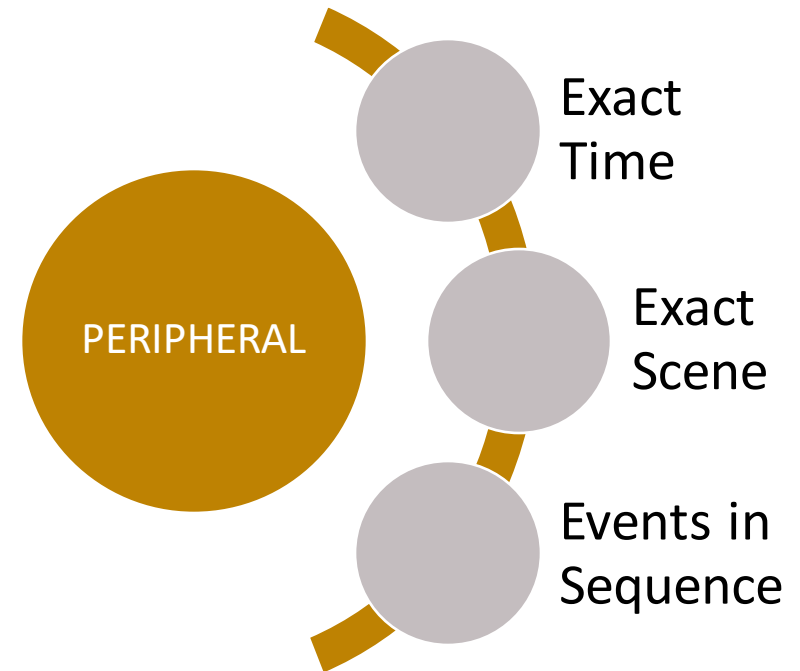
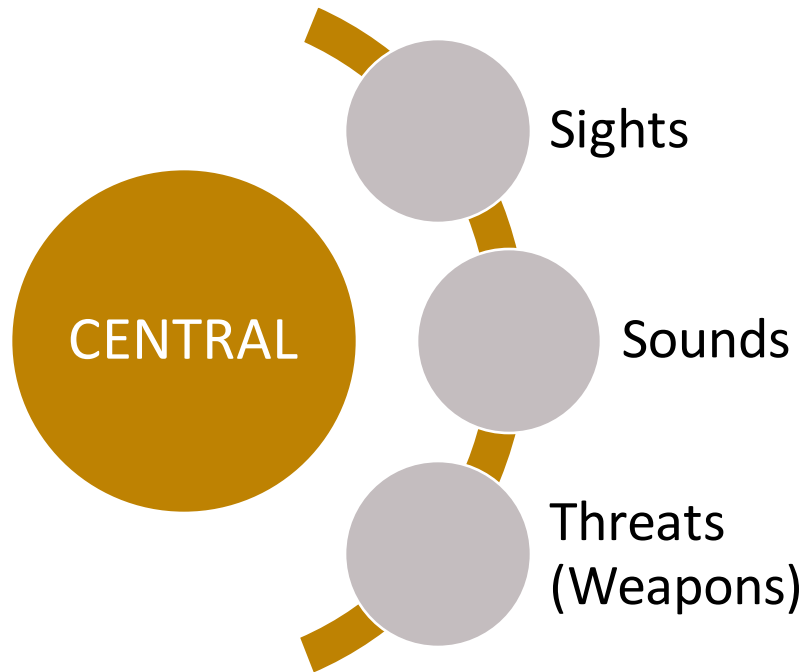
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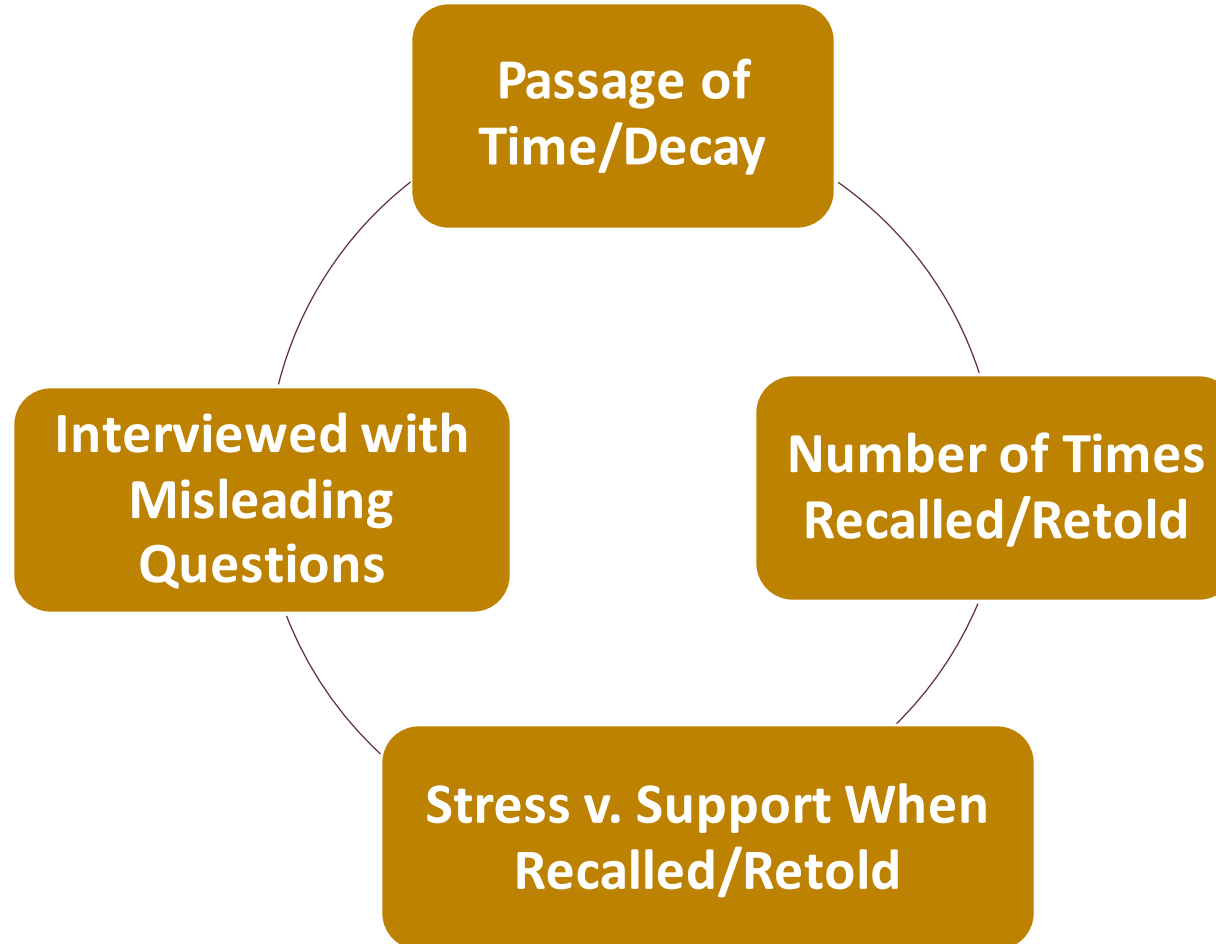
**THESE MEMORIES TEND TO BE ACCURATE & STABLE
OVER TIMEWITH SOME IMPORTANT CAVEATS**

Direct Witness Memories: Central v. Peripheral Information



TEND TO BE ACCURATE & STABLE OVER TIME

Direct Witness Memories: Recall Experiences Affect Accuracy



Direct Witnesses: What Did They Witness?

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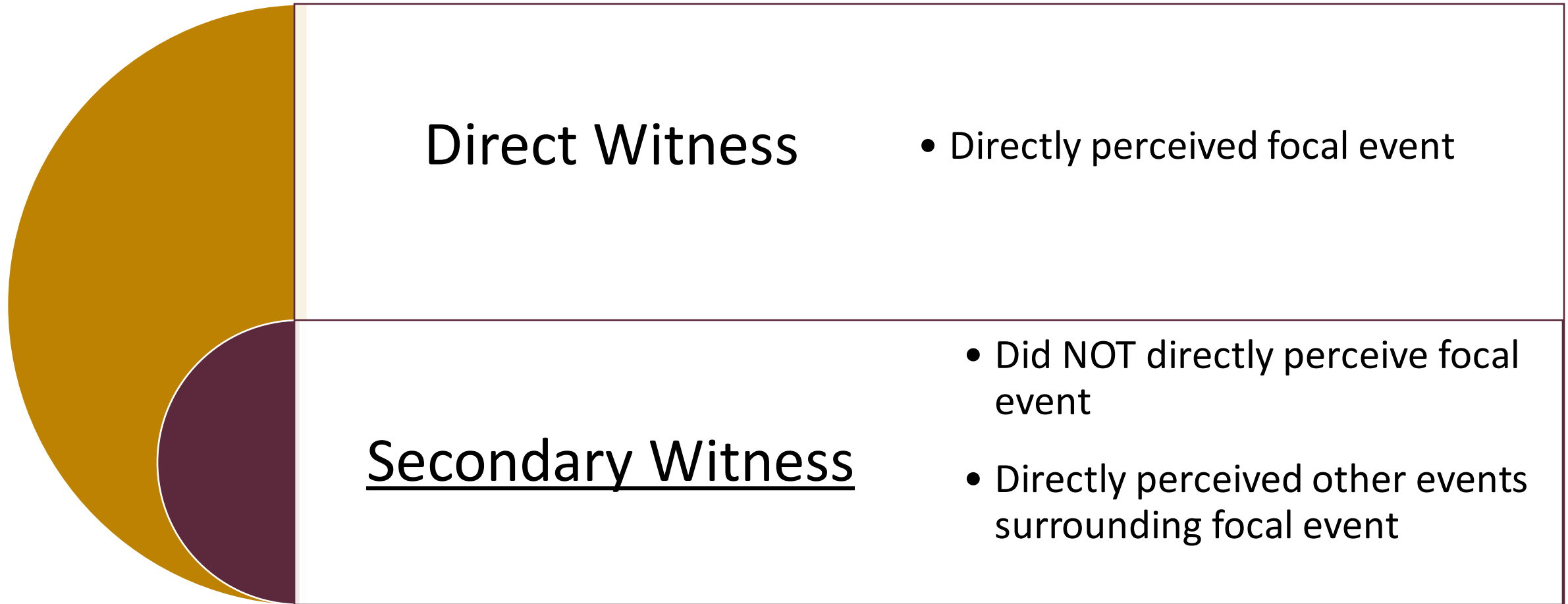
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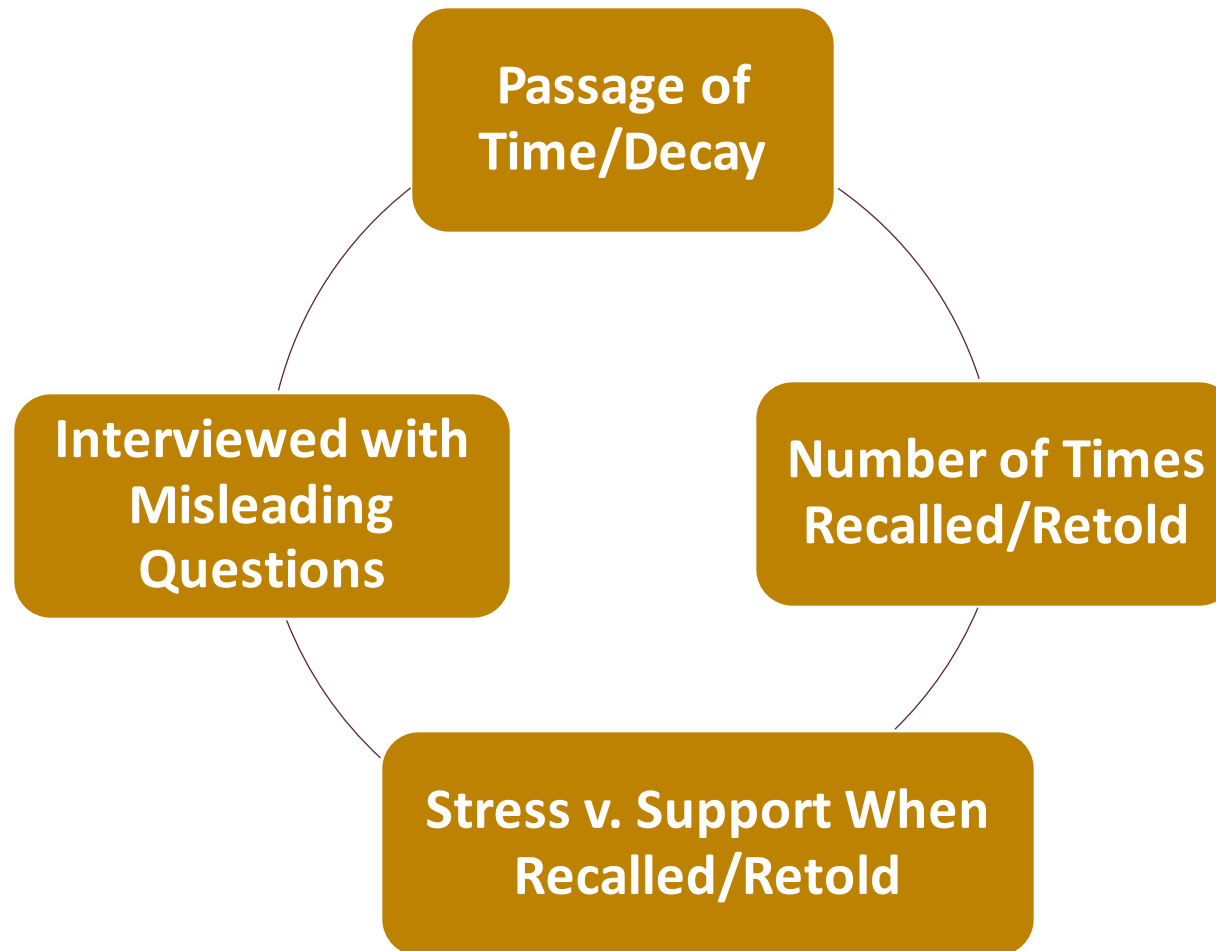
**UNCLEAR HOW ACCURATE
& STABLE OVER TIME**

... ALSO LESS COMMON IN LEGAL CONTEXT

Direct and Secondary Witnesses



Secondary Witness Memories: Recall Experiences Affect Accuracy



Both Direct & Secondary Witnesses: Facilitating Engagement

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.

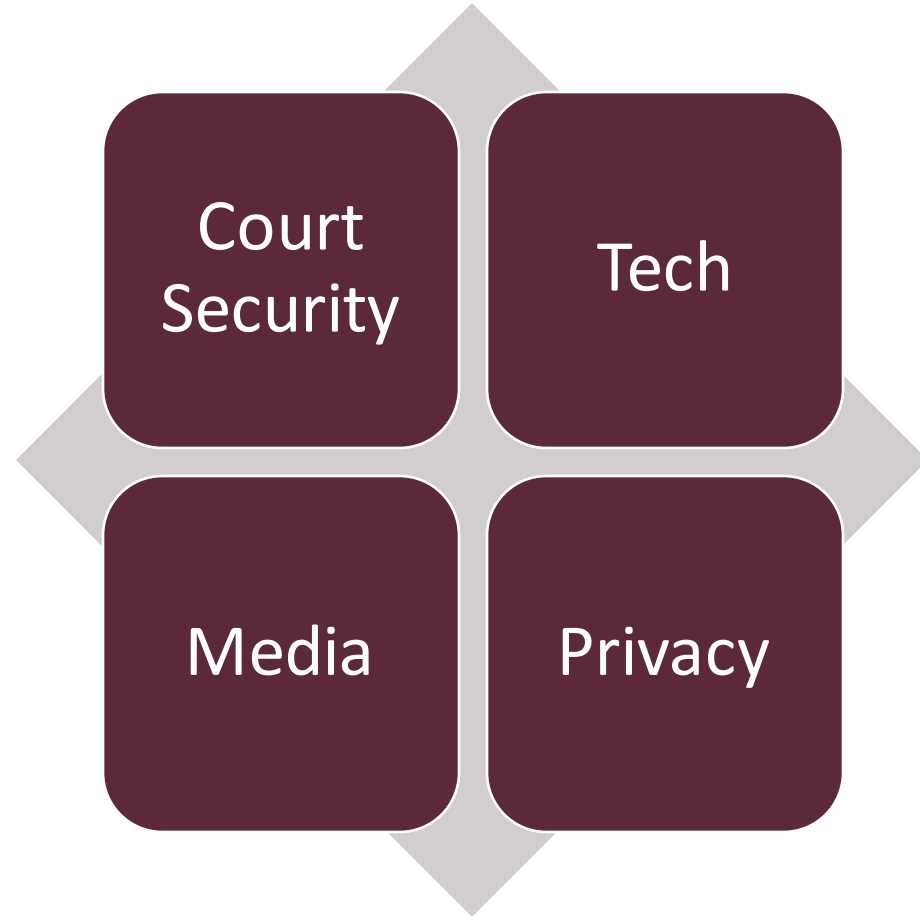
EXPECTATIONS

- 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.

Proactively provide information to witnesses.



Direct and Secondary Witnesses

Direct Witness

Describes sensory details of event: saw, heard, smelled, tasted, touched

- May be probative of victim's disclosure and/or the identity or presence of the offender.
- *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."

Secondary Witness

Describes inference or foundation for inference from an observed fact:

- May be probative of victim's disclosure, traumatic response to sexual assault, timeline
- *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."
- **FRE 404(b) witnesses:** Secondary witnesses who provide information that may suggest similarities in conduct or other relevant evidence

Direct Witnesses to Violent Crimes

Preparing with Direct Witnesses

May have seen, heard or otherwise experienced the crime or a closely related event.

Ask sensory questions to enable witness to access their memories.

Determine if/when the witness has spoken with anyone else and the reason for contact.

Inquire whether the witness has remembered any additional details and the circumstances of their recollection.

Establish the location of the witness in proximity to the event to determine what they were able to see or hear.

Refreshing Recollection Prior to Trial

- Allow witness an opportunity to review prior statement if requested.
- Consider possibility that witness may be asked about their prior statement during cross-examination.
- Advise witness as necessary of certain established facts, *e.g.*, date of crime.
- Ask witness if they recall a time when they contacted/spoke with police.
- Inquire about the circumstances leading up to their contact/ interview with the police.
- What was their emotional state during that time?

Foundation

- Name, length of time in the community, current/ previous employment.
- Recollection of the day in question, including events prior to and subsequent.
- Elicit additional details that the witness can recall, *e.g.*, renting a new apartment, new job, other event.
- “What are you able to tell us?” allows a narrative and removes burden of chronological detail.

Identification

- Establish whether witness can identify defendant, if relevant.
- Was a line up or photographic montage/array presented to the witnesses?
- Did the witness make an identification and initial the selection?
- Can witness articulate what features identification was based upon?
- Prepare for potential of physical changes over the years.
- If appropriate, ask witness to describe circumstance and initial view of the suspect during an earlier time.

Elicit description of experiential details.

What did you
see, hear, smell,
taste, touch?

Sensory

How did you
feel?

Emotional

Physiological

Conduct a Complete Direct Exam

Ask all necessary questions.

Anticipate probative cross-examination and incorporate into direct.

Establish all interview contacts with law enforcement and prosecutor.

If additional / revised information discovered at any time, provide discovery to the defense.

Importance of Detail

- Obtain as much detail as witness can provide.
- Details about what was seen and heard are vital.
 - Establish whether there was any obstruction or impairment in sight or hearing.
- Memory of day, time, surrounding events, and aftermath are also important.
- Determine whether witness recorded/memorialized any part of experience.

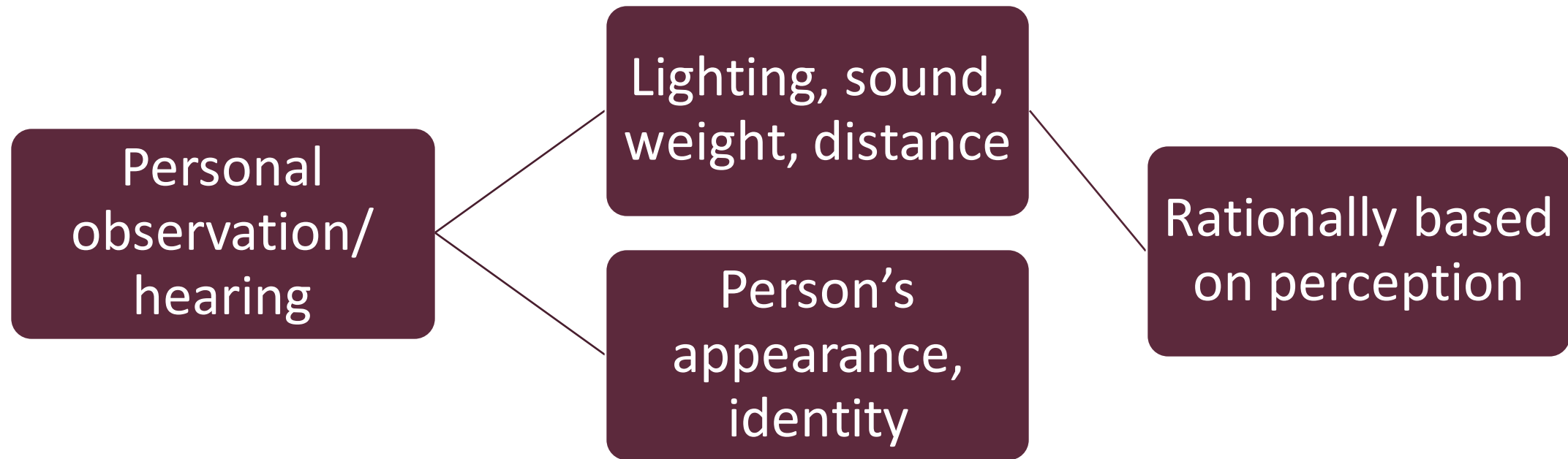
Opinion Testimony by Lay Witnesses

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

Lay Opinion Testimony



Secondary Witnesses

Contextual Evidence

Admissibility of Secondary Evidence

Res gestae

- Events/statements inextricably related to crime

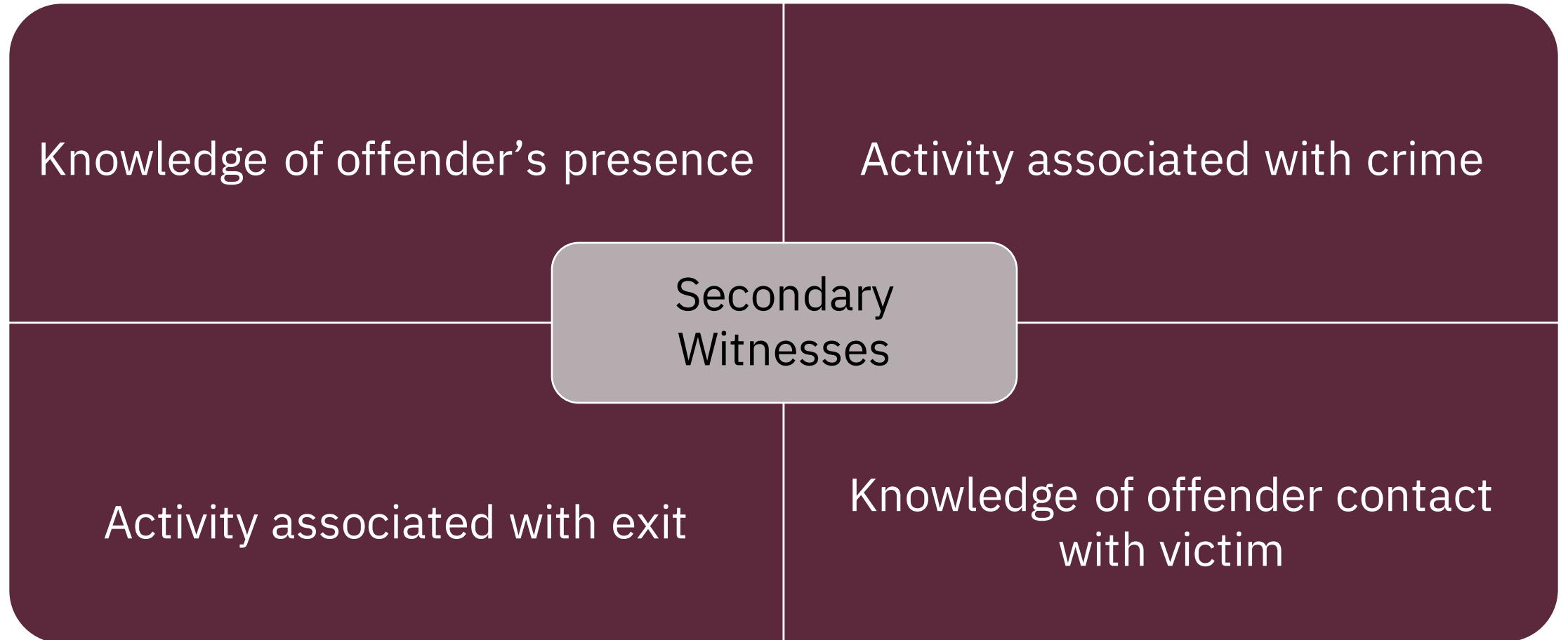
FRE 404(b)

- Evidence proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident and other bases

Other elements of the crime

- Probative of date, evidence of commission of the crime

Secondary Evidence



Secondary Witnesses

- May have observed prior or subsequent activity not initially associated with the crime.
- Determine impact of information on witness: how did they come to form a memory?
 - *E.g.*, “Why does that stand out in your mind?”
- Obtain as much detail as possible.
 - *E.g.*, “Do you recall the victim’s demeanor, any change in attire, openness to conversation?”
 - *E.g.*, What information did you have at that time?

Establish a Foundation: Knowledge of Victim

How long have you known the victim?

Are you acquainted with their usual demeanor/ attire/ social involvement?

Do you recall a time that you saw her during the identified time frame of x?

What, if anything, did you observe or caught your attention?

Did you have a conversation?

What did you say?

Foundation for Contextual Testimony

Prior to event

- Timeline
- Presence of offender
- Presence of victim

After event

- Timeline
- Presence/absence of offender
- Anticipated contact/
contact with victim

FRE 404(b) Witnesses

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.

“Other Acts” Evidence

FRE 404(b)

Motive

Opportunity

Intent

Preparation

Plan

Knowledge

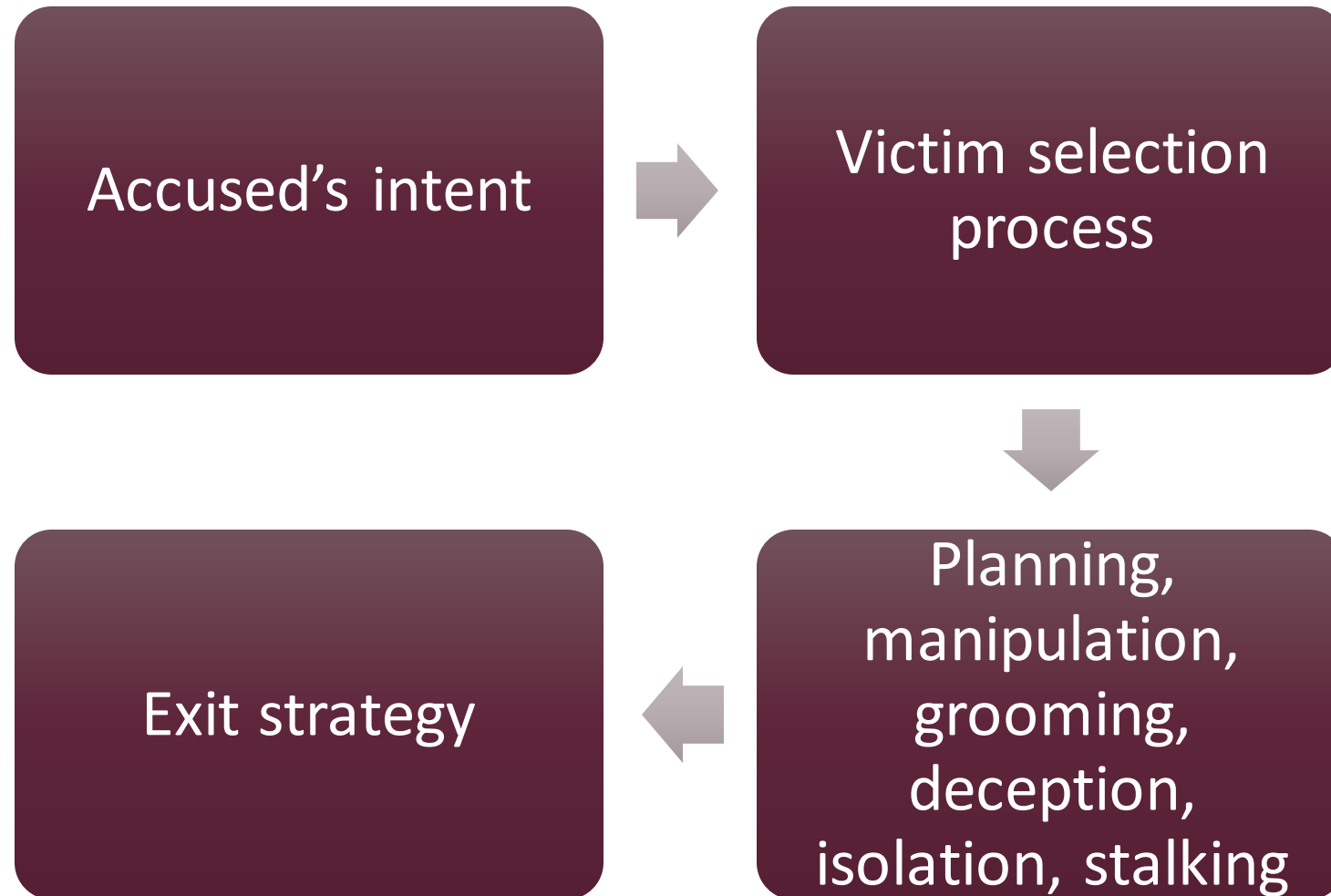
Identity

Absence of
Mistake / Lack
of Accident

Dive Deeper Into Evidence: Analyzing FRE 404(b) Testimony

- Recognize physical and behavioral evidence of predatory conduct.
- Assess evidence of premeditation and planning.
- Did the offender exploit known or perceived vulnerabilities?
- Was offender relying on known social misperceptions involving alcohol and/or drugs?

Predatory Behavior and FRE 404(b)



Broader Perspective for Serial Offending

- Consider that a rapist possibly has done this before, will continue to do this in the future, or both.
- Serial sex offenders frequently assault both victims known and unknown to them, and often exhibit intraserial variations in victim relationship, age, and even gender.
- Offenders do not necessarily follow substantially similar patterns across offenses.

• Rachel Lovell et al., *Identifying Serial Sexual Offenders Through Cold Cases*, LAW ENF'T BULL., May 7, 2020

Pre-Trial: FRE 404(b)

- When litigating FRE 404(b), brief and make offer of proof, if permitted.
- Offer of proof allows the court to know the substance of testimony without bringing the victim to court.
- Ensure that full discovery is provided to the defense.
- Prepare to argue commonalities in conduct and tactics causing victimization.
- Remember that the FRE 404(b) list is not exhaustive: consider other similarities, *e.g.*, use of alcohol, stalking.

Trial Preparation and FRE 404(b)

Interview victim(s)

Determine admissibility of evidence and basis or bases of admission

Identify details that corroborate victim's disclosure or other 404(b) victims

Consider issues: confession or admissions to one rape, strength of individual cases, cautionary instruction

Prior Victims

- Regardless of when these crimes occurred, these witnesses are victims who remain traumatized.
- Approach preparation and direct exam in a trauma-informed manner.
- Offer support throughout the process
- Proactively provide information regarding the offender's status, victim's safety and security considerations

Research on 404(b) Victim-Witnesses

- Experience varies depending on what happened in *their* case.
- If *their* case was still within the statute of limitations (SOL) and they could participate in their own case *AND* another case as a 404(b) witness → double stress, but generally empowering experience.
- If *their* case was beyond the SOL and they could *ONLY* participate as a 404(b) witness → often felt conflicted, frustrated, betrayed, but were still willing to help support the case.

Research on 404(b) Victim-Witnesses

- Court testimony is a reactivation of a traumatic memory.
- 404(b) witnesses want and need the same advocacy support and services as do victims.
- 404(b) witnesses are often highly concerned about their safety and possible retaliation from offenders & their associates.

FRE 404(b) Practice Tips

- Focus on pattern of conduct and allow jury to connect the dots.
- Remember that the court may reconsider admission of FRE 404(b) depending upon develop of evidence at trial.
 - *E.g.*, change in defense
- Offer a cautionary instruction to ensure that the jury considers the evidence for the appropriate purpose: motive, opportunity, intent, lack of mistake or accident, common scheme, or plan.

Going Forward

Identify direct and secondary witnesses with relevant information and prepare for their testimony.

Recognize the importance and sensitivity of preparation and testimony of FRE 404(b) victim-witnesses.

Conduct direct examination with experience-based questions relevant to the elements and context of the crime.

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Contact Information



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