

# Investigating Drug- and Alcohol-Facilitated Sexual Assault

Detective Carlton Hershman (Ret.)  
San Diego Police Department



- Have a new approach
- Understand key issues
- Dynamics of alcohol-facilitated sexual assault
- Why you must follow through
- Late disclosures and why they happen
- Why inconsistent statements are not lies
- What does the jury think?
- Credibility and how it works

- Evidence-based investigations
- What is behavioral evidence
- How does the “pretext” phone call fit into these types of investigations
- Why reconstructing a timeline is crucial
- The “blacked out: defense
- The “consent” defense
- False reporting
- How to get your case issued

85%



# Most Difficult To Work





# “Red Flags”





**Fresh  
Perspective  
AHEAD**

# New Approach

- Stay open-minded
- Believe any “story” your victim tells you until you find out otherwise
- Learn new investigative tools
- Don’t treat these cases like other crimes



# Criminal Investigation Goals

- Discovery of the truth
- Collection of evidence
- Identification of the suspect(s)
- Exoneration of the innocent

ISSUES  
KEY  
Y

# Key Issues

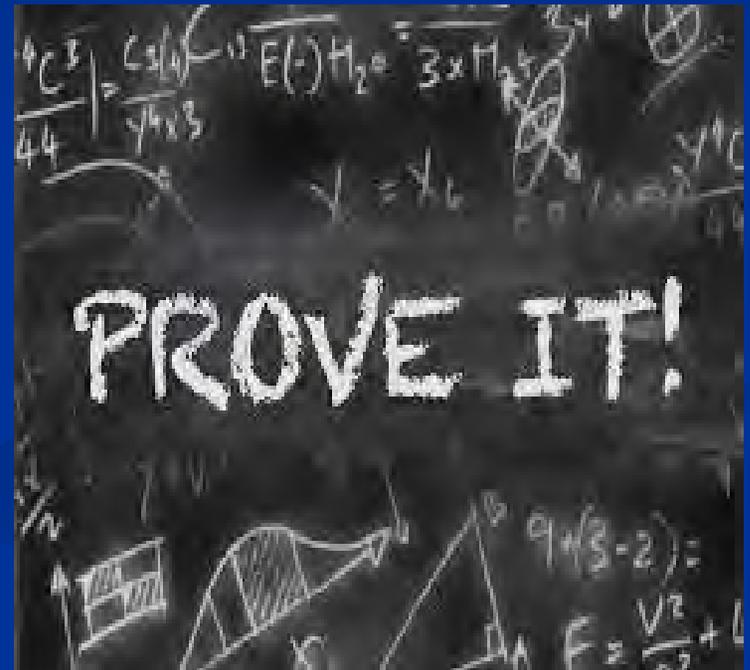
- Perceived lack of evidence
- Understanding this crime
- Failure to investigate
- Failure to prosecute
- Misjudging credibility
- When and how consent is given
- “No jury appeal”

# Sex Crimes Investigations

May not always make common sense

# What Do I Need to Prove?

- Victim did not give consent or legal consent
- Suspect “knew” or “should have known” they did not have consent or legal consent
- Sexual contact of some type occurred



# What Makes This Crime Different?







**He**  
**SAID**



*She*  
**SAID**

 **PICK**  **SIDE** 

 **PICK**  **SIDE** 

# Court of Public Opinion



# SEX CRIMES



# Dynamics of Alcohol-Facilitated Sexual Assault

# What Makes a Case Challenging?

- Credibility of Vic/Wit/Sus
- “Who” is your Vic/Wit/Sus
- Late disclosure
- Illegal activity (drugs/alcohol)
- Lies: Big and small
- Inconsistent statements
- Bad / Sloppy police work



# What Makes a Case Challenging?

- No physical evidence
- No biological evidence
- Identifying the suspect/s
- Unconscious victims
- The “consent” defense
- The “blacked out” defense
- “Bizarre” story
- No jury appeal
- Actions of victim before, during and after S/A

# What Makes a Case Challenging?

- Past behavior
- LE not knowing the law or how it applies
- Social issues
- Court of public opinion
- Social media
  - Drama / Rumor mill
  - Victim's own pictures and texts...

# What Makes an Alcohol-Facilitated Case Challenging?

- Victim's own family & friends make derogatory comments about the victim
- Family & friends blame the victim
- Victim suffers from trauma



# FOLLOW THROUGH



# Following Through

- Part of a “complete” investigation
- Victim and you will have some closure that you did “everything” you could have...
- You may find out your suspect has one or more priors

# Complete Investigation

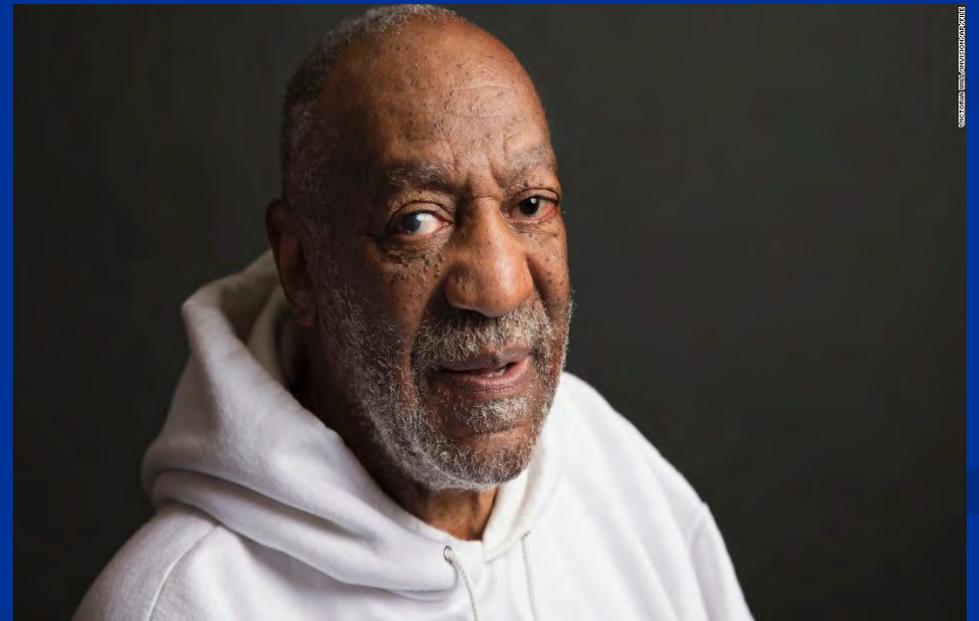
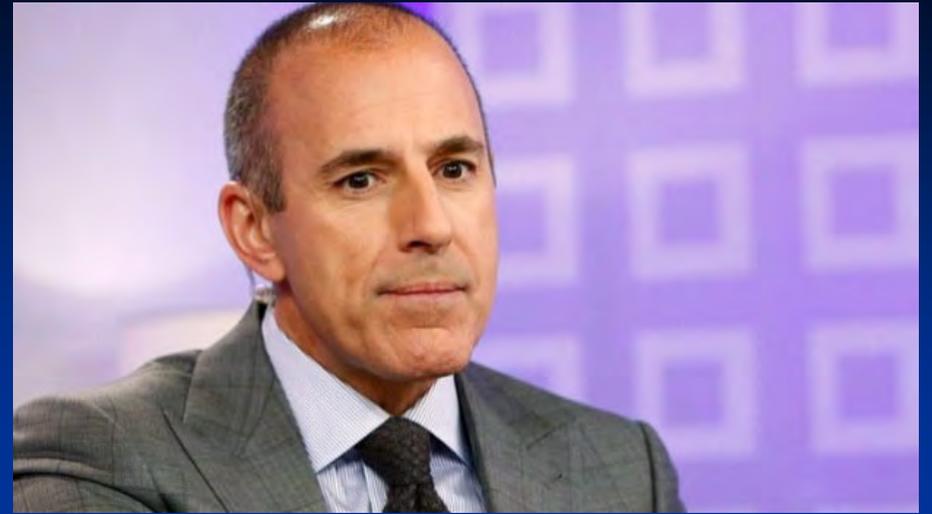
Shortcuts = Sloppy Bad Police Work

**Not following** through and completing a thorough, accurate, factual and detailed investigation, will result in a **false representation** of the facts and what occurred in the case

# “Shortcut” Investigation

Will never be **accepted** as **professional**  
nor **accurate** of the true actions of  
people in the event being investigated

**Document** your case - it may be the first one of a series.



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# Late Disclosures



# Late Disclosures

- Victim was **intoxicated, blacked out, passed out** or **unconscious** and does not know what happened
- Not sure a **crime** even occurred
- Involved in criminal activity (e.g., drugs, underage alcohol, sex work, escort service)
- Victim's **relationship** with suspect
- Embarrassed/Ashamed
- Self-blame

# Late Disclosures

- Victim conducts own investigation
- Will the police believe me?
- Trauma
  - Conduct as trauma-based interview
- Victim very often tells someone immediately (B/F) (911)
- Average 5 – 10 days
- Use expert witness
  - Investigator

# Late Disclosures

- Will the police believe me?
  - #1 issue with LE
- Priorities
  - LE isn't it
  - Interviews, pretext phone calls, court dates, etc...
- “Teach” the jury why late disclosures happen

So why does this happen?

What are they doing?

TM

The image features two large, stylized letters, 'N' and 'M', rendered in a vibrant lime green color. The letters have a thick, rounded, and slightly irregular shape, giving them a hand-drawn or bubbly appearance. They are positioned side-by-side, with the 'N' on the left and the 'M' on the right. In the upper right corner of the image, the letters 'tm' are written in a small, light gray, lowercase font, indicating a trademark.

# Dealing with Late Disclosures

- Let victim know it's not a big deal
- Ask victim “why” they waited...
- Use this to your advantage
- First disclosure witness (FDW) statement will give you a timeline & investigative leads

# Dealing with Late Disclosures

- First disclosure witness (FDW) will corroborate the victim's account
- Find the reason for the late disclosure
- Speak with witness and ask about victim's actions post-assault
  - Behavior & mental state

**CHANGE YOUR  
PRIORITIES**

**AND YOU**

**CHANGE  
YOUR LIFE.**

**IT'S THAT SIMPLE.**

ZERODAYS.COM

# Priorities

- School
  - Term paper
  - Test
- Work
- Financial
- Health
  - Pregnant
  - Other health issues

# Priorities

- Relationship(s)
  - Boyfriend
  - Spouse
- Family / Friends
- Life Plans
  - Graduation
  - Wedding
- Do I want the police involved in my life or move on?



# Relationships

- Family member
- Friend(s)
  - How close / How long?
  - Where does V rank?
- Status
  - This works both ways
- Employment
  - Boss / Supervisor
  - Coworker



# What Victims are Often Scared to Admit

- Drugs used
  - Legal / Illegal
- Location of assault
  - Some place they were forbidden to be
- Bad behavior
  - Dirty dancing
  - Sexual contact with others
- What sex acts committed
  - Sodomy
  - Oral copulation

# What Victims are Often Scared to Admit

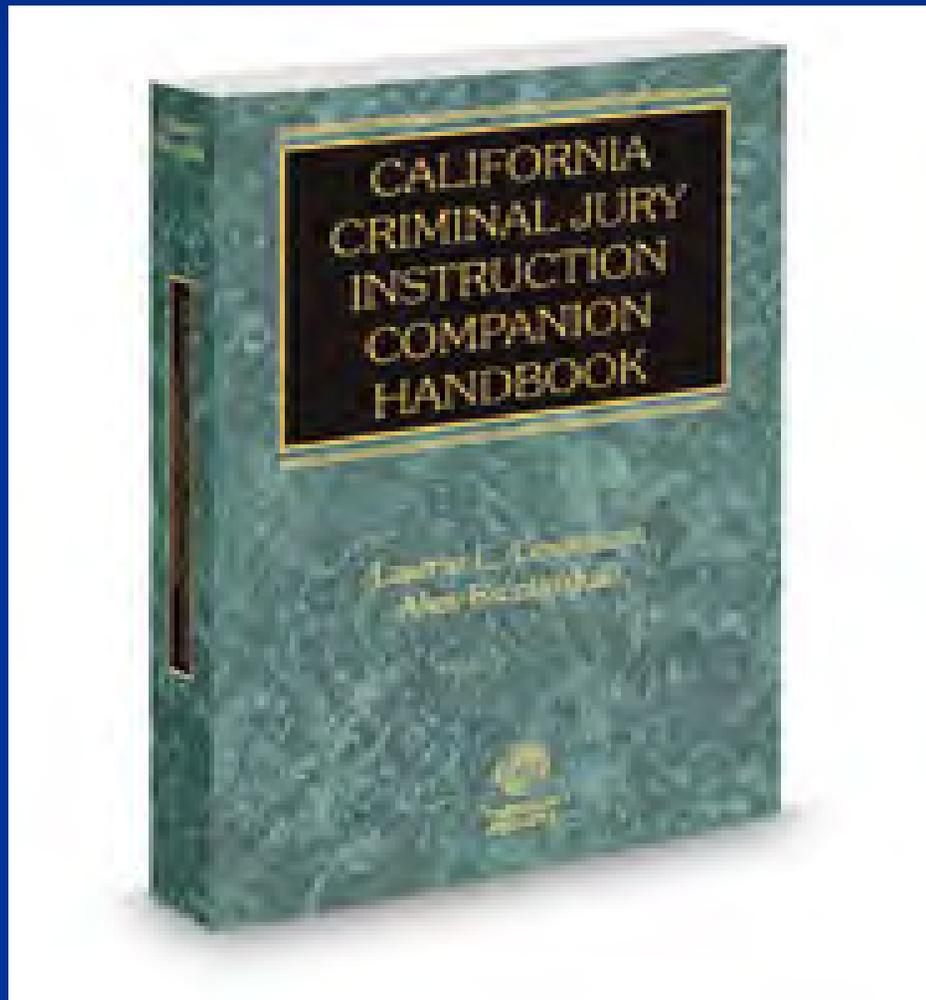
- Who they were with
  - Relationships
    - Boss / Ex-boyfriend



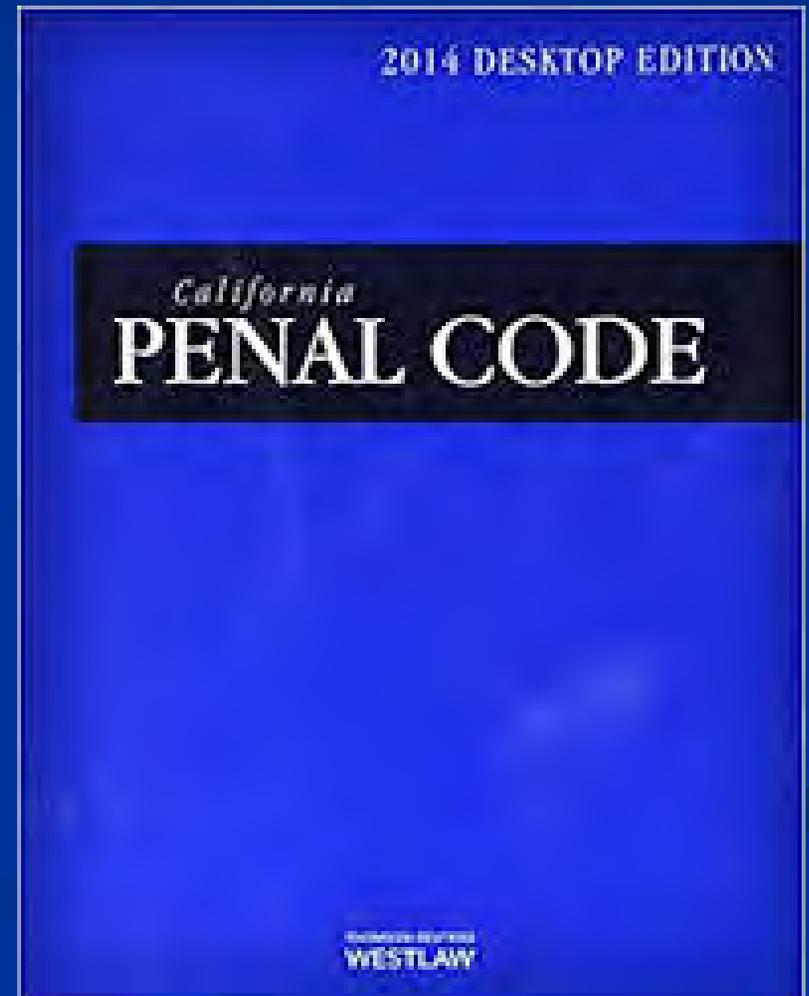
Can you prove it?



# Jury Instructions



# Criminal Code



# Case Not Issued



No  
evidence



**EVIDENCE IS NOT ENOUGH**



# Issues Surrounding Non-Issued Cases

she lied





Make it very clear the reason(s)  
why the case is not being issued

# WWAJT?



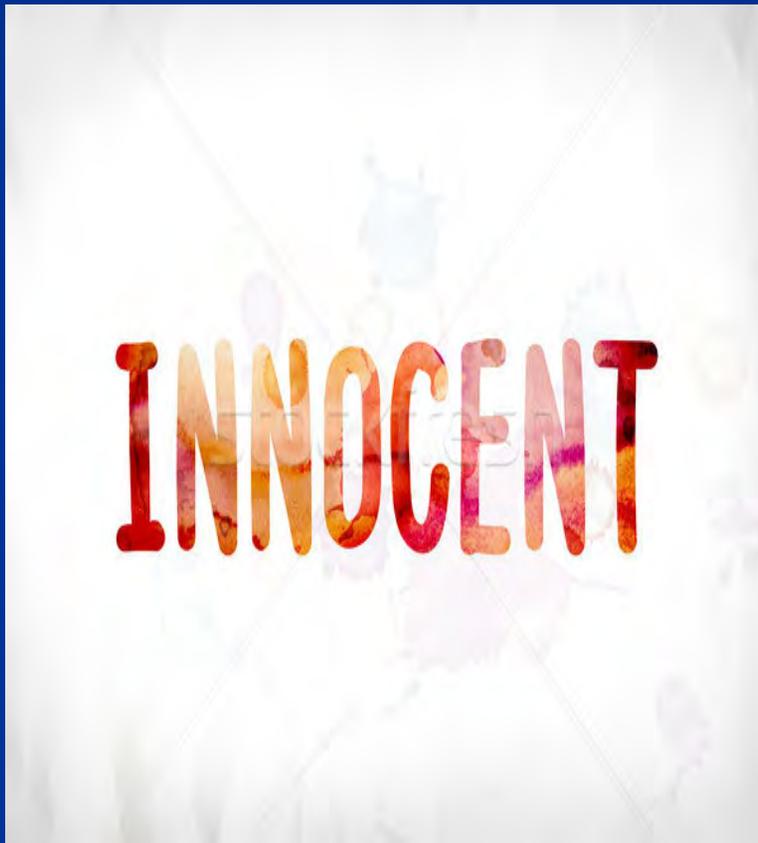
- Start your investigation by trying to convince **12 jurors** not just one prosecutor
- This should be your goal from the beginning!

“What would a juror think?”

# What Does the Jury Think?

- You can't be sexually assaulted if you are **simply intoxicated**
- Victim must have some kind of **motive** for coming forward
- This is about “**regrettable**” sex...
- Revenge!
- He doesn't look like a **rapist**
- This case doesn't make sense

# Versus



for which

to be best in a

point of view.

**Credibility** [ˌkrɛdɪˈbɪləti]

quality of being

believable or true

established reli

is thol

# Intoxication & Sexual Assault

When the victim of a sexual assault is **intoxicated**, the **investigation** and **prosecution** are **complicated** by two significant issues:

- 1) **CREDIBILITY**
- 2) **CONSENT**

These are **always issues** in sexual assault, but are grossly **magnified** with **alcohol**.

# CREDIBILITY

Intoxication makes the victim vulnerable to attack.

Intoxication amplifies stereotypes and misconceptions that may be held by the investigator, district attorney and the jury.

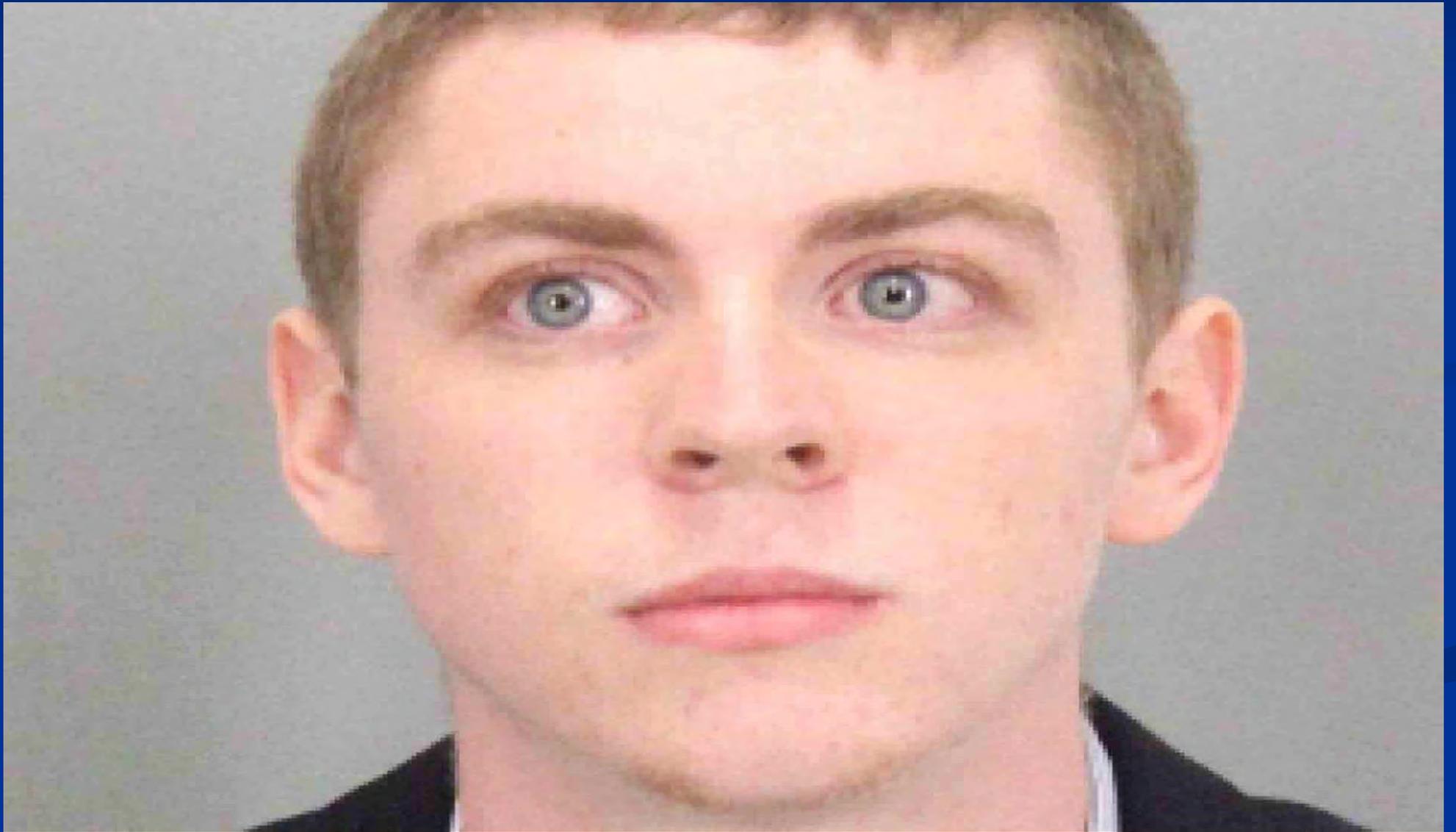
# CREDIBILITY

- Works both ways for the **victim** and **suspect**
- Most likely, your victim isn't **perfect!**
- Most likely, your suspect is **not a criminal**
- Most intoxicated sexual assaults are by males who do not have a **criminal record** and most likely will have **good standing** in the community
- This is a very important part of your investigation (don't overlook it!)



**Alcohol** is used as a weapon  
**against** the victim, but it is  
an excuse for the suspect.

# Brock Turner



**“Alcohol is irrelevant.”**

# Chanel Miller



for the first time we were hearing from

# CONSENT

THE DIFFERENCE BETWEEN

SEX

&

RAPE

All sexual assault cases have the **element** of **consent**, which has to be proven or disproven. Did the suspect have consent??

The **jury** has to consider this **element** even in stranger / serial cases.

# What Does the Law Say?

- When a person is prevented from resisting by any **intoxicating** or **anesthetic substance** or any controlled substance and this condition was **“known”** or **“reasonably should have been known”** by the accused
- Victim cannot give **“legal”** consent

# Three Types of Consent

- **Did not** give consent
  - Force / Fear
- **Unable** to give consent
  - Severely intoxicated / Unconscious / Asleep
- **Could not** give “legal” consent
  - Severely intoxicated / Unconscious / Asleep
  - Underage / Child molest
  - Mentally ill
  - Prisoners / Persons in custody

Consent – It's not just saying  
“Yes”

It's not just what they say, it's  
also what condition they are in.

# CONSENT

Consent is the #1 issue in sexual assault

Why?

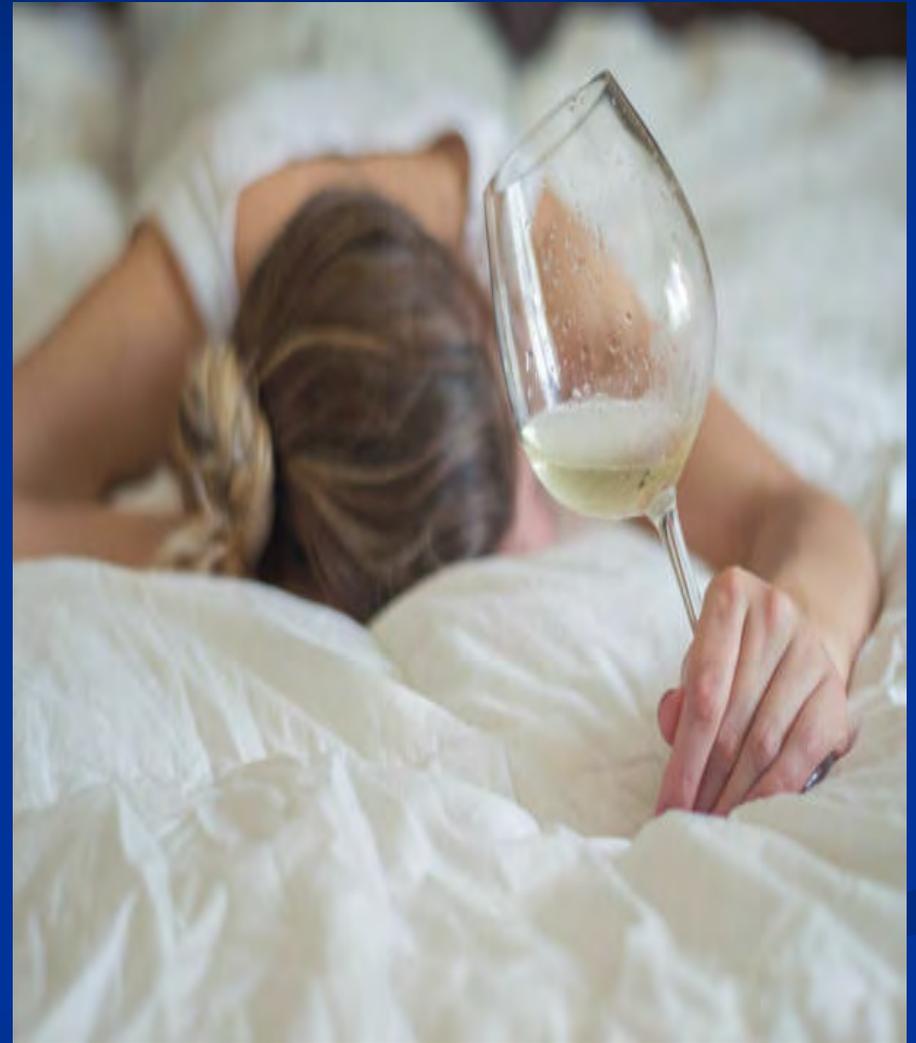
*Actual* and *reasonable* belief in consent is an absolute defense to the charge.

This defense doesn't happen in any other crime. Many investigators do not know how to overcome the “*consent defense.*”

# CONSENT

“Sober”	<u>Can</u> give consent
“Intoxicated”	<u>Depends</u>
“Drunk”	<u>Cannot</u> give consent
“Unconscious”	<u>Cannot</u> give consent

# Intoxicated / Unconscious Victims



Intoxicated / unconscious victims affects consent. It lets the defense write the script and tell the story:

- 1) “Blacked out” versus “Passed out”
- 2) Actual vs. Legal consent
- 3) “Did the victim give consent without knowing it?”



Have you ever asked what you  
thought was a simple question?

**Detective:** *“So how intoxicated do you think you were?”*

**Victim:** *“I wouldn’t say I was intoxicated. I was tipsy, but not tipsy tipsy. You know what I mean?”*

**Detective:** *“What does tipsy tipsy mean to you?”*

**Victim:** *“You know...tipsy tipsy not tipsy tipsy tipsy ...you know what I mean?”*

**Detective:** *“So you were on your way to being drunk?”*

**Victim:** *“No, I wasn’t four tipsys...that would be drunk. I was only one tipsys...you know what I mean?”*

**Detective:** *“So you wouldn’t be able to drive a car?”*

**Victim:** *“Oh, that would be five tipsys...”*

# Use the Word “Drunk”

- When you use the word “**Drunk,**” everyone knows and understands what you mean.
- The drunk person is past the “**good time**” phase.
- A person can **relate** this level to themselves.
- Being “**intoxicated**” means **several** different things, has **several** different **levels** and often is confused with a **scale** or **point system** like in DUI cases.
- All scales are different:
  - E.g., my “4” might be your “8”

# Contesting the “He Said, She Said” Defense and the Value of Pretext Phone Calls

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EVIDENCE

# Evidence

- Physical / Biological (injuries, DNA, toxicology)
- Medical forensic exam findings
- Pictures / Videos
- Cell phone (text messages, cell tower location)
- Victim / Witness Testimony
- Suspect's statement(s)
- Pretext phone call(s)
- Social media
- Expert testimony
- Behavioral evidence\*\*

# Behavioral Evidence

- “Forensic Victimology”
- Explain the **actions** of your victim, witnesses and suspect - **before, during** and **after** the sexual assault.
- This type of **evidence** is often overlooked, but is a very **important part** of your investigation and prosecution.
- Become an **expert**...you probably already are one!!



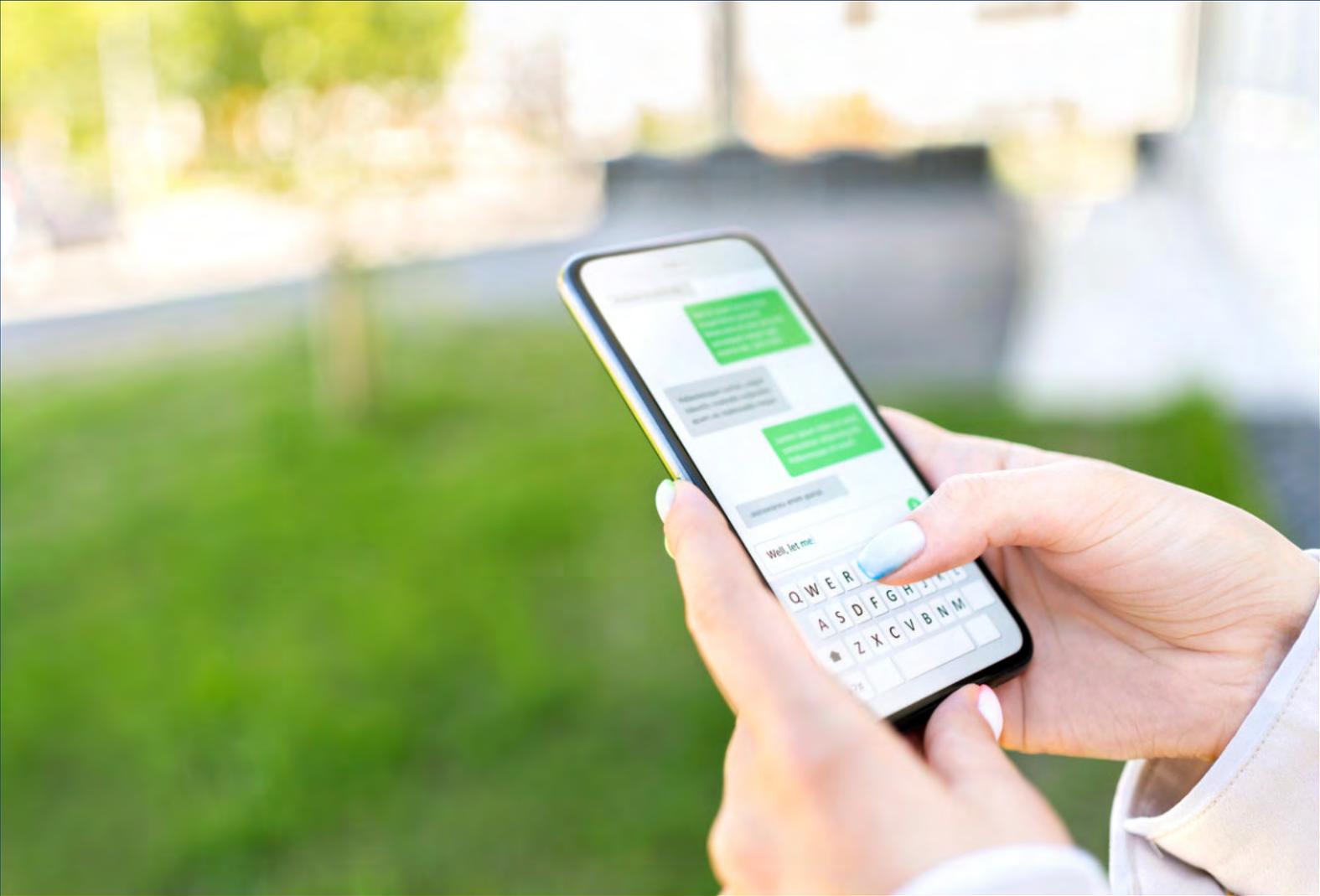
# Pretext Phone Call





# DIGITAL EVIDENCE





# Digital Evidence

- Email
  - No expectation of privacy
  - Can connect email address to person / computer
- Text
  - No expectation of privacy
  - Can connect phone number back to person
- Social media
  - No expectation of privacy
  - Instant Messenger

# Social Media

- Victim, witnesses, & suspect
- Information dealing with your case
- Pictures
- Do not need warrant
- Check ASAP!
- Find possible new victims, witnesses, & suspects



# Reconstruct the Timeline



# Timeline

- Conduct a detailed victim interview
- Narrow down when blackout occurred and/or level of BAC
- Ask witnesses
- Check cell phone activity
- Pictures / Videos!!



# Timeline

- Conduct a detailed suspect interview
- Narrow down when blackout occurred or level of BAC
- Ask witnesses
- Check cell phone activity
- Pictures / Videos



# Determine Approximate BAC

## Blood Alcohol Concentration / Content

How much alcohol is in your system compared to how much total blood volume you have

**This is not an exact science!**

But you can get close...

# Do the Math

- Take amount of drinks victim had per hour
  - Type & size
- Consider the “determining factors”
- Use approximate blood alcohol percentage chart
- *“The last thing I remember...”*
- At what time did your victim lose his/her memory?? (Narrow down the time frame)

# Determining Factors

- Height
- Weight (the more you weigh the more you can drink)
- Food (type)
- Activity (type)
- Gender (females process alcohol faster)
- Age (older is better!!)
- Race (Asian / Native American)
- Tolerance (comes with practice)

# Approximate Blood Alcohol Percentage

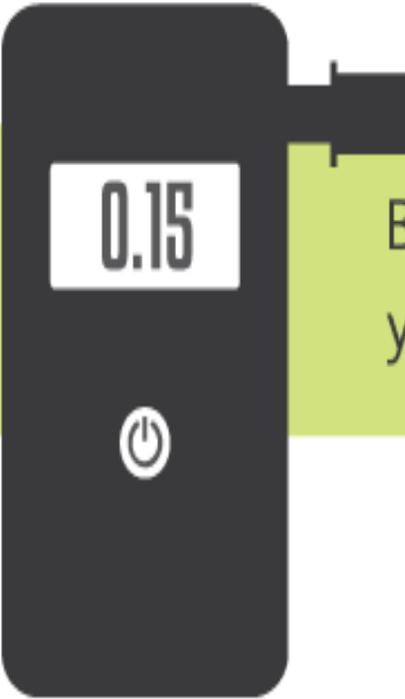
## Man

## Woman

Drinks	Body Weight in Pounds								Drinks	Body Weight in Pounds								Influenced
	100	120	140	160	180	200	220	240		100	120	140	160	180	200	220	240	
1	.04	.03	.03	.02	.02	.02	.02	.02	1	.05	.04	.03	.03	.03	.02	.02	.02	Possibly
2	.08	.06	.05	.05	.04	.04	.03	.03	2	.09	.08	.07	.06	.05	.05	.04	.04	
3	.11	.09	.08	.07	.06	.06	.05	.05	3	.14	.11	.11	.09	.08	.07	.06	.06	Impaired
4	.15	.12	.11	.09	.08	.08	.07	.06	4	.18	.15	.13	.11	.10	.09	.08	.08	
5	.19	.16	.13	.12	.11	.09	.09	.08	5	.23	.19	.16	.14	.13	.11	.10	.09	Legally Intoxicated
6	.23	.19	.16	.14	.13	.11	.10	.09	6	.27	.23	.19	.17	.15	.14	.12	.11	
7	.26	.22	.19	.16	.15	.13	.12	.11	7	.32	.27	.23	.20	.18	.16	.14	.13	
8	.30	.25	.21	.19	.17	.15	.14	.13	8	.36	.30	.26	.23	.20	.18	.17	.15	
9	.34	.28	.24	.21	.19	.17	.15	.14	9	.41	.34	.29	.26	.23	.20	.19	.17	
10	.38	.31	.27	.23	.21	.19	.17	.16	10	.45	.38	.32	.28	.25	.23	.21	.19	

**(Drinks Consumed Over 1 Hour)**

# WHAT CAUSES BLACKOUTS WHEN DRINKING?



0.15

Blackouts typically happen when your BAC is 0.15 or higher

Drinking on an empty stomach, your height, weight, and metabolism may affect blackout risk



Don't forget the burn off rate!

.02% an hour

# Burn Off Rates - Why They Are So Difficult

- What was the time of day it was administered?
- Tolerance of the individual
- What other substance(s) onboard?
  - Alcohol
  - Other medications
- What's the purity?
- What's the dosage?
  - You will never know!!

# Cell Phones & Videos



# Beginning to End



# Videos from Cell Phones and Cameras



**“Knew”** or **“should have known”** victim  
was unable to give consent?

**“Should have known”** is easier to prove

# DEFENSES

- Consent #1 defense
- Diminished capacity
  - I was drunk also
  - Blacked out
- Misidentification
  - Some other person committed the crime
- Crime did not occur
  - Elements are not present
- They are false reporting

# Blacked Out Defense

- Show how suspect was able to function
- Cognitive functioning is severely impaired or absent (prove it wasn't)
- Just how well was the “suspect” functioning?
- Diminished capacity is not a “legal” defense, but is a concern in front of the jury



one drink  
two drinks  
three drinks  
four drinks  
five drinks  
six drinks

# Five Beers

- Not the same for everyone
- *“Five beers doesn’t make me drunk.”*
- *“I wouldn’t pass out after five beers.”*
- Explain why everyone is not the same



# How Did I Get Drunk?

Victim surpassed their three beer limit

“Keeping up” or “catching up” with friends

# How Did I Get Drunk?

Victim mixed alcohol with an anesthetic

# How Did I Get Drunk?

Victim experimented with new drink(s)

1 Shot = 1 Beer?

1 Long Island Ice Tea = 1 Glass of Wine?

# What's the Truth?

12 ounces of beer

5 ounces of wine

1.5 ounces of  
hard liquor



- Which drink will get you drunk **faster**??
  - Glass of wine
  - Shot of liquor
  - Beer

# Why Do People Blackout?



**Rape Drugs are out there.**



**Are they in here?**

# Date Rape Drugs



# Victims Often Feel They Were Drugged

- San Diego Police Lab had 2 positive test for GHB in the past 12 years...
- Makes victims look better than saying they had too much to drink.



# Why Low Detection Rate?

- Naturally produced (GHB)
- Sample is taken late due to delayed reporting
- Victim doesn't initially disclose about voluntary use



# Do the Symptoms Fit?

- Reconstruct the timeline
- How the victim reacted before and after the suspected dosage
- Has this ever happened to them before?
- Determine if there is a mixture
- Learn the symptoms

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