

# COMPETENCY, CAPACITY AND CONSENT

UNDERSTANDING THE THREE C'S  
IN THE CRIMINAL JUSTICE SYSTEM

IN THE COURTROOM

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NAPSA 30<sup>TH</sup> ANNUAL CONFERENCE  
DENVER, COLORADO

# PRESENTERS

- Elizabeth Dunphy Farris  
Legal Counsel  
Hampden (MA) District Attorney  
[beth.farris@state.ma.us](mailto:beth.farris@state.ma.us)
- Julie Howley Westwater  
General Counsel  
Disabled Persons Protection Commission (MA)  
[Julie.Westwater@state.ma.us](mailto:Julie.Westwater@state.ma.us)

# AGENDA

- Introduce jurisdictional structure for MA agencies that apply “The Three C’s” in criminal justice multidisciplinary investigations
- Identify basic legal principles for “The Three C’s”: Competency, Capacity and Consent
- Explain legal principles as they apply to civil proceedings associated with persons with disabilities as victims and witnesses of abuse or crime(s)
- Explain legal principles as they apply to criminal proceedings associated with persons with disabilities as victims and witnesses of abuse or crime(s)
- Strategies for “other” evidence to meet burden(s) of proof to overcome potential obstacles with “The Three C’s”



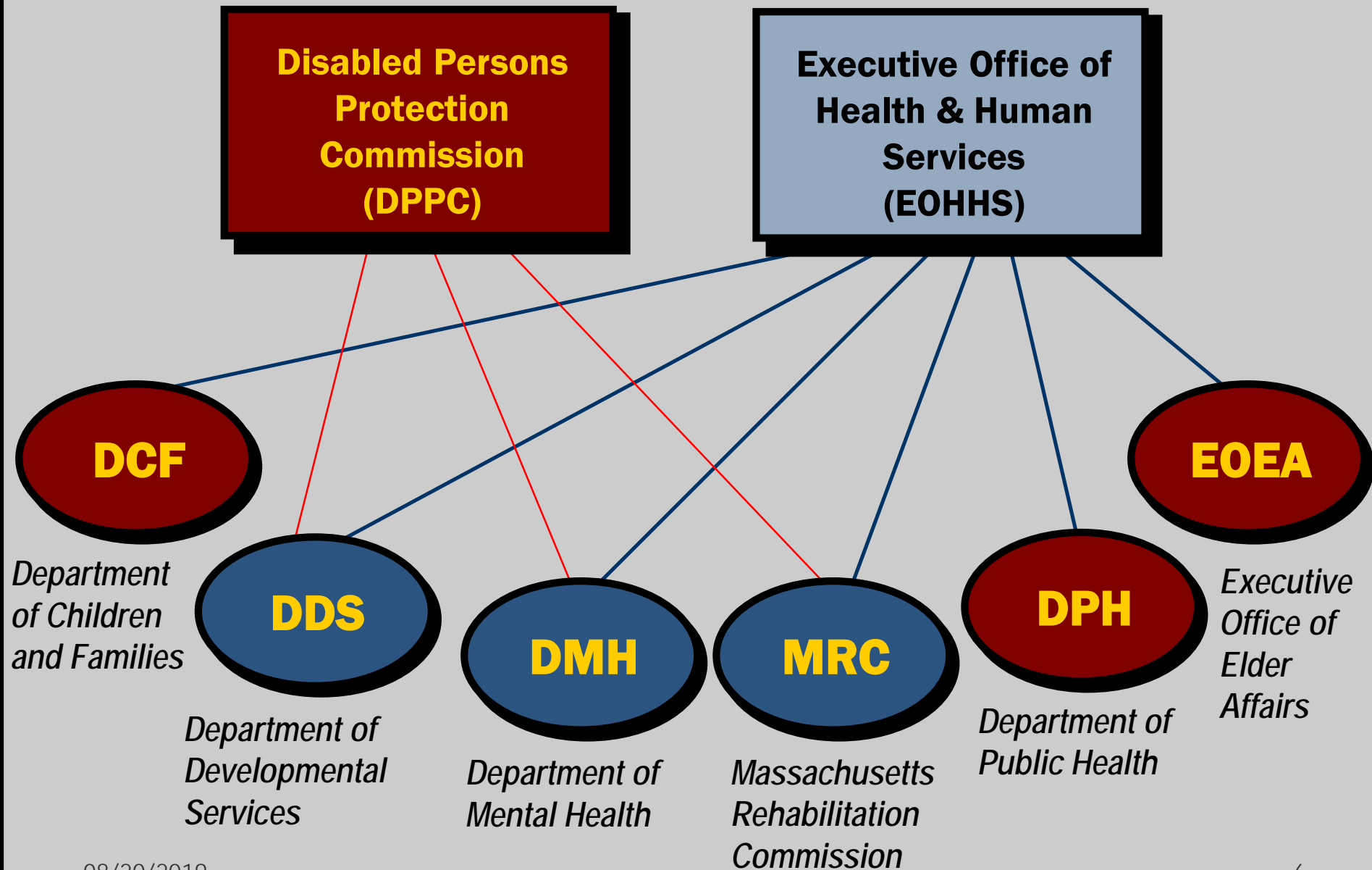
*"Building Partnerships"*  
*Working Together to Protect*  
*Persons with Disabilities*



# CREATION OF MA BPI

To effectively address abuse and crime(s) committed against persons with disabilities using a multidisciplinary approach to ensure equal protection(s) and equal access to the criminal justice system

# MA Government Structure & Oversight



# MA LAW ENFORCEMENT AGENCIES

- Attorney General
- District Attorneys (11 Districts)
- State Police
  - Patrol Highways, State Parks
  - State Police Detective Units
  - Attorney General
  - District Attorney
  - Specialized Units
  - Disabled Persons Protection Commission
- Municipal Police (local) Cities and Towns

# BENEFITS TO BUILDING PARTNERSHIPS

- Improved communication and coordination
- Increased reporting, criminal investigations and prosecutions
- Improved civil and criminal investigations
- Improved data collection and documentation
- Institutionalized systemic improvements
- Less trauma for victims and families
- Enhanced access to the criminal justice system for victims and witnesses with disabilities



How do we  
assist victims  
and witnesses  
with disabilities  
in a court  
setting?



One of the biggest challenges is educating the courts about the ABILITIES, not the DISABILITIES, of victims or witnesses who have a disability...

Let's talk about:

## *The Three C's*

# THE THREE C'S

Introduicing theBasic Legal Principles of:

- Competency;
- Capacity; and
- Consent

*Privilege and Confidentiality too!*

# COMPETENCY

- Conclusion of law
- Defined as to type of hearing
  - Civil – petition(s) for protective services
  - Criminal – victim, witness or accused
- Defined as to court of jurisdiction
  - Probate/Family Courts
  - Trial Courts
- May involve involuntary examination of crime victim or witness by expert (court-ordered)

# PRESUMPTION FAVORS COMPETENCY

Every witness is *presumed “competent to testify”*, unless it can be shown that :

- *the witness does not have personal knowledge of matters about which s/he is to testify;*
- *s/he does not have capacity to recall;*  
*or*
- *s/he does not understand duty to testify truthfully.*

# RELEVANT FACTORS

The witness's:

- appearance
- demeanor
- manner of testifying, and
- the nature and character of the testimony.

# COMPETENCY V. CREDIBILITY

- The “competency” of the witness **AT THE TIME OF THE CRIME** testified about would go to **CREDIBILITY**; which is always a question of fact for the jury;
- The “competency” **AT THE TIME OF TESTIFYING** in court would go to **COMPETENCY AS A WITNESS**, and as a general rule the competency of a witness is a question of law for the court and not for the jury.

## BOTTOM LINE ...

Where the evidence does not prove that the witness was *“incompetent”* as a matter of law at the time of testifying, he is *“competent”* to take the witness stand; questions resting on issues of fact (e.g., mental state, ability to recall) are left to the determination of the jury.



# CAPACITY

- Question(s) of Fact
- Encompasses personal characteristics of an individual that assist/deter “understanding”
- Defined as to purpose of legal proceeding

## TO PUT IT ANOTHER WAY ...

**Capacity** involves evidentiary fact(s) produced for factfinder;  
**Competency** involves legal conclusion by factfinder from evidentiary facts of capacity presented

# QUESTION INVOLVES ...

Whether a person possesses sufficient resources

- *intellectual,*
- *emotional,*
- *social, or*
- *psychological*

to determine whether to act

# HOW DO WE PROVE CAPACITY?

Evidence, including circumstantial inferences, may include

- Direct testimony ( *i.e.*, IQ, education level, employment history, independent residence, control over finances)
- Evaluation of responses (i.e., demeanor when speaking, difficulty in processing what is being asked and formulating responses to questions, simple descriptions, one-word or unintelligible responses, “parroting” language)

# QUESTION DOES *NOT* REQUIRE ...

- Expert testimony
- Particular type of clinical diagnosis; or
- Technical definition

# CONSENT

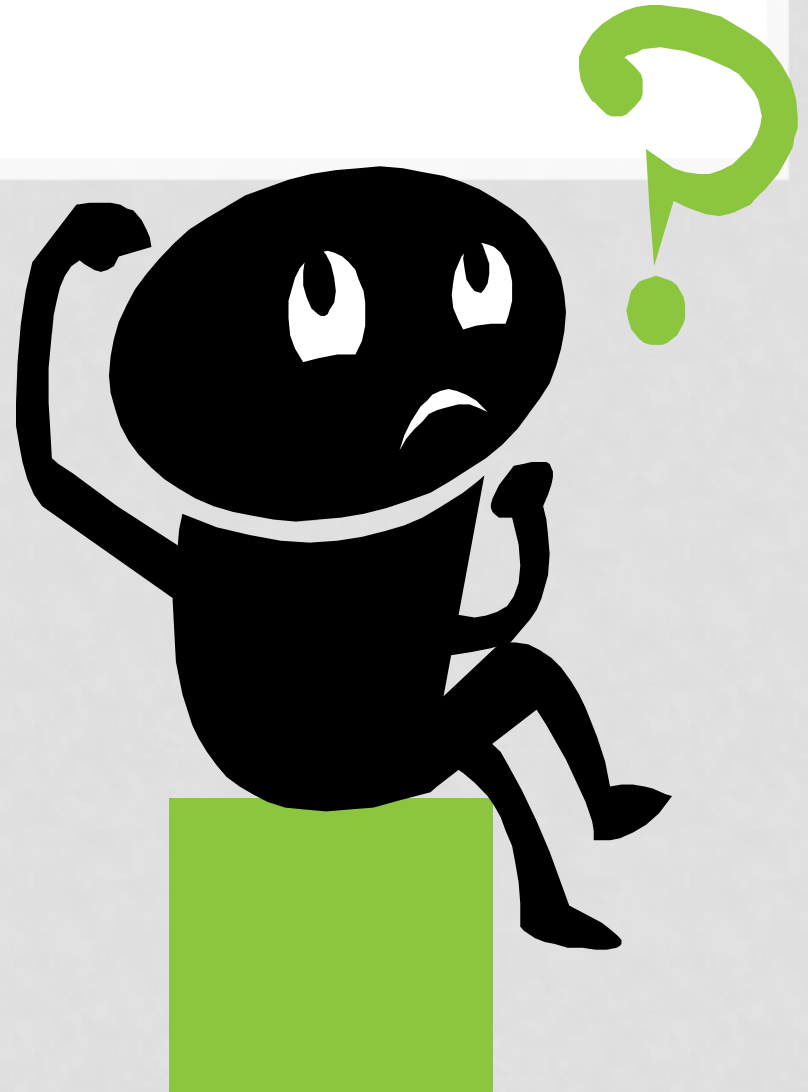
- Conclusion of law
- Cognitive understanding of the nature of act(s) involved
- Defined as to “act” at issue
  - Consisting of intelligence to understand the act, its nature and its probable consequences, or
  - Acting with positive cooperation and knowledge of the nature of the act involved

# CONSENT OR ASSENT?

Test: Positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

*What appears to be “consent” from a person who lacks “capacity” to consent is, in effect, legally nothing.*

How are these  
legal principles  
applied in a  
multidisciplinary  
investigation?  
*Let's assume the  
following:*





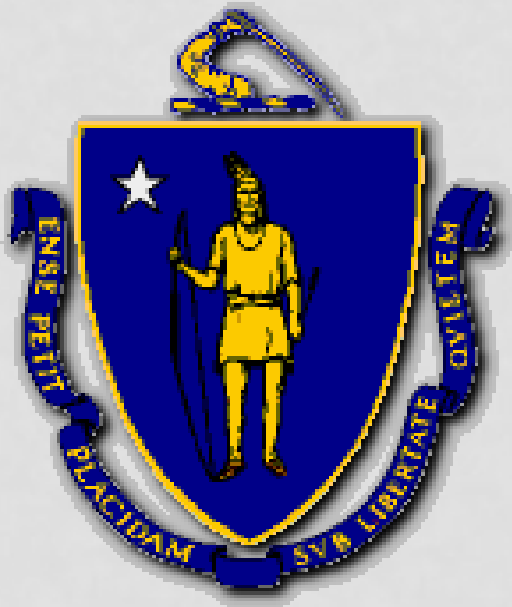
## **“JEAN’S CASE”**

- Jean is a middle-aged female with developmental disabilities who resides in a residential program. She is mildly autistic and non-verbal. Jean was sexually assaulted by a staff member as she was being assisted in preparing for bed.
- Vera, Jean’s roommate, who has an intellectual disability, reveals that she witnessed Jean being sexually assaulted by a staff member at the residential program.
- Vera communicates only with a message board.
- Jean has a limited guardian, appointed by the court to assist Jean with her medical decisions.
- When approached by residential staff after Vera’s disclosure, Jean seemed visibly upset and distraught, and ran out of her room.

# WHERE THREE C'S MAY BE APPLIED TO JEAN'S CASE

- Civil Proceedings
  - Role of APS
  - Burden of Proof: preponderance of evidence
- Criminal Proceedings
  - Role of Prosecutor
  - Burden of proof: varies, beyond a reasonable doubt (for crime); preponderance of evidence for “competency” of witness

# THE THREE C'S IN CIVIL PROCEEDINGS



In MA, it starts with the  
**Disabled Persons  
Protection Commission**

# DPPC PROFILE

Created in 1987, Independent Agency  
Units

Hotline/Intake

Investigations

Oversight

Legal

Sexual Assault Response Unit

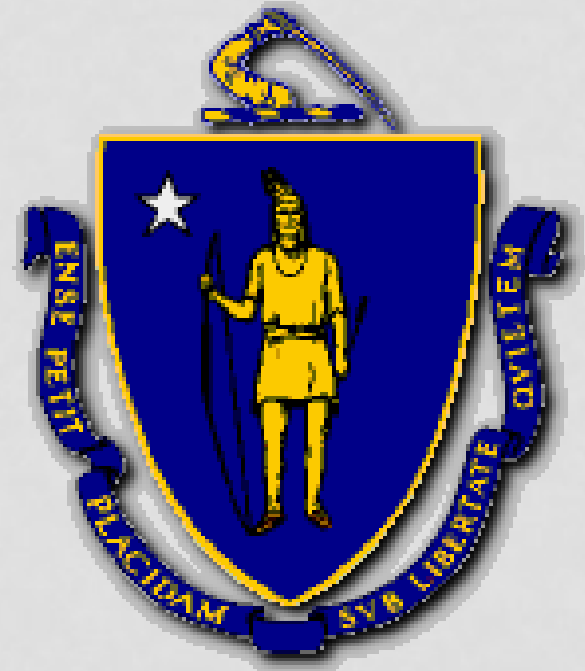
Informational Technology

Outreach and Prevention

Administration & Finance

Quality Assurance

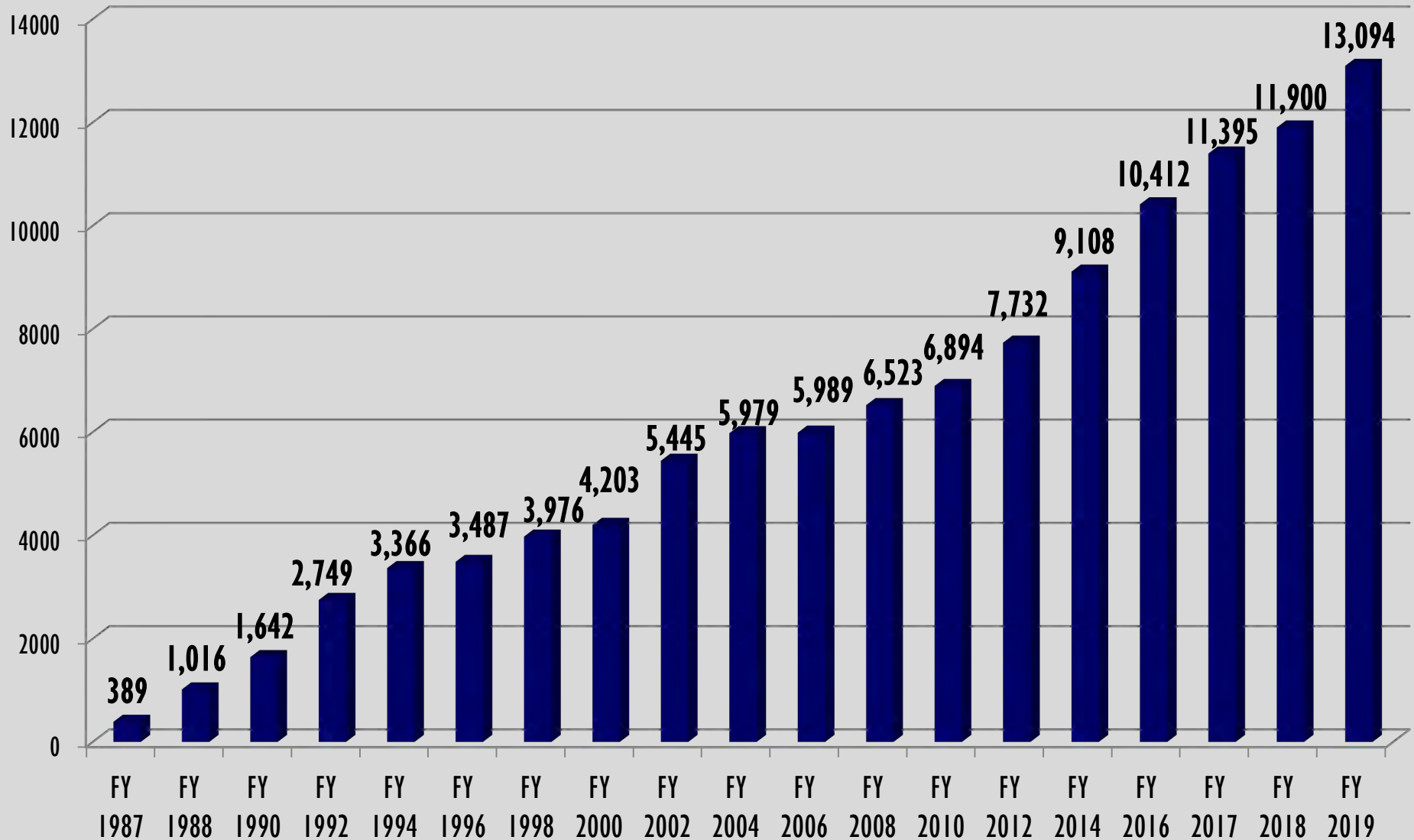
State Police Detective Unit



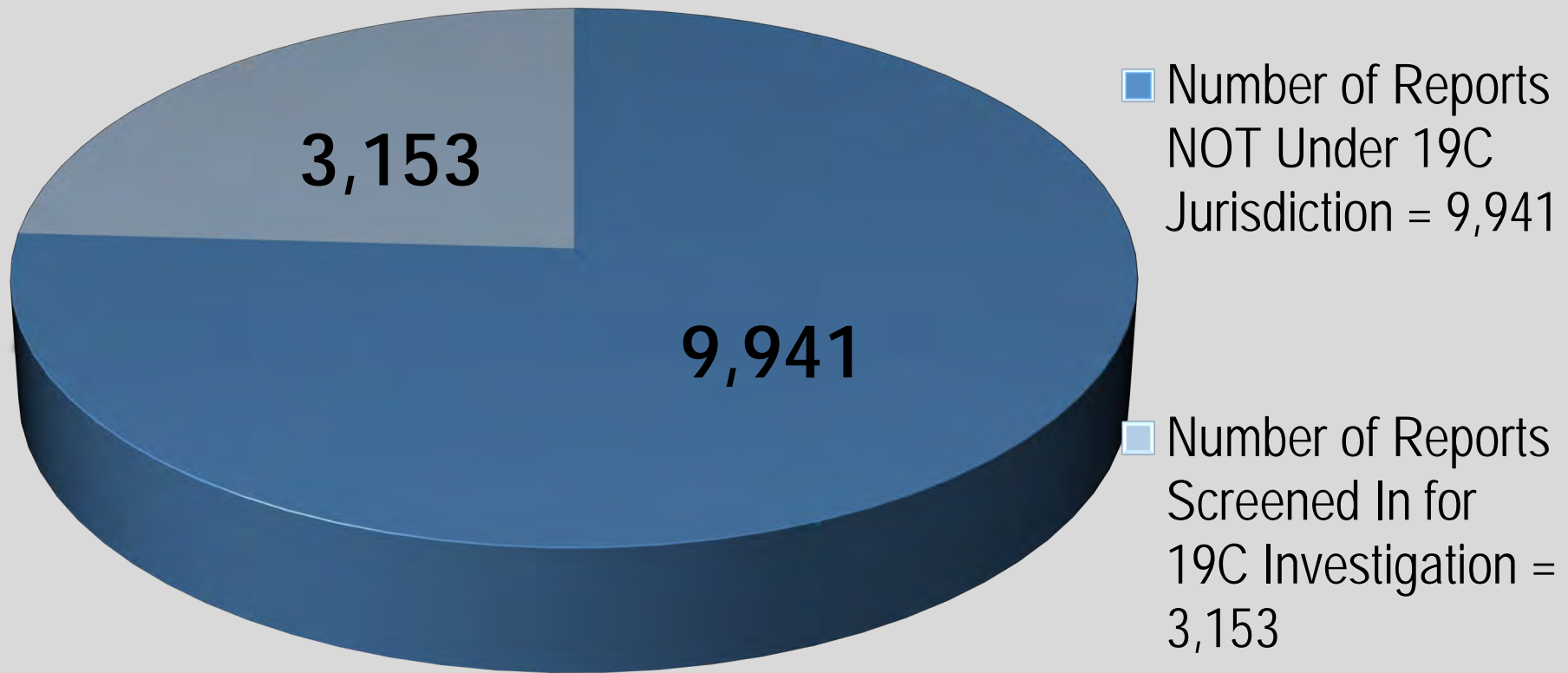
# DPPC JURISDICTION

- Person with a disability, aged 18-59, AND wholly or partially dependent on others for daily living needs;
- Residential status: state (including Department of Corrections) or private
  - No jurisdiction in long term care facilities

# Abuse Reporting to DPPC Hotline 1987-2019\*



# FY2019 Hotline Activity Report



**Number of Reports Received: 13,094\***

\* Does not include death reports and information and referral calls

# WHEN ARE THE THREE C'S FACTORS?

OFTEN...

FY 2019:

- Close to 50 % of Alleged Victims were reported to have an Intellectual/ Developmental Disability
- Over 30 % of Alleged Victims were reported to have a Mental Health Disability



# HOW DOES DPPC REVIEW JEAN'S INTAKE REPORT

Is it an Emergency? Is Jean/others safe?

Does DPPC have jurisdiction to investigate?

- Person with a disability per DPPC's statute?
- Alleged abuser a caretaker?
- Serious physical/emotional injury or abuse *per se*?

Also...

- Prior reports on Jean or the Alleged Abuser?
- Is there an alleged crime?

# DPPC/SPDU CRIMINAL SCREENING AND CASE ASSIGNMENT

- District Attorney's office notified within 24 hours
- Designated assistant district attorney assigns criminal investigations to:
  - Local Police
  - DA's SPDU
  - DPPC's SPDU
- APS and criminal investigator conduct a Joint Investigation – maximize expertise



# **DPPC 19C APS Investigations**

**Conduct abuse/neglect investigations,  
to assess risk and recommend  
protective service actions**

**DPPC**

**DDS**

**DMH**

**MRC**

# PROTECTIVE SERVICES EXAMPLES

- Access Warrants
- Protective Orders
- Respite Care
- Emergency Shelter
- Restraining Orders
- Case Management
- Family Planning
- Housing Assistance
- Adaptive Equipment
- Transportation
- Specialized Counseling
- Guardianship/GAL
- Counseling
- Financial Management
- Education/Training
- Support Groups
- Employment/Vocational Services
- Legal Assistance
- PCA's/Home Health
- Clinical Evaluation
- Medical Assistance

# **DPPC'S FIRST PRIORITY – PREVENT RISK OF FURTHER HARM**

**Competency becomes an issue if:**

- **ALV is unable to consent or is prevented from receiving Protective Services; and**
- **Protective Services are necessary to prevent risk of further harm to the ALV**

# COMPETENCY AND RISK OF FURTHER HARM

Questions to Ask:

Is there a Guardian?

Is the ALAB the Guardian?

Does ALV need a Guardian to stay safe?

# GUARDIANSHIP?

## ADULTS ARE PRESEUMED COMPETENT

Individuals over 18 are presumed legally competent, able and allowed to make decisions for themselves

...unless/until court determines otherwise

# EQUAL RIGHT TO TAKE RISKS/ MAKE BAD DECISIONS

A competent person may make harmful, unreasonable or even foolish decisions. Making bad decisions is not sufficient basis for pursuing guardianship.

Incompetence is demonstrated by *facts showing that a person does not have the cognitive or functional capacity to understand a problem and make an informed decision* even when the facts and consequences are clearly and simply explained to them.



# **STATUTORY “INCAPACITY”**

**A DECISION MADE BY A COURT AFTER  
REVIEWING THE EVIDENCE**

**(e.g., medical certificate or a clinical  
team report)**

**AND APPLYING A STATE STANDARD:**

**(that a person is unable to make  
knowing and voluntary decisions)**

# WHO IS AN “INCAPACITATED PERSON”?

In MA, an “IP” is defined by statute:

- An “IP” is an individual who for reasons other than advanced age or minority:
  - Has a clinically diagnosed condition that results in an inability to receive and evaluate information; or
  - Make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety or self-care;
  - even with appropriate technological assistance.

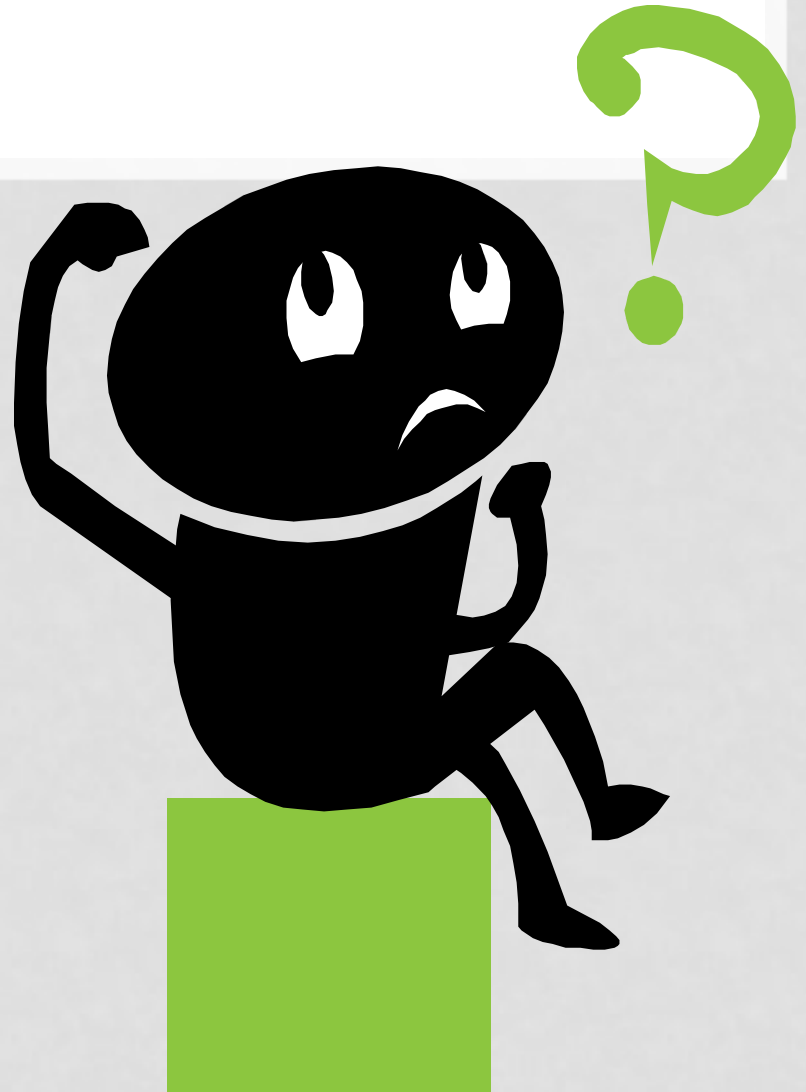
# HOW DO APS INVESTIGATORS APPROACH THE THREE C'S?

An “IP” can provide evidence in an APS investigation:

- Someone who lacks legal capacity can still be a great witness. In your investigation, outline:
  - The person’s ability to observe, remember, and recount what he or she has seen, heard, or experienced;
  - The person’s ability to comprehend the difference between truth and falsehood;
  - Why you believe the person is telling the truth (credibility – corroborating evidence; no history of fabrication; consistent accounts given to multiple people over time; etc.)

HAVING A GUARDIAN  
≠  
*INCAPACITY OR  
INCOMPETENCE*  
AS A VICTIM/WITNESS

How do we  
obtain justice  
for Jean as a  
crime victim  
and assist Vera  
as a witness?



# MA BPI INVESTIGATION OF JEAN'S CASE

Law Enforcement and APS (jointly):

- Seek medical attention for Jean (SANE)
- Interview Jean (preferably recorded)
- Document Jean's "injuries"
- Collect Jean's clothing
- Interview other residents, including Vera
- Interview residential staff personnel
- Interview alleged abuser, if possible
- Provide for alternative residential placement for Jean and Vera
- Recommend additional staff training

# THE THREE C'S IN CRIMINAL PROCEEDINGS



In MA, it starts with the  
**District Attorney**

# AUTHORITY OF A DISTRICT ATTORNEY

- District Attorney has statutory authority to decide which cases to be tried, and
- Duties range from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection.

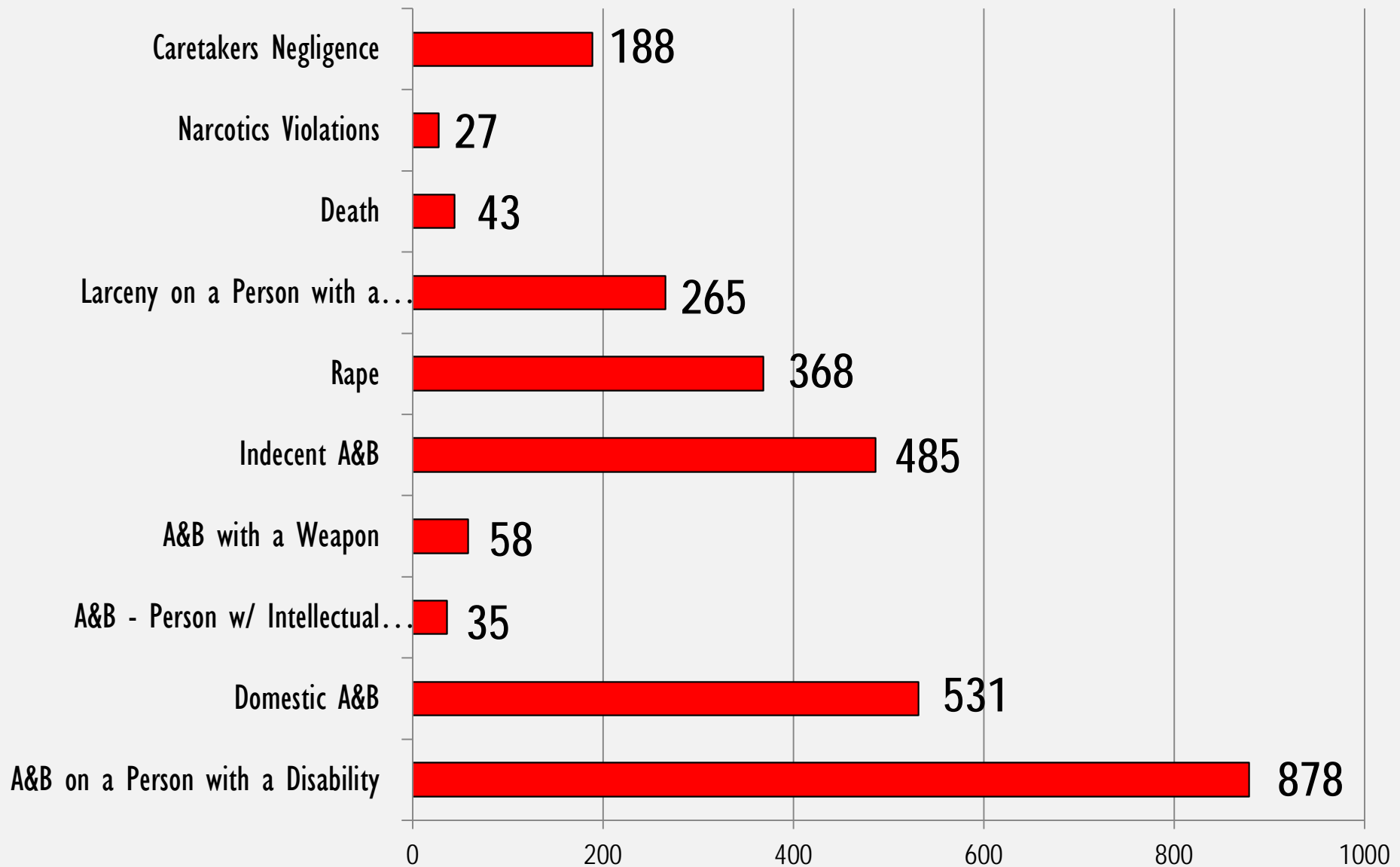




# DISTRICT ATTORNEY'S PERSONNEL

- Eleven (11) jurisdictions in Massachusetts
- Geographically Divided (primarily by county)
- Assistant District Attorney(s)
  - Elders and Persons with Disabilities Unit
  - Superior/District Court
- Victim Witness Advocate(s)
- Forensic Interviewer
- Massachusetts State Police Detective Unit

# FY2019 Number of Types of Crimes



# CIVIL INCOMPETENCE DOES NOT DISQUALIFY CRIME VICTIM OR WITNESS FROM PURSING JUSTICE

“... [t]he fact that the witness with an intellectual disability has been **found** in a court proceeding [civil] to be **incompetent to make informed decisions of a personal, medical or financial nature or that [s/]he is under a guardianship or conservatorship** shall **NOT** preclude such witness from testifying if [s/]he is found to be competent to testify and shall not preclude a determination of competency to testify.” (emphasis added)

# DA REFERRAL OF JEAN'S INTAKE REPORT

## ADA:

- Emailed intake report from DPPC (w/in 24 hours)
- Decides criminal/civil focus
  - Obtain necessary mental health, medical, school, work or social worker records from APS agencies (*capacity*)
  - Identify available collateral agencies
  - Request necessary medical services (*consent*)
  - Coordinate forensic interview, if any
- Assigns law enforcement agency (local or state) to conduct investigation
- Contacts APS agency
- Assigns victim/witness advocate to victim and witness(es)
- Decides case what, if any, criminal charges to be filed
- Prosecutes alleged abuser



# FORENSIC INTERVIEW OF VICTIM/WITNESS



- One interview of victim/witness meets needs of all agencies
- Less trauma for victim/witness (and family)
- More efficient investigation
- Improved evidence collection
- Access to more information
- Increased chance of successful prosecution

# COMPETENCY OF VICTIM/WITNESS

- Any person with a “sufficient understanding” is competent to testify
- Refers to a person’s basic understanding and for witness to relate back truthfully

# CHALLENGE TO VICTIM/WITNESS

- Any challenge to competency of a witness MUST be raised before witness testifies. BUT, the judge may reconsider decision, either *sua sponte* or on motion, if doubts arise about the correctness of an earlier ruling
- The witness's performance on the stand is reviewed (e.g., demonstrating a lack of awareness of the obligation to tell the truth or an inability to observe, remember or recount may be considered)

# TWO-PART TEST

- (1) Whether the witness has the “capacity to ‘observe, remember, and give expression to that which [s/]he ha[s] seen, heard, or experienced’”; and
- (2) “whether [s/]he has ‘understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment.’”



# TYPE OF HEARING

- **Federal:** Discretion of the court [formal competence hearing required but mode is within discretion of trial judge]
- **State:** Voir dire hearing conducted by judge [when a witness's competency is questioned by the court or a party, it is duty of the judge to examine into the question of competency]

**Standard: Preponderance of the evidence**

# INVOLUNTARY EXAMINATION?

- *For crime victim... Is the prosecution introducing expert testimony on issue?*
- If so, Majority View: Trial courts have the inherent power to order psychological examinations of crime victims.
- Historically, these examinations have been ordered where one of three situations exists: (1) **uncorroborated, testimony of victim**; (2) **competency of victim is in question**; and (3) **the victim's credibility is at issue**.

# IT'S A BALANCING ACT ...

Victim's privacy rights must be balanced with defendant's discovery and confrontation rights.

Test: (1) there must be compelling evidence to question a victim's veracity before requiring an *involuntary* examination; AND (2) the defendant must make a serious showing that due to mental or emotional incapacity, the victim's allegations may be spurious.

# COURT CONSIDERATIONS

- The nature of the examination requested and the intrusiveness inherent in that examination;
- The victim's age;
- The resulting physical and/or emotional effects of the examination on the victim;
- The probative value of the examination to the issue before the court;
- The remoteness in time of the examination to the alleged criminal act; and
- The evidence already available for the defendant's use.

# PRIOR CASES IN MA

- Denial of defendant's request that judge order psychiatric examination of witness with history of mental illness was not an abuse of discretion where judge acted on basis of his interviews and reading of grand jury minutes.
- "[t]endency [to]....let the witness testify and have the trier of fact 'make any proper discount for the quality of' the understanding of the witness."
- **Example:** 77 year old sexual assault victim's responses at voir dire that she knew what an oath was, understood her obligation to tell truth and the consequences for failing to do so was sufficient for trial judge to deny [involuntary] examination request from defense even though victim said she "heard voices" and "talked to space people".

# SUCCESSFULLY NAVIGATING THE COURT EXPERIENCE

The nature of the interview and the type of questions asked are critically important and can have significant impact upon the quality of the individuals responses.

- Prepare
- Conduct out-of-court interview(s) according to the person's level of understanding

# TIPS FOR A SUCCESSFUL EXAMINATION

Prepare for the victim/witness's examination, by:

- Obtaining background information
- Assessing communication abilities
- Determining level of understanding
- Reducing stress
- Establishing rapport
- Giving the person a sense of control
- Seeking assistance, whenever necessary

# INQUIRY MAY INCLUDE....

- Age
- Home address
- Name(s) of family members
- Name of school and teacher, if applicable
- Name of employer and type of job, if applicable
- Demonstration of the difference between the truth and a lie





# REMEMBER

- Every person with an intellectual (or other) disability is unique and there may be broad differences in ability to think and communicate.
- The nature of the examination and type of questions asked are critically important and can have significant impact upon the quality of the individuals responses

# IF COURT CONDUCTS EXAMINATION

Encourage judge to:

- Speak in a natural style and directly to the person
- Not assume a person with intellectual disabilities cannot tell you what happened
- Be patient – ALLOW FOR EXTRA TIME
- Avoid leading questions
- Not interpret or correct the witness
- Check for miscommunication

**For example:** Questions by the judge may include:

*Do you know where you are today?*

*Do you understand why you are here?*

*What are you here for?*

*How does that involve you?*

# CONSIDER POTENTIAL ALTERNATIVES

In MA, Court may on its own motion or through a motion from the proponent of evidence, allow for alternative procedures for determining examination for competency or taking of testimony of witness with intellectual disabilities.

- **Standard:** Clear and Convincing Evidence (criminal); Preponderance of the Evidence (civil)
- **Findings:** ... that the witness with an intellectual disability is likely, as a result of submitting to usual procedures for determining competency or as a result of testifying in open court... (i) suffer severe psychological or emotional trauma; or (ii) suffer a temporary loss of or regression in cognitive or behavioral functioning or communicative abilities, such that an ability to testify will be significantly impaired.
- **Order:** Use of alternative procedures for determining competency to testify or for taking testimony of the witness with an intellectual disability

# APPROVED ALTERNATIVE PROCEDURES

- Family member, clinician, counselor, social worker or friend may sit near or next to such witness;
- Permitting testimony at other location and/or on videotape
  - Provided that in criminal case defendant and counsel are present at location and defendant has unobstructed view of witness
- Court SHALL not deny a witness the benefit of an appropriate alternative procedure and is required to allow additional time or continuances to accommodate these procedures
- Use of expert witness regarding persons with intellectual disabilities
- Any other appropriate means

# TESTIMONIAL AIDES

## *Daubert/Lanigan Challenge?*

- When a witness's testimony incorporates **scientific fact (based on scientific theory or research methodology)** into a statement forming the basis of an opinion, that science may be subject to a *Daubert/Lanigan* inquiry
- If challenged, the evidence must be relevant and reliability (testing, peer review and publication, error rates and general acceptance in the scientific community)

## BE AWARE.....

- Judges have considerable latitude in devising procedures modifying the usual rules of trial to accommodate children, elders or witnesses with disabilities, so long as the defendant's right to a fair trial is not violated.
- "Competency" should not be confused with "availability" ( e.g., the trial court should have allowed the witness sufficient time to regain her composure, after decompressing after testifying about details of sexual assault, before declaring her incompetent prior to cross-examination).

# COMPETENCY OF OFFENDER

- Statutory provisions to address defendant's competence to stand trial
- Court ordered mental health examination by qualified physician or psychologist
- May require in-patient hospitalization (proceedings stayed while defendant remains incompetent or case is dismissed)

**Standard: Preponderance of the evidence**

# CRITERIA FOR COMPETENCE

“[A] defendant's competence is not governed by the presence or absence of any particular psychiatric diagnosis. Rather, the test is framed in terms of the defendant's functional abilities: *‘whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.’*”



# RELEVANT CONSIDERATIONS

- Relevant considerations are:
  - The judge's observations of the defendant's demeanor and behavior;
  - Reports of psychiatric examinations of the defendant;
  - Statements to the judge about the defendant's conduct and mental condition; and
  - Testimony of expert witnesses

# OVERCOMING THE THREE C'S HURDLES WITH CORROBORATING EVIDENCE

- **Suspect's interview**
- **Forensic evidence**
  - **DNA/CODIS**
  - **Crime scene(s)**
- **Other documentary evidence**
  - **photographs/charts**
  - **medical records**
  - **school/work records**



# CRITERIA FOR A SANE EXAM

- Patient must be medically cleared
- Able to consent
- Assault within **5 days/120 hours**
- Patient does not have to report to police to have evidence collected (evidence held for 6 month+ if not reporting at this time)

***In MA 90-95% conviction rate when a SANE testifies at trial!***

**Can we use  
hearsay  
statements?**



If it is an “Excited Utterance”? *Any statement made by a person, while under the influence of the “exciting event”, concerning the cause or circumstances surrounding the event.*

# POLICE AND APS HAVE DUAL ROLE

- First responder/public safety
- Prosecutorial arm

Preliminary questioning at the scene is admissible where inquiry is focused on need for medical attention and to secure a volatile scene.

# ADDITIONAL HEARSAY EXCEPTION

- **First Complaint** – the recipient of the “first” complaint of a sexual assault may testify not only to the details of the complaint and the circumstances in which the complaint was made, but also to the reasons (if known to the witness) why the victim came forward - or failed to come forward- at a particular time.

## ... AND FINALLY

- **Hospital Records** – all records relating to medical history and treatment (*including documentation of observations from which inculpatory inferences flow; e,g, statements made by victim during examination or physical findings*)



# MA BPI TRAINING CURRICULA

## Includes:

- **Law Enforcement**
  - State & Municipal Police Recruits
  - Veteran Officers
- **Service Providers**
- **Persons with Disabilities**
  - Learning Tool
  - Awareness & Action





# OTHER TRAININGS

- Adult Protective Service (APS) Investigators
  - Forty-hour basic investigation certification
  - Forty-hour sexual assault certification
  - In-Service Training
- Emergency Room Nurses and Physicians (in collaboration with SANE)
- Judiciary/Court Personnel Training
  - Practical Guide for Court Personnel entitled, *Crimes Against Persons with Disabilities: A Practical Guide to the Reporting, Investigation and Prosecution*
  - Americans with Disabilities Act (ADA) Coordinators training



# REFERENCE MATERIALS

- Crisis Intervention Program (CIP) Officer Reference Book
- BPI Replication Guide, Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, <http://www.ovc.gov/pubs/victimswithdisabilities/stateguide/index.html>, *Guide* (NCJ 239107)

# OUTREACH AND PREVENTION

## FY 2018

- 48 Awareness and Action trainings  
(921 persons with disabilities)
- 13 one-day new police recruit trainings  
(772 officers)
- 10 other law enforcement trainings  
(571 veteran police officers)
- 5 medical personal trainings  
(162 medical professionals)

# OUTREACH AND PREVENTION

## FY 2018

- 24 human service provider trainings  
(1,201 human service providers)
- 10 additional agency staff trainings  
(612 staff from various agencies)
- 2 Protect, Report, Preserve trainings  
(300+ attendees)

**Questions?**





# THE END.