

**THE CHALLENGES OF
ADULT VICTIM SEXUAL
ASSAULT CASES**

*Medical Forensic
Sexual Assault
Examinations:
What Are They, and
What Can They Tell
the Courts?*

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Legal Momentum

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**Medical Forensic Sexual Assault Examinations:
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FACULTY MANUAL

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Overview

Inaccurate assumptions about medical evidence in adult victim sexual assault trials undermine fairness in the justice system. These trials bring with them expectations about the kinds of injuries “real” victims sustain, the kind of medical evidence that will be offered, who will present it, and what the medical evidence can “prove”.

This curriculum provides accurate information about the purposes and processes of medical forensic sexual assault examinations and what they can and cannot “prove.” It also explores some of the legal issues these examinations raise for judicial resolution.

Learning Objectives

Participants will:

- Understand the need for Sexual Assault Nurse Examiner programs and how SANEs are trained;
- Know the purposes and components of a medical forensic sexual assault examination and the types of evidence it may or may not yield;
- Understand the limitations on what a medical forensic sexual assault examination can tell the courts;
- Know the circumstances in which different types of suspect examinations may be conducted and what types of evidence they may or may not yield;
- Be aware of the emerging field of telemedicine as it relates to medical forensic sexual assault examinations;
- Understand how judges can protect victim privacy with respect to the medical record, the rape shield law, and sensitive photographs of injuries without undermining defendants’ rights.
- Understand the permissible scope of SANEs testimony in the courtroom;
- Explore the judges’ role in:
 - Authorizing suspect examinations
 - Determining when a SANE may testify in cases raising *Crawford* issues because the victim is unavailable to testify
 - Determining the scope of SANEs’ permissible courtroom testimony

Components of this Curriculum

This curriculum includes the following components:

- A PowerPoint presentation, with suggested commentary for the faculty and extensive references
- A sample three-quarter day agenda
- A case study with three interactive exercises
- A glossary of anatomical terms for female and male genital structures and anatomical diagrams

Suggested Uses for this Curriculum

This curriculum can be used as a stand-alone program or integrated into a variety of other judicial education program types, as listed below:

- A judicial conference
- A criminal law program
- A program on sexual assault
- A program about violence against women
- A program about forensic evidence

Planning the Program

Judges and judicial educators wishing to present this curriculum or to integrate its subject matter into other judicial education programs should plan as follows:

- Adapt the material to local law and practice (see section below)
- Select the judicial and expert faculty for the program
- Work with the medical expert to ensure that she/he can present the material in a way most useful to judges
- Decide whether you will use small groups or a large group discussion for the case study exercises.
 - This will depend on the size of your group:

- If you are going to use small groups, decide whether you will choose small group discussion leaders in advance. If so, identify them.
 - If you are not going to choose your small group leaders in advance, there are directions below for choosing group leaders quickly at the program..
- Ensure that all faculty and discussion group facilitators are thoroughly familiar with the parts of the curriculum they will present or the discussions they will lead.

Sample Agenda

There is a one day agenda for this curriculum. The morning unites utilize a lecture format during which participants are invited to ask questions. The afternoon is devoted to extensive interactive exercises for the participant judges to discuss.

The following page contains the sample agenda.

One Day Program

Amount of Time	Activity
30 minutes	<i>Medical Forensic Sexual Assault Examinations: What Are They, and What Can They Tell the Courts?</i> (Lecture + Q &A: Slides 1 – 17) [Includes Welcome, Faculty Introductions, and Overview of Program]
60 minutes	<i>Medical Forensic Sexual Assault Examinations and Evidence Collection Kits</i> (Lecture + Q&A: Slides 18 – 48)
15 minutes	Break
15 minutes	<i>Suspect Examinations</i> (Lecture + Q&A: Slides 49 – 56)
10 minutes	<i>Telemedicine</i> (Lecture + Q&A : Slides 57– 61)
50 minutes	<i>SANEs in the Courtroom</i> (Lecture + Q&A: Slides 62 – 84)
60 minutes	Lunch
15 minutes	<i>Recommendations for Judges</i> (Lecture + Q&A: Slides 85-92)
45 minutes	<i>Case Study and Suspect Examination and Scope of SANE Testimony Exercises</i> (Slides 93-95 + Case Study and Interactive Exercises in the Faculty Manual)
15 minutes	Break
55 minutes	<i>Crawford Exercise</i> (Slide 96 + Interactive Exercise in the Faculty Manual)
5 minutes	Wrap Up and Evaluation

Faculty

A Judge and a Sexual Assault Nurse Examiner (SANE): This curriculum is designed to be presented by a judge experienced in trying sexual assault cases and a SANE experienced in conducting medical forensic sexual assault examinations and presenting training programs.

The judge also acts as the program Moderator and leads the interactive exercises

Even a SANE who has conducted many training programs may not have experience in presenting for judges. The judicial educator and judicial faculty should work with the SANE to prepare for this audience.

Small Group Facilitators: You can either select your small group facilitators ahead of time or choose them at the program.

With Pre-Selected Small Group Facilitators:

- If you pre-select the small group facilitators, meet with them before the program to review the exercises and discussion questions and be sure the exercises are adapted to your jurisdiction.
- Ask facilitators to appoint the person seated to their immediate left to be the Reporter who takes notes and gives the Report Back for the group. This saves time.
- Review with facilitators the key elements of leading a small group discussion, such as being sure that everyone speaks and no one person dominates.

Without Pre-Selected Small Group Facilitators:

- Assign the facilitator role to the person at each table whose last name begins with the letter closest to A.
- Assign the Reporter role to whoever is sitting to the left of the facilitator.

Adapting the Curriculum to Your State or Jurisdiction

- Determine the relevant statutes and rules of evidence and whether you want to include them in your handouts.
- Determine whether there is case law in your jurisdiction that addresses the issues raised in this curriculum.
- This curriculum is based on the *National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents* (2nd Ed. 2013). If your state or jurisdiction has its own protocols for medical forensic sexual assault examinations

and suspect examinations, utilize these to describe the examination and evidence collection process.

- Be sure the slides and exercises use the terminology of your state or jurisdiction. For example, do your statutes use the term “sexual battery” rather than “rape”?

To create new PowerPoint slides to reflect these adaptations:

- Open the PowerPoint slide provided that you would like to adapt;
- On the PowerPoint menu, select “Insert New Slide;” and then
- Create the slide content you need.

Note: Do not change any of the slides except for the designated slides that you are asked to adapt to reflect information specific to your state or jurisdiction..

Participant Materials

Give participants the following items for use during the program:

- Faculty Biographies
- Agenda
- PowerPoint Slides, printed three to a page with room for note-taking
- Case Study and Exercises, including Crawford Analysis Chart
- Glossary of anatomical terms for female and male genital structures and anatomical diagrams.
- Your evaluation instrument

Preparing Participant Materials

The handouts for the Participant’s Binder are available on the National Judicial Education Program (NJEP)’s website, www.njep.org. To access materials for this module click on Resources and Materials. In the Search the List box enter the exact name of this module: Medical Forensic Sexual Assault Examinations: What Are They and What Can They Tell the Courts?

To print handouts from the NJEP website:

- Click on the link to the handout you want to print. Clicking the link will download the handout to your computer as a PDF
- Open the downloaded PDF files
- Print and copy the handouts

To print PowerPoint slides as handouts for note-taking:

- Navigate to the Print Menu
- From the Print Menu select the “Print What” pull-down menu and choose “Handouts”
- From the “Color/Grayscale” menu select “Pure Black and White”
- From the “Slides per page” pull down menu select “3”

Presenting the PowerPoint Presentation

The lecture portion of this curriculum is contained in a PowerPoint presentation, with suggested commentary for the faculty included in the notes section of the slides. Sources are included on the slides. The PowerPoint presentation is provided on the National Judicial Education Program’s website, www.njep.org. To access the PowerPoint for this module click on Resources and Materials. In the Search the List box enter the exact name of this module: Medical Forensic Sexual Assault Examinations: What Are They and What Can They Tell the Courts?

To present the PowerPoint, navigate to the View menu or tab and click “View Slideshow.” The slide will fill the screen.

- To move to the next slide click your left mouse button, press “Enter” on the keyboard or use the forward arrow key on your keyboard
- To return to a previous slide, press “Backspace” on your key board or use the back arrow on your keyboard
- For more options use the right mouse button or for Mac users press the apple/control key and click your mouse button
- To exit the Slideshow mode press Escape (Esc) on the top left corner of your keyboard

How to Print PowerPoint Slides with Suggested Commentary for the Presenter:

To print the slides with suggested commentary for guidance during the presentation follow these steps:

- Navigate to the Print Menu
- From the Print Menu navigate to the “Print What” pull-down menu and select “Notes Pages”
- Select the “Color/Grayscale” pull-down menu and choose “Pure Black and White”

Case Study and Exercises

This curriculum includes a Case Study and three interactive exercises, with accompanying discussion questions and exercise directions:

- Suspect Examination Exercise, Discussion Questions, and Directions
- Scope of SANE Testimony Exercise, Discussion Questions, and Directions
- *Crawford* Exercise , Discussion Questions, and Directions

The Case Study and three exercises are provided on the following pages. The Case Study and the component parts of each exercise begin on a new page for ease of use and reference.

Beginning the Exercises

To begin the exercises the Moderator explains to participants how the exercises will be conducted and asks everyone to read the Case Study.

Recommended Amount of Time: Five minutes.

Case Study

Background: Defendant Daniel Marsh lived with his girlfriend, Trish Hartford, for five years. Last year, Ms. Hartford moved out and obtained a protective order against Mr. Marsh. The pleadings Ms. Hartford filed for the protective order documented a long history of Mr. Marsh’s violence toward her, including several instances where Ms. Hartford called the police to come to their home. On the last occasion, Ms. Hartford told the investigating officer that Mr. Marsh was getting more and more violent. “He said if I call the police one more time or ever leave him he is going to kill me.” She said, “I just want it to stop; I’m not trying to put him in jail.” Those statements were documented in the police reports and in Ms. Hartford’s application for the protective order. Charges were filed against Mr. Marsh on one occasion, but Ms. Hartford failed to appear at the hearing, so the charges were eventually dropped. When asked by her sister why she did not show up for court, Ms. Hartford said, “Daniel said he would make my life a living hell if I showed up at court.”

The Incident: Four months ago, Ms. Hartford called 911, panicked and crying, and reported that Mr. Marsh had been stalking her and that he just came into her apartment and raped her. She told the 911 operator that he also “choked” her and she was having trouble swallowing. She also told the 911 operator that she was terrified and thought Mr. Marsh was outside watching her apartment building. Law enforcement was immediately dispatched to her home.

When the two officers arrived, Ms. Marsh was sobbing. They noticed a red mark on her throat. She told the officer questioning her, “He told me before that if I called the police one more time he was going to kill me.” She said, “Daniel did this to me. He has been following me ever since I left. He won’t leave me alone. He keeps texting me, putting comments on my Facebook page and leaving me messages.” Her voice was hoarse. She sobbed as she told the officers, “He kept choking me and choking me. I couldn’t breathe. I really thought I was dying.” She also told the officers that he “forced me to have sex” and that he also “forced me to have oral sex.” The officers took her to the local hospital, where she was examined by Molly O’Brien, a Sexual Assault Nurse Examiner (the SANE). The officers remained at the hospital, but they were not in the examining room while the SANE took Ms. Hartford’s medical history and performed the examination.

SANE Examination: The SANE took a detailed history and did a comprehensive exam. The SANE asked Ms. Hartford what had happened to her. While the SANE was taking the history, Ms. Hartford told her, “My ex-boyfriend Daniel did this to me. I really thought he was going to kill me this time. He told me he was going to kill me. He was choking me so hard that I couldn’t breathe. Since I left him, no other man would ever touch me. He would make sure of that. I don’t know what to do. I think he’s still outside my apartment. He’s going to be furious because I called 911.” Ms. Hartford also told the SANE details about the vaginal and oral assaults. The SANE documented her findings and Ms. Hartford’s statements. She talked to Ms. Hartford about safety planning and gave her information about the local battered women’s shelter. Ms. Hartford was

prescribed medication for sexually transmitted infections, given emergency contraception medication and provided with a discharge plan and instructions. Because Ms. Hartford had been strangled, the SANE encouraged her to schedule a follow up appointment with her primary care physician.

As part of the examination, the SANE collected evidence in accordance with the *National Protocol for Medical Forensic Sexual Assault Examinations* (2d ed. 2013) and the local hospital policy and procedures. Based on the history given, the SANE collected oral and vaginal swabs. The SANE gathered, labeled and packaged the evidence, which she then delivered to the officers at the hospital.

The Preliminary Hearing: At the preliminary hearing, the responding officers testified about what Ms. Hartford said, her demeanor and the red mark they observed on her throat. The prosecutor did not subpoena Ms. Hartford to testify at the preliminary hearing.¹ At the conclusion of the hearing, the Court bound Mr. Marsh over for trial on charges of felony sexual assault (for the oral and vaginal rapes) and felony strangulation.

¹ For purposes of this exercise, assume that hearsay evidence is sufficient to establish probable cause at the preliminary hearing in your jurisdiction.

Suspect Examination Exercise

Background: Within a couple hours of Trish Hartford calling 911, law enforcement officers arrested Daniel Marsh. He was still wearing the clothing that the victim had described in her interview with the officers. He appeared disheveled and nervous. He told the officers that he didn't touch Ms. Hartford and denied having any sexual contact with her whatsoever. He said that she was lying and that he hadn't gone anywhere near her since she left him and got a protective order. Since it was early Sunday morning the officers were concerned that it would take them several hours to get a warrant or a court order for a suspect physical examination. The officers knew that judges are always swamped on Sunday morning dealing with the cases from Saturday night. The officers had an evidence technician take Mr. Marsh into a private room, in which no one was present except the evidence technician and Mr. Marsh, where the technician swabbed Mr. Marsh's penis. Subsequent testing showed evidence of Ms. Hartford's DNA on the swabs taken by the evidence technician.

The officers explained that they obtained the samples because of "exigent circumstances." The officers were afraid that Mr. Marsh would destroy the evidence before the officers could get a warrant or a court order. One of the officers had recently worked on a case in which a suspect accused of digital penetration was caught sucking on his fingers to destroy the evidence. They also had a case in which a defendant spit on his hand to try to wipe DNA evidence off of his penis.

Mr. Marsh's defense attorney filed a Motion to Suppress the DNA results from the penile swabs.

Defense Attorney's Argument: Warrantless searches are presumptively unreasonable. The penile swabs constituted an unreasonable search in violation of the Fourth Amendment. The officers were required to get either a warrant or a court order prior to conducting the intrusive search. A penile swab is much more intrusive than a buccal swab on the inside of Mr. Marsh's cheek.

Prosecutor's Response: The exigent circumstances in this case warranted the search. Under these specific circumstances, the officers were justified in ordering the evidence technician to swab the defendant's penis. The strength of the probable cause, the relatively short amount of time between the assault and the search, the showing of the need to preserve the DNA evidence, and the manner in which the search was conducted, in a private room by a trained technician, all demonstrate the requisite "exigent circumstances" to justify the search in this case.

Suspect Examination Discussion Question

1. **Would you grant the Motion to Suppress? Why or why not?**

Instructions for Suspect Examination Exercise

Purpose of the Exercise: Most discussions of medical forensic examinations revolve around examinations of victims of sexual assault, not suspects. The purpose of this exercise is to have judges discuss issues that may arise when police want to gather evidence from a suspect. For this scenario, the issue is not whether medical personnel will conduct a full medical forensic examination of the suspect, but whether there are circumstances in which an evidence technician can gather evidence from a suspect's body without a warrant or a court order.

This exercise is loosely based on *Ontiveros v. State*, 240 S.W.3d 369 (Tex. App. 2007). In that case, the defendant was arrested and law enforcement wanted to collect a penile swab to preserve any DNA evidence on the defendant's penis. They were concerned that it would take too long to obtain a warrant or a court order because it was Sunday morning and the judges were swamped with cases from Saturday night. The defendant objected to the swab, so law enforcement ordered an evidence technician to take the defendant into a private room, where the evidence technician swabbed the defendant's penis.

In a very fact-specific ruling, the Texas Court of Appeals held that, under the specific circumstances of the case, the officers were justified in ordering the evidence technician to swab the defendant's penis. The strength of the probable cause, the relatively short amount of time between the assault and the search, the showing of the need to preserve the DNA evidence, and the manner in which the search was conducted, in a private room by a trained technician, all demonstrated the requisite "exigent circumstances" to justify the search in that case.

Preparation Required: For this exercise, the moderator should:

- Be familiar with the case law in your jurisdiction with respect to whether the "exigent circumstances" described in the exercise would justify a warrantless search under these facts.
- Read *Ontiveros v. State*, 240 S.W.3d 369 (Tex. App. 2007).

Instructions for the Exercise: This is a short exercise that deals with one issue: was the warrantless search reasonable under the circumstances of this case.

- Participants should read the **Case Study**, so they will know the underlying facts of the case.
- Participants should read the **Suspect Examination Exercise** for the additional facts provided.

- The Moderator can then lead a discussion in which participants answer the question posed at the end of the **Exercise** and explain their reasoning for their decision.

- If small group discussions are utilized, the groups first discuss the exercise at their tables, followed by the Moderator leading a Report Back and full-group discussion

- **Recommended Amount of Time:** Fifteen minutes

Scope of SANE Testimony Exercise

Proposed Testimony: The prosecutor qualifies the SANE as an expert witness. When the SANE examined Ms. Hartford she noted some redness on Ms. Hartford’s external genitalia, but she did not observe any other physical injuries to Ms. Hartford’s genitalia. She found the presence of semen and sperm in Ms. Hartford’s vagina. In addition, the SANE will testify about Ms. Hartford’s demeanor during the examination. The SANE also plans to testify that, in her opinion, her findings are consistent with vaginal penetration. She will testify that the absence of physical injuries in the genital area does not rule out a sexual assault because, in her experience, “most of the patients I have treated who present themselves as sexual assault victims” do not have visible, physical genital injuries. She will then explain some of the reasons why sexual assault victims do not exhibit these types of injuries. In addition, the SANE will testify that, in her opinion, her findings do not “rule out” sexual assault, but instead the findings are “consistent with” Ms. Hartford’s allegations that she was vaginally assaulted.

Defense Attorney’s Argument: As the SANE begins to testify at trial, the defense attorney objects to her stating her opinions as described above. He argues that the SANE’s opinion testimony will have the improper prejudicial effect of bolstering Ms. Hartford’s credibility. In effect, the SANE is testifying that she believes Ms. Hartford’s claim that she was raped. The defense attorney also argues that the proposed opinion testimony allows the SANE to testify as to the ultimate issue in the case, which is the province of the jury.

Prosecutor’s Response: The SANE will testify that, in her expert opinion, her findings do not rule out sexual assault and are consistent with Ms. Hartford’s statements. This testimony does not invade the jury’s province. To the contrary, her expert medical opinion helps the jury understand the medical findings, which is the purpose of expert testimony. The SANE is not saying that Ms. Hartford was raped, nor is she saying, “I believe the victim’s testimony.” Instead, she is offering an expert opinion consistent with her medical findings, which is permissible under the law of this jurisdiction.

Scope of SANE Testimony Discussion Questions

1. **Is the proposed testimony by the SANE in this case admissible? Why or why not?**
2. **If the SANE found vaginal injuries and proposed to testify that the examination was “consistent with a history of blunt penetrating trauma of the vaginal orifice,” but the SANE did not testify as to the cause of the trauma, would that testimony be admissible? Why or why not?**
3. **If the SANE found vaginal injuries and proposed to testify that the injuries were “inconsistent with consensual intercourse” and were “consistent with nonconsensual intercourse,” would that opinion be admissible? Why or why not?**

Instructions for Scope of SANE Testimony Exercise

Purpose of the Exercise: This exercise deals with the scope of expert testimony in a case in which the expert is a SANE. In this exercise, the prosecutor is offering the SANE as both a fact witness and an expert. The SANE will express the opinions set forth in the **Scope of SANE Testimony Exercise**. The legal issue posed for judges is the permissible scope of the SANE's opinion testimony. In order to have participants explore the limits of expert testimony, they will be asked to respond to the facts posed by the exercise and then to two variations on the testimony given. Each part of this exercise is based on actual cases.

Question #1: The exercise is based, in part, on *State v. Veikoso*, No. 30138, 2010 Haw. App. LEXIS 809, 2010 WL 5037006 (Haw. Ct. App, 2010), a case in which the examining physician expressed the opinions contained in this exercise. In that case, the court held that it was proper to admit expert testimony that the medical findings were "consistent with" the victim's account. *Id.* The court also held that an expert was permitted to testify that a lack of physical trauma was "consistent with" the victim's allegations of assault.²

Question #2: The second question posed in the exercise is based on the facts and holding in *Young v. State*, 106 So.3d 775 (Miss. 2012). In *Young*, the SANE testified about the victim's injuries and expressed the opinion that the injuries were consistent with a history of "blunt penetrating trauma of the oral, rectal, hymen, and/or vaginal orifice." *Id.* at 777. The court rejected the defendant's argument that the SANE was not qualified to testify as to medical causation, holding that the SANE did not testify that the victim's injuries were caused by sexual penetration or sexual assault. *Id.* at 781.

Question #3: The third question is based on two other cases in which the courts reversed the defendants' convictions because of impermissible opinion testimony by the SANES. In *State v. Hudson*, 208 P.2d 1236 (Wash. Ct. App. 2009), two SANES testified. During the testimony of one of the SANES, the prosecutor asked the SANE whether the victim's injuries were consistent with the victim's report of "nonconsensual sex." The SANE responded, over the defendant's objection, that the injuries were "extensive injuries related to nonconsensual sex." *Id.* at 651. When asked whether the SANE would expect to see the type of injuries noted in a consensual encounter, the SANE responded, "No....this was a very traumatic nonconsensual...penetration." *Id.* The court reversed, holding that the trial court abused its discretion in admitting the SANE's opinion testimony that the victim's injuries were caused by "nonconsensual sex." *Id.* at 655.

In the second case, *Velazquez v. Commonwealth*, 557 S.E.2d 213, 216 (Va. 2002), the SANE testified that the victim's injuries were "inconsistent with consensual intercourse." When asked why she had that opinion, the SANE said, "Because the injuries she had are

² There were two victims in this case. The defendant's conviction was affirmed as to one of the victims, but reversed as to the second victim, based on the physician's testimony about threats made by the defendant to the second victim. *Id.* at 42.

consistent with non-consensual intercourse.” *Id.* The court reversed the defendant’s conviction, holding that the admission of expert opinion “upon an ultimate issue of fact in a criminal case is impermissible because it invades the province of the jury.” *Id.* at 104.

Preparation Required: For this exercise, the moderator should:

- Be familiar with the case law in your jurisdiction with respect to expert testimony. You may need to modify the exercise somewhat, based on your jurisdiction’s applicable case law.
- Read the following cases, described above, that were used to create this exercise:
 - *State v. Veikoso*, No. 30138, 2010 Haw. App. LEXIS 809, 2010 WL 5037006 (Haw. Ct. App, 2010).
 - *Young v. State*, 106 So.3d 775 (Miss. 2012).
 - *State v. Hudson*, 208 P.2d 1236 (Wash. Ct. App. 2009).
 - *Velazquez v. Commonwealth*, 557 S.E.2d 213, 216 (Va. 2002).

Instructions for the Exercise: This is a relatively short exercise that deals with one issue: the scope of a SANE’s expert opinion.

- Participants should read the **Case Study**, so they will know the underlying facts of the case.
- Participants should read the **Scope of SANE Testimony Exercise** for the additional facts provided.
- The Moderator can then lead a discussion in which participants answer the questions posed at the end of the **Exercise** and explain their reasoning for their decisions.
- If small group discussions are utilized, the groups first discuss the exercise at their tables, followed by the Moderator leading a Report Back and full-group discussion
- **Recommended Amount of Time:** Twenty-five minutes

Crawford Exercise

Background: A few days before trial, the Victim/Witness Advocate in the prosecutor's office received a phone call from Ms. Hartford's sister, who told the advocate that Ms. Hartford could not make it to the trial. When asked why, the sister said that Daniel had "threatened Trish and scared her away again." The sister also said, "He's a scary dude and Trish is afraid of him. She thinks he's going to really hurt her if she comes to court." The prosecutor sent her investigator to contact Ms. Hartford, but the investigator could not locate her. The investigator tried calling several times and went by Ms. Hartford's apartment and office on numerous occasions, but he was unable to find her.

The Prosecutor's Motion in Limine to Admit the SANE's Testimony: The prosecutor filed a Motion in Limine, asking the Court to admit the SANE's testimony about what Ms. Hartford said during the examination despite the victim's absence. The prosecutor argued that the SANE's testimony, including her findings and observations, as well as the statements Ms. Hartford made while the SANE was taking the medical history and conducting the examination, are admissible under *Crawford v. Washington*, 541 U.S. 36 (2004), because the SANE's testimony is "non-testimonial" under the tests set forth by the United States Supreme Court in *Crawford* and the subsequent cases.³ In the alternative, the prosecutor argued that the defendant was responsible for the victim's absence and, therefore, the SANE's testimony was admissible under the doctrine of forfeiture by wrongdoing.

The defense objected.

Prosecutor's Argument:

(1) Ms. Hartford's statements to the SANE were "non-testimonial." The SANE will testify that the primary purpose for the medical forensic examination she conducted on Ms. Hartford was for medical diagnosis and treatment. The SANE needed to obtain an extensive history of her patient in order to examine her properly and provide proper treatment. Ms. Hartford's statements to the SANE are integral to the SANE's ability to properly treat her patient. The statements were not made to law enforcement for the primary purpose of conducting a criminal prosecution. The SANE is an independent, experienced, specially trained health care provider whose primary purpose is always the best interest of her patient. When Ms. Hartford came to the hospital, she was hysterical and frightened for her life. The SANE needed to ascertain what happened to Ms. Hartford and why she was so frightened in order to properly assess and treat her. Although the SANE did also collect forensic evidence as part of her examination, that was not the primary purpose of the examination. Ms. Hartford's statements were made to the SANE as part of the ordinary course of the examination. A reasonable person in Ms.

³ The authors of this module realize that it would be unlikely a prosecutor would move forward with this case without the victim's testimony, however, we have discovered numerous cases with adult victims in which the victim was unavailable at trial (because the defendant killed her, she died of unrelated causes, she could not travel or she was unavailable for unspecified reasons). Because the issues raised by the *Crawford* line of cases are so difficult and interesting, we are using this fact pattern to address them.

Hartford's position would have expected that the statements she made to the SANE were for the purpose of medical treatment, not to assist law enforcement. Ms. Hartford had spoken to the officers prior to coming to the hospital and the officers were not present for the examination. Medical personnel need to be particularly careful to get a full history in cases of suspected domestic violence or intimate partner sexual abuse because safety planning is such an essential part of their treatment plan. Ms. Hartford was facing an "ongoing emergency" when she arrived at the hospital and she provided critical information to assist the SANE in conducting her examination and formulating her treatment plan.

(2) Since the statements were non-testimonial, they are admissible under the medical exception to the hearsay rule. Since the statements to the SANE were non-testimonial, *Crawford* does not apply and the Court must analyze the statements under the medical exception to the hearsay rule. The statements clearly fit within the medical exception, since they were made for the purpose of medical treatment and diagnosis, and, therefore, they are admissible.

(3) Ms. Hartford's statement to the SANE identifying Mr. Marsh as the perpetrator is also admissible. Case law is clear that courts may exercise discretion in admitting statements under the medical hearsay exception when those statements identify the perpetrator of abuse in sexual assault, domestic violence and child abuse cases. The medical provider must know who the perpetrator is in these types of cases because the treatment will differ when the abuser is an intimate partner, a member of the victim's family or a household member. In those cases, the abuser's identity becomes "reasonably pertinent" to the victim's proper treatment.

(4) Even if the statements were "testimonial," which they are not, the statements are admissible under the "forfeiture by wrongdoing" doctrine, since Mr. Marsh caused Ms. Hartford to be "unavailable" for trial. The defendant caused Ms. Hartford to be "unavailable" for trial, so he is not allowed to complain that his Fourth Amendment right to confrontation is violated by her absence. He acted with the intent to silence her, to make her unavailable and to deprive this Court of relevant evidence. According to the US Supreme Court in *Giles v. California*, 554 U.S. 353 (2008), the intent to silence a witness can be inferred from an ongoing pattern of abuse in domestic violence cases.

The prosecution does not have to prove that it was his sole intention, just that Mr. Marsh acted in part to silence Ms. Hartford. The evidence shows Mr. Marsh's long history of perpetrating domestic violence against Ms. Hartford, even after she left him and obtained a protective order. Ms. Hartford's sister is here and she will testify as to the threats Mr. Marsh made to Ms. Hartford. The SANE is also available to testify as to the threatening statements Ms. Hartford said the defendant made. We also have Ms. Hartford's application for her protective order, which documents Mr. Marsh's long history of violence toward Ms. Hartford, as well as the police reports from the previous times Ms. Hartford had to call the police to stop Mr. Marsh's violent behavior toward her.⁴

⁴ See facts set forth in the Case Study.

The totality of the evidence set forth in this case establishes that Mr. Marsh intended to isolate Ms. Hartford from outside help, including from the aid of law enforcement and the judicial process.

The burden of proof on this issue is by a preponderance of the evidence. The State has demonstrated that the statements Ms. Hartford made to the SANE are non-testimonial, but even if that were not the case, Mr. Marsh is precluded by the doctrine of forfeiture by wrongdoing from objecting to their admissibility.

Defense Attorney's Response:

(1) The statements Ms. Hartford made to the SANE are absolutely “testimonial” as defined by the US Supreme Court. The police drove Ms. Hartford to the hospital for the express purpose of a forensic examination. SANEs are an active participant in formal criminal prosecutions and they receive specialized training on how to assist the police by gathering evidence for the case. They are state actors involved in formal out-of-court interrogations of witnesses to gather evidence for trial. The primary purpose of a SANE is to act as an arm of law enforcement and collect evidence to aid in a criminal prosecution. Any objective witness would know that the purpose of a SANE examination is to help gather evidence to develop the criminal case. There was no ongoing emergency when Ms. Hartford went to the hospital.

(2) Ms. Hartford's alleged identification of my client to the SANE is inadmissible hearsay under any analysis. Statements that attribute fault or establish the identity of an alleged assailant are inadmissible under the *Crawford* line of cases and under any medical hearsay exception.

(3) The prosecutor failed to meet her burden of proving forfeiture by wrongdoing, which does not even apply in this case. There is no evidence that Mr. Marsh caused Ms. Hartford to be unavailable at this trial and the prosecutor cannot meet her burden of showing that Mr. Marsh did anything with the intention of preventing Ms. Hartford from testifying. She has a long history of making ridiculous accusations against my client and then not showing up for trial after she has put him through the wringer. It's time to put an end to this endless harassment of my client. This Court should deny the prosecutor's Motion in Limine, dismiss this case and let my client try to get on with his life.

Crawford Exercise Discussion Questions

- 1. Are Ms. Hartford’s statements to the SANE “non-testimonial” under the *Crawford* line of cases, as the prosecutor argues, or are they “testimonial” as claimed by the defense? Explain your reasoning.**
- 2. Assume, just for this part of the exercise, that the statements are “testimonial.” Is Mr. Marsh precluded by the doctrine of “forfeiture by wrongdoing” from raising an objection to the admission of Ms. Hartford’s statements to the SANE? Why or why not?**
- 3. Assuming that *Crawford* does not bar the statements from being admitted at trial, are they admissible under your jurisdiction’s medical exception hearsay rule? Why or why not?**
- 4. Are the statements in which Ms. Hartford identifies Mr. Marsh as her assailant also admissible under your jurisdiction’s medical exception hearsay rule? Why or why not?**

Instructions for Crawford Exercise

Purpose of the Exercise: This exercise explores the complex issues that would arise in applying *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, in an intimate partner sexual assault case in which the victim is unavailable to testify at trial. Although it would be unlikely a prosecutor would move forward with a case like this without the victim’s testimony, there are numerous cases with adult victims in which the victim was unavailable at trial (because the defendant killed her, she died of unrelated causes, she could not travel or she was unavailable for unspecified reasons.). Because the issues raised by the *Crawford* line of cases are so difficult and interesting, we use this fact pattern to address them.

In the ***Crawford Exercise***, the prosecutor learns shortly before trial that the victim will not appear in court. The prosecutor files a Motion in Limine seeking to introduce the statements the victim made to the SANE about what happened to the victim, who committed the crime and the threats the defendant made to the victim to keep her from appearing in court. These facts raise four main issues about the application of *Crawford* and its progeny:

- Whether the victim’s statements to the SANE were “non-testimonial” and, therefore, admissible or “testimonial.”
- Whether, even if the statements were “testimonial,” the statements are still admissible under the “forfeiture by wrongdoing” doctrine, since the defendant caused the victim to be unavailable for trial.
- Whether, if the statements were not barred by *Crawford*, they are admissible under your jurisdiction’s medical exception hearsay rule.
- Whether the statements in which the victim identified the perpetrator are also admissible under the medical exception hearsay rule.

Preparation Required: This is a very complex, rapidly changing area of the law. The moderator will need to be familiar with *Crawford* and the other related U.S. Supreme Court cases, as well as any case law in your jurisdiction that interprets or applies *Crawford* and the cases that followed.

The following ***Crawford Analysis Chart*** is provided to assist the moderator in preparing for and facilitating the discussion for the ***Crawford Exercise***. There is additional **Commentary** provided on the following pages to help explain the analysis required to discuss this scenario.

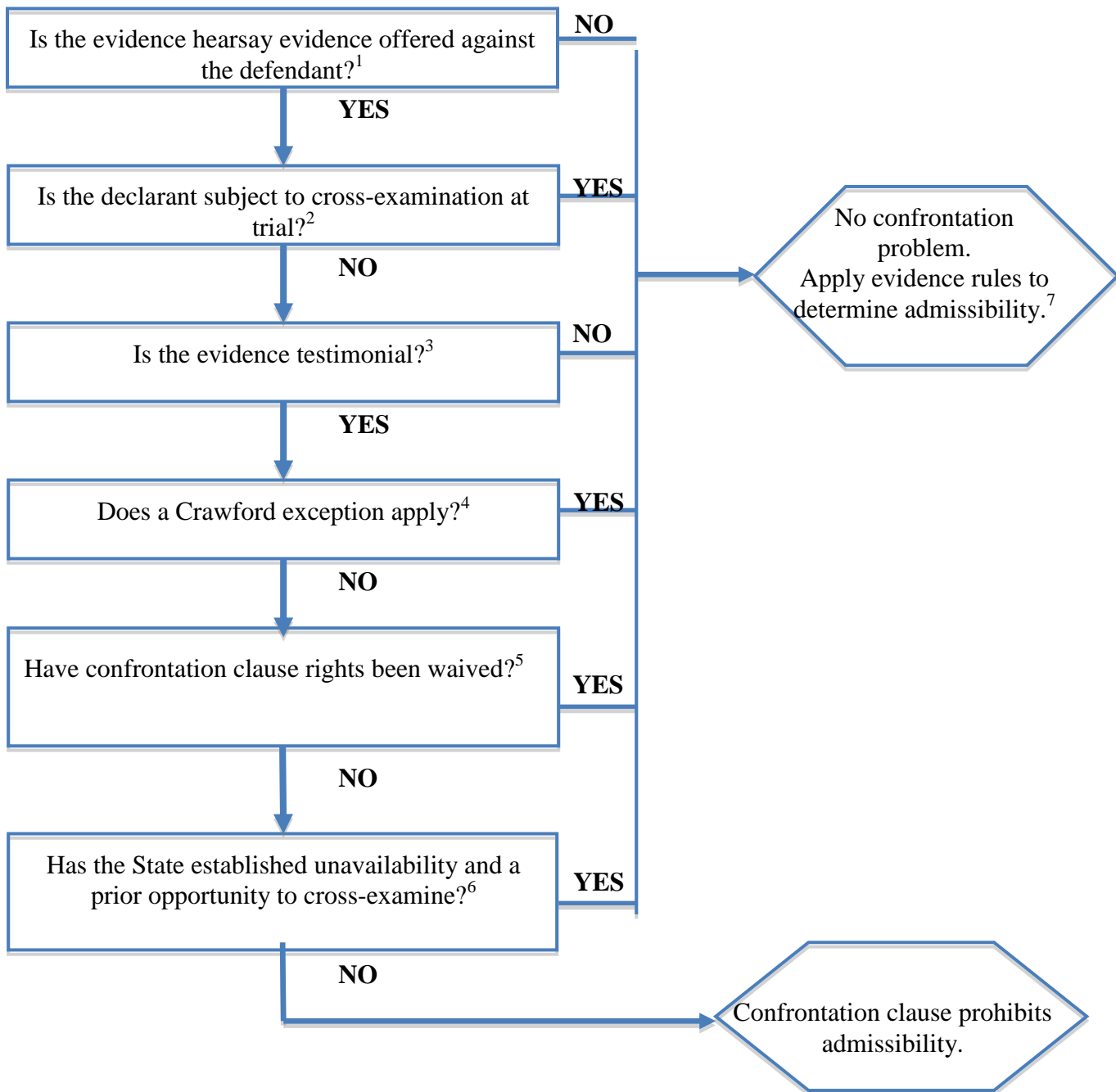
The moderator should read the cases annotated in the **Commentary** following the **Crawford Analysis Chart**, which were used to create this **Exercise**, as well as the following U.S. Supreme Court cases:

- *Crawford v. Washington*, 541 U.S. 36 (2004).
- *Davis v. Washington*, 547 U.S. 813 (2006) (applies *Crawford* in the domestic violence context).
- *Giles v. California*, 554 U.S. 353 (2008) (addresses forfeiture by wrongdoing in the domestic violence context).

Instructions for the Exercise: This is a complex exercise that deals with the multiple aspects of *Crawford* issue cases in the context of SANE

- Participants should read the **Case Study**, so they will know the underlying facts of the case.
- Participants should read the **Crawford Exercise** and **Crawford Analysis Chart** for the additional facts and road map provided.
- The Moderator can then lead a discussion in which the participants answer the questions posed at the end of the **Exercise** and explain their reasoning for their decisions.
- If small group discussions are utilized, the groups first discuss the exercise at their tables, followed by the Moderator leading a Report Back and full-group discussion
- **Recommended Amount of Time:** Fifty-five minutes

Crawford Analysis Chart



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Crawford Analysis Chart – Additional Commentary

Two other helpful references include:

- *1-5 Morosco, The Prosecution and Defense of Sex Crimes § 5.09 (Matthew Bender, Rev. Ed.) (2013).*
- AEquitas, The Prosecutors' Resource on Violence Against Women, *available at* www.aequitasresource.org.

For ease of reference, these comments are numbered to coincide with the numbers added to the **Crawford Analysis Chart**. The **Crawford Exercise** specifically deals with the following steps in the **Crawford Analysis Chart**:

- Step 3: Evidence “Testimonial” or “Non-Testimonial”
- Step 4: *Crawford* Exception Applicable
- Step 7: Admissible Under Jurisdiction’s Rules of Evidence

Because the *Crawford* analysis is so complicated and there is so much misunderstanding about how it is to be applied, each step is addressed in the **Commentary** below. There are **Moderator Hints** provided for each step and the moderator can just briefly touch on the issues not raised by the facts provided in the **Case Study** and the **Crawford Exercise**.

1. **Hearsay Offered Against the Defendant:** Hearsay analysis changed significantly with *Crawford v. Washington*, 541 U.S. 36 (2004), where the Supreme Court held that hearsay deemed “testimonial” must be excluded when the declarant is not available for cross-examination. *See 1-5 Jules Epstein, The Prosecution and Defense of Sex Crimes § 5.09 (Matthew Bender, Rev. Ed.) (2013).*

Moderator Hints: For this **Exercise**, the evidence (the victim’s statements to the SANE) is hearsay offered against the defendant.

2. **Declarant Subject to Cross-Examination:** Prosecutors rarely take adult sexual assault or rape cases to trial when the declarant (victim) is unavailable. However, these issues do arise in certain circumstances. *See, e.g., People v. Garland*, 777 N.W.2d 732 (Mich. Ct. App. 2009) (the victim lived in another state and, due to her high-risk pregnancy, was unable to fly to the trial); *State v. Harper*, 770 N.W.2d 316 (Iowa 2009) (the victim died before trial); *State v. Romero*, 156 P.3d 694 (N.M. 2007) (the victim was dead and the defendant was also accused of her murder); and *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006) (the victim died before trial from an unrelated seizure disorder).

Moderator Hints: For this **Exercise**, the declarant is unavailable at trial and is not subject to cross-examination.

3. Evidence “Testimonial” or “Non-Testimonial”: What constitutes “testimonial” evidence is a complicated question, the answer to which is constantly changing. The Supreme Court offered some additional guidance in its opinion regarding “testimonial” hearsay in *Davis v. Washington*, 547 U.S. 813 (2006). See Epstein, *supra* note 1, at 3, which lists the primary principles that distinguish “testimonial” evidence from “non-testimonial” evidence: If the state is describing a past criminal act, then the evidence is “testimonial.” If the declarant is seeking help in an emergency, the evidence is “non-testimonial.” See also AEQUITAS, THE PROSECUTORS’ RESOURCE- CRAWFORD AND ITS PROGENY 12 (2013), which offers a helpful chart of factors judges have used to determine whether statements are “testimonial” or “non-testimonial.”

Examples of cases in which an adult victim’s statements to medical personnel were deemed “non-testimonial”:

- *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006) (The victim died prior to trial from an unrelated seizure disorder. The statements made to the SANE were “non-testimonial.” The victim’s statements were elicited during the ordinary course of a medical examination, even though an officer was present. The test “should focus on the expectation of the declarant,” not the intent of the questioner. Because the victim had already spoken to the police, she would have reasonably believed that the statements she made to the SANE had a distinct medical purpose: to allow the SANE to diagnose and provide appropriate treatment. Also, the consent form authorized the release of physical evidence, but not the victim’s statements. Therefore, to a reasonable person, the SANE’s questioning would appear to be primarily healthcare related.).
- *People v. Garland*, 777 N.W.2d 732 (Mich. Ct. App. 2009) (Victim’s statements made to the SANE were “non-testimonial” because they were reasonably necessary for diagnosis and treatment, and patients have a self-interested motivation to speak the truth for a medical diagnosis. Also, the police investigation occurred after, and separate from, the nurse’s taking of the history and the medical examination. To determine whether the statements are “testimonial” or not, one must consider the totality of the circumstances, which here indicated “an objective witness would reasonably believe that the statements made to the nurse clearly indicated that the primary purpose of the questions or the examination was to meet an ongoing emergency.”).
- *State v. Harper*, 770 N.W.2d 316 (Iowa 2009) (The defendant raped the victim, tied her up and set her on fire. At the hospital, the ER physician asked the victim what happened and she explained what the defendant had done. The victim died from her burns. The court found that statements

made to the ER doctor were “non-testimonial.” The victim was describing events that were actually happening as she was facing an ongoing emergency. Also, even if the statements were “testimonial,” they fell under two hearsay exceptions: dying declaration and forfeiture by wrongdoing. There was nothing to lead an objective witness to believe that prosecution would use these statements. The statements assisted the physician in diagnosis and treatment of the victim and these types of statements are standard in evaluating a patient’s condition and treatment.).

- *Perry v. State*, 956 N.E.2d 41 (Ind. Ct. App. 2011) (The defendant strangled and raped his ex-girlfriend. The victim was interviewed by the police and then transported to a hospital, where she was examined by a SANE. The victim identified her assailant to the SANE and told the SANE what happened. The victim was unavailable at trial. In her testimony, the SANE emphasized the medical nature of the exam, explaining that identifying the attacker is necessary to implement a treatment plan. The statements were “non-testimonial” because the primary purpose of the exam from the victim’s or SANE’s perspective was not to prove past facts, and the exam was not done with an eye towards a trial. Also, the investigative purpose of the exam was secondary to the primary purpose of medical care.).
- *State v. Slater*, 939 A.2d 1105 (Conn. 2008) (The victim died before the trial of unrelated causes. The victim’s statements to the doctor at the hospital were “non-testimonial.” The victim’s statements indicated she “reasonably expected” that her statements were primarily to help guide the doctors in treatment. The statements made by the victim were relevant to determine possible pregnancy and exposure to sexually transmitted infections. Also, while the exam does preserve physical evidence, the primary purpose is medical treatment.).
- *State v. Castilla*, 87 P.3d 1211 (Wash. Ct. App. 2005) (Severely disabled victim’s statements to a nurse were “non-testimonial” as they were not elicited by a government official and were not given with “an eye toward trial.”).

Examples of cases in which an adult victim’s statements to medical personnel were deemed “testimonial”:

- *Green v. State*, 22 A.3d 941 (Md. 2011) (Law enforcement took the victim to a hospital first and then to the sexual assault center for a forensic examination. Because the victim was sent to the sexual assault center to “help develop the state’s criminal case,” an objective witness would

believe her statements would be used later at trial. Therefore, these statements were testimonial.).

- *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009) (The victim died before trial. Statements made by the victim to the SANE were “testimonial.” The SANE was “acting in cooperation with or for the police.” The SANE also had two primary roles: medical treatment and gathering evidence. The SANE is an active participant in formal criminal investigations, because forensic examinations are made available to victims of sexual offenses by statute. SANEs therefore serve the functional equivalent of police questioning, so statements to them are “testimonial.” The SANE’s questions were not related to an ongoing emergency. Therefore, statements made by the victim to the SANE were inadmissible.).
- *Medina v. State*, 143 P.3d 471 (Nev. 2006) (The victim died before the trial. The SANE was “a police operative.” Because of this, an objective witness would reasonably believe that statements made to the SANE would be available for use at a later trial. Therefore, it was an error to admit statements made by the SANE recounting what the victim had told her. These statements were “testimonial.”).
- *State v. Bennington*, 264 P.3d 440 (Kan. 2011) (Victim’s statements to the SANE, when both the SANE and law enforcement participated in the questioning, were “testimonial.” The SANE acted as an agent of law enforcement by following procedures and asking questions developed by law enforcement.).

Example of a case in which an adult victim’s statements to medical personnel were deemed “testimonial” in part and “non-testimonial” in part:

- *State v. Romero*, 156 P.3d 694 (N.M. 2007) (The defendant was charged with both domestic violence and the murder of the victim. The victim had previously been examined by a SANE after a prior assault by the defendant. At trial, the SANE read the victim’s statements from the earlier assault verbatim. The defendant appealed the domestic violence conviction. Because the victim went to the SANE several weeks after the prior assault, with the assistance and encouragement of a police officer, the victim’s statements to the SANE, which accused the defendant of specific acts, should have been redacted because they were “testimonial.” Some statements the victim made to the SANE were necessary for medical treatment so they were admissible.).

Moderator Hints: Under the facts presented in the *Crawford Exercise*, the statements made to the SANE should be “non-testimonial.”

4. **Crawford Exception Applicable:** *Crawford* exceptions to testimonial hearsay include dying declarations and forfeiture by wrongdoing.

The relevant exception for this **Exercise** is forfeiture by wrongdoing. The U.S. Supreme Court addressed forfeiture by wrongdoing in the domestic violence context in *Giles v. Davis* 128 S. Ct. 2678 (U.S. 2008), a complicated plurality opinion. In *Giles*, the defendant shot his ex-girlfriend and killed her. At trial, the prosecutor introduced evidence that the victim had gone to the police two to three weeks before the shooting and told the police that the defendant had punched her, “choked” her and threatened to kill her. The Supreme Court, in the plurality opinion, reversed Giles’ conviction, holding that the prosecutor had to prove that Giles caused the victim’s absence in order to prevent her from testifying. The *mens rea* of “intent-to-prevent” was accepted by the four-justice plurality and by two concurring justices. See Epstein, *supra* note 1, at 8.

However, the two concurring justices added the following important qualifier in the case of domestic violence:

[T]he element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.

Giles, 554 U.S. at 380.

It is also important to remember that the judge only gets to this stage of the analysis if the judge finds that the statements were testimonial. See Epstein, *supra* note 1, at 9; *State v. Harper*, 770 N.W.2d 316 (Iowa 2009).

Burden of Proof: In the majority of states, the prosecution must prove forfeiture by wrongdoing by a preponderance of the evidence. *The Prosecutor’s Resource*, at 14; See also, *Morosco*, at 10.

Moderator Hints: For the **Crawford Exercise**, the moderator should ask participants to assume, for the purpose of this part of the exercise, that the statements the victim made to the SANE are “testimonial.” The participants should then discuss whether the facts as provided in the **Case Study** and the **Exercise** establish that the defendant is prohibited by the doctrine of forfeiture by wrongdoing from objecting to the admissibility of the victim’s statements to the SANE. It is important to discuss forfeiture by wrongdoing in the context of

domestic violence and the qualifier quoted above from the *Giles* case. *Giles*, 554 U.S. at 380.

- 5. Confrontation Clause Rights Waived:** Defendants waives their right to confrontation when they stipulate to the admissibility of a testimonial statement, through a “notice and demand” statute, or by “opening the door.” Notice and demand statutes vary by jurisdiction but require the defendant to object to evidence before trial as part of a procedural motion. “Opening the door” is a common phrase used to describe the situation in which the defendant begins the line of questioning about otherwise inadmissible evidence, which the prosecutor then has the right to rebut. *See AEquitas*, *supra* note 3, at 16.

Moderator Hints: The defendant in the *Crawford Exercise* has not waived his right to confront the witness, so this step in the analysis does not apply here.

- 6. Unavailability and Prior Opportunity to Cross-Examine:** This is the last step in the *Crawford* analysis. If the statements are “testimonial” and the *Crawford* exceptions do not apply, then the prosecutor must show that the declarant is unavailable and that the defendant has a prior opportunity to cross-examine the declarant. If the prosecutor does not meet that burden, then the Confrontation Clause prohibits the evidence from being admitted. If “the defendant had the opportunity for meaningful cross-examination, the prior testimony is admissible.” *See Epstein*, *supra* note 1, at 8.

Moderator Hints: For the *Crawford Exercise*, participants will only get to this step if they find that the statements the victim made to the SANE are “testimonial” and that the forfeiture by wrongdoing exception does not apply. If participants come to that conclusion, the statements would not be admissible since the victim did not testify at the preliminary hearing, so the defendant had no prior opportunity to cross-examine her.

- 7. Admissible Under Jurisdiction’s Rules of Evidence:** As explained above, in cases where the declarant is unavailable, the judge must first engage in the steps of the *Crawford* analysis. If a judge finds that *Crawford* is not applicable, because, for example, the statements are “non-testimonial” or the defendant is barred by the doctrine of forfeiture by wrongdoing from objecting to their admission, the judge must then decide whether the statements are admissible under the rules of evidence in the jurisdiction.

For purposes of this **Exercise**, the relevant hearsay exception is the one that deals with statements made for the purpose of medical diagnosis or treatment. There are two types of statements made in the **Case Study** and the *Crawford Exercise*:

- The statements made by the victim describing what happened to her; and

- The victim’s statements about who assaulted her and the threats made by the defendant.

It is important to discuss both types of statements in this part of the **Exercise**. The following cases address whether statements identifying the assailant are admissible as part of the medical diagnosis or treatment hearsay exception in the context of domestic and/or sexual violence:

- *People v. Tyme*, Colo. App. 11 CA 1520 (2013) (Statements made by the victim to the SANE are admissible because they were necessary for medical treatment and diagnosis.).
- *Perry v. State*, 956 N.E.2d 41, 49 (Ind. Ct. App. 2011) (Recognizes that statements attributing fault or establishing perpetrator’s identity are typically inadmissible, but holds that in cases of child abuse, sexual assault and/or domestic violence, “courts may exercise their discretion in admitting medical diagnosis statements which relay the identity of the perpetrator.” Holds that in domestic sexual abuse cases, the medical provider “must know who the abuser was in order to render proper treatment because the physician’s treatment will necessarily differ when the abuser is a member of the victim’s family or household.”).
- *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006) (Addresses the importance of obtaining the perpetrator’s identity to avoid releasing the patient into the care of the perpetrator and for purposes of treating the patient’s mental health).
- *State v. Veikoso*, No. 30138, 2010 Haw. App. LEXIS 809, 2010 WL 5037006 (Haw. Ct. App, 2010) (Held that threats made by stranger rapist to victim were inadmissible under medical hearsay exception in this case, but recognized that courts are more willing to admit hearsay statements identifying the assailant and assigning fault in domestic violence or child abuse cases.).

Moderator Hints: This part of the *Crawford Exercise* is much more dependent on the law of the local jurisdiction. It is important to discuss these issues in the context of the long history of domestic violence established by the facts of this case.

Instructions for the Exercise: This is a complicated exercise that deals with the application of the *Crawford* line of cases in a case in which the defendant is accused of sexually assaulting and strangling his ex-girlfriend. The moderator should discuss each of the issues raised, using the analysis provided in the ***Crawford Analysis Chart*** and the related **Commentary**.

- The Moderator should distribute a copy of the ***Crawford Analysis Chart*** to all participants.
- Participants should read the **Case Study** and the ***Crawford Exercise*** so they will know the underlying facts of the case.
- The Moderator can then lead a discussion in which the participants answer the questions posed at the end of the **Exercise** and explain their reasoning for their decisions.
- If small group discussions are utilized, the group first discusses the exercise at their tables, followed by the Moderator leading a Report Back and full-group discussion
- **Recommended Amount of Time:** Fifty-five minutes

Evaluation

Evaluation is a critical component of any judicial education program. Because jurisdictions have their own standard evaluation instruments and procedures, we have not included a suggested evaluation form here.

Technical Support

The National Judicial Education Program (NJEP) is available to provide technical assistance to judicial educators and judges who are planning programs using these materials. Please contact us if you need technical assistance or have any questions about using this curriculum.

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