DISCERNING ONE PRIMARY PURPOSE FROM TWO: THE INCONSISTENT TREATMENT OF SEXUAL ASSAULT NURSE EXAMINER TESTIMONY UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE

TESSA DEFRANCO*

Abstract

Survivors of sexual assault and domestic violence often play a critical role in the criminal prosecutions of their abusers. The cyclical dynamics of abuse and corresponding prevalence of factors such as trauma, intimidation, and coercion, however, mean that survivors are often unavailable or unwilling to testify at trial. In these instances, a victim's prior out-of-court statements may nonetheless be admissible if they satisfy the Sixth Amendment's Confrontation Clause. This Note explores Confrontation Clause jurisprudence in the context of victim statements made during Sexual Assault Nurse Examiner (SANE) examinations and demonstrates how the divergent approaches taken by courts around the country have left defendants, law enforcement, SANEs, and victims without a coherent framework governing the admissibility of these statements at trial. Part I details the responsibilities of SANEs and the significant role they play in the provision of both medical care and evidentiary support in subsequent criminal prosecutions. Part II lays out the evolution of the U.S. Supreme Court's Confrontation Clause jurisprudence, from its longstanding focus on reliability to its modern-day primary purpose analysis. Part III explicates how courts throughout the United States analyze the testimonial nature of statements made by victims of sexual assault in the context of SANE examinations. Finally, Part IV recommends solutions to create a more consistent framework for analyzing SANE testimony when a victim is unavailable come trial, including practical changes to SANE programs as well as doctrinal changes to Confrontation Clause jurisprudence. Ultimately, this Note advocates for a declarant-centered approach due to the unique nature of domestic violence and sexual

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assault prosecutions, including the high rate of unavailable witnesses, the vulnerability involved in a sexual assault examination, and the likelihood of re-traumatization.

INTRODUCTION

Emergency rooms are often the first institutional contact for victims of sexual assault.[1] That was the case for K.E.H.,[2] who arrived at Tacoma General Hospital's emergency room at 1:24 a.m. on July 3, 2009, after she was raped in a nearby park.[3] At the hospital, K.E.H. spoke with a social worker who subsequently contacted the police to report the rape.[4] When the police arrived, K.E.H. provided officers with details of the assault, including the location of the incident and a description of her attacker.[5] Later that morning, K.E.H. was treated by a physician and medically cleared for discharge, but she decided to wait for Kay Frey, a Sexual Assault Nurse Examiner (SANE), to examine her.[6] At about 4:00 p.m. that afternoon, SANE Frey conducted a sexual assault forensic examination on K.E.H.[7] She performed a physical examination, collected biological samples that could contain DNA evidence, and gathered K.E.H.'s medical history, which included a description of the assault.[8]

The DNA evidence collected by SANE Frey during the forensic evaluation ultimately led to the apprehension of Ronald Delester Burke.[9] By the time Burke was arrested and

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1 *SANE Certification: What's the Scoop?*, INT'L ASS'N OF FORENSIC NURSES (2025), https://www.forensicnurses.org/sane-certification-whats-the-scoop/ [https://perma.cc/H7C3-NRM4].

2 In cases involving sexual assault, limited identifiers such as a victim's initials, first name, or pseudonym may be used in place of their full name to preserve their privacy. U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, FRAMEWORK FOR PROSECUTORS TO STRENGTHEN OUR NATIONAL RESPONSE TO SEXUAL ASSAULT & DOMESTIC VIOLENCE INVOLVING ADULT VICTIMS 18 (2024), https://www.justice.gov/ovw/media/1352371/dl?inline [https://perma.cc/7NVV-XRJQ]; *see also* United States v. Daskal, No. 21-CR-110, 2023 WL 9424080, at *3–5 (E.D.N.Y. July 12, 2023).

3 State v. Burke, 431 P.3d 1109, 1111 (Wash. Ct. App. 2018), *rev'd*, 478 P.3d 1096 (Wash. 2021).

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* At trial, Frey testified that the history was "'like any medical history' and was a personal statement about what happened." *Id.*

9 *Id.*

prosecuted for the assault, however, K.E.H. had passed away from an unrelated illness.[10] Because K.E.H. was unable to testify, the State of Washington moved to admit her statements to SANE Frey under the state's medical exception to the hearsay rule.[11] The prosecution sought to have SANE Frey read verbatim the portion of her report that included K.E.H.'s narrative description of the incident.[12]

Burke objected to the admission of SANE Frey's testimony under the Confrontation Clause,[13] a constitutional safeguard meant to protect the right of criminal defendants to cross-examine their accusers in court even when their accusers' out-of-court statements fall under a hearsay exception.[14] The Confrontation Clause's ultimate goal is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[15] In practice, the clause creates an additional, constitutional layer of protection to assess the reliability of hearsay evidence against criminal defendants by requiring testimony to be subject to "the crucible of cross-examination."[16] To that end, the clause bars the admission of an absent witness' testimonial statements at trial[17]—"however trustworthy a judge might think them—unless the witness is unavailable and the defendant had a prior chance to subject her to cross-examination."[18]

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10 *Id.* at 1111–12.

11 *Id.* at 1112.

12 *Id.* at 1114.

13 *Id.*

14 Crawford v. Washington, 541 U.S. 36, 50 (2004) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused . . . *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers would certainly not have condoned them."); U.S. CONST. amend. VI. The Fourteenth Amendment extended this right to state courts. Pointer v. Texas, 380 U.S. 400, 403 (1965).

15 *Crawford*, 541 U.S. at 74 (quoting Maryland v. Craig, 497 U.S. 836, 845 (1990)).

16 *Id.* at 61.

17 Determining whether out-of-court statements are testimonial or not involves ascertaining the "'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." Michigan v. Bryant, 562 U.S. 344, 370 (2011) (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)). See *infra* Part II.A for a further explication of the meaning of "testimonial" in the context of the Confrontation Clause.

18 Smith v. Arizona, 602 U.S. 779, 784 (2024).

After a hearing on the motion, the court overruled Burke's Confrontation Clause objection and allowed SANE Frey to read K.E.H.'s narrative statement describing the incident and her assailant, which SANE Frey had collected during the forensic examination.[19] The jury then convicted Burke of second-degree rape.[20]

Burke subsequently appealed, arguing that his Sixth Amendment rights under the Confrontation Clause had been violated by the admission of K.E.H.'s statements to Nurse Frey.[21] Under the Supreme Court's Confrontation Clause jurisprudence, Burke's challenge hinged on whether the court determined K.E.H.'s out-of-court statements to be of "testimonial" character.[22] The Washington Court of Appeals adopted the primary purpose test established twelve years earlier in *Davis v. Washington*,[23] requiring a determination of whether the circumstances of the examination objectively demonstrate that its primary purpose was to provide evidence for a future criminal prosecution.[24] The court reversed Burke's conviction after finding that the State had not met its burden in establishing that K.E.H.'s statements to Nurse Frey were *non*testimonial.[25]

The State appealed this holding to Washington's highest court.[26] In its decision, the Supreme Court of Washington grappled with the dual purposes of Nurse Frey's role as a SANE: collecting evidence and providing medical care.[27] Under the *Davis* test, statements

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19 *Burke*, 431 P.3d at 1114.

20 *Id.* at 1115.

21 *Id.*

22 *Id.* ("The [C]onfrontation [C]lause prohibits the 'introduction of testimonial statements by a nontestifying witness, unless the witness is unavailable to testify, and the defendant had a prior opportunity for cross-examination.'" (internal quotation marks omitted) (quoting Ohio v. Clark, 576 U.S. 237, 243 (2015))).

23 Davis v. Washington, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

24 *Burke*, 431 P.3d at 1118.

25 *Id.* at 1120.

26 *See* State v. Burke, 478 P.3d 1096, 1109–10 (Wash. 2021), *cert. denied*, Burke v. Washington, 142 S. Ct. 182 (Wash. 2021).

27 *Id.* at 1108–09 ("Though documenting and collecting evidence are some of the critical responsibilities of a sexual assault nurse examiner, so is providing medical care. Sexual assault nurse examiners provide medical

made for the primary purpose of receiving medical care are considered nontestimonial and thus can be admitted over a Confrontation Clause objection so long as they fall under a state or federal exception to the hearsay rule.[28] If the court found that any of K.E.H.'s statements were instead made for some other primary purpose, such as identifying her assailant or creating a record for trial, Burke could invoke the Confrontation Clause to prevent them from being admitted.[29] En banc, the court held that the majority of K.E.H.'s statements to Nurse Frey did not implicate the Confrontation Clause.[30] In making this determination, the court relied on the role of SANEs generally,[31] Nurse Frey's own description of her role,[32] the nature of Nurse Frey's employer,[33] the lack of law enforcement involvement,[34] and the circumstances surrounding K.E.H.'s statements.[35] The court did hold that one statement—K.E.H.'s description of her assailant—was testimonial, and thus inadmissible under the Confrontation Clause, because it served no medical purpose in K.E.H.'s treatment.[36]

State v. Burke represents an intuitive understanding of Confrontation Clause jurisprudence. When a victim is unavailable to testify at the subsequent criminal trial, their out-of-court statements are only admissible if they are made for a nontestimonial purpose, that is, a purpose other than preserving evidence for prosecution. In *Burke*, the court considered SANEs' forensic duties to be a supplement to their medical responsibilities,

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care specific to sexual assault regardless of whether or not the patient wishes to report the crime to police.").

28 *Id.* at 1114.

29 *Id.* at 1106–08.

30 *Id.* at 1102, 1110–12.

31 *Id.* at 1108.

32 *Id.* at 1110 ("She explained that, according to her medical training, taking the patient's history is the 'most important thing' for treating patients—including 'sexual assault patients'—because it guides the medical provider in determining where to look for injuries and what medication is appropriate.").

33 *Id.* ("[A]lthough the exam itself was paid for by state and federal crime victims' compensation funds, Nurse Frey was employed and paid by a health care organization; she was not paid with governmental funds.").

34 *Id.* ("Nurse Frey followed protocols to collect and preserve physical samples, but she did not take any direction from law enforcement regarding the steps she should take in the exam, and no member of law enforcement was present during the exam.").

35 *Id.* at 1111. The relevant circumstances included that the statements were made in a medical examination room in a hospital, that K.E.H. required medical attention from Nurse Frey, that K.E.H. did in fact receive medical care from Nurse Frey, and the confidential nature of the examination's medical records. *Id.*

36 *Id.* at 1112–13.

rendering most patient statements made to them during a sexual assault examination nontestimonial for purposes of the Confrontation Clause.[37] In contrast, directly inculpatory statements that have no connection to medical treatment can easily be excluded as testimonial.[38] A survey of cases across jurisdictions makes clear, however, that this intuitive understanding is not an accurate reflection of Confrontation Clause jurisprudence in the context of SANE testimony. Myriad factors are weighed differently by courts, sometimes in directly contradictory ways. The lack of clarity provided by the Supreme Court's "primary purpose" test has resulted in a remarkably inconsistent legal landscape.

Sexual assault and domestic violence often bear no witnesses and yet are incredibly prevalent across the United States. In the United States, nearly half a million people are raped or sexually assaulted each year, and over one in three women and one in four men will experience rape, physical violence, or stalking by an intimate partner in their lifetime.[39] If a victim of sexual assault is unavailable to testify at trial, admitting their statements made to SANEs can significantly impact the outcome of the accused's criminal prosecution. Like K.E.H., some victims may be unavailable to testify because they are no longer alive. More broadly, however, the prevalence of factors such as trauma, intimidation, coercion, and the cyclical dynamics of abuse can all contribute to a victim's unavailability under the standards of the Confrontation Clause.[40] The pervasiveness of these issues warrants a clearer framework for assessing the testimonial nature of SANE testimony to enable a more consistent application of the Confrontation Clause across the country.

This Note examines the unique posture of SANEs' factual testimony in American Confrontation Clause jurisprudence and suggests analytical parameters to decrease the impact that jurisdictional differences have on case outcomes. Part I details the advent and evolution of SANE programs and describes the role of Sexual Assault Nurse Examiners today. Part II outlines the development of the Supreme Court's Confrontation Clause jurisprudence. Part III highlights the problematic application of the "primary purpose" test to SANE testimony and synthesizes the current treatment of SANE testimony across the myriad factors that make up courts' Confrontation Clause analysis. Finally, Part IV

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37 *Id.* at 1110.

38 *Id.* at 1112–13.

39 *Victims of Sexual Violence: Statistics*, RAINN (Aug. 28, 2025), https://www.rainn.org/statistics/victims-sexual-violence [https://perma.cc/LR2F-8AQ6]; *Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/stakeholders/domestic-violence-statistics/#:~:text=Over%201%20in%203%20women,intimate%20partner%20in%20their%20lifetime [https://perma.cc/MJU9-XPAL].

40 *See infra* Part III.

proposes a more consistent framework for evaluating the admissibility of SANE testimony and advocates for a declarant-centered approach.

I. The Role and Responsibilities of Sexual Assault Nurse Examiners

Sexual Assault Nurse Examiner (SANE) programs began to develop in the 1970s in response to the inadequacy of emergency services provided to victims[41] of sexual assault.[42] Because most sexual assault survivors are not suffering from acute medical emergencies when they enter a hospital, the traditional emergency room department model left many waiting hours for treatment.[43] By the time they did get care, many victims were retraumatized by hurried and invasive examinations by emergency room staff without extensive training on how to conduct forensic examinations with the patience and sensitivity appropriate for patients who have recently experienced sexual trauma.[44] Some physicians were reluctant to participate in rape forensic evidence collection at all.[45] If evidence was collected from a survivor, hospital staff were rarely available to participate in the prosecution of the sexual assault case.[46] These gaps in patient care spurred the development of SANE programs, whose founding goal was often to "increase the consistency with which victims receive[] information about and treatment for injuries, pregnancy concerns, [sexually-

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41 Throughout this Note, the terms "victim" and "survivor" are used interchangeably to acknowledge and respect the range of experiences and preferences of people who have experienced sexual assault.

42 Rebecca Campbell, Debra Patterson & Lauren F. Lichty, *The Effectiveness of Sexual Assault Nurse Examiner (SANE) Programs: A Review of Psychological, Medical, Legal, and Community Outcomes*, 6 TRAUMA, VIOLENCE, & ABUSE 313, 315 (2005) [hereinafter *Effectiveness of SANE Programs*].

43 Cari Caruso, *The Forensic Sexual Assault Medical Legal Examination: The SANE Exam*, *in* HANDBOOK OF SEXUAL ASSAULT AND SEXUAL ASSAULT PREVENTION 609, 612 (William T. O'Donohue & Paul A. Schewe eds., 2019) ("Very few (fewer than 2–3%) sexual assault patients need emergency medical care."); *see also* Courtney E. Ahrens et al., *Sexual Assault Nurse Examiner (SANE) Programs: Alternative Systems for Service Delivery for Sexual Assault Victims*, 15 J. INTERPERSONAL VIOLENCE 921, 922–24 (2000). This is not meant to minimize the fact that many victims may have medical needs after experiencing sexual violence in addition to requiring information about attendant risks such as pregnancy and STI prevention.

44 Campbell et al., *Effectiveness of SANE Programs*, *supra* note 42, at 315.

45 *Id.* (noting that many emergency department physicians do not think that rape kits are medical procedures that "require their expertise" and "even ED physicians with forensic training usually do not perform forensic exams frequently enough to maintain their proficiency").

46 Linda A. Hutson, *Development of Sexual Assault Nurse Examiner Programs*, 37 NURSING CLINICS N. AM. 79, 70 (2002).

transmitted diseases (STDs)], crisis intervention and support, and follow-up care."[47] In 1992, seventy-two nurses created the International Association of Forensic Nurses and, by 1995, the American Nurses Association recognized forensic nursing as a distinct nursing subspecialty.[48]

Today, most SANE programs are affiliated with hospital emergency departments. As the first institutional contact for many survivors of sexual violence, the provision of quality medical care geared towards survivor-specific experiences and needs in emergency room environments is critical.[49] SANEs are trained to offer comprehensive, holistic services, remaining mindful of the principles of trauma-informed care.[50] To become a board-certified SANE nurse, a registered nurse with at least two years of experience must undergo additional training to develop the knowledge and skills to: (1) provide trauma-informed care, including the provision of forensic examinations; (2) assess patients for non-acute healthcare concerns such as pregnancy risk and STDs; and (3) be able to collaborate with law enforcement, lawyers, and other advocates.[51] Emergency departments with SANE programs are associated with greater quality of care for sexual assault victims including shorter waiting times, proper completion of and greater comfort with forensic examinations, lower incidence of survivors having to repeat their story, and greater availability of post-discharge resources.[52] However, despite their benefits, only 17–20% of American hospitals employ SANEs as of 2022.[53]

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47 Rebecca Campbell et al., *Responding to Sexual Assault Victims' Medical and Emotional Needs: A National Study of the Services Provided by SANE Programs*, 29 RSCH. NURSING & HEALTH 384, 385 (2006) [hereinafter *National Study*].

48 Kathleen Maguire & Marisa Raso, *Reflections on Forensic Nursing: An Interview with Virginia A. Lynch*, 13 J. FORENSIC NURSING 210, 211 (2017).

49 Campbell et al., *Effectiveness of SANE Programs*, *supra* note 42, at 315 (estimating that 10–25% of SANE programs are located outside of hospitals, such as in rape crises centers or medical office buildings).

50 Alba Fernandez-Collantes, Cristian Martin-Vasquez & Maria Cristina Martinez-Fernandez, *Patient and Healthcare Provider Satisfaction with Sexual Assault Nurse Examiners (SANEs): A Systematic Review*, 12 HEALTHCARE 1, 2 (2024).

51 INT'L ASS'N OF FORENSIC NURSES, SEXUAL ASSAULT NURSE EXAMINERS (SANE) EDUCATION GUIDELINES 1, 2 (2018), https://kbn.ky.gov/KBN%20Documents/mir-201-KAR-20-411-sane-education-guidelines.pdf [https://perma.cc/8UVX-7ZMW].

52 Kristen Chalmers et al., *Emergency Department Preparedness to Care for Sexual Assault Survivors: A Nationwide Study*, 24 W. J. EMERGENCY MED. 629, 633 (2023).

53 *Congress Moves to Address Critical Shortage of Sexual Assault Nurse Examiners; RAINN Partners on Bipartisan Legislation*, RAINN (Feb. 15, 2022), https://www.rainn.org/news/congress-moves-address-critical-

In September 2024, the Department of Justice (DOJ) published its third edition of A National Protocol for Sexual Assault Medical Forensic Examinations.[54] Although the structure of SANE programs differs depending on the jurisdiction, the DOJ protocol is designed to serve as a normative guide for practitioners who serve victims of sexual assault.[55] According to the DOJ protocol, before beginning their forensic examination, SANEs must first ensure that patients are treated for any acute medical needs.[56] Afterward, SANEs transition to collecting a patient's medical forensic history to guide their subsequent forensic examination and collection of evidence.[57] With the consent of the patient, SANEs then photograph any injuries, conduct a physical examination, and collect a variety of biological samples.[58] Finally, SANEs address issues related to medical discharge and follow-up care.[59] This includes STD testing, providing referrals for mental-health care or other community services that patients might benefit from, and helping patients plan for

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shortage-sexual-assault-nurse-examiners-rainn-partners [https://perma.cc/X7EH-GCCL].

54 U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS (3d ed. 2024) [hereinafter NATIONAL PROTOCOL], https://www.justice.gov/ovw/media/1367191/dl?inline [https://perma.cc/XM9F-PFXA].

55 *Id.* at 11–12. It is important to note that following the start of President Donald Trump's second term in office, the Department of Justice's Office for Victims of Crime took down its online guide to building trauma-informed SANE programs. *See* U.S. DEP'T OF JUST., OFF. FOR VICTIMS OF CRIME, PREPARING YOUR PROGRAM TO MEET THE UNIQUE NEEDS OF SURVIVORS, https://www.ovcttac.gov/saneguide/building-a-patient-centered-trauma-informed-sane-program/preparing-your-program-to-meet-the-unique-needs-of-survivors/ [https://perma.cc/LS2H-WDCD]. Although these guidelines served as recommendations rather than mandates, and thus it is unclear how large of an effect simply removing this information will have on SANE programs, President Trump has threatened massive cuts to Medicaid, which, if implemented, could have drastic consequences on the provision of hospital care, including SANE examinations. *See* FREDRIC BLAVIN ET AL., HEALTH CARE PROVIDERS WOULD EXPERIENCE SIGNIFICANT REVENUE LOSSES AND UNCOMPENSATED CARE INCREASES IN THE FACE OF REDUCED FEDERAL SUPPORT FOR MEDICAID EXPANSION 8 (Mar. 11, 2025), https://www.urban.org/research/publication/health-care-providers-would-experience-significant-revenue-losses-and-uncompensated-care-increases-in-the-face-of-reduced-federal-support-for-medicaid-expansion [https://perma.cc/XT2Q-K7RM].

56 NATIONAL PROTOCOL, *supra* note 54, at 86.

57 *Id.* at 93, 96–97. Relevant information includes the date, time, and location of the assault; pertinent medical history; recent consensual sexual activity; post-assault activities of patients; and offender information (limited to "that which will guide the exam and sample collection"). *Id.* at 96–97.

58 *Id.* at 100–17.

59 *Id.* at 118–37.

their "physical safety and emotional well-being," including ensuring that victims are not being released back to their abusers.[60]

In addition to conducting examinations, SANEs are regularly asked to testify at criminal trials prosecuting their patients' alleged assailants.[61] As explained *infra*, because sexual assault victims are often unavailable to testify at trial, the admissibility of SANE testimony has important implications for the prosecution of sexual crimes. And because SANE examinations serve a dual medico-legal purpose, a victim's statements made over the course of such an examination occupy a somewhat precarious evidentiary position in the criminal legal system under current Confrontation Clause jurisprudence.[62]

II. The Confrontation Clause and the Advent of the "Primary Purpose" Test

If a victim of sexual assault is unavailable to testify against their alleged assaulter at trial, admitting out-of-court statements they made to SANEs can have profound impacts on the case. Courts are divided on the questions of whether and when to admit such statements in the face of the Confrontation Clause.[63] This Note details the Supreme Court's evolving Confrontation Clause jurisprudence before analyzing how courts across the country discern when SANE testimony should be admitted against a criminal defendant.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[64] Termed the Confrontation Clause, this provision has long been recognized as a vital procedural safeguard for criminal defendants that applies at the state and federal level.[65] In 1895, the Supreme Court described the significance of the right to confront witnesses as:

> [A]n opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with

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60 *Id.*

61 Linda A. Hutson, *Development of Sexual Assault Nurse Examiner Programs*, 37 NURSING CLINICS N. AM. 79, 86–87 (2002).

62 Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of SANE Testimony Under the Medical Treatment Hearsay Exception and the Confrontation Clause*, 50 AM. CRIM. L. REV. 277, 281 (2013).

63 *Id.*

64 U.S. CONST. amend. VI.

65 Crawford v. Washington, 541 U.S. 36, 42 (2004).

> the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[66]

Reconciling the need for the testimony of a deceased witness with the importance of cross-examination's truth-finding function, the Court in *Mattox v. United States* held that the Confrontation Clause permits the introduction of an unavailable declarant's out-of-court statements against a criminal defendant *only if* the defendant had a prior opportunity to cross-examine the witness.[67] *Mattox* recognized that strict adherence to the rights afforded by the Confrontation Clause would not always be in the best interest of public policy,[68] and over time, the Court has weighed the right to confrontation with competing interests that arise when a witness is shown to be unavailable to testify at trial. Since *Mattox*, the standards by which courts evaluate whether the circumstances warrant admitting statements by unavailable out-of-court declarants have evolved.

From 1980 until 2004, the Supreme Court applied the confrontation standard established in *Ohio v. Roberts*, "conflat[ing] the analysis of the right to confrontation with the reliability analysis for hearsay" to determine when an out-of-court statement would be permitted to come in for its truth.[69] Hearsay—which consists of statements made out of court and introduced for their truth[70]—is generally inadmissible in court, though many exceptions exist at the state and federal levels.[71] These exceptions permit the introduction of hearsay statements in court proceedings even when the declarant is not available to testify and generally reflect common law understandings of reliability and trustworthiness.[72] The

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66 Mattox v. United States, 156 U.S. 237, 242–43 (1895).

67 *Id.* at 244.

68 *Id.* at 243 ("To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.").

69 Chapman, *supra* note 62, at 284. *See generally* Ohio v. Roberts, 448 U.S. 56 (1980).

70 FED. R. EVID. 801 (defining hearsay as a statement that a declarant makes outside of the current trial or hearing and that is offered to prove the truth of the matter asserted within the statement).

71 *See* FED. R. EVID. 803–804 (laying out exceptions to the rule against hearsay including statements made for medical diagnosis or treatment).

72 *Id.*; Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 B.C. J.L. & SOC. JUST. 1, 3–4 (2017).

Confrontation Clause, in contrast, is a constitutional protection that requires declarants be available for cross-examination in order for their hearsay statements to be admissible, even if such statements fall under a hearsay exception.[73]

Under *Roberts*, an unavailable declarant's out-of-court statement was nonetheless admissible under the Confrontation Clause if "it [bore] adequate indicia of reliability," either because it fell "within a firmly rooted hearsay exception" or otherwise bore "particular guarantees of trustworthiness."[74] By largely converging the practical application of the Confrontation Clause with the hearsay exceptions, *Roberts* departed from the historical understanding of the clause's purpose and created a test that resulted in constitutional scrutiny both too broad[75] and too narrow.[76] For instance, by allowing courts to infer the reliability of an out-of-court statement so long as the evidence fell within a firmly rooted hearsay exception, the *Roberts* framework failed to include any analysis of whether a statement could be considered testimonial, thus subjecting a much wider range of statements to Confrontation Clause scrutiny.[77] On the other hand, the Court later described the *Roberts* framework as "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations."[78] By giving judges extensive leeway in determining whether a statement was sufficiently reliable—including which factors to consider and how heavily

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73 *Crawford*, 541 U.S. at 54–56.

74 *Roberts*, 448 U.S. at 67.

75 *Crawford*, 541 U.S. at 60 ("[The *Roberts* test] applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony . . . often result[ing] in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause.").

76 *Id.* ("[The *Roberts* test] admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability . . . often fail[ing] to protect against paradigmatic confrontation violations.").

77 *Id.*

78 *Id.* at 63.

to weigh them—the *Roberts* test diminished assurances of reliability.[79] Discretion and lack of guidance ultimately resulted in conflicting decisions across jurisdictions.[80]

A. Crawford's Sea Change

In an effort to bring more clarity and consistency to Confrontation Clause jurisprudence, the Court overruled *Roberts* in 2004.[81] In *Crawford v. Washington*, the Court criticized the standard of reliability to be applied by judges under *Roberts* as "an amorphous, if not entirely subjective, concept" that is "*inherently*, and therefore *permanently*, unpredictable."[82] In its place, the Court imposed a new analysis centered on whether a statement was "testimonial," that is, "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[83]

Taking a more literal understanding of the Sixth Amendment, *Crawford* held that out-of-court statements of an unavailable declarant would only raise Confrontation Clause issues if a court determined them to be testimonial.[84] Based on the historical context surrounding the ratification of the Sixth Amendment, the Court defined "testimony" as "[a] solemn

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79 Rouhanian, *supra* note 72, at 5–6; *see also* Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis*, 75 TENN. L. REV. 753, 762–63 (detailing that "[i]n one [Colorado] case, the court found a statement reliable and therefore admissible in large part because it was made immediately after the alleged crime[, but i]n another case, the same court found a statement reliable and therefore admissible in large part because it was made two years after the alleged crime," and describing how this "contradiction offends not only the Constitution, but also the fundamental concepts of consistency and logic").

80 *Crawford*, 541 U.S. at 63 ("[t]here are countless factors bearing on whether a statement is reliable"); Cicchini, *supra* note 79, at 757–61 (describing how the amorphous reliability standard resulted in both inter– and intra–state inconsistencies). *Compare* People v. Farrell, 34 P.3d 401, 406–07 (Colo. 2001) (finding a statement more reliable because it was "detailed" and given "immediately after" the relevant events), *with* U.S. v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 245 (4th Cir. 2001) (finding a statement more reliable because it was "fleeting"), *and* Stevens v. People, 29 P.3d 305, 316 (Colo. 2001) (finding a statement more reliable because two years had passed since the relevant events).

81 *See Crawford*, 541 U.S. at 63.

82 *Id.* at 68 n.10 (emphasis in original).

83 *Id.* at 52 (quoting Brief for National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 3, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)).

84 *Id.* at 51 ("The text of the Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828))).

declaration or affirmation made for the purpose of establishing or proving some fact"[85] and discerned that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[86] In other words, only a declarant who made statements of a testimonial nature would be considered a "witness" within the meaning of the Confrontation Clause.[87] Although the Court declined to offer a "comprehensive definition" of testimonial, it laid out that, at a minimum, the term covers affidavits; custodial examinations; prior testimony given at a preliminary hearing, before a grand jury, or at another trial; and statements given to police officers during interrogations.[88] A statement deemed to be testimonial would only then be admissible if (a) the declarant was unavailable, and (b) the defendant had a prior opportunity to cross-examine the declarant.[89] The Court carved out an exception, however, for statements determined to be testimonial that would have been admissible at the time of the founding.[90]

Over the past two decades, the Supreme Court has further honed the meaning of "testimonial" in the confrontation context. Two years after *Crawford*, the Court consolidated two cases—*Davis v. Washington* and *Hammon v. Indiana*[91]—and created what some scholars refer to as "an emergency exception to the confrontation right."[92] The cases were factually similar—both involved a victim of domestic violence reporting incidents of abuse to agents of law enforcement.[93] In *Davis*, the victim called 911 and frantically relayed to the operator that her former boyfriend had just assaulted her and was now fleeing

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85 *Id.* (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

86 *Id.*

87 *Id.*

88 *Id.* at 51–52, 68.

89 *Id.* at 53–54.

90 *Id.* at 54. Elaborating on this exception in *Giles v. California*, the Court noted that forfeiture by wrongdoing, whereby the defendant caused the witness' absence to prevent the witness from testifying, was a founding-era exception to the confrontation right that would thus make testimonial statements nonetheless admissible. 554 U.S. 353, 359 (2008).

91 Davis v. Washington, 547 U.S. 813 (2006).

92 Paul F. Rothstein, *Ambiguous-Purpose Statements of Children and Other Victims of Abuse under the Confrontation Clause*, 44 SW. L. REV. 508, 515 (2015).

93 *Davis*, 547 U.S. at 817–21.

the scene.[94] In *Hammon*, police responded to a reported domestic dispute at the home the defendant shared with his wife.[95] Mrs. Hammon spoke to the police, initially telling them that nothing was wrong.[96] Police entered the home and separated the spouses at which point Mrs. Hammon told the officers that her husband had just physically assaulted her and her daughter.[97] Despite their similarities, the Court held that only the statement in *Hammon* was testimonial, whereas the statement in *Davis* was not.[98]

The Court assessed the primary purpose of each interrogation to distinguish between the testimonial nature of the statements made by the two victims.[99] The Court held that statements are nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," while statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[100]

In making the first determination, the Court relied on the situational factors of *Davis*, including that the declarant was relaying real-time information about an ongoing emergency to an agent of the police, the statements were made in order to resolve the emergency, and the circumstances surrounding the interrogation were frantic and potentially unsafe.[101] The Court found that "the circumstances of [the declarant's] interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency . . . [and that the declarant] was not acting as a witness or testifying."[102] Even so, the Court acknowledged that there came a point when the ongoing emergency appeared to have ended and the operator began asking more pointed questions about the battery such that the

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94 *Id.* at 817–18.

95 *Id.* at 819–20.

96 *Id.*

97 *Id.*

98 *Id.* at 814.

99 *Id.* at 822.

100 *Id.*

101 *Id.* at 814, 827.

102 *Id.* at 814.

declarant's responses became testimonial.[103] Rather than negate the nontestimonial nature of the earlier statements, however, the Court held that trial courts must simply recognize the point at which statements in response to questioning become testimonial and accordingly redact the testimonial portions through *in limine* procedures.[104]

In contrast, the interrogation that led to the determination in *Hammon* took place after police responded to a report of domestic violence, at which time no ongoing encounter was taking place and the victim was able to detail the abuse she had just endured in a sworn, handwritten affidavit while her husband was kept in a separate room by police.[105] Based on these circumstances, the Court concluded that the primary purpose of the declarant's statements was "to establish or prove past events potentially relevant to later criminal prosecution," and the statements were thus testimonial.[106]

Although *Davis* cabined the ongoing emergency rule and the "primary purpose" test to relatively specific scenarios involving police interrogations, lower court decisions in the years following exemplified that *Davis* left judges with as much, if not more, discretion than *Roberts* had to decide which evidence would implicate the Confrontation Clause.[107] Five years later in *Michigan v. Bryant*, the Court analyzed the limits of *Davis*' application.[108] In *Bryant*, police were called to a gas station to assist a man who had been shot.[109] Lying on the ground and struggling to speak, the victim responded to police questioning regarding "what had happened, who had shot him, and where the shooting had occurred" and described being shot by Richard Bryant outside Bryant's house before driving himself to the lot.[110] The Court held that the victim's statements were made for the primary purpose of assisting police in meeting an ongoing emergency—providing "important context for the

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103 *Id.* at 828–29.

104 *Id.* at 829.

105 *Id.* at 819–20.

106 *Id.* at 822, 829–30.

107 Cicchini, *supra* note 79, at 786.

108 Michigan v. Bryant, 562 U.S. 344, 354 (2011).

109 *Id.* at 348.

110 *Id.* at 349 (quoting People v. Bryant, 768 N.W.2d 65, 71 (Mich. 2009), *vacated*, 562 U.S. 344 (2011)).

first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public"—and thus were not testimonial.[111]

In an opinion by Justice Sotomayor, *Bryant* clarified how to make the "primary purpose" determination, explaining that a court must "objectively evaluate the circumstances in which the encounter [between the individual and the police] occurs" as well as "the statements and actions of the parties."[112] Both of these inquiries are objective, the former including the location of the encounter and whether a statement is made during an ongoing emergency, and the latter being assessed by considering "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred."[113] The Court highlighted that the formality of the encounter is an important consideration in the "primary purpose" analysis.[114] The question of whether there is an ongoing emergency remained crucial to the analysis, but only as one facet of the Court's totality-of-the-circumstances test.[115] Finally, the Court revived the reliability considerations of *Roberts*, adding that in "making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."[116]

The Supreme Court applied *Bryant*'s expanded "primary purpose" test in *Ohio v. Clark*.[117] Up until 2015, all the major Confrontation Clause cases decided by the Court involved statements made to law enforcement.[118] *Clark* was novel in this respect. In the case, the Court analyzed the potential testimonial nature of statements made by a three-year-old to his preschool teacher.[119] The Court determined that statements made to people other than law enforcement, while much less likely to be testimonial, are not

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111 *Id.* at 365.

112 *Id.* at 359.

113 *Id*. at 360.

114 *Id.*

115 *Id.* at 366.

116 *Id.* at 358–59.

117 Ohio v. Clark, 576 U.S. 237, 246 (2015).

118 Andrew Lentz, *The "Primary Purpose" of Children's Advocacy Centers: How* Ohio v. Clark *Revolutionized Children's Hearsay*, 23 ROGER WILLIAMS U. L. REV. 265, 272 (2018).

119 *Clark*, 576 U.S. at 237.

categorically exempted from Confrontation Clause challenges.[120] In applying the totality-of-the-circumstances test from *Bryant* to determine the primary purpose of the child's statement, the Court explicitly rejected contentions that the teacher's mandatory reporting obligations or their "natural tendency to result in Clark's prosecution" made the child's statements inherently testimonial.[121] Ultimately, the court held that the child's statements were nontestimonial, emphasizing that the teacher's objective purpose was to ensure the child's safety, that the child's young age precluded any intent for his statements to be used by police or prosecutors, as well as the informal setting of a preschool lunchroom.[122]

III. The Significance of the "Primary Purpose" Test in the Context of Sexual Assault and SANE Testimony

As exemplified by *Clark*, a court's determination of the primary purpose of a declarant's statement is central to the statement's admissibility. When a declarant is unavailable to testify at a criminal trial, the out-of-court statement is only admissible if it is nontestimonial or the defendant had a prior opportunity to cross-examine the declarant.[123] This framework, at least in theory, bolsters reliability and accuracy in the court system, serving as "a mechanism to allow a jury to get as close to the truth as possible by testing the veracity of an incriminating remark."[124] The importance of the Confrontation Clause in restraining prosecutorial overreach and helping ensure fair trials for criminal defendants cannot be overstated. However, in cases of domestic violence or sexual assault—crimes that are "notoriously susceptible to intimidation or coercion of the victim to ensure that

120 *Id.* at 245.

121 *Id.* at 250.

122 *Id.* at 247–48.

123 When a declarant appears for cross-examination at trial, the Confrontation Clause does not bar the introduction of any of her prior statements. Crawford v. Washington, 541 U.S. 36, 68 (2004). Additionally, the Confrontation Clause guarantees only an opportunity for cross-examination and does not guarantee that cross-examination actually be effective to the defendant's satisfaction. U.S. v. Owens, 484 U.S. 554, 559 (1988) ("[T]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987))); Paul F. Rothstein & Ronald J. Coleman, *Confronting Memory Loss*, 55 GA. L. REV. 95, 120–21 (2020) (assuming that, even though *U.S. v. Owens* pre-dated *Crawford*, the Court would still consider *Owens* binding post-*Crawford* because Justice Scalia authored both opinions and "likely would have anticipated that they could be interpreted consistently").

124 Dave Gordon, *Is There an Accuser in the House: Evaluating Statements Made to Physicians and Other Medical Personnel in the Wake of* Crawford v. Washington *and* Davis v. Washington, 38 N.M. L. REV. 529, 556 (2008).

she does not testify at trial"[125]—the courts need to apply a consistent "primary purpose" framework.

Victims of domestic violence are regularly unwilling to cooperate with prosecutors and thus "unavailable" to testify at trial for two main reasons:

> (1) the abuser exercises control over the victim by using intimidation, coercion (including economic coercion), psychological pain, or physical violence to scare or guilt the victim from appearing at a trial proceeding, or (2) the volatile and cyclical nature of a domestic violence relationship makes it possible that the victim has succumbed to the honeymoon phase of the cycle of violence, which involves feelings of love, self-blame, and forgiveness, and thus regrets ever having made any implicating statements.[126]

Neither of these explanations for a witness' unavailability should justify a decision not to prosecute an alleged incident of domestic violence or sexual assault. But without the live testimony of a victim at trial, prosecutors are often left with the victim's hearsay statements as their primary evidence, which may or may not be barred under the rules of hearsay or the Confrontation Clause.[127] This uncertainty, in turn, leads many prosecutors to drop charges in these cases and may even result in fewer referrals to prosecutors by police investigating alleged assault when there is no corresponding direct evidence.[128]

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125 Davis v. Washington, 547 U.S. 813, 832–33 (2006).

126 Rouhanian, *supra* note 72, at 22–23.

127 *Id.* at 23 (noting that "because domestic violence cases often turn on the admissibility of hearsay statements, these cases become 'particularly susceptible to the negative consequences' of *Crawford*" (quoting Robert P. Mosteller, Crawford*'s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 426 (2005))).

128 *Id.* at 27–28. As noted in *supra* note 90, courts have recognized that the doctrine of forfeiture by wrongdoing, which applies when a defendant causes the unavailability of a witness with the intention of preventing them from testifying, makes admissible a testimonial statement that otherwise would have been precluded by *Crawford* and its progeny. *See* Giles v. California, 554 U.S. 353, 359 (2008). Although forfeiture by wrongdoing is only relevant when it is possible to prove a subsequent act of violence *and* the defendant's requisite intention in inflicting such violence on their victim, the *Giles* Court noted that evidence of past abuse or threats of abuse intended to dissuade the victim from seeking help would be relevant to the intent inquiry. *Id.* at 368, 377. Thus, the doctrine provides one, albeit narrow, avenue through which prosecutors can get statements made by unavailable victims of domestic violence into court.

A. The Current State of the "Primary Purpose" Test

As discussed *supra* in Part II, the "primary purpose" test first outlined in *Davis*, and further developed in *Bryant*, informs the analysis of whether statements are testimonial for purposes of the Confrontation Clause. *Davis* established that a statement is testimonial where there is no ongoing emergency and the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[129] *Bryant* clarified that, in making this determination, courts should consider the formality of the interrogation, the objective purposes of the interrogator and the declarant, and the circumstances in which the interrogation took place.[130]

In so holding, *Davis* and *Bryant* failed to adequately address two significant issues: (1) whether the intent of declarant or that of the interrogator is given more weight when a statement is made,[131] and (2) how courts should analyze statements in which witnesses or interrogators have more than one motivation behind their words. The latter shortcoming was a main concern of Justice Thomas' concurrence in *Davis*, which emphasized that law enforcement regularly operates with dual purposes—responding to an emergency *and* gathering evidence.[132] In *Bryant* and *Clark*, the Court filled in some of the gaps left by *Davis* by developing an objective, multifactor framework to determine a statement's primary purpose and applying the test outside of the law enforcement context. But neither majority satisfactorily addressed the mixed-motives problem—that is, how a court should evaluate the primary purpose of a statement if the interrogator, declarant, or both have more than one motive. The *Bryant* Court claimed that its totality-of-the-circumstances analysis would ameliorate problems that could arise when participants have mixed motives,[133] but cases following *Bryant* illuminate the persistence of inconsistencies in courts' determinations of which statements count as testimonial when multiple motives underlie a single statement.[134]

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129 *Davis*, 547 U.S. at 822.

130 Michigan v. Bryant, 562 U.S. 344, 360, 366 (2011).

131 *See* Rouhanian, *supra* note 72, at 11–12.

132 *Davis*, 547 U.S. at 839 (Thomas, J., dissenting).

133 *Bryant*, 562 U.S. at 369–70 ("'[T]he identity of an interrogator, and the content and tenor of his questions' . . . can illuminate the 'primary purpose of the interrogation.' . . . Simpler is not always better, and courts making a 'primary purpose' assessment should not be unjustifiably restrained from consulting all relevant information, including the statements and actions of interrogators." (quoting *Bryant*, 562 U.S. at 382 (Scalia, J., dissenting))).

134 *See infra* Part III.C–F.

B. The Dual Purpose of SANE Examinations

These inconsistencies are especially apparent in cases involving domestic violence and the use of SANEs. SANEs are regularly called to testify in court as fact or expert witnesses,[135] but the Supreme Court has not addressed whether a patient's statement made to a SANE is testimonial for purposes of the Confrontation Clause.[136] Throughout forensic examinations, both SANEs and patients may act with more than one objective.[137] When SANEs conduct examinations on patients, they perform their duties with two purposes in mind: (1) providing medical care to the victim, and (2) collecting forensic evidence for a criminal investigation.[138] So too with victims—the desire to provide an accurate account of the incident that led to their hospitalization may stem from the very real need for medical treatment, including testing for pregnancy and STDs, but also from an assumption that their descriptions of their assaults may be used in a future prosecution.

Under the "primary purpose" test, which of these motivations is determined to be foremost has critical implications for a statement's admissibility. But with respect to any particular statement, the purpose of the SANE may differ from the purpose of the victim. Beyond consideration of the motivations of the SANE and the victim, many factors have played into lower courts' determinations of whether patients' statements to SANEs are testimonial or not. Although some courts parse out individual statements within one SANE examination that may carry different purposes,[139] other courts deem forensic examinations

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135 *See* NATIONAL PROTOCOL, *supra* note 54, at 138 ("Clinicians should expect to testify in court as fact and/or expert witnesses and should therefore complete each medical forensic examination with the understanding that they may have to testify about it.").

136 Dorsey v. Cook, 677 F. App'x 265, 267 (6th Cir. 2017) (per curiam) ("The Supreme Court has not addressed whether a statement is testimonial when it is made for the dual purpose of obtaining medical care and providing evidence for later criminal prosecution.").

137 *See* State v. Romanis-Beltran, No. A-1-CA-41730, 2025 LX 307902, at *28 (N.M. Ct. App. Sep. 11, 2025) ("The dual role [of SANEs] means that we must analyze 'which role [was] more present in eliciting' each contested statement, while bearing in mind that this factor 'is likely to change multiple times' during the examination." (quoting State v. Tsosie, 516 P.3d 1116, 1135–36 (N.M. 2022))).

138 NATIONAL PROTOCOL, *supra* note 54, at 104.

139 *See* State v. McDowell, No. 2022AP164-CR, 2022 WL 4372780, at *2 (Wis. Ct. App. Sep. 22, 2022) (remanding to enable the parties to submit specific statements they think should or should not be classified as testimonial after rejecting the contention that either all or none of the statements to a SANE are admissible); State v. Alvarez-Valencia, No. 2013AP2657–CR, 2015 WL 13122796, at *1 (Wis. Ct. App. June 8, 2015) (noting that the circuit court excluded only some of the victim's statements to the SANE, while admitting others).

by SANEs as conducted for either a medical or prosecutorial purpose and treat that classification as dispositive for a Confrontation Clause analysis.[140]

It is not always obvious that statements describing an assault or identifying an assailant during a SANE examination are testimonial. SANEs need to understand what the victim went through in order to provide the most thorough and appropriate treatment.[141] Details of an assault, including the name of the alleged perpetrator, serve multiple purposes: informing how a SANE conducts a physical examination, including testing for pregnancy and STDs; determining whether a patient's hospital stay should be kept confidential; evaluating a victim's injuries; determining what referrals may be necessary; and formulating safety and discharge plans.[142] In cases involving children, statements pertaining to the circumstances

140 Rothstein, *Ambiguous-Purpose Statements*, *supra* note 92, at 546 (describing how most cases conduct the testimonial inquiry on a "general characterization of the functions of SANEs," rather than on more specific circumstantial details). *Compare* State v. Slater, 939 A.2d 1105, 1119 (Conn. 2008) (finding that even when a victim is brought to the hospital by police, her primary purpose for doing so is getting medical attention, rather than providing a factual record for use in a later prosecution), *and* State v. Hill, 336 P.3d 1283, 1288 (Ariz. Ct. App. 2014) (rejecting assertion that statements to forensic medical professionals are testimonial as a matter of law), *with* Hartsfield v. Commonwealth, 277 S.W.3d 239, 244 (Ky. 2009) (determining that under Kentucky law, the fact that a SANE nurse must act upon request of a peace officer or prosecuting attorney, indicates that SANE interviews are invariably the "functional equivalent" of police questioning), *and* Combs v. State, No. 19A-CR-2231, 2020 WL 944189, at *2 (Ind. Feb. 27, 2020) (concluding that the unique nature of cases involving child abuse, sexual assault, or domestic violence, statements identifying the alleged perpetrator are nontestimonial). *But see* State v. Burke, 478 P.3d 1096, 1108–09, 1112–13 (Wash. 2021) (en banc) (acknowledging that SANE duties include both the provision of medical care and the collection of evidence, and rejecting that SANEs are "principally charged with uncovering and prosecuting criminal behavior," but still parsing out one statement to the SANE as testimonial (quoting Ohio v. Clark, 576 U.S. 237, 249 (2015))).

141 *See, e.g.*, NATIONAL PROTOCOL, *supra* note 54, at 96 (describing a variety of types of medical care that could be influenced by knowing the date and time of the sexual assault, including HIV prophylaxis and emergency contraception); *Romanis-Beltran*, 2025 LX 307902, at *31–32 ("[D]isclosure of historical allegations allowed [SANE] Chavez to assess the need for medical care . . . [T]he age of a victim at the time that the abuse occurred is relevant to personality formation and worldview and also allow[s SANEs] to evaluate the potential for current injury and infection. Importantly [SANE] Chavez testified that delayed disclosure increases psychological risks, including 'worthlessness and guilt' and 'anxiety, depression, suicide, poor relationships, [and] hypersexuality.' By asking questions that encouraged Victim to disclose, [SANE] Chavez explained that she was assessing the risk that the abuse would continue as well as suicide and negative psychological effects 'down the line.'").

142 As one forensic nurse explained, a victim's "resources and safety plan would be a lot different, for instance, if [she is] attacked by a stranger, an unknown person in a parking garage, let's say, downtown, versus somebody who might be a family member or someone [she is] living with. If there is a common child, if [the victim and abuser] share a child, because there might be visitation, custody issues. So it's critically important that [the forensic nurse] can find out who that person is." Ward v. State, 50 N.E.3d 752, 762 (Ind. 2016); *see also* Pham v. Kirkpatrick, 711 F. App'x 67, 69 (2d Cir. 2018); State v. Slater, 939 A.2d 1105, 1118

of abuse are relevant to ensuring they are not discharged back into the custody of their abuser.[143] Even open-ended questions such as, "Why are you here?" that elicit incriminatory statements may be considered a standard practice of any medical examination and thus objectively classified as furthering the primary purpose of providing medical treatment, at least from the provider's point of view.[144]

Due in part to the dual purposes of SANEs and the continued discretion afforded to judges under *Bryant*'s totality-of-the-circumstances test, lower courts have interpreted a variety of factors in their analysis of the primary purpose of a SANE examination. Courts weigh the same or similar circumstances differently, and in some instances, use the same factor to reach opposite conclusions. The following sections highlight the inconsistent approaches courts have taken with respect to applying the Confrontation Clause in the context of SANE examinations, including the treatment of certain factual indicia such as the SANE's purpose in asking a question, the victim's purpose in providing a statement, the involvement of law enforcement, the incriminating nature of the victim's statement, and the circumstances of the examination itself.

C. Per Se Classifications of SANEs

Davis made clear that courts must "recognize . . . point[s] at which, for Sixth Amendment purposes, statements in response to interrogations" take on a testimonial character.[145] In the context of a SANE examination, this delineation can be especially

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(Conn. 2008); Murphy v. Warden of Attica Corr. Facility, No. 20 Civ. 3076, 2022 WL 1145050, at *14 (S.D.N.Y. Apr. 19, 2022); Plater v. Hope, No. CIV-21-1092-HE, 2023 WL 3491048, at *8 (W.D. Okla. Apr. 6, 2023).

143 *See* Ohio v. Clark, 576 U.S. 237, 246–47 (2015); U.S. v. Barker, 820 F.3d 167, 171 (5th Cir. 2016) ("The primary purpose of the conversation between [the SANE] and [the adolescent patient, A.M.,] was to medically evaluate and treat the young girl. Moreover, the child's statements pertaining to the circumstances of the abuse were relevant to ensuring that A.M. would not be discharged into the custody of a sexual abuser."); People v. Hansson, 79 N.Y.S.3d 341, 346 (N.Y. App. Div. 2018) ("[T]he victim's statement at Westchester Medical Center was relevant to treatment inasmuch as the hospital was aware that this was an incident involving child abuse and, therefore, it was necessary for hospital staff to create a discharge plan for the victim that would, among other things, ensure his safety and provide for any psychological and counseling services that he might require.").

144 As one forensic nurse testified, "[I]f you go to a physician and you have a sore throat, you actually have to tell the physician or physician assistant or the nurse why you're there. You don't just go in a room and sit and they have to wonder why you're there. . . . It is the same thing with my patients, they come in and tell me why they are there, so that I can treat them." *Hill*, 336 P.3d at 1289.

145 *Davis*, 547 U.S. at 828–29.

complicated. The process of conducting a forensic examination and the dual role of SANEs mean that "*which* of the dual roles is *more* present is likely to change multiple times over the course of a SANE examination, as a typical SANE examination is not partitioned into one medical care component and one forensic component."[146] Some courts nonetheless assign a presumption that a victim's statements made in the course of a SANE examination are either testimonial or not. In *Combs v. State*, for example, the court concluded that because the identity of the abuser impacts treatment in cases involving child abuse, sexual abuse, and domestic violence, statements, including those that identify the attacker, serve a primarily medical, rather than testimonial, purpose.[147] In *Hartsfield v. Commonwealth*, on the other hand, the court concluded that the close relationship between SANE nurses and law enforcement, particularly the fact that a SANE nurse must act upon the request of a peace officer or prosecuting attorney, rendered SANE interviews the "functional equivalent of police questioning."[148] Thus, the *Hartsfield* court applied the factors enumerated in *Davis*, including that the interview involved past events, was not in the midst of an ongoing emergency, and took the nature of a formal interview, to conclude that the victim's statements during the SANE interview were testimonial.[149]

Other courts have taken a middle-ground, more indeterminate approach. In *State v. Tsosie*, the Supreme Court of New Mexico refused to "indulge either testimonial or nontestimonial presumptions based on the identity of a SANE nurse regarding the primary purpose of statements made in the course of a SANE exam."[150] Similarly, the Arizona Court of Appeals refused to recognize that victims' statements to SANEs are testimonial

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146 State v. Tsosie, 516 P.3d 1116, 1135 (N.M. 2022) (emphasis in original).

147 Combs v. State, No. 19A-CR-2231, 2020 WL 944189, at *2 (Ind. Ct. App. Feb. 27, 2020); *see also Barker*, 820 F.3d at 172 (comparing the SANE examination of an adolescent to the context of *Clark* and concluding that even though a hospital emergency room is a more formal setting than a preschool lunchroom, it is "far different from the law enforcement interrogation that has been found to raise Confrontation Clause problems in other cases," and that "[t]o conclude otherwise would ignore the reality that the relationship between a nurse and patient is very different from that between a citizen and the police" (internal quotation marks omitted)).

148 277 S.W.3d 239, 244 (Ky. 2009); *see also* People v. Spangler, 774 N.W.2d 702, 709 (Mich. Ct. App. 2009) ("A majority of state courts that have considered this issue have determined that statements by a sexual abuse victim to a SANE, or similar examiner, were testimonial in nature and barred by the Confrontation Clause.").

149 *Id.* at 245.

150 *Tsosie*, 516 P.3d at 1135–36.

as a matter of law.[151] Courts that do not recognize a blanket presumption of the testimonial nature of SANE examinations analyze the specific features of the individual SANE examination at issue in order to determine its primary purpose.[152] However, even after doing so, some courts discern one primary purpose for the entire examination, while others parse out which statements should be classified as testimonial.[153] Determining which statements should then be redacted also varies, as explored in further detail in the sections that follow.

D. Whose Primary Purpose Matters?

In the confrontation context, the purposes of both the SANE and the victim matter.[154] But how should courts evaluate the primary purpose of a forensic examination when the objective purposes of the SANE and the victims differ? Complicating this analysis further is the dual medico-legal role of SANEs and the likelihood that the testimonial nature of a victim's statements may change over the course of an examination.[155]

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151 *Hill*, 336 P.3d at 1288 ("Because forensic medical examinations often have two purposes—to gather evidence for a criminal investigation and to provide medical care to the victim—whether a victim's statement in response to a question by the examiner is testimonial for purposes of the Confrontation Clause turns on whether the surrounding circumstances, objectively viewed, show that the primary purpose of the exchange at issue was to provide medical care or to gather evidence.").

152 *See, e.g.*, State v. Romanis-Beltran, No. A-1-CA-41730, 2025 LX 307902, at *17–18 (N.M. Ct. App. Sep. 11, 2025) ("Following *Tsosie's* example, therefore, we begin the highly context-dependent inquiry with objective analysis of the circumstances in which Victim and [SANE] Chavez interacted, and then conduct an objective and combined inquiry into their statements and actions." (internal quotation marks omitted)).

153 *See, e.g.*, Commonwealth v. Bailey, No. 14–P–641, 2016 WL 192053, at *2 (Mass. App. Ct. Jan. 15, 2016) (holding that a victim's statements made in the course of a SANE examination were admissible if they were made for treating purpose, but would have to be redacted if they were "ultimate conclusions" concerning the alleged crime); U.S. v. Norwood, 982 F.3d 1032, 1033, 1051 (7th Cir. 2020) (redacting the statements indicating location and identity after finding them unnecessary for medical purposes, leaving only the descriptions of what happened and when, which were held to have been made for the primary purpose of medical treatment).

154 Michigan v. Bryant, 562 U.S. 344, 371 (2011) ("Objectively ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is . . . the approach most consistent with our past holdings.").

155 *See, e.g.*, State v. Romanis-Beltran, 2025 LX 307902, at *35 ("The historical and immediate statements reported events that occurred both the previous night and repeatedly for more than a decade, which supports [that a reasonable person in the victim's position would have] a nontestimonial primary purpose for the immediate statements and a testimonial primary purpose for the historical statements."). *See generally* NATIONAL PROTOCOL, *supra* note 54; *SART Toolkit Section 2.1: Learn about SARTs*, NAT'L SEXUAL VIOLENCE RES. CTR, https://www.nsvrc.org/sarts/toolkit/2-1 [https://perma.cc/G9L9-YGR4].

Many courts give controlling weight to the SANEs' understanding of their role. For example, in *Garrett v. State*, the Indiana Court of Appeals recounted the forensic nurse's trial testimony about the purpose of the patient interview during an examination and the importance of discerning the identity of a victim's alleged abuser.[156] From this testimony, the court concluded that the SANE needed to know how the victim sustained her injuries in order to treat her and create a safe discharge plan, and therefore held that the victim's statements to the nurse were nontestimonial.[157] The court did not ask any questions or make any observations about the victim's primary purpose in making inculpatory statements to the nurse.[158] Similarly, the Nevada Supreme Court in *Vega v. State* concluded, without explicitly considering other factors, that because "a medical professional conducting such an examination would reasonably believe that his or her report and findings regarding the examination would be available for use at a later trial," the report documenting the findings of the examination is testimonial.[159]

Additionally, in *Green v. State*, the Maryland Court of Special Appeals framed the question as "whether the *preparer* of the report, objectively speaking, would have believed that at the time the report was prepared that the statements made in the report would be available for use at a later trial."[160] The court's analysis centered on the fact that police officers ordered the forensic examination "for the purpose of examining and collecting evidence for" the case as well as the duties of a SANE nurse as laid out in the Code of Maryland Regulation.[161] Though it focused its analysis on the SANE's understanding of the

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156 Garrett v. State, No. 21A-CR-70, 2021 WL 4057706, at *3–4 (Ind. Ct. App. Sep. 7, 2021).

157 *Id.*

158 *See id.*

159 Vega v. State, 236 P.3d 632, 638 (Nev. 2010).

160 Green v. State, 22 A.3d 941, 954 (Md. Ct. Spec. App. 2011) (emphasis added).

161 *Id.* at 950. The Code of Maryland Regulations specify the duties of SANEs as follows:

> (1) Perform forensic evidentiary examinations on the victims and alleged perpetrators in connection with physical, sexual, or domestic assaults, whether chronic or acute; (2) Before the forensic evidentiary examination, obtain consent from the individual being examined, from the parent or guardian of a minor individual, or from the proper authority for photographing and evidence collection; (3) Prepare and document the assault history interview; (4) Perform the forensic evidentiary physical assessment; (5) Complete the physical evidence kit provided by law enforcement; (6) Gather, preserve, handle, document, and label forensic evidence, including but not limited to: (a) Labeling evidence collection containers with the patient's identification factors including police complaint

examination's purpose, the court ultimately concluded that the SANE nurse wrote the report "under circumstances that would lead an objective witness to believe that the statement in the report would be available for use at trial," muddying whether its holding was premised on the objective perspective of the SANE, the patient, or some other extraneous reasonable person.[162]

In some cases, however, courts consider only how the circumstances of the examination would influence a reasonable *victim*'s understanding of the examination's primary purpose. In *Padilla v. State*, for example, the Maryland Court of Special Appeals considered relevant the nine-year-old victim's young age, the fact that the examination was conducted in a typical medical examination room, the lack of a police presence during the examination, and that the nurse was wearing clothing typical of a medical provider.[163] The court concluded that a reasonable person in the victim's position would believe that the primary purpose of the examination was to receive medical treatment, rather than to collect evidence.[164]

In another case involving a four-year-old victim, the Kansas Supreme Court evaluated the victim's primary purpose from the statements and actions of her mother.[165] Considering that the parent of a young child who reported abuse would objectively seek a physical examination to determine whether the child needed any medical treatment, as well as the fact that the police had already conducted interviews before the SANE examination, the

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> number; (b) Placing evidence in the evidence collection container and sealing the container; (C) Signing the evidence collection container as the collector of the evidence; (d) Taking photographs; and (e) Obtaining swabs, smears, and hair and body samples; (7) Maintain the chain of custody; (8) Provide immediate health interventions using clinical practice guidelines; (9) Obtain consultations and make referrals to health care personnel and community agencies; (10) Provide immediate crisis intervention at the time of the examination; (11) Provide discharge instructions; (12) Participate in forensic proceedings including courtroom testimony; (13) Interface with law enforcement officials, crime labs, and State attorney's offices; and (14) Assist the licensed physician in performing a forensic evidentiary examination.

MD. CODE REGS. 10.27.21.04A (2003) (amended 2017).

162 *Green*, 22 A.3d at 956.

163 Padilla v. State, No. 02061, 2018 WL 4628624, at *7 (Md. Ct. Spec. App. Sep. 26, 2018).

164 *Id.* at *7–8 (distinguishing State v. Snowden, 867 A.2d 314, 84, 88 (Md. 2005), in which an interview held to be testimonial was initiated by police, conducted at a state facility dedicated to interviewing sexually abused children, done in the presence of police, and began with the investigator holding the police report).

165 State v. Miller, 264 P.3d 461, 489 (Kan. 2011).

court concluded that the purpose of the four-year-old victim and her mother in answering questions during the examination was to direct the SANE to the victim's injuries.[166]

On the other hand, when victims make explicit that they understand their answers will be used in a future prosecution, courts seem less likely to view their statements as nontestimonial.[167] Additionally, the timing of the statements and actual need for medical care also serve as indicators of a victim's primary purpose in pursuing the examination.[168]

In other cases, courts have explicitly considered what the primary purpose of a reasonable person in the victim's position would be in addition to considering the purpose of the examination from the SANE's perspective. For example, in *State v. Tsosie*, the Supreme Court of New Mexico credited a SANE's testimony about the medical purposes underlying eight examination forms challenged as testimonial by the defendant.[169] Acknowledging that a SANE's role may shift during the course of an examination, the court used the SANE's testimony about the relevance of the examination forms to determine what a reasonable SANE's purpose would be.[170] After concluding that the SANE's objective purpose in filling

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166 *Id.*

167 *See* State v. Smith, No. 2021AP72-CR, 2022 WL 4349801, at *5 (Wis. Ct. App. Sep. 20, 2022) (finding the victim's statements to SANE were testimonial in part because the victim was evaluated by medical personnel three separate times in one day and told the SANE that she returned for a forensic examination "to have evidence collected and report to police" and that the victim wanted the police to be contacted prior to the examination to "speed up [the] process").

168 People v. Garland, 777 N.W.2d 732, 736 (Mich. Ct. App. 2009) (using the fact that the victim went to the hospital the morning of the assault to support the finding that her primary purpose was for medical treatment); State v. Tsosie, 516 P.3d 1116, 1140 (N.M. 2022) (holding that "the close proximity in time of the SANE examination to the alleged predicate assault weighs toward a nontestimonial primary purpose" and distinguishing cases in which several weeks passed between the assault and the examination because after that much time has elapsed, it is less likely there is any medical treatment needed); *In re* J.C., No. 14-0357, 2015 WL 2089363, at *4 n.2 (Iowa Ct. App. May 6, 2015), *aff'd*, 877 N.W.2d. 447 (Iowa 2016) ("The fact that the physical examination did not show any physical injuries or the need for further medical treatment should not be considered as diminishing the medical treatment reasons for the examination and the taking of a history as part of the examination."); Bowers v. Ames, No. 20-0625, 2022 WL 123507, at *10 (W. Va. Ct. App. Jan. 12, 2022) (using the fact that the victim required stitches to support the finding that the victim's statements were necessary for medical care); Holiday v. Stephens, No. H–11–1696, 2013 WL 3480384, at *13 (S.D. Tex. July 10, 2013) (including the victim's "still-fresh injuries" and the fact that the SANE provided medical care as factors weighing in favor of a nontestimonial classification); Pham v. Kirkpatrick, 711 F. App'x 67, 69 (2d Cir. 2018) (noting that the victim actually did receive care in its totality-of-the-circumstances analysis).

169 *Tsosie*, 516 P.3d at 1142–46.

170 *Id.* at 1142.

out the forms was to provide medical treatment, the court incorporated this determination of the SANE's role as part of its analysis of the victim's primary purpose.[171] The court found that "[l]ogically, in the absence of contrary evidence, [the SANE's] medical care role was more present in conveying those questions than was her forensic role."[172] The court also deduced the nontestimonial nature of certain statements based on whether or not they provided information that was important to the provision of medical care.[173]

Additionally, in *United States v. Norwood*, the Seventh Circuit reasoned that the "identity and tenor of [the SANE's] questions" would inform the objective observer's perception of the examination.[174] But the court also considered the SANE's description of her role and the information she needed to conduct a thorough examination to determine which statements were testimonial.[175] And in *Bowers v. Ames*, the West Virginia Supreme Court's totality-of-the-circumstances analysis included SANE testimony that the victim's statement was necessary for care as well as evidence that the victim did not express any belief that her statements to the SANE were for prosecutorial purposes.[176]

Other cases seem to have little relation to the traditional understanding of the "primary purpose" test. In *Ward v. State*, for example, the court discerned that the primary purpose of the entire forensic examination was the provision of medical treatment from the International Association of Forensic Nurses' definition: "'[f]orensic nurses are nurses first and foremost,' even though they are also specially trained in injury identification, evaluation, and documentation."[177]

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171 *Id.* at 1145.

172 *Id.* at 1145.

173 *Id.*

174 United States v. Norwood, 982 F.3d 1032, 1050 (7th Cir. 2020).

175 *Id.* at 1051; *cf.* State v. Romanis-Beltran, No. A-1-CA-41730, 2025 LX 307902, at *39 (N.M. Ct. App. Sep. 11, 2025) (remarking that certain information—including how the sexual assault examination was described to the victim or for what specific services (beyond the physical examination) the victim gave her consent—was absent from the record and that the evidence did not indicate that the SANE's medical purpose in asking the questions was communicated to the victim).

176 Bowers v. Ames, No. 20-0625, 2022 WL 123507, at *10 (W. Va. Jan. 12, 2022).

177 Ward v. State, 50 N.E.3d 752, 762 (Ind. 2016).

E. Law Enforcement Involvement

An additional factor to be considered in applying the "primary purpose" test is the connection between SANE programs and law enforcement, which varies by jurisdiction. Some SANEs operate with mandatory reporting requirements, giving them no choice but to report assaults to law enforcement, even against a patient's wishes.[178] Some jurisdictions operate sexual assault response teams (SARTs) which bring together different stakeholders in response to sexual assault.[179] These stakeholders often include police and prosecutors, and while some SARTs are organized around relatively informal information sharing amongst stakeholders, others are highly formalized, requiring coordination among institutional players.[180] Other SANEs work in clinical settings specifically geared toward making the patient relaxed and comfortable while providing trauma-informed medical treatment.[181] These different situational factors can affect how courts assess SANE examinations, but even when programs share similar features, courts have reached opposing conclusions.

One key facet of courts' "primary purpose" analysis has centered on the role law enforcement officers play in the SANE examination. Common considerations include (1) the presence of police during the examination;[182] (2) mandatory reporting requirements;[183] (3) consent forms;[184] (4) who initiated the examination;[185] and (5) whether the SANE

178 NATIONAL PROTOCOL, *supra* note 54, at 14.

179 Megan R. Greeson & Rebecca Campbell, *Sexual Assault Response Teams (SARTs): An Empirical Review of Their Effectiveness and Challenges to Successful Implementation*, 14 TRAUMA, VIOLENCE, & ABUSE 83, 84 (2012).

180 *Id.*

181 *Tsosie*, 516 P.3d at 1141.

182 *See, e.g.*, Thompson v. State, 438 P.3d 373, 377–78 (Okla. Crim. App. 2019); State v. Fausto, No. 1 CA-CR 16-0356, 2017 WL 2242854, at *3 (Ariz. Ct. App. May 23, 2017) ("Although the victim was transported to the center by police, and the officer ostensibly referred to the center as 'our office,' no law enforcement officers were present for the examination.").

183 *See, e.g.*, State v. Smith, No. A18-0985, 2019 WL 3000705, at *3 (Minn. Ct. App. July 1, 2019) (citing Ohio v. Clark, 576 U.S. 237, 244 (2015) for the proposition that a nurse's mandatory reporting requirements do not turn an otherwise nontestimonial statement into a testimonial one).

184 *See, e.g.*, Pham v. Kirkpatrick, 711 F. App'x 67, 69 (2d Cir. 2018) (noting that a consent form permitting the hospital to provide evidence to law enforcement does not *itself* determine the correct objective characterization of the interview).

185 *See, e.g.*, Hernandez v. State, 946 So. 2d 1270, 1271, 1281–82 (Fla. Dist. Ct. App. 2007) (finding the nurse's questions to be the functional equivalent of police interrogation in part because deputies arranged for

examination takes place before or after the police interview. When SANE programs do not have any direct connections to law enforcement agencies and law enforcement does not play a significant role in a particular SANE examination, courts are likely to find statements made during examinations to be nontestimonial.[186] When the connections are less attenuated, however, courts are less consistent in their analyses.

In *State v. Tsosie*, the New Mexico Supreme Court found that the degree of law enforcement involvement in a SANE examination did not weigh in favor of finding a testimonial primary purpose.[187] In so concluding, the court noted that the only significant involvement of law enforcement was the transport of the victim to the SANE clinic by police.[188] Police did not instigate the examination and were not present during the exam.[189] The Family Advocacy Center, where the SANE examination took place, though located in the same building as law enforcement, occupied a distinct space "conducive to providing trauma-informed medical treatment."[190] Finally, the court found that although the victim's consent to the release of evidence to law enforcement was "noteworthy," a reasonable victim in the same position would not have understood the release form as rendering the primary purpose of the statements to be the creation of evidence for future prosecution.[191] In a more recent New Mexico case, the court found that law enforcement involvement did not support the conclusion that a reasonable person in the victim's position would understand their statements to have a primarily testimonial purpose even where detectives arranged the appointment for the SANE examination.[192] In so concluding, the court reiterated that, "absent some evidence that the police were attempting to manipulate the examination, [the

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the sexual assault examination and escorted the child and her parents to the location of the examination and back home).

186 *See* State v. Hilson, No. 10–0665, 2013 Iowa App. LEXIS 195, at *3–4 (Iowa Ct. App. Feb. 13, 2013) (finding that statements to a SANE were not testimonial where the court found no indication of any relationship between the SANE and the police, the police did not participate, and the SANE was not investigating for the police); *see also* State v. Miller, 264 P.3d 461, 487 (Kan. 2011).

187 *Tsosie*, 516 P.3d at 1141–42.

188 *Id.* at 1141.

189 *Id.*

190 *Id.*

191 *Tsosie*, 516 P.3d at 1141–42; *see also Pham*, 711 F. App'x at 69 (finding that the victim's signing a consent form to release evidence to law enforcement did not, in itself, change the primary purpose of the examination).

192 State v. Romanis-Beltran, No. A-1-CA-41730, 2025 LX 307902, at *26–27 (N.M. Ct. App. Sep. 11, 2025).

court] would not place dispositive weight on their presence on the premises or even in the examination room."[193]

Similarly, in *Cody v. Commonwealth*, the Virginia Court of Appeals held that notable connections to law enforcement did not change the primary purpose of the examination.[194] The court acknowledged that other factors to be considered were that the victim went to the hospital upon law enforcement's request and that the "Medical/Legal report contain[ed] a disclaimer informing the patient that the report 'ha[d] been created for the express purpose of facilitating state laws pertaining to the reporting and examination of abuse and/or neglect.'"[195] The court found the victim's statements to be nontestimonial after considering the location of the examination (a hospital), the SANE's characterization of the examination (as part of an ongoing police investigation but conducted for the goal of providing medical treatment), and the SANE's testimony regarding the importance of understanding a patient's injuries and their cause.[196]

In *State v. Hill*, the court found that a state-issued report similar to the one in *Cody* as well as the collection of DNA intended for use by law enforcement did not fundamentally change the primary medical purpose of the question, "Tell me why you're here."[197] By contrast, the Kansas Supreme Court in *State v. Bennington* held that statements made in response to a SANE reading off questions from a Kansas Bureau of Investigation (KBI) sexual assault evidence kit were testimonial.[198] The kit included questions "asking about the nature of the assault, the specific time of the assault, the name of the perpetrator, and a description of the perpetrator" and were asked in compliance with the procedures established by the KBI and the Kansas Department of Health and Environment.[199] The court found the victim's answers to be testimonial even though the evidence kit collected information pertaining to the assault that other courts have held to be relevant for medical treatment, and therefore nontestimonial, including recent sexual history and details of

193 *Id.* (quoting State v. Mendez, 242 P.3d 328, 339 (N.M. 2010)).

194 Cody v. Commonwealth, 812 S.E.2d 466, 477 (Va. Ct. App. 2018).

195 *Id.*

196 *Id.*

197 State v. Hill, 336 P.3d 1283, 1289–90 (Ariz. Ct. App. 2014).

198 State v. Bennington, 264 P.3d 440, 453 (Kan. 2011).

199 *Id.* at 452.

the assault.[200] The court found that because the SANE was complying with the protocol established by law enforcement agents, the responses of the victim were testimonial.[201]

Courts are also less consistent in their treatment of examinations when SANEs closely collaborate with police. As noted *supra*, the Kentucky Supreme Court in *Hartsfield* found that the state protocol requiring SANE nurses to act upon the request of police and prosecutors, and their subsequent role in collecting evidence, made the entire SANE interview testimonial.[202] By contrast, the Minnesota Court of Appeals found similar statements to be nontestimonial, despite mandatory reporting requirements, due to the fact that the examination was initiated by law enforcement and the fact that police escorted the patient to the SANE.[203] Further, even when police are present during the SANE examination, courts have held that inculpatory statements to SANEs are not testimonial.[204]

F. The Identity of the Assailant

Finally, one of the Confrontation Clause issues that courts grapple with most frequently arises when victims make directly inculpatory statements identifying their assailant. *Davis* and *Bryant* make clear that "statements that identify or accuse a defendant of specific criminal acts may nonetheless be rendered nontestimonial by virtue of a primary purpose that 'focuses the participants on something other than proving past events potentially relevant to later criminal prosecution,'" such as medical treatment.[205] While some courts accept carte blanche that the victim's statements identifying the defendant are necessary to ensure safe discharge and thus relevant to medical treatment,[206] others reach the opposite

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200 *Id.* at 455 ("[W]hen a SANE—even one who is a non-State actor—follows the procedures for gathering evidence pursuant to K.S.A. 2010 Supp. 65–448 and asks questions prepared by the KBI, the SANE acts as an agent of law enforcement."); *see also Miller*, 264 P.3d at 488 (concluding SANE was acting as an arm of law enforcement when collecting evidence and performing the KBI sexual assault evidence collection kit).

201 *Bennington*, 264 P.3d at 455; *see also* Hernandez v. State, 946 So.2d 1270, 1280 (Fla. Dist. Ct. App. 2007) ("Ms. Shulman's use of a standardized questionnaire to inquire of the child concerning the incident adds a structured aspect to her examination that causes it to more closely resemble a police interrogation.").

202 Hartsfield v. Commonwealth, 277 S.W.3d 239, 244 (Ky. 2009).

203 State v. Smith, No. A18-0985, 2019 WL 3000705, at *5 (Minn. Ct. App. July 1, 2019).

204 *See, e.g.*, Plater v. Harpe, No. CIV-21-1092-HE, 2023 WL 3491048, at *7 (W.D. Okla. Apr. 6, 2023).

205 *Tsosie*, 516 P.3d at 1145 (quoting Michigan v. Bryant, 562 U.S. 344, 361 (2011)).

206 *See* Ward v. State, 50 N.E.3d 752, 763 (Ind. 2016); Jackson v. State, No. 14-24-00241-CR, 2025 Tex. App. LEXIS 4955, at *14–15 (Tex. Ct. App. July 15, 2025) ("Numerous courts of appeals, including

conclusion[207] or at least qualify the inculpatory statement based on the identity of the alleged assailant.[208] In *Burke*, as discussed in the Introduction, the only statement K.E.H. made to Nurse Frey that the court judged to be testimonial was K.E.H.'s description of the assailant's appearance and clothing.[209] The court acknowledged that Nurse Frey's question seeking the description could provide guidance for medical treatment by eliciting answers designed to address K.E.H.'s safety, "rather than information that would assist police in investigating or prosecuting a crime," but concluded that because K.E.H. did not know her attacker, her description had no bearing on her medical treatment.[210] This conclusion suggests that the testimonial determination hinges in part on the actual identity of the alleged assailants and their relationship to the victims.

In a different vein, the Kansas Supreme Court in *State v. Bennington* analyzed the relevance of identifying the assailant from the objective patient's point of view.[211] The court concluded that even when a victim does not give explicit consent for the information gathered in a forensic examination to be provided to law enforcement, a reasonable patient would understand questions pertaining to the physical appearance of the perpetrator, and other similar information, to be for a use other than the provision of medical care.[212] In *Plater v. Harpe*, however, the Oklahoma federal district court concluded that the SANE examination had the primary purpose of providing medical care and, as a result, found that the victim's statements identifying the defendant as her attacker were not testimonial.[213]

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this court, have concluded that a patient's verbal history to a SANE or other medical professional during a sexual assault exam for purposes of receiving medical treatment is not testimonial, and its admission therefore does not violate the Confrontation Clause . . . because a person undergoing a SANE exam provides a verbal history to a medical professional for the primary purpose of obtaining medical treatment, whether or not the person intends to report the sexual assault to the police and even though the exam creates evidence that might be used in a prosecution." (internal quotation marks omitted)).

207 *See* United States v. Norwood, 982 F.3d 1032, 1051 (7th Cir. 2020) (holding that identity statements and details about the location of an assault are rarely for the primary purpose of medical treatment).

208 *See* People v. Maisonette, 144 N.Y.S.3d 752, 758 (N.Y. App. Div. 2021) (stating that details of abuse, including the perpetrator's identity, can be relevant to diagnosis and treatment).

209 State v. Burke, 478 P.3d 1096, 1112 (Wash. 2021).

210 *Id.* at 1112–13.

211 State v. Bennington, 264 P.3d 440, 455 (Kan. 2011).

212 *Id.*

213 Plater v. Harpe, No. CIV-21-1092-HE, 2023 WL 3491048, at *7 (W.D. Okla. Apr. 6, 2023).

IV. Creating a More Consistent Framework for Analyzing SANE Testimony

As the preceding discussion shows, Confrontation Clause challenges are highly fact- and context-specific, making it difficult to distill a general rule from the large body of case law. The inconsistency in state and federal court decisions demonstrates the unpredictable nature of Confrontation Clause analyses in the context of SANE testimony. Developing a more consistent framework for analyzing SANE testimony is necessary to empower criminal defendants, by enabling their attorneys to more cogently apply *Davis* in the context of a sexual assault case; law enforcement, by clarifying how their involvement in the SANE examination will impact the admissibility of evidence at trial; and SANEs, who will be able to more accurately explain to their patients how the results of their exams and any requisite statements may be used in future prosecutions, thereby also empowering victims. Finally, establishing clear guidelines for evaluating statements made to SANEs in court can help restore a measure of autonomy to survivors. This clarity can also disrupt the harmful cyclical patterns of domestic violence by increasing the likelihood that an abuser will be held accountable, even when the survivor is unwilling or unable to testify.

A. How SANE Programs Can Help

A few trends emerge from the case law that can inform a more predictable application of the "primary purpose" test in the context of SANE testimony. First, as explained in *Bryant*, the relevant inquiry in discerning the primary purpose of an interrogation is the objective understanding of the interrogation's purpose from the viewpoint of a reasonable person, *not* the actual participants' subjective purposes.[214] Most courts give credence to SANEs' own understanding of their role. When SANEs testify that information relating to the circumstances of the assault is necessary to provide medical care, courts are inclined to agree.[215] In contrast, when SANEs testify that their primary purpose is to collect forensic evidence or aid the police in an ongoing investigation, courts are more likely to interpret the primary purpose of the examination as collecting evidence for future prosecution.[216] SANE programs should therefore train nurses to understand that their primary purpose is to provide medical care and that they should state this purpose explicitly in their reports and

214 Michigan v. Bryant, 562 U.S. 344, 367 (2011).

215 United States v. Norwood, 982 F.3d 1032, 1048 (7th Cir. 2020).

216 *Id.*

testimony.[217] It is equally important for SANEs to be able to testify as to the importance of the information contained in inculpatory statements for patient care. For example, a SANE can explain to the court how the identity of an assailant (even if the admitted statement only includes the assailant's relationship to the victim and not their name) can impact how a victim is classified while in the hospital and the formulation of safety and discharge plans. If a victim personally knows their assailant, classifying them as a "no information" patient can help protect them: for "no information" patients, hospitals will only grant information to a list of specific people identified by the patient.[218] Further, and especially if the victim is a minor, identifying the assailant can be critical for the safe discharge of the patient.

Courts also tend to classify a SANE examination as medical if the SANE presents any consent form for the release of forensic evidence to police *after* the SANE has conducted the examination. In jurisdictions without mandatory reporting requirements, presenting the form prior to the examination tends to support a finding that the primary purpose of the examination was to preserve evidence for future prosecution. Thus, SANE programs that don't have mandatory reporting requirements should present a consent form only once an entire examination is completed. Although the most significant responsibility for establishing a more consistent legal landscape lies with the courts, these components of SANE testimony can contribute to a more consistent application of the Confrontation Clause in cases involving sexual assault.

Finally, based on the analysis of courts' treatment of law enforcement involvement with SANE examinations, SANE programs should ensure that, even where institutional relationships exist between law enforcement and SANE programs, the actual examinations of patients take place free of police interference. Law enforcement officers should never be in the examination room or partake in questioning.[219] As seen in *State v. Bennington*,

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217 *See* Rouhanian, *supra* note 72, at 71 ("[C]ourts commonly, though incorrectly and inconsistently, consider domestic violence and rape victims' statements testimonial despite the fact that these cases are characterized by lasting psychological effects, whether through the cyclical and manipulative nature of domestic violence or the vivid post-traumatic flashbacks of rapes, that create an ongoing state of emergency long after a 911 telephone call is placed.").

218 *See, e.g.*, Ward v. State, 50 N.E.3d 752, 754 (Ind. 2016) (testimony of SANE that such a classification can prevent people (specifically the attacker) from learning of the victim's whereabouts).

219 Though not the focus of this Note, it is important to mention that the presence of police can have severe implications beyond the admissibility of SANE testimony, replicating many of the systemic issues with policing on the street. Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2647 (2021) ("The ER is where people go when they are vulnerable and injured. ER's play a critical 'safety-net' function for those who do not have access to other types of medical care. Yet courts have interpreted the ER as an extension of the

officers asking questions during the examination can alter the objective circumstances and constitute the basis for finding that the primary purpose of the examination was for potential use in a subsequent prosecution.[220]

B. Doctrinal Changes

In addition to these adjustments to the testimony provided by SANEs, this Note suggests that, in evaluating the Sixth Amendment implications of a victim's statements to a SANE nurse, courts should focus on the primary purpose of the declarant—namely, the survivor. This is a substantive change to the current framework developed by *Crawford* and its progeny, which instructs courts to consider the objective purposes of *both* the interrogator *and* the declarant, as well as the circumstances in which the interrogation took place.[221] As detailed in *supra* Part III.D, courts already inconsistently apply this standard—some base their analysis solely on the perspective of a reasonable victim, others on that of a reasonable SANE nurse or an objective witness, and still others on both. Given the unique nature of domestic violence and sexual assault prosecutions, including the high rate of unavailable witnesses, the vulnerability involved in a sexual assault examination, and the likelihood of re-traumatization, courts should focus primarily on what the reasonable victim would understand the primary purpose of the examination to be.[222] This approach should still consider many of the circumstances envisioned, including how the SANE presents the purpose, location, and timing of the examination. However, unless police take an active role in the examination, courts should presume that a reasonable person in the victim's place would consider the primary purpose of the examination to be the provision of medical care.[223] By shifting the doctrinal focus to survivors, courts can more

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public street, generally permitting the police to engage in highly intrusive searches and questioning there . . . rais[ing] the same concerns of racialized street policing because of the convergence of police and marginalized groups in safety-net emergency rooms.").

220 State v. Bennington, 264 P.3d 440, 454 (Kan. 2011).

221 Michigan v. Bryant, 562 U.S. 344, 367–68 (2011).

222 *See generally* NATIONAL PROTOCOL, *supra* note 54.

223 While there are many valid critiques related to the application of a reasonable person standard, this Note suggests that courts apply a consistent presumption that a reasonable person in a victim's situation would consider the primary purpose of the examination to be the provision of medical care. For an analysis of the drawbacks of the reasonable person standard, see Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1275 (2010) ("Examining the many appearances of the reasonable person reveals the extent to which the rhetorical unity of the standard actually obscures very considerable differences."). For evidence that the reasonable person standard is not consistently

closely adhere to the proper analysis under the Confrontation Clause: determining whether a statement is testimonial in nature. This approach not only honors the constitutional framework established in *Crawford* but also ensures that survivors' statements are assessed in the context most relevant to confrontation; namely, whether they were *made* with the primary purpose of preserving evidence for later use at trial.

Finally, a declarant-centered approach is especially appropriate when the victim is a child. Even considering contextual factors that courts have used in analyzing whether a statement to a SANE is testimonial or not, including the primary purpose of the SANE, the SANE's description of their role, the location of the exam, and the involvement of law enforcement, it is unlikely that a reasonable child would understand the purpose of their statements to be for use in a further prosecution. Courts should extrapolate from *Ohio v. Clark*'s finding that "[s]tatements by very young children will rarely, if ever, implicate the [C]onfrontation [C]lause,"[224] to extend beyond preschool children because "unless children are explicitly told that what they say will be shared with the police, they are unlikely to believe that their statements will lead to criminal punishment."[225]

V. Conclusion

Crawford and its progeny have left unanswered critical questions relevant to the application of the "primary purpose" test. Without clearer rules guiding the analysis of statements made with multiple purposes, or clarifying whether the intent of the declarant or the interrogator is more significant, lower courts have created a legal patchwork that leaves victims, prosecutors, and defendants unsure about the treatment of SANEs' testimony at trial.

In sexual assault prosecutions, the complex and often cyclical dynamics of sexual and domestic violence cause many survivors to refuse to testify or even to recant their accounts.[226] As a result, these survivors—often the only witness to their own attack or

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applied across courtrooms, see Ed Cohen, *A Heated Argument Over the 'Reasonable Person'*, THE NAT'L JUD. COLL. (May 11, 2021), https://www.judges.org/news-and-info/a-heated-argument-over-what-is-reasonable/ [https://perma.cc/99JX-7T6D].

224 Ohio v. Clark, 576 U.S. 237, 247–48 (2015).

225 Brief for American Professional Society on the Abuse of Children as Amicus Curiae Supporting Petitioner at 19, Ohio v. Clark, 576 U.S. 237 (2015) (No. 13-1352).

226 Geetanjli Malhotra, Note, *Resolving the Ambiguity Behind the Bright-Line Rule: The Effect of* Crawford v. Washington *on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U.

abuse—are left facing the harsh reality that their attacker is less likely to be held accountable. Permitting the use of statements made during SANE examinations can help address and mitigate some of the systemic barriers to justice in these cases.[227] During these invasive and emotionally sensitive examinations, victims may provide information with the primary goal of receiving medical care, unaware that some questions are intended to elicit evidence for potential criminal prosecution. By excluding such out-of-court statements absent consistent analysis of the context in which they were made, current Confrontation Clause jurisprudence effectively denies some of society's most vulnerable individuals access to critical evidence needed to support prosecution.

Without creating a more predictable framework, the "primary purpose" test will continue to raise the exact concern the *Crawford* court sought to address—providing meaningful protection of the right to confrontation.[228] Focusing courts' "primary purpose" analysis on the declarant's understanding of the situation will create the conditions for a more consistent application of the Confrontation Clause to SANE testimony and more just outcomes for victims of sexual violence.

ILL. L. REV. 205, 213–14 (2006); Rouhanian, *supra* note 72, at 21 (describing the choice victims face between "testifying and confronting their attacker or facing the probability that their attacker may not be incarcerated . . . [which leaves victims] essentially re-victimized regardless of the choice they make because *Crawford* asks them to either re-live their trauma in a public trial or be responsible for making prosecution of their attacked much more difficult").

227 *Id.*

228 Crawford v. Washington, 541 U.S. 36, 63 (2004).