SANE Examinations Are Testimonial and Are Subject to Confrontation

[1]Features
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Definition of SANE Examination

Before delving into the case law, it is helpful to begin with some definitions to clearly delineate the terms of the argument. First, the United States Department of Justice’s description of SANE program operations states that “[t]he SANE or other medi-cal personnel (e.g., emergency department physicians or nurses) first assess the victim’s need for emergency medical care and ensure that serious injuries are treated. After the victim’s med-ical condition is stabilized or it is determined that immediate medical care is not required, the SANE can begin the evi-den-tial examination [emphasis added].” People v. Spangler, 285 Mich. App. 136, 149?150 (2009). Further, the role of the SANE includes the following functions: Perform[ing] a physical examination on the victim, collect[ing] evidence, treat[ing] minor injuries such as cuts/bruises,

Second, the word ?forensic? is universally understood as meaning ?pertaining to, connected with, or used in courts of law.? *Oxford English Dictionary Online Edition* (taken from second print ed. 1989). *Black?s Law Dictionary*, 6th edition, (5th re-print, 1991), defines ?forensic? as ?belonging to courts of justice.? A few definitions down, on the same page in *Black?s Law Dictionary*, 6th edition (5th reprint, 1991), the term ?forensic medicine? is defined as ?[t]hat science which teaches the application of every branch of medical knowledge to the purposes of law . . . to enable a court of law to arrive at a proper conclusion on a contested question affecting life or property.?

Putting these definitions together, a fair operative definition of a SANE examination is this: ?A forensic medical examination, conducted by a specially trained forensic medical provider, conducted as soon as practically possible after the occurrence of an alleged sexual assault, for the purpose of collecting evidence of a potential sexual assault and for the treatment of minor injuries.? The forensic nature of the SANE examination is precisely what makes it testimonial. No definition of SANE exam holds they are not forensic in nature. As such, forensic examinations, including SANE examinations, belong to the Courts and the Confrontation Clause, not medical records and hearsay.

Currently, there exists only one published court of appeals case in Texas dealing with the nature of SANE examination. This case is *Beheler v. State*, 3 S.W.3d 182 (Tex.App.?Forth Worth, 1999). The *Beheler* court held that statements made to a SANE nurse are made for the purpose of medical diagnosis, and are therefore not testimonial. *Beheler* and its antiquated interpretation of the purpose of a SANE examination is wrong and does not reflect the reality of what the purpose of a SANE examination is.

First, *Beheler* was decided in 1999. The fault-line shifting United State Supreme Court decision of *Crawford v. Washington*, 541 U.S. 36 (2004), which totally and completely changed the landscape of confrontation law jurisprudence, was decided five years later. As such, *Beheler*?s rationale/analysis for what does and does not qualify as statements made for purposes of medical diagnosis, as opposed to testimonial statements, must be viewed with suspicion, if not outright hostility.


Third, the *Beheler* opinion is one where the Defendant challenged the admission of the young female victim?s statements to the SANE examiner on evidentiary grounds, not constitutional confrontation grounds.

Fourth, *Beheler*?s description and definition of a SANE exam is not in keeping with current constitutional interpretations of the ultimate purpose of a SANE examination as held at both the State and Federal level.

Fifth, *Beheler* does not even attempt to address the fact that a SANE exam is forensic by its very definition.

Sixth, *Beheler* does nothing to address the issue of how an alleged assault victim?s identification of an alleged perpetrator of a crime is in furtherance of medical diagnosis, which has been held in other jurisdictions to be dispositive on its testimonial nature. *See State v. Kirby*, 280 Conn. 361, 391 (2006), holding that whether ?such statements [to a SANE examiner] . . . accuse or identify the perpetrator of the assault [] is significant to determining whether statements to the medical provider are testimonial.? (*See also Coates v. State*, 175 Md. App. 588 (Maryland 2007), where the court found that the identity of the abuser was of no concern for medical treatment purposes and the statements to the SANE nurse were testimonial.)
Last, any reliance on *Behler* for the proposition that a SANE examination’s purpose is for medical diagnosis ignores overwhelming case law to the contrary that such examinations are not primarily for medical diagnosis. Adherence to *Behler*’s definition inexplicably ignores commonly used definitions in the field of SANE examinations as established by the Department of Justice, standard English-language dictionary definitions, legal dictionary definitions, and those of academic scholars reviewing and critiquing this issue. All the aforementioned sources find that the forensic nature of SANE examinations make them testimonial.

Adherence to holdings like *Beheler* mean in the very near future that confrontation could readily be judicially decimated to nothing more than shallow formalism and meaningless platitudes if SANE examinations are flippantly recognized as being somehow being sufficiently attenuated from their actual law enforcement purpose?if all that is required to make such statements elicited during these forensic examinations nontestimonial is for the person conducting the questioning/examination to claim health and welfare as some part of their purpose in conducting the examination.3 Mosteller, Robert P. (2007), *Testing the Testimonial Concept and Exceptions to Confrontation: A Little Child Shall Lead Them,* 82 Indiana L. Rev. 918, 973.

**Forensic Exams Are Considered Testimonial in Federal Courts and in the Majority of State Courts Across the Country**

With the definitions from above regarding SANE examinations in hand, a brief survey across the SANE examination confrontation law landscape at both the state and federal level is warranted. This survey will show that the *Behler* court’s holding that the SANE examination was non-testimonial in nature goes against the overwhelming majority of jurisdictions that have considered this issue and directly ruled on it.

**A. Federal Courts: SANE Examinations and Forensic Examinations Are Testimonial**

The issue of SANE exams has been dealt with by federal courts. Federal courts, interpreting federal Constitutional jurisprudence, have squarely ruled that forensic exams, such as SANE exams, are testimonial in nature.

In *United States v. Gardinier*, 2007 CAAF LEXIS 723, reconsideration denied (2007), a military court was overturned when the court marshal judge ruled a forensic sexual assault exam was non-testimonial in nature. The *Gardinier* court held:

> We recognize that the referral of an alleged victim to a medical professional by law enforcement or trial counsel does not always establish that the statements at issue were made in response to a law enforcement or prosecution inquiry or elicited with an eye toward prosecution. Here, however, the evidence indicates that Ms. Sievers, who specialized in conducting forensic medical examinations, performed a forensic medical exam on [the victim] at the behest of law enforcement with the forensic needs of law enforcement and prosecution in mind. Under the totality of the circumstances presented here, [the victim]’s statements to [the SANE nurse] are testimonial and were admitted in error. *Id* at 66.

The holdings by federal courts that forensic interviews are testimonial do not stop at *Gardinier*. In *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005), Mr. Bordeaux maintained that the district court violated the Confrontation Clause of the United States Constitution by admitting a statement of the victim, made out of court, to an individual whom the government itself identified as ?forensic interviewer.?

The factual background of *Bordeaux* shows that after the allegations of sexual abuse arose, government officials referred the victim to a center for child evaluation. At this center, the victim was interviewed by a forensic interviewer before being examined by a doctor. Consistent with the center’s standard operating procedure, the interview was videotaped. As was the custom, two copies of the videotape were made—one for the patient’s medical records and one for law enforcement officials. On the videotape, the victim indicated
that Mr. Bordeaux put his penis in her mouth. The district court admitted the tape into evidence, and it was shown to the jury. The district court also admitted hearsay statements from a doctor at the center who observed the interview. The doctor recounted what the victim had said during her interview.

After conducting a constitutionally sound analysis of the statements made by the victim, the Bordeaux court held:

?We hold that Mr. Bordeaux?s sixth amendment rights were violated. First of all, [the victim?s] statements are testimonial. Statements elicited during police interrogations lie at the core of the definition of ?testimonial.? Crawford, 124 S. Ct. at 1374. A police interrogation is formal (i.e., it comprises more than a series of offhand comments?it has the form of an interview), involves the government, and has a law enforcement purpose. The same is true of the interview here. The formality of the questioning and the government involvement in it are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a ?forensic? interview, meaning that it ?pertained to, [was] connected with, or [was to be] used in courts of law.? Oxford English Dictionary Online Edition (taken from second print ed. 1989). That [the victim?s] statements may have also had a medical purpose does not change the fact that they were testimonial, because Crawford does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.4 Id at 556.

The analysis that SANE exams, and forensic exams in general, qualify as testimonial is accepted by federal courts. Legal scholars have convincingly and overwhelmingly argued that SANE nurses ?should categorically be treated as police agents? because of their intimate involvement with the prosecutor, the state, and the criminal process on multiple levels. Elizabeth J. Stevens, Comment, Deputy-Doctors: The Medical Treatment Exception after Davis v. Washington, 43 Cal. W. L. Rev. 451, 472 (2007). A majority of state courts as well that have considered this issue have determined that statements by a sexual abuse victim to a SANE nurse, or similarly situated forensic examiners, are testimonial in nature and barred by the Confrontation Clause. People v. Spangler, 285 Mich. App. 136 (2009). The Spangler court held, after considering the Justice Department?s definitions of a SANE examination and the relevant case law:

?While SANE personnel might treat medical conditions requiring immediate attention for a victim?s safety, ?further evaluation and care of serious trauma is referred to a designated medical facility or physician.? Id. Any medications provided the victim by SANE personnel are ?prophylactic . . . for the prevention of sexually transmitted diseases . . . and other care needed as a result of the crime.? Id. Clearly, the SANE examination is one geared for the preparation, collection, evaluation and disposition of evidence, and all medical treatment provided is relative to the patient being a victim of a sexual crime. We believe that this purpose exists in concert with the very things that might make a statement obtained thereby ?testimonial.?? People v. Spangler, 285 Mich. App. 136, 149?150 (2009).

Further, the fact that the majority of states consider SANE examinations and other similar forensic examinations as testimonial has been recognized in federal court. See Dorsey v. Banks, 749 F. Supp. 2d 715, 751 (2010). See also Paruch, Deborah, Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children? children of Michigan v. Bryant, 28 Touro L. Rev. 85 (2012), concurring that the majority of states find SANE examinations testimonial under Crawford and its progeny.

Under absolutely no other set of circumstances would a health care provider reveal such privileged and private information to a third party. The information obtained by the SANE nurse is revealed to law enforcement post-exam as a matter of simple routine. The purposes of the SANE nurse revealing the results of her examination to law enforcement is to allow law enforcement to use the SANE examination, the results
of the examination, and the expertise of the SANE nurse at trial. So how and why would any court find these
types of statement non-testimonial when the overwhelming body of federal and state case law, along with
legal scholars, says they are testimonial?

Surveying various court?s holdings, confrontation law scholars have concluded that appellate courts are
often reticent to find statements testimonial. These scholars believe this judicial reticence is based on the
appellate court?s concern about the decisive impact the determination of such statements as testimonial will
have on the prosecution of child abuse and sex crime cases in general. In other words, these commentators
believe that appellate courts are seeking to protect state prosecutions and prosecutors at the trial court level,
while at the same time providing an added level of insulation on appellate review?rather than faithfully
applying confrontation law jurisprudence. ??Testing the Testimonial Concept and Exceptions to
Confrontation: ?A Little Child Shall Lead Them.?? 82 Indiana L. Rev. 918, 978. The fear appears to be that
granting too much Confrontation will result in too many acquittals.5

However, there is light at the end of the tunnel. While some courts have resisted the change ushered in by
Crawford, most courts are faithfully applying confrontation law to forensic examinations and SANE
examinations in general.

B. Kansas: SANE Exams Are Testimonial

In State v. Bennington, 293 Kan. 503 (2011), the defendant was convicted of multiple crimes stemming from
his sexual assault and robbery of a 77-year-old woman in her home. The victim died before defendant?s jury
trial began, but she had related the incident in some detail to her niece, to a SANE examiner at the hospital,
and, more generally, on a claim form submitted to her bank (the defendant had stolen money from her). The
trial court denied the defendant?s motion to exclude admission of those statements. The jury found the
defendant guilty of all charges. The Supreme Court of the State of Kansas found that the trial court erred in
admitting the statements of the victim through the SANE nurse. The Court held:

?Moreover, when a SANE?even one who is a non-State actor?follows the procedures for gathering
evidence pursuant to [Kansas statute] and asks questions prepared by the [police], the SANE acts as an
agent of law enforcement. See Michigan v. Bryant, 562 U.S., 1143, 1151 n.3, 179 L. Ed. 2d
93 (2011) (noting non-State actors may be considered agents for purposes of analysis of whether
statements are testimonial); Davis v. Washington, 547 U.S. 813, 823 n. 2, 126 S. Ct. 2266, 165 L. Ed. 2d
224 (2006) (same).? Id at 524.

Both the Kansas Supreme Court and the Supreme Court of the United States (Bryant) have held that non-
police actors who are gathering evidence that is subsequently turned over to the police are agents of law
enforcement. Period. There is no room for debate on that subject. Holdings to the contrary are pernicious
judicial attempts to revive the old Roberts regime of confrontation at the expense of fully welcoming in the
new era of Crawford.

The Bennet court and the Medina court (discussed below) analyzed SANE nurse involvement in a
constitutionally correct way. These courts recognized, as has the United States Supreme Court, that police
and prosecutors can, and do, take steps to make it even easier for district judges and appellate courts to
bypass the Confrontation Clause and manipulate the introduction of evidence6?even when there is no
possibility of finding an ?ongoing emergency? (e.g., in cases where the hearsay statement was made days or
weeks after the alleged crime), courts still have other means of labeling hearsay as non-testimonial, thereby
placing it beyond the reach of the clause.7 One such way is to find that the statement was made, or obtained,
for some ?primary purpose? other than the investigation of a crime. This tactic is very common in cases
involving medical professionals who act on behalf of, or in concert with, the police.8 See Cicchini, Michael
D., Judicial (In)discretion: How Courts Circumvent the Confrontation Clause under Crawford and Davis.
75 Tenn.L.Rev. 753, 772.
In fact, the National District Attorney?s Association published a 46-page guidebook for district attorneys entitled ?The Role of the Sexual Assault Nurse Examiner in the Prosecution of Domestic Violence Cases.? The premise of this article is to teach prosecutors how to minimize the forensic aspect of the SANE examination and maximize the medical aspect, to insulate the examination results from confrontation. In appendix C of this publication, there is an article entitled ?Overcoming Crawford Issues.? In other words, prosecutors are being taught how to ?overcome? a defendant?s right to confrontation by subtle manipulation of testimony and words. These attempts by the government and state to usurp confrontation are precisely what Crawford and Davis are against. The government knows it, and they do their best to manipulate it.

C. Kentucky: SANE Examinations Are Testimonial

In Hartsfield v. Kentucky, 277 S.W.3d 239 (2009), the defendant allegedly sexually assaulted the victim. Immediately thereafter, the alleged victim fled and exclaimed to a passerby that the defendant had raped her. The alleged victim then went to her daughter?s house and told her that she had just been raped. The alleged victim was taken to a hospital, where she was examined by a SANE nurse. The victim related the details of the rape to the SANE nurse. The alleged victim died after the defendant was indicted for sex crimes against her, but before he was tried.

The Hartsfield court held that the sexual assault nurse examiner?s questioning was predominantly for the purpose of information gathering and the resulting statement was testimonial:

?The SANE nurse was acting in cooperation with or for the police. The protocol of SANE nurses requires them to act upon request of a peace officer or prosecuting attorney. A SANE nurse serves two roles: providing med­ical treatment and gathering evidence. SANE nurses act to supplement law enforcement by eliciting evidence of past offenses with an eye toward future criminal prosecution. The SANE nurse under [Kansas statute] is made available to ?victims of sexual offenses,? which makes the SANE nurse an active participant in the formal criminal investigation. We believe their function of evidence gathering, combined with their close relationships with law enforcement, renders SANE nurses? interviews the functional equivalent of police questioning.?

?In the case before us, the SANE nurse?s interview was not to provide help for an ongoing emergency but, rather, for disclosure of information regarding what had happened in the past. [The victim] was away from the per­petrator, and the questioning was not for the purpose of resolving a problem. The interview had some level of formal­ity, despite being unsworn. So the statement was virtually the kind of statement that a witness would give at a trial or hearing.?

?Looking to the factors enumerated in Davis, the SANE nurse?s questioning involved past events, was not related to an ongoing emergency, and took on the nature of a formal interview. So we conclude that the statements taken from [the victim] during her interview with the SANE nurse were testimonial in nature. Following the Supreme Court precedent, we conclude that the Court of Appeals erred when it reversed the trial court?s ruling in limine excluding from use at trial the statements [the victim] gave the SANE nurse. These statements were testimonial statements that Hartsfield never had the opportunity to cross-examine and so they are barred by the Confrontation Clause.

D. Nevada: Sane Exams Are Testimonial

The Nevada Supreme Court in Medina v. State, 131 P.3d 15 (2006), held that statements made by an adult sexual assault victim to a SANE nurse were testimonial. The court affirmed the conviction and found admission of the victim?s statements to be harmless error beyond a reasonable doubt. Nonetheless, the court?s reasoning is important to understand why the deceased?s statements to the SANE nurse, in the case sub judice, were testimonial.
During the Medina trial, the SANE examiner testified as to what the victim told her about the rape during the sexual assault examination. The SANE examiner testified that the victim stated that she was choked, that she was hit, that Medina put his penis into her mouth, into her vagina, he put his penis into her rectum. The victim stated that Medina put his mouth on her vagina and then he put his penis in her mouth. Id at 8. The Nevada court held that the SANE nurse's hearsay testimony violated the Confrontation Clause because the SANE nurse was a police operative. Id at 12.

In Medina, the SANE examiner testified that she is a forensics nurse, and that she gathers evidence for the prosecution for possible use in later prosecutions. As such, the circumstances under which the victim made the statements to the SANE examiner would lead an objective witness to reasonably believe that the statements would be available for use at a later trial. The victim was not available for trial, and Medina had no prior opportunity to cross-examine her regarding the statements to the SANE examiner. Therefore, the district court manifestly erred when it admitted the statements the victim made to the SANE examiner during the sexual assault examination [emphasis added]. Id at 14.

E. Tennessee: SANE Examinations Are Testimonial

In State v. Cannon, 254 S.W.3d 287 (Tenn. 2008), the 82-year-old victim reported that an unknown assailant raped her in her home. The victim did not testify at trial. Defendant was convicted of aggravated rape. On appeal, he challenged the admission of evidence and the violation of his confrontation rights. The Supreme Court of Tennessee concluded that the victim's statements describing the assault to the police officers and her statements to the sexual assault nurse examiner (SANE) were testimonial and admitted in violation of defendant's right of confrontation.

The Cannon court held that statements made by the victim to the SANE nurse were testimonial and subject to confrontation:

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. Id at 302.

This Issue Needs to Be Resolved

In Rangel v. State, 250 S.W.3d 96 (Tex.App.?Forth Worth, 2008), the Texas Court of Criminal Appeals was presented with the issue of forensic interviews and whether they are testimonial. Rangel petitioned for Discretionary Review. The Texas Court of Criminal Appeals initially granted, but then withdrew its granting of its Petition for Discretionary Review and punted, holding instead that the constitutional error was not preserved.

However, a dissenting opinion to the refusal to grant the PDR was filed by Justice Cochran. Justice Cochran provided a detailed analysis of the splits across the country that relate to forensic interviews. Justice Cochran wrote in her dissent:

Virtually all courts that have reviewed the admissibility of forensic child interview statements or videotapes after the Davis decision have found them to be testimonial and inadmissible unless the child testifies at trial or is presently unavailable but the defendant has had a prior opportunity for cross-examination. Id at 104. In 26 e.g., State v. Hooper, No. 33826, 176 P.3d 911, 2007 Ida. LEXIS 234 (Idaho, December 24, 2007) (holding that videotaped statements the child victim made to nurse during interview at a sexual-trauma abuse-response center were testimonial because the circumstances surrounding the interview indicated that the primary purpose of the interview was to establish past
events potentially relevant to later criminal prosecution as opposed to meeting the child’s medical needs); State v. Henderson, 284 Kan. 267, 160 P.3d 776 (Kan. 2007) (reversible error to admit three-year-old child’s videotaped statement to social worker taken at government facility to gather evidence against alleged perpetrator when child did not testify at trial); State v. Justus, 205 S.W.3d 872 (Mo. 2006) (while social worker’s job was to protect child, ?primary purpose? of videotaped statements was to establish past events); State v. Blue, 2006 ND 134, 717 N.W.2d 558 (N.D. 2006) (videotaped statement to forensic interviewer at child advocacy center inadmissible); State v. Pitt, 209 Ore. App. 270, 147 P.3d 940 (Ore. Ct. App. 2006) (reversible error to admit ?testimonial? videotaped statements made by two children to social worker at child abuse assessment center when children did not testify at trial); In the Interest of S.R., 2007 PA Super 79, 920 A.2d 1262 (Sup. Penn. 2007) (reversible error to admit videotape of child victim’s statement to forensic DHS interviewer for the purpose of investigation and possible prosecution when child did not testify at juvenile’s adjudication hearing).

While Justice Cochran’s dissenting opinion does not deal with SANE examination, it shows definitively that in the context of forensic examinations, courts across the United States have held such exams to be testimonial and subject to the rigors of confrontation.

Further, the fact that statements are made to non-law enforcement actors does negate the testimonial nature of a statement. Justice Scalia, in his Bryant dissent, stated that what constitutes testimonial must be looked at as meaning a statement that “may be used to invoke the coercive machinery of the State against the accused” as distinguished with a non-testimonial statement such as one from “a narrative told to a friend over dinner [emphasis added].” Judge Dibrell ?Dib? Waldrip and Sara M. Berkeley, ?What Happened? Confronting Confrontation in the Wake of Bullcoming, Bryant, and Crawford,? 43 St. Mary?s L.J. 1, 4 (2011). To hold otherwise would be to simply allow the police to use surrogate investigative services in order to avoid having to ever produce an accuser in court, and instead, rely on professional witnesses?i.e., police officer, CPS worker, SANE nurse, etc.

Sound constitutional reasoning favors finding SANE examinations to be testimonial. Holding otherwise simply leaves too large an opening for prosecutors to walk statements through unconfronted. Once those types of statements reach the jury, there is no unringing the bell. The damage is done. And with the quick sweeping broom of harmless error review, any erroneous admission of a SANE nurse’s testimony is neatly swept under the judicial rug. Confrontation means just that: confrontation. SANE examinations should not be viewed as a midwife for bringing unconfronted testimonial statements into court via hearsay exceptions.

Notes


2. The treatment by a SANE nurse has to be confined to only minor medical issues because by definition the SANE nurse is not a medical doctor and cannot provide medical treatment.

3. It defies logic to believe that an examination conducted by a medical provider would not have the patient/examinee’s health and welfare at least tangentially in mind. The police simply do not have the training or education to conduct such an exam. The medical examination is a proxy examination done by medical providers for the police. See Elizabeth J. Stevens, Comment, ?Deputy-Doctors: The Medical Treatment Exception after Davis v. Washington,? 43 Cal. W.L. Rev. 451, 472 (2007) (?[U]nder Davis, courts should treat health care providers as agents of the police and their interactions with the declarant as police interrogation? based on principles of agency law). Ms. Stevens? article is attached to this motion in the appendix as ?B.? The United State Supreme Court has applied agency related issues in the criminal context. See Pinkerton v. United States, 328 U.S. 640 (1946).

4. Therein lies the rub: Just because statements may have a dual purpose, it does not diminish the constitutional nature of such statements. The dual purpose is what makes those kinds of statements so
dangerous and readily manipulated by police. It allows testimonial statements to be smuggled into court under the guise of a non-testimonial hearsay rationale. Once the smuggled statements have reached the jury, unconfronted, there is no unringing that bell.

5. But see Roman, John, PhD, Walsh, Kelly, PhD, Post-Conviction DNA Testing and Wrongful Conviction, Urban Institute, Justice Policy Center, 2100 M St. NW, Washington, DC 20037. This project was supported by Contract No. 2008F-08165 awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. This study found an absolutely staggering rate of wrongful convictions for sexual assault cases in Virginia:

We find that in convictions in Virginia between 1973 and 1987 where evidence was retained in a sample of 422 convictions for sexual assault:

- The convicted offender was eliminated as the source of questioned evidence in 40 out of 422 convictions (9 percent).
- The convicted offender was eliminated as the source of questioned evidence in 33 out of 422 convictions (8 percent) and that elimination was supportive of exoneration.
- The convicted offender was eliminated as the source of questioned evidence in 40 out of 227 convictions (18 percent) where a determination could be made from the DNA analysis.

According to the Innocence Project, of the 250 people who have been wrongfully convicted then released from prison, 84% were convicted of sexual assault [4]http://www.innocenceproject.org/news/250.php, p19. These types of statistics on wrongful convictions should cause everyone who touches the criminal justice system, particularly in sexual assault cases or in cases (such as Appellant’s) where sexual assault issues play a vital role in obtaining a conviction; to pause; to hesitate; to reevaluate exactly what it is we are doing. In short, it should cause all of us to shudder. Each and every time a person goes to jail based in whole, or in part, on allegations of sexual assault, the evidence and the established procedures which allowed in the evidence of the purported sexual assault, needs to be scrupulously reviewed. Due process demands this. See United State Supreme Court case of Mathews v. Eldridge, 424 U.S. 319 (1976). The Eldridge court articulated three elements that need to be rigorously assessed in deciding what due process requires in terms of procedural safeguards established by a court. And remember, confrontation is a procedural safeguard, not a substantive guarantee of the evidence. The three Eldridge interests are as follows: (1) the private interests at stake, (2) the government’s interest, and (3) the risk that the procedures used will lead to erroneous decisions. Eldridge factor three is dispositive on this issue.

6. ?Confusion of the language of good and evil: this sign I give unto you as the sign of the State.? Thus Spoke Zarathustra, Frederick Nietzsche, Simon & Brown Publishing 2012, p. 72. More specifically here, ?[Deliberate] [c]onfusion of the language of [testimonial] and [non-testimonial]: this sign I give unto you as the sign of the state.?

7. This reticence by courts to hold statements testimonial is likely a means of trying to breathe continued life into pre-Crawford hearsay statutes. Prior to Crawford, many state legislatures (including Texas) had fashioned special hearsay exceptions for cases involving domestic violence. Pre-Crawford courts had liberally construed these statues to open the hearsay floodgates, allowing in statements by domestic violence victims very lax hearsay exceptions. This solicitous treatment of hearsay reflected a belief that many domestic violence victims and family members who witness domestic violence recant or refuse to cooperate after initially complaining to the police. See Lininger, Tom, Prosecuting Batterers After Crawford, 91 Va. L. Rev. 747 (2005).


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