No. __-_____

THE SUPREME COURT OF THE UNITED STATES

RONALD BURKE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petition for Writ of Certiorari

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QUESTION PRESENTED

Does the Confrontation Clause of the Sixth Amendment prohibit a Sexual Assault Nurse Examiner from testifying about statements made during a forensic examination by an adult sexual assault complainant who is unavailable to testify at trial and has not previously been subjected to cross-examination?

RELATED PROCEEDINGS

State of Washington v. Ronald Burke, No. 96783-1, Washington Supreme Court, January 14, 2021.

State of Washington v. Ronald Burke, No. 50053-1-II, Washington Court of Appeals, Division II, December 27, 2018.

State of Washington v. Ronald Burke, No. 14-1-04008-5, Pierce County Superior Court, February 17, 2017.

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PETITION FOR WRIT OF CERTIORARI

Ronald Burke petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington.

OPINIONS BELOW

The opinion of the Washington Supreme Court (Pet App. 1a) is published at 478 P.3d 1096. The opinion of the Washington Court of Appeals (Pet App. 69a) is published at 431 P.3d 1109. The trial court's ruling (Pet. App. 92a) was not published.

JURISDICTION

The Washington Supreme Court filed its opinion on January 14, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Ronald Burke was convicted of sexual assault based not on the testimony of his accuser, but on out-of-court statements given to a Sexual Assault Nurse Examiner (SANE) during a "forensic examination" of the complainant seven years prior to his trial. Over Mr. Burke's Confrontation Clause objection, the SANE was permitted to read the complainant's "narrative description of the incident verbatim" from her forensic report. Pet. App. 77a. Mr. Burke was convicted of Rape in the Second Degree, a conviction that required the sentencing judge to impose a maximum term of life imprisonment. Wash. Rev. Code § 9.94A.507.

The testimony presented against Mr. Burke by the SANE[1] has become both ubiquitous and controversial in sexual assault trials in our country. Over the last two decades, government agencies and non-profit groups have pushed to hire and train forensic medical professionals to collect sexual assault evidence and testify for the prosecution in court proceedings. There are nearly

[1] Medical professionals who conduct sexual assault forensic exams are also sometimes called Sexual Assault Forensic Examiners (SAFEs) or referred to as a member of a Sexual Assault Response Team (SART). This brief will refer to all medical professionals who are specially trained to conduct sexual assault forensic examinations for sexual assault complainants as SANEs for simplicity.

2,000 nurses certified in sexual assault forensic examination in the United States, with SANEs operating in all fifty states and the District of Columbia.

As the facts of this case demonstrate, SANEs have a dual role: they are medical professionals, but they work closely with police officers to collect evidence that is likely to be used in criminal prosecutions. SANEs have healthcare credentials, but they receive extensive training in legal topics, including how to testify persuasively in a criminal trial as a fact witness or an expert. They are authorized to prescribe medication, but SANE examinations are typically performed after the complainant has been medically examined and discharged by a physician. SANEs write reports that become part of the complainant's medical file, but they also seek to capture information central to a criminal case, including a description of the suspect and a chronological narrative of events.

In this case, a SANE named Kay Frey testified that she engaged in both of these forensic and medical roles when she evaluated a homeless, intoxicated woman named KEH who came into the Tacoma General Hospital emergency room shortly around 1:30 a.m. on July 3, 2009. Pet. App. 3a. KEH asserted that she had been sexually assaulted in a nearby park. *Id.* She was evaluated by a physician in the hospital's emergency room and medically cleared for discharge at approximately 11:00 a.m. *Id.* KEH decided to wait at the

hospital for an additional five hours, however, in order to participate in a forensic examination conducted by Nurse Frey, the SANE on duty at the time. Pet. App. 5a. KEH told the nurse that although she had been medically discharged earlier, she decided to wait because she wanted to ensure her assailant would not "be out there doing this to someone else." *Id.*

Nurse Frey had many years of training and experience in investigating claims of criminal sexual misconduct and preserving evidence for use in court proceedings. Pet. App. 147a-149a. She began the examination by providing KEH with a form stating that the purpose of the examination was the "collection of evidence for investigative purposes." Pet App. 50a. That same form also informed KEH that the exam was a "forensic evaluation" that "does not include general medical care." Pet. App. 6a. Nurse Frey then questioned KEH about the circumstances of the alleged assault, including asking for a physical description of the assailant and requesting a chronological narrative of events leading up to and including the sexual assault. Pet. App. 7a-8a. Although the interview was not recorded, the SANE took down KEH's statements conversation word-for-word in her records. Pet. App. 102a.

KEH passed away in 2011. Pet. App. 4a. In 2014, Ronald Burke was charged with raping KEH based on a purported match between his DNA profile and samples recovered and preserved from KEH. *Id.*

At Mr. Burke's trial, the court held an evidentiary hearing on whether the SANE would be permitted to testify about the statements made to her by KEH. *See* Pet. App. 93a-144a. Counsel for Mr. Burke asserted that permitting the SANE to relay KEH's statements to the jury would violate the Confrontation Clause, citing this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Pet. App. 93a, 124a-134a.

The trial court noted that the issue of permitting a SANE to testify about an unavailable sexual assault complainant's statements was an issue of "first impression" in Washington state. Pet. App. 138a. The court acknowledged that one of the purposes of the SANE's evaluation was "to collect forensic evidence." Pet. App. 140a. The trial court nonetheless ruled that the statements were not testimonial because they also included a medical care component, and permitted the SANE to testify about what KEH said about the assault without limitation. Pet. App. 142a. As a result, Nurse Frey was allowed to "read KEH's narrative description of the incident verbatim to the jury from" her forensic report. Pet. App. 77a.

In closing argument, the prosecuting attorney "heavily relied" on the SANE's testimony to argue that Mr. Burke used "forcible compulsion" to effect the sexual assault. Pet. App. 89a. Specifically, the prosecutor "quoted" from the SANE's testimony about how KEH said "that her assailant had

covered her mouth and took her to the ground." Pet. App. 79a. The jury convicted Mr. Burke as charged, and he appealed.

The Washington Court of Appeals reversed Mr. Burke's conviction, holding that the statements made by KEH to the SANE were testimonial. Pet. App. 69a-91a. The Court of Appeals noted that "KEH's statements were made under circumstances that objectively demonstrate that the primary purpose of the exam was to provide evidence for a criminal prosecution." Pet. App. 86a. The Court of Appeals found it persuasive that "the exam was a forensic evaluation that would include documentation of the assault [and] collection of evidence." Pet. App. 87a (citation omitted). The SANE examination did not occur in the context of an "ongoing emergency," but instead happened several hours after KEH was medically discharged from the hospital. *Id.* The Court of Appeals stated that the SANE's job "clearly had a law enforcement component" because she was required to "collect evidence that would potentially be used by law enforcement" and because the examination was "paid for by government funds related to crime victim support." *Id.* In light of these factors, the court concluded that the evidence was testimonial. *Id.* The Court of Appeals rejected the State's contention that the error in admitting KEH's statements was harmless, holding that the SANE's testimony may have

"influence[d] the jury's decision as to the forcible compulsion element" of the sexual assault charge. Pet. App. 90a.

The Washington Supreme Court reversed the Court of Appeals. Pet. App. 1a-68a. Six justices of the Supreme Court ruled that almost all of the complainant's statements to the SANE were nontestimonial because the primary purpose of the interaction was to obtain medical care. The majority found, however, that a single statement made by KEH "describing the assailant was testimonial." Pet. App. 30a. According to the majority, that statement alone was made for the "primary purpose" of "identify[ing] the person who could be prosecuted for the sexual assault." *Id.* Given the fact that Mr. Burke was identified by DNA, however, the Court found the admission of the description statement to be harmless. Pet. App. 30a-31a.

Three justices wrote separately, asserting that the entire interrogation conducted by the SANE was testimonial. Pet. App. 39a-68a. Those justices found that the exam had "an overwhelmingly forensic purpose." Pet. App. 57a. In the view of these justices, it was highly significant both that the SANE testified that the "overall medical responsibility" for treating KEH falls on the emergency room physician, and that the purpose of the exam was not to provide "general medical care." *Id.* Instead, the "verbal statements elicited from K.E.H." were for the purpose of "facilitat[ing] the collection of []

physical evidence" and "made with the primary purpose of 'creating evidence for [the defendant's] prosecution.'" Pet App. 58a (quoting *Ohio v. Clark* 576 U.S. 237, 246 (2015)).

Those three justices ultimately concurred in the outcome, however, finding that the Confrontation Clause violation was harmless. Pet. App. 63a-67a. The view of the concurrence regarding harmless error contrasts directly with the three judges of the Court of Appeals, who considered this argument and unanimously ruled that the State did not meet its burden of proving that the error was harmless beyond a reasonable doubt. Pet. App. 90a & n.8 (holding that the admission of "KEH's statements related to forcible compulsion are not harmless").

REASONS FOR GRANTING THE PETITION

This case squarely presents a question that has divided lower courts: whether admitting testimony regarding a complainant's statements during a forensic sexual assault examination violates the Confrontation Clause. As the Washington Supreme Court stated, "jurisdictions have split" on the question of admissibility of statements made during forensic examinations performed by SANEs. Pet. App. 18a-19a & n.9; *see also Thompson v. State*, 438 P.3d 373, 377 (Okla. Crim. App. 2019) ("[C]ourts considering the issue are divided."). Indeed, a panel of the Sixth Circuit recently denied a habeas corpus petition

related to SANE testimony, writing that "[t]he 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," and averred that "there could be fair-minded disagreement about whether [] statements" made during a forensic SANE examination "are testimonial." *Dorsey v. Cook*, 677 F. App'x 265, 267 (6th Cir. 2017) (unpublished).

The issue raised in this petition is important. The field of forensic sexual assault examination is growing and becoming more professional. There are forensic sexual assault nurses operating in all fifty states, and questions regarding the admissibility of their testimony bedevil lower courts. *See United States v. Norwood*, 982 F.3d 1032, 1045 (7th Cir. 2020) ("Statements made to a SANE in the context of a part-medical, part-forensic examination are difficult to examine under the primary purpose test."). This case provides this Court with an opportunity to address this "difficult" issue and resolve the "fair-minded disagreement" that has led to disparate outcomes in sexual assault cases in different jurisdictions.

Finally, the court below got it wrong. SANEs are adjuncts of law enforcement, and they engage in detailed, structured interrogation of sexual assault complainants for the purpose of creating a record that can serve as a

substitute for in-court testimony. As the complainant in this case was informed, the purpose of a SANE examination is not for "general medical care." Pet. App. 6a. Instead, it is a "forensic" examination—meaning that the SANE seeks information "[p]ertaining to, connected with, or used in courts of law; suitable or analogous to pleadings in court." Forensic, The Oxford English Dictionary (2d ed. 1989). Mr. Burke was never able to test the veracity of statements made during this interrogation through cross-examination because KEH was unavailable to testify. As a result, his right to Confrontation guaranteed by the Sixth Amendment was violated, and he is serving a life sentence as a result of an unconstitutional conviction.

I. Appellate Courts Are Divided Over Whether Admitting a SANE's Testimony Regarding a Non-Testifying Sexual Assault Complainant's Statements Violates the Confrontation Clause

The Washington Supreme Court's decision in this case exacerbates a conflict among lower courts over whether a SANE should be permitted to testify about the statements made by a sexual assault complainant during a forensic examination. At least seventeen state appellate courts have addressed the question of whether an adult's statements to a SANE are admissible when the declarant is unavailable to testify and has not previously been cross-examined. Ten state courts have found that such statements made to a SANE are nontestimonial and thus admissible over a Confrontation Clause objection,

while seven state courts hold that the admission of such statements violate the Sixth Amendment.[2] This Court should accept review to ensure that the federal Confrontation Clause is applied consistently across our country.

A. At least seven state courts have found that stereotypical SANE examinations elicit testimonial responses

After this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) recast the inquiry in Confrontation Clause cases as whether an out-of-court statement is "testimonial," lower courts immediately began to grapple with the question of whether statements given during a forensic sexual assault examination were admissible. At this time, appellate courts in at least seven states have directly held that statements made by an adult during a SANE examination are testimonial. *People v. Vargas*, 100 Cal.Rptr.3d 578 (Ct. App.

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[2] Other state appellate courts and federal courts of appeal have issued conflicting opinions on matters related to the question presented in this Petition, such as whether a child's interview with a SANE is testimonial. *Compare, e.g.*, *Ramirez v. Tegels*, 963 F.3d 604, 615 (7th Cir. 2020) (noting that "at least some of the questioning" of a thirteen-year-old girl "in the hospital examination room arguably functioned as a substitute for a police interrogation"); *and United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) ("That [a child sexual assault complainant's] statements may have also had a medical purpose does not change the fact that they were testimonial."); *with United States v. Barker*, 820 F.3d 167, 171 (5th Cir. 2016) ("The primary purpose of the conversation between [the SANE] and [a four year-old] was to medically evaluate and treat the young girl."). Resolving the question presented in this petition could provide additional guidance to courts considering these equally-controversial matters.

2009); *Hernandez v. State*, 946 So.2d 1270 (Fla. Dist. Ct. App. 2007)[3]; *State v. Bennington*, 264 P.3d 440 (Kan. 2011); *Hartsfield v. Commonwealth*, 277 S.W.3d 239 (Ky. 2009); *Medina v. State*, 143 P.3d 471 (Nev. 2006); *State v. Romero*, 156 P.3d 694 (N.M. 2007); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008).

In reaching this conclusion, these courts have stressed the close relationship between SANEs and law enforcement officials. In *State v. Medina*, for example, the Nevada Supreme Court held that a forensic nurse is a "police operative" who "gathers evidence for the prosecution for possible use in later prosecutions." 143 P.3d at 476. Likewise, in *State v. Romero*, the New Mexico Supreme Court found that a SANE "was acting as a proxy for law enforcement officers and conducting a police interrogation." 156 P.3d at 697. And in *People v. Vargas*, the California Court of Appeal found that the sexual assault nurse was in an "agency relationship" with law enforcement and conducted questioning from a "rigorous, statutorily mandated format" in order "to make a record of past facts." *Id.* at 588.

The Tennessee Supreme Court has also held that statements made by a sexual assault complainant to a nurse examiner were testimonial. *Cannon*, 254

[3] Although the *Hernandez* decision dealt with a minor child, it has been extended to adults in later cases. *See Malave v. State*, 269 So. 3d 669 (Fla. Dist. Ct. App. 2019).

S.W.3d 287. The court noted that the statements were made in response to a "structured" questionnaire, and that the nurse had special training on "how to collect evidence." *Id.* at 305. In ruling that the statements were testimonial, the *Cannon* court found it extremely persuasive that the complainant had "already been examined by a nurse and the emergency room physician" to resolve her acute medical needs before starting the evaluation with the SANE. *Id.*

In 2011, the Kansas Supreme Court joined those courts holding that statements made by an adult sexual assault complainant to a SANE were testimonial. *Bennington*, 264 P.3d 440. The court unanimously held that the "primary purpose" of the interview by the SANE was to collect evidence useful to a future criminal investigation. *Id.* at 454-55. The *Bennington* court found that the questioning performed by the SANE bore the hallmarks of interrogation designed to elicit a substitute for trial testimony. The form the SANE was asked to fill out that had been authored by the Kansas Bureau of Investigation. *Id.* at 454. While the SANE unquestionably took some steps to assist the victim, the questions posed by the SANE focused on traditional components of a law enforcement investigation: the "who, when, where, and other specifics relating to the elements of potential crimes." *Id.*

Appellate courts in at least seven states have thus held that statements made to SANEs during forensic examinations are testimonial, and should not be admitted when the declarant is unavailable to testify and has not previously been cross-examined. Had Mr. Burke been tried in California, Florida, Kansas, Kentucky, Nevada, New Mexico, or Tennessee, he would not be facing the prospect of serving a term of life imprisonment based on the testimony of a SANE.

B. Other state appellate courts permit SANE testimony over Confrontation Clause objections

In at least ten states, appellate courts have ruled that statements made to a SANE are not testimonial. *State v. Hill*, 336 P.3d 1283 (Ariz. Ct. App. 2014); *People v. Munoz-Salgado*, 61 N.E.3d 257 (Ill. App. 2016); *Perry v. State*, 956 N.E.2d 41 (Ind. Ct. App. 2011); *People v. Garland*, 777 N.W.2d 732 (Mich. App. 2009); *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006); *Thompson v. State*, 438 P.3d 373 (Okla. Crim. 2019); *Murray v. State*, 597 S.W.3d 964 (Tex. App. 2020); *State v. Guzman*, 427 P.3d 401 (Utah App. 2018); *State v. Nelson*, 954 N.W.2d 11 (Wis. 2020); Pet. App. 1a-68a.[4]

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[4] The complainants in *Guzman* and *Nelson* appear to be minors rather than adults, and the complainant in *Hill* is identified only as a "teenage[r]." However, they are included in this summary because each complainant appears to have been old enough to understand the nature of the examination and thus not subject to this Court's guidance that statements by "very young children" rarely implicate the Confrontation Clause. *Ohio v. Clark*, 576 U.S.

The rationale animating these decisions is neither consistent nor compelling. Some courts have attempted to justify the decision to admit statements made to SANEs by citing to the need to solve sexual assault crimes as an ongoing emergency. For example, in *State v. Garland*, a woman went to a hospital and asserted that she was sexually assaulted by someone she met at a bar. 777 N.W.2d at 734. The Michigan Court of Appeals held that the "the primary purpose of the questions or the examination was to meet an ongoing emergency," apparently based on the fact that the complainant may have needed to be prescribed "antibiotics and emergency birth control." *Id.* at 737-38. Other courts admitting statements made to a SANE, however, have explicitly rejected this rationale: "[T]he end of any emergency does not make [the SANE's] and [the complainant's] later conversation testimonial or any less for the purpose of medical treatment." *Murray*, 597 S.W.3d at 975.

Likewise, some state courts have found statements non-testimonial because they are made to a medical provider without law enforcement presence or guidance. *See Hill*, 336 P.3d at 1289 (finding statements admissible in part because "[n]o law enforcement officer was present during any part of the examination."). But other state courts find this distinction meaningless and admit statements made to a SANE even when a police officer

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237, 247 (2015).

is in the room for the exam. *See Stahl*, 855 N.E.2d at 837 (statements not testimonial even though police officer "remained in the examination room while [the SANE] took the incident history").

Yet other courts have emphasized state laws relating to the mandatory reporting obligation of SANEs. In *Murray v. State*, the Texas Court of Appeals held that statements made to a SANE are not testimonial in part because state law does not require those nurses to share information with law enforcement personnel. 597 S.W.3d at 975 (a complainant's "ability to control release of the records from the exam suggests that medical treatment was the exam's primary purpose"). But some courts have found state mandatory reporting laws meaningless in the context of evaluating the testimonial nature of forensic SANE evaluations. *See Garland*, 777 N.W.2d at 738 (statements made to a SANE not testimonial even though "the nurse is required to report the assault and turn over the evidence to law enforcement officials"); *cf. Ohio v. Clark*, 576 U.S. 237, 249 (2015) ("[M]andatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.").

The unifying theme of these decisions is that statements made by a sexual assault complainant during a SANE examination are for the purpose of

obtaining medical care rather than creating evidence for a future legal proceeding. This view conflicts directly with numerous opinions from other courts that have found that the forensic purpose of SANE exams subsumes any purported healthcare purpose, not to mention the Department of Justice's own guidance that "patients must understand that the [forensic sexual assault] exam does not provide routine medical care." Dep't of Justice Office on Violence Against Women, "A National Protocol for Sexual Assault Medical Forensic Examinations" at 95 (2018).[5] The conflict between these state appellate courts is long-standing, intractable, and can only be resolved through a ruling by this Court.

II. The Question Presented Is Important And Recurring

This Court should grant certiorari because the issue presented in this petition is important and recurs regularly in sexual assault prosecutions. The testimony of SANEs has become a regular part of sexual assault cases in the United States. There are nearly 2,000 SANEs certified by the International Association of Forensic Nurses in the United States. Int'l Ass'n of Forensic Nurses, "SANEs Trained and Certified by IAFN in 2020."[6] Certified SANEs operate in all fifty states and the District of Columbia. *Id.*

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[5] Available at https://cdn.ymaws.com/www.safeta.org/resource/resmgr/Protocol_documents/SAFE_PROTOCOL_2012-508.pdf, last visited June 7, 2021.
[6] Available at https://rise.articulate.com/share/Dr3MMRtTTQoRrtQAc3iitqCE

The proliferation of SANEs is reflected in the dramatic increase in references to them in court opinions. According to Westlaw, from 1991 to 2001, the term "Sexual Assault Nurse Examiner" appeared in state appellate cases just 42 times; from 2001 to 2011, the term appeared over 800 times; from 2011 to 2021, the number of references to SANEs in state appellate opinions topped 2,000. In addition, hundreds of cases cite the work performed by sexual assault forensic examiners operating under other acronyms, such as "SAFE" and "SART."

The ubiquity and increasing importance of SANEs in the criminal justice system is reflected in their support within the United States Congress and the Department of Justice. Congress has passed legislation to actively promote the use of SANEs. *See* 34 U.S.C. § 40723 (directing the Department of Justice to "provide training, technical assistance, education, equipment, and information relating to the identification, collection, preservation, analysis, and use of DNA samples and DNA evidence by medical personnel" including those labeled "SANE," "SAFE," and "SART"). Pursuant to this direction from Congress, the Department of Justice issues grants to local agencies and provides centralized training and educational materials to promote the work of SANEs. *E.g.*, Dep't of Justice, "Office for Victims of Crime Awards Nearly

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$4 Million to Support Sexual Assault Nurse Examiner Programs" (Oct. 22, 2020).[7]

The increasing use of SANEs in sexual assault investigations, when combined with the fractured state of the law in this area, ensures that the issue presented in this petition is likely to bedevil trial courts and state appellate courts until this Court resolves the question of whether SANE testimony violates the Confrontation Clause. Absent intervention from this Court, the effect of inconsistently interpreting the Sixth Amendment will be draconian; Mr. Burke may now spend the rest of his life in prison in Washington, while his conviction would not have been permitted to stand a few hundred miles to the south in California. His fate—and the fate of other criminal defendants facing serious sexual offense charges around the country—should not hinge on such vagaries of geography.

III. The Decision Below is Wrong

Certiorari is also warranted because the Washington Supreme Court's decision is wrong. The admission of a testimonial out-of-court statement of an unavailable witness violates the Confrontation Clause unless the defendant has had a prior opportunity to cross-examine the witness. *Crawford v.*

[7] Available at https://www.justice.gov/opa/pr/office-victims-crime-awards-nearly-4-million-support-sexual-assault-nurse-examiner-programs

Washington, 541 U.S. 36, 54 (2004). Statements made in response to questioning are testimonial if the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Ohio v. Clark*, 576 U.S. 237, 244 (2015) (citation omitted).

Although this Court has not yet fully articulated the scope of the term "testimonial," several statements are not likely to fall within the definition of the term. Specifically, statements are not testimonial if made for the purpose of resolving an "ongoing emergency." *Michigan v. Bryant*, 562 U.S. 344, 374, (2011). Statements made by "very young children will rarely, if ever," be testimonial. *Clark*, 576 U.S. at 247-48 (2015). When determining whether a statement is testimonial, the context of the questioning is critical: "A formal station-house interrogation . . . is more likely to provoke testimonial statements, while less formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused." *Id.* at 245 (citation omitted).

Applying these principles to questioning conducted by SANEs makes clear that statements made during sexual assault examinations are testimonial. To begin, examinations conducted by the SANE are *forensic* examinations, typically conducted by members of the International Association of *Forensic* Nurses. The word forensic means: "Pertaining to, connected with, or used in

courts of law; suitable or analogous to pleadings in court." Forensic, The Oxford English Dictionary (2d ed. 1989).

The use of the word "forensic" to describe the role of the SANE is hardly accidental. SANEs are specifically trained as adjuncts to law enforcement: they coordinate with police officers; they engage in formal, standardized interrogation; they elicit facts critical to a prosecution; and they are prepared to testify about their findings. In fact, the inextricable intertwining between police and SANEs has led lower courts to conclude that SANEs are "part of the prosecution team" for the purposes of prosecutorial discovery obligations. *McCormick v. Parker*, 821 F.3d 1240, 1247 (10th Cir. 2016); *see also People v. Uribe*, 76 Cal.Rptr.3d 829, 844 (Ct. App. 2008) ("We reject any suggestion that the [sexual assault] exam here was not investigative. It was clearly spearheaded by the police . . . .").[8]

The conclusion that SANEs engage in questioning to produce testimonial evidence for use at trial is buttressed by the content of their training. The Department of Justice, a federal law enforcement agency, has produced training manuals and provided funding to support the work of sexual

[8] To the extent SANEs are not considered to be operating in a law enforcement capacity, it bears noting that this Court has "decline[d] to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment." *Clark*, 576 U.S. at 249.

assault forensic examiners. These training materials explicitly advise SANEs to tailor their questions to ensure that they can testify under the "evolving law on hearsay exceptions." Dep't of Justice, "A National Protocol for Sexual Assault Medical Forensic Examinations" at 41-42. The Department also recommends that SANEs undertake court-focused training, including spending classroom time on "mock court testimony." Dep't of Justice Office on Violence Against Women, "National Training Standards for Sexual Assault Medical Forensic Examiners" at 12 (2018).[9] If SANEs were engaging in "informal" communications that were not designed to produce evidence for a later court proceeding, training them on "hearsay exceptions" and "mock testimony" would hardly seem necessary.

The role of SANEs in producing testimonial evidence is further illustrated by the involvement of law enforcement in the actual exam. In some states, law enforcement officials may attend the exam. *E.g.*, *State v. Stahl*, 855 N.E.2d 834, 837 (Ohio 2006). In other states, law enforcement officials simply tell the SANE what questions they want asked. *E.g.*, *State v. Bennington*, 264 P.3d 440, 454 (Kan. 2011) ("Even though the questions were verbally posed by the SANE, the source was the [Kansas Bureau of

[9] Available at https://cdn.ymaws.com/www.safeta.org/resource/resmgr/docs/Training_SexualAssaultForens.pdf, last visited June 1, 2021.

Investigation]."). In fact, the Justice Department has cautioned that SANEs and law enforcement might consider tempering their "coordination" to avoid evidentiary objections in court—again, something that would hardly be a concern if the questioning were not designed to create an out of court substitute for trial testimony. Dep't of Justice, "A National Protocol for Sexual Assault Medical Forensic Examinations" at 42.

These materials make clear that SANEs are a critical part of efforts to identify and prosecute perpetrators of sexual assault. The Justice Department states that the purpose of the evidence collected in the SANE exam is to "identify the suspect," "document recent sexual contact," "document force, threat, or fear," and "corroborate the facts of the assault." *Id.* at 95. If a police officer interviewed a sexual assault complainant many hours after an alleged assault with these goals in mind, there can be little doubt that the complainant's statement would be testimonial. The fact that the responsibility for asking these questions is transferred to a member of the prosecution team who also happens to hold certain medical credentials does not alter their primary purpose.

What is more, the law enforcement purpose of sexual assault examinations is confirmed by the fact that forensic examinations of sexual assault complainants are typically paid for by law enforcement. *See, e.g.*, 42

U.S.C. § 10607 (providing that the Attorney General or other federal law enforcement agency shall pay for any sexual assault examination that is "necessary or useful for evidentiary purposes"). In Washington state, KEH's exam was not merely paid for by the "government"—it was reimbursed directly from the state's Crime Victim's Compensation fund. Wash. Admin. Code § 296-30-170.

Finally, while courts admitting the testimony of SANEs have held that the primary purpose of SANE exams is the provision of medical care, it is clear that SANE examinations are not performed to respond to acute medical needs. SANEs are not first responders, and they do not provide general medical care. Instead, "[e]xaminers typically ask patients to provide a medical forensic history *after* initial medical care for acute problems." Dep't of Justice, "A National Protocol for Sexual Assault Medical Forensic Examinations" at 87 (emphasis added). In fact, the Justice Department states that it is essential that patients "patients must understand that the exam does not provide routine medical care." *Id.* at 95. The examination may occur after hours or even days after a physician has medically discharged the patient. *See, e.g.*, *State v. Ortega,* 175 P.3d 929, 930 (2008) (discussing admissibility of statements made to SANE four days after alleged assault).

Routine SANE examinations thus bear all the hallmarks of a conversation designed to create a "out-of-court substitute for trial testimony." *Bryant*, 562 U.S. at 358. That dynamic was evident in this case. The paperwork that was presented to KEH informed her that she would be consenting to an examination that would be "forensic" in nature, and would be conducted by a "Forensic Examiner." Although the prosecution later claimed that this was predominantly a medical exam, that would have been news to KEH: she was specifically advised that the purpose of exam was *not* for "general medical care." Pet. App. 6a. Indeed, she was medically discharged by her treating physician approximately five hours prior to the start of the SANE exam.

It is also beyond cavil that at the time of the exam, KEH knew that she was preparing for potential criminal proceedings. KEH had already spoken with police and waited for several hours to be examined because she wanted to be sure that her assailant would not "be out there doing this to someone else." Pet. App. 5a.

Finally, the end result of the conversation between the SANE and KEH was a report that functioned as a substitute for live trial testimony. Nurse Frey did not merely offer a smattering of KEH's phrases or a general description of the evidence she collected. Because she had engaged in rigorous questioning

with an eye towards an upcoming criminal trial, she was able to read the jury a "narrative description of the incident verbatim." Pet. App. 77a. This included a narrative version of events and a description of the assailant. And because KEH was unavailable for trial, her statements to Nurse Frey were never subjected to cross-examination, which is "beyond any doubt the greatest legal engine ever invented for the discovery of the truth." 5 Wigmore on Evidence 1367 at 32 (1974).

This Court presaged the issue raised in this case in *Davis v. Washington*, 547 U.S. 813 (2006). In *Davis*, the Court referenced an 18th-Century English case involving a young rape victim, who "immediately on her coming home, told all the circumstances of the injury" to her mother. *Id.* at 828 (quoting *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202 (1779)). This Court noted that the statements at issue did not involve "screams for help," but instead were made at "the time the victim got home," at which point her story had become an "account of past events." *Davis*, 547 U.S. at 828. The statements in this case are a far cry from the "screams for help" hypothesized in *Davis*. And KEH didn't just "come home" to tell her account of past events to her mother—she went to the hospital, met with police, obtained medical care from her doctor, and *then* waited five additional hours to give a statement to a nurse with special training on collecting forensic

evidence and testifying in Court. At that point, KEH, the SANE, and the police investigating the alleged offense all had the same goal: doing whatever it took to make sure that the perpetrator would be caught and convicted. While some jurists may feel that a jury should be exposed to these statements because they may have traditionally been deemed reliable, there can be little doubt that the statements made by KEH to Nurse Frey were testimonial.

Despite each of these factors dictating that the primary purpose of the SANE's questioning was to create statements for use in court, the Washington Supreme Court ruled that no Sixth Amendment violation occurred. This Court should grant Ronald Burke's petition for certiorari to confirm that admitting statements made to SANEs during forensic examinations violates the Confrontation Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted this 8th day of June, 2021.

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