



## Administrative Office of the Courts

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### **NM Supreme Court rules on constitutional issue about admissibility of rape victim's statements to sexual assault nurse**

SANTA FE – Most of what a now-deceased victim told a Sexual Assault Nurse Examiner (SANE) may be used as evidence in a trial without violating the defendant's constitutional right to confront witnesses against him, the state Supreme Court ruled today.

In a split decision, the Court concluded that the primary purpose of a majority of the SANE examination of the rape victim in 2017 was for medical care rather than a purpose of creating evidence that substitutes for trial testimony by a witness unable to appear in court. Based on that determination, the Court found there would be no constitutional violation if most of the sexual assault victim's statements were introduced as evidence in a pending trial. The Court sent the case back to a district court to decide other questions concerning the admissibility of the statements.

The majority opinion by Chief Justice C. Shannon Bacon provides guidance to lower courts in making an initial determination of whether statements by an unavailable witness are inadmissible because they would violate a defendant's confrontation right under the Sixth Amendment of the U.S. Constitution. The law concerning the confrontation requirement has evolved through a series of U.S. Supreme Court decisions that generally prohibit the use of "testimonial" statements by witnesses who do not testify at trial and the defense had no previous opportunity to cross-examine them.

The Court's majority of three justices reversed the state Court of Appeals and a district court, which found nearly all of the statements to the SANE nurse inadmissible in the pending trial of Oliver Tsosie. He is charged with criminal sexual penetration, kidnapping, aggravated assault and battery, burglary and bribery of a witness. Prosecutors appealed exclusion of the evidence. The trial is on hold until the evidentiary issue is resolved.

The victim, Kimbro Talk, is unavailable to testify in a trial because he died in 2018 from issues unrelated to the assault in his Albuquerque apartment. His statements to the SANE nurse

included a description of what happened the night of the assault, including how he was held at knifepoint and strangled to unconsciousness.

“As to the majority of the challenged statements, the surrounding circumstances in this case support the conclusion that the SANE exam was motivated toward the provision of medical care as a primary purpose,” the Court’s majority wrote.

The justices analyzed each of the statements in dispute and determined that a few statements were inadmissible, including several in which Talk identified Tsosie by name or accused him of specific criminal acts such as stealing his TV, stereo system and phone. The Court also ruled as inadmissible a section of the exam report in which Talk consented to the release of information to law enforcement.

The Court’s majority acknowledged that SANE nurses have a “dual role” of providing medical care and collecting evidence, such as genital and anal swabs, that are for forensic purposes that could prove facts in a later criminal prosecution.

In determining what evidence can be admitted at trial, district courts must be “vigilant that a SANE’s nurse’s dual role is not used by the prosecution to end-run the Confrontation Clause by introducing SANE exam statements made for a testimonial primary purpose under the guise of having been made for a medical care primary purpose,” the Court’s majority wrote.

In a dissenting opinion, Justice Michael E. Vigil concluded that the Sixth Amendment prohibits the use of any of a SANE exam report as evidence in a trial.

“It is clear from the objective circumstances that the overarching primary purpose of the SANE examination was to establish past facts potentially relevant to Defendant’s criminal prosecution,” Justice Vigil wrote. “The core characteristic of SANE examinations is the collection and preservation of evidence irrespective of necessary medical treatment.”

The SANE exam report, Justice Vigil stated, “is the only evidence the State has to prove its case against Defendant, and Defendant has never had an opportunity to confront and cross-examine” Talk. “The Sixth Amendment prohibits this result,” the justice wrote.

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To read the decision in *State v. Tsosie*, No. S-1-SC-38418, please visit the New Mexico Compilation Commission's website using the following link: [State v. Tsosie](#)