

# **APPENDIX R:**

Sexual Assault Law: Evidentiary Issues

**SAMPLE**  
***UNDERSTANDING SEXUAL VIOLENCE***  
**EVIDENTIARY ISSUES EXERCISE**

1. The prosecutor plans to introduce evidence at trial that the alleged victim suffered vaginal injuries as a result of the alleged rape by the defendant. The defense files a rape shield motion asking to introduce evidence of the alleged victim's prior sexual history, claiming that he is entitled to show alternative sources of the alleged victim's injury.
  - a. Do you grant the motion?
  - b. If so, what, if any, limits would you put on the evidence that the defendant could elicit at the rape shield hearing?
  
2. Assume that the prosecutor discovers that two similar complaints were made against the defendant, but no action was taken in either case. The prosecutor seeks to admit into evidence the two earlier rape complaints against the defendant. In one case, the woman reported to the campus police, but the prosecutor declined action. In the second case, the woman called the local rape crisis hotline, but did not report the rape to the campus police. The incidents are similar to the one in the case study. Both women knew Mr. Cates from college activities. Both claim that he offered them rides home from these activities, then lured them to his dorm room saying he needed to get his credit card to get gas for the ride. Once in the room, he offered the women drinks and made sexual overtures to them. When they resisted anything more than kissing, he used his superior weight and strength to keep the women pinned down.
  - a. Would you allow the prosecutor to introduce the evidence to show motive or intent?
  - b. Would you allow the prosecutor to introduce the evidence to show the defendant's plan?
  - c. Would you allow the prosecutor to introduce the evidence to show lack of mistake on the defendant's part?
  - d. Would you permit testimony from both of these other alleged victims?
  
3. The defendant seeks the alleged victim's medical records, claiming that he believes: (1) she was sexually assaulted as a child; (2) that she is taking psychiatric drugs; and (3) that she has a history of drug and/or alcohol abuse. The prosecutor files a motion for a protective order.
  - a. What would you require the defendant to show?
  - b. Would you grant the motion?
  - c. Would you review the records *in camera* before ruling on the motion?

4. The defendant seeks the alleged victim's records from her treating psychologist, claiming that she has a history of mental illness and attention-seeking behavior, which would cause her to make false rape accusations. The alleged victim files a motion for a protective order.
  - a. What would you require the defendant to show?
  - b. Would you grant the motion?
  - c. Would you review the records *in camera* before ruling on the motion?
  
5. The defendant seeks the alleged victim's records from the local rape crisis center, claiming that she may have made exculpatory statements to the rape crisis counselor. The alleged victim files a motion for a protective order.
  - a. What would you require the defendant to show?
  - b. Would you grant the motion?
  - c. Would you review the records *in camera* before ruling on the motion?
  
6. The prosecutor seeks to introduce expert testimony by a psychiatrist, who will testify about Posttraumatic Stress Disorder and the typical behaviors of sexual assault victims. The testimony will deal specifically with the alleged victim's delayed reporting. The prosecutor seeks to use this evidence to show Ms. Larsen's state of mind after the sexual assault. Ms. Larsen felt that it was her fault and did not report promptly. The prosecutor argues that the jury needs to know that this reaction is consistent with the reactions of other sexual assault victims. The prosecutor also wants the expert to testify about Posttraumatic Stress Disorder because the alleged victim exhibited many of the symptoms of PTSD after the alleged sexual assault.
  - a. Would you permit the testimony?
  
7. In the *State v. Cates* case study the complainant offered verbal and physical resistance. Assume instead that she was frozen with fright and did not resist at all. The prosecutor seeks to introduce the testimony of a local rape crisis counselor who has been trained by the local program and has worked with sexual assault victims for seven years. Since joining the rape crisis center the counselor has worked with hundreds of sexual assault victims. The prosecutor wants the counselor to testify about the typical reactions of sexual assault victims, including frozen fright and delayed reporting, and that rape victims frequently do not have visible physical injuries. The prosecutor argues that jurors often subscribe to rape myths and stereotypes and that expert testimony is necessary to rebut these commonly-held beliefs, and explain behavior that is counter-intuitive.
  - a. Would you permit the testimony?
  
8. The defendant seeks to introduce testimony from an expert that the defendant does not fit the profile of a rapist.
  - a. Would you permit the testimony?

9. The defendant claims that the alleged victim has previously fabricated a charge of rape and wants to introduce testimony about the prior report.
  - a. What does the defendant need to show in order to introduce this testimony?
  
10. During trial the alleged victim's testimony is extremely flat. She does not cry or exhibit emotion. The prosecutor seeks to admit the testimony of a psychologist who will testify that sexual assault victims often present without emotion because it is their way of coping with extreme emotion without breaking down, or because they have had to repeated their account so often that it had become almost rote. The expert will explain that a lack of evident emotion does not mean that there was no assault.
  - a. Do you admit the testimony?



### **Oregon Crawford Hypothetical**

Early in the morning on January 1, 2005, Sally Johnson called her best friend, Annie Wilson. Sally was crying so hysterically that Annie could hardly understand her. Sally said that her husband, Joe Johnson, had just beaten and raped her. Sally also said that she was swollen and bleeding because of what Joe did to her. Annie convinced Sally to call 911 to get medical attention. Sally called 911, still sobbing, and relayed the same information to the 911 dispatcher, who sent the paramedics to her home. The paramedics transported Sally to a local hospital where she was treated for her injuries. Officer Doyle, from the Eugene Police Department, was called to the hospital by hospital personnel. While at the hospital, Officer Doyle asked Sally how she was injured and took her statement. Sally told Officer Doyle that her husband of six years came home drunk and angry after partying on New Year's Eve and attacked her. She stated that Joe punched and kicked her, knocking her to the floor, where he ultimately raped her. After the attack, Joe fled the house. At a later interview with Officer Doyle, Sally also indicated that Joe had beaten her in the past when he was angry or frustrated.

Sally recently told the prosecutor that she would not come to court to testify at Joe's trial. The prosecutor intends to proceed with Joe's trial in Sally's absence. The prosecutor wants to introduce the statements Sally made to her friend, the 911 tape and the statements Sally made to the police officer. The prosecutor makes an offer of proof that Sally's mother will testify that Joe called Sally a few weeks ago and threatened to kill her if she testified against him at trial. The defense attorney strenuously objects to the testimony of Annie Wilson and Officer Doyle, and the 911 tape, on hearsay grounds and claiming that the evidence violates the *Crawford* requirements.

- a. Would you allow Sally's best friend, Annie Wilson, to testify about what Sally told her?
- b. Would you allow the prosecutor to introduce the 911 tape into evidence at Joe's trial?
- c. Would you allow Officer Doyle to testify regarding Sally's statements at the hospital? At the later interview?

## Notes on Oregon Crawford Hypothetical for Presenting Judge

### Issues raised in the hypothetical

- Excited utterance (conversation with Annie Wilson & 911 tape)
  - See, pp. 21-26 of Justice De Muniz' outline, particularly *People v. King* (p. 21); *State v. Ferguson* (p. 23); *People v. Vickers* (p. 24); & *State v. Harris* (p. 25)
  - See, pp. 33-34 of Justice De Muniz' outline, *Davis v. State*
  - The effect of *Crawford* on this issue
- Oregon's hearsay exception for reports of sexual assault
  - See, pp. 8-9, of the *Annotations for Selected Oregon Cases Related to Sexual Assault (Adult Victims)*
  - The effect of *Crawford* on this issue
- 911 call—statements concerning her injury v. statements about the crime itself
  - See, pp. 30 of Justice De Muniz' outline, *People v. West*
  - See, pp. 36-37 of Justice De Muniz' outline dealing specifically with 911 calls
  - The effect of *Crawford* on this issue
- Statements to the police officer—excited utterance; distinction between the statements made at the hospital and the statements made at the later interview with the officer
  - See, pp. 30-32 of Justice De Muniz' outline, particularly *People v. West* (p. 30); *Watson v. State* (pp. 30-31); & *People v. Mileski* (pp. 31-32) (victim statements)
  - See, pp. 21-26 of Justice De Muniz' outline (excited utterance)
  - The effect of *Crawford* on this issue
- Doctrine of forfeiture by wrongdoing (the fact that Sally will not testify because Joe has threatened to kill her if she does & his history of domestic violence)
  - See, pp. 9-12 of Justice De Muniz' outline
  - The effect of *Crawford* on this issue

### **Additional Oregon Crawford annotation** (not included on Justice De Muniz' outline)

*State v. William*, \_\_\_ P.3d \_\_\_ (Or. App. 2005), 2005 Ore. App. LEXIS 481, 2005 WL 905776.

**Facts:** The defendant was convicted of driving under the influence of alcohol. On appeal, the defendant contended that the trial court erred in admitting documentation that the Intoxilyzer employed to test his blood alcohol level was accurate and complied with the statutory requirements for analysis of a person's blood alcohol level. The defendant argued that the trial court erred by admitting the certification because: (1) it was hearsay; (2) the prosecution failed to prove the technician who certified the machine was unavailable; and (3) the admission of the document violated his right to confront witnesses against him.

**Holding:** Documentary hearsay is not subject to the unavailability requirement. Accordingly, the lack of testimony regarding documentary hearsay did not violate the defendant's right to confront witnesses.