

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM OCONEE COUNTY  
COURT OF COMMON PLEAS

The Honorable R. Scott Sprouse, Circuit Court Judge

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Appellate Case No.: 2018-001480

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Jane Doe

*Appellant,*

v.

Oconee Memorial Hospital, Greenville Health System

*Respondents.*

**RECEIVED**  
FEB 13 2019  
SC Court of Appeals

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**RECORD ON APPEAL**

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Hannah Rogers Metcalfe  
Courtney C. Atkinson  
Metcalfe & Atkinson, LLC  
1395 S. Church Street  
Greenville, South Carolina 29605  
Telephone: (864) 219-2319  
Attorneys for Appellant

Kenneth Shaw  
Post Office Box 2048  
Greenville, South Carolina 29602  
Telephone: (864) 240-3200  
Attorneys for Respondent

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STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

Jane Doe,

C.A. NO.: 2017-CP-10-\_\_\_\_\_

Plaintiff,

vs.

**SUMMONS**  
**(Jury Trial Requested)**

Oconee Memorial Hospital, Greenville  
Heath System,

Defendants.

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the subscriber at their office at 1395 S. Church Street, Greenville, SC 29605 within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

**s/Hannah Rogers Metcalfe**  
Hannah Rogers Metcalfe, SC Bar # 73046  
Courtney C. Atkinson, SC Bar # 71992  
Metcalfe & Atkinson, LLC  
1395 S. Church Street  
Greenville, SC 29605  
Telephone (864) 214-2319  
Facsimile (864) 214-3067  
*Attorneys for Plaintiff*

December 5, 2017  
Greenville, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

Jane Doe,  
  
Plaintiff,

C.A. NO.: 2017-CP-10-\_\_\_\_\_

vs.

**COMPLAINT  
(Jury Trial Requested)**

Oconee Memorial Hospital, Greenville  
Heath System,  
  
Defendants.

Plaintiff, Jane Doe, complaining of each of the above-listed Defendants, would hereby allege and show unto this Honorable Court as follows:

**THE PARTIES**

1. Plaintiff is a citizen and resident of Oconee County, South Carolina.
2. Defendant Oconee Memorial Hospital (hereinafter "the Hospital") is a business organization organized and existing under the laws of South Carolina and doing business in Oconee County, South Carolina.
3. Defendant Greenville Health System (hereinafter "GHS") is a business organization organized and existing under the laws of South Carolina and doing business in Oconee County, South Carolina. GHS is the owner of the Hospital.
4. Some or all of the unlawful actions complained of in this action occurred in Oconee County, South Carolina.
5. This Court has jurisdiction over this matter and the relief sought herein. Venue is also proper.

**FACTUAL ALLEGATIONS**

6. In the early morning hours of December 5, 2015, while in Atlanta, Georgia for a dance event, Plaintiff was unknowingly drugged and sexually assaulted by a Georgia resident that was known to the Plaintiff.

7. Within hours of the above-referenced assault, Plaintiff drove immediately back to South Carolina and reported to the Hospital at approximately 10:30 a.m. on December 5, 2015. While at the Hospital, Plaintiff reported to various employees of the Hospital, including physician Kevin Docyk and nurse Mary Beth Hendricks, that she had been sexually assaulted and believed that she had also been drugged.

8. After indicating that she wanted the Hospital to perform a sexual assault forensic examination and get law enforcement involved, Plaintiff was attended by two nurses and physician Docyk. The first nurse, Jane Finfrock, was only present for Plaintiff's initial intake and eventually turned Plaintiff over to the care of Hendricks, who Plaintiff understood to be a sexual assault nurse examiner ("SANE"). Hendricks then attended to Plaintiff and performed the sexual assault forensic examination which included both swabs and a blood draw. Following completion of the sexual assault forensic examination, a third Hospital employee came into the examination room and collected the specimens that had been taken by Hendricks, including the blood that had been drawn. Finally, Plaintiff was examined by Docyk, who had authority to order any tests that were needed, including the collection and testing of Plaintiff's blood. Both Docyk and Hendricks, as well as the other Hospital employees who attended Plaintiff on December 5, 2015, were made aware of Plaintiff's report that she had been drugged and sexually assaulted.

9. Following the above-referenced procedures and examination, and while still at the Hospital, Plaintiff affirmatively consented to the Hospital reporting the assault to law enforcement. Accordingly, Hendricks called and reported the assault to the Dekalb County Sheriff's Office in Georgia, the location of the assault.

10. During that call, the officer advised Hendricks that he was unwilling to come to the Hospital to collect the evidence himself. While not a party to the phone call, Plaintiff observed Hendricks become upset and heard her advise the officer of her belief that he needed to collect the evidence directly from the Hospital. The officer refused and, upon information and belief, advised Hendricks that the only option was for the Plaintiff to take physical possession of the evidence and drive it back to Georgia.

11. Following the call with the Dekalb County Sheriff's Office, neither Hendricks nor anyone else employed by the Hospital made any effort to contact local law enforcement or someone else in the Dekalb County Sheriff's Office to take custody of the evidence. Hendricks also made no effort to help Plaintiff contact local law enforcement or to pursue other options in securing the evidence and/or transferring it directly to law enforcement. Instead, she simply advised Plaintiff that if she wanted to pursue criminal charges against the perpetrator, Plaintiff would have to personally drive the evidence to the Dekalb County Sheriff's Office.

12. Hendricks then broke the chain of custody in regard to the evidence collected, giving Plaintiff a box that Plaintiff believed to include the entire rape kit, including the blood that she recalled as having been drawn. At the same time, she had Plaintiff sign a sticker on the back of the box to acknowledge her receipt of the box. At no time did Hendricks ever advise Plaintiff that in doing so the chain of custody had been

broken for the evidence collected. She also did not advise Plaintiff of the need for the rape kit to be transferred to law enforcement immediately.

13. Plaintiff then took the sealed box home with her and left the Hospital. Plaintiff then went to her home where she showered and tried to get some rest before traveling back to Georgia the following day.

14. On December 6, 2015, acting upon the direction and advice of the Hospital nurse, Plaintiff drove to the Dekalb County Sheriff's Office, delivered the box she had been given at the Hospital by Hendricks, and gave the investigating officer her statement regarding the drugging and assault she had endured the day prior. The officer asked Plaintiff several times if she was telling the truth and told her that if she was not telling the truth she could go to jail. Finally, the officer told Plaintiff he would be in touch at a later date.

15. In January of 2016, after some back and forth communications between Plaintiff and the Dekalb County Sheriff's Office, the investigating officer contacted Plaintiff and advised her that it would be several months before his office could examine and test the contents of the rape kit she had personally delivered.

16. A few weeks later, in February of 2016, Plaintiff again heard from the investigating officer, who advised Plaintiff that he had reviewed the contents of her rape kit and that there was no blood sample included from which his office could ever determine if Plaintiff had been drugged as she had originally reported. He further advised Plaintiff that, due to that lack of blood evidence to corroborate Plaintiff's report about the assault that occurred on the morning of December 5, 2015, he was going to close the case and not proceed further with any action against the Plaintiff's attacker.

Upon information and belief, the fact that there had been a break in the chain of custody for the Plaintiff's rape kit was also considered by the investigating officer in making the decision to close the Plaintiff's case.

17. After receiving that call, Plaintiff was very upset and contacted the Hospital to request a copy of her treatment records from December 5, 2015. Her review of those records surprisingly indicated that the Hospital had absolutely no record of blood having been drawn from the Plaintiff at the Hospital December 5, 2015.

18. When Plaintiff called the Hospital about the missing blood sample, an unidentified Hospital employee, believed to be one of the head nurses, advised Plaintiff that a review of Plaintiff's records from December 5 indicated that Docyk had made the decision to not include the blood in the rape kit that Hendricks handed to the Plaintiff on December 5 despite knowing that Plaintiff had claimed she was drugged and wanted the matter reported to law enforcement. That same nurse advised Plaintiff that the Hospital needed to do better training on evidence collection in assault cases.

**FOR A FIRST CAUSE OF ACTION**  
**(Negligence – Failure to Properly Collect and Protect Evidence)**

19. Plaintiff re-alleges and incorporates by reference the preceding paragraphs with the same force and effect as if fully set forth herein.

20. In treating and providing other services to Plaintiff at the Hospital on December 5, 2015, the Hospital and GHS owed a duty to Plaintiff to ensure that she received proper medical attention, that physical evidence of the drugging and assault Plaintiff reported to the Hospital was both collected and preserved and that all such evidence was properly transferred to law enforcement in keeping with generally accepted policies regarding the collection of evidence and chain of custody.

21. The Hospital and GHS also owed a duty to Plaintiff and other reporting victims of sexual assault to appropriately train their employees, including both physicians and nurses, on the collection, preservation, and proper transfer of physical evidence from sexual assault victims and to enact appropriate policies related thereto. Such guidance and training is set forth by both the U.S. Department of Justice and the South Carolina Attorney General's office and is available in written format.

22. The Hospital and GHS also owed a duty to Plaintiff and other reporting victims of sexual assault to have appropriate policies, procedures and protocols in place, and to provide appropriate training thereon, in regard to the collection, preservation and proper transfer of physical evidence from sexual assault victims to law enforcement

23. The Hospital and GHS breached the above-referenced duties by failing to collect, protect and preserve the physical evidence collected from Plaintiff by its employees on December 5, 2015, by failing to ensure that all evidence collected made it into Plaintiff's rape kit and in failing to maintain a proper chain of custody by ensuring that the evidence collected from Plaintiff was transferred directly to law enforcement.

24. The Hospital and GHS also breached their duties to Plaintiff by failing to enact proper policies and procedures regarding the collection and preservation of physical evidence from patients and victims, as well in chain of custody issues, and by failing to properly train its employees on these issues.

25. Defendants also breached their duties in handing Plaintiff's rape kit to Plaintiff and in failing to advise her that, by giving the rape kit to the Plaintiff, they were not maintaining the proper chain of custody

26. Defendants further breached their duties to Plaintiff in not keeping custody

of the rape kit until it could be collected directly by an appropriate law enforcement agency.

27. As a direct and proximate result of said breaches, Plaintiff has suffered damages, in addition to the loss of her inability to proceed with criminal action against her attacker, entitling Plaintiff to an award of actual and consequential damages from the Hospital and GHS.

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence – Failure to Order Necessary Tests)**

28. Plaintiff re-alleges and incorporates by reference the preceding paragraphs with the same force and effect as if fully set forth herein.

29. Understanding Plaintiff's allegations that she had been drugged and sexually assaulted, Defendants, acting by and through their employee physician Docyk, owed a duty to Plaintiff to ensure that all possible physical evidence of the drugging and assault Plaintiff reported to the Hospital was collected and preserved, and that said evidence was properly transferred to law enforcement in keeping with generally accepted policies, procedures, and protocols regarding the collection of evidence and chain of custody issues.

30. Defendants, acting by and through physician Docyk, breached said duties by failing to order all tests to protect and preserve all possible physical evidence collected from Plaintiff on December 5, 2015, and in failing to ensure that all possible physical evidence was included in the rape kit that was to be provided to law enforcement.

31. Defendants acting by and through physician Docyk, further breached their duties to Plaintiff in failing to ensure that any blood taken from the Plaintiff was included in the rape kit when Defendants were both advised and aware that Plaintiff reported her

belief that she had been drugged by her attacker.

32. Upon information and belief, Defendants further breached their duties to the Plaintiff when their employee physician Docyk decided to withhold Plaintiff's blood sample from the rape kit that was to be provided to law enforcement even though he knew that Plaintiff had reported her belief that she had been drugged by her attacker.

33. As a direct and proximate result of said breaches, Plaintiff has suffered damages, in addition to the loss of her ability to proceed with criminal action against her attacker, entitling Plaintiff to an award of actual and consequential damages from Defendants.

**FOR A THIRD CAUSE OF ACTION**  
**(Gross Negligence – Failure to Properly Collect and Protect Evidence)**

34. Plaintiff re-alleges and incorporates by reference the preceding paragraphs with the same force and effect as if fully set forth herein.

35. In treating and providing other services to Plaintiff at the Hospital on December 5, 2015, the Hospital and GHS owed a duty to Plaintiff to ensure that she received proper medical attention, that physical evidence of the drugging and assault Plaintiff reported to the Hospital was both collected and preserved and that all such evidence was properly transferred to law enforcement in keeping with generally accepted policies regarding the collection of evidence and chain of custody.

36. The Hospital and GHS also owed a duty to Plaintiff and other reporting victims of sexual assault to appropriately train their employees, including both physicians and nurses, on the collection, preservation, and proper transfer of physical evidence from sexual assault victims and to enact appropriate policies related thereto. Such guidance and training is set forth by both the U.S. Department of Justice and the South Carolina

Attorney General's office and is available in written format.

37. The Hospital and GHS also owed a duty to Plaintiff and other reporting victims of sexual assault to have appropriate policies, procedures and protocols in place, and to provide appropriate training thereon, in regard to the collection, preservation and proper transfer of physical evidence from sexual assault victims to law enforcement

38. The Hospital and GHS breached the above-referenced duties by failing to collect, protect and preserve the physical evidence collected from Plaintiff by its employees on December 5, 2015, by failing to ensure that all evidence collected made it into Plaintiff's rape kit and in failing to maintain a proper chain of custody by ensuring that the evidence collected from Plaintiff was transferred directly to law enforcement.

39. The Hospital and GHS also breached their duties to Plaintiff by failing to enact proper policies and procedures regarding the collection and preservation of physical evidence from patients and victims, as well in chain of custody issues, and by failing to properly train its employees on these issues.

40. Defendants also breached their duties in handing Plaintiff's rape kit to Plaintiff and in failing to advise her that, by giving the rape kit to the Plaintiff, the were not maintaining the proper chain of custody

41. Defendants further breached their duties to Plaintiff in not keeping custody of the rape kit until it could be collected directly by an appropriate law enforcement agency.

42. The above-referenced breaches by the Hospital and GHS were particularly willful and reckless given Plaintiff's repeated and express instructions that she wished to report her drugging and assault to law enforcement. These breaches were also willful and

reckless given the clear guidance and protocol provided by both the federal and state government as to the collection and preservation of physical evidence from victims of sexual assault, which the Hospital and GHS completely ignored on December 5, 2015.

43. As a direct and proximate result of said breaches, Plaintiff has suffered damages, in addition to the loss of her ability to proceed with criminal action against her attacker, entitling Plaintiff to an award of actual and punitive damages from the Hospital and GHS.

**FOR A FOURTH CAUSE OF ACTION**  
**(Gross Negligence – Failure to Order Necessary Tests)**

44. Plaintiff re-alleges and incorporates by reference the preceding paragraphs with the same force and effect as if fully set forth herein.

45. Understanding Plaintiff's allegations that she had been drugged and sexually assaulted, Defendants, acting by and through their employee physician Docyk, owed a duty to Plaintiff to ensure that all possible physical evidence of the drugging and assault Plaintiff reported to the Hospital was collected and preserved, and that said evidence was properly transferred to law enforcement in keeping with generally accepted policies, procedures, and protocols regarding the collection of evidence and chain of custody issues.

46. Regardless, Defendants, acting by and through physician Docyk, breached said duties by failing to order all tests to protect and preserve all possible physical evidence collected from Plaintiff on December 5, 2015, and in failing to ensure that all possible physical evidence was included in the rape kit that was to be provided to law enforcement.

47. Defendants, acting by and through physician Docyk, further breached their

duties to Plaintiff in failing to ensure that any blood taken from the Plaintiff was included in the rape kit when Defendants were both advised and aware that Plaintiff reported her belief that she had been drugged by her attacker.

48. Defendants further breached their duties to the Plaintiff when their employed physician, Docyk, decided to withhold Plaintiff's blood sample from the rape kit that was to be provided to law enforcement even though he knew that Plaintiff had reported her belief that she had been drugged by her attacker.

49. The above-referenced breaches were particularly willful and reckless given the fact that, as an emergency room physician, Docyk should have known the express protocols in regard to the collection and preservation of physical evidence from a sexual assault victim, including the fact that all relevant physical evidence should have both been collected and included in the rape kit that was to be provided directly to law enforcement.

50. These breaches were also particularly willful and reckless given the fact that Docyk made the decision either not to take and test Plaintiff's blood and/or not to include relevant blood evidence in Plaintiff's rape kit despite the fact that Plaintiff had reported that she had been drugged and had given repeated and express instructions that she wished to report her drugging and assault to law enforcement.

51. As a direct and proximate result of said breaches, Plaintiff has suffered damages, in addition to the loss of her ability to proceed with criminal action against her attacker, entitling Plaintiff to an award of actual and punitive damages from Hendricks.

**FOR A FIFTH CAUSE OF ACTION**  
**(Negligent Supervision)**

52. Plaintiff re-alleges and incorporates by reference the preceding paragraphs with the same force and effect as if fully set forth herein.

53. Defendants had a duty to properly supervise employees like Hendricks and Docyk so as to ensure that said they acted in accordance with generally accepted standards of care and protocol in regard to patient care and collection and preservation of evidence from assault victims such as the Plaintiff.

54. Defendants breached said duty to properly supervise Hendricks and Docyk in failing to ensure they were properly trained on and following proper protocol in regard to the collection and preservation of evidence from assault victims such as the Plaintiff.

55. In so doing, Defendants breached their duty to properly supervise Hendricks and Docyk.

56. As a direct and proximate result of said breach, Plaintiff has suffered damages, beyond the inability to proceed with criminal action against her attacker, entitling Plaintiff to an award of actual and consequential damages from Defendants.

**FOR A SIXTH CAUSE OF ACTION**  
**(Intentional Infliction of Emotional Distress)**

57. Plaintiff re-alleges and incorporates by reference the preceding paragraphs with the same force and effect as if fully set forth herein.

58. Defendants acted intentionally and/or recklessly in failing to collect all possible physical evidence from Plaintiff and in failing to secure all blood and other physical evidence taken from Plaintiff on December 5, 2015, in failing to ensure that said

evidence was properly transferred directly to law enforcement so as to maintain chain of custody of all available evidence, in giving the evidence directly to the Plaintiff, and in communicating to Plaintiff that it was her responsibility to transfer the evidence to law enforcement in Georgia.

59. Defendants also acted intentionally and/or recklessly in failing to enact proper policies and procedures regarding the collection and preservation of physical evidence from sexual assault victims, as well in chain of custody issues, and by failing to properly train its employees on these issues

60. Defendants were well aware of their duties, as communicated by federal and state authorities, in regard to the collection and preservation of evidence from victims of sexual assault, including their duty to maintain chain of custody at all times and to ensure that all relevant evidence collected was transferred directly to the appropriate law enforcement.

61. Defendants' conduct, as outlined above, was so extreme and outrageous as to exceed all possible bounds of decency, and Defendants knew or should have known that severe emotional distress would result from their conduct, including giving the rape kit to the Plaintiff and instructing her to personally drive it back to Georgia where her assault occurred just a day prior.

62. Plaintiff did, in fact, suffer severe emotional distress as a direct result of Defendants' conduct, and that distress was so severe that no reasonable person should be expected to endure it.

63. Accordingly, Plaintiff is entitled to an award of actual and punitive damages against Defendants.

WHEREFORE, Plaintiff prays for an award of damages against Defendants for actual and consequential damages, punitive damages, attorneys' fees and costs, and for any such other and further relief as the Court may deem just and proper.

**s/Hannah Rogers Metcalfe**  
Hannah Rogers Metcalfe, SC Bar # 73046  
Courtney C. Atkinson, SC Bar # 71992  
Metcalfe & Atkinson, LLC  
1395 S. Church Street  
Greenville, SC 29605  
Telephone (864) 214-2319  
Facsimile (864) 214-3067  
*Attorneys for Plaintiff*

December 5, 2017  
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Jane Doe,

Plaintiff,

v.

Oconee Memorial Hospital, Greenville  
Health System,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2017-CP-37-00700

*Defendant Greenville Health System's  
Motion to Dismiss*

**PLEASE TAKE NOTICE** that at such time and place as set by the Court, Defendant Greenville Health System (“GHS”) will move pursuant to Rule 12(b)(6), SCRPC, for an order dismissing Plaintiff’s Complaint against it on the basis that the Complaint fails to state facts sufficient to constitute a cause of action against GHS.<sup>1</sup> As discussed more fully below, dismissal is appropriate because South Carolina does not recognize an independent cause of action for spoliation of evidence.

**FACTS**

Plaintiff alleges that she was drugged and sexually assaulted in the early morning hours of December 5, 2015 while in Atlanta, Georgia. She alleges that following the assault, she drove back home to South Carolina and went to Oconee Memorial Hospital (“OMH”) where she requested a sexual assault forensic examination and stated her desire to report the assault to law enforcement. GHS employee, Mary Beth Hendricks, attended to Plaintiff and performed the sexual assault forensic examination, which included both swabs and a blood draw.

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<sup>1</sup> Plaintiff identifies Oconee Memorial Hospital as a named defendant in her Complaint; however, Oconee Memorial Hospital is not an independent entity capable of being sued. Rather, it is a facility owned and operated by GHS.

Upon completion of the examination, Hendricks contacted the Dekalb County Sheriff's Office in Georgia and reported the assault. Hendricks requested Dekalb County Sheriff's Office come collect the examination kit; however, she was advised by the Sheriff's Office that they were unwilling to travel to South Carolina to pick up the kit, and if Plaintiff wished to pursue her claim, she would personally need to bring the kit to them in Georgia. Hendricks protested, but was advised by the Sheriff's Office that was the only option. Hendricks reluctantly relayed the Sheriff's Office's instructions to Plaintiff and signed over custody of the kit to Plaintiff.

Plaintiff took the kit to the Dekalb County Sheriff's Office the following day. She gave the kit and her statement to the investigating officer, who advised her that he would be back in touch at a later date. A few weeks later, the investigating officer allegedly reached out to Plaintiff and informed her that there was no blood sample included in the kit from which his office could determine whether Plaintiff had been drugged. She alleges that the officer decided to close the case and not pursue any further action against Plaintiff's alleged attacker due to the lack of the blood sample. In addition, she contends that the officer may have also considered the alleged break in the chain of custody when making the decision to close the case.

#### LEGAL ANALYSIS

Under Rule 12(b)(6), SCRPC, the Court, upon reviewing all the well pleaded facts in a light most favorable to the claimant, must dismiss the action if the Complaint fails to state a claim upon which relief can be granted. Charleston County Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). The Court is to consider only the alleged facts and is not to consider the inferences or conclusions of law drawn by the Plaintiff from the facts. Charleston County Sch. Dist. v. S.C. State Ports Auth., 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct. App. 1984). Each element of a cause of action must be alleged, and a complaint that omits an

element fails to state a claim and must be dismissed. Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 363 S.E.2d 691 (1988).

**I. Plaintiff Fails to Plead Facts Sufficient to Support the Duty and Damages Elements of Her Negligence Causes of Action**

Plaintiff's first five causes of action allege negligence on the part of GHS and its employees. In order to survive a motion to dismiss, Plaintiff must allege facts sufficient to establish that GHS owed Plaintiff a duty of care, GHS breached that duty, and Plaintiff sustained damages proximately resulting from the breach. South Carolina Insurance Company v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct.App.1986). Plaintiff's claims fail because no legal duty was owed to her in regards to the sexual assault examination kit, and she has not alleged any cognizable damages.

"A legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large." Byerly v. Connor, 301 S.C. 441, 443 415 S.E.2d 796, 798 (1992). A legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2007). The court must determine, as a matter of law, whether the law recognizes a particular duty. Id. If there is no duty, then the defendant is entitled to a dismissal as a matter of law. Id.

Here, Plaintiff alleges that GHS owed her a duty to collect, preserve, and properly transfer all physical evidence of her alleged sexual assault to law enforcement. She alleges that GHS breached that duty by failing to ensure that the blood samples were in the examination kit and by breaking the chain of custody by giving the kit to Plaintiff rather than giving it directly to law enforcement. However, GHS did not owe Plaintiff a duty in regards to the examination kit. In gathering the evidence, GHS was not providing health care services to Plaintiff. It was not

treating her for any alleged injuries. Rather, it was performing a crime investigation service on behalf of law enforcement.

Plaintiff can point to no statute, regulation, rule, ordinance or standard which establishes a duty owed to her in regards to the collection of evidence in a criminal matter. Like the law enforcement agency it was acting on behalf of, GHS was acting pursuant to statutes, ordinances, and regulations which protect the public at large, but provide no duty of care to individuals. See Wells v. City of Lynchburg, 331 S.C. 296, 308, 501 S.E.2d 746, 752 (Ct. App. 1998); see also Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E.2d 122 (2008) (Court stating that sheriff's office owed no duty to plaintiff to preserve evidence that was collected for a criminal investigation).

In essence, Plaintiff is attempting to allege a negligent spoliation of evidence claim; however, South Carolina does not recognize an independent tort for spoliation of evidence. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011); see also Austin, *supra* (refusing to adopt the tort of third party spoliation of evidence where plaintiff sued sheriff's office for destroying evidence that plaintiff alleged prevented her from being able to pursue wrongful death claim against another party).

As noted in both Hobbs and Austin, one of the primary policy reasons for refusing to acknowledge a cause of action for spoliation of evidence is the very speculative nature of the damages. Here, Plaintiff alleges that the lack of a blood sample prevented her assaulter from being prosecuted; however, it is extremely speculative to suggest that he would have been prosecuted had the blood sample been in the kit. First off, Plaintiff cannot say for certain that she was drugged, so it is very possible the blood sample may have come back clean. Second, even if the blood sample revealed evidence of a drug in her system, she would still have to prove

her alleged assaulter was the one who drugged her.

Finally, Plaintiff's negligence claims fail because she has not alleged a cognizable injury. Plaintiff's only alleged injury is emotional distress; however, it is well established that South Carolina does not recognize a negligent infliction of emotional distress claim under these circumstances. See Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985); Doe v. Greenville County School Dist., 375 S.C. 63, 67-68, 651 S.E.2d 305 (2007) (limiting negligent infliction of emotional distress claims to bystander situations only).

## II. Plaintiff's Claims do not Amount to an Intentional Infliction of Emotional Distress

It appears Plaintiff has asserted an intentional infliction of emotional distress claim solely in an attempt to get around the obvious damage deficiencies of her negligence causes of action. However, regardless of the label, Plaintiff's claim is unavailing, because it should still be analyzed as an attempt to assert a spoliation of evidence claim. Hobbs, 394 S.C. 144, 149, 714 S.E.2d 537, 540.

Nevertheless, Plaintiff has failed to plead facts sufficient to establish the heightened standard of proof required for an intentional infliction of emotional distress claim. Argoë v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (noting higher standard of proof and enumerating elements of intentional infliction of emotional distress claim to include intentional or reckless conduct that exceeds all possible bounds of decency and causes such severe distress that no reasonable man could bear it). The South Carolina Supreme Court has held the circuit courts undertake a "significant gatekeeping role" in analyzing whether the alleged conduct was sufficiently outrageous and the emotional distress sufficiently severe to survive a motion to dismiss. AJG Holdings LLC v. Dunn, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011) (citing Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 72 (2007)).

In order to establish a claim for intentional infliction of emotional distress, plaintiff must allege that the GHS employees intentionally or recklessly conducted themselves in a manner that was “extreme and outrageous,” exceeding “all bounds of decency,” “atrocious,” and “utterly intolerable.” See Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981) (recognizing tort of intentional infliction of emotional distress and adopting elements set forth in Restatement (Second) of Torts § 46). First off, Plaintiff does not allege that the GHS employees acted with the intent to cause her severe emotional distress, nor does she allege that the employees were certain or substantially certain that their actions would cause her such distress. Id. Second, no reasonable person could determine that following the instructions of a law enforcement officer regarding the handling of evidence of a crime could be considered “extreme and outrageous” conduct. Id. Finally, Plaintiff does not allege such “severe” emotional distress that “no reasonable man could be expected to endure it,” as many, if not most, victims of sexual assault have to deal with the emotions associated with their attacker not being held accountable for his/her actions.

In addition, GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq. (1976, as amended), and it and its agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. See Murphy v. Richland Mem. Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995) (citing Benton v Roger C Peace, 313 S.C. 520, 443 S.E.2d 537 (1994)). Pursuant to S.C. Code § 15-78-60(17), GHS has maintained immunity for employee conduct outside the scope of his official duties or which constitutes actual malice or intent to harm. Therefore, even if the GHS employees’ conduct could be said to rise to the level of “extreme and

outrageous,” exceeding “all bounds of decency,” “atrocious,” and “utterly intolerable,” GHS would still be immune from liability. See Cornelius v. City of Columbia, 663 F.Supp.2d 471 (D.S.C. 2009).

WHEREFORE, for the reasons stated herein, GHS respectfully requests that all of Plaintiff’s claims against it be dismissed with prejudice and for such other and further relief as this Court may deem just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

s/Kenneth N. Shaw  
Kenneth N. Shaw (SC Bar No. 77859)  
kshaw@hsblawfirm.com  
PO Box 2048  
Greenville, SC 29602  
864-240-3323  
864-240-3300 (fax)  
Attorneys for Defendants

Dated: January 10, 2018  
Greenville, SC

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

C.A. No.: 2017-CP-37-00700

Jane Doe,

Plaintiff,

v.

***Defendant Greenville Health System's  
Reply Memorandum in Support of Motion  
to Dismiss***

Oconee Memorial Hospital, Greenville  
Health System,

Defendants.

Defendant GHS's motion to dismiss was before the Court on June 4, 2018. During the hearing, Plaintiff's counsel made several arguments in opposition to the motion. GHS submits this memorandum in response to those arguments.

• **Gathering evidence for a rape kit is not medical treatment**

GHS contends that collecting evidence for a rape kit is a function it performs on behalf of law enforcement for law enforcement purposes. Plaintiff argues that it was part of the duty owed to her as healthcare professional treating her alleged injuries. When collecting evidence, GHS personnel is in no way "treating" a patient for any injuries the patient may have sustained as a result of the alleged rape. Providing medical care for alleged or suspected injuries is a wholly separate function from gathering evidence for a rape kit. This is readily apparent by the fact that a person may come to the ED to seek treatment for an alleged rape, but decline to report the rape to law enforcement and/or complete a rape kit. See S.C. § 16-3-1350 (titled "medicolegal examinations," which denotes the fact that the examinations have both medical and legal aspects to them, with the collection of evidence for a rape kit being a purely legal aspect); see also

*Sexual Assault Protocol*, Office of Attorney General, attached hereto as Exhibit A.

However, even if the act of gathering evidence on behalf of law enforcement could be considered part of the medical treatment provided by the healthcare professionals at the hospital, Plaintiff's claim would still fail. Plaintiff's claim would then be one of medical malpractice, which means she would have to comply with the requirements of S.C. Code § 15-79-125. Plaintiff has not met any of the requirements set forth therein; thus, GHS would still be entitled to a dismissal.

- **Collecting blood for a rape kit is not the same as collecting blood for medical purposes**

Plaintiff argues that GHS collected the blood for medical purposes, but Plaintiff has failed to demonstrate any medical purpose for which the blood was gathered. In fact, once blood is collected and put into a rape kit, GHS does nothing with it other than turn it over to law enforcement. Contrary to Plaintiff's assertion, GHS does not have responsibility for testing the blood. Law enforcement, more specifically SLED, conducts all such tests. Again, the blood, like the other evidence in the rape kit, is collected solely for law enforcement purposes.

- **It doesn't matter what Plaintiff calls her claims**

Plaintiff alleges she is asserting "general negligence claims" rather than a claim for spoliation of evidence; however, that is the same argument that was rejected by the Court in *Cole Vision Corp. v. Hobbs*. As noted by the Court,

"Whether denominated as a claim for spoliation of evidence or as a general negligence claim based on spoliation of evidence, the substance of this claim is the same: both are based on the allegation that Cole Vision breached its duty to maintain a key document, the absence of which harmed Hobbs in the underlying lawsuit."

394 S.C. 144, 154, 714 S.E. 2d 537, 542 (2011). The instant case is indistinguishable. Plaintiff

claims that she has been harmed by GHS's alleged failure to maintain the blood sample that she claims would help her prove she was sexually assaulted. Calling it general negligence doesn't change the fact that the substance of relief sought is still the same – she wants GHS held responsible for the missing evidence. *Id.*

In a similar vein, Plaintiff argues that GHS lost “her property”. First off, Plaintiff has provided no legal authority in support of her assertion that when blood is drawn and put into a rape kit, the blood remains her property. However, that is essentially the same argument that was rejected by the Court in *Austin v. Beaufort County Sheriff's Office*, 377 S.C. 31, 659 S.E.2d 122 (2008). In *Austin*, the sheriff's office destroyed evidence of the plaintiff's son's overdose, including three blood samples. Plaintiff argued that the destruction of the evidence impaired her ability to bring a wrongful death action. In upholding summary judgment in favor of the sheriff's office, the Court held the sheriff's office owed plaintiff no particular duty to maintain the evidence, including the blood samples. 377 S.C. at 35-36.

- **Plaintiff conceded that her damage is purely emotional distress**

At the hearing, Plaintiff's counsel argued the crux of Plaintiff's claim is that she will never know whether she was drugged and whether she was sexually assaulted. Putting aside for a moment that such a statement seems contradictory to her prior affirmative allegation that she “was unknowingly drugged and sexually assaulted” (Compl. ¶ 6) (emphasis added), it further emphasizes that Plaintiff's only alleged injury is one of emotional distress. As previously discussed in GHS's motion to dismiss, emotional distress is not a sufficient basis for a negligence claim under the facts of this case.

- **Plaintiff's motion to amend should have no bearing on GHS's motion to dismiss and/or should be denied on the basis that it would be futile**

GHS filed its motion to dismiss on January 10, 2018. The motion included a memorandum which fully set forth GHS's basis for dismissal. The Court notified the parties of the June 4th hearing date on May 3, 2018. Despite knowing the basis of GHS's motion to dismiss for months and despite having more than a month's notice of the hearing date, Plaintiff waited until about an hour before the hearing was to begin to file her motion to amend the complaint. The motion to amend was never discussed with below signed counsel, and below signed counsel had no knowledge of the motion until Plaintiff's counsel mentioned it during the hearing.

Plaintiff's motion to amend was not properly before the Court during the hearing, and the merits of the motion were not discussed in any detail; therefore, it should have no impact on GHS's motion to dismiss. It appears Plaintiff filed the motion merely as a last minute attempt to correct the clear deficiencies in her Complaint in hopes of avoiding a dismissal. While Plaintiff's motion was not properly before the Court and should have no bearing on GHS's motion to dismiss, as a matter of precaution, GHS will take a moment to briefly address the motion.

As an initial matter, Plaintiff failed to attach a proposed Amended Complaint to her motion. The motion merely states that Plaintiff wishes to amend to name additional defendants and assert two additional causes of action. Plaintiff does not identify the additional witnesses or specify the new causes of action. As such, the motion is deficient on its face, and should be denied for that reason alone.

However, to the extent Plaintiff is seeking to name GHS employees as defendants and/or seeking to assert new causes of action against GHS and its employees, her motion should be denied because such an amendment would be futile. Although South Carolina law generally

provides that motions to amend pleadings are to be liberally allowed, the South Carolina courts have refused to allow amendments of pleadings where the proposed amendment would be futile. *Higgins v. Med. Univ. of S. Carolina*, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) (citing *Foman v. Davis*, 371 U.S. 178 (1962); *Dockside Ass'n v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988)). A motion to amend is futile where the proposed amendment is clearly insufficient on its face and a proposed amended complaint would not survive a motion to dismiss. *Heslin-Kim*, 2005 U.S. Dist. LEXIS 18830, at \*7-\*8 (citing *Foman v. Davis*, 371 U.S. 178 (1962); *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987); *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)) (emphasis added).

South Carolina state courts have long refused to allow amendments of pleadings on the grounds of futility when the proposed amendment contains a claim that is barred by the applicable statute of limitations. *See, e.g., Red Oak\_Lands, Inc. v. Lane*, 268 S.C. 631, 634-636, 235 S.E.2d 718, 720 (1977) (affirming a trial court's ruling refusing to allow plaintiff to amend its complaint because the statute of limitations had run and allowing amendment would be futile); *Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 487, 191 S.E.2d 337, 340 (1937) (holding that it would be futile to allow amendment of plaintiff's complaint because the action was barred by the statute of limitations).<sup>1</sup> In particular, a complaint cannot be amended to state

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<sup>1</sup> Under settled South Carolina law, a motion to dismiss a complaint may be based on an affirmative defense where the facts supporting the affirmative defense appear in the challenged complaint. *See Spence*, 368 S.C. at 123, 628 S.E.2d at 878 (holding that a motion to dismiss may be based on an affirmative defense where "the allegations of the complaint demonstrate the existence of the affirmative defense"); *Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 176-77, 551 S.E.2d 263, 273 (2001) (holding that dismissal of a case for failure to state a claim was proper where failure to exhaust administrative remedies appeared from allegations in the complaint); *Flateau v. Harrelson*, 355 S.C. 197, 208, 584 S.E.2d 413, 418-19 (Ct. App. 2003) (affirming trial court's dismissal of claim where there was a two year statute of limitations and it was evident from the complaint that the case was not filed until almost three years after the incident).

a new or different cause of action after the statute of limitations has expired. *Scott v. McCain*, 272 S.C. 198, 202, 250 S.E.2d 118, 121 (1978); *Crocker v. South Carolina State Highway Dep't*, 268 S.C. 147, 232 S.E.2d 340 (1977); *Lifschultz Fast Freight v. Haynsworth, Marion, McKay & Guerard*, 324 S.C. 645, 651-652, 486 S.E.2d 14, 17 (Ct. App. 1997), aff'd in part, vacated in part on other grounds, 334 S.C. 244, 513 S.E.2d 96 (1999).

GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq. (1976, as amended), and it and its agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. See *Murphy v. Richland Mem. Hosp.*, 317 S.C. 560, 455 S.E.2d 688 (1995) (citing *Benton v Roger C Peace*, 313 S.C. 520, 443 S.E.2d 537 (1994)).<sup>2</sup> Pursuant to the Tort Claims Act, Plaintiff is barred from naming a governmental employee, as that term is defined by the Act, as an individual defendant. S.C. Code § 15-78-70(c). Thus, presuming Plaintiff wishes to amend to name GHS employees as defendants, such an amendment would be futile. Further, the applicable statute of limitation is two years. S.C. Code § 15-78-110. Plaintiff's claims arose on December 5, 2015, more than two years ago. Thus, any proposed amendment to assert additional tort claims against GHS would be futile, since such claims would be barred by the statute of limitations.

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<sup>2</sup> It is anticipated that Plaintiff may argue that GHS is no longer a governmental entity. Such an argument would be both factually and legally misguided. At all times relevant to this action, Oconee Memorial was owned and operated by Greenville Health System, a governmental entity. On October 1, 2016, Greenville Health System entered into an agreement with Upstate Affiliate Organization ("UAO"), whereby UAO took over the operations of all GHS hospitals and other healthcare facilities. Pursuant to the agreement, Greenville Health System granted UAO the right to continue operations under the GHS name. It is true that UAO is not a governmental entity; however, UAO is not the defendant in this action. UAO has no involvement in Plaintiff's care. It is undisputed that the defendant in this action and the entity that was responsible for the services that were provided to Plaintiff on December 5, 2015 is the governmental entity, Greenville Health System.

During the hearing, Plaintiff's counsel mentioned that she wished to amend to assert a breach of contract claim. Such a claim would be futile, because there was no written contract between Plaintiff and GHS regarding the rape kit. To the extent Plaintiff seeks to argue that there was an implied contract, it is well established that South Carolina law does not recognize such a cause of action in the context of medical treatment. *Banks v. Medical Univ.*, 314 S.C. 376, 444 S.E.2d 519 (1994).

WHEREFORE, for the reasons stated herein, as well as those reasons set forth in GHS's Motion to Dismiss, GHS respectfully requests that all of Plaintiff's claims against it be dismissed with prejudice and for such other and further relief as this Court may deem just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

s/Kenneth N. Shaw  
Kenneth N. Shaw (SC Bar No. 77859)  
kshaw@hsblawfirm.com  
PO Box 2048  
Greenville, SC 29602  
864-240-4541  
864-240-3300 (fax)  
Attorneys for Defendants

Dated: June 8, 2018  
Greenville, SC

# SEXUAL ASSAULT PROTOCOL

For the Investigation, Prosecution, and Judgment of Sexual Assault

## 2nd Edition

The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**  
S.T.O.P. Violence Against Women Program

ALAN WILSON  
ATTORNEY GENERAL

2nd Edition



[www.scag.gov](http://www.scag.gov)

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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

ALAN WILSON  
ATTORNEY GENERAL

**General Protocol Information**

This is the 2<sup>nd</sup> Edition Protocol and all information contained herein may be considered current as of April 2015.

**Organization**

The protocol is divided into parts and sections. When viewing the Protocol on your computer, select "View," "Navigation Tabs," and "Bookmarks." Selecting any document name in the Bookmark will allow you to instantly relocate to that document within the protocol.

**Content**

Despite the designated protocol divisions, other valuable, related information is located throughout the protocol.

**Additional Copies**

Additional copies of the protocol may be obtained by contacting the S.T.O.P. Violence Against Women program at 803.734.3717.

**The information contained in the protocol is available only for law enforcement, victim advocates, health professionals, prosecutors, and judges. Distribution to any others is strictly prohibited.**

**All questions, concerns and/or suggestions should be submitted to the S.T.O.P. Violence Against Women program at 803.734.3717.**



April 2015

A MESSAGE TO LAW ENFORCEMENT OFFICERS, VICTIM ADVOCATES, PROSECUTORS, AND  
JUDGES

from Attorney General Alan Wilson

Although we have made progress to eradicate sexual assault, it is still a serious crime with far-reaching impact. We must consistently enforce South Carolina's sexual assault laws, thereby holding perpetrators accountable for their crimes in our state.

This is the second edition of the Sexual Assault Protocol for the State of South Carolina and continues to represent collaboration between numerous agencies.

The Office of the Attorney General is committed to stopping sexual assault. As a part of this effort, the Protocol has outlined a comprehensive statewide policy for the investigation, prosecution, and judgment of sexual assault crimes. We believe the Protocol will assist all parties involved with providing justice to these victims, thus effectuating an increase in sexual assault convictions and a decrease in the rate of recidivism.

Together, we can make South Carolina a safe place for our community.

Yours very truly,

Alan Wilson

## Purpose

The purpose of this protocol is to provide law enforcement officers, victim advocates, healthcare professionals, and prosecutors with effective tools and information that can be used in the handling of sexual assault cases.

This protocol was developed in response to and recognition of the fact that sexual assault crimes are insidious and far-reaching. Without the support and willingness of the judicial system to prosecute offenders, they are given license to repeatedly terrorize and brutalize their victims. Therefore, prosecution of sexual assault must be a priority.

- ✓ Prosecution is the formal expression of social norms. The absence of prosecution means the unspoken presence of permission to commit crime.
- ✓ Unless there is prosecution following arrest, law enforcement efforts are in vain.

The prosecution of offenders in a swift and uniform manner may deter them from future acts of sexual assault and violence, thereby creating a safer environment for the victim.

Law enforcement should treat all acts of sexual assault as criminal conduct and should utilize tools and policies available to them through non-profit organizations, local and state agencies and South Carolina law. The investigation of sexual assault cases is essential to the effective prosecution of the cases.

Prosecutors should treat all sexual assault cases as criminal conduct. Attention should be given to ensure that all appropriate charges are filed against offenders.

Judges should treat all sexual assault cases as criminal conduct; focus and attention should exclusively be given to the criminal behavior of the offender and not to any actions of the victim. Judges have the ultimate authority in holding offenders accountable for their actions.

This protocol will provide a guide on how to investigate, evaluate, prosecute, and dispose of sexual assault cases. Successful intervention on behalf of the criminal justice system, with or without the victim's participation, is the best way to stop interpersonal violence and hold offenders accountable for their actions.

## Special Considerations for Underserved Populations

The term “underserved population” refers to those individuals who experience barriers to obtaining needed services when seeking justice and medical services, including a lack of knowledge of services available to meet their needs.

It is imperative that sexual assault response teams collaborate with experienced organizations that work with these special populations within a community to glean the knowledge and expertise necessary to provide the best available sexual assault care.

The information contained within this section should be used as a guide for sexual assault responders when working with underserved populations.

### **Victims with Limited English Proficiency**

- A person’s culture can influence healthcare beliefs, treatment outcomes, emotional healing, and general beliefs about practices regarding justice in the aftermath of a sexual assault, the response of the criminal justice system, and the willingness of victims to be involved in the system.
- Victims may be apprehensive about receiving care from those of a different culture other than their own as a result of distrust and previous negative experiences; therefore, it may be helpful when possible to provide responders of the same background or at least who understand a victim’s culture.
- Consider cultural beliefs when asking a patient to discuss the sexual assault.
- Understand that victims may not report or discuss the assault because the stigma associated with it is so overwhelmingly negative. In some cultures, for example, the loss of virginity prior to marriage is devastating and may render victims unacceptable for an honorable marriage. Even discussing an assault or sexual terms may be linked with intense embarrassment and shame in some cultures.
- Responders should be familiar with procedures for coordinating services and interventions for victims in communities that recognize cultures that have their own laws, such as Indian tribes.
- All victims should be treated individually, understanding that what helps one victim deal with a traumatic situation like sexual assault may not be the same for another victim. Do not stereotype beliefs based on race, gender, sexual orientation, or religion.
- Help victims obtain culturally specific assistance and/or provide referrals where they exist.
- Be patient and understanding toward victims’ language skills and barriers, which may worsen with crisis.
- Make every attempt to provide same-language service through the use of demonstrably bilingual examiners or by providing monolingual examiners with support from professional interpretation services and translated materials for victims who do not speak English. Use certified interpreters when possible and not victims’ families or friends. Take the victim’s country of origin, acculturation level, and dialect into account when responding or arranging interpretation. Remember to speak directly to victims when interpreters are used.

- Train interpreters about issues related to sexual assault, confidentiality, and cultural concerns whenever they are needed to facilitate communication in these cases. Make sure that interpreters understand that they may need to testify.

### United States Immigrants

In addition to the information provided above regarding culture, immigrant survivors face particular and difficult barriers in accessing services following a sexual assault. Sexual assault responders must understand these barriers and work to eliminate them.

- When dealing with a sexual assault of an immigrant, be careful of your questioning. Questions should be posed as, "*Do you have any immigration concerns?*" rather than, "*What is your immigration status?*"
- Anticipate that an immigrant victim will usually not self-identify as undocumented or as fearing deportation. Such information about their rights should be offered to all victims, and in coordination with a referral to an immigration service provider experienced in working with immigrant victim populations.
- Immigrant victims of sexual assault may also qualify for immigration remedies that will allow them to stay in the United States lawfully and attain work authorization. These remedies may include:
  - Violence Against Women Act ("VAWA") Self-Petitions
  - U-Visas
  - T-Visas
  - Special Immigrant Juvenile Status.

### Victims with Disabilities

Reasonable accommodations for a disability are considered best practice.

- The rate of victimization for individuals with disabilities is disproportionately higher than for the general population, as disabled individuals are often victimized by family members, caretakers, or friends.
- Ask victims who they wish to have with them and respect those wishes. Designated individuals permitted by the victim need instruction on remaining silent so as to avoid influencing the victim's statements.
- Follow facility and jurisdictional policy for assessing vulnerable adults' ability to consent to the exam and evidence collection, and involve protective services as needed.
- Speak directly to victims with disabilities, even when interpreters, intermediaries, or guardians are present.
- Assess a victim's level of ability and need for assistance during the exam process. Explain procedures to victims and ask what help they require, if any (e.g., people with physical disabilities may need help to get on and off the exam table or to assume positions necessary for the exam). Do not assume they will need special aid.
- Note that not all individuals who are deaf or hard-of-hearing understand sign language or can read lips. Not all blind persons can read Braille. Communication equipment that may be beneficial to victims with sensory disabilities include TTY machines, word boards, speech synthesizers, anatomically correct dolls, materials in alternative formats, and access to interpreter services. Become familiar with the

basics of communicating with an individual using such devices. Be aware that victims with sensory disabilities may prefer communicating through an intermediary who is familiar with their patterns of speech.

- Recognize that individuals may have some degree of cognitive disability: mental retardation, mental illness, developmental disabilities, traumatic brain injury, neurodegenerative conditions such as Alzheimer's disease, or stroke. Note that not all developmental disabilities affect cognitive ability (e.g., cerebral palsy may result in physical rather than mental impairment). Be aware that victims with cognitive disabilities may be easily distracted and have difficulty focusing. To reduce distractions, conduct the exam in an area that is void of bright lights and loud noises. Speak to victims in a clear and calm voice and ask very specific and concrete questions. Be exact when explaining what will happen during the exam process and why. It may also be helpful if examiners and others present in the exam room refrain from wearing uniforms with ornamental designs and jewelry.
- Victims with disabilities may be apprehensive in consenting to an examination or reporting the crime for fear of losing their independence. For example, if a family member and primary caretaker is the abuser, the victim may need to be placed in a nursing home.
- Recognize this may be the first experience that victims have had with a pelvic exam. The procedure should be explained in detail in language in a way they can understand. Consider cognitive abilities and possible lack of knowledge regarding reproductive health. They may not know how they feel about the incident or even identify that a crime was committed against them.
- Some victims with disabilities may want to talk about their perceptions of the role their disability might have played in making them vulnerable to an assault. Listen to their concerns and what the experience was like for them. Assure them that it was not their fault they were sexually assaulted. If needed, encourage discussion in a counseling/advocacy setting on this issue as well as on what might help them feel safer in the future.
- Recognize that the exam may take longer to perform with victims with disabilities. Avoid rushing—such action not only may distress victims, but also can lead to missed evidence and information.

### **Male Victims**

- Help male victims understand that male sexual assault is not uncommon and that the assault was not their fault. Many male victims focus on the sexual aspect of the assault and overlook other elements such as coercion, power differences, and emotional abuse. Broadening their understanding of sexual assault may help reduce their self-blame.
- Because some male victims may fear public disclosure of the assault and the stigma associated with male sexual victimization, emphasis may need to be placed on the scope of confidentiality of patient information during the exam process.
- Offer male victims assistance in considering how friends and family members will react to the fact that they were sexually assaulted (e.g., by a male offender or a female offender).
- Male victims may be less likely than females to seek and receive support from family members and friends, as well as from advocacy and counseling services. Their ability to seek support may vary according to the level of stigmatization they

feel, the circumstances of the assault, the sensitivity of care they initially receive, and the appropriateness of referrals provided.

- Encourage advocacy programs and the mental health community to build their capacities to serve male sexual assault victims and increase their accessibility to this population. Requests by male victims to have an advocate of a particular gender should be respected and honored if possible.

### **Adolescent Victims**

- Adolescents in the presence of parents or guardians create an additional challenge for those involved in the Sexual Assault Response Team ("SART") process because they are often traumatized by their child's victimization.
- Understand there is a risk for further victimization by parents or guardians who punish victims for the assault for not obeying them.
- Assess the physical development of adolescent victims, taking age into consideration when determining appropriate methods of examination and evidence collection. Examinations in South Carolina should only be performed by trained professionals.
- Be aware of South Carolina laws governing a minor's ability to consent to forensic exams and medical treatment. Follow facility and jurisdictional policy in obtaining appropriate consent.
- A detailed explanation of the examination should be provided. This includes the pelvic examination, as this may be the victim's first experience receiving one.
- Reassure the adolescent that regardless of their actions they are not to blame for the assault.
- When possible, health care providers should gather information from the adolescent without the parents or guardian in the room. This permits the adolescents to share their concerns more openly.

### **Older Victims**

- Keep in mind that the emotional impact of the assault may not be felt by older victims until after the exam when they are alone and become aware of their physical vulnerability, reduced resilience, and mortality. Fear, anger, and depression can be especially severe in older victims who are isolated, have little support, and live on a meager income.
- Family members or caretakers may sexually assault their older dependents. Policies should be in place guiding staff on screening and handling situations that are threatening to patients or facility personnel.
- Note that older victims are generally more physically fragile than younger victims and thus may be at risk for tissue or skeletal damage and exacerbation of existing illnesses and vulnerabilities.
- Hearing impairment and other physical conditions attendant to advancing age, coupled with the initial reaction to the assault, may render older victims unable to make their needs known, which could result in prolonged or inappropriate treatment. Do not mistake this confusion and distress for senility.
- Health care personnel should follow facility policies for assessing a vulnerable adult's ability to consent to the exam and evidence collection, and for involving adult protective services.

- Some older victims may want to talk about their perceptions of the role their age and physical condition might have played in making them vulnerable to an assault. Listen to their concerns and what the experience was like for them. Assure them that it was not their fault they were sexually assaulted. If needed, encourage further discussion on this issue in a counseling/advocacy setting.
- Older victims may be reluctant to report the crime or seek treatment because they fear loss of independence. Although sometimes relatives wish to place older victims in an assisted living situation after an assault occurs, such an action is not always necessary or helpful to a victim's recovery. When a change in living environment is needed, assist victims and their relatives in making plans that maximize independence yet enhance safety.
- Encourage use of follow-up medical, legal, and non-legal assistance. Older victims may be reluctant to seek these services or proceed with prosecution. For example, they may rely on family members for transportation and may not want to burden them by asking to be taken to post-exam follow-up appointments.

### **Lesbian, Gay, Transsexual, and Bisexual ("LGTB") Victims**

- Allow victims to write in their gender or sex on forms, rather than asking.
- Always refer to victims by their preferred name and pronoun, even when speaking to others. If unsure of what names to call the victims, or what pronouns to use, ask.
- Treat the knowledge that the person is LGTB as protected information subject to all confidentiality and privacy rules.
- Be aware that companions of LGTB victims may not know their gender identities or sexual orientation.

### **Military Victims**

- The military offers victims the option of restricted reporting or unrestricted reporting. Restricted reporting allows a sexual assault victim to confidentially disclose the details of his or her assault to specified individuals and receive medical treatment and counseling without triggering the official investigative process or command notification. Restricted reporting can be voided if the medical facility contacts law enforcement or other professionals other than advocates, chaplains, and military sexual assault response coordinators.
- Exam sites that provide exams for military installations are encouraged to draft Memoranda of Understanding to address such issues as confidentiality and storage of evidence.

### **Domestic Violence Victims**

- Do not negate the possibility that a sexual assault can be a component of domestic violence. Response to sexual assault occurring within a domestic violence context requires understanding of the overlapping dynamics of sexual assault and domestic violence, the complex needs of victims, the potential dangerousness of offenders, the resources available for victims, and adherence to jurisdictional policies on response to domestic violence.

- Procedures should be implemented to maintain safety for the victim. At minimum, a referral to the local domestic violence service organization or hotline should be offered after the initial sexual assault report and examination.

The Special Considerations section of the South Carolina Sexual Assault Protocol was taken in part and adapted, with special permission from *SafeTa Source* ([www.safeta.org](http://www.safeta.org)), from: U.S. Department of Justice (2013). A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents (2nd Edition). Retrieved from <http://www.infn.org/associations/8556/files/SAFE%20PROTOCOL%202013-508.pdf>

## Sexual Assault Forensic Examination

### Guidelines for Forensic Evidence Collection in Pediatric Sexual Assault

<b>Timeline for Forensic Evidence Collection and Examination</b>	<ul style="list-style-type: none"> <li>• The South Carolina sexual assault evidence collection kit should be performed on a child 10 years of age and younger or on a prepubescent child within 36 hours of the acute sexual assault.             <ul style="list-style-type: none"> <li>➤ Child still requires an emergent exam up to 72 hours from the assault to identify, document and assess anogenital injuries.</li> <li>➤ Emergency room physician or a Pediatric Sexual Assault Nurse Examiner (“P-SANE”), if available, is to perform the collection.</li> </ul> </li> <li>• <b>After 36 hours</b> <ul style="list-style-type: none"> <li>➤ Only the clothing the child was wearing at time of assault and the linens where incident occurred need to be collected. Notify law enforcement, so they can pursue these articles.</li> <li>➤ Obtain a Buccal swab from child for DNA identification (see section below).</li> </ul> </li> </ul>
<b>State Mandated Notification of Agencies</b>	<ul style="list-style-type: none"> <li>• Law enforcement in the jurisdiction where the incident occurred.</li> <li>• Local DSS where the child resides, if alleged perpetrator involves parent/legal guardian or if parent/legal guardian’s actions have resulted in the sexual assault allegation, i.e. failure to protect child.</li> </ul>
<b>Other Agencies</b>	<ul style="list-style-type: none"> <li>• Sexual Assault Victim Advocate Services</li> </ul>
<b>Parent/Guardian Interview</b>	<ul style="list-style-type: none"> <li>• If more than one caregiver present, interview each separately. Ask the following questions:             <ul style="list-style-type: none"> <li>➤ When did you first become aware of the incident?</li> <li>➤ What did child say happened?</li> <li>➤ To whom did child make disclosure?</li> <li>➤ What prompted the disclosure (circumstances)?</li> <li>➤ What was parent’s reaction to disclosure?</li> <li>➤ What follow-up questions did parent ask the child?</li> <li>➤ Who is the alleged perpetrator and what is their relationship to the child?</li> <li>➤ What terms does the child use for genitalia?</li> <li>➤ Obtain a complete genitourinary medical history.</li> </ul> </li> </ul>
<b>Child Medical History</b>	<ul style="list-style-type: none"> <li>• It is recommended that the child interview be conducted by a trained Forensic Interviewer due to the varying cognitive developmental stages of the prepubescent child.</li> <li>• In the event the child spontaneously starts narrating the incident:             <ul style="list-style-type: none"> <li>➤ Do not interrupt the child.</li> <li>➤ Leave verification of details for forensic interview.</li> <li>➤ Document the child’s statements verbatim rather than the examiner’s interpretation of the child’s statements.</li> <li>➤ Document child’s demeanor and changes during the statement.</li> <li>➤ Obtain a complete genitourinary medical history.</li> </ul> </li> </ul>

<p style="text-align: center;"><b>Evidence Collection</b></p>	<ul style="list-style-type: none"> <li>• Speculum examination <b>is not indicated</b> on a prepubescent female child unless acute anogenital bleeding is present.             <ul style="list-style-type: none"> <li>➤ In these situations, examination under anesthesia is indicated and medical treatment is done in conjunction with evidence collection.</li> </ul> </li> <li>• Collecting swabs and smears should be guided by the history.             <ul style="list-style-type: none"> <li>➤ If indicated, examiner may gently swab with a cotton-tipped applicator, moistened in non-bacteriostatic sterile water, the vulva, inguinal creases, perineum, and/or medial aspect of upper thighs.</li> </ul> </li> <li>• Bite Mark Evidence Collection             <ul style="list-style-type: none"> <li>➤ If the child has not bathed or bite mark has not been washed, collect saliva specimen by swabbing with two cotton-tipped applicators using the double swab technique.                 <ul style="list-style-type: none"> <li>▪ First swab is moistened with non-bacteriostatic sterile water and rubbed over the skin using moderate pressure and circular motion. Second swab is used dry repeating this motion.</li> </ul> </li> </ul> </li> <li>• Do not collect plucked/pulled scalp hair from prepubescent child.             <ul style="list-style-type: none"> <li>➤ Scan the child/adolescent's body with an alternate light source with an orange filter and swab any area of fluorescence.</li> </ul> </li> <li>• Swab any skin surface showing dried or moist secretions at unaided visual inspection even if negative fluorescence</li> </ul>
<p style="text-align: center;"><b>Buccal Swab Collection for DNA Identification</b></p>	<ul style="list-style-type: none"> <li>• No Blood Standard indicated</li> <li>• If oral-genital contact suspected, first obtain oral specimen by swabbing between gums and lips, tonsillar pillars and under tongue using two sterile cotton applicators.</li> <li>• Then acquire Buccal Standard as follows:             <ul style="list-style-type: none"> <li>➤ Child cannot eat or drink for at least 30 minutes prior to collection.</li> <li>➤ Child is to rinse mouth thoroughly and wait 15 minutes before obtaining sample.</li> <li>➤ Using 2 sterile cotton-tipped applicators, rub inside of the cheek 10 times with an up and down motion.</li> </ul> </li> </ul>
<p style="text-align: center;"><b>STI Screening and Treatment</b></p>	<ul style="list-style-type: none"> <li>• Sexually transmitted infection ("STI") screening in a prepubescent child after <b>single acute sexual assault is not recommended</b>, unless there are signs of infection such as:             <ul style="list-style-type: none"> <li>➤ Presence of purulent vaginal/penile (urethral) discharge</li> <li>➤ Genital vesicles or ulcers</li> <li>➤ Genital warts; <b>OR</b></li> <li>➤ Child has been abused for an extended period of time and now presents for an acute assault</li> </ul> </li> <li>• If any of the above scenarios are present, obtain a dirty catch urine sample and send for N. gonorrhoea and C. trachomatis Nucleic Acid Amplification Testing (APTIMA Combo 2 or ProbeTec ET).             <ul style="list-style-type: none"> <li>➤ Presence of an STI in a prepubescent child is forensic evidence of sexual abuse. Cultures or a second confirmatory NAAT must be obtained prior to use of antibiotics.</li> </ul> </li> <li>• <b>In a prepubescent child, post-exposure prophylaxis and presumptive treatment after acute sexual assault is not indicated.</b></li> </ul>

<p><b>Referrals</b></p>	<ul style="list-style-type: none"><li>• All children initially seen for a forensic evidence collection at a local hospital Emergency Department or by a P-SANE require referral to the local Children's Advocacy Center facility within <b>2 weeks of the acute incident</b> for:<ul style="list-style-type: none"><li>➤ Medical follow-up with Child Abuse Pediatrics healthcare provider</li><li>➤ Forensic interview</li><li>➤ Mental health assessment/counseling</li><li>➤ STI assessment and/or follow-up</li></ul></li><li>• For a listing of Children's Advocacy Centers, please refer to <a href="http://www.sccamrs.org">www.sccamrs.org</a></li></ul>
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**Guidelines for Forensic Evidence Collection in the Pubescent Child and Adolescent  
after Acute Sexual Assault**

<b>Timeline for Forensic Evidence Collection and Examination</b>	<ul style="list-style-type: none"> <li>• The South Carolina sexual assault evidence collection kit should be performed in a pubescent child 11 to 17 years of age within 72 hours of the acute sexual assault.</li> <li>• Emergency room physician or a sexual assault nurse examiner, if available, is to perform the collection.</li> </ul>
<b>Mandated Notification of Agencies</b>	<ul style="list-style-type: none"> <li>• Law enforcement in the jurisdiction where the incident occurred.</li> <li>• Local DSS where the child/adolescent resides, if alleged perpetrator involves parent/legal guardian or if parent/legal guardian's actions have resulted in the sexual assault allegation, i.e. failure to protect child/adolescent.</li> </ul>
<b>Other Agencies</b>	<ul style="list-style-type: none"> <li>• Sexual Assault Victim Advocate Services</li> </ul>
<b>Adolescent Medical History</b>	<ul style="list-style-type: none"> <li>• Use open-ended (non-leading) questions and encourage free narrative.</li> <li>• Document questions asked and child/adolescent's statements verbatim.</li> <li>• Obtain a genitourinary medical history.</li> <li>• Document demeanor during statement.</li> </ul>
<b>Evidence Collection</b>	<ul style="list-style-type: none"> <li>• Clothing: Collect if child/adolescent has not changed clothes or bathed. Otherwise notify law enforcement to pursue these articles at child/adolescent's residence or site of assault.</li> <li>• Scan the child/adolescent's body with an alternate light source with an orange filter and swab any area of fluorescence.             <ul style="list-style-type: none"> <li>➢ Swab any skin surface showing dried or moist secretions at unaided visual inspection even if negative fluorescence.</li> </ul> </li> <li>• Fingernail scrapings: Collect if child/adolescent indicates he/she scratched the alleged perpetrator or fingernails show foreign material.</li> <li>• If pubic hair present, perform pubic hair combing. Do not pluck/pull hair.</li> <li>• Collect genital (vaginal and/or cervical specimens) and rectal swabs and smears.</li> <li>• Collect oral swabs, if history of oral-genital contact within 24 hours of assault.</li> <li>• If postpubertal/postmenarcheal adolescent (Tanner 4 and above), consider speculum examination for:             <ul style="list-style-type: none"> <li>➢ Inspection for vaginal injury or bleeding</li> <li>➢ Collection of vaginal swabs</li> </ul> </li> <li>• Bite Mark Evidence Collection: collect saliva specimen by swabbing with two cotton-tipped applicators using the double swab technique.             <ul style="list-style-type: none"> <li>➢ First swab is moistened with non-bacteriostatic sterile water and rubbed over the skin using moderate pressure and circular motion. Second swab is used dry repeating this motion.</li> </ul> </li> </ul>

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<p><b>Buccal Swab Collection for DNA Identification</b></p>	<ul style="list-style-type: none"> <li>• No Blood Standard indicated</li> <li>• If oral-genital contact suspected, first obtain oral specimen by swabbing between gums and lips, tonsillar pillars and under tongue using two sterile cotton applicators.</li> <li>• Then acquire Buccal Standard as follows:             <ul style="list-style-type: none"> <li>➢ Child/adolescent cannot eat or drink for at least 30 minutes prior to collection.</li> <li>➢ Child/adolescent is to rinse mouth thoroughly and wait 15 minutes before obtaining sample.</li> <li>➢ Using 2 sterile cotton-tipped applicators, rub inside of the cheek 10 times with an up and down motion.</li> </ul> </li> </ul>
<p><b>Laboratory Studies</b></p>	<ul style="list-style-type: none"> <li>• Urine pregnancy test, and</li> <li>• Toxicology screening, if drowsiness, confusion, memory loss or impaired motor skills is present.             <ul style="list-style-type: none"> <li>➢ If ingestion of the drug occurred within last 24 hours, collect:                 <ul style="list-style-type: none"> <li>▪ 10 ml of blood collected in gray-top tube</li> <li>▪ 30 to 50 ml of urine</li> </ul> </li> <li>➢ Collect only a urine specimen if 24 hours have passed from the ingestion but still within a 72-hour time frame.</li> </ul> </li> </ul>
<p><b>STI Testing and Prophylaxis/Treatment</b></p>	<ul style="list-style-type: none"> <li>• Request a Nucleic Acid Amplification Test for N. gonorrhea and C. trachomatis (PCR, TMA or SDA) on a dirty catch urine specimen (10-30 ml).</li> <li>• RPR</li> <li>• HIV</li> <li>• Check immunization status for Hepatitis B</li> <li>• STI prophylaxis or presumptive treatment is recommended after sexual assault and acceptable <b>after testing is completed.</b> <ul style="list-style-type: none"> <li>➢ For STI treatment guidelines, see the Center for Disease Control and Prevention website <a href="http://www.cdc.gov/std/treatment/">http://www.cdc.gov/std/treatment/</a></li> </ul> </li> </ul>
<p><b>Emergency Contraception</b></p>	<p><b>The standard of care is to discuss <u>and</u> offer emergency contraception.</b></p> <ul style="list-style-type: none"> <li>• Plan B One Step             <ul style="list-style-type: none"> <li>➢ 1.5 mgs tablet orally within 72 hours of the sexual assault, best if within 24 hours.                 <ul style="list-style-type: none"> <li>▪ If vomiting occurs within 2 hours, repeat dose.</li> </ul> </li> </ul> </li> </ul>
<p><b>Referrals</b></p>	<ul style="list-style-type: none"> <li>• If initially seen for a forensic evidence collection at a local hospital Emergency Department or by a Pediatric/Adult Sexual Assault Nurse Examiner, a referral is required to the local Children's Advocacy Center facility within 2 weeks of the acute incident for:             <ul style="list-style-type: none"> <li>➢ Medical follow-up with Child Abuse Pediatrics healthcare provider</li> <li>➢ Follow up with primary care physician if Child Abuse Pediatrics healthcare provider not available</li> <li>➢ Forensic interview, if indicated</li> <li>➢ Mental health assessment/counseling, and</li> <li>➢ STI reassessment and/or follow-up</li> </ul> </li> <li>• For a listing of Children's Advocacy Centers, please refer to <a href="http://www.sccamrs.org">www.sccamrs.org</a></li> </ul>

**Guidelines for the Medical Forensic Evaluation and Evidence Collection in the  
Competent Adult  
(18 years of age and older)**

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<p align="center"><b>Standard of Care</b></p>	<ul style="list-style-type: none"> <li>• All patients should receive a comprehensive medical/forensic evaluation by a Sexual Assault Nurse Examiner (SANE) within 72 - 120 hours after a sexual assault. If a SANE is not available, an emergency room physician or registered nurse may conduct the medical/forensic evaluation and evidence collection.</li> <li>• Care for sexual assault patients should be provided in a private and safe location. Sexual assault patients should be considered as priority emergency cases.</li> <li>• Advocacy services should be offered to all victims of sexual assault. The decision to accept or decline advocacy services should rest with the victim.</li> <li>• Victims should be able to identify the individual(s) she/he wishes to be present during the examination process.</li> <li>• All victims of sexual assault should be informed of their right to consent or decline to report their sexual assault to law enforcement. The options will be provided and discussed by a community-based advocate unless the victim wishes only to speak with medical personnel. See Appendix A for anonymous reporting requirements for sexual assault.</li> <li>• All victims have the right to consent or decline any portion of the medical forensic evaluation.</li> <li>• Medical treatment for life threatening or serious injuries should always be completed prior to any forensic evidence collection. Best practice includes a SANE being present to act as a resource for victim advocacy and evidence preservation when medical treatment is a priority.</li> <li>• Chain of custody must be maintained to protect the integrity of evidence.</li> </ul>
<p align="center"><b>Mandated Notification of Agencies</b></p>	<ul style="list-style-type: none"> <li>• Mandatory notification of law enforcement only applies to competent patients 18 years of age and older when there is evidence of injury by a gun, or if the patient meets the legal definition of a vulnerable adult.</li> <li>• The patient has the right to choose whether or not she/he would like to report the assault to law enforcement.</li> </ul>
<p align="center"><b>Anonymous Reporting</b></p>	<ul style="list-style-type: none"> <li>• If the patient declines law enforcement involvement, the patient should be given the option of having an anonymous medical forensic evaluation and evidence collection.</li> <li>• Anonymous report medical forensic evaluations for sexual assault use the SLED evidence collection kit.</li> <li>• Anonymous report labeling: DO NOT INCLUDE THE PATIENT'S NAME ON THE OUTSIDE OF THE SLED EVIDENCE COLLECTION KIT. In place of the patient's name on the outside of the SLED evidence collection kit, use an identifier (label) that will "link" the victim to the SLED evidence collection kit for future reference (e.g., a combination of the patient's birth date and the last four numbers of the medical record). The identifier (label) is generated by the individual SANE program based on the program's protocol for generating anonymous SLED evidence collection kit labels.</li> </ul>

<p style="text-align: center;"><b>Other Agencies</b></p>	<ul style="list-style-type: none"> <li>• Sexual assault victim advocate services should be offered to every victim who presents to Emergency Room. Local advocacy, whether it be sexual and/or domestic violence services and/or shelter resources should be identified in every community. State advocacy organizations should be identified and may include:             <ul style="list-style-type: none"> <li>○ South Carolina Coalition Against Domestic Violence and Sexual Assault (“SCCADVASA”)</li> <li>○ South Carolina Victim Assistance Network (“SCVAN”)</li> <li>○ South Carolina State Office of Victim Assistance (“SOVA”)</li> <li>○ Local advocacy and shelter resources</li> </ul> </li> </ul>
<p style="text-align: center;"><b>Forensic Evaluation</b></p>	<ul style="list-style-type: none"> <li>• The medical forensic evaluation consists of obtaining information necessary to make the appropriate decisions regarding medical care, forensic evidence collection and appropriate referral and follow up information. Evidence collection is guided by the patient history. It may include but is not limited to the following:             <ul style="list-style-type: none"> <li>○ Presenting/chief complaint                 <ul style="list-style-type: none"> <li>▪ Physical complaints</li> <li>▪ Psychological/emotional status</li> <li>▪ Complete review of systems</li> </ul> </li> <li>○ Medical history                 <ul style="list-style-type: none"> <li>▪ Medications</li> <li>▪ Allergies</li> <li>▪ Recent illness/injuries/surgeries</li> <li>▪ Immunization status (Tetanus, Hepatitis B, etc.)</li> </ul> </li> <li>○ Gynecological history                 <ul style="list-style-type: none"> <li>▪ Last menstrual period</li> <li>▪ Birth Control method</li> <li>▪ Number of pregnancies/outcomes</li> </ul> </li> <li>○ Pre Assault Activity                 <ul style="list-style-type: none"> <li>• Alcohol or drug use</li> <li>▪ Last consensual sexual activity (date)</li> </ul> </li> <li>○ Post Assault Activity                 <ul style="list-style-type: none"> <li>• Changed clothing</li> <li>• Showered/bathed</li> <li>• Food and or drink</li> <li>• Alcohol and/or drug use</li> </ul> </li> <li>○ Assault History (detailed account of events in patient’s own words)                 <ul style="list-style-type: none"> <li>• Date and time of assault</li> <li>• Location of assault (city and/or county)</li> </ul> </li> <li>○ Assailant Information                 <ul style="list-style-type: none"> <li>• Name, race, age, gender, relationship</li> <li>• Alcohol and/or drug use</li> </ul> </li> <li>○ Assailant Methods                 <ul style="list-style-type: none"> <li>• Weapons, strangulation, threats, physical assault details</li> </ul> </li> <li>○ Assailant Contacts                 <ul style="list-style-type: none"> <li>• Genital, oral and non-genital contacts, other acts</li> <li>• Ejaculation</li> <li>• Condom, lubricants, etc.</li> </ul> </li> </ul> </li> </ul>

<b>Timeline for Forensic Evidence Collection &amp; Examination</b>	<ul style="list-style-type: none"> <li>• The collection of evidence <u>may</u> be performed up to 120 hours post assault.</li> <li>• It is important to use the forensic evaluation as <u>the</u> guide in determining the appropriateness of evidence collection, medical treatment, referral and follow up.</li> </ul>
<b>Physical Assessment</b>	<p>All victims of sexual assault should receive:</p> <ul style="list-style-type: none"> <li>• Vital signs</li> <li>• Head to toe assessment for injuries</li> </ul>

**Evidence  
Collection**

- State Law Enforcement Division (“SLED”) evidence collection kits should be utilized for evidence collection. All personnel are to wear disposable gloves while handling all potential evidence.
- Non-genital physical exam findings: document the location, size and appearance of any findings that may have resulted from the assault (using a time clock as a reference guide). Diagram findings on a body map.
- Genital physical exam findings: document the location, size and appearance of any findings. Best practice includes colposcopy and/or digital photography to support exam findings.
- Clothing: If the patient has not changed clothes or bathed since the assault, collect clothing that has been in closest contact with the genitalia. Underwear should be collected. Do not routinely collect shoes, belts etc. Do **not** collect outer clothing **unless** torn, stained or damaged in the assault.
- Oral swab: Collect if history of oral genital contact within 24 hours of assault. (Collect prior to collection of buccal swab-see below.) Look for possible injury to the upper palate during collection.
- Buccal swab: Collected from the patient to identify his/her DNA, referred to as “known standard”.
  - Wait at least 10 minutes after eating or drinking to collect.
  - If oral swab indicated, collect first and then have the patient rinse with water and wait at least 10 minutes to collect Buccal swab.
- Suspected body fluid: Swab any areas that the patient indicates may contain the assailant’s body fluid. Document area swabbed and type of suspected fluid on envelope.
  - Scan the patient’s body with an alternate light source with an orange filter and swab any area of fluorescence.
  - Swab any skin surface showing dried or moist secretions at unaided visual inspection even if negative fluorescence.
- Suspected saliva: Swab any areas the patient states she/he has been licked, kissed, bitten and/or sucked. Document area swabbed and type of suspected fluid on envelope.
- Pubic hair combings: perform pubic hair combing. Do not pluck/pull hair.
- Genital exam (speculum exam if indicated):
  - Inspection for genital injuries and/or bleeding.
  - In the female patient collect vaginal, cervical and/or anal swabs and smears per assault history.
  - Identification of semen or discharge in the vaginal vault and collection of samples.
  - In the male patient collect penile, scrotal and anal swabs and smears per assault history.
- Miscellaneous materials: for comparison with debris at crime scene or on assailant’s body. Collect any debris or trace evidence that is found on the patient’s body or clothing. Package in the SLED kit envelope, labeled “Miscellaneous Materials”.
  - Leaves, fibers, hair, etc.
- Evidence is not to be packaged in plastic or airtight containers. Paper bags are to be used for clothing and larger item collection. All evidence must be air-dried.
- Each item collected as evidence must be documented in the patient record.

<p style="text-align: center;"><b>Laboratory Studies</b></p>	<ul style="list-style-type: none"> <li>• Perform a urine pregnancy test. In some patients a serum pregnancy test may be necessary.</li> <li>• Collect samples for toxicology screening:             <ul style="list-style-type: none"> <li>○ 10 ml of blood collected in gray-top tube (containing sodium fluoride and potassium oxalate).</li> </ul> </li> <li>• Collect urine sample if the patient's history or symptoms are concerning for a drug facilitated sexual assault. Drowsiness, impaired motor skills, confusion, memory loss during the potential time frame of the assault or isolated ("cameo") memories of sexual assault reported by the patient are potential indicators for toxicology screening.             <ul style="list-style-type: none"> <li>○ If potential ingestion of the drug occurred within the last 24 hours, collect:                 <ul style="list-style-type: none"> <li>• 10 ml of blood, collected in gray-top tube (containing sodium fluoride and potassium oxalate)</li> <li>• At least 30-50 ml of urine (keep refrigerated)</li> </ul> </li> <li>○ If 24 hours have passed from the potential ingestion but it is still within a 72-hour time frame collect ONLY urine.</li> <li>○ Submit all toxicology samples in the SLED kit. A biological sample sticker is to be placed on the outside of the SLED kit.</li> </ul> </li> </ul>
<p style="text-align: center;"><b>Photo-documentation</b></p>	<ul style="list-style-type: none"> <li>• Informed consent must be obtained from all patients prior to photo-documentation. In emergent cases, when a signature cannot be obtained, consent will be implied.</li> <li>• Photo-documentation should take place prior to any treatment whenever possible without compromising the patient's medical care (cleaning, suturing, surgery, etc.).</li> <li>• Photograph sequence should begin and end with a photograph of the patient's name or hospital sticker, marked with the photographer's initials.</li> <li>• Photographs taken for injury documentation are considered part of the forensic record and should be retained by the agency.</li> <li>• When photo-documentation is performed, there must be a system in place to properly store and maintain security of those pictures.</li> </ul>
<p style="text-align: center;"><b>Chain of Custody</b></p>	<ul style="list-style-type: none"> <li>• Documentation of the items collected as evidence must be in the patient's forensic record and include:             <ul style="list-style-type: none"> <li>○ Patient's full name</li> <li>○ Date and time of collection</li> <li>○ Identification/description of the evidence</li> <li>○ Signature of the individual collecting the evidence with the date and time</li> <li>○ Signature of the individual receiving the evidence with the date and time</li> </ul> </li> <li>• Evidence is to be sealed with evidence tape and released to the appropriate law enforcement agency.</li> <li>• See <b>Appendix A</b> for anonymously reported kit chain of custody recommendations.</li> </ul>

<p style="text-align: center;"><b>STI Screening and Prophylaxis</b></p>	<ul style="list-style-type: none"> <li>• For STI screening and prophylaxis guidelines, see the Centers for Disease Control and Prevention website <a href="http://www.cdc.gov/std/treatment/">http://www.cdc.gov/std/treatment/</a>. Best practice is post-assault prophylactic treatment for gonorrhea, chlamydia, trichomoniasis and hepatitis.</li> <li>• Routine screening is not recommended as best practice.</li> </ul> <p>If the patient is symptomatic consider:</p> <ul style="list-style-type: none"> <li>➤ Nucleic Acid Amplification Test (NAAT) for N. gonorrhea and C. trachomatis (PCR, TMA or SDA)</li> <li>➤ Wet mount or other test for T. vaginalis</li> <li>➤ RPR</li> <li>➤ HIV</li> <li>➤ Check immunization status for Hepatitis B – Consider giving a Hepatitis B shot for unknown status or known “never received” status, without testing.</li> </ul> <ul style="list-style-type: none"> <li>• This is considered routine care for victims of sexual assault and should be provided regardless of whether a kit was collected in the presenting facility.</li> </ul>
<p style="text-align: center;"><b>Emergency Contraception</b></p>	<p><b>The standard of care is to discuss <u>and</u> offer emergency contraception if applicable.</b></p> <ul style="list-style-type: none"> <li>• Plan B One Step             <ul style="list-style-type: none"> <li>▪ Given within 72 hours of the sexual assault, best if within 24 hours.</li> <li>▪ If vomiting occurs within 2 hours, repeat dose.</li> <li>▪ In circumstances where offering emergency contraception is not acceptable with your belief system or that of the institution’s, then arrangements/referrals should be made to provide the patient this option.</li> </ul> </li> </ul>
<p style="text-align: center;"><b>Referrals</b></p>	<ul style="list-style-type: none"> <li>• Follow-up information and/or referrals may include but is not limited to the following:             <ul style="list-style-type: none"> <li>○ Medical follow-up (pregnancy or STI testing, injuries, or new physical complaints).</li> <li>○ Sexual assault advocacy agencies (crisis counseling, self-help groups, safety planning, or Orders of Protection).</li> <li>○ SOVA (future crime victim compensation).</li> </ul> </li> </ul>

## Community-Based Sexual Assault Victim Advocate Recommended Protocol

The term “community-based advocates,” including sexual assault victim advocates, refers to victim advocates who work for private, autonomous, often non-profit agencies within the community and receive extensive training and continuing education on serving survivors of sexual violence. Community-based advocates work without agenda to serve the victim and his/her family members, when circumstances allow the advocate to work with both. Otherwise, the community-based advocate serves the victim. Victims of Crimes Act (“VOCA”) and VAWA-funded advocates and volunteers cannot serve known perpetrators of sexual or domestic violence, and can also not serve those that are incarcerated. In such instances, the responding advocate will contact the Hotline and request an eligible advocate for accompaniment, if available.

The primary objectives for a community based sexual assault victim advocate in any sexual assault case are as follows:

1. Accompany the survivor and his/her family members during the hospital/acute sexual assault center (“ASAC”) visit from a non-judgmental and victim-centered perspective;
2. Advocate for the survivor’s interests and rights;
3. Maintain survivor confidentiality (communications with community-based advocates have qualified privilege);
4. Provide the survivor and his/her family members information about medical, legal, and law enforcement procedures;
5. Provide crisis intervention to the survivor and his/her family members; and
6. Promote the responsiveness of individual service providers.

### **Hotline Response**

Sexual assault service centers operate a 24-hour hotline answered by a live person, typically trained advocates (who receive a comprehensive 25-hours training initially and four hours of continuing education annually, concerning topics such as sexual assault and the trauma of rape, crisis intervention techniques, hospital/ASAC accompaniment procedures from a victim-centered perspective, law enforcement and criminal justice perspectives, safety planning, working with males, LGTB, individuals with disabilities, the elderly, and collecting data) or dispatch operators, who will follow procedure for dispatching a trained advocate to the hospital/ASAC call per jurisdictional procedures. If a survivor contacts the hotline directly citing an assault within 120 hours\*, the advocate will explain the benefits of the survivor seeking medical treatment immediately and the importance of not showering, brushing his/her teeth, or eating and drinking if they have any intention to file a report with law enforcement in an effort to preserve evidence for possible collection at the hospital/ASAC. [Note: Some hospitals operate on a 72 hour timeline. Check your policy

for clarification.] A trained advocate from the sexual assault service center will respond to any hospital/ASAC accompaniment requests from the victim, family member, medical personnel, or law enforcement within one hour.

### **Hospital/ASAC Response**

At the hospital/ASAC, the community-based advocate will inconspicuously indicate to hospital/ASAC personnel that he/she is with the local sexual assault service center. Advocate will knock on survivor's door and request entry. The community-based advocate will introduce himself/herself and hand the survivor a standard packet of information on the local sexual assault service center, emergency numbers, the South Carolina Victim Bill of Rights, and a list of resources. The community-based advocate will also ask the survivor permission to remain in the room and again for the examination and evidence collection kit. If survivor does not want the community-based advocate present during all or part of the hospital/ASAC visit, the advocate will wait outside of the exam room until the survivor requests the advocate's presence or is discharged from the hospital/ASAC. If the survivor is abusive towards the advocate, the advocate should remain outside of the exam room until the survivor requests the advocate's presence and agrees to discontinue the abusive behavior.

The community-based advocate's primary role is to believe the survivor and his/her story, to advocate for that survivor with medical, law enforcement, and other systems, and to maintain the survivor's right to confidentiality. The advocate will discuss the short term and long term impact of sexual assault, gather and evaluate information during survivor contact, provide crisis intervention from a non-judgmental and victim-centered perspective, assist the survivor in identifying support systems, provide proper referrals (including special considerations for individuals who live in rural communities, Latinas, males, individuals who identify as gay, lesbian, bisexual, or transgender, the elderly, individuals with disabilities, and institutionalized individuals), provide information about legal procedures and victim's assistance programs, provide information to assist the survivor in making informed decisions about medical care and the preparations needed, provide information about medical care/concerns, including assistance with needed follow-up and support during medical exams, provide information about services available for sexual assault, including shelter and counseling, and assist the survivor in creating a safety plan, if necessary. The advocate will also provide information about the local sexual assault service center's follow up services to include crisis intervention, therapeutic counseling, assistance with filing for orders of protection/restraining orders, explaining the court process, assistance with completing victim assistance forms, personal advocacy, and law enforcement/court accompaniment.

The community-based advocate will not ask the survivor questions about the assault at any time. The advocate will only share information about the case with law enforcement or medical responders at the request of the survivor or in regard to the survivor's immediate safety, with exceptions noted in the Confidentiality Section. If law enforcement is not

already involved, the advocate will explain survivor's right to an anonymous kit (See Appendix A entitled South Carolina Act 59: VAWA Reauthorization for complete details regarding reporting of sexual assault incidents anonymously and procedure for follow up contact).

The advocate does not assist with the medical procedures or touch anything related to the sexual assault evidence collection kit. The advocate can turn on/off the lights for medical staff, bring pages of labels, or leave the room to get medical equipment, food, or clothing for the survivor. The advocate cannot spend money on the survivor for food or beverage, but can ask medical staff to order food or beverage for the survivor. The community-based advocate also cannot provide transportation to survivors, but can assist in coordinating transportation with law enforcement or with sexual assault service center funds, if available. If the survivor is discharged before receiving medical care, the advocate will encourage and direct the survivor to another medical location. The advocate should also assist the medical staff in finding appropriate shelter for the survivor, if necessary. In consideration of the survivor, the advocate should not eat or drink in the presence of the survivor if the survivor is being encouraged not to eat or drink prior to the forensic exam; the advocate should not talk or text on his/her cell phone or read a book if the survivor is awake; and the advocate should not leave the survivor unaccompanied for extended periods of time (if the advocate must leave the exam room to assist the survivor or for personal reasons, the advocate should not leave his/her personal items, such as a purse or cell phone, in the room). If a second survivor presents at the hospital/ASAC, the advocate will request another advocate be called in.

The community-based advocate will remain at the hospital/ASAC with the survivor until the survivor is discharged from the hospital/ASAC and has left the premises with three notable exceptions.

1. If an advocate must leave the hospital/ASAC before the survivor, the advocate will contact the hotline and request a replacement advocate. This should be done *only under very unusual circumstances*.
2. If the survivor has extensive injuries that must be treated before the sexual assault evidence collection kit is performed or is temporarily unable to consent to medical treatment as a result of severe drug or alcohol intoxication, the advocate can leave and request that ER staff call for another advocate when the survivor is being prepared for the evidence collection process. The advocate should contact the hotline and request approval from the rape crisis service center staff.
3. If the survivor does not want a male advocate, a female advocate can be substituted. The male advocate should contact the hotline and request a replacement, female advocate.

The community based advocate will complete an advocate report form ("ARF") at the conclusion of all hospital/ASAC accompaniments and submit to the rape crisis service center within 24 hours or the next business day of the accompaniment. The ARF includes

date, time range, and location of hospital/ASAC accompaniment, contact information for survivor and family/friends, information on the perpetrator (if available), contact information for medical/law enforcement personnel, any incident report/anonymously report identification numbers, services provided by the advocate, any referrals provided, and a brief overview of the case (if known) to include incident date, location, type, and any secondary conditions such as domestic violence, stalking, harassment, homelessness, or previous adult survivor of child sexual abuse. The ARF will also indicate survivor's request for follow up and how/when that follow up should be conducted with the least impact to survivor.

The community-based advocate will provide applicable referrals, to include but not limited to the local domestic violence shelter, child advocacy center, local college/university sexual assault assistance, and the sexual assault service center's hotline number. If survivor does not live in the advocate's service area, the advocate will provide a referral to the appropriate sexual assault services agency or to the Rape, Abuse, and Incest National Network ("RAINN") hotline (if out of state). No matter the survivor's residence, the survivor will receive follow up from sexual assault service center, if he/she requests it.

### **Confidentiality**

Sexual assault service centers are committed to respecting the privacy and dignity of each person served and to holding in confidence all client-identifying information obtained in the course of the helping relationship to encourage clients to report. The survivor owns the privilege of confidentiality and makes the decision regarding all disclosures of information. Client-identifying information obtained in the course of the helping relationship will not be shared with others outside of the sexual assault services agency without the survivor's consent, with five notable exceptions as set forth below:

1. Mandated reporting;
2. Situations involving life-saving or life-threatening emergencies;
3. A survivor's indication that he/she intends to commit a crime;
4. Routine contact during a hospital/ASAC accompaniment with law enforcement and medical personnel; and
5. Court-ordered release of documents (qualified privilege).

Sexual assault service centers are mandated reporting agencies under South Carolina Code of Laws § 20-7-510(B). Advocates must report information received in their professional capacity that gives them "reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect." For unmarried children ages 15 years or younger, this includes ALL forms of sexual conduct, physical abuse, or child neglect or maltreatment. For children 16 or 17 years old, *consensual* sexual conduct does not have to be reported, although assault must be reported. *Survivors over the age of 18 have the right to decide for themselves whether they will report their assault to law enforcement*, unless the adult survivor is developmentally delayed or mentally incoherent to the extent that he/she is not able to protect himself/herself from harm.

Advocates must report abuse/assault by a parent, guardian, caretaker, institution, or someone acting in the role of a parent to the county's Department of Social Services. Advocates must report abuse/assault by anyone other than a parental figure to law enforcement in the jurisdiction where the assault took place. If an advocate believes he/she has or may have a mandated reporting situation, the advocate should contact the hotline to request the assistance of a staff member from the sexual assault service center. The staff member will make the report to DSS or law enforcement, as appropriate and if deemed necessary.

Community-based advocates sign a confidentiality agreement indicating their understanding of the confidentiality policy and renew this document biannually.

## Law Enforcement Recommended Protocol

### **Purpose**

The primary objectives for a law enforcement officer in any sexual assault case are to identify information that supports the facts of the case, identify and preserve evidence, identify the offender, and develop probable cause to support the arrest and prosecution of the offender. Law enforcement officers should use a victim-centered approach to achieve these objectives.

Since many sexual assault victims will experience their first real contact with a law enforcement officer following the assault, the law enforcement officer should be ever-cognizant of the emotional wellbeing of the victim and should take all reasonable steps to alleviate the negative impact of the investigative process.

The officer(s) should remain mindful that law enforcement is but one component of a multidisciplinary team such as the Sexual Assault Response Team (SART). The team concept is crucial in ensuring a victim-centered approach to the investigation.

The victim-centered approach means that the needs and interests of victims/survivors are of central concern to sexual assault response teams and first responders as they respond. For a law enforcement officer this means:

- A. Enhancing cooperation between the law enforcement agency and community organizations that may assist the victim(s).
- B. Giving victims choices and options whenever possible.
- C. Demonstrating sensitivity by using non-judgmental questions, comments, and body language. For example, instead of "Tell me about your rape," ask, "What are you able to tell me about the assault?"
- D. Providing the opportunity for the victim to tell what happened. Instead of asking "What were you doing out so late?" ask the victim to "describe what happened before the assault."
- E. Establishing and maintaining liaisons with area law enforcement commands and crime victim liaisons and specialized units such as sexual assault programs, advocacy centers, and community medical/forensic services.
- F. Facilitating communication within the law enforcement agency and among members of the multidisciplinary team (SART).
- G. Maintaining respect for the victim/survivor in interdisciplinary communication.

- H. Avoiding premature judgments. Sexual assault cases often seem counterintuitive at first. Victims may wait days, weeks, months, or even years before reporting their assault. The victim may seem inappropriately calm and may lack signs of a physical struggle (e.g., cuts, bruises, or abrasions). It is important to withhold judgments about the case and the victim until sufficient evidence is collected. If you believe that a victim may be making a false statement or report, remain respectful.
- I. Using professional discretion concerning photos of victim's injuries, crime scenes, and videotapes.

### **Policy**

A victim's distress may create an unwillingness or psychological inability to assist in the investigation. Officers and investigators play a significant role in both the victim's willingness to cooperate in the investigation and ability to cope with the emotional and psychological aftereffects of the crime. Therefore, it is especially important that these cases be handled from a nonjudgmental perspective so as not to communicate in any way to a victim that the victim is to blame for the crime.

### **Procedures**

#### **A. Dispatcher or Call-Taker Response**

1. Due to the trauma of a sexual assault, a victim reaching out for assistance may be in crisis. The victim's behaviors may actually be symptomatic of this condition and can range from hysteria, crying, and rage to laughter, calmness, and unresponsiveness. There is no one typical reaction, so it is important to refrain from judging or disregarding any victim.
2. When a caller reports a sexual assault, communications personnel shall follow standard emergency response, to include ensuring the victim's safety, evaluating and properly prioritizing the call, securing medical assistance, inquiring about a suspect's current location, and obtaining detailed information to identify the suspect. Information about the relationship with the victim, weapon use, and history of violence shall also be obtained.
3. To ensure critical evidence is not lost, communications personnel shall:
  - a. Ask whether the victim has bathed, douched, urinated, or made other physical changes and advise against the victim doing so;
  - b. Ask the victim to use a clean jar to collect the urine should the victim have to urinate;

- c. Let the victim know that other evidence may still be identified and recovered so the crime should still be reported if the victim has bathed or made other physical changes;
  - d. Preserve the communications tape and printout for the investigation; and
  - e. Explain to the caller that these questions will not delay an officer's response to the caller's location.
4. Use professional discretion in relaying confidential information.

B. Initial Officer Response

1. Emergency Response

As part of the emergency response, officers shall:

- a. Make contact with the victim as soon as possible to address safety concerns and summon emergency medical assistance if needed;
- b. If the officer responds to a call from the hospital, try and establish an incident scene location, and then relay this information to other officers who can then secure the scene until an investigator can determine what evidence should be sought;
- c. Evaluate the scene for people, vehicles, or objects involved as well as possible threats;
- d. Relay all vital information to responding officers and supervisors, including any possible language barriers;
- e. Secure the crime scene to ensure that evidence is not lost, changed, or contaminated;
- f. Request assistance from detectives, field evidence technicians, crime laboratory personnel, and the prosecuting attorney when appropriate; and
- g. Begin a search for the suspect when appropriate.

2. Assisting the Victim

As part of the emergency response, officers shall:

- a. Show understanding, patience, and respect for the victim's dignity and attempt to establish trust and rapport;
- b. Determine special needs of the victim, if any; for example, are there language barriers (S.C. Code § 17-1-50); does the victim have children that need to be cared for or does the victim have a disability for which he/she needs immediate assistance;
- c. Inform the victim that an officer of the same sex will be provided if desired and available;
- d. Contact a sexual assault victim advocate as soon as possible to provide assistance throughout the reporting and investigative process. Advise the victim of his/her rights as a crime victim and the availability of and contact information for support services (S.C. Code § 16-3-1520);

- e. Supply victims of sexual assault with the phone number for the RAINN Hotline, 1-800-656-HOPE and/or victim's advocate. Operators at this hotline connect the caller with the sexual assault services agency closest to the victim's location;
- f. Request a response from investigations: clearly explain his or her role to limit the preliminary interview so that the victim is not then asked the same questions by a detective;
- g. Be aware that a victim of sexual assault may bond with the first responding officer, so it is important to explain the role of the different members of the sexual assault response team and help with transitions through introductions; and
- h. Record observations of the crime scene, including the demeanor of the suspect and victim, and document any injuries or disheveled clothing.

### 3. Evidence Collection Issues

- a. Officers shall request assistance or direction from crime scene technicians and forensic scientists.
- b. Responding officers shall protect the integrity of the evidence and guard the chain of custody by properly marking, packaging, and labeling all evidence collected, including:
  - (1) Clothing worn at the time of the assault and immediately afterward, especially the clothing worn closest to the genitals (such as undergarments, pants, and shorts); and
  - (2) Photographs and/or videotape of the victim's injuries (if any), the suspect's injuries (if any), and the crime scene prior to processing, keeping in mind:
    - When photographing a victim, be sensitive to the location of the injuries on the victim's body;
    - Summon an officer of the same sex as the victim;
    - Photograph victims using drapes and other techniques that help to maintain the victim's dignity;
    - Instruct medical personnel to take photographs of the genitalia when needed; and
  - (3) Diagram of the crime scene(s).
- c. When an investigating officer suspects that a sexual assault may have been facilitated with drugs or alcohol, he or she should determine the time of the incident as soon as possible in order to make decisions regarding the collection of urine and blood samples. Ensure that urine and blood samples within 24 hours after an assault or urine sample after 24 hours are obtained by a health professional and preserved (Refer to FNE/ SANE protocol).
- d. Officers shall introduce the need for a medical examination to the victim, explaining the importance of the examination to investigative and apprehension efforts as well as to the victim's well-being. Officers shall not coerce victims to go to the hospital or to provide samples for drug screening (a SANE or FNE should be utilized if available). Advise the victim that

he/she is not responsible for the cost of the forensic portion of the examination (S.C. Code § 16-3-1350(A)).

- e. DNA evidence plays a crucial role in the sexual assault investigation. In addition to the victim's and suspect's bodies and clothing, there are many other potential sources of evidence such as condoms, sheets, blankets, pillows, and bottles that may contain biological evidence such as blood, sweat, tissue, saliva, hair, and urine. To properly collect DNA evidence, officers shall:
  - (1) Use sterile gloves and change as needed;
  - (2) Use sterile swabs, papers, solutions, and tools;
  - (3) Package evidence in individual envelopes;
  - (4) Avoid touching the area where potential DNA evidence may exist;
  - (5) Avoid talking, sneezing, and coughing over evidence;
  - (6) Air dry evidence before packaging; and
  - (7) Put evidence into new paper bags or envelopes, not plastic.
- f. The sexual assault evidence kit shall be accepted from the medical staff after it has been properly sealed and labeled.
  - (1) The kit will contain whole blood that requires that the kit be placed and logged into an evidence refrigerator as soon as possible. The kit may also contain a urine sample for toxicology testing. If it does, the urine sample shall also be refrigerated;
  - (2) Investigating officers or supervisors shall have access to the evidence refrigerator after regular business hours, on weekends, and on holidays; and
  - (3) The kit shall not be allowed to freeze or be exposed to heat such as being near a car's interior heater or in the trunk.

#### 4. Stranger, Non-Stranger, and Spousal Assaults

Responding officers shall be familiar with common defenses to the charges of sexual assault.

##### a. Stranger Assault

Evidence in stranger sexual assaults often centers on a question of identification pending the processing of DNA evidence. Therefore, investigative strategies must remain flexible. An identity defense will typically include latent fingerprints, lineups, DNA, and trace evidence.

##### b. Non-Stranger Assault

The majority of non-stranger sexual assaults result in a consent defense. Thus, evidence of particular importance includes:

- (1) Evidence of physical or verbal resistance on the part of the victim;
- (2) Evidence of genital or non-genital injury;

- (3) Detailed account of the victim's thoughts and feelings during the assault;
- (4) Information regarding the suspect's size and strength in comparison to the victim's;
- (5) Information regarding the environment in which the assault took place (such as isolation, soundproofing); and
- (6) Information regarding the victim's behavior after the assault, including posttraumatic stress.

c. Spousal Assault

In the event of spousal sexual assault, explain to the victim that they do have the right to refuse unwanted sexual activity, but it must be reported to law enforcement within 30 days (S.C. Code § 16-3-658).

5. Identify and Locate Witnesses and Suspects

Based on the victim's emotional and physical state, questions of the victim concerning the assault and description and location of the suspect shall be limited. Responding officers must identify and interview any potential witnesses, bearing in mind that there may be multiple crime scenes. It is especially important that the first person the victim told about the sexual assault be identified and interviewed.

6. Documentation

Any officer who interviews a witness or a suspect, identifies evidence, or processes a crime scene shall write his or her own report detailing the actions he or she took. These supplemental reports shall be compiled by the first responding officer for the follow-up investigation regardless of whether an arrest is made.

C. Preliminary Victim Interview

Sexual assault investigations typically include both a preliminary and subsequent in-depth interview with the victim. The preliminary interview is intended to establish whether a crime has occurred. In the initial response, the officer shall first establish the elements of the crime(s) and identify any and all witnesses, suspect(s), evidence, and crime scene(s). The officer must understand the report indicates that the preliminary interview is **NOT** intended to be a comprehensive or final interview. Additional interviews will be needed as the investigation develops. Preliminary interviews with juvenile victims of sexual assault should be minimal factual interviews.

1. Involve a Victim Advocate

Every effort shall be made by the investigating officer to contact a community-based victim advocate (sexual assault victim advocate) and a system-based advocate as soon as possible. If the victim declines assistance from an advocate, the investigator shall provide the victim with written referrals for community resources specifically designed to help victims of sexual assault.

## 2. Victim Interview Protocol

- b. Based on the length of time between the assault and report of the crime and the individual's personal history, the victim may be in crisis and experiencing posttraumatic stress disorder or rape trauma syndrome and exhibiting a range of behaviors that will likely change over time.
- c. The victim's response to the trauma of a sexual assault shall not be used in any way to measure credibility. When drugs or alcohol are involved, the victim may have limited recollection or be unable to give a complete account of the crime. Not knowing the details of what happened may exacerbate the trauma experienced by the victim.
- d. Interviews shall be conducted promptly if the victim is coherent and able to give consent for the interview.
- e. Proceeding with or conducting a thorough investigation shall not be contingent upon laboratory findings.
- f. Investigators shall:
  - a. Remain patient and maintain an open mind while listening to the victim's account;
  - b. Remember that victims may struggle with gaps in memory;
  - c. Avoid leading questions while conducting the interview;
  - d. Use simple terminology appropriate to the victim's age, sophistication, and intelligence; and
  - e. Avoid using jargon or police, medical, or legal terms.
- g. Prior to initiating the interview, the officer shall:
  - a. Interview any witness who might have seen or spoken with the victim before, during, or after the assault;
  - b. Accommodate the victim's request for a rape crisis advocate or support person whenever possible;
  - c. Take responsibility for excluding a support person when appropriate and offer the victim and support person an explanation;
  - d. Secure a private location for the interview that is free from distractions;
  - e. Express sympathy to the victim and an interest in the victim's well-being; and
  - f. Inform the victim of the need and importance of full disclosure of any and all recent drug use.
- h. During the interview, the officer shall:
  - a. Obtain contact information for the victim, including temporary accommodations;
  - b. Explain the nature of the preliminary interview and the need for follow-up contacts;

- c. Ask victims to explain what they remember and how they felt;
- d. Revisit the possibility of a support person for victims who initially declined the offer; and
- e. Explain that other professionals such as forensic examiners, detectives, evidence technicians, and prosecutors may have additional questions.

- i. At the conclusion of the initial interview, the officer shall:
  - (1) Give the victim the investigator's contact information and case number;
  - (2) Encourage the victim to contact the investigator with any additional information or evidence;
  - (3) Remind the victim that visible evidence of injury may appear later, and to contact the investigators for additional photographs or other documentation;
  - (4) Ensure that requests for victim protection orders are made where indicated;
  - (5) Provide written referrals for victim service organizations (S.C. Code § 16-3-1520);
  - (6) Provide transportation when reasonably possible; and
  - (7) Inform the victim about next steps in the investigation.

### 3. Protecting Victim Rights

- a. Throughout the investigation of the case, officers shall protect the confidentiality of the victim's information to the maximum extent possible by law and policy.
- b. In addition, victims should be provided information on:
  - (1) The rights of a crime victim (S.C. Code § 16-3-1520);
  - (2) How to contact police if harassed or intimidated by the suspect(s);
  - (3) What information is part of the public record and what is confidential; and
  - (4) The possibility of media coverage and information the media has access to regarding sexual assault crimes.

### 4. Arrest and Prosecution Decisions

In the immediate aftermath of a sexual assault, a victim should not be expected or encouraged to make decisions regarding the investigation or charges related to the offense. Once a victim impact statement is introduced to the victim the victim may have questions regarding whether they should/should not be present at future hearings. Every effort should be made to answer the victim's questions without giving them advice as to what they "should" do.

### 5. Delayed Reports

Delayed victim reporting is common in sexual assault cases due to the trauma and fear experienced by victims and should not deter a thorough investigation. Officers shall inquire about and document the reasons for a delayed report, while avoiding questions that could be perceived as judgmental or accusatory.

#### D. Forensic Examinations for Victims of Adult Sexual Assault

Victim-centered care is paramount to the success of the forensic examination of victims of sexual assault. A timely, professional forensic examination increases the likelihood that injuries will be documented and evidence collected to aid in the investigation and prosecution of sex offenders. Evidence may normally be collected up to 120 hours after the assault, but evidence can be gathered and injuries documented beyond that time, especially if the victim is injured, bleeding, or experiencing pain.

##### 1. Investigating Officer Actions

- a. Ask the victim whether there is anyone who should be called or notified, and facilitate this contact;
- b. Address any special needs of the victim, such as communication or mobility, and notify the victim advocate of the special need;
- c. Explain the purpose of the forensic examination and its importance to the investigation and provide the victim with information on the procedure;
- d. Inquire whether the victim will consent to a forensic examination;
- e. Inform the victim of the right to decline any or all parts of the examination;
- f. Explain to the victim the potential consequences if any part of the examination is refused;
- g. Notify a victim advocate to offer the victim support when a forensic examination is to be conducted;
- h. Ensure that the victim has transportation to and from the appropriate facility. Transportation can be provided by law enforcement, family, friends or EMS, and recommend the victim bring a change of clothing to the forensic examination site in the event that his/her clothing is collected for evidentiary purposes;
- i. Seek permission from the victim to collect a urine sample for drug screening; and
- j. Encourage a victim who is unwilling to undergo a forensic exam to get medical attention, including testing for pregnancy and sexually transmitted diseases.

##### 2. Coordination with Forensic Examiner

Responding officers shall coordinate with other professionals such as forensic nurse examiners and criminalists to determine whether a medical forensic examination is indicated.

- a. When a forensic examination is indicated, the investigating officer shall brief the examining nurse or physician about the details of the sexual assault, as they are known at that time;

- b. Officers should not normally be present in the examining room, as the forensic examiner will testify about collection of evidence and the chain of custody;
- c. The nurse or physician shall brief the investigating officer at the conclusion of the examination; and
- d. The police report shall contain a copy of the forensic exam, if available, and a summary of the findings that note significant information or injury. After the examination, all the evidence shall be transferred to the department for storage.

### 3. Presence of a Victim Advocate

When it is determined that a forensic examination will be conducted, a victim advocate or a support person of the victim's choosing shall be allowed to be present in the room and during the interview, unless it would be harmful to the investigation. The officer shall take responsibility for excluding a support person, when appropriate, and providing an explanation to the victim and the support person.

### 4. Drug-Facilitated Sexual Assault Considerations

- a. If a drug-facilitated sexual assault is suspected, it is critical to obtain a urine sample from the victim as soon as possible. If it has been less than 24 hours since the time of the assault, also obtain a blood sample in a grey-top tube.
- b. Protocols for responding to illegal substance abuse by victims (including underage drinking) shall be followed and never used to discredit or discourage the victim from reporting the assault. The department priority should be to conduct a thorough investigation of a sexual assault rather than prosecute victims for misdemeanor violations.
- c. Because of the delay in reporting most sexual assaults, laboratories capable of testing urine and blood samples at very low levels for those drugs commonly used to facilitate sexual assault are essential.

### 5. Reimbursement for the Examination

- a. The cost of the medical forensic exam will not be passed onto the victim of a sexual assault, but through sources of financial support from the State Office of Victims Assistance (S.C. Code § 16-3-1350(A)).
- b. Officers shall not use the state compensation program as means to encourage cooperation from victims.

### E. Follow-Up Victim Interview

Prior to a follow-up interview, the investigating officer shall consult with agency personnel who responded to the scene, retrieve communications tapes and printouts, and review all reports. The officer should coordinate with relevant agencies,

assistance organizations, service providers, or sexual assault response professionals to address the needs of the victim and to discuss the best means for keeping the victim informed.

## 1. Investigative Strategy

In preparing for the interview, the investigator shall develop an investigative strategy based on the nature of the assault and the possible defenses available to the suspect (such as denial, mistaken identity, or consent). This strategy shall guide the questions and other evidence collection efforts. Critical evidence collection efforts include evaluating whether a pretext phone call is appropriate and re-photographing injuries to document changes in visible injuries.

## 2. Follow-Up Interview Protocol

- a. An in-depth follow-up interview shall be conducted after the victim has been medically examined and treated, and personal needs have been met.
- b. In the event that the victim is still under the influence of drugs or alcohol, has been injured, or as a result of the assault has not slept, and barring exigent circumstances requiring an arrest or identification, the interview shall be delayed.
- c. The interview shall be conducted in a location that is convenient, accessible, and comfortable for the victim. The investigator shall provide or arrange for transportation for the victim when needed.
- d. At the start of the follow-up interview, the officer shall:
  - (1) Discuss the purpose and scope of the interview;
  - (2) Review contact information for both the victim and investigator that may need to be updated;
  - (3) Explain the victim's rights, including confidentiality; and
  - (4) Address arrest decisions including an explanation of the status of the case.
- e. While conducting the follow-up interview, the officer shall:
  - (1) First allow the victim to describe what occurred without interruption;
  - (2) Relay what he or she heard for accuracy, identify new information or developments, and ask questions;
  - (3) Clarify any inconsistencies with earlier accounts of the sexual assault in a non-threatening manner;
  - (4) Document the victim's actions in response to the attack, the victim's state of mind during the attack, specific statements made by the perpetrator, and the nature of any relationship with the suspect and explain the importance of these questions from a prosecutorial standpoint; and
  - (5) Inquire about any circumstances that may indicate the use of a drug to facilitate the sexual assault (such as whether the victim experienced any loss of memory, disorientation, severe illness, or hallucinations); and
  - (6) Assist the victim in developing a safety plan, in the event safety concerns exist, and encourage the victim to call police if the suspect violates any

existing criminal or court orders or if the suspect contacts the victim in any way.

- f. Once a thorough follow-up investigation has been completed, the investigating officer shall:
  - (1) Evaluate impounded evidence and determine which items might have probative value based on the statements and other information;
  - (2) Submit a lab service request such as DNA, biology, trace, or toxicology based on the assessment of the evidence;
  - (3) Present the complete case file including forensic results as soon as available to the prosecuting attorney for review and work with the prosecutor's office to develop the case;
  - (4) Encourage the victim's continued support in the investigation, apprising the victim of future investigative and prosecutorial activities that will or may require involvement; and
  - (5) Familiarize the victim, prior to trial, with the types of defense strategies and inquiries that may be made during cross-examination.

### 3. When Lacking the Victim's Involvement

The law enforcement agency shall respect a victim's inability, or decision not, to be involved in criminal justice proceedings and always be willing to offer continued assistance and referrals.

### 4. Polygraph Examinations for Victims

A law enforcement officer, prosecuting officer, or other governmental official may request a sexual assault victim to take a polygraph examination as part of the investigation if the credibility of the victim is at issue. However, the victim/survivor's refusal to take a polygraph examination shall not prevent the investigation, charging or prosecution of the offense, pursuant to §16-3-750.

### F. Contacting and Interviewing the Suspect

1. The investigating officer(s) shall follow department procedures on identifying the suspect, conducting the suspect interview, and collecting evidence in a sexual assault investigation; and
2. Involvement of a victim in a pretext phone call to the suspect should take into consideration the victim's emotional and physical state. A victim advocate should be present whenever possible to offer support.

### G. Sexual Assault Forensic Examination for the Suspect

The law enforcement agency will work with other agencies and community organizations to establish protocols regarding where the forensic examination of the suspect will take place, who will pay for it, and what steps will be involved. It is

essential that the victim and suspect examinations must take place in different locations.

## 1. Protocol for Suspect Examination

- a. Immediately after the preliminary suspect interview, the investigating officer shall determine whether a forensic examination should be obtained for the suspect;
- b. A search warrant must be obtained to collect any evidence from the body of the suspect or even to collect clothing. If the suspect consents to such evidence collection procedures, documentation of voluntary consent shall be provided in the police report;
- c. The investigator shall clearly document the suspect's freedom to decline any part of the examination and to leave at any time; and
- d. First-line officers and supervisors shall be trained to collect cells from inside a suspect's cheek for DNA profiling. Cotton-tipped swabs or other buccal DNA collectors shall be readily available to investigators in the field.

## 2. Evidence Collection

- a. The forensic examiner shall document the suspect's medical history, document all injuries that are observed, and collect biological and trace evidence from the suspect's body;
- b. If in custody, the suspect shall be given a *Miranda* warning before being asked medical history questions by the forensic examiner or investigator;
- c. If the suspect invokes his right to remain silent, the examiner shall bypass the medical history portion of the examination and continue documenting any visible injury and collecting the appropriate specimens; and
- e. Both the examiner and attending officer shall be prepared to document any spontaneous statements made by the suspect regardless of whether or not the suspect is in custody and whether or not the suspect was provided with a *Miranda* warning.

## H. Role of the Supervisor

First-line supervisors shall demonstrate a detailed understanding of victim issues and proper response by subordinates. Supervisors shall:

1. Respond to assist officers investigating felony sexual assaults;
2. Exhibit sensitivity to victims and ensure that victims are dealt with properly by clarifying their expectations of line officers;
3. Assist in locating resources to effectively investigate sexual assaults;
4. Encourage problem-solving partnerships to enhance cooperation between the department and community organizations such as sexual assault services agencies and forensic examination programs using a victim-centered approach;
5. Include victim services information regularly at roll-call;
6. Develop and encourage community partnerships to reduce the risk of sexual assault;

- 7. Create opportunities for ongoing training to improve the skills needed to properly investigate sexual assault;
- 8. Work to increase interagency communication between law enforcement and prosecutors to ease the transition for victims moving from the investigation phase to prosecution;
- 9. Incorporate victim services issues into the evaluations of officers and detectives; and
- 10. Recognize and reward officers for rendering effective victim services.

**I. Blind Reporting**

In the aftermath of a sexual assault, a victim may not have the emotional or physical capacity to commit to a full investigation and a court trial. Departments should consider establishing blind reporting systems to allow victims to take the investigative process one step at a time. This will allow time for the victim to establish trust with an investigator and become comfortable with the investigative process.

**College and University Property (S.C. Code § 59-154-10(B-D))**

- A. All sexual assault reports that occurred on the property of a college or university should be investigated by campus law enforcement, local jurisdiction, and/or SLED.
- B. SLED must be notified of any sexual assaults having occurred on any college or university campus.

**Law Enforcement Victim Advocates (LEVA)**

The LEVA is a systems-based advocate based in a law enforcement agency, trained and certified to provide reasonable assistance to victims of all types of crime and help them navigate the criminal justice system. The LEVA may be either a sworn officer or a non-sworn civilian employee.

When a sexual assault has occurred, a LEVA may be called on at various stages of the investigation to provide victim services, from immediate crisis intervention to long-term follow-up. The LEVA may help coordinate team response to the victim's needs throughout the criminal justice process.

Initial Response

- A. The LEVA may respond to the **crime scene**:
  - 1. At the request of a supervisor, dispatch may alert the LEVA when a sexual assault has occurred. Alternatively, first responders or investigator may request the LEVA to respond to the crime scene. Upon arrival, the LEVA will be briefed on the case. The LEVA will assist officers to ensure the victim's immediate safety, and offer emotional as well as practical support to the victim while initial information is gathered.

2. The LEVA may contact friends or family members, at victim's request.
3. The LEVA will determine whether the victim has special needs (e.g. translator, deaf interpreter, assistance for elderly or disabled victim, etc.) and initiate locating special services as required.
4. The LEVA will attempt, as far as possible, to provide the victim privacy at the scene and during initial interview.
5. At the scene, the LEVA will remain calm and reassuring, using non-judgmental language, assuring the victim that she/he is safe now and that law enforcement is there to help.
6. The LEVA may remain with the victim during the initial interview, if the victim wishes or if requested by the officer/investigator.
7. The LEVA may remind the victim that she should not bathe or wash, and that officers will need to collect clothing or other items where evidence may be found. The LEVA should assure the victim that her possessions will be returned to her as soon as possible, and assist in retrieving them at a later date. The LEVA will also advise the victim that some of the items collected may be kept until the case is disposed in court. The LEVA will also advise that some of the items collected may not be in the same condition due to evidence and testing procedures (depending on evidence needed from clothing, it may be cut up or otherwise damaged).
8. The LEVA will explain the law enforcement process to the victim—what the officers are doing and why—and advise her that although the interview and evidence collection may be upsetting or intrusive, they are necessary. The need for evidence to establish victim's non-consent will be key.
9. The LEVA may offer preliminary Victims' Rights information at this stage; however, it is likely the victim will be traumatized and may not absorb the information yet. The LEVA will note that this information must be provided when the victim is receptive to it. If the first responding officer has not already given the victim a written Victim Rights information sheet, including law enforcement case number and contact information, the LEVA should be sure the victim receives this information.
10. If the victim has suffered major injuries, the LEVA will confirm that EMS has been called. Major injuries can be strong evidence that the victim did not consent. However, law enforcement and LEVA will be aware that lack of major injuries does not prove consent.
11. The LEVA may transport the victim to the hospital for the forensic exam.

**B. The LEVA may respond to the hospital:**

1. Dispatch, at supervisor's or investigator's request, may require the LEVA respond directly to the hospital.
2. Upon arrival, the LEVA will be briefed by the officer or investigator. This may be done either in person or by phone.
3. The LEVA will confirm that the SANE/FNE and sexual assault victim advocate have been notified.

4. The LEVA may offer preliminary Victims' Rights information at this stage; however, it is likely the victim will be traumatized and may not absorb the information yet. The LEVA will note that this information must be provided when the victim is receptive to it. If the first responding officer has not already given the victim a written Victim Rights information sheet, including law enforcement case number and contact information, the LEVA should be sure the victim receives this information.
5. The LEVA will be present to provide support and to stay with victim until the sexual assault victim advocate and forensic examiner arrive. The LEVA will remain as long as the victim wishes, or as long as the agency requests. The LEVA may also assist by providing support and information to the victim's family and friends while they wait for the exam to be completed.
6. It is the victim's decision who will remain with her during the forensic exam. The LEVA may be present during the exam, but will not participate in evidence collection. The victim has the right to accept or decline victim services and support offered to her/him.
7. If the victim needs transportation, the LEVA may provide transportation to the victim's home or a safe location (friend or family member's home, shelter or hotel).

C. The victim may **delay reporting** the assault:

1. The LEVA will contact the victim as soon as possible, in person or by telephone, with follow-up by mail. The LEVA will be sure the victim receives a copy of the incident report and Victim Rights information.
2. The LEVA will notify the sexual assault services agency of the reported assault. Pursuant to §16-3-1520.
3. The investigator may ask the LEVA to be present during interviews.
4. The LEVA may provide the options related to follow-up medical treatment or other support service referrals as necessary, and provide transportation.

In all sexual assault cases, the LEVA will:

- A. Respect the victim's rights at every stage of the criminal justice process. The victim must be offered options regarding the service she/he receives, and the opportunity to take back a measure of control.
- B. Guard carefully the victim's right to privacy and anonymity, and share information about the victim and case only on a "need to know" basis and with those cleared to have the information. The victim must be advised that the LEVA is not bound by the same degree of confidentiality as the sexual assault victim advocate, so information disclosed to the LEVA may be passed on to the investigator, as necessary.
- C. Make sure the victim receives a copy of the incident report and Victim's Rights information.
- D. Maintain contact with victim, by phone, mail or in person, throughout the criminal justice process.

- E. Act as liaison between the victim and investigator, providing appropriate case updates and information.
- F. Be aware that a sexual assault victim may display a variety of emotions, or indeed a lack of emotion, following the trauma. The LEVA will not judge the victim in any way, for her demeanor, dress and other behaviors, but will assure the victim that SHE/HE IS NOT TO BLAME. The victim will be treated with dignity, compassion, gentleness, patience and professionalism at all times.
- G. Be a sympathetic listener, allowing the victim to tell his/her story in a safe and supportive environment;
- H. Be aware of and address the victim's concerns, including fear of perpetrator, fear of family or others finding out about the crime, fear of media attention, shame or embarrassment, fear of not being believed, fear of pressures from family and friends, and fear of pregnancy or HIV.
- I. Inform the victim, as most sexual assaults are perpetrated by someone known to the victim, of options for Orders of Protection and Restraining Orders. Protection Order may be obtained through Family Court if the perpetrator is a family member, spouse or household member as defined by law. A Restraining Order may be obtained through a Magistrate's Court if the perpetrator is an acquaintance, boyfriend/girlfriend or friend. The LEVA may also address any safety measures the victim can put in place as necessary.
- J. Be aware of and address the short-term and long-term impact of sexual assault, such as
  - 1. Short-term: anxiety, shock, numbness or denial, heightened startle response, flashbacks, physical symptoms, memory problems, feelings of guilt;
  - 2. Long-term: PTSD, depression, substance abuse to self-medicate, and suicide; and
  - 3. The LEVA will refer victim to appropriate psychological and social services.
- K. Explain the Victim Compensation program to the victim, and assist in applying for compensation, as needed. The SOVA Victim Compensation program will automatically cover the cost of the hospital forensic exam. However, a separate application must be filed for assistance with psychological or other medical care, including transportation by EMS. Be sure the victim knows that this is an application process, and that the LEVA cannot guarantee that the victim will receive payment. The LEVA should also assess if the SOVA application needs to be completed during the initial contact, or if it might be necessary to wait a day or so.
- L. Explain the court process to the victim. The LEVA will make sure the victim is notified in a timely manner of any court proceedings, such as bond hearings, Order of Protection hearings and other court appearances where he/she has the right to be present. The LEVA will provide court accompaniment and advocacy. The LEVA may provide transportation to and from court as needed. The LEVA may help the victim prepare a Victim Impact Statement to be presented to the court. The LEVA will make sure that the court is aware of any special needs the victim may have, and that appropriate services will be available. The LEVA will also refer the victim to the solicitor's office victim advocate in cases being forwarded to circuit court for prosecution. The solicitor's office victim advocate will then make sure the victim is notified of all hearings and court appearances. The LEVA will make sure the victim's contact information provided to the Solicitor's Office is correct. The

LEVA may continue to work closely with the solicitor's office victim advocate and the victim.

- M. Properly document each case in designated victim files of the law enforcement agency (e.g. Victim Contact Form and victim database).
- N. Contact the victim on a regular basis to check on his/her well-being and ensure that she/he has access to any follow-up services, and make appropriate referrals. The LEVA will make sure the victim's contact information is up-to-date, and that other agencies are made aware of any changes. The LEVA will act as liaison with community advocacy and systems agencies (courts, corrections) on behalf of the victim, as necessary.

If the victim of sexual assault is a juvenile:

- A. The LEVA may be notified by dispatch, the reporting officer or investigator, and may be requested to respond to the scene or the hospital.
- B. The LEVA will be briefed and assist officers in providing crisis intervention and emotional support to the child and to the parent/guardian. The LEVA will stay with the juvenile victim until a responsible party has arrived (parent/guardian, social services, mental health personnel).
- C. The LEVA may become aware of the assault through the Incident Report and will make contact with the investigator for initial briefing on the case.
- D. The LEVA will make contact with the parent/guardian of the victim to offer support and provide case information, as appropriate.
- E. The LEVA will be sure the parent/guardian receives Victims' Rights information, case number, and department and victim services contact information.
- F. Following initial contact, the LEVA will confer with the investigator assigned to the case to determine how the case will proceed, and what additional resources are required. The victim may be referred to a Child Advocacy Center for forensic interview and/or medical exam. If so, the LEVA will make contact with the victim's parent/guardian, and explain the process. The LEVA may provide transportation to the Child Advocacy Center, and/or accompany the victim and family members and investigator to the appointment.
- G. The LEVA will be familiar with the dynamics of child sexual abuse and the effects of sexual trauma on a minor, and proceed with sensitivity and discretion in dealing with the victim and family (for example, if the perpetrator is a family member or friend of the minor victim, the victim and his/her family may have conflicted feelings toward the perpetrator).
- H. The LEVA will make sure the victim's parent/guardian completes a SOVA application, and assist them with the application.
- I. The LEVA will make further referrals on behalf of the victim and parent/guardian as needed, to social service providers, counselors, and medical services.

**Anonymous Reporting (Pursuant to South Carolina Act 59, see Appendix A)**

- A. Anonymous reporting allows evidence to be collected while allowing time for a traumatized victim to decide to move forward with the investigation.
- B. When notified by a medical facility or SANE or FNE that there is an anonymous sexual assault kit ready to be picked up, the officer or investigator should:
  - 1. Respond to the respective hospital/medical facility and speak directly with the SANE/FNE.
  - 2. Do NOT attempt to view or speak to the victim who has indicated a desire to remain anonymous.
  - 3. Obtain the anonymous patient's Patient ID number.
  - 4. Generate an Anonymous Report (i.e. Information Report, CSC Anonymous Report) with a case number, hospital name and the SANE's/FNE's full name, if applicable.
  - 5. Provide the SANE/FNE with the case number from your agency.
  - 6. Log evidence kit into Property/Evidence room. The kit should not be opened or submitted for forensic analysis.
- C. The anonymous reporting victim can request for the case to be investigated within the year after the evidence is collected. If no request is made by the victim, then the evidence collected will be destroyed.

Critical Note: If the victim reports that the individual perpetrating the sexual assault is the victim's legal spouse, the victim has only thirty (30) days to report to law enforcement under South Carolina law (S.C. Code § 16-3-658).

*For a list of references utilized in the law enforcement protocol, please see Appendix B.*

## Prosecutor Recommended Protocol

### Sexual Assault in South Carolina

*Sexual assault is often defined as any "non-consensual sexual contact."*

#### Key Definitions

**Sexual battery (§ 16-3-651(h)):** Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body.

Exception: When such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

**Aggravated force (§ 16-3-651(c)):** The actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.

**Aggravated coercion (§ 16-3-651(b)):** The actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.

**Mentally defective (§ 16-3-651(e)):** A person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct.

**Mentally incapacitated (§ 16-3-651(f)):** A person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause.

**Physically helpless (§16-3-651(g)):** A person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.

#### Criminal Sexual Conduct

There is no such thing as "sexual assault" or "rape" in South Carolina law. Instead, conduct is broken down by varying degrees of criminal sexual conduct. According to SC law, all of the following are criminalized as criminal sexual conduct ("CSC"):

##### CSC 1<sup>st</sup> (§ 16-3-652):

Sexual Battery with the Victim AND:

(a) Aggravated force is used to accomplish the sexual battery; OR

(b) The victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act; OR

(c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

Penalty: CSC 1<sup>st</sup> is a felony and carries 0-30 years

**CSC 2<sup>nd</sup> (§16-3-653):**

Sexual Battery with the victim and aggravated coercion is used to accomplish the sexual battery.

Penalty: CSC 2<sup>nd</sup> is a felony and carries 0-20 years

**CSC 3<sup>rd</sup> (§16-3-654):**

Sexual Battery with the Victim AND:

(a) Force or coercion is used to accomplish the sexual battery w/o aggravating circumstances OR

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

Penalty: CSC 3<sup>rd</sup> is a felony and carries 0-10 years

**Assault With Intent to Commit CSC (§16-3-656):**

Assaults with intent to commit criminal sexual conduct are punishable as if the criminal sexual conduct was committed.

## Sexual Assault and Marriage in South Carolina

### CSC Where the Victim is a Spouse (§16-3-658):

The couple must be living apart and the offender's conduct must either be CSC 1<sup>st</sup> degree (See above) or CSC 2<sup>nd</sup> degree (See above).

Reporting Requirement: The offending spouse's conduct must be reported to appropriate law enforcement authorities within **30 days** in order for a person to be prosecuted for these offenses.

Exception: This statute does not apply to a marriage entered into by a male under 16 and a female under 14.

Penalty: CSC 1<sup>st</sup> where the victim is a spouse is a felony and carries 0-30 years; CSC 2<sup>nd</sup> where the victim is a spouse is a felony and carries 0-20 years.

### Spousal Sexual Battery (§16-3-615):

If the couple is living together the crime of spousal sexual battery is committed when a sexual battery is accomplished through use of aggravated force (see above) by one spouse against the other spouse.

Reporting Requirement: The offending spouse's conduct must be reported to appropriate law enforcement authorities within **30 days** in order for that spouse to be prosecuted for this offense.

Exception: This statute does not apply to a marriage entered into by a male under 16 and a female under 14.

Penalty: Spousal Sexual Battery is a felony and carries 0-10 years.

## Sexual Assault and Children in South Carolina

*If a minor is involved the conduct may be classified in two ways:*

### **CSC with a Minor 1<sup>st</sup> Degree (§16-3-655(A)):**

- (1) Sexual battery with a victim who is younger than 11 OR
- (2) Sexual battery with a victim who is younger than 16 AND the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in South Carolina Code §23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to §23-3-430(D).

Penalty: §16-3-655(A)(1) is a felony and carries a mandatory minimum of 25 years (no part of which may be suspended or probation granted) to life.

If the defendant is convicted or adjudicated guilty of subsection (A)(1) and the conduct making up the sexual battery was sexual or anal intercourse by a person or intrusion by an object AND the defendant has a prior offense for first-degree CSC with a minor who is less than 11 years of age or has an out-of-state equivalent conviction, the State may seek the death penalty, or the defendant may be imprisoned for life, depending upon the prior type of sexual battery (please refer to §16-3-655(c)(1)).

§16-3-655(A)(2) is a felony and carries 10-30 years (no part of which may be suspended or probation granted).

### **CSC with a Minor 2<sup>nd</sup> Degree (§16-3-655(B)):**

- (1) Sexual battery with a victim who is 14 or younger, but is at least 11 OR
- (2) Sexual battery with a victim who is at least 14 but is less than 16 AND the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

Exception: A person may not be convicted of §16-3-655(b)(2) if he is 18 or younger when he engages in consensual sexual conduct with another person who is at least 14.

Penalty: A person convicted of this section is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years according to the discretion of the court.

**CSC with a Minor 3<sup>rd</sup> Degree (§16-3-655(C)):**

Actor is over 14 and he/she willfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under 16 with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child.

Exception: If the person is 18 or less and engages in a consensual lewd or lascivious act with another person who is at least 14.

Penalty: A person convicted of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than fifteen years, or both.

## Other Sexual Assault Laws in South Carolina

### Jessie's Law – Hearsay Exception (§17-23-175):

#### *Admission of child's recorded investigative interview (forensic interview)*

State v. Russell, 679 S.E.2d 542 (Ct. App. 2009) (Affirmed)

The court upheld the admission of the child victim's videotaped interview pursuant to the child hearsay exception enacted on July 1, 2006 as a component of "Jessie's Law," also known as the "Sex Offender Accountability and Protection of Minors Act of 2006"). The child hearsay exception requires that the child testify at the proceeding and be available for cross-examination in compliance with the Confrontation Clause of the U.S. Constitution.

In *Russell*, the appellant argued that the admission of the videotaped investigative interview amounted to "improper bolstering." The Court of Appeals determined that "the legislature has made a specific allowance for these out-of-court statements by child victims provided certain elements are met." In addition, the court ruled that the child's videotaped interview was "highly probative to the question of Russell's guilt or innocence," and that "any prejudicial effect was outweighed by its probative value."

State v. Bryant, 675 S.E.2d 816 (Ct. App. 2009) (Affirmed)

The court upheld the application of S.C. Code Section 17-23-175 (the child hearsay component of "Jessie's Law). Specifically, this case examined whether the application of the statute violated the *ex post facto* clauses of the state and federal constitutions. In *Bryant*, the defendant's charges were already pending when the "Jessie's Law" child hearsay exception was enacted on July 1, 2006.

The court determined that the child hearsay exception was procedural in nature and did not *ex post facto* clause to be implicated, the statute at issue must be criminal or penal in purpose and nature." Thus, Section 17-23-175 was found to be applicable regardless of the date of the defendant's arrest or indictment.

### Males under 14 (§16-3-659):

The common law rule that a boy under 14 years is conclusively presumed to be incapable of committing the crime of rape **shall not** be enforced in this State. However, ANYONE under the age of 14 shall be tried as a juvenile for any violations of §16-3-651 to 16-3-659.1.

**Admissibility of evidence concerning victim's sexual conduct (§16-3-659.1):**

This section covers what we commonly call "rape shield" statutes:

- (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is **not admissible** in prosecutions under §16-3-615 and 16-3-652 to 16-3-656.

Exception: Evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under the rules of evidence to impeach the credibility of the witness may not be excluded.

- (2) If the defendant offers evidence described in subsection (1): the defendant, prior to presenting his defense, shall file a written motion and offer of proof. The court shall order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).

Note: If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).

**Publishing a Victim's Name (§16-3-730):**

It is unlawful to publish or "cause to be published" the name of any person who is a victim of criminal sexual conduct in this state in any newspaper, magazine or other publication.

Exception: Does not apply to publications made by order of court.

Penalty: Upon conviction, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years.

**Polygraphs (§16-3-750):**

Polygraphs may be requested as a part of the investigation, charging or prosecution of the offense if the credibility of the victim is at issue; however a polygraph may not be required as a condition for proceeding with the investigation, charging or prosecution of the offense.

**Statutes of Limitation:**

There are **NO** statutes of limitation for reporting sexual assaults in SC, with the exception of the reporting requirements listed above (Spousal Sexual Battery and CSC where the victim is a spouse).

**Other Possible Charging Statutes:**

Sometimes conduct by an offender may not fit neatly into one of the CSC charges, or may be impossible under the law. If that is the case, the following may be considered as possible charges:

Indecent Exposure (§16-15-130)

Contributing to the Delinquency of a Minor (§16-17-490).

**Sexually Transmitted Disease Testing**

*Our law has provisions for testing on behalf of victims of sexual assault.*

**Key Definitions**

**Body Fluid (§16-3-740(A)(1)):** Blood, amniotic fluid, pericardial fluid, pleural fluid, synovial fluid, cerebrospinal fluid, semen or vaginal secretions, or any body fluid visibly contaminated with blood.

**HIV (§16-3-740(A)(2)):** Human Immunodeficiency Virus.

**Offender (§16-3-740(A)(3)):** Includes adults and juveniles.

**Testing Procedures (§16-3-740(B-1)):**

If a victim has been exposed to body fluids during the commission of a criminal offense, or upon the request of the legal guardian of a victim who has been exposed to body fluids during the commission of a criminal offense, the solicitor must, within **forty-eight hours**, excluding weekends and legal holidays as defined in Chapter 5, Title 53, after the offender is charged, or within forty-eight hours, excluding weekends and legal holidays, as defined in Chapter 5, Title 53, after a petition has been filed against an offender in family court, **petition the court** to have the offender tested for Hepatitis B and HIV.

An offender must not be tested for Hepatitis B and HIV without a court order.

**To obtain a court order, the solicitor must demonstrate the following:**

- (1) the victim or the victim's legal guardian requested the tests;
- (2) there is probable cause that the offender committed the offense;
- (3) there is probable cause that during the commission of the offense there was a risk that body fluids were transmitted from one person to another; and
- (4) the offender has received notice of the petition and notice of his right to have counsel represent him at a hearing.

The results of the tests: must be kept confidential and disclosed only to the solicitor who obtained the court order. The solicitor shall then notify only those persons designated.

The tests must be administered by the Department of Health and Environmental Control, through the local county health department or the medical professional at the state or local detention facility where the offender is imprisoned or detained.

The solicitor shall notify the following persons of the tests results:

- (1) The victim or the legal guardian of a victim who is a minor or is mentally retarded or mentally incapacitated;
- (2) The victim's attorney;
- (3) The offender and a juvenile offender's parent or guardian; and
- (4) The offender's attorney.

The results must have a disclaimer that reads: "The tests were conducted in a medically approved manner, but tests cannot determine infection by Hepatitis B or HIV with absolute accuracy. Additionally, the testing does not determine exposure to, or infection by, other sexually transmitted diseases. Persons receiving the test results should continue to monitor their own health, seek retesting in approximately six months, and should consult a physician as appropriate."

The solicitor also shall provide the test results to the state or local correctional facility where the offender is imprisoned or detained (only for the purpose of providing medical treatment).

The State shall pay for the tests. If the offender is subsequently convicted or adjudicated delinquent, the offender or the parents of an adjudicated offender must reimburse the State for the costs of the tests unless the offender or the parents of the adjudicated offender are determined to be indigent.

If the tests given pursuant to this section indicate infection by Hepatitis B or HIV, the Department of Health and Environmental Control shall be provided with all test results and must provide counseling to the offender and the victim. DHEC must also advise the victim of available treatment, refer the victim to health care and treat the victim, if requested.

At the request of the victim or the victim's legal guardian, the court may order a follow-up HIV test and counseling for the offender if the initial HIV test was negative. The follow-up test and counseling must be six weeks, three months, and six months following the initial test. If an offender is acquitted or charges are dismissed then an order for a follow-up test should be terminated.

If, for any reason, the testing described above has not been undertaken, upon request of the victim or the victim's legal guardian, the court shall order the offender to undergo testing for Hepatitis B and HIV following conviction or delinquency adjudication. DHEC administers the test as outlined above.

If there is probable cause, the collection of additional samples may also be ordered by the court so that the State may conduct scientific testing, including DNA analysis. The results of the scientific testing, including DNA analysis, may be used for evidentiary purposes. Other test results cannot be used as evidence.

Civil and criminal liability immunity is also created for any person or entity who administers tests ordered pursuant to this section and who does so in accordance with this section. Immunity is also created for the disclosure of information in accordance with this section, or in good-faith without malice.

## Sexual Assault and Students in South Carolina

*Sexual assault against a student is referred to as "sexual battery with a student."*

### Key Definitions

**Aggravated coercion (§16-3-755(A)(1)):** The person affiliated with a public or private secondary school in an official capacity threatens to use force or violence of a high and aggravated nature to overcome the student, if the student reasonably believes that the person has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping, or extortion, under circumstances of aggravation, against the student.

**Aggravated force (§16-3-755(A)(2)):** The person affiliated with a public or private secondary school in an official capacity uses physical force or physical violence of a high and aggravated nature to overcome the student or includes the threat of the use of a deadly weapon.

**Person affiliated with a public or private secondary school in an official capacity (§16-3-755(A)(3)):** An administrator, teacher, substitute teacher, teacher's assistant, student teacher, law enforcement officer, school bus driver, guidance counselor, or coach who is affiliated with a public or private secondary school but is not a student enrolled in the school.

**Secondary school (§16-3-755(A)(4)):** Either a junior high school or a high school.

**Sexual battery (§16-3-755(A)(5)):** Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

**Student (§16-3-755(A)(6)):** A person who is enrolled in a school.

### Sexual Battery with a Student (§16-3-755(B-E)):

A person affiliated with a public or private secondary school in an official capacity engages in sexual battery with a student enrolled in the school who is 16 or 17 years of age, and aggravated coercion or aggravated force is not used.

Penalty: This type of sexual battery with a student is a felony that carries up to 5 years.

A person affiliated with a public or private secondary school in an official capacity engages in sexual battery with a student enrolled in the school who is 18 years of age or older and aggravated coercion or aggravated force is not used to accomplish the sexual battery.

Penalty: This type of sexual battery is a misdemeanor that carries not more than \$500 or 30 days, or both.

A person affiliated with a public or private secondary school in an official capacity with direct supervisory authority over a student enrolled in the school who is 18 years of age or older, and the person affiliated with the public or private secondary school in an official capacity engages in sexual battery with the student without the use of aggravated coercion or aggravated force.

Penalty: This type of sexual battery is a felony and carries up to 5 years.

Exception: This statute does not apply if the offender is lawfully married to the student at the time of the act.

\*Students under the age of 16 are protected under the "CSC with a Minor" laws.

## Predicate Questions

### Qualifying a Medical Doctor as a Witness

#### Identifying the Witness

1. Please state your name and address.
2. What is your occupation/profession?
3. Are you licensed in this state?
4. How long have you held a license in \_\_\_\_\_ (name the state)?
5. What medical college did you attend?
6. Where did you intern?
7. Since that time, where have you practiced?
8. Is the nature of your practice general or specialized?

#### Identifying the Physical Facts

1. On or about \_\_\_\_\_, did you have occasion to see \_\_\_\_\_ professionally?
2. Where did you see \_\_\_\_\_?
3. Describe his condition at the time.
4. What, if anything, did you do on that occasion?
5. Have you been the attending physician since that date?
6. Describe the nature of the examinations which you made on \_\_\_\_\_ and from time to time since then.
7. Did you see him daily (several times a day at first) when he was at the hospital?
8. Did you continue to see him?
9. How often did you continue to see him?
10. What, generally, did your treatment consist of?
11. How many operations?
12. Did you see him from time to time, during those periods, as his attending physician?
13. From your examination and treatment of \_\_\_\_\_, did you determine what organs of his body were injured?

*\*Continue questioning for the purpose of your case*

### Identifying and Introducing Hospital Records as Evidence

#### Identifying the Witness

1. Please state your name and address.
2. What is your occupation/profession?
3. Who is your employer?
4. What is the position you hold?

#### Identifying the Physical Facts

1. Did you receive a subpoena for certain hospital records?

2. Did you bring the records?
3. Can you identify these hospital records?
4. What was the mode of preparation of these hospital records?
5. Were the hospital records maintained under your care, custody and control?
6. Were the hospital records made in the regular course of business?
7. Were the hospital records made at the time the act, condition or event occurred or transpired?
8. Are these hospital records regularly kept or maintained?

\*Your Honor, the State requests these records be marked for the purposes of identification as State's Exhibit \_\_\_\_ and asks that they be admitted as evidence.

### **Qualifying a DNA Expert as a Witness**

#### Identifying the Witness / RFLP Typing

1. What is your name and address?
2. What is your occupation/profession?
3. Who is your employer?
4. How long have you been employed by \_\_\_\_\_ (name of agency/company)?
5. What services does \_\_\_\_\_ provide?
6. What are your duties and responsibilities?
7. Would you describe your educational background?
8. What schools have you attended?
9. What degree(s) have you received?
10. Did your formal education include the study of DNA?
11. Did that education include hands-on work with DNA testing techniques?
12. Have you performed research in the area of DNA or DNA testing?
13. Prior to your employment at \_\_\_\_\_, please describe any other positions you have held.
14. Did you perform DNA typing in those previous positions?
15. What role do professional societies and organizations play in the science of DNA?
16. What societies or organizations do you belong to?
17. Do you attend their meetings?
18. Are you asked to deliver or present your own research at those meetings?
19. Have you written any papers or articles?
20. Have they been published in the scientific literature?
21. Are papers and articles important in science?
22. Why are papers and articles important?
23. What is "peer review"?
24. What role does peer review play in science?
25. Have your papers or articles been peer reviewed before they were published?
26. Are you asked to peer review the scientific publications of others?
27. Do you regularly read the scientific literature in the area of DNA? Why?
28. What journals or other scientific publications do you regularly read?
29. Have you testified before today as an expert in DNA testing?

30. Approximately how many times?
31. In what courts and states?
32. What is DNA?
33. When was it discovered?
34. Why is DNA important?
35. Where is DNA found in humans?
36. Is the DNA in all people the same?
37. What about in identical twins?
38. Are there methods to type DNA from different people?
39. When were they developed?
40. What do they do?
41. How are they different from one another?
42. Have you used them before?
43. How are they different from methods that have been used before DNA was discovered?
44. What is the RFLP method of DNA typing?
45. Is the RFLP form of DNA typing used in fields other than criminal cases?
46. What are those fields?
47. Do these uses include to:
  - a. Diagnose diseases?
  - b. Transplant organs and tissue?
  - c. Save lives?
  - d. Save endangered animals?
  - e. Identify the remains of American war dead?
48. Is the RFLP method used around the world?
49. Very briefly, how does the RFLP method work?
50. Are controls used in the testing process?
51. What is a control?
52. Why are they important?
53. What if the controls do not work properly?
54. How do you read the results of an RFLP test?
55. Is it an x-ray just like in the doctor's office?
56. Can anyone see the results?
57. Does that include the judge, the lawyers and the jury?
58. What types of results can you get from an RFLP test?
59. What is "no result"?
60. What is an "inconclusive" result?
61. What is an "exclusion"?
62. What is a "match"?
63. Can anything make DNA in a sample change from one type to another?
64. Can DNA in a sample get old or die?
65. Is there anything about the testing process that can change the DNA types in a sample?
66. Do you and your laboratory undergo proficiency testing?
67. What is proficiency testing?
68. How often are you tested?
69. What are the results of your proficiency testing?
70. What licenses does your laboratory hold?

71. What certification or accreditation does your laboratory hold?
72. Does your laboratory follow the guidelines of any organizations?
73. What is "T.W.G.D.A.M."?
74. Does your laboratory perform DNA typing for both prosecutors and defendants?
75. Are charges ever dismissed against defendants as a result of your DNA test results?
76. Are inmates ever freed from prison as a result of your DNA test results?
77. What is quality assurance?
78. Are quality assurance programs in effect at your laboratory?
79. Please describe those programs.
80. When your laboratory receives cases for DNA testing, what steps are taken to ensure the integrity of the evidence?
81. What is "chain of custody"?
82. How do you make sure that a proper chain of custody is maintained?
83. What are protocols?
84. Does your laboratory have written protocols?
85. What do those protocols require?
86. Do those protocols cover every step from receipt of evidence to the writing of reports?
87. Have those protocols been approved by any agency or organization?
88. What are population frequencies?
89. Why are they important in DNA typing?
90. What is your education and training in population frequencies?
91. Please describe your experience in the use of frequencies.
92. Have you used them in DNA cases before?
93. Have you testified before as an expert in the use of population frequencies in court?
94. Have population frequencies been used even before DNA typing?
95. How are these estimates calculated?
96. Do you take any steps to ensure that your estimates are accurate?
97. What do you mean when you say "conservative" steps are taken in the calculation of frequency estimates?
98. Why do you calculate estimates for major races?

#### Identifying the Physical Facts

1. Did you receive evidence in the case of \_\_\_\_\_ vs. \_\_\_\_\_?
2. When did you receive that evidence?
3. What was included in that evidence?
4. What was done with that evidence when it was received?
5. Was each entire sample used up in the testing process?
6. Why not?
7. What is a "future test sample"?
8. Why do you save a portion of the evidence?
9. Which samples were tested by you in this case?
10. Were results obtained?
11. Who decides what the results are?
12. Must both of you agree?
13. Did you both agree on all the results in this case?

14. Do you have with you the x-rays from the testing in this case?
15. Can you show them to the judge and jury?
  - a. Your Honor, the State asks that these \_\_\_\_\_ be marked for the purpose of identification as State's Exhibit \_\_\_\_\_ and offer them for admission as evidence.
16. Did all the controls show the tests were performed properly or not?
17. What were the results in this case?
18. Did you calculate estimates for the rarity of the matches you found?
19. What are those estimates?
20. What do those estimates mean?
21. What did you do with the evidence after your testing was completed?
22. Did you provide all of your reports and notes to the defense in this case?

#### Identifying the Witnesses / PCR Typing

1. Please state your name and address.
2. What is your occupation/profession?
3. Who is your employer?
4. How long have you been employed by \_\_\_\_\_ (name of agency/organization)?
5. What services does \_\_\_\_\_ provide?
6. What are your duties and responsibilities?
7. Would you describe your educational background?
8. What schools have you attended?
9. What degree(s) have you received?
10. Did your formal education include the study of DNA?
11. Did that education include hands-on work with DNA testing techniques?
12. Have you performed research in the area of DNA or DNA testing?
13. Prior to your employment at \_\_\_\_\_, please describe any other positions you have held.
14. Did you perform DNA typing in those previous positions?
15. What role do professional societies and organizations play in the science of DNA?
16. What societies and organizations do you belong to?
17. Do you attend their meetings?
18. Are you asked to deliver or present your research at those meetings?
19. Have you written any papers or articles?
20. Have they been published in the scientific literature?
21. Are papers and articles important in science?
22. Why?
23. What is "peer review"?
24. What role does peer review play in science?
25. Have your papers or articles been peer reviewed before they were published?
26. Are you asked to peer review the scientific publications of others?
27. Do you regularly read the scientific literature in the area of DNA? Why?
28. What journals or other scientific publications do you regularly read?
29. Have you testified before today as an expert in DNA testing?
30. Approximately how many times?
31. In what courts and states?

32. What is DNA?
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35. Where is DNA found in humans?
36. Is the DNA in all people the same?
37. What about in identical twins?
38. Are there methods to type DNA from different people?
39. When were they developed?
40. What do they do?
41. How are they different from one another?
42. Have you used them before?
43. How are they different from methods that have been used before DNA was discovered?
44. What is the PCR method or DNA typing?
45. Is the PCR form of DNA typing used in fields other than criminal cases?
46. What are those fields?
47. Do these uses include to:
  - a. Diagnose diseases?
  - b. Transplant organs and tissue?
  - c. Save lives?
  - d. Save endangered animals?
  - e. Identify the remains of American war dead?
48. Is the PCR method used around the world?
49. Very briefly, how does the PCR method work?
50. Are controls used in the testing process?
51. What is a control?
52. Why are they important?
53. What if the controls do not work properly?
54. How do you read the results of a PCR test?
55. What types of results can you get from a PCR test?
56. What is "no result"?
57. What is an "inconclusive" result?
58. What is an "exclusion"?
59. What is a "match"?
60. Can anything make DNA in a sample change from one type to another?
61. Can DNA in a sample get old or die?
62. Is there anything about the testing process that can change the DNA type in a sample?
63. What is a "contamination"?
64. What steps do you take to deal with the possibility of contamination?
65. What roles do controls play in determining whether any contamination has occurred?
66. Are there additional controls which are used specifically for PCR testing?
67. Do you and your laboratory undergo proficiency testing?
68. What is proficiency testing?
69. How often are you tested?
70. What are the results of your proficiency testing?
71. What licenses does your laboratory hold?
72. What certificates or accreditation does your laboratory hold?

73. Does your laboratory follow the guidelines of any organizations?
74. What is "T.W.G.D.A.M."?
75. Does your laboratory perform DNA typing for both prosecutors and defendants?
76. Are charges ever dismissed against defendants as a result of your DNA test results?
77. Are inmates ever freed from prison as a result of your DNA test results?
78. What is quality assurance?
79. Are quality assurance programs in effect in your laboratory?
80. Please describe those programs.
81. When your laboratory receives cases for DNA testing, what steps are taken to ensure the integrity of the evidence?
82. What is "chain of custody"?
83. How do you make sure that a proper chain of custody is maintained?
84. What are protocols?
85. Does your laboratory have written protocols?
86. What do those protocols require?
87. Do those protocols cover every step from receipt of evidence to the writing of reports?
88. Have those protocols been approved by any agency or organization?
89. What are population frequencies?
90. Why are they important in DNA typing?
91. What is your education and training in population frequencies?
92. Please describe your experience in the use of frequencies.
93. Have you used them in DNA cases before?
94. Have you testified before as an expert in the use of population frequencies in court?
95. Have population frequencies been used even before DNA typing?
96. How are these estimates calculated?
97. Do you take any steps to ensure that your estimates are accurate?
98. What do you mean when you say "conservative" steps are taken in the calculation of frequency estimates?
99. Why do you calculate estimates for major races?

#### Identifying the Physical Facts

1. Did you receive evidence in the case of \_\_\_\_\_ vs. \_\_\_\_\_?
2. When did you receive that evidence?
3. What was included in the evidence?
4. What was done with that evidence when it was received?
5. Was each entire sample used up in the testing process?
6. Why not?
7. What is a "future test sample"?
8. Why do you save a portion of the evidence?
9. What samples were tested by you in this case?
10. Were results obtained?
11. Who decides what the results are?
12. Must both of you agree?
13. Did you both agree in all the results in this case?
14. Did all the controls show the tests were performed properly or not?
15. What were the results in this case?

16. Did you calculate estimates for the rarity of the matches you found?
17. What are those estimates?
18. What do those estimates mean?
19. What did you do with the evidence after your testing was completed?
20. Did you provide all of your reports and notes to the defense in this case?

## More Predicate Questions

*The following pages (64-66) were reproduced with permission from the South Carolina Commission on Prosecution Coordination and L. Suzanne Mayes, Esquire. They were updated by the SC Attorney General's Office to reflect changes in the law.*

### Forensic Interviewer

A forensic interviewer should NEVER be qualified as an expert in forensic interviewing.

1. Educational Background and training
2. Employment Background
  - a. Where are you employed?
  - b. What services do you provide?
3. Courses, seminars, and other training in field of forensic interviews
4. What is a "forensic interview"?
5. How are forensic interviews conducted to assess possible child abuse?
6. What protocol do you use?
7. Are the child's parents or guardians present for the interview? Why or Why not?
8. Where is the interview conducted? Who may be allowed to observe the interview? In what manner?
9. Is the child's family and/or social history obtained?
10. Do you obtain a medical history?
11. What type of questioning format I used in the forensic interview? (i.e., non-leading, non-suggestive questions) Why are these safeguards used?
12. When assessing child physical or sexual abuse, how do you determine the child's knowledge of his or her anatomy?

### Case-Specific Questions

*Always make sure you have discussed these questions in advance with the forensic interviewer.*

1. On what date did you conduct a forensic interview with \_\_\_\_\_ (victim)?
2. What person or agency referred the child for the forensic interview?
3. What, if anything, did \_\_\_\_\_ (victim) relate to you concerning the place or places that sexual assault(s) occurred?
4. What, if any, recommendation did you make following \_\_\_\_\_'s (victim) disclosure of abuse?

### Counselor, Psychologist, or Other Behavioral Evidence Expert

#### Qualification of the Expert

*Request and review the expert's resume in advance.*

1. Background and training

2. Type of professional licensing or practice
  - a. Where are you employed?
  - b. What specific types of services do you provide?
3. Courses, seminars, and other training in child abuse, sexual assault, or incest
4. Training or teaching experience
5. Professional organizations, affiliations, publications, speaking engagements
6. Amount of experience counseling victims of sexual assault/child victims/or adult survivors of sexual child abuse
7. Number of years in practice; estimated number of patients
8. Previous court testimony and qualification as an expert witness

*Offer as an expert in the field of "child sexual abuse counseling & treatment" or "child sexual abuse trauma recovery." Remember State v. Schumpert, 435 S.E.2d 859 (S. Ct. 1993): "Defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility."*

*Remember State v. Chavis (2015): Requires that the forensic interviewer's work has been peer reviewed on multiple occasions. Also a forensic interviewer cannot testify to their recommendations in the case as this is improper bolstering.*

#### Delayed Reporting and Related Issues

*Caveat – State v. Dawkins, Opinion No. 25340 (S.Ct. Filed August 13, 2001) held that identity of the perpetrator is inadmissible hearsay. Corroborating witnesses are limited to "time and place" of assault as reported to them by the victim. Therefore, it is best to have the expert avoid calling the perpetrator by name or other identifying labels such as "Grandpa." However, the expert should be allowed to generally discuss the dynamics of sexual abuse which occur when the perpetrator is a family member or authority figure.*

1. Among child abuse professionals, what is meant by the terms "delayed disclosure" or "delayed reporting"?
2. In your experience, how common is delayed reporting among victims of child sexual abuse?
3. What factors commonly play a role in delayed disclosure?
4. Can you explain the family dynamics that may affect a child's delay in reporting physical or sexual abuse?
  - a. When the perpetrator is within the family or present at home
  - b. When the perpetrator has a strong influence on the child or the family
  - c. When the perpetrator is abusive, domineering, controlling
  - d. When the non-offending parent is passive
  - e. When the perpetrator is an authority figure or loved by child
  - f. The child wishes to protect others, such as the mother, siblings, or anyone she perceives as being harmed by the revelation
  - g. When the child has strong desire to keep the family intact
  - h. When the perpetrator has threatened the child or a family member
  - i. Child's own natural feelings of guilt, shame, fear, and not being believed

5. How may a child's disclosure be affected if the perpetrator is a family member (or lives in the home)? Are you more or less likely to see delayed reporting in these types of situations?
6. Based upon your professional experience, can you give us some examples of the different time spans you have seen involving the issue of delayed disclosure (e.g., cases spanning months, years, or into adulthood before disclosure, and cases with adult incest survivors where multi-generational sexual abuse may have occurred without any previous disclosure)?
7. What is meant by the term "piecemeal" or partial disclosure? Why may this occur?
8. Do you necessarily expect a complete disclosure when interviewing children? Why or Why not?
9. Do children necessarily recall the chronological order of events in cases of chronic (ongoing) sexual abuse? Why or Why not?

#### Case-Specific Delayed Disclosure

1. In your expert opinion, did any of the factors you have previously discussed play a role in \_\_\_\_\_'s (victim) delayed reporting?
2. Based upon your training and experience, was \_\_\_\_\_'s (victim) delayed response reporting consistent or inconsistent with her history of sexual abuse?
3. *Optional*—What experiences, if any, have you had with *adult victims* who later disclose a history of childhood sexual abuse?
4. Hypothetically, if the perpetrator is a family member (authority figure, etc.), would delayed disclosure be consistent or inconsistent with sexual abuse?
5. What, if any, effect may physical or emotional abuse by the perpetrator have in delayed reporting?
6. What factors may ultimately encourage a child to reveal sexual abuse (e.g., a trusted relationship, change in environment, sense of security, age development, or other factors such as child revealing because of fear that sibling will also be abused, or fear that the abuse will escalate)?
7. What type of support system should be in place to allow a child to disclose sexual abuse?

#### Trauma Symptoms

*Caveat—the proper language for the expert to use is "consistent with," instead of giving an outright conclusion regarding sexual abuse or post-traumatic stress disorder. See State v. Morgan, 485 S.E.2d 112 (1997).*

1. When was \_\_\_\_\_ (victim) first referred to you for counseling?
2. For what purpose have you treated the victim?
3. What are \_\_\_\_\_'s (victim) treatment goals?
4. How has he/she progressed?
5. Why may symptoms of trauma follow sexual abuse or sexual assault?
6. What, in general, are recognized symptoms of trauma following an act of sexual abuse or sexual assault?

7. What, if any, trauma symptoms did \_\_\_\_\_ (victim) exhibit? (Expert may rely on child's given history as underlying basis of opinion. Rule 703, SCRE.)
8. How does counseling help to address these symptoms?
9. In your expert opinion, are \_\_\_\_\_'s (victim) symptoms of trauma consistent or inconsistent with his/her history of sexual abuse?

#### Other Related Issues

*These sample questions may be helpful in cases of ongoing, chronic sexual abuse where the victim has seemingly become passive to the abuse or cooperative with the perpetrator. This type of behavioral response is often termed "Child Sex Abuse Accommodation Syndrome."*

1. In your expert opinion, can you tell us why some children may cooperate with an abuser?
2. Can you tell us what factors may play a role in a child's cooperation or acceptance of abuse (e.g., a desire to maintain other family relationships, love for the perpetrator, fear or intimidation)?
3. Based upon your professional experience, can you tell us whether this is a common or uncommon reaction to child sexual abuse?
4. In your expert opinion, can you tell us whether this reaction is consistent or inconsistent with \_\_\_\_\_'s (victim) history of child sexual abuse?

## General Duties of a Prosecutor

- 1) Meet with law enforcement
  - a. Review all reports and collected evidence and obtain any evidence not already in file (911 tape, photographs, medical reports, etc.).
  - b. Make recommendations for further investigation (witness statements, crime scene diagrams, etc.).
  - c. Discuss possible charges, if any.
  - d. If there are already charges, confer with the victim. Victims have a right to confer with the prosecution after charging, before trial or before any disposition and to be informed of the disposition, according to the South Carolina Constitution (Article 1, Section 24).
- 2) Meet with the victim
  - a. Establish a working relationship and rapport with the victim.
  - b. Review the victim's bill of rights with the victim and adhere to all mandatory constitutional and statutory requirements for the prosecuting agency.
  - c. Determine if any lethality risk exists and if so, refer victim to LEVA and/or other community advocates for assistance in obtaining orders of protection, restraining orders, etc.
  - d. Discuss any potential (or additional) charges with victim, if any. Victims have a right to confer with the prosecution after charging, before trial or before any disposition and to be informed of the disposition.
  - e. If case is not able to be charged, make appropriate referrals for victim (counseling, etc.).
- 3) Speak with community or law-enforcement advocates
- 4) Make charging decisions
  - a. Think "outside the box" about potential charges if CSC isn't a possibility (charges involving weapons, alcohol, lewd acts, indecent exposure, etc.).  
*Be conscious of State v. Baker (2015): Requires indictments to be more specific in regards to timeframe of the incident. For example, if the victim was assaulted every summer over a period of 6 years do indictments for just the summer months instead of one indictment covering 6 years.*
  - b. Attend bond hearing, arraignment, etc.
  - c. Make sure a no-contact order is a condition of the bond and ask law enforcement to monitor closely any contact that is made.
- 5) Prepare for plea/trial
 

\*Utilize your victim advocate during this phase of a sexual assault case. Prosecutors get very busy during trial preparation so it will be useful to have someone who communicates with the victim.

  - a. Keep victim informed of case progression, plea deals, etc. Victims have a right to confer with the prosecution before trial or before any disposition and to be informed of the disposition.
  - b. If the case proceeds to trial, prepare victim for testimony.
    - i. Practice direct and cross examination.
    - ii. Discuss proper attire.

- 6) Sentencing: Make sure the victim is prepared to address the court during sentencing if he/she wishes.
- 7) Appeal
  - a. Explain the appellate process.  
Make sure all victim notification forms are completed.

## **Appendix A: South Carolina Anonymous Reporting Protocol**

*VAWA 2005 reauthorization mandates, S.C. Recommended Protocol, and S.C. Act 59: VAWA Forensic Compliance (federal) and SC Act 59 (state) are law, and are not optional.*

### **Federal Precedent-Violence Against Women Act's Forensic Compliance 2005**

**42 U.S.C.A. S. 3796gg-4.b.3.D.d.1:** "Nothing in this section shall be construed to permit a state, Indian tribal government, or territorial government to require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such exam or both."

Translation: Victims do not have to report the sexual assault to law enforcement to receive a forensic exam and to have that exam paid for. Additionally, States must certify that they are in compliance with the statutory eligibility requirement of VAWA.

### **Model of Compliance**

**New Anonymous Reporting Protocol for victims 18 years old or older**

**Guiding principle: Victim Centered**

#### **Emphasizes:**

1. **Evidence collection** (forensic evidence collection kit)
2. **Medical attention for victim** (medico-legal examination, STI and pregnancy prevention)

#### **Characteristics:**

- Victims must be offered a sexual assault/forensic evidence collection examination regardless of their decision to participate with the criminal justice system (law enforcement authorization for forensic evidence collection kit is *not* required).
- As far as law enforcement is concerned, there is no investigation until the victim chooses to convert the kit (report the crime) and initiate a law enforcement investigation.
- Law enforcement transports evidence to appropriate law enforcement agency with jurisdiction over location where sexual assault occurred.

### New Anonymous Reporting Protocol

- The anonymous reporting protocol does not include law enforcement contact.
- SANE or other qualified medical provider at a hospital emergency department shall perform the forensic evidence collection kit in the *same manner as if it was a law enforcement-involved kit*.
- The evidence will be stored for a period of one (1) year, allowing the victim time to make a decision about whether or not she/he desires to move forward with law enforcement investigation once the trauma response has stabilized.
- The **only differences** between the new anonymous reporting protocol and the traditional law enforcement involved protocol is that:
  - law enforcement approval to perform the forensic evidence collection kit and exam is no longer required; and
  - anonymous forensic evidence kits will be stored for one year from date of collection.
- A full medico-legal examination, including:
  - a report of the assault by the victim taken by the SANE nurse or medical provider
  - evidence collection;
  - charting and photographs of injuries (if any);
  - prevention of sexually transmitted infections and pregnancy; and
  - blood draw, if indication that sexual assault was drug facilitated.

*Note: For storage purposes, only clothing that was next to the genitals will be collected, unless the circumstances of the assault warrants collecting additional clothing.*

### ➤ **SLED Forensic Evidence Collection Kits**

- Encourage bringing toxicology samples to SLED as soon as possible.
- Blood samples need to be taken within 12 hours of sexual assault.
- Urine samples need to be taken within 24 hours of sexual assault.

### Payment for Anonymous Kits

- Requests should be submitted through the SC State Office of Victims Assistance (SOVA) just as requests for payment of non-anonymous kits would be.
  - ANONYMOUS KIT should be clearly noted on the application form.
- If further medical attention is given beyond the forensic evidence collection kit, request for payment may be submitted to SOVA as well, with the anonymous notation.
  - SOVA will consider these on a case by case basis.
  - If there are issues with reimbursement, please contact your local sexual assault direct service provider, or SCCADVASA.

## S.C. Anonymous Reporting Protocol

### Step 1: Victim Discloses or Presents at a Hospital

- Protocols for Reporting Sexual Assaults: When an adult victim of sexual assault (age 18 or older) presents at a hospital or discloses to a victim advocate that she/he has been sexually assaulted, **the individual must be presented with all options for reporting the sexual assault.**
- Reporting options available are:
  1. New Anonymous Reporting Protocol;
  2. Traditional Law Enforcement-Involved Reporting Protocol; and
  3. Just Medical Care (without a forensic exam. SOVA *will only* pay for this if reimbursement forms are filed, which requires law enforcement participation).

### Step 2: Storage and Transportation of Anonymous SAFE Kits and Evidence

- Hospital personnel shall contact the designated law enforcement agency to notify that an anonymous SAFE kit is ready to be picked up for storage.
- Hospitals shall maintain chain of custody until SAFE kit and other evidence are turned over to the designated law enforcement agency.
  - The SANE nurse/hospital personnel and victim advocate will make reasonable efforts to determine the jurisdiction of the sexual assault.
  - Hospitals or other medical facilities shall not hold completed SAFE kits and other evidence for long-term storage. (Unless otherwise determined.)
- Law Enforcement shall pick up, transport and store SAFE kits and other evidence according to departmental procedures.
  - Methods such as anonymous report, citizen contact, suspicious incident, etc. can be utilized to generate a case number.
  - SAFE kit number and LE case number should be linked.

### Step 3: Tracking Anonymous Reports and Forensic Kits

- The hospital patient account number will link the evidence and sexual assault kit to the victim for future reference (recommended in state protocol).
- Outside of kit marked with:
  - A sticker identifying the one-year storage period end date;
  - A sticker identifying the date the forensic evidence collection kit was performed; and
  - Hospital account number.

- Tracking anonymous reports and forensic kits:
  - No personally identifying information shall be placed on the outside of the forensic evidence collection kit. This can include, but is not limited to:
    - Name; postal address; email address; cell phone or telephone number; facsimile; social security number; date of birth; racial, ethnic, or religious identity; or
    - Any other combined information that could serve to identify an individual.

#### **Step 4: Chain of Evidence, Length of Storage**

- Sexual assault evidence collection kits and other evidence collected for victims whose identity is unknown to law enforcement shall be maintained in the same manner as any other forensic evidence collection kit and evidence.
- Sexual Assault Evidence Collection Kits where the identity of the victim is unknown must be kept secure and chain of custody must be preserved for a period of one (1) year (365 days) from the date of collection.
- Sexual Assault Evidence Collection Kits and other evidence collected for victims whose identity is unknown *shall not be opened unless the victim reports the sexual assault to law enforcement.*
- Opening the Sexual Assault Evidence Collection Kit will compromise the admissibility of evidence for the purposes of prosecution.

#### **\*\*\*Spousal Rape\*\*\***

- If the victim reports that the individual perpetrating the sexual assault is the victim's legal spouse, the victim has only thirty (30) days to report to law enforcement under South Carolina law.
- Victims should receive this information, to be fully informed of their choices. However, the choice of whether to report is still completely the victim's decision.

#### **Step 5: Length of Storage**

- One year storage of anonymous report and forensic evidence collection kits
- Evidence will be stored in an environmentally controlled storage unit until
  - the victim desires to move forward with law enforcement investigation; or
  - a period of one (1) year, whichever comes first.
- Forensic evidence collection kits and other evidence collected for victims whose identity is unknown to law enforcement shall be maintained in the same manner as any other forensic evidence collection kit and evidence.
- For storage purposes, only clothing that was next to the genitals will be collected, unless the circumstances of the assault warrant collecting additional clothing.
- **No evidence shall be destroyed prior to the one year time period.**

**Step 6: Notification of victim prior to expiration of the one year storage deadline**

- If the victim does not elect to initiate a law enforcement investigation within eleven (11) months:
  - a victim advocate from the local rape crisis program (SCCADVASA member programs) serving the county in which the anonymously reported sexual assault occurred will confidentially notify the victim that the storage time is about to reach a conclusion, providing the victim with an opportunity to initiate law enforcement investigation and prosecution, if s/he so desires.
  
- Notification to victim prior to expiration of the one year storage deadline
  - It is the victim's responsibility to update contact information with the local rape crisis program if they desire to be notified one month prior to the end of the one year storage time for anonymous reports/kits.

At the time of the anonymous report, the victim will choose how s/he wants to be notified.  
No messages may be left for the victim unless indicated in writing at the time of the anonymous report.

## **Appendix B: Sexual Assault Laws in South Carolina**

For access to the South Carolina Victims' Bill of Rights please use the following link, specifically Article 1, Section 24:

<http://www.scstatehouse.gov/scconstitution/scconst.php>

For access to the most recent criminal laws, please use the following link, specifically Crimes and Offenses - Title 16, Chapter 3; Title 16, Chapter 15 and Criminal Procedures - Title 17:

<http://www.scstatehouse.gov/code/statmast.php>

**Appendix C: South Carolina Sexual Assault Resource and Advocacy Centers**

**CASA/Family Systems**

*Serves Orangeburg, Calhoun & Bamberg Counties (Sexual Assault and Domestic Violence)*

**Phone:** 803-534-2448  
**Hotline:** 1-800-298-7228  
**Address:** CASA/Family Systems  
P.O. Box 1568  
Orangeburg, SC 29116

**Cumbee Center to Assist Abused Persons**

*Serves Aiken, Barnwell & Allendale Counties for Domestic Violence; Aiken, Barnwell, Allendale, Edgefield, Saluda & McCormick Counties for Sexual Assault Issues*

**Website:** [www.cumbeecenter.org](http://www.cumbeecenter.org)  
**Phone:** 803-649-0480  
**Hotline:** 803-641-4162  
**Address:** Cumbee Center to Assist Abused Persons  
P O Box 1293  
Aiken, SC 29802

**Family Resource Center**

*Serves Kershaw & Lee Counties (Sexual Assault)*

**Phone:** 803-425-4357  
**Hotline:** 1-800-585-4455  
**Address:** Family Resource Center  
PO Box 282  
Camden, SC 29020

**Foothills Alliance**

*Serves Anderson & Oconee Counties (Sexual Assault)*

**Website:** [www.foothillsalliance.org](http://www.foothillsalliance.org)  
**Phone:** 864-231-7273  
**Hotline:** 1-800-585-8952  
**Address:** Foothills Alliance  
216 East Calhoun Street  
Anderson, SC 29621

**Hope Haven of the Lowcountry: Children's Advocacy and Rape Crisis Center**

*Serves Beaufort, Colleton, Hampton & Jasper Counties (Sexual Assault)*

**Phone:** 843-524-2256  
**Hotline:** 1-800-637-7273  
**Address:** Hope Haven of the Lowcountry: Children's Advocacy and Rape Crisis Center  
P.O. Box 2502  
Beaufort, SC 29901

**Julie Valentine Center**

*Serves Greenville County (Sexual Assault)*

**Website:** [www.julievalentinecenter.org](http://www.julievalentinecenter.org)  
**Phone:** 864-331-0560  
**Hotline:** 864-467-3633  
**Address:** Greenville Rape Crisis & Child Abuse Center  
2905 White Horse Road  
Greenville, SC 29611-6120

**Palmetto Citizens Against Sexual Assault**

*Serves Lancaster, Chester & Fairfield Counties (Sexual Assault)*

**Phone:** 803-286-5232  
**Hotline:** 1-888-790-8532  
**Address:** Palmetto Citizens Against Sexual Assault  
106 N. York Street  
Lancaster, SC 29720

**People Against Rape**

*Serves Charleston, Berkeley, & Dorchester Counties (Sexual Assault)*

**Website:** [www.peopleagainstrape.org](http://www.peopleagainstrape.org)  
**Phone:** 843-745-0144  
**Hotline:** 1-800-241-7273  
**Address:** People Against Rape  
2154 N. Center St., Suite 302  
North Charleston, SC 29406

**Pee Dee Coalition Against Domestic & Sexual Assault**

*Serves Florence, Darlington, Marion, Chesterfield, Marlboro, Dillon & Williamsburg Counties (Domestic Violence and Sexual Assault) and Clarendon County (Sexual Assault)*

**Website:** [www.peedeecoalition.org](http://www.peedeecoalition.org)  
**Phone:** 843-669-4694  
**Hotline:** 1-800-273-1820  
**Address:** Pee Dee Coalition Against Domestic & Sexual Assault  
P.O. Box 1351  
Florence, SC 29503

**Rape Crisis Center**

*Serves Horry & Georgetown Counties (Sexual Assault)*

**Website:** [www.victimtosurvivor.org/](http://www.victimtosurvivor.org/)  
**Phone:** 843-448-3180  
**Hotline:** 843-448-7273  
**Address:** Rape Crisis Center  
P.O. Box 613  
Myrtle Beach, SC 29578-0613

**Rape Crisis Council of Pickens County**

*Serves Pickens County (Sexual Assault)*

**Phone:** 864-442-5500  
**Hotline:** 864-442-5500  
**Address:** Rape Crisis Council of Pickens County  
P.O. Box 2952  
Easley, SC 29641

**SAFE Homes - Rape Crisis Coalition**

*Provides Domestic Violence Services to Spartanburg, Cherokee & Union Counties and Sexual Assault Services to Spartanburg and Cherokee Counties*

**Website:** [www.shrcc.org/](http://www.shrcc.org/)  
**Phone:** 864-583-9803  
**Hotline:** 1-800-273-5066  
**Address:** SAFE Homes - Rape Crisis Coalition  
236 Union Street  
Spartanburg, SC 29302

**Safe Passage Inc.**

*Provides Domestic Violence Services to York, Chester & Lancaster Counties and Sexual Assault Services to York and Union Counties*

**Website:** [www.safepassagesc.org](http://www.safepassagesc.org)  
**Phone:** 803-329-3336  
**Hotline:** 1-800-659-0977  
**Address:** Safe Passage Inc.  
P.O. Box 11458  
Rock Hill, SC 29731

**Beyond Abuse**

*Serves Greenwood, Laurens & Abbeville Counties (Sexual Assault)*

**Website:** [www.beyondabuse.info](http://www.beyondabuse.info)  
**Phone:** 864-227-1623  
**Hotline:** 864-441-6700  
**Address:** Beyond Abuse  
P.O. Box 693  
Greenwood, SC 29648

**Sexual Trauma Services of the Midlands**

*Serves Richland, Lexington, Newberry & Sumter Counties (Sexual Assault)*

**Website:** [www.stsm.org](http://www.stsm.org)  
**Phone:** 803-790-8208  
**Hotline:** 1-800-771-RAPE (7273)  
**Address:** Sexual Trauma Services of the Midlands  
3700 Forest Drive, Suite 350  
Columbia, SC 29204

## Appendix D: Victim Assistance Resources

National Organization for Victim Assistance (NOVA)

[www.trynova.org](http://www.trynova.org)

National Association for Victim Assistance

510 King Street, Suite 424, Alexandria, VA 22314

(800) 879-6682 (800-TRY-NOVA); Office: (703) 535-6682

RAINN (Rape, Abuse & Incest National Network)

1220 L Street NW, Suite 505, Washington, DC 20005

(800) 656-HOPE (4673)

[www.rainn.org](http://www.rainn.org)

South Carolina Victim Assistance Network (SCVAN)

[www.scvan.org](http://www.scvan.org)

113 Executive Pointe Blvd., Suite 202, Columbia, SC 29210

(888) 852-1900; (803) 750-1200

Email: [Ward@scvan.org](mailto:Ward@scvan.org)

State Office of Victim Assistance (SOVA)

[www.sova.sc.gov](http://www.sova.sc.gov)

1205 Pendleton Street, Edgar A. Brown Building, Room 401, Columbia, SC 29201

(803) 734-1900; Victims Only: 1(800) 220-5370

Email: [sova@ocpp.sc.gov](mailto:sova@ocpp.sc.gov)

South Carolina Coalition against Domestic Violence and Sexual Assault (SCCADVASA)

[www.sccadvasa.org](http://www.sccadvasa.org)

1320 Richland Street, Columbia, SC 29201

P.O. Box 776, Columbia, SC 29202

(803) 256-2900

S.C. Law Enforcement Victim Advocate ASSOCIATION (SCLEVA)

[www.scleva.com](http://www.scleva.com)

President: Leigh Caldwell, [lcaldwell@cherokeecountysheriff.net](mailto:lcaldwell@cherokeecountysheriff.net) or contact local law enforcement agency

US Department of Justice – Office For Victims Of Crime (OVC)

[www.ojp.usdoj.gov/ovc](http://www.ojp.usdoj.gov/ovc)

U.S. Department of Justice, 810 Seventh St. NW, 8<sup>th</sup> Floor, Washington DC 20531

(202) 307-5983

STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS  
CA No.: 2017-CP-37-00700

Jane Doe,  
  
Plaintiff,  
  
vs.  
  
Oconee Memorial Hospital, Greenville  
Health System,  
  
Defendant.

**PLAINTIFF'S MEMORANDUM IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS**

Plaintiff Jane Doe, by and through her undersigned counsel, respectfully submits this Memorandum in Opposition to Defendant's Motion to Dismiss. The Court should deny Defendant's<sup>1</sup> Motion, including all relief requested thereby, for the reasons set forth herein.

**STANDARD OF REVIEW**

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Gentry v. Yonce*, 337

<sup>1</sup> For ease of reading, Plaintiff refers to both hospital defendants throughout as "Defendant".

S.C. 1, 522 S.E.2d 137 (1999). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Spence v. Spence*, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006); *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

### ARGUMENT

Defendant contends that this matter should be dismissed for a number of reasons. Each of Defendant's arguments fails as a matter of law. Plaintiff will address each of Defendant's arguments in turn.

#### I. Defendant Had A Duty to Jane Doe.

Defendant contends that this action must be dismissed because the hospital did not have a duty to Jane Doe. The Defendant specifically contends that the hospital did not have a duty to its patient, Jane Doe. This argument is outrageous both on its face and as a matter of law.

The Defendant correctly notes that, in South Carolina, a legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstances. *See Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2007). In this case, the Defendant owed a duty to Jane Doe as a result of 1) a contractual relationship; 2) a property interest; and 3) a special circumstance, namely, that the defendant assumed a duty to the Plaintiff when it volunteered to provide the services rendered for compensation when performing the Sexual Assault Forensic Examination requested by Plaintiff.

I. CONTRACTUAL RELATIONSHIP: The parties entered into a contractual relationship wherein the hospital agreed to provide services, including a sexual assault

forensic examination, in exchange for compensation by the Plaintiff and/or her agents.<sup>2</sup>  
As such, the hospital had a duty to Plaintiff.<sup>3</sup>

2. PROPERTY INTEREST: The Plaintiff's bodily fluids and other specimens removed from her body are her private personal property. These items were collected from her body at her request and were entrusted to the care of the hospital, but do not belong to the hospital. The hospital was compensated by the Plaintiff and/or her agents in exchange for the safekeeping of her property until such time as Plaintiff could determine whether or not she wanted it properly handed over to law enforcement.<sup>4</sup> *See, e.g., Hadfield v. Gilchrist*, 343 S.C. 88, 96 538 S.E.2d 268 (S.C. Ct. App. 2000) ("a bailment for mutual benefit of the parties arises when one party takes the personal property of another into his or her care or custody in exchange for payment or other benefit."). *See* South Carolina Attorney General's Sexual Assault Protocol for the Investigation, Prosecution, and Judgment of Sexual Assault, 2<sup>nd</sup>. Ed., 2015, attached hereto as **Exhibit A**, at 22.

3. SPECIAL CIRCUMSTANCES: It "has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." *Madison v. Babcock Ctr.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656

<sup>2</sup> The Defendant contended at oral argument that it was compensated by the state's victim's assistance fund. This alleged fact was not alleged in the Plaintiff's complaint and is outside the scope of consideration for the currently pending 12(b)(6) motion filed by the Defendant. Whether the defendant was paid by the Plaintiff directly or by a third-party payor on Plaintiff's behalf does not obviate the contractual relationship. While hospitals are frequently compensated for their services by third-party payors, the manner in which Defendant was compensated in this case is a disputed issue of fact. Moreover, although counsel for the Defendant argued that the Defendant is always compensated by the victim's assistance fund, the Plaintiff vehemently contests this statement and would point this court to a separate action currently pending in Greenville County, wherein it is alleged that the Defendant has a pattern and practice of billing individual victims for the provision of sexual assault forensic examinations in violation of state and federal law. *See Jane Doe V. Greenville Health System*, C.A. No. 2017-CP-23-07961.

<sup>3</sup> Plaintiff has moved to amend her complaint to include additional causes of action for breach of contract and bailment.

<sup>4</sup> As noted above, Plaintiff has filed a motion to amend her complaint to assert an additional cause of action for bailment.

(S.C. 2006); *Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); *Roundtree Villas Assn. v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984). In addition, “[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.” *Restatement (Second) of Torts* §323 (1965).

The Defendant was not obligated to provide a sexual assault forensic examination for Plaintiff. In fact, and contrary to the arguments of defense counsel at oral argument, there is no statutory requirement that a hospital provide these services. In fact, the Defendant openly states on its own website that not all hospitals owned and operated by the Defendant provide these services at all times.

See <https://www.ghs.org/healthcenter/ghsblog/response-incident-laurens-county/>, last visited on June 8, 2018, attached hereto as **Exhibit B**. In this instance, the Defendant chose to offer these services, including a sexual assault forensic examination, as part of the services provided to patients in the emergency department at the hospital. Equally as important, the Defendant did not provide these services gratuitously, but was compensated for the work performed. Thus, the facts in this case are akin to any other service offered by a hospital for which the hospital receives compensation. The hospital offered to provide these services in exchange for compensation. As a result of the hospital’s offering to render services, the hospital assumes a duty of care to those for

whom it provides services and is liable for any harm caused as a result of any failure to take reasonable care in performing this undertaking.

## **II. The Defendant Is Not Exempt From Liability Under the Public Duty Doctrine**

The Defendant contends that it is exempt from liability pursuant to the public duty rule. This argument fails as a matter of law and fact.

First, Defendant asserts that it is not liable because the hospital “was not providing health care services to Plaintiff”. See Def. Motion to Dismiss at 3. This outrageous statement – that a hospital emergency department is not providing medical care when it treats a rape victim who reports thereto for medical treatment – goes to questions of fact in this matter, which are not before the Court’s consideration when deciding on Defendant’s Motion to Dismiss pursuant to S.C.R.C.P. 12(b)(6). See *Spence v. Spence*, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (200). Plaintiff notes in her Complaint that she was receiving medical treatment from the Defendant, that she presented to the emergency department of the hospital, and that “the Hospital and GHS owed a duty to Plaintiff to ensure that she received proper medical attention.” Complaint, ¶¶ 20, 35. The Defendant’s outrageous assertion that it is not liable because it was “not providing health services to Plaintiff” is directly contrary to the facts asserted by the Plaintiff, and as such, should be disregarded by the Court upon consideration of this motion to dismiss pursuant to Rule 12(b)(6).

Next, the Defendant argues that it was only “performing a crime investigation service on behalf of law enforcement.” Def. Motion to Dismiss at 4. The Defendant offers no support for this factual argument nor points to any statute or regulation that

commands the Defendant provide these services on behalf of a law enforcement agency.<sup>5</sup> In fact, and in opposition to any such arguments, the South Carolina Attorney General's Sexual Assault Protocol for the Investigation, Prosecution, and Judgment of Sexual Assault, 2<sup>nd</sup>. Ed., 2015, attached hereto as Exhibit B., specifically provides that "[a]ll patients should receive a comprehensive **medical/forensic** evaluation by a Sexual Assault Nurse Examiner (SANE)... If a SANE is not available, an emergency room physician or registered nurse may conduct the **medical/forensic** evaluation and evidence collection." *Id.* (emphasis added). "The **medical** forensic evaluation consists of obtaining information necessary to make the appropriate decisions regarding **medical care**, forensic evidence collection and appropriate referral and follow up information." *Id.*, at 19.

Most important for this case, and for competent adults such as Jane Doe, it is the patient who "has the right to choose whether or not she/he would like to report the assault to law enforcement." *Id.* Thus, the hospital is conducting the medical forensic evaluation and evidence collection for the patient who may later choose to involve law enforcement. The patient then has the right to report the assault to law enforcement, to decline to report the assault to law enforcement, or to report the assault anonymously. Should the patient choose to report the assault or report the assault anonymously, the evidence is to be "released to the appropriate law enforcement agency." *Id.*, at 22. In fact, for a competent adult such as Jane Doe, pursuant to the requirements of HIPAA, the federal Violence Against Women Act, the South Carolina Violence Against Women

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<sup>5</sup> Contrary to Defendant's incorrect factual assertion, law enforcement never directed or requested that the hospital conduct a sexual assault forensic examination. To the contrary, the examination was only conducted at the request of the Plaintiff. There is no indication that law enforcement was even aware of the sexual assault occurring prior to the Plaintiff electing her right to report the crime to law enforcement upon completion of the sexual assault forensic examination.

Compliance Act, S.C. Act, 59, and the South Carolina Victim's Bill of Rights, the medical/forensic evaluation and evidence collected during treatment of a sexual assault victim cannot be shared with law enforcement unless and until the patient consents and affirmatively chooses to share this information using their own identity or anonymously. See Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), Codified at 42 U.S.C. § 300gg and 29 U.S.C § 1181 et seq. and 42 USC 1320d *et seq*; 42 U.S.C. §3796gg-4.b.d.d.1 (“Nothing in this section shall be construed to require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such exam or both.”); S.C. Code § 16-3-1520). Thus, the Defendant’s argument that the hospital “was performing a crime investigation service on behalf of law enforcement” is completely incorrect as a matter of law.

Both factually and legally, the medical services rendered by the hospital to Jane Doe were done at her request as a patient on her behalf before she decided whether or not to exercise her right to report the sexual assault to law enforcement. Jane Doe’s private health information, including the evidence collected as part of the sexual assault forensic examination that she personally requested, must remain private unless and until she chooses to disclose that information to law enforcement. Thus, the *private* nature of Jane Doe’s personal health information completely undermines the outrageous notion that the hospital was acting on behalf of any law enforcement agency or pursuant to a public duty in following Jane Doe’s request for a forensic medical examination.

As a matter of law, the Defendant's argument that it has no duty to the Plaintiff pursuant to the public duty rule also fails. Under South Carolina's public duty doctrine, public officials are not liable to individuals for their own negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually. *Arthurs v. Aiken County*, 338 S.C. 253, 261. 525 S.E.2d 542 (Ct. App. 1999); *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). Thus, where the duty is owed to the public in general, the official is not liable to an individual who may have been incidentally injured by the failure to perform the duty. *Arthurs*, 338 S.C. at 263. An exception to the general rule of non-liability exists when a duty is owed to specific individuals rather than the public only. *Id.* In this case, the Defendant's duty was not to the general public, but to the patient, Jane Doe.

The public duty rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. In this case, there is no statute which defines the duties of a hospital with regard to the treatment of rape victims. There is no statute that mandates that a hospital must conduct a sexual assault forensic examination that would subject the hospital's actions to the public duty rule. As such, the Defendant's suggestion that the Defendant has no duty to the Plaintiff pursuant to the public duty doctrine is without merit and should be dismissed accordingly.

### **III. Plaintiff Is Not Asserting A Cause of Action for Spoliation of Evidence.**

The Defendant contends that Plaintiff's entire complaint should be dismissed because "[i]n essence, Plaintiff is attempting to allege a negligent spoliation of evidence

claim.” Def. Motion to Dismiss, at 4. Defendant’s efforts to mischaracterize Plaintiff’s actual causes of action – for negligence, gross negligence, and intentional infliction of emotional distress – as a claim that Plaintiff did not actually allege is improper. Plaintiff has not alleged a cause of action for negligent spoliation of evidence.

Defendant points this Court to the Supreme Court’s decision in *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011) in support of the contention that South Carolina does not recognize the independent tort of spoliation of evidence.<sup>6</sup> The Defendant is correct that *Cole Vision Corp.* states that “South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party, or otherwise.” *Id.* at 150. As previously noted, the Plaintiff is not asserting an independent tort for the negligent spoliation of evidence.

The *Cole Vision* case is distinguishable from the action at bar. In *Cole Vision* the defendant asserted a defense and counterclaim for negligent spoliation of evidence against Cole Vision and Sears stemming from the loss of a key piece of evidence necessary to the defense of a malpractice claim. Thus, the only basis for the claim was that the evidence necessary for a lawsuit had been lost. In this action, the Plaintiff’s claim is not based solely on the loss of evidence necessary for a lawsuit. In fact, Plaintiff expressly states in her Complaint that “[a]s a direct and proximate result of [Defendant’s negligence], Plaintiff has suffered damages, *beyond the inability to proceed with criminal action against her attacker*, entitling Plaintiff to an award of actual and consequential damages from Defendants.” Complaint ¶¶ 56, 27, 33, 43 (emphasis added).

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<sup>6</sup> The Defendant also points this Court to the Supreme Court’s decision in *Austin v. Beaufort County Sheriff’s Office*, 377 S.C. 31, 659 S.E.2d 122 (2008). In that case, the court specifically “decline[d] to address whether we would, under other factual circumstances, adopt the tort of third party spoliation of evidence.” *Id.*, at 35. As such, the *Austin* case is inapplicable to this action.

Plaintiff has suffered significant other damages, which will be specifically enumerated through the discovery process, including but not limited to mental anguish and suffering, manifested in physical and mental symptoms for which she has received medical treatment, as a result of the defendant's negligence which resulted in her inability to officially confirm, the identity of her attacker, the extent of the rape, including whether her attacker ejaculated while raping her, whether she had been drugged by her attacker and, if she had been drugged, with what substance.<sup>7</sup> None of these damages relate to spoliation of evidence for the use in a lawsuit. Thus, *Cole Vision* is inapplicable to the claims asserted in Plaintiff's complaint.<sup>8</sup>

**IV. The Plaintiff Has Alleged A Cognizable Injury.**

The Defendant avers that Plaintiff's action should be dismissed for failure to assert a cognizable injury. Defendant contends that Plaintiff's "only alleged injury is emotional distress." Def. Motion to Dismiss at 5. This statement is incorrect and is an impermissible mischaracterization of the facts as pled in Plaintiff's Complaint. Nowhere in Plaintiff's Complaint does the Plaintiff assert that her only injury is emotional distress. To the contrary, Plaintiff states that she has suffered "actual and consequential damages" as a result of Defendant's negligence. The nature of Plaintiff's damages are a factual issue that Plaintiff intends to prove at trial and which Defendant may discover through the normal discovery process.

**V. Plaintiff Has Pled Facts Sufficient to Establish A Claim for Intentional Infliction of Emotional Distress**

<sup>7</sup> One of the many reasons a sexual assault victim requests a medical forensic examination is to aid in determining appropriate medical treatment. Thus, if the evidence reveals the presence of semen, a victim will know that she may require emergency birth control.

<sup>8</sup> In addition, Plaintiff has moved to amend her complaint to assert causes of action for bailment and breach of contract. Neither of these causes of action would be impacted by the Supreme Court's ruling in *Cole Vision*.

To establish a claim for intentional infliction of emotional distress, a plaintiff must show the defendant: (1) “intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct”; (2) that the conduct was so outrageous it exceeded “all possible bounds of decency” and so “atrocious” it was “utterly intolerable in a civilized community”; (3) such actions actually caused plaintiff’s emotional distress; and (4) the emotional distress was so severe “no reasonable man could be expected to endure it.” *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) (citing *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981)).

The Plaintiff’s Complaint alleges sufficient facts to establish a claim for intentional infliction of emotional distress. Specifically, Plaintiff alleges that the Defendant acted “intentionally and/or recklessly”! Plaintiff notes that the “Defendants were well aware of their duties, as communicated by federal and state authorities, in regard to the collection and preservation of evidence from victims of sexual assault, including their duty to maintain chain of custody at all times and to ensure that all relevant evidence collected was transferred directly to the appropriate law enforcement.” Complaint, at ¶ 60. The nurse who conducted the medical evaluation of Jane Doe and collected her medical evidence was a properly trained Sexual Assault Nurse Examiner who was aware of the need to properly collect and preserve evidence taken from Jane Doe’s body. She was trained in the appropriate manner to handle this evidence and that the evidence was to be released only to law enforcement only upon Jane Doe’s election of her right to report the assault to law enforcement. Nonetheless, and despite that training, the nurse and the hospital Defendant violated their duty to Jane Doe by failing to

preserve said medical evidence and transferring it directly to law enforcement when so requested by Jane Doe, with knowledge that the failure to follow the appropriate standard of care would cause Jane Doe harm. The recklessness of this knowing conduct of the Defendant is evidenced by the Defendant's own statement in the Motion to Dismiss that the Nurse gave the evidence to Jane Doe after she "protested" against the Dekalb County Sheriff's Deputy's instructions and that the "reluctantly relayed the Sheriff's Office's instructions to Plaintiff and signed over custody of the kit to Plaintiff." This atrocious conduct – by the one person specifically trained to properly conduct a medical forensic examination of a rape victim – exceeds the bounds of decency and resulted in severe emotional distress on the part of Jane Doe. Complaint, at ¶ 61. The nurse is a qualified SANE. She is trained to know that putting an incomplete rape kit into the hands of a rape victim was far below the standard of care and would cause the victim great harm. As Plaintiff alleged in her Complaint, the emotional distress and other damages that Jane Doe has suffered as a result of the Defendant's outrageous conduct "was so severe that no reasonable person should be expected to endure it." Complaint, at ¶ 62. As such, Plaintiff has pled facts sufficient enough to allege a cause of action for intentional infliction of emotional distress and Defendant's motion to dismiss this cause of action should be denied.<sup>9</sup>

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<sup>9</sup> Defendant also contends that Plaintiff's action for intentional infliction of emotional distress must be dismissed because GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* As noted at the argument on Defendant's motion, the hospital is no longer operated by a government entity such that it would enjoy immunity for employee conduct outside the scope of his official duties or which constitutes actual malice or intent to harm. In fact, GHS is a private healthcare delivery system. See <http://www.ghs.org/newsroom/aboutus>, last visited on June 4, 2018, attached here to as Exhibit C.

**CONCLUSION**

Therefore, for the reasons stated herein, as well as those reasons articulated by counsel at the argument of Defendant's motion before this Court, the Plaintiff respectfully requests that the Defendant's Motion to Dismiss be denied with prejudice.

Respectfully submitted,

**s/Hannah Rogers Metcalfe**

Hannah Rogers Metcalfe, S.C. Bar #73046

Courtney C. Atkinson, SC Bar #71992

Metcalfe & Atkinson, LLC

1395 S. Church Street

Greenville, South Carolina 29605

Telephone: (864) 214-2319

Facsimile: (864) 214-3067

*Attorneys for Plaintiff*

June 8, 2018

**EXHIBIT A**

# SEXUAL ASSAULT PROTOCOL

**For the Investigation, Prosecution, and Judgment of Sexual Assault**

**2nd Edition**

The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**  
S.T.O.P. Violence Against Women Program

ALAN WILSON  
ATTORNEY GENERAL

2nd Edition



[www.scag.gov](http://www.scag.gov)

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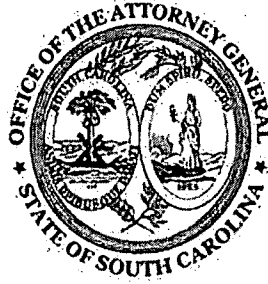
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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

ALAN WILSON  
ATTORNEY GENERAL

**General Protocol Information**

This is the 2<sup>nd</sup> Edition Protocol and all information contained herein may be considered current as of April 2015.

**Organization**

The protocol is divided into parts and sections. When viewing the Protocol on your computer, select "View," "Navigation Tabs," and "Bookmarks." Selecting any document name in the Bookmark will allow you to instantly relocate to that document within the protocol.

**Content**

Despite the designated protocol divisions, other valuable, related information is located throughout the protocol.

**Additional Copies**

Additional copies of the protocol may be obtained by contacting the S.T.O.P. Violence Against Women program at 803.734.3717.

**The information contained in the protocol is available only for law enforcement, victim advocates, health professionals, prosecutors, and judges. Distribution to any others is strictly prohibited.**

**All questions, concerns and/or suggestions should be submitted to the S.T.O.P. Violence Against Women program at 803.734.3717.**



April 2015

A MESSAGE TO LAW ENFORCEMENT OFFICERS, VICTIM ADVOCATES, PROSECUTORS, AND  
JUDGES

from Attorney General Alan Wilson

Although we have made progress to eradicate sexual assault, it is still a serious crime with far-reaching impact. We must consistently enforce South Carolina's sexual assault laws, thereby holding perpetrators accountable for their crimes in our state.

This is the second edition of the Sexual Assault Protocol for the State of South Carolina and continues to represent collaboration between numerous agencies.

The Office of the Attorney General is committed to stopping sexual assault. As a part of this effort, the Protocol has outlined a comprehensive statewide policy for the investigation, prosecution, and judgment of sexual assault crimes. We believe the Protocol will assist all parties involved with providing justice to these victims, thus effectuating an increase in sexual assault convictions and a decrease in the rate of recidivism.

Together, we can make South Carolina a safe place for our community.

Yours very truly,

Alan Wilson

## Purpose

The purpose of this protocol is to provide law enforcement officers, victim advocates, healthcare professionals, and prosecutors with effective tools and information that can be used in the handling of sexual assault cases.

This protocol was developed in response to and recognition of the fact that sexual assault crimes are insidious and far-reaching. Without the support and willingness of the judicial system to prosecute offenders, they are given license to repeatedly terrorize and brutalize their victims. Therefore, prosecution of sexual assault must be a priority.

- ✓ Prosecution is the formal expression of social norms. The absence of prosecution means the unspoken presence of permission to commit crime.
- ✓ Unless there is prosecution following arrest, law enforcement efforts are in vain.

The prosecution of offenders in a swift and uniform manner may deter them from future acts of sexual assault and violence, thereby creating a safer environment for the victim.

Law enforcement should treat all acts of sexual assault as criminal conduct and should utilize tools and policies available to them through non-profit organizations, local and state agencies and South Carolina law. The investigation of sexual assault cases is essential to the effective prosecution of the cases.

Prosecutors should treat all sexual assault cases as criminal conduct. Attention should be given to ensure that all appropriate charges are filed against offenders.

Judges should treat all sexual assault cases as criminal conduct; focus and attention should exclusively be given to the criminal behavior of the offender and not to any actions of the victim. Judges have the ultimate authority in holding offenders accountable for their actions.

This protocol will provide a guide on how to investigate, evaluate, prosecute, and dispose of sexual assault cases. Successful intervention on behalf of the criminal justice system, with or without the victim's participation, is the best way to stop interpersonal violence and hold offenders accountable for their actions.

## Special Considerations for Underserved Populations

The term "underserved population" refers to those individuals who experience barriers to obtaining needed services when seeking justice and medical services, including a lack of knowledge of services available to meet their needs.

It is imperative that sexual assault response teams collaborate with experienced organizations that work with these special populations within a community to glean the knowledge and expertise necessary to provide the best available sexual assault care.

The information contained within this section should be used as a guide for sexual assault responders when working with underserved populations.

### **Victims with Limited English Proficiency**

- A person's culture can influence healthcare beliefs, treatment outcomes, emotional healing, and general beliefs about practices regarding justice in the aftermath of a sexual assault, the response of the criminal justice system, and the willingness of victims to be involved in the system.
- Victims may be apprehensive about receiving care from those of a different culture other than their own as a result of distrust and previous negative experiences; therefore, it may be helpful when possible to provide responders of the same background or at least who understand a victim's culture.
- Consider cultural beliefs when asking a patient to discuss the sexual assault.
- Understand that victims may not report or discuss the assault because the stigma associated with it is so overwhelmingly negative. In some cultures, for example, the loss of virginity prior to marriage is devastating and may render victims unacceptable for an honorable marriage. Even discussing an assault or sexual terms may be linked with intense embarrassment and shame in some cultures.
- Responders should be familiar with procedures for coordinating services and interventions for victims in communities that recognize cultures that have their own laws, such as Indian tribes.
- All victims should be treated individually, understanding that what helps one victim deal with a traumatic situation like sexual assault may not be the same for another victim. Do not stereotype beliefs based on race, gender, sexual orientation, or religion.
- Help victims obtain culturally specific assistance and/or provide referrals where they exist.
- Be patient and understanding toward victims' language skills and barriers, which may worsen with crisis.
- Make every attempt to provide same-language service through the use of demonstrably bilingual examiners or by providing monolingual examiners with support from professional interpretation services and translated materials for victims who do not speak English. Use certified interpreters when possible and not victims' families or friends. Take the victim's country of origin, acculturation level, and dialect into account when responding or arranging interpretation. Remember to speak directly to victims when interpreters are used.

- Train interpreters about issues related to sexual assault, confidentiality, and cultural concerns whenever they are needed to facilitate communication in these cases. Make sure that interpreters understand that they may need to testify.

### United States Immigrants

In addition to the information provided above regarding culture, immigrant survivors face particular and difficult barriers in accessing services following a sexual assault. Sexual assault responders must understand these barriers and work to eliminate them.

- When dealing with a sexual assault of an immigrant, be careful of your questioning. Questions should be posed as, "*Do you have any immigration concerns?*" rather than, "*What is your immigration status?*".
- Anticipate that an immigrant victim will usually not self-identify as undocumented or as fearing deportation. Such information about their rights should be offered to all victims, and in coordination with a referral to an immigration service provider experienced in working with immigrant victim populations.
- Immigrant victims of sexual assault may also qualify for immigration remedies that will allow them to stay in the United States lawfully and attain work authorization. These remedies may include:
  - Violence Against Women Act ("VAWA") Self-Petitions
  - U-Visas
  - T-Visas
  - Special Immigrant Juvenile Status.

### Victims with Disabilities

Reasonable accommodations for a disability are considered best practice.

- The rate of victimization for individuals with disabilities is disproportionately higher than for the general population, as disabled individuals are often victimized by family members, caretakers, or friends.
- Ask victims who they wish to have with them and respect those wishes. Designated individuals permitted by the victim need instruction on remaining silent so as to avoid influencing the victim's statements.
- Follow facility and jurisdictional policy for assessing vulnerable adults' ability to consent to the exam and evidence collection, and involve protective services as needed.
- Speak directly to victims with disabilities, even when interpreters, intermediaries, or guardians are present.
- Assess a victim's level of ability and need for assistance during the exam process. Explain procedures to victims and ask what help they require, if any (e.g., people with physical disabilities may need help to get on and off the exam table or to assume positions necessary for the exam). Do not assume they will need special aid.
- Note that not all individuals who are deaf or hard-of-hearing understand sign language or can read lips. Not all blind persons can read Braille. Communication equipment that may be beneficial to victims with sensory disabilities include TTY machines, word boards, speech synthesizers, anatomically correct dolls, materials in alternative formats, and access to interpreter services. Become familiar with the

basics of communicating with an individual using such devices. Be aware that victims with sensory disabilities may prefer communicating through an intermediary who is familiar with their patterns of speech.

- Recognize that individuals may have some degree of cognitive disability: mental retardation, mental illness, developmental disabilities, traumatic brain injury, neurodegenerative conditions such as Alzheimer's disease, or stroke. Note that not all developmental disabilities affect cognitive ability (e.g., cerebral palsy may result in physical rather than mental impairment). Be aware that victims with cognitive disabilities may be easily distracted and have difficulty focusing. To reduce distractions, conduct the exam in an area that is void of bright lights and loud noises. Speak to victims in a clear and calm voice and ask very specific and concrete questions. Be exact when explaining what will happen during the exam process and why. It may also be helpful if examiners and others present in the exam room refrain from wearing uniforms with ornamental designs and jewelry.
- Victims with disabilities may be apprehensive in consenting to an examination or reporting the crime for fear of losing their independence. For example, if a family member and primary caretaker is the abuser, the victim may need to be placed in a nursing home.
- Recognize this may be the first experience that victims have had with a pelvic exam. The procedure should be explained in detail in language in a way they can understand. Consider cognitive abilities and possible lack of knowledge regarding reproductive health. They may not know how they feel about the incident or even identify that a crime was committed against them.
- Some victims with disabilities may want to talk about their perceptions of the role their disability might have played in making them vulnerable to an assault. Listen to their concerns and what the experience was like for them. Assure them that it was not their fault they were sexually assaulted. If needed, encourage discussion in a counseling/advocacy setting on this issue as well as on what might help them feel safer in the future.
- Recognize that the exam may take longer to perform with victims with disabilities. Avoid rushing—such action not only may distress victims, but also can lead to missed evidence and information.

### **Male Victims**

- Help male victims understand that male sexual assault is not uncommon and that the assault was not their fault. Many male victims focus on the sexual aspect of the assault and overlook other elements such as coercion, power differences, and emotional abuse. Broadening their understanding of sexual assault may help reduce their self-blame.
- Because some male victims may fear public disclosure of the assault and the stigma associated with male sexual victimization, emphasis may need to be placed on the scope of confidentiality of patient information during the exam process.
- Offer male victims assistance in considering how friends and family members will react to the fact that they were sexually assaulted (e.g., by a male offender or a female offender).
- Male victims may be less likely than females to seek and receive support from family members and friends, as well as from advocacy and counseling services. Their ability to seek support may vary according to the level of stigmatization they

feel, the circumstances of the assault, the sensitivity of care they initially receive, and the appropriateness of referrals provided.

- Encourage advocacy programs and the mental health community to build their capacities to serve male sexual assault victims and increase their accessibility to this population. Requests by male victims to have an advocate of a particular gender should be respected and honored if possible.

### **Adolescent Victims**

- Adolescents in the presence of parents or guardians create an additional challenge for those involved in the Sexual Assault Response Team ("SART") process because they are often traumatized by their child's victimization.
- Understand there is a risk for further victimization by parents or guardians who punish victims for the assault for not obeying them.
- Assess the physical development of adolescent victims, taking age into consideration when determining appropriate methods of examination and evidence collection. Examinations in South Carolina should only be performed by trained professionals.
- Be aware of South Carolina laws governing a minor's ability to consent to forensic exams and medical treatment. Follow facility and jurisdictional policy in obtaining appropriate consent.
- A detailed explanation of the examination should be provided. This includes the pelvic examination, as this may be the victim's first experience receiving one.
- Reassure the adolescent that regardless of their actions they are not to blame for the assault.
- When possible, health care providers should gather information from the adolescent without the parents or guardian in the room. This permits the adolescents to share their concerns more openly.

### **Older Victims**

- Keep in mind that the emotional impact of the assault may not be felt by older victims until after the exam when they are alone and become aware of their physical vulnerability, reduced resilience, and mortality. Fear, anger, and depression can be especially severe in older victims who are isolated, have little support, and live on a meager income.
- Family members or caretakers may sexually assault their older dependents. Policies should be in place guiding staff on screening and handling situations that are threatening to patients or facility personnel.
- Note that older victims are generally more physically fragile than younger victims and thus may be at risk for tissue or skeletal damage and exacerbation of existing illnesses and vulnerabilities.
- Hearing impairment and other physical conditions attendant to advancing age, coupled with the initial reaction to the assault, may render older victims unable to make their needs known, which could result in prolonged or inappropriate treatment. Do not mistake this confusion and distress for senility.
- Health care personnel should follow facility policies for assessing a vulnerable adult's ability to consent to the exam and evidence collection, and for involving adult protective services.

- Some older victims may want to talk about their perceptions of the role their age and physical condition might have played in making them vulnerable to an assault. Listen to their concerns and what the experience was like for them. Assure them that it was not their fault they were sexually assaulted. If needed, encourage further discussion on this issue in a counseling/advocacy setting.
- Older victims may be reluctant to report the crime or seek treatment because they fear loss of independence. Although sometimes relatives wish to place older victims in an assisted living situation after an assault occurs, such an action is not always necessary or helpful to a victim's recovery. When a change in living environment is needed, assist victims and their relatives in making plans that maximize independence yet enhance safety.
- Encourage use of follow-up medical, legal, and non-legal assistance. Older victims may be reluctant to seek these services or proceed with prosecution. For example, they may rely on family members for transportation and may not want to burden them by asking to be taken to post-exam follow-up appointments.

### **Lesbian, Gay, Transsexual, and Bisexual ("LGTB") Victims**

- Allow victims to write in their gender or sex on forms, rather than asking.
- Always refer to victims by their preferred name and pronoun, even when speaking to others. If unsure of what names to call the victims, or what pronouns to use, ask.
- Treat the knowledge that the person is LGTB as protected information subject to all confidentiality and privacy rules.
- Be aware that companions of LGTB victims may not know their gender identities or sexual orientation.

### **Military Victims**

- The military offers victims the option of restricted reporting or unrestricted reporting. Restricted reporting allows a sexual assault victim to confidentially disclose the details of his or her assault to specified individuals and receive medical treatment and counseling without triggering the official investigative process or command notification. Restricted reporting can be voided if the medical facility contacts law enforcement or other professionals other than advocates, chaplains, and military sexual assault response coordinators.
- Exam sites that provide exams for military installations are encouraged to draft Memoranda of Understanding to address such issues as confidentiality and storage of evidence.

### **Domestic Violence Victims**

- Do not negate the possibility that a sexual assault can be a component of domestic violence. Response to sexual assault occurring within a domestic violence context requires understanding of the overlapping dynamics of sexual assault and domestic violence, the complex needs of victims, the potential dangerousness of offenders, the resources available for victims, and adherence to jurisdictional policies on response to domestic violence.

- Procedures should be implemented to maintain safety for the victim. At minimum, a referral to the local domestic violence service organization or hotline should be offered after the initial sexual assault report and examination.

The Special Considerations section of the South Carolina Sexual Assault Protocol was taken in part and adapted, with special permission from *SafeTa Source* ([www.safeta.org](http://www.safeta.org)), from: U.S. Department of Justice (2013). A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents (2nd Edition). Retrieved from <http://www.iafn.org/associations/8556/files/SAFE%20PROTOCOL%202013-508.pdf>

## Sexual Assault Forensic Examination

### Guidelines for Forensic Evidence Collection in Pediatric Sexual Assault

<b>Timeline for Forensic Evidence Collection and Examination</b>	<ul style="list-style-type: none"> <li>• The South Carolina sexual assault evidence collection kit should be performed on a <b>child 10 years of age and younger</b> or on a prepubescent child within 36 hours of the acute sexual assault. <ul style="list-style-type: none"> <li>➤ Child still requires an emergent exam up to 72 hours from the assault to identify, document and assess anogenital injuries.</li> <li>➤ Emergency room physician or a Pediatric Sexual Assault Nurse Examiner (“P-SANE”), if available, is to perform the collection.</li> </ul> </li> <li>• <b>After 36 hours</b> <ul style="list-style-type: none"> <li>➤ Only the clothing the child was wearing at time of assault and the linens where incident occurred need to be collected. Notify law enforcement, so they can pursue these articles.</li> <li>➤ Obtain a Buccal swab from child for DNA identification (see section below).</li> </ul> </li> </ul>
<b>State Mandated Notification of Agencies</b>	<ul style="list-style-type: none"> <li>• Law enforcement in the jurisdiction where the incident occurred.</li> <li>• Local DSS where the child resides, if alleged perpetrator involves parent/legal guardian or if parent/legal guardian’s actions have resulted in the sexual assault allegation, i.e. failure to protect child.</li> </ul>
<b>Other Agencies</b>	<ul style="list-style-type: none"> <li>• Sexual Assault Victim Advocate Services</li> </ul>
<b>Parent/Guardian Interview</b>	<ul style="list-style-type: none"> <li>• If more than one caregiver present, interview each separately. Ask the following questions: <ul style="list-style-type: none"> <li>➤ When did you first become aware of the incident?</li> <li>➤ What did child say happened?</li> <li>➤ To whom did child make disclosure?</li> <li>➤ What prompted the disclosure (circumstances)?</li> <li>➤ What was parent’s reaction to disclosure?</li> <li>➤ What follow-up questions did parent ask the child?</li> <li>➤ Who is the alleged perpetrator and what is their relationship to the child?</li> <li>➤ What terms does the child use for genitalia?</li> <li>➤ Obtain a complete genitourinary medical history.</li> </ul> </li> </ul>
<b>Child Medical History</b>	<ul style="list-style-type: none"> <li>• It is recommended that the child interview be conducted by a trained Forensic Interviewer due to the varying cognitive developmental stages of the prepubescent child.</li> <li>• In the event the child spontaneously starts narrating the incident: <ul style="list-style-type: none"> <li>➤ Do not interrupt the child.</li> <li>➤ Leave verification of details for forensic interview.</li> <li>➤ Document the child’s statements verbatim rather than the examiner’s interpretation of the child’s statements.</li> <li>➤ Document child’s demeanor and changes during the statement.</li> <li>➤ Obtain a complete genitourinary medical history.</li> </ul> </li> </ul>

<p style="text-align: center;"><b>Evidence Collection</b></p>	<ul style="list-style-type: none"> <li>• Speculum examination <b>is not indicated</b> on a prepubescent female child unless acute anogenital bleeding is present.             <ul style="list-style-type: none"> <li>➤ In these situations, examination under anesthesia is indicated and medical treatment is done in conjunction with evidence collection.</li> </ul> </li> <li>• Collecting swabs and smears should be guided by the history.             <ul style="list-style-type: none"> <li>➤ If indicated, examiner may gently swab with a cotton-tipped applicator, moistened in non-bacteriostatic sterile water, the vulva, inguinal creases, perineum, and/or medial aspect of upper thighs.</li> </ul> </li> <li>• Bite Mark Evidence Collection             <ul style="list-style-type: none"> <li>➤ If the child has not bathed or bite mark has not been washed, collect saliva specimen by swabbing with two cotton-tipped applicators using the double swab technique.                 <ul style="list-style-type: none"> <li>▪ First swab is moistened with non-bacteriostatic sterile water and rubbed over the skin using moderate pressure and circular motion. Second swab is used dry repeating this motion.</li> </ul> </li> </ul> </li> <li>• Do not collect plucked/pulled scalp hair from prepubescent child.             <ul style="list-style-type: none"> <li>➤ Scan the child/adolescent's body with an alternate light source with an orange filter and swab any area of fluorescence.</li> </ul> </li> <li>• Swab any skin surface showing dried or moist secretions at unaided visual inspection even if negative fluorescence</li> </ul>
<p style="text-align: center;"><b>Buccal Swab Collection for DNA Identification</b></p>	<ul style="list-style-type: none"> <li>• No Blood Standard indicated</li> <li>• If oral-genital contact suspected, first obtain oral specimen by swabbing between gums and lips, tonsillar pillars and under tongue using two sterile cotton applicators.</li> <li>• Then acquire Buccal Standard as follows:             <ul style="list-style-type: none"> <li>➤ Child cannot eat or drink for at least 30 minutes prior to collection.</li> <li>➤ Child is to rinse mouth thoroughly and wait 15 minutes before obtaining sample.</li> <li>➤ Using 2 sterile cotton-tipped applicators, rub inside of the cheek 10 times with an up and down motion.</li> </ul> </li> </ul>
<p style="text-align: center;"><b>STI Screening and Treatment</b></p>	<ul style="list-style-type: none"> <li>• Sexually transmitted infection ("STI") screening in a prepubescent child after <b>single acute sexual assault is not recommended</b>, unless there are signs of infection such as:             <ul style="list-style-type: none"> <li>➤ Presence of purulent vaginal/penile (urethral) discharge</li> <li>➤ Genital vesicles or ulcers</li> <li>➤ Genital warts; <b>OR</b></li> <li>➤ Child has been abused for an extended period of time and now presents for an acute assault</li> </ul> </li> <li>• If any of the above scenarios are present, obtain a dirty catch urine sample and send for <i>N. gonorrhoea</i> and <i>C. trachomatis</i> Nucleic Acid Amplification Testing (APTIMA Combo 2 or ProBeTec ET).             <ul style="list-style-type: none"> <li>➤ Presence of an STI in a prepubescent child is forensic evidence of sexual abuse. Cultures or a second confirmatory NAAT must be obtained prior to use of antibiotics.</li> </ul> </li> <li>• <b>In a prepubescent child, post-exposure prophylaxis and presumptive treatment after acute sexual assault is not indicated.</b></li> </ul>

<p><b>Referrals</b></p>	<ul style="list-style-type: none"><li>• All children initially seen for a forensic evidence collection at a local hospital Emergency Department or by a P-SANE require referral to the local Children's Advocacy Center facility within <b>2 weeks of the acute incident</b> for:<ul style="list-style-type: none"><li>➤ Medical follow-up with Child Abuse Pediatrics healthcare provider</li><li>➤ Forensic interview</li><li>➤ Mental health assessment/counseling</li><li>➤ STI assessment and/or follow-up</li></ul></li><li>• For a listing of Children's Advocacy Centers, please refer to <a href="http://www.sccamrs.org">www.sccamrs.org</a></li></ul>
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**Guidelines for Forensic Evidence Collection in the Pubescent Child and Adolescent  
after Acute Sexual Assault**

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<p><b>Timeline for Forensic Evidence Collection and Examination</b></p>	<ul style="list-style-type: none"> <li>• The South Carolina sexual assault evidence collection kit should be performed in a pubescent child 11 to 17 years of age within 72 hours of the acute sexual assault.</li> <li>• Emergency room physician or a sexual assault nurse examiner, if available, is to perform the collection.</li> </ul>
<p><b>Mandated Notification of Agencies</b></p>	<ul style="list-style-type: none"> <li>• Law enforcement in the jurisdiction where the incident occurred.</li> <li>• Local DSS where the child/adolescent resides, if alleged perpetrator involves parent/legal guardian or if parent/legal guardian's actions have resulted in the sexual assault allegation, i.e. failure to protect child/adolescent.</li> </ul>
<p><b>Other Agencies</b></p>	<ul style="list-style-type: none"> <li>• Sexual Assault Victim Advocate Services</li> </ul>
<p><b>Adolescent Medical History</b></p>	<ul style="list-style-type: none"> <li>• Use open-ended (non-leading) questions and encourage free narrative.</li> <li>• Document questions asked and child/adolescent's statements verbatim.</li> <li>• Obtain a genitourinary medical history.</li> <li>• Document demeanor during statement.</li> </ul>
<p><b>Evidence Collection</b></p>	<ul style="list-style-type: none"> <li>• Clothing: Collect if child/adolescent has not changed clothes or bathed. Otherwise notify law enforcement to pursue these articles at child/adolescent's residence or site of assault.</li> <li>• Scan the child/adolescent's body with an alternate light source with an orange filter and swab any area of fluorescence.             <ul style="list-style-type: none"> <li>➢ Swab any skin surface showing dried or moist secretions at unaided visual inspection even if negative fluorescence.</li> </ul> </li> <li>• Fingernail scrapings: Collect if child/adolescent indicates he/she scratched the alleged perpetrator or fingernails show foreign material.</li> <li>• If pubic hair present, perform pubic hair combing. Do not pluck/pull hair.</li> <li>• Collect genital (vaginal and/or cervical specimens) and rectal swabs and smears.</li> <li>• Collect oral swabs, if history of oral-genital contact within 24 hours of assault.</li> <li>• If postpubertal/postmenarcheal adolescent (Tanner 4 and above), consider speculum examination for:             <ul style="list-style-type: none"> <li>➢ Inspection for vaginal injury or bleeding</li> <li>➢ Collection of vaginal swabs</li> </ul> </li> <li>• Bite Mark Evidence Collection: collect saliva specimen by swabbing with two cotton-tipped applicators using the double swab technique.             <ul style="list-style-type: none"> <li>➢ First swab is moistened with non-bacteriostatic sterile water and rubbed over the skin using moderate pressure and circular motion. Second swab is used dry repeating this motion.</li> </ul> </li> </ul>

<p><b>Buccal Swab Collection for DNA Identification</b></p>	<ul style="list-style-type: none"> <li>• No Blood Standard indicated</li> <li>• If oral-genital contact suspected, first obtain oral specimen by swabbing between gums and lips, tonsillar pillars and under tongue using two sterile cotton applicators.</li> <li>• Then acquire Buccal Standard as follows: <ul style="list-style-type: none"> <li>➢ Child/adolescent cannot eat or drink for at least 30 minutes prior to collection.</li> <li>➢ Child/adolescent is to rinse mouth thoroughly and wait 15 minutes before obtaining sample.</li> <li>➢ Using 2 sterile cotton-tipped applicators, rub inside of the cheek 10 times with an up and down motion.</li> </ul> </li> </ul>
<p><b>Laboratory Studies</b></p>	<ul style="list-style-type: none"> <li>• Urine pregnancy test, and</li> <li>• Toxicology screening, if drowsiness, confusion, memory loss or impaired motor skills is present. <ul style="list-style-type: none"> <li>➢ If ingestion of the drug occurred within last 24 hours, collect: <ul style="list-style-type: none"> <li>▪ 10 ml of blood collected in gray-top tube</li> <li>▪ 30 to 50 ml of urine</li> </ul> </li> <li>➢ Collect only a urine specimen if 24 hours have passed from the ingestion but still within a 72-hour time frame.</li> </ul> </li> </ul>
<p><b>STI Testing and Prophylaxis/Treatment</b></p>	<ul style="list-style-type: none"> <li>• Request a Nucleic Acid Amplification Test for <i>N. gonorrhoea</i> and <i>C. trachomatis</i> (PCR, TMA or SDA) on a dirty catch urine specimen (10-30 ml).</li> <li>• RPR</li> <li>• HIV</li> <li>• Check immunization status for Hepatitis B</li> <li>• STI prophylaxis or presumptive treatment is recommended after sexual assault and acceptable <b>after testing is completed</b>. <ul style="list-style-type: none"> <li>➢ For STI treatment guidelines, see the Center for Disease Control and Prevention website <a href="http://www.cdc.gov/std/treatment/">http://www.cdc.gov/std/treatment/</a></li> </ul> </li> </ul>
<p><b>Emergency Contraception</b></p>	<p><b>The standard of care is to discuss <u>and</u> offer emergency contraception.</b></p> <ul style="list-style-type: none"> <li>• Plan B One Step <ul style="list-style-type: none"> <li>➢ 1.5 mgs tablet orally within 72 hours of the sexual assault, best if within 24 hours. <ul style="list-style-type: none"> <li>▪ If vomiting occurs within 2 hours, repeat dose.</li> </ul> </li> </ul> </li> </ul>
<p><b>Referrals</b></p>	<ul style="list-style-type: none"> <li>• If initially seen for a forensic evidence collection at a local hospital Emergency Department or by a Pediatric/Adult Sexual Assault Nurse Examiner, a referral is required to the local Children's Advocacy Center facility within 2 weeks of the acute incident for: <ul style="list-style-type: none"> <li>➢ Medical follow-up with Child Abuse Pediatrics healthcare provider</li> <li>➢ Follow up with primary care physician if Child Abuse Pediatrics healthcare provider not available</li> <li>➢ Forensic interview, if indicated</li> <li>➢ Mental health assessment/counseling, and</li> <li>➢ STI reassessment and/or follow-up</li> </ul> </li> <li>• For a listing of Children's Advocacy Centers, please refer to <a href="http://www.sccamrs.org">www.sccamrs.org</a></li> </ul>

**Guidelines for the Medical Forensic Evaluation and Evidence Collection in the  
Competent Adult  
(18 years of age and older)**

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<p align="center"><b>Standard of Care</b></p>	<ul style="list-style-type: none"> <li>• All patients should receive a comprehensive medical/forensic evaluation by a Sexual Assault Nurse Examiner (SANE) within 72 - 120 hours after a sexual assault. If a SANE is not available, an emergency room physician or registered nurse may conduct the medical/forensic evaluation and evidence collection.</li> <li>• Care for sexual assault patients should be provided in a private and safe location. Sexual assault patients should be considered as priority emergency cases.</li> <li>• Advocacy services should be offered to all victims of sexual assault. The decision to accept or decline advocacy services should rest with the victim.</li> <li>• Victims should be able to identify the individual(s) she/he wishes to be present during the examination process.</li> <li>• All victims of sexual assault should be informed of their right to consent or decline to report their sexual assault to law enforcement. The options will be provided and discussed by a community-based advocate unless the victim wishes only to speak with medical personnel. See <b>Appendix A</b> for anonymous reporting requirements for sexual assault.</li> <li>• All victims have the right to consent or decline any portion of the medical forensic evaluation.</li> <li>• Medical treatment for life threatening or serious injuries should always be completed prior to any forensic evidence collection. Best practice includes a SANE being present to act as a resource for victim advocacy and evidence preservation when medical treatment is a priority.</li> <li>• Chain of custody must be maintained to protect the integrity of evidence.</li> </ul>
<p align="center"><b>Mandated Notification of Agencies</b></p>	<ul style="list-style-type: none"> <li>• Mandatory notification of law enforcement only applies to competent patients 18 years of age and older when there is evidence of injury by a gun, or if the patient meets the legal definition of a vulnerable adult.</li> <li>• The patient has the right to choose whether or not she/he would like to report the assault law enforcement.</li> </ul>
<p align="center"><b>Anonymous Reporting</b></p>	<ul style="list-style-type: none"> <li>• If the patient declines law enforcement involvement, the patient should be given the option of having an anonymous medical forensic evaluation and evidence collection.</li> <li>• Anonymous report medical forensic evaluations for sexual assault use the SLED evidence collection kit.</li> <li>• Anonymous report labeling: <b>DO NOT INCLUDE THE PATIENT'S NAME ON THE OUTSIDE OF THE SLED EVIDENCE COLLECTION KIT.</b> In place of the patient's name on the outside of the SLED evidence collection kit, use an identifier (label) that will "link" the victim to the SLED evidence collection kit for future reference (e.g., a combination of the patient's birth date and the last four numbers of the medical record). The identifier (label) is generated by the individual SANE program based on the program's protocol for generating anonymous SLED evidence collection kit labels.</li> </ul>

<p style="text-align: center;"><b>Other Agencies</b></p>	<ul style="list-style-type: none"> <li>• Sexual assault victim advocate services should be offered to every victim who presents to Emergency Room. Local advocacy, whether it be sexual and/or domestic violence services and/or shelter resources should be identified in every community. State advocacy organizations should be identified and may include:             <ul style="list-style-type: none"> <li>○ South Carolina Coalition Against Domestic Violence and Sexual Assault (“SCCADVASA”)</li> <li>○ South Carolina Victim Assistance Network (“SCVAN”)</li> <li>○ South Carolina State Office of Victim Assistance (“SOVA”)</li> <li>○ Local advocacy and shelter resources</li> </ul> </li> </ul>
<p style="text-align: center;"><b>Forensic Evaluation</b></p>	<ul style="list-style-type: none"> <li>• The medical forensic evaluation consists of obtaining information necessary to make the appropriate decisions regarding medical care, forensic evidence collection and appropriate referral and follow up information. Evidence collection is guided by the patient history. It may include but is not limited to the following:             <ul style="list-style-type: none"> <li>○ Presenting/chief complaint                 <ul style="list-style-type: none"> <li>▪ Physical complaints</li> <li>▪ Psychological/emotional status</li> <li>▪ Complete review of systems</li> </ul> </li> <li>○ Medical history                 <ul style="list-style-type: none"> <li>▪ Medications</li> <li>▪ Allergies</li> <li>▪ Recent illness/injuries/surgeries</li> <li>▪ Immunization status (Tetanus, Hepatitis B, etc.)</li> </ul> </li> <li>○ Gynecological history                 <ul style="list-style-type: none"> <li>▪ Last menstrual period</li> <li>▪ Birth Control method</li> <li>▪ Number of pregnancies/outcomes</li> </ul> </li> <li>○ Pre Assault Activity                 <ul style="list-style-type: none"> <li>• Alcohol or drug use</li> <li>▪ Last consensual sexual activity (date)</li> </ul> </li> <li>○ Post Assault Activity                 <ul style="list-style-type: none"> <li>• Changed clothing</li> <li>• Showered/bathed</li> <li>• Food and or drink</li> <li>• Alcohol and/or drug use</li> </ul> </li> <li>○ Assault History (detailed account of events in patient’s own words)                 <ul style="list-style-type: none"> <li>• Date and time of assault</li> <li>• Location of assault (city and/or county)</li> </ul> </li> <li>○ Assailant Information                 <ul style="list-style-type: none"> <li>• Name, race, age, gender, relationship</li> <li>• Alcohol and/or drug use</li> </ul> </li> <li>○ Assailant Methods                 <ul style="list-style-type: none"> <li>• Weapons, strangulation, threats, physical assault details</li> </ul> </li> <li>○ Assailant Contacts                 <ul style="list-style-type: none"> <li>• Genital, oral and non-genital contacts, other acts</li> <li>• Ejaculation</li> <li>• Condom, lubricants, etc.</li> </ul> </li> </ul> </li> </ul>

<b>Timeline for Forensic Evidence Collection &amp; Examination</b>	<ul style="list-style-type: none"><li>• The collection of evidence <u>may</u> be performed up to 120 hours post assault.</li><li>• It is important to use the forensic evaluation as <u>the</u> guide in determining the appropriateness of evidence collection, medical treatment, referral and follow up.</li></ul>
<b>Physical Assessment</b>	All victims of sexual assault should receive: <ul style="list-style-type: none"><li>• Vital signs</li><li>• Head to toe assessment for injuries</li></ul>

**Evidence Collection**

- State Law Enforcement Division (“SLED”) evidence collection kits should be utilized for evidence collection. All personnel are to wear disposable gloves while handling all potential evidence.
- Non-genital physical exam findings: document the location, size and appearance of any findings that may have resulted from the assault (using a time clock as a reference guide). Diagram findings on a body map.
- Genital physical exam findings: document the location, size and appearance of any findings. Best practice includes colposcopy and/or digital photography to support exam findings.
- Clothing: If the patient has not changed clothes or bathed since the assault, collect clothing that has been in closest contact with the genitalia. Underwear should be collected. Do not routinely collect shoes, belts etc. Do **not** collect outer clothing **unless** torn, stained or damaged in the assault.
- Oral swab: Collect if history of oral genital contact within 24 hours of assault. (Collect prior to collection of buccal swab-see below.) Look for possible injury to the upper palate during collection.
- Buccal swab: Collected from the patient to identify his/her DNA, referred to as “known standard”.
  - Wait at least 10 minutes after eating or drinking to collect.
  - If oral swab indicated, collect first and then have the patient rinse with water and wait at least 10 minutes to collect Buccal swab.
- Suspected body fluid: Swab any areas that the patient indicates may contain the assailant’s body fluid. Document area swabbed and type of suspected fluid on envelope.
  - Scan the patient’s body with an alternate light source with an orange filter and swab any area of fluorescence.
  - Swab any skin surface showing dried or moist secretions at unaided visual inspection even if negative fluorescence.
- Suspected saliva: Swab any areas the patient states she/he has been licked, kissed, bitten and/or sucked. Document area swabbed and type of suspected fluid on envelope.
- Pubic hair combings: perform pubic hair combing. Do not pluck/pull hair.
- Genital exam (speculum exam if indicated):
  - Inspection for genital injuries and/or bleeding.
  - In the female patient collect vaginal, cervical and/or anal swabs and smears per assault history.
  - Identification of semen or discharge in the vaginal vault and collection of samples.
  - In the male patient collect penile, scrotal and anal swabs and smears per assault history.
- Miscellaneous materials: for comparison with debris at crime scene or on assailant’s body. Collect any debris or trace evidence that is found on the patient’s body or clothing. Package in the SLED kit envelope, labeled “Miscellaneous Materials”.
  - Leaves, fibers, hair, etc.
- Evidence is not to be packaged in plastic or airtight containers. Paper bags are to be used for clothing and larger item collection. All evidence must be air-dried.
- Each item collected as evidence must be documented in the patient record.

<p style="text-align: center;"><b>Laboratory Studies</b></p>	<ul style="list-style-type: none"> <li>• Perform a urine pregnancy test. In some patients a serum pregnancy test may be necessary.</li> <li>• Collect samples for toxicology screening:             <ul style="list-style-type: none"> <li>○ 10 ml of blood collected in gray-top tube (containing sodium fluoride and potassium oxalate).</li> </ul> </li> <li>• Collect urine sample if the patient's history or symptoms are concerning for a drug facilitated sexual assault. Drowsiness, impaired motor skills, confusion, memory loss during the potential time frame of the assault or isolated ("cameo") memories of sexual assault reported by the patient are potential indicators for toxicology screening:             <ul style="list-style-type: none"> <li>○ If potential ingestion of the drug occurred within the last 24 hours, collect:                 <ul style="list-style-type: none"> <li>• 10 ml of blood, collected in gray-top tube (containing sodium fluoride and potassium oxalate)</li> <li>• At least 30-50 ml of urine (keep refrigerated)</li> </ul> </li> <li>○ If 24 hours have passed from the potential ingestion but it is still within a 72-hour time frame collect ONLY urine.</li> <li>○ Submit all toxicology samples in the SLED kit. A biological sample sticker is to be placed on the outside of the SLED kit.</li> </ul> </li> </ul>
<p style="text-align: center;"><b>Photo-documentation</b></p>	<ul style="list-style-type: none"> <li>• Informed consent must be obtained from all patients prior to photo-documentation. In emergent cases, when a signature cannot be obtained, consent will be implied.</li> <li>• Photo-documentation should take place prior to any treatment whenever possible without compromising the patient's medical care (cleaning, suturing, surgery, etc.).</li> <li>• Photograph sequence should begin and end with a photograph of the patient's name or hospital sticker, marked with the photographer's initials.</li> <li>• Photographs taken for injury documentation are considered part of the forensic record and should be retained by the agency.</li> <li>• When photo-documentation is performed, there must be a system in place to properly store and maintain security of those pictures.</li> </ul>
<p style="text-align: center;"><b>Chain of Custody</b></p>	<ul style="list-style-type: none"> <li>• Documentation of the items collected as evidence must be in the patient's forensic record and include:             <ul style="list-style-type: none"> <li>○ Patient's full name</li> <li>○ Date and time of collection</li> <li>○ Identification/description of the evidence</li> <li>○ Signature of the individual collecting the evidence with the date and time</li> <li>○ Signature of the individual receiving the evidence with the date and time</li> </ul> </li> <li>• Evidence is to be sealed with evidence tape and released to the appropriate law enforcement agency.</li> <li>• See <b>Appendix A</b> for anonymously reported kit chain of custody recommendations.</li> </ul>

<p><b>STI Screening and Prophylaxis</b></p>	<ul style="list-style-type: none"> <li>• For STI screening and prophylaxis guidelines, see the Centers for Disease Control and Prevention website <a href="http://www.cdc.gov/std/treatment/">http://www.cdc.gov/std/treatment/</a>. Best practice is post-assault prophylactic treatment for gonorrhea, chlamydia, trichomoniasis and hepatitis.</li> <li>• Routine screening is not recommended as best practice.</li> </ul> <p>If the patient is symptomatic consider:</p> <ul style="list-style-type: none"> <li>➤ Nucleic Acid Amplification Test (NAAT) for N. gonorrhea and C. trachomatis (PCR, TMA or SDA)</li> <li>➤ Wet mount or other test for T. vaginalis</li> <li>➤ RPR</li> <li>➤ HIV</li> <li>➤ Check immunization status for Hepatitis B – Consider giving a Hepatitis B shot for unknown status or known “never received” status, without testing.</li> </ul> <ul style="list-style-type: none"> <li>• This is considered routine care for victims of sexual assault and should be provided regardless of whether a kit was collected in the presenting facility.</li> </ul>
<p><b>Emergency Contraception</b></p>	<p><b>The standard of care is to discuss <u>and</u> offer emergency contraception if applicable.</b></p> <ul style="list-style-type: none"> <li>• Plan B One Step <ul style="list-style-type: none"> <li>▪ Given within 72 hours of the sexual assault, best if within 24 hours.</li> <li>▪ If vomiting occurs within 2 hours, repeat dose.</li> <li>▪ In circumstances where offering emergency contraception is not acceptable with your belief system or that of the institution’s, then arrangements/referrals should be made to provide the patient this option.</li> </ul> </li> </ul>
<p><b>Referrals</b></p>	<ul style="list-style-type: none"> <li>• Follow-up information and/or referrals may include but is not limited to the following: <ul style="list-style-type: none"> <li>○ Medical follow-up (pregnancy or STI testing, injuries, or new physical complaints).</li> <li>○ Sexual assault advocacy agencies (crisis counseling, self-help groups, safety planning, or Orders of Protection).</li> <li>○ SOVA (future crime victim compensation).</li> </ul> </li> </ul>

## Community-Based Sexual Assault Victim Advocate Recommended Protocol

The term "community-based advocates," including sexual assault victim advocates, refers to victim advocates who work for private, autonomous, often non-profit agencies within the community and receive extensive training and continuing education on serving survivors of sexual violence. Community-based advocates work without agenda to serve the victim and his/her family members, when circumstances allow the advocate to work with both. Otherwise, the community-based advocate serves the victim. Victims of Crimes Act ("VOCA") and VAWA-funded advocates and volunteers cannot serve known perpetrators of sexual or domestic violence, and can also not serve those that are incarcerated. In such instances, the responding advocate will contact the Hotline and request an eligible advocate for accompaniment, if available.

The primary objectives for a community based sexual assault victim advocate in any sexual assault case are as follows:

1. Accompany the survivor and his/her family members during the hospital/acute sexual assault center ("ASAC") visit from a non-judgmental and victim-centered perspective;
2. Advocate for the survivor's interests and rights;
3. Maintain survivor confidentiality (communications with community-based advocates have qualified privilege);
4. Provide the survivor and his/her family members information about medical, legal, and law enforcement procedures;
5. Provide crisis intervention to the survivor and his/her family members; and
6. Promote the responsiveness of individual service providers.

### **Hotline Response**

Sexual assault service centers operate a 24-hour hotline answered by a live person, typically trained advocates (who receive a comprehensive 25-hours training initially and four hours of continuing education annually, concerning topics such as sexual assault and the trauma of rape, crisis intervention techniques, hospital/ASAC accompaniment procedures from a victim-centered perspective, law enforcement and criminal justice perspectives, safety planning, working with males, LGTB, individuals with disabilities, the elderly, and collecting data) or dispatch operators, who will follow procedure for dispatching a trained advocate to the hospital/ASAC call per jurisdictional procedures. If a survivor contacts the hotline directly citing an assault within 120 hours\*, the advocate will explain the benefits of the survivor seeking medical treatment immediately and the importance of not showering, brushing his/her teeth, or eating and drinking if they have any intention to file a report with law enforcement in an effort to preserve evidence for possible collection at the hospital/ASAC. [Note: Some hospitals operate on a 72 hour timeline. Check your policy

for clarification.] A trained advocate from the sexual assault service center will respond to any hospital/ASAC accompaniment requests from the victim, family member, medical personnel, or law enforcement within one hour.

### **Hospital/ASAC Response**

At the hospital/ASAC, the community-based advocate will inconspicuously indicate to hospital/ASAC personnel that he/she is with the local sexual assault service center. Advocate will knock on survivor's door and request entry. The community-based advocate will introduce himself/herself and hand the survivor a standard packet of information on the local sexual assault service center, emergency numbers, the South Carolina Victim Bill of Rights, and a list of resources. The community-based advocate will also ask the survivor permission to remain in the room and again for the examination and evidence collection kit. If survivor does not want the community-based advocate present during all or part of the hospital/ASAC visit, the advocate will wait outside of the exam room until the survivor requests the advocate's presence or is discharged from the hospital/ASAC. If the survivor is abusive towards the advocate, the advocate should remain outside of the exam room until the survivor requests the advocate's presence and agrees to discontinue the abusive behavior.

The community-based advocate's primary role is to believe the survivor and his/her story, to advocate for that survivor with medical, law enforcement, and other systems, and to maintain the survivor's right to confidentiality. The advocate will discuss the short term and long term impact of sexual assault, gather and evaluate information during survivor contact, provide crisis intervention from a non-judgmental and victim-centered perspective, assist the survivor in identifying support systems, provide proper referrals (including special considerations for individuals who live in rural communities, Latinas, males, individuals who identify as gay, lesbian, bisexual, or transgender, the elderly, individuals with disabilities, and institutionalized individuals), provide information about legal procedures and victim's assistance programs, provide information to assist the survivor in making informed decisions about medical care and the preparations needed, provide information about medical care/concerns, including assistance with needed follow-up and support during medical exams, provide information about services available for sexual assault, including shelter and counseling, and assist the survivor in creating a safety plan, if necessary. The advocate will also provide information about the local sexual assault service center's follow up services to include crisis intervention, therapeutic counseling, assistance with filing for orders of protection/restraining orders, explaining the court process, assistance with completing victim assistance forms, personal advocacy, and law enforcement/court accompaniment.

The community-based advocate will not ask the survivor questions about the assault at any time. The advocate will only share information about the case with law enforcement or medical responders at the request of the survivor or in regard to the survivor's immediate safety, with exceptions noted in the Confidentiality Section. If law enforcement is not

already involved, the advocate will explain survivor's right to an anonymous kit (See Appendix A entitled South Carolina Act 59: VAWA Reauthorization for complete details regarding reporting of sexual assault incidents anonymously and procedure for follow up contact).

The advocate does not assist with the medical procedures or touch anything related to the sexual assault evidence collection kit. The advocate can turn on/off the lights for medical staff, bring pages of labels, or leave the room to get medical equipment, food, or clothing for the survivor. The advocate cannot spend money on the survivor for food or beverage, but can ask medical staff to order food or beverage for the survivor. The community-based advocate also cannot provide transportation to survivors, but can assist in coordinating transportation with law enforcement or with sexual assault service center funds, if available. If the survivor is discharged before receiving medical care, the advocate will encourage and direct the survivor to another medical location. The advocate should also assist the medical staff in finding appropriate shelter for the survivor, if necessary. In consideration of the survivor, the advocate should not eat or drink in the presence of the survivor if the survivor is being encouraged not to eat or drink prior to the forensic exam; the advocate should not talk or text on his/her cell phone or read a book if the survivor is awake; and the advocate should not leave the survivor unaccompanied for extended periods of time (if the advocate must leave the exam room to assist the survivor or for personal reasons, the advocate should not leave his/her personal items, such as a purse or cell phone, in the room). If a second survivor presents at the hospital/ASAC, the advocate will request another advocate be called in.

The community-based advocate will remain at the hospital/ASAC with the survivor until the survivor is discharged from the hospital/ASAC and has left the premises with three notable exceptions.

1. If an advocate must leave the hospital/ASAC before the survivor, the advocate will contact the hotline and request a replacement advocate. This should be done *only under very unusual circumstances*.
2. If the survivor has extensive injuries that must be treated before the sexual assault evidence collection kit is performed or is temporarily unable to consent to medical treatment as a result of severe drug or alcohol intoxication, the advocate can leave and request that ER staff call for another advocate when the survivor is being prepared for the evidence collection process. The advocate should contact the hotline and request approval from the rape crisis service center staff.
3. If the survivor does not want a male advocate, a female advocate can be substituted. The male advocate should contact the hotline and request a replacement, female advocate.

The community based advocate will complete an advocate report form ("ARF") at the conclusion of all hospital/ASAC accompaniments and submit to the rape crisis service center within 24 hours or the next business day of the accompaniment. The ARF includes

date, time range, and location of hospital/ASAC accompaniment, contact information for survivor and family/friends, information on the perpetrator (if available), contact information for medical/law enforcement personnel, any incident report/anonymous report identification numbers, services provided by the advocate, any referrals provided, and a brief overview of the case (if known) to include incident date, location, type, and any secondary conditions such as domestic violence, stalking, harassment, homelessness, or previous adult survivor of child sexual abuse. The ARF will also indicate survivor's request for follow up and how/when that follow up should be conducted with the least impact to survivor.

The community-based advocate will provide applicable referrals, to include but not limited to the local domestic violence shelter, child advocacy center, local college/university sexual assault assistance, and the sexual assault service center's hotline number. If survivor does not live in the advocate's service area, the advocate will provide a referral to the appropriate sexual assault services agency or to the Rape, Abuse, and Incest National Network ("RAINN") hotline (if out of state). No matter the survivor's residence, the survivor will receive follow up from sexual assault service center, if he/she requests it.

### **Confidentiality**

Sexual assault service centers are committed to respecting the privacy and dignity of each person served and to holding in confidence all client-identifying information obtained in the course of the helping relationship to encourage clients to report. The survivor owns the privilege of confidentiality and makes the decision regarding all disclosures of information. Client-identifying information obtained in the course of the helping relationship will not be shared with others outside of the sexual assault services agency without the survivor's consent, with five notable exceptions as set forth below:

1. Mandated reporting;
2. Situations involving life-saving or life-threatening emergencies;
3. A survivor's indication that he/she intends to commit a crime;
4. Routine contact during a hospital/ASAC accompaniment with law enforcement and medical personnel; and
5. Court-ordered release of documents (qualified privilege).

Sexual assault service centers are mandated reporting agencies under South Carolina Code of Laws § 20-7-510(B). Advocates must report information received in their professional capacity that gives them "reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by acts or omissions that would be child abuse or neglect." For unmarried children ages 15 years or younger, this includes ALL forms of sexual conduct, physical abuse, or child neglect or maltreatment. For children 16 or 17 years old, *consensual* sexual conduct does not have to be reported, although assault must be reported. *Survivors over the age of 18 have the right to decide for themselves whether they will report their assault to law enforcement, unless the adult survivor is developmentally delayed or mentally incoherent to the extent that he/she is not able to protect himself/herself from harm.*

Advocates must report abuse/assault by a parent, guardian, caretaker, institution, or someone acting in the role of a parent to the county's Department of Social Services. Advocates must report abuse/assault by anyone other than a parental figure to law enforcement in the jurisdiction where the assault took place. If an advocate believes he/she has or may have a mandated reporting situation, the advocate should contact the hotline to request the assistance of a staff member from the sexual assault service center. The staff member will make the report to DSS or law enforcement, as appropriate and if deemed necessary.

Community-based advocates sign a confidentiality agreement indicating their understanding of the confidentiality policy and renew this document biannually.

## Law Enforcement Recommended Protocol

### **Purpose**

The primary objectives for a law enforcement officer in any sexual assault case are to identify information that supports the facts of the case, identify and preserve evidence, identify the offender, and develop probable cause to support the arrest and prosecution of the offender. Law enforcement officers should use a victim-centered approach to achieve these objectives.

Since many sexual assault victims will experience their first real contact with a law enforcement officer following the assault, the law enforcement officer should be ever-cognizant of the emotional wellbeing of the victim and should take all reasonable steps to alleviate the negative impact of the investigative process.

The officer(s) should remain mindful that law enforcement is but one component of a multidisciplinary team such as the Sexual Assault Response Team (SART). The team concept is crucial in ensuring a victim-centered approach to the investigation.

The victim-centered approach means that the needs and interests of victims/survivors are of central concern to sexual assault response teams and first responders as they respond. For a law enforcement officer this means:

- A. Enhancing cooperation between the law enforcement agency and community organizations that may assist the victim(s).
- B. Giving victims choices and options whenever possible.
- C. Demonstrating sensitivity by using non-judgmental questions, comments, and body language. For example, instead of "Tell me about your rape," ask, "What are you able to tell me about the assault?"
- D. Providing the opportunity for the victim to tell what happened. Instead of asking "What were you doing out so late?" ask the victim to "describe what happened before the assault."
- E. Establishing and maintaining liaisons with area law enforcement commands and crime victim liaisons and specialized units such as sexual assault programs, advocacy centers, and community medical/forensic services.
- F. Facilitating communication within the law enforcement agency and among members of the multidisciplinary team (SART).
- G. Maintaining respect for the victim/survivor in interdisciplinary communication.

- H. Avoiding premature judgments. Sexual assault cases often seem counterintuitive at first. Victims may wait days, weeks, months, or even years before reporting their assault. The victim may seem inappropriately calm and may lack signs of a physical struggle (e.g., cuts, bruises, or abrasions). It is important to withhold judgments about the case and the victim until sufficient evidence is collected. If you believe that a victim may be making a false statement or report, remain respectful.
- I. Using professional discretion concerning photos of victim's injuries, crime scenes, and videotapes.

**Policy**

A victim's distress may create an unwillingness or psychological inability to assist in the investigation. Officers and investigators play a significant role in both the victim's willingness to cooperate in the investigation and ability to cope with the emotional and psychological aftereffects of the crime. Therefore, it is especially important that these cases be handled from a nonjudgmental perspective so as not to communicate in any way to a victim that the victim is to blame for the crime.

**Procedures**

**A. Dispatcher or Call-Taker Response**

- 1. Due to the trauma of a sexual assault, a victim reaching out for assistance may be in crisis. The victim's behaviors may actually be symptomatic of this condition and can range from hysteria, crying, and rage to laughter, calmness, and unresponsiveness. There is no one typical reaction, so it is important to refrain from judging or disregarding any victim.
- 2. When a caller reports a sexual assault, communications personnel shall follow standard emergency response, to include ensuring the victim's safety, evaluating and properly prioritizing the call, securing medical assistance, inquiring about a suspect's current location, and obtaining detailed information to identify the suspect. Information about the relationship with the victim, weapon use, and history of violence shall also be obtained.
- 3. To ensure critical evidence is not lost, communications personnel shall:
  - a. Ask whether the victim has bathed, douched, urinated, or made other physical changes and advise against the victim doing so;
  - b. Ask the victim to use a clean jar to collect the urine should the victim have to urinate;

- c. Let the victim know that other evidence may still be identified and recovered so the crime should still be reported if the victim has bathed or made other physical changes;
  - d. Preserve the communications tape and printout for the investigation; and
  - e. Explain to the caller that these questions will not delay an officer's response to the caller's location.
4. Use professional discretion in relaying confidential information.

B. Initial Officer Response

1. Emergency Response

As part of the emergency response, officers shall:

- a. Make contact with the victim as soon as possible to address safety concerns and summon emergency medical assistance if needed;
- b. If the officer responds to a call from the hospital, try and establish an incident scene location, and then relay this information to other officers who can then secure the scene until an investigator can determine what evidence should be sought;
- c. Evaluate the scene for people, vehicles, or objects involved as well as possible threats;
- d. Relay all vital information to responding officers and supervisors, including any possible language barriers;
- e. Secure the crime scene to ensure that evidence is not lost, changed, or contaminated;
- f. Request assistance from detectives, field evidence technicians, crime laboratory personnel, and the prosecuting attorney when appropriate; and
- g. Begin a search for the suspect when appropriate.

2. Assisting the Victim

As part of the emergency response, officers shall:

- a. Show understanding, patience, and respect for the victim's dignity and attempt to establish trust and rapport;
- b. Determine special needs of the victim, if any; for example, are there language barriers (S.C. Code § 17-1-50); does the victim have children that need to be cared for or does the victim have a disability for which he/she needs immediate assistance;
- c. Inform the victim that an officer of the same sex will be provided if desired and available;
- d. Contact a sexual assault victim advocate as soon as possible to provide assistance throughout the reporting and investigative process. Advise the victim of his/her rights as a crime victim and the availability of and contact information for support services (S.C. Code § 16-3-1520);

- e. Supply victims of sexual assault with the phone number for the RAINN Hotline, 1-800-656-HOPE and/or victim's advocate. Operators at this hotline connect the caller with the sexual assault services agency closest to the victim's location;
  - f. Request a response from investigations: clearly explain his or her role to limit the preliminary interview so that the victim is not then asked the same questions by a detective;
  - g. Be aware that a victim of sexual assault may bond with the first responding officer, so it is important to explain the role of the different members of the sexual assault response team and help with transitions through introductions; and
  - h. Record observations of the crime scene, including the demeanor of the suspect and victim, and document any injuries or disheveled clothing.
3. Evidence Collection Issues
- a. Officers shall request assistance or direction from crime scene technicians and forensic scientists.
  - b. Responding officers shall protect the integrity of the evidence and guard the chain of custody by properly marking, packaging, and labeling all evidence collected, including:
    - (1) Clothing worn at the time of the assault and immediately afterward, especially the clothing worn closest to the genitals (such as undergarments, pants, and shorts); and
    - (2) Photographs and/or videotape of the victim's injuries (if any), the suspect's injuries (if any), and the crime scene prior to processing, keeping in mind:
      - When photographing a victim, be sensitive to the location of the injuries on the victim's body;
      - Summon an officer of the same sex as the victim;
      - Photograph victims using drapes and other techniques that help to maintain the victim's dignity;
      - Instruct medical personnel to take photographs of the genitalia when needed; and
    - (3) Diagram of the crime scene(s).
  - c. When an investigating officer suspects that a sexual assault may have been facilitated with drugs or alcohol, he or she should determine the time of the incident as soon as possible in order to make decisions regarding the collection of urine and blood samples. Ensure that urine and blood samples within 24 hours after an assault or urine sample after 24 hours are obtained by a health professional and preserved (Refer to FNE/ SANE protocol).
  - d. Officers shall introduce the need for a medical examination to the victim, explaining the importance of the examination to investigative and apprehension efforts as well as to the victim's well-being. Officers shall not coerce victims to go to the hospital or to provide samples for drug screening (a SANE or FNE should be utilized if available). Advise the victim that

he/she is not responsible for the cost of the forensic portion of the examination (S.C. Code § 16-3-1350(A)).

- e. DNA evidence plays a crucial role in the sexual assault investigation. In addition to the victim's and suspect's bodies and clothing, there are many other potential sources of evidence such as condoms, sheets, blankets, pillows, and bottles that may contain biological evidence such as blood, sweat, tissue, saliva, hair, and urine. To properly collect DNA evidence, officers shall:
  - (1) Use sterile gloves and change as needed;
  - (2) Use sterile swabs, papers, solutions, and tools;
  - (3) Package evidence in individual envelopes;
  - (4) Avoid touching the area where potential DNA evidence may exist;
  - (5) Avoid talking, sneezing, and coughing over evidence;
  - (6) Air dry evidence before packaging; and
  - (7) Put evidence into new paper bags or envelopes, not plastic.
- f. The sexual assault evidence kit shall be accepted from the medical staff after it has been properly sealed and labeled.
  - (1) The kit will contain whole blood that requires that the kit be placed and logged into an evidence refrigerator as soon as possible. The kit may also contain a urine sample for toxicology testing. If it does, the urine sample shall also be refrigerated;
  - (2) Investigating officers or supervisors shall have access to the evidence refrigerator after regular business hours, on weekends, and on holidays; and
  - (3) The kit shall not be allowed to freeze or be exposed to heat such as being near a car's interior heater or in the trunk.

#### 4. Stranger, Non-Stranger, and Spousal Assaults

Responding officers shall be familiar with common defenses to the charges of sexual assault.

##### a. Stranger Assault

Evidence in stranger sexual assaults often centers on a question of identification pending the processing of DNA evidence. Therefore, investigative strategies must remain flexible. An identity defense will typically include latent fingerprints, lineups, DNA, and trace evidence.

##### b. Non-Stranger Assault

The majority of non-stranger sexual assaults result in a consent defense. Thus, evidence of particular importance includes:

- (1) Evidence of physical or verbal resistance on the part of the victim;
- (2) Evidence of genital or non-genital injury;

- (3) Detailed account of the victim's thoughts and feelings during the assault;
- (4) Information regarding the suspect's size and strength in comparison to the victim's;
- (5) Information regarding the environment in which the assault took place (such as isolation, soundproofing); and
- (6) Information regarding the victim's behavior after the assault, including posttraumatic stress.

c. Spousal Assault

In the event of spousal sexual assault, explain to the victim that they do have the right to refuse unwanted sexual activity, but it must be reported to law enforcement within 30 days (S.C. Code § 16-3-658).

5. Identify and Locate Witnesses and Suspects

Based on the victim's emotional and physical state, questions of the victim concerning the assault and description and location of the suspect shall be limited. Responding officers must identify and interview any potential witnesses, bearing in mind that there may be multiple crime scenes. It is especially important that the first person the victim told about the sexual assault be identified and interviewed.

6. Documentation

Any officer who interviews a witness or a suspect, identifies evidence, or processes a crime scene shall write his or her own report detailing the actions he or she took. These supplemental reports shall be compiled by the first responding officer for the follow-up investigation regardless of whether an arrest is made.

C. Preliminary Victim Interview

Sexual assault investigations typically include both a preliminary and subsequent in-depth interview with the victim. The preliminary interview is intended to establish whether a crime has occurred. In the initial response, the officer shall first establish the elements of the crime(s) and identify any and all witnesses, suspect(s), evidence, and crime scene(s). The officer must understand the report indicates that the preliminary interview is **NOT** intended to be a comprehensive or final interview. Additional interviews will be needed as the investigation develops. Preliminary interviews with juvenile victims of sexual assault should be minimal factual interviews.

1. Involve a Victim Advocate

Every effort shall be made by the investigating officer to contact a community-based victim advocate (sexual assault victim advocate) and a system-based advocate as soon as possible. If the victim declines assistance from an advocate, the investigator shall provide the victim with written referrals for community resources specifically designed to help victims of sexual assault.

## 2. Victim Interview Protocol

- b. Based on the length of time between the assault and report of the crime and the individual's personal history, the victim may be in crisis and experiencing posttraumatic stress disorder or rape trauma syndrome and exhibiting a range of behaviors that will likely change over time.
- c. The victim's response to the trauma of a sexual assault shall not be used in any way to measure credibility. When drugs or alcohol are involved, the victim may have limited recollection or be unable to give a complete account of the crime. Not knowing the details of what happened may exacerbate the trauma experienced by the victim.
- d. Interviews shall be conducted promptly if the victim is coherent and able to give consent for the interview.
- e. Proceeding with or conducting a thorough investigation shall not be contingent upon laboratory findings.
- f. Investigators shall:
  - a. Remain patient and maintain an open mind while listening to the victim's account;
  - b. Remember that victims may struggle with gaps in memory;
  - c. Avoid leading questions while conducting the interview;
  - d. Use simple terminology appropriate to the victim's age, sophistication, and intelligence; and
  - e. Avoid using jargon or police, medical, or legal terms.
- g. Prior to initiating the interview, the officer shall:
  - a. Interview any witness who might have seen or spoken with the victim before, during, or after the assault;
  - b. Accommodate the victim's request for a rape crisis advocate or support person whenever possible;
  - c. Take responsibility for excluding a support person when appropriate and offer the victim and support person an explanation;
  - d. Secure a private location for the interview that is free from distractions;
  - e. Express sympathy to the victim and an interest in the victim's well-being; and
  - f. Inform the victim of the need and importance of full disclosure of any and all recent drug use.
- h. During the interview, the officer shall:
  - a. Obtain contact information for the victim, including temporary accommodations;
  - b. Explain the nature of the preliminary interview and the need for follow-up contacts;

- c. Ask victims to explain what they remember and how they felt;
- d. Revisit the possibility of a support person for victims who initially declined the offer; and
- e. Explain that other professionals such as forensic examiners, detectives, evidence technicians, and prosecutors may have additional questions:

- i. At the conclusion of the initial interview, the officer shall:
  - (1) Give the victim the investigator's contact information and case number;
  - (2) Encourage the victim to contact the investigator with any additional information or evidence;
  - (3) Remind the victim that visible evidence of injury may appear later, and to contact the investigators for additional photographs or other documentation;
  - (4) Ensure that requests for victim protection orders are made where indicated;
  - (5) Provide written referrals for victim service organizations (S.C. Code § 16-3-1520);
  - (6) Provide transportation when reasonably possible; and
  - (7) Inform the victim about next steps in the investigation.

3. Protecting Victim Rights

- a. Throughout the investigation of the case, officers shall protect the confidentiality of the victim's information to the maximum extent possible by law and policy.
- b. In addition, victims should be provided information on:
  - (1) The rights of a crime victim (S.C. Code § 16-3-1520);
  - (2) How to contact police if harassed or intimidated by the suspect(s);
  - (3) What information is part of the public record and what is confidential; and
  - (4) The possibility of media coverage and information the media has access to regarding sexual assault crimes.

4. Arrest and Prosecution Decisions

In the immediate aftermath of a sexual assault, a victim should not be expected or encouraged to make decisions regarding the investigation or charges related to the offense. Once a victim impact statement is introduced to the victim the victim may have questions regarding whether they should/should not be present at future hearings. Every effort should be made to answer the victim's questions without giving them advice as to what they "should" do.

5. Delayed Reports

Delayed victim reporting is common in sexual assault cases due to the trauma and fear experienced by victims and should not deter a thorough investigation. Officers shall inquire about and document the reasons for a delayed report, while avoiding questions that could be perceived as judgmental or accusatory.

#### D. Forensic Examinations for Victims of Adult Sexual Assault

Victim-centered care is paramount to the success of the forensic examination of victims of sexual assault. A timely, professional forensic examination increases the likelihood that injuries will be documented and evidence collected to aid in the investigation and prosecution of sex offenders. Evidence may normally be collected up to 120 hours after the assault, but evidence can be gathered and injuries documented beyond that time, especially if the victim is injured, bleeding, or experiencing pain.

##### 1. Investigating Officer Actions

- a. Ask the victim whether there is anyone who should be called or notified, and facilitate this contact;
- b. Address any special needs of the victim, such as communication or mobility, and notify the victim advocate of the special need;
- c. Explain the purpose of the forensic examination and its importance to the investigation and provide the victim with information on the procedure;
- d. Inquire whether the victim will consent to a forensic examination;
- e. Inform the victim of the right to decline any or all parts of the examination;
- f. Explain to the victim the potential consequences if any part of the examination is refused;
- g. Notify a victim advocate to offer the victim support when a forensic examination is to be conducted;
- h. Ensure that the victim has transportation to and from the appropriate facility. Transportation can be provided by law enforcement, family, friends or EMS, and recommend the victim bring a change of clothing to the forensic examination site in the event that his/her clothing is collected for evidentiary purposes;
- i. Seek permission from the victim to collect a urine sample for drug screening; and
- j. Encourage a victim who is unwilling to undergo a forensic exam to get medical attention, including testing for pregnancy and sexually transmitted diseases.

##### 2. Coordination with Forensic Examiner

Responding officers shall coordinate with other professionals such as forensic nurse examiners and criminalists to determine whether a medical forensic examination is indicated.

- a. When a forensic examination is indicated, the investigating officer shall brief the examining nurse or physician about the details of the sexual assault, as they are known at that time;

- b. Officers should not normally be present in the examining room, as the forensic examiner will testify about collection of evidence and the chain of custody;
- c. The nurse or physician shall brief the investigating officer at the conclusion of the examination; and
- d. The police report shall contain a copy of the forensic exam, if available, and a summary of the findings that note significant information or injury. After the examination, all the evidence shall be transferred to the department for storage.

### 3. Presence of a Victim Advocate

When it is determined that a forensic examination will be conducted, a victim advocate or a support person of the victim's choosing shall be allowed to be present in the room and during the interview, unless it would be harmful to the investigation. The officer shall take responsibility for excluding a support person, when appropriate, and providing an explanation to the victim and the support person.

### 4. Drug-Facilitated Sexual Assault Considerations

- a. If a drug-facilitated sexual assault is suspected, it is critical to obtain a urine sample from the victim as soon as possible. If it has been less than 24 hours since the time of the assault, also obtain a blood sample in a grey-top tube.
- b. Protocols for responding to illegal substance abuse by victims (including underage drinking) shall be followed and never used to discredit or discourage the victim from reporting the assault. The department priority should be to conduct a thorough investigation of a sexual assault rather than prosecute victims for misdemeanor violations.
- c. Because of the delay in reporting most sexual assaults, laboratories capable of testing urine and blood samples at very low levels for those drugs commonly used to facilitate sexual assault are essential.

### 5. Reimbursement for the Examination

- a. The cost of the medical forensic exam will not be passed onto the victim of a sexual assault, but through sources of financial support from the State Office of Victims Assistance (S.C. Code § 16-3-1350(A)).
- b. Officers shall not use the state compensation program as means to encourage cooperation from victims.

### E. Follow-Up Victim Interview

Prior to a follow-up interview, the investigating officer shall consult with agency personnel who responded to the scene, retrieve communications tapes and printouts, and review all reports. The officer should coordinate with relevant agencies,

assistance organizations, service providers, or sexual assault response professionals to address the needs of the victim and to discuss the best means for keeping the victim informed.

#### 1. Investigative Strategy

In preparing for the interview, the investigator shall develop an investigative strategy based on the nature of the assault and the possible defenses available to the suspect (such as denial, mistaken identity, or consent). This strategy shall guide the questions and other evidence collection efforts. Critical evidence collection efforts include evaluating whether a pretext phone call is appropriate and re-photographing injuries to document changes in visible injuries.

#### 2. Follow-Up Interview Protocol

- a. An in-depth follow-up interview shall be conducted after the victim has been medically examined and treated, and personal needs have been met.
- b. In the event that the victim is still under the influence of drugs or alcohol, has been injured, or as a result of the assault has not slept, and barring exigent circumstances requiring an arrest or identification, the interview shall be delayed.
- c. The interview shall be conducted in a location that is convenient, accessible, and comfortable for the victim. The investigator shall provide or arrange for transportation for the victim when needed.
- d. At the start of the follow-up interview, the officer shall:
  - (1) Discuss the purpose and scope of the interview;
  - (2) Review contact information for both the victim and investigator that may need to be updated;
  - (3) Explain the victim's rights, including confidentiality; and
  - (4) Address arrest decisions including an explanation of the status of the case.
- e. While conducting the follow-up interview, the officer shall:
  - (1) First allow the victim to describe what occurred without interruption;
  - (2) Relay what he or she heard for accuracy, identify new information or developments, and ask questions;
  - (3) Clarify any inconsistencies with earlier accounts of the sexual assault in a non-threatening manner;
  - (4) Document the victim's actions in response to the attack, the victim's state of mind during the attack, specific statements made by the perpetrator, and the nature of any relationship with the suspect and explain the importance of these questions from a prosecutorial standpoint; and
  - (5) Inquire about any circumstances that may indicate the use of a drug to facilitate the sexual assault (such as whether the victim experienced any loss of memory, disorientation, severe illness, or hallucinations); and
  - (6) Assist the victim in developing a safety plan, in the event safety concerns exist, and encourage the victim to call police if the suspect violates any

existing criminal or court orders or if the suspect contacts the victim in any way.

- f. Once a thorough follow-up investigation has been completed, the investigating officer shall:
- (1) Evaluate impounded evidence and determine which items might have probative value based on the statements and other information;
  - (2) Submit a lab service request such as DNA, biology, trace, or toxicology based on the assessment of the evidence;
  - (3) Present the complete case file including forensic results as soon as available to the prosecuting attorney for review and work with the prosecutor's office to develop the case;
  - (4) Encourage the victim's continued support in the investigation, apprising the victim of future investigative and prosecutorial activities that will or may require involvement; and
  - (5) Familiarize the victim, prior to trial, with the types of defense strategies and inquiries that may be made during cross-examination.

### 3. When Lacking the Victim's Involvement

The law enforcement agency shall respect a victim's inability, or decision not, to be involved in criminal justice proceedings and always be willing to offer continued assistance and referrals.

### 4. Polygraph Examinations for Victims

A law enforcement officer, prosecuting officer, or other governmental official may request a sexual assault victim to take a polygraph examination as part of the investigation if the credibility of the victim is at issue. However, the victim/survivor's refusal to take a polygraph examination shall not prevent the investigation, charging or prosecution of the offense, pursuant to §16-3-750.

### F. Contacting and Interviewing the Suspect

1. The investigating officer(s) shall follow department procedures on identifying the suspect, conducting the suspect interview, and collecting evidence in a sexual assault investigation; and
2. Involvement of a victim in a pretext phone call to the suspect should take into consideration the victim's emotional and physical state. A victim advocate should be present whenever possible to offer support.

### G. Sexual Assault Forensic Examination for the Suspect

The law enforcement agency will work with other agencies and community organizations to establish protocols regarding where the forensic examination of the suspect will take place, who will pay for it, and what steps will be involved. It is

essential that the victim and suspect examinations must take place in different locations.

## 1. Protocol for Suspect Examination

- a. Immediately after the preliminary suspect interview, the investigating officer shall determine whether a forensic examination should be obtained for the suspect;
- b. A search warrant must be obtained to collect any evidence from the body of the suspect or even to collect clothing. If the suspect consents to such evidence collection procedures, documentation of voluntary consent shall be provided in the police report;
- c. The investigator shall clearly document the suspect's freedom to decline any part of the examination and to leave at any time; and
- d. First-line officers and supervisors shall be trained to collect cells from inside a suspect's cheek for DNA profiling. Cotton-tipped swabs or other buccal DNA collectors shall be readily available to investigators in the field.

## 2. Evidence Collection

- a. The forensic examiner shall document the suspect's medical history, document all injuries that are observed, and collect biological and trace evidence from the suspect's body;
- b. If in custody, the suspect shall be given a *Miranda* warning before being asked medical history questions by the forensic examiner or investigator;
- c. If the suspect invokes his right to remain silent, the examiner shall bypass the medical history portion of the examination and continue documenting any visible injury and collecting the appropriate specimens; and
- e. Both the examiner and attending officer shall be prepared to document any spontaneous statements made by the suspect regardless of whether or not the suspect is in custody and whether or not the suspect was provided with a *Miranda* warning.

## H. Role of the Supervisor

First-line supervisors shall demonstrate a detailed understanding of victim issues and proper response by subordinates. Supervisors shall:

1. Respond to assist officers investigating felony sexual assaults;
2. Exhibit sensitivity to victims and ensure that victims are dealt with properly by clarifying their expectations of line officers;
3. Assist in locating resources to effectively investigate sexual assaults;
4. Encourage problem-solving partnerships to enhance cooperation between the department and community organizations such as sexual assault services agencies and forensic examination programs using a victim-centered approach;
5. Include victim services information regularly at roll-call;
6. Develop and encourage community partnerships to reduce the risk of sexual assault;

7. Create opportunities for ongoing training to improve the skills needed to properly investigate sexual assault;
8. Work to increase interagency communication between law enforcement and prosecutors to ease the transition for victims moving from the investigation phase to prosecution;
9. Incorporate victim services issues into the evaluations of officers and detectives; and
10. Recognize and reward officers for rendering effective victim services.

I. Blind Reporting

In the aftermath of a sexual assault, a victim may not have the emotional or physical capacity to commit to a full investigation and a court trial. Departments should consider establishing blind reporting systems to allow victims to take the investigative process one step at a time. This will allow time for the victim to establish trust with an investigator and become comfortable with the investigative process.

**College and University Property (S.C. Code § 59-154-10(B-D))**

- A. All sexual assault reports that occurred on the property of a college or university should be investigated by campus law enforcement, local jurisdiction, and/or SLED.
- B. SLED must be notified of any sexual assaults having occurred on any college or university campus.

**Law Enforcement Victim Advocates (LEVA)**

The LEVA is a systems-based advocate based in a law enforcement agency, trained and certified to provide reasonable assistance to victims of all types of crime and help them navigate the criminal justice system. The LEVA may be either a sworn officer or a non-sworn civilian employee.

When a sexual assault has occurred, a LEVA may be called on at various stages of the investigation to provide victim services, from immediate crisis intervention to long-term follow-up. The LEVA may help coordinate team response to the victim's needs throughout the criminal justice process.

Initial Response

A. The LEVA may respond to the **crime scene**:

1. At the request of a supervisor, dispatch may alert the LEVA when a sexual assault has occurred. Alternatively, first responders or investigator may request the LEVA to respond to the crime scene. Upon arrival, the LEVA will be briefed on the case. The LEVA will assist officers to ensure the victim's immediate safety, and offer emotional as well as practical support to the victim while initial information is gathered.

2. The LEVA may contact friends or family members, at victim's request.
3. The LEVA will determine whether the victim has special needs (e.g. translator, deaf interpreter, assistance for elderly or disabled victim, etc.) and initiate locating special services as required.
4. The LEVA will attempt, as far as possible, to provide the victim privacy at the scene and during initial interview.
5. At the scene, the LEVA will remain calm and reassuring, using non-judgmental language, assuring the victim that she/he is safe now and that law enforcement is there to help.
6. The LEVA may remain with the victim during the initial interview, if the victim wishes or if requested by the officer/investigator.
7. The LEVA may remind the victim that she should not bathe or wash, and that officers will need to collect clothing or other items where evidence may be found. The LEVA should assure the victim that her possessions will be returned to her as soon as possible, and assist in retrieving them at a later date. The LEVA will also advise the victim that some of the items collected may be kept until the case is disposed in court. The LEVA will also advise that some of the items collected may not be in the same condition due to evidence and testing procedures (depending on evidence needed from clothing, it may be cut up or otherwise damaged).
8. The LEVA will explain the law enforcement process to the victim—what the officers are doing and why—and advise her that although the interview and evidence collection may be upsetting or intrusive, they are necessary. The need for evidence to establish victim's non-consent will be key.
9. The LEVA may offer preliminary Victims' Rights information at this stage; however, it is likely the victim will be traumatized and may not absorb the information yet. The LEVA will note that this information must be provided when the victim is receptive to it. If the first responding officer has not already given the victim a written Victim Rights information sheet, including law enforcement case number and contact information, the LEVA should be sure the victim receives this information.
10. If the victim has suffered major injuries, the LEVA will confirm that EMS has been called. Major injuries can be strong evidence that the victim did not consent. However, law enforcement and LEVA will be aware that lack of major injuries does not prove consent.
11. The LEVA may transport the victim to the hospital for the forensic exam.

**B. The LEVA may respond to the hospital:**

1. Dispatch, at supervisor's or investigator's request, may require the LEVA respond directly to the hospital.
2. Upon arrival, the LEVA will be briefed by the officer or investigator. This may be done either in person or by phone.
3. The LEVA will confirm that the SANE/FNE and sexual assault victim advocate have been notified.

4. The LEVA may offer preliminary Victims' Rights information at this stage; however, it is likely the victim will be traumatized and may not absorb the information yet. The LEVA will note that this information must be provided when the victim is receptive to it. If the first responding officer has not already given the victim a written Victim Rights information sheet, including law enforcement case number and contact information, the LEVA should be sure the victim receives this information.
5. The LEVA will be present to provide support and to stay with victim until the sexual assault victim advocate and forensic examiner arrive. The LEVA will remain as long as the victim wishes, or as long as the agency requests. The LEVA may also assist by providing support and information to the victim's family and friends while they wait for the exam to be completed.
6. It is the victim's decision who will remain with her during the forensic exam. The LEVA may be present during the exam, but will not participate in evidence collection. The victim has the right to accept or decline victim services and support offered to her/him.
7. If the victim needs transportation, the LEVA may provide transportation to the victim's home or a safe location (friend or family member's home, shelter or hotel).

C. The victim may **delay reporting** the assault:

1. The LEVA will contact the victim as soon as possible, in person or by telephone, with follow-up by mail. The LEVA will be sure the victim receives a copy of the incident report and Victim Rights information.
2. The LEVA will notify the sexual assault services agency of the reported assault. Pursuant to §16-3-1520.
3. The investigator may ask the LEVA to be present during interviews.
4. The LEVA may provide the options related to follow-up medical treatment or other support service referrals as necessary, and provide transportation.

In all sexual assault cases, the LEVA will:

- A. Respect the victim's rights at every stage of the criminal justice process. The victim must be offered options regarding the service she/he receives, and the opportunity to take back a measure of control.
- B. Guard carefully the victim's right to privacy and anonymity, and share information about the victim and case only on a "need to know" basis and with those cleared to have the information. The victim must be advised that the LEVA is not bound by the same degree of confidentiality as the sexual assault victim advocate, so information disclosed to the LEVA may be passed on to the investigator, as necessary.
- C. Make sure the victim receives a copy of the incident report and Victim's Rights information.
- D. Maintain contact with victim, by phone, mail or in person, throughout the criminal justice process.

- E. Act as liaison between the victim and investigator, providing appropriate case updates and information.
- F. Be aware that a sexual assault victim may display a variety of emotions, or indeed a lack of emotion, following the trauma. The LEVA will not judge the victim in any way, for her demeanor, dress and other behaviors, but will assure the victim that SHE/HE IS NOT TO BLAME. The victim will be treated with dignity, compassion, gentleness, patience and professionalism at all times.
- G. Be a sympathetic listener, allowing the victim to tell his/her story in a safe and supportive environment;
- H. Be aware of and address the victim's concerns, including fear of perpetrator, fear of family or others finding out about the crime, fear of media attention, shame or embarrassment, fear of not being believed, fear of pressures from family and friends, and fear of pregnancy or HIV.
- I. Inform the victim, as most sexual assaults are perpetrated by someone known to the victim, of options for Orders of Protection and Restraining Orders. Protection Order may be obtained through Family Court if the perpetrator is a family member, spouse or household member as defined by law. A Restraining Order may be obtained through a Magistrate's Court if the perpetrator is an acquaintance, boyfriend/girlfriend or friend. The LEVA may also address any safety measures the victim can put in place as necessary.
- J. Be aware of and address the short-term and long-term impact of sexual assault, such as
  - 1. Short-term: anxiety, shock, numbness or denial, heightened startle response, flashbacks, physical symptoms, memory problems, feelings of guilt;
  - 2. Long-term: PTSD, depression, substance abuse to self-medicate, and suicide; and
  - 3. The LEVA will refer victim to appropriate psychological and social services.
- K. Explain the Victim Compensation program to the victim, and assist in applying for compensation, as needed. The SOVA Victim Compensation program will automatically cover the cost of the hospital forensic exam. However, a separate application must be filed for assistance with psychological or other medical care, including transportation by EMS. Be sure the victim knows that this is an application process, and that the LEVA cannot guarantee that the victim will receive payment. The LEVA should also assess if the SOVA application needs to be completed during the initial contact, or if it might be necessary to wait a day or so.
- L. Explain the court process to the victim. The LEVA will make sure the victim is notified in a timely manner of any court proceedings, such as bond hearings, Order of Protection hearings and other court appearances where he/she has the right to be present. The LEVA will provide court accompaniment and advocacy. The LEVA may provide transportation to and from court as needed. The LEVA may help the victim prepare a Victim Impact Statement to be presented to the court. The LEVA will make sure that the court is aware of any special needs the victim may have, and that appropriate services will be available. The LEVA will also refer the victim to the solicitor's office victim advocate in cases being forwarded to circuit court for prosecution. The solicitor's office victim advocate will then make sure the victim is notified of all hearings and court appearances. The LEVA will make sure the victim's contact information provided to the Solicitor's Office is correct. The

LEVA may continue to work closely with the solicitor's office victim advocate and the victim.

- M. Properly document each case in designated victim files of the law enforcement agency (e.g. Victim Contact Form and victim database).
- N. Contact the victim on a regular basis to check on his/her well-being and ensure that she/he has access to any follow-up services, and make appropriate referrals. The LEVA will make sure the victim's contact information is up-to-date, and that other agencies are made aware of any changes. The LEVA will act as liaison with community advocacy and systems agencies (courts, corrections) on behalf of the victim, as necessary.

If the victim of sexual assault is a juvenile:

- A. The LEVA may be notified by dispatch, the reporting officer or investigator, and may be requested to respond to the scene or the hospital.
- B. The LEVA will be briefed and assist officers in providing crisis intervention and emotional support to the child and to the parent/guardian. The LEVA will stay with the juvenile victim until a responsible party has arrived (parent/guardian, social services, mental health personnel).
- C. The LEVA may become aware of the assault through the Incident Report and will make contact with the investigator for initial briefing on the case.
- D. The LEVA will make contact with the parent/guardian of the victim to offer support and provide case information, as appropriate.
- E. The LEVA will be sure the parent/guardian receives Victims' Rights information, case number, and department and victim services contact information.
- F. Following initial contact, the LEVA will confer with the investigator assigned to the case to determine how the case will proceed, and what additional resources are required. The victim may be referred to a Child Advocacy Center for forensic interview and/or medical exam. If so, the LEVA will make contact with the victim's parent/guardian, and explain the process. The LEVA may provide transportation to the Child Advocacy Center, and/or accompany the victim and family members and investigator to the appointment.
- G. The LEVA will be familiar with the dynamics of child sexual abuse and the effects of sexual trauma on a minor, and proceed with sensitivity and discretion in dealing with the victim and family (for example, if the perpetrator is a family member or friend of the minor victim, the victim and his/her family may have conflicted feelings toward the perpetrator).
- H. The LEVA will make sure the victim's parent/guardian completes a SOVA application, and assist them with the application.
- I. The LEVA will make further referrals on behalf of the victim and parent/guardian as needed, to social service providers, counselors, and medical services.

**Anonymous Reporting (Pursuant to South Carolina Act 59, see Appendix A)**

- A. Anonymous reporting allows evidence to be collected while allowing time for a traumatized victim to decide to move forward with the investigation.
- B. When notified by a medical facility or SANE or FNE that there is an anonymous sexual assault kit ready to be picked up, the officer or investigator should:
  - 1. Respond to the respective hospital/medical facility and speak directly with the SANE/FNE.
  - 2. Do NOT attempt to view or speak to the victim who has indicated a desire to remain anonymous.
  - 3. Obtain the anonymous patient's Patient ID number.
  - 4. Generate an Anonymous Report (i.e. Information Report, CSC Anonymous Report) with a case number, hospital name and the SANE's/FNE's full name, if applicable.
  - 5. Provide the SANE/FNE with the case number from your agency.
  - 6. Log evidence kit into Property/Evidence room. The kit should not be opened or submitted for forensic analysis.
- C. The anonymous reporting victim can request for the case to be investigated within the year after the evidence is collected. If no request is made by the victim, then the evidence collected will be destroyed.

Critical Note: If the victim reports that the individual perpetrating the sexual assault is the victim's legal spouse, the victim has only thirty (30) days to report to law enforcement under South Carolina law (S.C. Code § 16-3-658).

*For a list of references utilized in the law enforcement protocol, please see Appendix B.*

## Prosecutor Recommended Protocol

### Sexual Assault in South Carolina

*Sexual assault is often defined as any "non-consensual sexual contact."*

#### Key Definitions

**Sexual battery (§ 16-3-651(h)):** Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body.

Exception: When such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

**Aggravated force (§ 16-3-651(c)):** The actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon.

**Aggravated coercion (§ 16-3-651(b)):** The actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person.

**Mentally defective (§ 16-3-651(e)):** A person suffers from a mental disease or defect which renders the person temporarily or permanently incapable of appraising the nature of his or her conduct.

**Mentally incapacitated (§ 16-3-651(f)):** A person is rendered temporarily incapable of appraising or controlling his or her conduct whether this condition is produced by illness, defect, the influence of a substance or from some other cause.

**Physically helpless (§16-3-651(g)):** A person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to an act.

#### Criminal Sexual Conduct

There is no such thing as "sexual assault" or "rape" in South Carolina law. Instead, conduct is broken down by varying degrees of criminal sexual conduct. According to SC law, all of the following are criminalized as criminal sexual conduct ("CSC"):

##### CSC 1<sup>st</sup> (§ 16-3-652):

Sexual Battery with the Victim AND:

- (a) Aggravated force is used to accomplish the sexual battery; OR
- (b) The victim is also the victim of forcible confinement, kidnapping, trafficking in persons, robbery, extortion, burglary, housebreaking, or any other similar offense or act; OR
- (c) The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

Penalty: CSC 1<sup>st</sup> is a felony and carries 0-30 years

**CSC 2<sup>nd</sup> (§16-3-653):**

Sexual Battery with the victim and aggravated coercion is used to accomplish the sexual battery.

Penalty: CSC 2<sup>nd</sup> is a felony and carries 0-20 years

**CSC 3<sup>rd</sup> (§16-3-654):**

Sexual Battery with the Victim AND:

- (a) Force or coercion is used to accomplish the sexual battery w/o aggravating circumstances OR
- (b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

Penalty: CSC 3<sup>rd</sup> is a felony and carries 0-10 years

**Assault With Intent to Commit CSC (§16-3-656):**

Assaults with intent to commit criminal sexual conduct are punishable as if the criminal sexual conduct was committed.

## Sexual Assault and Marriage in South Carolina

### CSC Where the Victim is a Spouse (§16-3-658):

The couple must be living apart and the offender's conduct must either be CSC 1<sup>st</sup> degree (See above) or CSC 2<sup>nd</sup> degree (See above).

**Reporting Requirement:** The offending spouse's conduct must be reported to appropriate law enforcement authorities within **30 days** in order for a person to be prosecuted for these offenses.

**Exception:** This statute does not apply to a marriage entered into by a male under 16 and a female under 14.

**Penalty:** CSC 1<sup>st</sup> where the victim is a spouse is a felony and carries 0-30 years; CSC 2<sup>nd</sup> where the victim is a spouse is a felony and carries 0-20 years.

### Spousal Sexual Battery (§16-3-615):

If the couple is living together the crime of spousal sexual battery is committed when a sexual battery is accomplished through use of aggravated force (see above) by one spouse against the other spouse.

**Reporting Requirement:** The offending spouse's conduct must be reported to appropriate law enforcement authorities within **30 days** in order for that spouse to be prosecuted for this offense.

**Exception:** This statute does not apply to a marriage entered into by a male under 16 and a female under 14.

**Penalty:** Spousal Sexual Battery is a felony and carries 0-10 years.

## Sexual Assault and Children in South Carolina

*If a minor is involved the conduct may be classified in two ways:*

### **CSC with a Minor 1<sup>st</sup> Degree (§16-3-655(A)):**

- (1) Sexual battery with a victim who is younger than 11 OR
- (2) Sexual battery with a victim who is younger than 16 AND the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in South Carolina Code §23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to §23-3-430(D).

Penalty: §16-3-655(A)(1) is a felony and carries a mandatory minimum of 25 years (no part of which may be suspended or probation granted) to life.

If the defendant is convicted or adjudicated guilty of subsection (A)(1) and the conduct making up the sexual battery was sexual or anal intercourse by a person or intrusion by an object AND the defendant has a prior offense for first-degree CSC with a minor who is less than 11 years of age or has an out-of-state equivalent conviction, the State may seek the death penalty, or the defendant may be imprisoned for life, depending upon the prior type of sexual battery (please refer to §16-3-655(c)(1)).

§16-3-655(A)(2) is a felony and carries 10-30 years (no part of which may be suspended or probation granted).

### **CSC with a Minor 2<sup>nd</sup> Degree (§16-3-655(B)):**

- (1) Sexual battery with a victim who is 14 or younger, but is at least 11 OR
- (2) Sexual battery with a victim who is at least 14 but is less than 16 AND the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim.

Exception: A person may not be convicted of §16-3-655(b)(2) if he is 18 or younger when he engages in consensual sexual conduct with another person who is at least 14.

Penalty: A person convicted of this section is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty years according to the discretion of the court.

**CSC with a Minor 3<sup>rd</sup> Degree (§16-3-655(C)):**

Actor is over 14 and he/she willfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under 16 with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child.

Exception: If the person is 18 or less and engages in a consensual lewd or lascivious act with another person who is at least 14.

Penalty: A person convicted of this section is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than fifteen years, or both.

## Other Sexual Assault Laws in South Carolina

### Jessie's Law – Hearsay Exception (§17-23-175):

#### *Admission of child's recorded investigative interview (forensic interview)*

State v. Russell, 679 S.E.2d 542 (Ct. App. 2009) (Affirmed)

The court upheld the admission of the child victim's videotaped interview pursuant to the child hearsay exception enacted on July 1, 2006 as a component of "Jessie's Law," also known as the "Sex Offender Accountability and Protection of Minors Act of 2006"). The child hearsay exception requires that the child testify at the proceeding and be available for cross-examination in compliance with the Confrontation Clause of the U.S. Constitution.

In *Russell*, the appellant argued that the admission of the videotaped investigative interview amounted to "improper bolstering." The Court of Appeals determined that "the legislature has made a specific allowance for these out-of-court statements by child victims provided certain elements are met." In addition, the court ruled that the child's videotaped interview was "highly probative to the question of Russell's guilt or innocence," and that "any prejudicial effect was outweighed by its probative value."

State v. Bryant, 675 S.E.2d 816 (Ct. App. 2009) (Affirmed)

The court upheld the application of S.C. Code Section 17-23-175 (the child hearsay component of "Jessie's Law). Specifically, this case examined whether the application of the statute violated the *ex post facto* clauses of the state and federal constitutions. In *Bryant*, the defendant's charges were already pending when the "Jessie's Law" child hearsay exception was enacted on July 1, 2006.

The court determined that the child hearsay exception was procedural in nature and did not *ex post facto* clause to be implicated, the statute at issue must be criminal or penal in purpose and nature." Thus, Section 17-23-175 was found to be applicable regardless of the date of the defendant's arrest or indictment.

### Males under 14 (§16-3-659):

The common law rule that a boy under 14 years is conclusively presumed to be incapable of committing the crime of rape **shall not** be enforced in this State. However, ANYONE under the age of 14 shall be tried as a juvenile for any violations of §16-3-651 to 16-3-659.1.

**Admissibility of evidence concerning victim's sexual conduct (§16-3-659.1):**

This section covers what we commonly call "rape shield" statutes:

- (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is **not admissible** in prosecutions under §16-3-615 and 16-3-652 to 16-3-656.

Exception: Evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible if the judge finds that such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value. Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under the rules of evidence to impeach the credibility of the witness may not be excluded.

- (2) If the defendant offers evidence described in subsection (1): the defendant, prior to presenting his defense, shall file a written motion and offer of proof. The court shall order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).

Note: If new evidence is discovered during the presentation of the defense that may make the evidence described in subsection (1) admissible, the judge may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1).

**Publishing a Victim's Name (§16-3-730):**

It is unlawful to publish or "cause to be published" the name of any person who is a victim of criminal sexual conduct in this state in any newspaper, magazine or other publication.

Exception: Does not apply to publications made by order of court.

Penalty: Upon conviction, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years.

**Polygraphs (§16-3-750):**

Polygraphs may be requested as a part of the investigation, charging or prosecution of the offense if the credibility of the victim is at issue; however a polygraph may not be required as a condition for proceeding with the investigation, charging or prosecution of the offense.

**Statutes of Limitation:**

There are **NO** statutes of limitation for reporting sexual assaults in SC, with the exception of the reporting requirements listed above (Spousal Sexual Battery and CSC where the victim is a spouse).

**Other Possible Charging Statutes:**

Sometimes conduct by an offender may not fit neatly into one of the CSC charges, or may be impossible under the law. If that is the case, the following may be considered as possible charges:

Indecent Exposure (§16-15-130)

Contributing to the Delinquency of a Minor (§16-17-490).

## Sexually Transmitted Disease Testing

*Our law has provisions for testing on behalf of victims of sexual assault.*

### Key Definitions

**Body Fluid (§16-3-740(A)(1)):** Blood, amniotic fluid, pericardial fluid, pleural fluid, synovial fluid, cerebrospinal fluid, semen or vaginal secretions, or any body fluid visibly contaminated with blood.

**HIV (§16-3-740(A)(2)):** Human Immunodeficiency Virus.

**Offender (§16-3-740(A)(3)):** Includes adults and juveniles.

### Testing Procedures (§16-3-740(B-1)):

If a victim has been exposed to body fluids during the commission of a criminal offense, or upon the request of the legal guardian of a victim who has been exposed to body fluids during the commission of a criminal offense, the solicitor must, within **forty-eight hours**, excluding weekends and legal holidays as defined in Chapter 5, Title 53, after the offender is charged, or within forty-eight hours, excluding weekends and legal holidays, as defined in Chapter 5, Title 53, after a petition has been filed against an offender in family court, **petition the court** to have the offender tested for Hepatitis B and HIV.

An offender must not be tested for Hepatitis B and HIV without a court order.

**To obtain a court order, the solicitor must demonstrate the following:**

- (1) the victim or the victim's legal guardian requested the tests;
- (2) there is probable cause that the offender committed the offense;
- (3) there is probable cause that during the commission of the offense there was a risk that body fluids were transmitted from one person to another; and
- (4) the offender has received notice of the petition and notice of his right to have counsel represent him at a hearing.

The results of the tests: must be kept confidential and disclosed only to the solicitor who obtained the court order. The solicitor shall then notify only those persons designated.

The tests must be administered by the Department of Health and Environmental Control, through the local county health department or the medical professional at the state or local detention facility where the offender is imprisoned or detained.

The solicitor shall notify the following persons of the tests results:

- (1) The victim or the legal guardian of a victim who is a minor or is mentally retarded or mentally incapacitated;
- (2) The victim's attorney;
- (3) The offender and a juvenile offender's parent or guardian; and
- (4) The offender's attorney.

The results must have a disclaimer that reads: "The tests were conducted in a medically approved manner, but tests cannot determine infection by Hepatitis B or HIV with absolute accuracy. Additionally, the testing does not determine exposure to, or infection by, other sexually transmitted diseases. Persons receiving the test results should continue to monitor their own health, seek retesting in approximately six months, and should consult a physician as appropriate."

The solicitor also shall provide the test results to the state or local correctional facility where the offender is imprisoned or detained (only for the purpose of providing medical treatment).

The State shall pay for the tests. If the offender is subsequently convicted or adjudicated delinquent, the offender or the parents of an adjudicated offender must reimburse the State for the costs of the tests unless the offender or the parents of the adjudicated offender are determined to be indigent.

If the tests given pursuant to this section indicate infection by Hepatitis B or HIV, the Department of Health and Environmental Control shall be provided with all test results and must provide counseling to the offender and the victim. DHEC must also advise the victim of available treatment, refer the victim to health care and treat the victim, if requested.

At the request of the victim or the victim's legal guardian, the court may order a follow-up HIV test and counseling for the offender if the initial HIV test was negative. The follow-up test and counseling must be six weeks, three months, and six months following the initial test. If an offender is acquitted or charges are dismissed then an order for a follow-up test should be terminated.

If, for any reason, the testing described above has not been undertaken, upon request of the victim or the victim's legal guardian, the court shall order the offender to undergo testing for Hepatitis B and HIV following conviction or delinquency adjudication. DHEC administers the test as outlined above.

If there is probable cause, the collection of additional samples may also be ordered by the court so that the State may conduct scientific testing, including DNA analysis. The results of the scientific testing, including DNA analysis, may be used for evidentiary purposes. Other test results cannot be used as evidence.

Civil and criminal liability immunity is also created for any person or entity who administers tests ordered pursuant to this section and who does so in accordance with this section. Immunity is also created for the disclosure of information in accordance with this section, or in good-faith without malice.

## Sexual Assault and Students in South Carolina

*Sexual assault against a student is referred to as "sexual battery with a student."*

### Key Definitions

**Aggravated coercion (§16-3-755(A)(1)):** The person affiliated with a public or private secondary school in an official capacity threatens to use force or violence of a high and aggravated nature to overcome the student, if the student reasonably believes that the person has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping, or extortion, under circumstances of aggravation, against the student.

**Aggravated force (§16-3-755(A)(2)):** The person affiliated with a public or private secondary school in an official capacity uses physical force or physical violence of a high and aggravated nature to overcome the student or includes the threat of the use of a deadly weapon.

**Person affiliated with a public or private secondary school in an official capacity (§16-3-755(A)(3)):** An administrator, teacher, substitute teacher, teacher's assistant, student teacher, law enforcement officer, school bus driver, guidance counselor, or coach who is affiliated with a public or private secondary school but is not a student enrolled in the school.

**Secondary school (§16-3-755(A)(4)):** Either a junior high school or a high school.

**Sexual battery (§16-3-755(A)(5)):** Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.

**Student (§16-3-755(A)(6)):** A person who is enrolled in a school.

### Sexual Battery with a Student (§16-3-755(B-E)):

A person affiliated with a public or private secondary school in an official capacity engages in sexual battery with a student enrolled in the school who is 16 or 17 years of age, and aggravated coercion or aggravated force is not used.

Penalty: This type of sexual battery with a student is a felony that carries up to 5 years.

A person affiliated with a public or private secondary school in an official capacity engages in sexual battery with a student enrolled in the school who is 18 years of age or older and aggravated coercion or aggravated force is not used to accomplish the sexual battery.

Penalty: This type of sexual battery is a misdemeanor that carries not more than \$500 or 30 days, or both.

A person affiliated with a public or private secondary school in an official capacity with direct supervisory authority over a student enrolled in the school who is 18 years of age or older, and the person affiliated with the public or private secondary school in an official capacity engages in sexual battery with the student without the use of aggravated coercion or aggravated force.

Penalty: This type of sexual battery is a felony and carries up to 5 years.

Exception: This statute does not apply if the offender is lawfully married to the student at the time of the act.

\*Students under the age of 16 are protected under the "CSC with a Minor" laws.

## Predicate Questions

### Qualifying a Medical Doctor as a Witness

#### Identifying the Witness

1. Please state your name and address.
2. What is your occupation/profession?
3. Are you licensed in this state?
4. How long have you held a license in \_\_\_\_\_ (name the state)?
5. What medical college did you attend?
6. Where did you intern?
7. Since that time, where have you practiced?
8. Is the nature of your practice general or specialized?

#### Identifying the Physical Facts

1. On or about \_\_\_\_\_, did you have occasion to see \_\_\_\_\_ professionally?
2. Where did you see \_\_\_\_\_?
3. Describe his condition at the time.
4. What, if anything, did you do on that occasion?
5. Have you been the attending physician since that date?
6. Describe the nature of the examinations which you made on \_\_\_\_\_ and from time to time since then.
7. Did you see him daily (several times a day at first) when he was at the hospital?
8. Did you continue to see him?
9. How often did you continue to see him?
10. What, generally, did your treatment consist of?
11. How many operations?
12. Did you see him from time to time, during those periods, as his attending physician?
13. From your examination and treatment of \_\_\_\_\_, did you determine what organs of his body were injured?

*\*Continue questioning for the purpose of your case*

### Identifying and Introducing Hospital Records as Evidence

#### Identifying the Witness

1. Please state your name and address.
2. What is your occupation/profession?
3. Who is your employer?
4. What is the position you hold?

#### Identifying the Physical Facts

1. Did you receive a subpoena for certain hospital records?

2. Did you bring the records?
3. Can you identify these hospital records?
4. What was the mode of preparation of these hospital records?
5. Were the hospital records maintained under your care, custody and control?
6. Were the hospital records made in the regular course of business?
7. Were the hospital records made at the time the act, condition or event occurred or transpired?
8. Are these hospital records regularly kept or maintained?

\*Your Honor, the State requests these records be marked for the purposes of identification as State's Exhibit \_\_\_\_ and asks that they be admitted as evidence.

**Qualifying a DNA Expert as a Witness**

Identifying the Witness / RFLP Typing

1. What is your name and address?
2. What is your occupation/profession?
3. Who is your employer?
4. How long have you been employed by \_\_\_\_\_ (name of agency/company)?
5. What services does \_\_\_\_\_ provide?
6. What are your duties and responsibilities?
7. Would you describe your educational background?
8. What schools have you attended?
9. What degree(s) have you received?
10. Did your formal education include the study of DNA?
11. Did that education include hands-on work with DNA testing techniques?
12. Have you performed research in the area of DNA or DNA testing?
13. Prior to your employment at \_\_\_\_\_, please describe any other positions you have held.
14. Did you perform DNA typing in those previous positions?
15. What role do professional societies and organizations play in the science of DNA?
16. What societies or organizations do you belong to?
17. Do you attend their meetings?
18. Are you asked to deliver or present your own research at those meetings?
19. Have you written any papers or articles?
20. Have they been published in the scientific literature?
21. Are papers and articles important in science?
22. Why are papers and articles important?
23. What is "peer review"?
24. What role does peer review play in science?
25. Have your papers or articles been peer reviewed before they were published?
26. Are you asked to peer review the scientific publications of others?
27. Do you regularly read the scientific literature in the area of DNA? Why?
28. What journals or other scientific publications do you regularly read?
29. Have you testified before today as an expert in DNA testing?

30. Approximately how many times?
31. In what courts and states?
32. What is DNA?
33. When was it discovered?
34. Why is DNA important?
35. Where is DNA found in humans?
36. Is the DNA in all people the same?
37. What about in identical twins?
38. Are there methods to type DNA from different people?
39. When were they developed?
40. What do they do?
41. How are they different from one another?
42. Have you used them before?
43. How are they different from methods that have been used before DNA was discovered?
44. What is the RFLP method of DNA typing?
45. Is the RFLP form of DNA typing used in fields other than criminal cases?
46. What are those fields?
47. Do these uses include to:
  - a. Diagnose diseases?
  - b. Transplant organs and tissue?
  - c. Save lives?
  - d. Save endangered animals?
  - e. Identify the remains of American war dead?
48. Is the RFLP method used around the world?
49. Very briefly, how does the RFLP method work?
50. Are controls used in the testing process?
51. What is a control?
52. Why are they important?
53. What if the controls do not work properly?
54. How do you read the results of an RFLP test?
55. Is it an x-ray just like in the doctor's office?
56. Can anyone see the results?
57. Does that include the judge, the lawyers and the jury?
58. What types of results can you get from an RFLP test?
59. What is "no result"?
60. What is an "inconclusive" result?
61. What is an "exclusion"?
62. What is a "match"?
63. Can anything make DNA in a sample change from one type to another?
64. Can DNA in a sample get old or die?
65. Is there anything about the testing process that can change the DNA types in a sample?
66. Do you and your laboratory undergo proficiency testing?
67. What is proficiency testing?
68. How often are you tested?
69. What are the results of your proficiency testing?
70. What licenses does your laboratory hold?

71. What certification or accreditation does your laboratory hold?
72. Does your laboratory follow the guidelines of any organizations?
73. What is "T.W.G.D.A.M."?
74. Does your laboratory perform DNA typing for both prosecutors and defendants?
75. Are charges ever dismissed against defendants as a result of your DNA test results?
76. Are inmates ever freed from prison as a result of your DNA test results?
77. What is quality assurance?
78. Are quality assurance programs in effect at your laboratory?
79. Please describe those programs.
80. When your laboratory receives cases for DNA testing, what steps are taken to ensure the integrity of the evidence?
81. What is "chain of custody"?
82. How do you make sure that a proper chain of custody is maintained?
83. What are protocols?
84. Does your laboratory have written protocols?
85. What do those protocols require?
86. Do those protocols cover every step from receipt of evidence to the writing of reports?
87. Have those protocols been approved by any agency or organization?
88. What are population frequencies?
89. Why are they important in DNA typing?
90. What is your education and training in population frequencies?
91. Please describe your experience in the use of frequencies.
92. Have you used them in DNA cases before?
93. Have you testified before as an expert in the use of population frequencies in court?
94. Have population frequencies been used even before DNA typing?
95. How are these estimates calculated?
96. Do you take any steps to ensure that your estimates are accurate?
97. What do you mean when you say "conservative" steps are taken in the calculation of frequency estimates?
98. Why do you calculate estimates for major races?

#### Identifying the Physical Facts

1. Did you receive evidence in the case of \_\_\_\_\_ vs. \_\_\_\_\_?
2. When did you receive that evidence?
3. What was included in that evidence?
4. What was done with that evidence when it was received?
5. Was each entire sample used up in the testing process?
6. Why not?
7. What is a "future test sample"?
8. Why do you save a portion of the evidence?
9. Which samples were tested by you in this case?
10. Were results obtained?
11. Who decides what the results are?
12. Must both of you agree?
13. Did you both agree on all the results in this case?

14. Do you have with you the x-rays from the testing in this case?
15. Can you show them to the judge and jury?
  - a. Your Honor, the State asks that these \_\_\_\_\_ be marked for the purpose of identification as State's Exhibit \_\_\_\_\_ and offer them for admission as evidence.
16. Did all the controls show the tests were performed properly or not?
17. What were the results in this case?
18. Did you calculate estimates for the rarity of the matches you found?
19. What are those estimates?
20. What do those estimates mean?
21. What did you do with the evidence after your testing was completed?
22. Did you provide all of your reports and notes to the defense in this case?

#### Identifying the Witnesses / PCR Typing

1. Please state your name and address.
2. What is your occupation/profession?
3. Who is your employer?
4. How long have you been employed by \_\_\_\_\_ (name of agency/organization)?
5. What services does \_\_\_\_\_ provide?
6. What are your duties and responsibilities?
7. Would you describe your educational background?
8. What schools have you attended?
9. What degree(s) have you received?
10. Did your formal education include the study of DNA?
11. Did that education include hands-on work with DNA testing techniques?
12. Have you performed research in the area of DNA or DNA testing?
13. Prior to your employment at \_\_\_\_\_, please describe any other positions you have held.
14. Did you perform DNA typing in those previous positions?
15. What role do professional societies and organizations play in the science of DNA?
16. What societies and organizations do you belong to?
17. Do you attend their meetings?
18. Are you asked to deliver or present your research at those meetings?
19. Have you written any papers or articles?
20. Have they been published in the scientific literature?
21. Are papers and articles important in science?
22. Why?
23. What is "peer review"?
24. What role does peer review play in science?
25. Have your papers or articles been peer reviewed before they were published?
26. Are you asked to peer review the scientific publications of others?
27. Do you regularly read the scientific literature in the area of DNA? Why?
28. What journals or other scientific publications do you regularly read?
29. Have you testified before today as an expert in DNA testing?
30. Approximately how many times?
31. In what courts and states?

32. What is DNA?
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35. Where is DNA found in humans?
36. Is the DNA in all people the same?
37. What about in identical twins?
38. Are there methods to type DNA from different people?
39. When were they developed?
40. What do they do?
41. How are they different from one another?
42. Have you used them before?
43. How are they different from methods that have been used before DNA was discovered?
44. What is the PCR method or DNA typing?
45. Is the PCR form of DNA typing used in fields other than criminal cases?
46. What are those fields?
47. Do these uses include to:
  - a. Diagnose diseases?
  - b. Transplant organs and tissue?
  - c. Save lives?
  - d. Save endangered animals?
  - e. Identify the remains of American war dead?
48. Is the PCR method used around the world?
49. Very briefly, how does the PCR method work?
50. Are controls used in the testing process?
51. What is a control?
52. Why are they important?
53. What if the controls do not work properly?
54. How do you read the results of a PCR test?
55. What types of results can you get from a PCR test?
56. What is "no result"?
57. What is an "inconclusive" result?
58. What is an "exclusion"?
59. What is a "match"?
60. Can anything make DNA in a sample change from one type to another?
61. Can DNA in a sample get old or die?
62. Is there anything about the testing process that can change the DNA type in a sample?
63. What is a "contamination"?
64. What steps do you take to deal with the possibility of contamination?
65. What roles do controls play in determining whether any contamination has occurred?
66. Are there additional controls which are used specifically for PCR testing?
67. Do you and your laboratory undergo proficiency testing?
68. What is proficiency testing?
69. How often are you tested?
70. What are the results of your proficiency testing?
71. What licenses does your laboratory hold?
72. What certificates or accreditation does your laboratory hold?

73. Does your laboratory follow the guidelines of any organizations?
74. What is "T.W.G.D.A.M."?
75. Does your laboratory perform DNA typing for both prosecutors and defendants?
76. Are charges ever dismissed against defendants as a result of your DNA test results?
77. Are inmates ever freed from prison as a result of your DNA test results?
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80. Please describe those programs.
81. When your laboratory receives cases for DNA testing, what steps are taken to ensure the integrity of the evidence?
82. What is "chain of custody"?
83. How do you make sure that a proper chain of custody is maintained?
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85. Does your laboratory have written protocols?
86. What do those protocols require?
87. Do those protocols cover every step from receipt of evidence to the writing of reports?
88. Have those protocols been approved by any agency or organization?
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90. Why are they important in DNA typing?
91. What is your education and training in population frequencies?
92. Please describe your experience in the use of frequencies.
93. Have you used them in DNA cases before?
94. Have you testified before as an expert in the use of population frequencies in court?
95. Have population frequencies been used even before DNA typing?
96. How are these estimates calculated?
97. Do you take any steps to ensure that your estimates are accurate?
98. What do you mean when you say "conservative" steps are taken in the calculation of frequency estimates?
99. Why do you calculate estimates for major races?

#### Identifying the Physical Facts

1. Did you receive evidence in the case of \_\_\_\_\_ vs. \_\_\_\_\_?
2. When did you receive that evidence?
3. What was included in the evidence?
4. What was done with that evidence when it was received?
5. Was each entire sample used up in the testing process?
6. Why not?
7. What is a "future test sample"?
8. Why do you save a portion of the evidence?
9. What samples were tested by you in this case?
10. Were results obtained?
11. Who decides what the results are?
12. Must both of you agree?
13. Did you both agree in all the results in this case?
14. Did all the controls show the tests were performed properly or not?
15. What were the results in this case?

16. Did you calculate estimates for the rarity of the matches you found?
17. What are those estimates?
18. What do those estimates mean?
19. What did you do with the evidence after your testing was completed?
20. Did you provide all of your reports and notes to the defense in this case?

## More Predicate Questions

*The following pages (64-66) were reproduced with permission from the South Carolina Commission on Prosecution Coordination and L. Suzanne Mayes, Esquire. They were updated by the SC Attorney General's Office to reflect changes in the law.*

### Forensic Interviewer

A forensic interviewer should NEVER be qualified as an expert in forensic interviewing.

1. Educational Background and training
2. Employment Background
  - a. Where are you employed?
  - b. What services do you provide?
3. Courses, seminars, and other training in field of forensic interviews
4. What is a "forensic interview"?
5. How are forensic interviews conducted to assess possible child abuse?
6. What protocol do you use?
7. Are the child's parents or guardians present for the interview? Why or Why not?
8. Where is the interview conducted? Who may be allowed to observe the interview? In what manner?
9. Is the child's family and/or social history obtained?
10. Do you obtain a medical history?
11. What type of questioning format I used in the forensic interview? (i.e., non-leading, non-suggestive questions) Why are these safeguards used?
12. When assessing child physical or sexual abuse, how do you determine the child's knowledge of his or her anatomy?

### Case-Specific Questions

*Always make sure you have discussed these questions in advance with the forensic interviewer.*

1. On what date did you conduct a forensic interview with \_\_\_\_\_ (victim)?
2. What person or agency referred the child for the forensic interview?
3. What, if anything, did \_\_\_\_\_ (victim) relate to you concerning the place or places that sexual assault(s) occurred?
4. What, if any, recommendation did you make following \_\_\_\_\_'s (victim) disclosure of abuse?

### Counselor, Psychologist, or Other Behavioral Evidence Expert

#### Qualification of the Expert

*Request and review the expert's resume in advance.*

1. Background and training

2. Type of professional licensing or practice
  - a. Where are you employed?
  - b. What specific types of services do you provide?
3. Courses, seminars, and other training in child abuse, sexual assault, or incest
4. Training or teaching experience
5. Professional organizations, affiliations, publications, speaking engagements
6. Amount of experience counseling victims of sexual assault/child victims/or adult survivors of sexual child abuse
7. Number of years in practice; estimated number of patients
8. Previous court testimony and qualification as an expert witness

*Offer as an expert in the field of "child sexual abuse counseling & treatment" or "child sexual abuse trauma recovery." Remember State v. Schumpert, 435 S.E.2d 859 (S. Ct. 1993): "Defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility."*

*Remember State v. Chavis (2015): Requires that the forensic interviewer's work has been peer reviewed on multiple occasions. Also a forensic interviewer cannot testify to their recommendations in the case as this is improper bolstering.*

#### Delayed Reporting and Related Issues

*Caveat – State v. Dawkins, Opinion No. 25340 (S.Ct. Filed August 13, 2001) held that identity of the perpetrator is inadmissible hearsay. Corroborating witnesses are limited to "time and place" of assault as reported to them by the victim. Therefore, it is best to have the expert avoid calling the perpetrator by name or other identifying labels such as "Grandpa." However, the expert should be allowed to generally discuss the dynamics of sexual abuse which occur when the perpetrator is a family member or authority figure.*

1. Among child abuse professionals, what is meant by the terms "delayed disclosure" or "delayed reporting"?
2. In your experience, how common is delayed reporting among victims of child sexual abuse?
3. What factors commonly play a role in delayed disclosure?
4. Can you explain the family dynamics that may affect a child's delay in reporting physical or sexual abuse?
  - a. When the perpetrator is within the family or present at home
  - b. When the perpetrator has a strong influence on the child or the family
  - c. When the perpetrator is abusive, domineering, controlling
  - d. When the non-offending parent is passive
  - e. When the perpetrator is an authority figure or loved by child
  - f. The child wishes to protect others, such as the mother, siblings, or anyone she perceives as being harmed by the revelation
  - g. When the child has strong desire to keep the family intact
  - h. When the perpetrator has threatened the child or a family member
  - i. Child's own natural feelings of guilt, shame, fear, and not being believed

5. How may a child's disclosure be affected if the perpetrator is a family member (or lives in the home)? Are you more or less likely to see delayed reporting in these types of situations?
6. Based upon your professional experience, can you give us some examples of the different time spans you have seen involving the issue of delayed disclosure (e.g., cases spanning months, years, or into adulthood before disclosure, and cases with adult incest survivors where multi-generational sexual abuse may have occurred without any previous disclosure)?
7. What is meant by the term "piecemeal" or partial disclosure? Why may this occur?
8. Do you necessarily expect a complete disclosure when interviewing children? Why or Why not?
9. Do children necessarily recall the chronological order of events in cases of chronic (ongoing) sexual abuse? Why or Why not?

#### Case-Specific Delayed Disclosure

1. In your expert opinion, did any of the factors you have previously discussed play a role in \_\_\_\_\_'s (victim) delayed reporting?
2. Based upon your training and experience, was \_\_\_\_\_'s (victim) delayed response reporting consistent or inconsistent with her history of sexual abuse?
3. *Optional*—What experiences, if any, have you had with *adult victims* who later disclose a history of childhood sexual abuse?
4. Hypothetically, if the perpetrator is a family member (authority figure, etc.), would delayed disclosure be consistent or inconsistent with sexual abuse?
5. What, if any, effect may physical or emotional abuse by the perpetrator have in delayed reporting?
6. What factors may ultimately encourage a child to reveal sexual abuse (e.g., a trusted relationship, change in environment, sense of security, age development, or other factors such as child revealing because of fear that sibling will also be abused, or fear that the abuse will escalate)?
7. What type of support system should be in place to allow a child to disclose sexual abuse?

#### Trauma Symptoms

*Caveat—the proper language for the expert to use is "consistent with," instead of giving an outright conclusion regarding sexual abuse or post-traumatic stress disorder. See State v. Morgan, 485 S.E.2d 112 (1997).*

1. When was \_\_\_\_\_ (victim) first referred to you for counseling?
2. For what purpose have you treated the victim?
3. What are \_\_\_\_\_'s (victim) treatment goals?
4. How has he/she progressed?
5. Why may symptoms of trauma follow sexual abuse or sexual assault?
6. What, in general, are recognized symptoms of trauma following an act of sexual abuse or sexual assault?

7. What, if any, trauma symptoms did \_\_\_\_\_ (victim) exhibit? (Expert may rely on child's given history as underlying basis of opinion. Rule 703, SCRE.)
8. How does counseling help to address these symptoms?
9. In your expert opinion, are \_\_\_\_\_'s (victim) symptoms of trauma consistent or inconsistent with his/her history of sexual abuse?

#### Other Related Issues

*These sample questions may be helpful in cases of ongoing, chronic sexual abuse where the victim has seemingly become passive to the abuse or cooperative with the perpetrator. This type of behavioral response is often termed "Child Sex Abuse Accommodation Syndrome."*

1. In your expert opinion, can you tell us why some children may cooperate with an abuser?
2. Can you tell us what factors may play a role in a child's cooperation or acceptance of abuse (e.g., a desire to maintain other family relationships, love for the perpetrator, fear or intimidation)?
3. Based upon your professional experience, can you tell us whether this is a common or uncommon reaction to child sexual abuse?
4. In your expert opinion, can you tell us whether this reaction is consistent or inconsistent with \_\_\_\_\_'s (victim) history of child sexual abuse?

### General Duties of a Prosecutor

- 1) Meet with law enforcement
  - a. Review all reports and collected evidence and obtain any evidence not already in file (911 tape, photographs, medical reports, etc.).
  - b. Make recommendations for further investigation (witness statements, crime scene diagrams, etc.).
  - c. Discuss possible charges, if any.
  - d. If there are already charges, confer with the victim. Victims have a right to confer with the prosecution after charging, before trial or before any disposition and to be informed of the disposition, according to the South Carolina Constitution (Article 1, Section 24).
- 2) Meet with the victim
  - a. Establish a working relationship and rapport with the victim.
  - b. Review the victim's bill of rights with the victim and adhere to all mandatory constitutional and statutory requirements for the prosecuting agency.
  - c. Determine if any lethality risk exists and if so, refer victim to LEVA and/or other community advocates for assistance in obtaining orders of protection, restraining orders, etc.
  - d. Discuss any potential (or additional) charges with victim, if any. Victims have a right to confer with the prosecution after charging, before trial or before any disposition and to be informed of the disposition.
  - e. If case is not able to be charged, make appropriate referrals for victim (counseling, etc.).
- 3) Speak with community or law-enforcement advocates
- 4) Make charging decisions
  - a. Think "outside the box" about potential charges if CSC isn't a possibility (charges involving weapons, alcohol, lewd acts, indecent exposure, etc.).  
*Be conscious of State v. Baker (2015): Requires indictments to be more specific in regards to timeframe of the incident. For example, if the victim was assaulted every summer over a period of 6 years do indictments for just the summer months instead of one indictment covering 6 years.*
  - b. Attend bond hearing, arraignment, etc.
  - c. Make sure a no-contact order is a condition of the bond and ask law enforcement to monitor closely any contact that is made.
- 5) Prepare for plea/trial
 

\*Utilize your victim advocate during this phase of a sexual assault case. Prosecutors get very busy during trial preparation so it will be useful to have someone who communicates with the victim.

  - a. Keep victim informed of case progression, plea deals, etc. Victims have a right to confer with the prosecution before trial or before any disposition and to be informed of the disposition.
  - b. If the case proceeds to trial, prepare victim for testimony.
    - i. Practice direct and cross examination.
    - ii. Discuss proper attire.

- 6) Sentencing: Make sure the victim is prepared to address the court during sentencing if he/she wishes.
- 7) Appeal
  - a. Explain the appellate process.  
Make sure all victim notification forms are completed.

## **Appendix A: South Carolina Anonymous Reporting Protocol**

*VAWA 2005 reauthorization mandates, S.C. Recommended Protocol, and S.C. Act 59: VAWA Forensic Compliance (federal) and SC Act 59 (state) are law, and are not optional.*

### **Federal Precedent-Violence Against Women Act's Forensic Compliance 2005**

**42 U.S.C.A. S. 3796gg-4.b.3.D.d.1:** "Nothing in this section shall be construed to permit a state, Indian tribal government, or territorial government to require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such exam or both."

Translation: Victims do not have to report the sexual assault to law enforcement to receive a forensic exam and to have that exam paid for. Additionally, States must certify that they are in compliance with the statutory eligibility requirement of VAWA.

### **Model of Compliance**

#### **New Anonymous Reporting Protocol for victims 18 years old or older**

#### **Guiding principle: Victim Centered**

#### **Emphasizes:**

1. **Evidence collection** (forensic evidence collection kit)
2. **Medical attention for victim** (medico-legal examination, STI and pregnancy prevention)

#### **Characteristics:**

- Victims must be offered a sexual assault/forensic evidence collection examination regardless of their decision to participate with the criminal justice system (law enforcement authorization for forensic evidence collection kit is *not* required).
- As far as law enforcement is concerned, there is no investigation until the victim chooses to convert the kit (report the crime) and initiate a law enforcement investigation.
- Law enforcement transports evidence to appropriate law enforcement agency with jurisdiction over location where sexual assault occurred.

### New Anonymous Reporting Protocol

- The anonymous reporting protocol does not include law enforcement contact.
- SANE or other qualified medical provider at a hospital emergency department shall perform the forensic evidence collection kit in the *same manner as if it was a law enforcement-involved kit*.
- The evidence will be stored for a period of one (1) year, allowing the victim time to make a decision about whether or not she/he desires to move forward with law enforcement investigation once the trauma response has stabilized.
- The **only differences** between the new anonymous reporting protocol and the traditional law enforcement involved protocol is that:
  - law enforcement approval to perform the forensic evidence collection kit and exam is no longer required; and
  - anonymous forensic evidence kits will be stored for one year from date of collection.
- A full medico-legal examination, including:
  - a report of the assault by the victim taken by the SANE nurse or medical provider
  - evidence collection;
  - charting and photographs of injuries (if any);
  - prevention of sexually transmitted infections and pregnancy; and
  - blood draw, if indication that sexual assault was drug facilitated.

*Note: For storage purposes, only clothing that was next to the genitals will be collected, unless the circumstances of the assault warrants collecting additional clothing.*

### ➤ **SLED Forensic Evidence Collection Kits**

- Encourage bringing toxicology samples to SLED as soon as possible.
- Blood samples need to be taken within 12 hours of sexual assault.
- Urine samples need to be taken within 24 hours of sexual assault.

### Payment for Anonymous Kits

- Requests should be submitted through the SC State Office of Victims Assistance (SOVA) just as requests for payment of non-anonymous kits would be.
  - ANONYMOUS KIT should be clearly noted on the application form.
- If further medical attention is given beyond the forensic evidence collection kit, request for payment may be submitted to SOVA as well, with the anonymous notation.
  - SOVA will consider these on a case by case basis.
  - If there are issues with reimbursement, please contact your local sexual assault direct service provider, or SCCADVASA.

## S.C. Anonymous Reporting Protocol

### Step 1: Victim Discloses or Presents at a Hospital

- Protocols for Reporting Sexual Assaults: When an adult victim of sexual assault (age 18 or older) presents at a hospital or discloses to a victim advocate that she/he has been sexually assaulted, **the individual must be presented with all options for reporting the sexual assault.**
- Reporting options available are:
  1. New Anonymous Reporting Protocol;
  2. Traditional Law Enforcement-Involved Reporting Protocol; and
  3. Just Medical Care (without a forensic exam. SOVA *will only* pay for this if reimbursement forms are filed, which requires law enforcement participation).

### Step 2: Storage and Transportation of Anonymous SAFE Kits and Evidence

- Hospital personnel shall contact the designated law enforcement agency to notify that an anonymous SAFE kit is ready to be picked up for storage.
- Hospitals shall maintain chain of custody until SAFE kit and other evidence are turned over to the designated law enforcement agency.
  - The SANE nurse/hospital personnel and victim advocate will make reasonable efforts to determine the jurisdiction of the sexual assault.
  - Hospitals or other medical facilities shall not hold completed SAFE kits and other evidence for long-term storage. (Unless otherwise determined.)
- Law Enforcement shall pick up, transport and store SAFE kits and other evidence according to departmental procedures.
  - Methods such as anonymous report, citizen contact, suspicious incident, etc. can be utilized to generate a case number.
  - SAFE kit number and LE case number should be linked.

### Step 3: Tracking Anonymous Reports and Forensic Kits

- The hospital patient account number will link the evidence and sexual assault kit to the victim for future reference (recommended in state protocol).
- Outside of kit marked with:
  - A sticker identifying the one-year storage period end date;
  - A sticker identifying the date the forensic evidence collection kit was performed; and
  - Hospital account number.

- Tracking anonymous reports and forensic kits:
  - No personally identifying information shall be placed on the outside of the forensic evidence collection kit. This can include, but is not limited to:
    - Name; postal address; email address; cell phone or telephone number; facsimile; social security number; date of birth; racial, ethnic, or religious identity; or
    - Any other combined information that could serve to identify an individual.

#### **Step 4: Chain of Evidence, Length of Storage**

- Sexual assault evidence collection kits and other evidence collected for victims whose identity is unknown to law enforcement shall be maintained in the same manner as any other forensic evidence collection kit and evidence.
- Sexual Assault Evidence Collection Kits where the identity of the victim is unknown must be kept secure and chain of custody must be preserved for a period of one (1) year (365 days) from the date of collection.
- Sexual Assault Evidence Collection Kits and other evidence collected for victims whose identity is unknown *shall not be opened unless the victim reports the sexual assault to law enforcement.*
- Opening the Sexual Assault Evidence Collection Kit will compromise the admissibility of evidence for the purposes of prosecution.

#### **\*\*\*Spousal Rape\*\*\***

- If the victim reports that the individual perpetrating the sexual assault is the victim's legal spouse, the victim has only thirty (30) days to report to law enforcement under South Carolina law.
- Victims should receive this information, to be fully informed of their choices. However, the choice of whether to report is still completely the victim's decision.

#### **Step 5: Length of Storage**

- One year storage of anonymous report and forensic evidence collection kits
- Evidence will be stored in an environmentally controlled storage unit until
  - the victim desires to move forward with law enforcement investigation; or
  - a period of one (1) year, whichever comes first.
- Forensic evidence collection kits and other evidence collected for victims whose identity is unknown to law enforcement shall be maintained in the same manner as any other forensic evidence collection kit and evidence.
- For storage purposes, only clothing that was next to the genitals will be collected, unless the circumstances of the assault warrant collecting additional clothing.
- **No evidence shall be destroyed prior to the one year time period.**

**Step 6: Notification of victim prior to expiration of the one year storage deadline**

- If the victim does not elect to initiate a law enforcement investigation within eleven (11) months:
  - a victim advocate from the local rape crisis program (SCCADVASA member programs) serving the county in which the anonymously reported sexual assault occurred will confidentially notify the victim that the storage time is about to reach a conclusion, providing the victim with an opportunity to initiate law enforcement investigation and prosecution, if s/he so desires.
  
- Notification to victim prior to expiration of the one year storage deadline
  - It is the victim's responsibility to update contact information with the local rape crisis program if they desire to be notified one month prior to the end of the one year storage time for anonymous reports/kits.

At the time of the anonymous report, the victim will choose how s/he wants to be notified.  
No messages may be left for the victim unless indicated in writing at the time of the anonymous report.

## **Appendix B: Sexual Assault Laws in South Carolina**

For access to the South Carolina Victims' Bill of Rights please use the following link, specifically Article 1, Section 24:

<http://www.scstatehouse.gov/seconstitution/seconst.php>

For access to the most recent criminal laws, please use the following link, specifically Crimes and Offenses - Title 16, Chapter 3; Title 16, Chapter 15 and Criminal Procedures - Title 17:

<http://www.scstatehouse.gov/code/statmast.php>

## **Appendix C: South Carolina Sexual Assault Resource and Advocacy Centers**

### **CASA/Family Systems**

*Serves Orangeburg, Calhoun & Bamberg Counties (Sexual Assault and Domestic Violence)*

**Phone:** 803-534-2448  
**Hotline:** 1-800-298-7228  
**Address:** CASA/Family Systems  
P.O. Box 1568  
Orangeburg, SC 29116

### **Cumbee Center to Assist Abused Persons**

*Serves Aiken, Barnwell & Allendale Counties for Domestic Violence; Aiken, Barnwell, Allendale, Edgefield, Saluda & McCormick Counties for Sexual Assault Issues*

**Website:** [www.cumbeecenter.org](http://www.cumbeecenter.org)  
**Phone:** 803-649-0480  
**Hotline:** 803-641-4162  
**Address:** Cumbee Center to Assist Abused Persons  
P O Box 1293  
Aiken, SC 29802

### **Family Resource Center**

*Serves Kershaw & Lee Counties (Sexual Assault)*

**Phone:** 803-425-4357  
**Hotline:** 1-800-585-4455  
**Address:** Family Resource Center  
PO Box 282  
Camden, SC 29020

**Foothills Alliance**

*Serves Anderson & Oconee Counties (Sexual Assault)*

**Website:** [www.foothillsalliance.org](http://www.foothillsalliance.org)  
**Phone:** 864-231-7273  
**Hotline:** 1-800-585-8952  
**Address:** Foothills Alliance  
216 East Calhoun Street  
Anderson, SC 29621

**Hope Haven of the Lowcountry: Children's Advocacy and Rape Crisis Center**

*Serves Beaufort, Colleton, Hampton & Jasper Counties (Sexual Assault)*

**Phone:** 843-524-2256  
**Hotline:** 1-800-637-7273  
**Address:** Hope Haven of the Lowcountry: Children's Advocacy and Rape Crisis Center  
P.O. Box 2502  
Beaufort, SC 29901

**Julie Valentine Center**

*Serves Greenville County (Sexual Assault)*

**Website:** [www.julievalentinecenter.org](http://www.julievalentinecenter.org)  
**Phone:** 864-331-0560  
**Hotline:** 864-467-3633  
**Address:** Greenville Rape Crisis & Child Abuse Center  
2905 White Horse Road  
Greenville, SC 29611-6120

**Palmetto Citizens Against Sexual Assault**

*Serves Lancaster, Chester & Fairfield Counties (Sexual Assault)*

**Phone:** 803-286-5232  
**Hotline:** 1-888-790-8532  
**Address:** Palmetto Citizens Against Sexual Assault  
106 N. York Street  
Lancaster, SC 29720

**People Against Rape**

*Serves Charleston, Berkeley, & Dorchester Counties (Sexual Assault)*

**Website:** [www.peopleagainstrape.org](http://www.peopleagainstrape.org)  
**Phone:** 843-745-0144  
**Hotline:** 1-800-241-7273  
**Address:** People Against Rape  
2154 N. Center St., Suite 302  
North Charleston, SC 29406

**Pee Dee Coalition Against Domestic & Sexual Assault**

*Serves Florence, Darlington, Marion, Chesterfield, Marlboro, Dillon & Williamsburg Counties (Domestic Violence and Sexual Assault) and Clarendon County (Sexual Assault)*

**Website:** [www.pcedecoalition.org](http://www.pcedecoalition.org)  
**Phone:** 843-669-4694  
**Hotline:** 1-800-273-1820  
**Address:** Pee Dee Coalition Against Domestic & Sexual Assault  
P.O. Box 1351  
Florence, SC 29503

**Rape Crisis Center**

*Serves Horry & Georgetown Counties (Sexual Assault)*

**Website:** [www.victimtosurvivor.org/](http://www.victimtosurvivor.org/)  
**Phone:** 843-448-3180  
**Hotline:** 843-448-7273  
**Address:** Rape Crisis Center  
P.O. Box 613  
Myrtle Beach, SC 29578-0613

**Rape Crisis Council of Pickens County**

*Serves Pickens County (Sexual Assault)*

**Phone:** 864-442-5500  
**Hotline:** 864-442-5500  
**Address:** Rape Crisis Council of Pickens County  
P.O. Box 2952  
Easley, SC 29641

**SAFE Homes - Rape Crisis Coalition**

*Provides Domestic Violence Services to Spartanburg, Cherokee & Union Counties and Sexual Assault Services to Spartanburg and Cherokee Counties*

**Website:** [www.shrcc.org/](http://www.shrcc.org/)  
**Phone:** 864-583-9803  
**Hotline:** 1-800-273-5066  
**Address:** SAFE Homes - Rape Crisis Coalition  
236 Union Street  
Spartanburg, SC 29302

**Safe Passage Inc.**

*Provides Domestic Violence Services to York, Chester & Lancaster Counties and Sexual Assault Services to York and Union Counties*

**Website:** [www.safepassagesc.org](http://www.safepassagesc.org)  
**Phone:** 803-329-3336  
**Hotline:** 1-800-659-0977  
**Address:** Safe Passage Inc.  
P.O. Box 11458  
Rock Hill, SC 29731

**Beyond Abuse**

*Serves Greenwood, Laurens & Abbeville Counties (Sexual Assault)*

**Website:** [www.beyondabuse.info](http://www.beyondabuse.info)  
**Phone:** 864-227-1623  
**Hotline:** 864-441-6700  
**Address:** Beyond Abuse  
P.O. Box 693  
Greenwood, SC 29648

**Sexual Trauma Services of the Midlands**

*Serves Richland, Lexington, Newberry & Sumter Counties (Sexual Assault)*

**Website:** [www.stsm.org](http://www.stsm.org)  
**Phone:** 803-790-8208  
**Hotline:** 1-800-771-RAPE (7273)  
**Address:** Sexual Trauma Services of the Midlands  
3700 Forest Drive, Suite 350  
Columbia, SC 29204

## **Appendix D: Victim Assistance Resources**

National Organization for Victim Assistance (NOVA)

[www.trynova.org](http://www.trynova.org)

National Association for Victim Assistance

510 King Street, Suite 424, Alexandria, VA 22314

(800) 879-6682 (800-TRY-NOVA); Office: (703) 535-6682

RAINN (Rape, Abuse & Incest National Network)

1220 L Street NW, Suite 505, Washington, DC 20005

(800) 656-HOPE (4673)

[www.rainn.org](http://www.rainn.org)

South Carolina Victim Assistance Network (SCVAN)

[www.scvan.org](http://www.scvan.org)

113 Executive Pointe Blvd., Suite 202, Columbia, SC 29210

(888) 852-1900; (803) 750-1200

Email: [Ward@scvan.org](mailto:Ward@scvan.org)

State Office of Victim Assistance (SOVA)

[www.sova.sc.gov](http://www.sova.sc.gov)

1205 Pendleton Street, Edgar A. Brown Building, Room 401, Columbia, SC 29201

(803) 734-1900; Victims Only: 1(800) 220-5370

Email: [sova@ocpp.sc.gov](mailto:sova@ocpp.sc.gov)

South Carolina Coalition against Domestic Violence and Sexual Assault (SCCADVASA)

[www.sccadvasa.org](http://www.sccadvasa.org)

1320 Richland Street, Columbia, SC 29201

P.O. Box 776, Columbia, SC 29202

(803) 256-2900

S.C. Law Enforcement Victim Advocate ASSOCIATION (SCLEVA)

[www.scleva.com](http://www.scleva.com)

President: Leigh Caldwell, [lcaldwell@cherokeecountysheriff.net](mailto:lcaldwell@cherokeecountysheriff.net) or contact local law enforcement agency

US Department of Justice – Office For Victims Of Crime (OVC)

[www.ojp.usdoj.gov/ovc](http://www.ojp.usdoj.gov/ovc)

U.S. Department of Justice, 810 Seventh St. NW, 8<sup>th</sup> Floor, Washington DC 20531

(202) 307-5983

**EXHIBIT B**



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Home > Newsroom > Response to Incident in Laurens County

## Newsroom

### Response to Incident in Laurens County

July 17, 2017

Laurens County Memorial Hospital, stroke center, sexual assault nurse examiners, 3000000

0 Comment

On Saturday, July 15, the Laurens County Sheriff's Office issued a news release to local media concerning the handling of a sexual assault case at GHS' Laurens County Memorial Hospital.

Despite what has been reported in the news, I want to assure our patients and community that we followed the law and that all appropriate medical protocols and policies were followed. Patients are the focus of everything we do, and we strive to provide the best care possible to all of our patients.

Every patient who visits an emergency department at any one of our hospitals receives a medical screening exam to determine if they have an emergent medical condition. If such a condition exists, the patient is stabilized within the capabilities of that hospital. If the hospital doesn't have the capabilities to treat the patient, the patient is provided an appropriate transfer to another facility. For example, if a patient presents at one of our community hospitals with signs of a stroke, the patient would be stabilized and transported to the Stroke Center at Greenville Memorial Hospital where we have specially trained staff ready to provide expert care.

In the case of a sexual assault, it is general practice at all of our facilities to have a Sexual Assault Nurse Examiner (SANE) provide a sexual assault exam because these nurses have special training in medical forensics and often provide expert testimony if a case goes to trial. If a SANE-certified nurse is not present, we offer patients the opportunity to be immediately transported to a facility where a SANE-certified nurse is available. If a patient doesn't want to be transported, a doctor can perform the exam. However, in all cases, a patient must give consent for the exam to occur. If a patient does not consent or says they want to leave the hospital, we must respect their wishes.

Our goal is to provide the right care at the right time and the right place and to be a source of help and healing along this difficult journey. We take sexual assault cases very seriously and understand how difficult it can be for a victim to seek treatment at a hospital.

### Response to Incident in Laurens County

- About Greenville Health System
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- Executive Team
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- Governance
- History/Timeline
- Media Contacts
- Medical Scholars Program
- Social Media
- Weather Alert
- Website Feedback

### Latest from the GHS Blog



Hotter weather likely to cause more "hot-car deaths" this summer  
Jun 08, 2018



Ground-breaking breast cancer study shows some women don't need chemo  
Jun 06, 2018



Build your own home workout with these tools  
Jun 04, 2018



Colorectal cancer screenings now recommended at earlier age  
May 31, 2018



Just say no to teething medication

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GHS is committed to providing high quality care to all patients, and we welcome the opportunity to work together with local law enforcement to ensure victims of sexual assault and abuse get the care they need.

May 28, 2018

Catherine Chang, MD  
Chief Medical Officer  
Greenville Health System

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Was this Helpful?  Yes  No

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- Greer Medical Campus
- Laurens County Medical Campus
- North Greenville Medical Campus
- Patewood Medical Campus
- Simpsonville Medical Campus
- Oconee Medical Campus
- Children's Hospital
- Baptist Easley Hospital
- MD360@ Convenient Care

701 Grove Road  
Greenville, SC 29605  
(877) GHS-INFO

Patients and Visitors

- MyChart
- EGreetings
- How to be a Great Visitor
- Visiting Hours
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- Online Payments
- Financial Assistance
- Obtaining Your Medical Records
- Notice of Nondiscrimination
- Language Assistance Information
- Patient Rights and Responsibilities
- Making Healthcare Decisions
- Privacy Policy
- Contact Greenville Health System

Toll-Free GHS

Physician Finder Service:

(844) GHS-DOCS

Healthcare Services

- Behavioral Health
- Business Health
- GHS Cancer Institute
- Children's Hospital
- Heart & Vascular Institute
- GHS Hospice of the Foothills
- Internal Medicine
- Primary Care
- Radiology
- Stroke Center
- Surgery
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- Publications
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# EXHIBIT C



GREENVILLE HEALTH SYSTEM

Newsroom | Diversity | Careers | Donate | Employee Access

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Home > Newsroom > About Greenville Health System

## About Greenville Health System

Greenville Health System (GHS) is a private not-for-profit academic healthcare delivery system committed to medical excellence through clinical care, education and research. It is part of a health company led by the Strategic Coordinating Organization. The Strategic Coordinating Organization provides strategic direction and corporate services to its affiliates, including GHS.

**Our Mission:** Heal compassionately. Teach innovatively. Improve constantly.

**Our Vision:** Transform health care for the benefit of the people and communities we serve.

**Our Values:** Together we serve with integrity, respect, trust and openness.

### Our History

GHS first opened its doors as City Hospital back in 1912. Over the last 100 years, the organization has evolved from a single free-standing hospital to a highly integrated delivery system and now an academic medical center. In that time, GHS has become the state's largest not-for-profit healthcare system and an advocate for healthy living initiatives, such as LiveWell Greenville, the GHS Swamp Rabbit Trail and Greenville B-cycle, the city's new bike share program. We are a health resource for our community and a leader in transforming the delivery of health care for the benefit of the people and communities we serve.

GHS' commitment to medical education has also advanced over the years, most notably with the recent opening of the [University of South Carolina School of Medicine Greenville](#) on GHS' Greenville Memorial Medical Campus. This new medical school is focused on transforming healthcare delivery by training physicians to connect with communities, patients, colleagues and technology in a new, more progressive way.

### Annual Report

We invite you to visit our [annual report site](#) to learn more about how our nearly 15,000 employees are continuing to transform health care for the benefit of the people and communities we serve.

### Newsroom

[Click here](#) to see the latest news from GHS.

### Events

[View a listing](#) of free or low-cost events happening in our community hosted or sponsored by

### Newsroom

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  - Patients and Visitors
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    - The View - January-February 2018
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### Latest from the GHS Blog



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GHS.

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May 31, 2018



Just say so to teaching  
a colleague

May 28, 2018



Celebrate our first  
anniversary

May 23, 2018



Introducing Get Fit in  
Greenville

May 15, 2018



Empower strategies: What  
you need to know

May 14, 2018

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- Laurens County Medical Campus
- North Greenville Medical Campus
- Patewood Medical Campus
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State of South Carolina  
County of Oconee

Court of Common Pleas

Jane Doe )  
 )  
 Plaintiff, )  
 v. )  
 Oconee Memorial Hospital )  
 )  
 Defendant. )

Transcript of Record  
2017-CP-37-00700

June 4, 2018  
Walhalla, South Carolina

B E F O R E:

The Honorable Scott Sprouse, Judge.

A P P E A R A N C E S:

Hannah Metcalfe, Esquire  
Attorney for the Plaintiff

Kenneth Shaw, Esquire  
Attorney for the Defendant

Lisa Scott  
Circuit Court Reporter



1 and where she went to Oconee Memorial Hospital and  
2 requested that a rape kit be done and that her  
3 sexual assault be reported to law enforcement.

4 The staff that -- I don't -- I think it's  
5 undisputed that the staff at Oconee Memorial did, in  
6 fact, do a rape kit. The contents of that rape kit  
7 may be in dispute, but they did, in fact, do a rape  
8 kit. They contacted law enforcement.

9 In this case, the applicable law enforcement  
10 would've been DeKalb County, law enforcement in  
11 Georgia. They contacted DeKalb County and said, "We  
12 have a person here who has reported that she was  
13 raped. We have -- we have completed a rape kit. We  
14 need an officer to come pick up the rape kit."

15 The, I believe, is what's contained in the  
16 allegations is that the nurse who did the rape kit  
17 and made this phone call was told by the DeKalb  
18 County police that, "We're not coming to get it.  
19 You can just give the rape kit to the victim and  
20 have her bring it to us."

21 And we're going to need, I guess, to get a  
22 statement from her or whatever it may be, but for  
23 one reason or another, that was the instructions  
24 that the DeKalb County police gave to -- to the  
25 nurse. So the nurse following those instructions

1 gave the rape kit to the -- to the plaintiff in this  
2 case. Had her sign a custodial custody form saying  
3 that she had taken over custody of the package.

4 The -- my understanding from there and again  
5 based upon the allegations in the complaint, is that  
6 the plaintiff then took the rape kit to Georgia,  
7 gave it to the Georgia authorities.

8 Some time later, again, not exactly sure, but  
9 several weeks or -- or -- or so after that, she is  
10 told by the DeKalb County police that they're not  
11 going to pursue the charges and at least what is  
12 alleged is that one of the reasons why they're not  
13 pursuing the charges is that there was no blood work  
14 within the rape kit.

15 And then it's also alleged that -- well, part  
16 of the consideration too was that there was  
17 potentially a break in the chain of custody in  
18 regards to the -- in regards to the kit itself.

19 So that's basically the allegations as I  
20 understand them in the complaint, the factual  
21 allegations. We're not really here disputing those  
22 factual allegations.

23 What I'm -- the purp -- the -- the basis of my  
24 motion to dismiss is that assuming all of that to be  
25 true, we didn't owe a duty to the plaintiff in

1 regards to the rape kit. The collection of that  
2 rape kit is a -- is -- is done for criminal  
3 purposes, just as though -- just as if a -- the  
4 sheriff's department or the police department goes  
5 out to a crime scene to collect evidence, that's  
6 what we are doing. We are collecting evidence for a  
7 criminal investigation. We are collecting that  
8 evidence on behalf of the law enforcement agency who  
9 will be conducting that investigation.

10 In this case, that law enforcement agency was  
11 DeKalb County police in Georgia or sheriff's  
12 department in Georgia. You know, and so to the  
13 extent that we owe a duty to anyone, it's going to  
14 be to law enforcement because, again, we are  
15 providing a service on behalf of law enforcement.  
16 But, again, I would argue, Your Honor, I'm not sure  
17 that we owe a duty to anyone in that regards, but  
18 certainly we don't owe a duty to the plaintiff.

19 Again, this is a -- this -- you know, I'm not  
20 aware of any statute that says -- that deals  
21 specifically with this. There's certainly statutes  
22 that deal from SLED, South Carolina Law Enforcement,  
23 on how you go about doing this. And, again, that's  
24 a direction from SLED. So law enforcement providing  
25 direction to hospitals on how to collect evidence in

1 a rape kit, what -- what evidence should be in a  
2 rape kit. Again, I'm not even sure that that's  
3 applicable in this case since this wasn't a SLED  
4 investigation. This would have been a Georgia  
5 investigation.

6 So -- and what Georgia -- at least what's  
7 alleged in the complaint is what Georgia told our  
8 nurse was to give the kit to the victim and have her  
9 bring it to us. Whether that's right, wrong, or  
10 indifferent, we're not here to say. We're here to  
11 follow the instructions of -- of law enforcement.  
12 But, Your Honor, that's the -- that's the general  
13 basis of it.

14 And then as I stated in the thing is that first  
15 off, pretty much all of her causes of action are  
16 negligence-type causes of action. And -- and,  
17 again, I think that there's no -- for there to be a  
18 negligence, one of the first things she's got to  
19 establish is that there was a duty owed, and that's  
20 a matter of law. That's -- that's an issue for the  
21 Court to decide as to whether or not there was a  
22 duty owed.

23 And I don't think under these circumstances  
24 there's a duty. Again, duties are created by  
25 statute or some sort of common law. I'm not aware

1 of any sort of statute or common law that creates a  
2 duty to -- from the hospital to the plaintiff here.

3 This wasn't in regards to health care. This is  
4 not providing her health care services or not. We  
5 are collecting evidence for a criminal  
6 investigation. This -- we weren't treating her.  
7 She's not alleging that we committed malpractice in  
8 the treatment of any injuries that she received.  
9 She's alleging that we mishandled a rape kit. And,  
10 again, that's evidence.

11 What essentially they're alleging, Your Honor,  
12 is a spoliation of evidence. They're alleging that  
13 we -- we somehow another were negligently destroyed  
14 evidence that she would later be able to use in a  
15 criminal case against the alleged perpetrator of the  
16 crime.

17 No such cause of action exists in South  
18 Carolina. The Supreme Court -- that's why I handed  
19 up the -- the Cole case that the Supreme Court has  
20 said that it will not recognize a spoliation of  
21 evidence claim under a tort theory in South  
22 Carolina, whether it be a third person or a first  
23 person spoliation of evidence claim. Neither one of  
24 those is admissible. I think it's -- is -- is  
25 cognizant under South Carolina law.

1 I think that the language that is in the Cole  
2 case is very instructive here. And the rational for  
3 why the Court would not do it is -- and it appears  
4 that I might've given away -- I'm trying to find my  
5 copy of the case, Your Honor.

6 The -- the rational behind it, Your Honor, is  
7 the Court points to several things within the case  
8 that as far as policy considerations, why they  
9 won't -- why they won't, you know, allow this claim  
10 to exist, and I think several of those are  
11 applicable to this, but the one that is most  
12 applicable was the spec -- speculative nature of the  
13 claim itself in that there's no -- there's no  
14 guarantee that had -- had this rape kit been handled  
15 in a different manner, which I'm assuming is what  
16 plaintiff would've preferred.

17 I'm not exactly sure what plaintiff wanted us  
18 to do, but I would assume that she maybe wanted us  
19 to somehow or another give this rape kit directly to  
20 law enforcement. I'm not sure how we were supposed  
21 to do that when law enforcement is telling us they  
22 won't come get it.

23 But if we're somehow -- we're supposed to get  
24 the kate -- the kit to law enforcement, then there's  
25 no guarantee that if that had happened, that the

1 results here would've changed. We don't know why  
2 Georgia decided not to pursue the criminal action  
3 against this guy. There -- we -- we just don't know  
4 that. There's no evidence -- but even if they had,  
5 there's no evidence that a jury or there's no --  
6 it's purely speculative to suggest that a jury  
7 would've necessarily found the guy guilty of any  
8 sort of sexual assault.

9 He may have very well -- it could very well be,  
10 again, that -- that this was consensual. That may  
11 be his defense. That may be what happens. I don't  
12 know. I really don't know the answers to this, but  
13 that's the whole point is that all of this would be  
14 speculative.

15 But then the other policy consideration which  
16 the Court points out in the Cole case and I think  
17 would be extremely applicable to this is that if you  
18 let a case like this go forward, then essentially  
19 what ends up happening is, is that I have to defend  
20 the -- the rape case or at least issues in regards  
21 to the rape case, whether or not she was actually  
22 raped, whether or not she did -- you know, whether  
23 or not it was consensual, wasn't consensual, all  
24 that kind of stuff.

25 Those kind of issues become a question of fact

1 in our case. And -- and so -- you know, that  
2 becomes -- I mean, I start having to try a case  
3 that's not even relevant to my client. My client's  
4 not responsible in any way. I don't think anybody  
5 would argue that my client is somehow or another  
6 responsible for the rape.

7 But to defend this case because of the damages  
8 aspect of it, that becomes an issue in that trial  
9 from the standpoint of what she would have to show  
10 from a causation standpoint is that our failure  
11 to -- our failure to, you know, have this rape kit  
12 -- preserve the evidence in this rape kit is what  
13 prevented this guy from being found guilty.

14 Well, we would essentially have to try the --  
15 the case to find out whether the guy would've been  
16 found guilty. And that, I think, is what the Court,  
17 again, points to in Cole is that, no, that's the  
18 reason why we don't -- we don't allow this type of  
19 claim in South Carolina.

20 The other thing too that I think is -- language  
21 in this case that I think is important to this one,  
22 is they talk about very -- at the very end of the --  
23 at the very end of the opinion, there's language in  
24 there about calling this case something else, which  
25 I think, again, the other cause of action in this

1 case is an intentional infliction of emotional  
2 stress.

3 And -- and what -- what the Court says in Cole  
4 is -- and the Court at the end of the case it says,  
5 "Whether denominated as a claim spoliation of  
6 evidence or as a general negligence claim based on  
7 spoliation of evidence, the substance of the claim  
8 is the same. Both are based on the allegation that  
9 Cole had breached its duty to maintain a key  
10 document. The absent of which harm caused in the  
11 underlying lawsuit.

12 Well, that's essentially what's being -- that's  
13 exactly what they're doing here. They're saying  
14 that our failure to -- to handle the rape kit  
15 appropriately has harmed her and her ability to  
16 pursue a criminal action against the alleged  
17 perpetrator.

18 And, you know, you can call it whatever you --  
19 they can come up with any sort of cause of action  
20 they want, but at the end of the day what they're  
21 essentially alleging is the -- is the tort  
22 spoliation of evidence. And, again, what the  
23 Supreme Court has made clear is that that cause of  
24 action is not cognizable under South Carolina law.

25 THE COURT: Thank you, Mr. Shaw.

1 MS. METCALFE: Good afternoon, Your Honor. I'm  
2 Hannah Rogers Metcalfe. I'm here on behalf of the  
3 plaintiff, Jane Doe. Here with my law partner,  
4 Courtney Atkinson.

5 Your Honor, I'd like to if I may address  
6 Mr. Shaw's arguments in order in which he presented  
7 them to the Court in his memorandum today, his  
8 argument. I think Mr. Shaw accurately characterized  
9 the -- the basic underlying facts of this.

10 Jane Doe was sexually assaulted in Georgia.  
11 She, as a resident of Oconee County, returned to  
12 Oconee and took herself to the emergency department  
13 here at the Oconee Hospital where she reported to  
14 the emergency department that she was a victim of  
15 sexual assault and sought medical treatment,  
16 including the conduction -- conducting of a sexual  
17 assault, a forensic exam.

18 As part of her coming to the hospital, she  
19 received, and it is alleged in a complaint, medical  
20 attention, an examination by a doctor, medication,  
21 examination and treatment with regard to sexually  
22 transmitted diseases, pregnancy testing, medication  
23 to prevent her from becoming pregnant from the  
24 sexual assault. That is part of the treatment in  
25 the emergency department.

1           As -- intertwined in that medical treatment, is  
2           the collection of medical evidence that is related  
3           to her -- her complaint with regard to a sexual  
4           assault. That medical evidence is used by law  
5           enforcement, but it also belongs to -- under Federal  
6           and State law, it belongs to the plaintiff. It is  
7           the plaintiff's property or chattel until it is  
8           handed over and then used by law enforcement because  
9           it comes from the plaintiff's body. So it's the  
10          plaintiff's blood, the plaintiff's urine, and other  
11          things taken from the plaintiff's body.

12           And as part of this sexual assault forensic  
13          examination that was performed by a medical doctor  
14          and a nurse, blood was taken. I don't think there's  
15          a dispute at this point based on the allegations in  
16          the complaint that blood was drawn, urine was taken,  
17          and other samples were taken from various parts of  
18          her body.

19           The complaint alleges then that the rape kit --  
20          this evidence that then goes into the rape kit was  
21          not handled properly. The hospital was negligent in  
22          the handling of this evidence that was taken from  
23          her body. Specifically, the complaint alleges that  
24          the blood that was drawn was not preserved by the  
25          hospital, and the hospital was negligent in failing

1 to preserve this blood. And this is important not  
2 just for law enforcement purposes, it's important  
3 for the victim because she needs to know whether or  
4 not she was drugged. That blood is what determines  
5 whether or not she was drugged. There is a certain  
6 period of time which that blood had to be tested.  
7 And by failing to test that blood, the hospital was  
8 therefore negligent.

9 There's urine that is contained in this kit.  
10 It has to -- all of this has to be contained and  
11 maintained according to certain protocols that are  
12 provided by the State as far as with regard to  
13 refrigeration, how -- exposure to light, these kind  
14 of things. And so this evidence is collected from  
15 her body and has to be processed.

16 And the hospital was negligent in how they did  
17 that. They didn't preserve the blood, and the kit  
18 has to be maintained pursuant to State regulations  
19 in the hospital by the nurse in controlled  
20 condition, refrigerated, until it can be handed off  
21 to a proper person in law enforcement.

22 Under Federal law and State law and under the  
23 Attorney General's regulations, these kits then  
24 still belong to the victim for the Violence Against  
25 Women Act, 42 USC 3796, the South Carolina Violence

1       Against Woman Federal Compliance Act, the South  
2       Carolina Victim's Bill of Right and the South  
3       Carolina -- South Carolina Attorney General Sexual  
4       Assault protocols, Second Edition, as of April 2015.  
5       The victim controls what -- the contents of what  
6       goes into that kit, and they have up until a year's  
7       time to claim that kit and decide what happens to  
8       it.

9               Up until that point, it belongs to the victim.  
10       It's in the custody and control of the hospital and  
11       then the control of law enforcement, but it's the  
12       victim's kit. And it only becomes a law enforcement  
13       investigation should the victim choose to exercise  
14       her rights under the Federal and State law.

15              And so the complaint alleges that the victim  
16       went in to the hospital and had this medical  
17       treatment tied in with this collection of evidence  
18       at her request. And I think that's important  
19       because the defendant talks a lot about law  
20       enforcement protocol and acting on behalf of law  
21       enforcement.

22              It's not a situation where we have law  
23       enforcement doing an investigation, and then  
24       incident to that investigation, they collect this  
25       evidence. It's the other way around. It's the --

1           it's the patient who's initiating this.

2           We talked -- he talked about a duty to Jane  
3           Doe. Jane Doe is the patient. There is a duty  
4           here. The duty arises in three circumstances.

5           First, a contractual relationship. Jane Doe  
6           goes into the hospital. She signs all those papers  
7           where she contents -- consents to treatment. And  
8           as -- as a result of this treatment, including the  
9           provision of the collection of the medical evidence,  
10          Oconee Hospital is compensated. A contract arises  
11          creating a duty to Jane Doe.

12          There is a property interest. Under the law,  
13          the blood, the urine, and the other specimens are  
14          her property. They actually belong to Jane Doe  
15          until they are utilized by law enforcement. That's  
16          her blood.

17          And then finally, a special circumstance. And  
18          that here -- there are two special circumstances.  
19          One is this law in the South Carolina Attorney  
20          General's Regulations, but the second is an  
21          assumption of duty.

22          The defendant is in -- in his memorandum,  
23          Mr. Shaw's memorandum cites to *Madison v. Babcock*.  
24          That case was later reconsidered by the South  
25          Carolina Supreme Court. And the subsequent Madison

1 opinion, the Supreme Court says -- cites to case law  
2 that says, "Where a party doesn't have a duty." In  
3 this case, the hospital didn't have to do this kit.  
4 They could've sent her somewhere else, but they  
5 assumed the duty.

6 So if was me, I see somebody's falling down and  
7 I go to help them and I break their arm, if I assume  
8 that duty and injure that person, then I've created  
9 that relationship and I do have a duty to that  
10 person. So we have three -- three bases for duty --  
11 contractual relationship, property interest,  
12 special circumstance.

13 Mr. Shaw said, you know, well, they weren't  
14 providing health care services to the plaintiff and  
15 gathering evidence. That's just a preposterous  
16 argument. Imagine instead of being sexually  
17 assaulted, Jane Doe is poisoned by her boyfriend.  
18 She goes in the hospital and says, "I've been  
19 poisoned."

20 Well, in the course of treating her for being  
21 poisoned, the hospital is going to collect her blood  
22 in order to treat her, but is also going to collect  
23 that blood to use it for finding out what happened  
24 but also determine what -- what drug she was given.

25 And so it's all tied together and her damage

1 here is that she doesn't know what happened to her,  
2 and she needs that blood and she needs these samples  
3 to know what happened. Forget the criminal  
4 prosecution. She doesn't know what happened without  
5 this kit.

6 Mr. Shaw said that they were performing this  
7 investigation, and the memo says was performing a  
8 crime scene investigation service on behalf of law  
9 enforcement. It's not clear what law enforcement.  
10 They were actually doing this at the request of the  
11 plaintiff who came in. She asked for this evidence  
12 to be requested, and she asked for them to call  
13 DeKalb County.

14 Nowhere in anything do we argue -- do we allege  
15 in the complaint that Oconee Hospital has been  
16 deputized by the DeKalb County Sheriff's Office.  
17 And, in fact, DeKalb County refused to even come to  
18 Oconee. So there's -- there can be no argument that  
19 they are doing this on behalf of law enforcement.  
20 They are doing it because the victim -- the patient  
21 has requested it.

22 With regard to the public duty rule, there is  
23 such a thing as the public duty rule. If a fire  
24 department is putting out a fire and hurts somebody  
25 in the process or fails to maintain their fire

1 hydrant, I can't sue the fire department. I can't  
2 sue law enforcement if I get hurt in the process of  
3 them trying to catch a perpetrator. However, that  
4 only applies where a public official or their agent  
5 is doing something pursuant to a statute. There is  
6 no statute that mandates that a hospital collect  
7 this evidence for law enforcement, so the public  
8 duty rule is not triggered.

9 And, in fact, the South Carolina Supreme Court  
10 has made that abundantly clear in a number of  
11 opinions. And I'll -- I've got one I can hand up,  
12 Your Honor. In fact, I'll hand up two cases. I'll  
13 hand up a copy of the subsequent Madison case where  
14 the opinion cited by Mr. Shaw was reheard by the  
15 Supreme Court. And the second opinion is *Richland*  
16 *County v. Carolina Chloride*. That's a Court of  
17 Appeals decision, Your Honor, but it's very clear.  
18 It's from 2008. If I may approach?

19 THE COURT: Yes, ma'am.

20 MS. METCALFE: And so, Your Honor, in Richland  
21 County, the Richland County case from 2008, the  
22 Court of Appeals says, "Accordingly, only when the  
23 plaintiff relies upon a statute as creating the duty  
24 does the public duty rule come into play. Where the  
25 duty relies upon -- is based upon the common law,

1           then the existence of that duty is analyzed as it  
2           would be were the defendant a private entity."

3           And there in that case, the plaintiff started a  
4           negligence claim based upon the common law duty to  
5           exercise reasonable care; and therefore, the public  
6           duty rule is not -- is not applicable and that's the  
7           case here.

8           Now, as to the defendant's claim that this is  
9           essentially a spoliation of evidence claim, Your  
10          Honor, we would say it is not. It is a general  
11          negligence claim relating to the handling of this  
12          patient's medical evidence. With -- this is with  
13          regard to the handling of the kit, training of the  
14          staff, supervision of the staff where we had the  
15          cause of action and the negligent training and  
16          supervision. The hospital was negligent in training  
17          the physicians and nurses as to how they were  
18          handled -- how to handle blood, how things were  
19          supposed to be -- how the patients were supposed to  
20          be informed with regard to their rights, and how the  
21          patients were supposed to be informed with regard to  
22          this evidence in maintaining this evidence.

23          In addition, Your Honor, if this afternoon were  
24          to clear up any confusion, we move to amend the  
25          complaint so as to assault. And I know Mr. Shaw may

1 not have seen this because this was just right  
2 before I got here. Your Honor, I we went ahead and  
3 preemptively filed a motion to amend to allege the  
4 cause of action for breach of contract because there  
5 is this contractual relationship, as well as an  
6 action for bailment because there is a constructive  
7 and contractual bailment situation here where her  
8 blood is being given to the hospital for safekeeping  
9 and the hospital is compensated for that.

10 In this case, the patient wants to know if she  
11 was drugged, and there's no way for her to know  
12 without this blood being tested. Mr. Shaw said --  
13 in the memorandum they say, it was very possible the  
14 blood sample may have come back clean, but this is  
15 the crux of her damage, Your Honor. She'll never  
16 know if the blood sample could've come back clean  
17 because she never -- her blood was never tested.  
18 The blood was drawn and -- and disposed of by the  
19 hospital, so she'll never know.

20 And when -- and in our complaint what we say is  
21 for damage, aside from whether or not her  
22 perpetrator could be criminally prosecuted, she's  
23 been damaged because she doesn't know if she was  
24 drugged. She'll never know if she was actually  
25 raped because the -- the semen, the evidence, it's

1 all been contaminated and destroyed and lost.

2 And that's where the harm comes from, Your  
3 Honor. It's not a spoliation of evidence with  
4 regards to a civil claim or to a criminal action,  
5 that's there, but the real harm is this patient  
6 doesn't know.

7 And, you know, we've alleged failure to train.  
8 We've alleged failure to maintain the blood but keep  
9 the kit. Failure to tell her that she should not  
10 take the kit. We talk about in the complaint the  
11 physician making the decision not to include the  
12 blood, that he should've been trained pursuant to  
13 the terms of general protocol. This isn't  
14 spoliation of evidence. This is general negligence.

15 On page 6 of the complaint, we say she was  
16 being -- she was being treated as a patient. We say  
17 under our negligence cause of action, she was there  
18 and they owed a duty to her to ensure that she  
19 received proper medical attention, including  
20 physical evidence.

21 THE COURT: All right. Well, let me stop you  
22 there. Now, are you alleging she was a patient and  
23 you're alleging medical negligence?

24 MS. METCALFE: No, sir. We are not alleging  
25 medical malpractice, medical negligence at this

1 time.

2 We are alleging basically what amounts to an  
3 administrative error. They lost her property. She  
4 gave them her blood for safekeeping. And this is  
5 why we are moved to amend our complaint to add a  
6 bailment cause of action.

7 She gave them this evidence from her body to be  
8 tested -- blood, urine, other samples. And the  
9 hospital just discarded it. They did not include it  
10 in the kit that has to be tested. They didn't test  
11 it, and they got rid of it. It's a general -- it's  
12 just a straight negligence. They lost it.

13 THE COURT: Okay.

14 MS. METCALFE: There's no -- at this -- at this  
15 point we are not, based on the evidence we have thus  
16 far, not alleging an error with regard to diagnosis  
17 or treatment, just basically with regard to her  
18 property, property from her body.

19 Finally, Your Honor, he alleges that there are  
20 speculative damages of this -- with regard to  
21 negligence claims and says the results would not  
22 have -- would not have changed or results might've  
23 changed, but we can't predict.

24 Again, this is going in a criminal trial. This  
25 is a patient who wants to know whether or not she

1 was drugged. She wants to know if she was raped and  
2 she doesn't -- doesn't have that evidence now. And  
3 so she's denied that by that hospital's failure to  
4 maintain this evidence that was entrusted to her.

5 And then last, Your Honor, with regard to --  
6 there's an argument in the memo with regard to  
7 Greenville Hospital being immune under the Tort  
8 Claims Act as a State entity. That wasn't addressed  
9 in Mr. Shaw's argument.

10 Your Honor, we would -- there's a significant  
11 factual question with regard to that. Greenville  
12 Hospital System's own website says they are now a  
13 private entity. I don't know if Mr. Shaw wants to  
14 address that. I don't know the answer, Your Honor.  
15 I've been trying to figure out if they are a private  
16 entity or a public entity.

17 Oconee -- there's a question with regard to  
18 whether or not they are immune due to the recent  
19 privatization or the last couple of years. And so,  
20 Your Honor, I believe based on their own  
21 representations that they are not a State-owned  
22 entity anymore, such that a Tort Claims Act would  
23 apply.

24 In addition, Oconee Hospital is operated  
25 jointly by GHS at the time of this incident.

1 Mr. Shaw can correct me, but I believe this is a  
2 factual issue that the parties can get into  
3 discovery, Your Honor, to determine who controlled  
4 the hospital at this time and what their status was.

5 THE COURT: All right. Thank you, ma'am.

6 MR. SHAW: Your Honor, if I may. Fair to say,  
7 it's the first time I'm hearing any of these  
8 arguments. Obviously, the plaintiff's counsel  
9 didn't submit an memo or anything to give me some  
10 heads up as to what these arguments were going to  
11 be. So forgive me if I'm -- if I -- if I try to jot  
12 down some notes here to have some idea of what --  
13 what was said. I'll try to address some of these  
14 things.

15 First off, the motion to amend the complaint to  
16 add contracts. It sounds to me like they want to  
17 add some sort of claim for like some implied  
18 contract. I don't have the case law in front of me,  
19 but there's a case directly on point.

20 Your Honor, that would be a meritless claim  
21 because there is no such cause of action in South  
22 Carolina with regards to a hospital. You can't sue  
23 a hospital under an implied contract kind of theory.  
24 That -- that's what they're now claiming. If you  
25 want to make that type of claim, it's noted on

1 practices and very directed on point. Again, I  
2 can't cite it off the top of my head, but I have  
3 cited that numerous times when -- when -- when  
4 plaintiffs have attempted to allege such a cause of  
5 action.

6 The -- the other thing though that I want to --  
7 that I failed to mention when I was talking earlier  
8 is that, again, as she -- as Ms. Metcalfe said on  
9 previous occasions, this is -- this is a general  
10 negligence claim. She said that multiple times.  
11 Its' a general negligence claim, but that's exactly  
12 what was argued in the Cole case. That's what --  
13 that's the reason why I read that last paragraph.

14 That's exactly what the -- the people in that  
15 case were arguing. We've alleged general  
16 negligence. This would be -- we're not alleging a  
17 spoliation of evidence. I understand that. That's  
18 exactly the reason why the Supreme Court shut that  
19 down and what they were stating in Cole.

20 But the other thing, Your Honor, that I failed  
21 to mention is that, she also said that the crux of  
22 her damages is that she'll never know. Well,  
23 that's -- what kind of damage is that? That's at  
24 best an emotional damage of some sort. I mean,  
25 that's at best. And, again, one of my grounds for

1 dismissal is that, at best you got an emotional  
2 distress claim here on negligence. Well, there is  
3 no such cause of action for pure emotional distress  
4 under South Carolina law, unless you've alleged some  
5 sort of physical injury, or unless you are a  
6 bystander under certain circumstances. She hasn't  
7 alleged either of those in this case.

8 So there's no physical injury, and there's  
9 no -- there's no bystander. So the pure emotional  
10 distress claim doesn't survive under South Carolina  
11 law. And that's the only damage that I'm hearing  
12 from them in regards to the negligence causes of  
13 action so that would be that.

14 And then, you know, she also mentioned that  
15 this is -- what she's really talking about is that  
16 we lost her property. All right. Well, again,  
17 there's statutes on this. I mean, the South  
18 Carolina 16-3-1350 is the statute that's on point in  
19 regards to this. It does provide guidance to  
20 hospitals. It does tell the hospital what they have  
21 to do in this -- under these circumstances.

22 Contrary to what Ms. Metcalfe says is that we  
23 have a patient that comes into our facility and  
24 requests a rape kit. If we have someone there who  
25 is capable of doing it, we can't turn them away. We

1 have to do it. So that's not a -- we're required  
2 under the law to do the rape kit if that's what --  
3 if they request it.

4 And it's laid out. SLED lays out the entire  
5 list of regulations, you know, as to what we need to  
6 do, how we need to do it, and so forth. It's  
7 mandated by South Carolina law.

8 This isn't just some patient coming in and  
9 saying, you know, I'd like -- I think I've been  
10 injured. I'd like for you to treat the injury.  
11 Certainly, we do that as well. We bill them for the  
12 injuries that they are treated for. We bill the --  
13 the -- the victim fund for the rape kits.

14 That gets done differently. That's handled  
15 differently. It's a different obligation that is  
16 owed. It is, again, owed to law enforcement. We're  
17 doing it on behalf of law enforcement. We're doing  
18 it on behalf of the State to be more specific. It's  
19 a -- it's an obligation that hospitals owe to the  
20 State so that States can -- because States have  
21 found these types of crimes and these types of  
22 victims need some sort of protection of the State,  
23 but as a whole. It's a public duty that is owed to  
24 these types of victims as a whole. So it's not  
25 individually.

1           But then again, if you look at the Austin case,  
2           what they were talking about in that case is, you  
3           know, again, Ms. Metcalfe said was that, "We've lost  
4           our property." Well, that's exactly what happened  
5           in Austin. The sheriff's department in Austin lost  
6           evidence that the -- the victim claimed would help  
7           in a wrongful death case. She says that she could  
8           not pursue her wrongful death case because the  
9           sheriff's department lost key evidence.

10           Well, that's exactly what we're hearing here is  
11           that she can't pursue the -- the rape allegation.  
12           She will never know whether or not she -- I find it  
13           a little bit troublesome that she says she'll never  
14           know whether she was raped.

15           I mean, seems to me she knows whether she was  
16           raped or not, but to say that she would never know  
17           if she was raped, I can understand that she says, "I  
18           never know if I was drugged," but she alleges in her  
19           complaint she was drugged.

20           She doesn't say, "I may have been drugged."  
21           She says she was drugged. So she either knows or  
22           she doesn't know. So I find the argument -- that  
23           there to be somewhat unveiling in that respect.

24           THE COURT: This is what I want to do, I want  
25           to read what's been submitted. And if you have any

1 other cases or regulations, get those to me by the  
2 end of the week and I'll take it under advisement.  
3 I want to read everything. This is an  
4 interesting -- interesting case.

5 And I'll -- again, if you -- you've handed up a  
6 couple of cases, the Madison case and the Richland  
7 County and then the Cole Vision case. If there's  
8 any -- anything else that you'd like for me to  
9 consider, just get it to me.

10 MS. METCALFE: Yes, sir.

11 MR. SHAW: Can we e-mail it to your law clerk,  
12 Your Honor?

13 THE COURT: Yes, sir. That's the easiest way.  
14 Just send it to my law clerk.

15 Thank you, Counsel, for your well prepared  
16 arguments.

17 (The proceedings concluded at 5:12 p.m.)

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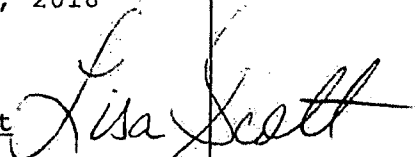
C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

I, the undersigned, Lisa Scott, Circuit Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Oconee County, South Carolina, on the 4th day of June, 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 10, 2018

/s/Lisa Scott 

Lisa Scott  
Circuit Court Reporter

STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-37-00700

Jane Doe,  
  
Plaintiff,

**PLAINTIFF'S MOTION TO  
AMEND COMPLAINT**

vs.

Greenville Health System,  
  
Defendant.

**TO: KENNETH N. SHAW, ESQUIRE, COUNSEL FOR DEFENDANT:**

Plaintiff, Jane Doe, hereby moves the Court, pursuant to South Carolina Civil Procedure Rule 15(a), S.C.R.C.P., to amend her Complaint to name any other appropriate entities as additional defendants, to add two additional causes of action for breach of contract and bailment, and to further clarify Plaintiff's pending claim for negligence.

This motion is made on the following grounds:

1. The proposed amendments include the naming of additional defendants who are necessary parties to this action, the addition of two additional causes of action, and the clarification of Plaintiff's current claim for negligence. All of these proposed amendments relate to and arise out of the exact same facts and conduct alleged in Plaintiff's original Complaint.

2. The proposed amendments would not prejudice Defendant as no substantive action has been taken in this case since it was originally filed on December 5, 2017. In fact, no answer has been filed yet by Defendant as Defendant's Motion to Dismiss has been pending since January 10, 2018. No substantial discovery has been

conducted beyond initial requests served on Defendant, no depositions have been taken and trial of this matter is not currently scheduled.

3. The interests of justice would be served in allowing the proposed amendments in order to make sure that all proper parties and all claims related to the facts alleged in Plaintiff's Complaint are before the Court in this matter.

For all the above reasons, Plaintiff respectfully requests that the Court grant this motion and allow Plaintiff to file an Amended Complaint. Counsel for Plaintiff believes that consultation with Defendant's counsel would be futile in light of Defendant's pending Motion to Dismiss Plaintiff's Complaint and Defendant's position that Plaintiff's entire action against Defendant should be dismissed.

METCALFE & ATKINSON, LLC

s/ Courtney C. Atkinson  
Courtney C. Atkinson, S.C. Bar #71992  
Hannah Rogers Metcalfe, S.C. Bar #73046  
1395 South Church Street  
Greenville, South Carolina 29605  
(864) 214-2319 Telephone  
(864) 214-3067 Facsimile  
*Attorneys for Plaintiff Jane Doe*

June 4, 2018  
Greenville, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF Oconee  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP3700700

Jane Doe  
PLAINTIFF(S)

Oconee Memorial Hospital et al  
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

Defendant's Motion to Dismiss is granted. Formal Order to Follow.

ORDER INFORMATION

This order  ends  does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/03/2018 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

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Oconee Common Pleas

**Case Caption:** Jane Doe VS Oconee Memorial Hospital , defendant, et al  
**Case Number:** 2017CP3700700  
**Type:** Order/Electronic Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2018-07-03 13:13:54 page 3 of 3

ELECTRONICALLY FILED - 2018 Jul 03 1:44 PM - OCCONEE - COMMON PLEAS - CASE#2017CP3700700

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Jane Doe,

Plaintiff,

v.

Oconee Memorial Hospital, Greenville  
Health System,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2017-CP-37-00700

***Order Granting Defendant Greenville  
Health System's Motion to Dismiss***

This matter came before the Court upon Defendant Greenville Health System's ("GHS") motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.<sup>1</sup> The motion was heard on June 4, 2018. Having listened to oral arguments and reviewed the submissions of the parties, for the reasons more fully set forth below, I hereby grant GHS's motion to dismiss as to the causes of action set forth in the Plaintiff's Complaint. This Order is, however, without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action.

**FACTS**<sup>2</sup>

Plaintiff alleges that she was drugged and sexually assaulted in the early morning hours of December 5, 2015 while in Atlanta, Georgia. She alleges that following the assault, she drove

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<sup>1</sup> Plaintiff identifies Oconee Memorial Hospital as a named defendant in her Complaint; however, Oconee Memorial Hospital is not an independent entity capable of being sued. Rather, it is a facility owned and operated by GHS.

<sup>2</sup> In ruling on Defendant's 12(b)(6) motion, the Court was constrained by the facts alleged in Plaintiff's Complaint. The Court notes that approximately one hour prior to the hearing on June 4, 2018, and without any prior notice to Defendant, Plaintiff electronically filed a motion to amend her complaint. While Plaintiff's counsel briefly mentioned the motion to amend during the hearing, the merits of Plaintiff's motion were not properly before the Court and were not discussed. Further, the Court could not consider the merits of Plaintiff's motion to amend even if it were inclined to do so, because no proposed amended complaint was ever submitted to the Court.

back home to South Carolina and went to Oconee Memorial Hospital (“OMH”) where she requested a sexual assault forensic examination and stated her desire to report the assault to law enforcement. GHS employee, Mary Beth Hendricks, attended to Plaintiff and performed the sexual assault forensic examination, which included both swabs and a blood draw.

Upon completion of the examination, Hendricks contacted the Dekalb County Sheriff’s Office in Georgia and reported the assault. Hendricks requested Dekalb County Sheriff’s Office come collect the examination kit; however, she was advised by the Sheriff’s Office that they were unwilling to travel to South Carolina to pick up the kit, and if Plaintiff wished to pursue her claim, she would personally need to take the kit to them in Georgia. Hendricks protested, but was advised by the Sheriff’s Office that was the only option. Hendricks reluctantly relayed the Sheriff’s Office’s instructions to Plaintiff and signed over custody of the kit to Plaintiff.

Plaintiff took the kit to the Dekalb County Sheriff’s Office the following day. She gave the kit and her statement to the investigating officer, who advised her that he would be back in touch at a later date. A few weeks later, the investigating officer allegedly reached out to Plaintiff and informed her that there was no blood sample included in the kit from which his office could determine whether Plaintiff had been drugged. She alleges that the officer decided to close the case and not pursue any further action against Plaintiff’s alleged attacker due to the lack of the blood sample. In addition, she contends that the officer may have also considered the alleged break in the chain of custody when making the decision to close the case.

#### **LEGAL ANALYSIS**

Under Rule 12(b)(6), SCRCP, the Court, upon reviewing all the well pleaded facts in a light most favorable to the claimant, must dismiss the action if the Complaint fails to state a claim upon which relief can be granted. Charleston County Sch. Dist. v. Laidlaw Transit, Inc.,

348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). The Court is to consider only the alleged facts and is not to consider the inferences or conclusions of law drawn by the Plaintiff from the facts. Charleston County Sch. Dist. v. S.C. State Ports Auth., 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct. App. 1984). Each element of a cause of action must be alleged, and a complaint that omits an element fails to state a claim and must be dismissed. Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 363 S.E.2d 691 (1988).

**I. Plaintiff Fails to Plead Facts Sufficient to Support the Duty and Damages Elements of Her Negligence Causes of Action**

Plaintiff's first five causes of action allege negligence on the part of GHS and its employees. In order to survive a motion to dismiss, Plaintiff must allege facts sufficient to establish that GHS owed Plaintiff a duty of care, GHS breached that duty, and Plaintiff sustained damages proximately resulting from the breach. South Carolina Insurance Company v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct.App.1986). Plaintiff's claims fail because no legal duty was owed to her in regards to the sexual assault examination kit, and she failed to allege any cognizable damages.

**A. No Duty was Owed to Plaintiff in Regards to the Sexual Assault Examination Kit**

"A legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large." Byerly v. Connor, 301 S.C. 441, 443 415 S.E.2d 796, 798 (1992). A legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2007). The court must determine, as a matter of law, whether the law recognizes a particular duty. Id. If there is no duty, then the defendant is entitled to a dismissal as a matter of law. Id. The Court finds that GHS owed no duty to Plaintiff in regards to the sexual assault examination kit. Rather, the Court finds that GHS was performing a service on

behalf of law enforcement in collecting evidence for a criminal investigation.

Plaintiff alleges that GHS owed her a duty to collect, preserve, and properly transfer all physical evidence of her alleged sexual assault to law enforcement. She alleges that GHS breached that duty by failing to ensure that the blood samples were in the examination kit and by breaking the chain of custody by giving the kit to Plaintiff rather than giving it directly to law enforcement. However, Plaintiff identified no statute, regulation, rule, ordinance or standard which clearly established a duty owed to her in regards to the handling of the sexual assault examination kit. Like the law enforcement agency it was acting on behalf of, GHS was acting pursuant to statutes, ordinances, and regulations which protect the public at large, but provide no duty of care to individuals. See Wells v. City of Lynchburg, 331 S.C. 296, 308, 501 S.E.2d 746, 752 (Ct. App. 1998); see also Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E.2d 122 (2008) (Court stating that sheriff's office owed no duty to plaintiff to preserve evidence that was collected for a criminal investigation).

Plaintiff argues that GHS's duty flowed from its obligation to provide medical treatment for her alleged sexual assault injuries. While GHS undoubtedly owed a duty of care in rendering medical services, Plaintiff has not alleged injuries stemming from those services.<sup>3</sup> Her only alleged injuries stem from her allegations that GHS negligently handled the sexual assault examination kit. While gathering evidence for the sexual assault examination kit, GHS was not rendering medical services or treatment to Plaintiff. Providing medical care for alleged or suspected injuries is a wholly separate function from gathering evidence for a sexual assault examination kit. This is readily apparent by the fact that a person may come to the ED to seek

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<sup>3</sup> To the extent the allegations in Plaintiff's Complaint could be read to infer injuries stemming from the medical services rendered to her, her claims would sound in medical malpractice. In that case, dismissal would still be appropriate on the basis that Plaintiff failed to comply with the requirements of S.C. Code § 15-79-125.

treatment for an alleged sexual assault, but decline to report the assault to law enforcement and/or complete an examination kit. *See* S.C. § 16-3-1350.

**B. Spoliation of Evidence is Not a Cognizable Cause of Action**

The Court interprets Plaintiff's claims as an attempt to allege a negligent spoliation of evidence claim; however, South Carolina does not recognize an independent tort for spoliation of evidence. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011); see also Austin, supra (refusing to adopt the tort of third party spoliation of evidence where plaintiff sued sheriff's office for destroying evidence that plaintiff alleged prevented her from being able to pursue wrongful death claim against another party).

Plaintiff contends she is asserting "general negligence claims" rather than a claim for spoliation of evidence; however, that same argument was rejected by the Court in *Hobbs*. As noted by the Court,

"Whether denominated as a claim for spoliation of evidence or as a general negligence claim based on spoliation of evidence, the substance of this claim is the same: both are based on the allegation that Cole Vision breached its duty to maintain a key document, the absence of which harmed Hobbs in the underlying lawsuit."

394 S.C. 144, 154, 714 S.E. 2d 537, 542 (2011). The instant case is indistinguishable. Plaintiff claims that she has been harmed by GHS's alleged failure to maintain the blood sample that she claims would have helped her prove she was sexually assaulted. Calling it general negligence doesn't change the fact that the substance of the relief being sought is still the same – she wants GHS held responsible for the allegedly missing evidence. *Id.*

As noted in both Hobbs and Austin, one of the primary policy reasons for refusing to acknowledge a cause of action for spoliation of evidence is the very speculative nature of the damages. Here, Plaintiff alleges the lack of a blood sample prevented her assaulter from being

prosecuted; however, it is extremely speculative to suggest he would have been prosecuted had the blood sample been in the kit.

### **C. Plaintiff Failed to Assert a Cognizable Injury**

Finally, Plaintiff's negligence claims fail because she has not alleged a cognizable injury. In her Complaint, Plaintiff merely alleged that she has "suffered damages, in addition to the loss of her ability to proceed with criminal action against her attacker." (Compl. ¶¶ 27, 33, 43, 51, 56.) At the hearing, Plaintiff's counsel explained that the crux of Plaintiff's injury was the pain of not knowing for certain whether she was drugged and whether she was sexually assaulted. Plaintiff does not allege she sustained a physical injury as a result of GHS's alleged negligence. The only reasonable inference the Court can draw from Plaintiff's allegations is that she has endured emotional distress; however, it is well established that South Carolina does not recognize a claim for negligent infliction of emotional distress under these circumstances. See Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985); Doe v. Greenville County School Dist., 375 S.C. 63, 67-68, 651 S.E.2d 305 (2007) (limiting negligent infliction of emotional distress claims to bystander situations only).

### **II. Plaintiff's Claims do not Amount to an Intentional Infliction of Emotional Distress**

For her sixth and final cause of action, Plaintiff asserted an intentional infliction of emotional distress claim. This cause of action further emphasizes that Plaintiff's only alleged injury is one of emotional distress. However, regardless of the label, Plaintiff's claim is unavailing, because the Court still views it as an attempt to assert a spoliation of evidence claim. Hobbs, 394 S.C. 144, 149, 714 S.E.2d 537, 540.

Nevertheless, Plaintiff failed to plead facts sufficient to establish the heightened standard of proof required for an intentional infliction of emotional distress claim. Argoe v. Three Rivers

Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (noting higher standard of proof and enumerating elements of intentional infliction of emotional distress claim to include intentional or reckless conduct that exceeds all possible bounds of decency and causes such severe distress that no reasonable man could bear it). The South Carolina Supreme Court has held the circuit courts undertake a “significant gatekeeping role” in analyzing whether the alleged conduct was sufficiently outrageous and the emotional distress sufficiently severe to survive a motion to dismiss. AJG Holdings LLC v. Dunn, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011) (citing Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 72 (2007)). In order to establish a claim for intentional infliction of emotional distress, plaintiff must allege that GHS employees intentionally or recklessly conducted themselves in a manner that was “extreme and outrageous,” exceeding “all bounds of decency,” “atrocious,” and “utterly intolerable.” See Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981) (recognizing tort of intentional infliction of emotional distress and adopting elements set forth in Restatement (Second) of Torts § 46).

First, nowhere in the Complaint did Plaintiff allege that GHS employees acted with the intent to cause her severe emotional distress, nor did she allege that the employees were certain or substantially certain that their actions would cause her such distress. Id. Second, the Court finds no reasonable person could determine that following the instructions of a law enforcement officer regarding the handling of evidence of a crime could be considered “extreme and outrageous” conduct. Id. Finally, Plaintiff did not allege such “severe” emotional distress that “no reasonable man could be expected to endure it,” as many, if not most, victims of sexual assault have to deal with the emotions associated with their attacker not being held accountable for his/her actions.

In addition, GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq. (1976, as amended), and it and its agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. See Murphy v. Richland Mem. Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995) (citing Benton v Roger C. Peace, 313 S.C. 520, 443 S.E.2d 537 (1994)). Pursuant to S.C. Code § 15-78-60(17), GHS has immunity for employee conduct outside the scope of his official duties or which constitutes actual malice or intent to harm. Therefore, even if the GHS employees' conduct could be said to rise to the level of "extreme and outrageous," exceeding "all bounds of decency," "atrocious," and "utterly intolerable," GHS would still be immune from liability. See Cornelius v. City of Columbia, 663 F.Supp.2d 471 (D.S.C. 2009).

WHEREFORE, for the reasons stated herein,

✓ IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the causes of action set forth in Plaintiff's Complaint are hereby dismissed with prejudice.

AND IT IS SO ORDERED.

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The Honorable Judge R. Scott Sprouse  
Tenth Judicial Circuit

July \_\_, 2018



Oconee Common Pleas

**Case Caption:** Jane Doe VS Oconee Memorial Hospital , defendant, et al

**Case Number:** 2017CP3700700

**Type:** Order/Dismissal

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2018-07-09 15:50:54 page 9 of 9

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Jane Doe,

Plaintiff,

vs.

Greenville Health System,

Defendant.

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-37-00700

**PLAINTIFF'S MOTION TO  
RECONSIDER ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS**

**TO: KENNETH N. SHAW, ESQUIRE, COUNSEL FOR DEFENDANT:**

PLEASE TAKE NOTICE that Plaintiff Jane Doe hereby moves the Court, pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure, to reconsider the Court's July 9, 2018 Order granting Defendant's Motion to Dismiss, essentially dismissing all causes of action alleged in Plaintiff's Complaint and effectively dismissing the entire action without prejudice to Plaintiff to re-file a new action alleging different causes of action against Defendant. This Motion is based on grounds, as previously argued by Plaintiff and set forth more fully below, that (1) Plaintiff's Complaint, when read in the light most favorable to Plaintiff, properly pleads Plaintiff's claims for negligence and intentional infliction of emotional distress against Defendant, and (2) dismissal of this action is improper given Plaintiff's outstanding Motion to Amend, which was filed on June 4, 2018 and remains pending before the Court in this action.

**ARGUMENT FOR RECONSIDERATION**

Plaintiff believes that the Court's grant of Defendant's Motion to Dismiss was erroneous for all those reasons set forth more fully below and, accordingly, requests the Court to reconsider its July 9, 2018 Order thereon.

**1. Plaintiff's Complaint properly pleads causes of action against Defendant for negligence and intentional infliction of emotional distress.**

In considering a motion to dismiss under Rule 12(b)(6), the question is whether, when a complaint is read in the light most favorable to the plaintiff, and with every doubt resolved on plaintiff's behalf, the complaint states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416 (1987)(emphasis added). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper and should be denied. Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n., 407 S.C. 67, 74 (2014). Applying that standard, and reading Plaintiff's Complaint in the light most favorable to Plaintiff, Plaintiff sufficiently pled her claims against Defendant for negligence and intentional infliction of emotional distress, and it was error for the Court to find otherwise.

**A. Plaintiff properly pled a duty and injury resulting from breach thereof by Defendant.**

Plaintiff properly pled that Defendant owed a duty to her as a patient as a result of Plaintiff having sought treatment and other services at Oconee Memorial Hospital on December 5, 2018 and injuries proximately resulting from Defendant's breach thereof. The Court's Order finding otherwise, specifically finding that the services Defendant provided to Plaintiff as a private patient at Defendant's hospital on December 5, 2015 were undertaken as a public duty without creating any duty on the part of Defendant and that Plaintiff failed to plead any cognizable injury, is clear error.

As previously argued in this matter, a legal duty sufficient to support a claim for negligence may be created by statute, a contractual relationship, status, property interest, or some other special circumstances. See Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2007).

In this case, Defendant arguably owed a duty to Plaintiff under various theories, including those based on a contractual relationship, property interest and other special circumstances. First, and regarding a duty created by a contractual relationship, the parties clearly entered into such a contractual relationship when a hospital owned by Defendant agreed to provide services to Plaintiff<sup>1</sup>, including a sexual assault forensic examination, in exchange for compensation by the Plaintiff and/or her agents. Second, and regarding a duty created by a property interest, Plaintiff's bodily fluids and other specimens removed from her body and entrusted to the care of Defendant are her private personal property and Defendant was compensated for the safekeeping of her property until such time as Plaintiff determined what she wanted to do with it. In regard to duty created by other special circumstances, it "has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." Madison v. Babcock Ctr., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (S.C. 2006); Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); Roundtree Villas Assn. v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984). In addition, "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323 (1965). Defendant was not obligated to provide a sexual assault forensic examination for Plaintiff and voluntarily chose to offer that service as part of the services provided in the emergency department at Oconee Memorial Hospital

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<sup>1</sup> Importantly on the duty issue is the fact that the services were specifically and expressly requested by the Plaintiff and not by law enforcement or any other public entity.

in exchange for compensation therefore. As a result thereof, Defendant undertook a legal duty to take reasonable care in performing this service as was properly alleged by the Plaintiff.

In regard to Plaintiff's alleged injuries resulting from Defendant's actions on December 5, 2018, Plaintiff's Complaint specifically alleges that she has suffered "actual and consequential damages" as a result of Defendant's negligence. Complaint, ¶ 33. This meets Plaintiff's burden of pleading a "short and plain" statement regarding her damages and is sufficient to overcome a 12(b)(6) motion to dismiss on grounds that Plaintiff's had not alleged any sufficient injury on her claims for negligence. See SCRCP 8(a)(2). While the Court offers findings on what those specific damages are and whether or not they are appropriate damages to be sought, the nature and type of Plaintiff's damages are a factual issue that Plaintiff intends to prove at trial and which Defendant may discover through the normal discovery process. Simply put, Plaintiff met her burden of pleading injury due to Defendant's negligence under 12(b)(6) and whether or not her damages are recoverable is an issue of fact not properly decided by the Court on Defendant's Motion to Dismiss.

**B. The public duty rule does not apply to the instant action so as to negate the duty Defendant owed to Plaintiff.**

It was also error for the Court to find that the public duty rule exempts Defendant from any liability to Plaintiff in this case under a theory of negligence. Specifically, the Court's July 9, 2018 Order states that Plaintiff's only alleged injuries stem from Defendant's handling of a sexual assault examination kit and that "GHS was not rendering medical services or treatment to Plaintiff" in connection therewith. Based thereon, and despite the fact that law enforcement did not request the conduct of said examination, the Court's Order goes on to find that Defendant was "acting on behalf of" law enforcement and, accordingly, was acting only with a duty to the public and not to Plaintiff individually. Any such finding is clearly erroneous given the allegations contained in Plaintiff's Complaint.

Plaintiff's Complaint clearly and expressly alleges that she presented to the emergency department of Defendant's hospital and that Defendant "owed a duty to Plaintiff to ensure that she received proper medical attention." Complaint, ¶¶ 20, 35. It was in the course of seeking such medical attention that Plaintiff – not law enforcement – personally and individually requested a sexual assault examination be performed so that she could confirm that she had been sexually assaulted, determine what she had been drugged with, and also determine what, if any action, she might decide to take in regard to her sexual assault, both legally and medically. In specific regard thereto, the South Carolina Attorney General's Sexual Assault Protocol For the Investigation, Prosecution, and Judgment of Sexual Assault, 2<sup>nd</sup>. Ed., 2015, a copy of which was provided to the Court, specifically provides that "[a]ll patients should receive a comprehensive medical/forensic evaluation," which "consists of obtaining information necessary to make the appropriate decisions regarding **medical care**, forensic evidence collection and **appropriate referral and follow up information.**" *Id.* (emphasis added). Regardless, the Court's July 9, 2018 Order completely and erroneously ignores the fact that a sexual assault forensic examination is not solely for law enforcement purposes, but also undertaken to enable individuals like Plaintiff to make decisions regarding their medical care and appropriate follow-up services needed. That error necessitates reconsideration of the Court's July 9, 2018 Order.

**C. Plaintiff properly alleged a claim for intentional infliction of emotional distress.**

To establish a claim for intentional infliction of emotional distress, a plaintiff must show the defendant: (1) "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct"; (2) that the conduct was so outrageous it exceeded "all possible bounds of decency" and so "atrocious" it was "utterly intolerable in a civilized community"; (3) such actions actually caused plaintiff's emotional

distress; and (4) the emotional distress was so severe “no reasonable man could be expected to endure it.” Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007) (citing Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981)). Plaintiff’s Complaint alleges sufficient facts to establish such a claim and any finding otherwise, or that any such claim is an attempt to assert a claim for spoliation of evidence, was clear error.

In regard to the element of intentionality and recklessness, Plaintiff’s Complaint expressly alleges that the Defendant acted “intentionally and/or recklessly.” Complaint, ¶ 58. In regard to same, as well as the outrageousness of Defendant’s conduct, Plaintiff goes on to allege that “Defendants were well aware of their duties, as communicated by federal and state authorities, in regard to the collection and preservation of evidence from victims of sexual assault, including their duty to maintain chain of custody at all times and to ensure that all relevant evidence collected was transferred directly to the appropriate law enforcement.” Complaint, at ¶ 60. Notwithstanding, and as expressly alleged by Plaintiff in her Complaint, Defendant and its employee violated this known duty by transferring Plaintiff’s medical evidence to her personally, rather than law enforcement. When these allegations are read in the light most favorable to Plaintiff, the intentionality, recklessness, and outrageousness of Defendant’s conduct is clear and most certainly exceeds the bounds of decency so as to properly allege a cause of action for intentional infliction of emotional distress. In fact, Plaintiff’s Complaint goes on to allege that the emotional distress Plaintiff suffered as a result of the Defendant’s outrageous conduct “was so severe that no reasonable person should be expected to endure it.” Complaint, at ¶ 62. The Court’s express statement that such emotional distress is essentially negated by the “emotions” that “many, if not most, victims of sexual assault have to deal with” is not only offensive in its implication that sexual assault victims cannot be further harmed by actions subsequent to the actions of their attackers,

but also erroneous in excusing the direct emotional distress caused directly by the Defendant, same having been properly alleged by Plaintiff in her Complaint.

**2. Dismissal of Plaintiff's action is improper given Plaintiff's pending Motion to Amend.**

As a final matter, Plaintiff would assert that the Court's July 9, 2018 Order erroneously dismisses all of Plaintiff's causes of action, effectively dismissing the entire action. Regardless, Plaintiff filed a Motion to Amend her Complaint on June 4, 2018 and that Motion is still pending before the Court. In fact, a hearing has not yet even been scheduled on Plaintiff's Motion to Amend. Plaintiff would assert that she is entitled for her Motion to Amend to be heard and decided on by the Court before this entire action is dismissed based solely on the alleged insufficiencies in Plaintiff's Complaint.

**CONCLUSION**

For all those reasons set forth above, Plaintiff would respectfully request that the Court reconsider its July 9, 2018 Order Granting Defendant Greenville Health System's Motion to Dismiss in the above-captioned matter.

(Signature on following page)

METCALFE & ATKINSON, LLC

s/ Courtney C. Atkinson

Courtney C. Atkinson, S.C. Bar #71992

Hannah Rogers Metcalfe, S.C. Bar #73046

1395 South Church Street

Greenville, South Carolina 29605

(864) 214-2319 Telephone

(864) 214-3067 Facsimile

*Attorneys for Plaintiff Jane Doe*

July 16, 2018

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Jane Doe,

Plaintiff,

v.

Oconee Memorial Hospital, Greenville  
Health System,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2017-CP-37-00700

***Defendants' Memorandum in Opposition to  
Plaintiff's Motion to Reconsider***

The purpose of a motion to reconsider pursuant to Rule 59(e)<sup>1</sup> is to preserve for appeal issues that were argued but not ruled upon by the court. A motion to reconsider is not necessary to preserve issues that have been ruled upon. *See Wilder Corp. v. Klaus Wilke, et al.*, 330 S.C. 71, 497 S.E.2d 731, 734 (1998); *Bailey v. Segars*, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001). In her motion to reconsider, Plaintiff does not identify any issues the Court failed to rule upon. Rather, Plaintiff merely reasserts the same arguments she previously made to the Court, which is not an appropriate use of a motion to reconsider. *See c.f. Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001) (interpreting South Carolina Appellate Court Rules). The Order makes clear the Court fully considered and rejected each of Plaintiff's arguments. The Order even addresses Plaintiff's motion to amend. Thus, Defendants do not think it appropriate to reargue those issues again. Therefore, for the well-thought-out reasons set forth in the Order - including those set forth in the section entitled "B. Spoliation of

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<sup>1</sup> Plaintiff's motion for reconsideration cites both Rules 59 and 60 of the South Carolina Rules of Civil Procedure; however, it is unclear why Plaintiff cited Rule 60. Plaintiff does not contend there has been a clerical mistake, see Rule 60(a), nor does she allege mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud as set forth in Rule 60(b).

Evidence is Not a Cognizable Cause of Action,” which Plaintiff appears to ignore - Plaintiff’s motion to reconsider should be denied.

HAYNSWORTH SINKLER BOYD, P.A.

s/Kenneth N. Shaw

Kenneth N. Shaw (SC Bar No. 77859)

kshaw@hsblawfirm.com

PO Box 2048

Greenville, SC 29602

864-240-4541

864-240-3300 (fax)

Attorneys for Defendants

Dated: July 18, 2018  
Greenville, SC





Oconee Common Pleas

**Case Caption:** Jane Doe, VS Oconee Memorial Hospital , defendant, et al  
**Case Number:** 2017CP3700700  
**Type:** Order/Other

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM OCONEE COUNTY  
COURT OF COMMON PLEAS

The Honorable R. Scott Sprouse, Circuit Court Judge

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Case No.: 2017-CP-37-00700

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Jane Doe

*Appellant,*

v.

Oconee Memorial Hospital, Greenville Health System

*Respondents.*

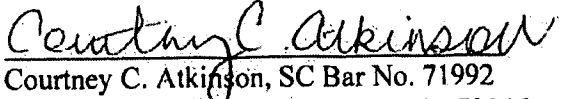
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NOTICE OF APPEAL

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Jane Doe hereby appeals from the order of the Circuit Court, by the Honorable R. Scott Sprouse, Circuit Court Judge, dated and entered on July 9, 2018. Written notice of this order was received on July 9, 2018. The Court's order denying Plaintiff's motion for reconsideration of the July 9, 2018 order was entered on July 19, 2018 and written notice of the order denying the motion to reconsider was received on July 19, 2018. A copy of the July 9, 2018 order is attached hereto and incorporated herein.

Respectfully submitted,

  
Courtney C. Atkinson, SC Bar No. 71992  
Hannah Rogers Metcalfe, SC Bar No. 73046  
METCALFE & ATKINSON, LLC  
1395 S. Church Street  
Greenville, South Carolina 29605  
(864) 214-2319

*Other Counsel of Record:*

Kenneth N. Shaw  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 2048  
Greenville, SC 29602

Attorney for Respondents Oconee Memorial Hospital and Greenville Health System

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM OCONEE COUNTY  
COURT OF COMMON PLEAS  
R. Scott Sprouse, Circuit Court Judge

---

Case No.: 2017-CP-37-00700

---

Jane Doe

*Appellant,*

v.

Oconee Memorial Hospital, Greenville Health System

*Respondents*

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CERTIFICATE OF SERVICE

---

I certify that on Aug. 1, 2018 I served Appellant's Notice of Appeal on the Respondents, by placing a copy into the U.S. Mail, postage prepaid, addressed to the Respondent's counsel of record as follows:

Kenneth N. Shaw  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 2048

Greenville, SC 29602

Attorney for Oconee Memorial Hospital and Greenville Health System, Respondents

*Courtney C. Atkinson*

Courtney C. Atkinson, SC Bar No. 71992

METCALFE & ATKINSON, LLC

1395 S. Church Street

Greenville, South Carolina 29605

(864) 214-2319

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Jane Doe,

Plaintiff,

v.

Oconee Memorial Hospital, Greenville  
Health System,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2017-CP-37-00700

***Order Granting Defendant Greenville  
Health System's Motion to Dismiss***

This matter came before the Court upon Defendant Greenville Health System's ("GHS") motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.<sup>1</sup> The motion was heard on June 4, 2018. Having listened to oral arguments and reviewed the submissions of the parties, for the reasons more fully set forth below, I hereby grant GHS's motion to dismiss as to the causes of action set forth in the Plaintiff's Complaint. This Order is, however, without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action.

**FACTS**<sup>2</sup>

Plaintiff alleges that she was drugged and sexually assaulted in the early morning hours of December 5, 2015 while in Atlanta, Georgia. She alleges that following the assault, she drove

<sup>1</sup> Plaintiff identifies Oconee Memorial Hospital as a named defendant in her Complaint; however, Oconee Memorial Hospital is not an independent entity capable of being sued. Rather, it is a facility owned and operated by GHS.

<sup>2</sup> In ruling on Defendant's 12(b)(6) motion, the Court was constrained by the facts alleged in Plaintiff's Complaint. The Court notes that approximately one hour prior to the hearing on June 4, 2018, and without any prior notice to Defendant, Plaintiff electronically filed a motion to amend her complaint. While Plaintiff's counsel briefly mentioned the motion to amend during the hearing, the merits of Plaintiff's motion were not properly before the Court and were not discussed. Further, the Court could not consider the merits of Plaintiff's motion to amend even if it were inclined to do so, because no proposed amended complaint was ever submitted to the Court.

back home to South Carolina and went to Oconee Memorial Hospital (“OMH”) where she requested a sexual assault forensic examination and stated her desire to report the assault to law enforcement. GHS employee, Mary Beth Hendricks, attended to Plaintiff and performed the sexual assault forensic examination, which included both swabs and a blood draw.

Upon completion of the examination, Hendricks contacted the Dekalb County Sheriff’s Office in Georgia and reported the assault. Hendricks requested Dekalb County Sheriff’s Office come collect the examination kit; however, she was advised by the Sheriff’s Office that they were unwilling to travel to South Carolina to pick up the kit, and if Plaintiff wished to pursue her claim, she would personally need to take the kit to them in Georgia. Hendricks protested, but was advised by the Sheriff’s Office that was the only option. Hendricks reluctantly relayed the Sheriff’s Office’s instructions to Plaintiff and signed over custody of the kit to Plaintiff.

Plaintiff took the kit to the Dekalb County Sheriff’s Office the following day. She gave the kit and her statement to the investigating officer, who advised her that he would be back in touch at a later date. A few weeks later, the investigating officer allegedly reached out to Plaintiff and informed her that there was no blood sample included in the kit from which his office could determine whether Plaintiff had been drugged. She alleges that the officer decided to close the case and not pursue any further action against Plaintiff’s alleged attacker due to the lack of the blood sample. In addition, she contends that the officer may have also considered the alleged break in the chain of custody when making the decision to close the case.

#### **LEGAL ANALYSIS**

Under Rule 12(b)(6), SCRPC, the Court, upon reviewing all the well pleaded facts in a light most favorable to the claimant, must dismiss the action if the Complaint fails to state a claim upon which relief can be granted. Charleston County Sch. Dist. v. Laidlaw Transit, Inc.,

348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). The Court is to consider only the alleged facts and is not to consider the inferences or conclusions of law drawn by the Plaintiff from the facts. Charleston County Sch. Dist. v. S.C. State Ports Auth., 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct. App. 1984). Each element of a cause of action must be alleged, and a complaint that omits an element fails to state a claim and must be dismissed. Inman v. Ken Hyatt Chrysler Plymouth, Inc., 294 S.C. 240, 363 S.E.2d 691 (1988).

**I. Plaintiff Fails to Plead Facts Sufficient to Support the Duty and Damages Elements of Her Negligence Causes of Action**

Plaintiff's first five causes of action allege negligence on the part of GHS and its employees. In order to survive a motion to dismiss, Plaintiff must allege facts sufficient to establish that GHS owed Plaintiff a duty of care, GHS breached that duty, and Plaintiff sustained damages proximately resulting from the breach. South Carolina Insurance Company v. James C. Greenc & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct.App.1986). Plaintiff's claims fail because no legal duty was owed to her in regards to the sexual assault examination kit, and she failed to allege any cognizable damages.

**A. No Duty was Owed to Plaintiff in Regards to the Sexual Assault Examination Kit**

"A legal duty is that which the law requires to be done or forbore with respect to a particular individual or the public at large." Byrly v. Connor, 301 S.C. 441, 443 415 S.E.2d 796, 798 (1992). A legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2007). The court must determine, as a matter of law, whether the law recognizes a particular duty. Id. If there is no duty, then the defendant is entitled to a dismissal as a matter of law. Id. The Court finds that GHS owed no duty to Plaintiff in regards to the sexual assault examination kit. Rather, the Court finds that GHS was performing a service on

behalf of law enforcement in collecting evidence for a criminal investigation.

Plaintiff alleges that GHS owed her a duty to collect, preserve, and properly transfer all physical evidence of her alleged sexual assault to law enforcement. She alleges that GHS breached that duty by failing to ensure that the blood samples were in the examination kit and by breaking the chain of custody by giving the kit to Plaintiff rather than giving it directly to law enforcement. However, Plaintiff identified no statute, regulation, rule, ordinance or standard which clearly established a duty owed to her in regards to the handling of the sexual assault examination kit. Like the law enforcement agency it was acting on behalf of, GHS was acting pursuant to statutes, ordinances, and regulations which protect the public at large, but provide no duty of care to individuals. See Wells v. City of Lynchburg, 331 S.C. 296, 308, 501 S.E.2d 746, 752 (Ct. App. 1998); see also Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E.2d 122 (2008) (Court stating that sheriff's office owed no duty to plaintiff to preserve evidence that was collected for a criminal investigation).

Plaintiff argues that GHS's duty flowed from its obligation to provide medical treatment for her alleged sexual assault injuries. While GHS undoubtedly owed a duty of care in rendering medical services, Plaintiff has not alleged injuries stemming from those services.<sup>3</sup> Her only alleged injuries stem from her allegations that GHS negligently handled the sexual assault examination kit. While gathering evidence for the sexual assault examination kit, GHS was not rendering medical services or treatment to Plaintiff. Providing medical care for alleged or suspected injuries is a wholly separate function from gathering evidence for a sexual assault examination kit. This is readily apparent by the fact that a person may come to the ED to seek

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<sup>3</sup> To the extent the allegations in Plaintiff's Complaint could be read to infer injuries stemming from the medical services rendered to her, her claims would sound in medical malpractice. In that case, dismissal would still be appropriate on the basis that Plaintiff failed to comply with the requirements of S.C. Code § 15-79-125.

treatment for an alleged sexual assault, but decline to report the assault to law enforcement and/or complete an examination kit. *See* S.C. § 16-3-1350.

**B. Spoliation of Evidence is Not a Cognizable Cause of Action**

The Court interprets Plaintiff's claims as an attempt to allege a negligent spoliation of evidence claim; however, South Carolina does not recognize an independent tort for spoliation of evidence. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011); see also Austin, supra (refusing to adopt the tort of third party spoliation of evidence where plaintiff sued sheriff's office for destroying evidence that plaintiff alleged prevented her from being able to pursue wrongful death claim against another party).

Plaintiff contends she is asserting "general negligence claims" rather than a claim for spoliation of evidence; however, that same argument was rejected by the Court in *Hobbs*. As noted by the Court,

"Whether denominated as a claim for spoliation of evidence or as a general negligence claim based on spoliation of evidence, the substance of this claim is the same: both are based on the allegation that Cole Vision breached its duty to maintain a key document, the absence of which harmed Hobbs in the underlying lawsuit."

394 S.C. 144, 154, 714 S.E. 2d 537, 542 (2011). The instant case is indistinguishable. Plaintiff claims that she has been harmed by GHS's alleged failure to maintain the blood sample that she claims would have helped her prove she was sexually assaulted. Calling it general negligence doesn't change the fact that the substance of the relief being sought is still the same – she wants GHS held responsible for the allegedly missing evidence. *Id.*

As noted in both Hobbs and Austin, one of the primary policy reasons for refusing to acknowledge a cause of action for spoliation of evidence is the very speculative nature of the damages. Here, Plaintiff alleges the lack of a blood sample prevented her assaulter from being

prosecuted; however, it is extremely speculative to suggest he would have been prosecuted had the blood sample been in the kit.

**C. Plaintiff Failed to Assert a Cognizable Injury**

Finally, Plaintiff's negligence claims fail because she has not alleged a cognizable injury. In her Complaint, Plaintiff merely alleged that she has "suffered damages, in addition to the loss of her ability to proceed with criminal action against her attacker." (Compl. ¶¶ 27, 33, 43, 51, 56.) At the hearing, Plaintiff's counsel explained that the crux of Plaintiff's injury was the pain of not knowing for certain whether she was drugged and whether she was sexually assaulted. Plaintiff does not allege she sustained a physical injury as a result of GHS's alleged negligence. The only reasonable inference the Court can draw from Plaintiff's allegations is that she has endured emotional distress; however, it is well established that South Carolina does not recognize a claim for negligent infliction of emotional distress under these circumstances. See Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985); Doc v. Greenville County School Dist., 375 S.C. 63, 67-68, 651 S.E.2d 305 (2007) (limiting negligent infliction of emotional distress claims to bystander situations only).

**II. Plaintiff's Claims do not Amount to an Intentional Infliction of Emotional Distress**

For her sixth and final cause of action, Plaintiff asserted an intentional infliction of emotional distress claim. This cause of action further emphasizes that Plaintiff's only alleged injury is one of emotional distress. However, regardless of the label, Plaintiff's claim is unavailing, because the Court still views it as an attempt to assert a spoliation of evidence claim. Hobbs, 394 S.C. 144, 149, 714 S.E.2d 537, 540.

Nevertheless, Plaintiff failed to plead facts sufficient to establish the heightened standard of proof required for an intentional infliction of emotional distress claim. Argoc v. Three Rivers

Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (noting higher standard of proof and enumerating elements of intentional infliction of emotional distress claim to include intentional or reckless conduct that exceeds all possible bounds of decency and causes such severe distress that no reasonable man could bear it). The South Carolina Supreme Court has held the circuit courts undertake a “significant gatekeeping role” in analyzing whether the alleged conduct was sufficiently outrageous and the emotional distress sufficiently severe to survive a motion to dismiss. AJG Holdings LLC v. Dunn, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011) (citing Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 72 (2007)). In order to establish a claim for intentional infliction of emotional distress, plaintiff must allege that GHS employees intentionally or recklessly conducted themselves in a manner that was “extreme and outrageous,” exceeding “all bounds of decency,” “atrocious,” and “utterly intolerable.” See Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981) (recognizing tort of intentional infliction of emotional distress and adopting elements set forth in Restatement (Second) of Torts § 46).

First, nowhere in the Complaint did Plaintiff allege that GHS employees acted with the intent to cause her severe emotional distress, nor did she allege that the employees were certain or substantially certain that their actions would cause her such distress. Id. Second, the Court finds no reasonable person could determine that following the instructions of a law enforcement officer regarding the handling of evidence of a crime could be considered “extreme and outrageous” conduct. Id. Finally, Plaintiff did not allege such “severe” emotional distress that “no reasonable man could be expected to endure it,” as many, if not most, victims of sexual assault have to deal with the emotions associated with their attacker not being held accountable for his/her actions.

In addition, GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq. (1976, as amended), and it and its agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. See Murphy v. Richland Mem. Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995) (citing Benton v Roger C Peace, 313 S.C. 520, 443 S.E.2d 537 (1994)). Pursuant to S.C. Code § 15-78-60(17), GHS has immunity for employee conduct outside the scope of his official duties or which constitutes actual malice or intent to harm. Therefore, even if the GHS employees' conduct could be said to rise to the level of "extreme and outrageous," exceeding "all bounds of decency," "atrocious," and "utterly intolerable," GHS would still be immune from liability. See Cornelius v. City of Columbia, 663 F.Supp.2d 471 (D.S.C. 2009).

WHEREFORE, for the reasons stated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the causes of action set forth in Plaintiff's Complaint are hereby dismissed with prejudice.

AND IT IS SO ORDERED.

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The Honorable Judge R. Scott Sprouse  
Tenth Judicial Circuit

July \_\_, 2018



Oconee Common Pleas

**Case Caption:** Jane Doe VS Oconee Memorial Hospital , defendant, et al  
**Case Number:** 2017CP3700700  
**Type:** Order/Dismissal

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM OCONEE COUNTY  
COURT OF COMMON PLEAS

The Honorable R. Scott Sprouse, Circuit Court Judge

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Appellate Case No.: 2018-001480

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Jane Doe

*Appellant,*

v.

Oconee Memorial Hospital, Greenville Health System

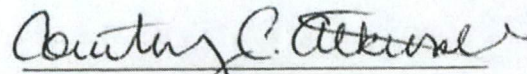
*Respondents.*

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Courtney C. Atkinson  
Hannah Rogers Metcalfe  
Metcalfe & Atkinson, LLC  
1395 S. Church Street  
Greenville, South Carolina 29605  
Attorneys for Appellant

February 12, 2019

**RECEIVED**  
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