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STATE V. MENDEZ: RESTORING THE ADMISSIBILITY OF STATEMENTS MADE FOR THE PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT IN THE CONTEXT OF CHILD SEXUAL ABUSE

Charles B. Kraft*

I. INTRODUCTION

When a person reports that sexual abuse has been, or may have been committed against a child in New Mexico, a Sexual Assault Nurse Examiner ("SANE nurse") commonly examines the child.[1] SANE nurses serve a dual role—medical and forensic—as they take the child's history, conduct a physical examination, and turn over evidence they collect to the authorities.[2] It is common during a SANE examination for a child to make statements to the SANE nurse concerning the cause of injuries, the location of injuries, and the identity of the abuser.[3] Those statements are used to guide the SANE nurse during the physical examination of the child.[4] In prosecutions of alleged sexual abusers prior to 2007, statements made by child victims to SANE nurses were generally admissible in New Mexico courts under Rule 11-803(D) NMRA.[5] In 2007, the New Mexico Court of Appeals ruled that all statements made by a child to a SANE

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* University of New Mexico School of Law, Class of 2013. Charles wishes to thank Jennifer Saavedra for introducing and sparking his interest in this field of law and to Judge Linda Vanzi for making the time to discuss and offer thoughtful insights about the article. Lastly, Charles thanks his wife Janae for her support in all his endeavors.

1. *See* Albuquerque SANE Collaborative, Sexual Assault Services, http://abq-sane.org/id35.html (last visited Aug. 19, 2012) (stating that A SANE nurse is a specially trained nurse who examines and treats victims of sexual abuse); *see also* State v. Mendez, 2010-NMSC-044, ¶¶ 41–43, 148 N.M. 761, 242 P.3d 328 (describing that victims of child sexual abuse are routinely taken to SANE nurses at various facilities, Para Los Ninos, urgent care centers, and hospital emergency rooms. Where the child is taken depends greatly on geography, as the more rural the setting, the fewer options there are for treatment providers).

2. *See generally Mendez*, 2010-NMSC-044, ¶ 7.

3. *See infra*, SANE Nurses Are Medical Providers.

4. *Id.*

5. *See* Rule 11-803(D) NMRA ("A statement that (a) is made for—and is reasonably pertinent to—medical diagnosis or treatment, and (b) describes medical his-

nurse were inadmissible at trial under Rule 11-803(D).[6] Viewing *State v. Mendez* as an opportunity to clarify and correct the proper analysis for Rule 11-803(D), in 2010 the New Mexico Supreme Court overruled the court of appeals and held that statements to SANE nurses can be admissible under Rule 11-803(D).[7] The court's opinion explained how and why statements that identify a perpetrator are pertinent to medical treatment and are thus admissible under Rule 11-803(D).[8]

In addition to discussing the pertinence of statements of identification, this note examines: (1) the problems the court of appeals ran into when making its decision, (2) the purpose and function of SANE nurses, and (3) what the proper analysis is for statements being offered under Rule 11-803(D). Lastly, because the admissibility of many statements made to SANE nurses hinges on whether the statement was pertinent to treatment, this note offers to courts the notion of adopting a working definition of "treatment," to aid in deciding whether statements are pertinent to medical diagnosis or treatment.

II. BACKGROUND LAW

In federal courts, the "Rule Against Hearsay," Rule 802, bars all hearsay from being admitted at trial that does not comport with a federal statute, a hearsay exception or exemption within the rules of evidence, or a rule promulgated by the U.S. Supreme Court.[9] Exceptions to the rule against hearsay exist because some statements are deemed so inherently trustworthy that their admission at trial would not be unfair to either party.[10] One such exception, Rule 803(4), provides that statements made

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tory, past or present symptoms, pain, or sensations, their inception, or their general cause" are exceptions to the rule against hearsay).

6. *See* State v. Ortega, 2008-NMCA-001, ¶¶ 16–27, 143 N.M. 261, 175 P.3d 929 (stating that because SANE nurses are "not in the business of providing ongoing treatment," statements made to SANE nurses during a SANE examination are inadmissible under Rule 11-803(D). The court's holding that the statements were inadmissible was also supported by the Confrontation Clause violation.); *see also* Rule 11-803(D) NMRA.

7. *See Mendez,* 2010-NMSC-044, ¶ 40.

8. *See id.* ¶¶ 47–55.

9. *Compare* FED. R. EVID. 802 ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.") *with* Rule 11-802 NMRA ("Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by statute.").

10. *See* FED. R. EVID. 803(4) advisory committee's note; *see also* Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. REV. 257 (1989).

for purposes of medical diagnosis or treatment are not excluded by the hearsay rule.[11] Specifically, Rule 803(4) allows for the admission of "[a] statement that: (A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause."[12] This hearsay exception is the basis for this note.[13]

A. The Rationales for Rule 803(4)

Rule 803(4) is based upon two rationales that help ensure trustworthiness.[14] First, because the declarant is seeking medical care of some kind, the declarant has a selfish interest in being truthful so that she is diagnosed or treated correctly.[15] If the declarant were to be dishonest, it would damage no one but herself.[16] This rationale requires courts to examine the declarant's subjective state of mind.[17] At first glance, it is easy to believe that Rule 803(4) applies only to statements made to medical providers. However, statements made to police officers, ambulance drivers, or even family members may qualify under the selfish interest rationale.[18] These statements, in which the auditor is not a traditional medical provider, may be admissible because the selfish interest rationale only pertains to the statement's purpose, rather than to whom the statement was made.[19]

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11. FED. R. EVID. 803(4).

12. *Id.*

13. Technically, Rule 11-803(D) NMRA is the basis for this case note. Rule 11-803(D) was modeled verbatim after the federal rule, Rule 803(4), both before and after the federal rules were restyled in 2011 (New Mexico restyled its rules of evidence to reflect the federal changes in 2012).

14. *See* Mosteller, *supra* note 10, at 259; *see generally* Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE, § 803.4 (6th ed. 2006).

15. *See* FED. R. EVID. 803(4) advisory committee's note; *see also* Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S EVIDENCE MANUAL STUDENT EDITION, § 16.05 (4th ed. 1999); United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980).

16. *See* Mosteller, *supra* note 10; *see also* Stephen A. Saltzburg et al., FEDERAL RULES OF EVIDENCE MANUAL, VOL. 4, § 803.02[5][a] (8th ed. 2002).

17. *See generally* Mosteller, *supra* note 10, at 265.

18. *See* FED. R. EVID. 803(4) advisory committee's note; *see also* Graham, *supra* note 14 at 161–64 ("Statements made for purposes of diagnosis or treatment may be made by either a patient or someone with an interest in his well being . . . . [T]he statement may be addressed to anyone associated with providing such services, including a physician, nurse, ambulance attendant, or even a family member."); *see generally* Weinstein & Berger, *supra* note 15.

19. *See* FED. R. EVID. 803(4) advisory committee's note.

The second rationale behind Rule 803(4) is based upon the pertinence of the statement to medical diagnosis or treatment.[20] Generally, when a medical provider relies on the declarant's statement to determine a diagnosis or to provide treatment, that statement is viewed as inherently trustworthy.[21] As such, the pertinence rationale examines the objective actions of the auditor in response to the declarant's statement.[22] The pertinence rationale rests on the notion that if a statement is reliable enough for a medical provider, then the statement is reliable enough for the courtroom.[23]

B. The Two-Part Test for Admissibility

Because the pertinence rationale and the selfish-interest rationale call for courts to examine both the subjective intent of the declarant and the objective actions of the auditor, many jurisdictions recognize that Rule 803(4) contains a two-part test.[24] The two parts consist of (1) the declarant's selfish interest in seeking a diagnosis or treatment and (2) the statement's pertinence to diagnosis or treatment. The analysis becomes contentious when the declarant's statement attributes fault. Generally, statements attributing fault are excluded from Rule 803(4) because they

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20. *See* FED. R. EVID. 803(4) advisory committee's note; *see also* State v. Mendez, 2010-NMSC-044, ¶ 21, 148 N.M. 761, 242 P.3d 328 ("[T]he second rationale behind [the rule], commonly referred to as 'pertinence' is that if a statement is pertinent to a medical condition, such that a medical care provider reasonably relies upon it in arriving at a diagnosis or treatment, the statement is deemed sufficiently reliable to overcome hearsay concerns."); United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980) (discussing pertinence as the second rationale behind Rule 803(4)).

21. *See generally Iron Shell*, 633 F.2d at 84 (discussing how these statements are deemed reliable because "life and death decisions are made by physicians in reliance on such facts and as such should have sufficient trustworthiness to be admissible in a court of law."); Morgan v. Foretich, 846 F.2d 941, 951 (4th Cir. 1988) (Powell, J., dissenting in part and concurring in part) ("[A] fact reliable enough to serve as a basis for a physician's diagnosis or treatment generally is considered sufficiently reliable to escape hearsay proscription."); Weinstein & Berger, *supra* note 15, at 20–21.

22. *See generally* Mosteller, *supra* note 10, at 267.

23. *See* Weinstein & Berger, *supra* note 15, at 22 ("Since doctors may be assumed not to want to waste their time with unnecessary history, the fact that a doctor or other trained medical personnel took the information is prima facie evidence that it was pertinent. Courtroom practice has tended to let in medical records and statements to nurses and doctors fairly freely, leaving it to the jury to decide the probative force.").

24. *See* United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) (stating that at least the Fourth, Eighth, and Ninth Circuits subscribe to the two-part analysis.); *see also* United States v. Chaco, 801 F. Supp. 2d 1200 (D. N.M. 2011) (discussing the Fourth, Eighth, Ninth, and Tenth Circuit's acceptance or rejection of the two-part analysis.).

are not pertinent to the declarant's medical diagnosis or treatment.[25] In other words, even if the first prong of the test is met, the second prong is not usually met because statements attributing fault are generally not considered pertinent to a medical diagnosis or treatment.

However, an exception has developed when the declarant is a child suspected to have been sexually abused and her statement identifies the abuser.[26] In those cases, the first prong of the two-part test is deemed met because the child's selfish interest in making her statement is no different from that of an adult—she is seeking medical attention and help. In fact, the child's statement may be more reliable than her adult counterpart for consideration under this rationale, as the child is more likely to consider her presence in front of a doctor or nurse to be for the purposes of medical diagnosis and treatment, rather than for law enforcement purposes.[27] The second prong of the two-part test is generally deemed satisfied because statements identifying the abuser are pertinent not only to the diagnosis of sexual abuse and the physical treatment of the child, but also to the child's future welfare, safety, and emotional and psychological well-being.[28] When doctors, nurses, or SANE nurses learn the identity of a perpetrator through a statement from a child victim, they rely on that statement to guide their diagnosis and treatment of the child, which includes determining the child's safety, assessing whether the child can be protected from recurring abuse, and possibly making a referral for removal from the home.[29]

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25. *See* FED. R. EVID. 803(4) advisory committee's note, (providing the following example: "[a] patient's statement that he was struck by an automobile would qualify, but not his statement that a car was driven through a red light.").

26. *See* Saltzburg, *supra* note 16, at § 803.02[5][b]; *see also* State v. Altgilbers, 109 N.M. 453, 786 P.2d 680 (1990) (Controversy regarding the intersection of Rule 803(4) and child sexual abuse is common. A number of courts are recognizing that an exception exists whereby the disclosure of the alleged abuser in a child sexual abuse case is considered essential to the child's diagnosis and treatment.); United States v. Renville, 779 F.2d 430 (8th Cir. 1985).

27. *See* State v. Mendez, 2010-NMSC-044, ¶ 23, 148 N.M. 761, 242 P.3d 328; *see also* Mosteller, *supra* note 10, at 267–70.

28. *See infra*, Statements Concerning the Identity of the Abuser.

29. *See Mendez*, 2010-NMSC-044, ¶ 51 (stating that knowing the identity of the perpetrator is relevant to the necessary treatment plan for the victim.); *see also* State v. Mendez, 2009-NMCA-060, ¶ 33, 146 N.M. 409, 211 P.3d 206 (discussing how SANE examinations are guided by the answers victims give during their interviews to guide the necessary treatment.); State v. Ortega, 2008-NMCA-001, ¶ 25, 143 N.M. 261, 175 P.3d 929; NMSA 1978, § 32A-4-3(A) (2005) (requiring all adults to report suspected child abuse to the authorities).

C. The Confrontation Clause and its Relation to Rule 803(4)

Before this note continues into the analysis of Rule 803(4), it is necessary to discuss the considerable overlap between the Confrontation Clause and Rule 803(4). The Confrontation Clause, part of the Sixth Amendment to the U.S. Constitution, states "[t]he accused shall enjoy the right . . . to be confronted with the witnesses against him."[30] Generally speaking, in criminal cases the prosecution must produce the witnesses against the defendant and subject them to face-to-face confrontation and cross-examination. The U.S. Supreme Court in *Crawford v. Washington* reasoned that "where nontestimonial hearsay is at issue . . . the States [have] flexibility in their development of hearsay law."[31] However, "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination."[32] The Court did not expand on its definition of "testimonial" until it decided *Davis v. Washington*, in which it held that statements are "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[33] Thus, the primary purpose test was born.

When Confrontation Clause analysis concerns medical examinations, statements made by the victim to a medical provider must be analyzed to determine whether the statements are testimonial.[34] This analysis, in light of *Davis*, requires the court to determine the primary purpose of the medical examination.[35] If the primary purpose of the examination is "to establish or prove past events potentially relevant to later criminal prosecution,"[36] and the child is unavailable at trial and was

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30. U.S. CONST. amend VI.

31. Crawford v. Washington, 541 U.S. 36, 68 (2004).

32. *See id.*

33. Davis v. Washington, 547 U.S. 813, 822 (2006).

34. Courts have generally distinguished this issue on account of whether the police were contacted prior to or after the medical examination. *See* State v. Romero, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694 (discussing how statements made to a nurse, who was accusing the defendant of a criminal act after the police had been contacted, were considered testimonial); State v. Hooper, 176 P.3d 911 (Idaho 2007) (statements made to a nurse in a forensic interview after the police had been contacted were testimonial); *but see* State v. Kirby, 908 A.2d 506 (Conn. 2006) (statements made to an emergency room technician were not testimonial because they concerned the victim's treatment); People v. Vigil, 127 P.3d 916 (Colo. 2006) (statements made to the examining physician at the hospital were not testimonial).

35. *See Davis*, 547 U.S. at 822.

36. *See id.*

never subject to cross-examination, the child's testimony is barred.[37] However, if the child is available and subject to cross-examination, the testimonial statements may be admissible.

Simply, under the Confrontation Clause, if the primary purpose of a medical examination is to prove past events relevant for future prosecution, then the statements made during that medical examination are testimonial.[38] Thus, if the declarant is unavailable at trial and has not been subject to cross-examination, then the statements will not be admissible.[39]

D. Rule 803(4) in the Federal Courts

The analysis used by federal courts in determining whether statements are admissible under Rule 803(4) differs from that used by New Mexico courts in determining whether the same statements are admissible under Rule 11-803(D). However, the New Mexico Supreme Court's decision in *Mendez* has closely aligned the Tenth Circuit's analysis for Rule 803(4) and New Mexico's analysis for Rule 11-803(D).[40] At the federal level, the Fourth, Eighth, and Ninth circuits follow the two-part test for admissibility.[41] In those circuits, the two-part test for admissibility consists of the declarant's motive (selfish interest) and the extent to which that statement was pertinent for diagnosis or treatment (pertinence).[42] The Tenth Circuit, however, rejects the two-part test and instead focuses on the extent to which the statement was pertinent to medical diagnosis or treatment.[43] The Tenth Circuit does not consider the first rationale, the

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37. *See* Dave Gordon, *Is There an Accuser in the House?: Evaluating Statements Made to Physicians and Other Medical Personnel in the Wake of* Crawford v. Washington *and* Davis v. Washington, 38 N.M. L. REV. 529 (2008) (generally discussing the Confrontation Clause analysis in the wake of *Crawford* and *Davis*, and discussing New Mexico's approach to Confrontation Clause analysis in regard to statements made to medical personnel).

38. *See generally Davis*, 547 U.S. at 822.

39. *See generally id.*

40. *Compare* United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993) (stating that the Tenth Circuit's test for admissibility under Rule 803(4) is whether the auditor of the statement found it pertinent enough to rely upon for medical diagnosis or treatment), *with* State v. Mendez, 2010-NMSC-044, ¶ 43, 148 N.M. 761, 242 P.3d 328 (stating that New Mexico's test for admissibility under Rule 11-803(D) requires trial courts to examine each statement sought to be introduced and make a determination of the statement's trustworthiness based upon the victim's motivation to seek medical care and the SANE nurse's reliance on their statements to diagnose or treat them.).

41. *See Joe*, 8 F.3d at 1494 n.5.

42. *See id.*

43. *See id.* (rejecting the two-part test on the grounds that the test "is not contemplated the by rule and is not necessary to ensure that the rule's purpose is carried out"); *see also* United States v. Chaco, 801 F. Supp. 2d 1200, 1206 (D. N.M. 2011)

declarant's selfish interest, when determining whether or not the statements fit into the exception.[44] Instead, the Tenth Circuit recognizes that using the two-part test is not always practicable in cases where the declarant is a child because children usually do not comprehend or understand that their motive in making their statements must be consistent with the purpose of receiving a medical diagnosis or treatment.[45]

Under the Tenth Circuit's test, statements made by a child may be deemed admissible using only a one-part test: if the auditor of the statement found it pertinent to rely upon for a medical diagnosis or treatment, then the statement is admissible.[46] Additionally, the Tenth Circuit held in *United States v. Joe*[47] that a statement revealing the identity of an alleged sexual abuser who is a member of the victim's family is admissible under Rule 803(4) because it is pertinent to the victim's treatment.[48] The holding is based upon the fact that the victim suffers emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser.[49] Furthermore, medical providers must know the identity of the abuser because treatment will differ when the abuser is a household member, caregiver, or person of authority.[50] The Tenth Circuit,

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("[T]he Tenth Circuit has rejected the two-part test that the Fourth and Eighth Circuits have used to evaluate evidence proffered under Rule 803(4).").

44. *See Joe*, 8 F.3d at 1494; *see also Chaco*, 801 F. Supp. 2d at 1206.

45. *See Joe*, 8 F.3d at 1494; *see also* Mosteller, *supra* note 10, at 265 (stating that children may lack the selfish interest component that their adult counterparts have because they may not understand the practical difference between a physician and a medical technician, who dress somewhat similarly and conduct their work in approximately the same medical setting. Under the first prong of the two-part test, a child's statement to the medical technician would likely be inadmissible, but if the same statement was made to a physician, the statement would be admissible.).

46. *See Joe*, 8 F.3d at 1494.

47. *Id.* at 1490–92 (the defendant had admitted fault in the killing of his wife and neighbor after his wife filed for divorce. At trial, the prosecution offered testimony from Dr. Smoker, who had treated Julia—the defendant's now-deceased wife—eight days prior for an alleged rape. During his treatment, Julia identified the defendant as the perpetrator. The defendant objected to this testimony being admitted, but the court allowed it under Rule 803(4)).

48. *Id.* at 1494 ("Where the abuser is a member of the family or household, the abuser's identity is especially pertinent to the physician's recommendation regarding an appropriate course of treatment, which may include removing the child from the home." Additionally, the court argued that "the identity of the abuser is reasonably pertinent in virtually every domestic sexual assault case, even those not involving children.").

49. *See id.*

50. *See id.* (Dr. Smoker testified that "[t]he identity of the [perpetrator] is extremely important in the sense that when we deal with victims of sexual assault, in terms of the way I look upon it, my care doesn't end at the end of my examination . . .

like the Fourth, Eighth, and Ninth circuits, bases its analysis for admissibility under Rule 803(4) upon the overall trustworthy nature of the statement, as the Advisory Committee stated was the intention of Congress.[51]

E. Rule 803(4) in New Mexico Courts

Like the Tenth Circuit, the New Mexico Court of Appeals in *State v. Altgilbers* declined to follow the two-part test and instead based its determination for admissibility of statements under Rule 11-803(D) largely on the extent to which the statement was pertinent to medical diagnosis or treatment.[52] The *Altgilbers* court relied heavily on then-retired U.S. Supreme Court Justice Powell's concurrence-in-part and dissent-in-part in *Morgan v. Foretich*.[53] In his opinion, Justice Powell argued that the proper

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It's my duty to follow up on the patient's care [and] make sure that they've gotten into appropriate counseling in necessary. [It's also my duty to] [m]ake sure that if they are in a situation where this assault might happen again and again and again, that [I] do the best [I] can . . . to remove [them] from that dangerous situation."); *see also* State v. Mendez, 2010-NMSC-044, ¶¶ 51–53, 148 N.M. 761, 242 P.3d 328 (discussing that the identity of the perpetrator is relevant to removing the child from their home, determining what injuries to look for, and whether they are in a safe home environment.); *see generally infra* SANE Nurses Are Medical Providers.

51. *See Joe*, 8 F.3d at 1494. ("The Fourth, Eighth and Ninth Circuits agree that the critical question in determining admissibility under Rule 803(4) is whether the statement is reasonably pertinent to diagnosis or treatment."); FED. R. EVID. 803(4) advisory committee's note.

52. *Compare* State v. Altgilbers, 109 N.M. 453, 786 P.2d 680 (1990), *with Joe*, 8 F.3d at 1494 (rejecting the two-part test on the grounds that the test "is not contemplated the by rule and is not necessary to ensure that the rule's purpose is carried out."); *see also* United States v. Chaco, 801 F. Supp. 2d 1206 (D. N.M. 2011) ("[T]he Tenth Circuit has rejected the two-part test that the Fourth and Eighth Circuits have used to evaluate evidence proffered under Rule 803(4)").

53. Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) (holding that statements made by the victim to her psychologist should have been admitted under Rule 803(4). In making its determination, the court applied the traditional two-prong test for admissibility. The court determined that both the child's motive in seeking treatment and the pertinence of her statements demonstrated the requisite trustworthiness for admission under the rule. However, Justice Powell, who was sitting on the court by designation and was a member of the U.S. Supreme Court when Rule 803(4) was proscribed, concurred in part and dissented in part. Justice Powell argued that pertinence should be the sole test for admissibility under the rule because in cases where the victim is a young child, demonstrating evidence of the child's frame of mind and help-seeking motivation may be difficult to show, even though the child had the proper frame of mind in seeking treatment. This argument was based on the Advisory Committee's note to Rule 803(4), which does not take into account the common law two-prong test for admissibility. Instead, admissibility is based upon the pertinence of the statement.); *see Altgilbers*, 109 N.M. at 458, 786 P.2d at 685 (stating that Justice Powell "would not impose the two-part test, [as] he agrees with O'Gee v. Dobbs

analysis under Rule 803(4) should not rely on the declarant's motive.[54] Instead, the pertinence of the statement should be the sole analysis for determining admissibility under Rule 803(4).[55] The *Altgilbers* court agreed with Justice Powell and held that Rule 11-803(D) does not require inquiry into a declarant's motive when she is making her statement.[56] Practically speaking, under *Altgilbers* and in a child sexual abuse case, the child's statement concerning the identity of the alleged abuser could be admissible if the auditor found the statement pertinent to medical diagnosis or treatment.

The *Altgilbers* analysis for Rule 11-803(D) was followed in the context of child sexual abuse for nineteen years until the New Mexico Court of Appeals decided *State v. Ortega*.[57] In *Ortega*, the court not only considered the admissibility of statements under a Rule 11-803(D) analysis, but also determined whether the Confrontation Clause barred any of the statements because of their potential testimonial nature.[58] In *Ortega*, Jane's mother overheard comments that led her to believe that Jane,[59] her eight-year-old daughter, was being sexually assaulted by Jane's mother's boyfriend.[60] As a result, Jane's mother questioned Jane about what she had heard. Jane told her mother she had been sexually abused by Jane's mother's boyfriend and his friend.[61] Two days later, Jane's mother brought Jane to the emergency room at the Española Hospital where hospital staff determined that a SANE examination should take place.[62] However, Nurse Mary Lopez, the only SANE nurse in the area, was out of town.[63] At that point, a decision was made "that an immediate, acute physical examination of [Jane] for injuries and to collect and preserve evidence was required."[64] During the examination, a nurse administered a

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Houes, Inc., 570 F.2d 1084 (2d Cir. 1978), which held that Federal Rule 803(4) applies 'so long as the statements made by an individual were relied on by the physician in formulating his opinion'").

54. *See Morgan*, 846 F.2d at 951–53.

55. *See id.*

56. *Altgilbers*, 109 N.M. at 460, 786 P.2d at 687.

57. State v. Ortega, 2008-NMCA-001, 143 N.M. 261, 175 P.3d 929 (*Altgilbers* has not been overruled. Rather, *Ortega* affects only statements made to SANE nurses, while *Altgilbers* has a much broader holding and includes both children and adults as declarants).

58. *Ortega*, 2008-NMCA-001, ¶ 1; *see generally* Gordon, *supra* note 37.

59. For purposes of confidentiality, the name Jane is arbitrarily assigned in this note. The victim is referred to as Jane, and her mother is referred to as Jane's mother.

60. *Ortega*, 2008-NMCA-001, ¶ 2.

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

sexual assault exam kit to collect physical evidence but did not ask Jane any questions or take a patient history.[65] Jane received no medical treatment during this examination because it was conducted solely for the purpose of evidence collection.[66]

At some point after this initial physical examination, Jane participated in a SAFE House interview,[67] where she discussed and disclosed information relevant to the abuse to her interviewer.[68] Additionally, upon Nurse Lopez's return four days after the initial examination of Jane had taken place, Nurse Lopez performed a partial SANE examination of Jane.[69] The partial examination did not consist of a physical examination, instead just a patient history.[70] The patient history involved asking a number of questions, including Nurse Lopez asking Jane, "why [are you here]?" to which she gave a narrative, including the specific acts that were committed and the name of her abusers.[71] The statements that created the issue in *Ortega* were the ones given to Nurse Lopez during the SANE examination, and to further complicate matters, Jane was unavailable at trial and was never subjected to cross-examination, thus creating a Confrontation Clause issue.[72]

Given the facts, the court of appeals had two questions to settle: (1) would the admission of Jane's statements to Nurse Lopez offend the defendant's right to confrontation? And (2) if not, were the statements admissible under Rule 11-803(D)?

When addressing the Rule 11-803(D) question,[73] the court of appeals declined to focus on the trustworthy nature of the statements by using the pertinence rationale. Instead, the court chose to focus on the primary purpose of the auditor's questions and examination to determine

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65. *See Ortega*, 2008-NMCA-001, ¶ 3.

66. *See id.*

67. S.A.F.E. HOUSE, WHO WE ARE, www.safehousenm.org (last visited Jan. 13, 2013) (SAFE House is a shelter for victims of sexual and domestic violence of all ages. It serves more than 1,000 families per year and has treatment plans in place "aimed at healing the wounds, breaking the cycle, and improving the lives of families in [the] community." A SAFE House interview is a conversation-like interview with a victim in a safe and comfortable setting. SAFE House's mission statement is "[t]o shelter and empower survivors of intimate partner domestic violence and to improve the way New Mexico responds to this violence").

68. *See Ortega*, 2008-NMCA-001, ¶ 4.

69. *See id.*

70. *See id.*

71. *See id.* ¶ 5.

72. *Id.* ¶ 7.

73. Only the court's Rule 11-803(D) analysis is addressed in this note. The court's Confrontation Clause analysis is not discussed.

whether the statements could be admissible under Rule 11-803(D).[74] In *Ortega*, the auditor was Nurse Lopez. When assessing the primary purpose of a SANE nurse's examination, the court reasoned that SANE nurses are not medical providers, but rather fulfill a forensic duty, therefore making their primary purpose more closely aligned with law enforcement than medical care.[75] The court determined that SANE examinations are "geared for the preparation, collection, evaluation and disposition of evidence, and all treatment provided is relative to the patient being a victim of a sexual crime."[76] Furthermore, the court reasoned that the SANE examination had no medical purpose and that SANE nurses are not in the business of providing ongoing treatment.[77] In so doing, the court determined that the primary purpose of a SANE nurse was not to proscribe a medical diagnosis or provide treatment, but rather to obtain information, gather evidence, and work in concert with law enforcement.[78]

Because the court adopted a primary purpose analysis rather than applying a pertinence or selfish interest analysis for determination under Rule 11-803(D), the court held that the statements were inadmissible because the primary purpose of a SANE examination is forensic rather than medical.[79] In other words, because a SANE examination's primary purpose is not medical care, statements made to a SANE nurse are not admissible under Rule 11-803(D). The result was that the court of appeals categorically excluded all future statements made to SANE nurses for purposes of admission under Rule 11-803(D), regardless of the statement's inherent trustworthiness or the extent to which that statement was relied upon for a medical diagnosis or treatment.[80] The *Ortega* holding not only changed the analysis for Rule 11-803(D) in New Mexico, but departed from the analysis that the Tenth Circuit had adopted as well.

In *State v. Tafoya*, which the court of appeals decided subsequent to *Ortega* and *Mendez* but while *Mendez* was on certiorari before the New Mexico Supreme Court, the court was asked to determine whether statements that identified the defendant, made to a "non-SANE" nurse, were

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74. *See Ortega*, 2008-NMCA-001, ¶ 1.
75. *See id.* ¶ 32.
76. *See id.* ¶ 21.
77. *See id.* ¶¶ 12, 22.
78. *See id.* ¶ 21.
79. *See Ortega*, 2008-NMCA-001, ¶ 1.
80. *See id.* (Trustworthiness—upon which the hearsay exception is based—was never once mentioned in the court's analysis of Rule 11-803(D)); *see* State v. Mendez, 2010-NMSC-044, ¶ 27, 148 N.M. 761, 242 P.3d 328 (stating that the *Ortega* court never mentioned the word "trustworthiness").

admissible under Rule 11-803(D).[81] In *Tafoya*, seven-year-old L.T.[82] told some of her family members she was being molested by the defendant.[83] L.T. was subsequently taken to see Rosella Vialpando, a nurse who works at the pediatric specialty clinic Para Los Niños, where L.T. was examined.[84] The examination consisted of a patient history, which included nurse Vialpando asking L.T. about why she was there and what had happened to her, and a physical examination.[85] At trial, the court allowed Vialpando to testify under Rule 11-803(D) that L.T. had told her during the examination that the "defendant touched her more than one time with his private, that he touched her butt with his private, and that he made her touch his private with her hands."[86] After Vialpando testified

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81. State v. Tafoya, 2010-NMCA-010, ¶¶ 1, 31, 147 N.M. 602, 227 P.3d 92.

82. For purposes of confidentiality, the true identity of the victim will not be disclosed. Instead, the victim will be referred to as L.T.

83. *Tafoya*, 2010-NMCA-010, ¶ 2.

84. *See id.* ¶¶ 31, 35; UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE, DEPARTMENT OF PEDIATRICS, PARA LOS NINOS, http://hsc.unm.edu/SOM/pediatrics/divisions/paraLosNinos.shtml (last visited Jan. 13, 2013) (stating that Para Los Ninos ("PLN") is a specialty clinic that services children and adolescents when there is a concern that they have been subjected to sexual abuse).

> PLN provides medical evaluations for children and adolescents who have been sexually abused and sexually assaulted. This multidisciplinary team provides comprehensive medical examinations, laboratory evaluations, crisis counseling and anticipatory guidance. PLN is the primary 24 hour on call service for pediatric sexual abuse. Colposcopic exams with photographic documentation are performed on children and adolescents who have been sexually abuse and assaulted. Medical examinations and services are free of charge. Services are provided on an emergency and scheduled basis. PLN has a leadership role in responding to, treating, and preventing child sexual abuse cases. Consultation is also available for evaluation of children with sexually transmitted diseases or second opinions on difficult or controversial cases. PLN also provides follow-up care for child sexual abuse and adolescent sexual assault survivors. PLN's Medical Director and staff offer expert medical reviews of cases of sexual abuse throughout the State. PLN staff provides training to social workers, educators, the *District Attorney's offices, law enforcement* and other state agencies and professionals in other disciplines who require education in the area of child maltreatment. Services Provided: Child Sexual Abuse–emergency and scheduled evaluations; *Forensic medical evaluations for evidence collection, rape kits and photo documentation*; Medical services for adults with developmental disabilities; Adolescent sexual assault follow-up; Consults; Crisis counseling and anticipatory guidance; Education and clinical training in the areas of child sexual abuse and adolescent sexual assault.

Id. (emphasis added).

85. *See Tafoya*, 2010-NMCA-010, ¶ 35.

86. *See id.* ¶ 31; *see also* State v. Ortega, 2008-NMCA-001, ¶ 24, 143 N.M. 261, 175 P.3d 929 (The child described to Nurse Lopez how the Defendants "assault[ed] her by rubbing parts of her body, and demanding she rub parts of theirs," and additionally described the times and places this occurred.); State v. Mendez, 2010-NMSC-044, ¶

about the victim's identification of the defendant and the acts that he subjected upon L.T., the defendant was convicted on four counts of criminal sexual penetration of a minor and two counts of criminal sexual contact of a minor.[87]

In light of *Ortega*, the defendant appealed the trial court's ruling allowing Vialpando's testimony under Rule 11-803(D).[88] The court of appeals' decision in *Ortega*, and upheld by the same court in *Mendez*, barred statements made to SANE nurses from admission under Rule 11-803(D). Instead of following its own precedent, the *Tafoya* court instead held that the statements were *admissible* under Rule 11-803(D).[89] The court deemed the statements admissible because they were not made to a SANE nurse and the examination was not a SANE examination.[90] Therefore, it was not conducted primarily for law enforcement purposes.[91] In support, the court noted that nurse Vialpando testified that she is a family nurse practitioner, does "pretty much what a primary care doctor does," and that "she is trained to assess, diagnose, and treat acute and chronic illnesses."[92] Therefore, the court held that *Ortega* was not controlling because technically, the examination was not a SANE examination.[93]

In 2010, the New Mexico Supreme Court took the opportunity to clarify and restore the proper analysis and application of Rule 11-803(D) to statements made by a child to a SANE nurse.[94] The case, *State v. Mendez*, is discussed below.[95]

48, 148 N.M. 761, 242 P.3d 328 (The child disclosed to Nurse Lopez that the defendant "touched her with his tongue," "put his finger inside and it hurt," and that "the Defendant had not ma[d]e her touch him," but that he told her not to tell anyone.). The statements and descriptions given by the child-victims in *Tafoya*, *Ortega*, and *Mendez* are essentially identical, yet the courts treated them differently.

87. *See Tafoya*, 2010-NMCA-010, ¶ 1.

88. *See id.* ¶ 31.

89. *Id.* ¶ 36.

90. *Id.*

91. *See id.*

92. *Tafoya*, 2010-NMCA-010, ¶ 35.

93. *Id.* ¶ 36.

94. *See generally id.* (demonstrating that *Ortega* was wrongly decided, as the same court, but different panel, that decided *Ortega* stepped around the holding in *Ortega* to ensure trustworthy statements made by a child victim to a nurse during a sexual assault exam would be admissible at trial).

95. State v. Mendez, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328.

III. STATEMENT OF THE CASE

In September 2005, nine year-old T.F.[96] started bleeding, but her mother did not know why.[97] Days later, after she found bloody paper towels hidden in the bathroom, T.F.'s mother became alarmed and brought T.F. to Arroyo Chamisa Pediatric Center to be examined.[98] T.F. was examined by Nurse Lopez,[99] a SANE nurse, who diagnosed T.F. as being a victim of sexual abuse after a brief physical examination.[100] Nurse Lopez disclosed her diagnosis to T.F.'s mother, who stated that the only male T.F. had been around was Bernadino Mendez, the father of T.F.'s mother's current boyfriend.[101] At that point, T.F. asked Nurse Lopez to leave the room so she and her mother could be alone.[102] T.F. then disclosed to her mother that she was sexually abused by Mendez.[103] T.F.'s mother communicated her daughter's admission to Nurse Lopez, who then called the New Mexico State Police and made arrangements for a SANE examination.[104] Nurse Lopez later testified that she called the po-

96. For purposes of confidentiality, the true identity of the victim or the victim's mother will not be disclosed. Instead, the victim is referred to as T.F., and her mother is referred to as T.F.'s mother.

97. *See Mendez*, 2010-NMSC-004, ¶ 3.

98. *See id.*

99. Coincidentally, Nurse Lopez is the same nurse who conducted the SANE examinations in *Ortega* and *Mendez*.

100. *See Mendez*, 2010-NMSC-004, ¶¶ 4–7 (during the brief physical examination, which occurred at Arroyo Chamisa, Nurse Lopez examined T.F. but found no current bleeding or trauma. However, because Nurse Lopez was concerned about T.F.'s prior complaints of "pain on the right side of her stomach" and because the cause of her previous bleeding could not be determined, Nurse Lopez made arrangements for a SANE examination to be conducted. Arroyo Chamisa did not have the necessary medical equipment needed to locate the source of T.F.'s bleeding, so Nurse Lopez referred T.F. to the Family Advocacy Center, which had the necessary equipment.).

101. *See id.* ¶ 5.

102. *See id.*

103. *See id.*

104. *See id.* (The SANE examination consisted of both an oral component (patient history) and a physical component. The physical component of this examination differed from the previous examination because at the previous examination, Nurse Lopez did not have access to any specialized equipment. Specifically, Nurse Lopez used a colposcope to further examine and help determine the source of T.F.'s bleeding); *see also* WEBSTER'S UNABRIDGED DICTIONARY 407 (2d ed. 2001) ("Colposcope: an instrument that magnifies the cells of the cervix and vagina to permit direct observation and study of the living tissue."); NMSA 1978, § 32A-4-3(A) (2005) (requiring all adults in New Mexico to report child abuse or suspected child abuse).

lice and set up the examination because she considered the situation to be an emergency that needed to be dealt with immediately.[105]

The SANE examination occurred less than two hours later at another location, the Family Advocacy Center, roughly seven miles from Arroyo Chamisa.[106] The Family Advocacy Center had specialized equipment necessary to carry out the SANE examination that Arroyo Chamisa lacked.[107] The examination had two separate parts: a patient-history interview and a physical examination.[108] During T.F.'s patient-history interview, she revealed facts relevant to the cause of her bleeding and specific acts of sexual abuse to which she was subjected, and she named Mendez as the perpetrator.[109] During that portion of the interview, it is unclear from the record whether a New Mexico State Police officer was present in the interview room, or simply present somewhere in the building.[110] Based upon the entirety of the SANE examination—which includes both the physical examination and the patient interview—Nurse Lopez determined that T.F.'s injuries were consistent with a penetrating injury and thus diagnosed T.F. as a victim of sexual abuse.[111] Mendez was later indicted for two counts of criminal sexual penetration of a minor and two counts of criminal sexual contact of a minor.[112]

A. Procedural History

Before trial, Mendez moved to suppress from evidence all statements that T.F. had made to Nurse Lopez, regardless of whether T.F. would testify at trial. The State argued that T.F.'s statements made to Nurse Lopez were admissible under Rule 11-803(D). At a pretrial hearing on the matter, Nurse Lopez testified that most of the questions and answers given during the patient-history interview pertained to the medical treatment and diagnosis of T.F., including the statements naming

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105. *See* State v. Mendez, 2010-NMSC-044, ¶ 6, 148 N.M. 761, 242 P.3d 328.

106. *See id.*

107. *See id.* ¶ 7.

108. *See id.* (describing how a proper SANE examination consists of these two parts as well, with the first part being the patient interview. The victim's answers to questions asked during that interview actually guide the scope and depth of the physical examination.).

109. *See id.* ¶ 9.

110. *See* State v. Mendez, 2010-NMSC-044, ¶ 8, 148 N.M. 761, 242 P.3d 328; *see also* State v. Mendez, 2009-NMCA-060, ¶ 31, 146 N.M. 409, 211 P.3d 206 (arguing that the presence of the police officer during the patient interview added to the conclusion that the examination had a primary purpose of a criminal investigation rather than a medical investigation).

111. *See Mendez*, 2010-NMSC-044, ¶ 10.

112. *See id.*

Mendez as the perpetrator.[113] Nurse Lopez explained that the identity of a child's abuser is relevant and necessary to removing that child from an unsafe environment and aids the medical provider in determining what injuries to look for based upon the age and size of the alleged perpetrator.[114] The trial court ruled that all statements made to Nurse Lopez by T.F. were to be excluded at trial. The court expressly relied on *Ortega*, which held that no statement made to a SANE nurse could be admitted at trial, as the primary purpose of a SANE examination is something other than medical care.[115] The trial court stated, "I find that *Ortega*, in fact, specifically excludes [the] 11-803(D) hearsay exception for SANE exam[s] . . . I don't see [that] there are any exceptions."[116]

The State then appealed the court's suppression order. On review, the court of appeals applied *Ortega*, reasoning that SANE examinations exist for forensic purposes. The court's decision was based partly on the fact that T.F.'s mother signed a consent form that included clauses stating that: (1) a SANE examination is not a routine medical check-up; (2) the SANE nurse is not responsible for identifying, diagnosing, or treating any new or existing medical problems; (3) the examination will involve the collection of evidence; and (4) photographs may be taken.[117] The consent form bolstered the court of appeals' argument that SANE examinations serve forensic rather than medical purposes, because although there are medical aspects to the examination, there are not enough characteristics of a classic medical examination to overcome *Ortega*.[118] The State argued that *Mendez* was distinguishable from *Ortega* because both examinations of T.F. were conducted for medical purposes. The court rejected the State's argument by determining T.F.'s initial physical examination had been completed, a diagnosis of sexual abuse had been made, T.F. was referred to another site for a SANE examination, and the New Mexico State Police had been notified.[119]

The court drew a line between the initial examination and the subsequent one, asserting that the subsequent examination was not for a medi-

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113. *See id.* ¶ 11.

114. *See id.* ¶ 51; *see also* In re T.T., 815 N.E.2d 789 (Ill. App. Ct. 2004) (a physician's interest is to facilitate the least traumatic method of treatment possible).

115. *See Mendez*, 2010-NMSC-044, ¶¶ 12, 18; *see also* State v. Ortega, 2008-NMCA-001, ¶¶ 21–22, 143 N.M. 261, 175 P.3d 929.

116. *See Mendez*, 2010-NMSC-044, ¶ 12.

117. *See* State v. Mendez, 2009-NMCA-060, ¶ 25, 146 N.M. 409, 211 P.3d 206.

118. *Ortega*, 2008-NMCA-001, ¶¶ 1, 21 (holding that all statements made to SANE nurses are categorically excluded from admission under Rule 11-803(D). The court justified this holding by arguing that SANE examinations' primary purpose is forensic rather than medical.).

119. *See Mendez*, 2009-NMCA-060, ¶¶ 30–31.

cal purpose, but a forensic one.[120] However, the court discounted the fact that Nurse Lopez could not find the source of T.F.'s bleeding during the initial examination and needed specialized medical equipment for this purpose.[121] Furthermore, the court noted that all adults in New Mexico have a duty to report any suspected child abuse, sexual or otherwise, to the police.[122] Nurse Lopez simply was following State law by contacting the authorities. Nurse Lopez's early diagnosis of sexual abuse was based in part upon the fact T.F. was far too young to be menstruating, and thus the probable explanation that her bleeding was caused by sexual abuse.[123] However, the court strictly applied *Ortega* and thus categorically excluded all statements T.F. had made to Nurse Lopez during the SANE examination, on the determination that the examination had the primary purpose of something other than medical care.[124]

The New Mexico Supreme Court granted the State's writ of certiorari in February 2010.[125]

B. Reasoning/Discussion

The New Mexico Supreme Court, in a unanimous opinion authored by Justice Bosson, held that: (1) focusing on the "purpose of the encounter" oversimplifies the Rule 11-803(D) analysis and creates an arbitrary distinction between admissible and inadmissible hearsay; (2) the touchstone of admissibility under Rule 11-803(D) is trustworthiness; and (3) statements made to a SANE nurse can be admissible for purposes of medical diagnosis or treatment, but courts must exercise exacting scrutiny to ensure trustworthiness.[126] Thus, the court overruled *Ortega* to the extent of its analysis of Rule 11-803(D) and abrogated the court of appeals in *Mendez*.[127] The court's actions are addressed separately below.

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120. *See id.* ¶¶ 31–32.

121. *See id.*

122. NMSA 1978, § 32A-4-3(A) (2005) ("Every person . . . who knows or has a reasonable suspicion that a child is an abused or neglected child shall report the matter immediately to" the police, Child Youth & Families Department or tribal authorities.).

123. *See Mendez*, 2009-NMCA-060, ¶ 23.

124. *See id.* ¶ 34.

125. State v. Mendez, 2009-NMCERT-006, 146 N.M. 734, 215 P.3d 34.

126. *See* State v. Mendez, 2010-NMSC-044, ¶¶ 19–46, 148 N.M. 761, 242 P.3d 328.

127. *See id.* ¶ 40.

1. The "primary purpose" test oversimplifies Rule 11-803(D) and creates arbitrary distinctions

The New Mexico Supreme Court, in a comprehensive analysis of the court of appeals' decisions in *Ortega*, *Tafoya*, and *Mendez*, determined the *Ortega* analysis of Rule 11-803(D) was oversimplified and created an arbitrary distinction regarding the admissibility of statements under the rule.[128]

The supreme court reasoned that *Ortega* conflated the Confrontation Clause analysis with the Rule 11-803(D) analysis by combining the "primary purpose test" from the Confrontation Clause with the two-part analysis for admitting statements under Rule 11-803(D).[129] Furthermore, Justice Bosson pointed out that the *Ortega* court did not once mention "trustworthiness" in its analysis of the rule and instead relied on the analysis surrounding the Confrontation Clause to support its holding regarding Rule 11-803(D).[130]

The New Mexico Supreme Court stated that the court of appeals erred in its failure to observe that the Confrontation Clause and Rule 11-803(D) are separate and distinct legal constructs.[131] They are not co-extensive.[132] Simply examining the purpose of each construct makes this distinction clear: the purpose of the hearsay rules and exceptions are to ensure the jury is not exposed to unreliable evidence, while the purpose of the Confrontation Clause is to ensure the accused in a criminal trial "be confronted with the witnesses against him," regardless of the witness' reliability.[133] Because the *Ortega* court based its reasoning on the primary purpose standard, it arbitrarily drew a line between admissible and inadmissible hearsay without taking into account the trustworthiness and reliability of the statements.[134]

The supreme court also stated that the *Ortega* analysis improperly instructed trial courts to determine the primary purpose of the encounter, rather than judge the reliability of the statements made by the declar-

128. *Id.* ¶¶ 24–40.
129. *Id.* ¶ 29.
130. *Id.* ¶ 27.
131. *See* State v. Mendez, 2010-NMSC-044, ¶ 28, 148 N.M. 761, 242 P.3d 328.
132. *Id.*
133. *See id.*; U.S. CONST. amend VI.
134. *See Mendez*, 2010-NMSC-044, ¶ 33 (stating that because *Ortega* is fundamentally flawed, and since the analysis does not consider trustworthiness, the *Ortega* court created an arbitrary line between admissible and inadmissible hearsay on account of the status of the auditor).

ant.[135] Because *Ortega* shifted the focus of the analysis away from trustworthiness and to a primary purpose standard, the supreme court overruled *Ortega* to the extent of its discussion of the admissibility of statements made under Rule 11-803(D).[136]

2. The touchstone of admissibility under Rule 11-803(D) is trustworthiness

Central to its holding, the New Mexico Supreme Court acknowledged that trustworthiness is the root of the hearsay exceptions and discussed how trustworthiness was traditionally determined for purposes under Rule 11-803(D) by applying a two-part analysis.[137] The analysis consists of examining the selfish interests of the declarant and the extent to which the statement was pertinent to medical diagnosis or treatment. However, the court argued both prongs of the two-part analysis are not necessarily needed to establish trustworthiness.[138] Rather, by examining the pertinence of the statement alone, courts can establish the statement's trustworthiness and thus determine its admissibility under Rule 11-803(D).[139]

Furthermore, the supreme court reasoned that in child abuse cases, a "pertinence-alone" standard is preferable to a two-part standard because many children will lack the requisite "help-seeking motivation" or it will be unclear whether the child understands the relationship between being truthful and receiving medical care.[140] Therefore, it is far more practicable to examine only the pertinence rationale. Otherwise, trustworthy

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135. *See id.* ¶ 40 (reasoning that *Ortega* shifted the focus of the analysis away from the statement's trustworthiness, which goes to reliability. The more trustworthy the statement, the more reliable that statement becomes.).

136. *See id.*

137. *See id.* ¶¶ 19–20. First, the patient's "help-seeking motivation" ensured the patient is truthful to his or her medical provider, as people exhibit a selfish interest in telling the truth in these situations because if they are untruthful, the only person they hurt is themself. *Id.* Second, the pertinence of the statement weighs the trustworthiness of the statement. *Id.* A statement is pertinent if the medical provider relies upon that statement in making their diagnosis or conducting their treatment. *Id.* The rationale behind the pertinence test is that if a statement is relied upon to the extent that a doctor bases his diagnosis or treatment on it, it must be truthful. *Id.*; *see generally supra* pp. 4–6.

138. *See id.* ¶ 22.

139. *See Mendez*, 2010-NMSC-044, ¶ 22.

140. *See id.* ¶ 23; *see also* Morgan v. Foretich, 846 F.2d 941, 951 (4th Cir. 1988). The *Mendez* court relied heavily upon U.S. Supreme Court Justice Powell's concurrence-in-part and dissent-in-part, which argued that focusing only on the pertinence of the statement is preferable in child abuse cases because the child is not likely to understand the difference between being truthful and receiving medical care. *Id.*

statements may end up being excluded from admission because of the difficulty of proving a child's motivation when being examined by a medical provider. On the other hand, the *Mendez* court stated that a pertinence-only standard lacks the inherent reliability of the traditional two-part standard.[141] When taking this into consideration, the supreme court nevertheless determined the pertinence-alone standard is sufficiently reliable and trustworthy in child sexual abuse cases even though the pertinence-alone standard has less reliability than the two-part standard.[142] To rectify the issue, the supreme court held that a better approach is for trial courts to take both rationales into account, depending on the specific circumstances in each case, while focusing on the trustworthiness of each statement.[143]

3. Statements made to a SANE nurse may be admissible under Rule 11-803(D), but courts must exercise exacting scrutiny to ensure trustworthiness

The New Mexico Supreme Court expressly rejected the notion that statements can be categorically excluded from admission under Rule 11-803(D) based upon the professional status or affiliation of the auditor. While SANE nurses do have expertise in evidence collection and forensic technique, they nevertheless fill a void in the medical system and are much better suited to provide treatment to victims of child sexual abuse than are non-SANE nurses or other medical professionals.[144] The supreme court argued that although SANE nurses are more closely aligned with law enforcement than non-SANE nurses and physicians, that shouldn't take away from the fact SANE nurses do provide medical care, albeit specialized.[145]

Trial courts must examine each statement to determine admissibility under Rule 11-803(D). The *Mendez* court held that because SANE nurses do provide medical care in the form of diagnosis and treatment, and because Rule 11-803(D) is based upon trustworthiness and reliability, the proper procedure for trial courts to follow is to "shoulder the heavy responsibility of sifting through statements, piece-by-piece, making individual decisions on each one."[146] Additionally, courts should continuously consider the help-seeking motivation of the declarant and the pertinence

141. *Mendez*, 2010-NMSC-044, ¶ 23.
142. *See id.*
143. *See id.*
144. *See id.* ¶¶ 41, 45.
145. *See id.* ¶ 43; Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 951 (2007).
146. *Mendez*, 2010-NMSC-044, ¶ 46.

of the statements to the diagnosis or treatment of the victim when conducting its analysis.[147]

4. *Ortega* is partially overruled and *Mendez* is abrogated

The New Mexico Supreme Court, viewing *Ortega* as using an incorrect and unworkable analysis, expressly overruled portions of the case not having to do with the Confrontation Clause. Thus, the court held that SANE nurses have a dual role—medical and forensic—and that statements made to SANE nurses are not categorically excluded from admission.[148] Instead, trial courts must examine each statement sought to be introduced and make a determination of the statement's trustworthiness based upon the victim's motivation to seek medical care and the SANE nurse's reliance on the statements to diagnose or treat the victim.[149] Both the victim's subjective belief—her selfish interest in seeking medical care—and the objective actions of the SANE nurse—the pertinence of the statement to diagnosis or treatment—are fully addressed in determining the admissibility of the statements.

Mendez has potentially far-reaching implications in both civil[150] and criminal law, on both sides of the bar. Correctly determining reliable statements in child sexual abuse cases is critically important, not just for the successful prosecution of child predators, but additionally for those wrongly accused of committing such criminal and tortious acts. Ineffective prosecution of child predators and wrongful convictions are detrimental to all parties involved, and because the number of cases involving child sexual abuse is on the rise, the stakes in these cases are particularly high.[151]

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147. *Id.*

148. *Id.* ¶ 1.

149. *See id.* ¶ 43.

150. Civil tort claims that will necessarily involve the *Mendez* analysis can include a variety of damages asserted against individuals and entities. Note, however, that the Confrontation Clause does not apply in civil actions. Therefore, inasmuch as *Mendez* discussed the Confrontation Clause, the case will have no bearing on that issue in a civil proceeding.

151. *See* Dyane L. Noonan, Note, *Where Do We Go From Here? A Modern Jurisdictional Analysis of Behavioral Expert Testimony in Child Sexual Abuse Prosecutions*, 38 SUFFOLK U. L. REV. 493 (2005) (stating that over the past several decades, reported incidents of child sexual abuse in the United States has risen as much as 2,300 percent); *see also* Lynn M. Marshall, Note, *Hutton v. State: Whose Rights are Paramount, the Defendant's or the Child Victim's?*, 27 U. BALT. L. REV. 291, 292 (1997) (stating that reported cases of child sexual abuse in the United States has increased from 6,000 in 1976 to 432,000 in 1991).

IV. ANALYSIS

A. The Confrontation Clause and Rule 11-803(D)

The Confrontation Clause and Rule 11-803(D) are separate legal constructs and have their own distinct analyses. In *Ortega*, the court essentially tried to kill two birds with one stone. In an attempt to settle Confrontation Clause issues regarding the testimonial nature of statements made by children to SANE nurses, and to settle issues regarding those statements' admissibility under Rule 11-803(D), the court combined the analysis for these two legal constructs to settle both issues in a single sweep.[152] While the idea of combining the analyses for the two constructs had some merit, when applied, it effectively turned a blind eye to the trustworthy character of many statements that would not be unfair to either party if they were admitted at trial.[153]

It is tempting to accept the analysis proffered by *Ortega*, as the testimonial nature of a statement is closely tied to that statement's admissibility at trial. According to the U.S. Supreme Court's rulings in *Crawford*[154] and *Davis*,[155] if a SANE nurse is acting under the guise of law enforcement and is unavailable at trial, her testimony is not admissible in court under the Confrontation Clause.[156] However, under a correct *Crawford* analysis, "information that was elicited from patients for the purposes of medical diagnosis or treatment would be considered non-testimonial in nature, and therefore may be admissible."[157] But if a court determines that a SANE nurse was functioning under the guise of law enforcement and not as a medical provider, then her testimony concerning the hearsay statements would most likely be inadmissible at trial.[158]

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152. *See Mendez*, 2010-NMSC-044, ¶ 26 (stating that "*Ortega* for the first time conflated the criteria for Confrontation Clause analysis and hearsay under Rule 11-803(D)").

153. *See Mendez*, 2010-NMSC-044, ¶¶ 24–40.

154. Crawford v. Washington, 541 U.S. 36, 68 (2004).

155. Davis v. Washington, 547 U.S. 813, 822 (2006).

156. *See generally* State v. Ortega, 2008-NMCA-001, ¶ 36, 143 N.M. 261, 175 P.3d 929. The child was not available in court or previously subject to cross examination, and under *Crawford* and *Davis*, admitting the testimony violated the Confrontation Clause because the statements the child gave to Nurse Lopez were testimonial in nature, as the court determined the primary purpose of the nurse's examination was in a law enforcement capacity. *Id.*; Gordon, *supra* note 37.

157. *See* Rebecca Campbell, *Defining the Boundaries: How Sexual Assault Nurse Examiners (SANEs) Balance Patient Care and Law Enforcement Collaboration*, 7 J. FORENSIC NURSING 17, 18 (2011); *see generally Crawford*, 541 U.S. 36.

158. *See generally Ortega*, 2008-NMCA-001.

Given the particular facts of *Ortega*, the court fell into the trap of conflation in the narrow field between the Confrontation Clause and Rule 11-803(D). The facts of *Ortega* did not help. In *Ortega*, it was clear that the SANE examination, which occurred days after an initial physical examination and after a SAFE House interview, did not have a medical purpose, but a forensic one.[159] Adding to these problems was the fact that the victim was unavailable at trial. Given the facts, there needed to be an analysis under both the Confrontation Clause and Rule 11-803(D). But to combine the analysis of both constructs, however convenient and workable it was in *Ortega* with the specific facts of that case, was erroneous.[160] Simply barring all statements made to SANE nurses based upon rather extraordinary facts in a single case is illogical for stare decisis purposes and has the practical effect of excluding trustworthy statements from admission at trial.[161]

The *Mendez* court recognized and corrected the *Ortega* court's mistake in conflating the Confrontation Clause analysis with the Rule 1-803(D) analysis.[162] Because the underlying rationale for hearsay exceptions is the inherent trustworthiness of the declarant's statements, the primary motivation of the *auditor* is not a factor under Rule 11-803(D), so long as the purpose of the *statements* meets the requirements of Rule 11-803(D).[163]

B. The Ortega Standard Was Not Workable

The same court[164] that decided *Ortega* split hairs in *Tafoya* to find a way around its own restrictive rule in order to ensure that trustworthy statements could be admitted into evidence.[165] The rule promulgated by *Ortega* was unworkable because it categorically excluded all statements made to SANE nurses under Rule 11-803(D), even though many of those statements are both trustworthy and reliable.[166] In *Tafoya*, the court was presented with a case where the child's statements to the medical provider were trustworthy and reliable, but in light of *Ortega*, the question of whether those statements could be admitted at trial became an issue in

159. *See id.* ¶¶ 4–5.
160. *See* State v. Mendez, 2010-NMSC-044, ¶ 28, 148 N.M. 761, 242 P.3d 328.
161. *See id.* ¶ 33.
162. *Id.* ¶ 28.
163. *See id.* ¶¶ 19–23.
164. The New Mexico Court of Appeals decided both *Ortega* and *Tafoya*, but the court's panels differed for the two cases.
165. *See* State v. Tafoya, 2010-NMCA-010, ¶¶ 35–36, 147 N.M. 602, 227 P.3d 92.
166. *See Mendez*, 2010-NMSC-044, ¶ 33.

contention.[167] The question became whether the medical examination was a SANE examination.

For all intents and purposes, in *Tafoya*, the examination that L.T. received was a SANE examination. In discussing the examination, the *Tafoya* court stated that Para Los Niños[168]—where L.T. was examined—serves children and adolescents who are suspected victims of sexual abuse and that L.T.'s examination consisted of "Vialpando talking to her about why she was there, Vialpando listening to L.T.'s description of what happened, and then Vialpando performing an examination of L.T.'s genital and anal areas."[169] Interestingly, the *Tafoya* court failed to state that Vialpando's examination mirrored that of a SANE examination, in that SANE examinations consist of the nurse taking a patient history (which Vialpando did), and then performing a physical examination (which Vialpando did). The New Mexico Supreme Court was critical of this point as well.[170] The supreme court stated: "[t]he nurse in *Tafoya* performed similar examinations to those performed by Nurse Lopez in this case, and she did so at a facility specially equipped to treat child victims of sexual abuse. In addition, like Nurse Lopez . . . the nurse in *Tafoya* was trained to collect evidence of sexual abuse that could be used by police to build a case against the perpetrator."[171] The examinations, although having technically different names, were virtually identical.

Instead of taking these facts into consideration—and thus being forced to follow *Ortega*—the *Tafoya* court focused its attention on facts that would create the illusion that the examination of L.T. was not a SANE examination.[172] Specifically, the court stated Vialpando was a family nurse practitioner, does "pretty much what a primary care doctor does," and "is trained to assess, diagnose, and treat acute and chronic

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167. *Tafoya*, 2010-NMCA-010, ¶¶ 31, 33 (discussing the holding of *Ortega*: "In *Ortega*, this court held that statements made to [SANE nurses] do not fall within the exception provided under 11-803(D) because the role of a SANE nurse is primarily to collect evidence for law enforcement purposes and primarily to diagnose or treat medical conditions."); *see generally* State v. Ortega, 2008-NMCA-001, ¶ 36, 143 N.M. 261, 175 P.3d 929.

168. *See supra* note 84; *see also Tafoya*, 2010-NMCA-010, ¶¶ 31–35.

169. *See Tafoya*, 2010-NMCA-010, ¶35; *see also Mendez*, 2010-NMSC-044, ¶¶ 41–43; *see generally* ALBUQUERQUE SANE COLLABORATIVE, SEXUAL ASSAULT SERVICES, http://abqsane.org/id35.html (last visited Jan. 13, 2013) (describing that a SANE nurse is a specially trained nurse who examines and treats victims of sexual abuse).

170. *See Mendez*, 2010-NMSC-044, ¶ 35.

171. *See id.*

172. *Tafoya*, 2010-NMCA-010, ¶¶ 31–36.

illnesses."[173] Additionally, the court distinguished the *Tafoya* facts further from *Ortega* and *Mendez*[174] by stating that L.T. had not undergone an examination prior to the one at issue (as the victims did in *Ortega* and *Mendez*), and that law enforcement was not instigated or otherwise involved with the examination, despite Vialpando notifying the authorities based upon her obligation to do so under New Mexico law.[175] Despite the *Tafoya* court's characterization of L.T.'s examination as something other than a SANE examination, the facts simply did not support it, and the New Mexico Supreme Court recognized this.[176] Determining that L.T.'s examination differed greatly from the examinations in *Ortega* and *Mendez*, the court of appeals ultimately ruled that the statements could be admitted under Rule 11-803(D).[177]

Practically speaking, *Tafoya* is a great example of why *Ortega* was unworkable. In *Tafoya*, the court argued that L.T.'s examination did not fall within the "law enforcement parameters" as did the examinations in *Mendez* and *Ortega*. Therefore, the statements made during that examination were admissible under Rule 11-803(D) because *Ortega* is controlling only in regard to examinations that fall within "law enforcement parameters."[178] However, the logic is circular. The *Tafoya* court wrote, "[w]e are unwilling to conclude that because nurse Vialpando sometimes provides evidence to the police after an examination, L.T.'s pediatric examination was for forensic law enforcement purposes rather than medical purposes," while disregarding that all adults in New Mexico are statutorily required to report suspected child abuse.[179] If following state law, Vialpando should *always* notify the authorities after conducting an examination if she suspects abuse.[180] For purposes of the *Ortega* court's

173. *Id.* ¶ 36.

174. Here, *Mendez* refers to the New Mexico Court of Appeals' opinion in State v. Mendez, 2009-NMCA-060, ¶ 33, 146 N.M. 409, 211 P.3d 206, which was on certiorari to the New Mexico Supreme Court when *Tafoya* was decided.

175. *Tafoya*, 2010-NMCA-010, ¶ 36; *see generally* NMSA 1978, § 32A-4-3(A) (2005).

176. *See* State v. Mendez, 2010-NMSC-044, ¶ 33, 148 N.M. 761, 242 P.3d 328 (discussing several reasons why the facts of *Tafoya* were "strikingly similar" to the facts of Mendez, and stating that "[a] closer look reveals that none of the putative factual distinctions provide a principled basis for administering Rule 11-803(D)").

177. *Tafoya*, 2010-NMCA-010 ¶ 36.

178. *See id.*

179. *See id.*; *see also* NMSA 1978, § 32A-4-3(A) (2005).

180. *See id.*; *see also* NEW MEXICO COALITION OF SEXUAL ASSAULT PROGRAMS, *Sexual Assault Consent Form* (Jan. 2009) ("I understand that the SANE nurse is not an employee or agent of any law enforcement agency but that a SANE nurse is required by state law to report child sexual abuse or neglect to appropriate authorities.").

analysis, the fact that New Mexico requires reporting of all suspected child abuse makes SANE nurses much more aligned with non-SANE nurses. The *Tafoya* court's vague "law enforcement parameters" analysis added another layer to the already difficult "primary purpose" analysis, all the while ignoring that the proper analysis under Rule 11-803(D) is trustworthiness, not the status, primary purpose, or parameters of the auditor.

The New Mexico Supreme Court reinstated the proper analysis for statements falling under Rule 11-803(D) in *Mendez*.[181] At the very heart of the issues in these cases is what to do with statements that identify an alleged abuser. In *Ortega*, the court chose to avoid the issue by excluding all statements made during SANE examinations.[182] In *Mendez*, the court of appeals did the same thing.[183] In *Tafoya*, instead of following the precedent set by the court of appeals by *Ortega* and *Mendez*, the court chose to admit these statements because the examination had a primary purpose of medical treatment and diagnosis (although it was a virtually a SANE examination) and thus did not fall within "law enforcement parameters."[184] The problem with this line of cases is that the analysis the court applied for Rule 11-803(D) had nothing to do with trustworthiness and reliability, but rather the technical aspects of certain examinations and examiners.[185] What the supreme court did in *Mendez* was right: it restored the proper analysis for Rule 11-803(D). However, even though the proper analysis is restored, controversy exists concerning the pertinence of statements that identify the alleged abuser to the victim's medical diagnosis or treatment.[186]

C. SANE Nurses Are Medical Providers

All SANE nurses are certified, registered nurses—which requires at least an associate's degree and licensure with the state—and upon receiving their nursing certification, they can become SANE qualified upon further training.[187] SANE nurses came to exist over the past thirty years

181. *See Mendez*, 2010-NMSC-044, ¶ 40.

182. State v. Ortega, 2008-NMCA-001, ¶¶ 16–27, 143 N.M. 261, 175 P.3d 929.

183. *Mendez*, 2010-NMSC-044, ¶ 3.

184. State v. Tafoya, 2010-NMCA-010, ¶¶ 31–36, 147 N.M. 602, 227 P.3d 92.

185. *See Ortega*, 2008-NMCA-001, ¶ 1 (stating that the "primary purpose" of the examination does not concern the trustworthiness of statements; rather, whether the examination was conducted for law enforcement or medical purposes.); *see also Mendez*, 2010-NMSC-044, ¶ 1.

186. *See generally Mendez*, 2010-NMSC-044, ¶¶ 51–53.

187. *See* New Mexico Coalition of Sexual Assault Programs, *Qualifications of Being a New Mexico SANE* (2008) (providing that an associate's degree two years nursing experience, completion of the New Mexico SANE training, and demonstrated

because nurses started to notice, and reacted to, the poor quality of medical treatment that victims of sexual abuse were receiving in hospital emergency rooms ("ER").[188] Specifically, nurses noticed that ER physicians were reluctant to conduct examinations related to sexual abuse because the physicians felt as though their skills were better used in situations where patients were facing life and death health risks.[189] Patients were forced to endure long wait times in the ER, averaging between four and eight hours before being seen.[190] While waiting, sexual abuse victims were not allowed to eat, drink, or use the restroom because of the likelihood that any evidence of the alleged crime would be destroyed.[191] Additionally, many ER physicians have not received formal forensic and evidence collection training.[192] Lastly, ER physicians were reluctant to collect evidence, as they knew that by doing so, they would need to provide detailed documentation, conduct a lengthy examination, would likely be called to testify and endure cross examination, where their techniques, education, and skills would be called into question.[193] As such, momentum began to build for nurses to become SANE qualified.

Although SANE nurses often work closely with law enforcement and function at "the nexus of medicine and law," their primary goal is to provide medical care, offer diagnoses, and provide medical treatment.[194] SANE nurses consider the separation of medical care from law enforcement paramount to their profession.[195] They "provide holistic care [to] the patient . . . and SANE documentation includes questions to assist the

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competency by a qualified preceptor are requirements. Further, recommended and strongly encouraged qualifications include having a bachelor's degree, demonstrated autonomy and nursing judgment, and having completed Trauma Nurse Core Curriculum); *see also* New Mexico Board of Nursing, *Eligibility Requirements*, *available at* http://nmbon.sks.com/uploads/FileLinks/67319fd61b0b4da28dfa2111728a4d46/RN_LPN_Exam_Nov2012_2.pdf.

188. *See* Rebecca Campbell et al., *The Effectiveness of Sexual Assault Nurse Examiner (SANE) Programs: A Review of Psychological, Medical, Legal, and Community Outcomes*, 6 TRAUMA, VIOLENCE & ABUSE 313, 314 (2005); *see generally* Patricia A. Furci, Note, *The Sexual Assault Nurse Examiner: Should the Scope of the Physician-Patient Privilege Extend That Far?*, 5 QUINNIPIAC HEALTH L.J. 229 (2002).

189. *See generally* Campbell, *supra* note 188, at 315.

190. *See generally id.*; *see also* Furci, *supra* note 188, at 229 (stating that victims of sexual assaults were "routinely treated in busy, impersonal hospital emergency rooms," forbidden to use the restroom, eat, and drink, and would wait long hours to be examined).

191. *See generally* Campbell, *supra* note 188, at 315.

192. *See generally id.*

193. *See generally id.*

194. *See generally* Campbell, *supra* note 157, at 17.

195. *See generally* Campbell, *supra* note 188, at 315.

nurse's determination of a safety plan for the patient, exposure risk for infectious diseases, and referrals for aftermath care."[196] Lastly, "SANE documentation is primarily a medical record that includes forensic documentation; however, the SANE medical record is not an investigatory tool" but is instead used for medical related purposes.[197]

Despite the fact that SANE nurses function separately from law enforcement and provide medical care, the New Mexico Court of Appeals in *Mendez* specifically pointed to some of the clauses in the SANE consent form, signed by T.F.'s mother, to add to its point that SANE nurses are not medical providers.[198] However, on the first page of the New Mexico Coalition of Sexual Assault Programs' Sexual Assault Exam Consent form—which is a model form—is a checklist that informs the victim or victim's guardian of what the SANE nurse may or may not have permission to do.[199] The checklist consists of eight questions, six of which are for distinctly medical purposes.[200] Presumably, the *Ortega* court never considered these questions, as they are lacking from its opinion.

The SANE consent form supports Nurse Lopez's testimony in *Mendez*, when she testified that a SANE examination has a medical purpose.[201] She explained her role was to look for reasons why T.F. had been bleeding—to develop a diagnosis and provide treatment—and that all of her questions related to that role.[202] Specifically, she testified that it was

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196. *See generally* NEW MEXICO COALITION OF SEXUAL ASSAULT PROGRAMS, *Core Components of a SANE Medical Record*, 2011. The "core components" are recommended by the New Mexico Coalition of Sexual Assault Programs and the New Mexico Statewide SANE Task Force to all SANE nurses and SANE programs throughout the state, although individual SANE programs may alter their records as they see fit. *Id.*; *see also* Furci, *supra* note 188, at 233. The "holistic care" SANE nurses provide arises from the fact that "victims of sexual assault display unique crisis symptoms" and "respond best to early intervention." *Id.* Further, during a SANE exam, "extraordinary trust and compassion is developed" between the victim and the SANE nurse, aiding the victim in speaking about her abuse and allowing the SANE nurse in provide holistic care and treatment. *Id.*

197. *See generally* NEW MEXICO COALITION OF SEXUAL ASSAULT PROGRAMS, *Core Components of a SANE Medical Record*, 2011.

198. *Mendez*, 2009-NMCA-060, ¶ 25.

199. NEW MEXICO COALITION OF SEXUAL ASSAULT PROGRAMS, *Sexual Assault Consent Form* (Jan 2009).

200. *See id.* The checklist consists of: "pregnancy test; emergency pregnancy prevention; Medicine for STI prevention; Tetanus diphtheria booster; Hepatitis B vaccine; urine collection for DFSA; photos for injury documentation; TB dye for injury documentation." *Id.* This checklist is given to the victim or victim's guardian, who can choose what the SANE nurse can and cannot do during her examination. *Id.*

201. *See* Mendez, 2009-NMCA-060, ¶ 33, 146 N.M. 409, 211 P.3d 206.

202. *See id.* ¶ 33; *see also* Sharon W. Cooper et al, 2 *Medical, Legal, & Social Science Aspects of Child Sexual Exploitation: A Comprehensive Review of Pornography,*

important for her to know: (1) what acts were performed so that she knew what to look for in the physical examination and whether the victim had been exposed to a sexually transmitted disease; (2) whether the abuse was acute or ongoing so she would know if the injuries would be fresh or healed; and (3) the identity of the perpetrator, so it could be determined whether it would be safe for the child to return home.[203] The purpose of both a SANE examination and a SANE nurse is to provide specialized medical treatment to victims of sexual abuse. The nurse's questions and the structure of the examination are all intended to facilitate the treatment of the victim at the highest level of care.[204] Despite the fact that SANE nurses are medical providers, a question that continuously arises concerns how SANE nurses use statements that identify the abuser in the context of their treatment and diagnosis of the patient.[205]

D. Statements Concerning the Identity of the Abuser

Ordinarily, when an adult identifies the person responsible for her injuries, she usually does not do so with the expectation that it will facilitate treatment.[206] However, cases involving children who are suspected of being sexually abused are inherently different. Learning the identity of an abuser and then guiding a child's course of treatment based upon the child's disclosures are fundamentally important to the child's health.[207] A child's health can be addressed by these statements largely in two ways: (1) the emotional and psychological problems that accompany abuse; and (2) avoiding recurrent abuse by determining whether the child is safe in

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Prostitution, and Internet Crimes (describing that the medical justifications for SANE examinations are: "[t]o assure that the correct diagnosis has been made and the child will be discharged to a safe environment, [t]o assure that there are no acute sexually transmitted infections, and if so, that appropriate medical management is instituted, [t]o assure that there is no evidence of acute genital trauma that might have long-term chronic consequences, [t]o assure that no chronic sexually transmitted infections exist, and if so, appropriate medical management is instituted, [and] [t]o assure that mental health diagnoses are preliminarily established and appropriate referrals are made.").

203. *See Mendez*, 2009-NMCA-060, ¶ 33.

204. *See generally* United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980) ("[A] discussion of the cause of the injury [is] important to provide guidelines for [the] examination by pinpointing areas of the body to be examined more closely and by narrowing [the] examination by eliminating other areas.").

205. *See* Mosteller, *supra* note 145, at 953 (statements of identification are major point of contention).

206. *See* Mosteller, *supra* note 10, at 276.

207. *See* Mosteller, *supra* note 145 at 951 (explaining that there is undeniably a medical purpose to every post-sexual assault examination, and those examinations are "fundamentally important to the child's health").

his or her home.[208] The Tenth Circuit Court of Appeals in *United States v. Joe* held that statements of identity are pertinent to a child's emotional and psychological treatment where the perpetrator is a member of the victim's family or household.[209] In coming to its conclusion, the court stated:

> All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser. The physician generally must know who the abuser was in order to render proper treatment because the physician's treatment will necessarily differ when the abuser is a household member of the victim's family or household . . . . For example, the [doctor] may recommend special therapy or counseling and instruct the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere.[210]

The proper treatment of emotional and psychological issues may hinge on the victim naming the abuser.[211]

Like the Tenth Circuit, New Mexico courts recognize that statements identifying an abuser are likely pertinent to medical diagnosis or treatment.[212] If a child is left in a home where abuse is continually occur-

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208. *See id.* at 954 (discussing United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005), in which "the court noted two reasons for a physician to find identity relevant to the treatment of child victims of sexual abuse. First, emotional and psychological problems that typically accompany sexual abuse are affected by whether or not the perpetrator is a family member, and second, knowing the identity of the abuser helps the doctor avoid recurrent abuse," which courts generally deem to be a medical concern.).

209. United States v. Joe, 8 F.3d 1488, 1494–95 (10th Cir. 1993).

210. *Id.*; *see* United States v. Chaco, 801 F. Supp. 2d 1200, 1207–10 (D. N.M. 2011) (discussing *Joe* and its holding that statements of identification can be pertinent to medical treatment and diagnosis).

211. *See* State v. Mendez, 2010-NMSC-044, ¶ 53, 148 N.M. 761, 242 P.3d 328, *citing* State v. Frank G., 2005-NMCA-026, 137 N.M. 137, 108 P.3d 543 (a proper diagnosis of the psychological issues resulting from sexual abuse often depends on the identity of the abuser); *see also* State v. Altgilbers, 109 N.M. 453, 459, 786 P.2d 680, 686 (1990) (identifying the abuser "may be essential to diagnosis and treatment"); United States v. Renville, 779 F.2d 430 (8th Cir. 1985) (doctors should be attentive to emotional and psychological injuries to the child and additionally have an obligation to prevent an abused child from being returned to an environment where the abuse will continue).

212. *See Altgilbers*, 109 N.M. at 460. In questioning a medical doctor about the necessity of questioning the child victim on the identity of their abuser, the trial transcript stated:

> Q. Why would it be important to know [the identity of the abuser]? A. Because their perception of the offender has to be looked at relative to the de-

ring, the child cannot effectively be treated for the abuse, either physically or psychologically.[213] Despite the considerable amount of evidence—both legal and medical—that supports the notion that statements of identity are pertinent to medical treatment, many courts still struggle with taking this step forward. To help rectify the issue, I posit that the judiciary adopt a working definition of "treatment" to act as a consistent guide when determining these issues.

As a starting point, courts should regard treatment—in the context of child sexual abuse—as the process by which recovery and healing is afforded, with the goal of making the victim whole.[214] "Recovery" and "healing" include all issues pertaining to the physical, emotional, and psychological well-being of the victim.[215] Such a broad definition is necessary because child sexual abuse, and the treatment thereof, will differ from child to child and from situation to situation. A broad definition of treatment would actually reflect the broad definitions set forth by the State of New Mexico in its licensing statutes for professionals who work in medicine.[216] These definitions are all broad, open-ended, all-encompass-

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> scriptions of their own behavior in relationship (sic) to their experiences; has to be looked at relative to the psychological test data and kinds of emotions, kinds of stresses, kinds of anxieties, the kinds of self-perceptions and perceptions of other people that are included in and derived from the clinical test data. It has to be looked at in terms of the probability that the experiences that they described are likely to have happened in the way they described them relative to their chronological age, developmental age. There are a variety of factors, then, that come into play once you are aware of the child's perception of the offender as well as other adults as other people who are supposed to be in positions of trust and authority.

Id.; *see also Mendez*, 2010-NMSC-044, ¶ 53.

213. *See Mendez*, 2010-NMSC-044, ¶ 53.

214. This definition came from molding several definitions together. *See* Merriam-Webster's, MEDICAL DESK DICTIONARY (revised ed. 2005) (remedy: "a medicine, application, or treatment that relieves or cures a disease," treatment: "the action or manner of treating a patient medically or surgically."); WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 2001) (remedy: "something that cures or relieves a disease or bodily disorder; a healing medicine, application, or treatment. [S]omething that corrects or removes an evil of any kind," treatment: "management in the application of medicines, surgery, etc., treat: "to deal with (a disease, patient, etc.) in order to relieve or cure.").

215. *See Mendez*, 2010-NMSC-044, ¶¶ 52–53 (discussing how the identity of the perpetrator pertains to the psychological treatment of the victim).

216. NMSA 1978, § 61-3-3(M) (2005). The "practice of nursing" includes "implementing a plan of care to accomplish defined goals and evaluating response to care and treatment. This practice is based on specialized knowledge, judgment and nursing skills acquired through educational preparation in nursing and in the biological, physical, social and behavioral sciences." *Id.*; NMSA 1978, § 61-6-6(J)(5) (2011). The "practice of medicine," among other things, "consists of offering or undertaking to

ing, and involve both physical and psychological manners of treatment.[217] Courts are receptive to acting within parameters, and hopefully by adopting a definition of treatment, courts will be inclined to accept that statements of identification to SANE nurses really are pertinent to medical treatment.

The majority of the treatment that victims of child sexual abuse require is psychological.[218] Child sexual abuse results in unique develop-

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diagnose, correct or treat in any manner or by any means, methods, devices or instrumentalities any disease, illness, pain, wound, fracture, infirmity, deformity, defect or abnormal physical or mental condition of a person." *Id.*; NMSA 1978, § 61-9-3(H) (2002). The "practice of psychology" means the observation, evaluation, and

> modification of human behavior by the application of psychological principles, methods and procedures for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior and of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health and mental health, and further means the rendering of such psychological services to individuals, families, or groups.

Id.; NMSA 1978, § 61-9A-3(Q) (2005). "Diagnosis and treatment planning" includes "assessing, analyzing and providing diagnostic descriptions of mental, emotional or behavioral conditions; exploring possible solutions; and developing and implementing a treatment plan for mental, emotional and psychological adjustment or development." *Id.*

217. NMSA 1978, §§ 61-3-3(M) (2005); 61-6-6(J)(5) (2011); 61-9-3(H) (2002); 61-9A-3(Q) (2005).

218. *See* Bonnie Meekums, *A Creative Model for Recovery From Child Sexual Abuse Trauma*, THE ARTS IN PSYCHOTHERAPY, V. 26, No. 4, 247, 248–55 (1999) (offering a model for recovery from child sexual abuse in female, adult survivors.) Meekums wrote that victims of child sexual abuse have "a significantly increased risk of depression, low self-esteem and other psychological [symptoms]." *Id.* Additionally, "well documented" psychological symptoms of child sexual abuse include:

> parasuicide, self-harming, substance misuse, eating disorders, a sense of two selves battling against each other, flashbacks . . . , self-blame for the abuse, a sense that the abuser is contained inside one's own body, burial of memories, feeling 'flat' and being detached from feelings . . . , avoidance of sex, or promiscuity without any real intimacy, out of body experiences, psychosomatic disorders, including irritable bowel syndrome, nausea, dizziness and headaches, avoidance of looking in mirrors, the need to bath after each [therapy] session, or conversely avoidance of bathing, and a tendency to misinterpret what others say, taking this as a criticism, among others. These symptoms are compounded by certain factors, including perpetration by a father figure, the use of force, and genital contact.

Id. However, Meekums suggests that therapy, including individual and group sessions, may prove to be the best treatment outcomes. *Id.*; *see also* Amy Sevigny, Note, *Updating the Medical Hearsay Exception: Maryland Should Modernize its Approach to the Medical Treatment Hearsay Exception*, 38 U. BALT. L.F. 1, 17 (2007) (stating that "[t]he short and long term effects of sexual abuse can include less obvious, psychological symptoms such as anxiety, fear, nightmares and sleep problems, acting out and general misbehavior, withdrawal, regression, poor self-concept, depression, developmentally inappropriate sexual behavior, and post-traumatic stress disorder").

mental consequences not associated with other forms of maltreatment.[219] Psychological issues that stem from child sexual abuse, especially from untreated abuse, include ailments such as symptoms related to post traumatic stress disorder ("PTSD")[220] and behaviors that are externalizing and internalizing in nature.[221] Accordingly, psychological treatment—in the form of therapy—has been demonstrated to be effective in reducing levels of PTSD symptoms and behaviors that are externalizing and internalizing following child sexual abuse. Different forms of psychological treatment "produce consistent improvement in the areas of self-esteem, anxiety, and depression."[222] A working definition of treatment must be sufficiently broad to encompass these ailments and their respective psychological forms of treatment.

Lastly, treatment cannot begin to make a victim whole again until the abuse has stopped. As such, the safety of the victim is paramount to treatment.[223] One study has demonstrated that "unless the required level of perceived safety was present for the [victim], certain interventions could be . . . harmful."[224] Simply, if the victim does not feel safe during treatment, the treatment could have a harmful effect. Additionally, in the same study, "safety was the single most often referred to element in recovery" and "was essential not only at the start of therapy, but through-

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219. Emily V. Trask et al., *Treatment Effects for Common Outcomes of Child Sexual Abuse: A Current Meta-Analysis*, 16 AGGRESS. VIOLENT BEHAV. 1 (2011) (also stating that child sexual abuse "is more strongly linked to later mental health problems than other forms of abuse").

220. *See* Meekums, *supra* note 218, at 248 (describing that PTSD in the context of child sexual abuse commonly includes the following symptoms: hyper-arousal, nightmares, difficulty sleeping, startle responses, aggression, and irritability)

221. *See* Trask, *supra* note 219, at 2–3. Externalizing behaviors include sexual behavior problems, hyperactivity, and aggression. *Id.* When compared to non-abused children, sexually abused children have higher rates of Attention Deficit/Hyperactivity Disorder, they are "significantly more aggressive and hyperactive," and they display greater rates of "highly sexualized behavior[s]." Internalizing behaviors include depression and anxiety. *Id.* When compared to non-abused children, sexually abused children have higher rates of depression and significantly higher rates of anxiety disorders, including phobias, separation anxiety disorder, and obsessive-compulsive disorder. *Id.*

222. *Id.* at 3. Despite the positive gains made by psychological treatment, there is no boilerplate, one-size-fits-all form of treatment. The effectiveness of treatment will vary depending on the research design and the individual. However, despite the differing forms of treatment and individual needs of each child, treatment is effective in reducing many of the negative outcomes of child sexual abuse. *Id.*

223. If the child is not removed from the home, where the abuse is occurring, the child cannot be effectively treated. How can one truly be treated for abuse that is ongoing?

224. *See* Meekums, *supra* note 218, at 253.

out" the process for those involved.[225] Because psychological, emotional, physical, and safety concerns are all intermingled effects of child sexual abuse, the treatment of such abuse needs to be sufficiently broad to include these issues.

E. Negative Implications of Mendez

Mendez is a positive step forward in New Mexico law regarding statements made by children to SANE nurses. However, as with anything positive, there are always negative implications. The largest issue with *Mendez* is it may contribute to judicial inefficiency, as courts are now burdened by having to examine each statement made to a SANE nurse and determine whether it can be admitted under Rule 11-803(D).[226] The implication is that the examination of each statement will create a trial within a trial, largely resembling *Daubert* hearings taking up time and space on the court's dockets, thus creating or exacerbating judicial inefficiencies.[227] However, courts are already accustomed to parsing out statements to determine their admissibility, as is required for statements made under Rule 11-804(B)(3).[228] Although some docket space may be consumed by hearings regarding statements made to SANE nurses, those hearings should not be incredibly time consuming or overly burdensome.

Secondly, *Mendez* is likely to affect the plea bargaining and settlement process, as attorneys should be better able to determine which statements are likely to be admitted at trial. The negative impact is that defendants may feel extra pressure to accept a plea instead of exercising their constitutional right to a trial by jury. However, despite the potential issues with *Mendez*, the overwhelming benefit is that trustworthy state-

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225. *See id.* at 253.

226. *See* State v. Mendez, 2010-NMSC-044, ¶ 43, 148 N.M. 761, 242 P.3d 328 (holing that "trial court[s] must . . . carefully parse each statement made to a SANE nurse to determine whether the statement is sufficiently trustworthy, focusing on the declarant's motivation to seek medical care and whether a medical provider could have reasonably relied on the statement for diagnosing or treating the declarant").

227. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). A *Daubert* hearing is one where a party argues to the court that a particular witness should be accepted as an expert witness. *Id.* The criteria under *Daubert* including whether the witnesses' theory has been reliably tested, subjected to peer review, whether it has an error rate, whether the theory is generally accepted in their field of specialty, and whether the theory was developed independent of the current litigation. *Id.*; *see also* FED. R. EVID. 702.

228. Rule 11-804(B)(3) NMRA (in applying this rule, trial courts must parse statements out and only admit those statements which are truly against the declarant's interest); *see also* FED. R. EVID. 804(B)(3) (adopted verbatim by the courts of New Mexico).

ments made by children who have been sexually abused may again be offered under Rule 11-803(D).

V. CONCLUSION

There were serious flaws with the analysis in *Ortega*, but the New Mexico Supreme Court has clarified the proper analysis for Rule 11-803(D). Once again the proper analysis for the rule, based upon trustworthiness, is the basis for admissibility of statements under Rule 11-803(D). Children deserve the highest quality of medical treatment, and SANE nurses have undertaken that difficult task of specialization and do their best to ensure that that standard is continuously upheld. SANE nurses are medical providers, and they necessarily fill a gap in our medical system.

This note offered a working definition of treatment, to aid New Mexico courts in the determination that statements of identification are pertinent to medical diagnosis or treatment. Implementing that definition would be a small but important step forward in New Mexico law. It will help ensure that trustworthy statements that are pertinent to medical diagnosis or treatment are admitted at trial. Taking this step forward will help ensure justice for the most helpless members of our society: our children.