



Overcoming Barriers to Advancing Cases

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Objectives



Engage in multidisciplinary case review to determine charging issues and responses to challenges

Secure probative evidence that will strengthen and enhance the case regardless of victim or other witness availability

Build an evidence-based case that can withstand developing issues

Context of Prosecution

Backlogged Cases, Cases Awaiting Trial, New Cases Coming In

Speedy Trial Considerations/
Pre-Accusatory Delay

Prioritization of
Violent Crimes/
Complex Cases

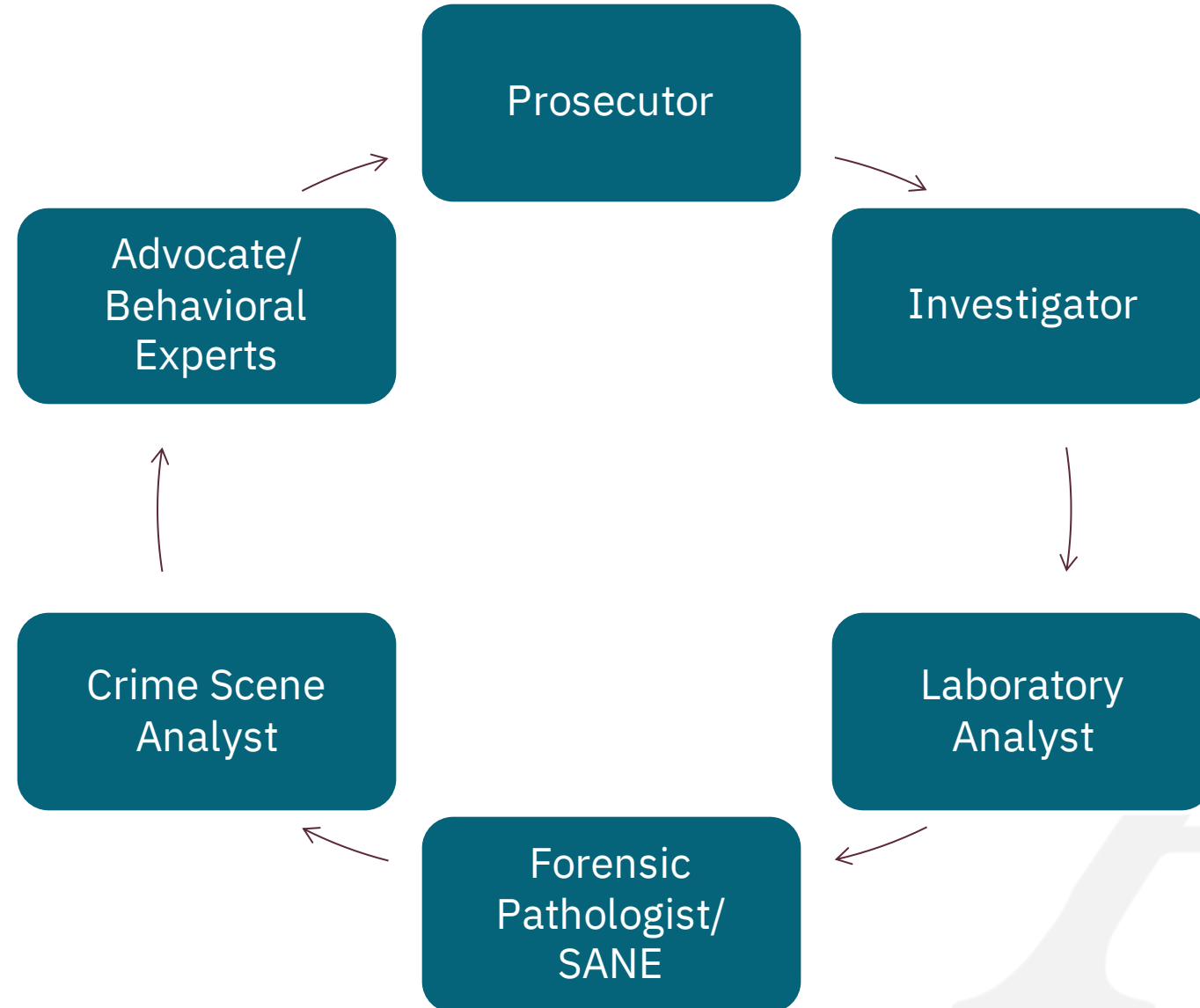
Other Systemic
Delays

Victim(s) Need
for Resolution

Witness
Availability/Expert
Witness Scheduling

Cold and Current Case Review

Multidisciplinary Engagement

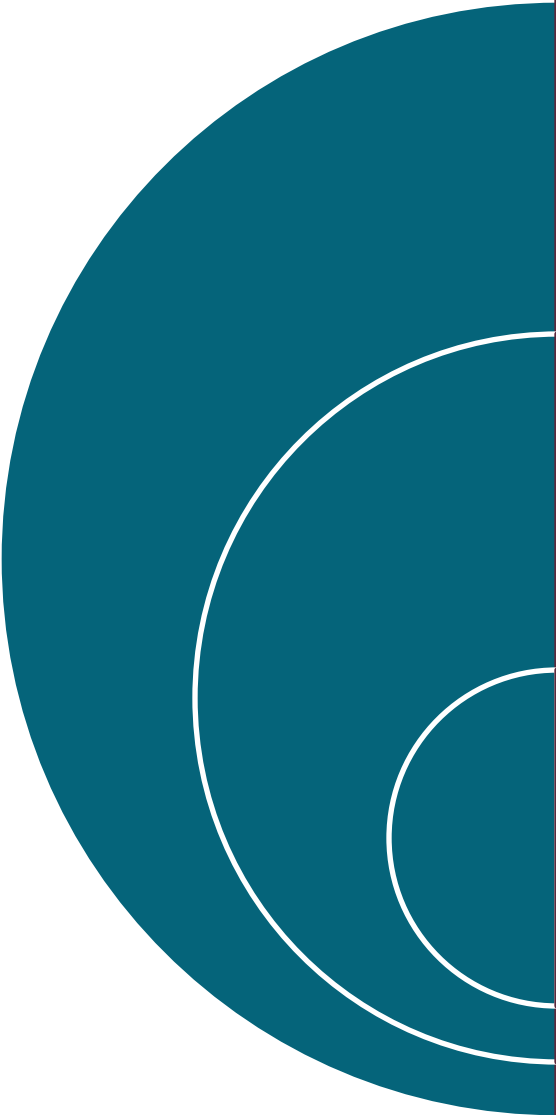


What is your experience with
multidisciplinary review?

Analyzing the Evidence

Informing Strategy with Case Review

True Collaboration



Systemic Engagement

- Communication with other experts
- Enhanced education and insight

Identifies Gaps

- Identifies need for follow up testing/investigation
- Analyzes reasons for absence of evidence

Enhances Pursuit of Justice

- Assists in determining plan for evidentiary analysis
- Develop strategies to advance testing of critical evidence

Is there enough evidence to
support the charge?

How much is enough?

Initial Determinations and Strategies

Applicable statute of limitations

DNA exception/statutory time periods

Can case be charged? If statute of limitations is expiring, consider John Doe warrant



Absence of offender

Case law that addresses tolling of statute of limitations

May also be admissible evidence of flight/guilty knowledge



Is pre-accusatory delay a consideration?

Diligence of investigation, availability of witnesses

Laboratory capacity

Strategies to Overcome Claim of Pre-Accusatory Delay

- Determine available witnesses who could support defense claim of unavailable testimony, if true
- Establish diligence of investigation
- Discuss prior protocols and availability of trauma-informed training
- Even if Motion to Dismiss is denied, consider Motion *In Limine* to address defense issues/arguments at trial

What was the victim's experience
of the crime?

What evidentiary resources are there
to center the victim's voice at trial?

Crime Scene Analysis

Identifying Probative Evidence

Begin with reviewing police reports, statements, laboratory reports

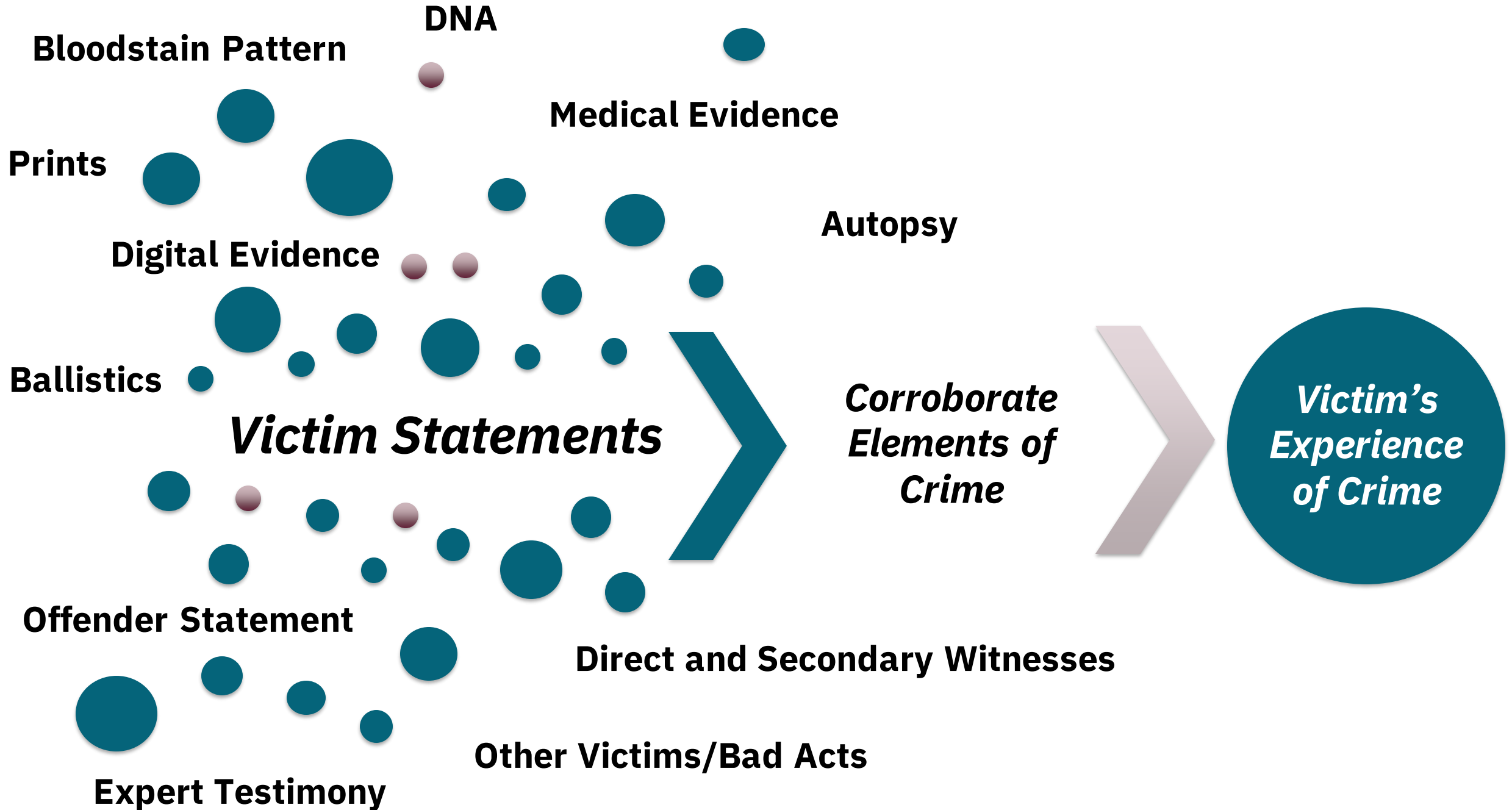
Identify any items associated with and *linking* crime scene, victim, offender

Determine availability of all evidence: tested, untested, and unsubmitted

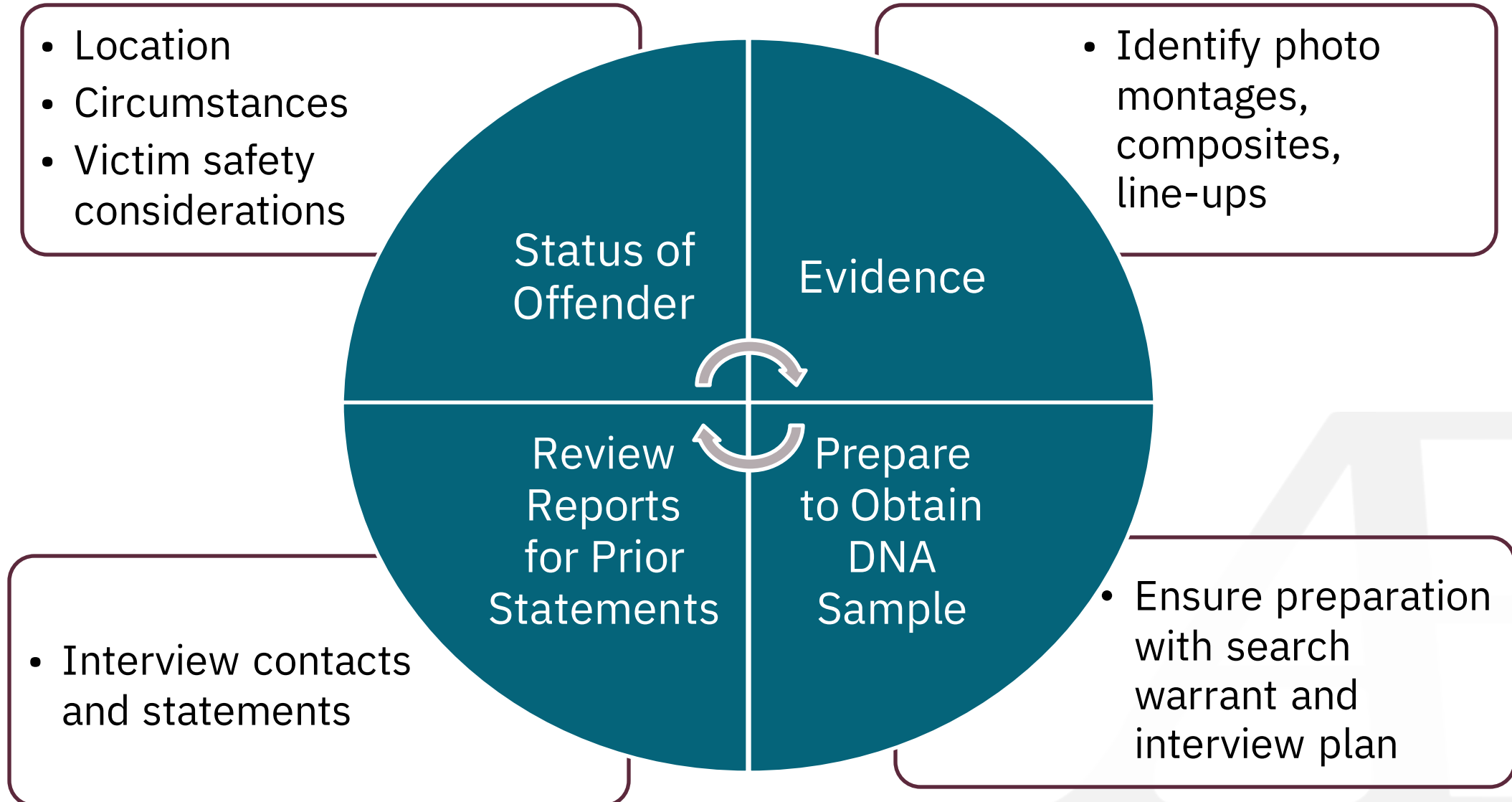
Recognize evidence that may corroborate aspects of the victim's disclosure, testimony of witnesses, presence of offender

Dive deeper—what details are significant, both old and new?

Consider all aspects of evidence: physical, forensic, behavioral, testimonial



Discuss Offender Information



Developing Insight Into Evidence

Identify physical, forensic, and medical evidence

- Documentation: video, digital photos, measurements
- DNA, bloodstain pattern, ballistics, fingerprints
- Autopsy and other medical evidence
- Digital evidence

Identify and review statements and conduct interviews

- Homicide witness interviews
- *Res gestae* victim statements
- Statements/admission of suspect

Determine potential defenses

- Denial, alibi, self-defense

Determining Admissibility of Evidence

Crawford et al.: declarant availability or exception, e.g., forfeiture by wrongdoing



Search and seizure issues: abandoned DNA/
surreptitiously obtained



Miranda: interrogation



Williams v. Illinois: unavailable witness



Relevant and material to elements of crime

CODIS

FRE 404(b) in Sexual Assault and Homicide Cases

Interview victim(s)
or homicide
witnesses

Consider joinder;
cross-admissibility of
FRE 404(b) evidence

Corroboration/
cross-corroboration

Issues: confession or
admissions to one
crime, strength of
individual case,
cautionary instruction

Case Complexities

Alcohol-
involved

Prior
relationship

No
weapon

Delayed
report

Prior
victimization

Limited/no
resistance

No apparent
injuries

Reluctance or
unavailability
to testify

Forensic Evidence & Testimony

In Light of Crawford and *Williams*

- Ideally, produce every analyst who participated in testing
- In cold case, if original analyst(s) are not available, consider retesting and rely solely at trial on results of new testing
- Negotiate stipulation to testing results
- If only option to admit crucial evidence is through analyst who did not personally conduct/observe testing, be careful to pose questions as hypotheticals under F.R.E. 703 and offer testifying expert's independent conclusion

Crawford v. Washington, 541 U.S. 36 (2004);
Williams v. Illinois, 132 S.Ct. 2221 (2012).

Missing or Unavailable Witnesses

- Chain of custody: Absence may go to the weight, rather than admissibility
- Identify other witnesses who may have supervised activity
- Consider other witnesses who may testify to protocol and evidence that protocol was followed
- Possible expert testimony: *Williams v. Illinois*



What if the victim indicates reluctance to testify or is unavailable?



Meeting the Victim's Needs

Safety

Argue for Protection Orders
Hold offenders accountable

Autonomy

Keep informed
Include in decision making

Privacy

Redact information
Litigate Motions *in Limine*

Timeliness

Manage expectations
Oppose Motions to Continue

Understand Barriers

- Victims face barriers, both systemic and batterer-created, which may reduce their willingness to participate
- Prosecutors have a role in breaking down barriers to facilitate victim participation and safety
- Victim participation and safety may be mutually exclusive



Offender Tactics

Intimidation

Emotional
abuse

Isolation

Minimizing,
denying,
blaming

Using
children

Using
privilege

Economic
abuse

Creating an
altered reality

Stalking

Immigration
abuse

Evidence-Based Investigations

Establish Elements, Provide Context,
& Combat Defenses

Act, State
of Mind,
Premeditation
as Applicable

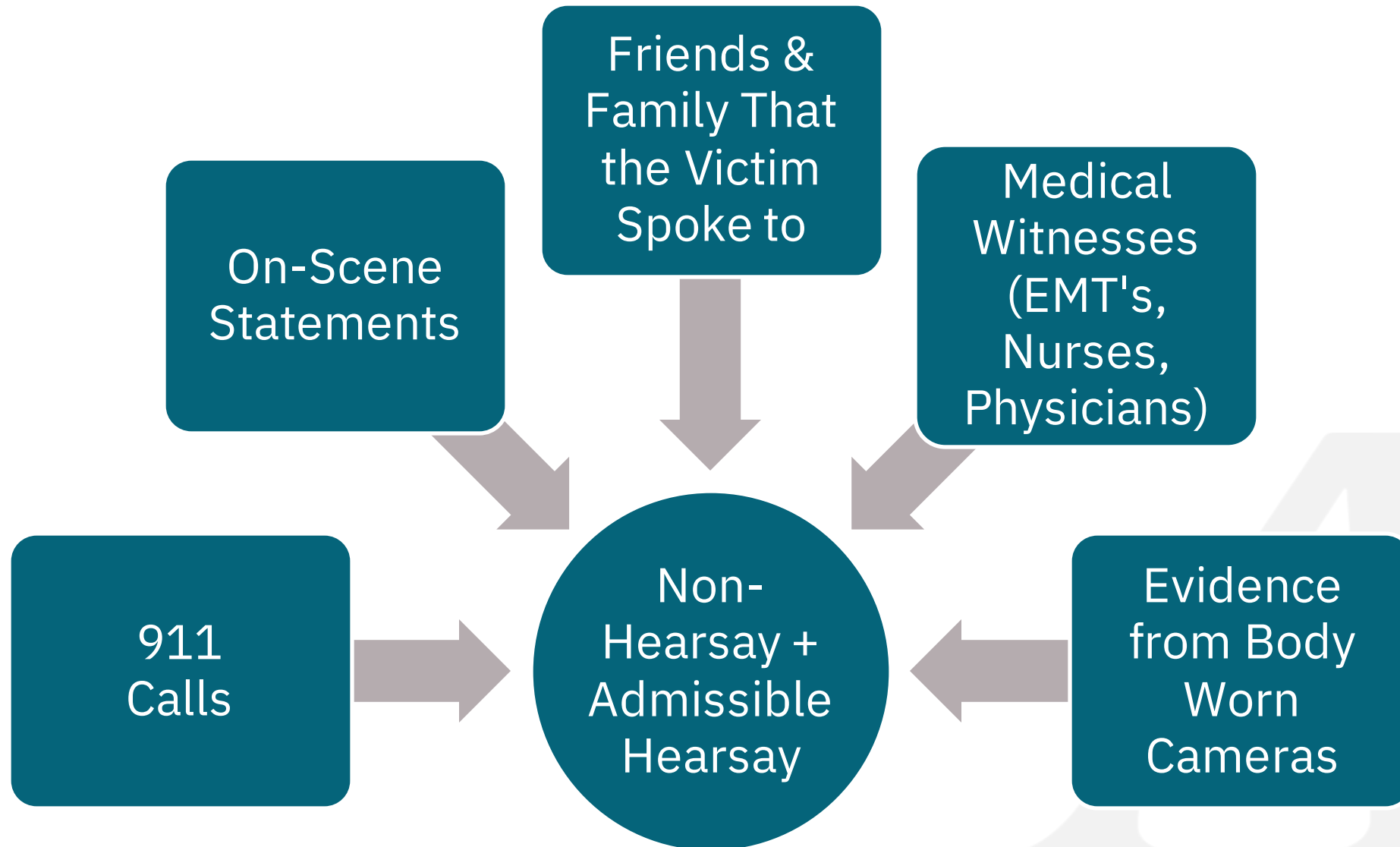
Medical/
Forensic
Evidence

Statements
(Testimonial
Evidence)

Demeanor

Prior
History/Other
Victims

Identifying Admissible Statements



Finding the Victim's Voice

Present Sense Impression

- FRE 803(1)

Excited Utterance

- FRE 803(2)

Then-Existing Mental, Emotional, or Physical Condition

- FRE 803(3)

Statement for Purpose of Medical Diagnosis or Treatment

- FRE 803(4)

Centering the Victim's Voice

Forfeiture by Wrongdoing

- FRE 804 (a) (5)

Statement Under Belief of Impending Death

- FRE 804(2)

Forfeiture by Wrongdoing

Fed. R. Evid. 804(b)

The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- 6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

Exception to Confrontation

Reynolds v. U.S., 98 U.S. 145, 158 (1878)

“The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.”



Invaluable Tool

Applies to any potential witness who is unavailable

- Not reluctant, or testifying for defense

Opens the door to any hearsay

- Testimonial
- Nontestimonial
 - No need for standard hearsay exception



Unavailability

- Cannot be located
- Real or feigned memory loss
- Deceased
- Defendant marries victim (privilege)
- Refusal to testify
- Defendant had the victim deported
- In some jurisdictions, unavailability includes recanting or feigned amnesia

*See, e.g., State v. Aguilar, 181 So.3d 649 (La. 2015);
People v. Pappalardo, 152 Misc. 2d 364 (N.Y. Sup. Ct. 1991).*

FBW Hearing

Preliminary Determinations

- Evidentiary Hearing should be held outside jury's presence pursuant to FRE 104(c) or state equivalent
- Evidentiary Hearing is not bound by evidentiary rules as per FRE 104(a)
 - Don't need to call intimidated victim — statements you wish to introduce are admissible
 - Hearsay allowed
 - Affidavits allowed
 - Consider calling lead investigator
 - Consider using expert witness to educate
- Burden of proof is preponderance of evidence federally, and in most states

What if there is a consent defense
and/or alcohol is involved?

Overcoming the Consent Defense

Offender

- Premeditation
- Stalking
- Context of crime
- Use of alcohol as weapon
- DNA, toxicology

Victim

- Narrative of the event and experiential detail
- Victim responses to trauma

Expert Testimony

- Toxicology
- DNA
- Behavioral

Concurrent crimes
(stalking, image
exploitation, witness
intimidation)

Evidence of
planning,
premeditation

AFSA

Coerced consumption,
exploitation of
voluntary consumption
or incapacitation

Potential of
serial/crossover
offending

Victim Interview

- Take an early brief account from the victim
- Establish rapport
- Allow victims to control their memory reporting (narrative)
- Focus on central details
- Probe about events that occurred prior to intoxication
- Use term “alcohol intoxication” instead of “drunk”

HEATHER D. FLOWE, ALCOHOL AND REMEMBERING RAPE:
NEW EVIDENCE FOR PRACTICE (Anna Carline ed., 2021)

Common Sense Arguments

Intoxication does not
cause sexual assault

Offender knowingly
assaulted incapacitated
victim

Violent predators target
their victim

Defendant may have coerced
alcohol consumption to
facilitate assault

It makes sense that
victims delay or have
difficulty in disclosing

It takes resolve to disclose
following trauma,
embarrassment, and shame

Impaired judgment makes people
responsible for the natural
consequences of their actions...

...Not the illegal consequences of someone else's
action.

What other case complexities are you working with?

Advancing the Case to Justice at Trial

Opening Statement

1

Advance the theme and theory to introduce the evidence

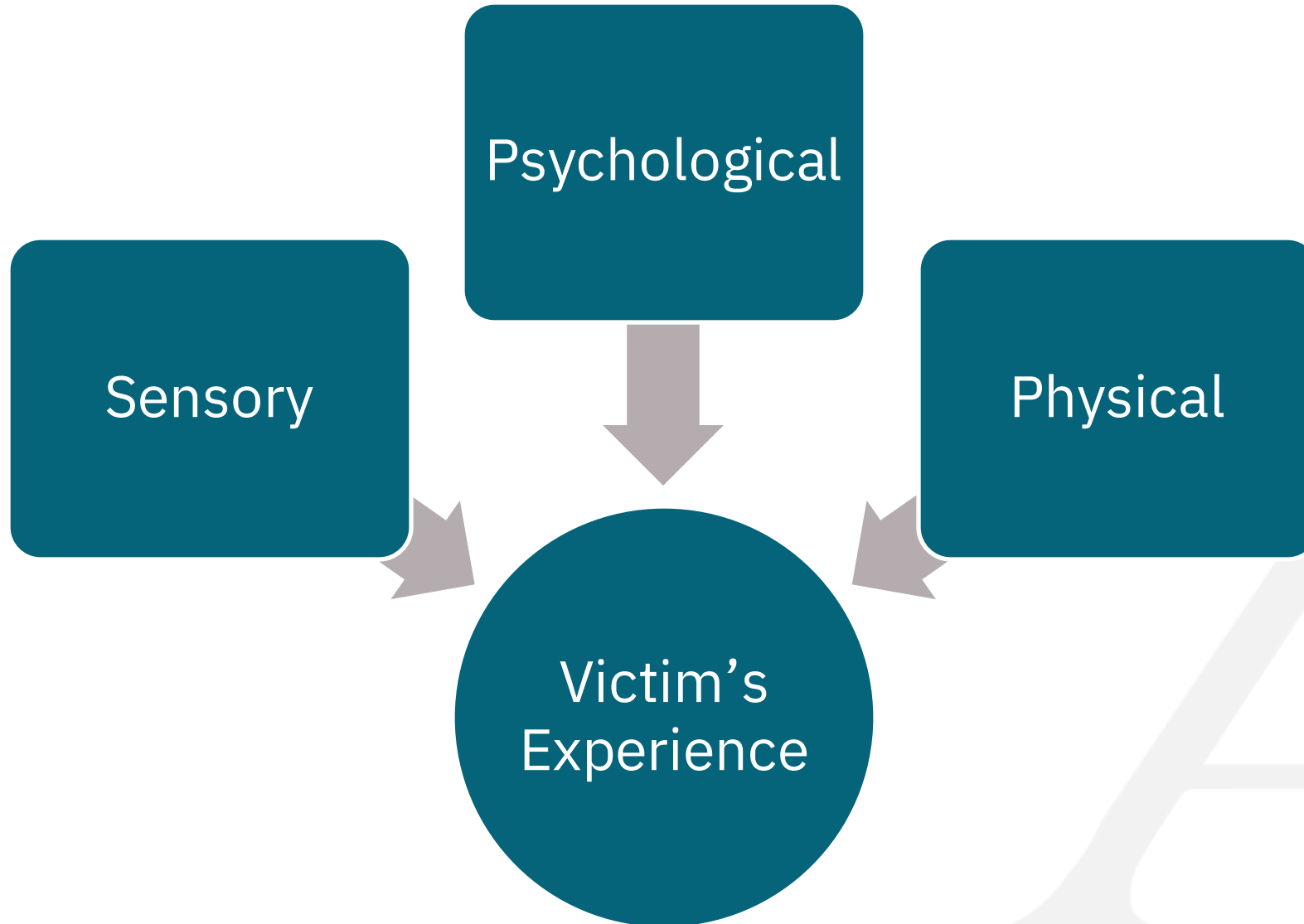
2

Identify key aspects of victim experience

3

Set the stage for closing argument

Presenting Evidence



Evidence of Victim's Experience

Sensory Details

Sight

Sound

Touch

Taste

Smell

Emotional Response

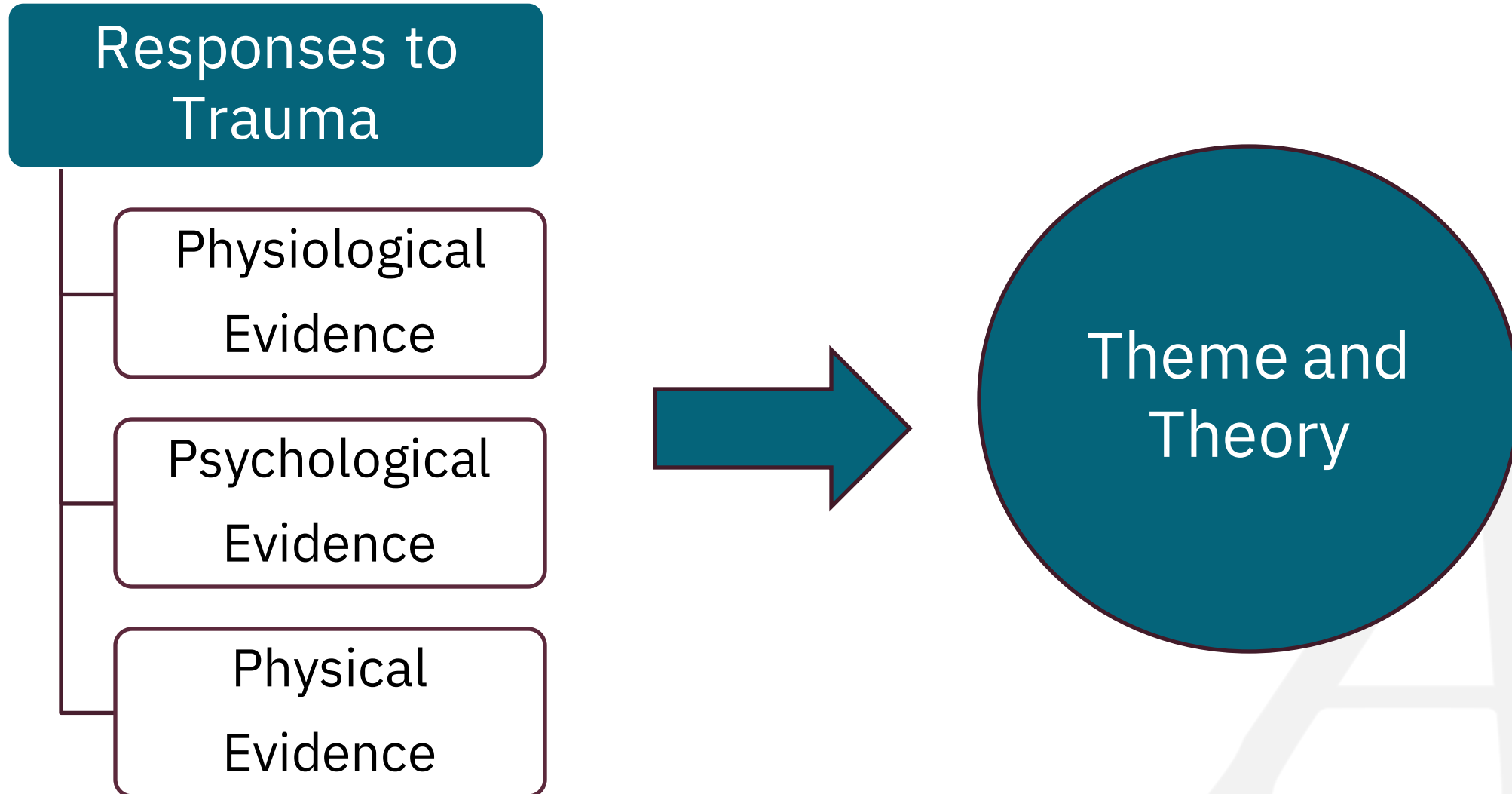
How did you
feel?

What did you
think then?

Physiological Effects

How did that
affect you?

Presentation of Evidence



Focus on Details

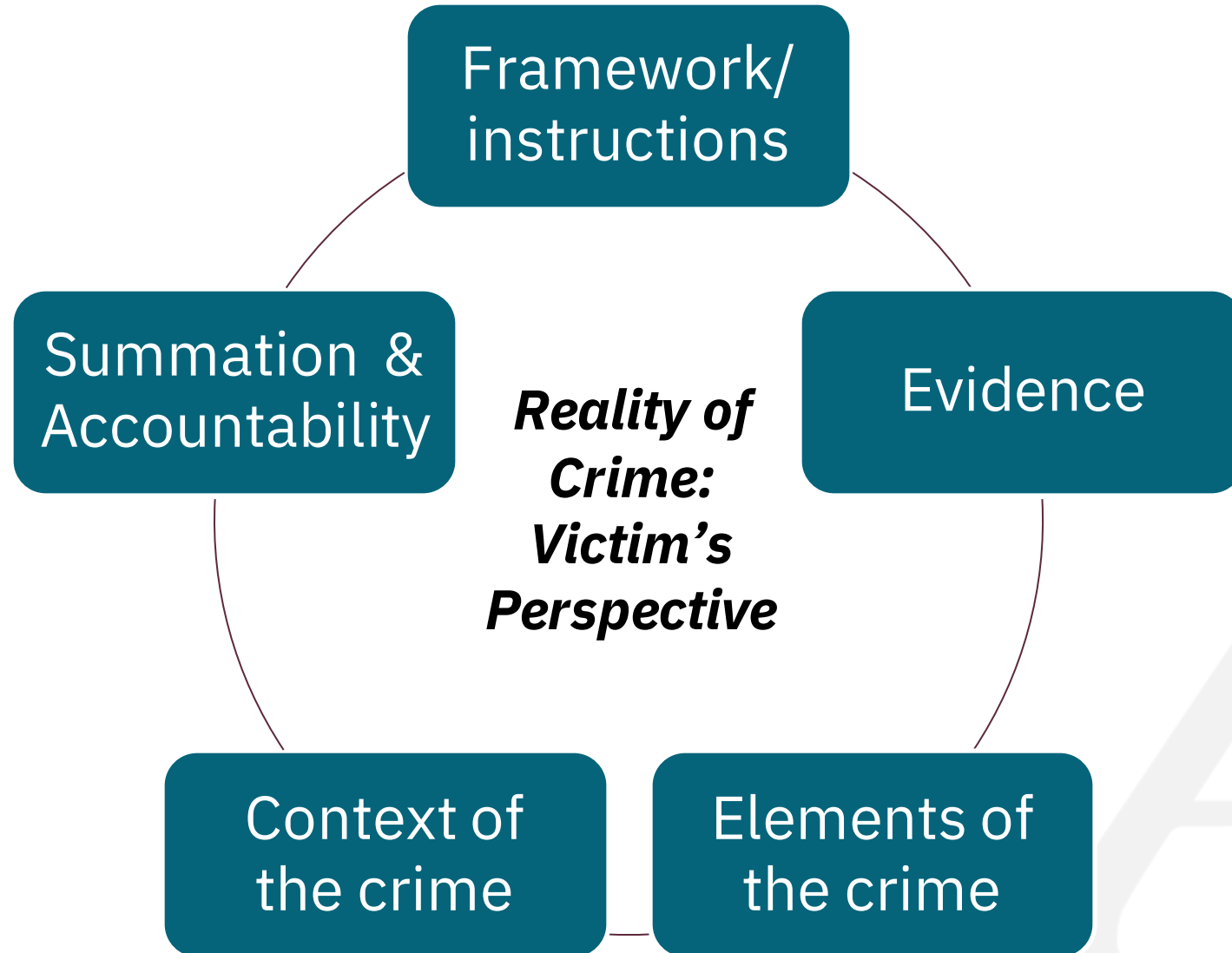
- Context and/or events leading up to the crime
- Defendant's control throughout: "whose idea was it?"
- Offender's awareness of victim's vulnerability
- Defendant's abilities and memory while claiming to be intoxicated
- The assault itself
- Defendant's statements/admissions early on and over time
- Corroboration of peripheral details
- Premeditation/planning/advance thought

Summarizing the Evidence

- Corroborate the elements of the crime and surrounding context with forensic evidence, folding in exhibits
- Review testimony regarding identification and collection of evidence and relationship to the crime scene
- Recount expert testimony to inform the jury of the significance of the evidence
- Center offender accountability and the victim's experience of the crime with evidentiary support

Closing Argument

Ensuring the Victim's Voice is Heard



Going Forward



Engage in multidisciplinary case review to determine charging issues and responses to challenges

Secure probative evidence that will strengthen and enhance the case regardless of victim/witness availability

Build an evidence-based case that can withstand developing issues and center the victim's experience of the crimes

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