



Seeking Justice: Case Review, Assessment and Trial

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Support

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Patricia D. Powers

Patti Powers joined AEquitas as the lead Attorney Advisor on the SAKI project after serving as a Senior Deputy Prosecuting Attorney in Washington State for 27 years. She supervised the Sexual Assault—Domestic Violence Unit, and prosecuted and tried a high volume of violent crimes—specializing in adult sexual assault, child sexual assault and abuse, sexual exploitation of minors, domestic violence, and related homicides (including complex litigation of high-profile, as well as cold and current cases). Patti served on the domestic violence and child fatality review committees and was a member of the Washington State Technical Assistance Committee for Child Death Review Guidelines. For five years, she was appointed as a Highly Qualified Expert for the United States Army, Criminal Investigation Division; in this role, she provided training for army criminal investigation agents and prosecutors at Fort Leonard Wood, Missouri, and in Germany.



John F. Wilkinson

John F. Wilkinson, an Attorney Advisor with AEquitas, presents on trial strategy, legal analysis and policy, and ethical issues related to violence against women at the local, state, national and international level. He conducts research; develops training materials, resources, and publications; and provides case consultation and technical assistance for prosecutors and allied professionals. John served as an Assistant Commonwealth's Attorney in Fredericksburg, VA prosecuting cases involving intimate partner violence and sexual assault, including cases of campus sexual assaults and domestic violence homicide. He also served on the Fredericksburg Area Sexual Assault Response Team and prosecuted child sexual and physical abuse and neglect cases and infant homicides.



Objectives



Conduct incisive case reviews of cold and current violent crimes

Assess cases for viable charges with evidentiary corroboration

Consult with experts to understand and present the significance of evidence

Prepare and conduct trials of violent crimes focusing on fairness to the defendant, victim, and community

Prosecutor Responsibilities

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

NATIONAL PROSECUTION STANDARDS § 1-1.1 (NAT'L DIST. ATTORNEYS ASS'N, 3rd ed.)

Seeking Justice in Every Case



Prosecutor Responsibilities, Cont'd

The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause

ABA MODEL RULES OF PROF'L CONDUCT, R. 3.8(a)

How Justice is Achieved

Case review

- Assessment of case and charges

Careful trial preparation

Ensuring the adequacy of pleas

Diligent attention to detail and making the record at trial

Preparing for appellate review

Role of conviction integrity units

Case Review, Assessment, and Trial Perspective

Homicide, Sexual Assault and other Violent Crimes

Case Review

Review all reports in timely manner

Analyze reports for relevant and probative evidence

Review law and developing case authority

Determine necessary follow-up

Investigate context as well as crime(s)

First Steps: Components of Case Review

Review all available reports and media:

- Investigatory narrative, statements and corresponding video/audio, photographs, and diagrams

Crime scene analysis:

- DNA, blood spatter, ballistics, and fingerprints

Are these reports sufficient or is follow-up required?

Cold case:

- Review by second expert if first is unavailable

Additional Components of Case Review

Identify all physical evidence and documented chain of custody.

Anticipated testimony is evidence.

Are the elements of the crime established through evidence?

What is missing and necessary?

Evidence: The Remains of the Crime

What does the evidence tell us?

Who or what does it connect to?

What else should we be looking for?

Does it establish an element of the crime?

What does the absence of evidence suggest?

Forensic Evidence

Medical Evidence

Digital Evidence

Victim Statement / Autopsy

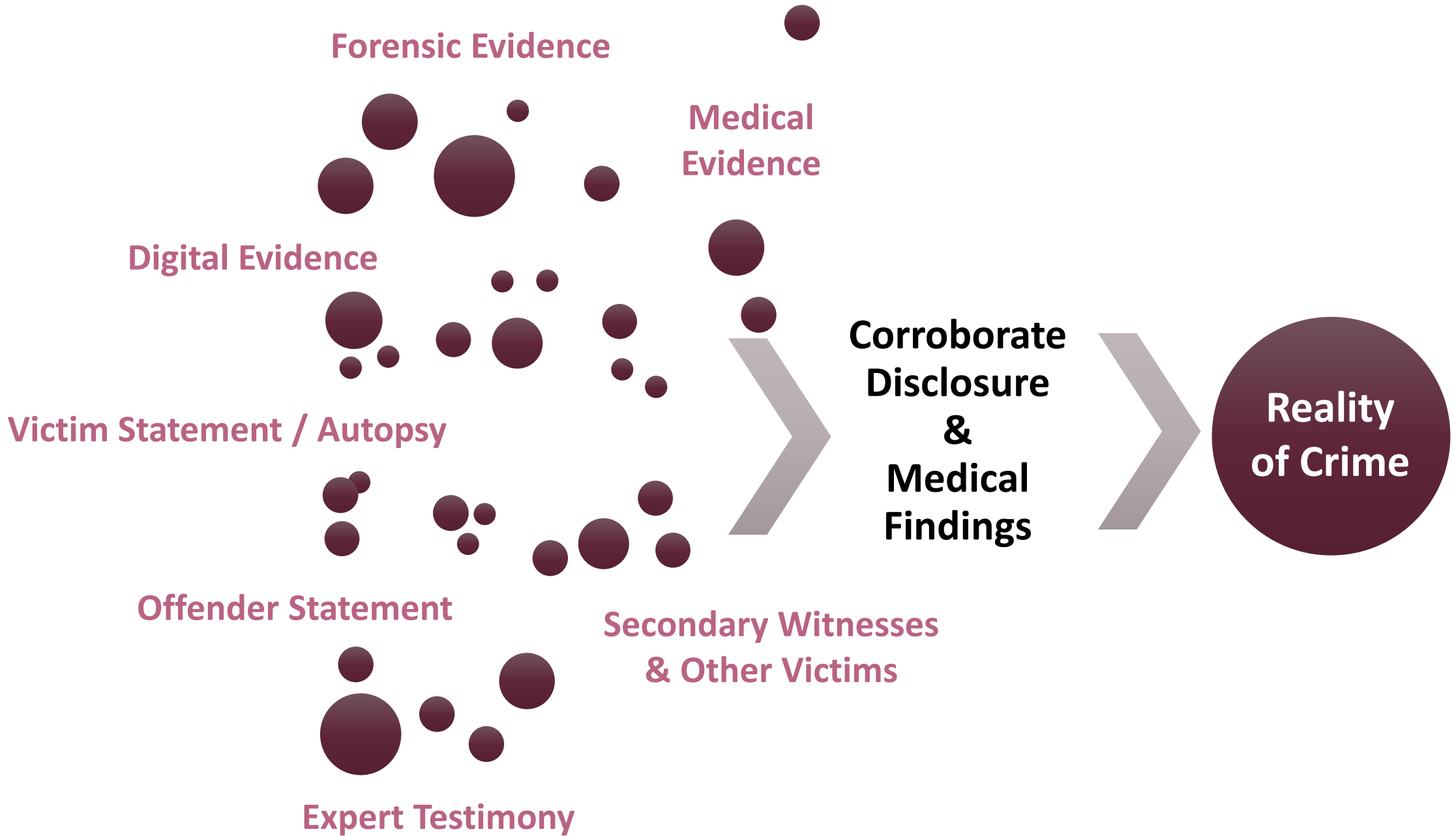
Offender Statement

Secondary Witnesses
& Other Victims

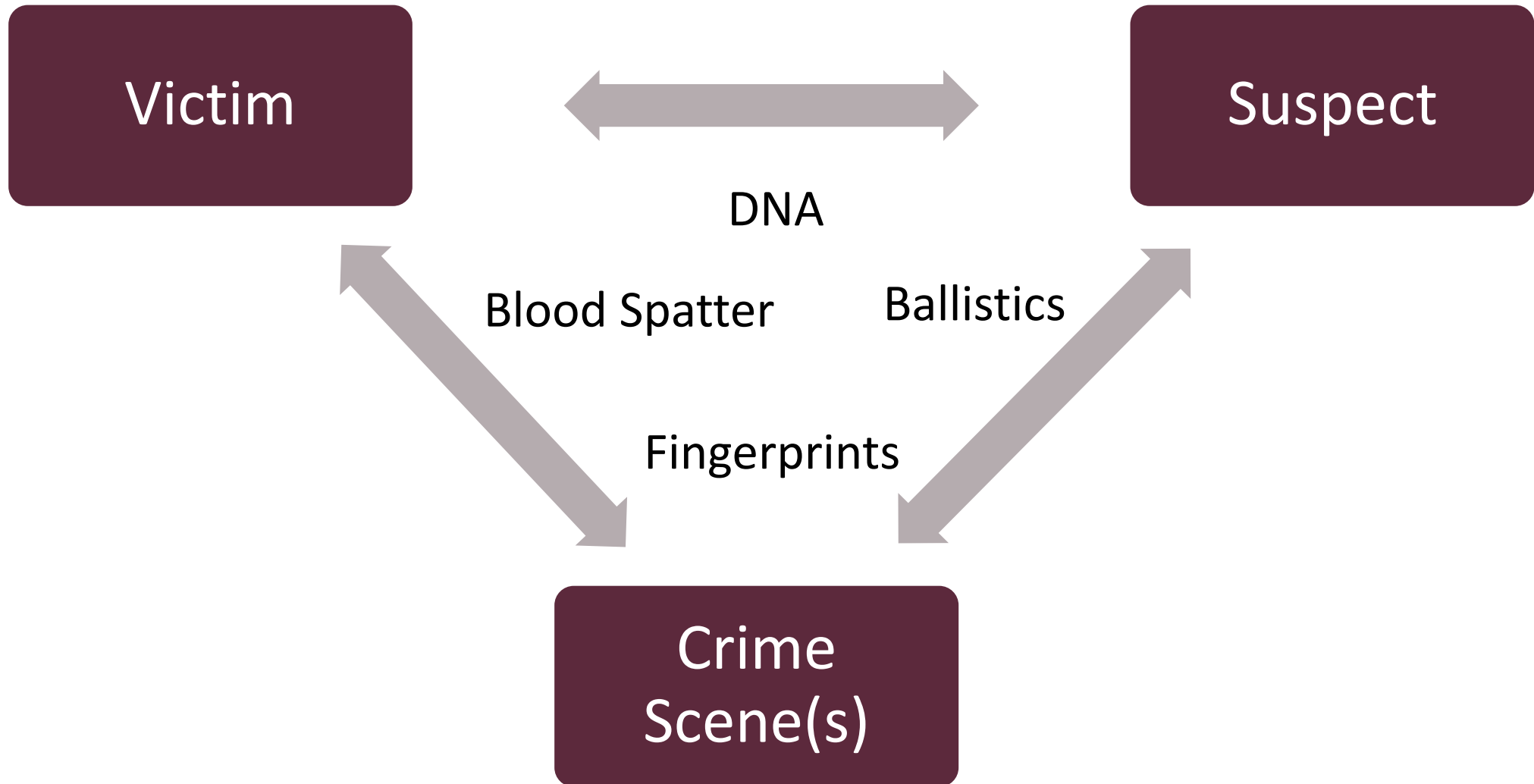
Expert Testimony

Corroborate
Disclosure
&
Medical
Findings

Reality
of Crime



Power of Linkage: Reality of the Crime



Scrutinize Offender Behavior

Dive Deeper Into Evidence

- Recognize physical and behavioral evidence of predatory conduct.
- Assess evidence of premeditation and planning.
- Identify evidence of cognitive engagement during the crime.
- Did the offender exploit known or perceived vulnerabilities?
- Was offender relying on known social misperceptions involving alcohol / drugs?

The key is to analyze the effect of offender conduct on victim and convey this information to the jury.

Serial Offenders

Look for CODIS hits.

- Crime scene or offender

Utilize ViCAP for unsolved cases.

Carefully evaluate all reports from investigation of crimes against other victims.

Review criminal history to determine time frames of activity.

Serial Offenders

- Recognize offender may have escaped detection and have confidence
- Account for “gaps” in time with absence from given jurisdiction
- Recognize any similarity in status of victims, vulnerability, environment, use of force / threats, stalking conduct
- Evaluate mobility of offenders through multiple jurisdictions

Sexual Assault and Homicide

- Recognize clear link between sexual assault and homicide
- Prepare for denial / consent:
 - “We had consensual sex and someone else killed the victim”
- Work with forensic pathologist / other expert to determine timeline for death and survival time for forensic evidence
- Focus on presence of defense wounds and any injuries
- Consider forensic genetic genealogy for unsolved cases

Context of the Crime

Interrelated Events

Identifying Context

Determine what led to the crime scene(s):

- Res gestae

Identify behavioral and physical evidence.

Establish availability of secondary witnesses for context.

Develop timeline leading to the crime:

- Tracing back with secondary witnesses and forensic information

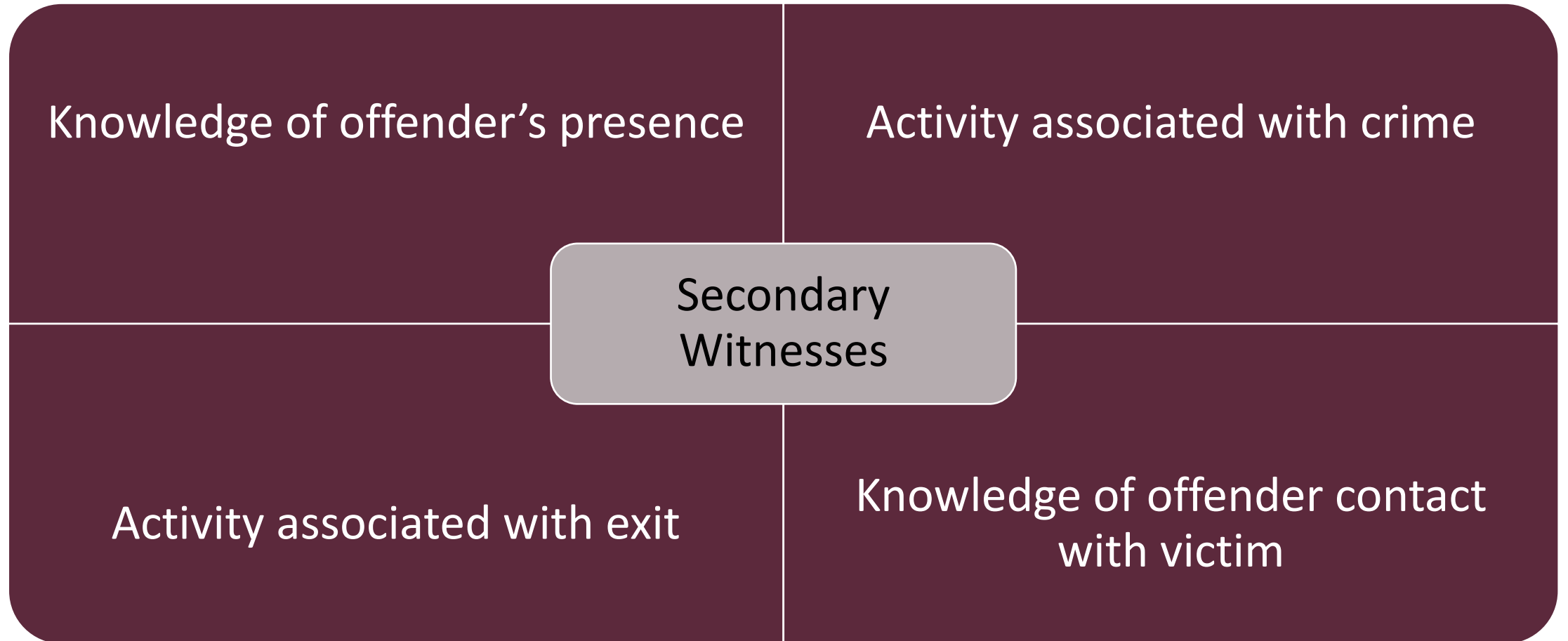
Focus on premeditation and intent.

Start at beginning of the day of the crime, or earlier.

Analysis of Premeditation



Secondary Evidence



Admissibility of Secondary Evidence

Res gestae

- Events/statements inextricably related to crime

FRE 404 (b)

- Evidence proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident and other bases

Other elements of the crime

- Probative of date, evidence of commission of the crime

Hearsay Exceptions

FRE 803

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Charging

- Determine whether there are co-occurring crimes
- Consider the statute of limitations and tolling if appropriate
- If a cold or delayed case, be proactive with defense against pre-indictment delay

Standard: Given the prosecution evidence that will likely be admissible at trial, and the likely evidence and arguments of the defense, should a jury find that every element of the offense has been proven beyond a reasonable doubt?

Consulting with Experts

Diving Deeper into the Evidence

Determining Potential Expert Testimony

Identify evidence.

Does significance
require
explanation?

Is there an
adequate basis for
expert testimony?

Is evidence
available for
review?

Has expertise been
augmented since
original opinion?

Evidentiary Dimensions of the Crime

DNA

Ballistics

Autopsy

Fingerprints

Foundation for Expert Testimony

- Foundation is necessary for the court and the jury
- Present legally sufficient foundation in a persuasive manner
- Assume most jurors do not have expertise in subject matter of expert
- Develop questions to educate jurors on the science

Presenting Expert Testimony

What science did expert apply to the evidence?

Use evidence based hypotheticals:

- Asking you to assume for the purpose of this question, that if the body was located in x area, what, if any, significance would the blood spatter located on x part of the wall have?

Supplement hypothetical with exhibit when possible.

Ask expert to explain absence of evidence given the history.

Drawing from the Foundation

- Instill an understanding of significance of the findings
- Always connect the findings to the crime and/or context
- Use evidentiary exhibits and localize to the crime scene

Homicide Cold Cases, Sexual Assault, and Other Violent Crimes

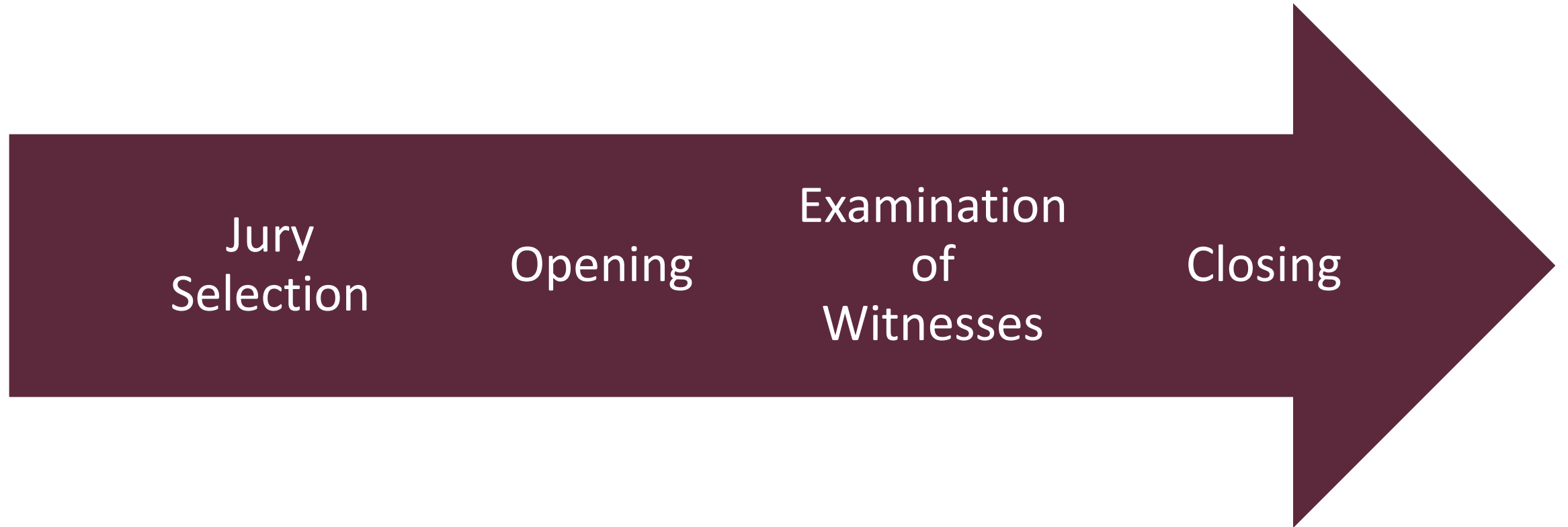
- Recognize the power of evidence that has persisted over time:
 - *E.g.*, field-stripped cigarette butt, glasses, button
- Carefully review crime scene(s) photographs and video to absorb as much detail as possible.
- Assume every detail of the scene is part of the story, or will become important.
- Answer the question:
 - What was the victim's experience of the crime and how was the crime committed?

Strategic Considerations for Violent Crimes

- Develop answers:
 - What was victim's experience of the crime and how did offender commit the crime?
- Motive is usually not an element of the crime, but is still important:
 - Why did the offender commit the crime?
- Carefully develop evidence of premeditation or intent through the timeline with secondary corroboration.
- Begin at the beginning of the last day of the victim's life, or the day when the victim's life changed due to the crime.

Serving Justice At and After Trial

Ensuring Justice in the Process



Voir Dire: to Speak the Truth

Discover if grounds for cause challenges exists

Determine if jurors have expressed definite opinions as to defendant's guilt/innocence for any charged offense

Determine if jurors can follow the law and apply it to case facts

Obtain information for the intelligent exercise of peremptory challenges

Build the infrastructure for the reality of the crime

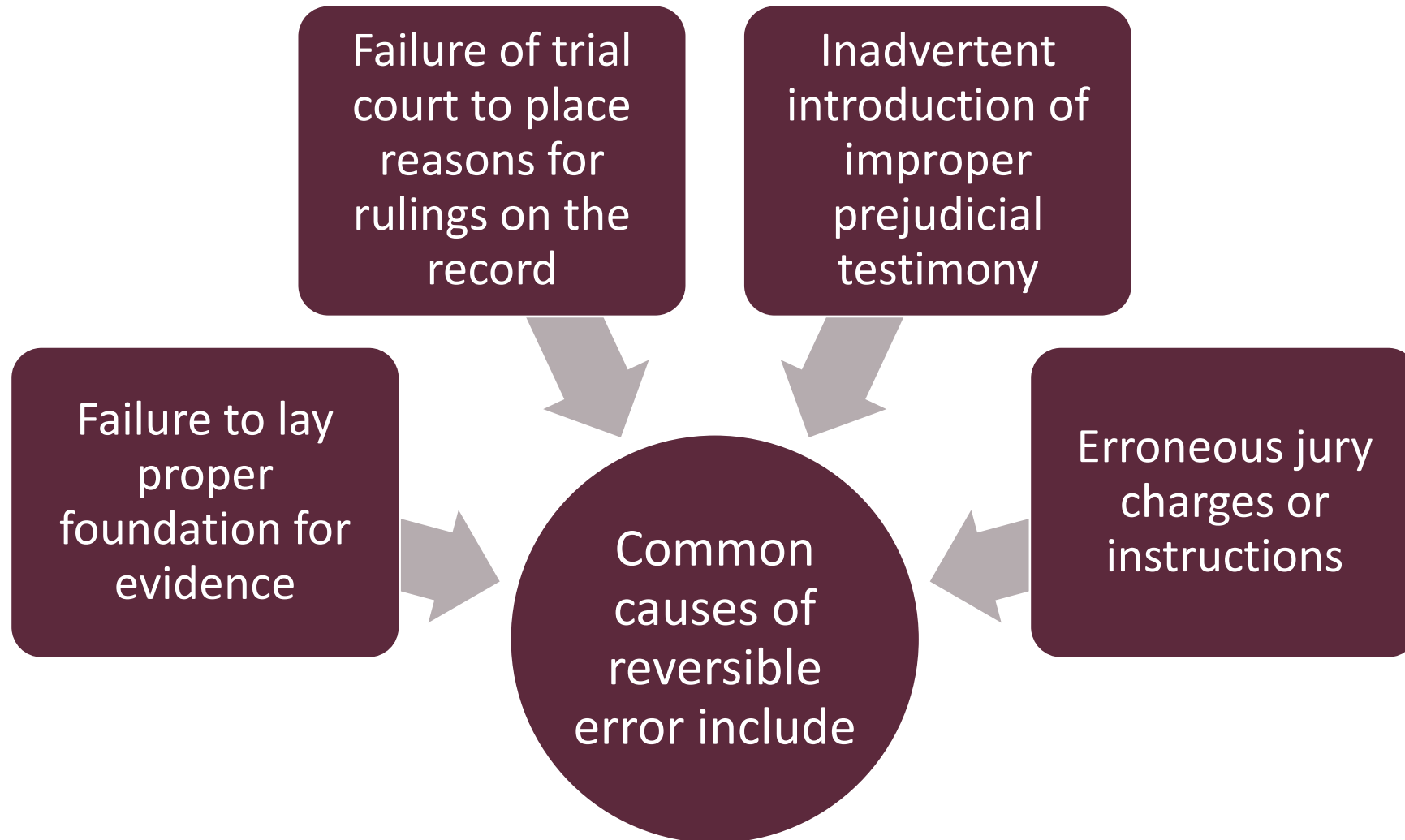
Ensuring Fairness in the Process: Voir Dire

- Batson v. Kentucky, 476 U.S. 79 (1986) and subsequent cases apply to both parties
 - A *Batson* challenge is made by one party in a case to the other party's use of peremptory challenges to eliminate potential jurors on the basis of sex, race, ethnicity, or religion.
- Issue challenges for cause where appropriate and articulate them on the record, including record of any necessary observations
- Display professionalism toward panelists — this allows them an opportunity to self-assess their ability to serve fairly and impartially

Making the Record

- Appellate review is part of the criminal justice process
- Ensure that side-bar conversations and any rulings, *e.g.*, in limine, are made part of the record
- If demeanor of a panelist or witness is important, articulate the observation
- Note observations in pandemic hearings / trials

Preventable Error



Opening

- Establish elements of the crime and evidentiary support
- Express witness testimony in terms of anticipated testimony
- Whether a cold or current case, summarize the context/reality of the crime for the jury

Trial Perspective: Murder

Victim's last day

- The victim was born on x day. During the victim's last day, these were her activities

Sensory, psychological, physiological detail

- Autopsy findings: defense wounds, multiple injuries,
- Single shot and range

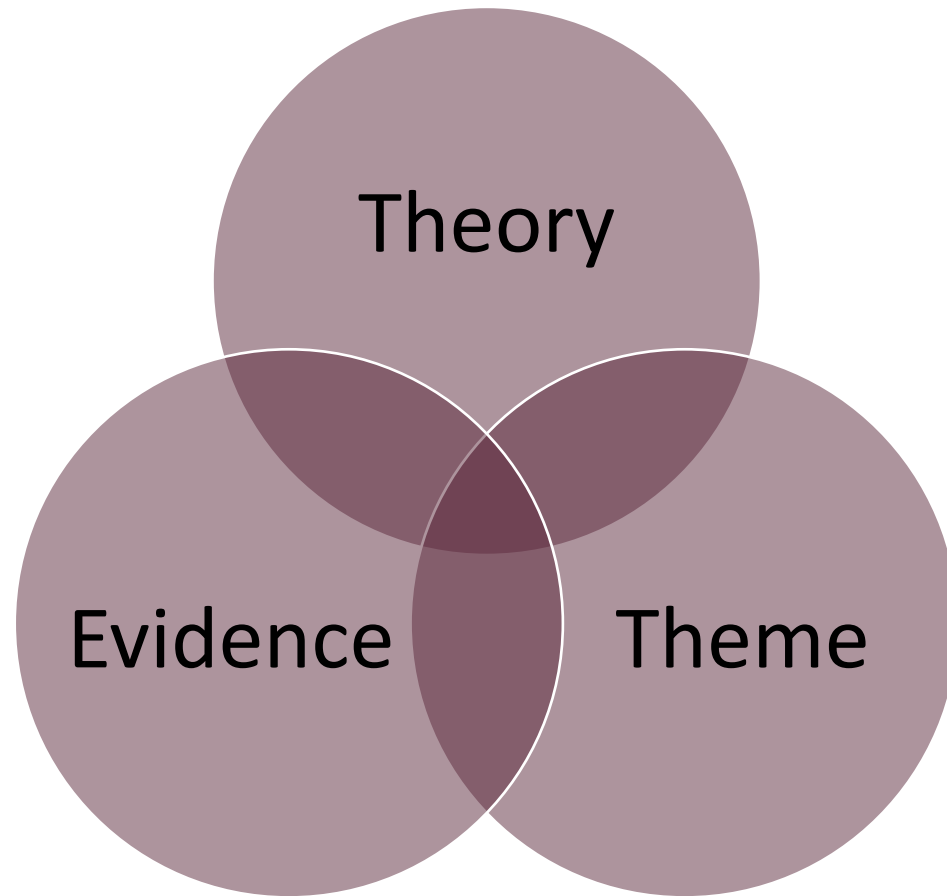
Accountability

- Premeditation, control, execution

End of victim's life

- How and when life ended

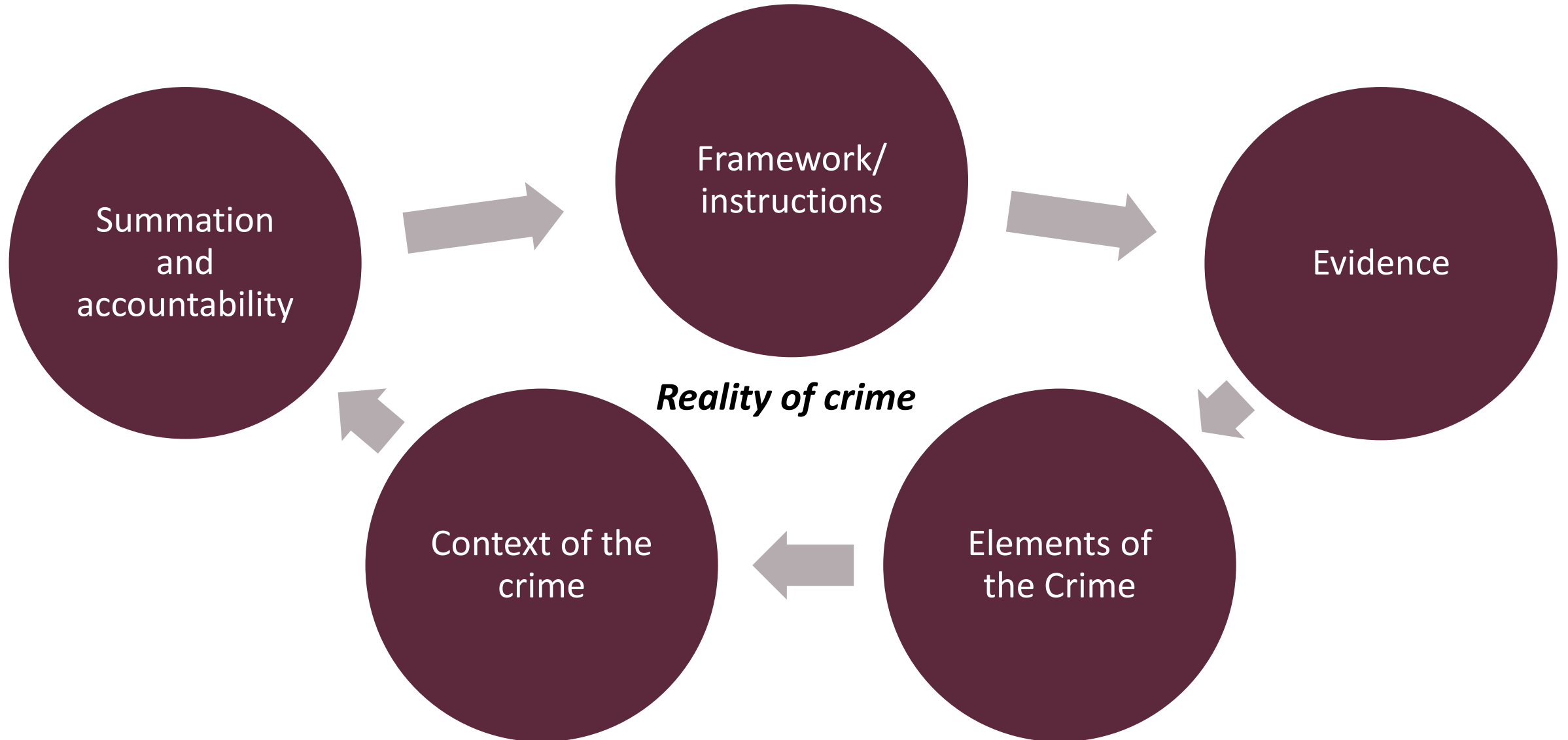
Opening Statement: Presenting the Reality of the Crime



Examination of Witnesses

- Ensure all discovery responsibilities are met
- Establish a context for questions, drawing attention to a certain date or event
- Prepare with documented statements made earlier in event of inconsistency, and make available to witness
- Prepare for cross-examination of defense witnesses: core areas and areas of argument
- Remember — date and identity are also elements of the crime, and may be supported by defense witnesses as well as other corroboration

Closing Argument and Justice





Going Forward

Conduct cold and current case reviews of violent crimes from trial perspective

Assess cases for viable charges with evidentiary corroboration

Consult with experts to understand significance of evidence

Prepare and try violent crimes with focus on fairness to the defendant, victim, and community

“Justice is truth
in action.”

Benjamin Disraeli



Introductions and Questions for the Panel

Panel Participants

Facilitators:



Patti Powers



John Wilkinson

Panelists:



Amy Jeanguenat



Eric Nelson



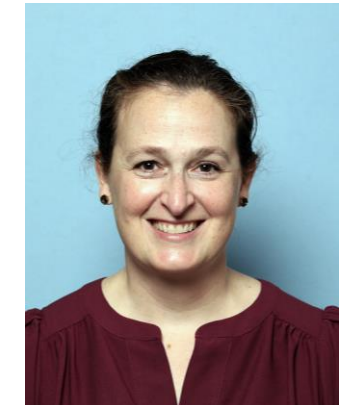
Misty Marra



Michelle Reznicek



Edward McCann Jr.



Heather Foshier

Questions for the Panel

- What insight into evidence can you provide as an expert? Or, what insight have you obtained *from* an expert?
 - DNA, fingerprints, ballistics
- Have you overcome any specific challenges in consulting on cold cases?

Questions for the Panel

Cont'd

- What developments in science have advanced your capacity as an expert or have enabled you as a prosecutor to address case challenges?
- Has information you have provided or obtained made a difference in case assessment, charging, or a trial in which expert testimony was critical?

Contact Information



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