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"Next-Level" Compulsion of Victim Testimony in Crimes of Sexual and Intimate Partner Violence: Prosecutorial Considerations Before Using Bench Warrants/Body Attachments and Material Witness Warrants

Introduction

The criminal justice process can expose survivors of intimate partner and sexual violence to unique re-traumatization. While multidisciplinary response efforts, employing a victim-centered and trauma-informed approach, have greatly reduced the level of trauma associated with a survivor's decision to report domestic abuse or a sexual assault, the process itself may remain daunting. Interviews, evidence collection, public court proceedings, and cross-examination at trial—all of which are essential to a meticulous and fair prosecution—may be difficult and distressing for victims, even with the guidance and support of advocacy and prosecution professionals. This is especially true in cases of intimate partner violence, where victims often face additional stressors, including but not limited to the potential loss of a romantic partner, financial support, or childcare. As a result of these and other case-specific factors, some survivors ultimately decline to participate in the criminal justice process, avoiding service of process or refusing to appear under subpoena.

When victims of sexual and intimate partner violence decline to testify, what should the prosecutor do? How far should the prosecution go in an effort to secure the victim's testimony? Although tools such as material witness warrants or bench warrants (sometimes referred to as body attachments) are available, is their use in this context appropriate and necessary?[2] What unintended consequences might come from their use? Have all efforts to involve advocacy been explored prior to using these measures?

This article examines the considerations that should be weighed in deciding whether to employ such next-level measures to compel victim testimony in these cases.[3] While prosecutors have a great deal of discretion in deciding whether to use compulsive measures beyond issuance of a subpoena, the decision to resort to such measures should be made with great care and with an awareness of the potential consequences, as well as consideration of possible alternatives. Through ensuring consistent and comprehensive access to advocacy, victims are afforded opportunities to provide additional details about potential evidence and to communicate safety concerns (both emotional and physical) upon which prosecutors can thoughtfully rest their judgement. Meaningful collaboration with advocates can help prosecutors avoid alternative next-level measures to secure a witness's testimony. Through meaningful advocacy, victims can be afforded opportunities to transition from a defensive posture to a position of collaboration and willingness to testify. The exercise of nuanced judgment in these situations is essential to fulfill the prosecutor's duty to "use every *legitimate* means to bring about a just [conviction]."[4]

Securing Witness Testimony—Levels of Compulsion

Ordinarily, prosecutors use the power of subpoena to bring witnesses to court for testimony. In most cases, subpoenas are issued routinely, without regard to whether the witness is willing to testify. They are issued to police officers (whose job routinely involves courtroom testimony), to victims eager to have their day in court, to reluctant eyewitnesses who would rather not have their lives disrupted to testify about something they had the misfortune to observe, and to expert witnesses who are paid for their time.

Because a subpoena is a type of court order—disregard of which can subject a recalcitrant witness to contempt for failure to comply—it is a form of compulsion. As such, there has been debate among some scholars and professionals in the field of gender-based violence as to whether victims should be subjected even to a subpoena.[5] Some believe that the use of subpoenas deprives victims of agency in their own lives. However, the routine use of subpoenas serves many purposes apart from compelling a witness to testify. Subpoenas provide an orderly means of summoning witnesses for court. They establish the attorney's diligence in the event a witness unexpectedly fails to appear and a continuance must be requested. Subpoenas provide witnesses with documentation that may be necessary to excuse absence from work or from school. They can afford "cover" for a witness who is subjected to pressure *not* to testify—a subpoena sends the message that the victim's testimony is not voluntary, but required by law. Subpoenas also provide a means of documenting a party's intent to present that witness's testimony in court (*e.g.,* for purposes of scheduling, enforcing sequestration orders, or to show that a witness "belongs" to one party or the other). There does not appear to be anything intrinsic to the use of ordinary subpoenas to summon victims to court that justifies routine avoidance of the practice.

In some criminal cases—regardless of the type of case—some prosecution witnesses will resist testifying in court, for any of a variety of reasons. Some witnesses may be loyal to the defendant (*e.g.*, fellow gang members, business associates, close friends, family members); some may simply not want to be involved; some may find going to court inconvenient or disruptive to their lives; some may fear disclosure of information that will harm them; some may have been subjected to intimidation by the defendant or the defendant's allies; some may be fearful of humiliation, embarrassment, or re-traumatization; some victims of intimate partner violence may still love the defendant and hope for a change in behavior. When such witnesses express an intention not to testify, even under court order, or if they refuse to appear in court after proper service of a subpoena, there are generally additional legal measures available for the purpose of obtaining the witness's testimony. For the sake of convenience, these will be referred to as "next-level measures" and they fall generally into two categories: material witness warrants and bench warrants (sometimes called body attachments).

Material witness warrants are typically sought in advance of trial when there is reason to believe that a witness will either avoid service of process or refuse to comply with a

properly served subpoena. The requirements and procedures for obtaining such a warrant—which may result in the witness's confinement or release on bail or other conditions—is usually set forth in statutory provisions or court rules. Bench warrants or body attachments (the terminology varies by jurisdiction) may be used when a witness fails to appear pursuant to a properly-served subpoena. Such warrants result in the arrest of the witness so they can be brought before the court to testify. In addition, the court could hold such a witness in civil contempt (holding them until they testify or until the trial has concluded) or criminal contempt (imposing a fine or jail sentence to punish their disregard of the order).

In cases involving drug-distribution schemes, gang violence, organized criminal activity, or even white-collar crimes involving corruption or misconduct, use of these kinds of next-level measures to compel witness testimony may be necessary and appropriate, particularly when the witnesses are themselves involved in criminal activity or resisting testimony for reasons that are unworthy or inexcusable.[6] But when is their use appropriate with victims of sexual or intimate partner violence?

The Prosecutor's Role as a Minister of Justice

As prosecutors, we are charged not only with enforcing the law and protecting the community, but with doing justice in the broadest sense of the word. Justice includes efforts to hold offenders accountable for their acts that harm others; protecting victims from further harm; inspiring confidence in the community that the justice system will treat fairly all individuals who come before it—victims, witnesses, and defendants—alike; presenting all relevant and available evidence in a search for the truth; and protecting the community from further victimizations. In addition to serving justice in the abstract, these practices enhance prosecutorial legitimacy and credibility, making it possible for us to do our jobs to the best of our ability, with the respect and support of the public that we serve.

The importance of prosecuting cases of sexual assault and intimate partner violence cannot be overstated. As the justice system works its way through the previously untested rape kits at the heart of the Sexual Assault Kit Initiative (SAKI) and as the DNA profiles of more offenders are entered into public databases, the prevalence of serial and "crossover" offending[7] highlights the urgent need to identify, hold accountable, and contain sex offenders to prevent future victimizations. Physical or sexual assault of an intimate partner, meanwhile, may ultimately result in even more serious physical injury, strangulation, or even death — as well as immeasurable psychological and developmental harm to child witnesses.[8] Nevertheless, the pressing needs of victims of sexual and intimate partner violence themselves sometimes prevent them from participating in the criminal justice process.

Research and experience show that there are many serious and legitimate concerns that prevent victims from participating in the prosecution of their perpetrators. There is often a risk of retaliation by offenders or their allies. Many victims fear the invasion of their privacy—although rape shield laws may afford some protection from the introduction of irrelevant evidence about a victim's sexual history, their identities (at least in the courtroom), and other aspects of the crime and of the victim's personal life. Many are repelled by the prospect of recounting, in a public setting, the intimate and humiliating details of an assault. In cases of intimate partner violence, victims may be reluctant to send a child's parent to jail; many may still have a sense of emotional connection with the offender or rely on the offender for financial support. Victims may fear that the jury will not believe them, or that they will be judged harshly for their actions, life circumstances, or choices. They may want to protect their family or other loved ones from knowledge about the assault. Victims may be reluctant to endure repetitive interviews and court appearances, particularly when the process is lengthy with numerous delays and postponements. Although many victims very much want the opportunity to be heard in court, it should not be surprising that some dread the prospect of enduring the process—or of coping with the emotional fallout of the ordeal.

In view of the daunting nature of the experience, a victim of sexual or intimate partner violence who refuses to testify or expresses an unwillingness to do so should not be considered (or labeled) as "uncooperative," but

rather viewed as a person unable or unwilling to be subjected to what is perceived as a highly intrusive and potentially traumatizing and life-changing experience. Prosecutors should approach the problem of securing victim testimony in these cases with this fact in mind. Remember, it is the *offenders' actions* that are responsible for putting victims in the precarious position that leads some to the difficult decision not to testify.

Potential Consequences of Next-Level Measures

The use of next-level measures to compel victim testimony can have serious negative consequences. Actual, direct harm to victims may include loss of freedom, missing school or work for days or weeks, and interference with the ability to care for children (perhaps resulting in the placement of children in shelter or foster care—or with the offender's family, in cases where the victim has children in common with the defendant). If adjudicated for criminal contempt, the victim may acquire a criminal record, potentially affecting child custody or employment (including the loss of security clearances). Victims arrested and held may be subjected to humiliating booking or admission procedures. In addition, jailing a victim even temporarily pending their appearance before a judge may expose them to COVID-19.

Moreover, the use of next-level measures has a negative effect on the perceptions of victims and the community, creating the impression that the prosecution does not care about the victim's safety and well-being. Arresting or forcibly compelling victim testimony on pain of punishment can look (and feel) a lot like abuse on the part of the agency that is supposed to protect victims. These practices often receive widespread negative publicity, which leads to distrust on the part of other victims and the community at large. Heavy-handed tactics may lead to increased rates of nonreporting.[9]

There is a good chance, too, that the use of such measures will backfire on the case in which it is employed. By the time the victim finally takes the stand, they are likely to be feeling hostile toward the prosecution. Their hostility on the stand may be evident to the jury, jeopardizing any prospect of conviction if the jury misinterprets that hostility as insincerity or engages in nullification to assert its own sense of justice. If the victim retains (or is assigned) an attorney to protect their interests, the case becomes more complex and time-consuming.[10] Furthermore, the defense can exploit the victim's obvious reluctance and the prosecutor's forcible compulsion to portray the prosecution as overzealous—aiming to win at all costs.

The routine use of arrest to secure victim testimony—at least in cases of intimate partner violence—may jeopardize federal funding. The Violence Against Women Act has recognized the arrest of victims of intimate partner violence as a practice that jeopardizes victim safety. As such, its routine use in the context of domestic violence is prohibited by certain grants that most states receive.[11]

Alternatives to Next-Level Measures

In view of the negative consequences likely to flow from the arrest of victims to compel their testimony in court, as well as the sense of injustice it tends to provoke, prosecutors should seek to employ case strategies that will help to avoid the need to resort to such measures. How can prosecutors support victims to enhance their ability and willingness to testify? First and foremost, prosecutors should closely collaborate with system- and community-based advocates and ensure that victims are connected to advocacy services at the earliest opportunity.[12] Through advocacy, victims can be empowered with opportunities to transition from a defensive posture to a position of collaboration and willingness to recount information in the form of testimony. They can also be directed to other resources that can provide support and assistance with the healing process. Prosecutors and advocates should maintain regular contact and communication about the status of the case to sustain victim engagement throughout the process.

To the extent possible, prosecutors should build sincere and strong relationships with the victims in their cases so that they can anticipate attempts to intimidate the victim. A prosecutor in good contact with the victim in their case may recognize and document the signs of a victim beginning to minimize the incident or attempting to recant.[13] These early warning signs may enable pros-

ecutors take steps to prevent further intimidation (using criminal orders of protection and/or appropriate bail conditions), and promptly respond if it occurs.[14] They should oppose lengthy or unnecessary delays or continuances that may dissuade the victim from continuing with the criminal justice process. Prosecutors should also provide victims with support for court appearances, including an escort to and from the courthouse and a safe place to wait until their testimony is needed.[15]

Next, prosecutors should employ evidence-based prosecution practices that will maximize the ability to move forward with the case in the absence of victim testimony, even if the ability to move forward is unlikely. Prosecutors should collaborate with law enforcement and ensure a thorough investigation to secure all available evidence and to identify and preserve potentially admissible hearsay. Important evidence may include 911 calls; medical evidence (including evidence from sexual assault kits or forensic exams, medical records, photos of injuries, and statements the victim made for purposes of medical treatment); crime scene documentation; a recorded statement from the victim; statements by the defendant (including, where appropriate, legally authorized recorded phone calls); DNA evidence; statements from percipient witnesses; statements from child witnesses to the abuse;[16] corroborative details; social media evidence; and nontestimonial statements made by the victim to friends, family, or acquaintances that fall within a hearsay exception (*e.g.*, an excited utterance to a friend contacted shortly after the rape; statements describing the victim's state of mind or present sense impressions; statements that come within a residual hearsay exception).[17]

Effective pretrial tactics in cases without victim testimony include motions to introduce evidence of other crimes or bad acts under Evidence Rule 404(b) or its equivalent; motions to admit expert testimony to explain victim behavior and common responses to trauma (including reluctance to testify); and, where witness intimidation has prevented the victim from testifying, a motion to admit the victim's out-of-court statements under the doctrine of forfeiture by wrongdoing. If the victim is willing to testify at the outset of the case, testimony at a preliminary hearing or bail proceeding may be admissible at trial if the victim becomes unavailable—provided that there was an adequate opportunity for cross-examination at the prior proceeding. Diligent and creative efforts by law enforcement and prosecutors thus may be sufficient to construct a case that can be tried even in the absence of the victim's testimony.[18]

Two of the strategies mentioned above—the presentation of prior testimony by the victim (*e.g.*, at a preliminary hearing with opportunity for cross-examination) and the admission of out-of-court statements under the doctrine of forfeiture by wrongdoing—require that the government show that the witness is "unavailable" to testify.[19] Proof of unavailability generally requires a showing that the government has been unable to secure the witness's testimony after making "reasonable efforts" to do so.[20] The question sometimes arises whether "reasonable efforts" require the prosecutor to seek a bench warrant/body attachment or material witness warrant if the witness's whereabouts are known but they are refusing to appear. To date, only the Oregon Supreme Court has held that establishing "unavailability" for purposes of introducing a witness's prior statements under the forfeiture doctrine *may* require an attempt to secure the witness's presence through use of a material witness warrant or initiation of contempt proceedings.[21] In other jurisdictions, however, prosecutors can make a compelling argument that seeking to arrest a victim of domestic or sexual violence before that victim can be deemed "unavailable" is inherently unreasonable—particularly when it is the *defendant's* actions that set in motion the circumstances leading to the victim's inability to participate. Such a requirement may also run afoul of state constitutional or statutory provisions protecting the rights of crime victims, many of which recognize the victim's right to be treated with dignity and respect by the criminal justice system. Thus, prosecutors generally do not need to show the failure of a material witness warrant in order to establish a witness's unavailability.

For cases involving sexual assault, prosecutors should also consider whether there are other serious charges that are more readily proved without the need for the victim's trial testimony. For example, medical and other

evidence might allow proof at trial of a serious assault or attempted murder, even if the sexual assault charge would require the victim's testimony. In such a case, consider whether the need to convict the defendant of a sex crime outweighs the potential harm resulting from forcing the unwilling victim to testify. Where a defendant faces multiple sexual assault charges against multiple victims, and at least some of those charges can be proved without obtaining the testimony of a nonparticipating victim, the interest in incapacitating the defendant may be adequately served by going forward only with the cases involving the victims willing to testify.

While domestic violence charges can be more readily proved at trial without the victim's testimony,[22] there still may be occasions where it will be challenging to move forward with an unavailable victim. For example, in cases where the offender threatened the victim with a gun and it is recovered within their possession, the prosecutor may still be able to seek charges for the firearms possession, even if they do not move forward with domestic violence charges.

A guilty plea is another potential avenue for resolving a case where the victim is unable to participate at trial. Depending on the facts of the case, the available evidence, and the dangerousness of the offender, it may be appropriate—particularly when the only alternative is the use of the victim's forcibly compelled testimony—to consider offering a plea to a lesser crime, or to offer a reduced sentence that adequately serves to hold the offender accountable. In cases of sexual violence, a plea to a non-sexual criminal offense may be considered in appropriate cases, particularly where it does not appear that the defendant poses a grave risk of re-offense.

In the Absence of Alternatives

Ultimately, when the alternatives suggested above are unacceptable or do not resolve the issue, the question the prosecutor must answer is whether the need to prosecute *this* offender for *this* offense outweighs the potential harm to the victim of using next-level means of compelling victim's testimony. Is such compulsion essential to achieving justice and to the safety of the community?[23]

Probably the most important consideration is the dangerousness of the offender, which can be assessed in reference to two categories of considerations. First, how great was the harm to the victim in this case? All crimes of sexual and intimate partner violence are seriously harmful to victims, but as with all crimes, the harm inflicted will be substantially greater in some cases than others. Among the factors that may magnify the harm to the victim are assaults that are particularly cruel, heinous, or sadistic; those in which there was a risk of death, permanent/disfiguring injury (*e.g.*, where the assault involved use of a weapon or when accompanied by strangulation), or severe psychological injury; those committed in the presence of or otherwise posing a risk to children; and those involving particularly vulnerable victims (*e.g.*, victims with disabilities or advanced age). The other major factor related to dangerousness is the risk of re-offense. Does the offender have a criminal history of violence? Has the offender been the subject of other reports involving physical or sexual assault? Did the offender use predatory tactics in selecting the victim or the means of attack (*e.g.*, drug- or alcohol-facilitated assault)? Did the sexual or intimate partner assault represent an escalation of violence in an ongoing abusive relationship?[24] Is there any evidence that points to an elevated risk of lethality?[25]

Next, the prosecutor should consider the risk of harm to this specific victim if next-level measures are employed to compel their testimony. Unless considerations of confidentiality and privilege prohibit doing so, consult with an advocate who is familiar with the victim's personal concerns and situation to learn whether the victim's life circumstances place them at risk of serious harm if compelled to testify. If the advocate is unable to share such information, consider making discreet inquiry of any known confidantes who might be able to help inform decision-making. Such information will not only be useful in making the decision whether to employ next-level measures to secure the victim's testimony, but also assist with planning to minimize the harm to the victim if such measures are deemed necessary.

These considerations should be evaluated early and on an ongoing basis whenever it appears, based on

interactions with the victim, that they may not be able to participate at trial. Doing so will maximize the relevant information available to the prosecutor in the event a decision about next-level measures will be required.

Mitigating the Harm to the Victim

If the prosecutor determines, after weighing all relevant considerations and alternatives, that a reluctant victim must be compelled to testify against their wishes, every effort should be made to minimize the adverse consequences to the victim.

How early must the victim's liberty be restrained? A material witness warrant may restrict liberty for a substantial period of time—from the time it is sought until the witness testifies. If the victim is unlikely to flee or to go into hiding, there is probably no need to seek a warrant as soon as they express an unwillingness to testify. By maintaining regular contact to update the victim on the case proceedings, and serving the subpoena (or warrant, if absolutely necessary) immediately before trial begins, the prosecutor will minimize the duration of any restraint.

Any material witness warrant served on a victim should request the least restrictive conditions necessary to ensure their appearance at trial. Monetary bond or actual confinement should be avoided; instead, consider seeking conditions such as restrictions on travel, regular reporting to probation, and surrender of any passport. Electronic monitoring (*e.g.*, ankle bracelets) for victims is not only restrictive, but tends to make the victim look (and feel) like a criminal; its use should be considered only when the alternative would be actual confinement. In the rare case for which actual confinement is necessary, seek the least restrictive placement possible. Victims should not be housed with those charged with, or convicted of, crimes.[26] This is even more critical when jails pose a high risk of viral transmission.

If the victim fails to appear at trial after having been properly served with a subpoena, and a bench warrant/body attachment is deemed appropriate and necessary, such orders should be executed in a way that minimizes the adverse consequences to the victim. First, seek to execute the order at a time when the trial court is in session and prepared to take the victim's testimony immediately. This will require the trial judge's understanding and cooperation; ensure that the judge understands the reason for the request—to minimize the harmful consequences to the victim who has already been traumatized by the crime. If the victim has young children, ensure there is someone available to care for them while the victim is testifying. Offer assistance to excuse the victim's absence from work or school, if necessary. Avoid any appearance that the victim has engaged in wrongdoing (*e.g.*, handcuffing). An advocate should accompany the officer when the warrant is executed to ensure that any of the victim's immediate needs are addressed. The prosecutor should support the appointment of counsel to represent the victim's interests in court; this appointment should occur at the earliest possible opportunity, and preferably before the prosecutor seeks a material witness warrant or body attachment.

Finally, prosecutors should request the court not to hold the victim in criminal contempt. Contempt generally requires a finding of willful disregard of a court order; as previously discussed, victims of intimate partner and sexual violence are faced with myriad obstacles in the course of participating in criminal proceedings. Their unwillingness to testify is a product of the crime that was committed against them, not an act of willful disobedience.

Conclusion

Next-level measures, beyond the issuance of a subpoena, to compel victim testimony in cases of intimate partner and sexual violence have serious consequences for the safety and well-being of victims. Such measures should not be used lightly or reflexively, but rather only after careful consideration of all relevant factors in cases where the victim's testimony is essential to achieving offender accountability and community safety as part of a just outcome. Prosecutors' offices should consider implementing a policy for supervisory review of prosecutorial decisions to seek material witness warrants or bench warrants/body attachments to compel the testimony of victims in these cases. This will ensure that all appropriate factors have been considered, that such action is truly necessary to achieve a just result, and that every effort has been made to minimize adverse consequences to the victim

ENDNOTES

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2 Some states ban the practice of placing a victim in custody for refusing to testify. *See, e.g.,* Cal. Civ. Proc. Code § 1219(b) (prohibiting courts from imprisoning or otherwise placing in custody victims of domestic or sexual violence for refusing to testify); *see also* Okla. Stat. Ann. tit. 22, § 720 (providing that no person may be detained as a material witness who is a victim of the crime that is the subject of the proceeding in question).

3 Because multidisciplinary support on the part of advocates and allied professionals can be critical in assisting victims in understanding their rights in the context of the criminal prosecution, a related article, Guiding and Supporting Regarding Participation in the Prosecution of Sexual Violence, has been written specifically for those professionals to 1) guide and advise victims about the circumstances that may affect the need for their testimony and 2) support them in participating, to the extent they are able to do so.

4 Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

5 Most of the discussion has centered around victims of domestic violence and the effect of "no-drop policies"; however, similar considerations of autonomy would apply to victims of sexual violence. *See, e.g.*, Erin L. Han, *Mandatory Arrest and No Drop Policies: Victim Empowerment in Domestic Violence Case*s, 23 B.C. Third World L.J. 159, 181-85 (2003); Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?* 63 Fordham L. Rev. 853, 856-57 (1994).

6 To the extent witness nonparticipation in such cases is attributable to witness intimidation, appropriate responses should take that intimidation into account. *See generally*, Teresa Garvey, Witness Intimidation: Meeting the Challenge (AEquitas, 2012).

7 Crossover offending refers to the fact that some offenders sexually assault victims both known and unknown to them. Rachel Lovell et al., *Offending patterns for serial sex offenders identified via the DNA testing of previously unsubmitted sexual assault kits,* 52 J. Crim. Justice 68-78 (2017). *See also* J. Cann et al., *Assessing crossover in a sample of sexual offenders with multiple victims,* 12(1) Legal & Criminological Psychology 149-163 (2007); P. Lussier et al., *Criminal trajectories of adult sex offenders and the age effect: Examining the dynamic aspect of offending in adulthood,* (20)(2) Int'l Crim. Justice Rev. 147-168 (2010).

8 *See generally* Adverse Childhood Experiences, https://www.ncsl.org/research/health/adverse-childhood-experiences-aces.aspx (last visited Sept. 27, 2022); Jacqueline Campbell et al., *Risk factors for femicide among pregnant and nonpregnant battered women*, in J.C. Empowering Survivors of Abuse: Health Care for Battered Women and Their Children 90-97 (Jacqueline Campbell ed., 1998).

9 *See, e.g.*. Melissa Schaefer Morabito, et al., *It All Just Piles Up: Challenges to Victim Credibility Accumulate to Influence Sexual Assault Case Processing*, J. Interpersonal Violence, 1, 14 (2016); Wayne Kerstetter & Barrik Van Winkle, *Who Decides? A Study of the Complainant's Decision to Prosecute in Rape Cases,* 17 Crim. Justice & Behav. 268-83 (1990).

10 The prosecutor should never discourage a victim from retaining their own counsel; indeed, the victim *should* be represented and advised by counsel whenever possible. Victims should be clearly advised that the prosecutor is not their attorney and must be guided by the public interest, even though the prosecutor will carefully take the victim's wishes and concerns into consideration.

11 OVW has identified the arrest of victims as sufficiently dangerous that its routine practice may result in a loss of federal funding. *See, e.g.,* OVW Grant Programs & Post-Award Information, FY2022 Solicitation Companion Guide—Improving Criminal Justice Responses to Domestic Violence, Dating Violence, Sexual Assault, and Stalking at 20 (identifying procedures or policies that penalize or impose sanctions on victims of violence for failing to testify against their abusers as "activities that compromise victim safety and recovery").

12 For a detailed discussion of the benefits of cross-training and collaboration with advocates and other allied professionals, see the companion piece, Guiding and Supporting the Victim's Choices Regarding Participation in the Prosecution of Sexual Violence.

13 This is also a critical step to documenting that a victim who was originally willing to testify has been intimidated out of coming to court in a motion for forfeiture by wrongdoing under FRE 804(b)(6) and its local equivalents.

14 *See generally* Garvey, *supra* n.6; *see also* AEquitas, Model Response to Sexual Violence for Prosecutors (RSVP Model) Volume I: An Invitation to Lead (2020) at 54, https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Vol.-I-1.8.20.pdf.

15 In the event that the courthouse does not have a separate area for victims and witnesses, prosecutors can ensure that victims are seated in an appropriate, quiet place where they can avoid the risk of being approached by the offender or the offender's friends or family. Victims should be accompanied by a support person (such as an advocate or a detective) while they wait to testify.

16 Several states have rules allowing for the statement of a young child (under 14 or 13, depending on the state) to be admitted into evidence without their presence in court. *See, e.g.,* Conn. R. Evid. 8-10, 42 Pa. C.S.A. § 5985.1.

17 *See, e.g.*, RSVP Model Vol. I, *supra* n.14 at 34-45.

18 *Id.* at 55-67.

19 The "unavailability" requirement for purposes of introducing testimonial hearsay where there has been opportunity for cross-examination arises from Confrontation Clause jurisprudence, including Crawford v. Washington, 541 U.S. 36 (2004); for purposes of introducing hearsay under forfeiture by wrongdoing, the requirement of unavailability may be in the rule of evidence under which the doctrine is codified (*e.g.*, Fed. R. Evid. 804(a) (defining unavailability); 804(b)(6) (hearsay exception for forfeiture by wrongdoing)).

20 *E.g.*, Ohio v. Roberts, 448 U.S. 56, 74-77 (1980), abrogated on other grounds by *Crawford,* 541 U.S. at 68; Barber v. Page, 390 U.S. 719 (1968).

21 *See* State v. Iseli, 458 P.3d 653 (Or. 2020). In *Iseli*, the defendant, who was acting president of a criminal motorcycle gang, had brutally assaulted his girlfriend and threatened to kill her, or have her killed by fellow gang members, if she testified. The prosecution made multiple efforts to persuade her to testify, including offering to house her in a motel before trial. Although the victim promised she would come, she ultimately failed to appear for trial. The trial court found that, in the absence of more coercive efforts, the State had failed to establish the victim's "unavailability" for purposes of introducing prior statements under the doctrine of forfeiture by wrongdoing. The Oregon Court of Appeals reversed, holding that, under the circumstances, the State was not required to "re-victimiz[e] an already traumatized crime victim" by seeking her arrest as a material witness for purposes of establishing unavailability. State v. Iseli, 426 P.3d 238 (Or. Ct. App. 2018); *rev'd* 458 P.3d 653 (2020). The Oregon Supreme Court reversed that decision, holding that under the totality of the circumstances, it was not unreasonable for the State to use such measures to bring the victim to court to testify if it appeared such efforts would be effective. The Court appeared to view "reasonable means" of securing the witness's attendance as focusing on the likelihood that the measure would succeed in securing the victim's appearance in court. *See also* State v. Cecconi, 480 P.3d 953 (Or. Ct. App. 2021) (finding that the State failed to use all "reasonable means" to secure the witness's attendance at trial and should have sought a continuance, but avoiding an explicit statement that the prosecution should have sought a material witness warrant). The Oregon Supreme Court's decision in *Iseli* might be attributable, in some measure, to its stringent interpretation of the Oregon State Constitution's confrontation provision, which guarantees a criminal defendant the right to meet the witnesses "face to face." Or. Const. Art. I, § 11. The Court has previously held that that provision requires a witness's unavailability in order to introduce even non-testimonial hearsay, such as a 911 call—despite the fact that such evidence could be introduced under the Sixth Amendment. *Compare* State v. Harris, 404 P.3d 926 (Or. 2017) (requiring witness unavailability as prerequisite to admission of 911 call) *with* Davis v. Washington, 547 U.S. 813, 822-29 (2006) (holding 911 call admissible as a nontestimonial excited utterance). Despite the *Iseli* Court's statement that its decision did not rest on state constitutional confrontation grounds, 458 P.3d at 666 n.10, the Oregon courts' insistence upon in-court testimony whenever possible might afford a basis for distinguishing *Iseli* if the case is cited by the defense as persuasive authority in other jurisdictions.

22 See discussion *supra.*

23 For comprehensive lists of factors prosecutors should generally consider in making charging decisions, *see* Am. Bar Ass'n, Criminal Justice Standards for the Prosecution Function (4th ed.), Standard 3-4.4, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/; Nat'l Dist. Att'ys Ass'n, National Prosecution Standards (3rd ed.) § 4-1.3, https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf.

24 At least two commonly used risk assessment instruments identify sexual violence as a significant lethality risk factor. Chelsea Spencer & Sandra Stith, *Risk Factors for Male Perpetration and Female Victimization of Intimate Partner Homicide: A Meta-Analysis,* 21(3) Trauma, Violence, & Abuse 527, 537 (2020); Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide,* 250 NIJ Journal 15 (1985).

25 *Id.*

26 Electronic monitoring or alternative housing can also be costly; victims should not bear the financial burden of such arrangements.

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