"Next-Level" Compulsion of Victim Testimony in Crimes of Sexual Violence Against Adults:

Prosecutorial Considerations Before Using Bench Warrants/Body Attachments and Material Witness Warrants

Testifying in court can be a daunting experience for victims. With that in mind, a victim of sexual violence who refuses to testify or who expresses an unwillingness to testify should not be considered "uncooperative." Instead, this individual should be seen as someone who is unable or unwilling to be subjected to what they may perceive as an intrusive, traumatizing, life-changing experience. Prosecutors should keep this fact in mind when attempting to secure victim testimony and also remember that the *offender's actions* are what put the victim in the position of having to decide about testifying.

When victims of sexual violence decline to testify, what should the prosecutor do to overcome such a challenge? Tools such as material witness warrants or bench warrants[1] are available; however, 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 implementing these measures? This brief examines the considerations that should be weighed when deciding whether to employ next-level measures to compel victim testimony in sexual assault cases.[3]

Background

Survivors of sexual violence who have a sexual assault kit (SAK) collected may choose to engage with the criminal legal system to seek justice for the crimes committed against them. Employing a victim-centered, trauma-informed approach may reduce the amount of trauma associated with a survivor's decision to report a sexual assault; however, the process may remain daunting.

Interviews, evidence collection, public court proceedings, and cross-examination at trial are all essential to a meticulous and fair prosecution, but these activities may be difficult and distressing for victims, even with the guidance and support of advocacy and prosecution professionals. As a result of these and other case-specific factors—including witness intimidation or the absence of personal support—some survivors may avoid service of process, refuse to appear under subpoena, or decline to participate in other prosecution activities. This process becomes further complicated when the case involves a previously unsubmitted SAK.

Thousands of SAKs are submitted to laboratories for testing as part of the National Sexual Assault Kit Initiative. As that happens, offenders' DNA profiles are entered in the Combined DNA Index System to reveal the identities of previously unknown offenders, confirm the identities of known offenders, and shed light on the prevalence of serial and "crossover" offending.[4] Such information provides the opportunity to reopen previously closed or cold cases and to give closure to victims who are still awaiting justice.

The importance of prosecuting sexual assault cases cannot be overstated; however, the pressing needs of victims sometimes prevent these individuals from participating in the criminal justice process. Victims whose SAKs were previously unsubmitted for forensic testing may be less interested in participating in prosecution than victims whose cases were processed more promptly. For some victims,

[1] Material witness warrants or bench warrants are sometimes referred to as body attachments in some jurisdictions.

[2] Some states ban the practice of placing a victim in custody for refusing to testify. *See, e.g.*, What is Exception to the Refuse to Testify in a Domestic Violence Case Rule, Cal. Civ. Proc. Code § 1219(b) (1872, amended 2019). https://leginfo.legislature.ca.gov /faces/codes_displayText.xhtml?lawCode=CCP&division=&title=5.&part=3.&chapter=&article= (prohibiting courts from imprisoning or otherwise placing in custody victims of domestic or sexual violence for refusing to testify); *see also* Detainment of person as material witness, Okla. Stat. ANN. tit. 22, § 720. https://oksenate.gov/sites/default/files/2019-12/os22.pdf (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 brief, *Guiding and Supporting a Victim's Choice to Participate in the Prosecution of Sexual Violence*, has been written specifically for those professionals to guide and advise victims about the circumstances that may affect the need for their testimony and to support them in participating to the extent they are able to do so.

[4] Crossover offending refers to the fact that some offenders sexually assault victims both known and unknown to them. Lovell, R., Luminais, M., Flannery, D. J., Overman, L., Huang, D., Walker, T., & Clark, D. R. (2017). Offending patterns for serial sex offenders identified via the DNA testing of previously unsubmitted sexual assault kits. *Journal of Criminal Justice, 52,* 68–78. https://doi.org/10.1016/j.jcrimjus.2017.08.002. *See also* Cann, J., Friendship, C., & Gozna, L. (2007). Assessing crossover in a sample of sexual offenders with multiple victims (NCJ Number: 217457). *Legal & Criminological Psychology, 12*(1), 149–163; Lussier, P., Tzoumakis, S., Cale, J., & Amirault, J. (2010). Criminal trajectories of adult sex offenders and the age effect: Examining the dynamic aspect of offending in adulthood. *International Criminal Justice Review, 20*(2), 147–168. https://doi.org/10.1177/1057567710368360.

years or decades may have passed from the time of their initial assault; victims may feel distrustful of the process or may have sought closure for their assault via other avenues (e.g., restorative justice, counseling), potentially discouraging further criminal justice involvement.

Securing Witness Testimony—Levels of Compulsion

Subpoenas. Ordinarily, prosecutors use subpoenas 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), victims eager to have their day in court, eyewitnesses who are reluctant and would rather not have their lives disrupted to testify, expert witnesses who are paid for their time, and other individuals.[5]

A subpoena is a type of court order, and disregarding such a notice can subject a recalcitrant witness to contempt for failure to comply; therefore, a subpoena is a form of compulsion. As such, some gender-based violence scholars and professionals have debated whether victims should be subjected to a subpoena because the practice may deprive victims of their agency.[6] However, the routine use of subpoenas serves many purposes apart from compelling a witness to testify.

In criminal cases, including sexual victimization crimes, prosecution witnesses will sometimes resist testifying in court for a variety of reasons. Although many victims want the opportunity to be heard in court, some understandably dread the prospect of enduring the process or aftermath of the ordeal. Research and experience show that there are many serious and legitimate concerns that prevent victims of sexual violence from participating in the prosecution of their perpetrators; these concerns include the following:

- Risk of retaliation by offenders or their allies
- Invasion of privacy[7]
- Prospect of recounting, in a public setting, the intimate and humiliating details of the attack
- Reluctance about possibly contributing to a child's parent going to jail or having that parent publicly labeled as a sex offender with the attendant registration requirements (applies to cases of intimate partner sexual violence)
- Reliance on or connection to the offender (e.g., financial support, emotional connection)
- Fear that the jury will not believe them, or that they will be judged harshly for their actions, life circumstances, or choices
- Desire to protect their family or other loved ones from knowledge about the act of sexual violence
- Reluctance over enduring repetitive interviews and court appearances, particularly when the process is lengthy with numerous delays and postponements

When victims 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 to obtain the witness's testimony. These "next-level measures" can be categorized as material witness warrants and bench warrants.

Purpose of Subpoenas

- Provide an orderly means of summoning witnesses for court.
- Establish an attorney's diligence in the event that a witness unexpectedly fails to appear and a continuance must be requested.
- Provide witnesses with documentation that may be necessary to excuse absence from work or from school.
- Offer "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.)
- Provide a means of documenting a party's intent to present witness testimony in court (e.g., for purposes of scheduling, enforcing sequestration orders, or showing that a witness "belongs" to one party or the other).

Material witness warrants are typically sought before trial when there is reason to believe that a witness will avoid service of process or refuse to comply with a properly served subpoena. A warrant may result in the witness's confinement or release on bail, or other conditions; the requirements and procedures for obtaining a warrant are usually set forth in statutory provisions or court rules.

[5] All individuals subpoenaed to court may be referred to as witnesses, including the victim of the crime. As such, the terms will be used interchangeably.

[6] 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.,* Han, E. L. (2003). Mandatory arrest and no drop policies: victim empowerment in domestic violence cases. *Boston College Third World Law Journal, 23*(1), 159. https://lawdigitalcommons.bc.edu/twlj/vol23/iss1/5/; Corsilles, A. (1994). No-drop policies in the prosecution of domestic violence cases: guarantee to action or dangerous solution? Fordham Law Review, 63(3), 853–881. https://ir.lawnet.fordham.edu/flr/vol63/iss3/5/

[7] Rape shield laws afford some protection from the introduction of irrelevant evidence about a victim's sexual history; however, a victim's identity—at least in the courtroom—and other aspects of the crime and of the victim's personal life will be open to public scrutiny.

Bench warrants may be used when a witness fails to appear pursuant to a properly served subpoena. Such warrants result in arresting the witness so they can be brought before the court to testify. In addition, the court could hold such a witness in contempt. Civil contempt involves holding a witness until they testify or until the trial has concluded, and criminal contempt involves imposing a fine or jail sentence to punish their disregard of the order.

These two types of warrants are potentially appropriate when witnesses are personally involved in criminal activity (e.g., gang violence) or resist testimony for inexcusable reasons;[8] however, the utility and appropriateness of these warrants must be reassessed for victims of sexual violence.

Potential Consequences of Next-Level Measures

Prosecutors have a great deal of discretion when deciding to possibly use compulsive measures beyond issuing a subpoena; the decision to resort to such measures should be made with prudence, an awareness of the potential consequences, and consideration for possible alternatives. Exercising well-informed and nuanced judgment in these situations is essential to fulfilling the prosecutor's duty to "use every *legitimate* means to bring about a just [conviction]."[9] First, the potential negative consequences of next-level measures to compel victim testimony must be considered.

Next-Level Measures May Cause Actual, Direct Harm to Victims. Using next-level measures may cause victims to experience a loss of agency, which may be particularly traumatic for sexual assault survivors based on the loss of agency experienced during the crime. Victims may be required to miss school or work for days or weeks and may experience difficulties with caring for children.

If adjudicated for criminal contempt as a result of next-level measures, the victim may acquire a criminal record, which potentially affects child custody and employment—including the loss of security clearances. Other victims may have an existing criminal record or outstanding charges or warrants. In these circumstances, a victim's criminal history may be further complicated by next-level measures.

Victims who are arrested and held may be subjected to humiliating booking or admission procedures, particularly because law enforcement may not be familiar with the nuances of arresting a victim. Additionally, jailing a victim during the pandemic—even temporarily prior to appearing before a judge—presents new challenges.

Ultimately, and most importantly, treating incarcerated victims like offenders can be traumatizing and cause real long-lasting harm.

Next-Level Measures May Cause Harm to the Prosecution's Case and Strengthen the Defense's Case. The use of next-level measures is likely to backfire in a case. By the time the victim takes the stand, they may feel hostile or resentful toward the State. They may avoid any kind of preparation for trial and their hostility on the stand may be evident to the jury, jeopardizing any prospect of conviction. If the victim retains (or is assigned) an attorney to protect their interests, then the case will become more complex and time-consuming.[10] The State's actions may receive negative attention from the media before, during, and after the trial. The defense can then exploit the victim's reluctance and the State's forcible compulsion to portray the prosecution as overzealous—aiming to win at all costs.

Next-Level Measures May Cause Harm to the Perception of Prosecution and Lead to Increased Rates of Nonreporting.[11] Using next-level measures may create the impression that the prosecution does not care about the victim's choices, safety, or well-being. Law enforcement arresting or compelling victim testimony in a forceful manner can look and feel abusive—especially because law enforcement personnel are supposed to protect victims. These practices often receive widespread negative publicity, which may lead individuals—such as other sexual assault victims—to distrust and not engage with the prosecution and the community at large.

Next-Level Measures May Result in a Loss of Federal Funding. Routinely arresting victims to secure their testimony may jeopardize federal funding—at least in cases of intimate partner sexual violence. The Violence Against Women Act recognizes that arresting victims of intimate partner violence is a practice that jeopardizes victim safety.

[8] To the extent witness nonparticipation in such cases is attributable to witness intimidation, appropriate response should take that intimidation into account. *See generally,* Garvey, T. (2013). *Witness intimidation: meeting the challenge*. Washington, DC: AEquitas. https://mn.gov/law-library-stat/archive/urlarchive/a170543.pdf.

[9] Berger v. United States, 295 U.S. 78, 88 (1935). https://supreme.justia.com/cases/federal/us/295/78/

[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] *See, e.g.,* Morabito, M. S., Pattavina, A., & Williams, L. M. (2019). It all just piles up: challenges to victim credibility accumulate to influence sexual assault case processing. *Journal of Interpersonal Violence, 34*(15), 3151–3170. https://doi.org/10.1177/0886260516669164; Kerstetter, W. A., & Van Winkle, B. (1990). Who decides? A study of the complainant's decision to prosecute in rape cases (NCJ Number 125980). *Criminal Justice and Behavior, 17*(3), 268–283.

As such, certain grants received by most states prohibit routine use of this practice in the context of domestic violence.[12]

Alternatives to Next-Level Measures

Whenever possible, prosecutors should seek to employ strategies that will eliminate the need to resort to next-level measures.

Provide Consistent and Comprehensive Access to Advocacy. Prosecutors should collaborate closely with system- and community-based advocates and ensure that victims are connected to advocacy services as soon as possible.[13] To engage with the criminal justice process in meaningful ways, victims must have a foundational belief that the system will benefit them; therefore, offering advocacy services supports engagement efforts. Advocates routinely address fears, concerns, and barriers so that victims can engage with the criminal justice system effectively. Through advocacy, victims may feel more supported in efforts to collaborate with the criminal justice system and may be more willing to recount information as part of their testimony.

Advocates can also direct victims to other resources that can provide support and assistance during the healing process. Such efforts may allow victims to feel more prepared to participate in the criminal justice process. Prosecutors and advocates should maintain regular contact and communication about the status of the case to sustain victim engagement throughout the process.

Implement Strategies to Reduce Burden on the Victim and Communicate with the Victim About These Efforts. For example, to the extent possible, prosecutors should (1) anticipate attempts by the defense team or the defendant and their personal network to intimidate the victim and (2) take steps to respond promptly and prevent such behavior, which may involve—among other actions—using criminal orders of protection and/or appropriate bail conditions.[14] Additionally, prosecutors should oppose lengthy or unnecessary delays or continuances and 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. As previously stated, an advocate may be able to support these efforts.

Employ Evidence-Based Prosecution Practices That Will Maximize the Ability to Move Forward With the Case in the Absence of Victim Testimony. This approach may include ensuring a thorough investigation to secure all available evidence as well as identifying and preserving potentially admissible hearsay. Important evidence may include the following:

- 911 calls
- Medical evidence (e.g., information from the SAK, with the victim's permission)
- Crime scene documentation
- Recorded statement from the victim
- Statements by the defendant (e.g., controlled communication phone calls or text messages)
- DNA evidence
- Statements from percipient witnesses
- Corroborative details
- Social media evidence
- Nontestimonial statements that the victim made to friends, family members, or acquaintances that fall within a hearsay exception (e.g., an excited utterance to a friend who was contacted shortly after the rape)[15]

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 (including reluctance to testify); and, when 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, then testimony at a preliminary hearing or bail proceeding may be admissible at trial if the victim becomes unavailable later—provided that there was an adequate opportunity

[12] Two of the primary grant programs under the Violence Against Women Act to improve criminal justice response to intimate partner violence, administered Department of Justice, Office on Violence Against Women (OVW), identify the arrest of victims as sufficiently dangerous that its routine practice may result in a loss of federal funding. See U.S. Department of Justice, Office on Violence Against Women (OVW). (2017a). *OVW Fiscal Year 2017 STOP Formula Grant Solicitation.* https://www.justice.gov/ovw/page/file/967326/download (identifying forced testimony by victims of domestic violence against their abuser as an "activit[y] that compromise[s] victim safety and recovery"); U.S. Department of Justice, Office on Violence Against Women (OVW). (2017b). *OVW Fiscal Year 2017 Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program (formerly known as the Grants to Encourage Arrest and Enforcement of Protection Orders Program) Solicitation*. https://www.justice.gov/ovw/page/file/922506/download (requiring that applicants for grant funds "demonstrate that their laws, policies, or practices and their training programs discourage dual arrests of offender and victim").

[13] For a detailed discussion of the benefits of cross-training and collaboration with advocates and other allied professionals, see the companion brief, *Guiding and Supporting a Victim's Choice to Participate in the Prosecution of Sexual Violence*.

[14] *See generally* Garvey, supra n.6; see also AEquitas, Urban Institute, & The Justice Management Institute. (2020). *Model Response to Sexual Violence for Prosecutors (RSVP Model) Volume I: An Invitation to Lead.*

[15] *See, e.g.,* RSVP Vol. I, *supra* n.10 at 34-45.

for cross-examination at the prior proceeding. Diligent and creative efforts by law enforcement and prosecutors may be sufficient to construct a case that can be tried even if the victim does not testify at trial.[16]

Two of the previously mentioned strategies—presenting the victim's prior testimony (e.g., at a preliminary hearing with an opportunity for cross-examination) and admitting out-of-court statements under the doctrine of forfeiture by wrongdoing—require the State to show that the witness is "unavailable" to testify.[17] Proof of unavailability generally requires a showing that the State has been unable to secure the witness's testimony after making "reasonable efforts" to do so.[18]

The question sometimes arises whether "reasonable efforts" require the prosecutor to seek a bench warrant or material witness warrant if the witness's whereabouts are known but the witness is 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.[19] In other jurisdictions, however, the argument that seeking to arrest a victim of domestic or sexual violence is necessary before that victim can be deemed "unavailable" is inherently *unreasonable*—particularly when the *defendant's* actions are what set in motion the circumstances leading to the victim's inability to participate. Such a requirement may also conflict with state constitutional or statutory provisions that protect crime victims' rights; many of these provisions recognize a victim's right to be treated with dignity and respect by the criminal justice system.

Offer a Plea to a Lesser Crime That Does Not Require Victim Participation. A guilty plea is another potential avenue for resolving a case when the victim is unable to participate at trial. The facts of the case, the available evidence, and the dangerousness of the offender may present an opportunity to offer a plea to a lesser sex crime or a reduced sentence that adequately serves to hold the offender accountable. These options should be considered, especially when the only alternative is to use the victim's forcibly compelled testimony. Ensuring consistent and comprehensive access to advocacy gives victims the opportunity—and statutory rights, in some jurisdictions—to (1) provide input about this decision and (2) express to the court how the crime has impacted their lives. Including victim impact statements may secure ongoing access to information, case status, and statutory rights beyond conviction. For many victims, this practice supplements ongoing efforts at overall healing.

Consider Whether Justice May be Served Using Charges That Do Not Require the Victim's Involvement. Prosecutors should consider whether there are other serious charges that are more readily proven and do not require the victim's testimony. For example, medical documentation and other evidence might allow proof at trial of a serious assault or an attempted murder. In such a case, consider whether convicting the defendant of a sex crime outweighs the potential harm that results from forcing an unwilling victim to testify. If a defendant faces multiple sexual assault charges against multiple victims and some of those charges can be

[16] *Id.* at 55-67.

[17] 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). https://supreme.justia.com/cases/federal/us/541/36/; 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.,* Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness. Federal Rule of Evidence, 804(a) (2011). https://www.rulesofevidence.org/article-viii/rule-804/ (defining unavailability); 804(b)(6) (hearsay exception for forfeiture by wrongdoing)).

[18] *E.g.,* Ohio v. Roberts, 448 U.S. 56, 74-77 (1980). https://supreme.justia.com/cases/federal/us/448/56/, abrogated on other grounds by *Crawford, supra*; Barber v. Page, 390 U.S. 719 (1968). https://supreme.justia.com/cases/federal/us/390/719/

[19] *See* State v. Iseli, 458 P.3d 653 (Or. 2020). https://www.leagle.com/decision/inorco20200221667. 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). https://law.justia.com/cases/oregon/supreme-court/2020/s066142.html. 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.

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." Oregon Constitution, art. I, § 11 https://codes.findlaw.com/or/oregon-constitution/or-const-art-i-sect-11.html. 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, 362 Or. 55 (2017). https://case-law.vlex.com/vid/404-p-3d-926-746772553 (requiring witness unavailability as prerequisite to admission of 911 call) *with* Davis v. Washington, 547 U.S. 813, 822-29 (2006). https://supreme.justia.com/cases/federal/us/547/813/ (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..

proven without involving nonparticipating victim(s), then going forward with only the cases that involve victims who are willing to testify may incapacitate the defendant.

In the Absence of Alternatives

Ultimately, when the previously suggested alternatives will not work or do not resolve the presented challenges, then the prosecutor must determine whether the need to prosecute *this* offender for *this* offense outweighs the potential harm in using next-level means of compelling a victim's testimony. Is such compulsion essential to achieving justice and keeping the community safe?[20]

Evaluating Considerations in the Absence of Alternatives. The most critical consideration should be how potentially dangerous the offender is. First, does the offender have the capacity to continue harming others and/or would failing to prosecute them cause further harm to the victim? The following crimes should be given thorough consideration:

- Assaults that are particularly cruel, heinous, or sadistic
- Crimes in which there was a risk of death, permanent/disfiguring injury (e.g., the assault involved strangulation or use of a weapon), or severe psychological injury
- Crimes committed in the presence of—or otherwise posing a risk to—children
- Crimes that involved particularly vulnerable victims (e.g., children, victims with disabilities)

The other major factor related to dangerousness is the risk of re-offense. For example, consider the following:

- Does the defendant have a history of sexual offenses or complaints, or a criminal history of violence?
- Did the offender use predatory tactics in choosing the victim or the means of attack (e.g., drug- or alcohol-facilitated assault)?
- Does the sexual assault represent an escalation of violence in an ongoing abusive relationship?[21]

Endorsing at least one of these questions about potential dangerousness does not necessarily justify next-level measures; however, these questions should be more carefully considered under relevant circumstances.

Next, the prosecutor should consider the risk of harm to the victim if next-level measures are employed to compel their testimony. Unless considerations of confidentiality and privilege prohibit, the prosecutor should 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.

These relevant considerations should be evaluated early and on an ongoing basis. Doing so will maximize the relevant information available to the prosecutor in the event of a required decision about next-level measures.

Mitigating Harm to the Victim in the Absence of Alternatives. If the prosecutor determines—after weighing all relevant considerations and alternatives—that a reluctant victim must be compelled to testify against their wishes, then every effort should be made to minimize adverse consequences for the victim.

A material witness warrant may restrict liberty for a substantial period—from the time the warrant is sought until the witness testifies. Consideration should be given to ensure minimal restraint of liberty. If the victim is unlikely to flee or to go into hiding, then 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 about 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, electronic monitoring, or actual confinement should be avoided in all circumstances. Instead, consider seeking conditions such as restricting travel, reporting to probation regularly, and surrendering any passports. Confinement is rarely necessary; when such a rarity occurs, seek the least restrictive placement possible. Victims should not be housed with those charged with, or convicted of, crimes.[22] 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 if a bench warrant is deemed appropriate and necessary, then such orders should be

[20] For comprehensive lists of factors prosecutors should generally consider in making charging decisions, *see* American Bar Association. (2017). *Criminal Justice Standards for the prosecution function (4th Ed., Vol. 1), Standard 3-4.4, Discretion in filing, declining, maintaining, and dismissing criminal charges*. https://www.americanbar.org/groups /criminal_justice/standards/ProsecutionFunctionFourthEdition/; National District Attorneys Association. (n.d.). *National Prosecution Standards* (3d Ed., Sec. 4-1.3). https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf.

[21] At least two commonly-used risk assessment instruments used to evaluate the risk posed by domestic violence offenders identify sexual violence as a significant lethality risk factor. Spencer, C. M., & Stith, S. M. (2020). Risk factors for male perpetration and female victimization of intimate partner homicide: a meta-analysis. *Trauma, Violence, & Abuse, 21*(3), 527–540. https://doi.org/10.1177/1524838018781101.

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

executed in a way that minimizes adverse consequences for 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 approach will require the trial judge's understanding and cooperation. Ensure that the judge understands the reason for the request (i.e., 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. The prosecutor should also offer assistance to excuse the victim's absence from work or school, if necessary. Avoid handcuffing and other actions that would suggest the victim has engaged in wrongdoing. 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.

Finally, when relevant, the prosecutor should request that the court not hold the victim in criminal contempt. Contempt generally requires a finding of willful disregard of a court order; as previously discussed, sexual assault victims are faced with myriad obstacles during criminal proceedings. Their unwillingness to testify is a result of the crime committed against them, not an act of willful disobedience.

Conclusion

Prosecutors are charged not only with enforcing the law and protecting the community but also with doing justice in the broadest sense of the word. Justice includes efforts to

- Hold offenders accountable for their harmful acts against others
- Protect victims from further harm
- Inspire community members' confidence that the justice system will treat fairly all individuals who engage with it—victims, witnesses, and defendants alike
- Present all relevant and available evidence in a search for the truth
- Protect the community from further victimizations.

In addition to serving justice, these practices enhance prosecutorial legitimacy and credibility within the communities the court serves.

Next-level measures, beyond issuing a subpoena, to compel victim testimony in cases of sexual violence have serious consequences for the safety and well-being of victims and the credibility of prosecutors. Such measures should be used only after carefully considering all relevant factors in cases in which the victim's testimony is essential to achieving offender accountability and community safety.

Prosecutors' offices should consider implementing a supervisory review policy for prosecutorial decisions related to seeking material witness warrants or bench warrants to compel the testimony of victims in sex crime cases. Implementing such a policy will ensure that all appropriate factors have been considered, that such action is necessary to achieve a just result, and that every effort has been made to minimize adverse consequences for victims.

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