The Department of Justice’s (DOJ) Office on Violence Against Women (OVW) developed this model protocol for prosecutors and prosecutors’ offices to implement with the goal of ensuring that victims of crimes involving sexual assault, domestic violence, dating violence, and stalking, are rarely, if ever, arrested, detained, or held in custody as part of the investigation and/or prosecution of the perpetrators who victimized them. It is a highly disfavored practice and is an option of last resort. Prosecutors regularly build provable cases and secure victim testimony without having victims arrested or detained to do so. *See*the [U.S. Department of Justice Framework for Prosecutors to Strengthen Our National Response to Sexual Assault & Domestic Violence Involving Adult Victims](https://urldefense.com/v3/__https:/www.justice.gov/ovw/media/1352371/dl?inline__;!!I47Zg8fJQnY!aea9N1-eIDJKJmL3UU_ETlZC5F1GCEeXfiRZXBMt90wviD_2VeQRX-hDeNALuGBKSEC_b0SLgoQkc-2szGL4wp-T1IxDkdMw--upSPYs$) (May 2024) (setting forth a blueprint for “building provable cases in a trauma-informed manner that treats victims with humanity and ensures due process for defendants.”)

This model protocol can be adapted and implemented by any prosecutor’s office. Integrating it into a prosecutor’s office policy and a prosecutor’s daily practice will lessen victim re-traumatization, increase defendant accountability and community safety, and help inform sound and principled prosecutorial decision-making. It will further help ensure that prosecutors adhere to mandatory victims’ rights statutes. *See*, *e.g.*, 18 U.S.C. § 3771 (federal Crime Victims’ Rights Act, providing various statutory rights to victims, including the right to confer with the attorney for the government and the right to be treated with fairness and respect for the victim’s dignity and privacy); 18 U.S.C. § 3772 (federal Sexual Assault Survivors’ Rights Act, providing various statutory rights to sexual assault victims regarding sexual assault forensic examinations and evidence collection kits).

State, local, or Tribal prosecutors’ offices that are recipients or subrecipients of funds under the Services\* Training\* Officers\* Prosecutors (STOP) Violence Against Women Formula Grant Program and/or the Improving Criminal Justice Response (ICJR) Program are required to implement such a protocol pursuant to 34 U.S.C. § 10454(3) and 34 U.S.C. § 10461(c)(1)(F)(iii), respectively.[[1]](#footnote-2) Recipients or subrecipients of STOP and/or ICJR funds may adapt and implement this model protocol to satisfy this statutory requirement.

Prosecutors’ offices should supplement and adapt this model protocol to reflect the legal vernacular, practices, and relevant caselaw of their jurisdictions.

**[Insert Office Name/Letterhead and amend as necessary]**

**Protocol Regarding Testimony of Victims of Sexual Assault, Domestic Violence, Dating Violence, and Stalking**

1. Background

* This office recognizes the gravity of crimes involving sexual assault, domestic violence, dating violence, and stalking, and that these crimes pose a significant public health and safety threat. This office takes these allegations seriously and is committed to investigating them thoroughly. It is further committed to ensuring offender accountability while upholding defendants’ constitutional rights, increasing community safety, and lessening victim re-traumatization.
* The policies and practices of this office related to the investigation and prosecution of these crimes have been guided by the principles set forth in the [U.S. Department of Justice Framework for Prosecutors to Strengthen Our National Response to Sexual Assault & Domestic Violence Involving Adult Victims](https://urldefense.com/v3/__https:/www.justice.gov/ovw/media/1352371/dl?inline__;!!I47Zg8fJQnY!aea9N1-eIDJKJmL3UU_ETlZC5F1GCEeXfiRZXBMt90wviD_2VeQRX-hDeNALuGBKSEC_b0SLgoQkc-2szGL4wp-T1IxDkdMw--upSPYs$) (DOJ Prosecutors’ Framework). The purpose of the DOJ Prosecutors’ Framework is to reduce declinations of meritorious allegations and to “equip prosecutors to build provable cases in a trauma-informed manner that treats victims with humanity and ensures due process for defendants.”
* Every prosecutor handling one of these cases should read the DOJ Prosecutors’ Framework, found in the link above or at <https://www.justice.gov/ovw/prosecutor-guide>, which also includes recorded trainings and additional resources that expand on the points throughout this document.

1. Policy and Purpose

* Most prosecutions of sexual assault, domestic violence, dating violence, and stalking rely on the victim’s account, and therefore require victims to testify. It is not uncommon for a victim to be reluctant to participate at some point during the pendency of a case. This is true for myriad reasons, particularly in cases where the defendant may have threatened or intimidated the victim, the victim may be frightened of escalating violence by the defendant, or the victim may be financially dependent on and/or have children in common with the defendant. The victim may also be apprehensive or embarrassed about the prospect of testifying, enduring cross-examination, or having their credibility publicly questioned, among other concerns.
* Prosecutors should expect such hesitance and engage with the victim throughout the pendency of a case, as set forth in Section III below and in the DOJ Prosecutors’ Framework. Doing so will increase the likelihood that the victim will participate in the prosecution through resolution, be it via guilty plea, or via trial, where the victim will likely be called to testify, even if reluctantly.
* **It is the policy of this office not to arrest, detain, hold victims in custody, or subject victims to contempt proceedings for the purpose of securing their testimony, absent extraordinary and limited circumstances.[[2]](#footnote-3)** Doing so is unnecessarily re-traumatizing, treats victims as perpetrators, and generally does not serve the ends of justice. It is an option of last resort that should rarely, if ever, be used. Prosecutors can build provable cases and ensure victims testify at trial without having victims taken into custody to do so. Sections III-IV below outline the process prosecutors should undertake to avoid compelling testimony in such a manner, and, where possible, prove cases without victim participation. Sections V-VII outline the extraordinary and limited circumstances under which prosecutors may seek arrests or detention of victims to compel testimony, and the steps to take thereafter.

1. Interacting with Victims and Working with Victim Advocates

* *Meet with Victims:* Prosecutors must meet with victims. Meeting with victims, as early as possible in an investigation, is the most basic and effective way to evaluate the merits of a case, learn more about what happened, collaborate with investigators on additional investigative steps, and properly assess the viability of various statutory violations. It will also allow prosecutors to gauge whether victims are hesitant to proceed and discuss and address with victims their reasons for hesitance. There is a difference between hesitance or reluctance and outright refusal to participate. Prosecutors must take care not to conflate the two. The information that a victim provides when meeting with the prosecutor, both in substance and the context in which it is given, may then inform a prosecutor’s next steps, and it may make for more meaningful discussions about charging decisions and plea offers.
* *Work with Victim Advocates:* Prosecutors should work with victim advocates. This office’s victim advocates should regularly check in with victims, per victims’ preferences, and work to allay victims’ concerns, particularly when victims receive automatic victim notifications or see case updates on the court’s website. They should help victims understand the criminal justice system and court process and help stabilize victims. This includes referring victims to community-based victim advocates, who may operate with some level of confidentiality and be better able to respond more directly to a victim’s needs and provide trauma-informed services and support. Ensuring the well-being of victims, where prosecutors and victim advocates work together to do so, may increase the likelihood that victims will testify at trial.
* *Explain Subpoenas:* All witnesses, including victims, receive subpoenas for trial as a matter of course. Prosecutors should explain to victims that trial subpoenas are court orders that require them to testify truthfully. Subpoenas allow prosecutors to make clear during the victim’s testimony that the victim is not testifying voluntarily but they are doing so because they have been ordered to testify. For the purposes of establishing *forfeiture by wrongdoing*, as discussed in Section IV, should the defendant intentionally cause a victim’s unavailability, subpoenas allow prosecutors to demonstrate to the court that they exercised due diligence in seeking to present the victim’s testimony. In addition, some victims may prefer to receive subpoenas because they are a tangible symbol that the filing of charges was not the victim’s decision.

1. Proving Cases without Victim Participation at Trial

* Most of these cases require victim testimony at trial to withstand a motion for judgment of acquittal. However, there are times where some cases, particularly stalking cases and domestic violence cases involving physical assault, can be proven without victim testimony. Because of the dynamics at play in these cases, particularly where the victim has an ongoing relationship with the defendant, prosecutors should prepare to prove their cases without victim testimony, even if the victim is communicative and participatory at the inception of the case.
* *Forfeiture by Wrongdoing:* Prosecutors should consider that a victim’s recantation, minimization, or refusal to testify commonly result from the defendant’s ongoing misconduct. When there is evidence that the defendant intentionally caused the victim’s unavailability, prosecutors should move to admit the victim’s hearsay statements under the doctrine of forfeiture by wrongdoing, obviating the need for victim testimony at trial. *See* the DOJ Prosecutors’ Framework at page 21.

1. Deciding to Compel Testimony via Arrest of the Victim

* There will be times when, despite a prosecutor’s best efforts consistent with the principles in the DOJ Prosecutor Framework and the points in Section III above, a victim will refuse to participate in a prosecution. On balance, such a refusal should rarely be a last-minute surprise, but rather something prosecutors consider throughout the pendency of a case, when making charging decisions and plea offers, and when announcing whether the government is ready for trial. A prosecutor should not announce “ready for trial” if a prosecutor knows that the victim will not appear to testify and that the case cannot be proven without the victim’s testimony.
* When a victim absolutely refuses to participate and the case cannot be resolved via guilty plea or proven without the victim’s testimony at trial, prosecutors should move for a continuance as long as they have a good faith belief that additional time will allow for meaningful engagement with the victim. Otherwise, in most cases, prosecutors should move to dismiss the case without prejudice or enter a nolle prosequi before the jury is sworn (or, in a bench trial, before the first witness is sworn) to avoid the attachment of jeopardy. This will allow for refiling of charges, if applicable.
* There are **limited** times where, despite a victim’s outright refusal to testify, community safety and offender accountability mandate that a case proceed to trial. Choosing to compel victim testimony via contempt proceedings, arrest, detention, or holding a victim in custody is an extreme measure that will most likely re-traumatize the victim. Prosecutors should consider the many collateral consequences that a victim will face, including but not limited to: the victim’s children being placed with the [Department of Children and Families] or with the offender, as well as the victim’s increased distrust of the criminal justice system, leading to an unwillingness to contact law enforcement if the defendant re-offends. Having a victim held in custody requires significant consideration about whether the ends justify the means, whether the prosecutor’s office is putting the victim’s safety or their family at risk, and whether the need for offender accountability outweighs the consequences to the victim. **Making this decision is a highly deliberative process, not to be first considered on the eve of trial, and to be undertaken sparingly, if ever, during a prosecutor’s career.**
* Prosecutors may only consider this option after all of the following criteria are met: (1) all other options and practices outlined in this document have been exhausted; (2) the crime at issue is extraordinarily serious, there is a high likelihood of conviction, and it is likely that a significant sentence will be imposed upon conviction; (3) the defendant poses a grave threat to the community, to the victim, or to the victim’s family should the case be dismissed; (4) the victim has indicated a refusal to comply with a lawfully-executed subpoena, has been evading subpoena service, or has ignored all attempts at contact; (5) the court has denied/will deny the prosecutor’s motion for a continuance; and (6) a supervisor with experience prosecuting these cases and the head of the office concur with arresting the victim to compel testimony.
* Most cases where the victim refuses to participate will not meet the aforementioned criteria.

1. The Process for Seeking to Hold the Victim in Custody

[Outline the process for obtaining a warrant, capias, writ of body attachment, or similar instrument used to in your jurisdiction to arrest, detain, or hold a victim in custody, including the process for moving to hold a victim in contempt or moving for rules to show cause and material witness petitions, if used in your jurisdiction. Prosecutors should request that, upon execution of the warrant, writ, etc., courts should impose the least restrictive conditions necessary to ensure a victim’s appearance at trial.

This section should also include matters for the court’s consideration, including but not limited to: the process for obtaining legal counsel for the victim; asking the court that the victim be taken into custody without the use of handcuffs or similar restraints, if possible; and educating the court about the nature of the case and that the victim be permitted to testify soon after the victim is arrested, detained, or taken into custody*.*]

1. Prosecutor’s Obligations Upon Arrest, Detention, or Holding the Victim in Custody

Upon arrest, detention, or holding the victim in custody, the prosecutor must do the following:

* Ensure that when authorities arrest, detain, or take a victim into custody that they do so in manner that does not unnecessarily embarrass or re-traumatize the victim. Victims should not be detained at their place of work, in front of their children, or during hours when they cannot be immediately brought before the court.
* Ensure that a victim is not held, detained, or housed among general population with individuals charged with crimes, or within eyesight or earshot of the defendant, and ensure that the victim is not transported to the courtroom with the defendant.
* Immediately meet with the victim, along with a victim advocate and/or an investigator, to explain why the victim’s arrest or detention was necessary, including the prosecutor’s obligation to the safety of the community. Prosecutors must also explain that they plan to expedite the victim’s testimony so that the victim may be more quickly released.
* Request that the trial court instruct the victim that the court compelled the victim’s presence on the prosecutor’s motion, that the victim’s obligation is to tell the truth, and that the substance of victim’s testimony will not be considered in determining the victim’s release from custody.
* Before the victim testifies, ensure that the victim has street clothes to wear during testimony. While the prosecutor (and the victim) may want the jury to know that the victim is in custody and the reason for it, the victim should still be afforded the dignity of not testifying in jail attire.

If a victim is arrested on an outstanding warrant on a matter unrelated to the case at issue, the prosecutor handling the case at issue should not also handle the case where the victim is a defendant.

1. These provisions state that “prosecutor’s offices [must] engage in planning, developing, and implementing:”

   a protocol outlining alternative practices and procedures for material witness petitions and bench warrants, consistent with best practices, that shall be exhausted before employing material witness petitions and bench warrants to obtain victim-witness testimony in the investigation, prosecution, and trial of a crime related to domestic violence, sexual assault, dating violence, and stalking of the victim in order to prevent further victimization and trauma to the victim. [↑](#footnote-ref-2)
2. Different considerations may apply where the victim has committed collateral or unrelated crimes. This policy governs detaining victims for the sole purpose of securing testimony. [↑](#footnote-ref-3)