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The Impact of Domestic Violence and Sexual Violence on Law Enforcement and The Administration of Justice

My remarks today are based on my time as a defense attorney and 21 years of service as the elected prosecutor in Ripley County, Indiana. During my tenure as Prosecuting Attorney, I developed best practices for law enforcement in my community, personally handled domestic and sexual violence cases, and trained prosecutors handling sexual and domestic violence cases across the country. These experiences showed me the gaps in our justice system's response to domestic and sexual violence crimes, and have led me to advocate for new and better law enforcement strategies over the course of my career.

Left unaddressed, offender-victim dynamics in cases of domestic violence threaten victim safety, compromise victims' ability to participate in the criminal justice process, and impact the type and availability of evidence that can be used to prosecute offenders.[1] A victims' hesitancy or unwillingness to participate in the criminal justice system–due to witness intimidation, dynamics of power and control, or feelings of love and loyalty toward the perpetrator–must be carefully examined in order understand how best to help victims and prosecute these cases.[2] Less experienced/untrained law enforcement officers and prosecutors may not recognize legitimate reasons for victim recantation, fail to investigate and prepare the case in anticipation of a possible recantation, or understand how these cases can proceed without victim testimony.

Like domestic violence, sexual assault involves uniquely vulnerable victims, and poses challenges for prosecutors and other professionals in the criminal justice system. How these crimes happen, who commits them, and who is victimized—are widely misunderstood by those untrained about perpetrator-victim dynamics and the neurobiology of trauma. Specialized training, meticulous case preparation, and compassionate and research-informed interactions with victims and witnesses are critical to successfully proceeding in these cases.

We know domestic violence and sexual violence incidences are severely underreported. With that in mind, Ripley County is a jurisdiction of approximately 30,000. In 2019, there were 90+ reports of domestic violence and less than 15 reports of adult sexual violence in Ripley County. There are many barriers to reporting these crimes, and I recognize that Ripley County is not immune to underreporting. The challenges domestic violence and sexual violence cases present are significant, but not insurmountable. We must work together to employ additional and new, evidence-based practices to tackle them. Below, I offer recommendations adapted from national resources addressing best prosecution practices because they mirror my own experiences in the field.

Recommendation 1: Enhanced Training for Law Enforcement Responding to Domestic Violence Cases

In domestic violence cases, prosecutors and law enforcement can employ strategies to enhance a victim's willingness to participate in the prosecution of their abusers, and even

the chance of prosecutorial success without victim participation. In the latter scenario, preparing and litigating forfeiture by wrongdoing motions[3], which can counter confrontation challenges in certain cases, is critical, and depends on evidence gathered by meticulous investigations, conducted by well-trained officers who understand the dynamic of domestic violence. Typical tactics supporting evidence based prosecutions include: conducting pretext phone calls (where appropriate), monitoring the defendant's phone calls from jail, reading any written communications to the victim, and working with medical and other experts to interpret and explain injury, lack of injury, common dynamics, and other important evidence. These investigations often reveal additional witnesses crucial to corroborating details of the crime when the victim is unwilling or unable to participate in the prosecution, and prioritize the documentation of information critical to overcoming hearsay or confrontation objections to the absent victim's out-of-court statements.[4]

By employing the principles of evidence-based prosecution, prosecutors are able to counter the challenges posed by gaps in the evidence, as well as legal challenges arising from a victim's lack of participation. Much of this corroborating evidence may also be relevant to admission of a victim's out-of-court statements by establishing that the defendant forfeited his right to confrontation. Thorough investigation and documentation[5], therefore, is critical in allowing prosecutors to anticipate—and prepare for—cases where the victim does not participate in prosecution.

Recommendation 2: Development of Specialized Prosecutors and Law Enforcement Responding to Domestic and Sexual Violence Cases

Specialized prosecution units promote the development of expertise, and provide access to focused training and collaboration opportunities with allied partners.[6] The research shows, however, that a specialized unit alone will not improve prosecution rates unless the prosecutors assigned to it are specially trained, aggressive, informed, and skillful trial attorneys, who measure success beyond conviction rates. Specialized investigative practices aid in uncovering relevant evidence and encourage victims to remain engaged throughout the process. Specialized trial expertise provides the necessary knowledge and skills to explain common gaps in evidence and counter deeply entrenched myths and assumptions about victim credibility—namely what trauma and victimization look like.

Experience, knowledge, and analytical skills are critical in identifying and correctly applying the criminal statutes, evidentiary and procedural rules, and case law relevant to the prosecution of sex crimes. Prosecutors must also be familiar with the current research related to: victim behavior, perpetration, medical/health issues, forensic science, and psychological/mental health issues. Moreover, specialized prosecutors must understand the common challenges that arise when investigating and prosecuting these crimes.

Offices can specialize by implementing hiring, assignment, and targeted training processes that identify and develop compassionate prosecutors with the skills necessary to succeed in prosecuting sexual and domestic violence. Prosecutors who have performed well in general crimes, crimes against persons, or violent crimes, who have the desire and disposition to develop the necessary expertise and to give these cases the attention they deserve, are possibly good candidates for specialization because of their expertise engaging with victims.

Recommendation 3: Commit to Trauma-Informed, Victim-Centered and Offender-Focused Sexual and Domestic Violence Prosecution.
Starting from a place of neutrality is critical, as it ensures trainings, practices, policies, and philosophies are trauma-informed, victim-centered, and offender-focused. A trauma-informed approach acknowledges trauma is an individual response to physically or emotionally harmful events, recognizes the offender is responsible for the victim's trauma, aids in identifying and interpreting of evidence of trauma, and assists juries in understanding its effects. Interaction with victims minimizes re-traumatization and maximizes their engagement with the criminal justice system.[7]

A victim-centered approach appreciates the central role victims play in the judicial process and demands law enforcement partners consider their needs throughout the process. An offender-focused approach recognizes that offenders purposefully and intentionally target victims whom they believe they can assault and impugn in order to avoid the consequences of their conduct. Importantly, it focuses on the offender's actions and intent and opposes defense tactics to deflect the focus on to the victim. These two approaches are not mutually exclusive, however, and prosecutors must weave the two together in order to ensure a trauma-informed prosecution.

In light of this, prosecutors should specialize in handling sex crimes, domestic violence, stalking, human trafficking, and/or child abuse cases, rather than carrying a mixed caseload of generalized crimes. This can enhance the assignment of trauma-informed practices and personnel to support victims through the criminal justice process.

Recommendation 4: Pretrial Motions, when possible, should be filed.
Pretrial motions enable us to keep out irrelevant and prejudicial information which open up the victim to attack on issues unrelated to their victimization. Such motions include those related to safety, rape shield, admissibility of hearsay and other evidence under federal or state rules. At the same time, prosecutors must file motions to introduce evidence pertaining to the offender's other acts, e.g., under FRE 404(b), or behaviors indicative of consciousness of guilt, and admissions, as well as sentencing enhancements for repeat offenses, gang activity, use of a firearm, or other factors.[8]

Recommendation 5: Engage in More Meaningful Multidisciplinary Collaboration
A comprehensive, successful response depends upon all system stakeholders–including medical forensic examiners and victim advocates. Strong collaboration among these professionals is essential; if one organization does not do its job well, prosecutions can be compromised.[9] Research shows that a system working collaboratively to provide a coordinated response encourages more victims to access services and participate in the process, better holds offenders accountable, and improves victim and community safety. Collaboration also enables allied professionals to share resources, educate one another, evaluate, refine their practices, adapt to emerging issues, and ensure the sustainability of their practices.[10] Prosecutors should identify and encourage collaboration with leading experts in these multidisciplinary fields to better understand victim experiences and develop deeper insight into sexual assault case evidence.[11] Some multidisciplinary partners not involved in the case may be qualified as experts to offer expert testimony on victim behavior and should be utilized whenever applicable and possible.

Engagement in Sexual Assault Response Teams (SARTs), represents an important way to "[e]nsure justice and create a more compassionate and streamlined response, [allowing] service providers [to] intervene in a way that speaks to the context of each victim's circumstance and respects the unique roles of the different professionals involved in responding to sexual assault."[12] Prosecutors should take a leadership role in the SART in their community and ensure *consistent* participation, preparation, and mentoring of staff assigned to the team.[13] They should also create a mechanism for receiving and responding to feedback from their community partners, sexual assault victims who have reported, and those who choose to remain anonymous or decided not to report.[14]

Recommendation 6: Recognize, Prevent, and Respond to Witness Intimidation.
Witness intimidation is a common issue that must be confronted at the outset of a case and throughout its prosecution. Without addressing it early on, witness intimidation can lead to destruction of a case, send a message to offenders that they control the criminal justice process, and cause additional trauma and injury to victims. Prosecutors should work with law enforcement and corrections to ensure an investigator immediately talks to the victim and witnesses so they understand what types of conduct constitute intimidation and how to safely report it. A prosecutor should, when possible, file charges, motions to revoke bond, and/or include the intimidating conduct in the prosecution of the underlying case.[15]

Recommendation 7: Obtain More Accurate Data on the Incidence of Sexual Violence to Determine the Rate of Victim Reporting to Law Enforcement and Percentage of Cases to Which Prosecutors are Responding.
Nationwide research suggests that many, if not most, incidents of sexual violence never result in criminal charges. By obtaining a clearer picture of sexual violence's scope in our communities, the reasons for nonreporting, and the rates of case attrition (the rate at which cases are "lost" or dropped), law enforcement and prosecutors can begin to assess the extent to which their own actions, as well as the actions of allied professionals in other agencies, are affecting these numbers.

Accurately calculating the prevalence of sexual assault in one's jurisdiction, as well as the rate and causes of attrition is a huge undertaking and could benefit from partnerships among allied professionals. Prosecutor's offices that have dedicated analysts incorporating and integrating data into its practice might be able to capture this number. However, prosecutors can also work with partners to obtain initial estimates for purposes of developing a very general, big-picture view of the extent and sources of attrition.

Recommendation 8: Ensure Unbiased and Well-Informed Standards for Charging and Prosecuting Sex Crimes
Inappropriate declinations tend to rest on two discrete, equally problematic practices: the initial—often inaccurate—impression of the case facts or victim, and the speculation or prediction about the likely outcome. Initial impressions that result in declination are often the product of premature judgments formed before all facts are known. Decisions to forgo full investigations sometimes flow from an intent to prioritize expenditure of finite resources for those crimes perceived as most likely to be substantiated and prosecuted.[16] However, improved investigations strengthen complex cases and improve the likelihood of a positive trial outcome. Results of recent research into untested sexual assault kits

should remind us of the consequences these decisions have for victims and communities, where failure to properly investigate and adequately communicate among allied professionals have resulted in perpetrators remaining free to possibly assault others.

Speculation about likelihood of conviction describes prosecutorial decision making based on what we believe a jury would do rather than based on what they should do. The "would" rather than "should" approach is also known as predictive analysis and "involves prosecutors in predicting the future decision-making of others… [and] if the persons who will make the ultimate decision at trial are unlikely to find the evidence sufficient, then the prosecutor… [will] decline prosecution on grounds of evidential insufficiency."[17] Collateral consequences put in motion from this approach includes law enforcement not referring cases for prosecution if they believe the prosecutor is unlikely to charge, based on the prosecutor's professed belief that juries will not convict on a given set of facts. Predictive analysis is at odds with the proper basis for prosecutorial discretion because it abdicates the critical decision-making responsibility to a less than fully informed, hypothetical jury. Prosecutorial decision making must focus on whether a factfinder, provided with the education (e.g., through expert testimony) and reviewing all available and admissible evidence, should render a guilty verdict. This method alone is in line with our duty as prosecutors to ensure the guilty do not escape and the innocent do not suffer as well as to use all legitimate means to bring about justice.[18]

In light of this, prosecutors should identify practices that result in little or no investigation, leading to cases that are inappropriately or prematurely closed without charges or referral to the prosecutor. Specialized prosecutors should review *all* police reports to determine which types of cases and victims are being passed over and why.

Recommendation 9: Develop a Comprehensive and Measurable Definition of Success in Sexual Violence Cases

The process of prosecuting a sexual assault case is arguably as important as its outcome. Even if a case results in a resolution that falls short of the charges or sentence pursued by the prosecutor, the implementation of best practices throughout the life of the case—from initial evaluation and charging through resolution—can generate a high quality of procedural justice for the victim and the public. A comprehensive definition of case success should thus account for prosecution efforts to bring about justice. There are multiple measures to consider, including: case resolution, which takes into account case complexity; the implementation of best prosecution practices throughout case processing; and the victims' experiences with their case and the quality of treatment they received.[19]

Recommendation 10: Enhance Training on Prosecuting Alcohol-Facilitated Sexual Assault

Alcohol is the most common weapon used to facilitate sexual assault. Offenders use alcohol because it renders victims vulnerable, affects memory, and impairs judgment and physical ability. These cases present unique complexities in identifying corroborating evidence, interviewing victims, explaining basic toxicology, differentiating between "passouts" and "blackouts," and understanding the effect of societal attitudes about alcohol on determinations of victim credibility.[20]

[1] *See* WOMEN PROSECUTORS SECTION, NAT'L DIST. ATTORNEYS ASS'N, NATIONAL DOMESTIC VIOLENCE PROSECUTION BEST PRACTICES GUIDE (2017), available at http://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-July-17-2017-1.pdf.

[2] *See* Jeffrey Sonnis et al., *Risk and Protective Factors for Recurrent Intimate Partner Violence in a Cohort of Low-Income Inner-City Women*, 23 J. FAM. VIOLENCE 529–538 (2008), *available at* https://doi.org/10.1007/s10896-008-9158-7; Emma Birdsey et al, *Reporting Violence to Police: A survey of victims attending domestic violence services*, 91 Bureau of Crime Stat. & Res. (2013), *available at* https://www.women.nsw.gov.au/__data/assets/pdf_file/0004/280912/Reporting_Violence_to_the_Police_-_BOCSAR_survey.pdf; and Amy E. Bonomi et al., *"Meet me at the hill where we used to park": Interpersonal Processes Associated with Victim Recantation*, 73 SOC. SCI. & MED. 1054 (2011), *available at* https://www.familyjusticecenter.org/wp-content/uploads/2018/09/Meet-Me-at-the-Hill-Where-We-Used-to-Park-Interpersonal-Processes-Associated-with-Victim-Recantation.pdf.

[3] *See* TERESA M. GARVEY, LEGAL JIU-JITSU FOR PROSECUTORS IN INTIMATE PARTNER VIOLENCE CASES: FORFEITURE BY WRONGDOING, 17 STRATEGIES (Dec. 2018), *available at* https://aequitasresource.org/wp-content/uploads/2018/12/Legal-Jiu-Jitsu-for-Prosecutors-in-IPV-Cases-Forfeiture-by-Wrongdoing-2.pdf (for a discussion of the use of forfeiture by wrongdoing).

[4] *See, e.g.,* Michigan v. Bryant, 131 S.Ct. 1143 (2011) (for discussion of ongoing emergency); *see also,* Herb Tanner & John Wilkinson, *Supreme Court Clarifies the "Ongoing Emergency" in Michigan v. Bryant*, 9 STRATEGIES IN BRIEF (Dec. 2011), *available at* http://www.aequitasresource.org/Supreme_Court_Clarifies_Ongoing_Emergency_in_Michigan_v_Bryant_Issue_9.pdf.

[5] Jennifer Gentile Long & Teresa Garvey, *No Victim? Don't Give Up*, 7 STRATEGIES (Nov. 2012), *available at* https://aequitasresource.org/wp-content/uploads/2018/09/S_Issue_7_No_Victim-Dont_Give_Up.pdf.

[6] Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461 (2005).

[7] *See* VIKTORIA KRISTIANSSON, AEQUITAS, CAMPUS-RELATED CRIMES OF SEXUAL VIOLENCE: TRIAL PACKET FOR PENNSYLVANIA JUDGES 18 (2016) (citing Rebecca Campbell, et al., *Responding to Sexual Assault Victims' Medical and Emotional Needs: A National Study of the Services Provided by SANE Programs*, 29(5) RES. IN NURSING & HEALTH 384 (2006)).

[8] For additional information on filing pretrial motions, *see* AEQUITAS, EVIDENCE OF OTHER "BAD ACTS": INTIMATE PARTNER VIOLENCE, SEXUAL VIOLENCE, STALKING, AND HUMAN TRAFFICKING PROSECUTIONS, 31 STRATEGIES (May 2017) *available at* https://aequitasresource.org/wp-content/uploads/2018/09/Evidence-of-Other-Bad-Acts-In-Intimate-Partner-Violence-Sexual-Violence-Stalking-and-Human-Trafficking-Prosecutions.pdf.

[9] *See* AEQUITAS, JMI, AND THE URBAN INSTITUTE, MODEL RESPONSE TO SEXUAL VIOLENCE FOR PROSECUTORS (RSVP MODEL) VOLUME I: INVITATION TO LEAD 27, *available at* https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Vol.-I-1.8.20.pdf.

[10] *See id.* at 9; *see generally* AEQUITAS, JMI, AND THE URBAN INSTITUTE, MODEL RESPONSE TO SEXUAL VIOLENCE FOR PROSECUTORS (RSVP MODEL) VOLUME I, II AND III, *available at* https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Vol.-I-1.8.20.pdf.

[11] RSVP citing *See* Rebecca Campbell, et al., *Adolescent Sexual Assault Victims and the Legal System: Building Community Relationships to Improve Prosecution Rates*, 50(1-2) AM. J. COMMUNITY PSYCHOL. 141-54 (2011); Rebecca Campbell et al., *Prosecution of Adult Sexual Assault Cases: A Longitudinal Analysis of the Impact of a Sexual Assault Nurse Examiner Program*, 18(2) VIOLENCE AGAINST WOMEN 223-44 (2012); and AEQUITAS, LITERATURE REVIEW: SEXUAL ASSAULT JUSTICE INITIATIVE (2017).

[12] RSVP citing *What is a SART?* SART TOOLKIT, https://ovc.ncjrs.gov/sartkit/about/about-sart.html (last visited Mar. 4, 2017). Please note that convening a sexual assault task force to discuss the potential formation of a SART/MDT is an initial step – it takes some time to discuss and agree upon MOUs and confidentiality agreements.

[13] *See* AEQUITAS, JMI, AND THE URBAN INSTITUTE, MODEL RESPONSE TO SEXUAL VIOLENCE FOR PROSECUTORS (RSVP MODEL) VOLUME I: INVITATION TO LEAD 27, *available at* https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Vol.-I-1.8.20.pdf.

[14] Feedback from victims who have opted out of the criminal justice system can be obtained via a hotline (perhaps one established within the crime victim rights and compensation office), victim's rights organization, civil attorneys, or community-based service provider, all of which interact with survivors in the aftermath of an assault. RSVP Volume II, Chapter 9.

[15]AEquitas led 2 special initiatives, "Combatting Witness Intimidation" and "Improving the Justice System Response to Witness Intimidation," both of which worked with pilot sites to enhance strategies to prevent, identify, and respond to, witness intimidation. For more information, visit https://aequitasresource.org/initiatives/ and visit Past Initiatives; *See also*, *Special Initiatives: Improving the Justice System Response to Witness Intimidation",* AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, http://aequitasresource.org/special-initiatives.cfm. IWI was a field-initiated project funded by the U.S. Department of Justice, Bureau of Justice Assistance (BJA) award number 2010-MU-BX-K079;

[16] Training both law enforcement and prosecutors in core competencies (identified in Appendix B of the RSVP Appendices) and fostering multidisciplinary collaboration can help with appropriate decision-making. The RSVP Appendices can be found at https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Appendices-1.9.20.pdf.

[17] Michelle Madden Dempsey, *Prosecuting Violence Against Women: Toward a "Merits-Based" Approach to Evidential Sufficiency*, VILLANOVA UNIVERSITY SCHOOL OF LAW (2016).

[18] *Berger v. United States*, 295 US 78, 88; 79 L.Ed.1314 (1935).

[19] *See* AEQUITAS, JMI, AND THE URBAN INSTITUTE, MODEL RESPONSE TO SEXUAL VIOLENCE FOR PROSECUTORS (RSVP MODEL) VOLUME I: INVITATION TO LEAD; VOLUME II: MEASURING THE RESPONSE & APPENDICES. The Model Response to Sexual Violence for Prosecutors (RSVP) includes a collection of office- and case-level promising practices, identified through research and the experience of both AEquitas staff and partnered prosecutors. It also includes a comprehensive tool for tracking measuring and continuously enhancing the prosecution of sexual violence. For more information visit https://aequitasresource.org/resources/ .

[20] For additional information on alcohol-facilitated sexual assault, *see* Teresa Scalzo, Prosecuting Alcohol-Facilitated Sexual Assault, NAT'L DISTRICT ATT'Y ASS'N. (2007), *available at* http://biblioteca.cejamericas.org/bitstream/handle/2015/3185/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf?sequence=1&isAllowed=y, ; *See also* RSVP MODEL, Appendix G. *Stages of Acute Alcohol Influence/Intoxication*. For additional information visit https://aequitasresource.org/resources/.